

Jill Clark, P.A.  
2005 Aquila Avenue North  
Golden Valley, MN 55427

## FAX COVER SHEET

**TO:**

Civil filing

**FAX:**

612/348-2131

**FROM:**

Jill Clark, Esq.  
Jill Clark, P.A.

**FAX:**

763/417-9112

**PHONE:**

763/417-9102

**DATE:**

June 8, 2009

**RE:**

Brown v. Browne

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Fax fee to follow.

STATE OF MINNESOTA  
COUNTY OF HENNEPIN

DISTRICT COURT  
FOURTH JUDICIAL DISTRICT

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

Civil Case No. 27-CV-09-2277

Plaintiffs,

v.

**PLAINTIFFS' WRITTEN CLOSING  
ARGUMENT**

Michael "Kip" Brown, *et al*,

Defendants.

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**INTRODUCTION**

This preliminary injunction hearing was held upon Plaintiffs' notice of and request for equitable relief pursuant to Minn. Stat. §317A.751. Plaintiffs' motion listed, without limitation, various forms of relief that could assist the corporation function more properly.

Certain evidence emerged at trial that may lead the Court to consider additional equitable remedies. Plaintiffs are not seeking dissolution.

The Court requested written closing arguments but not findings of facts.

**ARGUMENT**

**I. THE MINNESOTA NON-PROFIT EQUITABLE RELIEF STATUTE.**

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. 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<sup>1</sup> 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).<sup>2</sup>

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<sup>1</sup> “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

- 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 corporation, a shareholder's reasonable expectations may be determined by reference to the understandings that would normally be expected; *Id.*

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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).

<sup>2</sup> 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).

- 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, 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:*

- 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) (Att. A to Clark TRO Reply Aff.);
- 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.”<sup>3</sup> The leading case defining director

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<sup>3</sup> This should not be confused with the duty of directors who wish to remove other directors to need to show “misconduct” under JACC Bylaws (Exh. 1; reprinted at **Appendix A**) at Art. VI,

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 and Elections 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 its broad powers under §302A.751/317A.751. Various cases, and legal terms therein, support the notion that actions taken at a meeting (including an election) 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

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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) (Att. B to Clark TRO Reply Aff.), decision to remove association officers and board members was null and void for failing to follow bylaws regarding such removal.

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 really all ways to void certain 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*";<sup>4</sup> 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).

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<sup>4</sup> According to *Black's Law Dictionary*, West, 5<sup>th</sup> 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.



- 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).

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

Subd. 2. Meetings solely by means of remote communication.<sup>5</sup>

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,**<sup>6</sup> 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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<sup>5</sup> 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.”

<sup>6</sup> 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 current 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 is 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. They have used shouting, interruption, yelling, a harassing number of grievances, and even physical violence, to get their way.

This group would take advantage of a rule, and then turn around and tell others they could not rely on that same rule. For example, when the JACC Board tried to clean up the Bylaws to deal with some inconsistencies or deficiencies, such as whether the Chair can appoint a board member vacancy (see Art. VI, Sec. 1(a)), by clarifying that the Chair *can* so appoint (see Myers Aff. Exh. A, Sec. 7), Michael Browne scuttled the forward motion on that project. (Myers Aff. and Dejvongsa testimony).

Further, even though the practice at JACC was to allow the Chair to appoint vacancies in board member “offices,”<sup>7</sup> and even though McCandless had used that practice to her advantage to appoint Brian Smith to the Board (Smith Aff. ¶5), when Myers tried to do so at the October 2007 board meeting, McCandless threw a fit. (Smith Aff. ¶7).

McCandless and Browne (and certain others) showed a total disregard for the rules. Consider the following evidence adduced at trial:

**1. Annual Meeting Improperly Moved.**

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<sup>7</sup> There is support in the Bylaws for this interpretation. See Art. III, Sec. 1. At the Annual Meeting “voting shall be held on **offices** available for election.” Since Art. VI, Sec. 2 states that “All officers shall be elected annually by the Board of Directors at the October Board meeting,” the language in Art. III, Sec. 1 cannot relate to officer elections. Even Bob Cooper of CPED acquiesced that a possible interpretation is that the Chair can appoint directors to fill vacancies (and therefore the term for those directors would be less than 2 years). (See Exh. 138).

JACC's current state of distress 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 and Bob Miller) in order to assist with his mission of getting the Membership to violate the Bylaws. (See Exh. 177).

Not only did Browne and McCandless intentionally (or under the Disney standard, with conscious regard 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. (Exh. 138). 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 (see Exh. 177 and Browne testimony), Browne himself failed to ensure that the Nominating

Committee met and had a quorum at each meeting to conduct business.<sup>8</sup> 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 in the Record 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 Exh. 141). 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, as well as 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 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

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<sup>8</sup> Note at Exh. 136 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.

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. 138). This is yet another example of this group's battle cry, 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 continued to solicit for support. (See various letters from City officials "endorsing" Browne's board). Within a short time of Browne taking over, Don Samuels asked to have an office at the JACC offices, and a major policy decision was made to adopt the Advantage Program that City Officials had wanted.

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.

The January 2009 election should be invalidated, because: i) neither the Board nor the General Membership affirmatively dealt with the 1-year/2-year term issue (Browne did

not bring the issue to the Board or to the Membership; he took it to outside Bob Cooper), resulting in the incorrect slots being open for election; ii) failing to hold director elections at the October 2008 meeting violated the Bylaws; and iii) Browne manipulated the slate to get 3 people off, and 3 people on, to suit his agenda.

The cost of the new election should be borne by the defendants. Portnoy v. Cryo-Cell Int'l, Inc., 940 A.2d 43 (Cel. Ch. 2008) (election invalidated and court ordered new election to be paid for by defendants).

If the October 2008/January 2009 election is void, the Court should order a new election, and should provide rules that must be followed prior to and during said election. Of course, if the October 2008/January 2009 election is voided, there would need to be a new officer election.

Plaintiffs urge that Anne McCandless, Michael Browne, and Robert Hodson should be removed as Directors by the Court, and not be allowed to run again for director for 2 years, as a penalty for the bad acts discussed herein (note that it is those 3 who signed the fraudulent bank resolution – see below).

The Court should note that the Bylaws require that the board officers be elected at the October *board* meeting. Art. VI, Sec. 2. The Court would need to square that requirement with the facts of this case, as well as the TRO Order in this case.

## **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. See Exh. 11, 12. The 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.) The 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 Plaintiff directors) – 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<sup>9</sup> 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 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. 10). 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.

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<sup>9</sup> 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.



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 should be required to disgorge the approximately \$1,500 that he obtained by check (signed by Hodson (see Exh. 15)), 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. (See Second Rebuttal Aff. of Jerry Moore). 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 (Exh. 16), 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 be facing 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. 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.
- 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. 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 any check signatory. McCandless' story that she got some type of permission from Jill Keiner was not credible and did not hold up. 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.

Plaintiffs contend that Jerry Moore could be re-installed as Executive Director to serve out his contract. That would reduce JACC's liabilities by about \$75,000. If the directors election is voided, then the subsequent meetings and the decision to terminate Jerry Moore would also be void. And perhaps that is the logical result.. However, Moore would likely *not* be interested in being re-installed as ED just to have the McCandless group turn around and act in accordance with the now-known-of employment contract. And it would not be equitable to do so. If the election is voided, then the January 12, 2009 meeting would be voided as well. This might change the complexion of the incident that led to the purported termination of Jerry Moore (meaning - as a legal construct, the meeting *never happened*, so Moore could not have acted inappropriately at it. At a minimum, JACC should be required to retain an independent investigator to determine: i) whether Jerry Moore was set up; and ii) whether he acted in self defense.

**B. Additional relief sought.**

Director Steve Jackson was told that he is no longer a director of JACC. If all meetings are voided by the Court, but even if they are not, Jackson's directorship should revert to the position it was in on October 23, 2008 or January 12, 2009 (depending on how the Court deals with the issue).

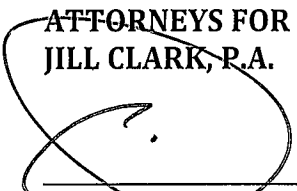
Whether the Court voids all meetings of the McCandless Board or not, the major policy decision to adopt the Advantage program should be voided. City officials have been too quick to interfere in JACC internal business, and the City should not benefit from the numerous bad acts of the McCandless group to take over JACC.

A "supermajority" should be required for all vote for a 1-year period. The first recommendation of Plaintiffs is that for 1 year, all votes must be unanimous. If they are not, a Receiver appointed by the Court would decide the issue. And JACC would bear the expense of that remedy. The high hourly rate of the Receiver would hopefully be an incentive to work together to deal with the issues until tempers cool, discussions are had, and issues are resolved in the form of unanimity.

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.

Dated: June 8, 2009

**ATTORNEYS FOR PLAINTIFF  
JILL CLARK, P.A.**

By:  Jill Clark, Esq. (#196988)  
2005 Aquila Avenue North  
Minneapolis, MN 55427  
(763) 417-9102

Current

BYLAWS  
OF  
THE JORDAN AREA COMMUNITY COUNCIL (JACC)

ARTICLE I  
NAME, OFFICES, PURPOSE

SECTION 1 NAME

The name of the organization shall be the Jordan Area Community Council, also known as JACC.

SECTION 2 OFFICES

- a. The address of the registered office of this corporation is: 2507 Fremont Avenue N., Minneapolis, MN, 55411.
- b. The corporation may have such other offices at other places as the Board of Directors of the corporation from time to time may determine.

SECTION 3 PURPOSE

The Jordan Area Community Council is organized exclusively for charitable purposes, more specifically to organize people, knowledge and capital for the collective empowerment of Jordan residents.

ARTICLE II  
MEMBERSHIP

SECTION 1 GENERAL MEMBERSHIP

Membership in the corporation shall be limited to people at least eighteen (18) years of age, residing or working in the Jordan Neighborhood (as defined in the Articles of Incorporation) and qualified business and institution representatives as designated by the Board of Directors. A membership will be conferred upon individuals who have filed a completed Membership Registration Form with the Jordan Area Community Council at least three (3) days before an applicant will be legally eligible to vote. Youth fifteen (15) to seventeen (17) years of age may petition the Jordan Area Community Council Board of Directors to obtain membership. Membership must be renewed annually. The membership cycle will run from October 1st through September 30th.

SECTION 2 MEMBERSHIP PRIVILEGES AND DUTIES

Any Jordan resident may speak regarding issues discussed at Jordan Area Community Council general meetings. Each member of the corporation by his or her own membership shall be:

- a. Entitled to the privilege of making motions
- b. Entitled to one (1) vote on each matter submitted to a vote of members in any corporate meeting.
- c. Eligible to serve as a Board member of the corporation upon election. They shall be eligible to serve as a chair or a member of any committee appointed or organized by the organization.
- d. Responsible for attending all duly called meetings of the Jordan Area Community Council and communicating any concerns, issues, and business of the Jordan Area Community Council to and from the community.

**EXHIBIT**  
1  
Browne  
5-8-09 KZ

ATT. B  
Myers

APPENDIX A

## ARTICLE III ANNUAL MEETING

### SECTION 1 ANNUAL MEETING

The general membership meeting in October shall be considered the Annual Business meeting. The date, time and location will be determined by the Board of Directors. This meeting shall consist of reports made from the officers of the Board of Directors summarizing the year's activities and actions for which they were responsible. This shall include a financial, membership and audit statement. Appropriate awards and citations may be made. Voting shall be held on offices available for election.

## ARTICLE IV GENERAL MEMBERSHIP MEETINGS

### SECTION 1 GENERAL MEMBERSHIP MEETINGS

General membership meetings shall be held at such time and place as necessary. Special meetings may be called by the Chair or Vice Chair. Members in good standing may call special meetings upon presenting a petition to the Secretary signed by 25 members. There shall be a minimum of four (4) general membership meetings held throughout the year. The general membership present at any meeting held in accordance with procedures for calling the meeting shall constitute a quorum.

## ARTICLE V BOARD OF DIRECTORS

### SECTION 1 DUTIES

- a. **DUTIES** The Board of Directors shall be responsible for appointing officers of the organization, overseeing day-to-day business, setting and reviewing policies, preparing meeting agendas, approving expenditures within the limits of the budget, approving plans of work for standing and special committees, and other duties which normally fall to a Board of Directors.
- b. **AUTHORITY** The Board of Directors shall be representative of the organization and therefore its actions shall be binding on the organization.
- c. **DIRECTORS TENURE IN OFFICE** Directors shall serve a period of two years and will be elected at the General Membership meeting in October.

### SECTION 2 OPERATIONS

- a. **OPERATIONS** The Board is responsible for overall policy and direction of the Council, and delegates responsibility for day-to-day operations to the Council Administration Officer and Committees. The Board shall have up to fifteen (15) and not fewer than five (5) members. The Board receives no compensation other than reasonable expenses.
- b. **QUORUM** The next whole person over fifty percent of the members of the Board of Directors shall constitute a quorum.
- c. **ROBERT'S RULES**--All meetings shall be conducted according to stated ground rules, but the meeting facilitator may impose Robert's Rules of Order if it is deemed necessary.

- d. MEETINGS--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. The regular Board of Directors meetings shall be held at a pre-determined regular meeting time, once per month.

### SECTION 3 ELECTIONS

- a. ELIGIBILITY  
Every candidate for any elective office must be a member in good standing.
- b. NOMINATIONS  
The Nominating Committee will be made up of at least three members of the Board of Directors and may include non board members of JACC. The members and chair of the Nominating Committee will be chosen by the Board of Directors and shall convene each year after the August Board of Directors meeting in order to research and recommend, at the October Board of Directors meeting, a slate of candidates for election to the Board. The nominating process shall be defined as any member in good standing submitting a name in writing to the Nominating Committee. The consent of each candidate must be obtained before his/her name is placed in nomination. Nominations will be accepted at the JACC office until one week before the annual business meeting. Nominations will then be closed to allow for the publication of the ballot. The Nominating Committee shall notify the membership by mail at least five days before the annual business meeting of the candidates for office. The Nominating Committee may choose to recommend a particular candidate indicated on the ballot with an asterisk by his/her name.
- c. BALLOTING  
If the number of candidates is equal to or less than the number of positions open on the Board, a motion can be made for election by unanimous consent. If there is more than one nominee per Board position or if unanimous consent is not achieved, the Directors shall be elected by secret ballot. A simple majority of all votes cast at the meeting shall be necessary for election of any Director. If no nominee receives a majority of the votes cast, there shall be an immediate runoff election held between the two candidates receiving the highest number of votes cast. If the two candidates receiving the most votes receive a tie vote, a runoff shall follow immediately. If the tie is not broken after the runoff, the Board of Directors shall vote by secret ballot at its next regular meeting to choose one of the two candidates.
- d. INSTALLATION  
Directors shall be installed at the first Board meeting in November. All Board members shall serve 2 year terms, but are eligible for re-election.

### SECTION 4 REMOVAL

Any member of the Board of Directors may be removed from office "with cause", provided that the following steps are taken in succession:

1. A resolution detailing the member's misconduct "with cause" is passed; at a regularly scheduled Board meeting, by a simple majority vote of those present.
2. All Board members are notified by mail of the resolution and impending action.
3. Two thirds of the total membership vote at a regularly scheduled Board meeting to remove the member in question.
4. At least one month passes between steps one and three.

## SECTION 5 FAILURE TO ATTEND

The seat of any board member who fails to attend three consecutive Board of Directors meetings, without satisfactory excuse to the Chair, or fails to attend five meetings within a twelve-month period, shall automatically become vacant.

## ARTICLE VI BOARD OFFICERS

### SECTION 1 OFFICERS

The officers shall be Chair, Vice-Chair, Secretary, and Treasurer. No officer shall be granted any contractual rights to office, nor shall they draw a salary.

- a. CHAIR—The Chair shall preside at all meetings of this organization, have power to appoint all necessary committees upon approval of a simple majority of the Board of Directors, define duties thereof, and perform other duties as may pertain to his/her office. S/he shall be an ex officio member of all other committees except the Nominating Committee. If any office is vacated for any reason and not filled by succession, the Chair shall appoint any member in good standing to occupy such office for the balance of the term upon approval of a simple majority of the Board of Directors.
- b. VICE CHAIR—The Vice Chair shall perform the duties of the Chair in the absence of the Chair and shall otherwise act as an aid to the Chair. If the office of the Chair should become vacant, the Vice Chair shall succeed to the office. If the offices of the Chair and Vice Chair become vacant or if the Chair and Vice Chair are both temporarily absent, a temporary Chair may be chosen from the Board of Directors by a majority of the members at a regularly called meeting.
- c. SECRETARY—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, and assuring that corporate records are maintained.
- d. TREASURER—The Treasurer shall have charge of all funds belonging to this organization, shall oversee the depositing of funds in a bank approved by this organization and the rendering of a monthly statement at regular board meetings, showing the financial condition of the organization. S/he shall oversee the annual audit of the books of the organization and submit a written summary to the Board of Directors. S/he shall chair the Finance Committee, assist in the preparation of the budget, help develop fundraising plans, and make financial information available to Board members and the public.
- e. ADMINISTRATIVE OFFICER—In addition to the above officers, the Board of Directors may appoint an administrative officer to conduct the activities of the organization as directed by the Board of Directors. The title of such administrative officer, his/her salary if any, and general operating procedures shall be determined by the Board of Directors.

### SECTION 2 OFFICERS TENURE IN OFFICE

All officers shall be elected annually by the Board of Directors at the October Board meeting. No member of the Board of Directors shall serve more than two consecutive years in the same office. The outgoing Chair shall maintain his/her full Board status while serving ex-officio for a period of



one year. Every candidate for an officer position shall have served a minimum of six months as a member of the Board of Directors or serve a probationary period as an officer and officially be appointed after six months on the Board by a majority vote of the Board.

#### SECTION 3 REMOVAL OF OFFICER FROM OFFICE

A Board officer may be removed from office, "with cause", by a two-thirds vote of the total membership of the Board of Directors following the procedures set forth in Article V, Section 4 Removal.

#### SECTION 4 EXECUTIVE COMMITTEE

There shall be an Executive Committee which shall consist of the officers of the organization (Chair, Vice Chair, Treasurer, and Secretary). The Executive Committee shall set the agenda for the monthly board meetings, act in place of the full Board of Directors when deemed necessary for time-specific decisions, and other duties which normally fall to Executive Committees.

### ARTICLE VII BLOCK CLUBS

#### SECTION 1 BLOCK CLUBS

The Board of Directors supports the forming of block clubs that conform with the values of the Jordan Area Community Council.

### ARTICLE VIII COMMITTEES

#### SECTION 1 APPOINTMENT

Any committees deemed necessary shall be formed by the Chair in accordance with Article V, SECTION 3 of the Bylaws. An accurate listing of all committees and their purpose and duties shall be maintained.

#### SECTION 2 FINANCE COMMITTEE

The Treasurer is Chair of the Finance Committee, which includes three other Board members. The Finance Committee is responsible for developing and reviewing fiscal procedures, a fundraising plan, and annual budget with staff and other Board members. The Board must approve the budget, and all expenditures must be within the budget. Any major change in the budget must be approved by the Board or the Executive Committee. The fiscal year shall be June 1 - May 31. Annual reports are to be submitted to the Board showing income, expenditures and pending income. The financial records of the organization are public information and shall be made available to the membership, Board members and the public.

#### SECTION 3 APPOINTED COMMITTEES

Any member in good standing may become a member of any committee s/he desires. Attendance at a minimum of three meetings in a twelve-month period is an expectation of an active committee member.

#### SECTION 4 ELECTED COMMITTEES

The members of an elected committee shall be elected by the General Membership. Any member in good standing may be selected to serve on an elected committee provided that s/he resides within the block club which s/he is to represent.

#### SECTION 5 OPERATIONAL BYLAWS

Any elected committee that wishes to adopt its own Operational Bylaws shall submit the Bylaws in writing to the Board of Directors for approval. Following approval, the Bylaws shall be attached to this document.

#### SECTION 6 RESPONSIBILITIES

Each committee shall appoint a Chair. The committee Chair will be responsible for the preparation of monthly committee reports to be given to the Board of Directors at its monthly meeting. This status report will include items of significance from all subcommittees as well as the main committee.

### ARTICLE IX AMENDMENTS

#### SECTION 1 AMENDMENTS

These Bylaws may be amended by a vote of 2/3<sup>rds</sup> of the membership present at any general membership meeting provided the amendment(s) have been submitted in writing to JACC and notice has been given to the general membership of the proposed change at least 28 days prior to the date of meeting at which the vote will be taken.

### ARTICLE X PERSONAL LIABILITY

#### SECTION 1 PERSONAL LIABILITY

No member, officer or Director of this corporation shall be personally liable for the debts or obligations of this corporation of any nature whatsoever, nor shall the property of those parties be subject to the payment of the debts or obligations of this corporation, except to the extent that Federal or State law shall mandate individual party responsibility for tax obligations or trustee-impressed funds.

### ARTICLE XI HARASSMENT

#### SECTION 1 TYPES OF HARASSMENT (NON-SEXUAL)

- a. "DISABILITY HARASSMENT" is hostile, derogatory, offensive or exploitive verbal or physical conduct relating to the disability of an individual or group. It includes behavior which maligns a reasonable accommodation provided by the organization to enable an individual to compete for or perform a job, or utilize services. It covers such actions as tampering or interfering with assistive devices used by the individual to overcome the effects of his/her disability.

## ADA

The Americans with Disabilities Act became effective July 26, 1992. All companies with 25 or more employees are affected. As of July 26, 1994, ADA applies to all employers with 15 or more employees, including State and local governments. Basically, organizations are prohibited from discriminating against hiring any person with a disability and companies are required to make a reasonable accommodation for any qualified person (current or prospective employee) who can perform the essential portion of the job functions.

- b. "MENTAL AND PHYSICAL HARASSMENT" is defined as behavior that include, but not limited to, any derogatory remarks or activities directed toward another person regarding his/her:
- Age, Religion, Political Affiliations/Views, Sex, National Origin, Sexual Orientation, Race, Disability, Public Assistance Status, Personal Philosophy, Marital Status
- c. "CONDUCT AND COMMUNICATION OF HARASSMENT"
- Such conduct or communication as stated below constitutes harassment, and employees are prohibited from engaging in such behavior when:
1. Submission to such conduct or communication is made either explicitly or implicitly a term or condition of another individual's employment or access to services.
  2. Submission to or rejection of such conduct or communication by an individual is used as a basis for making decisions that affect the individual's employment or access to services.
  3. Such conduct or communication has the purpose or effect of substantially interfering with an individual's employment or use of services, or of creating an intimidating, hostile or offensive work environment or atmosphere.
- d. "GENDER HARASSMENT" exists when an employee is treated unfairly simply because that employee is a woman or a man. It includes:
1. Belittling or discrediting of either sex through jokes, remarks or other behavior which creates a hostile, intimidating or offensive work environment.
  2. The difference between gender harassment and sexual harassment is that while both create offensive working environments, gender harassment takes place without any suggestion of sexual behavior. For example: A superior assigned only certain duties to an employee because the employee was a woman or a man.
  3. Gender harassment and sexual harassment, although different in their nature, are both forms of sex discrimination. Both violate the company's anti-harassment policy, and Federal, State and local non-discrimination laws.
- e. "RACIAL/NATIONAL ORIGIN HARASSMENT" is defined as an individual's verbal or physical conduct relating to another individual or group's race or national origin that is hostile, offensive, degrading, or exploitive.

## SECTION 2 SEXUAL HARASSMENT STATEMENT

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

1. Submission to such conduct is made to either explicitly or implicitly a term or condition of an individual's employment advancement.
2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.
3. Such conduct has the purpose or effect of unreasonably interfacing with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

An employee is expected to talk to either the Executive Director or another neutral party in the organization regarding any actions of sexual harassment received while on the job. In the case where the Executive Director is conducting the harassment, the employee may submit a complaint to the Board Chair. Complaints shall be recorded and kept within the personnel files. The complainant shall submit a formal written complaint, including a statement of the alleged incident and the remedy desired. The respondent must reply to the written complaint within ten days of receipt of the complaint. The filing of such response shall be mandatory and the person responding shall be required to indicate denial in whole or in part, or agreement with the assertions in whole or in part. Failure to respond shall result in disciplinary action which may range from a verbal reprimand, to a letter in the personnel files, ultimately to dismissal as determined by the Executive Director.

SECTION 3 PROTECTION FOR EMPLOYEES WHO REPORT VIOLATIONS OF THE LAW  
JACC complies with the legislation enacted in 1987 which states that a Minnesota employer cannot discharge, discipline, threaten, otherwise discriminate against, or penalize an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:

1. The employee, or a person acting on behalf of an employee, in good faith, reports a violation or suspected violation of any federal or state law or rule adopted pursuant to law to an employer or to an government body of law enforcement official.
2. The employee is requested by a public body or office to participate in an investigation, hearing or inquiry; or
3. The employee refuses to participate in any activity that the employee, in good faith, believes violates any state or federal law or rule or regulation adopted pursuant to law.

## ARTICLE XII DISSOLUTION

In the event of dissolution, the Corporation will follow the process defined in Article XI of the Jordan Area Community Council Articles of Incorporation.

## Appendix B

### Subd. 4. Calling meetings; notice.

(a) Unless the articles or bylaws provide otherwise, a director may call a board meeting by giving five days' notice to all directors of the date, time, and place of the meeting. The notice need not state the purpose of the meeting unless the articles or bylaws require it.

(b) If the day or date, time, and place of a board meeting have been provided in the articles or bylaws, or announced at a previous meeting of the board, notice is not required. Notice of an adjourned meeting need not be given other than by announcement at the meeting at which adjournment is taken.

(c) Any notice to a director given under any provision of this chapter, the articles, or the bylaws by a form of electronic communication consented to by the director to whom the notice is given is effective when given. The notice is deemed given if by:

(1) facsimile communication, when directed to a telephone number at which the director has consented to receive notice;

(2) electronic mail, when directed to an electronic mail address at which the director has consented to receive notice;

(3) a posting on an electronic network on which the director has consented to receive notice, together with a separate notice to the director of the specific posting, upon the later of:

(i) the posting; or

(ii) the giving of the separate notice; and

(4) any other form of electronic communication by which the director has consented to receive notice, when directed to the director.

An affidavit of the secretary, other authorized officer, or authorized agent of the corporation, that the notice has been given by a form of electronic communication is, in the absence of fraud, prima facie evidence of the facts stated in the affidavit.

(d) Consent by a director to notice given by electronic communication may be given in writing or by authenticated electronic communication. Any consent so given may be relied upon until revoked by the director, provided that no revocation affects the validity of any notice given before receipt of revocation of the consent.