LEGAL ISSUES

I. Should the order be vacated under Evans v. Blessi because the attorney for the Respondents served also as counsel for JACC, which creates conflict of interest?

Plaintiffs raised this issue for the District Court at the commencement of the preliminary injunction hearing.

District Court: District Court noted the issue. Later, the Court asked defense counsel in chambers how it would be handled, but defense counsel never withdrew.

Most apposite law: *Evans v. Blessi*, 345 N.W.2d 775 (Minn. Ct. App. 1984).

II. Should the Plaintiffs' motion for summary judgment have been granted and the defense motion denied?

District Court: Granted Defendants' motion and dismiss all claims against them even though they had not moved to dismiss all claims in the Second Amended Complaint.

Summary judgment was granted in *favor* of JACC, even though that party (JACC) never moved for summary judgment.

Most apposite law:

III. Should the fees and costs awards be reversed or reduced?

District Court: First awarded $15,000 in costs. Then, after receiving a letter From defense counsel, *sua sponte* amended the order to add $28,25,887.37 in attorney fees without analysis.

Most apposite law: Minn. Stat. §317A.715, Subd. 8; *Foy v. Klapheimer*, 992 F.2d 774 (8th Cir. 1993).

INTRODUCTION

The Jordan Area Community Council (JACC) was created in 1965 to represent a "neighborhood" which now falls inside what most call "North Minneapolis." The Board as it existed moving into 2009 was fighting gentrification. Although steeped in corporate law, this lawsuit represents the struggle of neighborhood folk to resist political and monetary controls by the City of Minneapolis and its politicians.

At the time the board takeover that triggered this lawsuit occurred, Minnesota was about to received $58 Million in federal funds for areas hit by foreclosures. This brave group of plaintiffs knew that controlling JACC went a long way to controlling the federal funds. There are those who believe that federal funds are siphoned off by cities, nonprofits and others, so they never get to people in need.

When a rogue group took over the Board in a single board meeting, Plaintiffs cried foul. Plaintiffs' theory of who wanted control of JACC was proven when two Minneapolis City Council Member, a City Attorney, and even the Police Department "endorsed" the new board.

One role of the courts is to uphold the rights of individuals and to enforce the rule of law – not the rule of men. Appellants, in their view, proved their case. They showed an illegal corporate takeover, and why the rogue team should disgorge monies they had mishandled. But Plaintiffs lost, and then were hit with $40,000 in fees and costs. Some who ride roughshod over the law have no consequences. Those who question government often lose in a big way.

STATEMENT OF THE CASE

This case was commenced in Hennepin County, by the Plaintiff-appellants when they were ousted from the Board of Directors of the Jordan Area Community Council (JACC) in a manner that controverted established corporate law. The newly-constituted board became known as the "new" board or the "McCandless" board (see order on TRO). Appellants filed a TRO, seeking to reinstate the "old" Board (or "Myers" Board). The Honorable Charles A. Porter, Jr. presided throughout the case.

The TRO was denied including language that specifically invited the Plaintiffs to put on a preliminary injunction hearing and said nothing about this action being improper. (A:1-8). The preliminary injunction was denied following an evidentiary hearing (which also included some affidavits). The City-defendants did not participate in the preliminary injunction hearing and are not included in this appeal.

The JACC Executive Director also plead a breach of written contract claim, protesting his termination from JACC by the "new board" without following the express terms of his definite-term employment contract. His motion for summary judgment on that claim was denied. His claim for intentional interference was dismissed – even though it was no longer in the case.

All non-city parties moved for summary judgment – though they are not technically "cross" motions (the parties did not stipulate to the facts). Plaintiff-Appellants' motions were denied, and the Respondents' motions were granted.

FACTS & PROCEDURAL HISTORY

This dispute came to a head in January 2009 when during a board meeting of the Jordan Area Community Council (JACC), some board members who met in advance to plan an illegal corporate take-over, switched agendas, called for an immediate voice vote to oust the Board Officers. (See Complaint filed January 28, 2009. That complaint definitely sues JACC but that name was not in the caption.). The claims were of several varieties:

- Direct claims against individual "new" board members;
- Claims under Minn. Stat. §317A.751 for misconduct of board members in the handling of monies and other conduct, otherwise known as "indirect" or "derivative" claims. These claims sought to have the individual "new" board members reimburse the corporation for monies they used ultra vires.
- The initial complaint also included a claim of intentional interference with Executive Director (ED) Jerry Moore's employment contract. ***That claim was later changed to a breach of contract claim in the SAC*.**

The ousted board members filed an action in the Fourth Judicial District, attaching the certified Articles of Incorporation and most recent set of Bylaws to the Complaint . Those who orchestrated the take-over were sued individually: Michael "Kip" Browne, John Hubbard, Robert Hodson, Ann McCandless. These four individuals are referred to here as "Respondents."

A law firm came on board to represent the Respondents. JACC also answered, *n the same Answer as* Respondents, answered and JACC was represented by the same attorney as for Respondents.

Plaintiffs brought a motion for temporary restraining order (TRO) seeking to be re-installed as rightful board members. (A:75; 81).

The TRO urged that established corporate law was violated when the "new" board interrupted the meeting to switch agendas. The Vice Chair, Benjamin Myers ("Myers") affied,

> Defendant Jordan Area Community Council ("JACC") is a non-profit corporation duly organized under the law of the State of Minnesota (Chapter 317A), and granted 501(c)(3) status by the Internal Revenue Service. It began its corporate status as the Jordan Area Action Committee, in 1965....
>
> … The JACC Bylaws also provide for Board Officers: Chair, Vice Chair, Treasurer and Secretary. (Att. B, Art. VI, Sec. 1). The immediate past Chair serves *ex officio* as the Vice Chair, by function of Bylaws, for one year. Att. B, Art. VI, Sec. 2. Pursuant to Art. VI, Sec. 2, the officers shall be elected annually by the Board of Directors. I was Chair in the last term; I became ex officio Vice Chair by virtue of that prior (Chair) office. I was also voted in as Vice Chair in fall 2008. The Officers can only be removed from office by following the precise steps set forth in Art. V, Sec. 4 (Att. B, Art. VI, Sec. 3).
>
> … Pursuant to Art. V, Sec. 1c of the Bylaws, JACC is to hold an annual meeting each October to elect new board members to fill all vacant seats (of those leaving the Board by virtue of their term expiring, or for other reason). The newly elected board members are then installed in November for a two-year term. Att. B, Art. V, Sec. 3. JACC held its annual meeting to elect board members to fill the six vacant seats on October 23, 2008. At the meeting, Michael Browne, who was the Chair of the Nominations Committee, and another Director alleged irregularities in the nominations process. The election was postponed to January 2009 by majority vote of the JACC members. … JACC's October 2008 Board Meeting was continued to November, and Officers were duly elected on November 12, 2008.

…

The JACC [board officers] and the Executive Director Jerry Moore began to voice disagreement with the agenda of Council Members Don Samuels and Barbara Johnson about what to do with the Federal HUD monies that were flowing through the State to the Jordan neighborhood. It is my belief based on what I know, that the Executive Committee and the Jerry Moore were seen by Samuels and Johnson as a thorn in the side of their political agenda, which included control over where the monies went and which individuals and entities profited from the monies. We were exercising our First Amendment rights to criticize government. We were attempting to have a voice in the way in which federal monies were going to be used in our community, an important socio-political issue.

… On January 12, 2009, elections were held from those that the Nominating Committee said were eligible. Among those elected to the board were Robert Hodson and Anne McCandless. Michael Browne, P.J. Hubbard, Robert Hodson, and Anne McCandless are closely aligned with Minneapolis Council Member Don Samuels.

On January 14, 2009 … *ultra vires*, and in violation of the Bylaws, Michael Browne and Anne McCandless led a coup and takeover of JACC. First, the Board began discussing whether to fire Jerry Moore, the Executive Director. It remains unclear whether any legitimate board action was taken on that point; at no point did the assembled group follow the requirements of the written employment agreement between Jerry Moore and JACC. When legitimately-elected Chair, still filling her one-year term, E.B. Brown began to declare that that Michael Browne and his followers were out of order and started to disagree with Michael Browne about the termination of Jerry Moore, Michael Browne called for an immediate voice vote to oust the Chair, Vice Chair, Treasurer and Secretary. This purportedly carried on a voice vote of 8-6. The eight voting to oust the duly elected Executive Committee included the board members just elected on January 12, 2009, who are closely aligned with Don Samuels.

Very soon after the voice vote (which did not comply with the Bylaws for removal of Officers), the rogue group began to claim that it had authority to take action for JACC. Michael Browne, claiming to be the Chair, sent a letter instructing Jerry Moore not to take any action as ED. The rogue team called for the Ackerberg group to come change the locks on the JACC offices. The *de jure* officers were literally "locked out."

> The rogue team began to assemble political cover and endorsements. The rogue team has contacted the surrounding neighborhood organizations, community partners, major funders, elected officials, the police department, the media, and others claiming to be the legitimate Officers of JACC, and manipulating, misrepresenting, cajoling or otherwise coopting individuals and entities to take part in the coup, or to aid and abet it. On January 16, 2009, Council Members Barbara Johnson and Don Samuels, in their official capacities, and on City of Minneapolis letterhead, stated, "[W]e would like to congratulate and officially recognize the newly elected board and its officers of the Jordan Area Community Council (JACC)." Attachment C to Complaint. The letter made a list of the officers and board members, according to them. Notably, I, who am Vice Chair for one year following his term as Chair, pursuant to the Bylaws, was listed in the Council Member's letter merely as "ex officio member" and not described as an officer, at all.

Not only did Plaintiff Ben Myers not try to cover up that he had the checkbook for JACC: he sought relief because he was writing checks and the bank was refusing to cash them, due communications sent by the McCandless board.

> I sent various cease and desist letters to the rogue team (Exhibit 1 hereto), but the rogue team refused to do so. I have also dealt with the bank, which has indicated that the rogue team is attempting to utilize JACC funds therein. The bank froze the account until it could investigate. At this time it appears that Franklin Bank will not release funds to the rogue team.

(A:106). At the point the TRO was filed, the corporation was frozen. The hearing on the TRO was held February 3, 2009. (*Id*.).

After the hearing, certain defendants obtained new counsel, who wrote a lengthy brief and filed it claiming, in part, that district court litigation was not possible, because the Plaintiffs had not exhausted their administrative remedies. (A:50-53). That defense counsel also threatened Plaintiff counsel with a Rule 11

motion based on that exhaustion of remedies argument. Plaintiff counsel responded, and the reason the Rule 11 motion was not valid are at A:51-52.

Plaintiffs both: i) objected to the late-filing of incoming counsel; and ii) sought to respond with new information they had obtained via subpoena to the bank. (A:46;50-53).

The TRO order considered all filings by Defendants, but declined to allow Plaintiffs to augment the record with documents they had received via subpoena. (A:46, A:2 FOF:4).

Although the TRO was denied (A:1-8). The Court held:

> The dynamics between the McCandless Board and the Myers officers would suggest that the McCandless Boad would almost surely effect a change of officers. In accordance with the by-laws, the McCandless Board would…likely [remove the Myers Board].

(A:7, ¶17). In other words, the McCandless Board had the Myers board outnumbered, so re-installing the Myers Board would simply result in the McCandless Board voting (successfully) to remove the Myers Board. This is an important finding – given the results of summary judgment discussed below.

Nothing in the language of the TRO order suggested that Plaintiffs had done anything improper or "not in good faith" in filing this action. (A:8). Indeed, the Court acknowledged the 'frozen' nature of the corporation unless someone (a

district court judge) broke the stalemate. Plaintiffs performed an important function, and this is why the law and the courts are there.

The Court did not hold that Plaintiffs had failed to exhaust administrative remedies. Indeed, the District Court specifically invited the Plaintiffs to put on a preliminary injunction hearing. (*See also* A:10).

Plaintiffs set on a preliminary injunction hearing for May 12 & 13. Respondents complained that it was not sufficient notice and moved to "strike" the preliminary injunction hearing. The District Court denied that motion April 24, 2009. (A:96). Plaintiffs responded to the concern about insufficient notice for the hearing by filing an amended notice of hearing dated April 24, 2009. (A:92-94). The issues for the Preliminary Injunction hearing included:

…evidence of misconduct and breach of fiduciary duty including but not limited to:

1. an unauthorized "telephonic" meeting on 1-15-09 (not authorized by the By-laws) and held serially (not all together) with only those who "support" the McCandless group,
2. a "secret" meeting on 1-15-09 because those who were likely to vote against what the McCandless group wanted were not called, not timely noticed, and/or not allowed to vote on the transfer (and not notified later that it had occurred),

3. the unauthorized change/alteration of signatories on the corporation checking account, creating a situation where, literally, every check signed by the new signatories (Brown, Hodson and McCandless) was unauthorized,
4. conflict of interest, or otherwise failing to act as an "independent" board for or in behalf of JACC, including obeying direction from an NRP representatives to hold the unauthorized telephonic meeting to change signatories,[1] and also passing a City-defendant-supported policy decision (at a meeting where plaintiff-board members were not notified),
5. a fraudulent resolution provided to the bank in order to change signatories,
6. refusal to provide proper or actual notice to plaintiff-board members of the time/place of board meetings,
7. Making major policy decisions at meetings for which plaintiff-board members were not properly notified/excluded,
8. Failing to provide plaintiff-board members with Minutes of meetings that would have put the plaintiff-board-members on notice of significant misconduct or breach of fiduciary duty, and
9. other *ultra vires* actions.

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[1] Because the scope of the hearing is to prevent prejudice and harm until trial on the merits, Plaintiffs do not view the scope of the upcoming hearing to be about those who are alleged to have tortiously interfered with the By-laws (including City-defendants, and potential new defendants, like the NRP representative noted herein). These defendants might be witnesses, however. Finally, Plaintiffs reserve the right, should retaliatory events continue by defendants and their agents, to seek an injunction under Section 1983 (to enjoin retaliating against Plaintiffs for filing this lawsuit).

(*Id*). "The goal of this relief is to protect all concerned, including the Plaintiffs, as well as JACC the entity, from unauthorized expenditures (including use of restricted funds) and absconding with funds, from secret meetings and major policy decisions, without notifying all board members or allowing them to participate in the process." (*Id*).

The Respondents then requested "reconsideration" of the Court's denial of their motion to strike in a letter dated May 4, 2009. (A:95-100, see A:96; *see also* A:88). The Court denied the motion again on May 5. (A:89). On May 6, 2009, Respondents tried to again: the District Judge characterized this new attempt as "revisiting the revisiting of the revisiting." (A:87-91).

Above is a good example of how the Respondents protracted the litigation, making the same motions over and over, wasting court resources. They changed their position, even going back on the word of their counsel to the Court. This caused delay in the proceedings and needless, wasteful hearings. Appellants will note here that the Respondents had insurance coverage, and the defense attorneys were being paid by that coverage. Insurance-defense attorneys should not be allowed to run up the bill, so to speak, and then demand payment from their adversaries.

One day before the preliminary injunction hearing was to commence, Respondents filed a dispositive motion (to dismiss), seeking to prevent any district

court litigation by arguing that Plaintiffs had not exhausted their administrative remedies. (A:55). This is the same issue they briefed in the TRO round of briefing. The PI hearing commenced, but the first part was taken up by Respondents *again* trying to prevent it from going forward. (May 12, 2009 Hearing Tr. (5/12/09-Tr.) p. 34-36 at A:69-71). Respondents made that motion *knowing* that there had not been any contract in place at the time.[2]

With one day to prepare a response, Plaintiff filed an affidavit affying that there was no such contract, and that motion was denied. (see A:71b). Note that when a CPED official was on the stand later, he confirmed no contract.

But Respondents did not want to let the PI hearing go forward. They made last-minute dispositive motions. These took significant hearing time. (5/12/09-Tr. p. 61 (note that the first 62 pages of Transcript on 5/12/09 are motions and not testimony)).

One of Respondents' motions argued that Minn. Chap. 317A did not apply to the case. Corporate Attorney Mahoney addressed that motion, and it was also denied. (5/12/09-Tr. p. 44-55 (ruling at 54-55)).

At 5/12/09-Tr. p. 57 the Court stated,

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[2] At the TRO hearing at the Ridgedale Court on February 3, 2009, the Assistant Minneapolis City Attorney stated that there was no contract in place between CPED and JACC (A:71a).

> Well, we're at about the fourth round of this [respondent-counsel], wherein I've told you that I don't agree with you on that point; and I would guess if I have to say it again, I'll say it again. I don't think that the plaintiffs' cause of action is limited merely to Rule 65, irreparable or not.

and continued…

> And I think you've been put on notice, [respondent-counsel], twice and maybe more, that that's what the plaintiffs are noticing you that they intend to prove. … one of the remedies that's available in this case is to have somebody else run this organization or to tear it up and throw it away; and if that's an appropriate thing to do given the facts as they come out in the case, I have no intention of shirking my responsibility or ability to do that.

5/12/09-Tr. p. 59. Respondents would continue this pattern of protracting litigation. The District Court was obviously aware of that issue.

Another issue unnecessarily added time to this litigation. The same attorney answered for JACC and Respondents. That is a built-in conflict of interest. Consider that the Plaintiffs were alleging that the individual board members who engaged in the hostile take-over were engaged in fraud and other improper conduct with regard to corporate monies. They were being asked to disgorge monies and *give the money back to JACC*. At the PI hearing, corporate attorney Mahoney alerted the Court to this conflict. (5/12/09-Tr. 29-32 at A:64-67). Attorney Mahoney cited to *Evans v. Blessi*.

As another example of protracting litigation, Respondents pushed really hard to be able to put affidavits and deposition testimony in at the PI hearing. (*See, e.g.*,

5/12/09-Tr. p. 27-28). Then, when Plaintiffs wanted to do the same thing, Respondents objected. This required the Court to hold a hearing *just for the objections of the Respondents* to the affidavits that they had urged be filed. (5/27/09-Tr. p. 57-60). This double-standard was common. Respondents would apply one version of the law to themselves, and a different version to Plaintiffs. Indeed, this mirrored the conduct of the Respondents. They wanted others (like Plaintiffs) to follow the rules. But they ignored them and disobeyed them. (See discussion below.)

At the close of the PI hearing, the District Court ordered closing *arguments* by the attorneys. This was very specifically discussed, and the Court made clear, twice, that it wanted only argument (no facts). (5/27/09-Tr. p. 54-6 at A:37-40).

In their Closing Argument, Plaintiffs detailed their legal argument, and requested specific relief:

- invalidate the election of January 12, 2009 (which would force a voiding of the January 12, 2009 meeting);
- void the fraudulent bank resolution;
- assign an independent auditor/Receiver to consider the checks written, whom they benefitted, and which checks should be disgorged or reimbursed to JACC, and whether any of the defendants should reimburse JACC;
- assign an independent auditor/Receiver.

- Void the major policy decision to adopt the Advantage program.
- Revert Board Member Jackson's directorship to the position it was in on October 23, 2008 or January 12, 2009.
- Impose a "supermajority" requirement for Board decisions for a 1-year period.

Almost none of this relief was considered by the District Court. Indeed, Plaintiff's legal arguments and citations to specific corporate statutes and case law were also not considered.

Plaintiffs did not seek to re-install the "old" board members/officers – but that is what the Court considered.

The Respondents, in their "responsive closing argument" filed a dispositive motion seeking to dismiss two claims that had not been the subject of the PI hearing. (A:47). Those claims were not part of the PI hearing. (*See, e.g.,* A:84-86; 5/12/09-Tr. p. 23).

The District Court denied preliminary injunctive relief following the PI hearing (A:9-14), holding at A:12, FOF: 12:

> As the January 14, 2009 meeting wrapped up, an altercation broke out between JACC Executive Director, Jerry Moore, and JACC Board member, Dennis Wagner. It began as a verbal dispute, then Wagner pushed Moore, and Moore shoved JACC member Megan Goodmundson. PJ Hubbard tried to intervene; Moore punched Hubbard with a closed fist in return. The McCandless Board soon voted to terminate Moore for cause because he threw the punch.

This Finding of Fact shows that it was Dennis Wagner who began the physical altercation. The District Court also found that Hubbard "intervened." The Court did not cite specific facts. The Record actually shows:

- A Mrs. Champion accused Jerry Moore of stealing money from JACC;
- As Moore turned to walk away, Wagner hit him in the back. Moore asked him to stop. Wagner's response was to do it two more times. Because 'no means no,' Moore pushed Wagner.
- Hubbard came across the room and he tried to hit Moore. Moore moved back, and Hubbard hit him in his arm/shoulder area. Moore swung and connected.
- Mr. Monroe grabbed Moore from behind. Put him in a full Nelson.
- Then Mrs. Champion grabbed Moore.

(5/18/09-Tr. p. 145-46). It is interesting that, having heard all of the evidence, the District Court found that Wagner started the physical fracas. And that Jerry Moore was terminated for it because he "punched."

The precise nature of the termination letter was litigated at summary judgment and will be discussed below.

Although the District Court commented on the 'telephonic meeting' organized by McCandless, the Court neglected to consider: a) McCandless specifically organized that meeting so that only "new" board members were on the phone – all

"old" board members were disenfranchised; and b) Minnesota specifically prohibits such telephonic meetings. This is also discussed below.

The District Court avoided the most poignant evidence at the PI hearing: Anne McCandless and others signed a fraudulent bank resolution, stating that there had been a meeting of the JACC Board of Directors to switch the signatories on the account. The Court merely held that, "the signatories were changed on the JACC checking account…." (A:12, FOF:14). This is also discussed below.

The District Court found that some of the JACC equipment including the checkbook was "missing" after hostile take-over and commented Myers had cashed 2 checks. But Myers never hid that he had the checkbook. That is included in both of his affidavits supporting the TRO. There was never *any* evidence that any Plaintiff had absconded with any equipment. Indeed, what did emerge at the PI hearing was that Anne McCandless and others planned in advance their hostile take-over. They planned in advance to fire Jerry Moore as their first order of business. And they planned to *call police* if anything was missing from JACC's offices. It is just as likely that that group moved items to make them appear missing, *so they could cal police*. Indeed- that is just the group to do it. Especially with McCandless, a former MPD, and her connections on the force.

Following the PI ruling, the parties gathered in chambers to discuss the remaining litigation. The Attorney for the incoming JACC Board members who

wanted to remain on the Board ("Respondents") agreed to the filing of a Second Amended Complaint (SAC) and the Judge indicated an order would be signed upon its submission. (A:59).

When the SAC was prepared and presented to the Court, suddenly, the Respondents objected, and that caused delay. Indeed, Respondents filed a formal motion objecting to an amended complaint (after their attorney gave his word in chambers that no motion was necessary). (A:47;59).

Further, the Respondents decided to file a motion for summary judgment based on the First Amended Complaint (FAC) before the SAC was of Record. This caused great delay and confusion in the summary judgment proceedings. (A:59).

But something else from the chambers conference got dropped. The attorney for Respondents agreed that Traveler's Insurance would decide which attorney should represent JACC. (A:59). And then the conflict issues was dropped by Respondents.

Even though the Court had ordered to brief *only* the law in PI Closing Arguments, the Respondents purchased the <u>entire</u> PI hearing transcript. They would not let Plaintiff counsel look at it, even to learn the names of which court reporters reported on which session. At Court in January 2010, at the Court's urging, the Respondents agreed to let Plaintiff counsel look at the transcript to learn

court reporter names. But then, after giving their word to the Court, Respondents refused to allow access. (A:60-62). This type of conduct protracted the litigation.

In the SAC, the JACC Executive Director plead a breach of written contract claim, protesting his termination from JACC by the "new board" without following the express terms of his definite-term employment contract. (A:139). The intentional interference claim as to that plaintiff was abandoned (replaced by breach of contract once Moore located the written agreement).

Summary judgment

Plaintiffs' motion for summary judgment

Plaintiffs moved for summary judgment (*not* cross motions, because the parties did not stipulate to facts):

- **Count I**, for equitable relief under Minn. Stat. §317A.751 (against JACC with participation of individual defendants).
- **Count V**, for breach of fiduciary duty against individual defendants McCandless, Browne, Hubbard and Hodson.
- **Count VI** (mis-labeled in the SAC as II): Breach of written employment agreement of Jerry Moore.

Jerry Moore moved for summary judgment on his breach of contract claim. The Respondents had moved for summary judgment on the First Amended Complaint

and never fixed the problem. Therefore, the Respondents never moved to dismiss Jerry Moore's breach of contract claim.

Facts supporting Plaintiffs' motion for summary judgment

All of the cited deposition pages, PI hearing transcripts and affidavits are of Record.

The JACC Organization

JACC is organized under Minn. Stat. §317A. Plaintiffs are members of JACC. *Id*. The TRO order acknowledged the elections of:

- Michael K. Browne, Chair
- P.J. Hubbard, Vice Chair
- Anne McCandless, Secretary
- Robert Hodson, Treasurer

Accordingly, as discussed below, those officers had a fiduciary duty to the corporation. The beneficiary of damages for breach of fiduciary duty is JACC, therefore the duty is discussed in the context of Minn. Stat. §317A.751. But refilling the corporate coffers would also allow private right-holders (such as Jerry Moore to recover). All of the other board-member-plaintiffs had their board positions interfered with and they were disenfranchised.

In **October 2009**, an Annual Meeting was held. Nine seats were vacant,[3] but only five people ran for the board. (Titus Aff. ¶7-8). At the October 29, 2009 Board meeting, Defendant Robert Hodson ran for Chair, Vice Chair and Treasurer. Monroe, Browne, Hodson and Haddy were elected. (Clark Aff. **Exhs. J-1, J-2**). On **January 13, 2010**, Hodson resigned as Treasurer, and Anne McCandless took over. (Clark Aff. **Exh. K**).

Jerry Moore hired as executive director

Brian Smith (Smith), former Board Chair of JACC, then took the position of Vice Chair, under Ben Myers as Chair. It was the tradition at JACC to have the outgoing Chair serve as Vice Chair, to ensure a smooth transition. (Smith Aff. ¶1 at Clark Aff. **Exh. AA**).

Smith was in charge of research and information gathering regarding the appropriate salary level for the Executive Director of JACC (ED). (Smith Aff. ¶2).

Robert Wilson chaired the search ED search committee. (Wilson Aff. ¶2 at Clark Aff. **Exh. BB**). Moore was serving as interim ED at that time. The Committee met and reviewed applications, and made a recommendation to the Board to hire Jerry Moore.

Wilson was aware that in order to keep McKnight Foundation funding, JACC had responded to feedback from that organization to have more consistency/stability in the ED position. Therefore, when the Board approved

[3] During the course of this litigation, Plaintiffs Robert Wilson, Steve Jackson and E.B. Brown were "removed" for not attending meetings, that they were not given notice of. Originally, Wilson and Jackson asked to be placed back onto the Board, but that relief is no longer sought.

Wilson's Committee's recommendation of hiring Jerry Moore, the Board purposely authorized a longer term employment contract. (Wilson Aff. ¶2).

In **March 2007**, the Board voted to hire Jerry Moore (Moore) as the ED. The Board did authorize hiring Jerry Moore, and authorized Ben Myers, Chair of JACC, to sign it. (Wilson Aff. ¶3).

Moore signed the employment agreement on May 15, 2007, and took an original home to keep in his records. This was Exhibit 16 at the PI hearing. (A:139; Moore PI-Tr. 84-7 at Clark Aff. **Exh. U**). That contract contains a definite term of three years, from May 15, 2007 to May 15, 2010 (¶1), and specific language regarding termination at Paragraph 6, "Cancellation."

> B) JACC may cancel this Agreement immediately if Executive engages in an act or omission of dishonesty, misrepresentation, conflict of interest, breach of fiduciary duty, or any act of misfeasance malfeasance or moral turpitude. Upon cancellation, JACC must disclose to Executive **the act or omission upon which the cancellation of this Agreement is based.**

(Emphasis added). Otherwise, cancellation required a 30-day notice in writing, and then paying to Executive severance consisting of six (6) months salary plus.

Moore was hired due to his programmatic and administrative experience with nonprofits, to do administrative and programmatic work. (Smith Aff. ¶3).[4]

Moore served as ED from until January 14, 2009 (see discussion below).

[4] Smith was aware of the request from Bob Miller to review the contract for the JACC ED position, but viewed that as the City interfering with JACC business. (Smith Aff. ¶3-4 (the second time those number appear in the affidavit).

Pattern at JACC was to provide agendas and minutes prior to meetings

Prior to **January 2009**, the JACC Board Secretary was providing board members with advance copies of proposed minutes. (McCandless dep. p. 47-48 (at Clark Aff. **Exh. T**)). On **January 12, 2009**, Ann McCandless was elected to the Board of JACC. (McCandless dep. 45-46).

In the days in between and 12th, and January 14th, several Defendants and others worked together to secretly take-over the Board of JACC. (McCandless dep. exh. 6, p. 96; McCandless PI hearing p. 36). Dave Haddy testified that it was fair to say that he and several others planned, prior to the January 14 Board meeting, to elect new officers. (Haddy PI-Tr. 49, 54 (at Clark Aff. **Exh. V**); Clark Aff. **Exh. L**).

Kip Browne prepared the agenda and McCandless communicated with Hubbard about it in advance of the meeting. (McCandless dep. 96-97). The agenda called for a new election of board members. The Plaintiffs were not told about this planned re-election. McCandless did not raise the issue with the rest of the board by letter or email – about possibly altering the agenda for the **January 14, 2009** meeting to call for instant re-elections. (McCandless dep. 100-101). No notice was given to the Plaintiff-board-members. (Haddy PI-Tr. 49-50). Michael Browne did not want to tell them about the plan to supplant the agenda, because he knew that they would vote against it. (Browne PI Tr. p. 196-98).[5]

[5] These pages are found at Clark-Supp. Aff. Att. B.

At the board meeting on **January 14, 2009**, a motion was made to use the "new" agenda. (Haddy PI-Tr. p. 27). And a vote was held to remove the prior officers for misconduct and elect new officers. (Haddy PI-Tr. 50-51).

Board Member and then-Vice Chair Ben Myers, is a lawyer. But there was no time between the surprise substitution of the agenda, and the vote, to get a legal opinion about corporate takeovers. (Myers PI-Tr. p. 5-6 (at Clark Aff. **Exh. W**)).

It is undisputed that following the vote, Defendants Browne, Hubbard, McCandless and Hodson claimed they were the new board officers. The TRO Order held that they were officers.

The termination of Jerry Moore

Prior to the **January 14, 2009** meeting, McCandless and several non-board members made a plan to fire Jerry Moore at the next meeting. (McCandless PI-Tr. p. 99;[6] Clark Aff. **Exh. L**). But there is no evidence that the plaintif-board-members were told about this agenda in advance. A closed session was called. E.B. Brown cautioned the board not to proceed too quickly. She advised that an investigation should be performed. (E.B. Brown PI-Tr. p. 103-110).[7] Several of the board members claimed to be eye witnesses to the events that they wanted to fire Moore over, yet they did not recuse from the vote. (McCandless dep. p. 151).

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6 The McCandless PI hearing Tr. is found at Clark-Supp. Aff. Att. A.

7 The E.B. Brown PI hearing Tr. is found at Clark-Supp. Aff. Att. C.

The Board did not heed the words of E.B. Brown, but hastily voted to terminate Moore. (McCandless dep. p. 142; Wilson Aff. ¶5). McCandless was not aware of any investigation having been performed prior to the vote to terminate. (McCandless dep. 151).

No one at the board meeting on January 14 had a copy of the Moore employment agreement, and none of them reviewed it prior to voting to terminate him. (McCandless dep. 149; Wilson Aff. ¶4). Myers knew of the contract, but there was no time to run back to the JACC offices to obtain it. (Myers PI-Tr. p. 5-6). Haddy never satisfied himself one way or the other whether there was an employment contract. (Haddy PI-Tr. p. 53).

Myers warned that JACC could be sued for wrongful termination. (Haddy PI-Tr. p. 25). McCandless said they were going to vote to terminate, and *live with the consequences*. (*Id*.).

Jerry Moore was not at the closed session. (Haddy PI-Tr. p. 49). There was no clear articulation, either during the discussion, or during the vote, as to why Moore was being terminated. (Wilson Aff. ¶5; Clark Aff. **Exh. M**).

On **January 14, 2009**, Defendants Michael Browne, Anne McCandless and Robert Hodson signed a termination letter and sent it to Moore. (Clark Aff. **Exh. N-1**). It was served on Moore on January 15, 2009. (Clark Aff. **Exh. N-2**). The basis for termination listed in that letter was simply,

> …based on a majority vote of the Jordan Area Community Council (JACC) Board of Directors as a regularly scheduled board meeting on this date, your employment is hereby terminated because of your misconduct following the JACC election meeting on January 12, 2009.

This letter did not follow the strictures of the written employment agreement because it did not set forth the *facts* that were alleged to have resulted in misconduct.

Board members are shut out of subsequent meetings and decisions

On **January 14, 2009**, McCandless was elected Secretary. (*Id*.). Prior to McCandless becoming secretary, Moore would email agendas to all board members prior to meetings, and minutes were distributed after they were prepared. (Dejvongsa PI-Tr. p. 59-60 (at Clark Aff. **Exh. Z**)). When McCandless became secretary, she handed out minutes at the board meetings, and she disseminated them in advance via email, only to the 10 board members of her choice. (McCandless dep. 48-49). She did not send any meeting agendas to any of the Plaintiffs in this case. (McCandless p. 53-4). But she sent the advance agendas to the "ten" board members that she had selected. (*Id*.).

Around **January 14, 15,** or **16, 2009**, McCandless learned that there was a dispute over who were the "rightful" Officers of JACC. On **January 15, 2009**, Ann McCandless, acting as an Officer for JACC (Secretary), held an illegal, telephonic meeting. She did this after conferring with Mr. Robert Miller, who McCandless believed was not a lawyer. Ms. McCandless had a lawyer at the time, but she did not consult with him around the time of the telephonic board meeting. (McCandless

dep. 65-67). Only ten "special" board members were communicated with via telephone, in this alleged "board meeting." In reality, all of these board members participated in an illegal meeting:

1. Daniel Rother
2. Robert Hodson (defendant in this action)
3. P.J. Hubbard (defendant in this action)
4. Vladimir Monroe
5. Tyrone Jaramillo
6. Dave Haddy
7. Todd Heintz
8. Michael Browne (defendant in this action)
9. Keith Reitman
10. Ann McCandless (defendant in this action)

(McCandless dep. exh. 2 and dep. 87). Ten on the McCandless 'team.' The Plaintiffs in this action, were ***not*** communicated with, not gotten on the phone for the purported board meeting:

1. E.B. Brown
2. Shannon Hartfiel
3. Robert Wilson
4. Steve Jackson
5. Ben Myers

(Only five on that 'team.') McCandless did not attempt to purchase simultaneous telephonic phone services. (McCandless dep. 90). McCandless made no real attempt to reach any of the Plaintiffs in this action,[8] to get their votes. And she made no attempt after the telephonic meeting, to tell these board members that there had been a telephonic meeting, or its results. (McCandless dep. 70-71, 75, 89).

The illegal telephonic "board meeting" attempted to change the signatories on the JACC corporate checking account at Franklin Bank. (McCandless dep. exh. 2 at Clark Aff. **Exh. C**; Clark Aff. **Exh. D**). The bank would not accept what McCandless drafted. (McCandless 104, 109, 110-112). The bank asked for a bank resolution. (McCandless dep. 110-111).

McCandless and 3 other defendants signed a bank resolution, even though there had been no board meeting (as the resolution claims), and the board had not authorized them to sign it. (Clark Aff. **Exh. P**, depo. 112-114; McCandless PI Tr. p. 27-29; 38).[9] The 3 other signatories on the bank resolution are:

- Robert Hodson,
- P.J. Hubbard, and
- Michael K. Browne.

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[8] For example, she called work numbers for some, making no attempt to obtain home or cell numbers. Ben Myers was intentionally not contacted at all. (McCandless dep. exh. 2 at Clark Aff. **Exh. C-D** (these are exhibits 10-11 at the PI hearing)). McCandless had a list of JACC board member telephone numbers and email addresses in her possession but did not fully use it. (McCandless dep. p. 89).

[9] This is one of the transcripts Plaintiffs are awaiting.

(*Id*.; Browne dep. p. 98-99 (at Clark Aff. **Exh. Y**). At the point that McCandless signed the fraudulent bank resolution, she knew there was a dispute over who were the rightful officers of JACC. (*Id*.).

McCandless admitted that she was a fiduciary as a board member of JACC. (McCandless dep. p. 139).

At the **February 11, 2009** board meeting, business was conducted by the present members. (McCandless dep. p. 57-9). One of the issues was presented by the Housing Committee, which had already met and taken up the issue as a committee meeting, prior to February 11. (McCandless 60-61). The Board had voted against the Jordan Advantage Program in the previous year. Ben Myers voted against it. The majority of the "old" board voted against it. (McCandless dep. 62).

Kip Browne supported the Jordan Advantage Program. (McCandless dep. 63). Now, with the "new" board, and only select board members present at meetings, that issue was taken up again, and passed.

Long-term accountant also let go

In addition to removing all officers and the Executive Director on the same night, shortly thereafter, the new Officers let the long-term accountant go. (Moore "Second" Aff. dated May 31, 2009, ¶1-3 and exhibits cited therein (at Clark Aff. **Exh. DD**)). This occurred amidst allegations by Robert Hodson that she had engaged in some kind of misconduct. (*Id*.).

Although they were happy to plan these removals, none of the Defendants took the time to think that would happen to *JACC*, when all of the above 5 core functions were moved at about the same time. There was no discussion among the "planners" about how to have a smooth transition for the corporation if they did the take-over. (Haddy PI-Tr. p. 55).

Q: Did you consider the effect on the organization to raise after a meeting had already started that you wanted to elect new officers?

A: ….I, I, I knew that they would not like it.

(Browne dep. p. 115). Michael Browne is an attorney, and knew that more than the By-Laws govern a Minnesota non-profit corporation. (Browne dep. p. 124).

Relief requested by Plaintiffs

Plaintiffs requested the following relief in their summary judgment motion:

1. Removal of McCandless, Browne and Hodson from the JACC Board;
2. Requiring McCandless and Hodson to pay to JACC, the monies that they wasted (Clark Aff. Exh. F);
3. Payment of Plaintiffs' attorney fees and expenses (Minn. Stat. §317A.751, Subd. 8);
4. Finding liability against JACC for the breach of Jerry Moore's definite term employment agreement.

Respondents' motion for summary judgment and Rule 11 sanctions

The Respondents moved for summary judgment, but JACC did not. Neither Respondents nor JACC raised any issues about derivative claims.

The Respondents sought Rule 11 sanctions along with their summary judgment motion. But they neglected any safe harbor period. (A:142).

Facts disputed by Plaintiffs in opposing Respondents' motion

Use of JACC Revenues

Defendants allege at page 5-6 of their Factual Statement that the Myers Board spent 91% of its revenues on administration. That is disputed. (See Affidavit of Jerry Moore, dated February 7, 2010, ¶4; and Moore May 31, 2009 Affidavit, ¶4-5). Respondents cited only Mr. Miller, the ED of NRP, one funding source, and one that could be used for administration. (*Id*.).

Respondents alleged that the Myers Board had a duty to supply non-profit financial information, and failed to do so. That is disputed. Jerry Moore testified that Wagner was entitled to "financial results." (PI-Tr. 5/19/09, p. 45). Jerry Moore testified that Ben Myers was handling the requests for financial information at the time. (*Id*. at 47). In December 2008, an "open book" meeting was held, to provide access to members. (*Id*. at 49).

Respondents alleged Jerry Moore "interfered" with the nominations process in fall 2008. However, the By-Laws make clear that the administrative office should receive the nominations. (Art. V, Section 3, b; 5/19/09, pages 64-71).

Respondents alleged that the terms of certain Board members were extended at the November 2008 meeting, in violation of the By-Laws. But Ms. Dejvongsa testified that the By-Laws were silent on the issue (Tr. p. 60-70), and that the extension of the terms was made necessary by the fact that Kip Browne had failed to provide any *process* for JACC, once it was taken off the By-Laws at the October 2008 meeting. (Indeed, it was not until this Court ruled on the TRO that the process was put back on track.)

At page 12, Defendants allege that Defendants followed the By-Laws when they amended the agenda and held new elections for Officers. Plaintiffs have focused on different facts, and cited law for the proposition that board members fail in their fiduciary duty when they plan a secret board take-over. (See Plaintiffs' motion for summary judgment.) The issue is not the amending of the agenda (in and of itself), but the *content* of the amendment, which was a pre-planned, secret take-over strategy (regardless of whether it was a "removal" of board officers).

Respondents alleged that Myers and Moore mis-represented their status following the January 14, 2009 ouster. But it is undisputed that until the District Court ruled on the TRO, that there was a legitimate dispute about who was in charge

of JACC. (Moore did not admit that he misrepresented himself as an employee of JACC to Franklin Bank, see 5/19/09 Tr. p. 83).

Respondents alleged that JACC's finances were in "disarray." That is disputed. Jerry Moore discussed the finances at some length on cross examination (see 5/19/09 Tr. p. 10-40; and Moore May 31, 2009 Affidavit, ¶4-5).

Further, Defendants allege at their p. 15 that there was no evidence of failure by the McCandless group to pay bills timely. But Plaintiffs focused on different financial misconduct: paying too many bills, to the financial detriment of JACC. (See Plaintiffs' motion for summary judgment.)

Respondents alleged that Plaintiffs did not attend board meetings after this litigation began. Plaintiffs have cited facts to show that McCandless began to send agendas and minutes only to the select group of board members, specifically declining to send to Plaintiffs. (See Plaintiffs' motion for summary judgment.)

Plaintiffs acknowledged that a "new" board was elected in October 2009. As Plaintiffs have pointed out, McCandless again became treasurer in January 2010.

District Court's Order on summary judgment motions

The District Court ruled at A:15-26. The Court rejected the defendants argument of 'unclean hands,' and made no finding of bad faith or "not in good faith."

Entry of partial judgment

The parties had agreed to entry of partial judgment (that is, not dealing with any claims against City-defendants) under Minn.R.Civ.P. 54.02. But Defendants wanted to have their motion for Rule 11 sanctions ruled upon.

The Respondents also sought **$25,887.35** in costs. (2/16/11-Tr. p. 2). This total included the cost of purchase the entire PI hearing transcript – even though the Court had affirmatively ruled that the parties should not brief the facts, but should brief only the law.

Respondents also sought **$191,153** in attorney fees pursuant to Minn. Stat. "317A." (2/16/11-Tr. p. 3). This included the defense costs for protracting the litigation, some of the example of which are noted above.

A separate hearing was held.

The Court issued an order taxing costs at $15,000, without any analysis, explanation or calculation. Then defense counsel wrote a letter. And then, without any hearing, argument, briefing or weighing in by Plaintiffs, the Court added $25,887.37 in attorney fees, again, without any explanation, analysis or calculation. (A:28).

ARGUMENT

In reviewing a motion for summary judgment, the trial court and must determine (a) whether there are any genuine issues of material fact, and (b) apply the law. *Offerdahl v. University of Minnesota Hosps. and Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). The review of decisions under Minn. Stat. §317A.751 is abuse of discretion. *Gunderson*.

I. THE DISTRICT COURT RAISED DERIVATIVE ISSUES SUA SPONTE.

No defendant raised any issues about the derivative nature of any claims. The issue was not brief, not discussed orally. The District Court, *sua sponte*, held that the fiduciary duty claims were derivative and therefore could not be asserted. Then it characterized the intentional interference claims as fiduciary duty claims. This gutted the entire case – and Plaintiffs were never allowed to brief the issues. This denied due process. The District Court briefed *its own* issues, and never considered Plaintiffs facts or arguments – at all.

The District Court failed to address the relief requested by Plaintiffs.

The District Court should have allowed Plaintiffs to brief the derivative issue. This is an issue of law that is often misunderstood. Plaintiffs would have cited to *Janssen v. Best & Flanagan*, LLP, 704 N.W.2d 759 (Minn. 2005) and *Wessin v. Archives Copr.*, 592 N.W.2d 460 (Minn. 1999). These cases hold that where the issue is the loss of a specific right (such as breach of contract), asking the wrongdoer board

members to put the money *back* into the corporation so that it can be paid to the one wronged, describes direct claims, not derivative claims.

The next error in the Court's *sua sponte* summary judgment issue, is that that the board members aligned with and voting in favor of the McCandless Board clearly outnumbered the Myers Board. For reasons that are unclear, the Court counted the number o board members suing. But that runs afoul of the cases cited by the Court itself. The number of Board 'pro-McCandless' board members was 10, and the number of Myers members was 5 (see facts above). Further, the District Court had already found in the TRO order, that the McCandless Board would simply vote out the Myers board – so installing Myers board was useless. The District Court would not allow Plaintiffs to bring a motion for reconsideration, even once Plaintiffs pointed out the conflict between the TRO order and summary judgment order. (A:57-58).

If Respondents attempt now to brief derivative law, Plaintiffs reserve the right to move to strike, or to brief it in reply.

II. THE MINNESOTA NON-PROFIT EQUITABLE RELIEF STATUTE.

Had Plaintiffs been alerted to the issue, they would have briefed that disenfranchising board members (preventing voting, meeting attendance, etc.) are direct claims.

Plaintiffs, secure the Court had already essentially ruled they could pursue their derivative claims, did seek to protect the JACC coffers at summary judgment. JACC is a nominal defendant.

The ByLaws in effect at the time are found at Clark Aff. **Exh. Q**.

The ability of directors and members of non-profit corporations to seek judicial intervention is codified at Minn. Stat. §317A.751. Select portions reprinted at A:143.

Although not exclusively relevant, Plaintiffs focus on §317A.751, Subd. 3(2): that those in control have acted ***fraudulently, illegally, or in a manner unfairly prejudicial toward one or more members in their capacities as members, directors, or officers***.

A. Abuse by Non-controlling Directors Not to be Tolerated.

Minnesota Statute §317A.751 bears some resemblance in language and purpose to Minn. Stat. §302A.751 (although "shareholders" was replaced with "members" in 317A, or at times is equivalent to "directors"). More cases have been decided under 302A than under 317A. And we know from Janssen v. Best & Flanagan, 662 N.W.2d 876 (Minn. 2003) that general corporate concepts apply to non-profits. The Comment to §302A.751 states in part:

- Lesser relief than dissolution can be granted by the court, and the relative burden is lesser as well.

- In view of the power of the court to order lesser equitable relief, the threshold of "persistent unfairness" required for a lesser remedy should be proportionately less than the stringent standards which are required, quite properly, for the ultimate relief of dissolution. **Abuse of non-controlling shareholders is not to be tolerated under this act**.

Further, cases interpreting §302A.751 confirm that the court has "broad equitable powers" in fashioning relief under the statute. *See, e.g.*, *Pedro v. Pedro*, 489 N.W.2d 798 (Minn. Ct. App. 1992). The trial court is the trier of fact, and need not accept the assertions of the witnesses. *Cf.*, *Pooley v. Mandato Iron & Metal, Inc.,* 513 N.W.2d 834 (Minn. Ct. App. 1994).

B. "Unfairly Prejudicial" Defined.

No cases defined "unfairly prejudicial" under 317A. However, case law from 302A is persuasive:

- Whether directors have been "unfairly prejudicial" is a question of fact; *Regan v. Natural Resources Group, Inc.,* 345 F.Supp.2d 1000 (D. Minn. 2004);
- "Materiality" is not an element of unfairly prejudicial conduct. *Berreman v. West Pub. Co.*, 615 N.W.2d 362 (Minn. Ct. App. 2000);

- Breaches of fiduciary duty[10] are probably "unfairly prejudicial." *Id*. In Minnesota, the existence of a fiduciary relationship is a question of fact. *Carlson v. SALA Architects, Inc.,* 732 N.W.2d 324, 331 (Minn. Ct. App. 2007).[11]

- A director need not know that his action breaches a fiduciary duty for liability for that breach to lie: gross negligence is sufficient for breach of the duty of care, and no showing of knowledge is required. *See, e.g., Smith v. Van Gorkum*, 488 A.2d 858, 873 (Del. 1985).

- "Unfairly prejudicial" conduct is conduct that frustrated the reasonable expectations of shareholders in their capacity as shareholders or directors of a corporation that is not publicly held. *Id*.;

- When presented with a statutory claim of unfair prejudice towards shareholder of closely held corporation, courts may look to a course of dealing that implies an agreement among shareholders or between shareholders and the corporation in determining whether shareholder expectations are reasonable. *Gunderson v. Alliance of Computer*

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[10] "Fiduciary duty" in this context can be summarized as follows: State corporate law generally provides that "[t]he business and affairs of . . . [the corporation] shall be managed by or under the direction of a board of directors." In managing the business and affairs of the corporation, directors stand in a fiduciary relationship to the corporation, which requires that they act prudently and in the best interest of the corporation and its stockholders, rather than in their own interest. Directors owe the corporation complete loyalty, honesty and good faith. They must not take actions to advance their individual interests that conflict with their duty to the corporation. Directors must also exercise their duties with a requisite degree of care. PLI Corporate Law and Practice Course Handbook Series, 1646 PLI/Corp 689 (PLI 2008).

[11] An officer and a director of a corporation owe a duty to the corporation under common law. *Bolander v. Bolander*, 703 N.W.2d 529 (Minn. Ct. App. 2005).

Professionals, Inc., 628 N.W.2d 173 (Minn. Ct. App. 2001), review granted, appeal dismissed;

- When presented with a statutory claim of unfair prejudice towards shareholder of closely held corporation, in the absence of a specific agreement among shareholders or between shareholders and the corporation, a shareholder's reasonable expectations may be determined by reference to the understandings that would normally be expected; *Id*.;
- When presented with a statutory claim of unfair prejudice towards shareholder of closely held corporation, a touchstone for identifying the shareholder's reasonable expectations is the standard of conduct identified in the common law as fiduciary duty,[12] and referred to in the statute as the duty which all shareholders owe to one another to act in an honest, fair, and reasonable manner in the operation of the corporation. *Id*.

[12] In Minnesota, a breach of fiduciary duty claim is proven by showing: a fiduciary relationship and that the defendant breached a duty arising from that relationship. *See Midland National Bank of Minneapolis v. Perranoski*, 299 N.W.2d 404, 413 (Minn. 1980) (requiring fiduciary relationship and breach). The fiduciary duty was owed by the defendant officers/board members to the JACC corporation. The breaches of that duty are as described in Sections I and II. A "fiduciary" is "[a] person who is required to act for the benefit of another person on all matters within the scope of their relationship." Black's Law Dictionary 658 (8th ed. 2004). The duty imposed on fiduciaries is "the highest standard of duty implied by law." *D.A.B. v. Brown*, 570 N.W.2d 168, 172 (Minn. App. 1997); *see also Prince v. Sonnesyn*, 222 Minn. 528, 535, 25 N.W.2d 468, 472 (1946) (describing partners' duties as fiduciaries). Minnesota caselaw recognizes two categories of fiduciary relationship: relationships of a fiduciary nature *per se*, and relationships in which circumstances establish a de facto fiduciary obligation. *Carlson*, 732 N.W.2d at 331. A director-corporation fiduciary relationship is *per se*. *Thomas B. Olson & Assocs., P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 914 (Minn. App. 2008).

Although §317A.751 contains a specific provision that requires shareholders to act "openly, fairly and honestly with the minority shareholder" (Subd. 3(a)) – language that is not found in 317A.751, the concept of "honest" and fair dealing nonetheless plays out in §317A.751, Subd. 3(2) by precluding fraud, breaches of fiduciary duty, unlawful conduct, etc. See footnote 1. *See also*:

- *Pedro v. Pedro*, 489 N.W.2d 798 (Minn. Ct. App. 1992) ;
- It was **deceitful** for directors to trick attendance at a meeting, not notifying that they planned an ouster. *Alderstein v. Wertheimer*, 2002 WL 205684 (De. Ch. 2002) (Clark Aff. Exh. R).
- Absence of a particular director from a meeting effectuated by trickery would void actions taken at that meeting. *Schroeder v. Scotten*, Dillon Co., 299 A.2d 431 (Del. Ch. 1972).

The duty imposed on a director pursuant to Minn. Stat. §317A.751 is an affirmative duty not to act badly. It is a duty *not* to act illegally, fraudulently, etc. It would therefore require a lesser standard of proof than proving "misconduct."[13] The leading case defining director misconduct is *In re Walt Disney Company Derivative Litigation*. There, the Delaware Supreme Court defined director misconduct to include "intentional dereliction of duty, a conscious disregard for one's

[13] This should not be confused with the duty of directors who wish to remove other directors to need to show "misconduct" under JACC Bylaws at Art. VI, Section 3 (removal of officers). *See, e.g.*, *The Thornhurt Country Club Estates Property Owners Assoc. v. Jones*, 2006 WL 2065402 (Pa.Com.Pl. 2006) (Clark Aff. **Exh. S**), decision to remove association officers and board members was null and void for failing to follow bylaws regarding such removal.

responsibilities." 906 A.2d 27 (Del. 2006). However, it is axiomatic that if misconduct is shown, that prejudicial conduct (a lesser standard) is also shown.

C. Invalidation of Actions Can be Appropriate Remedy.

State v. Kylmanen, 180 Minn. 486, 486 N.W.2d 197 (Minn. 1930) held that meeting of a board of directors without notice to some directors was improperly held, and action taken at meeting was ineffective. Since 1929 Minnesota Courts have been empowered to invalidate corporate elections, if they are arbitrary. *State ex rel. Koski v. Kylamen*, 178 Minn. 164, 226 N.W. 401 (Minn. 1929). That case was an action in *quo warranto* by the State. However, the court's power to void an election is now subsumed under it broad powers under §302A.751/317A.751. Various cases, and legal terms therein, support the notion that actions taken at a meeting can be invalidated by the court.

Obviously, there is overlap in the terms discussed by courts, and various forms of relief awarded. An Illinois Court commented on the deceptive nature of a notice and how it failed to apprise minority shareholders of the purpose of a meeting and the actions that the majority planned to take at that meeting. That, combined with a violation of the Bylaws, caused that Court to void the decision to remove a minority shareholder from the board of directors. *Schmirmer v. Bear*, 648 N.E.2d 1131 (Ill. Ct. App.2d Dist. 1995). Discussion of similar concepts, and finding of similar facts can also cause a court to invalidate an election. *Schroeder v. Scotten*, Dillon Co., 299 A.2d 431 (Del. Ch. 1972). These are all ways to void board actions.

D. "Illegal Conduct" Examined.

In the context of Minn. Stat. §317A.751, the term "illegal" can be interpreted as meaning: i) "*ultra vires*"; [14] ii) violating a corporate statute or the bylaws; or ii) breach of fiduciary duty. *See, e.g.*:

- *Kaufman v. Shoenberg*, 33 Del. Ch. 211, 91 A.2d 786 (De. Ch. 1952), [directors] were not empowered to inaugurate radical departures from fundamental policies and methods for conducting the business as prescribed by the directors;
- Members of nonprofit corporation *seeking to remove* corporation board of directors failed to comply with corporation articles and bylaws by withdrawing and suspending directors powers and transferring them to members before taking action to remove incumbent directors and, thus, were not entitled to injunctive and declaratory relief. *Glover v. Overstreet*, 984 S.W.2d 406 (Ark. 1999).
- Duly elected directors may proceed at law to oust former officers unlawfully usurping authority in attempting to manage business. *Helm v. Talmadge*, 40 S.W.2d 496 (Mo. Ct. App. 1931).

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[14] According to *Black's Law Dictionary*, West, 5th Ed., "An act performed without authority…." See also, *50 States Statutory Surveys: Business Organizations Corporations* (Thompson Reuters/West 2008), 15 Surveys 18, "The term ultra vires literally means beyond the power and in a business organizations context, refers to instances when a corporation or its officers acts in a way that exceeds the powers granted to the corporation under the law." An additional way for a director to challenge an *ultra vires* act appears at Minn. Stat. §317A.165. Most of the debate around "ultra vires" actions is whether individual board members can be liable.

See also Minn. Stat. §317A.231, which permits telephonic board meetings only under certain conditions.

> Subd. 2. Meetings solely by means of remote communication.[15]
>
> Any meeting among directors may be conducted solely by one or more means of remote communication **through which all of the directors may participate in the meeting**, **if the same notice is given of the meeting required by subdivision 4**,[16] and if the number of directors participating in the meeting is sufficient to constitute a quorum at a meeting. Participation in a meeting by that means constitutes presence at the meeting.
>
> Subd. 3. Participation in meetings by means of remote communication.
>
> A director may participate in a board meeting by means of conference telephone or, **if authorized by the board**, by such other means of remote communication, in each case through which that director, other directors so participating, **and all directors physically present at the meeting may participate with each other during the meeting**. Participation in a meeting by that means constitutes presence at the meeting.

Minn. Stat. §317A.231 (emphasis added).

Continuing with the above example, an "emergency" or special telephonic board meeting could only be held by the JACC Board if the JACC Bylaws provision(s) regarding notice were followed. Minn. Stat. §317A.231, Subd. 4. The JACC Bylaws provide in part:

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[15] Minn. Stat. §317A.011 DEFINITIONS**,** Subd. 18a. Remote communication. "'Remote communication' means communication via electronic communication, conference telephone, video conference, the Internet, or such other means by which persons not physically present in the same location may communicate with each other on a substantially simultaneous basis."

[16] Minn. Stat. §317A.231, Subd. 4, Calling meetings; notice is lengthy, so it is appended at the back of this Memorandum as Appendix B.

- Art. V, Sec. 2(d) provides, "A special meeting of the Board of Directors may be called by the Chair alone, or the Chair must call a meeting upon request of two members of the Board of Directors."
- Art. VI, Sec. 1(c) provides, "The Secretary shall be responsible for keeping records of Board actions, including overseeing the following: taking of minutes at all board meetings, sending out meeting announcements, distributing copies of minutes and agenda to **each** Board member…

The "telephonic board meeting" that McCandless called on **January 15, 2009** therefore:

- violated the Bylaws (by failing to provide an agenda and then minutes of that meeting to all directors); and
- violated state statute (by failing to provide notice to all directors, failing to have approval of the board before utilizing remote communication, and failing to have all parties on the line at the same time during the "meeting").

Those actions could also be characterized as "illegal," "breach of fiduciary duty," "unfairly prejudicial" to the board members who were not noticed (or even called), as well as other terms.

In Section II, below, Plaintiffs discuss the numerous affirmative bad acts and failure of those in then-control of JACC. This Section I is the legal support for that discussion, keeping in mind the overlap among many of the terms. In other words,

Plaintiffs might discuss certain conduct in one way, but that does not preclude a finding that the same conduct also fit other standards discussed in this Section I.

Numerous Acts and Omissions Require Remedy

A. Numerous Acts and Omissions Constitute Illegal, Fraudulent Conduct.

There was a persistent theme in the conduct of the "McCandless" team of officers: they want others to follow the rules – but they boldly violate whatever rule stands in their way.

1. Annual Meeting Improperly Moved.

JACC's corporate distress in 2009 can be traced to an intentional effort in Fall 2008 to prevent an effective Annual Meeting, required by Bylaws to be held in October of each year. Bylaws Art. III, Sec. I requires that the General Membership meeting held on October shall be the Annual meeting. The General Membership meeting *was* held. But due to the conduct of Michael Browne and Anne McCandless (with others in a now-familiar group supporting them), there was no election for offices available for election (*Id*.). Michael Browne admitted that he spoke in favor of the motion not to have the mandatory vote. And, he solicited the assistance of outsiders (Bob Cooper) in order to assist with his mission of getting the Membership to violate the Bylaws. (Browne PI-Tr. p. 137; 192-93; Clark Aff. **Exh. G, H**).

Not only did Browne and McCandless intentionally (or under the Disney standard, with conscious disregard for their duties) violate the Bylaws, but they had no plan for how to get the organization *back* onto the Bylaws. This act, perhaps more than any other, caused disarray in the affairs of JACC, uncertainty by members and directors alike, and the disputes over officers that arose in January 2009.

Certainly, a precursor to the October 2008 Bylaw violation, was Michael Browne's role in the Nominations process. Again, Michael Browne solicited the help of an outsider (Bob Cooper), to put pressure on the organization to get his way. (Clark Aff. **Exh. G, H**). Claiming to care about the Bylaws, and the 2-year board term provision found at Art. V, Sec. 1(b), Browne ignored the rest of that sentence, "and will be elected at the General Membership meeting in October," because it did not suit him. He also ignored major portions of Art. V, Sec. 3(b), which relates specifically to Nominations. Also he looked to blame Jerry Moore; Browne himself (who chaired the Nominations Committee) failed to ensure that the Nominating Committee met and had a quorum at each meeting to conduct business.[17] He also failed to ensure that that Committee would make a recommendation for a slate at the October Board meeting to be held prior to the October Annual meeting.

Indeed, there is no evidence that Browne provided the JACC Office (and Jerry Moore) with the applications for Vladimir Monroe, Robert Hodson or Tyrone Jaramillo prior to October 20, 2008 – 3 days before the Annual meeting. (See Clark

[17] Note at **Clark Aff. Exh. B** that it is Michael Browne who wants to cancel the September 15, 2008 meeting, because Jay Clark (the outsider "observer") might not be able to make it. This did not give his Committee forward motion with which to fulfill its duty under the Bylaws.

Exh. I). Although Browne claimed outrage that Jerry Moore did not instantly do what he said (add these 3 names to the slate), the Bylaws require that Nominations are closed one week prior to the Annual meeting. (Art. VI, Sec. 3(b)). Once again, Michael Browne ignored the Bylaws that he did not like, and pressured to get the result that *he wanted*.

Browne also ignored the text of the Nominations section, that any member in "good standing" can run for director. *Id*. Instead, Browne and Megan Goodmundson created their own set of rules, and intentionally kept certain people off the slate – even removing them from the slate, because *their* rules had not been followed. See Affidavit of Jernelle McLane, and Browne PI-Tr. p. 185-87 (Michael Browne's acknowledgement of email chain with Megan Goodmundson that confirmed they knew that Jernell McLane worked at the Jordan New Life Church (which is in Jordan)), and yet affirmatively took her off the slate, anyway. Supposedly Michael Browne scuttled the October 2008 elections because they were not "inclusive" enough – yet taking 3 members off the slate was not "inclusive."

Another problem was the way in which the McCandless group went from the October 2007 Annual Meeting (after McCandless pitched a fit when Myers wanted to appoint board members), at which it was agreed that vacancies would be filled for 1 year term remainders, to pressuring the Nominations Committee that the terms could only be 2 years (even soliciting Bob Cooper's heavy hand that the City would invalidate the election if it was not "fair") (**Exh. G**). This is yet another example of

this group's strategy, to cry foul when someone else allegedly violated the Bylaws – but doing so *while violating the Bylaws*.

Michael Browne's insistence on the 2-year terms (even soliciting outside 'pressure' from the City as funder) was one more way in which Michael Browne got the General Membership to violate the Bylaws at the October 2008 meeting. But it did more than that. By keeping Rother (and some others) on the Board without election (Rother was one of the 4 board members that were to run for election in October 2008, because they agreed to serve out the remainder of a term), and by getting McLane, Baker, and Hardy *off* the slate, and moving Jaramillo, Hodson and Monroe *onto* the slate by January 2009, Michael Browne took over the Board. Browne did so either for his own selfish motives and interest, or to benefit the "outsiders" that he and McCandless continued to solicit for support.

The handling of the October 2008 Annual meeting (*vis a vis* the October 2007 meeting) involved numerous violations of the Bylaws, and unfairly prejudiced the Plaintiff directors. More importantly, it was the beginning of great turmoil for JACC.

Plaintiffs urge that the individual Defendants should be removed as Officers Directors by the Court:

- Browne (currently director and Vice Chair);
- McCandless (currently board member and Treasurer); and
- Robert Hodson (currently board member)

Note that these 4 all signed the fraudulent bank resolution – see below. (This need not be viewed as invalidating the election; the Court clearly had the discretion to remove board members for the type of conduct proven here.)

2. Transfer of Signatories was Illegal and Fraudulent.

Anne McCandless admitted that she solicited advice from Bob Miller, an outsider, and not an attorney, to have the telephonic "meeting" on **January 15, 2009**. The telephone-call meeting did not comply with Minnesota Chapter 317A. It was not a permissible telephonic conference, because all members were not present on the phone at the same time. (The point of that is to allow discussion of *both sides* of the issue.) Board member Haddy testified that he did *not* hear both sides of the issue before he voted. (Haddy PI-Tr. p. 14).

Further, this Board had not provided for such meetings. *And*, McCandless did not call all members. McCandless' reason for not being able to call the other directors (who not coincidentally are all Plaintiffs) – that it was evening and she did not have their numbers - is not credible. McCandless admitted that she got this advice from Miller around noon. She was the purported "Secretary" and as such had a *duty* under the Bylaws to provide agenda of meetings[18] to all members. Yet she did not make *any* calls to others to learn the phone numbers of plaintiff-directors. McCandless knew that Ben Myers was suing her before she ran for Secretary, then

[18] McCandless also failed in her duty to provide plaintiff-directors agenda and minutes for the February, March, April and May 2009 meetings. All of those meetings are ultra vires for lack of notice under the statute, and all should be declared void.

later claimed that that lawsuit was the reason that she could not call Ben Myers for the telephonic meeting.

The telephonic meeting further violated the Bylaws, because it was called by the Secretary and merely acquiesced in by the Chair. This violates Art. V, Sec. 2(d).

There was no reason for the "special" meeting, since the issue was not finally resolved until **January 26, 2009**, when the officers executed a fraudulent bank resolution. (**Exh. P**). In that timeframe, McCandless made *no effort* to inform the plaintiff-directors that she had held this "secret" meeting. The telephonic meeting was *ultra vires*. In addition to the above, it was without notice to all directors. Therefore, all actions taken at that meeting should be voided.

The fraudulent bank resolution should also be voided. It was false (no board meeting was held on **January 26, 2009**). There was not even an attempt to comply with Minn. Stat. 317A.239 (action without meeting), which requires **all directors**.

Since the signatory authority of the McCandless group is void, that means the checks that were signed on behalf of JACC should also be voided. Innocent third parties should not be harmed, but on the other hand, insiders should not benefit. Rother, who never tendered his defense to the corporation,[19] and whose attempt to be paid for his attorney fees was denied by the previous board,[20] should be required to disgorge the approximately $1,500 that he obtained by check (signed by Hodson (see Clark Aff. **Exh. F**)), purportedly that was reimbursement intended to indemnify

[19] Dejvongsa PI-Tr. p. 65.
[20] *Id*.

him, although he had never tendered his defense/indemnification to JACC so that it could control the expenses.

3. Corporate Assets Misapplied and/or Wasted.

Perhaps the most grievous harm that the McCandless group did to JACC (the corporation) was to conspire to take over the board, and then in one night, to fire the Executive Director and remove all of the corporate officers, *without a plan of how to maintain stability and institutional knowledge* in the organization. Shortly thereafter, the McCandless group fired the 12-year veteran Accountant, Judy Gallas. Because of this short-sightedness, corporate assets have been misapplied. Consider the following:

- Had the McCandless group *asked* Jerry Moore if he had a written employment contract, and had they listened when Ben Myers warned that their actions in closed session were courting a wrongful discharge lawsuit (and said she did not care…Haddy testimony), and had they considered the text of the employment agreement, perhaps JACC would not be facing the threat of a breach of contract action by Jerry Moore (with damages of $75,000 or more);
- Had the McCandless group *asked* Judy Gallas whether she had a contract, perhaps JACC would not have faced the threat of a breach of contract action by Judy Gallas;
- Had the McCandless group properly handled the allegations against Jerry Moore (put Moore on suspension, hired an independent investigator (which

E.B. Brown was suggesting)), even if Moore had eventually been terminated, JACC would have benefitted from the smooth transition of information. As it was, McCandless wrote out checks for over $5,000 to the Ackerberg group – not knowing that Jerry Moore had been negotiating to pay less (or not any) and to move the JACC offices.[21] The McCandless group wrote out more than $1,500 to the County for taxes, not aware that Jerry Moore was being successful in negotiating not to pay *any* taxes because the building housed a county program.[22]

- McCandless admitted that on **January 13, 2009**, she was already planning to change the locks and called Ackerberg on **January 14** without authority, and that she and others planned to oust Jerry Moore and *if JACC property was missing* to file a police report to better their case against Moore.[23] It is certainly possible that the McCandless group took files and computers from the JACC offices to be able to blame this on Jerry Moore. But even if they did not, their absolute failure from January 2009 until trial in May 2009, to ask any of the funders for the contracts that formed the requirements for the segmented funds, was a breach of fiduciary duty for Treasurer Hodson, and

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21 Moore PI-Tr. p. 106-9; McCandless PI-Tr. 41. See McCandless PI Tr. 39-49 for discussion of spending from JACC coffers by McCandless, Hodson, Browne.

22 Moore PI-Tr. p. 114-17.

23 McCandless PI-Tr. p. 98-99.

any check signatory. McCandless' story that she got some type of permission from Jill Keiner was not credible and did not hold up.[24]

JACC had only $32,000 in its checking account when the McCandless group took over. The above expenditures and liabilities due to misapplication of funds/mismanagement exceed $32,000. The District Court was required to consider the financial condition of the company in providing equitable relief. The evidence upon summary judgment was that liabilities of JACC exceeded assets. Plaintiffs suggested that the Court assign an independent auditor/Receiver to consider the checks written, whom they benefitted, and which checks should be disgorged or reimbursed to JACC, and whether any of the defendants should reimburse JACC.

All of the above argument was parsed in one paragraph by the District Court. The District Court held, simply, that judicial intervention was not appropriate.

III. JACC IS LIABLE FOR BREACH OF MOORE'S EMPLOYMENT AGREEMENT.

Employment contracts of a specific duration can be repudiated, but the employer becomes liable for breach of contract unless the termination of the employee is "for cause." *See Bang v. International Sisal Co.,* 212 Minn. 135, 138-39, 4 N.W.2d 113, 115 (1942); *Pine River State Bank v. Mettille,* 333 N.W.2d 622, 628 (Minn. 1983).

[24] Moore PI-Tr. p. 103-4, 109; McCandless PI-Tr. p. 47-49.

Here, the employment agreement required that in order to terminate Moore, a specific articulation of "cause" was required, namely, a statement of the precise action that constituted misconduct (see Paragraph 6(B)). Here, it is undisputed that that was not done. The motion to discharge Moore was general, as was the letter delivered to him on **January 15, 2009**.

Neither was Moore given a 30-day notice, and severance pay as required by Paragraph 6(B). Moore sought a determination that the contract was breached. Wilson Aff. ¶7 showed the damages to be about $75,000. That money would not be available to pay Moore, if the McCandless board continued their spending of JACC monies.

The District Court accepted as true that Moore had an employment contract with JACC. However, the District Court then failed to apply the specific language of that contract, instead ruling, essentially, that what JACC did was 'good enough.' (A:25). Moore seeks reversal of the denial of his motion for summary judgment on liability.

JACC did not move for summary judgment. And, the Defendants never moved to dismiss Moore's breach of contract claims. (They moved to dismiss the FAC – interference with contract claim). The District Court therefore lacked the authority to dismiss a claim that the defendants did not move to dismiss.

III. Were Attorney Fees and Costs Appropriate?

Appellants challenge the District Court's award of both costs and fees. Plaintiffs objected to nearly all of the costs (except statutory costs). None of those arguments were considered, which, alone, warrants reversal.

Plaintiffs noted that that district court reimbursed for depositions *if they were cited* at trial or summary judgment. Plaintiffs noted only 8 transcripts were cited by defendants. Plaintiffs objected to the lack of specificity in the defense motion for costs. Plaintiffs objected that the defendants were told *only* to brief the law, and they responded by purchasing the *entire* PI hearing transcript, which was unnecessary. Defendants were also attempting to have Plaintiffs pay for videotaped copies of the depositions, in addition to paper transcripts. (2/19/11-Tr. p. 10-11).

Plaintiffs objected to the $5,000 in copy costs as excessive, but also lacking any detail to decipher what it was for. There was no court order to create numerous 3-ring binders of exhibits and most of them were duplicative. (*Id*.). A large amount of the copy costs appear to be a subpoena *duces tecum* to Judy Galls for a huge box of her accounting records, which was something JACC may have needed, but not for the case. Messenger costs were objected to – when opposing counsel can be served via fax. (*Id.* at 12).

Plaintiffs objected to the numerous frivolous Rule 11 motions, and suggested that there were attorney fees incurred, that did not need to be incurred. (*Id*. at 13-

14). A huge part of the defense was that of 'unclean hands,' which failed, and which is not available for derivative claims, citing Eighth Circuit case *Foy*. (*Id*.). Plaintiffs pointed out that early on, they raised the conflict of interest for the same attorney to represent the alleged-wrongdoer-board-members and the corporation. Yet the same law firm continued on, incurring fees, while making legal and ethical error with regard to JACC. The case was necessary, as board members were engaging in self-help, and someone needed to make a decision. (Id.).

The Court's amended order on fees stated, "This court's prior rulings on this matter and Plaintiffs' conduct in bringing this lawsuit support a finding that plaintiffs have acted in a manner not in good faith in bringing some or all of their claims against the Defendants." Appellants do not know what this means.

If the fees were awarded under Minn. Stat. §317A.751 (and it is hard to tell), then only those claims should have been considered. Neither Respondents nor the District Court parsed the fees in that way. "Some of all" is so vague as to be meaningless, and to show that there was not due deliberation by the District Court. The TRO order did not suggest in any way that the Plaintiffs should not have filed the lawsuit. The TRO was necessary. Surely this Court requires more explanation from a district court awarding $40,000 in fees.

As noted above, the fees charge by respondent-counsel were excessive. There were numerous unnecessary motions and hearings, and Respondents protracted the

litigation. It is Plaintiffs who should be awarded fees. Further, much of the 'defense' taking numerous days of the PI hearing was 'unclean hands,' which is not an available defense in derivative actions. *Foy v. Klapheimer*, 992 F.2d 774 (8th Cir. 1993)

CONCLUSION

Appellants respectfully request reversal of the District Court and: Plaintiffs requested the following relief in their summary judgment motion:

1. Removal of McCandless, Browne and Hodson from the JACC Board;
2. Requiring McCandless and Hodson to reimburse JACC;
3. Payment of Plaintiffs' attorney fees and expenses (§317A.751, Subd. 8);
4. Finding liability against JACC for the breach of Jerry Moore's definite term employment agreement.

WORD COUNT CERTIFICATE

The undersigned certifies that this brief contains no more than 13,868 words, counted utilizing Microsoft Office 2010 and counting footnotes.

Dated: December 20, 2011

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