

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RICE

THIRD JUDICIAL DISTRICT

In Re WCAL Charitable Trust

PETITION TO REDRESS
BREACH OF TRUST

No. _____

I. PETITIONER

1. Petitioner SaveWCAL is a non-profit corporation organized under the laws of the State of Minnesota. It is also a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code.

II. JURISDICTION AND VENUE

3. The District Court has subject matter jurisdiction over this Petition to redress a breach of a charitable trust pursuant to Minn. Stat. §§ 501B.16(19) and 501B.31.

4. The proper venue for this proceeding under Minn. Stat. § 501B.17 is Rice County because the WCAL Charitable Trust was administered in Rice County and because there has been a prior court proceeding in Rice County regarding the trust. Rice County District Court File No. 66-CV-06-2518.

III. HISTORICAL BACKGROUND

5. St. Olaf College is a non-profit corporation organized under the laws of the State of Minnesota. It is also a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code. The campus of the college is located in Northfield, Minnesota.

6. In 1922 the federal government issued a broadcasting license to St. Olaf College to operate WCAL Radio. When the Federal Radio Commission was created in 1927, one of the first 27 licenses it issued was to St. Olaf College to operate WCAL Radio on an AM broadcasting frequency.

7. In 1968 the Federal Communications Commission issued a license to St. Olaf College to operate WCAL Radio at the 89.3 FM broadcasting frequency.

8. In 1998 the Federal Communications Commission issued a license to St. Olaf College to operate a translator station at the 88.7 FM broadcasting frequency to transmit the WCAL signal to southeastern Minnesota.

9. The broadcasting studios and offices of WCAL Radio were located in Skifter Building on the campus of St. Olaf College. The building was built in stages from 1931 through 1991. All the costs of the construction of the building were paid with charitable contributions from WCAL donors.

10. In 1991 a new broadcasting tower to transmit the WCAL signal was constructed at a cost of more than \$1 million on land leased from the University of Minnesota in Rosemount, Minnesota. The entire cost of the construction of the tower was paid by charitable contributions from WCAL donors. St. Olaf College

did make a loan for part of the cost of construction. The loan was repaid with interest at the rate of 7% per annum by the charitable contributions.

11. At periodic intervals St. Olaf College renewed its broadcast licenses for WCAL Radio pursuant to the requirements of federal law. In order to renew the licenses St. Olaf College had to demonstrate to the Federal Communications Commission that it was serving the public interest, convenience, and necessity.

12. Over more than 80 years tens of thousands of WCAL donors contributed millions of dollars to support WCAL Radio. Their charitable contributions enabled St. Olaf College to serve the public interest, the prerequisite for the renewal of its licenses for WCAL Radio. The support of the donors was the *sine qua non* for the continuing existence of the radio station. Without that support St. Olaf College would not have possessed the licenses and other assets of the charitable trust that it has attempted to convert to its own purposes as described in Section IV below.

13. St. Olaf College solicited donations on the basis that charitable gifts would "help guarantee the future of Classical 89.3 for generations to come." See Exhibit A. The act of making donations to a charitable organization (St. Olaf College) for a charitable and educational purpose (the operation and perpetuation of a public radio station) created a charitable trust under Minnesota law. Minn. Stat. § 501B.35 subd. 3.

14. The principal assets of the charitable trust (WCAL Radio) were the broadcasting licenses, Skifter Building, the Rosemount broadcasting tower, the

lease for the land on which the tower is located, the broadcasting equipment, the good will and going concern value of the station, and the WCAL music library.

15. WCAL was the first listener supported radio station in the nation, one of the facts recognized by its inclusion as Item No. 141 in *Minnesota 150—the People, Places and Things that shape Our State*, the major sesquicentennial exhibit at the Minnesota History Center. See Exhibit B.

16. WCAL was a public radio service that was designed to broadcast classical music, public affairs programs, and religious services to a large metropolitan community outside the academe in a manner that would reflect the intellectual, spiritual, and cultural traditions of St. Olaf College. See the WCAL mission statement at Exhibit C.

17. In 2004 WCAL had 8,000 listener-members and a weekly audience of 80,000 listeners. See charts 4 and 5 in Exhibit D prepared by the former business manager of WCAL.

IV. BREACH OF TRUST

18. Minnesota Public Radio is a non-profit corporation organized under the laws of the State of Minnesota. It is also a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code. Its principal place of business is located in St. Paul, Minnesota.

19. In November 2003 Minnesota Public Radio submitted a multi-million dollar offer to St. Olaf College for the assignment of the broadcasting licenses for 89.3 FM and 88.7 FM, for the purchase of the Rosemount broadcasting tower, for

the assignment of the lease on which the tower is located, for all other real property used in connection with the operation of WCAL Radio, for the purchase of personal property, including most of the music library, used in connection with the operation of the station, and for the good will and the going concern value of the station. See Section 1.1 of the Purchase Agreement at Exhibit E.

20. Minnesota Public Radio communicated the offer to Christopher Thomforde, who was the president of St. Olaf College at that time. In turn, Thomforde turned the offer over to Jan McDaniel and to Addison (Tad) Piper for evaluation. See Exhibit F. At that time McDaniel was a vice president of St. Olaf College. Piper was a member of the Board of Regents of St. Olaf College and the chair of its finance committee. At the same time Piper was a member of the Board of Trustees of Minnesota Public Radio and a member of the Board of Directors of Piper Jaffray & Co.

21. On August 5, 2004, the Board of Regents of St. Olaf College voted to accept the MPR offer. Piper abstained from the formal vote.

22. Four days later, on August 9, 2004, St. Olaf College informed the Board of Directors of WCAL Radio of the MPR offer for the first time. The WCAL Board of Directors had been established in 1979. The Board was intended to serve as the community advisory board required by federal law as a condition to the receipt of federal funds. The purpose of the community advisory board is to enable the public to participate in major policy decisions. 47 U.S.C. § 396(k)(8).

23. Two of the WCAL directors were Jan McDaniel and Walter Ringer III, who was also a member of the Board of Regents of St. Olaf College. Neither director informed his or her fellow directors on the WCAL board of the MPR offer prior to August 9, 2004.

24. On August 30, 2004 St. Olaf College and Minnesota Public Radio submitted an application to the Federal Communications Commission for the assignment of the broadcast licenses for 89.3 FM and 88.7 FM.

25. On October 5, 2004 the general counsel for SaveWCAL submitted a request to the Attorney General of the State of Minnesota to exercise the statutory responsibility for the supervision of charitable trusts to investigate the St. Olaf--MPR transaction. The request states, in part, that “the proceedings before the FCC and the CPB will not provide a forum for the determination of compliance with the provisions of state law on charitable trusts.” See Exhibit G.

26. In a written response on October 19, 2004 the Attorney General refused to commence an investigation. See Exhibit H.

27. On November 15, 2004 the Federal Communications Commission approved the assignment of the broadcast licenses for 89.3 FM and 88.7 FM to MPR.

28. On November 19, 2004 the closing on the St. Olaf--MPR transaction was held. St. Olaf College received \$10.5 million in cash from MPR plus promotional announcements for the college broadcast on MPR. The parties agreed that the promotional announcements had a value of \$1.3 million.

29. In December 2004 St. Olaf College announced that the \$10.5 million in cash would be added to the general endowment for the college. The income from that additional investment would be used to repair the organ in the chapel and to endow four faculty chairs. See Exhibit I.

30. St. Olaf College did not give notice of the transaction to the Attorney General of the State of Minnesota nor did it obtain judicial approval for the transaction.

31. MPR has used the assets of the WCAL charitable trust for its own purposes, including broadcasting its own programming (alternative rock music) on 89.3 FM since January 24, 2005.

32. Over the years St. Olaf College had established an endowment for WCAL with some of the charitable contributions from the WCAL donors. In March 2004 the value of the endowment was approximately \$2.96 million. See Exhibit J.

33. Between November 2004 and December 2006 St. Olaf College withdrew approximately \$1.6 million from the WCAL endowment, including a gift from Senior Regent Leonard Hoeft with a value of \$1 million. The value of the charitable gifts in the WCAL endowment after the withdrawals was approximately \$1.36 million.

V. JUDICIAL REVIEW

34. In December 2006 St. Olaf College filed a petition in Rice County District Court requesting approval to use the charitable gifts remaining in the

WCAL endowment. St. Olaf College designated three major categories of donations: (1) restricted endowment gifts listed in exhibit A of its petition with a value of approximately \$401,600.00 as of April 2006; (2) restricted non-endowment gifts listed in exhibit B of its petition with a value of approximately \$651,000.00 as of April 2006; and (3) “undocumented gifts” listed in exhibit C of its petition with a value of approximately \$230,000.00 as of April 2006. St. Olaf College requested the Court to approve the use of the restricted endowment gifts for activities it defined as “core WCAL activities.” The college requested the Court to declare that there were no longer any restrictions on its use of the restricted non-endowments gifts and the “undocumented gifts.”

35. The Attorney General responded to the petition in the form of a letter memorandum. See Exhibit K. SaveWCAL also responded to the petition in the form of a letter memorandum. See Exhibit L.

36. Hearings on the petition were held in Rice County District Court before Judge Gerald Wolf in March, April and May 2007.

37. On June 20, 2007 the Attorney General filed a memorandum of law in the proceeding. In the memorandum the Attorney General expressed her official position to Judge Wolf as follows:

In its April Memorandum St. Olaf **attempts to circumvent charitable trust requirements** for lifting restrictions on its assets by characterizing certain of its assets as not "literally" being charitable trusts and thus not subject to charitable trust principles. St. Olaf's assets, however, are **undoubtedly** either charitable trusts or held in charitable trust and thus subject to charitable trust principles.

Memorandum of Attorney General of June 20, 2007 at 2 (emphasis added).

Not only would charitable gifts donated to St. Olaf be received in trust, but St. Olaf's status as a charitable nonprofit corporation also necessitates that assets it holds are impressed with a charitable trust.

Memorandum of Attorney General of June 20, 2007 at 4. See Exhibit M.

38. In July 2007 Judge Wolf appointed Senior District Court Judge Gary Meyer as a special master.

39. St. Olaf College represented to the Court that it had obtained the consent of living donors to withdraw the \$1.6 million from the WCAL endowment between November 2004 and December 2006 and that therefore there were no longer any restrictions on the use of those donations. Senior Regent Leonard Hoeft denied this representation in a letter to the Court in which he declared that St. Olaf College had never contacted him about the withdrawal of his gift, much less obtained his consent. See Exhibit N.

40. In March 2008 Judge Meyer submitted his report as special master. On June 10, 2008 Judge Wolf issued his Order regarding the petition of St. Olaf College. The Order grants the request of the college to use the restricted endowment gifts for "core WCAL activities." The Order restricts the use of the Hoeft gift to the same purpose. The Order denies the petition with respect to the restricted non-endowment gifts and the "undocumented gifts."

41. The Order recognizes that the donations to St. Olaf College for WCAL Radio created a charitable trust. Order of June 10, 2008 at 4-5. The Order also

describes the failure of the Attorney General to honor her statutory duty to enforce the WCAL Charitable Trust:

The Minnesota Attorney General is the watchdog of all trusts throughout the state of Minnesota. Deplorably, when St. Olaf made the decision to sell WCAL, no one from the Attorney General's Office intervened to safeguard the trust. The Attorney General's Office was notified by SaveWCAL of the pending sale yet they failed to do anything. The undersigned is absolutely mystified as to why the State Attorney General did not become involved in a sale of **trust assets** valued at \$12 million **when it is its statutory obligation to do so**. Let's hope that type of activity never happens again.

The undersigned does recognize that there is a new elected Attorney General who was not in office at the time of the sale. However, the office is painted with the same brush. Her office is tainted with this **lapse of duty** even though she did not hold her present position at the time. Regardless of who was serving as Minnesota Attorney General at the time of the sale, the office as an institution **has a duty to the people of Minnesota** to serve as guardian of all trusts created and operated in this state. The Minnesota Attorney General's Office **failed in its duty** in this case.

The only watchdog looking out for the interests of the trust in this case was Respondent, the non-profit organization SaveWCAL. SaveWCAL raised the alarm when they first learned of the sale of WCAL by St. Olaf, but neither St. Olaf nor the Minnesota Attorney General's Office paid any heed to SaveWCAL's warning.

Order of June 10, 2008 at 5 (emphasis added). See Exhibit O.

VI. STANDING

42. SaveWCAL was organized as a non-profit corporation under the laws of the State of Minnesota on September 3, 2004. The purpose of the corporation, as expressed in its Articles of Incorporation, is to preserve WCAL Radio. The corporation is governed by a board of directors composed of eight persons. All eight directors were WCAL donors.

43. After St. Olaf College announced the sale of WCAL to MPR on August 10, 2004, SaveWCAL posted an electronic petition to demonstrate to St. Olaf College the support of the listeners in the community to preserve the radio station. More than 5,500 persons signed the petition by the end of 2004.

44. On September 17, 2004, MPR applied to the St. Paul Housing & Redevelopment Authority for the issuance of tax exempt bonds to provide the permanent financing for its acquisition of the assets of the WCAL Charitable Trust. The proposed underwriter was Piper Jaffray & Co. The general counsel of SaveWCAL appeared at the public hearing on the application to express opposition on the ground that state law (Minn. Stat. § 469.152) does not authorize the use of *housing and redevelopment* bonds for the purchase of a radio station. The MPR application was denied. (The law firm that served as bond counsel for the HRA had submitted a written opinion that state law does authorize such use of HRA bonds. The same law firm would go on to represent Piper Jaffray & Co. in the subsequent MPR application to the St. Paul Port Authority in 2005 described in the next paragraph.)

45. In August 2005 MPR applied to the St. Paul Port Authority for the issuance of tax exempt bonds to provide the permanent financing for its acquisition of the assets of the WCAL Charitable Trust. The general counsel of SavwWCAL appeared at the public hearing on the application to express opposition on the ground that state law (Minn. Stat. §§ 469.084 and 469.152) does not authorize the use of Port Authority bonds for the purchase of a radio station.

The MPR application was granted on a vote of four to two despite the fact that *no one* spoke in favor of the application at the public hearing (not even Thomas J. Kigin, the vice president and general counsel of MPR, who was present at the hearing). Piper Jaffray & Co. was retained as the underwriter of the bonds. (The law firm that served as bond counsel for the Port Authority had submitted a written opinion that state law does authorize such use of Port Authority bonds. The same law firm served as corporate counsel on other matters for Piper Jaffray & Co. at that time.)

46. After the Order described in paragraph 42 was issued in June 2008, SaveWCAL renewed its demand on the Attorney General to enforce the WCAL Charitable Trust by seeking a judicial declaration that the St. Olaf--MPR transaction is void. The Attorney General has again refused to take action to enforce the WCAL Charitable Trust.

47. SaveWCAL, as a representative of WCAL listeners and donors, is an interested organization under Minn. Stat. § 501B.16 with standing to seek redress for the breach of the WCAL Charitable Trust. There is no other party to represent the public interest as the Attorney General continues to abdicate her statutory duty under Minn. Stat. § 501B.41 to enforce the charitable trust. *In Re Trust of Louis W. Hill*, 509 N.W.2d at 171-172 (Minn. App. 1993).

VI. REMEDY

48. Where the trustees of a charitable trust have no power under the trust instrument or under an order of a court of equity to convey such property, a deed

made of such property **is void** and subject to cancellation upon application of proper parties. 15 Am.Jur.2d Charities § 95 (emphasis added).

49. A judicial declaration that the St. Olaf--MPR transaction is void is the only adequate remedy for the breach of the WCAL Charitable Trust. The broadcast license for 89.3 FM was the only full power non-commercial license in the Twin Cities metropolitan area that MPR had not previously acquired. The Federal Communications Commission will not issue any additional full power non-commercial licenses in the Twin Cities metropolitan area as the broadcast spectrum is full. See Exhibit P.

THEREFORE, the Petitioner requests the Court to issue a judgment declaring that the St. Olaf College--Minnesota Public Radio transaction is void. In the alternative, the Petitioner requests the Court to issue a judgment declaring (a) that the transaction did not terminate the WCAL Charitable Trust and (b) that the assets of the trust include the current value of the \$10.5 million cash payment received from Minnesota Public Radio, and the current value of the \$2.96 million WCAL endowment, and Skifter Building. The Petitioner also requests the Court to determine whether St. Olaf College should be removed as trustee for its attempt to liquidate the WCAL Charitable Trust without notice and without judicial approval and to convert the assets of the trust to its own purposes.

ACKNOWLEDGMENT

SaveWCAL, through its attorney, hereby acknowledges that sanctions may be imposed by the Court pursuant to Minn. Stat. § 549.211 if Petitioner asserts a frivolous or unfounded claim or defense or otherwise acts in bad faith in this proceeding.

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