RECORD NO. 18-7161

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The

United States Court of Appeals

For The District of Columbia Circuit

HE DEPU, LI DAWEI, WANG JINBO, OUYANG YI, XU YONGHAI, AND XU WANPING,

***Plaintiffs - Appellants*,**

v.

YAHOO! INC., MICHAEL CALLAHAN, RONALD BELL, LAOGAI RESEARCH FOUNDATION, LAOGAI HUMAN RIGHTS ORGANIZATION, AND ESTATE OF HARRY WU,

***Defendants - Appellees*.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PAGE PROOF BRIEF OF APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

1. Plaintiffs-Appellants

He Depu, Li Dawei, Wang Jinbo, Ouyang Yi, Xu Yonghai, and Xu Wanping appeared before the district court and are parties in this Court.

Yu Ling and Yang Zili also appeared before the district court, and Yu Ling also appeared here initially, but both have decided not to pursue the appeal of the dismissal of their claims.

2. Defendants-Appellees

Yahoo! Inc., Michael Callahan, Ronald Bell, the Laogai Human Rights Organization, the Laogai Research Foundation, and the Estate of Harry Wu appeared before the district court and are parties in this Court.

The Yahoo Human Rights Fund Trust and Does 1-20 were also named as defendants in the district court, but did not appear.

B. Rulings under review

The rulings under review are:

1. The district court's March 30, 2018 opinion dismissing Plaintiffs' Complaint for failure to state a claim, and the accompanying order that had the effect of dismissal with prejudice;
2. The district court's September 24, 2018 opinion denying Plaintiffs' motion to remove the prejudicial effect of the district court's March 30,

2018 order, and denying Plaintiffs' motion for leave to file their Proposed SAC.

C. Related cases

There are no related cases.

/s/ Times Wang
Times Wang

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GLOSSARY

LRF	Laogai Research Foundation
LHRO	Laogai Human Rights Organization
YHRF	Yahoo Human Rights Fund
Op.	District court's initial opinion dated March 30, 2018
2nd Op.	District court's second opinion dated September 24, 2018
Complaint	Plaintiffs' amended complaint dated July 3, 2017
Proposed SAC	Plaintiffs' proposed second amended complaint

INTRODUCTION

An underappreciated risk of speaking truth to a regime like the Chinese Communist Party is the grave financial hardship that can result, especially if doing so lands one in prison. And yet, the human spirit compels that truths be spoken, for truth advances liberty, and liberty is an elemental human yearning. This case is about a noble and modest attempt, from a more hopeful time in the internet age, to acknowledge that yearning, and to advance that liberty, by alleviating the financial burdens visited on the most vocal, and thus most imperiled, modern Chinese truth speakers.

Just over a decade ago, when two such Chinese found themselves imprisoned on the strength of evidence from their Yahoo accounts, they sued the company in which they had placed their trust. When Yahoo's founder and then-CEO Jerry Yang, ethnically Chinese himself, met with their families, he saw what was at stake, and decided to not just lighten their burdens, but also the burdens of others who would risk their freedom in defense of the truth. The Yahoo Human Rights Fund was thus established, with a sum that, though a pittance when set against the wealth of the Chinese regime, in the eyes of those to whom it promised succor, was unfathomably munificent, a chance at warmth when a cold night might come.

And yet.

A decade on, to say that the Yahoo Human Rights Fund has lost its way would be generous. To say that it has been corrupted beyond recognition would be closer to

the mark. Today, what pitiful fraction remains is not known with certainty. What is known with certainty is that after spending no more than 4% of it on imprisoned Chinese dissidents in its entire history, those to whom it was entrusted said, that is enough. The rest, they said, is ours.

This appeal asks: are they right?

JURISDICTIONAL STATEMENT

The district court (Hon. John D. Bates) had diversity jurisdiction under 28 U.S.C. § 1332. Plaintiffs[1] appeal from two of its orders. The first, dated March 30, 2018, dismissed their Complaint with prejudice. The second, dated September 24, 2018, denied Plaintiffs' April 27, 2018 Rule 59(e) and Rule 15(a)(2) motions. A notice of appeal was timely filed on October 24, 2018. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Did the Complaint plausibly allege a manifestation of trust intent, such that the monies constituting the Yahoo Human Rights Fund was plausibly held by the LRF as a trustee, with legal but not equitable title to the monies?

[1] "Plaintiffs" are He Depu, Li Dawei, Wang Jinbo, Ouyang Yi, Xu Yonghai, and Xu Wanping.

"Defendants" are Yahoo! Inc. ("Yahoo"), Michael Callahan, Ronald Bell (collectively the "Yahoo Defendants"), the Laogai Research Foundation ("LRF"), the Laogai Human Rights Organization ("LHRO") and the Estate of Harry Wu ("Wu").

2. Did the Complaint plausibly allege that Plaintiffs had a special interest in the YHRF under *Hooker v. Edes Home*, 579 A.2d 608 (D.C. 1990) and *Family Fed'n for World Peace v. Moon*, 129 A.3d 234 (D.C. 2015)?

3. After dismissing the Complaint, did the district court improperly impose prejudice, and then improperly deny Plaintiffs' requests to remove the prejudice and amend the Complaint, contravening *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996)?

4. Did the Proposed SAC plausibly allege a manifestation of trust intent, as well as Plaintiffs' special interest? And did the district court err in finding the Proposed SAC futile?

STATEMENT OF THE CASE

A. In 2007 and 2008, Yahoo transferred several million dollars to the LRF in trust for the benefit of others, including for the establishment of the YHRF.

In late 2007 or early 2008, Yahoo transferred over $10 million to the LRF, a D.C.-based nonprofit corporation focused on research and advocacy led by the late Harry Wu. These sums had their origins in a lawsuit ("*Wang* Lawsuit," and the subsequent settlement, "Settlement") brought against Yahoo by two Chinese dissidents, Shi Tao ("Shi") and Wang Xiaoning ("Wang"), as well as Shi's mother Gao Qinsheng ("Gao") and Wang's wife Yu Ling ("Yu"), for allegedly turning over Shi and Wang's Yahoo user information to the Chinese government, which was alleged to have contributed to their imprisonment. Complaint, ¶ 29. After Yahoo's then-CEO

Jerry Yang ("Yang") met with Gao and Yu, who had travelled to the U.S. from China while their son and husband were in prison, he decided to not just to settle the *Wang* Lawsuit, but to go further and create a fund to help similarly situated dissidents. *Id.*, ¶¶ 33, 41. As Yahoo and Yang said publicly on November 13, 2007, not only was "a private agreement" reached with the plaintiffs, but Yahoo would also "create a separate human rights fund to provide humanitarian and legal support to political dissidents who have been imprisoned for expressing their views online." *Id.*, ¶ 41. Yahoo's stated reason was "to mak[e] sure our actions match our values." *Id.*

The LRF was not a party to the *Wang* Lawsuit and had no claims there. Nevertheless, because it was familiar with the plaintiffs and their families, as well as with Chinese human rights issues, Yahoo transferred to it both the private settlement monies, as well as the monies for the contemplated fund. *Id.*, ¶ 36. This was not in exchange for the dismissal of any LRF claims against Yahoo in the *Wang* Lawsuit, as it had none. Nor were any of these monies donations to the LRF. Instead, as the Settlement made clear, all the transfers were made to the LRF "in trust," for specified purposes. *Id.*, ¶ 36 n.2; Settlement at 2.

Two transfers of $3.2 million were "made to the [LRF]" to be "held in trust" in separate accounts for the benefit of the "Wang and Shi Families," including family members who were third parties to the settlement. Settlement at 2 (indicating that the monies' beneficiaries were not limited to the four plaintiffs but included their third-

party family members). These monies were to be "distributed by the Laogai Research Foundation to the respective families, and will not be used for any other purpose." *Id.*

A third transfer of $4.4 million was also made "in trust" to the LRF, also to be maintained separately, also for the purpose of benefiting others, including persons who, like the members of the plaintiffs' families, were third parties to the Settlement. Specifically, this $4.4 million was part of the "separate human rights fund" Yahoo and Yang had referred to, and was to be known as the Yahoo Human Rights Fund ("YHRF"). *Id.*

As with the private settlement payments, the Settlement made clear that this $4.4 million was to be used by the LRF on certain "stated purposes"—indeed "three purposes *only*." *Id.* at 2-3 (emphasis added). The first was as Yahoo and Yang had publicly described: providing aid to persons like the underlying plaintiffs—political dissidents imprisoned for dissent using Yahoo and other online services. *Id.* at 3. The other purposes included resolving legal claims against Yahoo by such dissidents, and what Yahoo elsewhere described as a "limited exception," namely funding certain of the LRF's work. *Id.*; Proposed SAC, Appendix B; Complaint, ¶ 43.

The YHRF thus initially contained $4.4 million. However, Yahoo was willing to provide additional funding, up a total of $17.3 million—"[a]ll" of which was to be "made in trust"—but only if it was satisfied that "disbursement[s] [made by the LRF] conform with the purposes of the YHR Fund." Settlement at 2. If not, Yahoo would withhold additional funding. *Id.* There is no indication it would have been entitled to

the monies' return. Yahoo also required the LRF to eventually establish a board of directors that would "have the power and authority to direct the activities of the YHR Fund." *Id.* at 6.

The provisions governing the transferred monies were set forth in the Settlement's second section, Settlement at 1-4, which was deemed "essential to the intended purpose of this Agreement." *Id.* at 10.

As is in the nature of settlement agreements, the Settlement also stated, in a section *not* deemed "essential," that the parties were entering the Settlement because they "desire[d] to resolve their disputes" finally. *Id.* at 1. And in another section also not deemed "essential," it stated that the "Agreement" was "enforceable only by the Parties hereto and their respective successors and assigns," and that "[t]here are no express or implied third party beneficiaries of this Agreement." *Id.* at 9.

B. The YHRF Board is formed and reiterates that the YHRF's "intended purposes" relate to "online dissent."

In late 2007 or early 2008, the "YHRF Board" was formed, with Yahoo executive Michael Samway as a member. Proposed SAC, Appendix B. Around that time, guidelines for the YHRF were drafted. Complaint, ¶ 49. Those guidelines stated that the "highest priority" for the YHRF's humanitarian spending be given in cases where: (1) the person is from China; (2) suffered violations of fundamental human rights, like arbitrary detention; (3) as the direct result of exercising their freedom of expression; and (4) using Yahoo's services or other electronic media, with the amount

determined by factors like length of prison sentence and family needs. Complaint, ¶ 50. By July 2008, several board meetings had been held, including at least one in person. Proposed SAC, Appendix B.

Around the same time, Yahoo transferred a second, and then a third installment, each of $4.3 million, to the LRF. These transfers were also made "in trust." At this point, the YHRF contained about $13 million.

Then, before Yahoo transferred a fourth installment, Samway emailed the LRF. In that email, Samway "re-emphasize[d]" a point "we've all discussed at the YHRF Board meetings," which was that "we need to use the Fund for its intended purposes regarding online dissent." Complaint, ¶ 51; Proposed SAC, Appendix B. Thus, Samway emphasized that although the YHRF Board had "made limited exceptions" that did not have to do with online dissent, "including supporting some of the preparatory work for the LRF Museum … [w]e should be sure to keep focused on the Fund's purpose though." *Id.* Yahoo then made a fourth and final transfer of $4.3 million in trust to the LRF.

C. Chinese dissidents imprisoned for online dissent were a distinct and preferred class of YHRF beneficiaries, but were profoundly failed by it.

Of the various permissible uses of the YHRF, one class of persons was singled out for especially preferential treatment, to be given, in the YHRF's own terms, the "highest priority": Chinese dissidents imprisoned for online dissent. Other individuals could also obtain humanitarian assistance, as could the LRF (capped at $1 million a

year, and subject to other restrictions), Complaint, ¶ 50, but Chinese dissidents came first.

That did not happen. Between 2008 and 2015, less than *4%* of the $17.3 million YHRF was spent on humanitarian purposes, while approximately $13 million (75%) was spent on unrelated purposes. Complaint, ¶ 110. And in March 2016, the LRF told Plaintiff Xu Wanping that the YHRF would not only cease giving the "highest priority" to applicants like him, but would cease giving *anyone* humanitarian assistance *at all*. Complaint, ¶ 72; Proposed SAC, ¶ 74 ("We have decided to discontinue this project."). But, the LRF indicated, it would continue to use the YHRF for its *own purposes*, namely to fund "our website …, the Laogai Museum, and public speeches," Proposed SAC, ¶ 76—notwithstanding that the YHRF had not been a gift to it. No court permission was sought or obtained for the LRF's decision. *Id.*, ¶ 77.

D. Plaintiffs filed an initial complaint, followed by the Complaint, which was an amendment as of right to correct factual errors.

In April 2017, after years of unsuccessfully trying to hold Wu and the LRF to account for failing to apply the YHRF towards humanitarian spending, Plaintiffs, all of whom are Chinese Yahoo users who have been imprisoned for online criticisms of the Chinese government, finally managed to file suit, in an attempt to vindicate the YHRF. They challenged, among other things, the LRF's decision to cease humanitarian assistance completely. But given that the YHRF's operations were confidential, Plaintiffs' initial complaint misstated certain facts about the YHRF's

inner workings. When Defendants attached previously confidential documents to their initial dismissal motions revealing as much, Plaintiffs amended as of right to correct these errors, and filed the Complaint.

This Complaint was the only one the district court considered before dismissing Plaintiffs' claims with prejudice.

E. The district court dismissed the Complaint with prejudice.

On Defendants' motion, the district court dismissed Plaintiffs' claims for failure to allege trust intent, and failure to allege the special interest in the YHRF required by trust law. The dismissal did not mention amendment, or whether dismissal was with prejudice. By operation of law, that meant it was *with* prejudice. Why prejudice was imposed was not explained.

F. The district court denied Plaintiffs' Rule 59(e) and Rule 15(a)(2) motions.

Plaintiffs then filed a Rule 59(e) motion, paired with a Rule 15(a)(2) motion, attaching the Proposed SAC. The Proposed SAC added new facts supporting both trust intent and Plaintiffs' special interest in the YHRF. Proposed SAC, ¶¶ 41, 138-144. It also attached the email from Samway described above, Proposed SAC, Appendix B, as well as a document from Yahoo stating that "the Yahoo Human Rights Fund is now being administered by Verizon," to support the Proposed SAC's proposed naming of Verizon as a defendant in light of that document. *Id.*, Appendix A.

The district court denied both motions, and this appeal followed.

STANDARD OF REVIEW

The Complaint's dismissal is reviewed *de novo*, *Rollins v. Wackenhut Servs., Inc.*, 703 F.3d 122, 126 (D.C. Cir. 2012), while the imposition of prejudice is reviewed for abuse of discretion. *United States ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1259 (D.C. Cir. 2004). The Rule 59(e) denial is reviewed for abuse of discretion, which "necessarily occurs when a district court misapprehends the underlying substantive law, and we examine the underlying substantive law *de novo*." *Osborn v. Visa, Inc.*, 797 F.3d 1057, 1063 (D.C. Cir. 2015). Further, because the district court explicitly "relie[d] in part on [the futility] of plaintiffs' proposed SAC to deny the Rule 59(e) motion," 2nd Op. at 7 n.7, to the extent the denial of the Rule 59(e) motion was based on the perceived futility of the Proposed SAC, that denial is reviewed *de novo*. *Osborn* at 1062. The denial of the Rule 15(a)(2) motion for futility is reviewed *de novo*. *Id.*

SUMMARY OF ARGUMENT

The Complaint plausibly alleged that Yahoo intended that the YHRF be held by the LRF as a trust, in which Plaintiffs had a special interest, such that a traditional rule limiting enforcement of charitable trusts to public officials should not apply. The district court's contrary conclusion erred, including by failing to apply Rule 12(b)(6) pleading standards, by impermissibly ignoring facts favoring Plaintiffs, by misunderstanding trust law, including by confusing trust intent with motive, and by

failing to follow rulings of the D.C. Court of Appeals, by which it was bound as a federal court sitting in diversity.

The district court also erred by imposing prejudice *sub silentio* without giving reasons or an explanation for that imposition, and its post-hoc explanations for doing so did not satisfy *Firestone*.

The Proposed SAC was not futile, and the district court's contrary holding erred for much the same reasons its dismissal of the Complaint erred, and also because it failed to apply Rule 12(b)(6) pleading standards to new allegations, and because it impermissibly ignored other new facts favoring Plaintiffs.

ARGUMENT

I. THE COMPLAINT WAS ERRONEOUSLY DISMISSED.

A. The Complaint plausibly alleged trust intent.

1. Trust intent is an intent to create a particular type of relationship with respect to property.

"A trust is a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention [of the settlor] to create it." *Beckett v. Air Line Pilots Ass'n*, 995 F.2d 280, 301 (D.C. Cir. 1993) (citation omitted). Its "essential elements … are a trustee, a

beneficiary and a trust property." *Id.* (citation omitted); *Cabaniss v. Cabaniss*, 464 A.2d 87, 92 (D.C. 1983) (same elements).[2]

Similarly, "[a] charitable trust is a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose." *Eychaner v. Gross*, 779 N.E.2d 1115 (Ill. 2002). "Charitable … trusts have traditionally been favorites of the law and courts will struggle to uphold them, whenever possible." *Lancaster v. Merchants Nat. Bank*, 961 F.2d 713, 715 (8th Cir. 1992) (citing *Russell v. Allen*, 107 U.S. 163, 167 (1883)). A charitable trust can be a "portion of a [larger noncharitable] trust." D.C. Code § 19-1301.03(3).

"The requirements for effective creation of a charitable trust are essentially the same as those for private trusts, except as to beneficiaries and purposes." Bogert et al., *The Law of Trusts and Trustees* § 323 (3d ed. 2017) ("Bogert"). While "[a valid] private trust must have an identifiable beneficiary or beneficiaries," a charitable trust does

[2] Put another way, a trust divides property ownership into legal and equitable title, with the former vesting in trustees and the latter in beneficiaries. *E.g.*, Am. Jur. 2d Trusts § 1 (2005) ("The fundamental nature of a trust is the division of title, with the trustee being the holder of legal title and the beneficiary that of equitable title.") "Legal title … 'evidences apparent ownership but does not necessarily signify full and complete title or a beneficial interest.' Equitable title … pertains to that which 'indicates a beneficial interest in property.'" *Bucci v. Lehman Bros. Bank, FSB*, 68 A.3d 1069, 1088 (R.I. 2013) (citing Black's Law Dictionary 1622 (9th ed. 2009)).

not. *Id.* "Instead, in creating a charitable trust the settlor must describe a purpose considered legally charitable." *Id.*

Thus, the intent to create a charitable trust is essentially the same as the intent to create a trust generally, and, importantly, does not require a charitable motive. *See id.* § 366 ("Motive of settlor unimportant. … It is immaterial [to the charitable nature of a trust] what motive induced the settlor induced to transfer the property."). That a donor is motivated by a desire to settle litigation, as the district court claimed was true for Yahoo, has little, if any, bearing on trust intent. Indeed, case law is replete with trusts arising from settlements, while Plaintiffs are aware of no authority where such a desire defeated a trust, charitable or otherwise. *E.g.*, *Beckett*, 995 F.2d at 301 (trust arising in connection with settlement); *D'Agrosa v. Coniglio*, 12 Misc. 3d 1179(A) (N.Y. Sup. Ct. 2006) (same); *Matter of Estate of Binder*, 386 N.W.2d 910 (N.D. 1986) (same); *Diamond Crystal Brands, Inc. v. Wallace*, 563 F. Supp. 2d 1349 (N.D. Ga. 2008) (same).

Nor is what might be called specific intent required; indeed, the settlor need not even know what a trust is for the requisite intent, including for charitable trusts. *See* Scott et al., *The Law of Trusts* § 2.8 (4th ed. 1987) (charitable trust intent exists "if what [the parties] appear to have in mind is in its essentials what the courts mean when they speak of a [charitable] trust[,]" even though "the parties do not call it a trust, and even though they do not understand what a [charitable] trust is[.]")

Instead, as with trusts generally, all that is required is that "[t]he conduct of the alleged settlor of the charitable trust must show an intent to create a trust and not

some similar relationship or some other effect." Bogert § 323. "Such manifestation may be by written or spoken language or by conduct, in light of all surrounding circumstances." *Cabaniss*, 464 A.2d at 91. "No particular form of words or conduct is necessary to manifest an intention to create a trust," including a charitable trust, such that the failure to use certain words cannot defeat intent. *Id.*

Nevertheless, intent in the charitable trust context sometimes poses unique problems because

> [s]ometimes a person seeks to confer benefits on society by means other than through the use of a trust, as where she pays money to another in return for the promise of the latter to make payments for the public benefit; or where she conveys property to another subject to an equitable charge in favor of some charitable object; or she dedicates land to a governmental agency to hold for charitable objects.

Bogert § 324.

Another way of conferring societal benefits implicating trust issues is when a gift is accompanied by words that "merely express the motive for his gift and not the intent that the done[e] is to hold in trust for charity, as where the donor believes that the donee on his own initiative will use the gift property for the public benefit." *Id.* A common example is a transfer to a charitable corporation, like the LRF here, which raises the question whether "[t]he intent of the donor" was "to make the donee a trustee or to make an absolute gift to the corporation." *Id.* If the transfer "used the words 'in trust,' … that language may be used to find an intent to make the corporation a trustee[.]" *Id.*

2. The Complaint plausibly alleged manifestation of intent.

Here, the manifestations of intent to create a trust in the monies constituting the YHRF, with the LRF as the initial trustee of those monies, are legion.

a. The Settlement manifested trust intent.

At the outset, the Settlement expressly used the words "in trust" to describe the way Yahoo was transferring monies to the LRF, both for the private payments for the underlying plaintiffs and their families, and for the monies devoted to the YHRF. "[T]he parties' use of the word 'trust' is to be given *great weight*[.]" *In re Strack* 524 F.3d 493 at 499 (4th Cir. 2008) (emphasis added). Indeed, Bogert states that, in the context of transfers to charitable corporation like the LRF, that if the transfer "used the words 'in trust' … in connection with the transfer, that language may be used to find an intent to make the corporation a trustee[.]" Bogert § 324. *See also Binder*, 386 N.W.2d at 911 (phrase "in trust" supported trust intent); *Glover v. Baker*, 76 N.H. 393, 83 A. 916 (1912) (same). All this strongly indicates trust intent.

Further, in transferring those monies to the LRF, Yahoo used mandatory, as opposed to precatory language, saying the monies "*shall*" be separately maintained, "*shall not* be used" for various prohibited purposes, "may be used for three purposes *only*," and with specific mechanisms to address "non-conforming disbursements." Settlement at 4-5 (emphasis added). This language also strongly indicates trust intent. *E.g.*, *Beckett*, 995 F.2d at 301 ("The mandatory 'shall' makes clear that the disputed 'sums' must be distributed to the eligible pilots, including appellants. … We therefore

reject ALPA's contention that the Consent Decree did not manifest an intention to create enforceable duties."); *Cabaniss*, 464 A.2d at 91-92 (whether language is mandatory or precatory is first factor in trust intent); *Madison County Bd. of Educ. v. Ill. Cent. R.R*, 939 F.2d 292, 304 (5th Cir. 1991) (equating mandatory language with "an intention to impose enforceable duties"); *Wilson v. Church*, 284 N.C. 284, 297 (N.C. 1973) ("The real test is whether the language is imperative or leaves the use and disposition of the property to the discretion of the donee."); *In re Strack*, at 499 (trust intent found where language was "Enterprise '*shall* segregate the proceeds from the sale and hold the same in trust for Kubota.'") (emphasis added) (modifications omitted).

The Settlement also expressly prohibits the LRF from commingling the YHRF with its own funds. Complaint, ¶ 36 n.3; Settlement at 2. Courts routinely find this supports trust intent. *E.g.*, *In re Strack*, 524 F.3d 493 at 499 (segregation of funds supports trust intent); *Racetrac Petro., Inc. v. Khan*, 461 B.R. 343, 348 (Bankr. E.D. Va. 2011) (same); *Alithochrome Corp. v. E. Coast Finishing Sales Corp. (In re E. Coast Finishing Sales Corp.)*, 53 B.R. 906, 908 (Bankr. S.D.N.Y. 1985) (same); *Quaif v. Johnson*, 4 F.3d 950, 954 (11th Cir. 1993) (similar).

Moreover, the Settlement makes clear that, although LRF would have legal title to the YHRF, the LRF would *not* have the right to spend the YHRF for its sole benefit—that is, it would *not* have *equitable* title. Notably, the Settlement prohibited the LRF from spending more than "$1 million USD of the YHRF Fund in each calendar

year" on its own operating expenses. Settlement at 3. It included monitoring provisions to police that limit and said "non-conforming disbursements" would preclude further transfers. *Id.* at 2-4. And it contemplated that the YHRF would eventually be overseen by a "Board of Directors." *Id.* at 6. None of these provisions make sense if Yahoo intended that the LRF have full equitable title and are flatly inconsistent with such an intent. This also supports trust intent.

Finally, trust intent is supported by the lack of language in the Settlement suggesting that Yahoo might ever be entitled to the return of the YHRF. *See generally* Settlement. Thus, rather than a conditional gift that reverted to Yahoo if the YHRF "were not used for the designated charitable purposes," the intent was "to impose an enforceable obligation on the [LRF] to devote [the YHRF] to those purposes." *L.B. Research & Education Foundation v. UCLA Foundation*, 130 Cal. App. 4th 171, 178 (Cal. Ct. App. 2005).

b. The surrounding circumstances manifested trust intent.

The surrounding circumstances further manifested trust intent. Well *before* fully funding the YHRF, Yahoo repeatedly, in public and in private, acted in ways indicating trust intent. Publicly, Yahoo said it wanted to go beyond just "provid[ing] financial, humanitarian and legal support" the four plaintiffs and their families through a "private agreement," but wanted to ensure "our actions match our values" by establishing "a separate human rights fund to provide humanitarian and legal

support to political dissidents who have been imprisoned for expressing their views online." Complaint, ¶ 41. This strongly indicates that though the later payments, both for the families and for the YHRF, were made to the LRF, they were made for the LRF in its capacity as *trustee*, to advance these declared purposes.

Privately, before making the final YHRF payment, Yahoo emphasized that the monies it was about to transfer were *not* for the LRF's sole or even primary benefit, but for "its intended purposes regarding online dissent," Complaint, ¶ 51. Further, Yahoo privately objected to the failure of the LRF to administer the YHRF for those purposes. Complaint, ¶ 100 n.11. Moreover, Defendants later worked to *divest* the LRF of even *legal* title to the YHRF, by creating the LHRO. Complaint, ¶ 54. These circumstances further indicate that Yahoo never intended to vest the LRF with both legal and equitable title in the YHRF.

In sum, the Settlement's provisions, as well as the surrounding circumstances, veritably *prove* an intent to make the YHRF a trust, with the LRF as trustee, holding legal but not equitable title, much plausibly allege such an intent, which is all that is required at this stage.

3. The district court's conclusion to the contrary was erroneous.

And yet, against all this, the district court dismissed for lack of trust intent.[3] First, the district court brushed aside the Settlement's use of the words "in trust" as not "talismanic." Op. at 6. But Plaintiffs never claimed they were, and in any event the question is *not* whether they are "talismanic," *i.e.*, whether they alone prove a trust. Rather, it is whether they can *reasonably be inferred* to support it. As seen above, the answer is indisputably yes. The district court's casual dismissal of their significance, giving them no weight whatsoever, was improper, and indeed inexplicable, especially at this stage. *Cf. In re Strack*, 524 F.3d at 499 (4th Cir. 2008) ("[T]he parties' use of the word 'trust' is to be given great weight[.]")[4]

[3] Defendants opening briefs did not argue lack of a manifestation of intent, and Plaintiffs responded to such arguments on sur-reply.

[4] Nor could the cases cited by the district court justify disregarding these words, especially at this stage. Both were decided after significant discovery and even trial, and on utterly inapposite facts. *See In re Ames Dep't Stores, Inc.*, 144 F. App'x 900, 901-02 (2d Cir. 2005) and *In re Ames Dept. Stores, Inc.*, 274 B.R. 600 (Bankr. S.D.N.Y. 2002) (decided under Rule 52 after submission of "joint stipulated facts and deposition transcripts" from eight witnesses, involving an agreement that did not prohibit commingling, rampant actual commingling that was not objected to, and history of conduct indicating debtor-creditor, rather than trustee-beneficiary, relationship, such that court did not give effect to agreement's use of the word "trust"); *Meima v. Broemmel*, 117 P.3d 429, 444-46 (Wyo. 2005) (Supreme Court of Wyoming noted that the words "trust," "in trust," and "trustee" supported trust intent, but because there was "conflicting evidence" below, including evidence that the purported settlor/beneficiary fraudulently induced the purported trustee into inserting these into a series of real estate lease-purchase agreements, it was bound by trial court decision).

The district court then found fault in the fact that the Settlement "does not purport to be a trust document." Op. at 7. But it cited no authority for this negative inference. And given that a writing is not even required for trust intent, to draw this inference is barely reasonable, much less permissible at this stage, when a neutral inference was reasonably available. This is particularly true given that "essential" *sections* of the Settlement *do* "purport" to make payments "in trust."

Similarly, the district court cited against Plaintiffs the Settlement's failure to use the words "charitable" or "charitable beneficiaries." *Id.* Again, it provided no authority for this negative inference. And given that parties do not even have to know what a charitable trust is or have a charitable motive to create one, *supra* at 13, such a negative inference was not reasonable, much less permissible.

The district court then drew a negative inference from the Settlement's language disclaiming "third-party beneficiaries to this Agreement." Op. at 7. But given that this language came in a section not deemed "essential" by the parties, while detailed, carefully negotiated sections that *were* so deemed unambiguously said third parties *were* to benefit from the transferred monies (in trust, if not in contract), this negative inference was also unreasonable. It suggests the private settlement payments entrusted to the LRF for the plaintiffs' families also were not trusts or were only for the benefit of the four named plaintiffs and no one else, an untenable outcome.

An equally (indeed more) reasonable inference is that this language was *neutral* with respect to trust intent and was directed at preventing third parties from enforcing

the "Agreement" in *contract*. *Banneker Ventures, LLC v. Graham,* 798 F.3d 1119, 1129 (D.C. Cir. 2015) ("A complaint survives a motion to dismiss even if there are two alternative explanations, one advanced by the defendant and the other advanced by the plaintiff, both of which are plausible.") As a lengthy, complex contract attempting to accomplish several things, the Settlement's inclusion of such boilerplate is utterly unremarkable, and case law is replete with disputes over similar boilerplate. *In re Stone Webster, Inc.*, 558 F.3d 234, 241 (3d Cir. 2009) (contract disclaimer of third-party beneficiaries ineffective); *India.com, Inc. v. Dalal*, 412 F.3d 315, 319 (2d Cir. 2005) (disclaimer effective). But given that such language does not even automatically preclude a *contract* claim, there is little basis to say it weighs against, much less precludes, a *trust* claim. Certainly, the district court cited no authority, and Plaintiffs are aware of none.[5] Put simply, it is reasonable, and thus required, to infer that this language was neutral with respect to trust intent. That is doubly true here, where such language was not even "essential," while the trust language *was*, by the Settlement's own terms.

Finally, the district court reasoned that the Settlement indicated that Yahoo's *true* "intent" was its "desire to resolve [its] disputes," which the district court claimed,

[5] Indeed, there is contrary authority. *Tiber Const. Co. v. Crossland Sav., FSB*, No. CIV.A. 83-2484, 1987 WL 15776, at *3 (D.D.C. Aug. 6, 1987) (disclaimer foreclosed third-party plaintiff from claiming under contract, but not from claiming fiduciary obligations under equity).

citing no authority, "plainly is not a manifestation of an intent to create a trust." Op. at 8. That fails as a matter of trust law because it confuses Yahoo's *motive* for creating the YHRF with Yahoo's *intentions* about the type of property relationship that would govern. Trust intent is about the latter, not the former, and neither the district court, nor Defendants below, have explained what property relationship could possibly have been intended if *not* a trust, despite Plaintiffs' repeated invitations. *See* ECF No. 39 at 2; ECF No. 47 at 9 n.2; Proposed SAC, ¶ 41. Indeed, this fundamental confusion of Yahoo's motives with trust intent permeates the decisions below, and alone justifies reversal.

It is thus unreasonable to infer a lack of trust intent from a desire "to resolve finally all disputes arising from the 2007 *Wang* litigation." The district court cited no case finding a similar desire incompatible with trust intent, and in cases with trusts arising from settlements, *none* mention a desire to finally resolve disputes—inherent in *all* settlements—as affecting intent. *See supra* at 13.

This inference also impermissibly fails to credit Plaintiffs' contrary *factual* allegation that Yahoo said the YHRF was "separate" from the "private agreement" to end the *Wang* Lawsuit, established to "mak[e] sure our actions match our values." It also fails factually because Yahoo gave the YHRF to an organization that was not suing it and had no claims to relinquish in return. Thus, even if "trust motive" or "charitable trust motive" were valid concepts, and they are not, it is at least plausible that the YHRF was motivated by a humanitarian impulse to create a charitable trust.

And it also fails as a factual matter because this language was also not deemed "essential" to the Settlement by the parties, while the trust language *was*. Thus, the district court impermissibly drew a negative inference from this language, which is at best neutral with respect to trust intent.[6]

Finally, and perhaps most egregiously, the district court erred by ignoring completely the mandatory nature of the language governing YHRF spending, as well as the prohibition on commingling. Given that the D.C. Court of Appeals placed "the imperative, as distinguished from precatory, nature of the words used" first in a list of factors indicating intent, the district court's failure to infer intent from such language—or to address it at all—defies Rule 12(b)(6).

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[6] The district court may have found tension in a settlor's (Yahoo) "intention" (a misnomer in this context) to end litigation, with the Yahoo Defendants being later being sued as trustees. If so, that reflects another misunderstanding of trust law, because it conflates Yahoo's intention to make the LRF a trustee (satisfying trust intent), with its intention to make *itself* one (unnecessary for trust intent). The two are unrelated.

In other words, whether Yahoo is a trustee has nothing to do with trust intent. Plaintiffs have never claimed that entrusting the YHRF to the LRF, or anything else in the Settlement, made Yahoo anything other than a settlor. Indeed, had Yahoo left the YHRF's management to others, Plaintiffs would have little basis to claim it was a trustee at all.

To be sure, Plaintiffs allege the Yahoo Defendants later *became* trustees, on the theory that they later meddled in trust affairs, but that has nothing to do with trust intent. Indeed, a finding of trust intent does not preclude a finding that they are *not* trustees. In fact, Yahoo's opening dismissal brief focused on this latter argument, *not* lack of trust intent. *See* ECF No. 20-1 at 15-16.

Put simply, Yahoo's desire to end the *Wang* Lawsuit is perfectly consistent with trust intent, and the district court's contrary view misunderstands trust law.

At bottom, it is difficult to understand the district court's dismissal for lack of trust intent as anything other than deeply flawed, based on a fundamental misunderstanding of trust law, and inconsistent with applicable pleading standards. Indeed, Plaintiffs have found no case where an alleged trust was found wanting for lack of trust intent on remotely similar facts, much less dismissed at the *pleading* stage, and the district court cited none. The dismissal should be reversed.

B. The Complaint plausibly alleged Plaintiffs' special interest in the YHRF.

1. Rule 12(b)(6) applies, not Rule 12(b)(1).

At the outset, whether a plaintiff has a "special interest" in a charitable trust giving it a valid cause of action is often discussed in terms of "standing." Despite that terminology, this question does not implicate a federal court's subject-matter jurisdiction—*i.e.*, its power to adjudicate the case in which a special interest is asserted. *See Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 89 (1998) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case.") (emphasis in original).

Yet, perhaps because Article III case-or-controversy standing was also disputed below, the district court appears to have applied Rule 12(b)(1) to the special interest issue. *See* 2nd Op. at 2 ("The Court granted defendants' subsequent motions to dismiss the trust-based claims under Federal Rules of Civil Procedure 12(b)(6) and

12(b)(1).”). This was error, especially since it may have led the district court to apply more rigor to Plaintiffs’ special interest allegations than was permitted.[7]

2. Under *Hooker* and *Family Federation*, the Complaint plausibly alleged a special interest in the YHRF.

The traditional rule is that charitable trusts can only be enforced by public officials, with an exception made for those with a “special interest.” But the D.C. Court of Appeals follows a “modern trend” recognizing that strict application of the traditional rule in cases that do “not present the dangers the rule was intended to guard against” is not only senseless, but “may be *inimical* to trust purposes[.]” *Hooker v. Edes Home*, 579 A.2d 608, 613 (D.C. 1990) (emphasis added). And, under a recent D.C. Court of Appeals case, “the key consideration” is whether “finding a justiciable interest in a given plaintiff would contravene the considerations underlying the traditional rule.” *Family Fed’n for World Peace v. Moon*, 129 A.3d 234 (D.C. 2015). As a federal court sitting in diversity, the district court was bound to apply this law. *Metz v. BAE Sys. Tech. Solutions & Servs. Inc.*, 774 F.3d 18, 21 (D.C. Cir. 2014).

In *Family Federation*, which involved a D.C. nonprofit corporation, the D.C. Court of Appeals said it would not make sense to strictly apply the traditional rule

[7] As for Article III, the district court found it satisfied by Plaintiff Xu Wanping. While Plaintiffs the dispute that the other Plaintiffs did not satisfy Article III, in large part because they have a “special interest” as discussed here, the larger point is that this very result demonstrates that special interest under trust law does not implicate subject-matter jurisdiction.

because of the "exponential expansion of charitable institutions," which it concluded "justifies a reasonable relaxation of any rule limiting enforcement to a busy [D.C.] Attorney General." *Id.* at 244. *See also* Mary Grace Blasko, et al., *Standing to Sue in the Charitable Sector*, 28 U.S.F. L. Rev. 37, 48-52 (1993) (cataloguing similar problems).

Here, the main relevant institutions are also located in the District, *see* Complaint, ¶¶ 24-25, and the same concern about the burdens on the D.C. Attorney General apply. Thus, *Family Federation* calls for a "reasonable relaxation" of the traditional rule here.

So do other considerations. Where, as here, the special interest is a claimed status as a potential beneficiary, the D.C. Court of Appeals in *Hooker* identified two interrelated concerns underlying the traditional rule. First, given that charities inherently benefit the "community at large," the lack of sufficiently definite criteria would make it too easy for "individuals who might benefit incidentally," lacking any interest "distinguishable from the public's," to file expensive, recurring lawsuits. 579 A.2d at 612, 614. Second, the lack of such criteria would make it too difficult for courts to identify with confidence which individuals might have distinct, justiciable interests in a trust that has "a large and constantly shifting benefited class[.]" *Id.*

Here, neither concern is implicated by letting Plaintiffs sue. To begin, being imprisoned for exercising one's freedom of expression is a threshold requirement. Achieving such a status requires extraordinary personal sacrifice, naturally reducing the risk of recurring litigation. Further reducing that risk is that persons meeting this

definition will tend to be outside the U.S. and less able or likely to sue in U.S. courts. And it is not so vague as to invite difficult-to-adjudicate claims of beneficiary status, further reducing concerns about recurring litigation and lack of justiciability.

As *Family Federation* stated, these policy issues are "the key considerations" in deciding whether to let Plaintiffs sue. And because these policy concerns plausibly point in Plaintiffs' favor, further relaxation of the traditional rule is justified.

Indeed, that these considerations favor letting this case proceed is evidenced by the fact that, despite years of complaints about the LRF's failures to apply the YHRF to humanitarian spending, and after exceedingly strenuous efforts by a variety of interested individuals, including Plaintiffs, to get someone—anyone—to do something about those failures, would-be beneficiaries have managed to bring only a single lawsuit—this one. That their efforts have been so unceremoniously dismissed, without even a chance to proceed to discovery, and with *claim-preclusive judgment* being entered against them, even after undisputedly alleging a profound breach of the YHRF's humanitarian purpose, cannot be reconciled with the letter or spirit of *Hooker* or *Family Federation*.

Hooker also held that the traditional rule's concerns are mitigated where a member of a "class of potential beneficiaries" that "is sharply defined" and "limited in number" challenges something more than "an ordinary exercise of discretion on a matter expressly committed to the trustees." 579 A.2d at 614. In *Hooker*, Margaret Edes's 1905 will created "'a free Home for aged and indigent Widows, residing, or to

reside,' in that part of the District of Columbia then known as Georgetown." *Id.* at 609. The trustees later added, via by-laws, other "criteria beyond those set out in the will," including that residents of "Edes House" "must be in good health," and a preference that they "have been for at least five years immediately preceding the date of application residents of Georgetown." *Id.*

When the trustees sought court approval to close the Edes House and transfer the trust assets to an institution about a mile away, certain potential residents of the Edes House sued. Given that the new institution would continue to "select residents according to criteria set out" in the will, their complaint was not that the relocation would deprive them of potential beneficiary status (as here). Instead, it was merely that the relocation would "change the face of Edes." *Id.* at 615.

The D.C. Court of Appeals allowed them to proceed. For the purposes of the special interest analysis, the court searched for any narrowing criteria it could reasonably find, ultimately identifying six. The first four were from the Edes will, which said residents had to be "(1) female, (2) indigent, (3) aged, and (4) widowed." *Id.* at 615. But under these criteria, any old, poor, widow in the world was a potential beneficiary. Still, because the trustees had added other narrowing criteria—that she "'be in good health,'" and preferably to "have been for at least five years immediately preceding the date of application a resident of Georgetown"—the court considered those also. *Id.* Yet, even then, the Edes House could still theoretically benefit all poor, healthy, widows worldwide and anyone who might *become* such persons. *Id.* (not

disputing defendants' contention that "all women" were theoretically beneficiaries). Nevertheless, the court concluded that for the purposes of the special interest analysis, there were "definite criteria narrowing the instant class and identifying its present members" with sufficient particularity. *Id.*

Here, the Settlement—analogous to the Edes will—states that the YHRF's first purpose is "to provide humanitarian and legal assistance primarily to persons in or from the People's Republic of China who have been imprisoned for expressing their views through Yahoo! or another medium." Settlement at 3. The settlor emphasized this purpose, repeatedly, publicly and privately, and specified that the "medium" be "online." Complaint, ¶¶ 41, 43, 51, 104, 106, 107; *see also* Proposed SAC, Appendix B; *In re Duroskо Marital Trust*, 862 A.2d 914, 921 (D.C. 2004) (""The intent and purpose of the settlor is the law of the trust."") (quoting *Albright v. United States*, 308 F.2d 739, 743 (5th Cir. 1962). And the YHRF's governing documents—analogous to the by-laws in *Hooker*—state that "highest priority" should be given to: (1) persons from China; (2) who suffered violations of fundamental human rights, such as arbitrary imprisonment; (3) as the direct result of the exercise of the person's freedom of expression; (4) using Yahoo's services or other electronic media, with the amounts to be informed by factors such as length of the sentence. Complaint, ¶ 17.

As in *Hooker*, then, reasonably narrowing criteria exist for a class composed of: (1) Chinese persons, (2) imprisoned, (3) for dissent, (4) online. Such a class is plausibly

"sharply defined" and "limited in number,"[8] and clearly satisfies *Hooker*, especially viewing the facts in Plaintiffs' favor (as *Hooker* itself did, *see Hooker*, 579 A.2d at 615 n.12 (finding plaintiffs "probably satisfy" the Georgetown residency criteria "if facts are taken in a light most favorable to them")).

Under *Hooker*, however, even a member of such a class cannot automatically sue. To address the traditional rule's concerns about recurring litigation, the court must also "consider the nature of the challenge to the trustees' acts in deciding whether to apply the special interest exception." *Hooker*, 579 A.2d 614.

In *Hooker*, the main challenged act was the relocation of the home that did not even threaten plaintiffs' status as potential beneficiaries. *Id.* at 610-11. *Id.* But because it would irrevocably change the character of the institution, and "raise[d] substantial questions about the compatibility of this action with the settlor's intent," putting "the Trustees, and all present and future residents of the Edes Home … at a crossroads they are unlikely to face again," the court held that the traditional rule should give way to the plaintiffs' attempt to vindicate the trust. *Id.* at 616. As the court concluded, "when, as here, the Trustees decide upon a basic change affecting the interests of the entire class of intended beneficiaries—and one alleged to be inconsistent with the

[8] Much ado was made below about China's large population and its government's repressiveness, a bitter irony given that those facts were cited to deprive Plaintiffs—Chinese victims of that repression—of relief here. In all events, those facts cannot justify rejecting an inference of a "limited" class or compel an inference of a "limitless" one, especially at this stage.

settlor's will—the value of denying representatives of the class access to judicial process to challenge that decision is greatly diminished." *Id.* at 617.

No truer words could describe the situation here. The alleged trustees have decided on a profound change, alleged to be inconsistent with the settlor's intent in creating the YHRF, affecting the interests of the entire class of intended beneficiaries—namely, the termination of their beneficiary status altogether. That is far more drastic an action than in *Hooker*, and one the parties are unlikely to face again. Thus, it can hardly be doubted that the D.C. Court of Appeals would conclude that here, as in *Hooker*, "the value of denying [Plaintiffs] access to judicial process to challenge that decision is greatly diminished."

Accordingly, under D.C. law, the Complaint plausibly alleges Plaintiffs' special interest in the YHRF.

3. The district court's opinion to the contrary was erroneous.

a. The district court failed to consider the traditional rule's policies.

Despite all this, the district court dismissed the Complaint for lack of a special interest. But in so doing, the district court inexplicably failed to grapple with Plaintiffs' arguments about the traditional rule's policy considerations. Given *Family Federation*'s clear statement that such issues constitute "the *key* consideration" in the analysis, it is difficult to conceive how that failure satisfies D.C. law. Indeed, had a D.C. Superior Court similarly failed to consider these arguments, despite a litigant's reliance on

Family Federation, the D.C. Court of Appeals almost certainly would reverse. *Metz*, 774 F.3d at 22 ("Our duty, then, is to achieve the same outcome we believe would result if the District of Columbia Court of Appeals considered this case.") (citation omitted). And any D.C. court considering the traditional rule would doubtless follow *Family Federation*'s reasoning that the "exponential expansion of charitable institutions justifies a reasonable relaxation of any rule limiting enforcement to a busy [D.C.] Attorney General," which the district court also failed to do.

b. The district court's dismissal based on its interpretation of the beneficiary class was erroneous.

The district court also erred by finding a lack of a special interest based on its construction of the relevant beneficiary class as: "(1) individuals persecuted for expressing their views 'online' through 'Yahoo *or another medium*,' … (2) is 'primarily,' but not exclusively, limited to individuals in China, … and (3) is not temporally limited at all," Op. at 10 (emphasis in original), which it deemed too broad. It also erred by basing its dismissal on the inference that, because of reports of the Chinese government's increasing repressiveness, "the beneficiary class is expanding[.]" Op. at 11.

Taking these issues in reverse, it violated Rule 12(b)(6) in the extreme for the district court to rely on the truth of various news reports not referenced in the Complaint to infer that the "class is expanding." *Hurd v. District of Columbia Gov't*, 864 F.3d 671, 686 (D.C. Cir. 2017) (improper to "rely on [documents outside the

pleadings] for the truth of the matter asserted" at the motion to dismiss stage). And as discussed, because special interest under trust law has nothing to do with subject-matter jurisdiction, this move cannot be justified by Rule 12(b)(1) either.

Moreover, as Plaintiffs argued, even if these reports could be considered for truth, a plausible inference is that increased repression will *deter* dissent, *shrinking* the beneficiary class. ECF No. 32 at 22 n.24 (plausible "that any increased CCP persecution will work, resulting in *fewer* challenges, *fewer* imprisonments, and *fewer* persons meeting the Trust criteria") (emphasis in original). The district court gave no reason for rejecting this inference, and it is dubious to resolve such a complex factual dispute at the pleading stage, particularly against Plaintiffs. The district court thus erred.

As for the district court's construction of the relevant beneficiary class, that must be rejected for several reasons. Regarding the first item, the district court gave no reason for rejecting the "imprisonment" criteria and replacing it with "persecution." To be sure, its later opinion addressing the special interest issue said it was rejecting other limiting criteria because "the relevant expression of an intent to benefit a particular, defined, group remains the language in the *Wang* Settlement creating the YHRF." 2nd Op. at 11. But that would still fail to explain the substitution, since the Settlement uses the word "imprisoned," not "persecuted." This incoherency alone justifies reversal. As for the district court's later contradictory explanation, that fails too, as discussed below.

As for the second and third item, though they are at least easier to comprehend, they too must be rejected. These items, as the district later explained, supposedly defeat special interest because the YHRF's humanitarian beneficiaries are "neither exclusively limited to Chinese individuals nor temporarily limited." 2nd Op. at 11. But in so reasoning, the district court inserted two requirements into the special interest analysis that are not just contradicted by *Hooker*, where the criteria *also* were "neither exclusively limited to [Georgetown residents] nor temporally limited," but illogical, as discussed below.

(i) Under *Hooker*, class definition is not limited to the four corners of the initial trust instrument.

As discussed, the district court later claimed that "the relevant expression of an intent to benefit a particular, defined, group remains the language in the *Wang* Settlement creating the YHRF." 2nd Op. at 11. But why that should be, when its own initial opinion went beyond that language, was unexplained, and unsupported by any authority. Indeed, *Hooker* expressly *rejected* an argument that because certain criteria did not appear in the Edes will, they were irrelevant. Specifically, the defendants argued that being in "good health" was "unrelated to Margaret Edes' intent" because it did not appear therein, sought to dismiss on that basis. *Hooker*, 579 A.2d at 616. The court rejected that argument, saying it was enough that the trustees themselves used that criteria in running the trust. *Id.* at 617. And for similar reasons, the court considered it for the purposes of identifying narrowing criteria. *Id.* at 615.

Here, Plaintiffs rely on analogous governing documents, as well as the settlor's own public and private statements of intent, *id. at* 616 (challenged relocation "raise[s] substantial questions about the compatibility of this action with the settlor's intent"), and the district court failed to explain why it would not follow *Hooker* and consider these facts as well. Thus, it erred, and the four corners of the Settlement cannot control the special interest analysis under *Hooker*.

(ii) The district court's exclusivity requirement contradicts *Hooker* and is illogical.

The district court's opinions also effectively announce a rule that the proposed class must be the *exclusive* beneficiaries of a charitable trust. Indeed, the district court's later opinion suggests that Plaintiffs are required to "plausibly allege that Yahoo intended to benefit *only* 'Chinese persons . . . imprisoned [in China] . . . for exercising their freedom of expression . . . online.'" 2nd Op. at 12 (emphasis added).

But this flies in the face of *Hooker*, which found a special interest in members of a class who were *not* the trust's exclusive beneficiaries. In particular, the proposed class included criteria relating to Georgetown residency, but that criteria was *waivable*, not *exclusive*. Yet, for purposes of "narrowing the instant class," the *Hooker* court took that non-exclusive criteria requirement into consideration. *Hooker*, 579 A.2d at 615.

Put simply, *Hooker* and other special interest cases make clear that there is *no* exclusivity requirement, and that it is enough that the class is *distinct*, and entitled to a *preference*, *Alco Gravure, Inc. v. Knapp Found.*, 64 N.Y.2d 458, 465 (N.Y. 1985) ("a

particular group of people has a special interest in funds held for a charitable purpose … when they are *entitled to a preference* in the distribution of such funds") (emphasis added); *State ex Rel. Nixon v. Hutcherson*, 96 S.W.3d 81, 84 (Mo. 2003) ("The test to determine whether such an interest is special enough to confer standing is whether the person 'is entitled to receive a benefit under the trust that is not merely the benefit to which members of the public in general are entitled,' … [and] [a] person … may have standing if *he or she is entitled to a preference* under the terms of the trust") (emphasis added), which Plaintiffs' proposed class indisputably satisfies, since it is entitled to the "highest priority." The district court's exclusivity ruling thus has no basis in law.

It also has no basis in logic. As an initial matter, a trust, including a charitable one, can have more than one beneficiary (in which case the trustee must treat them impartially). D.C. Code § 19-1308.03 ("If a trust has 2 or more beneficiaries, the trustee shall act impartially[.]"). Given that, the exclusivity rule makes no sense. Suppose a charitable trust has two classes of beneficiaries: indigent, elderly widows in Georgetown, and indigent, elderly widows in Dupont Circle. It cannot be that if the trustees wanted to stop helping Georgetown widows (arguably violating their duty of impartiality), the fact that the charity is not *exclusively* for their benefit means they are categorically precluded from challenging that decision. Yet that is what the district court's rule would compel.

The district court's rule leads to strange results another way, namely by allowing preferred beneficiaries to challenge *smaller* acts that harm only them, but not *larger* acts that harm preferred and non-preferred beneficiaries alike. Suppose a charity is meant to benefit female students with autism in Foggy Bottom "primarily," but not exclusively, such that female students with autism worldwide could also apply. Under the district court's reasoning, were the trustees to end the charity (as here), and a Foggy Bottom student sued, the district court would ask how many female students with autism there are worldwide, and presumably dismiss for lack of a special interest. But if the trustees decided merely to eliminate the *preference* for Foggy Bottom students, and the same student sued to preserve that preference, surely the question would be how many female students in *Foggy Bottom* have autism, and the suit would likely proceed.

This result is passing strange. What basis in law or logic is there for the Foggy Bottom student being allowed to challenge the *less* egregious trustee action, while being prohibited from challenging the *more* egregious one? None was identified below, and Plaintiffs think none exists. Indeed, *Hooker*'s reasoning that the more extraordinary the challenged measure, the less the traditional rule should apply, strongly suggests the *opposite* result should hold.

Note that Plaintiffs are *not* arguing that the word "primarily" means nothing, or that any conceivable humanitarian beneficiary of the YHRF has a special interest that would let them sue here. Thus, for example, an imprisoned North Korean dissident,

or a Chinese one imprisoned for street protests, may have been able to receive humanitarian assistance before the LRF it, but because nothing about the YHRF singles out North Koreans or non-internet users for special treatment, their special interest claims would likely fail (though, given *Hooker*'s solicitousness, it would not be surprising if a D.C. Court of Appeals held otherwise). But this is neither of those more difficult cases, and to say that the word "primarily" means that even people like Plaintiffs, who meet the YHRF's most exacting criteria, cannot proceed, merely because others could also benefit, defies logic, not to mention *Hooker*.

Letting Plaintiffs sue also makes eminent sense. The basic rationale of *Hooker* is that where a relatively specialized charity threatens fundamental change inconsistent with the settlor's intent, there is no good reason to prevent the charity's specialized beneficiaries from challenging that change in court, and indeed to do so, and to say that recourse can only be found in the D.C. Attorney General, is "inimical to trust purposes." Indeed, the more specialized the charity, the less likely public officials like the D.C. Attorney General are to enforce it. And that is even truer where, as here, the harm is most acutely felt far outside the District.

(iii) The district court's temporal limits requirement also contradicts *Hooker*, and also is illogical.

The district court also criticized the lack of temporal limits. Defendants in *Hooker* made a similar argument that "the class of potential beneficiaries includes 'all women' and so is limitless, because any woman could [in the future] possibly become

poor and widowed." *Hooker*, 579 A.2d at 615. Indeed, the *Hooker* court effectively conceded that point by not disputing it. *Id.* Nevertheless, it declined to apply the traditional rule on that basis, instead focusing on the class's "*present members*." *Id.* (emphasis added). Here too, the district court should have focused on the class's present members. Its failure to do so contravenes *Hooker*.

A rule requiring temporal limits is also illogical. It is in the very nature of charitable trusts to benefit an indefinite posterity. Indeed, they are largely exempt from the rule against perpetuities for that reason. *E.g.*, 15 Am. Jur. 2d Charities § 19, at 26 (2000) ("A gift for charitable purposes of permanent interest and benefit to the public may be perpetual in its duration and is not within the rule against perpetuities."). The district court's proposition that the lack of temporal limits in a charitable trust—*i.e.*, perpetuity—defeats a special interest therein, is thus deeply contradictory. Indeed, who creates a charitable trust and then imposes a time limit on its benefits? Plaintiffs submit that few would, and that the lack of temporal limits cannot defeat a special interest in a charitable trust.

At bottom, given the facts and reasoning of *Hooker* and *Family Federation*, it is difficult to see how the district court's opinion can be squared. One imagines that if the *Family Federation* court were hearing this case, it would ask, how is this outcome justified given the traditional rule's policy considerations? And one imagines that if the *Hooker* court were, it would ask, did we not decide this case already?

For the above reasons, the district court's holding that the Complaint failed to allege Plaintiffs' special interest in the YHRF should be reversed.

II. THE IMPOSITION OF PREJUDICE WAS AN ABUSE OF DISCRETION, AND THE DENIAL OF THE RULE 59(E) MOTION TO REMOVE PREJUDICE WAS ERRONEOUS.

A. The district court erred by imposing prejudice.

"The standard for dismissing a complaint with prejudice is high," and requires that *before* dismissing with prejudice, a trial court must "'determine[] that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.'" *Belizan v. Hershon*, 434 F.3d 579, 584 (D.C. Cir. 2006) (quoting *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996)).

In *Belizan*, this Court noted that, "[i]n its order, the district court neither adverted to *Firestone* nor undertook the inquiry required by that decision." 434 F.3d at 584. Because of this "fail[ure] adequately to explain, with reference to the standard we set in *Firestone*, why it dismissed Belizan's complaint with prejudice," this Court vacated that order. *Id.* Here, too, the district court's initial opinion "neither adverted to *Firestone* nor undertook the inquiry required by that decision," and this "failure adequately to explain … why it dismissed [Plaintiffs'] complaint with prejudice" was an abuse of discretion. That abuse was even more pronounced given that prejudice was imposed *sub silentio*, without even a statement disallowing amendment. *Cf. Rollins*, 703 F.3d at 131 (finding *Firestone* satisfied despite no impossibility determination where district court said amendment was "futile" and that "the plaintiff has not

indicated that she will be able to plead sufficient facts to state a claim for relief."). The order should be vacated.

B. The post-hoc explanations given for imposing prejudice do not meet the *Firestone* standard, and the Rule 59(e) motion should have been granted.

Then, when Plaintiffs sought to remove the imposition of prejudice for failure to conduct *Firestone*'s impossibility analysis, the district court accepted Defendants' argument that it *implicitly* determined that amendment would have been impossible, given the nature of Plaintiffs' allegations. 2nd Op. at 4-7.

On the facts here, this reasoning fails because it put Plaintiffs in an unduly disadvantageous procedural posture bordering on Kafkaesque. Had the district court explained its reasons for imposing prejudice, Plaintiffs could at least have addressed them intelligently in their Rule 59(e) motion, or on appeal. But because it did not, Plaintiffs had to proceed in the dark, unsure of what precisely the district court intended or why. Specifically, Plaintiffs had to choose between filing a potentially premature appeal that would waste judicial resources and time,[9] or filing a Rule 59(e) motion to remove the prejudice (without any meaningful understanding of the

[9] Had Plaintiffs appealed, the lack of any reasoning for imposing prejudice would have hindered intelligent appellate review, as happened in *Belizan*, 434 F.3d at 584. None would even have known whether prejudice was based on the special interest issue (which presumably was not the reason, as it is unmentioned in the district court's second opinion), or the trust intent issue (as it turns out was the reason).

reasons behind it), combined with a Rule 15(a)(2) motion for leave to amend (in the hopes that their less-than-fully-informed Rule 59(e) motion would first be granted).

Plaintiffs chose the latter.[10] When the district court rejected their motion, Plaintiffs learned for the first time that, of the two grounds for dismissal, it was trust intent that had apparently justified prejudice. Plaintiffs also learned the reasons for the first time, namely that the "rejection of the possibility that the *Wang* Settlement established any trust is inextricable from, and fatal to the premise of, plaintiffs' trust claims," such that "no set of additional facts can feasibly cure the FAC such that it would survive Rule 12(b)(6)." 2nd Op. at 6.

With respect to the district court, however, this was at best a post-hoc justification for what cannot reasonably be described as anything other than an unexplained initial decision to dismiss with prejudice, one that deprived Plaintiffs of any meaningful ability to argue against such a harsh result. As such, that initial decision could not have satisfied *Firestone*, and the district court's denial of the Rule 59(e) motion based on the contrary conclusion should be reversed.

[10] The briefing on the Rule 59(e) portion illustrates the confusion arising from the district court's *sub silentio* imposition of prejudice, with lengthy disputes about how to characterize the district court's opinion, and whether and which of the two grounds for dismissal formed the basis for prejudice.

C. This is not an ordinary Rule 59(e) denial and it should not be afforded deference.

The Rule 59(e) denial should also be reversed because it was expressly based in part on the supposed legal insufficiency of the Proposed SAC, despite the Proposed SAC plausibly stating both trust intent and a special interest in the trust, as discussed below. Indeed, the facts here strongly suggest that overall review of the denial of the combined Rule 59(e) and Rule 15(a)(2) motion should be conducted on the liberal amendment policy of Rule 15(a)(2). The Seventh Circuit has reasoned that "[w]hen the district court has taken the unusual step of entering judgment at the same time it dismisses the Complaint, the court … must still apply the liberal standard for amending pleadings under Rule 15(a)(2)." *Runnion*, 786 F.3d at 518-19 (7th Cir. 2015).

This makes sense because when a court dismisses the very first complaint it passes on with prejudice, a plaintiff's only option for curing pleading deficiencies runs through Rule 59(e), a strict procedure, depriving it of a chance to benefit from the more liberal Rule 15(a)(2). To apply strict Rule 59(e) standards in this scenario is to allow a court to "nullify the liberal right to amend under Rule 15(a)(2) by entering judgment prematurely at the same time it dismisses the complaint that would be amended," and to allow "one error by the district court (prematurely entering a final judgment on the basis of futility) [to] insulate another error (erroneously denying leave to amend on the basis of futility) from proper appellate review." *Id.* at 520, 522.

Here, the procedural facts cry out even more for review on a liberal standard. In *Runnion*, the district court had at least "supported its decision with a finding that amendment would be futile," based on its interpretation of a statute. *Id.* Thus, when plaintiffs filed their Rule 59(e) motion, they knew both the court's view on amendment, and its reasoning. Here, when Plaintiffs filed their Rule 59(e) motion, they did not even have a *finding*.

For these reasons, the denial of the Rule 59(e) motion should be reversed.

III. THE PROPOSED SAC WAS NOT FUTILE.

A. The Proposed SAC plausibly alleged trust intent.

Because the Proposed SAC contains all the Complaint's facts, it plausibly states trust intent for the reasons above. It also adds an allegation that the prohibition on commingling has been complied with over the years. Proposed SAC, ¶ 41. This bolsters trust intent. *E.g., Shea v. Goldstein*, 234 B.R. 214, 222 (Bankr. D. Mass. 1999) (similar conduct "indicative of a trust" as it acknowledged lack of full equitable title). The district court failed to consider this fact, which was error.

The Proposed SAC also explained that before the YHRF, the LRF had no program providing humanitarian assistance, such that it could not have been intended to support the LRF generally. Proposed SAC, ¶ 41. In *Family Federation*, the court cited with approval the proposition that "when a contribution or disposition is made to an institution for a specific purpose such as to support medical research or to establish a scholarship fund in a certain field of study, then such a specifically targeted gift or

contribution creates a charitable trust of which the institution is the trustee." 129 A.3d at 247 n.20 (D.C. 2015) (internal quotation marks, modifications, and citations omitted).

Plainly, the YHRF was such a contribution, and supports trust, as opposed to gift, intent. And yet, the district court not only declined to draw this reasonable inference, it distinguished *Family Federation* on factually inaccurate grounds. Specifically, it claimed that Yahoo was unlike the donor there because "Yahoo contracted to pay LRF *in exchange* for settling its claims in the *Wang* litigation." 2nd Op. at 9 n.9 (emphasis in original). Putting aside that that is not inconsistent with trust intent, and putting aside that Bogert states that a charitable trust can be created "by the making of a contract by the settlor in favor of a trustee," Bogert § 324, the deeper problem is that, as discussed, the LRF had *no claims to settle*, such that the YHRF could not plausibly have been "in exchange" for them.

More fundamentally, the district court rejected the Proposed SAC because "[c]ritically, … [it] fail[s] adequately to allege any intention to create a trust as opposed to an intention to settle claims and confer a benefit on society. But 'sometimes a person seeks to confer benefits on society by means other than through the use of a trust.'" 2nd Op. at 9-10 (quoting Bogert § 324). But this reasoning simply repeated the fundamental trust-law errors described above. Put simply, to say that Yahoo's "intention [was] to settle claims and confer a benefit on society by means other than through the use of a trust" is a non sequitur with respect to the ownership status of

the YHRF, and is only "opposed" to "an intention to create a trust" by force of *ipse dixit*.

It also demands an answer to the question: what "means other than a trust," then? Plaintiffs have repeatedly pointed out that the only "other" means actually described by the quoted Bogert section were: (1) a conditional gift; (2) an equitable charge; and (3) a land grant to the government. *See* ECF No. 39 at 2; ECF No. 49 at 9 n.8. Nevertheless, the district court did not conclude that the YHRF was even *plausibly* any of these "other" means, much less so *obviously* so as to justify dismissal. *E.g.*, *Arar v. Ashcroft*, 585 F.3d 559, 617 (2d Cir. 2009) ("[A]lternative explanations [must be] so compelling, that the claim no longer appears plausible.").

Lest there be any doubt, the YHRF is not even *plausibly* one of these. It plainly was not a land grant to the government. It plainly was not an equitable charge, because it was not transferred to the LRF subject to a certain, specified sum thereof being payable to a second person (who would then hold a lien on that sum), and without further duties imposed on the LRF as to how to deal with those sums. *Cf. Arenofsky v. Arenofsky*, 29 N.J. Super. 209, 218 (N.J. Super. App. Div. 1954); *In re Estate of Stephano*, 602 Pa. 527, 534 (Pa. 2009). And, as discussed above, it plainly was not a conditional gift, to be returned to Yahoo if the condition was not satisfied. And it was emphatically not a gift.

At bottom, while it is true that "sometimes a person seeks to confer benefits on society by means other than through the use of a trust," it is surely also true that

sometimes the means *is* a trust. And here, taking the Proposed SAC's facts as true, and drawing all reasonable inferences in Plaintiffs' favor, the conclusion that *this* time, the means was *plausibly* a trust simply cannot be disputed.

B. The Proposed SAC plausibly alleged a special interest in the YHRF.

With respect to special interest, in addition to all of the Complaint's allegations, the Proposed SAC also alleged that the number of people who would have been given the "highest priority" for humanitarian assistance from the YHRF, had it not been terminated, was between 800 and 1,200 individuals. Proposed SAC, ¶ 141. Plaintiffs explained that they arrived at this number by searching terms related to internet use on a U.S. government database of Chinese political prisoners ("CECC database"), yielding 633 records. *Id.*, ¶ 140 & n.10. Plaintiffs noted that the results included Plaintiffs themselves, such that the search terms it used were a plausible indicator of high-priority eligibility. *Id.* Plaintiffs then alleged that "internet-savvy individuals [are] likely to have contacts with individuals and organizations outside China" that report to the CECC database, providing further assurance that the database did not significantly undercount the "highest priority" individuals. *Id.*, ¶ 141.

But Plaintiffs then took *another* step, and multiplied the 633 search results by 1.33 to 2, to account for the possibility that the database only contained half or three-quarters of the present "highest priority" individuals, a significant concession against their own interests. *Id.*

Plaintiffs then alleged that the number of people who received humanitarian funding *at all* (and not just the "highest priority" individuals) had declined over the years, and included the below table:

LRF Tax Year	Number of Reported Recipients of Humanitarian Assistance Program Aid
2008	0
2009	40
2010	40
2011	20
2012	9
2013	11
2014	6
2015	6
2016	0

Id., ¶ 142.

Plaintiffs then alleged that "[e]ven these figures are likely inflated," because of various inconsistences described elsewhere in the Proposed SAC. *Id.*, ¶ 143. Plaintiffs then alleged that the number of applicants had declined as well. *Id.*

Finally, Plaintiffs cited data that the number of "'human rights defenders' in China who were 'deprived of liberty for at least five (5) days, and those known to have been tortured or treated inhumanely in retaliation for their rights advocacy work, regardless of length of detention,' declined from 968 cases in 2014 to 704 cases in 2015." *Id.*, ¶ 144.

These additional facts put Plaintiffs' special interest beyond doubt, especially at this stage. *See Hooker*, 579 A.2d at 611, 615 (class of "hundreds, if not thousands," with suggestion of declining numbers).

C. The district court again inserted unsupported requirements into the special interest analysis.

The district court nevertheless found the Proposed SAC futile because "the relevant expression of an intent to benefit a particular, defined, group remains the language in the *Wang* Settlement," which benefits a class that is "is neither exclusively limited to Chinese individuals nor temporally limited." 2nd Op. at 11. As discussed above, this reasoning fails, and the Proposed SAC cannot be futile on this basis.

D. The district court improperly rejected the Proposed SAC's factual allegations regarding class size.

Finally, the district court held that "even if the SAC did plausibly allege that Yahoo intended to benefit" Plaintiffs' proposed class, "such a beneficiary class remains 'limitless and uncertain,' … as it is both temporally boundless and reliant on the estimate of an organization that itself acknowledges its information is incomplete and unreliable." 2nd Op. at 12.[11] Again, requiring temporal boundaries contradicts both *Hooker* and logic.

[11] The district court also described the Proposed SAC as alleging "a 'conservative estimate' of 800 to 1,200 individuals meeting those criteria." 2nd Op. at 11. But putting it this way suggests Plaintiffs meant the true number is likely higher, when in fact Plaintiffs *inflated* the number (against their interests).

As for the criticism of Plaintiffs' reliance on the CECC database, that also fails. To reiterate, Rule 12(b)(6) governs the special interest inquiry, and the district court was bound to apply its plausibility standard while drawing reasonable inferences in Plaintiffs' favor, which it failed to do. Instead, it seemed to impermissibly apply "close scrutiny" under Rule 12(b)(1). Given that Plaintiffs bent over backwards to account for the potential incompleteness of the database, and alleged other reasons it was not significantly underinclusive of the proposed class, it is reasonable—and thus required—to infer that this sufficiently corrects for any issues that might exist with it. The district court's unexplained failure to do so was error, to say nothing of its resolution of complex fact issues against Plaintiffs at this stage.

The district court's error was compounded by its failure to consider allegations about the declining number of beneficiaries and applicants, and of reported imprisoned Chinese dissidents. The district court's initial opinion noted that similar facts supported special interest in *Hooker*, Op. at 10, yet when presented with these facts—which are unrelated to the supposedly "unreliable" database—in the Proposed SAC, it inexplicably ignored them.

For these reasons, the Proposed SAC was not futile, and the district court's contrary conclusion should be reversed.

CONCLUSION

For the reasons above, the district court's dismissal of the Complaint should be reversed; its order imposing prejudice should be vacated; its Rule 59(e) denial should be reversed; its Rule 15(a)(2) denial should be reversed; and this Court should remand with instructions to proceed on the basis of either the Complaint or the Proposed SAC.

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Respectfully submitted,

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Dated: April 15, 2019

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