

No. A22-0906

STATE OF MINNESOTA
IN SUPREME COURT

In the Matter of the Otto Bremer Trust

BRIEF OF AMICUS CURIAE MINNESOTA COUNCIL OF NONPROFITS

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STATEMENT OF INTEREST¹

The Minnesota Council of Nonprofits (“MCN”) is a nonprofit, public interest organization dedicated to assisting nonprofit organizations accomplish their missions by informing, promoting, connecting, and strengthening individual nonprofits and the nonprofit sector as a whole, thereby supporting nonprofits to involve members of the public in building a more healthy, cooperative, and just society.

MCN was founded in 1987 to meet the information needs of nonprofits and to convene nonprofits to address issues facing the sector. MCN provides education and professional development for nonprofit leaders; conducts research on nonprofit sector trends and issues; and advocates at local, state, and federal levels on issues concerning nonprofits. These education and advocacy efforts include issues involving foundation grants from charitable trusts to nonprofit organizations. MCN currently serves over 2,300 member nonprofit organizations across the state of Minnesota.

Financial grants from foundations (including charitable trusts) are a valuable, highly influential, and often very flexible source of funding for nonprofit organizations. Foundation dollars are a crucial source of stable operating funding for nonprofits when provided for long-term projects. Other sources of nonprofit funding (such as government grants and contracts) often carry restrictions and do not cover the full cost of work.

¹ Pursuant to Minnesota Rule of Civil Appellate Procedure 129.03, the undersigned certify that counsel for amicus curiae Minnesota Council of Nonprofits authored the brief in whole and that no other person or entity made monetary contribution to the preparation or submission of this brief.

Foundations are an essential component to a thriving nonprofit economy, and nonprofits have a keen interest in understanding and interacting with foundations. For 30 years MCN has sponsored educational events and publications to help nonprofit organizations succeed in presenting their case to foundations. MCN has annually published the Minnesota Grants Directory and sponsored the Minnesota Foundations workshop throughout the state. More recently MCN created the grantadvisor.org website to facilitate anonymous customer feedback from nonprofit fundraisers about their experiences and advice to peers about their interactions with foundations. MCN conferences frequently include foundation program officers and trustees as speakers to help nonprofits understand the grantmaking process and opportunities.

The Court's decision in this matter will clarify standards of conduct for charitable trusts and trustees in Minnesota. The issues presented in this case have significant implications for the use of foundation funds, the transparency and integrity of grantmaking, and the autonomy of nonprofits like those MCN supports.

MCN respectfully submits this brief as amicus curiae in support of Respondent, the State of Minnesota. MCN urges this court to affirm the decision of the Court of Appeals.

**LEGAL ISSUE, STATEMENT OF THE CASE, STATEMENT OF FACTS, AND
STANDARD OF REVIEW**

MCN accepts the Legal Issue, Statement of the Case, Statement of Facts, and Standard of Review as stated by the Respondent.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BECAUSE LIPSCHULTZ'S SELF-DEALING AND ABUSE OF GRANTMAKING AUTHORITY CONSTITUTE SERIOUS BREACHES OF TRUST.

The trial court appropriately identified, and the court of appeals affirmed, four bases upon which Lipschultz committed serious breaches of trust in his role as Trustee: a) self-dealing; b) abuse of grantmaking authority; c) failed duty of information; and d) aggressive behavior. MCN will focus our brief on two of these bases: a) self-dealing and b) abuse of grantmaking power.

Petitioner's brief fails when it seeks to downplay, dismiss, or ignore the four bases relied upon by the lower courts to establish and affirm Lipschultz's behavior as a "serious breach of trust" under Minn. Stat. § 501C.0706(b)(1). Petitioner proposes that two specific grounds must be present to "divine a general rule" for what constitutes a "serious" breach. Pet.Br. 30. MCN vehemently disagrees with this line of reasoning, as common law states clearly that the "determination of what constitutes sufficient grounds for the removal of a trustee is within the discretion of the [trial] court." *In re Will of Gershcov*, 261 N.W.2d 335, 338 (Minn. 1977) As the Respondent aptly states, "the fact that some courts exercised their discretion differently and declined to remove trustees under varying circumstances in the cases cited by Lipschultz does not mean the trial court abused its broad discretion under the facts of this case." Resp't Br. 35.

Lipschultz did commit serious breaches of trust through his actions. In an effort to minimize those actions, Lipschultz demonstrates a misunderstanding of how a charitable

trustee’s abuse of their considerable influence can significantly disrupt a charitable trust’s mission, with material effects on the trust, its grantees, the wider charitable sector, and the public. Such abuses are particularly damaging to the ability of charitable trusts to maintain productive relationships with nonprofit community organizations, an important element of effective grantmaking.

The effect that Lipschultz’s misconduct has on nonprofit community organizations deserves close attention from the Court, because it is central to the mission of OBT. OBT’s trust instrument states, “no part of the trust estate or income therefrom shall be used for any purpose except such as is charitable.” P.Add.132. In turn, “the public or the community . . . is the real beneficiary of every charitable trust.” *Bogert’s The Law of Trusts and Trustees* § 363 (June 2023). Indeed, the bulk of the original trust instrument’s “Purposes” are devoted to the activities of nonprofit entities, both specific (“the Red Cross” and “the Boy Scouts, Girl Scouts, and Camp Fire Girls”) and general (“churches,” “hospitals,” and “orphan and baby’s homes.”). P.Add. 129–130. It is clear that the trust imagined by Otto Bremer was to be solely focused on charitable giving to nonprofits. In 2022, OBT contributed \$81,684,820 through 941 grants made to 856 organizations.²

As an association of thousands of charities, MCN is particularly well-situated to witness the impacts on these organizations, and to observe what Petitioner’s analysis overlooks: the severe negative impact that his a) self-dealing; and b) abuse of

² See *Otto Bremer Trust Awarded \$81.6 Million in Grants and Program-related Investments in 2022*, OTTO BREMER TR. (Feb. 9, 2023), https://ottobremer.org/news_stories/2023-02-09-news/.

grantmaking authority has on nonprofit grantees and the climate for the charitable sector as a whole. Each of these bases is a serious breach of trust in its own right.

A. Lipschultz’s Self-Dealing Is a Serious Breach of Trust Because it Violates the Law and Harms OBT’s Nonprofit Grantees.

1. Lipschultz’s Self-Dealing Violates the Law.

Lipschultz admits to having misused Trust assets in the amount of \$1,875. *Id.* at 124–26. While remediated, any self-dealing is a violation of state laws and must be considered a relevant factor in a removal proceeding. Lipschultz describes his misuse of funds as “*de minimis*,” despite the lower courts’ clarity that there is no *de minimis* excuse for self-dealing in the State of Minnesota. *Id.* at 014–017. The courts have further established that “no excuse can be offered by the trustee to justify such transactions.” *In re Anneke’s Tr.*, 229 38 N.W.2d 177,179 (Minn. 1949). Such a “no excuses” approach to self-dealing includes the \$1,875 in transactions that Lipschultz deems “commonplace and inconsequential.” P.Br. 42. Violating the law in this manner is a serious breach of trust.

Lipschultz suggests that the established no excuses approach to self-dealing creates a “harsh result” and would apply to “virtually everyone in the state.” *Id.* at n.10. He provides no evidence to support this claim that philanthropic professionals around the state misuse office resources for personal benefit.³ Such a contention ignores the considerable resources that charitable organizations devote to educating sector leaders,

³ OBT’s personnel policy has explicit prohibitions on this behavior, and its staff demonstrated concerns over Lipschultz’s misuse since he started as a trustee in 2012. P.Br. 054.

ensuring compliance, and avoiding even the smallest instances of self-dealing.⁴ The Council on Foundations, of which OBT is a member organization, provides over a dozen resources for its members on “self-dealing snares such as sharing office equipment [and] employees,” violations to which that Lipschultz admits.

2. Lipschultz’s Self-Dealing Harms OBT’s Nonprofit Grantees.

Lipschultz’s self-dealing—whatever the size—used OBT’s charitable assets, intended for grantees, for noncharitable purposes. This poses direct harm to grantees who would have otherwise benefited from the funds. There should be no tolerance for such a clear violation of the intent of OBT’s trust instrument that “no part of the Trust estate or income therefrom shall be used for any purpose except such as is charitable.” *Id.* at 054.

There is no doubt that nonprofits who are current grantees of OBT or hope to be future grantees find themselves in a position of financial uncertainty, wondering if or how the court cases involving OBT would impact their budgets. Most nonprofits could not survive losing a grant of the size OBT typically gives without causing serious havoc for the organization. MCN is a current grantee of OBT, receiving \$100,000 annually, and has

⁴ See, e.g., *Private Benefit, Private Inurement, and Self-Dealing*, BOARDSOURCE, <https://boardsource.org/resources/private-benefit-private-inurement-self-dealing/> (last visited July 24, 2023) (“Self-dealing is absolutely forbidden in a private foundation . . . No matter how small the benefit (even \$1)”); see also John A. Edie, *Self-Dealing: A Concise Guide for Foundation Board and Staff*, F. REG’L ASS’NS GRANTMAKERS (2006), https://www.ctphilanthropy.org/sites/default/files/resources/Self_Dealing_A_Concise_Guide_for_Foundation_Board_and_Staff_Guide.pdf; and *Conflicts of Interest at Foundations: Avoiding the Bad and Managing the Good*, COUNCIL MICH. FOUNDS. (2005), <https://www.michiganfoundations.org/system/files/documents/2021-08/Conflicts-of-Interest-at-Foundations.PDF>.

experienced this financial uncertainty ourselves. As we make staffing and programing plans for the next few years, we must build in contingencies in case OBT is unable to, or chooses not to, renew its grant to MCN. Financial uncertainty heavily constricts the base work of charitable nonprofits and eliminates opportunities for innovation.

Beyond the direct conversion of charitable funds for noncharitable purposes and financial harm to current and prospective grantees, Lipschultz's misconduct affects OBT's positive reputation and relationship with nonprofit grantees. OBT is a well-known foundation in the region it supports, including all of Minnesota. In 2019, OBT delivered 626 to grants to Minnesota organizations, and many more across the region.⁵ That same year, OBT had the third highest annual giving among Minnesota's private foundations, totaling \$57 million.⁶ Being mired in high-profile court cases creates mistrust in that foundation and the philanthropic sector. Even minor abuses, when left unaddressed, can erode public trust and confidence in philanthropic and charitable organizations, and the public's trust in these sectors is already being questioned. In 2022, Americans' trust in nonprofits declined by 3% from two years before.⁷ Those who mistrust nonprofits and

⁵ 2019 Form 990-PF for *Otto Bremer Trust*, PROPUBLICA, https://projects.propublica.org/nonprofits/display_990/416019050/11_2020_prefixes_37-45%2F416019050_201912_990PF_2020110417412539 (last visited July 24, 2023).

⁶ OBT's giving in 2019 constituted over 7% of private foundation giving in Minnesota in 2019, and private foundations represented nearly half of the state's giving landscape that year. *Giving in Minnesota*, MINN. COUNCIL ON FOUNDS. (2021), [https://mcf.org/system/files/documents/2023-03/2021 Giving in MN Report.pdf](https://mcf.org/system/files/documents/2023-03/2021_Giving_in_MN_Report.pdf).

⁷ *Trust in Civil Society: Understanding the Factors Driving Trust in Nonprofits and Philanthropy*, INDEP. SECTOR, (2022), <https://independentsector.org/resource/trust-in-civil-society/>.

philanthropy cite a lack of integrity as the reason for their mistrust—in particular, the “perceived mismanagement of funds and instances of corruption and scandals.”⁸

Mistrust inculcated by Lipschultz’s actions will not be limited to OBT. Serious breaches of trust cast a shadow on all philanthropic endeavors, leading to individuals and corporations fearing that their donation might not be used as intended, resulting in less giving and ultimately fewer dollars for nonprofits’ charitable work. In this way, a breach of trust by a sole trustee negatively impacts charitable organizations across the state.

B. Lipschultz’s Abuse of Grantmaking Authority is a Serious Breach of Trust Because it Harms OBT’s Nonprofit Grantees.

Lipschultz’s communications to at least two grantees—Junior Achievement North (“JA”) and Twin Cities Habitat for Humanity (“Habitat”)—constituted an abuse of grantmaking authority and a serious breach of trust. Lipschultz communicated that he, as a single trustee, had the last word on whether their grants would be approved or denied—based not on any funding guidelines or grant application process, but on their compliance to Lipschultz’s demands related to the ongoing legal dispute with Bremer Financial Corporation (“BFC”). Lipschultz put the grants of \$1.2 million to Junior Achievement and \$1 million to Habitat for Humanity in play to serve his non-charitable purpose of countering BFC. This substantial diversion of \$2.2 million in trust assets is an abuse of the charitable purpose of these funds because, “Fundamentally, Lipschultz weaponized [OBT’s] grantmaking power to further his personal vendettas.” Resp’t Br. 39.

⁸ *Id.*

Lipschultz minimizes the negative impact that a delay in grantmaking has on a grantee, describing Lipschultz's coercive behavior toward JA (and its officer, Sarah Dziuk) as "hostility", "acrimony", or "friction." P.Br. 36 (citing *In re Estate of Rosenbrook* 2013 Minn. App. LEXIS 461). Lipschultz's actions toward Dziuk and JA go far beyond hostility. As the District Court acknowledged, JA "missed nearly a full fiscal year of funding" for \$1.2 million, which, at the time, represented 10% of their budget, "at the height of the pandemic impacting other revenue streams, which forced Junior Achievement to reduce its workforce by 40% to save costs." P.Add. 099. Nonprofits experienced epic uncertainty during the COVID-19 pandemic, particularly around funding. Reducing workforce due to lack of sufficient funding has a serious impact on the staff let go, the remaining staff, clients, and partners of the organization. Even worse, when a nonprofit loses funding unexpectedly, it has no time to wind down programs, leaving clients and the community served without critical supports.

The delay had a serious financial impact on JA that interfered with its operations during a particularly difficult time. The delay caused material and substantive harm to one of OBT's grantees to pressure the grantee into supporting Lipschultz's interests in a legal matter completely unrelated to the charitable purpose of their grant—his dispute with BFC. Such harm constitutes a serious breach of Lipschultz's duty of loyalty.

Lipschultz excuses his actions in part by suggesting that his dispute with Dziuk and JA was a "single dispute" and that, "there is not one other example of any type of problem or issue arising. Not one." P.Br. 39. This claim is patently false. The District

Court noted that in November 2019, Lipschultz also expressed frustration to Habitat for positive statements made in an article about BFC. P.Add. 100. Then in January 2020, Lipschultz informed Habitat that OBT's decision not to renew funding for the organization was due to an existing contribution from BFC. Lipschultz would later say Habitat's loyalty to BFC over OBT "did come up in the discussion for sure" in the decision not to award the grant. *Id.* at 100–01. Together with Lipschultz's behavior toward JA and Dziuk, his behavior toward Habitat demonstrates a concerning pattern of using his influence as a trustee to coerce or retaliate against grantees of OBT to align with his noncharitable interests.

In these ways, it is clear that Lipschultz's abuse of his grantmaking authority is a serious breach of trust because it harms OBT's grantees.

II. DEFERENCE TO COURTS' DISCRETION IS PARTICULARLY WARRANTED FOR REMOVAL OF CHARITABLE TRUSTEES GIVEN THEIR PUBLIC ROLE.

Lipschultz's argument that the District Court abused its discretion raises critical questions about how much discretion courts should have over charitable trusts. Minnesota case law centers on *noncharitable* trusts rather than charitable trusts.⁹ While the trust code governs both charitable *and* noncharitable trusts in Minnesota according to Minn. Stat. § 501C.0102(a), the two types have considerable differences. A closer examination

⁹ While Petitioner cites myriad cases about trustee removal, only two focus on charitable rather than noncharitable trusts. *See Schaeffer v. Newberry*, 50 N.W.2d 477, 482 (Minn. 1951) *see also In re Estate of Wilson*, 452 N.E.2d 1228, 1232 (N.Y., 1983).

of these differences reveals the unique, public role that charitable trusts hold, which in turn warrants wider deference to courts' discretion to protect the public's interests.¹⁰

Noncharitable trusts are established by the trust settlor for a private purpose, be it stewardship of individual property, protection of family wealth, or care for a loved one. Charitable trusts, however, play a unique and vital public role. The settlor's purpose in creating a charitable trust is advancing a greater good, providing assistance to members of the public, and addressing wider social challenges.

Charitable trustees, therefore, have a duty to act in the best interests of the public. Minnesota's Trust Code contemplates charitable trusts' unique public role, providing for public supervision of the trust, granting the attorney general "the rights of a qualified beneficiary with respect to a charitable trust." Minn. Stat. § 501C.0110(d). In imagining such a role for the attorney general, who is empowered to bring matters to the courts on behalf of the public, the Trust Code recognizes charitable trusts matters to be of public concern. The judiciary, in turn, is designated in part to safeguard the public's rights. The public has a right to expect that the judiciary should play a more significant role in charitable trusts' proper administration than noncharitable trusts, which concern private parties able to advocate for their own interests. Deference to courts' discretion over remedies such as trustee removal preserves public trust that there is proper oversight of

¹⁰ See *Wertin v. Wertin*, 13 N.W.2d 749, 751 (Minn. 1944) (noting courts are "empowered to exercise their equitable authority for the purpose of protecting beneficiaries against inefficiency, incompetency, neglect, or fraud on the part of those who have been named trustees").

the philanthropic and charitable sectors, protecting the interests of current and future beneficiaries of the trust.

Wide deference to courts on matters of trustee removal is an important deterrent to misconduct or mismanagement among charitable trustees. Knowledge among charitable trustees of the courts' authority to remove those who misbehave promotes diligence and responsibility for compliance with the law. In this case, the District Court has made clear that there is a high standard for professional personal conduct, zero tolerance for self-dealing, no place for willful delays or failures in mandatory reporting, and no excuses for coercion, bullying, or other inappropriate behavior toward grantees. Even if the Court is convinced by Lipschultz that his transgressions were somehow minor, it is in the interest of public policy to hold charitable trustees accountable for such abuses. Such accountability upholds the highest standards of conduct, maintains public trust, and ensures the long-term health and sustainability of the charitable sector by safeguarding its assets and ensuring their proper utilization.

Judicial scrutiny of charitable trustees, therefore, upholds the integrity and effectiveness of charitable trusts in accomplishing their mission. It mitigates the opportunity for bad actors to improperly leverage charitable funds for noncharitable purposes. It also assures grantees and the public that there is some level of protection from misconduct. Overall, an approach that defers to courts' discretion on what constitutes a "serious breach of trust" worthy of trustee removal ensures the preservation

of the noble intentions behind charitable trusts and allows society to continue benefiting from these important charitable grantmaking entities.

CONCLUSION

Both the courts and the Attorney General's Office should remain empowered to keep a watchful guard over the use of charitable funds for noncharitable purposes. MCN urges the Court to uphold established law that protects courts' discretion to determine what constitutes serious breach of trust. Holding otherwise would open nonprofit community organizations, and the wider public that benefits from their work, to abuse by charitable trustees. Such abuse only weakens charitable institutions and the public's trust in them. For these reasons, MCN respectfully requests that the Court affirm the decision of the Minnesota Court of Appeals, finding that Lipschultz's self-dealing and abuse of grantmaking authority are serious breaches of trust under state law.

Dated: July 24, 2023

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 3. This brief was prepared using Microsoft Word, and the length of the brief is 3,233 words, excluding the cover page, Table of Contents, Table of Authorities, and this Certificate.

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