

**THE COURT OF COMMON PLEAS OF  
DAUPHIN COUNTY, PENNSYLVANIA**

**MILTON PURCELL et al,**

**Plaintiffs**

**CIVIL DIVISION**

**v.**

**NO. 2005-CV-0463-EQ**

**MILTON HERSHEY SCHOOL  
ALUMNI ASSOCIATION, JOHN RICE  
AND JERRY WATERS,**

**Defendants**

**DEFENDANTS' RESPONSE TO PLAINTIFFS'  
MOTION FOR SUMMARY JUDGMENT**

Defendants the Milton Hershey Alumni Association (“MHSAA”), John Rice (“Rice”), and Jerry Waters (“Waters”) (collectively “Defendants”) respond to Plaintiffs’ Motion for Summary Judgment pursuant to Pa. R.C.P. 1035.3 as follows:

1. On February 1, 2005, Plaintiffs filed a six (6) count complaint in equity under 15 Pa. C.S.A. §5793, seeking judicial review of certain officer and director elections to the MHSAA Board and related Board decisions that took place on November 19, December 19, and December 26, 2004, and requesting preliminary and permanent injunctive relief.

2. Plaintiffs now seek summary judgment on their complaint, a remedy that should be granted only in very clear cases. *Schaffer v. Larzelere*, 410 Pa. 402, 189 A.2d 267(1963). As is demonstrated *infra*, the instant motion should not be considered by this Court at this time, and if it is, relief should be denied because Plaintiffs cannot demonstrate they are correct on their

positions as matters of law, and further, because significant factual disputes prevent judgment from being entered in their favor.

3. The six counts contained in Plaintiffs' complaint requested the following preliminary and permanent injunctive relief:

- a. Count I – an order enjoining MHSAA to reconvene the meeting of November 14, 2004, and allow Francine Serafin to participate in that meeting in person, by proxy, or by telephone;
- b. Count II - an order enjoining MHSAA to reconvene the meeting of November 14, 2004, and allow Milton Purcell, Ethel Campbell and Graham McIntyre to participate in the November 14 meeting and to vote at that meeting;
- c. Count III - an order enjoining MHSAA to reconvene the meetings of November 14, December 19, and December 26, 2004 and disallow Jerry Waters from participating in those meetings and further disallow Waters from serving on the Board in 2005;
- d. Count IV - an order enjoining MHSAA to reconvene the meeting of November 14, December 19, and December 26, 2004 and allow the emeritus Directors, Plaintiffs Harvey Deitrich, Ralph Fink and Ivan Dietrich to vote and participate in those meetings;
- e. Count V – an order enjoining MHSAA from implementing a resolution enacted at the December 26, 2004 meeting; and
- f. Count VI - an order enjoining MHSAA from allowing the Executive Committee to take any actions until the officers are properly selected by a vote of the Board in which all members of the 2005 Board are permitted to participate.

4. While Plaintiffs request summary judgment in their favor, their motion makes no mention of the issues raised in Counts I, III, V, and VI. Plaintiffs must therefore preliminarily be deemed to have abandoned the claims in those counts, or their motion must be deemed as one only for partial summary judgment.

5. Plaintiffs' motion for summary judgment further does not set forth facts supporting each claim of their complaint, but rather recites a single set of facts to request

summary judgment in their favor with a prayer for relief that Plaintiffs Campbell, Purcell, McIntyre, Dietrich, and Deitrich be permitted to vote on the MHSAA Board until removed or replaced as Directors pursuant to the MHSAA By-laws, and a proposed order that goes beyond any relief ever requested and asks for a declaration that Chapter Representatives of three Chapters and Emeritus Directors be forever allowed to vote in future elections.

6. The facts alleged and the relief requested in Plaintiffs' motion demonstrate that the only issues they seek a decision upon are: a) the right of the MHSAA Board to review Chapter elections; b) the right of Emeritus Directors to vote at MHSAA Board meetings; and c) whether the Honorary Chapter representative can serve as a voting member of the Board.

7. The issues raised by Plaintiffs' motion were in essence already addressed by this Court, after a May 10, 2005 hearing on Plaintiffs' request for preliminary injunctive relief. The issues were addressed by this Court's ruling of June 6, 2005, which ordered new officer elections on June 26, 2005, and which determined as a matter of law that: a) the MHSAA Board did not have the power to review, revise or reject the election of a Chapter representative(s) (i.e. Campbell, Purcell, and McIntyre); b) Emeritus Directors had the right to vote based upon past practice (i.e. Dietrich and Deitrich); and c) the Honorary Chapter representative could vote at Board meetings, based also on past practice (i.e. Campbell).

8. In effect, Plaintiffs seek to have this Court re-enter or affirm its June 6<sup>th</sup> order, but this time in the form of a summary judgment order. The relief is redundant and would impose duplicative judicial burdens on this Court, for no sound reason, and in a manner that in fact can only frustrate ongoing properly pursued judicial proceedings, putting this Court's ruling on a potential collision course with those of the Commonwealth Court.

9. Plaintiffs seek a redundant ruling in the form of the instant summary judgment request even though prior to the May 10, 2005 preliminary injunction hearing this Court informed counsel that it would not allow any discovery, and further that this Court would not consider as relevant Defendants' new matter allegations concerning the unclean hands of Plaintiffs on the issues to be decided on the request for preliminary injunctive relief.

10. On June 13, 2005, Defendants filed a Notice of Appeal from this Court's June 6, 2005 order to the Commonwealth Court of Pennsylvania. Because new officer and several director elections are to be conducted this fall, the Commonwealth Court deemed the matter worthy of *expedited* appellate consideration, setting argument for September 15, 2005, and with briefing now well underway.

**I – RESPONSE IN THE NATURE OF A MOTION TO STAY CONSIDERATION OF  
THE SUMMARY JUDGMENT MOTION**

11. As a matter of course, among the issues to be decided by the Commonwealth Court on Defendants' appeal are the issues previously decided by this Court -- and which are now repackaged here by Plaintiffs, to be decided again in the in the instant motion for summary judgment.

12. On appeal, Defendants have respectfully set forth their position that the decisions rendered by this Court in its June 6th order were in Defendants' view incorrectly decided, and that it is in fact Defendants who were entitled to have had these issues decided in their favor as matters of law. Defendants' appeal arguments respectfully state that at a minimum, if these issues cannot be decided as matters of law in Defendants' favor, then the issues should be remanded back to this Court for discovery, development of the case, and factual determinations.

13. Plaintiffs' request for a redundant and duplicative ruling in the form of the instant summary judgment motion would ask this Court to act in a manner that may procedurally

complicate the pending appeal with an inconsistent order. Worse yet, it may delay the present appeal by entry of another final order -- one that, if against Defendants, would require the filing of a second appeal, potentially delaying the resolution of the issues that need to be decided in time for MHSAA Board elections this fall.

14. Three months ago, Plaintiffs sought to moot their own Complaint by purporting to conduct a “Special Meeting” of the MHSAA membership to vote on the issues before this Court one day before a scheduled hearing. The instant motion is a near cousin, where Plaintiffs are attempting to disrupt the pending appeal before the Commonwealth Court, rather than allowing their case to proceed in the normal course.

15. Apart from the potential procedural complications noted above, if the central issues in this case are to be shortly decided by the Commonwealth Court, then further briefing, argument, consideration, and decision by this Court would be a waste of the parties’ and this Court’s limited and valuable resources, and present a most confusing picture on appeal.

16. Alternatively, as will be explained below, Defendants should be entitled to conduct discovery before any summary judgment motion is decided. Forcing the parties to engage in time intensive and costly discovery and other pre-trial procedures now could potentially be a further waste of resources, because of the potential for a decision from the Commonwealth Court that would make further litigation unnecessary. MHSAA is a nonprofit corporation with limited resources and volunteer Board members, and should not be put to this burden when the case is properly on appeal that may be dispositive.

17. Deference by this Court toward the now imminent review by the Commonwealth Court of the very matters presented here in Plaintiffs’ redundant motion for summary judgment

would serve the best interests of orderly litigation and judicial economy, and would prevent unnecessary taxing of the parties' and this Court's limited and valuable resources.

WHEREFORE, Defendants respectfully ask this Court to stay consideration of Plaintiffs' motion for summary judgment in deference to the Commonwealth Court and until disposition by the Commonwealth Court of its expedited review.

**II – ALTERNATIVELY, SUMMARY JUDGMENT SHOULD BE DENIED ON THE ISSUE OF THE BOARD'S RIGHT TO REVIEW CHAPTER ELECTIONS**

18. Plaintiffs argue that nothing in the MHSAA By-laws or relevant statutes permitted review of the Homestead, Honorary and Washington D.C. Chapter elections by the MHSAA Board, even for disputed election irregularities, and therefore that the votes of these Chapters should have been allowed at the November 14, 2004 meeting. Summary judgment must be denied on the basis of relevant law, and because factual issues exist on whether elections were conducted at all.

19. Plaintiffs are incorrect in asserting that no authority exists in the MHSAA By-laws to review chapter elections. To the contrary, the By-laws of the MHSAA and for each chapter establish authority in the Board to review elections:

- a. The MHSAA Board possesses the sole authority to approve a chapter, their organizational procedures, and to set their territories. MHSAA By-Laws Article X, Sec. 1;
- b. MHSAA By-laws provide each chapter must elect officers in accord with regulations set forth by the MHSAA Board. MHSAA By-Laws Article X, Sec. 9;
- c. MHSAA By-laws provide the affairs of the Association, including bylaws and policies and control of Association property are vested in the Board. MHSAA By-laws Article IV, Sec. 1;
- d. The bylaws for the Honorary, Washington D.C., and Homestead Chapters each provide for "election" of a chapter representative. May 10, 2005

Plaintiffs' Hearing Exhibit 5 at Article IV, Sec. 1, Article V, Sec. 2, Exhibit 6 at Article IV, and Exhibit 7 at Article IV, respectively;

- e. The charter granted to each chapter provides that each pledges to "conform to the Association Charter, by-laws, and regulations of the Board of Directors as now exist or hereafter amended." May 10, 2005 Plaintiffs' Exhibit 8.

20. Applicable statutes also provide for regulation of chapters by nonprofit corporations such as MHSAA. Under 15 Pa. C.S.A. §5511, nonprofit corporations may establish and terminate chapters regardless of their designation, form of government, status or relationship to the corporation.

21. As a matter of law, based upon applicable by-laws and statute, Plaintiffs are incorrect in asserting that the MHSAA Board does not possess the authority to review election irregularities of its member chapters.

22. Assuming arguendo that this Court disagrees that sufficient authority exists to permit review by the MHSAA Board of chapter elections, summary judgment must still be denied to the Plaintiffs based upon significant factual issues that underlie this issue in this case.

23. Attached hereto are the affidavits of John Rice, former President and current Past President of MHSAA, and member of the Homestead Chapter of MHSAA, Christopher Ortiz, a member of the Washington, D.C. Chapter of MHSAA, and Rodney E. McGlaughlin, member of the "Honorary Chapter" of MHSAA as Exhibits A, B, and C, respectively.

24. As can be seen from these attached affidavits, the occurrences at each of the Homestead, Honorary, and Washington D.C. chapters describe not simply election irregularities, but instead, that in fact *no* elections were conducted at all in any of three chapters prior to the November 14, 2004 meeting.

25. If these facts are ultimately accepted as true, then the question here is not the conduct of these elections, or whether one election process is better than another, but rather whether chapters may discriminately appoint representatives to the Board without election at all. In this case, the MHSAA By-laws on their face preclude seating these purported representatives because the MHSAA By-laws require that each chapter “*elect*” a member to the Board. MHSAA By-laws Article X, Sec. 9.

26. The Plaintiffs also urge that the Homestead and Honorary Chapters be allowed to vote because the Board purportedly unanimously restored their voting rights for 2005. The Plaintiffs rely principally upon the affidavit provided by Robert Heist, where he states “By a unanimous vote, the Board adopted motions permitting the Emeritus Directors, and the Homestead and Honorary Chapter representatives to vote in the future...” Heist Aff. At ¶20.

27. The Plaintiffs, and in particular the Heist affidavit, are factually at variance with minutes of the Board. At a minimum, this create a factual issue on this contention and prevents, for purposes of their motion, this Court from deciding this issue at this time.

28. The December 19, 2004 Board minutes reflect that: a) by a split vote of 14-8-1, the status of only two of the three Emeritus Directors, Harvey Deitrich and Ivan Dietrich, were restored, and *only* for 2004; b) the Board refused to overturn its action concerning the Homestead Chapter’s failure to conduct a 2005 Chapter Representative election prior to the 2005 officer elections; and, c) by a vote of 23-1, the Honorary Chapter was restored to vote upon 2005 matters from December 19, 2004 forward, but *without expanding any powers that do not exist in the Bylaws*. May 10, 2005 Plaintiffs Hearing Exhibit 3. See Rice Aff. At ¶¶19-22. Plaintiffs’ Complaint has ripened the contest of whether such vote is proper under the By-Laws.

29. The December 19, 2004 minutes, standing alone, contradict Plaintiffs' assertions and the Heist affidavit in several respects: all votes were *not* unanimous; Homestead's vote was *not* restored for the 2005 officer elections; the right of the Honorary Chapter to vote from December 19, 2004 forward on 2005 matters was still recognized *if and only if* permitted under the Bylaws; and only two of the three Emeritus Directors were purportedly restored, but only for 2004 matters, which would not include election of 2005 officers.

30. Not a single one of the factual assertions made by Plaintiffs even approaches the standard necessary for a grant of summary judgment. Plaintiffs and the Heist affidavit therefore contradict and create factual issues as to the Board's consideration and treatment of the Homestead and Honorary Chapters and the two Emeritus Directors. This should prevent this Court from granting summary judgment to Plaintiffs on the issue of voting rights for 2005 officers. Heist's affidavit is also full of conclusions of law rather than facts.

WHEREFORE, Defendants respectfully request that Plaintiffs' motion for summary judgment on the right of the MHSAA Board to review chapter elections, and on the right of the Emeritus Directors and of the Homestead, Washington, D.C. and Honorary Chapter Representatives to vote for 2005 officers be denied.

**III - ALTERNATIVELY, SUMMARY JUDGMENT SHOULD BE DENIED ON THE  
ISSUE OF THE EMERITUS DIRECTORS' RIGHTS TO VOTE AT MHSAA BOARD  
MEETINGS**

31. Plaintiffs argue that the non-profit corporation statute provision at 15 Pa. C.S.A. §5724 requires that Emeritus Directors Harvey Deitrich and Ivan Dietrich be allowed to vote because there have been no successors selected or qualified to succeed them. Plaintiffs also urge this Court to look to prior conduct and practice of the Board to clarify any ambiguity in the Bylaws and to permit a finding that these directors have a right to vote on the Board.

32. Plaintiffs are incorrect as a matter of law under 15 Pa. C.S.A. §5724, because that statute explicitly limits directors to one-year terms where no term is stated in the bylaws. Emeritus Directors Dietrich and Deitrich were appointed Emeritus Directors in 1998 and 1997, respectively. May 10, 2004 Hearing, Defendant Exhibit 1. Mr. Fink is now deceased.

33. Further, the clear intent under Section 5724 is not to create lifetime appointments. Plaintiffs' assertion runs afoul of this obvious intent.

34. The Plaintiffs' suggestion that these directors are to remain because they have not been succeeded again runs afoul of the obvious intent of Section 5724, because the MHSAA By-laws do not provide for succession of these directors. Plaintiffs admit that the "Board has never deemed one such Director to be replaced by another." Plaintiffs Brief in Support of Summary Judgment at p.15. This statement undercuts the only conceivable argument Plaintiffs might have tried to fashion to get around Section 5724 and thus is fatal to Plaintiffs' summary judgment request.

35. As a matter of law, Plaintiffs also are not entitled to summary judgment because the MHSAA By-laws, as of 1999, eliminated the Board's authority to appoint Emeritus Directors. May 10, 2005, Plaintiff Hearing Exhibit 11. Cf. May 10, 2005, Defendant Hearing Exhibit 4, at Art. IV, Sec. 7.

36. To the extent Plaintiffs suggest the bylaws are ambiguous and seek summary judgment nonetheless, the Court may not grant summary judgment, since significant factual questions or inconsistencies exist. For instance:

- a. While permitted under the 1994 bylaws, the current bylaws do not provide for Emeritus Director appointments. May 10, 2005, Plaintiff Hearing Exhibit 1. Plaintiffs offer no evidence in support of their motion to explain this change or the obvious inconsistency with their position which, under reasonable inference, suggests these positions expired and may not currently vote.

- b. No Emeritus Director has ever been succeeded by another member. Plaintiffs' Brief in Support of Summary Judgment at p.15. Nonetheless, Plaintiffs do not explain how this fact is consistent with Section 5724 which assumes succession for continuing terms.
- c. In reliance upon past practice for summary judgment, Plaintiffs argue that the Board never questioned an Emeritus Director's right to vote until Rice's announcement on December 19, 2004. Yet, preliminary hearing testimony was that over the years there was an understanding that only two of the three Emeritus Directors could vote, but that the bylaws were never consulted. May 10, 2005, Hearing transcript at pp. 57-58. Therefore, past practice only establishes complete ignorance of bylaws and not past practice thought to be in accord with their intent.
- d. Mr. Weller testified preliminarily that the question of an Emeritus Director's right to vote was never questioned, this was never an issue, and there was no discussion on this issue. May 10, 2005, Hearing transcript at pgs. 39-40. Again, this testimony establishes complete ignorance of bylaws and not past practice thought to be in accord with their intent.
- e. Although Emeritus Directors were eliminated from Board positions under the current bylaws, a single reference to Emeritus Directors remains under Article V, Sec. 2, regarding officers rights to vote, and possibly now referring merely to the Past President, an emeritus director. If Plaintiffs are correct that an ambiguity must be resolved in their favor, they do not explain this inconsistency.

WHEREFORE, the defendants respectfully request that the Plaintiffs' Motion for Summary Judgment on the issue of the Emeritus Directors' right to vote be denied.

**IV - ALTERNATIVELY, SUMMARY JUDGMENT SHOULD BE DENIED ON THE  
ISSUE OF THE HONORARY CHAPTER'S RIGHT TO HOLD AN ELECTED BOARD  
POSITION**

37. Plaintiffs present three arguments in support of their claimed right to summary judgment that the Honorary Chapter representative to the Board can vote as a member of the Board of Directors: First, the Honorary Chapter is a legitimate chapter under MHSAA bylaws. Second, approval cannot be withdrawn by fiat of the President. And third, ambiguity under the bylaws must be resolved in their favor. Plaintiffs are wrong legally and factually.

38. Article IV, Sec. 3 of the MHSAA Bylaws provides “any *active* member of the Association shall be eligible to be a member of the Board of Directors...” (Emphasis added). “Active” members are defined as those persons who, *inter alia*, received a Milton Hershey School high school diploma or official Milton Hershey School certificate of attendance and achievement. MHSAA By-laws, Article II, Sec. 2.

39. Honorary members by definition are persons who do not qualify as “active” members. *See*, MHSAA By-laws, Article II, Sec. 3.

40. Since Honorary members are not active members of the Association, they cannot serve as members of the Board of Directors. This is entirely consistent with the disputed bylaw provision here at Article II, Sec. 3, which provides “Honorary members have all voting privileges but may not hold elected Board positions.” The voting privileges to which this provision refers is that contained at Article IV, Sec. 3 which provides that Honorary members, like active members, are entitled to vote for Board Directors at large. This however does not include voting as an active member of an elected Board of Directors.

41. Regardless of whether the Honorary Chapter is properly constituted or properly recognized by the Board, it is not entitled to have an elected representative to the MHSAA Board. The Plaintiffs’ argument that the Honorary Chapter is entitled to have a member vote on the Board of Directors because the chapter was recognized by the Board is therefore irrelevant to the question presented.

42. Likewise, the Plaintiffs’ argument that the Honorary Chapter’s charter cannot be revoked by Presidential fiat is irrelevant as well, since the controlling issue is not whether it can exist as a chapter, but whether it may have a voting representative on the Board, a very different matter.

43. To the extent the resolution of this question depends upon resolving any ambiguity in the bylaws, Plaintiffs are not entitled to summary judgment without further proceedings.

44. While the bylaws are clear that Honorary members may not hold “elected Board positions,” Plaintiffs rely upon the affidavit of Michael Weller, a former Executive Director of MHSAA, to contradict this unambiguous language, claiming from his knowledge that this provision was drafted to give Honorary members elected Board membership. An examination of the Weller affidavit establishes that his testimony is not relevant or admissible on this point, and does not explain away other factual inconsistencies.

45. When the MHSAA Board voted to recognize an Honorary Chapter in 1998, it was with an express reservation that the chapter would be recognized, but would have no vote at Board meetings until the bylaws could be clarified. May 10, 2005 Hearing, Plaintiffs’ Exhibit 9. When the Board Executive Committee met prior to the Board vote, it came to the same recommendation. May 10, 2005 Hearing, Defendants’ Exhibit 7. At the time of chapter approval, it was therefore clear both within the Board’s Executive Committee and Board of Directors that the newly created Honorary Chapter could not vote.

46. When the bylaws were revised they provided clearly that Honorary members could not hold “elected Board positions.” This language is quite consistent with the Executive Committee’s and the Board’s earlier sentiment to grant membership, but without Board voting rights. In other words, the “clarification” changed the MHSAA 70-year practice in order to allow Honorary Members to *vote* in MHSAA elections, while *retaining* the prohibition on Honorary Members’ “hold[ing] elected Board positions,” just as is stated.

47. Mr. Weller's affidavit flatly contradicts the earlier sentiments of the Executive Committee and Board. Moreover, the affidavit provides no explanation whatsoever of this puzzling change of heart by the very persons who considered and voted upon the 1999 bylaw provision providing that Honorary members could *not* hold "elected Board positions." Mr. Weller's testimony creates a factual dispute over language that on its face does not support the construction Mr. Weller would ascribe to this language.

48. Further, it appears that Mr. Weller's affidavit does not provide admissible evidence for this Court to consider. Mr. Weller was a former Executive Director of the Association, but never a voting member of the Board with authority to vote on matters before the Board. *See* May 10, 2005 Transcript at p. 37. In fact, Mr. Weller was listed as a "guest" at the Executive Committee and Board meetings wherein the Honorary Chapter was considered. May 10, 2005, Hearing Plaintiff Exhibit 9, Defendant Exhibit 7. Rice Aff. ¶24.

49. Mr. Weller admits in his affidavit that he prepared the first proposed revision to the bylaws which provided that Honorary members "may not hold Board positions." May 10, 2005, Hearing Plaintiff Exhibit 10. While he states that "subsequent" versions provided that Honorary members may not hold "elected Board positions" (Affidavit at ¶5), he is careful not to claim to have been the author of this revision. *See* May 10, 2005, Hearing Plaintiff Exhibit 11.

50. Mr. Weller does not in his affidavit claim that he was present during any Board deliberations that voted upon this bylaw provision, he does not relate any Board deliberations that could help explain the Board's intentions, and he does not offer any testimony that he had authority to speak for the Board as to its intent when this provision was considered and adopted.

51. As such, Mr. Weller's affidavit is without foundation on whether he is even in a position to relate the Board's intent when this provision was considered and adopted. He lacks

personal knowledge as to the intent of the scrivener who drafted the final language of this provision and as to the Board's deliberations and intent when this provision was adopted. His testimony is therefore inadmissible. *See* Pa. R.E. 602, and *Liles v. Balmer*, 567 A.2d 691, 692 (*Super. Ct. 1989*)(*only admissible evidence may be considered on a motion for summary judgment*). If admissible, then defendants themselves would call Weller to testify in a full proceeding in much greater detail, as they were surprised by his testimony at the preliminary hearing.

52. Nor may any prior practice or course of conduct be used to support the grant of summary judgment in Plaintiffs' favor. The preliminary testimony thus far at best has only established that if Honorary members were allowed to vote that this was done in complete ignorance of any bylaw provisions. No one ever looked at the bylaws, raised any issue on Honorary members voting, or asked about the intent of the provision that is in dispute here. *See* May 10, 2005 Hearing Transcript at p. 39-40. Prior practice in ignorance of the bylaws in this case therefore has no bearing on intent.

53. The bylaw provision here which provides that Honorary members "may not hold elected Board positions" is not ambiguous. As such, this Court may not seek out a strained intent and overlook the plain meaning of this language. *Steuart v. McChesney*, 498 Pa. 45, 444 A.2d 659 (1982). If any ambiguity does exist, Plaintiffs are not entitled to summary judgment anyway because many factual questions would then surround the intent of this provision.

WHEREFORE, Defendants respectfully request that Plaintiffs' Motion for Summary Judgment on the issue of Honorary members being allowed to vote as Board members be denied.

**V – DEFENDANTS’ RESPONSE TO PLAINTIFFS’ MOTION FOR SUMMARY  
JUDGMENT UNDER PA. R.C.P. 1035.3(B)**

54. Pa. R.C.P. 1035.3(b) provides that in defense of a summary judgment motion, an adverse party may supplement the record or set forth reasons why they cannot present evidence essential to justify opposition to a summary judgment motion and any proposed action to be taken to present such evidence

55. As stated above, this Court did not allow discovery prior to the May 10, 2005 hearing on Plaintiffs’ request for a preliminary injunction. Subsequent to that date, the Court issued its decision, on June 6, 2005. An appeal of this decision was taken by Defendants on June 13, 2005. Briefing before the Commonwealth Court has already commenced, with argument ordered on an expedited basis for September 15, 2005, and with the potential to resolve this case *in toto* at that point. No meaningful opportunity for discovery has been presented; and as explained in **I** above, the parties’ resources are not well spent conducting extensive discovery at this time, prior to resolution of a potentially dispositive *expedited* appeal with issues of law directly before the Commonwealth Court.

56. Defendants have alleged as an affirmative defense to Plaintiffs’ equity complaint that Plaintiffs’ do not have clean hands in this action, and therefore, that equitable relief should be denied to them.

57. If allowed to proceed, Defendants would conduct discovery which they believe will establish at least the following:

(a) Plaintiffs violated MHSAA election rules for at large members with an unauthorized misleading mass mailing to the Alumni Association membership;

(b) Plaintiffs utilized the MHSAA database membership list, a proprietary and valuable asset of MHSAA, without permission of

MHSAA, to further their attempted takeover of MHSAA while acting for parties adverse to MHSAA;

(c) Plaintiffs were instrumental in causing Chapters, or purported Chapters, to fail to hold fair elections, or any elections at all for Chapter Representative, so as to defeat the will of Chapter members, making up rules to fit their pre-determined result;

(d) Plaintiffs have used threats of financial and physical harm to defendants, MHSAA members, and other members of the MHSAA Board in an attempt to obtain the relief requested in their Complaint, and including personally naming Waters and Rice defendants for no reason apparent from their Complaint other than to intimidate;

(e) Plaintiffs have coordinated with MHS on matters adverse to MHSAA to allow MHS to take punitive actions against MHSAA and to create Alumni dissension, such as causing MHS contractors to sponsor a Hershey-located Homestead Chapter event instead of an MHSAA event, to deny access to the Homestead for MHSAA Board meetings, to terminate relations with MHSAA (and refusing to reinstate them unless certain of plaintiffs' demands were met), and to evict MHSAA from MHS Trust property, all in furtherance of their pursuit of a takeover MHSAA;

(f) Plaintiffs seek in this action to have the Court increase the number of directors over that provided in the Bylaws merely so that they can gain control of MHSAA, and accede to the desires of MHS, which is the employer of three plaintiffs (one of whom obtained his position shortly after this Court ruled in Plaintiffs' favor, and who Defendants will show has concealed his ongoing job pursuit all the time that he was acting for MHS and harming MHSAA), and the purchaser, or prospective purchaser, of goods or services from two other plaintiffs, or their relatives, all of which was intended to render MHSAA powerless in pursuing MHSAA purposes of independence, vigilance toward the Deed of Trust, and structural reform of the MHS Trust through litigation;

(g) Plaintiffs are in many cases hopelessly burdened with conflicts that compromise their ability to exercise their fiduciary duty, whereas the non-plaintiff directors have no such conflicts; and

(h) Plaintiffs who seek to have their votes counted for 2005 Board officers for the Honorary, Homestead, and Washington, D.C. Chapters were all involved in devising actions that resulted in their appointments to the Board without elections being held at all.

58. Even while these proceedings have progressed, Plaintiffs have demonstrated bad faith and unclean hands which should deny them any equitable relief. Specifically, and as more specifically detailed in Defendants' Motion to Vacate, Amend, or Stay the Preliminary Injunction (now pending before this Court and incorporated herein by reference), Plaintiffs have misrepresented their true intentions on the relief they seek. Incredibly, at the June 26th court-ordered election, Plaintiffs nominated and voted for persons *other than those represented in their sworn pleadings to this Court*, and have violated the May 25th Order of this Court prohibiting them from increasing the number of Board members until the next elections to be conducted under the MHSAA bylaws. This Motion has yet to be heard by this Court.

59. To present the unclean evidence described above, Defendants at a minimum would intend to depose many of the Plaintiffs, third parties with knowledge of Plaintiffs' glaring financial interests, certain key employees at the Milton Hershey School, and former Board members and/or employees.

60. In the event that the issues raised by Plaintiffs cannot be decided in Defendants' favor as matters of law as a result of the pending Commonwealth Court appeal, Defendants would additionally intend, at a minimum, to depose: (a) former Board and committee members regarding changes to the MHSAA bylaws; (b) members present during the contested Chapter elections consistent with the attached affidavits; and (c) members knowledgeable of bylaw changes in 1999 with respect to the status of Emeritus Directors.

WHEREFORE, Defendants respectfully request that this Court stay Plaintiffs' Motion for Summary Judgment in deference to the ongoing expedited Commonwealth Court review, or deny it, on the grounds stated in I through IV above, or that this Court deny Plaintiffs' motion pursuant to Pa. R.C.P. 1035.3(b).

Dated: August 12, 2005

Respectfully submitted,

**MILTON HERSHEY SCHOOL ALUMNI ASSOCIATION, JOHN RICE, AND JERRY WATERS**

By:

\_\_\_\_\_  
VICTOR P. STABILE, ESQUIRE  
Attorney I.D. No. 37449  
Dilworth Paxson LLP  
112 Market Street, Suite 800  
Harrisburg, PA 17101  
Tel.: 717-236-4812  
Fax: 717-236-7811

JOHN W. SCHMEHL, ESQUIRE  
Attorney I.D. No. 27888  
Dilworth Paxson LLP  
1735 Market Street, Suite 3200  
Philadelphia, PA 19103  
Tel.: 215-575-7201  
Fax: 215-575-7200

F. FREDERIC FOUAD, ESQUIRE  
230 Park Avenue, Suite 625  
New York, NY 10169  
Tel.: 212-687-8534  
Fax: 212-687-8535