

STATE OF MINNESOTA
COUNTY OF CARVER

DISTRICT COURT
FIRST JUDICIAL DISTRICT
CASE TYPE: Other Civil

Craig Liechty and Michael Fisher

Court File No. 86-CV-071545

Plaintiffs,

vs.

Keith Anderson and Audi Car Club of North
America, Inc.,

Defendants.

DEFENDANTS KEITH ANDERSON AND
AUDI CAR CLUB OF NORTH AMERICA,
INC.'S MEMORANDUM OF LAW IN
OPPOSITION TO PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION

Defendants Keith Anderson and Audi Car Club of North America submit this memorandum of law in opposition to Plaintiffs' motion for preliminary injunction.¹ Based upon this memorandum, arguments of counsel, and the entire record in this matter, Defendants request Plaintiffs' motion be denied in its entirety.

FACTUAL BACKGROUND

Defendant Audi Car Club of North America ("Audi Club") is a Minnesota non-profit corporation with its designated registered office located at 7700 Quattro Drive, Chanhassen, Minnesota. (Answer Counter Claim ¶ 4). Defendant Keith Anderson ("Anderson") is a resident of Carver County and is a current member, director, and president of the Audi Club. (Answer Counter Claim ¶ 3). Plaintiff Michael Fisher ("Fisher") is a resident of Traverse City, Michigan. (Compl. ¶ 3). Plaintiff Fisher is a current member of the Audi Club, and served on the Board of Directors as an Officer and Director in an appointed or elected capacity from 1997 through 2006. (Answer Counter Claim ¶ 2). Plaintiff Craig Liechty ("Liechty") is a resident of Chagrin Falls,

¹ Rule 65.01 refers to such motions as a motion for a "Temporary Injunction."

Ohio. (Compl. ¶ 2). Plaintiff Liechty is a current member of the Audi Club, and served on the Board of Directors as an Officer and Director in an appointed or elected capacity from 1998 through 2006. (Answer Counter Claim ¶ 1).

In fall 2006, Defendant Audi Club proposed an amendment to Article V. Directors.

Article 5.2, of the Audi Club Bylaw, as follows:

Each director of this organization shall be elected to serve a term of not more than two consecutive three-year terms. A director shall hold office for the term for which he or she was elected until the end of the meeting at which his or her successor has been elected. Any vacancies occurring in the Board of Directors shall be filled by a vote of the majority of the directors then in office. Members may not serve on the Board of Directors as an Officer or Director in an appointed or elected capacity for more than nine consecutive years. The member that served nine consecutive years as a director or officer may then elect to run for a position after a one year absence from the Board of Directors.

(Chadwick Aff. Ex. A). The purpose of the amendment is to allow “the club to grow and expand under new leadership. It also gives the membership opportunities to become involved in the organization in a leadership capacity, bringing new skills and fresh ideas to grow the club.”

(Chadwick Aff. Ex. A). The Audi Club Board of Directors did by vote of 5 in favor, 2 opposed, and 2 abstaining, decide to submit the proposed bylaw amendment to Article V, 5.2 to the Audi Club members for majority vote.² (Chadwick Aff. Ex. B). At the 2006 Audi Club general election, the members voted to adopt the proposed bylaw amendment to Article V, 5.2.

(Chadwick Aff. ¶ C).

² Plaintiffs state that the vote on Article V, 5.2 by the membership at the general election “appears to have been a violation of the Audi Club Bylaws because plaintiffs are not aware of any regular Board of Director meeting with a legal quorum present at which it was decided by a majority vote of the directors to submit the proposed bylaw amendment regarding the directors’ term to the Audi Club members for a vote at the annual election.” (Plfs.’ Mem., at 6 n.2). This is not true. The Board of Directors did vote by email and it was decided by a majority vote of the directors to submit the proposed bylaw amendment to the Audi Club members. (Chadwick Aff. Exs. B, E).

Plaintiffs make much out of an Audi Club Chapter Representatives Conference Call on October 30, 2006. In the notes to that conference call, it was noted that “Affected board members are NOT kicked off immediately, will serve out the remainder of their term.” (Chadwick Aff. Ex. D). However, the Chapter Conference Call minutes reflect the comments, opinions, and shared information between chapters, nothing more. (Chadwick Aff. Ex. C). Chapter Conference Calls are information sharing only, and have no National Board or Executive Committee authority or voting power. (Chadwick Aff. Ex. C).

Contrary to what Plaintiffs now assert, they were aware of the effect the proposed amendment to Article V, 5.2 would have on them. In an email to members of the Audi Club in his email address book, dated Monday, October 17, 2006, Plaintiff Liechty stated that the bylaw proposals were passed to go to a vote by the members by a 5-4 vote of the Board of Directors.³ (Chadwick Aff. Ex. E). Plaintiff Liechty urged people to vote against all five proposed bylaw amendments. In particular, Plaintiff Liechty urged people to vote against the proposed amendment to Article V, 5.2 because it “would immediately force long-time volunteers Mike Fisher and Craig Liechty off the board.” (Chadwick Aff. Ex. E). To quote Liechty:

The proposed by-law changes were pushed through the Audi Club board without the participation of the full Board. We urge you to contact as many fellow members as possible and ask them to **VOTE AGAINST ALL FIVE PROPOSED BY-LAWS AMENDMENTS** for the following reasons:

- The first proposal consolidates power in the hands of a few by limiting the number of consecutive years a member can serve. **This proposed change would immediately force long-time volunteers Mike Fisher and Craig Liechty off the board.** These two progressive, dedicated, selfless gentlemen are responsible for much of the club’s success in recent years.

³ This is additional evidence that the Board of Directors did vote to take the proposed bylaw amendments to a vote by the members of the Audi Club.

(Chadwick Aff. Ex. E)(emphasis added).

The Audi Club Executive Committee is charged with ensuring compliance with the Bylaws. Specifically, Article VII, 7.1 provides as follows:

The Chairman, President, Vice President, Secretary, Treasurer and Executive Director shall constitute the Executive Committee. The Committee shall be responsible for proper conduct of the administrative affairs of the Club and the proper functioning of the Committees, and **shall ensure compliance with the Bylaws**. All decisions of the Committee shall be by a majority vote unless otherwise provided by these Bylaws.

(Chadwick Aff. Ex. G)(emphasis added).

While Plaintiffs would have the Court believe that Defendant Anderson acted alone in enforcing Article V, 5.2, the evidence shows that this was an effort by the Executive Committee as a whole. In accordance with Article VII, 7.1, in a December 21, 2006 Executive Committee meeting, the Executive Committee stated that the proposed amendments passed by a wide margin by the Audi Club members are effective immediately. (Chadwick Aff. Ex. C). Specifically, the Executive Committee stated that "Because there was no grandfather clause in 5.2 Term Limits, it is also effective immediately as passed by the membership." (Chadwick Aff. Ex. C). In response, Plaintiff Liechty stated that he believed the new bylaws took effect on January 1, 2007. (Chadwick Aff. Ex. C). Plaintiff Liechty stated that he thought he and Plaintiff Fisher "would be 'grandfathered' to allow them to complete their current terms contrary to the new bylaw 5.2" (Chadwick Aff. Ex. C). The Executive Committee stated that "All bylaw changes are in effect as approved by the membership in December 2006." The Executive Committee asked Plaintiff Liechty "to resign for one year for the good of the club (to avoid bad publicity) because his term ends with bylaw 5.2 on December 31, 2006 and because the

[Executive Committee] is concerned about multiple Code of Ethics violations.” (Chadwick Aff. Ex. C).

On January 12, 2007, in a letter to each Plaintiff, the Executive Committee enforced the bylaw amendment to Article V, 5.2 and advised Plaintiffs that they were no longer members of the Board of Directors. (Chadwick Aff. Ex. F). In the letters, it was noted that the Executive Committee met regarding compliance with bylaw Article V, 5.2, and after carefully considering the amendment, the Executive Committee voted to enforce the bylaw requirement that Plaintiffs were no longer eligible to serve on the Audi Club Board of Directors. (*Id.*)⁴ The Executive Committee believed it was necessary to enforce the bylaw so that precedent would not be set for the future—if one bylaw is ignored by members of the Board of Directors, the other bylaws may be ignored at will. (Chadwick Aff. Ex. F).

After Plaintiffs were removed from the Board of Directors, a majority of the remaining directors filled the vacancies with two new Directors. Article V, 5.2 provides that “Any vacancies occurring in the Board of Directors shall be filled by a vote of the majority of the directors then in office.” (Chadwick Aff. Ex. G). On April 26, 2007, a majority of the directors in office appointed Giovanni Tomasi of the Northeast Chapter and Dean Esmail of the Rocky Mountain Chapter to fill the Director vacancies left by Plaintiffs. (Chadwick Aff. Ex. H).

Plaintiffs assert that they have not served as members of the Board of Directors for more than nine years. Specifically, Liechty asserts that he was not a Board of Director in 2004. Fisher asserts that he was not a Board of Director in 2003 and 2004. This is not true. As to Liechty, he was elected by the membership to serve as a Board of Director from 1998 through 2000 and then

⁴ The Board of Directors also voted to affirm the action of the Executive Committee, and to the extent necessary, interpreted Article V, 5.2 to mean that Liechty and Fisher were ineligible to serve on the board in 2007. (Chadwick Aff. Ex. P).

again from 2001 through 2003. (Chadwick Aff. Ex. N). According to the bylaws, after serving two three-year terms, he could not run again as a Board of Director. (Chadwick Aff. Ex. G). However, Liechty was appointed by the Board of Directors to serve as President in 2004. (Chadwick Aff. ¶ 4). At that time, the bylaws provided that an individual did not need to be an elected member of the Board of Directors to serve as an officer. (Chadwick Aff. ¶ 4). Liechty was then again elected by the membership to serve as a Board of Director from 2005 through 2007. (Chadwick Aff. ¶ 4). As to Fisher, he was elected by the membership to serve as a Board of Director from 1997 through 1999, and again from 2000 through 2002. (Chadwick Aff. ¶ 5). As with Liechty, Fisher was then appointed by the Board of Directors to serve as Chairman from 2003 through 2005. (Chadwick Aff. ¶ 5). Fisher was then again elected by the membership to serve as a Board of Director from 2006 through 2008. (Chadwick Aff. ¶ 5). It is disingenuous for Plaintiffs to assert that they were not on the Board of Directors during 2003 through 2005—Plaintiffs filled the positions of Chairman and President of the Board and voted as did other directors on the Board. (Chadwick Aff. Ex. O).⁵ As such, Plaintiffs served on the Board of Directors as an Officer or Director in appointed or elected capacity for more than nine consecutive years.

Plaintiffs assert that their removal from the Board of Directors “threatens the ongoing success and operations of the Audi Club.” (Liechty Aff. ¶ 23; Fisher Aff. ¶ 11). Fisher also states in his affidavit that “It is critical that Audi of America continues to support the Audi Club and defendants’ actions in attempting to remove me and Craig Liechty from the Board of threaten the success of that relationship which Craig Liechty and I have worked very hard to develop.” (Fisher Aff. ¶ 11). None of this is true. Audi of America does support the current

⁵ The Quattro Quarterly also listed Liechty and Fisher as serving on the board more than nine years in a publication to its members. (Chadwick Aff. Ex. L).

Audi Club Board of Directors. This is evidenced by an e-mail dated May 21, 2007 from Stephanie Valentine, the Audi Club's Audi of America contact, to Audi Dealer General Managers encouraging them to support the Audi Club. (Chadwick Aff. Ex. I). It is also evidenced by a May 14, 2007 letter from Johan de Nysschen, Executive Vice President of Audi of America stating his support of the Audi Club. (Chadwick Aff. Ex. J). Further, Audi of America has recently sent a purchase order for \$35,000 to the Audi Club to continue to advertise in the Audi Club's monthly magazine and to generally support the Audi Club. (Chadwick Aff. ¶ 16, Ex. K). Therefore, there is no evidence that Plaintiffs' removal from the Board of Directors "threatens the ongoing success and operations of the Audi Club."

ARGUMENT

The purpose of a temporary injunction is to maintain the status quo of a matter in controversy until a trial on the merits so that the effect of any judgment may not be impaired by the acts of the parties during the litigation. Pickerigin v. Pasco Mktg., Inc., 303 Minn. 442, 444, 228 N.W. 2d 562, 564 (Minn. 1975). The determination whether to grant a temporary injunction lies within the discretion of the trial court. Bird v. Wirtz, 266 N.W. 2d 166, 167 (Minn. 1978). Rule 65 relief is available only in extraordinary circumstances where all other means of resolving the matter have failed or would be inadequate and no adequate remedy at law exists. AMF Pinspotters, Inc. v. Harkins Bowling, Inc., 260 Minn. 499, 504, 110 N.W. 2d 348, 351 (Minn. 1961). Because a temporary injunction is granted prior to a complete trial on the merits, it should be granted only when it is clear that the rights of a party will be irreparably harmed before a trial on the merits is held. Miller v. Foley, 317 N.W. 2d 710, 712 (Minn. 1982).

Minnesota courts have developed five factors which determine whether a temporary injunction to prevent irreparable injury, loss or damage ought to be granted or denied:

1. The nature of the relationship between the parties prior to the dispute;
2. The comparative harm to the moving and non-moving parties;
3. The likelihood that the moving party will prevail on the merits;
4. Any public policy considerations triggered by the factual situation; and
5. The administrative burden of judicial supervision or enforcement of the temporary injunction.

Dahlberg Bros., Inc. v. Ford Motor Co., 137 N.W.2d 314, 321 (1965); M.G.M. Liquor Warehouse Int'l, Inc. v. Forsland, 371 N.W.2d 75 (Minn. Ct. App. 1985). Where the facts are not free from doubt, it is proper to deny a temporary injunction. Roroback v. Motion Picture Machine Operators' Union of Minneapolis, 140 Minn. 481, 484, 168 N.W. 766, 767 (1918). The burden of proof rests solely on the complaining party to establish the material allegations entitling it to relief. Pinspotters. v. Harkins, 110 N.W.2d 348 at 351.

In the case at bar, Plaintiffs cannot establish that they would suffer irreparable harm absent the grant of a temporary injunction. Additionally, Plaintiffs fail to meet their substantial burden of proof under the Dahlberg factors.

I. PLAINTIFFS CANNOT ESTABLISH IRREPARABLE HARM

Plaintiffs cannot establish they would be irreparably harmed if the temporary injunction does not issue. Irreparable harm must exist before a court can grant any temporary injunctive relief. Morse v. City of Waterville, 458 N.W.2d 728, 738 (Minn. Ct. App. 1990). See also Gelco Corp. v. Coniston Partners, 811 F.2d 414, 418 (8th Cir. 1984) (same). The “failure to show irreparable harm is, by itself, a sufficient ground upon which to deny a temporary injunction.” Id. A party seeking a temporary injunction must demonstrate it has no adequate remedy at law and interim relief is necessary to prevent irreparable injury. Unlimited Horizon Mktg., Inc. v. Precision Hub, Inc., 533 N.W.2d 63, 66 (Minn. Ct. App. 1995). In contrast, a non-

moving party need only show that it would suffer substantial harm to bar issuance of an injunction. Ecolab, Inc. v. Garland, 537 N.W.2d 291, 296 (Minn. Ct. App. 1995).

In Miller v. Foley, the Minnesota Supreme Court described “irreparable harm” as follows:

[M]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Miller, 317 N.W.2d 710, 713 (Minn. 1982) (quoting Sampson v. Murray, 415 U.S. 61, 90, S. Ct. 937, 952, 39 L. Ed 2d 166 (1974)). The threatened injury must be real and substantial.

Independent School District No. 35 v. Engelstad, 294 Minn. 366, 370, 144 N.W. 2d 245, 248 (Minn. 1966).

In order to show irreparable harm, Plaintiffs attempt to persuade the Court that this case is similar to cases involving minority shareholders in closely held corporations or cases involving the termination of a franchise holder’s rights. None of the cases cited by Plaintiffs are analogous to the case at bar. First, Plaintiffs do not have a financial interest in the Audi Club. The Audi Club is a non-profit corporation and its directors are not paid—they are volunteers. The Audi Club does not have shareholders—it has members who pay a fee to become a member. (Chadwick Aff. ¶ 2, Ex. G). Second, Plaintiffs’ regular jobs are not intertwined with being Board of Directors, as is the case in most closely held corporations. In this regard, Plaintiffs are not losing their livelihood by not serving as Board of Directors. Third, Plaintiffs are not losing the opportunity to ever serve again as Board of Directors. In this regard, Plaintiffs can run again for a position on the Board at the end of 2007 to begin serving in 2008. In most instances when a member of a closely held corporation is forced from the company or a franchise is taken away

from a franchisee owner, it is a permanent removal. That is not the case here. Both Liechty and Fisher can run again. Fourth, Plaintiffs have not guaranteed any loans for the Audi Club. For these reasons, Plaintiffs situations are not at all similar to that of minority shareholders in a closely held corporation or a franchise owner.

In particular, Plaintiffs' case is not similar to the minority shareholder in Haley v. Forcelle, 669 N.W.2d 48 (Minn. Ct. App. 2003). In Haley, the minority shareholder lost his ability to work for the company he co-founded. The minority shareholder also served as an officer and director of the corporation. In upholding the temporary injunction, the Minnesota Court of Appeals stated "As a result, the injury from Jack's termination includes the loss of the ability to work for his company and earn a living, but also extends to the loss of the ability to have a voice in management and to protect his ex-wife's and his interest in the company for which they have guaranteed \$4.3 million in loans and worked to grow and operate." Haley, 669 N.W.2d at 57. Here, Plaintiffs did not co-found⁶ the Audi Club, they are not losing their ability to work for their company and earn a living, they are not losing an interest in the Audi Club, and they have not guaranteed any loans to the Audi Club. Plaintiffs' situation is not like the minority shareholder's situation in Haley, and as such, the Haley case is not on point.

To the extent the Court finds that Plaintiffs are similar to minority shareholders in a closely held corporation, there are many cases that hold a temporary injunction is not necessary in such cases. See Miller v. Foley, 317 N.W.2d 710, 712-14 (Minn. 1982) (loss of employment insufficient to demonstrate irreparable harm); Morse v. City of Waterville, 458 N.W.2d 728, 730 (Minn. Ct. App. 1990) (sudden loss of employment "insufficient to warrant the extraordinary remedy of interim injunctive relief"). In these cases, plaintiffs lost jobs, but the courts found

⁶ The founder of the Audi Club, Frank Beddor, supports the action of the Executive Committee to enforce bylaw 5.2 and remove Plaintiffs from the Board of Directors. (Schemmel Aff. Ex. 3).

there was no irreparable harm. Here, plaintiffs are losing their eligibility to serve on a volunteer Board of Directors for the remainder of 2007. If losing a job does not equate to irreparable harm, then losing a volunteer position for one year cannot equate to irreparable harm.

Plaintiffs argue that they “will lose the benefit and rights of serving out their elected terms on the Audi Club Board of Director,” absent injunctive relief. This is not a substantial injury. In this regard, Plaintiffs will not lose any money, they are not losing their jobs, they are not losing a company they co-founded, and they will remain members of the Audi Club and be able to participate in any functions they so desire. Moreover, Plaintiffs are not permanently off the board—they are eligible to run for election at the end of 2007 to begin serving on the Board of Directors in 2008. It is important to not lose sight of the fact that Plaintiffs are volunteers to the Audi Club. If Plaintiffs feel strongly about volunteering at the Audi Club, they are permitted to pursue any other volunteer position, other than the Board of Directors volunteer position in 2007. Plaintiffs are not in situations similar to that of any of the minority shareholders of the cases they cited. For all the reasons stated above, this case is not one in which the extraordinary relief of a temporary injunction is warranted.

II. PLAINTIFF FAILS TO MEET ITS BURDEN OF PROOF UNDER THE DAHLBERG FACTORS.

Plaintiffs cannot meet their burden to establish each of the Dahlberg factors. First, the nature of the relationship of the parties favors Defendants. Second, the hardship to the Audi Club weighs in favor of denying the requested injunction. Third, Plaintiffs are unlikely to succeed on the merits of the case. Fourth, public policy favors denial of the requested injunction. As such, the motion for temporary injunction should be denied.

A. Nature of the Relationship Between the Parties

The nature of the relationship between Plaintiff and Defendants favors the denial of

Plaintiffs' request for temporary injunctive relief. For a temporary injunction to issue, there must exist a relationship between the parties that supports the need for injunctive relief. See State v. Gartenberg, 488 N.W. 2d 493, 496 (Minn. Ct. App. 1992).

There is no current relationship between Plaintiffs and Defendants that would support the need for injunctive relief. Prior to January 2007, Defendant Anderson and Plaintiffs were all members and voluntary directors on the Board of Directors of Audi Club, a non-profit corporation. None of them received compensation for being on the Board of Directors. (Chadwick Aff. ¶¶ 4, 5, Ex. A). Currently, as of January 2007, Plaintiffs are members of the Audi Club, but are not on the Board of Directors. As such, denial of the temporary injunction would maintain the status quo with Plaintiffs remaining as members, but not Board of Directors, of the Audi Club.

To the extent Plaintiffs believe they are current Board of Directors, the parties' relationship prior to the dispute was governed by the Audi Club Bylaws and now after the dispute the parties' relationship is governed by the Audi Club Bylaws. The only difference is that the Article V, 5.2 of the Bylaws has changed. As a result, the relationship between the parties has changed. The amendment does not permit Plaintiffs to serve on the Board of Directors because they have both served nine or more consecutive years on the Board of Directors in an elected or appointed capacity. (Chadwick Aff. Ex. G). Plaintiffs are permitted to run for a position on the Board of Directors after they have not been on the Board of Directors for one year. For Plaintiffs, this means they can run for a position on the Board of Directors at the end of 2007—i.e. in just a few months—to begin serving on the Board of Directors in 2008. The parties' relationship cannot go back to the way it was because Article V, 5.2 has changed by a vote of the members.

Plaintiffs assert that by not being permitted to serve in their elected director positions that Defendant Anderson has failed to act in the best interest of the Audi Club as expressed by the voting members of the Audi Club. (Pls.' Mem., at 10). There are two problems with this bold statement. First, while the members initially voted to allow Plaintiffs Fisher and Liechty to serve on the Board of Directors, the members subsequently voted to amend Article V, 5.2, which does not allow a member to serve "on the Board of Directors as an Officer or Director in an appointed or elected capacity for more than nine consecutive years." (Chadwick Aff. Ex. E). Plaintiff Fisher served on the Board of Directors as an Officer or Director in an appointed or elected capacity from 1997 through 2006. Liechty served on the Board of Directors as an Officer or Director in an appointed or elected capacity from 1998 through 2006. Both Plaintiffs served nine or more years and were subject to the amendment to Article V, 5.2 as approved by the Audi Club members. The Audi Club members voted in favor of the Article V, 5.2 amendment, and therefore, enforcing the provision is in the best interest of the members, as voted on and approved by the members. In fact, Liechty campaigned against the amendment on the ground that he and Fisher would be taken off the Board. (Chadwick Aff. Ex. E). Despite this campaign by Liechty, the members still voted to pass it, showing that they agreed with removing Liechty and Fisher from the Board once they were no longer eligible.

Second, to the extent Plaintiffs suggest that Defendant Anderson used his position as President to remove Plaintiffs from the Board of Directors or breached a fiduciary duty to Plaintiffs, the allegation is simply not true. Defendant Anderson did not act alone at any stage of the amendment or enforcement process. In this regard, a majority of the Board of Directors voted to take the proposed amendment to Article V, 5.2 to the members. The members then voted by a wide margin to pass the amendment to Article V, 5.2. Thereafter, a majority of the

Executive Committee decided to enforce the amendment to Article V, 5.2 and removed Plaintiffs from their positions on the Board of Directors. At no point in time did Defendant Anderson act alone in removing Plaintiffs from the Board of Directors. In fact, the Board of Directors has affirmed the action of the Executive Committee. As such, the nature of the relationship of the parties favors denial of the motion for temporary injunction.

B. Relative Hardship

The balancing of the harms between Plaintiffs and Defendants favors Defendants. Plaintiffs assert that they “will lose the benefits and rights of serving out their elected terms on the Audi Club Board of Directors,” if injunctive relief is not granted. As discussed above, this is not a substantial harm. Further, after Plaintiffs’ elected terms expire they will not be eligible to sit on the Board of Directors for one year. In other words, Plaintiffs will be required to take a one-year break from being on the Board of Directors if it is the remainder of this year or next year. Therefore, there can be no substantial harm by a one-year break that must take place. In contrast, the Audi Club has appointed two new Board of Directors to fill the positions left open by Plaintiffs. The Board of Directors is functioning with nine directors without Plaintiffs. If the Court were to order Plaintiffs reinstated on the Board of Directors, the Audi Club would have to release two current board members to make room for Plaintiffs. As such, reinstating Plaintiffs on the Board of Directors would cause more harm than ordering Plaintiffs to remain off the Board until they can run for re-election.

C. Likelihood of Success on the Merits

Plaintiffs are not likely to succeed on the merits of their declaratory judgment action. Second, Plaintiffs are not likely to succeed on their breach of fiduciary duty action. Third, Plaintiffs claims are derivative claims which they cannot bring as individuals. As such, Plaintiffs

are not likely to succeed on the merits and the motion for a temporary injunction should be denied.

1. Plaintiffs Will Not Succeed on the Merits of Their Declaratory Judgment Cause of Action

The Plaintiffs are not likely to succeed on the merits. “The Minnesota Declaratory Judgment Act gives courts the ‘power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.’” Cincinnati Ins. Co. v. Franck, 621 N.W.2d 270, 273 (Minn. Ct. App. 2001) (citing Minn. Stat. § 555.01 (1998)). “A declaratory action is a justiciable controversy if it (a) involves definite and concrete assertions of right that emanate from a legal source, (b) involves a genuine conflict in tangible interests between parties with adverse interests, and (c) is capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion.” Edina Community Lutheran Church v. State, 673 N.W.2d 517, 521-22 (Minn. Ct. App. 2004).

Plaintiffs cannot succeed on the merits of their claim for declaratory relief. The amended Article V, 5.2 provides that “Members may not serve on the Board of Directors as an Officer or Director in an appointed or elected capacity for more than nine consecutive years.” The amended language does not refer to terms, but does refer to nine years of “service in an appointed or elected” position. Article V, 5.2 does not shorten the length of a term—that remains at three years. The amendment caps the number of consecutive years that may be served and makes Directors who have served more than nine years ineligible to serve on the Board of Directors.

Plaintiffs assert that they have not served as members of the Board of Directors for more than nine years. Specifically, Liechty asserts that he was not a Board of Director in 2004. Fisher asserts that he was not a Board of Director in 2003 and 2004. This is not true. In 2003 through

2005 Plaintiffs filled the positions of Chairman and President of the Board and voted as did other directors on the Board. (Chadwick Aff. Ex. ¶ 4 & 5, Ex. O). As such, Plaintiffs served on the Board of Directors as an Officer or Director in appointed or elected capacity for more than nine consecutive years and are not eligible to serve on the Board of Directors in any capacity for 2007.

Further, there is no grandfather clause that would exclude Plaintiffs from amended Article V, 5.2. A grandfather clause is “A provision that creates an exemption from the law’s effect for something that existed before the law’s effective date; . . . a statutory or regulatory clause that exempts a class of persons or transactions because of circumstances existing before the new rule or regulation takes effect.” Black’s Law Dictionary 718-19 (8th ed. 2004). Where a statute does not include a grandfather clause, a court “cannot supply that which the legislature purposely omits or inadvertently overlooks.” Wallace v. Comm’r of Taxation, 184 N.W. 2d 588, 594 (Minn. 1971). Here, there is no grandfather clause in amended Article V, 5.2 and one cannot be read into the amendment. As such, Plaintiffs were not, and are not, exempt from its effect.

Plaintiffs rely heavily on Minnesota Statute § 317A.207 subd. 1(c), which provides that “A decrease in the number of directors or term of office does not shorten an incumbent director’s term.”⁷ Here, the Audi Club did not decrease the number of years in a term for which directors are elected to serve. The Audi Club has capped the total number of years a director is eligible to serve without regard to how many terms nine years encompasses. As such, after nine years of service, Plaintiffs are not eligible to serve until they have not served on the Board of Directors for one year.

⁷ Minn. Stat. § 317A.207, sub.1(b) provides “Unless the articles or bylaws provide otherwise, a director holds office until expiration, the term for which the director was elected or appointed...” Here, the Audi Club bylaws provide a director is ineligible once he or she has served nine consecutive years.

Plaintiffs also rely on the language in Article V, 5.2, which states that “A director shall hold office for the term for which he or she was elected until the end of the meeting at which his or her successor has been elected.” This language must be read in connection with the remainder of Article V, 5.2, which states that “Members may not serve on the Board of Directors as an Officer or Director in an appointed or elected capacity for more than nine consecutive years.” This language makes a member not eligible to serve after nine consecutive years on the Board. Plaintiffs are not eligible to be on the Board of Directors and cannot serve the remainder of their elected terms.⁸

Further, Plaintiffs rely on an Audi Club Chapter Representatives Conference Call on October 30, 2006. In the notes to that conference call, it was noted that “Affected board members are NOT kicked off immediately, will serve out the remainder of their term.”

(Chadwick Aff. Ex. D). However, the Chapter Conference Call minutes reflect the comments, opinions, and shared information between chapters, nothing more. (Chadwick Aff. Ex. C).

Chapter Conference Calls are information sharing only, and have no National Board or Executive Committee authority or voting power. (Chadwick Aff. Ex. C). In addition, Plaintiff Liechty knew what amended Article V, 5.2 meant for him and Plaintiff Fisher and campaigned to the Members against the provision, as evidenced by his October 17, 2006 e-mail to other members of the Audi Club:

The proposed by-law changes were pushed through the Audi Club board without the participation of the full Board. We urge you to contact as many fellow members as possible and ask them to VOTE AGAINST ALL FIVE PROPOSED BY-LAWS AMENDMENTS for the following reasons:

⁸ Moreover, Plaintiffs’ successors on the Board have been appointed. (Chadwick Aff. Ex. H). So, no matter how Plaintiffs attempt to spin it, the time for service is over under Amendment 5.2.

- The first proposal consolidates power in the hands of a few by limiting the number of consecutive years a member can serve. **This proposed change would immediately force long-time volunteers Mike Fisher and Craig Liechty off the board.** These two progressive, dedicated, selfless gentlemen are responsible for much of the club's success in recent years.

(Chadwick Aff. Ex. E)(emphasis added). Thus, Liechty and Fisher understood one of the effects of the amendment to Article V, 5.2 was to immediately force them off the board of the Audi Club.

For all these reasons, Plaintiffs cannot succeed on the merits of their declaratory judgment action.

2. **Plaintiffs Will Not Succeed on the Merits of Their Breach of Fiduciary Duty Action.**

Defendant Anderson is immune from a breach of fiduciary duty action. The standard of conduct for a Board of Director who is not compensated is not the same as a director who is paid. Minnesota Statute Section 317A.257 provides as follows:

a person who serves without compensation as a director, officer, . . . , is not civilly liable for an act or omission by that person if the act or omission was in good faith, was within the scope of the person's responsibilities as a director, officer, trustee, member, agent, or fire chief of the organization, and did not constitute willful or reckless misconduct.

Minn. Stat. § 317A.257. "The protection provided in section 317A.257 is not based upon the justification of a defendant's specific actions, but rather upon the defendant's status as an unpaid director, officer, member or agent of a nonprofit corporation." Rehn v. Greater Anoka County Animal Humane Society, 557 N.W.2d 328, 333 (Minn. 1997).

"[T]he burden of proof remains with the defendant to allege facts sufficient for a court to determine as a matter of law that the immunity applies." Rehn, 557 N.W.2d at 333. In this case,

Defendant Anderson has the burden of proving to the court that the Executive Committee's action in removing Plaintiffs from the Board of Directors: (1) was done in good faith; (2) was within the scope of his responsibilities as President of the Board of Directors; (3) was not willful or reckless misconduct; and (4) did not personally and directly cause physical injury. Rehn, 557 N.W.2d at 333. Defendant Anderson can show all four elements.

First, Defendant Anderson can show that he acted in good faith. "Good faith" is defined as "honesty in fact in the conduct of an act or transaction." Minn. Stat. § 317A.011 subd. 10. Here, on a vote of 5-2-2, the Board of Directors voted to send the proposed amendment to Article V, 5.2 to the membership to reject or pass. The membership did pass the proposed amendment to Article V, 5.2. Once passed by the membership, the Executive Committee, under Article VII, 7.1 ensured compliance with the amended Article V, 5.2 Bylaw by informing Plaintiffs that they were no longer on the Board of Directors because they had served more than nine consecutive years on the Board of Directors. The actions of the Executive Committee show that they did not believe that Article V, 5.2 needed any interpretation by the Board of Directors. Plaintiffs believe that Article V, 5.2 should have been interpreted by the Board of Directors before being enforced by the Executive Committee.⁹ However, this does not show a lack of good faith.

Second, Defendant Anderson can show that he acted within the scope of his responsibilities as President of the Board of Directors. Defendant Anderson, as President of the Audi Club, is on the Executive Committee pursuant to Article VII, 7.1. One duty of the Executive Committee is to "ensure compliance with the Bylaws." Enforcing amended Article V,

⁹ In fact, to the extent necessary, the Board has approved the Executive Committee's action and agrees with the enforcement of Article V, 5.2 against Plaintiffs Liechty and Fisher. (Chadwick Aff. Ex. P).

5.2 is a specific duty of the Executive Committee, and Defendant Anderson's action of enforcing amended Article V, 5.2 is within his scope of responsibilities as President of the Audi Club.

Third, Defendant Anderson can show that his actions were not willful or reckless misconduct. In Shepherd of the Valley Lutheran Church of Hastings v. Hope Lutheran Church of Hastings, 626 N.W.2d 436, 443 (Minn. Ct. App. 2001), the court found "willful or reckless misconduct" where an officer intentionally withheld material information from other officials and members of the group. Defendant Anderson is not alleged to have withheld any material information. Here, Defendant Anderson followed the Audi Club Bylaws, the Board of Directors voted to allow the membership to vote on the proposed amendments to the Bylaws, the membership voted on the Bylaws, and the Executive Committee enforced the amended Article V, 5.2 of the Bylaws. Further, Defendant Anderson and Defendant Audi Club sought the advice of legal counsel before enforcing amended Article V, 5.2. (Chadwick Aff. ¶ 22). As such, Defendant Anderson did not intentionally withhold information from other officials, but the record shows that he engaged the Board of Directors, the membership, and the Executive Committee. Therefore, Defendant Anderson's actions were not reckless.

Fourth, Defendant Anderson can show that he did not personally and directly cause physical injury. As to this element, there are no allegations that Defendant Anderson personally and directly caused a physical injury to either Plaintiff. As such, this element is satisfied.

In addition, "the boards of nonprofit corporations may receive the protection of the business judgment rule." Janssen v. Best & Flanagan, 662 N.W.2d 876, 883 (Minn. 2003). "The business judgment rule is a presumption protecting conduct by directors that can be attributed to any rational business purpose." Id. at 882. For all the reasons stated above, Defendant Anderson acted with a rational business purpose when he, along with the Executive Committee, removed

Plaintiffs from the Board of Directors based on their ineligible status to serve on the board. The decision of the Executive Committee should be upheld because it had a rational business purpose—enforcing amended Article V, 5.2.

In order to show that Defendant Anderson breached his fiduciary duties to the directors and members of the Audi Club, Plaintiffs assert that he “improperly act[ed] through the executive committee, without the authority and consent of a required quorum of the Board of Directors, to manage the affairs, activities and concerns of the Audi Club in violation of the Audi Club’s Bylaws.” (Plfs.’ Mem., at 18). This is not true. The record shows that the Board of Directors did not manage the affairs of the Audi Club until April 26, 2007 when a majority of the remaining directors, in compliance with Article V, 5.2, which provides that “Any vacancies occurring in the Board of Directors shall be filled by a vote of the majority of the directors then in office,” appointed Giovanni Tomasi to fill Plaintiff Liechty’s vacant position (four in favor, no opposed, and three not in attendance) and Dean Esmail to fill Plaintiff Fisher’s vacant position (five in favor, no opposed, and three not in attendance). (Chadwick Aff. Ex. H). Moreover, the Board of Directors has affirmed the actions of the Executive Committee and has agreed that Plaintiffs Liechty and Fisher are not eligible to serve on the Board of Directors. As such, there is no evidence that Defendant Anderson acted improperly to manage the affairs, activities and concerns of the Audi Club, and Plaintiffs cannot show a breach of fiduciary duty.

Defendant Anderson can show that that he is entitled to immunity from the breach of fiduciary duty claim, and to protection of the business judgment rule. As such, Plaintiffs cannot succeed on the merits of their breach of fiduciary duty claim against Defendant Anderson. Therefore, a temporary injunction is not warranted.

3. This Lawsuit is a Derivative Action

The Complaint contains two claims—both of which are derivative claims on behalf of the Audi Club. Before commencing this lawsuit, Plaintiffs did not request that the Audi Club pursue the claims they have now asserted on behalf of the Audi Club. The Audi Club should be given the opportunity to decide for itself whether the claims asserted by Plaintiffs derivatively on behalf of the Audi Club should be pursued, and to appoint a Special Litigation Committee (“SLC”) to investigate these claims and decide what action to take. In order to allow the Audi Club Board of Directors sufficient time to appoint a SLC to investigate this matter and make a business judgment about how the Audi Club should proceed, this case should be stayed until the SLC makes a determination.

Under Minnesota law, the general principle is that an individual shareholder may not directly assert a cause of action that belongs to the corporation. See, e.g., Wessin v. Archives Corp., 592 N.W.2d 460, 464 (Minn. 1999) (citing Singer v. Allied Factors, Inc., 216 Minn. 443, 446, 13 N.W.2d 378, 380 (1944)). An action brought by a shareholder that belongs to the corporation must be brought in a “derivative” action on behalf of the corporation rather than in a direct action by the individual shareholder.” Id. (citing Northwest Racquet Swim & Health Clubs, Inc. v. Deloitte & Touche, 535 N.W.2d 612, 617 (Minn. 1995)). In order to determine whether a claim is derivative, the court looks to injury, not to the theory on which the claim is made. Id.

Here, the injuries alleged by Plaintiffs arise out of Defendant Anderson’s alleged breach of fiduciary duty. In this regard, Plaintiffs allege that Defendant Anderson “engaged in conduct in breach of his fiduciary duties and that was unfairly prejudicial to the directors and members of the Audi Club.” (Plfs.’ Mem., at 18). Defendant Anderson owes a fiduciary duty to the Audi

Club, and Plaintiffs benefit from that duty derivatively through the Audi Club. Therefore, if Defendant Anderson breached his fiduciary duty to the Audi Club, the breach gives rise to a derivative claim by the Audi Club. As such, Rule 23.09 must be complied with, and Plaintiffs have failed to allege compliance in the Complaint as required under law. (Minn. R. Civ. P. 23.09; see Complaint generally).

Plaintiffs also allege a declaratory judgment. The facts used to reach a declaration in their favor are the same facts Plaintiffs must use to allege the breach of fiduciary duty claim—i.e. that Defendant Anderson did not follow the Audi Club Bylaws when he terminated them from their elected positions on the Board of Directors. As such, both claims are derivative actions and should be brought by the Audi Club.

When a corporation is faced with a derivative claim by a shareholder, the board of directors is specifically permitted to create a disinterested committee to investigate the claims and decide whether it is in the corporation's best interest to dismiss or pursue the claims. See Janssen v. Best & Flanagan, 662 N.W.2d 876, 888 (Minn. 2003) (“We hold the Minnesota Nonprofit Corporations Act does not prohibit corporations from appointing independent committees with the authority to decide whether the corporation should join a member’s derivative suit.”). Under the law, the Audi Club is entitled to form a SLC. This case should be stayed until the Audi Club has had a chance to do so. See In re United Health Group Incorporated Shareholder Derivative Litigation, No. 06-CV-1216 (JMR/FLN), 2007 WL 803048, at *1-2 (D. Minn. Mar. 14, 2007) (stating that courts “have discretion to stay a derivative action to allow the SLC time to investigate and decide whether to pursue litigation” and staying the action until a SLC makes a decision); Silverstein v. Larson, No. Civ. 04-3450 ADM/AJB, 2005 WL 435241, at * (D. Minn. Feb. 25, 2005) (staying a derivative suit, and completely staying

discovery, to allow the SLC to conduct a thorough and independent investigation). (Schemmel Aff. Exs. 1, 2). Therefore, even after the Court denies Plaintiff's temporary injunction, the Court should then stay this proceeding and discovery until Liechty and Fisher have made a demand on the Club to take legal action, and the Audi Club has formed a SLC and that SLC has come to a business judgment on the Audi Club joining this case.

D. Public Policy

Public policy favors the denial of the temporary injunction. In drafting Minnesota Statute section 317A.257, "the intent of the legislature was to provide a broad protection to all uncompensated contributors." Rehn, 557 N.W.2d at 334. This broad policy needs to remain in place so that people will be willing to serve on non-profit boards without fear of being liable for less than reckless actions. Here, public policy favors denying the temporary injunction because Defendant Anderson's actions were not reckless. In fact, his actions were consistent with the Audi Club Bylaw, Article VII, 7.1. As such, public policy favors the denial of a temporary injunction.

E. Administrative Burdens

The fifth and final Dahlberg factor favors neither Plaintiffs nor Defendants. While it is unlikely that an injunction in this case would create an administrative burden, denying the motion for injunctive relief will most certainly not be the cause of any administrative burden. Plaintiff's failure to prevail on the other Dahlberg factors renders this fifth and final factor superfluous.

Four of the five Dahlberg factors strongly favor Defendants and denial of Plaintiffs' request for injunctive relief. Plaintiffs' motion for a temporary injunction should be denied.

F. Plaintiff Should be Required to Post a Bond

No temporary restraining order shall be granted without posting adequate security to protect against loss from an injunctive order. Minn.R.Civ.P. 65.03 (2007). Defendants request a bond in the amount of \$20,000 to cover the costs and disbursements of this lawsuit pursuant to Minnesota Statute § 357.01 et. al.

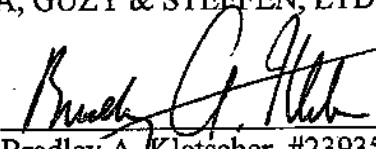
CONCLUSION

Plaintiffs cannot show that they will suffer irreparable harm if the injunction does not issue and, likewise, fail to meet their burden of establishing their right to injunctive relief under the Dahlberg factors. Further, this action should be stayed until a special litigation committee can be formed and make a business judgment on Plaintiffs' claims. For all of the foregoing reasons, Defendants respectfully requests that Plaintiff's motion for a temporary injunction be denied in its entirety and this action stayed pending a business judgment by a special litigation committee.

BARNA, GUZY & STEEFEN, LTD.

Dated: 5/31, 2007

By:


Bradley A. Kletscher, #239355
Tammy J. Schemmel, #339325
400 Northtown Financial Plaza
200 Coon Rapids Boulevard
Coon Rapids, MN 55433
(763) 780-8500
Attorneys for Defendants