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Scratch My Back, And I'll Scratch Yours: Scratching the Surface of the Duty of Care in Cross Sector Collaborations - Are For-profits Obligated to Ensure the Sustainability of Their Partner Non-profits?

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SCRATCH MY BACK, AND I'LL SCRATCH YOURS: SCRATCHING THE SURFACE OF THE DUTY OF CARE IN CROSS SECTOR COLLABORATIONS – ARE FOR-PROFITS OBLIGATED TO ENSURE THE SUSTAINABILITY OF THEIR PARTNER NONPROFITS?

*Christyne J. Vachon, Esq.**

I. INTRODUCTION

“[I]t is continually becoming more evident that values-based leadership, synergistic generation of social and economic value, and strategic cross-sector alliances are key ingredients to achieving sustainably successful business.”¹

The cross-sector interactions between Nonprofit and For-profit institutions create rich opportunities to explore new and varied corporate dynamism through collaboration on the path to a philanthropic goal (the “Collaboration”). Each organization offers opportunities to the other collaborating entity from which to gain. In this way, a Nonprofit can benefit from collaborating in a cross-sector Collaboration from, among other things, access to funds,² resource and time donations, availability of

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1. James E. Austin & Ezequiel Reficco, *Corporate Social Entrepreneurship*, 11 INT'L J. NOT-FOR-PROFIT L. 86, 90 (2009).

2. Gail A. Lasprogata & Marya N. Cotten, “*Contemplating Enterprise*”: *The Business and Legal Challenges of Social Entrepreneurship*, 41 AM. BUS. L. J. 67, 73–74 (2003) (stating that entrepreneurial ventures provide Nonprofits access to a flow of income that is reliable and protect against the feast or famine of grant and private donation funding).

new ideas, learning and expertise,³ developing new contacts and business avenues,⁴ and broadening the Nonprofit's market.⁵ In turn, For-profits may benefit from the Collaboration by improving good will and respectability of the corporate image, engendering trust, accessing new learning, creating new markets,⁶ and attracting new employees.⁷ To accomplish effective implementation and continuation of the Collaboration, both entities should be aware of the possible corporate governance issues posed by the Collaboration and the corresponding options for the business. Too frequently the legal issues, such as corporate governance, are marginalized by management in favor of the business issues.⁸ The legalities can affect the business' viability and productivity depending on the information known and decisions made, and therefore, should be an integral part of management decision making.⁹

In Part II, this paper will explain the concept of the Collaboration, its relevance to the Nonprofit and For-profit individually, and the Collaboration's path along a continuum of ever increasing levels of engagement between the Nonprofit and For-profit ("Continuum"). By examining the Collaboration from the perspective of the Continuum, this paper will evaluate in Part III the duty of care of the entities' boards of directors and related management with similar authority ("Board and Others"), and its application in the context of the cross-sector dynamic for the Nonprofit and For-profit. The paper will further explore whether the duty of care owed to the For-profit implicates a responsibility on the part of the For-profit's Board and Others to ensure proper care and sustainability of the Nonprofit in the Collaboration, especially in light of the fact that affiliation with the Nonprofit alone can improve the For-profit's image.

3. Lasprogata & Cotten, *supra* note 2, at 96–97. See also J. Gregory Dees, *Philanthropy and Enterprise: Harnessing the Power of Business and Entrepreneurship For Social Change*, SESSION IV: SOCIAL ENTERPRISE AND PRIVATE ENTERPRISE, 5 (Aug. 2, 2007, 12:45 PM) [http:// www.brookings.edu/global/aspem/2007dees.pdf](http://www.brookings.edu/global/aspem/2007dees.pdf).

4. Dees, *supra* note 3.

5. JAMES E. AUSTIN, THE COLLABORATION CHALLENGE: HOW NONPROFITS AND BUSINESSES SUCCEED THROUGH STRATEGIC ALLIANCE 90–92 (2000). See generally Dennis R. Young & Lester M. Salamon (2002) *Commercialization, Social Ventures, & For-Profit Competition*, in THE STATE OF NONPROFIT AMERICA (2002).

6. Austin & Reficco, *supra* note 1, at 96; See Lasprogata & Cotten, *supra* note 2, at 96. See also Dees, *supra* note 3, at 7–8 (discussing the difference between investors and philanthropic entrepreneurs and the impact they can have on improving social conditions through “supporting social enterprise to achieve social impact,” “helping social enterprise move into mainstream capital markets,” and “supporting socially beneficial forms of private enterprise”).

7. See generally Young & Salamon, *supra* note 5; AUSTIN, *supra* note 5, at 88, 93. See also Lasprogata & Cotten, *supra* note 2, at 96 (describing that how a For-profit company that develops a philanthropic approach can increase their business development and appeal to new employees); Elizabeth A. Weeks, *The Ethical Health Lawyer: Loopholes: Opportunity, Responsibility, or Liability?*, 35 J.L. MED. & ETHICS 320, 320–21 (2007).

8. Lasprogata & Cotten, *supra* note 2, at 70.

9. *Id.*

This conclusion will vary depending on where the Collaboration is along the Continuum.

II. COLLABORATION

The Nonprofit and For-profit are very different types of organizations. On a very basic level, the cultures of the two types of organizations differ greatly.¹⁰ With the changing business and economic climate, the dynamics of each type of organization are shifting. With increasing shortage of funding, Nonprofits are devising means to raise funds which often resemble those of For-profits, including collaborating with For-profits.¹¹ On the other hand, due to recent corporate scandals and greater appreciation by the public of the value of the commons, the For-profits are often incorporating corporate philanthropy into the business plan.¹² The Collaboration has become an integral part of the strategy of these organizations to increase their value.¹³ It is not a new idea; Nonprofits and For-profits have been collaborating for years with increasing frequency.¹⁴ In earlier forms, cross sector Collaborations mainly occurred in the areas of educational reform, cultural opportunities, and environmental concerns in various communities where the collaborating businesses operated.¹⁵ “These alliances are the vehicles for achieving what the [corporate social entrepreneurship] definition referred to as *extending the firm’s domain of competence and corresponding opportunity set through innovative leveraging of resources outside its direct control.*”¹⁶ The Collaboration between the For-profit and the Nonprofit has been described as occurring on a continuum, with increasing levels of integration (“Continuum”).¹⁷ The Continuum is useful to understanding the varying levels of involvement the collaborating entities may engage in and the corresponding duty of care responsibilities.

10. Lasprogata & Cotten, *supra* note 2, at 100.

11. Alan R. Andreasen, *Profits For Nonprofits: Find a Corporate Partner*, HARV. BUS. REV. 47, 48 (1996).

12. *Id.* at 56 (indicating that a sizeable percentage of consumers stated that when price and quality of competing products are equal, the consumer considers a corporation’s business practices and a greater percentage would pay a “premium” on products of companies that support a cause they care about).

13. Austin & Reficco, *supra* note 1, at 89.

14. Howard P. Tuckman, *Commercialization and For-Profits in Disguise*, in INT’L ENCYCLOPEDIA OF CIVIL SOC’Y 504, 504 (2010).

15. Lasprogata & Cotten, *supra* note 2, at 95.

16. Austin & Reficco, *supra* note 1, at 89.

17. James Austin, *Collaboration Between Nonprofits and Business*, 29 HARV. BUS. SCH. NONPROFIT & VOLUNTARY SECTOR QUARTERLY SUPPLEMENT 69, 71 (2000) [hereinafter *Austin Collaboration*].

A. FOR-PROFITS AND THE COLLABORATION

The corporation is a creature of law formed to emphasize one “good” over others in the interest of the owners of the corporation, the shareholders. This tradition is often referred to as “shareholder primacy.”¹⁸ And the referenced “good” is profit maximization.¹⁹ Historically, state corporate law held that Boards and Others owed a fiduciary duty only to the shareholders, and therefore, their emphasis was on the profit motive.²⁰ Currently, however, promoters for socially accountable For-profits and other social entrepreneurs have been effecting change in the thinking, laws, rules and incentive structures to allow for, and arguably, try to ensure increased social responsibility of For-profits.²¹ Some argue that this approach has not changed the fiduciary duty since, in fact, taking into account the outside effects of the corporate activities it has the potential to prop up the bottom line. This still aligns with the traditional duty to the shareholder.²²

In recent years painful examples of greed and corporate power, such as the Enron, Worldcom, Tyco, and Madoff scandals, have made the public and government sensitive to and vigilante of the conduct of For-profits.²³ In light of the scandals, new laws, changing business ethics, and increased scrutiny and/or support from the public and regulators, For-profits find themselves responding to and developing a new atmosphere with emphasis on corporate philanthropy, including at times, resorting to Collaborations with Nonprofits.²⁴ This is true especially in light of the shift in public appreciation of the commons and the new emphasis placed on corporate

18. Jonathan D. Springer, *Corporate Law Corporate Constituency Statutes: Hollow Hopes and False Fears*, ANN. SURV. AM. L. 85, 87 (1999).

19. Lawrence E. Mitchell, *Cooperation and Constraint in the Modern Corporation: An Inquiry into the Causes of Corporate Immorality*, 73 TEX. L. REV. 477, 501 (1995).

20. Geoffrey P. Miller, *Corporate Stakeholders: A Contractual Perspective*, 43 U. TORONTO L. J. 401, 401 (1993).

21. DAVID BORNSTEIN & SUSAN DAVIS, SOCIAL ENTREPRENEURSHIP: WHAT EVERYONE NEEDS TO KNOW 4-5 (2010).

22. Springer, *supra* note 18, at 88.

23. Weeks, *supra* note 1, at 320.

24. *Id.* See Austin & Reficco, *supra* note 1, at 87 (noting that corporate social reporting leads to serious implications and controversy as to the nature of evolving contemporary capitalism. It directly implies institutional adjustments in the structure and process of the market economy. The import of an evolving capitalism lends the subject of corporate social reporting a certain public significance); Martha Minow, *Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Nonprofit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061, 1066 (2000) (“Examples of profit/Nonprofit collaborations go far beyond corporate volunteering and financial donations to Nonprofit social agencies.”); see also HAROLD L. JOHNSON, DISCLOSURE OF CORPORATE SOCIAL PERFORMANCE: SURVEY, EVALUATION, AND PROSPECTS 1, 3 (1979) (discussing corporate accounting, “corporate reports on social performance beyond that implied in traditional financial data” either for use in the organization or published externally for varying audiences).

ethics and governance.²⁵ In general, many perceive For-profits as entering into Collaborations with Nonprofits so they can “bask in the glow of their esteemed partners.”²⁶ For-profits may, indeed, seek a Collaboration with a Nonprofit hoping that the Nonprofit’s image will help to better define the For-profit’s image, enhance it, or repair it.²⁷ Many For-profits approach the Collaboration as an opportunity to improve their reputation, and consequently, their relationships with their customers.²⁸ There are other collaborative benefits, however, that attract For-profits, such as “creating an enabling environment, fostering corporate social entrepreneurs, amplifying corporate purpose and values, generating double value, [and] building strategic alliances.”²⁹ For-profits may save on advertising and promotional costs due to the free opportunities that arise from the Collaboration.³⁰ The For-profit also gains access to a whole new avenue for potential customers: the Nonprofit’s staff, clients, members, donors, etc.³¹ This concept is echoed by Starbuck’s Vice President of Business Practices, a Collaboration allows the company:

to extend our reach to areas where we have interests, but perhaps not influence or expertise. It’s a real extension of what we can do, and often what we would like to do, or what our customers expect us to do—issues that are very complex and difficult to solve.³²

However, the Collaboration may not be easily substantiated by the Board and Others as a worthwhile use of the For-profit’s resources given the traditional nature of the For-profit.

B. NONPROFITS AND THE COLLABORATION

A Nonprofit is a business entity created under and governed by state law, intended for a philanthropic purpose. The tax-exempt Nonprofit

25. Lasprogata & Cotten, *supra* note 2, at 95.

26. Andreasen, *supra* note 11, at 50.

27. Andreasen, *supra* note 11, at 56.

28. *Id.* at 50 (stating that “consumers respond to the halo effect”).

29. Austin & Reficco, *supra* note 1, at 87.

30. Andreasen, *supra* note 11, at 56.

31. *Id.*

32. Austin & Reficco, *supra* note 1, at 90 (quoting Susan Mecklenburg, Starbucks Vice President of Business Practices discussing Starbuck’s partnership with Conservation International to promote environmentally sustainably production of coffee in Chiapas, Mexico).

This Nonprofit brought to partnership its environmental expertise and its capacity to work with small farmers. Starbucks contributed its knowledge of quality coffee production and its marketing channels. This entrepreneurial combination of distinctive competencies created a process that developed new production techniques and new supply of organic coffee for Starbucks, which in turn generated significant income enhancements to the farmers and improved environmental conditions in the growing areas. This initial partnership expanded to other countries and even led to the reformulation of Starbuck’s basic coffee procurement criteria and procedures.

Id.

created under federal law is governed in the United States primarily by the Internal Revenue Code (the “Code”).³³ In particular, Section 501 of the Code provides the primary source for the exemption from taxation.³⁴ Section 501(a) of the Code allows for exemption from federal income tax for any organization that meets the criteria of Section 501(c) of the Code, the “charitable exemption.”³⁵ The tax-exempt status of a Nonprofit allows the organization to be exempt from the obligation to pay certain federal taxes, such as excise tax and employment taxes.³⁶ Further, this federal determination relieves the organization of some of the state taxation.

Traditionally, distinguishing itself from For-profits, the Nonprofit continued its operations by relying on grants from the government and private foundations, donations from private individuals, and fees for services.³⁷ This characteristic distinguishes Nonprofits from For-profits. However, this traditionally clear line between For-profits and Nonprofits has increasingly become blurred as Nonprofits pursue increased commercial activity, including Collaborations.³⁸ Principally, there is so much competition for limited resources in a very challenging economy, which necessitates the Nonprofit to look for ways to raise funds in nontraditional ways, a more commercialized approach.³⁹

33. Austin & Reficco, *supra* note 1, at 90 (“Section 501 of the Internal Revenue Code provides several different categories of organization types for which tax-exempt status is an option.”). *See also* Michael W. Peregrine, *Legal Concerns in Specific Health Care Delivery Settings: Nonprofit Corporate Governance*, in 3 HEALTH L. PRAC. GUIDE 43:2, 2 (2010) (“Furthermore, the determination of tax-exempt status and charitable trust status are not necessarily one and the same. A Nonprofit corporation is not automatically recognized by virtue of its state incorporation as exempt from income tax under the Internal Revenue Code (IRC). Conversely, the lack of tax-exempt status under the IRC will not prevent the state regulators from concluding that all of the corporation’s assets are held for charitable purposes (consistent with its charitable dedication clause), notwithstanding a failure to obtain tax exemption.”).

34. 26 U.S.C.A. § 501(c)(3) (West 2010) and accompanying Treasury Regulations. *See* PANEL ON THE NONPROFIT SECTOR, PRINCIPLES FOR GOOD GOVERNANCE AND ETHICAL PRACTICE: A GUIDE FOR CHARITIES AND FOUNDATIONS 8 (2007) [hereinafter PANEL]; Lasprogata & Cotten, *supra* note 2, at 75.

35. 26 U.S.C.A. § 501(a)(c) (West 2010). In addition:

Often tax-exempt nonprofit organizations are referred to as “charitable” organizations. “Charitable” is actually the term used to describe one of the types of organizations that qualifies for tax exempt status under Section 501(c)(3) of the Internal Revenue Code. However, the word “charitable” has become accepted as a more generic term to apply to “religious,” “scientific,” “educational,” and other similar purposes for which 501(c) applies.

Christyne J. Vachon, *Blurring. Not Fading. Looking at the Duties of Care and Loyalty as Nonprofits Move Into Commercialism*, 12 TRANSACTIONS: THE TENN. J. BUS. L. 37, 39 (2011). *See also* Lasprogata & Cotten, *supra* note 2, at 75.

36. Lasprogata & Cotten, *supra* note 2, at 75.

37. *Id.* at 68.

38. Jude L. Fernando & Alan W. Heston, *The Role of NGOs: Charity and Empowerment: Introduction: NGOs Between States, Markets and Civil Society*, 554 ANNALS AM. ACAD. POL. & SOC. SCI. 8, 11 (1997); Dees, *supra* note 3, at 1.

39. Andreasen, *supra* note 11, at 48; Tuckman, *supra* note 14, at 1 (indicating that a reason there is a growth in commercial activities by Nonprofits is the serious challenge to raise funds). *See also* Lasprogata & Cotten, *supra* note 2, at 68.

Commercialization may be the strongest force shaping Nonprofit business these days.⁴⁰ Among other things, this step in commercialization has lead Nonprofits to enter into cross-sector Collaborations with For-profits at various levels of engagement along the Continuum. Working with a For-profit, the Nonprofit may seek, among other things, greater access to funds,⁴¹ business contacts, intellectual property, brand recognition, and education of employees.⁴² While Nonprofits may be selling products and services to make money to fund the mission, commercialization achieves deeper penetration through a Collaboration.⁴³ Nonprofits collaborate with For-profit companies as affiliates and partners, and even have For-profits as spin-offs and subsidiaries.⁴⁴ These changes may be seen as admirable and promising as they may lead to greater independence and sustainability for Nonprofits.⁴⁵ However, the Nonprofit's activities in the Collaboration and the effect of the Collaboration on the Nonprofit need to be carefully monitored and evaluated by the Board and Others depending on where the Collaboration is on the Continuum.

C. THE CROSS-SECTOR COLLABORATION CONTINUUM

The Continuum provides a description of the various stages in which a Nonprofit and For-profit may collaborate. Each step on the Continuum lends itself to being categorized in specific stages with specific identifying characteristics, and each stage along the Continuum relates to increasing engagement between the Nonprofit and For-profit.⁴⁶ James Austin in *The Collaboration Challenge* has identified the Continuum as having three specific stages identified below: “[t]he characteristics ascribed to each stage appear in gradations as a multifaceted relationship evolves incrementally from one stage into another.”⁴⁷ The deeper the engagement, the more important the Collaboration becomes to the collaborating entities, from “peripheral to strategic” as the resources devoted to the Collaboration

40. Young & Salamon, *supra* note 5, at 441.

41. The forms of cross-sector relationship that a Nonprofit considers will all, most likely, be revenue enhancing. Lasprogata & Cotten, *supra* note 2, at 69.

42. *Id.* at 96.

43. Young & Salamon, *supra* note 5, at 423.

44. Estelle James, *Commercialism and the Mission of Nonprofits*, 40 SOC. J. 29, 29 (2003). Also stating that “Nonprofits and For-profits compete with each other in a number of key industries, including some cases where For-profits are moving into traditional Nonprofit areas.” *Id.*

45. Allan Maram, Commentary, *Commercialization of the Nonprofit Sector: A Discussion and Critical Analysis*, SOC. & PUB. POLICY REVIEW 1, 1 (2004).

46. As James E. Austin described in *The Collaboration Challenge*, the cross sector interaction tends to follow a specific collaboration continuum wherein each stage of the continuum has specific identifying characteristics. AUSTIN, *supra* note 5, at 20, 34. The three stages in the continuum are philanthropic stage, transactional stage, and integrative stage. *Id.*

47. AUSTIN, *supra* note 5, at 35.

by each entity and risk of loss increase.⁴⁸ Similarly the value of the Collaboration to each organization increases from incidental to strategic.⁴⁹ Importantly, the more a Nonprofit or For-profit has at stake in the Collaboration, the more the Board and Others should be involved to effectuate their fiduciary duties. Considering the cross-sector Collaboration relationship in the perspective of this Continuum can help to organize the analysis in light of the duty of care in Collaboration governance.

1. *The Philanthropic Stage*

The Continuum identified by James Austin in *The Collaboration Challenge* starts with the philanthropic stage which is the stage on the Continuum that most cross-sector Collaborations achieve.⁵⁰ In this stage the For-profit corporation provides a charitable donation, and the Nonprofit is the recipient.⁵¹ Early on, in the Austin philanthropic stage,⁵² for instance, each side will benefit modestly⁵³ and potentially have an equally modest risk. The collaborating entities at this stage of the Continuum are very reserved in terms of corporate resources allocated to the Collaboration and interaction between the For-profit and Nonprofit.⁵⁴ This may be called the “Delivery and Receipt Form.” The For-profit corporation delivers goods or services received by the Nonprofit, and the Nonprofit, by the association, delivers reputation to be received by the For-profit.⁵⁵ Nevertheless, often with these Collaborations at the philanthropic stage the Board and Others are not involved.⁵⁶ “Such low-level engagements between Nonprofits and companies are commonplace and often long standing, their mutual benefits real and not insignificant.”⁵⁷

2. *The Transactional Stage*

The next stage on the Continuum is the transactional stage in which “organizations carry out their resource exchanges through specific

48. AUSTIN, *supra* note 5, at 34.

49. *Id.*

50. AUSTIN, *supra* note 5, at 20.

51. *Id.*

52. *Id.*

53. *Id.* at 87 (stating “The Nonprofit increases funding; the company enhances its reputation as a community supporter.”) (alteration in original).

54. *Id.* at 21–22 (stating “Few individuals and none of the top leadership were involved.” Describing the simple “benefit equation” between City Year and Timberland at the outset of their collaboration, including that “traditional mind-sets constrained the relationship”).

55. This Delivery and Receipt Form may involve other players as well, such as a provider of transport and the government, if regulations apply.

56. AUSTIN, *supra* note 5, at 21–22.

57. *Id.* at 22.

activities, such as cause-related marketing, event sponsorships, licensing, and paid service arrangements.”⁵⁸ In the case of cause-related marketing and event sponsorship, this type of Collaboration usually represents the initial form of Collaboration between the entities skipping the philanthropic stage.⁵⁹ At the transactional stage, the Collaboration is mutually beneficial for the parties. The parties seek and identify benefits and, thereby, establish a two-way benefit flow.⁶⁰ Each of the entities is more engaged in the activity of the Collaboration that, generally, leads to increased value to each organization in the results.⁶¹ The For-profit will start to see more direct benefits to its business operations.⁶² “Although collaboration in the transactional stage may focus on the *deal* between the partners and involve sharply circumscribed transactions such as those just listed, often it includes other important resource exchanges as well.”⁶³ This stage involves the exchange of expertise between the collaborators. “Interaction between the partners broadens and intensifies. Strategic fit becomes closer. The complexity of the alliance grows, and the nature and magnitude of the benefits also multiply.”⁶⁴ In this stage, it is important for the collaborators to pursue opportunities that increase the possibilities for each collaborator to understand the other side’s vision and goals. Through understanding each other’s vision and goals, each collaborator can realize there might be a real connection. “The cornerstone for building a richer value exchange is the identification of overlapping missions and compatible values.”⁶⁵

3. *The Integrative Stage*

Characteristics of the integrative stage are when the collaborators’ missions, people and activities benefit from more “collective action and organizational integration.”⁶⁶ At this stage, the Collaboration takes on characteristics that resemble more and more a “highly integrated joint venture,” and the Collaboration becomes more integral to the strategy and

58. AUSTIN, *supra* note 5, at 22.

59. *Id.*

60. *Id.* at 24 (indicating that the Chief Operating Officer at Timberland described this stage of the collaboration with City Year as “commercial” since “it is analogous to a buyer-seller relationships dominated by the parties’ search for specific value transactions.”).

61. *Id.* at 22.

62. *Id.*

63. *Id.* at 23 (indicating that this is particularly true when the collaboration has evolved from the philanthropic stage.). For example “[c]ompany employee volunteer programs often emerge as extensions of financial donations made to Nonprofits in the philanthropic stage of an alliance, and this involvement of company personnel begins to generate many of the employee motivational and developmental benefits” *Id.*

64. *Id.*

65. *Id.* at 24.

66. *Id.* at 26.

functioning of each individual collaborator.⁶⁷ In this form, the type of resource exchange intensifies in value and the amount of exchange increases.⁶⁸ The interaction between personnel from each collaborator becomes more frequent and involved.⁶⁹ In the prior stages, the Collaboration created value for each collaborator. This continues in the integrative stage, but also the element of joint-value becomes part of the mix.⁷⁰ The Collaboration creates joint-value to the collaborators such that the value is contingent upon the survival of the Collaboration. “[E]ach organization’s culture is affected by the other’s; processes and procedures are instituted to manage the growing complexity of the relationship. Ultimately, the alliance becomes institutionalized.”⁷¹ Along with this stage and collaboration comes an “ever-widening set of personal and organizational connections.”⁷² “Relatively few nonprofits and companies have advanced to this degree of integration, but those farsighted partners that have are reaping what they perceive to be significant benefits.”⁷³

III. THE DUTY OF CARE IN COLLABORATION-RELATED GOVERNANCE

As stated earlier, there are great differences between For-profits and Nonprofits. It is important to keep in mind the primary mission for each organization: For-profit businesses are organized and operated for the

67. AUSTIN, *supra* note 5, at 26.

68. *Id.*

69. *Id.*

70. *Id.* (indicating that the Chief Operating Officer of Timberland described this stage of the collaboration continuum as “mutual mission relationship” with boundaries). “It’s not them and us. It’s just we are us and they are them and we are together us, too.” *Id.* at 26–27.

71. *Id.*

72. *Id.* at 27. Describing the Starbucks/CARE collaboration, Austin writes:

[a]s more Starbucks executives and staff became involved in CARE activities and some CARE staff spent time in Starbucks, the organizations’ values and missions became more entwined, and joint learning and value creation increased. This is indicative of a relationship that is moving beyond traditional philanthropy to the transactional stage of two-way benefit flows and then to the stage of organizational integration, in which people from each organization become more deeply engaged in issues critical to the other.

Id. at 31. “The benefits of an integrative relationship are attended by additional challenges. As the nature of The Nature Conservancy-Georgia-Pacific relationship has changed with its progression along the Collaboration Continuum, both organizations have had to relinquish increasing amounts of control, which has posed a threat to each along the way.” *Id.* at 33 (Explaining that the Georgia-Pacific senior communications manager stated “There was concern at Georgia-Pacific about locking ourselves into something that would be bad for shareholders.” Meanwhile the president of The Nature Conservancy explained “We value our reputation. If we tarnish it in a partnership, we jeopardize our membership support and our revenues.” As Austin explained, “[a]s the partnership has intensified and the once-separate reputations of the partners have become more closely aligned, each organization has also had to give up some degree of control over its image and brand.”).

73. *Id.* at 26.

pursuit of profit and gains to the shareholders, the Nonprofits are organized and operated in pursuit of its philanthropic mission.⁷⁴ Despite these differences, however, there are parallels, including the responsibilities of each organization's Board and Others to ensure the proper care of the organization.⁷⁵ In general, in recent years with several instances of For-profit and Nonprofit corporate malfeasance drawing the attention of the public and regulators, the duties of the Board and Others have received heightened attention.⁷⁶ In particular, governments adopted significantly more onerous governance requirements and brought more enforcement actions to thwart the perceived improper, if not illegal, behavior of business management.⁷⁷

Responsibility for governance rests with the Board and Others, those with the fiduciary duty.⁷⁸ The corresponding duties require that an organization establish rules, systems, and business practices that ensure the transparency, accountability and fairness of the entity's business dealings.⁷⁹ The Board of both types of organizations is charged with responsibility for management of the organization.⁸⁰ As such, they should be guided by the similar basic fiduciary principles of the duties of loyalty and care.⁸¹ The duty of care on a basic level requires the person with the duty to act in an "informed and deliberate manner"⁸² as an "ordinarily prudent person"

74. Vachon, *supra* note 35, at 37.

75. Some state statutes provide limited liability for officers, directors, and other persons serving nonprofit entities without compensation. *See e.g.*, 805 Ill. Comp. Stat. 105/108.70 (2010).

76. Chris Cornforth, *Introduction: The Changing Context of Governance—Emerging Issues and Paradoxes*, in THE GOVERNANCE OF PUBLIC AND NON-PROFIT ORGANIZATIONS: WHAT DO BOARDS DO? 1, 4 (Chris Cornforth ed. 2003) [hereinafter Cornforth]. *See also* Lasprogata & Cotten, *supra* note 2, at 72–73 ("In the meantime, with scandals like the United Way of America and the recent Red Cross embarrassment in New York City, attention has been focused on nonprofit efficiency and accountability."). *See* Danne L. Johnson, *Seeking Meaningful Nonprofit Reform in a Post Sarbanes-Oxley World* 54 ST. LOUIS U. L.J. 187, 217–18 (2009) (indicating that the For-profit malfeasance received more attention than Nonprofit malfeasance most likely due to the link between "management malfeasance and individual harm" and the individual harmed with Nonprofit malfeasance in not the investor but the beneficiary of the Nonprofit's mission). *But see* Karen Donnelly, *Good Governance: Has the IRS Usurped the Business Judgment of Tax-Exempt Organizations in the Name of Transparency and Accountability?*, 79 UMKC L. REV. 163, 165 (2010) (stating "Arguably, the public responded to the tainted industry of good deeds with more disdain and scrutiny than to the corporate scandals because of the public trust in the nonprofit sector.").

77. Cornforth, *supra* note 76, at 5. *See also* Lasprogata & Cotten, *supra* note 2, at 72–73 ("In the meantime, with scandals like the United Way of America and the recent Red Cross embarrassment in New York City, attention has been focused on nonprofit efficiency and accountability.").

78. Vachon, *supra* note 35, at 45–46.

79. *Id.*

80. Johnson, *supra* note 24, at 196–97.

81. *Id.* "Courts apply the duty of care in cases involving alleged negligence, mismanagement, or intentional decisions to commit unlawful acts. Cases involving fraud, self-dealing, and conflicts of interest are covered under the duty of loyalty." 3 WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF CORP. § 837.60 (2011).

82. Lou R. King & Eileen T. Nugent, *Corporate Law Aspects of Acquisitions*, in 1 NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS 44–45 (2011). *See also* FLETCHER, *supra*

would.⁸³ The duty of care applies to the decision making and oversight responsibilities of the directors on the Board.⁸⁴ In the seminal case about the duty of care, the *Aronson* court held “[D]irectors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them. Having become so informed, they must then act with requisite care in the discharge of their duties.”⁸⁵ The Board exercises its oversight function by authorizing agents, officers and employees to perform corporate functions on behalf of the Board.⁸⁶ As the Board’s role tends to be more passive, it corresponds more to the duty of care’s oversight management than regular decision making.⁸⁷ In order to ensure that it conducts proper and adequate passive management through oversight, the directors should verify that 1) the corporate management team can perform the necessary tasks and responsibility, 2) there are systems in place through which the Board can monitor and oversee the performance of the corporate management team, and 3) the Board must respond to protect the interests of the corporation if there are signs that corporate management is not fulfilling its responsibilities.⁸⁸ The necessity for this evaluation increases the further along the Continuum.

Early on in the Continuum, at the philanthropic stage, as stated earlier, the Board and Others are not very involved, if at all.⁸⁹ But as the Collaboration continues to develop, and depending on the form of Collaboration, the Board and Others will need to become more involved.⁹⁰ They will need to evaluate the impact the Collaboration will have on the company and whether it is in the best interest of the company. This evaluation differs greatly when considering the primary representation that the Board and Others performs for each collaborator. For a For-profit, the traditional approach would be that the Board and Others would represent the shareholders, individuals invested in financial return. This approach may be modified to account for stakeholders as well. For a Nonprofit, the Board and Others do not have shareholders to represent. Instead, the Board

note 81, at § 4.02.

Whether by statute or common law, every state imposes on directors and officers a duty of care to their corporations. This duty is tempered, however, by judicial reluctance to second guess the business decisions of corporate management. Courts generally focus on whether the director took reasonable care to make an informed judgment rather than on whether the judgment itself was reasonable.

Id. at § 4.02.

83. FLETCHER, *supra* note 81, at § 1032 (discussing the various standards of conduct and indicating that the “ordinarily prudent person” standard is the majority).

84. 6 IOWA PRAC. BUS. ORGS. § 28:4 (2010).

85. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

86. IOWA PRAC., *supra* note 84.

87. *Id.*

88. *Id.*

89. AUSTIN, *supra* note 5, at 20.

90. *Id.* at 60, 77, 85.

and Others represent the corporate mission and the stakeholders, including the public.

As part of the analysis to determine if the duty of care has been fulfilled along the various stages of the Continuum, the court may need to analyze the conduct under the business judgment rule. The business judgment rule is designed to ensure that the Board and Others have plenty of opportunity to sufficiently exercise their power to manage the business affairs of the organization pursuant to the powers granted to them under the relevant statutes.⁹¹ The business judgment rule provides protection to the decision maker and the decision.⁹² The decision, however, had to have been made in good faith and with proper care.⁹³ Pursuant to the business judgment rule, liability will not attach if a decision was made in good faith and the decision maker was a) disinterested (i.e., no conflicts or self-dealing), b) reasonably informed about the circumstances relevant to the situation and c) rationally believed the decision to be made in the best interests of the organization.⁹⁴ If these standards are met, a court will generally not question a decision unless clearly made irrationally.⁹⁵ Essentially, actual business judgment must have been made.⁹⁶ A director must perform reasonable diligence in order to be able to exercise business judgment.⁹⁷ This includes a director informing himself of “all the material information reasonably available to [him]” before making the business

91. *Smith v. Van Gorkom*, 488 A.2d 858, 872-73 (Del. 1985); *Zapata Corp. v. Maldonado*, 430 A.2d 779, 782 (Del. 1981).

92. Olsen provides as follows:

If the sole issue is whether the director breached the duty of care, the courts defer to the director’s judgment and generally will not impose liability unless the director clearly did not analyze and evaluate a proposed action before approving it. The courts employ a presumption of propriety with respect to director actions. This presumption is sometimes referred to as the “Business Judgment Rule.” The “Business Judgment Rule” will not protect a director where there is a conflict of interest, fraud, oppression or corruption.

BRENT A. OLSON ET AL., *CAL. BUS. LAW DESKBOOK* § 2:17 (2010). *See also* FLETCHER, *supra* note 81, at § 837.60.

93. JOHNSON, *supra* note 24, at 187, 197.

94. *See, e.g.*, *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 54 (Del. 1989); Michael W. Peregrine & James R. Schwartz, *The Business Judgment Rule and Other Protections for Conduct of Not-for-Profit Directors*, 33 J. HEALTH L. 422, 466 (2000).

95. *Aronson*, 473 A.2d 805, 812–13 (Del. 1984) (finding that the rule “is a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.”); Peregrine & Schwartz, *supra* note 94, at 466 (stating that “While the Rule ‘is not easily transposed to the nonprofit context,’ the drafters of the Revised Model Act, several courts, and a number of observers have all supported such applications.”).

96. *See Kaplan v. Centex Corp.*, 284 A.2d 119, 124 (Del. Ch. 1971) (stating that “Application of the [business judgment] rule of necessity depends upon a showing that informed directors did in fact make a business judgment authorizing the transaction under review.”).

97. *See e.g.*, *Burt v. Irvine Co.*, 47 Cal. Rptr. 392, 408 (1st Dist. 1965); *Casey v. Woodruff*, 49 N.Y.S.2d 625, 643 (N.Y. 1944).

decision.⁹⁸ As a result, the director cannot ignore what is going on with the organization, including Collaboration activities.⁹⁹ Accordingly, in order to find that the business judgment rule does not apply, in some jurisdictions, a claimant must rebut the presumption that the decision was an informed decision and establish that the director acted in bad faith.¹⁰⁰ In the seminal case, *Smith v. Van Gorkom*, the court held that the standard to determine director's liability requires a showing of gross negligence under the business judgment rule.¹⁰¹

Starting immediately, before the philanthropic stage, as the two different types of organizations search out or engage with potential Collaboration partners to exercise their duty of care, the Board and Others must inform themselves and reasonably believe the potential collaborator is the best fit.¹⁰² If management is not involved, as has been suggested in the philanthropic stage,¹⁰³ the lack of involvement of management indicates, among other things, the perceived value to the collaborator as well as the perceived risk.¹⁰⁴ The determination of best fit involves creating a strategy, a meshing of corporate cultures, and determining if both organizations will benefit.¹⁰⁵ This analysis should be done individually by each organization, while considering the culture, goals and values of the other organization in the cross-sector Collaboration. For if the goals and values of the other organization cannot be met, the Collaboration will not succeed. It is important, therefore, for each organization to determine whether it will be able to, in the Collaboration, 1) meet and uphold its goals and values and 2) meet and uphold the goals and values of the other organization, without encountering risks it cannot manage. Even at the first step in the philanthropic stage, the two entities need to consider the form of their interactions and where they plan to take the interactions as their Collaboration evolves.¹⁰⁶

98. *Van Gorkum*, 488 A.2d at 872 (citing *Kaplan*, 284 A.2d at 119).

99. *Id.*

100. *In re Walt Disney Derivative Litigation*, 907 A.2d 693, 746-48 (Del. Ch. 2006). *See also Van Gorkum*, 488 A.2d at 872; *Aronson*, 473 A.2d at 812.

101. *Van Gorkum*, 488 A.2d at 873 (citing *Aronson*, 473 A.2d at 812).

102. *Lasprogata & Cotten*, *supra* note 2 at 97.

103. *AUSTIN*, *supra* note 5 at 90 and 92.

104. *Austin & Reficco*, *supra* note 1, at 87 (indicating that the process requires management to advocate it).

105. *Lasprogata & Cotten*, *supra* note 2, at 97.

106. *Austin & Reficco*, *supra* note 1, at 87 (stating that incorporating concepts like social responsibility into the business process of a For-profit requires that the top management advocate the change and starts with a "power vision" and "why it is vital to the organization's success"); Gary H. Moore, *Joint Ownership of Intellectual Property: Issues and Pitfalls*, in *STRUCTURING, NEGOTIATING, AND IMPLEMENTING STRATEGIC ALLIANCES* 215, 220-21 (PLI Corp. Law Practice, Course Handbook Ser. No. 1132, 199) (stating that if there is collaboratively created intellectual property it should be considered early on and incorporated into the agreements drafted for the collaborative venture).

IV. FOR-PROFIT'S DUTY OF CARE AND THE COLLABORATION

Corporations have grown immensely powerful. Three hundred multinational corporations control roughly a quarter of the world's wealth. Their managers frequently make decisions that run counter to the long-term interests of the public and even their own shareholders, as the recent financial crisis has illustrated. Some view these derelictions as an unavoidable consequence of the corporate legal structure.¹⁰⁷

Integrating the Collaboration into the For-profit's agenda can be a great challenge for the Board and Others due to the fact that the traditional role of a For-profit Board and Others is to represent the shareholders and ensure profitability of the company, thereby guaranteeing a return on the shareholders' investment. Translated, the bottom line for the company represents the mission of the For-profit company, possibly to the exclusion of the interests of stakeholders.¹⁰⁸ "Stakeholders are those being defined as groups who are significantly affected by company actions and who can in turn impact the company."¹⁰⁹ The embodiment of this approach can be found with Milton Friedman who was quoted as saying that the "social responsibility of business is to increase profits."¹¹⁰

When other factors come into play, such as stakeholders and philanthropy, the waters become clouded¹¹¹ because, traditionally, business and philanthropy are separate paths in the For-profit world.¹¹² Concern for social responsibility on the part of the company might impair the pursuit of

107. DAVID BORNSTEIN & SUSAN DAVIS, *SOCIAL ENTREPRENEURSHIP* 4 (2010) (For example, in this book *The Corporation*, law professor Joel Bakan argues that while a corporation enjoys the legal status of a person, it is free of the social and legal forces that ensure good behavior from real people, such as empathy, public disapproval, and the threat of imprisonment. "Unlike the human beings who inhabit it," he writes, "the corporation is singularly self-interested and unable to feel genuine concern for others in any context.").

108. Milton Friedman, *The Social Responsibility of Business*, N.Y. TIMES, Sept. 13, 1970; Weeks, *supra* note 7, at 320. HAROLD L. JOHNSON, *DISCLOSURE OF CORPORATE SOCIAL PERFORMANCE: SURVEY, EVALUATION, AND PROSPECTS* 9 (1979) ("According to the traditional framework, the enterprise is concentrated in the role and goals of the entrepreneur who contracts with owners of various inputs for their services and commodities into a production process. The objective function of the firm is solely that of the entrepreneur who, particularly in competitive markets, is motivated by a singled-minded focus on profits. Owners of inputs are said to take up the purpose of the entrepreneur as part of a contractual quid pro quo, for it is the entrepreneur's commercial venture, not theirs. If workers dislike their jobs, if consumers are dissatisfied with the quality or safety of products, or if consumers are dissatisfied with the quality or safety of products, or if dealers are outraged by arbitrary treatment—they vote with their feet, departing the relationship in search of greener pastures.").

109. Austin & Reficco, *supra* note 1, at 90.

110. Friedman, *supra* note 108.

111. Cornforth, *supra* note 76, at 7.

112. Austin & Reficco, *supra* note 1, at 86–87 (indicating that a national U.S. study (Center for Corporate Citizenship 2004) determined that most for-profits have not been able to integrate corporate social responsibility into their organizations significantly). Dees, *supra* note 4, at 9.

profit maximization, which would arguably be a breach of the duty of care to the For-profit.¹¹³ In this model, the Board and Others serve as agents to the For-profit, essentially the For-profit's owners, the shareholders and, therefore, their duty of care centers on fulfilling the goals of the shareholders.¹¹⁴

Consequently, the argument is that the Board and Others have a duty to ensure and pursue profit maximization. This controversy can be seen as premised on the actual perception of how the For-profit, through its operations, links with the outside world.¹¹⁵ Those advocating for profit maximization exclusively, excluding philanthropy, do not generally recognize that the economic context of the For-profit is necessarily connected with the social context outside of the organization.¹¹⁶ Traditionally, courts upheld the shareholder's primacy, and that remains the majority today.¹¹⁷ In 1919, the court in the leading case of *Dodge v. Ford Motor Co.* held that a For-profit "is organized and carried on primarily for the profit of the stockholders."¹¹⁸ Almost forty years later, the *A.P. Smith Manufacturing Co.* court held that charitable giving was not a waste of corporate assets and that shareholder primacy "ought not to be permitted . . . to thwart the long-visioned corporate action in recognizing and voluntarily discharging its high obligations as a constituent of our modern social structure."¹¹⁹ The *A.P. Smith Manufacturing Co.* decision applied the business judgment rule to hold that corporate giving was a "lawful exercise of the corporation's implied and incidental powers under common-law principles."¹²⁰ Historically, this seems to be the start of the shareholder versus stakeholder debate. Today, however, shareholder primacy is still the norm in many jurisdictions,¹²¹ but the For-profit organization may look for ways to be more philanthropic, moving from purely donating to a deeper involvement, along the Continuum.¹²²

113. Weeks, *supra* note 7, at 320.

114. *But see* Cornforth, *supra* note 76, at 7–8. According to the agency theory of compliance (the most frequently used theory in corporate governance), management acts for the interests of themselves rather than the shareholders or mission. Arguably the duty of loyalty and good faith may be implicated as well.

115. JOHNSON, *supra* note 24, at 4.

116. "Proponents of the philanthropic use of enterprise point out that social and economic issues are inextricably intertwined." Dees, *supra* note 3, at 3 (indicating that to create sustainable solutions to social problems people would be wise to use business methods and market-oriented approaches as a part of their overall approach but not every social problem will respond to market-based solutions or business methods).

117. Springer, *supra* note 18, at 87.

118. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 681 (Mich. 1919).

119. *A.P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581, 590 (N.J. 1953).

120. *Id.*

121. Springer, *supra* note 18, at 97.

122. Lasprogata & Cotten, *supra* note 2, at 96; Minow, *supra* note 24, at 1066.

On the other hand, the new atmosphere encourages a modified approach to business for the For-profits by emphasizing For-profit's conduct effects on others over profits.¹²³ Recent years have witnessed greater and greater integration of social responsibility into the For-profit business model such that it has become more the norm in business but not necessarily in law.¹²⁴ Shifted perspectives of the corporation and modified law encourage For-profits' Board and Others to consider stakeholders when effectuating their fiduciary duties. State constituency statutes have, to a certain extent, codified these efforts to allow For-profits to pursue philanthropy.¹²⁵ Thus, when making business decisions and plans, management should no longer only consider the bottom-line but also philanthropy.¹²⁶

The duty of care standard emphasizes that the Board and Others must inform themselves and exercise the decision making and oversight functions over the Collaboration as an "ordinarily prudent person" would at that stage on the Continuum, recognizing that shareholder and stakeholder theories compete but may not be preclusive. Making the decision to engage or stay in the Collaboration, the Board and Others, taking a conservative approach to exercising their duty of care, would evaluate whether, in fact, social philanthropy of the Collaboration can build goodwill for the For-profit and, thereby, contribute to the bottom line when consumers gravitate towards the more philanthropic organization.¹²⁷ Through this approach the For-profit organization may hope to increase its reservoir of goodwill, develop additional business,¹²⁸ and take ameliorative

123. Mitchell, *supra* note 19, at 502 (arguing that the laws of the state have severely limited the corporation to pursue stakeholder interests and philanthropy).

124. Austin & Reficco, *supra* note 1, at 90. See also, Springer *supra* note 18, at 87.

125. See the constituency statutes of each state such as DEL. CODE ANN., Tit. 8, § 122(9) (giving the Delaware corporation the power to "make donations for the public welfare or for charitable, scientific or educational purposes...."); see also N.J. STATE. ANN. § 14A:3-4 (2011) ("(1) Any corporation organized for any purpose under any general or special law of this State, unless otherwise provided in its certificate of incorporation or by-laws, shall have power, irrespective of corporate benefit, to aid, singly or in cooperation with other corporations and with natural persons, in the creation or maintenance of institutions or organizations engaged in community fund, hospital, charitable, philanthropic, educational, scientific or benevolent activities or patriotic or civic activities conducive to the betterment of social and economic conditions, and the board may authorize the making of contributions for those purposes in money, securities, including shares of the corporation, or other property, in such reasonable amounts as the board may determine; provided, that a contribution shall not be authorized hereunder if at the time of the contribution or immediately thereafter the done institution shall own more than 10% of the voting stock of the donor corporation or one of its subsidiaries. (2) The provisions of this section shall not be construed as directly or indirectly minimizing or interpreting the rights and powers of corporations, as heretofore existing, with reference to appropriations, expenditures or contributions of the nature above specified.").

126. Weeks, *supra* note 7, at 320-21.

127. Michael N. Glanz, *Introduction to Corporate Social Responsibility (CSR)*, IN DOING BUSINESS ABROAD 229, 232 (2009).

128. Lasprogata & Cotten, *supra* note 2, at 96 (referring to the specific example of Ben & Jerry's Partnership Program that granted franchises for the sale of ice cream to community-based social

steps to counter corporate scandal or bad publicity.¹²⁹ This conservative approach treats the Collaboration as another effort to increase the bottom line and to improve on shareholder interest; therefore it supports the already fundamental duty of care owed to the organization.

Clearly, the decision to allocate resources to the Collaboration has varying implications at various stages along the Continuum. The more the Collaboration diverts from the bottom-line pursuits of the For-profit, the more important the Board and Others are to the actual decision to be involved in the Collaboration or stay involved. At the philanthropic stage, where there is “Delivery and Receipt,” the Board and Others may be justified in taking a more hands off approach. The transactional and integrative stages, by their nature, trigger the duty of care given the allocation of resources and potential risk at those stages. Under the first approach, the Board and Others can more easily justify the Collaboration because the For-profit’s bottom line is greatly influenced by its public image and the Collaboration would be intended to improve that image.¹³⁰ Improved image means the increased chance for more business which in turn benefits shareholders. Arguably, the Collaboration would be another method to improve profits similar to what an advertising campaign is intended to achieve. Engaging in cause-related marketing, for example, may not even be written off as corporate giving or community relations in corporate accounting. Instead, it may come right out of the corporation’s budget for marketing.¹³¹

A less conservative approach finds the Collaboration as augmenting the mission of the corporation from a corporate mission of maximizing profits and returns to investors, to a mission of optimizing returns to stakeholders.¹³² This approach modifies the duty of care by adding the stakeholder to the mix. The underlying concept asserted by the Board and Others would be that through the Collaboration the For-profit is serving a broader constituency which will improve the company’s sustainability. Through this means, the company would produce both economic and social value, which some have referred to as “blended value.”¹³³ Arguably, this second approach is a greater challenge for the Board and Others to validate as consistent with the duty of care.¹³⁴ “In this approach organizations’ social value creation is not treated as something separate or peripheral. On

services Nonprofit organizations. Through this process the Nonprofit gains experience and knowledge on how to run a business and, in turn, Ben & Jerry’s gains advertising.).

129. Minow, *supra* note 24, at 1066.

130. *Id.*

131. Andreasen, *supra* note 11, at 48.

132. Austin & Reficco, *supra* note 1, at 90.

133. *Id.*

134. The duty of loyalty may also be implicated.

the contrary, it is imbedded in a larger and transparent accountability system that reports to the internal and external stakeholders.”¹³⁵

To help the Board and Others exercise the duty of care, they should consider: 1) What does the For-profit intend to gain from the Collaboration? 2) Does the bottom line of the For-profit stand to benefit from the Collaboration and to what degree? 3) At what point on the Continuum will the Collaboration start and where do the collaborating entities intend that it should go? 4) What are the risks to the For-profit of the Collaboration, which will be influenced by the stage on the Continuum and the evaluated strength of the collaborating Nonprofit? and 5) Are the risks of the Collaboration worth the intended result, including whether the Board and Others determine if there is an obligation to ensure the sustainability of the Nonprofit in the Collaboration pursuant to Section III. C. below? Similar to venture philanthropy, corporate philanthropy requires the For-profit Board and Others to determine “what measures of social return it is looking for.”¹³⁶ Generally, there are a few instances when social and economic returns are correlated, i.e., they are synchronized.¹³⁷ In many cases, however, they do not.¹³⁸ If there is an economic return for the philanthropic efforts, it is usually not in time. Ethically, as the Collaboration proceeds along the collaboration Continuum with investment by both collaborating companies, it is important for the For-profit Board and Others to determine whether it is collaborating with an exit strategy in mind or with loyalty to staying in the Collaboration. As early as possible, the For-profit company should reach this determination for its own corporate governance purposes, and ethically given the impact of its decision on the collaborating Nonprofit. This should be translated in the business plan. If the Board and Others (ultimately the Board) decide to pursue a social and not an economic return, then loyalty to the program rather than an exit strategy may be its better focus of time and funds.¹³⁹

V. NONPROFIT DUTY OF CARE AND THE COLLABORATION

For a Nonprofit, “[t]he biggest challenge is keeping focused on key goals; developing a strategy for accomplishing them; and generating a set of tactics, operations, and actions that are aligned with producing them.”¹⁴⁰

135. Austin & Reficco, *supra* note 1, at 90.

136. Roger Thompson, *The Coming Transformation of Social Enterprise Q&A with: V. Kasturi Rangan*, HARV. BUS. SCH. (2008) (responding to a query about the state of venture philanthropy).

137. *Id.* at 1.

138. *Id.* at 2.

139. *Id.*

140. Sean Silverthorne, *Achieving Excellence in Nonprofits Q&A with: Herman B. Leonard*, HARV. BUS. SCH. (Oct. 27, 2008), <http://hbswk.hbs.edu/item/5942.html>.

Like their For-profit counterparts, Nonprofits also have experienced a heightened level of scrutiny for reasons including their move into commercialism.¹⁴¹ In addition, it has been uncovered recently that many Nonprofits did not adequately incorporate corporate governance requirements.¹⁴² The governance law applicable to Nonprofits is really underdeveloped compared to the law of For-profits.¹⁴³ Recently, the Internal Revenue Service (“IRS”) has been among the leaders in Nonprofit governance reform, relying principally on public disclosure as a tool.¹⁴⁴

The IRS’ 2008 position paper concerning governance and, in particular, the 501(c)(3) tax-exempt Nonprofit, states:

[the IRS does] not require charities to have governance and management policies [but that it] will review an organization’s application for exemption and annual information returns to determine whether the organization has implemented policies relating to executive compensation, conflicts of interest, investments, fundraising, documenting governance decisions, document retention and

141. See ABA COORDINATING COMMITTEE ON NONPROFIT GOVERNANCE, GUIDE TO NONPROFIT CORPORATE GOVERNANCE IN THE WAKE OF SARBANES-OXLEY v-vii (2005). See also Heather Gottry, *Profit or Perish: Non-Profit Social Service Organizations & Social Entrepreneurship*, 6 GEO. J. ON POVERTY L. & POL’Y 249, 249–50 (1999) (indicating that scandals such as with Jim Bakker, Pat Robertson and United Way of America have also contributed to the scrutiny); Lisa A. Runquist & Michael E. Malamut, *The IRS’s New Regulation of Nonprofit Governance*, 18 BUS. L. TODAY 29, 29 (2009) (“In light of the Enron debacle and parallel scandals in the Nonprofit world, Congress and the IRS have put Nonprofits, and specifically Nonprofit governance, under the microscope. Sarbanes-Oxley (SOX) instituted federal corporate governance oversight of public companies.”).

142. Richard Wallace, *Nonprofit Corporate Governance: Playing the Game by the Rules*, ALICEBOT (Oct. 1, 2002). For example, the Nonprofits maintained many directors in management positions. Towards this end, a goal of corporate governance for both the Nonprofit and For-profit companies is to achieve a board of directors that is primarily independent of the company and can guide the Nonprofit ethically and legally. A director that is also company management is not independent and represents a source of conflict.

143. Henry B. Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 500 (1981).

144. Runquist, *supra* note 141, at 30, 33. See also INTERNAL REVENUE SERVICE, GOVERNANCE AND RELATED TOPICS – 501(C)(3) ORGANIZATIONS. § 4, (2008), http://www.irs.gov/pub/irs-tege/governance_practices.pdf. Peregrine, *supra* note 34, at §43:44 (“The Position Paper is structured as a discussion of six specific governance topics: (i) Mission; (ii) Organizational Documents; (iii) Governing Body; (iv) Governance and Management Policies; (v) Financial Statements and Form 990 Reporting; and (vi) Transparency. The discussion reflects governance themes from both the several public speeches of recent months by IRS Commissioner Steven Miller, as well as those from Parts VI and XI from the new Form 990 for fiscal year 2008. In this way, the Position Paper significantly updates and expands upon the February 2007 discussion draft of “Good Governance Practices” for charitable organizations, which has now been withdrawn from the IRS web site.”). See also INTERNAL REVENUE SERVICE, FORM NO. 990, RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX, (2010), http://www.irs.gov/pub/irs-trge/governance_practices.pdf. If required to file the Form 990, a Nonprofit Organization will need to file it annually with the IRS. Many states also require an annual filing of the Form 990 as well. See also Runquist, *supra* note 141, at 29. (“The resulting IRS foray into corporate governance is simplistic; neither the form nor the instructions recognize the many problems that may result from the revised form.”).

destruction, and whistleblower claims.¹⁴⁵

Consequently, the implication is that a properly organized and operated Nonprofit will have governance policies for management of the organization.¹⁴⁶

Historically, however, state law has primarily regulated Nonprofit governance.¹⁴⁷ In the area of directors and officers duties and responsibilities in a Nonprofit, state Nonprofit laws have been primarily modeled off of the state law of For-profits, particularly corporations and the Model Business Corporation Act.¹⁴⁸ As a result, evaluation of the conduct of the Board and Others of a Nonprofit involves reference to a standard of fiduciary duties similar to that of a For-profit.¹⁴⁹ Since the Nonprofit and For-profit are not the same type of organization, however, this analysis would be incomplete without considering specific qualities of the Nonprofit.¹⁵⁰ First, a Nonprofit's activities are limited to those in furtherance of its philanthropic mission.¹⁵¹ Second, a Nonprofit, despite its name, is not precluded from generating a profit, but must apply the profit to the purpose(s) for which the Nonprofit was organized.¹⁵²

In the context of Nonprofits' governance, the court in the 2008 *Health Alliance of Greater Cincinnati* case found that a fiduciary is a person that has a duty to act primarily for the benefit of another.¹⁵³ This duty is based

145. See GOVERNANCE AND RELATED TOPICS, *supra* note 144. See also FORM 990, *supra* note 146.

146. Vachon, *supra* note 35, at 44.

147. Runquist, *supra* note 141, at 29.

148. Vachon, *supra* note 35, at 44. In addition, in the wake of the Sarbanes-Oxley Act of 2002, some states have proposed laws that apply Sarbanes-Oxley-type corporate governance provisions to Nonprofit Organizations. *Id.* In terms of state's general corporations statutes, Delaware law is worthy of note for a variety of reasons, including that it has a corporations code that is applied to both for-profit and nonprofit corporations. *Id.* at 44-45.

149. Peregrine, *supra* note 33, at § 43:3. ("Litigation is conducted, contracts are executed, and money is borrowed all in the name of the nonprofit corporation itself, rather than in the name of individual trustees, just as in the case of business corporations. In addition, adoption by most states of the Uniform Prudent Management of Institutional Funds Act (UPMIFA) confirms the application of traditional corporate law principles to financial investment practices of charitable corporations (particularly with regard to UPMIFA's shift away from a 'legal list' of approved types of investments).") *Id.*

150. Vachon, *supra* note 35, at 39.

151. *Id.* ("In the United States most Nonprofit Organizations of import are corporations. This mission limitation means that the Nonprofit's business purpose is limited to activities specifically set forth in its organizing documentation, namely its charter or Articles of Incorporation.")

152. Vachon, *supra* note 35, at 39 ("Corporate earnings in excess of expenses are returned to the corporation for use in support of the corporate mission."). "This 'private inurement doctrine' in which the Nonprofit Organization's net earnings may not inure to the benefit of private parties, is central to the law governing Nonprofits. It marks a very clear line between Nonprofits and For-profits." *Id.* (citing DANIEL L. KURTZ, BOARD LIABILITY: GUIDE FOR NONPROFIT DIRECTORS 2-3 (1988) [hereinafter KURTZ]).

153. *Health Alliance of Greater Cincinnati v. Christ Hosp.*, No. C-070426, 2008 WL 4394738, at *6 (Ohio Ct. App. 2008). See Vachon, *supra* note 35, at 46 (discussing this case involving a Nonprofit corporation).

the person's efforts for the other and applies to matters related to those efforts.¹⁵⁴ In the case of a Nonprofit in a cross-sector Collaboration, this duty attaches to the individuals of the Board and Others acting for the Nonprofit.¹⁵⁵ The traditional role of the Board of the Nonprofit is to serve as the "guardians of the charity's mission".¹⁵⁶ Consequently, the decision by a Nonprofit to enter into a Collaboration with a For-profit and the ongoing involvement in the Collaboration requires careful analysis and monitoring to ensure: 1) pursuit of the philanthropic mission and 2) application of the profit towards the mission. This implicates the duty of care of the Board and Others.¹⁵⁷ The following conduct would help towards fulfilling the duty of care, among others: 1) understand their fiduciary duties to the organization, 2) continue to be informed about the duties and the organization in general, 3) do not take things at face value, instead be skeptical and ask questions, and 4) when making decisions and applying judgment use complete (undivided) loyalty and care towards the organization and if impossible disclose the conflict for approval.¹⁵⁸

In its 2008 Position Paper on Corporate Governance, the IRS emphasized the duty of care through its encouragement of "an active and engaged board" explaining that "it is important to the success of a charity and to its compliance with applicable law."¹⁵⁹ The duty of care applies in two identified categories of Nonprofit action: 1) decision making and 2) oversight.¹⁶⁰ "Decision Making" is when the Board, along with management, makes a specific decision or pursues a specific action.¹⁶¹ "Oversight" is the general responsibility of the Board to oversee the management of the day-to-day operations of the Nonprofit. While ultimately the Board's obligation, oversight is shared with the management of the Nonprofit.

The decision-making and oversight aspects of the duty of care are relevant first to the Nonprofit's decision to enter into the Collaboration and, second to the ongoing activities of the Nonprofit relevant to the Collaboration.¹⁶² The further along the Continuum, the more involved the Board and Others should be to effectively carry out their duty.¹⁶³ The

154. Vachon, *supra* note 35, at 46.

155. *Id.*

156. *Id.* Cornforth *supra* note 76, at 7-8.

157. Vachon, *supra* note 35, at 48.

158. See PANEL, *supra* note 34, at 8 (indicating "they should be familiar with the basic rules and requirements with which their organization must comply and should secure the necessary legal advice and assistance to structure appropriate monitoring and oversight mechanisms."); Peregrine, *supra* note 34, at § 6.

159. GOVERNANCE AND RELATED TOPICS, *supra* note 145, at § 3.

160. Peregrine, *supra* note 33, at § 16.

161. *Id.*

162. Vachon, *supra* note 36, at 52.

163. *Id.*

collaborating Nonprofit's Board and Others need to be vigilant to ensure that the commercialization pressures of the Collaboration, and the time and activities allocated to the Collaboration at any point along the Continuum do not erode and/or erase the Nonprofit's mission and values.¹⁶⁴ Exposure to the Collaboration and resulting commercialism may encourage the Nonprofit's board and management to bend to the force of popular will instead of firmly pursuing the mission, whether popular or not.¹⁶⁵ Along the Continuum, the Board and Others needs to consider the risk of the Collaboration and whether that risk is worth the ultimate financial, and otherwise, benefit to the Nonprofit.¹⁶⁶

To this end, first, when making the decision to enter into the cross-sector collaboration with the For-profit, the Nonprofit's Board and Others should pursue answers to the following questions, among others, as part of the decision making: 1) What does the Nonprofit hope to achieve through the Collaboration? 2) What are the details about the For-profit intended for the Collaboration? 3) What stage on the Continuum will the Collaboration start with and are there goals for moving further along the Continuum? 4) What are the risks of the commercial venture and can the Nonprofit afford to take those risks, including mission drift and IRS compliance? 5) What is expected of the Nonprofit for the Collaboration and can the Nonprofit afford to meet the needs? 6) Does the culture and mission of the Nonprofit align with that of the Collaboration and the For-profit in the Collaboration? and 7) What is the Collaboration timeline and can the Nonprofit meet them?¹⁶⁷

Second, the oversight function of the duty of care relates to the ongoing management of the Nonprofit whilst engaging in Collaboration activities. Oversight requires the directors to make a reasonable inquiry on an ongoing basis as the Nonprofit pursues the Collaboration, trying to balance pursuit of the Nonprofit's mission with the need for more funds, or the other goals of the Collaboration.¹⁶⁸ The Board, ultimately responsible

164. Tuckman, *supra* note 14, at 2; Young & Salamon, *supra* note 5, at 441. *See also* James, *supra* note 44, at 29 ("So long as the charitable goal of the Nonprofit remains the driving force, such commercialization has a positive impact on the finances and long term stability of the organization and the sector."). *But see* Lasprogata & Cotten, *supra* note 2, at 86.

165. Young & Salamon, *supra* note 5, at 441.

166. Lasprogata & Cotten, *supra* note 2, at 70.

167. *Id.* at 87 (citing four questions identified by Nonprofit consultant and scholar Edward Skloot). "However, social service Nonprofit organizations vary dramatically both in their objectives and in how they achieve those objectives in their day-to-day operations. This makes it very difficult to identify one or more entrepreneurial strategies that are uniformly appropriate." *Id.* at 88.

168. GOVERNANCE AND RELATED TOPICS, *supra* note 144. ("Regardless of whether a charity is a trust, corporation, unincorporated association, or other type of organization, it must have organizational documents that provide the framework for its governance and management."). *See* PANEL, *supra* note 34, at 10; Tuckman, *supra* note 14, at 507. If the Nonprofit is also a tax-exempt organization, this process should also provide a means to ensure that the Nonprofit stays compliant with the IRS requirements. The Nonprofit will be deemed as operating exclusively for the charitable (tax-exempt)

for the management of the organization, is also responsible pursuant its oversight function (and by implication the Board and Others) to avoid, and adequately respond to instances of mission drift evidenced by or caused by the mission distortion of the Collaboration.¹⁶⁹ They will need to be able to recognize and distinguish between the pull of Collaboration commercialization that benefits the Nonprofit's mission and Collaboration commercialization that distorts it.¹⁷⁰ Distortion would result in mission drift. Mission drift happens if the activities of the Nonprofit no longer relate to and/or support substantially the mission of the Nonprofit.¹⁷¹ As part of the duty of care, the Board needs to be vigilant to ensure that the pull of the Collaboration does not erode and erase the mission and values of the Nonprofit.¹⁷² Many times mission drift occurs gradually over time through the activities of the Collaboration and may be intentional or unintentional.¹⁷³ "Important to keep in mind, however, is that an activity that seemingly may be alternative to the purpose of the Nonprofit may

purpose if substantially all of its operations are devoted to the charitable purpose or purposes. I.R.S. Treas. Reg. § 1.501(c)(3)-1(c) (2008). See GOVERNANCE AND RELATED TOPICS, *supra* note 145. See also Lasprogata & Cotten, *supra* note 2, at 78 ("If more than an insubstantial amount of the [Nonprofit's] activities are not in furtherance of its exempt purposes, it will not qualify as a charitable organization defined in Section 501(c)(3)."). See, e.g., *Federation Pharmacy Servs. Inc. v. Comm'r*, 72 T.C. 687 (1979).

169. PANEL, *supra* note 34, at 13 ("The board must protect the assets of the organization and provide oversight to ensure that its financial, human and material resources are used appropriately to further the organization's mission."). See also GOVERNANCE AND RELATED TOPICS, *supra* note 144, at §5 (articulating the duty "to ensure that financial resources are used to further charitable purposes and that the organization's funds are appropriately accounted for..."); Peregrine, *supra* note 33, at §§ 1, 8 (indicating that directors are responsible directing and overseeing the management of corporate affairs). "The core fiduciary duties attributable to such board members; their compliance oversight obligations (it being such a crucial aspect of health care); the regulators with primary jurisdiction with respect to the exercise of such duties; the concept of corporate governance 'best practices' as applied to the not-for-profit corporation;" "Many mission statements are written in broad, unfocused, and all-encompassing terms, making it difficult to tell when the activities of a nonprofit are causing it to drift away from its intended mission . . . As a result, individual Nonprofits and their boards are largely free to judge whether an activity is mission appropriate." *Id.* at § 2.

170. James, *supra* note 44, at 29.

171. Cornforth, *supra* note 76, at 7-8.

172. Young & Salamon, *supra* note 5, at 423. See James, *supra* note 44, at 29 ("So long as the charitable goal of the Nonprofit remains the driving force, such commercialization has a positive impact on the finances and long term stability of the organization and the sector."); Tuckman, *supra* note 14, at 506. *But see* Dees, *supra* note 3, at 10-11 ("Aligning incentives to assure the creation of intended social impact. When philanthropists invest in enterprises, they need to be confident that the incentives inherent in the enterprise are aligned with their intended social impact, or that safeguards are in place should financial rewards ever threaten to pull the organization away from the desired social impact."); Lasprogata & Cotten, *supra* note 2, at 86.

173. Tuckman, *supra* note 14, at 506. ("It can be intentional, as when a Nonprofit consciously decides to redirect its activities in a new direction, when it is influenced to seek a new direction through government or donor pressure or it may be unintentional, as when thought is not given to the effects of commercial activity and the organization gradually addresses its output of goods and services to a different mission over time.").

actually support the mission.”¹⁷⁴ Mission drift has to be carefully monitored for corporate governance purposes and also because it is often challenging to detect.¹⁷⁵ Some claim that one of the biggest challenges confronting the Nonprofit is mission drift.¹⁷⁶ This is particularly relevant with regards to a Nonprofit that engages in a Collaboration with a For-profit particularly as they move along the Continuum towards the Integrative Stage.

Even if the Collaboration is successful, the Nonprofit may still be putting itself at great risk.¹⁷⁷ For instance, a successful venture with much profit may implicate a possible violation of a tax-exempt Nonprofit’s status under 501(c)(3).¹⁷⁸ At a minimum, succumbing to the pressure from the Collaboration commercialization pull that distorts the Nonprofit’s mission could result in the questionable ethical and legal status of a Nonprofit claiming a mission but not pursuing it. Further, by benefitting from the status of being a Nonprofit (such as tax breaks for a tax-exempt Nonprofit), the Nonprofit will be under intense scrutiny to establish how it pursues commercialization through Collaboration whereby the Nonprofit company achieves a degree of unfair competition over For-profit companies.¹⁷⁹ The deeper into the Continuum the Collaboration moves, the harder it may be for the Board and Others manage the mission drift.

As part of the analysis to determine if a Nonprofit Board member or Others has met his or her duty of care relating to the decision to enter into the Collaboration at any point along the Continuum or to stay in the Collaboration, the court may need to analyze the conduct under the business judgment rule. A Nonprofit decision maker and the good faith decision will be protected if at the time the decision was made the decision maker was: 1) disinterested (i.e., no conflicts or self-dealing), 2) reasonably informed about the circumstances relevant to the Collaboration, and 3) rationally believed the decision about the Collaboration to be made in the best interests of the organization.¹⁸⁰ As a result, the activities of the Collaboration, mission pull or mission drift cannot be ignored.¹⁸¹ The Board and Others, to better ensure the protection of the business judgment rule, should continually evaluate, among other things: 1) if the Collaboration aligns with and will not interfere with the mission and goals of the Nonprofit,¹⁸² 2) whether there is a market for the product or service

174. Vachon, *supra* note 35, at 37.

175. Tuckman, *supra* note 14, at 506.

176. Sean Silverthorne, *Achieving Excellence in Nonprofits, Q & A with: Herman B. Leonard*, HARV. BUS. SCH. (2008), <http://hbswk.hbs.edu/item/5942.html>.

177. Andreasen, *supra* note 11, at 50.

178. Vachon, *supra* note 35, at 37.

179. Maram, *supra* note 45, at 3.

180. Peregrine & Schwartz, *supra* note 94, at 466.

181. *Id.*

182. Lasprogata & Cotten, *supra* note 2, at 70.

to be generated by the Collaboration, 3) whether the Nonprofit will have resources to meet the needs of the Collaboration,¹⁸³ 4) whether the Collaboration fits with the purpose of the Nonprofit articulated in its Articles of Incorporation,¹⁸⁴ and 5) whether the Collaboration will achieve the goals for the Nonprofit and not scar the Nonprofit with prohibitive risk, including the risk of a tax-exempt Nonprofit losing its tax-exempt status.¹⁸⁵ To monitor for mission drift during the Collaboration, the Board and Others should consider as part of their oversight function, among other things, setting up a compliance program that monitors for the following issues.¹⁸⁶

The hiring or increased involvement of people in the day to day function of the organization's business who become or are already driven by personal gain and, therefore, spend the majority of their time on For-profit activities and begin to neglect or completely lose the mission of philanthropy that, by and large, does not generate profit. Similarly, the people in the day-to-day business of the Nonprofit start to reallocate their work pursuits towards the commercial activities and away from the philanthropic activities that support the mission. The commercial venture may cause increased pressure on Nonprofits to neglect certain aspects of the Nonprofits philanthropic activities that support the mission. There may be conflicts of interest between the mission of the Nonprofit and the intent of the commercial activities. For instance, money may be raised in the philanthropic, non-commercial activities but end up being channeled towards the betterment of For-profit activities or actually bailing out failed commercial projects, including a cross-sector Collaboration. These concepts are symptomatic but not necessarily conclusive.¹⁸⁷

Essential to ensuring that these processes are effective, the Board and Others need to create and implement a strategy and system to accomplish

183. Lasprogata & Cotten, *supra* note 2, at 70.

184. If the Articles articulate an exclusively narrowly defined purpose or purposes, then that may preclude the organization from functioning in a commercial venture even if for an insubstantial amount. Lasprogata & Cotten, *supra* note 2, at 77. "To that end, the Articles of a social service nonprofit organization seeking exemption from federal income tax should contain a statement of purpose that reflects the charitable purposes identified in Section 501(c)(3) of the Code. Additionally, the Articles must obligate the organization to further such exempt purposes as its primary activity and prohibit the organization from engaging in any meaningful way in activities that are not in furtherance of some exempt purpose." *Id.* at 77-78.

185. *Id.* at 70.

186. See Runquist, *supra* note 141, at 31 (stating that while the IRS Code does not require these types of policies and procedures, the implication from Form 990 is that a well-run Nonprofit would have the policies and procedures such as conflicts of interest policy, whistle-blower policy, record retention and destruction policy, compensation policy, joint venture policy (which is relevant to joint ventures with For-profit partners), Form 990 disclosure policy, governance disclosure policy etc.).

187. Vachon, *supra* note 35, at 59.

the mission and goals in light of the Collaboration. The *Caremark* court determined that in certain circumstances, a director's failure to reasonably oversee the implementation and continued application of this system could be a breach of the director's duty of care.¹⁸⁸

In the realm of Collaboration with a For-profit, a Nonprofit's board must carefully consider the legality and ethics of the Nonprofit's collaboration and potential commercialization. In particular, the Nonprofit's Board should ensure that the intended goals and operations of the collaboration align with the Nonprofit's mission¹⁸⁹ and that there is a means to ensure continued alignment. Further, if involvement in the collaborative venture drifts from the original path and endangers the Nonprofit's mission, and tax-exempt status, there are safety measures in place to ensure a proper and legal response.¹⁹⁰

VI. DUTY OF CARE INTERTWINED?

Here is one of the biggest challenges in philanthropy today—there is just not enough money. Even if you put together what all the governments and all the philanthropies in the world spend to help poor and vulnerable people, the financial resources would not be enough to solve the fundamental problems. It will take much more—and more will have to come from private investment capital.¹⁹¹

The next question is whether, pursuant to its duty of care, the For-profit has an obligation to ensure that the Nonprofit does not experience mission drift—arguably, yes, the deeper the Collaboration is along the Continuum. This section sets forth the analysis that may determine whether the Board and Others of the For-profit should consider the care of the Nonprofit as part of its oversight function under its duty of care to the For-profit. A first consideration for this analysis is that movement forward through the various stages along the Continuum does not happen automatically. Moreover, a Collaboration, in fact, can fall backwards

188. *In re Caremark Int'l Inc., Deriv. Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996); Sean Silverthorne, *Achieving Excellence in Nonprofits, Q & A with: Herman B. Leonard*, HARV. BUS. SCH. (October 27, 2008), <http://hbswk.hbs.edu/item/5942.html>. “The court in dicta in the *In re Caremark Int'l, Inc., Derivative Litig.* matter identified the duty of the director to oversee the organization's compliance programs. The *Caremark* court stated that the duty includes a good faith attempt to assure that (i) a corporate information and reporting system exists and is adequate based on Board determination; and (ii) the organization's information and reporting system is adequate to capture and provide reliable and appropriate information to the Board concerning organizational compliance with applicable laws in a timely way and in the ordinary course of business.” Vachon, *supra* note 34, at 59 (referring to *In re Caremark*, 698 A.2d at 970). See also *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27 (Del. 2006); *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 363 (Del. 2006).

189. Dees, *supra* note 3, at 10.

190. *Id.*

191. *Grants & Grantees*, THE ROCKEFELLER FOUND. (Feb. 3, 2011), <http://www.rockefellerfoundation.org/grants>.

and/or fail along that Continuum as well. The status on the Continuum is determined as a result of the collaborating partners' efforts and activities to support the Collaboration.¹⁹² If the Collaboration venture fails, a For-profit can usually absorb financial failure more readily than the Nonprofit that most likely has a small staff and limited resources.¹⁹³

A second consideration is derived from the application of psychological theory to the Collaboration. The psychologist Piaget's theory about childhood development has been applied to corporations, Boards, and Others, finding in general that a corporation and its management will function better and more ethically if less dominated and constrained.¹⁹⁴ The dominant theme from Piaget's research was that children will not develop into autonomous and morally responsible adults without having had the experience of cooperative play and other childhood ventures with those who are the child's equals.¹⁹⁵ Society in general seems to be ideally modeled from Piaget's equilibrium concepts of autonomy, cooperation and reciprocity ("Ideal Model").¹⁹⁶ Characteristics of this Ideal Model include "relatively equal and free autonomous beings seeking their own ends and respecting the ends of others with agreement on the general principle that each should have the opportunity to do just that and that governmental restraint is justified only to sustain that possibility."¹⁹⁷ In today's society, the corporation is taking on more and more characteristics of the natural person under the law, and is also comprised of natural persons that exercise the corporation's decision-making functions and general oversight. Given the nature of the Collaboration, with the Nonprofit usually in need of funds from the For-profit, and maybe in need of business expertise, it may be argued that the For-profit has greater potential for treating the Nonprofit as an inferior or a subordinate and thereby creating the antithesis of the Ideal Model. In this way, under Piaget's theory, if a For-profit were to conduct itself in the Collaboration in this oppressive manner, the Nonprofit's development in the Collaboration may suffer, including its moral autonomy thereby implicating mission drift. Mission drift would lead to varying problems for the Nonprofit, the worst being failure of the entity and/or violations of IRS regulations.

A third factor is that the failure of one collaborator in the Collaboration can have negative impacts on the other collaborator with

192. AUSTIN, *supra* note 5, at 35.

193. Andreasen, *supra* note 11, at 50.

194. Mitchell, *supra* note 19, at 498 ("[T]he relationship between managers and other corporate constituent groups is characterized by exactly the kind of dominance that Piaget found not only stifles the moral development of the weaker parties but also leads the strong party to be inattentive to rationality and justice.").

195. Mitchell, *supra* note 19, at 499.

196. *Id.* at 500.

197. *Id.*

increasing intensity the deeper into the Continuum the Collaboration has moved. A cross-sector collaborator engaging in a Collaboration with a “tainted partner”¹⁹⁸ can have disastrous effects for the collaborator. This has been true in the circumstances where a Nonprofit collaborates with a For-profit, and the For-profit’s activities taint the Nonprofit so that even basic fundraising becomes painfully damaged.¹⁹⁹ Similarly, if a For-profit collaborates with a Nonprofit, and the Nonprofit violates the Internal Revenue Code or fails entirely as an organization, the For-profit may also suffer by affiliation. From the For-profit’s point of view, the most valuable contribution the Nonprofit can make to the Collaboration is its image.²⁰⁰ If the Nonprofit violated the IRS’ tax-exempt requirements and/or experienced mission drift due to the pull of mission distortion from the Collaboration, the For-profit’s image would be damaged.

The relationship between the For-profit and the Nonprofit seeking to collaborate relates to their engagement with each other. But it also exists in the historical context, of which some claim that many of the reasons for the Nonprofit’s existence and the philanthropic considerations of the For-profit exist due to the problems created by the drive for success of For-profits as a collective at the expense of stakeholders.²⁰¹ When a Nonprofit and For-profit collaborate, it first may be argued that the For-profit has an ethical obligation to ensure the care and sustainability of the Nonprofit in the Collaboration due to the nature of its relationship to the For-profit and the strong pull of mission distortion caused by the For-profit.

The ethical perspective may not suit the nature of the For-profit, but a second argument is that the Board and Others of a collaborating For-profit have an obligation to ensure the care and sustainability of the Nonprofit because their duty of care to the For-profit requires it. This premise depends on how far the Collaboration is positioned along the Continuum. The duty of care requires that the For-profit Board and Others be informed. By being informed, they will understand that the deeper into the Continuum the more that the success of the Collaboration depends upon the sustainability of the Nonprofit. The success of the Nonprofit is affected by, among other things the possibilities of mission drift caused by the mission distortion pull from the Collaboration. Consequently, the Nonprofit’s sustainability determines the success of the For-profit’s engagement in the Collaboration. The success of the Collaboration determines the success of the business decision by the For-profit to enter into the Collaboration to achieve its articulated goals, such as image improvements, customer loyalty, etc. Further, the duty of care requires that they act with “requisite

198. Andreassen, *supra* note 11, at 50.

199. *Id.* at 50–51.

200. *Id.* at 56.

201. BORNSTEIN & DAVIS, *supra* note 21, at 4–6.

care.” Knowing that the sustainability of the Nonprofit determines the sustainability of the Collaboration, the For-profit Board and Others arguably need to determine the level of care owed to ensure the success of the investment in the Collaboration which may include ensuring the sustainability of the Nonprofit.²⁰²

If, for instance, the For-profit entered into the Collaboration to improve its image, the image would be damaged if the For-profit were associated with a Nonprofit that violated laws related to its tax-exempt status. The chances of failure of the Collaboration can be greatly reduced by both parties taking steps to ensure the sustainability of the Nonprofit. Many risks of the Collaboration failing due to sustainability of the Nonprofit center on the premise that the Nonprofit should be treated not as charity but as true equal in the Collaboration.²⁰³ In the case of the success of “Charge Against Hunger,” American Express’ Collaboration with the Nonprofit, Share Our Strength, the money that flooded in as a result of the Collaboration venture between the two could have overwhelmed Share Our Strength, such that it would have had more funds and request for use than it could handle. Instead, American Express anticipated this possible issue, and established a separate endowment and assisted the Nonprofit to help establish the necessary procedures and processes to meet the resulting increased activity from the Collaboration.²⁰⁴ In this way, American Express struck the balance of ensuring that the Nonprofit did not succumb to pressures associated with the Collaboration but still participated in the Collaboration without abusing its tax-exempt status.²⁰⁵

VII. CONCLUSION

New problems create new opportunities for philanthropy. Increased need has led to increased numbers of Nonprofits, straining the already limited resources. Increased need, on the other hand, combined with the changing perspective on corporate value, has created new opportunities for For-profit organizations to add value, including and most practically through cross-sector Collaboration with a Nonprofit. There are various stages on the Continuum at which the collaborators may engage. As the level of engagement becomes higher, so too does the need for the Board

202. Austin & Reficco, *supra* note 1, at 90 (explaining that at the integrative stage, there is at least one example where the For-profit held a seat on the Nonprofit partner’s board of directors and had become engaged in the governance of that partner).

203. Andreasen, *supra* note 11, at 48. Clearly, the interest in the well-being of the Nonprofit should not rise to the level as to implicate a conflict of interest or breach of the corresponding duty of loyalty. *Id.*

204. *Id.* at 55. See also Richard Alan Nelson, Ali M. Kanso, & Steven R. Levitt, *Integrating Public Service and Marketing Differentiation: An Analysis of the American Express Corporation’s “Charge Against Hunger” Promotion Program*, in SERV. BUS. 275-93 (SPRINGER-VERLAG 4d ed. 2007).

205. PANEL, *supra* note 34, at 3.

and Others to be involved so as to properly exercise their duty of care, decision making and oversight. Confronting issues early on and continually assessing legal considerations such as those identified in this paper, allows the Collaboration a better opportunity to be stronger and last longer, with fewer unwelcome surprises for both collaborators. Further, since the cross-sector Collaborations pose a ripe, new opportunity for both types of entities to develop as entrepreneurs in a sense, the law in this area continues to experience parallel changes and enhancements, an exciting area to explore. As part of the entrepreneurial nature of the business venture and the law, the collaborators need to be vigilante as to what that means for the duty of care. In particular, the unique nature of the cross-sector Collaboration between a Nonprofit and a For-profit may require that the For-profit make efforts to ensure the sustainability of the Nonprofit contrary to the possibility of mission drift and other Collaboration effects. The risks for negative consequences to the Nonprofit increase the further along the Continuum if steps are not taken to counter the effects of the Collaboration to the culture and mission of the Nonprofit.²⁰⁶ This paper establishes that a For-profit should view the sustainability of the collaborating Nonprofit as a responsibility under its own duty of care. This responsibility focuses on the unique influences of the Collaboration on the Nonprofit and ensuring that the Nonprofit does not abuse the tax-exempt status and maintains adequate measures in place to continue pursuit of the mission.

206. Austin & Reficco, *supra* note 1, at 90.

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