STATE OF MINNESOTA | DISTRICT COURT
COUNTY OF CARVER | FIRST JUDICIAL DISTRICT
CASE TYPE: OTHER CIVIL

Craig Liechty and Michael Fisher,

Plaintiffs,

v.

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

Defendants.

Court File No. CV-07-543

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Defendants' opposition to plaintiffs' motion for injunctive relief quite correctly points out the following:

> "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.***'"[1]

By "also rely" defendants again correctly refer to a parallel provision in the Minnesota Non-Profit Corporation Act providing that a post-election bylaw change "does not shorten an incumbent director's term."[2] Plaintiffs do not need to rely on anything else to establish that they

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1 *See* Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion, at p. 17 (emphasis added).

2 *See* Minnesota Statute § 317A.207, subd. 1(c); *see also* 18 *Minnesota Practice*, Corporation Law & Practice § 3.10 (2d ed.) (bylaw amendments probably cannot be used to reduce the term of a director who has previously been elected for a fixed term).

are likely to succeed in this action to regain their positions as duly elected directors of the Audi Club.

Noticeably absent from defendants' opposition is an affidavit from defendant Keith Anderson. For good reason, there is no attempt to dispute defendant Anderson's admission that under the amended Bylaw "affected board members are NOT kicked off immediately, will serve out the remainder of their term."[3] The Court is also provided with no sworn affidavit from defendant Anderson stating that, when he went back on his word and sought to remove plaintiffs from their duly elected positions as directors, he was somehow acting in good faith and in the best interests of the Audi Club.

Defendants' opposition papers also correctly establish that unless injunctive relief is granted plaintiffs have no adequate remedy at law. Defendants suggest no such adequate remedy - no compensatory damages or future corrective relief - none. Offering no legal remedy, while arguing that plaintiffs are entitled to no equitable remedy, defendants' proposed relief is that "plaintiffs can run again for a position on the board" in the future. Plaintiffs trust the Court does not feel that is a remedy for the irreparable harm this action seeks to address.

ARGUMENT

Plaintiffs respectfully submit that the present record provides a sound and justified basis for the issuance of injunctive relief. This is one of those extraordinary circumstances where money damages are inadequate and no other adequate remedy at law exists. *AMF Pinspotters, Inc. v. Harkins Bowling, Inc.*, 260 Minn. 499, 504, 110 N.W.2d 348, 351 (Minn. 1961).

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3 *See* Liechty Aff., ¶ 13 and Ex. 4, p. 2 (emphasis in original).

I. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF THEY ARE REQUIRED TO WAIT FOR RELIEF UNTIL A TRIAL ON THE MERITS.

Plaintiff Liechty's elected term on the Audi Club Board of Directors expires on December 31, 2007. He is irreparably harmed for every day between now and then defendants are allowed to prevent him from serving out his elected term. While plaintiff Fisher's elected term does not expire until December 31, 2008, there is no relief available at a trial months from now which serves as an adequate remedy for his lost time on the Board of Directors.

Defendants' attempt to distinguish the case law establishing that plaintiffs' harm is irreparable is appreciated because it proves the point. Defendants are right that plaintiffs do not have a "financial interest in the Audi Club" and that "plaintiffs will not lose any money, they are not losing their jobs." (*See* Defendants' Memorandum of Law in Opposition, at pp. 9-11). If that were true, money damages would likely serve as an adequate remedy and - just like in the cases cited by plaintiffs - injunctive relief would not be necessary.[4] Defendants' argument that this case is "not similar to" *Haley v. Forcelle*, 669 N.W.2d 48 (Minn. Ct. App. 2003) must be based on a misunderstanding that plaintiffs, like Jack Haley, are requesting injunctive relief to remedy their "loss of the ability to have a voice in management and to protect [their] interests" in the Audi Club which they have "worked to grow and operate." *See Haley*, 669 N.W.2d at 57.

The Court should summarily reject defendants' argument that removing plaintiffs from their duly elected positions on the Audi Club Board of Directors is "not a substantial injury." (*See* Defendants' Memorandum of Law in Opposition, at p. 11). Because there is none,

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4 Defendants cite *Miller v. Foley*, 317 N.W.2d 710, 712-14 (Minn. 1982) and *Morse v. City of Waterville*, 458 N.W.2d 728, 730 (Minn. Ct. App. 1990) for the proposition that a loss of employment can be remedied with an award of money damages and is thus insufficient to demonstrate irreparable harm. (*See* Defendants' Memorandum of Law in Opposition at p. 10). Plaintiffs agree and submit that defendants' arguments and case law prove - not disprove - the presence of irreparable harm.

defendants cite no legal precedent for such an argument. After conceding there is no adequate remedy at law, defendants' attempt to minimize the level of plaintiffs' irreparable harm is not a legally recognized consideration. Plaintiffs also submit that defendant Anderson would consider his removal from the Audi Club Board of Directors to be a "substantial injury."

In summary, an award of money damages does not adequately compensate plaintiffs for having lost the opportunity to serve out their elected terms as directors of the Audi Club. Injunctive relief is the only available remedy to prevent such irreparable harm.

II. THE BALANCE OF HARM FROM GRANTING INJUNCTIVE RELIEF FAVORS PLAINTIFFS.

Defendants' only argument here is that "[i]f the Court were to order plaintiffs restated on the Board of Directors, the Audi Club would have to release two current board members to make room for Plaintiffs." (*See* Defendants' Memorandum of Law in Opposition, at p. 14). That is it. Defendants do not even try and make the follow-up argument as to how releasing the individuals defendant Anderson appointed after his improper removal of plaintiffs from the Board of Directors would in any way harm the Audi Club. Even more revealing is that defendants are now willing to make the argument that releasing two recently and improperly appointed directors is "substantial harm" yet removing plaintiffs as duly elected directors before the expiration of their terms is "not a substantial injury."

For the reasons demonstrated here, and in plaintiffs' initial Memorandum, the balancing of harms factor supports a determination that plaintiffs' motion for injunctive relief is properly granted.

III. PLAINTIFFS HAVE DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS.

A. Plaintiffs Are Likely To Prevail On Their Claim For Declaratory Relief.

The gravamen of plaintiffs' claim is a request that the Court issue a declaratory judgment stating that plaintiffs Liechty and Fisher are entitled to serve out the Board of Directors' terms for which they were elected. The Audi Club's Bylaws - which defendants cannot and do not dispute - expressly state 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." (Liechty Aff., Ex. 2, p. 2, and Ex. 3, p. 1). Plaintiffs submit that on this record alone the Court is justified in finding that plaintiffs have established a reasonable possibility of succeeding on their claim for declaratory relief.

While ignoring Minnesota Statute § 317A.207, subd. 1(c) which expressly provides that "[a] decrease in the number of directors and term of office does not shorten an incumbent director's term," defendants instead argue that there is "no grandfather clause that would exclude plaintiffs from amended Article 5, 5.2."[5] Once again, this argument by defendants supports a finding for the plaintiffs. The provided *Black's Law Dictionary* definition - "a provision" that exempts a class of persons "because of circumstances existing before the new rule or regulation takes effect" - establishes that the amended Bylaw does contain a grandfather clause because it states that "a director shall hold office for the term for which [they were] elected." This key provision deals with an existing circumstance - the members' vote to elect plaintiffs to the Audi

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5 *See* Defendants' Memorandum of Law in Opposition, at p. 16. Notably, defendants always choose to omit the title of the amended Bylaw - "Term" - when making this argument in an apparent effort to avoid the application of Minnesota Statute § 317A.207.

Club Board of Directors before the Bylaw was amended, and it exempts plaintiffs from the operation of the amendment - "shall hold office for the term for which [they were] elected."

Defendants' argument based on plaintiff Liechty's October 17, 2006, e-mail is chronologically misleading and misrepresents the factual record. It was almost two weeks later, on October 30, 2006, that defendant Anderson announced at the Audi Club Chapter Conference Call that the amended Bylaw would not be interpreted to call for the removal of any of the currently elected directors who "will serve out the remainder of their term." (Liechty Aff., ¶ 13 and Ex. 4, p. 2). This representation and correct bylaw interpretation by defendant Anderson is aptly described in the following May 18, 2007, letter from the head of the Potomac-Chesapeake Chapter of the Audi Club:

> We feel betrayed by this attempt to remove Mike and Craig after being told in the October 30 Chapter meeting that this was not the intent of the amendment to Section 5.2 of the Bylaws.

(*See* Ponessa Aff., Ex. A). An e-mail that same day from the Audi Club Golden Gate Chapter President to the Audi Club and defendant Anderson states "[j]ust want you all to know how disappointed we are in the misrepresentations made to the Chapter Representatives. You are poor stewards of your elected responsibilities." (Ponessa Aff., Ex. B).

In a June 1, 2007, letter to defendant Anderson and the Audi Club Executive Committee and Board of Directors, the Chicago Chapter Board of Directors wrote:

> Craig Liechty and Mike Fisher should be allowed to return to the sitting Board of Directors and be allowed to serve out their terms as promised and as guaranteed under Article V - 5.2. The Executive Committee made this promise during the last conference call with chapter representatives in October of 2006. As a matter of personal integrity, we all must uphold our word or it becomes meaningless.

(Ponessa Aff., Ex. C). Another June 1, 2007, letter from the Audi Club Chapter Representatives states:

> Furthermore, during the October 30 Chapter Representative's meeting, multiple members of the Executive Committee stated (and reported in the minutes of that meeting) that, regarding passage of the Bylaw amendment to V.5.2, "affected Directors are NOT kicked off immediately, will be allowed to serve out their term." That promise, also, has been broken by these actions.

(Ponessa Aff., Ex. D).

To the extent defendants now argue that defendant Anderson's new interpretation of the amended Bylaw is what controls, plaintiffs refer the Court to Audi Club Bylaw 5.4 which states that "[t]he Board of Directors shall interpret the bylaws." (*See* Liechty Aff., Ex. 2, pp. 2-3, § 5.4). Now that the complete record is in, plaintiffs reaffirm their position that there was no majority vote at a regular Board of Directors meeting with a legal quorum present to submit the proposed Bylaw amendment regarding the directors' term to the Audi Club members at the annual election. The proof is defendants' failure to present the Court with the minutes from any such Board of Directors meeting. Defendants' attempt to use an exchange of e-mails between defendant Anderson and his friends on the executive committee is not a legally valid substitute for the required action by the Board of Directors and is a clear violation of Audi Club Bylaws 10.2 and 11.2. (*See* Liechty Aff., Ex. 2, at 10.2 and 11.2).

In summary, the declaratory relief plaintiffs seek is a direct application of the plain language of the Audi Club's Bylaws and thus plaintiffs have established a reasonable likelihood of success on the merits.

B. Plaintiffs Have Also Established A Reasonable Likelihood Of Success On Their Claims Under The Minnesota Non-Profit Corporation Act And For Breach Of Fiduciary Duty.

Rather than even attempt to argue that defendant Anderson did not violate Minnesota Statute § 317A.751, as well as his common law fiduciary duties, defendants instead argue that Anderson is entitled to immunity from such breaches under Minnesota Statute § 317A.257. (*See* Defendants' Memorandum of Law in Opposition, at p. 18). Plaintiffs' initial Memorandum of Law provides the necessary factual and legal basis for the Court to find a reasonable likelihood of success that defendant Anderson violated his statutory and common law fiduciary duties to plaintiffs - as co-directors in the Audi Club. Having failed to submit an affidavit from defendant Anderson stating that his actions were in good faith, defendants have failed to meet their burden of proving "facts sufficient for a court to determine as a matter of law that the immunity applies." *Reyn v. Greater Anoka County Animal Humane Soc.*, 557 N.W.2d 328, 333 (Minn. 1997).

Plaintiffs also offer the following additional proof - position statements from the Audi Club leaders and members themselves - which further establish a likelihood of success on the merits:

- As the head of the Potomac-Chesapeake Chapter, one of the largest if not the largest chapters in the country, I am disturbed to see this attempt at removing Craig and Mike from the Board. Since the Board election and bylaw vote, along with some other events that have taken place over the past year, I have had to personally question the sincerity, honesty, and integrity of some members of the Board and whether they truly have the best interests of the Club in mind. (*See* Ponessa Aff., Ex. A).

- We, as representatives of the chapters of the ACNA, are writing to express our concern with the recent actions of the ACNA Executive Committee, and our hope that the Executive Committee will, in the interests of the Club membership of which we are stewards reverse specific actions that are inconsistent with the ACNA Bylaws and Code of Ethics. It is the belief of the undersigned that the following actions of the ACNA Executive Committee are not in accordance with the Bylaws of the ACNA and ACNA Code of Ethics: approval of bylaw amendments for ballot inclusion without a proper Board vote; interpretation of the bylaw amendments of the last election such that they would apply retroactively to

board members elected in said election; appointment of replacement members to the Board of Directors. (*See* Ponessa Aff., Ex. D).

- Our concern over the election applies not only to the tabulation methodology, but also to the "amendments" to the bylaws that were on the last ballot. ACNA Board minutes indicate that the proposed bylaws were never discussed or approved by the ACNA board of directors prior to their introduction as a referendum as required by Article XI - 11.2. As the letter and spirit of Article XI was not adhered to, the referendum was improperly conducted. (*See* Ponessa Aff., Ex. C).

- Since August of 2006, the Executive Committee of the ACNA has embarked on a program to consolidate power, take control of the Board of Directors and wield absolute control over the management and direction of the ACNA. Towards these ends, they have engaged in a series of activities that have violated the ACNA bylaws, disregarded the Code of Ethics and endangered the existence of the ACNA by creating exposure to litigation and/or legal involvement with governing authorities such as the IRS. (*See* Ponessa Aff., Ex. E).

- In October Mark Sampson and Keith Anderson both told the ACNA chapter reps that the amendments were not intended to drive anybody, including Mike Fisher and Craig Liechty off the BOD. When pressed, both Mr. Anderson and Mr. Sampson stated they would ignore that part of the bylaw and would absolutely not take any action to remove Mr. Liechty or Mr. Fisher from the BOD. (*See* Ponessa Aff., Ex. E).

- As ACNA member who helps run events with the Potomac-Chesapeake Chapter, I urge the Board to reverse its rulings regarding Craig Liechty and Mike Fisher, and to bring the Club's actions into full compliance with the bylaws. (*See* Ponessa Aff., Ex. F).

- I am writing to bring to the attention of yourself and the Board of Directors several legal concerns relating to the recent bylaw amendments and their implementation. . . . This letter has been prompted by the letters of January 12, 2007 from you to Craig Liechty and to Mike Fisher informing them of purported action by the Executive Committee to remove them from the Board of Directors. For the reasons set forth below, this action contradicts the bylaws of ACNA. (*See* Ponessa Aff., Ex. G).

- At this point, I am all but convinced that you are no longer operating with the interests of the ACNA in mind. To the contrary, it would seem that you are endangering the Club by flagrantly violating the bylaws with no regards for the effects of your actions and little care for the Club and its members. (*See* Ponessa Aff., Ex. H).

- Our [Chapter] Board meets tonight. I am sure the topic of the ACNA Board issues will arise. I have seen an awful lot of questions that have arisen, but no response from you. We are open to hear the other side of the story. Specific

> interest in the actions of the Executive Committee that appear in conflict with the ACNA Bylaws; failure to convene the 2007 Board, lack of Board elections for 2007 officers and apparent misrepresentations made to the chapter representatives during conference calls. (*See* Ponessa Aff., Ex. J).

On the record submitted, the Court acts well within its discretion to find that plaintiffs have met their burden of proving a reasonable likelihood of success on their claim that defendant Anderson violated the Minnesota Non-Profit Corporation Act and his common law fiduciary duties.

IV. DEFENDANTS' DERIVATIVE ACTION ARGUMENT IS A RED HERRING.

The claims on which plaintiffs base this motion for injunctive relief are not derivative claims on behalf of the Audi Club. Plaintiffs' claims do not belong to the corporation and are not the subject of Minnesota Rule of Civil Procedure 23.09.[6] It is plaintiffs' irreparable harm that the present motion seeks to address. *See Wessin v. Archives Corp.*, 592 N.W.2d 460, 464 (Minn. 1999) (in order to determine whether a claim is derivative, the court looks to the injury, not the theory of recovery). Plaintiffs do not seek injunctive relief on behalf of the corporation.

Defendants' argument that plaintiffs' motion should be stayed while a special litigation committee is appointed "to investigate these claims and decide what action to take" is just another attempt to delay - and deny - plaintiffs the relief necessary to remedy their irreparable harm.

V. PUBLIC POLICY.

Defendants' argument on the *Dahlberg* public policy factor misunderstands the nature of the injunctive relief requested. Defendants argue that "public policy favors denying the temporary injunction because defendant Anderson's actions were not reckless." (*See* Defendants'

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6 Importantly, the recently filed Answer and Counterclaim of Defendant Audi Car Club of North America, Inc. does not assert an affirmative defense based on Minnesota Rule of Civil Procedure 23.09.

Memorandum of Law in Opposition, at p. 24). The requested injunctive relief does not involve a finding of liability or damages against defendant Anderson. Defendants simply miss the point. The public policy at issue, as evidenced by the broad reach of Minnesota Statute § 317A.751 and § 317A.207, is that elected directors shall serve out the terms for which they were elected. The public interest does, and continues to, support the injunctive relief requested by plaintiffs.

VI. INJUNCTIVE RELIEF IMPOSES NO ADMINISTRATIVE BURDEN.

Defendants concede "it is unlikely that an injunction in this case would create an administrative burden." (*See* Defendants' Memorandum of Law in Opposition, at p. 24). Thus, this final *Dahlberg* factor further supports a finding of injunctive relief.

VII. PLAINTIFFS SHOULD NOT BE REQUIRED TO POST A BOND TO COVER DEFENDANTS' COSTS AND DISBURSEMENTS.

The purpose of a bond under Minnesota Rule of Civil Procedure 65.03 is to address the potential harm to the defendants from the injunctive relief granted, not cover defendants' "costs and disbursements of this lawsuit." (*See* Defendants' Memorandum of Law in Opposition, at p. 25). As discussed above, defendants are unable to identify any harm to the Audi Club if injunctive relief is granted. Thus, the Court has the discretion to waive the bond requirement under these circumstances. *See Bio-Lied, Inc. v. Burman*, 404 N.W.2d 318, 321-22 (Minn. Ct. App. 1987); *Little Earth of United Tribes, Inc. v. United States Dept. of HUD*, 584 F. Supp. 1301, 1303 (D. Minn. 1983).

CONCLUSION

For the foregoing reasons, plaintiffs Liechty and Fisher respectfully request that their motion for preliminary injunction be granted in its entirety.

Dated: June 4, 2007.

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