

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

MILTON PURCELL et al,

PLAINTIFFS

v.

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

DEFENDANTS

CIVIL DIVISION

NO. 2005-CV-0463-EQ

**AMENDED MOTION FOR
PRELIMINARY INJUNCTION**

**DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS'
AMENDED MOTION FOR PRELIMINARY INJUNCTION**

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I. Introduction

Plaintiffs' action, brought pursuant to 15 Pa.C.S.A. §5793, arises from a series of decisions taken by the Officers and Directors of the Milton Hershey School Alumni Association (MSHAA) during meetings held on November 14, December 19, and December 26, 2004. These decisions, concerning the eligibility and qualification of certain individuals to be voting members of the MHSAA Board, were all fully within the bounds of Pennsylvania law and in compliance with the MSHAA By-Laws (the "Bylaws").

Plaintiffs' action is constructed on weak legal arguments, in some cases plainly admitted, while nonetheless seeking dramatic injunctive relief and affirmative action by this Court, and an abrupt sweeping aside of virtually all of MHSAA's current leadership, in a way that would jarringly disrupt MHSAA's ongoing business. Plaintiffs fail to articulate even a scintilla of the irreparable harm necessary to sustain their injunctive request, but on the contrary, grave harm would be caused to MHSAA if plaintiffs' requested relief were granted.

Plaintiffs' action is no more than a long-shot effort to complete a powerplay earlier initiated by them, in the hopes of allowing a small, and in some cases financially interested, faction of alumni to seize control of MHSAA's Board, and to thereby radically alter MHSAA's policies in a way that contravenes alumni wishes but brings personal rewards to certain plaintiffs. Having thus far failed to get their way through rule violations, election misconduct, and rank intimidation and bullying, plaintiffs now take their exertions to this judicial venue, in the hopes of better luck. That plaintiffs rejected all reasonable compromise offers while engaging in acts that establish unclean hands, and nonetheless haul MHSAA into court here to resolve publicly disputes that ought to have been resolved internally with discretion and decorum, only underscores the lack of equity in plaintiffs' request for an injunction, whose very averments in their Complaint are rife with error that more careful review would have revealed prior to filing.

When examined carefully, however, the alleged “misconduct” of the MHSAA Board on which plaintiffs construct the edifice of their legal claims collapses out from under them, leaving only the question of why these arguments were ever even presented here. Rather than demonstrating that plaintiffs are likely to prevail on the merits and that irreparable harm will flow from a denial of their injunctive request, examination of plaintiffs’ claims and their related conduct shows that plaintiffs’ claims are baseless, and that any irreparable harm that might occur here would be only as a result of granting this group the control that they have sought to wrest from MHSAA’s duly-elected leaders.

II. Background

Evaluation of the plaintiffs’ request for injunctive relief requires examination of the background surrounding this case. This includes the evolution of MHSAA as a service provider and corporate entity.

MHSAA, established at the direction of Milton S. Hershey, is a non-profit corporation with over 5,500 members, primarily alumni of the Milton Hershey School (hereinafter the “School”), and a handful of honorary and associate members who are not alumni of the School. Since its formation, MHSAA has grown to embrace and advance the child-saving mission of Milton and Catherine Hershey, the founders of the School. Over time, MHSAA took on responsibilities that included the creation of service programs for the School’s children and young graduates, while emerging as a meaningful and credible voice in matters concerning the School and the Deed of Trust. MHSAA thus came to monitor on behalf of alumni whether the major actions of the School were consistent with the Hersheys’ Deed of Trust.

One of the first instances where MHSAA began influencing School matters came in the early 1990s when MHSAA fought to preserve the School’s vocational educational program,

which the School intended to disband. This represented a dramatic break with MHSAA's past as a mere passive supporter of virtually every action taken by the School.

Then, in 1999, MHSAA succeeded in convincing the Orphans' Court to deny the joint request by the School and Office of the Attorney General of Pennsylvania ("OAG") to divert over 1,000 acres of the School's land to non-child use. Thereafter, MHSAA successfully persuaded the OAG to investigate alleged departures from the Hershey's Deed of Trust and related School governance flaws. As a result of this investigation, the OAG commenced negotiations in 2001 of structural reforms sought by MHSAA. Most recently, MHSAA succeeded in obtaining a Commonwealth Court decision granting MHSAA standing to present evidence and arguments for reinstatement of a historic reform agreement entered between the OAG and the School on July 31, 2002 (the "Reform Agreement"), that was later rescinded.

The expanded influence of MHSAA has led to internal struggles among alumni and Directors over control of the Board, particularly as the School has sought to use its vast resources to install Directors that it can control. This has implicated the MHSAA Bylaws, conflicts of interest, and MHSAA rules and procedures. It is for this reason that the Bylaws should be closely followed, as it represents the only "contract" among Alumni Association members by which to resolve these issues. The matter before this Court is an extension of efforts by the School Administration, the Hershey Trust Company Board of Directors, and the School Board of Managers (collectively "MHS") to take control of and pacify the MHSAA Board. They seek such control and pacification in order to compromise efforts by MHSAA to enforce the structural reforms agreed to by the School, but later rescinded, and to thereby avoid a public hearing regarding the Reform Agreement. Germane to the analysis here, MHS is using MHS Directors

and would-be Directors in its actions, thus leading to conflicts of interest for such persons, as described below.

Plaintiffs, and those working with plaintiffs, have organized opposition to MHSAA reform efforts. Their views are a minority voice, albeit a loud one. By and through this lawsuit, plaintiffs seek to make inappropriate additions to the Board of persons who are not supportive of MHSAA's Reform Agreement efforts, and to remove properly elected Officers and Directors who are supportive of these efforts.

In their motion for injunctive relief, plaintiffs seek the following:

- (a) "To reverse and vacate the actions taken at the meetings of the Board of Directors held on November 14, 2004, December 19, 2004 and December 26, 2004."
- (b) "To restore to the Board those who were members of the Board as of the beginning of the November 14 meeting;" and
- (c) To enjoin MHSAA "[f]rom conducting anything other than routine Board business, which business shall not include implementation of the Resolutions purportedly passed at the meeting of December 26, 2005 [sic]."

Plaintiff's contentions in the instant lawsuit and Motion for Injunctive Relief are unfounded and must fail as a matter of law. The actions taken during the meetings held on November 14, December 19, and December 26, 2004 were all well within the bounds of Pennsylvania law and the MHSAA Bylaws, and were eminently reasonable under the relevant circumstances.

III. Legal Argument

A. Standards for Preliminary Injunction that must be satisfied.

For a preliminary injunction to be granted the movant must show: (1) that the injunction is necessary to prevent immediate and irreparable harm that could not be compensated by damages; (2) that greater injury would result from refusing the injunction than by granting it; (3) that the injunction restores the parties to the status quo that existed immediately before the

alleged wrong; (4) that the wrong is manifest and the injunction is reasonably suited to abate it; and (5) the applicant's right to relief is clear. City of Philadelphia v. District Council 33, 528 Pa. 355, 598 A.2d 256 (1991). To establish a clear right to relief, the applicant must show that it is likely to succeed on the merits. Id. Plaintiffs set forth similar prerequisites for injunctive relief in their moving papers, but add that they must prove a "strong" likelihood of success on the merits.

B. Plaintiffs will suffer no immediate or irreparable harm and no greater injury could result by refusing to grant injunctive relief. Moreover, a retroactive *status quo* is inappropriate and unattainable.

Plaintiffs' preliminary injunction motion summarily alleges that the defendants will continue to carry out policies which are inconsistent with the wishes of the majority of the members of MHSAA in a conclusory manner, entirely failing to identify even a single example of such a policy, let alone one that would justify the dramatic remedy of a preliminary injunction that would in effect shut down the Association's business. This failure to identify any such policy, standing alone, is dispositive because it makes plain that plaintiffs cannot establish any immediate or irreparable harm whatsoever. What irreparable harm from what immediate action?

There is nothing irreparable that would occur if the duly-elected 2005 Board as determined by the Association is allowed to conduct business. The Association conducts annual elections of at least four at large members, which will occur again in September 2005. Officers are reelected in November of each year for the following year. Any supposed will of the majority will express itself in this next cycle of elections. Moreover, absent this litigation, eight of the plaintiffs (as well as Francine Serafin, whom plaintiffs claim supports them) are current voting members of the 2005 MHSAA Board, seven of whom will be on the 2006 MHSAA Board and eligible to vote for the next slate of officers.

In addition, a retroactive status quo as requested by plaintiffs is unattainable. It would be inappropriate to bring back the entire 2004 MHSAA Board, which is the last time there was no obvious conflict between the parties on the instant Officer/Director question, and to reverse every single decision made at three Board meetings. The conflict began in September 2004 with the election at large of four 2005 Board members under circumstances where MHSAA rules were violated by plaintiffs. Any selective date for a return to *status quo*, other than freezing the 2005 Board at its current make-up, would be arbitrary and unfairly disadvantage MHSAA, which has acted in good faith at all times in interpreting its Bylaws and determining eligible Board members and the results of elections. The requested return to the *status quo* evidently seeks to return persons to the Board who have completed as of December 31, 2004 their full three-year or one-year terms, as the case may be, and to add to the Board four individuals (Deitrich, Fink, Dietrich and Campbell) who have no right to serve on the Board from a plain reading of the Bylaws.

It is impossible to interpret plaintiffs' request to reinstate the MHSAA Board as of the beginning of the November 14, 2004 meeting. The use of such date still leaves unresolved who were proper members of that Board or the 2005 Board as of that date and would disregard all officer elections for 2005. Only 2005 Board members can vote for 2005 officers. The requested relief would only move the dispute to a different day, and leaves judgments to be made by MHSAA. MHSAA has concluded that under its Bylaws, plaintiffs Campbell, Fink, Deitrich, and Dietrich were not valid members of the Board as of November 14, 2004, and that McIntyre and Purcell were not members of the 2005 Board as of that date.

- C. Plaintiffs have an adequate remedy at law, whereby the Court could find in plaintiffs' favor after a full and fair hearing with proper notice to all affected parties, as provided by the statute, so that the retroactive affirmative relief requested by plaintiffs is inappropriate.**

Plaintiffs have an adequate remedy at law pursuant to Pennsylvania statute, which should be allowed to take its course without affirmative retroactive relief. The plaintiffs have brought their complaint pursuant to 15 Pa.C.S.A. §5793, titled “Review of contested corporate action.” The procedure set forth in this statute makes it clear that preliminary relief of the type requested by plaintiffs is inappropriate. The statute requires the court to “hear and determine the validity of such [contested] corporate action.” 15 Pa.C.S.A. §5793(a). It is only after “[i]t is determined that no valid corporate action has been taken,” that “the court may order a meeting to be held in accordance with section 5792 (relating to proceedings prior to corporate action).” 15 Pa.C.S.A. §5793(b). “The court shall provide for notice of the pendency of the proceedings under this section to all persons affected thereby.” *Id.* If all plaintiffs are affected by the corporate action as alleged, then all other MHSAA Board members are similarly affected and each should receive proper notice.¹

If plaintiffs’ preliminary relief were granted, all other MHSAA board members would be deprived of their statutory rights. This statutory scheme is such that a full and complete hearing with all affected parties is contemplated before any affirmative relief can be considered, recognizing that these issues are very fact intensive and should not be made as snap judgments as sought by plaintiffs here. Plaintiffs ask this Court to place certain people on the MHSAA Board,

¹ Plaintiffs have personally named Waters and Rice as defendants, in addition to the Association. There is no statutory authority for naming these individuals as party defendants (as opposed to providing them with notice of the proceeding), as the plaintiffs seek review of only “corporate action,” and there is no allegation that Waters or Rice acted outside their authority. Moreover, Waters and Rice are protected from liability under Pennsylvania’s business judgment rule. Cuker v. Mikaloukas, 547 Pa. 600, 692 A.2d 1042 (1997) (rule insulates an officer or director of a corporation from liability for a decision made in good faith if he is not interested in the subject of the business judgment, is informed with respect to the subject matter to the extent he reasonably believes it is appropriate under the circumstances, and rationally believes that the business judgment is in the best interest of the corporation).

remove others, reinstate others, overturn officer elections, contravene Bylaws, reverse every decision made at three Board meetings, and after all that, enjoin this new/old Board from conducting any business. The request is preposterous. Injunctions in cases such as this would serve to cripple organizations from conducting business during the entire time the injunction is in place. Such obstruction and complete overhaul of a nonprofit entity's Board of Directors are clearly not contemplated by the statute as being determinable by preliminary injunction.

Moreover, the language and meaning of the proposed relief is unclear, vague, overbroad and inappropriate. To the extent that plaintiffs would be entitled to any relief, it should only be after a full and fair trial on each discreet issue, taking all the evidence in its proper context. Only after such a careful review should the court consider taking the extreme remedy of reversing any action of a nonprofit board of directors acting in good faith with no alleged financial interest or conflict in any of the decisions reached. See In re Lord's New Church, 817 A.2d 559 (Pa. Cmwlth. 2003); aff'd in part and rev'd in part, 826 A.2d 863 (Pa. 2003) (Commonwealth Court quoted with approval the Montgomery County Orphans' Court as regarding any "judicial supervision of the corporation's affairs," as a "drastic remedy;" trial court entered a preliminary order preserving the *status quo* prospectively only).

D. There is no clear right to relief and manifest injustice will only occur if plaintiffs' relief is granted.

Contrary to the assertion of plaintiffs of a high probability of success, they have nearly no probability of success when the issues are analyzed in connection with the Association's Bylaws and Pennsylvania law. Here, plaintiffs are asking this Honorable Court to disregard the longstanding MHSAA Bylaws by creating additional Directors out of whole cloth and preventing properly elected Directors and Officers from serving their terms. They also seemingly argue that the past course of dealing by MHSAA Directors and Officers somehow overrides the Bylaws.

This argument is misplaced and must fail. Plaintiffs lack any clear right to relief that would be sufficient to grant a preliminary injunction.

It is well settled Pennsylvania law that bylaws are presumed to be valid and enforceable in accordance with their terms and the courts do not scrutinize their terms for the purpose of making them void, nor hold them invalid even if every particular reason for them does not appear. Dugan v. Firemen's Pension Fund of Philadelphia, 372 Pa. 429, 94 A.2d 353 (1953); Hibernia Fire Engine v. Commonwealth ex re. George Harrison, 93 Pa. 264 (1880).

Before a bylaw of a corporation may be declared invalid for unreasonableness, the fact that it is unreasonable must clearly appear and the court ordinarily will not substitute its judgment for the judgment of those who are authorized to adopt the bylaws. Stewart v. Monongaghela Val. Country Club, 177 Pa. Super. 632, 112 A.2d 444 (1955) (bylaws requiring ownership of stock as a condition precedent to right to vote and participate in management of the company were not invalid as conflicting with the nonprofit corporation law or as being unreasonable).

Here, plaintiffs ask that this Court blindly disregard the clear and unambiguous Bylaws which were properly promulgated and duly approved by the MHSAA Board. Plaintiffs do not as much as mention that the Bylaws are invalid or unreasonable. Accordingly, this Court must enforce the Bylaws as written. Defendants submit that in interpreting such Bylaws, this Honorable Court must construe the same within the four corners of the document.

For instance, in Gordon v. Tomei, 144 Pa. Super. 449, 19 A.2d 588 (1941), the Superior Court, after concluding that the bylaws of an association are a “contract” among the members, quoted with approval the following:

“... benevolent associations or fraternities, not more than other parties to contracts, cannot be allowed to construe the words they

use in making agreements otherwise than according to their plain and unambiguous meaning, in the English language they employ, whether of the words of the contract itself or of the rules and regulations which become, by the principal they insist on, embodied in the contract as a part of it. They cannot be permitted to interpret the contract as they please, and become their own judges of what they mean by the use of the words employed that have either a technical or well-defined signification, known of all men who use the language.”

Moreover, bylaws will not be waived merely as the result of corporate action that contravenes those bylaws, such as where the bylaws of a nonprofit corporation restrict membership to members of a particular political party, and the majority of the members admit members of another party. Commonwealth ex. rel. v. DeLeo, 34 Pa. D&C 139 (Phila. 1938) (it is doubtful bylaws can be waived in any manner except perhaps by a unanimous vote of all members of the organization; the method for amending bylaws must be adhered to; only the votes of those qualified to be members under the bylaws were counted), citing Bagley v. Reno Oil Co., 201 Pa. 78, 50 A. 760 (1902).

In a recent Nebraska Court of Appeals decision concerning the existence of a contract with a nonprofit organization, the court rejected an argument that the “course of dealing” between the parties created a contract. The court held that “‘course of dealing’ is used to interpret express terms in an agreement . . . ‘Course of dealing’, or the parties’ past interactions with each other, alone cannot establish a contract.” Omaha Fish & Wildlife Club v. Cox/Johnson Corp., 2003 WL 1962917 (Neb. App. 2003). See also Bd. of Directors of Aplaca Owners & Breeders Ass’n v. Clang, 80 P.3d 945 (Colo. App. 2003) (a court cannot declare an action of a nonprofit entity valid when it was taken in violation of existing bylaws).

Here, plaintiffs cannot claim that past actions or course of dealing of the Board and Officers shall override the express intentions of the Bylaws with regard to those who are permitted to have voting rights and serve as Officers and/or Directors. In their Memorandum of

Law, Plaintiffs cite five claims of impropriety undertaken by the MHSAA Board during the November, 14, December 19, and December 26, 2004 meetings. For the reasons more particularly set forth below, all of plaintiffs' claims lack any merit and plaintiffs have no likelihood of success.

1. Francine Serafin was not wrongfully deprived of her right to participate in the November 14, 2004 meeting by conference telephone, as by her own actions, she failed to avail herself of the opportunity to participate.

It is undisputed that Francine Serafin was not present at the Sunday, November 14, 2004 MSHAA Board meeting in Hershey scheduled to begin at noon, the purpose of which was, in part, to select officers for the 2005 MHSAA Board. This was quite typical of Ms. Serafin, as she routinely failed to attend such meetings in person, preferring instead to participate by telephone. In this instance, she did not participate by phone, as she made no or inadequate effort to arrange such participation.

By way of background, prior to the Sunday meeting, on Wednesday, November 10, 2004, Serafin sent an e-mail to MHSAA office assistant Jill Grimes, asking Grimes to arrange to have John Rice call her for the Board meeting, stating that "I have to work from home on Sunday and will not be able to drive up, **knowing especially that the meeting probably will last 4-5 hours.**" (Emphasis Added). That same day Grimes forwarded the e-mail to Rice, with a copy to Serafin. Rice was out of state on business on a client's computer when the e-mail was received. The Grimes e-mail gave Rice no direction and did not state that anything had been arranged. Neither Grimes nor Rice ever advised Serafin that arrangements were made, nor otherwise acknowledged her request in any way whatsoever. Ordinarily, when a Director intends to participate in Board meetings by telephone, he or she would obtain a conference call number to dial into, or would otherwise obtain some sort of instruction as to how telephone participation would occur. Serafin certainly must have been aware of this procedure, as she had participated

by telephone numerous times in the past. This time, when she obtained no such number nor any instruction as to how the telephone participation was to occur, she did not follow up to secure this information in any way.

During the meeting, John Rice was asked if Serafin had requested to participate via telephone. Rice responded in the negative, not recollecting any communication from Serafin. Certain Board members repeatedly attempted to contact Serafin via telephone during the meeting, but were unable to reach her at her home. It was later learned that Serafin, by her own admission, had left her residence sometime after 2:00 p.m. that Sunday afternoon because she tired of waiting, and missed the calls made to her from the Board meeting to secure her vote.

If Serafin were truly concerned about her vote, she could have sent an e-mail directly to Rice or to any other member of the MHSAA Board, as she had ready access to their e-mails. She also could have called any of the MHSAA Board members to advise them of her need to be called, as she had ready access to their phone numbers. Or, alternatively, she could have provided any other MHSAA Board member with her proxy as permitted by Article IV, Section II of the MHSAA Bylaws, and as Directors frequently did in light of the general understanding that problems sometimes occur in telephone participation. Instructions accompanying the proxy would have apparently been perfunctory, as plaintiffs allege she would have voted with them on every single issue or candidate.

Serafin did not avail herself for the meeting of any of these opportunities to participate. Instead, she made herself unavailable during the minimum four-hour time period predicted by her, knowing that the meeting would be ongoing from 12:00 noon until at least 4:00 p.m. If she had been reachable at the number she provided Grimes at the times in which she knew the meeting would extend, she would have been able to participate by phone. Plaintiffs cannot

complain that Serafin was unable to vote when she abandoned her only location where she could have been reached. Clearly, Serafin's failure to call any Director that afternoon and her absence from her phone when she was called between 2:00 p.m. and 4:00 p.m. were overriding factors of her own volition that were the ultimate cause of her failure to vote that day. She simply failed to take the proper precautions or obtain the proper assurances or confirmation that she would be called for the meeting. The complaints by plaintiffs on Serafin's behalf are no more than an effort to mine for votes after the fact by constructing an argument of impropriety where none exists. If plaintiffs have any genuine cause for complaint, it is unfortunately with Serafin.

While plaintiffs' frustration on what they believed was a key vote is understandable, it is misplaced and ought not to have found its way into a court of law. Serafin was not present to vote for the 2005 MHSAA Board Officers and under these circumstances there is no reason to allow her to register a vote after the meeting and election. The facts regarding Serafin do not establish that plaintiffs have any likelihood of success on the merits and therefore, there is no reason to enjoin the decisions reached on November 14 without regard to her vote. Moreover, Serafin's failure to join in this Complaint is indicative that while Serafin may have been unhappy that the boat sailed without her, her gripe hardly rises to the level of actionable conduct, let alone establishes the immediate or irreparable harm necessary to sustain the dramatic remedy sought in this motion. The one alleged to be most harmed in this portion of the Complaint (Serafin) is not even a plaintiff, to her credit.

2. **Ethel Campbell, Graham McIntyre and Milton Purcell were properly excluded from voting at the November 14, 2004 meeting for MHSAA 2005 Officers, as they were not qualified to vote in accordance with the Bylaws.**
 - (a) **Ethel Campbell is not a Director because she is only an Honorary Member of MHSAA and did not attend the School.**

Ethel Campbell, the individual plaintiffs purport to be the Chapter Representative of the purported Honorary Chapter, attended the November 14, 2004 MHSAA Board Meeting. Her vote was properly disqualified as the Honorary Chapter does not qualify as a “Chapter” as defined by the Bylaws. The Honorary Chapter has no Active Members of MHSAA. Furthermore, Honorary Members, who are not School alumni, are specifically and clearly prohibited from serving on the MHSAA Board pursuant to MHSAA Bylaws.

Article X of the MHSAA Bylaws governs the organization of chapters. Section 1 requires the Board of Directors to identify the “territory” for any new chapter. Section 3 sets forth a minimum requirement for the percentage or number of Alumni in the Chapter territory that are “Active Members.” “Active Members” are defined in Article II, Section 1 of the Bylaws as those “who received a Milton Hershey School high school diploma or official Milton Hershey School certificate of attendance and achievement.”

Section 9 of Article X of the Bylaws provides that “Each Chapter shall elect...one member of the Board of Directors of the Association.” Similarly, Article IV (Board of Directors), Section 2 states that each Chapter shall have the right to “elect” one member of the Board “pursuant to an election held by the Chapter.”

Article II, Section 3 of the Bylaws defines “Honorary Members,” and their rights and privileges. Specifically, Section 3 provides: “Honorary members have all voting privileges but may not hold elected Board positions.” Honorary members are selected from those who have been employed with the School as a member of “the Board of Managers, the Administrative Staff, the Faculty, Houseparents, and Support Personnel.” See Article II, Section 3(a).

Current employees and retirees qualify as “Associate Members” under Section 4 of Article II. Honorary members are also Associate members; however, those who are only

Associate members have no voting rights and also cannot be a member of the MHSAA Board of Directors.

Article IV governs the Board of Directors of the MHSAA. Section 3 of this Article provides that “Any active member of the Association shall be eligible to be a member of the Board of Directors.” As noted above, honorary members do not qualify as and are not active members.

The plain language of the MHSAA Bylaws is consistent in its provisions governing Chapters, Honorary Members, and the Board of Directors. The Bylaws specifically provide that Honorary Members may not be elected as members of the Board, which would mean they do not qualify to be elected as a Chapter Representative to the Board, an elected Board position. Moreover, the Honorary Chapter is not even a Chapter that is organized under the authority of the Bylaws, as it lacks both Active Members and a territory. For all of these reasons, no Honorary Members can serve as voting members of the 2005 MHSAA Board. Thus, any purported vote of Ethel Campbell would be void under the MHSAA Bylaws. Any injunction that would have the result of giving Ethel Campbell, who is not an alumna, a vote on the 2005 MHSAA Board would be directly contrary to the express terms of the MHSAA Bylaws. There is no underlying merit to the plaintiffs’ claims relative to Campbell. In fact, plaintiffs’ counsel conceded this at the January 30, 2005 MHSAA Board Meeting, endorsing a suggestion that a group of Active Members quickly join the purported Honorary Chapter in order to create some argument for plaintiffs on this point. As such, plaintiffs’ allegation is not merely without merit, but borders on being made in bad faith.

- (b) Graham McIntyre and Milton Purcell were not qualified as 2005 Directors on account of their failure to be properly elected as Chapter Representatives.**

During the November 14, 2004 Board meeting where 2005 MHSAA Officers were to be chosen by qualified 2005 Directors only, Graham McIntyre appeared as the Washington D.C. Chapter Representative for 2004, and purported to retain his Directorship for 2005. However, his conduct had blocked any genuine 2005 Washington, D.C. Chapter Representative election, and thus left the Chapter without any properly-selected 2005 Director. McIntyre had sought by his conduct to lock his Chapter into permitting him to retain his position, over the objections of Chapter members who wanted a genuine vote.

During the MHSAA Board meeting of November 14, 2004, McIntyre was permitted to vote on all 2004 business, as the 2004 Chapter Representative. But since he had no claim at all that he had been properly elected as a 2005 Chapter Representative as required by the Bylaws, he had no right to vote on any 2005 matters, which included the 2005 Officer elections. In this, McIntyre was treated just as any other lame-duck 2004 Director, whether Ruben Rodriguez (who voted on 2004 matters for the New York Chapter while the duly-elected 2005 New York Chapter Representative, Chuck Hill, voted on the 2005 matters), or Jim Bykowski (who voted on 2004 matters for the Philadelphia Chapter while the duly elected 2005 Philadelphia Chapter Representative, Bob Chalmers, voted on the 2005 matters). McIntyre apparently believed that his own misconduct in blocking a proper 2005 Chapter Representative vote would leave the Board with no option but to allow him to vote for 2005 Officers, ignoring that the rights of his Chapter membership to have the proper election they sought of him were matters eminently within the authority of the MHSAA Board to enforce.

During the Washington D.C. Chapter election, not one member was permitted to oppose McIntyre for the position. In fact, members of the Washington D.C. Chapter were given the choice of either voting for McIntyre or abstaining from voting at all, and efforts to have any

competing candidate placed on the ballot were simply rejected by McIntyre and others working with him. As the Washington D.C. Chapter election was a sham, McIntyre was not properly a 2005 Director and was accordingly not allowed to cast votes on 2005 issues. Plaintiffs' effort to have this election sham endorsed by this Court must fail. Importantly, the Board took no action on McIntyre's status as a 2004 Director notwithstanding plaintiffs' patently untrue allegations in their Complaint that he was denied the right to participate in 2004 matters.

Similar to McIntyre, Milton Purcell, the individual purported by plaintiffs to have been the 2005 Homestead Chapter Representative at the time of the November 14, 2004 meeting, orchestrated a sham election that the Board determined was no election at all. Purcell's action thereby precluded his participation as a voting member of the 2005 MHSAA Board, or participating in the 2005 Officer elections conducted at the November 14, 2004 meeting. Purcell orchestrated his "election" differently than McIntyre. At the Homestead Chapter meeting at which the scheduled election of a Chapter Representative was to be held, plaintiff Purcell and those working with him looked out at those in attendance, and realized that they might not have the votes necessary to lock Purcell into the position of Chapter Representative. Upon this realization, plaintiff Purcell and those working with him refused to hold any election, simply declaring that five of them had "just held a special meeting upstairs," before the regularly-scheduled meeting. They thereupon announced that they had decided during that "special meeting" to name Purcell as Chapter Representative. They claimed that these five had this "special meeting" to "avoid the embarrassment" of a Chapter Representative election.

This was all done over the strenuous objections of Chapter members in attendance that night specifically to vote in the Chapter Representative election that was scheduled for that meeting and who had no qualms about any "embarrassment." In short, Purcell and the others

working with him circumvented the election process, effectively appointing Purcell to the Chapter Representative position in a sham election. Plaintiffs ask this Court to endorse this sham election too. As with McIntyre, Purcell's 2004 voting was unaffected for the November 14, 2004 meeting. Later, when it was shown that an election had taken place in the Homestead Chapter after the November 14, 2004 MHSAA Board meeting, Purcell was permitted to vote on all issues, notwithstanding plaintiffs' untrue allegations to the contrary. Importantly, Purcell only conducted the subsequent election after lining up the necessary votes to secure the position, something which might not have happened when the scheduled election was blocked on the most dubious of grounds. In spite of this, the MHSAA Board recognized the subsequent election.

During the November 14 meeting, the 2004 MHSAA Board made a decision based on facts and evidence of witnesses to the Homestead and Washington, D.C. purported Chapter Representative "elections" for the 2005 MHSAA Board, and reasonably concluded that fair and open elections were not conducted. At the Homestead Chapter meeting, Chapter members were not allowed to vote at any open meeting and a representative was selected by a small and closed group. General invitations to the Washington, D.C. chapter meeting were not extended to those in the Washington area except on a select basis to assure a certain outcome.

The MHSAA Board has the discretion and authority over its Chapters sufficient to require them to conduct true elections as required by the MHSAA Bylaws, and not to allow circumvention of the most basic election principles by a small minority group. Article IV, Section I of the MHSAA Bylaws provides that: "The affairs of the Association, including but not limited to establishing By-Laws and policies of the Association, and the control of the Association's property, shall be vested in a Board of Directors." This authority is certainly of sufficient breadth to allow MHSAA to reject Chapter Representatives who are not properly

elected. It is also sufficient authority to allow MHSAA to interpret its own Bylaws as they apply to qualifications and election of board members and officers. See also Article X, Sections 1 and 9 (governing regulation of Chapters).

The plaintiffs have not made a case that there is any likelihood of success on the merits of their challenge to MHSAA's decision on this matter, and in fact, such determination could not be made by this Court without a full and fair hearing where witnesses are presented and subject to cross-examination. There is no justification for requiring the MHSAA Board to accept the votes of these purported representatives as of November 14, 2004. While plaintiffs seek to restore the MHSAA Board as of November 14, 2004 before the meeting, the Court should be cognizant of the fact that Campbell, McIntyre and Purcell were not accepted as 2005 MHSAA Board members as of this date, and were not eligible to vote on 2005 officers.

3. Jerry Waters is qualified, pursuant to MHSAA Bylaws, to serve as President of the MHSAA 2005 Board of Directors.

Plaintiffs allege that Waters was not eligible to serve on the MHSAA Board as Vice-President/President Elect in 2004 because there had not been a lapse of one year from the expiration of his previous three-year term as a Director. This argument is misplaced, as Waters served as the duly elected Vice President/President-Elect since being elected in 2003, and the requirement of the one year lapse is thus inapplicable to him.

The MHSAA Bylaws (Article IV, Section 4) provide that "the President and past President shall be members of the Board without regard to the term for Directors provided in" the Bylaws. Members of the Board are, in general, not eligible for re-election. This provision, for example, prohibits a member elected at large for a 3-year term from seeking re-election for another 3-year term. In addition to the President and Past President, the Secretary, Assistant

Secretary and Counsel, a Chapter Representative and the Treasurer are excluded from the prohibition on being elected officers after serving a 3-year term from an election at large.

Plaintiffs allege that since the term President-Elect is not specifically identified as excluded from the re-election limitations, Waters was not eligible to be a Board member in 2004. Plaintiffs then allege that if not eligible in 2004, he could not serve as the 2005 President.

Plaintiffs' arguments miss the mark again for several reasons. First, the issue in 2005 is one of whether Waters is the duly elected President of the 2005 MHSAA Board, the only Board in question. He was elected in November 2003 to serve as Vice-President/President-Elect for 2004. In substance and form, by that same November 2003 vote Waters was also simultaneously elected to serve as the 2005 President, because the Board does not choose a President per se, but instead chooses a President-Elect who automatically accedes to the office of President. There is simply no provision whatsoever within the Bylaws for choosing only a President, but instead the election is for a President-Elect. There is thus no Bylaw provision that would prevent Waters' election as the 2004 Vice-President/President-Elect from being a valid selection of Waters as the 2005 President, a position for which there is no restriction on continuous service and election to the Board. This is so whether or not Waters should have been a member of the 2004 MHSAA Board.

Second, the common meaning of an "Elect" designation is that the officer has been elected to the office, but has not yet been inducted into it. Webster's New Collegiate Dictionary. For example, Section 3(c) of the Presidential Transition Act of 2000 (3 U.S.C. §102 (set out in the Notes to §102)) defines President-Elect as "the apparent successful candidate[s] for the office of President." 3 U.S.C.A. §102.

In the present case, as in its common usage, the President-Elect is simply one who has been elected to serve as President. Under the Bylaws, Waters did not face re-election in 2004 to the 2005 Board, as he had already been elected the 2005 President at the end of 2003. The provision allowing the President to serve on the MHSAA Board without regard to a prior election would be meaningless unless it also allowed the President-Elect, i.e., the elected president, to serve on the Board without regard to his prior election while waiting to take office, just as the Bylaws provide (i.e., the President-Elect who has been elected to serve as President (an exempt position) is automatically a voting member of the Board, Article V, Section 2).

The construction urged by plaintiffs on this Court would lead to the wholly irrational conclusion that even though the President-Elect and the following term's President are chosen in one vote, the President is excepted from the restriction while the President-Elect is not. The only way the Bylaws make sense is where the exception applies to the two together.

Hence, Waters was elected President prior to 2004 and, therefore, the exception applicable to the President being allowed to serve after a 3-year term should be applicable to one serving on the Board under the Bylaws as the President-Elect. Any other construction of the Bylaws, as urged by plaintiffs, would be nonsensical, since it would mean that the President -- who is not elected as such by the Board -- is given the exception to the three-year limit, while the President-Elect -- who is elected by the Board to be President -- is not given the exception. The argument strains credulity. Waters is a valid member of the 2005 MHSAA Board as its President under any circumstance.

In addition, this issue was not presented until the plaintiffs filed their pleading, well after Waters had already served a full 12-month term as President-Elect, and is actually only an objection to his serving in 2004. It has no relevance to his serving as 2005 President. The

plaintiffs again have not demonstrated a likelihood of success on this issue. Moreover, the plaintiffs incorrectly make allegations in their Complaint (to establish harm, presumably) that Waters voted against them on many votes where he actually voted for them, eliminating the harm from Waters serving. See Defendant's Answer, ¶¶ 43, 63, 64. Waters is fully qualified and duly elected to serve as the 2005 MHSAA Board President.

4. The votes of "Directors Emeritus" Ivan Dietrich, Ralph Fink and Harvey Deitrich for 2005 Officers were properly disallowed as they had no right under the Bylaws to serve in their purported positions for the 2005 term, and it was well within the province of the Board to make such a decision.

Ivan Dietrich was purportedly elected by the MHSAA Board in 1998 to serve as Director Emeritus. Ralph Fink was purportedly elected by the MHSAA Board in 1988 to serve as Director Emeritus. Harvey Deitrich was purportedly elected by the MHSAA Board in 1997 to serve as Director Emeritus. The plaintiffs fail to allege when these individuals were elected MHSAA Board members or for what terms. Further, it is undisputed that Mr. Fink did not attend an MHSAA Board meeting for eight years prior to November 14, 2004.

With respect to each of these purported elections, there was no term set for the individual to serve. Presumably they were elected to serve on the MHSAA Board for the calendar year following their election. If validly elected, they would have a one-year term under Pennsylvania law. None of these three individuals have stood for election or reelection since the time of their initial election, except that the 2004 MHSAA Board voted on December 19, 2004 to allow Deitrich and Dietrich to serve on the 2004 MHSAA Board from December 19, 2004 through December 31, 2004, but not the 2005 MHSAA Board. The three subject individuals were not elected to serve and have no basis for serving on the 2005 MHSAA Board.

Pursuant to Pennsylvania statute, the qualifications of directors of a nonprofit corporation may be prescribed in the bylaws. 15 Pa.C.S.A. §5722. The number of directors shall be fixed in

the manner provided in the bylaws. 15 Pa.C.S.A. §5793. There is only one reference to the term “Director Emeritus” in the MHSAA Bylaws. This reference is in Article V concerning “Officers” and not Article IV, which governs “Directors.” The reference in Article V, Section 2 states that “All officers, and any Director Emeritus, shall have the right to vote at any regular or special meeting of the Board of Directors.” Nothing in the Bylaws governing directors prescribes the qualifications of a Director Emeritus or fixes their number.

Webster’s Dictionary defines the noun “emeritus” as “one retired from professional life but permitted to hold the rank of his last office, as an honorary title.” As an adjective, it is defined as “holding after retirement an honorary title corresponding to that held last during active service.”

There is no provision in the MHSAA Bylaws regarding: (i) nomination of a Director Emeritus; (ii) election of such a director either by the general membership or the Board of Directors; (iii) qualifications of a nominee for Director Emeritus; or (iv) the term of any such Director. The detailed provisions in the MHSAA Bylaws regarding qualification as an Honorary Member (Article II, Section 3(a) through (f)) and the make-up of the Board of Directors (Article IV, Sections 1 through 6) would lead one to conclude that these omissions are not accidental and that there is no authority in the MHSAA Board to award voting Board membership to anyone with purported Director Emeritus status.

The use of term Director Emeritus in Article V on Officers can be given meaning by concluding that it refers to the immediate past president of MHSAA, who is a member of the Board of Directors solely on account of the rank of his last office. Article IV, Section 4 provides that the past president is a member of the Board of Directors, but is silent regarding that person’s right to vote. Article V, Section 2 provides that officers have the right to vote at meetings of the

Board of Directors, but the voting rights of the past president, who is not an officer, might be unclear unless the term Director Emeritus had been added to Article V, Section 2 as having a right to vote. The past president is the only person identified in the MHSAA Bylaws as having Board membership by virtue of his former status, hence the only Director Emeritus contemplated by the reference in Article V.

It is clear that members of the Board elected by the membership at large have 3-year terms, and officers and the past president have a one-year term. No term is provided for a Director Emeritus, and none would be needed if it is interpreted to mean the past president, who serves for one year.

If, in fact, a Director Emeritus were given its own status notwithstanding the lack of any provision related to this in the Bylaws, the term of office under Pennsylvania law would nonetheless be restricted to one year, because no term is specified (15 Pa. C.S.A. §5724). There is no authority for viewing the position as a lifetime appointment as had been previously asserted by plaintiffs. See Singh v. Singh, 114 Cal. App. 4th 1264, 9 Cal. Rptr. 3d 4 (2004) (directors had one year term where bylaws did not specify term, not unlimited or lifetime terms as alleged; California statute mirrors 15 Pa.C.S.A. §5724).

The plaintiffs suggest the Directors Emeritus should serve as voting members of the MHSAA Board forever or until they are replaced; however, this argument misses the mark on two important levels. First, there is no designated position of Director Emeritus under the MHSAA Bylaws governing director positions that must be filled, unlike positions for elected at large members, officers, and the past president. Second, the MHSAA Board has no authority to elect a Director Emeritus to the Board in the first place. Moreover, plaintiffs' position would be wholly inconsistent with the entire scheme of electing directors contained in the Bylaws,

including the provision not allowing retiring directors to be re-elected to the Board except as an officer or Chapter Representative.

The weakness of plaintiffs' argument that a purported Emeritus Director serves until he or she is replaced is underscored by its internal inconsistency here, since plaintiffs seek an irrational application of the rule they suggest. Applying plaintiffs' own reasoning, Fink's purported directorship would have in any event concluded with Deitrich's replacing him in 1997 when Deitrich was purportedly elected. Deitrich, in turn, would have been replaced a year later, when Dietrich was purportedly elected. Instead, plaintiffs claim that all three serve forever or until their "replacements" are named, though none of them were replacements for each other. The only consistency is that plaintiffs' arguments are all conclusion-driven, so long as they can scrape together the votes they need to take control of MHSAA's Board.

Allowing the naming of an unlimited number of Directors Emeritus merely on account of a sentence referring to voting rights in a Section of the Bylaws governing Officers would be chaotic with regard to corporate governance. Each so-called Director Emeritus would serve for life, whether they participated or not, or represented the views of the majority of the Board or the Association's members.

There is simply no justification under the MHSAA Bylaws for the position of the plaintiffs on this issue. Therefore, rather than there being a strong likelihood or even any likelihood of success for plaintiffs on the merits of this issue, there is *no* likelihood of success. A preliminary injunction requiring these three persons to be placed on the 2005 MHSAA Board would not in any sense restore a *status quo*, but would instead constitute affirmative action of Director designation by a court wholly inconsistent with any reasonable MHSAA Bylaws interpretation and contrary to the decision of the MHSAA Board. It would also punish

defendants for not joining plaintiffs in their questionable claims about these purported Emeritus Directors; for defendants did not use their clear majority at the 2004 meetings to “stack” the Board with their own dubiously authorized Emeritus Directors, recognizing such to be outside the Bylaws.

Plaintiffs have not alleged how there can be immediate and irreparable harm from not recognizing for the 2005 MHSAA Board three persons who have not been elected to serve for such year, and who cite no Bylaw provision that would support their membership on the Board. In addition, Mr. Fink had not attended an MHSAA Board meeting for 8 years, so his exclusion from the 2005 Board can hardly be deemed to result in an immediate and irreparable harm.

Plaintiffs Heath and Gaughan complain that the above actions were the cause of their not being elected 2005 Officers and Chuck Welsh being elected President-Elect. Welsh was elected by a four vote margin and Heath and Gaughan were not elected because of two vote margins for other candidates. Accordingly, the results of the elections would be changed only if there are multiple vote changes on account of this litigation. The addition or subtraction of one vote would have no impact.

5. The December 26, 2004 MHSAA Board resolution was a proper exercise of discretion.

As previously discussed, the MHSAA Board of Directors governs the affairs of the Association, and is responsible for enforcing its rules and Bylaws. The resolution in question was the result of a compromise reached by a majority of the MHSAA Board to accept the 2004 election of four members at large, to begin service in 2005, despite election irregularities, provided there was no other election disputes brought to litigation by disgruntled Board or Association members. A judgment was made, however, that if other decisions of the Board were contested in court, the Board would conduct a re-election without the taint of the improper

assistance provided to the winners on account of the unauthorized use of MHSAA's mailing list. If multiple election disputes were to be contested by one faction, then that faction should not benefit from alleged misconduct of the dispute that the Board had tried to resolve as a package.

Here, the four Directors who obtained positions in an election tainted by gross rule abuse are not satisfied merely to preserve their questionable victory. Instead, they repay the MHSAA Board's restraint on this singularly improper MHSAA rule violation with a complete lack of restraint on what they assert is Board wrongdoing, and where their allegations of wrongdoing in most cases cannot even pass the colorable claim test. That the election rule violations, and this lawsuit, are driven primarily by persons who have had the most to gain personally, at the expense of MHSAA's interests, renders their injunction relief request even more troubling.

The resolution was a proper exercise of discretion by the MHSAA Board, and one that sought to discourage public rancor embarrassing to all alumni and MHSAA. The resolution makes reference to the inappropriate conduct of candidates for the Board who, prior to the 2005 Board of Director elections held in 2004, had the benefit of the MHSAA alumni database used to inappropriately solicit votes. This solicitation was in direct violation of MHSAA's strict rule against the use of the alumni database for MHSAA elections or for any mailings not authorized by the Board. Plaintiff Purcell used the alumni mailing database to endorse anti-reform candidates Gaughan, Patton, (Gerald) Long, and Via, all of whom Purcell favored, and all from the conflicted Homestead Chapter, a substantial number of the membership of which has engaged in highly uncivil conduct. The Director election candidates for the 2005 Board who did not violate MHSAA rules on the use of the database were unfairly disadvantaged. Plaintiff Purcell also misled the Association membership as to the totality of his motives for his endorsement of certain candidates, neglecting to explain in his mailings how his own financial

interests were tied directly to aiding MHS in its all-out push to end MHSAA reform activity together with MHSAA's independence. Notably, all of the candidates who received the benefit of Purcell's inappropriate actions were elected, and those who finished dead last did not have the advantage of the mailing list.

As the actions of plaintiff Purcell and the candidates he supported were deemed inappropriate, the MHSAA Board took action where it found appropriate and exercised restraint in others. Thereafter, the Board learned that certain individuals suggested litigation against MHSAA, the MHSAA Board and/or certain Directors. In response, the Board enacted the disputed Resolution, resolving, *inter alia*, that in the event of such litigation, new elections of the four director positions selected in the 2004 Elections for the 2005 Board would take place, with all candidates having equal access to the Alumni database. This would serve to level the playing field for all candidates, providing a truly fair election. The Resolution did nothing more than protect the integrity of MHSAA and its election process.

In Pennsylvania, it is well-settled that Directors are insulated from liability for a business decision made in good faith, so long as the Director making the decision is not financially intertwined with the subject of the business decision, and is informed with respect to the subject of the business decision to the extent he or she reasonably believes that the business decision is in the best interests of the corporation. Cuker v. Kikalauskas, 547 Pa. 600, 692 A.2d 1042 (1997) (relating to the business judgment rule). This reflects a policy of noninterference by the judiciary with the business decisions of Directors, presuming that they pursue the best interests of corporations. *Id.* See also White v. Associates in Counseling and Child Guidance, Inc., 767 A.2d 638 (Pa. Cmwlth. 2001).

Here, while plaintiffs may or may not be seeking to hold the Directors personally liable for their corporate decisions, they are asking the court to interfere with decisions made by the corporation. Clearly, the Resolution was made in good faith without fraud or misconduct, as its sole purpose was to protect the integrity of the MHSAA elections and Bylaws. The Directors who approved the resolution used their best business judgment in pursuing the best interests of the corporation. Without more, it would be in direct conflict with Pennsylvania policy with regard to corporate decision-making for this Court to enjoin the actions taken by the Board. At a minimum, a full hearing with testimony on the merits is necessary for fair adjudication of this matter.

Further, defendants have stipulated in their Answer to the Preliminary Injunction that they will not implement this resolution until the final resolution of the instant lawsuit, if ever. The issue of the propriety of the resolution is thus entirely moot so far as injunctive relief is concerned given this stipulation.

E. Plaintiffs have unclean hands and should not be granted equitable relief.

Plaintiffs are not entitled to injunctive relief if they came to the proceeding with unclean hands. One who seeks equitable relief must appear before the court with clean hands. Mazer v. Sargent Electric Co., 407 Pa. 169, 173, 180 A.2d 63, 65 (1962). Equity will aid none but the worthy claimants. Appeal of Bleakley, 66 Pa. 187 (1870). The doctrine is applicable when the wrongdoing directly relates to the matter in controversy and affects the relationship between the parties. Jackson v. Pelusi, 379 Pa. Super. 361, 371, 550 A.2d 199, 204 (1988). The doctrine of unclean hands is

far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively

enforcing the requirements of conscience and good faith . . . Thus while ‘equity does not demand that its suitors shall have led blameless lives’ . . . as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue . . .

Shapiro v. Shapiro, 415 Pa. 503, 506-507, 204 A.2d 266, 268 (1964), quoting Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 814-15, (1945).

In this matter, plaintiff’s hands are not clean, as evidenced by the following, all as further described in defendant’s New Matter:

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

(b) Plaintiffs somehow utilized the MHSAA database membership list, a proprietary and valuable asset of MHSAA, without permission of MHSAA, to further their attempted takeover of 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 and making up rules to fit their pre-determined result;

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

(e) Plaintiffs 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 goals to takeover MHSAA;

(f) Plaintiffs' counsel acknowledged to a member of the MHSAA Board that the Honorary Chapter was not a proper chapter, but made a contrary claim in the Complaint;

(g) 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 two plaintiffs, and the purchaser or prospective purchaser of goods or services from two other plaintiffs or their relatives, to render MHSAA powerless to serve its purposes of independence, vigilance toward the Deed of Trust, and structural reform of the MHS Trust through litigation; and

(h) 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.

In Bagley v. Reno Oil Co., 201 Pa. 78, 50 A. 760 (1902), the Pennsylvania Supreme Court spoke to the danger of takeover attempts of a board of directors that is *apropos* in the instant matter:

No more radical change can be made in the management of the affairs of a corporation than an increase in the number of its directors as fixed by its by-laws. Such increase may result in taking the control of a prosperous business from the hands of those who have successfully conducted it, and committing it to those who, with different notions, may lead it into ruin and disaster; honest management may be followed by a dishonest one; prodigality may take the place of frugality; a sense of security may be succeeded by unrest; and where all was right, everything may be wrong.

Bylaw changes cannot be made for MHSAA by a mere majority vote. Plaintiffs are attempting an end run around the Bylaw amendment provisions by seeking to have this Court adopt their radical reasoning and add directors, so they can gain control of MHSAA and reverse its last 15 years of hard work. This relief should not be granted at all, and certainly not as a preliminary injunction. Rather than the facts demonstrating that greater injury would result by refusing the injunction than granting it, far greater injury to MHSAA's goals and historic efforts would result if the injunction were granted, as 15 years of reform effort and MHSAA progress would come to a screeching halt.

IV. Conclusion

Plaintiffs fail to make any credible, let alone compelling, argument for the dramatic equitable relief sought here. Quite the contrary, the motion has every appearance of being a desperate heave to the end zone, falling short, and filed a mere one day after MHSAA's Commonwealth Court victory in its reform efforts. Defendants thus respectfully ask this Honorable Court to deny plaintiffs' motion in its entirety, and to allow the parties to proceed with this case in the deliberate manner appropriate under the circumstances, with the proviso that MHSAA will not implement the resolution at issue until after the underlying proceeding has been concluded, if ever. Nothing in plaintiffs' motion even remotely justifies the extraordinary remedy sought by plaintiffs in their motion, though MHSAA will surely be harmed if the motion is granted.

Respectfully submitted,

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