Seventh Judicial Circuit Court

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July 19, 2016

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Re: Neal L. Larson v. Black Hills Institute of Geological Research, et. al. Case 51CIV-725

Counsel:

After careful consideration, the Court has prepared, signed and filed its Findings of Fact and Conclusions of Law. The Court has rejected both parties proposed FFCL and entered its own. I have attached via email the file stamped copy of the Court's FFCL and have also put them in the mail.

I would ask the prevailing party to prepare an Order consistent with my decision.

Sincerely,

Matthew M. Brown, Circuit Judge 7th Judicial Circuit

Pennington County, SD
FILED
IN CIRCUIT COURT
JUL 19 2016
Ranae Truman, Clerk of Courts
By _____ Deputy

STATE OF SOUTH DAKOTA)) SS. COUNTY OF PENNINGTON)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
NEAL L. LARSON, Plaintiff, v. BLACK HILLS INSTITUTE OF GEOLOGICAL RESEARCH, INCORPORATED, a South Dakota corporation, PETER L. LARSON, ROBERT A. FARRAR, MATTHEW P. LARSON and SAMUEL T. FARRAR, Defendants.	51CIV15-000725 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

THIS MATTER having come on for trial from May 9, 2016 through May 11, 2016; the Plaintiff, Neal L. Larson appearing in person and through his counsel of record, John K. Nooney and Emily M. Swanson; the Defendants, Peter L. Larson, Robert A. Farrar, Matthew P. Larson and Samuel T. Farrar, appearing in person and through their counsel of record, Jeffrey G. Hurd, Gregory J. Erlandson, and Benjamin D. Tronnes; the Court having had an opportunity to review the pleadings, hear the testimony, and consider the evidence presented, hereby makes the following:

FINDINGS OF FACT

1. Black Hills Minerals ("Minerals") was an informal partnership originally established between James Honert ("Honert") and Peter Larson ("Pete") on or about January 1, 1974.

2. Minerals was a mineral business.

3. Neal Larson ("Neal") and Robert Farrar ("Farrar"), while they were students at the South Dakota School of Mines and Technology, began their professional careers in the field of paleontology in 1976 and worked for Minerals.

4. In 1977, Neal and Farrar were both provided with two options: (1) continue as an employee and continue to receive a salary/wage; or (2) become an owner, receive no salary/wage, and receive a percentage of the profits, if any. *See testimony of James Honert, Robert Farrar, and Neal Larson.*

5. Due to his own personal financial circumstances, Farrar chose to continue to be paid for his services and remain an employee. *See testimony of Robert Farrar.*

6. Neal chose to contribute his services in exchange for an ownership interest, and in 1977, Neal became a "partner" in Minerals. No monetary compensation was exchanged for the shares Neil owned in the partnership, instead his contribution was his labor and services. *See testimony of Neal Larson.*

7. As evidenced by his 1977 tax return form 1040, Neal Larson did not receive any wages, salary, tips, or any other form of employee compensation, but received $1411 as "income from partnership." *See Exhibit 26.*

8. On March 15, 1978 Black Hills Institute of Geological Research Incorporated (the "Institute") filed Articles of Incorporation with the South Dakota Secretary of State's Office. Subsequently, the Secretary of State for the

State of South Dakota issued a Certificate of Incorporation for the Institute on March 15, 1978. *See Exhibit 30, p. 013-016.*

9. The Institute assumed the assets formerly owned by Minerals.

10. Neal, like Pete and Honert, contributed his interest in Minerals as consideration for his shares in the Institute.

11. Neal's shares in the Institute were received for consideration, both in the sense that he provided his services in exchange for his interest in Minerals in lieu of receiving a salary or wage, and that he contributed his interest in Minerals (an item of value) for his interest in the Institute.

12. Honert testified that he never considered Neal's shares a gift, and acknowledged that Neal earned and worked for his interest in Minerals. Honert confirmed that Neal elected to become a partner in Minerals in lieu of a salary or wage. *See Testimony of James Honert.*

13. Honert testified that in exchange for his interest in Minerals, Neal worked just as much and as hard as Pete and Honert. *See Testimony of James Honert.*

14. Honert further testified that Farrar opted to continue to receive a wage and remain an employee of Minerals, and Farrar did not become a partner in Minerals as did Neal in 1977. *See Testimony of James Honert; See Exhibit 26.*

15. Honert's testimony regarding Neal's shares is consistent with his email to Neal in October of 2012, when Honert wrote to Neal urging Neal "to be

strong in asserting [his] rights and ownership that [he had] worked hard to earn over the years." *See Exhibit 55.*

16. Honert's testimony and email of October 2012 both confirm Neal's testimony that he (Neal) received his shares for value. *See Testimony of James Honert; Neil Larson and Exhibit 55.*

17. Farrar testified that as corporate secretary of the Institute, he knows more than anyone else about the Institute's corporate documents and records. Farrar acknowledged that he could not identify any documents substantiating any capital contribution by any of the current or previous shareholders of the Institute, including Pete. *See Testimony of Robert Farrar.*

18. Pete testified he paid cash for the assets of Black Hills Minerals and that he loaned Honert the money for his share of the original assets. No documentation exists to substantiate this testimony, although the Court accepts it as fact. *See Testimony of Peter Larson.*

19. Neal was the incorporator of the Institute in March 15, 1978 and at all times since its inception until July of 2012 was an employee, officer, and director of the Institute.

20. At the time of incorporation, Pete was elected President of the Institute, Neal was elected Vice President, and Honert was elected Secretary/Treasurer.

21. The Institute is a close corporation under South Dakota law.

22. The Institute's Articles of Incorporation created 10,000 authorized shares, of which 1,000 shares were issued at inception. *See Exhibit 30, p. 007-013.*

23. Associated with the creation of the Institute, By-laws of the Black Hills Institute of Geological Research, Inc. ("By-laws") were adopted. *See Exhibit 30, p. 001-006.*

24. Section 1 of the By-laws states:

> SECTION 1. ANNUAL MEETINGS. – Annual meetings of stockholders for the election of directors and for such other business as may be stated in the notice of the meeting, shall be held at such place, either within or without the State of So. Dak. and at such time and date as the Board of Directors, by resolution, shall determine and as set forth in the notice of the meeting. In the event the Board of Directors fails to so determine the time, date and place of the meeting, the annual meeting of stockholders shall be held at the registered office of the corporation in So. Dak. on September 30.
>
> If the date of the annual meeting shall fall upon a legal holiday, the meeting shall be held on the next succeeding business day. At each annual meeting, the stockholders entitled to vote shall elect a Board of Directors and may transact such other corporate business as shall be stated in the notice of the meeting.

See Exhibit 30, p. 001.

25. Section 3 of the By-laws states:

> SECTION 3. VOTING. – Each stockholder entitled to vote in accordance with the terms and provisions of the Certificate of Incorporation and these By-Laws shall be entitled to one vote, in person or by proxy, for each share of stock entitled to vote held by such stockholder, but not proxy shall be voted after three years from its date unless such proxy provides for a longer period. Upon the demand of any stockholder, the vote for directors and upon any question before the meeting shall be by ballot. All elections for directors shall be decided by plurality vote; all other questions shall be decided by majority vote except as otherwise provided by the Certificate of Incorporation or the laws of the State of South Dakota

See Exhibit 30, p. 001.

26. Article III, Section 1 of the By-laws states:

> SECTION 1. NUMBER AND TERM. – The number of directors shall be The Directors shall be elected at the annual meeting of stockholders and each director shall be elected to serve until his successor shall be elected and quality. The number of directors may not be less than three except where all the shares of the corporation are owned beneficially and of record by either one or two stockholders, the number of directors may be less than three but not less than the number of stockholders.

See Exhibit 30, p. 002.

27. Article III, Section 4 of the By-laws states:

> SECTION 4. REMOVAL. – Any director or directors may be removed either for or without cause at any time by the affirmative vote of the holders of a majority of the shares of stock outstanding and entitled to vote, at a special meeting of the stockholders called for the purpose and the vacancies thus created may be filled, at the meeting held for the purpose of removal, by the affirmative vote of a majority in interest of the stockholders entitled to vote.

See Exhibit 30, p. 002.

28. At its inception in March of 1978, the Institute was owned wherein Pete and Honert each held 400 shares and Neal held 200 shares. *See Exhibit 30, p. 007-012.*

29. Subsequent to the creation of the Institute, Farrar remained an employee and did not hold any ownership interest in the Institute until March of 1990.

30. In March of 1981, the Institute and Honert agreed to a stock redemption wherein the Institute would acquire Honert's shares in exchange for consideration related to Honert leaving the Institute. *See Exhibit 30, p. 024-029.*

31. The stock redemption was completed in February of 1989 and at the conclusion of the redemption the Institute's outstanding shares were held as follows:

Peter Larson (400 shares) 66-2/3%;

Neal Larson (200 shares) 33-1/3%.

See Exhibit 30, p. 050.

32. In February of 1990, the Institute's Board of Directors redistributed and reallocated shares so that the outstanding shares in the Institute were held as follows:

Peter L. Larson (600 shares) 60%;

Neal L. Larson (350 shares) 35%;

Robert A. Farrar (50 shares) 5%.

See Exhibit 30, p. 050.

This is the current shareholder arrangement of the parties in the Institute.

33. At all times since each of them respectively became a shareholder in the Institute and until July 2012, Pete, Neal, and Farrar have each been officers, directors, and employees of the Institute.

34. At all times since its inception in March of 1978 and until July of 2012, Neal was a shareholder, officer, director, and employee of the Institute.

35. At all times since the creation of the Institute, the Institute has been Neal's primary source of income. Neal also has an ownership interest in Dakota Nature and Art and received income from books he had written and has income from Larson Paleontology Unlimited. *See Testimony of Neil Larson.*

36. At the time the Institute was incorporated in 1978, when Neil became a shareholder, his primary income and employment came from the Institute.

37. The parties' actions and course of conduct provide a basis for the reasonable expectations of shareholders in the Institute, including Neil.

38. When the Institute was incorporated in 1978, the shareholders, Pete, Neil, and Honert, were shareholders, employees, and held positions on the Board of Directors.

39. Honert held these positions until 1980 when he was removed by Pete and Neil as an officer and Director of the Institute.

40. Since its incorporation, only Honert was a shareholder and was not also an employee of the Institute.

41. Honert was not fired from the Institute, but left to pursue other business interests, and was later removed from his position on the Board in 1980.

42. Since its incorporation, there has never been a shareholder who was not also on the Board of Directors of the Institute. Some Board of Directors were eventually removed (Honert), including Neil, but all shareholders had a seat on the Board of Directors when they became shareholders.

43. While there is evidence that one of the former shareholders, James Honert, was eventually removed from the Board of Directors, the evidence also shows that all of the previous shareholders, including Honert, retained a position on the Board of Directors contemporaneous with the time they held

shares within the Institute. *See Testimony of James Honert, Neil Larson, Peter Larson and Robert Farrar.*

44. The only exception to the pattern that a shareholder did not also have a position on the Board of Directors at the Institute during the Institute's thirty-five plus year history, was Neil's removal. *Id.*

45. In addition, a review of the Institute's entire history reveals that not only did all of the other shareholders hold positions on the Board of Directors; the shareholders also participated as officers and managers of the Institute. *Id.*

46. The Court is satisfied given the historical interaction between the shareholders at the inception of the venture that all the investors shared a reasonable expectation of continued employment, compensation from the Institute, and management positions in the Institute.

47. No formal, written documents exist from the time of the formation of the Institute which spell out the understandings between Neil and the original shareholders (Pete and Honert).

48. At no time since 1978 did Neil have a written employment contract with the Institute.

49. Absent any written agreements between the parties in this action, the Court has relied upon the testimony provided by the various witnesses, and the exhibits provided to the Court to garner its finding of a behavioral pattern and course of conduct that appears to be the foundation of the shared reasonable expectations of Neil and the other shareholders of the Institute.

50. The Court also concludes the Defendants should have been well aware of Neil's expectations given the history of the Institute and Neal's participation in these employment/managerial positions for over thirty-five years.

51. The pattern of the Institute was investment/consideration, followed by company employment and management participation with the company.

52. All of the shareholders of the Institute, including Neil, had a reasonable expectation of continued employment and compensation from the Institute.

53. All of the shareholders of the Institute, including Neil, had a reasonable expectation of a position as an officer of the Institute.

54. All of the shareholders of the Institute, including Neil, had a reasonable expectation of a position on the Board of Directors of the Institute.

55. All of the shareholders of the Institute, including Neil, had a reasonable expectation to receive compensation from the Institute.

56. All of the shareholders of the Institute, including Neil, had a reasonable expectation of continued involvement in the management and operation of the Institute.

57. Each of the shareholders of the Institute acknowledged that the Institute's By-laws, enacted in March of 1978, applied to the operation of the Institute, and further acknowledged that applicable provisions of South Dakota law also applied to the operation of the Institute. *See Testimony of Peter Larson and Robert Farrar.*

58. Despite the requirements found in the By-laws, the owners, officers and Directors of the Institute, including Pete, Neal and Bob, have always conducted internal Institute business in an informal manner.

59. Since its incorporation in March of 1978, the owners, officers and directors of the Institute, including Pete, Neal and Bob, rarely read or sought guidance from the Institute By-laws or South Dakota law in regards to internal Institute business.

60. Since its incorporation in 1978, proper notices of Board of Directors meetings at the Institute were rarely sent.

61. Since its incorporation in 1978, minutes of Board of Directors Meetings at the Institute were rarely kept, although Bob did keep handwritten notes of meetings for a short time period at the insistence of a business consultant.

62. Since its incorporation in 1978, agendas for Board of Directors meetings at the Institute were rarely drafted.

63. Since its incorporation in 1978, typical Board of Directors meetings at the Institute were conducted spontaneously when the directors happened to be in the same room at the same time.

64. Since the incorporation of the Institute, removal or election of Directors has always been done by the Board of Directors.

65. At a meeting of the Board of Directors on December 17, 1980, Neal and Pete, as Directors of the Institute, unanimously voted to remove Honert, a

40% owner of the Institute, as an officer and director of the Institute. (Ex. 30, p. 022).

66. At that same meeting of the Board of Directors, Bob was elected to fill the vacant Secretary/treasurer position and the vacant seat on the Board of Directors. (Ex. 30, p. 022).

67. At a subsequent meeting of the Board of Directors on March 9, 1982, Neal and Bob, in their capacity as Directors, and in the absence of Pete, elected Leon Theison (Theison) to the Board of Directors. (Ex. 30, p. 034).

68. The Board of Directors subsequently accepted Theison's resignation from the Board on November 1, 1986. (Ex. 30, p. 044). Theison was never a shareholder at the Institute.

69. At a meeting of the Board of Directors on January 4, 2012, Neal, Pete and Bob, in their capacity as Directors, increased the number of seats on the Board of Directors to five. (Ex. 30, p. 149).

70. At that same meeting, the Institute's Board of Directors was expanded from three to five with the addition of Matt Larson ("Matt") and Sam Farrar ("Sam"). See Exhibit 30, p. 149.

71. Matt and Sam are not shareholders of the Institute but are the children of Pete and Farrar, respectively.

72. Since its incorporation, and until 2015, official Shareholder Meetings at the Institute were never held.

73. Since the incorporation of the Institute, there has never been a Shareholder's Meeting called for the purpose of electing directors to the Institute.

74. The Board of Directors of the Institute supplanted the role of the shareholders in Institute corporate matters. Since there were no shareholder meetings, the Board made decisions the shareholders should/would otherwise be making.

75. Since the incorporation of the Institute, Neal has never asked for a Shareholder's Meeting for the purpose of electing directors to the Institute, or for any other purpose.

76. Historically, there have been personal issues with the owners and employees of the Institute, largely relating to the family dynamics of the business.

77. These personal and personnel issues at the Institute have been serious enough to justify the enlisting of professional counseling on numerous occasions.

78. Personnel issues came to a head in July, 2012 when Barry Brown, a former employee of the Institute, returned to the Institute property in Hill City, SD.

79. Barry Brown ("Brown") was a prior employee of the Institute. *See Exhibit 27.*

80. Brown was employed at the Institute from 1991 to 1993. *See Exhibit 27.*

81. Brown was in his 20's during the timeframe of 1991-1993 and is approximately 14 years older than Sarah Farrar.

82. Sarah Farrar (now Sarah Mason) ("Sarah") was 10-12 years old during the timeframe of 1991 to 1993. She is the daughter of Robert Farrar and sister of Sam Farrar.

83. Both Matt Larson and Sam Farrar observed inappropriate acts between Brown and Sarah Farrar. *See testimony of Matt Larson and Sam Farrar.*

84. Both Matt and Sam believed Brown had repeatedly raped and molested Sarah during the time she was 10-15 years old. *See testimony of Matt Larson and Sam Farrar.*

85. Sarah testified she was sexually molested, including sexual intercourse, by Brown during the time she was 10, 11, 12, 13, and 14. *See testimony of Sarah Mason.*

86. Brown admits he entered into a sexual relationship with Sarah, but claims she was 16 at the time. *See testimony of Barry Brown.*

87. The Court finds that an inappropriate sexual relationship existed between Brown and Sarah between the years of 1991-1993 and that both Matt and Sam were aware of the relationship during the time it took place or soon after.

88. Prior to July 2012, no one had ever suggested that Barry Brown was not welcome at the Institute. *See Testimony of Peter Larson, Robert Farrar, Neal Larson, Matthew Larson, and Samuel Farrar.*

89. There were never any discussions at any Board of Directors meetings, Shareholder meetings, or any other meeting of owners and/or employees of the Institute where it was ever suggested that Brown was not welcome at the Institute. *See Exhibit 30; See Testimony of Peter Larson, Robert Farrar, Matthew Larson, and Samuel Farrar.*

90. Matt and Sam both acknowledged that neither of them ever suggested that Brown should not be allowed at the Institute to any of the shareholders of the Institute prior to July of 2012. *See testimony of Matthew Larson and Samuel Farrar.*

91. At no time prior to July 23, 2012 had it ever been suggested that Neal should be suspended, removed, or terminated as an employee, officer, or director by any member of the Board of Directors. *See Testimony of Peter Larson, Robert Farrar, Matthew Larson, and Samuel Farrar.*

92. Neal was aware of Sarah's allegations in 2011 as Brown sent Neal an email in June of 2011 indicating he was aware that Sarah had contacted "Tom." Brown referred to Sarah as "a womans (sic) scorn" and asked Neal and Brenda for his support should the allegations ever come to a head. (Ex. 500).

93. Sam and Matt were aware of Sarah's allegations and had been discussing them for several months prior to July of 2012. *See testimony of Matthew Larson and Sam Farrar.*

94. On July 17, 2012, Matt ran into Brown, who was by himself, at the

Institute toward the end of the working day. Matt reacted strangely, looked like he had seen a ghost, refused to shake Brown's hand, and immediately told Sam about the encounter. *See testimony of Barry Brown and Matthew Larson.*

95. Sam then emailed the other directors of the Institute and several others that Barry Brown was no longer welcome on Institute property based on his inappropriate relationship with Sarah. (Ex. 1).

96. Sam's email was precipitated by Brown's presence at the Institute on July 17, 2012. *See Testimony of Samuel Farrar and Matthew Larson.*

97. Neal responded via email that "if anyone escorts Barry off the property it will be the last thing they ever do here." (Ex. 3).

98. An email exchange ensued over the next few days between various individuals associated with the Institute regarding Brown and his presence at the Institute. Despite the accusations against Brown, Neal continued to defend him. *See Ex. 1, 2, 3, 4, 7, and 42.*

99. In that ensuing email exchange, Neal referred to his business partners and the others at the Institute as "judgmental hypocrites." (Ex. 529).

100. In that same ensuing email exchange, Pete noted that Matt and Sam needed to be respected on their position whether Brown committed the acts or not. (Ex. 6 – 001).

101. Neal's response was to tell Pete "you can have them for a partner or me, I will not allow them to become owners unless they change drastically." *See Exhibit 1.*

102. On July 18, 2012, Neal sent an email only to Pete that demanded that Sam be removed from the Board of Directors and as a manager, and expressed his opinion that it would be in the Institute's best interests if he were no longer employed with the Institute. *See Exhibit 5.*

103. In his July 18, 2012 email, Neal went on to explain to Pete that he had numerous concerns regarding Sam and Matt's work habits, and their disrespect for Neal and Pete as owners of the Institute. *See Exhibit 5.*

104. At a meeting of the Board of Directors held on July 23, 2012, Pete placed Neal on a 30-day suspension without pay from the Institute. Matt, Bob, and Sam agreed to this action. *See Exhibit 8 and Testimony of Peter Larson, Matthew Larson, Robert Farrar, and Sam Farrar.*

105. It was Pete's decision to suspend Neal. Sam, Matt and Bob agreed with Pete's decision. *See Testimony of Peter Larson, Sam Farrar, Robert Farrar and Matthew Larson.*

106. There is nothing in the minutes from the July 23, 2012 meeting detailing what Neal was expected to do during his 30-day unpaid suspension, aside from the comment that Neal should "think things over." *See Exhibit 8.*

107. Sam testified that at no time did the Institute tell Neal what he would have to do to return to the Institute. *See Testimony of Samuel Farrar.*

108. Sam further testified that he personally believed that Neal should reflect on how to deal with others and have a different attitude. Sam testified that he expected Neal to talk about the Barry Brown issue. Sam testified that he had no conversations or contact with Neal during the period of July 23,

2012 to September 26, 2012 regarding Sam's personal expectations of Neal or Neal's return to the Institute. *See Testimony of Samuel Farrar.*

109. Farrar testified that he personally expected Neal to return after his one-month suspension and be apologetic for not supporting his employees and Board. Farrar testified that like Matt and Sam, he did not reach out to Neal or have any communication or contact with Neal during the period of July 23, 2012 to September 26, 2012 regarding Farrar's personal expectations of Neal or Neal's return to the Institute. *See Testimony of Robert Farrar.*

110. Matt testified that he personally believed that Neal needed to have a more constructive attitude to return to work at the Institute and that an apology was in order. Matt testified that like Sam, he did not reach out to Neal nor have any communication or contact with Neal during the period of July 23, 2012 to September 26, 2012 regarding Matt's personal expectations of Neal or Neal's return to the Institute. *See Testimony of Matthew Larson.*

111. Since July 23, 2012, Neal has not acted as an employee of the Institute.

112. From July of 2012 until this litigation was commenced, Neal was not provided with notice of any meeting or any other opportunity to elect individuals to serve on the Board of Directors of the Institute. *See Testimony of Robert Farrar.*

113. At no time after July 23, 2012 did the Institute or anyone on behalf of the Institute provide notice to Neal of any meetings of the shareholders for purposes of removing Neal as a member of the Board of Directors or for the

purpose of electing a new Board of Directors as required by the By-Laws and South Dakota law. *See Testimony of Robert Farrar.*

114. On August 16, 2012, Neal wrote to Pete asking what he needed to do to return to the Institute. Neal specifically inquired as to whether the decision was a personal one made by Pete or a decision by the Board of Directors. Neal also asked what Pete saw Neal's role at the Institute after the suspension period was over. *See Exhibit 12.*

115. Despite Neal's request of August 16, 2012 *(See Exhibit 12)*, Pete did not provide Neal with any concrete plan, direction, or proposals for Neal's re-assimilation into the Institute.

116. On August 22, 2012, the Institute's Board of Directors conducted a meeting with Pete, Farrar, Matt, and Sam present. *See Exhibit 14.*

117. Neal was not present at the August 22, 2012 meeting, nor was he provided notice of the same. *See Exhibit 14.*

118. According to the minutes from the August 22, 2012 meeting, the members who were present drafted an offer for Neal for the retirement of his shares in the company. *See Exhibit 14.*

119. On August 22, 2012, Pete communicated the Board's offer to buy Neal's shares to Neal via email. *See Exhibit 13.*

120. Honoring his 30-day suspension, Neal was not present at the Institute from July 23, 2012 until he attempted to return to work on August 23, 2012.

121. On August 23, 2012, Neal attempted to return to work at the Institute.

122. Upon arriving at the Institute on the morning of August 23, 2012, Neal checked his emails in his office until he was told to come to a meeting in the "Mineral Room."

123. Complying with the request, Neal went to the "Mineral Room" and stood in the doorway. Pete asked Neal if he had anything to say, Neal got angry and demanded an apology from Matt and Sam. Pete stated that it was obvious nothing had changed, and Neal was suspended from his employment with the Institute without pay indefinitely. *See Testimony of Neal Larson and Peter Larson.*

124. Upon hearing that he was indefinitely suspended without pay, Neal promptly left the "Mineral Room," went back to his office, packed up his laptop, and left the Institute. *See Testimony of Neal Larson.*

125. On September 5, 2012, Neal sent Pete an email regarding his role at the Institute and his desire to return to the company. *See Exhibit 17.*

126. In his September 5, 2012 email, Neal stated:

> You asked me to reflect on my role. I have done that, and I would like to stay in the business and do my best to make things work.
> ...
> You are my brother. I want to work this out together with you so we can heal and be a family again. I know things have been difficult at time, and I will accept my fair share of the blame for that and do my best to overcome it.

See Exhibit 17, p. 002-003.

127. Pete, Farrar, Matt, and Sam each testified that Neal's September 5, 2012 email was "insincere" even though each of them acknowledged that other than Pete's email correspondence with Neal, they had had zero contact or communication with Neal from July 23, 2012 until Neal's ultimate removal on September 26, 2012, aside from Neal's attempt to return to work on August 23, 2012. *See Testimony of Robert Farrar, Matthew Larson, and Samuel Farrar.*

128. Despite Neal's requests to come back to the Institute of September 5, 2012 (*See Exhibit 17),* Pete responded to Neal's on September 6, 2012 stating that "it seems clear that [Neal needed] to consider the offer made to [him] by the BOD..." *See Exhibit 19.*

129. On September 10, 2012, Neal emailed Pete regarding a "realistic estimate of the value of the business and [Neal's] share of stock..." *See Exhibit 21.*

130. In his email of September 10, 2012, Neal also requested to meet with "[Pete] and the rest of the board at an official board meeting to ask to have a current listing of all BHI assets created[.]" *See Exhibit 21.*

131. Despite Neal's request, he was never afforded an opportunity to meet with the Board of Directors before he was permanently terminated and removed from his employment and directorship with the Institute on September 26, 2012.

132. On September 26, 2012, a meeting of the Institute's Board of Directors consisting of Pete, Farrar, Sam, and Matt was held. The Board of

Directors terminated Neal's employment from the Institute and removed him from the Board of Directors. *See Exhibit 23.*

133. The Board of Directors terminated Neal as a member of the Board of Directors at a meeting of the Board of Directors on September 26, 2012.

134. Pete, Bob, Matt, and Sam received no financial benefit from Neal's termination.

135. In relation to Neil's termination from his employment at the Institute, Pete, Bob, Matt and Sam acted in the honest belief that the action taken was in the best interests of the corporation when they terminated Neil as an employee of the Institute.

136. Pete, Bob, Matt and Sam believed Neil's conduct had been harmful to the Institute. *See Testimony of Peter Larson, Robert Farrar, Matthew Larson and Sam Farrar.*

137. Pete, Bob, Matt and Sam believed Neil was not committing himself to the success of the Institute. *See Testimony of Peter Larson, Robert Farrar, Matthew Larson and Sam Farrar.*

138. Pete, Bob, Matt and Sam believed Neil's conduct, and his unwillingness to change that conduct made the termination of his employment a proper exercise of business judgment. *See Testimony of Peter Larson, Robert Farrar, Matthew Larson and Sam Farrar.*

139. Farrar, the Corporate Secretary of the Institute, acknowledges that at no time subsequent to July 23, 2012, and prior to the Board's action of

September 26, 2012, was Neal provided notice of any Shareholder meeting or Board of Directors meeting.

140. There were no Board of Directors or Shareholder meetings held between the dates of July 23, 2012 and September 26, 2012.

141. Neal was not present at the Board of Directors meeting held on September 26, 2012, nor was he provided notice of or an agenda for the meeting. *See Exhibit 23, 30.*

142. Neal was not present at nor invited to the September 26, 2012 meeting of the Institute's Board of Directors. He learned of his termination and removal from an email Pete sent to him on September 26, 2012. *See Exhibit 24.*

143. Pete's September 26, 2012 email to Neal was the "official notification that [Neal is] no longer working for the Institute and [is] hereby removed from the Board of Directors." *See Exhibit 24.*

144. Pete testified that Neal was terminated by the Institute Board of Directors for failure to obey orders, rules, or instructions, or failure to discharge the duties for which an individual was employed; substantial disregard of the employer's interests or of the employee's duties and obligations to the employer; Conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee; and carelessness or negligence of such degree or recurrence as to manifest equal culpability or wrongful intent. *See Testimony of Peter Larson.*

145. From July of 2012 until this litigation was commenced, Neal was not provided with notice of any meeting or any other opportunity to elect individuals to serve on the Board of Directors of the Institute.

146. Since July of 2012, the other two shareholders of the Institute, Pete and Farrar, have continued to be full-time employees of the Institute.

147. Since July of 2012, the other two shareholders of the Institute, Pete and Farrar, have maintained positions as officers of the Institute.

148. Since July of 2012, the other two shareholders of the Institute, Pete and Farrar, have maintained positions on the Board of Directors.

149. Since July of 2012, the other two shareholders of the Institute, Pete and Farrar, have had the benefit of receiving compensation from the Institute.

150. Since July of 2012, the other two shareholders of the Institute, Pete and Farrar, have had continued involvement in the management and operation of the Institute.

151. Since July of 2012, Neal has received no wage or dividend from the Institute.

152. Since July of 2012 Neal has been denied the chance to participate as a shareholder of the Institute.

153. Each Defendant has acknowledged that neither South Dakota law nor the Institute's by-laws were followed in their actions to remove Neal from the Board of Directors. *See Testimony of Peter Larson, Robert Farrar, Matthew Larson, and Samuel Farrar.*

154. Under South Dakota law, Neal, as the holder of 35% of the outstanding shares in the Institute, is entitled to elect two individuals to the five person Board of Directors of the Institute.

155. Since July of 2012, Neal has not received any salary, wage, dividend, or other compensation whatsoever from the Institute other than the dividend necessary to satisfy his tax obligation for his pro-rata share of the Institute's income, despite the fact he owns 35% of the Institute's shares.

156. After Neal was removed from the Board of Directors, the Defendants further decided that Neal, shareholder of the Institute, would not be permitted on any Institute properties except during business hours and first calling ahead to check with either Pete or Farrar. *See Exhibit 24.*

157. Neal has been has not had any voice in Institute operations, has not taken any part in Institute business and has been denied the chance to affect a future change to the Institute's treatment of non-employee shareholders since July of 2012.

NEIL'S UNCLEAN HANDS

158. The Defendants have asserted the affirmative defense that Neil came into this action with "unclean hands". *See Defendant's Answer.*

159. The Court finds the following relevant facts relating to the defense of "unclean hands":

160. In 2008, shortly after Brenda Larson (Neal's wife) resigned from

Everything Prehistoric, Neal called Brenda to inform her he had an epiphany. Brenda concluded that the epiphany meant Neal had found a way to leave the Institute "with income and specimens." (Ex. 509).

161. Jeff Patchens is President of The Children's Museum in Indianapolis, Indiana. The Children's Museum is one of the Institute's biggest clients.

162. On June 16, 2008 Neal asked Patchens via email if he could talk with The Children's Museum's lawyer "sometime about that problem we discussed?" (Ex. 579).

163. In response to Neal's email, Patchens agreed to have the lawyer call Neal. Patchens also asked Neal how it was going. (Ex. 579).

164. Neal's response to Patchens, via email that same day was to refer to Pete, the President of the Institute, as "Jekyl and Hyde." (Ex. 579).

165. Patchens responded via email and told Neal, "I understand. You can't contoinue (sic) to live, work under these conditions. BrianS (sic) will call you in the AM." (Ex. 579).

166. Later that year, Patchens and Neal continued to send emails about how bad Pete was. (Exs. 101 and 102).

167. On January 19, 2011, Neal told several other individuals via email that "[f]or all of you to know, I am going to be committing most of my time and future to the Black Hills Museum of Natural History beginning this spring." Neal was a director and officer of the Black Hills Museum of Natural History ("Museum") at that time. (Ex. 513).

168. In June and July of 2011, Neal and Brenda sent Neal's resume to Patchens for his advice on getting the resume ready to "present [it] in various opportunities." (Ex. 516).

169. John Sherman is a man Neal befriended and helped get on the Board of Directors of the Black Hills Museum of Natural History.

170. In November of 2009, Neal sent Sherman an email indicating he was ready to commit his future to building the Museum. (Ex. 510).

171. Sherman and Neal had subsequent conversations in which Sherman was asking Neal to visit confidentially about heading up a new museum project. (Ex. 582).

172. Around this time, the Institute was involved in an arrangement with a group of individuals to assist them in preparing and selling a fossil specimen called "Dueling Dinosaurs."

173. All parties agree that the Dueling Dinosaurs are the greatest paleontological discovery in at least 100 years.

174. Sherman and Neal sought to interfere with the Institute's arrangement with the Dueling Dinosaurs ownership so that Sherman could have exclusive rights to sell Dueling Dinosaurs, and so Neal could attempt to secure the specimen for the Museum and secure a full time job at the Museum as a result. (See, i.e., Exs. 515, 583, 584, 598).

175. In May of 2010, Neal sent Sherman an email in which Neal

admitted that because Sherman was now involved in Dueling Dinosaurs, the Museum "would have to pay so much more for DD now that you were involved." (Ex. 584).

176. The arrangement between Neal and Sherman was not in the best interests of the Institute.

177. In March of 2011, at the same time as his attempt to cut the Institute out of the Dueling Dinosaurs, Neal sent Sherman and Polly Hix, a member of the Board of Directors of the Museum, the Institute's confidential financials in order to get Sherman's advice on how Neal could get out of the Institute. (Ex. 597).

178. Sherman's response, via email on March 27, 2011 included a bullet point list of what Neal could get if he were to file a lawsuit against the Institute if he were to "resign or be terminated (wrongful termination or constructive discharge) by BHIGR." (Ex. 597).

179. In an email exchange between Neal and Sherman in April of 2011, despite the Institute's early and significant involvement in Dueling Dinosaurs, Neal suggested to Sherman that they not talk to Pete about their intentions with Dueling Dinosaurs, particularly Neal's plan to get the Dueling Dinosaurs for the Museum to "give [him] a full time job with pay." (Ex. 598).

180. Soon thereafter, the attorney for the Museum determined that Neal and Sherman had a conflict of interest with the Board of the Museum as a result of their conduct regarding the Dueling Dinosaurs. (Ex. 515).

181. In July of 2011, Neal sent Sherman an email in which he

discussed the Museum's conclusion that the two of them were in a conflict of interest as it related to the Dueling Dinosaurs. In that email, Neal stated that he was hoping to have a job with the Museum if he and Sherman's plans had been successful. (Ex. 515).

182. In that same email, in regards to his employment at the Institute, Neal told Sherman, "I am still trying to make my exit strategy work, and still will need to find a way to make income after that happens." (Ex. 515).

183. In an email response dated July 18, 2011 Sherman states, "I did not want to respond to your institute email address." Neal responded a week later by thanking Sherman for sending the email to his "gmail" address. (Ex. 515).

184. In that exchange, Sherman advises Neal that he has the opportunity to become a paleontology professor but that he will have to move from Hill City. (Ex. 515).

185. Neal was aware of Sarah Mason's allegations against Barry Brown in 2011 as Brown sent Neal an email in June of 2011 indicating he was aware that Sarah had contacted "Tom." Brown referred to Sarah as "a womans (sic) scorn" and asked Neal and Brenda for his support should the allegations ever come to a head. (Ex. 500).

186. Neal responded to Brown by stating via email "I have not heard a word about or from her, but would not doubt anything from that group. Her brother has said many things about my family as well which is why I am

sending from this email address which hopefully does not get read by that family." (Ex. 500).

187. Despite the serious accusations against one of Neal's friends by the daughter of a man Neal worked with for almost 40 years, Neal did not discuss the accusations with Bob, Pete, Sam, or Matt in 2011 because, as he testified, he forgot Brown sent the June 2011 email until discovery in this lawsuit. *See Testimony of Neil Larson.*

188. After he was suspended in July of 2012, in part because of his reaction to the Barry Brown situation, Neal sent Brown an email on August 3, 2012 in which he called the Institute's other directors the "evil empire" and in which he noted "I have an idea and a plan!!!." (Ex. 606).

189. Court finds that Neil, especially and increasingly between the years of 2008-2012, had been a disruptive force in the Institute.

190. Any Finding of Fact more properly denominated as a Conclusion of Law is so deemed and vice-versa.

CONCLUSIONS OF LAW

1. Neal commenced this action, in part, for the judicial dissolution of the Institute. *See Complaint, ¶¶ 28-31.*

2. This trial dealt with Neal's claim that he has been oppressed by the Defendants. *See Complaint, ¶¶ 19-24.*

3. Neal claims he was oppressed as a minority shareholder of the Institute as a result of conduct by the Defendants. In this regard, Neal must demonstrate the Defendants engaged in "conduct that substantially defeat[ed]

the 'reasonable expectations' held by [Neal] in committing [his] capital" to the Institute's enterprise. *Mueller v. Cedar Shore Resort, Inc*, 2002 SD 38 ¶13, 643 N.W.2d 56, 62.

4. In considering this issue the Court "must investigate what the majority shareholders knew, or should have known" of Neal's expectations when he entered the Institute. *Id. at ¶13.*

5. Further, Neal's "[r]easonable expectations are to be analyzed in light of the entire history of the parties' relationship, and include expectations such as participation in corporate affairs. Id. at ¶14 (citing *Longwell v. Custom Benefit Programs Midwest*, Inc. 2001 SD 60, ¶19, 627 N.W.2d 396, 399) (quoting *Landstrom*, 1997 SD 25 at ¶39, 561 N.W.2d at 8)).

6. The determination as to whether a stockholder's expectations are reasonable requires utilization of a balancing test. In this instance, the Court must weigh the "minority shareholder's expectations against the 'corporation's ability to exercise its business judgment and run its business efficiently.'" *Id.* at 63.

7. This weighing of interests is necessary because the "courts are loathe to second guess the business decisions of the directors. *Id.*

8. Consequently, "[o]ppression will only arise where the minority shareholder's expectations were 'both reasonable under the circumstances and were central to the decision to join the venture.'" *Id.* (quoting Longwell, 2001 SD 60 at ¶19).

9. Shares may be acquired for consideration consisting of "any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, contracts for services to be performed, or other securities of the corporation." SDCL § 47-1A-621.

10. Neal's shares in the Institute were received for consideration, both in the sense that he provided his services in exchange for his interest in Minerals, and that he contributed his interest in Minerals (an item of value) for his interest in the Institute.

11. "Whether conduct is oppressive is a legal conclusion." *Mueller v. Cedar Shores, Inc.,* 2002 S.D. 38, ¶ 11, 643 N.W.2d 56, 62 (citing *Landstrom v. Shaver,* 1997 S.D. 25, ¶ 37, 561 N.W.2d 1, 7) (citing *Robblee v. Robblee,* 68 Wash.App. 69, 841 P.2d 1289, 1293 (1992); *Davis v. Sheerin,* 754 S.W.2d 375, 380–81 (Tex.App.1998)).

12. "South Dakota has adopted the Model Business Corporations Act, which provides equitable relief for minority shareholders who have been oppressed, particularly in the context of a close corporation." *Mueller,* 2002 S.D. 38, ¶ 13.

13. "A close corporation is one in which the management and ownership are 'substantially identical to the extent that it is unrealistic to believe that the judgment of the directors will be independent of that of the stockholders.'" *Landstrom,* 1997 S.D. 25, ¶ 57, n.15 (citing *Thisted v. Tower Management, Corp.,* 147 Mont. 1, 409 P.2d 813, 820 (1966)).

14. "Typical attributes of a close corporation are that: (1) the shareholders are few in number, often two or three; (2) the shareholders usually live in the same geographical area, know each other, and are well acquainted with each other's skills in regards to the corporation; (3) all or most of the shareholders are active in the business usually serving as directors or officers or as management; and (4) there is no established market for the corporate stock." *Landstrom*, 1997 S.D. 25, ¶ 57, n. 15 (citing *Balvik v. Sylvester,* 411 N.W.2d 383, 383 (N.D.1987)).

15. The Institute is a "close corporation."

16. "Generally, corporation law states that, while directors owe a fiduciary duty to the corporation, shareholders do not owe a fiduciary duty to either the corporation or their fellow shareholders. This standard is different, however, for close corporations. '[I]n almost every state, majority, dominant, or controlling shareholders, or a *group of shareholders acting together* to exercise effective control, are held to owe a fiduciary duty to minority shareholders.'" *Mueller*, 2002 S.D. 38, ¶ 26 (emphasis in original) (citing *Hayes v. N. Hills General Hosp.,* 1999 S.D. 28 ¶ 52, 590 N.W.2d 243, 253 (quoting *Moore v. Maine Indus. Services, Inc.,* 645 A.2d 626, 628 (Me.1994))).

17. "This fiduciary duty is characterized by a high degree of diligence and due care, as well as the exercise of utmost good faith and fair dealing." *Mueller*, 2002 S.D. 38, ¶ 26 (citing *Landstrom,* 1997 S.D. 25, ¶ 84; *Case v. Murdock,* 488 N.W.2d 885, 889–90 (S.D.1992); *Mobridge Cmty. Indus., Inc. v. Toure, Ltd.,* 273 N.W.2d 128, 133 (S.D.1978)).

18. Pursuant to this duty, the Defendants have the duty to act "with the care that a person in a like position would reasonably believe appropriate under the circumstances." *SDCL 47-1A-830.*

19. "The Code [ ] does not define what constitutes oppression. [The South Dakota Supreme Court] ha[s] resolved the question by considering oppressive actions to refer to conduct that substantially defeats the 'reasonable expectations' held by minority shareholders in committing their capital to the particular enterprise." *Mueller*, 2002 S.D. 38, ¶ 13 (citing *Landstrom,* 1997 S.D. 25, ¶ 38; *Gimpel v. Bolstein,* 125 Misc.2d 45, 477 N.Y.S.2d 1014, 1018 (N.Y.Sup.Ct.1984) (defining oppression in context of "reasonable expectations" of minority shareholder or "burdensome, harsh and wrongful conduct" by majority shareholders)).

20. "Mere disappointment in the results of a venture is not sufficient. Rather, the statutory protection is more dramatic, and oppression should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the minority shareholder's decision to join the venture." *Landstrom v. Shaver*, 1997 S.D. 25 ¶ 39, 561 N.W.2d 1, 8.

21. "Whether the defendant's conduct is oppressive, including whether the minority shareholder's expectations were reasonable, is a question of law for the court to decide." *Mueller v. Cedar Shore Resort, Inc.*, 2002 S.D. 38, ¶11, 643 N.W.2d 56, 62.

22. The expectations must have been "both reasonable under the circumstances and . . . central to the minority shareholder's decision to join the venture." *Landstrom v. Shaver*, 1997 S.D. 25, ¶ 39, 561 N.W.2d 1, 8.

23. And they must be expectations about which "the majority shareholders knew, or should have known, to be the petitioner's expectations[.]" *Mueller v. Cedar Shore Resort, Inc.*, 2002 S.D. 38, ¶ 13, 643 N.W.2d 56, 62.

24. In determining what the majority knew or should have known, the Court considers "the entire history of the parties' relationship[.]" *Mueller v. Cedar Shore Resort, Inc.*, 2002 S.D. 38, ¶ 14, 643 N.W.2d 56, 62 (citations omitted).

25. "A shareholder who reasonably expected that ownership in the corporation would entitle him or her to a job, a share of corporate earnings, a place in corporate management, or some other form of security, would be oppressed in a very real sense when others in the corporation seek to defeat those expectations and there exists no effective means of salvaging the investment." *Landstrom*, 1997 S.D. 25, ¶ 38 (quoting *In re Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 484 N.Y.S.2d 799, 473 N.E.2d 1173, 1179 (1984)).

26. Neil had a reasonable expectation of *continued* employment and compensation. However, absent an employment contract, an expectation to *perpetual* employment is not reasonable. *Mueller v. Cedar Shore Resort, Inc.* 2002 S.D. 38, 643 N.W.2d 56, 65 n.4.

27. Objectively, Neal did not have a reasonable expectation of *perpetual* employment with the Institute.

28. Given the factual findings of the Court, Neil's termination as an employee of the institute, *in and of itself*, does not constitute oppression.

29. "[S]hareholders of a close corporation often expect to be actively involved in its management and operation." *Mueller*, 2002 S.D. 38, ¶ 16 (citing *Balvik,* 411 N.W.2d at 386).

30. "Unlike the typical shareholder in a publicly held corporation, who may be simply an investor or a speculator and does not desire to assume the responsibilities of management, the shareholder in a close corporation considers himself or herself as a coowner [sic] of the business and wants the privileges and powers that go with ownership. Employment by the corporation is often the shareholder's principal or sole source of income. As a matter of fact, providing for employment may have been the principal reason why the shareholder participated in organizing the corporation." *Mueller,* 2002 S.D. 38, ¶ 16 (citing *Balvik,* 411 N.W.2d at 386) (citing 1 F. O'Neal and R. Thompson, *O'Neal's Close Corporations* § 1.07 (3d ed 1987).

31. The Court does acknowledge Neal could not have expected to hold his positions in every circumstance. Rather, Neal's expectation had to be "reasonable under the circumstances." *Mueller*, at ¶14.

32. With this in mind, it would have been unreasonable for Neal to expect he would remain a director if the other shareholders had <u>in good faith</u> removed him pursuant to the rights afforded them under Article III, Section 4

of the Institute's by-laws. In addition, it would have been unreasonable for Neal to expect to hold his position as an officer if the Board of Directors had exercised their powers in good faith and voted to remove him during a properly noticed and run shareholder's meeting.

33. The Court finds guidance in these matters in the case of *Mueller*, 2002 S.D. at ¶14. In *Mueller*, the South Dakota Supreme Court addressed whether majority shareholders in a close corporation frustrated the reasonable expectations of the minority shareholders when the majority removed the minority from their managerial positions. *Mueller, at ¶23.* The Court held the removal of the minority shareholders from their managerial positions did not amount to oppression. *Mueller, at FN. 4.*

34. In reaching its decision, the Court emphasized the minority shareholders did not have written employment agreements, nothing in the shareholder's agreement indicated the minority shareholders had the right to perpetual employment or managerial control, removal was accomplished in accordance with the procedures set forth in the corporation's by-laws, the other family members presented a united front on the issue of removal, and there was no evidence of any secret meetings. *Mueller, at ¶23.*

35. The present case stands in stark contrast to the facts of *Mueller.* In the present case, the Defendants did not act in accordance with the procedure set forth in the Institute's by-laws. In fact, the Defendant's removed Neal without any authority from either the Institute's by-laws or South Dakota law.

36. The facts of the present case show that Neal was removed during a meeting that was akin to a secret meeting. During this "secret meeting", where no proper notice was given to Neil, who was at the time a shareholder and director with control of 35% of the Institute's shares, was stripped of his managerial powers.

37. Neal was not allowed to participate at the meeting at which he was fired as an employee and removed from the Board of Directors, let alone vote in his capacity as either a Director or a shareholder.

38. The facts demonstrate the Defendant's acted completely outside of not only their authority under the Institute's by-laws and South Dakota law, but also in direct contrast to the Institute's traditional customs and history of allowing all of the Institute's shareholders to be present at director meetings.

39. The Court concludes a reasonable person in the Defendants' circumstances would not have violated South Dakota law and would have recognized that "the by-laws of a corporation constitute a binding contract between the corporation and its shareholders." *St. John's Hosp. Med. Staff v. St. John Reg'l Med. Ctr., Inc.*, 90 S.D. 674, 678, 245 N.W.2d 472, 474 (1976); referencing Conclusion of Law 18.

40. A reasonable Director would have looked to the authority afforded them under South Dakota law and the corporate by-laws and would not have acted outside such authority. See *Davis v. Dyson*, 387 Ill. App. 3d 676, 692, 900 N.E.2d 698, 712 (2008) (As part of their fiduciary duty, directors are

required to comply with the procedures of their by-laws and any applicable state law).

41. The Defendants acted unreasonably, and in violation of their duty of care when they acted outside their authority and ignored South Dakota law and the Institute's by-laws in the manner they removed Neil from his position.

42. Consequently, the Court concludes the Defendants have frustrated Neil's reasonable expectations to (1) a position on the Board of Directors of the Institute; (2) a position as an officer of the Institute; and (3) the right to continued involvement in the management and operation of the Institute.

43. "Freeze-out or squeeze-out conduct may occur when the controlling shareholders or directors:

> refuse to declare dividends; they may drain off the corporation's earnings in the form of exorbitant salaries, and bonuses to the majority shareholder-officers and perhaps to their relatives ...; they *may deprive minority shareholders of corporate offices and of employment by the company;* they may cause the corporation to sell its assets at an inadequate price to the majority shareholders."

Mueller, 2002 S.D. 38, ¶ 15 (quoting *Landstrom,* 1997 S.D. 25, ¶ 46) (emphasis in original).

44. "A common method of effectuating this squeeze-out is to discharge the minority shareholder from the board of directors or from employment, while also withholding dividends, thus depriving the shareholder of his only source of income." *Mueller,* 2002 S.D. 38, ¶ 16 (citing *Balvik,* 411 N.W.2d at 387).

45. "As a general rule, the bylaws of a corporation, so long as adopted in conformity with state law, constitute a binding contract between the

corporation and its shareholders." *St. John's Hosp. Med. Staff v. St. John Reg'l Med. Ctr., Inc.*, 90 S.D. 674, 678-79, 245 N.W.2d 472, 474 (1976) (citing *Allied Supermarkets, Inc. v. Grocer's Dairy Company*, 1973, 45 Mich.App. 310, 206 N.W.2d 490, 493, affirmed 1974, 391 Mich. 729, 219 N.W.2d 55).

46. A corporation's bylaws are "permanent and continuing in nature and must be observed until legally changed." *Bosch v. Meeker Co-op. Light & Power Ass'n*, 253 Minn. 77, 83, 91 N.W.2d 148, 152 (1958) (citing Diedrick v. Helm, 217 Minn. 483, 14 N.W.2d 913).

47. Pursuant to the By-Laws, a director may only be removed "at a special meeting of the stockholders called for the purpose [of removing a director]." *See Exhibit 30, p. 002.*

48. Similarly, South Dakota law provides specific provisions for the removal of directors from a corporation. Pursuant to SDCL § 47-1A-808,

> The shareholders may remove one or more directors, with or without cause, unless the articles of incorporation provide that directors may be removed only for cause. If a director is elected by a voting group of shareholders, only the shareholders of that voting group may participate in the vote to remove that director.
>
> If cumulative voting is authorized, a director may not be removed if the number of votes sufficient to elect that director under cumulative voting is voted against removal. If cumulative voting is not authorized, a director may be removed only if the number of votes cast to remove that director exceeds the number of votes cast not to remove that director.
>
> *A director may be removed by the shareholders only at a meeting called for the purpose of removing that director and the meeting notice must state that the purpose, or one of the purposes, of the meeting is removal of the director.*

(emphasis added).

49. Neal was not informed of the September 26, 2012 meeting held for the purposes of removing him from the Board of Directors, and therefore, did not attend the September 26, 2012 meeting. As such, Neal did not waive any notice requirement of the Model Business Corporations Act as set forth in SDCL § 47-1A-701 *et. seq.* SDCL § 47-1A-706; *See also Frye v. Frye,* 217 W. Va. 674, 679, 619 S.E.2d 187, 192 (2005).

50. Pursuant to SDCL § 47-1A-704, an action required by South Dakota law to be taken at a shareholders' meeting may be taken without a meeting if the action is taken by all the shareholders entitled to vote on the action. The action shall by evidenced by one or more written consents describing the action taken, signed by all the shareholders entitled to vote on the action, and delivered to the corporation for inclusion in the minutes or filing with the corporate records.

51. Although South Dakota law specifically contemplates an exception to the requirement that certain actions must be taken at a shareholders' meeting, this exception does not apply to the Defendants' conduct because they did not obtain a consent from Neal, a voting shareholder. SDCL § 47-1A-701 *et. seq.*

52. The actions taken by the Board of Directors of the Institute to "remove" Neal as a member of the Board of Directors was contrary to the By-Laws and South Dakota law. SDCL § 47-1A-708.

53. The Court must take into consideration the business judgment of the Corporation, weighed against the minority shareholder's expectations.

54. It is not considered oppression when the controlling shareholders seek

to control management and the affairs of their corporation. *Landstrom v. Shaver*, 1997 S.D. 25, ¶ 50, 561 N.W.2d 1, 11.

55. "The determination of whether a stockholder's expectations are reasonable, however, must include a balancing test. The court weighs the minority shareholder's expectations against the "corporation's ability to exercise its business judgment and run its business efficiently." *Mueller v. Cedar Shore Resort, Inc.*, 2002 S.D. 38, ¶ 14, 643 N.W.2d 56, 63 (*quoting, Landstrom v. Shaver*, 1997 S.D. 25, ¶ 39, 561 N.W.2d 1, 8).

56. Even in the context of a close corporation, where the directors may have substantial personal interests, courts are loathe to second guess the business decisions of the directors. *Mueller v. Cedar Shore Resort, Inc.*, 2002 S.D. 38, ¶ 14, 643 N.W.2d 56, 63 (*citing* Robert W. Hamilton, Business Organizations: Unincorporated Businesses and Closely Held Corporations § 9.41 (1996)).

57. "A minority shareholder's reasonable expectations must be balanced against a corporation's ability to exercise its business judgment and run its business efficiently." *Landstrom v. Shaver*, 1997 S.D. 25, ¶ 39, 561 N.W.2d 1, 8; *Mueller v. Cedar Shore Resort, Inc.*, 2002 S.D. 38, ¶ 14, 643 N.W.2d 56, 63.

58. Deference to the decisions of the board of directors is founded in the business judgment rule. "[A] minority shareholder's expectations must be balanced against the corporation's need to conduct its business in accordance with the business judgment rule." *Mueller v. Cedar Shore Resort, Inc.*, 2002 S.D. 38, ¶ 24, 643 N.W.2d 56, 66.

59. The business judgment rule is a "presumption that in making a business decision the directors acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the corporation." *Brehm v. Eisner*, 746 A.2d 244, 264 (Del. 2000).

60. The business judgment rule requires that the Board's decisions "will be respected by courts unless the directors are interested or lack independence relative to the decision, do not act in good faith, act in a manner that cannot be attributed to a rational business purpose or reach their decision by a grossly negligent process that includes the failure to consider all material facts reasonably available." *Brehm v. Eisner*, 746 A.2d 244, 264 (Del. 2000).

61. The business judgment rule only applies to a corporation's intra vires acts, not ultra vires ones. *Fisher v. Shipyard Village Council of Co-Owners, Inc.* 409 S.C. 164, 760 S.E.2d 121 (Ct. App. 2014).

62. The business judgment rule is not applicable to actions taken by a board in excess of its contractual authority. *Lippman v. Shaffer*, 15 Misc. 3d 705, 836 N.Y.S.2d 766 (Sup 2006).

63. The privilege of a corporate office to use his or her discretion in acting on behalf of the corporation ceases to exist if the corporate officer acts outside the scope of his or her corporate authority. *Hegy v. Community Counseling Center of Fox Valley*, 158 F. Supp.2d, 892 (N.D. Ill. 2001).

64.A director may not defend such ultra vires actions by alleging ratification. *Sammis v. Stafford*, 48 Cal. App. 4th 1935, 56 Cal. Rptr.2d 589 (4th Dist. 1996).

65. The act of the Board of Directors in removing Neil from the Board, without statutory authority or authority under the By-Laws of the Institute, constituted an ultra vires act.

66. Therefore, the action taken by the Board in removing Neil from the Board of Directors is not protected under the business judgment rule.

67. "Directors are elected at the first annual shareholders' meeting *and at each annual meeting thereafter* unless their terms are staggered under § 47-1A-806." SDCL § 47-1A-803 (emphasis added).

68. The Defendants have failed to hold a shareholder meeting for the purpose of electing directors since Neal's removal from the Institute's Board of Directors.

69. "A corporation shall hold a meeting of shareholders annually at a time stated in or fixed in accordance with the bylaws." SDCL § 47-1A-701.

70. The Defendants have failed to hold an annual meeting in accordance with the By-Laws and South Dakota law.

71. Neal is a "shareholder who reasonably expected that ownership in the corporation would entitle him or her to a job, a share of corporate earnings, a place in corporate management, or some other form of security [and Neal has been] oppressed in a very real sense when others in the corporation [] defeat[ed] those expectations and there exists no effective means of salvaging the investment." *Landstrom*, 1997 S.D. 25, ¶ 38 (quoting *In re Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 484 N.Y.S.2d 799, 473 N.E.2d 1173, 1179 (1984)) (alterations added with facts from this case).

72. In *Landstrom*, the South Dakota Supreme Court conducted a detailed analysis of "squeeze-out" and determined the Landstrom had not established a "squeeze-out." The Court held that:

> It should be noted that while Landstrom has always been a minority shareholder, *there has never been a shareholder who would qualify as a majority shareholder*. Landstrom's difficulties stem from the fact that she was unable to get a single other minority shareholder to agree with her views. In fact Landstrom along with Drew have been the largest single shareholders in BHJMC since it was incorporated in 1977.
>
> *Landstrom always received her proportionate share of dividends* which totaled in excess of $20 million by 1994. *She was never deprived of corporate offices* as she was elected Chairperson of BHJMC upon Shaver's retirement in 1984. *Landstrom was notified and allowed to attend all Directors meetings where she presided as Chairperson until her voluntary resignation* from the Chair and the Board. At her option, her attorney was allowed to also attend and advise her during the course of the meetings. *When she voluntarily resigned, she was allowed to pick her successor on the Board*. In 1993 she elected two directors, one of whom became the Chair.
>
> *Landstrom was employed by BHJMC from time to time as a consultant and was always paid when she requested it.* She was at no time forced to sell her shares let alone at less than their value. When she decided she wanted to sell her shares, she admitted she failed to follow the buy-sell agreement she had previously signed, and instead demanded $25 million for her shares which was in excess of the formula of the agreement which should have controlled. In fact, when the Shaver shares were purchased pursuant to the buy-sell agreement after his death, Landstrom acquired her pro rata share increasing her holdings from 33% of the corporate stock to 40%.

Landstrom, 1997 S.D. 25, ¶¶ 47-49 (emphasis added). Further, the Court in *Landstrom* noted that "there is no evidence that the Defendants violated any laws of this state, violated the by-laws of the corporation or engaged in any financial self-dealing conduct to the exclusion of Landstrom." *Id.* at ¶ 51.

73. Unlike the Plaintiff in *Landstrom,* Neal was suspended from his employment at the Institute without pay on July 23, 2012. Neal was terminated as an employee and discharged from the Board of Directors of the Institute. Neal was not allowed to select his successor on the Board of Directors and has not been allowed to elect a single director since his removal despite the fact that he owns 35% of the Institute. Neal was not included in any shareholder meetings from the time of his removal until this litigation was commenced. Since Neal was removed from his positions as employee, officer, and director of the Institute, Neal has received no salary or wage and the Institute has declared no dividends other than those monies required to pay each shareholder's pro-rata share of the tax obligation for the Institute. Neal has received no financial benefit from the continued operation of the Institute and has been provided no opportunity to participate in any of the affairs of the Institute.

74. Neal has been "squeezed-out" and/or "frozen-out" of the Institute by the Defendants since July of 2012.

75. The Defendants have substantially defeated Neal's reasonable expectation of a position as an officer of the Institute.

76. The Defendants have substantially defeated Neal's reasonable expectation of a position on the Board of Directors of the Institute.

77. The Defendants have substantially defeated Neal's right as a 35% shareholder to vote to elect two of the five Directors on the Board of Directors of the Institute.

78. The Defendants have substantially defeated Neal's reasonable expectation of continued involvement in the management and operation of the Institute.

79. The Defendants have substantially defeated Neal's reasonable expectation of compensation from the Institute.

80. None of the actions of the Defendants, in and of themselves, rise to the level of inherent oppression. But the pattern of conduct, including the nearly complete disregard of South Dakota law or abiding by the By-laws of the Institute extinguished Neil's ability to exercise his rights as a minority shareholder.

81. Minority shareholder oppression is an equitable claim. *Landstrom v. Shaver*, 1997 S.D. 25 ¶¶ 22-34, 561 N.W.2d 1, 5-7; *Noble for Drenker v. Shaver*, 1998 S.D. 102, ¶ 3, 583 N.W.2d 643, 645; *Mueller v. Cedar Shore Resort*, Inc., 2002 S.D. 38, ¶13, 643 N.W.2d 56,62.

82. "He who comes into equity must come with clean hands. (citations omitted). A party seeking equity must act fairly and in good faith." *Action Mech., Inc. v. Deadwood Historic Pres. Comm'n*, 2002 S.D. 121, ¶ 26, 652 N.W.2d 742, 751.

83. Although the Court has found that Neil had been a disruptive force in the Institute, and especially and increasingly between the years of 2008-2012, the Defendants have not met their burden of proof to establish their affirmative defense in showing that Neil does not come in with clean hands.

84. Neil is not barred from recovery.

85. Neal has been oppressed under South Dakota law.

86. Any Finding of Fact more properly denominated as a Conclusion of Law is so deemed and vice-versa.

Dated this 19th day of July, 2016.

BY THE COURT:

Hon. Matthew Brown
Circuit Court Judge

ATTEST:

(SEAL)
CLERK OF COURTS

Pennington County, SD
FILED
IN CIRCUIT COURT
JUL 19 2016
Ranae Truman, Clerk of Courts
By _____ Deputy