STATE OF MINNESOTA | DISTRICT COURT
COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

Court File No. 62-C9-61-315222

In the Matter of the OTTO BREMER TRUST (formerly known as the Otto Bremer Foundation)

STATE'S MEMORANDUM OF LAW IN SUPPORT OF PETITION TO ENFORCE SUPERVISION OF CHARITABLE TRUSTS AND TRUSTEES ACT, REMOVE TRUSTEES, REPLACE TRUSTEES, AND FOR OTHER RELIEF; AND PETITION FOR INTERIM RELIEF

PUBLIC VERSION

INTRODUCTION

The State of Minnesota, by its Attorney General, Keith Ellison, brings this Petition to remove S. Brian Lipschultz, Daniel Reardon, and Charlotte Johnson (collectively "Trustees") as the trustees of Otto Bremer Trust ("Trust") pursuant to the Attorney General's broad authority as the chief law officer of the state, the supervisor of charitable trusts in Minnesota, and the sole representative of the beneficiaries of the Otto Bremer Trust—the public. He seeks Trustees' removal both for their longstanding failure to effectively administer the Otto Bremer Trust, and their serious, individual breaches of their fiduciary duties, culminating in a breathtakingly reckless hostile takeover attempt of the Trust's primary asset, Bremer Financial Corporation ("BFC") in October 2019.

Through this attempt, Trustees intentionally triggered a "cascade of unfortunate consequences" they knew would plunge the Trust into chaos, bleed its assets dry in "guaranteed" and "inevitable" litigation, and undermine Otto Bremer's charitable legacy by waging their "self-aggrandizing" war on BFC. They engaged in these extraordinary transactions under the specter of self-dealing contracts that provided personal incentives to Lipschultz and Reardon to liquidate as much BFC stock as possible so they could earn an investment fee off of a larger pool of assets. And they treated the Minnesota Attorney General's Office ("AGO") as an adversary—not as a fiduciary—intentionally withholding from the AGO the most important aspects of their ill-conceived plan that may have otherwise allowed the AGO to protect the public's interests and prevent the unmitigated disaster that followed.

The October 2019 events did not happen in isolation. They followed Trustees' years-long process to mold the Trust according to their personal interests by amplifying the Trust's "investment" activities, and "reframing" the Trust's "brand" from the "homespun" philanthropic foundation Otto Bremer created into to a "private equity firm" in its own right. And they followed a pattern reflected in their testimony during the AGO's just-concluded investigation of their activities: "The Trust is the Trustees." In accordance with this misguided standard, Trustees have persistently elevated their own interests above the Trust's—by failing to implement proper governance structures incorporating Trustee accountability; by using Trust assets to further their personal interests like giving grants to charities where they have personal affiliations and misusing Trust assets in favor of their private businesses or other interests; by retaliating against employees, grantees, and other stakeholders who dared to disagree with them; and by enshrining themselves in opulent offices separated from their employees and elevated above the communities they are directed to serve.

Indeed, Trustees continue to flout their obligations and the Attorney General's authority in a manner that presents imminent harm to the Trust, including threatening to "divest" additional BFC shares, invest tens of millions of Trust assets in prohibited investments like hedge funds, transfer assets to a limited liability subsidiary to shield them from Court scrutiny, and spend $20 million in attorneys' fees waging their war. And since Trustees face substantial individual liability for their actions, their interests in self-preservation and justifying their conduct present untenable conflicts that will displace the interests of the Trust, requiring immediate removal.

Through the Petitions, the Attorney General does not take a position on any related lawsuits, condone the actions of BFC or any other third party, seek a determination on the validity of the October 2019 transactions, or weigh in on the discretion that a trustee has to sell the Trust's BFC shares and under what circumstances. The Attorney General further expressly seeks to defer and preserve for potential separate actions the determination on the availability and amount of restitution from Trustees and third parties. Rather, the Attorney General at this time solely seeks findings and an order sufficient to effectuate the narrow equitable remedies of removal, replacement, and other requested relief to address the reckless manner in which Trustees engaged in the transactions, their self-interested motives for doing so, their adversarial treatment of the AGO and the beneficial interests of the public, and their longstanding failure to properly administer all aspects of the Trust. The Attorney General respectfully requests that this Court remove Trustees, replace them with successor trustees who will put the Trust's charitable purposes first, and order interim and other equitable relief required to protect the Trust's assets and the public's interest.

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FACTS

I. BACKGROUND.

A. The Minnesota Attorney General.

Attorney General Keith Ellison is the "chief law officer of the state." *State ex rel. Hatch v. Am. Family Mut. Ins. Co.*, 609 N.W.2d 1, 3 (Minn. Ct. App. 2000) (citation omitted). He is the primary regulator of charitable interests in Minnesota. The Legislature has expressly conferred authority on the Attorney General to supervise, regulate, and enforce laws governing Minnesota nonprofit corporations, *see* Minn. Stat. ch. 317A, soliciting charitable organizations, *see* Minn. Stat. §§ 309.50–.61, and charitable trusts, *see* Minn. Stat. ch. 501B. The Attorney General's authority over charitable interests, however, is not limited to express statutory grants of enforcement power. It is also conferred by longstanding common-law power to act for the benefit of the public as a representative of the sovereign under the *parens patriae* doctrine. *Cross Country Bank, Inc.*, 703 N.W.2d at 569. Such authority is particularly established with respect to charitable trusts, where the public is the beneficiary, since no individual is suited to enforce the ephemeral interests of the "large and shifting class of the public." Ronald Chester, George Gleason Bogert et al., *The Law of Trusts and Trustees* § 411 (Supp. June 2020). Accordingly, when the Attorney General regulates, supervises, and enforces charitable trusts in Minnesota—he acts pursuant to the apex of his authority as a constitutional officer representing the public.

B. Otto Bremer.

Otto Bremer was a German immigrant who grew from modest beginnings to become a prominent banker and community leader in Minnesota. (Affidavit of Carol Washington ("Aff.")

Exhibit 1 at OBT_00173037.) He invested his own funds to help keep small "countryside banks" afloat during the Great Depression. (*Id*. at OBT_00173036.) In 1943, Bremer created a holding company for his investments in community banks called the Otto Bremer Company, which eventually became Bremer Financial Corporation ("BFC"). (Aff. Ex. 2 at OBT_00008149) In 1944, he established the Otto Bremer Foundation, now named the Otto Bremer Trust ("Trust" or "OBT"). (*Id*.) Following Otto Bremer's death in 1951, the assets of his estate were transferred to the Trust to be used for charitable purposes. (*Id*.)

C. The Trust's Legal Structure.

Otto Bremer Trust is an express trust under the Minnesota Trust Code, Minn. Stat. ch. 501C, created by a trust instrument set forth in detail below. Its principal place of administration is in St. Paul, Minnesota. (Aff. Ex. 3 at 75:18-21.) It is also a private foundation exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Service Code. (Aff. Ex. 5) It is registered as a Minnesota Charitable Trust with the AGO under the Supervision of Charitable Trusts and Trustees Act, Minn. Stat. §§ 501B.33 –.45, and files annual information filings with the AGO under section 501B.38. It is further subject to ongoing court supervision under the Minnesota Trust Code. *See* Minn. Stat. § 501C.0205. The Trust 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. (Aff. Ex. 6 at Interrog. No. 6.)

OBT is not, however, a corporation organized under nonprofit laws. Although the Trust Instrument expressly authorizes the Trustees to administer the Trust through a "charitable corporation" with directors, *see* Aff. Ex. 7 at ¶ 19, Trustees have never considered incorporating the Trust, Aff. Ex. 8 at 31:21-25; Aff. Ex. 9 at 44:8-10. Rather, Trustees characterize the Trust as "somewhere between a legal organization and not." (Aff. Ex. 9 at 20:16-22.) In some contexts, Trustees operate the Trust like a "business enterprise," in that, acting through Trustees, the Trust itself can employ people, disburse funds, loan out money, and enter into contracts. (*Id*. at 21:3—22:12.) In other contexts, however, Trustees distinguish the Trust from nonprofit foundations, noting that it does not have an independent board of directors "overseeing the governance of the corporation." (Aff. Ex. 8 at 31:1-13; Aff. Ex. 9 at 44:8-10; Aff. Ex. 4 at 37:8-14.) Instead, Trustees assert, the AGO and the Supervising Court are their "oversight bodies." (Aff. Ex. 4 at 138:2-12; Aff. Ex. 5 at Interrog. 8.) Trustees have never instituted a board-type governance structure because it "adds one more level of management" over the operations of the trust. (Aff. Ex. 4 at 37:15—38:2.)

D. The Trustees.

The Trust has three current trustees: Charlotte S. Johnson, Daniel C. Reardon, and S. Brian Lipschultz (collectively "Trustees"). In several respects demonstrated herein, Trustees perceive the Trust as coextensive with their personal identities. (*See* Aff. Ex. 8 at 8:9-11.) Reardon testified that "the Trust is really the three trustees that comprise the Trust," and: "The Trust is the trustees." (Aff. Ex. 8 at 8:3-11; 195:5.) All three Trustees were appointed as successors by their respective fathers: Johnson in 1991 (Aff. Ex. 10), Reardon in 1992 (Aff. Ex. 11), and Lipschultz in 2012 (Aff. Ex. 12). None of the Trustees are familial decedents of Otto Bremer. Rather, the original trustees—Trustees' respective fathers and grandfathers—served as business advisors and attorneys to Otto Bremer. (Aff. Ex. 8 at 9:4-13; Aff. Ex. 4 at 9:19—10:23; Aff. Ex. 9 at 24:9-22.)

Before her appointment, Johnson graduated with an undergraduate degree in anthropology and volunteered on nonprofit boards. (Aff. Ex. 4 at 12:13—13:2; Aff. Ex. 13.) Reardon's prior experience includes working as an investment advisor and as a director of corporate finance. (Aff. Ex. 8 at 102:20-22; Aff. Ex. 14.) Before he was named Trustee, Lipschultz held a series of financial management and executive positions at large corporations and co-founded an investment firm. (Aff. Ex. 15.) Aside from advice provided by legal counsel, Lipschultz has never attended any trainings on Trustee duties and responsibilities since his appointment in 2012. (Aff. Ex. 9 at 18:2-5.)

While none of the Trustees have designated successors yet, continuing the family tradition, Johnson has selected her husband and Reardon has selected his brother to serve in the event that they resign or cannot perform their duties. (Aff. Ex. 16; Aff. Ex. 17 at Interrog. No. 40.) Since Lipschultz's appointment in 2012, Trustees "have acted unanimously with respect to every action they have taken," and no dissenting Trustee has "notified any co-Trustee of his or her dissent to an action at the direction of the majority of the Current Trustee[s]." *See* Minn. Stat. § 501C.0703(h). (Aff. Ex. 5; Aff. Ex. 18; Aff. Ex. 19 at Interrog. No. 29.)

E. Trust Instrument.

1. General Provisions.

The Trust Instrument states: "The trust herein created shall be known as the 'Otto Bremer Foundation' and under that name so far as practicable the business of the trust shall be conducted." (Aff. Ex. 7 at ¶ 2.) The Trust Instrument is governed by Minnesota law, and requires Trustees to have a domicile in Minnesota to be subject to the jurisdiction of this state. (*Id*. at ¶ 21.)

2. Charitable Purpose.

The Trust has no named beneficiaries. (*See generally id*.) Rather, it exclusively serves general charitable purposes, notwithstanding any Trust Instrument provisions that "may be construed to the contrary," or "any change in the law." (*Id*. at ¶¶ 3, 6.) 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." (*Id*. at ¶ 6.)

The Trust Instrument outlines its specific charitable purposes, including but not limited to: to "relieve poverty in the City of St. Paul, Minnesota;" to "establish scholarships and assist poor and deserving children in securing education;" to "promote citizenship by aiding such movements as the Boy Scouts, Girl Scouts, and Camp Fire Girls;" to "promote the public health by aiding in the construction, enlargement and maintenance of hospitals;" to fund the study and treatment of disease; and to "aid persons suffering from catastrophe." (*Id*. at ¶ 3(a)-(j).) The Trust Instrument limits beneficiaries to those in the "State of Minnesota, or Wisconsin, or North Dakota or Montana." (*Id*. at ¶ 3(k).)

3. Compensation.

The Trust Instrument allows for, but does not require, Trustee compensation. Specifically, it states:

> Paragraph 13
> Trustee's Compensation.
>
> The Trustee, if he claims it, shall receive as compensation for his services in the management of the trust estate not to exceed four percent of the cash income of the trust estate. Such compensation may be divided among the acting trustees as they desire. The above compensation shall be in full for all ordinary services rendered by the trustee; but for extraordinary services required the trustee shall have reasonable additional compensation.

(*Id*. at ¶ 13.)

4. BFC Shares.

The Trust also has specific provisions addressing Trustees' retention of the shares in what is now BFC. It states:

> 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 unforseen [sic] 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. As to any other investment that Trustor may hereafter make a part of the Trust Estate, the trustee shall have the 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, except that they shall not invest in real estate or mortgages or unimproved property or mortgages in excess of 50% of the fair market value of improved real estate and then only if the mortgage is amortized annually over a period not exceeding 15 years, and provided further that it be not a manufacturing plant, theater, hotel or other single purpose building unless the same qualifies as an institution within the purposes set forth in paragraph 3.

(*Id*. at ¶ 16.)

F. BFC ownership and relationship.

Otto Bremer Company, as referenced in the Trust Instrument, is now Bremer Financial Corporation ("BFC"). BFC is a privately held corporation organized under Minnesota law with its principal place of business in Saint Paul, Minnesota. BFC operates as a regional financial institution located in Minnesota and surrounding states. (Aff. Ex. 20.) BFC has also provided a variety of contracted services to the Trust over the years, including financial, insurance, investment, compliance, and human resource support. (Aff. Ex. 21 at Interrog. No. 2.) By virtue of the Trust's status as BFC's primary shareholder, Trustees also serve on BFC's Board of Directors ("Directors" or "Board"). (Aff. Ex. 5 at Interrog. No. 6.)

For years, the Trust retained all of its shares in BFC as outlined in the Trust Instrument. In 1969, IRS laws changed to require private foundations to own less than 20 percent of the voting stock of a for-profit company, or distribute at least five percent of their assets' fair market value to charity each year. (Aff. Ex. 22.) BFC was reorganized under a Plan of Reorganization and its Articles of Incorporation were amended to limit the Trust's voting power to 20 percent to comply with these changes. (Aff. Ex. 20).

The Plan of Reorganization creates two classes of common stock: Class A and Class B. Class A shares have voting power. Class B shares are restricted to voting on "extraordinary transactions," including mergers and similar corporate transactions and amendments to BFC's articles of incorporation relating to capital structure or voting power. (Aff. Ex. 22.) Class A shares may vote during director elections, whereas Class B cannot. After exchanging its existing shares in BFC, the Trust sold 80 percent of the Class A voting shares to BFC's Employee Stock Ownership Plan ("ESOP"), profit-sharing plan, and employees and directors. (*Id.*) Thus, for 30 years, the Trust and BFC employees have served as the sole co-owners of BFC.

Under the Plan of Reorganization, BFC must issue dividends to its shareholders equal to at least five percent of its net book value. (Aff. Ex. 20.) If it fails to do so, it risks Class B shareholders opting to convert their shares into Class A shares. (*Id.*) The Trust also has its own distribution requirements. Trustees must distribute five percent of the fair market value of the Trust's assets for charitable purposes each year. If Trustees fail to meet this threshold, the Trust faces a 30% tax on the undistributed income, which rises to 100% if not distributed during the required time period. *See* 26 U.S. Code § 4942. The only time BFC failed to meet its minimum payout requirements to the Trust under the Plan of Reorganization was during the financial crisis between 2008 and 2010. (Aff. Ex 23.) The Trust was still able to meet its 5% IRS distribution requirements, however, due to available carryover balances from preceding years, and from its other non-BFC sources of funds. (*Id.*)

Since these payout requirements are calculated based upon the fair market value of the Trust's assets, the valuation of the Trust's largest asset—BFC—is of paramount importance to the

Trust. Prior to 2019, Trustees valued the Trust's BFC shares in its IRS Form 990-PFs at a set discount from the book value per share. (Aff. Ex. 24; Aff. Ex. 25; Aff. Ex. 26; Aff. Ex. 27.) BFC would calculate its book value and provide this figure to Trustees. Trustees would then apply a 10% blockage discount to all of the Trust's BFC shares, as well as an additional 5% discount on its Class B shares due to their lack of voting rights. The result was reported as the fair market value. The Trust's accountants utilized this methodology to prepare the 990-PFs each year. (Aff. Ex. 28.) Trustees also utilized periodic external appraisals to validate this valuation. The Trust's auditors also reviewed the valuation methodology, as well as the external appraisals, and noted no issues with the valuation each year. (Aff. Ex. 29 at 7.)

G. Trust operations.

The Trust currently has 19 employees, plus the three Trustees. (Aff. Ex. 6.) Over half of these employees perform the Trust's grant-making functions, including two Regional Directors, who each oversee program staff serving a particular geographic area. (Aff. Ex. 30; Aff. Ex. 31; Aff. Ex. 32 at 15:2—16:11.) These employees on the "program side" of the Trust review grant applications, gather information in the community, and write memoranda to the Trustees with recommendations for funding. (Aff. Ex. 32 at 15:2—16:2.) The Trust employs a comparatively smaller operational staff: Controller Anthony Thompson, Director of Operations Kari Suzuki, a communications associate, an IT manager, and three administrative support staff. (*See* Aff. Ex. 30; Aff. Ex. 31.)

The Trust also outsources a significant portion of its operations to various contractors who report directly to Trustees. (*See* generally, Aff. Ex. 6.) For example, the Trust retains two outside communications consultants to monitor media, prepare press releases, and generally manage the Trust's external communications (Aff. Ex. 3 at 70:13-23; Aff. Ex. 32 at 166:16-167:7]. OBT also outsources its accounting functions to an accounting firm. [Aff. Ex. 3 at

110:7-9.] BFC performs human-resources functions for the Trust, including payroll processing and administering employee benefits, in addition to providing several investment services discussed further below. (Aff. Ex. 38; Aff. Ex. 3 at 64:11-25.)

Further, OBT has no in-house counsel and exclusively retains external law firms. (Aff. Ex. 4 at 73:21—74:2.) Since 2012, the Trust has primarily outsourced legal services to Dorsey & Whitney LLP and Stinson LLP. (Aff. Ex. 33; Aff. Ex. 4 at 73:21—74:2.) The Dorsey firm provides guidance in non-profit, trust, and banking law, while Stinson primarily serves the Trust's corporate and employment law needs. (Aff. Ex. 33.) These firms represent all three Trustees simultaneously in their capacities as Trustees. (Aff. Ex. 8 at 194:13—195:7). At the same time, Lipschultz is frequently the point-person to directly interact with counsel on behalf of all three Trustees. (Aff. Ex. 8 at 194:2-12.)

H. Grant activities.

To fulfill its charitable purpose, the Trust issues grants in two primary categories: (1) "responsive, and (2) "strategic." Responsive grants are the bulk of the volume of OBT's grantmaking, where program staff lead the process to review, vet, and recommend to Trustees whether or not to fund a particulate applicant. (Aff. Ex. 8 at 47:15—20.) The average OBT grant amount has ranged from around $10,000 to $50,000 over the years. (Aff. Ex. 4 at 56:24—57:7.) For responsive grants, applicants must fill out a form on OBT's web site to screen their initial eligibility for a grant. (Aff. Ex. 34 at 67:5-15.) The eligibility criteria are designed to, among other things, ensure the proposed grant comports with the Trust Instrument's purposes and other restrictions, like geographic limitations. (*See* Aff. Ex. 35; Aff. Ex. 4 at 64:21-23; Aff. Ex. 34 at 69:3—71:1.) If a grantee selects a purpose that does not comport with the Trust Instrument, such as the environment, the arts, or special events; it is automatically screened out. (*See* Aff. Ex. 34 at 70:7-10; Aff. Ex. 36 at 19:20—20:4; Aff. Ex. 37 at 55:15-20.)

"Strategic" grants or "initiatives," in contrast, refer to a "secretive" and "opaque" category of Trustee-led grants and special projects that Trustees become aware of through "their involvement in the community." (Aff. Ex. 8 at 48:11-20; Aff. Ex. 39 at 28:19-25; Aff. Ex. 40 at 32:7-12.) According to OBT's former Executive Director, "the trustees developed a practice" of making the grants "after Brian Lipschultz became a trustee" in 2012. (Aff. Ex. 36 at 45:1-7.) These grants "bypass the normal process" of initial screening, "and foundation staff, including [the former Executive Director], didn't hear about them until the grants had been made." (Aff. Ex. 36 at 45:1-7; Aff. Ex. 34 at 85:15-19.) They also involve substantially higher amounts of money.

II. TRUSTEES' INTERNAL CONTROL DEFICIENCIES.

A. Self-interested grantmaking.

Trustees all agree to abide by a self-described "rather vague" conflicts-of-interest policy that prohibits conflicted transactions as defined, unless disclosure and other steps are taken. (Aff. Ex. 41; Aff. Ex. 42; Aff. Ex. 43; Aff. Ex. 4 at 48:20-24.) Although the policy requires recusal of the conflicted Trustee for "financial" conflicts as defined by the policy, it does not require a Trustee to refrain from voting on a transaction despite a "fiduciary" conflict, which includes grants to entities which the Trustee or family member serves on the board of directors. (Aff. Ex. 41; Aff. Ex. 42 ; Aff. Ex. 43.) Further, since there are only three trustees, recusal and/or disclosure is frequently an act of futility if a trustee has an objection. (Aff. Ex. 4 at 72:11-14.)

Since 2012, Trustees made substantial grants to multiple entities on which they served or a family member served on the board. (*See* Aff. Ex. 44; Aff. Ex. 45; Aff. Ex. 46; Aff. Ex. 8 at 51:3—52:24; Aff. Ex. 8 at 52:25—53:17; Aff. Ex. 8 at 54:21—55:1; Aff. Ex. 4 at 55:23—66:7; Aff. Ex. 4 at 67:24—68:22; Aff. Ex. 4 at 68:22—69:24; Aff. Ex. 9 at 59:12-60:1; Aff. Ex. 9 at 60:4-21.) These grants are outlined as follows:

TRUSTEES' RELATED-PARTY GRANTS 2012-2019

Organization	2012	2013	2014	2015	2016	2017	2018	2019	Total	Trustee	Conflict
Charity 1		$50,000		$75,000	$75,000		$100,000	$250,000	$550,000	Johnson	Daughter-in-law on staff
Charity 2							$300,000		$300,000	Johnson	Spouse on Board
Charity 3	$10,000					$40,000	$50,000		$100,000	Johnson	Daughter on Board
Charity 4			$125,000	$125,000	$75,000		$75,000	$75,000	$475,000	Johnson	Daughter on Board
Charity 5	$150,000	$150,000	$300,000			$150,000	$150,000	$250,000	$1,150,000	Lipschultz	Board Member
Charity 6	$125,000								$125,000	Lipschultz	Board Member
Charity 7		$15,000	$20,000			$20,000	$20,000		$75,000	Lipschultz	Trustee
Charity 8							$1,000,000		$1,000,000	Reardon	Board Member
Charity 9						$35,000			$35,000	Reardon	Board Member
TOTAL	$285,000	$215,000	$445,000	$200,000	$150,000	$245,000	$1,695,000	$575,000	$3,810,000		

(Aff. Ex. 5).

Staff expressed concerns that many Trustee-led grants to these otherwise-worthy and respected institutions did not comport with the Trust's purposes, or that the grants would have been appropriate had the championing Trustee not had a self-interested motive, such as increasing his or her standing in the community. (*See, e.g.*, Aff. Ex. 39 at 30:7-22, 16:3-8; Aff. Ex. 47 at 29:23—30:2.) For example, Johnson and grants staff, including an employee who "explained to them the improprieties associated with Dan making the recommendation and then voting on it," questioned whether a Reardon-championed million-dollar grant overlapping with his board service comported with the Trust purposes. (Aff. Ex. 8 at 51:3—52:24; Aff. Ex. 4 at 72:15—73:1; Aff. Ex. 39 at 16:3-8, 30:7-22; 34:17-35:6; 35:2-23.) Reardon boasted to a staff member that he had successfully championed a half-million dollar grant to a different entity for the purpose of advancing the political appointment of an acquaintance, stating "there's a method to my madness[ ] with these grants." (Aff. Ex. 48; Aff. Ex. 39 at 41:1-5; Aff. Ex. 32 at 123:05—123:16.) Multiple staff members questioned Lipschultz's personal motives for facilitating "huge sums of money" to a "glitzy" and "highly ineffective" New York-based charity that put on special events, despite "a really clear directive" that "the Otto Bremer Trust doesn't fund events." (Aff. Ex. 47 at 25:12-22, 26:1-11; Aff. Ex. 37 at 55:1-20; Aff. Ex. 40 at 44:3-17; Aff. Ex. 49.) Staff testified that Lipschultz and his family attended a trip to Africa with the organization, which also ran educational trips abroad. (Aff. Ex. 40 at 46:15-25.)

Former staff also testified to the negative impact these grants had on their ability to do their jobs, noting frustration in the community of an unfair "backdoor way that you could get a whole ton of money," for what staff perceived as less Trust-appropriate causes. (*See* Aff. Ex. 40 at 32:2-14.) As one former employee testified,

> In a real way, I can't really stress enough, as a program officer we were out in communities seeing the community need and often having to say no to people

> or say no, you can't ask for that much, or whatever. I mean, needs that were square in the Trust's purview. Like housing, you know. Like food. I mean, and a lot of the communities I worked in, we were the only or one of maybe two funders. So when you hear things like the trust is funding a seal exhibit, that's money that isn't going to help hungry kids or to build community infrastructure.

(Aff. Ex. 40 at 38:8-22.)

One former employee testified that staff hoped that the AGO and Supervising Court would "come in and investigate that and find . . . that there were problems," but instead "everything got worse." (Aff. Ex. 40 at 64:15—65:11.) She testified that, "in terms of grant-making, the trustees became more and more emboldened to just use the trust to make whatever grants they personally wanted to without a process, without due diligence, without even sort of pretending to follow the trust." (Aff. Ex. 40 at 65:11-22.)

B. Employee Liability Exposure.

1. Inadequate Workplace Controls.

Trustees have enacted workplace policies, such as anti-discrimination, harassment, and noncompliance reporting policies. (Aff. Ex. 50.) The Trust does not have a standalone Human Resources officer or department. (Aff. Ex. 3 at 110:1-2.) The primary point-person for HR-related complaints is Kari Suzuki, Director of Operations. (Aff. Ex. 37 at 96:1-16; Aff. Ex. 3 at 100:1-4.) Suzuki, who described herself as the "de facto" HR point person, (Aff. Ex. 37 at 96:14), has numerous, non-HR responsibilities for the Trust (Aff. Ex. 8 at 59:13-23).

As demonstrated in various contexts with Trust operations, each policy ultimately ends with the Trustees. Former and current staff, including Suzuki herself, testified that Suzuki is not equipped to handle and resolve workplace concerns because of her lack of power and recourse if concerns arose out of Trustee conduct. (*See, e.g.*, Aff. Ex. 47 at 21:22—23:1, 72:3-6; Aff. Ex. 37 at 108:21-23; Aff. Ex. 39 at 53:14-23.) Suzuki is not empowered to investigate workplace discrimination or harassment complaints; she is instructed to bring them directly to Trustees.

(Aff. Ex. 37 at 102:17-25.) Employees further have "no access or no knowledge . . . on what we can do if we had concerns at the trustee level," including procedures for reporting to outside authorities like the AGO. (Aff. Ex. 39 at 71:18-24; Aff. Ex. 40 at 52:13-21; Aff. Ex. 39 at 43:21—44:25.)

2. Employee Complaints.

Former employees described the OBT workplace as "hostile," "degrading," "stressful," and "like an abusive relationship." (Aff. Ex. 39 at 17:1-4, 76:17-4; Aff. Ex. 47 at 48:6-11, 49:17-20; Aff. Ex. 40 at 75:2-6.) Considering the relatively small size of the workplace, a substantial number of current and former employees made formal and informal complaints about their mistreatment or inappropriate conduct in the workplace, evidencing a lack of sufficient controls to protect Trust assets from liability.

Many complaints centered around one specific manager. Since 2012, complaints against him included, but are not limited to, disability discrimination, (Aff. Ex. 51) treating women employees and grantees with hostility, (Aff. Ex. 52; Aff. Ex. 39 at 56:10-16, Aff. Ex. 39 at 57:2-10, Aff. Ex. 37 at 104:4-13, Aff. Ex. 40 at 61:11-15, Aff. Ex. 53 at 9:2-17, Aff. Ex. 53 at 16:1-8, Aff. Ex. 37 at 107:1-15; an anonymous complaint comparing the manager to a serial sexual harasser, (Aff. Ex. 54); and a formal sex discrimination charge brought this year with the Minnesota Department of Human Rights (Aff. Ex. 37 at 101:3-20; Aff. Ex.). Other than a Trustee "conversation" with the grant manager after the AGO initiated its investigation, he has never been disciplined for any misconduct. (Aff. Ex. 4 at 92:21—93:13.)

Other workplace complaints centered on the Trustees themselves, specifically Reardon and Lipschultz. Allegations generally included unfair, inappropriate, or belittling treatment of women (*see, e.g.*, Aff. Ex. 47 at 37:8-11, 51:2-7, 57:8-17, 58:6-10; Aff. Ex. 56), using office resources to view explicit material (Aff. Ex. 57; Aff. Ex. 58; Aff. Ex. 47 at 41:25—42:12), and expressions of bias against certain religions or ethnic groups (*see* Aff. Ex. 40 at 69:6-9, Aff. Ex. 47 at 53:1-8, Aff. Ex. 39 at 82:8-24).

3. Severance Payments.

The harm to Trust assets resulting from insufficient controls is evidenced by the substantial amount of money Trustees have paid out to former employees in severance agreements in exchange for discrimination and harassment claim waivers and non-disclosure and non-disparagement terms. Trustees testified that the severance agreements are not standard policy for the Trustees, but rather a case-by-case assessment dependent on factors including "the potential liability" from the employee. (Aff. Ex. 8 at 63:10—64:1; Aff. Ex. 4 at 79:3-13.) Since 2014, the AGO is aware of at least five such agreements, amounting to more than **$320,000** in payouts. (Aff. Ex. 59; Aff. Ex. 60; Aff. Ex. 61; Aff. Ex. 62; Aff. Ex. 63.)

4. Fear of Trustee Retaliation.

Finally, insufficient workplace controls exist to protect Trust assets because employees, including the HR/Operations Director, Aff. Ex. 37 at 105:9-13, are afraid to bring workplace concerns to or about the Trustees for fear that they will retaliate.

Multiple current and former employees told the AGO they were afraid to report concerns to or raise concerns about the Trustees because, based upon their observation of Trustees' treatment of other employees, they believed Trustees would retaliate against them by firing them, "destroy[ing their] reputation," or "ruin[ing their] career." (*See, e.g.*, Aff. Ex. 37 at 107:19-25; Aff. Ex. 34 at 125:4-13; Aff. Ex. 39 at 66:13-23; Aff. Ex. 47 at 73:13-22; Aff. Ex. 47 at 74:3-22; Aff. Ex. 40 at 58:9-15; Aff. Ex. 47 at 70:9-14.) For example, one employee specifically declined to have Suzuki raise a pay discrimination concern with Trustees because she was afraid Trustees would retaliate against her. Aff. Ex. 37 at 110:18–111:10. A former employee who insisted on "the cover of a subpoena . . . to prevent retaliation" by Trustees for cooperating with the AGO, Aff. Ex. 47 at 73:13-23; testified that she believed she was terminated for raising a list of concerns about how she was treated by Trustees, Aff. Ex. 47 at 22:8-17. Current HR and Operations Director Suzuki testified that she did not bring her *own* concerns about Trustees' ongoing failure to address an employee's repeated alleged misconduct, because "it seems to me that complaints lead to separations" of the reporting parties. (Aff. Ex. 37 at 107:19-25.)

As one current employee testified, this fear stems from employees' understanding that Trustees "hold the absolute power in the organization." (Aff. Ex. 32 at 145:8-10.) In depositions, Trustees indicated that they did not see employees' fear of retaliation as unusual, due to the "power structure dynamic of boss versus employee." (Aff. Ex. 8 at 70:6-8.) As Trustee Johnson testified, "If I were the employee, my reservation would be that there is always the threat that I will lose my job if I complain. I mean, I don't know that that's unique to OBT." (Aff. Ex. 4 at 96:1-3.)

C. Administration of Trust Assets.

1. Lipschultz Self-Dealing.

In addition to various standards imposed by law, Trustees have enacted policies prohibiting the use of Office resources for non-Trust purposes. (Aff. Ex. 64; Aff. Ex. 37 at 58:7-20). Nonetheless, since his appointment in 2012, Lipschultz has been using Trust resources for personal purposes. (Aff. Ex. 9 at 77:11-12.)

Lipschultz operates several for-profit businesses out of the Trust's offices. Corporate business filings, as well as Lipschultz's business web site, currently list OBT's offices as the business address for these entities. (Aff. Ex. 65; Aff. Ex. 66; Aff. Ex. 9 at 61:9—65:6, 67:3-20, 68:16—69:6.) Despite attesting to the Supervising Court that discharging his Trust-related "duties and responsibilities is a full time job," and "I have no employment elsewhere;" Lipschultz lists himself as an officer and manager of these entities. (*See* Aff. Ex. 65.) Lipschultz uses Trust office space, technology, supplies, and postage to run his businesses. (Aff. Ex. 9 at 76:20-25; Aff. Ex. 37 at 58:7-20; Aff. Ex. 32 at 66:18—67:2, 71:20—72:21.) He also used staff time, principally the Trust's administrative assistant, to handle his private business affairs. (Aff. Ex. 32 at 71:20–72:21.) Lipschultz also spends his own time during office hours on his businesses, and lamented to his business partner: "I can't keep this shit straight," after accidentally using his OBT email domain for personal business purposes during the workday. (Aff. Ex. 67; Aff. Ex. 39 at 62:22–63:11.)

Lipschultz also uses OBT staff to help manage his private life, including his personal Google calendar, kids' soccer schedules, and personal travel arrangements. (Aff. Ex. 32 at 65:14—66:1; Aff. Ex. 68 ("At least you didn't get stuck with the spring season where each kid was playing in two full time sports!").) Lipschultz also uses administrator time to assist with work related to his board service for other organizations. (*See, e.g.*, Aff. Ex. 69; Aff. Ex. 70.)

In general, the assistant estimated that she spent "an hour or two a day" on items not related to the Bank or the Trust. (Aff. Ex. 32 at 71:20—72:21.) She testified that, while acknowledging "it's hard for me to have complete visibility on . . . what he's doing," and at the risk of "confusing with the work that I'm doing for those versus what he's doing himself;" she estimated "from what I could see from the tasks that I was doing, emails being sent, et cetera, I would say maybe 70 percent Trust and bank and 30 percent not." (Aff. Ex. 32 at 102:09—103:10.; *see also* Aff. Ex. 71.[1])

[1] Counsel instructed the assistant to provide to the AGO an affidavit clarifying her testimony after they determined it was inaccurate. (Aff. ¶ 229.) The affidavit appears to attempt to set up counsel's legal argument that not all of Lipschultz's use of Trust resources for personal use should be treated equally, but does not change the substance of the above testimony.

The assistant raised her concerns about Lipschultz's "constant push to make her a personal assistant" to multiple employees over multiple years, including Operations/HR Director Suzuki. (Aff. Ex. 37 at 112:1-4; Aff. Ex. 72; Aff. Ex. 39 at 75:20; Aff. Ex. 47 at 14:6-15, 15:8-25, 17:19-25.) Suzuki communicated to the assistant that she "probably shouldn't be" working on Lipschultz's personal matters, but there was no way to "solve the problem with the system that we had at the time." (Aff. Ex. 32 at 75:08—76:09.) Suzuki testified that she "didn't feel comfortable going to the three trustees about this matter" because she was concerned about "[p]otential retaliation"—specifically, being fired. (Aff. Ex. 37 at 112:18—113:4.)

After Controller Thompson was hired in 2018, staff raised their self-dealing concerns to him. (Aff. Ex. 3 at 88:6-18.) In September 2019, Thompson sent the following email to Trustees:

> **At the most basic level, any Disqualified Person (in our case, the three Trustees) are prohibited from using any Foundation resources for personal or non-OBT business- related use**. . . . This would trigger self-dealing reporting with the IRS, which is an administrative burden we would most certainly like to avoid. In addition to the administrative burden, there could be other penalties, including monetary. . . . **An example I could think of happening here is if any of you would ever have [the assistant] perform an administrative duty that is not for OBT business purposes** for which [the assistant] incurs an expense that she gets reimbursed for. We really shouldn't be doing this anyway, but if the need ever arises, please make sure [the assistant] has your personal payment information so she doesn't incur any expenses using OBT resources.

(Aff. Ex. 73 (emphasis added); Aff. Ex. 74.) When Lipschultz followed up with Thompson to ask what the email was about, Thompson stated that if Trust assets are used to reimburse personal expenses, then it "**would trigger a self-dealing violation since OBT resources were used for Trustee (Disqualified Person) personal gain**." (Aff. Ex. 74 (emphasis added).) Neither of the other co-Trustees inquired about the email, or took any steps to determine what was happening to trigger the email. (Aff. Ex. 4 at 97:1-18; 99:3-14; Aff. Ex. 3 at 96:11-24.)

On May 15, 2020, Trustees filed their original 2019 990-PF with the IRS and the AGO. On June 8, 2020, several months after the AGO investigation made plain the self-dealing, Trustees provided to the AGO Amended 990-PFs for the 2017 through 2019 tax years, with attached Forms 4720s disclosing Lipschultz's self-dealing. (Aff. Ex. 75; Aff. Ex. 76; Aff. Ex. 9 at 81:15—82:3.) Trustees disclosed, under "penalties of perjury," that Lipschultz had used the Trust assets for self-dealing transactions, including "office space, administrative assistant, and scan/fax machine for personal business plus FedEx charges for personal mailings." (Aff. Ex. 75;] Aff. Ex. 76; Aff. Ex. 77.) Trustees estimated the total self-dealing expenses for all three years at $2,984, and the Trust paid a $300 total excise tax on these transactions. (Aff. Ex. 75; Aff. Ex. 76; Aff. Ex. 77.) In the filings, Trustees attested that Lipschultz "learned that the Trustee's use of office space and resources was prohibited" by the IRS Code after the original filing, and that once Lipschultz "discovered that such transactions were prohibited" during the AGO's investigation, he repaid the sums above. (Aff. Ex. 75; Aff. Ex. 76.)

Lipschultz characterized the self-dealing expenses to the AGO as "so de minimus as to approach zero," Aff. Ex. 9 at 77:11-19, and "matters of administrative convenience," (Aff. Ex. 78 at Interrog. No. 45). In calculating the self-dealing amounts, co-Trustees, counsel, and OBT's accountants relied on Lipschultz to help "determine the extent of his use of OBT resources in connection with his investments." (*See* Aff. Ex. 78 at Interrog. No. 45.) Trustees did not employ a process independent of Lipschultz; did not require Lipschultz to retain his own counsel; did not include any reimbursement of Lipschultz's own time spent on non-Trust matters; did not include expenses related to employee time that Lipschultz expended on personal, non-business matters; and did not consult or credit the assistant's own assessment of her time she spent on non-Trust matters. (*See* Aff. Ex. 78 at Interrog. No. 45; Aff. Ex. 9 at 78:7—79:6 ("I know how much time I have asked of her, so there was really nothing to consult.").)

2. Office Construction and Overhead Expenses.

OBT currently has 22 employees, including Trustees. (Aff. Ex. 6.) Since 2012, OBT has never had more than 23 total employees in a given year. (*Id.*)

In 2016, Trustees moved OBT's offices to a new location in downtown Saint Paul. (Aff. Ex. 37 at 63:24-25).) Prior to the move, Trustees commissioned a $2.5 million build-out of the new office space. (Aff. Ex. 79.) Trustees personally selected the materials, finishes, furniture, and accessories; which included $525,761 worth of office furniture, $59,819 for artwork, and $19,872 visitor lounge in a Trustees-only suite where Trustees have never received any visitors. (Aff. Ex. 37 at 64:102, :13-18, 64:23—65:1, 67:4-7, 68:17, 69:18-20, 72:16-21, 74:14-20; Aff. Ex. 80; Aff. Ex. 81.)

(Aff. Ex. 2.)

Staff described the new office as "very, very luxe," "lavish," "complete overkill," and "no expense spared," noting custom artwork, marble floors, and expensive, impractical finishes. (Aff. Ex. 47 at 34:12—34:25; Aff. Ex. 40 at 50:9-22; Aff. Ex. 39 at 73:12-20, 74:1-11.) In July

2016, Reardon expressed concerns to OBT's then-communications director about inviting then-Senators Klobuchar or Franken to the office because "the display of wealth would be off-putting and would cause them to investigate or inquire more serious[ly] about how we are spending our money." (Aff. Ex. 83; Aff. Ex. 47 at 34:17—35:9.)

The grants staff was also "embarrassed" by the display of wealth, as one former employee testified:

> [W]hen I would go visit nonprofits, sometimes the people I met with were literally working in hallways, or their building was crumbling . . . . I saw just really working conditions that really you wouldn't consider acceptable for anyone, right. And facilities serving people, homeless shelters, whatever, that were just decrepit. And then to know that we were spending assets on this sort of luxurious office that really was not coming from the staff wanting that. . . . I just felt really uncomfortable with the contrast between that and our mission.

(Aff. Ex. 40 at 50:9-22, 51:21—52:12.)

In 2018, Trustees spent an additional $248,602 in construction costs to lease and build out more office space so they could occupy the rest of the floor despite the fact that, according to Controller Thompson, the previous space was already sufficient for the current staff. (Aff. Ex. 4 at 102:22—103:6; Aff. Ex. 3 at 76:3-7; Aff. Ex. 37 at 82:16-25; Aff. Ex. 84.) Trustees anticipated using the space for Community Benefit Financial Company staff, a nonprofit LLC OBT subsidiary that Trustees founded in fall of 2019, as discussed further below. (Aff. Ex. 37 at 81:5-14.) According to Operations Director Suzuki, this additional office space has been empty since it was acquired in 2018. (Aff. Ex. 37 at 80:2-8.)

In addition to the one-time costs, OBT's annual rental costs have increased substantially. According to Trustees' filings with the Supervising Court,[2] Trustees' annual rent expenses have increased since 2010 as follows:

YEAR	RENT
2010	$179,415
2011	$174,795
2012	$180,435
2013	$185,834
2014	$187,813
2015	$184,778
2016	$157,399
2017	$380,913
2018	$387,725
2019	$438,030

(Aff. Ex. 85.) Accordingly, OBT's current annual rent amounts to **$19,910 per employee**. (Aff. Ex. 6.)

3. Trustee Expenses.

Finally, Trustees implemented an operations manual to guide the daily operations of the Trust, including expense reporting and reimbursement. The manual dictates, among other things, that such expenses "must be reasonable and both necessary and incidental to the performance of the business and purpose of OBT," and that "preference should be given to moderately priced rooms, meals, and services unless business requires that more be spent." (Aff. Ex. 86 at ¶ II.B.) It further states: "Reimbursement of business expenses incurred by individuals represents an important trust. Extravagance is an abuse of that trust." (*Id.*) Trustees' expense reports reflect certain OBT reimbursements for Trustee expenditures that are either extravagant or further

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2 In 2017, Trustees discussed with their auditors whether to disclose the new "leases & new office space" in financial statements filed with the Supervising Court and the AGO; but they were "deemed not to be sufficiently informative to warrant disclosure." Aff. Ex. 237; Aff. Ex. 238.

personal, rather than Trust, purposes. These include, for example, a $368.09 Spoon and Stable restaurant bill for Trustees and their legal counsel, and a $497.34 Butcher and the Boar restaurant bill for OBT's Investment Team consisting of Reardon, Lipschultz, and their advisors. (Aff. Ex. 87; Aff. Ex. 8 at 74:19-76:4.) Other expenses include reimbursements for meals related to Trustees' board service with other organizations, which Reardon characterized furthering OBT's purposes because "my board service is an extension of OBT." (*See* Aff. Ex. 87; Aff. Ex. 8 at 50:3-7.)

In 2017, the Supervising Court raised specific questions about OBT's overhead, and requested records to back up the amount of meals, entertainment, and travel expenses incurred by the Trust prior to approving Trustees' annual accounts. (Aff. Ex. 88.) Trustees provided a high-level summary, but did not break down the expenses in a manner that would have revealed the above expenditures to the Supervising Court or AGO. (*Id.*)

III. TRUSTEE COMPENSATION.

A. The Evolution of Trustees' Base Compensation.

1. Overview of Trustees' Different Roles.

Trustees are paid three separate fees for three different jobs: (1) Trustee/Chief Executive Officer, (2) BFC Director, and, for Lipschultz and Reardon, (3) Investment Advisor. BFC Director fees are paid directly by BFC, and Trustees' Investment Advisory fees are discussed further below.

With respect to Trustee's base compensation, Trustees assert that, as "the senior-most executives in the Trust," their duties are not "bound by job descriptions." (Aff. Ex. 19.) They further state that, "[c]omparable to other full-time corporate executives with the highest levels of senior management authority, the Current Trustees do not record their time and do not keep timesheets." (*Id.*) They assert that there is "no practical way to estimate how much time each

Trustee spends on the performance of each duty, responsibility, or task." (*Id.*) As such, Trustees do not record if and when they are spending time managing investments as an investment advisor, fulfilling duties in their separate role as BFC directors, or fulfilling their core trustee duties—stating that "every day, week, and month can be different." (*Id.*)

2. Early Compensation Increases.

Trustees' base compensation, along with Trustees' role and the structure of the Trust, has evolved over the past decade. Prior to 2010, Trustees were paid one flat base salary each for all the services provided to the Trust, including managing OBT's investments. (Aff. Ex. 89 at ¶¶ 13-14.)

In 2010, Reardon, Johnson, and Lipschultz's predecessor commissioned a report to assess appropriate Trustee compensation. (Aff. Ex. 90.) The report authors ultimately concluded "that an exact match to the Trustee position was not possible," and ultimately selected "the position of Chief Executive Officer as an optimum comparable" for Trustees' role. (*Id.*) After retaining separate counsel, Trustee Johnson expressed concerns "in particular [with] the assumptions [the report] makes about the Trustees' duties (including that the duties are comparable to senior executive duties, even though the Foundation and the Bank have their own Executive Director and CEO, respectively)." (Aff. Ex. 91; *see also* Aff. Ex. 4 at 120:1—122:13.) At the time, the Trust had an Executive Director, Randi Roth. (Aff. Ex. 4 at 113:9-19.)

Johnson further expressed that "the significant increase in Trustees' compensation . . . could raise questions with the Minnesota Attorney General's Office," could implicate IRS penalties, and "could result in negative publicity that could seriously damage the reputation of the Foundation and the Bremer Banks." (Aff. Ex. 91.) Then-Executive Director Roth also expressed concerns about the compensation amount and structure. (Aff. Ex. 36 at 76:17—77:2, 79:20-20; Aff. Ex. 4 at 128:5-21.) All three Trustees eventually agreed to an initial base fee increase to $285,000, as well as to separate out additional investment fees discussed further below. (Aff. Ex. 92.)

3. Trust Restructuring and Backlash.

In 2012, Lipschultz was appointed Trustee, and sought to bring to the Trust "a level of sophistication befitting of its size." (Aff. Ex. 9 at 105:10-11.) After an "extensive review," in June 2014, Trustees agreed upon an organizational change that eliminated the Executive Director position and named the three Trustees as co-CEOs—setting up Trustees as the sole "senior executives," or employee-officers, of the Trust. (Aff. Ex. 4 at 130:12-21.)

Backlash was swift. (Aff. Ex. 8 at 130:6-9.) On June 25, 2014, the National Committee for Responsive Philanthropy (NCRP) published an op-ed stating that the "new structure gives complete oversight, management and fiduciary control to the three individuals, completely removes accountability and violates many principles of good governance," and called upon the AGO to investigate the "culmination of nearly a decade of suspicious activity from the foundation's trustees," including substantial compensation increases. (Aff. Ex. 93.) Trustees heard from their peers, the public, and regulators about the structure and compensation changes, as evidenced by a July 2014 Civil Investigative Demand from the AGO, Aff. Ex. 4 at 151:12—152:2, direct outreach from the public, Aff. Ex. 4 at 142:4-16, a reputational report Trustees commissioned that reported "strong, negative comments related to the change" among "peer foundation and grantee sectors," (Aff. Ex. 94), an inquiry about compensation and overhead from the Supervising Court, (Aff. Ex. 95), and [redacted] (Aff. Ex. 4 at 158:19-23; Aff. Ex. 96).

With respect to OBT's peers, the Minnesota Council on Foundations recommended that OBT conduct a review of its structure and practices, opining that "there is the opportunity for a division of duties and the creation of a system of checks and balances." (Aff. Ex. 97; Aff. Ex. 8 at 135:16-21.) The "respected" then-President of the McKnight Foundation sent a letter to Trustees "strongly encourag[ing]" them to "commit publicly to an independent review of whether the actions that you have taken to date are consistent with the guidance and best practices on governance and compensation provided by organizations that serve the philanthropic and nonprofit sector." (Aff. Ex. 98; Aff. Ex. 4 at 148:15-22.)

Trustees did not conduct an independent review, did not make any changes to the Trust's governance, and did not make any changes to how their compensation was assessed following this public criticism, regulator intervention, and peer recommendations. (Aff. Ex. 4 at 150:19-22, 159:11-14, :15-20.)

4. Continuing Compensation Increases.

Rather, with the impediment of a competing executive officer position removed, Trustees commissioned another compensation report in 2015. The authors, upon direct input from Trustees and their counsel, took note of the co-CEO/Trustee role and that Trustees "collectively manage all senior management functions of the trust." (Aff. Ex. 8 at 140:5-9; Aff. Ex. 4 at 166:12-24; Aff. Ex. 99; Aff. Ex. 100.) Comparing OBT to "peer groups" of charitable organizations, for-profit bank holding companies, and banking institutions; the report recommended an increased base compensation range for Trustees. (Aff. Ex. 99; Aff. Ex. 4 at 167:3-25.) The Trust's auditors opined internally that they found the rationale interesting "as the bank should have its own CEO," and were "not sure how this is reasonable to pay the officers for something that is already being done." (Aff. Ex. 101.) The report also noted that, in the opinion of Trustees' counsel, Lipschultz and Reardon's separate investment fees were for "extraordinary services" and thus were not subject to the 4% cap set forth in the Trust Instrument. (Aff. Ex. 99; Aff. Ex. 4 at 168:7—169:3.)

In March 2016, Trustees increased their base compensation accordingly to $321,458. (Aff. Ex. 102.) Despite the fact that their duties did not change each year, Aff. Ex. 4 at 169:4–171:19, Trustees continued to increase their base compensation each year until 2020, as shown below:

YEAR	BASE FEE
2010	$120,000
2011	$285,000
2013	$294,262
2014	$303,790
2015	$312,183
2016	$321,458
2017	$331,102
2018	$347,657
2019	$358,067

(Aff. Ex. 39; Aff. Ex. 92; Aff. Ex. 103; Aff. Ex. 104; Aff. Ex. 105; Aff. Ex. 102; Aff. Ex. 106; Aff. Ex. 107; Aff. Ex. 108; Aff. Ex. 109.)

B. Lipschultz and Reardon's Investment Advisory Fee.

1. Early Investment Advisory Fee Concerns.

At one time, all of the Trust's non-BFC "investment portfolio was managed by outside managers." (Aff. Ex. 96.) Over time, BFC, whose subsidiary includes Bremer Wealth Management, started providing "management oversight of [the] portfolio, reporting in to Trustees via the Investment Committee," discussed further below. (*Id.*) Over the last decade, the "evolutionary process" continued, as described below. (*Id.*)

In 2008, Trustees and their advisors "discussed the relationship between the Otto Bremer Foundation (OBF) and Tealwood Investment Fund (Tealwood)." (Aff. Ex. 110.) The Trustees met to "explain to the [then-]new executive director of OBF the details regarding this transaction between OBF and an entity affiliated with a disqualified person," since "Ward Johnson, who is the spouse of Charlotte Johnson, serves as a consultant to Tealwood." (*Id.*) The Trustees approved the contract despite Mr. Johnson's disqualified person status. Trustees have continuously retained Tealwood to this day, and Mr. Johnson continued to work for Tealwood until at least 2018. (Aff. Ex. 8 at 96:2-5.)

Two years later, Reardon and Lipschultz's predecessor entered into their own direct contracts with OBT to provide investment advisory services, despite their equivalent disqualified person status. (*See* Aff. Ex. 111.) At that time, the then-Treasurer of BFC (which provided financial and administrative support to the Trust), expressed concerns about Trustees entering into a contractual relationship with the Trust, versus reflecting the value of the investment services in their base salary. (Aff. Ex. 112; Aff. Ex. 8 at 11:14-21.) He opined that "Trustees are already in an Investment management oversight position" by virtue of their status as Trustees, that Trustees "may run the risk of explaining to an outside authority, such as the SEC, or MN Dept of Commerce, the qualifications of the Investment Advisors," and that accounting for the services within Trustees' base compensation, "rather than defin[ing their] services as part of an 'Outside' consultant type fees function;" "more accurately describes what you are doing anyway." (Aff. Ex. 112.)

The Trustees also discussed internally the potential conflict of Lipschultz and Reardon serving in both investment manager and fiduciary capacities, but ultimately decided that they were qualified to provide the services and that they were authorized under the Trust Instrument, so "there was no conflict." (Aff. Ex. 4 at 116:22—117:11.) Two years after that, when Lipschultz succeeded his father in 2012, he signed an identical Investment Services Agreement. (Aff. Ex. 113.)

2. Lipschultz and Reardon's Contractual Relationship with the Trust.

Lipschultz and Reardon signed the Investment Services Agreements on behalf of themselves, not the Trust. (Aff. Ex. 9 at 83:9-14; Aff. Ex. 8 at 100:3-13.) In drafting and signing the agreements, Lipschultz and Reardon did not hire separate counsel to differentiate the Trust's best interests from their individual self-interests. (Aff. Ex. 8 at 100:14-21.) Since signing the agreements eight and ten years ago, Trustees have never renegotiated, revisited, or revised their contracts with themselves in their individual capacities. (Aff. Ex. 9 at 85:24-86:2; Aff. Ex. 8 at 107:23-25.) Despite the fact these services can be provided by other vendors,[3] Aff. Ex. 9 at 86:1-8, and that OBT regularly seeks out competitive bids from the marketplace for its other vendors, Aff. Ex. 3 at 68:7-23; Trustees have never bid out these services to other vendors in the marketplace, Aff. Ex. 9 at 86:9-11.

Under the Agreements, the Trust agrees to pay Lipschultz and Reardon "an annual fee equal to fifteen (15) basis points (0.15%) based on the market value of the Account (including cash and cash equivalent items) determined as of the last day of the preceding calendar year." (Aff. Ex. 111; Aff. Ex. 113.) This fee is assessed on the market value of OBT's entire non-BFC holdings, and does not vary depending on the performance of the account, or the amount of time Lipschultz or Reardon spend on investment activities, which they do not track. (Aff. Ex. 9 at 85:8-12; Aff. Ex. 3 at 41:1-17.) Finally, Lipschultz and Reardon simultaneously provide the same investment advisory functions as each other, over the same pool of OBT assets. (Aff. Ex. 3 at 41:24-42:1.) Their fee, which the Trust pays in addition to Trustees' base compensation, is reflected as follows:

YEAR	FEE
2010	$167,499.99
2011	$165,000.00

[3] In contrast, Lipschultz and Reardon would need to obtain additional licenses and fulfill additional qualifications to provide equivalent services to the public. They are able to provide these services to OBT without these licenses due to different standards for in-house versus public services. (Aff. Ex. 8 at 109:4-18.)

2012	$169,900.10
2013	$173,568.33
2014	$183,048.72
2015	$187,059.96
2016	$170,263.22
2017	$184,837.47
2018	$186,045.20
2019	$193,893.80

(Aff. Ex. 89; Aff. Ex. 85; Aff. Ex. 103; Aff. Ex. 104; Aff. Ex. 105; Aff. Ex. 102; Aff. Ex. 106; Aff. Ex. 107; Aff. Ex. 108.)

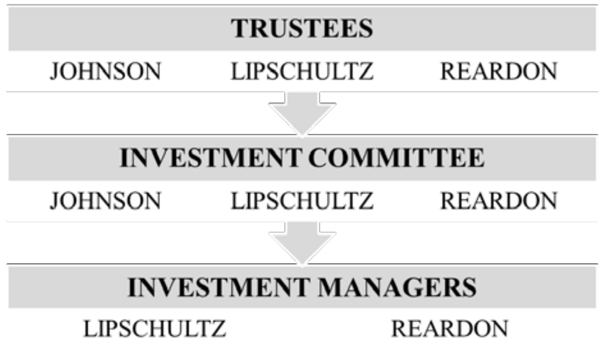
3. Nature of Lipschultz and Reardon's Investment Services.

OBT also retains "third-party subadvisors," like Tealwood, to perform investment services. (Aff. Ex. 3 at 36:23-25.) Except for one vendor, each subadvisor is paid a percentage of the pool of assets that it directly manages, constituting a subset of OBT's non-BFC holdings from which Reardon and Lipschultz's fee is also calculated. (Aff. Ex. 3 at 38:2-5.)

Lipschultz and Reardon do not directly buy, sell, or trade investments. (Aff. Ex. 3 at 39:20-25.) They do not "have formal trade approval" over the assets. (Aff. Ex. 114.) In contrast, the sub-advisors each "make their own, independent purchase and sale decisions," and Lipschultz and Reardon do not pre-approve their trades. (*Id.*; Aff. Ex. 9 at 88:23—89:4.)

4. Governance and Oversight Deficiencies over Lipschultz and Reardon's Investment Activities.

OBT's investment activities are governed by an Investment Policy. (Aff. Ex. 115.) The Policy sets forth certain standards, and restricts certain activities and investments. (*Id.* at ¶ 5.03.) The Policy also sets forth a governance structure over investment activities, including an "Investment Committee" to oversee and monitor the investment activities, consisting of the three Trustees; and "Investment Managers." consisting of Reardon and Lipschultz. This structure is illustrated below:



(*Id*. at ¶ 3.0; Aff. Ex. 8 at 107:16-22; Aff. Ex. 3 at 39:8-18, 42:13-24.) The Policy also discusses the role of Controller Thompson. Although Thompson executes some trades on behalf of Reardon and Lipschultz, he reports directly to trustees, and attends investment committee meetings "as more of a facilitator and note-taker," not a member. (Aff. Ex. 3 at 44:6-11.)

Thompson's hiring followed feedback from [redacted].

Johnson noted: "If managing the Trust's assets is a core duty, then additional compensation for managing a portion of the investment portfolio seems contradictory." (Aff. Ex. 96.) She further noted the inadequacy of the Investment Committee structure, stating that since Trustees are "overseeing their own performance, [there is] an inherent conflict of interest[ ] (even though all three trustees sit on the Investment Committee, two make a majority)." (Aff. Ex. 96.) She opined: "They seem to be interested in exploring the Trustees in their roles of both managing and providing oversight; this is a red flag and generally not considered good governance." (*Id*..)

Other than hiring a controller, Trustees did not make any changes to their governance over their investment activities. (Aff. Ex. 8 at 118:18-25; 199:1-15.)

IV. TRANSFORMATION FROM CHARITABLE TO FINANCIAL PURPOSES.

According to staff and Trustees, prior to Lipschultz's appointment, Trustees focused on the grantmaking aspects of the Trust. As part of their work, Trustees used to engage directly with grantees and the public by holding "convenings" and taking other steps to directly assess community needs. (Aff. Ex. 4 at 61:5-15; Aff. Ex. 39 at 14:5-17.) When Lipschultz was appointed Trustee, he decided OBT should evolve from a "homespun and improvised" foundation "doing nothing other than making grants to small organizations," into an entity with "a level of sophistication befitting of its size." (Aff. Ex. 9 at 15:11-18, 105:3-22.) Under Lipschultz's leadership, Trustees determined that, in light of its bank holding company status and Trustees' investor backgrounds, the Trust should "live at the intersection of finance and philanthropy." (Aff. Ex. 9 at 105:2-22.) Before his tenure, Lipschultz contended, "the financial piece was missing." (Aff. Ex. 9 at 105:19-21.)

As such, Trustees, engaging a "more corporate mindset," Aff. Ex. 4 at 126:7-16, created a plan to evolve the "OBT 'brand' from grantmaker to impact investor." (Aff. Ex. 117.) One of Trustees' first steps was to change the Trust's name from "Otto Bremer Foundation" to "Otto Bremer Trust." Despite direction from the settlor that the Trust "shall be known as the Otto Bremer Foundation," Trustees got court approval to change the name because it was not "inclusive of the Trust's other activities of operating the business of a bank holding company and having a significant investment in Bremer Financial Corporation and its other investments." (Aff. Ex. 118; Aff. Ex. 7 at ¶ 2.)

Trustees took further steps to reframe OBT's focus, such as internally characterizing their work, including their grantmaking, as "investments" providing either "social, financial, or hybrid" returns. (Aff. Ex. 119.) To their auditors, they characterized the Trust as "in part a foundation, in part a bank and in part a private equity firm." (Aff. Ex. 120.) They created a pass-through limited liability subsidiary called "Community Benefit Financial Company" to conduct as-yet-unclear investment activities for the Trust. (Aff. Ex. 8 at 267:2-13, 271:14-25, 272:5-10; Aff. Ex. 120.) They increased their office space to expand the "finance" arm of the Trust; while at the same time, they declined to fill vacant program staff positions. (Aff. Ex. 4 at 100:12-17; Aff. Ex. 37 at 122:20—123:11.) They touted "alternative philanthropic investments" in "for-profit enterprise[s], not just [501](c)(3) recipient[s]"; while they simultaneously explored artificial intelligence to automate the Trust's philanthropic activities. (Aff. Ex. 9 at 102:21—103:10; Aff. Ex. 37 at 122:7-15.) They "ceased all . . . engagement" with their grantee stakeholders; yet they asserted more and more control over BFC in their roles as directors. (Aff. Ex. 39 at 14:5-18; Aff. Ex. 122 at 13:6-9, 20:12-14.)

Trustees' intent to consign the Trust's philanthropic activities to secondary purposes of the Trust, however, culminated in their attempt to stage a hostile takeover of the Trust's primary asset, Bremer Financial Corporation.

V. THE OCTOBER SALE.[4]

A. Trustees' early sale discussions.

On May 30, 2018, Trustees' compensation consultant forwarded Reardon contact information for Keefe, Bruyette & Woods (KBW), an investment bank and broker-dealer. (Aff.

[4] The AGO collectively refers to the October 2019 transactions described herein as the "October sale" or the "sale" for efficiency. It takes no position in this Memorandum on the validity of the transaction or the other claims asserted by the parties to the various Bremer Financial Corporation-related litigation ("BFC Litigation").

Ex. 123; Aff. Ex. 8 at 160:1-5.) Trustees' consultant, according to Reardon, [redacted] offered KBW's contact to explore some potential strategic options, including a "potential sale." (Aff. Ex. 8 at 160:11—161:10.) Later in 2018, in an October meeting discussing potential successors, Trustees discussed "persistent question of the BFC holding," including "[w]hether or not to sell our shares in BFC." (Aff. Ex. 117; Aff. Ex. 9 at 99:7-13.) Sometime thereafter, Trustees under the primary leadership of Lipschultz, began exploring their sale options with Joseph Gulash, the Trustees' main contact at KBW. (Aff. Ex. 9 at 253:17-24.)

In a January 2019 BFC Board meeting, Trustees' counsel presented a letter to the Board to educate new directors about the OBT/BFC ownership history and structure. (Aff. Ex. 122 at 17:2-12; Aff. Ex. 22.) In the letter, Trustees' counsel described "safeguards that provided options related to purchases options, conversions and transfers if OBT believed the BFC Directors were no longer acting in a way consistent with OBT's wishes." (Aff. Ex. 22.) Counsel noted, among other options, that if, in the opinion of the Trustees, "it was necessary or proper" to so "due to unforeseen circumstances;" Trustees could sell "as little as 720,001 shares" of its Class B non-voting shares a third party, the third party could elect to convert the shares to Class A voting shares, and those shares, "together with OBT's 240,000 shares, would constitute a majority of the Class A Common voting shares and those voting shareholders could elect new Directors." (*Id.*)

B. BFC and Trustees discuss competing strategic options.

After the January 2019 meeting, Directors, including Trustees, started exploring a potential transaction involving BFC. Trustees noted the importance of "the strategic justification of entering into a transaction of this magnitude that so dramatically alters the structure of OBT and BFC." (Aff. Ex. 124.) In April 2019, BFC's management shared with Directors a proposal for "Project Piano," the code name for a proposed merger of equals ("MOE") with Company A. (Aff. Ex. 122 at 22:10-14.) The proposal explored the pros and cons of different strategic alternatives, [redacted]

Trustees knew that BFC's board agreeing to an outright sale "wasn't going to happen." (Aff. Ex. 8 at 174:3-8.) So Trustees decided to make it happen. As Lipschultz told Gulash: "You can be absolutely sure [BFC] will never open the door to outright sale. But we will." (Aff. Ex. 126.) The plan was as follows: reach out to banks and induce them to make an "unsolicited" offer for all of BFC's stock to drive up the price. (Aff. Ex. 127.) Once the offer came in the door, the increased price would justify a higher valuation for the shares, which would then trigger higher distribution requirements for OBT in order to meet IRS standards, and in turn higher dividend payouts for BFC. (*Id.*) At that point, Trustees would have their justification to sell, and open a "once-in-lifetime door for which there is no going back." (Aff. Ex. 128).

In June 2019, Trustees engaged KBW to "render financial advisory and investment banking services to the Trust in connection with the Trust's general strategy and available strategic alternatives." (Aff. Ex. 129.) KBW immediately reached out to various banks about "a unique M&A opportunity" to acquire all of BFC. (*See, e.g.*, Aff. Ex. 130; Aff. Ex. 131; Aff. Ex. 132; Aff. Ex. 122 at 44:16-24.) In the course of the discussions, Lipschultz expressed frustrations about potential bank buyers spending "too much time serenading us with all of the good that [they do] for communities," wishing for "a hard charging partner focused on making money" not "a tree hugger." (Aff. Ex. 133.)

At the same time, Trustees conducted their own assessment of BFC's entire value under different scenarios on the open market. The analysis indicated a BFC valuation upwards of $2 billion in an outright sale. (Aff. Ex. 134)]; Trustees' analysis also indicated a higher value in an outright sale versus merger of equals. (Aff. Ex. 135 at 33:15—34:1; *id.* at 43:5-14). [redacted]. It also indicated that—assuming their valuation approach was appropriate—the Trust could face substantial excise taxes and other consequences, like revocation of its tax-exempt status, if the parties were unable to make their respective payout obligations. (Aff. Ex. 136; Aff. Ex. 3 at 130:18–131:10; Aff. Ex. 4 at 198:18–199:5.)

D. Trustees vote to sell the Trust's BFC shares.

On July 12, 2019, Trustees signed a resolution to "sell their shares of stock in BFC as soon as reasonably practicable under the circumstances," on the basis that "Trustees have reached the opinion, unanimously, that it is necessary and proper to sell their shares of stock in BFC owing to unforeseen circumstances." (Aff. Ex. 137.) The resolution does not reflect the basis of Trustees' opinion on why "unforeseen circumstances" existed, or why it was "necessary or proper" to sell the shares. (*Id.*)

In depositions, the Trustees highlighted different considerations. Reardon and Johnson both testified to the increased valuation and payout requirements as the "primary consideration" or "big one" for their votes. (Aff. Ex. 8 at 185:2-11; Aff. Ex. 4 at 191:3-15.) Lipschultz, reading from a handwritten list in depositions, highlighted factors like changes in the banking industry, "rogue management" at BFC, and other challenges that contributed to his decision. (Aff. Ex. 9 at 142:1—143:21; Aff. Ex. 138.)

Reardon testified, as Trustees and their counsel have indicated in multiple contexts, that they had "absolute discretion" to sell the shares under the Trust agreement. (Aff. Ex. 8 at 29:18—30:4; *see also* Aff. Ex. 139 (referencing Trustees' "broad and unchallengeable discretion").) Lipschultz's later emails indicate he did not deem it necessary to pin down a precise justification for the sale at the time of the resolution, in light of the fact that "the Trust Instrument says literally: it's 'in the opinion of the Trustee(s)[ ] to make [ ] that determination." (Aff. Ex. 140.) Rather, he stated, Trustees would make "the final decision on what we will declare as the unforeseen circumstances when it counts - which is in court." (*Id.*)

E. Trustees face "obvious pushback" from BFC.

Directors, including Trustees, met on July 23 and 24, 2019 to discuss Trustees' desire to sell the Trust's BFC shares. (Aff. Ex. 141.) Directors specifically discussed "whether OBT has the authority under the trust instrument to sell its stock and/or engage in a sales transaction that is triggered by an unforeseen circumstance," in reference to the applicable Trust Instrument provisions. (*Id.*)

Among other things, the Directors discussed potential consequences of the action, including Lipschultz, who "asked about the potential for personal liability." (*Id.*) BFC also brought in a law firm, Wachtell, Lipton, Rosen and Katz, to discuss the risks of the transaction. The firm advised Directors of their fiduciary duty inquiry: "[I]s [the] transaction viable; assuming the transaction is viable, is pursuing the sales process prudent; and if the transaction is viable and the process prudent, is the transaction advisable." (*Id.*; Aff. Ex. 4 at 215:4—216:10.)

Around the time of this meeting, Lipschultz noted the retention of the "[w]ell-known" Wachtell law firm to a family member, stating: "Things are heating up in our path to divest and the bank is in essence lawyering up." (Aff. Ex. 142.) Lipschultz later testified that "Wachtell is probably the most famous . . . anti-takeover firm in the world." (Aff. Ex. 9 at 163:23—164:2.)

Johnson noted "obvious pushback" from the Board about a sale by that time. (Aff. Ex. 4 at 220:5-9.) Trustees began to explore potential "D&O", or "Directors & Officers", insurance coverage for potential breach-of-fiduciary-duty claims against Trustees by BFC arising out of a potential sale. (Aff. Ex. 143; Aff. Ex. 3 at 143:14-23; Aff. Ex. 9 at 158:13-17.) On August 1, 2019, nearly three months before the Sale, Thompson told Trustees the insurance broker's results:

> They didn't see any gaps in the language when it comes to outside parties, other than any personal umbrella policies the Trustees have would kick in first, as we talked about this morning. However, internal (and bank) employees are different. Harassment and other employment related issues would fall under the EPL policy, **but for some other claims (most notably, your example of litigation brought against the Trustees or OBT by a BFC employee arising from any transaction involving BFC), there would likely be no coverage** due to the insured vs. insured exclusion (which includes subsidiaries and shareholders of subsidiaries). Since the bank is a subsidiary and likely all of the employees are technically shareholders due to the ESOP, the insured vs. insured exclusion would most likely kick in, unfortunately, leaving us no coverage in those situations.

(Aff. Ex. 144 (emphasis added); Aff. Ex. 3 at 149:8-10 (shared with all three Trustees). The broker further noted that the exclusion would still apply even "post-transaction"—specifically, even if Trustees successfully sold all of their BFC shares. (Aff. Ex. 144; Aff. Ex. 3 at 147:6-22.) To date, Trustees have not obtained a standalone D&O insurance policy that would cover Trust losses from Trustees' potential breaches. (Aff. Ex. 3 at 142:24-25.)

G. Trustees inform the AGO of their intent to sell "the entirety of [the Trust's] stock in Bremer Financial Corporation."

That same week, Trustees finalized a "communications plan" about a potential sale, with intended audiences including "OBT employees," "Grantees," and "Regulators." (Aff. Ex. 145.) The "messaging goal" for OBT was, as set forth in the plan: "[I]t is business as usual." (*Id.*) A week later, in an August 5 meeting, "BFC and counsel for OBT discussed the possibility that litigation could be brought to prevent a potential sale of BFC shares." (Aff. Ex. 146 at Interrog. No. 7.) Counsel also discussed the potential for AGO objection at that meeting, but "counsel for OBT expressed confidence that the AGO would not object to a transfer of OBT's BFC shares." (*Id*. at Interrog. No. 3.)

On August 8, Company B offered Trustees a "non-binding indicative proposal" [redacted] Trustees asserted they had authority to negotiate to sell the entire bank even though the Trust did not own all of its shares, because they could assert control under the Trust's "drag-along rights," as discussed in the January Board meeting. (*See* Aff. Ex. 9 at 167:1-12.)

In early August, Trustee counsel from the Dorsey & Whitney law firm reached out to the AGO to set up a meeting for August 16, 2019. (Aff. Ex. 148.) Counsel did not tell the AGO the reason in advance or provide any written materials, such as the "unforeseen circumstances" provision of the Trust Instrument. At the meeting, counsel indicated that Trustees intended to sell all of the Trust's BFC shares, Aff. Ex. 4 at 241:7-11, that they received an unsolicited $2 billion offer for BFC, and that the increased valuation and payouts required the sale, *see* Aff. Ex. 149.

Knowing that compensation was a past concern for the AGO, Aff. Ex. 4 at 242:7-14, counsel represented that Trustees did not stand to benefit personally from the sale.

Trustees did not instruct their attorneys to inform the AGO that the BFC directors could oppose the sale as contrary to the Trust Instrument, that Trustees were considering exercising their drag-along rights, that Trustees were planning on selling shares to 19 different hedge funds, that there was a risk that BFC might sue Trustees, or that there would be no insurance coverage for a lawsuit. (Aff. Ex. 4 at 243:1—244:19.)

The AGO followed up with a letter to memorialize its understanding of the discussion, including Trustees' plan to sell "the entirety of its stock in Bremer Financial Corporation," counsel's agreement "to keep the AGO informed as OBT considers its options moving forward, including providing it copies of relevant documents in a timely manner;" and the AGO's desire 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." (Aff. Ex. 149.) The AGO also followed up to indicate that it had an open investigative file for the Trust. (Aff. Ex. 150.). There was no further interaction with the AGO until after the October Sale, as described below.

H. Trust-law issues "create an unusual dimension of deal risk."

Trustees' and BFC's dispute intensified in August. On August 19, three days after the AGO meeting, Trustees told the Board that the merger discussions and "subsequent valuation events are unforeseen circumstances and the Trustees have determined that we can no longer continue to hold our BFC stock." (Aff. Ex. 151.) They further stated if the Board did not agree to "a joint effort to sell BFC" using KBW:

> We will go to market and the result will be a sale of our voting and non-voting 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 whomever OBT believes is the best buyer. Most likely that will be whomever pays the most."

(Aff. Ex. 152.)

The next day, Company B withdrew its proposal. (Aff. Ex. 153.) A representative of Company B later told BFC President Jeanne Crain that he would "never have supported anything like this had I known the board was not in support of this." (Aff. Ex. 122 at 68:14-25.) Lipschultz later noted to Gulash that Company B's "unsolicited" offer "was a keystone in this whole story and the fact it was retracted and not reissued has been devastating to our storyline." (Aff. Ex. 154.)

The Board and Trustees met again on August 29, 2019. Among other things, BFC brought in a trust law attorney from Lathrop GPM to explain potential legal risks associated with the sale. (Aff. Ex. 151.) She advised that an unforeseen circumstance as set forth in the Trust Instrument "is a high standard," that a "transaction could be challenged in court by multiple parties," including by the AGO, which has the "authority to conduct an informal or formal investigation, and can begin a court proceeding to challenge trust action." (*Id.*; Aff. Ex. 8 at 229:4—230:7.) BFC's Wachtell counsel also commented that "the trust-law issues just discussed[ ] appeared to create an unusual dimension of deal risk," and as such, a "potential buyer may seek to mitigate the risk through, for example, pre-clearance with the AG or other regulator." (Aff. Ex. 151.) Over Trustees' objection, the Board ultimately voted to "terminate any further discussion regarding a sales Transaction." (*Id.*)

Trustees discussed their options in light of BFC's vote. Specifically, they discussed their plan—code-named "Project Raptor"—to seek out several hedge fund investors to buy a portion of the Trust's BFC shares, convert those shares to voting under the Plan, and call a special meeting to replace the current board, who—Trustees presumed—would vote alongside Trustees to sell the Bank. (Aff. Ex. 135 at 140:23—141:3.) Lipschultz characterized the plan to Gulash as "essentially a hostile takeover," and they strategized "going after smaller activist investor funds" to execute the deal because "they live for the fight" and it would signal "that we aren't fucking around." (Aff. Ex. 155; Aff. Ex. 156; Aff. Ex. 157.)

Trustees internally discussed risks of the Project Raptor, including that it might "put [the Trust's] major investment in jeopardy," Aff. Ex. 158, that staging a takeover of the Bank might create a "perception of self-aggrandizement," *id.*, that Trustees did not have any control over what the investors did with their shares once they bought them, Aff. Ex. 8 at 244:7-12, that the plan would not work if even "one of the investors[ ] decided that they weren't going to vote in favor of" a sale, Aff. Ex. 9 at 258:10-19, that even if they did replace the board, the banking regulators might not approve of the intended sale anyway, Aff. Ex. 9 at 260:5-13; and that it was "guaranteed" that Trustees would get "smeared and sued" and "wind up as defendants in the inevitable Wachtell driven lawsuit," Aff. Ex. 159; Aff. Ex. 160.

Trustees also considered an alternative path involving prior court guidance or approval. (Aff. Ex. 6 at Interrog. 26; Aff. Ex. 161.) Trustees ultimately chose self-help instead of court guidance because, among other things, prior court approval would "likely invite countermeasures." (Aff. Ex. 6; Aff. Ex. 9 at 200:2-13; Aff. Ex. 4 at 236:6-16; Aff. Ex. 162.) In rejecting that path, Trustees specifically factored in the ability of the AGO to object as one of the "countermeasures" they sought to avoid. (Aff. Ex. 8 at 234:14—235:7.)

Johnson had initial reservations about Project Raptor. (Aff. Ex. 159.) Lipschultz characterized her to Gulash as "a mess," stating that she "committed to sign but feels like she is signing someone's death warrant." (Aff. Ex. 163.) Lipschultz expressed frustration at Johnson's reticence, stating "every day I have to go through this shit with Shotsy, my exit price goes up." (Aff. Ex. 164.) When Gulash joked about taking over her Trustee position, Lipschultz said:

"That would be great. She could give it to the panhandler on the street in front of our office and even that would be better." (Aff. Ex. 165; Aff. Ex. 166.)

But ultimately, Johnson agreed to the plan, and on October 10, 2019, all three Trustees passed a second written action, specifically resolving that it was "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." (CJ Ex. 32; Aff. Ex. 167; Aff. Ex. 8 at 235:22—236:18.)

I. Trustees "go for the BFC jugular."

Trustees' October 10 resolution also approved engaging KBW to help with the sale, and Trustees agreed to pay KBW a "non-refundable cash placement fee (the "Placement Fee"), payable at each closing of a Placement, in an amount equal to 5.5% of the aggregate gross proceeds from the sale." (Aff. Ex. 168.) Trustees further agreed to indemnify KBW, "to the fullest extent permitted by law," from any "actions (including shareholder actions), inquiries, proceedings and investigations related to or arising out of such engagement or KBW's role in connection therewith or the Placement," and agreed to reimburse KBW "for all expenses (including counsel fees) as they are incurred by KBW." (*Id.*)

KBW immediately got to work finding buyers for Trustees' shares. Specifically, at Trustees' direction, KBW sought out "guys that only care about making money and are willing to do whatever is necessary," and "aggressive animals that would swoop in and go for the BFC jugular." (Aff. Ex. 169; Aff. Ex. 170; *see also* Aff. Ex. 8 at 242:12-14; Aff. Ex. 9 at 210:6-17.)

These potential investors immediately identified a litany of potential risks in mid-October phone calls and emails with KBW, investors, and Trustees' primary deal counsel, Sullivan & Cromwell. (*See, e.g.*, Aff. Ex. 171) The investors noted, among other things, (1) the risk of Federal Reserve objection on the basis that investors and Trustees were "acting in concert" to take control over a bank contrary to federal rules, *see* Aff. Ex. 9 at 196:1-24; (2) the risks that the

AGO might object to the sale, *see, e.g.*, Aff. Ex. 172; Aff. Ex. 135 at 264:22—265:4; Aff. Ex. 173 at Interrog. 1(2); (3) the prerequisite that Trustees meet the "unforeseen circumstances" standard under the Trust Instrument, Aff. Ex. 174 at Interrog. 1(7); and (4) the risks that BFC might impede the sale in a litany of ways, including "[b]locking or delaying the conversion of the [investor's] shares to voting shares," seeking an "injunction to enjoin or delay" the sale, or otherwise challenging Trustees' actions in light of Directors' "previously expressed reticence to engage in a business combination involving, or sale of, BFC," Aff. Ex. 162 at Interrog. 1(2), 1(4); Aff. Ex. 175 at Interrog. 1. KBW opined that, "if the transaction was blocked," Trustees "could consider buying back the shares" from the investors. (Aff. Ex. 176 at Interrog. 1(3)).

Accordingly, the potential investors insisted that to do the deal, the risks needed be "priced in" or otherwise mitigated. (*See* Aff. Ex. 171.) So Trustees agreed in advance to the following terms. First, Trustees "had to accept" a "discount" from their own valued price "in order to complete the sale." (*See* Aff. Ex. 177.) Second, Trustees' counsel agreed to "provide legal opinions regarding OBT's ability to, among other things, enter into and consummate the October Sale." (Aff. Ex. 173 at Interrog. 1(2).) And third, in the event that BFC challenged the sale, Trustees agreed in advance to provide investors with a proportional share of the Trust's BFC "dividend payments during the time that any litigation was pending." (Aff. Ex. 176 at Interrog. 1(3); Aff. Ex. 178.)

Trustees then prepared, in BFC's words, to "declare[ ] war" on BFC. (Aff. Ex. 122 at 127:13-21.) Initially, on October 17, Trustees incorporated Community Benefit Financial Company LLC as a subsidiary of the Trust to "consolidate and build out some of the financing or program-related investments that the Trust has done in its past," and run all of its financing and investments through the entity going forward. (Aff. Ex. 3 at 22:4-14; Aff. Ex. 179.) Trustees have also indicated they formed the LLC to "limit the parent company liability associated with these types of investments." (Aff. Ex. 6 at Interrog. No. 6.) Trustees did not seek prior court approval to create a subsidiary for this purpose. Although the AGO received conflicting and uncertain testimony on whether the LLC currently holds any assets, grants staff have indicated that Trustees are currently using the LLC to sign promissory notes for its program-related investments. (Aff. Ex. 34 at 108:4-11.) At the same time, Reardon testified to the AGO that he "does not think" that any assets held by the LLC will be "subject to the supervision of the District Court." (Aff. Ex. 8 at 271:4—272:10.)

Trustees met with [redacted] (Aff. Ex. 9 at 201:23—204:8.) Trustees also pre-planned a sequence of events to take place on October 28—the Monday after the sale closed—including: (1) a press release to serve as a "trigger" to investors to convert their shares into voting shares, (2) a meeting with the AGO specifically prearranged to take place *after* the sale had closed, and (3) a letter to the BFC Board announcing the sale. (Aff. Ex. 8 at 255:14—256:5; Aff. Ex. 180.) In an initial draft of that letter, written a week before the sale, Lipschultz wrote:

> We at OBT go into this with a heavy heart and yet with our eyes open. **We know that this path could result in a cascade of unfortunate consequences.** As acknowledged above, with BFC's resources and advisors, you have the option to engage in a protracted battle. But what would that accomplish other than the destruction of so much good?

(Aff. Ex. 181 (emphasis added); Aff. Ex. 9 at 217:24—218:1.)

On October 25, 2019, Trustees' closed their sale of 725,000 BFC shares to 19 different hedge funds held by 11 investment banks at a total price of $87,000,000, or $120 a share. (*See, e.g.*, Aff. Ex. 182; Aff. Ex. 183; Aff. Ex. 184.) The sale packet incorporated two opinion letters from counsel, including a letter from the Dorsey & Whitney law firm specifically opining that no "filing with, or authorization, approval, consent, license, order, registration, qualification or decree of, the Ramsey County District Court, the State of Minnesota, including the Minnesota Attorney General, or the Internal Revenue Service is required for the due execution and delivery of the Transaction Documents by the Trustees." (Aff. Ex. 185; Aff. Ex. 186.) Trustees paid KBW's fee, and Lipschultz told Gulash: "I've rarely been so happy to spend $5M." (Aff. Ex. 187.)

J. A "cascade of unfortunate consequences" ensues.

On October 28, 2019, Trustees executed their plan, beginning with the pre-planned meeting with the AGO, where counsel informed the AGO that the October Sale had taken place. Counsel did not give the AGO copies of the Stock Purchase Agreements, the letter to the BFC Board, or any other written materials, save for emailing a link to the press release touting the October Sale after the meeting. (Aff. Ex. 188.) Trustees then emailed the press release and letter to the Board announcing the transaction. (Aff. Ex. 189.) Trustees' letter instructed BFC to be "mindful that every dollar spent to contest this matter is a dollar lost" that could ultimately benefit "the very people Otto Bremer sought to help." (*Id.*) Trustees testified that the letter specifically intended to reference "legal expenses, [which have] been very expensive on both sides to move the matters forward and all that money could have been put to a different purpose." (Aff. Ex. 4 at 264:24—265:13; Aff. Ex. 8 at 250:5-18; Aff. Ex. 8 at 251:7-12.)

Trustees then published the release, and all 11 investors "nearly simultaneously" surrendered their assignments to BFC and sought to convert their shares. (Aff. Ex. 190 at ¶ . 70; Aff. Ex. 191; Aff. Ex. 192; Aff. Ex 193; Aff. Ex. 194; Aff. Ex. 195; Aff. Ex. 196; Aff. Ex. 197; Aff. Ex. 198; Aff. Ex. 199; Aff. Ex. 200; Aff. Ex. 201; Aff. Ex. 202.) BFC refused to turn over the shares. In the weeks following the Sale, Lipschultz and Gulash discussed in texts about being "frightened for BFC if they try to withhold shares from the new investors," depicting "an aerial bombardment the likes of which sleepy St. Paul MN has never seen." (Aff. Ex. 203).

BFC testified about the impact on the company in the aftermath. BFC contended, among other things, that the press release implied that the company was "weak" and "can't compete." (Aff. Ex. 122 at 120:17-23.) BFC claimed it faced challenges recruiting and retaining employees in light of the "uncertainty," including a "wave of top revenue producers receiv[ing] a stream of calls from recruiters seeking to tempt them elsewhere." (Aff. Ex. 122 at 125:7-11, 139:9-13; Aff. Ex. 146 at Interrog. No. 6.) It further reported that, as a result of the sale and fallout, "several existing clients . . . have declined to pursue additional business with BFC or have considered taking their business elsewhere." (Aff. Ex. 146 at Interrog. No. 6.) And finally, BFC states that it has faced the "energy," "expense," and "nuisance" of the "inevitable" litigation that followed. (Aff. Ex. 122 at 143:10-14.)

On November 19, 2019, BFC sued Trustees individually and in their capacity as trustees in Court File No. 62-CV-19-8203, for claims arising out of the October sale, alleging among other things that Trustees' self-interested incentives for the Sale and that it was not authorized under the Trust Instrument. Specifically, BFC asserted that because Lipschultz and Reardon's Investment Advisory Fee is a percentage calculated based upon the "non-Bremer Financial Corporation stock assets of the Foundation," it gave "Lipschultz and Reardon a powerful financial incentive to trade away the Trust's Bremer stock for non-Bremer assets . . . and increase their annual investment advisory fee by nearly a factor of ten." (Aff. Ex. 204 ¶¶ 42-43.) KBW immediately emailed the lawsuit to the investors stating: "Last night, as we suspected could be the response, the Bremer board filed a lawsuit against the three Trustees challenging, among other things, the sale of shares by OBT." (*See, e.g.*, Aff. Ex. 205.)

The litigation garnered widespread media coverage, including negative coverage about Trustees. (*See, e.g.*, Aff. Ex. 206.) Trustees scrambled internally to manage the fallout. Lipschultz, expressing frustration to Trustees' media consultants about favorable nonprofit community statements about BFC, stated: "Bremer is just a bank. That's it." (Aff. Ex. 207.) He told the consultant to discourage the press from "wast[ing] ink" on the "ridiculous" premise that " 'losing Bremer Bank would be a big loss to our community.' " (*Id.*) Lipschultz also expressed concerns that the media would learn about a "stump speech" that his "father along with the other Trustees" had "that essentially said 'the bank will never be sold.'" (Aff. Ex. 208.)

Lipschultz also told Gulash that negative media portrayals that "OBT+KBW gave out sweetheart deals" to investors would be "a story which also provokes the AG as the guardian of 'charitable assets,' " and would just be "another piece of evidence that this was all gaming to get rid of the 'real' board and takeover the company for our own selfish end." (Aff. Ex. 209.) Finally, Lipschultz discussed coverage about the self-dealing allegations with his co-Trustees, stating: "Maybe the trustees are motivated by money. But isn't this a free society where the individual can make their own choices?" (Aff. Ex. 210.) In explanation, Lipschultz later testified: "[S]o what if we're motivated by money? Is there anything wrong with that?" (Aff. Ex. 9 at 228:1-6.)

Trustees then executed their plan for an "aerial bombardment" against BFC, and "observ[ed] the carnage." (Aff. Ex. 203; Aff. Ex. 211.) As Lipschultz told Gulash, Trustees needed a "platoon" of investors "file suit in Ramsey County and pile in" if Trustees were "going to take this thing" against BFC. (Aff. Ex. 211; Aff. Ex. 212.) They expressed frustrations at investors "not doing shit" to fight BFC, and stated that Trustees and KBW "need to know if they're going to step in to the ring or wait for others to fight it out and then nibble on the leftovers." (Aff. Ex. 170.) Lipschultz expressed, however, that with or without the investors' help: "OBT can weather this storm for a long time." (Aff. Ex. 212.) He stated, in reference to Trustees' legal fees draining the Trust's charitable assets: "I've got years of reserves if absolutely necessary." (*Id.*)

On December 13, 2019, FJ Capital sued BFC in Court File No. 62-CV-19-8845. (Aff. Ex. 213.) Lawsuits by Maltese Capital and Patriot Financial Services, Court File No. 62-CV-20-1931; later followed. In late December, as promised, Trustees sent a letter to all 11 investors in which they agreed to pay upon receipt "any dividends paid to record holders of the Purchased Securities on or after October 25, 2019, and received by the Trustees together with any interest or other income derived therefrom." (Aff. Ex. 214.) KBW and Trustees testified that they were not deterred by the fact the validity of the sale was currently being challenged in court, did not discuss whether to put the dividend payments in escrow pending the litigation, and did not negotiate specific terms with the investors in the event that BFC was successful in court and the sale was invalidated. (Aff. Ex. 3 at 172:11-23, Aff. Ex. 3 at 173:5-8; Aff. Ex. 8 at 260:5-18; Aff. Ex. 9 at 251:3-25; Aff. Ex. 135 at 258:4-16.)

And as predicted, on December 15, 2019, insurance denied Trustees' defense costs and indemnification for claims related to the BFC litigation under the "insured versus insured" exclusion. (Aff. Ex. 215; Aff. Ex. 3 at 167:19—168:1.)

K. The AGO investigates.

On January 1, 2020, Trustees voted for the first time in at least seven years not to increase their base compensation, and to freeze Lipschultz and Reardon's Investment Advisory Fee for two years. (Aff. Ex. 216.) Johnson explained that the two-year freeze was a "statement of good faith that this sale of the bank was not intended in any way to be to the benefit of the trustees' personal [interests]." (Aff. Ex. 4 at 272:14-22.) When the AGO asked the Trustees if they truly intended to assuage self-dealing concerns, why they did not vote to permanently freeze the fees; Johnson testified that "[n]ever is a long time," and they would revisit compensation after things had "settled down." (Aff. Ex. 4 at 272:24—273:7.)

On January 6, 2020, the AGO initiated a formal investigation about the Sale and the general administration of the Trust by serving Civil Investigative Demands on Trustees and other parties, pursuant to Minnesota Statutes sections 8.31 and 501B.40. (Aff. Ex. 217.) The AGO immediately gave notice to the Bremer Litigation courts, explaining the Attorney General's role to protect the beneficial interests of the public, and that he "has all the powers available by statute and common law to investigate and bring enforcement actions to ensure the proper administration of charitable trust assets." (*Id.*) In contemporaneous texts to his co-Trustees, Reardon listed "a few things that may be questioned" by the AGO, noting that the "Hedgefunds story [is] not good." (Aff. Ex. 218.) Reardon testified that he knew the AGO might specifically have concerns about the Trustees selling to hedge funds, because they are "given a bad rap." (Aff. Ex. 8 at 275:18—276:13.)

Subsequent to the litigation, Trustees and BFC agreed on one thing: that there has been a "complete breakdown" in the relationship between Trustees and BFC's management and directors. (*See* Aff. Ex. 8 at 185:16-17; Aff. Ex. 122 at 144:8-20.) This is a departure from the "cooperative relationship" the Trust and BFC have historically maintained in their delicate balance of interests. (*See* Aff. Ex. 6 at Interrog. No. 23; Aff. Ex. 218; Aff. Ex. 19.) BFC testified to its position that the Trust/BFC relationship "cannot continue to work" with the current "three individuals as trustees" representing the Trust. (BFC 144:20-22.) Trustees similarly represent that they "cannot acquiesce to the continued leadership of individuals who have taken such egregious positions," and that the Trust and BFC simply "cannot function" in light of their divergent positions. (Aff. Ex. 9 at 301:9-13; Aff. Ex. 219.)

Relatedly, the dispute has also influenced Trustees' grantmaking decisions. After BFC sued Trustees in November 2019, the president of a large metro-area nonprofit that had received substantial past support from both OBT and BFC, told the press that he "would not comment on the lawsuit, just that Bremer Bank had been a good partner for them." (Aff. Ex. 207.) Lipschultz and Reardon questioned the nonprofit's "motivation for providing support in the press" to BFC, noting "something awry" due to a long-time professional relationship between the president and BFC's marketing director. (Aff. Ex. 9 at 235:16—236:12.) In January 2020, Lipschultz told the nonprofit they would not fund the proposal due to the "significant financial commitment already provided" to the nonprofit "by our subsidiary, Bremer Bank." (Aff. Ex. 220.) The nonprofit expressed its "tremendous disappointment" at the rejection, connecting the "litigation currently engulfing both institutions" to Trustees' decision. (*Id.*) Lipschultz testified that the president's perceived loyalty to BFC was part of Trustees' discussions on whether to fund the nonprofit. (Aff. Ex. 9 at 287:25—288:6.)

L. Assets that "could be life and death" for the Trusts' beneficiaries are "squandered" on legal fees.

On May 15, 2020, Trustees filed their original IRS Form 990-PF for the 2019 calendar year. In the 990-PF, Trustees ascribed a fair market value of nearly $1.8 billion, or $174 per share, for the Trust's remaining shares of BFC stock. (Aff. Ex. 221.) This valuation reflected a fair market value that far exceeded book value and nearly doubled the fair market value reported the previous year. (Aff. Ex. 190; Aff. Ex. 221.) Trustees indicated that the value was exclusively based on methodology set forth in an expert report. (Aff. Ex. 190.) Controller Thompson testified that the report's valuation methods diverged from previous years' methods because

Trustees "took some additional steps to obtain additional market information about what the true market value would be" based upon the "active sale discussions" arising from the contended unforeseen circumstances. (Aff. Ex. 3 at 138:7-25.)

The 990-PF also reflected some, but not all, of the expenses the Trust incurred related to the October sale.[5] The 990 does reflect that Trustees paid $3.41 million excise tax on investment income. This amount includes the gain on the October Sale, which comprises nearly half of the investment income and corresponding taxes. (Aff. Ex. 3 at 170:18-23; Aff. Ex. 221].) KBW's $5 million fee, on the other hand, was not reported in the 990, nor was KBW listed as one of OBT's highest-paid independent contractors, despite the fact that the fee far exceeded any other contractor payments. (Aff. Ex. 3 at 179:10-25.) As Trustees used these same methods for their Annual Accounts, the millions of dollars in legal fees and KBW fees are not reflected in the accounts filed with this Court. (*See generally* Aff. Ex. 222.)

Trustees, who continue to retain three law firms, have also spent millions of dollars in Trust assets in legal fees. These include KBW's legal fees, which KBW estimated at $190,000 in May. (Aff. Ex. 221.) Trustees also state that they have paid and will continue to "pay 100% of [Trustees'] attorney fees for defending against and pursuing claims" in the BFC litigation out of Trust assets. Thompson estimated that these fees have already exceeded $3 million. (Aff. Ex. 3 at 160:12-19.; Aff. Ex. 6; Aff. Ex. 18 at Interrog. No. 28.)

On July 8, 2020, Trustees' counsel from Dorsey & Whitney and Stinson LLP met with the AGO and requested that the AGO either instruct BFC to dismiss its claims, or file a letter

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5 Trustees' accountants applied accounting methods that allow expenses related to a transaction to be netted from the gain from the transaction. (Aff. Ex. 236.) This has the effect of obscuring from the public the total costs associated with the transactions. (*See id.* (noting "Trustees would prefer to not show such a large number for legal fees on the 990, if possible").)

with the Bremer Litigation court indicating that Trustees' actions were appropriate. Counsel predicted that if such measures were not taken, Trustees' legal expenses will exceed **$20 million**. (Aff. ¶ 228; Aff. Ex. 223.) Attributing these mounting costs to BFC, Trustees characterized the draining of Trust and BFC assets on legal fees as "[a]mazing, sad, and unfortunate." (Aff. Ex. 218; Aff. Ex. 8 at 282:2-15.) With respect to the mounting legal fees, Lipschultz told Reardon: "I feel so badly for our beneficiaries. This squandered money could be life and death for some people." (Aff. Ex. 218.)

M. Trustees move substantial Trust assets into prohibited investments.

The Trust's IRS filings also revealed that, for the first time, Trustees started investing Trust assets in private funds, such as hedge funds.

The Trust's investment policy states that "[i]nvestments prohibited by law and/or regulation" and "Direct or Indirect investments in hedge funds or private equity funds ('covered funds'), as broadly defined under the Volcker Rule," are "prohibited under this Policy." (Aff. Ex. 115.) The Volcker Rule, contained in the Dodd–Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 1851, was implemented in the wake of the 2008 financial crisis to prevent banks and holding companies like OBT[6] from engaging in the types of high-risk investments that caused the resulting economic fallout and bailouts.[7] (*See* Aff. Ex. 3 at 47:20—48:11.) Trustees, Thompson, and the Trust's auditor, all acknowledged in testimony and

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6 As such, if Trustees successfully "divest" the Trust's remaining BFC assets, the Rule will no longer impede these activities.

7 *See also* "Everything you need to know about the Volcker Rule," *Washington Post* (Dec. 10 2013), available at https://www.washingtonpost.com/news/wonk/wp/2013/12/10/everything-you-need-to-know-about-the-volcker-rule/ ("In short, the theory is: You can speculate on financial markets. Or you can have a government safety net. But you can't have both.").

documents that Trustees are prohibited from investing Trust assets into funds covered by the Rule. (Aff. Ex. 224; Aff. Ex. 225; Aff. Ex. 3 at 155:3-9, Aff. Ex. 9 at 311:10-18.)

Nonetheless, from late 2019 through at least May 2020, Trustees have moved about $143 million of the Trust's public securities and cash into "private fund investments" like hedge funds. (Aff. Ex. 9 at 309:18-23; Aff. Ex. 226; Aff. Ex. 227.) Despite acknowledging that the Volcker Rule is "a matter of policy and law," that Trustees' new investments are the type prohibited by the Rule, and that the Rule is applicable to OBT; Trustees continue to transfer the Trust's holdings into these investments because of Trustees' assertion that the [redacted] (Aff. Ex. 9 at 136:23-25, 311:10-18, 23-25; Aff. Ex. 3 at 155:3-9.) At the same time, Trustees acknowledge that [redacted] (Aff. Ex. 3 at 156:19-25; Aff. Ex. 115; Aff. Ex. 9 at 136:23-25.) As of May 31, 2020, these $143 million of investments in hedge funds and private equity funds make up the majority—or 63%—of the Trust's $228 million non-BFC assets, with additional commitments pending. (Aff. Ex. 9 at 309:18-23; Aff. Ex. 226.)

N. Trustees inform the AGO of their intent to proceed with "divesting" the Trust's BFC holdings.

As is patent in the face of the current "unprecedented economic calamity" arising from the global pandemic, Trustees assert that the market for banks has dropped "precipitously" since October 2019. (Aff. Ex. 9 at 295:18—296:18, 297:18-20.) Nonetheless, [redacted] Trustees indicated to the AGO that they intend to proceed with a sale when they can. (Aff. Ex. 219.)

In recent interactions with the AGO, Trustees stated that they "cannot conclude that a sale of BFC would not be necessary even if the value is less than OBT would have received" last year, and that they will not "forego opportunities for OBT or for BFC that may arise in the future." (*Id.*) As such, Trustees have made plain their continued intent to "divest" their "[r]emaining BFC [h]oldings" if and when they see fit. (Aff. Ex. 223.) Trustees have not made plain, in contrast, any intent to seek preapproval from this Court or the AGO for a potential transaction involving its remaining shares.

ARGUMENT

I. PROCEDURAL BASIS FOR PETITION.

A. The Attorney General Has Broad Authority to Supervise and Enforce Charitable Trusts.

The Supervision of Charitable Trusts and Trustees Act ("Act"), Minnesota Statutes sections 501B.33 to 501B.45, codifies and supplements longstanding common law recognizing the Attorney General's broad authority over the "supervision, administration, and enforcement of charitable trusts." Minn. Stat. § 501B.34. Unlike express trusts benefitting specific individuals, charitable trust beneficiaries "are usually some or all of the members of a large shifting class of the public." *Longcor v. City of Red Wing*, 206 Minn. 627, 635, 289 N.W. 570, 574 (1940). As such, the Attorney General, as "a responsible state officer who will act in the public interest rather than for personal motives," *id.* at 635, 289 N.W. at 574, "is entrusted with the duty of representing the beneficiaries of a charitable trust," *Schaeffer v. Newberry*, 227 Minn. 259, 261, 35 N.W.2d 287, 288 (1948). In this capacity, the Attorney General acts "as representative of the sovereign, rooted in the common law power of *parens patriae*." George G. Bogert, George T. Bogert et al., *The Law of Trusts and Trustees ("Bogert's")* § 411 (June 2020). As such, "the attorney general has not only the right but the duty to enforce charitable trusts by proper court proceedings." *In re Quinlan's Estate*, 233 Minn. 35, 44, 45 N.W.2d 807, 812 (1951).

B. The Attorney General Appropriately Enforces the Beneficial Interests of the Public through the Petition.

The Minnesota Trust Code ("Code"), Minnesota Statutes chapter 501C, "applies to express trusts, charitable or noncharitable." Minn. Stat. § 501C.0102(a). Under the Code, an "interested person may petition the district court" and invoke its in rem or in personam jurisdiction for specified matters. *Id.* § 501C.0201(a), (c). An "interested person" under the Code includes a beneficiary. *Id.* § 501C.0201(a). Because the Attorney General has all rights of a qualified beneficiary with respect to a charitable trust principally administered in Minnesota, he is an interested party under the Code. *See id.* § 501C.0110(d); *see also* Minn. Stat. § 501B.31, subdiv. 5 (stating that the attorney general "shall represent the beneficial interests" of and enforce charitable trusts).

Under the Code, a petition may include, among other things, a request to "remove a trustee as provided in section 501C.0706," Minn. Stat. § 501C.0202(9), to "appoint a successor trustee" by reason of removal, *id.* § 501C.0202(10), to "redress a breach of trust," Minn. Stat. § 501C.0202(19), and "to secure compliance with" the Act, *id.* § 501C.0202(16). The Act similarly empowers the Attorney General to "institute appropriate proceedings to obtain compliance with [the Act] and the proper administration of a charitable trust." Minn. Stat § 501B.41, subdiv. 1.

C. The Act and Code Allow for Trustee Removal With and Without "Cause."

Both the Act and the Code allow for the removal of a trustee. Under the Act, if it "appears to the attorney general that a breach of trust has been committed," the attorney general may sue for and obtain injunctive relief, including "the removal of a trustee who has committed or is committing a breach of trust," or "another appropriate remedy." Minn. Stat. § 501B.41 subdiv. 7. The Code similarly allows the Court to remove a trustee who "has committed a serious breach of trust." Minn. Stat. §§ 501C.0706, 501C.1001(b)(7).

The Code also provides for trustee removal for circumstances less than a breach, including if "removal of the trustee best serves the interests of the beneficiaries because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively;" or if "removal is requested by all of the qualified beneficiaries, 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 a suitable cotrustee or successor trustee is available." Minn. Stat. § 501C.0706(b)(3), (4); *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."). "Removal of a trustee under [the Code] is an exercise of the district court's equitable authority." *In re Jorgenson Family Tr. dated Mar. 12, 2001*, No. A12-2292, 2013 WL 3155471, at *5 (Minn. Ct. App. June 24, 2013) (citing *In re Foley Trust*, 671 N.W.2d 206, 209 (Minn. Ct. App. 2003) (citation omitted)).

II. TRUSTEES SHOULD BE REMOVED FOR CAUSE IN LIGHT OF PERSISTENT, ONGOING, AND SERIOUS BREACHES OF THEIR FIDUCIARY DUTIES AND THE PUBLIC TRUST.

Charitable trustees must "administer and manage property held for charitable purposes in accordance with [the] law" and "consistent with fiduciary obligations." Minn. Stat. § 501B.41, subdiv. 6. Fiduciary obligations are set forth in the Act, the Code, and common law. *See* Minn. Stat. §§ 501B.34 (preserving AGO "common law and statutory rights, duties, and powers"), 501C.01006 (stating common law and equity supplement the Code). The requirements of the Act "apply regardless of contrary provisions of an instrument." Minn. Stat. § 501B.42. Trustees are held to "a higher standard than a corporate director." *Bogerts* § 394. The "unbending and inveterate" standard of behavior for trustees is "stricter than the morals of the market place," and is not simply "honesty alone, but the punctilio of an honor the most sensitive." *In re Janke's Estate*, 193 Minn. 201, 205, 258 N.W. 311, 313 (1935) (citing *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545 (1928) (citations omitted)).

The Trustee duties implicated here include:

- **Duty of Good Faith.** First, a trustee has the duty to "administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with" the law. Minn. Stat. § 501C.0801. In accordance with this duty, trustees must honor the settlor's intent and the trust's purpose. *Norwest Bank v. Beckler*, 663 N.W.2d 571, 580 (Minn. Ct. App. 2003) (stating trustee must not "defeat[ ] the settlor's intent or the purposes of the trust"); *United States v. O'Shaughnessy*, 517 N.W.2d 574, 577 (Minn. 1994) (stating any "attempt to violate the settlor's intent or the trust's purpose" is an abuse of trustee's discretion).

- **Duty of Loyalty.** Second, a "trustee owes a duty of loyalty to the beneficiaries." Minn. Stat. § 501C.0802(a). The duty of loyalty prohibits a trustee from placing his "own interests above those of the beneficiaries," which, in this case, is the charitable purpose of the trust. *Id.*; *Bogerts* § 394. Since it is perhaps "the most fundamental duty of a trustee," he or she "must administer the trust with complete loyalty to the interests of the beneficiary, without consideration of the personal interests of the trustee or the interests of third persons." *Bogerts* § 543. 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*, 190 Minn. 410, 413, 252 N.W. 423, 425 (1934) (emphasis added).

- **Duty of Care.** Third, trustees owe the beneficial interests the duty of care, or to "administer the trust as a prudent person would, by considering the purposes, terms, and distribution requirements of the trust and all relevant circumstances." Minn. Stat. § 501C.0804; *see also* Minn. Stat. § 501B.41, subdiv. 6. "In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution." Minn. Stat. § 501C.0804.

- **Duty of Information.** Fourth, trustees owe the duty to inform and report, or to keep the beneficiaries "reasonably informed about the administration of the trust and of the material facts necessary to protect their interests." Minn. Stat. § 501C.0813. In Uniform Trust Code states like Minnesota, where "the state Attorney General is given the rights of a qualified beneficiary with respect to a charitable trust[;]" trustees have the duty to "inform and report to the state Attorney General." *Bogerts* § 962. Trustees must disclose "fully, frankly, and without reservation all facts pertaining to the trust." *In re Enger's Will*, 225 Minn. 229, 239, 30 N.W.2d 694, 701 (1948).

As demonstrated below, Trustees' actions implicate multiple, longstanding, serious breaches of the above duties and the trust of the public whom they represent. The facts in this

Memorandum demonstrate a substantial basis for the Court to order Trustees' removal both for their individual breaches, as well as their collective persistent failure of the trustee to administer the trust effectively, as demonstrated below.

A. Trustees Should be Removed for their Persistent Failure to Apply Appropriate Internal Controls in their General Administration of the Trust, in Contravention of their Duties of Good Faith, Care, and Loyalty.

As demonstrated below, Trustees have persistently failed to effectively administer the Trust effectively across various aspects of the Trust's administration, which individually and collectively justify removal. The universal root of these failures can be encapsulated in one phrase: "The Trust is the trustees." (Aff. Ex. 8 at 8:3-11; 195:5.) If the "Trust is the Trustees," it is appropriate to give grants to Trustees' personal causes regardless of whether they best serve the Trust. If the "Trust is the Trustees," there is no need for proper governance or reporting structures beyond Trustees because their judgment is infallible. If the "Trust is the Trustees," there is no need to separate time working on Trust business from personal business because those efforts are inseparable. If the "Trust is the Trustees," it is befitting of their status to enshrine themselves in opulent offices separated from their employees and elevated above the communities they serve.

This is not the first time that the AGO has questioned the Trustees' administration of the Trust. And the AGO is neither the first nor the only party that has raised these specific concerns about Trustees' administration of Trust assets. But instead of taking the prior feedback from regulators, grantees, employees, contractors, peer foundations, watchdog groups, and the members of the public whom they serve; Trustees have doubled down on their self-focused, insular, and adversarial leadership of the Trust. Since the Trustees' have persistently failed to police their own conduct, it is left to the AGO to police them instead. Trustees should be removed.

1. Trustees should be removed for failing to maintain adequate human resources staff, procedures, and structures, fostering a toxic workplace and exposing the Trust to unnecessary liability.

Trustees should first be removed for failing to establish a human resources system sufficient to protect the Trust from unnecessary liability. *See* Minn. Stat. § 501C.0804. Case law in the corporate and nonprofit contexts[8] shows that fiduciaries can breach the duty of care through a "general failure of attention in overseeing the affairs" of an organization, including "patterns of actions or inactions that result in significant harm to [the organization] over a period of time." Restatement of the Law of Charitable Nonprofit Org. § 2.03 TD No. 1 cmt. c (2016); *see also Stern v. Lucy Webb Hayes Nat. Training Sch. for Deaconesses & Missionaries*, 381 F. Supp. 1003, 1014 (D.D.C. 1974) ("A director whose failure to supervise permits negligent mismanagement by others to go unchecked has committed an independent wrong against the corporation."); *In re Caremark Int'l. Inc. Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996) (stating that business corporation directors can breach duty of care for "sustained or systematic failure" to assure existence of reporting system to identify illegal corporate conduct). Thus, failure to establish adequate systems to protect trust assets from liability is one way a trustee can breach the duty of care to "administer the trust as a prudent person would" and exercise "reasonable care, skill, and caution." *See* Minn. Stat. § 501C.0804.

Trustees have fostered a toxic work environment and exposed the Trust to liability by, among other things: (1) delegating all HR-related complaints to Director of Operations Kari Suzuki, who lacks the authority to investigate or handle such complaints; *see, e.g.*, Aff. Ex. 47 at 21:22-23:1; Aff. Ex. 39 at 53:14-23; (2) fostering a workplace in which employees—including

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[8] Trustees are held to an even higher standard of care than directors of nonprofit or business corporations. *See Bogerts* § 394. Authority from nonprofit and other corporate contexts, therefore, is instructive as to the minimum standard of care, but the AGO does *not* concede that the lesser corporate standard applies to Trustees' conduct.

Suzuki herself—are afraid to bring concerns to or about the Trustees due to fear of Trustee retaliation, *see, e.g.*, Aff. Ex. 37 at 106:19-25; Aff. Ex. 34 at 125:4-13; Aff. Ex. 39 at 66:13-23; Aff. Ex. 47 at 73:13-22; Aff. Ex. 47 at 74:3-22; Aff. Ex. 40 at 58:9-15; (3) failing to provide employees a reporting mechanism for concerns about Trustee conduct, such as procedures for reporting to outside authorities, Aff. Ex. 39 at 71:18-24; Aff. Ex. 39 at 43:21-44:12; Aff. Ex. 40 at 52:13-21; (4) neglecting to discipline a manager who is the subject of repeated discrimination and harassment complaints, Aff. Ex. 51; Aff. Ex. 37 at 101:3-106:21; Aff. Ex. 4 at 92:21—93:13; and (5) engaging in inappropriate workplace conduct themselves, in the case of Reardon and Lipshultz, *see, e.g.*, Aff. Ex. 47 at 37:8-11, 57:8-23, Aff. Ex. 57; Aff. Ex. 58; Aff. Ex. 47 at 41:25-42:12; Aff. Ex. 40 at 69:6-9, Aff. Ex. 47 at 53:1-8, Aff. Ex. 39 at 82:8-24.

Trustees' actions and inactions have resulted in significant harm to the Trust. In addition to losses which may yet arise, the Trustees have already executed severance agreements with several former employees in exchange for a waiver of discrimination claims and non-disclosure and non-disparagement terms. (Aff. Ex. 8 at 63:10—64:1; Aff. Ex. 4 at 79:3-13.) Since 2014, the Trustees have executed at least five such agreements, paying out more than $320,000 to avoid potential liability. (Aff. Ex. 6; Aff Ex. 59; Aff. Ex. 53; Aff. Ex. 61; Aff. Ex. 62; Aff. Ex. 63.) Considering the relatively small size of OBT's staff, the frequency and volume of employee severance payments evidences a lack of sufficient workplace controls.

In addition to these financial losses, Trustees' human-resource-related failures have injured the Trust in other ways. A workplace that is "hostile," "degrading," and "like an abusive relationship" degrades staff morale and detracts from employees' work to further the Trust's charitable purposes. (Aff. Ex. 39 at 17:1-4, 76:21-23; Aff. Ex. 47 at 48:6-11, 49:17-20).

Accordingly, Trustees should be removed for fostering a toxic workplace that exposes the Trust to harm, both financially and in the form of distraction from its charitable purpose.

2. Trustees should be removed for expending Trust assets on unreasonably lavish, expensive overhead costs.

Trustees' unreasonable spending on overhead expenses also warrants removal. A trustee must "administer the trust as a prudent person would," considering "all relevant circumstances." Minn. Stat. § 501C.0804. "In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution." *Id.* § 501C.0804. "A trustee can properly incur and pay expenses that are reasonable in amount and appropriate to the purposes and circumstances of the trust and to the experience, skills, responsibilities, and other circumstances of the trustee." Restatement (Third) of Trusts § 88 (2007). A trustee's duty to administer the trust prudently extends to making reasonable expenses on overhead. *See, e.g.*, *Fred Hutchinson Cancer Research Ctr. v. Holman*, 732 P.2d 974, 982 (Wash. 1987) (allowing recovery of excess offices expenses from trustee in charitable trust action).

Trustees' failure to exercise prudence in Trust expenditures is evidenced by their decisions to: (1) pay for extravagant meals with Trust assets, Aff. Ex. 87; Aff. Ex. 8 at 74:19-76:4); (2) spend $2.5 million to build out a conspicuously opulent new office space in 2016, Aff. Ex. 37; (3) drastically increase their annual rent to an amount equal to $19,910 per employee, Aff. Ex. 85; Aff. Ex. 6; and (4) lease and build out additional, unnecessary office space in 2018, which has since sat empty, Aff. Ex. 37 at 80:2-8. The Trust's office space is so lavish that Reardon told one staff member that he was hesitant to bring elected officials to the office due to concern that the display of wealth would lead the officials to question how Trustees were spending the Trust's money. (*See* Aff. Ex. 83; Aff. Ex. 47 at 34:17—35:9.) One employee testified she felt "really uncomfortable" with the contrast between the "luxurious" office space and the charitable mission of OBT, particularly in light of the "decrepit" conditions faced by many nonprofits in the communities OBT serves. (Aff. Ex. 40 at 51:21—52:12.)

By failing to exercise appropriate caution or restraint in spending the Trust's assets, Trustees should be removed for failing to "administer the trust as a prudent person would." *See* Minn. Stat. § 501C.0804. Moreover, Trustees' use of Trust assets to enshrine themselves in an opulent office towering over the city does not align with the charitable purpose of the Trust—like to "relieve poverty in the City of St. Paul." (Aff. Ex. 7 at ¶ 3(a).)

3. Trustees should be removed for placing their own self-interests above the Trust's purposes in selecting grant recipients.

Trustees should also be removed for prioritizing their own self-interests over Trust purposes in constructing the process by which grant recipients are selected. Trustees' duty of good faith requires them to administer the trust "in accordance with its terms and purposes and the interests of the beneficiaries." Minn. Stat. § 501C.0801. When fulfilling the duty of good faith, trustees must honor the settlor's intent and the trust's purpose. *Nw. Bank Minn. N., N.A. v. Beckler*, 663 N.W.2d 571, 580 (Minn. Ct. App. 2003). Trustees also owe a duty of loyalty to the beneficiaries, which prohibits a trustee from placing his or her "own interests above those of the beneficiaries"—or, in this case, the charitable purpose of the trust. Minn. Stat. § 501C.0802(a); Bogerts § 394. 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) (emphasis added).

As detailed above, Trustees made substantial grants to multiple entities on which they or a family member served on the board. These grants furthered Trustees' self-interests by advancing their personal standing in the community. Trustees frequently made these conflicted grants as "strategic initiatives"—a Trustee-led, secretive process that bypasses the normal process Trust staff used to ensure grants comported with Trust purposes. (Aff. Ex. 8 at 48:11-20; Aff. Ex. 36 at 45:1-7; Aff. Ex. 34 at 85:15-19.) Such "strategic" grants were also larger than a typical OBT grant and frequently involved multi-year funding. (Aff. Ex. 8 at 48:15-25.) These grants were facilitated by an inadequate and admittedly "vague" conflicts-of-interest policy that did not require Trustees to remove themselves for "fiduciary" conflicts, such as a Trustee or a family member serving on a grantee's board of directors, let alone remove the "opportunity" for a conflict. (Aff. Ex. 41; Aff. Ex. 42; Aff. Ex. 43; Aff. Ex. 4 at 48:20-24).

Indeed, once they learned of these grants after-the-fact, many OBT employees questioned whether Trustees made these grants for self-interested reasons and whether the grants comported with Trust purposes, and testified as to the disruption the process caused to the administration of the grants. (*See, e.g*., Aff. Ex. 39 at 30:7-22; Aff. Ex. 47 at 29:23—30:2.) Trustees themselves have also challenged their co-Trustees' "strategic" selections, like a million-dollar grant Reardon championed to an organization where he served on the board; and admitted self-serving motives for grants, such as to advance their political connections. (Aff. Ex. 8 at 51:3—52:24; Aff. Ex. 4 at 72:15—73:1; Aff. Ex. 39 at 16:3-8, 30:7-22; 34:17-35:6; 35:2-23.) (Aff. Ex. 48; Aff. Ex. 39 at 41:1-5; Aff. Ex. 32 at 123:05—123:16.)

Although the organizations who received these grants may indeed have been worthy recipients (and not privy to Trustees' intentions), and although the AGO does not allege that every grant that overlapped with Trustees' board service necessarily breached trust; the inadequacy of the overall *process* that Trustees employed merits removal. Their secretive, opaque process lacked any safeguards to ensure the grants comported with Trust purposes, thus implicating the duty of good faith. *See* Minn. Stat. § 501C.0801. Further, the process allowed Trustees to champion grants that furthered their own self-interests, thereby violating the duty of loyalty. *See* Minn. Stat. § 501C.0802(a). In sum, the process failed to ensure Trustees acted with proper motives consistent with their fiduciary duties. Trustees should be removed on this basis.

4. Trustees should be removed for their persistent failure to ensure that their compensation is reasonable and in the best interests of the Trust.

Trustees should be also removed because the structure and amount of their compensation is calculated to advance their own self-interests, not the interests of the Trust. A "trustee owes a duty of loyalty to the beneficiaries." Minn. Stat. § 501C.0802(a). As such, a charitable trustee must "deal with [Trust] property for a charitable purpose," may "not act for personal gain," and shall "not place the trustee's own interests above those of the beneficiaries." Minn. Stat. §§ 501B.35, subdiv. 3, 501C.0802(a); *In re Sykes*, No. A14-2076, 2015 WL 4715325, at *1 (Minn. Ct. App. Aug. 10, 2015) (citations omitted)). This duty of loyalty does not preclude "payment of reasonable compensation to the trustee," if it is "fair to the beneficiaries." Minn. Stat. § 501C.0802(d). In determining what is reasonable, courts "look to the practices of other trust institutions in the state and to the circumstances surrounding the administering of the particular trust in question." *Matter of Trusts Created Under Will of Dwan*, 371 N.W.2d 641, 642–43 (Minn. Ct. App. 1985) (citing Restatement (Second) of Trusts § 242, cmt. b)). The taking of unauthorized compensation by a trustee is a clear ground for removal, as is the practice of openly charging compensation in excess of the value of services rendered. *Bogert's* § 527.

Trustees are paid three different fees for three different roles: (1) Trustee/CEO, (2) BFC Director (paid directly by BFC), and for Lipschultz and Reardon, (3) Investment Advisors. For the reasons explained below, Trustees' overall compensation is not "fair to the beneficiaries" of the Trust in both structure and amount, and merits removal. *See* Minn. Stat. § 501C.0802(d).

a. Trustees' base compensation is unreasonable in structure and amount.

Initially, despite the fact that Trustees are paid for either two or three different roles, they take no steps to track their time or otherwise separate out their activities depending on if they are serving a Director role, an Investment Advisor role, or a Trustee role. To the contrary, they assert that their duties are not "bound by job descriptions," that "every day, week, and month can be different," and there is "no practical way to estimate how much time each Trustee spends on the performance of each duty, responsibility, or task." (Aff. Ex. 19 at Interrog. 6.)

Indeed, there is no "practical" way to measure how much time Trustees are spending advancing the Trust's interests—as opposed to their own interests (as investment advisors), or BFC's interests (as directors)—because they *apply* no "practical" separation to their different roles while on the Trust's clock. As such, the beneficial interests of the Trust have no assurances that they are getting the full value of the separate fees they pay Trustees out of Trust assets, or that Trustees are not performing separately compensated activities on the Trust's time. (*See* Aff. Ex. 101.) Indeed, this concern is aggravated by other indicators that Trustees fail to separate out even their *personal* time, as evidenced by Lipschultz's operation of multiple businesses out of the Trust's offices, *see* infra Part II.A.5, and Reardon's testimony that using Trust resources to advance the interests of completely different organizations is appropriate because their board service "is an extension of OBT," (*See* Aff. Ex. 87; Aff. Ex. 8 at 50:3-7.)

Further, the process and measures Trustees employed to determine their base compensation do not bear the hallmarks of independence and fairness. For example, Trustees and counsel provided direct input to the consultant on what benchmarks to use to determine their appropriate role. (Aff. Ex. 8 at 140:5-9; Aff. Ex. 4 at 166:12-24; Aff. Ex. 18; Aff. Ex. 100.) In doing so, Trustees compared their roles not to other trustees of peer foundations, but rather to "peer groups" of charitable organizations, for-profit bank holding companies, and banking institutions. (Aff. Ex. 99; Aff. Ex. 4 at 167:3-25.) At the same time, Trustees *do* compare their expenses to trustees of peer foundations when it suits their purposes, such as when touting their "efficiency" when this Court asked Trustees to justify their overhead expenses in 2017 (Aff. Ex. 228.) Trustees also continue to increase their compensation each year, despite the fact that their duties have remained the same. Aff Ex. 89; Aff. Ex. 92; Aff. Ex. 103; Aff. Ex. 104; Aff. Ex. 105; Aff. Ex. 102; Aff. Ex. 106; Aff. Ex. 107; Aff. Ex. 108; Aff. Ex. 109.)

Trustees' vague and shifting justification for their base compensation does not demonstrate that they are putting the beneficial interests of the Trust first. *See* Minn. Stat. §§ 501B.35, subdiv. 3, 501C.0802(a); *In re Sykes*, 2015 WL 4715325, at *1.

b. Trustees' Investment Advisory Fee is unreasonable in structure and amount.

Trustees' investment advisory fee also violates Trustees' duty of loyalty and separately merits removal. Under the duty of loyalty, 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," except in "discrete circumstances." Restatement (Third) of Trusts § 78 (2007). As such, "self-hiring by a trustee is generally prohibited as a form of self-dealing." *Id.* § 78 cmt. c(5). However, "in some circumstances a trustee may provide to the trust, and receive additional compensation for, special services that—while not required of trustees generally—are necessary or appropriate to prudent administration of the trust." *Id.* At the same time, "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.*; *see also* Minn. Stat. § 501C.0901, subdiv. 7 ("In 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.").

From the outset, Trustees' contractual arrangement to each pay themselves 0.15% of the Trust's total non-BFC assets to provide investment services do not bear the hallmarks of arms-length arrangements serving the "interest of the beneficiaries." *See* Restatement (Third) of Trusts § 78 cmt. c(5) (2007). Lipschultz and Reardon signed the Investment Services Agreements as in their individual capacities. (Aff. Ex. 9 at 83:9-14; Aff. Ex. 8 at 100:3-13.) In drafting and signing the agreements, Lipschultz and Reardon did not hire separate counsel to differentiate the Trust's best interests from their individual self-interests. (Aff. Ex. 8 at 100:14-21.) Since signing the agreements eight and ten years ago, Trustees have never renegotiated, revisited, or revised their contracts with themselves in their individual capacities. (Aff. Ex. 9 at 85:24-86:2; Aff. Ex. 8 at 107:23-25.) Despite the fact these services can be provided by other vendors, Aff. Ex. 9 at 86:1-8, and that OBT regularly seeks out competitive bids from the marketplace for its other vendors, Aff. Ex. 3 at 68:7-23; Trustees have never bid out these services to other vendors in the marketplace, Aff. Ex. 9 at 86:9-11. As such, Trustees have taken no steps to determine by whom the services "may best be provided." *See* Restatement (Third) of Trusts § 78 cmt. c(5) (2007); *see also id.* cmt. d (stating that the "danger that exists" if a trustee "claims extra compensation for services that could have been performed by another," is that he will be "tempted to . . . employ himself even if another person might render better service").

Additionally, Trustees have failed to ensure that their separate services are "reasonably necessary" in the first place. *See* Restatement (Third) of Trusts § 78 cmt. c(5) (2007). To the contrary, the Trust is paying multiple times over for investment services. *First*, the Trust already pays the Trustees to manage Trust assets as part of their ordinary compensation under the Trust

Instrument (including Johnson, who is not paid a special investment fee). *See* Aff. Ex. 7; *see also* Minn. Stat. §§ 501C.0815; 501C.0901. As Johnson stated, if "managing the Trust's assets is a core duty," then the additional investment advisory fee is "contradictory." (Aff. Ex. 16.) *Second*, the Trust pays "third-party subadvisors" like Tealwood (where Johnson's husband served as a Vice President until 2018) and Bremer Wealth Management to perform investment services, most of whom are each paid a separate percentage of the pool of non-BFC assets that each directly manages. (Aff. Ex. 3 at 38:2-5.) *Third*, the Trust pays Lipschultz 0.15% of the Trust's total non-BFC assets, including those assets managed by separately paid subadvisors, to serve as an investment manager for the Trust. (Aff. Ex. 3 at 38:2-5.) And *fourth*, the Trust pays Reardon 0.15% of the Trust's total non-BFC assets, including those assets managed by separately paid subadvisors, to perform the exact same services as Lipschultz.

In addition to these redundancies, other evidence shows that Lipschultz and Reardon's fees are neither necessary nor reasonable. For example, in contrast to the subadvisors, who each "make their own, independent purchase and sale decisions," Lipschultz and Reardon do not directly buy, sell, or "have formal trade approval" over the assets they manage. (Aff. Ex. 117; Aff. Ex. 9 at 88:23—89:4.) Instead, investments are left to the subadvisors' discretion. Additionally, their fee does not vary depending on the performance of the account, or the amount of time they spend on investment activities, which they do not track. (Aff. Ex. 9 at 85:8-12; Aff. Ex. 3 at 323:11-17.)

Further, Trustees' failure to change these practices despite multiple internal and external "red flags" points to a lack of concern for the Trust's best interests. (*See* Aff. Ex. 8 at 118:18-25; 199:1-15.) Examples include: (1) the former Treasurer of BFC discouraging the contractual arrangement because the services reflected in Trustees' base salary "more accurately describes what you are doing anyway," Aff. Ex. 112; (2) external regulator concerns about Trustees' oversight over themselves in conducting these activities, *see* Aff. Ex. 96; and (3) Johnson's commentary that the arrangement was "a red flag and generally not considered good governance," *Id.* The totality of the above circumstances direct that the investment fee is not one of the "discrete circumstances" where the "strict[ ] prohibit[ion]" on self-dealing is allowed. *See* Restatement (Third) of Trusts § 78 (2007). Rather, they reflect the continued pattern of the Trustees' placing their interests above the Trust.

Finally, the reasonableness and amount of the fee is not the only concern. Rather, the self-dealing nature of the fee presents harms to the Trust that extend beyond any excessive compensation. The structure of the arrangement provides a powerful incentive for Trustees to make fundamental changes to the Trust to benefit themselves. This has already evidenced itself in significant ways discussed further below—like increasing the Trust's non-BFC holdings (such as by selling the Trust's stock), or subverting the Trust's entire charitable purpose to serve their personal ends (such as building out a "finance" arm of the Trust to facilitate more investing). This conduct necessitates removal.

5. Trustees should be removed for misappropriating Trust assets and failing to appropriately prevent, investigate, and remedy the misuse.

a. Lipschultz engaged in improper self-dealing.

Trustees should be removed for engaging in improper self-dealing and failing to appropriately prevent, investigate, and remediate Lipschultz's use of Trust assets for self-interested, non-Trust purposes.

A charitable trustee must "deal with [Trust] property for a charitable purpose," may "not act for personal gain," and shall "not place the trustee's own interests above those of the beneficiaries." Minn. Stat. §§ 501B.35, subdiv. 3, 501C.0802(a); *In re Sykes*, No. A14-2076, 2015 WL 4715325, at *1 (Minn. Ct. App. Aug. 10, 2015) (citing *In re Estate of Lee*, 214 Minn. 448, 458, 9 N.W.2d 245, 250 (1943), and *Boyum v. Jordan*, 146 Minn. 66, 68-69, 178 N.W. 158,159 (1920)). As such, a trustee is "strictly prohibited" from engaging in unauthorized "transactions that involve self-dealing." Restatement (Third) of Trusts § 78 (2007). "Self-dealing, purchasing, or renting trust assets at below-market rates, and withdrawing trust money for personal use is a breach of a trustee's fiduciary duty to a trust." *In re Jorgenson Family Tr. dated Mar. 12, 2001*, No. A12-2292, 2013 WL 3155471, at *6 (Minn. Ct. App. June 24, 2013) (citing W*iztman v. Lehrman, Lehrnan & Flom*, 601 N.W.2d 179, 187 (Minn. 1999)). Additionally, the Act specifically prohibits private foundation trustees from "engag[ing] in an act of 'self-dealing' " as defined by the IRS Code that "would give rise to liability for the tax imposed by" the applicable Code provisions. Minn. Stat. § 501B.32, subdiv. 1(b). "If the trustee appropriates trust property to the trustee's own use directly, the trustee should be removed." *Bogerts* § 527.[9]

Lipschultz has used Trust resources to benefit his private businesses and other personal interests since he started as trustee in 2012. (Aff. Ex. 9 at 77:11-12.) He has used Trust office space, staff time, technology, supplies, and postage to benefit his private businesses or other personal non-Trust affairs. (Aff. Ex. 9 at 76:20-25; Aff. Ex. 37 at 58:7-20; Aff. Ex. 32 at

[9] *See In re Sykes*, 2015 WL 4715325, at *1–2 (holding district court did not abuse its discretion by removing trustee who "improperly used trust funds for personal gain" by seeking payment or reimbursement of personal obligations); *In re Jorgenson Family Tr. dated Mar. 12, 2001*, No. A12-2292, 2013 WL 3155471, at *6 (Minn. Ct. App. June 24, 2013) (upholding removal of trustee who breached duty of loyalty and committed several serious breaches of trust when he "favored himself in transactions with the trust and, in a number of instances, used trust assets for his own purposes"); *Schneider v. Oestreich*, No. 82-CV-16-3220, 2017 WL 9433848, at *12 (Minn. Dist. Ct. Jan. 4, 2017) (finding that there was no genuine issue of material fact trustee committed a serious breach of trust and that removal was permitted pursuant to Minn. Stat. § 501C.0706 where trustee "used his position for his own benefit").

66:18—67:2, 71:20—72:21; Aff. Ex. 32 at 71:20—72:21, Aff. Ex. 32 at 71:20–72:21; 102:09—103:10; Aff. Ex. 32 at 65:14—66:1; Aff. Ex. 68.) Evidence includes Lipschultz' corporate business filings and web sites, which list the Trust's address as their registered offices Aff. Ex. 65, Aff. Ex. 66; Aff. Ex. 9 at 61:9—65:6, 67:3-20, 68:16—69:6; his own emails assigning staff to work on his personal interests, and evidencing that he could not "keep . . . straight" what was personal and Trust business, Aff. Ex. 67, Aff. Ex. 32 at 65:14—66:1; Aff. Ex. 68, Aff. Ex. 69; Aff. Ex. 70; testimony and documents from staff members who either witnessed or discussed concerns about the misuse, Aff. Ex. 32 at 71:20—72:21 Aff. Ex. 9 at 76:20-25; Aff. Ex. 37 at 58:7-20; Aff. Ex. 32 at 66:18—67:2, 71:20—72:21, Aff. Ex. 32 at 71:20–72:21, Aff. Ex. 37 at 112:1-4; Aff. Ex. 72; Aff. Ex. 39 at 75:20; Aff. Ex. 47 at 14:6-15, 15:8-25, 17:19-25, Aff. Ex. 3 at 88:6-18, Aff. Ex. 73, Aff. Ex. 74; Lipschultz's own testimony admitting to using Trust resources to further non-Trust purposes, Aff. Ex. 9 at 77:11-12; and the Trust's Amended Form 990-PF and corresponding Form 4720 in which Trustees disclosed Lipschultz's self-dealing and paid the resulting tax, Aff. Ex. 75; Aff. Ex. 76; Aff. Ex. 77; Aff. Ex. 9 at 81:15—82:3.

Lipschultz has unquestionably engaged in "act[s] of 'self-dealing' " subjecting the Trust to taxes in violation of the Act, the Code, the IRS Code, and his fiduciary duties, and should be removed on this basis alone. *See* Minn. Stat. §§ 501B.32, subdiv. 1(b), 501B.35, subdiv. 3, 501C.0802(a); *In re Sykes*, No. A14-2076, 2015 WL 4715325, at *1 (Minn. Ct. App. Aug. 10, 2015).

b. Co-Trustees' failed to properly prevent, investigate, and remediate Lipschultz's longstanding misuse.

Relatedly, Lipschultz's co-Trustees failed to act with loyalty and care to prevent, investigate, and redress the misuse. A trustee "shall take reasonable steps to . . . protect the trust property." Minn. Stat. § 501C.0809(b). "It is ordinarily a breach of trust for a trustee to allow a co-trustee to have such control of the trust property as to enable him to misappropriate it." Restatement (Second) of Trusts § 184 cmt. a (1959). A trustee "shall exercise reasonable care" to "prevent a cotrustee from committing," and "compel a cotrustee to redress," a serious breach of trust. Minn. Stat. § 501C.0703(g).

Initially, Trustees failed to create sufficient structural safeguards to prevent the misuse in the first place. Employees specifically avoided reporting misuse because (1) there was no one to report it to, and (2) they feared "[p]otential retaliation" if they did. (Aff. Ex. 37 at 112:18—113:4; Aff. Ex. 32 at 75:08—76:09.) Further, Johnson and Reardon failed to appropriately investigate Lipschultz's activities. Lipschultz's conduct was longstanding and not a secret. (*See* Aff. Ex. 32 at 71:20—72:21 Aff. Ex. 9 at 76:20-25; Aff. Ex. 37 at 58:7-20; Aff. Ex. 32 at 66:18—67:2, 71:20—72:21, Aff. Ex. 32 at 71:20–72:21, Aff. Ex. 37 at 112:1-4; Aff. Ex. 72; Aff. Ex. 39 at 75:20; Aff. Ex. 47 at 14:6-15, 15:8-25, 17:19-25, Aff. Ex. 3 at 88:6-18, Aff. Ex. 73, Aff. Ex. 74.) If there were any doubt, the Controller's email instructing that "**the three Trustees[ ] are prohibited from using any Foundation resources for personal or non-OBT business- related use**," removed it. (Aff. Ex. 73 (emphasis added); Aff. Ex. 74.) Nonetheless, neither Reardon or Johnson inquired about the email, or took any steps to investigate what triggered it. (Aff. Ex. 4 at 97:1-18; 99:3-14; Aff. Ex. 3 at 96:11-24.)

Even assuming that, unlike every other Trust employee, co-Trustees indeed first discovered the prohibited transactions during the AGO's investigation, Trustees failed to employ appropriately independent procedures to remedy it. (*See* Aff. Ex. 75; Aff. Ex. 76; Aff. Ex. 77).) Co-Trustees and counsel allowed Lipschultz, admitted self-dealer who dismissed the misuse as "de minimus," Aff. Ex. 9 at 77:11-19, and "matters of administrative convenience," Aff. Ex. 78

at Interrog. No. 45; to "determine the extent of his use of OBT resources in connection with his investments," *see id.* Specifically, the Trust's accountants and counsel relied on Lipschultz to estimate the amount of time he asked Trust staff to perform non-Trust functions. (*Id.*; Aff. Ex. 9 at 78:7—79:6.) Finally, the fact that co-Trustees and counsel did not credit an employee's own assessment of how her own time was apportioned, and directed her to mitigate her testimony in an affidavit, does not inspire confidence that the process put the Trust's interests first. (Aff. Ex. 9 at 78:7—79:6; Aff. Ex. 71.)

6. Trustees should be removed for making substantial investments with Trust assets that are prohibited by law and the Trust's investment policies.

Trustees also failed to properly administer Trust assets by making substantial investments prohibited by law and the Trust's own policies. The failure of a Trustee "to administer and manage property held for charitable purposes in accordance with law" is a breach of trust. Minn. Stat. § 501B.41. "A trustee shall invest and manage trust assets as a prudent investor would" and "shall exercise reasonable care, skill, and caution." Minn. Stat. § 501C.0901, subdiv. 2(a); *see also* § 501C.0804. In investing trust funds, a trustee "has a duty to conform to any applicable statutory provisions governing investment by trustees." Restatement (Third) of Trusts § 91(a) (2007).

Trustees, Thompson, and the Trust's auditor, all admit that (1) the Trust is subject to the Volcker Rule; (2) Trustees are prohibited from investing Trust assets into funds covered by the Rule; and (3) Trustees invested in these funds anyway [redacted] (Aff. Ex. 224; Aff. Ex. 225; Aff. Ex. 3 at 155:3-9, Aff. Ex. 9 at 311:10-18; (Aff. Ex. 9 at 136:23-25, 311:10-18, 23-25; Aff. Ex. 3 at 155:3-9.) Further, Trustees' own Investment Policy states that "[i]nvestments prohibited by law and/or regulation" and "Direct or Indirect investments in hedge funds or private equity funds ('covered funds'), as broadly defined under the Volcker Rule," are "prohibited under this Policy." (Aff. Ex. 115 at sec. 5.03.)

Nonetheless, from late 2019 through at least May 2020, Trustees have moved about $143 million of the Trust's public securities and cash into private fund investments prohibited by the Volcker Rule, with future pending commitments. (Aff. Ex. 9 at 309:18-23; Aff. Ex. 226; Aff. Ex. 227) Notably, Trustees made the investments under the heavily criticized governance structure that allowed them to oversee their own investment decisions. (*See* Aff. Ex. 96.) This constitutes a breach of trust and a basis for Trustees' removal.

B. Trustees Should be Removed for Diverting the Trust's Focus from Charitable to Financial Purposes.

Trustees should also be removed for subverting the Trust's charitable purposes into a self-interested financial focus and purpose for the Trust.

A trustee has the duty to "administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with" the law. Minn. Stat. § 501C.0801. In accordance with this duty, trustees must honor the settlor's intent and the trust's purpose. *Norwest Bank v. Beckler*, 663 N.W.2d 571, 580 (Minn. Ct. App. 2003) (stating trustee must not "defeat[ ] the settlor's intent or the purposes of the trust"); *United States v. O'Shaughnessy*, 517 N.W.2d 574, 577 (Minn. 1994) (stating any "attempt to violate the settlor's intent or the trust's purpose" is an abuse of trustee's discretion). Specifically with respect to charitable trusts, trustees are subject "to equitable duties to deal with the property for a charitable purpose." Minn. Stat. § 501B.35, subdiv. 2. A "charitable purpose" includes any "charitable, philanthropic, religious, social service, educational, eleemosynary, or other public use or purpose." *Id.* "If the views of a trustee are or become such that he is hostile to the purposes of the trust, he can be removed." Restatement (Second) of Trusts § 387 cmt. a (1959).

Trustees have relegated the entire purpose for the Trust's existence to benefit the public to second-class status—in contrast with their efforts to reframe the Trust itself into an investment firm in its own right. This is evidenced by Trustees' intent to (1) "employ a more corporate mindset," Aff. Ex. 4 at 126:7-16, and evolve the "OBT 'brand' from grantmaker to impact investor," Aff. Ex. 117; (2) Trustees' consideration of their own interests and investor backgrounds in determining that the Trust should "live at the intersection of finance and philanthropy," Aff. Ex. 9 at 105:2-22; (3) changing the name Otto Bremer assigned to the Trust from "Otto Bremer Foundation" to "Otto Bremer Trust" because "Foundation" was too philanthropy-focused and not "inclusive of the Trust's other activities of operating the business of a bank holding company" or "its other investments," Aff. Ex. 7 at ¶ 2; (4) reframing all of the Trust's activities, including grants, as "investments" providing either "social, financial, or hybrid" returns, Aff. Ex. 119; (5) creating a pass-through limited liability subsidiary with the decidedly financial name of "Community Benefit Financial Company" for Lipschultz and Reardon to run the Trust's investment activities, Aff. Ex. 8 at 267:2-13, 271:14-25, 272:5-10; Aff. Ex. 121; and (6) building out their opulent offices to expand the "finance" arm of the Trust, Aff. Ex. 8 at 267:2-13, 271:14-25, 272:5-10; Aff. Ex. 121—all while simultaneously reducing their program staff, Aff. Ex. 4 at 100:12-17; Aff. Ex. 37 at 122:20—123:11; ceasing all engagement with grantee stakeholders, Aff. Ex. 39 at 14:5-18; and otherwise relegating Trust's charitable purposes to second-class status.

In essence, Trustees, specifically Lipschultz and Reardon, are not as interested in fulfilling the Trust's charitable purposes as they are growing its money. Because they are more interested in finance; they have molded the Trust in their own image. While it is important to be good stewards of the Trust's assets, making money is a means to an end—not an end in itself.

Further, these structural changes were the inevitable result of the Trust's self-dealing arrangement with Lipschultz and Reardon, who personally benefit from these investment activities. The more that the Trust purposes are directly reframed to specifically encompass investment activities—the more they can justify their time and compensation on these purposes. Trustees' subversion of the Trust's purposes to their own interests is disloyal and violate the true purpose of the Trust—to serve the public as set forth in the Trust Instrument. Trustees should be removed on this basis.

C. Trustees Should be Removed for Selling the Trust's Primary Asset in a Reckless Manner, Without Due Respect to the Settlor's Intent, and in Furtherance of their Personal Interests.

As shown below, Trustees should also be removed for knowingly engaging in a rushed, reckless, high-stakes transaction to further their self-interested motives, without providing appropriate consideration to settlor's intent, without prior court approval or other mitigating steps, and without engaging with the AGO in good faith and in a manner that would enable it to protect the beneficial interests of the public.

Initially, it is important to clarify what the AGO is *not* arguing here. *First*, although the AGO does not concede that the Trust Instrument provision that "Trustee is *directed* to retain the shares of stock in the Otto Bremer Company," and 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" is a "discretionary" act by Trustees; the AGO assumes for the sake of this Petition that the Trust Instrument does provide Trustees discretion, and that Trustees abused that discretion nonetheless in a manner that requires removal. (Aff. Ex. 7 at ¶ 16 (emphasis added). As such, Court interpretation of this provision is unnecessary. *Second*, the AGO does not categorically assert that no circumstances existed at the time of the sale that could have potentially justified a potential action by a trustee; or opine on when such circumstances might exist in the future. Rather, the AGO asserts that regardless of these circumstances, Trustees' motives and conduct in this case do not reflect appropriate regard for the "terms and purposes" of the Trust under their strict fiduciary standards. And *third*, the AGO does not assert that BFC's actions were appropriate or justified, and takes no position on the claims and defenses it has asserted in the related litigation.

Rather, the AGO's position is that the reckless manner that Trustees exercised their discretion in selling the shares, their self-interested motives for doing so, and their failure to engage with the AGO in good faith, merits their removal.

1. Trustees should be removed for failing to apply appropriate consideration to the Trust Instrument in determining whether the Sale was prudent.

Trustees first should be removed for failing to apply appropriate consideration to the Trust Instrument's instruction that the "Trustee is directed to retain the shares of stock in the Otto Bremer Company," and 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." *See* Aff. Ex. 7 at ¶ 16; Minn. Stat. § 501C.0801; *In re Revocable Tr. of Margolis*, 731 N.W.2d 539, 546 (Minn. Ct. App. 2007) (stating Trustees "have a duty to act pursuant to the terms of the trust, and they commit a breach of trust when they fail to do so"). "Even where trustees have absolute, unlimited, or uncontrolled discretion, any attempt to violate the settlor's intent or the trust's purpose is considered an abuse of that discretion." *United States v. O'Shaughnessy*, 517 N.W.2d 574, 577 (Minn. 1994).

Trustees did not act in good faith because their "primary consideration" for selling the shares was manufactured to achieve a predetermined objective—not to remediate an unforeseen problem. (Aff. Ex. 137; Aff. Ex. 8 at 185:2-11; Aff. Ex. 4 at 191:3-15). Trustees first started exploring a sale as early as 2018, which cuts against their assertion that "[c]ircumstances changed dramatically in 2019, when, for the first time, there was a market for the BFC shares." (Aff. Ex. 6 at Interrog. No. 18; Aff. Ex. 123; Aff. Ex. 8 at 160:1-5; Aff. Ex. 8 at 160:11—161:10; Aff. Ex. 117; Aff. Ex. 9 at 99:7-13.) Trustees induced the "unsolicited" proposal intended to create a "storyline" justifying the higher share price and resulting "unforeseen" circumstances. (Aff. Ex. 126; Aff. Ex. 127; Aff. Ex. 128; Aff. Ex. 154; Aff. Ex. 130; Aff. Ex. 131; Aff. Ex. 132; Aff. Ex. 135 at 44:16-24). Further, Trustees, asserting that they had "absolute" and "broad and unchallengeable" discretion to sell the shares, believed that they could manufacture arguments of convenience why the shares needed to be sold "when it counts - which is in court." (Aff. Ex. 8 at 29:18—30:4; *see also* Aff. Ex. 139; Aff. Ex. 140.)

Lipschultz also dismissed BFC as "just a bank," scorned potential buyers who spent "too much time serenading us with all of the good that [they do] for communities," and derided the "ridiculous" premise that "losing Bremer Bank would be a big loss to our community." (Aff. Ex. 207.) Trustees' words and conduct do not reflect a careful and thoughtful consideration of Otto Bremer's intent when they signed the "death warrant" of the historic partnership with BFC. (Aff. Ex. 163; Aff. Ex. 208.)

2. Trustees should be removed for selling Trust property despite their personal interests in the outcome of the transaction.

Trustees also breached trust engaging in the Sale despite having a personal stake in the outcome. A "trustee owes a duty of loyalty to the beneficiaries." Minn. Stat. § 501C.0802(a). The duty of loyalty prohibits a trustee from placing his "own interests above those of the beneficiaries." *Id.* 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*, 190 Minn. 410, 413, 252 N.W. 423, 425 (1934) (emphasis added). A trustee violates the duty of loyalty in the course of selling trust property where he "has a personal interest in the purchase of such a substantial nature that it might affect his judgment in making the sale." Restatement (Second) of Trusts § 170 cmt. c (1959); *see also* Minn. Stat. § 501C.0802 (stating that a "transaction involving the investment or management of trust property entered into by the trustee" which is "affected by a conflict between the trustee's fiduciary and personal interests is voidable"). Removal is appropriate when a trustee engages in a transaction with self-interested motivations. *See In re Jorgenson Family Tr. dated Mar. 12, 2001*, No. A12-2292, 2013 WL 3155471, at *6 (Minn. Ct. App. June 24, 2013).

Under decade-old unrevised contracts Johnson characterized as an "inherent conflict of interest" and "not good governance;" Reardon and Lipschultz each earn 0.15% of the market value of the Trust's entire non-BFC assets. (Aff. Ex. 95; Aff. Ex. 4 at 116:22—117:11; Aff. Ex. 111; Aff. Ex. 113.) Under this arrangement, the more assets the Trust holds in cash and not in BFC stock, the more money Lipschultz and Reardon individually stand to make, thus providing self-interested incentives "of such a substantial nature" as to impair Trustees' loyalty to the beneficiaries and breach trust. *See* Restatement (Second) of Trusts § 170 cmt. c (1959).

Although the existence of the conflict itself is sufficient to establish a breach, *see Tolversen*, 190 Minn. at 413, 252 N.W. at 425, the evidence supports that Trustees did, in fact, pursue their self-interests when deciding to sell. First, in acknowledgement of the apparent conflict, Trustees imposed a two-year freeze on their investment fees and other compensation as a "statement of good faith"—but did not agree to a permanent freeze, resign their Investment Manager positions, or take similar actions that could have quickly eliminated the self-interested incentives. (Aff. Ex. 216; Aff. Ex. 4 at 272:14-22; Aff. Ex. 4 at 272:24—273:7.) To the contrary, they expanded the "investment" arm of the Trust to receive sale proceeds in a shielded subsidiary run by Lipschultz and Reardon. (Aff. Ex. 8 at 267:2-13, 271:14-25, 272:5-10; Aff.

Ex. 119.) (Aff. Ex. 9 at 102:21—103:10; Aff. Ex. 37 at 122:7-15; Aff. Ex. 121; Aff. Ex. 3 at 22:4-14.)

Trustees' own words also evidence their self-interested motivations for the sale, including Lipschultz's acknowledgement of how their conduct could create a perception that it "was all gaming to get rid of the 'real' board and takeover the company for our own selfish end,"Aff. Ex. 209; opining that "[m]aybe the trustees are motivated by money," but challenging whether there is "anything wrong with that," Aff. Ex. 210; and referencing an "exit price" to separate from the Trust after the Sale, Aff. Ex. 164. Finally, particularly with respect to Lipschultz, the self-interested motivations extended beyond the pecuniary to "self-aggrandiz[ing]" animosity and a desire to punish Directors and management. *See, e.g.*,Aff. Ex. 211; Aff. Ex. 158; Aff. Ex. 229; Aff. Ex. 230; Aff. Ex. 170. A Trustee who is motivated by personal grudges and animosity cannot apply his undivided loyalty to the Trust's charitable purposes.

3. Trustees should be removed for acting recklessly in the manner that they sold Trust assets.

Even if Trustees had unfettered discretion to sell the shares, appropriately determined that the shares had to be sold, and had no self-interested motives for the Sale; Trustees should still be removed for selecting an unquestionably reckless path to achieve their goals.

A trustee must "administer the trust as a prudent person would," considering "all relevant circumstances." Minn. Stat. § 501C.0804. "In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution." Minn. Stat. § 501C.0804; *see also* § 501C.0901, subdiv. 2(a) (prudent investor standard). This standard requires a trustee "to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property." Restatement (Second) of Trusts § 174 (1959). Regardless of the "breadth of discretion" granted in a trust, a trustee must "exercise a discretionary power in good faith, in accordance with the terms and purposes of the trust and, in the best interests of the beneficiaries." Minn. Stat. § 501C.0814(a).

Indeed, even under the much more lenient duty of care standard applicable to corporate directors,[10] directors have "a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them," act "reasonably to learn about actual and potential conflicts faced by directors, management, and their advisors," and "act with requisite care in the discharge of their duties." *Potter v. Pohlad*, 560 N.W.2d 389, 392 (Minn. Ct. App. 1997); *In re Rural Metro Corp.*, 88 A.3d 54, 89 (Del. Ch. 2014). Further, under this more lenient standard, the "imposition of time constraints on a board's decision-making process may compromise the integrity of its deliberative process." *Id.* at 89. "History has demonstrated boards that have failed to exercise due care are frequently boards that have been rushed." *Id.* (citation omitted). Removal is appropriate when a "trustee's judgment is unreasonable and results in unnecessary losses." *Bogerts* § 527.

As demonstrated below, Trustees' reckless conduct has subjected the Trust and its assets to unreasonable, unnecessary, and immeasurable harm. Removal is justified under these facts.

a. Rush and lack of control.

First, Trustees' judgment was unreasonable because they completed the unprecedented, high-stakes transaction by rushing the process and vesting complete control over the most material aspects of the transaction to their agent, KBW. *See Rural Metro*, 88 A.3d at 89.

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[10] Again, Trustees' duty of prudent administration is much higher than the business judgment rule, and the AGO under no circumstances asserts that the more lenient standard applies here. Rather, if conduct would implicate violations of the more lenient standard, it is instructive to the question of whether Trustees' conduct was reasonable under a much more strict review.

Trustees voted to sell the shares to the investors on October 11, 2019. (Aff. Ex. 167.) By October 25—*two weeks later*—the sale of $87 million of its charitable assets had closed. *See, e.g.*, Aff. Ex. 182; Aff. Ex. 183; Aff. Es. 184.) It is unfathomable how, in any circumstances, appropriate diligence for the sale of the Trust's most important asset could be conducted during this time period. At the same time, Trustees completely delegated fundamental terms of the sale—the price and the buyers—to its agent KBW, whom Trustees had indemnified, and who had a $5 million incentive to complete the sale regardless of the risks to the Trust.

The AGO understand that Trustees assert that to achieve their end, (1) they had to structure the deal abdicated control over price and buyers in this manner to avoid acting in "concert" with the investors in violation of federal laws, (2) the "hard charging" investment firms may have been the only takers for a deal of this structure, and (3) they had to move quickly to avoid third parties (like the AGO) from trying to stop them. But this "ends justify the means" approach should be rejected. If a path is unreasonable, then it is unavailable to a Trustee.

b. "Guaranteed" and "inevitable" litigation.

Second, Trustees acted recklessly because they staged a hostile takeover of the Trust's primary asset knowing beforehand that it would "result in a cascade of unfortunate consequences" that would drain Trust assets, including a "protracted battle" with BFC, an AGO investigation, and other potential regulatory action. *See* Aff. Ex. 181(emphasis added); Aff. Ex. 9 at 217:24—218:1; Restatement (Third) of Trusts § 88 cmt. d (2007) (noting potential trustee liability for attorneys fees "incurred by trustees in controversies" involving "allegations of breach of trust and thus exposing the trustee personally to risks").

Evidence of Trustees' pre-sale knowledge includes, but is not limited to, the following:

- Trustees' knowledge that BFC would "never open the door to outright sale" in April 2019, Aff. Ex. 126;

- Trustees exploration of breach-of-fiduciary-duty insurance coverage for "litigation brought against the Trustees or OBT by a BFC employee arising from any transaction involving BFC," as early as June 2019, Aff. Ex. 143; Aff. Ex. 3 at 143:14-23; Aff. Ex. 9 at 158:13-17; Aff. Ex. 144; Aff. Ex. 3 at 149:8-10; *see also* Aff. Ex. 141 (exploring personal liability);

- Trustees' acknowledgement in July 2019 that BFC hired a world-famous "anti-takeover" firm and that "things are heating up," Aff. Ex. 9 at 163:23—164:2; Aff. Ex. 142;

- An August 5 meeting where "BFC and counsel for OBT discussed the possibility that litigation could be brought to prevent a potential sale of BFC shares," Aff. Ex. 146;

- Extensive Director discussions with Trust law experts that a "transaction could be challenged in court by multiple parties" including the AGO and BFC, Aff. Ex. 151; Aff. Ex. 8 at 229:4—230:7;

- Trustees' pre-sale discussions with potential investors and agreements to mitigate to buyers the risk of Federal Reserve objection, AGO objection, and BFC lawsuits, Aff. Ex. 162 at Interrogs. 1(2), 1(4); Aff. Ex. 9 at 196:1-24; Aff. Ex. 172; Aff. Ex. 135 at 264:22—265:4, Aff. Ex. 173 at Interrog. 1(2); Aff. Ex. 174 at Interrog. 1(7); Aff. Ex. 171 ("What if things don't go according to plan?"); Aff. Ex. 162 at Interrogs. 1(2), 1(4); Aff. Ex. 175 at Interrog. 1; and

- Trustees' internal acknowledgements it was "**guaranteed**" that Trustees would get "smeared and sued" and "wind up as defendants in the **inevitable**" litigation, "put[ting the Trust's] major investment in jeopardy," and draining "years of reserves" of charitable Trust assets in legal fees, Aff. Ex. 159; Aff. Ex. 160; Aff. Ex. 212; Aff. Ex. 158.

The AGO does not contend that BFC's actions were necessarily appropriate, that all litigation is or should be avoidable, or that Trustees had control over all the circumstances leading to the litigation. But Trustees' conduct is not a comparative fault analysis. To the extent that BFC or other third parties wrongfully contributed to harm to the Trust, Trustees' successors can vindicate those interests separately. The question here is whether the Trustees alone acted prudently when faced with these known risks, particularly when there were opportunities to mitigate them, as discussed further below.

c. Futility.

Third, Trustees acted recklessly because they knew there was a substantial risk that the plan they pulled together in a few short months would not work in either the short or long-term.

The risk of futility and resulting harm to the Bank was discussed at length in Board meetings, specifically that "a failed sales process can be damaging for any company, particularly financial institutions." (Aff. Ex. 151.) Trustees and the investors discussed how BFC and others might impede the takeover by "[b]locking or delaying the conversion of the [investor's] shares to voting shares." *See* Aff. Ex. 162 at Interrogs. 1(2), 1(4), Aff. Ex. 200 at Interrog. 1. Further, as Trustees internally discussed prior to the Sale, even if they could successfully sell to the investors, the ultimate plan to sell the *entire* bank—Trustees' sole justification for the October Sale—would not work if even "one of the investors[ ] decided that they weren't going to vote in favor of" a sale. *See* Aff. Ex. 9 at 258:10-19. And as Trustees also discussed pre-sale, even if Trustees successfully took over the bank, if all of the new Directors were on board for a future sale—and if there was still a market for BFC at that point—regulators might not approve of the ultimate sale of all of BFC anyway. *See* Aff. Ex. 9 at 260:5-13.

d. Hostile interests.

Fourth, Trustees acted recklessly and contrary to Trust purposes in their selection of potential buyers. Ever since the Plan of Reorganization diluted the Trust's sole control over BFC, Trustees and the employee shareholder-appointed Directors have had to maintain a delicate balance of interests. (*See* Aff. Ex. 6 at Interrog. No. 23; Aff. Ex. 18; Aff. Ex. 19.) This balance was difficult enough when Trustees and employees were the only shareholders. *See* Aff. Ex. 4 at 214:17-24 (noting solutions balancing potentially diverging interests are "never perfect for either one"). Trustees also knew that to avoid violating federal banking laws, they could not have any agreement about or control over what the investors did with their shares. Aff. Ex. 8 at 244:7-12. Under this framework, Trustees invited 19 different hedge funds owned by 11 investments firms across the country into the arrangement—investors that Trustees specifically sought out because they "only care about making money" and were "aggressive animals that would swoop in and go for the BFC jugular." (Aff. Ex. 169; Aff. Ex. 170.) Even if BFC had to be sold, it is difficult to envision a scenario where the interests of these particular investors, over whom Trustees have no control, would align with the Trust's charitable purposes and Otto Bremer's intent. Trustees surrendering a substantial measure of their control over BFC to these parties does not reflect "reasonable care, skill, and caution." *See* Minn. Stat. § 501C.0804.

e. Failure to mitigate.

Fifth, Trustees acted recklessly by failing to take steps that could have mitigated the harm to Trust assets.

They initially failed to mitigate by failing to seek from this Court and the AGO an approval, instruction, or a declaration of rights concerning the Sale. A trustee may ask this Court to instruct him or her "regarding any matter involving the trust's administration or the discharge of the trustee's duties, including a request for instructions and an action to declare rights." Minn. Stat. § 501C.0202(24). With respect to charitable trusts, "if a trustee has a power of sale, the trustee may want to seek court approval of a sale, especially in cases where the trustee believes that the sale might face objections from the settlor, beneficiary, or attorney general." *Bogerts* § 392. This provision "protect[s] the trustees under circumstances where, in the opinion of competent lawyers, the meaning of the trust instrument may be in doubt or . . . where there [is] uncertainty as to the proper application of the law." *In re Warner's Tr.*, 275 Minn. 174, 179–80, 145 N.W.2d 542, 546 (1966). A trustee who proceeds under these circumstances without instruction is "not compelled to take this risk" and does so "at its peril." *Redmond v. Commerce Tr. Co.*, 144 F.2d 140, 154 (8th Cir. 1944).

Trustees acknowledged that the Sale was opening a "once-in-lifetime door for which there is no going back." Aff Ex. 128. They knew they were "dramatically alter[ing] the structure of OBT and BFC." (Aff. Ex. 124). "Competent lawyers"— specifically, the President-elect of the American College of Trust and Estate Counsel[11]—challenged Trustees' interpretation of the Trust Instrument allowing them complete discretion to sell and the associated risks from their planned transaction. *See In re Warner's Tr.*, 275 Minn. At 179–80, 145 N.W.2d at 546. (Aff. Ex. 151; Aff. Ex. 8 at 229:4—230:7.) Trustees themselves considered prior court approval under a structured timeline as an option. (Aff. Ex. 6 at Interrog. 26; Aff. Ex. 161.) Yet, despite all of these circumstances, and despite the fact that the Trust has been supervised by this Court for nearly 60 years—Trustees failed to obtain any court approval or instruction, or engage with the AGO with sufficient candor as discussed infra Part II.C.4, in manner that could have mitigated the "inevitable" morass of disputes that followed.

The unreasonableness of Trustees' conduct is heightened by additional factors known to Trustees prior to the Sale. "If an ordinarily prudent person would have taken out insurance against the risks of tort liability involved, or the trust instrument required this, and the trustee failed to insure, the trustee is liable to the beneficiaries for the tort liability to the extent that it would have been covered by insurance, and his right to indemnity from trust property for the amount of tort liability ought to be similarly reduced." *Bogert's* § 731. Trustees engaged in an extremely risky high-stakes hostile takeover without court approval despite knowing that (1) the Trust needed insurance coverage for their actions, (2) they would be sued for their actions, and (3) there would be no insurance coverage for judgments or defense costs. (Aff. Ex. 144; Aff. Ex. 3 at 149:8-1.) This conduct does not demonstrate "reasonable care, skill, and caution." Minn. Stat. § 501C.0804.

While the Trustees failed to take reasonable steps like seek court approval or obtain appropriate insurance to protect the Trust *from* risks, they did shift the known risks of BFC

[11] *See* https://www.lathropgpm.com/Ann-Burns (last visited Aug. 2, 2020.)

obstruction or objection from the sellers *to* the Trust by agreeing in advance to make dividend payouts to the investors while any litigation was pending, and indemnified their agent, KBW. (Aff. Ex. 176 at Interrog. 1(3); Aff. Ex. 178.) Trustees did not continue to hold the Sale proceeds in escrow, put the dividend payments in escrow, or negotiate specific terms with the investors about the dividend payments in the event the Sale was invalidated. (Aff. Ex. 3 at 172:11-23, Aff. Ex. 3 at 173:5-8; Aff. Ex. 8 at 260:5-18; Aff. Ex. 9 at 251:3-25; Aff. Ex. 135 at 258:4-16.) Trustees also advocated for additional parties to "pile in" the litigation, increasing the complexity and costs of the dispute. (Aff. Ex. 231; Aff. Ex. 212.) These actions do not reflect appropriate regard for the costs to the Trust.

f. Costs to the Trust.

Finally, although the AGO requests that the Court defer the extent of the harm and appropriate restitution until after removal, *see* Pet. ¶ 27, the seriousness of the consequences of Trustees' actions is relevant to the removal inquiry, *see Bogert's* § 527 (stating removal may be decreed if a "breach of trust, though honest, results in serious losses").

Potential harms include, but may not be limited to: (1) the $39.5 million difference between Trustees' own valued price at $174.50/share and the $120.00/share price they "had to accept" from the investors "in order to complete the sale," Aff. Ex. 174; Aff. Ex. 171; Aff. Ex. 232; Aff.Ex. 221; *see also Heilig Bros. Co. v. Kohler*, 366 Pa. 72, 79, 76 A.2d 613, 616 (1950) ("Failure by a fiduciary to obtain the most advantageous price constitutes a breach of trust."); (2) reputational and other harms to the Trust's primary asset, BFC, Aff. Ex. 122 at 125:7-11, 139:9-13; Aff. Ex. 146 Interrog. No. 6; (3) disruption to the Trust's own operations and BFC relationship, *see* Aff. Ex. 206; Aff. Ex. 8 at 185:16-17; Aff. Ex. 122 at 144:8-20; (4) excise taxes on the gain of the sale, Aff. Ex. 3 at 170:18-23; Aff. Ex. 221; (5) KBW's $5 million fee, Aff. Ex. 3 at 179:10-25; (6) nearly a million dollars in transactional legal fees, Aff. Ex. 221; Aff. Ex. 3 at

160:12-19; and (7) millions of dollars in total uninsured legal fees from litigation, which Trustees warn will exceed $20 million, and which "could be life and death" for the Trust's beneficiaries, Aff. Ex. 3 at 170:18-23; Aff. Ex. 221; Aff. Ex. 221; Aff. Ex. 223; Aff. Ex. 218.

To be clear, Trustees were unconcerned about these risks to Trust assets because they were not coming out of their own pockets. *See Restatement (Second) of Trusts* § 174 (1959) (requiring Trustee to treat trust property as he would his own). Rather, Trustees believed they could count on "years of reserves" draining charitable assets to fight it out. (Aff. Ex. 212; Aff. Ex. 8 at 185:16-17; BFC 144:8-20.) These harms to the Trust were avoidable, unreasonable, and unjustifiable. *See Bogerts* § 527. Trustees should be removed.

4. Trustees should be removed for failing to disclose material facts to the AGO necessary to protect the public's interests.

Trustees also should be removed for failing to inform the AGO about material facts relevant to the Office's supervision over charitable trust assets. Trustees of charitable trusts owe a duty to keep the AGO "reasonably informed about the administration of the trust and of the material facts necessary to protect their interests." Minn. Stat. § 501C.0813; *see also Bogerts* § 962; Minn. Stat. § 501C.0110(c). Trustees must disclose "fully, frankly, and without reservation all facts pertaining to the trust." *In re Enger's Will*, 225 Minn. 229, 239, 30 N.W.2d 694, 701 (1948). The duty to inform is specifically implicated by "significant actions under consideration involving hard-to-value assets or special sensitivity to beneficiaries," such as "liquidating or selling shares of a closely held business." Restatement (Third) of Trusts § 82 cmt. (2007). A serious failure to properly inform a beneficiary is a "particularly appropriate circumstance justifying removal of the trustee." Unif. Trust Code § 706 cmt.

At the August 16 meeting with the AGO—Trustees' only substantive pre-sale contact with the AGO—Trustees' counsel disclosed the following material facts to the AGO: (1)

Trustees' planned to sell "the entirety of [the Trust's] stock in Bremer Financial Corporation," Aff. Ex. 149; Aff. Ex. 4 at 241:7-11; (2) Trustees received an unsolicited $2 billion offer for BFC and that the increased valuation and payouts required the sale, *see* Aff. Ex. 149; (3) Trustees did not stand to benefit personally from the sale, *see* Aff. Ex. 4 at 242:7-14; and (4) Trustees would "keep the AGO informed as OBT considers its options moving forward, including providing it copies of relevant documents in a timely manner," Aff. Ex. 149.

By the time of the August 16 meeting, Trustees knew, but did *not* disclose to the AGO, the following material facts: (1) BFC's board agreeing to an outright sale "wasn't going to happen" and they anticipated litigation from BFC, Aff. Ex. 143; Aff. Ex. 3 at 143:14-23; Aff. Ex. 9 at 158:13-17; Aff. Ex. 4 at 243:1—244:19; Aff. Ex. 8 at 174:3-8; Aff. Ex. 126; (2) BFC specifically challenged the Trustees' ability to sell under the "unforeseen circumstances" provision of the Trust Instrument, Aff. Ex. 141; Aff. Ex. 4 at 243:1—244:19; (3) Trustees were seeking as an ultimate buyer for BFC "a hard charging partner focused on making money" not "a tree hugger" focused on doing good in the community Aff. Ex. 133; (4) there would be no insurance coverage if Trustees got sued, so defense costs and judgments would be paid out of Trust assets, Aff. Ex. 143; Aff. Ex. 3 at 143:14-23; Aff. Ex. 9 at 158:13-17; Aff. Ex. 4 at 243:1—244:19; and (5) Trustees earned a percentage of the Trust's entire non-BFC assets, thus providing a personal incentive to sell, Aff. Ex. 111; Aff. Ex. 113.

After the August 16 meeting, but prior to the sale, Trustees knew of the following material facts, but did not update the AGO in advance of the Sale: (1) BFC voted against the sale, but Trustees were going to proceed with a takeover, Aff. Ex. 153; (2) Trustees were going to sell to 19 different hedge funds "that only care about making money" and "would swoop in and go for the BFC jugular," Aff. Ex. 4 at 243:1—244:19; Aff. Ex. 169; Aff. Ex. 170; *see also*

Aff. Ex. 8 at 242:12-14; Aff. Ex. 9 at 210:6-17; (3) the myriad risks to that approach that could "put [the Trust's] major investment in jeopardy," Aff. Ex. 158; and (4) "protracted" litigation with BFC was the "inevitable" and "guaranteed" result from this path, Aff. Ex. 159; Aff. Ex. 160. As the supervisor of charitable trusts in Minnesota and the guardian of the public's interest in these assets, the Attorney General's interest in these specific facts could not be clearer.

Further, these omissions and representations are not simple acts of negligence. Trustees calculated a "business as usual" approach so the AGO would not be aware of the material facts until it would be too late to stop them. (*See* Aff. Ex. 145.) This is evidenced by, among other things, testimony by Trustees that they specifically factored in the AGO's ability to object when they decided against a pre-petition, Aff. Ex. 8 at 234:14—235:7; testimony that Trustees knew the AGO might object to them selling BFC shares to hedge funds, because they are "given a bad rap," Aff. Ex. 8 at 275:18—276:13; and evidence that Trustees intentionally pre-planned a meeting with the AGO to update the Office the first business day after the sale had closed and it was too late to stop them, Aff. Ex. 8 at 255:14—256:5; Aff. Ex. 180; Aff. Ex. 233.

Trustees' and counsel's failure to inform the AGO reflects a fundamental disregard not just for the authority of the Attorney General—but the AGO's rights to act on behalf of the beneficial public. They are not the actions of a fiduciary. They are the actions of an adversary. They constitute a serious breach of the duty to inform the AGO and deal with the Office in good faith, necessitating Trustees' removal. *See* Minn. Stat. § 501C.0813; Unif. Trust Code § 706 cmt.

III. ALTERNATIVELY, REMOVAL WITHOUT CAUSE BEST SERVES THE TRUST'S BENEFICIAL INTERESTS.

Even if the Court determines that the above facts do not sufficiently establish individual breaches of trust, *see* Minn. Stat. §§ 501C.0706(b)(1), 501B.41, subdiv. 7, or a collective "persistent failure of the trustee to administer the trust effectively," *see* Minn. Stat. § 501C.0706(b)(3), removal without cause is appropriate nonetheless under section 501C.0706(b)(4) of the Code.

A court can remove a trustee if "removal is requested by all of the qualified beneficiaries, 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 a suitable cotrustee or successor trustee is available." Minn. Stat. § 501C.0706(b)(4). Removal under this provision does not require a breach of trust or a substantial change in circumstances[12] if the above factors are present. *See id.*, *Lund as trustee of Revocable Tr. of Kim A. Lund v. Lund*, 924 N.W.2d 274, 285 (Minn. Ct. App. 2019), review denied (Mar. 27, 2019); *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.").) The decision to remove a Trustee is subject to the Court's discretion. *Lund*, 924 N.W.2d at 284. As shown below, all conditions are met, and removal is justified even without cause.

A. All qualified beneficiaries have requested removal.

The first condition requiring unanimous beneficiary consent is met. *See* Minn. Stat. § 501C.0706(b)(4). The Trust has no named beneficiaries. (*See generally* Aff. Ex. 7.) The sole beneficial interests of the Otto Bremer Trust are its general charitable purposes. (*See id*. at ¶¶ 3(a)-(j), 6.) The Attorney General is the sole representative of these "uncertain or indefinite charitable beneficiaries." *See* Minn. Stat. § 501B.41, subdiv. 2(5). He has all the "rights of a qualified beneficiary with respect to" the Trust, including the right to invoke the removal

[12] Alternatively or additionally, the impact of the sale and subsequent events outlined infra Part IV, including Trustees' self-interested motives in justifying their conduct and disruption to the Trust, constitute a substantial change in circumstances justifying removal.

provisions under section 501C.0706(b)(4). *See* Minn. Stat. § 501C.0110(d). As the Attorney General has requested Trustees' removal, this condition is satisfied. *See* Minn. Stat. § 501C.0706(b)(4).

B. Removal best serves the interests of all the beneficiaries.

Further, regardless of whether the Court determines that the facts outlined above rise to the threshold of "cause," they conclusively demonstrate that it best serves the beneficial interests of the Trust to remove Trustees. *See* Minn. Stat. § 501C.0706(b)(4).

The choices Trustees have made with respect to their structure, compensation, expenses, investments, and other aspects of Trust administration have resulted in an avoidable yet unabated pattern of challenges, criticism, regulator intervention, and other distractions that have undermined the purposes and operation of the Trust. (*See, e.g.*, Aff. Ex. 91; Aff. Ex. 94, Aff. Ex. 97; Aff. Ex. 4 at 151:12—152:2; Aff. Ex. 116.) Despite circumstances where Trustees could have implemented relatively straightforward changes to avoid even the appearance of the conflict, they have failed to do so. (*See, e.g.*, Aff. Ex. 4 at 150:19-22, 159:11-14, :15-20; Aff. Ex. 8 at 118:18-25; 199:1-15). Trustees' focus on applying a hard-charging "corporate mindset" to the Trust, while at the same demonstrating indifference and at times outright hostility to the communities they serve like the "panhandler on the street"—is not befitting the stewards of a Trust intended to, among other things, "relieve poverty in the City of St. Paul, Minnesota." (Aff. Ex. 7 at ¶ 3a.)

Regardless of whether it amounts to "cause," Trustees' conduct has contributed to a longstanding negative perception, fundamental mistrust, and an adversarial relationship with their peers, BFC, watchdog groups, their employees, and the public they represent. *See Bergman v. Bergman Davison Webster Charitable Tr.*, No. 07-02-0460-CV, 2004 WL 24968, at *2 (Tex. App. Jan. 2, 2004) (citations omitted) (stating that removal may be appropriate where "hostility, ill will, or other factors have affected the trustee so that he cannot properly serve in his capacity"). Trustees and BFC agree that they simply "cannot function" in light of their divergent positions. (Aff. Ex. 9 at 301:9-13; Aff. Ex. 219.) Further, Trustees have positioned themselves as adversaries to the AGO, reflecting an indifference to not just the beneficial interests it represents, but the authority of the Attorney General as a whole. *See* Restatement (Third) of Trusts Section 37 cmt. e (stating "pattern of indifference to some or all of the beneficiaries" is relevant for removal); Aff. Ex. 209); *supra* Part II.C.4.

Finally, as discussed below regarding the AGO's requested interim relief, the litigation and other matters pose immediate, serious threats to the administration of the Trust, regardless of who is to blame. Trustees' removal is paramount to protect the public interest the AGO represents. *See* Minn. Stat. § 501C.0706(b)(4).

C. Removal is not inconsistent with any material purpose of the Trust.

The Trust's sole purposes are charitable. (*See* Aff. Ex. 7 at ¶¶ 3(a)-(j).) Trustees are not related to Settlor, nor has the Settlor named these specific individuals to serve as Trustees, or otherwise indicated his intent that these specific Trustees are required to further the Trust's purposes. *See* Restatement (Second) of Trusts § 107 cmt. f (1959) (stating removal is more likely where trustee is not specifically named by settlor). Trustees' removal is not inconsistent with the Trusts' charitable purposes. *See* Minn. Stat. § 501C.0706(b)(4).

D. Suitable successor Trustees are available.

Finally, suitable successor Trustees are available. The Attorney General has identified multiple potential Interim Trustee candidates with the breadth of experience and integrity to take control over the Trust, assess immediate harms to be remedied, and, with the help of expert and community input, develop a path forward for the Trust that honors Otto Bremer's intent and the charitable purposes of the Trust. *See* Affidavits and Acceptances of Appointments. Removal is appropriate under these circumstances. *See* Minn. Stat. § 501C.0706(b)(4).

IV. THE AGO'S PETITION FOR INTERIM RELIEF IS JUSTIFIED.

"Pending a final decision on a petition to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under section 501C.1001, paragraph (b), as may be necessary to protect the trust property or the interests of the beneficiaries." Minn. Stat. § 501C.0706(c). Section 501C.1001, paragraph (b) allows the court to, among other things, "enjoin the trustee from committing a breach of trust," *id.* subdiv. (b)(2), "compel the trustee to redress a breach of trust," *id.* subdiv. (b)(3), "appoint a special fiduciary to take possession of the trust property and administer the trust," *id.* subdiv. (b)(5), "suspend the trustee," *id.* subdiv. (b)(6), "remove the trustee as provided in section 501C.0706," *id.* subdiv. (b)(7), and order "any other appropriate relief, *id.* subdiv. (b)(10). As demonstrated below, it is critical that the interim remedies requested in the AGO's Petition for Interim Relief be immediately employed to protect Trust assets and the beneficial interests of the Trust.

A. Immediate Relief is Necessary to Prevent Further Imminent Harmful Trustee Action.

The AGO's requested interim remedies are necessary because of the risk of future harm to the Trust. First, Trustees have indicated their intent to continue to "divest" the BFC assets in the short term despite drastic change in the market without any assurances that the AGO will have an opportunity to protect its interests beforehand. *See* supra Part V.N; Aff. Ex. 9 at 295:18—296:18, 297:18-2; Aff. Ex. 219; Aff. Ex. 223. Trustees have also indicated that they have made additional pending commitments to transfer millions of additional dollars in assets into private investments that are prohibited by law and Trust policy, in the midst of the AG's investigation. *See* supra Part V.M; Aff. Ex. 9 at 309:18-23; Aff. Ex. 226; Aff. Ex. 227.

Further, Trustees have made structural changes to the Trust, including creating a subsidiary intended to shield Trustees from liability and Trust assets from Supervising Court scrutiny, as substantial questions exist as to what assets Trustees plan to transfer to the LLC and under what circumstances. *See supra* Part V.I; Aff. Ex. 6 at Interrog. No. 6; Aff. Ex. 8 at 271:4—272:10; Aff. Ex. 34 at 108:4-11. Fourth, the lack of independent oversight and investigation by co-Trustees and counsel over Lipschultz's self-dealing, which is a particularly serious and conceded breach of Trust, do not provide any assurances to the AGO that these problems have been conclusively remedied and will not happen again. *See supra* Part II.5; Aff. Ex. 78 at Interrog. No. 45; Aff. Ex. 9 at 78:7—79:6; Aff. Ex. 9 at 78:7—79:6; 2020-07-08. And finally, the AGO is concerned for current Trust employees, who universally have expressed fears about Trustee retaliation for cooperating with the AGO or otherwise challenging Trustees' authority. *See supra* Part II.A.1. Interim removal or suspension, or at minimum an injunction on these actions, is critical to protect the Trust.

B. Immediate Relief is Necessary to Stem Ongoing Waste of Trust Assets.

The AGO also seeks immediate relief to cauterize the bleeding of Trust assets in the form of Trustees' attorneys' fees. The AGO has asserted that Trustees chose an aggressive, reckless path knowing that avoidable, expensive, disruptive litigation was "guaranteed" and "inevitable" if they chose this path. (Aff. Ex. 159; Aff. Ex. 160; Aff. Ex. 212; Aff. Ex. 158.) They not only failed to take appropriate mitigating steps to prevent this harm like obtaining court approval or adequate insurance—they encouraged additional parties to "pile in" and "go for the jugular." (Aff. Ex. 6 at Interrog. 26; Aff. Ex. 161; Aff. Ex. 169.) Trustees were unconcerned about the impact to the Trust because they expected to have endless "reserves" in the form of charitable assets to fight it out. (Aff. Ex. 212.) They have threatened to incur upwards of $20 million to win their “war” with BFC that far transcends a simple vindication of the Trust’s interests. (Aff. ¶ 228.).

Under these circumstances, immediate relief in the form of Trustee suspension, removal, attorney fee review, or other relief determined by the Court is necessary to protect the Trust from potentially avoidable fees, as determined by an objective fiduciary. *See Matter of Great N. Iron Ore Properties*, 311 N.W.2d 488, 494 (Minn. 1981) (where “trustees’ stood to profit personally from a resolution of the controversy in their favor,” court should have reduced attorneys fees where it “resulted in needlessly protracted litigation”); *In re Myrtle Haack Irrevocable Tr. Agreement*, No. A08-1998, 2009 WL 2016938, at *7 (Minn. Ct. App. July 14, 2009) (district court’s “concern for the voluminous and seemingly endless litigation concerning this trust” justified denial of attorneys fees “as a means of protecting trust assets by depriving the trustees of the perverse economic incentive to resolve their disputes through litigation”).

C. Immediate Relief is Necessary Because Trustees’ Personal Self-Protective Interests are Hostile and Adverse to the Best Interests of the Trust.

Immediate relief is also necessary because Trustees cannot protect the Trust and their own interests at the same time. *See* Minn. Stat. § 501C.0802(a). Trustees are in the fight of a lifetime to justify their actions. This incentive for self-preservation and entrenched litigation positions necessarily supersedes the objectivity and loyalty required for Trustees to appropriately serve the Trust.

To illustrate, Trustees’ dispute has influenced their grantmaking decisions, including denying a long-standing grant to a major metro area nonprofit, after Trustees observed the president’s post-litigation “loyalty” to BFC. (Aff. Ex. 207; Aff. Ex. 9 at 235:16—236:12.) (Aff. Ex. 220; Aff. Ex. 9 at 287:25—288:6.) Trustees have also involved employees in their dispute in ways that raise fundamental questions of how the Trust is served, including collecting OBT employee ESOP participant names "that they could use in the Bremer lawsuit," to the discomfort of those employees. (Aff. Ex. 37 at 96:22—97:13), and securing an employee affidavit in an attempt to mitigate her damaging testimony about Lipschultz's self-dealing. (Aff. Ex. 71.)

Indeed, every future action Trustees take with respect to BFC will be corrupted by the question of whether Trustees are seeking to retrospectively justify their actions, or prospectively serve the Trust. The AGO does not have certainty, for example, that Trustees used a different valuation method to ascribe a higher value to the Trust's BFC shares in their public 990-PFs—a value that contributed to substantial excise taxes for the Trust—because it favored their litigation position, or because it was actually the most prudent measure of those assets. (*See* Aff. Ex. 221; Aff. Ex. 120.) The AGO will never be sure if these specific Trustees are intent on "divesting" their BFC assets in a historically depressed market because it is the interest of the Trust to do so, or because otherwise their attempted takeover was in vain if it did not achieve their original goal. (*See* Aff. Ex. 223.) The AGO cannot be certain the Trustees will spend $20 million in Trust assets in litigation because of their personal stake in the outcome, or because it is required to vindicate the Trust's interests. (*See* Aff. ¶ 228.).

Finally, the AGO believes the Trust is best served if this Court does not have to evaluate the merits of the AGO's Petitions under the specter of the potential attorney conflicts implicated by trust counsel's continuous representation of Trustees in their Trustee capacities, including: (1) providing advice and counsel to Trustees about the general administration of the Trust underlying the AGO's allegations, Aff. Ex. 33; (2) providing identical representation to all three Trustees, with Lipschultz as counsel's primary point person, despite the fact that each Trustee's interests may not be aligned, Aff. Ex. 8 at 194:2-12; (3) serving as deal counsel for the Sale, Aff. Ex. 234; (4) providing advice and counsel pertaining to the Sale and other matters relevant to the investigation, which Trustees have raised as a defense in the AGO's investigation, *see, e.g.*, Aff. Ex. 9 at 197:6-18, 198:10-14; Aff. Ex. 8 at 235:22-236:3, 257:13-14; (5) providing opinion letters to buyers on material questions pertaining to the Sale, including the need for AGO and Court approval, Aff. Ex. 235; (6) making representations or omissions to this Office that underlie the basis of the AGO's duty of information allegations, *see generally* supra Part II.C.4, and (7) potentially serving as material, irreplaceable witnesses to those representations made to the AGO, *see* Aff. Ex. 4 at 244:22-25.[13]

Removal, replacement, and/or the AGO's other interim remedies give the Trust a chance to proceed with a clean slate without having to simultaneously litigate where the parties' and their representatives' loyalties lie. If Trustees' litigation positions and other actions are justified, then their successors and counsel will presumably make the same choices, and there is little downside. If they are not—then the harm to the Trust could be immeasurable. The AGO's interim relief should be granted.

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[13] *See* Minn. R. Prof. Cond. 1.7(a)(2), 1.7 cmt. 10 (stating "if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice"); Minn. R. Prof. Cond. 1.7(a)(1) (stating a lawyer shall not represent a client if "the representation of one client will be directly adverse to another client"); Minn. R. Prof. Cond. 3.7(a) (stating that generally a "lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness"); *ABS MB Inv. Ltd. P'ship v. Ivax Corp.*, No. CIV. AMD 94-1923, 1996 WL 173131, at *2 (D. Md. Apr. 10, 1996) (noting that "there is good reason why many law firms whose transactional advice forms the basis for both damage claims asserted against the client-recipient of that advice, and of defenses to those claims, do not undertake the litigation of such cases on behalf of such clients"); Minn. R. Prof. Cond. 4.1 cmt. 1 (noting prohibited "false statement of fact or law" can include "partially true but misleading statements or omissions that are the equivalent of affirmative false statements"); *Bogert's* § 901 (stating general rule that one "acting with a trustee in performing an act that such person knows or should know is a breach of trust becomes a participant in the breach and subject to liability"); Restatement (Third) of the Law Governing Lawyers § 51 cmt h (2000) (noting situations and jurisdiction where lawyers "representing a client in the client's capacity as a fiduciary (as opposed to the client's personal capacity) may in some circumstances be liable to a beneficiary").

CONCLUSION

Based on the foregoing, the Minnesota Attorney General's Office respectfully requests that this Court grant its Petition to Enforce the Supervision of Charitable Trusts and Trustees Act, Remove Trustees, Replace Trustees, and for Other Relief; grant its Petition for Interim Relief; and order all other equitable relief necessary for the resolution of these Petitions and proper administration of the Otto Bremer Trust.

Dated: August 12, 2020

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The undersigned hereby acknowledges that sanctions may be imposed for violation of Minn. Stat. §§ 549.211 and Minn. R. Civ. P. 11.

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