**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A22-0906**

In the Matter of the Otto Bremer Trust.

**Filed January 17, 2023**
**Affirmed**
**Larson, Judge**

Ramsey County District Court
File No. 62-C9-61-315222

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Considered and decided by Gaïtas, Presiding Judge; Bjorkman, Judge; and Larson, Judge.

**SYLLABUS**

A district court does not abuse its discretion when it removes the trustee of a charitable trust: (1) who has engaged in a series of breaches of trust that collectively constitute "a serious breach of trust" under Minn. Stat. § 501C.0706(b)(1) (2022); or (2) whose repeated improprieties demonstrate that removal is in "the best interest" of the charitable trust and its beneficiaries under Minn. Stat. § 501C.0706(b)(3) (2022).

## OPINION

**LARSON**, Judge

This case arose from a Minnesota Attorney General's Office (the AGO) petition to remove the three trustees of the Otto Bremer Trust (the Trust). After a 20-day bench trial, during which the district court heard testimony from more than two dozen witnesses and received more than 500 exhibits, the district court issued an order granting the AGO petition to remove trustee Brian Lipschultz but denying the AGO petition to remove trustees Daniel Reardon and Charlotte Johnson.

Lipschultz appealed the district court's decision to remove him. Lipschultz argues the district court abused its discretion when it determined his actions constituted a serious breach of trust and that his removal serves the interests of the Trust and its beneficiaries. We affirm.

## FACTS

Lipschultz largely does not challenge the district court's findings of fact.[1] We briefly recite the district court's findings of fact and conclusions of law relevant to this appeal.

### A. The Trust's Foundation, Structure, and Trustees

Otto Bremer founded the Trust in 1944. The Trust is an express trust governed by a trust instrument (the Trust Instrument). The Trust functions as a charitable trust with no

[1] As addressed below in Part I(D), Lipschultz challenges the district court's findings related to his disclosure of his successor to the AGO.

named beneficiaries.[2] 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."

Shortly before establishing the Trust, Bremer created a holding company for his investments in community banks called the Otto Bremer Company, now called the Bremer Financial Corporation (BFC). Bremer originally funded the Trust with shares from BFC.

The Trust Instrument suggests that Bremer intended the Trust and BFC to remain connected. Paragraph 16 of the Trust Instrument instructs the trustees to retain the Trust's BFC shares and that these shares "may only be sold if, in the opinion of the [t]rustee, it is necessary or proper to do so owing to unfor[e]seen circumstances." At the time of the bench trial, the vast majority of the Trust's assets consisted of its BFC stock ownership and the Trust's total value was over $2 billion.

When he founded the Trust, Bremer appointed three individual trustees. The Trust Instrument states that "[t]here shall not be more than 3 acting [t]rustees at any one time."[3] The Trust Instrument grants the trustees the power to appoint their successors. Johnson, Reardon, and Lipschultz were the trustees when the AGO filed its petition to remove.

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[2] Bremer established the Trust for charitable purposes with no named beneficiaries. *See* Minn. Stat. § 501B.35 (2022). Accordingly, the Trust's beneficiary is the public. *See, e.g.*, *Longcor v. City of Red Wing*, 289 N.W. 570, 574 (Minn. 1940) (stating "the beneficiaries" of "charitable trusts" are "some or all of the members of a large shifting class of the public"). Under longstanding common law, "[t]he attorney general is entrusted with the duty of representing the beneficiaries of a charitable trust, and it is [the AGO's] duty to enforce such trusts." *Schaeffer v. Newberry*, 35 N.W.2d 287, 288 (Minn. 1948); *see also* Minn. Stat. §§ 501B.31, subd. 5 (2022) (the attorney general shall represent the beneficial interests in cases involving charitable trusts arising under section 501B.31 and shall enforce affected trusts); .41 (2022) (the attorney general is the proper party to participate in proceedings involving charitable trusts).

[3] The one exception to this general rule is not relevant to this appeal.

The Trust Instrument grants the trustees authority and discretion to determine the methods and processes for carrying out the Trust's charitable purposes. This includes discretion "to choose the purposes, objects[,] or institutions [which further the Trust's purposes] that shall . . . receive aid from the [T]rust or be its beneficiaries." Since its founding, the Trust has granted more than $700 million to organizations to further the Trust's mission and its charitable purposes.

**B. Self-Dealing**

Lipschultz used the Trust's assets for personal purposes. Lipschultz misused staff time, postage, and computer resources for non-Trust purposes.[4] Lipschultz admitted to using Trust assets for non-Trust purposes "probably from the day [he] arrived at the Otto Bremer Trust" in 2012.

A Trust employee reported Lipschultz's personal use of the Trust's assets to the Trust's controller around September 2019. After confirming that Lipschultz misused the Trust's assets, the Trust hired an accounting firm to calculate the value of the misuse. The accounting firm determined that between 2017 and 2019 Lipschultz's misuse totaled $1,875.[5] The calculation did not include the time the Trust paid Lipschultz while he

[4] Lipschultz admitted he used staff time "regularly" for personal reasons since his trustee appointment. According to the Trust's employees, Lipschultz asked them to manage his personal calendar, to perform administrative tasks unrelated to the Trust, and to complete a variety of other personal tasks. Lipschultz also used the Trust's address in some of his personal business and investment activities. Additionally, Lipschultz used the Trust's electronic storage and email for his own personal and business activities.

[5] The accounting firm calculated the value of office use, personal copies and scans, postage, and administrative-assistant time, plus interest, to total $1,875. The accounting firm only calculated self-dealing expenses for the three years where the Trust could amend its form 990-PFs with the IRS—2017, 2018, and 2019.

worked on non-Trust matters. The accounting firm charged the Trust $4,762.80 for the review. The Trust incurred a tax on self-dealing under the IRS code.

Lipschultz admitted that he used the Trust's resources for non-Trust purposes and that this constituted self-dealing under the IRS code. Lipschultz reimbursed the Trust $1,875. Lipschultz did not reimburse the $4,762.80 the Trust paid the accounting firm or the legal fees the Trust incurred in remediating the self-dealing.

### C. Sale of BFC Stock and Resulting Lawsuits

In February 2019, executives from BFC met with an investment banker to discuss a potential "merger-of-equals" opportunity for BFC with another company. BFC retained an investment bank to evaluate its strategic opportunities. In April 2019, the investment bank presented its analysis to the BFC board, which included the trustees.[6] The investment bank identified four potential "strategic alternatives" for BFC: (1) continue with the status quo; (2) go public through an initial public offering; (3) pursue a merger; or (4) explore a BFC sale. After this meeting, the trustees, especially Lipschultz, expressed interest in selling. The rest of the BFC board did not want to pursue this option.

The trustees and other BFC board members explored their favored routes for the next few months. Then, in July 2019, the trustees formally concluded it was necessary and proper to sell the Trust's shares in BFC as soon as reasonably practical due to unforeseen circumstances.

[6] The trustees occupied three of the ten seats on the BFC board.

In August 2019, tensions between the trustees and the other BFC board members increased. BFC's board convened a special board meeting to address BFC's strategic alternatives. After further deliberation, and over the trustees' objections, the BFC board voted to terminate discussions about a sale and prohibited management from engaging in further sale discussions without explicit BFC board approval.

According to the district court, the August 2019 meeting placed the trustees "in the awkward position of owning an asset that had become hostile to the idea of a sale at that time." Lipschultz worked closely with an investment-bank consultant (the consultant) to develop a plan to get around the "hostility" problem. Lipschultz and the consultant planned to replace the BFC board through a calculated sale of the Trust's nonvoting shares in BFC.[7] The plan called for the Trust to sell enough nonvoting shares so that when investors who purchased the nonvoting shares converted them to voting shares,[8] the Trust and the investors would collectively hold just over 50% of BFC's total voting shares. With the majority of the voting power, the Trust and the investors could vote to replace the BFC

[7] The Trust and BFC reorganized their relationship after the passage of the Tax Reform Act of 1969 (Tax Reform Act). Before the Tax Reform Act, the Trust owned 100% of BFC. But the Tax Reform Act prohibited private foundations from holding more than 20% of the voting stock of for-profit businesses. To comply with the Tax Reform Act, BFC and the Trust developed a reorganization plan. Under the plan, BFC was reorganized and recapitalized through the issuance of two classes of stock: 1.2 million voting shares and 10.8 million nonvoting shares. The Trust's controlling BFC shares were converted almost entirely to nonvoting shares. To that end, the Trust owned 100% of the nonvoting shares and 20% of the voting shares. This ownership structure persisted until the Trust sold a portion of their shares in October 2019.

[8] As noted by the district court, the reorganization plan allowed "a third-party to whom the Trust transfers shares to convert those [nonvoting] shares to [voting] shares."

board. Lipschultz and the consultant expected a new board would be willing to reconsider BFC's "strategic alternatives," including the sale of BFC.

Lipschultz purposefully sought out investors who were willing to incur the risks associated with a hostile deal. Lipschultz told the consultant he wanted smaller activist investor funds who "live for this kind of thing," because selling to them "would signal to the entrenched [BFC] management and [BFC's counsel] that we aren't f-cking around." In another text, Lipschultz stated they needed activist investors willing to replace the BFC board "ASAP." The consultant later commented to Lipschultz, "[y]ou told me don't bring me friendlies[,] . . . bring me real investors . . . that only care about making money and are willing to do whatever is necessary."

Lipschultz became frustrated with Johnson, who did not share Lipschultz's enthusiasm for this plan. Lipschultz admitted it took Johnson some time to sign off on the plan due to the many known and substantial risks. Lipschultz sent several texts disparaging Johnson to the consultant.[9]

[9] In August 2020, Lipschultz texted the consultant: "We have to be super careful with all of this around [Johnson]. When she becomes aware that this strategy involves tossing the current board and essentially a hostile takeover, she could toss her cookies." Lipschultz admitted by "hostile takeover," he was referring to a transaction over BFC's objection. Two days before the sale, Lipschultz texted the consultant that "every day [he] ha[d] to go through this sh-t with [Johnson], [his] exit price goes up." Lipschultz testified that "exit price" was referring to what it would take to make up for the difficulties she caused him. In late October 2020, the consultant joked with Lipschultz about Johnson: "She should just give me her trustee's seat." Lipschultz responded: "That would be great. She could give it to the panhandler on the street in front of the office and even that would be better."

In October 2019, the trustees sold 725,000 nonvoting shares of BFC stock, or 7% of the Trust's BFC holdings, to 11 separate investors at $120 per share. After the sale, BFC refused to register the conveyed shares to the investors that purchased them.

When the trustees learned BFC refused to register the shares, Lipschultz anticipated the investors would join forces to sue BFC. Lipschultz texted the consultant on November 4, 2019: "I am frightened for BFC if they try to withhold shares from the new investors. I picture an aerial bombardment, the likes of which sleepy St. Paul has never seen." On November 7, 2019, Lipschultz texted the consultant: "I am looking forward to observing the carnage."

Significant litigation ensued. BFC filed suit against the trustees on November 19, 2019. Several investors subsequently filed suit against BFC for its failure to register their purchased shares. Additionally, BFC shareholders sued the trustees. In a December 2019 text to the consultant, Lipschultz discussed investor F.J.'s intent to sue BFC. In the text, Lipschultz joked about his distaste for BFC's CEO (whose name starts with "J") saying: "BTW, we affectionately say FJ=f-ck [BFC's CEO]." The next day, F.J. sued BFC.

In a series of texts to the consultant, Lipschultz expressed frustration that some investors did not sue BFC. Complaining about one investor's lack of aggressiveness in responding to BFC's lawsuit, Lipschultz said the investor was a "big talker when [they] met" but was "now [] not doing sh-t." Lipschultz continued: "I need to know if [the investor is] going to step in[]to the ring or wait for others to fight it out and then nibble on the leftovers." Referring to Federal Reserve restrictions, Lipschultz added: "It's so tricky because we can't coordinate, but I would have thought we didn't need to because these

investors were aggressive animals that would swoop in and go for the BFC jugular without any coordination required." Regarding suggestions about the duration of the litigation, Lipschultz remarked: "The truth is [the Trust] can weather this storm for a long time. I've got years of reserves if absolutely necessary." Lipschultz admitted that by "years of reserves," he meant the Trust's assets available to fund legal fees.

The AGO filed this action in August 2020, seeking interim and permanent removal of the three trustees premised on allegations that largely reflected the allegations BFC made in its pending lawsuit against the trustees. The AGO sought to stay the other pending civil lawsuits, which the parties agreed to in a stipulation. In November 2020, the district court granted in part and denied in part the AGO's petition for interim equitable relief. In August 2021, we affirmed the district court's decision regarding interim equitable relief. *In re Otto Bremer Trust*, No. A21-0053, 2021 WL 3852250 (Minn. App. Aug. 30, 2021).

**D. Communications with Junior Achievement**

After the stock sale but before trial, Lipschultz made two phone calls to the CEO of Junior Achievement, a worldwide nonprofit that seeks to prepare young people for success in a global economy. The Trust provided grants to Junior Achievement in prior years, including $1 million in 2017 and a five-year $500,000 program-investment loan. The Trust was Junior Achievement's largest donor.

In a November 2020 call, Lipschultz complained to Junior Achievement's CEO that Junior Achievement had not defended the trustees during their legal challenges with BFC and the AGO. Lipschultz told Junior Achievement's CEO that the Trust "expected that Junior Achievement would have gone to the governor or to the attorney general" to tell

them that the AGO's investigation of the Trust was "government overreach." Lipschultz told Junior Achievement's CEO that she needed to go to her board and figure out how Junior Achievement would prove that it was the trustees' partner if Junior Achievement wanted to obtain future funding.

Thereafter, Junior Achievement submitted a three-year renewal request for a $1.2 million grant. In July 2021, the Trust approved the request. But the new grant was significantly delayed compared to previous years, and Junior Achievement missed nearly a full fiscal year of funding. This delay occurred concurrently with the COVID-19 pandemic impacting other revenue streams, which forced Junior Achievement to reduce its workforce by 40% to save costs.

In August 2021, approximately one month before the trial began, Lipschultz and Junior Achievement's CEO had another phone call, during which Lipschultz expressed anger and frustration that Junior Achievement intended to honor the BFC board chair at an upcoming event. Lipschultz claimed that the board chair had sued the trustees personally and was trying to "dismantle" the Trust. Lipschultz told Junior Achievement's CEO that the decision to honor the BFC board chair "would damage [their] relationship moving forward." Junior Achievement's CEO testified that Lipschultz made her feel "disrespected and bullied." She also testified that Lipschultz treated her "more poorly than [she had] been treated by a donor in [her] professional career."

After the August call, Junior Achievement's CEO emailed several Junior Achievement board members. The Junior Achievement board instructed the CEO to cease one-on-one discussions with Lipschultz to protect her from "very difficult, very hostile

conversations." Later, the Junior Achievement board voted to "return the $1.2 million recently funded grant from [the Trust]." The $1.2 million represented 10% of Junior Achievement's annual revenue. That decision was documented in a letter from Junior Achievement's board chair to the Trust stating: "Moving forward, we do not believe a continued relationship aligns with either organization's expectations. Therefore, we are returning your recent grant award of $1.2 [million] with this letter."

**E. Disclosure of Successor**

On multiple occasions during the AGO's investigation and litigation, the AGO asked the trustees to identify all named potential successor trustees. Lipschultz initially claimed he had not named one. A few weeks before trial and in support of a motion, the trustees' counsel attached a copy of Lipschultz's successor appointment, with the successor's name redacted. Lipschultz refused to provide an unredacted copy because he worried about potential publicity affecting his nominated successor. Lipschultz identified the successor for the first time at trial while on the witness stand.

**F. The District Court's Order**

The district court issued an order granting the AGO petition to remove Lipschultz and denying the AGO petition to remove Reardon and Johnson. Relevant to this appeal, the district court concluded that Lipschultz's removal was appropriate under two provisions of Minn. Stat. § 501C.0706(b) (2022).

First, the district court concluded Lipschultz engaged in a series of breaches of trust, which cumulatively constituted "a serious breach of trust" warranting removal under section 501C.0706(b)(1). The district court determined Lipschultz violated the duty of

loyalty, Minn. Stat. § 501C.0802(a) (2022), through his self-dealing, aggressive behavior during the BFC sale, and abuse of grant-making powers. The district court further determined that Lipschultz had violated the duty of information, Minn. Stat. § 501C.0813(a) (2022), through his deception and unwillingness to disclose his appointed successor, and the Minnesota Charitable Trust Act, Minn. Stat. § 501B.41 (2022), through his self-dealing. The district court summarized by saying "Lipschultz's repeated improprieties constitute a serious breach of trust that justify removal."

Second, the district court concluded Lipschultz's removal best served the interests of the beneficiaries and the Trust, thus, his removal was appropriate under section 501C.0706(b)(3). The district court again referenced Lipschultz's "repeated improprieties" as the basis for his removal.

Lipschultz appeals.

## ISSUES

I. Did the district court abuse its discretion when it removed Lipschultz pursuant to Minn. Stat. § 501C.0706(b)(1)?

II. Did the district court abuse its discretion when it removed Lipschultz pursuant to Minn. Stat. § 501C.0706(b)(3)?

## ANALYSIS

Lipschultz challenges the district court's decision to remove him as trustee pursuant to Minn. Stat. § 501C.0706(b)(1), (3). "We review a district court's decision whether to remove a trustee for abuse of discretion." *Lund ex rel. Revocable Tr. of Lund v. Lund*, 924 N.W.2d 274, 284 (Minn. App. 2019), *rev. denied* (Minn. Mar. 27, 2019). And "a determination of what constitutes sufficient grounds for the removal of a trustee is within

the discretion of the [district] court." *In re Gershcow's Will*, 261 N.W.2d 335, 338 (Minn. 1977). "A district court abuses its discretion by making findings of fact that are unsupported by the evidence, misapplying the law, or delivering a decision that is against logic and the facts on record." *Woolsey v. Woolsey*, 975 N.W.2d 502, 506 (Minn. 2022) (quotation omitted).

"To the extent the parties challenge [the] underlying findings of fact, we do not reconcile conflicting evidence on appeal from a court trial." *Lund*, 924 N.W.2d at 284. Instead, "we defer to the district court's factual findings and will not set them aside unless clearly erroneous." *Id.* "We will not conclude that a factfinder clearly erred unless, on the entire evidence, we are left with a definite and firm conviction that a mistake has been committed." *In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 221 (Minn. 2021) (quotation omitted). "[B]ecause the factfinder has the primary responsibility of determining the fact issues and the advantage of observing the witnesses in view of all the circumstances surrounding the entire proceeding, an appellate court's duty is fully performed after it has fairly considered all the evidence and has determined that the evidence reasonably supports the decision." *Id.* at 222 (quotations omitted).

Lipschultz challenges the district court's decision to remove him for committing "a serious breach of trust" under section 501C.0706(b)(1), and for determining that his removal "best serves the interests of the beneficiaries because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively" under section 501C.0706(b)(3). We address both arguments in turn below.

## I.

Lipschultz challenges the district court's decision that he committed a "serious breach of trust" under section 501C.0706(b)(1). A breach of trust is "[a] violation by a trustee of a duty the trustee owes to a beneficiary." Minn. Stat. § 501C.1001(a) (2022). Section 706 of the Uniform Trust Code provides, in a comment, that "not every breach of trust justifies removal of the trustee," rather to justify the removal of a trustee for a breach of trust, that breach must be "serious."[10] And "[a] serious breach of trust may consist of a *single act* that causes significant harm or involves flagrant misconduct," or "*a series of smaller breaches,* none of which individually justify removal when considered alone, but which do so when considered together." Unif. Tr. Code § 706 cmt. (emphasis added). Even when a trustee is given complete discretion, the trustee cannot exercise that discretion in a manner that violates a fiduciary duty owed to the trust's beneficiaries. *In re Tr. of Schwagerl*, 965 N.W.2d 772, 783 (Minn. 2021).

### A. Self-Dealing

Lipschultz contends the district court improperly weighed his admitted self-dealing. The duty of loyalty prohibits a trustee from placing "the trustee's own interests above those of the beneficiaries." Minn. Stat. § 501C.0802(a). "[N]o rule is more fully settled than that which forbids a trustee's dealing with himself in respect to trust property." *In re Anneke's Tr.*, 38 N.W.2d 177, 179 (Minn. 1949) (quotation omitted); *see also In re Janke's*

[10] The language of section 501C.0706 mirrors the language in section 706 of the Uniform Trust Code (Unif. L. Comm'n 2000). We have used the Uniform Trust Code comments to interpret Minnesota statutes the legislature adopted verbatim from the Uniform Trust Code. *See, e.g., In re Margolis Revocable Tr.*, 765 N.W.2d 919, 924-27 (Minn. App. 2009).

*Est.*, 258 N.W. 311, 313 (Minn. 1935) (noting trust assets are not "to be used in developing or furthering business enterprises" of a trustee). "If the trustee appropriates trust property to the trustee's own use directly, the trustee should be removed." Susan Gary et al., *Bogert's The Law of Trusts and Trustees* § 527, at 4 (June 2022) (emphasis omitted).[11] Further, the trustees of a charitable trust are expressly prohibited by the Minnesota Charitable Trust Act from "engag[ing] in an act of 'self-dealing,'" as defined by the IRS code, that could "give rise to liability for the tax imposed by" the IRS code. Minn. Stat. § 501B.32, subd. 1(b) (2022).

Here, Lipschultz admitted he used the Trust's assets for non-Trust purposes "probably from the day [he] arrived at the Otto Bremer Trust." Lipschultz admitted that his use of the Trust's resources for non-Trust purposes constituted self-dealing under the IRS code. This self-dealing caused the Trust to incur a tax on self-dealing under the IRS code. Lipschultz's admitted misuse of assets is prohibited under the general duty of loyalty and under the Charitable Trust Act. *See Anneke's Tr.*, 38 N.W.2d at 179; Minn. Stat. § 501B.32, subd. 1(b).

Lipschultz attempts to minimize the impact of his misuse of the Trust's assets. Lipschultz focuses on the district court characterizing his self-dealing as "de minimis."[12] But Lipschultz misconstrues the district court's findings. The district court wrote:

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[11] Minnesota courts have relied on *Bogert's The Law of Trusts and Trustees* as persuasive authority. *See In re Hill*, 509 N.W.2d 168, 172 (Minn. App. 1993), *rev. denied* (Minn. Feb. 1, 1994); *In re Tr. Known as Great N. Iron Ore Props.*, 263 N.W.2d 610, 619-20 n.15-17, 19 (Minn. 1978).

[12] Lipschultz cites several cases to argue that courts have "consistently held that de minimis breaches [do] not warrant trustee removal." *See, e.g.*, *In re Will of Gerschcow*, 261 N.W.2d

> The Court acknowledges that the amount involved is relatively small. No doubt the value of Trust resources misused over the seven-year timeframe exceeds several thousand dollars. *In the larger scheme of things, it may be "de minimis*." Nonetheless, this misuse of trust assets constitutes self-dealing which is strictly prohibited by law and by the Trust Instrument itself . . . If this were the only behavior constituting a breach of trust by Lipschultz, it would likely not, by itself, justify removal . . . it is a part of a concerning series of breaches, however, that collectively constitute a serious breach of trust in violation of the Charitable Trust Act.

(Emphasis added.) Although the district court noted that Lipschultz's misuse did not cost the Trust a great deal when compared to the Trust's $2 billion in value, it did determine Lipschultz's actions violated the strict prohibitions against self-dealing. And, even assuming that Lipschultz's personal use of the Trust's assets was "de minimis," there is no "de minimis defense" to whether self-dealing violates the duty of loyalty. *See Anneke's Tr.*, 38 N.W.2d at 183 (holding that the rule against self-dealing is to be "strictly applied" and declining to read in an exception absent "clear and unmistakable language" in the trust instrument); *see also* Restatement (Third) of Trusts § 78(2) (2007) (articulating general rule that "[e]xcept in discrete circumstances, the trustee is *strictly prohibited* from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict

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at 340 (affirming decision not to remove a trustee who failed to file annual accounts and placed a portion of trust assets in a savings account); *In re Will of Comstock*, 17 N.W.2d 656, 665 (Minn. 1945) (affirming decision not to remove trustee who failed to sell a stock to avoid a loss in value). But these cases are inapposite and the district court did not solely rely on Lipschultz's self-dealing to conclude Lipschultz committed a serious breach of trust. *See* Unif. Tr. Code § 706 cmt. ("A serious breach of trust may consist of . . . a series of smaller breaches, none of which individually justify removal when considered alone, but which do so when considered together.").

between the trustee's fiduciary duties and personal interests" (emphasis added));[13] *In re Wash. Builders Benefit Tr.*, 293 P.3d 1206, 1222, n.16 (Wash. App. 2013) (rejecting a de minimis defense for self-dealing).

As the district court noted, Lipschultz's self-dealing had a small monetary cost, compared to the Trust's total value, but the district court did not abuse its discretion when it determined that Lipschultz's actions breached the duty of loyalty and violated the Charitable Trust Act, actions which constitute breach of trust. *See* Minn. Stat. §§ 501B. 41, subd. 6, 501C.0802, .1001(a).

**B. Behavior During Transaction**

Lipschultz next argues the district court erred when it determined his contentious behavior during the BFC sale violated the duty of loyalty. The duty of loyalty prohibits a trustee from placing "the trustee's own interests above those of the beneficiaries." Minn. Stat. § 501C.0802. The trustee's "primary duty [is] not to allow his interest as an individual even the opportunity of conflict with his interest as trustee." *In re Revocable Tr. of Margolis*, 731 N.W.2d 539, 545 (Minn. App. 2007)); *see also Schug v. Michael*, 245 N.W.2d 587, 591 (Minn. 1976) (citation omitted) (stating a trustee's duty of loyalty is "a duty to the beneficiary to administer the trust *solely* in the interest of the beneficiary"

[13] Minnesota courts have cited to the Restatement (Third) of Trusts as persuasive authority. *See Norwest Bank Minn. N., N.A. v. Beckler*, 663 N.W.2d 571, 581 (Minn. App. 2003); *In re Disciplinary Action Against Overboe*, 745 N.W.2d 852, 863 n.5 (Minn. 2008).

(emphasis added)). "Where the trustee has a personal interest adverse to the trust, a court is likely to remove the trustee." Gary, *supra*, § 527, at 3 (emphasis omitted).

"Differences of opinion, unfriendliness, or lost confidence" between a beneficiary and a trustee are generally insufficient to warrant trustee removal. *Id.* at 4. However, "[w]hen the hostile relations have gone beyond mere attitudes and have resulted in actual *vindictive acts* of administration, removal will normally be ordered." *Id.* Removal is also appropriate "where there are several trustees and the relations among the trustees are such that they cannot cooperate in the affairs of the trust." *Id.*

Here, the district court detailed "the inappropriate behavior of [t]rustee Lipschultz in his communications during the transaction." The district court found that "[b]eginning in September 2019 during his conversations with [the consultant], Lipschultz displayed a crude, vulgar[,] and otherwise offensive brashness that has no place in the charitable world." These conversations included Lipschultz's desire to find aggressive investors, rude comments about BFC's CEO, and disparaging statements about Johnson. The district court pointed to these communications, coupled with Lipschultz's aggressive pursuit of the sale, as emblematic of Lipschultz's animosity and vindictiveness towards BFC and his co-trustees.

Lipschultz's hostility went "beyond mere attitudes" and instead "resulted in actual *vindictive acts* of administration." Gary, *supra*, § 527 (emphasis added). The district court found Lipschultz "allowed his own personal interests, animosity, enmity, or vindictiveness to impact his decisions and behavior as a trustee of one of the region's most important charitable institutions." Lipschultz sought out aggressive investors who "live for" hostile

takeovers because he wanted to show BFC management the Trust was not "f-cking around." Once the many lawsuits were filed, Lipschultz expressed a willingness to use extensive Trust resources to fund continued litigation. Simply put, the district court determined that Lipschultz put his own interests before that of the Trust.

The district court did not abuse its discretion when it determined that Lipschultz's behavior during the BFC stock sale constituted a violation of the duty of loyalty and was, therefore, a breach of trust. *See* Minn. Stat. §§ 501C.0802, .1001(a).

### C. Abuse of Grantmaking Power

Lipschultz argues the district court erred when it determined that he violated the duty of loyalty by abusing his grantmaking power. Lipschultz concedes that his interaction with Junior Achievement's CEO involved "some hostility," but argues that hostility between a trustee and a beneficiary is not a sufficient reason to remove a trustee.

Once again, the duty of loyalty prohibits a trustee from placing "the trustee's own interests above those of the beneficiaries." Minn. Stat. § 501C.0802; *see Margolis*, 731 N.W.2d at 545 (stating a "trustee's primary duty is not to allow his interest as an individual even the opportunity of conflict with his interest as trustee" (quotation omitted)). "Mere friction between the trustee and the beneficiary is not a sufficient ground for removing the trustee *unless* such friction interferes with the proper administration of the trust." Restatement (Second) of Trusts § 107 (1959) (emphasis added).[14] "[A] serious breakdown

[14] Minnesota courts have treated the Restatement (Second) of Trusts as authoritative in the absence of Minnesota authority on point. *Kohler v. Fletcher*, 442 N.W.2d 169, 171 (Minn. App. 1989) (noting the Minnesota Supreme Court has treated the Restatement (Second) of Trusts as authoritative in the absence of other authority), *rev. denied* (Minn. Aug. 25,

in communications between beneficiaries and a trustee may justify removal, particularly if the trustee is responsible for the breakdown or it appears to be incurable." Restatement (Third) of Trusts § 37 (2003).

Here, the district court described Lipschultz's interactions with Junior Achievement as "[s]ome of the most disturbing evidence in this case." The district court found Lipschultz's "abusive treatment" of Junior Achievement's CEO caused a rift between the Trust and a longtime beneficiary. And that Lipschultz's actions caused a significant delay in Junior Achievement's receipt of its grant funds. The district court found Lipschultz's behavior led to Junior Achievement returning its grant funds and severing its relationship with the Trust.

Lipschultz's actions caused "a serious breakdown in communications" between the Trust and a beneficiary. *See* Restatement (Third) of Trusts § 37. This breakdown "interfere[d] with the proper administration of the trust" by severing a multi-year relationship with a beneficiary. Restatement (Second) of Trusts § 107. As such, the district court did not abuse its discretion when it determined that Lipschultz's abuse of grantmaking power violated the duty of loyalty and that these acts constitute a breach of trust. *See* Minn. Stat. § 501C.0802, .1001(a).

**D. Failure to Disclose Successor**

Lipschultz argues the district court erred when it found he delayed identifying his successor and when it concluded this alleged delay breached the duty of information. The

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1989); *see also In re Hormel's Tr.*, 163 N.W.2d 844, 850 (Minn. 1968) (citing section 107 of the Restatement (Second) of Trusts).

duty of information requires trustees to keep "qualified beneficiaries . . . reasonably informed about the administration of the trust and of the material facts necessary to protect their interests." Minn. Stat. § 501C.0813(a). A trustee must "promptly respond" to a qualified beneficiary's "request for information related to the [trust's] administration." *Id.* Trustees must disclose "fully, frankly, and without reservation all facts pertaining to the trust." *In re Enger's Will*, 30 N.W.2d 694, 701 (Minn. 1948). A "serious breach of the trustee's duty to keep the beneficiaries reasonably informed of the administration of the trust" is a "particularly appropriate circumstance justifying removal of the trustee." Unif. Trust Code § 706 cmt; *see also* Gary, *supra*, § 527, at 3 ("Removal is likely where a desire to conceal the true state of affairs is indicated."). The AGO "has the rights of a *qualified beneficiary*" with respect to charitable trusts. Minn. Stat. § 501C.0110(d) (2022) (emphasis added).

Here, the district court found that Lipschultz acted in a deceitful and secretive manner when the AGO asked him to disclose his successor's the identity. The district court found "Lipschultz sought to hide [his successor] nomination from the AGO and would not reveal the nomination until he was forced to do so on the stand at trial." Lipschultz argues that the district court clearly erred when it found he committed a breach of trust by delaying the identification of his chosen successor.

Nothing in the record leaves us "with a definite and firm conviction that a mistake has been committed" regarding the timing of Lipschultz's disclosure. *Kenney*, 963 N.W.2d at 221 (quotation omitted). The record supports the district court's finding that Lipschultz first disclosed his successor nomination at trial while on the witness stand. Therefore, the

district court's finding was not clearly erroneous. *Id.* The district court did not abuse its discretion when it determined that Lipschultz's failure to disclose his successor violated the duty of information and, hence, was a breach of trust. *See* Minn. Stat. § 501C.0813(a), .1001 (a).

**E. Serious Breach of Trust**

We conclude the district court did not abuse its discretion when it determined that Lipschultz committed "a serious breach of trust" under section 501C.0706(b)(1). The district court appropriately concluded Lipschultz breached his duties of loyalty and information, and violated the Minnesota Charitable Trust Act, and that each violation was a breach of trust. *See* Minn. Stat. § 501C.1001(a) (defining a breach of trust as "[a] violation by a trustee of a duty the trustee owes to a beneficiary"). The district court did not need to conclude that any one of the breaches individually constituted "a serious breach of trust." Instead, the record supports the district court's decision that Lipschultz engaged in a series of breaches, and those breaches when viewed collectively constitute a serious breach of trust. *See* Unif. Tr. Code § 706 cmt; *In re Gershcow's Will*, 261 N.W.2d at 338 (noting "a determination of what constitutes sufficient grounds for the removal of a trustee is within the discretion of the [district] court"). Thus, the district court did not abuse its discretion when it removed Lipschultz under section 501C.0706(b)(1).

**II.**

Lipschultz also challenges the district court's determination that his removal serves the best interests of the beneficiaries and the Trust under section 501C.0706(b)(3).

Lipschultz argues that he administered the Trust to the advantage of its beneficiaries and effectuated the Trust's purposes.

A district court may remove a trustee if "the court determines that 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." Minn. Stat. § 501C.0706(b)(3). "Unfitness" may include not only mental incapacity but also lack of basic ability to administer the trust. Unif. Trust Code § 706; *see also* Restatement (Third) of Trusts § 37 (providing a nonexhaustive list of possible grounds for the removal of trustee, including: "unfitness, whether due to insolvency, diminution of physical vigor or mental acuity, substance abuse, want of skill, or *the inability to understand fiduciary standards and duties*" (emphasis added)). Before removing a trustee for unfitness, the district court should consider the extent to which the problem might be cured by a delegation of functions the trustee is personally incapable of performing. Unif. Trust Code § 706; Restatement (Third) of Trusts § 37; *In re Pollack Tr.*, 867 N.W.2d 884, 907 (Mich. App. 2015) (affirming cotrustee's hostility or partiality to some beneficiaries does not warrant removal absent a showing these feelings make him unfit); *In re Marriage of Petrie*, 19 P.3d 443, 447-48 (Wash. App. 2001) (upholding a determination that a trustee was unfit due to a "lack of good judgment and willingness to use assets entrusted to him as a fiduciary").

A "persistent failure to administer the trust effectively" might include a long-term pattern of mediocre performance, such as consistently poor investment results when compared to other trusts. Unif. Tr. Code § 706; *see also* Minn. Stat. § 501C.0901, subd. 2

(2022) (stating a trustee must "invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust" through the "exercise of reasonable care, skill, and caution"); *Passero v. Fitzsimmons*, 81 N.E.3d 814, 819-20 (Mass. App. 2017) (holding that the trustees "persistently failed to administer the trust effectively" by expending trust funds on storage fees for many years without the beneficiaries' authorization, refusing to disclose the address of a storage facility to a beneficiary, and failing to provide a beneficiary with accounts, despite providing them to other beneficiaries).

Here, Lipschultz's persistent improprieties support the district court's determination that his removal serves the best interests of the beneficiaries and the Trust. *See* Minn. Stat. § 501C.0706(b)(3). Lipschultz continually breached his duties to the Trust's beneficiaries. Lipschultz caused the Trust to incur unnecessary expenses, injured the Trust's charitable reputation, refused to disclose information to the AGO, and eliminated a relationship with at least one beneficiary. These actions support the district court's determination that Lipschultz is unfit to administer the Trust and that he has persistently failed to administer the Trust. *See In re Gershcow's Will*, 261 N.W.2d at 338 (noting "a determination of what constitutes sufficient grounds for the removal of a trustee is within the discretion of the [district] court"). The district court did not abuse its discretion when it removed Lipschultz pursuant to Minn. Stat. § 501C.0706(b)(3).

## DECISION

Because Lipschultz engaged in a series of breaches that collectively constitute "a serious breach of trust" under Minn. Stat. § 501C.0706(b)(1) and because Lipschultz's

repeated improprieties demonstrate his removal is in "the best interest" of the Trust and its beneficiaries under Minn. Stat. § 501C.0706(b)(3), the district court did not abuse its discretion when it removed him as a trustee.

**Affirmed.**