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 CROSS-MOTION

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Dated: September 18, 2019

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PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted by Plaintiffs in reply to Defendant's opposition to Plaintiffs' motion for a preliminary injunction and in opposition to Defendant's cross-motion to partially dismiss the complaint. Plaintiffs have established all three elements needed for a preliminary injunction. In addition, Plaintiffs have properly stated a cause of action with respect to each of the claims set forth in their complaint.

ARGUMENT I

Plaintiff Have Established All Elements Needed for a Preliminary Injunction

To obtain a preliminary injunction, a party "must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of the equities in its favor." *Biles v. Whisher,* 160 A.D.3d 1159, 1160 (3d Dept 2018) (internal quotation marks and citation omitted); *see also Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862 (1990). Plaintiffs have established that each of these requirements has been met.

POINT 1

Plaintiffs Have Established A Probability of Success on the Merits

In arguing that Plaintiffs are unlikely to success on the merits, Defendant relies almost exclusively on N-PCL §618, which governs the procedure to be followed *in challenging past elections*. That section, however, has no bearing on the relief sought by Plaintiffs in this case. Plaintiffs are not challenging the results of a *past* election, but are instead seeking prospective relief with respect to *future elections* (most immediately, the election scheduled for September 28, 2019, which is the subject of Plaintiffs' request for a preliminary injunction).

The preliminary injunction is necessary to prevent the very serious flaws that have tainted past elections, the worst of which is the ability of the entrenched Board to control who can be nominated or elected via bylaws that illegally deprive the membership of all power even to nominate opposition candidates. Plaintiffs should not have to wait until after the flawed election is held on September 28th to then bring a new and separate proceeding to challenge the results of such election under N-PCL §618 (which is the remedy Defendant appears to be suggesting), wasting both Plaintiffs' money and the Court's time. Instead, by granting the preliminary injunction, the upcoming election will simply be held in abeyance until the merits of the underlying action can be determined, so that any flaws established by Plaintiffs in the action can be remedied prior to the holding of such election.

POINT II

Plaintiffs Have Established the Danger of Irreparable Injury

In opposing Plaintiffs' motion for a preliminary injunction, Defendant alleges that Plaintiffs are seeking to change the status quo, and that Plaintiffs have failed to show why such change is necessary. However, Plaintiffs are not seeking to *change* the status quo; they are instead seeking to *preserve* the status quo – the continuation of the current composition of the Board of Trustees until the merits of the action can be determined. It is the holding of the election on September 28th which would change the status quo, by changing the configuration of the Board.

If such election is allowed to continue, the new Trustees would immediately take office, some for a term of three years. That would leave Plaintiffs with two equally unacceptable alternatives – either bringing a new action to contest the election under N-PCL §618, as described above, or being effectively "stuck" with such new Trustees until the expiration of their respective terms, even if Plaintiffs are ultimately successful in the underlying action.

In addition, while Defendant argues that Plaintiffs have not presented any stated irregularity they are trying to prevent with the preliminary injunction, the Complaint and supporting papers are replete with multiple irregularities that have occurred in the existing election process, including the most significant: that by giving the Board the sole right to pick the slate of candidates who will be considered for election, and limiting members to either rubber-stamping the entire slate, or voting against it in its entirety, the Board has denied RAA's members from having any real voice in electing the Trustees, in direct contravention of the members' legal right to elect RAA's Trustees which was granted by its charter.

As was discussed in detail in Plaintiffs' Memorandum of Law in Support of a Preliminary Injunction (*see* pages 18-20), courts have consistently found that irreparable harm exists where corporate management has taken action that denies shareholders the right to vote or obtain representation on the board of directors. *International Banknote Company, Inc. v. Muller* , 713 F. Supp. 612, 623 (S.D.N.Y. 1989) (*citing Danaher Corp. v. Chicago Pneumatic Tool Co.*, No. 86 Civ. 3499 (PNL) slip op., 1986 WL 7001 (S.D.N.Y. June 16, 1986); *Treco, Inc. v. Land of Lincoln Sav. and Loan*, 572 F. Supp. 1447, 1450 (N.D.IL 1983); *Minstar Acquiring Corp. v. AMF Inc.*, 621 F. Supp. 1252 (S.D.N.Y.1985); *Bank of New York Co., Inc. v. Irving Bank Corp.*, 139 Misc.2d 665, 528 N.Y.S.2d 482, 484 (Sup.Ct.1988)).

Irreparable harm has also been found to exist where shareholders have sought to enjoin the enforcement of a bylaw amendment impacting an *upcoming* election of directors, on the basis that '[i]f the amendment is invalid, its presence is likely to taint the electoral process *which a subsequent invalidation by this court will not cure* (emphasis added)." *Bank of N.Y. Co. v Irving Bank Corp.*, 139 Misc.2d 665, 669 (Sup. Ct. N.Y. Cty.)(1988), finding that the granting of a preliminary injunction prior to the shareholders' meeting was proper, since the harm threatened

was to the corporate electoral process, which "carries with it the right of shareholders to a meaningful exercise of their voting franchise" (*Id., quoting Packer & G&P Ind. Mgt. Corp. v Yampol, et al.* 54 USLW 2582 [Del Ch, Apr. 18, 1986, C.A. No. 8432) (available on WESTLAW, 1986 WL 4748)).

POINT III

The Balance of Equities Favor Plaintiffs

Simply stated, the proposed election of Trustees on September 28th is fatally flawed, since each of the problems with the election process that Plaintiffs are challenging in this action are present in the scheduled election. The slate of candidates was picked solely by the Board, and the candidates on that slate are the only ones that may be considered by the members at the meeting, since nominations from the floor and write-ins are not permitted. The entire slate must be voted as a unit; members are limited to just approving the slate picked by the Board, or voting against it in its entirety. If the slate is voted down, the current Trustees continue in office until such time as a new slate is selected, again solely by the Board, and a special meeting of the members can be called. This procedure goes to the very core of Plaintiffs' Complaint – *that the Board has effectively usurped the members' right to elect RAA's Trustees.*

Since the temporary continuation of the current Board if the preliminary injunction is granted is exactly the same result which would occur if the slate nominated by the Board is voted down in the election, Defendant's arguments that the grant of the preliminary injunction "would afford Plaintiffs preferential treatment," "undermine the public interest of not-for-profit corporations to hold elections," "unfairly disadvantage the RAA," and "create uncertainty on the eve of the Election," are specious, and totally without basis, in fact or in law.

ARGUMENT II

Defendant's Cross-Motion to Dismiss Plaintiffs' Complaint in Part Should Be Denied

For the reasons set forth below, Defendant's cross-motion to dismiss what it has characterized as Plaintiffs' Claims 1, 2 and 5 as failing to state a cause of action should be denied; for convenience, Defendant's numbering has been used in this Memorandum of Law. In addition, Defendant's assertion that Claims 3 and 4 are moot is premature and without merit.

Claim 1

Change in Number of Members Required to Call a Special Meeting of the Members

Plaintiffs have challenged the amendment adopted by the Board in January, 2019 to Article III, Section 2 of RAA's Bylaws, which changed the number of members required to call a special meeting of the meeting from 100 to 10% of the total membership. Since there are approximately 100,000 members of RAA, the change would now require 10,000 member signatures (a 100-fold increase) before a special meeting will be called. The change was passed by the Board just days after a special meeting of the members had been called, under the 100 threshold then required.

Defendant's reliance on N-PCL §603(c) as authorizing in all cases a change to 10% of membership for the calling of a special meeting of the members is misplaced. Such section is not intended to provide the exclusive method by which members can call a special meeting; instead, it is designed as an *additional* method by which members can call a meeting.

Essentially, N-PCL §603(c) states that "in any case," no matter what the bylaws or certificate of incorporation may provide, 10% of membership will *always* have a right to call a special meeting. It does not mean that requiring 10% in all cases will always be appropriate, no matter what the underlying facts are. That is especially so in egregious cases such as the one here,

where the increase from 100 to 10,000, coupled with the underlying facts and timing, would strongly suggest that the overriding reason for the change was to make it virtually impossible for members to call any future special meetings of the membership.

Claim 2

Change in Quorum Needed for Meeting of Members

Plaintiffs have challenged the Board's action in amending Article III, Section 4 of RAA's Bylaws to set the quorum for the holding of a meeting of members at 100 as being a violation of N-PCL §608, since it was not properly approved by the members.

In response, Defendant argues that the Board has the unilateral "undeniable" right to amend RAA's Bylaws, citing as support Article XI of RAA's Bylaws, as long as the amendment "is not inconsistent" with this chapter, state law, or the certificate of incorporation. This argument is incorrect. As will be explained in more detail in connection with Claim 5 below, the Board does *not* have the unilateral right to amend RAA's Bylaws, and the adoption of Article XI, presumably by the Board, does not confer this right; instead the N-PCL gives preference to a corporation's members in passing any bylaw amendment (see discussion of N-PCL §602 below).

In addition, while N-PCL §608(b) permits the number of members needed for a quorum to be set at 100, under N-PCL §608(c), this action is required to be approved by the *members* (not the Board), at a special meeting of the members called for that purpose. Sections such as N-PCL §608(c) serve as a check on the Board's ability to amend provisions having to do with essential rights of the membership, by requiring in this case that changing the number needed for a quorum to 100 be approved specifically by the membership.

Finally, the Board's attempt to set the quorum at 100 ignores a very real logistical problem. Historically, it would be very rare for a meeting of the members to have 100 members in

attendance. Since a lower number may well be needed to ensure that a quorum for the conduct of business exists, the proper course of action would have been the filing of a petition with the Supreme Court, on notice to the Attorney General, seeking approval to set the quorum at some lower number pursuant to N-PCL §608(e); this is not something the Board or the members can do independently.

Claims 3 and 4

Reduction in Minimum Number of Trustees and Grant of Sole Power to Elect Trustees to Board

Plaintiffs have challenged the reduction in the minimum number of Trustees allowed from five to three, on the basis that such change violates RAA's Charter (Claim 3). In addition, Plaintiffs have challenged the Bylaw provisions giving the Board the sole power to effectively decide who will be elected as Trustees as a violation of the right granted to the members by RAA's Charter to elect its Trustees (Claim 4). Defendant argues that both of these claims should be dismissed because RAA "has taken steps to amend the By-laws, and upon approval, those claims would be moot."

This argument is lacking merit for two reasons. First, copies of the actual proposed amendments to RAA's Bylaws were not attached to Defendant's cross-motion. Without the ability to review the actual amendments which are being proposed, there is no way for the Court to determine whether such proposed amendments would fully address the issues raised by Plaintiffs in Claims 3 and 4.

Second, as is made clear in the Affidavit of Kareem I. Muhammad submitted with Defendant's cross-motion, even if the amendments fully address the issues presented (and there is no way to confirm that this is correct), they have simply been forwarded to the Board for consideration, and have not yet been approved. Until such time as the amendments are actually

approved, which will not occur at the earliest until the next meeting of the Board, Claims 3 and 4 are clearly not yet moot, and are still in issue.

Claim 5

Improper Grant to Board of Sole Power to Adopt, Amend or Repeal RAA's Bylaws

It is Plaintiffs' position that to the extent Article XI of RAA's Bylaws purports to give the Board the sole power to adopt, amend or repeal RAA's bylaws, such Article violates N-PCL §602. In response, Defendant mistakenly argues that the provision in RAA's Charter giving the Board the power to *adopt* bylaws, and set the term and number of Trustees, automatically carried with it the unilateral, absolute right to make all amendments to the bylaws. This is incorrect for the following reasons.

First, what the charter granted to the Trustees was the right to adopt *the initial bylaws* of RAA. This is simply the equivalent of N-PCL 602(a), which provides that the initial bylaws of a corporation can be adopted by either the incorporators or by the Board; that is not the same thing as the power to amend RAA's Bylaws subsequently.

Instead, the amendment of a not-for-profit corporation's bylaws is covered by N-PCL §602(b), which provides that bylaws may be adopted, amended or repealed *by the members* at the time they are entitled to vote for directors, and, *unless otherwise provided by the certificate of incorporation or the bylaws adopted by the members*, by the board (giving preference to the members with respect to any amendment of the bylaws, and further giving the members the right to restrict the Board's ability to amend the bylaws).

Even more telling, N-PCL §602(c) then goes on to provide that "any bylaw 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 bylaw adopted by the

members may be amended or repealed by the board. As with N-PCL §602(b), this also gives preference to the members in being able to restrict the Board's ability to amend bylaws.

Finally, N-PCL §602(e) provides that if any bylaw regulating an impending election of the directors is adopted by the board, there has to be a notice in the next meeting of the members for the election of directors explaining the change that was made – another example of the power given to members to act as a check on the right of directors to amend bylaws.

The Charter only gave the Board the power to amend the bylaws in <u>one</u> instance – the ability by two-thirds vote to change the number of trustees to not more than 25 nor less than 5 (the maximum was later changed by the Board of Regents in 1999 to 40). Instead of supporting Defendant's argument that the Charter gave the Board the unfettered right to amend RAA's bylaws, the Charter can be read as doing the exact opposite - *limiting* the Board's right to amend RAA's bylaws to just where a change in the total number of Trustees was desired.

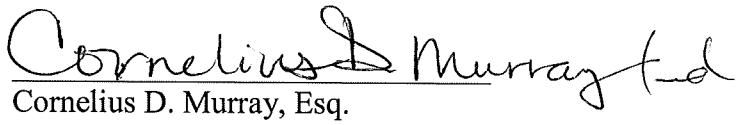
CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' request for a preliminary injunction, enjoining Defendant from conducting an annual election of Trustees and Officers until further order of this Court, deny Defendant's cross-motion to partially dismiss the Complaint filed by Plaintiffs, and grant such other and further relief as to the Court seems just and proper.

DATED: Albany, New York
September 18, 2019

Respectfully submitted,

O'CONNELL AND ARONOWITZ
By:



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