STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

In the Matter of the OTTO BREMER TRUST	Court File No. 62-C9-61-315222 Judge: Robert A. Awsumb **ORDER GRANTING PETITION TO REMOVE TRUSTEE LIPSCHULTZ AND DENYING PETITION TO REMOVE TRUSTEES REARDON AND JOHNSON**

This matter came on for an evidentiary hearing before the undersigned District Court Judge, Robert A. Awsumb. Assistant Attorneys General Carol Washington, Katherine Moerke, Lindsey Lee, and Collin Ballou and Special Assistant Attorney General Christopher Burns from Henson & Efron appeared on behalf of the Office of the Minnesota Attorney General ("AGO") with Attorney General Keith Ellison attending occasionally. Attorneys Michael V. Ciresi, Jan M. Conlin, Katie Crosby Lehman, Mathew Korte, Ciresi Conlin LLP, appeared on behalf Otto Bremer Trust ("OBT") Trustees Brian Lipschultz, Charlotte Johnson, and Daniel Reardon. Other appearances of counsel for various witnesses and non-parties were as noted in the record.

The trial was held to address the allegations in the AGO's Petition for Removal seeking the removal of the three OBT Trustees and the defenses and counterclaims of the Trustees. The Petition includes various allegations related to Trustees' compensation, general administration, human resources, Trust expenses,

grantmaking, and the manner of sale of its Bremer Financial Corporation ("BFC") stock. The Petition specifically does not seek a determination on whether Trustees have authority under the Trust Instrument to sell any of its BFC shares.

Testimony began on September 27, 2021 and continued through November 23, 2021. Over the course of twenty days of trial, the Court heard testimony from more than two dozen witnesses and received more than 500 exhibits. In addition to the testimony from the three OBT trustees, the Court heard testimony from former attorneys from the Attorney General's Office, past and present OBT employees, executives from BFC, representatives from charitable community organizations, attorneys, accountants, and outside investors. The parties also presented testimony from expert witnesses relating to fiduciary duties and other relevant topics. The parties thereafter agreed to supplement the record and submit proposed findings, conclusions, and orders, which were submitted by January 10, 2022. Closing arguments were heard on January 31, 2022.

This Order does not detail all the evidence or arguments submitted by the parties. Rather, the findings and conclusions contained below are intended to identify or summarize the most salient issues that have a direct bearing on the Court's conclusions and the ultimate outcome. The Court has heard, read, and considered all the evidence and arguments relating to all claims and defenses, even if not specifically mentioned in this Order.

Based on the evidence submitted, together with all the briefings, arguments, and proceedings herein, the Court makes the following:

FINDINGS OF FACT

I. Historical Background of the Otto Bremer Trust

1. Otto Bremer was a German immigrant who became a prominent banker and community leader in Minnesota. In the 1920s he held ownership in more than fifty banks throughout Minnesota, Montana, North Dakota, Wisconsin, and Iowa. In 1943, Bremer created a holding company for his investments in community banks called the Otto Bremer Company. In 1944, he established a charitable trust named the Otto Bremer Foundation, now the Otto Bremer Trust ("Trust" or "OBT"). OBT is a charitable trust organized under the laws of the State of Minnesota. A historic chronology of Bremer and the foundation is included in the record as TX 866 at OBT_00001071-76.

2. Otto Bremer originally funded the foundation with shares of common stock of Otto Bremer Company, which was created as a holding company for Bremer's stock in the banks. Following his death in 1951, his residual estate was transferred to the foundation to be used for charitable purposes. This included his remaining ownership interest in Otto Bremer Company, which is now Bremer Financial Corporation ("BFC"). BFC is a privately held corporation organized under Minnesota law with its headquarters in St. Paul, Minnesota. BFC operates as a regional financial institution, and through its wholly owned subsidiary, Bremer Bank, National Association ("Bremer Bank"). Bremer Bank branches are located in Minnesota, North Dakota and Wisconsin. The history of the ownership structure between the foundation, OBT and BFC is discussed below.

3. The Trust is an express trust governed by a trust instrument (the "Trust Instrument"). Also called an Agreement and Declaration of Trust, the Trust Instrument is identified as Trial Exhibit 1 ("TX 1"). By its terms, it is to be construed and enforced under the laws of the State of Minnesota. TX 1 ¶ 21. Its principal place of administration is in St. Paul, Minnesota. The Trust is perpetual in nature. TX 1 ¶ 2. The Trust Instrument was amended periodically before Bremer's death. A complete history of the legal filings relating to the history of the Court's supervision of OBT going back to 1961 is included in the official court records, of which the Court takes judicial notice.

4. While the Trust has no named beneficiaries, it identifies examples of specific charities and charitable purposes which Otto Bremer desired to fund. These are set forth in Paragraph 3 of the Trust Instrument. TX 1 at ¶ 3. Under Paragraph 3, the Trust's express "Purposes" are:

> (a) To relieve poverty in the City of St. Paul, Minnesota;
> (b) To establish scholarships and assist the poor and deserving children in securing education in any University or College

situated in the State of Minnesota and to aid such Universities or Colleges to increase their efficiency;

(c) To provide or assist in providing physical training in schools and public grounds;

(d) To promote citizenship by aiding such movements as the Boy Scouts, Girl Scouts, and Camp Fire Girls;

(e) To advance religion by aiding in the construction or maintenance of churches, aiding in the upbuilding of church choirs and music and the supply of music;

(f) To aid orphan and baby's homes conducted as charitable institutions;

(g) To promote the public health by aiding in the construction, enlargement and maintenance of hospitals and by aiding them to purchase new surgical and other appliances used in the treatment and study of human diseases;

(h) To aid or provide for the study of causes or cure or treatment of diseases and other human ailments;

(j) To aid persons suffering from catastrophe that effects a section of a community and by reason of which a call for aid to the Red Cross of the public is made;

(k) The beneficiaries under foregoing Section (b) and (j) inclusive shall be limited to those persons, institutions, corporations and municipalities, states or sub-divisions who are residents of or have their situs in the State of Minnesota, or Wisconsin, or North Dakota or Montana.

TX 1 at ¶ 3.

5. Otto Bremer funded the Otto Bremer Trust in 1944 and since then the Trust has granted more than $800 million to organizations in Minnesota, Wisconsin, North Dakota, and Montana to further the Trust's mission and its charitable purposes. TX 1; TX 1487 at 5; Tr. 3764:16-24 (Lipschultz). Trustees have authority and discretion under the Trust Instrument's Paragraph 5 to determine the methods and processes for carrying out the Trust's charitable purposes and have used that discretion and authority to make distributions. TX 1 at ¶ 5 ("Discretion in Trustee to Choose Purposes"); Tr. 792:06-18 (Johnson); Tr. 3853:09-19, 3921:14-3922:10 (Gary); 2838:17-2839:7, 2839:17-22 (Marion).

6. The original asset value of the Trust in 1944 was approximately $2 million. After Bremer's death in 1961, the assets in the Trust exceeded $4 million. This has grown in value to over $2 billion. Tr. 3764-3765 (Lipschultz). In the first 68 years, the Trust issued approximately $400 million in IRS qualified grants and distributions. In the past nine years the current Trustees have distributed nearly $500 million to charities through various charitable programs, with the number of

distributions increasing in each successive year from about $36 million in 2012 to over $71 million in 2020. Tr. 3764:16-24; 3762:09-12 (Lipschultz); Tr. 781:16-18, 817:05-818:02 (Johnson); TX 1873. Tr. 119:18-21(Suzuki); TX 1904.

7. The Trust has grown its grantmaking each year and met the IRS requirement to distribute at least 5% of the fair market value of its overall assets. Tr. 780:15-782:04 (Johnson); Tr. 3764:25-3765:9, 3762:9-3764:12 (Lipschultz); TX 3101; TX 3102; TX 1468 (2012 From 990PF); TX 893 (2013 Form 990PF); TX 1470 (2014 Form 990PF); TX 7 (2015 Form 990PF); TX 8 (2016 Form 990PF); TX 10 (2017 Amended Form 990PF); TX 11 (2018 Amended Form 990 PF); TX 12 (2019 Amended Form 990PF); TX 1873 (2020 Annual Report). Since the Trust's inception, the Trust has issued thousands of grants benefitting the people and institutions of Minnesota, Wisconsin, North Dakota, and Montana, the geographic scope defined by the Trust. Tr. 586:16-587:06, 608:19-20 (Johnson); Tr. 1816:07-13 (Lipschultz). The Trust is also engaged in impact investing with low interest loans called program-related investments ("PRIs"). Tr. 1716:23-1717:20 (Dziuk); Tr. 3757:20-3758:06 (Lipschultz).

8. The vast majority of the value of Trust assets consists of its ownership of BFC stock. As of 2020, approximately twelve percent, or $234 million, of the Trust's corpus is comprised of non-BFC assets. TX 1746.

II. Selection of Initial Trustees and Successor Trustees

9. Through the Trust Instrument, Otto Bremer determined that the Trust would be managed by individual trustees and not corporate trustees. Tr. 2757:19-2758:1 (Marion); Tr. 3766:18-3767:01 (Lipschultz). The Trust Instrument limits the total number of trustees to three. Tr. 3856:02-3857:04 (Gary); TX 1 at ¶ 8 ("There shall not be more than three acting Trustees at any one time").

10. Otto Bremer, as Settlor, initially named people close to him to serve as trustees. He originally selected two trustees, stepbrother Paul G. Bremer as "Original Trustee," and banker George J. Johnson as "Co-Trustee." In 1949, after the death of Paul G. Bremer, Otto Bremer appointed Lawrence A. Carr to succeed him as trustee. Carr was the President of Bremer-owned Jacob Schmidt Brewing Company and Secretary-Treasurer of Otto Bremer Company. Bremer also appointed Bernard H. Ridder to succeed George J. Johnson. Ridder was at the time President of Otto Bremer Company, President of Northwest Publications, Inc. (publisher of Saint Paul Dispatch-Pioneer Press) and Secretary of the Jacob Schmidt Brewing Company. Also in 1949, Bremer appointed attorney Samuel Lipschultz as a co-trustee. It is reported that Samuel Lipschultz drafted the Trust Agreement for Bremer. He died in 1960 and appointed his son William H. Lipschultz his successor. These appointments were all confirmed by this Court by order dated January 30, 1961.

11. The Trust Instrument also determines the process for selection of successor Trustees. The Trust Instrument grants to the trustees the power of appointing successor trustees as detailed in Paragraph 8 of the Trust Instrument. In other words, Bremer assigned the discretion of appointing successive trustees to those he originally selected to act as trustees and specifically authorized them to pick their own successors. TX 1 at ¶ 8; Tr. 3954:18-3956:12 (Gary); Tr. 3765:10-3768:9 (Lipschultz).

12. Each of the current Trustees comprise the third generation of successor trustees appointed pursuant to the Trust Instrument since Otto Bremer's death in 1951. Each current Trustee has family ties to the initial trustees appointed by Otto Bremer or their successors. Tr. 1209:16-1211:21 (Reardon); Tr. 622:04-06, 624:06-11 (Johnson); Tr. 3722:11-3723:21, 3765:25-3766:05 (Lipschultz).

13. Charlotte Johnson has been a Trustee the longest of the three current Trustees. She has served in her role administering the Trust for over 30 years. Tr. 780:06-14 (Johnson). Johnson was appointed in 1991 by her father, Gordon Shepard. Her appointment as Trustee was confirmed by Order of this Court dated November 8, 1991. TX 1768. Gordon Shepard, an attorney, served 26 years as trustee after he was appointed by Bernard H. Ridder upon his resignation in 1965. Ridder, as noted above, was appointed directly by Otto Bremer as one of the initial trustees. Tr. 624:06-14 (Johnson); Tr. 587:19-20, 622:04-06, 624:06-11 (Johnson); TX 1768. When Johnson first became a Trustee in 1991, the Trust had three employees. Tr. 779:04-780:05. The Trust now employs 16 staff members not including the Trustees. Before her appointment thirty years ago, she had experience serving a variety of non-profits, including in leadership positions. Tr. 621:18-622:03 (Johnson). Johnson has particular interest in grantmaking and the grantmaking process. Tr. 589:11-18, 783:10-785:04 (Johnson).

14. Daniel Reardon has been a Trustee for 26 years. He was formally appointed to replace his father, Robert J. Reardon, in 1995 after his father's death. Tr. 1103:25-1104:06 (Reardon). Daniel Reardon's appointment was confirmed by this Court by Order date July 18, 1995. Prior to his death, Robert Reardon served as a trustee for 27 years while also occupying the position of Chairman and CEO of Otto Bremer Company (now BFC). Robert J. Reardon succeeded his father-in-law, Lawrence A. Carr (Trustee Reardon's grandfather), as trustee in 1968. Tr. 1209:16-22 (Reardon). Carr was Otto Bremer's longtime personal accountant and businesses associate. Tr. 1211:11-19 (Reardon). Prior to his appointment, Daniel Reardon interned at BFC, had his own investment career, and observed his father navigate the changing tax laws that impacted the Trust from 1969 through 1989. Tr. 1209:23-1212:19 (Reardon). He continues to have particular interest in the Trust's investments and activity as a bank holding company.

15. Brian Lipschultz was appointed as a Trustee in 2012, succeeding his father, William Lipschultz, after the elder Lipschultz's 51-year tenure as trustee. Tr. 3722:11-16 (Lipschultz); TX 1543. His appointment as Trustee was confirmed by Order of this Court dated November 26, 2012. William Lipschultz was appointed in 1961 after the death of his father, Samuel Lipschultz. Tr. 3722:15-16, 3723:10-18 (Lipschultz). Samuel Lipschultz was an attorney and close friend to Otto Bremer. He reportedly drafted the Otto Bremer Trust Instrument before becoming one of the initial trustees. Tr. 3722:20-3723:04 (Lipschultz). Prior to his appointment, Brian Lipschultz had significant experience in private industry., leading a software company, and served in executive finance and general management roles for several large companies. He has particular interest in modernizing the Trust policies and practices, managing the investments, and increasing the use of Program Related Investments ("PRIs"). Tr. 3726:12-23 (Lipschultz).

16. The Trust Instrument provides conditions and requirements for appointment of successor trustees, but does not direct or describe the person, nature, or qualities of a successor. TX 1 ¶ 8. Current Trustees are not beneficiaries of the Trust or related to Otto Bremer. They are all related to the people Otto Bremer chose to administer the Trust. The Trust Instrument does not designate that only the original trustees' descendants should serve as trustees. Tr. 3814:5-13 (Lipschultz); Tr. 626:22-627:8 (Johnson). Trustees have each designated successor trustees in the event they become unable to serve. Reardon has named a successor and alternate successor, who are both Reardon's heirs. Tr. 1104:24-1106:6 (Reardon); TX 628. Johnson has named family members as emergency successors. Tr. 624:21-626:21 (Johnson); TX 621.

17. Lipschultz has conditionally named a cousin as his successor in the event he is no longer able to serve as a trustee. Tr. 1946:5-1947:2 (Lipschultz); TX 832. On multiple occasions in the Civil Investigative Demand ("CID") investigation and litigation, the AGO asked Trustees to identify all named potential successor Trustees. Lipschultz initially claimed he had named none. A few weeks before trial and in support of a motion argument, Trustees' counsel attached a copy of Lipschultz' successor appointment redacting the successor name. Lipschultz refused to provide an unredacted copy of his successor appointment because he was worried about potential publicity effecting his nominated successor. Tr. 1866:16-1867:3 (Lipschultz). Lipschultz identified the successor for the first time on the witness stand.

18. Although the AGO argues that Trustees may not be the best qualified people for their positions, and that their selection of successor trustees is improper, their appointments were made in accordance with the terms of the Trust and approved by the court some 10, 20, and 30 years ago. Likewise, with the exception of the apparent deception by Lipschultz, the designations of emergency and conditional successors are in no way violative of the Trust Instrument or the Settlor's intent.

III. Powers Granted to Trustees Under Trust Instrument

19. General Powers. Trustees are empowered with full authority over the means by which to carry out the charitable purposes of the Trust. TX 1 at ¶ 7. Paragraph 7 of the Trust Instrument generally provides that the trustees "shall have all powers necessary or appropriate to carry out the purposes of the Trust." *Id.*; Tr. 3853:21-3854:07 (Gary). Trustees' powers over the Trust's property expressly include the power to:

- Manage the Trust's property;
- Operate the Trust's property;
- Maintain the Trust's property;
- Improve the Trust's property;
- Lease, sell, or exchange the Trust property;
- Mortgage or pledge the Trust property;
- Borrow money on the credit of the trust estate; and to
- Apply the Trust's money, funds, or property as necessary or expedient to care for, protect, or improve the trust property or any part thereof.

TX 1 at ¶ 7.

20. Settlor's Intent. Trustees are guided by the intent of settlor Otto Bremer as set forth in the Trust Instrument. *See, e.g.*, Tr. 586:24-587:18 (Johnson); Tr. 3848:08-11 (Gary). They alone have decision-making authority and responsibility for all Trust matters, and they manage and operate the Trust, and maintain Trust assets, by exercising their discretion in accordance with the Trust Instrument. TX 1 at ¶8(a) ("manage, operate, [and] maintain . . . trust property"); Tr. 793:04-08, 794:14-16 (Johnson); Tr. 1212:25-1213:03 (Reardon); Tr. 3727:09-3728:13, 3744:08-3745:13, 3727:23-3728:02 (Lipschultz); Tr. 2838:17-21 (Marion).

21. Operational Discretion Granted. The Trustees manage, operate, and maintain Trust assets in accordance with their discretion and direction as stated in the Trust Instrument. TX 1; *see also* Tr. 791:16-793:16 (Johnson); Tr. 1212:25-1213:03 (Reardon); Tr. 3744:8-3745:13 (Lipschultz).

22. Unlimited Discretion to Choose Purposes. The Trust Instrument also addresses how trustees may carry out the charitable purposes. It does so by granting broad discretion to the trustees. To fulfill his Trust's charitable purposes, Otto Bremer vested his trustees with "full and unlimited discretion" to choose which purposes to devote aid. TX 1 at ¶ 5. Specifically, the Trust Instrument provides:

> The Trustee shall have the full and unlimited discretion, power and authority to choose the purposes, objects or institutions that shall from time to time receive aid from the trust or be its beneficiaries from among those who qualify under paragraph 3 and shall also have the full and unlimited discretion, power and authority to choose or determine or direct or prescribe

> the method of choosing or determining the person or persons, class or classes of persons who shall receive aid from the trust from among those who qualify under Paragraph 3 except that no discrimination shall be made as to race or religion.

TX 1 at ¶ 5; *see also, e.g.*, Tr. 792:06-18 (Johnson); Tr. 3852:24-3853:19 (Gary); Tr. 2788:15-2789:8 (Marion).

23. Liability of Trustees. The Trust Instrument provides that trustees are protected from personal liability for any losses or costs that are not attributable to an act of dishonesty by the trustee or to the willful commission of an act known to be a breach of trust. TX 1 at ¶ 12; *see also* Tr. 3855:05-21, 4088:18-23 (Gary) (describing trust provision as providing protection from inadvertent missteps). The Trust also allows Trustees to seek out and act upon the opinion or advice of counsel and specifically permits them to act on such opinion or advice without risk of liability for any loss resulting to the trust estate. TX 1 at ¶ 12.

24. Trustee Compensation. The Trust Instrument establishes the terms of trustee compensation. It provides that trustees may receive "compensation for [their] services in the management of the trust estate not to exceed four per cent of the cash income of the trust estate" and that "[s]uch compensation may be divided among the acting trustees as they desire." TX 1 at ¶ 13. This compensation "shall be in full for all ordinary services rendered by the trustee; but for extraordinary services the trustee shall have reasonable additional compensation." *Id.* Thus, Trustees are expressly empowered to receive compensation for management of the Trust. TX 1 at ¶ 13; *see also, e.g.*, Tr. 642:25-643:12 (Johnson); Tr. 1202:16-19 (Reardon); Tr. 2783:4-11 (Marion). Specifically, Trustees are authorized to receive compensation up to four percent (4%) of the cash income of the Trust estate, divided at their discretion amongst themselves. TX 1 at ¶ 13; Tr. 1202:12-19, 1309:3-16 (Reardon); Tr. 3942:4-43:1 (Gary). The Trustees have not been compensated at or near the 4% level and have not asked to be compensated at that level. Tr. 2131:04-2135:24, 2173:04-2174:19 (Smith); TX 3117 at 6, 16. The Court reviewed and approved Trustee compensation annually or periodically through the year 2016.

25. Trustee Reimbursement. The Trust Instrument also provides that trustees shall be repaid all sums "justly, necessarily or appropriately expended to carry out the purposes of the trust, and the protection and management of the trust property". TX 1 at ¶ 13 This specifically includes agent and attorneys' fees "as in the judgment of the trustee shall at any time be needed about or concerning the trust and the trust property and any and all charges, costs, expenses and attorney's fees incurred or suffered by reason of being a party to any action or proceeding by reason of being such trustee, save one rising from willful neglect." *Id.*; *see also* Tr. 3914:07-21, 4088:11-23 (Gary).

26. Trust Investments—Non-BFC Holdings. The Trust Instrument vests trustees with broad discretion to invest Trust property. TX 1 at ¶ 16. The Trust distinguishes between the Trust's BFC stock holdings (originally referred to as the Otto Bremer Company stock holdings) and non-BFC investments. Regarding the investment of the Trust's non-BFC assets, trustees possess "full power to invest and reinvest the trust estate in any manner in [their] absolute discretion, acting in good faith, and they shall not be confined to the usual investments which trustees, by mere virtue of their office are authorized to make..." TX 1 at ¶16. The only limitations regarding investment of such assets relate to real estate, mortgages, and certain businesses, however, those assets may be permitted if they qualify within the purposes of Paragraph 3. TX 1 at ¶ 16.

27. Trust Investments—BFC Holdings. As it relates to the Trust's BFC stock, the Trust Instrument directs Trustees to "retain the shares of stock in the Otto Bremer Company" (now known as BFC) unless certain conditions exist "even though the same may be unproductive of income or be of a kind not usually considered suitable for trustees to select or hold, or be a larger proportion in one investment than a trust estate should hold…" TX 1 at ¶ 16; *see also, e.g.*, Tr. 3849:11-3850:19 (Gary) (explaining how such language protects trustees from prudent investor rules that would otherwise compel them to diversify such trust assets). Notwithstanding the foregoing, the Trust Instrument empowers trustees with discretion to sell the Trust's BFC stock "if, in the opinion of the Trustee, it is necessary or proper to do so owing to unforeseen circumstances." TX 1 at ¶ 16; *see also* Tr. 757:21-758:23 (Johnson); Tr. 3851:13-3852:11 (Gary). The Trust specifically states that "the opinion of the Trustee shall not be questioned by reason of the fact that the trustee may personally own stock in said company." TX 1 at ¶ 16.

IV. Supervision and Regulation of Trust and Trustee Actions

28. The Trust is a private foundation exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Service Code. The Trust is registered as a Minnesota charitable trust with the AGO under the Supervision of Charitable Trusts and Trustees Act, Minn. Stat. §§ 501B.33–.45. It is subject to ongoing court supervision under the Minnesota Trust Code. *See* Minn. Stat. § 501C.0205. The Trust Instrument was amended periodically before Bremer's death. A complete history of the legal filings relating to the history of the Court's supervision of OBT going back to 1961 is included in the official court records, of which the Court takes judicial notice.

29. The Trust is regulated or supervised in various capacities by four different government entities: the Minnesota Second Judicial District Court, the Minnesota Attorney General, the Federal Reserve ("FRB"), and the Internal Revenue Service ("IRS"). Tr. 662:06-10 (Johnson); Tr. 1804:05-21 (Lipschultz). In addition, each trustee is independent and provides oversight for the actions of the

other two. Tr. 3947:16-18 (Gary); Tr. 644:2-645:11, 833:7-25 (Johnson); Tr. 1213:14-1214:7 (Reardon); Tr. 2807:1-2808:17 (Marion); TX 1442 at p. 22.

30. Because the Trust owns BFC, a financial services company, OBT is also a bank holding company under the Bank Holding Company Act of 1956, 12 U.S.C. § 1841 *et seq.*, and is regulated by the Federal Reserve.

31. Court Supervision. The Trust and its trustees are supervised by this Court as a charitable trust under the Supervision of Charitable Trusts and Trustees Act, Minn. Stat. §§ 501B.33–.45. It is also subject to ongoing court supervision under the Minnesota Trust Code. *See* Minn. Stat. § 501C.0205.; TX 1164C; Tr. 284:23-288:06 (Gillaspey); Tr. 1015:23-25 (Berens). As part of the Trust's supervised administration, the Trustees are required to file an account of their administration with the Court every year, and at least every five years the Trustees' administration is subject to more fulsome review. TX 1164C; Tr. 284:23-288:06 (Gillaspey); Tr. 1015:23-25 (Berens); Tr. 1131:22-1132:02 (Reardon). The Court record includes these detailed filings and orders relating back to 1961. The most recent five-year review was conducted by the Court in 2017, and the Court approved the Trust's administration during the preceding 5-year period. The evidence establishes that Trustees have continued to submit timely annual accounts for fiscal years 2017, 2018, 2019, and 2020, with proper notice to Petitioner's office. Tr. 773:13-15 (Johnson); *see also, e.g.*, TX 1746 (2020 Annual Account); Index No. 31 (2017 Annual Account), No. 37 (2018 Annual Account), and No. 53 (2019 Annual Account).

32. Attorney General Supervision. The Trust and its trustees are supervised by this Court and the Minnesota Attorney General. The Trust provides regular filings and notices to the AGO for matters related to its supervision, including copies of court filings and the Trust's annual 990-PF IRS submissions. TX 1876 at RFA No. 72; Tr. 929:07-16 (Berens). The Trust is also subject to civil investigations through the use of CIDs consistent with the AGO's statutory authority. *See* TX 1876 at RFA No. 71.

33. The Attorney General is granted power to conduct investigations that are reasonably necessary pursuant to the Supervision of Charitable Trusts and Trustees Act (Minn. Stat. § 501B.33–501B.45, the "Act"). The Attorney General has conducted civil investigations or CIDs relating to OBT on two occasions in recent years. In 2014, for example, Petitioner conducted a CID "to determine if the Otto Bremer Foundation or its trustees have violated Minn. Stat. §§ 501B.33 *et seq.*, the Supervision of Charitable Trusts and Trustees Act, to determine whether property held for charitable purposes has been properly administered, including as it relates to the compensation paid to the trustees and the oversight and management of the organization." TX 638 (2014 CID); Tr. 1190:23-1191:19 (Reardon); Tr. 3933:15-3935:10 (Gary). No corrective action or directives resulted from that investigation. Tr. 1194:22-1195:04, 1304:05-21 (Reardon); Tr. 2815:14-2816:02 (Marion); Tr.

3933:15-3935:10 (Gary). Trustees were also subject to a second CID in 2020. Tr. 1112:14-16 (Reardon). During the eight-month CID, over 60 document requests and 48 interrogatories were served, resulting in substantial volumes of documents and information. Trustees and Trust employees were extensively interviewed under oath, resulting in over 1,500 pages of testimony.

34. Federal Reserve Bank Regulation and Oversight. In addition to the Court and the Petitioner's office, the Trust is also regulated by the Federal Reserve as a bank holding company. Tr. 286:20-287:13 (Gillaspey); Tr. 662:08-10 (Johnson). As part of the Federal Reserve's oversight, Trustees provide quarterly and annual financial statements to the Federal Reserve, along with regular internal and external audit reports, court filings, and meeting minutes unrelated to grantmaking. *See, e.g.*, TX 1857; Tr. 1178:15-21 (Reardon); Tr. 1625:11-23, 1533:08-15 (Thompson). Trustees are also subject to supervisory examinations and provide additional information as periodically requested by the Federal Reserve. *See, e.g.*, Tr. 1908:19-23, 1909:08-11, 1923:18-1924:06, 3739:21-3740:19 (Lipschultz).

35. IRS Regulation. The Trust is also regulated as a private foundation by the IRS. It is exempt from federal income tax pursuant to the Internal Revenue Code, 26 U.S.C. § 501(c)(3), and must file annual 990-PFs subject to the IRS's regulatory authority. TX 1164C; Tr. 284:23-285:13 (Gillaspey); Tr. 1019:19-1020:17 (Berens). As such, the IRS can, for example, review whether compensation paid by the Trust is in accordance with federal law. TX 1164C; Tr. 284:23-285:13 (Gillaspey); Tr. 1019:19-1020:17 (Berens). The IRS has never taken issue with Trustees' compensation structure or amount. *See, e.g.*, Tr. 285:15-286:17 (Gillaspey).

36. Trust Internal Controls and Operations. The Trust Instrument empowers trustees "to organize or cause to be organized under the laws of the State of Minnesota, a charitable corporation with corporate powers and purposes ample to receive, own and administer the Trust." TX 1. The Trust has a Controller, Anthony Thompson, and long-time Operations Director, Kari Suzuki. Before 2014, the Trust had an executive director. In 2014, after Lipschultz joined the Trust, Trustees eliminated the executive director position, and since that time have acted as "co-CEOs" and trustees. Tr. 134:13-22 (Suzuki). There is no aspect of the Trust where Thompson has veto power over Trustees, nor is there any area of his job where he has a vote that would be equal to Trustees in decision-making. Tr. 1333:23-1334:2 (Thompson); Tr. 1352:19-21 (Thompson). Other than Trustees' regulators, the AGO and the Court, Trustees are the ultimate decision makers for the Trust. Tr. 1810:23-1811:8 (Lipschultz); Tr. 662:4-13 (Johnson).

37. Trustees received public criticism about the governance structure in 2014 after they eliminated the executive director position. TX 161; Tr. 662:14-663:11 (Johnson). The executive director of the National Committee for Responsive Philanthropy (NCRP), a watchdog group for the philanthropic sector, wrote an

editorial about Trustees' governance: "This new structure gives complete oversight, management and fiduciary control to the three individuals, completely removes accountability and violates many principles of good governance." Tr. 663:12-665:9 (Johnson); TX 161. He urged the AGO to investigate the change in structure and compensation. *Id.* The president of the McKnight Foundation then asked Trustees to respond to those concerns to avoid an erosion in public trust and confidence in the non-profit sector. TX 163. She encouraged Trustees to commit to an independent review to assure that they are consistent with the guidance and best practices on governance and compensation." Tr. 665:10-667:11 (Johnson); TX 163.

38. After those comments, the AGO conducted a formal investigation into the administration of the Trust in 2014. TX 967. Following the investigation, the AGO made no recommendations to Trustees or the public about its investigation. Tr. 1304:5-1305:22 (Reardon). The Trustees added the Controller position in 2018, otherwise, the Trust's governance remains unchanged. Tr. 667:12-18 (Johnson). As noted, the AGO has been consistently included in the Trust's oversight through its own processes and the court supervision process.

39. Expenses of the Trust. The AGO offered evidence relating to other operations of the Trust, including human issues, office improvements and overall operational structure. While not perfect, the Court finds that none of these issues give rise to a potential breach of fiduciary duty. Like in any organization, improvement of operational elements is a continual process. The Trust has made many changes and advances in this regard over the years and will no doubt continue to do so. The factual record does not support the allegation that Trustees operations are in such disarray as to constitute a potential breach of their fiduciary duties. As to the overall expenses of the Trust, the Trust has had one of the lowest expense ratios of its national and local peers, averaging 12%, while having one of the highest grant-to-employee ratios. Tr. 1587:21-24 (Thompson); Tr. 3747:01-3750:02, 3755:22-3757:16, 3799:08-13 (Lipschultz); TX 3113; Tr. 2142:13-2144:21, 2146:13-2147:21 (Smith); TX 3117 at 9. Even with the significant legal fees associated with the present proceeding and those related to the potential bank sale, the Trust's expenses are at or below 20%, which, as a general rule, is a reasonable cost level. Tr. 1587:21-1588:9 (Thompson). Based upon the evidence, the Trust is operated and managed in a reasonably efficient and effective manner. Tr. 2144:06-21, 2156:24-2159:08 (Smith); Tr. 3755:22-3757:16, 3748:05-3750:02 (Lipschultz); TX 3113.

V. Trustee Compensation and the Investment Advisory Fee

40. As noted above, the Trust specifically authorizes the Trustees to be compensated up to a combined amount not to exceed 4% of Trust income. Nothing in the Trust Instrument suggests or requires that the Trustees be compensated in equal amounts. Trustees have been using the same compensation structure since 2010—*i.e.*, (1) equal trustee base compensation for all three trustees, (2) an investment advisory fee, pursuant to an Investment Services Fee Agreement, for

investment advisory services of two Trustees, and (3) annual raises for Trustees less than the annual raises for staff. The Trustees have not deviated from this approved method/structure since it was originally approved by the Court in 2011. Tr. 773:16-19 (Johnson). Historically, the Trust contracted with third party subadvisors to provide investment management services, including with a subsidiary of BFC. TX 164; Tr. 647:13-25 (Johnson). The Trust has been paying investment advisory fees to certain trustees since 2009. Prior to engaging Cambridge Associates as an advisor, the Trust's subadvisors retained the ultimate discretion and responsibility for all non-BFC investments, and each subadvisor made its own independent purchase and sale decisions. Tr. 1475:1-17 (Thompson). Thompson explained that when an advisor retains discretion, this requires more work and is generally more expensive. Tr. 1474:11-17 (Thompson). Yet even with respect to Trustees' later discretionary investments made upon Cambridge's recommendation, Lipschultz and Reardon do not buy, sell, or trade investments themselves, and Thompson executes all trades on behalf of Trustees. Tr. 1473:3-6 (Thompson).

41. On January 1, 2010, the Trust (through Trustee Johnson) entered into an Investment Services Agreement with Trustee Reardon and then-trustee William Lipschultz for investment management services. Tr. 639:22-640:20 (Johnson); TX 255. William Lipschultz retired in 2012 after serving as a trustee for over fifty years and the Trust entered into an Investment Services Agreement with his successor Trustee Brian Lipschultz on August 1, 2012. Tr. 641:1-18 (Johnson); Tr. 1850:24-1850:11 (Lipschultz); TX 194. The terms of the agreements have remained substantively unchanged since their inception in 2010. TX 255; Tr. 844:7-25 (Johnson); Tr. 2837:15-19 (Marion). The combined totals of annual compensation paid to Trustees over the years (including investment advisory fees) has never approached the 4% maximum established by the Trust Instrument. It has instead averaged near or below 50% of the maximum over the past decade.

42. Thompson testified that in general, it is standard Trust practice for Trustees to employ a competitive process and seek proposals from multiple candidates before selecting vendors. Tr. 1349:17-1350:5 (Thompson); Tr. 1352:2-4 (Thompson). Nonetheless, Lipschultz and Reardon admitted that in the decade or more since their signing, these agreements have never been amended or renegotiated, and Trustees have never sought any proposals from outside entities to perform the same work. Tr. 1125:25-1126:2 (Reardon); Tr. 1850:24-1850:11 (Lipschultz); Tr. 1850:24-1850:11 (Lipschultz).

43. The Investment Services Agreement requires that Reardon and Lipschultz provide investment services relating to the investment assets of the Trust other than its BFC holdings. TX 255. It directs that the investments be held by a third-party custodian and prohibits them from having possession or custody of those assets. TX 255, ¶ 2. It requires that investments be subject to the Investment Guidelines identified in the agreement. It provides them with complete discretion,

known as Discretionary Authority, to take action on the investments consistent with those guidelines, applicable law, and the Trust Instrument. TX 255, ¶ 4. In exchange, the agreement provides for compensation for services on an annual basis equal to fifteen basis points or 0.15% of the market value of the non-BFC assets under management. TX 255 ¶ 8; Tr. 1470:6-1471:5 (Thompson); TX 255; TX 194. In 2018, for example, the Trust paid Lipschultz and Reardon $186,045 each in investment management fees. TX 3117 at 5; Tr. 1845:15-1846:21 (Lipschultz).

44. The agreement also establishes a standard of conduct "consistent with his status as a fiduciary of the [Trust]" and affords "all rights, responsibilities and protections" given to the trustees in the Trust Instrument and the applicable law. TX 255, ¶ 9. There are several other covenants and representations included in paragraph 10 of the agreement.

45. The 2009 Annual Account filed with the Court on July 20, 2010, describes the commencement of investment advisory fees paid to Trustee Reardon and then-trustee William Lipschultz in the amount of $174, 999.96 each. Sixty-Fifth Annual Account filed July 10, 2010. The Trustees filed their Petition for approval of the 2009 Annual Account on January 31, 2011. *See* Petition for Court Order Approving Trustees' Account Covering the Period January 1, 2009 Through December 31, 2009; Confirming and Approving Trustee Compensation; and Granting Other Relief filed January 11, 2011. In the Petition, Trustees described the rationale for paying investment advisory fees for managing the non-BFC stock assets. The fees amounted to thirty basis points (0.30%) of that amount divided equally between the two trustees. The Trustees requested that the Court approve the continued receipt of the investment advisory fees by Reardon and then-trustee William Lipschultz. The Petition also sought authority to increase the ordinary Trustee Fee paid to all Trustees based upon the review and advice of an independent consulting firm which provided guidance on Trustee compensation. The independent consultant identified a range of $333,400 to $500,000 for regular Trustee compensation. Based upon that guidance, the Petition requested an increase in the annual Trustee fee to $285,000 per Trustee.

46. After receiving the Petition relating to the 2009 Annual Account and approving Trustee Compensation, the Court ordered a hearing which specified the issues to be addressed, including the approval of the requested increase in the annual Trustee Fee and the investment advisory fee. *See* Order for Hearing on Petition for Court Order Approving Trustees' Account Covering the Period January 1, 2009 Through December 31, 2009; Confirming and Approving Trustee Compensation; and Granting Other Relief dated February 1, 2011. Notice of the hearing was routinely provided to the AGO. The hearing was scheduled for March 1, 2011. Prior to the hearing, the AGO sent a letter to the Court acknowledging receipt of the Petition and the 2009 Annual Account. The AGO stated: "After review of the Proposed Order provided to the Court on February 25, 2011, this Office does

not oppose the relief requested in the Proposed Order." *See* AGO Correspondence dated February 28, 2011, filed March 1, 2011.

47. Following the hearing, the Court approved the Trustees' proposed compensation approach involving a trustee base fee with annual raises not to exceed employee raises, and compensation under the Investment Services Fee Agreement paying a combined total of 30 basis points for investment advisory fee services to two trustees. TX 1446 (Order Approving Trustees' Account Covering the Period January 1, 2009 Through December 31, 2009; Confirming and Approving Trustee Compensation Dated March 9, 2011). In that Order, the Court approved and authorized the requested annual Trustee Fee each Trustee (with annual increases not exceeding those for other employees) so long as the total compensation does not exceed the limit of 4% of income set out in the Trust Instrument. The Court further authorized the "continued receipt of annual thirty (30) basis points (0.30%) investment advisory fee for the services performed by Trustees [William] Lipschultz and Reardon in the active management of the non-Bremer Financial Corporation stock assets" with the fee divided equally between those Trustees. The Order further provided that no additional annual compensation from the Trust to the Trustees will "be permitted without prior approval by the Court." *Id*.

48. Several times since 2010 the Court reconsidered and approved trustee compensation, including the methodology for the investment advisory fee received by the two trustees. A hearing on the petition to approve the 2010 Annual Account and trustee compensation was held on November 7, 2011. This petition specifically incorporated the increased annual trustee compensation from $120,000 to $285,000 referenced in the 2009 petition and the continued 0.30% investment advisory fee totaling $167,499 each. The AGO submitted a letter before the hearing indicating that "having reviewed this matter, this Office takes no position with respect to the relief requested in the Petition." *See* Correspondence filed October 27, 2011. The Court approved the compensation by Order dated November 14, 2011.

49. In 2012 the Court granted a petition to allow the Trustees to be treated as employees of the Trust thereby allowing them to access the employee benefits. *See* Order Approving Trustee Compensation and Benefits and Granting Other Relief Dated March 26, 2012. The Court approved the 2011 Annual Account along with Trustee compensation and investment advisory fees on November 26, 2012. That Order also confirmed the retirement of trustee William Lipschultz and the appointment of his successor Trustee Brian Lipschultz effective August 1, 2012. *See* Order Confirming Successor Trustee; Approving Trustees' Account Covering the Period January 1, 2011 Through December 31, 2011; and Granting Other Relief, Dated November 26, 2012. Again, the AGO submitted a letter indicating that "this Office takes no position with respect to the relief requested in the Petition." *See* Correspondence filed October 26, 2012.

50. After 2012, while the Trust still must file Annual Accounts every year, the Court began scheduling annual account approval hearings every five years instead of annually. The Trustees next petition for review and approval of their Trust administration during the preceding 5-year period was therefore filed in 2017. TX 432; TX 1164A. This petition sought approval of the Annual Accounts submitted for the years 2012 through 2016. Among other things, that petition included a request for approval of Trustees' compensation, specifically including the specifics of the annual investment advisory fees paid during the previous five years. Also included in that petition was this statement regarding the BFC holdings: "During the period covered by the accounts, no unforeseen circumstances arose that, in the opinion of Trustees, caused it to be necessary or proper for them to sell the [BFC] shares." TX 1499 at 3-4. The AGO was provided notice and an opportunity to participate but did not appear at the hearing or object to the relief sought in the petition. Tr. 1070:19-23 (Berens).

51. The 2017 review by the Court was more detailed than the previous Annual Account reviews because a public member appeared at the hearing September 25, 2017 and raised concerns about trustee compensation and governance. The public member had been involved in a foundation in the late 1900's and wrote an op-ed in the Star Tribune in 2014 critical of large "tax-dodging" family foundations, like Blandin, Ford, and Bremer, and was also critical of their oversight by the Attorney General and the District Court. TX 821. In his op-ed submission he suggested that the OBT structure and ownership of BFC were obsolete and should be replaced, along with the Trustees. In response to that complaint, the judicial officer contacted the Assistant Attorney General assigned to oversee the Trust and directed they meet with the public member to address his concerns. The AGO was asked to report back to the Court and did so in writing. TX 1164C; Tr. 1071:5-1072:6 (Berens); Tr. 3937:06-3941:24 (Gary); TX 1164C.

52. The AGO met with the public member and reported to the Court that he "raised several concerns about the trustees and their role overseeing the Otto Bremer Foundation," including regarding compensation and investment fees, among several other things. TX 1164C. The AGO provided the Court with "relevant background information and legal standards for the Court's consideration in its continued review of the petition." *Id.* The AGO summarized the recommendations of the compensation consulting firm and the Court's prior approval of the compensation structure in place, including the investment advisory fees. The AGO noted that the Court had approved this structure at each of the last two review hearings in 2011 and 2012, finding that the trustees' compensation was "just and reasonable." The AGO further reviewed both the federal (IRS) law and state trust law regarding similar entities and other matters regarding the history of the Court's supervision and prior orders and noted that the Trust Instrument itself allows for trustee compensation of up to 4% of the cash income of the Trust. *See also* Tr. 288:07-290:21 (Gillaspey). By its letter, the AGO raised no concerns about the

Trust nor the Trustees' administration of the Trust. Tr. 288:07-290:21 (Gillaspey); Tr. 1197:07-1202:10 (Reardon). The AGO likewise asserted no objections or positions on any of the issues raised by the public member. TX 1164C.

53. Following the hearing, the Court requested further information regarding trustee compensation, as well as information about time and efforts trustees expend on behalf of the Trust and other positions and Trust administration expenses. TX 656; TX 1164D. The Court noted that the "AG points out that the reported compensation should be given the benefit of the doubt as it has been approved in prior years, it is supervised by the IRS, and is within the terms allowed by the trust." TX 656; TX 1164 D. All Trustees thereafter submitted affidavits responding to the Court's requests. TX 1164E. Trustees indicated that they worked full-time in their Trustee capacity and served on the Boards of Directors of Bremer Financial Corporation and Bremer Bank, N.A. They all likewise affirmed that they "have no employment elsewhere." TX 1164E; *see also* Tr. 1844:2-1845:8 (Lipschultz); TX 872. On December 26, 2017, this Court issued an Order approving the Annual Accounts for the years 2011 through 2016. TX 1164F. By that Order, the Court approved, confirmed, and ratified Trustees' actions and administration for those years, specifically including the compensation structure approved and summarized in the prior orders discussed above. TX 1164F; Tr. 2834:3-7 (Marion); TX 1543; Tr. 3935:23-3941:24 (Gary).

54. The Court's 2011 Order authorized Trustees to receive up to 30 basis points (0.30) as additional compensation for their investment services to the Trust. TX 1446 (2011 Order). Trustees have complied with the Court's Order regarding basis point fee-related compensation. In 2017, Trustees Reardon and Lipschultz received $369,674.94 in advisory fee compensation based on $123,770,454.07 in non-BFC assets of the Trust. TX 1876 at RFA No. 25. This amounted to 29.8 total basis points in compliance with the authorized methodology. In 2018, Trustees Reardon and Lipschultz received $372,090.40 in advisory fee compensation based on $128,982,303.99 in non-BFC assets of the Trust. TX 1876 at RFA No. 25. This amounted to 28.8 total basis points in compliance with the authorized methodology. In 2019, Trustees Reardon and Lipschultz received $387,787.60 in advisory fee compensation based on $246,951,148.31 in non-BFC assets of the Trust. TX 1876 at RFA No. 25. This amounted to 15.7 total basis points, which was well below the authorized methodology entitling Trustees to 30 total basis points.

55. On January 1, 2020, the Trustees voluntarily froze the basis-point fee compensation amounts for 2020 and 2021 at the 2019 level, which was based on the assets under management as of December 31, 2018. TX 1492 (Jan 1, 2020 resolution freezing Trustee compensation at 2019 levels); Tr. 774:4-775:3, 839:4-840:18 (Johnson). Such compensation freeze meant that Trustee compensation would not increase due to the BFC share sales in October 2019 or in the event a sale of BFC occurred and more assets would then be under management by the Trust.

Moreover, the 2017 Order, which reaffirms the Court's 2011 Order, precludes any additional compensation without prior Court approval. TX 1164F (2017 Order). Consistent with this, by letter in follow-up to the meeting between Trustees' counsel and the AGO, the AGO confirmed that after any BFC sale was finalized, "the trustees' current compensation would be modified in light of changes to their duties and responsibilities as a result of the stock sale." TX 129 (Gillaspey Aug. 23, 2019 Letter).

56. Trustee Reardon and Lipschultz's advisory fee compensation in 2020 conformed accordingly, and was further suspended subsequent to the Court's November 16, 2020 Order on Interim Relief. Tr. 1137:10-24 (Reardon); Tr. 1855:01-05 (Lipschultz); *see also* TX 1746.

57. The next time the Court addressed Trustee compensation was in connection with the AGO's filing of the State's Petition for Interim Relief Under Minn. Stat. § 501C.0706(C), and the State's Petition to Enforce Supervision of Charitable Trusts and Trustees Act; Remove Trustees; Replace Trustees; and for Other Relief, simultaneously filed on August 12, 2020. The AGO alleged that Trustees' base compensation is unreasonable and that the investment advisory fees were duplicative, unnecessary, and unreasonable, and constitutes self-dealing in violation of their duty of loyalty. The Petitions sought the immediate removal of the Trustees for these and a number of other reasons. The Court held a hearing on the Petition for Emergency Interim Relief on September 30, 2021. Following that hearing, on November 16, 2020, the Court suspended the investment advisory fee and ordered the Trustee's compensation to revert to the amount approved by the December 26, 2017, Order. *See* Order Granting in Part and Denying in Part the Petition for Emergency Interim Relief, dated November 16, 2020. On November 16, 2020, this Court issued interim relief during the pendency of the present proceeding, suspending, in part, the investment fee compensation and reverting Trustee compensation back to the approved December 31, 2016 levels. TX 858 (Nov. 16, 2020 Order); Tr. 1470:15-1471:05 (Thompson); Tr. 1136:08-1138:02 (Reardon); Tr. 1853:18-1855:05 (Lipschultz). In compliance with the Court's Order on Interim Relief, Trustees reverted and reduced their compensation to the December 31, 2016 levels approved by the Court in its December 26, 2017 Order. Tr. 1470:14-1471:05 (Thompson); Tr. 1136:08-1138:02 (Reardon); Tr. 1855:01-05 (Lipschultz).

58. The Court ordered additional relief, essentially suspending further actions of the Trustees that are the subject of the AGO's Petition and imposing interim measures protecting the Trust until all of the evidence is fully developed at trial. The AGO appealed that order to the Minnesota Court of Appeals on January 13, 2021, arguing that the Court committed error in not removing the Trustees. The Court of Appeals affirmed this Court's Order in a decision issued on August 30, 2021.

VI. Trustees' Strategic Grantmaking Process

59. As noted at the outset, the Trust Instrument outlines the specific purposes of the Trust, which are exclusively charitable. The Trust Instrument also has a geographic restriction on grants: "The beneficiaries under foregoing Section (b) and (j) inclusive shall be limited to those persons, institutions, corporations and municipalities, states or sub-divisions who are residents of or have their situs in the State of Minnesota, or Wisconsin, or North Dakota or Montana." TX 1 at ¶ 3(k). Under these provisions, Trustees may not award grants outside of the limits of Paragraph 3, both with respect to purposes and with respect to geography. Tr. 597:24-599:7 (Johnson).

60. The Trust's grantmaking process is set up to allow for grants to be made through both a "responsive" process and a "strategic initiative" process. Through the responsive grantmaking process an experienced staff of program officers works with potential grant recipients who make applications. To apply, potential responsive grantees first submitted responsive applications through the Trust's online portal. Tr. 411:9-412:2 (Benjamin). Among other things, the online portal required the applicant to input geographic information, and to select a program description that comported with the Trust Instrument. TX 26. Applications were screened to ensure they meet the Charitable Purposes and then investigated by program staff. Ultimately, program officers make recommendations to the Trustees on whether to fund the application. Tr. 146:20-147:3 (Suzuki). Trustees then made the final decisions about whether potential grantees receive funding, which were communicated to the grantees. Tr. 413:23-414:10 (Benjamin). Past and present employees testified that the responsive process was well defined, expectations were clear, and everything was well-documented. *See, e.g.*, Tr. 430:22-431:10 (Benjamin). Likewise, expert witness James Marion testified that, based on his experience and review of the record, the responsive grantmaking process was rigorous and well-documented. Tr. 2624:17-2626:20 (Marion).

61. The AGO asserts that the strategic grantmaking process is improper and mandates the Trustees' removal. Strategic initiative grants involve requests from organizations, which are identified, reviewed, and evaluated directly by Trustees for funding, with involvement by staff as needed. Tr. 795:05-796:18 (Johnson). Strategic grants are led by Trustees. Tr. 147:21-148:4 (Suzuki); Tr. 425:16-426:17 (Benjamin). Strategic grants generally involve larger amounts of money and can occur throughout the year. Tr. 147:21-148:4 (Suzuki). Strategic grants are often made outside of the staff's grant process because of the larger amounts of money, because the grants take place over longer periods of time, and because the staff process uses different parameters that don't always fit for strategic grants. Tr. 1824:16-1825:6 (Lipschultz). Trustees make strategic grant decisions based on a majority vote—i.e., two out of three. Tr. 590:3-9 (Johnson). Notwithstanding the foregoing, each strategic initiative involves an application and

request for funds, just like all other funding requests, and the request must fall under a proper purpose of the Trust Instrument. *See, e.g.*, Tr. 796:19-797:13 (Johnson).

62. Former employees of the Trust testified that they felt the strategic grantmaking process involved less diligence and documentation ensuring a grant met Trust purposes. For example, memos for strategic grants were sometimes not completed or stored in the Trust's database or were incomplete. Tr. 429:12-430:20 (Benjamin). Benjamin called the strategic grant process a "back-door" way of getting funding from the Trust. Tr. 430:22-431:10 (Benjamin). They thought it undermined the responsive grant process of going through the program officers. Tr. 150:21-151:11 (Suzuki); Tr. 422:13-425:15 (Benjamin); Tr. 479:10-480:1 (Wetjen). They were also concerned that they at times learned about strategic grants after the fact. For example, while one former employee was conducting a site visit for a $100,000 grant, an organization thanked her for a prior $1 million grant of which she was unaware. Tr. 422:13-425:15 (Benjamin).

63. The AGO also asserts that the Trustees gave out multiple grants through the strategic grant process that did not meet the Trust Instrument's purposes. Witnesses testified that they had concerns about some strategic grants they believed were outside the scope of those purposes. There was testimony relating to three such grants. One former employee thought that strategic grants sponsored by Trustee Lipschultz to Free the Children for "WE Day" fell outside the Trust purposes in two respects. First, WE Day was an event, and the Trust generally did not fund events. Tr. 1821:4-15 (Lipschultz); Tr. 443:22-444:17 (Benjamin). Second, Free the Children's corporate headquarters is based in Canada and therefore fell outside the geographic scope of the Trust. Tr. 1822:23-1823:3 (Lipschultz); TX 890; Tr. 443:22-444:17 (Benjamin). The evidence establishes, however, that WE Day grants were made to support We Act Minnesota, issued from 2012 to 2015, and were limited solely to support "an educational initiative that provides service learning for schools, families and youth in Minnesota," to activities in the geographic scope of the Trust and within the defined Trust purposes. TX 1157; Tr. 2252:03-2253:03 (Lipschultz); Tr. 4090:13-4092:25 (Gary); TX 1157; Tr. 460:03-461:18 (Benjamin). The grant supported WE Act's "year-long educational initiative which puts students at the forefront of active citizenship by educating them on civic issues and action planning, developing leadership skills and engaging them in world-changing action." TX 1157, p. 7.

64. Other strategic grants challenged were grants to The Arts Partnership, Como Friends, and Blake School. These grants were challenged as being outside the charitable purposes of the Trust Instrument. The $1 million Arts Partnership grant approved in 2014 was sponsored by Trustee Johnson and paid in 2015. It is undisputed that the Trust did not generally fund the arts per se, nor give grants to theatre programs, music, or the arts because they did not meet a Trust purpose. Tr.

495:17-496:1 (Wetjen); Tr. 456:4-8 (Benjamin); Tr. 609:9-611:11 (Johnson). The grant was made as part of a capital campaign for The Arts Partnership in St. Paul and was earmarked "to support the construction of a new concert hall, provide access endowment and a transition fund to support production and rental costs." TX 1471, p. 112. To help alleviate confusion, Johnson wrote to The Arts Partnership when the grant was approved to request help clarifying that the Trust's "support for this project is because of its importance as a community and regional asset and not to create the sense that the Otto Bremer Foundation now funds the arts per se." TX 30.

65. Another challenged grant was a 2018 strategic grant made to Como Friends, a nonprofit supporting the Como Park Zoo and Conservatory. Como Friends applied for $1,000,000 over three years to help fund a new seal and sea lion habitat. TX 1699. Trustee Reardon sponsored the grant. Trustees approved the grant "to upgrade the facility to enhance visitor experience." The rationale for the grant request was that the Como Zoo and Conservatory is the country's last completely free metro area zoo and serves as a critical resource to urban schools through residency programs, off-site school programs, and school enrichment. TX 1699. The Trust's strategic grant assists with one of the zoo's exhibits and with accommodations at the visitor center. Tr. 613:02-15 (Johnson). Reardon included "to promote citizenship" in his recommendation memo, and testified that it served other purposes, including alleviating poverty, promoting citizenship, and physical activity. Tr. 1288:10-21 (Reardon). Trustee Johnson initially questioned whether the grant fit within the Trust purposes, but ultimately supported it. Tr. 612:13-614:25 (Johnson). The Trust normally does not fund grants relating solely to animal welfare. *Id.* A former Trust staff member testified that if the grant request came to her, she would have recommended denying the grant. Tr. 437:6-11 (Benjamin).

66. A third purported strategic grant challenged at trial was a grant request starting in 2014 for $20,000 for a program at Blake School called LearningWorks. The AGO offered testimony of a former Trust employee that the Trust did not generally provide funding to private schools or schools of any kind. Tr. 442:14-15 (Benjamin). It appears, however, that this grant was initially reviewed and proposed by program staff for the Trustees' approval. TX 1694. LearningWorks is a public-private tuition-free academic enrichment program offered to underprivileged high-achieving middle school students from Minneapolis Public Schools during school vacations. TX 1694. Blake School is a private K through 12 school in the West-Metro area of the Twin Cities. Initially, when the grant was requested in 2014, a program officer conducted a site visit and wrote a Staff Overview which concluded:

> In short, having worked on the Minneapolis Youth Coordinating Board, and being terribly worried about the achievement gap, I was WOWED by the students, faculty and staff of this program. I kept

> thinking, if we could only get this program to more students in the metro area during the summer, we might really be able to close the achievement gap. Staff recommends full funding at $20,000 and hopes that the model can be expanded in Minneapolis and St. Paul city schools and across the Metro area.

TX 1694, p. 3. The first $20,000 grant was approved in 2014 and was announced to Blake by the Grant Reviewer involved. TX 1699. In a 2019 report to a program officer at the Trust, Blake School reported that they were able to use the grant to expand a program called College Bound and hired a fulltime coordinator to create College Bound workshops and supervise a College Bound intern. TX 260. By 2021, LearningWorks was identified as a strategic grant sponsored by Trustee Lipschultz. The Trust increased its grant amount to $25,000. The Trustees' minutes that year describe the purpose "to support LearningWorks, which provides academic and enrichment programming to a diverse group of students and aspiring teachers." TX 593. This fits within the Trust purpose of promoting citizenship.

67. Another strategic grant challenged at trial was a $1 million grant in 2018 to the Science Museum of Minnesota to fund an update to the exhibition "Race: Are We So Different?" It was suggested that this grant did not fit within the Trust purposes. This strategic grant funded the long-term race exhibit as well as related community programming. TX 1358. Trustee Reardon was the sponsor of the grant. The grant was approved in recognition that race and racism are prominent and polarizing in our community and that the Trust wants to take a meaningful role in elevating racism awareness and discussion. Tr. 1300:11-1302:20 (Reardon); TX 1358. The grant was approved as promoting citizenship. The AGO also contested a grant in 2020 to the Science Museum for an implicit bias exhibit called "The Bias Inside Us" as falling outside the four-state Trust-approved geographic scope, because the exhibit originated at the Smithsonian in Washington D.C. The grant, however, was specifically for the exhibit in Minnesota. *Id.*; Tr. 514:20-516:02 (Wetjen) (acknowledging the Smithsonian-related initiative for the "The Bias Inside Us" exhibit was at the Science Museum of Minnesota); Tr. 4127:06-4128:15, 4093:15-4094:2 (Gary); Program guidelines only preclude grants for programs taking place outside the required geographic region. TX 371.

VII. Trustee Conflict of Interest Policies and Disclosures Relating to Grants

68. The AGO asserts that several grants were made to community nonprofits with which Trustees had established relations, such as board membership, and that it was therefore impermissible for them to participate in grantmaking to those organizations. The recipients of the challenged grants include

Como Friends, James J. Hill Reference Library, and the Blake School LearningWorks program.

69. The Trust has in place specific policies relating to financial and fiduciary conflicts of interest that govern Trustees actions in grantmaking. TX 153. The policy provides:

Conflicts of Interest

OBT must not enter into any transaction with respect to which a Trustee has a conflict of interest that has been reported or is otherwise known to the other Trustees unless the conflict of interest is disclosed and the transaction approved in the manner set forth below.

Identification of Existence of a Conflict of Interest

A Trustee conflict of interest can result from financial interest in ("Financial Conflict of Interest") or as a result of a fiduciary relationship with ("Fiduciary Conflict of Interest") an entity with which OBT is considering a transaction which are described below:

A. Financial Conflict of Interest

An OBT Trustee has a "Financial Conflict of Interest" with respect to any transaction if the OBT Trustee or family member…has a "material financial interest" in the transaction. An OBT Trustee has a "material financial Interest" if he or she or a family member has one of the following financial interests, directly or indirectly, that a reasonable person would believe is substantial enough to affect a person's judgment with respect to the transaction:

(i) An ownership or investment interest in any entity with which OBT has a transaction or arrangement (including but not limited to grants from OBT to such entity);
(ii) A compensation arrangement with OBT or with which OBT has a transaction or arrangement (including but not limited to grants from OBT to such entity); or
(iii) A potential ownership or investment interest in, or compensation arrangement with, any entity or individual with which OBT is negotiating a transaction or arrangement (including but not limited to grants from OBT to such entity).

B. Fiduciary Conflict of Interest

An OBT Trustee has a Fiduciary Conflict of Interest if he or she serves as an officer or director of an entity or other position with similar responsibilities.

70. Here, a Trustee's board membership on community nonprofits to whom the Trust considers making a grant implicates the Fiduciary Conflict of Interest policies. Where such a conflict of interest is identified pursuant to the policy quoted above, the Trustees must follow certain procedures, including the following:

> ***Reporting Conflicts***
> A Trustee who has a Financial Conflict of Interest or Fiduciary Conflict of Interest with respect to a transaction must disclose the conflict of interest to the Director of Operations and to the other Trustees promptly once the conflict of interest becomes known to the Trustee.
>
> If a Trustee is uncertain as to whether a Financial Conflict of Interest or Fiduciary Conflict of Interest exists, then the Trustee must disclose the circumstance to the other Trustees, who must determine whether there exists a conflict of interest.
>
> ***Transaction Approval***
> The process for approving a transaction involving a conflict of interest with a Trustee depends on whether it is a Financial Conflict of Interest or a Fiduciary Conflict of Interest as follows:
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> …
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> (b) *Fiduciary Conflict of Interest*
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> OBT furthers its mission by having its Trustees involved in the community and its Trustees may serve in governance roles with for-profit or tax-exempt organizations. From time to time, organizations may apply for funding from OBT which creates a Fiduciary Conflict of Interest for the Trustees who serve as directors of such organizations' board of directors. Although the Trustees do not personally benefit from approving a transaction where they have a Fiduciary Conflict of Interest and thus, there is no legal or tax requirement that trustees disclose such an interest, it is a best practice for trustees to make such a disclosure. Accordingly, the Trustees may approve a transaction involving a Fiduciary Conflict of Interest if the material facts as to the transaction and the Fiduciary Conflict of Interest are fully disclosed or known to the Trustees, and if the Trustees approve the transaction by majority vote. For avoidance of doubt, unlike a Financial Conflict of Interest, a Trustee who has a Fiduciary Conflict of Interest may vote to approve the transaction as long as he or she has fulfilled his or her obligation to disclose the Fiduciary Conflict of Interest to the other Trustees.

Documentation
OBT must maintain a written record of each approval given under this Policy, describing the transaction, the nature of the conflict of interest, the parties involved, and, how each Trustee voted.

Policy Review; Annual Disclosure
Promptly after becoming a Trustee, and annually thereafter, each Trustee must review a copy of this Policy and acknowledge in writing that he or she has done so. Each Trustee must annually complete a Conflict of Interest Information Form and submit it to the other Trustees. The other Trustees must treat the information on the forms as confidential and disclose it only as necessary to implement OBT's Policy on Conflicts of Interest.

TX 153.

71. The Financial Conflict of Interest policy requires disclosure and recusal from any vote in which a financial conflict exists. Tr. 819:15-822:01 (Johnson); TX 153 at 2. The AGO does not allege any violation of a Financial Conflict of Interest occurred in the grantmaking process, but does allege Fiduciary Conflicts of Interest. Tr. 2848:04-11, 2854:21-2855:04 (Marion). The Fiduciary Conflict of Interest policy requires that such conflicts be disclosed to the other Trustees but does not compel recusal from related votes. Tr. 819:15-820:13 (Johnson); TX 153 at 2. The Trust's conflict policy recognizes the value in Trustee community involvement and that the Trust "furthers it mission by having its Trustees involved in the community and its Trustees may serve in governance roles with for-profit or tax-exempt organizations." TX 153 at 2. The policy requires that where a trustee holds a fiduciary position with an organization applying for funds, the trustee must disclose the conflict before a vote on approving the grant. *Id.* In serving on community boards, board members are typically expected to donate funds themselves or obtain donations from others. Tr. 1146:1-1147:9 (Reardon).

72. As noted, the AGO asserts that grants implicating Fiduciary Conflicts of Interest involve Como Friends, James J. Hill Reference Library, and the Blake School LearningWorks program. Trustee Reardon served on the board of Como Friends in 2018 when the three-year $1 million grant was approved. Tr. 1147:10-1148:2 (Reardon). The Como Friends grant of $333,333 for each of three years was approved in April 2018. TX 1959. There is no notation in the minutes specifically identifying Reardon's conflict. *Id.* In his 2018 Conflict of Interest Annual Disclosure Statement, Trustee Reardon disclosed his service on the board of the Como Fiends as a potential Fiduciary Conflict of Interest. Reardon disclosed conflicts as a board

member of the Como Zoo. Tr. 1146:1-1147:9 (Reardon); TX 252. Tr. 1291:17-19 (Reardon); TX 1816 at p. 0004. He was listed prominently as a board member on the grant application submitted by Como Friends in 2018. TX 1356 at p. 0011. Trustee Johnson likewise testified that Reardon disclosed his board membership as required. Tr. 829:14-23 (Johnson). Reardon did not recuse himself from the Como Zoo decision. Tr. 612:13-614:25 (Johnson). Johnson initially opposed the grant but ultimately voted for it. The grant would have passed even if she had voted against it because all three Trustees supported it. Tr. 612:13-614:25 (Johnson).

73. The Trust made a $35,000 grant to James J. Hill Center, formerly known as James J. Hill Reference Library, in 2017. The Grant Application was submitted in May 2017 and requested the grant to help fund the "express purpose in helping entrepreneurs and small business owners develop and strengthen and expand their business." TX 1359. The grant was investigated by staff. Tr. 1293:10-1294:18 (Reardon). The grant was approved in 2017 and was included in the Trust's annual 990PF IRS filing. Tr. 1295:14-22 (Reardon); *see also* Tr. 829:14-23 (Johnson). It is undisputed that the Trustees awarded the $35,000 grant to the Hill Library when Reardon sat on the library's board. Tr. 1148:20-25 (Reardon); TX 10 at Statement 21. Reardon disclosed his conflict as a board member of the Hill Library. Tr. 1146:1-1147:9 (Reardon). His 2018 Conflict of Interest Disclosure Statement likewise included the disclosure of his board position. TX 252; TX 1816.

74. The annual grants to the Blake School's LearningWorks program are discussed above. The Trust began making $20,000 annual grants to LearningWorks in 2014. Lipschultz has been a Trustee of Blake School since 2016. Tr. 1820:23-1821. The Trust made grants to Blake's LearningWorks program for several years thereafter while Lipschultz served on the board. Tr. 1821 (Lipschultz); Tr. 1149:1-23 (Reardon). Lipschultz disclosed his board membership as a conflict of interest. Tr. 1821:2-3 (Lipschultz). His 2018 and 2020 Conflict of Interest Disclosure Statements include his status as a Blake School trustee. TX 1815 at p. 004; TX 569.

75. Trustee Johnson identified numerous conflicts on her Conflict of Interest Disclosure Statement. TX 1892. Her disclosures related to family members' board membership on numerous charities and foundations. One of the conflicts disclosed was that her husband was a board member of the Friends of Saint Paul College. Trustees approved a grant to that organization in 2018. TX 180; Tr. 618-621 (Johnson). The application for the grant was for $500,000. TX 1674. The Trustees approved a grant of $300,000, but the program was discontinued, and the money was returned to the Trust in early 2020. Tr. 825-828. TX 11; TX 1675. Johnson testified that she always disclosed her conflicts to the other Trustees. Trustee Reardon also testified that Johnson disclosed her conflict before any grant was made to the organization. Tr. 1264 (Reardon). The Trust made grants to other organizations listed on her conflict disclosure statement, but the timeframe is unclear. Tr. 619:17-621:17 (Johnson); TX 1892. The Trust gave money in the past to

the United Way of the St. Croix Valley, for example, and Johnson's daughter was listed as a board member in 2019. TX 1892; Tr. 621 Johnson believes they made grants to Washburn Center for Children and Life House, Inc., and her daughter is listed as a board member of those organizations in her disclosure statement. *Id.* Trustee Johnson's Conflict of Interest Disclosure Statement for 2018 discloses that one of her daughter's worked as a personal banker at Bremer Bank. TX 153.

VIII. Alleged Abuse of Grantmaking Power by Trustee Reardon

76. The AGO alleges that Trustees Reardon and Lipschultz exploited the strategic grantmaking process to further their personal agendas. A former Trust employee, Christine Fuglestad, testified that she believed Trustee Reardon approved a grant to the St. Paul Police Foundation ("SPPF") in April 2016 "to ensure that Todd Axtell was elected chief of police." TR 111; Tr. 369-370 (Fuglestad). Fuglestad testified that they were on an elevator together and Reardon told her that "there is a reason for giving the grant, that there was a method to my madness in making the grant to the Police Foundation." Tr. 369:11-14. She emailed herself a note at the time (June 15, 2016) in which she said Reardon "just admitted to me in the elevator that he gave the SPPD a $500k grant to ensure that Todd Axtell was elected chief of police. Axtell was named chief on Monday -article in the Strib said his ability to raise $$ put him over the top of the other candidates for the job." TX 111. A second note to herself included "The key word he used was 'there's a method to my madness' with these grants, Christine. There is always a method to my madness.'" TX 111. Fuglestad said she wanted to document the discussion because it "raised a red flag in terms of ethical grant-making" and that she wanted to protect herself. Tr. 372:16-373:5 (Fuglestad). She did not raise any concerns with Trustees about her conversation. Tr. 363-374. During her eight months as a Trust employee, she was confronted about her job performance several times. Tr. 386-390 (Fuglestad). There were several other instances of her emailing herself notes about her interactions with the Trustees. TX 1118; TX 1119; TX 1122; TX 1131. She was ultimately fired in late November of 2016. Approximately Four years later, in 2020, she emailed her notes to the AGO. Tr. 390 (Fuglestad). She also sent several follow-up emails to the AGO critical of Trustees. TX 1121; TX 1122; TX 1128; TX 1131.

77. On cross-examination, Fuglestad agreed that the grant to the St. Paul Police Foundation was within the Trust purposes. The purpose of the grant was to enhance diversity of personnel and to support a civilian staff of engagement specialists for the African American and East and West African, Latino, and Southeast Asian communities. Tr. 397 (Fuglestad); TX 1965. She stated that she was unaware of Todd Axtell's experience with the police department and that she was unaware that his position was not an elected position. Tr. 396 (Fuglestad). In fact, the Mayor of St. Paul appointed Axtell chief on June 13, 2016. She also testified about the reasons she was given for her termination and the severance pay that was negotiated upon her departure. TX 122.

78. Trustee Reardon provided testimony relating to the SPPF grants. He confirmed that he was the Trustee in charge of the SPPF grants over the years. The Trust approved a two-year grant in 2016 for $250,000 each year but the second-year grant required that it be matched dollar for dollar to encourage a broader contribution base. Tr. 1276 (Reardon); TX 1965. Reardon did not have a personal relationship with Todd Axtell. Tr. 12-77-78 (Reardon). He testified that he did not make any grant to SPPF for political reasons and never told anyone that OBT gave a grant to SPPF to influence Axtell's selection as chief. Tr. 1278 (Reardon). In 2018 there were some financial concerns raised about the internal management at SPPF and he requested further financial information. SPPF replaced the executive director, so he felt comfortable with the organization again. Additional grants were made to SPPF over the years, including the $250,000 in 2017 (TX 10) and a three-year grant in 2018 of $250,000 per year. Tr. 1293-84 (Reardon); (TX 11). The 2018 grant was for the Step Forward campaign that was designed to continue to build trust and outreach in the community targeting diverse community members. Tr. 1281 (Reardon); TX 1005.

IX. Misuse of Trust Resources by Trustee Lipschultz

79. The Trust Instrument directs that no part of the Trust estate or income therefrom shall be used for any purpose except such as is charitable. TX 1 ¶6. The Trust's personnel policies, which apply to Trustees, prohibit the "use of office resources for non-office purposes." The policies also prohibit any employee from using "OBT time or resources to pursue outside activities, (*e.g.*, coursework or other employment)." Tr. 188:11-189:18 (Suzuki); TX 839 at 23.

80. The evidence establishes that since starting as a Trustee in 2012, Lipschultz engaged in improper use of Trust assets for personal purposes. Lipschultz's misuse included using staff time, mailing, and computer resources for non-Trust purposes. Tr. 189:19-190:4 (Suzuki). Kari Suzuki is the Director of Operations at the Trust and has been employed there for 22 years. She testified that in 2016 she helped Lipschultz doing "personal calendaring and health forms for his kids." Tr. 190:5-13 (Suzuki). Around 2013, a staff member indicated to her that she wasn't sure how to handle non-Trust mail received for Lipschultz. Tr. 191 (Suzuki). Another staff member advised Suzuki that Lipschultz was using his computer's OneDrive file for non-Trust purposes. Tr. 192 (Suzuki). Executive Assistant Marissa Schon expressed concern about feeling pressured to perform personal tasks for Trustee Lipschultz. Tr. 194 (Suzuki).

81. Marissa Schon testified that she performed personal tasks for Lipschultz between 2016 and 2019. These included entering his children's sports schedules on his personal Google calendar and sending things to his daughter's college. Tr. 551 (Schon). Sometimes he would forward her personal travel details, including "car confirmations, hotel confirmations, and flight confirmations, and I

would put those confirmations into the Gmail calendar." Tr. 551:6-9 (Schon). Schon spent 1-2 hours per day of her time performing non-Trust tasks for Lipschultz during that time period. Tr. 581:15-582:18 (Schon). She believes this happened in the Spring when his son was looking into colleges. *Id.* She also indicated that she was asked to perform tasks relating to non-Trust matters like scanning documents for Lipschultz' s business associates to sign and receiving and sending mail for his own businesses, for which the Trust would pay the expense. Tr. 552:21-553:9 (Schon); Tr. 554:9-24 (Schon); Tr. 555:2-17 (Schon); TX 281.

82. At trial, Lipschultz admitted the above-described behavior occurred and that he was likely using Trust assets in that manner for non-Trust purposes "probably from the day I arrived at the Otto Bremer Trust." Tr. 1825:7-12 (Lipschultz). Lipschultz used staff time "regularly" for personal reasons since he started as a Trustee. Tr. 2496:14:00 (Lipschultz). He also used the Trust address in some of his personal business/investment activities. For example, Lipschultz registered Eagle Street Partners' business address with the Secretary of State at the Trust's address and listed the Trust's address on Eagle Street Partners' "About Us" web page. Tr. 1829:23-1830:15 (Lipschultz); TX 189; Tr. 1828:19-1829:18 (Lipschultz); TX 188. Lipschultz continued as an investor in Eagle Street Partners, where he had previously worked, after starting as Trustee. Tr. 1825:13-1826:5 (Lipschultz). He occasionally used the Trust email to send messages to others relating to Eagle Street including a time he was travelling and accidentally sent such an email from his Trust email account. Tr. 1831:8-25 (Lipschultz); TX 191.

83. The concerns about Lipschultz's use of Trust assets for personal reasons was also brought to the attention of the Trust's Controller, Anthony Thompson. He worked with both Suzuki and Schon to address the issue, and in September 2019, Thompson wrote an email to all Trustees. Tr. 1353-1358 (Thompson); TX 322; TX 323. Thompson's email was to serve as a "reminder of self-dealing and why we want to avoid that" and reminded Trustees of IRS restrictions on using Trust assets for personal use. TX 322. Both Schon and Suzuki approved of the email sent by Thompson and felt it was appropriate. TX 322. Thompson emailed Schon at the time stating, "Marissa, now that I've sent the email, hopefully you feel empowered to ask the question 'Is this for OBT business purposes?' if any Trustee asks you to do something you would question." Tr. 558:16-559:25 (Schon); TX 279; TX 322.

84. After confirming that Lipschultz misused Trust assets, the Trust engaged the assistance of counsel and Clifton Larson Allen ("CLA") to calculate the value of Lipschultz's misuse of Trust assets. Thompson and others investigated and CLA used the information that was provided to calculate a value. TX 998 at 72:12-73:21 (Gries); TX 60. They got input from Thompson, Lipschultz, Schon, Suzuki, CLA, and the Trust's attorneys. Tr. 1369 (Thompson). CLA did not interview any employees of the Trust and relied on others' input to value the use of the office

space, staff time, and resources. TX 998 at 55:05-10 (Gries); TX 998 at 57:06-25 (Gries); TX 998 at 58:06-59:06 (Gries); TX 998 at 59:10-60:3 (Gries); TX 998 at 60:4-61:5 (Gries). CLA calculated the value of office use, personal copies/scans, FedEx charges, and administrative assistant time plus interest to total $1,875. TX 60; TX 998 at 54:03-13 and 73:22-74:18 (Gries). Lipschultz reimbursed the Trust $1,875. TX 336; TX 60; TX 998 at 61:09-19 (Gries).

85. On June 8, 2020, Trustees filed with the IRS Amended Forms 990-PF and corresponding Forms 4720 for 2017, 2018, and 2019 reporting improper use of Trust "office space, administrative assistant, and scanned fax machine for personal business, plus FedEx charges" in violation of IRS Code Section 4941 for those three years. Tr. 1364:17-1365:17 (Thompson); TX 192; TX 193; TX 15. Thompson testified that they only calculated self-dealing expenses for 2017, 2018, and 2019 because that was the IRS's time requirement for amending 990-PFs even though the self-dealing started when Lipschultz began as Trustee in 2012. There was no attempt to calculate the value of self-dealing during the previous years. Tr. 1372:14-25 (Thompson); Tr. 1837:18-24 (Lipschultz). Lipschultz conceded that he had used Trust assets for non-Trust purposes since 2012, and has not paid the Trust back for the years before 2017. Tr. 955:3-8 (Lipschultz).

86. Lipschultz admits that his use of Trust resources for non-Trust purposes constituted self-dealing under IRS Rules. Tr. 1832:13-1833:2 (Lipschultz). The Trust incurred a tax on self-dealing under IRS rules totaling approximately $300. TX 15; TX 192; TX 193; Tr. 1366:16-23 (Thompson). Lipschultz did not reimburse the $4,762.80 the Trust paid for CLA's professional services relating to those filings. Tr. 1376:12-1377:2 (Thompson); TX 62. Nor did Lipschultz reimburse the Trust for the legal fees it incurred in remediating the self-dealing. Tr. 1377:3-13 (Thompson); Tr. 1117:22-1118:11 (Reardon). Lipschultz admitted Trustees' self-dealing repayment calculation did not include Lipschultz's own time spent on non-Trust matters. Tr. 1837:5-7 (Lipschultz).

87. In addition to reimbursement from Trustee Lipschultz, Controller Thompson also implemented a single expense tracking program so that any potential future misuse would be quickly and easily identified. Tr. 1583:07-1584:14 (Thompson). Thompson also was alerted to the past activity and kept alert to any such future activity. *Id.* There has been no recurrence by Trustee Lipschultz or any Trustee. Tr. 584:25-585:03 (Schon); Tr. 2496:20-2497:05 (Lipschultz); Tr. 1583:07-18 (Thompson); Tr. 3946:1-18 (Gary); Tr. 1218:16-1219:22 (Reardon). Schon received no negative reaction by anyone at the Trust for raising her concerns and the Trust's process and controls ultimately resolved her concerns. Tr. 579:10-15 (Schon). There is no evidence suggesting culpability or responsibility on the part of Trustees Johnson and Reardon for Lipschultz's inappropriate use of Trust resources.

X. Private Investments and the Volcker Rule

88. As noted above, the Trust is a bank holding company due to its ownership of BFC shares. As such, it is regulated by the Federal Reserve Board ("FRB") and subject to applicable federal law. Tr. 1480:2-17 (Thompson). One such law is section 13 of the Bank Holding Company Act, 12 U.S.C. § 1851, commonly known as the "Volcker Rule." The Volcker Rule was enacted after the 2008 financial crisis and generally prohibits banks from holding certain "covered funds" which include investments like hedge funds and private equity funds. Tr. 1478-1480 (Thompson); The aim was to protect bank customers by preventing banks from making certain types of speculative investments that contributed to the crisis. Thompson testified that there are risks for not complying with the Volcker Rule – primarily repercussions with the Federal Reserve. Tr. 1480:24-1481:5 (Thompson). The Federal Reserve is the only regulator with authority to enforce the Volcker Rule and impose related duties, restrictions, or exemptions on Trustees. Tr. 1488:11-22 (Thompson); Tr. 1168:08-1170:23 (Reardon); Tr. 1909:25-1913:24 (Lipschultz); *see also* Tr. 2659:22-2660:15, 2690:07-25 (Marion); TX 1164C at 2. As a bank holding company, the Trust must file quarterly and annual reports with the Federal Reserve. Tr. 1908:19-23, 1922:13-1923:07 (Lipschultz); Tr. 1178:15-21 (Reardon); Tr. 1532:05-13 (Thompson); TX 1857 (Mar. 14, 2019 letter from the Federal Reserve); TX 1164C (Gillaspey 2017 Letter to the Court) (OBT is "a bank holding company," and therefore "must file annual reports with the Federal Reserve Board and is subject to the Federal Reserve System's regulatory authority.").

89. The Trust's Investment Policy originally approved in 2018 explicitly prohibits "direct or indirect investments in hedge funds or private equity funds ("covered funds") as broadly defined under the Volcker Rule." TX 320; Tr. 1477:16-1478:25 (Thompson). Thompson testified this language was designed to ensure the Trust's compliance with the Volcker Rule. Tr. 1480:21-23 (Thompson). The Investment Policy also required Trustees to "maintain an appropriate buffer of safe and highly liquid assets." Tr. 1454:8-15 (Thompson); TX 320. Thompson testified that the Trust has liquidity requirements to have cash available to meet its obligations as a tax-exempt foundation and bank holding company. Tr. 1627:21-1628:1 (Thompson). Private investments like hedge funds and private equity funds are generally illiquid. Tr. 1628:6-10 (Thompson); Tr. 1888:15-18 (Lipschultz).

90. Trustees have long known that they are subject to the Volcker Rule and are limited when it comes to investments in "covered funds." *See, e.g.*, Tr. 733:14-24 (Johnson). The Trust has historically invested in such types of holdings going back to at least 2009. Tr. 1909:12-1911:22, 1922:20-1924:06 (Lipschultz); Tr. 1558:05-13 (Thompson); *see also, e.g.,* TX 7 at 24 (2015 990-PF–Statement 11, noting "other investments"); TX 8 at 21 (2016 990-PF–Statement 11, noting "other investments"); TX10 at 21 (2017 990-PF–Statement 12, noting "other investments"); TX 11 at 21 (2018 990-PF–Statement 11, noting "other investments"); TX 12 at 205 (2019 990-

PF–Statement 14, noting "other investments"). Smaller banks with less than $10 billion in assets under management, for example, are exempted from the Volcker Rule's enforcement. *See, e.g.,* TX 1753 (Federal Reserve notice of revisions to Volcker Rule); FRB Final Rule, 84 FR 35008 (July 22, 2019). The Federal Reserve was aware of the Trust's private equity and hedge fund holdings and did not require divestiture. *See, e.g.,* TX 1751 (January 2017 email from G. Aase to Lipschultz); Tr. 1909:12-1912:24 (Lipschultz); Tr. 1532:05-1533:15 (Thompson); TX 7 at 24 (2015 990-PF–Statement 11, noting "other investments"); TX 8 at 21 (2016 990-PF–Statement 11, noting "other investments"); TX 10 at 21 (2017 990-PF–Statement 12, noting "other investments"); TX 11 at 21 (2018 990-PF–Statement 11, noting "other investments"); TX 12 at 205 (2019 990-PF–Statement 14, noting "other investments").

91. After BFC surpassed the $10 billion mark in assets under management, the Federal Reserve conducted a more focused examination of OBT and directed the Trust to divest its Volcker Rule investments unless an extension or exemption was obtained for its holdings. TX 339; TX 1408 at 2-3; Tr. 1911:10-1912:22 (Lipschultz); Tr. 744:08-21 (Johnson). Specifically, on March 31, 2016, the FRB emailed Lipschultz: "In response to our discussion yesterday, I confirmed that Otto Bremer Trust will need to divest of the assets covered by the Volcker Rule by July 21st, 2016, unless the organization receives a specific extension." TX 339. The earlier extension, which the Trust obtained, was to expire in July 2017. Tr. 1868:12-1869:18 (Lipschultz); TX 339. In January 2017, the FRB again inquired about Trustee "trades potentially affected by the Volcker Rule." TX 1751. After Lipschultz responded, the FRB stated: "I don't think we are going to be citing a Volcker Rule MRA" compelling divestment of the Trust's private equity holdings. TX 1751. The FRB examiner did state, however, that they wanted to have "further discussions on the portfolio." Tr. 1912:15-19 (Lipschultz); TX 1751.

92. The Federal Reserve reviews and analyzes the Trust's submissions, coordinating with Trustees to the extent additional information is needed, questions arise, or if certain other supervisory communications are required. *E.g.*, Tr. 1532:05-1533:15 (Thompson). Thompson reports on a quarterly basis to the Federal Reserve financial statements, investment statements, and other items that they require on an annual basis and engages in discussions with them on reporting requirements. *See* TX 1408 at 2-3.

93. Apart from the Trust's investment holdings, the Federal Reserve directed Trustees to update their Investment Policy and implement other internal controls—which led to the hiring of the Trust's Controller, Tony Thompson in June 2018. *Id.*; *see also* TX 888; TX 1408 at 2-3; Tr. 1531:01-18, 1562:11-18 (Thompson); Tr. 1177:05-16 (Reardon). The Trustees addressed the issues identified by the Federal Reserve, updated the Investment Policy, and the Federal Reserve closed the matter it designated as requiring attention. Tr. 1176:18-1177:21 (Reardon).

94. In 2018, Trustees raised the question of Volcker Rule compliance in a meeting with the FRB. At the time of the 2018 FRB meeting, the Trust had less than $5 million in private fund investments. Tr. 1558:5-13 (Thompson). In late November and early December of 2018, Controller Thompson had direct conversations with Federal Reserve personnel confirming the closure of all remaining MRAs previously issued to the Trust. Tr. 1531:16-21 (Thompson) (addressing the Federal Reserve's closure of all open matters requiring attention); Tr. 1924:01-06 (Lipschultz). As part of conversations around that time, the FRB examiner told Thompson and Lipschultz that the Volcker Rule would not be enforced against the Trust. Tr. 1532:20-1537:02 (Thompson); Tr. 1898:23-1899:02, 1911:10-22, 1916:17-1917:03 (Lipschultz); *see also, e.g.,* TX 1753 (stating examiner Greg Aase informed them that "enforcement [of the Volcker Rule] hasn't been pushed down organizations of our size, and likely wouldn't, at least while he remains our examiner."). No written assurance, however, was received from the Federal Reserve that the Volcker Rule would not be applied to the Trust. Tr. 1490:4-8 (Thompson). By the end of 2018, Federal Reserve personnel confirmed the closure of all remaining MRAs previously issued to the Trust. Tr. 1531:16-21 (Thompson); Tr. 1924:01-06 (Lipschultz). Both Thompson's and Lipschultz's understanding after these interactions was that the FRB's comments correlated to the Trust's unique structure and relatively small size. Tr. 1532:20-1537:02 (Thompson); Tr. 1916:17-1917:03, 1924:07-20 (Lipschultz).

95. The Volcker Rule was amended in August of 2019 to increase the threshold size of banking entities from $10 billion to $20 billion for some regulatory issues. Thompson and Lipschultz discussed the changes, and Thompson commented that "it appears as long as we don't purchase assets for 'short term intent' (buying and reselling within 60 days) we can still participate in most markets, as least as far as I can tell." TX 1400; Tr. 1536:17-1537:02 (Thompson). Thompson told Lipschultz that "We may want to get a more thorough review and opinion on that, depending on how we see ourselves investing in the future." TX 1400. In an August 6, 2019, email about changes to the Volcker Rule, Thompson advised Lipschultz that he did not see "any deferrals of the rule as a whole," and that the rule is "technically in effect." TX 328; Tr. 1484:1-1488:2 (Thompson). In a later email to Lipschultz, Thompson stated that a Volcker Rule change impacting reporting requirements "doesn't mean we are exempt from the rule itself." Tr. 1560:1-5 (Thompson); TX 1400.

96. In July 2019, Trustees retained Cambridge Associates for their investment advice and recommendations. Tr. 1471:13-17 (Thompson); TX 997A at 39:19-40:22 (Sadikot). Cambridge Associates ("Cambridge") is a well-known advisor for foundations and non-profit organizations locally and nationally. Tr. 1475:18-22 (Thompson). Cambridge specializes in assisting foundations and endowments to invest in private funds. Private equity holdings are commonly maintained in charitable organizations' investment portfolios. TX 997A at 112:12-116:17 and 118:11-18 (Sadikot); Tr. 1475:18-1476:05 (Thompson). Trustees continue to utilize their services to date. Tr. 1471:13-20 (Thompson). The Trust pays Cambridge a flat

fee for its services and Trustees maintain all discretion over investment purchases and formally approve all investments. Tr. 1475:18-1477:15 (Thompson); TX 997 at 13:09-14:05 (Sadikot).

97. Cambridge understood from Trustees that the Volcker Rule "potentially was applicable historically to their investments." TX 997 at 23:04-23:22 (Sadikot). A July 2019 email from Cambridge's business development team stated that the Trust "might be affected by the Volcker Rule, which would prevent them from investing in PI and traditional hedge funds." TX 997 at 48:21-54:16 (Sadikot). Trustees did not instruct Cambridge to avoid investment recommendations of that nature. TX 997 at 43:12-44:02 (Sadikot). Cambridge noted, however, that the "Volcker Rule has kept the investment portfolio out of private investments and traditional hedge funds." TX 36; TX 997 at 41:21-43:10 (Sadikot).

98. Relying, in part, on the advice of Cambridge regarding the general prudence of private equity-type investments for philanthropic organizations, and in part on Trustees' existing understanding regarding the non-enforcement of the Volcker Rule to the Trust, Trustees sought to shift their investment strategy to utilize more private equity holdings and related investments. *Id.*; Tr. 1490:17-1491:17 (Thompson); *see also* Tr. 1916:17-1917:17 (Lipschultz). Prior to implementing the strategy Lipschultz consulted the FRB examiner and again was told that the Volcker Rule would not be enforced against the Trust or prevent it from pursuing its revised investment strategy. Tr. 1929:25-1931:07 (Lipschultz); Tr. 747:14-17 (Johnson); TX 1408 at 3.

99. Starting in October 2019 and extending through 2020, the Trust made over $160 million in private fund investments, representing about 75 percent of the Trust's non-BFC assets. Tr. 1491:14-1492:4 (Thompson). Thereafter, OBT's FRB examiner was replaced. Tr. 1494:09-11 (Thompson). The substitution of examiners occurred at the request of BFC management following its complaint that the bank no longer wanted the same examiner as OBT. Tr. 1914:19-1915:23 (Lipschultz); Tr. 3097:08-3099:15 (Crain). Prior to the change, BFC and the Trust reported to the same FRB personnel. *Id.*

100. In May 2020, the new Federal Reserve examiner inquired about "the increase in investments in Limited Partnerships with hedge funds." TX 224. Lipschultz sought Cambridge's assistance in composing a detailed response for the investments. TX 1344: TX 232. Lipschultz stated:

> As expected, the Federal Reserve has questions about our dramatic shift in investing strategy over the past 6 months. You know we're very comfortable with this change but it's going to take some time and effort to get them settled. As we've mentioned to you, the Fed has both conceptual and practical reasons to be opposed to "private" investments. Technically they have the Volcker Rule which, if applied

> and enforced, would actually preclude OBT from making ANY private investments. We knowingly took the gamble that they won't apply Volcker to us given our relatively small size. And I think that is still the case.

TX 1344; TX 232; Tr. 1874:24-1876:19 (Lipschultz).

101. Lipschultz responded to the FRB inquiry by explaining the rationale and plans for the new investments. TX 224; TX 1858. Between May 10, 2020, and May 19, 2020, Lipschultz discussed the investments on a call with the FRB examiner and Lipschultz understood and believed that the examiner was satisfied with the answers and that no further action was required. Tr. 1566:05-14 (Reardon); Tr. 1919:04-13 (Lipschultz). Shortly thereafter Lipschultz sent a note to Thompson and Reardon indicating that the Federal Reserve examiner "said he was totally satisfied" which was "quite huge" because "the Federal Reserve knows that we have shifted away from purely marketable securities and into privates." TX 224; TX 1858. Lipschultz acknowledged that "technically that is inconsistent with the never implemented Volcker Rule. So this is great for us." Tr. 1872:23-1873:15 (Lipschultz); TX 224; TX 1858. Thompson testified that they did not get that in writing from the FRB examiner, however. TX 858; Tr. 1566 (Thompson); Tr. 1490 (Thompson). Despite the FRB's inquiry in May 2020, Lipschultz testified that the Trust continued making investments in private funds. Lipschultz testified that he repeatedly asked the FRB examiner if divestment was necessary for compliance purposes, and consistently understood from him that divestment would not be required. TX1408 at 3; Tr. 1925:06-1926:05 (Lipschultz).

102. Trustees updated the relevant investment policy to indicate that private funds were now in the "approved" category. Tr. 1884:19-1885:13 (Thompson); TX 344 (November 2020 Policy). Trustees explained to the Court that the prior policy's prohibition "is not determinative" and that the "policy serves as a guideline" rather than limiting Trustees' authority. Tr. 1884:19-1885:13 (Lipschultz); TX 489.

103. On November 16, 2020, after a hearing on the AGO's emergency petition for removal, the Court issued its Order on the Petition for Interim Relief, denying removal but precluding investments prohibited by the Volcker Rule and new investments in private equity funds or hedge funds absent Court order or written approval from the Attorney General. Nov. 16, 2020 Order at 2, ¶¶ 3, 8. Soon thereafter, capital calls were issued on the Trust from private investment commitments. The Court approved a request to meet that call, but on February 9, 2021, the Court ordered Trustees to ascertain a divestment strategy.

104. In January 2021, the FRB sent a letter inquiring whether the Trust's private investments constitute covered funds generally prohibited by the Volcker

Rule. Tr. 1880:21-1881:3 (Lipschultz); TX 345. The inquiry related to 14 investment funds and asked whether they were covered funds and if so whether they qualify for any exemptions from the prohibition. The inquiry also asked about the process for OBT to ensure and monitor compliance with its 2019 Investment Policy prohibiting investments in hedge funds or private equity funds. TX 345. On January 29, 2021, Lipschultz provided the requested information and further detailed the Trust's past interactions with its examiners concerning the application of the Volcker Rule to the Trust. TX 234; TX 1408; Tr. 1920:10-1927:04 (Lipschultz). In part, Lipschultz responded: "Although under a literal reading of the Volcker Rule, the Trust could be subject to the Rule, and the trust's investments in the funds could be deemed to violate the Rule, the trustees submit that no supervisory or regulatory purpose would be served by the application of the Volcker Rule to the trust." Tr. 1887:9-15 (Lipschultz); TX 234. He continued that precluding the kind of investments "in which almost all peer philanthropic organizations invest would harm the very communities that the BHC Act is explicitly designed to protect." TX 234; TX 1408 at 4. Lipschultz asked the FRB to consider a determination that OBT's investment activities are not subject to the restrictions of the Volcker Rule, or alternatively, for an exemption. He further stated that Trustees will commit not to make any new commitments in covered funds and would comply with any divestiture requirement as promptly as feasible. TX 234 at 7; TX 1408 at 7.

105. At the same time, Trustees considered divesting from the private funds given gains the investments had already achieved, the Court's order requesting a divestiture plan, the AGO's allegations, and the potential that the FRB could require the Trust to divest under less-advantageous market conditions. Tr. 748:11-25 (Johnson); Tr. 1927:05-1929:05 (Lipschultz); TX 177; TX 1281. Trustees ultimately decided that it was in the Trust's best interests to pursue divestment. Tr. 748:11-25 (Johnson); Tr. 1183:01-1186:22 (Reardon); Tr. 1927:05-1928:10 (Lipschultz); *see also* TX 177; TX 1281. On February 19, 2021, Trustees memorialized that decision by executing a Written Action to pursue divestment in a prudent manner and over a reasonable time to avoid significant loss or penalty. TX 177; TX 1281; Tr. 1183:01-1186:22 (Reardon). Trustees also notified the Court and the AGO of the planned divestment, providing a summary report, a profit report, and an anticipated schedule for complete divestment. TX 348; Tr. 1929:01-03 (Lipschultz).

106. On March 8, 2021, the FRB met with Lipschultz and counsel and informed them that the FRB made a decision to issue a "Matter Requiring Immediate Attention" ("MRIA") due to an apparent violation of the Volcker Rule. Tr. 1897:7-1898:13 (Lipschultz). Lipschultz affirmatively testified in his March 29, 2021 deposition that the FRB had not determined that Trustees violated the Volcker Rule and had not issued an MRIA. Tr. 1898:14-1899:25 (Lipschultz). On April 27, 2021, Lipschultz sent a letter to the FRB examiner providing the Trust's

Investment Liquidation Schedule and committing to complete the divestment of remaining funds by September 2021. TX 1754; Tr. 1931:13-1932:14 (Lipschultz).

107. On June 11, 2021, the Federal Reserve issued an MRIA to the Trust echoing the previously agreed divestment schedule and directing Trustees to revise the Trust's Investment Policy to address the issue in the future. TX 601; Tr. 739:17-740:10 (Johnson); Tr. 1900:1-9 (Lipschultz); Tr. 1173:24-1174:13 (Reardon). In the letter, the FRB "determined that OBT was in apparent violation of section 13(a)(1)(b) of The Bank Holding Company ("BHC") Act and the board's regulations, which generally prohibit a banking entity from inquiring or retaining any ownership interest in or sponsoring a hedge fund or private equity fund." TX 601; Tr. 1900:18-1901:8 (Lipschultz). The letter then references the March 8 phone meeting with Lipschultz and counsel and states that "[d]uring the meeting, OBT management agreed to divest the investments and to submit a written plan detailing the timeframe for divestiture. Management submitted the final divestiture plan on April 27, 2021. This plan is acceptable to the FRS. TX 1755. The letter required that by July 30, 2021, the Trust "review and revise as necessary policies, procedures, and internal controls to assure full compliance with" the Volcker Rule, and provide an update on the status of divestiture with a final detailed update by September 2021. Tr. 1515:5-15 (Thompson); TX 601.

108. Trustees agreed to take the necessary actions to address and resolve the items in the MRIA. Tr. 1516:01-09 (Thompson); Tr. 1900:01-12 (Lipschultz); *see also* Tr. 1898:23-1899:02, 1899:12-17 (Lipschultz). On July 30, 2021, Trustees provided a report to the FRB, which included the requested information and revised Investment Policy, along with an update on divestment. TX 603; TX 1903; Tr. 1933-1934 (Lipschultz). In their response, Trustees confirmed that they changed the investment policy to add a specific reference to the application of the prohibitions of the Volcker Rule. Tr. 1516:14-1518:4 (Thompson); TX 603. Trustees also changed the policy to require written approval from qualified regulatory counsel confirming compliance before making private investments. Tr. 1525:11-1526:14 (Thompson).

109. Complete divestment was completed by September 30, 2021. TX 1977; Tr. 1935:01-08 (Lipschultz). Although there were known risks to early divestment, the Trust did not incur any significant exit penalties because of the divestment from the at-issue funds. Tr. 1549:18-20 (Thompson); Tr. 1935:09-14 (Lipschultz). Overall, despite a $700,000 loss in one investment, the Trust realized more than $62.25 million in profits from its participation in those private funds—a nearly 40% return on the Trust's initial $160 million investment. Tr. 1551:23-24, 1569:03-06 (Thompson); Tr. 1935:12-14 (Lipschultz); *see also* Tr. 1539:15-1549:11 (Thompson). The Trust did incur some transactional costs and legal fees relating to divesting. Tr. 1549-1562 (Thompson).

110. Marion opined that "no reasonable similarly situated trustee, based on my review of the record, would have made and continued to make through the period reflected in the record investments that may violate the Volcker Rule." Tr. 2663:11-24 (Marion). He also stated that even if the FRB represented that the investments were not prohibited, and even if Trustees had actually relied those statements, "[r]easonable fiduciaries don't rely on such fundamental matters of application of laws and possible violations of the law on oral representations of examination staff in the field." Tr. 2670:22-2671:8 (Marion); *see also* Tr. 4076:24-4077:5 (Gary).

XI. The Trust's Ownership of BFC Stock: 1944-2019.

111. As noted above, the Trust has owned shares in the Otto Bremer Company, now known as Bremer Financial Corporation ("BFC"), since 1944. TX 1; TX 866 at 33. In fact, the Trust was the 100% owner of BFC at the time of Mr. Bremer's death in 1951. TX 866 at 33. As sole owner, the Trust possessed complete control of BFC through its trustees. During the Trust's historic ownership of BFC, its trustees also served as BFC Officers and Executives, including as CEO. *See, e.g.,* Tr. 2495:13-17 (Lipschultz). Trustee Reardon's father, Robert Reardon, served as President, CEO, and Chairman of BFC throughout the majority of his 26-year trustee tenure. Tr. 1209:18-22 (Reardon); Tr. 2495:13-17 (Lipschultz). The Trust's three trustees continuously served as board members of BFC until recently. Tr. 1846:16-18 (Lipschultz); Tr. 1162:20-1163:03 (Reardon).

112. While the nature of the Trust's ownership and control of BFC changed over the years, the relationship between the Trust and Bremer Bank was important to Otto Bremer. The Trust Instrument included a specific provision relating to the ownership of the bank stock. Paragraph 16 of the Trust Instrument states in part:

> Paragraph 16
> Investments
>
> The Trustee is directed to retain the shares of stock in the Otto Bremer Company hereinbefore described and any additional shares of stock in said company purchased on the exercise of stock rights or which Trustor may hereafter make a part of the Trust Estate herein created even though the same be unproductive of income or be of a kind not usually considered suitable for trustees to select or hold or be a larger proportion in one investment than a trust estate should hold, and any securities or stock received in exchange for said shares of stock shall also be so held. Such stock or any part thereof may only be sold if, in the opinion of the Trustee, it is necessary or proper to do so owing to unforeseen circumstances, and the opinion of the trustee shall not be questioned by reason of the fact that the trustee may personally own stock in said company.

113. Lipschultz testified that in his view, it was important to Otto Bremer for the Trust to retain BFC under this language. Tr. 2546:18-20 (Lipschultz). Lipschultz admitted that Trustees had never attempted a sale of BFC shares prior to 2019, for reasons including these Trust Instrument restrictions. Tr. 2542:22-2543:4 (Lipschultz). For decades after its creation, the Trust retained all of its BFC shares.

114. In 1969, the U.S. Congress passed the Tax Reform Act of 1969, P.L. 91-172. The Act included a number of laws applicable to private foundations like the Trust. Two major prongs of the Tax Reform Act of 1969 are relevant to this proceeding. The first prong prohibited private foundations from holding more than twenty percent (20%) of the voting stock of for-profit businesses. 26 U.S.C. § 4943(c)(2)(A)(i). Private foundations like the Trust, which owned 100% of BFC, had twenty years to conform with the 1969 Tax Reform Act's requirements without penalty. 26 U.S.C. § 4943(c)(4)(B)(i). The second prong of the Tax Reform Act of 1969 required private foundations to determine the "fair market" value of their assets each year and distribute at least five percent (5%) of that value in qualified distributions within a two-year rolling period. 26 U.S.C. § 4942(e)(1); Tr. 284:05-22, 285:02-14, 292:18-293:21 (Gillaspey). Failure of private foundations to comply with either prong of the 1969 Tax Reform Act subjected them to significant penalties and put at risk their charitable and tax-exempt status. *See, e.g.,* Minn. Stat. § 501B.32, subd. 1; 26 U.S.C. § 4942(b); Tr. 284:05-22, 299:21-300:12 (Gillaspey); Tr. 3917:09-23, 4086:04-4087:02 (Gary).

115. The sole ownership structure provided by the Trust did not account for the 1969 Tax Reform Act changes. Between 1969 and 1988, the Trust's trustees explored the possibility for the Trust to retain its ownership in BFC while remaining in compliance with governing laws. They explored an exemption to the Tax Reform Act, the enactment of other laws, and obtaining the assistance of other public officials. TX 1426 at 4; TX 1088 at 2; *see also* TX 1837; TX 73 at 7; TX 866 at 34. In addition to those efforts, the Trust actively explored an outright sale of BFC. TX 1428. By 1988, BFC and OBT officials had contact with more than twenty organizations as prospective acquirers or merger candidates. TX 1428. The trustees and BFC officials recognized and understood that a sale or merger could present itself at any time in the future and that the "trustees have a responsibility to consider any valid offer and if of such size and terms as to further enhance its charitability, it must accept such an offer." TX 1426 at 21; TX 1088 at 6.

116. As the 1989 deadline for divestiture approached, the trustees and BFC identified, in conjunction with counsel, an avenue by which the Trust would be able to comply with the Act in the near term while still retaining the Trust's majority

ownership of BFC. TX 1088; TX 1426. The Plan of Reorganization required a wholesale reorganization of BFC's ownership structure and amendments to BFC's articles of incorporation. Under the plan, the Bank would reorganize and be recapitalized through the issuance of two classes of stock, a 1.2 million voting shares (Class A Common) and 10.8 million non-voting shares (Class B Common). OBT's controlling shares of BFC would essentially be converted almost entirely to non-voting shares. In the end, OBT would own 100% of the non-voting stock and 20% of the voting stock.

117. In March of 1988 the attorneys for OBT and BFC jointly requested a ruling from the IRS as to whether the proposal would comply with the 1969 Tax Reform Act and other IRS regulations. TX 1837. On July 29, 1988, the IRS issued a Private Letter Ruling that approved the plan and specifically agreed that the BFC stock to be held by OBT "will be classified as a permitted holding" under the 1969 Tax Reform Act. TX 1837. The Plan of Reorganization was also presented to BFC's management in June of 1988, which described the circumstances requiring reorganization, the method by which it would be accomplished, and the "Net Result" of the plan. TX 1426 at 20. It was represented that the "Net Result" allowed the Trust to meet "the statutory requirements of divestiture, while also allowing the Trust to be "positioned for now and in the future to maintain its charitability and fulfill its fiduciary responsibility . . . [] via ownership of an enhanced bank holding company or a sale of it at an advantageous price at a later date." *Id.* at 20; *see also* TX 1088 at 6; Tr. 2885:05-20 (Marion); Tr. 3165:17-3166:01 (Crain).

118. In February 1989, the Trust and BFC executed the "Bremer Financial Corporation Plan of Reorganization." TX 1055; Tr. 2266:06-23 (Lipschultz); Tr. 3000:21-3001:14 (Crain). The Trust then sold 960,000 shares of its 1.2 million Class A voting stock to a group of shareholders made up of BFC directors, employees, and employee stock ownership and 401(k) plans. TX 1426 at 6-10; TX 1088. The trustees' sale amounted to 80% of the voting stock. TX 1426 at 12. The Trust retained the remaining 20% of the voting stock (240,000 shares) along with all of the Class B (non-voting) stock (10,800,000 shares). *Id.* As a result, the Trust continued to own 92% of BFC (11,040,000 shares) but possessed only 20% of voting control. *Id.* This ownership structure remained in place for the next 30 years.

119. During the reorganization process, the trustees petitioned this Court multiple times. In 1979, then-trustees petitioned the Court "to independently analyze the various methods of divestiture available to the Otto Bremer Foundation to comply with the provisions of IRC section 4943." Tr. 2514 (Lipschultz); TX 931; Tr. 2518:21-2519:1 (Lipschultz); TX 932. In 1982, a petition was filed seeking approval for the "hiring of Morgan Stanley by the trustees for the purpose of assisting the foundation in its efforts to comply with the divestiture requirements of IRC 4943." Tr. 2520:10-20 (Lipschultz); TX 936. In 1985, then-trustees further sought approval for exploring "a possible restructuring of its holdings through a

business combination or reorganization." Tr. 2521:20-21 (Lipschultz); TX 941. In March 1989, Trustees' predecessors specifically filed a petition requesting approval for "formulating and adopting the Plan of Reorganization" executed in February 1989. TX 973. The AGO was given prior notice of these petitions. *See, e.g.*, Tr. 2527:5-15 (Lipschultz); TX 974. The Court approved the reorganization plan by Order dated April 12, 1989. On November 8, 1991, upon trustees' Petition for Review, this Court approved the implementation of the reorganization plan and specifically approved OBT's sale of the 960,000 shares of Class A stock. TX 1768.

120. The Minnesota Legislature reinforced the Trust's express rights to sell BFC to a third-party purchaser. At the same time the Trust reorganized BFC in 1989 and sold a portion of its shares to comply with the 1969 Tax Reform Act's obligations, the Minnesota Legislature passed Minn. Stat. § 501B.45, which was signed into law in 1989. *See also, e.g.*, TX 866 at 34. Minn. Stat. § 501B.45 concerns the "Sale of Banks owned by Charitable Trusts." The Trust was and has been the only charitable trust that owned a bank at the time and since § 501B.45 was passed. *See, e.g.*, TX 1164C; Tr. 282:10-283:05 (Gillaspey). Pursuant to § 501B.45, subd. 2, the Trust was legally authorized to sell, assign, merge, or transfer "the stock or assets of one or more banks or a bank holding company owned directly or indirectly by a charitable trust" to "a bank holding company, bank, or other qualified entity as permitted by applicable banking laws without regard to whether the entity acquiring the stock or assets is located in a reciprocating state." Minn. Stat. § 501B.45, subd. 2. The historical record indicates that the Trust's trustees believed a sale of the Trust's BFC stock in 1989 was necessary or proper due to the unforeseen circumstances brought on by the 1969 Tax Reform Act. *See, e.g.*, TX 1768; TX 1 at ¶ 16; Tr. 3172:05-20 (Crain). After the Reorganization, BFC's Board of Directors was expanded from three (3) board seats to four (4), then five (5). *See, e.g.*, TX 1093 at 3 (Jan 22, 2019 Memorandum to BFC board).

121. The Trust's trustees still occupied three of the five board seats, with Sherman Winthrop, a local Minnesota attorney and counsel for the Trust and its trustees, and Terry Cummings, a BFC executive, occupying the fourth and fifth BFC board seats. *Id*. Throughout the following years, the Trust's trustees were Officers of BFC and continued to hold board positions for BFC as well. *See* Tr. 622:04-06; 587:19-20 (Johnson); Tr. 1209:16-18, 1120:15-18, 1162:20-1163:03 (Reardon); Tr. 1846:16-18, 3722:11-16 (Lipschultz); Tr. 2980:07-09 (Crain). Through their continuing service in their roles with BFC, the Trustees were able to monitor the Trust's 92% ownership of its principal asset. After the enactment of the Sarbanes-Oxley Act of 2002, as a voluntary measure to promote greater director independence, BFC's Board of Directors expanded further to 10 seats. Tr. 3912:12-24 (Gary); TX 441 at 47 ("until the advent of Sarbanes-Oxley, OBT Trustees held a majority of BFC's board seats"). Because most actions of BFC's Board of Directors require majority vote, the Trust could no longer take formal board action regarding the management, operations, and maintenance of its primary asset (BFC) through a

majority board presence but instead held a minority board position. Such actions of the BFC Board of Directors include, for example, certain governance and oversight measures, policy review and adoption, regulator coordination and compliance, dividend determination, and submission of shareholder proposals (including annual board recommendations and sale/merger/acquisition proposals), among numerous others. *See, e.g.*, TX 171 at 9.

XII. Events Leading up to Sale of BFC Stock in 2019

122. Book Value, Fair Market Value, Dividends and Distributions pre-2019. The 1989 reorganization addressed the first prong of the 1969 Tax Reform Act. Under the second prong, a charitable foundation must distribute five percent of the fair market value ("FMV") of its assets for charitable purposes each year. The failure to meet this threshold, could result in a 30% tax on the undistributed income, which rises to 100 percent if not distributed during the specified time period. *See* 26 U.S. Code § 4942. It can also lead to penalties and a potential loss of the Trust's charitable status. Tr. 1388:11-24 (Thompson).

123. The Trust and BFC addressed this requirement in the Plan of Reorganization as well. Protections for the Trust were built into the plan and within BFC's Restated Articles of Incorporation. TX 1055. BFC must issue annual dividends to its shareholders equal to at least five percent of its net book value to facilitate the Trust's ongoing charitable distribution requirement. If it fails to do so, Class B shareholders can opt to convert their shares into Class A shares. TX 1055 at ¶4(b). The Plan of Reorganization contains other provisions to protect the Trust, such as allowing a third-party to whom the Trust transfers shares to convert those Class B shares to Class A shares. TX 1055 at ¶4(a). Additionally, the Trust's Class B non-voting shares were entitled to vote in limited "extraordinary" circumstances. *Id.* at ¶ 3(b). Those limited "extraordinary" circumstances include any sale, merger, or acquisition proposal for shareholder approval and in the event a shareholder proposes to amend BFC's Restated Articles of Incorporation. *Id.*; *see also* TX 1088.

124. The distribution requirements of OBT and BFC are not necessarily based on the same calculation. The 1969 Tax Reform Act requires OBT to distribute 5% of the FMV of its holdings. BFC, on the other hand, is required to distribute dividends of at least 5% of its book value. "Book value" is generally known as the difference in reported value between a corporation's assets and its liabilities. Tr. 2499:25-2500:07 (Lipschultz). "Fair market value" is the price a willing buyer would pay to a willing seller in the market. Tr. 2501:12-20 (Lipschultz); *see also* Tr. 2477:17-2478:11 (Lipschultz). As a private corporation, BFC was not traded on a known market, so the "fair market value" of 92% of BFC was always understood and reported by the Trust to be at or under BFC's recorded book value given the constraints on marketability. Tr. 1382:05-1383:16 (Thompson). The difference could lead to a shortfall to OBT if BFC's book value is significantly less than its fair

market value resulting in insufficient dividends paid to meet the Trust's obligations to distribute 5% of the FMV of BFC. Because the bulk of the Trust's assets is BFC stock, the Trust is dependent on dividends from BFC to meet its minimum distribution obligations.

125. Since BFC's 1989 Reorganization, the Trust has primarily received income from its BFC stock holdings in the form of dividends. TX 1974 (OBT Dividends 2010-2020); *see also* TX 3120. While the dividends paid by BFC were generally limited to 5% of BFC's book value, BFC failed to meet that dividend requirement "[d]uring the financial crisis and economic downturn of 2008 to 2010." TX 1974; TX 196. The Trust was able to meet its own IRS distribution requirement, however, due to "available carryover balance and income capital gains from non-BFC investments." Tr. 1906:8-22 (Lipschultz); TX 196. The Trust has always distributed more than the 5 percent required, and is allowed to "bank" overpayments" and address future year requirements. Tr. 1612:15-21 (Thompson). In January 2018, after BFC had made an accounting adjustment that negatively impacted dividends, Trustees reminded BFC executives that the 5% book value dividend requirement was a "minimum" dividend and that additional annual dividends may be necessary. TX 1956 at 3; Tr. 3130:14-17, 3140:04-12, 3141:11-3142:23 (Crain). Trustees requested that BFC pay a supplemental dividend in 2018. TX 1956 at 4; Tr. 3142:12-23 (Crain). BFC thereafter approved a $20 million special dividend and submitted for approval from the Federal Reserve. The FRB approved the special dividend plan but cautioned that due to certain issues future dividends similar in size over an extended period of time would negatively impact BFC's strength and "could potentially be an annual distraction for OBT and BFC from the core operations of both entities." TX 1091.

126. After implementation of the 1969 Tax Reform Act, the Trust must evaluate and report the "fair market value" (FMV) of its BFC holdings annually to the IRS. Tr. 4086:04-4087:02 (Gary); Tr. 1019:15-1020:17 (Berens); Tr. 3172:18-20, 3371:06-10 (Crain); *see also* Tr. 1388:08-24 (Thompson). These valuations dictate the Trust's minimum distributions. Trustees generally used BFC's average book value and applied a discount for the lack of marketability and liquidity to arrive at the FMV. Tr. 1380:20-1384:10 (Thompson); TX 326; Tr. 3066:13-19 (Crain). The determined FMV is important to both BFC and the Trust. Tr. 3825:6-17 (Lipschultz); Tr. 1388:11-24 (Thompson). Obviously, the higher the book value of BFC stock, the higher the FMV, thus increasing OBT's distribution obligation and the corresponding need for higher dividends from BFC.

127. The valuation of BFC stock has been reviewed and validated through annual independent audits by Ernst & Young ("E&Y"). TX 999 at 92: Dep. Tr. 13-94 (Epp); Tr. 1598:18-25 (Thompson). The valuation materials have also been submitted to and reviewed by the AGO each year, and repeatedly approved by this Court. *See, e.g.,* TX 1768; TX 1446; TX 1543; TX 1164F. In 2018, for example, the

reported book value of BFC was $1,050,756,371 resulting in a reported FMV of $899,451,000. TX11 at 21. There are alternative methods to value stock, particularly when it comes to a private company, and the auditors agree that Trustees have significant latitude regarding the valuation method used. TX 999 at 84:9-85:6 (Epp); TX 104; *see also* Tr. 1385:4-12 (Thompson). Lipschultz acknowledged that selecting the FMV is "a choice" and believes that Trustees' valuation methods were appropriate. Tr. 3825:6-17 (Lipschultz); Tr. 3825:6-17 (Lipschultz). E&Y's 2018 audit reviewed the valuation of BFC holdings and determined that the method and valuation approach was reasonable. TX 999 at 8:03-89:14 (Epp); TX 105 at 6; Tr. 1598:16-25 (Thompson).

128. The AGO now challenges the Trustee's longstanding valuation method and argues that the FMV reported under this method was generally lower than other valuations. The AGO points to valuations from BFC's ESOP which showed a significantly higher FMV of the shares, including 1.63 times higher than the book value in 2016. Tr. 2505:7-10 (Lipschultz); TX 970. BFC's ESOP valuation as of December 31, 2017, reported the fair market value on a discounted nonmarketable minority basis as $167 per share. Tr. 3806:4-8 (Lipschultz); TX 4035. In 2017, the Trust reported a FMV of $885 million, or an average $80 per share. TX 10 at Statement 10; TX 4035 at 9. Crain testified that BFC executives always recognized that Bremer was worth more than book value if it could ever be sold, "but we never looked at it that way because we . . . weren't looking to be sold." Tr. 3065:4-20 (Crain). The record establishes that there are multiple methods of evaluating FMV, and the method used by the Trust up to 2019 was a generally acceptable evaluation method for stock holdings of this nature. Of course, once potential suitors began making offers for the bank stock in 2019, the valuation had to take those into account. Due to these discussions, the Trust retained Empire Valuation to provide valuations in 2019 and 2020 which reflected over a $900 million increase in the FMV of the Trust's BFC holdings, nearly a doubling from 2018. Tr. 1386:19-1387:20 (Thompson); TX 11; TX 12; TX 1933; TX 1935.

129. Considerations of Strategic Alternatives Begin in 2018. The parties dispute who began the discussion of the potential sale of BFC. Trustees argue that BFC first instigated discussions when Crain and BFC CFO Bleske met with JP Morgan brokers in November 2018 following an executive banking forum and arranged a time in early 2019 to discuss "what Bremer Financial and OBT might look like in a different ownership structure." TX 1010; Tr. 3242:12-3543:01; Tr. 3251:18-3252:03, 3542:12-3543:01 (Crain). Crain sought to arrange the meeting after BFC's board meetings in December 2018 and January 2019. TX 1010; Tr. 3179:11-3180:11 (Crain).

130. At the time, Crain served on BFC's Board of Directors along with the three Trustees and six independent directors. Tr. 2979:19-2980:09 (Crain). At the first of those board meetings in December 2018, an "educational session" was

requested by the non-Trustee board members, to learn more about the 1989 Plan of Reorganization, BFC's corporate structure and the Trust's rights and obligations under the Trust Instrument. Tr. 2271:25-2273:10 (Lipschultz); Tr. 2996:24-2997:10, 3180:17-3181:05 (Crain); TX1092. Shortly thereafter, BFC's board chair, Ron James, arranged for BFC's counsel at Winthrop & Weinstine to provide an education session at the next board meeting January 2019. TX 1092; Tr. 2272:12-2273:10 (Lipschultz). Trustee Lipschultz emailed Mr. James, offering to assist in the educational session by making the Trust's separate counsel available for the session as well. *Id*.

131. On January 22, 2019, counsel for the Trust sent a memorandum to all BFC board members describing the Trust's history, the influence of the 1969 Tax Reform Act on its ownership of BFC, and the subsequent Plan of Reorganization and Restated Articles. TX 1093; Tr. 2996:24-2997:10, 3183:04-3191:13 (Crain); Tr. 2274:10-2278:10 (Lipschultz). At the January 2019 board meeting Counsel for BFC (from Winthrop & Weinstine), and the Trust (from Dorsey and Stinson Leonard Street) were in attendance, and the topics and history detailed in the memorandum were addressed and discussed. TX 1094. The minutes also confirm that the board discussed BFC's dividend obligations, the Trust's share-conversion rights, the circumstances in which the Trust could vote its Class B shares as well as certain drag-along rights accompanying a sale of OBT's Class B shares. TX 1094. Those drag-along rights could allow a third-party purchaser to acquire sufficient voting control to change the composition of BFC's Board. Tr. 2276:04-2277:13 (Lipschultz); Tr. 3211:05-13 (Crain). BFC's counsel was involved in the drafting of the 1989 Plan of Reorganization and did not dispute the historical account or the protective measures available to OBT. Tr. 2277:24-2278:10 (Lipschultz); Tr. 3198:21-23, 3199:25-3208:23 (Crain). There was no discussion by the board of a potential sale or merger, or of Crain's discussions with JP Morgan regarding potential changes to BFC's ownership structure. TX 1094; Tr. 2281:01-04 (Lipschultz); Tr. 3200:04-07 (Crain). TX1094.

132. The AGO suggests that Trustees began orchestrating conditions to justify a sale of the Trust's BFC shares in early 2018, when Trustees began discussions about "Project Otto Pilot." Tr. 1817:8-12 (Lipschultz). This planning included the future creation of a subsidiary LLC—Community Benefit Financial Company ("CBFC"). Tr. 138:9-139:10 (Suzuki). Trustees also expanded their office space to allow for future staffing growth, including for the CBFC. Tr. 140:21-141:7 (Suzuki). In May 2018, a consultant for Bremer Bank forwarded to Reardon contact information from an investment advisor at KBW, in case Trustees wanted to discuss "strategic options" for BFC. Tr. 1150:25-1151:18 (Reardon); TX 247. Reardon testified that he never followed up on that referral. The AGO points to the January 2019 memo discussed above that Trustees' counsel presented to the BFC board, which included Trustees' rights to sell BFC stock in certain circumstances as further evidence that Trustees contemplated a sale of BFC at that time. TX 73.

Crain testified that she found the January 2019 discussion of selling stock "kind of odd" because "we had never talked about that." Tr. 2999:10-13 (Crain).

133. Irrespective of who might have thought about a sale first, in mid-February 2019 Crain and Bleske met with an investment banker from Sandler O'Neill & Partners LP, who approached them about a potential "merger-of-equals" opportunity for BFC with Company A. TX 1096; Tr. 3223:19-3226:05 (Crain). Sandler O'Neill was the investment bank for Company A, a similarly sized regional bank headquartered in the Midwest. TX 1014; Tr. 3275:09-11 (Crain). In March of 2019, Crain notified Trustee Lipschultz that BFC was approached about a potential merger opportunity with Company A. Tr. 1965:21-25, 2281:19-2282:01 (Lipschultz); Tr. 3235:20-3237:01 (Crain).

134. BFC retained JP Morgan to evaluate BFC's strategic opportunities, including the merger opportunity with Company A, and Crain informed Trustees by email in late March. *See* TX 1097; Tr. 2282:21-2283:05 (Lipschultz). Crain wanted to share JP Morgan's "updated review of the marketplace" with Trustees before the next board meeting. TX 1097. The JP Morgan investment bankers assisting BFC management were the same individuals that Ms. Crain and Mr. Bleske had exchanged communications in November 2018 regarding "what if" scenarios with a different ownership structure for BFC. TX 1010; Tr. 3251:11-3252:03 (Crain). After notification of BFC's efforts, and at the urging of BFC, Trustees retained their own investment banking advisor, Keefe, Bruyette & Woods ("KBW"), as well as legal counsel, to provide independent guidance and analysis regarding the exploratory efforts and the banking market in general. TX 1783; Tr. 1974:06-1975:19, 2283:06-19 (Lipschultz); *see also* TX 1105 at 2; Tr. 3296:13-18 (Crain).

135. <u>April-June 2019 Strategic Discussions.</u> On April 1, 2019, BFC management had direct email contact with the Chairman and CEO of Company A, the potential merger-of-equals partner, who sought to arrange a call and further discussion between the entities. TX 1098; Tr. 3249:22-3250:18 (Crain). BFC codenamed this effort "Project Piano." Tr. 3007:4-3008:10 (Crain). A few days later, JP Morgan presented its analysis to BFC board members, including the Trustees. TX 1099 (April 4, 2019 Discussion Materials from JP Morgan). JP Morgan identified four potential "alternatives" for BFC: (1) remain status quo; (2) go public through an initial public offering ("IPO"); (3) pursue a merger; or (4) explore a sale of BFC. TX1099 at 13; Tr. 3253:06-3257:24 (Crain); Tr. 2287:06-2291:18 (Lipschultz). Obviously, except for the status quo option, the three other alternatives identified would require the Trust to sell or transfer its shares of BFC. Tr. 3257:08-20 (Crain); *see also* Tr. 2288:18-21 (Lipschultz). A benefit of the merger approach identified by JP Morgan was that BFC could "retain key management and meaningful influence." TX 1099 at 13. Alternatively, an outright "sale" provided the "highest premium to intrinsic value" but came with the likely loss of control and risks of buyers' abilities to pay. *Id.*; Tr. 2291:04-2292:24 (Lipschultz). JP Morgan also estimated BFC's total

market value was $1.845 billion, compared to its tangible book value of $1.022 billion. TX 1099 at 17; Tr. 2293:06-13 (Lipschultz).

136. During an executive session of BFC's Board of Directors on April 24, 2019, BFC management sought the Board's authorization to engage in further exploratory conversation with Company A regarding a merger-of-equals. TX 1105; Tr. 2295:11-23 (Lipschultz). BFC's Board and management were told of OBT's concerns that such efforts could significantly impact the Trust, including what value OBT will receive for its shares and the impact on its dividends. *See, e.g.,* TX 1105; Tr. 3241:19-3243:01, 3244:11-3245:15; 3246:08-3247:12 (Crain); *see also* Tr. 3342:06-23 (Crain). In the end, the BFC board ultimately authorized Crain to engage in further exploratory discussions. TX 1105. It was noted that no one from BFC raised any concern about the Trustees' authority to sell their BFC shares. Tr. 2332:04-08 (Lipschultz).

137. After this meeting, Lipschultz conversed with the Trust's KBW consultant, Joe Gulash. In a text Lipschultz told Gulash:

> I was hoping, not expecting, [BFC's presentation] would be more M&A or die, which would make it easier for us to get a sale approved with the court. Now it's all going to come down to the Benjamins. Massive take for the trust, and therefore the community will remove any discussion about the strategy. A really big number upfront trumps a smaller number with risks any day.

Tr. 1978:7-14 (Lipschultz); TX 375. Subsequent communications between KBW and Lipschultz related to BFC management's effort to de-emphasize the sale option and having JP Morgan focus on the merger opportunity. TX 199. Crain confirmed this and stated that the outright sale option was provided only for "illustrative purposes." Tr. 3254:07-09 (Crain). Trustees acknowledged their need to "open the door" to the consideration of all options to ensure the best interests of BFC and the Trust were achieved. TX 199. In an April 2019 email to KBW about potential options, Lipschultz said: "You can be absolutely sure they will never open the door to outright sale. But we will." Tr. 1976:13-1977:4 (Lipschultz); TX 199. Lipschultz testified he believed that the higher the price of the BFC stock, the more likely a sale would be approved by the Court. Tr. 1980:25-1981:4 (Lipschultz). A timeline and notes prepared at one point also shows that Trustees discussed the potential of seeking court approval of a sale process with a confidential filing before a sale was finalized and a second court approval after approval by the BFC board. Tr. 693:13-695:10 (Johnson); TX 784.

138. On May 16, 2019, Crain updated the BFC board regarding her subsequent meetings and negotiations with Company A's CEO. TX 1102; Tr.

3282:02-3283:18 (Crain). Included in her summary was the indication that Crain would be the surviving CEO of the merged company. *Id.* A follow-up meeting was scheduled with Company A to discuss valuation, after which a meeting with Trustees was anticipated to occur to address their interest in proceeding with the proposed merger. *Id.* The next day, Johnson responded to Crain's memo, noting many considerations Trustees had to consider including financial, legal, and social considerations. TX 1066; TX 1483; Tr. 754:20-757:20 (Johnson); Tr. 2300:20-2302:21 (Lipschultz). Johnson informed the board that the Trustees would be consulting their own advisors for advice. *Id.* Johnson further noted the importance of understanding the broader strategic justification for the proposed transaction and requested that BFC management further articulate how the other strategic options of the status quo, IPO, and sale fit into BFC's strategy. *Id.*

139. On May 20, 2019, KBW provided its own analysis to Trustees. TX 1796. That analysis estimated the Company A merger-of-equals proposal valued BFC at $1.632 billion. *Id.* at 10; Tr. 2302:22-2304:20 (Lipschultz). Despite that the new proposed value nearly doubled the fair market value the Trust had reported in its 2018 IRS filings ($899 million), it was far below the $1.845 billion value opined by JP Morgan. *Id.*; TX 11 at 21; TX 1099 at 17.

140. On May 24, 2019, Crain and Bleske traveled to Company A's headquarters to meet with their counterparts and discuss the specifics of a merger of equals. TX 1103. In that meeting, they discussed "cost savings" to "meet the bankers' projections," the "organizational structure" suggested by Crain, the "strategic focus" of the proposed combined entity, and "how to address OBT ownership options… and dividend needs." *Id.*; Tr. 3303:04-3308:24 (Crain); Tr. 3617:17-3624:18 (Bleske). They also made plans to present to their respective boards the rationale for why BFC or Company A should not "just sell" to a larger financial institution.

141. On June 7, 2019, BFC management responded to Johnson's request for information regarding strategic alternatives. TX 1104; TX 1802; Tr. 3309:04-3310:07 (Crain). The response focused on the merger proposal, recognizing that proceeding with the merger of equals would cause BFC to become a public company, would impact its control structure, would dilute its ownership in the combined organization, and would otherwise alter BFC's culture. *Id.;* Tr. 3321:16-3325:18 (Crain). BFC management also acknowledged the merger would likely require BFC to contribute the majority of proposed cost-savings due to BFC's lower efficiency ratios relative to Company A, and that those cost savings would have likely required closing facilities and layoffs. *Id.*; Tr. 2310:18-2311:23 (Lipschultz); Tr. 3333:17-23 (Crain). The response did not address the potential sale option. *Id.* BFC management nevertheless stated that such a merger would allow OBT to

"monetize the value" of BFC's stock by gaining "liquidity through the flexibility to trade that stock in public markets," and sought agreement amongst the BFC Board and Trustees to proceed with the merger-of-equals. TX 1802. At this point there was still no concern raised about the Trust's ability to sell its BFC shares to accomplish the proposed merger.

142. Prior to the upcoming June 2019 BFC board meeting, Trustees ran an internal sensitivity analysis, which modeled the Trust's ability to make qualified distributions equal to 5% of the Trust's fair market value given the increased BFC valuations by JP Morgan and KBW relating to the merger analyses. TX 1862; Tr. 1607:10-15 (Thompson). Thompson modeled scenarios in which fair market value the Trust's assets was $2.0 billion and $2.5 billion as compared to those previously budgeted. *Id.*; Tr. 1611:15-1613:12 (Thompson). The modeling showed that, based on the $2.0 billion valuation for its BFC shares, by early 2020, the prior year carryover would not be enough to enable the Trust to meet its obligation to distribute 5% of the fair market value of its assets, leaving a shortfall of $27 to $50 million. TX 1862 at 7; Tr. 1611:15-1615:15 (Thompson); Tr. 2313:17-2314:10 (Lipschultz); Tr. 3878:02-3882:15 (Gary).

143. At the next BFC board meeting on June 25th Trustees expressed their disinterest in the merger of equals proposal. TX 1105. Trustees expressed concerns that the proposed merger would dilute their ownership structure from 92% to 46-47%, lacked assurances that future dividends would be sufficient to meet the IRS distribution requirements, and that the proposal carried other execution risks and delays. *Id.* at 2-3. Trustees relayed that they had completed considerable due diligence after being presented with the merger proposal. *See id.*; TX 1962. In fact, Crain testified that OBT seemed far ahead of the rest of the board in terms of information gathering and analysis. Tr. 3346:03-20, 3352:11-3355:03 (Crain). Trustees advised the board that the Trust was instead interested in an outright sale which could yield hundreds of millions of dollars more for the Trust than the merger. TX 1105 at 2-3; Tr. 3346:03-20, 3348:15-3350:10, 3354:05-24; Tr. 3009:10-22 (Crain); TX 74. Crain testified that was the first time Trustees expressed a desire to sell the company outright and it came as a "significant surprise" to her. Tr. 3014:18-3015:5 (Crain). Crain acknowledged that reasonable board members could have differing opinions on the facts presented. Tr. 3354:02-04 (Crain). The BFC board ultimately agreed not to proceed with the merger-of-equals proposal and directed management to terminate discussions with Company A. Tr. 3009:10-22 (Crain). The board voted instead to assess organic growth as well as potential sale alternatives. TX 1105 at 3.

144. July 12, 2019, Resolution to Sell the Trust's BFC Stock. Given the new fair market value appraisals of at least $1.632 billion and higher, the

Trust's IRS-mandated distribution would increase substantially, perhaps by $25 million or more. At the same time, Trustees were concerned that its primary income-generating asset, BFC, would be providing substantially less than that in dividends. Tr. 758:11-23 (Johnson); Lipschultz stated that he believed they had an "absolute crisis" on their hands Tr. 2321:21-2322:19, 2477:17-2479:19 (Lipschultz). Trustees believed that the circumstances and consequences brought about by the same 1969 Tax Reform Act (which provided the basis and required the Trust's prior sale of BFC stock), made it once again necessary or proper to sell the Trust's shares in BFC in order to comply with the Tax Reform Act's distribution regulations. Tr. 758:14-23 (Johnson); Tr. 2327:05-2328:09 (Lipschultz). On July 12, 2019, Trustees formally concluded that it was necessary and proper to sell the Trust's shares in BFC owing to unforeseen circumstances as soon as reasonably practicable under the circumstances. TX 170; TX 837; TX 1079; Tr. 2327:05-2328:09 (Lipschultz). Johnson stated that the decision to sell was made after much consideration, evaluation, and analysis given its significant impact on the Trust. Tr. *Id.;* 753:21-754:10 (Johnson). It was not made lightly or in a rush. *Id.* The Written Action to sell their stock in BFC was based upon the "unforeseen circumstances" provision of the Trust Instrument. TX 837. The resolution itself, however, did not list what those circumstances were. Tr. 1986 (Lipschultz); Tr. 685:18-686:16 (Johnson); TX 170; TX 837; TX 1079.

145. Around the same time, Trustees reiterated to the BFC board their intent to sell the stock. Tr. 758:24-759:09 (Johnson); Tr. 2328:10-14 (Lipschultz). In early July 2019 BFC engaged the Wachtell Lipton law firm on the advice of JP Morgan. Bleske testified that the hiring of Wachtell was to explore further strategic options for the bank and "try to understand the nuances of the ownership structure with Otto Bremer Trust and BFC." Tr. 3649:02-07 (Bleske); TX 1022; TX 1070. On July 19, 2019, BFC notified Trustees that Wachtell Lipton had been retained as "BFC Corporate" counsel. TX 1486. Crain was unable to recall why communications with Wachtell Lipton and JP Morgan were redacted as privileged, but denied it was owing to contemplated litigation. Tr. 3359:03-3362:16 (Crain); TX 1070. Some witnesses, including Lipschultz, were aware that Wachtell Lipton had a reputation in the investment banking industry as an aggressive, antitakeover firm. TX 965 at 34:17-35:04, 52:09-23 (Lindenbaum); Tr. 1994:06-19 (Lipschultz).

146. July 23-24, 2019, BFC Board Meeting. Another BFC board meeting was held on July 23-24, 2019. TX 75. Trustees knew BFC was opposed to an outright sale in advance of the meeting. Johnson testified that there was obvious pushback from BFC by this time. Tr. 690:4-19 (Johnson); *see also* Tr. 1153:18-1154:4 (Reardon). In a July 20th email, Lipschultz noted that "things are heating up in our path to divest" because BFC hired the anti-takeover law firm. Tr. 1993:17-1994:19 (Lipschultz); TX 203. BFC's hiring of Wachtell Lipton signaled to him "[t]hat a war

was about to start." Tr. 2330:12-15 (Lipschultz). Crain stated that Wachtell Lipton was brought in for specialized expertise because of Trustees' desire to sell.

147. Crain testified that the board was trying to understand if they had the capacity to sell the bank, if it was the right time to sell, what kind of process would be involved, and if a sale would be challenged in court. Tr. 3032:21-3033:2 (Crain); Tr. 3029:1-23 (Crain). Wachtell Lipton attorneys attended the meeting and provided a presentation regarding the BFC board's fiduciary responsibilities under Minnesota law and the board's responsibilities when determining whether to pursue a sales transaction. TX 1804; Tr. 2447:03-2450:13 (Lipschultz). A Wachtell Lipton attorney advised that the board should answer three fundamental questions before a transaction. "One, is a transaction viable? Two, assuming the transaction is viable, is pursuing the sale process prudent? And, three, if the transaction is viable and the process prudent, is the transaction advisable?" Tr. 1992:15-1993:5 (Lipschultz); Tr. 688:3-24 (Johnson); TX 75. Lipschultz inquired about the potential for personal liability arising from a transaction. Tr. 1993:6-9 (Lipschultz). The board was advised that there was no easy answer in balancing the interests of OBT, the primary shareholder, with that of BFC if the Board decides against pursuing a sales transaction. The Board and management knew that reasonable Board members might differ as to their opinions on the questions presented. TX 1071; TX 1804; Tr. 3383:04-3385:06 (Crain).

148. The board discussed the question of whether Trustees had the authority to sell its shares under Paragraph 16 of the Trust Instrument. Tr. 1992:1-6 (Lipschultz). A BFC lawyer said that the issue raised an important question of whether OBT has the authority to sell triggered by an unforeseen circumstance. BFC management at that time knew that the "unforeseen circumstance" required by Paragraph 16 of the Trust Instrument was the 1969 Tax Reform Act and that the 5% fair market value distribution requirement had to be met every year. Tr. 3369:01-04, 3369:20-24, 3370:22-3371:10 (Crain). BFC management and Board knew that decision was not for the Board to determine. TX 1071; TX 1804; Tr. 3124:25-3125:08, 3304:19-3305:03, 3308:07-08, 3371:24-3372:10 (Crain). Non-Trustee board members inquired as to Trustees' motivations at the meeting and asked them to identify what unforeseen circumstances existed to trigger a sale. TX 1071; TX 1804. Trustees offered to make their counsel available to answer any questions the Board had regarding that issue. *Id.*

149. Lipschultz told the board that "if BFC and trustees cannot reach a collaborative approach, . . . OBT will move forward with the sale of the shares independently." Tr. 1991:21-25 (Lipschultz); Tr. 3024:8-21 (Crain). When questioned if there were any alternative options to meet the Trust's needs and interests without selling the bank, Lipschultz replied that this was Trustees' decision, and questioned the Board's pushback. Tr. 3031:20-3032:11 (Crain). During the July 2019 meeting, Lipschultz recommended a collaborative approach to a sale. There

was no threat of litigation by any board members or Trustees. Tr. 3396:06-10; 3401:22-3402:11 (Crain).

150. August 5, 2019, BFC/Trustee Meeting. On August 5, 2019, Trustees' counsel met with BFC's counsel about Trustees' interest in pursuing a sale. TX 76; Tr. 932:06-933:14 (Berens). Trustees' fiduciary counsel William Berens from Dorsey attended the meeting and testified at trial. Berens testified that in the August 5 meeting, BFC's counsel wanted to "debate" whether unforeseen circumstances existed under Paragraph 16 of the Trust Instrument. Tr. 932:4-934:16 (Berens). Berens agreed that the "clear implication" of the "somewhat adversarial" meeting was "that . . . [BFC] didn't think there were unforeseen circumstances and they wanted to convince us that they were right." Tr. 932:4-934:16 (Berens). Counsel for BFC contended that, in their opinion, no unforeseen circumstances existed to warrant Trustees' sale of BFC stock and asserted that the AGO could oppose Trustees efforts to sell. Tr. 934:06-935:08 (Berens); Tr. 1014:22-1015:11 (Berens). Berens explained that their opinion did not matter, because the Trust Instrument says it is only in the opinion of Trustees—not anyone else. Tr. 934:17-935:5 (Berens). When BFC raised the possibility that the AGO might oppose a sale, Berens told them that Trustees were "confident" that the AGO would not oppose the sale. Tr. 935:6-13 (Berens).

151. August 8, 2019, Company B Letter of Interest. On August 8, 2019, Trustees received a written indication of interest from Company B to purchase BFC for $1.9 billion. TX 204; TX 1109. In the letter Company B issued a nonbinding proposal to buy 100 percent of BFC at $1.9 billion. TX 204. Company B recommended the parties immediately engage in due diligence and offered to proceed on a "very compressed schedule," with speed of execution being beneficial to Company B, BFC, and the Trust. *Id.* Lipschultz believed that indication of interest for $1.9 billion was further confirmation of the prior valuations and Trustees' good faith belief that sale was necessary or proper. Tr. 2451:21-2453:11 (Lipschultz). He also believed that Company B would likely increase its offer through negotiation and that JP Morgan also anticipated Company B would be able to increase its offer. *Id.*; Tr. 2470:24-2471:06,) (Lipschultz); TX 1808 at 27.

152. Lipschultz knew that an outright sale of this nature would require BFC's cooperation. Tr. 1994:20-1996:16 (Lipschultz). BFC was not involved in the discussions with Company B, and Crain testified that the CEO of Company B was later "embarrassed" for sending the letter of interest because he "thought the [BFC] board was supporting of it." Tr. 3531:7-15 (Crain). Company B ended up withdrawing its proposal a few weeks after it was made. Tr. 1994:20-1996:16 (Lipschultz). Lipschultz later texted Gulash that the Company B offer "was a keystone in this whole story" in justifying the sale. Lipschultz texted "the fact it was retracted and not reissued has been devastating to our story line." Tr. 2080:8-22 (Lipschultz); TX 424. Lipschultz said at the time, "It really comes down to this, get

[Company B] to make that unsolicited offer and train will leave the station." TX 381. Lipschultz thought the proposal from an attractive buyer like Company B would break the "logjam" between BFC and OBT regarding a potential sale. Tr. 1989:18-1990:5 (Lipschultz).

153. August 16, 2019, AGO Meeting and Follow-Up Letter. Two days after the meeting between BFC and Trust counsel, Berens emailed the AGO to schedule a meeting with Assistant Attorney Generals Sarah Gillaspey and Ben Velzen to "discuss a significant matter involving the Otto Bremer Trust." TX 363; Tr. 241:14-17 (Gillaspey); Tr. 936:4-18 (Berens). Gillaspey was the person at the AGO responsible for oversight of the Trust since 2014 and was involved in the supervision and participation in the Trust's petitions for review in 2017 and before. *See, e.g.,* TX 1164C; Tr. 271:14-272:12, Tr. 273:22-295:19 (Gillaspey).

154. Berens testified that the "significant matter" referred to Trustees' conclusion that it was appropriate to explore a sale of BFC stock. It was "significant" because it involves a large Minnesota trust, the BFC shares are the Trust's dominant asset, and because the AGO would have supervisory authority over any sale. Tr. 936:19-937:6 (Berens). Berens did not provide the AGO any further information in advance of the meeting. Tr. 937:12-16 (Berens); Tr. 243:23-244:4 (Gillaspey); Tr. 2426:7-2427:2 (Velzen). Velzen testified that he and Gillaspey "didn't have any clue what Ms. Topp and Mr. Berens wanted to talk about with respect to OBT before we were in the meeting." 2426:7-2427:2 (Velzen).

155. The meeting took place at the AGO's offices on August 16, 2019. Trust attorneys Berens and Claire Topp of Dorsey met with Gillaspey and Velzen and discussed the circumstances confronting Trustees, including BFC's increased fair market value and the implications to the Trust's 5% distribution requirement, as well as Trustees' decision to pursue a sale of BFC. Tr. 1018:04-1030:05 (Berens); Tr. 241:25-242:03, 246:07-247:22 (Gillaspey); TX 128; TX 1164. The meeting was cordial and friendly, mirroring Trustees' past coordination with the AGO's Office. Tr. 1028:23-1029:01 (Berens); Tr. 2370:21-2371:04 (Velzen).

156. Berens testified that he told the AGO that Trustees were considering selling their BFC shares. He explained that BFC management was exploring a merger of equals, which implied the valuation of the BFC stock was 40 to 50 percent higher than BFC's stated book value, which had historically been used to value the stock. He also told them that Trustees received an "unsolicited" offer from another bank indicating an even higher value and that the higher value would require BFC to pay dividends at a higher rate. Berens testified that he told the AGO that the higher value and dividend pressure could impact the Trust's ability to meet its 5 percent distribution requirements with the IRS. Tr. 938:6-939:25 (Berens). Berens advised that Trustees believed market conditions were favorable for a sale, and Trustees wanted to explore them. Tr. 938:6-939:25 (Berens).

157. It is not clear exactly what was discussed at the meeting about potential disagreement between Trustees and the BFC board, but it appears that subject was discussed. Berens testified that he disclosed that there was tension between the Trustees and the other BFC directors and that BFC may even contest OBT's effort to sell. "We told them that there was a distinct possibility that the board of BFC and/or senior management of BFC would not favor a sale and would not be cooperative[.]" Tr. 946:21-25, 1028:11-22 (Berens); Tr. 2367:21-2370:06 (Velzen); Lipschultz agreed at trial that by the time of the August 16 meeting, it was his own opinion that BFC would never open the door to an outright sale. Tr. 1998:13-15 (Lipschultz). He did not agree that Trustees actually knew that, however. Gillaspey testified that she could not recall discussion about any dispute, conflict, or tension between Trustees and the rest of the BFC board. Tr. 249:4-250:24 (Gillaspey); TX 128. Gillaspey testified her understanding at and impression from the August 2019 meeting was that Trustees and BFC were cooperative about a possible sale. Tr. 359:16-361:11 (Gillaspey). Neither Gillaspey's nor Velzen's notes reference any tensions or opposition by BFC. Tr. 2433:15-20 (Velzen); TX 128. In the end, Gillaspey stated that she couldn't recall one way or another.

158. Velzen stated that the August 16, 2019 meeting was the first time the Trust "was potentially contemplating selling stock in BFC." Tr. 2358:12-16 (Velzen). Velzen testified that the transaction discussed was a sale of all the Trust's BFC stock, and that consistent with his notes, Trustees hoped to sell within 18 months or sooner. Tr. 2427:3-8 (Velzen); TX 1168. Berens did not provide any details or terms of a possible sale, such as a buyer or price. Consistent with her meeting notes, Gillaspey testified that they were told there was "nothing imminent" regarding a particular sale. Tr. 251:22-252:22 (Gillaspey); TX 128. Counsel also told the AGO that Trustees did not intend to change the organizational structure of the Trust. Tr. 254:23-255:23 (Gillaspey); TX 128. The AGO did not object to the idea of a sale during the August 16, 2019, meeting. Tr. 2363:07-2363:13 (Velzen); TX 1164.

159. As noted, the sale discussions were of a general nature. Berens agreed that he did not discuss any sale details, because at the time there was no buyer and there was no price. Tr. 948:9-19 (Berens). Likewise, there was no discussion about the Trust potentially selling only enough BFC shares so that the buyers could convert those shares to voting stock and select a new slate of BFC directors. Tr. 2427:9-2428:12 (Velzen); Tr. 946:1-9 (Berens). Nor was there any discussion that there was any risk that BFC would initiate litigation to stop the sale. Tr. 947:21-948:1 (Berens); Tr. 2431:2-2432:2 (Velzen). Lipschultz admitted that by the time of the August 16 meeting, he believed that litigation was likely, not just a possibility. Tr. 1998:13-15 (Lipschultz). Per Velzen's testimony, counsel certainly did not tell the AGO that "a war was going to start." Tr. 2432:13-18 (Velzen). Lipschultz also admitted that, going into the August 16 meeting, Trustees knew there would be no insurance coverage for any BFC litigation arising from a sale. Tr. 1998:21-1999:3

(Lipschultz). Berens acknowledged that there was no discussion about insurance coverage for any litigation between BFC and trustees. Tr. 948:2-5 (Berens).

160. There was limited discussion at the meeting about any potential financial benefit to the Trustees of a sale of BFC stock. Berens knew that it was "absolutely" important to the AGO that Trustees act in the best interest of the Trust and not themselves. Tr. 943:11-944:2 (Berens). When the AGO specifically asked about the Trustees' potential for personal gain from a sale, counsel told the AGO that, other than that de minimis potential benefit from their personal ownership of shares as required by bank holding rules, Trustees did not stand to personally benefit from the sale. Tr. 942:6-21 (Berens); Tr. 2366:2-10 (Velzen). Velzen's notes confirm he was told that "trustees don't personally benefit from sale." TX 1168. The AGO argues that Berens should have brought up that Lipschultz and Reardon earned the investment fee of .15 percent of all non-BFC assets and that a sale of BFC stock would increase the non-BFC assets of the Trust, and accordingly, increase Lipschultz and Reardon's investment fee. As noted below, however, there is no evidence supporting the argument that they would be earning a fee on the proceeds of BFC stock.

161. Gillaspey specifically asked if Trustees intended to seek court approval for the contemplated transaction. Berens told the AGO that they did not believe court approval was necessary under the Trust Instrument and they would seek approval after the fact, during the normal course of the Trust's account hearings. Tr. 940:11-941:3 (Berens). Berens also explained that prior court approval would not work well in the context of a significant M&A transaction, because court proceedings are generally public, and transactions on the public record would be a "recipe for trouble" because "one doesn't want the negotiations and discussions around the transaction to show up in the newspaper." Tr. 1022:11-21 (Berens); Tr. 941:7-19 (Berens). It is undisputed that Berens did not request, nor did the AGO give, any approval or take a position on a potential sale in the August 16 meeting. Tr. 256:6-15 (Gillaspey); Tr. 2435:12-2436:3 (Velzen); Tr. 948:20-949:12 (Berens). Velzen explained that the AGO does not "take a position in the meeting in those type of circumstances," but rather is "there to absorb information and figure out what to do later." Tr. 2433:21-2434:23 (Velzen). Berens agreed that "there was no ask" for the AGO's consent because it was merely an "informational meeting." Tr. 948:20-949:12 (Berens). Moreover, Berens testified that in his experience, the Charities Division generally does not give legal advice, render legal opinions, or give any sort of "pre-ruling" to charitable trustees. Tr. 928:10-931:17 (Berens).

162. After the meeting, Gillaspey met with Velzen to discuss the matter further. Tr. 326:18-24 (Gillaspey). Gillaspey had also met with others at the AGO regarding the OBT meeting. Tr. 327:14-328:01 (Gillaspey). On August 23, 2019, a week after the meeting, Gillaspey sent a letter to Berens and Topp thanking them

for meeting and for providing the AGO "advance notice of a contemplated sale of OBT assets, mainly the entirety of its stock in [BFC]." TX 129; TX 1164G; TX 1142. The letter also stated: "I also appreciate that you agreed to keep the AGO informed as OBT considers its options moving forward, including providing it copies of relevant documents in a timely manner." *Id.* Velzen testified that the first paragraph of the letter reflected what Trustees' attorneys told the AGO in the August meeting. Tr. 2436:4-23 (Velzen); Tr. 2437:16-2438:1 (Velzen). The second paragraph of the letter addressed the subject of Trustees' future compensation after a sale:

> When appropriate, and most likely after any contemplated sale is finalized, the AGO will want to discuss with OBT its trustee compensation. Given the potentially significant change in the overall operations of the trust, we will want to discuss if the trustees' current compensation would be modified in light of changes to their duties and responsibilities as a result of such a stock sale.

TX 129; TX 1164G; TX 1142; Tr. 330:03-08 (Gillaspey).

163. The AGO's letter did not raise any questions or concerns about the Trustees' right to sell their BFC shares and did not ask the Trustees to confer with the AGO before doing so. Likewise, it did not state that the AGO either approved or consented to the contemplated sale. Berens agreed that the AGO had not approved a sale at the time of the letter. Tr. 967:2-11 (Berens). Johnson testified that she did not understand the AGO's August 23, 2019, letter as having approved a sale but instead as instructing Trustees to keep the AGO informed. Tr. 695:18-696:6 (Johnson). This letter was the last communications between the Trust and the AGO after the August 16 meeting and before the eventual sale closing on October 25, 2019. Tr. 957:22-958:2 (Berens).

164. Events Relating to August 29, 2019, BFC Special Board Meeting. In August of 2019 tensions between the BFC board and Trustees increased. Lipschultz communicated with Crain about BFC's further engagement of JP Morgan. Crain represented that the engagement was solely to evaluate BFC value and potential market opportunities and that there was no written agreement with JP Morgan. TX 1487. All Trustees met with Crain and Bleske on August 7. Thereafter, BFC provided a proposed agreement with JP Morgan that would make JP Morgan BFC's exclusive agent in a sales process and pay them a 1% fee (potentially $20 million). Trustees objected to the proposed agreement because it would require payment of that fee even if OBT, without the help of JP Morgan, sold its shares resulting in a complete merger. On August 19, 2019, Lipschultz sent the BFC board a memorandum detailing their concerns with the potential agreement to retain JP Morgan. TX 206; TX 1487; Tr. 2455:13-246:06; Tr. 1999:21-2002:4 (Lipschultz); (Lipschultz).

165. Within the August 19 memorandum Lipschultz recounted the events of 2019 and the Trust's resulting problematic circumstance he attributed to BFC management's efforts. *Id*. The memo further explained that such events constituted the unforeseen circumstances, that the higher valuations impacted the Trust's IRS obligations to make minimum charitable distributions each year, which was further reinforced by Company B's $1.9 billion letter of interest. *Id.* The memo further advised the Board that over the past two months "all of OBT's regulators" had been briefed about OBT's conclusions and intent. *Id.* In the memo, Trustees implored that they and the BFC board engage in a "professional process to secure maximum value for all shareholders," reiterating Trustees' previous requests to "work collaboratively with BFC management and the Board" towards a sale and "be part of all of the good that comes of one of the most significant events in the history of Minnesota philanthropy." TX 206; TX 1487 ("[Trustees] thought it would be better for everybody, and frankly, from a purely fiduciary standpoint, that all of us as fiduciaries to BFC, as well as the three of us who are fiduciaries for OBT, it would be a way to hopefully get the greatest value for the charitable trust."); 2449:02-2450:13 (stating that Trustees sought several times to pursue a collaborative approach with BFC management and non-Trustee board members) (Lipschultz); *see also* Tr. 764:09-11 (Johnson).

166. The August 19 memorandum also informed the board that if it did not wish to take a collaborative approach, OBT would engage KBW to sell its voting and non-voting shares with the incumbent drag-along rights. This process would result in a likely replacement of the entire board. TX 206; TX 1487; Tr. 3416:05-14 (Crain). Specifically, the memo stated:

> If BFC doesn't want to participate in a joint effort to sell BFC by completing a joint investment banking mandate this week, then OBT will engage KBW to sell its shares. We will go to market, and the result will be a sale of our voting and nonvoting shares, a subsequent conversion of those shares to voting, drag-along rights impacting other shareholders, a likely replacement of the entire current board and BFC sold to whoever OBT believes is the best buyer. Most likely that will be whoever pays the most. JPM would also need to be informed that they have no support from OBT and any corporate transaction they brought unilaterally would be vetoed by OBT.

The memo concluded in part that "If we work together, management would have an important role and voice in the communication with potential buyers, we could look at a variety of considerations, and we could all perform our fiduciary duties as Board members and as Trustees to maximize shareholder value for the end purpose of enriching the non-profit fabric of the upper Midwest."; TX 206; TX 1487; Tr. 2455:13-2466:06 (Lipschultz);

167. BFC's board convened a special meeting of the Board of Directors on August 29, 2019 to address BFC's consideration of strategic alternatives. The minutes of this meeting are quite detailed. TX 1072; TX 1863; Tr. 2466:17-2475:15 (Lipschultz). In addition to the BFC board members, four attorneys from Wachtell Lipton were present, as were two BFC attorneys from Winthrop & Weinstine, and attorney Ann Burns of then-Gray Plant Mooty LLP, along with two investment bankers from JP Morgan. TX 1072; TX 1863; Tr. 3430:06-24 (Crain).

168. JP Morgan presented its analysis regarding BFC's strategic alternatives. TX 1072; TX1863 at 2; Tr. 910:08-25 (Burns); Tr. 2466:19-2469:20 (Lipschultz); Tr. 3430:08-3434:04 (Crain); TX 1808. Among other topics, JP Morgan addressed an IPO option as well as a sale to potential acquirers. TX 1072 at 5; TX 1808 at 21-22; Tr. 3441:02-3442:18 (Crain). JP Morgan noted that a 10-15% discount from total enterprise value is typical for stakes sold in an IPO. TX 1072; TX 1863 at 12; Tr. 3460:04-12 (Crain). Regarding a sale, JP Morgan identified 14 potential buyers, with many likely being able to pay $2 billion or more for BFC. TX 1808 at 26. With regard to Company B, JP Morgan estimated Company B would be able to pay between $2.1 and $2.3 billion. As such, JP Morgan expressed that "Quantitatively, [Company B] has room to materially improve on its $1.9bn offer." *Id.* at 27. JP Morgan further commented that the letter of intent from Company B was "a sign of Bremer's strength due to the fact that Company B has a select list of high-quality banks they are interested in." TX 1072; TX 1863.

169. Attorney Ann Burns was retained by Wachtell Lipton to provide commentary on Minnesota trust law at the meeting. Burns specializes in trusts and estates law, has taught extensively on trust law topics, and is the current president of the American College of Trust and Estate Counsel. Tr. 853:1-855:15 (Burns). Burns understood she was representing Wachtell Lipton, and she did not know Wachtell Lipton was litigation counsel for the Board. Tr. 892:06-893:17 (Burns).

170. Burns advised on Trustees' ability to sell BFC stock under the Trust Instrument. Tr. 856:15-857:5 (Burns). Burns told the board that to answer the question, "you begin with the intent of the settlor" and "you determine his intent by the terms of the [trust] document." Tr. 866:1-9 (Burns). She explained that the "unforeseen circumstances" provision limited Trustees' ability to sell, "was a particularly high bar," was "difficult to convince a judge" to approve and required circumstances that (i) were not foreseen by the settlor, (ii) could cause immediate harm, and (iii) could impair or destroy the purpose of the trust. Tr. 867:16-868:6 (Burns); Tr. 871:20-872:7; 874:2-3 (Burns); Tr. 3058:8-2 (Crain); TX 1072. Burns' takeaway was that "[t]here are a lot of factors and that it can lead to a fairly long and

protracted discussion, if not litigation, and that that is one of the places that causes risk" to BFC and the Trust. Tr. 921:7-25 (Burns).

171. Burns told the Board that the Trustees have the right to make the decision whether it was necessary or proper to sell BFC stock due to unforeseen circumstances and the Court has no preapproval right, but the Court always has oversight under the statutes. Tr. 903:19-904:20 (Burns). Ms. Burns did not give any opinion whether unforeseen circumstances existed in the present situation. Tr. 907:08-13 (Burns). She was not aware whether any stock sales had occurred before 2019, such as during the 1989 Reorganization. She informed the board that "court approval of a sale [by Trustees] is not required by trust law or the trust document." Tr. 856:15-857:08, 903:19-904:01, 922:08-11 (Burns).

172. Burns also "made it very clear" that a decision to sell could be investigated or challenged by the AGO due to its supervisory power over charitable trusts. Tr. 3058:23-3059:1 (Crain); Tr. 880:20-881:15 (Burns). As such, Burns emphasized the importance of disclosure to the AGO. A key takeaway was that "they should contact the Attorney General's Office before taking action on a sale transaction." Tr. 885; (Burns); Tr. 917-918 (Burns). Tr. 2018:17-19 (Lipschultz). Burns advised that although court approval of a sale is not required by trust law or the Trust Instrument, the most "conservative approach" was to seek court approval with notice to the Attorney General. Tr. 880:10-19 (Burns); Tr. 922:8-18 (Burns). She told the Board that notification to the Attorney General could be accomplished by picking up the telephone and calling and arrange to have a conversation with the charities division. Burns did not recall whether she was aware at the time that the Trust's attorneys had already met with the AGO on August 16, 2019. Tr. 916:20-917:06, 919-92 (Burns); TX 1072. The AGO called Burns to testify at trial as a fact witness for notice purposes. Tr. 872:16-873:25. She was not called to testify as an expert witness or provide opinions related to the claims at issue. BFC's lawyers told the board that "trust law issues . . . create an unusual dimension of deal risk in any M&A transaction involving BFC." Tr. 2019:8-24 (Lipschultz). Crain testified that based on Burns' comments, she understood the execution risk of a sale would be particularly high. Tr. 3059:2-25 (Crain).

173. Towards the end of the meeting, Lipschultz was allowed to share OBT's perspective on the unforeseen circumstances leading to the Trustees' decision to pursue a sale. He distributed a memorandum entitled "Unforeseen Mathematics" that once again summarized the valuation issue confronting the Trust and causing Trustees to pursue sale. TX 1072; TX 1863 at 11; TX 1568; Tr. 2476:13-2481:08 (Lipschultz). The memo described the situation created for the Trust due to the heightened valuation, the book value versus fair market value problem, and the ongoing 5% distribution

requirement of the 1969 Tax Reform Act. *Id.* Lipschultz recounted the Board's discussions about dividends over the past several years, and further expressed the Trustees' continuing concern that the level of dividends BFC would have to provide for the Trust to comply with its distribution requirements was not feasible (and may not even be permitted by regulators) "without impairing the value of BFC and creating what could be an even bigger problem for the Trust's assets." TX 1568; Tr. 2476:13-2479:06 (Lipschultz). Two board members asked whether OBT would be open to discussing other ways to meet OBT's dividend needs and Trustee Lipschultz replied that OBT would be open to such a discussion. TX 1072; TX 1863 at 11.

174. After discussion of the "Unforeseen Mathematics" memorandum, Board Chair James asked for discussion and reactions to the alternatives placed in front of the Board. *Id.* at 12. BFC's ability to pay sufficient dividends to OBT while the Board evaluated an IPO was discussed. *Id.* Two independent board members expressed opinions that BFC should be free from OBT's ownership, which when combined with the three Trustees, meant that five of the ten Board members believed BFC and OBT should be separated. CFO Bleske was asked if BFC could make necessary dividend payments in the short term. Bleske responded in the affirmative without providing any supportive data or the period such dividend could be paid. TX 1072; Tr. 3458:10-3463:08, 3464:16-3465:07 (Crain). This dividend issue was a looming element in the discussion of whether to pursue a sales transaction. TX 1072; TX 1863 at 12; Tr. 3466:06-3467:15 (Crain). Other board members expressed the opinion that the board should explore alternatives other than a sale while finding a way to support OBT's dividend requirement in the short term. TX 1072 at 12. Ultimately, James called for a recess and the independent board members met with the board's attorneys.

175. Following the recess, the board chair called for a motion to be made on a process forward for BFC. After further deliberation, and over Trustees' objections, the BFC board voted to terminate any further discussion regarding a sales transaction and prohibiting management from engaging in further sales discussions without explicit approval by the board. TX 1072 at 13; TX 1863 at 13. Only the three Trustees opposed the motion. Crain understood that the prohibition was absolute in that BFC management could not have any discussion at any price, at any time, or under any conditions. Tr. 3469:11-25 (Crain). Lipschultz stating that the other directors were putting the Trust's standing as a charitable trust in jeopardy, that the current circumstances were unsustainable, and that OBT would be forced to proceed to sell its shares in BFC. *Id.;* Tr. 2472:06-22 (Lipschultz). He moved to reconsider and collaborate on a sale process, suggesting that JP Morgan (BFC's advisor) lead the process in cooperation with KBW (the Trust's advisor), with a 3-person oversight committee consisting of two non-Trustee

BFC board members and Lipschultz bringing a recommendation to the full board by the end of September. TX 1072; TX 1863 at 13; Tr. 2474:22-2475:15 (Lipschultz). Only Trustees supported the motion to reconsider. The meeting adjourned with no discussion of litigation, despite that the Board was explicitly told OBT would pursue a sale. *Id.*; Tr. 3471:21-3472:13 (Crain).

176. Lipschultz testified the vote "meant an end to [Trustees'] ability to sell our shares to one financial services company and have a complete transaction." He stated BFC's refusal to sell "would have a chilling effect on value" and would preclude regulatory approval, since a buyer could not conduct due diligence. Tr. 2473:24-2474:21 (Lipschultz). Berens testified that with BFC's vote to terminate sale discussions, the risks to the Trust "went up substantially" and created an "untenable situation." Tr. 954:21-957:2 (Berens). Berens characterized the vote as a "game changer" that led Trustees to execute a sale. Tr. 954:21-957:2 (Berens). No one told the AGO about this "game changer." Tr. 957:22-958:2 (Berens).

177. Internal documents from BFC corroborate Trustees' concerns and recognition that BFC would be unable to provide dividends at a level to sustain the Trust's distribution requirements for any extended period of time. For example, BFC's supplemental distributions in 2018 were met with hesitant approval from the Federal Reserve, which cautioned against similar actions in the future. TX 1091. Evidence also established that, prior to the August 2019 Special Board Meeting, Bleske created a dividend affordability schedule to distribute at the meeting. Emails the day after the board meeting suggest that this dividend information was intentionally withheld at the meeting because BFC did not want OBT to conclude that BFC "would" pay regular and supplemental dividends. Instead, according to emails between Crain and others, they wanted to only acknowledge that BFC "had the capacity to do supplemental dividends at a higher level for a short period of time to 'bridge' to a better outcome . . . *i.e.* IPO." TX 1074; Tr. 3475:22-3477:01 (Crain)."); Tr. 3670:17-3671:14 (Bleske). Crain considered the comments regarding dividend availability a "turning point in the Board discussion." Tr. 3473:08-17 (Crain); TX 1074.

178. Additional emails indicate that some of BFC's board members privately recognized that Trustees were put "between a rock and a hard place" given their situation and the potential lack of dividend funding. TX 1075). Those same board members also recognized that BFC's ability to provide sufficient dividends in the near term for the Trust meet its distribution requirements would only be "temporary," and was not otherwise sustainable. *Id.*; TX 1074; TX 1024 at 4; Tr. 3674:14-3675:12 (Bleske); *but see* Tr. 3672:14-3673:09 (Bleske) (acknowledging BFC failed to the provide supplemental dividends commensurate with its dividend affordability

schedule analysis). Those board members understood that the Trust would have a higher charitable distribution requirement and that BFC could not pay a higher dividend long term. TX 1074; Tr. 3482:05-3483:04 (Crain).

179. Although BFC opposed Trustees' efforts to sell, BFC management continued to evaluate a potential IPO following the August 29, 2019 Board meeting, while simultaneously contending that no unforeseen circumstances existed to permit Trustees to sell. However, like an outright sale, an IPO would have required Trustees to sell their private BFC shares to become public. Unlike an outright sale, however, an IPO would have ensured the preservation of BFC management's roles in the resulting public organization. TX 1036; TX 1038; Tr. 3182:15-18 (Crain); Tr. 2288:11-21 (Lipschultz). The evidence at trial showed that, up to and through the period encompassing Trustees' October sales of stock, BFC management continued to explore and evaluate the initial public offering option that would have necessitated the sale of the Trust's BFC stock. Tr. 3680:02-3682:15, 3687:03-3696:16 (Bleske); TX 1036; TX 1038; TX 1040; TX 1042. In September 2019 Bleske and another BFC executive exchanged a potential IPO timeline and process for potential board approval at September, October, or December board meetings. TX 1038.

180. Expert testimony from Professor Glenn Hubbard, further corroborates concerns about BFC's ability to sustain dividends sufficient to meet the Trust's needs. Tr. 986:03-16, 1002:04-09, 1009:02-1010:10 (Hubbard); TX 3111. Hubbard provided expert testimony and analysis regarding the bank's inability to pay dividends at higher levels for any sustainable period without violating its regulatory and minimum capital requirement obligations. Tr. 988:07-1010:10 (Hubbard); *see also* TX 3111. Professor Hubbard described BFC and Bremer Bank's relatively low existing capital performance metrics compared to peer institutions, its relatively high existing dividend metrics compared to peer institutions, and the impact elevated dividends would have on both. Tr. 998:14-1001:11, 1007:24-1009:01 (Hubbard). In the event BFC attempted to pay dividends at elevated levels, such efforts would jeopardize the underlying organizations' operations and financial flexibility, impairing growth, expansion, innovation, and competitive endeavors, given the lack of available capital to do so. Tr. 999:08-19, 1009:02-1010:10 (Hubbard); Tr. 2308:02-2309:19, 2315:13-2316:01 (Lipschultz); *see also, e.g.,* TX 1802 at 2; Tr. 3477:03-13 (Crain).

181. Events leading up to the October Sale. The events following the August 29 board meeting include the behavior most pertinent to this removal action. Up until that time, the actions of the Trustees were reasonable and in furtherance of the best interests of the Trust. Circumstances arose that required the Trustees to seriously consider whether the long-term ownership

of BFC would be sustainable. Clearly Trustees had to recognize that the interest by suitors and mergers and investment bankers changed the manner in which the historic fair market value of their BFC stock needed to be considered and reported. Trustees are left with a major conundrum. They made reasonable efforts to work with BFC after Crain advised them of the merger of equals proposal. They considered the several options proposed by JP Morgan to maximize the value of the stock. They engaged KBW to help them evaluate their options and provide independent advice given their unique situation of owning 92% of the BFC stock. To accommodate sale or merger potentials Trustees made a determination that it was necessary and proper to sell its BFC stock due to the compelling circumstances presented.

182. Due to the actions of the BFC board, it became impossible to achieve cooperation from BFC to allow for interested potential buyers to perform due diligence relating to BFC's operations as would be expected in any sale process of this nature. Trustees were in the awkward position of owning an asset that had become hostile to the idea of a sale at that time. Trustees felt forced to explore their other options to protect the Trust. Tr. 2481:18-23 (Lipschultz); Tr. 763:05-19 (the Trust "was standing on the edge of a cliff . . .[with] great repercussions") (Johnson). Their decision to do so was a good faith one, and a reasonable response to the situation in which they had been placed.

183. As evidenced by Company B's withdrawal, Lipschultz testified that by late August 2019, he was having trouble finding bank buyers because of BFC's hostility to a deal. Tr. 2016:5-24 (Lipschultz). In an August 26, 2019, text, Lipschultz updated Gulash about a conversation with a potential bank buyer. TX 386. Lipschultz testified that when the potential buyer "really grilled us on whether BFC was on board with all of this," Lipschultz had to "wax-on, wax-off," or dance around, the issue. Lipschultz admitted at trial that if the buyer knew "what was really going on"—BFC's hostility to a deal—the buyer would be "out so fast there wouldn't be another convo." Tr. 2008:6-2011:4 (Lipschultz); Tr. 1160:11-24 (Reardon). Lipschultz knew that the inability to allow a buyer to conduct due diligence would prohibit a larger buyer from buying all or substantially all of the shares. Tr. 2463:03-16, 2473:13-2475:21 (Lipschultz).

184. Lipschultz worked hand in hand with Gulash from KBW to develop a scheme to get around the "hostility" problem. Tr. 2016:5-24 (Lipschultz); TX 388; TX 1055. They decided that they could try to replace the board by selling only enough Class B non-voting shares that when converted into Class A voting shares they would have the majority of voting power and could replace the entire board and vote to sell the remaining shares. They nicknamed this plan "Project Raptor." In an August 23, 2019 text, Lipschultz

and Gulash calculated the number of shares required to replace the directors. Tr. 2003:9-2005:9 (Lipschultz); TX 382. The assumption was that the buyers would exercise the conversion rights prescribed in BFC's Plan of Reorganization and Restated Articles of Incorporation, convert their stock to voting stock and combined with the minimal voting shares that Trustees held they would have just over 50 percent of the total voting shares, creating a majority. Tr. 2481:18-2482:13 (Lipschultz); Tr. 763:05-764:11 (Johnson); Tr. 959:05-960:02, 1048:15-1049:12 (Berens). TX 1489 at 8-10.

185. Not all Trustees were anxious to go down this path. Lipschultz admitted it took some time for Trustee Johnson (aka "Shotsy") to sign off on the plan because of the many known and substantial risks. Tr. 2037:8-10 (Lipschultz); TX 377 ("Shotsy has made it clear she is against an outright sale."). On August 25th Lipschultz texted Gulash: "We have to be super careful with all of this around Shotsy. When she becomes aware that this strategy involves tossing the current board and essentially a hostile takeover, she could toss her cookies." Lipschultz admitted by "hostile takeover," he referred to a transaction over BFC's objection. Tr. 2006:18-2008:5 (Lipschultz); TX 385. Johnson's hesitance caused frustration for Lipschultz. Two days before the sale, Lipschultz texted Gulash that "every day I have to go through this shit with Shotsy, my exit price goes up." Lipschultz testified that "exit price" referred to what it would take to make up for the difficulties she caused him. Tr. 2049:20-2050:11 (Lipschultz); TX 408. On October 23rd, Gulash joked with Lipschultz about Johnson: "She should just give me her trustee's seat." Lipschultz responded, "That would be great. She could give it to the panhandler on the street in front of the office and even that would be better." TX 409; TX 410.

186. Lipschultz also knew the plan would require buyers who were willing to take on the risks associated with a hostile deal. In a September 9, 2019 text, Lipschultz discussed with Gulash pursuing "smaller activist investor funds." Unlike the larger bank buyers, Lipschultz noted, activist investors "live for this kind of thing," and selling to them "would signal to the entrenched management and Wachtell that we aren't fucking around." Tr. 2023:18-2025:8 (Lipschultz); TX 389. Lipschultz commented in another text that an issue with activist buyers is that "they live for the fight, so sometimes they never stop pushing and they may want to be large and in charge," and "so they have to be carefully selected by people who can prevent them from going overboard." Tr. 2025:21-2026:10 (Lipschultz); TX 391. But to replace the board "ASAP," they only needed candidates that "are up for the job and know what needs to be done." Tr. 2035:12-2036:16 (Lipschultz); TX 393; TX 394; TX 395. Gulash later commented to Lipschultz that "you told me don't bring me friendlies…bring me real investors" that "only care about making money and are willing to do whatever is necessary." Tr. 2061:17-2062:8 (Lipschultz); TX 415.

187. According to the plan, a special shareholder meeting with new BFC shareholders would be called "for the purpose of removing the BFC directors other than the Trustees," after which the new board would "seek a meaningful review of BFC's strategic options." TX 1489 at 10. Tr. 2481:18-2482:13 (Lipschultz); Tr. 763:05-764:11 (Johnson); Tr. 959:05-960:02, 1048:15-1049:12 (Berens); TX 1489 at 8-10. If the new shareholders approved of the new slate of directors, their voting shares combined with the Trust's 240,000 shares of Class A (voting) shares would provide the necessary majority for approval. *Id*. Trustees would seek to appoint at least four independent directors before any board decision on a strategic transaction. TX 1489 at 10. If the new purchasers declined to convert their shares or consider strategic options, then the status quo of the BFC would be maintained. Tr. 1049:13-23 (Berens). This potential stock sale process was included as an example of OBT options in the memo Trust counsel provided to the board prior to the January 2019 Board Meeting. TX 73.

188. On September 24, Lipschultz notified OBT's examiner at the Federal Reserve about the plan. TX 1489 at 1, 8-10. By that submission, Trustees sought the Federal Reserve's determination as to whether potential buyers of the stock would be required to give the FRB 60 days' written notice before completing the stock purchase. Trust counsel opined that such notice would not be required as the Trust would continue to be the controlling shareholder of the stock. TX 1489 at 10-17. On October 2, 2019, the Federal Reserve responded, stating that no notice from the buyers was required for the transactions as they would not be working in concert with Trustees. TX 1490. This exchange is not considered by the Court as an explicit "approval" by the Federal Reserve of the Trustee's determination that a sale was necessary and proper or that sufficient unforeseen circumstances existed to justify a sale.

189. Trustees formally executed a written resolution on October 10, 2019, to proceed with the sale of 725,000 shares of their Class B shares, and to utilize KBW to facilitate such transactions. TX 1856; Tr. 763:05-765:09 (Johnson). The resolution states that "Trustees have determined in accordance with the Trust instrument governing OBT that in their opinion, due to unforeseen circumstances, it is necessary and proper to sell up to 725,000 shares of Class B Stock in a private transaction to one or more independent, third-party purchasers." Tr. 2026:11-2027:19 (Lipschultz); TX 209. Lipschultz testified that it was important to Trustees to document this resolution because it was a different transaction than the sale of all shares contemplated by the July resolution. Tr. 2027:20-2028:1 (Lipschultz).

190. On October 15, 2019, Lipschultz again texted Gulash regarding Johnson: "She just hates conflict and tries to avoid it at any cost. But we're

giving her strength, which she's going to need when she, Dan, and I wind up as defendants in the inevitable Wachtell driven lawsuit." Tr. 2037:11-2038:9 (Lipschultz); TX 397. In an October 20, 2019 text, Lipschultz texted Gulash regarding the impending transaction: "Dan and I are going to be the ones getting shot at, smeared, and sued. Guaranteed." Tr. 2042:9-22 (Lipschultz); TX 402. On October 20, 2019, Lipschultz also told Gulash that Trustees "have a very difficult trade-off we have to live with possibly for the rest of our lives." Lipschultz testified that "trade-offs" referred to the risk that Trustees "could wind up personally wrecked"… "financially, reputationally, potential government enforcement, litigation—everything." Tr. 2043:7-2044:3 (Lipschultz); TX 403. On October 23, 2019, Lipschultz texted Gulash that Johnson was a "mess" because "she has committed to sign but feels like she is signing someone's death warrant." By "death warrant," he meant "the war that might ensue from these transactions." Tr. 2044:16 -2045:12 (Lipschultz); TX 406. Ultimately, Johnson made the decision to resign from the BFC board before the October sale. Tr. 2039:15-18 (Johnson). Lipschultz believed that if she stayed on the BFC board, the Trust would own the bank for a longer period of time. Tr. 2040:15-2041:21 (Lipschultz). Lipschultz told Gulash in a text that it was going to be a "challenging few months." TX 398. The challenge was because of the threat of "[l]itigation, publicity, [and] just general discord." Tr. 2038:23-2039:5 (Lipschultz).

191. KBW was engaged as the exclusive agent for the contemplated sales. TX 209; TX 138. Under the agreement, KBW was to receive a nonrefundable fee of 5 percent of the transaction regardless of whether the sale was challenged. Tr. 2029:24-2030:14 (Lipschultz); Tr. 1442:9-1443:3 (Thompson). The Trust agreed to indemnify KBW from liability and legal fees resulting from the transaction. Tr. 1428:10-19; Tr. 1443:8-1445:12 (Thompson); Tr. 2030:15-20 (Lipschultz); Tr. 2030:7-14 (Lipschultz); TX 138.

192. Potential purchasers were contacted exclusively through KBW to comply with the Federal Reserve's requirement that potential buyers were not working in concert with Trustees. Tr. 2535:02-23 (Lipschultz); *see also, e.g.,* TX 878 at ¶2.3(c)(i)-(ix). Potential purchasers were tasked with conducting their own due diligence and decisions, maintaining their independence throughout. *Id.* KBW provided potential buyers with an information deck regarding BFC, its ownership structure, and additional information regarding the Trust. TX 1311.

193. Buyers were notified by Trust counsel that BFC's board opposed the sale and could initiate litigation to prevent BFC from pursuing a potential sale after the closing of their purchases. TX 841; TX 842; *see generally* TX 965 at 19:19-22:05 (Lindenbaum); TX 713 at 3. One buyer understood that BFC did not want to sell the company. Tr. 1241:18-1244:15

(Deutsch). Another buyer "expected" BFC to fight. TX 965 at 19:24-20:6; TX 965 at 53:04-21 (Lindenbaum). KBW told a buyer that Trustees would pay buyers their share of dividend payments while any litigation was pending. TX 965 at 36:17-38:9 (Lindenbaum).

194. During negotiations, buyers requested an opinion that the Trust and Trustees had legal authority to enter into the transaction. Tr. 1232:19-1234:13 (Deutsch). The seller's legal authority was important to them. Tr. 1234:14-18 (Deutsch); TX 965 at 45:21-46:03 (Lindenbaum). Trust counsel at Dorsey sent a letter on October 25, 2019, opining that no approval from the Ramsey County District Court, the State of Minnesota, including the Minnesota Attorney General, or the Internal Revenue Service is required. TX 358 at 3. Berens testified that the opinion letter provided protection to the buyer in the event the representations were false. Tr. 965:8-18 (Berens). Berens agreed that the letter does not opine on whether it was prudent for Trustees to seek court or AGO preapproval. Tr. 966:19-967:1 (Berens). It was specifically important to one buyer that the AGO did not object to the transaction. Tr. 1237:18-1239:5 (Deutsch). They were told that the AGO had not objected to Trustees' planned sale. Tr. 1235:20-1237:17 (Deutsch). As noted above, however, the AGO was not presented with the details about the specific transaction until after the sale was completed. Tr. 957:3-21 (Berens). KBW buyers that Trustees had planned a meeting to communicate with the AGO after the transaction had closed. Tr. 1239:6-1241:17 (Deutsch).

195. On October 25, 2019, Trustees completed the sale of 725,000 shares of BFC Class B stock, or seven percent of the Trust's BFC holdings, to eleven separate purchasers at $120 per share. Tr. 2055:14-21, 2305:01-03, 2488:01-03 (Lipschultz); TX 878; TX 130 at 3., at $120 per share. Tr. 2055:14-17 (Lipschultz); TX 843. The sale involved eleven (11) separate purchasers. Tr. 2055:14-21, 2305:01-03, 2488:01-03 (Lipschultz); TX 878 (Stock Purchase Agreement); TX 130 at 3. The sales price was significantly above the per-share value of the merger-of-equals discussion back in January. TX 216; Tr. 2304:18-2305:03, 2485:10-2488:03 (Lipschultz); TX 1796 at 10. The total proceeds from the sale were $87 million and the fee paid to KBW was approximately $5 million. Tr. 1441:3-8 (Thompson). Lipschultz emailed Gulash the day of the sale: "I've rarely been so happy to spend $5M." Tr. 2057:24-2058:3 (Lipschultz).

196. Berens characterized the October Sale as an "unusual transaction" because Trustees only sold a small slice of the Trust's BFC shares, sold them at a discounted value compared to what the per share price would have been for the entire bank. Tr. 958:7-959:4 (Berens). Lipschultz testified that because Trustees "were only selling a small portion" of BFC, "there has to be a discount to account for the fact that the buyer doesn't control the whole company." Tr. 2487:5-8

(Lipschultz). Berens testified that "the best price would only be obtained from a buyer who's buying the whole bank, 100 percent of the stock." Tr. 946:10-20 (Berens). Crain testified that publicity around the sale caused harm to BFC in the form of retention of employees, retention of customers, and was a distraction from her ordinary work. Tr. 3083:22-3084:8 (Crain). She also believes that Trustees' press release, which questioned BFC's ability to succeed, was an "unprecedented" and "value-destroying" approach to the sale of a financial institution. Tr. 3078:1-19 (Crain); Tr. 3079:6-14 (Crain); TX 85. By "put[ting] the bank in play publicly," Trustees created uncertainty with both employees and customers, which "gave our competitors advantages" and prevented business opportunities. Tr. 3568:12-3569:8 (Crain). BFC has also incurred over $20 million in legal fees since 2019 with respect to this matter. Tr. 3516:3-3517:3 (Crain).

197. October 28, 2019, Post-Sale Meeting with AGO. After the sale was finalized, the Trust's attorneys again arranged to meet with Velzen and Gillaspey at the AGO on Monday, October 28, 2019. Tr. 1039:22-1049:23 (Berens). Gillaspey's August 23, 2019 letter requested the parties meet "after any contemplated sale is finalized." TX 129. Like prior meetings between the AGO and Trustees, the October 28, 2019 meeting was collegial, professional, informational, and collaborative. Tr. 1054:24-1055:02 (Berens); Tr. 2402:07-10 (Velzen); Tr. 338:09-10 (Gillaspey). Trust counsel updated the AGO regarding the events that occurred after their last August 16, 2019, including the October sales and the anticipated special shareholder meeting to elect a new slate of BFC directors. *See, e.g.,* Tr. 1039:22-1049:23 (Berens); TX 130. The AGO was told that litigation between OBT and BFC could very well ensue, and the Trust would be issuing a press release regarding the matter. Tr. 268:04-10 (Gillaspey); Tr. 2392:14-24 (Velzen); *see also* TX 130 at 4.

198. Trustees did not give the AGO any documents, including the purchase agreements, before or at this later meeting. Tr. 2437:16-2438:1 (Velzen); Tr. 971:17-24 (Berens). Berens and Topp provided the AGO information about the sale that Trustees thought was relevant to the AGO's supervision over the Trust. Tr. 968:23-969:9 (Berens). This included that the sale involved only a small portion of the Trust's BFC stock, that the sale involved 11 different investment banks holding 19 hedge funds, and that the sale was at a discounted price. He also advised of the strategy to replace the non-Trustee BFC directors to explore strategic options. He advised that BFC was "not happy about any sale at any price on any terms to anybody" and that litigation with BFC was "a distinct possibility." Tr. 969-971 (Berens). Gillaspey testified that the October 28, 2019, meeting was the first time she could recall discussion about a dispute with BFC. Tr. 361:25-362:18 (Gillaspey); TX 130. Neither Velzen nor Gillaspey expressed an opinion either way on any issue with the sale of shares at the meeting. Tr. 337:24-338:21 (Gillaspey); Tr. 2394:04-14, 2400:24-2401:05 (Velzen); Tr. 971:25-972:5 (Berens).

199. After the meeting on October 28, Topp emailed the AGO a link to the press release. Tr. 972:23-973:17 (Berens); TX. 361; TX 844. The press release announced that "Trustees have commenced a process to explore strategic options for BFC." TX 844. The press release further stated that "it can be daunting for a stand-alone regional bank to succeed" in a changing marketplace, and that a sale would make BFC "part of a stronger banking organization that better serves its customers and successfully competes for new ones." TX 844.

200. After the Sale. Trustees also sent BFC a letter on October 28 informing BFC of the sale and Trustees' intent to call a special meeting to elect new directors. Tr. 3074:20-25 (Crain); TX 84. The letter referenced Trustees' fiduciary responsibilities and stated: "We hope that the Board feels the same sense of responsibility and is mindful that every dollar spent to contest this matter is a dollar lost." TX 84. Following this notification, BFC's management internally distributed "talking points" for BFC employees and BFC customers on October 28, 2019, which suggested that BFC's previous merger-of-equals pursuit was the Trustees' proposal which was rejected by other board members and Crain. TX 1045; Tr. 3699:08-12 (Bleske). On October 29th Crain, Bleske, and BFC's HR head discussed creating a "poison pill for OBT" involving compensation and bonuses for management. TX 1047 (email from Bleske to Brown: "we could put our own stay bonuses in place (creates poison pill for OBT)"); Tr. 3712:19-23 (explaining that the poison pill idea was "kind of a… stick-it-to-'em sort of thing") (Bleske). Those same individuals noted the "need to move fast" on the topic. TX 1047. BFC also refused to register the third-party buyers' shares when those purchasers exercised their right to convert their Class B shares and register them as Class A (voting) shares. Tr. 3710:10-13 (Bleske) (directed by Ms. Crain not to register shares); *see also* Tr. 3505:21-3507:22 (Crain). Under the IRS-approved Plan of Reorganization, BFC was required to register such shares upon transfer and election.

201. After the sale, BFC refused to register the shares to the buyers. Tr. 2059:3-6 (Lipschultz). When Trustees learned BFC was refusing to register the shares, Lipschultz anticipated the investors would join forces to sue BFC. Lipschultz texted Gulash on November 4, 2019: "I am frightened for BFC if they try to withhold shares from the new investors. I picture an aerial bombardment, the likes of which sleepy St. Paul has never seen." Tr. 2060:10-15; TX 414 (Lipschultz). On November 7, 2019, Lipschultz texted Gulash: "I am looking forward to observing the carnage." Tr. 2062:17-19 (Lipschultz).

202. BFC representatives also arranged a meeting on November 14, 2019, with the AGO's Charities Division attorneys. TX 1174. BFC's Chief Marketing Officer emailed the Attorney General's Deputy of Staff, along with Velzen and Gillaspey scheduling the meeting with BFC's counsel, which included the head of the Attorney General's transition team. Tr. 341:21-346:04 (Gillaspey); Tr. 2403:03-2406:23 (Velzen); Tr. 3525:20-3526:19 (Crain). BFC representatives attending the meeting included BFC's counsel from three law firms, including Wachtell Lipton.

Id.; Tr. 345:05-12 (Gillaspey); Tr. 2406:18-2407:20 (Velzen). At the meeting with the AGO, BFC representatives left the impression that it was the Trustees, and not BFC, that had initiated the merger of equals discussions and caused the events of 2019. Tr. 2409:14-2410:14 (Velzen). BFC representatives further relayed that a merger would result in the loss of jobs in the community, and that the Trustees were attempting to enrich themselves and that trust laws prohibited them from selling the stock. Tr. 2410:06-14 (Velzen).

203. BFC filed suit against Trustees on November 19, 2019. *Bremer Fin. Corp., et al. v. Lipschultz et al.,* Court File No. 62-CV-19-8203. Several third-party purchasers subsequently filed suit against BFC for its failure to register their purchased shares. *See, e.g., Malta Hedge Fund LP, et al. v. Bremer Fin. Corp.,* Court File No. 62-CV-20-1931. In a December 12, 2019 text to Gulash, Lipschultz referenced the intentions of one of the buyers, referred to as FJ, to file its own lawsuits against BFC. In the text, Lipschultz concluded, "BTW, we affectionately say FJ=fuck Jeanne." Tr. 2076:10-19 (Lipschultz); TX 418. An obvious reference to Crain. On December 13, 2019, FJ sued BFC. Tr. 2239:18-21 (Lipschultz). On January 8, 2020, BFC shareholders sued Trustees. Tr. 2239:22-25 (Lipschultz).

204. Trustees next met with the AGO on November 25, 2019. Tr. 349:02-03, 351:20-352:19 (Gillaspey). The tenor of the meeting stood in stark contrast to prior meetings. Tr. 1056:05-1057:08 (Berens) ("strikingly different," "adversarial," "uncomfortable"); Tr. 2419:03-2422:13 (Velzen); Tr. 352:20-353:12 (Gillaspey). Velzen and Gillaspey nevertheless expressed the AGO's preference that Trustees attempt mediation with BFC, and that, whether the matter could be successfully resolved would influence the AGO's view of situation. Tr. 1057:09-1058:03 (Berens); Tr. 2422:25-2424:14 (Velzen). Trustees agreed to mediate, but BFC subsequently refused. Tr. 1058:04-11 (Berens); Tr. 2424:15-19 (Velzen); Tr. 348:23-349:01 (Gillaspey); Tr. 3391:04-10 (Crain).

205. Media attention followed the sale and litigation. Lipschultz told a media consultant that he did not understand why other community groups would side with BFC. He said: "Bremer is just a bank. That's it." TX 417. Expressing frustration about the negative press in November Lipschultz texted Johnson and Reardon:

> "Maybe the trustees are motivated by money, but isn't this a free society where the individual can make their own choices? Or is this simply Minnesota money envy at play once again? Let's not forget that by selling Bremer, the trust would then be massively increasing their donations to society. That needs to be considered. Also, could it be possible that Jeanne Crain simply is acting to protect her own job since it likely would be lost or at least minimized through a sale? If we are honest, let's point out everyones self interests.

Tr. 2065:13-19 (Lipschultz); TX 212. In another email to a communications consultant, Lipschultz discussed what the messaging to the media should be on what unforeseen circumstances triggered the sale. He stated: "We haven't made a final decision on what we will declare as unforeseen circumstances when it counts, which is in court." Tr. 2067:18-2068:13 (Lipschultz); TX 213.

206. In a series of texts to Gulash in December Lipschultz expressed frustration that some investors didn't sue BFC. Lipschultz said that one investor "was a big talker when we met, and now he's not doing shit," and "I need to know if they're going to step into the ring or wait for others to fight it out and then nibble on the leftovers." Speaking of FRB restrictions Lipschultz added: "It's so tricky because we can't coordinate, but I would have thought we didn't need to because these investors were aggressive animals that would swoop in and go for the BFC jugular without any coordination required." Tr. 2077:2-2078:6 (Lipschultz); TX 419. On December 13, 2019, Lipschultz again texted Gulash: "The truth is OBT can weather this storm for a long time. I've got years of reserves if absolutely necessary." Lipschultz further texted: "But if anyone wants a relatively quick resolution, they will need to file suit in Ramsey County and pile in." Tr. 2078:24-2079:23 (Lipschultz); TX 420. Lipschultz admitted that by "years of reserves," he meant the Trust's charitable assets available to fund legal fees. Tr. 2078:24-2079:23 (Lipschultz). The investors were not acting in the way he expected after the sale, and he had no control over them. Tr. 2078:7-21 (Lipschultz).

207. BFC continued to urge the AGO to take action against Trustees. *E.g.,* TX 1111. On January 6, 2020, the AGO initiated a CID. *See, e.g.,* TX 441 at 1. In January 2020, BFC met again with the AGO and provided a lengthy written presentation encouraging suit and further investigation. TX 1111. The presentation included allegations that "no new facts existed to support [the Trust's] radical change in valuation" of its BFC assets, that "Bremer has the financial capacity to pay the dividends Trustees claim are necessary," and that Trustees directed charitable funds to "favored causes in exchange for personal recognition," among others *Id.* at 6, 9. BFC representatives continued to correspond with the AGO, including an April 14, 2020 conference call and subsequent memorandum containing more allegations. TX 1519. The AGO thereafter served additional CID investigative inquiries on Trustees, expanding the scope to multiple areas of past Trust administration. *See* TX 446. Trustees responded to those requests. *See, e.g.,* TX 441; TX 446. Multiple examinations under oath were also obtained.

208. The AGO filed this proceeding on August 12, 2020, seeking interim and permanent removal of Trustees premised on allegations that largely reflected those by BFC. The AGO further sought to stay the other pending civil lawsuits after completion of the removal action, which was ultimately agreed to by stipulation of all parties. Court File No. 62-CV-19-8203, Index No. 145 (Aug. 12, 2020), No. 180 (Sept. 8, 2020).

209. As a result of the combined actions of the AGO, BFC and Trustees, there undisputedly has been a complete breakdown in the relationship between BFC and Trustees. Tr. 1162:3-6 (Reardon); Tr. 2085:6-16 (Lipschultz). Lipschultz agreed that litigation between Trustees and BFC was disruptive to Trustees' ability to oversee the Trust's assets and was "difficult" for the board's operations. Tr. 2086:6-14 (Lipschultz). In April of 2021, the BFC board voted not to renominate Lipschultz and Reardon to serve on the board. Tr. 2087:2-7 (Lipschultz); Tr. 3085:18-22 (Crain). With Johnson's earlier resignation, the Trust no longer has any representation on the BFC board.

XIII. Misuse of Grantmaking Power by Lipschultz After Stock Sale

210. The evidence establishes that after the stock sale and before trial Trustee Lipschultz misused his grantmaking power by making multiple hostile or coercive statements to the President and CEO of Junior Achievement North f/k/a Junior Achievement of the Upper Midwest ("Junior Achievement") because he believed they were not sufficiently supportive of the Trust relating to this litigation. OBT provided grants to Junior Achievement in past years, including $1 million in 2017(TX 1473) and a five-year $500,000 program investment loan (TX 957). In November 2020, Lipschultz sponsored a three-year strategic grant. In June of 2021 the Trust awarded a $1.2 million grant. Tr. 1648:3-1652:21; 1742:10-23 (Dziuk). The Trust was Junior Achievement's largest donor and the grants accounted for approximately 10 percent of Junior Achievement's annual revenue. Sara Dziuk, the President CEO of Junior Achievement, began in her role with Junior Achievement in June of 2020 and had worked with Lipschultz while in a similar role at another non-profit. Tr. 1712:5-21, 1655:3-6 (Dziuk).

211. Dziuk received two troubling phone calls from Lipschultz, one in late 2020 and the other just before trial, in August of 2021. Her testimony was compelling and credible and based upon her own personal interactions with Lipschultz and others. In a November 2020 call, Lipschultz told Dziuk that Junior Achievement had not stood by Trustees during their legal challenges from BFC and the AGO. Lipschultz told Dziuk that the Trust "expected that Junior Achievement would have gone to the governor or to the attorney general" to tell them that the AGO's investigation of the Trust was "government overreach." Tr. 1655:18-1656:20 (Dziuk). She understood this as a request to lobby the AGO and Governor on the Trustees' behalf. Tr. 1734:16-18 (Dziuk). Dziuk also believed that Lipschultz was inferring that further Trust funding was in jeopardy if they did not. Tr. 1658:17-1659:5 (Dziuk). Lipschultz "made it clear that there was not an opportunity to continue that conversation about funding" in November 2020. Tr. 1793:16-1795:7 (Lipschultz). Lipschultz told Dziuk in that November 2020 call that Dziuk needed to go to her board and figure out how Junior Achievement would "prove to them we are their partners" if they wanted to obtain future funding. Tr. 1658:3-16 (Dziuk).

Dziuk documented in her notes that Lipschultz commented that Trustees "would be in power for a very long time." Tr. 1658:3-16 (Dziuk); TX 1979.

212. Following that phone conversation, Dziuk sent an email to Lipschultz attempting to demonstrate the importance of Junior Achievement's relationship with the Trust and providing examples of how they had collaborated with the Trust and publicly recognized their partnership. TX 948. Thereafter, Junior Achievement submitted a three-year renewal request for a grant of $1.2 million (TX 960) and in July 2021 that request was approved. Tr. 1673:1-13 (Dziuk); TX 956. The new grant was significantly delayed compared to previous years during these interactions and Junior Achievement missed nearly a full fiscal year of funding. Tr. 1742:13-21 (Dziuk); Tr. 1798:9-11 (Dziuk). This was at the height of the pandemic impacting other revenue streams, which forced Junior Achievement to reduce its workforce by 40% to save costs. Tr. 1654:5-1655:2 (Dziuk). Dziuk acknowledges that the Trust awarded the $1.2 million grant with no restrictions, conditions, or limitations, and Junior Achievement had no concerns as to any future funding by the Trust. Tr. 1672:19-23, 1743:2-1744:11 (Dziuk); TX 960; TX 956.

213. The second troubling interaction between Dziuk and Lipschultz occurred during a phone call on August 25, 2021, approximately a month before this trial began. On August 19th Dziuk sent a note to Lipschultz updating him on the organization's activities and the upcoming Hall of Fame induction. She indicated that they invited the five honorees and their guests and "plan to highlight OBT as a partner" during the virtual event. TX 949. Lipschultz responded late on August 24th by asking Dziuk to call him the next day. TX 949. During the call on August 25th Lipschultz expressed anger and frustration to Dziuk that Junior Achievement intended to honor BFC board chair Ron James at the upcoming Hall of Fame event. Lipschultz said that James had sued the Trustees personally and was trying to "dismantle" the Trust. Tr. 1677:11-21 (Dziuk). He referred to the award as "a catastrophic situation" for Trustees because of the timing of the upcoming trial. Tr. 1677:22-1678:24 (Dziuk). In the call, Lipschultz told Dziuk that Junior Achievement's decision to honor James "would damage our relationship moving forward." Tr. 1679:13-22 (Dziuk). Dziuk testified that Lipschultz "spoke to my ignorance in the process" by honoring James. Tr. 1680:5-11 (Dziuk). Tr. 1710:9-18 (Dziuk). Dziuk testified that Lipschultz made her feel "disrespected and bullied." And that he treated her "more poorly that I've been treated by a donor in my professional career." Tr. 1710:9–18 (Dziuk). Dziuk agreed, however, that Lipschultz never threatened her or asked for the $1.2 million grant to be returned. Tr. 1753:13-1754:6. There was no discussion of any funding being at risk. Tr. 1754:5-8. Also, Lipschultz did not ask for Ron James's award to be revoked. Tr. 1754:9-11, 1758:9-11, 1763:6-15 (Dziuk).

214. Following the call, Dziuk sent an email to several of her board members relaying that she "had a very difficult call with Brian Lipschultz from Otto

Bremer Trust today" TX 954. She asked for time to meet with them to discuss the call and reminded them that the Trust's recent grant of $1.2 million. Thereafter, Junior Achievement's Executive Committee affirmed the slate of award recipients and instructed Dziuk to cease solo discussions with Lipschultz to protect her from "very difficult, very hostile conversations". Tr. 1691:22-1692:19 (Dziuk); TX 1986; TX 1983. Later, the full Junior Achievement board voted to "return the $1.2 million recently funded grant from OBT." Tr. 1704:1-18 (Dziuk); TX 1987. The $1.2 million represented 10 percent of Junior Achievement's annual revenue. Tr. 1706:14-23 (Dziuk). That decision was documented in a letter from Junior Achievement's board chair to OBT stating: "Moving forward, we do not believe a continued relationship aligns with either organization's expectations. Therefore we are returning your recent grant award of $1.2MM with this letter." TX 1988. Dziuk testified their expectations were at odds because Lipschultz wanted to influence Junior Achievement through the Trust's grants and treat Junior Achievement's staff poorly. Tr. 1704:19-1706:13 (Dziuk). Dziuk later learned that Lipschultz contacted at least one other nonprofit organization asking that they contact the Governor or Attorney General about the AGO's investigation. Tr. 1671:25-1672:13 (Dziuk).

215. Dziuk was asked about the involvement of BFC CEO Crain in the situation. Dziuk agreed that after Crain became involved Crain "elevated" and "escalated" the situation. Tr. 1776:14-1777:20, 1730:8-20. Less than 24 hours after she spoke with Crain, an emergency meeting was scheduled and Junior Achievement "changed course." Tr. 1699:2-7, 1730:8-20 (Dziuk). The day after Crain's involvement, and without more contact with Lipschultz, Junior Achievement's Board voted to return the $1.2 million grant and terminate its relationship with the Trust. TX 1988; Tr. 1705:6-22, 1730:8-1731:22 (Dziuk). Crain also asked Dziuk to talk with "Bremer's counsel as they were working with the AGO on the current legal situation." Tr. 1778:6-23, 1792:4-7, 1796:3-19. Dziuk also acknowledged that Junior Achievement had two PPP loans totaling $1.2 million from BFC. Both loans were forgiven in 2021. Tr. 1736:11-1737:7 (Dziuk). In hindsight and with knowledge of the BFC litigation against the Trust, Dziuk understood why Trustee Lipschultz was frustrated during the August 2021 call. Tr. 1771:21-1772:7, 1723:6-12.

216. The AGO also alleges Lipschultz evidenced similar improper considerations in declining to award renewed PRI funding to Twin Cities Habitat for Humanity ("Habitat") in late 2019. OBT provided a three-year $1 million PRI loan in 2016 which was paid back at the end of 1019. In a November 22, 2019, email, Lipschultz expressed frustration about positive media statements Habitat leadership made about BFC in the context of an article about a potential sale of BFC. TX 214. Lipschultz questioned Habitat's motives for backing BFC over Trustees, noting BFC made large financial commitments to Habitat and Habitat's president used to work with BFC's marketing director. Tr. 2070-2071 (Lipschultz). OBT did not award new funding and Lipschultz notified Habitat on January 9,

2020, that it was largely due to BFC's "significant commitment already provided". TX 218. Habitat's president immediately shared his "tremendous disappointment" with the decision, which he related in part to "the litigation currently engulfing both institutions" and further explained his prior positive media statements about BFC and OBT partnerships. Tr. 2096:13-2097:1 (Lipschultz); TX 218. He hoped the parties could find a solution to the litigation that would maintain the strength of those partnerships. At trial, Lipschultz confirmed his earlier sworn testimony that questions of Habitat's loyalty to BFC "did come up in the discussion for sure" in the decision not to award the grant. Tr. 2099:5-25 (Lipschultz). The Trust issued a smaller grant to Habitat for Humanity later in 2020. *See* TX 1746 at 0083.

XIV. Other Procedural History

217. On August 12, 2020, the AGO filed a petition seeking permanent removal of Trustees and other equitable relief, as well as a petition for interim equitable relief. On November 16, 2020, the Court granted in part and denied in part the AGO's petition for interim equitable relief, and later set the removal petition for an evidentiary hearing. On January 13, 2021, the AGO appealed the Court's November 16, 2020, interim decision. The Minnesota Court of Appeals affirmed the November 16, 2020, decision on August 30, 2021.

218. On April 22, 2021, the Court dismissed Trustees' "unclean hands" defense. The Court ruled that regardless of whether the AGO's motives were politically motivated the only issues to be addressed in this proceeding relate to the actions of the Trustees, and not the AGO. April 22, 2021, Order at 6.

219. On May 27, 2021, the AGO and Trustees filed cross motions for summary judgment. On September 16, 2021, the Court ordered that the AGO's allegations based on Trust administration through 2016 were precluded because they had already been approved by the Court without objection by the AGO. The only exception to the ruling would be if the AGO Trustees made a material misrepresentation or omission in the approval process. Sept. 16, 2021, Order. at 1-2, ¶ 3. The Court ruled that the AGO's allegations based on Trust administration from 2017 onward were not precluded, including the AGO's allegations about Trustees' compensation. *Id*.

220. As noted at the outset, the Court held a four-week evidentiary hearing starting September 27, 2021. In addition to fact witnesses, both parties presented expert witnesses. The AGO called James Marion. Marion served as the national fiduciary adviser, national fiduciary investment adviser, and national fiduciary executive and had management responsibilities for trust administration professionals in U.S. Trust's fiduciary organizations. Tr. 2578:14-2579:4 (Marion). Marion provided expert opinion testimony on behalf of the AGO as to the custom and practice of similarly situated reasonable trustees. Tr. 2595:8-2596:14 (Marion).

Professor Susan Gary provided opinion testimony on behalf of Trustees. Professor Gary is a law professor at the University of Oregon School of Law. She is co-author of *Bogert's The Law of Trusts and Trustees* (June 2021), which is recognized as authoritative in the field of trust law. These experts were very helpful in framing the issues involved, and their testimony demonstrated that two prominent experts in the field can come to divergent conclusions based on the facts presented.

Based upon the foregoing Findings of Facts and Conclusions of Law, the Court makes the Following:

CONCLUSIONS OF LAW

1. This is an in rem proceeding pursuant to Minn. Stat. § 501C.0203, subd. 1, brought by the AGO seeking the removal of Trustees Johnson, Reardon, and Lipschultz, to secure compliance with the Supervision of Charitable Trusts and Trustees Act, and obtain other relief as authorized by Minn. Stat. §§ 501C.0202(9), 501C.0202(16), 501C.0706, 501B.41, and other authority.

2. The Trust is under the ongoing supervision and jurisdiction of this Court. The principal place of administration of the Trust is in Saint Paul, Minnesota. Venue is appropriate in this Court pursuant to Minn. Stat. § 501C.0207(a) and (b).

3. The Legislature has expressly conferred authority on the Attorney General to supervise, regulate, and enforce laws governing charitable trusts. *See* Minn. Stat. Ch. 501B. Under longstanding common law, "[t]he attorney general is entrusted with the duty of representing the beneficiaries of a charitable trust, and it is his duty to enforce such trusts." *Schaeffer v. Newberry*, 227 Minn. 259, 261, 35 N.W.2d 287, 288 (1948).

4. The AGO has the rights of a qualified beneficiary with respect to the Trust and is an interested person under the Trust Code with standing to initiate these proceedings. *See* Minn. Stat. § 501C.0110(d).

5. This Court has personal jurisdiction over Trustees under Minn. Stat. § 501C.0206.

6. The AGO seeks removal of all three Trustees under each of the following grounds:

   (a) That Trustees have committed a serious breach of trust and failed to manage the Trust in accordance with the law and their fiduciary obligations. Minn. Stat. § 501C.0706(b)(1); Minn. Stat. § 501B.41, subd. 6.

(b) That removal of Trustees best serves the interests of the beneficiaries because of Trustees' persistent failure to administer the trust effectively. Minn. Stat. § 501C.0706(b)(3).

(c) That removal of Trustees best serves the interests of the beneficiaries because of Trustees' unfitness based upon their conflicts of interest. Minn. Stat. § 501C.0706(b)(3).

(d) That there has been a substantial change in circumstances, that removal best serves the interests of all beneficiaries, and that removal is not inconsistent with a material purpose of the Trust. Minn. Stat. § 501C.0706(b)(4).[1]

(e) That removal of Trustees has been requested by all qualified beneficiaries, that removal best serves the interests of all beneficiaries, and that removal is not inconsistent with a material purpose of the Trust. Minn. Stat. § 501C.0706(b)(4).

7. This Court is mindful that "removal is an equitable remedy serving as a "protective measure" for the trust, and "not a penalty for past irregularities." Susan Gary et al., *Bogert's The Law of Trusts and Trustees* § 527 (June 2021). It is "the duty of courts of equity" to ensure "integrity of the corpus of the trust" is not "destroyed or impaired." *Matter of Tr. Known as Great N. Iron Ore Properties*, 263 N.W.2d 610, 622 (Minn. 1978).

8. Minnesota Statutes Chapter 501B provides the AGO standing to bring its Petition because this action involves a charitable trust. Specifically, §501B.41 authorizes Petitioner to "institute appropriate proceedings to obtain compliance with sections 501B.33 to 501B.45," including initiating a "civil action" to remedy and redress a "breach of trust" under 501B.41(6) or as otherwise provided by law. Minn. Stat. § 501B.41, subds. 1, 7. A "breach of trust" under § 501B.41(6) is defined as a "failure of a trustee to register under section 501B.37, to file annual reports under section 501B.38, or to administer and manage property held for charitable purposes in accordance with law or consistent with fiduciary obligations." Minn. Stat. § 501B.41 subd. 6.

9. Chapter 501C provides the applicable framework to obtain the judicial relief at issue. *See* Minn. Stat. § 501C.0202(16) (providing court jurisdiction "to secure compliance with the provisions of sections 501B.33 to 501B.45, in accordance with section 501B.41, relating to charitable trusts[.]"); Minn. Stat. § 501C.0102 (stating Chapter 501C applies to charitable trusts); *Matter of Lindmark Endowment*

[1] The last requirement of this section, "that a suitable successor trustee is available," has been bifurcated for separate consideration as appropriate.

for Corp.-Bus. Ethics Fund, 2019 WL 5546205, at *6 (Minn. App. Oct. 28, 2019) (citing the Legislature's enactment of § 501B.41 as conferring "standing on the attorney general to enforce the purpose of a charitable trust"); *see also* Petition ¶ 3 (invoking the Court's jurisdiction under § 501C.0202(16)).

10. Minnesota Statute § 501C.0706(b) addresses the necessary grounds for the Court to remove a trustee. Specifically, § 501C.0706(b) states that a court "may" remove a trustee if it is shown that:

> (1) the trustee has committed a "serious breach of trust;"
>
> (2) a "lack of cooperation among co-trustees substantially impairs the administration of the trust;"
>
> (3) the court determines that removal of the trustee "best serves the interest of the beneficiaries because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively;" or
>
> (4) there has been a "(i) substantial change in circumstances or removal is requested by all of the qualified beneficiaries, (ii) the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and (iii) a suitable cotrustee or successor trustee is available."

11. A court may remove a trustee under Minn. Stat. § 501C.0706 if the petitioner shows that "the trustee has committed a serious breach of trust." Minn. Stat. § 501C.0706(b)(1). Minn. Stat. § 501C.1001(a) defines a "breach of trust" as a "violation by a trustee of a duty the trustee owes to a beneficiary." The definition of a "breach of trust" under Minn. Stat. § 501C.1001(a) is in accord with Chapter 501B, which itself defines a "breach of trust" to include the failure "to administer and manage property held for charitable purposes in accordance with law or consistent with fiduciary obligations." Minn. Stat. § 501B.41, subd. 6.

12. The Court has broad discretion to issue orders it considers appropriate. Minn. Stat. § 501C.0204 ("the court shall make an order it considers appropriate."); *cf., e.g.,* Minn. Stat. § 501C.0706(b) (stating a court "may," but is not required, to remove even where basis for potential removal is established); *In re Will of Gershcow,* 261 N.W.2d 335, 338 (Minn. 1977) (holding that the "determination of what constitutes sufficient grounds for the removal of a trustee is within the discretion of the court."); *see also* Restatement (Third) of Trusts 37, cmt. e ("not every breach of trust warrants removal of the trustee, but serious or repeated misconduct . . . may justify removal." It has also been held that removal of a trustee is a "drastic action" and is not always appropriate. *Gorby v. Aberth*, 81 N.E.3d 910, 919 (Ohio Ct. App. 2017); *In re Croessant's Estate*, 393 A.2d 443, 446 (Pa. 1978); *Sternberg v. St. Louis Union Tr. Co.*, 163 F.2d 714, 719 (8th Cir. 1947.

13. The Court will not substitute its judgment for Trustees' discretionary acts and decisions unless necessary to prevent an abuse of discretion constituting a breach of fiduciary duty. *United States v. O'Shaughnessy,* 517 N.W.2d 574, 577 (Minn. 1994) (clarifying the discretionary review standard and stating that "[s]o long as the trustees act in good faith, from proper motives, and within the bounds of reasonable judgment, the court will not interfere with their decisions."); *In re McCann's Will*, 3 N.W.2d 226, 230 (Minn. 1942) (compelling courts to be mindful that, when a settlor "intentionally and unmistakably reposes a discretion in a trustee, he does so because he desires the honest judgment of the trustee, perhaps even to the exclusion of that of the court . . . It is not for the court to read into a trust instrument provisions which do not expressly appear or which do not arise by implication from the plain meaning of the words used, . . . and the court will not substitute its discretion for that of the trustee except when necessary to prevent an abuse of discretion." (emphasis added)); *cf., e.g., In re Comstock's Will,* 17 N.W.2d 656, 665 (Minn. 1945) (holding that trial court did not abuse its discretion when it declined to remove a trustee for good faith mistakes); *Kolles v. Ross,* 418 N.W.2d 733, 738 (Minn. App. 1988); *In re Donald Briks Revocable Lifetime Trust Agreement,* 2014 WL 7011200, at *7-8 (Minn. App. Dec. 15, 2014); *In re Estate of Rosenbrook*, 2013 WL 2301954, at *3 (Minn. App. May 28, 2013).

14. Nor is hindsight used to determine the prudence of a trustee's prior act. *In re McCann's Will,* 3 N.W.2d at 231 ("To determine whether the acts of a trustee have been prudent, the court must consider the facts as they existed at the time the acts were performed. This is necessarily so, 'for it is an obvious truth that "a wisdom developed after an event, and having it and its consequences as a source, is a standard no man should be judged by" . . . and it is impossible to say that trustees are wanting in sound discretion "simply because their judgment turned out wrong."'" (internal citation omitted) (alteration in original)); *Matter of Irrevocable Inter Vivos Tr. Established by R.R. Kemske by Tr. Agreement dated Oct. 24, 1969,* 305 N.W.2d 755, 761 (Minn. 1981) ("[T]he law is emphatic that the trustee is not to be second guessed by the infallibility of hindsight."); *see also* Restatement (Third) of Trusts § 77 (2007).

15. The Court decides whether a trustee acts in good faith, from proper motives, and within the bounds of reasonable judgment, to determine whether an abuse of authorized discretion occurred. *O'Shaughnessy,* 517 N.W.2d at 577*; In re McCann's Will,* 3 N.W.2d at 231.

A. Use of the Strategic Grantmaking Process Does Not Constitute a Breach of the Duties of Good Faith, Loyalty, and Care.

20. To fulfill the duty of good faith, a trustee shall administer a trust "in accordance with its terms and purposes." Minn. Stat. § 501C.0801; *Nw. Bank Minn. N., N.A. v. Beckler*, 663 N.W.2d 571, 580 (Minn. Ct. App. 2003). Any "attempt to violate the settlor's intent or the trust's purpose" is an abuse of trustee's discretion.

United States v. O'Shaughnessy, 517 N.W.2d 574, 577 (Minn. 1994); *see also In re Revocable Tr. Agreement of Avis V. Cordes*, No. A19-1872, 2020 WL 5107287, at *5 (Minn. Ct. App. Aug. 31, 2020), review denied (Nov. 25, 2020) (holding district court properly found a serious breach of trust justifying removal "[g]iven [Trustees] inability to follow the terms of the trust and creating a self-serving situation" in trying to "defeat the plainly worded provision" of the trust). The Trust Instrument gives Trustees complete discretion and control over the process for grantmaking. TX 1 at ¶ 5. Use of strategic grants, responsive grants, and PRIs is appropriate for the Trust based on the discretion afforded by the Trust Instrument.

21. The AGO argues that Trustees' use of the strategic grantmaking process constitutes a breach of their fiduciary duties. They assert that Trustees breached the duty of care, loyalty, and good faith by failing to implement adequate processes and controls over strategic grant-making that were sufficient to protect the Trust. They also argue that Trustees breached the duty of good faith by making grants that were not authorized by the Trust Instrument. Finally, the AGO argues that Trustees breached the duty of loyalty by making strategic grants that constituted conflicts of interests and to further their personal interests.

22. The Court concludes that the use of the strategic grantmaking process, combined with the responsive process that has historically been used, is within the discretion of the Trustees under the Trust Instrument and does not constitute a breach of their fiduciary duties. Trustees are the ultimate determiners when it comes to making grants. They have established and oversee a professional operation that includes many dedicated staff members to assist them in the process. It would likely be impossible to effectively operate the Trust without the staff's help. Utilizing the strategic process whereby Trustees take personal responsibility for determining larger grants is an acceptable enhancement to the overall charitable giving process. The Trustees often involve staff members in obtaining an application from the recipient and in vetting the organization and anticipated use of grant money. The strategic process, like the responsive process, requires the same level of scrutiny and approval by the Trustees. The Court rejects the view that the process presently in place is inadequate, improper, or otherwise constitutes a violation of Trustees' fiduciary obligations.

B. Grants to WE Day, LearningWorks and Como Friends Comply with the Trust Purposes.

23. That the strategic grantmaking process is approved, however, does not remove it from scrutiny for grants that would violate the Trust Purposes or the Trust's conflict of interest policies. To be sure, those concerns apply to all grants made by the trust, whether responsive or strategic. The AGO argues that Trustees violated the Trust Instrument and breached the duty of good faith by making grants

that were not authorized by the Trust Instrument. Among the grants in question were grants to WE Day, Como Friends and Blake School's LearningWorks program.

24. The AGO argues that the Trust's grant to WE Day was improper because the parent corporation is headquartered in Canada and that it therefore violates the Trust's geographic restrictions AGO also argues that the grants funded events not authorized by the Trust Instrument. The Court disagrees. The WE Day grant was limited to programming exclusively in the defined geographic scope of the Trust and met the defined Trust purposes. Tr. 2252:03-2253:03 (Lipschultz); Tr. 4090:13-4092:25 (Gary); TX 1157; Tr. 460:03-461:18 (Benjamin). The grant also supported "a year-long educational initiative which puts students at the forefront of active citizenship by educating them on civic issues and action planning, developing leadership skills and engaging them in world-changing action." TX 1157. Promotion of citizenship aligns with an express trust purpose. TX1 at ¶ 3. Trustees did not abuse their discretion with regard to the WE Day grant.

25. The AGO also argues that a grant to the Como Zoo was not authorized by the Trust Instrument. Como Zoo is a free urban zoo serving the needs of all members of the community, providing educational and community resources, and promoting citizenship and civic engagement. Tr. 1286:2-1288:5 (Reardon); TX 1959; TX 1699. It was not just about the seals and sea lions. The Trust's grant assists with one of the zoo's exhibits and with accommodations at the visitor center. Tr. 613:02-15 (Johnson). The grant contributed to the enhancement of this important community asset, which is well within the broad discretion given the Trustees to fulfill the Trust Purposes.

26. Another challenge to grantmaking relates to grants made to fund the LearningWorks program at Blake School. This is not a grant to fund the private school operations. The grants helped fund the LearningWorks program to provide tuition-free academic enrichment programs for disadvantaged Minneapolis Public School students during school vacations. TX 1694. The grants were ongoing responsive grants reviewed and proposed by program staff for the Trustees' approval. *Id.*; *see also* Tr. 829:02-13 (Johnson). As discussed above, Trust staff considered LearningWorks as one of the most promising programs the Trust could fund. While the Trust Instrument only authorizes grants for post-secondary scholarships, these grants were designated as falling under Paragraph 3.D (promoting citizenship) of the Trust Instrument. Tr. 1274:24-1275:14 (Reardon). The Court concludes that the grants fall within the discretion accorded Trustees by the Trust Instrument.

C. Trustees Did Not Violate Conflict of Interest Rules in Grants or Contracts.

27. The AGO argues that grants made to nonprofits on whose boards Trustees serve violates their duty of loyalty by making grants that constituted conflicts of interests. A "trustee shall not place the trustee's own interests above those of the beneficiaries." Minn. Stat. § 501C.0802(a). A trustee has a "duty not to allow his interest as an individual even the opportunity of conflict with his interest as trustee." *Smith v. Tolversen*, 252 N.W. 423, 425 (Minn. 1934). A trustee must also administer a trust "as a prudent person would." Minn. Stat. § 501C.0804. Conflicts must be managed so that the charity's interests are protected. Restatement (Third) of Trusts § 78.

28. The Trust has a Conflict-of-Interest policy the expressly recognizes the value in Trustee community involvement and that the Trust "furthers it mission by having its Trustees involved in the community and its Trustees may serve in governance roles with for-profit or tax-exempt organizations." TX 153 at 2. The policy requires that Trustees disclose those conflicts to the other Trustees. The process is meant to maximize the community impact to organizations by encouraging trustees to be involved in the community while not automatically excluding those organizations from potential grants from the Trust. Tr. 3920:20-3921:04 (Gary); Tr. 822:24-823:09 (Johnson).

29. The Trustees have complied with and disclosed potential conflicts to each other in accord with the stated conflict policy before any vote on a potentially conflicted grant was made. Tr. 821:01-08, 823:10-17, 829:02-23 (Johnson); Tr. 1264:03-1267:11 (Reardon); *see also, e.g.*, TX 1815; TX 569; TX 252; TX 153; TX 1892. Trustees have disclosed to each other such conflicts with organizations to which they approved grants. For example, Lipschultz was on the board of the Blake School when the Trustees approved the LearningWorks grants. Reardon served on the board of Como Friends when they approved a grant to that organization. As noted above in the Court's findings, these conflicts were disclosed to the other Trustees before the grants were unanimously approved. There are other examples described above that will not be repeated here. This disclosure before voting is sufficient to address any fiduciary conflict. Tr. 3919:08-3921:12 (Gary); Tr. 2850:8-2851:4 (Marion).

30. It is correct that a "trustee shall not place the trustee's own interests above those of the beneficiaries." Minn. Stat. § 501C.0802(a). There is no evidence that the grants discussed above violate that important principle of trust law. Nor is there a breach of the duty of loyalty when a trustee deals with another trust, or votes in favor of a charitable contribution from one nonprofit to another, simply because the trustee holds a fiduciary position with the other trust. Restatement (Third) of Trusts § 78 Comment c(7); *Doermer v. Callen*, 847 F.3d 522, 535 (7th Cir.

2017). There is no evidence establishing that the Trustees benefitted personally or financially from any grant subject to the conflict policy. While a more meticulous process of capturing and documenting conflicts is advisable, Trustees have managed those conflicts with necessary disclosures and approvals of grants to worthy organizations consistent with the Trust's charitable purposes. The Court agrees that trustees in these situations should "exercise extraordinary care, both in connection with the decision-making, but even more importantly in connection with the documentation of the reasons why a particular action is or is not appropriate." Tr. 2629:1-2630:6 (Marion).

31. Although not discussed in detail above, the AGO also argues that Trustees' engagement of Tealwood Asset Management constitutes an impermissible conflict and breach. Johnson's husband worked for Tealwood when the Trust engaged Tealwood back in 2008. The relationship between Trustee Johnson and her husband was fully disclosed and properly addressed. The decision to open an account with Tealwood was "unanimously approved by the Trustees after full disclosure of Ward Johnson's relationship with Tealwood, and after an analysis of the comparability data for similar services provided by others in similar circumstances." TX 156. Johnson recused herself from the discussion and the vote. *Id.*; Tr. 652:07-14, 821:09-822:01 (Johnson). In so doing, any potential financial conflict was appropriately addressed.

32. As to other claims asserted, there is insufficient evidence to establish that Reardon and the other Trustees approved a strategic grant to the St. Paul Police Foundation for the purpose of advancing the political appointment of the police chief. Likewise, there is insufficient evidence that the Trustees purposely refused to renew a strategic program-related investment to Habitat for Humanity Twin Cities because of statements reported in the press relating to the dispute between Trustees and BFC.

D. Trustees' Court-Approved Compensation and Investment Advisory Fees Did Not Violate Their Fiduciary Duties.

33. The duty of loyalty generally prohibits self-dealing and hiring oneself to provide additional services constitutes self-dealing." Susan Gary et al., *Bogert's The Law of Trusts and Trustee*s § 543 (June 2021). As such, except in "discrete circumstances" where the special non-trustee skills "are necessary or appropriate to prudent administration of the trust," a trustee is "strictly prohibited from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests." Restatement (Third) of Trusts § 78 (2007). Even those discrete circumstances where self-hiring is allowed, "the trustee is not relieved of the normal duty to act with prudence and in the interest of the beneficiaries in determining whether the services are reasonably necessary and by whom they may best be provided." *Id.* § 78 cmt. c(5) (2007). In all

circumstances, when "investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the trustee." Minn. Stat. § 501C.0901, subd. 7.

34. Marion explained that an agreement between a trust and a trustee is, by its very nature, a self-dealing agreement. Tr. 2603:11-2604:8 (Marion). Nonetheless, there is "no breach of the duty of loyalty where the transaction is explicitly authorized by the terms of the trust." *In re Revocable Tr. of Margolis*, 731 N.W.2d 539, 545 (Minn. App. 2007); *see also* Minn. Stat. § 501C.0802(b)(1); Restatement (Third) of Trusts § 78 Comment c(2); cf., *e.g.*, *In re McCann's Will*, 3 N.W.2d at 230. Minnesota law is clear that Trustees may be compensated from the trust without violating their duty of loyalty. Minn. Stat. §§ 501C.0708; 501C.0802(b)(1), (d)(1). The Trust provisions allowing compensation for carrying out fiduciary duties are standard in trust law. Tr. 4102:8-17 (Gary). In this case, the Trust Instrument specifically authorizes that the trustees may be compensated and establishes an upper limit on that compensation of 4% of the annual earnings of the Trust assets. TX 1 at ¶ 13. It is undisputed that Trustee compensation has always been well below the 4% cap and in accordance with the Trust Instrument. Tr. 2130:15-2132:11 (Smith); *see also* TX 3117 at 6; TX 1876 at 21-23.

35. From the outset the AGO raised various objections to Trustee compensation. This was initially an issue raised upon the simultaneous filing of this Petition, along with the Petition for Interim Relief. They argued that the total amount of compensation paid to the Trustees was excessive and unreasonable. Based on those arguments, the Court reverted Trustees compensation to the amount last approved by the Court in 2017 to allow for a full exploration of those claims. At trial, there was no evidence that the total amount of trustee compensation is unreasonable. Tr. 2748:21-24 (Marion) ("I express no opinion, correct, counsel, on reasonableness of compensation."). Rather, The AGO focused only on the compensation structure, namely the payment of the additional investment advisory fees to Reardon and Lipschultz. The AGO argues that the Trustees' agreement to receive the investment advisory fee constitutes a breach of their fiduciary duty to the Trust and an impermissible conflict of interest.

36. This Court approved Trustees' compensation, and methodology for determining it, five times since 2011. The same compensation structure, including the Investment Services Fee Agreement that was used in 2014 is still used today. Tr. 1191:16-22 (Reardon). In 2011, the then-appointed Trustees sought six outside proposals to manage approximately $100 million of investment assets. TX 1859 at 1 (outside proposals to manage Trust's non-OBT assets); TX 1838; Tr. 775:4-778:24 (Johnson). The outside proposals were for a variety of management levels and all show that the cost to manage the assets ranged from 40-60 basis points, significantly higher than the combined 30 basis points paid to Reardon and then-

trustee Bill Lipschultz. TX 1859. The compensation under the Investment Services Fee Agreement, along with the trustee base fee, was also consistent with reasonable compensation levels based on a third-party compensation study in 2010. TX 1581; TX 1164C; TX 1838. In 2015, the Trustees' compensation was again reviewed by a third party and again found reasonable. TX 1580.

37. The Court has reviewed and ratified each aspect of this compensation structure five times, including the Investment Services Fee Agreement along with the actual compensation amounts. Tr. 2834:3-7, 2835:18-2837:19 (Marion); TX 1164F; TX 1137. The AGO has also repeatedly investigated Trustee compensation and the Investment Services Fee Agreement. In 2014, the AGO conducted a CID, including on Trustees' compensation in the form of a trustee base fee and the Investment Services Fee Agreements providing payment of 30 basis points to the two Trustees. TX 638; TX 1442; Tr. 2789:13-2794:16 (Marion); Tr. 1192:02-1195:04 (Reardon); Tr. 841:15-842:9 (Johnson). The AGO closed the 2014 CID with no recommendation for any corrective action on any matter, including Trustee compensation amount and structure. Tr. 842:2-9, 848:05-11 (Johnson); Tr. 1191:23-1192:01, 1194:22-1195:04 (Reardon); Tr. 2815:05-21 (Marion); Tr. 3932:4-3935:10 (Gary).

38. In 2017, as detailed above, there was a robust court approval process addressing Trustee compensation. The Court directed the AGO to investigate the concerns raised by a public member and later informed the Court that Trustee compensation was "just and reasonable." TX 1164F; Tr. 1027:08-20 (Berens); Tr. 279:17 *et seq*. (Gillaspey). Thus, just as in 2014, no concerns were raised and the Court approved all Trustee compensation. There is no evidence that Trustees somehow hid or misrepresented their compensation in connection with either the 2014 CID process or the 2017 court hearing. TX 1164C; Tr. 3937:02-3941:24 (Gary); TX 638 (2014 CID); Tr. 1190:23-1192:01 (Reardon); Tr. 3932:04-3937:05 (Gary); TX 1442.

39. The Trustees reasonably relied on the AGO's response in 2017 to their administration and compensation (including the investment advisory fee under the Investment Services Fee Agreement) and the Court's 2017 Order approving Trust administration. TX 1164F; TX 1308; TX 137. The Court concludes that Trustees' compensation complying with the Court's specific approval in the two years that followed does not constitutes a breach of trust. This reliance was particularly reasonable given the Court's communication to Trustees recognizing that the "AG points out that the reported compensation should be given the benefit of the doubt as it has been approved in prior years, it is supervised by the IRS, and is within the terms allowed by the trust." TX 656; *see also* Tr. 2825:8-2826:5 (Marion); TX 1502. This relates to the total Court-approved compensation, including the investment advisory fees.

40. In 2021, the reasonableness of Trustees' compensation was reviewed by compensation expert A. W. Smith. Smith determined that the compensation amount is reasonable. Smith opined that "[t]he remuneration provided to the trustees of the Bremer Trust has been necessary to carry out the exempt purpose in the organization, is not excessive and should not be found or deemed unreasonably high in terms of either the laws of the State of Minnesota or the IRS intermediate sanctions regulations." Tr. 2115:13-19, 2173:23-2174:11 (Smith); *see also* Tr. 2159:19-24 (Smith). Smith also analyzed Trustees' investment advisory fees under the Fee Agreements and determined they fell within reasonable amounts compared to peer institutions. Tr. 2157:06-2159:08, 2160:04-2164:06 (Smith).

41. While Trustees compensation amounts are in the range of reasonableness, the Court acknowledges that there is a far simpler and more straight-forward way to address Trustee compensation going forward. At trial, expert Smith suggested that any extra work should be reflected in Trustees' base salaries and the contracts, and the percentage-based advisory fee should be eliminated to avoid a perceived conflict of interest. Tr. 2164-2174 (Smith); TX 3117 at 13-15. The Court agrees. There is good reason going forward to incorporate all the duties performed by each Trustee into an annual Trustee salary for each Trustee. The amount paid to each Trustee does not have to be identical and can incorporate additional amounts for different responsibilities carried out by each Trustee. This would eliminate all controversy surrounding the ethics of a separate investment advisory fee agreement and would accomplish two important goals. It would require a thoughtful process of determining the relative contributions from each trustee based upon an agreed upon division of duties, potentially requiring different commitments of time and energy. It would also eliminate any argument that having a separate agreement tied to a percentage of assets under management might somehow compromise the decision-making and present a conflict. It also would eliminate any confusion about what assets are subject to the fee in the event that the Trust's ownership of BFC does indeed come to an end.

42. The AGO (and BFC) also raised allegations that the Trustees' compensation would be increased by the sale of BFC stock. There is no evidence to support those allegations. The evidence established that the Trustees recognized that their compensation would be subject to restructuring upon the sale of BFC stock. Trustees' attorneys advised the AGO that the potential sale would not increase Trustees' compensation. Trustees also froze the investment advisory fee in 2020 to eliminate any confusion on that issue. Most importantly, any such increase would have had to be approved by both the AGO and the Court. It is impossible to envision a scenario where that would happen.

E. Selection of Successor Trustees is Not Improper.

43. In accordance with the Trust Instrument, and to allow for continuity in the event a Trustee became incapacitated or otherwise unable to serve, each Trustee has named a successor trustee. The AGO asserts that Trustees' naming of family members or relatives as successor trustees constitutes a serious breach of trust and merits removal of all Trustees. The Court disagrees.

44. The Settlor of the Trust, Otto Bremer, named a relative and a business partner as original trustees. Through the generations, each trustee has named a successor to replace them upon retirement or death. With almost no exceptions, the successor trustees have been children or other relatives. Each successor trustee has been approved though the court approval process with notice to the AGO. Now, nearly eighty years after creation of the Trust, the AGO says that the current Trustees are violating their duty to the Trust by following the path of their predecessors.

45. As noted by the AGO, furthering Trustees' family legacies is not a Trust purpose. If a trustee chooses a successor for self-interested motives, as opposed to on the grounds that the successor "would serve the interests" of the trust, "it follows that [the] appointment [is] a breach of fiduciary duty." *Cohen v. Minneapolis Jewish Fed'n*, 286 F. Supp. 3d 949, 972 (W.D. Wis. 2017), aff'd, 776 F. App'x 912 (7th Cir. 2019); Minn. Stat. § 501C.0802(a). "[R]egardless of the language of the agreement or the regulation, a trustee's duty of loyalty to the beneficiary applies to choosing a successor trustee just as it applies to any other action by the trustee." *Cohen v. Minneapolis Jewish Fed'n*, 286 F. Supp. 3d 949, 972 (W.D. Wis. 2017), aff'd, 776 F. App'x 912 (7th Cir. 2019); *see also* Minn. Stat. 501C.0814 (duties apply to discretionary acts). The question is whether the evidence establishes such a breach.

46. Overall, as shown throughout the Trust Instrument, trustees are vested with broad discretion as to how they breathe life into the Trust, from meeting the purposes to selection of successors. Tr. 792:6-18, 812:20-24 (Johnson). There is no evidence that Trustees' intent in naming emergency successors is intended to further a self-interested motive. To conclude that would be speculative. Rather, Trustees have made provisional appointments which become effective if they die or become unable to serve. They are free to change these appointments at will. There is no evidence that the appointed individuals are unfit or unable to serve. Only that they are relatives. In fact, they would be subject to the requirement of court approval if something happened, and their provisional appointment becomes effective.

47. The Court concludes that the naming of family members or relatives as emergency successor trustees is not, by itself, a breach of the duty of loyalty.

F. Trustees' Private Equity Investments Supervised by the Federal Reserve Did Not Violate the Prudent Investor Rule as Modified by the Trust Instrument.

48. The AGO alleges that investing a portion of the Trust's non-BFC holdings in certain private investments in violated the Volcker Rule as discussed above. In Minnesota, a trustee who invests and manages trust assets shall comply with the prudent investor rule. Under that rule, a trustee shall invest and manage trust assets as a prudent investor would, but considering the purposes, terms, distribution requirements, and other circumstances of the trust, and shall exercise "reasonable care, skill, and caution." Minn. Stat. § 501C.0901, subd. 2(a). Minn. Stat. § 501C.0901, subd. 1. A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and a part of an overall investment strategy having risk and return objectives reasonably suited to the trust. Minn. Stat. § 501C.0901, subd. 2(b).

49. A trustee shall also administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with all other applicable law. Minn. Stat. § 501C.0801. A trustee has a duty to conform to any applicable statutory provisions governing investment by trustees. Restatement (Third) of Trusts § 91(a) (2007). In Minnesota, the AGO may institute proceedings to obtain compliance with this requirement. Minn. Stat. § 501B.41. The failure of a trustee to administer and manage property held for charitable purposes in accordance with law or consistent with fiduciary obligations constitutes a breach of trust. Minn. Stat. § 501B.41, Subd. 6. If a "trustee purchases for the trust some… non-legal investment, the trustee is committing a breach of trust." Amy Morris Hess et al., *Bogert's The Law of Trusts and Trustees* § 705 (June 2021). Accordingly, "making prohibited investments . . . [has] been held to justify removal." Susan Gary et al., *Bogert's The Law of Trusts and Trustees* § 527 (June 2021).

50. In Minnesota, the prudent investor rule may be expanded, restricted, eliminated, or otherwise altered by the trust instrument. Minn. Stat. § 501C.0901, subd. 1(b). In this case, the Trust Instrument addresses this issue specifically. The Trust Instrument vests trustees with broad discretion to invest Trust property. TX 1 at ¶ 16. The Trust distinguishes between the Trust's BFC stock holdings and non-BFC investments. Regarding the investment of the Trust's non-BFC assets, trustees possess "full power to invest and reinvest the trust estate in any manner in [their] absolute discretion, acting in good faith, and they shall not be confined to the usual investments which trustees, by mere virtue of their office are authorized to make..." *Id.*

51. Given this legal backdrop and the specific authority and discretion afforded Trustees by the Trust Instrument, the Court must examine whether the

Trust's investments in the private funds at issue satisfy the prudent investor rule as modified by the Trust Instrument. The AGO argues that because private investments are generally prohibited by the under the Volcker Rule that is the end of the inquiry. The Court disagrees. Rather, it is the totality of the circumstances, including the discretion afforded by the Trust Instrument, the engagement of world-class charitable investment advisors, and the communication with and tacit approval by the Federal Reserve.

52. Under the Volcker Rule, a "banking entity shall not . . . acquire or retain any equity, partnership, or other ownership interest in or sponsor a hedge fund or a private equity fund." 12 U.S. Code § 1851(a)(1). The "Volcker Rule" within the Bank Holding Company Act ("BHCA") is extraordinarily complex. The Federal Reserve Board has exclusive original jurisdiction over questions arising under the BHCA. *Whitney Nat'l Bank in Jefferson Parish v. Bank of New Orleans*, 379 U.S. 411 (1965); *Centerre Bancorporation v. Kemper*, 682 F. Supp. 459, 462 (E.D. Mo. 1988). According to the Supreme Court, the BHCA provides a "carefully planned and comprehensive method for challenging Board determinations" and "was designed to permit an agency, expert in banking matters, to explore and pass on the ramifications of a proposed bank holding company arrangement." *Whitney Nat'l Bank*, 379 U.S. at 420. Congress intended that the technical and complex problems involved in the application of the Bank Holding Act to the banking industry should be resolved, at least in the first instance, by a body of experts that know the competitive realities of the banking business. *Orbanco, Inc. v. Sec. Bank of Oregon*, 371 F. Supp. 125, 130 (D. Or. 1974); *Mid Am. Bancorporation Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 523 F. Supp. 568 (D. Minn. 1980) ("Congress had great respect for the expertise and judgment of the Board."). As one of the principal architects of the Volcker Rule explained, the discretion to exclude certain activities from the scope of the Rule, 12 U.S.C. § 1851(d)(1)(J), is "intended to ensure that some unforeseen, low-risk activity is not inadvertently swept in by [the Volcker Rule]." 156 Cong. Rec. S5870-02, S5897 (daily ed. July 15, 2010) (statement of Sen. Merkley). Smaller banks are exempted from the Volcker Rule's enforcement. *See, e.g.*, TX 1753 (Federal Reserve notice of revisions to Volcker Rule); FRB Final Rule, 84 FR 35008 (July 22, 2019). Also, the relevant compliance period for organizations has varied. *See, e.g.*, TX 1753 (Federal Reserve notice of revisions to Volcker Rule).

53. Here, the Federal Reserve had jurisdiction over the enforcement of the Volcker Rule and whether it would be applied to investments by the Trust. The Trust has historically invested private funds covered by the Rule going back to at least 2009, with the full knowledge of the Federal Reserve. The Federal Reserve reviews and analyzes the Trust's submissions, coordinating with Trustees to the extent additional information is needed, questions arise, or if certain other supervisory communications are required. *E.g.*, Tr. 1532:05-1533:15 (Thompson) (testifying that OBT reports all positions to the Federal Reserve Board, further stating "I report on a quarterly basis to [the Federal Reserve] financial statements,

investment statements, some other things that they ask for on an annual basis as well[,] [a]nd I've had back and forth questions discussions with them on some of those reporting requirements."); *see also* TX 1408 at 2-3.

54. After BFC grew in assets under management, the Federal Reserve conducted a more focused examination of OBT and directed the Trust to divest its Volcker Rule investments unless an extension or exemption was obtained for its holdings. TX 339; TX 1408 at 2-3; Tr. 1911:10-1912:22 (Lipschultz); Tr. 744:08-21 (Johnson). Specifically, on March 31, 2016, the FRB emailed Lipschultz stating that "I confirmed that Otto Bremer Trust will need to divest of the assets covered by the Volcker Rule by July 21st, 2016, unless the organization receives a specific extension." TX 339. The earlier extension, which the Trust obtained, was to expire in July 2017. Tr. 1868:12-1869:18 (Lipschultz); TX 339. In January 2017, the FRB again inquired about Trustee "trades potentially affected by the Volcker Rule." TX 1751. The examiner later wrote that "I don't think we are going to be citing a Volcker Rule MRA." However, the examiner also added that they wanted to have "further discussions on the portfolio." TX 1751. In 2018, Trustees again discussed the Volcker Rule issue in a meeting with the FRB. As part of the conversations, the FRB examiner again told Thompson and Lipschultz that the Volcker Rule would not be enforced against the Trust. Tr. 1532:20-1537:02 (Thompson); Tr. 1898:23-1899:02, 1911:10-22, 1916:17-1917:03 (Lipschultz); TX 1753. The examiner informed them that enforcement of the Rule hasn't been applied to organizations of OBT's size, and likely wouldn't be by applied by that examiner. By the end of 2018, Federal Reserve personnel confirmed there were no open compliance issues or MRAs. Tr. 1531:16-21 (Thompson); Tr. 1924:01-06 (Lipschultz).

55. After engaging Cambridge Associates for advice regarding the prudence of private equity-type investments for philanthropic organizations, and in part relying on FRB's non-enforcement of the Volcker Rule to the Trust, Trustees increased their private equity holdings. Tr. 1490:17-1491:17 (Thompson). Lipschultz consulted the FRB examiner and confirmed that the Volcker Rule would not prevent it from pursuing its revised investment strategy. Tr. 1929:25-1931:07 (Lipschultz); Tr. 747:14-17 (Johnson); TX 1408 at 3. In 2020 OBT's FRB examiner was replaced at the request of BFC. The new examiner inquired about "the increase in investments in Limited Partnerships with hedge funds." TX 224. Lipschultz responded by explaining the rationale and plans for the new investments. TX 224; TX 1858. After further discussions Lipschultz believed the examiner was satisfied and that no further action was required. Tr. 1566:05-14 (Reardon); Tr. 1919:04-13 (Lipschultz). Lipschultz acknowledged that "technically that is inconsistent with the never implemented Volcker Rule. So this is great for us." Tr. 1872:23-1873:15 (Lipschultz); TX 224; TX 1858. Tr. 1490 (Thompson). Lipschultz testified that he repeatedly asked the FRB examiner if divestment was necessary for compliance purposes, and consistently understood from him that divestment would not be required. TX 1408 at 3; Tr. 1925:06-1926:05 (Lipschultz). Thompson testified that

they did not get that in writing from the FRB examiner, however. TX 858; Tr. 1566 (Thompson).

56. In November 2020, after a hearing on the AGO's emergency petition for removal, the Court precluded further investments prohibited by the Volcker Rule and new investments in private equity funds. The Court thereafter allowed Trustees to meet a capital call but suggested that Trustees make a plan to divest to avoid future conflict around these investments. Thereafter, in January 2021, the Federal Reserve made further inquiries. Given the Court's directive and the increased scrutiny by the FRB, Trustees determined it was in the Trust's best interests to pursue divestment. Tr. 748:11-25 (Johnson); Tr. 1183:01-1186:22 (Reardon); Tr. 1927:05-1928:10 (Lipschultz); *see also* TX 177; TX 1281. On February 19, 2021, Trustees memorialized that decision by executing a Written Action to pursue divestment in a prudent manner and over a reasonable time to avoid significant loss or penalty. TX 177; TX 1281; Tr. 1183:01-1186:22 (Reardon). Trustees also notified the Court and the AGO of the planned divestment.

57. On March 8, 2021, the FRB met with Lipschultz and counsel and informed them that the FRB made a decision to issue a "Matter Requiring Immediate Attention" ("MRIA") due to Trustees' apparent violation of the Volcker Rule. Tr. 1897:7-1898:13 (Lipschultz). On April 27, 2021, Lipschultz sent a letter to the FRB examiner providing the Trusts Investment Liquidation Schedule committing to complete the divestment of remaining funds by September 2021. TX 1754; Tr. 1931:13-1932:14 (Lipschultz). On June 11, 2021, the Federal Reserve issued an MRIA to the Trust echoing the previously agreed divestment schedule and directing Trustees to revise the Trust's Investment Policy to address an "apparent violation" of the Volcker Rule. TX 601; Tr. 739:17-740:10 (Johnson); Tr. 1900:1-9 (Lipschultz); Tr. 1173:24-1174:13 (Reardon). The letter then references OBT's agreement to divest the investments. OBT submitted the final divestiture plan on April 27, 2021. The examiner stated that the plan was acceptable. TX 1755. The FRB further directed the Trust to "review and revise as necessary policies, procedures, and internal controls to assure full compliance with" the Volcker Rule and provide an update on the status of divestiture with a final detailed update by September 2021. Tr. 1515:5-15 (Thompson); TX 601. Trustees addressed and resolved the MRIA and changed the investment policy to add a specific reference to the application of the Volcker Rule. Tr. 1516:14-1518:4 (Thompson); TX 603. Trustees also changed the policy to require written approval from qualified regulatory counsel confirming compliance before making private investments. Tr. 1525:11-1526:14 (Thompson). Complete divestment was completed by September 30, 2021. TX 1977.

58. The Federal Reserve was in regular communication with the Trustees from at least 2016 to 2021, both before and after the disputed investments were made. Two examiners informed the Trustees that the Volcker Rule would not be

enforced against the Trust. The evidence establishes that Trustees possessed a good faith belief, based upon discussions they and others at the Trust had with the Federal Reserve examiners that they were not and would not be in violation of the Volcker Rule given the Trust's size and unique structure. Given the assurances by the two examiners, the discretion given federal banking regulators to implement the Volcker Rule, and the Federal Reserve's exclusive jurisdiction, it was not unreasonable or imprudent under the circumstances for Trustees to rely on its regulator. The Court further concludes that Trustees completed their divestiture in a reasonable and prudent manner resulting in a substantial net benefit of over $60 million to the Trust. The Court also concludes the Trust's investments were and are adequately supervised and regulated by the Federal Reserve, which exercised its discretion and authority to interpret and apply the Volcker Rule to the Trust. The Trust has complied with all directives from the FRB.

59. The Court further concludes that the matter of the investments' compliance with federal rules and regulations, along with its resolution, has been properly addressed with the regulatory body tasked with jurisdiction and supervisory oversight on the issue and its implications, and that no further action or relief from this Court is necessary nor warranted. Given the oversight by the Federal Reserve, the advice of Cambridge Associates, and the investment authority granted in the Trust Instrument, Trustees actions do not violate the prudent investor rule set forth in Minn. Stat. § 501C.0901, subd. 2(a).

G. The Sale of BFC Stock Was Not a Violation of Fiduciary Duty.

60. The AGO asserts that Trustees abused their discretion and breached the duty of good faith and the Trust Instrument by selling some of the Trust's shares in October 2019. They do not dispute that Trustees had the right to sell BFC stock under the terms of the Trust Instrument, but rather they dispute the manner in which the sale was conducted. Specifically, Petitioner alleges Trustees' removal is warranted for allegedly: (1) failing to apply appropriate consideration to the Trust Instrument in determining whether the sale was prudent; (2) selling shares of BFC in a "reckless" manner; (3) selling shares of BFC despite alleged personal interests in the outcome of the transaction; and (4) for allegedly failing to disclose material facts to the AGO that were necessary to protect the public's interest.

61. To fulfill the duty of good faith, a trustee shall administer the trust "in accordance with its terms" and "must honor the settlor's intent." Minn. Stat. § 501C.0801; *Nw. Bank Minn. N., N.A. v. Beckler*, 663 N.W.2d 571, 580 (Minn. Ct. App. 2003). Any "attempt to violate the settlor's intent or the trust's purpose" is an abuse of a trustee's discretion and breach of trust. *United States v. O'Shaughnessy*, 517 N.W.2d 574, 577 (Minn. 1994). "[T]he considered conclusions of the settlor regarding what should constitute appropriate investments cannot be lightly disregarded." *Stanton v. Wells Fargo Bank & Union Tr. Co.*, 150 Cal. App. 2d 763,

310 P.2d 1010 (1957) The Minnesota Supreme Court has permitted a trustee to deviate from a trust restriction only if the accomplishment of the purposes of the trust would otherwise be defeated or substantially impaired. *In re Trusteeship under Agreement with Mayo*, 259 Minn. 91, 105 N.W.2d 900 (1960); *see also*, Restatement, Trusts (2 ed.) § 167, comment c. It is only in exceptional circumstances described as cases of emergency, urgency, or necessity that deviation from the intention of the donor, as evidenced by the trust instrument, has been authorized. *Id.* A trustee must administer the trust as a prudent person would," considering all relevant circumstances. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution." Minn. Stat. § 501C.0804; *see also* § 501C.0901, subd. 2(a) (prudent investor standard). Removal is appropriate when a "trustee's judgment is unreasonable and results in unnecessary losses." Susan Gary et al., *Bogert's The Law of Trusts and Trustees* § 527 (2021).

62. When a settlor unmistakably reposes a discretion in a trustee, courts assume that "he does so because he desires the honest judgment of the trustee, perhaps even to the exclusion of that of the court." *In re McCann's Will*, 3 N.W.2d at 240. In such event, "it is not for the court to read into a trust instrument provisions which do not expressly appear . . . and the court will not substitute its discretion for that of the trustee except when necessary to prevent an abuse of discretion." *Id.* In this case, ¶ 16 of the Trust Instrument authorizes Trustees to sell the Trust's shares in BFC and requires the Trustees, not this Court or Petitioner, to decide whether such sale is "necessary or proper owing to unforeseen circumstances." TX 1 at ¶ 16. The Trust Instrument specifically states that "Such stock or any part thereof may only be sold if, in the opinion of the Trustee, it is necessary or proper to do so owing to unforeseen circumstances . . .." *Id.* Because the determination regarding whether a potential sale is "necessary or proper owing to unforeseen circumstances" is controlled by the Trustees' opinion, it is discretionary, and the Court must determine whether Trustees abused that discretion, *i.e.*, whether Trustees acted in good faith, from proper motives, and within the bounds of reasonable judgment. *O'Shaughnessy,* 517 N.W.2d at 577.

63. The AGO argues that Trustees abused their discretion and breached the duty of good faith and the Trust Instrument by selling some of the Trust's shares in BFC without due consideration of the Settlor's intent that the shares be retained except for unforeseen circumstances. They argue that Trustees did not give adequate consideration to Otto Bremer's desire to maintain a relationship between BFC and the Trust and that Trustees orchestrated the conditions to create a false narrative justifying the sale, irrespective of whether it was necessary or proper under the Trust Instrument. They claim that the change in fair market value of the bank, the resulting tension on required bank dividends, and the increased distribution requirements were essentially fabricated. The evidence does not support those claims.

64. The evidence establishes that when BFC was approached with the merger of equals proposal by Company A that the likely fair market value was far more than had been assumed over the past decades. The subsequent discussions and offers confirmed that the amount a willing buyer would pay for the bank was almost double what had historically been assumed. The market-value appraisals derived from the merger-of-equals proposal with Company A—which were further reinforced by the market-based valuation by BFC's investment advisor (JP Morgan) and the Trust's investment advisor (KBW)—put the Trust and its Trustees in a severe predicament: given the considerably higher fair market valuation determined as a result of the discussions (nearly double that previously understood), Trustees would be required to make significantly higher charitable distributions in 2020 and in each subsequent year, without assurances that it would receive sufficient dividends from BFC.

65. Trustees could not ignore these developments and could not incorporate them into their annual report to the IRS of the fair market value of the Trust's holdings. To do so would have been a serious breach of duty on their part, not to mention the harm it could have brought to the Trust. At the same time, BFC was already in a difficult situation in meeting the Trust's dividend requirements. That was a real situation and was not concocted to fit a false narrative.

66. The AGO also asserts that Trustees rushed the process and exercised inadequate deliberations and control over the sale process. To the contrary, the process played out over a period of more than nine months, from the time Crain first approached Trustees about the merger of equals proposal until the time of the stock sale in October. Throughout that process, Trustees laid out all of their concerns about owning an asset that could cause harm to the Trust by not being capable of meeting its need for dividends to comply with its much higher distribution obligation. They expressed their concerns at the January BFC board education session and at all subsequent board meetings. They never misrepresented to the BFC board the requirements of the Trust Instrument or the process that could be used in the event BFC acted in a manner that would not allow Trustees to fully explore all feasible alternatives to make an informed and reasonable business decision about the potential sale of the bank. At every stage of the proceedings everyone involved knew what everyone else's concerns were.

67. Both BFC and OBT engaged experienced investment bankers to help them evaluate the marketplace of opportunities for a merger or sale. Throughout the process BFC's board knew either option would require the Trust to transfer or sell its 92% ownership interest in the bank. There were no concerns raised that such a transaction would violate the terms or the intent of the Trust Instrument, it was not even in question. Trustees learned about how each type of transaction, merger, sale or IPO, would impact the value of its largest asset. It became obvious to them that the outright sale option would bring the best results for the charity.

They explained that thoroughly to the BFC board. BFC had other interests and different priorities to consider. That BFC's interests may conflict with the interests of the Trust is understandable, but the ownership structure in place impedes BFC's ability to control its own destiny. Only the owners have the ability to sell, and the Trustees have an obligation to maximize the price to the extent reasonable.

68. Despite the concerns raised by Trustees of the lower comparative value of the proposed merger, when the BFC board voted in April 2019 to further explore the merger with Company A Johnson asked BFC to explain how the other options might fit the bank's strategy. In June Trustees again expressed to the board that selling was the best option for them and could result in hundreds of millions more for the charity than the merger being considered. In July, Trustees resolved to sell the bank shares based on the circumstances described above. By the time of the July board meeting, BFC engaged litigation counsel and began a process to attempt to block a sale. Lipschultz urged the board to reconsider and work collaboratively with Trustees to find a solution. At the August board meeting Trustees again explained their reasoning for favoring exploration of a sale and implored the board to work cooperatively to that end. Instead, the board voted to immediately cease all negotiations of merger or sale. Lipschultz asked them to reconsider and suggested creating a joint oversight committee to work with the investment bankers to explore options. His request was denied.

69. From Trustees' perspective, BFC closed off all opportunity to allow for a cooperative approach to exploring the best way forward for the Trust to address its circumstance and maximize the value of its BFC holdings. Trustees explored their available options. They knew that BFC's lack of cooperation would make it impossible to attract a single buyer in the banking industry. Attempts to force a sale of the whole bank under those circumstances would not bring a fair value to the Trust. Trustees then focused on the strategic option discussed back in January, which was to sell the minimum number of shares necessary to elect members to the board that would be open to the continued exploration of strategic options. That strategy resulted in the sale of 725,000 (7%) of the Trust's shares in October so that the buyers could convert the shares to voting stock and proceed accordingly.

70. Before completing the sale, Trustees through their legal representatives met with the AGO and laid out the plan discussed above. There was no controversy or conflict with the AGO about proceeding in that fashion. The AGO followed up with a letter expressing gratitude for informing them of the planned partial sale and strategy and asked the Trustees to keep them informed and notify them when the transaction was completed. The AGO wanted to talk about Trustee compensation after the sale. Likewise, Trustees notified the Federal Reserve examiner discussing the plan and were given the permission they requested relating to having a third-party negotiate the transaction. After completing the sale, Trustees' counsel again met with the AGO as was requested to advise them of the

details of the transaction and the potential conflict with BFC. Again, there was no opposition expressed by the AGO. Trustees reasonably relied on the AGO's statements, representations, and non-objection to the contemplated sale when pursuing their stated intent and course of action.

71. After the sale was completed, the landscape changed dramatically. A few weeks after the sale, BFC refused to register the buyers' shares and commenced a lawsuit against the Trustees seeking to invalidate the sale, among other things. The buyers then also sued BFC to enforce their rights as shareholders. The AGO got involved and asked the parties to mediate a resolution and BFC declined. BFC representatives then worked diligently to provide the AGO with detailed theories and allegation of wrongdoing by Trustees which ultimately resulted in a stay of all of the litigation, a lengthy CID and the AGO's Petition for Removal and, ultimately, this trial. Certainly, in hindsight, there may have been different ways of proceeding, including requesting court approval or BFC could have accepted Trustees' proposal to form a joint oversight committee to further explore a solution. Neither party was required to do so, and hindsight is not the standard by which the Court considers the issues. In today's climate, that litigation was expected and ensued relating to a transaction of this nature is not determinative.

72. It is important to note that the AGO has respectfully requested that the Court not determine whether Trustees' decision to pursue the partial sale was necessary and proper due to unforeseen circumstances as required by the Trust Instrument. The Court will honor that request, despite that most of the evidence relating to that question was presented at trial and despite knowing that question will ultimately need to be answered, absent the parties working out a solution that serves the best interests of all involved. It is clear, however, that there are many valid reasons supporting further exploration of strategic options to separate BFC from its ownership by the Trust, and that doing so may very well be in everyone's best interests. The extensive and duplicative regulation and investment restrictions imposed on the Trust due to its designation as a bank holding company is expensive and impedes the Trust's ability to invest its assets and pursue strategies consistent with all other charitable organizations in the nation. BFC's dividend requirements to OBT obviously impact the bank's ability to consider growth and structural options which may be increasingly important in the current and future financial marketplace. The real question may be how to proceed from here to best allow both organizations to prosper. Certainly, Otto Bremer did not intend the establishment of the Trust to be a heavy burden on these two important and venerable organizations. Further consideration of separating that relationship may very well be the single best path to preserving and enhancing his goal of using the bank to fuel a perpetual vehicle for continued charitable giving. Capturing the hard-earned value of BFC in today's marketplace would greatly increase OBT's charitable endowment, while allowing BFC to grow and prosper in the region deemed so important to its founder.

73. The AGO asserts a number of other arguments in support of its Petition relating to the sale of BFC stock. The reasons for pursuing the sale were consistent with the discretion given them in the Trust Instrument. Otto Bremer did not create the Trust for the purpose of operating his banks. Rather, he directed that his trustees manage and oversee the banks to ensure they would fund the Trust's philanthropic mission. As noted, the process was not unnecessarily rushed as it developed over the course of nearly ten months. Trustees provided notice to the AGO about their intended course of action and advised the Federal Reserve as well. The sale was intended to accomplish the legitimate purpose of creating an opportunity to explore strategic options in the best interest of the Trust, an option which BFC unilaterally prohibited by refusing to cooperate. The price and terms of the sale of the 725,000 shares was not unreasonable given that it allowed for the potential for the Trust to obtain a much higher price for the other 93% of its holdings. Finally, the evidence does not support the argument that Trustees pursued their strategy to increase their compensation or otherwise enrich themselves.

74. The Court concludes that Trustees' decision to pursue a strategy to further explore options to sell its BFC stock through the sale of the minimum number of shares necessary was not an abuse of their discretion or a breach of trust and did not violate the settlor's intent. To the contrary, under the unique circumstances presented, it was a good faith effort to protect and enhance the Trust.

75. The evidence relating to Trustee Lipschultz's failure to disclose the designation of his successor trustee is disturbing, however. Nothing about this conclusion relates at all to the person he has designated, as there is no evidence in the record suggesting that they would not be an able and capable successor. It is Lipschultz's deception and secrecy that is troubling. Rather, Lipschultz sought to hide this nomination from the AGO and would not reveal the nomination until he was forced to do so on the stand at trial. He misrepresented that he had not made a successor appointment when in fact he had. When it came to light and he was required to provide a copy of the written designation, he redacted the name of his designee. His stated reason was to spare the designee from publicity or protect their privacy. These are not valid reasons to be evasive about a topic that the AGO has every right and reason to explore.

76. The Court concludes that Lipschultz's deception and unwillingness to disclose his appointed successor is a violation of the duty of information, and thereby a breach of trust.

H. Multiple Breaches of Trust by Lipschultz Constitute a Serious Breach of Trust and Removal is in the Best Interests of the Trust and its Beneficiaries.

77. Misuse of Trust Assets is a Breach of Trust. A trustee owes a beneficiary the duties of good faith, loyalty, care, and information. *See* Minn. Stat. §§ 501C.0801, 501C.0802, 501C.0804, 501C.0813. "A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust." Minn. Stat. § 501C.1001(a). Under the Trust Code, this "court may remove a trustee if . . . the trustee has committed a serious breach of trust." Minn. Stat § 501C.0706(b)(1). "A serious breach of trust may consist of a single act that causes significant harm or involves flagrant misconduct." Uniform Trust Code § 706 cmt. "A serious breach of trust may also consist of a series of smaller breaches, none of which individually justify removal when considered alone, but which do so when considered together." *Id.*

78. "[N]o rule is more fully settled than that which forbids a trustee's dealing with himself in respect to trust property." *In re Anneke's Tr.*, 229 Minn. 60, 65, 38 N.W.2d 177, 179–80 (1949) (citations and quotations omitted); *see also* Minn. Stat. § 501C.0802 (duty of loyalty). Private foundation trustees are expressly prohibited under Minnesota law from "engag[ing] in an act of 'self-dealing'" as defined by the IRS Code that could "give rise to liability for the tax imposed by" the IRS Code. Minn. Stat. § 501B.32, subd. 1(b). "If the trustee appropriates trust property to the trustee's own use directly, the trustee should be removed." Susan Gary et al., *Bogert's The Law of Trusts and Trustees* § 527 (June 2021). Likewise, trust assets are not "to be used in developing or furthering business enterprises" of a trustee. *In re Janke's Est.*, 193 Minn. 201, 205, 258 N.W. 311, 313 (1935).

79. The Trust Instrument directs that "no part of the trust estate or income therefrom shall be used for any purpose except such as is charitable." TX 1 ¶ 6. The Trust's personnel policies, which apply to Trustees, prohibit the "use of office resources for non-office purposes." TX 839 at 23.

80. The evidence establishes that Lipschultz breached the duty of loyalty and violated the Charitable Trust Act by appropriating Trust assets and staff time for his own benefit, unrelated to the Trust's activities. He utilized Trust staff and resources to work on his personal, business and family matters. He repeatedly used staff time, mailing, and computer resources for non-Trust purposes. Lipschultz used the Trust office as his address for other business interests after he became Trustee.

81. Lipschultz did not disclose his improper use of Trust assets to the IRS or the other Trustees, and when those actions were discovered an audit was required to estimate the value of the self-dealing and resulting tax liability. The audit addressed only the timeframe required under IRS rules, the amount involved for the years 2017-2019. Although Lipschultz reimbursed the Trust for the value of

misused Trust assets calculated by the auditors, $1875, he did not reimburse the Trust for the years 2012 through 2016. Likewise, he did not reimburse the Trust for the resulting tax liability, accounting fees or legal fees incurred to address and remedy his breach. The Trust incurred a tax on self-dealing under IRS rules for the three years totaling approximately $300. Lipschultz did not reimburse the $4,762.80 the Trust paid for accounting fees relating to the audit and IRS filings. Nor did Lipschultz reimburse the Trust for legal fees incurred in remediating his self-dealing.

82. The Court concludes that Lipschultz's conduct constituted acts of self-dealing as defined by the IRS code resulting in a tax to the Trust in violation of Minn. Stat. § 501B.32, subd. 1(b). Lipschultz's partial remediation of his self-dealing, or the fact that partial restitution was made, does not eliminate the breach from consideration in a removal proceeding. Susan Gary et al., *Bogert's The Law of Trusts and Trustees* § 527 (June 2021).

83. The Court acknowledges that the amount involved is relatively small. No doubt the value of Trust resources misused over the seven-year timeframe exceeds several thousand dollars. In the larger scheme of things, it may be "de minimis." Nonetheless, this misuse of trust assets constitutes self-dealing which is strictly prohibited by law and by the Trust Instrument itself. *See* Restatement (Third) of Trusts § 78(2) (2007) (stating except in discrete circumstances, self-dealing is "strictly prohibited"); *see also In re Washington Builders Ben. Trust*, 293 P.3d 1206, 1222, n.16 (2013) (rejecting argument that misused assets "did not constitute a breach of trust because the amounts were de minimis . . . when compared to the total amounts implicated). If this were the only behavior constituting a breach of trust by Lipschultz, it would likely not, by itself, justify removal. As discussed below, it is a part of a concerning series of breaches, however, that collectively constitute a serious breach of trust in violation of the Charitable Trust Act

84. Lipschultz stated that his breach was made in good faith and that it was an honest mistake. Good faith, however, is not an absolute defense to a self-dealing breach. To establish a breach for self-dealing, "no fraud, in fact, need be shown by the beneficiaries, and no excuse can be offered by the trustee to justify such transactions." *In re Anneke's Tr.*, 229 Minn. 60, 65, 38 N.W.2d 177, 179-80 (1949). Likewise, the "fact that the trustee acted honestly under an assumption of entitlement to the property" is not a defense to removal. Susan Gary et al., *Bogert's The Law of Trusts and Trustees* § 527 (June 2021).

85. Reardon and Johnson do not bear responsibility for Lipschultz's unreported self-dealing. They took reasonable steps to protect Trust property after learning of the breach and steps were taken to assure that such misuse of Trust assets will not occur again. The failures by Lipschultz properly rest with him. The

Court concludes that his breach belongs only to him and the AGO's arguments that Reardon and Johnson should be removed because of his actions are rejected.

86. Behavior of Lipschultz During the Completion of the Sale. Apart from the above analysis and conclusions relating to the Trustees' decision to sell the BFC shares, the Court is compelled to address the inappropriate behavior of Trustee Lipschultz in his communications during the transaction. Beginning in September 2019 during his conversations with KBW's Gulash, Lipschultz displayed a crude, vulgar and otherwise offensive brashness that has no place in the charitable world. Initially he suggested that he wanted to find aggressive investors that "live for this kind of thing" to signal to BFC and Wachtell that they "were not fucking around." After BFC refused to transfer the shares Lipschultz stated that he was "looking forward to observing the carnage." Relating to media inquiries about the reason for proceeding with the sale he remarked that "we will declare those in court, where it counts." Complaining about one investor's lack of aggressiveness in responding to BFC's lawsuit he said the investor "was a big talker" and is now "not doing shit." Regarding suggestions about the duration of the litigation, he remarked "I've got years of reserves if absolutely necessary" referring to the Trust's assets. And finally, in December 2019, he stated that the initials of one of the investor companies of "FJ" is referred to as "Fuck Jeanne" Crain.

87. This uncontradicted behavior is part of a larger pattern of improper behavior starting with the misuse of corporate assets and ending with the berating of the Junior Achievement executive discussed below. Among other examples, he also made several disparaging statements about co-Trustee Johnson to Gulash during the negotiations, merely because she was hesitant to agree with him. The Court concludes that Lipschultz's behavior during this important transaction was highly unprofessional and not in accord with the requirements of a Trustee of a large charitable institution. It constitutes a breach of loyalty to the organization by putting his own frustration, aggression, and personal interest in revenge ahead of the important interests of the Trust. This behavior cannot be attributed to the other two Trustees.

88. Lipschultz Misused His Grantmaking Authority to Further His Personal Interests. The "duty of loyalty" prohibits trustees from placing their own interests above the interests of the beneficiaries. *See* Minn. Stat. § 501C.0802; Restatement (Third) of Trusts § 78. "Pursuant to the duty of loyalty, a trustee must act solely in the interests of the beneficiaries. For that reason, a court may remove a trustee with divided loyalty, due to a conflict of interest." Susan Gary et al., *Bogert's The Law of Trusts and Trustees* § 527 (2021); *Matter of Will of Cargill*, 420 N.W.2d 268, 269 (Minn. Ct. App. 1988) (affirming district court decision removing trustee for a conflict of interest and other ground). "Where the trustee has a personal interest adverse to the trust, a court is likely to remove the trustee." Susan Gary et al., *Bogert's The Law of Trusts and Trustees* § 527 (2021). While a trustee may be

removed for untoward action, such as for a serious breach of trust, a trustee may also be removed under circumstances in which the court concludes that the trustee is not best serving the interests of the beneficiaries." Unif. Trust Code § 706; *see also* Restatement (Second) of Trusts § 387 (1959) ("A court may remove a trustee of a charitable trust if his continuing to act as trustee would be detrimental to the accomplishment of the purposes of the trust.").

89. Some of the most disturbing evidence in this case relates to the actions of Lipschultz in his communications with Junior Achievement's CEO after the conflict with BFC intensified. His actions were based solely on his personal animosity toward BFC and have no place in the charitable community. At worst, his actions could be reasonably interpreted as threats against future grants because Junior Achievement was honoring BFC's board chair. At best it was abusive treatment of a grantee for operational decisions unrelated to any legitimate charitable purpose of the Trust. His behavior caused Junior Achievement to return a $1.2 million grant, at a most critical time of need. Regardless of the involvement of BFC executive Crain in the situation, the Court cannot shift responsibility for this egregious misconduct to anyone else. Further, the Court cannot ascribe Lipschultz's misconduct to the other two Trustees.

90. Lipschultz wrongfully questioned the loyalty of a longtime recipient of the Trust's charity. His conduct caused a delay of nearly an entire fiscal year of funding during a devastating pandemic and resulting hardships. The conduct was a misuse of grantmaking power to further his own personal objectives and resentment. It is not lost on the Court that this conduct occurred during a time of intense scrutiny on Trustees' actions, including just weeks before trial. Lipschultz's misconduct was a serious breach of the duty of loyalty and demonstrates a lack of objectivity and fitness, which along with the other breaches noted herein, collectively constitute a serious breach of trust that justify removal under Minn. Stat. § 501C.0706(b)(1).

91. Removal is Appropriate. There is no room in the charitable world for animosity and vindictiveness to infiltrate or impact the decision-making of a charitable trustee. Lipschultz has shown repeatedly that he cannot operate in a purely charitable manner and has allowed his own personal interests, animosity, enmity, or vindictiveness to impact his decisions and behavior as a trustee of one of the region's most important charitable institutions.

92. The Court concludes that Trustee Lipschultz's repeated improprieties constitute a serious breach of trust that justify removal under Minn. Stat. § 501C.0706(b)(1) and Minn. Stat. § 501B.41. Additionally, considering those circumstances, the Court concludes that his removal serves best serves the interests of the beneficiaries and the Trust. Minn. Stat. § 501C.0706(b)(3).

Based upon the foregoing Findings of Facts and Conclusions of Law, the Court makes the Following:

ORDER

1. Petitioner's Petition for Removal is GRANTED IN PART. Effective immediately, Brian Lipschultz is hereby removed as a Trustee of the Otto Bremmer Trust.

2. Petitioners Petition for Removal as to Trustees Daniel Reardon and Charlotte Johnson is DENIED.

3. The Trust shall terminate the remaining Trust Advisory Fee Agreement with Trustee Reardon effective April 30, 2020. Beginning May 1, 2022, Trustee compensation for Trustees Reardon and Johnson shall continue at the amount of the Annual Fee set forth in the Court's Order dated November 16, 2020. Trustee compensation going forward will be addressed at the next hearing for approval upon the Petition of Trustees. In connection with that approval process Trustees may consider adjusting the total compensation for each Trustee as appropriate based on the duties undertaken by each Trustee.

4. The removal of Brian Lipschultz creates a vacancy. The Trust Instrument establishes a process for the selection of a successor. Trust Instrument Paragraph 8(c). Minn. Stat. § 501C.0704(b) also addresses a vacancy due to removal, including that the vacancy need not be filled. The issue of successor or replacement Trustee was bifurcated from the trial for later determination. The parties shall meet and confer regarding whether a successor Trustee is necessary and the process to be utilized for considering the appointment of a successor Trustee. With that guidance in mind, the parties shall submit to the Court within 60 days, either jointly or separately, their written proposal for addressing the vacancy.

IT IS SO ORDERED.

April 29, 2022

Apr 29 2022 4:19 PM

Robert A. Awsumb
Judge of District Court