STATE OF NEW YORK
SUPREME COURT – 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-

Index No. 2019-263996.
Hon. Andrew Ceresia

THE RENSSELAER ALUMNI ASSOCIATION,

Defendant.

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE AMENDED AND SUPPLEMENTAL COMPLAINT AND IN SUPPORT OF PLAINTIFFS' REQUEST TO CONVERT TO SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

New York State Cases

New York State Statutes

Secondary Authorities

PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted by Plaintiffs in opposition to Defendant's motion to dismiss the verified amended and supplemental complaint ("Complaint"), and to request that this Court convert Defendant's motion to dismiss to a motion for summary judgment. For the following reasons, Plaintiffs have properly stated a cause of action with respect to each of the claims set forth in their Complaint, and the instant motion should be converted to one for summary judgment.

INTRODUCTION

Defendant Rensselaer Alumni Association ("RAA" and/or "Corporation"), chartered in 1964, is a not-for-profit corporation whose membership consists of all graduates of Rensselaer Polytechnic Institute ("RPI"). Plaintiffs, all of whom are graduates of RPI and therefore members of the RAA, have brought this lawsuit to resolve a dispute between themselves, as members, and the RAA's Board of Trustees ("the Board") concerning the relative rights, powers and authority of the Board vis-à-vis its alumni members. Plaintiffs contend that ultimate power over the RAA rests in the membership, and that while day-to-day governance of the Corporation is the Board's responsibility, the Board must be elected by the members, and must carry out the membership's wishes in conformity with RAA's Charter and the Not-for-

Profit Corporation Law ("N-PCL"), including the inherent right of the members to adopt bylaws which are binding on the Board.

In the instant case, however, the Board, through the illegal adoption of certain bylaws, has hijacked the RAA, trampled upon and ignored the rights of its members and illegally rigged the election process to ensure that the Trustees of the Board, rather than the members, control who will succeed them, so that the Board is now self-perpetuating. In addition, the Board has steadfastly denied and refused the right of members to adopt bylaws, and also has adopted its own bylaws which are designed to prevent the members from calling meetings to undo those illegal actions.

This action seeks to declare illegal those bylaws adopted by the Board to effectuate such illegal purposes and to restore to the members the rights and powers guaranteed to them under RAA's Charter and the N-PCL.

BACKGROUND

For years, the RAA has operated unfettered by the constraints of the law and its Charter. RAA's Charter requires that its Trustees be elected by the members of RAA, and both RAA's bylaws and the N-PCL require that such election be held during an annual meeting of the members of RAA. *See* Complaint, Exhibit B and Exhibit C at Article III, § 1, Article VI, § 2(3); N-PCL § 603(b). However, Defendant failed to hold any annual membership meetings from 2014 until 2018, and when an annual membership meeting was finally called in December 2018, it proceeded

without the legally required quorum. *See* Complaint, Exhibit I at 16, 19; Exhibit K at 2; Exhibit L at 2; Exhibit M at 2-3; Exhibit N at 5; Exhibit O at 3.

In addition, in direct contradiction to the requirement in RAA's Charter that Trustees be elected by RAA's members (*see* Complaint, Exhibit B), RAA's Trustees adopted bylaws which gave the Trustees sole control over the nomination and election process, effectively converting RAA's Board of Trustees to a self-perpetuating Board, rather than one elected by its members. *See* Complaint, Exhibit C at Article VI, § 2. In January 2019, RAA's Trustees further attempted to insulate themselves from the members and cement their absolute and sole control over RAA by amending RAA's bylaws to essentially eliminate any ability of the members to call a special meeting of the members. This was effectuated by changing the number of signatures needed to call a special meeting from 100 members to approximately 10,000, a threshold that was clearly designed to make it virtually impossible for members to meet. *Compare* Complaint, Exhibit C at Article III, at § 2; Exhibit P at Article III, at § 2. Finally, the Trustees adopted bylaws that gave the sole right to amend RAA's bylaws to the Trustees, ignoring the clear language of the N-PCL that specifically grants members the right to amend bylaws, and further provides that the members' right to do so is superior to the right granted to the Board. *See* N-PCL §§ 602(b), (c).

This lawsuit brings to a head the conflict between the RAA Board and RAA's members. Plaintiffs are concerned, dedicated and distinguished alumni of RPI, (*See* Complaint at ¶¶ "12-19") who have brought this lawsuit to bring a stop to the illegal actions of the Board and to ensure that the 100,000 members of RAA have the rights granted to them by both RAA's Charter and the N-PCL to have a meaningful voice in the election of Trustees and in how and by whom RAA is governed.

Defendant's attempt to portray Plaintiffs as a rogue minority is totally without merit. In fact, as demonstrated by the results of the Annual Membership Meeting held on September 28, 2019 during the pendency of this lawsuit (the "September Membership Meeting"), it is RAA's Board which is in the minority, not Plaintiffs.[1] At that meeting, an election was conducted in which the slate of Trustees proposed by RAA's Trustees was resoundingly defeated by a vote of 298 (no) to 84 (yes), with three abstentions. A vote to endorse all actions of the Board since the prior meeting was also taken, and the result of this vote was 295 (no) to 72 (yes), with 18 abstentions. *See* Complaint, Exhibit A. The actions of the Board since the prior meeting, that were repudiated by the members, included unilaterally amending the bylaws to increase the signature requirement for members to petition for a special meeting from 100 members to 10% of RAA's members (*Compare* Complaint,

[1] Notably, the current Board was never elected at an Annual Meeting where the quorum requirement was satisfied.

Exhibit C at Article III, § 2; Exhibit P at Article III, § 2), deliberately making it virtually impossible to call a meeting as the new requirement meant that at least 10,000 signatures were necessary. The Board also changed the definition of a quorum from 20 members to 100 members (*Compare* Complaint, Exhibit C at Article III, § 4; Exhibit P at Article III, § 4). To add insult to injury, members present at the meeting attempted to propose new amendments to the bylaws for consideration by the membership, as permitted by the N-PCL, but RAA's President refused to allow any such amendments to be presented. *See* Affidavit of John Krob ("Krob Affidavit") at ¶ 9. Before the September Membership Meeting, the RAA's President and Board had already decided that no member-initiated actions on the bylaws would be permitted. *See* Affidavit of David Glowny ("Glowny Affidavit") at ¶ 4. In fact, at the outset of the September Membership Meeting, RAA presented a slide which stated, "Attempts at bylaw amendments / changes will not be recognized." Glowny Affidavit, Exhibit A. The foregoing action by the Board demonstrates its willingness to ignore the requirements of the N-PCL. By refusing to allow members the right to propose and vote on amendments to RAA's bylaws, the RAA Board has denied the right of its members to have any voice in RAA's operation, notwithstanding the provisions of the N-PCL.

The votes of the members at the September Membership Meeting reflect the widespread discontent among the alumni, not just the Plaintiffs, with how the RAA

is currently being operated. That frustration is exacerbated by RAA's bylaws, which provide that when a slate of candidates is defeated, the existing Trustees nevertheless remain in office until a special meeting of members can be called for a new election. That is exactly what occurred as a result of the defeat of the slate at the September Membership Meeting. While a special meeting was thereafter scheduled for this purpose for February 1, 2020, RAA's Board recently decided to cancel the meeting. *See* Krob Affidavit, Exhibit A. While Plaintiffs can only speculate as to the reason why, it is entirely possible that the Board fears yet another rejection while this lawsuit remains pending before this Court. Meanwhile, the members continue to have no voice in how and by whom RAA is being governed, while the existing Trustees continue in place.

In anticipation of the February 1, 2020 election meeting, Plaintiffs sent proposed bylaws to Defendant on December 13, 2019, to be presented at such meeting. *See* Affirmation of Cornelius D. Murray ("Murray Affirmation"), Exhibit A; Glowny Affidavit, Exhibit B. Defendant responded by stating that it was deferring any presentation of the proposed amendments to its bylaws until after a decision was rendered in the instant lawsuit. *See* Murray Affirmation, Exhibit B. Unless and until a judicial decision is rendered holding that RAA's members have a right to amend RAA's bylaws, Defendant has made it clear that no such right will be recognized. It is against this background that Plaintiffs commenced this lawsuit.

Defendant has now made a motion to dismiss Plaintiffs' Complaint for failure to state a cause of action. For the following reasons, the motion should be denied, and this Court should convert Defendant's motion into one for summary judgment, since there are no questions of material fact and the issues raised herein can be decided as a matter of law.

STANDARDS

A. MOTION TO DISMISS

"A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: the pleading fails to state a cause of action." CPLR 3211(a)(7). A party making such a motion, however, has a heavy burden. "On a motion to dismiss made pursuant to CLR 3211, a court should construe the pleadings liberally, accept the allegations as true and afford the party opposing the motion the benefit of every possible inference to determine whether the facts alleged fit within a cognizable legal theory." *T.Lemme Mechanical, Inc. v. Schalmont Cent. School Dist.*, 52 AD3d 1006, 1008 (3rd Dept 2008) (internal citations omitted). "If any portion of a cause of action is sufficient, it should not be dismissed on motion." *Lacks v. Lacks*, 12 NY2d 268, 271 (1963). "A motion to dismiss under CPLR 3211(a)(7) should not be granted unless, within the four corners of the pleading, liberally construed, the pleader[s have] failed to state a cause of action, or unless documents and other submissions establish conclusively that [the pleaders have] no

cause of action." *Schwaner v. Collins*, 17 AD3d 1068, 1069 (4th Dept 2005) (internal quotation marks and citations omitted). "It is now well established that the criterion in considering a motion to dismiss under CPLR 3211(a)(7) is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Allen v. City of New York*, 49 AD3d 1126, 1127 (3rd Dept 2008) (internal quotation marks and citations omitted). Given the facts set forth above at pages 2-6, Defendant RAA has failed to meet the heavy burden necessary to prevail on a motion to dismiss the Complaint.

B. CONVERTING TO A MOTION FOR SUMMARY JUDGMENT

CPLR 3211(c) provides that "[w]hether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment." Notably, "[i]t is the making of a motion pursuant to CPLR 3211(a), not the making of a request pursuant to CPLR 3211(c), that opens the door to the possibility of summary judgment treatment prior to joinder of issue." *Four Seasons Hotel Ltd. v. Vinnik*, 127 AD2d 310, 319 (1st Dept 1987). "CPLR 3211(c) treatment can avail, and be requested by, the pleader as well as the party pleaded against, provided there is . . . a motion to dismiss that the court, on notice can convert." *Id.* at 319-320. Generally, treatment of a motion to dismiss as one for summary judgment must be preceded by "adequate notice to the parties . . . expressly given by the court." *Mihlovan v. Grozavu*, 72 NY2d 506, 508 (1988). Where the parties

ask for summary judgment treatment, "submit facts and arguments clearly indicating that they were deliberately charting a summary judgment course" or "indicate that the case involved a purely legal question rather than any issues of fact," the court may convert a motion to dismiss to a motion for summary judgment without notice to the parties. *Id.* (internal quotation marks and citations omitted).

A motion for summary judgment "must be supported by an affidavit of a person having knowledge of the facts, together with a copy of the pleadings and other available proof." *S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.*, 34 NY2d 338, 341 (1974). "If the cause of action or defense be established sufficiently to warrant judgment in favor of a party as a matter of law, then such judgment must be granted." *Id.* "On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact." *Id.*

As stated above, the standard for a motion to dismiss requires the Court to liberally construe the pleadings, accept the allegations contained therein as true and afford Plaintiffs, as the party opposing the motion to dismiss, the benefit of every possible inference to determine whether the facts alleged fit within a cognizable legal theory. *See T.Lemme Mechanical, Inc. v. Schalmont Cent. School Dist.*, 52 AD3d at 1008. Plaintiffs are permitted to request treatment of Defendant's motion to dismiss as a motion for summary judgment. *See Four Seasons Hotel Ltd. v. Vinnik*, 127

AD2d at 319. Under the instant circumstances, summary judgment treatment is proper because the parties have submitted facts and arguments which clearly indicate that they are charting a course for summary judgment. *See Mihlovan v. Grozavu*, 72 NY2d at 508. Specifically, both parties have submitted extensive documentation and support for their respective positions. *See generally* Marc Goldberg Affidavit; Murray Affirmation; Krob Affidavit; Glowny Affidavit. Notably, Defendant stated that it was moving pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint, but its memorandum of law fails to address the documentary evidence it relies upon for moving to dismiss under CPLR 3211(a)(1). Moreover, both parties agree that there are no issues of material fact and the instant lawsuit involves purely legal questions. *See id.* As fully set forth below, the parties simply disagree on the interpretation and application of the relevant law to the causes of action. Accordingly, this Court should treat Defendant's motion to dismiss as a motion for summary judgment and grant such motion in Plaintiffs' favor.

ARGUMENT

POINT I

THE COMPLAINT STATES A CAUSE OF ACTION

Defendant's Memorandum of Law in support of its motion to dismiss addresses each of the bylaws challenged by Plaintiffs in this case in numerical sequence as they appear in the Complaint. Plaintiffs, in contrast, will address each

of those bylaws in their relative order of importance, setting forth the reasons why they are illegal.

A. Article XI, § 1 of the Bylaws violates N-PCL § 602

To the extent Article XI, § 1 of RAA's bylaws purports to give the Board the ***sole*** power to adopt, amend, or repeal RAA's bylaws, such section violates N-PCL § 602 and the Charter. Article XI, § 1 provides as follows:

> [t]hese 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.

Complaint, Exhibit C at Article XI, § 1.

Defendant argues that this provision means that only the Board, and not the members, can amend the bylaws. *See* Defendant's Memorandum of Law in Support of its Motion to Dismiss the Amended and Supplemental Complaint at 10 ("Defendant's MOL"). A not-for-profit education corporation's bylaws, however, may not contravene its Charter, the N-PCL, or any other applicable New York State statute. *See* N-PCL § 602(f); Education Law § 226(10). Bylaw provisions that are inconsistent with the N-PCL or the certificate of incorporation/Charter are void and unenforceable. *See e.g., Keogh v. Connolly*, 235 AD2d 241, 241 (1st Dept 1997) ("Any attempt to amend or adopt by-laws in a manner that violates the certificate of

incorporation of a not-for-profit corporation is null and void"); *Sealey v. American Socy. of Hypertension, Inc.,* 10 Misc. 3d 572 (Sup. Ct. 2005), *aff'd*, 26 A.D.3d 254, 810 N.Y.S.2d 48 (2006). N-PCL § 602(b) specifically grants the members of a not-for-profit corporation the power to adopt, amend or repeal the bylaws, and further provides that "**unless otherwise provided in the certificate of incorporation or the bylaws adopted by the members**," this power is granted to the board as well (emphasis added). Once bylaws are in place, the power to repeal any bylaw is covered by N-PCL § 602(c), which provides that "[a]ny by-law adopted by the board may be amended or repealed by the members and, **unless otherwise provided in the certificate of incorporation or the by-laws adopted by the members**, any by-law adopted by the members may be amended or repealed by the board (emphasis added)." As noted by several well-recognized commentators, under the language in N-PCL §§ 602 (b) and (c), "members seem to have **greater** rights than directors, as the directors' power to amend the by-laws can be curtailed." VICTORIA B. BJORKLUND, JAMES J. FISHMAN, DANIEL L. KURTZ AND KAREN ALINAUSKAS LOVE, NEW YORK NONPROFIT LAW AND PRACTICE: WITH TAX ANALYSIS § 3.07 (3rd ed. 2019) ("Bjorklund Fishman") (Murray Affirmation, Exhibit C) (emphasis added). "[E]ven if by-laws are adopted by the board of directors, unless otherwise provided in the certificate of incorporation or the by-laws, the membership has an inherent right to amend [such] by-laws." *Id.*

The superior right of members to amend, adopt and repeal bylaws under N-PCL §§ 602(b) and (c) was recognized in the Substantive Outline prepared by the New York State Bar Association for Workshop X of its 2014 Partnership Conference, in which it was stated:

> Members have the right to adopt, amend or repeal bylaws. Unless the certificate of incorporation or bylaws otherwise provide, the Board of Directors also has this right. The N-PCL provides further that the Board of Directors and membership may amend or repeal any bylaw adopted by the other, **provided, however, that the Board's powers may be limited in the certificate of incorporation or the bylaws adopted by the members. Therefore, members appear to enjoy more expansive rights than the Board because members may adopt, amend, or repeal the bylaws and restrict the Board's right to do the same.**

New York State Bar Association, Moving Towards Civil Gideon, 2014 Legal Assistance Partnership Conference, August 28, 2014, at 9 available at https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=51499 (Murray Affirmation, Exhibit D) (emphasis added).

"N-PCL §§ 602 (b) and (c) reflects the legislature's concern for member rights. The [New York Business Corporation Law (BCL)] has an analogous provision, BCL § 601, which gives shareholders an inherent right to amend the by-laws." Bjorklund Fishman, n.15. Pursuant to BCL § 601, "any by-law adopted by the board may be amended or repealed by the shareholders entitled to vote." "The N-PCL was designed to parallel the New York Business Corporation Law as closely as the subject matter permitted." Harry G. Henn and Jeffery H. Boyd, *Statutory*

Trends in the Law of Nonprofit Organizations: California Here We Come, 66 CORNELL L. REV. 1103 (1981), available at: http://scholarship.law.cornell.edu /clr/vol66/iss6/2 (Murray Affirmation, Exhibit E).

The right of RAA's members to adopt, amend or repeal bylaws is the gravamen of the instant lawsuit. The recognition of the members' rights to adopt, amend and repeal bylaws pursuant to N-PCL §§ 602 (b) and (c) would resolve the remaining issues at hand because members could exercise their rights and amend the bylaws to properly conform with the N-PCL, the Education Law and the Charter. Defendant has made it clear that it believes members have no right to amend or adopt bylaws. As previously stated, members were not allowed to move to amend the bylaws at the September Membership Meeting and the proposed bylaws sent on December 13, 2019 were not presented to the members. *See* Krob Affidavit at ¶¶ 9, 12. Defendant has clearly indicated it will not present amendments proposed by members unless this instant lawsuit is resolved in Plaintiffs' favor.

The inherent right of members to amend or repeal bylaws cannot be limited, and there is nothing in RAA's Charter that would prevent the exercise of such a right. Defendant's argument that RAA's Charter, giving the Board the "power to adopt bylaws," as well as the power "to change the number of trustees," was intended to vest sole authority in the Board to not only adopt the initial bylaws, but to also make all further amendments, is misplaced and wholly without merit. *See*

Complaint, Exhibit B. The language in the Charter is analogous to N-PCL § 602(a), which grants the initial incorporators or the Board the power to adopt the **initial** bylaws of the corporation. It is N-PCL §§ 602(b) and (c) which govern the procedure by which the initial bylaws can be amended or repealed, and there, the right of members to take these actions is clearly recognized. In addition, there is a strong argument that instead of delegating sole power to the Board to amend the bylaws, the Charter actually **limited** the Board's power to amend the bylaws to only **one** instance – to change the number of trustees, for which a two-thirds vote of the trustees was required.

Since RAA's members have the inherent right under N-PCL § 602 to adopt, amend and repeal bylaws, Plaintiffs claim that Article XI, § 1 violates N-PCL § 602 and the Charter clearly states a cause of action, and should not be dismissed. Furthermore, since the interpretation of N-PCL § 602 is solely a question of law, Plaintiffs are entitled to summary judgment on this claim. Accordingly, Plaintiffs request that this Court declare and recognize that members have a right to adopt, amend and repeal bylaws, that nothing in RAA's Charter prevents members from taking such action and that any bylaws adopted by the members supersede and nullify any inconsistent bylaws adopted by the Board.

B. Article III, § 1 and Article VI, § 2 of the Bylaws violate RAA's Charter.

Defendant's assertion that "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 RAA" is meritless. *See* Defendant's MOL at 7. RAA's Charter specifically provides that its Trustees are "to be elected by the membership of Rensselaer Alumni Association." *See* Complaint, Exhibit B. In the event of a conflict between a corporation's Certificate of Incorporation or Charter and its bylaws, the provisions of the Certificate of Incorporation or Charter control. *See* N-PCL § 602(f); Education Law § 226(10); *see also Herbert H. Lehman College Foundation, Inc. v. Fernandez*, 292 AD2d 227, 227-28 (1st Dept 2002). In a not-for-profit corporation with members, the Charter or "the by-laws may provide, either absolutely or contingently, that the members of any class shall not be entitled to vote, or it may limit or define the matters on, and the circumstances in which a member or a class of members shall be entitled to vote." *Gluck v. Chevre Liady Nusach Hoary*, 97 AD3d 787, 790-91 (2012), quoting N-PCL § 612. "[N]o such denial, limitation or definition of voting rights shall be effective unless at the time one or more classes of members, singly or in the aggregate, are entitled to full voting rights." *Gluck v. Chevre Liady Nusach Hoary*, 97 AD3d at 791, quoting N-PCL § 612. Bylaws which attempt to abrogate members' rights to vote are legally ineffectual. *See Gluck v. Chevre Liady Nusach Hoary*, 97 AD3d at 791.

The bylaws adopted by RAA's Trustees governing election of Trustees are in direct conflict with RAA's Charter and are thus invalid. *See id.* While under the nomination and election process set forth in Article VI, § 2 of the bylaws, RAA's members can submit nominations for Trustee positions, the final slate of candidates is chosen by the Board's internal Nominating Committee, and thereafter approved by the Board. At the Annual Meeting of members, members can only vote to approve or disapprove the Board's selected slate in its entirety, and nominations from the floor and write-in ballots are not permitted. If the Board's slate of candidates is defeated, as occurred at the September Annual Meeting, the current Trustees merely continue in office until a special meeting of the members can be called, and this process is repeated.

While the bylaws purport to give the members the right to "elect" Trustees, that right is illusory. The net effect of this process is to eliminate any effective right of the members to actually choose who the Trustees will be. A pre-selected slate, chosen solely by the Board and based on criteria known only to the Board, with no ability for the members to add candidates, or vote individually for any particular candidate, is, at best, a rubber-stamp of the Board's selection, especially where, even when a slate is defeated, only the Board has the opportunity to select a new slate. This cannot by any definition be deemed a true election, and is the equivalent of a self-perpetuating Board. Based upon the foregoing, the members' full voting right

was abrogated and, therefore, the amendments to bylaws Article III, § 1 and Article VI, § 2 were illegal. *See Gluck v. Chevre Liady Nusach Hoary*, 97 AD3d at 791. Since RAA's Charter does not allow for a self-perpetuating Board of Trustees, and instead requires that the Trustees be elected by RAA's members, Plaintiffs Claim that Article III, § 1 and Article VI, § 2 violate RAA's Charter states a proper cause of action, and should not be dismissed. Furthermore, since this issue involves solely the question of whether such bylaw provisions violate RAA's Charter, and does not involve any question of fact, Plaintiffs are entitled to summary judgment on this Claim.

C. Article III, § 2 of the Bylaws violates RAA's Charter, the Education Law and the N-PCL.

Historically, Article III, § 2 of RAA's bylaws permitted a special meeting of the members to be called on the signature of 100 members. *See* Complaint, Exhibit P at Article III, § 2. The ability to call a special meeting is an important right granted to members by N-PCL § 603(c), since it allows the membership to address issues of importance that arise between the required annual meetings of the members. Without such a right, pressing issues which arise between annual meetings could not be addressed. In January 2019, a Petition was submitted to the Board, calling for a special meeting of the members to discuss several issues pertaining to RAA, including problems with how the December 2018 election of Trustees was

conducted. *See* Krob Affidavit at ¶ 7.

As an added insult to the members, four days after the submission of the Petition calling for a special meeting of the members, RAA's Trustees amended Article III, § 2 to now provide that a special meeting of the members could only be called on the signature of 10% of the membership. *See* Complaint, Exhibit C at Article III, § 2. Since there are approximately 100,000 members of RAA, the net effect of this change was to increase the number of signatures required from 100 to 10,000, a 100-fold increase that would clearly be impossible for members to meet. As stated previously, this change effectively eliminated any ability of the members to call a special meeting of the members. It was a blatant attempt by the Board to eliminate any ability of the members to challenge its actions between annual meetings, further cementing its sole and total control over RAA.

Defendant perversely invokes N-PCL § 603(c) as support for this draconian reduction. *See* Defendant's MOL at 4. Defendant, however, failed to include the most important part of the clause from N-PCL § 603(c) – the first three words stating that "[i]n any case," 10% of the members would have the right to call a special meeting. The 10% threshold in the statute was intended as a default provision, so that if the bylaws were silent as to the number needed, or if the bylaws had too large a requirement, a special meeting could always be called by 10% of the members. From the timing of the amendment, it is obvious that the sole motive for imposing

this requirement was to make it impossible as a practical matter for members to call a meeting to challenge the Board's illegal actions. A provision intended by the Legislature to enhance members' rights is being used instead to diminish them. The right of members to call a meeting exists to enable members to have a voice; the Board's amendment does just the opposite – it silences that voice.

N-PCL § 603(c) was not intended to provide justification for a Board's action in insulating itself from member review by raising the number to call a special meeting so high that it would be virtually impossible to meet. Plaintiff's Claim that Article III, § 2 violates the Charter, Education Law or the N-PCL states a cause of action and should not be dismissed. In addition, since there are no facts at issue, Plaintiffs are entitled to summary judgment on this Claim.

D. <u>Article V, § 1(c) of the Bylaws violates the N-PCL.</u>

Article V, § 1(c) of the bylaws is in violation of N-PCL § 712(a)(2), since it allows vacancies in Trustee Officer positions to be filled by RAA's Executive Committee. Article V, § 1(c) of the bylaws allows RAA's Executive Committee to fill any "officer" vacancies that occur between the annual membership meetings. The key fact is that all officers are elected and serve as Trustees of RAA, and not purely as officers. The composition of the Board of Trustees is covered by Article IV, § 1 of the Bylaws, which provides that the Board includes the following:

- A maximum of 12 Trustee Officers;
- A maximum of 3 Trustee Officer Designates; and

- A maximum of 17 Trustees-at-Large.

Under Article IV, § 2 and Article V, § 1(a), most Trustee Officers are elected for terms of one year, while Trustees-at-Large are elected for three year terms. Since under Article IV, § 1 of the bylaws, all officers are elected as Trustees of RAA, and all serve as voting members of the Board of Trustees, the rules governing the filling of Trustee Officer vacancies are those governing the filling of Director/Trustee vacancies, and not those that are applicable solely to officers. N-PCL § 712(a)(2) specifically provides that no committee of any kind shall have the power to fill vacancies occurring in the board of directors or in any committee.

Plaintiffs' claim that Article V, § 1(c) of the bylaws violates the N-PCL states a cause of action, and should not be dismissed. In addition, since this issue solely involves an interpretation of law, and there are no facts at issue, Plaintiffs are entitled to summary judgment on this Claim.

E. <u>RAA's Amendment of Article III, § 4 of the Bylaws was Approved in Violation of the N-PCL.</u>

Until June 2019, Article III, § 4 of the bylaws provided that 20 members would constitute a quorum, a far lower number than permitted under any paragraph of N-PCL § 608. *See* Complaint, Exhibit P at Article III, § 4. In June 2019, RAA's Board of Trustees amended that provision to now provide that 100 members shall constitute a quorum. *See* Complaint, Exhibit C at Article III, § 4. Under N-PCL § 608(a), a majority of the members of a not-for-profit corporation are needed in order

for a quorum to be present at a meeting of the members. Since organizations with a large number of members such as RAA would never meet the threshold needed for a quorum, N-PCL § 608(b) permits organizations to reduce the number of members needed for a quorum to the lesser of 100 members or 10% of the membership, by providing for such reduced number in their certificate of incorporation or bylaws. Where the certificate of incorporation or bylaws do not currently allow for such reduced number, a reduction in the number of members required can be accomplished by either a vote of the members at a special membership meeting, or by filing a petition with the supreme court, seeking permission to make such reduction. *See* N-PCL §§ 608(c),(e).

While Plaintiffs believe a reduction to 100 members is appropriate, the Trustees' action in unilaterally adopting that change, rather than submitting it for a vote of the members, violates the procedure mandated by N-PCL § 608(c). Quorum provisions that are "inconsistent with statutory requirements" are null and void. *Sealey v. American Socy. of Hypertension, Inc.*, 26 AD3d 254, 255 (1st Dept 2006). The Board's attempted amendment of the number of members needed for a quorum was therefore invalid, and the amendment must instead be submitted to the membership for vote.

Plaintiffs' Claim that the amendment of Article III, § 4 of the bylaws violated the N-PCL states a cause of action and should not be dismissed. Since there is also

no question of fact at issue, Plaintiffs are entitled to summary judgment on this Claim.

POINT II

THE BUSINESS JUDGMENT RULE DOES NOT APPLY TO ILLEGAL ACTS

Defendant's invocation of the "business judgment rule" is to no avail. It is inapplicable to the present case. The business judgment rule is intended to prevent courts from second-guessing decisions made by a board acting in its legal capacity as the day-to-day governing body of a corporation. It exists to remind courts that they must generally defer to such judgments given the presumed expertise of a board. This case, however, is about something entirely different. Judicial deference to business judgments does not provide a board with license to ignore laws governing how it is to be elected, how bylaws are to be adopted, or what number constitutes a valid quorum for a meeting. The fact that the Judiciary may not question the wisdom of a law passed by the State Legislature does not mean that it may not invalidate a law passed in violation of the State Constitution. The same logic applies here.

Defendant mistakenly relies upon the business judgment rule and the role of a governing board in managing a corporation to justify the actions taken by RAA's Trustees in usurping all legal rights that RAA's members have in this matter. *See* Defendant's MOL at 2, 3. To be sure, in a corporation with 100,000 members, it is axiomatic that a much smaller body is needed to handle the overall operations of

RAA on an ongoing basis, as well as to serve as the central source for providing information to its membership. That, however, does not negate the fact that the Board is ultimately answerable to the membership, which was granted the sole right by RAA's Charter to elect the Trustees and the power to adopt, amend and repeal RAA's bylaws pursuant to N-PCL § 602. Simply stated, the business judgment rule does not give a board the right to act in violation of a statute.

Directors of a not-for-profit corporation are required to act "in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances," (N-PCL § 717(a)) and in discharging their duties, may rely on information, opinions, reports, etc. from officers, employees and committees of the corporation, and attorneys, accountants and other outside professionals. *See* N-PCL § 717(b). While actions taken by directors in good faith, to further lawful and legitimate purposes of the corporation, are protected by the business judgment rule, *Matter of Levandusky v. One Fifth Ave. Apt. Corp.*, 75 NY2d 530 (1990), such rule is intended to cover **business decisions** made in the course of operating a corporation (entering into contracts, making or securing loans, selling or purchasing property, etc.). *See e.g., 40 West 67th Street v. Pullman*, 296 AD2d 120, 124 (1st Dept 2002) (applying the business judgment rule to a cooperative's decision to enforce building policy); *In the Matter of Kenneth Cole Prods., Inc.,* 27 N.Y.3d 268, 280 (2016) (finding that the business judgment rule was applicable to the decision involving a

private merger).

The business judgment rule is not intended, however, to apply to a complete takeover by the Board of all rights granted by law and the governing instruments to the members (or shareholders) of a corporation. *See Cababe v. Estates at Brookview Homeowner's Association, Inc.*,52 AD3d 557, 558-559 (2nd Dept 2008) ("the business judgment rule protects the board's business decisions and managerial authority from indiscriminate attack . . . [but] it permits review of improper decisions, [where] the board's action has no legitimate relationship to the welfare . . . [or] is taken without notice or consideration of the relevant facts, or is beyond the scope of the board's authority"). Where "corporate decisions of the directors lacked a legitimate business purpose or were tainted by a conflict of interest, bad faith or fraud, the business judgment rule may not be invoked to insulate the directors." *Amfesco Industries, Inc. v. Greenblatt*, 172 AD2d 261, 264 (1st Dept 1991). "The business judgment rule has no place where corporate officers or directors take actions that exceed their authority under the relevant corporate bylaws." *People by Attorney Gen. of State v. Lutheran Care Network, Inc.*, 167 AD3d 1281, 1286 (3rd Dept 2018).

The business judgment rule does not protect the actions taken by RAA's Trustees in this matter, where the Board eliminated member voting rights, made it impossible for members to call a special meeting of the members, and barred the

members from exercising their statutory rights to adopt, amend and repeal bylaws under N-PCL § 602. Just as in a business corporation, the Board of Directors cannot take actions adverse to the rights granted by law or the Certificate of Incorporation to the shareholders of the corporation without being held accountable, the Board of a not-for-profit membership corporation may not take actions adverse to the rights granted to its members by its Charter or the N-PCL. Defendant's actions in denying rights legally granted to RAA's members are not business decisions in furtherance of RAA's purpose. Instead, Defendant's actions are designed for one purpose only – to totally usurp the right of RAA's members to have a voice as to how and by whom RAA is governed. In short, the business judgment rule does not supersede duly enacted statutes applicable to corporate governance.

POINT III

THE LAW OF THE CASE DOCTRINE DOES NOT APPLY

Defendant also mistakenly argues that this Court's prior decision denying a preliminary injunction somehow triggers the "law of the case" doctrine. The law of the case doctrine was designed to limit re-litigation of issues, where there was a full and fair opportunity to litigate the initial determination. *See People v. Evans*, 94 NY2d 499, 502 (2000). "The granting or refusal of a temporary injunction does not constitute the law of the case or an adjudication on the merits, and the issues must be tried to the same extent as though no temporary injunction had been applied for."

J.A. Preston Corp. v. Fabrication Enterprises, Inc., 502 N.E. 2d 197, 199 (1986). "Notably, the granting or refusal of a temporary injunction does not constitute the law of the case or an adjudication on the merits." *Digitronics Inventioneering Corp. v. Jameson*, 11 AD3d 783, 784 (3rd Dept 2004). No causes of action are precluded by the doctrine of the law of the case in this matter, since the prior motion was for a preliminary injunction, and the parties did not have a full and fair opportunity to address the merits of the case. *See J.A. Preston Corp. v. Fabrication Enterprises, Inc.*, 502 N.E. 2d at 199.

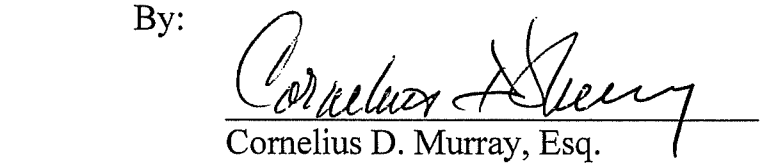
CONCLUSION

The Defendant Board members either do not understand, or have forgotten, that they derive their power from the members who elect them. For the foregoing reasons, Plaintiffs respectfully request that Defendant's motion to dismiss the Complaint be denied in its entirety, that such motion be treated as one for summary judgment and that Plaintiffs be granted summary judgment. Alternatively, Plaintiffs request that this Court provide both parties with notice that it intends to treat Defendant's motion as one for summary judgment and provide an opportunity for both parties to submit any additional arguments it deems appropriate.

DATED: Albany, New York
February 7, 2020

Respectfully submitted,

O'CONNELL AND ARONOWITZ
By:



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