

STATE OF MINNESOTA  
COUNTY OF RICE



IN DISTRICT COURT  
THIRD JUDICIAL DISTRICT  
CIVIL DIVISION

---

File No. 66-CV-08-3602

In Re WCAL Charitable Trust

**ORDER GRANTING ST. OLAF  
COLLEGE AND MINNESOTA  
PUBLIC RADIO'S MOTIONS  
FOR SUMMARY JUDGMENT  
AND MEMORANDUM**

---

On September 24, 2008, Petitioner, SaveWCAL, filed a Petition pursuant to Minn. Stat. §§ 501B.16, subd. 19 and 501B.31 "to redress a breach of a charitable trust" by St. Olaf College ("St. Olaf") concerning its sale of WCAL Radio to Minnesota Public Radio ("MPR") on August 5, 2004. Its prayer for relief is as follows:

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 remove St. Olaf College as trustee for its attempt to liquidate the WCAL Charitable Trust without notice and without judicial approval and for its attempt to convert the assets of the trust to its own purposes.

On October 20, 2008, St. Olaf filed a motion pursuant to Minn. R. Civ. P. 12, for dismissal for failure to state a claim or, in the alternative, a motion pursuant to Minn. R. Civ. P. 56, for summary judgment. On October 21, 2008, MPR filed a similar motion for dismissal or, in the alternative, for summary judgment.

FEB 27 2009

A hearing was held on said motions before the Honorable Bernard E. Borene, Judge of District Court, on December 18, 2008, at the Rice County Courthouse in Faribault, Minnesota. Michael W. McNabb, Ames Business Center, 2500 West County Road 42, Burnsville, Minnesota, represented SaveWCAL. Michael R. Cunningham, Robert E. Harding, and Sarah Duniway, of GRAY, PLANT, MOOTY, MOOTY & BENNETT, P.A., 500 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota, represented St. Olaf. Eleasalo V. Ale and Hazen Graves, of FAEGRE & BENSON, LLP, 2200 Wells Fargo Center, 90 South Seventh Street, Minneapolis, Minnesota, represented MPR. Ann K. Bloodhart and Shannon Harmon, Assistant Attorneys General, 445 Minnesota Street, Suite 1200, St. Paul, Minnesota, represented the State of Minnesota.

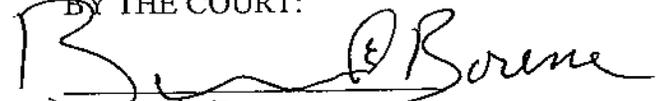
At the hearing the Court indicated that, since affidavits and exhibits had been presented concerning the motions, the motions would be considered motions for summary judgment.

The Court, having considered the pleadings, motions, affidavits, and statements and memoranda of counsel, **DOES HEREBY ORDER:**

1. The motions for summary judgment of St. Olaf and MPR are **GRANTED**. The Petitioner of SaveWCAL for redress of breach of a charitable trust is Dismissed on the merits.
2. St. Olaf and MPR are awarded costs and disbursements to be taxed herein.
3. Entry of judgment is stayed until March 27, 2009.
4. The following **MEMORANDUM** is incorporated herein.

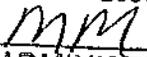
Dated this 25<sup>th</sup> day of February, 2009.

BY THE COURT:

  
Bernard E. Borene  
Judge of District Court

RICE COUNTY, MN  
FILED

FEB 26 2009

  
COURT ADMINISTRATOR

## MEMORANDUM

### FACTS

St. Olaf, a liberal arts college located in Northfield, Minnesota, 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.

In 1922 the federal government issued a broadcasting license to St. Olaf to operate WCAL Radio. When the Federal Radio Commission was created in 1927, one of the first 27 licenses was to St. Olaf to operate WCAL Radio on an AM broadcasting frequency. In 1968 the Federal Communications Commission ("FCC") issued a license to St. Olaf to operate WCAL Radio at the 89.3 FM broadcasting frequency. In 1998 the FCC issued a license to St. Olaf to operate a translator station at the 88.7 broadcasting frequency to transmit the WCAL signal to southeastern Minnesota.

WCAL was the first listener supported radio station in the nation. 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.

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

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 cost of the construction of the tower was paid by charitable contributions from

WCAL donors. The contribution from St. Olaf was a loan for part of the cost of construction that was repaid with interest at the rate of 7% per annum by charitable contributions.

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

Over more than 80 years, tens of thousands of individual 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 individual donors financially supported the radio station, and financially enabled St. Olaf to continue possessing the licenses and other assets. The support of the individual donors also enabled the college to obtain donations and grants from additional sources.

St. Olaf solicited donations and grants to provide for the operating costs, the capital assets, and the WCAL endowment. The donors to WCAL included corporations, foundations, the Corporation for Public Broadcasting, St. Olaf itself, and tens of thousands of individuals. St. Olaf solicited donations on the basis that charitable gifts would “help guarantee the future of Classical 89.3 for generations to come.”

In 2004, WCAL had 8,000 listener-members and a weekly audience of 80,000 listeners. The broadcast signal reached the Twin Cities metropolitan area and southeastern Minnesota. More than three million listeners could access the WCAL programming with a radio. At the same time, St. Olaf considered the station’s relevance to the college’s educational mission had become increasingly tenuous. Evaluating WCAL against other programs more directly related to St. Olaf’s educational mission, the Board of Regents questioned whether continued operation of

the radio station was in the College's best interest. When the opportunity arose to sell St. Olaf's FCC license and associated equipment for a reasonable price and to use the proceeds to advance St. Olaf's mission of educating students, the Board of Regents determined that closing the radio station and selling the associated assets was in the best interests of St. Olaf and its students.

MPR 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 in St. Paul, Minnesota.

In November 2003 MPR submitted a multi-million dollar offer to St. Olaf 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.

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

St. Olaf and MPR did not give notice of the transaction to the Attorney General of the State of Minnesota nor did either party obtain judicial approval for the sale.

On August 9, 2004, four days after St. Olaf accepted the MPR offer, the 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 significant policy decisions.

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.

On August 30, 2004, St. Olaf and MPR submitted an application to the FCC for the assignment of the broadcast Licenses for 89.3 FM and 88.7 FM.

SaveWCAL was organized on September 3, 2004 as a non-profit corporation 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 purpose of the corporation, as expressed in its Articles of Incorporation, is to preserve WCAL Radio.

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 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.

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." In a written response on October 19, 2004, the Attorney General refused to commence an investigation.

On November 15, 2004, the FCC approved the assignment of the broadcast licenses for 89.3 FM and 88.7 FM to MPR.

On November 19, 2004, the closing on the St. Olaf –MPR transaction was held. St. Olaf 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.

In December 2004, St. Olaf 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.

MPR has used the assets of WCAL for its own purposes, including broadcasting its own programming (alternative rock music) on 80.3 FM since January 24, 2005.

Over the years St. Olaf 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 \$2.94 million. Between November 2004 and December 2006, St. Olaf 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.

In December 2006, St. Olaf filed a petition in Rice County District Court requesting approval to use the charitable gifts remaining in the WCAL endowment. St. Olaf 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 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.”

The Attorney General responded to the petition in the form of a letter memorandum. SaveWCAL also responded to the petition in the form of a letter memorandum. Hearings in the petition were held in Rice County District Court before Gerald J. Wolf, Judge of District Court, in March, April and May 2007.

On June 20, 2007, the Attorney General filed a memorandum of law in the proceeding. In the memorandum the Attorney General filed expressed her official position to the court. In July 2007, Judge Wolf appointed Senior District Court Judge Gary J. Meyer as a special master.

St. Olaf 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 submitted to the Court in which he declared that St. Olaf had never contacted him about the withdrawal of his gift, nor obtained his consent.

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. 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.”

On September 24, 2008, Petitioner, SaveWCAL, filed a Petition pursuant to Minn. Stat. §§ 501B.16, subd. 19 and 501B.31 “to redress a breach of a charitable trust” by St. Olaf College (“St. Olaf”) concerning its sale of WCAL Radio to Minnesota Public Radio (“MPR”) on August 5, 2004.

On October 20, 2008, St. Olaf filed a motion pursuant to Minn. R. Civ. P. 12, for dismissal for failure to state a claim or, in the alternative, a motion pursuant to Minn. R. Civ. P. 56, for summary judgment. On October 21, 2008, MPR filed a similar motion for dismissal or, in the alternative, for summary judgment.

## STANDARD

### I. Summary Judgment Standard

In deciding a motion for summary judgment, the court must view all evidence in the light most favorable to the non-moving party and must resolve all doubts and factual inferences against the moving party. Nord v. Herried, 305 N.W.2d 337, 339 (Minn. 1981); Anderson v. Twin City Rapid Transit Co., 250 Minn. 167, 186, 84 N.W.2d 593, 605 (1957). The moving party is entitled to summary judgment only if it can show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. See Minn. R. Civ. P. 56.03.

When the moving party has carried its burden under Rule 56.03, “its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.” Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1989); citing, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Summary judgment is appropriate when the nonmoving party has failed to show sufficient evidence to establish the existence of an element essential to the party's case and on which the party will carry the burden of proof at trial. Lubbers v. Anderson, 539 N.W.2d 398, 401 (Minn. 1995). A party cannot rely on speculation or

general assertions to create a genuine issue of material fact. Nicollet Restoration, Inc. v. City of St. Paul, 533 N.W.2d 845, 848 (Minn. 1995). Allegations and speculations are not enough to avoid summary judgment. Bob Useldinger & Sons, Inc. v. Hangsleben, 505 N.W.2d 323, 328 (Minn. 1993). The mere existence of a scintilla of evidence in support of the nonmoving party's position will be insufficient. Id. The nonmoving party bears the burden of proof on an element essential to its case, and it must make a showing sufficient to establish that essential element. DLH, Inc., 566 N.W.2d at 71 (citing Matsushita Elec. Indus. Co., 475 U.S. at 586; Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986)).

### ISSUES

On September 24, 2008, Petitioner commenced this proceeding to redress an alleged breach of "the WCAL Charitable Trust." Both St. Olaf and MPR have moved for dismissal or, in the alternative, for summary judgment on the four following grounds:

1. Standing
2. Laches
3. WCAL Radio not a "charitable trust"
4. St. Olaf and MPR acted properly

### ANALYSIS

#### **1. Standing**

Standing requires that a plaintiff have sufficient stake in a justiciable controversy to seek judicial relief. Sierra Club v. Morton, 405 U.S. 727, 731-32 (1972).

##### **a. Attorney General**

In a charitable trust case the attorney general shall represent the beneficial interest and shall enforce affected trusts. Minn. Stat. § 501B.31, subd. 5 (2008); see also In The Matter of

Louis W. Hill on December 27, 1934, 509 N.W.2d 168, 171 (1993) (citing Schaeffer v. Newberry, 35 N.W.2d 287, 288 (1948)).

Since the Attorney General is statutorily designated to represent the beneficial interest and enforce the trust, the Court must determine whether the Attorney General executed these responsibilities.

First, the Attorney General had knowledge of St. Olaf and MPR's planned transaction and possessed a copy of the purchase agreement in advance of St. Olaf's sale of the radio station assets to MPR in 2004. Second, SaveWCAL directly informed the Attorney General of its charitable trust theory. The Attorney General rejected SaveWCAL's argument in a letter to SaveWCAL dated October 19, 2004, explaining that one nonprofit organization may sell or transfer assets to another nonprofit organization, citing Minn. Stat. § 317A.601(2002). Furthermore, the Attorney General explained that WCAL does not have a separate corporate existence from St. Olaf, and is listed as an asset of St. Olaf on its 990 tax form. Therefore, the Attorney General dismissed SaveWCAL's charitable trust argument and did not intervene.

Third, the Attorney General has been present and involved at every court proceeding involving the WCAL sale. The Attorney General's own analysis and conclusion over whether the sale between St. Olaf and MPR violated a beneficiary interest of a charitable trust, along with its presence and involvement in the court hearings, constitutes a showing that the Attorney General, in compliance with its obligations, has been actively involved in this matter.

**b. Minn. Stat. § 501B.16 as an "Interested Person"**

In addition to the Attorney General, the legislature has granted standing to participate in a charitable trust proceeding to a "person interested in the trust." Minn. Stat. § 501B.16 (2008). Because the attorney general is responsible for representing the public interest, members of the

public who may benefit from the enforcement of a charitable trust usually have “no special interest” in the trust entitling them to sue. Longcor v. City of Red Wing, 289 N.W. 570, 574 (1940).

The statutes do not define an “interested person.” However, in the context of a chapter 501B, the Court of Appeals has defined an interested person as a “person or entity with a specific financial stake in or a specific claim against the trust.” In re Horton, 668 N.W.2d 208, 213 (Minn. App. 1981).

To resolve the issue of standing, it must be determined whether SaveWCAL has a special interest in the “charitable trust,” one that differs from that of the general public and falls into the Horton definition. Id. SaveWCAL clearly does not have a financial stake in the “charitable trust,” since as an entity it has never made financial contributions to WCAL, nor does it stand to gain anything financially in the future from WCAL. In Horton, the Court held that a social service agency coordinating Horton’s discharge plans had a financial stake in or claim against the Horton Trust in terms of its own compensation; here, SaveWCAL itself has no potential financial stake in the “charitable trust,” rather it has only sentimental and emotional attachment to WCAL. Id. See also, e.g., In re Everett’s Trust, 116 N.W.2d 601, 604 (Minn. 1962) (“A member of the general public, without a special interest in the matter, is not entitled to enforce a charitable trust.”) (citation omitted); Longcor, 298 N.W. at 574 (“The mere fact that as members of the public they benefit from the enforcement of the trust is not a sufficient ground to entitle them to sue, since a suit on their behalf can be maintained by the Attorney General.”) (citation omitted).

In Schaeffer v. Newberry, the Minnesota Supreme Court held that American Legion Post No. 321 of Elbow Lake, Minnesota did not have standing to compel compliance with the terms

of a charitable trust. 35 N.W.2d 287, 288 (Minn. 1948). The Court reasoned that that the Respondent had no special interest in the property that was not common to all the citizens of Elbow Lake, nor did a corporation composed of a membership of a large number of citizens of Elbow Lake give it more right to maintain an action that the individual citizens would have. *Id.* at 288. Likewise, SaveWCAL attempts to represent the interests of unidentified listeners and donors, which provides it no more right to maintain an action than any one individual would have, and is therefore insufficient to confer standing.

### **c. Donor Standing**

In addition to the general public interest, however, there is the interest of donors who have directed that their contributions be used for certain charitable purposes. Although the public in general may benefit from any number of charitable purposes, charitable contributions must be used only for the purposes for which they were received in trust.

“At common law, a donor who has made a completed charitable contribution, whether as an absolute gift or in a trust, has no standing to bring an action to enforce the terms of his or her gift or trust unless he or she had expressly reserved the right to do so.” Carl J. Herzog Foundation, Inc. v. University of Bridgeport, 699 A.2d 995, 997 (Conn. 1997). In Amundson v. Kletzing-McLaughlin Memorial Foundation College, 73 N.W.2d 114, 116-117 (Iowa 1995), the Iowa Supreme Court held that a “settlor of a trust or his heirs cannot sue to enforce the trust unless there is some reservation or condition which amounts to a property interest therein...Plaintiff’s only interest in the college is a sentimental one which is not sufficient basis for enlisting the aid of the court.”

SaveWCAL purports to represent the interests of many different donors. The details of such donations and whether they included an expressly reserved right to bring such an action has

not been provided by SaveWCAL. Therefore, not only would it be inappropriate for SaveWCAL to have donor standing, given the variety of the gifting by its multiple donors, insufficient documentation of said gifting has been provided to enable the court to find donor standing.

## 2. Laches

The equitable doctrine of laches is “available to prevent the granting of relief to a party who has unreasonably delayed the assertion of a legal right and has thereby prejudiced others and made it inequitable for the court to grant the relief requested.” State ex rel. Sviggum v. Hanson, 732 N.W.2d 312, 317 (Minn. App. 2007); Aronovitch v. Levy, 56 N.W.2d 570, 574 (1953); Fetsch v. Holm, 236 52 N.W.2d 113, 115 (1952) It is intended “to prevent one who has not been diligent in asserting a known right from recovering at the expense of one who has been prejudiced by the delay.” Harr v. City of Edina, 541 N.W.2d 603, 606 (Minn. App. 1996) (quotation omitted).

Minn. Stat. § 541.05, subd. 1(7) states that an action to enforce a trust shall be commenced within six years. However, because SaveWCAL seeks an equitable remedy, the statute of limitations does not apply.

There are two criteria for dismissal for laches: (1) unreasonable delay in bringing the suit and (2) prejudice to the defendant caused by such delay. See Funcie v. Packaging Corp. of America, 494 F. Supp 662 (D. Minn. 1980).

SaveWCAL has unreasonably delayed in bringing this Petition. St. Olaf announced the WCAL sale in August of 2004. The Board of Directors of WCAL Radio were informed of the MPR offer for the first time on August 9, 2004. SaveWCAL was formed in early September 2004, two and one-half months before St. Olaf closed on the sale of the WCAL assets to MPR.

October 5, 2004, SaveWCAL contacted the Attorney General's Office with a letter to inform the Attorney General of the proposed sale of WCAL, that this sale constituted a breach of a "charitable trust," and urged the commencement of investigation. However, on October 19, 2004, the Attorney General responded to SaveWCAL's request and declined to intervene; stating that under Minnesota law, one nonprofit may sell or transfer assets to another nonprofit organization. Having this notice that the Attorney General would not be intervening, SaveWCAL took no legal action prior to the closing to pursue its purported charitable trust theory. Furthermore, SaveWCAL took no action in district court between 2004 and 2006 to assert its legal theories.

When St. Olaf filed a Petition with the Rice County District Court in December of 2006 seeking instructions with regard to certain endowments and other restricted gifts designated by donors to support WCAL, SaveWCAL opposed St. Olaf's Petition. However, SaveWCAL did not file a petition or cross-petition to this Court regarding its charitable trust theory. Instead, Michael McNabb, SaveWCAL's counsel, wrote a letter to the Court, dated February 27, 2007, which referred to the "charitable trust" theory, made reference to \$10.5 million of sales proceeds and argued that the \$10.5 million which St. Olaf received constituted an asset of the claimed charitable trust. The charitable trust theory, which SaveWCAL has possessed for four years was not formally brought before the Court until the filing of this Petition, on September 24, 2008. Petitioner provides no reasoning as to what caused this delay, and the delay is unreasonable.

Both St. Olaf and MPR will suffer prejudice due to SaveWCAL's delay in bring this Petition. In the nearly four years between the sale of WCAL and the filing of SaveWCAL's Petition, both St. Olaf and MPR have made significant financial decisions and taken major programmatic actions based on the reasonable belief that the multi-million dollar sale was final.

St. Olaf, in its reasonable reliance has made financial allocations, investing in its students, faculty and facilities. MPR, in its reasonable reliance on the sale, has begun broadcasting The Current, with over 156,000 listeners. To undo the sale would affect The Current, its employees, listeners, subscribing members, and contract partners.

In Carlson v. City of Marble, 612 F. Supp. 669, 672-73 (D. Minn. 1985), the court held that delay in the filing of a lawsuit seeking to invalidate a transaction was prejudicial because the transaction had been consummated and the parties have completed performance of the terms of the agreement (construction began in November of 1982, completed in April of 1983 and the action was filed in March of 1984). Here, St. Olaf and MPR fully completed the performance of the terms of their agreement years ago.

Regardless of the merit of SaveWCAL's position, because SaveWCAL waited nearly four years after the closing of a well-publicized, FCC approved, multi-million dollar transaction, to the prejudice of MPR, St. Olaf and others, laches bars the granting of equitable relief.

### **3. WCAL Radio not a "Charitable Trust"**

Minnesota law broadly defines a "charitable trust" as:

A fiduciary relationship with respect to property that arises as a result of a manifestation of an intention to create it and that subjects the person by whom the property is held to equitable duties to deal with the property for a charitable purpose.

Minn. Stat. § 501B.35, subd. 3. Petitioner has provided no evidence that the legal entity called "the WCAL Charitable Trust" has ever existed. SaveWCAL created the name "The WCAL Charitable Trust" only after St. Olaf decided to sell its assets used to operate the radio station to MPR. No trust agreement or declaration creating a trust with that name has ever been drafted or executed to this Court's knowledge. St. Olaf has not used that name in connection with its operation of WCAL, either in its programming or in its solicitation of contributions.

No legal entity known as “The WCAL Charitable Trust” has ever applied to the Internal Revenue Service for a taxpayer identification number or federal tax exemption under Section 501(c)(3) of the Internal Revenue Code, nor is any entity with that name registered as a charitable trust with the Minnesota Attorney General, as is required under Minnesota’s Supervision of Charitable Trusts and Trustees Act, Minnesota Statutes §§ 501B.33 to 501B.45.

Moreover, in the Attorney General’s letter to Michael McNabb, dated July 3, 2008, she states, “The WCAL radio station was not separately organized as a charitable trust in and of itself; rather, it was an asset of St. Olaf.”

A particular donor’s charitable gift constitutes a charitable trust in a simple sense, as the gift imposes a fiduciary duty on the donee institution to use the gift for the purpose the donor has specified. In re Peterson’s Estate, 277 N.W. 529, 533 (Minn. 1938) (To avoid a gift failure based on capacity, Court held larger corporation should take gifts left by donor’s will and use it to support the homes originally intended, imposing simple fiduciary duty on the donee institution); In re Quinlan’s Estate, 45 N.W.2d 807, 811 (Minn. 1951) (will gifted to not purely charitable organization, but Court held will demonstrated intent that gift was for purely charitable purposes though the word “trust” was never used; held donee institution had a fiduciary duty to use the gift exclusively for the intended charitable purposes); In re Munson’s Estate, 57 N.W.2d 22, 25 (Minn. 1953) (personal representative was personally and financially interested as an heir of the estate, which was antagonistic to the administration of the will and therefore was unsuitable to continue to act as administrator of the estate). The type of fiduciary relationship found in the Peterson, Quinlan, and Munson courts, is very different from the complex, separate entity that SaveWCAL alleges exists in this case.

These independent cases of Peterson, Quinlan and Munson do not suggest that a large number of independent gifts of varying size and made at different times can be rolled together into one charitable trust, which itself constitutes a separate legal entity.

Charitable trusts are “highly favored” in Minnesota and “all instruments where they are concerned are to be construed liberally in their behalf. In re Quinlan’s Estate, 45 N.W2d at 812. Here, the matter is not a simple will or individual gift. Even when considering the favorability of charitable trusts, WCAL itself does not fit the definition of a charitable trust. WCAL was a radio station born of St. Olaf, not a will, nor a gift. WCAL existed as an asset of St. Olaf. While donations received by St. Olaf for WCAL may have created a charitable trust in and of themselves, held for the benefit of WCAL, they did not make the WCAL station *itself* a charitable trust.

#### **4. St. Olaf and MPR Acted Properly**

##### **a. Minnesota Nonprofit Corporations Act**

Minnesota nonprofit organizations are governed by the Minnesota Nonprofit Corporations Act, codified in Minnesota Statutes Chapter 317A (the “Act”). Minn. Stat. § 317A.021, subd. 8.

The Act provides that the business and affairs of a corporation must be managed by or under the direction of a board of directors. Minn. Stat. § 317A.201. Each director is required to discharge the duties of his or her position in good faith, in a manner the director reasonably believes to be in the best interests of the corporation, and with the care an ordinarily prudent person in a like position would exercise under similar standards. Minn. Stat. § 317A.251, subd. 1. When directors have acted consistent with their standard of conduct, courts will respect the decision of a board of directors because they are “reticent to replace a well-meaning decision by

a corporate board with their own.” Janssen v. Best & Flanagan, 662 N.W.2d 876 at 882-83 (Minn. 2003). This principle is also referred to as the “business judgment rule,” and is a presumption protecting conduct by directors that can be attributed to any rational business purpose. Id.

The St. Olaf Board of Regents made the decision to close the radio station and sell the assets St. Olaf used to operate WCAL. SaveWCAL has not alleged anything, which if true, would rise to the level of a conclusion that the Board of Regents did not act in good faith, in a manner reasonably believed to be in the best interests of the College, and with the care an ordinary prudent person in a like position would exercise under similar circumstances.

Petitioner purports that Mr. Addison (Tad) Piper’s presence on both the MPR Board of Trustees and the St. Olaf Board of Regents constitutes a conflict of interest. Minnesota Statutes § 317A.255, subd. 1 states that that a transaction between a nonprofit corporation and another nonprofit corporation on whose board one of its directors also sits is not void or voidable if the interested director discloses the conflict of interest and the transaction is approved by a majority of directors not including the interested director. Petitioner alleges Mr. Piper attended the St. Olaf Board of Trustees meeting at which the sale to MPR was approved, but abstained from the vote. Therefore, the conflict was handled appropriately and need not be further considered.

**b. The Attorney General**

The sale of WCAL does not meet the requirements which necessitate advanced notice to the Attorney General under Minn. Stat. § 317A.811, subd. 1. Minn. Stat. § 317A.811, subd. 1, requires Nonprofit corporations to give the Attorney General advance notice of their intent to conduct certain transactions: dissolve, merge, consolidate, or transfer of all or substantially all of their assets. The WCAL transactional sale price was around 11.8 million, which was less than

3% of St. Olaf's total assets. This small percentage does not constitute a transfer of "all or substantially all" of St. Olaf's assets and therefore did not require notice to the Attorney General under Chapter 317A.

In addition, when assets are transferred to an organization exempt under 501(c)(3) of the Internal Revenue Code, the corporation is not required to seek approval or to notify the Attorney General of its intent to transfer its assets. Minn. Stat. §§ 317A.811 subds. 1 and 6. Thus, even if the sale had not fallen under the "substantially all" exception of subd. 1, because the sale was between two non-profit corporations, the sale is exempt from requiring any pre-approval of the Attorney General to be valid. Finally, the Attorney General acknowledges this, and in her letter response to SaveWCAL dated October 19, 2004, the Attorney General cited the Nonprofit Corporation Act, stating "under Minnesota law, one nonprofit organization may sell or transfer assets to another nonprofit organization. (Minn. Stat. § 317A.601 (2002).")

### **c. Court Approval**

A nonprofit corporation has the authority to sell, transfer, or dispose of its property or assets. Minn. Stat. §§ 317A.161, subd. 5, 317A.601, subd. 2, Minn. Stat. § 317A.661. The sale of the WCAL Station did not require court approval. The sale was between two nonprofit corporations, approved by persons with authority at those nonprofit corporations, was well-publicized, and was approved by the FCC. The Attorney General was aware of the sale and deliberately did not intervene or stop the sale. The assets are still serving the public, through a public, listener-supported radio station.

## CONCLUSION

SaveWCAL brought this action solely pursuant to Minn. Stat. §§ 501B.16, subd. 19 and 501B.31 “to redress a breach of a charitable trust” by St. Olaf College. Since, as a matter of law, SaveWCAL is not a “charitable trust” the action fails. Moreover, since the Attorney General did appropriately act and SaveWCAL is not an “interested party” with a property interest in WCAL Radio, SaveWCAL has no standing to petition for redress under the statute. Finally, even if SaveWCAL had a claim under the statute, it waited for too long to assert a claim to set aside the sale of WCAL Radio.

The Court does not determine herein that St. Olaf has acted appropriately with each gift that was received for benefit of WCAL Radio. There may have been individual gifts given to St. Olaf and accepted by St. Olaf expressly to maintain WCAL Radio. Those claims cannot and have not been brought in this lawsuit by SaveWCAL. Finally, this is not a class action lawsuit on behalf of such donors. Such claims, if any, must be brought individually by such donors and addressed in the future.

  
Bernard E. Borene  
Judge of District Court