

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA
Appeal No. 27524

MARK SCHWAN AND PAUL SCHWAN,
as members of the Trustee Succession Committee
of The Marvin M. Schwan Charitable Foundation,
Petitioners/Appellants,

vs.

LAWRENCE BURGDORF, KEITH BOHEIM,
KENT RAABE, GARY STIMAC, and
LYLE FAHNING, as Trustees of The Marvin M.
Schwan Charitable Foundation,
Respondents/Appellees

APPELLANTS' BRIEF

Appeal from the Second Judicial Circuit
Minnehaha County, South Dakota
The Honorable Mark E. Salter

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JURISDICTIONAL STATEMENT

Petitioners/Appellants Mark Schwan and Paul Schwan (the “Schwans”) appeal from an Order and Judgment dismissing their Petition seeking court supervision and instructions regarding a charitable trust under SDCL 21-22-9. The Circuit Court granted a motion for summary judgment and dismissal filed by Respondents/Appellees Lawrence Burgdorf, Keith Boheim, Kent Raabe, Gary Stimac and Lyle Fahning (collectively, the “Trustees”), determining that the Schwans lacked standing to apply to the Court for instructions regarding their duties as members of an oversight committee charged with responsibility to review the Trustees' administration of the trust under the trust's governing document.

The Circuit Court’s Memorandum Opinion and Order granting summary judgment was signed on July 10, 2015 and filed on July 13, 2015. (App. 1.)¹ The Circuit Court’s Judgment of Dismissal was signed on July 31, 2015 and filed on August 3, 2015. Notices of Entry of the Circuit Court's Memorandum Decision and Judgment of Dismissal were served on July 15, 2015 and August 6, 2015, respectively. The Schwans timely filed their Notice of Appeal on August 7, 2015. This Court has jurisdiction under SDCL 15-26A-3 and -4.

¹ Citations to the Schwans' Appendix are cited as "App." with reference to the appropriate page of the Appendix. Citations to the Certified Record of the Clerk of Court are cited as "CR" with reference to the appropriate page in the record.

STATEMENT OF ISSUES

1. **Whether the Circuit Court erred as a matter of law by determining that the Schwans, as members of a charitable trust's oversight committee charged with reviewing the Trustees' administration of the trust and authorized to request that the Trustees account to the committee with regard to their "doings" under the governing trust document, were not persons "in any manner interested in" the trust, and therefore lacked standing to petition the Court for supervision and instructions under SDCL 21-22-9?**

The Circuit Court held that the Schwans were not persons "in any manner interested in" the trust because they did not have a beneficial interest in the trust.

SDCL 21-22-1(1)

SDCL 21-22-9

In re Reese Trust, 2009 SD 111, 776 NW.2d 832 (S.D. 2009)

Lokey v. Texas Methodist Found., 479 S.W.2d 260 (Tex. 1972)

2. **Whether the Circuit Court erred as a matter of law by determining that the Schwans were not a "trust committee," and therefore lacked standing to petition the Court for supervision and instructions as fiduciaries under SDCL 21-22-9?**

The Circuit Court held that the Schwans were not a "trust committee" because their petition was not joined by a majority of the members of the oversight committee.

SDCL 21-22-1(3)

SDCL 21-22-9

STATEMENT OF THE CASE

This appeal presents the Court with an important issue of first impression as to whether non-trustee members of a trust committee, charged with important oversight powers and duties regarding a South Dakota charitable trust under the trust's governing document, have standing to petition the Circuit Court for supervision and instructions

when questions arise about the exercise of their powers and duties under the trust's governing document.

The Schwans are two of seven members of the Trustee Succession Committee (“TSC”) of the Marvin M. Schwan Charitable Foundation (the "Foundation"), a charitable trust formed under and governed by the laws of South Dakota. Under the Foundation’s governing document, the TSC is required to meet, at least annually, to review the administration of the Foundation by its Trustees, and is vested with the exclusive power to appoint and remove Trustees. To facilitate the TSC’s exercise of these powers and duties, the Foundation's governing document imposes a duty upon the Trustees to share information with the TSC upon request: "The Trustees shall account to the [TSC] upon the [TSC’s] request with regard to the Trustees’ doings hereunder."

In the present case, the Foundation's Trustees made a series of highly speculative and catastrophic investment decisions over several years that resulted in over *\$600 million in losses*—roughly two thirds of the Foundation’s entire value. The Schwans, as members of the Foundation’s TSC, requested that the Trustees provide information to the TSC to enable its members to determine, *inter alia*, why the investments were made, how the losses occurred, and whether the Trustees were negligent and/or breached their fiduciary duties to the Foundation—information necessary for the TSC to review the Trustees’ administration of the Foundation and determine their fitness to continue to serve as Trustees as required by the terms of the trust's governing document. The Trustees, three of whom are also members of the TSC, have refused to provide the four non-Trustee members of the TSC with the information requested by the Schwans.

Unable to obtain information from the Trustees necessary for the TSC to determine how the \$600 million in losses occurred or to evaluate the Trustees' conduct with regard to their investment decisions, the Schwans filed a Petition in Minnehaha County Circuit Court seeking Court supervision and instructions under SDCL 21-22-9. In their Petition, the Schwans asked the Court to provide instructions to address whether the TSC has a duty under the Foundation's governing document to request an accounting from the Trustees with regard to their investment losses; whether a vote of a majority of the TSC members is required in order to request such an accounting; if a majority vote of the TSC is so required, whether Trustees who also serve on the TSC are conflicted from participating in such a vote; whether individual TSC members have a fiduciary duty to request that the Trustees account for their investment decisions; and whether the Schwans as individual members of the TSC may request such an accounting.

The Trustees filed a motion to dismiss the Petition, arguing that the Schwans lacked standing to apply to the Court for supervision and instructions under SDCL 21-22-9. The Trustees' motion was initially set for hearing before the Honorable Robin J. Houwman on August 25, 2014. Also scheduled for hearing before the Circuit Court was a motion by the Schwans requesting that the Court take judicial notice of a 2011 Memorandum Decision issued by Minnehaha Circuit Court Judge Stewart L. Tiede in a previous Schwan family trust case involving many of the same parties, allegations and issues as in the present case. In his 2011 Memorandum Decision, Judge Tiede found that one of the Trustees in this litigation had committed "serious breaches of trust" warranting his removal as a trustee of another trust established by the Foundation's settlor, Marvin Schwan.

Prior to the hearing before Judge Houwman, however, the Foundation's Trustees and Beneficiaries, together with the South Dakota Attorney General, jointly requested that the hearing on all motions be held in abeyance for 90 days. The request for abeyance was based on an agreement reached between the Trustees, Beneficiaries and Attorney General, negotiated without the Schwans' knowledge or participation, pursuant to which the Trustees agreed to provide the Beneficiaries and the Attorney General with documents and information about their investment losses, on the condition that such information would be kept confidential and not be shared with the Schwans. Judge Houwman granted the motion for abeyance over the Schwans' objections, and declined to rule on the Schwans' motion for judicial notice of Judge Tiede's 2011 decision.

The instant case was later transferred to the Honorable Mark E. Salter, and a hearing on the parties' motions was rescheduled for February 23, 2015. On the eve of the hearing, the Foundation's Trustees, Beneficiaries and the Attorney General once again entered into an agreement without the Schwans' knowledge or participation, captioned as a "Settlement Agreement," which purported to address the issues raised in the Schwans' petition. The "Settlement Agreement" was negotiated following the Trustees' production in confidence of thousands of pages of information regarding their investment losses to the Foundation's Beneficiaries and the Attorney General. The "Settlement Agreement" provided for certain changes to be made to the Foundation's governance structure, all of which were contingent upon the Circuit Court's dismissal of the Schwans' petition, but made no provision for the Trustees to account to the TSC. On the basis of their "Settlement Agreement," the Trustees brought a new motion to dismiss, joined by the

Beneficiaries and Attorney General, arguing that the Schwans' Petition had been rendered moot by the Settlement Agreement.

All of the parties' motions were heard by the Circuit Court on February 23, 2015. Following the hearing, Judge Salter gave the parties notice of his intent to treat the Trustees' motions to dismiss as motions for summary judgment pursuant to SDCL 15-6-56 and requested that the parties submit additional briefing. After reviewing additional briefing from all parties, the Circuit Court denied the Trustees' motion to dismiss based on mootness, finding that the "Settlement Agreement" was contingent upon the Court's dismissal of the Schwans' Petition, and neither addressed all of the issues raised in the Schwans' Petition nor preempted the Court's ability to grant effectual relief. The Circuit Court further granted the Schwans' motion for judicial notice of Judge Tiede's 2011 Memorandum Decision, holding that Judge Tiede's decision to remove of one of the Foundation's Trustees from another Schwan family trust for "serious breaches of trust" and conflicts of interest was relevant. However, the Court granted the Trustees' motion for summary judgment on standing, holding that the Schwans were neither "beneficiaries" nor "fiduciaries" as those terms are defined in SDCL 21-22-1, and therefore lacked standing to petition the Court for instructions under SDCL 21-22-9. The Schwans appeal the Circuit Court's latter ruling, and respectfully submit that the Circuit Court erred as a matter of law in determining that they lack standing under SDCL 21-22-9.

STATEMENT OF FACTS

The facts relevant to this appeal are largely undisputed. The relevant facts in the record below are as follows:

A. The Foundation's Trust Instrument

Marvin M. Schwan, the father of Appellants Mark and Paul Schwan, established the Marvin M. Schwan Charitable Foundation in 1992 as a tax-exempt charitable supporting organization under Sections 501(c)(3) and 509(a)(3) of the Internal Revenue Code. (Pet. ¶ 1.)² By the terms of its governing document (the "Trust Instrument"), the Foundation was established for the support and benefit of seven named beneficiaries: the Evangelical Lutheran Synod; The Lutheran Church, Missouri Synod; the Wisconsin Lutheran College Conference, Inc.; the Evangelical Lutheran Synod; Bethany Lutheran College, Inc.; the International Laymen's League; and the Wisconsin Evangelical Lutheran Synod Kingdom Workers, Inc. (collectively, the "Beneficiaries"). (Tr. Inst. Art. 2).

To ensure the Foundation's existence in perpetuity, and to provide continuing financial support for its Beneficiaries, Marvin Schwan left substantial stock in the Schwan Food Company to the Foundation in his estate plan. Following Marvin Schwan's death in 1993, the Foundation redeemed the stock and funded itself with assets worth nearly \$1 billion. (App. 3; Pet. ¶ 10.)

² The Schwans' Petition for Court Supervision and Enforcement of Charitable Trust and for Court Instructions and Exhibits thereto are cited as "Pet." with reference to the appropriate paragraph or Exhibit, and can be found at App. 21-105. The Petition was verified by the Schwans when filed. After receiving notice of the Circuit Court's intent to treat the Trustees' motions to dismiss as motions for summary judgment under SDCL 15-6-56, Paul Schwan submitted an affidavit stating under oath that he had personal knowledge of all of the facts alleged in the verified Petition. CR 562-564. The Foundation's Trust Instrument is attached as Exhibit 1 to the Petition and can be found at App. 43-63. Citations to the Trust Instrument are cited as "Tr. Inst." with reference to the appropriate Article or paragraph.

The Trust Instrument provides that the Foundation shall have at least two and not more than five Trustees. (Tr. Inst. Art. 6.A.(3).) At all times relevant to this proceeding, the Foundation has been governed by five Trustees: Appellees Burgdorf, Boheim, Raabe, Stimac and Fahning. (Pet. ¶ 12.) Under the Trust Instrument, the Trustees are charged with responsibility for the Foundation’s investments and are given broad discretion to determine the amount of distributions, if any, made to each Beneficiary. (Tr. Inst. Arts. 2 and 6.) Since the Foundation's inception, the Trustees have paid out approximately \$800 million in distributions to the seven Beneficiaries. (Affidavit of Keith Boheim ("Boheim Aff.") ¶ 3.)³

The Trust Instrument also provides for the establishment of the TSC to oversee the conduct of the Foundation’s Trustees. The Trust Instrument assigns to the TSC the exclusive power to appoint new or successor Trustees and TSC members, and to remove Trustees, with or without cause. (Tr. Inst. Art. 6.A.(5) and (6).) The Trust Instrument further requires the TSC to meet at least annually, “to review the administration of the trust by the Trustees.” (*Id.* Art. 6.A.(9).) To enable the TSC to perform its review function, the Trust Instrument also imposes disclosure obligations on the Trustees. To this end, the Trust Instrument states that “[t]he Trustees shall account to the Committee upon the Committee’s request with regard to the Trustees’ doings hereunder.” (*Id.*)

The Trust Instrument provides that the TSC may have between three and ten members. (Tr. Inst. Art. 6.A.(7).) At all times relevant to this proceeding, the TSC has consisted of seven members. They include Marvin Schwan’s sons, Appellants Mark and Paul Schwan; two non-Trustees who are not parties to this proceeding, David Ewert and

³ The Boheim Affidavit can be found in the Certified Record beginning at CR 175.

Paul Tweit; and three current Trustees, Appellees Burgdorf, Boheim and Raabe.
(Pet. ¶ 16.)

B. The Trustees' Offshore Investments

The dispute in this proceeding stems from a series of speculative and ill-advised investment decisions made by the Foundation's Trustees that have resulted in losses of roughly \$600 million—roughly two thirds of the Foundation's corpus. Neither the nature of these investments nor the magnitude of the resulting losses is disputed.

Over a period of several years, the Trustees embarked on a strategy of investing the Foundation's assets in three luxury resort and hotel development projects in the Caribbean and Central America (the "Offshore Investments"). These Offshore Investments consisted of hundreds of millions of dollars in loans and equity investments, made with Foundation assets, to develop a Four Seasons Resort at Emerald Bay, Great Exuma, Bahamas; a Ritz Carlton Hotel at Seven Mile Beach, Grand Cayman, Cayman Islands; and a Four Seasons Resort at Peninsula Papagayo, Costa Rica. The Trustees funded these Offshore Investments through an elaborate network of over 100 holding companies, subsidiaries, partnerships and other related organizations with legal domiciles in the British Virgin Islands, the Bahamas, Costa Rica, the Cayman Islands, and Panama. (Pet. ¶¶ 23-24.) The Trustees' Offshore Investments include at least three loans, totaling nearly \$20 million, to three Costa Rican entities on which Trustees Boheim and Burgdorf, along with Burgdorf's son, Foundation Associate Director Eric Burgdorf, serve as members of the Board of Directors. (Pet. ¶ 25.)

Speculative by their very nature, each of the Trustees' Offshore Investments failed in spectacular fashion, causing the Foundation to suffer losses of hundreds of

millions of dollars. In 2006, the Foundation recorded over \$135 million in losses associated with the Trustees' investments in the Four Seasons Resort, Great Exuma, Bahamas, and in 2009, it wrote off an additional \$21,953,652 in losses associated with that project. (Pet. ¶ 26.) In 2012, the Foundation wrote off nearly \$250 million in loans associated with the Trustees' investments in the Ritz Carlton Hotel project in Grand Cayman. (*Id.*) And in November 2013, the Trustees disclosed that the Foundation had suffered an additional \$205 million in losses associated with their investments in the Four Seasons Resort project in Costa Rica. Affidavit of Paul Schwan dated 8/14/14 ("Schwan Aff.") ¶¶ 4 and 13 and Ex. 1.)⁴

In total, the Trustees' Offshore Investments have resulted in losses of approximately \$600 million. (Schwan Aff. ¶¶ 12-13.) As a consequence, the Foundation's net assets, once valued at nearly \$1 billion, plunged in value to \$335-\$340 million as of November 19, 2013. (Schwan Aff. Ex. 1.) These precipitous losses have substantially curtailed the Foundation's ability to make grant distributions to its Beneficiaries. The Foundation's publicly accessible Form 990 tax returns⁵ reflect a decline in grants and charitable distributions to the Beneficiaries from over \$43 million in the tax year ending November 2006 to just over \$16 million during the tax years ending November 2010, 2011 and 2012. (Pet. ¶ 28.)⁶

⁴ The Schwan Affidavit can be found in the Certified Record beginning at CR 236.

⁵ Form 990 tax returns filed by non-profit organizations are publicly available on a variety of websites, including propublica.org and guidestar.org.

⁶ In spite of the Trustees' enormous investment losses, the Beneficiaries—who collectively have received some \$800 million in distributions from the Trustees over the past two decades—have opposed the Schwans' Petition, citing "concern[s] about disruption of the Trust and the Foundation moving forward." (February 23, 2015 Motion

C. The Schwans' Unsuccessful Efforts to Obtain Underlying Information Regarding the Trustees' Offshore Investment Losses

Despite the magnitude of the Trustees' Offshore Investments, the Trustees for years provided the TSC only cursory information regarding their investments. Information regarding the Offshore Investments distributed by the Trustees to the TSC⁷ was limited to short, vague executive summaries regarding the Trustees' respective real estate development projects. (Pet. ¶ 30; Boheim Aff. Ex. 2-4.) The summaries included virtually no detail regarding the structure of the Trustees' Offshore Investments or the degree of risk associated with those investments. (*Id.*) More importantly, the reports failed to accurately convey the extent to which the Trustees' Offshore Investments were failing or at risk of sustaining massive losses. (Pet. ¶ 30; Schwan Aff. ¶ 13.) Until May 2013, none of the reports, financial statements or other information provided by the Trustees to the TSC offered any indication that the Foundation's investments in Grand Cayman or Costa Rica, in particular, were at any risk of loss, let alone on the brink of catastrophic failure. (Schwan Aff. ¶ 13; Boheim Aff. Ex. 2 and 3.)

At the TSC's annual meeting in May 2013, the four non-Trustee members of the TSC, including the Schwans, were informed for the first time about the extent of the

Hearing Transcript ("Hearing Tr.") at 39, App. 115.) Counsel for the Beneficiaries informed the Circuit Court at the February 23, 2015 hearing that her clients saw no benefit in having the Trustees disclose information to the TSC about their investment activities, "even if there was a breach of fiduciary duty back when these investments were made, when decisions were made about whether to continue providing capital for these investments at the particular time they did—even if there were some particular type of breach of fiduciary duty that occurred. . . ." (Hearing Tr. at 40, App. 116.)

⁷ The limited investment information provided to the full TSC membership was typically provided by the Trustees at the TSC's annual meetings. *See, e.g.*, Boheim Aff. ¶¶ 7-10. Of course, three of the TSC members—Burgdorf, Boheim and Raabe—had full access to information regarding the Foundation's investments due to their roles as Trustees.

losses associated with the Trustees' Offshore Investments. (Schwan Aff. ¶ 13.) At that meeting, the Trustees disclosed to the TSC that their Grand Cayman investments had resulted in a \$249 million loss, and that their Costa Rica investments were likely to produce hundreds of millions of dollars of additional losses. (*Id.*) At the next meeting of the TSC in November 2013, the Trustees confirmed that their Costa Rica investments were projected to lose an additional \$205 million. (*Id.* and Ex. 3.)⁸

After learning the extent of the Trustees' Offshore Investment losses, the Schwans made several attempts to obtain information from the Trustees to enable the TSC to review the Trustees' investment activities, as contemplated by the Trust Instrument. (Pet. ¶¶ 32-39; Schwan Aff. ¶¶ 14, 16.) Despite the Schwans' requests for such information, the Trustees repeatedly refused to provide the Schwans or the other two non-Trustee members of the TSC any additional information regarding their Offshore Investments or to account to the TSC for their conduct and investment decisions. (*Id.*; Hearing Tr. at 46, 61-62, App. 120, 122-123.)

Frustrated by the Trustees' refusal to provide the TSC with information regarding their Offshore Investments, the Schwans in February 2014 contacted TSC Chair Dave Ewert, one of the TSC's two other non-Trustee members, to urge him to join the Schwans in requesting that the Trustees account to the TSC regarding their investment activities. (Pet. ¶ 36 and Ex. 5.) Ewert refused, stating in an e-mail that the TSC would focus exclusively on governance issues "as they apply to the future. . . . [We] will not dwell

⁸ Coupled with the \$155 million in bad loans written off in 2006 and 2009 relating to the Four Seasons project in the Bahamas, the \$455 million in losses from the Trustees' investments in Grand Cayman and Costa Rica disclosed to the TSC in 2013 raised the total losses resulting from the Trustees' Offshore Investments to over \$600 million.

with the happenings of the past but look forward to the future and how we will function.”
(Pet. ¶ 37 and Ex. 6.)⁹

To date, aside from the Schwans’ requests that the Trustees account to the TSC for their investment decisions, the TSC has taken absolutely no collective action to request, and the Trustees have refused to provide, even the most basic information regarding the Trustees' Offshore Investments. (Pet. ¶¶ 36-39, 46.) As a result, despite the loss of \$600 million in Foundation assets due to the Trustees' speculative investment decisions, the majority of the members of the TSC have had no access to information necessary to answer to several important questions critical to the performance of their oversight function, among them:

- Why did the Trustees of a charitable foundation commit over \$600 million in assets to speculative real estate investments?
- Who among the Trustees was responsible for these investment decisions?
- What due diligence, if any, did the Trustees perform before, or after, making their investment decisions?
- How, and why, did the Trustees’ investments fail in such spectacular fashion?
- Did the Trustees have in place an effective exit strategy to mitigate the Foundation’s future losses?
- Were the Trustees’ Offshore Investment decisions made in violation of the Foundation’s own written conflict of interest and/or investment policies?
- Were the Offshore Investment losses the result of wrongdoing, self-dealing, neglect, or other breaches of the Trustees’ fiduciary duties to the Foundation?
- Are the Trustees competent to manage the affairs of the Foundation?

⁹ Ewert's refusal to allow the TSC to examine the "happenings of the past" is at odds with the TSC's mandate under the Trust Instrument to "review the administration of the [Foundation] by the Trustees." (Tr. Inst. Art. 6.A.(9).)

(Pet. ¶ 46; Schwan Aff. at ¶ 16.)

D. The Trustees' Conflict of Interest

The Schwans' efforts to require the Trustees to account to the TSC for their investment decisions have been frustrated, in particular, by the actions of three Trustee members of the TSC—Burgdorf, Boheim and Raabe—who have used their positions as members of the TSC to oppose the Schwans' requests for an accounting. Their active opposition to the Schwans' request is not disputed: Boheim has submitted an affidavit stating that the Trustees “unanimously take the position that they have ‘accounted’ to the TSC as called for in the [Foundation's] trust instrument.” (Boheim Aff. ¶ 13.).

Excluding the opposition of the three Trustee members of the TSC, the remaining four members of the TSC are evenly split on whether to request that the Trustees account to the TSC¹⁰ and there is no TSC majority opposed to the Schwans' Petition. This is significant because the Trust Instrument explicitly requires that the TSC act “by a majority” in appointing or removing Trustees,¹¹ but expresses no requirement that the TSC act by a majority in requesting an accounting from the Trustees or in performing its oversight function of reviewing the Trustees' administration of the Foundation.¹²

¹⁰ The Schwans' Petition was not joined by non-Trustee TSC members Ewert and Tweit. (CR 204, 208.)

¹¹ Article 6.A.(5) of the Trust Instrument states that the appointment of a successor or additional trustee shall be made “in a writing signed by a majority of the living and competent members of the [TSC].” (App. 50.) Article 6.A.(6) provides that the TSC shall have the power to remove a trustee “by the written action . . . of a majority of the living and competent members of the Committee.” (App. 51.)

¹² Article 6.A.(9) states that “[t]he Trustees shall account to the Committee upon the Committee's request with regard to the Trustees' doings,” and provides that the TSC “is requested to meet at least once a year . . . to review the administration of the trust by the Trustees.” (App. 53.)

The Foundation has adopted strict conflict of interest policies intended to prevent the Trustees and other Foundation representatives from using their positions to advance their own personal interests. The Foundation's Conflicts of Interest and Disclosure Policy, adopted and approved by the Trustees, requires all Trustees and TSC members to "act exclusively in the interests of the Foundation and not use their positions to further their own financial interests or to derive personal advantage." (Pet. Ex. 2, App. 65.) The Foundation's Code of Business Conduct and Ethics, also adopted and approved by the Trustees, provides that a conflict of interest "occurs when a person's private interest interferes in any way (or even appears to interfere) with the interests of the Foundation as a whole. A conflict situation can arise when an employee, officer or Trustee takes action or has interests that make it difficult to perform his or her work objectively and effectively." (Pet. Ex. 3, App. 70.) The three Trustees have offered no explanation for how or why their admitted use of their positions on the TSC to block TSC review of their own investment activities as Trustees is not in violation of the Foundation's written conflict policies.

The efforts of Burgdorf, Boheim and Raabe to block TSC review of the Trustees' investment decisions is just one example of their attempts to circumvent the oversight responsibilities of the TSC on which they serve. During the proceedings in the Circuit Court, the Trustees reached an agreement (without the Schwans' knowledge or participation) to provide the Beneficiaries and the Attorney General with certain information and documents regarding the Trustees' investment activities, on the express condition that the information not be shared with or disclosed to the Schwans. (8/21/14 Affidavit of Allen I. Saeks ¶¶ 2-4, CR 320-322; 2/15/15 Affidavit of Allen I. Saeks ¶ 2,

CR 434-435; Hearing Tr. pp. 46-47, App. 120-121.). Thereafter, the Trustees produced "thousands of pages" of material to the Beneficiaries and the Attorney General pursuant to a confidentiality agreement, a volume of information "significantly more" than what was provided by the Trustees to the TSC at its annual meetings. (Hearing Tr. pp. 47, 72, App. 121, 126.) None of the information provided by the Trustees to the Beneficiaries and Attorney General has been made available to the Schwans or to the other two non-Trustee members of the TSC, Ewert and Tweit. (Hearing Tr. pp. 46-47, 61-62, App. 120-123.) In short, the Trustees have provided thousands of pages of information and documents regarding their Offshore Investment activities to all parties involved in these proceedings *except* the four non-Trustee members of the TSC, who together comprise a majority of the committee specifically charged under the Trust Instrument with reviewing the Trustees' administration of the Foundation, and the committee on which Trustees Burgdorf, Boheim and Raabe purport to serve.

STANDARD OF REVIEW

The Circuit Court granted the Trustees' motion for summary judgment and dismissed the Schwans' Petition, finding that the Schwans lacked statutory standing to petition the Court for supervision and instructions under SDCL 21-22-9. On appeal, all issues are reviewed *de novo*. See, e.g., *AMCO Ins. Co. v Employers Mut. Cas. Co.*, 2014 SD 20 ¶ 7 n.2, 845 N.W.2d 918, 920 (S.D. 2014) (standard of review is *de novo* on review of a motion for summary judgment) (citation omitted); *Pourier v S. D. Dep't of Revenue*, 2010 SD 10 ¶ 8, 778 N.W.2d 602, 604 (S.D. 2010) ("[S]tatutory interpretation and application are questions of law, and are reviewed by this Court under the *de novo* standard of review"). *Fritzmeier v. Krause Gentle Corp.*, 2003 SD 112 ¶ 10, 669 N.W.2d

699,702 (S.D. 2003) ("The question of whether a party has standing to maintain an action is a question of law reviewable by this court *de novo*"). Under the *de novo* standard of review, the Supreme Court gives no deference to the Circuit Court's conclusions of law. *Benson v. State*, 2006 SD 8 ¶ 39, 710 N.W.2d 131, 145 (S.D. 2006).

ARGUMENT

As members of the Foundation's TSC, the Schwans are charged with duties under the Foundation's Trust Instrument to review the Trustees' administration of the Foundation. The Trust Instrument confers upon them the power to request that the Trustees account to the TSC for their actions and to appoint and remove Trustees as they see fit. The Schwans' oversight responsibilities are critical features of the administrative checks and balances established by the Foundation's settlor, Marvin Schwan, and they are required to perform the special duties assigned to them under the Trust Instrument in good faith.

In the wake of the Foundation's \$600 million losses resulting from the Trustees' Offshore Investments, the Schwans have attempted to perform their responsibilities as TSC members by requesting that the Trustees account to the TSC with regard to their investment decisions. At every turn, their efforts have been obstructed by the Trustees, particularly the three Trustee members of the TSC. Without the active opposition of the three conflicted Trustees who sit on the TSC, the remaining four members of the TSC are deadlocked, and there is no TSC majority opposing the Schwans' Petition or their request to have the Trustees account for their investment activities. To resolve this impasse, the Schwans commenced this equitable proceeding to seek instructions from the Court as to

how they and their fellow TSC members should carry out their duties under the Trust Instrument.

The Circuit Court held that the Schwans lacked statutory standing to petition the Court for instructions, disregarding the Legislature's expansive language in SDCL Ch. 21-22, which provides that "any person in any manner interested in" a trust may file a petition seeking Court supervision and instructions. As members of the Foundation's TSC, the Schwans have important duties under the Trust Instrument, and thus have a special interest in the Foundation that is different than the interests of the Trustees, the Beneficiaries, the Attorney General or members of the public at large. By virtue of their duties and responsibilities under the Trust Instrument, they are persons "in any manner" interested in the Foundation, and therefore have standing to petition the Court for instructions under SDCL 21-22-9.

Alternatively, the Schwans have standing to apply to the Court for instructions under SDCL Ch. 21-22 as a "trust committee." The definition of a "fiduciary" in SDCL 21-22-1(3) includes a "trust committee, as named in the governing instrument *or order of the court*. . . ." Neither the language in SDCL Ch. 21-22 nor the terms of the Trust Instrument itself requires a majority vote of the TSC to establish the Schwans' standing to petition the Court on behalf of the deadlocked TSC. The Circuit Court incorrectly held that a "majority" of the non-Trustee members of the TSC was necessary to act as a "trust committee." As a result, it never exercised its equitable powers to determine whether the Schwans should be allowed to petition the Court for supervision and instructions on behalf of the deadlocked TSC. Together, the Legislature's expansive language in SDCL Ch. 21-22 and equitable principles compel the conclusion that the Schwans have standing

to apply to the Court for supervision and instructions regarding their responsibilities under the Foundation's Trust Instrument pursuant to SDCL 21-22-9.

A. The Schwans' Petition for Instructions is governed by SDCL 21-22-9

The procedure for seeking Court supervision and instructions relating to a South Dakota trust is set forth in SDCL 21-22-9. That section provides, in relevant part, as follows:

Any fiduciary . . . or beneficiary of any other trust may, . . . if any of the trust estate has its situs in this state, at any time petition the circuit court . . . to exercise supervision. . . . Upon the petition being filed, the court shall fix a time and place for a hearing thereon, . . . and, upon such hearing, enter an order assuming supervision unless good cause to the contrary is shown. . . . The court shall make such order approving the relief requested by the petition, give such direction to a fiduciary as the court shall determine, or resolve objections filed by an interested party.

SDCL 21-22-9 (App. 107.) (emphasis added).

The Circuit Court characterized the issue of whether the Schwans are authorized to seek court supervision and instructions under SDCL 21-22-9 as an issue of statutory standing that does not implicate subject matter jurisdiction. (App. 8-11.) The Trustees do not dispute the Court's jurisdiction or that SDCL 21-22-9 governs this proceeding. (Hearing Tr. p. 68, App. 125.) The sole issue on appeal, therefore, is whether, based on the Schwans' factual allegations and all inferences reasonably drawn therefrom, the Schwans are parties permitted under SDCL 21-22-9 to petition the Court for supervision and instructions. *See Wojewski v Rapid City Reg'l Hosp., Inc.*, 2007 SD 33, ¶ 11-12, 730 N.W.2d 626, 631 (S.D. 2007).

For the reasons explained below, the Schwans are both "beneficiaries" and "fiduciaries," as those terms are defined in SDCL 21-22-1. They therefore have standing to petition the Court for supervision and instructions under SDCL 21-22-9.

B. The Schwans are persons "in any manner interested in" the Foundation, and therefore have standing to petition the Court as "beneficiaries."

The Schwans are "beneficiaries" as that term is used in SDCL Ch. 21-22 and therefore have standing to petition the Court for supervision and instructions under SDCL 21-22-9. The term "beneficiary" as used in SDCL 21-22-9 is defined in SDCL 21-22-1(1). That statute defines "beneficiary" as "*any person in any manner interested in the trust.*" SDCL 21-22-1(1) (App. 106) (emphasis added). Therefore, in determining whether the Schwans are "beneficiaries," this Court must look to the Legislature's definition of the term provided in 21-22-1(1). *See* SDCL 21-22-1 (providing definitions for "terms used *in this chapter,*" including the term "beneficiary") (emphasis added); *In re Reese Trust*, 2009 SD 111, ¶ 12, 776 NW2d 832, 835-36 (S.D. 2009) (stating for purposes of a petition filed under Chapter 21-22 the definition of beneficiary is found in SDCL 21-22-1(1)).

This Court's function in interpreting statutory language is well established:

When engaging in statutory interpretation, we give words their plain meaning and effect, and read statutes as a whole, as well as enactments relating to the same subject. When the language in a statute is clear, certain, and unambiguous, there is no reason for construction, and this Court's only function is to declare the meaning of the statute as clearly expressed.

Paul Nelson Farm v. S.D. Dep't of Revenue, 2014 SD 31, ¶ 10, 847 N.W.2d 550, 554 (S.D. 2014) (quoting *State v. Hatchett*, 2014 SD 13, ¶ 11, 844 N.W.2d 610, 614 (S.D. 2014)). The purpose of statutory construction is to discover the true intent of the law, which the Court must ascertain from the language expressed in the statute. *Martinmaas v. Engelmann*, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611 (S.D. 2000). "The intent of a

statute is determined from what the legislature said, rather than what the courts think it should have said, and the Court must confine itself to the language used." *Id.*

Here, the Legislature chose to define a "beneficiary," as the term is used in SDCL Ch. 21-22, to include persons "in any manner interested in" a trust. It did not limit or restrict the nature of the trust interest required to qualify as a beneficiary for purposes of Chapter 21-22; rather, it chose to include in its definition persons interested in a trust "in any manner." Had the Legislature wanted to limit the definition of "beneficiary" in SDCL 21-22-1(1) to persons with a beneficial or financial interest in a trust, it certainly could have included such language in that definition, as it elected to do in other trust statutes. *See, e.g.,* SDCL 55-1-12 (defining a beneficiary as "a person that has a present or future beneficial interest in a trust, vested or contingent"); SDCL 55-13A-102 (defining beneficiary as an "income beneficiary and a remainder beneficiary"). The Legislature's decision to define "beneficiary" more broadly in SDCL 21-22-1(1) to include persons "in any manner" interested in a trust is clear evidence of its intent *not* to restrict the term to persons with only a financial or beneficial interest. There is simply no language in SDCL 21-22-1(1) to limit the definition of beneficiary in a proceeding under Chapter 21-22 to persons with a beneficial interest in a trust. *See Citibank, N.A. v. South Dakota Dept. of Revenue*, 2015 SD 67, ¶ 15, ___ N.W.2d ___ (S.D. 2015) (rejecting argument to allow exception to three-year limitations period when there was no language in the statute permitting an exception.)¹³

¹³ Moreover, this Court's rules of statutory construction require that "statutes of specific application take precedence over statutes of general application." *Citibank*, 2015 S.D. 67, ¶ 19. Here, the definition of beneficiary found in SDCL 21-22-1(1) applies specifically to proceedings under SDCL 21-22-9, and therefore takes precedence over statutory definitions of beneficiary found in other Chapters.

In this case, the Schwans, as members of the Foundation's TSC, are clearly "person[s] in any manner interested in" the Foundation. The Foundation's Trust Instrument charges them with the duty to review the Trustees' administration of the Foundation, and grants them powers to request that the Trustees account to the TSC with regard to their activities and to appoint and remove Trustees. The Schwans' interest in the Foundation is neither "casual" nor merely "altruistic." (App. 18-19.) Rather, their powers and duties as members of the TSC confer upon them a special interest with regard to the administration of the Foundation that is different than the interests of the Beneficiaries, the Trustees, or the Attorney General. By accepting these duties as members of the TSC, the Schwans are obligated to carry out their responsibilities in good faith. *See generally* Uniform Trust Code § 808(d) (holder of a power to direct actions of trustee is presumptively acting in a fiduciary capacity with respect to the powers granted and is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries); Restatement (Third) of Trusts, § 75 Comment e (third party holding power to direct or control actions of a trustee for the benefit of someone other than the third party holding that power is subject to fiduciary duties in the exercise of that power). The plain language in SDCL 21-22-1(1) compels the conclusion that persons to whom the Trust Instrument has conferred such important powers and duties are persons "in any manner interested in" the Foundation.

The Supreme Court of Texas addressed precisely this issue in *Lokey v. Texas Methodist Foundation*, 479 S.W.2d 260 (Tex. 1972). In that case, the court held that a petitioner, a single member of a three person committee charged with the duty to direct the distributions from a \$100,000 charitable trust, had standing to file suit to seek the

removal of a foundation as trustee. (*Id.* at 265.) Article 7425b-24 of the Texas Trust Act governing the proceeding in *Lokey* provided that "actions hereunder may be brought by a trustee, beneficiary, or any person affected by or having an active interest in the administration of the trust estate."¹⁴ The court there held that the petitioner had standing, even though he had no beneficial interest in the trust, because he raised the funds at issue and "*he is one of a committee of three charged with the duty and responsibility of directing the distribution of the \$100,000 trust fund.*" (*Id.* at 265) (emphasis added). In interpreting the Texas Trust Act, the Court held that the Attorney General was not the only person who could bring suit to enforce or attack a charitable trust, but that "any other person doing so must have *some special interest in the performance of the trust different from that of the general public.*" (*Id.*) (emphasis added); accord, *In Matter of Hill*, 509 N.W.2d 168, 172 (Minn. Ct. App. 1994) (holding that descendant of the settlor of a charitable trust who had no beneficial interest in the trust was nonetheless a "person interested in the trust," and had standing in a charitable trust proceeding); *St. Mary's Med. Center, Inc. v. McCarthy*, 829 N.E.2d 1068, 1072 (Ind. Ct. App. 2005) (assuming without deciding that petitioner with ties to grantor's family and grandson of a member of trust committee who voted to build a chapel with trust funds had more than a general interest in trust and therefore had standing even though he had no beneficial interest).

Not surprisingly, courts in other jurisdictions have interpreted the phrase "in any manner interested" expansively. See, e.g., *Shoffeitt v United States*, 403 F.2d 991, 992 (5th Cir. 1968) ("[T]he statutory language 'every person in any manner interested in the use of ' is broad and has been broadly construed.") (citation omitted); *Montgomery Cnty.*

¹⁴ Article 7425b-39 of the Texas Trust Act similarly authorized the removal of trustees under certain conditions "on petition of any person actually interested."

v Merscrop, Inc., 904 F. Supp. 2d 436, 450 (E.D. Pa. 2012) ("[T]he Act, in permitting an action to compel recordation by any person 'in any manner interested' in a conveyance . . . creates a broad right of enforcement."); *Norwest Bank Neb., N.A. v. Bellevue Bridge Comm'n*, 607 N.W.2d 207, 211-212 (Neb. Ct. App. 2000) (analyzing the phrase "any manner interested," and stating "[i]n popular parlance, the word, 'any' usually means all or every").

Here, the Legislature's decision to grant standing to any persons "in any manner interested" in a trust certainly must be construed to mean more than just a person with a beneficial interest in a trust. It must, at a minimum, include persons with special powers, duties or interests under the governing trust document, regardless of whether their interest is beneficial or financial. *Lokey*, 479 S.W.2d at 265. To hold otherwise would violate the Legislature's intent and ignore the plain meaning of the words and phrases used in SDCL 21-22-1(1).

The Circuit Court improperly relied on definitions of "beneficiary" found in common law, other South Dakota statutes and even Black's Law Dictionary to support its conclusion that a person's interest in a trust must be beneficial in nature to qualify as a beneficiary under Chapter 21-22. (App. 17-18.) The Court's reference to these sources was both unnecessary and erroneous, since the term "beneficiary" is specifically defined by statute in SDCL 21-22-1(1). *See In re Reese Trust*, 2009 SD 111, ¶ 12, 776 N.W.2d 832, 835 (S.D. 2009) (applying statutory definition of "beneficiary" in SDCL 21-22-1(1) in proceeding under SDCL Chapter 21-22). In addition, by restricting the statutory definition of "beneficiary" to a traditional definition of a person with a beneficial interest, the Circuit Court ignored the fact that the statutory definition itself is broader than the

traditional definition of beneficiary, since it includes "creditors who have asserted a claim against the estate"—parties not traditionally considered "beneficiaries."

This Court need not decide in this case whether persons with only a "casual" or "unconnected" interest in a trust have standing to seek Court supervision and instructions as beneficiaries under SDCL 21-22-9, because those are not the facts before the Court. As the Circuit Court noted, "[t]he Schwans unquestionably have an interest in the Foundation which is more than casual and unconnected." (App. 18.) As descendants of the Foundation's settlor, and as members of the Foundation's TSC with specific powers and duties under the Foundation's Trust Instrument, the Schwans have a special interest in the administration of the Foundation that is different than the interests of the Beneficiaries, the Trustees, or the Attorney General. *See Lokey*, 479 S.W.2d at 265. As such, they are clearly "persons in any manner interested in" the Foundation, and have standing to petition the Court for supervision and instructions as beneficiaries defined under SDCL 21-22-1(1).

C. The Schwans constitute a "trust committee," and therefore have standing to petition the Court for supervision and instructions as "fiduciaries" under SDCL 21-22-9.

Under SDCL 21-22-9, any "fiduciary" of a trust may petition the Court for supervision and instructions. A "fiduciary" as that term is used in SDCL 21-22-9 is defined as a "trustee, custodian, trust advisor, trust protector, *or trust committee, as named in the governing instrument or order of court*, regardless of whether such person is acting in a fiduciary or non-fiduciary capacity." SDCL 21-22-1(3) (App. 106) (emphasis added).

In this case, the Circuit Court found, and the Trustees do not deny, that the Schwans are members of a "trust committee." (App. 14.) The Circuit Court determined, however, that the Schwans lacked standing as a "trust committee" because their Petition was not supported by a "majority" of the members of the TSC. (*Id.* 14-15.) The Circuit Court's holding was in error for several reasons.

The seven-member TSC includes three Trustees—Appellees Burgdorf, Boheim and Raabe—who presumably are the very persons responsible for the investment decisions that led to the Foundation's \$600 million loss. (Pet. ¶ 13, 23-26.) They have loaned \$20 million to three Costa Rican entities on which Boheim, Burgdorf, and a member of Burgdorf's family sit on the Board of Directors. (*Id.* ¶ 25.) All three Trustees have repeatedly used their positions on the TSC to block TSC review of their own investment decisions and activities—a blatant conflict of interest and violation of the Trustees' fiduciary duty of loyalty to the Foundation. *See* Restatement (Third) of Trusts, § 78(1) (2007) ("[A] trustee has a duty to administer the trust solely in the interest of the beneficiaries, or solely in furtherance of its charitable purpose."); Foundation Conflict of Interest and Disclosure Policy (Pet. Ex. 2, App. 65.) (requiring Trustees to "act exclusively in the interest of the Foundation and not use their position to further their own financial interests or to derive personal advantage"); Foundation Code of Business Conduct and Ethics (Pet. Ex. 3, App. 70.) (conflict of interest exists "when a person's private interests interfere in any way (or even appear to interfere) with the interests of the Foundation as a whole"). Clearly, Burgdorf, Boheim, and Raabe have a personal interest in preventing the TSC from scrutinizing their actions as Trustees, and thus have a conflict

of interest that should disqualify them from participating in the TSC's deliberations over whether to demand an accounting from the Trustees.

The Trustees' conflict of interest in this case is very similar to a conflict of interest that led to the removal of one of the Foundation's Trustees from his position as trustee of another trust created by Marvin Schwan. *See In re Schwan 1976 Grandchildren's Trust*, TR. 05-36, (S.D. Cir. Ct. 2011) (Tiede, J.) ("Tiede Decision").¹⁵ In that case, the Trustee had been appointed to serve as Trustee of the Foundation and a second family trust established by Marvin Schwan known as the 1976 Grandchildren's Trust. (*Id.* at 2.) The beneficiaries of the 1976 Trust alleged that the Trustee had violated his fiduciary duty of loyalty to the 1976 Trust by making investment decisions as a Trustee of the Foundation that caused substantial harm to the 1976 Trust. (*Id.* at 6.) The Trustee attempted to excuse his conflict of interest and disloyalty to the 1976 Trust in that case by arguing that Marvin Schwan had initially appointed him as Trustee of both trusts. (*Id.* at 12.) Judge Tiede rejected that argument, finding that the Trustee's conflict arose *not* from his initial appointment as Trustee of both trusts, but rather from his investment decisions as Trustee of the Foundation that were made at the expense of, and in violation of his undivided duty of loyalty to, the 1976 Trust. (*Id.*) Judge Tiede held that the Trustee had engaged in "serious breaches of trust" that justified his removal as a trustee of the 1976 Trust. (*Id.* at 14.)

¹⁵ Judge Tiede sealed the file in the *In re Schwan 1976 Grandchildren's Trust* case by court order. However, the Circuit Court in this proceeding granted the Schwans' motion to take judicial notice of the Tiede Decision. (App. 20.) The Tiede Decision is filed under seal as part of the record in this case. The citations to the Tiede Decision in this brief refer to the page number of Judge Tiede's memorandum decision.

In this proceeding, the Circuit Court recognized that, without the participation of the three conflicted Trustee members of the TSC, the remaining four TSC members were evenly divided on whether to request that the Trustees account to the TSC. (App. 15.) Despite the lack of a majority *opposing* the Schwans' Petition, the Circuit Court held that without a majority of the four remaining TSC members *supporting* their request, the Schwans lacked standing to act as a "trust committee" under SDCL 21-22-9. The Circuit Court's holding is unsupported by the terms of the Trust Instrument or the language of SDCL 21-22-9.

The Foundation's Trust Instrument expresses no requirement that the TSC act by a "majority" in requesting an accounting from the Trustees. (Tr. Inst. Art. 6.A.(9).) It provides only that the Trustees "shall account to the Committee upon the Committee's request." (*Id.*) The absence of any requirement that a "majority" of the deadlocked TSC must request an accounting is significant, because the Trust Instrument elsewhere specifically states that a "majority" of the TSC is required, for example, to appoint and remove Trustees. Absent a majority requirement in the Trust Instrument to request an accounting from the Trustees, the Circuit Court erred in ruling, as a matter of law, that the Schwans lacked standing to represent the interests of the deadlocked TSC.

Furthermore, the statutory language of SDCL 21-22-1(3) recognizes the Court's equitable powers to determine whether a party should be permitted to petition the Court for instructions as a fiduciary. SDCL 21-22-1(3) defines a fiduciary to include a "trust committee, as named in the governing instrument *or order of court. . . .*" SDCL 21-22-1(3) (emphasis added). The Circuit Court never reached the question of whether or not the Schwans should be permitted to petition the Court in equity as a "trust committee,"

since the Court erroneously ruled as a matter of law that the Schwans needed the support of a "majority" of the four non-Trustee members of the TSC to act as a trust committee.

The Circuit Court's failure to consider the use of its equitable powers to determine if the Schwans should be allowed to petition the Court for instructions on behalf of the deadlocked TSC was reversible error. *See, e.g., Nicholson v. Isaacman*, 26 F.3d 629, 630, 633 (6th Cir. 1994) (reversing a lower court for its failure to exercise its equitable powers); *Metro. Dist. Comm'n v. Conn. Res. Recovery Auth.*, 22 A.3d 651, 658 (Conn. App. Ct. 2011) (reversing a trial court for failing to hold a hearing to consider defendant's claim for equitable relief); *Belluso v. Tant*, 574 S.E.2d 595, 596 (Ga. Ct. App. 2002) ("The trial court determined as a matter of law that [plaintiff] lacked standing to bring the action. Because we find the trial court failed to consider applicable precedent authorizing the exercise of its equitable powers in favor of [plaintiff], we reverse."); *Gorsuch Homes, Inc. v. Wooten*, 597 N.E.2d 554, 561 (Ohio Ct. App. 1992) (reversing because "there is no indication [in the trial court's decision] that [plaintiff's] equitable argument was considered.")

The equities in this case compel the conclusion that the Schwans should have been recognized as a "trust committee" with standing to petition the Circuit Court for instructions. As members of the TSC, they have special powers and duties to review the Trustees' administration of the Foundation and were obligated to carry out their responsibilities under the Trust Instrument in good faith. *See, e.g., Restatement (Third) of Trusts* § 75 and Reporter's Notes at 65. In light of the Trustees' \$600 million investment disaster and the TSC's duties to review the Trustees' actions to determine their fitness to continue to serve as Foundation Trustees, the Circuit Court should have

exercised its equitable powers to recognize the Schwans as "fiduciaries" by court order under SDCL 21-22-1(3).

D. The Circuit Court's decision unfairly denies the Schwans, as well as fiduciaries in other South Dakota trusts, access to the courts to seek instructions regarding their trust duties.

A decision by this Court recognizing the Schwans' standing to petition the Circuit Court for supervision and instructions is consistent with statutory language in SDCL 21-22-1 and 21-22-9 and would reaffirm a longstanding right of trust fiduciaries to petition a court in equity when necessary to determine how they should perform their special duties to the trust.

It is increasingly common in modern trust practice for the governing trust document to confer powers on a third party to direct or control certain conduct of the trust's appointed trustees. *See, e.g.*, Restatement (Third) of Trusts § 75 and Reporter's Notes at p. 58. The definition section of SDCL Ch. 21-22 is evidence of the Legislature's recognition of the existence and common use of trust committees, trust protectors, consultants and advisors to oversee or assist trustees in managing or administering trusts. *See, e.g.*, SDCL 21-22-1(3) (defining trust custodians, trust advisors, trust protectors and trust committees as "fiduciaries").

When the power to direct or control the actions of trustees is for the benefit of someone other than the third party to whom such powers are conferred, the third party may be subject to fiduciary duties in the exercise of such a power. Restatement (Third) of Trusts § 75, Comment e at p. 56. "Circumstances . . . may justify one or more of the beneficiaries in relying on the holder of such a power to monitor the administration of the trust, so that there may be an affirmative duty to act when the power holder knows or

should know that the purposes of the power call for some action to be taken." *Id.*, Comment f; *see also* Uniform Trust Code § 808(d) ("a person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith").

A trust fiduciary's access to the courts to apply for instructions when questions arise regarding his or her duties to the trust, and the court's power to grant instructions in such circumstances, "has long been viewed . . . in most states as inherent in the equitable powers of courts having jurisdiction over trusts." Restatement (Third) of Trusts § 71 Comment a; *see also* Uniform Trust Code § 201 Comment ("The jurisdiction of the court with respect to trust matters is inherent and historical and also includes the ability to act on its own initiative . . . and provide a trustee with instructions."). The expansive language used by the Legislature in SDCL Ch. 21-22 granting standing to "any person in any manner interested in" a trust to seek court supervision and instructions under SDCL 21-22-9 is consistent with this longstanding equitable right, and assures that all persons with special trust duties in South Dakota have access to the courts to seek guidance in complex cases rather than acting improperly without opportunity for judicial guidance and later being sued for damages.

The Circuit Court's narrow reading of the standing provisions in SDCL Ch. 21-22 improperly denies the Schwans court access to seek judicial clarification of their duties to the Foundation under the Trust Instrument. As legal precedent, it would also potentially deny court access to trust fiduciaries with special powers and in future cases. Chapter 21-22 should be read to avoid such unintended and anomalous results. The Schwans, as persons assigned special powers and duties under the Foundation's Trust Instrument,

should be regarded as persons "in any manner interested in" the trust with standing to petition the court under SDCL 21-22-9, regardless of whether or not they have a financial or beneficial interest in the trust. Such a holding is consistent with the Court's inherent equitable powers to provide instructions to persons with special trust powers and duties when necessary.

CONCLUSION

For all of the reasons set forth above, Appellants Mark and Paul Schwan respectfully request that this Court reverse the decision of the Circuit Court and hold that they have standing to petition the Court for supervision and instructions under SDCL 21-22-9.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief does not exceed the number of words permitted under SDCL 15-26A-66(b)(2), said brief containing 9,460 words, Times New Roman Font, 12 point, 49,719 characters (no spaces) and 59,419 character (with spaces).

Dated this 9th day of October, 2015.

Jason R. Sutton

Dated: October 9, 2015

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APPENDIX

1. Judge Salter's memorandum Opinion and Order dated 07/10/15 Appendix 1-20
2. Petition for Court Supervision and Enforcement of Charitable Trust and for Court Instructions dated 06/03/14 and Exhibits 1-8 Appendix 21-105
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4. SDCL 21-22-9 Appendix 107
5. Motions Hearing Transcript (portions) dated 02/23/15 Appendix 108-127
6. Trustees' Statement of Undisputed Material Facts dated 06/05/15 Appendix 128-130
7. Attorney General's, Beneficiaries', and Trustees' Joint Statement of Undisputed Material Facts dated 06/03/15 Appendix 131-137
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#1

STATE OF SOUTH DAKOTA)
 :SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

In the Matter of the MARVIN M.
SCHWAN CHARITABLE FOUNDATION

TRU 14-21

MARK SCHWAN and PAUL SCHWAN,
as members of the Trustee Succession
Committee of the Marvin M. Schwan
Charitable Foundation,

Petitioners,

vs.

LAWRENCE BURGENDORF, KEITH
BOHEIM, KENT RAABE, GARY
STIMAC and LYLE FAHNING, as
Trustees of the Marvin M. Schwan
Charitable Foundation,

Respondents.

MEMORANDUM OPINION
AND ORDER

This matter is before the court upon the Petition of Mark Schwan and Paul Schwan (collectively "the Schwans") seeking court supervision of the Marvin M. Schwan Charitable Foundation ("the Foundation"). The Foundation's trustees, Lawrence Burgdorf, Keith Boheim, Kent Raabe, Gary Stimac and Lyle Fahning (collectively "the Trustees") previously filed a motion to dismiss the Petition which the court has converted to a summary judgment motion. Also pending before the court is the Schwans' motion for judicial notice and the Trustees' motion to strike the Affidavit of John H. Langbein.

The court held a consolidated hearing on the motions on February 28, 2006. The Schwans were represented at the hearing by Thomas J. Well and Blake Shepard, Jr. The Trustees were represented by Vince M. Roche and Reese Almond.

The South Dakota Attorney General was present through Assistant Attorneys General Jeffrey P. Hallem and Phil Carlson. Pamela Bollweg and Kenneth L. Gosch were also present, representing separate individual named beneficiaries of the Foundation.

On May 15, 2015, the court gave the parties notice of its intent to treat the Trustees' motion to dismiss as a motion for summary judgment pursuant to SDCL § 15-6-56. The notice, later amended on June 1, 2015, established deadlines for the parties to submit materials "pertinent to" a summary judgment motion. See §§ SDCL 15-6-12(b), 15-6-12(c). The parties have since submitted those materials.

After fully reviewing the parties' arguments, reading all of their written submissions and the relevant authorities, and carefully considering the issues presented, the court grants the Trustees' motion for summary judgment. The court also grants the motion to strike the Affidavit of John H. Langbein and grants the motion for judicial notice.

FACTUAL BACKGROUND

Marvin Schwan established the Foundation in 1992. The Foundation was conceived as a perpetual charitable foundation, and its trust instrument ("Foundation Trust Instrument" or "Trust Instrument") lists seven named beneficiaries – Wisconsin Evangelical Lutheran Synod, The Lutheran Church, Missouri Synod, Wisconsin Lutheran College Conference, Inc., Evangelical Lutheran Synod, Bethany Lutheran College, Inc., International Lutheran Laymen's

League, and Wisconsin Evangelical Lutheran Synod Kingdom Workers, Inc. (collectively the "Named Beneficiaries").¹

The Foundation Trust Instrument provided for at least two trustees but no more than five. Originally, Marvin Schwan named himself, his brother, Alfred Schwan, and friend, Lawrence Burgdorf, as trustees. Currently, the Trustees are Messrs. Burgdorf, Boheim, Raabe, Stimac and Fahning.

The Trust Instrument also provided for a trust succession committee ("TSC"). As its name suggests, the TSC is responsible for selecting and removing trustees. The original members of the TSC included Marvin Schwan, Alfred Schwan, Lawrence Burgdorf and Owen Roberts. The current TSC is comprised of Mark Schwan, Paul Schwan, David Ewert, Paul Tweidt and current Trustees Burgdorf, Boheim and Raabe. The TSC also has the power to review the trustees' efforts on behalf of the Foundation by requiring the trustees to "account to the [TSC] upon the [TSC's] request with regard to the Trustees' doings..." Trust Instrument, Sixth Art., ¶ A.9.

After Marvin Schwan passed in May of 1993, the Foundation received all of his stock in what was ultimately known as Schwan Food Company. Pursuant to Mr. Schwan's estate plan, the Foundation redeemed the stock and funded itself with assets of nearly \$1 billion. See *In re Schwan 1996 Great, Great, Grandchildren's Trust*, 2006 SD 9, ¶ 6, 709 N.W.2d 849, 851 (describing the funding of the Foundation); see also Petition for Court Supervision at ¶ 10.

¹ There is no dispute that the provisions of the Trust Instrument are subject to South Dakota law or that the case is correctly venued in Minnehaha County.

At the center of the current controversy involving the Schwans and the Trustees are significant investment losses sustained by the Foundation as a result of three real estate investments. The investments all involve luxury hotels at locations in the Caribbean and include the Four Seasons Resort at Emerald Bay, Great Exuma, Bahamas, the Ritz Carlton Hotel at Seven Mile Beach, Grand Cayman, Cayman Islands, and the Four Seasons Resort at Peninsula Papagayo, Costa Rica. The Schwans estimate the losses total over \$400 million which account for a significant reduction in the Foundation's assets and reduced distributions to the seven Named Beneficiaries. See Paul Schwan Aff. of 8/14/14 at ¶4; see also Petitioners' Supplement Brief of 6/24/15 (describing losses of \$600 million).

The fact that the Foundation has sustained these losses is not disputed, and the Trustees claim their existence is long-standing and well-known. The Schwans, for their part, suggest the Caribbean luxury hotel investments may not be suitable investments for the Foundation, and, more specifically, they claim the Trustees have not sufficiently accounted to the TSC for the losses and the decisions to undertake the investments.

The other members of the TSC do not appear to share this position. Despite efforts by the Schwans to obtain additional information about the Caribbean investments, they have been unable to secure the concurrence of other TSC members, three of whom also serve as current trustees. Indeed, the Trustees have asserted, among other things, that they have already provided an adequate accounting and, further, that they have the authority under the Foundation Trust

Instrument to conclusively determine sufficient compliance with the accounting requirement.

Notwithstanding this position, the Trustees have, during the pendency of this case, offered far greater disclosure to the Named Beneficiaries and the Attorney General's Office -- but not the Schwans. Following their review of the information, the Named Beneficiaries, the Attorney General and the Trustees entered into a contingent settlement agreement. The settlement agreement is contingent upon this court dismissing the Schwans' Petition with prejudice and provides for the eventual resignation of Trustees Burgdorf, Boehm and Raabe along with the eventual resignation of Messrs. Burgdorf and Boehm as members of the TSC. The settlement agreement also contemplates an amendment to the Foundation Trust Instrument to prohibit trustees from simultaneously serving as TSC members, though the effective date for the amendment is undetermined.

The Schwans are seeking court supervision of the Foundation pursuant to SDCL § 21-22-9 to obtain an accounting and further instructions from the court. The Trustees resist court supervision, asserting a number of arguments. Chief among them is the claim the Schwans are not authorized to seek court supervision under South Dakota law and are not, in any event, able to obtain a different accounting from the Trustees under their interpretation of the Trust Instrument.

The Trustees also claim that their opposition to court supervision along with the opposition of the Named Beneficiaries and the Attorney General militate against it. Further, the Trustees have argued the Schwans previously released any

claims arising from an individual's simultaneous appointments as a trustee and a TSC member.

Finally, the Trustees claim the contingent settlement agreement renders the Petition moot. The Named Beneficiaries and the Attorney General have joined in the request to dismiss the petition on the basis of mootness.

AUTHORITIES AND ANALYSIS

I. **The controversy is not rendered moot by the contingent settlement agreement among certain parties.**

"It is a fundamental principle of our jurisprudence that courts do not adjudicate issues that are not actually before them in the form of cases and controversies." *Moeller v. Weber*, 2004 SD 110, ¶ 45, 689 N.W.2d 1, 16. A case becomes moot when "the actual controversy ceases and it becomes impossible for the ... court to grant effectual relief." See *Hewitt v. Felderman*, 2018 SD 91, ¶ 11, 841 N.W.2d 258, 262 (applying principle of mootness in the appellate context) (citations omitted).

The controversy here remains a live one for which this court may grant effectual relief. The Trustees, the Named Beneficiaries and the Attorney General ("the Trustees" for this section) argue that the contingent settlement agreement, among the parties other than the Schwans, renders the case moot, but the claim is unsustainable for a number of reasons.

First, the contingent settlement agreement is an agreement among non-adverse parties, not the Schwans, which is contingent upon the Trustees prevailing against the Schwans. If anything, a decision dismissing the Schwans' Petition

would render the need for the contingent settlement agreement moot – not the reverse.

Second, the provisions of the settlement agreement do not preempt the court's ability to grant effectual relief. Even assuming, without deciding, that the court would order removal of the Trustees and bar their service on the TSC if it assumed supervision, it would do so without any temporal constraints. By contrast, the timetable for these changes, under the contingent settlement agreement, is delayed and uncertain. For example, Mr. Burgdorf would resign as a trustee within 80 days of a decision dismissing the petition or an order affirming that decision in the event of an appeal to the South Dakota Supreme Court. Mr. Boehm would resign within that same timeframe, or within 80 days of the Foundation's recapitalization effort for the Costa Rica resort, whichever is later. Also, the amendment of the Trust Instrument to prohibit trustees from serving on the TSC becomes effective on a date the parties determine after "confer[ing] in good faith." ² Petition for Dismissal, filed 2/17/15, Ex. 1 attachment.

Beyond this, removal of the Trustees and barring their service on the TSC, even if it were part of the relief ordered, does not represent the universe of actions the court could undertake. For example, part of the court's instructions if it assumed jurisdiction could include a requirement that the Trustees account to the TSC, including the Schwans, to the same extent it shared information with the

²The court is leaving aside the question of whether any of the non-adverse parties would actually seek to enforce the settlement agreement if its provision were not observed.

Named Beneficiaries and the Attorney General. The contingent settlement agreement makes no allowance for such an accounting.⁸

Questions of mootness aside, the contingent settlement agreement should not play any role in the determination of the issues before the court. The court must decide these issues solemnly and independently based upon the law and the record -- not based upon the effect of an agreement that only operates if the court decides the case in a particular way. Such a utilitarian argument rests uneasily upon the premise that the Trustees' *contingent* willingness to resign and amend the Trust Instrument somehow impacts the court's application of the principles governing the merits of this case.⁴ It does not.

II. The question of statutory standing does not implicate subject matter jurisdiction.

The principal issue presented here is also a threshold one -- whether the Schwans are authorized to seek court supervision for the Foundation. The Trustees

⁴ Though the court is not deciding the issue of the Trustees' ability to interpret the Trust Instrument, it is aware they possess the authority to determine "the meaning and reference of any ambiguous expression used in this instrument." Trust Instrument, Sixth Art, ¶ C. Assuming, arguendo, the term "account" is ambiguous and could require interpretation, the Trustees' power to determine its meaning is further conditioned upon "good faith and the exercise of reasonable judgment[.]" *Id.* At a minimum, the record reflects two types of accounting, and more specifically, the Trustees' inclination to provide two types of accounting with more detail provided to the Named Beneficiaries and the Attorney General than to the TSC which is actually charged with reviewing the Trustees' "doings." Perhaps a reasonable explanation exists, but suffice it to say here that the Trustees' authority to interpret ambiguous Trust Instrument terms would not necessarily prevent an order to provide a greater level of accounting if the court were assuming supervision of the Foundation.

⁸ The settlement agreement, by its own terms, states that it should not be admissible "for any purpose in any proceeding." Petition for Dismissal, filed 2/17/15, Ex. 1 at ¶ 13. The parties to the agreement have obviously waived operation of that provision at least to the extent it has been submitted here.

characterize the issue as one of standing which they claim impacts subject matter jurisdiction. Because the argument relates to jurisdiction, the court has considered the issue further and concludes that the statutory standing question here does not implicate jurisdiction.

The Eighth Circuit Court of Appeals has observed that the single term "standing" refers to distinct legal doctrines:

Though all are termed "standing," the differences between statutory, constitutional, and prudential standing are important. Constitutional and prudential standing are about, respectively, the constitutional power of a federal court to resolve a dispute and the wisdom of so doing. Statutory standing is simply statutory interpretation; the question it asks is whether Congress[, or the State,] has accorded *this* injured plaintiff the right to sue the defendant to redress his injury.

Miller v. Redwood Toxicology Laboratory, Inc., 688 F.3d 928, 934 (8th Cir. 2012) (quoting *Graden v. Conexant Sys., Inc.*, 496 F.3d 291, 295 (8th Cir. 2007)) (original emphasis of *Graden* court) (internal citations omitted).

The South Dakota Supreme Court has concluded that even constitutional standing – requiring a plaintiff's injury in fact – does not necessarily create a jurisdictional issue:

Subject matter jurisdiction is conferred solely by constitutional or statutory provisions. Black's Law Dictionary defines subject matter jurisdiction as jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things. Conversely, standing is a party's right to make a legal claim or seek judicial enforcement of a duty or right. In order to establish standing, a litigant must show: (1) an injury in fact that is (a) concrete and particularized and (b) actual or imminent; (2) a causal connection between the plaintiff's injury and the conduct of which the plaintiff complains; and (3) the likelihood that the injury will be redressed by a favorable decision. *Determining lack of standing or*

lack of subject matter jurisdiction are separate arguments that require separate analyses. It is possible for a court to have subject matter jurisdiction, but a party could lack standing.

City of Rapid City v. Estes, 2011 SD ¶ 9 n.6, 805 N.W.2d 714, 717 n. 6 (internal quotations and citations omitted) (emphasis supplied).⁵

The question of whether the Schwans' ability to seek court supervision involves a jurisdictional question impacts the proper legal standard under SDCL § 15-6-12(b). If, as the Trustees suggest, the argument is jurisdictional, Rule 12(b)(1) allows the court to consider matters outside of the pleadings, and no presumptive truthfulness applies to the non-movant's allegations. *Huttierville Hutterian Brethren, Inc. v. Waldner*, 2010 SD 86, ¶ 20, 791 N.W.2d 169, 174-175. However, when the motion to dismiss challenges the legal sufficiency of the complaint or, in this case the Petition, the court accepts the pleader's description of what happened along with any conclusions reasonably drawn from them. *Wojewski v. Rapid City Regional Hosp., Inc.*, 2007 SD 38, ¶ 11, 790 N.W.2d 626, 681 (interpreting SDCL § 15-6-12(b)(6)).

In the court's view, the question of statutory standing presented here is not a jurisdictional question⁶ but, rather, a question of statutory interpretation focusing upon whether the Schwans are among those designated in SDCL § 21-22-1 who may

⁵ Our Supreme Court has equated standing with appellate jurisdiction previously, though an issue requiring the Court to distinguish between types of standing was not presented. See e.g. *Appeal of Lawrence County*, 499 N.W.2d 626 628-629 (S.D. 1993).

⁶ In its contemporary formulation of subject matter jurisdiction, the United States Supreme Court has held that jurisdiction means simply "the courts' statutory or constitutional power to adjudicate the case." *United States v. Cotton*, 535 U.S. at 690 (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998)).

seek court supervision of a trust. The court would otherwise restrict its consideration to the pleadings, but here the parties have submitted significant additional information. The court agrees this information should be considered as part of the record, and for this reason, the court will treat the Trustees' motion to dismiss as a motion for summary judgment and analyze it under the provisions of SDCL § 15-6-56.

III. Determining whether the Schwans are proper parties to seek court supervision of the Foundation.

A. Summary Judgment in an action under Chapter 21-22.

The standard for a trial court's determination of summary judgment is well settled:

Summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law... A disputed fact is not material unless it would affect the outcome of the suit under the governing substantive law.... When a motion for summary judgment is made and supported as provided in § 15-6-56, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in § 15-6-56, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Morris Family, LLC ex rel. Morris v. South Dakota Dept. of Transp., 2014 SD 97, ¶ 11, 867 N.W. 2d 865, 869 (quotations and embedded citations omitted).

The text of SDCL § 21-22-9 requires court supervision of a trust "unless good cause to the contrary is shown." SDCL § 21-22-9. Here, the Trustees suggest, among other things, that good cause exists because the Schwans are not proper parties to seek court supervision for the Foundation. Because the court agrees, it

makes no further determination of the other arguments offered by the Trustees or by the Schwans.

B. Construing the definitions found in SDCL § 21-22-1(1) and (3).

South Dakota law provides for judicial supervision of trusts upon the petition of a "beneficiary" or a "fiduciary." SDCL § 21-22-9. Section 21-22-9 provides in relevant part:

Any fiduciary or beneficiary of any other trust may... at any time petition the circuit court... to exercise supervision. Upon the petition being filed, the court shall fix a time and place for hearing thereon... cause notice to be given as provided by this chapter, and, upon such hearing, enter an order assuming supervision unless good cause to the contrary is shown...

SDCL § 21-22-9.⁹

At the heart of this controversy is the question of whether the Schwans are either beneficiaries or fiduciaries under SDCL Chapter 21-22. Both terms are defined by statute:

- (1) "Beneficiary," any person in any manner interested in the trust, including a creditor or claimant with any rights or claimed rights against the trust estate;

- (3) "Fiduciary," a trustee, custodian, trust advisor, trust protector, or trust committee, as named in the governing instrument or order of court, regardless of whether such person is acting in a fiduciary or nonfiduciary capacity;

SDCL § 21-22-1(1), (3).¹⁰

⁹ The Legislature amended SDCL § 21-22-9 in 2015. Those changes became effective on July 1, 2015, but they do not appear to impact any of the issues currently before the court. See 2015 S.D. Sess. Laws, Ch. 240 (HB 1051).

The South Dakota Supreme Court has not had occasion to interpret either term under circumstances similar to those presented here, and this court is left to construe them according to well-settled rules of statutory construction.¹¹ These rules have been summarized by the Supreme Court in the following terms:

The purpose of statutory construction is to discover the true intention of the law which is to be ascertained primarily from the language expressed in the statute. The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. Words and phrases in a statute must be given their plain meaning and effect. When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed.

Discover Bank v. Stanley, 2008 SD 11, ¶ 16, 757 N.W.2d 756, 762 (citation omitted).

"A statute is ambiguous when it is reasonably capable of being understood in more than one sense." *Zoss v. Schaefers*, 598 N.W.2d 550, 552 (S.D. 1999) (citation omitted). Where a court must construe an ambiguous statute, it may "look to 'the legislative history, title, and the total content of the legislation [.]'" *Id.* (quoting *LaBore v. Muth*, 473 N.W.2d 485, 488 (S.D.1991)).

¹⁰ The Legislature also amended the definition of beneficiary during its 2015 session, adding the concluding phrase, "if the creditor or claimant demonstrates a previously asserted specific claim against the trust estate." See 2015 S.D. Sess. Laws, Ch. 240 (HB 1051).

¹¹ For this reason, the court is granting the motion to strike the Affidavit of John H. Langbein. Though Professor Langbein has written extensively on subjects connected with trust law (and legal history as cited by the United States Supreme Court), the court views the question presented here as one that turns upon statutory construction. The broader principles of trust law described by Professor Langbein in his affidavit simply do not assist with the discrete issues before the court.

C. The Schwans' membership on the Trust Succession Committee does not make them fiduciaries under SDCL § 21-22-1(3).

Here, the term fiduciary, as defined in SDCL § 21-22-1(3), is not ambiguous.¹² According to the plain language of the statute, even those who are not acting in a fiduciary capacity could, nevertheless, be considered fiduciaries for purposes of Chapter 21-22 as long as they were included among those expressly listed in subdivision (3).

There is no dispute that Mark and Paul Schwan are not trustees of the Foundation. They are not custodians or trust advisors, and neither man is named as a trust protector in the 1992 Trust Instrument. See SDCL § 55-1B-1(2) (defining trust protector for purposes of Chapter 55-1B as a person appointed by the trust instrument). Both are, however, serving members of the TSC which is a "trust committee" established in the Trust Instrument. The question of whether they can, acting without a majority of the TSC, petition for court supervision of the Foundation is resolved by the language of the SDCL § 21-22-1(3) and the trust document.

First, SDCL § 21-22-1(3) limits fiduciary status to a singular "trust committee" and does not allow for individual members to become fiduciaries by acting independent of the trust committee. It seems self-evident that the Legislature could easily have drafted subdivision (3) to allow individual trust committee members to be considered fiduciaries, but it did not. Nor did it provide a

¹² Subdivision (3) was enacted by the Legislature in 2014 as a new subsection. All parties have proceeded as if it applies to this case.

means by which individual members could act derivatively in the name of the committee.

Further, the trust document does not support the idea that an individual member of the TSC can act unilaterally. For instance, the TSC can appoint a successor or additional trustee only with the consent of a "majority of the living and competent members[.]" Trust Doc, Sixth Art. ¶ A.5. Appointments to the TSC, itself, are also determined by a majority of the members. See Trust Doc, Sixth Art. ¶ A.7.

The Schwans claim that they can act on behalf of the TSC because three of the seven members are conflicted by virtue of their concurrent service as trustees. Citing the Foundation's Conflict of Interest and Disclosure Policy, the Schwans claim these three Trustees cannot, or will, not fairly demand an accounting of their own work. Even if these three Trustees were disqualified, however, the fact remains that the Schwans have been unable to obtain a majority of the four remaining members – Messrs. Ewert and Tweidt have not joined in the Schwans' Petition for court supervision; nor have they previously agreed to seek a more detailed accounting relating to the Caribbean luxury hotel investments.

The Schwans also argue that their individual roles on the TSC make them fiduciaries of the Foundation under common law trust principles. This claim overlooks the fact that the Legislature's definition of fiduciary in SDCL § 21-22-1(3) is a purely statutory one. Indeed, fiduciary status for under Chapter 21-22 depends only upon inclusion in one of the enumerated categories regardless of "whether such person is acting in a fiduciary or nonfiduciary capacity." SDCL § 21-22-1(8).

Accordingly, even if the Schwans are acting in a fiduciary capacity as individual members of the TSC, they do not satisfy the statutory definition of fiduciary unless they are acting as a trust committee, or acting within one of the other roles set out in SDCL § 21-22-1(3).

D, The Schwans are not beneficiaries under the definition set out in SDCL § 21-22-1(1).

When construing the provisions of SDCL § 21-22-1(1) defining a beneficiary, additional rules of statutory construction are necessary. Included among them is the principle that courts read statutes as a whole and in their entirety. *Dakota Plains AG Center v. Smithey*, 2009 SD 78, ¶ 46, 772 N.W.2d 170, 186 (citations omitted). A court also reads a statute "with the underlying assumption that the Legislature did not insert surplusage into its enactments[]" and presumes "the legislature did not intend an absurd or unreasonable result." *Id.*, 2009 SD 78, ¶ 46, 772 N.W.2d at 186 (citations omitted).

The term "beneficiary" as defined in SDCL § 21-22-1(1) is reasonably capable "of being understood in more than one sense." *Zoss*, 598 N.W.2d at 552. The textual description of a beneficiary as "any person in any manner interested in the trust" is broad and seemingly includes any person who has even a casual, non-beneficial interest in the trust. The "interest" requirement could also be reasonably read more narrowly to apply only to those with a beneficial or economic interest in the trust.

Under the former interpretation, any person who is otherwise wholly unconnected to the trust could assert his "interest" in the trust in order to trigger

the provisions of Chapter 21-22. Indeed, if this view prevailed, the definition of beneficiary would envelop all other classifications of status under Chapter 21-22, including those listed in the definition of fiduciary recently enacted in subsection (3) of SDCL § 21-22-1.

This result seems incongruous with the Legislature's clear intent. The Legislature's decision to amend § 21-22-1(3) accompanied a corresponding amendment to SDCL § 21-22-9 which now allows fiduciaries to obtain court supervision of a trust. There would be no reason to authorize this relief for fiduciaries if virtually any individual could seek the same relief through the simple expedient of having a casual interest in the trust. The court cannot accept the idea that the Legislature intended these amendments to be meaningless efforts, which they would surely become if the class of those who could seek court supervision was effectively unlimited.

Even if it will not support a construction that allows for an unlimited class of interested beneficiaries, SDCL § 21-22-1(1) is still conspicuously broad, allowing a beneficiary to be interested "in any manner." However, the court concludes that a beneficiary's interest must be a beneficial one. To hold otherwise overlooks the term "beneficiary," itself. Indeed, it hardly seems novel that a beneficiary should actually possess a beneficial interest. See *In re Reese Trust*, 2009 SD 11, 776 N.W.2d 882 (determining an alternative beneficiary under trust document has sufficient interest to be a beneficiary under SDCL § 21-22-1(1)).

Without regard to its use in particular statute, the term beneficiary has traditionally meant a beneficial interest. Black's Law Dictionary describes a

beneficiary, in the first instance, as someone "who benefits from the act of another." Black's Law Dictionary 142 (5th ed.). Within the specific area of trust law, the legal dictionary includes as beneficiaries those with "any present or future interest, vested or contingent and also includes the owner of an interest by assignment or other transfer." *Id.* at 143.

Other statutes enacted by our Legislature, though not controlling here, are consistent with this definition. For example, SDCL § 55-1-12 defines a beneficiary as "a person that has a present or future beneficial interest in a trust, vested or contingent." SDCL § 55-1-12. South Dakota's Uniform Principal and Income Act defines a beneficiary of a trust as "an income beneficiary and a remainder beneficiary[.]" SDCL § 55-19A-102; *see also* SDCL § 55-3-31 (describing an interest in a trust, for purposes of the statute, as including both interests in the income and the principal).

The Schwans have not cited any authority from any jurisdiction to support the claim that a trust beneficiary need not have a beneficial interest. Nor has the court been able to locate any such authority despite undertaking its own research. The paucity of statutory or decisional law in this regard and the absence of any evidence that our Legislature intended to dramatically expand the definition of beneficiary well beyond its traditional and common law definition further supports the determination that the definition contained in SDCL § 21-22-1(1) requires a beneficial interest.

The Schwans unquestionably have an interest in the Foundation which is more than casual and unconnected. They are Marvin Schwan's children and profess

an interest in perpetuating their father's philanthropic vision amid the Foundation's stark losses.¹³ They also participate directly in the Foundation through their service on the TSC.

Still, their shared interest is not beneficial. The Schwans have no claim or right to any of the Foundation's corpus or income, and they have no right under South Dakota law to enforce this charitable trust. *See* SDCL § 55-9-3 (grantor can designate a person to enforce the charitable trust); *see also* § 55-9-5 (Attorney General authorized to enforce charitable trusts). Paul Schwan acknowledges in his affidavit that he and his brother, Mark, "have nothing to gain personally from filing this Petition, other than doing what we can to ensure that the Foundation is managed in a professional, ethical and transparent manner, for the long-term benefit of the Foundation's beneficiaries." Paul Schwan Aff. of 8/14/14 at ¶ 5; *see also* Petitioner's Response to Trustees' Statement of Undisputed Material Facts at #8 (it is undisputed the Schwans are not entitled to or seeking income or principal from the Foundation and are not named beneficiaries in the Trust Instrument). This altruistic interest does not equate to a beneficial one, and there are no disputed issues of material fact which prevent the court from determining the question of statutory standing.¹⁴

¹³ The court has also considered the fact that the Trust Instrument describes some limited family involvement in the Foundation by providing that members of the Schwan family be consulted "as ... deem[ed] appropriate" in the selection of TSC members and trustees. *See* Trust Instrument, Sixth Art., ¶¶ A.5., A.7.

¹⁴ The Trustees' argument that the Schwans cannot be beneficiaries simply because they are not designated as beneficiaries under the Trust Instrument overlooks the text of SDCL §21-22-1(1) which expressly recognizes that claimants or creditors of the trust – not simply named beneficiaries – can qualify as beneficiaries.

IV. The motion for judicial notice.

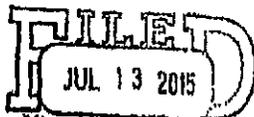
The court grants the Schwans' motion for judicial notice of the September 8, 2011, order issued by the Honorable Stuart Tiede in TRU 05-86, *In the Matter of Marvin M. Schwan 1976 Grandchildren's Trust*. See SDCL § 19-10-2. Although the efficacy of court supervision was not an issue in that case, there is contextual value to the decision in the sense that Judge Tiede's decision to remove Mr. Burgdorf as the trustee of the 1976 Trust for "serious breach of trust" counters the Trustees' allegation that the Schwans' motives for seeking court supervision are contrived or purely self-serving. Frankly, the unvarnished fact that the Foundation has sustained hundreds of millions of dollars in losses in the three Caribbean luxury hotel investments is sufficient to ameliorate any concern that the Schwans' petition is somehow contrived.

ORDER

Based upon the foregoing, it is hereby ORDERED;

- 1) That the Trustees' motion for summary judgment is granted;
- 2) That the Trustees' motion to strike the Affidavit of John H. Langbein is granted;
- 3) That the Schwans' motion for judicial notice is granted; and
- 4) That the court supervision of the Marvin M. Schwan Charitable Foundation is terminated.

Dated this 10th day of July, 2015.



Minnehaha County, S.D.
Clerk Circuit Court

ATTEST:

Angalia M. Gries, Clerk of Court
By *Carol VanHorn* Deputy

BY THE COURT:

A handwritten signature in black ink, appearing to read "Mark E. Salter".

Mark E. Salter
Circuit Court Judge



#2

STATE OF SOUTH DAKOTA
COUNTY OF MINNEHAHA

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

In the Matter of the MARVIN M. SCHWAN
CHARITABLE FOUNDATION

Tr. 14-21

Mark Schwan and Paul Schwan, as members
of the Trustee Succession Committee of the
Marvin M. Schwan Charitable Foundation,

Petitioners,

v.

Lawrence Burgdorf, Keith Bohelm, Kent
Raabe, Gary Stimaac and Lyle Fahning, as
Trustees of the Marvin M. Schwan Charitable
Foundation,

Respondents.

**PETITION FOR COURT SUPERVISION AND ENFORCEMENT OF CHARITABLE
TRUST AND FOR COURT INSTRUCTIONS**

Petitioners Mark Schwan and Paul Schwan (collectively, "Petitioners"), for their Petition
for Court Supervision and Enforcement of Charitable Trust and for Court Instructions, state as
follows:

THE PARTIES

1. The Marvin M. Schwan Charitable Foundation (the "Foundation") is a tax-exempt
supporting organization under Sections 501(c)(3) and 509(a)(3) of the Internal Revenue Code
("IRC").

2. The Foundation was established as a charitable trust in 1992 under the laws of the State of South Dakota. At all times relevant to this proceeding, the legal domicile and situs of the Foundation is and was located in the State of South Dakota.

3. Grantor Marvin M. Schwan ("Marvin Schwan") established the Foundation by trust agreement dated November 20, 1992 (the "Trust Agreement"). Marvin Schwan was a resident of Sioux Falls, South Dakota when he established the Foundation, and the Trust Agreement specifically provides that it shall be governed by and construed under the laws of South Dakota. A copy of the Trust Agreement is attached to this Petition as Exhibit 1.

4. Petitioner Mark Schwan is a resident of Minnehaha County, South Dakota, and is a member of the Foundation's Trustee Succession Committee ("TSC").

5. Petitioner Paul Schwan is a resident of San Diego County, California, and is a member of the Foundation's TSC.

6. Respondents Lawrence Burgdorf, Keith Boehm, Kent Raabe, Gary Stimac and Lyle Fahning (collectively, "Respondents") are current Trustees of the Foundation. Respondents Burgdorf, Boehm and Raabe are also members of the Foundation's TSC.

7. The Honorable Marty Jackley is the Attorney General of the State of South Dakota. Under South Dakota law, the Attorney General is charged with the duty of representing the interests of the beneficiaries of a charitable trust, including the beneficiaries of the Foundation. Each of the Beneficiaries of the Foundation has strong ties to the State of South Dakota. The Beneficiaries have affiliate churches located in South Dakota, provide financial support for Lutheran schools located in South Dakota, and provide training and education for teachers employed by Lutheran schools located in South Dakota.

JURISDICTION AND VENUE

8. This Court has jurisdiction over this action pursuant to SDCL Chapters 21-22 and 55-9.

9. Venue is proper pursuant to S.D.C. L. 21-22-9 because the Foundation's legal domicile and situs is in Minnehaha County, South Dakota.

THE FOUNDATION TRUST AGREEMENT

10. Grantor Marvin Schwan established the Foundation as a tax-exempt charitable supporting organization under sections 501(c)(3) and 509(a)(3) of the IRC. Marvin Schwan's intent, as reflected in the Trust Agreement, was that "the Foundation have a perpetual existence." (Trust Agreement, Sixth Article, ¶ B. 3. c.) To help ensure the Foundation's financial health and existence in perpetuity, Marvin Schwan endowed the Foundation with stocks and other assets worth nearly \$1 billion.

11. By the terms of the Trust Agreement, Marvin Schwan expressed his intent that the Foundation be "organized and operated exclusively to support or benefit" seven religious organizations. (Trust Agreement, Fourth Article) The seven religious organizations designated in the Trust Agreement to receive support from the Foundation are: (1) the Wisconsin Evangelical Lutheran Synod of Milwaukee, Wisconsin; (2) the Lutheran Church, Missouri Synod, of St. Louis, Missouri; (3) the Wisconsin Lutheran College Conference, Inc. of Milwaukee, Wisconsin; (4) the Evangelical Lutheran Synod of Lombard, Illinois; (5) Bethany Lutheran College of Mankato, Minnesota; (6) the International Lutheran Layman's League, St. Louis, Missouri; and (7) the Wisconsin Evangelical Lutheran Synod Kingdom Workers, Inc. (collectively, the "Beneficiaries"). (*Id.*, Second Article)

12. The Trust Agreement provides that there shall be at least two and not more than five Trustees of the Foundation. There are presently five (5) Trustees of the Foundation. They are Respondents Burgdorf, Boehm, Raabe, Stimac and Fahning.

13. Under the Trust Agreement, the Foundation's Trustees are charged with the duty to "hold and dispose of the trust estate for the benefit of" the seven Beneficiaries. (Trust Agreement, Second Article) The Trust Agreement authorizes the Trustees to make distributions of income or principal to the seven Beneficiaries; to provide services or facilities for individual members of the seven Beneficiary organizations; and/or to support the activities of any religious or educational organization supporting the activities of the seven Beneficiary organizations. (*Id.*)

14. The Trust Agreement further grants the Trustees broad powers with regard to administration of the Foundation, including the powers to buy or sell real or personal property or securities and to make investments on behalf of the Foundation; to make distributions to the Foundation's Beneficiaries; to employ attorneys and advisors to render services to the Foundation; and to take other actions which they deem necessary or advisable relating to the administration of the Foundation. (Trust Agreement, Sixth Article, ¶ B.) The Trust Agreement provides that all such powers granted to the Trustees must be exercised exclusively for the benefit of the Beneficiaries. (*Id.*)

15. To provide accountability for the Trustees in the exercise of their powers, the Trust Agreement also established a Trustee Succession Committee, or TSC, to monitor the Trustees' administration of the Foundation. Among the specific powers and responsibilities granted to the TSC by the Trust Agreement are the following:

- a. The power to select new Trustees;
- b. The power to remove Trustees, with or without cause;

- c. The power to request that the Trustees "account" to the TSC "with regard to the Trustees' doings" under the Trust Agreement; and
- d. The power to review the administration of the Foundation by the Trustees. (*Id.*, Sixth Article, ¶ A)

16. There are presently seven members of the TSC. Three of the seven TSC members – Respondents Burgdorf, Boheim and Raabe – are also Foundation Trustees. The other four TSC members are Marvin Schwan's sons, Petitioners Mark Schwan and Paul Schwan; TSC Chairman David Ewert; and Paul Tweit.

17. In addition to serving in the dual role as a Trustee and as a member of the TSC, Respondent Lawrence Burgdorf also served as Executive Director of the Foundation until 2010. He was succeeded as Executive Director of the Foundation by Respondent Keith Boheim, who, like Burgdorf, serves both as a Trustee and as a member of the TSC. Since 2007, Respondent Burgdorf's son, Erik Burgdorf, has been the Associate Director of the Foundation, appointed to that position by the Trustees. Based on information reported in the Foundation's publicly available IRS Form 990 tax returns, Respondents Burgdorf and Boheim, along with Erik Burgdorf, have been the Foundation's three highest compensated employees for several years. During his last five years as Executive Director, Respondent Lawrence Burgdorf received total compensation of more than \$2 million; Respondent Keith Boheim has been paid over \$2.7 million since 2006 and has averaged over \$435,000 per year in annual compensation since succeeding Burgdorf as Executive Director in 2010; and Erik Burgdorf has received over \$1.5 million in total compensation since beginning employment with the Foundation in 2007.

THE FOUNDATION'S CONFLICT OF INTEREST AND INVESTMENT POLICIES

18. In addition to guidance provided by the terms of the Trust Agreement, the Foundation's Trustees have formally adopted and agreed to comply with strict conflict of interest and ethical conduct policies.

19. The Foundation's Conflicts of Interest and Disclosure Policy requires all Trustees, TSC members, officers and key employees (defined as "covered persons") to "act exclusively in the interests of the Foundation and not use their positions to further their own financial interest or to derive personal advantage." If a covered person has any interest in a transaction coming before the Trustees, he or she is required to "fully disclose the conflict, seeming or real," before the Trustees discuss the matter or take action upon it. Where a conflict exists or there is even an appearance of a conflict, "the transaction may be approved only by a majority vote of the disinterested Trustees," and the disclosure must be recorded in the minutes of the meeting at which the consideration and vote occurs. A copy of the Foundation's Conflicts of Interest and Disclosure Policy is attached to this Petition as Exhibit 2.

20. The Foundation's Code of Business Conduct and Ethics contains even broader language prohibiting conflicts of interest. Applicable to all Trustees, officers and employees of the Foundation, the Code defines a "conflict of interest" as follows:

A "conflict of interest" occurs when a person's private interest interferes in any way (or even appears to interfere) with the interests of the Foundation as a whole. A conflict situation can arise when an employee, officer or trustee takes action or has interests that may make it difficult to perform his or her work objectively and effectively. . . . Any employee, officer or trustee who becomes aware of a conflict or potential conflict, or knows of any material transaction or relationship that reasonably could be expected to give rise to such a conflict, should promptly bring it to the attention of a supervisor, manager or other appropriate personnel who is not involved in the matter giving rise to such a conflict or potential conflict. . . .

A copy of the Foundation's Code of Business Conduct and Ethics is attached to this Petition as Exhibit 3.

21. Upon information and belief, each of the Respondent Trustees has agreed in writing to become familiar with the contents of the policies described in paragraphs 18-20, *supra*, and to comply with the terms of those policies.

22. The Trustees adopted an Investment Policy on August 22, 2007 ("2007 Investment Policy") to "provide guidance" for the Trustees' decisions concerning investment types and opportunities. A revised Investment Policy Statement was adopted by the Trustees on February 17, 2010 ("2010 Investment Policy"). Under both the 2007 and 2010 Investment Policies, the stated goals for the Trustees' investment decisions are: 1) to produce income for distribution to the Foundation's Beneficiaries; 2) to grow or at a minimum preserve the Foundation's corpus to insure long-term viability and influence of the Foundation for its Beneficiaries; and 3) to maintain a balanced portfolio with a goal to reach 50/50 mix (plus or minus 10%) of marketable investments and real estate investments. With regard to real estate investments, the 2007 and 2010 Investment Policies both provide that the goal in any single real estate venture is generally not to exceed 10% of the corpus of the Foundation, while the "total maximum allocation of offshore real estate investment is generally not to exceed 30% of the corpus of the Foundation." A copy of the Foundation's 2007 and 2010 Investment Policies are attached to this Petition as Exhibit 4.

THE FOUNDATION'S OFFSHORE REAL ESTATE INVESTMENT LOSSES

23. For the past several years, the Foundation's Trustees have embarked on a strategy of investing heavily in three five-star luxury resort and hotel development projects in the Caribbean and Central America. These investments have included multi-million dollar loans and

equity investments for development of (a) the Four Seasons Resort at Emerald Bay, Great Exuma, Bahamas; (b) the Ritz Carlton Hotel at Seven Mile Beach, Grand Cayman, Cayman Islands; and (c) the Four Seasons Resort at Peninsula Papagayo, Costa Rica (collectively, the "Offshore Investments").

24. The Trustees have made these Offshore Investments by creating and funding, with hundreds of millions of dollars of Foundation assets, an elaborate system of foreign holding companies, subsidiaries, partnerships and other related entities. The Foundation's publicly available IRS Form 990 tax return for the tax year ending November 30, 2012 identifies 109 different "related organizations" with legal domiciles in the British Virgin Islands, the Bahamas, Costa Rica, the Cayman Islands and Panama in which the Foundation maintains a majority ownership interest. The "primary activity" for each of the 109 related organizations is described as a "real estate investment/operation."

25. Included among the Offshore Investments made by the Trustees are three loans, totaling over \$19.8 million, to three Costa Rican companies on which Foundation Trustees Keith Bohcim and Lawrence Burgdorf and Foundation Associate Director Erik Burgdorf serve as members of the Board of Directors.

26. Highly speculative by their very nature, the results of the Trustees' Offshore Investments have been financially ruinous for the Foundation. The Foundation's recent IRS Form 990 tax returns reveal a series of write-offs and losses associated with the Trustees' Offshore Investments, including but not limited to the following:

- a. In 2006, the Foundation recorded a loss of \$86,658,525 for "bad debt," and wrote down an additional \$48,905,715 on its Form 990 tax return for losses associated with its investment in the Four Seasons Resort at Emerald Bay, Bahamas.

-
- b. In 2009, the Foundation took a "bad debt write off for uncollectible loans" in the amount of \$21,953,652 for additional losses associated with its investment in the Four Seasons Resort at Emerald Bay, Bahamas.
 - c. In 2012, the Foundation wrote off \$249,727,993 in loans associated with its investment in the Ritz Carlton Hotel at Seven Mile Beach, Grand Cayman.

27. As a result of these losses, the net value of the Foundation's assets, once valued at nearly \$1 billion, has declined precipitously. According to the Foundation's most recently filed IRS Form 990 tax return, the Foundation's net assets as of November 30, 2012 were valued at \$460,478,060 - a decline of more than one-third from the previous year and a decline of more than 50% since the year 2000. The vast majority of these losses - over \$400,000,000 to date - are attributable to losses associated with the Trustees' Offshore Investments.

28. The losses incurred by the Foundation to date from its Offshore Investments have dramatically impacted the level of financial support that it has been able to provide to its seven Beneficiaries. As the corpus of the Foundation has declined in value, the annual distributions made by the foundation to its seven Beneficiaries have declined even more precipitously. According to the Foundation's Form 990 tax returns, annual grants and charitable distributions to the Foundation's Beneficiaries dropped from over \$43 million in the tax year ending November 30, 2006 to an average of just over \$16 million during the three tax years ending November 30, 2010, 2011 and 2012.

29. Notwithstanding the catastrophic losses that the Foundation has already suffered as a result of the Trustees' Offshore Investments, the Foundation still had over \$191,000,000 invested in "offshore hotel and real estate projects" in Central America and the Caribbean, according to its most recent IRS Form 990 tax return. Petitioners have reason to believe that the

Foundation may be at risk of suffering still further significant losses associated with its remaining Offshore Investments.

THE TRUSTEES' REFUSAL TO PROVIDE INFORMATION TO THE TSC REGARDING THE FOUNDATION'S OFFSHORE INVESTMENT LOSSES

30. For years, non-Trustee members of the Foundation's TSC have been provided only cursory information regarding the Foundation's investments. In particular, information provided to the non-Trustee members of the TSC regarding the Trustees' Offshore Investments typically has been limited to providing short, vague executive summaries of the respective hotel and resort projects. For example, the non-Trustee members of the TSC were provided little or no information regarding the details or structure of the Foundation's Offshore Investments; what, if any due diligence was being performed by the Trustees to oversee or monitor those investments; the degree of risk associated with the Trustees' investments and decisions; or how the Trustees were managing their investments to mitigate risk to the Foundation. More importantly, the information provided by the Trustees to the TSC failed to accurately convey the extent to which the Foundation's Offshore Investments were at risk of sustaining massive losses.

31. In May 2013, Petitioners were informed by the Trustees for the first time that there were serious problems with the Foundation's Offshore Investments, and that the Foundation had already incurred hundreds of millions of dollars of losses associated with loans made by the Trustees to the developer of the Ritz-Carlton Grand Cayman resort project. In addition to the losses already incurred by the Foundation relating to the Ritz-Carlton Grand Cayman project, Petitioners were also informed that the Foundation's investments in the Four Seasons Resort project in Costa Rica were in serious trouble.

32. Shortly after learning about the extent of the Foundation's losses, Petitioner and TSC member Paul Schwan attended a meeting of the Foundation's Trustees in St. Louis,

Missouri in the summer of 2013. At that meeting, Respondent Burgdorf refused to allow Petitioner Paul Schwan to be present for the Trustees' discussion with their hired consultant regarding the Foundation's investments in the Four Seasons Costa Rica project, and demanded that Mr. Schwan leave the room for the Trustees' meeting with the consultant.

33. Thereafter, a Special Joint Meeting of the Foundation's Trustees and TSC was held in St. Louis on November 19, 2013. In advance of the meeting, Petitioner Paul Schwan contacted Foundation Trustee, TSC member and Executive Director Keith Bohlein to request that the meeting agenda include, among other topics, (a) discussion of the TSC's duties and responsibilities to review the "doings" of the Trustees, as required by the terms of the Trust Agreement; (b) the actions being taken by the Trustees to recoup its losses and to mitigate future losses associated with the Foundation's Offshore Investments; (c) cash flow projections for the coming years in light of the Foundation's massive Offshore Investment losses; (d) a review of the Trustees' investment decisions; (e) lessons learned from the Trustees' Offshore Investment decisions; and (f) a closed session meeting of the non-Trustee members of the TSC to discuss the "doings" of the Trustees with regard to the Foundation's Offshore Investments.

34. Paul Schwan's suggested agenda for the Special Joint Meeting was largely ignored by Respondent Trustees. The Trustees again provided the non-Trustee TSC members with only short summaries of the Foundation's Offshore Investments; the TSC was given no meaningful opportunity to discuss or review the Trustees' investment decisions that resulted in the Foundation's massive losses or to assess the Trustees' strategy for mitigating the Foundation's losses; no separate meeting of the independent non-Trustee members of the TSC was held; and no "accounting" was provided by the Trustees to the TSC, as required by the Trust Agreement and as requested by Petitioner Paul Schwan.

35. The next meeting of the Foundation's TSC was scheduled for February 26, 2014. That meeting was later postponed until May 8-9, 2014 after Respondents Burgdorf and Raabe expressed their views that there was "nothing urgent" to discuss that could not wait until May.

36. Following the postponement of the February 2014 TSC meeting, Petitioner Mark Schwan wrote to TSC Chair Dave Ewert on February 14, 2014 to express the Petitioners' continued concern regarding the Foundation's Offshore Investment losses and their inability as TSC members to obtain basic information as to "why those investments were made, what was done to monitor the investments and loans, what was done to minimize the losses, and whether there are now any steps that can be taken to prevent further losses." The February 14, 2014 letter expressed the Petitioners' belief that as TSC members, they had an obligation to the Foundation's beneficiaries to request that the Trustees account to the TSC as to their doings with regard to their Offshore Investments. Included with the letter was a list of documents that Petitioners asked Ewert, as Chair of the TSC, to send to the Trustees in order to obtain certain basic information regarding the Trustees' Offshore Investments. A copy of Petitioner Mark Schwan's February 14, 2014 letter to Ewert and the suggested list of documents is attached hereto as Exhibit 5.

37. On March 15, 2014, TSC Chair Dave Ewert sent an e-mail to the other six members of the TSC regarding their upcoming meeting on May 8-9, 2014. Responding obliquely to Mark Schwan's February 14, 2014 letter and suggested list of documents to request from the Trustees, Ewert wrote that "the meeting of May 9 will focus on governance issues as they apply to the future. . . . [We] will not dwell with [sic] the happenings of the past but look forward to the future and how we will function." A copy of Ewert's March 15, 2014 e-mail is attached as Exhibit 6.

38. At the TSC meeting on May 8 and 9, 2014, TSC Chair Ewert and the Trustee members of the TSC refused to allow the TSC to "look back" to determine how the Foundation's massive Offshore Investment losses had occurred, who was responsible for the decisions that led to those losses or whether further steps could have been taken to mitigate the losses.

39. To date, despite the repeated urgings of Petitioners, the Trustees have yet to "account" to the TSC for their Offshore Investment decisions or for the more than \$400 million in losses so far sustained to date by the Foundation as a result of the Trustees' Offshore Investments.

THE FOUNDATION'S OFFSHORE INVESTMENT LOSSES
ATTRACT MEDIA ATTENTION

40. The enormous losses from the Foundation's Offshore Investments that were reported in the Foundation's most recently filed IRS Form 990 tax return have drawn national media attention. On February 3, 2014, the online publication *Offshore Alert* published an article about the Foundation's investment losses entitled, "U.S. charity loses one-third of assets in Cayman Islands property investment." The article reported that the Foundation's losses were associated with loans that became worthless after the Ritz Carlton, Grand Cayman was forced into receivership in March 2012 by a major lender. The article further reported that \$175 million of the amounts lost had been loaned to various firms controlled by developer and Foundation business partner Michael Ryan, "long after *Offshore Alert* began raising red flags about the project." In addition to reporting on the magnitude of the Foundation's Offshore Investment losses, the article:

- Reported that a former employee of Michael Ryan had told *Offshore Alert* that the Foundation "essentially served as an ATM for the [Ritz Carlton] development," supplying it with funds when it was low on cash, both before and after the hotel opened in December 2005;

-
- Questioned why the Foundation had made "such a speculative, illiquid investment in a venture that had already been exposed by *Offshore Alert*," and noted that Respondents Burgdorf and Boehm had refused to discuss the matter with its news reporters over a period of years;
 - Further questioned the appropriateness of the Foundation's Offshore Investments for a charitable organization, noting that the Foundation's tax returns "read more like those of a private sector global conglomerate like Citigroup" than a domestic charitable organization;
 - Noted that the Foundation was still carrying nearly \$200 million of assets on its books relating to hotel and real estate investments in Central America and the Caribbean; and
 - Reported that the IRS had audited the Foundation's tax returns over a three year period and had asserted that the Foundation had excess holdings in connection with one investment, resulting in the Foundation's payment of \$1.1 million in "IRS settlements."

A copy of the *Offshore Alert* February 3, 2014 article is attached to this Petition as Exhibit 7.

41. On the same day, the *Huffington Post* on February 3, 2014 ran an online story entitled, "Christian Charity Loses a Fish Stick Fortune in Caribbean Hotel Investment Gone Wrong." The *Huffington Post* wrote that the Foundation had lost \$250 million from loans that "went not to the construction of a new school, or the purchase of clean-energy stoves in a less-developed country, but [to] a far less charitable cause: the construction of a Ritz-Carlton hotel and residences in the Cayman Islands." A copy of the *Huffington Post* February 3, 2014 article is attached to this Petition as Exhibit 8.

42. Despite the national media scrutiny of the Foundation's financial losses, the Trustees to date have refused to account to the Foundation's own TSC for their "doings" with respect to their Offshore Investment decisions.

REQUEST FOR COURT SUPERVISION AND ENFORCEMENT OF CHARITABLE TRUST AND FOR COURT INSTRUCTIONS

43. Petitioners are persons designated in the Trust Agreement who may enforce the Trust Agreement pursuant to SDCL 55-9-3 and SDCL 21-22-9, as amended.

44. Petitioners, as members of the Foundation's TSC, are persons interested in the Foundation, as "Beneficiaries" under 21-22-1(1) and are "Fiduciaries," as defined in SDCL 21-22-1(3), as amended, and are authorized to petition the Court to request supervision of the Foundation pursuant to SDCL 21-22-9, and as amended.

45. The Foundation's Trust Agreement provides that "[t]he Trustees *shall account to the [TSC] upon the [TSC's] request with regard to the Trustees' doings*" under the Trust Agreement. (emphasis added)

46. Despite the Foundation having suffered over \$400,000,000 in losses to date, and at risk of suffering even greater losses in the future, as a direct result of the Trustees' Offshore Investment decisions, the Foundation's Trustees have not adequately accounted to the TSC for their actions and decisions with regard to the Foundation's losses. Specifically, the Trustees have failed to provide the TSC with information and documents regarding the following:

- Why the Trustees decided to invest hundreds of millions of dollars of Foundation assets in the Offshore Investments;
- Whether the Trustees sought advice and consultation from anyone with regard to the Foundation's Offshore Investments;
- What, if any, due diligence or monitoring the Trustees performed regarding the Foundation's Offshore Investments, both before and after the investments were made;
- Whether the Foundation's Offshore Investments comply with the investment guidelines adopted by the Trustees in the Foundation's 2007 and 2010 Investment Policies;
- How, and why, the Trustees' Offshore Investments resulted in such dramatic losses;
- Whether the Trustees ignored "red flags" or warning signs about the risks associated with the Foundation's Offshore Investments;
- Whether, and to what extent, the Foundation may be exposed to potential additional losses in the future from its Offshore Investments, in addition to the losses it has already incurred;

-
- Whether there are additional steps that can or should be taken to mitigate future losses from the Foundation's Offshore Investments;
 - Whether the Foundation's loans and/or other transactions with entities on which the Foundation's Trustees and members of their families served on the Board of Directors violated the Foundation's Conflicts of Interest and Disclosure Policy or its Code of Business Conduct and Ethics;
 - Whether the Trustees have adequately and appropriately communicated with the Foundation's Beneficiaries about the Foundation's losses and the impact of those losses on the Beneficiaries' future distributions; and
 - Whether the Trustees have in place adequate procedures and safeguards to ensure that any mistakes and misjudgments made with regard to the Foundation's Offshore Investments are not repeated in the future.

47. Petitioners have a duty as members of the Foundation's TSC, and the TSC has a duty as a body, to request that the Trustees account to the TSC for their actions and decisions with regard to the Foundation's Offshore Investments and resulting financial losses of more than \$400 million.

48. Court supervision of the Foundation is appropriate and necessary to ensure that the terms of the Trust Agreement are enforced, and that the Trustees account to the TSC for their doings with respect to the Foundation's Offshore Investments.

49. Under the Foundation's Conflicts of Interest and Disclosure Policy and Code of Business Conduct and Ethics, a conflict of interest exists if a trustee has a personal or private interest in a matter coming before the Trustees that may interfere, or even appear to interfere, with the interests of the Foundation, or when a trustee takes action or has interests that make it difficult to perform his work objectively and effectively.

50. Because of their dual roles as current or former Foundation Trustees, on the one hand, and as current members of the Foundation's TSC, on the other hand, Respondents Burgdorf, Bohelm and Raabe have a conflict of interest in determining whether the Trustees

should be required to account to the TSC (on which they simultaneously serve) for their own decisions and actions as Trustees with regard to the Foundation's Offshore Investments.

51. Court supervision of the Foundation is appropriate to ensure that the Trustees comply with the terms of the Foundation's Conflicts of Interest and Disclosure Policy and its Code of Business Conduct and Ethics, which the Trustees have adopted and agreed to follow.

52. Petitioners desire to comply with their obligations under the Trust Agreement and applicable law in fulfilling their responsibilities as TSC members. To ensure that the Petitioners individually, and the TSC as a body, fulfill their fiduciary duties to the Foundation and its Beneficiaries, Petitioners seek the assistance of this Court in determining their responsibilities as members of the TSC, and the responsibilities of the TSC as a body.

53. Instructions from the Court are necessary and appropriate to determine the duties and responsibilities of the Foundation's TSC and its members. Specifically, Petitioners request instructions from the Court to address the following issues:

- a. Whether, in light of the Foundation's massive Offshore Investment losses, the TSC as a body has a duty under the Trust Agreement and/or South Dakota law to request that the Trustees "account" to the TSC for their actions and decisions with regard to the Foundation's Offshore Investments.
- b. Whether a vote of a majority of the members of the TSC is required to request that the Trustees account to the TSC for their actions and decisions with regard to the Foundation's Offshore Investments.
- c. If a vote of a "majority" of the members of the TSC is so required, whether current and former Trustees who also serve on the TSC are

conflicted from participating in such a vote, either under the Foundation's Conflicts of Interest and Disclosure Policy and Code of Business Conduct and Ethics, or by their fiduciary duty of loyalty to the Foundation under South Dakota law.

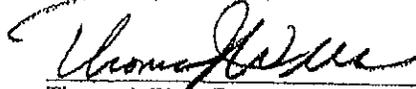
- d. Whether the individual members of the TSC have a duty under the Trust Agreement and/or a fiduciary duty of loyalty to the Foundation under South Dakota law to request that the Trustees account to the TSC for their actions and decisions with regard to the Foundation's Offshore Investments.
- e. Whether Petitioners as individual members of the TSC may request that the Trustees account to the TSC for their actions and decisions with regard to the Foundation's Offshore Investments.
- f. Whether the Trustees have an obligation to provide to the TSC, *inter alia*, the documents requested in Petitioner Mark Schwan's February 14, 2014 letter to David Ewert.

WHEREFORE, Petitioners respectfully request that this Court enter an order:

- a. Assuming supervision of the Foundation under South Dakota law;
- b. Enforcing the terms of the Foundation's Trust Agreement;
- c. Instructing Petitioners, all other members of the Foundation's TSC and the Foundation's Trustees as to whether or not the Trustees must account to the TSC for their actions and decisions with regard to the Foundation's Offshore Investments; and
- d. Sealing of this Petition and all subsequent filings pursuant to SDCL 21-22-28, as amended.

Dated: June 4, 2014

Respectfully submitted,



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ATTORNEYS FOR PETITIONERS

MARK SCHWAN AND PAUL SCHWAN

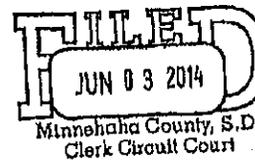


EXHIBIT 1

MARVIN M. SCHWAN CHARITABLE FOUNDATION

The undersigned, MARVIN M. SCHWAN, of Sioux Falls, South Dakota, as Grantor, hereby transfers Ten Dollars (\$10) in trust to himself, MARVIN M. SCHWAN, his brother ALFRED PAUL G. SCHWAN, and REV. LAWRENCE A. HURGDORF, as Trustees; upon the trusts hereinafter set forth.

FIRST: Additional Property. The Trustees may accept any kind of additional property in trust hereunder from any person at any time.

SECOND: Distributions. The Trustees shall hold and dispose of the trust estate for benefit of the following publicly supported organizations (meaning organizations described in section 509(a)(1) or (2) of the Code):

WISCONSIN EVANGELICAL LUTHERAN SYNOD of Milwaukee, Wisconsin;
THE LUTHERAN CHURCH, MISSOURI SYNOD, of St. Louis, Missouri;
WISCONSIN LUTHERAN COLLEGE CONFERENCE, INC. ("WISCONSIN
LUTHERAN COLLEGE") of Milwaukee, Wisconsin;
EVANGELICAL LUTHERAN SYNOD of Lombard, Illinois;
BETHANY LUTHERAN COLLEGE, INC., of Mankato, Minnesota;
INTERNATIONAL LUTHERAN LAYMEN'S LEAGUE, St. Louis, Missouri;
and
WISCONSIN EVANGELICAL LUTHERAN SYNOD KINGDOM WORKERS, INC.

If any of said publicly supported organizations reorganizes in such a way as to spin off or otherwise generate a separate publicly supported religious or educational organization exempt under section 501(c)(3) of the Code (such as an independent church organization in another country) the new separate organization shall also be a beneficiary hereunder.

The Trustees shall make such distributions of income, accumulated income or principal, from time to time, to such one or more of the publicly supported organizations designated above (for its or their general purposes or for one or more of its or their specific programs), or shall make such distributions to or for the use of or to provide services or facilities (such as teaching and retreat facilities and programs) for individual members of any one or more of said organizations, or in support of the activities of any religious or educational organization supporting the activities of the supported organization, as the Trustees deem advisable. The level of support provided to a designated publicly supported organization or any of its programs or members shall be in the sole discretion of the Trustees; provided, that the Trustees shall maintain a significant involvement in the operations of at least one of them to the extent that one or more of them shall be dependant upon the Foundation for the type of support provided in the manner contemplated in Treasury Regulations section 1.509(a)-4(i)(3) so that the Foundation may be considered for purposes of

said Regulations to be an "integral part" of one or more of the supported organizations.

THIRD: Amounts otherwise distributable under Article SECOND, above, shall be subject to the following limitations:

A. Amounts so distributable to WISCONSIN EVANGELICAL LUTHERAN SYNOD or EVANGELICAL LUTHERAN SYNOD shall not exceed the amount of the distributee's public support, and amounts so distributable to THE LUTHERAN CHURCH, MISSOURI SYNOD shall not exceed one-half (1/2) of its public support. "Public support" for these purposes shall mean gifts, grants and contributions directly or indirectly received from the general public, applying the rules and definitions set forth in Treasury Regulations section 1.170A-9(e)(6), (7) and (8), including the 2 percent limitation set forth in said section 1.170A-9(e)(6). The determination of the Trustees with respect to the interpretation and application of this Paragraph A and Paragraph B, below, and the rules and definitions referred to in the preceding sentence shall be conclusive.

B. Amounts so distributable to WISCONSIN LUTHERAN COLLEGE and BETHANY LUTHERAN COLLEGE shall not exceed the sum of the distributee's receipts from:

a. Tuitions, board, fees and other charges to students (including as receipts any tuition remissions based on bona fide academic criteria and any transfers from any scholarship, fellowship and similar funds); and

b. Public support as defined in Paragraph A, above.

c. The support and receipts of an organization shall be consolidated (consolidating, for example, synodal and district support and receipts), for purposes of this Article THIRD, except that exclusively parochial or congregational support and receipts shall not be consolidated with other support and receipts.

FOURTH: It is intended that the Foundation be an exempt supporting organization described in sections 501(c)(3) and 509(a)(3) of the Code, organized and operated exclusively to support or benefit one or more specified publicly supported organizations, and operated in connection with said organizations; and that the provisions of this instrument be consistent with the requirements of the applicable Treasury Regulations. By written action of a majority, the Trustees may amend this instrument, from time to time, to the extent necessary or convenient to cause the Foundation to be in compliance with said provisions and with any other applicable rule of law pertaining to tax exempt organizations which are not private foundations, and to cause any transfer to the Foundation to be deductible under sections 2055, 2522, 170 and 642(c) of the Code. Notwithstanding any other provision of this instrument, no distribution (during the Foundation's ordinary operations or upon its liquidation) shall be made by the Trustees (except for the purchase of goods or services reasonably necessary

for the administration of the Foundation) to any distributee which is not an organization described in said section 501(c)(3); no part of the net earnings of the Foundation shall inure to the benefit of any private shareholder or individual; except as may be permitted under said section, no substantial part of the activities of the Foundation shall consist of carrying on propaganda or otherwise attempting to influence legislation; and the Foundation shall not participate in or intervene in (including the publishing or distribution of statements) any political campaign on behalf of any candidate for public office. If the Foundation is ever a private foundation within the meaning of said section 509, then during the time it is so classified: (1) the Trustees shall make at least such distributions at such times and in such a manner as to avoid subjecting the Foundation to a tax under section 4942 of said Code; and (2) the Trustees shall not engage in any act of self-dealing as defined in section 4941(d) thereof, shall not retain any excess business holdings as defined in section 4943(c) thereof, shall not make any investment in such a manner as to subject the trust to tax under section 4944 thereof, and shall not make any taxable expenditure as defined in section 4945(d) thereof. All references to the "Code" refer to Internal Revenue Code of 1986 and to successor provisions of law, and all references to "Treasury Regulations" refer to regulations issued by the United States Treasury Department and successor regulations.

FIFTH: Disqualification. If a publicly supported organization referred to in Article SECOND, above, departs materially from its fundamental creed or tenets as in effect in 1992 (or whenever thereafter it first becomes a beneficiary), as finally determined by a court of competent jurisdiction, loses its exemption for federal income tax purposes, or substantially fails to operate or abandons its operations, then it shall be disqualified hereunder, and shall cease to be eligible for any distributions or to be a designated publicly supported organization hereunder. In that event, subject to the provisions of Article SIXTH(B)(3)(d), below, the remaining publicly supported organizations designated in said Article SECOND shall be the sole organizations eligible to receive distributions hereunder, unless by written action of a majority of the Trustees another publicly supported organization (which may include an organization created by the Trustees) following a conservative Lutheran creed and tenets is selected to take the place of the organization which has been disqualified.

SIXTH: Regarding the administration of the trusts established by this instrument, in general:

A. Trustees' Identity.

1. A reference to "Trustee" or "Trustees" shall be construed to refer to the Trustee or Trustees in office at any time, whether originally named or appointed later, except as otherwise required by the context. Whenever there is a vacancy in the office of Trustee, the remaining Trustee or Trustees shall

have all the powers of the Trustees. Any action may be taken when there are more than two (2) Trustees by the affirmative vote of a majority. A Trustee may delegate any part or all of his powers to another Trustee to the extent specified in an instrument signed by the delegating Trustee and delivered to the other. Each additional or successor Trustee under this instrument shall have or share all the powers, authority, and exemptions given to the Trustees originally named and shall be subject to the same trusts, without any formality of conveyance. A Trustee shall have a term of three (3) years, and shall continue to serve after the expiration of his or her term until a successor is appointed and accepts the appointment. A Trustee may resign (without leave of court or the consent of the beneficiaries) upon thirty (30) days' prior written notice to another Trustee.

2. The original Trustees have for a considerable period of time maintained a close and continuous working relationship with the officers, directors or trustees of the publicly supported organizations designated in Article SECOND, above. It is intended that the Trustees of the Foundation manage the Foundation in such a way as to exert a substantial and independent influence upon the policies and practices of the beneficiary organizations in furtherance of a conservative and traditional position. It is

intended, however, that the Foundation be classified as an organization which is "operated, in connection with" the designated publicly supported organizations within the meaning of Treasury Regulations section 1.509(a)-4(1). Accordingly, the identity of the Trustees shall always be such that the "responsiveness test" defined in Treasury Regulations section 1.509(a)-4(1)(2) will be satisfied, either by there being at least one Trustee who is a member of the governing body of one or more of the publicly supported organizations designated in said Article SECOND, or by the Trustees' being persons who maintain the aforesaid close and continuous working relationship.

3. There shall always be at least two (2) and not more than five (5) Trustees hereunder.

4. The person, if any, designated in a writing signed by the Grantor shall become Trustee as a successor to a Trustee who dies, resigns or becomes incompetent, or as an additional Trustee, upon delivery of his signed acceptance of these trusts to the Grantor during the Grantor's lifetime.

5. Whenever there is an appropriate occasion for the appointment of a successor or additional Trustee hereunder, and none is appointed as provided in subparagraph 4, above, the person then designated in a writing signed by a majority of the living and competent members of the Trustee Succession Committee shall become Trustee upon delivery of his signed acceptance to any

of the signers of such designation. The designation of a successor or additional Trustee as provided in this subparagraph 5 shall represent a determination by the persons signing it that there is an appropriate occasion for the appointment, and their determination in that regard shall be conclusive upon all persons. It shall be the duty of the Trustee Succession Committee to have consulted such Trustees or prior Trustees or such members of the Grantor's family as they deem appropriate concerning the selection of any Trustee, but their breach of this duty shall not impair the validity of any appointment. The Grantor or a Trustee may nominate one or more candidates for future appointment as Trustee by an informal memorandum given to a member of the Trustee Succession Committee. The Trustee Succession Committee may designate one or more of its own members as Trustee.

6. The Trustee Succession Committee shall have power to remove, with or without cause, a Trustee or a member of the Trustee Succession Committee by the written action (with or without a meeting) of a majority of the living and competent members of the Committee; such removal shall be effective upon delivery of such action to the person removed.

7. The Trustee Succession Committee shall consist of at least three (3) but not more than ten (10) persons. The original members of the Committee shall be said MARVIN M. SCHWAN, said ALFRED PAUL G. SCHWAN, said REV. LAWRENCE A. BURGDORF, OWEN J. ROBERTS of Belleair Bluffs, Florida, and such additional

person or persons as may be designated in a writing signed by the Grantor and delivered to a member of the Committee during the Grantor's lifetime. Whenever there is an appropriate occasion for the appointment of a member of the Trustee Succession Committee -- either to succeed a member who dies, resigns (and a member may resign forthwith by signed written notice to any other member or to a Trustee) or becomes incompetent, or as an additional member -- and none is appointed by the Grantor, the person designated in a writing signed by a majority of the remaining living and competent member or members of the Committee shall become a member of the Committee upon delivery of his signed acceptance to any of the signers of such designation. The designation of a member of the Committee shall represent a determination by the person or persons signing it that there is an appropriate occasion for the appointment, and his or their determination in that regard shall be conclusive upon all persons. It shall be the duty of the Trustee Succession Committee to have consulted the Grantor and such Trustees or prior Trustees and such members of the Grantor's family as they deem appropriate concerning the selection of any member, but their breach of this duty shall not impair the validity of any appointment. The Trustee Succession Committee and each of its members shall be free from any personal liability for any good faith action or omission, and none of its members shall be required to give surety on any bond.

8. Ordinarily there will be five (5) incumbent members of the Trustee Succession Committee and five (5) candidates.

9. The Trustees shall account to the Committee upon the Committee's request with regard to the Trustees' doings hereunder. The Trustee Succession Committee is requested to meet at least once a year, even if no occasion exists for the appointment of a Trustee or member, to review the administration of the trust by the Trustees. The Committee is requested to invite candidates for appointment as Trustees or as members of the Committee to attend its meetings and participate in its other activities.

8. Trustees' Powers. The Trustees shall have the following powers without leave of court and without limiting any other power which may be conferred upon them in any other manner (provided, that any such power may be exercised by the Trustees only in a manner not inconsistent with the statement of intent contained in Article FOURTH, above):

1. Powers Relating to Investments.

a. Authorized Investments. They may retain, invest, and reinvest in real or personal property of any kind, amount, or proportion for any length of time which they deem advisable, including mutual fund shares, and stock or other securities of any closely held corporation or trust.

b. Voting Rights. They may vote stock or shares of any corporation or trust directly or by proxy in such

manner as they deem advisable, they may vote for their own election (or for the election of any employee or agent of the Trustees) as officers, directors or trustees and they may vote in fixing their own compensation. If the Foundation is a party to a redemption agreement with Schwan's Sales Enterprises, Inc., the Trustees shall perform said agreement, and shall not exercise their voting power hereunder so as to rescind it.

c. Use of Nominees. They may hold any real or personal property in the name of a nominee without disclosure of the trust.

d. Authority to Make Transfers. No transfer agent, bank, or other person dealing with a Trustee shall be obliged to see to the application of money or other property delivered to the Trustee or to ascertain whether he has authority to make transfers.

2. Powers Relating to Disposition of Property.

They may buy, sell, mortgage, pledge, lease (for any length of time), or otherwise deal with real or personal property on such terms as they deem proper; they may take such action as they deem advisable regarding the sale or exchange of securities in connection with any reorganization or other change in capital structure; they may pay any debt or claim on the basis of such evidences as they deem sufficient, and they may compromise any such debt or claim on such terms as they deem proper; they may

execute, acknowledge, and deliver a deed, lease, or any other instrument in such manner, in such form, and for such purpose as they deem proper; and they may authorize one or more of their number to sign checks and engage in other banking transactions. They may make contracts binding on the trust estate and without assuming personal liability.

3. Powers Relating to Distributions to Beneficiaries.

a. To Determine Income and Principal. They may decide in such manner as they deem proper in the light of applicable principles of law all questions with respect to the determination of income or principal, including the determination of what, if any, deduction shall be made from income for amortization, depletion, depreciation or obsolescence.

b. To Distribute Property in Kind. They may distribute property in kind to one or more distributees on account of any distribution, on the basis of fair market value determined by the Trustees as of the time of distribution, without distributing the same kind of property to others.

c. To Apply Distributions for Benefit of Beneficiaries. The Trustees may apply any part or all of a distribution, if they deem it advisable and in such manner as they deem advisable, for the use or benefit of a distributee instead of making payment or transfer to it directly.

d. To Determine Identity of Beneficiaries. If any of the beneficiaries designated by name in this instrument or

successor organization determined hereunder (or benefiting pursuant to an order applying a benefit cy pres) ceases to exist (by reason of a merger, reorganization, dissolution or otherwise) then the Trustees shall determine which organization or organizations exempt under section 501(c)(3) of the Code, if any, is or are its successor organization or organizations entitled to benefits, in its place, under this instrument, and the reasonable determination of the Trustees in that regard shall be conclusive upon all persons. They are requested to give preference to the more conservative organization, in the event of a split.

e. To Terminate the Foundation. It is intended that the Foundation have a perpetual existence. If the Trustees determine, however, that a material change of circumstances shall have occurred, such that the continued existence of the Foundation is impractical, then they may terminate the Foundation by distributing all of its net assets to such one or more of the organizations then otherwise eligible to receive distributions as the Trustees shall select, in such shares as they shall determine. The provisions of Article THIRD, above, shall not apply in the case of a termination pursuant to the preceding sentence. The reasonable determination of the Trustees to terminate the Foundation shall be conclusive upon all persons; provided, however, that a decision to terminate the Foundation within less than two hundred (200) years after the date of this instrument shall be presumed to be unreasonable in the absence of a judicial finding that

a material change of circumstances shall have occurred. On any termination of the Foundation its remaining net assets shall be distributed only to one or more organizations described in section 501(c)(3) of the Code.

4. Miscellaneous Powers. The Trustees may employ such attorneys, investment advisors, custodians, and other persons as they deem advisable and pay them reasonable compensation for their services from property with respect to which such services are rendered in addition to receiving reasonable compensation for their own services; and they may take any other action which they deem necessary or advisable in connection with the administration of any trust established by this instrument.

C. Finality of Trustees' Judgment; Trustees' Liability. All powers and discretion given to the Trustees shall be exercisable in their sole discretion, and all their decisions and determinations (including determinations of the meaning and reference of any ambiguous expression used in this instrument) made in good faith and in the exercise of a reasonable judgment shall be conclusive upon all persons, whether or not ascertained, in being, or under a disability. No Trustee under this instrument shall be personally liable for any good faith action or omission or for the consequences of any investment made in good faith. No Trustee shall be required to give surety on any bond.

D. Restraint on Alienation of Beneficial Interests. No beneficiary shall have the power to anticipate, alienate or assign

any beneficial interest given under this instrument, and no such beneficial interest is subject to being reached or applied by any creditor or other person in satisfaction of any claim against the beneficiary thereof.

E. Miscellaneous. A provision that a particular matter is to be included within a general category shall not be construed to limit the generality of the category, and the use of any gender or number shall be construed to refer to any other gender or number unless such reference is plainly inconsistent with the context. The word "person" refers to individuals, corporations, partnerships, trusts, and estates.

SEVENTH: Amendment. The trust created by this instrument is irrevocable. In a manner consistent with the statement of intent set forth in Article FOURTH, above, however, this instrument may be amended, from time to time, by a writing signed by the Trustee or Trustees then serving, but only to the extent that any purported amendment: (a) clarifies the meaning or reference of any expression or provision of this instrument so as to avoid the necessity of instructions by a court, (b) alters or adds to the administrative powers of the Trustees for the better accomplishment of the purposes of the trust, or (c) alters or adds to the instrument so that its provisions are in better conformity with relevant provisions of applicable federal and state tax laws.

EIGHTH: Name; Choice-of-law. The trust established hereunder shall be referred to as the MARVIN M. SCHWAN CHARITABLE FOUNDATION. It shall be governed by and construed in accordance with the provisions of Subchapter F of Chapter 1 of Subtitle A, and Chapter 42 of Subtitle B of the Code and by South Dakota law.

EXECUTED in triplicate, at Boston, Massachusetts, under this seal this 20th day of November, 1992.

Marvin M. Schwan
MARVIN M. SCHWAN, Grantor

Suffolk, ss. Commonwealth of Massachusetts November 20, 1992.

Then personally appeared the above-named MARVIN M. SCHWAN and acknowledged the foregoing instrument to be his free act and deed, before me,

Edward M. Kelly
Notary Public
My Commission expires 12/31/93

The undersigned hereby acknowledge delivery of the foregoing instrument and accepts the trusts thereby established this 20th day of November 1992:

Marvin M. Schwan
MARVIN M. SCHWAN, Trustee

Alfred Paul G. Schwan
ALFRED PAUL G. SCHWAN, Trustee

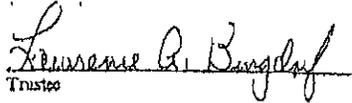
Rev. Lawrence A. Burgdorf
REV. LAWRENCE A. BURGDOFF, Trustee

TRUST AMENDMENT

The undersigned, being all of the Trustees of The King's Foundation (the "Foundation") do this 13th day of December, 1994, amend the trust instrument of the Foundation as follows:

The first sentence of paragraph EIGHTH shall be deleted and replaced with the following:

The legal name of the trust established hereunder shall henceforth be The King's Foundation. The Foundation may, however, continue to do business as the Marvin M. Schwan Charitable Foundation.


Trustee


Trustee

Confidential -
Attorney Eyes Only



TRUST AMENDMENT

The undersigned, being all of the Trustees of The King's Foundation
(formerly the Marvin M. Schwau Charitable Foundation) do this 17th day of
October, 1997, amend the trust instrument of the Foundation by
revoking the Trust Amendment dated November 30, 1994, so that henceforth the
trust shall be referred to by its original name, the Marvin M. Schwau Charitable
Foundation.

Alfred P. Schwau
Trustee

Lawrence A. Bunge
Trustee

\\DD - 025811 - 0254418.01

EXHIBIT 2

Adapted
5-23-07

MARVIN M. SCHWAN CHARITABLE FOUNDATION
CONFLICTS OF INTEREST AND DISCLOSURE POLICY

PREAMBLE

The purpose of this Conflicts of Interest and Disclosure Policy ("Policy") is to address instances in which one or more of the trustees, members of the trustee succession committee, officers, or key employees (collectively referred to as "covered persons") of the Marvin M. Schwan Charitable Foundation (the "Foundation") might have interests in conflict with those of the Foundation and to require disclosure of transactions that might be prohibited by the Internal Revenue Code ("Code").

Under relevant state law, covered persons have a duty of loyalty to the Foundation. That duty requires a covered person to be conscious of the potential for such conflicts, and to act with candor and care in dealing with such situations. Conflicts of interest involving a covered person are not inherently illegal, nor are they to be regarded as a reflection upon the integrity of the individual involved. It is the manner in which the individual and the Board of Trustees of the Foundation (the "Board") deal with a disclosed conflict that determines the propriety of the transaction.

Additionally, as a tax-exempt 501(c)(3) organization that is further classified as a "supporting organization" under Section 509(a)(3) of the Code, the Foundation is subject to special rules regarding prohibited and permissible transactions between the Foundation and its "disqualified persons", as defined under the Code. These rules are referred to as the Intermediate Sanctions rules and are separately described in the Appendix to this Policy. To determine whether a transaction is prohibited by the Intermediate Sanctions rules, any proposed transaction between a "disqualified person" and the Foundation will be examined, with the assistance of counsel as necessary. If the proposed transaction is not prohibited, then the Board will proceed with its evaluation of the proposed transaction in accordance with this Policy.

The axioms of this Policy are disclosure and discussion. Disclosure and discussion are essential, if a relationship or transaction might involve a conflict of interest or be prohibited under the Intermediate Sanctions Rules.

POLICY

Covered persons are obligated to act exclusively in the interests of the Foundation and not use their positions to further their own financial interests or to derive personal advantage. A covered person should be sensitive to any interest he or she may have in a decision to be made by the Foundation, and as much as possible, recognize such interest prior to any presentation or discussion of such a matter before the Board.

Whenever a covered person becomes aware that he or she or a family member has an "interest in a transaction" that is coming before the Board, the covered person must disclose fully the conflict, seeming or real, before the Board discusses the matter or takes action on it. An "interest in a transaction" may take the form of (i) a significant personal financial interest in the transaction; (ii) a significant personal financial relationship with any organization involved in the transaction; or (iii) a position as director, officer, key employee, or major donor in any

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organization involved in the transaction. In addition, covered persons are required to disclose any client relationships they or their family members may have with potential auditors, attorneys, investment advisors, and similar professionals and vendors under consideration by the Foundation.

Upon disclosure, the Board, in consultation with counsel if necessary, will determine whether a conflict exists. Where it has been determined that a conflict is present or there is the appearance of a conflict, the transaction may be approved only upon a majority vote of the disinterested trustees of the Board. The covered person may answer any questions and elaborate on information regarding the transaction or arrangement, but shall not participate in or be present at that portion of the meeting of the Board during the discussion or vote.

Documentation

Whenever a covered person discloses an interest in a transaction, such disclosure will be recorded in the minutes of the meeting at which the consideration and vote occurs. The minutes of the Board meeting also will include the names of the Board members present for the discussion and vote relating to the transaction or arrangement, the content of the discussion and a record of any votes taken.

Distribution of Policy

All covered persons will receive a copy of this Policy at the start of their relationship with the Foundation and periodically thereafter as determined from time to time by the Board.

APPENDIX

Deborah Aelford
202-837-8646

Automatic Excess Benefit Transactions and the Intermediate Sanctions Rules

Payments to Persons and Entities Related to Marvin M. Schwan are Prohibited: New section 4958(c)(3) of the Code absolutely prohibits the Foundation from making any grant, loan, compensation or other similar payment to a "substantial contributor" of the Foundation, person related to a substantial contributor or 35% controlled entity (the "Substantial Contributor Group"). This rule would cover Marvin M. Schwan as a "substantial contributor"^{1/} and all of his siblings and their spouses, his children, grandchildren, great grandchildren and the spouses of these descendants, and any 35% controlled entities, which would include a corporation, partnership, trust or estate in which one or more of the above-described persons owns 35% of the total combined voting power, profits interest or beneficial interest. These transactions are referred to as Automatic Excess Benefit Transactions and result in penalty excise taxes being assessed against the person and the Board of Trustee members who knowingly approved the transaction, arrangement or payment.

Loans to any Director, Officer or Key Employee are Prohibited: Loans by the Foundation to any Disqualified Person (as defined below) are absolutely prohibited. The loan is treated as an Automatic Excess Benefit Transaction and the entire amount of the loan is treated as an excess benefit. Thus, this rule extends automatic excess benefit treatment for loans to a broader group of people than just the Substantial Contributor Group.

Other Transactions Between the Foundation and Disqualified Persons must be for Fair Market Value: In general, Disqualified Persons include the Foundation's trustees, officers, key employees, members of the Trustee Succession Committee, substantial contributors, any person in a position to exercise *substantial influence* over the affairs of the Foundation, persons related to the above-described group and 35% controlled entities. Under the Intermediate Sanctions Rules, the Foundation is prohibited from engaging in a transaction in which an economic benefit is provided, directly or indirectly, to a Disqualified Person that exceeds the value of the consideration (including the performance of services) received by the Foundation. Thus, the Foundation must receive fair value for any payment or benefit provided to a Disqualified Person. These transactions are referred to as Excess Benefit Transactions and result in penalty excise taxes being assessed against the Disqualified Person and the Board of Trustee members who knowingly approved the transaction, arrangement or payment.

Prior to entering into any contract or other transaction involving a Disqualified Person, the Foundation must consider whether the contract or transaction is absolutely prohibited as an Automatic Excess Benefit Transaction. If the arrangement or transaction is not absolutely prohibited, the Foundation Board should then ensure that the arrangement or transaction does not otherwise violate the Intermediate Sanctions Rules.

^{1/} A "substantial contributor" means any person who contributed or bequeathed an aggregate amount of more than \$5,000 to the Foundation, if such amount is more than 2% of the total contributions or bequests received by the Foundation before the close of the taxable year of the organization in which the contribution or bequest is received. A substantial contributor also includes the creator of the trust, which for the Foundation is Marvin M. Schwan.

EXHIBIT 3

Drafted by H.A.H.

CODE OF BUSINESS CONDUCT AND ETHICS FOR The Marvin M. Schwan Charitable Foundation

Introduction

This Code of Business Conduct and Ethics covers a wide range of business practices and procedures. It does not cover every issue that may arise, but it sets out basic policies to guide all trustees, officers and employees of The Marvin M. Schwan Charitable Foundation and its subsidiaries. In particular, this Code covers policies designed to deter wrongdoing and to promote: (1) honest and ethical conduct (including the ethical handling of actual or apparent conflicts of interest); (2) full, fair, accurate, timely, and understandable disclosure; and (3) compliance with applicable governmental laws, rules and regulations. All trustees, officers and employees must conduct themselves in accordance with these policies and seek to avoid even the appearance of improper behavior. The Foundation's agents and representatives, including consultants, should also be directed to this Code at the Foundation offices.

If a law conflicts with a policy in this Code, you must comply with the law; however, if a local custom or practice conflicts with a policy in this Code, you must comply with the Code. If you have any questions about these conflicts, you should ask your supervisor how to handle the situation.

Each trustee, officer and employee will be held accountable for his/her adherence to this Code. Those who violate the policies in this Code will be subject to disciplinary action, up to and including discharge from the Foundation and, where appropriate, civil liability and criminal prosecution. *If you are in a situation that you believe may violate or lead to a violation of this Code, you must report the situation as described in Sections 14 and 15 of this Code.*

1. Compliance with Laws, Rules and Regulations

Obeing the law, both in letter and in spirit, is one of the foundations on which The Schwan Charitable Foundation's ethical policies are built. All trustees, officers and employees must respect and obey the governmental laws, rules and regulations of the state in which we operate. Although not all trustees, officers and employees are expected to know the details of these laws, rules and regulations, it is important to know enough to determine when to seek advice from supervisors, managers or other appropriate personnel.

2. Honest and Ethical Conduct

Each trustee, officer and employee must always conduct him/herself in an honest and ethical manner. Each trustee, officer and employee must act with the highest standards of personal and professional integrity and not tolerate others who

attempt to deceive or evade responsibility for actions. All actual or apparent conflicts of interest between personal and professional relationships must be handled honestly, ethically and in accordance with the policies specified in this Code.

3. Conflicts of Interest

A "conflict of interest" occurs when a person's private interest interferes in any way (or even appears to interfere) with the interests of The Foundation as a whole. A conflict situation can arise when an employee, officer or trustee takes actions or has interests that may make it difficult to perform his or her work objectively and effectively. Conflicts of interest may also arise when an employee, officer or trustee, or a member of his or her family, receives improper personal benefits as a result of his or her position in the Foundation. Loans to, or guarantees of obligations of, employees, officers, or trustees or their family members may also create conflicts of interest.

It is a conflict of interest for an employee to work simultaneously for a competitor, customer or supplier. The best policy is to avoid any direct or indirect business connection with our customers, suppliers and competitors, except on our behalf.

Conflicts of interest are prohibited as a matter of policy, except under guidelines approved by the Board of Trustees. Conflicts of interest may not always be clear-cut, so if you have a question, you should consult with a supervisor, manager or other appropriate personnel or the Foundation's Legal Counsel. Any employee, officer or trustee who becomes aware of a conflict or potential conflict, or knows of any material transaction or relationship that reasonably could be expected to give rise to such a conflict, should promptly bring it to the attention of a supervisor, manager or other appropriate personnel who is not involved in the matter giving rise to such a conflict or potential conflict or consult the procedures described in Sections 14 and 15 of this Code.

4. Corporate Opportunities

Employees, officers and trustees are prohibited from taking for themselves personally, opportunities that are discovered through the use of corporate property, information or position. No employee, officer or trustee may use corporate property, information, or position for personal gain, and no employee, officer or trustee may compete with the Foundation directly or indirectly. Employees, officers and trustees owe a duty to the Foundation to advance its legitimate interests when the opportunity to do so arises.

5. Competition and Fair Dealing

We seek to outperform our competition fairly and honestly. We seek competitive advantages through superior performance, never through unethical or illegal business practices. Stealing proprietary information, possessing secret information that was obtained without the owner's consent, or inducing such disclosures by past or present employees of other companies is prohibited. Each employee, officer and trustee should endeavor to respect the rights of and to deal fairly with the Foundation's customers, suppliers, competitors and employees. No employee, officer or trustee should take unfair advantage of anyone through manipulation, concealment, abuse of privileged information, misrepresentation of material facts, or any other intentional unfair dealing practice.

The purpose of business entertainment and gifts in a commercial setting is to create good will and sound working relationships, not to gain unfair advantage with customers. No gift or entertainment should ever be offered, given, provided or accepted by any Foundation trustee, officer or employee, family member of a trustee, officer or employee or agent unless it: (1) is not a cash gift; (2) is consistent with customary business practices; (3) is not excessive in value; (4) cannot be construed as a bribe or payoff; and (5) does not violate any laws or regulations.

6. Discrimination and Harassment

The Foundation is firmly committed to providing equal opportunity in all aspects of employment and will not tolerate any illegal discrimination or harassment of any kind. Examples include derogatory comments based on racial or ethnic characteristics and unwelcome sexual advances.

7. Health and Safety

The Foundation strives to provide each employee with a safe and healthful work environment. Each employee has responsibility for maintaining a safe and healthy workplace for all employees by following safety and health rules and practices and reporting accidents, injuries and unsafe equipment, practices or conditions.

Violence and threatening behavior are not permitted. Employees should report to work in condition to perform their duties, free from the influence of illegal drugs or alcohol. The use of illegal drugs in the workplace will not be tolerated.

8. Record-Keeping

The Foundation requires honest and accurate recording and reporting of information in order to make responsible business decisions.

Many employees regularly use business expense accounts, which must be documented and recorded accurately. If you are not sure whether a certain expense is legitimate, ask your supervisor.

All of the Foundation's books, records, accounts and financial statements must be maintained in reasonable detail, must appropriately reflect the Foundation's transactions and must conform both to applicable legal requirements and to the Foundation's system of internal controls.

All employees are responsible to report to a Trustee any questionable accounting or auditing matters that may come to their attention. Business records and communications often become public, and we should avoid exaggeration, derogatory remarks, or inappropriate characterizations of people and companies that can be misunderstood. This applies equally to e-mail, internal memos, and formal reports. Records should always be retained or destroyed according to the Foundation's record retention policies. In accordance with those policies, in the event of litigation or governmental investigation please consult the Foundation's Legal Counsel.

9. Confidentiality

Employees, officers and trustees must maintain the confidentiality of confidential information entrusted to them by the Foundation or its beneficiaries, except when disclosure is authorized by the Legal Department or required by law. Confidential information includes all non-public information that might be of use to competitors, or harmful to the Foundation or its beneficiaries, if disclosed. The obligation to preserve confidential information continues even after employment with the Foundation or its subsidiaries ends.

10. Protection and Proper Use of Foundation Assets

All employees, officers and trustees should protect the Foundation's assets and ensure their efficient use. Theft, carelessness, and waste have a direct impact on the Foundation's financial condition. Any suspected incident of fraud or theft should be immediately reported for investigation. All Foundation assets should be used for legitimate business purposes and should not be used for non-Foundation business, though incidental personal use may be permitted.

The obligation of employees, officers and trustees to protect the Foundation's assets includes its proprietary information. Proprietary information

includes intellectual property as well as business plans databases, records, salary information and any unpublished financial data and reports. Unauthorized use or distribution of this information would violate Foundation policy.

11. Payments to Government Personnel

The U.S. Foreign Corrupt Practices Act prohibits giving anything of value, directly or indirectly, to officials of foreign governments or foreign political candidates in order to obtain or retain business. It is strictly prohibited to make illegal payments to government officials of any country.

In addition, the U.S. government has a number of laws and regulations regarding business gratuities which may be accepted by U.S. government personnel. The promise, offer or delivery to an official or employee of the U.S. government of a gift, favor or other gratuity in violation of these rules would not only violate Foundation policy but could also be a criminal offense. State and local governments, as well as foreign governments, may have similar rules.

12. Rules for Principal Executive Officer and Senior Financial Officers

In addition to complying with all other parts of this Code, if you are the Foundation's principal executive officer, principal financial officer, principal accounting officer or controller, or any person performing similar functions (each referred to in this Code as a "Senior Officer"), you must take the following steps to ensure full, fair, accurate, timely and understandable disclosure in reports and documents that the Foundation files and in other public communications made by the Foundation:

(a) Carefully review drafts of reports and documents the Foundation is required to file before they are filed and Foundation press releases or other public communications before they are released to the public, with particular focus on disclosures each Senior Officer does not understand or agree with and on information known to the Senior Officer that is not reflected in the report, document, press release or public communication.

(b) When relevant, confirm that neither the Foundation's internal auditors nor its outside accountants are aware of any material misstatements or omissions in filings.

(c) Bring to the attention of Legal Counsel matters that you feel could compromise the integrity of the Foundation's financial reports, disagreements on accounting matters and violations of any part of this Code.

13. Amendments to the Code of Business Conduct and Ethics

Any amendments to this Code that apply to executive officers, including Senior Officers, or trustees may be made only by the Board or a Board committee (other than technical, administrative or other non-substantive amendments to this Code).

14. Reporting any Illegal or Unethical Behavior (Whistleblower policy)

Employees are encouraged to talk promptly to supervisors, managers or other appropriate personnel about observed illegal or unethical behavior and any violations of law, rules, regulations or this Code, and otherwise when in doubt about the best course of action in a particular situation. The supervisor, manager or other appropriate personnel to whom such matters are reported should not be involved in the reported illegal or unethical behavior or violation of law, rules, regulations or this Code. Any supervisor or manager who receives a report of violation or potential violation of this Code must report it immediately to the Legal Counsel or Audit Committee. It is the policy of the Foundation not to allow retaliation for reports of misconduct by others made in good faith by employees.

Employees are expected to cooperate in internal investigations of misconduct. Any person involved in an investigation of possible misconduct in any capacity must not discuss or disclose any information to anyone outside of the investigation unless required by law or when seeking his or her own legal advice.

Any use of these reporting procedures in bad faith or in a false or frivolous manner will be considered a violation of this Code.

15. Compliance Standards and Procedures

We must all work to ensure prompt and consistent action against violations of this Code. However, in some situations it is difficult to know right from wrong. Since we cannot anticipate every situation that will arise, it is important that we have a way to approach a new question or problem. These are some steps to keep in mind:

- Make sure you have all the facts. In order to reach the right solutions, we must be as fully informed as possible.
- Ask yourself: What specifically am I being asked to do? Does it seem unethical or improper? This will enable you to focus on the specific question you are faced with, and the alternatives you have. Use your judgment and common sense; if something seems unethical or improper, it probably is.

- Clarify your responsibility and role. In most situations, there is shared responsibility. Are your colleagues informed? It may help to get others involved and discuss the problem.
- Discuss the problem with your supervisor. This is the basic guidance for all situations. In many cases, your supervisor will be more knowledgeable about the question, and will appreciate being brought into the decision-making process. Remember that it is your supervisor's responsibility to help solve problems.
- Seek help from other resources. In the rare case where it may not be appropriate to discuss an issue with your supervisor, or where you do not feel comfortable approaching your supervisor with your question, discuss it with the Foundation's Executive Director, Legal Counsel, or, if necessary, any member of the Board of Trustees.
- Your report of violations of this Code may be made in confidence and without fear of retaliation. If your situation requires that your identity be kept secret, your anonymity will be protected. The Foundation does not permit retaliation against employees for good faith reports of violations of this Code or questionable accounting or auditing matters.
- Always ask first, act later. If you are unsure of what to do in any situation, seek guidance before you act.

16. Administration

Board of Trustees. The Board of Trustees will help ensure that this Code is properly administered. The Board of Trustees will be responsible for the annual review of the compliance procedures in place to implement this Code and will recommend clarifications or necessary changes to this Code in consultation with Legal Counsel.

Officers and Managers. All officers and managers are responsible for reviewing this Code with their employees and ensuring they have signed the attached certification. Officers and managers are also responsible for the diligent review of practices and procedures in place to help ensure compliance with this Code.

CERTIFICATION

I hereby acknowledge that I have read the Code of Business Conduct and Ethics For the Marvin M. Schwan Charitable Foundation, have become familiar with its contents and will comply with its terms.

Name (please print)

Signature

Date

The Marvin M. Schwan Charitable Foundation
Confidential Disclosure Statement

Please report below any potential conflict of interest you may have, including but not limited to, any financial interest in, any compensation arrangement, service on the board of, or affiliation with, any entity which is, or is likely to be, a party to an agreement with the Foundation. Each officer, member of the Board of Trustees, the Trustee Succession Committee and key employees shall have an ongoing obligation to notify the Foundation's Legal Counsel or the Board of Trustees immediately of any potential conflict of interest as it arises. Specifically, if any individual shall have a significant change in his or her relationship with any entity or individual which was not disclosed previously, he or she shall provide notice within thirty (30) days of such change. (Attach additional sheets if necessary.)

I have received a copy of the Conflicts of Interest and Disclosure Policy and have read and understood it, and hereby agree to comply with it. I further understand that the Foundation is a charitable organization, which must engage primarily in activities which accomplish its tax-exempt purposes.

Name: _____
(Print Name)

Position: _____

Dated: _____ Signed: _____

EXHIBIT 4

MMSCF Investment Policy

The investment policy of the Marvin M. Schwan Charitable Foundation is adopted by the Trustees of the Foundation in order to provide guidance for decisions concerning investment types and opportunities. The trust document for the Marvin M. Schwan Charitable Foundation gives the authority to the Trustees to make all decisions regarding investments according to their collective judgment. The following investment policy serves as a general guide.

I. Goal

- A. Produce income for distribution to the beneficiaries of the Foundation in accordance with the IRS-mandated 85% annual distribution of net income. The 85% level is based upon the previous fiscal year's net income (total income including short-term gain but excluding long-term gain which is added to the corpus minus expenses) and is the basis for determining the distribution allocations for the various beneficiaries. There is a possible modification to that amount, in that previous years' distributions that exceeded the 85% minimum may be counted against the current year's distribution level. There is a five-year rolling window to recoup such overages. A general goal would be to target an average annual distribution equal to 5% of the corpus.
- B. Grow or at minimum preserve the corpus to insure long-term viability and influence of the Foundation for its beneficiaries.
- C. Maintain a balanced portfolio with a current goal to reach a 50/50 mix of marketable investments and real estate investments, with allowances for flexibility within a range (+/-10%) for both classes.

II. Investment Types

- A. Marketable Investments – both public and private
 1. Stocks
 2. Bonds
 3. Alternative investment strategies
 4. PIOS by the Clifton Group
- B. Real Estate – both domestic and offshore
 1. Direct Ownership
 2. Loans to projects
 3. Partnership/Equity Investment in projects
 4. REITs

III. Investment Guidelines – Marketable Investments

- A. An investment strategy group is engaged to assist in the analysis of performance, selection of investment managers, and portfolio allocations for this section of Foundation investments. Currently, that investment advisory is Summit Strategies of Clayton, Missouri.
- B. Based on the recommendations of the consulting group, the current target allocations and permissible ranges within the marketable investments sector are as follows:

Asset Class	Minimum Percent	Maximum Percent	Target Percent
Domestic Equity	20%	55%	37.50%
Large Cap	15%	35%	26.25%
Mid and Small Cap	5%	20%	11.25%
Non-US Equity	20%	55%	37.50%
Developed International	15%	35%	27.50%
Emerging Markets	5%	20%	10.00%
Alternative Investments	0%	50%	25.00%
Private Equity	0%	20%	10.00%
Hedge Funds & Alternative Strategies	0%	30%	15.00%

- C. Performance of investment managers is reviewed quarterly and the overall portfolio strategy is reviewed annually with Summit Strategies. Managers with consistent underperformance are reviewed for consideration of replacement, redirection of funds, or other appropriate action.
- D. The "cash positions" of the Foundation within its accounts are overlaid using the PIOS approach of the Clifton Group. The overlay is intended to provide equity exposure for the cash being held and to help the overall targeted allocations for marketable investments to be more closely in balance.

IV. Investment Guidelines – Real Estate

- A. The real estate component of the Foundation's investments is to provide both cash flow/income for the Foundation as well as to provide the opportunity for increased appreciation in the value of the assets.
- B. The real estate component of the Foundation's investments includes both domestic real estate as well as offshore real estate investment opportunities.
- C. A goal in any real estate venture is generally not to exceed 10% of the corpus of the Foundation. This allocation target includes both equity investment in a project and loans.
- D. The total maximum allocation for offshore real estate investment is generally not to exceed 30% of the corpus of the Foundation. This maximum also includes both equity investment as well as project loans.
- E. Domestic real estate is generally concentrated in one or two domestic markets, with the primary market being the Washington, D.C. area.
- F. All domestic real estate is currently under an exclusive agreement with Joe Benkowski of Seaton Benkowski. Seaton Benkowski is located in the Washington, D.C. area.

Adopted – August 22, 2007

Marvin M. Schwan Charitable Foundation

INVESTMENT POLICY STATEMENT
February 17, 2010

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INTRODUCTION

The Investment Policy Statement ("Investment Policy") for the Marvin M. Schwan Charitable Foundation (the "Fund") is adopted by the Trustees of the Foundation in order to provide guidance for decisions concerning investment types and opportunities. The Marvin M. Schwan Charitable Foundation Trustees (Trustees) are responsible for managing the investment process of the Fund in a prudent manner. The trust document of the Foundation gives the authority to the Trustees to make all decisions regarding investments according to their collective judgment.

This Investment Policy has been chosen as the most appropriate policy for achieving the financial objectives of the Fund which are described in the "Statement of Objectives" section of this document. However, the Trustees shall be free to deviate from this Investment Policy when it concludes that it is prudent and in the interest of the Fund to do so and may amend the Investment Policy at any time.

The Trustees have adopted a long-term investment horizon such that the chances and duration of investment losses are carefully weighed against the long term potential for appreciation of assets. In addition to the Investment Policy defined herein, the management of the Fund will be in compliance with all applicable laws.

DUTIES AND RESPONSIBILITIES

The Trustees are responsible for managing the investment process in a prudent manner with regard to preserving principal while providing reasonable returns. In carrying out these duties, the Trustees have retained an Investment Manager, SEI Investments Management Corporation (the "Investment Manager"), to assist in managing the assets of the Fund. The Investment Manager's role is to provide guidance to the Trustees on matters pertaining to the investment of Fund assets including Investment Policy, investment selection, monitoring the Fund's performance and compliance with the Investment Policy. All decisions pertaining to the Investment Policy and guidelines for the Investment Policy's implementation will be made by the Trustees. The Investment Manager, in carrying out the Investment Policy defined in this document, has authority and responsibility to select appropriate investments in the specific asset classes mandated by this investment Policy, in accordance with (and subject to) the terms of an investment management agreement dated May 28, 2009 executed between the Investment Manager and the Fund (the "Investment Management Agreement").

Duties and responsibilities are described in detail below.

The Trustees

The Marvin M. Schwan Charitable Foundation Trustees will retain a qualified Investment Manager to assist in the development and implementation of the investment Policy and guidelines.

The Trustees will establish the Investment Policy of the Fund. This includes, but is not limited to, allocation between equity and fixed income assets, selection of acceptable asset classes and investment performance expectations. The Trustees periodically will review the Investment Policy.

The Trustees will regularly review the investment performance of the Fund including the performance of the Investment Manager to assure the Investment Policy is being followed and progress is being made toward achieving the objectives.

Investment Manager

The Investment Manager retained by the Trustees will assist the Trustees in establishing the Investment Policy and guidelines contained in this Investment Policy.

In accordance with the terms of the Investment Management Agreement, the Investment Manager will be responsible for managing the asset allocation, determining investment strategy and implementing security selection decisions through the investment sub-advisors for the mutual funds managed by the Investment Manager, within the Investment Policy and as otherwise provided by the Trustees. The Investment Manager will monitor asset allocation across and among asset classes.

The Investment Manager will monitor investment performance of the Fund. Performance reports will be provided to the Trustees quarterly. The Investment Manager will report in a timely manner any substantive developments that may affect the management of Fund assets.

STATEMENT OF OBJECTIVES

The purpose of the investments is to provide a regular and reliable source of income to meet the needs and services that are not self supporting.

The financial obligations that must be met are as follows:

1. Financial needs and programs
2. Administrative expenses

Fund Financial Objectives

The primary financial objective is to preserve the purchasing power of the investments after withdrawals are taken.

The financial goals can be summarized as follows:

- 1) Produce income for distribution to the beneficiaries of the Foundation in accordance with the IRS-mandated 85% annual distribution of net income. The 85% level is based upon the previous fiscal year's net income (total income including short-term gain but excluding long-term gain which is added to the corpus minus expenses) and is the basis for determining the distribution allocations for the various beneficiaries.
- 2) Grow or at minimum preserve the corpus to insure long-term viability and influence for the Foundation for its beneficiaries.
- 3) Maintain a balanced portfolio with a current goal to reach a 50/50 mix of marketable investments and real estate investments, with allowances for flexibility within a range (+/- 10%) for both classes.

While there cannot be complete assurance that this objective will be realized, it is believed that the likelihood of its realization is reasonably high based upon this Investment Policy and historical performance of the asset classes discussed herein. The objective is based on a ten-year investment horizon, so that interim fluctuations should be viewed with appropriate perspective.

The desired investment objective is a long-term real rate of return on assets that is approximately 5.5% greater than the assumed rate of inflation as measured by the Consumer Price Index. The target rate of return for the Fund has been based upon an analysis of historical returns supplemented with an economic and structural review for each asset class. The Trustees realize that market performance varies and that a 5.5% real rate of return may not be meaningful during some periods. The Trustees also realize and agree that historical performance is no guarantee of future performance.

STATEMENT OF INVESTMENT POLICY

Total Portfolio Allocation

It will be the goal of the Fund to attain a balanced portfolio mix of real estate and marketable investments in accordance with the below.

<u>Investment Type</u>	<u>Target Range</u>
Marketable	40-60%
Real Estate	40-60%

Asset Allocation Targets for Marketable Investments

It will be the policy of the Fund to invest in marketable assets with an allocation as shown below.

<u>Asset Class</u>	<u>Target Range</u>
Equity	50-80%
Fixed Income	10-30%
Alternatives	0-30%

Within Real Estate and those asset classes making up the investments, assets will be invested in accordance with the Guidelines set out below. The investments selected by the Investment Manager in accordance with this Investment Policy may include a small portion of total assets in cash reserves when deemed appropriate. However, the investments will be evaluated against their appropriate benchmarks on the performance of the total funds under management.

Adherence to Policy Targets and Rebalancing

The asset allocation established by this Investment Policy represents a long-term perspective. As such, rapid unanticipated market shifts or changes in economic conditions may cause the asset mix to fall outside of the policy range. Generally, these divergences should be of a short-term nature.

To ensure that divergence from the target policy is within acceptable limits, rebalancing of assets may be necessary. Rebalancing procedures are authorized by the Committee for the portion of Fund assets managed by the Investment Manager in accordance with the Investment Management Agreement.

Generally, rebalancing among funds may occur on a monthly basis for the registered investment companies (i.e., mutual funds) and quarterly for hedge funds and private equity (as applicable, if required) to ensure that the target asset allocation specified in this Investment Policy is maintained within acceptable ranges as determined by the Investment Manager. The Investment Manager will identify the amount of assets that must be reallocated in order to bring the Fund back into compliance with this Investment Policy and will issue the necessary instructions for the transfer of funds.

Notwithstanding the foregoing, under certain circumstances, the Investment Manager may (i) modify the target variance(s) applicable to the strategy, (ii) modify its standard rebalancing operating procedures, and/or (iii) suspend some or all of the rebalancing procedures affecting the strategy. Investment Manager shall only modify or suspend its rebalancing procedures as outlined in this paragraph if it has prudently determined that such suspension is in the best interest of the Fund, its participants and beneficiaries in its reasonable sole discretion. If the Investment Manager has suspended its rebalancing procedures applicable to the Fund, the Investment Manager shall seek to notify Marvin M. Schwan Charitable Foundation as promptly as possible of such decision.

Investment Securities and Diversification

As described in the Investment Management Agreement, the Investment Manager implements this Investment Policy through investments in mutual funds and other pooled asset portfolios. It is the responsibility of the Manager to provide a prospectus (or other offering documents) for each investment and the responsibility of the Board to read and understand the information contained in the prospectus.

Mutual funds may use shorting strategies as outlined in the prospectus. Further, certain mutual funds may participate in securities lending as determined by the prospectus (or other offering documents). Such investments are acceptable investments provided they conform to the diversification restrictions set forth below.

Investments will be diversified within asset classes with the intent to minimize the risk of large losses to the Fund. The portfolio includes mutual funds that are managed in accordance with the diversification and industry concentration restrictions set forth in the Investment Company Act of 1940, as amended (the "1940 Act"). Pursuant to the provisions of the 1940 Act, a mutual fund may not, with respect to 75% of its assets, (i) purchase securities of any issuer (except securities issued or guaranteed by the United States Government, its agencies or instrumentalities) if, as a result, more than 5% of its total assets would be

invested in the securities of such issuer; or (ii) acquire more than 10% of the outstanding voting securities of any one issuer. This restriction does not apply to the International Fixed Income Fund or the Emerging Markets Debt Fund.

In addition, no mutual fund may purchase any securities which would cause more than 25% of its total assets to be invested in the securities of one or more issuers conducting their principal business activities in the same industry, provided that this limitation does not apply to investments in securities issued or guaranteed by the United States Government, its agencies or instrumentalities.

Guidelines for Portfolio Holdings

Real Estate

The real estate component of the Foundation's investments is to provide both cash flow/income for the Foundation as well as to provide the opportunity for increased appreciation in the value of the assets. The real estate component of the Foundation's investments includes both domestic real estate as well as offshore real estate investment opportunities. A goal in any real estate venture is generally not to exceed 10% of the corpus of the Foundation. This allocation target includes both equity investment in a project and loans. The total maximum allocation for offshore real estate investment is generally not to exceed 30% of the corpus of the Foundation. This maximum includes both equity investment as well as project loans. Domestic real estate is generally concentrated in one or two domestic markets, with the primary market being the Washington, D.C. area. All domestic real estate is currently under an exclusive agreement with Joe Bankowski of Seaton Bankowski. Seaton Bankowski is located in the Washington, D.C. area.

Equity

Domestic Equity:

The Domestic Equity portion of the portfolio will consist primarily of equity securities of companies that are listed on registered exchanges or actively traded in the over the counter market. The equity portion may also be invested in securities that are not readily marketable (illiquid and restricted securities), receipts, securities issued by investment companies, warrants, repurchase agreements, convertible securities and US dollar denominated securities of foreign issuers that are traded on registered exchanges or listed on NASDAQ. A portion of the equity portfolio may also be invested in fixed income securities that are rated investment grade or better, i.e., rated in one of the four highest rating categories by a nationally recognized statistical rating organization ("NRSRO"), or, if not rated, determined to be of comparable quality by the Investment Adviser or a mutual fund sub-adviser. The Investment Adviser will equitize cash to remain as fully invested as possible.

Non-U.S. Equity:

The non-U.S. equity portion of the portfolio will consist primarily of equity securities (common stocks, securities that are convertible into common stocks, preferred stocks, warrants and rights to subscribe to common stocks) of non-U.S. issuers purchased in foreign markets, on U.S. or foreign registered exchanges, or the over-the-counter markets. The issuers of the securities are located in countries other than the United States, including emerging market countries. Additionally, the portfolio may seek to enhance returns by active management of currency exposure. This strategy may involve taking long and short positions using futures, foreign currency forward contracts, foreign currencies and other derivatives. The portfolio may also engage in currency transactions in an attempt to take advantage of certain inefficiencies in the currency exchange market, to increase the exposure to a foreign currency or to shift exposure to foreign currency fluctuations from one currency to another. Any remaining assets may be invested in fixed income securities of emerging market governments and companies. Certain securities issued by governments of emerging market countries are, or may be, eligible for conversion into investments in emerging market companies under debt conversion programs sponsored by such governments.

A portion of the portfolio's assets may be invested in securities that are rated below investment grade, U.S. or non-U.S. cash reserves and money market instruments, repurchase agreements, securities that

strategies that include temporary or dedicated directional market exposures; and will also choose and combine hedge funds in order to target the fund's return objectives.

The Fund's portfolio may be allocated across several hedge fund styles and strategies. For example, the hedge fund portion of the portfolio may consist of various index-listed as well as over-the-counter securities including but not limited to: common or preferred stock issued by U.S. and non-U.S. corporations, debt securities issued by U.S. and non-U.S. corporations, governments, or government-sponsored agencies, asset-backed securities, convertible bonds, warrants, and exchange-traded funds. The hedge fund portion of the portfolio may also consist of various index-listed or over-the-counter derivative instruments including but not limited to: forward contracts, futures contracts, options, swaps, and swap options. Derivatives may be valued based on the price of underlying debt or equity securities or the level of particular economic variables such as interest rates, inflation rates, currency exchange rates, or commodity prices. In addition to purchasing securities outright, hedge funds may employ specialized investment techniques, such as short-selling and using leverage.

The Fund may also invest in less liquid, private investment funds. These investments are illiquid, non-publicly traded assets and securities, such as shares in private operating companies. The fund will select and manage these strategies in accordance with its liquidity policy.

Private Assets

Private Equity:

Private equity investments will consist of primary limited partnership interests in corporate finance and venture capital funds. In addition, secondary partnership and co-investment deals are acceptable. Corporate finance investments may include leveraged buy-out, industry consolidation, growth or fundamental business change, acquisitions, refinancing and recapitalization, mezzanine investments and distressed and turnaround strategies.

Venture capital investments include start-up companies and companies developing new business solutions and technologies. New technologies may include semi-conductors, telecommunications, software, biotechnology, computers and medical devices. Investments may be made to domestic and international partnerships.

Cash Equivalent Reserves

The investments selected by the Investment Advisor in accordance with this Investment Policy Statement may include a small portion of total assets in cash reserves when deemed appropriate.

Cash equivalent reserves will consist of money market securities such as high quality, short-term debt instruments. They include: (i) bankers' acceptances, certificates of deposits, notes and time deposits of highly-rated U.S. and foreign banks; (ii) U.S. Treasury obligations and obligations issued or guaranteed by the agencies and instrumentalities of the U.S. Government; (iii) high-quality commercial paper issued by U.S. and foreign corporations; (iv) debt obligations with a maturity of one year or less issued by corporations with outstanding high-quality commercial paper; (v) repurchase agreements involving any of the foregoing, obligations entered into with highly-rated banks and broker-dealers; and (vi) foreign government obligations.

Volatility

Consistent with the desire for adequate diversification, the investment policy is based on the assumption that the volatility of the combined equity investment will be similar to that of the market opportunity available to institutional investors with similar return objectives. The volatility of fixed income portfolios may be greater than the market during periods when the portfolio duration exceeds that of the market.

Proxy Statements

Proxies, tender offers and the like will be voted in accordance with the terms of the Investment Management Agreement.

Execution of Security Trades

The Fund expects the purchase and sale of its securities to be made in a manner designed to receive the combination of best price and execution. The Board recognizes that mutual fund shares are purchased and sold at the net asset value next determined after receipt of the order and that accordingly, best price and execution may not be applicable to such transactions.

CONTROL PROCEDURES

Review of Investment Objectives

Investment performance will be reviewed annually to determine the continued feasibility of achieving the investment objectives and the appropriateness of the investment Policy for achieving these objectives. In addition, the validity of the stated objective will be reviewed annually.

It is not expected that the investment Policy will change frequently. In particular, short-term changes in the financial markets should not require an adjustment to the investment Policy.

Review of Investment Manager and Investments

The investment Manager will report on a quarterly basis to review the total Fund investment performance.

The investment Manager will be responsible for keeping the Board advised of any material change in the personnel, the investment strategy, or other pertinent information potentially affecting performance of all investments.

Performance reviews will focus on:

- Comparison of investment results to appropriate benchmarks, as well as market index returns in both equity and debt markets.
- Investment adherence to this investment Policy and guidelines.
- Material changes in the investment organizations, such as in investment philosophy and personnel, etc.

Performance Expectations

The most important performance expectation is the achievement of long-term investment results that are consistent with the Fund's investment Policy. Implementation of the policy will be directed toward achieving this return and not toward maximizing return without regard to risk.

The Board recognizes that this real return objective may not be meaningful during some time periods. In order to ensure that investment opportunities available over a specific time period are fairly evaluated, comparative performance statistics (including benchmark indices) will be used to evaluate investment results.

Adoption of Investment Policy

ADOPTION OF INVESTMENT POLICY STATEMENT

The Board has reviewed, approved and adopted this Investment Policy Statement, dated February 17, 2010, prepared with the assistance of SEI Investments Management Corporation.

Signature _____

Date _____

EXHIBIT 5

February 14, 2014

VIA U.S. MAIL

Mr. Dave Ewert, Chair
Trustee Succession Committee
of the Marvin M. Schwan Charitable Foundation
2425 Winterpark Street
Loveland, CO 80538

Re: Foreign Investments and Related Loan Financial Losses

Dear Dave:

As I believe you know, Paul and I have been very concerned about the disastrous financial results arising from the Trustees' investments and loans to the various foreign companies and projects in the Caribbean. While we have of late been provided with some very general information on the losses on those investments totaling \$365 million or more, we as TSC members have not been provided with full details as to why those investments were made, what was done to monitor the investments and loans, what was done to minimize the losses, and whether there are now any steps that can be taken to prevent further losses.

As you know, paragraph 9 of the Foundation Trust document provides in part that:

"The Trustees shall account to the Committee upon the Committee's request with regard to the Trustees' doings hereunder. The Trustee Succession Committee is requested to meet at least once a year, even if no occasion exists for the appointment of a Trustee or member, to review the administration of the trust by the Trustee. ****

Since the investments were made and loans were provided with Foundation funds, these activities are part of the "doings" of the Trustees, and they relate to the "administration" of the Trust. We strongly believe that we, as TSC members, have an obligation to the beneficiaries of the Trust to have the Trustees "account to" the TSC as to their "doings" with regard to the investments and related expenditures of such a large amount of trust monies. We, of course, want to avoid any claims by the beneficiaries that we have not carried out our responsibilities as TSC members.

We had hoped to discuss these issues at the scheduled meeting of the TSC on February 26, 2014. Then Paul developed a conflict for that date and suggested we meet on February 24. That date was not acceptable so Paul suggested February 27. That date was not acceptable either. Larry

Mr. Dave Ewert, Chair
February 14, 2014
Page 2 of 2

Brugdorf indicated there was no compelling reason to have the meeting in February. Kent Raabe saw "nothing urgent" so the meeting was moved to May 9.

Paul and I do not agree that there is nothing urgent to discuss. We believe that carrying out our responsibilities as TSC members is urgent and that we should be doing that immediately. Therefore, enclosed is a list of questions Paul and I believe need to be answered and documents we believe should be made available to the TSC by the Trustees so we can better understand how such an extraordinary amount of trust assets have been lost. You may want to consider adding to our list and I would encourage you to do so. We ask that you, as Chair of the TSC, present this list to the Trustees with the request that they provide us with the answers to the questions asked and provide us with the documents requested. Once we get the information requested, Paul and I believe the independent TSC members (you, Paul Tweit, Paul and I) should meet to discuss what, if anything, we should do to carry out our responsibilities as TSC members.

Thank you very much.

Very truly yours,

Mark Schwan

cc: Paul Schwan
Paul Tweit

Documents for TSC to request from the Foundation Trustees:

1. The Foundation's IRS Form 1099 (2011 Tax Return) for the tax year ending November 30, 2012.
2. The Foundation's audited financial statements for the years 2007 to the present.
3. Valuations, appraisal reports or other documents reflecting the financial performance of the Foundation's off-shore real estate investments (including loans) over the years 2005 to the present time.
4. Foundation Trustees Meeting materials, including meeting minutes, agendas, presentations and material distributed to the Trustees and to the TSC members over the period 1991 to the present.
5. A list of all loans the Foundation has made to entities involved in the Foundation's off-shore real estate investments and projects in Costa Rica, Cayman Islands or the Bahamas, including the entity to which the loan was made, date of the loan, amount of the loan, purpose of the loan and loan payment history.
6. The loan agreements relating to all the loans identified in #5 above.
7. A list of all the entities involved in the Foundation's off-shore real estate investments and projects in which the Foundation or any of its subsidiaries or affiliates has an ownership.

membership, partnership or equity interest, including the names of the entities, date the Foundation acquired its interest, amount invested to acquire its interest, percentage interest owned, and current value of the Foundation's interest in such entities at the present time.

8. All of the membership agreements, partnership agreements, joint venture agreements, operating agreements etc. relating to the entities identified in #7 above.

9. Analyses and reports prepared by consultants, experts or third parties regarding any of the off-shore projects in which the Foundation has had or now has a financial interest or to which the Foundation has lent money.

10. All of the documents evaluating the suitability of the Foundation's off-shore investments under the Foundation's investment policies and guidelines.

11. All of the documents assessing the impact of the Foundation's off-shore investments on its net asset value or income available for distribution to its beneficiaries.

12. All of the communications by the Foundation with the Foundation's beneficiaries regarding the Foundation's off-shore investments.

13. All of the documents provided to the members of the TSC regarding the Foundation's off-shore investments.

14. All of the projections, estimates or plans prepared at any time reflecting the future financial performance of the Foundation's off-shore investments.

15. All of the engagement letters, contracts or agreements between the Foundation and any consultant, expert or third party relating to the Foundation's off-shore investments.

16. A list of all entities involved in any transaction with the Foundation relating to its off-shore investment projects in which a Foundation Trustee or member of a Foundation Trustee's family is or was an employee, officer, director or owner of the entity.

EXHIBIT 6

From: David Ewert (<mailto:ewerd@gmail.com>)
Sent: Saturday, March 15, 2014 7:35 PM
To: Kdboh@aol.com; Twelt, Paul; Paul Schwan; bee2615@aol.com; kraabe@wv.rr.com; mark@theschwans.net
Subject: Meetings of May 8th and 9th

TSC Members,

Greetings in the name of our Lord and Savior Jesus Christ.

We are quickly approaching our meetings of May 8 and 9. Keith will be preparing the agenda for the May 8th joint meeting with the Trustees and the LCMS.

The meeting of May 9th will focus on governance issues as they apply to the future. As our Lord teaches us in Luke 9:62 "No one who puts his hand to the plow and looks back is fit for service in the Kingdom of God",

therefore we will not dwell with the happenings of the past but look forward to the future of the Foundation and how we will function. I ask that you prayerfully consider the following points for discussion as they apply to the TSC:

1. The Structure of the Foundation.
2. Purposes and Non-purposes
3. Deliverables and Expectations
4. Operational "Norms"

This process and the outcomes will help us all work together for the good of the Marvin M. Schwan Charitable Foundation.

We ask for the Lord's Blessings as we continue the work of His Kingdom.

In Christ's service,

Dave

EXHIBIT 7

OffshoreAlert

Daily news, documents and intelligence about Offshore Financial Centers and those who conduct business in them that you will not find anywhere else.

[Home / Articles](#)

US charity loses one-third of assets in Cayman Islands property investment

February 03, 2014 by David Marchant

HIGHLIGHTS

- \$250 m loss in Cayman follows \$100 m-plus loss on Emerald Bay Resort in the Bahamas
- Charity has also invested heavily in Costa Rica
- Charity loaned money to Cayman project AFTER OffshoreAlert published red flags
- Caribbean investment losses contributed to charity's assets falling by 52% in 12 years

RELATED CONTENT

- [The Marvin M. Schwan Charitable Foundation: 2011 Tax Return \(marvin-schwan-charitable-foundation-losses.aspx\)](#)

A United States charity has realized a loss of \$250 million on loans that helped build The Ritz-Carlton, Grand Cayman hotel and residences development in the Cayman Islands. The amount was one-third of the charity's total assets.

The Marvin M. Schwan Charitable Foundation disclosed the loss in its federal tax return for the 12 months ended November 30, 2012, which recently became publicly available. It was the biggest reason the charity's assets plummeted in value from \$705 million to \$460 million during the period.

The loans became worthless after The Ritz-Carlton, Grand Cayman was forced into Receivership on March 12, 2012 by its other major lender, Connecticut-based investment firm Five Mile Capital Partners, which bought the development at auction six months later for \$177 million - \$57 million less than it was owed. Five Mile Capital Partners had acquired the distressed debt in 2011 from Credit Suisse, which itself had bought it in 2007 from the original lender, The Royal Bank of Scotland.

The Marvin M. Schwan Charitable Foundation's tax returns indicate that approximately \$175 million of the amount lost was loaned to firms controlled by developer Michael Ryan in 2005 and 2006 - long after OffshoreAlert began raising red flags about the project, prompting Ryan to file a libel complaint against OffshoreAlert at the Grand Court of the Cayman Islands in February, 2004. A former employee of the developer told OffshoreAlert several years ago that the charity essentially served as an ATM for the development, supplying ever more funds when it was low on cash, both before and after the opening of the hotel in December, 2006.

What prompted The Marvin M. Schwan Charitable Foundation to make such a speculative, illiquid investment in a venture that had already been exposed by OffshoreAlert is a mystery given the unwillingness of the charity's executive director, 60-year-old Keith Bohelm, and his predecessor, 82-year-old Lawrence Burgdorf, to discuss the matter with OffshoreAlert over the years.

In our most recent call to the charity's headquarters in Earth City, Missouri last Friday, the charity was typically uncooperative. After OffshoreAlert identified itself and asked to speak with Bohelm, a man who did not identify himself responded with "Keith is not available and would not want to discuss with you" before abruptly terminating the call. OffshoreAlert did not even have a chance to state why it was calling.

The \$250 million write-off in 2012 was the second time in six years that the Foundation had taken a substantial loss on a tourism-related investment in the Caribbean: In 2006, the charity realized a loss of \$87 million and wrote down an additional \$49 million regarding an investment in the Four Seasons Resort at Emerald Bay in the Bahamas. The entity through which the charity made its investment - Bahamas-domiciled EBR Holding Ltd. - went into receivership in 2007 and the resort closed down in 2009 - just six years after opening, according to media reports. The charity realized a further loss of \$22 million on a loan for the Emerald Bay development in its 2009 tax return.

The Foundation's tax returns read more like those of a private sector global conglomerate like Citigroup than a domestic U.S. charity, showing an array of legal structures and accounts in offshore jurisdictions like the British Virgin Islands, the Bahamas, Cayman Islands, Costa Rica, Ireland, and Panama.

Apart from Cayman and the Bahamas, the charity made substantial investments in a resort development in Costa Rica, also managed by Four Seasons, which is still in business ten years after opening in 2004. In its 2012 tax return, the charity disclosed that it was still carrying \$186 million of assets on its books concerning "Investments in hotel and real estate activities" in "Central America and the Caribbean".

The charity was founded in 1993 - the year of the death of its founder, Marvin M. Schwan, who became a self-made billionaire through his Minnesota-based frozen food firm, The Schwan Food Company. Schwan left the bulk of his estate to the charity to support Lutheran religious and missionary organizations. The charity does not accept donations from the public.

As the charity's assets have dwindled in recent years mainly due to poor investment decisions - plummeting by more than half from \$952 million to \$460 million in the 12 years to November 30, 2012 - so has its financial support to religious causes, providing \$15 million, \$18 million and \$16 million in 2010, 2011, and 2012, respectively, compared with an average of \$40 million per year for the previous nine years.

Burgdorf retired as the charity's executive director on March 31, 2010 and was replaced by Bohelm, who had previously been the assistant director. Burgdorf's son, 58-year-old Erik Burgdorf, has been a director since 2007. In the 10 years preceding his retirement, Lawrence Burgdorf received financial compensation totaling \$4 million for a work-week that fluctuated between 25 and 40 hours per week, according to the charity's tax returns. Even after retiring from his full-time position, he continued to receive substantial amounts: For example, in 2011 he received \$160,200 for a five-hour working week. That same year, his son received \$294,312 and Bohelm received \$448,113, each for a 40-hour week.

The charity's tax returns make for interesting reading. For example, in 2001, the Foundation issued a personal loan of \$500,000 to Herbert Humphreys, Jr., who was one of the original investors in The Ritz-Carlton, Grand Cayman development. The following year, Humphreys filed for bankruptcy protection in Tennessee, with the charity listed among his creditors, with a claim for \$5.9 million. In 2003, the charity's "management and general" expenses inexplicably ballooned to \$46 million, compared with just \$2.9 million and \$4.9 million for 2001 and 2002, respectively, and \$4.5 million in 2004. No explanation for the bump was given in the charity's 2003 tax return, except as to attribute it to "administration" expenses of \$40 million.

The charity changed accountants in 2009, replacing long-serving tax preparer Alfred V. Lall, of Birchler Mengwasser Martin Lall PC, with Marle N. Carle, of Stone Carle & Company. Unsurprisingly, given the dozens of offshore structures that have appeared in its returns, the charity attracted the attention of the IRS, disclosing in its 2010 tax return

that the IRS was auditing its 2006, 2007 and 2008 returns and "has asserted the position that the Foundation has excess business holdings in connection with one investment". In its 2011 return, the charity disclosed that the IRS had found that the charity did indeed have "excess business holdings" and in its 2012 return the charity disclosed that it had paid \$1.1 million in "IRS settlements".

RATE THIS

★★★★★

EXHIBIT 8

Christian Charity Loses A Fish Stick Fortune In Caribbean Hotel Investment Gone Wrong

February 3rd at 13:08 PM in the The Huffington Post - Business

WASHINGTON -- A Lutheran charitable foundation lost roughly a third of its endowment in a Caribbean investment scheme gone wrong, the group's most recent tax documents reveal.

The Marvin M. Schwan Foundation's endowment comes from the fortune made by its namesake in the frozen food business. The Schwan Food Company delivers fish sticks, chicken nuggets and other foods to homes and grocery stores across the U.S.; its trucks are a staple of some rural communities. Meanwhile, the Schwan Foundation seeks to spread its founder's Lutheran message.

But now a busted investment has left a gaping hole in the charity's coffers, reducing its assets from well over \$700 million to less than \$500 million. (Tax-exempt organizations must make certain tax forms available to the public.)

The foundation lost \$250 million from loans that went not to the construction of a new school, say, or the purchase of clean-energy stoves in a less-developed country, but a far less charitable cause: the construction of a Ritz-Carlton hotel and residences in the Cayman Islands.

That comes on top of a previous loss of more than \$100 million for the once nearly billion-dollar charity. And the group still lists \$213 million in assets tied up in "hotel and real estate activities" in "Central America and the Caribbean."

HuffPost was tipped off to the collapse by the Miami-based newsletter OffShoreAlert, which investigates tax strategies in the Caribbean. OffShoreAlert also wrote about the foundation's troubles on Monday.

A woman who answered the phone at the foundation Friday stated that the organization would not comment on any matter, including its recent losses. "We don't give out any information, OK. Thank you," she said before hanging up. In a subsequent phone call, when HuffPost asked to speak to charity head Keith Boehm, the woman said that he travels a lot. "I don't know his schedule," she said.

Another representative of the foundation also refused to comment. "We do not discuss any of the foundation's business," this person said.

OffShoreAlert, however, had more of the story on Monday. "The loans became worthless after The Ritz-Carlton, Grand Cayman was forced into Receivership on March 12, 2012 by its other major lender, Connecticut-based investment firm Five Mile Capital Partners, which bought the development at auction six months later for \$177 million -- \$57 million less than it was owed," editor David Marchant wrote.

A parade of B-list celebrities attended the hotel's 2006 grand opening party, led by actors William Baldwin and Adrian Grenier, weatherman Al Roker, and Christopher Meloni of "Law & Order: SVU" and, of course, "Wet Hot American Summer." Boehm snapped a photo with Roker at the shindig.

Marchant wrote that he had tried to reach out to the foundation several years ago to warn that the Ritz-Carlton investment was likely to go belly up, but the charity refused to hear from him.

"The Marvin M. Schwan Charitable Foundation's tax returns indicate that approximately \$175 million of the amount lost was loaned to firms controlled by developer Michael Ryan in 2005 and 2006 -- long after OffshoreAlert began raising red flags about the project, prompting Ryan to file a libel complaint against OffshoreAlert at the Grand Court of the Cayman Islands in February, 2004," Marchant wrote.

A call to Ryan's development firm was not returned.

#3

21-22-1. Definition of terms. Terms used in this chapter mean:

(1) "Beneficiary," any person in any manner interested in the trust, including a creditor or claimant with any rights or claimed rights against the trust estate if the creditor or claimant demonstrates a previously asserted specific claim against the trust estate;

(2) "Court trust," any trust which is established or confirmed by the judgment, decree, or order of any court of record of this state or any foreign jurisdiction, or one which is established or confirmed by a personal representative's instrument of distribution or a personal representative's deed of distribution;

(3) "Fiduciary," a trustee, custodian, trust advisor, trust protector, or trust committee, as named in the governing instrument or order of court, regardless of whether such person is acting in a fiduciary or nonfiduciary capacity;

(4) "Other trust," any trust which is not a court trust;

(5) "Supervision," the supervision of the circuit court over the administration of a trust as provided in this chapter;

(6) "Trustee," the trustee or trustees of any trust which may be supervised under this chapter.

Source: Supreme Court Rule 237, 1939; SDC 1939 & Supp 1960, § 33.2601; SL 2010, ch 232, § 24; SL 2014, ch 226, § 6; SL 2015, ch 240, § 21.

#4

21-22-9. Petition, hearing, and order for court supervision of other trust--Information. Any fiduciary, trustor, or beneficiary of any other trust may, if the trustee is a resident of this state or if any of the trust estate has its situs in this state, at any time petition the circuit court, the county where such petition is to be filed to be determined the same as in the case of a court trust, to exercise supervision. Upon the petition being filed, the court shall fix a time and place for hearing thereon, unless notice and a hearing are waived in writing by all fiduciaries and beneficiaries, and notice shall be given as provided pursuant to this chapter, and, upon such hearing, enter an order assuming supervision unless good cause to the contrary is shown. Thereupon the trustee shall within thirty days, file the information required pursuant to § 21-22-3 by a trustee under a court trust, and, at all times thereafter, the court shall have the same powers as over a court trust. If the petition for court supervision includes the information required pursuant to § 21-22-3, the fiduciary, trustor, or beneficiary may, in the same petition, request court action as to any matter relevant to the administration of the trust, including the termination of court supervision. Upon the hearing on the petition, the court shall enter an order assuming supervision unless good cause to the contrary is shown. The court shall make such order approving the relief requested by the petition, give such directions to a fiduciary as the court shall determine, or resolve objections filed by an interested party pursuant to § 21-22-16.

Source: SDC 1939 & Supp 1960, § 33.2605; SL 2002, ch 100, § 8; SL 2004, ch 312, § 10; SL 2014, ch 226, § 10; SL 2015, ch 240, § 24.

#5

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
2)SS
2 COUNTY OF MINNEHAHA) SECOND JUDICIAL DISTRICT

3 * * * * *

4 In the Matter of the MARVIN M.
5 SCHWAN CHARITABLE FOUNDATION *

6 MARK SCHWAN and PAUL SCHWAN, *

7 as members of the Marvin M. *

8 Schwan Charitable Foundation, *

9 Petitioners, * TRU 14-000021

10 vs. * MOTIONS HEARING

11 LAWRENCE BURGDORF, KEITH *

12 BOHEIM, KENT RAABE, GARY *

13 STIMAC and LYLE FAHNING, as *

14 Trustees of the Marvin M. *

15 Schwan Charitable Foundation, *

16 Respondents. *

17 * * * * *

18 BEFORE: The Honorable Mark Salter,
19 Circuit Court Judge in and for the Second
20 Judicial Circuit, State of South Dakota,
21 Sioux Falls, South Dakota.

22 PROCEEDINGS: The above-entitled proceeding commenced at
23 1:30 p.m. on the 23rd day of February, 2015,
24 in Courtroom 5B at the Minnehaha County
25 Courthouse, Sioux Falls, South Dakota.

Carla Dedula, RPR, CRR
425 North Dakota Avenue, Sioux Falls, South Dakota 57104

1 APPEARANCES: Thomas J. Welk, Esquire
2 Boyce Law Firm, LLP
3 300 South Main Avenue
4 Sioux Falls, South Dakota 57104
5
6 Blake Shepard, Jr., Esquire
7 Allen I. Saeks, Esquire (via phone)
8 Stinson Leonard Street
9 150 South Fifth Street, Suite 2300
10 Minneapolis, Minnesota 55402
11
12 for the Petitioners,
13
14 Vincent M. Roche, Esquire
15 Reece M. Almond, Esquire
16 Davenport, Evans, Hurwitz & Smith, LLP
17 206 West 14th Street
18 P.O. Box 1030
19 Sioux Falls, South Dakota 57101-1030
20
21 for Trustees,
22
23 Pamela R. Bollweg, Esquire
24 Johnson, Abdallah, Bollweg and Parsons, LLP
25 P.O. Box 2348
Sioux Falls, South Dakota 57101
for WELS Kingdom Workers,
Evangelical Lutheran Synod,
Wisconsin Lutheran College, and
Bethany Lutheran College;
Kenneth L. Gosch, Esquire
Bantz, Gosch & Cremer, LLC
305 6th Avenue Southeast
Aberdeen, South Dakota 57402-0970
for WELS, Wisconsin Evangelical
Lutheran Church;
Phil Carlson, Esquire
Jeffrey P. Hallem, Esquire
Office of the Attorney General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8503
for the Attorney General;

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CONTINUED

APPEARANCES: James Dankenring, Esquire (via phone)
Spencer, Fane, Britt & Browne
1 North Brentwood Boulevard, Suite 1000
St. Louis, Missouri 63105

for the International Lutheran
Laymen's League;

Sherri Strand, Esquire (via phone)
Thompson Coburn, LLP
One US Bank Plaza
St. Louis, Missouri 63101

for Lutheran Church Missouri
Synod.

1 In this case my view is that this decision by Judge
2 Tiede, which I've not read, is being tendered, for lack
3 of a better word, as a rebuttal to the allegation that
4 Mark or Paul Schwan are motivated by something that's
5 nefarious. My decision is that I'll pull that earlier
6 decision by Judge Tiede. I'll look at it. I won't
7 accord it any preclusive effect.

8 And Mr. Roche, you mentioned something about
9 unsealing. Is the unsealing procedure one that binds
10 the parties or purports to bind the Court?

11 MR. ROCHE: I think it's a court order by Judge Tiede.
12 So -- and my concern is not that you would see it. It's
13 that if there were other parties to that prior
14 litigation and it was to be disseminated beyond the
15 Court and counsel for the Trustees and the Petitioners,
16 ie. to these folks sitting on the right side of the
17 room, would that be violative of any of the rights of
18 the other parties to that case who had that sealing
19 order entered?

20 THE COURT: Have you seen it?

21 MR. ROCHE: I have seen it, yes.

22 THE COURT: Mr. Welk obviously has as well. My
23 inclination is that I will review it in the absence of
24 an objection from anyone else. I'll essentially review
25 it in camera. I'll seal it and make it part of the

1 record. And depending upon what happens at the end of
2 this hearing, if I take matters under advisement, issue
3 a written decision, I'll be very transparent with how
4 I've treated that earlier decision. As I say, I'm not
5 seeing this as something that is being offered for an
6 argument that certain issues are precluded or anything
7 like that. It is, to my mind, of the nature of
8 rebuttal -- and that may not be fair, Mr. Welk, but
9 that's kind of what I'm seeing it as.

10 MR. HALLEM: Your Honor, for the record, the Attorney
11 General's Office has no objection to what you're
12 proposing.

13 THE COURT: Thank you very much, Mr. Hallem.

14 Ms. Bollweg or Mr. Gosch, any objection?

15 MS. BOLLWEG: No objection, Your Honor.

16 MR. GOSCH: I'm not going to object, but I find it
17 difficult to object because I have no clue what I'm
18 objecting to.

19 THE COURT: Understood, Mr. Gosch.

20 There's one other thing that I want to talk about
21 before I get into the motions, the dispositive motions.
22 That is the motion that was filed earlier today by
23 Mr. Roche seeking to strike Professor Langbein's
24 Affidavit. It is, it seems to me, not timely for
25 consideration at this hearing, but I want to hear from

1 55-3-31. And there the term "interest in a trust" is
2 defined to only encompass persons entitled to income or
3 principal from the trust estate.

4 THE COURT: Isn't that a notice provision of the Uniform
5 Trust Act that doesn't really impact a substantive -- or
6 doesn't really have a substantive connotation beyond
7 that?

8 MR. ROCHE: I don't think so. That is where it's found;
9 you're correct. But as far as reflecting the
10 legislature's intent on what an interest in a trust
11 entails, I think that's the only indication we have from
12 anywhere in the code as to what the legislature believes
13 an interest in a trust encompasses.

14 THE COURT: Doesn't the language of "beneficiary" under
15 21-22-1(1) seem to be at odds from the definition that
16 you just gave me, which is right to receive a
17 distribution, because the beneficiary claim -- excuse
18 me, "includes any person in any manner interested in the
19 trust" -- okay, we've talked about that -- "including a
20 creditor or a claimant with any rights or claimed rights
21 against the trust estate." So would you consider, for
22 instance, a creditor to be someone who has a right to
23 receive a distribution?

24 MR. ROCHE: They may under certain circumstances if it
25 was the right kind of trust and they had the right kind

1 of judgment that would entitle them to levy against the
2 distribution.

3 THE COURT: This is an expansive definition though. It
4 doesn't limit, in any way, the definition of beneficiary
5 to the right kind of trust or the right kind of claim.
6 It says "any person in any manner." Very underscripted,
7 very broad language by the legislature here in defining
8 this.

9 MR. ROCHE: But then it says "interested in the trust."
10 And again, the term of art is "interested." And what
11 that term means is someone who might have a right to a
12 distribution out of a trust. And I think that's borne
13 out by the language that the Court just quoted because
14 it says "including a creditor or claimant," which again,
15 is consistent with the notion that interest is talking
16 about a distributional interest.

17 THE COURT: In any event, even if you see congruity
18 between the statutory definition of "beneficiary" and
19 the Trust Instrument's definition of "beneficiary,"
20 would you agree that -- or not, that the correct
21 definition to apply, and maybe it's a distinction
22 without a difference under your view, is the statutory
23 definition if we're talking about a statutory remedy of
24 court supervision?

25 MR. ROCHE: That is the correct interpretation to use.

1 Ms. Bollweg or Mr. Gosch, if you want to add to
2 that.

3 MS. BOLLWEG: Sure. Yes, Your Honor.

4 Just as a backdrop, since you haven't really heard
5 from the Beneficiaries yet, having reviewed the
6 information that was provided by the Trustees to the
7 Beneficiaries, four of whom I represent -- Ken
8 represents one and Sherri and Jim represent the other
9 two -- we are convinced that there was no bad faith here
10 by the Trustees. That they did not personally profit
11 from any of these investments. And having been through
12 these documents and, you know, talked amongst ourselves
13 about it, talked with the Attorney General's Office
14 about it, we are comfortable that the existing Trustees
15 are moving forward in a proper manner. And we are
16 actually also concerned about disruption in the
17 operation of the Trust and the Foundation moving forward
18 because we are concerned that qualified trustees who
19 would be people who would come on in the future here,
20 there's some people who are going to be retiring. And
21 having the Trust involved in massive litigation like
22 this is a very big deterrent, from the Beneficiary
23 standpoint, of additional people thinking about coming
24 forward to act as a Trustee or a Trustee Succession
25 Committee. And I'm telling you all these things in

1 terms of to give you some background as to why the
2 Beneficiaries are here asking that the Court dismiss the
3 Petition, have ratified the Trustees' conduct. And we
4 see no benefit coming to the Trust, even if there was a
5 breach of fiduciary duty back when these investments
6 were made, when decisions were made about whether to
7 continue providing capital for these investments at the
8 particular time that they did -- even if there was some
9 particular type of breach of fiduciary duty that
10 occurred --

11 (Noise on the phone.)

12 THE COURT: Do we still have everybody on the phone? Do
13 we have anybody on the phone?

14 MS. STRAND: I'm still on the phone. This is Sherri
15 Strand.

16 MR. SAEKS: Yes. Saeks is on the phone.

17 THE COURT: Okay. We may have lost --

18 MS. BOLLWEG: Mr. Dankenbring?

19 It looks like we've lost Jim.

20 THE COURT: I think he's got the number though; doesn't
21 he? Hopefully he can rejoin us.

22 MS. BOLLWEG: Yeah. I think that's true.

23 THE COURT: So you're saying, Ms. Bollweg -- forgive me
24 for interrupting. But you're saying that essentially
25 even if there were, in a theoretical sense, a breach of

1 the fiduciary duty somewhere along the way, the decision
2 of your clients, as Beneficiaries, is to effectively
3 ratify that, come here to court and seek dismissal of
4 the petition.

5 MS. BOLLWEG: That's right, Your Honor. We don't feel
6 like there's any benefit to the Trust, even if there was
7 a breach of fiduciary duty claim, to try to bring that.

8 (Voice came over the phone saying Jim Dankenbring
9 is joining the meeting.)

10 MS. BOLLWEG: Welcome back, Jim.

11 THE COURT: Glad to have you back on board.

12 MR. DANKENBRING: I'm not sure what happened there.

13 Sorry, Your Honor.

14 THE COURT: No problem.

15 MS. BOLLWEG: So in any event, Your Honor, that's my
16 client's position. We're comfortable, especially with
17 the newer Trustees, Kent Raabe and Mr. Fahning, we
18 believe that they're very experienced business people,
19 and they have done a very good job of trying to minimize
20 the losses that occurred as a result of some very early
21 investment decisions. And they have a new investment
22 policy in place, and we believe that they're following
23 that very well.

24 We will be looking at replacing three Trustees by
25 the end of 2015 if our settlement agreement is put in

1 place. And we see nothing but a financial drain on the
2 Trust if this litigation goes forward. And that's not
3 in the interest of any of the Beneficiaries. So as you
4 can see in our Petition and in our Settlement Agreement,
5 we would be particularly pleased if the Court would
6 dismiss all of this and get the Trust back to putting
7 its feet on the ground and getting back to its original
8 purpose of benefiting the charities.

9 MS. BOLLWEG: And one other thing, Judge Salter, that I
10 forgot to mention is that, in reviewing the professor's
11 affidavit, it looks to me like one of the things that he
12 mentioned is that the Schwan brothers need to pursue
13 this if they could potentially be held liable, as a TSC
14 member, to a Beneficiary or to the Attorney General's
15 Office. And after that affidavit was proposed or
16 submitted to the record, I talked with the other
17 Beneficiaries' counsel. And we have all agreed -- all
18 of the Beneficiaries have agreed that if the Settlement
19 Agreement is adopted and this Petition is dismissed that
20 we would, likewise, release any TSC members in the same
21 manner as we have agreed to release the Trustees.

22 THE COURT: Understood.

23 Anything from the Attorney General's Office,
24 Mr. Hallem?

25 MR. HALLEM: Yes, Your Honor. I think one important

1 thing is the Attorney General's Office is the one who
2 initially proposed the settlement terms based upon our
3 review of the record. This was not generated by the
4 Trustees. It wasn't generated by the Beneficiaries. It
5 was generated by our office based upon our review of the
6 record as to how to remove things -- to move things
7 going forward. And we also sent proposals out to all
8 the parties, including Petitioners here, on it. So
9 everybody knew what we thought about it. And we truly
10 believe that settlement is the best way to deal with
11 this; that nothing is gained to go forward; and the
12 structural changes will rectify any of the issues that
13 will allow the TSC to operate unrestricted under the
14 terms in the Trust document. We found nothing, based
15 upon our review, that was criminally actionable or any
16 personal profit based upon conflict of interest by
17 individual Trustees. We viewed the issues with the
18 Trustees as the very beginning, initial investments in
19 dealing with asset allocation and the type of
20 investments they went into, which is the resorts. And
21 then also that they were committed to the construction
22 of those resorts and during that process did what we
23 consider things that a charitable fiduciary probably
24 shouldn't have done. But at least at this stage they
25 were done a decade ago, and there was nothing in bad

1 separation that will allow truly independent TSC. And
2 under that they can perform their duties, and the
3 Trustees have to be accountable to them. Also, during
4 the process the Beneficiaries are provided more
5 information so that they can exercise their rights as
6 Beneficiaries under South Dakota law.

7 THE COURT: You mentioned that you'd proposed settlement
8 terms to the Schwan brothers. Did you also -- how did
9 that work? I mean, since we're all into this discussion
10 about this prospective contingent Settlement Agreement,
11 it's unusual, I suppose, that we're talking about that,
12 but I understand that the argument is essentially being
13 made to suggest that -- or that fact is being entered
14 into this record to suggest that there's really nothing
15 more by relief that could be realized here, a mootness
16 type argument. But I'm curious, as long as we're
17 talking about it, did the Schwan brothers have the
18 ability to get the same information that everybody else
19 got or did they have to sign a release or was it
20 contingent upon them releasing them before that?

21 MR. HALLEM: The Schwan brothers have not received the
22 information that the Attorney General's Office and
23 Beneficiaries have received. And in order for the
24 Beneficiaries and our office to receive it, we signed a
25 confidentiality agreement that limited our ability to

1 disclose information in there. And we've abided by the
2 confidentiality agreement. That agreement would not
3 have effect if we determined to pursue an action, but it
4 did prevent us from disclosing to any party, including
5 the Schwan brothers. So they have not looked at the
6 underlying documents that the Beneficiaries and we have.

7 THE COURT: Thousands of pages somebody said.

8 MR. HALLEM: I think that's a fair description, Your
9 Honor.

10 THE COURT: Okay.

11 Mr. Welk, I'm interested to hear your argument.

12 MR. WELK: Thank you, Your Honor, and counsel.

13 Your Honor, let's just step back for a minute.
14 We're dealing with a situation in which we know -- and
15 whether, and I hate to be this flippant, four, five, six
16 hundred million, pick your number at various times, of
17 losses that have occurred. This isn't a minor matter.
18 And this matter would have not been brought to the
19 attention of anybody but for our clients, who, by the
20 way, are not getting a nickel out of this. They are not
21 getting any distribution. Their sole function is to act
22 as members of the TSC. And what the agreement -- and
23 also to build upon what Mr. Hallem said, it was
24 inexplicable in this instance where the people who are
25 sitting on the committee that can vote to remove

1 say, okay, this is what the law is, and the
2 Beneficiaries have signed off on it.
3 THE COURT: Understood.
4 MR. WELK: May I respond?
5 THE COURT: You may, of course.
6 MR. WELK: Your Honor, one thing that's missing here is
7 the intent under the Trust Instruments that's been
8 thwarted by this proposed settlement. There is a
9 specific duty of the TSC to review the accountings and
10 the doings. Where has that been discharged? That's not
11 the responsibility of, frankly, the AG under the
12 Instrument or even the Beneficiaries. That is an
13 Instrument -- that was set up by Marvin Schwan in the
14 Instrument. And that's what our clients are trying to
15 do is to discharge that responsibility. And that's not
16 being done here. Other people have looked at this. The
17 people on the TSC committee, the only people that have
18 looked at it are the people whose conduct is at issue
19 not others.
20 THE COURT: So the other two non-Trustee members of the
21 Trust Succession Committee were not privy to this
22 information?
23 MR. WELK: Not that we're aware of, anybody seen it on
24 any of these documents.
25 THE COURT: Mr. Ewert and the other gentleman whose name

1 escapes me, the other non-Trustee member of the Trustee
2 Committee.
3 MR. WELK: Well, since we haven't seen the agreement, we
4 don't know who the signatories are. We know our
5 clients. I don't know if they signed it or not.
6 MR. GOSCH: Paul Tweit is the other gentleman you were
7 thinking of.
8 THE COURT: Thank you.
9 MR. WELK: I think it's important, for the record,
10 whether they signed or saw any of these documents. I
11 don't think they did.
12 THE COURT: I do have that question. Were they privy to
13 this information or not?
14 MR. ROCHE: No. They're on the TSC, and the TSC voted
15 five to two that they were comfortable with the type of
16 accounting that was provided. Which again, going back a
17 number of years, Judge, there's been disclosures that,
18 "Hey, here's a loss. Here's another loss. Hey, this is
19 coming down the pipe." This didn't come out of no where
20 as has been alleged. And the TSC has been kept entirely
21 up to speed on this. And so that's why there's some
22 historical background for you for why these other
23 gentlemen, like the Beneficiaries, are saying, "Let's
24 look forward and move on rather than dwell in the past
25 and spend hundreds of thousands of dollars litigating

1 THE COURT: Or hire them.

2 MR. ROCHE: Or hire them. Absolutely.

3 THE COURT: Okay. I have a couple of unconnected
4 questions. Before I leave, though, we've got some time.
5 I want to make sure everyone has had enough opportunity
6 to add anything they want to add. I have your
7 arguments. Is there anything else?

8 Mr. Roche, your submissions in the initial motion
9 or brief that you had last summer seem to suggest an
10 attenuated connection with or between the Foundation in
11 South Dakota. I read that as being contextual and that
12 you are not otherwise challenging the Court's
13 jurisdiction to act here. Am I right?

14 MR. ROCHE: That's correct, Your Honor. Except, as we
15 did lay out in our papers, there was -- there's language
16 in the Trust Instrument where the Settlor provided that
17 if there was any question over the meaning of a term in
18 the Instrument, the Trustees were entitled to construe
19 that in order to avoid the Trust coming under court
20 supervision. So --

21 THE COURT: That was when I said earlier I suspected
22 what you were going to tell me. That's what I thought
23 part of your answer was going to be based upon the
24 strength of the South Dakota Supreme Court's earlier
25 decision in 2006 in the Great Grandchildren Trust case.

1 But --

2 MR. ROCHE: We're not contesting that 21-22 applies I
3 guess is what I'm saying.

4 THE COURT: Okay. So there's not a jurisdictional
5 argument.

6 MR. ROCHE: No.

7 THE COURT: All right. What about the claim you made
8 earlier? We haven't touched upon it. Where does it fit
9 into your overall argument the claim you made in one or
10 both of your briefs, if not your more recent Petition,
11 that that language that gives to the Trustees in this
12 case sole discretion, gives them also the ability, in
13 this case, to determine the sufficiency of an
14 accounting, to determine the sufficiency of their
15 relationship, vis-a-vis the Trust selection or
16 Succession Committee? Is that how that works in your
17 view?

18 MR. ROCHE: It's the definition of an accounting.
19 Again, remember that every year -- this is without
20 complaint from either of the Schwans, by the way -- but
21 the Trustee Succession Committee gets the audited
22 financials, reports on investment, reports on
23 distributions, and then an opportunity to ask questions.
24 And that's how it's gone on for years. And it's
25 certainly within the realm of reasonableness for the

1 Committee along the way, prior to this Petition, let's
2 say, is an amount of information that is far less
3 detailed than information that was presented to the
4 Beneficiaries and the Attorney General. Am I correct
5 in -- without testimony or anything else -- am I correct
6 in taking that as -- you don't have to agree. But is
7 that factually correct and can I consider that? I don't
8 know that it will be significant or not. I just want to
9 know.

10 MR. ROCHE: I think the volume of documents is correct,
11 but as far as the chance and opportunity to ask
12 questions at TSC meetings versus meetings with
13 Beneficiaries, it's been, I think, an open book by the
14 Trustees on both stages.

15 THE COURT: The volume of information. Was the volume
16 of information, the detail of the information that was
17 shared with the Beneficiaries and with the Attorney
18 General, more, and significantly more, than what the
19 members of the Trust Succession Committee were receiving
20 along the way at the annual meetings?

21 MR. ROCHE: From a physical count up the documents, yes.
22 What was provided to the Beneficiaries and the AG was
23 more.

24 THE COURT: And I can accept that and no one has a
25 disagreement with me accepting that without further need

1 of testimony? That can be stipulated? Again, I don't
2 know to what extent that's significant, but I have that
3 in my notes.

4 Ms. Bollweg?

5 MS. BOLLWEG: Yes, Your Honor.

6 THE COURT: Mr. Gosch?

7 MR. GOSCH: That's correct, Your Honor.

8 THE COURT: Mr. Hallem?

9 MR. HALLEM: Yes.

10 THE COURT: Mr. Shepard is nodding.

11 All right. Well, here's -- my sense is that, one,
12 we've made it into court after a couple of efforts in
13 the past to have a hearing like this. We've made it
14 into court, and we've had this hearing, which is not a
15 merits hearing in the event that I decide that the
16 Petition can go through. That's something different.
17 What we've handled here today, in my view, is oral
18 argument on whether these dispositive motions should be
19 granted or not. I'm going to take that question, those
20 questions, under advisement. The parties have been
21 waiting for a while for some resolution. I think the
22 parties collectively, all of them, are anxious to move
23 on to whatever follows from our hearing today. And I'm
24 cognizant of that, and I'm going to endeavor to give you
25 a written decision as quickly as I can. But it is a

#6

2. The Trust Instrument also named Marvin Schwan, Alfred Schwan, Lawrence Burgdorf, and Owen Roberts as the original members of the Trustee Succession Committee ("TSC"), (Petition, Ex. 1 at p. 9.)

3. Article 7(a) of the Trust Instrument gives the Trustees the authority to enact any amendment that "clarifies the meaning or reference of any expression or provision of this instrument *so as to avoid the necessity of instructions by the court.*" (*Id.* at 16 (emphasis added).)

4. Article 6(c) likewise gives the Trustees broad discretion to construe the language of the Trust:

All powers and discretion given to the Trustees shall be exercisable in their sole discretion, and all their decisions and determinations (including determinations of the meaning and reference of any ambiguous expression used in this instrument) made in good faith and in the exercise of reasonable judgment shall be conclusive upon all persons[.]

(*Id.* at 15.)

5. Petitioners' purportedly draw their "standing" to seek court supervision from the fact that they currently serve as members of the TSC. (*See generally* Petition.)

6. Petitioners are only two of the seven members of the TSC, as the current members of the TSC are Mark Schwan, Paul Schwan, Paul Tweit, Dave Ewert and Trustees Kent Raabe, Keith Boheim and Lawrence Burdgorf. (Petition, ¶ 16.)

7. A majority of the members of the TSC (five of seven) oppose the Petition and do not want the "accounting" requested by Petitioners. (Boheim Affidavit, ¶ 13; Ewert Affidavit, ¶ 5; Tweit Affidavit, ¶ 2.)

8. Separately, Petitioners are not entitled to income or principal from the trust estate and are not named beneficiaries per the Trust Instrument. (*See generally* Petition, Ex. 1.)

9. Each year, the Trustees provide the TSC audited financial statements, reports on investments, an overview of the management of the Trust, and information on distributions.

(Boheim Affidavit, ¶ 9.)

10. The TSC meets at least annually, sometimes more frequently, and additional information is provided orally at these meetings. (Boheim Affidavit, ¶ 10; Ewert Affidavit, ¶¶ 2-3).

11. Aside from Petitioners, no other member of the TSC—including the two other non-trustee TSC members—is seeking an additional "accounting" from the Trustees. (Boheim Affidavit, ¶ 13; Ewert Affidavit, ¶ 5; Tweit Affidavit, ¶ 2.)

Dated in Sioux Falls, South Dakota on this 5th day of June, 2015.

DAVENPORT, EVANS, HURWITZ &
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#7

STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

In the Matter of MARVIN M.
SCHWAN CHARITABLE
FOUNDATION;

Tr. 14-21

Mark Schwan and Paul Schwan, as
members of the Trustee Succession
Committee of the Marvin M. Schwan
Charitable Foundation.

ATTORNEY GENERAL'S,
BENEFICIARIES', AND TRUSTEES'
STATEMENT OF UNDISPUTED
MATERIAL FACTS

Petitioners,

v.

Lawrence Burgdorf, Keith Boehm,
Kent Raabe, Gary Stimac and Lyle
Fahning, as Trustees of the Marvin
M. Schwan Charitable Foundation,

Respondents.

The Honorable Marty Jackley, South Dakota Attorney General, beneficiaries
WELS Kingdom Workers, Inc., Evangelical Lutheran Synod, Wisconsin Lutheran
College, Bethany Lutheran College, The Lutheran Church—Missouri Synod,
International Lutheran Laymen's League, Wisconsin Evangelical Lutheran Synod
(collectively, "Beneficiaries"), and Trustees Lawrence Burgdorf, Keith Boehm, Kent
Raabe, Gary Stimac and Lyle Fahning (collectively, "Trustees") respectfully submit the
following Statement of Undisputed Material Facts in support of their Petition for
Dismissal of June 2014 Petition, Termination of Court Supervision, and Other Relief
("Petition for Dismissal") following the Court's Amended Notice of Intent to Treat
Pending Motion to Dismiss as Summary Judgment Motion:

1. Petitioners are two members of the Trust Succession Committee, which consists of seven total members: Mark Schwan, Paul Schwan, Paul Tweit, Dave Ewert, Kent Raabe, Keith Boehm, and Lawrence Burgdorf. (Petition for Court Supervision and Enforcement of Charitable Trust and for Court Instructions ("Petition for Court Supervision", ¶ 16.)

2. Trustees are the persons charged with administering the Marvin M. Schwan Charitable Foundation ("Foundation"). (Petition for Court Supervision, ¶ 6.)

3. Beneficiaries are the designated beneficiaries of the Foundation and are the only entities entitled to receive distributions from the Foundation. (Petition for Court Supervision, Ex. 1.)

4. After Petitioners brought this action, representatives of the Attorney General, the Beneficiaries, and the Trustees reached and executed a settlement agreement that would effectively resolve all potential issues raised by the Petition for Court Supervision. (See Petition for Dismissal, Ex. 1.)

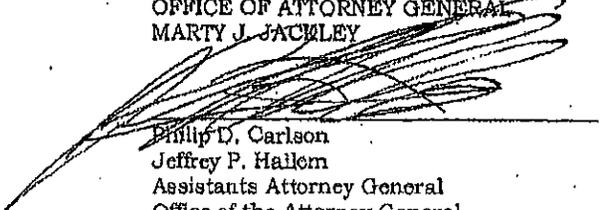
5. The Beneficiaries have represented in open Court that they will waive all potential claims against the Trustee Succession Committee and its individual members arising out of the matters that are the subject of the Petition for Court Supervision when the Settlement Agreement becomes effective. (2/23/15 Hearing Transcript.)

6. The Attorney General, the Beneficiaries, and the Trustees believe that continued litigation would be contrary to the best interests of the Beneficiaries and would needlessly waste additional Trust assets. (Petition for Dismissal at ¶ 5.)

[SIGNATURE PAGES FOLLOW]

Dated at Pierre, SD on this 4th day of June, 2015.

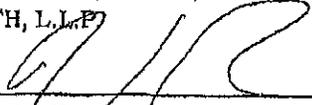
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Dated at Sioux Falls, SD on this 2nd day of June, 2015.

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Dated at Sioux Falls, SD on this 30th day of June, 2015.

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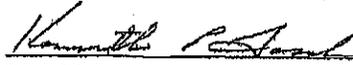
Attorneys for Bethany Lutheran College,

Wisconsin Lutheran College, WELS

Kingdom Workers, Evangelical Lutheran
Synod

Dated at Aberdeen, S.D. on this 3rd day of June, 2015.

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#8

STATE OF SOUTH DAKOTA
COUNTY OF MINNEHAHA

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

In the Matter of the MARVIN M.
SCHWAN CHARITABLE FOUNDATION

Tru. 14-21

MARK SCHWAN and PAUL SCHWAN,
as members of the Trustee Succession
Committee of the Marvin M. Schwan
Charitable Foundation,

Petitioners,

vs.

**PETITIONERS' RESPONSE TO
TRUSTEES' STATEMENT OF
UNDISPUTED MATERIAL
FACTS**

LAWRENCE BURGDORF, KEITH BOHEIM,
KENT RAABE, GARY STIMAC and
LYLE FANNING, as Trustees of the
Marvin M. Schwan Charitable Foundation,

Respondents.

Petitioners, Mark Schwan and Paul Schwan, as members of the Trustee Succession Committee of the Marvin M. Schwan Charitable Foundation ("Petitioners"), respectfully submit the following Responses to the Trustees' Statement of Undisputed Material Facts pursuant to S.D.C.L. § 15-6-56(c)(2).

1. Marvin Schwan executed the Trust Instrument in 1992, naming himself, his brother Alfred Schwan, and his life-long friend Lawrence Burgdorf as trustees. (Petition, Ex. 1 at p. 17.)

RESPONSE: Undisputed that Marvin Schwan executed the Foundation Trust Instrument in 1992, and that Marvin Schwan, Alfred Schwan and Lawrence Burgdorf were named as the original Trustees of the Foundation in the Trust Instrument. Disputed that the Trust Instrument characterizes Lawrence Burgdorf as Marvin Schwan's "lifelong friend." The

language in the Trust Instrument speaks for itself, and any interpretation of the Trust Instrument's language or application to the facts of this case is a legal question that does not require a response. (Trust Instrument, Petition at Ex. 1)

2. The Trust Instrument also named Marvin Schwan, Alfred Schwan, Lawrence Burgdorf, and Owen Roberts as the original members of the Trustee Succession Committee ("TSC"). (Petition at Ex. 1 at ¶ 9.)

RESPONSE: Undisputed that the Trust Instrument named Marvin Schwan, Alfred Schwan, Lawrence Burgdorf and Owen Roberts as original members of the Foundation's Trustee Succession Committee ("TSC"). The language in the Trust Instrument speaks for itself, and any interpretation of the Trust Instrument's language or application to the facts of this case is a legal question that does not require a response. (Trust Instrument, Petition at Ex. 1)

3. Article 7(a) of the Trust Instrument gives the Trustees the authority to enact any amendment that "clarifies the meaning or reference of any expression or provision of this instrument *so as to avoid the necessity of instructions by the court.*" (*Id.* at 16 (emphasis added).)

RESPONSE: Undisputed that the Trust Instrument contains the language quoted in the statement above, without highlighting or italics. Disputed to the extent that the statement implies that Article 7(a) of the Trust Instrument gives the Trustees discretion to determine that no further accounting to the TSC is required or that Petitioners are precluded from seeking instructions from the Court. The language in the Trust Instrument speaks for itself, and any interpretation of the Trust Instrument's language or application to the facts of this case is a legal question to which no further response is required. (Trust Instrument, Petition at Ex. 1)

4. Article 6(c) likewise gives the Trustees broad discretion to construe the language of the Trust:

All powers and discretion given to the Trustees shall be exercisable in their sole discretion, and all their decisions and determinations (including determinations of the meaning and reference of any ambiguous expression used in this instrument) made in good faith and in the exercise of reasonable judgment shall be conclusive upon all persons[.]

(*Id.* at 15.)

RESPONSE: Undisputed that the quoted language appears in the Trust Instrument. Disputed to the extent that the statement implies that Article 6(e) of the Trust Instrument gives the Trustees discretion to determine that no further accounting to the TSC is required, or that Petitioners are precluded from seeking instructions from the Court, or that the Trustees' refusal to provide information to the Petitioners or other members of the TSC regarding their investment decisions is made in good faith or in the exercise of reasonable judgment. The language in the Trust Instrument speaks for itself, and any interpretation of the Trust Instrument's language or attempt to apply it to the facts of this case is a legal question to which no further response is required. (Trust Instrument, Petition at Ex. 1)

5. Petitioners' purportedly draw their "standing" to seek court supervision from the fact that they currently serve as members of the TSC. (*See generally* Petition.)

RESPONSE: The statement above constitutes legal argument and is not a statement of fact to which a response is required. To the extent that a response is required, Petitioners are current members of the TSC. Petitioners, as members of the TSC, are persons "in any manner interested in" the Foundation under the terms of the Trust Instrument and S.D.C.L. § 21-22-1(1). Article 6(A)(9) provides that the Trustees "shall account to the [TSC] upon the [TSC's] request with regard to the Trustees' doings hereunder." That provision further states that the TSC is requested to meet at least once a year "to review the administration of the Trust by the Trustees." Article 6(A)(6) gives the TSC the exclusive power to "remove, with or without cause, a Trustee or a member of the Trustee Succession Committee by the written action ... of a majority of the living and competent members of the Committee." (Petition at Ex. 1, Article 6(A)(6) and (9))

6. Petitioners are only two of the seven members of the TSC, as the current members of the TSC are Mark Schwan, Paul Schwan, Paul Tweit, Dave Ewert and Trustees Kent Raabe, Keith Boehm and Lawrence Burgdorf. (Petition, ¶ 16.)

RESPONSE: Undisputed.

7. A majority of the members of the TSC (five of seven) oppose the Petition and do not want the "accounting" requested by Petitioners. (Boehm Affidavit, ¶ 13; Ewert Affidavit, ¶ 5; Tweit Affidavit, ¶ 2.)

RESPONSE: Disputed. Three members of the TSC – Respondents Burgdorf, Boehm and Raabe – are also Trustees of the Foundation whose actions, conduct and decisions with regard to the Foundation's \$600 million Offshore Investment losses are at issue. The Foundation's Conflicts of Interest and Disclosure Policy, adopted and approved by the Trustees, requires all Trustees and TSC members to "act exclusively in the interests of the Foundation and not use their positions to further their own financial interest or to derive personal advantage." The Foundation's Code of Business Conduct and Ethics, also adopted and approved by the Trustees, provides that a conflict of interest "occurs when a person's private interest interferes in any way (or even appears to interfere) with the interests of the Foundation as a whole. A conflict situation can arise when an employee, officer or trustee takes action or has interests that make it difficult to perform his or her work objectively and effectively." (Petition at ¶¶ 19-20 and Exhibits 2 and 3 thereto). As Trustees, Respondents Burgdorf, Boehm and Raabe have a personal interest in preventing the TSC from requiring them to account for their own actions, conduct and decisions as Trustees with regard to the Foundation's Offshore Investment losses. Respondents Burgdorf, Boehm and Raabe have used their positions as members of the TSC to prevent the TSC from requesting that they account for their own actions, conduct and decisions as Trustees with regard to the Foundation's Offshore Investment losses. (Affidavit of Keith Boehm at ¶ 13; Affidavit of Paul Schwan dated August 14, 2014 at ¶¶ 6-9.)

8. Separately, Petitioners are not entitled to income or principal from the trust estate and are not named beneficiaries per the Trust Instrument. (*See generally* Petition, Ex. 1.)

RESPONSE: Undisputed that Petitioners are not entitled to (or seeking) income or principal from the trust estate and are not named Beneficiaries in the Trust Instrument. Disputed to the extent the statement implies that Petitioners, as members of the TSC, are not persons "in any manner interested in" the Foundation under the Trust Instrument and S.D.C.L. § 21-22-1(1). (Trust Instrument, Petition at Ex. 1, Article 6 (A)(6) and (9))

9. Each year, the Trustees provide the TSC audited financial statements, reports on investments, an overview of the management of the Trust, and information on distributions. (Boehm Affidavit, ¶ 9.)

RESPONSE: Disputed to the extent the statement implies that the financial information provided by the Trustees to the TSC constituted an adequate accounting with respect to the Trustee's \$600 million Offshore Investment losses and their respective actions, conduct and decisions with respect to such losses. The non-Trustee members of the TSC were not made aware of the extent of the Foundation's losses associated with the Trustees' Offshore Investment losses until the TSC annual meeting in May 2013, when the Trustees informed the non-Trustee members of the TSC that the Trustees' investments in Grand Cayman had resulted in a loss of \$249 million. In November 2013, the Trustees informed the TSC that the Trustees' Offshore Investments in Costa Rica were projected to result in losses of an additional \$205 million. The financial statements and information provided by the Trustees to the TSC prior to May 2013 did not reflect the losses associated with the Trustees' Offshore Investments in Grand Cayman or Costa Rica. The Trustees still have provided no information to the non-Trustee members of the TSC sufficient to answer basic questions regarding the Trustees' Offshore Investments and the \$600 million in losses to the Foundation, including who made the investment decisions; whether the Trustees sought advice from consultants or experts before the investments were made; why

the Trustees decided to invest \$600 million in offshore real estate development projects; what due diligence was conducted by the Trustees regarding the investments; how the Foundation's investments in the offshore projects escalated into a \$600 million commitment; why the Trustees decided to risk two-thirds of the entire corpus of the Foundation in speculative offshore real estate development projects; whether the Trustees ignored warning signs regarding their Offshore Investments; what red flags were raised about the Foundation's business partner in the Grand Cayman project as alleged in a February 3, 2014 on-line news article about the Foundation's Grand Cayman losses; whether safeguards are in place to avoid similar catastrophes in the future; whether the Foundation's losses were the result of wrongdoing, self-dealing, neglect or other breaches of the Trustees' fiduciary duties; whether the Offshore Investments were made by the Trustees in violation of their own investment policy guidelines; and whether the Trustees' behavior, including their approval of loans to entities on which they served on boards of directors, complied with the Foundation's ethics and conflict of interest policies. (Affidavit of Paul Schwan at ¶¶ 13, 16)

10. The TSC meets at least annually, sometimes more frequently, and additional information is provided orally at these meetings. (Boheim Affidavit, ¶ 10; Ewert Affidavit, ¶¶ 2-3).

RESPONSE: Undisputed that the TSC meets annually; disputed that the financial information provided to the TSC by the Trustees at the TSC meetings constitutes an adequate accounting. (Paul Schwan Affidavit at ¶13,16)

11. Aside from Petitioners, no other member of the TSC—including the two other non-trustee TSC members—is seeking an additional "accounting" from the Trustees. (Boheim Affidavit, ¶ 13; Ewert Affidavit, ¶ 5; Tweit Affidavit, ¶ 2.)

RESPONSE: Undisputed that other members of the TSC have not joined Petitioners' request in seeking an accounting from the Trustees. Disputed to the extent that the statement implies that a majority of non-conflicted members of the TSC opposes the Petitioners' request

for an accounting from the Trustees. (Foundation Conflicts of Interest and Disclosure Policy and Code of Business Conduct and Ethics, Petition at Exs. 2 and 3; Affidavit of Paul Schwan at ¶¶ 7-8.) Not counting the three Trustee members of the TSC whose actions, conduct and decisions are at issue, the remaining four TSC members are deadlocked as to whether to require the Trustees to provide further information regarding the Trustees' Offshore Investment losses. (Paul Schwan Affidavit at ¶ 9)

Dated: June 24, 2015

Respectfully submitted,



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**ATTORNEYS FOR PETITIONERS
MARK SCHWAN AND PAUL SCHWAN**

#9

STATE OF SOUTH DAKOTA
COUNTY OF MINNEHAHA

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

In the Matter of the MARVIN M.
SCHWAN CHARITABLE FOUNDATION

Tru. 14-21

MARK SCHWAN and PAUL SCHWAN,
as members of the Trustee Succession
Committee of the Marvin M. Schwan
Charitable Foundation,

Petitioners,

vs.

LAWRENCE BURGDORF, KEITH
BOHEIM, KENT RAABE, GARY STIMAC
and LYLE FANNING, as Trustees of the
Marvin M. Schwan Charitable Foundation,

Respondents.

**PETITIONERS' RESPONSE TO
ATTORNEY GENERAL'S,
BENEFICIARIES', AND TRUSTEES'
JOINT STATEMENT OF
UNDISPUTED MATERIAL FACTS**

Petitioners, Mark Schwan and Paul Schwan, as members of the Trustee Succession Committee of the Marvin M. Schwan Charitable Foundation ("Petitioners"), respectfully submit the following Responses to the Attorney General's, Beneficiaries', and Trustees' Statement of Undisputed Material Facts pursuant to S.D.C.L. § 15-6-56(c)(2).

1. Petitioners are two members of the Trust Succession Committee, which consists of seven total members: Mark Schwan, Paul Schwan, Paul Tweit, Dave Ewert, Kent Raabe, Keith Bonheim, and Lawrence Burgdorf. (Petition for Court Supervision and Enforcement of Charitable Trust and for Court Instructions ("Petition for Court Supervision") at ¶ 16.)

RESPONSE: Undisputed.

2. Trustees are the persons charged with administering the Marvin M. Schwan Charitable Foundation ("Foundation"). (Petition for Court Supervision, ¶ 6.)

RESPONSE: Undisputed. The responsibilities of the Foundation's Trustees and members of the Trustee Succession Committee ("TSC") are more fully set forth in the

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Foundation's Trust Instrument, which speaks for itself. (Verified Petition for Court Supervision and Enforcement of Charitable Trust and for Court Instructions (the "Petition"), Ex. 1.)

3. Beneficiaries are the designated beneficiaries of the Foundation and are the only entities entitled to receive distributions from the Foundation. (Petition for Court Supervision, Ex. 1.)

RESPONSE: Undisputed that the Beneficiaries named in the Trust Instrument are the only entities entitled to receive distribution from the Foundation. Disputed to the extent it implies that Petitioners, as members of the Foundation's TSC, are not persons "in any manner interested in" the Foundation under the terms of the Foundation's Trust Instrument and S.D.C.L. § 21-22-1(1). (Petition at ¶¶ 15-16 and Ex. 1, Article 6.)

4. After Petitioners brought this action, representatives of the Attorney General, the Beneficiaries, and the Trustees reached and executed a settlement agreement that would effectively resolve all potential issues raised by the Petition for Court Supervision. (See Petition for Dismissal, Ex. 1.)

RESPONSE: Disputed. The purported settlement agreement was negotiated without the knowledge or participation of the Petitioners, has not been approved by the Petitioners or the Court, and is contingent upon the Court's dismissal of the Petition with prejudice, a condition which would effectively ensure that the accounting requested by Petitioners never occurs. The settlement agreement contains no provisions that address the specific questions and issues as to which the Petition seeks instructions from the Court, i.e., whether the TSC or its individual members have a fiduciary duty to investigate the Trustees' \$600 million Offshore Investment losses; whether a majority vote of the TSC members is required to request that the Trustees provide an accounting with regard to their Offshore Investment losses; whether current and former Trustees who also serve on the TSC are conflicted from participating in the decision or vote to determine whether the Trustees must account to the TSC for their own actions and conduct with respect to their Offshore Investment losses; whether, in light of the fact that,

excluding the conflicted Trustees on the TSC, there is no majority opposing Petitioners' request for an accounting, Petitioners may request the Trustees to account regarding their Offshore Investment losses. (Petition for Dismissal, Ex. 1; Petition at ¶ 53 and Prayer for Relief)

5. The Beneficiaries have represented in open Court that they will waive all potential claims against the Trustee Succession Committee and its individual members arising out of the matters that are the subject of the Petition for Court Supervision when the Settlement Agreement becomes effective. (2/23/14 Hearing Transcript.)

RESPONSE: Undisputed that such representations were made. Disputed to the extent that the statement implies that members of the TSC have no obligation under the Trust Instrument to review the doings of the Trustees or to investigate the Trustees' \$600 million Offshore Investment losses. (Trust Instrument, Petition at Ex. 1, Article 6)

6. The Attorney General, the Beneficiaries, and the Trustees have stated they believe that continued litigation would be contrary to the best interests of the Beneficiaries and would needlessly waste additional Trust assets. (Petition for Dismissal) at ¶ 5.)

RESPONSE: Undisputed that the Attorney General, Beneficiaries and Trustees have so stated. Disputed to the extent that the statement implies that members of the TSC have no obligation under the Trust Instrument to review the doings of the Trustees or to investigate the Trustees' \$600 million Offshore Investment losses. (Trust Instrument, Petition at Ex. 1, Article 6)

Dated: June 24, 2015

Respectfully submitted,



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**ATTORNEYS FOR PETITIONERS
MARK SCHWAN AND PAUL SCHWAN**

#10

STATE OF SOUTH DAKOTA
COUNTY OF MINNEHAHA

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

In the Matter of the MARVIN M.
SCHWAN CHARITABLE FOUNDATION

Tru. 14-21

MARK SCHWAN and PAUL SCHWAN,
as members of the Trustee Succession
Committee of the Marvin M. Schwan
Charitable Foundation,

Petitioners,

**PETITIONERS' STATEMENT
OF MATERIAL FACTS AS TO
WHICH GENUINE ISSUES
EXIST FOR TRIAL**

LAWRENCE BURGENDORF, KEITH BOHEIM,
KENT RAABE, GARY STIMAC and
LYLE FANNING, as Trustees of the
Marvin M. Schwan Charitable Foundation,

Respondents.

Petitioners, Mark Schwan and Paul Schwan, as members of the Trustee Succession Committee of the Marvin M. Schwan Charitable Foundation (collectively, "Petitioners"), respectfully submit the following Statement of Material Facts as to which Petitioners contend a genuine issue exists for trial pursuant to S.D.C.L. § 15-6-56(c)(2).

1. Respondent Lawrence Burgdorf, Keith Boehm and Kent Raabe are Trustees of the Foundation, and as Trustees are responsible for investment decisions made on behalf of the Foundation. (Trust Instrument, Petition at Ex. 1, Article 6(B).)

2. The Foundations' Trust Instrument executed by the Foundation's settlor, Marvin Schwan, established a Trustee Succession Committee ("TSC") to review the administration of the Foundation by the Trustees. The Trust Instrument provides that the TSC has the exclusive power "to remove with or without cause a Trustee or a member of the Trustee Succession

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Committee by the written action . . . of a majority of the living and competent members of the Committee." The Trust Instrument further provides that the TSC has the exclusive power to request that the Trustees "account to the [TSC] upon the [TSC's] request with regard to the Trustees' doings" under the Trust Instrument. (Trust Instrument, Petition at Ex. 1, Article 6(A)).

3. Petitioners are current members of the TSC. As members of the TSC, they are persons with an interest in the Foundation under the terms of the Foundation's Trust Instrument and S.D.C.L. § 21-22-1(1). (*Id.*)

4. There are five members of the TSC in addition to the Petitioners. Three of those additional members -- Respondents Burgdorf, Bohelm and Raabe -- are also currently Trustees of the Foundation. The two other non-Trustee members of the TSC are Dave Ewert and Paul Tweit. (Petition at ¶ 16; Affidavit of Paul Schwan dated August 14, 2014 ("Schwan Aff.") at ¶ 6.)

5. Over a period of several years, the Trustees invested hundreds of millions of dollars of Foundation money, in the form of multi-million dollar loans and equity investments, in the development of three luxury resort hotels in the Bahamas, the Cayman Islands and Costa Rica (the "Offshore Investments"). The Offshore Investments were made by the Trustees through a network of foreign holding companies, subsidiaries, partnerships and other related entities, including over 100 "related organizations," with legal domiciles in the British Virgin Islands, the Bahamas, Costa Rica, the Cayman Islands and Panama, in which the Foundation maintains a majority ownership interest. (Petition at ¶¶ 23-24.) The Trustees continued to invest millions of dollars in the Offshore Investments, even after it became apparent that the investments were in serious financial trouble and losing money. (Schwan Aff. at Ex. 1 thereto.)

6. Among the Offshore Investments made by the Trustees are at least three loans, totaling \$19.8 million, to three Costa Rican entities on which Respondents Bohelm and Burgdorf

and Respondent Burgdorf's son, Eric Burgdorf, serve as members of the Boards of Director.
(Petition at ¶ 25.)

7. The Trustees' Offshore Investment decisions have resulted in approximately \$600 million in losses of Foundation assets. In 2006 and 2009, the Foundation wrote off approximately \$157 million in losses associated with the Trustees' investments in the Bahamas. In 2012, the Foundation wrote off nearly \$250 million associated with the Trustees' investments in the Cayman Islands. In November, 2013, the Trustees projected an additional \$205 million in losses associated with their investment in Costa Rica. (Schwan Aff. at ¶ 13.) Due to the losses resulting from the Trustees' offshore investment decisions, the Foundation's net asset value has fallen from approximately \$900 million in November 2007 to \$335-\$340 million as of November, 2013. (Schwan Aff. at ¶ 12.)

8. The Petitioners' efforts to require the Trustees to account to the TSC for their actions, conduct and decisions relating to their Offshore Investment losses have been actively opposed by the three Trustees – Respondent Burgdorf, Boehm and Raabe – who are also members of the TSC. (Schwan Aff. at ¶ 6) The Trustees have “unanimously taken the position” that they have already adequately accounted to the TSC. (Boehm Aff. at ¶ 13.)

9. Not counting the three Trustees who are also members of the TSC, the remaining members of the TSC are deadlocked over whether to request the Trustees to account to the TSC for their Offshore Investment losses. Aside from Petitioners, the remaining two non-Trustee members of the TSC – Dave Ewert and Paul Tweit – state that they are “satisfied” with the information they have been provided by the Trustees and have not supported the Petitioners' request to have the Trustees account to the TSC with regard to their investment losses. Contrary to the language in the Foundation's Trust Instrument charging the TSC with the responsibility to

review the doings of the Trustees with regard to their administration of the Foundation, TSC member Dave Ewert's stated reason for not requesting an accounting from the Trustees is that the TSC will not "dwell with the happenings of the past." (Schwan Aff. at ¶ 6; Petition at Ex. 6.)

10. The Foundation's Conflicts of Interest and Disclosure Policy, adopted and approved by the Trustees, requires all Trustees and TSC members to "act exclusively in the interest of the Foundation and not use their positions to further their own financial interest or to derive personal advantage." The Foundation's Code of Business Conduct and Ethics, also adopted and approved by the Trustees, provides that a conflict of interest exist "when a person's private interest interferes in any way (or even appears to interfere) with the interests of the Foundation as a whole. A conflict situation can arise when an employee, officer or trustee takes action or has interests that may make it difficult to perform his or her work objectively and effectively [.]" (Petition at ¶¶ 19-21 and at Ex. 2 and 3; Schwan Aff. at ¶¶ 7-8.) As Trustees, Respondents Burgdorf, Boehm and Raabe have a personal interest in preventing the TSC from requiring them to account for their own actions, conduct and decisions as Trustees with regard to the Foundation's Offshore Investment losses. (Schwan Aff. at ¶ 7.)

11. Respondents Burgdorf, Boehm and Raabe have used their positions as members of the TSC to prevent the TSC from requesting that they account for their actions, conduct and decisions as Trustees with regard to the Foundation's Offshore Investment losses. (Schwan Aff. at ¶¶ 6-8; Petition at ¶¶ 19-21, 30-39.)

12. The Foundations' Investment Policy, adopted and ratified by the Trustees, provides that any single real estate investment venture should not exceed 10% of the corpus of the Foundation, and that "the total maximum allocation of offshore real estate investment is generally not to exceed 30% of the corpus of the Foundation. (Petition at ¶ 22 and Ex. 4.)

13. Each of the Trustees' Offshore Investments in the Bahamas, Grand Cayman and Costa Rica, respectively, exceeded 10% of the value of the Foundation's corpus. (Schwan Aff. at ¶¶ 12-13 and Ex. 1-3 thereto.)

14. Collectively, the Trustees' Offshore Investments exceeded over 30% of the value of the Foundation's corpus. (Id.)

15. The non-Trustee members of the TSC were not made aware of the extent of the Foundation's losses associated with the Trustees' Offshore Investments until the TSC's annual meeting in May 2013. At that meeting, the TSC was informed that the Trustees' Offshore Investments in Grand Cayman had resulted in a loss of \$249 million. In November, 2013, the Trustees informed the TSC that the Trustees' Offshore Investments in Costa Rica were projected to result in losses of an additional \$205 million. (Schwan Aff. at ¶ 13.)

16. The financial statements and information provided by the Trustees to the TSC prior to May 2013 did not reflect the losses associated with the Trustees' Offshore Investments in Grand Cayman or Costa Rica. (Schwan Aff. at ¶¶ 12-13 and Ex. 1-3.)

17. The Trustees still have provided no information to the non-Trustee members of the TSC sufficient to answer basic questions regarding the Trustees' Offshore Investments and the \$600 million in losses to the Foundation, including who made the investment decisions; whether the Trustees sought advice from consultants or experts before the investments were made; why the Trustees decided to invest \$600 million in offshore real estate development projects; what due diligence was conducted by the Trustees regarding the investments; how the Foundation's investments in the offshore projects escalated into a \$600 million commitment; why the Trustees decided to risk two-thirds of the entire corpus of the Foundation in speculative offshore real estate development projects; whether the Trustees ignored warning signs regarding

their Offshore Investments; what red flags were raised about the Foundation's business partner in the Grand Cayman project as alleged in a February 3, 2014 on-line news article about the Foundation's Grand Cayman losses; whether safeguards are in place to avoid similar catastrophes in the future; whether the Foundation's losses were the result of wrongdoing, self-dealing, neglect or other breaches of the Trustees' fiduciary duties; whether the Offshore Investments were made by the Trustees in violation of their own investment policy guidelines; and whether the Trustees' behavior, including their approval of loans to entities on which they served on boards of directors, complied with the Foundation's ethics and conflict of interest policies. (Affidavit of Paul Schwan at ¶¶ 13, 16.)

18. In August 2014, the Trustees entered into a secret agreement with the Foundation's Beneficiaries and the South Dakota Attorney General to provide documents and information regarding the Trustees' Offshore Investment activities with the explicit requirement that the Beneficiaries and Attorney General not disclose or share any of the documents or information provided by the Trustees with the Petitioners (Affidavit of Allen I. Sacks, August 21, 2014 ("First Sacks Aff.") at ¶¶ 2-5 and Ex. 1 thereto.)

19. The Trustees, Beneficiaries and the Attorney General have refused to provide the Petitioners with a copy of their secret agreement and have denied the Petitioners access to any of the information and documents made available by the Trustees to the Beneficiaries and the Attorney General. (Second Affidavit of Allen Sacks dated Feb. 16, 2015 ("Second Sacks Aff.") at ¶ 2-3. Pursuant to the secret agreement between the Trustees, the Beneficiaries and the Attorney General, the Trustees have provided thousands of pages of documents to the Beneficiaries and the Attorney General regarding their Offshore Investment activities. (Second Sacks Aff. at ¶ 2; Feb. 23, 2015 Motion Hearing Transcript ("Hrg. Tr.") at 47, 71-73.)

20. None of the documents or information provided by the Trustees to the Beneficiaries or the Attorney General have been provided to the Petitioners or to the two other non-Trustee members of the TSC, Messrs. Ewert and Tweit. (Second Sacks Aff. at ¶ 2; Hrg. Tr. at 61-62.)

21. The Foundation is a charitable foundation organized as a tax-exempt supporting organization under § 501(c) 3 and 509(a) 3 of the Internal Revenue Code. (Petition at ¶ 1.)

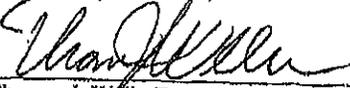
22. In February 2015, the Trustees, Beneficiaries and Attorney General entered into a purported "settlement agreement," again without the knowledge or participation of the Petitioners, pursuant to which the signing parties purportedly agreed to amend the Foundation's Trust Instrument to prohibit any Trustee from simultaneously serving on the TSC in the future. The terms of this settlement agreement have not been approved by the Petitioners or the Court, and are contingent upon the Court's dismissal of the Petition with prejudice. (Petition for Dismissal of June 2014 Petition for Termination of Court Supervision and Other Relief ("Petition for Dismissal") and Ex. 1 thereto.)

23. By the terms of the purported settlement agreement, Respondent Trustees Burgdorf, Boehm and Raabe would eventually resign as Trustees but would be allowed to remain on the TSC and participate in the selection of their replacements. The settlement agreement does not contain a date certain by which the prohibition against a Trustee concurrently serving as a member of the TSC would become effective. The settlement agreement contains no provision to allow the TSC to request an accounting from the Trustees and, because it is expressly contingent upon dismissal of the Petition with prejudice, it would effectively ensure that no accounting will ever be provided by the Trustees to the TSC. The settlement agreement further contains no provisions that address the questions as to which the Petition seeks

instructions from the Court. (Petition for Dismissal and Ex. 1 thereto; Petition at ¶ 53 and Prayer
for Relief.)

Dated: June 24, 2015

Respectfully submitted,



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**ATTORNEYS FOR PETITIONERS
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#11

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

In the Matter of the MARVIN M. SCHWAN
CHARITABLE FOUNDATION

MARK SCHWAN and PAUL SCHWAN, as
Members of the Trustee Succession Committee
of the Marvin M. Schwan Charitable
Foundation,

Petitioners,

vs.

LAWRENCE BURGDORF, KEITH BOHEIM,
KENT RAABE, GARY STIMAC, and LYLE
FAHNING, as Trustees of the Marvin M.
Schwan Charitable Foundation,

Respondents.

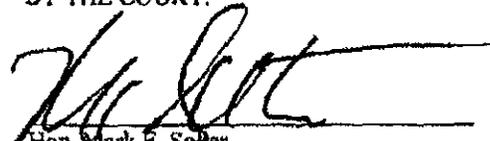
TR. 14-21

JUDGMENT OF DISMISSAL

Pursuant to the Court's Memorandum Opinion and Order dated July 10, 2015, which is
incorporated as if set forth fully herein, the above-named Trustees' Motion for Summary
Judgment is hereby granted and Mark and Paul Schwan's *Petition for Court Supervision and
Enforcement of Charitable Trust and for Court Instructions* is denied.

Dated this 31st day of July, 2015.

BY THE COURT:


Hon. Mark E. Soller
Circuit Court Judge

FILED
AUG 03 2015
Minnehaha County, S.D.
Clerk Circuit Court

ATTEST:
Angelia M. Gries, Clerk of Courts
Second Judicial Circuit

By: 



**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

No. 27524

MARK SCHWAN AND PAUL SCHWAN, as members of the Trustee
Succession Committee of The Marvin M. Schwan Charitable Foundation,

Petitioners/Appellants,

vs.

LAWRENCE BURGDORF, KEITH BOHEIM, KENT RAABE, GARY
STIMAC, and LYLE FAHNING, as Trustees of The Marvin M. Schwan
Charitable Foundation,

Respondents/Appellees.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

The Honorable Mark E. Salter, Presiding Judge

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Notice of Appeal filed August 7, 2015
Notice of Review filed August 26, 2015

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PRELIMINARY STATEMENT

This brief is being submitted by Respondents/Appellees Lawrence Burgdorf, Keith Boheim, Kent Raabe, Gary Stimac, and Lyle Fahning (collectively, the “Trustees”), who are the current trustees of the Marvin M. Schwan Charitable Foundation. The Beneficiaries, as defined below, and the South Dakota Attorney General have authorized the Trustees to represent to the Court that the Beneficiaries and the Attorney General join in the arguments put forth herein.

JURISDICTIONAL STATEMENT

Petitioners/Appellants Mark Schwan and Paul Schwan (the “Schwans”) appeal from an order and judgment dismissing their Petition, which sought court supervision over a charitable trust under SDCL 21-22-9. The Circuit Court granted a motion—originally filed as a motion to dismiss that the Circuit Court converted to a motion for summary judgment—filed by the Trustees and dismissed the Schwans’ Petition.

Respondents/Appellees, the Trustees, the South Dakota Attorney General, and WELS Kingdom Workers, Inc., Evangelical Lutheran Synod, Wisconsin Lutheran College, Bethany Lutheran College, The Lutheran Church—Missouri Synod, International Lutheran Laymen’s League, and Wisconsin Evangelical Lutheran Synod (collectively, the “Beneficiaries”),

appeal from the Circuit Court’s Memorandum Opinion and Order in which the Circuit Court rejected an argument put forth by the Beneficiaries, Attorney General, and Trustees (collectively, the “Respondents”) in their Petition for Dismissal of June 2014 Petition, Termination of Court Supervision, and Other Relief (the “Joint Petition”).

The Circuit Court’s Memorandum Opinion and Order granting summary judgment was signed on July 10, 2015, and filed on July 13, 2015. (App. 1.)¹ The Circuit Court’s Judgment of Dismissal was signed on July 31, 2015, and filed on August 3, 2015. Notices of Entry of the Circuit Court’s Memorandum Opinion and Order and Judgment of Dismissal were served on July 15, 2015, and August 6, 2015, respectively. The Schwans filed their Notice of Appeal on August 7, 2015, and Respondents filed their Notice of Review on August 26, 2015.

STATEMENT OF THE ISSUES

I. Whether the Circuit Court properly determined that the Schwans are neither “beneficiaries” nor “fiduciaries” under SDCL 21-22-1.

The Circuit Court held that the Schwans are not beneficiaries under SDCL 21-22-1, because they do not have a financial interest in the trust. The

¹ Citations to the Schwans’ Appendix are cited as “App.” with reference to the appropriate page of the Appendix. Citations to Respondents’ Appendix are cited as “R-App.” with reference to the appropriate page in the record. Citations to the Certified Record of the Clerk of Court are cited as “CR.” with reference to the appropriate page in the record.

Circuit Court also held that the Schwans are not fiduciaries, because they are not a trust committee.

SDCL 21-22-1(1)

SDCL 21-22-1(3)

SDCL 21-22-9

SDCL 55-3-31

In re Reese Trust, 2009 S.D. 111, 776 N.W.2d 832

II. Whether good cause exists to decline court supervision under SDCL 21-22-9.

The Circuit Court rejected the argument in the Joint Petition that good cause exists to decline court supervision under SDCL 21-22-9.

SDCL 21-22-9

SDCL 55-4-31

STATEMENT OF THE CASE

The Schwans filed a Petition seeking court supervision of the Marvin M. Schwan Charitable Foundation (the “Foundation”), which is a charitable trust governed by the laws of South Dakota. Court supervision can be requested only by a trustor, beneficiary, or fiduciary of a trust. SDCL 21-22-9. The Schwans’ are two members of a seven member committee charged with electing new trustees. Merely being a member of a trust committee does not make someone a trustor, beneficiary, or fiduciary, as those terms are used in SDCL 21-22-9. The Trustees objected to the Petition and filed a

motion to dismiss, arguing, among other things, that the Schwans lacked standing to seek court supervision under SDCL 21-22-9.

In addition to the Trustees' motion to dismiss, Respondents filed the Joint Petition, which opposed the Schwans' Petition and asked the Circuit Court to dismiss it.

The Circuit Court, Honorable Mark E. Salter presiding, gave the parties notice that it was treating the Trustees' motion to dismiss and the Respondents' Joint Petition as motions for summary judgment. Thereafter, the Circuit Court issued a Memorandum Opinion and Order holding the Joint Petition did not moot the Schwans' Petition. The Circuit Court also held, however, that the Schwans were not beneficiaries or fiduciaries and thus had no standing to seek court supervision. Because the Schwans' lacked standing to seek court supervision, their Petition was dismissed by the Circuit Court's July 31, 2015, Judgment of Dismissal.

STATEMENT OF FACTS

The facts *relevant to this appeal* are simple and few. The Schwans, however, injected a plethora of irrelevant facts into their brief, which painted an incomplete picture.

Marvin M. Schwan established the Foundation in 1992 with the bulk of the fortune he made as the founder of Schwan Food Company. (App. 43-

59.) The Foundation is a charitable trust. (*Id.*) Its mission is to support the seven named beneficiaries in the Trust Instrument. (App. 43.) The Schwans receive no support from the Foundation and have no financial stake in the Foundation; they have no property rights in the trust nor do they have any financial claims against the trust. (App. 43-59; 142.)

The Foundation acts through its trustees. (App. 43-59.) Trustees of the Foundation are selected by the Trustee Selection Committee (the “TSC”). (App. 50.) In addition to selecting trustees, the TSC also has the power to remove trustees, with or without cause, and can request the trustees “account to” the TSC. (App. 51, 53 (“The Trustees shall account to the committee upon the Committee’s request with regard to the Trustees’ doings hereunder.”).) The TSC has no other authority under the Trust Instrument. (App. 43-59.) The TSC acts by a majority vote of its members. (App. 50-52.) Nowhere in the Trust Instrument are individual members of the TSC authorized to act on behalf of the TSC. (App. 43-59.)

Marvin Schwan named himself, his brother Alfred Schwan, and his friend Lawrence Burgdorf as the original trustees of the Foundation. (App. 43.) The original members of the TSC were Marvin Schwan, Alfred Schwan, Lawrence Burgdorf, and Owen Roberts. (App. 51.) Thus, Marvin Schwan named all of the original trustees to also serve on the TSC; Owen

Roberts was the only original TSC member who was not also a trustee.

(App. 43, 51.) Marvin Schwan chose not to name either of the Schwans as trustees or members of the TSC. (*Id.*)

Burgdorf, Boheim, Raabe, Stimac, and Fahning (i.e., the Trustees) are the current trustees of the Foundation. (App. 3.) The newer Trustees are very experienced business people and have implemented new investment policies. (R-App. 83.) The current members of the TSC are Burgdorf, Boheim, Raabe, David Ewert, Paul Tweit, and the Schwans. (App. 3.) Accordingly, overlap between trustees and TSC members presently exists, just as it did when Marvin Schwan originally set up the Foundation. (*Id.*) Such is expressly permitted by the Trust Instrument: “The [TSC] may designate one or more of its own members as Trustee.” (App. 51.)

The Foundation became involved with certain offshore real estate investments in the 1990s. (CR. 176.) At the time these investments were made, Alfred Schwan and Lawrence Burgdorf were the only trustees of the Foundation. (*Id.*) Unfortunately, the Foundation experienced losses in these offshore real estate investments. (CR. 175.) Those investments, however, represent only a portion of the Foundation’s investment portfolio. (*Id.*) Domestic real estate investments, for example, have generated hundreds of millions of dollars in gains. (CR. 175-76.) As context, the Foundation was

initially funded with assets worth approximately \$829 million and has paid out approximately \$800 million in distributions to the Beneficiaries. (CR 175.) As of November 19, 2013, the Foundation's assets were valued between \$335–\$340 million. (CR. 242.) Nevertheless, the losses with respect to the offshore real estate investments did occur, and the current trustees have been working diligently with professional advisors to wind down these investments and minimize losses. (CR. 176.)

Once the losses became evident to the Trustees, the TSC was informed early and often that the Foundation's offshore real estate investments were not performing well and were going to cause losses to the Foundation. (CR. 176-202.) The TSC was provided a substantial amount of information regarding these investments, including audited financial statements, reports on investments, an overview of the management of the Foundation, information on distributions, and information on the Beneficiaries. (*Id.*) TSC members were also encouraged to ask questions of the Trustees at regular meetings. (CR. 203.) These meetings, however, were not always as productive as they otherwise could have been, because members of the Schwan family, including the Schwans, were disruptive. (CR. 177-202.) For example, in or around 2010, the Schwans' brother and former TSC member, David Schwan, accused two of the original trustees—

his uncle Alfred Schwan and Lawrence Burgdorf—of “stealing the inheritance of the grandchildren.” (*Id.*) In a similar fashion, Paul Schwan once misrepresented to the Trustees that he had been elected chairman of the TSC and demanded that he be allowed to participate in the Trustees’ meeting. (CR. 177-78.) Despite disruptions like these, the TSC—including Ewert and Tweit—is satisfied with the accounting the Trustees have provided to date with respect to the offshore real estate investments. (CR. 203-21.)

The Trustees themselves likewise believe they have adequately accounted to the TSC as called for in the Trust Instrument. (CR. 178.) This is significant because the Trust Instrument gives the Trustees the authority to enact any amendment that “clarifies the meaning or reference of any expression or provision of this instrument so as to avoid the necessity of instructions by the court.” (App. 58.) The Trust Instrument also provides: “All powers and discretion given to the Trustees shall be exercisable in their sole discretion, and all their decisions and determinations (including determinations of the meaning and reference of any ambiguous expression used in this instrument) . . . shall be conclusive upon all persons[.]” (App. 57.) In *In re Schwan 1996 Great Grandchildren’s Trust*, 2006 S.D. 9, 709 N.W.2d 849, this Court held that when such language is found in a trust

instrument, the trustees' interpretation of the trust instrument is controlling absent exceptional circumstances.

The Schwans, however, are not satisfied with how the Trustees have accounted to the TSC and believe they, as individual members of the TSC, are entitled to more information. (App. 21-38.) The Schwans shared their dissatisfaction with other members of the TSC, but the other five members of the TSC—including Ewert and Tweit—are satisfied with how the Trustees have accounted to the TSC with respect to the offshore investments. (CR. 203-21; App. 32-33.) In fact, Ewert and Tweit are opposed to any additional accounting and opposed to court supervision. (CR. 203-12.)

Without the support of any other TSC member, the Schwans filed their Petition in June 2014 seeking court supervision of the Foundation. (App. 21-38.) Remarkably, the Schwans did not contact any of the Beneficiaries to determine whether they wanted the Foundation subject to court supervision and the Schwans are not authorized to represent the Beneficiaries' interest. (CR. 213-21.) This is not the first time, however, that the Schwans have sued those persons their father chose to carry out his

wishes.² *See In re Schwan 1996 Great Grandchildren's Trust*, 2006 S.D. 9, 709 N.W.2d 849.

After the Schwans filed their Petition, the Trustees agreed to provide the Beneficiaries and the Attorney General with information regarding the offshore investments so those parties could decide whether to support the Schwans' Petition. (CR. 222-24.) That information was provided, and the Respondents had multiple meetings and communications, including some that included the Schwans. (R-App. 18, 86; CR. 409.) After reviewing the information, the Beneficiaries and Attorney General were comfortable with what they reviewed and the Attorney General generated and proposed a settlement agreement to all parties, including the Schwans, to end the litigation. (R-App. 86.) Under the terms of the settlement agreement, the Trustees and Beneficiaries agreed to amend the Trust Instrument to eliminate any overlap between trustees and the TSC. (R-App. 18-20.) The Beneficiaries and Attorney General also released the Trustees "from any and all claims and causes of action of whatever nature up through and including" the effective date of the settlement agreement. (*Id.*) Even though it

² Indeed, in resolving one prior lawsuit, the Schwans waived and released any claim that a trustee cannot also serve as a member of the TSC. (CR. 478-87.)

eliminates the overlap between trustee and TSC membership, the Schwans rejected the settlement agreement. (R-App. 1-42; CR. 409-33.)

Despite the Schwans' rejection of the settlement agreement, the Respondents decided to move forward and enter into the settlement agreement. (*Id.*) As a result, the Respondents believed nothing was to be gained through court supervision and filed the Joint Petition, which asked the Circuit Court to dismiss the Schwans' Petition. (R-App. 1-17.) Thus, the Trustees, the Beneficiaries, the Attorney General, and the TSC all opposed the Petition and opposed court supervision. (*Id.*; CR. 203-21, 515-28.)

ARGUMENT

Respondents agree with the Schwans that all issues on appeal are reviewed *de novo*. *See AMCO Ins. Co. v. Employers Mut. Cas. Co.*, 2014 S.D. 20, ¶ 6 n.2, 845 N.W.2d 918, 920 (de novo review of whether moving party was entitled to summary judgment); *Pourier v. S.D. Dep't of Revenue*, 2010 S.D. 10, ¶ 8, 778 N.W.2d 602, 604 (“Statutory interpretation and application are questions of law, and are reviewed by this Court under the *de novo* standard of review.”); *In re Schwan 1996 Great, Great Grandchildren's Trust*, 2006 S.D. 9, ¶ 11, 709 N.W.2d 849, 852 (“The interpretation of the terms of a trust is a question of law and is reviewed *de novo*.”).

I. Schwans Are Not Proper Parties to Seek Court Supervision of the Foundation

The Schwans' Petition requests court supervision over the Foundation. The Schwans, however, do not have standing to seek court supervision under South Dakota law. Therefore, the Schwans' Petition was properly dismissed by the Circuit Court.

SDCL 21-22-9 limits those persons who can seek court supervision of a trust to beneficiaries, fiduciaries, and trustors. The Schwans cannot and do not argue they are trustors. Thus, Respondents focus exclusively on whether the Schwans are fiduciaries or beneficiaries. SDCL 21-22-1 defines the terms "beneficiary" and "fiduciary." The Schwans are not beneficiaries or fiduciaries, as those terms are defined in SDCL 21-22-1.

A. Schwans Are Not Beneficiaries under SDCL 21-22-1

The Schwans are not beneficiaries under SDCL 21-22-1. The term "beneficiary" is defined as:

any person in any manner interested in the trust, including a creditor or claimant with any rights or claimed rights against the trust estate if the creditor or claimant demonstrates a previously asserted specific claim against the trust estate.

SDCL 21-22-1(1). To qualify as a beneficiary under SDCL 21-22-1(1), a person must have a financial interest in the trust, whether it is a property right in the trust or a claim against the trust. Because the Schwans have no

such financial interest in the Foundation, they are not beneficiaries under SDCL 21-22-1(1).

The natural starting point in identifying the beneficiaries of a trust is the trust instrument. *See Luke v. Stevenson*, 2005 S.D. 51, ¶¶ 7-9, 696 N.W.2d 553, 557 (examining trust instrument to determine beneficiaries). Here, Marvin Schwan specifically identified seven charitable beneficiaries in the Trust Instrument. (App. 43.) Though the Schwans may not agree with their father’s decision to leave the bulk of his fortune to charity, neither of the Schwans was named as a beneficiary in the Trust Instrument and neither has a financial interest in the Foundation.

When read in its entirety, SDCL 21-22-1(1) requires a person to have a financial interest in a trust to qualify as a beneficiary. *See Paul Nelson Farm v. S.D. Dep’t of Revenue*, 2014 S.D. 31, ¶ 10, 847 N.W.2d 550, 554 (“When engaging in statutory interpretation, we give words their plain meaning and effect, and read statutes as a whole[.]”). Again, “beneficiary” is defined as:

any person in any manner interested in the trust, *including* a creditor or claimant with any rights or claimed rights against the trust estate if the creditor or claimant demonstrates a previously asserted specific claim against the trust estate.

SDCL 21-22-1(1) (emphasis added). The Legislature provided an example of a “person interested in the trust” when it added the phrase: “including a

creditor or claimant with any rights or claimed rights against the trust estate.” A creditor with claims against a trust has a financial interest in said trust. Thus, the Legislature’s use of “a creditor with claims against a trust” as an example of a beneficiary shows that the Legislature intended the definition of beneficiary to include only those persons with a financial interest in the trust. *See Opperman v. Heritage Mut. Ins. Co.*, 1997 S.D. 85, ¶ 7, 566 N.W.2d 487, 490 (noting that under the canon of *noscitur a sociis* “terms ought to be measured with their companions” and that “this maxim of interpretation is wisely applied where a word or phrase is capable of many meanings in order to avoid the giving of unintended breadth.”).

Limiting the term “beneficiary” to include only those persons who have a financial interest in the trust is necessary given the Legislature’s use of the word “any” in SDCL 21-22-1(1): “any person in any manner.” Without limiting beneficiaries to those persons with a financial interest in the trust, the term beneficiary would conceivably cover any person who has any relationship or any self-proclaimed interest in the trust. *See Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (“The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.”).

Consequently, under the Schwans' view, a large number of persons would be able to request court supervision for any given trust. *See* SDCL 21-22-2 (“This chapter applies to all trusts[.]”). It is unlikely the Legislature intended to provide a large number of persons the ability to request court supervision given its costs. Instead, the Legislature appropriately limited those individuals who could request court supervision to those with a financial interest in the trust, as well as the trustor and fiduciaries. *See* SDCL 21-22-9.

Multiple other trust statutes confirm the Legislature intended to limit the definition of “beneficiary” to those with a financial interest in a trust. *Paul Nelson Farm*, 2014 S.D. 31, ¶ 10, 847 N.W.2d at 554 (“When engaging in statutory interpretation, we . . . read statutes . . . as well as enactments relating to the same subject.”). Perhaps the best example is found in SDCL 55-1-12, which was recently amended in 2015 to clarify the term “beneficiary.” SDCL 55-1-12 now provides in part: “As used in this title . . . the term, beneficiary, means a person that has a present or future *beneficial interest* in a trust, vested or contingent. A person is not a beneficiary solely by reason of holding a power of appointment.” (emphasis added). A “beneficial interest” means a distributional interest or a remainder interest (i.e., a financial interest) and excludes a power of appointment. SDCL 55-1-24. Therefore, the Legislature’s most recent declaration regarding the

definition of “beneficiary” shows that a person must have a financial interest in a trust to be a beneficiary.³ Other statutes do the same. *See, e.g.*, SDCL 55-13A-102(2) (“‘Beneficiary’ includes . . . in the case of a trust, an income beneficiary and a remainder beneficiary.”); SDCL 29A-1-201 (“‘Beneficiary,’ as it relates to a trust beneficiary, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer; as it relates to a charitable trust, includes any person entitled to enforce the trust[.]”). Similarly, the term “beneficiary” is defined in Black’s Law Dictionary as “someone who is designated to receive the advantages from an action or change; esp., one designated to benefit from an appointment, disposition, or assignment . . . , or to receive something as a result of a legal arrangement or instrument.” (10th ed. 2014).

³ Respondents anticipate the Schwans will argue the Legislature’s definition of “beneficiary” in SDCL 55-1-12 is irrelevant because of the introductory language found therein: “as used in this title.” But the introductory language in SDCL 55-1-12 does not state: “as used in this title *only*.” Therefore, the Legislature left open the possibility that the definition of “beneficiary” in SDCL 55-1-12 could be applied beyond Title 55. Moreover, this Court has stated: “When engaging in statutory interpretation, we . . . read statutes as a whole, *as well as enactments relating to the same subject.*” *Paul Nelson Farm*, 2014 S.D. 31, ¶ 10, 847 N.W.2d 550, 554 (emphasis added). SDCL 55-1-12 is an enactment relating to the same subject as SDCL 21-22-1, as they both define the term “beneficiary” as that term is used in trust law. Thus, how the Legislature defined “beneficiary” in SDCL 55-1-12 provides guidance when interpreting how that term is defined in SDCL 21-22-1(1).

The Legislature has also used the phrases “interest in a trust” and “interested” to signify a financial interest. SDCL 55-3-31 defines “interest in a trust.” That statute provides: “the term, an interest in an estate or trust, includes both interests in income and interests in principal.” Interests in income and interests in principal are financial interests one has in a trust. SDCL 29A-1-201(23) defines “interested person” in a similar fashion. That statute provides that an “interested person” is someone “having a property right in or claim against a trust estate[.]” In other words, in the context of trust law, the Legislature has defined the phrases “interest in a trust” and “interested person” to mean a *financial* interest in a trust. It logically follows that the Legislature’s use of the phrase “interested in the trust” in SDCL 21-22-1(1) means a financial interest in the trust. Black’s Law Dictionary also defines an “interested person” as a “person having a property right in or claim against a thing, such as a trust or decedent’s estate.” (10th ed. 2014). Given that every other statute in the Code uses “beneficiary” to mean one with a financial interest in a trust and “interest in a trust” to mean a financial interest, it is clear the Legislature did not suddenly intend for those words to take on substantially different meanings when used in SDCL 21-22-1(1).

This Court’s precedent also supports the notion that the term “beneficiary” and the phrase “interested in the trust” relate to a financial interest. In *In re Reese Trust*, 2009 S.D. 111, ¶¶ 12-13, 776 N.W.2d 832, 835-36, the Court was charged with determining whether a foundation was a “beneficiary,” as that term is defined in SDCL 21-22-1(1), of a charitable trust. The foundation had requested distributions from the trust and in fact was awarded distributions by the circuit court. *Id.* Because the foundation received distributions from the trust, this Court determined the foundation had an interest in the trust and was therefore a beneficiary. *Id.*; *see also Montgomery v. Kelley*, 174 N.W. 869, 869 (S.D. 1919) (using the phrase “interested in the trust” to refer to a financial interest). Thus, this Court’s precedent aligns with the notion that a person must have a financial interest in a trust to be a beneficiary under SDCL 21-22-1(1).

In sum, a beneficiary under SDCL 21-22-1(1) is a person who has a financial interest in the trust, whether it is a property right in the trust or a claim against the trust. The Circuit Court agreed. The Schwans, however, try to expand the definition of beneficiary to include anyone with any type of interest in a trust, despite conceding that the Circuit Court’s interpretation was consistent with the “traditional definition” of beneficiary. (*See Schwans’ Brief 24.*)

By expanding the term “beneficiary” to include persons without a financial interest in the trust, the Schwans are expanding the term far beyond what the Legislature intended. The Schwans’ expansive interpretation of the term “beneficiary” engulfs the terms “fiduciary” and “trustor,” making such terms superfluous in SDCL 21-22-9. To be sure, SDCL 21-22-9 allows trustors, beneficiaries, and fiduciaries to seek court supervision. Fiduciaries, as defined in SDCL 21-22-1(3), are trustees, custodians, trust advisors, trust protectors, and trust committees. To the extent these roles exist for a given trust, all are “interested in the trust” in a non-financial manner. And all would be “beneficiaries” under the Schwans’ interpretation of the term. If that were the case, it was unnecessary for the Legislature to include “fiduciary” in SDCL 21-22-9 when it identified persons who can request court supervision, because “fiduciaries” would already be included by the term “beneficiary.” The same can be said with respect to the term “trustor.” Thus, adopting the Schwans’ interpretation of the term “beneficiary” would make the terms “fiduciary” and “trustor” entirely superfluous in SDCL 21-22-9. This Court has explicitly stated: “We assume the Legislature did not intend to include duplicative, surplus language in its enactments.” *VanGorp v. Sieff*, 2001 S.D. 45, ¶ 10, 624 N.W.2d 712, 715. When the Legislature included beneficiaries, fiduciaries, and trustors in SDCL 21-22-9, it intended

that those terms take on separate and distinct meanings from one another. Schwans' interpretation of the term "beneficiary" flatly contradicts this rule of construction, and they have never even attempted to explain this deficiency in their argument.

It is unclear how exactly the Schwans are defining the term "beneficiary." The Schwans do not provide any limitations in their definition that would allow for a definitive determination as to whether someone is a beneficiary. Apparently, the Schwans would have the circuit courts decide on a case-by-case basis whether the "interest" urged by the party seeking court supervision rises above some subjective, invisible line. Being able to definitively determine all beneficiaries of a given trust is particularly important. For example, SDCL 21-22-18 requires notice of all hearings to be served upon all beneficiaries. Given the statutory notice requirements, the necessity of the bright-line definition endorsed by the Circuit Court is obvious. Under the Schwans' interpretation of the term "beneficiary," it would be very difficult, if not impossible, to identify all of the beneficiaries of a trust. And even assuming one could satisfactorily identify and locate all "beneficiaries," serving notice on all such persons would be time consuming and costly. Such a system would simply be unfeasible and borders on the absurd. *C.f. Dakota Plains AG Center, LLC v. Smithy*, 2009 S.D. 78, ¶ 47,

772 N.W.2d 170, 186 (“[I]n construing statutes together it is presumed that the legislature did not intend an absurd or unreasonable result.”). Therefore, the Schwans’ vague interpretation is unworkable, particularly when considering the practical aspects of trust law.

The caselaw cited by the Schwans does little to help their cause. The Schwans cite only two cases pertinent to the issue presently before the Court: *Lokey v. Texas Methodist Foundation*, 479 S.W.2d 260 (Tex. 1972), and *In re Matter of Hill*, 509 N.W.2d 168 (Minn. Ct. App. 1993). Neither case advances the Schwans’ argument.

In *Lokey v. Texas Methodist Foundation*, 479 S.W.2d 260, the Texas Supreme Court interpreted Article 7425b–24 of the Texas Trust Act (since repealed)—which provided statutory standing to certain individuals to request removal of a trustee—to determine whether Clarence Lokey had standing to seek removal of a trustee. Article 7425b–24 read: “actions hereunder may be brought by a trustee, beneficiary, or any person affected by or having an active interest in the administration of the trust estate.” *Id.* at 265. That statute is different than SDCL 21-22-9 in that it authorizes trustees, beneficiaries, and *persons having an active interest in the*

administration of the trust to seek removal of a trustee.⁴ SDCL 21-22-9, on the other hand, authorizes trustors, beneficiaries, and fiduciaries to seek court supervision. Because of this difference in language, the group of persons who could seek removal of a trustee under Article 7425b-24 is different than the group of persons recognized in SDCL 21-22-9. And in *Lokey*, the Texas Supreme Court determined that Clarence Lokey, the settlor of the trust who also decided how trust assets were distributed, had an “active interest in the administration of the trust.” 479 S.W.2d at 265. Nowhere in *Lokey* did the Texas Supreme Court find that Lokey was a *beneficiary* of the trust, which is the issue here. Because SDCL 21-22-9 does not include “persons having an active interest in the administration of the trust” with those persons capable of seeking court supervision, *Lokey* is not on point here.

Lokey is also factually distinguishable. There, the person whose standing was being considered—Clarence Lokey—was the settlor of the trust, had a financial interest in the trust resulting from his deposit of \$40,000 in the trust, and acted in a quasi-trustee role by deciding how trust

⁴ Moreover, the language of Article 7425b-25 acknowledges an inherent difference between a “beneficiary” and a “person who has an active interest in the administration of the trust” by separately including each of those terms in the list of persons authorized to seek removal of a trustee.

funds were distributed. *Lokey*, 479 S.W.2d at 261. Indeed, Clarence Lokey would have been able to seek court supervision under South Dakota law, because he was the settlor. *See* SDCL 21-22-9. The Schwans, however, are not the settlors of the Foundation, do not have a financial interest in the Foundation, and do not determine how trust funds are distributed. In sum, *Lokey* does not support the Schwans' argument.

In re Matter of Hill is equally unhelpful to Schwans' position. There, a Minnesota Court of Appeals found that the petitioner, a former trustee and descendant of the settlor, had standing to challenge a proposed amendment to a charitable trust under Minn. Stat. Ch. 501B.16. *In re Matter of Hill*, 509 N.W.2d at 170-72. The Minnesota statute allows a trustee or "a person interested in the trust" to petition a district court to review trust activities. Minn. Stat. § 501B.16. The court found the petitioner had standing because there was no party protecting the beneficiaries of the charitable trust, as the attorney general failed to notice an appearance and the beneficiaries were unidentifiable. *In re Matter of Hill*, 509 N.W.2d at 172. The court specifically stated: "When the attorney general does not appear to represent the interest of trust beneficiaries, other courts have granted standing to members of the public in order to protect the public interest." *Id.* In other

words, the court granted petitioner standing only because there was no party otherwise representing the beneficiaries' interests.

In re Matter of Hill has no application here. First, the Beneficiaries of the Foundation are not an unidentifiable public interest. The Beneficiaries are named in the Trust Instrument and are specific, identifiable organizations capable of representing themselves, including through seeking court supervision under SDCL 21-22-9 if desired. And in fact, the Beneficiaries are representing themselves here, through experienced counsel, by unanimously opposing the Schwans' Petition and court supervision. Second, the Attorney General made an appearance here and is also opposed to court supervision. Third, *In re Matter of Hill* is either no longer good law or is limited to the very specific facts under which the court made its ruling. Since *In re Matter of Hill* was decided, several Minnesota Courts of Appeal have specifically held that a "person interested in the trust" must have a financial interest in the trust. *See In re Horton*, 668 N.W.2d 208, 213 (Minn. Ct. App. 2003) ("We conclude that in the context of chapter 501B, an "interested person" is more accurately defined as a person or entity with a specific financial stake in or a specific claim against the trust."); *In re RIJ Revocable Trust Agmt. Dated March 16, 2006*, 27-Tr-Cv-12-186, 2014 WL 684698, at *9 (Minn. Ct. App. Feb. 24, 2014) ("Because the trust unambiguously

provides Elfi Janssen with the right to receive payment from the trust after Robert Janssen's death, she is an “interested person[.]” (unpublished); *In re Colene P. McDonough Living Trust*, 19HA-Cv-08-2669, 2009 WL 2447481, at *1 (Minn. Ct. App. Aug. 11, 2009) (“On the most fundamental level, an interested party must have a property right in or claim against the estate.”) (unpublished); *In re Estate of Mealey*, 695 N.W.2d 143 (Minn. Ct. App. 2005) (requiring a financial stake for one to be “interested”); *In re Marital Trust under Last Will and Testament of Wilfred Wolfson*, C7-00-131, 2000 WL 978723, at *2 (Minn. Ct. App. July 18, 2000) (“In this context, “interested” means a person with a specific financial stake in or claim against the trust.”) (unpublished). Thus, *In re Matter of Hill* is not helpful to the Schwans’ position.

The Schwans have not identified any authority from any jurisdiction where a court has found that a person without a financial interest in a trust is a beneficiary of said trust. Moreover, the Schwans’ interpretation of the term “beneficiary” is unworkable and renders other terms in SDCL 21-22-9 superfluous. Therefore, the Court should reject the Schwans’ interpretation and affirm the Circuit Court’s decision, which held that the Schwans are not beneficiaries under SDCL 21-22-1(1).

B. Schwans Are Not Fiduciaries under SDCL 21-22-1

As a fallback argument, the Schwans try to squeeze into the definition of “fiduciary.” (R-App. 74.) But the Schwans are not fiduciaries under SDCL 21-22-1, either.

The term “fiduciary is defined as “a trustee, custodian, trust advisor, trust protector, or trust committee, as named in the governing instrument or order of court, regardless of whether such person is acting in a fiduciary or nonfiduciary capacity.” SDCL 21-22-1(3). The Schwans do not contend they are trustees, custodians, trust advisors, or trust protectors. The dispute rests, therefore, on whether the Schwans are a “trust committee.”

The Schwans are not a trust committee. They are merely two members of a seven-member trust committee, the TSC. Under the Trust Instrument, individual committee members take no action aside from voting. (App. 50-53.) The TSC is the entity that takes substantive action, not individual committee members. (*Id.*) Because the Schwans are acting only as individual trust committee members and not on behalf of the TSC, they are not a trust committee. (*See* Judge Salter’s Opinion at App. 14 (“It seems self-evident that the Legislature could easily have drafted subdivision (3) to allow individual trust committee members to be considered fiduciaries, but it did not.”).)

Furthermore, the actual trust committee involved in this litigation—the TSC—is opposed to the Schwans’ Petition and opposed to court supervision. The Trust Instrument and common rules of governance require an affirmative vote of the majority of TSC members for the TSC to take action. (*Id.*) An overwhelming majority of the TSC members—five of seven—are opposed to the Schwans’ Petition and opposed to court supervision. (App. 129.) In other words, the Schwans did not bring the Petition on behalf of the TSC, and in fact, the TSC is actively opposed to the Petition. Thus, the only “trust committee” capable of seeking court supervision is actually against court supervision. It would be quite strange if a minority of the TSC could force the Foundation into court supervision when the Trust Instrument empowers the TSC to act only through majority vote and the majority opposes court supervision.

The Schwans recognize that a straightforward approach to this issue defeats their position; so they inject irrelevant conspiracies proclaiming conflicts and irrelevant caselaw into their analysis to obfuscate the issue.⁵

Essentially, the Schwans argue Boheim, Burgdorf, and Raabe should be

⁵ The Schwans’ reference to the Tiede Decision is pointless. (*See* Schwans’ Brief 27.) That case involved a different trust with different trustees. Also, that case has no preclusive effect here, because that case settled while on appeal. *See, e.g.*, 18A Wright & Miller, Federal Practice & Procedure § 4443 (litigation resolved by settlement prior to appeal does not act as res judicata in subsequent litigation unless consent judgment is entered as part of settlement).

unable to serve simultaneously as Trustees and as members of the TSC, and thus their votes should not count. This argument, however, ignores how Marvin Schwan set up the Foundation and ignores this Court's precedent.⁶

Marvin set up the Foundation so that the TSC's only duty is to oversee the trustees; the TSC elects trustees, removes trustees, and can request trustees account to it. (App. 50-53.) Because the TSC's *only* duty is to oversee the trustees, accepting the Schwans' conflict argument—that TSC members who are also trustees should not be able to vote on matters related to trustee oversight—would effectively result in trustees being unable to serve on the TSC, because *every* TSC vote relates to the oversight of the trustees. Such an interpretation directly conflicts with how Marvin set up the Foundation. The Trust Instrument states: “The [TSC] may designate one or more of its own members as Trustee.” (App. 51.) Thus, Marvin explicitly approved of persons serving as both a trustee and a member of the TSC. Moreover, Marvin named himself, Alfred Schwan, and Burgdorf as the sole trustees and at the same time named himself, Alfred, Burgdorf, and Owen Roberts as the members of the TSC. (App. 43, 51.) Accepting the Schwans' conflict argument would mean that Marvin intended Owen Roberts to have

⁶ This argument also ignores the fact that the Schwans previously waived and released any claim that a trustee cannot also serve as a member of the TSC, barring them from making such a claim now. (CR. 478-87.)

the unilateral power to remove Marvin, Alfred, and Burgdorf as trustees. Surely that was not Marvin's intent. *See In re Schwan 1996 Great, Great Grandchildren's Trust*, 2006 S.D 9, ¶ 12, 709 N.W.2d at 852 ("The duty of the court is to carry out the wishes of the trust creator."). Because Marvin originally set up the Foundation with overlap between trustees and the TSC, the Schwans' complaint related thereto falls on deaf ears. *See In re Betty A. Luhrs Trust*, 443 N.W.2d 646 (S.D. 1989) (holding that courts should defer to settlor's wishes when analyzing potential conflicts of interest).

Even accepting the Schwans' untenable conflict argument does not aid the Schwans. Eliminating Boheim, Burgdorf, and Raabe from consideration does not make the Schwans a majority of the TSC. To constitute a majority of the TSC, the Schwans would need a supportive vote from either Ewert or Tweit. But Ewert and Tweit are openly opposed to the Petition and court supervision. (CR. 203-12.) Thus, the Schwans still do not have a majority of the TSC to act, making their conflict argument ultimately unsuccessful, even if it was correct in theory.

The Schwans also argue that individual TSC members can request an accounting, because the Trust Instrument does not explicitly use the term "majority" when stating the "Trustees shall account to the Committee upon the Committee's request." (App. 53.) The language is clear; an accounting is

necessary when “the Committee” requests it. “The Committee” has made no such request here and, in fact, is opposed to such a request. If Marvin Schwan intended for individual TSC members to have the ability to request an accounting, the Trust Instrument would read: “Trustees shall account to the Committee upon the request of a Committee member.” But it does not.

Lastly, the Schwans contend the Circuit Court should have used its equitable powers and declared them a trust committee under SDCL 21-22-1(3). The equities of this case, however, do not support such an action. All concerned parties are opposed to the Petition and opposed to court supervision. The Trustees are unanimously opposed. The Beneficiaries are unanimously opposed. The TSC is opposed. The Attorney General is opposed. Even the two “independent” members of the TSC are both opposed. The Circuit Court, for good reason, declined to use its equitable power to declare that the Schwans are a trust committee in contravention of SDCL 21-22-1(3).

In sum, a straightforward reading of SDCL 21-22-1(3) illustrates the Schwans are not “fiduciaries.” Because the Schwans are not fiduciaries or beneficiaries, they do not have standing to seek court supervision under SDCL 21-22-9 and the Circuit Court’s decision should be affirmed.

II. Good Cause Exists to Not Assume Court Supervision

There are alternative grounds for upholding the Circuit Court's ruling. *Purdy v. Fleming*, 2002 S.D. 156, ¶ 11, 655 N.W.2d 424, 429 (“Summary judgment will be affirmed if there exists *any* basis which would support the trial court's ruling.”). In particular, SDCL 21-22-9 provides in part: “Upon the hearing on the petition, the court shall enter an order assuming supervision *unless good cause to the contrary is shown.*” (emphasis added). Court supervision was unwarranted here because such “good cause to the contrary” exists. The Circuit Court could have and should have simply dismissed the Petition based on the Joint Petition filed by the Trustees, Beneficiaries, and Attorney General.

This is a very unique case. In any other trust case, some or all of the beneficiaries and/or trustees would be at odds on some issue. Here, in contrast, all of the Trustees, all of the Beneficiaries, the Attorney General, and a clear majority of TSC members oppose the Schwans' Petition and court supervision. Only the Schwans want to fight on. This means that the individuals who actually administer the Foundation do not believe court supervision is appropriate or necessary; the entities who receive financial benefits from the Foundation do not believe court supervision is appropriate or necessary; the Attorney General does not believe court supervision is

appropriate or necessary; and the committee from which the Schwans purportedly draw their “standing” does not believe court supervision is appropriate or necessary. There is no legal authority—in South Dakota or elsewhere—that permits court supervision under such circumstances. And more importantly, there is no reason to force the Foundation into court supervision against the wishes of all parties who have a legitimate interest in the Foundation.

Perhaps a different situation would exist if the Foundation had unidentifiable beneficiaries who were unable to protect their interests and if the Attorney General had refused to make an appearance in this matter. *See In re Matter of Hill*, 509 N.W.2d 168 (Minn. Ct. App. 1993). But those facts are not present here. The Beneficiaries are capable of protecting their interests and have done so. They retained experienced counsel and are actively opposing court supervision. The Attorney General has made an appearance, has been highly involved, and is also opposed to court supervision. Indeed, the Beneficiaries and the Attorney General entered into a settlement agreement with the Trustees that resolves all issues to the satisfaction of the Beneficiaries and the Attorney General. (R-App. 1-20.) This settlement agreement supported Respondents’ Joint Petition for dismissal of the Schwans’ Petition. (*Id.*)

Notably, the settlement agreement obligates the Trustees to amend the Trust Instrument to prohibit any person from serving as both a trustee and a member of the TSC. (R-App. 18-20.) The Trustees do not believe overlap between the two roles creates a conflict—given that Marvin Schwan set the Foundation up with three of the four TSC members also being trustees—but the Trustees agreed to make that concession because the Beneficiaries favored it. The Schwans’ Petition and briefing complain of this supposed “conflict,” so the settlement agreement is something the Schwans seemingly would applaud. But that was not the case. The Schwans wanted more. The Schwans’ counsel told the Circuit Court they would be satisfied and “move on” only if trustees Raabe, Boheim and Burgdorf are not allowed to vote on who will succeed them on the TSC:

I mean, we're prepared to move on as well if there's a proper committee, Your Honor. We don't believe there's a proper committee, and that *these people shouldn't vote on their replacements*.

(R-App. 95 (emphasis added).) Of course, the Schwans’ proposal would create a 2-2 tie between remaining TSC members Ewert and Tweit and the two Schwans, allowing the Schwans to potentially gain control of the TSC and thereby the identity of the Foundation’s trustees. That is the real reason the Schwans have invested so much effort in arguing that a “conflict” prevents any trustee from also serving on the TSC. That the Schwans would

rather continue litigating in the face of unanimous dissent from the Beneficiaries and Attorney General reveals all. It is apparent that the Schwans' real focus is not investment losses, but a desire to gain control of the TSC and, thereby, the Foundation.

That is not what the Beneficiaries want, however. In the settlement agreement, the Beneficiaries made the conscious decision to ratify the Trustees' conduct and release any potential claim, as is the Beneficiaries' right under SDCL 55-4-31,⁷ and the Trustees agreed to effect a separation between the trustees and TSC membership. In light of this agreement, the Beneficiaries oppose court supervision and the Schwans' Petition. The Attorney General agrees. Nonetheless, the Circuit Court held that the settlement agreement did not warrant dismissal of the Schwans' Petition because the Circuit Court could still grant relief beyond what was agreed to in the settlement agreement. (App. 6-8.) Respectfully, this misses the point.

⁷ SDCL 55-4-31 provides:

A trustee is not liable to a beneficiary . . . for breach of trust from any or all of the duties, restrictions, and liabilities which would otherwise be imposed on the trustee . . . if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach. . . . Any such beneficiary may release the trustee from liability to such beneficiary for past violations of any of the provisions of this chapter. No consideration is required for the consent, release, or ratification to be valid.

The thrust of Respondents' argument was that a resolution acceptable to the core constituencies of a trust should always trump the desire of some other outside party to see litigation continue for its own sake. If the Schwans were truly acting in the Beneficiaries' best interest, they would accede to the Beneficiaries' desire to stop spending Foundation resources on this litigation.

In sum, there is no reason to allow the Schwans to force court supervision of the Foundation when the parties for whose benefit the trust exists stand hand-in-hand with the Trustees in opposing court supervision and continued litigation. Under those circumstances, court supervision is unwarranted because good cause to the contrary exists as a matter of law. *See* SDCL 21-22-9. The Circuit Court should have dismissed the Petition on this basis.

CONCLUSION

The Circuit Court properly concluded that the Schwans are neither beneficiaries nor fiduciaries as those terms are used in SDCL 21-22-9 and that, as such, they do not have standing to seek court supervision. Additionally, court supervision was properly denied because there exists good cause to the contrary as that phrase is used in SDCL 21-22-9, namely that the Trustees, the Beneficiaries, the TSC, and the Attorney General all

are opposed to court supervision and that there is nothing to be gained through court supervision. Therefore, Respondents respectfully request the Circuit Court's decision be affirmed.

Dated this 14th day of December, 2015.

DAVENPORT, EVANS, HURWITZ &
SMITH, L.L.P.

/s/ Reece Almond _____

Vince M. Roche

Reece Almond

206 West 14th Street

PO Box 1030

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Attorneys for

Respondents/Appellees Trustees

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Brief complies with the type volume limitations set forth in SDCL 15-26A-66. Based on the information provided by Microsoft Word 2010, this Brief contains 7,346 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificate of counsel. This Brief is typeset Times New Roman (12 point) and was prepared using Microsoft Word 2010.

Dated this 14th day of December, 2015.

DAVENPORT, EVANS, HURWITZ &
SMITH, L.L.P.

/s/ Reece Almond _____

Vince M. Roche

Reece Almond

206 West 14th Street

PO Box 1030

Sioux Falls, SD 57101-1030

Telephone: (605) 336-2880

Facsimile: (605) 335-3639

Attorneys for

Respondents/Appellees Trustees

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to 500 East Capital Avenue, Pierre, South Dakota, 57501-5070, on December 14th, 2015.

The undersigned further certifies that an electronic copy of the foregoing Brief was emailed to the attorneys set forth below, on December 14th, 2015:

<u>Name</u>	<u>Address</u>
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Gary Stimac	6089 Flat Creek Drive Evergreen, CO 50439
Lyle Fahning	7991 Covered Bridge Road Prior Lake, MN 55372
Dave Ewert	2425 Winterpark Ridge Drive Loveland, CO 80538
Paul Tweit	1126 Anderson Drive Mankato, MN 56001
Mark D. Schwan	42 Riverview Heights Sioux Falls, SD 57105 and Thomas J. Welk and James R. Sutton Boyce Law Firm, LLP P. O. Box 5015 Sioux Falls, SD 57117-5015

	and
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	and
	Allen I. Saeks and Blake Shepard, Jr. Stinson Leonard Street, LLP 150 S. Fifth Street, Ste. 2300 Minneapolis, MN 55402
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Evangelical Lutheran Synod	6 Browns Court Mankato, MN 56001
Wisconsin Evangelical Lutheran Synod Kingdom Workers, Inc.	2323 N. Mayfair Road, #400 Wauwatosa, WI 53226
International Lutheran Laymen's League	660 Mason Ridge Center Dr. St. Louis, MO 63141
Bethany Lutheran College	700 Luther Drive Mankato, MN 56001
Lutheran Church—Missouri Synod Harrison	ATTN: Rev. Dr. Matthew 1333 S. Kirkwood Road St. Louis, MO 63122-7226
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/s/ Reece Almond _____

APPENDIX

1. Petition for Dismissal of June 2014 Petition, Termination of Court Supervision,
and Other Relief. R-App.1-42.
2. 2/23/2015 Motions Hearing Transcript in its Entirety. R-App. 43 - 118.

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

In the Matter of the MARVIN M.
SCHWAN CHARITABLE
FOUNDATION.

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TRU 14-21

PETITION FOR
DISMISSAL OF JUNE 2014 PETITION,
TERMINATION OF COURT
SUPERVISION, AND OTHER RELIEF

Come now your Petitioners, Lawrence Burgdorf, Keith Boheim, Kent Raabe, Gary Stimac, Lyle Fahning (collectively, “Trustees”), WELS Kingdom Workers, Evangelical Lutheran Synod, Wisconsin Lutheran College, Bethany Lutheran College, The Lutheran Church—Missouri Synod, International Lutheran Laymen’s League, Wisconsin Evangelical Lutheran Synod (collectively, “Beneficiaries”), and the Honorable Marty Jackley, South Dakota Attorney General (collectively, the Trustees, Beneficiaries and Attorney General are referred to as the “Petitioners”), and respectfully state to the Court as follows:

1. The Petitioners include all of the Trustees and Beneficiaries of the above-entitled Charitable Foundation (the “Foundation”). The Foundation was established pursuant to a certain trust agreement dated November 20, 1992 (the “Trust Instrument”) executed by and between Marvin M. Schwan, as the settlor, and Marvin M. Schwan, Alfred Paul G. Schwan, and Lawrence A. Burgdorf, as the trustees. A copy of the Trust Instrument is on file herein. The current Trustees of the Foundation are Lawrence Burgdorf, Keith Boheim, Kent Raabe, Gary Stimac and Lyle Fahning.

2. On June 4, 2014, Mark Schwan (“Mark”) and Paul Schwan (“Paul”) filed in this Court their Petition for Court Supervision and Enforcement of Charitable Trust and For Court

Instructions, which is on file herein (the “June 2014 Petition”). Mark and Paul purported to bring the June 2014 Petition as two individual members of the Foundation’s Trustee Succession Committee (“TSC”). Trustees previously moved to dismiss the June 2014 Petition on multiple grounds and that motion to dismiss remains pending.

3. In the June 2014 Petition, Mark and Paul requested that this Court grant certain relief primarily related to Mark and Paul’s complaint that some of the existing Trustees of the Foundation were also members of the Foundation’s Trustee Succession Committee, which is allowed by the Foundation’s Trust Instrument. Nonetheless, the relief requested herein, if granted, will render this concern moot. Therefore, Petitioners respectfully request that this Court dismiss with prejudice the June 2014 Petition.

4. Petitioners have entered into a Settlement Agreement attached hereto as Exhibit 1 which will achieve a separation of identity between the TSC and the Foundation’s trustees. The obligations imposed on the Trustees in the Settlement Agreement are contingent on dismissal of the June 2014 Petition.

5. Petitioners are of the opinion that continued litigation over the June 2014 Petition would be contrary to the best interests of the Beneficiaries and would needlessly waste additional assets.

6. Pursuant to the Trust Instrument, the Beneficiaries of the Foundation are as follows: Wisconsin Evangelical Lutheran Synod; Evangelical Lutheran Synod; WELS Kingdom Workers; International Lutheran Laymen’s League; Bethany Lutheran College; The Lutheran Church—Missouri Synod; and Wisconsin Lutheran College. Each of the Beneficiaries of the Foundation and the Honorable Marty Jackley, South Dakota Attorney General, is a Petitioner

herein. By signing below, each of the Beneficiaries and the Attorney General consent to this Petition. Therefore, notice of this Petition may be dispensed with pursuant to SDCL § 21-22-21.

7. In the opinion of Petitioners, the interests of the Beneficiaries will be better served if the Court file in connection with this proceeding continues to be sealed by the Clerk of Court pursuant to SDCL § 21-22-28. Accordingly, Petitioners respectfully request, upon the filing of this Petition (including all exhibits attached hereto), as well as upon the filing of all other court papers or documents in connection with this proceeding and upon the issuance of all Court Orders thereon, that the file containing the same continue to be sealed pursuant to SDCL § 21-22-28.

8. In the opinion of Petitioners, after this Court has entered its Order on this Petition, Court supervision of the Foundation will be unnecessary and impractical and it would involve unnecessary burden and expense to the Foundation. Accordingly, Petitioners respectfully request that following the Court's action on the other relief requested herein, the Court order that any type of supervision of the Foundation is terminated pursuant to SDCL § 21-22-7.

WHEREFORE, Petitioners pray that the Clerk of Court continue to seal the file upon the filing of this Petition, that a hearing be scheduled on this Petition, and, upon such hearing, that the Court enter its Order:

- (1) Ratifying and confirming the continued sealing of the Court file in connection with this proceeding pursuant to SDCL § 21-22-28;
- (2) Dismissing with prejudice the June 2014 Petition;
- (3) Terminating Court Supervision of the Foundation; and
- (4) Granting such other and further relief which to the Court may seem just and proper.

Dated this 13th day of February, 2015.

[signatures on following pages]

LAWRENCE A. BURGDORF

STATE OF MISSOURI)
 : SS
COUNTY OF St. Charles)

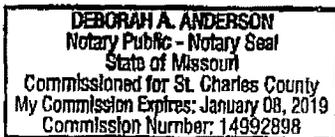
LAWRENCE A. BURGDORF, being first duly sworn, deposes and says that he is one of the Petitioners named in the foregoing Petition; that he has read the above Petition, including the exhibits attached thereto, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

Lawrence A. Burgdorf
Lawrence A. Burgdorf

Subscribed and sworn to before me this 11th day of February, 2015.

Deborah A. Anderson
Notary Public, Missouri
My Commission expires: 1-8-2019

(SEAL)



KEITH BOHEIM

STATE OF MISSOURI)
 : SS
COUNTY OF St. Charles)

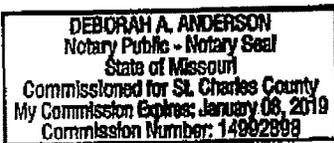
KEITH BOHEIM, being first duly sworn, deposes and says that he is one of the Petitioners named in the foregoing Petition; that he has read the above Petition, including the exhibits attached thereto, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

Keith W. Boehm
Keith Boehm

Subscribed and sworn to before me this 11th day of February, 2015.

Deborah A. Anderson
Notary Public, Missouri
My Commission expires: 1-8-2019

(SEAL)



KENT RAABE

STATE OF WISCONSIN)
COUNTY OF Waukesha : SS

KENT RAABE, being first duly sworn, deposes and says that he is one of the Petitioners named in the foregoing Petition; that he has read the above Petition, including the exhibits attached thereto, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

Kent A Raabe

Kent Raabe

Subscribed and sworn to before me this 09th day of Feb, 2015

Ali Khan

Notary Public, Wisconsin

My

Commission

expires: July 26, 2015

(SEAL)



WISCONSIN EVANGELICAL
LUTHERAN SYNOD

By: Mark Schroeder
Name: Mark Schroeder
Its: President

STATE OF WISCONSIN)
 : SS
COUNTY OF Waukesha)

Mark Schroeder, being first duly sworn, deposes and says that he/she is the
President of Wisconsin Evangelical Lutheran Synod; that he/she has read
the above Petition, including the exhibits attached thereto, and knows the contents thereof, and
that the same is true of his/her own knowledge, except as to those matters therein stated upon
information and belief, and as to those matters he/she believes it to be true.

Mark Schroeder

Subscribed and sworn to before me this 10th day of February, 2015.

Nancy L. Gittel
Notary Public (Wisconsin)
My Commission expires: 7-29-2018

(SEAL)

WELS KINGDOM WORKERS

By: [Signature]
Name: WILLIAM L. MEIER
Its: EXECUTIVE DIRECTOR

STATE OF WISCONSIN)
 : SS
COUNTY OF MILWAUKEE)

WILLIAM L. MEIER, being first duly sworn, deposes and says that he/she is the EXECUTIVE DIRECTOR of WELS Kingdom Workers; that he/she has read the above Petition, including the exhibits attached thereto, and knows the contents thereof, and that the same is true of his/her own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he/she believes it to be true.

[Signature]

Subscribed and sworn to before me this 12th day of FEBRUARY, 2015.

[Signature]
Notary Public, Wisconsin
My Commission expires: 7-1-2018

(SEAL)

INTERNATIONAL LUTHERAN
LAYMEN'S LEAGUE

By: [Signature]
Name: KURT S. BUCHHOLZ
Its: EXECUTIVE DIRECTOR

STATE OF MISSOURI)
 : SS
COUNTY OF St. Louis)

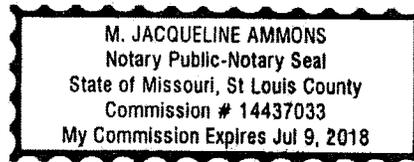
Kurt S Buchholz, being first duly sworn, deposes and says that he/she is the Executive Director of International Lutheran Laymen's League; that he/she has read the above Petition, including the exhibits attached thereto, and knows the contents thereof, and that the same is true of his/her own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he/she believes it to be true.

[Signature]

Subscribed and sworn to before me this 11th day of February, 2015.

M. Jacqueline Ammons
Notary Public, Missouri
My Commission expires: July 9, 2018

(SEAL)



BETHANY LUTHERAN COLLEGE

By: [Signature]
Name: Dan R. Bruss, Ph.D.
Its: President

STATE OF MINNESOTA)
 : SS
COUNTY OF Blue Earth)

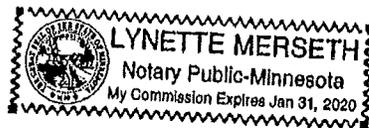
Dan R. Bruss, being first duly sworn, deposes and says that he/she is the
President of Bethany Lutheran College; that he/she has read the above
Petition, including the exhibits attached thereto, and knows the contents thereof, and that the
same is true of his/her own knowledge, except as to those matters therein stated upon
information and belief, and as to those matters he/she believes it to be true.

[Signature]

Subscribed and sworn to before me this 12th day of February, 2015.

[Signature]
Notary Public, Minnesota
My Commission expires: 01-31-2020

(SEAL)



SETTLEMENT AGREEMENT

Lawrence Burgdorf ("Burgdorf"), Keith Boheim ("Boheim"), Lyle Fahning ("Fahning"), Kent Raabe ("Raabe") and Gary Stimac ("Stimac") (collectively, "Trustees"), in their capacities as trustees of the Marvin M. Schwan Charitable Foundation ("Foundation"), Wisconsin Evangelical Lutheran Synod; The Lutheran Church—Missouri Synod; Wisconsin Lutheran College Conference, Inc.; Evangelical Lutheran Synod; Bethany Lutheran College, Inc.; International Lutheran Laymen's League; and Wisconsin Evangelical Lutheran Synod Kingdom Workers, Inc. (collectively, "Beneficiaries"), and the Attorney General of the State of South Dakota ("Attorney General") (collectively, the Trustees, Beneficiaries and Attorney General are referred to as the "Parties") hereby agree as follows this _____ day of February, 2015:

RECITALS

WHEREAS, Burgdorf, Boheim and Raabe currently serve as trustees of the Foundation and members of the Foundation's Trustee Succession Committee ("TSC");

WHEREAS, Mark Schwan and Paul Schwan (collectively, "Schwans") filed a Petition for Court Supervision and Enforcement of Charitable Trust and for Court Instructions ("Schwan Petition") in the Second Judicial Circuit, Minnehaha County, Case No. Tr. 14-21 (the "Litigation");

WHEREAS, since the Schwan Petition was filed, the Trustees have provided information and documents to the Beneficiaries and the Attorney General and the Parties have had multiple meetings and communications; and

WHEREAS, the Parties have determined that it is in the best interest of the Foundation for the Litigation to be terminated on the following terms;

NOW, THEREFORE, THE PARTIES HEREBY AGREE AS FOLLOWS

1. This Agreement is contingent upon the dismissal with prejudice of the Schwan Petition and will take effect forty (40) days following Notice of Entry of an order and judgment of the Circuit Court dismissing the Schwan Petition with prejudice (the "Effective Date"). If a notice of appeal of said order and judgment is filed within the thirty (30) day time period allowed under South Dakota law, the Trustees' obligations described herein shall only become effective upon an order of the South Dakota Supreme Court affirming the Circuit Court's order and judgment dismissing the Schwan Petition with prejudice, in which case the Effective Date shall be seven (7) days after the date of the Supreme Court's order. No action shall be required of the Trustees prior to the Effective Date.
2. Burgdorf will resign as a trustee of the Foundation within 30 days of the Effective Date.



3. Boheim will resign as a trustee of the Foundation within 30 days of the conclusion of the Foundation's recapitalization efforts with respect to its investment in the Costa Rica resort property or within 30 days of the Effective Date, whichever occurs later.

4. Raabe will resign as a trustee of the Foundation on or before December 31, 2015.

5. After the Effective Date, the Beneficiaries will jointly propose four names to the TSC as nominees for new TSC members. Beneficiaries will submit the four names as soon as possible after the Effective Date, but in all events within 180 days of the Effective Date. It is understood and agreed that other members of the TSC may also submit nominations for new TSC members along with the names submitted by the Beneficiaries. Within 90 days of receiving the nominations from the Beneficiaries, Burgdorf, Boheim and Raabe will present those nominations to the TSC for a vote along with any other nominations received from other TSC members.

6. Burgdorf and Boheim will resign their positions on the TSC after new members are elected from the pool of nominees described in Paragraph 5, but only after the occurrence of the Effective Date. Burgdorf and Boheim are entitled to vote as TSC members on the new TSC members chosen from the pool of nominees described in Paragraph 5.

7. Boheim may continue as Executive Director of the Foundation even after he is no longer serving as a trustee or on the TSC.

8. The Trustees agree to provide the TSC with at least the same amount of information regarding the Foundation's activities as was provided in 2013 and agree to respond to reasonable requests for information from a majority of the TSC. Nothing in this Agreement gives any individual TSC member the right to challenge the amount, type or quality of information provided by the trustees to the TSC in any future year.

9. The Trustees agree to provide the Beneficiaries with information and materials regarding the Foundation's activities as may reasonably be requested from time to time jointly by two or more Beneficiaries.

10. Nothing in this Agreement shall prevent the TSC at any time from electing new trustees or TSC members according to the procedures in the Trust Instrument. Nothing in this Agreement shall require the TSC to solicit nominations for TSC members from the Beneficiaries in the future, nor shall anything in this document prohibit the TSC from doing so at its option. The Parties agree the replacement and selection of future TSC members shall be performed according to the Trust instrument.

11. Within 30 days of the Effective Date, the Parties shall each execute the Fourth Amendment to the Trust Instrument attached hereto as Exhibit 1. The Parties further agree to confer in good faith prior to execution regarding the appropriate date to be inserted in Section 1 of the Amendment. Except for this Fourth Amendment, nothing in this Agreement is intended to alter, modify or affect the existing terms of the Trust Instrument.

12. The Beneficiaries and Attorney General hereby release the Trustees, their employees and agents from any and all claims and causes of action of whatever nature up

through and including the Effective Date. This release shall be effective as of the Effective Date and shall only be effective if there is an Effective Date.

13. This Agreement is entered into solely in the interests of compromise and is not an admission of wrongdoing on the part of the Trustees. Nor is this Agreement an admission by the Trustees that service by trustees as members of the TSC is improper or contrary to the Trust Instrument. In the event the Effective Date never occurs, this Agreement is not admissible for any purpose in any proceeding; in particular, this Agreement is not admissible to support a showing that the Trust Instrument should be modified to provide that a trustee should not simultaneously serve on the TSC.

14. There are no third-party beneficiaries of this Agreement and its terms are not enforceable by any non-party to this Agreement.

15. A facsimile or PDF signature on this Agreement shall constitute an original and this Agreement may be executed in multiple counterparts, the collection of which shall constitute an original, complete Agreement.

[Signatures to Follow]

SIGNATURE PAGE OF SETTLEMENT AGREEMENT

Lawrence Burgdorf

Keith Boheim

Lyle Fahning



Kent Raabe

Gary Stimac

TRUSTEES

SIGNATURE PAGE OF SETTLEMENT AGREEMENT

Lawrence Burgdorf

Keith Boheim



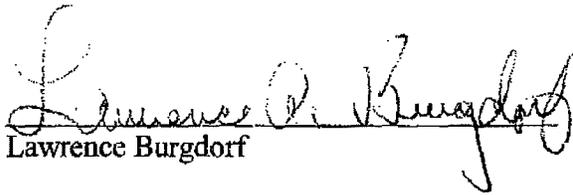
Lyle Fahning

Kent Raabe

Gary Stimac

TRUSTEES

SIGNATURE PAGE OF SETTLEMENT AGREEMENT


Lawrence Burgdorf

Keith Boheim

Lyle Fahning

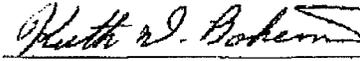
Kent Raabe

Gary Stimac

TRUSTEES

SIGNATURE PAGE OF SETTLEMENT AGREEMENT

Lawrence Burgdorf



Keith Boheim

Lyle Fahning

Kent Raabe

Gary Stimac

TRUSTEES

SIGNATURE PAGE OF SETTLEMENT AGREEMENT

WELS KINGDOM WORKERS,
INC.

THE LUTHERAN CHURCH—MISSOURI
SYNOD

Signature

Printed Name: _____



Signature

Printed Name: Randall Schultz

EVANGELICAL LUTHERAN SYNOD

INTERNATIONAL LUTHERAN
LAYMEN'S LEAGUE

Signature

Printed Name: _____

Signature

Printed Name: _____

WISCONSIN LUTHERAN COLLEGE
CONFERENCE, INC.

WISCONSIN EVANGELICAL
LUTHERAN SYNOD

Signature

Printed Name: _____

Signature

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SIGNATURE PAGE OF SETTLEMENT AGREEMENT

WELS KINGDOM WORKERS,
INC.

THE LUTHERAN CHURCH—MISSOURI
SYNOD

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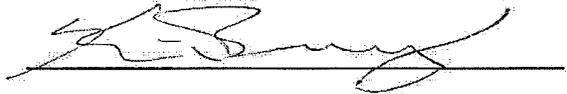
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EVANGELICAL LUTHERAN SYNOD

INTERNATIONAL LUTHERAN
LAYMEN'S LEAGUE



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Printed Name: _____

Printed Name: KURT S. BUCHHOLZ

WISCONSIN LUTHERAN COLLEGE
CONFERENCE, INC.

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THE LUTHERAN CHURCH—MISSOURI
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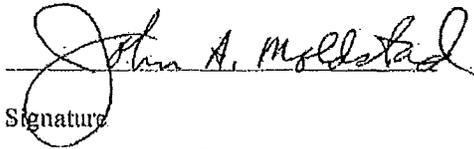
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EVANGELICAL LUTHERAN SYNOD

INTERNATIONAL LUTHERAN
LAYMEN'S LEAGUE


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Printed Name: JOHN A. MOLDSTAD

Printed Name: _____

WISCONSIN LUTHERAN COLLEGE
CONFERENCE, INC.

WISCONSIN EVANGELICAL
LUTHERAN SYNOD

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SIGNATURE PAGE OF SETTLEMENT AGREEMENT

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INC.

THE LUTHERAN CHURCH—MISSOURI
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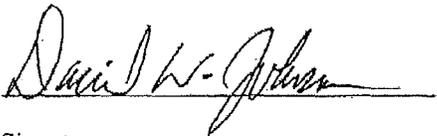
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WISCONSIN LUTHERAN COLLEGE
CONFERENCE, INC.

WISCONSIN EVANGELICAL
LUTHERAN SYNOD



Signature

Signature

Printed Name: Daniel W. Johnson

Printed Name: _____

SIGNATURE PAGE OF SETTLEMENT AGREEMENT

WELS KINGDOM WORKERS,
INC.

THE LUTHERAN CHURCH, MISSOURI
SYNOD

Signature

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EVANGELICAL LUTHERAN SYNOD

INTERNATIONAL LUTHERAN
LAYMEN'S LEAGUE

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WISCONSIN LUTHERAN COLLEGE
CONFERENCE, INC.

WISCONSIN EVANGELICAL
LUTHERAN SYNOD

Signature

Printed Name: _____

Mark Schroeder

Signature

Printed Name: Mark Schroeder

SIGNATURE PAGE OF SETTLEMENT AGREEMENT

WELS KINGDOM WORKERS,
INC.



Signature

Printed Name: WILLIAM T. MEIER

THE LUTHERAN CHURCH—MISSOURI
SYNOD

Signature

Printed Name: _____

EVANGELICAL LUTHERAN SYNOD

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Printed Name: _____

INTERNATIONAL LUTHERAN
LAYMEN'S LEAGUE

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Printed Name: _____

WISCONSIN LUTHERAN COLLEGE
CONFERENCE, INC.

Signature

Printed Name: _____

WISCONSIN EVANGELICAL
LUTHERAN SYNOD

Signature

Printed Name: _____

BETHANY LUTHERAN COLLEGE

SOUTH DAKOTA ATTORNEY
GENERAL



Signature

Printed Name: Dan R. Bruss

Signature

Printed Name: _____

BETHANY LUTHERAN COLLEGE

Signature

Printed Name: _____

SOUTH DAKOTA ATTORNEY
GENERAL

By: 
Signature

Printed Name: Jeffrey P. Hallem
Assistant Attorney General

EXHIBIT 1

(Fourth Amendment of Trust Instrument)

FOURTH AMENDMENT OF TRUST INSTRUMENT

THIS FOURTH AMENDMENT OF TRUST INSTRUMENT is made this ____ day of _____, _____, by Lawrence A. Burgdorf, Keith Boheim, Kent Raabe, Gary Stimac, and Lyle Fahning, the currently serving Trustees of the MARVIN M. SCHWAN CHARITABLE FOUNDATION.

WITNESSETH:

WHEREAS, the Marvin M. Schwan Charitable Foundation (the "Foundation") was established on November 20, 1992, pursuant to a trust instrument made by and between Marvin M. Schwan, as grantor, and Marvin M. Schwan, Alfred Paul G. Schwan, and Lawrence A. Bergdorf, as trustees, and later amended on December 13, 1994, and again on October 17, 1997 (collectively the "Trust Instrument");

WHEREAS, the Trustees desire to amend the Trust Instrument to disallow any of the Trustees from serving as a member of the Foundation's Trustee Succession Committee;

WHEREAS, the Foundation is subject to the jurisdiction and laws of the State of South Dakota, more particularly SDCL § 55-3-24 which provides, in part, as follows: "An irrevocable trust may be modified or terminated upon the consent of all the beneficiaries if continuance of the trust on its existing terms is not necessary to carry out a material purpose";

WHEREAS, each beneficiary of the Foundation has consented to this Fourth Amendment pursuant to the "Consent to Fourth Amendment of Trust Instrument" which is attached hereto as Exhibit A and incorporated herein by this reference;

WHEREAS, due to the charitable nature of the Foundation, the Attorney General has also consented to this amendment to the Trust Instrument, which consent is also set forth on Exhibit A; and

WHEREAS, additional authority for this Fourth Amendment is set forth at Article SEVENTH of the Trust Agreement which provides, in part, as follows: "This instrument may be amended, from time to time, by a writing signed by the Trustee or Trustees then serving, but only to the extent that any purported amendment: ... (b) alters or adds to the administrative powers of the Trustees for the better accomplishment of the purposes of this Trust".

NOW, THEREFORE, the Trustees agree as follows:

1. The Trust Instrument is amended by adding a new subsection 10 to Article SIXTH, Section (A), as follows:

10. Notwithstanding anything herein to the contrary, beginning _____, _____, and at all times thereafter, no individual or party may concurrently serve as a Trustee and as a member of the Trustee Succession Committee.

2. All other provisions of the Trust Instrument will remain in force.

3. This Fourth Amendment may be executed in counterparts, all of which will be deemed an original, and when taken together, will constitute one and the same document.

IN WITNESS WHEREOF, the undersigned Trustees have signed this Fourth
Amendment of Trust Instrument.

[Signatures to follow]

Lawrence A. Burgdorf

Keith Boheim

Kent Raabe

Gary Stimac

Lyle Fahning

TRUSTEES

EXHIBIT A

CONSENT TO FOURTH AMENDMENT OF TRUST INSTRUMENT

The undersigned each consent to the foregoing Fourth Amendment to the Marvin M. Schwan Charitable Foundation including, specifically, the addition of a new Subsection 10 to Article SIXTH, Section (A) of the Trust Instrument which established the Marvin M. Schwan Charitable Foundation. This Consent may be executed in counterparts all of which will be deemed an original, and when taken together, will constitute one and the same document.

Dated this ____ day of _____, _____.

WELS KINGDOM WORKERS,
INC.

THE LUTHERAN CHURCH—MISSOURI
SYNOD

Signature

Signature

Printed Name: _____

Printed Name: _____

EVANGELICAL LUTHERAN SYNOD

INTERNATIONAL LUTHERAN
LAYMEN'S LEAGUE

Signature

Signature

Printed Name: _____

Printed Name: _____

WISCONSIN LUTHERAN COLLEGE
CONFERENCE, INC.

WISCONSIN EVANGELICAL
LUTHERAN SYNOD

Signature

Printed Name: _____

Signature

Printed Name: _____

BETHANY LUTHERAN COLLEGE

SOUTH DAKOTA ATTORNEY
GENERAL

Signature

Printed Name: _____

Signature

Printed Name: _____

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served
by United States mail upon:

<u>Name</u>	<u>Address</u>
Lawrence A. Burgdorf	18 Burnside Court St. Charles, MO 63303
Keith Boheim	514 Earth City Expressway, Ste. 233 Earth City, MO 63045
Kent Raabe	1080 Hawthorne Ridge Drive Brookfield, WI 53048
Gary Stimac	6089 Flat Creek Drive Evergreen, CO 50439
Lyle Fahning	7991 Covered Bridge Road Prior Lake, MN 55372
Dave Ewert	2425 Winterpark Ridge Drive Loveland, CO 80538
Paul Tweit	1126 Anderson Drive Mankato, MN 56001
Mark D. Schwan	42 Riverview Heights Sioux Falls, SD 57105 and Thomas J. Welk and Jason R. Sutton Boyce Law Firm, LLP P. O. Box 5015 Sioux Falls, SD 57117-5015 (also by email) and Allen I. Sacks and Blake Shepard, Jr. Stinson Leonard Street, LLP 150 S. Fifth Street, Ste. 2300 Minneapolis, MN 55402

(also by email)

Allen.saeks@stinsonleonard.com

Blake.shepard@stinsonleonard.com

Paul M. Schwan

17916 Cielo Court

Poway, CA 92064

and

Thomas J. Welk and Jason R. Sutton

Boyce, Greenfield, Pashby & Welk, LLP

P. O. Box 5015

Sioux Falls, SD 57117-5015

and

Allen I. Saeks and Blake Shepard, Jr.

Stinson Leonard Street, LLP

150 S. Fifth Street, Ste. 2300

Minneapolis, MN 55402

Wisconsin Evangelical

Lutheran Synod

N16 W23377 Stone Ridge Drive

Waukesha, WI 53188-1108

Evangelical Lutheran Synod

6 Browns Court

Mankato, MN 56001

Wisconsin Evangelical Lutheran

Synod Kingdom Workers, Inc.

2323 N. Mayfair Road, #400

Wauwatosa, WI 53226

International Lutheran Laymen's League

660 Mason Ridge Center Dr.

St. Louis, MO 63141

Bethany Lutheran College

700 Luther Drive

Mankato, MN 56001

Lutheran Church Missouri Synod

ATTN: Rev. Dr. Matthew Harrison

1333 S. Kirkwood Road

St. Louis, MO 63122-7226

Wisconsin Lutheran College

8800 W. Bluemound Road

Milwaukee, WI 53226

Pamela Bollweg

Johnson, Heidepriem & Abdallah, L.L.P.

P. O. Box 2348
Sioux Falls, SD 57101-2348
(also by email)

Jeffrey P. Hallem and
Phil Carlson

Office of the Attorney General
1302 E. Hwy. 14, Ste. 1
Pierre, SD 57501-8501
(also by email)

Sherri Strand

Thompson Coburn LLP
One US Bank Plaza
St. Louis, MO 63101
(also by email)
ssstrand@thompsoncoburn.com

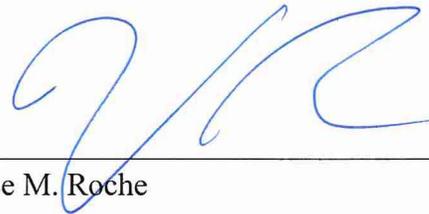
Kennith Gosch

Bantz, Gosch & Cremer, LLC
305 Sixth Ave. SE
Aberdeen, SD 57402
(also by email)
kgosch@bantzlaw.com

James Dankenbring

Spencer Fane Britt & Browne LLP
1 Northwood Blvd., Suite 1000
St. Louis, MO 63105
(also by email)
jdankenbring@spencerfane.com

This 13th day of February, 2015.



Vince M. Roche

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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
 :SS
COUNTY OF MINNEHAHA) SECOND JUDICIAL DISTRICT

* * * * *

In the Matter of the MARVIN M. SCHWAN CHARITABLE FOUNDATION *

MARK SCHWAN and PAUL SCHWAN, *
as members of the Marvin M. Schwan Charitable Foundation, *

Petitioners, * TRU 14-000021

vs. * **MOTIONS HEARING**

LAWRENCE BURGENDORF, KEITH *
BOHEIM, KENT RAABE, GARY *
STIMAC and LYLE FAHNING, as *
Trustees of the Marvin M. Schwan Charitable Foundation, *

Respondents. *

* * * * *

BEFORE: The Honorable Mark Salter,
Circuit Court Judge in and for the Second
Judicial Circuit, State of South Dakota,
Sioux Falls, South Dakota.

PROCEEDINGS: The above-entitled proceeding commenced at
1:30 p.m. on the 23rd day of February, 2015,
in Courtroom 5B at the Minnehaha County
Courthouse, Sioux Falls, South Dakota.

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APPEARANCES: Thomas J. Welk, Esquire
Boyce Law Firm, LLP
300 South Main Avenue
Sioux Falls, South Dakota 57104

Blake Shepard, Jr., Esquire
Allen I. Saeks, Esquire (*via phone*)
Stinson Leonard Street
150 South Fifth Street, Suite 2300
Minneapolis, Minnesota 55402

for the Petitioners;

Vincent M. Roche, Esquire
Reece M. Almond, Esquire
Davenport, Evans, Hurwitz & Smith, LLP
206 West 14th Street
P.O. Box 1030
Sioux Falls, South Dakota 57101-1030

for Trustees;

Pamela R. Bollweg, Esquire
Johnson, Abdallah, Bollweg and Parsons, LLP
P.O. Box 2348
Sioux Falls, South Dakota 57101

for WELS Kingdom Workers,
Evangelical Lutheran Synod,
Wisconsin Lutheran College, and
Bethany Lutheran College;

Kennith L. Gosch, Esquire
Bantz, Gosch & Cremer, LLC
305 6th Avenue Southeast
Aberdeen, South Dakota 57402-0970

for WELS, Wisconsin Evangelical
Lutheran Church;

Phil Carlson, Esquire
Jeffrey P. Hallem, Esquire
Office of the Attorney General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8503

for the Attorney General;

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CONTINUED
APPEARANCES: James Dankenring, Esquire (*via phone*)
Spencer, Fane, Britt & Browne
1 North Brentwood Boulevard, Suite 1000
St. Louis, Missouri 63105

for the International Lutheran
Laymen's League;

Sherri Strand, Esquire (*via phone*)
Thompson Coburn, LLP
One US Bank Plaza
St. Louis, Missouri 63101

for Lutheran Church Missouri
Synod.

1 THE COURT: Good afternoon. We'll begin going on the
2 record in Trust 14-21. It is captioned in the Matter of
3 Marvin -- the Marvin M. Schwan Charitable Foundation.
4 Before we get to other appearances, who do we have on
5 the phone with us this afternoon?

6 MR. DANKENBRING: Jim Dankenbring here, Your Honor, for
7 the International Lutheran Laymen's League.

8 THE COURT: Thank you. Good to have you. I saw Mr. --
9 am I saying it right, Saeks?

10 MR. SAEKS: Yes. That's correct, Your Honor. I am on
11 the phone.

12 THE COURT: Good to have you with us.

13 I think there's one other.

14 MS. STRAND: Yes. This is Sherri Strand with Thompson
15 Coburn in St. Louis representing the Lutheran Church
16 Missouri Synod, Your Honor.

17 THE COURT: Good afternoon. Good to have you as well.

18 The courtroom is full. I will -- we'll start with
19 Mr. Welk's table and have appearances, please.

20 MR. WELK: Representing the petitioners, Your Honor,
21 myself, Tom Welk, from the Boyce Law Firm; and Blake
22 Shepard and Allen Saeks. Mr. Saeks is on the telephone.

23 THE COURT: Understood. Thank you.

24 Ms. Bollweg.

25 MS. BOLLWEG: Pamela Bollweg represented WELS Kingdom

1 Workers, Evangelical Lutheran Synod, Wisconsin Lutheran
2 College, and Bethany Lutheran College.

3 MR. GOSCH: Ken Gosch from Aberdeen representing the
4 WELS, Wisconsin Evangelical Lutheran Synod.

5 THE COURT: Thank you, Mr. Gosch.

6 Mr. Hallem.

7 MR. HALLEM: Jeff Hallem and Phil Carlson representing
8 the Attorney General's Office.

9 THE COURT: Finally, gentlemen.

10 MR. ROCHE: Vince Roche and Reece Almond with Davenport
11 Evans for the Trustees, Your Honor.

12 THE COURT: Thank you very much.

13 Well, I want to start by thanking you all, not only
14 for being here, but for your submissions. I've spent
15 some time over the course of the past week as I started
16 to come in trying to reconstruct what's preceded me in
17 this case, and I think I've got a sense of it. And I
18 thought what I might do, given the fact that I'm new to
19 the case, is at the outset -- we have two hours this
20 afternoon; I don't want to use the time unwisely -- but
21 I thought it might make some sense, in the event that
22 I'm wrong, to give you, I guess, my assessment about
23 what's before the Court and an order that we might
24 proceed in.

25 First off, the case obviously began with filing of

1 a Petition for Court Supervision, which was followed
2 soon thereafter by an order from the clerk setting a
3 January 3 hearing date. That has been continued a few
4 times along the way. It looks like there was a hearing
5 in August of 2014, late August, but -- in front of Judge
6 Houwman. But Judge Houwman, it appears to me, granted
7 the request of, for lack of a better word,
8 Beneficiaries, the Attorney General, to hold things, if
9 you will, in abeyance for 90 days. That put things out
10 to about, initially, the 3rd of November, 2014. Then by
11 agreement of the parties that was moved until the 10th,
12 and then, ultimately, moved to this date. I think that
13 seems to be where we've been.

14 Now, along the way what have been the matters that
15 are then pending have -- I don't know that they've
16 increased, but they've been the subject of additional
17 submissions. We have the Petition, of course, the
18 merits of the Petition for Court Supervision. That's in
19 front of the Court. But we have other issues that
20 include motions, some of which are dispositive, that are
21 also in front of the Court. And I think we need to
22 address those prior to the merits, including, most
23 notably, the motion -- motions by the Trustees,
24 Mr. Roche's clients, for dismissal for various reasons
25 and judgment on the pleadings.

1 But there's also a couple of other motions that I
2 wonder if we might not address in shorter fashion, the
3 first of which is the -- what I read to be a motion for
4 continued sealing of this case. I suspect there might
5 not be opposition to that. I looked in the file. The
6 case is sealed, but I don't know on whose order it's
7 sealed. So it might not be a bad idea to actually have
8 an order sealing it.

9 Is there any objection to essentially continuing
10 the status quo, which is continuing the sealing of this
11 case?

12 MR. HALLEM: No objection, Your Honor.

13 THE COURT: Attorney Generals.

14 MS. BOLLWEG: No objection.

15 THE COURT: Ms. Bollweg.

16 MR. GOSCH: No objection.

17 THE COURT: Mr. Welk?

18 MR. WELK: No objection from the Petitioners, Your
19 Honor.

20 MR. ROCHE: No, Your Honor.

21 THE COURT: See, that was easy.

22 We've got a couple of other motions, and I'll
23 mention them. I don't know if they're -- if they are
24 contested, my inclination would be to set them off to
25 the side for a few moments. I'm most interested in

1 getting to the dispositive motions here this afternoon;
2 but what I do see in the record is Mr. Welk's motion
3 dating back to I think last summer for judicial notice
4 of Judge Tiede's decision in Trust File 05-36 relating
5 to what is commonly known as the 1976 Grandchildren's
6 Trust of Marvin Schwan.

7 Is that a disputed motion, something I need to
8 decide at some point if not now?

9 Mr. Roche?

10 MR. ROCHE: That is disputed, Your Honor. And if you'd
11 like me to address that now, I certainly can.

12 THE COURT: Just briefly the basis of your -- almost if
13 we were having a trial and you said "objection,
14 hearsay," that kind of quick.

15 MR. ROCHE: Sure. The three very quick bases. The
16 first is there's a sealing order in that case. There
17 were other parties involved in that case, and the
18 sealing order in that case lays out the steps that must
19 be followed if you want to unseal that file, and those
20 steps haven't been followed.

21 Secondly, that case was settled, and so it cannot
22 be used as *res judicata* in this case. It doesn't have
23 any precedential value. And more fundamentally, the --
24 it's a different trust, different trustees, different
25 issues; so it doesn't have any bearing on this case in

1 the first place.

2 All that said, if the Court wants to take a look at
3 that file, I certainly have no problem with that.

4 MR. WELK: May I respond, Your Honor?

5 THE COURT: Yes.

6 MR. WELK: Your Honor, under 19-10-4 if a party makes a
7 request for judicial notice and supplied the necessary
8 information, I believe it's mandatory that the Court
9 take judicial notice of that. This motion was filed
10 after allegations in the moving papers by the Trustees
11 attempting to impugn the motives of the Petitioners, and
12 to say that they had some ulterior motive to change the
13 Trust, to want to be involved. This file, which Judge
14 Tiede wrote an extensive decision on, does involve some
15 of the people whose conduct is at issue in this case.
16 And so we are not offering it for the purpose of *res*
17 *judicata*; but we're offering it to demonstrate the
18 motives and also to demonstrate what another court with
19 some of the same people in front of them in another
20 trust looked at the duties and responsibilities that are
21 also in issue in this case in some regard. So we
22 believe that, Your Honor, that the Court must take
23 judicial notice of it. We don't need to have it
24 accessible to the other file; but the Court obviously
25 can take judicial notice of it and read it and review

1 it; and we believe it ought to be part of the appellate
2 record.

3 THE COURT: I'll give you a little more time, Mr. Roche.
4 Anything else beyond that?

5 MR. ROCHE: I don't have anything else, Your Honor.

6 THE COURT: Well, here's my view of it. And it's along,
7 I guess, a theme that I've seen in the submissions by
8 the parties. (Moving microphone) Forgive me if I've
9 got that too close. And that is whether and to what
10 extent is motivating people to, who are involved and
11 connected to this case, to do or not do things. I
12 wonder to what extent divining those subjective motives
13 is helpful in deciding the issues that are currently
14 before the Court. It may well be that those motivations
15 don't play any role, or certainly not a significant
16 role, in determining what I ultimately have to determine
17 as far as legal issues in this case. We sometimes feel
18 as though juries may have a difficulty, to varying
19 degrees, compartmentalizing information that they
20 receive. Generally, though, the appellate courts,
21 including our Supreme Court, recognizes that a trial
22 court does have the ability to compartmentalize
23 information, treat it for purpose that it can be
24 lawfully used by and not treat it for a broader, more
25 improper purpose.

1 In this case my view is that this decision by Judge
2 Tiede, which I've not read, is being tendered, for lack
3 of a better word, as a rebuttal to the allegation that
4 Mark or Paul Schwan are motivated by something that's
5 nefarious. My decision is that I'll pull that earlier
6 decision by Judge Tiede. I'll look at it. I won't
7 accord it any preclusive effect.

8 And Mr. Roche, you mentioned something about
9 unsealing. Is the unsealing procedure one that binds
10 the parties or purports to bind the Court?

11 MR. ROCHE: I think it's a court order by Judge Tiede.
12 So -- and my concern is not that you would see it. It's
13 that if there were other parties to that prior
14 litigation and it was to be disseminated beyond the
15 Court and counsel for the Trustees and the Petitioners,
16 ie. to these folks sitting on the right side of the
17 room, would that be violative of any of the rights of
18 the other parties to that case who had that sealing
19 order entered?

20 THE COURT: Have you seen it?

21 MR. ROCHE: I have seen it, yes.

22 THE COURT: Mr. Welk obviously has as well. My
23 inclination is that I will review it in the absence of
24 an objection from anyone else. I'll essentially review
25 it in camera. I'll seal it and make it part of the

1 record. And depending upon what happens at the end of
2 this hearing, if I take matters under advisement, issue
3 a written decision, I'll be very transparent with how
4 I've treated that earlier decision. As I say, I'm not
5 seeing this as something that is being offered for an
6 argument that certain issues are precluded or anything
7 like that. It is, to my mind, of the nature of
8 rebuttal -- and that may not be fair, Mr. Welk, but
9 that's kind of what I'm seeing it as.

10 MR. HALLEM: Your Honor, for the record, the Attorney
11 General's Office has no objection to what you're
12 proposing.

13 THE COURT: Thank you very much, Mr. Hallem.

14 Ms. Bollweg or Mr. Gosch, any objection?

15 MS. BOLLWEG: No objection, Your Honor.

16 MR. GOSCH: I'm not going to object, but I find it
17 difficult to object because I have no clue what I'm
18 objecting to.

19 THE COURT: Understood, Mr. Gosch.

20 There's one other thing that I want to talk about
21 before I get into the motions, the dispositive motions.
22 That is the motion that was filed earlier today by
23 Mr. Roche seeking to strike Professor Langbein's
24 Affidavit. It is, it seems to me, not timely for
25 consideration at this hearing; but I want to hear from

1 Mr. Welk concerning your position.

2 MR. WELK: Mr. Shepard will address this motion, Your
3 Honor.

4 THE COURT: Thank you, Mr. Shepard. Forgive me. I
5 didn't mean to overlook you.

6 MR. SHEPARD: Thank you, Your Honor. Very briefly,
7 given the fact that this is a bench trial at least and
8 not before a jury, I think it's appropriate that -- not
9 appropriate for you to be concerned with excluding the
10 affidavit. Substantively, the affidavit is not being
11 offered to instruct the Court on what South Dakota law
12 says or doesn't say. Professor Langbein has basically
13 laid out his opinion regarding fiduciary standards of
14 care that would apply to fiduciaries in this case based
15 on custom and practice. He provides training and
16 instruction to fiduciaries in a variety of contexts.
17 And basically what he has laid out is, you know -- are
18 issues of standards of care. So for that -- that
19 principally is the basis for opposing the motion. And
20 not to beat a dead horse, but he was a witness cited in
21 Judge Tiede's opinion with approval.

22 THE COURT: Mr. Shepard, given the fact that you've ably
23 responded to that motion, am I to believe that you're
24 waiving any objection concerning untimeliness?

25 MR. SHEPARD: I think we've stated our position, Your

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Honor.

THE COURT: Understood.

Mr. Roche, anything further?

MR. ROCHE: I don't have anything further than what was in our papers except to note that the affidavit was served, I believe, on Wednesday, and our motion was filed on Friday.

THE COURT: I'm going to take that motion under advisement at this point. I'll think further about it. I thought about it this morning, I guess, after I saw it, and I don't feel as though I am in a position to rule on it just yet. And I'm more interested in hearing the parties' thoughts about the Motion to Dismiss and Motion for Judgment on things. I see them as being different.

I see -- Mr. Roche, I want to hear from you on them.

I see the Motion to Dismiss as being -- well, now one that also involves mootness, I suppose. But initially was one that was brought on the basis of an argument that there was no standing. And the standing that I'm talking about here, to be clear, at least in my mind -- you can tell me if you think I'm right or wrong -- the standing that we're talking about here is not what I would call, oh, in the federal constitutional

1 center article three type standing, an injury in fact
2 standing. This seems to be a more statutory standing.
3 Are these two individuals able to maintain this kind of
4 an action? So nevertheless, there is that sense of
5 whether they're proper or appropriate parties to bring
6 and seek this relief. So I see that as being just
7 disability issue. Add to that now the more recent basis
8 of mootness, which also obviously impacts your
9 disability and would go to the dismissal part of your
10 submissions.

11 Then I see beyond that the argument that,
12 essentially, under principles of trust governance, only
13 the Trust Succession Committee can, by majority vote,
14 require an accounting as being an argument that goes to
15 the merits, sort of your judgment on the pleadings type
16 argument. I also see as a merits argument the argument
17 that the Trustees' interpretation of the Trust is
18 controlling and dispositive upon everybody here.

19 So I see those. I've got questions for you,
20 though. But I did want to go ahead. And since you're
21 the moving party and those are preliminary issues before
22 we get to the merits of Mark and Paul Schwan's Petition,
23 I want to go ahead and hear from you, please.

24 MR. ROCHE: Thank you, Your Honor. And as far as
25 preliminary or threshold issues, I think you're right

1 that we have our original Motion to Dismiss/Motion for
2 Judgment on the Pleadings; but we also have the more
3 recent joint Petition that I think also presents some
4 threshold issues for the Court's determination. So we
5 can take those in whatever order the Court wants to
6 address them.

7 THE COURT: Let's talk about, if you will, statutory
8 standing first.

9 MR. ROCHE: Sure. The Court is correct that it is a
10 question of statutory standing, and that's because our
11 trust code defines the classes of people who are able to
12 seek court supervision of a trust, which is not an
13 inconsequential thing because once a trust is
14 court-supervised, it imposes certain obligations on the
15 trustees going forward. So I think on this question of
16 standing, as we've characterized it, there's three basic
17 issues for the Court to resolve.

18 The first question is whether the Schwan brothers
19 qualify as beneficiaries as that's defined in SDCL
20 21-22-1.

21 THE COURT: As amended.

22 MR. ROCHE: As amended. That's correct. And that was
23 -- it was amended after the Petition was filed, but the
24 Petition acted as if it was based on the amended
25 statute; so that's where I think we're all proceeding by

1 agreement on the amended statute.

2 THE COURT: That was my view. I didn't mean to suggest
3 that was the right answer; but that was my view, that it
4 seems to me the parties are acknowledging that not only
5 the amendments to 21-22-9 are advocated here, but also
6 the definitional changes in 21-22-1.

7 MR. ROCHE: Right. And we've accepted that we're
8 proceeding on the amended statute.

9 So the statute then says that you must have an
10 interest in the trust to be -- to qualify as a
11 beneficiary. Our view, as we've laid out in our papers,
12 is that the interest referred to, there can't just be
13 any self-declared interest because, if that's true, then
14 you don't have any limit on the class of persons who can
15 petition for court supervision. The Supreme Court tells
16 us, and we see this in the other Schwan Great-Great
17 Grandchildren's Trust case and any other number of
18 cases, that you have to look at the Trust Instrument to
19 find the Settlor's intent, and that includes when you're
20 trying to figure out who the Beneficiaries are. Here
21 there's no mystery who the Beneficiaries are. They're
22 listed out very clearly by name in the Trust Instrument.
23 We know who they are. They're all here and represented.
24 And frankly, they don't want the Trust under court
25 supervision. It doesn't name either of the Schwan

1 brothers as a Beneficiary of the Trust. They have no
2 right to any distribution from this Trust under any
3 circumstance.

4 THE COURT: I have a question for -- and by the way, I
5 should have mentioned this at the outset. I'm going to
6 ask some questions today. I don't mean to intimate in
7 any way, shape, or form that I've formed decisions or
8 that what I'm suggesting perhaps by way of a
9 hypothetical or hard question is the way I'm thinking or
10 I'm going to rule. And I apologize in advance for
11 interrupting you, but this is helpful to me.

12 My question is this. Isn't the problem with your
13 argument that you're supplanting a trust document, that
14 definition of beneficiary, for a statutory remedy which
15 has its own definition of beneficiary that is broader
16 than the one that you're utilizing in your construction
17 of this Trust Instrument?

18 MR. ROCHE: I don't think it is, Your Honor, because the
19 term "beneficiary," as it's defined there and talks
20 about an interest in the trust, when you read that
21 phrase "interest in the trust," you need to realize that
22 the term "interest" is a term of art. And what it means
23 is that you have the right to receive distributions
24 therefrom. And you see that the only other place that
25 "interest in a trust" is defined in the statutes is

1 55-3-31. And there the term "interest in a trust" is
2 defined to only encompass persons entitled to income or
3 principal from the trust estate.

4 THE COURT: Isn't that a notice provision of the Uniform
5 Trust Act that doesn't really impact a substantive -- or
6 doesn't really have a substantive connotation beyond
7 that?

8 MR. ROCHE: I don't think so. That is where it's found;
9 you're correct. But as far as reflecting the
10 legislature's intent on what an interest in a trust
11 entails, I think that's the only indication we have from
12 anywhere in the code as to what the legislature believes
13 an interest in a trust encompasses.

14 THE COURT: Doesn't the language of "beneficiary" under
15 21-22-1(1) seem to be at odds from the definition that
16 you just gave me, which is right to receive a
17 distribution, because the beneficiary claim -- excuse
18 me, "includes any person in any manner interested in the
19 trust" -- okay, we've talked about that -- "including a
20 creditor or a claimant with any rights or claimed rights
21 against the trust estate." So would you consider, for
22 instance, a creditor to be someone who has a right to
23 receive a distribution?

24 MR. ROCHE: They may under certain circumstances if it
25 was the right kind of trust and they had the right kind

1 of judgment that would entitle them to levy against the
2 distribution.

3 THE COURT: This is an expansive definition though. It
4 doesn't limit, in any way, the definition of beneficiary
5 to the right kind of trust or the right kind of claim.
6 It says "any person in any manner." Very underscripted,
7 very broad language by the legislature here in defining
8 this.

9 MR. ROCHE: But then it says "interested in the trust."
10 And again, the term of art is "interested." And what
11 that term means is someone who might have a right to a
12 distribution out of a trust. And I think that's borne
13 out by the language that the Court just quoted because
14 it says "including a creditor or claimant," which again,
15 is consistent with the notion that interest is talking
16 about a distributional interest.

17 THE COURT: In any event, even if you see congruity
18 between the statutory definition of "beneficiary" and
19 the Trust Instrument's definition of "beneficiary,"
20 would you agree that -- or not, that the correct
21 definition to apply, and maybe it's a distinction
22 without a difference under your view, is the statutory
23 definition if we're talking about a statutory remedy of
24 court supervision?

25 MR. ROCHE: That is the correct interpretation to use.

1 But I think you also need to read that in harmony with
2 the Trust Instrument where the Settlor -- and again,
3 that's the primary thing we're here to do is carry out
4 the Settlor's intent -- that's where he listed what he
5 thought the Beneficiaries of the Trust were.

6 THE COURT: So you say the reference to -- correct me if
7 I'm wrong, but under your argument then you fold in the
8 Trust Instrument here because that has a direct bearing
9 on the text "interested in the trust."

10 MR. ROCHE: Correct.

11 THE COURT: So your argument is they're not --
12 beneficiaries cannot bring a cognizable claim for court
13 supervision because they don't have that status.

14 MR. ROCHE: The Petitioners cannot bring a petition for
15 court supervision because they do not have beneficiary
16 status.

17 THE COURT: Under that argument, and to the extent that
18 we're talking only about beneficiaries, the entire Trust
19 Succession Committee, then, could not bring a petition
20 for court supervision because none of them would be
21 beneficiaries unless they're named that. But let's say
22 they're not, and let's say none of the Trust Succession
23 Committee members are true beneficiaries under the
24 instrument. So you're telling me that they don't have
25 sufficient interest -- even if they could all vote and

1 get together and have a majority view, they could not
2 seek court supervision under the terms of Chapter 21-22
3 as beneficiaries?

4 MR. ROCHE: Not as beneficiaries. Even on a seven to
5 zero vote, the Trustee Succession Committee does not
6 qualify as a beneficiary. They would qualify as a
7 majority. If the majority of the TSC were to bring such
8 a petition, they would qualify as a fiduciary as defined
9 by the statute, but they are not a beneficiary.

10 THE COURT: I'm ready to talk about fiduciary if you
11 are.

12 MR. ROCHE: That's where I was next is whether the --
13 the one we're talking about here, of course, under the
14 listed items after fiduciary is a trust committee.
15 Because I think everyone agrees that the Petitioners are
16 neither of the other things, and the only thing that is
17 potentially up for debate is whether two individual
18 members of a trust committee qualify as a trust
19 committee for purposes of the statute. Here the Court
20 knows, from our papers, that five of the seven members
21 of the TSC are opposed to court supervision. So if you
22 simply do black-letter, statutory application, the
23 Petitioners here have no power to act contrary to the
24 will of the commission -- committee of which they're a
25 part. I think that would be a bizarre result, Your

1 Honor. The statute says very clearly that it must be a
2 trust committee. And the Trust Instrument itself says
3 that the TSC acts through a majority of its members and
4 gives zero power to any individual TSC member acting in
5 their individual capacity.

6 THE COURT: What's a trust protector?

7 MR. ROCHE: A trust protector is something that was --
8 is a relatively new concept that wasn't -- it originated
9 in other countries and wasn't even around in the United
10 States when this particular Trust was executed. And it
11 certainly didn't become part of our statutes until long
12 after this Trust was executed by the Settlor.

13 THE COURT: What is one though?

14 MR. ROCHE: It's somebody who can act in -- and I'm
15 probably going to butcher this a little bit, but can act
16 in either a fiduciary or a nonfiduciary capacity as
17 named and outlined in the Trust Instruments to carry out
18 certain -- I don't know if they would be characterized
19 as administrative or distributional activities as
20 directed by the Settlor.

21 THE COURT: So are you telling me then your view a trust
22 protector has to be somebody that's designated in some
23 type of role in the Trust Instrument?

24 MR. ROCHE: They have to be designated as a trust
25 protector in the Trust Instrument.

1 THE COURT: They can't just succeed to that rank because
2 of circumstances?

3 MR. ROCHE: Not under our interpretation of the
4 statutes, no.

5 THE COURT: Are there cases that address that? You
6 mentioned it was from a concept that was maybe borrowed
7 from other areas of the world. Are there cases that
8 address what a trust protector is?

9 MR. ROCHE: There are. And if I could find it here, I
10 believe it's defined under the code; but I,
11 unfortunately -- if I could look through my index, I
12 think I could find it, Your Honor.

13 THE COURT: Go ahead.

14 MR. ROCHE: I didn't bring my index.

15 THE COURT: Well, I did see it. It's in there.

16 MR. ROCHE: I know it's in there, but I don't have the
17 cite right in front of me, Your Honor.

18 MR. SHEPARD: Your Honor, I think it's South Dakota
19 Codified Laws 55-1B-1(2). It's the definition of trust
20 protector. And there is a further provision in 55-1B-6
21 that talks about the powers and discretions of trust
22 protectors.

23 THE COURT: Thank you, Mr. Shepard.

24 I apologize for taking out of your argument,
25 Mr. Roche.

1 So they're not -- so are you telling me that the
2 Schwan brothers are not a trust committee because they
3 can't act for the committee; they're not also -- they
4 occupy none of the other designations of fiduciary?

5 MR. ROCHE: That's correct, Your Honor.

6 THE COURT: Intuitively, it seems unusual -- and I'm not
7 suggesting that I am at liberty to disregard the
8 legislature's definition. I'm not, of course. But
9 intuitively it seems unusual that members of a committee
10 that are charged with hiring and firing the trustees of
11 a trust, who must themselves act as fiduciaries, are
12 not, as members of that committee, charged with hiring
13 or firing, also fiduciaries. Does that make sense?

14 MR. ROCHE: So your question is whether they are
15 fiduciaries?

16 THE COURT: Just sort of a statement, I guess, if you
17 wanted to react to it. It seems intuitively
18 inconsistent that a group of individuals would not be
19 fiduciaries when their role, with respect to the trust,
20 is to select fiduciaries, select trustees. In other
21 words, if they selected the wrong person or if they
22 weren't diligent in selecting a trustee or removing a
23 trustee, that may, in the ordinary course of events,
24 possibly should be removed, you're saying they would not
25 be fiduciaries.

1 MR. ROCHE: Well, what I'm saying is I don't think the
2 Court needs to make a determination, as a matter of a
3 general proposition, as to whether or not TSC members
4 owe fiduciary duties. And that's because you have the
5 statutory definition of "fiduciary" right in front of
6 you, which requires there to be a trust committee who is
7 coming in to petition for court supervision. So it may
8 be in the abstract that someone who's on a TSC owes a
9 fiduciary duty, but that doesn't mean they fall within
10 the defined category of fiduciaries who may come to
11 court and petition for court supervision. So the
12 settlor might have envisioned that there could be
13 conflict years after his death among the members of the
14 TSC, and that's why he said that they only act through a
15 majority of their membership. That's exactly what you
16 have here, and that dovetails perfectly with the
17 statute, which requires that if a trust committee is
18 going to come in and force the trust into court
19 supervision, it must be the majority of the members.
20 And two of the minority members cannot come in and
21 contravene the will of the majority of the committee on
22 which they serve.

23 THE COURT: I understand your argument. Are you --
24 seems to me you're saying that as between -- maybe just
25 in the circumstances of this case you can't -- or at

1 least these two petitioners aren't, if I'm hearing you
2 right, occupy both roles at the same time. Couldn't
3 you, though? Could you be a trust protector and a
4 member of the trust committee? One is not necessarily
5 exclusive of the other; is it?

6 MR. ROCHE: Perhaps. But in this case they're not named
7 as trust protectors because that concept wasn't around
8 when the Trust was executed.

9 THE COURT: Okay. I think I understand your argument.
10 I just wanted to --

11 MR. ROCHE: And if you look at 55-1B-1(2), it says here,
12 quote, "Any person whose appointment as protector is
13 provided for in the instrument." And we simply don't
14 have that here; so they don't qualify as trust
15 protectors under the statute.

16 THE COURT: Okay. So those are your status arguments on
17 your Motion to Dismiss. They're just not proper
18 parties.

19 What else am I missing on that argument?

20 MR. ROCHE: Well, and maybe this is a more proper
21 rebuttal argument, but I'll cover it now. The third
22 thing that the Petitioners have raised is that they
23 realize that there's a problem with the language of the
24 statute because it only gives standing to a trust
25 committee; and so that's why we have this argument that,

1 well, three of the seven members are conflicted out, and
2 they don't get to vote because they're also trustees.
3 But that's really, frankly, contrary to the plain
4 language of the Trust Instrument which has a sentence in
5 there which expressly says -- this will be on page nine,
6 Your Honor -- that, quote, "The Trustee Succession
7 Committee may designate one or more of its own members
8 as Trustee," end quote. So when Marvin Schwan set the
9 Trust up, he allowed for persons to serve as both
10 Trustees and as members of the TSC. So this idea that
11 it's a two-to-two tie because the votes of the three
12 Trustees should be disregarded is, frankly, contrary to
13 the Trust Instrument, and it's contrary to South Dakota
14 law that says when a settlor sets something up, and if
15 he sets it up in a way that creates potential conflicts,
16 then no one can complain about those potential
17 conflicts. So that would be the other point I have on
18 the quote-unquote "statutory standing arguments."

19 THE COURT: Okay. I hate to chop it up too much, but
20 there's a lot of moving parts here.

21 I'm going to hear -- I'm going to compartmentalize,
22 to use the term again, some of the arguments.

23 Mr. Shepard, are you going to respond to this?

24 MR. SHEPARD: I am going to respond to this issue, Your
25 Honor, if that's okay.

1 THE COURT: Go ahead, please.

2 Then after that -- we'll take mootness after that,
3 Mr. Roche.

4 MR. SHEPARD: Thanks. I think you've identified, very
5 specifically, the issue on statutory standing. The
6 standing in this case is conferred by statute. And the
7 term "beneficiary," as defined in Section 21-22-1,
8 basically -- well, it says that "a beneficiary, as used
9 in this chapter, is any person in any manner interested
10 in the trust." That definition does not require a
11 financial interest, does not say any person with a
12 financial interest. It's any person in any manner
13 interested in the trust.

14 I think the only question then for the Court is
15 whether or not Mark and Paul Schwan, as individuals who
16 are members of a committee charged with very specific
17 responsibilities under the Trust Instrument, are persons
18 who are in any manner interested in the Trust. And I
19 think the answer to that is clearly yes. And I think
20 that is the end of the standing issue. I think they, by
21 virtue of that role as members of the TSC, are persons
22 in any manner interested in the Trust. And no vote or
23 further action on the part of the TSC is necessary to
24 basically make them persons with an interest in the
25 Trust.

1 THE COURT: Okay. Are you disagreeing with the argument
2 concerning fiduciary status? In other words, do you
3 think the Schwans are fiduciaries?

4 MR. SHEPARD: Well, I do. I think it isn't necessary
5 for the Court to have reached that issue because I think
6 the answer is clear that they're beneficiaries as
7 defined by the statute; but I think they also qualify as
8 fiduciaries either as -- because they are -- the
9 definition of "fiduciary" includes a trust committee.
10 And I think they qualify in -- as trust protectors. The
11 statute in South Dakota on trust protectors I believe
12 was enacted after the formation of the Foundation Trust
13 Document; so they aren't called trust protectors in the
14 document itself. But the definition or the description
15 in South Dakota statutes about the powers and discretion
16 of trust protectors includes a long list, including
17 powers to remove and appoint a trustee, and other issues
18 of that kind that are clearly part of the TSC members'
19 powers as well. So I think they fall under that
20 definition.

21 And to the issue of whether a majority of the -- a
22 majority vote of the Trust committee or of the TSC is
23 necessary to qualify Mark and Paul as a trust committee,
24 I think -- this is where I think there's some very
25 helpful analysis in Professor Langbein's Affidavit. And

1 essentially -- as well as Judge Tiede's decision -- that
2 members of a committee are regarded as co-fiduciaries
3 that have individual responsibilities to perform the --
4 in good faith the tasks that have been assigned to that
5 committee and to ensure that their fellow committee
6 members are performing their responsibilities that
7 they've been charged with. So I think it's impossible
8 for a committee to act without the individuals on the
9 committee exercising their fiduciary responsibilities.
10 THE COURT: Doesn't that create a problem, or isn't
11 there a problem in that argument, though, Mr. Shepard?
12 Because it doesn't say members of the trust committee.
13 It says the trust committee. And as I said earlier,
14 under what I might think of as principles of trust
15 governance, it seems as though the committee, as a body,
16 could act only through majority vote. So doesn't that
17 create a problem in your argument?
18 MR. SHEPARD: Well, as I say, I think the membership on
19 a committee charges those individuals with
20 responsibilities, fiduciary responsibilities to act.
21 And I think the definition in Section 21-22-1(3)
22 suggests that the reference to trust committee may
23 include individual members as well. It talks about
24 fiduciary is a trustee, custodian, trust advisor, trust
25 committee, regardless of whether such person is acting

1 in a fiduciary or nonfiduciary capacity. There seems to
2 be, at least in the definition, an indication that
3 persons may be -- that the reference includes
4 individuals not just the committee by majority vote.
5 THE COURT: Could a member -- could a person ever be
6 designated as a trust protector even though that concept
7 was not known or utilized at the time the trust, the
8 settlor instituted, settled the trust -- could you
9 ever -- could there ever -- is there authority, by the
10 way, is the better way to ask that. Is there authority
11 to allow and permit that more contemporary status to be
12 conferred upon somebody who's named in a trust document
13 that's decades' old?

14 MR. SHEPARD: Well, I think the responsibilities
15 assigned to the TSC are very similar to those of a trust
16 protector. So by the duties assigned to the members of
17 the TSC, although they are not called trust protectors
18 in the document, I think the responsibilities that they
19 have are similar in nature to what the statute now
20 defines as a trust protector.

21 THE COURT: Okay.

22 MR. SHEPARD: But as I say, I think the easiest answer
23 to the standing question is that they are clearly
24 beneficiaries, which is why I think some of the
25 discussion about fiduciaries, you know, need not even be

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reached.

THE COURT: Understood. Thank you.

Mr. Roche, I'll give you the last chance. But before I do that, I want to make sure that I'm not excluding any other party who wants to weigh in.

Ms. Bollweg?

MS. BOLLWEG: No, thank you.

THE COURT: Mr. Gosch?

MR. GOSCH: Nothing further, Your Honor.

THE COURT: Mr. Hallem?

MR. HALLEM: Your Honor, the only thing I'd like to point out is that there's two defined terms, "beneficiary" and "fiduciary." And if you interpret beneficiary the way it's being proposed by Petitioners, that consumes the term of "fiduciary." You have to read the two terms in harmony. And so you have -- the legislature intended two entities that can pursue actions. One is a fiduciary and one is a beneficiary. The way you're being asked to construe it, there's no reason to have fiduciary language in there because everybody is a beneficiary. So that's inconsistent with statutory construction, Your Honor. So to me if they have standing, it is as a fiduciary because otherwise everybody is a beneficiary. There'd be no limitation in a charitable trust situation.

1 THE COURT: Well, I thought about that. But you know --
2 because Mr. Roche made that argument, essentially.
3 Some -- seemingly anybody, potentially, could become an
4 interested beneficiary or otherwise, and that was sort
5 of the argument. But do I really need to reach that
6 issue here under these facts because these two men are
7 not just folks who have, you know, a passing interest?
8 They are, no question, named to roles under this Trust
9 document.

10 MR. HALLEM: Mine was the general assertion, Your Honor,
11 as to what constitutes beneficiary. And I think, you
12 know, traditionally a beneficiary is somebody that
13 receives some benefit from a trust; and a fiduciary is
14 whose duty it is to -- obligation to the trust. And
15 those are two unique circumstances. I mean, benefit is
16 to gain benefit from the trust. And so creditors are
17 gaining benefit from the trust. The named beneficiaries
18 are. And a charitable trust situation, the public has
19 an interest, which the Attorney General's Office
20 represents. So those would all be construed
21 traditionally as beneficiaries. Fiduciaries would be
22 those that owe some responsibility for the trust and has
23 some obligation in enforcement. And all mine is, Your
24 Honor, is I'm not taking a position on the narrow
25 arguments, just the broad one, is that those two terms

1 mean something different. And if you -- if the argument
2 removes the distinction between fiduciary and
3 beneficiary because every fiduciary would have an
4 interest in the trust if you look at interest meaning
5 some interest in any aspect of the trust document. So
6 it's a statutory construction issue, Your Honor, and
7 it's a broader one because, at least from our office, we
8 need to deal with this in the future in any decision the
9 Court would render that would give general principles on
10 how it would go beyond this case itself on it.

11 THE COURT: I understand your argument. The
12 legislature, though, recently, by virtue of what -- by
13 virtue of the way that it amended these terms, did
14 evidence a clear intent to broaden them; in other words,
15 to broaden the class of individuals who could seek court
16 supervision of a trust. As a general matter, that seems
17 correct.

18 MR. HALLEM: Well, Your Honor, as it relates to the
19 trust protector, they haven't done that, at least for
20 the removal of trustees. If you look at 55-3-20.1 that
21 talks about removal of trustees, it does not include the
22 term "trust protector." And the legislature this year,
23 there was a bill that got introduced, that was removed
24 by the sponsor, that would have included trust protector
25 there. So when you're looking at a lot of these terms

1 on it, the legislature hasn't been consistent on it.
2 And if you're looking for legislative guidance on at
3 least an area of trust protector on it, it wouldn't be
4 going to some of the core areas that the trust committee
5 here has authority under the Trust, and that is to
6 remove Trustees.

7 THE COURT: Although that relief is not being sought
8 right here right now.

9 MR. HALLEM: Right. Again, it's just a matter of if
10 you're looking at the scope and what the legislature
11 intended to do and what they didn't. It's hard to reach
12 any conclusions beyond the general language. Again, our
13 interest is the broader interest trying to deal with
14 these issues in the future, especially the charitable
15 trust context.

16 THE COURT: Sounds fine. Thank you.

17 MR. HALLEM: Thank you, Your Honor.

18 THE COURT: Final thoughts. And just roll into your
19 next argument if you want.

20 MR. ROCHE: Sure. And because we've been focusing on
21 beneficiary, I do want to point out to the Court that
22 when the statutes were amended in the last session, the
23 term "beneficiary" was not. That's been the same for a
24 number of years. So that particular definition has not
25 been expanded. And again, I guess it would boil down,

1 to me, to the good old common sense argument, Your
2 Honor. If you asked a hundred trust lawyers, "Are the
3 Schwans beneficiaries of this Trust?", they would tell
4 you to a person, no, they're not because they're not
5 going to get any distributional effects from the Trust
6 in the future.

7 THE COURT: Don't put Professor Langbein in your
8 line-up.

9 MR. ROCHE: So that's kind of how -- that's how I would
10 conclude and just simply rely on our brief on the
11 remainder of the arguments regarding whether the Schwans
12 are fiduciaries.

13 THE COURT: Understood. Thank you.

14 Now, I'm interested to hear your mootness argument.
15 Because it seems as though in the interim, after the
16 late August hearing and as a result of holding this
17 matter in abeyance for a period of time, it was -- there
18 was disclosure of information from the Trustees to the
19 Attorney General's Office and the beneficiaries. And
20 so, if I'm reading things correctly, you are formulating
21 from that an argument that essentially this is maybe not
22 moot. Am I reading that right?

23 MR. ROCHE: I don't know that it's a mootness point,
24 Your Honor. That's part of it, but it's broader --

25 THE COURT: Go ahead, please.

1 MR. ROCHE: -- in the sense that when you have an
2 agreement by all of the Trustees, all of the
3 beneficiaries and the Attorney General's Office that
4 they don't want the Trust to be under court supervision
5 and they have agreed to ratify the actions of the
6 Trustees, then that is, period, end of story, and
7 there's no precedent for allowing the Trust to be forced
8 under court supervision, into court supervision, based
9 solely on the desires of two minority members of one of
10 the trust committees. And I would point the Court to
11 SDCL 55-4-31 which expressly says that the beneficiaries
12 of the trust can ratify the actions of the trustees.
13 That's exactly what the Beneficiaries have done here.
14 They don't want to see any more the Trust's assets or
15 their own assets wasted on expensive, time-consuming
16 litigation. And so they've made a decision,
17 represented, all, by sophisticated counsel, that they
18 want the matter to be done. And under the statutes the
19 Court is bound to respect the decision that the
20 Beneficiaries have reached. And again, the Trust is for
21 their benefit. It's not for the benefit of Mark and
22 Paul Schwan.

23 THE COURT: We're slightly out of order. I'm going to
24 have Mr. Shepard or Mr. Welk go last. Mr. Welk, I'm
25 going to hear, first, from the Beneficiaries.

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Ms. Bollweg or Mr. Gosch, if you want to add to that.

MS. BOLLWEG: Sure. Yes, Your Honor.

Just as a backdrop, since you haven't really heard from the Beneficiaries yet, having reviewed the information that was provided by the Trustees to the Beneficiaries, four of whom I represent -- Ken represents one and Sherri and Jim represent the other two -- we are convinced that there was no bad faith here by the Trustees. That they did not personally profit from any of these investments. And having been through these documents and, you know, talked amongst ourselves about it, talked with the Attorney General's Office about it, we are comfortable that the existing Trustees are moving forward in a proper manner. And we are actually also concerned about disruption in the operation of the Trust and the Foundation moving forward because we are concerned that qualified trustees who would be people who would come on in the future here, there's some people who are going to be retiring. And having the Trust involved in massive litigation like this is a very big deterrent, from the Beneficiary standpoint, of additional people thinking about coming forward to act as a Trustee or a Trustee Succession Committee. And I'm telling you all these things in

1 terms of to give you some background as to why the
2 Beneficiaries are here asking that the Court dismiss the
3 Petition, have ratified the Trustees' conduct. And we
4 see no benefit coming to the Trust, even if there was a
5 breach of fiduciary duty back when these investments
6 were made, when decisions were made about whether to
7 continue providing capital for these investments at the
8 particular time that they did -- even if there was some
9 particular type of breach of fiduciary duty that
10 occurred --

11 (Noise on the phone.)

12 THE COURT: Do we still have everybody on the phone? Do
13 we have anybody on the phone?

14 MS. STRAND: I'm still on the phone. This is Sherri
15 Strand.

16 MR. SAEKS: Yes. Saeks is on the phone.

17 THE COURT: Okay. We may have lost --

18 MS. BOLLWEG: Mr. Dankenbring?

19 It looks like we've lost Jim.

20 THE COURT: I think he's got the number though; doesn't
21 he? Hopefully he can rejoin us.

22 MS. BOLLWEG: Yeah. I think that's true.

23 THE COURT: So you're saying, Ms. Bollweg -- forgive me
24 for interrupting. But you're saying that essentially
25 even if there were, in a theoretical sense, a breach of

1 the fiduciary duty somewhere along the way, the decision
2 of your clients, as Beneficiaries, is to effectively
3 ratify that, come here to court and seek dismissal of
4 the petition.

5 MS. BOLLWEG: That's right, Your Honor. We don't feel
6 like there's any benefit to the Trust, even if there was
7 a breach of fiduciary duty claim, to try to bring that.

8 (Voice came over the phone saying Jim Dankenbring
9 is joining the meeting.)

10 MS. BOLLWEG: Welcome back, Jim.

11 THE COURT: Glad to have you back on board.

12 MR. DANKENBRING: I'm not sure what happened there.

13 Sorry, Your Honor.

14 THE COURT: No problem.

15 MS. BOLLWEG: So in any event, Your Honor, that's my
16 client's position. We're comfortable, especially with
17 the newer Trustees, Kent Raabe and Mr. Fahning, we
18 believe that they're very experienced business people,
19 and they have done a very good job of trying to minimize
20 the losses that occurred as a result of some very early
21 investment decisions. And they have a new investment
22 policy in place, and we believe that they're following
23 that very well.

24 We will be looking at replacing three Trustees by
25 the end of 2015 if our settlement agreement is put in

1 place, and we would be looking at replacing two of the
2 TSC members in that time period. And the Beneficiaries
3 believe that if all of this litigation is put behind us
4 that we are in a much better position to recruit
5 qualified, capable Trustees and TSC members who are not
6 going to be dissuaded from doing so by the threat of
7 ongoing litigation in this case.

8 THE COURT: Mr. Gosch. Thank you. Anything to add?

9 MR. GOSCH: Well, Your Honor, in reviewing all the
10 documents, it became clear to my client that we're
11 dealing all with good Christian gentlemen, and that
12 includes the Schwans, the folks who brought this action.
13 And we're not here to impugn anyone's motives. When Pam
14 said that they all acted in good faith, I believe that.
15 And as I review the records, I think they all thought
16 they were doing the right thing. There was no personal
17 benefit to any of them, that we could find, and we
18 didn't find any impure motive for them. And the things
19 that we wanted, like separation of the TSC from the
20 Trustees, is all a part of the agreement. Replacing
21 some of the old Trustees with someone who may have
22 better business experience, that's in place. An
23 investment policy that would prohibit mistakes that were
24 made in the past is in place. A conflicts policy that
25 will avoid conflicts like we've seen in the past is in

1 place. And we see nothing but a financial drain on the
2 Trust if this litigation goes forward. And that's not
3 in the interest of any of the Beneficiaries. So as you
4 can see in our Petition and in our Settlement Agreement,
5 we would be particularly pleased if the Court would
6 dismiss all of this and get the Trust back to putting
7 its feet on the ground and getting back to its original
8 purpose of benefiting the charities.

9 MS. BOLLWEG: And one other thing, Judge Salter, that I
10 forgot to mention is that, in reviewing the professor's
11 affidavit, it looks to me like one of the things that he
12 mentioned is that the Schwan brothers need to pursue
13 this if they could potentially be held liable, as a TSC
14 member, to a Beneficiary or to the Attorney General's
15 Office. And after that affidavit was proposed or
16 submitted to the record, I talked with the other
17 Beneficiaries' counsel. And we have all agreed -- all
18 of the Beneficiaries have agreed that if the Settlement
19 Agreement is adopted and this Petition is dismissed that
20 we would, likewise, release any TSC members in the same
21 manner as we have agreed to release the Trustees.

22 THE COURT: Understood.

23 Anything from the Attorney General's Office,
24 Mr. Hallem?

25 MR. HALLEM: Yes, Your Honor. I think one important

1 thing is the Attorney General's Office is the one who
2 initially proposed the settlement terms based upon our
3 review of the record. This was not generated by the
4 Trustees. It wasn't generated by the Beneficiaries. It
5 was generated by our office based upon our review of the
6 record as to how to remove things -- to move things
7 going forward. And we also sent proposals out to all
8 the parties, including Petitioners here, on it. So
9 everybody knew what we thought about it. And we truly
10 believe that settlement is the best way to deal with
11 this; that nothing is gained to go forward; and the
12 structural changes will rectify any of the issues that
13 will allow the TSC to operate unrestricted under the
14 terms in the Trust document. We found nothing, based
15 upon our review, that was criminally actionable or any
16 personal profit based upon conflict of interest by
17 individual Trustees. We viewed the issues with the
18 Trustees as the very beginning, initial investments in
19 dealing with asset allocation and the type of
20 investments they went into, which is the resorts. And
21 then also that they were committed to the construction
22 of those resorts and during that process did what we
23 consider things that a charitable fiduciary probably
24 shouldn't have done. But at least at this stage they
25 were done a decade ago, and there was nothing in bad

1 faith. It's just the benefit of 20/20 hindsight and a
2 whole lot of bad luck. You had the 2008 economic
3 turnaround that was disaster. You had a hurricane in
4 the Cayman Islands that was one of the resorts, and you
5 had a bad location. And you also had some bad
6 partnering. But together with a very unliquid
7 investment, all of those type of things are either
8 outside of the current Trustees' control or stuff that
9 was done in 1999 through 2001 when they made these
10 initial investments. And at least at this stage to go
11 back and say, "What are the reasons of these?", to do a
12 forensic audit, do all those types of things on it,
13 you're talking hundreds of thousands of dollars. And
14 again, to what end? If the fiduciaries, at that time
15 the initial Trustees, which were Mr. Burgdorf and
16 Mr. Schwan, that's Alfred Schwan -- Alfred Schwan is
17 dead. And under the terms of the settlement,
18 Mr. Burgdorf is going to be removed as a Trustee. So
19 any powers that the Trustee Succession Committee would
20 have would be removal of the Trustees that caused the
21 issues. They're being removed.

22 We thought there was some issues dealing with
23 simultaneous representation on the TSC and also as
24 Trustees; so we put together, as part of the settlement
25 document, a structure where you're going to have

1 separation that will allow truly independent TSC. And
2 under that they can perform their duties, and the
3 Trustees have to be accountable to them. Also, during
4 the process the Beneficiaries are provided more
5 information so that they can exercise their rights as
6 Beneficiaries under South Dakota law.

7 THE COURT: You mentioned that you'd proposed settlement
8 terms to the Schwan brothers. Did you also -- how did
9 that work? I mean, since we're all into this discussion
10 about this prospective contingent Settlement Agreement,
11 it's unusual, I suppose, that we're talking about that;
12 but I understand that the argument is essentially being
13 made to suggest that -- or that fact is being entered
14 into this record to suggest that there's really nothing
15 more by relief that could be realized here, a mootness
16 type argument. But I'm curious, as long as we're
17 talking about it, did the Schwan brothers have the
18 ability to get the same information that everybody else
19 got or did they have to sign a release or was it
20 contingent upon them releasing them before that?

21 MR. HALLEM: The Schwan brothers have not received the
22 information that the Attorney General's Office and
23 Beneficiaries have received. And in order for the
24 Beneficiaries and our office to receive it, we signed a
25 confidentiality agreement that limited our ability to

1 disclose information in there. And we've abided by the
2 confidentiality agreement. That agreement would not
3 have effect if we determined to pursue an action, but it
4 did prevent us from disclosing to any party, including
5 the Schwan brothers. So they have not looked at the
6 underlying documents that the Beneficiaries and we have.

7 THE COURT: Thousands of pages somebody said.

8 MR. HALLEM: I think that's a fair description, Your
9 Honor.

10 THE COURT: Okay.

11 Mr. Welk, I'm interested to hear your argument.

12 MR. WELK: Thank you, Your Honor, and counsel.

13 Your Honor, let's just step back for a minute.
14 We're dealing with a situation in which we know -- and
15 whether, and I hate to be this flippant, four, five, six
16 hundred million, pick your number at various times, of
17 losses that have occurred. This isn't a minor matter.
18 And this matter would have not been brought to the
19 attention of anybody but for our clients, who, by the
20 way, are not getting a nickel out of this. They are not
21 getting any distribution. Their sole function is to act
22 as members of the TSC. And what the agreement -- and
23 also to build upon what Mr. Hallem said, it was
24 inexplicable in this instance where the people who are
25 sitting on the committee that can vote to remove

1 trustees has on it three members of the committee, two
2 of which were some of the members of which actions were
3 the very issue in this case. So you have seven on there
4 that are deadlocked: Two Schwan, two others, and the
5 other three whose actions are at issue in this case. So
6 it's a very interesting dilemma when the Schwan brothers
7 bring to the Court's attention a 600-million-dollar
8 loss. Issues are raised as to what happened. And the
9 only people that have received it are the Beneficiaries
10 and the Attorney General. And the people that are on a
11 committee whose responsibilities, under the Trust
12 Instrument, are to remove trustees, to ask and have the
13 ability to ask for the doings regarding the
14 administration, have not been able to see the
15 information. I find this highly unusual, Your Honor,
16 that the people who have complained and that we couldn't
17 see it. No one offered us, subject to a
18 confidentiality. We weren't provided any opportunity to
19 see the documents. We asked for them. Mr. Saeks has
20 affidavits. We asked to see the confidentiality order.
21 We've seen nothing on a 600-million-dollar loss.

22 And this settlement, we believe, is ineffectual to
23 get to what we have requested in this court. We are not
24 coming into the court as Petitioners, Your Honor, asking
25 for money damages. There are specific questions that

1 are being asked by the Petitioners. They're requests
2 for instructions from the Court. This will not moot
3 those questions, Your Honor, that are being asked in the
4 Petition. And if this approval would be -- if you would
5 approve the settlement, there are a number of issues.
6 First of all, you will not have been consistent with the
7 Trust agreement that the TSC look at the doings of the
8 Trustees and their administration. The people that have
9 looked at this are some -- are the Beneficiaries and the
10 Attorney General's Office. The Instrument doesn't give
11 them the right to ask, under the Instrument itself --
12 they may have rights under trust law -- to look at the
13 doings and administration of the Trust. There were
14 conflict policies. There were investment policies that
15 existed during the time of these investments. We don't
16 know whether they were utilized or not utilized.

17 And so, Your Honor, also when you peel back this
18 settlement itself to the point -- and I appreciate
19 Ms. Bollweg's release to the TSC members. That wasn't
20 in the Settlement Agreement. Also in the Settlement
21 Agreement you will be having people, the names coming
22 from the Beneficiaries, and then apparently our clients
23 get to submit some; but the people whose conduct was at
24 issue will be voting on their replacements. That's a
25 problem for us. We're the ones that brought up the

1 issue of the separateness of the TSC and Trustees. But
2 the people whose conduct is at issue is going to be
3 voting on the replacements. We don't want that. You
4 know, we would prefer to have a committee with four
5 right now and will -- either the Court or someone else
6 will pick someone independent and start this process
7 quicker and to get to the independence that apparently
8 now all of us agree are there. It is -- we need to get
9 independent people on there, but the people whose
10 conduct is at issue should not be voting on it.

11 One of the issues also on the settlement issue that
12 has sort of -- has gone through some of the other
13 issues -- and there's a difference, Your Honor, between
14 when the Trust Instrument allows a dual appointment.
15 That is the appointment issue. But when someone
16 occupies a dual appointment and then I would call it a
17 situational conflict because of their actions after the
18 appointment and breaches those duties, that's a
19 different issue. And that's what we have in this
20 instance, Your Honor, as to what happened.

21 So we're saying, Your Honor, as members of the TSC,
22 why can't we, as members that have it, see the documents
23 that everybody else has? There's apparently some
24 secretness here that people that are charged with
25 removing trustees can't see but others can? This is

1 inexplicable to us, Your Honor, why we shouldn't have
2 access to those documents.

3 We understand, Your Honor, and completely, the
4 Beneficiaries not wanting to expend money to -- on the
5 Trust that's here. But the issue is has the
6 accountability been done? What are the doings of the
7 Trust and the TSC members? We have a responsibility,
8 our clients do as members, to look whether they should
9 be removed, not removed. We didn't ask to go spend
10 hundreds of thousands of dollars in litigation. We came
11 to court to ask you questions, Your Honor, about those
12 particular duties, responsibilities, and voting. And
13 that's why we're here. So the Petition or the
14 settlement does not moot the relief that's sought by the
15 Petitioners, Your Honor.

16 THE COURT: I have a question on that. Thank you. I
17 have a question for you now, and I'm going to go back to
18 Mr. Roche.

19 What about the math? What about the issue that
20 there are two non-Trustee members of that Trustee
21 Succession Committee that aren't in the role of Trustee;
22 but even they don't vote with your clients in some of
23 these cases or some of these matters, and so your
24 clients are confronted with the situation where they're
25 a distinct minority. I hate to form party inferences

1 about what that means; but it does, as I said a couple
2 times before, raise questions about Trust governance,
3 about whether this committee should act as a body by
4 majority vote or whether one, or in this case two,
5 members of a minority can take action without the rest
6 of the -- without the rest of the committee, including
7 two of whom -- even if you throw out the three, two of
8 whom would still give you a majority.

9 MR. WELK: Well, two and two is an impasse, Your Honor.
10 There's three others that we believe, because of their
11 actions, shouldn't be able to vote. We believe the
12 fix -- and I think all of us agrees with the fix that we
13 proposed; it's just taken a while -- and that is to make
14 these separate. The TSC has a function to remove and
15 appoint and to ask for doings, and the Trustees ought to
16 be separate. Marvin's document allowed those to be
17 appointed, okay. And that doesn't -- and the
18 Instrument, as Mr. Roche said, allows that. But when
19 there are conflicts that arise and issues as to whether
20 the doings imputed to those, we need to have independent
21 people. So I agree with you, but I think the answer is
22 to get independent people on the TSC as quickly as
23 possible. Because right now if you would say, "You
24 can't vote on your replacement because of the actions
25 that you've done in the past," and we have four. Let's

1 get three new people on there and constitute a committee
2 of independent people and move on.

3 THE COURT: I understand your argument. I guess I
4 wasn't saying it very artfully; but it seems to me you
5 have two independent people on that committee that
6 aren't Trustees. And they're not persuaded by the
7 efficacy, seemingly, of Mark and Paul Schwan's position.

8 MR. WELK: Well, I don't know their motivations. I
9 assume it's similar to nobody wants to spend money and
10 fight about this; but this was 600 million dollars spent
11 here and lost. So we're going to move on. I mean,
12 we're prepared to move on as well if there's a proper
13 committee, Your Honor. We don't believe there's a
14 proper committee, and that these people shouldn't vote
15 on their replacements. I think we're moving to that
16 weight, Your Honor; but I think the quicker we can get
17 to the separateness and to answer our questions -- some
18 of the questions still that remain, even if the
19 settlement was approved by the Court, which we say
20 should be rejected, we still have questions to ask for
21 the Court.

22 THE COURT: That's my next question to you, Mr. Roche.
23 My question is -- and I think I know your -- I know part
24 of your answer, but I won't preempt you. The relief
25 that's sought initially is an accounting, not removal,

1 not anything, an accounting, and instructions, but
2 specifically, an accounting. As I looked at the case --
3 I'm newer to it than you all are -- but as I looked at
4 the case -- and I thought about the fact that the
5 Beneficiaries seem satisfied with what they have seen.
6 I thought about the fact that the Attorney General
7 seemed satisfied with what he and his designees have
8 seen. And I thought about the description of it being
9 thousands of pages. And I saw what I believe Paul
10 Schwan had attached to his affidavit, which was not
11 thousands of pages and may just be a portion of it. I
12 was left with the question about why not share this
13 information to the Schwans? That's the accounting.

14 MR. ROCHE: Couple responses, Your Honor. The first is
15 the suggestion that the TSC has been kept in the dark is
16 not true. It's in the papers that every year they get
17 audited financial statements. They get reports on the
18 investments. They get reports on the distribution
19 activities, and they have a powwow to come together and
20 ask any questions that you want to ask.

21 THE COURT: I hear them saying that after several
22 hundred million dollars of losses they want more, maybe
23 like the thousands of pages more. What about that?

24 MR. ROCHE: And the term "accounting" appears in that
25 Trust Instrument. And it's up to the TSC and perhaps

1 the Beneficiaries to decide what that means; but the TSC
2 at this point has voted five to two that the accounting
3 that they've received so far has been sufficient. Their
4 right to information on the TSC springs solely from that
5 Trust Instrument. The Beneficiaries' right to
6 information is statutory, and there's no statutory right
7 that applies to the members of the TSC.

8 THE COURT: I understand your argument. But as long as
9 you're sharing information, I mean, isn't this an
10 instance where the truth will set you free or not?

11 MR. ROCHE: If you want me to be blunt, no. We don't
12 think it will set us free. We think it will take us
13 down the path to another three years' worth of
14 litigation where they do a forensic accounting for
15 hundreds of thousands of dollars, and we're going to be
16 litigating this for a number of years going forward.
17 That's where we see it going. But frankly, that's a
18 bridge to no where because even if the Schwans come up
19 with something that, "Oh, we think in hindsight you
20 shouldn't have done it this way," they don't have the
21 right to bring claims against the Trustees. Only the
22 Beneficiaries do. Members of the TSC do not have a
23 right to seek to recover damages or any other money from
24 the Beneficiaries -- or from the Trustees, excuse me.
25 So even if we go down that path, it's just an expensive

1 bridge to no where. And that's been the primary basis
2 for our objection at this point.

3 THE COURT: Well, the themes that keep resurfacing here
4 is that if -- let's just say if a trust, generally
5 speaking, had trustees who were not performing well,
6 whose conduct was resulting in big losses for the trust,
7 and who may be violating their fiduciary duties to act
8 in the best interest of the trust when they have
9 conflicts, all undisclosed, under your theory a minority
10 of members on a trust committee could never really
11 redress that, and that condition would be allowed to
12 persist. That's the rule that would result in this case
13 if the Schwans don't have an opportunity to litigate
14 this; or am I wrong?

15 MR. ROCHE: But, Judge, you're missing the elephant in
16 the room that the Schwans have not ever addressed, and
17 that is that this Trust is for the Beneficiaries'
18 benefit. And here you've got them here unanimously
19 represented by competent counsel. You've got the
20 Attorney General saying "This is what we want to happen
21 with this Trust that was created for our benefit." And
22 that's what distinguishes it from the case that you just
23 suggested. That is the elephant in the room. They've
24 never addressed that. They've never cited one single
25 authority, case, or anything saying that a matter like

1 this could proceed contrary to the wishes of the
2 Beneficiaries of the Trust, the unanimous interest of
3 the Beneficiaries of the Trust.

4 MS. BOLLWEG: And, Judge, if I might on that particular
5 point.

6 THE COURT: Of course.

7 MS. BOLLWEG: One of the things that has concerned my
8 clients from the beginning of this case is that the
9 Schwan brothers have stated in their papers that they're
10 doing this for the benefit of the Beneficiaries. My
11 clients are very concerned that they were never
12 contacted by the Schwan brothers before they brought
13 this Petition to inquire what their beliefs were, what
14 they thought should be done in this case. And in fact,
15 we had a meeting in Wisconsin, and we invited the Schwan
16 brothers and the Trustees to come with us and sit
17 down --

18 MR. WELK: Objection, this is off the record -- this is
19 not in the record, Your Honor. I'm going to object to
20 any of these statements by counsel. It's not an
21 affidavit. It's just statements that are there, and I'm
22 objecting to it.

23 THE COURT: I thought it was in an affidavit. I thought
24 I remembered seeing that somewhere in an affidavit.

25 MS. BOLLWEG: I believe it was in our response to the

1 Petition, Your Honor. But in any event, the point here
2 is that, just to follow up on what Mr. Roche was saying,
3 if there was some action here and a member -- a minority
4 member of the TSC felt like there was something bad
5 going on and they couldn't get court supervision, they
6 can certainly bring that issue to the attention of the
7 Beneficiaries, who clearly have the right to go into
8 court. The Attorney General clearly has the right to
9 petition for court supervision. So I think the Court's
10 concern about non-majority members of the TSC not having
11 any ability to raise any issues I think is taken care of
12 by the fact that they certainly have the ability to
13 bring that issue to the attention of the Beneficiaries
14 and the Attorney General, who obviously have an interest
15 in investigating breaches of fiduciary duty. That's
16 what Beneficiaries and the Attorney General -- that's
17 one of the reasons that we're here.

18 MR. GOSCH: If I may, Your Honor.

19 THE COURT: Yes.

20 MR. GOSCH: The thing that's concerning me with
21 Mr. Welk's argument is that was all fine and well until
22 all the Beneficiaries reached a Settlement Agreement and
23 gave the releases. And so none of that matters now.
24 There's not going to be -- let's say that it showed
25 there was 600 million embezzled. It's gone. Complete

1 release given. There's no relief left. None of it
2 matters. Why do they need to see that any more? It
3 doesn't matter. The statute is clear. We've given the
4 release. The Trustees, the TSC, are completely
5 exonerated. They have no future liability. And the
6 only reason I can see for them still wanting that
7 information is to see if they can foster some future
8 litigation that isn't covered by the release. And the
9 release, as you've seen, is a broad release. There's
10 nothing left. So I don't get the argument. As far as I
11 can see, when the Beneficiaries gave this release,
12 entered into this agreement, we got what we wanted in
13 terms of what the Trust is going to do in the future,
14 and the TSC and the Trustees got what they wanted in the
15 sense that we've given them a complete release. They no
16 longer have any liability going forward.

17 THE COURT: Well, your question was a rhetorical one,
18 you know, what concerns the Schwans. And I don't know.
19 Only they know that. But I think if I'm -- unless I'm
20 very much mistaken, the amount of the losses here that
21 have been incurred are very substantial. And I can only
22 guess that that, at some level, prompts them or prompted
23 them initially to action in this case. They seemed to
24 be saying as much in their submissions.

25 Mr. Roche.

1 MR. ROCHE: And if I may, Judge. From the beginning of
2 this, it's always been a focus on looking at one aspect
3 of the portfolio that had the losses; and there's been
4 no mention of the fantastic gains that were achieved in
5 some of the domestic real estate investments that were
6 made. So when we talk about, okay, this is the number
7 of losses, you have to recognize that that's offset by
8 gains in other parts of the portfolio and hundreds of
9 millions of dollars of distributions to the
10 Beneficiaries over the course of the Trust. So I want
11 to put that in perspective for you. Were there losses
12 offshore? Absolutely. But you also need to look at the
13 bigger picture.

14 THE COURT: I understand that perspective. But the
15 difficulty with that argument is that these losses, if
16 they're at all accurate, are very large. Even if
17 they're offset, to a certain extent, by success in other
18 areas in the portfolio, these are large losses. I'm not
19 citing the case on the strength of how large, precisely,
20 they are; but it seems to me that we can all probably
21 agree that these are large losses.

22 MR. ROCHE: And you took the words out of my mouth, Your
23 Honor, which is whether the allegation is one dollar or
24 10 billion dollars, you still have to apply the law as
25 it's written. So you got to put your blinders on and

1 say, okay, this is what the law is, and the
2 Beneficiaries have signed off on it.

3 THE COURT: Understood.

4 MR. WELK: May I respond?

5 THE COURT: You may, of course.

6 MR. WELK: Your Honor, one thing that's missing here is
7 the intent under the Trust Instruments that's been
8 thwarted by this proposed settlement. There is a
9 specific duty of the TSC to review the accountings and
10 the doings. Where has that been discharged? That's not
11 the responsibility of, frankly, the AG under the
12 Instrument or even the Beneficiaries. That is an
13 Instrument -- that was set up by Marvin Schwan in the
14 Instrument. And that's what our clients are trying to
15 do is to discharge that responsibility. And that's not
16 being done here. Other people have looked at this. The
17 people on the TSC committee, the only people that have
18 looked at it are the people whose conduct is at issue
19 not others.

20 THE COURT: So the other two non-Trustee members of the
21 Trust Succession Committee were not privy to this
22 information?

23 MR. WELK: Not that we're aware of, anybody seen it on
24 any of these documents.

25 THE COURT: Mr. Ewert and the other gentleman whose name

1 escapes me, the other non-Trustee member of the Trustee
2 Committee.

3 MR. WELK: Well, since we haven't seen the agreement, we
4 don't know who the signatories are. We know our
5 clients. I don't know if they signed it or not.

6 MR. GOSCH: Paul Tweit is the other gentleman you were
7 thinking of.

8 THE COURT: Thank you.

9 MR. WELK: I think it's important, for the record,
10 whether they signed or saw any of these documents. I
11 don't think they did.

12 THE COURT: I do have that question. Were they privy to
13 this information or not?

14 MR. ROCHE: No. They're on the TSC, and the TSC voted
15 five to two that they were comfortable with the type of
16 accounting that was provided. Which again, going back a
17 number of years, Judge, there's been disclosures that,
18 "Hey, here's a loss. Here's another loss. Hey, this is
19 coming down the pipe." This didn't come out of no where
20 as has been alleged. And the TSC has been kept entirely
21 up to speed on this. And so that's why there's some
22 historical background for you for why these other
23 gentlemen, like the Beneficiaries, are saying, "Let's
24 look forward and move on rather than dwell in the past
25 and spend hundreds of thousands of dollars litigating

1 for to no end."

2 THE COURT: It seems like, you know, the argument is
3 sort of a -- I don't know, an argument that essentially
4 says or presupposes that there's nothing that, in the
5 view of the Beneficiaries, that can be gained through
6 court supervision; much could be lost; and so we're just
7 going to go ahead and look forward. The rest, including
8 the hundreds of millions of dollars of losses, is water
9 over the dam; and we're not going to worry about clueing
10 in the Trust Succession Committee with the additional
11 information. But they, it seems to me, even apart for a
12 moment the question of statutory standing -- it seems to
13 me they do have a need to know, under the Trust
14 document, about those losses. And it seems to me that
15 your principal argument here, Mr. Roche, is that, again,
16 they just don't have the votes, even excluding the non-
17 Trustee -- excuse me, even excluding Trustee members of
18 the committee, they don't have the votes to compel.

19 Am I right?

20 MR. ROCHE: That is correct.

21 THE COURT: Mr. Welk, what about that? Are your
22 clients, at some point, confronted with a situation
23 where they truly don't have the votes to compel what you
24 have yourself described as the intent of the Settlor? I
25 mean, Mr. Schwan says, "All right. We'll have this

1 Trustee Succession Committee. It has these oversight
2 powers, and it acts through its members by a majority
3 vote." And we don't have that here. So how does that
4 reconcile with your argument?

5 MR. WELK: Well, in this instance the majority is
6 constituted -- you have to say are we dealing in the
7 future where we don't have three people that are
8 conflicted by looking at these particular vote? Then
9 the answer is they have a minority position. But one of
10 the questions we asked this Court is precisely that
11 question, Your Honor. If you're outvoted in a majority,
12 is that sufficient if you know that? If you know
13 somebody is embezzling money and you lose, is that it?
14 We're done? You've discharged your responsibilities,
15 but you've been outvoted? That's one of the questions
16 that we're having here. I think in the future -- it's
17 really a multifaceted question you have because we have
18 the current situation where we have three people sitting
19 there. In the future if you had independent people
20 whose -- whose actions are not at issue, I think it's a
21 different story. Right now you have an impasse if you
22 don't -- if you discount the three people whose actions
23 may be at issue.

24 THE COURT: You have an impasse, and you do not have a
25 majority right now.

1 MR. WELK: Right.

2 MR. ROCHE: And Mr. Welk makes an interesting point
3 which is, "Hey, in the future maybe the TSC does ask for
4 this information." And if the TSC does ask for the
5 information, then I think the Trustees are obligated to
6 respond. And that's the whole point for why we
7 shouldn't go down this path is that the Settlement
8 Agreement provides for a transition into an independent
9 TSC. And it very well may be that that independent TSC
10 asks for these items. And at that point that TSC will
11 be provided the materials that were -- have been
12 provided to the Beneficiaries and the Attorney General's
13 Office.

14 THE COURT: Doesn't the resolution skip a step? Doesn't
15 it sort of frustrate the intent on the part of the
16 Settlor in this case if the Trust selection -- excuse
17 me, the Trust Succession Committee is effectively out?
18 They're out. And they have a greater oversight role --
19 they have the oversight role, not just the principal
20 one. They have the oversight role for reviewing,
21 hiring, and firing trustees. And so you can make an
22 argument, again, just a little bit more intuitive than
23 connected more directly to particular principles or
24 statutes; but you could make an argument, it seems to
25 me, that the one body that's vested with the authority

1 to hire and fire doesn't have the information that the
2 Beneficiaries and the Attorney General have. And it's
3 done not in a vacuum in the context of hundreds of
4 millions of dollars of losses. That seems unusual.
5 Seems an unusual circumstance.

6 MS. BOLLWEG: Judge Salter, I think one of the
7 overriding things that I see about the argument about
8 the TSC, two members of the TSC still needing to do an
9 accounting, is that the whole purpose of the TSC is to
10 protect the Beneficiaries. They don't have any reason
11 to protect themselves. Their whole purpose in this
12 Instrument is to be there to protect the Beneficiaries.
13 And if the Beneficiaries have now come forward and said
14 "We don't need your protection, and we don't want your
15 protection as to past actions," then I think they've
16 fulfilled their duties.

17 THE COURT: I suppose the argument is even if there was
18 a disagreement on that discreet point, the next question
19 would be that even if they haven't, what could be
20 ordered in terms of relief. Okay.

21 MR. ROCHE: And that's a good point, if I may, Your
22 Honor, that the sole power that the TSC members have is
23 to remove Trustees. They don't have the power to bring
24 any claims against the Trustees. The only thing they
25 can do is remove Trustees.

1 THE COURT: Or hire them.

2 MR. ROCHE: Or hire them. Absolutely.

3 THE COURT: Okay. I have a couple of unconnected
4 questions. Before I leave, though, we've got some time.
5 I want to make sure everyone has had enough opportunity
6 to add anything they want to add. I have your
7 arguments. Is there anything else?

8 Mr. Roche, your submissions in the initial motion
9 or brief that you had last summer seem to suggest an
10 attenuated connection with or between the Foundation in
11 South Dakota. I read that as being contextual and that
12 you are not otherwise challenging the Court's
13 jurisdiction to act here. Am I right?

14 MR. ROCHE: That's correct, Your Honor. Except, as we
15 did lay out in our papers, there was -- there's language
16 in the Trust Instrument where the Settlor provided that
17 if there was any question over the meaning of a term in
18 the Instrument, the Trustees were entitled to construe
19 that in order to avoid the Trust coming under court
20 supervision. So --

21 THE COURT: That was when I said earlier I suspected
22 what you were going to tell me. That's what I thought
23 part of your answer was going to be based upon the
24 strength of the South Dakota Supreme Court's earlier
25 decision in 2006 in the Great Grandchildren Trust case.

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But --

MR. ROCHE: We're not contesting that 21-22 applies I guess is what I'm saying.

THE COURT: Okay. So there's not a jurisdictional argument.

MR. ROCHE: No.

THE COURT: All right. What about the claim you made earlier? We haven't touched upon it. Where does it fit into your overall argument the claim you made in one or both of your briefs, if not your more recent Petition, that that language that gives to the Trustees in this case sole discretion, gives them also the ability, in this case, to determine the sufficiency of an accounting, to determine the sufficiency of their relationship, vis-a-vis the Trust selection or Succession Committee? Is that how that works in your view?

MR. ROCHE: It's the definition of an accounting. Again, remember that every year -- this is without complaint from either of the Schwans, by the way -- but the Trustee Succession Committee gets the audited financials, reports on investment, reports on distributions, and then an opportunity to ask questions. And that's how it's gone on for years. And it's certainly within the realm of reasonableness for the

1 Trustees to construe the word "accounting," as it's used
2 in the Trust Instrument, to mean exactly that, which is
3 something that's been accepted and relied upon by them
4 for a number of years.

5 THE COURT: But they are, even under that standard,
6 bound by standards of good faith and reasonable
7 judgment, which may beg the question about whether
8 they've exercised that in this case to perhaps
9 anticipate the objection from the Schwans.

10 MR. ROCHE: And the good faith and reasonable judgment,
11 I think, is based on the past history, and this is
12 historically how the accountings have been done to the
13 TSC.

14 THE COURT: Okay.

15 Does anyone else have -- I've got all my questions
16 that have been addressed, either in my question and
17 answer directly or in other --

18 MR. SHEPARD: Your Honor, may I just respond very
19 briefly on the last point about the Trustee discretion?
20 Couple of points. I think in -- and we've submitted an
21 affidavit from Paul Schwan describing the extent of
22 information provided by the Trustees to the TSC sort of
23 on an annual basis. What I think is very clear from the
24 submission from Mr. Schwan was that the -- prior to the
25 spring of 2013 what the TSC members got was a

1 30,000-foot summary of what was going on with these
2 offshore investments. What happened in 2013 in the
3 spring was that the Trustees informed the TSC that there
4 were -- in addition to one -- the investment in the
5 Bahamas that had already been written off, which is in
6 the documents, what they learned in the spring of 2013
7 was that there were 450 million dollars of additional
8 losses in Costa Rica and Grand Cayman. And up until
9 that time, if you look at the audited financials and the
10 other documents that Mr. Roche has mentioned, those very
11 investments show up as assets of the Foundation. The
12 TSC, up until that time, was never informed that there
13 was now really what amounts to something like 600
14 million dollars in losses.

15 So you know, what -- I think there has to be
16 consideration for the -- as you refer to earlier, the
17 magnitude of the loss that became apparent in 2013 when
18 considering what is a reasonable accounting. It -- for
19 the Trustees to say we get to decide what is a
20 reasonable accounting in light of a 600-million-dollar
21 loss -- if they are interpreting what they have already
22 provided to preclude further review by the TSC or the
23 Court I think is a clear breach of their own duties and
24 would be against public policy. They can't restrict
25 their own accountability and say, "Well, that's all

1 you're going to get. We've decided that there's -- that
2 this is what the document means," and by doing so
3 preclude TSC and Court review of what's happened.

4 THE COURT: Thank you. You know what, I understood
5 that. I guess a couple things come to my mind when I
6 have seen the references to -- you know, suggestion this
7 is a belated effort by the Schwan brothers. One, I
8 don't see that accompanied by any legal argument that
9 they are either time-barred or somehow precluded by some
10 equitable defense or doctrine such as laches. So I
11 don't see that. The other thing is that it appears as
12 though the losses -- unless I'm, again, misreading the
13 record; and someone tell me if I'm factually on -- but
14 it seems as though the losses were, if you will,
15 somewhat being calculated in succession along the way
16 and may have reached a tipping point in May of 2013.
17 That's sort of how I read the record. But in any event,
18 whatever prompted them to act whenever they acted is, as
19 I said, not connected to a legal argument that they
20 waited too long and are legally prohibited from acting
21 here now.

22 I had one other factual question, and I don't need
23 to know the details of it. But it seems to me we've
24 been all around this issue. But it seems to me that
25 whatever was provided to members of the Trust Succession

1 Committee along the way, prior to this Petition, let's
2 say, is an amount of information that is far less
3 detailed than information that was presented to the
4 Beneficiaries and the Attorney General. Am I correct
5 in -- without testimony or anything else -- am I correct
6 in taking that as -- you don't have to agree. But is
7 that factually correct and can I consider that? I don't
8 know that it will be significant or not. I just want to
9 know.

10 MR. ROCHE: I think the volume of documents is correct;
11 but as far as the chance and opportunity to ask
12 questions at TSC meetings versus meetings with
13 Beneficiaries, it's been, I think, an open book by the
14 Trustees on both stages.

15 THE COURT: The volume of information. Was the volume
16 of information, the detail of the information that was
17 shared with the Beneficiaries and with the Attorney
18 General, more, and significantly more, than what the
19 members of the Trust Succession Committee were receiving
20 along the way at the annual meetings?

21 MR. ROCHE: From a physical count up the documents, yes.
22 What was provided to the Beneficiaries and the AG was
23 more.

24 THE COURT: And I can accept that and no one has a
25 disagreement with me accepting that without further need

1 of testimony? That can be stipulated? Again, I don't
2 know to what extent that's significant, but I have that
3 in my notes.

4 Ms. Bollweg?

5 MS. BOLLWEG: Yes, Your Honor.

6 THE COURT: Mr. Gosch?

7 MR. GOSCH: That's correct, Your Honor.

8 THE COURT: Mr. Hallem?

9 MR. HALLEM: Yes.

10 THE COURT: Mr. Shepard is nodding.

11 All right. Well, here's -- my sense is that, one,
12 we've made it into court after a couple of efforts in
13 the past to have a hearing like this. We've made it
14 into court, and we've had this hearing, which is not a
15 merits hearing in the event that I decide that the
16 Petition can go through. That's something different.
17 What we've handled here today, in my view, is oral
18 argument on whether these dispositive motions should be
19 granted or not. I'm going to take that question, those
20 questions, under advisement. The parties have been
21 waiting for a while for some resolution. I think the
22 parties collectively, all of them, are anxious to move
23 on to whatever follows from our hearing today. And I'm
24 cognizant of that, and I'm going to endeavor to give you
25 a written decision as quickly as I can. But it is a

1 complicated case. And it involves, as I said earlier --
2 a little bit self-conscious because it involves, to a
3 certain extent, quite a bit that's preceded my
4 involvement in the case. I want to make sure that I'm
5 reflecting enough on everything in the case and that
6 I'm, to the extent that I need to, picking up on all
7 aspects of the record that bear upon a legal analysis in
8 this case. So I am going to take it under advisement,
9 and I am going to issue a written decision just as soon
10 as I possibly can.

11 Is there anything else from anyone?

12 MS. BOLLWEG: No, Your Honor.

13 MR. WELK: Not from the Petitioners, Your Honor.

14 MR. ROCHE: Judge, we had a proposed order that I
15 cleared with Mr. Welk where you would allow us to file
16 the affidavit that I provided to you under, I guess,
17 double seal you would call it.

18 THE COURT: I misspoke.

19 MR. ROCHE: May I approach?

20 THE COURT: You may. I misspoke. That was one thing I
21 did want to talk about. Forgive me. This is the 1997
22 Settlement Agreement?

23 MR. ROCHE: That's correct.

24 THE COURT: I have that in my notes. I said I'm not
25 entirely sure why I have it, but it was sent to me in

1 camera, and I need to disclose that I have it. So I can
2 have it and I can look at it? We got a stipulation
3 here. I think has everyone signed off on it? If not,
4 everyone is nodding. Ms. Bollweg is nodding. Mr. Welk
5 is nodding yes.

6 MR. WELK: Yes, Your Honor.

7 MR. GOSCH: Yes.

8 MR. HALLEM: Yes, Your Honor.

9 THE COURT: Okay. I've signed that. Thanks for
10 reminding me of that.

11 All right. With that, we'll be in recess. I hope
12 you all have a good day. Good to see you here this
13 afternoon. Thank you very much for your thoughtful
14 submissions and your thoughtful arguments.

15 (Proceedings concluded at 3:22 p.m.)

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**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

APPEAL NO. 27524

MARK SCHWAN and PAUL SCHWAN,
as members of the Trustee Succession Committee
of The Marvin M. Schwan Charitable Foundation,

Petitioners and Appellants,

vs.

LAWRENCE BURGDORF; KEITH BOHEIM;
KENT RAABE; GARY STIMAC; and LYLE FAHNING,
as Trustees of The Marvin M. Schwan Charitable Foundation,

Respondents and Appellees.

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE MARK E. SALTER
CIRCUIT COURT JUDGE

**APPELLEE BRIEF OF THE TRUST BENEFICIARIES
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PRELIMINARY STATEMENT

References to the settled record as reflected by the Clerk's Index are cited as (R.). References to the Appendix to the Appellants' Brief are cited as (App.). References to the Appendix to the Trustees' Appellee Brief are cited as (R-App.). References to the transcript of the February 23, 2015 motions hearing before the circuit court are cited as (HT).

REQUEST FOR ORAL ARGUMENT

The Attorney General and trust beneficiaries respectfully request the privilege of oral argument.

STATEMENT OF THE ISSUES

I. Are the two Schwan brothers either “beneficiaries” or “fiduciaries” as defined by SDCL 21-22-1 so as to authorize them to bring a petition for court supervision of the charitable trust pursuant to SDCL 21-22-9?

The circuit court held that the Schwan brothers, acting as individual members of the Trustee Succession Committee without the support of that committee, are neither beneficiaries nor fiduciaries as defined by SDCL 21-22-1 and thus did not have statutory standing to bring a petition for court supervision, a legal defect constituting “good cause” to deny the petition under SDCL 21-22-9. The circuit court therefore granted the joint motion for summary judgment brought by the Attorney General’s Office, trust beneficiaries, and trustees and dismissed the petition.

- SDCL 21-22-1(1)
- SDCL 21-22-1(3)
- SDCL 21-22-9
- *In re Reese Trust*, 2009 S.D. 111, 776 N.W.2d 832

II. Is there “good cause” to decline court supervision of the charitable trust under SDCL 21-22-9 as the result of settlement negotiated between the Attorney General’s Office, trust beneficiaries, and trustees?

The circuit court held that good cause existed to decline court supervision under SDCL 21-22-9 due to the two Schwan brothers’ lack of statutory standing to bring such a petition, but did not hold that the settlement agreement reached between the Attorney General’s Office, beneficiaries, and trustees itself constituted good cause to decline court supervision.

- SDCL 21-22-9
- SDCL 55-9-5
- *In re Geppert’s Estate*, 59 N.W.2d 727 (S.D. 1953)
- *Schmidt v. Pine Lawn Memorial Park, Inc.*, 278 N.W.2d 180 (S.D. 1979)

STATEMENT OF THE CASE

The Marvin M. Schwan Charitable Foundation (“Foundation” or “trust”) is a tax-exempt charitable trust established by its donor, Marvin Schwan, under South Dakota law. The Foundation was organized to be operated exclusively for the support and benefit of seven religious organizations selected by Mr. Schwan and named as the trust’s beneficiaries: (1) Wisconsin Evangelical Lutheran Synod; (2) The Lutheran Church – Missouri Synod; (3) Wisconsin Lutheran College Conference, Inc.; (4) Evangelical Lutheran Synod; (5) Bethany Lutheran College; (6) International Lutheran Layman’s League, Inc.; and (7) Wisconsin Evangelical Lutheran Synod of Kingdom Workers, Inc. (“beneficiaries”).

Like most charitable trusts, the Foundation is governed by a board of trustees. Marvin Schwan appointed his brother, Alfred Schwan, and good friend, Lawrence Burgdorf, as the original trustees and did not select any of his children to be trustees. Today, the Foundation has five trustees: Burgdorf, Keith Boheim, Kent Raabe, Gary Stimac, and Lyle Fanning (“trustees”). According to the terms of the trust, any new trustees are elected by the seven-member Trustee Succession Committee (“TSC”). Mark Schwan and Paul Schwan (the “Schwans”), two of Marvin Schwan’s sons, occupy two of the seven seats on the TSC. They are not trustees, beneficiaries, or donors of the trust and have never had any financial or other beneficial interest in the Foundation.

The Schwan petition

The two Schwan brothers were unhappy with the level of detail in the volume of information provided to the TSC regarding certain large investment losses incurred by the Foundation. And so on June 3, 2014, they filed a Petition for Court Supervision and Enforcement of Charitable Trust and for Court Instructions in Minnehaha County Circuit Court of the Second Judicial Circuit. (R. 1). The case was assigned to the Honorable Robin J. Houwman, Circuit Judge.

The Schwan petition sought to have the South Dakota courts assume supervision of the trust pursuant to SDCL 21-22-9 and provide a catalogue of instructions to the trustees regarding its operation. (R. 15, 18). None of the other five appointed members of the TSC – three of whom are trustees as contemplated and permitted by the trust instrument – supported the Schwan petition.

On June 6, 2014, the Attorney General filed a notice of appearance in furtherance of his statutory duties to represent the beneficiaries of a charitable trust and “enforce such trusts by proper proceedings in the courts.” (R. 104). Separate counsel for the trustees and beneficiaries noticed their appearances as well.

The trustees’ motion to dismiss

On July 30, 2014, the trustees filed a Motion to Dismiss the Petition and for Judgment on the Pleadings contending that the Schwan brothers, representing only two of the seven members of the TSC, did not have standing under SDCL 21-22-9 to seek court supervision of a charitable trust. (R. 152). On August 6, 2014, the beneficiaries filed their response in opposition to the Schwan petition stating:

Before filing the present Petition, neither Paul nor Mark Schwan contacted any of the beneficiaries of the Schwan Foundation to determine their wishes regarding court supervision over the trust. The beneficiaries of the Schwan Foundation have never asked Paul or Mark Schwan to represent their interests regarding any of the matters set forth in the Petition. The beneficiaries are satisfied at this time with the Trustees' commitment to them to provide information regarding the losses described in the Petition.

(R. 213). As a result, the beneficiaries asked the circuit court to decline to comply with the Schwan brothers' derivative effort to impose court supervision on the trust.

The Attorney General's request to stay the proceedings

On August 12, 2015, the Attorney General also filed a response. (R. 222). The Attorney General explained that it had been in contact with the trustees, the beneficiaries, as well as the Schwan brothers, and that the trustees had agreed to provide detailed information regarding the investments in question both to the Attorney General's Office and the beneficiaries. (R. 223). As the response further explained:

The Attorney General's Office notes that while the Trustees have contested the standing of Petitioners, they have not contested the Court's supervisory jurisdiction over the Marvin M. Schwan Charitable Foundation, or the standing of the Beneficiaries and the Attorney General's Office to request an accounting. It is also apparent from their filing, that the Beneficiaries do not want to become involved in or have the Trustees embroiled in protracted litigation with its associated costs and unknowns where the Trustees have agreed to provide them information regarding their investment activities.

(R. 223). The Attorney General's Office stated that it was sympathetic with the beneficiaries' concerns and requested that both the Schwan petition and motion to dismiss be held "in abeyance for an initial period of three months to allow time to obtain and review the information provided by the Trustees..." (R. 224).

After the submission of this response, the parties filed a stipulated motion for a ninety-day abeyance to allow the beneficiaries and South Dakota Attorney General's Office "to obtain and review documents and information regarding the Marvin M. Schwan Charitable Foundation trustees' investment activities." (R. 308). On September 14, 2014, the circuit court granted the motion. (R. 332).

The settlement agreement and joint motion to dismiss

On February 17, 2015, after reviewing the information provided by the trustees concerning their investment activities, the Attorney General's Office, beneficiaries, and trustees filed a joint motion to dismiss the Schwan petition and terminate the prospect of court supervision. (R. 392). As indicated in the motion, the Attorney General, beneficiaries, and trustees had negotiated a settlement agreement (attached to the motion as Exhibit 1) that would resolve each of their respective concerns and effect substantial operational and personnel changes to the trust creating a separation of identity between the trustees and TSC and reforming the Foundations' investment policies. (R. 393).

In light of this settlement, which was contingent upon dismissal of the Schwan petition, the Attorney General's Office, beneficiaries, and trustees believed that "continued litigation over the June 2014 Petition would be contrary to the best interests of the Beneficiaries and would needlessly waste additional assets" and that "Court supervision of the Foundation will be unnecessary and impractical and it would involve unnecessary expense to the Foundation." (R. 394).

By that time, the action had been transferred to the Honorable Mark E. Salter, Circuit Judge. On May 18, 2015, the circuit court served notice of its intent to treat the joint motion to dismiss as a joint motion for summary judgment pursuant to SDCL 15-6-12(b). (R. 501, 503).

A hearing on the motion was held before Judge Salter on February 23, 2015. At the hearing, counsel for each of the trust's beneficiaries signaled their strong support for the settlement and noted that they, like the Attorney General's Office, had reviewed all of the pertinent information, found no evidence of personal profit by any of the trustees, concluded that nothing would be gained by court supervision, and ratified the conduct of the trustees and the TSC. (HT 39-43, 59). As summarized by Assistant Attorney General Jeff Hallem at the hearing:

[T]he Attorney General's Office is the one who initially proposed the settlement terms based upon our review of the record. This was not generated by the Trustees. It wasn't generated by the Beneficiaries. It was generated by our office based upon our review of the record as to how to remove things – to move things going forward. And we also sent proposals out to all the parties, including Petitioners here, on it. So everybody knew what we thought about it. And we truly believe that settlement is the best way to deal with this; that nothing is gained to go forward; and the structural changes will rectify any of the issues that will allow the TSC to operate unrestricted under the terms in the Trust document. We found nothing, based upon our review, that was criminally actionable for any personal profit based upon conflict of interest by individual Trustees.

(HT 44). The beneficiaries further agreed to waive any conceivable liability of the trustees, TSC, or any of its individual members. (HT 43, 59).

The Memorandum Opinion and Order

On July 13, 2015, the circuit court issued its Memorandum Opinion and Order. (R. 571). The circuit court first held that the settlement agreement reached between the Attorney General's Office, the beneficiaries, and the trustees did not render the controversy moot. (R. 577). Next, it concluded that the question of statutory standing did not implicate the court's subject matter jurisdiction. (R. 578). Finally, the court held that the two Schwan brothers, acting on their own without the support of TSC, were neither beneficiaries nor fiduciaries with standing to bring an action to force court supervision of a charitable trust pursuant to SDCL 21-22-9. (R. 584-89). As a result, the court concluded, "good cause" to deny the petition existed under that statute "because the Schwans are not proper parties to seek court supervision for the Foundation." (R. 581).

The circuit court thus granted the joint motion for summary judgment, (R. 590), and on August 3, 2015, entered its judgment of dismissal. (R. 615).

STATEMENT OF THE FACTS

Apart from the description of the parties and the legal proceedings summarized above, there are very few additional facts relevant to the legal questions presented by this appeal.

The Marvin M. Schwan Charitable Foundation charges its board of trustees, not the Trustee Succession Committee, with administering the trust. (R. 2). The seven religious or educational institutions that the trust instrument designates as its beneficiaries are the only entities entitled to receive distributions. (R. 23).

The Schwan brothers are two members of the Trustee Succession Committee, which consists of seven total members; Mark Schwan, Paul Schwan, Paul Tweit, Dave Ewert, Kent Raabe, Keith Boheim, and Lawrence Burgdorf. (R. 5).

After the Schwan brothers filed this petition, representatives of the Attorney General, the beneficiaries, and the trustees reached and executed a settlement agreement that would effectively resolve all potential issues raised by the Schwan petition. (R. 409-10). The beneficiaries stipulated in open Court that they waive all potential claims against the trustees, the TSC, and its individual members arising out of any matters that are the subject of the Schwan petition when the settlement agreement becomes effective. (HT 39-43, 59). The Attorney General, beneficiaries, and trustees believe that continued litigation would be contrary to the best interests of the beneficiaries and would needlessly waste additional trust assets. (R. 393).

STANDARD OF REVIEW

This Court reviews the question of whether the moving party was entitled to summary judgment de novo. *See AMCO Ins. Co. v. Employers Mut. Cas. Co.*, 2014 S.D. 20, ¶ 6 n.2, 845 N.W.2d 918, 920. The interpretation of statutes present a question of law that this Court reviews de novo. *See In re B.Y. Development, Inc.*, 2010 S.D. 57, ¶ 7, 785 N.W.2d 296, 299; *Verry v. City of Belle Fourche*, 1999 S.D. 102, ¶ 6, 598 N.W.2d 544, 546. The interpretation of the terms of a trust also presents a question of law reviewed de novo. *See In re Schwan 1996 Great, Great Grandchildren's Trust*, 2006 S.D. 9, ¶ 11, 709 N.W.2d 849, 852.

ARGUMENT

I. The circuit court correctly held that the Schwan brothers do not have standing under SDCL 21-22-9 to bring an action to force court supervision of this charitable trust.

The Attorney General and beneficiaries join in the analysis and authorities presented by the trustees on this issue in their appellee brief filed with this Court. The circuit court properly rejected the alternative contentions by the Schwans that they are either beneficiaries or fiduciaries of the Foundation so as to give them standing to bring an action for court supervision under SDCL 21-22-9.

The Schwan brothers have no beneficial interest in the trust within the meaning of SDCL 21-22-1(1) for purposes of beneficiary status under SDCL 21-22-9. *See In re Reese Trust*, 2009 S.D. 111, ¶ 12-13, 776 N.W.2d 832, 835-36 (holding that a foundation was a beneficiary of a charitable trust within the meaning of SDCL 21-22-1(1) because it had received distributions). And the two brothers are not, acting alone without the support of the Trustee Succession Committee, themselves a “trust committee” within the meaning SDCL 21-22-1(3) for purposes of fiduciary status under SDCL 21-22-9. For all of the reasons expressed by the circuit court and articulated in the brief submitted by the trustees, this Court should affirm the grant of summary judgment and dismissal of the Schwan petition for lack of standing.

II. The settlement negotiated by the Attorney General, beneficiaries, and trustees establishes “good cause” within the meaning of SDCL 21-22-9 to deny the Schwan petition for court supervision.

The Attorney General and beneficiaries also join in the analysis and authorities presented by the trustees on this issue in their appellee brief filed with this Court. Under the governing statute, upon the filing of a petition for court supervision of a

charitable trust, “the court shall fix a time and place for hearing thereon . . . and, upon such hearing, enter an order assuming supervision *unless good cause to the contrary is shown.*” SDCL 21-22-9 (emphasis supplied).

As noted by a leading commentator, “*good cause shown* is one of the few standard legal expressions that are neither prolix nor inaccessible to nonlawyers.” Bryan A. Garner, *A Dictionary of Modern Legal Usage*, 388 (Oxford 2d ed. 1995). “Good cause” is generally defined as a “[l]egally sufficient cause or reason.” *Black’s Law Dictionary*, 692 (West 6th ed. 1990). In the context of SDCL 21-22-9, then, good cause for declining to enter an order assuming court supervision may be shown by demonstrating a legally sufficient cause or reason not to do so under the circumstances.

That standard has been met in this case. Even apart from the issue of standing, the circuit court plainly had good cause under SDCL 21-22-9 to deny the Schwan petition for court supervision of a charitable trust where the petition is contrary to the express wishes of the Attorney General’s Office, each of the trust’s beneficiaries, and all of the trustees in light of the settlement agreement negotiated between them to resolve the issues raised in the petition.

Under the common law, courts have traditionally recognized that state attorneys general are the appropriate parties to bring suit to enforce fiduciary duties that charitable entities owe to their beneficiaries or the public at large, adopting the principle that “the state, as *parens patriae*, superintends the management of all public charities or trusts, and in these matters acts through her attorney general.” *People ex.*

rel. Ellert v. Cogswell, 45 P. 270, 271 (Cal. 1896). As explained by Blackstone, the heritage of charitable enforcement by the Crown dates to medieval England and was eventually codified by the Statute of Elizabeth enacted in 1601:

The king, as *parens patriae*, has general superintendence of all charities; which he exercises by the keeper of his conscience, the chancellor. And therefore, whenever it is necessary, the attorney general, at the relation of some informant, (who is usually called the relator) files *ex officio* an information in the court of chancery to have the charity properly established. By statute also 43 Eliz. C. 4, authority is given to the lord chancellor or lord keeper, and to the chancellor of the duchy of Lancaster, respectively, to grant commission under their several seals, to inquire into any abuses of charitable donations, and rectify the same by decree; which may be reviewed in the respective courts of the several chancellors, upon exceptions taken thereto.

William Blackstone, Commentaries on the Laws of England 427-28 (3d ed. 1768).¹

This Court has recognized the traditional common law approach, explaining that the Attorney General is a proper party to take action to enforce a charitable trust, if necessary, over the objections of those who are not its intended beneficiaries. *See In re Geppert's Estate*, 59 N.W.2d 727, 731 (S.D. 1953) (explaining that “[t]he laws of

¹ *See also Trustees of the Philadelphia Baptist Ass'n v. Hart's Executors*, 17 U.S. (4 Wheat) 1, 27-50 (1819) (Marshall, C.J.) (holding, erroneously, that the sole basis for the English Crown's jurisdiction over charities was rooted in the Statute of Elizabeth); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518, 643-45 (1819) (Marshall, C.J.) (explaining that only the “Crown” or state, acting through the attorney general, and trustees had enforcement powers over charitable trust, and the trustees only when acting in a collective and fiduciary capacity rather than in an individual or private capacity); *Vidal v. Girard*, 43 U.S. (2 How.) 127, 196 (1844) (Story, J.) (effectively overruling *Hart's Executors* and holding that because charitable enforcement was part of the equity law of England, rather than having been conferred solely by the Statute of Elizabeth, the power, authority, and jurisdiction of state attorneys general to enforce charitable trusts was part of American common law independent of any statutory authority).

this state do not require the diversion of this fund from the religious and charitable use to which testator clearly intended it should be devoted, to the benefit of his relatives which he clearly indicated should not receive it”).

Following *In re Geppert's Estate*, the South Dakota Legislature codified the Attorney General's role in enforcing the terms of a charitable trust. *See* SDCL 55-9-5 (enacted pursuant to SL 1955, Ch. 429, § 3). That statute now provides that “the attorney general shall represent the beneficiaries in all cases arising under this chapter, and the attorney general shall enforce such trusts by proper proceedings in the courts.” *Id.* Pursuant to that statute, the Attorney General not only represents the interests of the beneficiaries to the charitable trust, but that of the public as well.²

Distilled to its essence, the Schwan petition raises the following substantive issues and requests for relief: (1) an accounting through court supervision of the investment activities of the trust; (2) resolution through court supervision of any overlap between the trustees and TSC; and (3) resolution through court declarations questions of interpretation concerning the TSC and its interaction with the trustees. The settlement agreement negotiated by the beneficiaries, trustees, the Attorney General acting pursuant to SDCL 55-9-5 resolves each of these issues.

The Schwan brothers argue that the circuit court should have required the trustees to further “account” to the Trustee Succession Committee regarding the

² *See, e.g., Schmidt v. Pine Lawn Memorial Park, Inc.*, 227 N.W.2d 438, 441 (S.D. 1975) (*Schmidt I*); *Schmidt v. Pine Lawn Memorial Park, Inc.*, 278 N.W.2d 180, 182 (S.D. 1979) (*Schmidt II*); *Estate of Hamm*, 262 N.W.2d 201, 206 n.7 (S.D. 1978); *Banner Health System v. Long*, 2003 S.D. 60, 663 N.W.2d 242.

investments at issue to ensure that the TSC is fulfilling its fiduciary duties under the trust document, despite the fact that the committee voted against such action. But the TSC's fiduciary duties and other responsibilities are to the Foundation's named beneficiaries. As set forth in the settlement agreement, the trustees have provided information regarding the issues raised in the Schwan petition both to the beneficiaries and the Attorney General's Office. After reviewing this information, all of the affected parties agreed to a resolution making substantial changes to the operation and structure of the Foundation that each has determined to be in their best interests.

The settlement establishes a plan that ends any overlap between the trustees and TSC in an effective, practical, and expedient manner. (R. 409-10). The settlement further requires the trustees to provide information to the beneficiaries and TSC at a level consistent with the recent disclosures by the trustees and honor reasonable requests for additional information. (R. 409-10). In addition, a new investment policy has been adopted to address concerns relating to the type of investments criticized by the Schwan brothers in their petition. (HT 41). Upon implementation of the settlement, no trustee will be a member of the TSC and sufficient safeguards will be in place to ensure trustee compliance with all adopted policies. (R. 409-10; HT 42, 45-46). There will be no apparent conflict of interest and thus no need for the courts to enter further declarations. *See Schmidt II*, 278 N.W.2d at 182 (holding that interests of beneficiaries of charitable trust were

protected where Attorney General conducted investigation concluding that settlement of dispute was legitimate and appropriate).

Furthermore, to the extent that there could be any potential liability of the trustees for any breach of fiduciary duty, the settlement agreement provides for a complete release by all beneficiaries. *See* SDCL 55-4-31 (providing that “[a]ny such beneficiary may release the trustee from liability to such beneficiary for past violations of any of the provisions of this chapter” and that “[n]o consideration is required for the consent, release, or ratification to be valid”). In addition, the beneficiaries have waived any potential liability of the TSC or its members for the activities described in the Schwan petition and the Attorney General’s Office has assured that it will pursue no additional action so long as the negotiated resolution is finalized. (HT 43).

Where the beneficiaries of a charitable trust – the only parties injured by alleged breaches of fiduciary duty or other conduct – have released the trustees pursuant to a settlement agreement drafted by the Attorney General following his independent review, there is little point to individual members of the TSC prolonging an expensive and quixotic quest to reopen and litigate that which has already been resolved. No additional effectual relief could be gained by the trust’s beneficiaries from continued litigation. As far as the Attorney General and trust beneficiaries are concerned, this matter has been thoroughly examined and properly addressed.

Although this issue was presented to the circuit court by the Attorney General and beneficiaries within the context of their argument that the Schwan petition was moot, rather than it constituting additional “good cause” under SDCL 21-22-9 to

grant summary judgment and dismiss the Schwan petition, this Court has explained that “[s]ummary judgment will be affirmed if there exists any basis which would support the trial court’s ruling.” *Purdy v. Fleming*, 2002 S.D. 156, ¶ 11, 655 N.W.2d 424, 429. Independent of the issue of statutory standing, the circuit court’s order granting summary judgment and denying court supervision of this charitable trust should be affirmed because the settlement agreement negotiated between the Attorney General, beneficiaries, and trustees resolves the issues raised in the Schwan petition in a manner they have concluded to be in the best interests of both the public and beneficiaries for whom this charitable trust was established.

That, in itself, establishes more than sufficient “good cause” under SDCL 21-22-9 to decline the attempt by the Schwan brothers to force court supervision of the trust against the wishes of its beneficiaries and further extend this litigation to the detriment of these charitable institutions and the public interest.

CONCLUSION

WHEREFORE, for all of these reasons, the Attorney General and trust beneficiaries respectfully request that this Honorable Court *affirm* the circuit court’s judgment of dismissal.

Dated this 15th day of December, 2015.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to 500 East Capital Avenue, Pierre, South Dakota, 57501-5070, on December 15, 2015.

The undersigned further certifies that an electronic copy of the foregoing Brief was emailed to the attorneys set forth below, on December 15, 2015:

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 3,812 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

/s/ Ronald A. Parsons, Jr.

Ronald A. Parsons, Jr.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA
Appeal No. 27524

MARK SCHWAN AND PAUL SCHWAN,
as members of the Trustee Succession Committee
of The Marvin M. Schwan Charitable Foundation,
Petitioners/Appellants,

vs.

LAWRENCE BURGDORF, KEITH BOHEIM,
KENT RAABE, GARY STIMAC, and
LYLE FAHNING, as Trustees of The Marvin M.
Schwan Charitable Foundation,
Respondents/Appellees

APPELLANTS' REPLY BRIEF

Appeal from the Second Judicial Circuit
Minnehaha County, South Dakota
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INTRODUCTION

Appellants Mark and Paul Schwan (the "Schwans"), members of the Marvin M. Schwan Foundation's Trustee Succession Committee ("TSC"), commenced this equitable proceeding under SDCL 21-22-9 seeking instructions from the Circuit Court and an accounting from the Foundation's Trustees regarding the Trustees' investments in several Caribbean luxury hotel development projects that produced losses of some \$600 million—roughly one-third of the Foundation's total value. At every turn, the Trustees have systematically concealed from the Schwans, and the other non-Trustee members of the TSC, the facts relating to their respective roles in, and responsibility for, their ill-advised investment decisions. Now the Trustees, joined by the Foundation's Beneficiaries and the South Dakota Attorney General (collectively, "Appellees"), argue for the first time on appeal that the Schwans' Petition should be dismissed "for good cause shown" under SDCL 21-22-9 based on a "Settlement Agreement"¹ that is contingent upon this Court's dismissal of the Schwans' Petition with prejudice, and that would ensure that the Trustees never are required to disclose to the TSC the facts regarding their responsibility for the Foundation's enormous losses.

This Reply Brief responds to Appellees' newly-raised "good cause" argument and addresses arguments raised in Appellees' briefs regarding the Schwans' standing to petition the Court for instructions and for an accounting regarding the Trustees' investment losses. For the reasons explained below, Appellees' arguments are without merit.

¹ This document is found in the Trustee's brief, defined hereinafter, Appendix R-App. 18-39.

ARGUMENT

I. APPELLEES' ARGUMENT TO DISMISS THE PETITION FOR "GOOD CAUSE" BASED ON THE SETTLEMENT AGREEMENT WAS NOT RAISED BELOW AND SHOULD NOT BE CONSIDERED FOR THE FIRST TIME IN THIS APPEAL.

In the Circuit Court, the Trustees, Beneficiaries and Attorney General filed a joint Petition for Dismissal, arguing that their contingent Settlement Agreement, negotiated without the Schwans' knowledge, participation or approval, rendered moot the issues raised in the Petition. (CR 392-395, 521-522) The Circuit Court denied Appellees' request for dismissal based on mootness, determining that the Settlement Agreement did not address all of the issues raised in the Petition, and thus did not prevent the Court from granting effectual relief. (App. 6-8.)

In their briefs to this Court,² Appellees have abandoned the mootness arguments they advanced below and in their joint Notice of Review.³ They now argue instead, and for the first time on appeal, that their contingent Settlement Agreement establishes grounds for dismissal of the Petition "for good cause shown" under SDCL 21-22-9. (Trustee Br. 23; Bene/AG Br. 15-16.) Appellees did not raise that argument in the Circuit Court, and the issue was neither briefed by the parties nor addressed by the Circuit Court in the proceedings below—a fact conceded by the Beneficiaries and the Attorney General. (Bene/AG Br. 15-16.)

² Appellees filed two separate briefs in this Court. The Trustees' brief, titled "Appellees' Brief," was joined by the Beneficiaries and the Attorney General, and is cited as "Trustee Br." The Appellee Brief of the Trust Beneficiaries and South Dakota Attorney General is cited as "Bene/AG Br." The Schwans' opening Brief is cited as "Schwan Br."

³ In their Notice of Review to this Court, Appellees describe the issue for which they seek review as "whether the Circuit Court erred in rejecting the collective argument made by the Trustees, Beneficiaries and Attorney General . . . that *the Schwans' Petition was moot* because, among other reasons, the Beneficiaries ratified the Trustees' conduct." (emphasis added)

An issue not raised in the trial court will not be reviewed for the first time on appeal. *Kreiser's, Inc. v. 1st Dakota Title Ltd. P'ship*, 2014 S.D. 56 ¶ 46, 852 N.W.2d 413, 425; *State v. Gard*, 2007 S.D. 117 ¶ 15, 742 N.W.2d 257, 261. "Failing to raise an issue below, thereby allowing the circuit court an opportunity to correct the claimed error, results in waiver of the issue." *Gard*, 2007 S.D. 117 ¶ 15. Because Appellees' good cause argument was neither briefed nor addressed in the proceedings below, this Court should decline to review the issue on appeal.

II. THE CONTINGENT SETTLEMENT AGREEMENT DOES NOT ESTABLISH GOOD CAUSE TO DISMISS THE SCHWANS' PETITION.

Even if Appellees had made their good cause argument below, the argument is both procedurally and substantively flawed and should be rejected by this Court.

A. SDCL 21-22-9 Does Not Authorize Dismissal of a Petition For Good Cause Without a Hearing on the Merits.

SDCL 21-22-9 contemplates that a petition may be dismissed for good cause shown only after a hearing on the merits of the petition:

[U]pon the filing of a petition for court supervision, the court shall fix a time and place for hearing thereon . . . and, upon such hearing enter an order assuming supervision unless good cause to the contrary is shown.

SDCL 21-22-9 (emphasis added).

Here, the Circuit Court dismissed the Schwans' Petition based on standing without a hearing on the merits of the Petition. The Circuit Court made clear that the February 23, 2015 hearing on Appellees' dispositive motions was "not a merits hearing. . . . That's something different." (R-App. 48, 115.) The absence of a merits hearing on the Petition, coupled with Appellees' failure to raise their good cause argument in the Circuit Court, denies the Schwans a full opportunity to present evidence to demonstrate why the Settlement Agreement does not establish good cause for dismissal. Dismissal of the

Schwans' Petition without a hearing on the merits is unwarranted and unsupported by SDCL 21-22-9.

B. Appellees Have Not Met Their Burden to Show the Settlement Agreement Provides Good Cause for Dismissal.

In addition to these procedural deficiencies, Appellees cannot meet their burden to show that the Settlement Agreement resolves all of the issues raised in the Schwans' Petition and therefore provides good cause for dismissal.

First, as noted by the Circuit Court, the Settlement Agreement contains no provision to address the most fundamental grievance in the Schwans' Petition—namely, the Trustees' refusal to account to the TSC regarding their responsibility for the Foundation's \$600 million investment losses. (App. 8; R-App. 18-20.) Further, the Settlement Agreement is contingent upon the Court's dismissal of the Schwans' Petition. (App. 6; R-App. 18.) The absence of any requirement for an accounting, coupled with the fact that the Settlement Agreement would become effective only if this Court first dismisses the Schwans' Petition with prejudice, means the Trustees will never be required to disclose the information sought by the TSC regarding their investment activities. Without an accounting, the TSC cannot ascertain which Trustees bear responsibility for the Foundations' losses, or whether the Trustees' past conduct should disqualify them from continued service. An agreement specifically designed to conceal information from the TSC regarding the Trustees' responsibility for the Foundation's \$600 million losses does not constitute *good cause* for dismissing the Schwans' Petition.

Second, the Settlement Agreement provides no resolution to the existing conflict of interest arising from Trustees Burgdorf, Boheim and Raabe using their positions on the TSC to block the TSC from reviewing their own conduct as Trustees. (Schwan Br. 14-

16, 26-27.) The Agreement does not establish a firm deadline for Burgdorf and Boheim to resign their positions as Trustees; in fact, their resignation will not occur unless this Court first dismisses the Petition. (R-App. 18-19.) Further, the effective date for amending the Trust Instrument to prohibit a Trustee from serving on the TSC is left blank, subject to the Appellees "confer[ring] in good faith" in the future regarding an effective date. (*Id.* 34-35.) As noted by the Circuit Court, the timetable established by the Settlement Agreement for barring the Trustees from serving on the TSC "is delayed and uncertain." (App. 7.) Leaving this essential term open to be negotiated in the future makes the Settlement Agreement unenforceable. *See Weitzel v. Sioux Valley Heart Partners*, 2006 S.D. 45 ¶ 23, 714 N.W.2d 884, 892 (S.D. 2006).

In short, the Settlement Agreement would permit the Trustees to serve indefinitely both as Trustees and as TSC members, and thus continue to use their positions to deny the four non-Trustees on the TSC access to basic facts regarding the Foundation's enormous losses. An accounting by the Trustees is necessary to determine the Trustees' responsibility for these losses and their competence to continue serving as Trustees. The Settlement Agreement leaves these issues shrouded in secrecy and does not establish "good cause" for dismissal.

C. The Settlement Agreement Violates the TSC's Duties Under the Trust Instrument.

Aside from concealing the facts regarding the Foundation's enormous losses, the Settlement Agreement would circumvent the TSC's duty under the Trust Instrument to review the Trustees' administration of the Foundation.

The Trust Instrument charges the TSC with exclusive authority to appoint and remove trustees, and specifically requires the TSC to review the Trustees' actions on a

yearly basis. (App. 51, 53.) The TSC cannot effectively perform its critical oversight functions without access to information regarding the Trustees' conduct. *Alexander A. Bove, Jr.*, TRUST PROTECTORS: A PRACTICE MANUAL WITH FORMS (Juris Publishing 2014) (hereinafter "*Bove*"), § 7.3 at 73 ("[A]s a fiduciary of the trust, it would seem clear that the right to trust documents and information would be necessary for a protector to carry out his fiduciary duties. . . . To hold otherwise would frustrate the settlor's purpose and objective in naming a protector. It is hard to imagine a court would not allow a fiduciary complete access to all information necessary to the proper execution of the fiduciary's duties.").

Here, the Trustees have provided the Beneficiaries and Attorney General access to thousands of pages of documents regarding their investment activities but have denied the independent members of the TSC access to the same information. Consequently, the only parties in this action who have *not* had access to the thousands of pages of documents regarding the Trustees' investment activities are *the four non-trustee members of the committee responsible for reviewing the Trustees' conduct*. By concealing information from the TSC that has already been provided to the Beneficiaries and Attorney General, the Settlement Agreement would effectively turn the trustee oversight provision in the Foundation's Trust Instrument on its head and would emasculate the TSC's powers.⁴

⁴ The Trustees do not have unilateral discretion to determine that they have already adequately accounted to the TSC. (Trustee Br. 6-7.) This Court's decision in *In re Schwan 1992 Great Grandchildren's Trust*, 2006 S.D. 9, 709 N.W.2d 849, held that the Trustees' discretion to interpret ambiguous terms of a trust document must be exercised in "good faith and reasonable judgment." 2006 S.D. 9 ¶ 22. The Trustees' refusal to provide the TSC with the same voluminous information they have provided to the Beneficiaries and Attorney General is neither reasonable nor in good faith.

D. Appellees' Joint Opposition to the Petition Does Not Override the TSC's Duties Under the Trust Instrument.

Appellees argue that good cause for dismissal exists because the Schwans' Petition is jointly opposed by the Trustees, Beneficiaries and Attorney General. (Trustee Br. 24; Bene/AG Br. 11.) The fact, however, that Appellees find the Schwans' Petition inconvenient or bothersome does not excuse the TSC from performing its oversight duties.

The Schwans, as TSC members, owe duties to the Foundation itself, per the terms of the Trust Instrument. *Bove*, § 6.1 at 65 (a non-trustee who holds power over a trust has fiduciary duties to the purposes of the trust.). The TSC's members have special interests and duties to the Foundation that are distinct from the interests and duties of the Trustees, Beneficiaries and Attorney General. The Trust Instrument charges the TSC—not the Trustees, the Beneficiaries or the Attorney General—with the exclusive power to appoint and remove trustees, and to review the Trustees' job performance. Neither the Settlement Agreement, nor the Beneficiaries' decision to release the Trustees from liability for their disastrous investments, excuses the TSC from performing its duties under the Trust Instrument.⁵

It is perhaps not surprising that the Beneficiaries have determined the Settlement Agreement to be "in their best interests" and have joined the Trustees in opposing the Schwans' Petition. Since the Foundation's inception in 1993, the Trustees have dispensed approximately \$800 million in Foundation money to the Beneficiaries (CR 175), and retain complete discretion to determine the amount of each Beneficiary's monetary

⁵ The Beneficiaries' objection to the Schwans' failure to consult them before filing their Petition is irrelevant. (Bene/AG Br. 5.) As members of the TSC, the Schwans had an obligation to exercise their powers and duties under the Trust Instrument independently and in good faith, with or without the approval of the Beneficiaries.

distribution in the future. (App. 55.) It is in the Beneficiaries' best financial interests, therefore, to join the Trustees in opposing the Schwans' Petition. In any event, the Beneficiaries' decision to join the Settlement Agreement has no bearing on the TSC's duty to oversee the Trustees' job performance.

Similarly, the Attorney General's failure to discover "criminally actionable" misconduct by the Trustees hardly qualifies the Trustees to continue to serve as Trustees, free from TSC oversight. (Bene/AG Br. 7). The Attorney General's failure to uncover criminal behavior does not answer whether any of the Trustees acted negligently or recklessly; profited personally from serving on the boards of directors of entities to which the Foundation lent money; violated the Foundation's investment or ethics policies; or otherwise breached fiduciary duties to the Foundation. Such behavior by any Trustee, whether or not criminally actionable, would warrant his removal for cause. *See, In re: Schwan 1976 Grandchildren's Trust*, TR. 05-36 (S.D. Cir. Ct. 2011) (removing one of the Foundation's Trustees as trustee of another Schwan family trust for "serious breach of trust" based on conflicts of interest and disloyalty to trust).

III. THE SCHWANS HAVE STANDING TO PETITION THE CIRCUIT COURT UNDER SDCL 21-22-9.

The Schwans explained in their opening brief that they have standing to apply to the Circuit Court for instructions and an accounting under SDCL 21-22-9 because (1) they are "persons in any manner interested in" the Foundation, and therefore are "beneficiaries" as defined in SDCL 21-22-1 (1) (Schwan Br. 20-25); and (2) because they represent a "trust committee," and therefore are "fiduciaries" as defined in SDCL 21-22-1(3). (*Id.* 25-30)

Appellees argue that the Schwans are not persons interested in the Foundation "in any manner" because their interests are not financial in nature, and that they cannot represent a "trust committee" without a majority vote of the TSC. Appellees' arguments are based on a strained interpretation of the definitions in SDCL 21-22-1 and ignore the expansive language used by the Legislature to define persons who have standing to petition the Circuit Court under SDCL 21-22-9.⁶

A. The Schwans are "Persons in Any Manner Interested in" the Foundation.

There is no support in the statute or case law for Appellees' argument that a person must have a *financial* interest in order to be *in any manner* interested in a trust and qualify as a "beneficiary" under SDCL 21-22-1(1). Appellees' argument is refuted by the plain language of SDCL 21-22-1(1), which contains no requirement of a financial interest. Had the Legislature wanted to confine the definition of "beneficiary" to persons with a financial interest, it easily could have included such language in the statute. It elected instead to define the term broadly to include persons interested in a trust "in any manner." The statute's plain language demonstrates that the Legislature did not intend to restrict the definition to persons with a financial interest.

Ironically, the Trustees argue that the plain language of the statute is so *expansive*—"any person in any manner interested"—that the definition must be read *restrictively* to include only persons with a financial interest in the trust. (Trustee Br.

⁶ Appellees consistently describe the Schwans' Petition as a request for "court supervision." While a petition for instructions under SDCL 21-22-9 technically requires the court to exercise supervision in order to provide instructions to the parties, the equitable relief requested in the Schwans' Petition does not seek burdensome or prolonged judicial involvement in the day-to-day administration of the Foundation. The Petition merely asks the Court to clarify the TSC's authority to review the Trustees' investment activities—a function already contemplated in the Trust Instrument.

11). The Trustees' argument twists accepted rules of statutory construction and would read language into the definition that the Legislature did not include in the statute. The phrase "in any manner interested" has uniformly been interpreted broadly, rather than restrictively. (Schwan Br. 23-24). It is nonsensical to suggest that the Legislature's use of such expansive language requires a restrictive reading of those who qualify as a "beneficiary."

Nor does the inclusion in SDCL 21-22-1(1) of "creditors" with claims against a trust demonstrate that the Legislature intended the definition to include "*only* those persons with a financial interest in the trust." (Trustee Br. 11). While the statutory definition may *include* persons with a financial interest, there is no language in the statute to *exclude* persons whose interests are not financial. The Legislature's broad definition recognizes that the nature of a person's interest in a trust may vary, and that all persons with interests directly affected by the trust's administration should have standing to petition the court under SDCL 21-22-9, regardless of whether their interests are considered "beneficial" interests at common law.

The Trustees' reliance on more restrictive definitions of "beneficiary" in different statutes is similarly misplaced. (Trustee Br. 12-13). The statutory definitions cited by the Trustees clarify that when the Legislature desired to restrict the definition of "beneficiary" to persons with a financial interest, it did so explicitly. For example, the Legislature amended SDCL 55-1-12 in 2015 to expressly limit the definition of "beneficiary" to persons with a present or future financial interest in a trust. It did not, however, similarly amend SDCL 21-22-1(1) to limit the definition of a "beneficiary" for purposes of establishing who may file a petition under SDCL 21-22-9.

Moreover, all of the alternative statutory definitions cited by the Trustees to support their narrow definition of "beneficiary" are found outside Chapter 21-22, and have no specific application to proceedings brought under SDCL 21-22-9. (Trustee Br. 12-13). For example, SDCL 55-3-31 defines "interested persons" for purposes of providing notice in proceedings requiring service or consent, including service of persons who owe a debt to the South Dakota Department of Social Services. Likewise, SDCL 29A-1-201(23) defines "interested persons" for purposes of probate proceedings. By contrast, the definitions in SDCL 21-22-1, including the definition of "beneficiary" in SDCL 21-22-1(1), apply specifically to proceedings under Chapter 21-22-9. *See* SDCL 21-22-1 (providing definitions for "[t]erms used in this chapter"). The Legislature's choice to define "beneficiary" restrictively for some purposes but expansively for the specific purpose of defining who may bring suit under SDCL 21-22-9 undermines, rather than supports, the Trustees' argument. *See, e.g., Citibank N.A. v. South Dakota Dep't of Revenue*, 2015 SD 67, ¶ 19, 868 N.W.2d 381 (S.D. 2015) (rules of statutory construction require that "statutes of specific application take precedence over statutes of general application.").

A common-sense reading of SDCL 21-22-1(1) must include as beneficiaries all persons charged with special powers and duties under a trust's governing document in order to provide such persons with access to the courts, when necessary, to clarify their responsibilities to the trust. (Schwan Br. 30-31). This is particularly important in the context of charitable trusts, where public access and transparency should trump secrecy and lack of accountability. In this equitable proceeding, the Schwans are "persons in any

manner interested in" the Foundation, and therefore have standing as "beneficiaries" under SDCL 21-22-9.⁷

There are few reported cases, and none in South Dakota, in which a party has challenged the standing of a person charged with specific powers and duties under a trust document. In cases in which the issue has been litigated, however, courts have consistently held that persons with such trust powers and duties, like the Schwans, have standing to sue. *See Sheldon v. Trust Co. of Virgin Islands, Ltd.*, 535 F. Supp. 667, 671-672 (D.P.R. 1982) (holding that trust protector assigned powers to appoint and remove trustees had "real interest in the trust" emanating from the trust instrument and had standing to bring action to remove trustee and request accounting for trustee's alleged mismanagement and breaches of trust); *Lokey v. Texas Methodist Foundation*, 479 S.W.2d 260,265 (Tex. 1972); *accord In re Matter of Hill*, 509 N.W. 2d 168, 172 (Minn. Ct. App. 1994); *St. Mary's Med. Center, Inc. v. McCarthy*, 829 N.E. 2d 1068, 1072 (Ind. Ct. App. 2005).⁸ The Trustees have not cited a single case in which a person charged with special trust powers and duties has been denied standing.

⁷ Granting standing to persons with special trust powers and duties would not, as Trustees suggest, "engulf the definitions of "fiduciary" or "trustor" used in SDCL 21-22-9 or render those terms superfluous. For example, the definition of "fiduciary" in SDCL 21-22-1(3) includes persons with specific titles or positions named in the governing document "or order of the court." The definition of "fiduciary" thus may include persons who should be permitted to seek court instructions or equitable relief on behalf of another – for example, a court-appointed guardian or conservator—but who have no interest in the trust under the trust's document. Conversely, a person with important trust duties may not have one of the specific titles or positions listed as a "fiduciary" in SDCL 21-22-3-1(3), but still be recognized as a person "in any manner interested" in the trust under SDCL 21-22-1(1).

⁸ *See* discussion of *Lokey*, *Hill* and *St. Mary's Med. Center* cases in Schwan Br. 22-23.

The Trustees attempt to distinguish *Lokey* because the statute at issue there authorized actions by a trustee, beneficiary or "any person affected by or having an active interest in the administration of the trust estate." The Texas Supreme Court construed this language to include all persons with a "special interest [in the trust] not shared by the general public," and held the petitioner, as a member of a committee charged with directing distributions of trust funds, had standing despite having no financial interest in the trust. 479 S.W.2d at 265. The language in SDCL 21-22-1(1) is strikingly similar to the statutory language in *Lokey* but is even broader in scope, as it grants standing to "any person *in any manner interested*" in a trust, not just those with an active interest in the trust's administration. The Schwans, like the petitioner in *Lokey*, have a special interest in the Foundation sufficient to confer standing.

The Trustees' attack on *In re Matter of Hill* also fails. The court in *Hill* found the petitioner had standing because he was a "person interested in the trust," even though he had no financial interest. 509 N.W. 2d at 171-172. None of the cases cited by the Trustees decided after *Hill* denied standing to persons, like the Schwans, with duties under a governing trust document. (Trustee Br. 19). The *Hill* decision remains good law and no appellate decision has altered its holding.

In sum, the Schwans are "persons in any manner interested in" the Foundation, and have standing to petition the court under SDCL 21-22-9.

B. The Schwans Represent a Trust Committee, and Therefore, Have Standing to Petition the Court as "Fiduciaries."

In addition to their standing as "beneficiaries," the Schwans have standing as "fiduciaries" as defined in SDCL 21-22-1(3) because they represent a "trust committee."

As explained in the Schwans' opening brief, three of the seven members of the Foundation's TSC—Burgdorf, Boheim and Raabe—have used their positions on the TSC to block the TSC from reviewing their own investment decisions and activities—a fact not disputed by the Trustees. (Schwan Br. 26; *see* Trustee Br. 7-9, 24). Their conduct violates the Foundation's conflict of interest policies and is in breach of the Trustees' fiduciary duties of loyalty to the Foundation. (Schwan Br. 26-27). Without the opposition of the three conflicted Trustees, the remaining four members of the TSC are evenly divided on whether to request an accounting from the Trustees, and there is no TSC majority opposing the Schwans' Petition. (*Id.* 28).

The Trustees either ignore or misapprehend the nature of their conflict of interest. Their conflict does not arise simply from their simultaneous service as Trustees and as members of the TSC, nor is it excused because Marvin Schwan allowed Trustees to serve on the TSC. (Trustee Br. 21-22). Rather, their conflict arises from Trustees Burgdorf's, Boheim's, and Raabe's use of their membership on the TSC to thwart TSC review of their own personal conduct as Trustees. The use of their powers as TSC members to obstruct review of their own \$600 million mess violates their obligation to perform their duties solely in the interest of the Foundation.

Judge Tiede's decision in *In re Schwan 1976 Grandchildren's Trust*, TR. 05-36 (S.D. Cir. Ct. 2011)⁹ illustrates why the three Trustees' conflict of interest in this case was neither waived nor authorized by Marvin Schwan. In the *1976 Trust* case, one of the Foundation's Trustees had been appointed as a Trustee of another trust established by Marvin Schwan (the "1976 Trust"). The Trustee made a decision to sell one of the

⁹ Judge Tiede's decision in the *1976 Trust* case is under seal in the Circuit Court record beginning at CR 769.

Foundation's stock holdings, knowing that the sale would cause the value of the 1976 Trust's holdings in the same stock to decline. The beneficiaries of the 1976 Trust sued, alleging the Trustee had violated his duty of loyalty to the 1976 Trust by making investment decisions as a Trustee of the Foundation that harmed the 1976 Trust. The Trustee attempted to excuse his conflict of interest by arguing, just as the Trustees argue here, that Marvin Schwan had appointed him as trustee of both trusts and therefore had waived his conflict. Judge Tiede rejected that argument, finding that the Trustee's conflict arose from the investment decisions he made as Trustee of the Foundation that harmed the 1976 Trust, *not* from his appointment as trustee of both trusts many years earlier. (CR 780.) Judge Tiede noted there was no evidence that Marvin intended to waive "the full panoply of fiduciary duties inherent in the appointment of trustees, including the duty of undivided loyalty," when he appointed the Trustee to both trusts. (*Id.*) Based on the Trustee's conflict of interest and disloyalty to the 1976 Trust, Judge Tiede held the Trustee had engaged in "serious breaches of trust" that warranted his removal as trustee of the 1976 trust. (*Id.* at 14.)¹⁰

As in the *1976 Trust* case, Marvin Schwan's decision here to allow the Foundation's Trustees to serve simultaneously as members of the TSC does not excuse the Trustees' use of their membership on the TSC to obstruct the TSC from investigating the Trustees' investment activities. The three Trustees should be barred from

¹⁰ In light of Judge Tiede's decision in the *1976 Trust* case and the \$600 million losses suffered by the Foundation as a result of their decisions, the Trustees' attempts to impugn the Schwans' motives for filing their Petition are preposterous. (Trustee Br. 7-8, 25-26.) The Circuit Court squarely rejected the Trustees' slanderous attacks against the Schwans. (App. 20.)

participating in the TSC's decision regarding whether they should be required to account to the TSC for their own past behavior.¹¹

Without the opposition of the three conflicted Trustees, the remaining four members of the TSC are evenly divided on whether to request an accounting from the Trustees, and there is no majority that opposes the Schwans' Petition. The Trust Instrument expresses no requirement that the TSC act by a majority to request an accounting from the Trustees or to review the Trustees' job performance. (Schwan Br. 14, 28). In the absence of such a provision in the Trust Instrument, the Circuit Court erred by ruling, as a matter of law, that the Schwans required a majority of the TSC to initiate this proceeding as a "trust committee."

C. The Circuit Court Should Have Used Its Equitable Powers to Permit the Schwans to Bring Their Petition

In light of the deadlock among the four non-conflicted members of the TSC, it was incumbent upon the Circuit Court to exercise its equitable powers to determine whether the Schwans should be allowed to petition the Court under SDCL 21-22-9 as a "trust committee." (Schwan Br. 28-29). The Circuit Court's inherent power to make such an equitable determination is explicitly recognized in SDCL 21-22-1(3). (*Id.*) Equity is not served by the Trustees' efforts to conceal information from the TSC regarding their responsibility for the Foundation's massive losses. The Circuit Court erred by not

¹¹ The Schwans' argument would not preclude Trustees generally from serving on, or voting as a member of, the TSC. (Trustee Br. 21-22). Rather, it would only preclude trustees from participating in TSC decisions in which they have a personal interest. The three Trustees on the TSC are conflicted from participating in the TSC's deliberations in this case because all three are involved in the investment activities at issue. *See Tibble v Edison International, et al.*, 135 S. Ct. 1823, 1828 (2015)(recognizing under common law principles that a trustee has an ongoing fiduciary obligation to consider the trust's investments to ensure they are appropriate).

exercising its equitable powers to permit the Schwans to petition the Court for instructions under SDCL 21-22-9.

CONCLUSION

The Schwans respectfully request that this Court reverse the Order and Judgment of the Circuit Court and remand this case for a hearing on the merits of their Petition.

CERTIFICATE OF COMPLIANCE

This brief complies with the length requirements of SDCL 15-26A-66(b). Excluding the cover page, Table of Contents and Table of Authorities, and certificates of counsel, this brief contains 4,980 words as counted by Microsoft Word.

Dated: January _____, 2016

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