

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

CASE TYPE: OTHER CIVIL

BREMER FINANCIAL CORPORATION,
RONALD JAMES, JEANNE H. CRAIN,
MARY BRAINERD, GLENN D. MCCOY,
KEVIN A. RHEIN, WENDY SCHOPPERT, and
CHARLES WESTLING,

Plaintiffs,

v.

S. BRIAN LIPSCHULTZ, DANIEL C.
REARDON, and CHARLOTTE S. JOHNSON,
individually and in their capacity as Trustees of
the Otto Bremer Trust

Defendants.

Court File No. 62-CV-19-8203

ANSWER AND COUNTERCLAIM

PRELIMINARY STATEMENT

The Otto Bremer Trust (“OBT”) has been the principal owner of Bremer Financial Corporation (“BFC”) for seventy-five years. Unfortunately, recent actions by BFC’s CEO and the remaining Plaintiff Directors have forced OBT to begin the process of selling its shares. Over the years, there have been a number of changes in circumstances that were unforeseen when Otto Bremer created OBT in 1944—including changes in tax law, and, recently, rapid and deep-seated changes in the competitive environment for mid-sized banking organizations such as BFC. The occurrence of additional unforeseen circumstances in 2019—including the effort by BFC’s CEO to merge BFC with another bank, and a subsequent offer to buy BFC at a substantial premium—compelled the Trustees’ conclusion that it had become necessary and proper to sell. Although forced by unforeseen circumstances, a sale of OBT’s BFC stock will have extraordinary benefits for the communities OBT serves, potentially *doubling* OBT’s charitable assets and thereby allowing OBT to increase its charitable giving by \$50 million per year.

Plaintiffs have no legitimate basis for opposing the Trustees' decision. The Trust Instrument, to which BFC is not a party, makes clear that the "Trustee's opinion" governs the issue of "unforeseen circumstances" and "necessary and proper." When Mr. Bremer created the Trust, he left no room for the BFC Board to second-guess this decision by the OBT Trustees. This should end the analysis. As the Plaintiff Directors acknowledge, if the transfer was valid under the Trust Instrument, BFC must honor that transfer.

Unable to allege viable claims, Plaintiffs seek to embarrass the Trustees by impugning their motives, alleging that Trustee compensation will increase if BFC is sold. But putting words on a page does not make them true, and Plaintiffs know—or should know—that these assertions are false. The Trustees have each agreed to freeze their compensation for two years following a sale. And, as Plaintiffs are well aware, any future changes to Trustee pay would require this Court's approval.

Plaintiffs also trivialize OBT's ongoing charitable work. OBT has contributed over \$700 million to charitable causes in the Upper Midwest, with over \$300 million distributed since Defendants Johnson, Reardon, and Lipschultz began serving together as Trustees. Last year alone, OBT made \$50 million in grants and program-related investments to over 500 organizations spanning more than 160 communities. It helped improve dental care in Rochester, Minnesota; provided education and job training in Minneapolis; supported innovative housing, employment, health care, and youth arts initiatives throughout the Twin Cities; and helped children in Carrington, North Dakota, have a safe and fun place to go after school. This charitable work is OBT's and OBT's alone.

OBT's ability to pursue its charitable mission is now at risk. Under federal tax law, OBT must report the fair market value of its assets each year, and then distribute at least five percent of that value by the end of the following year. The events of 2019 have revealed that BFC shares are

worth approximately *double* their previous valuation. Because BFC stock accounts for the vast majority of OBT's portfolio, OBT has been forced to increase the valuation of its assets significantly, greatly increasing its future charitable distribution requirements. This is extraordinary news for the communities OBT serves, but places OBT in an untenable position. OBT cannot meet this increased distribution requirement without roughly \$50 million in additional income from BFC each year, and BFC cannot sustainably increase its dividend by that amount. OBT now faces an existential crisis. And its only path forward is to sell its shares in BFC.

Rather than accept OBT's decision, BFC's incumbent leadership has done everything it can to obstruct a sale. The seven non-Trustee directors have ordered BFC's management to withhold necessary information from potential buyers. They have refused to recognize OBT's sales of shares to third-party investors. They have refused to hold a special shareholder meeting called by OBT to consider replacing the board. And they are now wasting BFC's money on a misguided lawsuit.

Plaintiffs' actions are unlawful, and their claims are without merit. The Court should reject their request for declaratory relief, dismiss their Complaint, order them to comply with their obligations under Minnesota law, and award the Trust damages for the injuries caused by the Counterclaim Defendants' self-interested breaches of duty.

ANSWER

For its answer to the Complaint of Bremer Financial Corporation (“BFC”), Ronald James, Jeanne H. Crain, Mary Brainerd, Glenn D. McCoy, Kevin A. Rhein, Wendy Schoppert, and Charles Westling (collectively, “Plaintiffs”), Defendants S. Brian Lipschultz, Daniel C. Reardon, and Charlotte S. Johnson (collectively, “Trustees”) state as follows:

The Trustees deny all allegations contained in the Complaint unless specifically admitted. Moreover, any factual allegation admitted below is admitted only as to the specific facts stated therein and not as to any conclusions (legal or otherwise), characterizations, implications, or speculation in the averment or the Complaint as a whole. To the extent that an averment includes a mix of alleged factual assertions and legal conclusions, the Trustees deny such commingled allegations except those that are specifically admitted. The Trustees deny any allegations set forth in the headings of the Complaint. The Trustees incorporate this general denial into each numbered paragraph of this Answer.

INTRODUCTION

1. The first two sentences of this paragraph contain Plaintiffs’ characterization of their claims, to which no response is required. To the extent a response is required, the Trustees deny the allegations in the first sentence and admit the allegations in the second sentence. Answering further, the Trustees admit that the Otto Bremer Trust (“OBT”) has held a majority economic interest in Bremer Financial Corporation (“BFC”) for more than 75 years, and that OBT’s three Trustees serve as directors of BFC. The Trustees deny the remaining allegations in this paragraph, and deny that Plaintiffs rightfully “control” BFC.

2. The Trustees deny these allegations. The Trust Instrument expressly authorizes the Trustees to sell BFC stock, in their sole discretion, based on unforeseen circumstances. Plaintiffs—who are neither trustees nor beneficiaries of OBT—lack any standing to challenge the

Trustees' discretionary determination that unforeseen circumstances exist. Such unforeseen circumstances are manifest, including dramatic changes to the banking industry that could not have been foreseen by Otto Bremer, and financial circumstances that, in the Trustees' good-faith determination, jeopardize OBT's ability to make distributions sufficient to comply with federal tax law.

3. The Trustees admit that OBT is a charitable organization that has held a majority of BFC's shares since OBT was created in 1944. The Trustees deny that Otto Bremer intended to create a permanent relationship between OBT and BFC or that the Bank's earnings would always be shared with the community. The Trustees deny the remaining allegations in this paragraph, and deny that Plaintiffs' characterizations of the Trust Instrument are accurate or of any relevance.

4. The allegations in this paragraph state legal conclusions to which no response is required. The Trustees state further that the voting rights of BFC shareholders are governed by the Plan of Reorganization, which is attached as Exhibit B to the Complaint, and the Restated Articles of Incorporation of Bremer Financial Corporation, which is attached as Exhibit C to the Complaint. The Plan of Reorganization and the Articles of Incorporation speak for themselves, and the Trustees deny any characterization inconsistent therewith.

5. The Trustees deny the allegations in this paragraph, and deny that the "will of the employee-shareholders" has been expressed on any subject relevant to the Complaint.

6. The Trustees deny the allegations in this paragraph, and deny that the Trustees disclosed any BFC confidential information to potential acquirers of BFC.

7. The Trustees admit that in August 2019 the Plaintiff Board Members resolved not to consider a sale of BFC. The Trustees deny the remaining allegations in this paragraph, and aver that the assertion that a sale "would destroy shareholder value" is contradicted by the allegation in

Paragraph 60 that BFC's value as a stand-alone entity "was almost exactly the same" (but less than) its value in a sale.

8. The Trustees admit that OBT sold a portion of its nonvoting shares to 11 investors consisting of 19 investment funds, who then converted those shares into voting shares. The Trustees deny the remaining allegations in this paragraph, including specifically Plaintiffs' characterizations of the Trustees' actions and of the investors as "accomplices." The Trustees state that their sale of shares was lawful and effective and that BFC's refusal to recognize the sale is baseless and unlawful.

9. The Trustees deny the allegations in this paragraph.

10. The Trustees deny the allegations in this paragraph.

11. This paragraph contains Plaintiffs' characterization of their claims, to which no response is required. To the extent further response is required, the Trustees deny the allegations in this paragraph, and deny that the individual Plaintiffs are "disinterested."

PARTIES

A. Bremer Financial Corporation

12. The Trustees admit the allegations in this paragraph.

13. The Trustees admit that BFC has two classes of common stock: Class A and Class

B. The Trustees admit that there are 1.2 million Class A shares outstanding and 10.8 million Class B shares outstanding, and that neither class of stock is registered to trade on a securities exchange. The Trustees admit that BFC is not a "publicly held corporation" within the meaning of the Minnesota Business Corporation Act. The Trustees state that the voting rights of Class A and Class B shares are governed by the Plan of Reorganization and the Articles of Incorporation, and deny any characterization inconsistent therewith.

14. The Trustees admit that Bremer Bank is a regional bank; admit that, like many banks, Bremer Bank's clients include business, agricultural, and rural customers; and admit that BFC describes itself as "cultivating strong communities." The Trustees further admit that BFC has an "outstanding" Community Reinvestment Act rating from bank regulators, and that BFC engages in charitable giving, including partnerships with Habitat for Humanity, Farm Rescue, United Way, and Great Plains Food Bank. The Trustees lack knowledge or information sufficient to form a belief about the truth of the remaining allegations of Paragraph 14, and thus deny those allegations.

B. The Otto Bremer Trust and Its Trustees

15. The Trustees admit the allegations in this paragraph.

16. The Trustees admit the first sentence of this paragraph. The Trustees state that, before October 25, 2019, OBT owned 20 percent of BFC's outstanding Class A shares and all of BFC's outstanding Class B shares. On October 25, 2019, OBT sold 725,000 Class B shares to 11 investors consisting of 19 investment funds, and the investors have subsequently elected to convert those shares to Class A shares. The Trustees deny all remaining allegations in this paragraph.

17. The Trustees admit that OBT has three Trustees and that they are named as defendants in this action. The Trustees further admit that the Trustees are members of BFC's Board. The Trustees admit that S. Brian Lipschultz has been a Trustee and a BFC director since 2012, that Daniel C. Reardon has been a Trustee and a BFC director since 1996, and that Charlotte S. Johnson has been a Trustee since 1991 and a BFC director since 1993. The Trustees admit that their work as Trustees and BFC directors is a full-time commitment, and thus they do not hold additional full-time jobs. None of the Trustees "inherited" their positions, as Plaintiffs' falsely assert. The Trustees were appointed in accordance with the explicit requirements of the Trust

Instrument. The Trustees further deny that they began serving as OBT's co-CEOs in 2014; OBT's trustees have been its co-CEO's since OBT was established.

The Trustees admit that Reardon previously worked as a securities broker. Reardon's FINRA BrokerCheck records speak for themselves, and the Trustees deny any characterization inconsistent therewith. The Trustees additionally state that each of the matters reflected in the BrokerCheck records relate to two incidents that occurred more than thirty years ago—in 1988 and 1989—when Reardon was just entering the securities business. In the first incident, Reardon took the matter to arbitration and the panel ruled in his favor—an outcome not recorded in the BrokerCheck records. In the second incident, Reardon mistakenly made investments that were later deemed to be outside of an approved category for the client. This mistake was born out of inexperience, not intent. Neither of these incidents has any relevance to this lawsuit or to Reardon's successful work as a Trustee for OBT.

The Trustees deny the remaining allegations in this paragraph and all allegations and characterizations inconsistent with the foregoing response.

C. Bremer's Board of Directors

18. The Trustees admit that BFC's Board has ten members, including the three Trustees, and that the seven non-Trustee directors are Plaintiffs in this action. The Trustees lack knowledge or information sufficient to form a belief about the truth of the allegations in the third sentence of this paragraph, and thus deny those allegations.. The remaining allegations in this paragraph state legal conclusions to which no response is required. To the extent a response is required, the Trustees deny that the seven non-Trustee directors are "independent," and state that they are acting in their own self-interests rather than in the interests of shareholders, for purposes of entrenching themselves on BFC's Board.

a. The Trustees admit that Ronald James has been a director of BFC since 2004, a director of Bremer Bank since October 2014, and has served as Chair of Bremer's Board since 2015. The Trustees lack knowledge or information sufficient to form a belief about the truth of the remaining allegations of Subparagraph A, and thus deny those allegations.

b. The Trustees admit that Jeanne H. Crain has served as the President and CEO and a director of BFC since November 2016, and that she joined BFC in 2012. The Trustees lack knowledge or information sufficient to form a belief about the truth of the remaining allegations of Subparagraph B, and thus deny those allegations.

c. The Trustees admit that Mary Brainerd has been a director of BFC since January 2014 and a director of Bremer Bank since October 2014. The Trustees lack knowledge or information sufficient to form a belief about the truth of the remaining allegations of Subparagraph C, and thus deny those allegations.

d. The Trustees admit that Glenn D. McCoy has been a director of BFC and a director of Bremer Bank since June 2016. The Trustees lack knowledge or information sufficient to form a belief about the truth of the remaining allegations of Subparagraph D, and thus deny those allegations.

e. The Trustees admit that Kevin A. Rhein has been a director of BFC and a director of Bremer Bank since May 2017. The Trustees lack knowledge or information sufficient to form a belief about the truth of the remaining allegations of Subparagraph E, and thus deny those allegations.

f. The Trustees admit that Wendy Schoppert has been a director of BFC and a director of Bremer Bank since May 2017. The Trustees lack knowledge or information sufficient to form a belief about the truth of the remaining allegations of Subparagraph F, and thus deny those allegations.

g. The Trustees admit that Charles B. Westling has been a director of BFC since April 2015 and a director of Bremer Bank since 2010. The Trustees lack knowledge or information sufficient to form a belief about the truth of the remaining allegations of Subparagraph G, and thus deny those allegations.

JURISDICTION AND VENUE

19. The Trustees admit the allegations in this paragraph.

20. The Trustees admit the allegations in this paragraph.

21. The Trustees admit the allegations in this paragraph.

FACTUAL ALLEGATIONS

I. HISTORICAL BACKGROUND

A. Otto Bremer's Founding of Bremer and the Trust

22. The Trustees admit that Otto Bremer was an American success story; that Otto Bremer was a German immigrant who moved to Minnesota in 1886; and that Otto Bremer invested in a number of community banks in Minnesota, Wisconsin, and North Dakota. The Trustees further admit that BFC was incorporated in December 1943, under the name Otto Bremer Company, to consolidate Otto Bremer's stockholdings in community banks in Minnesota, Wisconsin, and North Dakota. The Trustees lack knowledge or information sufficient to form a belief about the truth of the remaining allegations of Paragraph 22, and thus deny those allegations.

23. The Trustees admit that Otto Bremer was originally BFC's sole shareholder. With respect to the allegations in the second sentence of this paragraph, the Trustees state that the Trust Instrument speaks for itself, and deny any characterizations inconsistent therewith. The Trustees lack knowledge or information sufficient to form a belief about the truth of the remaining allegations of this paragraph, and thus deny those allegations.

24. The Trustees admit that OBT was BFC's sole shareholder between 1951 and 1989; admit that BFC is the parent company of Bremer Bank, a regional banking business; admit that Bremer Bank extends credit and offers financial products; and admit that, by extending credit and offering financial products, banks like Bremer Bank can play a role in growing the economy and improving the lives of individuals in the communities where they are located. The Trustees further admit that OBT uses the earnings on its assets, including dividends it receives from BFC, to pursue OBT's charitable mission in Minnesota, Wisconsin, and North Dakota, and that the relationship between OBT and BFC has been largely synergistic for much of the last 75 years. The Trustees deny the remaining allegations in Paragraph 24.

B. The Trust Instrument Directs the Trust to Retain Its Bremer Shares

25. The Trustees admit that Exhibit A is a copy of the Trust Instrument. The Trust Instrument speaks for itself, and the Trustees deny any characterization inconsistent therewith. The remaining allegations in this paragraph are legal conclusions to which no response is required.

26. The Trustees state that the Trust Instrument speaks for itself, and deny any characterization inconsistent therewith, including the allegation that Otto Bremer instructed that the Trust would always hold its shares of BFC stock, or that BFC's earnings are or would always be used for charitable purposes, or that the Trust Instrument requires the Trustees to retain BFC stock.

27. The Trustees state that the Trust Instrument speaks for itself, and deny these allegations because they are incomplete and ignore the Trustees' express right to sell BFC shares in their discretion, thus falsely characterizing the Trust Instrument. Plaintiffs lack standing to challenge the Trustees' exercise of discretion.

28. The Trustees state that the Trust Instrument speaks for itself, and deny these allegations because they are incomplete and ignore the Trustees' express right to sell BFC shares

in their discretion, thus falsely characterizing the Trust Instrument. Plaintiffs lack standing to challenge the Trustees' exercise of discretion.

C. The Trust Relinquishes Control of Bremer's Board in the 1989 Reorganization

29. The Trustees admit that in 1969 Congress enacted tax legislation that included rules governing private charitable foundations. The Trustees state that the remaining allegations in this paragraph state legal conclusions to which no response is required. To the extent a response is required, the Trustees admit that the new law provided that private foundations would face substantial excise taxes if (1) they owned more than 20 percent of the voting stock of a for-profit company after 1989, or (2) they failed to distribute at least five percent of their assets' fair market value to charitable causes annually. The Trustees deny the remaining allegations in this paragraph.

30. The Trustees admit that BFC underwent a reorganization in 1989, which was memorialized in the Plan of Reorganization and Amended Articles. The Trustees admit that as a result of the reorganization it held 20 percent of BFC's Class A stock. The Trustees state that the voting rights of Class A shares are governed by the Plan of Reorganization and the Amended Articles, which speak for themselves, and the Trustees deny any characterization inconsistent therewith.

31. The Trustees admit that the reorganization recapitalized BFC's share capital into two classes of common stock, Class A and Class B. The Trustees state that the voting rights of Class A and Class B shares are addressed in the Plan of Reorganization and the Amended Articles, which speak for themselves, and the Trustees deny any characterization inconsistent therewith. The Trustees admit that OBT exchanged its existing BFC shares for 1.2 million Class A shares and 10.8 million Class B shares, and then sold 80 percent of the Class A shares to BFC employees, directors, and BFC's employee stock-ownership plan and profit-sharing plan, as permitted by the Trust Instrument.

32. The Trustees admit that following the 1989 reorganization and until October 2019 OBT held a 92 percent economic interest in BFC, and that OBT held 20 percent of BFC's Class A shares. The Trustees admit that the dividends OBT receives from BFC represent OBT's return on its investment in BFC, which OBT uses to support its charitable mission. The Trustees state that the voting rights of Class A shares are governed by the Plan of Reorganization and the Amended Articles, which speak for themselves, and the Trustees deny any characterization inconsistent therewith. The Trustees lack knowledge or information sufficient to form a belief about the truth of the remaining allegations of Paragraph 32, and thus deny those allegations.

33. The Trustees state that the allegations in this paragraph state legal conclusions to which no response is required, and state that the Bank Holding Company Act did not exist when OBT was formed, and the referenced regulation was first adopted in 1984.

D. Following the 1989 Reorganization, the Trust Continues to Hold Its Bremer Shares for 30 Years

34. The Trustees admit that, following the 1989 reorganization, BFC has remained independent during a time when many of its peers have been absorbed by larger institutions that possess significant advantages given their ability to make substantial investments in technology. The Trustees further admit that OBT retained its 92 percent economic interest in BFC until October 2019, when it sold 725,000 shares of Class B stock to 11 investors consisting of 19 investment funds. The Trustees deny the remaining allegations in this paragraph, including the Plaintiffs' characterization of Otto Bremer's vision.

35. The Trustees admit that, since 1989: OBT has, to its knowledge, always complied with its charitable distribution obligations under federal tax law; OBT's fair market value calculations have been neither arbitrary nor careless; OBT has consistently reported, under penalty of perjury, based on the information available to it at the time, that the fair market value of its BFC

shares was lower than their book value; OBT has solicited professional advice when needed in valuing its assets; and OBT's valuations have never been rejected by the IRS. The Trustees deny all remaining allegations in this paragraph.

36. The Trustees deny that BFC's dividends have been sufficient in all previous years to cover OBT's statutory charitable-distribution requirement, and further deny that they will be sufficient in the future. The Trustees lack knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 36 to the extent they refer to trustees of OBT other than the Trustees, and thus deny those allegations, except state that they or their predecessors concluded in both 1989 and 2019 that selling the Trust's shares of BFC had become "necessary or proper . . . owing to unforeseen circumstances," admit that the Trustees did not otherwise sell shares in BFC in the years 1990 through 2018 because such sale was "necessary or proper . . . owing to unforeseen circumstances," and deny that the Trustees at any time concluded that the 2001 stock-market crash, the Great Recession, and the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act were foreseen by Mr. Bremer at the time he formed OBT in 1944.

37. The Trustees admit that Exhibit D is a copy of a Ramsey County Court order regarding OBT. The Trustees admit that OBT is required to file annual accountings with the Probate Division of the Ramsey County District Court and petition that Court to approve them periodically. The Trustees state that the filings and orders referenced in Paragraph 37 speak for themselves, and deny the allegations of the first, third, and fourth sentences, which misstate the content of the order, as well as any other characterization inconsistent therewith.

II. THE TRUSTEES' RECENT EFFORTS TO FORCE A SALE OF BREMER

38. The Trustees deny the allegations in this paragraph.

A. The Trustees' Compensation and Incentives

39. The Trustees deny the implication that OBT's management is not independent or that its governance practices are not consistent with best practices for similarly sized charitable trusts, and further deny that OBT is a charitable nonprofit corporation foundation or that OBT's governance practices should be judged in comparison to charitable nonprofit corporation foundations. The Trustees admit that in June 2014, the Trustees entered into a separation agreement with the then-serving executive director. The Trustees deny that they "appointed themselves" or began serving as OBT's co-CEOs in 2014; OBT's trustees have been its co-CEO's since OBT was established. The Trustees lack knowledge or information sufficient to form a belief about the truth of the remaining allegations of Paragraph 39, and thus deny those allegations.

40. The Trustees admit that the three Trustees' collective total compensation in 2013 was greater than \$1.2 million. The Trustees deny Plaintiffs' characterizations and implications regarding this compensation. The Trustees further deny that Plaintiffs' comparison of total compensation for three trustees to median trustee compensation is appropriate or meaningful. The Trustees lack knowledge or information sufficient to form a belief about the truth of the allegation concerning the NCRP's executive director's purported statement, and thus deny this allegation. The Trustees state that the MPR News and Minneapolis *Star Tribune* articles referenced in this paragraph speak for themselves, and deny any characterization inconsistent therewith.

41. The Trustees admit that in 2018 Lipschultz earned \$524,567, Reardon earned \$531,663, and Johnson earned \$346,704, for a total of over \$1.4 million. As co-CEOs of OBT, the Trustees oversee the investment of well over \$1 billion in assets, and manage OBT's extensive distributions and operations. In 2017, Ramsey County District Court expressly approved the Trustees' compensation, holding that it was "just and reasonable." The Trustees deny the remaining allegations in this paragraph.

42. The Trustees admit that Lipschultz and Reardon earn more than Johnson in part because they provide additional services to OBT as Investment Advisors under a written Investment Policy Statement. The Trustees admit that Ramsey County District Court has approved the investment advisory fee received by Reardon and Lipschultz and has further held that the “compensation paid to the Trustees . . . was just and reasonable.” Answering further, the Trustees state that the Ramsey County District Court’s order approving the Trustees’ compensation is attached as Exhibit D to the Complaint. This order speaks for itself, and the Trustees deny any characterizations inconsistent therewith. The Trustees deny all remaining allegations in this paragraph.

43. The Trustees deny the allegations in this paragraph. The Trustees have committed that they will not receive any increased Trustee fees, and that Lipschultz and Reardon will not receive any increased investment-management fees, for the next two years. Moreover, the Trustees’ compensation is far less than authorized in the Trust Instrument, and is subject to oversight by the Minnesota Attorney General’s Office and approval by Ramsey County District Court.

B. The Trustees’ Unauthorized Efforts to Find a Buyer for Bremer

44. The Trustees deny the allegations in this paragraph.

1. The June 25 Board Meeting

45. The Trustees admit that in April and May 2019, a similarly sized regional bank (“Company A”) approached BFC to discuss a potential merger of equals, and that these discussions ended in June 2019 without a resulting agreement to merge. The Trustees deny the remaining allegations in this paragraph.

46. The Trustees admit that they explained at the June 25 Board meeting that a merger-of-equals strategy was not desirable for OBT. Among other things, it threatened OBT’s ability to

ensure it received sufficient dividends to allow it to meet its distribution requirements under federal tax law. The Trustees deny the remaining allegations in this paragraph.

47. The Trustees admit that they are a minority of the directors on the BFC Board, and that before October 25, 2019, OBT owned 20 percent of BFC's Class A shares. The Trustees further admit that they disclosed to the Board that they had retained Keefe, Bruyette & Woods ("KBW") to advise them regarding potential strategic options for BFC, and that KBW evaluated the market concerning potential purchasers of BFC. The Trustees admit that OBT concluded that a sale of BFC would be better for OBT than a merger of equals, and that OBT communicated this to the BFC Board. The Trustees deny all remaining allegations in this paragraph.

48. The Trustees admit that at the June 25 Board meeting the Board agreed unanimously to consider a potential sale of BFC. The Trustees deny the remaining allegations in this paragraph.

2. The July 23-24 Board Meeting

49. The Trustees state that BFC's Amended Articles speak for themselves, and deny any characterization inconsistent therewith. The Trustees deny the remaining allegations in this paragraph.

50. The Trustees admit that the Board did not resolve to pursue a sale. The Trustees admit that the Board resolved to retain JP Morgan as a financial advisor in a limited role that explicitly excluded a transactional component. The Trustees deny the remaining allegations in this paragraph.

51. The Trustees deny the allegations in this paragraph.

52. The Trustees admit that certain Plaintiff Board Members inquired at the July 23-24 Board meeting about the Trustees' power to sell BFC shares under the Trust Instrument, in spite of those Board Members' previous pursuit of a merger through which OBT would sell or transfer

its BFC shares. The Trustees admit that Lipschultz agreed to discuss with OBT's counsel a means of providing answers to these questions. The Trustees deny the remaining allegations in this paragraph.

53. The Trustees deny the allegations in this paragraph.

3. The Trustees Continue to Push for a Sale of Bremer

54. The Trustees admit that on August 5, 2019, OBT's counsel met with BFC's lawyers to explain the basis for the Trustees' conclusion that unforeseen circumstances existed. OBT's counsel explained that OBT's Trust Instrument gives the Trustees sole discretion to determine whether unforeseen circumstances exist. OBT's attorneys further explained that the Trustees had determined that multiple unforeseen circumstances exist leading the Trustees to conclude that a sale of OBT's BFC stock is necessary and proper. They explained in particular that the Trustees had determined, based in part on and only after the merger negotiations with Company A, that BFC's valuation was substantially higher than previously thought, and that the Trustees believed this jeopardized BFC's ability to provide dividends sufficient to allow OBT to meet its charitable-distribution requirements under federal tax law. The Trustees deny all allegations and characterizations in this paragraph inconsistent with the foregoing.

55. The Trustees deny the allegations in Paragraph 55, except admit that on August 8, 2019, a larger financial institution ("Company B") sent KBW an unsolicited indicative proposal for acquiring the stock of BFC at a price substantially above the value implied in the merger BFC had considered earlier. The Trustees deny the remaining allegations in this paragraph.

56. The Trustees deny the allegations in this paragraph.

57. The Trustees admit that the Board scheduled a meeting for August 29, 2019. The Trustees deny the remaining allegations in this paragraph.

58. The Trustees deny the allegations in Paragraph 58, except admit that the Trustees suggested that KBW be involved in advising the Board regarding a potential sale of BFC, and they reminded the Board that OBT was free to sell its shares with or without the Board's cooperation.

4. The Board Determines Not to Pursue a Sale of Bremer

59. The Trustees admit that the Board met on August 29, 2019, and that JP Morgan and outside legal counsel presented at the meeting. The Trustees admit that the Board and JP Morgan discussed the M&A market and potential strategic alternatives for BFC, including a sale of BFC, but deny Plaintiffs' characterization of those discussions. The Trustees deny the remaining allegations in this paragraph.

60. The Trustees admit that JP Morgan presented on BFC's strategic options, and opined that BFC's stand-alone market value was substantially in excess of BFC's current book value. The Trustees deny the remaining allegations in this paragraph.

61. The Trustees admit that the Board discussed risks associated with a sale of BFC and that certain individual Plaintiffs self-servingly raised purported issues concerning the Trust Instrument's provisions regarding unforeseen circumstances. The Trustees deny Plaintiffs' characterization of those discussions.

62. The Trustees deny the allegations in paragraph 62, except admit that, as a result of the merger discussions pursued by BFC management in spring 2019, and the later offer by Company B, as well as other recently-obtained information, including the valuation analysis of BFC's financial advisor, JP Morgan, the Trustees concluded that the value of OBT's assets were substantially greater than previously thought.

63. The Trustees lack knowledge or information sufficient to form a belief about the truth of allegations in the first sentence of Paragraph 63, and thus deny those allegations. The Trustees deny the remaining allegations in this paragraph.

64. The Trustees admit that the Board briefly discussed the possibility of paying a higher dividend to OBT. The Trustees deny the remaining allegations in this paragraph.

65. The Trustees deny the allegations in Paragraph 65, except admit that the Board resolved to terminate any further discussion regarding a sales transaction, and to direct BFC's management to refrain from participating in any further sales discussions without explicit approval by the Board, or even assisting OBT in the sale of OBT's own stock. The Trustees further admit that all six non-Trustee Directors present at the meeting voted for this resolution, and all three Trustees voted against it.

66. The Trustees lack knowledge or information sufficient to form a belief about the truth of the allegations in the first two sentences of Paragraph 66, and thus deny those allegations. The Trustees state that Company B informed KBW that it needed to formally withdraw the offer it had originally submitted in August 2019 to avoid any unintended public disclosure, but it was still interested in pursuing a transaction on substantially the same terms and would resubmit the offer in writing if requested once the disclosure period had passed. The Trustees admit that there was no discussion of the Company B offer at the August 29 Board meeting, and thus no occasion for the Trustees to discuss either the status of the non-binding offer or Company B's continued interest in acquiring BFC. The Trustees deny that they misled their fellow directors regarding the availability of a deal with Company B, and deny all remaining allegations in this paragraph.

III. THE TRUSTEES PURPORT TO TRANSFER A PORTION OF THE TRUST'S CLASS B SHARES TO HEDGE FUNDS IN A SCHEME TO FORCE A SALE OF BREMER

67. The Trustees admit that the Board's resolution was adopted by the non-Trustee directors for the specific purpose of hindering OBT's exercise of its rights as a shareholder to sell its shares. The Trustees further admit that OBT sold 725,000 Class B shares to 11 investors consisting of 19 investment funds without any cooperation or assistance from the company of

which OBT was the 92% owner. The Trustees further admit that the Board resolved not to permit BFC to cooperate with a potential buyer of OBT's shares, and this would have presented an obstacle to OBT selling all of its shares had OBT so desired. Paragraph 67 contains Plaintiffs' speculation about what unidentified potential buyers would or would not do, to which no response is required. The Trustees deny the remaining allegations and characterizations in this paragraph.

68. The Trustees admit that they sold 725,000 shares of Class B stock to various purchasers. The Trustees deny the remaining allegations in this paragraph, including that they intended to assemble a coalition or act in concert with the purchasers.

69. The Trustees deny the allegations in Paragraph 69, except admit that they sent to BFC the documents attached as Exhibits E and F to the Complaint, which speak for themselves, and the Trustees deny any characterization inconsistent therewith.

70. The Trustees lack knowledge or information sufficient to form a belief about the truth of the allegations in the first sentence of this paragraph, and thus deny those allegations. The Trustees admit that, following the conversion of the 19 entities' Class B shares to Class A shares, the purchasers and OBT collectively own 50.13 percent of BFC's Class A stock. The Trustees deny the remaining allegations in this paragraph.

71. The Trustees deny that they have received assurances from the purchasers of OBT's Class B shares that the purchasers will support or act in concert with the Trustees in any way. The Trustees state that Exhibits E and G to the Complaint speak for themselves, and deny any characterization inconsistent therewith.

72. The Trustees admit that OBT sold 725,000 shares for \$120 per share. The Trustees admit that they believe that BFC could be sold as a going concern for more than \$1.44 billion in a customary sale of all issued and outstanding shares of BFC rather than a minority interest. The Trustees deny the remaining allegations in this paragraph.

73. The Trustees admit that, as a result of the sale of Class B shares on October 25, 2019, and their subsequent conversion to Class A shares, the percentage of BFC's Class A shares owned by OBT has decreased from 20 percent to roughly 12.5 percent. The Trustees deny the remaining allegations in this paragraph.

74. The Trustees deny the allegations in this paragraph.

75. The Trustees admit that BFC's Board had resolved not to pursue a sale and that the Trustees issued a press release around the time they sent a letter to the Board. The Trustees state that the press release speaks for itself, and deny any characterization inconsistent therewith.

76. The Trustees state that the referenced press release speaks for itself, and deny any characterization inconsistent therewith. The Trustees deny all remaining allegations in this paragraph, including Plaintiffs' characterization of the Trustees' actions and motives.

77. The Trustees state that OBT's website speaks for itself, and deny any characterizations inconsistent therewith. The Trustees state that the last sentence of this paragraph is a legal conclusion to which no response is required. The Trustees deny the remaining allegations in this paragraph.

78. The Trustees deny the allegations in Paragraph 78, except lack knowledge or information sufficient to form a belief about the truth of the allegations concerning the knowledge or views of third parties, and on that basis deny those allegations.

79. The Trustees deny the allegations in this paragraph.

IV. THE PURPORTED TRANSFERS BY THE TRUST ARE INVALID UNDER BREMER'S BYLAWS AND THE TRUST INSTRUMENT

80. The allegations in this paragraph state legal conclusions to which no response is required.

81. The Trustees state that BFC's Amended and Restated Bylaws speak for themselves, and deny any characterization inconsistent therewith. The Trustees additionally state that the allegations in this paragraph state legal conclusions to which no response is required.

82. The Trustees state that the Stock Transfer Notification, attached to the Complaint as Exhibit F, speaks for itself, and deny any characterization inconsistent therewith. The Stock Transfer Notification is lawful and effective, and the Trustees deny Plaintiffs' characterization of it as "purported." The Trustees lack knowledge or information sufficient to form a belief about the truth of the remaining allegations of Paragraph 82, and thus deny those allegations.

83. The Trustees deny the allegations in this paragraph.

84. The Trustees state that the Trust Instrument speaks for itself, and deny any characterization inconsistent therewith. The Trustees admit that in 2017 they stated to the Ramsey County District Court that "[d]uring the period covered by the accounts [2012-2016], no unforeseen circumstances arose that caused it to be necessary or proper for the Trustees to sell the shares." The Trustees deny the remaining allegations in this paragraph.

85. The Trustees deny the allegations in paragraph 85, except admit that, as a result of BFC's merger discussions, the Company B acquisition offer, and other recently acquired information, they believe that the fair market value of OBT's BFC stock is likely at least twice as high as OBT reported to the IRS in its 2018 tax filings, and state that Plaintiffs' allegation regarding the discretion afforded by federal tax law is a legal conclusion to which no response is required.

86. The Trustees admit that they sold 725,000 shares of BFC Class B stock to 19 entities at per share values far above the value ascribed to those shares in OBT's books. The Trustees deny the remaining allegations in this paragraph.

87. The Trustees deny the allegations in this paragraph.

88. The Trustees deny the allegations in this paragraph.

89. The Trustees deny the allegations in this paragraph.

COUNT ONE
Declaratory Judgment (by Bremer)

90. The Trustees restate their answers to Paragraphs 1 through 89 of the Complaint as if fully set forth herein.

91. The Trustees state that BFC's Amended and Restated Bylaws speak for themselves, and deny any characterization inconsistent therewith.

92. BFC is not a party to the Trust Instrument and the Trustees thus deny that the Trust Instrument is a "plan[] or agreement[]" applicable to the transfer of the Corporation's shares." The Trustees deny that BFC has standing to enforce the provisions of the Trust Instrument. The Trustees state that the Trust Instrument speaks for itself, and deny any characterization inconsistent therewith. The remaining allegations in this paragraph state legal conclusions to which no response is required.

93. The Trustees deny the allegations in this paragraph.

94. The Trustees deny the allegations in this paragraph.

95. This paragraph states legal conclusions to which no response is required.

96. This paragraph states a legal conclusion to which no response is required.

COUNT TWO
Breach of Fiduciary Duty: Misuse of Confidential Information (by Bremer)

97. The Trustees restate their answers to Paragraphs 1 through 96 of the Complaint as if fully set forth herein.

98. The Trustees admit that S. Brian Lipschultz, Daniel C. Reardon, and Charlotte S. Johnson, in their capacity as directors of BFC, owe fiduciary duties of care and loyalty to BFC as and to the extent set forth by Minnesota law. Defendants deny all allegations in this paragraph inconsistent with the foregoing.

99. The allegations in this paragraph are legal conclusions to which no response is required. To the extent that a response is required, the Trustees deny the allegations in this paragraph, and state that the references to the Bank Holding Company Act are irrelevant to Plaintiffs' Minnesota law claims.

100. This paragraph states a legal conclusion to which no response is required.

101. The Trustees deny the allegations in this paragraph.

102. The Trustees deny the allegations in this paragraph.

COUNT THREE

Breach of Fiduciary Duty: Disloyalty and Self-Dealing (by Bremer)

103. The Trustees restate their answers to Paragraphs 1 through 102 of the Complaint as if fully set forth herein.

104. This paragraph states a legal conclusion to which no response is required.

105. This paragraph states a legal conclusion to which no response is required. Answering further, the Trustees deny that they have exploited their position to secure private benefits at the expense of BFC's other shareholders and constituencies.

106. The Trustees admit that KBW has engaged in discussions with potential acquirers of BFC. The Trustees deny the remaining allegations in this paragraph.

107. The Trustees deny the allegations in this paragraph.

108. The Trustees admit that the non-Trustee Directors have resolved in their own self-interest to refuse to consider a sale of BFC at this time. The Trustees deny the remaining allegations in this paragraph.

COUNT FOUR
Minn. Stat. § 302A.751, subd. 1(b)(3):
Shareholder Oppression (by the Individual Plaintiffs)

109. The Trustees restate their answers to the allegations in Paragraphs 1 through 108 of the Complaint as if fully set forth herein.

110. The Trustees lack knowledge or information sufficient to form a belief about the truth of the allegations in this paragraph, and therefore deny those allegations.

111. The Trustees admit the allegations in this paragraph.

112. The Trustees admit that they are directors of BFC. The Trustees deny the remaining allegations in this paragraph.

113. The Trustees deny the allegations in this paragraph.

114. The Trustees deny the allegations in this paragraph.

PRAYER FOR RELIEF

The Trustees deny any and all allegations contained in Plaintiffs' prayer for relief, deny that Plaintiffs are entitled to any of the relief requested in the Complaint, and request that Plaintiffs take nothing by this suit and that this matter be dismissed with prejudice.

AFFIRMATIVE DEFENSES

The Trustees do not concede that they have the burden of proof on any defense set forth below. The Trustees reserve the right to assert any additional affirmative or avoidance defenses as may become applicable and apparent during the course of this action.

1. The Complaint fails to state a claim for which relief may be granted.
2. Plaintiffs lack standing to pursue some or all of their claims.
3. Plaintiffs' claims are barred, in whole or in part, by the doctrines of unclean hands, equitable estoppel, and waiver.

4. Plaintiffs' claims are barred, in whole or in part, because Plaintiffs have not been injured or suffered damages as a result of the Trustees' alleged acts or omissions.

5. Plaintiffs have failed to join indispensable parties under Minnesota Rule of Civil Procedure 19.

6. Plaintiffs have failed to satisfy the requirements for a derivative action.

7. The non-Trustee directors have a conflict of interest as both shareholder and officer/directors, and thus are not proper plaintiffs.

COUNTERCLAIM

Charlotte Johnson, S. Brian Lipschultz and Daniel C. Reardon, solely in their capacities as trustees of the Otto Bremer Trust (“OBT” and, such trustees, the “OBT Trustees”), for their Counterclaim against Bremer Financial Corporation (“BFC”), Ronald James, Jeanne H. Crain, Mary Brainerd, Glenn D. McCoy, Wendy Schoppert, and Charles Westling (“Counterclaim Defendants”), allege as follows:

INTRODUCTION

1. In October 2019, OBT sold a portion of its BFC stockholdings to new, third-party investors, as it was entitled to do. Around the same time, the OBT Trustees, both in their capacities as directors of BFC and on behalf of OBT as a BFC shareholder, called a special meeting of the shareholders of BFC in accordance with Minnesota law and BFC’s governing corporate documents to allow BFC’s shareholders to consider removing the members of BFC’s current board of directors named as Counterclaim Defendants. In an unlawful effort to entrench BFC’s directors and management, Counterclaim Defendants have (i) refused to recognize the OBT Trustees’ right to sell the BFC stock owned by OBT, (ii) refused to recognize the new investors as the rightful owners of their purchased stock, and (iii) refused to set a record date and a meeting date for the special meeting of BFC’s shareholders called by the OBT Trustees, thereby depriving OBT and the new investors of the right to vote at such special meeting.

2. Counterclaim Defendants’ actions violate Minnesota law, BFC’s governing corporate documents, and OBT’s rights as a shareholder. BFC’s actions are a breach of the contract between it and OBT establishing BFC’s capital structure. Counterclaim Defendants’ actions also violate BFC’s articles of incorporation and applicable sections of Minnesota’s Business Corporation Act, Minn. Stat. §§ 302A.101 *et seq.* In so doing, the BFC board members named as Counterclaim Defendants seek improperly to preserve their directorships at the expense

of BFC's shareholders, and to interfere improperly with OBT's rights as a shareholder, all in violation of their fiduciary and statutory duties.

3. The Court accordingly should declare the rights of the parties and direct Counterclaim Defendants specifically to perform their clear administrative obligations so as to enable BFC's lawful shareholders to exercise their rights. The Court should also find Counterclaim Defendants in breach of their contractual, fiduciary and statutory obligations to OBT, and award appropriate relief against BFC and the individual Counterclaim Defendants personally, including money damages for lost or delayed opportunities for OBT to sell its shares at a substantial premium

PARTIES

4. OBT is a charitable trust formed under Minnesota law that is exempt from federal income tax as a private foundation described in Section 501(c)(3) of the Internal Revenue Code. It is also a bank holding company within the meaning of the Bank Holding Company Act, 12 U.S.C. §§ 1841 *et seq.* OBT was formed pursuant to an Agreement and Declaration of Trust dated May 22, 1944, by and between Otto Bremer, as trustor, and Paul G. Bremer and George J. Johnson, as original trustees (the "Trust Instrument"). OBT's annual earnings come primarily from the dividends it receives from its subsidiary, BFC, in amounts equal to approximately 5% of BFC's value. Since its founding, OBT has provided more than \$700 million in charitable grants and program-related investments to non-profit organizations in Minnesota, Montana, North Dakota and Wisconsin.

5. Counterclaim Plaintiff Charlotte Johnson is Co-CEO and a trustee of OBT and a member of BFC's board.

6. Counterclaim Plaintiff S. Brian Lipschultz is Co-CEO and a trustee of OBT and a member of BFC's board.

7. Counterclaim Plaintiff Daniel C. Reardon is Co-CEO and a trustee of OBT and a member of BFC's board.

8. BFC is a regional financial services company with assets greater than \$12 billion; among those assets is Bremer Bank, N.A. BFC has a ten-member board of directors (the "BFC Board"). The OBT Trustees are three of those ten members.

9. Counterclaim Defendant Ronald James is and, for the relevant period was, Chair of the BFC Board.

10. Counterclaim Defendant Jeanne Crain is and, for the relevant period was, the Chief Executive Officer and President of BFC and a member of the BFC Board.

11. Counterclaim Defendant Wendy Schoppert is, and for the relevant period was, a member of the BFC Board.

12. Counterclaim Defendant Kevin Rhein is, and for the relevant period was, a member of the BFC Board.

13. Counterclaim Defendant Mary Brainerd is, and for the relevant period was, a member of the BFC Board.

14. Counterclaim Defendant Glenn McCoy is, and for the relevant period was, a member of the BFC Board.

15. Counterclaim Defendant Charlie Westling is, and for the relevant period was, a member of the BFC Board.

16. Counterclaim Defendants James, Crain, Schoppert, Rhein, Brainerd, McCoy, and Westling collectively are referred to as the "Director Counterclaim Defendants."

FACTS

17. Until 1989, OBT was the sole owner of BFC. On February 8, 1989, OBT and BFC entered into a plan of reorganization (the "Plan of Reorganization") which included the transfer by

OBT of eight percent of its ownership position to directors and employees of BFC through employee stock ownership and 401(k) plans.

18. As a result of the Plan of Reorganization, at all times since 1989 OBT has owned 1,200,000 shares of Class A common stock in BFC, which, until October 25, 2019, represented 20% of the issued and outstanding Class A common stock. Until October 25, 2019, OBT also owned 10,800,000 shares of Class B common stock in BFC, representing 100% of the issued and outstanding Class B common stock. Together, these Class A and Class B stockholdings reflected 92% of the total equity interests in BFC.

19. Pursuant to BFC's Restated Articles of Incorporation, Class A common stock carries with it the right to vote on all matters, including the election of directors. Class B common stock does not carry with it a right to vote on the election of directors or other routine matters, but only on certain extraordinary matters, such as a sale of all or substantially all of the assets of the company or a merger transaction (in which case holders of Class B common stock have the right to vote on an equivalent per share basis with holders of Class A common stock). However, upon the sale by OBT of any Class B shares to a third party, each such share of Class B common stock is convertible as of right to Class A common stock having full voting rights at such third party's unilateral election.

20. The OBT Trustees have an obligation to manage OBT's assets prudently for the benefit of OBT's many charitable pursuits in and around Minnesota, Montana, North Dakota and Wisconsin. In fulfilling their duties as trustees of OBT, the OBT Trustees have concluded that it is incumbent upon them, as fiduciaries of OBT, to consider OBT's options with respect to its majority ownership interest in BFC, including with respect to a potential strategic transaction involving BFC.

21. Likewise, as directors of BFC, Counterclaim Plaintiffs believe it is in the best interests of BFC and its shareholders to explore BFC's strategic alternatives, including a potential strategic transaction involving BFC.

22. The circumstances facing OBT, as the substantial majority-owner of BFC, which has historically comprised over 90% of OBT's assets, and BFC, as a small, privately-held regional financial institution, have shifted dramatically in recent years. Among other things, the business of banking, in general, and the business of BFC, in particular, has changed substantially due to consolidation, advances in technology and shifts in consumer preferences. The banking business is increasingly concentrated with large nationwide and super-regional banks with greater scale. Consumer financial services have shifted online, enabling banking customers to make deposits and withdrawals, pay bills, borrow money, obtain mortgages, make loan payments, purchase and sell securities, and conduct every other type of banking business remotely and at all hours. This trend has been accelerated by the ubiquity of the smartphone, which provides customers even greater flexibility to manage accounts and conduct transactions through conveniently accessible online banking applications. Historic low interest environments have caused an unprecedented contraction in net interest margins, the principal source of bank profitability. As a result of these circumstances, traditional brick-and-mortar banks are at risk of deterioration of their financial and competitive positions. Moreover, additional threats to traditional banks are proliferating in the form of online-only banks, digital banking services, robot-advisors, payment apps and software, bitcoin and other virtual currencies, and other alternative financial technologies.

23. Earlier this year, management of BFC pursued a potential merger of equals with another institution without the knowledge or prior approval of the BFC board. Weeks later, BFC management informed the board of its discussions and enthusiastically endorsed pursuing that transaction, as a result of which OBT and the other BFC stockholders would become minority

owners of another publicly traded company. In the preceding 30 years, OBT had not considered or suggested a sale of BFC.

24. The BFC Board ultimately did not pursue that merger proposal. Nevertheless, the values ascribed to BFC implied a valuation for OBT's interests in BFC substantially above the carrying value of those shares on OBT's financial statements.

25. Under the Trust Instrument, the Trustees have the power to sell stock if, "in the opinion of the Trustee, it is necessary or proper to do so owing to unforeseen circumstances." The recent, revolutionary changes in the banking industry and the threats they pose to BFC and similar banks are circumstances that were unforeseen to Otto Bremer in 1944.

26. OBT had never previously sought a buyer for BFC. Following the unaccepted merger-of-equals proposal, however, and in furtherance of their fiduciary duties under the Trust Instrument, the OBT Trustees began to explore, on behalf of OBT, as one possible response to these unforeseen circumstances, whether a sale of BFC was possible. The possibility of a strategic transaction proved to be attractive to the market. Within a short time after the OBT Trustees began to explore the possibility of such a transaction, a publicly traded financial institution made an unsolicited offer to acquire BFC at a substantial premium.

27. The Director Counterclaim Defendants, however, refused to consider the unsolicited offer. Instead, over the objection of Counterclaim Plaintiffs (in their capacity as BFC directors), the BFC Board passed resolutions refusing to further evaluate a sale and directing management to refrain entirely from participating in any future discussions or due diligence related to such a transaction (even to provide assistance to OBT in any independent sale of its BFC common stock).

28. Had the Director Counterclaim Defendants been willing to explore this or other sales, and to allow shareholders to do so, OBT would have been empowered to vote on a strategic

transaction. By declining even to allow a shareholder vote, BFC effectively stripped BFC's owners from having any say in its future, including the right to consider (and approve) such a transaction.

29. The fact of an offer being made at such a price itself created another unforeseen circumstance: under federal tax laws, OBT must distribute 5% of the fair market value of its assets every year. If the fair market value of BFC is much higher than previously estimated, OBT will need to dramatically increase its charitable distributions in order to comply with the mandatory 5% minimum distribution rule.

30. Under the Plan of Reorganization, OBT is entitled to convert its Class B common stock to Class A voting common stock if BFC fails to provide a dividend equal to 5% of BFC's year-end book value. Thus, the Plan of Reorganization contemplates that the cashflow to support OBT's distributions would come from BFC dividends, but OBT would have wide options on its own if BFC failed to provide sufficient cash flow. However, as a bank holding company, BFC is subject to capital distribution and capital level requirements under federal banking laws, regulations, and regulatory guidance, including limitations on BFC's ability to pay dividends. Given the values recently ascribed to BFC, it would be impossible for BFC to pay dividends at a level that would be sufficient to enable OBT to comply with the mandatory 5% minimum distribution rule over a sustained period of time without violating such capital-based requirements or, at the very least, suffering long-term and material deterioration in its value. As a result, the OBT Trustees were compelled to continue to explore the potential for a value-enhancing strategic transaction for BFC.

31. Pursuant to the Plan of Reorganization as well as BFC's Restated Articles of Incorporation, OBT has the right to sell its Class B common stock to any third party (other than a disqualified person with respect to the Trust under Section 4946(a) of the Internal Revenue Code).

Indeed, OBT had sold shares of BFC before as part of the Plan of Reorganization. This Court approved those sales in an order dated November 8, 1991. The Plan of Reorganization and BFC's Restated Articles of Incorporation additionally grant the purchaser of any Class B common stock sold by OBT the right to convert those shares into an equivalent number of Class A shares.

32. Under the Trust Instrument, the OBT Trustees have the power to sell stock if, "in the opinion of the Trustee, it is necessary or proper to do so owing to unforeseen circumstances." The Trust Instrument makes the OBT Trustees' judgment regarding the existence of unforeseen circumstances a matter within their sole discretion. The Trustees have determined that a number of unforeseen circumstances now exist warranting a sale of OBT's shares in BFC. These circumstances (which are described in the preceding paragraphs) include, but are not limited to: changes in federal tax law that prevent charitable private foundations from owning more than 20 percent of the voting stock of a business, and the resulting need for OBT to sell 80% of its voting stock; changes in federal tax law requiring minimum charitable distributions each year; BFC's recent exploration of change-in-control transactions; the third-party expressions of interest in acquiring or merging with BFC; the threats facing BFC due to recent, revolutionary changes in the banking industry; BFC's continued declining performance relative to its peers; recent actions by the non-Trustee directors adverse to the interests of OBT; the significantly higher value OBT would realize in a strategic transaction involving BFC; the substantial increase in OBT's valuation of its assets necessitated by the purchase offers made for BFC; and the resulting impact on OBT's charitable-distribution requirements under federal tax law, pursuant to which OBT must distribute at least five percent of the fair market value of its assets annually. After considering these unforeseen circumstances, among other things, the OBT Trustees decided that a sale of certain BFC shares was necessary and proper.

33. On October 25, 2019, OBT sold approximately seven percent of its Class B common stock to eleven separate unrelated and independent investors (the “Third Party Buyers”). In total, OBT sold 725,000 shares of its Class B common stock to the Third Party Buyers.

34. OBT has no agreement or understanding with the Third Party Buyers regarding how they will vote their shares. Nevertheless, OBT’s hope is that the Third Party Buyers, free from the Director Counterclaim Defendants’ selfish interests, will carefully consider the merits of BFC’s strategic options and will vote to remove the Director Counterclaim Defendants at the special meeting of BFC shareholders, so that the owners of BFC might have a voice in considering those options.

35. To ensure that their actions met not only all contractual requirements but also all applicable regulatory requirements, the OBT Trustees have consulted with the relevant federal and state government authorities in preparing for the sale of the Class B shares.

36. The Third Party Buyers are the lawful transferees and holders of the Class B common stock each purchased from OBT, as evidenced by the assignment separate from certificate delivered by OBT to each Third Party Buyer.

37. Pursuant to the Plan of Reorganization and the Restated Articles of Incorporation, the Third Party Buyers each had the right to convert the Class B common stock to Class A common stock, share for share, by surrendering the certificates to BFC accompanied by written notice of the election to convert.

38. On October 28, 2019, the OBT Trustees provided a written notice to BFC of the sales, surrendered the stock certificate representing its shares of BFC’s Class B common stock and the assignments separate from certificate evidencing the assignment of the shares it sold to the Third Party Buyers, and requested, among other things, that BFC issue and deliver new stock

certificates to the Third Party Buyers for the number of shares of Class B common stock each purchased.

39. On information and belief, on or about October 28, 2019 the Third Party Buyers each surrendered to BFC its assignment separate from certificate evidencing the shares of Class B common stock it purchased from OBT accompanied by a written notice of its election to convert such shares of Class B common stock to shares of Class A common stock.

40. Also on October 28, 2019, Counterclaim Plaintiffs, acting in their capacity as directors of BFC and on behalf of OBT, a shareholder of BFC, gave written notice to BFC in accordance with BFC's bylaws and Minn. Stat. §302A.433 calling a special meeting of shareholders for the purpose of voting on the removal of the Director Counterclaim Defendants from BFC Board and a reduction in the number of directors of BFC to three or more directors.

41. BFC has taken aggressive and unlawful steps to preclude the Third Party Buyers from exercising their lawful rights as shareholders, including, among other things:

BFC has declined to recognize the transfers of Class B common stock from OBT to the Third Party Buyers and has refused to register the Third Party Buyers as the owners of record of those shares;

BFC has refused to deliver to the Third Party Buyers certificates reflecting the number of full shares of Class A common stock issuable upon such conversion to which each Third Party Buyer is entitled; and

BFC has failed to call a special meeting of shareholders as required by Minn. Stat. §302A.433, or to fix a record date for that meeting.

42. As a result of these actions, BFC has prevented the Third Party Buyers from exercising their lawful rights to vote their shares.

43. By refusing to recognize OBT's sale of Class B common stock and to convert those shares to Class A common stock on the election of each Third Party Buyer, even though the Plan of Reorganization expressly allowed such sales and conversion, Counterclaim Defendants are

unlawfully frustrating OBT's right to sell its Class B common stock, and thereafter to participate in a meaningful vote that includes all shareholders entitled to vote, in order to entrench its Board and management. They are also potentially reducing the value of OBT's remaining common stock in that their actions may have a chilling effect on the OBT Trustees' ability to find willing buyers for the shares due to Counterclaim Defendants' wrongful refusal to recognize transfers.

44. By refusing to set a record date and a meeting date for the special meeting of BFC's shareholders called by the OBT Trustees in their capacities as directors of BFC and on behalf of OBT, the BFC Board is unlawfully depriving OBT and the new investors of the right to vote at such special meeting in order to thwart their lawful exercise of the shareholder franchise.

45. On November 8, 2019, Director Counterclaim Defendants, acting by written consent, purported to pass a resolution creating a separate committee, consisting exclusively of themselves, with broad and ill-defined powers to act on BFC's behalf, thereby largely excluding the Trustees from their rights as directors of BFC. At the same time, the Director Counterclaim Defendants voted to indemnify themselves (and only themselves) from potential claims that might be asserted against them. Although the written action was clearly precipitated by one or more formal or informal meetings of the BFC Board (whether in person or by means of remote communication), the OBT Trustees did not receive any notice of these meetings, as required by law and BFC's bylaws, and accordingly were given no opportunity to participate. The Director Counterclaim Defendants' arrogation of power to themselves is unlawful and *ultra vires*.

46. Acting through this special committee, the Director Counterclaim Defendants have hired one of the country's most expensive law firms to pursue meritless litigation against the Trustees in an attempt to prevent them from exercising their clear rights as shareholders to sell OBT's shares. In effect, the Director Counterclaim Defendants have given themselves the authority to use OBT's own money (as majority shareholder of BFC) to try to prevent OBT from

selling its shares, while simultaneously purporting to indemnify themselves (again, using OBT's money) from any counterclaims for the harm they have done, and are continuing to do, to OBT.

COUNT I
(Declaratory Judgment)
(Against BFC)

47. The OBT Trustees incorporate the allegations contained in Paragraphs 1-46 as if fully set forth herein.

48. Given the state of affairs, there exists a concrete dispute that can be resolved only by an expedited declaration from this Court, pursuant to Minn. Stat. §§ 555.01, 555.03, and Minn. R. Civ. P. 57, that BFC's actions are unlawful.

49. The OBT Trustees seek a declaratory judgment that:

- a) The sales of Class B common stock to the Third Party Buyers were valid transactions by which the Third Party Buyers became the lawful owners of the shares each purchased;
- b) The Third Party Buyers are entitled to be registered as the record owner of the shares each purchased, effective as of the date of the purchase;
- c) The Third Party Buyers are entitled to convert the Class B common stock each purchased to Class A common stock, share for share, effective as of the date of the election; and
- d) The Third Party Buyers are entitled to vote their Class A common stock at an upcoming special meeting of shareholders.

COUNT II
(Breach of Contract)
(Against BFC)

50. The OBT Trustees incorporate the allegations contained in Paragraphs 1-49 as if fully set forth herein.

51. BFC's actions constitute a breach of the Plan of Reorganization in that OBT's right to sell its Class B common stock has been frustrated by BFC's refusal to recognize the transfer and to convert those shares to Class A common stock at the election of each Third Party Buyer.

52. OBT has been harmed by that breach in a manner that is irreparable, and not remediable by damages, and warrants specific performance.

53. The OBT Trustees seek injunctive relief directing specific performance so that BFC immediately:

- a) Registers each Third Party Buyer as the owner of record of the Class B shares purchased, effective as of the date of the purchase;
- b) Recognizes the Third Party Buyers' conversions of the Class B common stock purchased to Class A common stock, share for share, effective as of the date of the election;
- c) Delivers to each Third party Buyer a certificate representing the number of Class A shares to which each is entitled; and
- d) Permits the Third Party Buyers to vote their Class A common stock at an upcoming special meeting of shareholders.

COUNT III
(Violation of Fiduciary Duties)
(Against the Director Counterclaim Defendants)

54. The OBT Trustees incorporate the allegations contained in Paragraphs 1-53 as if fully set forth herein.

55. The Director Counterclaim Defendants' actions in causing BFC not to recognize the sales to the Third Party Buyers, and not to convert those shares to Class A common stock with voting privileges, as well as in causing BFC to refuse to set the meeting date and the record date are in bad faith and in breach of their fiduciary duty of loyalty to BFC's shareholders. They also are in violation of Minn. Stat. §§302A.251 and 302A.445 in that the actions have thwarted OBT's ability to participate in a meaningful vote, that includes all shareholders, on the removal of incumbent directors opposed to any exploration of a strategic transaction.

56. The Director Counterclaim Defendants' actions have caused, and will continue to cause, great financial harm to OBT, and threatens to destroy the opportunity for OBT and BFC's

other shareholders to secure an attractive price for their shares. The Director Counterclaim Defendants' misconduct was and is in bad faith and motivated by their own self-interests, for which they are entitled to neither exculpation nor indemnification.

57. Pursuant to Minn. Stat. § 302A.467, the OBT Trustees are entitled to equitable relief to remedy that violation. The Court accordingly should direct BFC and the Director Counterclaim Defendants immediately to act as follows:

- a) BFC to register each Third Party Buyer as the owner of record of the Class B common stock purchased, effective as of the date of the purchase;
- b) BFC to recognize the Third Party Buyers' conversions of the Class B common stock purchased to Class A common stock, share for share, effective as of the date of the election;
- c) BFC to deliver to each Third Party Buyer a certificate representing the number of Class A shares to which each is entitled; and
- d) The Director Counterclaim Defendants to set the meeting date and the record date so that the Third Party Buyers may vote their Class A common shares at an upcoming special meeting of shareholders.

WHEREFORE, the OBT Trustees pray for judgment on their Counterclaims as follows:

- A. Entering the requested declaratory relief;
- B. Entering an injunction directing the requested specific performance;
- C. Finding Counterclaim Defendants in breach of BFC's governing corporate documents, Minnesota statutory law, and, in the case of the Director Counterclaim Defendants, their fiduciary duties;
- D. Awarding Counterclaim Plaintiffs money damages for all losses, damages, or diminution in value of OBT's shares proximately caused by Counterclaim Defendants' breaches of duty and violations of law;

- E. Awarding them their costs and, pursuant to Minn. Stat. § 302A.467, their attorneys' fees; and
- F. Such other and further relief as the Court may deem just and equitable.

Dated: December 9, 2019

STINSON LLP

s/ Todd A. Noteboom

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ACKNOWLEDGMENT

The undersigned hereby acknowledges that sanctions may be imposed under Minn. Stat. § 549.211.

s/ Todd A. Noteboom

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