SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RENSSELAER

GEORGE W. CRISS III, DAVID A. GLOWNY, JOHN A. KROB, THEODORE F. MIRCZAK, JR., JAMES NAPOLITANO, JOSEPH TEMPLIN, PETER VANDERMINDEN, AND PETER VANDERZEE,

Plaintiffs,

- against -

THE RENSSELAER ALUMNI ASSOCIATION,

Defendant.

Index No. 2019-263996

Hon. Andrew G. Ceresia

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE AMENDED AND SUPPLEMENTAL COMPLAINT

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PRELIMINARY STATEMENT

This memorandum of law is respectfully submitted on behalf of defendant, The Rensselaer Alumni Association ("RAA"), in support of its motion to dismiss plaintiffs' verified amended and supplemental complaint ("Complaint").

This case involves a power struggle for control of the RAA board by plaintiffs (a small minority of members of the RAA, a private New York not-for-profit corporation). Despite containing 97 paragraphs consisting solely of hyperbole and irrelevant allegations and assertions, plaintiffs' only enumerated cause of action in the Complaint seeks to declare five (5) provisions of the RAA's by-laws ("By-Laws") in violation of its Charter, the New York Education Law ("Educ. Law"), and the New York Not-For-Profit Corporation Law ("N-PCL") as follows:

1. Article III, § 2 stating that Members can only call a special meeting upon the written request of 10% of the RAA's membership, was designed to prevent Members from exercising their right to call special meetings by making it virtually impossible for them to do so (the prior requirement was a written request from 100 RAA members ("Claim 1");

2. Article III, § 4, purporting to define a quorum as 100 Members, violates N-PCL § 608 in that it was not approved in accordance with subdivision (c) thereof, "at a special meeting of members at which the quorum requirements application to the corporation immediately prior to the effective date" of the N-PCL or by the Supreme Court through intervention sought in accordance with subdivision (e) ("Claim 2");

3. Article III, §1, and Article VI, § 2, limiting the Member's right to vote for Trustees to just the slate selected by the Nominating Committee and the Board, thereby giving the Board the sole power to elect Trustees, violates the RAA Charter in that it diverts the Members of their

rights under the RAA's Charter to elect RAA Trustees ("Claim 3");

4. Article IV, § 1(c) gives the Executive Committee the sole power to elect Officers and fill Officer vacancies arising between Annual Meetings, in violation of N-PCL § 712(a)(2), which prohibits such power from being delegated to a committee ("Claim 4"); and

5. Article XI, § 1, to the extent it purports to give the Board the sole power to adopt, amend, or repeal the RAA's bylaws, violates N-PCL § 602, which gives Members the right to do so as well, and gives Members the power to limit the Board's ability to exercise this right ("Claim 5").

See **Ex. A** ¶ 97.[1]

For the reasons discussed herein, ***none*** of the provisions in the By-Laws sought to be invalidated by plaintiffs violate RAA's Charter, the Educ. Law, or the N-PCL. Rather, in every instance, the By-Laws comply with the Charter and applicable law, and the Complaint is nothing more than a thinly veiled attempt to obtain control over the RAA, which must be rejected.

It is axiomatic that " a corporation shall be managed by its board of directors," and that the board's decisions shall not be questioned, absent evidence of bad faith, fraud or wrongdoing. N-PCL § 701. Moreover it is well settled that a court '"should not interfere in the internal affairs of a [not for profit] corporation . . . unless a clear showing is made to warrant such action.'" *Nyitray v. N.Y. Athletic Club of the City of N.Y., Inc.*, 195 A.D.2d 291, 291 (1st Dep't 1993) (quoting *Scipioni v. Young Women's Christian Ass*'n., 105 A.D.2d 1113, 1113 (4th Dep't 1984); *see also Matter of Gilheany v. Civil Serv. Employees Ass'n, Inc.*, 59 A.D. 2d 834, 836 (3d Dep't 1977); *Matter of F.I.G.H.T., Inc.*, 79

[1] Referenced exhibits are attached to the Affidavit of Marc H. Goldberg, Esq., sworn to on December 20, 2019, submitted herewith.

Misc. 2d 655, 659 (Sup. Ct. Monroe Cty. 1974); *Ohrbach v. Kirkeby*, 3 A.D.2d 269, 273 (1st Dep't 1957) (the conduct of private corporate affairs should be interfered with as little as possible). Here, Plaintiffs have not and cannot make the requisite showing.

Additionally, under the business judgment rule, if actions of corporate directors of not-for profits are taken in good faith and "in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes," judicial inquiry into those actions is barred. *Consumers Union of U.S., Inc. v. New York*, 5 N.Y.3d 327, 360 (2005).

Plaintiff's claims represent mere requests or wish lists in an effort to overtake the board, which as a matter of law, they are not entitled. Accordingly, the Complaint fails to state a cause of action against RAA, and it should be dismissed in its entirety.

ARGUMENT

STANDARD

When considering a motion to dismiss under CPLR 3211(a)(1) and (7), the Court "must 'accept the facts as alleged in the complaint as true, accord plaintiff [] the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" *Kolchins v. Evolution Mkts. Inc.,* 31 N.Y.3d 100, 105-06 (2018) (quoting *Leon v Martinez,* 84 N.Y.2d 83, 87-88 (1994)). A motion to dismiss pursuant to CPLR 3211(a)(1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Life Ins. Co. of N.Y.,* 98 N.Y.2d 314, 326 (2002), citing *Leon*, 84 N.Y.2d at 88.

Pursuant to CPLR § 3211(a)(7), "[a] party may move for judgment dismissing one or more causes of action asserted against him on the grounds that ... the pleading fails

to state a cause of action." N.Y. CPLR 3211(a) (Westlaw through L. 2019 ch. 579). Although the Court must accept as true all well-pleaded factual allegations when analyzing a motion under § 3211(a)(7), "conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss." *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009).

POINT I

THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION

A. Article III, § 2 of the By-laws does not violate the Charter, Educ. Law or the N-PCL.

Claim 1, which alleges that Article III, Section 2 of the By-Laws requiring 10% of the membership to call a special meeting violates the Charter and is unlawful, is belied by the plain language of RAA's Charter and the N-PCL in two key respects. *See* **Ex. A** ¶ 97.

First, the Charter is silent on the number of votes by members necessary to call a special meeting. *See* **Ex. B**. Indeed, the Charter does not even discuss the calling of a special meeting. *Id.* Second, and contrary to plaintiffs' claim, N-PCL § 603(c) specifically authorizes the convening of a special meeting of the members by "ten per cent of the total number of votes entitled to be cast at such meeting" is necessary. *See* N-PCL § 603(c). As a result, Article III, § 2 of the By-Laws is consistent with RAA's Charter and applicable law.

Thus, since Article III, § 2 of the By-Laws complies in all respects with N-PCL § 603, and is not in violation of the Charter, Claim 1 fails to state a cause of action against RAA and must be dismissed.

B. RAA did not violate N-PCL § 608.

Like Claim 1, Claim 2—which alleges that Article III, Section 4 of the By-laws violates N-PCL § 608 since it was "not" approved in accordance with subdivision (c) thereof, "at a special meeting of members at which the quorum requirements applicable to the corporation immediately prior to the effective date" of the N-PCL or by the Supreme Court through intervention sought in accordance with subdivision (e) (*see* **Ex. A** ¶ 97)— is fatally flawed. N.Y. Not-for-Profit Corp. Laws 608(c) (Westlaw through L. 2019, Ch. 589). Simply put, RAA's board is authorized to amend its By-Laws and did not need approval by a quorum of its members at a special meeting.

Any rights the members may have to amend, adopt, or repeal the By-laws, must be distinguished from the rights of RAA's board. *See* N-PCL § 602. Under N-PCL § 602(f), a corporation's "by-laws may contain any provision relating to . . . the rights or powers of its members, directors or officers, ***not inconsistent with*** this chapter or any other statute of this state or the certificate of incorporation." N-PCL §§ 602(f) (emphasis added). Here, the Charter vests authority ***in the board*** to, among other things, adopt by-laws. *See* **Ex. B** ¶ 2 (emphasis added). In addition, Article XI of the By-Laws authorizes the board to amend the By-Laws as follows:

> Section 1. Process-***These Bylaws may be amended at a meeting of the Board by approval of two-thirds of the Board*** provided that thirty (30) days' notice of such amendments has been given to each Trustee. Further modifications may be made to the amendments at such meeting. ***Any amendment to the Bylaws goes into effect immediately upon its adoption.*** Amendments to the Bylaws shall be printed in the minutes of the Board.

See **Ex. C** Article XI (emphasis added).

Thus, an amendment by the Board did not require approval from the members, and nothing in the N-PCL is inconsistent with this authority. *See* N-PCL §§ 602, 603 and 608.

Claim 2 improperly conflates the Board's authority to amend its By-laws with the quorum requirements of the members. Critically, the Board was authorized to amend the By-laws, and any such amendment went into "effect immediately upon its adoption." *See* **Ex. C** Article XI. No further approvals are necessary, at a special meeting or otherwise. *Id.*

Finally, Claim 2 is precluded by the doctrine of the law of the case since it is simply an attempt to renew and/or reargue the court's Decision/Order, that "the board is vested with the authority to [amend its By-laws] both by law and by defendant's own charter and by-laws (see N-PCL § 602[b])." *See* Ex. D. p. 3. *Gentile v. Gentile*, 172, A.D.3d 688, 690 (2d Dep't 2018) (defendant precluded from re-litigating those issues where she had a full and fair opportunity to address them).

Accordingly, Claim 2 fails to state a cause of action against RAA and must be dismissed.

C. Article III, § 1 and Article VI, § 2 of the By-Laws do not violate the Charter.

In Claim 3, plaintiffs allege that Article III, Section 1 and Article VI, Section 2 of the By-Laws violate RAA's Charter because these provisions enable the board to limit the members' ability to vote for Trustees to just the slate selected by the board, thus, in effect, divesting members of an alleged right under the Charter and giving the board the sole power to elect Trustees. **Ex. A.** ¶ 97. Plaintiffs are wrong.

Critically, the members of the RAA do not have a vested right to vote for its directors or trustees, since they do not have any interest in the property of the RAA. *Matter of Sousa v. Knights of Columbus*, 26 Misc. 2d 474 (Sup. Ct. Kings Cty. 1960).[2] Furthermore, nothing in the N-PCL or the Charter invalidates or undermines the RAA's board's right to select nominees to be considered for a Trustee position. Indeed, N-PCL §703(b) provides that, "[d]irectors shall be elected or appointed in the manner and for the term of office provided in the certificate of incorporation or the by-laws." Moreover, N-PCL § 602(e) contemplates that the RAA board may adopt by-laws which regulate the election of directors. As a result, Article III, Section 1 and Article VI, Section 2 are consistent with RAA's Charter and applicable law, and RAA's Trustee selection process cannot be disturbed.

Plaintiffs' efforts to modify RAA's 55 year internal selection process for its own interests must be rejected by the Court. Especially in light of the well settled principle that a Court should not interfere in the internal affairs of a not for profit corporation. *See Nyitray,* 195 A.D.2d at 483 (holding that directors of a corporation ordinarily have no duty to elect third parties to the corporation's board of directors, and past practices does not create such a duty).

Finally, Claim 3 is also barred by the law of the case, when the court rejected Plaintiffs' contention that the right to elect board officers and trustees was essentially usurped by the board, and found that "the manner in which elections are to be conducted is governed by the association's by-laws (see N-PCL § 703[b]) and, here defendant's by-laws

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[2] Reversed on other grounds by *Sousa v. N.Y. State Council Knights of Columbus Found.*, 10 N.Y.2d 68, 75-76 (1961) (not reaching the contention of whether or not petitioner had a vested right to vote for directors, since he failed to exercise the right to vote).

allow for elections to be conducted in the above-described manner." *See* **Ex. D**. pp. 2-3. *Gentile*, 172 A.D.3d at 690.

Accordingly, Claim 3 fails to state a cause of action against RAA and must be dismissed.

D. Article V, § 1(c) does not violate N-PCL § 712, since it deals with *officers*, not directors.

In Claim 4, plaintiffs allege that Article V, § 1(c) of the By-Laws gives the executive committee the sole power to elect ***officers*** and fill ***officer*** vacancies arising between annual meetings, in violation of N-PCL § 712 (a)(2), which prohibits such power from being delegated to a committee. **Ex. A.** ¶ 97. Again, plaintiffs are wrong.

Article V, § 1(c) of the By-Laws provides that:

> If an ***Officer*** resigns during a term, or is otherwise unable to perform the duties, the Executive Committee may, by a two-thirds (2/3) vote, declare the office vacant, and by a majority vote, elect a successor to serve until the following Annual Meeting. If the office of the President becomes vacant during a term, the President Elect shall act as President until formal succession to the office of President. In the absence of a President Elect, the Executive Committee shall elect an acting President to serve until the next election.

Ex. C Article V, § 1(c) (emphasis added).

Here, Plaintiffs' improperly conflate the filling of vacancies of ***officers*** authorized by N-PCL § 713, with the limitation to fill the vacancy of a ***board of director*** prescribed by N-PCL § 712 (a)(2). Indeed, N-PCL § 712 is inapplicable to the election and appointment of officers, and N-PCL § 713 specifically vests the power in the Board to appoint ***officers*** as provided in the by-laws. *Compare* N-PCL § 712(a)(2) *with* N-PCL § 713(a); *see also* N-PCL § 705(a) (providing for the filling of newly created directorships and

vacancies ***by a vote of the majority of the directors, unless the by-laws provide that they shall be voted in by the members***). Thus, N-PCL § 712 has absolutely no bearing on RAA's procedure for filling the vacancy of an officer pursuant to Article V, § 1 of its By-Laws, which complies in all material respects with the applicable provisions of the not for profit corporation law, *viz.*, N-PCL § 713.

Accordingly, Claim 4 fails to state a cause of action against RAA and must be dismissed.

E. Article XI, § 1 does not violate N-PCL § 602.

Finally, Claim 5 alleges that "Article XI, § 1 to the extent it purports to give the Board the sole power to adopt, amend, or repeal the RAA's bylaws, violates N-PCL § 602" (*see* **Ex. A.** ¶ 97), is equally baseless.

Article XI, § 1 provides:

> These By-laws ***may*** be amended at a meeting of the Board by approval of two-thirds of the Board provided that thirty (30) days' notice of such amendments has been given to each Trustee. Further modifications may be made to the amendments at such meeting. Any amendment to the Bylaws goes into effect immediately upon its adoption. Amendments to the Bylaws shall be printed in the minutes of the Board.

Ex. C Article XI, § 1 (emphasis added).

Consistent therewith, the N-PCL provides that "by-laws ***may*** be adopted, amended or repealed by the members" or ***"by the board,"*** unless the certificate of incorporation—or by-laws adopted by the members—restrict the latter. *See* N-PCL § 602(b). Nothing in the By-Laws or Charter restricts the Board's right. *See* **Exs. B** and **C**. Furthermore, N-PCL § 602 neither mandates nor commands that members have an equivalent right to adopt, amend, or repeal by-laws too. Indeed, N-PCL § 602 unambiguously provides that "[b]y-laws ***may*** be

adopted, amended or repealed by the members" of the board, and not that they "shall" or "must" include a members right to adopt, amend, or repeal them. N.Y. Not-For-Profit Corp. Laws 602(b) (Westlaw through L. 2019 Ch. 579) (emphasis added).

Nevertheless, RAA was chartered under the Educ. Law, which specifically permits such organizations to be chartered, "subject to such limitations and restrictions in all respects as the regents may prescribe." Educ. Law § 216. Here, the Charter expressly provides that "[t]he board shall have the power to adopt by-laws, including therein provisions for fixing the terms of trustees, and shall have power also by vote of two-thirds of all the members of the board of trustees." *See* **Ex. B** ¶ 2. In addition, Educ. Law § 216-A(4)(a) provides that if a provision of the N-PCL conflicts with a provision of the Educ. Law, the Educ. Law shall prevail. *See* N.Y. Educ. Law § 216-a. As a result, since the Board of Regents authorized the RAA's Board as the ***sole*** body to adopt by-laws, the members do not have such rights under the not-for-profit law; nor does N-PCL §602 mandate anything to the contrary.

A historical analysis of the applicable law is instructive. At the time that RAA was chartered, the New York Membership Corporation Law was in effect ("MCL").[3] The MCL did not provide members with the power to adopt By-laws. See MCL. Indeed, if an organization wanted its members to have the right, it would have had to provide for it

[3] Prior to the enactment of the N-PCL, not-for profit corporations were governed by a smattering of different laws, including the MCL and the General Corporations Law. On account of the confusion and conflict resulting from the law governing not-for-profits, the legislature enacted the N-PCL as a unifying body of law. Letter from Eliot P. Green, Chair Association Committee on Non-Profit Organizations, to Frederick G. Attea, Partner, Re Proposed Revisions to New York's Not-for-Profit Corporation Law (Jan. 21, 2010), Proposed Revisions to New York's Not-for-Profit Corporation Law, New York City Bar Association, Jan. 21, 2010, www.nycbar.org/pdf/report/uploads/20071870-Proposed Revisions to New York's Not-for-Profit-CorporationsLaw.pdf.

in its By-laws. Members had no inherent right under the MCL. *See* **Ex. E**. Furthermore, MCL § 8 provided that the by-laws of any such corporation may make provisions, not inconsistent with law or its ***certificate of incorporation***. Consistent therewith, the Charter provided that only its directors had the authority to adopt bylaws. As a result, if the Board of Regents or the RAA wanted the members to have the power to adopt Bylaws, it would have been required to be included in its Charter, which it is not.

Accordingly, Claim 5 fails to state a cause of action against RAA and must be dismissed.[4]

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed in its entirety, together with such other and further relief as to the Court seems just and proper.

[4] In the event the Court finds that the RAA members have a right to adopt, amend, or repeal the By-laws, such right must be in accordance with the rights, obligations, and requirements of N-PCL §§ 602, 603, 605, and 608, and for the reasons discussed, does not vitiate the legality of Article XI, § 1. Regardless, Claim 5 still fails to state a cause of action against RAA.

Dated: Albany, New York
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