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IN THE IOWA DISTRICT COURT FOR LINN COUNTY

LORIANN BUSSE and LISA CARPENTIER, ALEXANDRA RENEE CARPENTIER; DEVAN MICHELE CARPENTIER; and MARIE JOSEE CARPENTIER, A Minor Through Her Mother and Next Best Friend LISA CARPENTIER,

Plaintiffs,

v.

JEFFREY BUSSE; LAVERN T. BUSSE; BUSSE FINANCIAL ADVISORS, LLC; BUSSE FAMILY LIMITED PARTNERSHIP; AB BI NOTE LIMITED PARTNERSHIP; LAVERN T. BUSSE AND AUDREY BUSSE FOUNDATION and Nominal Defendants: LTB 2002 IRREVOCABLE TRUST; LTB 2002 IRREVOCABLE TRUST U/D/O DECEMBER 20, 2002 F/B/O LORIANN BUSSE; LTB 2002 IRREVOCABLE TRUST U/D/O DECEMBER 20, 2002 F/B/O ALEXANDRA RENEE CARPENTIER; LTB 2002 IRREVOCABLE TRUST U/D/O DECEMBER 20, 2002 F/B/O DEVAN MICHELE CARPENTIER; and LTB 2002 IRREVOCABLE TRUST U/D/O DECEMBER 20, 2002 F/B/O MARIE-JOSEE CARPENTIER,

Defendants.

CIVIL NO. LACV083022

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT ENTRY

This case came on for trial before the Court January 23 through February 8, 2017. The parties were present and represented by counsel of record. The Court having considered the testimony, the exhibits, the pre-trial and post-trial briefs, and the jury's verdict enters the following Findings of Fact, Conclusions of Law and Judgment Entry.

Following thirteen trial-days, the jurors were given 48 instructions and a 47-question verdict form to help them reach a decision. On February 9, 2017, the jury returned a unanimous verdict in favor of Defendants on all of Plaintiffs' claims submitted to the jury. Additionally, the jurors unanimously found that Jeff Busse ("Jeff") and Lavern Busse ("Lavern") proved they did not intend Plaintiffs, LoriAnn Busse ("LoriAnn") and Lisa Carpentier ("Lisa"), to retain or obtain collective

voting control over the approximately $20 million dollar real estate business Busse Investments, Inc. ("BI").

The following issues were not submitted to the jury and remain for the Court's consideration: (1) Count II with respect to whether Jeff should be removed as Trustee of the Grantor Trusts; (2) Count IV with respect to whether Lavern's optional capital contribution into BFLP should be voided as a product of Jeff's undue influence over Lavern; (3) Count V with respect to whether BFA should be dissolved; (4) Count VI with respect to whether Jeff breached a fiduciary duty to BFA in making distributions from BFLP or AB BI to support a derivative claim on behalf of BFA; (5) Count IX with respect to whether LoriAnn's Dynasty Trust was admitted as a Substitute Limited Partner in BFLP and AB BI; (6) Count XIII with respect to whether the Foundation Pledge is enforceable; and (7) Counterclaim Count II with respect to the remedy, if any, for Defendant's unjust enrichment claim.

FINDINGS OF FACT

Lavern Busse's business acumen and hard work generated incredible wealth which he and his wife, Audrey, freely shared with their three children, Jeff, LoriAnn and Lisa and their grandchildren. As time went on, Lavern increasingly entrusted Jeff with management and control of a number of companies, trusts and sophisticated estate planning vehicles which are essentially a small empire. Jeff was and is intelligent and hardworking and his business acumen and pursuit of sophisticated estate planning mechanisms both vastly increased the wealth of all parties and did so in such a way as to minimize taxation. Jeff shared his father's vision for management of the companies and the tax advantaged transfer of wealth to future generations. Jeff's efforts along with Lavern increased the family's wealth many fold.

Lavern's daughters, Plaintiffs LoriAnn and Lisa, neither worked in nor were they given control of any of the family businesses. This was clearly Lavern's intent. While LoriAnn and Lisa were not given control, they shared equally in the profits. LoriAnn and Lisa's children shared handsomely, each

become multi-millionaires as the result of the hard work, business acumen and generosity of their father Lavern and the hard work and business acumen of their brother Jeff.

The numerous entities involved in this case, various limited liability companies, limited partnerships, grantor trusts and dynasty trusts were operated very successfully and without controversy to the immense benefit of all concerned until disputes arose in 2012, one of which boiled down to Lisa and LoriAnn chaffing under Lavern's decision to entrust Jeff with management. The disputes escalated. LoriAnn took to surreptitiously recording meetings with Lavern and Jeff. LoriAnn and Lisa eventually denied their father a seat on the board of directors of Busse Investments, Inc. ("BI"), the very company Lavern had built and gifted to his children and which had generated so much of the family's wealth. They refused to elect Lavern to fill what was believed to be a vacant management position with Busse Financial Advisors, a company that was the general partner and manager of a number of limited liability partnerships. After those decisions by Plaintiffs which were very hurtful to their father, Lavern exercised his retained swap power to reacquire shares of non-voting BI stock that were held in the Grantor Trusts benefitting LoriAnn and Lisa's daughters. As a result of what the Court will find to be a mistaken transfer of voting control of Busse Investments to LoriAnn, Lisa and Lisa's children, LoriAnn and Lisa, on October 19, 2015 fired Jeff as an employee of Busse Investments, thereby taking control of the company Lavern had founded and Jeff had successfully managed for 29 years.

The jury rejected all of Plaintiffs' claims. For the reasons that follow, the Court both rejects those claims of Plaintiffs that were reserved for the Court and concludes that equity requires the Court to return the mistaken transfer of the voting stock of Busse Investments to the grantor trusts, which will again allow Jeff to resume management of Busse Investments as his father intended.

In order to reach the merits of the issues reserved for the Court, a brief background of the Busse family, trusts benefitting Busse family members, and the corporations and partnerships at issue is necessary. Following this brief background, the Court will discuss the gifts and distributions that

Jeff, LoriAnn, and Lisa have received over the years. Then, the Court will discuss the pertinent events leading to this litigation. This factual background is intended to provide a broad understanding of the Busse family, trusts benefitting Busse family members, the corporations and partnerships at issue, and the family dispute. The Court will discuss additional facts in subsequent sections as necessary to resolve the particular counts on which the parties seek relief from the Court.

A. Background Relating to the Busse Family and Busse Family Entities

Lavern Busse grew up on a farm, married his high school sweetheart and had three children, Jeff, LoriAnn and Lisa. Lavern's father had died his junior year in high school and he had to stay at home to work the family farm and tend to the dairy herd. He married Audrey at age 19 and they lived on the farm. All three children had been born by 1965. 1965 was a very dry year and he was unable to buy hay for the herd so he sold the dairy herd and went to work at a John Deere factory in Waterloo. In 1970, they moved to Marion, Iowa, and Lavern became an insurance claims adjustor. He continued to own and lease the family farm. His neighbor in Marion was a gentleman named Clark McCloud who approached Lavern in 1979 with an idea for a tele-communications business named TeleConnect. Mr. McCloud was a very persuasive salesman as he persuaded Lavern to mortgage the family farm and Lavern also "robbed" from his children's college accounts to invest. He began working part time for TeleConnect and eventually he quit the claims adjusting business to work for TeleConnect full time. At that time TeleConnect had twelve employees. With deregulation of the telephone industry, the company grew rapidly, growing into one of the largest tele-communication businesses in Iowa and nationally. Lavern was one of its largest shareholders. By 1990 when TeleConnect was sold to MCI, Lavern received an eight figure payment for his investment.

In 1987, Lavern felt he had been fortunate so he and Audrey established the Busse Trust for his three children, which he and his wife each funded with $600,000 for a total of $1,200,000 which was the maximum they could transfer at that time without paying tax. Lavern's philosophy was that he

wanted to benefit his children but that they should earn their own way. The Trust was structured such that the children could not receive any distributions until later in life.

Prior to selling his interest in TeleConnect, in the late-1980s, Lavern began Busse Investments to build and rent commercial real estate in the Cedar Rapids area. Jeff had been working for Proctor and Gamble but as Busse Investments grew, he joined his father and began working full time for Busse Investments in approximately 1989.

Lavern and Audrey started the Busse Foundation in 1990. Lavern always felt fortunate in life and wanted to establish the Busse Foundation to benefit the community. The Busse Foundation is governed by a Board of Trustees. (Exhibit 1G, By-Law § 2.01, D6). Lavern, Audrey, Jeff, LoriAnn and Lisa served as the original Trustees on the Board. Since the Busse Foundation was established Lavern and his wife have annually given to the Foundation and encouraged the children to do so as well.

Lavern has always been particularly convinced of the value of an education. Not only has he paid for the college educations of his children and grandchildren, but he has paid for the college educations of at least 40 people including not only his children and grandchildren but nieces and nephews and even some employees of Busse Investments. He has established scholarships at Luther College, Wartburg College, Mt. Mercy College and Coe College.

Lavern and Audrey have always given financially equally to their children. As a small example of the giving, which actually pales in comparison to the wealth transfers that will be discussed later, Lavern and Audrey are each able to give $14,000 per year to their children and their children's spouses without incurring gift or estate taxes. This works out to $56,000 every year per couple and those gifts are made to grandchildren as well. Lavern and Audrey also pay LoriAnn's extensive medical bills.

Lavern decided to give each of his three children a 20% ownership interest in Busse Investments, retaining 40%. While he gifted ownership equally to each child, Jeff had begun working

with his father in running Busse Investments in 1989 and Jeff had earned his father's trust and was doing a good job. Jeff understood his father's wishes and philosophy and Lavern entrusted Jeff with total control of the company. While Jeff controlled the day-to-day management of the company, Jeff continued to consult with and involve his father with all significant decisions.

Lisa has been living in California for many years after having moved with her husband to France, Japan, England and Texas for her husband's work. LoriAnn moved to Arizona shortly after college graduation where she has remained. LoriAnn has a real estate license and briefly helped Lavern manage some properties he owned in Arizona but that did not go very well. LoriAnn needed Lavern's assistance and an employee of Busse Investments to go to Arizona and straighten out the books. During the 30 years preceding 2015, neither LoriAnn nor Lisa had expressed any interest in moving to Iowa or being involved in the day-to-day operations at Busse Investments. They did have seats on the board of directors.

Lavern was very clear with his children about his philosophy for managing the businesses, his estate and the transfer of wealth to future generations. He expressed this clearly on the witness stand and had provided the same philosophy in writing to his children a number of years previously. He always gave equally to his three children. However, he did not give equal control over the family entities to his children. His philosophy had four elements. First, he wanted to give not only to his children but to future generations and ultimately to the foundation. Second, he did not intend to pay inheritance or estate taxes. Third, he wanted to combine the management of businesses and investment accounts to make it easier to invest. Finally, he wanted to have someone running the operation that bought into his ideas. That person was clearly Jeff. Lavern testified he did not want the money to be squandered and felt that Jeff bought into his philosophy and went out of his way to be fair to his sisters. Lavern did not feel his daughters had equal buy-in to his philosophy. For instance, he testified that from time to time his daughters had expressed the desire to dissolve the Busse Family Limited

Partnership and give each their proportionate share. That did not fit with Lavern's philosophy as he wanted to grow the assets.

As noted above, Busse Investments was formed in the late-1980's and Jeff began working with the company full-time in 1989. It started with zero properties and grew to owning over twenty commercial real estate properties. BI is a highly successful commercial real estate business and has generated tremendous wealth for the Busse family. Until after initiation of this lawsuit, Jeff managed the day-to-day affairs of BI initially together with Lavern, but since 2000 increasingly as the primary manager of BI's day-to-day operations. Lavern gifted each of his children $35,000 to invest in BI. LoriAnn and Lisa testified that they have invested no additional sums into BI. From BI's inception to the present date, LoriAnn, Lisa and Jeff have received millions of dollars in distributions from BI. (*See* Exhibit 3076).

In approximately 1992, Jeff became quite interested in studying estate planning tools. When Lavern had set up the Busse Trust, he had used his estate tax exclusion. He had also set up a generation-skipping trust and ended up paying taxes on that which caused Lavern some buyer's remorse. Jeff and his father had dozens of conversations about estate planning over the years. Jeff bought into and followed his father's four principals outlined above.

By 2002, Jeff had been working with his father for about 13 years since Jeff left Proctor and Gamble. Jeff had been researching using grantor trusts as an estate planning tool. In 1987, Lavern and Audrey had each given away $600,000 each which was the maximum they could transfer at that time without tax but by 2002, the lifetime exclusion had increased to $1 million, meaning Lavern and Audrey each had the ability to give away an additional $400,000 each without paying taxes. In 2002, Lavern ceased being a shareholder of BI and transferred his BI stock into seven grantor trusts he established, one for LoriAnn and one for each of his six granddaughters. This was accomplished by $800,000 being placed into the grantor trusts and then the grantor trusts purchased Busse Investment stock using the $800,000 as a down payment. Additionally, Lavern took a promissory note from the

grantor trusts for the BI stock purchase which was then paid back with earnings from Busse Investments.

Since the creation of the grantor trusts, Jeff has been the sole trustee for the seven grantor trusts. As trustee of the grantor trusts, Jeff is entitled to exercise all voting rights with respect to stock and other securities held by the grantor trusts. (Exhibit 1-B, LTB 2002 irrevocable trust U/D/O December 20, 2001, Article VI, A.7). Jeff's voting rights as trustee for the grantor trusts combined with his personal interest allowed Jeff to exercise majority control over BI while the grantor trusts held BI voting stock.

Lavern testified that Jeff was appointed as trustee of the Grantor Trusts because Jeff had extensive experience operating BI and was a key consultant for Lavern and Audrey concerning both business and estate planning matters.Lavern testified further that Jeff was appointed as trustee of the Grantor Trusts because Jeff "had bought into my way of thinking" and treated his sisters "very fairly." Jeff's performance as trustee since the inception of the Grantor Trusts in 2002 has resulted in a nearly 20-fold increase in the trust corpus through 2015. (See Exhibit 2076, p. 15). Lavern has paid the income taxes generated by the assets held in all seven Grantor Trusts since 2002. LoriAnn testified that her Grantor Trust was initially seeded with a $266,667 gift from Lavern, and Jeff, acting as trustee of her Grantor Trust, has increased the value of her Grantor Trust to $5.4 million.(See Exhibit 3071, p. 1). Lisa's testimony confirms that Jeff, acting as trustee of her daughters' Grantor Trusts, has made her daughters multi-millionaires.(See Exhibit 3071. p. 2).

The creation and funding of the Grantor Trusts and the purchase of the BI stock by the Grantor Trusts with gifted money was a wonderful estate planning tool. Under the applicable Internal Revenue Service Rules, the Grantor Trusts were able to purchase the BI stock for a heavily discounted value due to lack of marketability and minority interest discounts. The minority interest discount at the time the Grantor Trusts acquired the BI stock was 22.5% and the marketability discount was 35%, meaning that the Grantor Trusts were acquiring the BI stock at $0.425 cents on the dollar. (Exhibit 3002, p. 59,

69). The Grantor Trusts are known as intentionally defective Grantor Trusts because they are considered a complete gift for estate tax purposes but incomplete for income tax purposes. Lavern's retained "swap" power helped assure that the Grantor Trusts were incomplete for income tax purposes. Since the transfers were incomplete gifts for income tax purposes, Lavern still paid the income tax on the BI income held by the Grantor Trusts. This meant that not only did the Grantor Trust receive the income generated by BI but they did not have to pay the income tax. This was an incredibly beneficial tool for estate planning purposes. Not only did the trusts acquire the stock at a greatly discounted value but every year that Lavern paid the tax it was essentially another tax-free transfer to the beneficiaries of the Trusts.

The value of the Busse Investments stock purchased by the Grantor Trusts in exchange for the $800,000 that had been given by Lavern and Audrey was determined by an appraisal performed by Management Planning, Inc. ("MPI"). The appraisal was necessary because the transfer was required to be at equivalent value. Exhibit 3002, the appraisal done by Management Planning, Inc., demonstrates that the price per share that the Grantor Trust paid for 40% of the outstanding Busse Investment stock was 53 cents per share for the voting stock and 50 cents for the non-voting stock. (Exhibit 3002, p. 70). As noted above, there was a minority interest discount. The minority interest discount was 22.5% and the lack of marketability discount was 35%. (*Id.* p. 59, 69).

After Lavern's BI stock was transferred to the Grantor Trusts in 2002, Lavern remained somewhat involved in BI but decisions about distributions from BI after 2002 were made by Jeff. After Jeff was able to make the Busse Investment distribution decisions, the distributions were greatly increased.

Jeff as trustee of the Grantor Trusts is empowered to issue distributions to the beneficiaries. However, none of the beneficiaries of the Grantor Trusts has ever asked him to make a distribution. Jeff credibly testified that he has never denied a request for a distribution because there have been no requests for distributions. He further testified it would be unwise for beneficiaries to request

distributions. As Lavern pays the tax on the income generated by the Grantor Trusts, if the Grantor Trusts' beneficiaries keep assets in their respective trusts, Lavern pays tax on a larger and larger amount.

From time to time over the years, family members have requested loans from the Grantor Trusts. The Grantor Trusts have loaned money to each branch of the family, including Lisa's and LoriAnn's branch and the Grantor Trusts have also loaned money to Lavern. As Jeff testified, Busse Investments was "distributing money hand over fist" which meant that the Grantor Trusts accumulated a great deal of cash. As discussed above, in addition to the Grantor Trusts acquiring Busse Investment stock at a discounted value with money gifted by Lavern and Audrey, they also paid for the Busse Investment stock by a promissory note. The profitability of Busse Investments was such that the promissory notes were paid back in less than three years. Busse Investments was making so much money that they Grantor Trusts had a great deal of cash to invest each year.

When there was borrowing from the Grantor Trusts, the family member borrowing money would pay the minimum allowable interest rate, which is called the applicable federal rate. This meant that the family member could borrow money at a very low interest rate. For instance, when Lisa borrowed money from her children's Grantor Trusts, she paid 2.95% on a thirty year loan, interest only. When LoriAnn borrowed money from her Grantor Trust, the interest rate at that time was 1.65% for a nine year loan but that was the lowest rate that she could pay by law. When Jeff borrowed money from his daughters' Grantor Trusts, he paid 6.75%, voluntarily paying a higher rate to benefit his children. When loans were made by the Grantor Trusts to family members that was still better than the return the Grantor Trust could generate from cash.

In 2004 the decision was made to terminate the Busse Trust and transfer the funds to a newly created entity, Busse Family Limited Partnership ("BFLP"). That decision was made because their attorney, in the course of establishing the Grantor Trusts, had discovered a potential estate tax inclusion problem with the Busse Trust meaning that estate taxes could have been owed on the value

of the Trusts and all of the beneficiaries would only have gotten about half due to estate taxes. The decision was made to replace the Busse Trust with BFLP.

As will be discussed below, BFLP was established in 2004 with a new entity, Busse Financial Advisors, LLC ("BFA"), acting as the general partner. When the Busse Trust had been established, the generation-skipping exclusion had not been used to fund the Busse Trust which meant that the Busse Trust would be included in Jeff's, Lisa's and LoriAnn's estates. Distributing the Busse Trust to Jeff, Lisa and LoriAnn's generation and putting the money into a limited partnership created a discountable asset that that generation could use for their own estate planning purposes to minimize estate taxes, which was one of Lavern's goals. When the assets of the Busse Trust were distributed, each of Jeff, LoriAnn and Lisa received $4,400,000. Jeff made the election to put that entire amount into BFLP plus some additional funds. LoriAnn and Lisa each elected to hold some money back. Jeff also placed his share of Busse Investments in BFLP. This meant that, because LoriAnn and Lisa had elected to keep some money back and Jeff invested all of his Busse Trust funds plus additional BI stock, the family members no longer had equal proportions. Jeff and his family's stake in BFLP was approximately 38% and Lavern's was somewhat more than 22%. The balance was held by LoriAnn, Lisa and Lisa's children.

In 2004 BFA was formed. BFA is a manager-managed LLC, managed by a Board of Managers consisting of two managers. (Exhibit 1C, BFA Operating Agreement Article 5.1). The original managers of BFA were Jeff and Lavern. The original members of BFA were Lavern, Jeff, LoriAnn, and Lisa, and each member held a 25% interest. Article 4.7 of the BFA Operating Agreement provides "The affirmative vote of Members holding a majority of the outstanding Membership Interests shall be the act of the Members…" (Exhibit 1C, BFA Operating Agreement Article 4.7). Pursuant to Article 5.5(h) of the BFA Operating Agreement, a simple majority of the members can dissolve BFA. (Exhibit 1C, BFA Operating Agreement Article 5.5(h)). BFA's primary function is to operate and manage two other companies: BFLP and AB BI Note Limited Partnership.

BFLP was formed in 2004 and holds substantial assets (primarily marketable securities) that Lavern primarily manages. BFLP is owned by Busse family members individually, trusts benefitting Busse family members, and BFA. BFA is the General Partner of BFLP. Under the BFLP Partnership Agreement, BFA designated Jeff and Lavern to act on its behalf as managers of BFLP. (Exhibit 1D, BFLP Agreement, Art. VII, p. 10). Neither Jeff nor Lavern are General Partners of BFLP. The BFLP Partnership Agreement provides: "Cash may be distributed at the sole discretion of the General Partner among the Partners pro rata in accordance with their Sharing Ratios," subject to Article XII and other provisions of the operating agreement. (Exhibit 1D, BFLP Agreement, Article XI, A, p. 24). The BFLP Partnership Agreement further provides: "Because the Partnership has been formed and created to manage the Partners' investments in a single entity, the General Partner shall have complete and absolute discretion and authority in determining whether any distribution, including Cash distributions, shall be made by the Partnership." (Exhibit 1D, BFLP Agreement, Art. XII, p. 25). The BFLP Partnership Agreement further provides that the General Partner may be removed with a 70 percent vote of Limited Partners. (Exhibit 1D, BFLP Agreement, Article VI, p. 11). If the General Partner is removed or cannot serve, the Limited Partners may elect a successor General Partner by a simple majority. (Exhibit 1D, BFLP Agreement, Article X, C.4). The BFLP Partnership Agreement contains the following integration clause: "**Entire Agreement.** This Agreement contains the entire agreement among the Partners with respect to the matters of this Agreement and shall supersede and govern all prior agreements, written or oral." (Exhibit 1D, BFLP Partnership Agreement, p. 40, Art. XIX.H).

The BFLP Partnership Agreement gives the General Partner, BFA, complete and absolute discretion to determine whether there are distributions. (Exhibit 1D, BFLP Agreement, Art. XII, p. 25). Under the BFLP Partnership Agreement, BFA designated Jeff and Lavern to act on its behalf as managers of BFLP. (Exhibit 1D, BFLP Agreement, Art. VII, p. 10). Jeff credibly testified that he has never denied a request for a distribution from BFLP or BFA. The partners of BFLP pay the tax on income generated by BFLP. None of the partners, including LoriAnn and Lisa, have ever asked for a

distribution sufficient to allow them to pay taxes. Prior to the initiation of this lawsuit, there were no complaints from LoriAnn or Lisa about the level of distributions they were receiving out of BFLP or BFA.

As noted above, when BFA was originally formed, Lavern, Jeff, LoriAnn and Lisa each owned 25%. The testimony from Jeff and Lavern established that Lavern's plan had always been to bequeath Lavern's share of BFA to Jeff on his death. Exhibit 3008, an e-mail Jeff sent to LoriAnn and Lisa in 2010, forwards to them a page from Lavern's estate plan demonstrating that Lavern's 25% of BFA would be bequeathed to Jeff upon Lavern's death. As Jeff pointed out in his testimony, Exhibit 3008 illustrates that Lavern intended to transfer his 25% interest in BFA to Jeff even if he had to incur estate taxes to effectuate the transfer. There were no complaints from LoriAnn and Lisa at that time about this plan.

In 2004 LoriAnn, Lisa, and Jeff, in recognition of Lavern's charitable philosophy, entered into a Busse Foundation Pledge ("Foundation Pledge"). (Exhibit 49). The Foundation Pledge indicates, among other things, that LoriAnn, Lisa, and Jeff would deposit the excess of their respective estates into the Busse Foundation under certain circumstances and with certain conditions. (Exhibit 49).

In 2007 an appraisal of Busse Investment stock was performed. The appraisal of Busse Investment stock was necessary because a long-time Busse Investment employee, Don Pfelier had died and an appraisal was necessary to purchase the stock from his estate. While Mr. Pfelier was alive, he had granted Jeff a right of first refusal to purchase his stock. After Mr. Pfelier's death, Jeff waived his right to purchase Mr. Pfelier's Busse Investment stock to allow the stock to be purchased by the Grantor Trusts. It did not just go into the Grantor Trusts benefitting Jeff's children but was equally divided among all seven Grantor Trusts. MPI appraised the stock as reflected in Exhibit 3005.[1] In 2007 the price per share for voting stock was determined to be 73 cents per share and the price per

[1] A buy-sell agreement signed by all of the shareholders of BI, including Plaintiffs, designated the valuation firm MPI to exclusively provide any necessary valuation of BI stock. (Exhibit 3003). The parties executed the buy-sell agreement on November 1, 2005. (*Id.*).

share for nonvoting stock was 69 cents per share. (Exhibit 3005, p. 72). In 2007 MPI applied a 20% minority interest discount and a 35% lack of marketability discount. (Exhibit 3005, p. 55, 71).

In 2011 a new entity was created, AB BI Note Limited Partnership ("AB BI"). The primary purpose of the creation of AB BI was to create a discountable asset that Lavern and Audrey could use in their estate planning or potentially for giving. Audrey Busse contributed to AB BI promissory notes she had received from Busse Investments, which notes had been assigned to her by Lavern, and Lavern Busse contributed $1.5 million in cash. BFA was the general partner of AB BI. As noted above, the managers of BFA were Jeff and Lavern.

AB BI is owned by the Dynasty Trusts which will be discussed below and by its General Partner BFA. Under the AB BI Partnership Agreement, BFA designated Jeff and Lavern to act on its behalf as managers of ABI BI. Neither Jeff nor Lavern are General Partners of AB BI. Each Dynasty Trust holds a 32.9% ownership interest in AB BI and BFA holds a 1.3% ownership interest in AB BI. AB BI holds a portfolio of marketable securities. AB BI also holds notes entitling it to principal and interest payments on loans it made to BI and Lavern's individual trust, LTB 1996 Trust. The AB BI Partnership Agreement provides: "Cash may be distributed at the sole discretion of the General Partner among the Partners pro rata in accordance with their Sharing Ratios," subject to Article XII and other provisions of the Partnership Agreement. (Exhibit 1E, AB BI Partnership Agreement, p. 25, Art. XI.A). The AB BI Partnership Agreement further provides: "Because the Partnership has been formed and created to manage the Partners' investments in a single entity, the General partner shall have complete and absolute discretion and authority in determining whether any distribution, including Cash distributions, shall be made by the Partnership." (Exhibit 1E, AB BI Partnership Agreement, p. 26, Art. XII). The AB BI Partnership Agreement contains the following integration clause: "**Entire Agreement**: This Agreement contains the entire agreement among the Partners with respect to the matters of this Agreement and shall supersede and govern all prior agreements, written or oral." (Exhibit 1E, AB BI Partnership Agreement, p. 41, Art. XIX.M).

On October 21, 2011, Lavern and Audrey executed three Dynasty Trusts. Each trust designated one of their three children—Jeff, LoriAnn, and Lisa—as the initial "primary beneficiary." (Exhibit 84, Exhibit 3016, Article II, B). With the exception of the named child and initial designations, the Dynasty Trusts' terms and provisions are identical in all significant respects. Each Dynasty Trust has an Investment Trustee. The Investment Trustee is entitled to vote any stock or security interest the Dynasty Trust holds. (Exhibit 84, Exhibit 3016, Article IV, A.5). The Dynasty Trusts appointed LoriAnn, Lisa, and Jeff as the initial Investment Trustee for their respective Dynasty Trusts. (Exhibit 84, Exhibit 3016 Article V, A). The Dynasty Trusts also provide for a Trust Protector. (Exhibit 84, Exhibit 3016, Article V, J). The Trust Protector "may remove a Trustee at any time and for any reason, and may replace said Trustee with a Successor Trustee selected by the Trust Protector…."[2] (Exhibit 84, Exhibit 3016, Article V, J.4).

The Dynasty Trusts held—and continue to hold—two assets: an interest in BFLP and an interest in AB BI. In 2011 Lavern and Audrey each transferred their interest in the AB BI Note Limited Partnership into the Dynasty Trusts. Also, late in 2011, Lavern transferred his BFLP interest into the Dynasty Trusts. If the Dynasty Trusts were properly admitted as Limited Partners in BFLP,[3] then, following Lavern's transfer of his shares in BFLP to the Dynasty Trusts, LoriAnn, Lisa, and Lisa's daughters collectively owned 53.08% of the voting shares in BFLP, and Jeff and his children collectively owned 45.59%. In addition, if the Dynasty Trusts were properly admitted as Limited Partners in AB BI, LoriAnn and Lisa collectively owned 65.8% of the voting shares in AB BI, and Jeff owned 32.9% of the voting shares in AB BI.

[2] Each Dynasty Trust provides that "the term 'Trustee' and any pronoun referring to that term includes both the Investment Trustee and the Independent Trustee at any time acting hereunder, regardless of number." Article VII, D.

[3] It is undisputed the Dynasty Trusts eventually became Substitute Limited Partners in BFLP and AB BI. (Entity Def. Brief on Post-Trial Issue Reserved for the Court p. 18 ("Defendants do not dispute that LoriAnn's Dynasty Trust eventually became a Substitute Limited Partner of BFLP…"). Until the Dynasty Trusts were admitted as Substitute Limited Partners into BFLP and AB BI, however, the Dynasty Trusts are merely "Assignees" under the BFLP Partnership Agreement and the AB BI Partnership Agreement. An "Assignee" under the BFLP Partnership Agreement and AB BI Partnership Agreement has only the economic rights of a Limited Partnership interest, but no right to vote or participate in management. (BFLP Agreement, Article IV, I, p.2; AB BI Agreement Article IV, I, p.2).

In 2012 Jeff created MMB Limited Partnership ("MMB"), named after his wife's initials. Lavern, Audrey, and Jeff contributed cash to form MMB. (Exhibit 1F). Lavern and Audrey borrowed $3.2 million to fund their interest in MMB, and Jeff and his family contributed $1.8 million to MMB for a total of $5 million. Jeff was established as the general partner of MMB. (Exhibit 1F p.10, Art. VII(B)). The MMB Partnership Agreement contains the following forced reinvestment clause: "If required in the discretion of the General Partner, the Partners will be required to make additional Capital Contributions to the Partnership within thirty (30) days from date of written notice by the General Partner. Any required Capital Contributions shall be made pro rata, in accordance with the Partners Sharing Ratios unless otherwise agreed to by all Partners in writing." (Exhibit 1F p. 18, Art. VIII(C)). Upon MMB's formation, LoriAnn and Lisa had no personal interests or ability to participate in MMB.

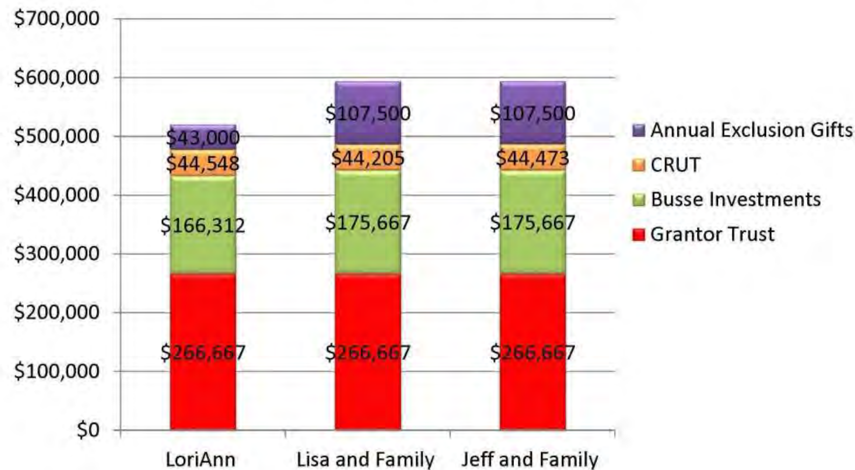
In 2012, the Busse Foundation Trustees, including LoriAnn and Lisa, entered into a Charitable Distribution Resolution Procedure ("Distribution Resolution"). (Exhibit 62). The Distribution Resolution reflected the allocation of charitable giving by the Foundation among Busse Family Members based on their proportionate share of assets contributed to the Foundation. (Exhibit 62, Distribution ¶ 1). Under the Distribution Resolution, any Busse Family Member can assign their contribution allocation to any other Busse Family Member in any proportion they choose. (Exhibit 62, Distribution Resolution ¶ 2). If a Busse Family Member does not make an assignment pursuant to paragraph 2 of the Distribution Resolution prior to their death, then the Distribution Resolution provides that, after their death, their allocation percentage will be assigned proportionally to that person's lineal descendants. (Exhibit 62, Distribution Resolution ¶ 7).

By 2012 Jeff Busse had been managing Busse Investments for 23 years, had been a manager of BFLP for 8 years and a manager of AB BI for one year. He had been a trustee of the Grantor Trusts for 10 years. There had been no complaints from his sisters with regard to how he was handling any of those entities by 2012. Exhibit 2 is what the parties referred to in the courtroom as the "circuit board."

It is an Exhibit which shows the numerous Busse family entities, how they interrelate and who owns what percentage. Jeff credibly testified that he administered those entities along with his father without compensation for doing so other than what he received as an employee of Busse Investments. By 2012 there had been no complaints regarding Jeff's management of the family entities or lack of distributions.

B. Gifts and Distributions

The lack of complaints regarding Jeff's management of the family entities or lack of distributions prior to 2012 is unsurprising given the substantial gifts and distributions LoriAnn and Lisa received, throughout this dispute and prior, as the result of Lavern's generosity and the hard work and business acumen of Jeff and Lavern. In 2002 LoriAnn received over $500,000 in gifts and distributions. A significant portion of this sum is attributable to distributions from BI ($166,312)[4] and the formation of her Grantor Trust ($266,667). In 2002 Lisa and her kids received nearly $600,000 in gifts and distributions. A significant portion of this sum is attributable to distributions from BI ($175,667) and the formation of Lisa's daughters' Grantor Trusts ($266,667).

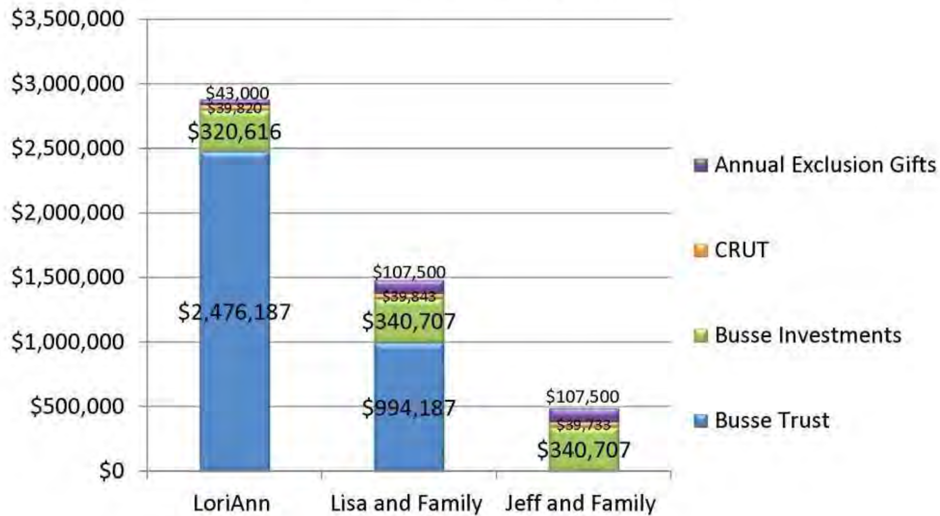


[4] Lavern testified BI rarely, if ever, made distributions when he was the primary manager of BI's day-to-day operations. Lavern testified further that BI started to make substantial distributions to its shareholders once Jeff became the primary manager of BI's day-to-day operations in 2002.

In 2003, although the Grantor Trusts did not make a distribution, LoriAnn received nearly $550,000 in gifts and distributions. A significant portion of this sum is attributable to BI distributions ($475,491). In 2003 Lisa and her kids collectively received nearly $650,000 in gifts and distributions. A significant portion of this sum is attributable to BI distributions ($505,287).

In 2004 LoriAnn received over $700,000 in gifts and distributions. A significant portion of this sum is attributable to distributions from BI ($642,706). In 2004 Lisa and her kids received over $800,000 in gifts and distributions. A significant portion of this sum is attributable to distributions from BI ($682,980).

In 2005 LoriAnn received nearly $3 million in gifts and distributions. A significant portion of this sum is attributable to the portion of the Busse Trust distribution LoriAnn elected to not invest into BFLP ($2,476,187).[5] LoriAnn also received $320,616 in distributions from BI in 2005. Lisa and her kids received nearly $1.5 million in gifts and distributions in 2005. A significant portion of this sum is attributable to the portion of the Busse Trust distribution Lisa elected to not invest into BFLP ($994,187). Lisa and her kids also received $340,707 in distributions from BI in 2005.



In 2006 LoriAnn received nearly $350,000 in gifts and distributions. A significant portion of this sum is attributable to distributions from BI ($253,656). In 2006 Lisa and her kids received over $400,000 in gifts and distributions. A significant portion of this sum is attributable to distributions from BI ($269,551).

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[5] As noted above, the Busse Trust distributed all of its assets to the Busse Trust beneficiaries. LoriAnn elected to retain approximately $1.8 million of her Busse Trust distribution, and invested the remaining portion into BFLP. Lisa elected to retain approximately $900,000 of her Busse Trust distribution, and invested the remaining portion into BFLP. Jeff invested the entirety of his Busse Trust distribution ($4.5 million) and additional personal funds into BFLP.

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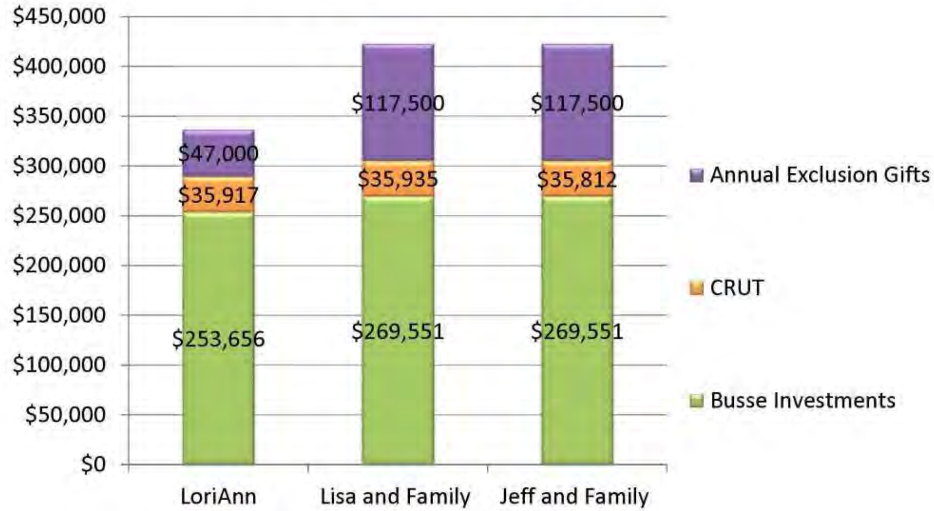
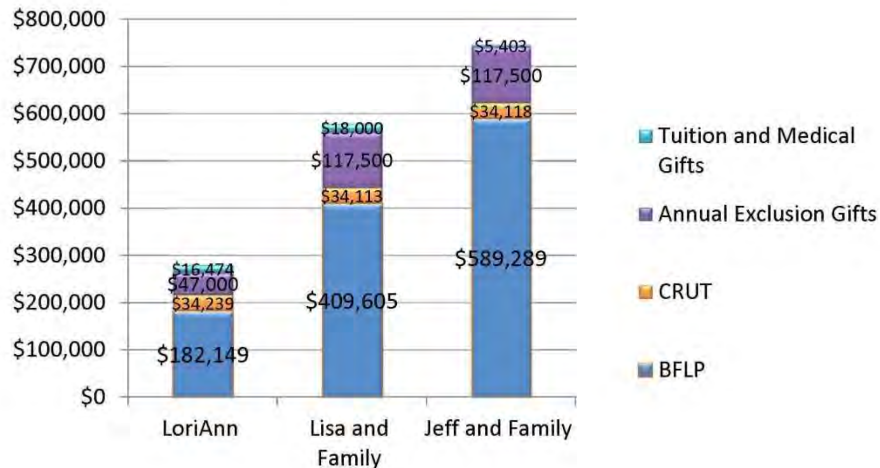
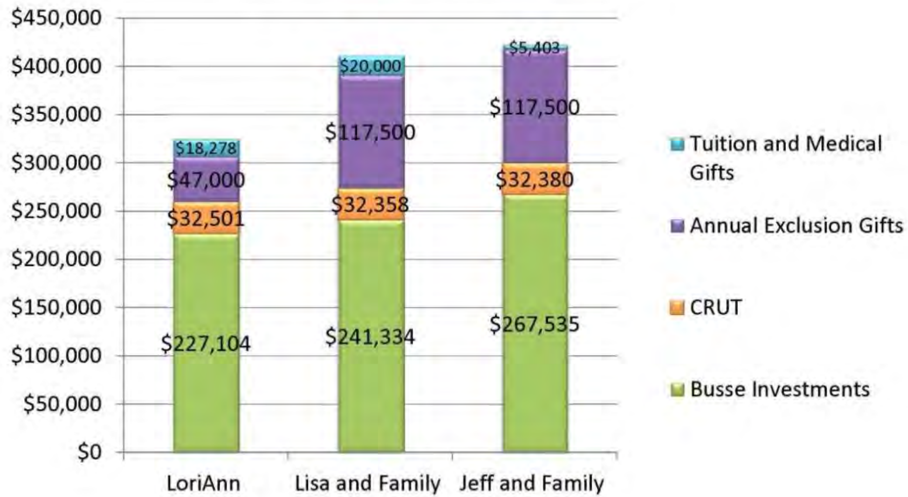


In 2007, although BI did not make a distribution,[6] LoriAnn received nearly $300,000 in gifts and distributions. A significant portion of this sum is attributable to distributions from BFLP ($182,149). In 2007 Lisa and her kids received nearly $600,000 in gifts and distributions. A significant portion of this sum is attributable to distributions from BFLP ($409,605).



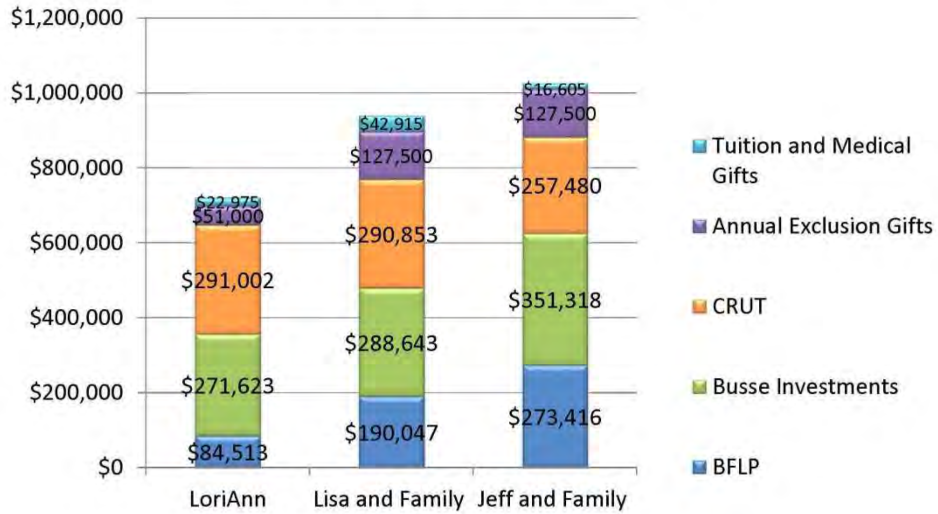
[6] As noted above, in 2007 a minority BI shareholder, Don Pfeiler, died. Jeff testified BI did not make a distribution in 2007 to ensure Mr. Pfeiler's creditors could not reach Mr. Pfeiler's portion of the BI distribution. Jeff testified further that BFLP distributed its 2006 operating income in 2007 to offset the lack of distributions from BI. Jeff testified that the Busse family coordinates distributions from BI and BFLP because BI and BFLP are both pass through entities for tax purposes. In addition, Jeff testified that he waived his right of first refusal to acquire Mr. Pfeiler's BI shares and Mr. Pfeiler's BI shares were evenly distributed into all seven Grantor Trusts.

In 2008, although BFLP did not make a distribution, LoriAnn received over $300,000 in gifts and distributions. A significant portion of this sum is attributable to distributions from BI ($227,104). In 2008, Lisa and her kids received over $400,000 in gifts and distributions. A significant portion of this sum is attributable to distributions from BI ($241,334).

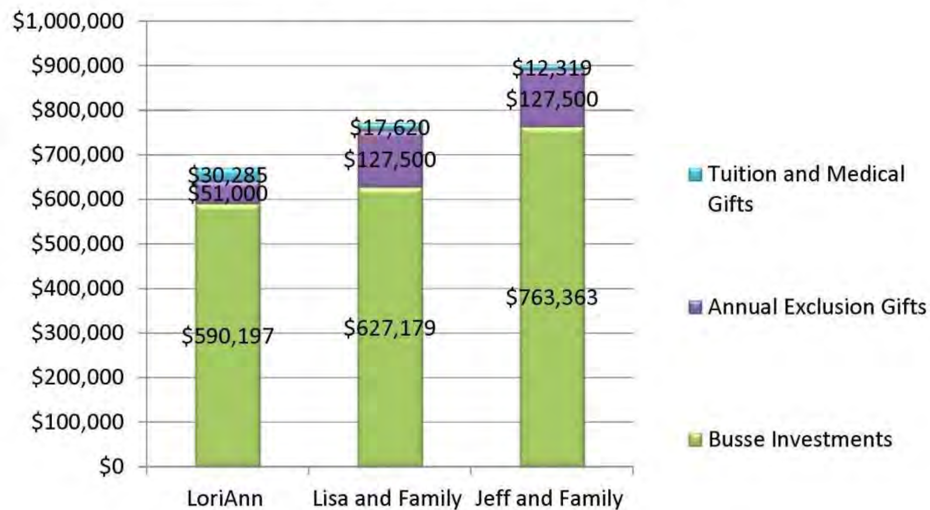


In 2009 LoriAnn received approximately $700,000 in gifts and distributions. This sum primarily consists of distributions from the Busse family's charitable remainder unitrust ($291,002), distributions from BI ($271,623), and distributions from BFLP ($84,513). In 2009 Lisa and her kids received approximately $900,000 in gifts and distributions. This sum primarily consists of distributions from the Busse family's charitable remainder unitrust ($290,853), distributions from BI ($288,643),[7] and distributions from BFLP ($190,047).

[7] In 2009 Jeff and his family started receiving a greater portion of BI's distributions than Lisa and her family. In an e-mail dated June 27, 2008, Jeff told Lavern, Audrey, LoriAnn, and Lisa that he wanted a BI stock option to attain a minimum "real level" salary. (Exhibit 3006). In that same e-mail, Jeff requested the stock option allow him to purchase a minimum 475,000 shares of non-voting BI stock. (*Id.*). On July 1, 2008, Jeff was awarded a stock option to purchase 707,000 shares of non-voting BI stock, at an exercise price of $0.14 per share. (Exhibit 71). After Jeff exercised the July 1, 2008 stock option, Jeff and his family started receiving a greater portion of BI distributions than Lisa and her family. When asked on cross examination whether a stock option was typical for an employee who had worked close to twenty years in a commercial real estate company, LoriAnn testified "I'm not aware of the Cedar Rapids business market."

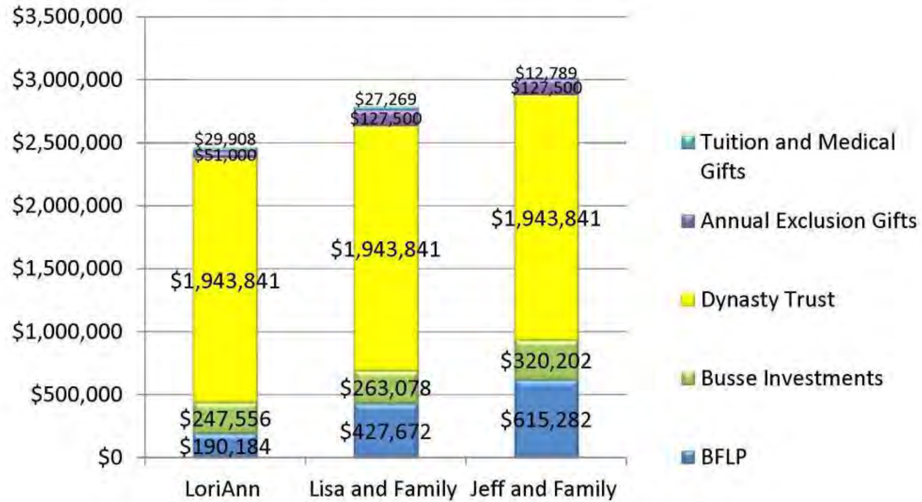


In 2010 LoriAnn received nearly $700,000 in gifts and distributions. A significant portion of this sum is attributable to distributions from BI ($590,197). In 2010 Lisa and her kids received nearly $800,000 in gifts and distributions. A significant portion of this sum is attributable to distributions from BI ($627,179).

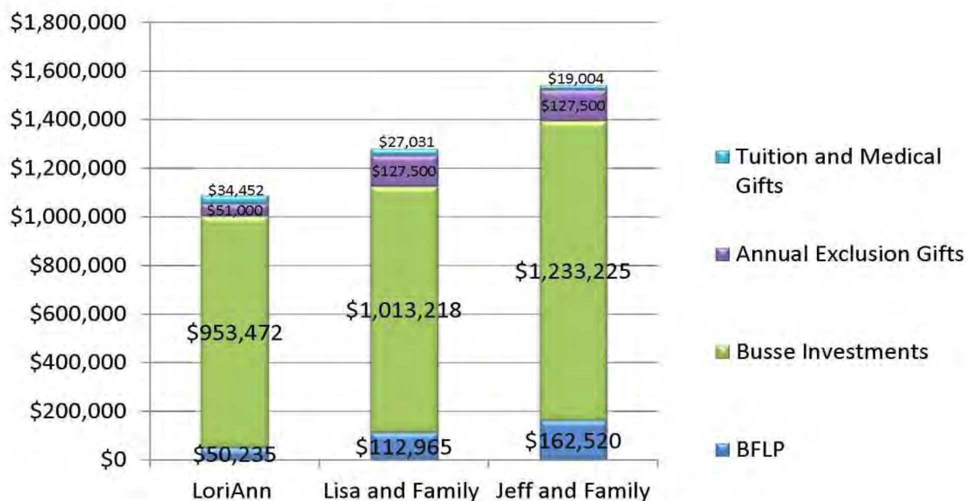


In 2011 LoriAnn received nearly $2.5 million in gifts and distributions. The lion's share of this sum stems from the creation of LoriAnn's Dynasty Trust ($1,943,841). In 2011 LoriAnn also received distributions from BI ($247,556) and distributions from BFLP ($190,184). In 2011 Lisa and her kids received approximately $2.75 million in gifts and distributions. The lion's share of this sum stems

from the creation of Lisa's Dynasty Trust ($1,943,841). In 2011 Lisa and her kids also received distributions from BI ($263,078) and distributions from BFLP ($427,672).

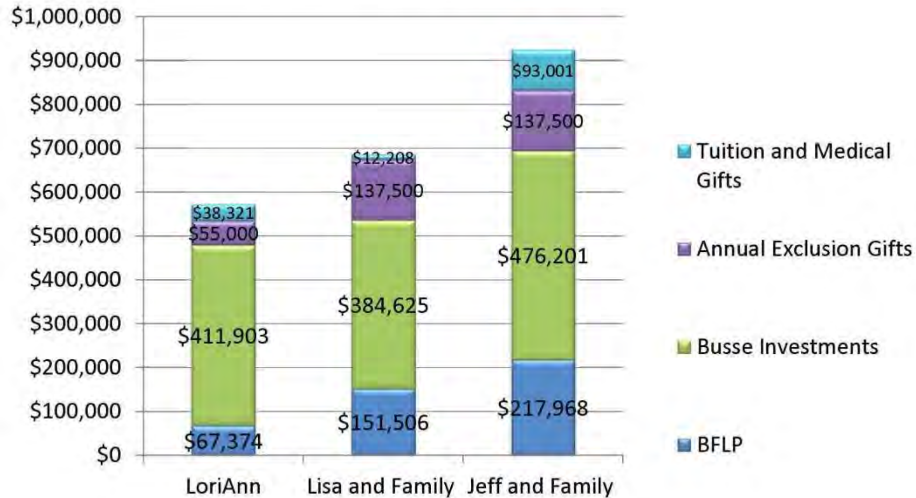


In 2012 LoriAnn received approximately $1.1 million in gifts and distributions. A significant portion of this sum is attributable to distributions from BI ($953,472). In 2012 Lisa and her kids received approximately $1.3 million in gifts and distributions. A significant portion of this sum is attributable to distributions from BI ($1,013,218).

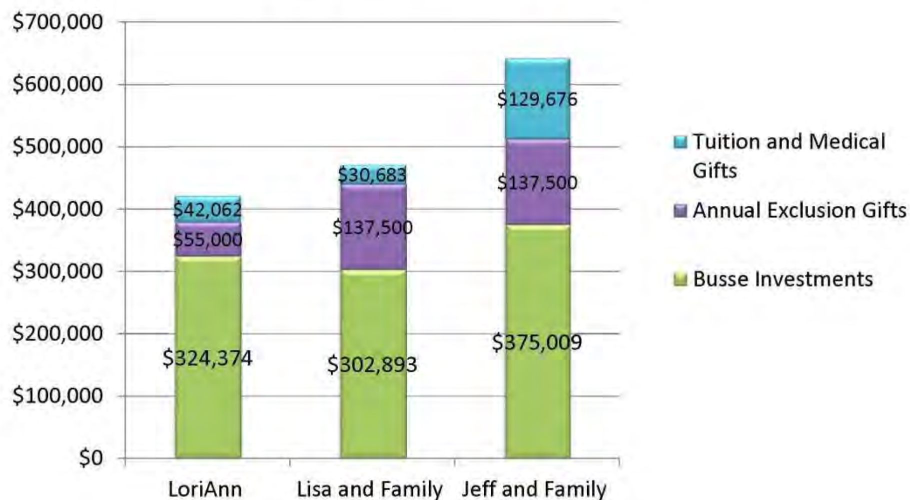


In 2013 LoriAnn received nearly $600,000 in gifts and distributions. A significant portion of this sum is attributable to distributions from BI ($411,903). In 2013 Lisa and her kids received nearly

$700,000 in gifts and distributions. A significant portion of this sum is attributable to distributions from BI ($384,625).

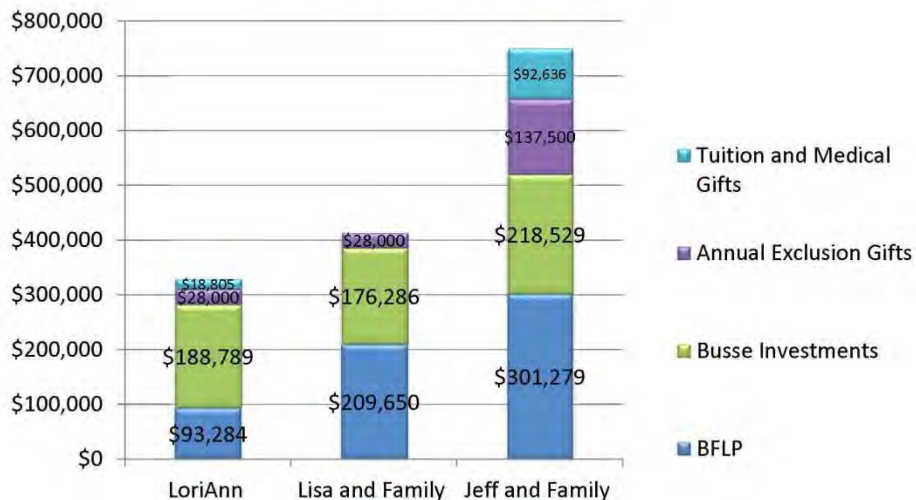


In 2014, although BFLP did not make a distribution, LoriAnn received over $400,000 in gifts and distributions. A significant portion of this sum is attributable to distributions from BI ($324,374). In 2014 Lisa and her kids received nearly $500,000 in gifts and distributions. A significant portion of this sum is attributable to distributions from BI ($302,893).



In 2015 LoriAnn received over $300,000 in gifts and distributions. This sum primarily consists of distributions from BI ($188,789) and distributions from BFLP ($93,284). Lavern testified that he

ceased paying for LoriAnn's health expenses once Plaintiffs initiated this lawsuit on April 29, 2015. LoriAnn acknowledged on cross examination that Lavern contributed approximately $250,000 towards her medical insurance and expenses between the years 2007 and 2015. (*See* Exhibit 3082). In 2015 Lisa and her kids received over $400,000 in gifts and distributions. This sum primarily consists of distributions from BI ($176,286) and distributions from BFLP ($209,650). Lavern testified that he ceased paying Lisa's daughters' college tuition once Plaintiffs initiated this lawsuit. Lavern testified that he directed Lisa's daughters to use the assets in their Grantor Trusts to pay for their college expenses.



Since 2002 until October 19, 2015, Jeff primarily managed the day-to-day operations of BI. Since the creation of the Grantor Trusts in 2002, Jeff has been the sole trustee for the seven Grantor Trusts. Since the inception of BFLP and AB BI, Jeff has served as a manager of both entities. In occupying these various roles, Jeff credibly testified he never declined a request for a loan, distribution, or financial need.

C. Background Relating to the Busse Family Dispute

As noted above, in 2010 Jeff sent LoriAnn and Lisa a page from Lavern's estate plan demonstrating that Lavern's 25% interest in BFA would be bequeathed to Jeff upon Lavern's death.

(Exhibit 3008). Jeff credibly testified that he received no complaints from LoriAnn and Lisa following the June 22, 2010 e-mail. In 2012 Jeff emailed Lavern and stated he wanted to purchase Lavern's 25% interest in BFA. On September 15, 2012, Jeff and Lavern executed an assignment and consent form that transferred Lavern's 25% interest in BFA to Jeff. (Exhibit 12). Jeff did not disclose to LoriAnn or Lisa that Lavern was going to sell his 25% interest in BFA to Jeff prior to the transfer occurring. Jeff testified he informed LoriAnn and Lisa that he purchased Lavern's 25% interest in BFA in May of 2013. As discussed in greater depth below, Jeff purchasing Lavern's 25% interest in BFA frustrated LoriAnn and Lisa.

A good deal of the controversy between the parties revolves around MMB, which was created in late-September, 2012. In 2012, Lisa had requested that Busse Investments consider leveraging an unencumbered asset and distributing the proceeds to the shareholders which she would use to pay down her debt to her Grantor Trust. Lisa and LoriAnn assert there was a plan in place with Lavern that would result in a $4 million distribution by BI to its shareholders and that Jeff hijacked this plan by approaching Lavern about investing in a new limited partnership rather than loaning money to AB BI to help facilitate the $4 million BI distribution. Plaintiffs point to an e-mail dated May 15, 2012 written by Jeff to Audrey, Lavern, LoriAnn and Lisa in which Jeff proposed "AB BI Note LP borrow $2.0 MM from Lavern and $2.0 MM from Audrey to fund the BI $4.0 MM loan." (Exhibit 25). The memo also references that Lisa could use $600,000 of her BI $4 million distribution to pay down her debt to the Grantor Trust. (*Id.*). Having considered the testimony of Jeff, Lavern, LoriAnn and Lisa, the Court concludes there was no firm plan for Audrey and Lavern to proceed in that fashion, it was simply a proposal. At the time Jeff wrote his May 15, 2012, e-mail, Lavern had not agreed to do anything of the sort. It was simply a plan being discussed.

Jeff and his family contributed $1.8 million and Lavern and Audrey contributed $3.2 million to form MMB in September 2012. MMB, shortly after its formation, loaned its $5 million in initial investments entirely to BI, with $3.4 million loaned directly to BI and then $1.6 million loaned

indirectly to BI, as MMB first loaned the $1.6 million to AB BI, which then lent that $1.6 million to BI. The $3.4 million that MMB loaned directly to BI is organized through two notes: one for $1.6 million (Exhibit 2132) and the other for $1.8 million (Exhibit 2134) (collectively referred to as "the MMB loans"). The $1.6 million that MMB indirectly loaned BI through AB BI is organized through one note (Exhibit 2130) ("the AB BI loan") (the MMB loans and AB BI loan collectively referred to hereinafter as "the $5 million MMB Loan"). The terms of the MMB loans and AB BI loan are identical, but for the amounts loaned and the lender. The term of each note is thirty years, and the interest rate is 2.2%. (Exhibit 2132, Exhibit 2134, Exhibit 2130). BI is only required to make payments of accrued interest each year as of December 31 of that year, until September 15, 2042, when "All unpaid principal and interest is due and payable." (*Id.*). BI may prepay the MMB loans and AB BI loan without penalty. (*Id.*).

The $5 million MMB Loan to BI was beneficial because the interest rate was 2.2% and it was interest only for 30 years. Jeff testified that BI got a great deal by receiving $5 million in loans, directly and indirectly, from MMB for the lowest interest rate allowable by law. LoriAnn testified that if BI were to replace those $5 million in loans with $5 million in loans from commercial lenders, BI would pay approximately double the interest, which would not be a good deal for BI or its shareholders. Jeff testified that if BI were to prepay the $5 million loans to MMB, it would be great for MMB's limited partners, as MMB would receive the $5 million tax free, a return of more than 100% if pre-paid within a few years. Lavern testified that this was the best deal the family ever engineered. Jeff testified that if BI repays the loan according to its terms, MMB will be repaid in 2046 with a 6% return.

Of the cash loaned to BI, $4 million was distributed to the shareholders and the remaining $1 million was retained as operating capital. Busse Investments then distributed $4 million to the shareholders. Lisa and LoriAnn's share of the $4 million distribution was approximately $1.3 million each. Lisa and LoriAnn had no obligation based on that distribution other than Busse Investments had

an obligation to pay the interest and principal when due. In other words, LoriAnn and Lisa invested no money into MMB and received approximately $1.3 million each without any personal obligations to MMB.

Lavern credibly testified that he considered the investment into MMB to be a big benefit. One of the primary benefits was that it created a discountable asset he could use for estate planning. MMB was structured in a way to maximize the discount in terms of the valuation of MMB if Lavern should transfer his limited partnership interest to one of his heirs. This structure involved the partnership agreement providing that the partners could be required to reinvest additional money. Further, the partnership planned on reinvesting all of its income for a lengthy period of time and did not plan on making distributions to the partners to allow them to pay the income tax. Lavern also testified that the formation of MMB was a big benefit to him because he could invest $3.2 million into a new limited partnership and obtain a discountable asset for estate planning purposes rather than loaning $4 million to AB BI.

One of Plaintiffs primary complaints regarding Jeff was that they viewed MMB as simply an estate planning tool for Jeff. While MMB's creation did have estate planning benefits for Jeff and Lavern, Plaintiffs fail to recognize the benefits for them as well. First, the creation of MMB and its $5 million loan to BI facilitated distributions of $1.3 million each to Lisa and LoriAnn with no personal obligation by either. Second, MMB's structure (long-term note, no obligation to make distributions, potential for forced reinvestment and no plan to make distributions to cover taxes) created an asset that could be heavily discounted and transferred at $0.35 cents on the dollar. As will be discussed below, the total return to the owners of MMB, which Plaintiffs subsequently became, is actually quite extraordinary. While it must be acknowledged there are certainly some downsides to MMB ownership, having heard all the testimony at trial, the Court is confident Plaintiffs did not fully understand the benefits of MMB. Ironically, at trial, Plaintiffs emphasized Lavern's failure to fully understand the interrelationship of the various family entities made him susceptible to undue influence.

On October 16, 2012, shortly after the formation of MMB, Jeff circulated a Memorandum to Lavern, Lisa, LoriAnn, and Audrey regarding "an issue" he discovered with the Grantor Trusts. (Exhibit 10). Jeff informed his family that he discovered a clause in the Grantor Trusts that allows his children, Lisa's children, and LoriAnn to obtain the voting shares of BI stock held in the Grantor Trusts, as beneficiaries of the Grantor Trusts, upon Lavern's death. (*Id.*). Specifically, the beneficiaries could elect to distribute to themselves the shares of the BI voting stock anytime within sixty days of Lavern's death, or afterwards, they could swap assets of equivalent value into the Grantor Trusts for removal of the BI voting stock. Jeff stated he "missed" this clause in the Grantor Trusts. (*Id.*). Jeff stated further that the clause concerned him in two ways: (1) he was uncertain whether " 'twenty somethings' are capable of making mature, long-term financial decisions that are in their best interests…" and (2) "when something happens to [Lavern], voting control of the company could 'switch over' from those that have built and run the company to the more passive investors (LoriAnn and Lisa)." (*Id.*).

Jeff proposed solutions to his family in that same October 16, 2012 memo. Jeff thought Lavern should write a letter to the grandchildren and the trustees of the Dynasty Trusts, communicating that Lavern did not want the beneficiaries to personally hold BI voting stock and that the assets are more valuable held in Trust and that it was preferred that beneficiaries under age thirty not request significant distributions. Jeff also proposed that he be given a stock option that would grant him two shares of voting stock for every one share that Lisa's children distributed from their respective Grantor Trust. Lavern agreed with Jeff's proposals in the memo. In an e-mail dated October 18, 2012, Lavern told Lisa, LoriAnn and Jeff, in part, "…we must proceed with the stock option. This will protect Busse Investments and as long as everyone is still around and everything goes according to plans, the options will not be exercised and all will remain as it is today." (Exhibit 51).

Following Lavern's October 18, 2012 e-mail, Jeff circulated a proposed Stock Option along with the October 16, 2012 Memo. Plaintiffs testified that they agreed to grant Jeff the Stock Option

that enabled him to purchase BI voting shares sufficient to retain control of BI upon Lavern's death. (Exhibit 3026). The evidence demonstrates Lisa executed her approval of the Stock Option on October 18, 2012, and LoriAnn executed her approval of the Stock Option on November 9, 2012. If they had not, Lavern testified that he would have exercised his retained swap power to remove BI voting shares from the Grantor Trusts. (*See* Exhibit 10, p.3 (describing Lavern's "absolute power" to remove BI shares from the Grantor Trusts)). Jeff and Lavern's testimony demonstrated that Lavern exercising his swap power was a less favorable alternative to creating the stock option because the swap would have entailed fees for a third-party valuation of the shares and additional estate tax planning if Lavern were to take control of the BI voting shares once again. (*See* Exhibit 10, p.3 (describing distribution as "simpler and less expensive" than exercise of Lavern's retained swap power)).

The relevant material terms of the executed Stock Option were:

- The "purchase price per share…of the Voting Common Stock covered by this Option shall be 50% of the estimated Corporation Net Asset Value Per Share on the last day of the month prior to the Exercise Date….";

- "The Option is exerciseable (sic) only to the extent it is vested. Two shares of the Option shall vest for every share of Corporation Voting Common Stock that is distributed to: a) Alexandra Renee Carpentier, pursuant to Article VI, Paragraph (e) of the LTB 2002 Irrevocable Trust U/D/O December 20, 2002, F/B/O Alexandra Renee Carpentier…"'

- Two subsequent paragraphs, b) and c), follow that are materially identical, except they each name Lisa's other two children, Devan Michal Carpentier (b) and Mare-Josee Carpentier (c). The shares of voting stock held by Jeff's children's Grantor Trusts were not included in the Stock Option Agreement.

(Exhibit 2061).

In an e-mail dated November 11, 2012, Jeff informed Lavern that he discovered potential estate tax inclusion issues created by the Grantor Trusts holding the BI voting stock while Lavern retained his "swap" power. (Exhibit 3025). Specifically, Jeff discovered the BI voting stock held in the Grantor Trusts could be included in Lavern's estate, which would result in the Grantor Trusts' beneficiaries receiving approximately half of the value of the BI voting stock held inside the Grantor

Trusts. As a solution, Jeff suggested the Grantor Trusts distribute the BI voting stock to the beneficiaries. (*Id.*). In that same e-mail Jeff stated "Distribution of the voting shares would trigger vesting of my BI voting stock option." (*Id.*).

In an e-mail dated November 14, 2012, Jeff informed LoriAnn and Lisa that "[t]he grantor trusts distributed all the BI voting stock they owned to their respective beneficiaries on October 30, 2012." (Exhibit 52). Jeff further informed LoriAnn and Lisa in the same e-mail that he made the distribution from the Grantor Trusts for the purpose of preventing any "potential for causing inclusion of the [Grantor] trust assets in Lavern T. Busse's estate." (*Id.*). Although the November 14, 2012 e-mail indicates the BI voting stock was transferred to the Grantor Trusts' beneficiaries on October 30, 2012, the parties acknowledge the BI voting stock was transferred to the Grantor Trusts' beneficiaries in November 2012. Jeff credibly testified that the November 14, 2012 e-mail stated the BI voting stock was distributed from the Grantor Trusts on October 30, 2012 because BI's fiscal year ends in October. LoriAnn acknowledged on cross examination that Jeff distributed the BI voting stock from the Grantor Trusts on November 13, 2012 or November 14, 2012. Jeff informed LoriAnn and Lisa of the distribution after LoriAnn and Lisa had both approved the Stock Option. (Lisa executed her approval on October 18, 2012, LoriAnn on November 9, 2012).

As a consequence of Jeff's distribution of the BI voting stock to the Grantor Trusts' respective beneficiaries, LoriAnn, Lisa, and Lisa's daughters hold enough voting stock that, if voted together, allows for majority control of BI. The executed Stock Option, which would have allowed Jeff to retain majority control of BI, did not vest because Jeff, as trustee of the Grantor Trusts, distributed the BI voting stock to the beneficiaries—the Stock Option only vested if Lisa's children elected to take the BI voting stock upon Lavern's death pursuant to Article VI(E) of the Grantor Trust document. Jeff testified that he distributed the BI voting stock out of the Grantor Trusts to avoid estate tax inclusion issues created by the Grantor Trusts holding the BI voting stock while Lavern retained his "swap" power. Jeff testified that he mistakenly believed distribution of the BI voting shares would trigger the

vesting of the Stock Option. Lavern testified that he refrained from exercising his retained swap power on the mistaken belief that the Stock Option would permit Jeff to retain voting control of BI if shares were distributed for any reason. (*See e.g.,* Exhibit 3025 (a November 11, 2012 email from Jeff to Lavern stating that "[d]istribution of the voting shares would trigger vesting of my BI voting stock option.")). Consistent with Jeff and Lavern's mistaken belief the Stock Option would permit Jeff to retain voting control of BI if shares were distributed for any reason, the parties testified that they were unaware distribution of the BI voting stock to the Grantor Trusts' beneficiaries failed to trigger vesting of the Stock Option until the following calendar year.

The family held various meetings during May and June of 2013. On May 20, 2013, Jeff informed LoriAnn and Lisa that he had purchased Lavern's 25% interest in BFA. (Exhibit 53). Upon receiving this information, LoriAnn inquired as to how Jeff obtained Lavern's former 25% interest in BFA. (*Id.*). Jeff told LoriAnn that he purchased Lavern's former 25% interest in BFA in the fall of 2012 for $80,000. (*Id.*). Although Jeff sent LoriAnn and Lisa a page from Lavern's estate plan demonstrating that Lavern's 25% interest in BFA would be bequeathed to Jeff upon Lavern's death in 2010, LoriAnn testified Lavern told her when BFA was formed in 2004 that if he would ever transfer his BFA interest, then each of his three children would receive one-third of his 25% interest. At trial, LoriAnn emphasized Jeff stated in his June 22, 2010 e-mail that Lavern was going to transfer his interest in BFA to Jeff upon his death, not during his lifetime. (*See* Exhibit 3008). LoriAnn also emphasized that Jeff stated in his June 22, 2010 e-mail that she and Lisa would receive BFLP shares in equal value to the BFA interest Jeff received upon Lavern's death. (*See* Exhibit 3008). LoriAnn's testimony on this issue, however, overlooks that Jeff purchased Lavern's 25% BFA interest for $80,000 in an arm's-length transaction as opposed to receiving Lavern's 25% BFA interest as a gift upon Lavern's death. LoriAnn's commentary on this issue also runs afoul of her testimony that Lavern can do whatever he likes with his estate plan while he is alive.

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In an e-mail dated May 27, 2013, LoriAnn asked Jeff why she and Lisa were not given the opportunity to purchase an equal share of Lavern's former 25% interest. (Exhibit 2098). Jeff sent a reply e-mail to LoriAnn that same day, stating in part:

> I own 50% of BFA and you and Lisa each own 25%. It takes greater than 50% interest to make material decisions regarding the LLC.
>
> An equal distribution of dad's 25% share of BFA to each of us three children would have caused me (the active manager) to become a minority owner. Conceptually, material BFA decisions could have been made over my objection….
>
> After working together closely for more than two decades, I think I have a pretty good understanding of the business decisions that dad would make in most circumstances. I believe he trusts my judgment – which is supported by my track record. However, note that I own no more of BFA than you and Lisa combined, so I don't have sole control – you could think of it as my 50% giving me a veto power and your combined 50% giving the two of you veto power.
>
> In order to make material changes, two out of the three of us need to agree, and one of the majority needs to be me.
>
> I don't feel this structure is unreasonable considering the active role I have played in the management of the family office. Plus, I have always been the largest BFLP limited partner: I own almost as much as you and Lisa combined.

(*Id.*). In an e-mail dated May 28, 2013 LoriAnn replied to Jeff, stating in part:

> I believe my record shows I would not generally oppose you in your decisions regarding Busse Family estate planning with respect to BFA. I, too, know and understand Dad's intentions.
>
> I am formally asking to buy 1/3 of Dad's share of BFA. If Lisa cannot also buy 1/3) and I doubt she has the cash to do so), I am formally requesting to buy ½ of Dad's share.

(*Id.*).

On May 29, 2013, LoriAnn met with Jeff and Lavern. LoriAnn testified that she discovered Jeff's Stock Option could not vest sometime between May 20, 2013 and the May 29, 2013 meeting. LoriAnn secretly recorded the May 29, 2013 meeting. (Exhibit 3029). During the May 29, 2013 meeting, LoriAnn persistently demanded an equal portion of Lavern's former 25% interest in BFA. Jeff unequivocally refused to sell LoriAnn a portion of the BFA interest he purchased from Lavern.

Lavern unequivocally refused to restructure the transfer of his former interest in BFA. In response, LoriAnn stated she felt less trusted and that Lavern was setting the family up to be adversarial. Lavern eventually stated: "Well, then I don't trust you. Drop it. I have it set up this way for a reason." (Exhibit 3029, audio of May 29, 2013 meeting). During this meeting, LoriAnn also stated she wanted to manage BI in the event Jeff could no longer do so. Lavern disagreed with this proposal because LoriAnn lives in Arizona and is unfamiliar with the Cedar Rapids, Iowa real estate market. During this meeting, LoriAnn also expressed concerns with respect to MMB. LoriAnn testified Jeff answered all of her questions relating to MMB at the May 29, 2013 meeting. In answering LoriAnn's questions, Jeff advised LoriAnn that MMB is a long-term investment and, due to her investment horizon, she may not want her Grantor Trust to hold a limited partnership interest in MMB. In response, LoriAnn requested Lavern to set up three family branches, one for each of his children, for future gifting of discounted assets. Lavern similarly rejected this proposal. In addition, at the May 29, 2013 meeting, Jeff informed LoriAnn that 100% of the 2013 operating income from BFLP would be distributed because there would be no distribution of BFLP's 2014 operating income due to an appraisal of BFLP required for Jeff's estate planning.

On May 30, 2013, Jeff sent a follow up e-mail to LoriAnn, Lisa, and Lavern regarding the discussion of MMB at the May 29, 2013 meeting. In that e-mail, Jeff stated:

> I have already advised that [MMB] does not plan to make distributions for an extended period – potentially decades. All partners will generally need to fund their annual tax liability associated with their LP ownership from other sources. I have also communicated that the partnership plans to reinvest the maximum my children have available to "reinvest" each year. Each child owns two percent (2%) of the LP.
>
> This "adverse" strategy had a material effect on the appraised value.
>
> Here is the point: From a limited partner's perspective, the MMB Family LP's strategy is about as "bad" as it can get – that is, I'm not sure what decisions the general partner could make that could be any more detrimental to a Limited Partner than the strategy planned to be implemented from the start.

(Exhibit 2099). As noted above, MMB was intentionally structured to be undesirable from a limited partner's perspective in order to maximize discounts for future gifting.

The family met again in June 2013. LoriAnn testified that, at the June 2013 meeting, Plaintiffs informed Jeff they did not want a limited partnership interest in MMB. LoriAnn testified that Jeff, upon receiving this information, became very angry. LoriAnn testified the June 2013 meeting was "very confrontational." LoriAnn and Lisa testified they did not want a limited partnership interest in MMB due to the absence of planned distributions, the prospect of forced reinvestments, and the annual tax liability associated with a limited partnership interest in MMB. Jeff testified that Plaintiffs unequivocally communicated they did not want a limited partnership interest in MMB.

In August 2013 LoriAnn informed Lisa that Jeff's Stock Option could not vest. Shortly thereafter, Plaintiffs organized a family meeting to occur on September 4, 2013. Prior to this meeting, Lisa inadvertently e-mailed LoriAnn's discussion topics for the September 2013 meeting to Jeff. (*See* Exhibit 3031; Lisa testimony). LoriAnn's discussion topics for the September 2013 meeting included: "Jeff's [BI] option history, including all exercised and outstanding options." (Exhibit 3031 p. 4). Jeff testified he realized the Stock Option could not vest after reviewing LoriAnn's discussion topics for the September 2013 meeting.

Jeff, Lavern, Audrey, LoriAnn, and Lisa met on September 4, 2013. LoriAnn surreptitiously recorded the September 4, 2013 meeting. Jeff's Stock Option was discussed at the outset of the September 4, 2013 meeting. Initially, Jeff represented that the Stock Option had vested and he continued to exercise majority control over BI. Plaintiffs denied that the Stock Option had vested. Thereafter, Jeff presented a new stock option that deleted the language from paragraphs 3(a)-(c) "pursuant to Article VI, Paragraph (E) of" and replaced with "from" so each paragraph then read: "from the LTB 2002 Irrevocable Trust U/D/O December 20, 2002, F/B/O [Lisa's respective child's name]." (Exhibit 2065). The new stock option provided further that "except no shares shall vest until and unless the Busse Investments, Inc. Board of Directors votes on an issue wherein Jeffrey Busse is

in the minority." (*Id.*). Jeff testified that he prepared the new stock option prior to the September 4, 2013 meeting. LoriAnn and Lisa refused to approve of or otherwise execute the new stock option. LoriAnn and Lisa both testified they refused to sign the new stock option because they believed majority control of BI was intentionally given to them. LoriAnn and Lisa both testified further that they refused to sign the new stock option because they had lost trust in Jeff as a result of him purchasing Lavern's former 25% interest in BFA, the creation of MMB, and his misrepresentation that the Stock Option had vested at the outset of the September 4, 2013 meeting. After LoriAnn and Lisa refused to sign a new stock option, Jeff told LoriAnn and Lisa that there would be consequences unless control of BI was returned to him. LoriAnn testified that Jeff told Plaintiffs at the September 4, 2013 meeting that a limited partnership interest in MMB was going to be placed in their Grantor Trusts, and that he was unwilling to explain the advantages and disadvantages of MMB any further. Plaintiffs also testified Jeff stated at the September 4, 2013 meeting that plans may change in terms of distributions to LoriAnn and Lisa from BFLP, and "fixing" BI must come first.

Following the September 4, 2013 meeting, Jeff testified that he and Lavern decided to take the "moral high ground" and would try to negotiate some type of settlement. Jeff testified it was obvious he had made a mistake with respect to the Stock Option and felt responsible for that mistake. Following the September 2013 meeting, Jeff still had decisions to make with regards to distributions from BI and BFLP. Jeff testified that BI made a full distribution of its 2013 operating income in December 2013. (*See* Exhibit 3073). Jeff testified further that BFLP made an extraordinary distribution of appreciated securities and another large distribution to its limited partners in December 2013. (*See id.*).

Following the September 2013 meeting, the parties exchanged a series of proposals to resolve their ongoing dispute. (*See* Exhibit 3037). In doing so, Plaintiffs sent Lavern, Audrey, and Jeff a series of conditions upon which they would return majority voting control of BI to Jeff. (*Id.*). Plaintiffs' conditions consisted of restructuring Lavern and Audrey's estate plan and restructuring various family

entities. (*See* Exhibit 3037). Plaintiffs' conditions included, but were not limited to the following: (1) LoriAnn, Lisa, and Jeff serve as managers of BFA; (2) BFLP makes minimum annual distributions; (3) Lisa is appointed as the trustee of her daughters' Grantor Trusts; (4) LoriAnn is appointed as the trustee of her Grantor Trust; (5) LoriAnn, Lisa, and Jeff become permanent Directors of BI; and (6) in the event MMB shares are gifted to Lisa and her family, there shall be no forced reinvestment and MMB shall distribute annually the tax obligation on all income. (*Id.*). On cross examination, LoriAnn acknowledged her and Lisa's ability to collectively exercise majority control over BI put them in a position to negotiate such terms. LoriAnn acknowledged further on cross examination that Lavern and Audrey are the ultimate decision-makers with respect to their estate plan and family entities, which is why Plaintiffs were "discussing" such topics with Lavern and Audrey. Lisa, on cross examination, acknowledged that Lavern can do whatever he likes with his estate plan while alive. The parties were unable to reach a resolution. Despite the ongoing dispute, Lavern and Audrey continued to make gifts and special distributions in Plaintiffs' favor. (*See* Exhibit 3076). Essentially what Plaintiffs were doing was using their control of BI voting stock, which they received due to Jeff's mistake, to demand a restructuring of their parents' estate plan and Lavern's desire that Jeff control the family entities.

Following LoriAnn and Lisa's refusal to execute a new stock option, Lavern requested to fill a vacant BI Board position— a company he had created and operated for many years. In requesting to fill the vacant BI Board position, Lavern reminded LoriAnn and Lisa that he founded BI, never took a salary from BI and loaned BI millions of dollars at the lowest rate by law to build BI as quickly as possible. (Exhibit 3043, audio of 8/18/14 meeting). Lavern also reminded LoriAnn and Lisa that he gifted all of his BI shares for the benefit of his children, and that he continues to pay the income tax on the assets held in the Grantor Trusts. (*Id.*). Lavern told LoriAnn and Lisa he wanted to fill the vacant BI Board position so he could serve as a mediator for the ongoing family dispute. (*Id.*). Lavern credibly testified that he was still involved with all significant decisions relating to BI when he requested to fill the vacant BI Board position. As noted above, Jeff consulted with and involved

Lavern with all significant decisions relating to BI. Notwithstanding, LoriAnn and Lisa denied Lavern's request to fill the vacant BI Board position. In doing so, LoriAnn and Lisa outvoted Jeff to amend BI's bylaws to reduce the BI Board to three directors on August 18, 2014. LoriAnn and Lisa refused to acknowledge they denied Lavern's request to fill the vacant BI Board position. Instead, LoriAnn and Lisa both testified they reduced the BI Board to three directors to preserve the status quo of the BI Board. Despite LoriAnn and Lisa's refusal to allow Lavern to serve on the BI Board, Lavern and Audrey continued to make gifts and special distributions in Plaintiffs' favor. (*See* Exhibit 3076).

Thereafter, Jeff, acting as an officer of BI, prepaid $2.65 million of BI's outstanding debt to AB BI. Jeff testified he prepaid $2.65 million of BI's outstanding debt to AB BI in an effort to diminish BI's liquidity because he did not trust Plaintiffs' business judgment following their refusal to allow Lavern to serve on the BI Board. Jeff testified further that he was dumbfounded Plaintiffs would betray Lavern in light of his generosity.

On August 18, 2014 LoriAnn sent a notice for the BFA 2014 Annual Meeting, which included electing a manager as an agenda item. (Exhibit 1007). Until receiving this notice on August 18, 2014, Jeff testified he had not questioned Lavern's ability to act as a manager of BFA despite selling his BFA interest to Jeff. Jeff testified that after receiving the notice, he researched the Iowa Code about whether there was a limitation on a non-member's ability to serve as a manager of a limited liability company and concluded—wrongly—that when Lavern sold his interest to Jeff, he was no longer a manager. The BFA 2014 Annual Meeting was held on August 28, 2014. There, the members of BFA—LoriAnn, Lisa, and Jeff—voted on a replacement manager for Lavern's position. (Exhibit 1009). LoriAnn and Lavern were nominated. (*Id.*). The vote was deadlocked. (*Id.*). Specifically, LoriAnn and Lisa voted their collective 50% interest in favor of LoriAnn, and Jeff voted his 50% interest in favor of Lavern. (*Id.*). Lavern attended the meeting. There, Lavern stated that he "had acted as manager since BFA's inception, and that he a had a strong desire to continue in the role of manager." (Exhibit 2171, audio of 8/28/2014 meeting; Exhibit 1009). Lavern, however, neither

objected to the vote nor insisted he was still a manager during the BFA 2014 Annual Meeting. (Exhibit 2171, audio of 8/28/2014 meeting; Exhibit 1009).

On August 31, 2014, Lavern took $2.65 million that AB BI loaned his personal trust and substituted that amount of cash for BI non-voting stock in LoriAnn and Lisa's daughters' Grantor Trusts. Lavern testified that he swapped the BI non-voting stock for cash out of LoriAnn and Lisa's daughters' Grantor Trusts because he felt betrayed after LoriAnn and Lisa refused to put him on the BI Board, and following their decision to reduce the BI Board to three directors he wanted to own a portion of BI. Lavern determined the number of shares to exchange based on the amount of cash he had available to swap and a valuation prepared by MPI.

Later in 2014, Audrey transferred her interest in MMB to Lavern, and Lavern disproportionately substituted his combined 64% interest in MMB into all seven Grantor Trusts in exchange for a total of $1,277,504 in cash.[8] (Exhibit 2125, p. 5). Lavern, in order to swap his MMB interest for cash held in the Grantor Trusts, hired Shaw Business Valuation and Litigation Support Services, LLC ("Shaw") to appraise MMB. (*See* Exhibit 1018). Pursuant to the discounts applied in the Shaw valuation, and as the parties agreed in their testimony, the Grantor Trusts acquired an interest in MMB at $0.35 cents on the dollar.

LoriAnn's Grantor Trust's Balance Sheet reveals that the price LoriAnn's Grantor Trust paid for its limited partnership interest in MMB, the fair market value, was $301,386. (Exhibit 3071). LoriAnn's Grantor Trust's Balance Sheet reveals further that the value of LoriAnn's Grantor Trust's MMB limited partnership interest without any discounts, the earning asset base, is $828,922. (*Id.*). As noted above, MMB holds two notes from BI and one note from AB BI, and the term of each note is thirty years with a 2.2% interest rate. (Exhibit 2132, Exhibit 2134, Exhibit 2130). LoriAnn and Lisa agreed MMB earns a 2.2% return on its earning asset base, not the discounted value of the limited

[8] LoriAnn and Lisa's daughters' Grantor Trusts paid approximately $588,850 in total for their combined 29.5% interest in MMB. (Exhibit 2125, p. 5).

partnership interest. Accordingly, LoriAnn and Lisa agreed the interest yield on the cash the Grantor Trusts contributed to acquire a limited partnership interest in MMB is in excess of 6%.

Jeff testified the Grantor Trusts will earn an additional 6.3% return on the cash the Grantor Trusts contributed to acquire Lavern's MMB interest if BI repays the $5 million MMB Loan according to its terms. Jeff testified that if BI were to prepay the $5 million MMB Loan, the returns skyrocket for MMB's limited partners, as MMB would receive the $5 million tax free, a return of more than 100% if pre-paid within a few years. LoriAnn acknowledged that she and Lisa exercising their collective control of BI could have prepaid the $5 million MMB Loan at any point in the 16 months prior to trial.

Lavern described MMB as the best deal the family ever structured. Lavern testified that he exercised his discretion to substitute a portion of his interest in MMB into LoriAnn and Lisa's daughters' Grantor Trusts because LoriAnn and Lisa's daughters should not let go of such a good deal. Lavern credibly testified he was not attempting to punish anybody by substituting a limited partnership interest in MMB into the Grantor Trusts at $0.35 cents on the dollar. As outlined above, the cash the Grantor Trusts contributed to acquire Lavern's MMB interest earns a return in excess of 6%, and the returns can skyrocket if BI prepays the $5 million MMB Loan. At a minimum, Lavern substituting his limited partnership interest in MMB into the Grantor Trusts was a reasonable benefit to the Grantor Trusts. Lavern also testified he informed LoriAnn and Lisa that he was going to place a minimum portion of his MMB interest into the Grantor Trusts benefiting LoriAnn and Lisa's daughters because MMB is a lucrative entity. Lavern testified that he offered to substitute his 64% interest in MMB proportionally into all seven Grantor Trusts, but LoriAnn and Lisa refused to accept an equal portion of his MMB interest.

LoriAnn and Lisa testified they did not want a limited partnership interest in MMB, in part, due to the prospect of forced reinvestments. The evidence adduced at trial and the parties' testimony reveals that no forced reinvestment into MMB has occurred since the Grantor Trusts acquired an interest in MMB. Jeff testified that there are no current plans for forced reinvestment into MMB. Lisa

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testified that over the last thirty years Jeff has not made a single decision that required her or her children to reinvest any investment or gift they have been given. LoriAnn testified that to date she has not been forced to reinvest into any family entity or investment.

In addition, MMB limited partners can sell their limited partnership interest to a permitted transferee, which includes various family entities and immediate family members. Jeff testified he has an interest in purchasing additional ownership in MMB because it is a highly lucrative entity. Jeff testified further that neither LoriAnn nor Lisa have asked him whether he is willing to purchase additional ownership in MMB in the event they want out from the limited partnership.

Jeff has been a manager of BFLP for 12 years and a manager of AB BI for six years. Jeff has been a trustee of the Grantor Trusts for 14 years. In serving in these capacities, Jeff credibly testified that he has never declined a request from his sisters for a loan or a distribution, even after this lawsuit was filed. Jeff credibly testified further that he has never declined a request from his sisters for financial assistance whether to pay taxes or for any other need they had in his capacity as a manager or trustee of the family entities. Indeed, Jeff testified that the Busse family has entered into extraordinary transactions to create liquidity when they perceive a need. Jeff also testified the Busse family coordinates the liquidity available to the shareholders and partners in family entities for tax purposes. For instance, Jeff testified that he informed his sisters there would be no 2014 BFLP distribution because he was obtaining an appraisal of BFLP for his estate plan, but BI would make an extraordinary distribution in December 2013 to provide BFLP limited partners with extra liquidity to pay taxes due in April 2014. LoriAnn and Lisa understood and agreed with this.

On September 11, 2014, Audrey and Lavern entered into an agreement entitled Busse Foundation Assignment/Allocation Agreement ("Foundation Allocation Agreement"). (Exhibit 1011). In executing the Foundation Allocation Agreement, Lavern and Audrey exercised their rights under paragraph two of the Distribution Resolution and assigned to Jeff 40% of their Current Year Charitable allocation percentage upon the last of their deaths, and left the remaining 60% to be

assigned pursuant to paragraph 7 of the Distribution Resolution. (*Id.*). Jeff testified that Lavern and Audrey allocated a significant share of their ability to direct the Foundation's operation to Jeff upon their deaths. Jeff testified that upon Lavern and Audrey's death he will control approximately 90 percent of the Foundation's giving.

On October 6, 2014, Jeff's three daughters (but not Lisa's three daughters) were added to the Busse Foundation Board of Trustees. (Exhibit 3048; Exhibit 3050). Plaintiffs testified that Jeff's daughters, but not Lisa's daughters, were appointed to the Foundation Board, to give Jeff's family majority control over the Busse Foundation. (*See* Exhibit 2159). Relatedly, Jeff testified that the Foundation has considered removing Plaintiffs from the Board but has not yet acted to do so. (*See* Exhibit 2107). Lavern testified that he believed the Busse Foundation had already removed LoriAnn and Lisa from the Foundation Board.

On October 19, 2015, LoriAnn and Lisa exercising their collective control over BI terminated Jeff's employment with Busse Investments, thereby taking control of the company Lavern had founded and Jeff had successfully managed for 29 years. LoriAnn and Lisa testified they terminated Jeff's employment with Busse Investments because he refused to sign a ten-year employment contract with Busse Investments. Jeff testified that during his tenure as manager of BI he had never been required to sign a written employment contract. Jeff testified further that the ten-year employment contract lowered his base compensation and subjected his annual bonus to approval from the BI board of directors. Because the BI board of directors consists of LoriAnn, Lisa, and Jeff, LoriAnn and Lisa could have collectively decided to withhold Jeff's annual bonus under the ten-year employment contract. The evidence adduced at trial and the parties' testimony reveals LoriAnn and Lisa provided Jeff a copy of the ten-year employment contract on October 14, 2015, and the employment contract was a "take it or leave it" proposition on October 19, 2015.

LoriAnn and Lisa testified that Jeff's employment with Busse Investments was contingent upon him signing the ten-year employment contract on October 19, 2015 because they had been discussing

the parameters of an employment contract with Jeff since February 2015. In an e-mail dated October 13, 2015, LoriAnn told Lisa "if Jeff does NOT accept employment agreement he will be given one more opportunity to accept during the annual board mtg. If he does not accept, he will be immediately fired." (Exhibit 3067). On the date LoriAnn and Lisa terminated Jeff's employment with Busse Investments, LoriAnn and Lisa had an off duty sheriff's deputy present at Busse Investments to escort Jeff off of the premises. LoriAnn and Lisa also had an IT expert present at Busse Investments to prevent Jeff from accessing Busse Investments' electronically stored information. LoriAnn and Lisa were clearly prepared to terminate Jeff's employment with Busse Investments on October 19, 2015.

On March 27, 2015, Jeff acting as trustee of LoriAnn's Grantor Trust loaned Lavern's personal trust $1,852,000. A review of the 2014 and 2015 balance sheets for LoriAnn's Grantor Trust shows a $1,198,600 reduction in her "TD Ameritrade Stock Account" and $778,247 reduction in cash and a corresponding $1.852 million loan to Lavern. (Exhibit 2173, p.1-2). Jeff testified that the portion of the $1,852,000 loan made from LoriAnn's Grantor Trust's "TD Ameritrade Stock Account" was made with cash sitting in that account. Plaintiffs adduced no evidence at trial to suggest anything but cash was taken from LoriAnn's Grantor Trust's "TD Ameritrade Stock Account" to facilitate the loan between LoriAnn's Grantor Trust and Lavern. The material terms of the loan between LoriAnn's Dynasty Trust and Lavern are as follows. Lavern received $1,852,000 in exchange for a note with a nine year term and 3% interest rate. (Exhibit 1019, p. 13). Lavern is only required to make interest payments. (*Id.*). There is no penalty if Lavern prepays under the note. (*Id.*).

At trial, Plaintiffs claimed that Jeff's decision to allow a $1.852 million loan to be made out of LoriAnn's Grantor Trust to Lavern breached Jeff's fiduciary duty as trustee. Jeff testified that the loan was the best risk-adjusted return available on cash within LoriAnn's Grantor Trust. When questioned at trial whether Jeff should have obtained LoriAnn's consent for the loan, Jeff testified that doing so would have been meaningless because the retained swap power enabled Lavern to achieve the same result with or without Jeff or the Grantor Trust beneficiary's consent. The jury unanimously found

LoriAnn failed to prove Jeff breached his fiduciary duties owed to LoriAnn as trustee of her Grantor Trust by loaning $1.852 million to Lavern from LoriAnn's Grantor Trust. (February 9 Verdict Form Question No. 4)

In addition to the conduct discussed above, Plaintiffs allege Defendants engaged in the following oppressive conduct for exercising their legitimate control over BI: (1) Jeff, acting as a manager of BFA, refused to make distributions from BFLP and AB BI; (2) Jeff, acting in multiple capacities, executed a series of transactions that enabled Lavern to make a voluntary capital contribution into BFLP to ensure Plaintiffs no longer owned a combined majority of BFLP's limited partnership interests; (3) LoriAnn was removed as the Investment Trustee of her Dynasty Trust and Jeff was appointed as the successor Investment Trustee of the LoriAnn Dynasty Trust to punish LoriAnn and to ensure Plaintiffs would no longer own a combined majority of the limited partnership interests in BFLP; and (4) Jeff engineered a series of loan transactions in 2014 and 2015 that have resulted in additional financial detriment to Plaintiffs.

On April 29, 2015, Plaintiffs filed a Petition at Law asserting thirteen counts against the various defendants in this case. On February 23, 2016, Jeff and Lavern filed a Counterclaim asserting an Intentional Interference with Prospective Business Advantage claim against LoriAnn and Lisa relating to their decision to terminate Jeff's employment with BI. On May 20, 2016, Jeff and Lavern filed an Amended Answer and added an unjust enrichment counterclaim against LoriAnn and Lisa relating to the distribution of BI voting stock to the Grantor Trusts' beneficiaries.

On February 9, 2017, the jury returned a verdict in favor of Defendants on all of Plaintiffs' claims submitted to the jury. The jury found that Jeff did not breach any fiduciary duties to the Grantor Trusts' beneficiaries; Jeff did not breach any fiduciary duties regarding distributions from BFLP or AB BI; and Jeff did not unduly influence Lavern. (February 9, 2017, Verdict Form). The jury also found that Jeff and Lavern proved they did not intend Plaintiffs to retain or obtain collective voting control of BI. (*Id.*). In addition, the jury found that Jeff failed to prove LoriAnn and Lisa intentionally

interfered with his prospective business relationship with BI. (*Id.*). The jury's February 9, 2017, findings guide the Court's analysis on the handful of related equitable issues remaining for the Court's consideration.

CONCLUSIONS OF LAW

As outlined above, the following issues were reserved for the Court's consideration: (1) Count II with respect to whether Jeff should be removed as Trustee of the Grantor Trusts; (2) Count IV with respect to whether Lavern's optional capital contribution into BFLP should be voided as a product of Jeff's undue influence over Lavern; (3) Count V with respect to whether BFA should be dissolved; (4) Count VI with respect to whether Jeff breached a fiduciary duty to BFA in making distributions from BFLP or AB BI to support a derivative claim on behalf of BFA; (5) Count IX with respect to whether LoriAnn's Dynasty Trust was admitted as a Substitute Limited Partner in BFLP and AB BI; (6) Count XIII with respect to whether the Foundation Pledge is enforceable; (7) Counterclaim Count II with respect to Defendants Jeff and Lavern's unjust enrichment claim. The Court will address these issues in turn.

I. Count II—whether Jeff should be removed as Trustee of the Grantor Trusts

Iowa Code section 633A.4107(2) allows the Court to remove a trustee "if any of the following occurs:

a. If the trustee has committed a material breach of the trust.

b. If the trustee is unfit to administer the trust….

g. For other good cause shown."

IOWA CODE § 633A.4107(2) (2017); *In re Weitzel*, No. 09-1660, 2010 WL 2757212 (Iowa Ct. App. July 14, 2010) (discussing section 'g' as the "catch-all."). "The burden to prove conduct sufficient for removal of the trustee is upon the person seeking removal." *Id.* (citing *In re Estate of Atwood*, 577 N.W.2d 60, 63 (Iowa Ct. App. 1998)).

Iowa courts "consistently decline to order removal of a trustee unless such action is clearly in the best interests of the trust and its beneficiaries." *Schildberg v. Schildberg*, 461 N.W.2d 186, 191 (Iowa 1990). "The power to remove a trustee should be used only when the objects of the trust are endangered." *Id.* "[A] trustee does not merely serve at the pleasure of the trust beneficiaries," and the best interest of the trust itself is the key to determining the propriety of removal. *Id.* "A court is less likely to remove a trustee named by a settlor, as opposed to one appointed by the court,…and the court will not ordinarily remove a trustee appointed by the settlor for grounds existing at the time of the trust's creation and known to the settlor." *Id.* (citing Restatement (Second) of Trusts § 107 comment f). "Judicial removal of a trustee usually will not be grounded on a mere error of judgment or conduct even though there is a technical breach of the trust, if the trust estate does not suffer." *Id.* (citing 76 Am.Jur.2d *Trusts* § 130, at 370 (1975)). Hostility between a trustee and beneficiary is typically insufficient to warrant removal of the trustee:

> Disagreement and unpleasant personal relations between the trustee and beneficiaries are not usually enough to warrant removal. The beneficiary often conceives that he could manage the trust better than the trustee, resents failure to follow his advice, is dissatisfied with returns, thinks that the trustee is too conservative in his investment policies, and otherwise finds fault with the trustee. Thus friction develops. But the settlor has entrusted the management to the trustee not the beneficiary. The very fact that he created a trust showed that he did not want the beneficiary to be the controlling factor in the management of the property. However, in some instances the hostile relations between the trustee and beneficiary have gone so far that the court feels a new trustee should be appointed. Where the malicious or vindictive conduct of the trustee is the cause of disagreement and bitterness, removal is apt to be decreed.

Schildberg, 461 N.W.2d at 192-93 (quoting G. Bogert, *Law of trust and Trustees* § 160, at 577 (5th ed. 1973)); *see also Heidecker Farms, Inc. v. Heidecker*, Nos. 09-1541, 10-0273, 2010 WL 3894199, at *8 (Iowa Ct. App. Oct. 6, 2010).

Plaintiffs cite to the Restatement (Third) of Trusts to support their contention that Jeff should be removed as trustee of the Grantor Trusts benefitting LoriAnn and Lisa's daughters. The Restatement (Third) of Trusts identifies "want of skill, or the inability to understand fiduciary

standards and duties;" "unwarranted preference to the interests of one or more beneficiaries; [and] a pattern of indifference toward some or all of the beneficiaries" as reasons for a court to remove a trustee. *Restatement (Third) of Trusts* § 37 cmt. e. The Restatement (Third) of Trusts identifies further that "…serious or repeated misconduct, even unconnected with the trust itself, may justify removal." *Id.* In addition, "[a] trustee's removal may be warranted…by a conflict of interests that…came into being at a later time." *Id.* cmt. f(1). Finally, the Restatement (Third) of Trusts provides that "[f]riction between the trustee and some of the beneficiaries is not a sufficient ground for removing the trustee unless it interferes with proper administration of the trust." *Id.* cmt. e(1).

According to Plaintiffs, Jeff's conduct related to the 2014 Grantor Trusts "swaps" and Jeff's conduct related to the $1.852 million loan from LoriAnn's Grantor Trust to Lavern merit his removal as trustee. Specifically, Plaintiffs contend this conduct constitutes "serious or repeated misconduct" that "may justify removal." *Restatement (Third) of Trusts* § 37 cmt. e. In addition, Plaintiffs contend Jeff's willingness to facilitate Lavern's actions taken as "retribution" against Plaintiffs is evidence of sufficient "friction" between Jeff as trustee and Plaintiffs as beneficiaries to merit Jeff's removal as trustee. *Id.* cmt. e(1). The Court will discuss Jeff's conduct related to the 2014 Grantor Trusts swaps and Jeff's conduct related to the $1.852 million loan from LoriAnn's Grantor Trust to Lavern in turn, and will then determine whether Jeff should be removed as trustee of LoriAnn and Lisa's daughters' respective Grantor Trusts.

A. Jeff's conduct related to the 2014 Grantor Trust swaps

First, Plaintiffs contend Jeff's conduct related to the 2014 Grantor Trust swaps reveals he directly opposes the purpose of the Grantor Trusts, which merits his removal as trustee of the Grantor Trusts benefitting LoriAnn and Lisa's daughters. The purpose of the Grantor Trusts, as evidenced by testimony and the trust instruments was to take the $800,000 Lavern gifted to the Grantor Trusts in 2002 (then the maximum gift excluded from estate taxes by law) and grow that investment inside the Grantor Trusts, with Lavern paying the income taxes for the benefit of the beneficiaries.

Effective August 28, 2014, Lavern exercised his retained swap power to exchange cash for BI non-voting stock held in the Grantor Trusts benefitting LoriAnn and Lisa's daughters. Lavern determined the number of shares to exchange based on the amount of cash he had available to swap and the valuation prepared by MPI. In December 2014, Lavern exercised his retained swap power once again to exchange his interest in MMB for cash held in all seven Grantor Trusts. Lavern, in order to swap his MMB interest for cash held in the Grantor Trusts, hired Shaw to appraise MMB. (*See* Exhibit 1018).

According to Plaintiffs, Jeff's conduct related to the 2014 Grantor Trust swaps evidence his opposition towards the purpose of the Grantor Trusts in two ways. First, Plaintiffs allege Jeff pressured MPI to reduce its valuation of the BI stock for the purpose of Lavern's Grantor Trust substitution. Second, Plaintiffs allege Jeff made entirely inconsistent representations about BI's intentions to prepay the $5 million MMB Loan to MPI and Shaw to decrease the value of BI and MMB. The Court will address these allegations in turn.

i. Jeff's December 4, 2014 e-mail to MPI

First, Plaintiffs allege Jeff pressured MPI to reduce its valuation of the BI stock for the purpose of Lavern's 2014 Grantor Trust substitution. To bolster this contention, Plaintiffs rely upon an email Jeff sent MPI on December 4, 2014. In that email, Jeff informed MPI that the BI stock discount should be higher, as it was in MPI's "previous 2002 appraisal" and stated "Dad is highly unsatisfied," "Query: Were you wrong then, or are you wrong now? Given our lack of voluntary buyers at this 35% higher price, the answer seems obvious." (Exhibit 29). After Jeff expressed dissatisfaction with the discounts MPI applied in its 2014 draft appraisal, MPI increased the discounts slightly, which lowered the price per share of BI in Lavern's Grantor Trust substitution. (*Compare* Exhibit 3084, p. 55 and 82 *with* Exhibit 3053, p. 55 and 83). Specifically, following Jeff's December 4, 2014 email, MPI reduced its valuation of a share of BI non-voting stock from $0.76 cents to $0.71 cents. (*Compare* Exhibit 3084, p. 83 *with* Exhibit 3053 p. 83)

Jeff testified that he sent the December 4, 2014 e-mail to MPI because Lavern, after reviewing MPI's 2014 draft appraisal, was shocked the discounts MPI applied in its 2014 draft appraisal were substantially less than the discounts MPI applied in its 2002 and 2007 appraisal of BI. (*Compare* Exhibit 3084 (2014 draft appraisal) (p. 55 (15% minority interest discount), p. 82 (20% discount for lack of marketability) and p. 83 ($0.80 per voting share and $0.76 per non-voting share)) *with* Exhibit 3005 (2007 report) (p. 55 (20% minority interest discount), p. 71 (35% discount for lack of marketability) and p. 72 ($0.73 per voting share and $0.69 per non-voting share)) *and* Exhibit 3002, (2002 report) (p. 59 (22.5% minority interest discount), p. 69 (35% discount for lack of marketability) and p. 70 ($0.53 per voting share and $0.50 per non-voting share))). Lavern testified he was dissatisfied with MPI's 2014 draft appraisal because he transferred his BI stock into the Grantor Trusts at a steep discount and was about to have to buy it back at a higher price for no apparent reason. Jeff testified he sent the December 4, 2014 e-mail to MPI because MPI had sought Lavern's feedback, and Lavern asked Jeff to formulate a response.

Justin Etter, a vice president and partner at MPI, prepared the final appraisal of BI in 2014. Mr. Etter testified that it is not unusual at all to receive feedback from a client after an initial draft of an appraisal report is issued. Mr. Etter testified further that it was his responsibility to review the draft appraisal, which a senior analyst prepared, and to issue the final appraisal. Mr. Etter testified that he applied the same methodology as the senior analyst, but the final report applied higher minority and marketability discounts than the draft appraisal for three reasons. First, Mr. Etter testified that he allocated BI's current liabilities to its current assets, which decreased the freely traded value of BI. Second, Mr. Etter testified that changing BI's assets and liabilities components increased BI's volatility, which resulted in a slightly higher minority discount. Third, Mr. Etter testified that he personally reviewed MPI's notes regarding BI, which revealed Jeff stated BI would no longer continue to make distributions at its historical levels, in part, because continued distributions in excess of BI's operating income would require the shareholders to pay additional taxes. Mr. Etter testified further that

he concluded BI would no longer continue to make distributions at its historical levels because BI's prior operating income included gains on the sale of property, and because BI prepaid 2.8 million it owed to AB BI a couple days before the valuation date. Mr. Etter testified his understanding that BI would no longer continue to make distributions at its historical levels resulted in a slightly higher marketability discount in the final 2014 appraisal. Finally, Mr. Etter testified that, in accordance with MPI's policies, he never directly communicated with Jeff or Lavern because he was responsible for preparing the final appraisal.

In Plaintiffs' view, Jeff's December 4, 2014 email to MPI was an intentional act to harm their financial interests. The evidence and testimony, however, supports a finding that Jeff's December 4, 2014 email to MPI was legitimate commentary on an unexplained change in methodology involving the same factual parameters. MPI appraised BI in 2002, 2007, and 2014. (*See* Exhibit 3002, 3005, 3084). MPI applied greater discounts to the value of BI in 2002 and 2007 than in 2014. (*Id.*) For instance, MPI applied a 35% discount for lack of marketability in 2002 and 2007, but a 20% discount for lack of marketability in its 2014 draft appraisal. (*Id.*). This supports a finding that Jeff and Lavern reasonably suspected the discounts MPI applied in its 2014 draft appraisal were the result of a "drastic change in methodology…." (Exhibit 29). Furthermore, MPI sought Lavern's feedback and Lavern asked Jeff to formulate a response. Therefore, Jeff's December 4, 2014 email was not a spontaneous inquiry, but rather, was solicited by both MPI and Lavern. Finally, Mr. Etter's testimony reveals he was going to review and finalize the 2014 draft appraisal regardless of Jeff's email. The suggestion that Jeff's December 4, 2014 email influenced MPI's final appraisal loses persuasiveness in light of Mr. Etter's reasonable explanations as to why the discounts were increased in the final report, and Mr. Etter's insulation from any direct contact with Jeff or Lavern. Accordingly, the Court finds Jeff's December 4, 2014 email to MPI is not the type of serious misconduct that warrants his removal as trustee.

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ii. Jeff's representations regarding BI's intention to prepay the $5 million MMB Loan

Next, Plaintiffs allege Jeff made entirely inconsistent representations about BI's intentions to prepay the $5 million MMB Loan to MPI and Shaw to decrease the value of BI and MMB. Plaintiffs contend the Court should not allow Jeff to continue serving as trustee because he will misrepresent facts to valuation companies in order to obtain deeper discounts of assets held in trust for Plaintiffs' benefit. The evidence does not support Plaintiffs' contention.

Mr. Etter testified the final 2014 appraisal applied a higher marketability discount than the 2014 draft appraisal because he believed BI would have decreased distributions in future years. Mr. Etter testified he believed BI would have decreased distributions in future years, in part, because of material planned loan prepayments. Plaintiffs suggest the only reasonable inference is Jeff told MPI that BI would be prepaying the $5 million MMB Loan, even though BI was only required to make interest payments at the lowest rate allowable by law until 2046. The evidence, however, does not support an inference that Jeff told MPI that BI would be prepaying the $5 million MMB Loan. Mr. Etter testified he was unfamiliar with the $5 million MMB Loan. Mr. Etter testified he anticipated BI would make loan prepayments because BI prepaid 2.8 million it owed to AB BI a couple days before the valuation date. Plaintiffs adduced no evidence to suggest Jeff told MPI that BI would be prepaying the $5 million MMB Loan. Furthermore, Mr. Etter testified that the BI Board vetoing loan prepayments would not impact BI's liquidity or the marketability discount he applied in the final report if the BI Board elected to reinvest BI's operating income as opposed to distributing the income to its shareholders. This is precisely the manner in which Plaintiffs have operated BI since commandeering control of BI. LoriAnn testified that Plaintiffs, after taking control of BI, have vetoed prepayments on the $5 million MMB Loan, but have not distributed BI's operating income in order to cover foreseeable expenses. Therefore, any alleged misrepresentation Jeff made to MPI regarding BI's intentions to prepay the $5 million MMB Loan is harmless with respect to the discounts MPI applied

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in its 2014 appraisal of BI. Accordingly, Jeff's alleged representations about BI's intentions to prepay the $5 million MMB Loan to MPI do not warrant his removal as trustee of the Grantor Trusts.

Plaintiffs also contend Jeff's representations about BI's intention to prepay the $5 million MMB Loan to Shaw merit his removal as trustee. This argument, however, overlooks the nature of the "swap" at issue. Lavern substituted his MMB interest into the Grantor Trusts in exchange for cash held in the Grantor Trusts. Thus, any representation Jeff made to Shaw that decreased the value of an interest in MMB was a benefit to the Grantor Trusts' beneficiaries. Specifically, the Grantor Trusts paid less cash for the MMB interest Lavern swapped into the Grantor Trusts. Indeed, LoriAnn acknowledged through her own testimony that she acquired the MMB interest placed in her Grantor Trust at $0.35 cents on the dollar. Accordingly, Jeff's alleged representations about BI's intentions to prepay the $5 million MMB Loan to Shaw do not warrant his removal as trustee of the Grantor Trusts.

B. Jeff's conduct related to the $1.852 million loan from LoriAnn's Grantor Trust

Next, Plaintiffs allege Jeff's conduct related to the $1.852 million loan from LoriAnn's Grantor Trust to Lavern merits Jeff's removal as trustee. The Grantor Trust Instrument, along with trial testimony, confirms that LoriAnn is eligible to distribute assets out of her Grantor Trust upon turning sixty in just a few years. Until then, Jeff is responsible for managing the assets held in LoriAnn's Grantor Trust.

The Busse family has a history of borrowing from the Grantor Trusts. When there was borrowing from the Grantor Trusts, the family member borrowing money would pay the minimum allowable interest rate. For instance, when Lisa borrowed money from her children's Grantor Trusts, she paid 2.95% on a thirty year loan, interest only. When LoriAnn borrowed money from her Grantor Trust, she paid 1.65% on a nine year loan, interest only. When Jeff borrowed money from his daughters' Grantor Trusts, he paid 6.75%, voluntarily electing to pay a higher interest rate to benefit his daughters. When loans were made by the Grantor Trusts to family members that was still better

than the return the Grantor Trusts could generate from cash. The loan between LoriAnn's Grantor Trust and Lavern is consistent with prior family practices.

Jeff testified that the $1,852,000 loan made from LoriAnn's Grantor Trust's "TD Ameritrade Stock Account" was made with cash sitting in that account. Plaintiffs adduced no evidence at trial to suggest anything but cash was taken from LoriAnn's Grantor Trust's "TD Ameritrade Stock Account" to facilitate the loan between LoriAnn's Grantor Trust and Lavern. The material terms of the loan between LoriAnn's Dynasty Trust and Lavern are as follows. Lavern received $1,852,000 in exchange for a note with a nine year term and 3% interest rate. (Exhibit 1019, p. 13). Lavern is only required to make interest payments. (*Id.*). There is no penalty if Lavern prepays under the note. (*Id.*).

The cash within LoriAnn's Grantor Trust's "TD Ameritrade Stock Account" was earning less than 0.5% interest. The loan to Lavern generates a 3% return. The loan of cash from LoriAnn's Grantor Trust's TD Ameritrade account generated a 2.5% margin over its prior use, thereby financially benefitting the LoriAnn Grantor Trust.

At trial, Plaintiffs claimed that Jeff's decision to allow a $1.852 million loan to be made out of LoriAnn's Grantor Trust to Lavern breached Jeff's fiduciary duty as trustee. Jeff testified that the loan was the best risk-adjusted return available on cash within LoriAnn's Grantor Trust. When questioned at trial whether Jeff should have obtained LoriAnn's consent for the loan, Jeff testified that doing so would have been meaningless because the retained swap power enabled Lavern to achieve the same result with or without Jeff or the Grantor Trust beneficiary's consent. The jury unanimously found LoriAnn failed to prove Jeff breached his fiduciary duties owed to LoriAnn as trustee of her Grantor Trust by loaning $1.852 million to Lavern from LoriAnn's Grantor Trust. (February 9 Verdict Form Question No. 4)

Although the jury unanimously found no breach of trust by Jeff, Plaintiffs contend Jeff's conduct related to the $1.852 million loan from LoriAnn's Grantor Trust to Lavern merits his removal as trustee because LoriAnn is on the verge of retirement and Jeff's conduct has delayed LoriAnn's

access to nearly $2 million until her mid-seventies. LoriAnn's desire to have a liquid asset rather than a long-term investment in her Grantor Trust, however, is insufficient to merit Jeff's removal as trustee. *Schildberg*, 461 N.W.2d at 192-93 (quoting G. Bogert, *Law of trust and Trustees* § 160, at 577 (5th ed. 1973)) ("The beneficiary often conceives that he could manage the trust better than the trustee, resents failure to follow his advice, is dissatisfied with returns, thinks that the trustee is too conservative in his investment policies, and otherwise finds fault with the trustee. Thus friction develops. But the settlor has entrusted the management to the trustee not the beneficiary. The very fact that he created a trust showed that he did not want the beneficiary to be the controlling factor in the management of the property."). Although LoriAnn is dissatisfied with Jeff's investment decisions as trustee of her Grantor Trust, Jeff's conduct related to the $1.852 million loan from LoriAnn's Grantor Trust to Lavern financially benefitted LoriAnn's Grantor Trust and is consistent with prior family practices. Accordingly, Jeff's conduct related to the $1.852 million loan from LoriAnn's Grantor Trust to Lavern does not merit his removal as trustee.

C. Jeff's overall conduct and performance as trustee of the Grantor Trusts do not warrant his removal as trustee

Above the Court analyzed isolated instances of Jeff's conduct as trustee of the Grantor Trusts and found Jeff's specific actions in and of themselves do not warrant his removal as trustee of the Grantor Trusts. The Court now turns its attention to Jeff's overall conduct and performance as trustee of the Grantor Trusts. In analyzing Jeff's overall conduct and performance as trustee of the Grantor Trusts the Court finds it would be inappropriate to remove Jeff as trustee of the Grantor Trusts benefitting Lisa's daughters and LoriAnn under Iowa Code section 633A.4107(2).

The facts in this case are similar to those in *Schildberg v. Schildberg*, 461 N.W.2d 186 (Iowa 1990). In *Schildberg*, the grantor was a successful businessman and "had a long-standing corporate policy of separating equity value in the Schildberg companies from voting rights and decision-making powers in the companies. The concept was for the family to share in any financial successes and

growth in the businesses while limiting the voting and decision making to a limited number of family members." *Schildberg*, 461 N.W.2d at 188. The grantor in *Schildberg* created a trust and appointed his son Dennis as trustee under the belief that Dennis was best able to run the family business. *Id.* at 188-89. The beneficiaries of the trust were the children of the grantor's deceased son John. *Id.* at 189. After a dispute, the beneficiaries sued claiming that the trustee had a material conflict of interest due to his other interests and positions related to the grantor's family business. *Id.* at 189-90. The district court agreed that Dennis, as trustee, had a conflict and appointed an independent co-trustee to oversee the trust. *Id.* at 188. The Supreme Court of Iowa reversed and held that the grantor was well aware of the potential conflict of interest between the trustee and the beneficiaries when the trust was established, and that keeping the business interests under common control (irrespective of beneficial interests) was a fundamental goal of the grantor in establishing his plan. *Id.* at 194. Since the grantor's intent would be thwarted by appointing an independent trustee, the appointment was overturned. *Id.* Under *Schildberg*, if a settlor establishes a trust with respect to which a fiduciary has a known potential conflict of interest, that potential conflict is not grounds for removal, and indeed, the settlor's intent in appointing such a person is given significant deference.

Like the trustee in *Schildberg*, Jeff was appointed by the grantor, Lavern, who knew his family and his business, and placed Jeff in control of both. *See Schildberg*, 461 N.W.2d at 192. Lavern selected Jeff as trustee of the seven Grantor Trusts because Jeff had extensive experience operating BI and was a key consultant for Lavern and Audrey concerning both business and estate planning matters. *Schildberg*, 461 N.W.2d at 191 ("A court is less likely to remove a trustee named by a settlor, as opposed to one appointed by the court.") (quoting Restatement (Second) of Trusts § 107 comment *f*). Furthermore, the jury found no breach of trust by Jeff, and the potential for conflict based on hostility between Jeff and the trust beneficiaries will not trigger judicial removal and replacement of the trustee under *Schildberg*. (February 9, 2017, Verdict Form, Question Nos. 1 and 4); *Schildberg*, 461 N.W.2d at 194. The exceptional performance and growth of the trusts Jeff oversees also demonstrates that the

objects of the trust are not endangered. (*See, e.g.* Exhibit 3076, p. 15 (depicting an approximately 20-fold increase in the 2002 gift to the Grantor Trusts through December 31, 2014)). Thus, while there is present friction among the family members, it has not seriously interfered with the effectiveness of the trust. *Schildberg*, 461 N.W.2d at 193 ("[m]ere friction between the trustee and the beneficiary is not a sufficient ground for removing the trustee unless such friction interferes with the proper administration of the trust.") (quoting Restatement (Second) of trusts section 107 (1959)). The Court finds the Grantor Trusts continue to operate in accordance with the settlor's intent and to the advantage of the beneficiaries. Accordingly, the Court finds it would be inappropriate to remove Jeff as trustee of the Grantor Trusts benefitting LoriAnn and Lisa's daughters under Iowa Code section 633A.4107(2).

II. Count IV—whether Lavern's optional capital contribution into BFLP should be voided as a product of Jeff's undue influence over Lavern

In Count IV, Plaintiffs brought an undue influence claim against Jeff, asserting he unduly influence Lavern to take certain actions, including making an optional capital contribution into BFLP. (Amended Petition at p. 19). The undue influence claim was brought as a law action seeking damages, and Plaintiffs amended their Petition to add equitable relief relating to Lavern's optional capital contribution into BFLP. In their Amended Petition, Plaintiffs sought the unwinding of Lavern's Optional Capital Contribution as equitable relief for Jeff's alleged undue influence. The jury returned a verdict against Plaintiffs on their undue influence claim against Jeff, finding Lavern was not susceptible to undue influence. (February 9, 2017, Verdict Form, Question No. 31).

The Court entirely agrees with the jury's finding that Lavern was not susceptible to undue influence by Jeff. Lavern impressed the Court as a man with keen intellect, good judgment and a mind of his own. To this day he spends much of his time managing an extensive portfolio of stocks both on his own account and for BFLP. This includes not only simply buying and selling securities but the sophisticated trading of puts and calls. He clearly understood how to properly manage his own wealth, the family wealth and business interests and understood his sophisticated estate plan. He also

understood the value of the transfer of discountable assets for estate planning purposes. While the evidence certainly supports the conclusion that he valued Jeff's advice and business judgment, the evidence also clearly demonstrated that he would often reject Jeff's advice or suggestions if he did not agree. On the audio recordings of the meetings secretly recorded by LoriAnn, he clearly expressed his opinions and desires on various proposals urged by LoriAnn, firmly rejecting those with which he disagreed. On the witness stand, Lavern was an impressive witness. He understood the questions, often on complex topics, and answered the questions in a clear and forthright manner. Lavern was certainly no willow wisp bending to the desires of Jeff.

Because Plaintiffs failed to prove undue influence, they have no basis to unwind Lavern's Optional Capital Contribution into BFLP as part of their requested relief on Count IV of their Amended Petition. (*See* Amended Petition, p. 19; February 9, 2017, Verdict Form, Question No. 31). A transaction subject to undue influence is voidable. *See McCoy v. Tewksbury*, 165 N.W. 400, 401 (Iowa 1917); *Matter of Herm's Estate*, 284 N.W.2d 191, 200 (Iowa 1979); *In re Estate of Lowns*, No. 03-1844, 2004 WL 2951960, at *2 (Iowa Ct. App. Dec. 22, 2004). Having failed to prove essential elements of their undue influence claim, Plaintiffs failed to prove that the Optional Capital Contribution is a voidable transaction. (February 9, 2017 Verdict Form, Question No. 31). Accordingly, Plaintiffs request to unwind Lavern's Optional Capital Contribution must be denied.

III. Count V—whether BFA should be dissolved

In Count V, Plaintiffs seek judicial dissolution of BFA pursuant to Iowa Code section 489.701. In relevant part, Iowa Code section 489.701 provides that a member of a limited liability company may seek judicial dissolution in two circumstances: when "[i]t is not reasonably practicable to carry on the company's activities in conformity with the certificate of organization and the operating agreement," Iowa Code § 489.701(d)(2), or "on the grounds that the managers or those members in control of the company…[h]ave acted or are acting in a manner that is oppressive and was, is, or will be directly harmful to the applicant," Iowa Code § 489.701(e)(2). By its statutory nature, dissolution is an

equitable remedy for the Court to decide. *See Baur*, 832 N.W.2d at 666 (suit seeking judicial dissolution based on allegations of fraudulent, illegal and oppressive conduct and breach of fiduciary duty by defendants "was tried to the court sitting in equity"); *Goetssch v. Goettsch*, 29 F. Supp. 3d 1231, 1238 (N.D. Iowa 2014) (denying jury request on judicial dissolution claim under Iowa law where "Iowa courts have conducted these type of proceedings in equity").

"[T]he remedy of liquidation is so drastic that it must be invoked with extreme caution. The ends of justice would not be served by too broad an application of the statute, for that would merely eliminate one evil by substituting a greater one-oppression of the majority by the minority." *Polikoff v. Dole & Clark Bldg. Corp.*, 37 Ill. App. 2d 29, 35-38, 184 N.E.2d 792, 795 (Ill. App. Ct. 1962) (cited *Maschmeier*, 435 N.W.2d at 383); *see also Afshar v. WMG, L.C.,* 310 F.R.D. 408, 411-12 (N.D. Iowa 2015) (recognizing dissolution as a drastic remedy). The Supreme Court of Iowa has "caution[ed]…that courts must be careful when determining relief to avoid giving the minority a foothold that is oppressive to the majority." *Baur v. Baur*, 832 N.W.2d 663, 678 (Iowa 2013).

Plaintiffs seek judicial dissolution of BFA on the basis that Jeff, as manager of BFA, has acted oppressively toward Plaintiffs by withholding distributions from BFLP and AB BI in an effort to "get further concessions" from Plaintiffs related to control over BI. (Petition ¶¶ 177-81). Plaintiffs also seek judicial dissolution of BFA on the basis that: (1) BFA is operating with only one manager, contrary to its Operating Agreement requirement for two managers, and (2) BFA is in such a state of deadlock over who the second manager would be that it is unable to function. The Court will address Plaintiffs' arguments in turn.

A. Dissolution of BFA on the basis of Minority Oppression

Plaintiffs brought a direct claim of oppression against Jeff. The jury returned a verdict against Plaintiffs, finding they failed to "prove Jeff, as a manager of BFLP, engaged in oppression by delaying a distribution to Plaintiffs." (February 9, 2017, Verdict Form, Question No. 23). The jury also found

that Jeff did not act oppressively by "not distributing all or part of BI's $2.65 million dollar loan prepayment to AB BI" or by "not distributing all or part of AB BI's operating income." (February 9, 2017, Verdict Form, Question No. 26).

The Court concludes that the jury's decision that there was no breach of fiduciary duty from the failure to make distributions from BFLP in 2014 was well supported by the evidence. The evidence demonstrates that in the May, 2013, meeting Jeff indicated to LoriAnn he would distribute all of BFLP's operating income for 2013 because there would be no 2014 BFLP distribution because Jeff was obtaining an appraisal of BFLP for his estate planning purposes. LoriAnn understood and agreed with this. The operating income from BFLP in 2014 did not go away, it was retained and available for future distributions. There were in fact significant BFLP distributions in 2015. (*See* Exhibit 3073).

The Court agrees with the jury's finding that Jeff did not act oppressively by "not distributing all or part of AB BI's operating income" or by "not distributing all or part of BI's $2.65 million loan prepayment to AB BI" (February 9, 2017, Verdict Form, Question No. 26). The distributions from AB BI were not reflected in Exhibit 3076 because each Dynasty Trust holds a 32.9% ownership interest in AB BI and BFA holds a 1.3% ownership interest in AB BI. Plaintiffs allege, and Defendants agree, that AB BI has withheld approximately $508,773 attributable to its operating income from distribution to the entities holding an ownership interest in AB BI. This sum, however, remains in AB BI. Therefore, any portion of AB BI's operating income that is not distributed results in the Dynasty Trusts holding a great equity interest in AB BI. Plaintiffs recognized this benefit on cross-examination when they testified BI's failure to distribute its operating income while under their operational control was a benefit to the BI shareholders. Further, the evidence at trial demonstrated that AB BI has distributed, at a minimum, $482,154 attributable to its operating income to the entities holding an ownership interest in AB BI. Distributions from AB BI are left to the sole discretion of the General Partner. Moreover, the evidence adduced at trial reveals Plaintiffs never requested additional

distributions from AB BI. Under these facts, the Court agrees that Jeff did not act oppressively by failing to distribute a greater portion of AB BI's operating income.

Similarly, the Court agrees with the jury's conclusion that Jeff did not act oppressively by "not distributing all or part of BI's $2.65 million loan prepayment to AB BI." Rather than distribute all or part of BI's $2.65 million loan prepayment to AB BI, Jeff loaned the $2.65 million to Lavern's personal trust at a 3% interest rate. The note under which BI made its $2.65 million prepayment to AB BI required BI to pay an interest rate slightly lower than 3%. Therefore, AB BI loaned the $2.65 million at a higher interest rate to Lavern's personal trust, which is a benefit to AB BI, the Dynasty Trusts, and BFA. Jeff credibly testified that loaning the $2.65 million to Lavern was the best risk-adjusted investment AB BI could make at the time. Jeff believed other fixed-income investments such as bonds created risk due to the declining interest rate environment which would decrease the value of the bonds if interest rates declined. In addition, Lavern testified that he could have acquired a $2.65 million loan at an interest rate as low as .85%. Given Lavern's extensive worth and his ability to offer rock solid security to any lender, the Court accepts this testimony as being true. Lavern's personal trust, therefore, paid a higher interest rate to AB BI than the rate he would have paid to a third-party lender. Plaintiffs' allegation that Jeff loaned $2.65 million from AB BI to Lavern to facilitate Lavern's "retribution" is unpersuasive. At a minimum there was sound evidence to support the jury's finding. Accordingly, the Court agrees that Jeff did not act oppressively by not distributing all or part of BI's $2.65 million loan prepayment to AB BI.

Because Plaintiffs failed to prove Jeff acted oppressively toward them in his distribution decisions, which is the only basis of oppression alleged in the Amended Petition (Amended Petition ¶¶ 177-80), Plaintiffs cannot meet the statutory basis for dissolution of BFA under Iowa Code section 489.701(e)(2). The Court previously recognized as much in its January 10, 2017 Order denying summary judgment on Plaintiffs' dissolution claim. (January 10, 2017 Order at 23 ("Furthermore, if the fact issues discussed in the Court's ruling on Jeff and Lavern's Motion for Partial Summary

Judgment are resolved in favor of Jeff and Lavern at trial, the Court may not have to reach the issue of whether judicial dissolution of BFA is appropriate on the basis of minority oppression.")); *see Snider v. Consolidation Coal Co.*, 973 F.2d 555, 559 (7th Cir. 1992) ("…when common issues are simultaneously tried to both a judge and a jury, the jury's findings with respect to those common issues are binding upon the judge."); *Smith Flooring, Inc. v. Pennsylvania Lumbermens Mut. Ins. Co.*, 713 F.3d 933, 937 (8th Cir. 2013) (finding common issues between legal and equitable claims were conclusively decided by the jury). Accordingly, Plaintiffs have failed to meet the statutory basis for dissolution of BFA on the basis of minority oppression under Iowa Code section 489.701(e)(2).

B. Lavern's status as a manager of BFA

Pursuant to the BFA Operating Agreement, Jeff and Lavern were expressly designated as "[t]he Managers of initial Board of Managers" for BFA, and they were to "serve until their successors are elected and qualified, or until their earlier death, resignation or removal." (Exhibit 1C, BFA Operating Agreement § 5.3). Thus, Lavern remains a manager until his death, resignation, or removal. Lavern clearly is not dead. LoriAnn and Lisa both testified that Lavern has not been removed as a manager of BFA. In denying summary judgment on the issue of whether BFA is operating with only one manager, the Court found it was undisputed that the requirements for a written resignation from Lavern under the BFA Operating Agreement have not been met. (1/10/2017 Order at 12). The Court also rejected Plaintiffs' argument that the BFA Operating Agreement had been modified by oral agreement because there is no evidence that the members of BFA reached such an agreement. (1/10/2017 Order at 11). The testimony at trial confirmed this conclusion. Thus, under the terms of the BFA Operating Agreement, Lavern remains a manager.

Notwithstanding, the Court concluded on summary judgment that a fact issue remained with respect to whether Lavern waived or abandoned the right to manage BFA under the doctrine of estoppel by acquiescence. "Estoppel by acquiescence occurs when a person knows or ought to know of an entitlement to enforce a right and neglects to do so for such time as would imply an intention to

waive or abandon the right." *Markey v. Carney*, 705 N.W.2d 13, 21 (Iowa 2005) (citations omitted). Under Iowa law, it is not necessary to prove prejudice to establish estoppel by acquiescence. *Davidson v. Van Lengen*, 266 N.W.2d 436, 439 (Iowa 1978). "The doctrine of estoppel by acquiescence is more akin to waiver than to equitable estoppel due to the absence of the justifiable reliance and prejudice elements." *Westfield Ins. Cos. v. Econ. Fire & Cas. Co.*, 623 N.W.2d 871, 880 (Iowa 2001).

Estoppel by acquiescence "is applicable 'where a person knows or ought to know that he is entitled to enforce his right or to impeach a transaction, and neglects to do so for such a length of time as would imply that he intended to waive or abandon his right' " *Anthony v. Anthony*, 204 N.W.2d 829, 834 (Iowa 1973) (quoting *Humboldt Livestock Auction, Inc. v. B & H Cattle Co.*, 261 Iowa 419, 432, 155 N.W.2d 478, 487 (1967)); *see also Woodroffe v. Woodroffe*, No. 13-2034, 2015 WL 1546365, at *2 (Iowa Ct. App. April 8, 2015) ("This doctrine applies where a person knows or ought to know that he is entitled to enforce his right…and neglects to do so for such a length of time as would imply that he intended to waive or abandon his right."). "Estoppel by acquiescence is based on an examination of the rightholder's acts to determine whether the right has been waived." *Schiltz v. Teledirect Intern., Inc.*, 524 N.W.2d 671, 674 (Iowa Ct. App. 1994). As the party asserting the estoppel by acquiescence theory, Plaintiffs must "establish its elements by clear, convincing, and satisfying proof." *Corsiglia v. Summit Ctr. Corp.*, 348 N.W.2d 647, 651 (Iowa Ct. App. 1984) (citing *Dierking v. Bellas Hess Superstore*, 258 N.W.2d 312, 315 (Iowa 1977)).

As outlined above, on September 15, 2012, Jeff and Lavern executed an assignment and consent form that transferred Lavern's 25% interest in BFA to Jeff. (Exhibit 12). Although Lavern sold his former 25% interest in BFA to Jeff on September 15, 2012, there is evidence that Lavern continued to act as a BFA manager. For example, Lavern signed an Assignment and Consent form on behalf of BFA on June 29, 2013. (Exhibit 17 (Assignment and Consent form admitting the MMB Grantor Trust as a Substitute Limited Partner into BFLP)). In addition, the parties testified that to this

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day Lavern continues to be actively involved managing BFLP's portfolio of marketable securities on behalf of BFA, the general partner of BFLP.

Jeff testified he had not questioned Lavern's ability to act as a manager of BFA until LoriAnn sent a notice for the BFA 2014 Annual Meeting on August 18, 2014 (two years after the sale of Lavern's BFA interest to Jeff), which included electing a manager as an agenda item. (Exhibit 1007). Jeff testified that after receiving the notice, he researched the Iowa Code about whether there was a limitation on a non-member's ability to serve as a manager of a limited liability company and concluded—wrongly—that when Lavern sold his interest to Jeff, he was no longer a manager. Lavern attended the BFA 2014 Annual Meeting to elect a replacement manager. There, Lavern stated that he "had acted as manager since BFA's inception, and that he a had a strong desire to continue in the role of manager." (Exhibit 2171, audio of 8/28/2014 meeting; Exhibit 1009). Lavern testified he never ceased being a manager of BFA, even though others tried to tell him he was unable to act as a manager and a vote was held for a replacement manager.

There is conflicting evidence, however, as to whether Lavern waived or abandoned his right to manage BFA. For instance, during the BFA 2014 Annual Meeting, Lavern neither objected to the vote nor insisted he was still a manager during the meeting. (Exhibit 2171, audio of 8/28/2014 meeting; Exhibit 1009). Indeed, Lavern stated at the BFA 2014 Annual Meeting: "I would say that one manager is not a deadlock and I don't think that it has worked that bad" and "If there is going to be another manager, I'd like to be it." (Exhibit 2165). Further, in a correspondence to Lavern's counsel in December 2014, Jeff stated he was the only manager of BFA. (*see* Exhibit 2112). Moreover, in the Answer filed in this litigation on June 15, 2015, Jeff and Lavern admitted that BFA only had one manager. (Answer ¶ 169).[9]

[9] Jeff and Lavern filed an Amended Answer and denied this prior admission on February 23, 2016. (Amended Answer ¶169).

Based on this conflicting evidence, the Court finds Plaintiffs have failed to establish "by clear, convincing, and satisfying proof" that Lavern neglected to enforce his right to manage BFA for such a length of time as would imply that he intended to waive or abandon his right to manage BFA. Of importance, BFA's primary function is acting as General Partner of BFLP and AB BI. BFLP was "formed and created to manage the Partners' investments in a single entity…" (Exhibit 1D, BFLP Agreement, Art. XII, p. 25). The parties testified that to this day Lavern continues to be actively involved in managing BFLP's investments on behalf of BFA. Therefore, to this day, Lavern continues to perform managerial duties on behalf of BFA.

In addition, although Jeff asserted he was the only manager of BFA in a correspondence to Lavern's counsel in December 2014, this does not establish that Lavern intended to waive or abandon his right to manage BFA. Lavern testified he was unaware Jeff informed Bill McCartan, Lavern's counsel in December 2014, that BFA only had one manager. (*See* Exhibit 2112). Similarly, Jeff and Lavern's admission that BFA had only one manager in their initial Answer does not establish Lavern intended to waive or abandon his right to manage BFA. Lavern testified he never informed an attorney that BFA only has one manager. Lavern testified further that he was unaware the initial Answer admitted BFA only had one manager. The Court finds Jeff and Lavern's admission in their initial Answer that BFA only has one manager and the same assertion to Lavern's counsel in December 2014 stems from information Jeff provided and Jeff's misunderstanding of the Iowa Code. Jeff's mistaken belief that only members of a limited liability company can serve as a manager of the company is not relevant to Lavern's own understanding or whether Lavern intended to waive or abandon his right to manage BFA. *Schiltz*, 524 N.W.2d at 674 ("Estoppel by acquiescence is based on an examination of *the rightholder's acts* to determine whether the right has been waived.") (emphasis added).

Upon examining Lavern's acts, the Court finds the evidence insufficient to trigger the application of estoppel by acquiescence. Although Lavern failed to object to the vote and did not insist he was still a manager at the BFA 2014 Annual Meeting, it is undisputed Lavern communicated a

strong desire to continue in the role of manager during the meeting. Furthermore, Lavern credibly and unequivocally testified that he never intended to cease being a manager of BFA. Finally, Lavern continues to serve as a BFA-appointed manager of BFLP and AB BI. In doing so, Lavern continues to manage BFLP's portfolio of marketable securities. Thus, Lavern continues to act on behalf of BFA and assist BFA serve as General Partner of BFLP and AB BI—BFA's primary function. Given the lack of clear and convincing evidence to support a finding that Lavern intended to waive or abandon his right to manage BFA, the Court finds Lavern continues to serve as a manager of BFA.

C. Deadlock and Statutory Dissolution of a Limited Liability Company

Plaintiffs allege judicial dissolution of BFA is warranted because there is a deadlock in choosing a new manager, which results in BFA operating contrary to the BFA Operating Agreement and in a manner that is neither reasonable nor sensible because it allows Jeff to solely control BFA, BFLP, and AB BI, without any meaningful input or control from the other members of BFA. (Petition ¶¶ 176, 178-79). Although the Court previously concluded Lavern continues to serve as a manager of BFA, which resolves the deadlock issue, the Court notes Plaintiffs' dissolution claim under the "reasonably practicable" standard would have failed regardless.

Plaintiffs testified at trial they believe they lack veto power over Jeff because they collectively own 50% of BFA and Jeff owns the other 50%. Lisa specifically testified on direct examination that she and LoriAnn lack a veto power because Jeff continues to make material decisions on behalf of BFA. Lisa testified further that BFA is designed as a system of checks and balances, and BFA is currently operating contrary to that design because Plaintiffs cannot prevent Jeff from making material decisions on behalf of BFA. Lisa's testimony runs afoul of the BFA Operating Agreement and illustrates that BFA continues to operate as intended.

BFA is a manager-managed, not a member-managed, limited liability company. (Exhibit 1C at 9, § 5.1; LoriAnn testimony; Lisa testimony). As such, the members of BFA by design under the operating agreement have no ability to manage BFA and are limited to only those actions to which

member approval is required, as Plaintiffs each admitted during their testimony. With respect to those issues on which member approval is required, Plaintiffs' collective 50% ownership would preclude Jeff from making changes requiring member approval. Thus, Jeff cannot unilaterally: merge BFA with another entity; amend the Articles of Organization or the Operating Agreement; change the number of managers; issue or redeem any membership interests; confess judgment against BFA; liquidate or dissolve BFA; or sell substantially all of BFA's assets. (Exhibit 1C, at 9-10, § 5.5; LoriAnn cross examination testimony). Plaintiffs have the same veto power with respect to member-level decisions they have had since BFA was formed.

Furthermore, BFA continues to operate as intended. BFA's primary activity is to serve as General Partner of BFLP and AB BI. BFA appointed Jeff and Lavern to fill those roles on its behalf, roles that Plaintiffs agree Jeff and Lavern continue to fill to this day. BFLP and AB BI have continued to make distributions to their respective limited partners, and the jury concluded Jeff did not breach his fiduciary responsibilities in those roles. (February 9, 2017 Verdict Form, Questions No. 19, 23). Jeff and Lavern both testified that the overall plan has always been for Jeff and Lavern to manage the various Busse entities, including BFA, BFLP, and AB BI. Jeff and Lavern's testimony is bolstered by the BFA Operating Agreement, BFLP Partnership Agreement, and AB BI Partnership Agreement. (Exhibit 1C, BFA Operating Agreement Article 5.3 (designating Jeff and Lavern as the initial managers of BFA); Exhibit 1D, BFLP Partnership Agreement Article VII.B.2 (BFA designating Jeff and Lavern to act on its behalf as managers of BFLP); Exhibit 1E, AB BI Partnership Agreement Article VII.B.2 (BFA designating Jeff and Lavern to act on its behalf as managers of AB BI)). Given these facts, the drastic remedy of dissolving BFA would be improper even assuming Lavern no longer serves as a manager of BFA. Accordingly, the Court finds Plaintiffs have failed to establish that "[i]t is not reasonably practicable to carry on the company's activities" pursuant to Iowa Code section 489.701(d)(2), and Plaintiffs request to judicially dissolve BFA is denied.

IV. Count VI—Plaintiffs' Derivative Claim on Behalf of BFA

Plaintiffs' derivative claim on behalf of BFA is limited to whether Jeff breached duties owed to BFA when Jeff made decisions regarding distributions from BFLP and AB BI. (1/10/2017 Order at 26). Plaintiffs brought identical individual claims against Jeff as limited partners of BFLP and AB BI. The jury returned a verdict against Plaintiffs, finding that Jeff did not breach a duty owed to them as limited partners by delaying distributions from BFLP. (February 9, 2017 Verdict Form Question No. 15). The jury likewise found that Jeff did not breach any fiduciary duties as a manager of AB BI, either with respect to not distributing the $2.65 million loan repayment or with respect to not distributing all of AB BI's net operating income. (February 9, 2017 Verdict Form Question No. 19). Plaintiffs recognize that the Court granting relief under Count VI "would be inconsistent with the verdict." (Plfs. Brief on Remaining Equitable Matters Before the Court, p. 17). Because Plaintiffs failed to prove Jeff breached any fiduciary duties based on his distribution decisions, Plaintiffs' derivative claim on behalf of BFA should be and hereby is denied.

V. Count IX—whether LoriAnn's Dynasty Trust was admitted as a Substitute Limited Partner in BFLP and AB BI

Under the BFLP Partnership Agreement, when Lavern gifted a 7.34% interest in BFLP to each of Plaintiffs' Dynasty Trusts, the Dynasty Trusts were not Limited Partners of BFLP, but were "Permitted Transferees". (Exhibit 1D, BFLP Partnership Agreement, Article IV, B, KK (defining "Permitted Transferee" to include a trust or estate created for the benefit of a descendant of a Partner)). Article XIII, Section 6 (Admission of Substitute Limited Partners) of the BFLP Partnership Agreement states in pertinent part:

> Notwithstanding anything in this Article to the contrary, any successor to the Partnership Interest of a Limited Partner permitted under the terms of this Agreement shall be admitted to the Partnership as a substitute Limited Partner only upon the (a) furnishing to the General Partners of a written acceptance in a form satisfactory to the General Partners of all of the terms and conditions of this Agreement and such other documents and instruments as may be required to effect the admission of the successor as a Limited Partner; and (b) obtaining the Required Consent except where the successor is a Permitted Transferee. (A Permitted Transferee shall be admitted as a substitute Limited Partner on satisfaction of the conditions of (a) above.[10]

[10] The BFLP Partnership Agreement is missing the closed parentheses.

(*Id.* Article XIII, B, 6, p. 28).

If the Dynasty Trusts were not admitted as substitute Limited Partners in BFLP, then the Dynasty Trusts were mere "Assignees":

> A Permitted Transferee, upon receiving a transfer of a Limited Partnership Interest, shall be an Assignee. A Permitted Transferee, upon receiving a transfer of a Limited Partnership Interest, shall be a substitute Limited Partner, subject to the Permitted Transferee accepting and assuming the terms and conditions of this Agreement in writing as provided in Paragraph B of Article XIII.

(*Id.* Article IV, KK, p. 5). An "Assignee" under the BFLP Partnership Agreement only has the economic rights of a Limited Partnership interest, but no right to vote or participate in the management of BFLP. (*Id.* Article IV, I, p. 2).

In 2012 and 2013, in order to admit the Dynasty Trusts as substitute Limited Partners into BFLP, Defendants, acting as BFA-appointed-managers of BFLP, prepared Assignment and Consent forms ("BFLP Assignment and Consent Forms"), and provided copies of the BFLP Assignment and Consent forms to LoriAnn and Lisa as Investment Trustees of their respective Dynasty Trusts. (Jeff testimony).With the exception of the named Dynasty Trust and respective Dynasty Trust's Investment Trustee, the BFLP Assignment and Consent Forms' terms and provisions are identical in all significant respects. (Exhibit 42, Exhibit 43). The BFLP Assignment and Consent Forms have separate signature lines for Lavern, Jeff, and LoriAnn/Lisa. (*Id.*). Lavern's signature line identifies him as the transferor of the limited partnership interest in BFLP. (*Id.*). Jeff's signature line identifies him as a BFA-appointed-manager of BFLP acting on behalf of BFA. (*Id.*). LoriAnn/Lisa's signature line identifies them as the Investment Trustee of their respective Dynasty Trusts. (*Id.*). In Ruling on Jeff and Lavern's First Motion for Summary Judgment, the Court held "Lavern and Jeff's signatures on the BFLP Assignment and Consent Forms were not necessary to admit Plaintiffs' Dynasty Trusts as

substitute Limited Partners into BFLP." (1/5/2017 Ruling p. 45; *see* 1/5/2017 Ruling section III.B.2.a.i).

Defendants acknowledge they were in receipt of Lisa's signed BFLP Assignment and Consent Form in December 2013. Defendants allege, however, they were not in receipt of LoriAnn's signed BFLP Assignment and Consent Form until February 2016. In Ruling on Jeff and Lavern's First Motion for Summary Judgment, the Court stated: "there is a genuine issue of material fact as to whether LoriAnn furnished a signed BFLP Assignment and Consent Form to Defendants prior to the Optional Capital Contribution." (1/5/2017 Ruling at 45). Plaintiffs requested the Court to rule on the factual issue of whether LoriAnn's Dynasty Trust was admitted as a Substitute Limited Partner in BFLP prior to the Optional Capital Contribution.

"While Defendants do not dispute that LoriAnn's Dynasty Trust eventually became a Substitute Limited Partner of BFLP," Defendants allege "the evidence presented at trial makes clear the assignment was not completed until at least February 2016, when LoriAnn first provided a signed Assignment and Consent form."(Entity Def. Brief on Claims Reserved for the Court, p. 18). The Court disagrees. LoriAnn testified that she executed a BFLP Assignment and Consent form in 2012 and 2013. LoriAnn's testimony was specific regarding the form she signed in 2012. LoriAnn testified that she executed two copies of her BFLP Assignment and Consent Form while participating in the 2012 family meeting telephonically and mailed one of the signed copies to Jeff several days after that meeting. (*See* Exhibit 43). LoriAnn testified that she remembered going to the post office to mail a signed copy of her BFLP Assignment and Consent Form in 2012 because a friend had recently passed away. LoriAnn's testimony linking her mailing of the BFLP Assignment and Consent Form in 2012 to a concrete, easily remembered, event enhances her credibility on this issue. LoriAnn testified that thereafter, in June 2013, Jeff asked Plaintiffs to sign duplicates of the BFLP Assignment and Consent Forms. LoriAnn testified she did not immediately sign the form at the June 2013 meeting because Jeff had recently told her she should review forms before she signs them. LoriAnn testified that shortly

after the June 2013 meeting she left a signed copy of her BFLP Assignment and Consent Form on Lavern's home desk. LoriAnn testified that she believes she executed a BFLP Assignment and Consent Form in 2012 and 2013. The Court having heard the evidence finds LoriAnn's testimony on this issue to be credible. Accordingly, the Court finds LoriAnn's Dynasty Trust was properly admitted as a Substitute Limited Partner into BFLP prior to Lavern's Optional Capital Contribution.

VI. Count XIII—whether the Foundation Pledge is enforceable

In 2004 the Foundation Pledge was prepared which indicates, among other things, that LoriAnn, Lisa, and Jeff would deposit the excess of their respective estates into the Busse Foundation under certain circumstances and with certain conditions. (Exhibit 49). Under Count XIII Plaintiffs seek a declaratory judgment that the Foundation Pledge Agreement is unenforceable.

In order to resolve this issue the Court must determine whether the Foundation Pledge is merely a statement of future intent to make a will or bequest as Plaintiffs argue, or a binding promise and charitable subscription as Defendants contend. The distinction is important because statements of future intent to make a will or bequest, without more, cannot give rise to a binding obligation. *Houlette v. Johnson*, 216 N.W.2d 679, 681 (Iowa 1927) (noting essential contractual elements were required for promise of inheritance, including consideration). A charitable subscription[11], however, is binding if the maker intends to be bound, as revealed by the terms used in the subscription and any extrinsic evidence of the maker's intent to be bound, regardless of consideration or reliance. *Salsbury v. Northwestern Bell Tel. Co.,* 221 N.W.2d 609, 613 (Iowa 1974). In the context of determining whether a pledge is obligatory, the Supreme Court of Iowa has explained the distinction between a statement of intention and a promise as follows:

> A statement of intention is the mere expression of a state of mind, put in such a form as neither to invite nor to justify action in reliance by another person. A promise is also the

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[11] "A charitable subscription is an oral or written promise to do certain acts or to give real or personal property to a charity, or for a charitable purpose. Charitable subscriptions are considered under contract principles." *In re Estate of Schmidt*, No. 06-0330, 2006 WL 2561231, at *2 (Iowa Ct. App. Sept. 7, 2006) (citations omitted).

> expression of a state of mind, but put in such a form as to invite reliance by another person

Pappas v. Bever, 219 N.W.2d 720, 721-22 (Iowa 1974) (quoting 1 Corbin on Contracts s 15 at 35 (1963)).

In Ruling on Jeff and Lavern's First Motion for Summary Judgment, the Court previously stated: "the Foundation Pledge's discussion of how personal effects are to be disposed of upon the Busse children's death, the use of the words 'it is our intent…', and the potential uncertainty that the Busse Foundation will receive any portion of the Busse children's respective estates creates a genuine issue of material fact concerning the intent of Plaintiffs in entering the Foundation Pledge. Specifically, the language in the Foundation Pledge is not clear as to whether Plaintiffs were making a pledge to the Busse Foundation or whether Plaintiffs were merely expressing their intent to make such a bequest in their wills." (1/05/17 Ruling p. 65). When a "contract is ambiguous and uncertain, extrinsic evidence can be considered to help determine the intent" of the parties. *Hartig Drug Co. v. Hartig*, 602 N.W.2d 794, 797 (Iowa 1999).

Plaintiffs testified that their intent in executing the Foundation Pledge was to make a conditional statement of their future intent to make a bequest to the Busse Foundation. Plaintiffs testified further that changes in the Busse Foundation changed their intentions as set forth in the Foundation Pledge. For instance, Plaintiffs testified that Jeff's daughters, but not Lisa's daughters, were appointed to the Foundation Board, giving Jeff's family majority control over the Busse Foundation. (*See* Exhibit 2159). Relatedly, Jeff testified that the Foundation has considered removing Plaintiffs from the Board but has not yet acted to do so. (*See* Exhibit 2107). Lavern testified that he believed the Busse Foundation had already removed LoriAnn and Lisa from the Foundation Board. Jeff also testified that Lavern and Audrey allocated a significant share of their ability to direct the Foundation's operation to Jeff upon their deaths. Jeff testified that upon Lavern and Audrey's death he will control approximately 90 percent of the Foundation's giving.

Plaintiffs testified that their intent to act in accordance with the Foundation Pledge at the time of execution was premised upon the Foundation continuing to operate as it was in 2004. Plaintiffs testified their expectation was that they would continue to serve on the board, their control over the Busse Foundation would not be diluted, and that they would receive an equal share (one-third, one-third, one-third) of their parents' allocation to direct the Foundation's giving. According to Plaintiffs, the threats of removing them from the Foundation Board, the dilution of their control over the Busse Foundation, and Lavern and Audrey allocating a significant portion of their ability to direct giving to Jeff upon their deaths materially altered the circumstances that induced their statement of intent in 2004.

The evidence shows that the Busse Foundation was not a party to the Foundation Pledge. The Busse Foundation was neither a signatory to the Foundation Pledge nor specifically identified as a third-party beneficiary to the Foundation Pledge. (*See* Exhibit 49). There was no evidence that the Busse Foundation ratified, approved of, or otherwise relied upon the Foundation Pledge at any of its meetings. Defendants adduced no evidence that the Busse Foundation itself has relied upon the Foundation Pledge, including specific bequests the Foundation has made or actions the Foundation has taken in reliance on the Foundation Pledge.

Examining this evidence in conjunction with the terms of the Foundation Pledge, the Court finds the Foundation Pledge is merely a statement of future intent to make a will or bequest, which, without more, cannot give rise to a binding obligation. *Houlette*, 216 N.W.2d at 681. Although the Busse children expressed an unequivocal intent to leave the remainder of their estates to the Busse Foundation in the Foundation Pledge, this expression of intent is insufficient to constitute a promise to the Busse Foundation. *See Pappas v. Hauser,* 197 N.W.2d 607, 613 (Iowa 1972) ("mere declarations of intention, no matter how clearly proven, would not give rise to binding obligations."); *Bever,* 219 N.W.2d at 721 (noting there must be a promise to a charitable organization, and not a mere statement of intent). In order to constitute a promise, the Foundation Pledge was required to be put in such a

form as to invite reliance by the Busse Foundation. *Bever,* 219 N.W.2d at 721-22. There is no evidence that the Busse Foundation itself has relied upon the Foundation Pledge, including specific bequests the Foundation has made or actions the Foundation has taken in reliance on the Foundation Pledge. This is unsurprising because, pursuant to the Foundation Pledge, only the "the balance of [the Busse children's respective] estate[s]" or the "remainder of the Marital Trust" shall go to the Foundation. (Exhibit 49). Therefore, the Busse Foundation has nothing more than a hope or mere expectation to receive some unidentified portion of the Busse children's respective estates. This is further supported by the Foundation Pledge failing to fund a specific amount or specific action. (*See* Exhibit 49.); *cf. In re Estate of Schmidt*, No. 06-0330, 2006 WL 2561231, at *3 (Iowa Ct. App. Sept. 7, 2006) (finding church member made charitable subscription to church, which was enforceable after his death using funds from his estate, where church member pledged to pay for improvements to the church, parsonage, and cemetery, because church member was aware of the amount to be spent, and the church accepted offer before church member's death by starting the remodeling work).

In light of the foregoing, the Court finds the Foundation Pledge neither invites nor justifies the Busse Foundation's reliance. *See Bever*, 219 N.W.2d at 721-22. Accordingly, the Court finds the Foundation Pledge does not give rise to a binding obligation.

VII. Counterclaim Count II—Unjust Enrichment

Unjust enrichment is a doctrine that "evolved from the most basic legal concept of preventing injustice." *State ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142, 149 (Iowa 2001). The doctrine of unjust enrichment is admired for both its simplicity and breadth. *See Iconco v. Jensen Const. Co.*, 622 F.2d 1291, 1302 (8th Cir. 1980) (quoting *In re Stratman's Estate*, 231 Iowa 480, 488, 1 N.W.2d 636, 642 (1942)) ("We are impressed with the simplicity of the rule echoed by the Iowa unjust-enrichment cases. '(I)t is essential merely to prove that a defendant has received money which in equity and good conscience belongs to plaintiff.' "); *Unisys Corp.*, 637 N.W.2d at155 ("We recognize unjust enrichment is a broad principle with few limitations.") (citations omitted).

The doctrine of unjust enrichment is an equitable principle that "mandates 'one shall not be permitted to unjustly enrich himself at the expense of another to receive property or benefits without making compensation' for them." *Johnson v. Dodgen*, 451 N.W.2d 168, 175 (Iowa 1990) (quoting *Larsen v. Warrington*, 348 N.W.2d 637, 642-43 (Iowa App. 1984)). The word "benefit," in the context of unjust enrichment, "denotes any form of advantage." *Okoboji Camp Owners Co-op v. Carlson*, 578 N.W.2d 652, 654 (Iowa 1998) (quoting Restatement of Restitution § 1, at 12 (1937)).

Unjust enrichment "may arise from contracts, torts, or other predicate wrongs, or it may also serve as independent grounds for restitution in the absence of mistake, wrongdoing, or breach of contract." *Unisys Corp.*, 637 N.W.2d at 154. "It is a theory to support restitution, with or without the existence of some underlying wrongful conduct." *Id.* at 149-150 (citation omitted). "The doctrine of unjust enrichment is based on the principle that a party should not be permitted to be unjustly enriched at the expense of another or receive property or benefits without paying just compensation." *Id.* "Although it is referred to as a quasi-contract theory, it is equitable in nature, not contractual." *Id.* "Unjust enrichment…is not grounded in contract law but rather is a remedy of restitution." *Iowa Waste Sys., Inc. v. Buchana Cty.*, 617 N.W.2d 23, 29 (Iowa Ct. App. 2000). "As it is not grounded in pure contract law such remedies are often referred to as quasi contracts or implied-in-law contracts." *Id.* "In short, a quasi-contract is 'simply a rule of law that requires restitution to the plaintiff of something that came into the defendant's hands but belongs to the plaintiff.' " *Hunter v. Union State Bank*, 505 N.W.2d 172, 177 (Iowa 1993) (quoting Dan B. Dobbs, *Handbook on the Law of Remedies* § 4.2, at 235 (1973)). "It is contractual only in the sense that it is based on an obligation that the law creates to prevent unjust enrichment." *Unisys Corp.*, 637 N.W.2d at 154.

"Recovery based on unjust enrichment can be distilled into three basic elements of recovery. They are: (1) defendant was enriched by the receipt of a benefit; (2) the enrichment was at the expense of the plaintiff; and (3) it is unjust to allow the defendant to retain the benefit under the circumstances." *Id.* at 154-55 (citations omitted). Before analyzing the elements of unjust enrichment within the

context of this case, the Court will address Plaintiffs' lingering post-trial arguments that Defendants' unjust enrichment claim fails as a matter of law.

Although unjust enrichment is a broad principle, it is subject to limitations. "Generally the existence of a contract precludes the application of the doctrine of unjust enrichment." *Johnson v. Dodgen*, 451 N.W.2d 168, 175 (Iowa 1990). Express and implied contracts cannot coexist on the same subject matter, and where an express contract and implied contract purport to cover the same subject matter, the former must supersede the latter. *Chariton Feed & Grain, Inc. v. Harder*, 369 N.W.2d 777, 791 (Iowa 1985). Plaintiffs contend that the existence of the 2012 stock option precludes Defendants' unjust enrichment claim as a matter of law. The Court finds this argument unpersuasive. There is simply no contract between the parties calling for the distribution of BI voting stock to the Grantor Trusts' respective beneficiaries. The 2012 stock option did not require Jeff to distribute BI stock to the Grantor Trusts' respective beneficiaries. If Jeff had elected to not distribute the BI voting stock to the Grantor Trusts' respective beneficiaries in 2012, that decision would not have given rise to a breach of contract claim. Furthermore, the 2012 stock option was only applicable upon Lavern's death. The stock option does not govern the distribution of BI stock to the Grantor Trusts' respective beneficiaries during Lavern's lifetime, which is the subject matter at issue in this case. Indeed, Defendants' unjust enrichment claim involves the 2012 stock option because Defendants mistakenly believed the stock option would vest upon the distribution of BI stock to the Grantor Trusts' respective beneficiaries during Lavern's lifetime.

Plaintiffs contend further Defendants' mistaken belief that the stock option would vest upon the distribution of the BI stock to the Grantor Trusts' respective beneficiaries was a unilateral legal mistake, which cannot be remedied in equity. To support this proposition Plaintiffs cite *Bakke v. Bakke*, 47 N.W.2d 813, 817 (Iowa 1951) and *National Fire Ins. Co. of Hartford v. Butler*, 152 N.W.2d 271, 272-73 (Iowa 1967). The Court finds Plaintiffs reliance on *Bakke* and *Butler* to be misplaced. In *Bakke*, the plaintiff sought recission of a settlement agreement on the basis of a mistake of fact. *Bakke*,

47 N.W.2d at 616. The *Bakke* Court analyzed the plaintiff's claim under contract principles and found the mistake of fact was not mutual. *Id.* at 618. Because *Bakke* did not involve restitution or unjust enrichment, *Bakke* provides no guidance. In *Butler*, an insurance company sought to recover money it voluntarily paid to satisfy the insured's claim on the basis that it misapprehended its legal obligations to pay the insured under the governing policy. *Butler*, 152 N.W.2d at 274. The *Butler* Court concluded that payment itself implied acceptance of liability by the insurer and affirmed the trial court's denial of recovery based on insufficient proof of mistake, either at law or in fact. *Id.* Unlike *Butler*, there is sufficient proof in this case to conclude Defendants mistakenly conferred voting control of BI to Plaintiffs. (*See* February 9, 2017 Verdict Form Question No. 47).

Furthermore, *Bakke* and *Butler* did not involve a gratuitous transfer. The plaintiffs in *Bakke* and *Butler* made a conscious choice to voluntarily settle an existing claim. Restitution is unavailable where a paying party alleges it would not have settled or compromised on the same terms if the relevant facts had been known at the time of settlement or compromise. *See* Restatement (Third) of Restitution and Unjust Enrichment § 5 cmt. b(1) (2011) ("the parties' contractual allocation of the risk of uncertainty is what bars a claim in restitution in respect of a payment made pursuant to a valid compromise or settlement. Neither the settlement of a disputed liability nor a payment thereunder is made subject to invalidation merely by the subsequent discovery of facts tending to show that the parties (with the benefit of hindsight) would have settled on different terms.").

Plaintiffs also contend that Defendants' unjust enrichment claim fails because Plaintiffs did not knowingly request or accept the BI voting stock that was distributed from their Grantor Trusts. In support of this proposition, Plaintiffs cite *Credit Bureau Enterprises, Inc. v. Pelo*, 608 N.W.2d 20, 25 (Iowa 2000). *Pelo*, however, is readily distinguishable from the present case. In *Pelo*, the restitution claimant voluntarily conferred benefits to the defendant, and then sought payment for its value. Here, Defendants claim they mistakenly conferred voting control of BI to Plaintiffs. Furthermore, Plaintiffs' suggestion that they are innocent recipients of the BI voting stock runs afoul of their "unreasonable

failure, despite notice and opportunity, to avoid or rectify the unjust enrichment in question." Restatement (Third) of Restitution and Unjust Enrichment § 52(1)(d) (2011) (explaining when a defendant who is not a "conscious wrongdoer" may nevertheless be responsible for receiving, retaining, or dealing with benefits that are the subject of a restitution claim).

Finally, Jeff's role in distributing the BI voting shares to the Grantor Trusts' respective beneficiaries does not disqualify Defendants from equitable relief. "A claimant does not bear the risk of a mistake merely because the mistake results from the claimant's negligence." Restatement (Third) of Restitution and Unjust Enrichment § 5(4) (2011). "As a general rule, neither the claimant's level of care nor the reasonableness of the claimant's conduct is relevant to the viability of a claim in restitution." Restatement (Third) of Restitution and Unjust Enrichment § 5 cmt. f (2011); *see also United States v. Northwestern Nat'l Bank & Trust Co.*, 35 F.Supp. 484, 486 (D. Minn. 1940) ("if a benefit is bestowed through a mistake, no matter how careless or inexcusable the act of the bestower may have been, the recipient of the benefit in equity must make restoration, the theory being that the restitution results in no loss to the recipient. He merely received something for nothing"). Further, "[a] rule that every mistaken transfer was made at the risk of the transferor would eradicate the law of restitution for mistake." Restatement (Third) of Restitution and Unjust Enrichment § 5 cmt. b(3) (2011); *see also Ex parte AmSouth Mortgage Co.*, 679 So.2d 251, 255 (Ala. 1996) ("If all persons who negligently confer an economic benefit upon another are disqualified from equitable relief because of their negligence, then the law of restitution, which was conceived in order to prevent unjust enrichment, would be of little or no value.").

Returning to the elements of unjust enrichment, the Court concludes Jeff and Lavern proved all elements of their counterclaim of unjust enrichment because: (1) Plaintiffs were enriched by the receipt of a benefit of voting rights in and control of BI; (2) the enrichment was at Jeff and Lavern's expense; and (3) it is unjust to allow Plaintiffs to retain voting control over BI by operation of a

mistake. Equity requires the Court to return the mistaken transfer of the voting stock of BI to the Grantor Trusts, which will again allow Jeff to resume management of BI as his father intended.

A. Plaintiffs were enriched with the benefit of voting rights

The voting shares of BI distributed to Plaintiffs in 2012 satisfy the first element of unjust enrichment. Because Plaintiffs neither had nor were entitled to receive the voting rights associated with the BI voting stock held in their respective Grantor Trusts prior to the distribution, the 2012 distribution of BI voting stock from the Grantor Trusts was a voluntary, albeit mistaken, transfer of BI voting rights to the Grantor Trusts' beneficiaries. A voluntary transfer of voting rights constitutes "enrichment." *Okoboji Camp Owners*, 578 N.W.2d at 654 (the word "benefit," in the context of unjust enrichment, "denotes any form of advantage." (quoting Restatement of Restitution § 1, at 12 (1937)).

B. Plaintiffs receipt of voting rights sufficient to control BI was at the expense of Lavern's estate plan and Jeff's retention of control

Uncontroverted trial testimony confirmed that Plaintiffs' receipt of BI voting rights was at the expense of Jeff's operation and control of BI and Lavern's estate plan to keep Jeff in control of BI. Lavern, in structuring his estate plan, was entitled to place Jeff in complete control of BI. The trial testimony confirms that Lavern has a long-standing policy of separating equity value in the Busse family entities from voting rights and decision-making powers in those entities.[12] Lavern testified that he structured the Busse family entities to allow Plaintiffs to share in any financial successes and that he made equal gifts to his children to promote fairness, but he never conferred equal voting rights or decision-making powers in the Busse family entities to his children. Lavern testified that he entrusted Jeff with greater voting rights and decision-making powers in the Busse family entities because Jeff was the most qualified manager and treated his sisters fairly. Lavern's intention is reflected in the parties' testimony that Lavern refused to: restructure BFA, appoint Lisa as trustee of her daughters' Grantor Trusts, or appoint LoriAnn as trustee of her Grantor Trust. Lavern's intention is further

[12] Plaintiffs' assertion that Lisa and LoriAnn served on the Board of Directors ignores the critical issue. Lavern never intended the Plaintiffs to exercise control over an entity he and Jeff exclusively controlled and successfully operated since inception.

reflected in Plaintiffs' testimony—Lisa conceded in her testimony that Lavern never intentionally gave her and LoriAnn control of BI, and LoriAnn testified she did not know whether anybody ever intended that she or Lisa have voting control of BI. Lavern's intention that the Busse family should share in any financial successes and growth in the family entities while giving majority interest voting control to Jeff is apparent in the parties' testimony and the jury's answer to Question No. 47 on the February 9, 2017, Verdict Form.

Lavern's desire for Jeff to exercise majority control over BI is underscored by the history of control of BI since 2002. Lavern specifically and intentionally designated Jeff trustee of the Grantor Trusts, which allowed Jeff to vote those shares while the shares remained in the Grantor Trusts. Trial testimony demonstrated that Jeff was chosen because of his extensive experience operating BI.

Ten years later, in October 2012, Lavern and Jeff became concerned that BI voting shares could be distributed from the Grantor Trusts upon Lavern's death, resulting in Jeff's loss of control. (*See* Exhibit 10). When Jeff and Lavern recognized a risk that Jeff may lose control of BI upon Lavern's death, they secured a stock option to permit Jeff to retain control. Plaintiffs testified that they agreed to grant Jeff the stock option that enabled him to purchase BI voting shares sufficient to retain control of BI upon Lavern's death. (Exhibit 3026). If they had not, Lavern testified that he would have exercised his retained swap power to remove BI voting shares from the Grantor Trusts. (*See* Exhibit 10, p.3 (describing Lavern's "absolute power" to remove BI shares from the Grantor Trusts)). Jeff and Lavern's testimony demonstrated that Lavern exercising his swap power was a less favorable alternative to creating the stock option because the swap would have entailed fees for a third-party valuation of the shares and additional estate tax planning if Lavern were to take control of the BI voting shares once again. (*See* Exhibit 10, p.3 (describing distribution as "simpler and less expensive" than exercise of Lavern's retained swap power)).

It defies reason that Lavern and Jeff would endeavor to create the Stock Option to keep Jeff in control one month and render the Stock Option irrelevant the next, when estate tax concerns in

November 2012 motivated distribution of the BI shares from the Grantor Trusts. If Lavern intended to allow Plaintiffs to take present control of BI, he would not have advocated for a stock option designed to keep Jeff in control. (*See* Exhibit 51 ("…we must proceed with the stock option. This will protect Busse Investments and as long as everyone is still around and everything goes according to plans, the options will not be exercised and all will remain as it is today.")).

The uncontroverted evidence at trial confirms Lavern wanted Jeff to exercise control over BI. Jeff lost majority voting control of BI as a result of the 2012 distribution of BI voting stock from the Grantor Trusts. Lavern's estate plan, desire for common management of business and investment accounts, and having someone running the operation that bought into his ideas was disrupted by Jeff losing majority voting control of BI. Lavern and Jeff established that the loss of Jeff's majority voting control over BI was at their expense at trial.

C. It is unjust under the circumstances to allow Plaintiffs to retain sufficient voting rights to collectively assert control over BI

The jury unanimously found Defendants proved that Lavern and/or Jeff did not intend Lisa's daughters and LoriAnn to retain or obtain collective voting control of BI. (February 9, 2017, Verdict Form, Question No. 47). The result is consistent with Lisa's admission in her testimony that Lavern never intentionally gave her control of BI, and LoriAnn's testimony that she did not know whether anybody ever intended that she or Lisa have voting control of BI. The result is also consistent with Lavern's testimony that if he knew the stock option would not vest, he would have instead exercised his retained power to remove BI shares from the Grantor Trusts. Jeff's October 16, 2012 memorandum regarding distribution of shares noted the alternative possibility:

> Pops: Absent consensus, you have the absolute power to fix this. However, provided we have a "meeting of the minds" , I think this solution is superior (meaning simpler and less expensive) to the alternative of you "repurchasing" and "reallocating" the BI voting stock from the Grantor Trusts, which would likely require an appraisal.

(Exhibit 10, p. 3). Lavern refrained from exercising his retained swap power on the mistaken belief that the stock option executed by Lisa and LoriAnn would permit Jeff to retain voting control of BI if shares were distributed for any reason. (*See e.g.,* Exhibit 3025 (a November 11, 2012 email from Jeff to Lavern stating that "[d]istribution of the voting shares would trigger vesting of my BI voting stock option.")). The shares were distributed on the mistaken belief that the stock option would vest so that Jeff would retain control of BI, consistent with past practice and Lavern's intent.

In summary judgment briefing and during trial, Plaintiffs attempted to recast Lavern and Jeff's claim of unjust enrichment to facilitate factual and legal arguments against it. For instance, Plaintiffs argued that the looming alternative of Lavern's reacquisition of BI shares from the Grantor Trusts was contrary to Lavern's desire to minimize estate taxes. While that may be true, if the reacquisition of the shares by exercising the swap created estate tax issues, Lavern would have had the ability to weigh the negative estate planning consequences against the prospect of a change in control of BI and could have taken action that would minimize estate taxes immediately after reacquisition. Further, the Court is convinced by the testimony provided by Jeff and Lavern that Jeff would not have distributed the voting shares had he known the stock option would not vest. It was simply to contrary to the long-standing plan established by Lavern.

Plaintiffs also repeatedly relied on the bare distribution of BI shares from their Grantor Trusts to attempt to prove intent. The jury's finding, however, is consistent with Jeff and Lavern's testimony that the distribution of shares occurred under the mistaken belief that the 2012 stock option would vest so that Jeff would retain control of BI. LoriAnn and Lisa did not testify to any contrary belief. Indeed, LoriAnn and Lisa's testimony revealed that they, too, did not realize the stock option had not vested until the following calendar year. Again, it defies reason that Lavern and Jeff would endeavor to create the stock option to keep Jeff in control one month and render the stock option irrelevant the next, when estate tax concerns in November 2012 motivated distribution of the BI shares from the Grantor Trusts.

Plaintiffs received collective voting control of BI by operation of a mistake and in consideration for nothing. *See Northwestern Nat'l Bank & Trust Co.*, 35 F.Supp. at 486 ("if a benefit is bestowed through a mistake, no matter how careless or inexcusable the act of the bestower may have been, the recipient of the benefit in equity must make restoration, the theory being that the restitution results in no loss to the recipient. He merely received something for nothing."). The intent to give Plaintiffs only equity in BI and reserve control for Jeff is apparent in the parties' testimony and the jury's answer to Question No. 47 on the February 9, 2017, Verdict Form. Equity should intervene to reverse the transfer of control because Lavern and Jeff never intended Plaintiffs to obtain or retain collective voting control of BI.

D. Remedy to correct Plaintiffs' unjust enrichment

Unjust enrichment is an equitable theory of recovery. Suits based in equity allow the Court considerable flexibility in determining the equities between the parties and in framing an appropriate remedy. *Hosteng Concrete & Gravel, Inc. v. Tullar*, 524 N.W.2d 445, 448 (Iowa Ct.App. 1994). "Any situation that is contrary to equitable principles and can be redressed within the scope of judicial action may have a remedy devised to meet it, even though no similar relief has ever been given." *Hosteng*, 524 N.W.2d at 448.

Of the available remedies to correct Plaintiffs' unjust enrichment, the Court finds the most appropriate remedy to restore Jeff's management of BI as his father intended is to require Lisa's daughters and LoriAnn to return the BI voting stock distributed from their respective Grantor Trusts (45,078 voting shares from each of Lisa's three daughters' Grantor Trusts and 116,022 voting shares from LoriAnn's Grantor Trust) to their respective Grantor Trusts. (Exhibit 52). This remedy will correct Plaintiffs' unjust enrichment with the least complications and transactional cost.

Plaintiffs assert this remedy is untenable as it treats Jeff's daughters, who were equally enriched from the 2012 distribution of BI voting stock, more preferably than Lisa's daughters. According to Plaintiffs, LoriAnn and Lisa's daughters will be inequitably deprived of a benefit that Jeff's daughters

will be allowed to retain. Plaintiffs, however, cite no authority for the proposition that an unjust enrichment claimant must bring a claim against all individuals who are enriched by the receipt of a benefit at the claimant's expense in a single lawsuit in order to prevail. Further, no reason exists for Defendants' to sue Jeff's daughters (as opposed to Plaintiffs) for unjust enrichment because Plaintiffs carried out the takeover of BI, not Jeff's daughters. The Court notes that it does not find LoriAnn and Lisa's daughters were unjustly enriched by receipt of the BI voting stock based solely on how they subsequently exercised their voting rights. The inequity the Court seeks to remedy is that, but for the existence of the Stock Option, which Defendants mistakenly believed would allow Jeff to retain control of BI, the Grantor Trusts' beneficiaries would not have been conferred the right to vote the BI shares that were held in their respective Grantor Trusts, and Plaintiffs would not be able to collectively exercise majority control over BI.

RULING

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. Count II of Plaintiffs' Amended Petition with respect to Plaintiffs' prayer that Jeff Busse be removed as trustee of the Grantor Trusts is dismissed at Plaintiffs' cost.

2. Count IV of Plaintiffs' Amended Petition with respect to whether Lavern Busse's Optional Capital Contribution into BFLP should be voided is dismissed at Plaintiffs' cost.

3. Count V of Plaintiffs' Amended Petition seeking judicial dissolution of BFA is dismissed at Plaintiffs' cost.

4. Count VI of Plaintiffs' Amended Petition asserting Jeff Busse's breach of fiduciary duty to BFA in making distributions from BFLP or AB BI to support a derivative claim on behalf of BFA is dismissed at Plaintiffs' cost.

5. With respect to Count IX of Plaintiffs' Amended Petition with regard to whether LoriAnn's Dynasty Trust was admitted as a Substitute Limited Partner in BFLP and AB BI, the Court finds that LoriAnn Busse's Dynasty Trust was admitted as a Substitute Limited Partner in BFLP and AB BI prior to Lavern Busse's Optional Capital Contribution and Orders the parties to conduct the affairs of BFLP and AB BI accordingly.

6. With respect to Count XIII of Plaintiffs' Amended Petition with regard to whether the Foundation Pledge is enforceable Plaintiffs' request for a Declaratory Judgment is GRANTED, and the Court finds the Foundation Pledge is unenforceable as to LoriAnn Busse and Lisa Carpentier.

7. With respect to Count II of Defendants Jeffrey Busse and Lavern Busse's Counterclaim seeking equitable relief for unjust enrichment it is Ordered that Alexandra Renee Carpentier, Devan Michele Carpentier, and Marie Josee Carpentier, a minor through her mother and next best friend, Lisa Carpentier are each Ordered to execute any documents necessary to return 45,078 voting shares of Busse Investment stock to their respective Grantor Trusts and it is further Ordered that LoriAnn Busse shall execute any documents necessary to return 116,022 voting shares of Busse Investment stock to her Grantor Trust, said transfers to be accomplished within 30 days of the date of this Order.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
LACV083022	(BC)LORIANN BUSSE & LISA CARPENTIER ET AL VS JEFFREY BUSSE

So Ordered