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' REPLY TO DEFENDANTS' CLOSING ARGUMENT

INTRODUCTION

Defendants have failed to address key factual and legal issues in this equitable proceeding. It is clear that defendants wish to paint "Plaintiffs" (a global term that they seem never to define) with "unclean hands." Yet Defendants admit that that is only available for "unconscionable" conduct. (Def. Memo. p. 32). Defendants latched onto one receipt that had been coded improperly, that Moore and the Accountant would have dealt with in due course (had they not been terminated). By contrast, McCandless and Hodson admitted to spending many thousands of dollars over months, never once consulting *any* funding contract. Either they failed to make a few phone calls to get the contracts faxed over, or *they already had the contracts* because the entire "stealing of JACC equipment" was a rouse. Either way – a lot of stones were thrown from their glass house.

Defendants allege lack of "specific" notice, yet essentially move for summary judgment on 2 claims that weren't even litigated in the hearing (intentional interference and fiduciary duty), and for which no notice was ever provided. Similarly, defendants rely on evidence that was *not* in the Record at the close of hearing.

REPLY TO DEFENSE FACTUAL STATEMENT

The chart below briefing addresses certain factual assertions of Defendants:

Pg.	Defense assertion	Plaintiff rebuttal
4	That Counts I, II and III were "fully litigated."	Counts II and III were not litigated at all in this hearing. Plaintiffs indicated that there could certainly be discussion of fiduciary duty in the context of 317A.751 – but that that claim was not at issue in the hearing. (See Plaintiff's notices/motions filed prior to hearing.)
5	That 90% of JACC funds were spent on administration.	Defendants ignore, entirely, Miller's cross examination. He admitted that the 91% would assume that all salaries were "administration." Evidence that Plaintiffs offered (Affidavit of Brian Smith, testimony of Ben Myers) that Jerry Moore spent 50-60% of his time on programming, was unrebutted by Defendants. Further, Miller acknowledged that even if it was 91% - that reasonable people could disagree about whether that was an inappropriate amount. There is no "law" at Defendants suggest, that requires a non-profit to keep administrative costs to a particular level.
6	That $60k is an outrageously high salary for the ED.	This ignores: • That the salary was $55,000 before it was raised to 60k (Smith Aff.); • That the organization was losing EDs to higher paying jobs and the market indicated the salary should be raised to 60 (*Id*.).
6	That large numbers of grievances means bad conduct.	Miller admitted that if someone wanted to attack a non-profit administration, they could file a lot of grievances. That is precisely what happened here. Plaintiffs explained how this harassment got out of hand. Based on the entire record – it certainly looks calculated.
8	That Jerry Moore conjured up the 1-year term issue.	The Record shows that the 1-year term issue had arisen in fall 2007. Moore, as ED, was merely raising the issue in fall 2008. That was his job – to be the institutional memory for the

		volunteers. Myers did not have as clear a memory of what occurred in fall 2007. But Brian Smith did – and he supports that there were board terms that had to be finished up. Myers *could have* merely appointed, but instead he let the membership vote on that "appointment." A Chair can cede his authority to the membership. That's what Myers did. Defendants' double-standards are palpable. They contend that the Members could not vote on who to fill board member vacancies. And yet Defendants' whole argument stands on the notion that the Membership had the authority to violate the specific Bylaws and fail to hold elections at the Annual Meeting.
10	That board member terms were "extended" for Dejvongsa et al in 11/08.	They weren't really "extended" – since there had been no new election at the Annual Meeting. It is appropriate to interpret the Bylaws such that the board member terms continue until they are replaced.
10	That Haddy testified that *all* officer positions were "temporary."	Even Haddy did not say that. His testimony was about Shannon Hartfiel, only, as "temporary." It is interesting that Kip Browne ran for Officer at the November 2008 meeting. Why would he do that if he thought that was "illegal?" The more sensible interpretation is that Kip Browne was upset that he did not *win* in that election. Surely, if he had – the takeover in January 2009 would not have happened.
11-12	That City personnel "validated" the January 12, 2009 election.	The City officials did not have authority to "validate" the election.
12-13	That Jerry Moore admitted that he could have retreated. Moore acted completely unprovoked.	Moore was honest in his re-direct that hindsight 20-20 he might have made a different fdecision. But that he was literally "against the wall," and everything happened quickly. There is significant evidence that Moore was assaulted first. Dennis Wagner was not made available for cross examination. And Mike Martin had no first-hand evidence. The police

		who *did* investigation decided that Moore had responded to the assault by another (Hodson testimony).
13	That Board decided "in writing" to terminate Jerry Moore because of the assaults.	This is not supported by the Record. The Voting Record (Exh. 128) merely says terminate Moore immediately.
13-14	Current officers were not "removed." Board members can and do amend agendas.	There were Board Officers in place on January 14, 2009, and in an unplanned and unnoticed event, they were removed. It is for the Court to decide whether it is relevant that they were "removed" and what that means. Of course board members amend agendas. But it is much different to amend to consider approving an additional set of Minutes, and adding the re-election of Officers. Defendants cited *no law* for the proposition that board members (here, the majority) can conspire in secret to take over the board, and then do so by "amending" the agenda. Amending the agenda was the vehicle by which the bad conduct occurred. Amending the agenda does not turn bad acts into acceptable acts.
14-15	Numerous allegations of what Myers and Moore did immediately following January 14, 2009 "re"-elections of Officers.	It is clear there was a dispute over who were the appropriate Officers – immediately following the January 14 meeting. At that time, the Court had not ruled on the TRO. The Plaintiffs did the responsible thing – to bring the dispute to the Court so that a calm, rational decision could be made. But there is *no* evidence to suggest that any action taken by Myers, Moore, E.B. Brown or other Plaintiffs immediately following January 14 was in bad faith. They truly believed they were the rightful board. Further, just because the Court *can* take an adverse inference, does not mean it is required to do so. Myers and Moore legitimately feared that the MPD was in the "pocket" of the "pro-city" McCandless Board. The way these public officials endorsed the elections made them fear it even more. McCandless is former MPD.

		Therefore, the fact that Moore and Myers were extra cautious on the witness stand is *not* evidence that they did anything improper with any records or equipment of JACC. That is – if it is really missing. It should be noted that every time the McCandless board needed JACC documents – they had them. During the hearing when it behooved the McCandless board to come up with 2007 Minutes – they got them from the Office. Given that McCandless and others conspired to get Jerry Moore fired (before January 14), and that McCandless wanted to be able to report to the police that Moore had taken property of JACC to "help their case," it cannot be said that Defendants carried their burden to show that Myers and Moore did anything improper with any such property. It was not wrong for E.B. Brown to attempt to mitigate damages for JACC, by instructing Jerry Moore that he had not been terminated. And it was not wrong for Jerry Moore to assume that she had the authority to so instruct. During the period that Myers wrote checks, *he was an authorized signatory* on the JACC checking account. There isn't any evidence of McCandless asking Myers if he had the checkbook. There *is* evidence that McCandless elected not to call Myers during her telephonic "meeting."
17	That Moore had not paid the boils.	It is fairly normal for a small non-profit to struggle financially. Sometimes priorities have to be made about who gets paid, and when. Evidence shows that Moore took action, and indeed, was already in negotiations, with the County, the Ackerberg group.
1920	Miller told McCandless to	More's the pity. It was McCandless' duty. She

	have a telephonic meeting.	failed by relying on Miller. Nothing changed at the bank for 11 days. There was no "emergency." And no reason that McCandless could not contact other Board members about what the telephonic "meeting" had concluded. Kip Browne admitted in his deposition that Bylaws *and* statutes should be taken into account. (Exh. 28, p. 124). And yet the Minnesota Statutes that Defendant cited *does not* authorize a remote communication board meeting under the conditions that existed January 15, 2009.
	That E.B. Brown did not call back for days.	E.B. Brown did not even get the voicemail message for some time. And then, it said nothing about an urgency or even about a telephonic board meeting. It is clear that McCandless waited until after 5 pm, feigned not being able to get numbers for board members, and then failed to report to the entire board, so that this action could be taken by the over-reaching majority.
	That Al Alexander asked for letters from City Officials.	McCandless admitted on cross that Alexander did ask for the *letters*. He asked for a bank resolution. For obvious reasons, Defendants did not even touch the issue of the bank resolution. They made no factual or legal arguments that such resolution is anything other than what Plaintiff contend: fraudulent.
19	Myers board refused to pay Rother.	Rother did not tender the indemnification or the defense to JACC.

PLAINTIFF REPLY TO DEFENSE LEGAL ARGUMENTS

Plaintiffs will not re-address the same arguments that Defendants made prior to the hearing, and at the beginning of the hearing, except to note the following:

- Mr. School and his law firm *answered* on behalf of JACC, so Defendants should not be heard to claim that JACC was not sued or served. (JACC was served 4 times over by serving 4 who claim to be "Officers." Note that there was *no* evidence introduced at the hearing that JACC was not served properly.) JACC is a described nominal defendant. And, the mere fact that the words Jordan Area Community Council do not appear in the caption is not dispositive.
- The evidence did *not* show that there was a CPED contract in January 2009. Indeed, Cooper testified that there was not. Indeed, there was still no contract by the time of the Hearing in May 2009. The notion that parties can 'act as if' until a contact is negotiated has no legal bearing. Cooper admitted that would only apply if all agreed – and surely here, Plaintiffs do not.

The "Specific notice" issue.

Plaintiffs gave sufficient notice. They "specifically" sought a supermajority in their lengthy motion introducing the hearing.

At the pre-hearing motions, Mr. Mahoney was merely giving an *example* of the Court's authority using a situation where a board is deadlocked and the court must dissolve the company to break the deadlock. That does not mean that Plaintiffs were going to urge dissolution as a remedy. Plaintiffs did not note dissolution as a remedy. Mr. Jackson favored dissolution, and Plaintiff counsel represented all plaintiffs and had a duty to represent their wishes. Those issues were worked out and Plaintiffs did not seek dissolution as a remedy.

Surely, closing arguments are allowed to conform to the evidence that came in at the Hearing. As the evidence came out regarding the October 2007 Annual Meeting, and the agreement by the entire membership *and* those who ran for the directorships to have certain seats finish out the remaining 1 years of the terms, Plaintiffs argued that the 2008 election for board members should be invalidated by the Court.

This is an equitable proceeding. Plaintiffs can only suggest remedies to the Court: the matter is in the Court's hands. The Court, while questioning Myers, did ask questions on this point, and Defendants were on notice that the Court could be considering this.

The rest of the suggested remedies flowed from the invalidation of the election, or from the invalidation of certain purported decisions of the board. There was sufficient notice of all of this.

Defendants just had no factual or legal argument against the remedies. That is not sufficient to prevent the Court from considering them.

No summary judgment motion.

Plaintiffs noticed Count I as a claim for the hearing. They did *not* notice intentional interference with contract (indeed, City Officials did not appear based on their understanding that that claim was not at issue). Plaintiffs did not notice fiduciary duty as a stand-alone claim, but only as it related to 317A.751. Defendants have essentially moved for summary judgment, although Plaintiffs had no notice of such a motion.

Defendants have confused 2 different discussions of "fiduciary duty" that comes up in board-related matters. The fiduciary duty breaches that are relevant to Plaintiffs claim were discussed in their initial closing argument. The high standard that is cited at Def. Memo p. 31-32 deals with the ability to sue a board member *individually* (meaning holding

them personally liable) for a decision they made as a board member. That is simply not at issue in this case.

If the termination of Jerry Moore is not invalidated by the Court, then it would be Moore's intention to sue for breach of contract, now that he has located the contract. Defendants take a lot of evidence out of context (for example, Myers did not recall all of the specific terms of Moore's contract because it was not in front of him, there is nothing unusual about that), but much of the discussion is not relevant to this current proceeding. Even if there was not a written contract (and there is significant evidence that there was, further the point was that McCandless and Kip Browne should have *checked* before taking action), an at will employment agreement can be a contract for purposes of intentional interference with contract.

Rebuttal to Defendants' arguments against Plaintiffs' Closing.

Defendants spend a couple of pages arguing against points that Plaintiffs made in their Closing. Plaintiffs rely on their initial argument, and only add a few comments here:

- Plaintiffs *did* put into the Record affidavits of a number of Members who had been removed from the slate after the October 2008 meeting (Lynda Baker, etc.), and did put on evidence that showed that Kip Browne and Megan Goodmundson knew that Jernell McLane worked at the Jordan New Life Church (in Jordan) but took over off the slate, anyway.
- There was no evidence that E.B. Brown attended all Nominations Committee meetings or that she got all the emails. There was evidence her email wasn't working properly in that timeframe.

- There is no evidence that Myers 'created the need' for an emergency meeting. A lot of the confusion and harm to JACC could have been avoided if the McCandless board would have picked up the phone and talked to Myers and Moore.
- The statute that the Defense cites does *not* authorize a telephonic meeting unless certain conditions are met. Those conditions were not met, and that is undisputed.
- Jerry Moore *did not* admit that it was standard practice to misuse segmented funds. He did indicate that it was standard for him to work with the accountant to get everything finalized, and that is normal in any business.
- Each of the instances that Defendants use to blame Moore or Myers seem planned. There is evidence of their pre-planning for numerous events (the "re"-election, voting to terminate Jerry Moore (see also the "set up" of Alfred Flowers described in his affidavit).

CONCLUSION

For all of the foregoing reasons, and those in their pre-hearing arguments and in their initial written closing, Plaintiffs seek the appropriate equitable relief.

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