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 RULING ON DEFENDANTS JEFFREY BUSSE AND LAVERN BUSSE'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants, Jeffrey Busse ("Jeff") and Lavern T. Busse ("Lavern") (collectively referred to hereinafter as "Defendants"), filed a Motion for Partial Summary Judgment together with a Memorandum and Statement of Undisputed Facts on September 8, 2016. Defendants' Motion for Partial Summary Judgment joins in the Motion for Partial Summary Judgment filed concurrently on behalf of Defendants Busse Financial Advisors, LLC, Busse Family Limited Partnership, AB BI Note Limited Partnership, Lavern T. Busse and Audrey Busse Foundation (hereinafter collectively referred to as "Entity Defendants"). Plaintiffs, LoriAnn Busse ("LoriAnn") and Lisa Carpentier ("Lisa"), filed a Resistance to Defendants' Motion for Partial Summary Judgment together with a Memorandum and

Response to Defendants' Statement of Undisputed Facts on September 30, 2016.[1] Plaintiffs' Resistance to Defendants' Motion for Partial Summary Judgment incorporates the arguments raised in their Resistance to the Entity Defendants' Motion for Partial Summary Judgment. Defendants filed a Reply to Plaintiffs' Resistance on October 11, 2016. Defendants' Reply to Plaintiffs' Resistance joins in the reply filed concurrently on behalf of the Entity Defendants.

Oral argument on Jeff and Lavern's Motion for Summary Judgment was held on November 7, 2016. The parties appeared by their attorneys of record. The Court has considered counsels' briefs, the parties' exhibits, and the applicable law, and now makes the following ruling:

Factual Background and Proceedings

Though the motion before the Court involves numerous counts and complicated estate-planning entities, at its core, the present controversy concerns: (1) whether Plaintiffs can maintain claims against Lavern for substituting assets of allegedly inequivalent value into and out of the Grantor Trusts he established for the benefit of LoriAnn and Lisa's three children, when the terms of the Grantor Trusts entitle Lavern to exercise his retained right to swap assets in an individual, nonfiduciary capacity; (2) whether a portion of Plaintiffs' claims fail for a lack of damages; (3) whether Jeff stopped operating Busse Investments ("BI") for the benefit of its shareholders and started operating BI for the primary benefit of entities he controlled to the detriment of LoriAnn, Lisa, and their families; (4) whether Jeff, as a manager of two Busse Family partnerships, Busse Family Limited Partnership ("BFLP") and AB BI Note Limited Partnership ("AB BI"), breached the fiduciary and legal duties he owed to LoriAnn and Lisa; (5) whether Jeff was able to act for his benefit at the expense of his sisters and their children because he exercised undue influence over Lavern.

In order to reach the merits of the controversy before 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 pertinent events leading to

[1] LoriAnn and Lisa's Resistance was timely filed pursuant to Court Orders entered on September 22, 2016 and September 26, 2016 that granted the parties' requests for an extension of Summary Judgment Resistance Deadlines.

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 Jeff and Lavern seek summary judgment. A reasonable fact finder viewing the summary judgment record in the light most favorable to the non-moving party, LoriAnn and Lisa, could find the following facts:

A. Background Relating to Busse Family Entities

Lavern and Audrey Busse ("Audrey") have three children: LoriAnn, Lisa, and Jeff. Lisa has three daughters: Alexandra, Devan, and Marie-Josee. Jeff has three daughters: Monica, Anna, and Grace. LoriAnn is childless.

Lavern formed Busse Investments, Inc. ("BI") in 1989. 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. At all times pertinent to this litigation, Plaintiffs have been shareholders and board members of BI.

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.[2] As of Lavern's 2002 BI stock transfer, Jeff was an employee and manager of BI. Since the creation of the Grantor Trusts until the present, 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. (Def. App. 45, LTB 2002 Irrevocable Trust U/D/O December

[2] In forming the Grantor Trusts, Lavern retained the following power:

> …Grantor shall have the power in Grantor's individual (nonfiduciary) capacity to reacquire any asset transferred to the Trustee by Grantor or otherwise included within the Trust estate of the Trust or any such separate Trust by substituting other property of an equivalent value for such asset or assets.

(Def. App. 53, LTB 2002 Irrevocable Trust U/D/O December 20, 2001, Art. VI, B).

20, 2001, Art. VI, A.7). Jeff's voting rights as trustee for the Grantor Trusts combined with his personal interests in BI allowed Jeff to exercise majority control over BI while the Grantor Trusts held BI voting stock.[3]

In 2004 Busse Financial Advisors, LLC ("BFA") was formed. BFA is a manager-managed LLC, managed by a Board of Managers consisting of two managers. (BFA Operating Agreement Article 5, D82). 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. BFA's primary function is to operate and manage two other companies: Busse Family Limited Partnership ("BFLP") and AB BI Note Limited Partnership ("AB BI").

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. 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. (Def. App. 87, 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." (Def. App. 88, 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. (Def. App. 74, BFLP Agreement, Article VI, p. 11). If the General Partner is removed or cannot serve, the Limited Partners

[3] For many years, Jeff was the key employee, manager, officer, and director of BI and a key consultant for Lavern and Audrey concerning both business and estate planning matters. Consistent with this position, Lavern and Audrey provided Jeff with majority voting control in BI and appointed him as trustee of various Busse family entities.

may elect a successor General Partner by a simple majority. (Def. App. 95, 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." (Def. App. 103, BFLP Partnership Agreement, p. 40, Art. XIX.H). As of March 15, 2006, the limited partnership interest in BFLP was divided as follows: BFA owned 1.33%, LoriAnn owned 11.82%, Lisa and Lisa's daughters owned 26.58%, Jeff and his children owned 38.25%, and Lavern owned 22.02%.

AB BI Note Limited Partnership ("AB BI") was formed in 2011. It is owned by the Dynasty Trusts 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. (Def. App. 133, 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." (Def. App. 134, 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." (Def. App. 149, 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." (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. (Article IV, A.5). The Dynasty Trusts appointed LoriAnn, Lisa, and Jeff as the initial Investment Trustee for their respective Dynasty Trusts. (Article V, A). The Dynasty Trusts also provide for a Trust Protector. (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…."[4] (Article V, J.4).

The Dynasty Trusts held—and continue to hold—two assets: an interest in BFLP and an interest in AB BI.[5] Lavern gifted an equal portion of his 22.02% limited partnership interest in BFLP to each of his children's Dynasty Trusts. If the Dynasty Trusts were properly admitted as Limited Partners in BFLP, 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.

In 2012 Jeff created MMB Limited Partnership ("MMB"), named after his wife's initials. Lavern, Audrey, and Jeff contributed cash to form MMB. (Def. App. 10, 34, Lavern Depo. Tr. 81: 9-19; Jeff Depo. Tr. 226:24-227:4). Lavern and Audrey borrowed $3.2 million to fund their interest in

[4] 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.

[5] Defendants dispute whether the Dynasty Trusts were properly admitted as Limited Partners in BFLP and AB BI. According to Defendants, the Dynasty Trusts are merely "Assignees" under the BFLP Agreement and AB BI Agreement. An "Assignee" under the BFLP Agreement and AB BI 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).

MMB, and Jeff and his family contributed $1.8 million to MMB for a total of $5 million. (Plfs. App. 126, Lavern Depo. Tr. 24:16 – 25:18; Defs' Second Am. Ans. ¶ 71). Like BFLP, MMB's General Partner is a limited liability company, but not BFA. MMB's General Partner is LTB Financial Advisors, LLC ("LTB Financial Advisors").[6] Upon MMB's formation, LoriAnn and Lisa had no personal interests or ability to participate in MMB.

In 2012 Jeff's wife, Michelle Busse ("Michelle") formed the MMB Grantor Trust and transferred Jeff's former personal interest in BFLP into the MMB Grantor Trust. (Jeff. Dep. Tr. Vol. I 63:8 – 23, Plfs. App. 136; Jeff Dep. Tr. Vol. I 197:15 – 23, Plfs. App. 169).[7] "The MMB Grantor Trust is a dynasty trust set up…for [Jeff's] benefit and [his] descendants' benefits." (Jeff. Dep. Tr. Vol. I 62:10 – 12, Plfs. App. 136). Jeff is the primary beneficiary of the MMB Grantor Trust. (Jeff. Dep. Tr. Vol. I 62:25 – 63:7, Plfs. App. 136). Jeff is also the Investment Trustee of the MMB Grantor Trust. (D00001893; Plfs. App. 466). Tim Touro, Jeff's personal friend, is the Independent Trustee for the MMB Grantor Trust. (Jeff Dep. Tr. Vol. I 67:18 – 22, Plfs. App. 137 (Touro's status as a personal friend)).

Another entity subject to this dispute is the Lavern T. Busse and Audrey Busse Foundation ("Busse Foundation"). The Busse Foundation is a non-profit organization formed in 1990 to coordinate charitable giving of a portion of Lavern and Audrey's wealth. The Busse Foundation is governed by Articles of Incorporation and By-Laws. (Entity App. 29-33, D1-D5; Entity App. 34-51, D6-D23). The Busse Foundation is governed by a Board of Trustees. (Entity App. 34, By-Law § 2.01, D6). Lavern, Audrey, Jeff, LoriAnn and Lisa served as the original Trustees on the Board.

In 2004 a Busse Foundation Pledge ("Foundation Pledge") was prepared which indicated, among other things, that LoriAnn, Lisa, and Jeff would deposit the excess of their respective estates

[6] Lavern is the manager of LTB Financial Advisors. (Jeff Dep. Tr. Vol. I 66:12 – 16, Plfs. App. 137). LoriAnn and Lisa have no personal interests or ability to participate in LTB Financial Advisors.

[7] On September 15, 2012, Jeff transferred his entire interest in BFLP to Michelle. (Jeff Dep. Tr. Vol. I 173:7 – 23, Plfs. App. 163). Michelle held Jeff's former personal interest in BFLP for several months prior to transferring the asset into the MMB Grantor Trust to utilize a significant portion of her $5 million estate tax exclusion that expired at the end of 2012. (Jeff Dep. Tr. Vol. I 199:20 – 201:10, Plfs. App. 170; Jeff Dep. Tr. Vol. I 62:13 – 24, Plfs. App. 136).

into the Busse Foundation under certain circumstances and with certain conditions. (*See* Plfs. Entity App. 394, Busse Foundation Pledge PLFS007375). In 2012, the Foundation Trustees, including LoriAnn and Lisa, entered into a Charitable Distribution Resolution Procedure ("Distribution Resolution"). (Entity App. 176-177, D356-57). 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. (Entity App. 176, Distribution ¶ 1, D356). Under the Distribution Resolution, any Busse Family Member can assign their contribution allocation to any other Busse Family Member in any proportion they choose. (Entity App. 176, Distribution Resolution ¶ 2, D356). 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. (Entity App. 176-177, Distribution Resolution ¶ 7, D356-357).

The final entity subject to the present controversy is the Lavern T. and Audrey F. Busse Irrevocable Trust Agreement dated April 15, 1991 ("Life Insurance Trust"), which owns a life insurance policy benefiting Lavern and Audrey's three children. (Petition ¶ 235). Lavern and Audrey appointed Jeff to serve as the Trustee of the Life Insurance Trust. (Def. App. 212 p. 1 of Life Insurance Trust, Def App. 235-36 p. 24-25 of Life Insurance Trust). In 2015, the policy was exchanged for three separate policies, one for each of Jeff, Lisa, and LoriAnn. (Petition ¶ 238). The life insurance policies only pay upon the second of Lavern and Audrey's passing. (Plfs. App. 782, 771 p.1 of LoriAnn's and Lisa's policies). The Life Insurance Trust provides, in part:

> The Trustee shall be under no obligation to pay the premiums, dues, assessments or other charges which may become due and payable with respect to any insurance coverage which may become owned by this Trust, nor to see that such payments are made, nor to notify the Grantors or any other person that such payments are or will become due, and the Trustee shall be under no liability to anyone in case such premiums, dues, assessments or other charges are not paid, nor for any result of the failure to make such payments. Neither the Grantors nor the Trustee shall be deemed, because of the terms of this Trust Agreement to have entered into any covenant to keep any such insurance coverage in force.

(Def. App. 214, Life Insurance Trust, Art. II. B, p. 3). If premium payments are missed, they can be "made up." (Def. App. 291, Plfs. App. 267, Mike Foley, May 11, 2016 E-mail Subj: "$0 Premium Analysis in year 2"). However, in the event that a premium is missed, the policy's duration decreases. (Plfs. App. 267, Mike Foley, May 11, E-mail Subj: "$0 Premium Analysis in year 2"; Plfs. App. 772, 783, p. 2 of each of LoriAnn's and Lisa's policies: "The impact of the CPG is reflected in the projection in years where the death benefit remains in force while the surrender value is zero.").

B. Background Relating to the Busse Family Dispute

In 2006 LoriAnn, Lisa, and Lisa's daughters invested in BFLP. Prior to LoriAnn, Lisa, and Lisa's daughters investing in BFLP, Plaintiffs allege Defendants told them that, other than highly appreciated stock for lifetime gifting, they should invest all of their remaining assets in BFLP for "more efficient investing." (Plfs. Answer to Interrogatory No. 10, Plfs. App. 47). Plaintiffs allege further that prior to investing in BFLP, Defendants told them that any member could request each year to have any portion of their capital account be distributed to them or they could invest additional principal and such distributions or additional investments would likely occur in January. (*Id.*). Following these alleged representations, Plaintiffs voluntarily invested significant amounts of their money into BFLP in 2006. (*Id.*). In particular, Lisa claims she deposited all of her daughters' individual and trust assets into BFLP. (*Id.*). In 2007, after LoriAnn, Lisa, and Lisa's daughters invested assets into BFLP, Plaintiffs allege Jeff indicated the annual withdrawal of principal by individual limited partners could not occur unless proportionate distributions were made to all partners because software that allowed non-proportionate distributions without precipitating a tremendous amount of accounting adjustments of BFLP partner ownership did not exist. (*Id.*). Jeff allegedly requested that Plaintiffs limit requests for principal distributions from BFLP to no more frequently than every two years due to "accounting complexities." (*Id.*). Plaintiffs' expert, Louis Mezzullo, opines "it is

inconceivable" that software programs capable of accounting for non pro rata withdrawals from BFLP "was not in existence" in 2007. (Plfs. App. 287, Louis Mezzullo's Expert Report p. 6).

In 2012 Jeff emailed Lavern and stated he wanted to acquire Lavern's 25% interest in BFA because when Lavern died "[Plaintiffs] might be able to take that opportunity to not count that 25 percent interest as a voting interest and take control" of BFA. (Jeff Dep. Tr. Vol. I 170:19 – 171:2, Plfs. App. 163). On September 15, 2012, Jeff and Lavern executed an assignment and consent form that transferred Lavern's 25% interest in BFA to Jeff. (Jeff. Dep. Tr. Vol. I 171:7 – 11, Plfs. App. 163). Jeff did not disclose to LoriAnn or Lisa that Lavern was going to transfer his 25% interest in BFA to Jeff prior to the transfer occurring. (Jeff. Dep. Tr. Vol. I 171:18 – 21, Plfs. App. 163). Jeff alleges he did not inform LoriAnn or Lisa that he was going to acquire Lavern's 25% interest in BFA because "[Plaintiffs] already knew" Lavern intended "to transfer his BFA to me upon his death," so the September 2012 transfer simply "accelerate[d] the plan that was already in place." (Jeff Dep. Tr. Vol. I 172:5 – 13, Plfs. App. 163).

In 2012 Lisa requested a distribution from BI to pay down her debt. (Plfs. App. 294). In an email dated May 15, 2012, Jeff told Audrey, Lavern LoriAnn, and Lisa that Lavern was willing to help facilitate a transaction that would allow BI to distribute $4 million to its shareholders. (*Id.*). In that same email, Jeff proposed "AB BI Note LP borrow $2.0MM from Lavern and $2.00MM from Audrey to fund the BI $4.0MM Loan." (Plfs. App. 295). Following this proposal, Jeff approached Lavern about investing in a new limited partnership rather than loaning money to AB BI to help facilitate the $4 million BI distribution: "one day [Jeff] came to me and said look, I'm setting up a limited partnership for my family, if you'd like, you can join me on that partnership, and if you do, you only have to put in 1. – or 3.2 million." (Laver Dep. Tr. Vol. I 87:2 – 7, Plfs. App. 223). Lavern testified that he needed to borrow money to help facilitate the $4 million BI distribution, so it was a "big benefit" to invest $3.2 million into a new limited partnership rather than loan AB BI $4 million. (Lavern Dep. Tr. Vol. I 87:7, Plfs. App. 223).

After Jeff approached Lavern about investing $3.2 million in a new limited partnership, Lavern and Audrey borrowed $3.2 million and invested the proceeds into MMB. (Plfs. App. 126, Lavern Depo. Tr. 24:16 – 25:18; Defs' Second Am. Ans. ¶ 71). Jeff and his family contributed $1.8 million to help form MMB. (*Id.*). 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. (Def. App. 210, Jeff's October 8, 2015 Answers to Interrogatories, Answer No. 15; Def. App. 297 Decl. ¶ 12). At that point, BI owed MMB $3.4 million in principal, plus thirty years of interest, and it owed AB BI $1.6 million, plus thirty years of interest. (Defs. Second Am. Ans. ¶¶ 76, 78). Of the cash loaned to BI, $4 million was distributed to its shareholders, including Plaintiffs and their Grantor Trusts. (Def. App. 11, 28, 297, Lavern Depo. Tr. 82:12-16; LoriAnn Depo. Tr. 124:6-23; Jeff Decl. ¶ 13-16). Approximately half of BI's $4 million distribution ended up inside the various Grantor Trusts. (Plfs. App. 300, PLFS0002091).

Following the $4 million BI distribution, Lavern exercised his retained "swap" power under the Grantor Trusts and substituted $3.4 million of his securities for cash held in the Grantor Trusts. (PLFS002090, Plfs. App. 299; D00018425, Plfs. App. 490). Plaintiffs allege Lavern substituted $3.4 million of his "poorly performing securities into the Grantor Trusts" for cash held in the Grantor Trusts. (Plfs. Resistance to Defandants' Motion for Summary Judgment Brief p. 6). After Lavern substituted a portion of his securities for cash held in the Grantor Trusts, Lavern was able to repay the $3.4 million loan that funded his initial investment in MMB, and he was almost on an even cash basis. (Plfs. App. 490, D0018425). Plaintiffs assert that Jeff engineered the loans to BI, an entity in which Plaintiffs have an interest, so BI would fund MMB, an entity in which Plaintiffs had no personal interests or ability to participate.[8] Plaintiffs assert further that Jeff engineered the loans to BI to bail

[8] As discussed *infra*, Lavern substituted his interests in MMB into all seven Grantor Trusts in the year 2014. (Plfs App. 810; Jeff Dep. Tr. 147:20 – 148:4, Plfs. App. 157).

Lavern out of numerous investment mistakes and to make Lavern's investment in MMB a cash-neutral event. According to Plaintiffs, following the formation of MMB and the subsequent loans to BI:

- Jeff's family's partnership, MMB, owned a revenue-generating loan of $3.4 million, and BI was obligated to pay $5 million, plus thirty-years of interest, directly or indirectly, to Jeff's family's partnership.
- The Grantor Trusts were left with Lavern's worst-performing stocks that had declined in value, and Lavern had received his initial $3.4 million investment back as "substituted" securities.
- BI, in which Plaintiffs had a significant interest, and their Grantor Trusts, were left with debt (BI) and poorly performing securities (Grantor Trusts).
- Lavern was allowed to turn his worst investment decisions into $3.4 million, plus a discounted asset in his MMB interest.
- Jeff's family received (control over) $5 million plus interest, plus a discounted asset, in its MMB interest for only a $1.8 million investment.

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. (Plfs. App. 479). 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. (Plfs. App. 479). 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 30 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. Jeff circulated a proposed Stock Option along with the October 16, 2012 Memo and the Stock Option was approved by LoriAnn and Lisa as board members of BI and executed as between Jeff and BI. 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.

Jeff, as trustee of the Grantor Trusts, distributed all BI voting shares held by the Grantor Trusts to the Grantor Trusts' respective beneficiaries on October 30, 2012. (Plfs. App. 455). Jeff first informed LoriAnn and Lisa of the distribution on November 14, 2012. (*Id.*) 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). Jeff further informed LoriAnn and Lisa on November 14, 2012, 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." (Plfs. App. 455).

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 passing pursuant to Article VI(E) of the Grantor Trust document. According to Jeff and Lavern, the Stock Option's failure to vest was a "drafting error."

The family held various meetings during May and June of 2013. During the course of these meetings, Jeff informed LoriAnn and Lisa that he had acquired Lavern's 25% interest in BFA. (Jeff Dep. Tr. Vol. I 174:17 – 175:4, Plfs. App. 164). Upon receiving this information, Jeff testified that Plaintiffs "were not happy" and demanded to receive an equal percentage of Lavern's former interest in BFA. (Jeff Dep. Tr. Vol. I 175:10 – 17, Plfs. App. 164). Contrary to Jeff's understanding that Lavern intended to transfer his interest in BFA to Jeff upon his death, LoriAnn and Lisa allege they "were told by Lavern that if he would ever transfer his BFA interest, then each of his three children would receive one-third of his 25% interest." (Petition ¶ 53). LoriAnn and Lisa allege further that, during the course of these meetings, Jeff stated 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. (Plfs. Answer to Interrogatory No. 10, Plfs. App. 48).

Thereafter, during a September 2013 family meeting, Jeff asked LoriAnn and Lisa to approve a new stock option that would allow him to regain majority control of BI. LoriAnn and Lisa refused to sign a new option. (Lavern Dep. Vol I 48:1 – 13, Def. App. 7; Petition, ¶ 94). In response, Jeff told LoriAnn and Lisa that there would be consequences unless control of BI was returned to him. (Jeff

Dep. at 113:9 – 23, Plfs App. 148). According to LoriAnn and Lisa, Jeff also stated that plans may change in terms of distributions to LoriAnn and Lisa from BFLP, and "fixing" BI must come first. (Plfs. Answer to Interrogatory No. 10, Plfs. App. 48).

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.[9] 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. At a family meeting on August 28, 2014, Lavern told LoriAnn "there are consequences to things you do and as long as you can live with the consequences I don't have a problem with that." (Plfs. App. 793; *See also* Plfs. App. 150-51 Jeff Dep. Tr. 121:17 – 122:6).

On August 31, 2014, Lavern took $2.65 million that AB BI loaned his personal trust and substituted that amount of cash for the BI non-voting stock in LoriAnn and Lisa's daughters' Grantor Trusts. (Plfs. App. 802; Defs. Response to Plfs. SAF ¶ 37). Lavern testified that he swapped the BI non-voting stock for cash out of the LoriAnn and Lisa's daughters' Grantor Trusts because he "was mad, very mad," and "wanted to do something" in the form of retribution after LoriAnn and Lisa refused to put him on the BI Board. (Lavern Dep. Vol. II at 138:L12 – 139:L20, Plfs App. 226). Jeff testified that Lavern removed the BI non-voting stock from LoriAnn and Lisa's daughters' Grantor Trusts because LoriAnn and Lisa denied Lavern's request to fill the vacant BI Board position. (Jeff Dep. Tr. Vol I 122:13 – 125:18, Plfs. App. 151). 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—almost half of the cash Lavern

[9] Lavern left the BI Board at some point in between the BI 2002 report and the 2004 report, when he transferred his entire interest in BI to the seven Grantor Trusts. (Lavern Dep. Tr. Vol. I 16:19 – 17:10, Plfs App. 40; 2002 and 2004 BI Biennial Reports from Iowa Secretary of State, Plfs App. 188-191).

had substituted into LoriAnn and Lisa's daughters' Grantor Trusts in the BI non-voting stock substitution.[10] (Plfs. App. 810; Jeff Dep. Tr. 147:20 – 148:4, Plfs. App. 157).

On September 11, 2014, Audrey and Lavern entered into an agreement entitled Busse Foundation Assignment/Allocation Agreement ("Foundation Allocation Agreement"). (Entity App. 178). 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. Jeff testified that a close analysis of the Foundation Allocation Agreement reveals that Lavern and Audrey assigned "in excess of 90 percent" of their allocation percentage to Jeff upon the last of their deaths. (Jeff Dep. Tr. Vol. I 124:5 – 125:6, Plfs. App. 151; Jeff Dep. Tr. Vol. II 313:2 – 11, Plfs. App. 95).

On October 6, 2014, Jeff's three daughters (but not Lisa's three daughters) were added to the Busse Foundation Board of Trustees. (Plfs. Entity App. 329-30). Jeff's daughters were added the Busse Foundation Board of Trustees because "[Lavern] did not want to happen to the foundation what appears to have just happened with Busse Investments with regard to the voting." (Jeff Dep. Tr. Vol. I 125:12 – 15, Plfs. App. 151). Lisa's daughters were not considered for the Busse Foundation Board of Trustees because at that point Lavern, Audrey, and Jeff had decided that Jeff's family would have control over the Busse Foundation. (Jeff. Dep. Tr. Vol. II 317:22 – 318:6, Plfs. 96).

In addition to the conduct discussed above, Plaintiffs allege Defendants have 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

[10] LoriAnn and Lisa's daughters' Grantor Trusts paid approximately $588,850 in total for their combined 29.5% interest in MMB. (Plfs. App. 810).

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; (4) Defendants have threatened to remove Plaintiffs from the Busse Foundation Board of Trustees; (5) Jeff engineered a series of loan transactions in 2014 and 2015 that have resulted in additional financial detriment to Plaintiffs; and (6) Jeff, acting as the Trustee of the Life Insurance Trust, has refused to make premium payments on Plaintiffs' life insurance policies and has refused to accept funds from Plaintiffs in order to make such payments.

On April 29, 2015, Plaintiffs filed a Petition at Law asserting thirteen counts against the various defendants in Linn County Case No. LACV083022. On June 9, 2016, Plaintiffs filed a Supplement to their Busse Petition, which added a new count against Jeff relating to his conduct as Trustee for the Life Insurance Trust. Defendants seek partial summary judgment with respect to the following counts: (a) Count I – Violation of Grantor Trust (Lavern) for a lack of any duty owed by Lavern to beneficiaries of the trusts; (b) Count VII – BFA Breach of Fiduciary Duty (Jeff) for a lack of evidence of harm in the record; (c) Count VIII – Oppressive Conduct of BFA, BFLP, and AB BI (Jeff) for a lack of evidence of harm in the record; (d) Count IX – Declaratory Judgment-BFLP (Jeff) for the lack of grounds in the BFLP Partnership Agreement giving rise to a right to challenge Lavern's optional capital contribution; (e) Count X – BI Breach of Fiduciary Duty (Jeff) for a lack of evidence of harm in the record; (f) Count XI – Negligent Misrepresentation (Jeff) for a lack of evidence of harm in the record and because Jeff was not in the business of supplying information; (g) Count XIII – Declaratory Judgment-Busse Foundation for a lack of grounds in Busse Foundation bylaws or its Charitable Distribution giving rise to a right to declaratory relief; (h) Count XIV – Breach of Fiduciary Duty re: Life Insurance Trust (Jeff) for a lack of a duty to provide notice to beneficiaries and for a lack of evidence of harm in the record as a result of the ability of beneficiaries to make catch-up payments; (i) Count IV – Undue Influence (Jeff) because no reasonable jury could find that Lavern was

susceptible to undue influence; and (j) Count XII – Aid and Abet (Lavern) to the extent that it relies on any count for which Defendants are entitled to summary judgment in their favor.

Applicable Law and Analysis

I. Summary Judgment Standard

A motion for summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3) (2015). The moving party carries the burden of proving the absence of a fact issue. *McIlravy v. North River Ins. Co.*, 653 N.W.2d 323, 328 (Iowa 2002) (citations omitted). "If reasonable minds could differ on how to resolve an issue, then a genuine issue of material fact exists." *Id.* However, speculation and mere allegations are not material facts. *Hlubek v. Pelecky*, 701 N.W.2d 93, 95-96 (Iowa 2005) (citations omitted).

In ruling on a motion for summary judgment, the court must look at the facts in a light most favorable to the nonmoving party. *Crippen v. City of Cedar Rapids*, 618 N.W.2d 562, 565 (Iowa 2000). The court must also consider on behalf of the nonmoving party every legitimate inference that can be reasonably deduced from the record. *Id.* "An inference is legitimate if it is 'rational, reasonable, and otherwise permissible under the governing substantive law.'" *Smith v. Shagnasty's Inc.*, 688 N.W.2d 67, 71 (Iowa 2004) (quoting *McIlravy*, 653 N.W.2d at 328). But an inference based on "speculation or conjecture" is not to be indulged. *Id.*

If summary judgment cannot be granted with regard to the entire action, the Court may grant partial summary judgment on the material facts that "exist without substantial controversy and [determine] what material facts are actually and in good faith controverted." Iowa R. Civ. P. 1.981(4). The court will deem these material facts that are not controverted as established at trial. *Id.*

II. Count I – Violation of Grantor Trust (Lavern)

Defendants assert that Plaintiffs cannot prevail as a matter of law on Count I – Violation of Grantor Trust against Lavern because they cannot establish Lavern owed them any duty in exercising his retained right to swap assets in the Grantor Trusts.

Iowa Code section 633A.4501 sets forth an action for breach of trust when a trustee violates a duty owed to the beneficiary. Iowa Code section 633A.4501 does not recognize any duty owed by the settlor. IOWA CODE § 633A.4501 (2015) ("A violation by a trustee of a duty the trustee owes a beneficiary is a breach of trust."); *see also Alpert v. Riley*, 274 S.W.3d 277, 292 (Tex. App. 2008) ("Unless the trust instrument expressly provides otherwise, a settlor has no duty to manage trust property, and the trustee alone is responsible as a fiduciary if he allows the settlor to mismanage trust property to the detriment of the trust."); Bogert's Trusts and Trustees, *Status of Settlor after Trust Creation*, § 42 (2015) ("After a settlor has completed the creation of a trust, the settlor is not, with a few exceptions noted below, and except as expressly provided otherwise by the trust instrument or by statute, in any legal relationship with the beneficiaries or the trustee, and has no rights, liabilities or powers with regard to the trust administration.").

Lavern's retained right to initiate an asset swap expressly disavows any fiduciary obligations to beneficiaries:

> …Grantor shall have the power in Grantor's individual (nonfiduciary) capacity to reacquire any asset transferred to the Trustee by Grantor or otherwise included within the Trust estate of the Trust or any such separate Trust by substituting other property of an equivalent value for such asset or assets.

(Def. App. 53, LTB 2002 Irrevocable Trust U/D/O December 20, 2001, Art. VI, B). The terms of the Grantor Trusts entitle Lavern to exercise his retained right to swap assets in an individual, nonfiduciary capacity. *See* IOWA CODE § 633A.1105 (2015) ("The terms of a trust shall always control and take precedence over any section of this trust code to the contrary. If a term of the trust modifies or makes any section of this trust code inapplicable to the trust, the common law shall apply to any issues raised by such term.").

Plaintiffs contend they can maintain a breach of trust claim against Lavern because Jeff, as trustee of the Grantor Trusts, has failed to take action to block or unwind Lavern's substitutions that are for allegedly inequivalent value. To bolster this contention, Plaintiffs point to Restatement (Third) of Trusts § 107(2)(b), which provides a beneficiary may maintain a proceeding related to the trust or its property against a third party if "the trustee is unable, unavailable, unsuitable, or improperly failing to protect the beneficiary's interest." Restatement (Third) of Trusts § 107(2)(b) (2012). Plaintiffs assert Jeff is unsuitable to protect the beneficiaries' interests with respect to Lavern's "substitution power" because Jeff pressured the company hired to value the Grantor Trusts' shares of BI non-voting stock, Management Planning, Inc. ("MPI"), to reduce its valuation of the BI stock for the purpose of Lavern's Grantor Trust substitution. To bolster this contention, Plaintiffs point to 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." (Plfs. App. 487). After Jeff expressed dissatisfaction with the discount MPI applied to BI stock in its 2014 appraisal, MPI increased the discount slightly, which lowered the price per share of BI in Lavern's Grantor Trust substitution. (Jeff. Dep. Tr. Vol. II 255:5 – 257:3, Plfs. App. 80-81). According to Plaintiffs, Jeff obtaining a reduced valuation of the BI stock in the Grantor Trusts was adverse to the fiduciary obligations he owed to the beneficiaries of the Grantor Trusts.

Plaintiffs assert further that there are at least four questions of material fact as to whether Lavern substituted assets of equivalent value in LoriAnn and Lisa's daughters' Grantor Trusts. First, Plaintiffs challenge the valuation report Jeff relied upon because Jeff purportedly pressured MPI, on Lavern's behalf, to reduce the BI stock valuation. Second, with respect to the substitution of cash for BI non-voting stock, Plaintiffs allege Jeff improperly relied on a valuation of BI shares that incorporated minority and lack of marketability discounts, which valued the BI stock at "fair market

value," or what a non-family member buyer in the open market would value it at, rather than its proportionate value to the value of BI as a whole. Third, Plaintiffs allege Jeff failed to account for BI's history of annual distributions and its quality as an investment, which undervalued BI and allowed Lavern to "substitute" an inequivalent amount of cash for the BI non-voting stock. Fourth, Plaintiffs allege Lavern, with Jeff's assent, overvalued the interests in MMB that he substituted into the Grantor Trusts for cash because MMB's projected rate of return for the foreseeable future is 0%, and at least cash generates "a nominal 2% rate of return." (Nielsen Apr. 8, 2016 Rep. 6 – 7, Plfs. App. 803-804; Jeff Dep. Tr. Vol. 1 127:3 – 128:18, Plfs. App. 152).

The Court finds Plaintiffs' resistance unpersuasive. Restatement (Third) of Trusts § 107(2)(b) does not give rise to any duty; it merely states necessary conditions for a beneficiary to maintain a claim against a third party. In other words, Restatement (Third) of Trusts § 107(2)(b) does not delineate the constituent elements of a breach of trust claim; it simply confers standing upon a trust beneficiary to bring a breach of trust claim against a third person under certain circumstances. Plaintiffs have failed to identify any duty Lavern owed the Grantor Trusts' beneficiaries in exercising his retained swap power. Restatement (Third) of Trusts § 107(2)(b) does not give rise to any duty. Likewise, Lavern has no contractual obligation to the beneficiaries, because the trust is not a contractual agreement executed by Lavern and the beneficiaries. In support of their claim against Lavern, Plaintiffs can only point to instances where Jeff allegedly failed to safeguard the Grantor Trusts from substitutions of inequivalent value. An alleged breach of a trustee's fiduciary duty, however, is immaterial to a settlor's lack of duty. *See* IOWA CODE § 633A.4501(1) (2015) (a breach of trust claim requires "a violation by a trustee of a duty the trustee owes a beneficiary"); *Alpert*, 274 S.W.3d at 292 ("Unless the trust instrument expressly provides otherwise, a settlor has no duty to manage trust property, and the trustee alone is responsible as a fiduciary if he allows the settlor to mismanage trust property to the detriment of the trust.").

All that remains with respect to whether Lavern owed the Grantor Trusts' beneficiaries fiduciary duties in exercising his retained swap power are the explicit terms of the Grantor Trusts. The terms of the Grantor Trust expressly disavow Lavern owing the Grantor Trusts beneficiaries any fiduciary duty in exercising his retained swap power because Lavern exercised the power in an individual, "nonfiduciary" capacity. (Def. App. 53, LTB 2002 Irrevocable Trust U/D/O December 20, 2001, Art. VI, B). Plaintiffs have identified no common law authority that imposes fiduciary obligations on Lavern contrary to the express provisions of the Grantor Trusts. IOWA CODE § 633A.1105 (2015) ("The terms of a trust shall always control and take precedence over any section of this trust code to the contrary. If a term of the trust modifies or makes any section of this trust code inapplicable to the trust, the common law shall apply to any issues raised by such term."). Because Plaintiffs have failed to identify any authority that would support the imposition of a fiduciary duty on Lavern, and the Grantor Trusts expressly disavow Lavern owing the beneficiaries any fiduciary duty in exercising his retained swap power, there is no genuine issue of material fact which, if resolved in Plaintiffs favor, would support a finding that Lavern owed the Grantor Trusts' beneficiaries fiduciary duties in exercising his retained swap power. There is no basis for a breach of trust claim without a violation of a duty owed to a beneficiary. IOWA CODE § 633A.4501(1) (2015). Accordingly, Plaintiffs have failed to state a breach of trust claim against Lavern, and Lavern is entitled to summary judgment with respect to Count I – Violation of Grantor Trust as a matter of law.

III. Counts IV, VII, VIII, X, XI and XII – Damages

Next, Defendants assert Plaintiffs lack harm or their damages are overly speculative for the counts in which Plaintiffs seek compensatory damages—Counts IV, VII, VIII, X, XI and XII. According to Defendants, even when viewing the evidence in a light most favorable to Plaintiffs, counts VII, VIII, X, XI, and part of counts IV and XII fail as a matter of law because Plaintiffs have suffered no harm, and any harm they claim they will suffer in the future is purely speculative.

To maintain standing in Iowa, plaintiffs "must (1) have a specific personal or legal interest in the litigation and (2) be injuriously affected." *Godfrey v. State*, 752 N.W.2d 413, 418 (Iowa 2008) (citations omitted); *Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 475 (Iowa 2004). "The second requirement—the plaintiff must be injuriously affected—means the plaintiff must be 'injured in fact.' This requirement recognizes the need for the litigant to show some 'specific and perceptible harm' from the challenged action, distinguished from those citizens who are outside the subject of the action but claim to be affected." *Godfrey*, 752 N.W.2d at 419 (citation omitted). Therefore "the injury cannot be 'conjectural' or 'hypothetical,' but must be 'concrete' and 'actual or imminent.' " *Godfrey*, 752 N.W.2d at 423; *see also Sanchez v. State*, 692 N.W.2d 812, 821 (Iowa 2005) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted)).

The necessity of non-speculative injury is a rudimentary requirement that serves as both a practical and technical bar to the maintenance of a claim. The principle sometimes arises in the context of a statute of limitations discovery rule dispute. In that context, Iowa courts have recognized that "no cause of action accrues under Iowa law until the wrongful act produces injury to the claimant." *Collins v. Fed. Land Bank of Omaha*, 421 N.W.2d 136, 140 (Iowa 1988); *Starke v. Horak*, 260 N.W.2d 406, 408 (Iowa 1977) ("Damage, of course, had to exist or [the plaintiffs] had no cause of action."); *Wolfswinkel v. Gesink*, 180 N.W.2d 452, 456 (Iowa 1970) ("There must be actual loss to the interest of another before a cause of action accrues. Generally, the wrong or negligence of the party charged gives in itself no right of action to anyone. The injury is traceable to the original wrongful or negligent act, but until this act produces injury to claimant's interest by way of loss or damage, no cause of action accrues.").

Purely speculative harm, likewise, is not subject to recovery. *Hammes v. JCLB Properties, LLC*, 764 N.W.2d 552, 558 (Iowa Ct. App. 2008) (citing *Northrup v. Miles Homes, Inc.*, 204 N.W.2d 850, 857 (Iowa 1973)). Under Iowa law, the plaintiff bears the burden of establishing a claim for damages with some reasonable certainty and for demonstrating a rational basis for determining their amount.

Conley v. Warne, 236 N.W.2d 682, 687 (Iowa 1975). Iowa courts, however, "take a broad view in determining the sufficiency of evidence of damages." *Westway Trading Corp. v. River Terminal Corp.*, 314 N.W.2d 398, 403 (Iowa 1982). Iowa courts also recognize a distinction between proof of the fact that damages have been sustained and proof of the amount of those damages. *Olson v. Nieman's Ltd.*, 579 N.W.2d 299, 309 (Iowa 1998). As the Supreme Court of Iowa noted in *Northrup v. Miles Homes*, *Inc.*, 204 N.W.2d 850, 857 (Iowa 1973):

> If it is speculative and uncertain whether damages have been sustained, recovery is denied. If the uncertainty lies only in the amount of damages, recovery may be had if there is proof of a reasonable basis from which the amount can be inferred or approximated.

Thus, "[w]hile it may be hard to ascertain…a loss with preciseness and certainty, the wronged party should not be penalized because of that difficulty." *Bangert v. Osceola County*, 456 N.W.2d 183, 190 (Iowa 1990).

Likewise, an award of punitive damages requires a showing that the plaintiff has sustained actual damage. *Engel v. Vernon*, 215 N.W.2d 506, 517 (Iowa 1974). Harm, for purposes of awarding punitive damages, "has been established when the record shows actual damage has been suffered, even though for one reason or another the damages have not been computed or awarded." *Pringle Tax Serv., Inc. v. Knoblauch*, 282 N.W.2d 151, 154 (Iowa 1979). Therefore, "a failure to award actual damages will not bar exemplary damages when actual damage has in fact been shown." *Id.*

Defendants argue Plaintiffs lack harm or their damages are overly speculative with respect to Counts IV, VII, VIII, X, XI and XII—the counts in which Plaintiffs seek compensatory damages. First, Defendants argue Plaintiffs have failed to articulate any harm with respect to the formation of MMB and the subsequent loans MMB made to BI. Second, Defendants argue Plaintiffs have failed to articulate any harm with respect to the management of BFA, BFLP, and AB BI. Third, Defendants argue Plaintiffs have failed to articulate any harm attributable to Jeff with respect to the alleged shift in future control of Busse Foundation gifting power. The Court will address these arguments in turn.

A. Counts X and XII: Plaintiffs' claims related to Defendants' alleged self-dealing in favor of MMB to the detriment of BI

As outlined above, MMB, shortly after its formation, loaned its entire $5 million in initial investments 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 and the other for $1.8 million (collectively referred to as "the MMB loans"). The MMB loans are identical, but for the amounts loaned. The term of each note is thirty years, and the interest rate is 2.2%. 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." BI may prepay the MMB loans without penalty. When BI acquired the MMB loans, Plaintiffs were shareholders of BI, but had no personal interests or ability to participate in MMB.

Documents authored by Jeff show that if BI repaid the loan to MMB in 2017 it would result in a "40%" "pretax yield-to-maturity" for MMB. (Plfs. App. 769, MMB Family LP "purchase" – Questions & Answers). However, if BI repaid the MMB loans consistent with the loans' terms: thirty years of interest payments, with a balloon principal payment in 2042, the "pretax yield-to-maturity" would only be "9.16%." *Id.* Jeff characterized the MMB loans as "the MMB plan," which LoriAnn could "sabotage" given her and Lisa's control over BI. (Jeff dep. Tr. Vol. I 162:22 – 163:8, Plfs. App. 161).

Lavern testified that the Busse family waited to pay off loans between family entities until the IRS could no longer challenge the transaction. (Lavern Dep. Tr. Vol. I 84:20 – 85:7, Plfs. App. 222). Lavern also testified that the plan was for BI to pay back the MMB loan in 2017, when Defendants believed the IRS could no longer challenge the transaction. (Lavern Dep. Tr. Vol. II 142:25 – 143:16, Plfs. App. 227). Lavern testified further that if the MMB loans were paid back according to their terms: interest for 30 years and then a balloon payment of the principal in 2042, "it was not going to be a very good deal." *Id.* Lavern agreed with Jeff that Plaintiffs, now in control of BI, could "screw

up…the loan that was made to Busse Investments." (Lavern Dep. Tr. Vol. II 142: 23-24, Plfs. App. 227). Lavern exercised his retain swap power to substitute MMB interests into LoriAnn's Grantor Trust because he "wanted Lori to be part of that, and that way if it [the MMB loans] was not a good deal, it was also not a good deal for her." (Lavern Dep. Tr. Vol. II 142:2 – 143:16, Plfs. App. 227).

Plaintiffs assert two claims that are ultimately aimed at challenging the formation of MMB and the MMB loans. Plaintiffs assert Jeff, as an officer and director of BI, breached fiduciary duties he owed to Plaintiffs as BI shareholders (Count X), and to the extent Jeff did not exert undue influence, Lavern was complicit with Jeff (Count XII).

Defendants move for summary judgment on Counts X and XII, as they relate to the formation of MMB and the MMB loans, for lack of damages. Defendants note that Lavern did not enter into any agreements nor did he have any duty to loan funds, individually or via separate legal entity, to BI. Defendants note further that any reduction of share value in BI resulting from the MMB loans was fully offset by the economic benefit BI's shareholders received as a result of BI's $4 million distribution.[11] To the extent Plaintiffs assert the MMB loans diminish BI's profitability and ability to make distributions to shareholders, Defendants argue Plaintiffs' long-term harm is purely speculative as they fail to offer any comparison of the thirty-year costs and benefits of the MMB loans.

Plaintiffs do not dispute that the economic benefit BI's shareholders received as a result of BI's $4 million distribution fully offset any reduction of share value in BI resulting from the MMB loans. Plaintiffs only argument in resistance to summary judgment, with respect to the MMB loans, is that the MMB loans saddled BI with long-term debt obligations, which diminish BI's profitability and ability to make distributions to its shareholders.[12] To bolster this allegation, Plaintiffs attached a thirty-

[11] In their Amended Initial Disclosures, Plaintiffs allege the MMB loans resulted in a $0.14 per share reduction in value of BI between 2012 and 2014. (Def. App. 182, Depo. Ex. 73. 73, Plaintiffs' August 25, 2015, Amended Initial Disclosures). The per share value to shareholders resulting from BI's $4 million distribution, however, was $0.216 per share. (Def. App. 297, Jeff Decl. ¶ 15, BI had just over 18.519 million shares outstanding at the end of 2012. $4MM/18.519MM shares = $0.216/share). Therefore, the net gain resulting from the MMB loans and subsequent $4 million distribution to BI shareholders was $0.076 per share.

[12] On November 10, 2016, prior to the Discovery Deadline in this case, Plaintiffs supplemented their response to Interrogatory No. 19, Defendants' interrogatory requesting that Plaintiffs identify their damages. Plaintiffs' supplemented

year amortization schedule to their resistance. (Plfs. App. 768). The thirty-year amortization schedule indicates BI will repay $2.24 million in interest alone at the end of the MMB loans, plus the additional $3.4 million in principal, for a total of more than $5.64 million. (*Id.*).

The Court finds Plaintiffs' disclosure of the interest BI could pay on the MMB loans insufficient to establish either the fact of damage or a reasonable basis from which damages can be inferred or approximated. Plaintiffs have failed to provide any calculation demonstrating whether BI has generated revenue with the money loaned exceeding the interest accrued thus far, let alone whether BI will generate revenue using the money exceeding the interest that could accrue up to the amounts disclosed. Plaintiffs acknowledge that "it is an open question of fact as to whether the [MMB] loans ultimately harm [them] as shareholders of BI." (Plfs. Resistance to Defs. Motion to Strike Plfs. Supp. App. p. 6). Plaintiffs acknowledge further that it is "pure speculation" whether BI will generate revenue from the MMB loans "so as to outpace the interest paid." (*Id.*). Because it is uncertain whether BI will generate revenue from the MMB loans in excess of the interest paid on the MMB loans, there is no reasonable basis from which a fact finder could infer or approximate any damages to Plaintiffs from the MMB loans. *See Tredrea v. Anesthesia & Analgesia, P.C.*, 584 N.W.2d 276, 288 (Iowa 1998) (finding any income postdating end of hospital's contract for exclusive anesthesia services with medical group was too speculative to allow recovery by independent anesthesiologists on their claim for future damages against hospital); *Data Documents, Inc. v. Pottawattamie County*, 604 N.W.2d 611, 617 (Iowa 2000) (finding that damages were too speculative where the plaintiff established only the unpaid contract price but did not present proof on the market price of the goods it had produced or the expenses saved from the defendant's breach). Because there is no reasonable basis to infer or approximate Plaintiffs' damages, if any, as shareholders of BI with respect to the MMB

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response to Interrogatory No. 19 identifies damages related to BI's long-term interest payments on the MMB loans and affixes specific dollar amounts to the interest BI will pay if the MMB loans are paid over the span of thirty years. Accordingly, Defendants reliance on *Lawson v. Kurtzhals*, 792 N.W.2d 251 (Iowa 2010) for the proposition that Plaintiffs are held to the reduction in BI share value resulting from the MMB loans as their basis for damages is unavailing. *See Lawson v. Kurtzhals*, 792 N.W.2d 251, 258 (Iowa 2010) ("The discovery deadline passed with no supplementation of Lawson's prior answers.")

loans, Defendants are entitled to summary judgment on Counts X and XII, as they relate to compensatory damages and punitive damages stemming from the MMB loans, for overly speculative damages and uncertainty of actual harm.

In reaching this conclusion, the Court has considered Plaintiffs' argument that the fact finder can infer Plaintiffs are harmed by the MMB loans because the loans diminished BI's balance sheet and the equivalent value Lavern had to pay Plaintiffs' Grantor Trusts in the "swap" for BI non-voting stock. The Court finds this argument unpersuasive because it overlooks the economic benefit the Grantor Trusts received from BI's $4 million distribution, which fully offset any reduction of share value in BI resulting from the MMB loans.

In reaching this conclusion, the Court has also considered Plaintiffs' argument that the MMB loans are part of a scheme to divert BI's operating income from shareholders to illiquid entities under Jeff's control, such as MMB. According to Plaintiffs, Jeff has engineered "a backup plan to keep BI saddled with debt over the long-term in the event that BI prepays its loan to MMB." (Plfs' Resistance p. 25). Specifically, on March 31, 2015, LTB Family Limited Partnership ("LTB Family LP")[13] loaned $3,425,000 to BFLP at an interest rate of 2.19% through December 31, 2018[14] ("BFLP Loan"). (Plfs. App. 501). The BFLP Loan is structured so that the note can be assigned to BI, and then ultimately to any BI shareholders, including Jeff. (Plfs. App. 501-505). If BFLP assigns its obligations to BI or MMB under the BFLP Loan, the interest rate would remain at 2.19%. (Plfs. App. 501, 503). However, if BFLP does not assign its obligations to BI or MMB under the BFLP Loan, then, on May 1, 2021, the interest rate increases to "the high prime interest rate published in the Wall Street Journal plus 3%." (Plfs. App. 501). If BFLP or BI prepays the BFLP Loan, MMB may elect to take the payment and put itself under an obligation to repay the debt to LTB Family LP at a rate of 2.19%. (Plfs. App. 502-03).

[13] LTB Family LP formed in 2015 and is not a party to this case. Jeff is a manager of LTB Family LP. (Defs. Second MSJ App. 36). Plaintiffs have no interest or ability to participate in LTB Family LP.

[14] On August 31, 2016 BFLP and LTB Family LP amended the BFLP Loan. One of the amendments lowered the initial interest rate to 1.9%. Another amendment extended the date on which BFLP's interest would increase to May 1, 2021.

According to Plaintiffs, because the shareholders of BI are also limited partners of BFLP, the BFLP Loan presents an ultimatum: BI shareholders accept the BFLP Loan or face a reduction in the value of their limited partnership interests in BFLP as a consequence of BFLP paying a higher interest rate. Plaintiffs' expert, Lou Mezzulo, opines the BFLP Loan "contains terms that [he] has never seen in a promissory note in my 40 years of practice as an estate and business planning attorney." (Mezzullo Jul. 7, 2016 Supp. Rep. 2, Plfs. App. 291). Noting the interest-rate hike, assignability to MMB, and assignability to BI and then its shareholders, Mr. Mezzulo concluded that "Jeff will end up with $3,425,000 in cash and will be obligated to pay only interest until March 30, 2045 at a 2.19% rate. This is just another example of Jeff's taking extremely complicated measures to benefit himself and his family to the detriment of LoriAnn, Lisa, and Lisa's descendants." (*Id.*).

Plaintiffs allege further that Jeff used his position as trustee of the Grantor Trusts to deplete LoriAnn's and Lisa's children's Grantor Trusts of cash and securities—but not his daughters' Grantor Trusts—to fund the BFLP Loan.

Although the escalating interest rate provision coupled with the assignability of the BFLP Loan are certainly highly unusual terms, the possibility of the BFLP Loan harming BI is insufficient to provide a reasonable basis from which a fact finder could infer or approximate any injury to Plaintiffs as shareholders of BI. Like the MMB loans, there is no basis to assert BFLP or BI will be harmed by a 2.19% interest rate. Furthermore, the May 1, 2021 assignment trigger date has not occurred, and BI has not been presented the opportunity to take assignment of the BFLP Loan. The only alleged harm relating to the BFLP Loan that is presently measureable relates to Jeff's conduct as trustee of the Grantor Trusts. Jeff's actions as trustee for the Grantor Trusts, however, have no bearing on whether Plaintiffs, as shareholders of BI, sustained measurable damages from Jeff's actions as an officer and director of BI.

Because there is no reasonable basis to infer or approximate Plaintiffs' damages, if any, as shareholders of BI with respect to the BFLP Loan, Defendants are entitled to summary judgment on

Counts X and XII, as they relate to compensatory damages and punitive damages stemming from the BFLP Loan, for overly speculative damages and uncertainty of actual harm.

B. Plaintiffs' claims related to the management of BFA, BFLP, and AB BI (Counts IV, VII, VIII, X, XI, and XII)

Plaintiffs assert several claims that are ultimately aimed at challenging the management of BFA, BFLP, and AB BI. The claims do so by asserting various torts relating to control of the General Partner of BFLP and AB BI, BFA, and duties allegedly owed as part of the operation of those entities or otherwise. According to Defendants, the backdrop to each of these claims, set out in Counts IV, VII, VIII, X, XI, and XII, demonstrates that Plaintiffs suffered no harm and any damages related to BFLP and AB BI distributions are, at best, overly speculative.

1. Counts IV, VII, VIII, X, XI, and XII: Distributions from BFLP and AB BI

First, Defendants allege Plaintiffs cannot establish damages for any cause of action premised on allegedly inadequate distributions from BFLP and AB BI. Defendants assert Plaintiffs' claims relating to inadequate distributions from BFLP and AB BI fail because the BFLP and AB BI Partnership Agreements exclusively control distribution from these entities, and the Partnership Agreements do not guarantee any particular amount or frequency of distributions. Defendants assert further that Plaintiffs' claims relating to inadequate distributions from BFLP and AB BI fail because the actual distributions from BFLP and AB BI have far exceeded these entities' collective operating income. The Court will address Defendants' arguments with respect to BFLP and AB BI's distributions in turn.

a. Discretionary clauses related to distributions in the BFLP and AB BI Partnership Agreements

The BFLP and AB BI Partnership Agreements expressly state that distributions from these entities are discretionary:

> Subject to Article XII and other provisions of this Agreement, Cash may be distributed at the sole discretion of the General Partner among the Partners in pro rata in accordance with their Sharing Ratios.

(Def. App. 87, BFLP Partnership Agreement, p. 24, Art. XI.A.; Def. App. 133, AB BI Partnership Agreement, p. 25, Art. XI.A)

> 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.

(Def. App. 88, BFLP Partnership Agreement, p. 25, Art. XII; Def. App. 134, AB BI Partnership Agreement, p. 26, Art. XII).

Although the BFLP and AB BI Partnership Agreements give Defendants, as BFA-appointed-managers of BFLP and AB BI, sole and absolute discretion in making distributions, the Partnership Agreements do not absolve Defendants of their duties of loyalty and good faith that are owed to the limited partners in each partnership. *See* IOWA CODE § 488.408 (2015). The duties of loyalty and good faith may not be eliminated pursuant to Iowa Code section 488.110. Moreover, the "discretionary" clauses cited by Defendants do not waive the fiduciary duties of loyalty and good faith that BFA and the BFA-appointed-managers of BFLP and AB BI owe the entities' limited partners. Thus, while BFA and BFA-appointed-managers of BFLP and AB BI have discretion to make distributions, the discretion is constrained by the fiduciary obligations of loyalty and good faith.

Furthermore, Plaintiffs have engendered a genuine dispute of material fact as to whether Jeff, acting as a BFA-appointed-manager of BFLP and AB BI, exercised his discretion in making distributions from BFLP and AB BI consistent with his fiduciary obligations of loyalty and good faith. In response to Interrogatory No. 10, LoriAnn and Lisa assert:

> Jeff stated during the 2013 annual meetings that 100% of the 2013 operating income from BFLP would be distributed because, to accommodate the appraisal of BFLP required for his estate planning, there would be no distribution of 2014 income. Weeks later, at the September 2013 meeting, Jeff stated there 'would be consequences,' plans may change in terms of distributions to LoriAnn and Lisa from BFLP, and "fixing" BI

> must come first…Thereafter,…[Jeff] withheld 2013 BFLP income distributions and specified he would not even discus LoriAnn and Lisa's needs with respect to the Grantor Trusts, ABBI, BFLP or the Dynasty Trusts until they provided Jeff with voting control over BI.

(Plfs. Answer to Interrogatory No. 10, Plfs. App. 48). Plaintiffs' answer to Interrogatory No. 10 is, to some extent, corroborated by Jeff's deposition testimony:

> **Q.** Okay. And do you recall saying at least generally at the meeting that – words to the effect decisions have consequences?
>
> **A.** Yes, I do believe I said something to that effect.
>
> **Q.** And what was your intent of – When you said that, what was the decision and what was the consequences that you were thinking that might occur from that decision?
>
> **A.** The decision was to yank control of Busse Investments away from me, which was the entity that I had spent my entire career building.

(Jeff Dep. at 113:9 – 23, Plfs App. 148). The Court is satisfied that this creates a genuine issue of material fact as to whether Jeff delayed or withheld distributions from BFLP and AB BI for reasons related to Plaintiffs' control of BI. If Jeff delayed or withheld distributions from BFLP and AB BI on the sole basis that Plaintiffs were exercising control over BI, this would support Plaintiffs' claim that Jeff breached fiduciary duties he owed to them and their Dynasty Trusts as limited partners of BFLP and AB BI. [15] Because there is a genuine issue of material fact as to whether Jeff, acting as a BFA-appointed-manager of BFLP and AB BI, exercised his discretion to make distributions consistent with his fiduciary obligations of loyalty and good faith, Defendants are not entitled to summary judgment as a matter of law by operation of the discretionary clauses related to distributions in the BFLP and AB BI Partnership Agreements.

b. Actual distributions from BFLP and AB BI

[15] The Court notes that the parties dispute whether Plaintiffs' Dynasty Trusts were properly admitted as Substitute Limited Partners in BFLP and AB BI. For reasons discussed *infra*, there is a genuine dispute of material fact as to whether Plaintiffs' Dynasty Trusts were properly admitted as Substitute Limited Partners in BFLP and AB BI.

Setting aside the discretionary clauses related to distributions in the BFLP and AB BI Partnership Agreements, Defendants assert Plaintiffs' claims relating to inadequate distributions from BFLP and AB BI fail because the actual distributions from BFLP and AB BI exceed the distributions Plaintiffs claim they anticipated.

According to Plaintiffs, "BFLP and AB BI should have made an annual distribution equal to at least 50% of the annual operating income of each company in each year in order to at least cover the tax obligations for that year." (Def. App. 193-195, 205-207, LoriAnn Busse's Answers to Defendants' First Set of Interrogatories, Interrogatory No. 19; Lisa Carpentier's Answers to Defendants' First Set of Interrogatories, Interrogatory No. 19). Defendants allege distributions from BFLP and AB BI have far surpassed BFLP and AB BI's collective operating income. (*See* Def. App. 295, Jeff Decl. ¶¶ 8-9). Defendants assert BFLP has generated $2,584,012 in operating income since its inception, and has distributed $6,156,987. (*Id.* at ¶¶ 2-4). Defendants assert AB BI has generated $990,927 in operating income since its inception, and has distributed $482,154. (*Id.* at ¶¶ 6-7). According to Defendants' calculations, BFLP and AB BI have collectively generated $3,574,939 in operating income and have collectively distributed $6,639,141. (*Id*. at ¶¶ 8-9). Having benefitted from millions of dollars in distributions, Defendants assert Plaintiffs have no basis to claim a different level of discretionary distributions was required.

While alluring at first blush, Defendants' argument improperly commingles Plaintiffs' claims relating to BFLP and AB BI, and neglects Plaintiffs' assertion that Jeff is using the excessive buildup of cash reserves in AB BI to engineer transactions that harm Plaintiffs.

i. Damages related to BFLP

With respect to BFLP, Plaintiffs allege they have been harmed from Jeff's unreasonable delays in making distributions from BFLP. Specifically, Plaintiffs allege they were damaged by Jeff's belated distribution of BFLP's 2013 operating income. As outlined above, Plaintiffs have engendered a genuine dispute of material fact as to whether Jeff delayed or withheld distributions from BFLP and

AB BI for reasons related to Plaintiffs' control over BI. (*See* Plfs. Answer to Interrogatory No. 10, Plfs. App. 48; Jeff Dep. at 113:9 – 23, Plfs App. 148). If Jeff delayed or withheld distributions from BFLP and AB BI on the sole basis that Plaintiffs were exercising control over BI, this would support Plaintiffs' claim that Jeff breached fiduciary duties he owed to Plaintiffs and their Dynasty Trusts as limited partners of BFLP and AB BI.

Plaintiffs claim they are entitled to interest as a consequence of Jeff's allegedly belated distribution of BFLP's 2013 operating income. Plaintiffs' damages expert, Ronald Nieslen, opines "the economic damages sustained by the non-distribution of cash in 2014 by BFLP to the Plaintiffs are [at a minimum] $3,981." (Plfs. Expert Ronald Nielsen's November 9, 2016 Report ¶ 7-8, Plfs. Supp. App. 1105). The Court is satisfied that a genuine issue of material fact exists concerning whether Plaintiffs suffered harm from the allegedly belated distribution of BFLP's 2013 operating income. Furthermore, Mr. Nielsen's calculations provide a reasonable basis from which the amount of Plaintiffs' damages, if any, could be inferred or approximated from Jeff's allegedly belated distribution of BFLP's 2013 operating income. Therefore, Defendants' are not entitled to summary judgment on Counts IV, VII, VIII, X, XI, and XII insofar those Counts rely on damages from Jeff's allegedly belated distribution of BFLP's 2013 operating income.

The Court finds, however, that Plaintiffs, as limited partners in BFLP, have failed to carry their burden with respect to damages attributable to the BFLP Loan. Plaintiffs allege:

> a jury could award [them] damages related to the BFLP Loan because [BFLP's] payment obligations under the loan, including interest, may be found to exceed the return on the securities (purportedly) purchased by BFLP with the loan proceeds. Because Jeff could not identify the marketable securities in his deposition, there is presently no basis for the Court to conclude, either way, that the return on BFLP's investment of the $3 million will exceed its payment of loan obligations. A jury could reasonably conclude based on all the facts and evidence that Plaintiffs, as limited partners of BFLP, will be harmed by Jeff's self-dealing with respect to the BFLP Loan.

(Plfs. Resistance to Defs. Motion for Partial Summary Judgment p. 38).

As outlined above, potential for future harm is overly speculative. *See Tredrea*, 584 N.W.2d at 288 (finding any income postdating end of hospital's contract for exclusive anesthesia services with medical group was too speculative to allow recovery by independent anesthesiologists on their claim for future damages against hospital). As Plaintiffs acknowledge, "there is presently no basis for the [fact finder] to conclude, either way, that the return on BFLP's investment of the $3 million will exceed its payment of loan obligations." (Plfs. Resistance to Defs. Motion for Partial Summary Judgment p. 38). There is no basis to assume the limited partners of BFLP will be harmed by the BFLP Loan because BFLP currently enjoys the returns on the proceeds from the BFLP Loan generated above 1.9%.[16] Even if the fact finder speculates that BI would not agree to assume the BFLP Loan, the terms of the BFLP Loan allow BFLP to repay the loan early. Consequently, there is no reasonable basis to infer or approximate Plaintiffs' damages, if any, as limited partners of BFLP with respect to the BFLP Loan. Therefore, Defendants are entitled to summary judgment on Counts IV, VIII, X, and XII, as they relate to compensatory damages and punitive damages stemming from the BFLP Loan, for overly speculative damages and uncertainty of actual harm.

ii. Damages related to AB BI

It is undisputed that AB BI has not distributed all of its operating income to its limited partners. (Def. App. 295, Jeff Decl. ¶¶ 6-7, asserting AB BI has generated $990,927 in operating income since its inception, and has distributed $482,154). Plaintiffs allege there is no basis for AB BI to withhold any portion of its operating income from distribution because AB BI has no employees or overhead. Plaintiffs allege further that Jeff has used the excessive buildup of cash reserves in AB BI to fund Lavern's "retribution" against them. To bolster this allegation, Plaintiffs note that on August 25, 2014, AB BI loaned Lavern's personal trust, the "LTB 1996 Trust," $2.65 million at a rate of 3%. (Jeff Dep. Tr. Vol. I, 143:11 – 145:7, Plfs. App. 156). Viewing Jeff's deposition testimony in the light most

[16] On August 31, 2016 BFLP and LTB Family LP amended the BFLP Loan. One of the amendments lowered the initial interest rate to 1.9%.

favorable to Plaintiffs, a reasonable fact finder might infer Jeff believed AB BI could have used the money it loaned Lavern's revocable trust to pursue more profitable investment opportunities:

> **Q.** But there were other investment opportunities that could have reasonably yielded more than 3 percent, correct?
>
> **A.** Yes.
>
> **Q.** And why—Why weren't those opportunities pursued?
>
> **A.** Because AB BI decided to loan the money to Lavern, we felt that that was the best risk-adjusted investment that it could make at the time.

(Jeff Dep. Tr. Vol. I 145:10 – 18, Plfs. App. 156). Thereafter, Lavern substituted half of the proceeds from AB BI's $2.65 million loan for the BI non-voting stock in LoriAnn and Lisa's daughters' Grantor Trusts. (Jeff Dep. Tr. Vol. I 146:12 – 23, Plfs. App. 157). Lavern testified that he swapped the BI non-voting stock for cash out of the LoriAnn and Lisa's daughters' Grantor Trusts because he "was mad, very mad," and "wanted to do something" in the form of retribution after LoriAnn and Lisa refused to put him on the BI Board. (Lavern Dep. Vol. II at 138:L12 – 139:L20, Plfs App. 226). Plaintiffs' expert, Ronald Nielsen, opines "the economic damages sustained by the Plaintiffs due to the transfer of BI shares out of LoriAnn's Grantor Trust and Lisa's Daughters' Grantor Trusts is $2,817,581." (Plfs. Expert Ronald Nielsen's April 8, 2016 Report ¶ 33, Plfs. App. 803).

These facts, when viewed in the light most favorable to Plaintiffs, support an inference that Jeff used AB BI's cash reserves to fund Lavern's "retribution" against Plaintiffs at the expense of pursuing better investment opportunities or distributing the money to the entities that held a limited partnership interest in AB BI. If Jeff used AB BI's cash reserves to fund Lavern's "retribution" against Plaintiffs, rather than distributing the money to the entities holding limited partnership interests in AB BI, this would support a finding that Jeff, acting as a BFA-appointed-manager of AB BI, breached his fiduciary obligations of loyalty and good faith. Defendants are not entitled to negate Plaintiffs' claims relating to AB BI because BFLP made distributions to its shareholders in excess of its operating income. Accordingly, the Court finds Plaintiffs have engendered a genuine dispute of material fact as

to whether they have been harmed by inadequate distributions from AB BI. Moreover, Defendants' calculations, which indicate AB BI has withheld $508,773 attributable to its operating income, provide a reasonable basis from which the fact finder could infer or approximate Plaintiffs' damages, if any, relating to inadequate distributions from AB BI in the event the fact issues discussed in this section are resolved in Plaintiffs' favor at trial. Therefore, Defendants are not entitled to summary judgment on Counts IV, VII, VIII, X, XI, and XII to the extent those Counts rely on damages related to inadequate distributions from AB BI.

2. Counts IV, X, and XII: Lavern's Optional Capital Contribution into BFLP

In March 2015, Lavern, through his revocable trust, the LTB Revocable Trust, made an optional capital contribution of $2,812,597 into BFLP resulting in 9.49% ownership of BFLP ("Optional Capital Contribution"). (Def. App. 9, 32, 177-178, Lavern Dep. Tr. 74:10-14; Jeff Dep. Tr. 205:19-23).[17] Defendants assert Plaintiffs cannot maintain damages relating to Lavern's Optional Capital Contribution because the Optional Capital Contribution did not alter: (1) the voting control over BFLP; (2) the status quo in management of BFLP; or (3) Plaintiffs' economic stake in BFLP.

a. Voting control over BFLP

As of March 15, 2006, the limited partnership interest in BFLP was divided as follows: BFA owned 1.33%, LoriAnn owned 11.82%, Lisa and Lisa's daughters owned 26.58%, Jeff and his children owned 38.25%, and Lavern owned 22.02%. In 2011 Lavern gifted an equal portion of his 22.02% limited partnership interest in BFLP to each of his children's Dynasty Trusts. The Dynasty Trusts' respective Investment Trustee is entitled to vote any stock or security interest the Dynasty Trust holds. (Article IV, A.5). Therefore, if the Dynasty Trusts were properly admitted as Limited Partners in BFLP, 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%.

[17] This transaction is described in greater detail *infra*

Defendants argue that Lavern's Optional Capital Contribution did not alter the majority voting control of the Limited Partnership interests in BFLP because the Dynasty Trusts were not properly admitted as Substitute Limited Partners in BFLP. According to Defendants, even if the Dynasty Trusts were admitted as Substitute Limited Partners in BFLP, Plaintiffs did not have majority voting control of the Limited Partnership interests in BFLP prior to the Optional Capital Contribution because Jeff was appointed as the Investment Trustee of LoriAnn's Dynasty Trust in October 2014. In his deposition, Jeff agreed that if the Dynasty Trusts were properly admitted as Limited Partners in BFLP and LoriAnn was not removed as the Investment Trustee of her Dynasty Trust, then the Optional Capital Contribution would have shifted the majority voting control of the Limited Partnership interest in BFLP from Plaintiffs to Defendants. (Jeff Dep. Tr. Vol. I 131:11 – 132:6, Plfs. App. 153).

For reasons that follow, the Court finds there is a genuine issue of material of fact as to whether the Dynasty Trusts were admitted as Limited Partners in BFLP. The Court also finds there is a genuine issue of material fact as to whether Jeff was properly appointed as Investment Trustee of LoriAnn's Dynasty Trust. Accordingly, the Court finds there is a genuine issue of material fact as to whether the Optional Capital Contribution shifted majority control of BFLP from Plaintiffs to Defendants.

i. The Dynasty Trusts' Limited Partnership Status in BFLP

First, the Court finds there is a genuine of material fact as to whether the Dynasty Trusts were properly admitted as Limited Partners in BFLP. 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". (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), Defs. App. 68). 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.[18]

(*Id.* Article XIII, B, 6, p. 28, Def. App. 91).

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, Def. App. 68). 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, Def. App. 65).

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. (Lavern Decl. ¶6, Def. App. 293).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. The BFLP Assignment and Consent Forms have separate signature lines for Lavern, Jeff, and LoriAnn/Lisa. Lavern's signature line identifies him as the transferor of the limited partnership interest in BFLP. Jeff's signature line identifies him as a BFA-appointed-manager

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

of BFLP acting on behalf of BFA. LoriAnn/Lisa's signature line identifies them as the Investment Trustee of their respective Dynasty Trusts.

Lisa testified that she executed her BFLP Assignment and Consent Form during a family meeting in 2012 and returned the form to Jeff during that same meeting. (Lisa Dep. Tr. 203:2 – 12, Plfs. App. 230). 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. (LoriAnn Dep. Tr. 69:19 – 70:14, Plfs. App. 236-37). Thereafter, in the summer of 2013, Jeff asked Plaintiffs to sign duplicates of the BFLP Assignment and Consent Forms. (Jeff Dep. Tr. Vol. II 297:16 – 20, Plfs. App. 91; LoriAnn Dep. Tr. 58:13 – 21, Plfs. App. 235; Lisa Dep. Tr. 203:2 – 207:14, Plfs. App. 230-31). Plaintiffs testified that they signed copies of the BFLP Assignment and Consent Forms that were produced in the 2013 family meeting and returned the signed forms to Lavern several days after the meeting. (Lisa Dep. 203:2 – 12, Plfs. App. 230; LoriAnn Dep. Tr. 58:13 – 59:14, Plfs. App. 235). Defendants acknowledge they were in receipt of Lisa's signed BFLP Assignment and Consent Form in December 2013. (Jeff Dep. Tr. Vol. II 298:20 – 299:11, Plfs. App. 91; *see* Plfs. App. 265). Defendants allege, however, they were not in receipt of LoriAnn's signed BFLP Assignment and Consent Form until February 2016. (Jeff Dep. Tr. Vol. II 299:13 – 19, Plfs. App. 91; *see* Plfs. App. 266).[19] According to LoriAnn, Defendants "conveniently misplaced" her signed BFLP Assignment and Consent Form. (LoriAnn Dep. Tr. 58:17 - 18, Plfs. App. 235).

Plaintiffs produced BFLP Assignment and Consent Forms that bear their signatures, but are missing Jeff and Lavern's signatures. (Plfs. App. 363, 457). Defendants testified they refused to sign

[19] Specifically, Defendants allege they were not in receipt of LoriAnn's signed BFLP Assignment and Consent Form until after February 10, 2016. (*See* Jeff Dep. Tr. Vol. II 299:13 – 19, Plfs. App. 91; *see* Plfs. App. 266). Defendants contend that February 10, 2016 is significant because that is the date Lavern sent Plaintiffs signed written notice that any offer to assign a Full Limited Partnership Interest in BFLP to their Dynasty Trusts "has been revoked by the Transferor and is no longer effective, and the status of the Trust is, therefore, that of a mere assignee of an economic interest in BFLP." (Plfs. App. 265-66).

Plaintiffs' BFLP Assignment and Consent Forms due to the developing family conflict. (Jeff Dep. Tr. Vol. II 294:3 – 17, Plfs. App. 90; Lavern Decl. ¶ 8, Defs. App. 293).

Plaintiffs allege it is legally irrelevant whether Jeff or Lavern executed the BFLP Assignment and Consent Forms because the Dynasty Trusts are "Permitted Transferees" under the BFLP Partnership Agreement. Plaintiffs note a "Permitted Transferee" is only required to "furnish[] to the General Partners…written acceptance in a form satisfactory to the General Partners of all of the terms and conditions of [the BFLP Partnership Agreement] and such other documents and instruments as may be required to effect the admission of the successor as a Limited Partner" to be admitted as a substitute Limited Partner in BFLP. (BFLP Partnership Agreement, Article XIII, B, 6, p. 28, Def. App. 91). Plaintiffs assert the Dynasty Trusts furnished written acceptance "in a form satisfactory to the General Partners" when Plaintiffs signed the BFLP Assignment and Consent Forms and delivered the signed forms to Defendants in 2012 and 2013. In response, Defendants assert Plaintiffs overlook the requirement that the form be "satisfactory to the General Partners," and "Lavern's execution alone could complete the process to denote admission." (Def. Reply Brief p. 12).

Resolution of whether the Dynasty Trusts were admitted as substitute Limited Partners into BFLP involves interpretation and construction of the BFLP Partnership Agreement. "Interpretation is the search for the meaning of contractual terms; construction is ascertaining their legal effect." *Pathology Consultants v. Gratton*, 343 N.W.2d 428, 433 (Iowa 1984). "Insofar as the partnership agreement covers the relationship of the parties, it is a contract between them." *Wolf v. Murrane*, 199 N.W.2d 90, 97 (Iowa 1972). "Interpretation of a contract is a legal issue unless the interpretation of the contract depends on extrinsic evidence." *Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 435 (Iowa 2008); *see also Hartig Drug Co. v. Hartig*, 602 N.W.2d 794, 797 (Iowa 1999) ("when no relevant extrinsic evidence exists, the resolution of any ambiguity in a written contract is a matter of law for the court."). "Words are assigned their ordinary meaning in the interpretation of a contract."

Northern Natural Gas Co. v. Knop, 524 N.W.2d 668, 671 (Iowa Ct. App. 1994) (citation omitted). Words are also "interpreted within the context in which they are used." *Id.*

"When construing a written contract, [Iowa courts] are guided by the rule that the intent of the parties controls and, except in cases of ambiguity, intent is determined by what the contract itself says." *Anderson v. Aspeimeier, Fisch, Power, Warner & Engberg*, 461 N.W.2d 598, 600 (Iowa 1990) (citations omitted). "The court will not resort to rules of construction where the intent of the parties is expressed in clear and unambiguous language." *Pathology Consultants v. Gratton*, 343 N.W.2d 428, 434 (Iowa 1984) (citation omitted). "[A]lthough summary judgment will be refused if the…agreement…is ambiguous, the preliminary question of whether an ambiguity does exist is a question of law that may be resolved summarily by the court." *Boge v. State*, 309 N.W.2d 428, 430 (Iowa 1981) (quoting 10 C. Wright and A. Miller, Federal Practice and Procedure s 2730, at 585-87 (1973)).

The Court finds the phrase at issue, "in a form satisfactory to the General Partners", to be unambiguous. *See Viera v. Life Ins. Co. of North America*, 642 F.3d 407, 417 (3rd Cir. 2011) ("it is not clear whether 'satisfactory to Us' means 'electronic proof of loss [in a form] satisfactory to Us' or 'electronic proof of loss [substantively and subjectively] satisfactory to Us.' ") (brackets in original); *Pedrick v. Roten*, 70 F.Supp.3d 638, 648 (D. Del. 2014) ("It is not clear whether 'satisfactory to TIAA' means 'written notice [in a form] satisfactory to TIAA' or 'written notice [substantively] satisfactory to TIAA.' ") (brackets in original); *Gross v. Sun Life Assur. Co. of Canada*, 734 F.3d 1, 15 (1st Cir. 2013) (explaining that "satisfactory to us" wording "reasonably may be understood to state [an administrator's] right to insist on certain forms of proof rather than confer[] discretionary authority over benefits claims"). Here, the BFLP Partnership Agreement does not include ambiguous "satisfactory to Us" language; instead, it clearly confers a right upon the General Partners to insist on one form of written acceptance over another.

The only discretion reserved by the phrase "in a form satisfactory to the General Partners" is the prerogative to determine whether the written acceptance assumes all of the terms and conditions of the BFLP Partnership Agreement. This reading of the BFLP Partnership Agreement is supported by the language that follows the phrase at issue, which states "all of the terms and conditions of [the BFLP Partnership Agreement] and any other document or instrument that may be required to effect the admission of the successor as a Limited Partner." (BFLP Partnership Agreement, Article XIII, B, 6, p. 28, Def. App. 91); *Hartig Drug Co. v. Hartig*, 602 N.W.2d 794, 798 (Iowa 1999) ("particular words and phrases are not interpreted in isolation…[b]ut are interpreted in a context in which they are used." (internal citations omitted)). This reading of the BFLP Partnership Agreement is further supported by the well-settled principle that "an interpretation which gives a reasonable, lawful, and effective meaning to all terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect." *Iowa Fuel & Minerals Inc. v. Iowa State Bd. Of Regents*, 471 N.W2d 859, 863 (Iowa 1991). Under this principle, the phrase "in a form satisfactory to the General Partners" must mean something different from the language following it that refers to the General Partners' "Required Consent." Otherwise, the exception that a "Permitted Transferee" shall be admitted as a substitute Limited Partner upon furnishing written acceptance in a form satisfactory to the General Partners alone would be rendered meaningless. Finally, this reading is supported by the principle that "a contract is to be interpreted as a whole." *Id.* Article IV section KK of the BFLP Partnership Agreement provides: "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." (BFLP Partnership Agreement, Article IV, KK p.5, Def. App. 68) (emphasis added).

Applying the plain language of the BFLP Partnership Agreement, the Court holds BFLP's General Partner, BFA, cannot deny a "Permitted Transferee" admission as a substitute Limited Partner into BFLP because it is subjectively unsatisfied with the "Permitted Transferee" becoming a substitute

Limited Partner in BFLP. BFLP's General Partner, BFA, may only deny a "Permitted Transferee" admission as a Limited Partner into BFLP if it finds the "Permitted Transferee's" written acceptance fails to assume "all of the terms and conditions of [the BFLP Partnership Agreement] and such other documents and instruments as may be required to effect the admission of the successor as a Limited Partner." (BFLP Partnership Agreement, Article XIII, B, 6, p. 28, Def. App. 91).

It is undisputed that Defendants, acting on behalf of BFA, prepared the BFLP Assignment and Consent Forms. (Lavern Decl. ¶6, Def. App. 293). It is also undisputed that the BFLP Assignment and Consent Forms require the Dynasty Trusts' Investment Trustees to "agree[] to be bound by all terms of the BFLP Agreement." (Plfs. App. 363, 457). Therefore, there is no basis for BFA to assert it was unsatisfied with the BFLP Assignment and Consent Forms.

Defendants testified they refused to sign Plaintiffs' BFLP Assignment and Consent Forms due to the developing family conflict. (Jeff Dep. Tr. Vol. II 294:3 – 17, Plfs. App. 90; Lavern Decl. ¶ 8, Defs. App. 293). As outlined above, Defendants, as a BFA-appointed-managers of BFLP, cannot deny Plaintiffs' Dynasty Trusts, "Permitted Transferees," admission as substitute Limited Partners into BFLP because they are subjectively dissatisfied with Plaintiffs' Dynasty Trusts becoming substitute Limited Partners in BFLP. Defendants assert further "Lavern's execution alone could complete the process to denote admission." (Def. Reply Brief p. 12). This argument, however, relies on an untenable interpretation of the BFLP Partnership Agreement. It is undisputed that Lavern transferred his interest in BFLP to the Dynasty Trusts in 2011, and thereafter the Dynasty Trusts have held, at a minimum, an economic interest in BFLP. Therefore, Lavern's signature on the BFLP Assignment and Consent Forms was not required to transfer his Limited Partnership Interest in BFLP to the Dynasty Trusts. Consequently, Defendants' interpretation of the BFLP Partnership Agreement would give a BFA-appointed-manager of BFLP, Lavern, unfettered discretion to deny a "Permitted Transferee" admission as a Limited Partner into BFLP, which contradicts the plain language of the BFLP Partnership Agreement. Furthermore, Defendants' interpretation of the BFLP Partnership Agreement

is contrary to the well-settled principle "that a contract will not be interpreted giving discretion to one party in a manner which would put one party at the mercy of another, unless the contract clearly requires such an interpretation." *Iowa Fuel & Minerals, Inc.v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 863 (Iowa 1991) (citations omitted).

In light of the foregoing, the Court finds that 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. Therefore, Defendants are not entitled to partial summary judgment on Counts IV, X, and XII, on the basis that Plaintiffs have failed to produce fully executed BFLP Assignment and Consent Forms.

To be clear, however, the Court does not conclude that Plaintiffs' Dynasty Trusts were admitted as substitute Limited Partners into BFLP prior to the Optional Capital Contribution. The Court cannot reach this conclusion because 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. *Frontier Leasing Corp. v. Links Engineering, LLC*, 781 N.W.2d 772, 775-776 (Iowa 2010) ("In granting summary judgment, the district court is not to make credibility assessments, as such assessments are 'peculiarly the responsibility of the fact finder.' ") (citation omitted).

ii. Jeff's Appointment as the Investment Trustee of LoriAnn's Dynasty Trust

Next, Defendants assert Plaintiffs did not have majority voting control of the Limited Partnership interests in BFLP prior to the Optional Capital Contribution because Jeff was appointed as the Investment Trustee of LoriAnn's Dynasty Trust in October 2014. The Court finds this argument unavailing because Plaintiffs have already engendered a genuine dispute of material fact as to whether the Trust Protector of LoriAnn's Dynasty Trust "replaced the Trustees of the LoriAnn Dynasty Trust to effectuate Jeff and Lavern's desire to maintain or gain control of the limited partnership voting interests in other family entities and to enact retribution against LoriAnn and Lisa." (Combined Ruling on Motions for Summary Judgment filed on November 17, 2016, in Linn County Case No.

EQCV083014, p. 36-37). Furthermore, Plaintiffs are currently seeking equitable relief from Jeff's appointment as the Investment Trustee of LoriAnn's Dynasty Trust. Specifically, in Linn County Case No. EQCV083014, Plaintiffs are requesting, *inter alia*, the Court to appoint LoriAnn as the Investment Trustee of the LoriAnn Dynasty Trust. In the event Plaintiffs are granted the relief they seek in Linn County Case No. EQCV083014, the Optional Capital Contribution may have shifted the majority voting control of the Limited Partnership interest in BFLP from Plaintiffs to Defendants. (*See* Jeff Dep. Tr. Vol. I 131:11 – 132:6, Plfs. App. 153). Therefore, Defendants are not entitled to partial summary judgment on Counts IV, X, and XII on the basis that Jeff was appointed as the Investment Trustee of LoriAnn's Dynasty Trust.

Because there is a genuine issue of material fact as to whether: (1) Plaintiffs' Dynasty Trusts were admitted as substitute Limited Partners into BFLP; and (2) Jeff was properly appointed as the Investment Trustee of LoriAnn's Dynasty Trust, there is a genuine issue of material fact as to whether the Optional Capital Contribution shifted control of BFLP from Plaintiffs to Defendants. (*See* Jeff Dep. Tr. Vol. I 131:11 – 132:6, Plfs. App. 153)

b. The status quo in management of BFLP

Next, Defendants assert that any alleged harm to Plaintiffs based on the dilution of their voting power is hypothetical because BFA remains as BFLP's General Partner and the designated managers remain in charge of the management, operation and control of BFLP. In support of this argument, Defendants note that BFA controls the "exclusive management, operation and control of the business and affairs of the Partnership" including the "complete and absolute discretion and authority in determining whether any distribution, including Cash distributions, shall be made by the Partnership." (*Id.* at Article VII, Section B, Def. App. 73; Art. XII, Section A, Def. App. 88). Thus, the Limited Partner voting power over BFLP is irrelevant to the alleged deficiency of distributions. Defendants note further that Plaintiffs have never held sufficient voting power in BFLP to unilaterally remove

BFA as the General Partner of BFLP. (Def. App. 74, BFLP Agreement, Article VI, p. 11 (removal of General Partner requires 70 percent vote)). The Limited Partners of BFLP can only elect a new General Partner by a simple majority if BFA is removed or cannot serve as General Partner. (Def. App. 95, BFLP Agreement, Article X, C.4). Therefore, according to Defendants, Plaintiffs have failed to allege any harm based on the dilution of their voting power in BFLP because, even if a vote to replace the General Partner became necessary, the result of the vote and any alleged damages from the result are purely speculative.

Defendants' argument, however, overlooks Plaintiffs claim for punitive damages. *See Westway Trading Corp. v. River Terminal Corp.*, 314 N.W.2d 398, 403-04 (Iowa 1982) (upholding award of punitive damages although actual damages were not awarded because there was no reasonable basis to calculate the amount). For reasons discussed below, there are genuine issues of material fact as to: (1) whether Jeff breached fiduciary duties he owed to Plaintiffs by authorizing a series of transactions on BFA's behalf that allowed Lavern to make his Optional Capital Contribution; and (2) whether the Optional Capital Contribution was a purposeful attempt to ensure that, should BFA be dissolved, Plaintiffs would not hold majority voting power over BFLP. If Jeff authorized a series of transactions on BFA's behalf to allow Lavern to make the Optional Capital Contribution in an effort to ensure that Plaintiffs would not hold majority voting power over BFLP in the event BFA is dissolved, this would support a finding that Plaintiffs' voting interests in BFLP were improperly diluted. The improper dilution of voting interests results in actual harm. *See Gentile v. Rossette*, 906 A.2d 91, 101-02 (Del. 2006) (finding that it was unnecessary for a shareholders' interest to be reduced from a majority to minority voting interest to bring a direct claim for dilution of their voting rights). Therefore, unlike the MMB Loans and BFLP Loan, Plaintiffs may be able to establish that they sustained actual harm from the Optional Capital Contribution. Under Iowa law, "a failure to award actual damages will not bar exemplary damages when actual damage has in fact been shown." *Knoblauch*, 282 N.W.2d at 154.

Accordingly, Defendants are not entitled to partial summary judgment on Counts IV, X, and XII on the basis that the Optional Capital Contribution did not affect BFA's managerial control over BFLP.

c. Plaintiffs' economic interest in BFLP

Setting aside Plaintiffs' voting interest in BFLP, Defendants assert Plaintiffs have failed to allege any harm with respect to their economic interests in BFLP that is attributable to the Optional Capital Contribution. According to Defendants, any reduction in Plaintiffs' percentage ownership of BFLP from the Optional Capital Contribution is equalized by the additional capital in BFLP. As Defendants aptly put: "[Plaintiffs'] slice of the pie is smaller, but the pie is bigger." (Def. Brief p. 21 n.4).

Plaintiffs contend the reduction in their percentage ownership of BFLP will result in a smaller portion of BFLP distributions during Lavern's lifetime. Plaintiffs' damages expert, Ronald Nielsen, opines that Plaintiffs will incur $188,134 in damages over Lavern's anticipated life expectancy from the Optional Capital Contribution. (Ronald Nielsen April 8, 2016 Report, Plfs. App. 804). In order to estimate annual distributions from BFLP during Lavern's anticipated lifetime, Mr. Nielsen calculated a weighted average of the distributions BFLP made between the years 2007 and 2015. (*Id.*). Mr. Nielsen asserts his methodology and calculation were conservative. (*Id.*).

According to Defendants, the assumption that BFLP will limit distributions to pre-Optional Capital Contribution sums, despite larger absolute gains and losses from the greater capital now in BFLP, is purely speculative. Defendants assert that Plaintiffs have not presented a question of fact, but rather, a bald allegation of damage that is legally unfounded and mathematically incorrect. Defendants cite *Dana Corp v. American Standard, Inc.*, 866 F.Supp. 1481 (N.D. Ind. 1994) for the proposition that Mr. Nielsen's April 8, 2016 report is insufficient to overcome the lack of damages resulting from the Optional Capital Contribution.

The court in *Dana Corp.* was addressing a CERCLA claim in 1996, and the plaintiff's expert was opining on the percentage of hazardous material disposed of in a waste site from 1974-1979 by

various entities. *Id.* at 1500. The *Dana Corp.* Court excluded an expert affidavit because the expert's "opinion rest[ed] on the assumption that a given defendant disposed of a hazardous substance at the Site" and "the deposition testimony and other evidence [was] insufficient to prove that each defendant disposed of a hazardous substance at the Site." *Id.* The *Dana Corp.* Court deemed the record evidence of the defendants' alleged conduct decades prior insufficient to support the expert's conclusion that defendants contaminated a site with hazardous waste; therefore, the *Dana Corp* Court found the expert's opinion was without foundation. *Id.* at 1500-1501. In excluding the expert's affidavit, the *Dana Corp.* Court stated "[e]xpert opinions premised upon speculation and conjecture are insufficient to create a genuine issue of material fact to survive summary judgment." *Id.* at 1499.

Here, Plaintiffs' damages expert, Mr. Nielsen, relied on facts in the summary judgment record to develop a methodology to calculate BFLP's future distributions. (Plfs. App. 804). Because Mr. Nielsen's methodology in calculating BFLP's future distributions is based entirely on facts in the summary judgment record, Defendants' reliance on *Dana Corp*. is misplaced. To the extent Mr. Nielson relied on a flawed assumption to project BFLP's future distributions, that fact goes to the weight to be given to his opinion, not to its admissibility. *See Olson v. Nieman's, Ltd.*, 579 N.W.2d 299, 309 (Iowa 1998) ("if an expert makes some flawed assumptions in testifying, that fact goes to the weight to be given the opinion, not to its admissibility."). The weight of evidence and credibility of witnesses are matters for the jury. *Eventide Lutheran Home v. Smithson Elec. And Gen. Constr., Inc.*, 445 N.W.2d 789, 791 (Iowa 1989). As with any opinion testimony, the trier of fact can consider the credibility of expert witnesses and is at liberty to reject their testimony. *Bandstra v. International Harvester Co.*, 367 N.W.2d 282, 289 (Iowa 1985).

Accordingly, the Court finds Plaintiffs have engendered a genuine dispute of material fact as to whether the Optional Capital Contribution harmed their economic interest in BFLP, and Plaintiffs have provided at least enough basis from which the fact finder can infer or approximate those damages to survive summary judgment. Therefore, Defendants are not entitled to partial summary judgment on

Counts IV, X, and XII on the basis that the Optional Capital Contribution did not affect Plaintiffs' economic stake in BFLP.

C. Count IV: The portion of Count IV relying on a shift in future control of Busse Foundation gifting power

Next, Defendants allege Plaintiffs' claim relating to the Foundation Allocation Agreement fails because any harm relating to the future loss of control of gifting ability is purely speculative. At oral arguments, Plaintiffs noted that they are not seeking compensatory damages with respect to the Foundation Allocation Agreement. Because Plaintiffs are only seeking declaratory relief and punitive damages with respect to the Foundation Allocation Agreement, Defendants are not entitled to summary judgment on the portion of Count IV that relies on the Foundation Allocation Agreement on the basis that Plaintiffs have failed to provide a reasonable basis to approximate or infer damages attributable to the Foundation Allocation Agreement.

IV. Counts IX and XIII: Plaintiffs' Requests for Declaratory Relief

Next, Defendants assert Plaintiffs fail to state a claim for declaratory relief as to (1) the Optional Capital Contribution; and (2) the Busse Foundation Pledge or Busse Foundation board seats. The Court will address Plaintiffs' requests for declaratory relief in turn. The Court's analysis is governed by the principle that a declaratory judgment action must be tied to the enforcement of a legal right. *See* Iowa R. Civ. P. 1.1101 ("Courts of record within their respective jurisdictions shall declare rights, status, and other legal relations whether or not further relief is or could be claimed."); *see also Greenbriar Grp., L.L.C. v. Haines*, 854 N.W.2d 46, 50-51 (Iowa Ct. App. 2014), *as amended* (Aug. 1, 2014) ("The mere filing of a declaratory judgment action does not, in and of itself, create a justiciable controversy.").

A. Count IX: Declaratory Judgment—BFLP

Count IX is a Declaratory Judgment claim seeking a declaration of the parties' rights under the BFLP Partnership Agreement with respect to Lavern's Optional Capital Contribution. In Count IX, Plaintiffs seek the following declaration of the parties' rights under the BFLP Partnership Agreement:

(1) "[t]he conduct of Jeff and Lavern in making the optional capital contribution violated the duty of good faith and fair dealing owed to LoriAnn and Lisa as part of the Partnership." (Amended Petition ¶ 211); (2) "BFA and Jeff, as a manager of BFLP, have materially breached the partnership agreement by approving [the] optional capital contribution." (Amended Petition ¶ 210); and (3) "BFA along with Jeff, who is a manager of BFLP, and Lavern, who is a manager of BFLP, have breached the duty of good faith and fair dealing owed to LoriAnn and Lisa by approving [the] optional capital contribution because the effect of the contribution is to dilute the interest of LoriAnn and Lisa and allow Jeff and Lavern to have majority control over BFLP." (Amended Petition ¶ 209).

Defendants argue Plaintiffs have failed to state a claim for declaratory relief in Count IX because Plaintiffs have "failed to assert any right under the BFLP Agreement sufficient to give rise to a declaratory judgment action…." (Def. Motion for Summary Judgment Brief. p. 29). Because Defendants seek summary judgment on Count IX in its entirety, the Court will address Plaintiffs' requests for declaratory relief in Count IX in turn.

The Court's analysis is governed by the BFLP Partnership Agreement and the Iowa Code section 488.408. The BFLP Partnership Agreement provides that the General Partner of BFLP has a duty of loyalty and a duty of care towards BFLP. "The General Partner will owe a duty of loyalty and a duty of care to the Partnership." (BFLP Partnership Agreement Article VII(H)(5); Entities App. 96). Iowa Code section 488.408 also codifies a General Partner's duties of loyalty, care, and good faith and fair dealing. *See* IOWA CODE § 488.408 (2015). Iowa Code section 488.408 provides that the duty of loyalty owed by a General Partner includes the duty to: "refrain from dealing with the limited partnership in the conduct…of the limited partnerships activities as or on behalf of a party having an interest adverse to the limited partnership." IOWA CODE § 488.408(2)(b) (2015). In addition, "A general partner shall discharge the duties to the partnership and the other partners under this chapter or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing." IOWA CODE § 488.408(4) (2015).

1. The conduct of Jeff and Lavern in making the Optional Capital Contribution

On December 17, 2014, Jeff requested a distribution of 0.1% of BFLP interest from his MMB Grantor Trust. (Dep. Ex. 18, Plfs. Entity App. 249).[20] Jeff's personal friend Mr. Touro, the MMB Grantor Trust's Independent Trustee, distributed this fractional share of BFLP to Jeff. (Jeff Dep. Tr. Vol. I 67:18 – 22, Plfs. Entity App. 137 (Touro's status as a personal friend); Jeff Dep. Tr. Vol. I 203:5 – 10, Plfs. Entity App. 171 (fact of distribution)). The next day, on December 18, 2014, Jeff then acted in three separate capacities to execute a transfer of this fractional partnership interest to himself personally. Jeff confirmed the transfer as Investment Trustee of the MMB Grantor Trust, approved the transfer on behalf of BFA, and accepted the transfer on behalf of himself personally, signing the document in these three separate capacities. (Dep. Ex. 19, Plfs. Entity App. 250). Jeff then, on December 19, 2014, personally sold a 0.05% interest in BFLP to Lavern's personal trust, LTB Revocable Trust, and approved the transfer on behalf of BFA. (Dep. Ex. 20, Plfs. Entity App. 251; Lavern Dep. Tr. Vol. I 77:23 – 78:2, Plfs. Entity App. 220-221). Jeff testified during his deposition that both the transfer of a 0.1% interest in BFLP to himself and the transfer of a 0.05% interest in BFLP to Lavern's personal trust were necessary for Lavern to make the Optional Capital Contribution. (Jeff Dep. Tr. Vol. I 205:24 – 206:4, Plfs. App. 171-172). Jeff testified further during his deposition that the Optional Capital Contribution diluted Plaintiffs' ownership interest in BFLP.[21] (Jeff Dep. Tr. Vol. I 129:19 – 132:6, Plfs. App. 152-153).

Plaintiffs allege "[b]y utilizing three separate capacities to orchestrate a transfer of a small partnership interest to Lavern/LTB Trust so that Lavern could use that as a foothold to dilute the interests of other limited partners, Jeff breached…the duties of loyalty and good faith and fair dealing

[20] On December 17, 2014, neither Jeff nor Lavern held a personal interest in BFLP. In 2011 Lavern gifted an equal portion of his 22.02% limited partnership interest in BFLP to each of his children's Dynasty Trusts. On September 15, 2012, Jeff transferred his entire interest in BFLP to Michelle. (Jeff Dep. Tr. Vol. I 173:7 – 23, Plfs. Def. App. 163). Michelle held Jeff's former personal interest in BFLP for several months prior to transferring the asset into the MMB Grantor Trust to utilize a significant portion of her $5 million estate tax exclusion that expired at the end of 2012. (*Id.*).

[21] During this portion of his testimony, Jeff emphasized that any reduction in Plaintiffs' percentage ownership of BFLP from the Optional Capital Contribution was equalized by the additional capital in BFLP. (Jeff Dep. Tr. Vol I 129:22 – 24, Plfs. App. 152).

owed by Jeff, when acting as General Partner for BFA and as Manager for BFLP." (Plfs. Resistance to Entities Motion for Summary Judgment p. 27). For reasons that follow, the Court finds there is a genuine dispute of material fact as to whether Jeff, acting on behalf of BFA, breached the duties of good faith and fair dealing he owed to Plaintiffs as limited partners in BFLP by authorizing a series of transactions that transferred a fractional interest in BFLP to Lavern's personal trust, LTB Revocable Trust.

As Jeff acknowledged during his deposition, this is not a situation where Lavern was already a Limited or General Partner in BFLP and decided to make a capital contribution. Instead, Jeff had to transfer interests in BFLP to himself, which he then transferred to Lavern, to allow the Optional Capital Contribution to occur. Jeff acknowledged further during his deposition that the Optional Capital Contribution diluted Plaintiffs' interests in BFLP. Notably, Jeff acted on behalf of BFA to authorize these transactions after the members of BFA reached an impasse with respect to the appointment of a new manager of BFA.[22] Prior to the Optional Capital Contribution, Plaintiffs controlled 53.08% of the limited partnership ownership interest in BFLP.[23] When viewing these specific facts in the summary judgment record in the light most favorable to the nonmoving party, a reasonable jury could infer that Jeff acted on behalf of BFA to approve both the transfer of a 0.1% interest in BFLP to himself and the transfer of a 0.05% interest in BFLP to Lavern's personal trust to allow the Optional Capital Contribution to occur in an effort to ensure that, in the event BFA was dissolved, Plaintiffs would not have majority control over BFLP and the ability to appoint a new General Partner of BFLP. (*See* Def. App. 95, BFLP Agreement, Article X, C.4 (the Limited Partners may elect a successor General Partner by a simple majority if the General Partner is removed or cannot

[22] Plaintiffs assert the BFA members were unable to agree on a replacement manager at the August 28, 2014 member meeting, resulting in a deadlock on who should be the second manager, with no "reasonable basis to believe this deadlock will be resolved." (Petition ¶¶ 170-72). The parties dispute whether Lavern resigned as a manager of BFA. It is undisputed, however, that Plaintiffs and Jeff believed Lavern had resigned as a manager of BFA during the August 28, 2014 BFA member meeting and reached an impasse when trying to appoint a manager to fill the purportedly vacant BFA manager position. (Plfs. Response to Entity Def. SOF ¶ 30). The BFA Operating Agreement provides "The number of Manager(s) to constitute the Board of Managers shall be two (2)…" (BFA Operating Agreement Art. V, 5.2, Entity App. 60).

[23] There is a genuine issue of material fact as to whether a portion of Plaintiffs' collective 53.08% interest in BFLP was merely an economic interest. (*See supra* Section II.B.2.a.i)

serve)).[24] If Jeff acted on behalf of BFA to authorize the transfer of a fractional interest in BFLP to himself and then Lavern for this sole purpose, it would support a finding that Jeff breached the duties of good faith and fair dealing he owed Plaintiffs when he stepped into the shoes and obligations of BFLP's General Partner, BFA. Therefore, Defendants are not entitled to partial summary judgment with respect to Count IX to the extent Count IX seeks a declaration that "[t]he conduct of Jeff and Lavern in making the optional capital contribution violated the duty of good faith and fair dealing owed to LoriAnn and Lisa as part of the Partnership Agreement." (Amended Petition ¶ 211).

Although not alleged in their Petition, Plaintiffs argue in their resistance that Jeff also violated the duty of loyalty because "Lavern's interest was adverse to LoriAnn and Lisa and Jeff, as General Partner, executed a plan to dilute their interest for the interest of Lavern, a non-partner." (Plfs. Resistance to Entity Motion for Summary Judgment p.19). The Court finds this argument unavailing. The BFLP Partnership Agreement does not place a duty of loyalty on the General Partner. (*See* BFLP Partnership Agreement Article VII(H)(5); Entities App. 96). Therefore, BFA's duty of loyalty to BFLP and other partners is confined by statute. *See* IOWA CODE § 488.408(1)-(2)(c) (2015). A General Partner's duty of loyalty to a limited partnership and other partners is limited "[t]o refrain from dealing with the limited partnership…as or on behalf of a party having an interest *adverse to the limited partnership*." IOWA CODE §488.408(2)(b) (2015). To the extent Lavern's interest in acquiring a fractional interest in BFLP was adverse to Plaintiffs, it was not adverse to BFLP. Furthermore, a General Partner of a limited partnership does not violate a duty or obligation under Iowa Code section 488.408 "merely because the general partner's conduct furthers the general partner's own interest." IOWA CODE § 488.408(5) (2015). Therefore, there is no genuine issue of material fact which, if resolved in Plaintiffs' favor, would entitle them to a declaration that the conduct of Jeff and Lavern in making the Optional Capital Contribution violated the duty of loyalty.

[24] This inference is further supported by Jeff stating his daughters were added the Busse Foundation Board of Trustees, and not Lisa's daughters, because "[Lavern] did not want to happen to the foundation what appears to have just happened with Busse Investments with regard to the voting." (Jeff Dep. Tr. Vol. I 125:12 – 15, Plfs. App. 151).

2. Approval of the Optional Capital Contribution and the BFLP Partnership Agreement

Next, Plaintiffs seek a declaration that "BFA and Jeff, as a manager of BFLP, have materially breached the partnership agreement by approving [the] optional capital contribution." (Amended Petition ¶ 210). Defendants assert that Plaintiffs fail to state a claim for declaratory relief because the Optional Capital Contribution was permitted under the BFLP Partnership Agreement.

The BFLP Partnership Agreement allows Limited Partners to make optional capital contributions, which need only the consent of the General Partner. Section VIII(B) of the BFLP Partnership Agreement provides:

> Optional Contributions. The Partners shall be permitted to make additional Capital Contributions to the Partnership. Optional Capital Contributions by a Limited Partner will be subject to the consent of the General Partner. Optional Capital Contributions by a General Partner will be subject to the consent of 70 Percent in Interest of Limited Partners. Any optional Capital Contributions may be on a non-pro rata basis. A General Partner is required to maintain a General Partnership Interest of at least one percent (1%) at all times. The required consent need not be in writing, and any optional Capital Contributions will be presumed to have been made with the required consent unless there is clear and convincing evidence to the contrary.

(BFLP Partnership Agreement Article VII, Section B, at 18, Entity App. 100). It is undisputed that as of March 2, 2015, Lavern's personal trust, LTB Revocable Trust, was a limited partner of BFLP, having purchased a .05% interest from Jeff on December 17, 2014 for $9,147.67. (Entity App. 182; *see* Plfs response to Entity SOF ¶10; *supra* section III.B.2.a.i). On that date, Lavern through the LTB Revocable Trust provided notice of his intent to make a voluntary contribution to BFLP. (Def. App. 181). Jeff, acting on behalf of BFA, the only General Partner of BFLP, consented to the Optional Capital Contribution. (Entities App. 223-224, Depo. Ex. 54 at 2).

Plaintiffs contend the Optional Capital Contribution breached material terms of the BFLP Partnership Agreement because Lavern was acting as a General Partner in making the contribution and did not obtain the requisite 70 percent limited partner approval. In support of this position, Plaintiffs rely on Section VII(B)(2) of the BFLP Partnership Agreement, which provides that "[t]he Manager

may exercise all of the powers which could be exercised by majority consent of the General Partners. If a Manager is designated, any reference to 'General Partner' in this Agreement shall also include 'Manager' *if applicable*." (Entity App. 92, § VII(B)(2) (emphasis added)).

Plaintiffs rely on Section VII(B)(2)'s statement that any reference to a General Partner also includes a manager, if applicable, to conclude that Lavern is a General Partner of BFLP and therefore the Optional Capital Contribution was subject to "the consent of 70 Percent in Interest of Limited Partners." (BFLP Partnership Agreement Article VII, Section B, at 18, Entity App. 100). Plaintiffs' reliance on Section VII(B)(2), however, is misplaced. First, the statement at issue must be read in context. *See Hartig*, 602 N.W.2d at 798 ("[P]articular words and phrases are not interpreted in isolation…[but] are interpreted in a context in which they are used." (internal citations omitted)). Section VII(B) governs the management of BFLP, which is vested in the General Partners. (Entity App. 92). Furthermore, the statement that any reference to General Partner includes a Manager follows the sentence: "The Manager may exercise all of the powers which could be exercised by majority consent of the General Partners." Taken in context, the clear and unambiguous meaning of the statement that references to General Partners includes Managers, if applicable, is that the named managers are authorized to carry out the management functions of the General Partner, even though the Partnership Agreement delegates that authority to the General Partners. *See, e.g., People ex re. Burris v. Mem'l Consultants, Inc.*, 587 N.E.2d 34, 37 (Ill. Ct. App. 1992) (concluding that 'if applicable' language in stipulation was unambiguous and limited required application to condition made "applicable").

Plaintiffs' interpretation also ignores the limiting language at the end of the sentence: "If a Manager is designated, any reference to 'General Partner' in this Agreement shall also include 'Manager' *if applicable*." (Entity App. 92, § VII(B)(2) (emphasis added)). Every term in the Partnership Agreement must be given effect, including the term 'if applicable." *Iowa Fuel & Minerals*, 471 N.W.2d at 863 ("Because a contract is to be interpreted as a whole, it is assumed in the

first instance that no part of it is superfluous; an interpretation which gives a reasonable, lawful, and effective meaning to all terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect."). Under Plaintiffs' interpretation, the limiting phrase "if applicable" would have no meaning, and one could simply replace "General Partner" with "Manager" throughout the Partnership Agreement.

Finally, Plaintiffs' interpretation overlooks the principle that "a contract is to be interpreted as a whole." *Iowa Fuel & Minerals*, 471 N.W.2d at 863. Section VIII(D) of the BFLP Partnership Agreement requires that "[t]he Sharing Ratios of each General Partner shall at all times equal or exceed one percent (1%)." (Entity App. 100). Therefore, if Lavern became a General Partner upon his appointment as Manager, Jeff would also have become a General Partner, and each of their sharing ratios would have been required to equal or exceed one percent of the total ownership of BFLP at all times. It is undisputed that Lavern and Jeff have not always held at least one percent of the total ownership of BFLP.

Setting aside problems of interpretation and construction, Plaintiffs' reliance on Section VII(B)(2)'s statement that any reference to a General Partner also includes a manager overlooks that LTB Revocable Trust made the Optional Capital Contribution, not Lavern individually. Thus, even if Plaintiffs' interpretation of the BFLP Partnership Agreement was correct, the Optional Capital Contribution was made by the LTB Revocable Trust, which is not a manager of BFLP.

In light of the foregoing, the Court finds the Optional Capital Contribution was made by a limited partner, subject only to the approval of the General Partner. Because it is undisputed that BFA approved the Optional Capital Contribution, Defendants are entitled to summary judgment in their favor with respect to Count IX insofar Count IX seeks a declaration that "BFA and Jeff, as a manager of BFLP, have materially breached the partnership agreement by approving [the] optional capital contribution…"(Amended Petition ¶ 210).

3. Approval of the Optional Capital Contribution and the duties of good faith and fair dealing

Next, Plaintiffs seek a declaration that "BFA along with Jeff, who is a manager of BFLP, and Lavern, who is a manager of BFLP, have breached the duty of good faith and fair dealing owed to LoriAnn and Lisa by approving [the] optional capital contribution because the effect of the contribution is to dilute the interest of LoriAnn and Lisa and allow Jeff and Lavern to have majority control over BFLP." (Petition ¶ 209). For reasons that follow, the Court finds Defendants are entitled to summary judgment on this portion of Plaintiffs' request for declaratory relief in Count IX.

It is undisputed that as of March 2, 2015, Lavern's personal trust, LTB Revocable Trust, was a limited partner of BFLP, having purchased a .05% interest from Jeff on December 17, 2014 for $9,147.67. (Entity App. 182; *see* Plfs response to Entity SOF ¶10; *supra* section III.B.2.a.i). Therefore, to the extent Plaintiffs assert Jeff breached the duties of good faith and fair dealing by approving the Optional Capital Contribution on BFA's behalf, Jeff likewise owed those same duties of good faith and fair dealing to LTB Revocable Trust. Plaintiffs assert, without authority, that a general partner owes a fiduciary duty to reject expressly authorized non-pro rata capital contributions by one limited partner where it would have the effect of reducing the percentage ownership of another limited partner. Plaintiffs' argument would effectively write out the non-pro rata contribution provision in the BFLP Partnership Agreement, because all non-pro rata contributions would have this effect. Furthermore, Plaintiffs' argument overlooks the well-settled principle that where a partnership agreement expressly allows the action taken, the same action cannot form the basis for a claim of breach of fiduciary duty. "[B]ecause the partnership agreement had not been breached, there could be no breach of any fiduciary duty." *Whalen v. Connelly*, 545 N.W.2d 284, 292 (Iowa 1996) (holding a limited partner may validly consent in advance to transactions by the general partner that might otherwise constitute a breach of fiduciary duty).

Because the BFLP Partnership expressly authorizes limited partners to make non-pro rata contributions, Plaintiffs have failed to assert an enforceable right under the BFLP Partnership Agreement with respect to the approval of the Optional Capital Contribution. Therefore, Defendants are entitled to summary judgment in their favor with respect to Count IX insofar Count IX seeks a declaration that "BFA along with Jeff, who is a manager of BFLP, and Lavern, who is a manager of BFLP, have breached the duty of good faith and fair dealing owed to LoriAnn and Lisa by approving [the] optional capital contribution…" (Amended Petition ¶ 209).

B. Count XIII: Declaratory Judgment—Busse Foundation

Count XIII is a declaratory Judgment claim seeking a declaratory judgment relating to the Busse Foundation. In Count XIII, Plaintiffs seek permanent seats on the Foundation Board of Trustees and a declaration that the Foundation Pledge Agreement is unenforceable. Defendants argue they are entitled to summary judgment on Count XIII because Plaintiffs have no legally enforceable right to permanent seats on the Busse Foundation Board of Trustees under the Foundation's bylaws and there is no legal basis to declare the Foundation Pledge unenforceable.

1. Permanent seats on the Busse Foundation Board of Trustees

The Busse Foundation is a non-profit corporation governed by Articles of Incorporation and By-Laws. (Entity App. 29-33, D1-D5; App. 34-51, D6-D23). The Foundation is governed by a Board of Trustees. (Entity App. 34, By-Law § 2.01, D6). The number of Trustees on the Board may be varied between three and ten members. (Entity App. 34, By-Law § 2.02, D6). Trustees serve for one-year terms. (*Id.*). "The Board of Trustees shall consist of members of the general community who have expressed an interest and desire to aid in the fulfillment of the purposes of this Foundation." (*Id.*). Any vacancy on the Board, including due to the increase in the number of trustees, may be filled by a majority vote of current trustees. (Entity App. 35, By-Law § 2.05, D7). Any trustee may be removed, with or without cause, by a vote of a majority of the members of the Board of Trustees. (Entity App.

36, By-Law § 2.12, D8). The original Trustees in 1990 included: Lavern, Audrey, Jeff, LoriAnn, and Lisa.

Based on the Busse Foundation by-laws cited above, the Court finds there is no legal basis under the Busse Foundation by-laws for Plaintiffs' request for permanent seats on the Busse Foundation Board of Trustees. Under Iowa law, the articles of incorporation and bylaws of a non-profit corporation like the Busse Foundation "create a contractual relationship between the parties." *Oberillig v. W. Grand Towers Condo Ass'n*, 807 N.W.2d 143, 149-50 (Iowa 2011) (citations omitted). Thus, Iowa courts "apply the general rules for contracts to construe a corporation's governing documents." *Id.* (citation omitted). With respect to the composition of the Foundation Board of Trustees, the Busse Foundation by-laws specifically provide for one-year terms for Trustees. (Entity App. 34, By-Law § 2.02, D6). Furthermore, it is undisputed that the vote to add Jeff's daughters to the Busse Foundation Board of Trustees and increase the number of Board members from five to eight complied with the Busse Foundation bylaws. (Plfs. Response to Entity SOF ¶ 40).

Plaintiffs argue they are entitled to permanent seats on the Busse Foundation Board of Trustees because Defendants have diluted their influence on the Board by adding Jeff's three daughters contrary to the spirit of the Foundation Pledge. In support of this argument, Plaintiffs rely on a single sentence in the prefatory paragraph of the Foundation Pledge that states: "Specifically, we recognize that our parents would like the assets of our families be used to fund the LAVERN T. BUSSE AND AUDREY BUSSE FOUNDATION (the "Foundation") created by our parents on August 28, 1990, and an organization that we and our parents serve as directors." (Plfs. Entity App. 394, PLFS007375). The Court finds Plaintiffs reliance on this sentence unpersuasive. The sentence simply identifies the Foundation and its current Board of Trustees. It does not control who serves on the Board of Trustees.

Construing this sentence from the Foundation Pledge to confer permanent seats to the initial trustees would directly conflict with the Busse Foundation's by-laws, which were enacted in 1990. Permanent seats for anyone, including Plaintiffs, are contrary to several terms of the Busse Foundation

by-laws, particularly the provisions that all trustees serve one-year terms and "[a]ny trustee, other than the Chairman, may be removed either for or without cause…" (Entity Def. App. 34-36, By-Law §§ 2.02, 2.12). Permanency is the opposite of one-year terms and removal with or without cause.

In addition, construing the Foundation Pledge to confer permanent seats is contrary to the Revised Iowa Nonprofit Corporation Act, which requires the Foundation's articles of incorporation or by-laws to control governance of its board and limits the length of a trustee's term to five years "except as otherwise provided in the articles or bylaws." IOWA CODE § 504.805(1) (2015). Therefore, even if the Busse Foundation by-laws did not provide for one-year terms for all Trustees, the Plaintiffs' terms would be limited by statute to five years. Under Iowa Code section 504.805(1), permanent board seats are created in the articles or by-laws, and the Foundation's by-laws specifically provide for one-year terms for all Trustees.

Accordingly, the Court finds Plaintiffs have no legally enforceable right to permanent seats on the Busse Foundation Board of Trustees under the Busse Foundation's by-laws. Therefore, Defendants are entitled to summary judgment on Count XIII insofar Plaintiffs seek permanent seats on the Busse Foundation Board of Trustees under Count XIII.

In reaching this conclusion, the Court has considered Plaintiffs' argument that permanent seats on the Busse Foundation Board of Trustees is an alternative remedy to dissolution of the Foundation under Iowa Code section 504.1431. (Plfs. Brief in Resistance to Entity Def. Motion for Summary Judgment at 32). The Court finds this argument unavailing because Plaintiffs did not seek dissolution of the Foundation (or an alternative remedy) under Iowa Code section 504.1431 in their pleadings. The deadline to amend pleadings has long passed, and Plaintiffs cannot seek a remedy for alleged oppression of their rights with respect to the Busse Foundation when all they sought is a declaration of their rights under the Foundation agreements.

Under Iowa Rule of Civil Procedure 1.1102, "Any person interested in an oral or written contract…may have any question of the construction or validity thereof or arising thereunder

determined, and obtain a declaration of rights, status or legal relations thereunder." Nothing in the Rule 1.1102 provides a mechanism for seeking additional relief. Rather, a "declaratory judgment action is a remedy that can be invoked to secure a declaration of rights." *Whitworth v. Heinzle*, 246 Iowa 1155, 1158, 70 N.W.2d 536, 538 (1955). If Plaintiffs wanted to seek remedies under Iowa Code section 504.1431, they were required to plead a claim under that statute. Because Plaintiffs did not do so, they are entitled, at most, to "a declaration of rights, status or legal relations" under the Foundation agreements, which provide no legally enforceable right for permanent seats on the Busse Foundation Board of Trustees.

2. The 2004 Busse Foundation Pledge Agreement

In 2004 the Foundation Pledge was prepared which indicated, among other things, that LoriAnn, Lisa, and Jeff would deposit the excess of each of their estates over their estate tax exemption amount into the Busse Foundation under certain circumstances and with certain conditions. (*See* Plfs. Entity App. 394, Busse Foundation Pledge PLFS007375). According to Defendants, the Foundation Pledge is obligatory and Plaintiffs cannot articulate any legal grounds to refuse its enforcement.

In resistance, Plaintiffs argue the Foundation Pledge fails to meet the standard of a charitable subscription. According to Plaintiffs, the Foundation Pledge is merely a statement of future intent to make a will or bequest. As a corollary to this argument, Plaintiffs assert the Foundation Pledge is nonobligatory because the pledge fails to fund a specific amount and specific action.

At issue for the Court is 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. 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[25], 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 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)).

Resolution of whether the Foundation Pledge is sufficiently obligatory to meet the standard of a charitable subscription involves construction of the Foundation Pledge. That is, the Court must determine the legal effect of the Foundation Pledge. "When construing a written contract, [Iowa courts] are guided by the rule that the intent of the parties controls and, except in cases of ambiguity, intent is determined by what the contract itself says." *Anderson*, 461 N.W.2d at 600 (citations omitted). "[A]lthough summary judgment will be refused if the…agreement…is ambiguous, the preliminary question of whether an ambiguity does exist is a question of law that may be resolved summarily by the court." *Boge*, 309 N.W.2d at 430 (quoting 10 C. Wright and A. Miller, Federal Practice and Procedure s 2730, at 585-87 (1973)). The test for ambiguity is whether the language is susceptible to two interpretations. *Oberbillig v. West Grand Towers Condo Ass'n*, 807 N.W.2d 143, 150 (Iowa 2011).

In entering the Foundation Pledge, the Busse children recognized their "parents' philosophy of returning to others" and stated they wanted "on our deaths, a substantial portion of what we may have

[25] "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).

received from our parents or that we will or may receive in the future, to be returned to others through gifts to charities." (Plfs. Entity App. 395). In furtherance of this commitment, the Busse children stated: "we, in reliance upon each other's promise to the other, agree among ourselves… to dispose of our estates" in a specified manner and then "[t]he remainder of the Marital Trust shall go to the Foundation" and "If we leave no surviving spouse…the balance of our estate shall go to the Foundation." (Plfs. Entity App. 394-95). Thus, the Busse children specifically invited "reliance upon each other's promise to the other" in entering the Foundation Pledge. The Busse children also expressed an unequivocal intent to leave the remainder of their estates to the Busse Foundation as revealed by the Foundation Pledge utilizing obligatory language with respect to the Busse Foundation: "The remainder of the Marital Trust *shall go* to the Foundation" and "If we leave no surviving spouse…the balance of our estate *shall go* to the Foundation." (Plfs. Entity App. 395 (emphasis added)). The Busse children further expressed an unequivocal intent to leave the remainder of their estates to the Busse Foundation by agreeing: "this Pledge shall be enforceable against me or my estate by the Foundation, by one or more of my siblings…or one or more of my siblings' descendants." (*Id.*).

The Busse children's unequivocal intent to leave the remainder of their estates to the Busse Foundation, however, is insufficient to constitute a promise to the Busse Foundation. *See Pappas v. Bever,* 219 N.W.2d 720, 721 (Iowa 1974) (noting there must be a promise to a charitable organization, and not a mere statement of intent); *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."). Moreover, the Busse children inviting "reliance upon each other's promise to the other" in entering the Foundation Pledge, does not necessarily invite the Busse Foundation to rely on their promises. Indeed, a reasonable fact finder could infer that the Busse Foundation has nothing more than a hope or mere expectation to receive a portion of the Busse children's respective estates because only the "remainder of the Marital Trust" or "the balance of [their] estate" shall go to the Foundation. (Plfs. Entity App. 394-95). This is further supported by the Foundation Pledge not being for a specific amount or to fund

a specific action. The Foundation Pledge also contains paragraphs that broadly describe how the Busse children intend to distribute their assets upon their death. The Foundation Pledge describes how the Busse children intend to distribute "Household goods, furniture, furnishings, household equipment, dishes, silverware" etc. (Plfs. Entity App. 394 ¶ 1), their homestead and vacation homes (¶ 2), and "assets depending on their marital status (¶¶ 3 and 4). Finally, in paragraph 3 of the Foundation Pledge, the Busse children state "It is our intent that assets shall be transferred to descendants of Lavern T. and Audrey F. Busse…" (¶ 3).

The Court finds 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. *See Hamilton v. Wosepka*, 154 N.W.2d 164, 169 (Iowa 1967) ("The polestar of construction is the intention of the parties to the contract as revealed by the language used…"). 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. *See* Entity Def. Reply Brief p. 10 (Plaintiffs agreed "that the remainder of their respective estates, after making transfers to their spouses and the lineal descendants of Lavern and Audrey that maximized their applicable tax exclusion amount, *would be left to the Foundation in their wills*. (emphasis added)). The test for ambiguity is whether the language is susceptible to two interpretations. *Oberbillig*, 807 N.W.2d at 150. "[S]ummary judgment will be refused if the…agreement…is ambiguous…." *Boge*, 309 N.W.2d at 430 (quoting 10 C. Wright and A. Miller, Federal Practice and Procedure s 2730, at 585-87 (1973)). Accordingly, Defendants are not entitled to summary judgment on Count XIII to the extent Plaintiffs seek a declaration that the Foundation Pledge is unenforceable under Count XIII.

V. Count IV: Undue Influence

Next, Defendants assert Plaintiffs' claim for undue influence fails as a matter of law. The elements necessary to establish a finding of undue influence are: (1) susceptibility to undue influence; (2) opportunity to exercise such influence and effect the wrongful purpose; (3) disposition to influence unduly for the purpose of procuring an improper favor, and (4) result clearly the effect of undue influence. *Matter of Estate of Davenport*, 346 N.W.2d 530, 532 (Iowa 1984).

Defendants assert Plaintiffs' claim for undue influence fails because (1) no reasonable jury could find Lavern was susceptible to undue influence; and (2) the compensatory damages Plaintiffs seek are unrecoverable in a claim for undue influence.

a. Susceptibility

The Court finds Plaintiffs have engendered a genuine dispute of material fact as to whether Lavern was susceptible to undue influence. Notably, Jeff testified that Lavern is incapable of expressing himself in written communications:

> **Q.** Okay. You talk on page 2 also about his – on D and C and E, all three, about Dad's desire. Why didn't your father send this e-mail expressing his desire?
>
> **A.** I think primarily because he would not have the capability of organizing and writing down his thoughts.
>
> **Q.** And why do you say that?
>
> **A.** He's never demonstrated that capability.

(Jeff Dep. Tr. Vol I 139:24 – 140:7, Plfs. App. 155). In addition, the summary judgment record contains facts, when viewed in the light most favorable to the nonmoving party, that suggest Jeff may have attributed his own views, desires, and interests on behalf of Lavern in written communications. Jeff authored the memo relating to the distribution of BI voting stock out of the Grantor Trusts. (Plfs. App. 479-82). Jeff also testified it was his idea to distribute the BI voting stock out of the Grantor Trusts.

> **A.** The idea for the grantor trust to distribute the Busse Investments voting stock was my idea.

Q. It was your idea?

A. Correct.

(Jeff Dep. Tr. Vol. I, 138:3 – 9, Plfs. App. 155). Jeff also edited the initial drafts of the Dynasty Trusts. Lavern's counsel, Patrick Courtney, sent the first draft of the Dynasty Trust to Jeff on June 17, 2011. (Plfs. App. 650). Jeff responded by asking for a version in MS Word, so he could use its "track changes" function to insert his "questions, comments, and suggestions" to "make it easier for mom and dad to follow and understand the issues." (*Id.*). Jeff exchanged several marked up drafts with Lavern's counsel. (Plfs. App. 653, 661). During these exchanges, Jeff told Lavern's counsel "This outcome is not what I want…I want the entire trust to all go to the deceased child's closest relatives…" (Plfs. App. 664). Jeff also proposed the formation of AB BI to Lavern's counsel. (Plfs. App. 649-50). When viewing these facts in the light most favorably to the nonmoving party, a reasonable jury could conclude that Lavern was susceptible to undue influence.

In reaching this conclusion, the Court has considered Defendants' argument that no reasonable jury could find Lavern was susceptible to undue influence because Plaintiffs have entrusted him with management of the portfolio of securities in BFLP. (LoriAnn Dep. Tr. 37:22 – 38:6, Def. App. 24 ("You understand that [Lavern] continues to be actively involved in managing the portfolio of stock in BFLP? A. And all of the family entities, yes. Q. Do you have any objection to him continuing to serve as the manager of the portfolio stocks in BFLP? A. No, I think it's good for him. Q. Do you think it's good for you? A. I do not believe it's bad for me."). The Court finds this argument unavailing because Lavern's knowledge of the stock market and ability to select stocks does not prove no reasonable jury could find Lavern did not understand Jeff's complex estate-planning efforts or have the ability to resist Jeff's influence on such matters. (*See* Lavern Dep. Vol. I 80:2 – 21, Plfs. App. 221).

b. Compensatory Damages and Undue Influence

Next, Defendants assert they are entitled to summary judgment on Plaintiffs' undue influence claim because the claim seeks money damages, and "[t]here is no apparent authority to award money damages on the claim." (Def. Reply Brief p. 14). The Court finds Defendants argument unpersuasive. A victim of undue influence can elect to pursue equitable relief or actual damages. *See Kennedy v. Thomsen*, 320 N.W.2d 657, 659 (Iowa Ct. App. 1982) (upholding award of punitive damages where "there was ample evidence that [a victim of undue influence] had sustained actual damage, but he attempted to made whole by a claim of recission *rather than a claim for damages*.") (emphasis added). Although a victim of undue influence can elect to pursue equitable relief or actual damages, a victim of undue influence may not recover both actual damages and equitable relief if the entry of judgment results in an award of duplicative damages. *Bronner v. Randall*, No. 14-0154, 2015 WL 2089360, at *15 (Iowa Ct. App. May 6, 2015) (vacating prior judgment entry on basis of duplicative damages where jury returned a verdict "for [victim of undue influence] to receive his one-sixth share of the account as a result of the 2010 designation being found invalid plus an additional $22,706.55 from [tortfeasors] for the same one-sixth share."). Defendants do not allege Plaintiffs are seeking duplicative damages. Therefore, Defendants are not entitled to summary judgment on Count IV on the basis Plaintiffs' are seeking compensatory damages under Count IV. The Court notes, however, that to the extent Plaintiffs fail to substantiate compensatory damages as to any of the underlying conduct (*e.g.*, the Optional Capital Contribution) at trial, the undue influence claim will likewise fail in that respect.

VI. Count XI: Negligent Misrepresentation

Next, Defendants assert they are entitled to summary judgment on Count XI because Jeff was not in the business of supplying information to Plaintiffs, so he has no duty that would give rise to a claim for negligent misrepresentation.

Iowa courts recognize claims for negligent misrepresentation and utilize the Restatement (Second) of Torts section 552 to help define the tort. *See Freeman v. Ernst & Young*, 516 N.W.2d 835, 837

(Iowa 1994) (genesis of tort of negligent misrepresentation is the Restatement (Second) of Torts section 552). Restatement (Second) of Torts section 552 provides:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts § 552(1). "As with all negligence actions, an essential element of negligent misrepresentation is that the defendant must owe a duty of care to the plaintiff. In the context of negligent misrepresentation, this means the person who supplies the information must owe a duty to the person to whom the information is provided." *Sain v. Cedar Rapids Community School dist.*, 626 N.W.2d 115, 124 (Iowa 2001). In determining whether a defendant owed a duty of care to the plaintiff, Iowa courts have adopted a narrower view than the Restatement and "have determined that this duty arises only when the information is provided by persons in the business or profession of supplying information to others." *Id.* (citations omitted); *see Meier v. Alfa-Laval, Inc.*, 454 N.W.2d 576, 581 (Iowa 1990) (providing false information is not actionable if the person is not in the business or profession of supplying information). Iowa courts justify the imposition of a duty of care in this context "because a transaction between a person in the business or profession of supplying information and a person seeking information is compatible to a special relationship." *Sain*, 626 N.W.2d at 124 (citations omitted).

When determining whether a person is in the business of supplying information to others, Iowa courts consider several factors. Iowa courts distinguish between relationships that are arm's-length and adversarial and those that are advisory. *Sain*, 626 N.W.2d at 124-25. Iowa courts also consider whether the person providing the information "is manifestly aware of the use that the information will be put, and intends to supply it for that purpose." *Id.* at 125. Iowa courts consider whether the defendant gave the information to the plaintiff "gratuitously or incidental to a different service." *Id.* Iowa courts have also found it appropriate to consider the role the defendant was playing when the

alleged misrepresentation occurred. *Meier*, 454 N.W.2d at 581 (determining whether a cause of action would lie where the defendant supplied information in his "role as a retail merchant").

"[T]he pecuniary interest that a person has in a business, profession, or employment that supplies information to others gives rise to the factors that support the imposition of a duty, such as the awareness, foreseeability, and justifiable reliance compatible with a special relationship." *Dinsdale Construction, LLC v. Lumber Specialties, Ltd.*, No. 15-0164, 2016 WL 7422352, at *5 (Iowa Dec. 23, 2016). "Transactions involving a pecuniary interest share the attributes of a business, profession, or employment supplying information to others, as well as the rationale for imposing a duty." *Id.* An indirect financial interest in providing the information satisfies the pecuniary interest requirement. *Id.*; *Sain*, 626 N.W.2d at 126.

In addition to the pecuniary interest requirement, the information must be supplied "for the guidance of others in their business transactions." *Sain*, 626 N.W.2d at 125-26 (citation omitted). "This means the tort does not apply when a defendant directly provides information to a plaintiff in the course of a transaction between the two parties, which information harms the plaintiff in the transaction with the defendant." *Id.* (citation omitted). The Court also observes that "the tort of negligent misrepresentation does not apply to the failure to provide information, but to the disclosure of information." *Id.* at 128 (citation omitted). The Court observes further that negligent misrepresentation "applies only to false information and does not apply to personal opinions or statements of future intent." *Id.* at 127 (citations omitted).

According to Plaintiffs' three transactions give rise to a negligent misrepresentation claim against Jeff: (1) the formation of MMB; (2) distributions and withdrawals from BFLP; and (3) BI loans. (Amended Petition ¶ 219).

1. The formation of MMB

With respect to the formation of MMB, Plaintiffs allege "Jeff informed [them] of a 'new partnership', the partners of which were to be Lavern and Audrey, at the annual meetings in 2012 and

then failed to keep them properly and completely updated as the parameters of this partnership were fundamentally changed." (Def. App. 189, 201). Under the principles set out above, Plaintiffs' negligent misrepresentation claim with respect to the formation of MMB fails as a matter of law because it is premised on the alleged "failure to provide information" or alleged "statements of future intent." *Sain*, 626 N.W.2d at 126-7.

2. Distributions and withdrawals from BFLP

With respect to distributions and withdrawals from BFLP, Plaintiffs allege they "invested funds into BFLP and would not have done so but for Jeff's misrepresentations regarding their ability to control such amounts." (Def. App. 189-90, 201-202). According to Plaintiffs, Jeff "said they could withdraw amounts as needed from BFLP and Lisa, in particular, invested all her daughter's funds possible into BFLP with that expectation. Then Jeff changed the rules and won't allow such withdrawals. The funds are trapped by Jeff." (*Id.*).

Plaintiffs allege there is a triable issue of fact as to whether Jeff was a Busse family financial adviser because Jeff acknowledges he was a financial adviser to his parents. (Def. Resistance to Plfs. Motion to Compel ¶¶ 7, 8). Plaintiffs allege further "[i]f the jury finds that Jeff provided the advice for Plaintiffs' reliance as a Busse 'financial adviser,' then it cannot be a statement of his future intent to allow the distributions, a decision he would be making as a BFA-appointed manager of BFLP." (Plfs. Resistance p. 49). Finally, Plaintiffs allege "a jury could reasonably conclude that Jeff was in the business of supplying advice to Plaintiffs to the extent that he was acting in his role as the manager of BFA and that Plaintiffs could have reasonably understood him to be providing them with financial advice for them to rely on in their interactions with third parties, entities controlled by BFA as the General Partner, like BFLP and AB BI." (*Id.* at 47-8).

The thrust of Plaintiffs' resistance is: (1) Jeff was a Busse family financial adviser; (2) Jeff, acting as Busse family financial adviser, told Plaintiffs if they invest in BFLP they can request withdrawals as needed; (3) Plaintiffs invested in BFLP with that expectation; (4) Jeff, acting as Busse family

financial adviser, supplied the information for the guidance of Plaintiffs in their business transactions with BFLP; (5) Jeff, having a limited partnership interest in BFLP, had an indirect pecuniary interest in providing the advice; (6) Jeff, acting as a BFA-appointed manager of BFLP, allegedly will not allow Plaintiffs to withdraw funds from BFLP as needed. Alternatively, Plaintiffs allege Jeff supplied the information as a manager of BFA.

The Court finds Plaintiffs' resistance unpersuasive.[26] Plaintiffs carefully categorize the various roles Jeff occupied, but then collapse his various "hats" when discussing the pecuniary interest requirement. Plaintiffs provide no evidence to indicate Jeff was ever directly or indirectly compensated as a Busse family financial adviser. At most, Jeff was indirectly compensated as a limited partner in BFLP and through his interests in other family entities. Notably, Plaintiffs cannot blur the distinction between Jeff's various roles to satisfy the pecuniary interest requirement without running afoul of the tripartite relationship requirement of the tort. *Sain*, 626 N.W.2d 126 (negligent misrepresentation "does not apply when a defendant directly provides information to a plaintiff in the course of a transaction between the two parties, which information harms the plaintiff in the transaction with the defendant.") (citation omitted).[27] Because Jeff was not compensated as a Busse family financial adviser, any information he provided in that role would be gratuitous. *Sain*, 626 N.W.2d 125 ("information given gratuitously or incidental to a different service imposes no [duty of care]."). Moreover, Plaintiffs allege since 2002 every transaction or business move always had an estate planning purpose for Jeff's benefit. (Plfs. SOF ¶¶ 1-4); *cf Sain*, 626 N.W.2d at 126 (discussing

[26] For purposes of its analysis, the Court will assume, without deciding, that Jeff was a Busse family financial adviser.
[27] Plaintiffs allege Jeff misrepresented that they could withdraw amounts from BFLP as needed but "*Jeff changed the rules* and won't allow such withdrawals." (Def. App. 189-90, 201-02). Plaintiffs must refer to Jeff in his capacity as a BFA-appointed-manager of BFLP in their interrogatory response as he has no power to disallow withdrawals except in that capacity. Therefore, Plaintiffs' assertion that "Jeff's pecuniary interest was access to and control of the family members assets" is unavailing. (Plfs. Response to Defs. Statement of Add'l Authority ¶ 11). Jeff would only have access to and control of the family members assets as a BFA-appointed-manager of BFLP. If Jeff provided advice in his capacity as a BFA-appointed-manager of BFLP, Plaintiffs cannot satisfy the tripartite relationship requirement of the tort. *Sain*, 626 N.W.2d 126 (negligent misrepresentation "does not apply when a defendant directly provides information to a plaintiff in the course of a transaction between the two parties, which information harms the plaintiff in the transaction with the defendant.") (citation omitted). Plaintiffs cannot bypass the tripartite relationship requirement by asserting Jeff advised Plaintiffs as a Busse family financial adviser, but then rely on his status as a BFA-appointed-manager of BFLP to satisfy the pecuniary interest requirement.

similarity between a high school counselor and a person in the business or profession of supplying information to others and noting "[t]he school counselor does not act for his or her own benefit, but provides the information for the benefit of students."). Therefore, even if Jeff was acting as a Busse family financial adviser, the Court finds Jeff was not in the business or profession of supplying information.

To the extent Jeff advised Plaintiffs as a manager of BFA, the information provided would be incidental to his primary function of operating and providing management of BFLP and AB BI. BFA was not created to provide information; it was created to serve as the General Partner to BFLP and AB BI. (Def. App. 104, 151, BFLP Agreement, p. 41; AB BI Agreement, p. 43; *see* Plfs. SOF ¶ 11). Therefore, if Jeff advised Plaintiffs as a manager of BFA, the information would have been incidental to his primary function of operating and providing management of BFLP and AB BI. *Sain*, 626 N.W.2d at 125 ("information given gratuitously or incidental to a different service imposes no [duty of care].").

To the extent Jeff advised Plaintiffs as a BFA-appointed manager of BFLP, the information provided would be incidental to his primary function of operating and providing management of BFLP, and would constitute a statement of future intent. *Sain*, 626 N.W.2d at 126 (the tort of negligent misrepresentation "does not apply to personal opinions or statements of future intent.").

Under the principles set out above, Plaintiffs' negligent misrepresentation claim with respect to distributions and withdrawals from BFLP fails as a matter of law because Jeff was not in the business or profession of supplying information. *Sain*, 626 N.W.2d 124 ("an essential element of negligent misrepresentation is that the defendant must owe a duty of care to the plaintiff…this duty arises only when the information is provided by persons in the business or profession of supplying information to others.").

3. BI loans

With respect to BI loans, Plaintiffs assert "BI earnings decreased in 2013 and 2014 due to unnecessarily taking on $4,995,000 of debt in 2012." (Def. App. 189-90, 201-202). Plaintiffs do not explain how the BI loans give rise to a negligent misrepresentation claim. However, to the extent Plaintiffs rely on Jeff's statement "I am not comfortable with BI taking on additional debt larger than the suggested $4.0MM" (Jeff Busse May 15, 2012 email, Plfs. App. 256), the Court finds the statement is a nonactionable opinion or statement of future intent. *Sain*, 626 N.W.2d 127 (negligent misrepresentation "applies only to false information and does not apply to personal opinions or statements of future intent.") (citations omitted). To the extent Plaintiffs allege Jeff inadequately informed Plaintiffs about the BI loans, Plaintiffs claim is premised on the alleged "failure to provide information." *Id.*

Based on the foregoing, the Court finds there is no genuine issue of material fact which, if resolved in Plaintiffs' favor, would enable Plaintiffs to satisfy all of the requisite elements of a negligent misrepresentation claim. Therefore, Plaintiffs' negligent misrepresentation fails as a matter of law and Defendants are entitled to summary judgment in their favor on Count XI.

VII. Count XIV: Breach of Fiduciary duty Re: Life Insurance Trust

In Count XIV, Plaintiffs seek compensatory damages stemming from Jeff's failure, as trustee of the Life Insurance Trust, to make premium payments on Plaintiffs' respective life insurance policies in 2016. According to Plaintiffs, they have been harmed because their life insurance policies' durations have decreased due to Jeff's failure to make premium payments on their respective life insurance policies in 2016.

Defendants assert Plaintiffs have failed to state a claim against Jeff for breach of fiduciary duty on the Life Insurance Trust because Jeff owed no duty to pay premiums or to provide notice of premium payment deadlines. Defendants assert further that no harm resulted from any failure to pay premiums or to provide notice of premium payment deadlines because supplemental makeup payments are possible.

The Court finds Defendants are entitled to summary judgment on Count XIV because Plaintiffs' harm is entirely speculative. It is undisputed that the life insurance premium payments in question may be made up. (Plfs. Response to Def. SOF ¶ 78). Therefore, any financial harm attributable to a reduced duration in Plaintiffs' respective life insurance policies is speculative and contingent upon (1) the failure to make up premium payments and (2) the death of Lavern and Audrey during a specific window of time. Because it is uncertain whether or when these events will occur, there is no reasonable basis from which a fact finder could infer or approximate Plaintiffs' damages, if any, that stem from Jeff's failure to make premium payments on Plaintiffs' respective life insurance policies in 2016. *Sun Valley*, 551 N.W.2d at 641 ("a fact finder may allow recovery provided there is a reasonable basis in the evidence from which the fact finder can infer or approximate the damages.). Because Plaintiffs are only seeking compensatory damages on Count XIV and those damages are overly speculative, Defendants are entitled to summary judgment as a matter of law on Count XIV.

RULING

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants, Jeffrey Busse and Lavern T. Busse's Motion for Partial Summary Judgment is GRANTED IN PART and DENIED IN PART as follows:

1. Defendants' Motion for Summary Judgment on Count I – Violation of Grantor Trust (Lavern) is GRANTED.

2. Defendants' Motion for Summary Judgment on Count VII – BFA Breach of Fiduciary Duty (Jeff) is DENIED.

3. Defendants' Motion for Summary Judgment on Count VIII – Oppressive Conduct of BFA, BFLP, and AB BI (Jeff) is GRANTED IN PART and DENIED IN PART:

    a. Defendants are entitled to Summary Judgment on Count VIII to the extent Count VIII relies on compensatory damages and punitive damages stemming from the BFLP Loan.
    b. Defendants' Motion for Summary Judgment on Count VIII is otherwise DENIED.

4. Defendants' Motion for Summary Judgment on Count X – BI Breach of Fiduciary Duty (Jeff) is GRANTED IN PART and DENIED IN PART:

a. Defendants are entitled to Summary Judgment on Count X to the extent Count X relies on compensatory damages and punitive damages stemming from the MMB Loans or the BFLP Loan.

b. Defendants' Motion for Summary Judgment on Count X is otherwise DENIED.

5. Defendants' Motion for Summary Judgment on Count XII – Aid and Abet (Lavern) is GRANTED IN PART and DENIED IN PART:

a. Defendants are entitled to Summary Judgment on Count XII to the extent Count XII relies on compensatory damages and punitive damages stemming from the MMB Loans or the BFLP Loan. Defendants are also entitled to Summary Judgment on Count XII to the extent that Count XII relies on any other count for which Defendants are entitled to summary judgment in their favor.

b. Defendants' Motion for Summary Judgment on Count XII is otherwise DENIED.

6. Defendants' Motion for Summary Judgment on Count IX – Declaratory Judgment BFLP is GRANTED IN PART and DENIED IN PART:

a. Defendants' Motion for Summary Judgment on Count IX is DENIED to the extent Count IX seeks a declaration that "[t]he conduct of Jeff and Lavern in making the optional capital contribution violated the duty of good faith and fair dealing owed to LoriAnn and Lisa as part of the Partnership Agreement." (Petition ¶ 211).

b. Defendants' Motion for Summary Judgment on Count IX is GRANTED to the extent Count IX seeks a declaration that "BFA and Jeff, as a manager of BFLP, have materially breached the partnership agreement by approving [the] optional capital contribution…" (Petition ¶ 210).

c. Defendants' Motion for Summary Judgment on Count IX is GRANTED to the extent Count IX seeks a declaration that "BFA along with Jeff, who is a manager of BFLP, and Lavern, who is a manager of BFLP, have breached the duty of good faith and fair dealing owed to LoriAnn and Lisa by approving [the] optional capital contribution…" (Petition ¶ 209).

7. Defendants' Motion for Summary Judgment on Count XIII – Declaratory Judgment Busse Foundation is GRANTED IN PART and DENIED IN PART:

a. Defendants' Motion for Summary Judgment on Count XIII is GRANTED to the extent Plaintiffs seek permanent seats on the Foundation Board under Count XIII.

b. Defendants' Motion for Summary Judgment on Count XIII is DENIED to the extent Count XIII seeks a declaration that the Foundation Pledge is unenforceable.

8. Defendants' Motion for Summary Judgment on Count IV – Undue Influence is GRANTED IN PART and DENIED IN PART:

    a. Defendants are entitled to Summary Judgment on Count IV to the extent Count IV relies on compensatory damages and punitive damages stemming from the MMB loans or the BFLP Loan.

    b. Defendants' Motion for Summary Judgment on Count IV is otherwise DENIED.

9. Defendants' Motion for Summary Judgment on Count XI – Negligent Misrepresentation is GRANTED.

10. Defendants' Motion for Summary Judgment on Count XIV – Breach of Fiduciary Duty re: Life Insurance Trust is GRANTED.

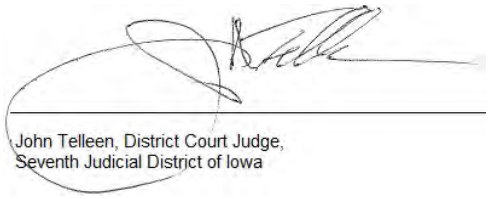
ALL OF THE ABOVE IS SO ORDERED. The Court directs the clerk to provide copies of this Ruling and Order to the counsel of record.

State of Iowa Courts

Type: OTHER ORDER

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

So Ordered



John Telleen, District Court Judge,
Seventh Judicial District of Iowa