Filed:03/02/2021 10:54:54
Fourth Judicial District, Boise County
Mary Prisco, Clerk of the Court
By: Deputy Clerk -Baumhoff, Staci

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR BOISE COUNTY

DENNIS LARGENT, MARY CORDOVA, CHUCK STEELE, ACTING AS MEMBERS OF THE BOARD OF DIRECTORS OF THE TERRACE LAKES WATER COMPANY, Plaintiffs, vs. ILENE JOHNSON, LONNIE BRAMON, DARLENE BLAKESLEE AND TERRACE LAKES WATER COMPANY, Defendants.	Case No. CV08-20-247 ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION AND DENYING MOTION TO DISMISS

THIS MATTER comes before the Court on Plaintiffs' Motion for Preliminary Injunction, requests for various writs, and request for early hearing on the merits, filed through counsel on December 16, 2020, and Defendants' Motion to Dismiss the same, filed through counsel on December 23, 2020. A hearing was held on January 22, 2021, and the matter was taken under advisement.

For the reasons set forth herein, Plaintiffs' Motion is GRANTED and Defendants' Motion to Dismiss is DENIED. The Court finds and concludes that (a) the October 25, 2020 election, certified as final following a recount on October 28, 2020, was valid; (b) the legitimate Board of Directors of the Terrace Lakes Water Company is comprised of Mary Cordova, Dennis Largent, and Chuck Steele; (c) the December 19, 2020 election was invalid and is void; (d) Defendants shall facilitate the transfer of Company books and records to the Plaintiffs; (e) Defendants shall perform all necessary acts to place Plaintiffs in control of Company financials; and (f) Defendants are prohibited from altering or destroying Company books and records.

PROCEDURAL AND FACTUAL BACKGROUND[1]

This action concerns a determination of who makes up the legitimate Board of Directors of Terrace Lakes Water Company ("the Company").

(1) Background

The Company was created in 2006 as a non-profit domestic water distribution company benefitting the members, also known as "Subscribers," of the Terrace Lakes Subdivision in Garden Valley. The initial Board of Directors identified in the Articles of Incorporation ("Articles") included Ilene Johnson ("Johnson"), Val Wardle ("Wardle"), and Lonnie Bramon ("Bramon").[2] Bramon is Johnson's son. The Articles stated that anyone owning real property within the Terrace Lakes Subdivision may be a "Member of the Company" and that the "Company will not have voting Members."[3]

Johnson testified that since the Company's incorporation, there have been "at least" six annual or special meetings. However, the records of such meetings are spotty, incomplete, and reflect that Johnson has been mismanaging the Company since its inception by failing to hold proper meetings and document them. The entirety of the Company records regarding meetings before 2020 are as follows.

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[1] The record consists of the Verified Applications for Writ of Mandate, Writ of Prohibition, Alternative Writ, Peremptory Writ, Petition for Declaratory Judgment, Motion or Temporary Restraining Order, Motion for Preliminary Injunction and Application for Injunctive Relief (filed Dec. 16, 2020) (hereafter, "Compl.") and the Affidavits of Michael Kane, Sandy Nabbefeld, Annetta Zimmerman, David Stillman, Lisa Largent, Mary Cordova, Kattie Steele, Melissa Lefevre, Dennis Largent, Chuck Steele, Ilene Johnson, Dennis Largent (2nd), Chuck Steele (2nd), Barbara Beehner-Kane, Michael Kane (2nd), Mark Iverson, Kattie Steele (2nd), Robert Goodwin, and Ronald Sneed. Defendants filed a motion to strike the last four affidavits, because they were untimely filed. However, Defendants did not (1) notice the Motion for hearing, (2) raise the issue at oral argument, (3) indicate they needed additional time to respond, or (4) set forth any prejudice by the late filings. Therefore, the Motion to Strike is DENIED.

[2] Johnson Aff. ¶ 3, Ex. A.

[3] *Id*. at p. 2.

An undated notice was sent to landowners within the subdivision stating that a meeting would be held on October 17, 2009 to elect a Board of Directors.[4] The notice listed five nominees. The notice stated that the "by-laws refer to all users of the water as Subscribers instead of Members." (Emphasis in original.) However, the only evidence of any Company Bylaws are the Bylaws signed by Johnson and dated months later, on January 26, 2010. The October 17, 2009 notice further indicated that the Directors "have voted" to amend the Bylaws (which did not yet exist) in pertinent part as follows: (1) a "Special Meeting may be called at any time" by the Board of Director or 10% of the Subscribers, (2) the initial Board of Directors designated in the Articles shall serve until their successors are elected at the Annual Meeting or a Special Meeting called for the purpose of electing a Director(s), (2) terms of the Directors are to be "one, two and three year terms for continuity," and (3) the Board of Directors "shall consist of five (5) Directors elected by the Subscribers." There are no records of the meeting that was supposed to be held on October 17, 2009.

On December 30, 2009, meeting minutes indicated a Board of Directors meeting was held at which time the Directors voted to amend the Articles to satisfy federal law to qualify for a loan. The amendment was to change the name of the users of the water system from "Members" to "Subscribers."[5]

On January 10, 2010, another notice was issued for a meeting to be held on January 23, 2010 "for the purpose of electing five Directors."[6] The notice again represented that the current Bylaws (which did not yet exist) were amended in order to qualify for a governmental loan to

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[4] *Id*. at Ex. B.
[5] Kane (2nd) Aff. Ex. B; Beehner-Kane Aff. Ex. E.
[6] Johnson Aff. Ex. C.

upgrade the water system. The notice stated that "property owners at Terrace Lakes Resort that are being billed for water and have connected to the water system are known as 'Subscribers' [and that each] Subscriber has one vote per lot."[7] The notice listed various amendments[8] to be voted on at the January 23 meeting, including that the "Board of Directors shall consist of five (5) Directors elected by the Subscribers.[9] The notice also listed five nominees for the Board of Directors, which included Johnson, Bramon, Janet Harris ("Harris"), Wardle, and Bob Mize ("Mize").[10]

Meeting minutes from the January 23, 2010 meeting indicate that a

> motion was made to adopt the By-Laws, approve the Amendments and elect the Board of Directors as they appeared on the ballot, and there would be another meeting in a year if Subscribers wanted to make any changes it could be done at that time. . . . Motion was seconded and approved. . . The vote was 100% to adopt the By-Laws, approve the Amendments, accept the Policies and Procedures and elect the Five (5) Board members on the ballot to the Board of Directors of the Terrace Lakes Water Company.[11]

Mark Iverson, Ronald Sneed, and Robert Goodwin testified that they were present at the January 23, 2010 meeting. They all affirmed that the Subscribers voted at that meeting to amend the Bylaws and the Articles to allow Subscribers to vote for the Board of Directors.[12] However, amended Articles reflecting this change were never filed with the Secretary of State.

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[7] *Id.*
[8] The notice stated that "[e]ach of you of you have received a copy of the By-Laws for your review. The following are the changes to the original By-Laws that were never recorded." Kane (2nd) Aff. Ex. C.
[9] *Id.*
[10] Johnson Aff. at Ex. C.
[11] Kane 2nd Aff. at Ex. D.
[12] Iverson Aff. ¶ 4, Sneed Aff. ¶ 4, Goodwin Aff. ¶ 4.

Following this Subscriber meeting, a Board of Directors meeting was held wherein Johnson was appointed President, Wardle was appointed Vice President, and Bramon was appointed Secretary/Treasurer.[13]

On January 26, 2010, Johnson signed Bylaws for the Company.[14] The Bylaws appear to be notarized by Bramon. These are the only Company Bylaws in the record. The Bylaws provide in pertinent part that (1) each Subscriber has one vote per lot, (2) the Board of Directors shall consist of five Directors (to fill seats designated as A, B, C, D, E) elected by the Subscribers, and (3) the longest term of any Board seat is three years. Bylaws §§ 2.2, 3.3, 3.5. Under the Bylaws, a Director may be removed by a majority vote of the other Directors or of the Subscribers. *Id*. at § 3.7. Any "vacancies" on the Board, which are the result of "death, resignation, disqualification, removal or other cause," are to be filled by appointment of the Board. *Id*. at § 3.8.

On April 15, 2013, Johnson issued a notice for a "second" meeting to be held on April 27, 2013.[15] The notice indicated that there was a meeting held on March 23, 2013 (however, there is no evidence of this meeting) and that it "was declared void due to some controversy regarding the present Board of Directors having the authority to conduct a meeting and having the right to nominate anyone for the Board of Directors because the current Directors terms had expired." Johnson stated in the notice that this "threw [her] for a loop and [she] was without an answer." However, the notice indicated that she consulted with legal counsel and

> it was determined the Board of Directors are to remain active until they are replaced. This was because the last meeting for the water company was in January 2010 when the five member Board was elected. Lonnie Bramon and I were

[13] Johnson Ex. D.
[14] Kane 2nd Aff. at Ex.
[15] Johnson Aff. Ex. E.

> elected to the three year term, Janet Harris and Val Wardle was [sic] elected to the two year term and Bob Mize was elected to the one year term. It was my mistake because I thought, beings this is [sic] 3 years later, all of our terms had expired. I thought I was in deep trouble because I had not called a meeting for three years. Legal counsel reminded me that the only problem that could exist is if the vendors questioned our authority to buy necessary products for Water Company.[16]

The notice stated that this second meeting was being called for the purpose of electing two Directors to fill two vacancies on the Board of Directors (Wardle and Mize's seats). The notice again stated that each Subscriber has "one vote per lot per Director." The notice listed two nominees: Mike Headrick ("Headrick") and Beckie Nichols ("Nichols").

There is no record of the April 27, 2013 meeting. However, Johnson testified that there was a meeting held on that date and "two Directors were elected."[17] Presumably, the Directors elected were Headrick and Nichols.

On November 2, 2013, a meeting was held to elect three board members.[18] The notice for the meeting again stated that property owners have one vote per lot and one vote for each Director. Nominees were Harris, Darlene Blakeslee ("Blakeslee"), and Ginger Waters ("Waters"). The notice for the meeting also stated that nominations from the floor could be made or written in on the proxy ballot. The meeting minutes from the November 2, 2013 meeting indicate that there were two other meetings held in 2013 for the purpose of electing new Board Members; however, they were "to no avail," because there was "controversy" concerning how the vote should be conducted.[19] Harris, Blakeslee, and Waters were elected to the Board of Directors.

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[16] *Id*.
[17] *Id*. at ¶ 9.
[18] *Id*. at Ex. F.
[19] *Id*.

An undated notice indicated that a meeting would be held on November 1, 2014, to elect two members to the Board of Directors.[20] There are no meeting minutes or any documentation indicating who was elected.[21] However, Johnson testified that she and her son, Bramon, were elected. Johnson testified that after this 2014 meeting, the Board of Directors consisted of herself (three year term), Bramon (three year term), Harris (one year served of a three year term), Blakeslee (one year served of a three year term), and Waters (one year served of a two year term).[22]

There are no records of any further Company meetings until 2020. Accordingly, the terms had expired for all the Board of Director seats. There are reports to the Secretary of State listing Harris as the Company's President in 2015 and 2016.[23] Johnson is listed as the President from 2017 to 2020. However, there are no Company records showing when or how they were appointed.[24]

(2) September 16, 2020 Notice Sent to Subscribers of Annual Meeting

On September 16, 2020, Johnson sent a notice to all Subscribers that a meeting would be held on September 27, 2020 "for the purpose of electing five Directors to serve on the Board of Directors" and "to vote on acquiring a grant and the possibility of installing meters."[25] Like the previous notices, this notice stated that "[e]ach Subscriber has one vote per lot per director, and

[20] *Id*. at Ex. G.
[21] Johnson stated that she attached meeting minutes for this meeting, however, Exhibit G consists of an undated notice for the meeting as well as what appears to be her notes in preparation for the meeting.
[22] *Id*. at ¶ 12.
[23] Kane Aff. ¶ 8, Ex. C.
[24] According to the Bylaws, the Officers of the Company consist of, at a minimum, a President, a Secretary, and a Treasurer, to be appointed by the Board of Directors. Bylaws ¶ 4.1.
[25] Compl. Ex. A.

one vote on other matters."[26] The notice listed the following nominees for the Board: Johnson, Bramon, Blakeslee, Waters, and John Scholl ("Scholl"). The notice stated "[p]roperty owners have five votes one for each director. Votes cannot be cumulative. The proxy has five spaces for write-ins. The above names are on your proxies. Every lot owner with water service can vote."[27]

(3) September 27, 2020 Annual Meeting

At the September 27, 2020 meeting, Johnson announced that (1) a quorum of Subscribers was present, (2) an election was needed as there was "no" Board of Directors, and (3) a meeting had not been held for several years.[28]

The Subscribers then discussed having a fair and open election. A motion was made to appoint an Interim Board of Directors, which would accept nominations and then hold an election. Specific persons were nominated for the Interim Board. The motion was seconded and was approved. There is no evidence that anyone voted against or objected to the proposed course of action. In fact, Bramon participated in the discussion and was elected to the Interim Board. The Interim Board that was elected included Bramon, Lisa Largent, Kattie Steele, Scott Dike ("Dike"), and another individual who later chose not to participate. Neither Johnson, nor anyone else, raised any objection to (1) the creation of an Interim Board or (2) the procedure that was agreed upon at the September 27, 2020 hearing.[29]

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[26] *Id.*
[27] *Id.*
[28] Nabbefeld Aff. ¶¶ 3, 4; Zimmerman Aff. ¶ 5; Stillman Aff. ¶ 4; Lisa Largent Aff. ¶ 4; Cordova Aff. ¶ 4; Steele Aff. ¶ 5.
[29] Johnson states that the "motions were not approved by the sitting Board Members," Johnson Aff. ¶ 15 however, there is no evidence she (or anyone else) lodged any objection at the time of the meeting.

(4) October 2020 Election and Certification of Votes

Following the September 27, 2020 meeting, the Interim Board sent out a notice to all Subscribers. The notice called for nominations to be delivered by October 14, 2020. The Interim Board met on October 16, 2020 to review the nominations and finalize the election process. Blakeslee did not receive enough nominations to be listed as one of the candidates for the election. Bramon participated in the Interim Board meeting and agreed to the final list of candidates to be listed on the ballot. Johnson was also listed on the ballot. On or about the same date, ballots were mailed to Subscribers asking them to denote the number of lots they owned and to vote for five members for the Board of Directors.

On October 25, 2020, the Interim Board held a meeting to count votes. One hundred and eighteen Subscribers voted in the election, including Johnson, Blakeslee, and Bramon.[30] The winners of the election were Dennis Largent, Bramon, Mary Cordova ("Cordova"), Dike, and Chuck Steele. All the Interim Board members present, including Bramon, signed their names on the final tally to certify the results. Three days later, Bramon requested a recount, and the members elected to the Board remained the same. The Interim Board members present again signed their names on the final tally to certify the results.

(5) Aftermath

On October 31, 2020, the newly elected members of the Board of Directors received a "cease and desist" letter from Johnson's attorney, stating that since June of 2020, the Company's Board of Directors included Johnson (President), Bramon (Vice President), and Blakeslee (Secretary)

[30] Lisa Largent ¶ 8, Ex. D.

and two members "at large."[31] The letter advised that the newly elected Board was invalid under the Company's Bylaws and threatened a lawsuit. On November 1, 2020, Johnson sent a letter to Subscribers stating that the Interim Board appointed themselves and did not follow Company Bylaws to remove Directors. She stated that a notice would be sent out to hold a "legitimate election."[32]

On November 7, 2020, three members of the new Board (Dennis Largent, Chuck Steele, and Cordova) had a meeting.[33] Bramon did not attend and Dike resigned from the Board. At the meeting, Dennis Largent was appointed President, Chuck Steeled was appointed Vice President, and Cordova was appointed Secretary/Treasurer. The Board agreed that Bramon should voluntarily resign due to his conflict of interest or the Board would vote him out. The new Board opted to wait on appointing two other Board members until an attorney was consulted.

On November 14, 2020, the Governor of Idaho issued a "Stay Healthy Order," prohibiting gatherings of over 10 people due to the COVID-19 pandemic.[34]

On December 9, 2020, Johnson sent out a notice of a meeting to take place on December 19, 2020, to hold a new election. The notice listed five nominees: Johnson, Bramon, Dike, John Jansen, and Blakeslee.

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[31] No evidence has been presented as to anything that occurred in June 2020 that made these individuals Board members.
[32] Dennis Largent Aff. Ex. E.
[33] *Id*. at Ex. G.
[34] Compl. Ex. G.

On December 16, 2020, Plaintiffs Dennis Largent, Chuck Steele, and Cordova, acting as the Board of Directors of the Company filed suit against Defendants Johnson, Bramon, Blakeslee, and the Company. Plaintiffs seek various forms of injunctive relief, writs of mandate, and requested a temporary restraining order prohibiting the December 19, 2020 election called by Johnson.[35]

On December 19, 2020, the Defendants held a meeting with over 30 people present[36] and in violation of the State of Idaho's prohibition against private gatherings of more than 10 people. Chuck Steele and Dennis Largent attended the meeting to object to the proceedings. Johnson, Bramon, Dike, John Jansen, and Blakeslee were elected at the meeting.

On December 23, 2020, Defendants filed a Motion to Dismiss the instant proceeding. On January 22, 2021, a hearing was held on the Plaintiffs' Motion for Preliminary Injunction and request for various writs and Defendants' Motion to Dismiss, and the matter was taken under advisement.[37]

LEGAL STANDARD

(1) Preliminary Injunction

The decision to grant or deny a preliminary injunction rests within a trial court's discretion. *Walker v. Boozer*, 140 Idaho 451, 454, 95 P.3d 69, 72 (2004). On discretionary issues, the Court must: (1) correctly perceive the issue as one of discretion; (2) act within the boundaries of its

[35] The motion was not brought to the Court's attention until after the December 19, 2020 meeting.
[36] Chuck Steele 2nd Aff. ¶ 6.
[37] Defendants never filed a notice of hearing on their Motion to Dismiss, however, the parties agreed to have the Motion heard and decided.

discretion; 3) act consistent with applicable legal standards; and (4) reach its decision by an exercise of reason. *Lunneborg v. My Fun Life*, 163 Idaho 856, 421 P.3d 187 (2018).

(2) Dismissal under IRCP 12(b)(6)

"A court may grant a motion to dismiss for failure to state a claim under Rule 12(b)(6) only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief." *Harper v. Harper*, 122 Idaho 535, 536, 835 P.2d 1346, 1347 (Ct. App. 1992). In ruling on a motion to dismiss, the issue "is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims." *Losser v. Bradstreet*, 145 Idaho 670, 673, 183 P.3d 758, 761 (2008). "A motion to dismiss must be resolved solely from the pleadings and all facts and inferences from the record are viewed in favor of the non-moving party." *Taylor v. McNichols*, 149 Idaho 826, 832-33, 243 P.3d 642, 648-49 (2010).

To state a claim for relief and survive a Rule 12(b)(6) motion, the pleading "does not need detailed factual allegations," however, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007). Mere "labels and conclusions" or a "formulaic recitation of a cause of action's elements will not do." *Id*. There must be "enough facts to state a claim to relief that is plausible on its face." *Id*. at 547. Stated differently, "[the] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "As a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual

case in which the plaintiff includes allegations showing on the face of the complaint that there is some insurmountable bar to relief." *Harper*, 122 Idaho at 536, 835 P.2d at 1347.

ANALYSIS

At issue is a determination of whether the actions taken at the September 27, 2020 meeting, the appointment of the Interim Board, and the subsequent election of Dennis Largent, Chuck Steele, Cordova, Bramon, and Dike was legitimate. If so, the actions taken by Johnson to hold a subsequent election on December 19, 2020 were invalid, and the results of the December 19, 2020 election are void.

Plaintiffs argue they are entitled to injunctive relief because (1) holding the December 19, 2020 meeting violated the November 14, 2020 Executive Order prohibiting private gatherings of more than 10 people, (2) Defendants are estopped from claiming there was a current Board of Directors on September 27, 2020, because Johnson affirmatively represented there was no Board, (3) even if there was a current Board on that date, the body was entitled to structure a method of electing members to the Board, (4) the signing of the tally sheet by all present members of the Interim Board certified the election and the Bylaws do not provide for a new election, and (5) Plaintiffs are entitled to injunctive relief and have the Company accept them as the duly elected Board of Directors. Plaintiffs seek an alternative writ enjoining the December 19, 2020. They also claim they are entitled to a writ of mandamus requiring (a) the Company to recognize the certified election of the Plaintiffs, (b) the Defendants to transfer Company books and records to the Plaintiffs, and (c) the Defendants to perform such acts necessary to place Plaintiffs on Company financial matters. Plaintiffs seek a writ of prohibition prohibiting the

Defendants from claiming the October 25, 2020 election was illegal or invalid. Finally, Plaintiffs seek a peremptory writ to require the Company to recognize the Plaintiffs as the valid Board and require the Defendants to take steps to effectuate the transfer of governing authority to them.

Defendants responded to the Motion for Preliminary Injunction by filing a Motion to Dismiss. They argue a preliminary injunction is improper because anyone concerned about the pandemic could have attended the December 19, 2020 meeting remotely or telephonically. They argue equitable estoppel does not apply because Johnson did not make a false representation or conceal any facts. They argue that the Board of Directors was entitled to structure an election, and the Subscribers were not entitled to create an Interim Board. They argue that the individuals who signed the tally sheet following the October election did not have authorization to certify the election under the Bylaws. They claim Plaintiffs are not entitled to the relief sought, will not suffer irreparable harm, and are not entitled to any writs.

(1) The December 19, 2020 meeting violated the Executive Order Prohibiting Gatherings over 10 People.

Plaintiffs assert that the December 19, 2020 meeting violated the Executive Order prohibiting gatherings over 10 people and that no alternative was made for Subscribers wishing to attend remotely. Defendants argue that accommodations could have been made; however, there is no evidence they offered any alternative method for Subscribers to attend the meeting.

The November 14, 2020 Executive Order stated: "Gatherings of more than 10 people, both public and private, are prohibited."[38] "Gathering" is defined as "a planned or spontaneous event,

[38] Compl. Ex. G; *see also* https://coronavirus.idaho.gov/wp-content/uploads/2020/11/stage-2-modified-order.pdf.

indoors or outdoors, with a small number of people participating or a large number of people in attendance such as a community event or gathering, concert, festival, conference, parade, wedding, or sporting event." The Order provides that a "violation of any mandatory provision of this Order constitutes an imminent threat to public health."[39] A violation or failure to comply with a mandatory provision in the Order "may constitute a misdemeanor punishable by fine, imprisonment, or both."[40]

Defendants do not dispute that more than 10 people attended the December 19, 2020 meeting. Moreover, there is no evidence any alternative accommodations were offered or made to allow Subscribers to attend the meeting remotely. Thus, the Court finds the meeting and the results of the election are invalid on this basis, among other reasons set forth below.

(2) Estoppel.

Plaintiffs claim Defendants are equitably estopped from claiming they made up the legitimate Board based on Johnson's (a) representation there was no Board of Directors and (b) failure to raise any objection to the creation of an Interim Board or the procedures agreed to by a majority of Subscribers.

Defendants claim that equitable estoppel does not apply, because Johnson only represented that a new Board needed to be elected. However, this claim is contradicted by a number of Affidavits submitted by Plaintiffs from Subscribers present at the September 27, 2020 meeting who all attested that Johnson affirmatively represented to everyone that there was "no" Board of

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[39] Compl. ¶ 5.
[40] *Id.*

Directors. Defendants did not provide any contradictory Affidavit. In fact, Johnson's own Affidavit does not contradict the many Affidavits submitted by Subscribers present at that meeting.

The elements of equitable estoppel are as follows:

> (1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth; (2) that the party asserting estoppel did not know or could not discover the truth; (3) that the false representation or concealment was made with the intent that it be relied upon; and (4) that the person to whom the representation was made, or from whom the facts were concealed, relied and acted upon the representation or concealment to his prejudice.

Ferro v. Soc'y of Saint Pius X, 143 Idaho 538, 540, 149 P.3d 813, 815 (2006) (citation omitted).

Here, Johnson represented to the Subscribers that there was no Board of Directors. Although she might have believed at the time that there was no Board, she is charged with constructive knowledge as the self-claimed President of the Company and member of the Board since the Company's inception. She was in the best position to know of the status of the Board of Directors. Her name is on almost every spotty record kept since the Company's inception. It is clear she mismanaged the Company by failing to keep and maintain proper records and hold meetings as called for in the Bylaws. She also sent a written notice advising the Subscribers they all able to vote for the Board: "[p]roperty owners have five votes one for each director. . . . Every lot owner with water service can vote. . . ." There is no evidence that any objection was made to the creation of the Interim Board or to the October election. Only when the results were not in the Defendants favor, did the Defendants protest. Thus, the Court finds the first element of equitable estoppel is satisfied.

As to the second element, the Subscribers were not in a position to know the truth at the time of the September 27 meeting. Johnson maintained the meeting minutes and had been involved as an officer of the Company since 2006. As indicated by the Company records, she was involved with every action taken by the Company since it was created. The Court finds the second element is met.

The third element of equitable estoppel is also present. The evidence shows Johnson made representations that no Board existed with the intent that the Subscribers would vote on a new Board. Indeed, she clearly assumed the Subscribers would vote for her five nominations.

The final element is also met. The Subscribers acted in reliance on Johnson's representations and by a majority vote created an Interim Board and specific procedures to hold an open and fair election. None of the Defendants objected to this process. Bramon acted on the Interim Board and certified the October election results. All three individual Defendants, Johnson, Bramon, and Blakeslee, voted in that election! Accordingly, the Court concludes Defendants are estopped from claiming they made up the legitimate Board of Directors.

The facts here also meet the elements of quasi estoppel. "[Quasi-estoppel] prevents a party from asserting to another's disadvantage a right inconsistent with a position previously taken by him or her. The doctrine applies where it would be unconscionable to allow a person to maintain a position with one in which he acquiesced or of which he accepted a benefit. The act of the party against whom the estoppel is sought must have gained some advantage to himself or produced some disadvantage to another; or the person invoking the estoppel must have been induced to

change his position." *Silicon Int'l Ore, LLC v. Monsanto Co*., 155 Idaho 538, 549, 314 P.3d 593, 604 (2013) (citation omitted). The individual Defendants acquiesced in the election process. They collectively endorsed the Subscribers' actions by remaining silent and then only protesting after the election results were not in their favor. Given the Defendants' superior knowledge of the Company and their role as purported Officers and members of the Board, it would be unconscionable to allow them to acquiesce in a legitimate voting process and then seek to invalidate it. This is especially true given that (as explained in the next section) the Subscribers were authorized under the ByLaws and Idaho's Nonprofit Corporation Act ("INCA") to take the actions they took.

(3) The Subscribers were authorized to Appoint an Interim Board and Create a Voting Procedure.

The Company's Bylaws "constitute the code of rules" adopted by the Company "for the regulation and management of its affairs." Bylaws § 1.1. Each owner of a lot in the subdivision is a "Subscriber of the Company. *Id*. at § 2.1. Each Subscriber has one vote for each lot "eligible to have water delivered to it." *Id*. at § 2.2. The Bylaws require an annual meeting of Subscribers be held with the date and time "designated" by the Board of Directors. *Id*. at § 2.4. "Special meetings" may be called at any time by either the Board of Directors or by 10% of the Subscribers. *Id*. at § 2.5. "A quorum to conduct business at any Annual or Special Meeting of the Subscribers shall be at least ten percent (10%) of the Subscribers entitled to vote present or represented by proxy." *Id*. at § 2.6.

The Board of Directors are "elected by the Subscribers."[41] *Id.* at § 3.3. The Bylaws endow the Board of Directors with "all corporate powers" subject to any limitations set forth in the Articles, Bylaws, or authorized under INCA. *Id.* at § 3.1. The Bylaws provide that the initial Board of Directors designated in the Articles shall serve until their successors are elected at the Annual Meeting of Subscribers or a special meeting called for the purpose of electing a director or directors. *Id.* at § 3.2. The Board of Directors consists of five directors, which fill seats designated as A, B, C, D, or E. *Id.* at § 3.3. "The terms of the initial Directors shall continue until the first Annual Meeting of Subscribers. The terms for the Directors elected at the first Annual Meeting of Subscribers" is three years for seats A and B, two years for seats C and D, and one year for seat E. *Id.* at § 3.5. "Thereafter, the terms of office for each seat shall be three (3) years, to the end that the terms for no more than two (2) seats shall expire in any year." *Id.* "If a vacancy occurs, the term for the person selected to fill the vacancy shall only run through the unexpired term for the seat with respect to which the vacancy is being filled." *Id.*

Directors may be removed by a majority vote of either the Board or the Subscribers. *Id.* at § 3.7. Any "vacancy" that occurs on the Board as a result of "death, resignation, disqualification, removal, or other cause" is to be filled by appointment of the other Board members. *Id.* at § 3.8.

[41] Defendants argue that under the Company's Articles, the Company does not have voting members, and thus, Subscribers have no right to elect a Board. Plaintiffs acknowledge that the 2006 Articles state this, however, they argue that meeting minutes from 2009 and 2010 reflect that the Board of Directors amended the Bylaws and Articles so that Subscribers were responsible for electing the Board. According to 2009/2010 meeting minutes, the Bylaws and Articles were voted on and approved to state that the Board is elected by the Subscribers. Bylaws did not actually exist until January 26, 2010 and they reflect this. However, the Articles were never amended to reflect this change. In each and every of Johnson's notices calling for a meeting to elect a Board member that the Board is to be elected by the Subscribers. It is not surprising given the shoddy record-keeping that the Articles were never properly amended and filed. Nevertheless, the record shows, and the Court finds, that they were.

The Bylaws are silent as to what happens when a term expires without a new member elected to fill the seat. They are also silent as to the procedure for an election.[42]

The evidence is undisputed that as of 2020, all seats on the Board had expired. Hence, Johnson represented to all that there was "no" Board. The Bylaws are silent as to what occurs in this scenario. Nevertheless, the Bylaws clearly state that the Board is elected by the Subscribers.[43] Bylaws § 3.3; *see also* I.C. § 30-30-604(1) ("If the corporation has members, all the directors . . . shall be elected at the first annual meeting of members, and at each annual meeting thereafter[.]").

Johnson specifically gave notice that the September 27 meeting was called for the express purpose of electing five Directors to serve on the Board. She announced a quorum was present. Under the Bylaws, a quorum is required to conduct business at any meeting. *See* Bylaws § 2.6; I.C. § 30-30-512(1) ("[I]f a quorum is present, the affirmative vote of the votes represented and voting, which affirmative votes also constitute a majority of the required quorum, is the act of the members."). The Subscribers then unanimously elected an interim Board of Directors to serve

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[42] Defendants acknowledge that the Bylaws do not contain provisions dictating what is to occur in the event a Director's terms lapses without a successor elected. Defs.' Mem. in Supp. of Defs.' Mot. to Dismiss, p. 8. Defendants also acknowledge that the "Bylaws are not entirely clear on the process of electing Directors." *Id*. at p. 10.

[43] Defendants rely on the Board's power under Section 3.8 in the Bylaws to appoint a Director when a "vacancy" occurs for their argument that the Subscribers lack authority to elect a new Board. However, Section 3.8 specifically defines a vacancy as a circumstance such as "death, resignation, disqualification, removal, or other cause." A prime example of this includes the vacancies that were created following the October election due to (a) Dike's resignation and (b) Bramon's disqualification or removal. As of the September 27 meeting, the previous Board's duties carried on even though all Board seats had expired. *See* I.C. § 30-30-605(4) ("Despite the expiration of a director's term, the director continues to serve until the director's successor is elected[.]"). At the September 27 meeting, an Interim Board was legitimately elected and a new Board was lawfully elected a month later by the Subscribers. The new Board now has the power to fill Dike and Bramon's vacancies as opposed to putting it to vote by the Subscribers. When the seats of the Board members elected in October 2020 expire, the Subscribers will then be tasked with electing a new Board.

for 30 days until a final Board of Directors was elected. Neither the Bylaws, nor INCA, prohibit this. Thus, the Court concludes that the creation of an Interim Board and the election process created for the October 2020 election was legal and valid. Therefore, the election of the member to the Board at that time was valid. Johnson's subsequent actions to hold a new election were invalid and void.

(4) Signing the tally sheet

On October 25, 2020, the Interim Board met, counted the votes, and signed the tally sheet. Following a recount three days later, the same process was followed, and the vote was certified. Pursuant to Idaho Code § 30-30-516(6), "Contested elections shall be referred to the board of directors, which shall, after reviewing all ballots, proxies, reports of election inspectors or judges, and any other relevant documents or materials, certify the results of the election. . . ." On October 25, 2020, the Interim Board was the acting and legitimate Board based on the September 27 meeting.

Defendants also argue that the October 25 election was invalid because a quorum was not present to count the votes. However, INCA permits this type of procedure. Idaho Code § 30-30-508(1) provides that [u]nless prohibited or limited by the articles or bylaws, any action that may be taken at any annual, regular or special meeting of members may be taken without a meeting if the corporation delivers a written ballot to every member entitled to vote on the matter." Here, the evidence is undisputed that a ballot was delivered to every Subscriber entitled to vote. The Bylaws also do not prohibit the mailing of ballots. Defendants made no argument that the

Plaintiffs did not otherwise comply with the provisions of Section 30-30-508. Therefore, the Court concludes the mailing of ballots and later certification by the acting Board was proper.

(5) Preliminary Injunction

Idaho Rule of Civil Procedure 65(e) enumerates the grounds under which a preliminary injunction may be sought. Plaintiffs seek a preliminary injunction under IRCP 65(e)(1). They argue they have a substantial likelihood of success on the merits of the case, they have also argued that the Company will be harmed if they are not confirmed as the legitimate Board of Directors. As the moving parties, Plaintiffs bear the burden of proving their right to the preliminary injunction. *Harris v. Cassia County*, 106 Idaho 513, 517, 681 P.2d 988, 992 (1984). Under IRCP 65(e)(1), a preliminary injunction may issue when it appears "that the plaintiff is entitled to the relief demanded, and that relief, or any part of it, consists of restraining the commission or continuance of the acts complained of, either for a limited period or perpetually[.]" This language is often referred to as "substantial likelihood of success." *Harris*, 106 Idaho at 518, 681 P.2d at 993. A substantial likelihood of success "cannot exist where complex issues of law or fact exist which are not free from doubt." *Id.* Under IRCP 65(e)(4), a preliminary injunction may issue "when it appears, by affidavit, that the defendant is about to remove or to dispose of the defendant's property with intent to defraud the plaintiff[.]"

Here, based on the analysis above, the Court finds Plaintiffs have shown a substantial likelihood of success on the merits and irreparable harm to the Company if the legitimate Board of Directors is not restored.

(6) Writs

Plaintiffs seek an alternative writ, peremptory writ, writ of mandamus, and writ of prohibition. The Court finds the issuance of a peremptory writ proper.

"A peremptory writ requires a party, immediately after receipt of the writ or at some other specified time, to do the act required to be performed or to stop doing or refrain from taking any other specified act." I.R.C.P. 74(a)(4).

Plaintiffs ask that the Company and Defendants recognize them as duly elected, certified members of the Board of Directors. Plaintiffs demand Defendants take steps to turn over the Company books and records as well as act to transfer governing authority to them. They they seek cooperation with adding Plaintiffs' names as authorized parties to the various Company financial accounts. Based on the above analysis and the absence of disputed facts, the Court will enter a peremptory writ in this case.

(7) Conclusion, Order, and Peremptory Writ.

Plaintiffs have made a showing that they have a substantial likelihood of success on the merits and that irreparable harm will ensue if the legitimate Board of Directors of the Company is not restored. Plaintiffs have also shown entitlement to a peremptory writ. Accordingly, Plaintiffs' Motion for Preliminary Injunction and Peremptory Writ is GRANTED. Defendants' Motion to Dismiss is DENIED. Remaining issues (if any) shall be reserved for trial.

It further HEREBY ORDERED as follows:

a. The October 25, 2020 election, certified as final following a recount on October 28, 2020, was valid.

b. The legitimate Board of Directors of the Terrace Lakes Water Company is comprised of Mary Cordova, Dennis Largent, and Chuck Steele.[44]

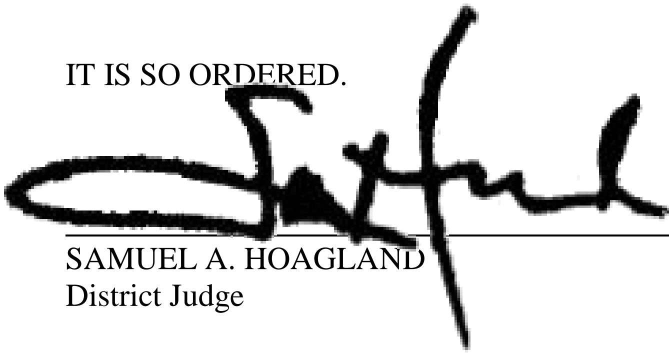
c. The December 19, 2020 election was invalid and is void.

d. Defendants shall transfer or deliver all Company books and records to the Plaintiffs.

e. Defendants shall perform all necessary acts to place Plaintiffs in control of Company financials.

f. Defendants are prohibited from altering or destroying Company books and records.

IT IS SO ORDERED.



3/1/2021 9:12:47 AM

SAMUEL A. HOAGLAND Date
District Judge

[44] Dike resigned from his position, and it is apparent that the Board disqualified or removed Bramon.

CERTIFICATE OF MAILING

I hereby certify that on 3/2/2021 10:54 AM, I served a true and correct copy of the within instrument to:

Michael Kane
mkane@ktlaw.net

Terri Pickens Manweiler
terri@pickenslawboise.com

Abigail Mercedes McCleery
abigail@pickenslawboise.com

Mary T. Prisco
Clerk of the District Court

By
Deputy Court Clerk