

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

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 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.

ORDER GRANTING APPELLEES'
MOTION TO SEAL APPENDICES

#27524
#27538 (NOR)

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

MAY 18 2016

Shirley A. Johnson Legal
Clerk

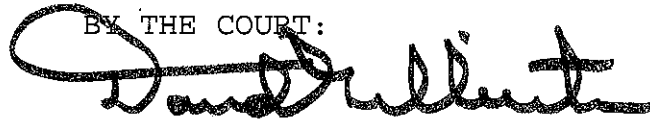
Appellees having served and filed a motion to seal brief
appendices filed in the above-entitled matter, and appellants having
served and filed an opposition thereto and the Court having considered
the motion and response and being fully advised in the premises, now,
therefore, it is

ORDERED that the motion to seal appendices be and it is
hereby granted.

IT IS FURTHER ORDERED that the Clerk of the Supreme Court
shall seal brief appendices.

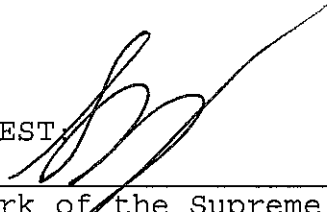
DATED at Pierre, South Dakota, this 18th day of May, 2016.

BY THE COURT:



David Gilbertson, Chief Justice

ATTEST



Clerk of the Supreme Court
(SEAL)

(Chief Justice Gilbertson dissents.)

PARTICIPATING: Chief Justice David Gilbertson, Justices Steven L. Zinter,
Glen A. Severson, Lori S. Wilbur and Janine M. Kern.

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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NOTICE OF APPEAL FILED August 7, 2015

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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 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. Sacks ¶¶ 2-4, CR 320-322; 2/15/15 Affidavit of Allen I. Sacks ¶ 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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**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 cannon 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.

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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.

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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.

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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

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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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[Additional signature pages follow]

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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
The Honorable Mark E. Salter

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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.

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