STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Ethylon B. "E.B." Brown, *et al*,

Plaintiffs,

v.

Michael "Kip" Brown, *et al*,

Defendants.

Civil Case No. 27-CV-09-2277

PLAINTIFFS' MEMORANDUM OF LAW SUPPORTING THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT: SUPPLEMENTED TO ADD TR. CITES

INTRODUCTION

This Court had the opportunity at the preliminary injunction (PI) hearing to view the witnesses, and to develop a broad-based understanding of the disputes that arose at the Jordan Area Community Council (JACC). It is Plaintiffs' position that there is no need for a trial in this matter. Numerous facts were admitted by defendants at the PI hearing; the facts needed to prove "liability" in this action are of record, and not disputed.

Plaintiffs' action for equitable relief under Minn. Stat. §317A.751 is not one for "liability" *per se*. However, Plaintiffs assert that, given the Court's extensive knowledge of this matter, and the past evidentiary hearing, that the Court may decide that issue in this summary motion. Even if there were to be a trial, equity issues are decided by the court and not the jury. If necessary, this Court should be able to make credibility determinations in deciding this Count.

Plaintiffs move for summary judgment on the following claims in the Second Amended Complaint (SAC):

- **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.

FACTUAL STATEMENT

The JACC Organization

The Jordan Area Community Council (JACC) is a Minnesota non-profit corporation organized under Minn. Stat. §317A. (TRO Order p. 2). Plaintiffs are members of JACC. *Id.*

Defendants are four individuals who were elected as officers of the JACC Board, after they hatched a secret plan to hold elections on **January 14, 2009**. When this litigation began, claiming officer positions were:

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

The Court's TRO Order acknowledged that election, and that those individuals held officer positions. 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.

In **October 2009**, an Annual Meeting was held. Nine seats were vacant,[1] but only five people ran for the board. (Titus Aff., filed with defense motion for summary judgment, ¶7-8). At the October 29, 2009 Board meeting, Defendant Robert Hodson ran for Chair, Vice Chair and Treasurer. The following officers were elected:

- Vladimir Monroe, Chair
- Michael K. Browne, Vice Chair
- Robert Hodson, Treasurer
- Dave Haddy, Secretary

(Clark Aff. **Exhs. J-1, J-2**). On **January 13, 2010**, Robert Hodson resigned as Treasurer, and Anne McCandless took over as Treasurer. (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

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1 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.

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). The survey was conducted, in part, to assist with the general direction from McKnight to have more consistency in the ED position. The then-board determined that to attract the appropriate personnel, and to keep them, it needed a definite term employment agreement, and a suitable salary. Other ED salaries were studied. (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 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). Smith then passed the survey information to Ben Myers (Myers) to be able to effectuate the employment contract. (Smith Aff. ¶3). Myers' recollection

is that at the April 10, 2007 Executive Committee meeting, the major contours of the Moore employment agreement were discussed. (Myers 6/1/09 Aff. ¶1 at Clark Aff. **Exh. CC**).

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. (Clark Aff. **Exh. A**; 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).[2]

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

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2 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 P.J. 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).[3]

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3 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;[4] 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).[5] 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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4 The McCandless PI hearing Tr. is found at Clark-Supp. Aff. Att. A.

5 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. p. 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. p. 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 people participated in an illegal meeting:

- Daniel Rother
- Robert Hodson (defendant in this action)
- P.J. Hubbard (defendant in this action)
- Vladimir Monroe
- Tyrone Jaramillo
- Dave Haddy
- Todd Heintz
- Michael Browne (defendant in this action)
- Keith Reitman
- Ann McCandless (defendant in this action)

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

- E.B. Brown
- Shannon Hartfiel
- Robert Wilson
- Steve Jackson
- Ben Myers

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,[6] 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).[7] The 3 other signatories on the bank resolution are:

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

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6 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).

7 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).

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).

I. THE MINNESOTA NON-PROFIT EQUITABLE RELIEF STATUTE.

These Plaintiffs have brought this action, in part, to force those who were quick to remove the core JACC functions in January 2009, without regard for the best interests of JACC, the corporation. These Plaintiffs bring this claim on behalf of JACC. For purposes of this claim, 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 are reprinted below:

> **317A.751. Judicial intervention; equitable remedies or dissolution**
>
> **Subdivision 1. General; when permitted.** A court may grant equitable relief it considers just and reasonable in the circumstances or may dissolve a corporation and liquidate its assets and business as provided in this section.
>
> **Subd. 3. Action by director or members with voting rights.** A court may grant equitable relief in an action by a director or at least 50 members with voting rights or ten percent of the members with voting rights, whichever is less, when it is established that:
>
> (1) the directors or the persons having the authority otherwise vested in the board are deadlocked in the management of the corporate affairs, the members cannot break the deadlock, and the corporation or the parties have not provided for a procedure to resolve the dispute;
>
> (2) the directors or those in control of the corporation have acted **fraudulently, illegally, or in a manner unfairly prejudicial toward one or more members in their capacities as members, directors, or officers**;
>
> (3) the members of the corporation are so divided in voting power that, for a period that includes the time when two consecutive regular meetings were held, they have failed to elect successors to directors whose terms have expired or would have expired upon the election and qualification of their successors;
>
> (4) **the corporate assets are being misapplied or wasted**; or
>
> **Subd. 6. Condition of corporation.** In determining whether to order equitable relief or dissolution under this section, the court shall consider the financial condition of the corporation but may not refuse to order equitable relief or dissolution solely on the ground that the corporation is solvent.

> **Subd. 8. Expenses.** If the court finds that a party to a proceeding brought under this section has acted arbitrarily, vexatiously, or otherwise not in good faith, it may award reasonable expenses, including attorneys fees and disbursements, to any of the other parties.

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. <u>Abuse by Non-controlling Directors Not to be Tolerated</u>.

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 <u>Janssen v. Best & Flanagan</u>, 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. **<u>Abuse of non-controlling shareholders is not to be tolerated under this act</u>**.

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[8] are probably "unfairly prejudicial." *Id.* In Minnesota, the existence of a fiduciary relationship is a question of fact.

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8 "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).

Carlson v. SALA Architects, Inc., 732 N.W.2d 324, 331 (Minn. Ct. App. 2007).[9]

- 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 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

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9 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).

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,[10] 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.*

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*:

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10 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).

- 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."[11] The leading case defining director misconduct is In re Walt Disney Company Derivative Litigation. In that case, the Delaware Supreme Court defined director misconduct to include "intentional dereliction of duty, a conscious disregard for one's 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

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11 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.

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*";[12] 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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12 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.[13]
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> 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**,[14] 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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13 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."

14 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.

II. 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.[15] 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

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15 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.

Jaramillo prior to October 20, 2008 – 3 days before the Annual meeting. (See Clark **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[16] 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

16 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,[17] and whose attempt to be paid for his attorney fees was denied by the previous board,[18] should be required to disgorge the approximately $1,500 that he obtained by check (signed by Hodson

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17 Dejvongsa PI-Tr. p. 65.

18 *Id.*

(see Clark Aff. **Exh. F**)), purportedly that was reimbursement intended to indemnify 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 tesmiony), 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.[19] 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.[20]
- 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.[21] 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

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19 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.

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

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

segmented funds, was a breach of fiduciary duty for Treasurer Hodson, and any check signatory. McCandless' story that she got some type of permission from Jill Keiner was not credible and did not hold up.[22]

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 Court is required to consider the financial condition of the company in providing equitable relief. It certainly appears that the liabilities now exceed the assets. Plaintiffs suggest 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.

B. Additional relief sought.

McCandless and Hodson should be required to re-pay JACC for all of the monies they wasted (Clark Aff. **Exh. F**).

Plaintiffs seek payment of their attorney fees and expenses, for bringing this action on behalf of JACC.

Plaintiffs ask that this Court caution the City of Minneapolis and its various employees and elected officials that JACC is an independent corporation authorized under the laws of the State of Minnesota, and that the City may fund but cannot run JACC.

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22 Moore PI-Tr. p. 103-4, 109; McCandless PI-Tr. p. 47-49.

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).

Here, the employment agreement required a specific articulation of "cause," namely, that the precise action that constituted misconduct be stated (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 seeks a determination that the contract was breached. Damages can be calculated from the contract (see Wilson Aff. ¶7), or if the Court believes it is necessary, a brief hearing could be held to determine precise damages. Moore believes that a jury trial on damages is not necessary.

CONCLUSION

For all of the foregoing reasons, Plaintiffs seek the relief requested herein:

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.

Plaintiffs reserve the right to supplement this filing upon receipt of the additional transcripts of the PI hearing.

Supplemented: 2/11/10

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