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7 SUPERIOR COURT OF CALIFORNIA
8 COUNTY OF SAN DIEGO

9
10 PROPER MEDIA, LLC, a California limited
liability company; CHRISTOPHER
11 RICHMOND, an individual; and DREW
SCHOENTRUP, an individual,

12 Plaintiffs,

13 v.

14 BARDAV INC, a California corporation, and
15 DAVID MIKKELSON, an individual,

16 Defendants,

) CASE NO. 37-2017-00016311-CU-BC-CTL
)
) **DEFENDANT DAVID MIKKELSON'S**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN OPPOSITION TO**
) **PLAINTIFFS' MOTION FOR**
) **PRELIMINARY INJUNCTION**

) Date: August 4, 2017
) Time: 10:30 a.m.
) Dept.: C-28
) Judge: Hon. Judith F. Hayes

17 BARDAV INC. a California corporation,

18 Cross-Complainant,

19 v.

20 PROPER MEDIA, LLC, a California limited
21 liability company; DREW SCHOENTRUP,
an individual; and ROES 1 through 30,
22 inclusive,

23 Cross-Defendants.
24
25

) Complaint Filed: May 4, 2017
) Trial Date: TBD

26 Defendant DAVID MIKKELSON ("Mr. Mikkelson" or "Defendant") hereby submits this
27 memorandum of points and authorities in opposition to the above-captioned plaintiffs'
28 (collectively "Plaintiffs") motion for preliminary injunction ("Motion").

DEFENDANT DAVID MIKKELSON'S MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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1 **I. INTRODUCTION**

2 Mr. Mikkelson is the founder of Snopes.com, an online resource for urban legend and
3 rumor research. Started in 1994, Snopes.com has, over the past two decades, grown into one of
4 the most renown fact-checking Internet websites, and one that is highly-regarded among
5 journalists, news publications, researchers, writers, and laypersons. (Plaintiffs’ First Amended
6 Complaint (“FAC”) ¶ 31.) Mr. Mikkelson is also an officer and a duly-appointed director of the
7 corporation that owns Snopes.com – co-defendant Bardav, Inc. (“Bardav”) – as well as a 50%
8 shareholder. (FAC ¶¶ 2, 64, 108; Declaration of David Mikkelson (“Mikkelson Decl.”), ¶¶ 1, 6.)

9 Plaintiff PROPER MEDIA, LLC (“Proper Media”) *was* a party to a now-terminated
10 business contract with Bardav, i.e., the General Services Agreement (“GSA”). (FAC ¶¶ 32, 55,
11 82; *see*, Exhibit A to Plaintiffs’ Declaration of Drew Schoentrup (“the GSA”).) Plaintiffs
12 CHRISTOPHER RICHMOND and DREW SCHOENTRUP, interestingly, wear two *distinct* hats
13 in this case: 1) they are members and majority equity-holders of Proper Media (FAC ¶¶ 24, 25),
14 *and*, 2) they are also individual shareholders in Bardav. It is clear from the FAC and the Motion
15 that their loyalties lie with Proper Media.

16 Indeed, Plaintiffs’ lawsuit – and, in particular, their Motion – is nothing more than the
17 efforts of Proper Media, as a disgruntled former business associate of Bardav, to use the minority
18 shareholder status of its principals to pressure Mr. Mikkelson into reviving the GSA so that
19 Proper Media can derive income to pay its debts, for which Messrs. Richmond and Schoentrup
20 are accountable. (FAC ¶ 41.) That this is the true motive for their Motion is clear from
21 Plaintiffs’ statement of the basis of the Motion, in the corresponding Notice:

22 Mikkelson’s purported termination of the written contract on behalf of
23 Bardav is intentional and designed to cause such financial harm to Proper
24 Media that Proper Media defaults on payments it made on its purchase of
25 a 50% interest in Bardav. If Mikkelson (and Bardav, on whose behalf
he purports to act) are not enjoined from terminating the [GSA], and
Mikkelson is not immediately removed as a director of Bardav, Plaintiffs
will suffer an immediate and dramatic harm.

26 Plaintiffs’ Notice of Motion, p. 1, lns. 15-25 [emphasis added].

27 Plainly, Plaintiffs’ collective issue giving rise to the Motion is that the GSA has been
28 terminated, upon the action of Bardav’s president, Mr. Mikkelson. This action, however, was

1 well within Bardav’s rights and does not implicate *any* legal wrong: this is because the GSA
2 expressly gives Bardav the right to terminate the contract, with or without cause, upon 60 days’
3 notice – notice that Plaintiffs *admit* they received on or about March 10, 2017, making the
4 termination effective May 9, 2017. (GSA, ¶ 7.1; FAC ¶ 55.) Otherwise stated, Bardav had *every*
5 right to terminate the GSA, and Plaintiffs have *no* right to force Mr. Mikkelson to resume it.

6 Nor do Plaintiffs have any right to demand a Board vote on the termination of the GSA.
7 Proper Media is not a shareholder, and thus has no rights relative to Bardav, whatsoever.
8 Messrs. Richmond and Schoentrup’s request for Board intervention is factually unsupported; the
9 GSA was entered by Mr. Mikkelson in his capacity as Bardav’s president (*not* as a director),
10 without Board action; the GSA can be terminated by Mr. Mikkelson in the same capacity in the
11 very same manner – precisely what occurred here. Their claim for injunctive relief in the form
12 of reinstatement of the GSA and a Board vote on its termination, thus, is properly denied.

13 Significantly, Mr. Mikkelson’s termination of the GSA in his role as Bardav’s *president*
14 does not speak to his conduct as a *director*, which Plaintiffs’ Motion challenges. As reflected by
15 the evidence (and Plaintiffs’ lack thereof), Plaintiffs do not *truly* have any concern about Mr.
16 Mikkelson’s service as a director. The main issue they raise pertains to a compensation plan that
17 Messrs. Richmond and Schoentrup thoroughly reviewed, analyzed, and approved *before* the
18 GSA was terminated. Tellingly, it was only after the March 10, 2017 notice of termination of
19 the GSA that Plaintiffs suddenly and inexplicably called Mr. Mikkelson’s compensation into
20 question. There is, very simply, no basis to remove from the Board the very founder of
21 Snopes.com who has spent the last 23 years creating, establishing, and growing the website,
22 readership, and brand – particularly against the ulterior business motives of two individuals (and
23 their own separate company) that have only had any relationship with Bardav for *barely one*
24 *year*. Even more, the one plaintiff that asserts the FAC’s eighth cause of action for Removal of
25 Director is Proper Media, and Proper Media, as a non-shareholder, does not have standing to
26 pursue such action. Plaintiffs’ request for injunctive relief in the form of the removal or
27 suspension of Mr. Mikkelson from his role as a Bardav director, thus, must be denied.

28 Plaintiffs’ third request for injunctive relief, the production of documents by

1 “Defendants” in response to inspection demands made under Sections 1600-1602 of the
2 Corporations Code, does not pertain the Mr. Mikkelson in his individual capacity. There is no
3 legal authority under these provisions for Mr. Mikkelson to produce any documents, not has Mr.
4 Mikkelson received any request for his individual documents. Moreover, given the availability
5 of the Civil Discovery Act in this lawsuit, it is not a proper basis for injunctive relief. This
6 request, too, is thus appropriately denied as to Mr. Mikkelson.

7 Mr. Mikkelson incorporates by reference the points, authorities, and evidence offered by
8 Bardav in support of its independent opposition to Plaintiffs’ Motion, which further supports the
9 denial of the Motion, in its entirety.

10 **II. SUMMARY OF RELEVANT FACTS**

11 Mr. Mikkelson founded Snopes.com in 1994 as an expression of his interest in
12 researching urban legends. (Mikkelson Decl., ¶3.) Over the past few decades, the site has grown
13 in scope, readership, and credibility, with its personnel making multiple appearances as guests on
14 national news programs such as *20/20*, *ABC World News*, *CNN Sunday Morning*, and NPR’s *All*
15 *Things Considered*, and they and their work having been profiled in major news publications
16 such as *The New York Times*, the *Los Angeles Times*, *The Washington Post*, *The Wall Street*
17 *Journal*, and *Reader’s Digest*. (Id. at ¶3.) In 2003, Mr. Mikkelson and his then-wife Barbara,
18 co-formed Bardav as the corporate entity for the business operations behind Snopes.com. (Id. at
19 ¶4.) At that time, Mr. Mikkelson and Barbara held 100% of Bardav’s shares (50% respectively),
20 and were each duly appointed as Bardav’s directors. (Mikkelson Decl., ¶5 and Exhibit 1
21 [Director Appointment].)

22 With Snopes.com having grown in all aspects since its foundation, in 2015 Bardav opted
23 to explore the potential benefits of third party vendors. In August 2015, Bardav entered into the
24 GSA with Proper Media to assist with web development and advertising. Both parties
25 maintained the express right to terminate the GSA, “with or without cause”, upon 60 days’ notice
26 (GSA ¶7.1; Mikkelson Decl., ¶¶ 8, 9.)

27 In May 2016, during the dissolution of Mr. Mikkelson’s marriage, Proper Media’s five
28 individual members (including Messrs. Richmond and Schoentrup) purchased Barbara’s 50%

1 shareholder interest in Bardav. Despite Plaintiffs’ efforts to obfuscate this fact in the FAC, there
2 can be *no question* that the share interest was purchased by and in the name of these five
3 individuals, and not in the name, ownership, or *any* legal interest of Proper Media. (FAC ¶¶ 5,7,
4 36, 38¹; Exhibit 2 [Purchase Agreement], Exhibit 5 [1/3/17 Drew Schoentrup Decl., ¶ 2].) Thus,
5 Proper Media is not and never has been a shareholder of Bardav.

6 Following the sale of Barbara’s shares to the five individuals, Mr. Mikkelson’s 2016
7 compensation was agreed to, and Mr. Schoentrup, himself, approved certain of Mr. Mikkelson’s
8 expenses in advance of their being made. (Mikkelson Decl., ¶12) At the end of 2016, Mr.
9 Mikkelson provided the five new Bardav shareholders the opportunity to fully review Mr.
10 Mikkelson’s compensation for the 2016 year, including a line-by-line review of his expense
11 reimbursement requests for that period, conducted by Mr. Schoentrup. (Id. at ¶13.) By February
12 2017, we reached an agreement relative to these expenses, which Plaintiffs refer to as the
13 “Compensation Agreement”. (Id. at ¶13.)

14 Indeed, Mr. Schoentrup *concedes* that the matter was discussed, and that he signed off on
15 the agreement. (Declaration of Drew Schoentrup (“Schoentrup Decl.”) ¶ 8.) Accordingly, the
16 Bardav shareholders, including Mr. Schoentrup, proceeded to act in accord with the
17 Compensation Agreement. (Mikkelson Decl. ¶13.) Specifically, the compensation was in fact
18 paid to Mr. Mikkelson upon the authorization of Mr. Schoentrup. (Id. at ¶13.)

19 In March 2017, with at least 60 days’ notice via correspondence from Mr. Mikkelson,
20 Bardav terminated the GSA pursuant to Paragraph 7.1 thereof. Mr. Mikkelson did so in his role
21 as Bardav’s president (and its co-owner) – the same capacity in which he executed Bardav’s
22 entry into the GSA and corresponding Exhibit A thereto. (See, GSA pp. 6, 7; Mikkelson Decl.
23 ¶8.) Plaintiffs admit that they received such timely notice. (FAC ¶55.)

24 On May 4, 2017, *after* the notice of the termination of the GSA was issued and shortly
25 before it became effective, Messrs. Richmond and Schoentrup suddenly claimed to revoke the

26 ¹ FAC ¶ 5 (sale of Bardav shares was “to Proper Media’s individual shareholders”); FAC ¶ 7 (former Proper Media
27 member Vincent Green “holds only a small fraction of Bardav’s equity”); FAC ¶ 36 (sale of Bardav shares was “to
28 Proper Media’s individual shareholders”); FAC ¶ 38 (“The sale of Barbara’s equity in Bardav to Proper Media’s
five members closed on July 1, 2016 []” [emphasis added]). Not only are these allegations in the FAC judicial
admissions, but also, the FAC is verified, and thus they are Plaintiffs’ statements under oath.

1 Compensation Agreement, albeit already in effect for the preceding several months. They
2 provided no explanation for such purported revocation, and even relative to this Motion, they
3 offer no supporting facts.² Notably, the other three Bardav shareholders' agreement to the
4 Compensation Agreement terms remains undisturbed. By letter date June 21, 2017, Mr.
5 Mikkelson (though counsel) explained why Messrs. Richmond and Schoentrup's claim to revoke
6 his compensation plan was ineffective. (Exhibit 6 [6/21/17 Letter].)

7 This lawsuit by Plaintiffs followed. Shortly before the parties' early mediation effort in
8 this case, Plaintiffs' Motion was filed and served on the defendants.³

9 **III. AUTHORITY SUPPORTING DENIAL OF PLAINTIFFS' MOTION**

10 The decision on whether or not to grant a preliminary injunction rests on “(i) the
11 likelihood that the party seeking the injunction will ultimately prevail on the merits of his [or
12 her] claim, and (ii) the balance of harm presented, i.e., the comparative consequences of the
13 issuance and nonissuance of the injunction.” *Law School Admission Council, Inc. v. State of*
14 *California* (2014) 222 Cal.App.4th 1265, 1280, quoting *Common Cause v. Board of*
15 *Supervisors* (1989) 49 Cal.3d 432, 441–442. The general purpose of a preliminary injunction is
16 to preserve the status quo pending a determination on the merits of the action. *Continental*
17 *Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528.

18 Importantly, “[a] trial court may not grant a preliminary injunction, regardless of the
19 balance of interim harm, unless there is some possibility that the plaintiff would ultimately
20 prevail on the merits of the claim.” *Law School Admission Council, Inc. v. State of*
21 *California* (2014) 222 Cal.App.4th at 1280 [emphasis added], citing *Butt v. State of*
22 *California* (1992) 4 Cal.4th 668, 678. “Accordingly, the trial court must deny a motion for a
23 preliminary injunction if there is no reasonable likelihood the moving party will prevail on the
24 merits.” *SB Liberty, LLC v. Isla Verde Assn., Inc.* (2013) 217 Cal.App.4th 272, (upholding San
25

26 ² Mr. Schoentrup claims that he agreed to the Compensation Agreement based upon Mr. Mikkelson's promises
27 relative to his 2017 compensation. (Schoentrup Decl. ¶ 9.) Mr. Schoentrup does not state that such promises were
28 not kept or untrue. Indeed, Plaintiffs offer no evidence of any conduct by Mr. Mikkelson relative to his 2017
compensation or involvement with Bardav finances – the Schoentrup Decl. is devoid of any such information.

³ The Motion was served on June 6th by overnight mail, thus reaching defendants on June 7th. The parties' early
mediation conference was held before Judge Wayne Petersen on June 8th.

1 Diego Superior Court’s denial of motion for preliminary injunction) [emphasis added]; *see also*,
2 *Saltonstall v. City of Sacramento* (2014) 231 Cal.App.4th 837 (upholding denial of motion for
3 preliminary injunction where plaintiff made “only passing arguments, unsupported with citation
4 to authority or evidence,” relative to its claim of impending harm).

5 Against these standards, and because Plaintiffs cannot satisfy *either* prong of showing
6 required for a preliminary injunction, Plaintiffs’ Motion must be denied.

7 **IV. PLAINTIFFS CANNOT SATISFY THE LEGAL REQUIREMENTS FOR A**
8 **PRELIMINARY INJUNCTION AND THUS THEIR MOTION MUST BE DENIED**

9 For a multitude of reasons, as explained herein, Plaintiffs cannot establish either, 1) a
10 likelihood that they can prevail on the purported merits of their claims, or, 2) that the balance of
11 harm presented weighs in their favor. Accordingly, their Motion therefore must be denied.

12 **A. Plaintiffs Cannot Show a Probability of Prevailing Because Many of Their Claims**
13 **Are Defective as a Matter of Law and/or Do Not Meet the Requisite Pleading**
14 **Standards**

15 At the outset, Plaintiffs cannot prevail on at least five (5) of their causes of action against
16 Mr. Mikkelson, simply as a matter of California law. Specifically:

17 • Plaintiffs’ second cause of action for intentional interference with contract (as to the
18 GSA) fails as a matter of law because Mr. Mikkelson, as an officer and director of
19 Bardav, cannot be held liable for inducing a breach of Bardav’s GSA with Proper Media as a
20 matter of law (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 24 (corporate agent acting for and on
21 behalf of corporation cannot be held liable for inducing a breach of corporation’s contract));

22 • Plaintiff Proper Media’s third cause of action for conspiracy fails as a matter of law
23 because “conspiracy” itself is not recognized as an independent actionable cause of action under
24 California law. *Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1581; *Applied*
25 *Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511 (“Conspiracy is not a
26 cause of action, but a legal doctrine ...”);

27 • Plaintiff Proper Media’s fourth cause of action for abuse of control fails because, i) it
28 is a claim for injury to the corporation that is improperly asserted as a direct claim by (alleged)
shareholders, whereas it must be asserted as a derivative claim (*Jones v. H.F. Ahmanson & Co.*

1 (1969) 1 Cal.3d 93, 107 (claims for injury or damage to a corporation or its property belong to
2 the corporation, and not its stockholders individually)); ii) in order to pursue a derivative claim, a
3 shareholder plaintiff must first satisfy the prerequisites to a derivative action as required by
4 Section 800(b) of the Corporations Code⁴ – namely, standing as a shareholder and a pre-lawsuit
5 written demand on the corporate board, and, iii) Proper Media is not a shareholder capable of
6 bringing a derivative action relative to Bardav, nor did any shareholder issue the requisite pre-
7 litigation demand or written notice of such claim.

8 • Pursuant to these same legal authorities, Plaintiffs’ fifth cause of action for corporate
9 waste fails because, i) it is a claim for injury to the corporation that is improperly asserted as a
10 direct claim, instead of a properly-framed derivative claim; and, ii) in order to pursue a
11 derivative claim, a shareholder plaintiff must first satisfy the prerequisites to a derivative action
12 as required by Section 800(b) of the Corporations Code, which was not done by *any* of Plaintiffs
13 (i.e., there was no pre-litigation demand on the Board or written notice of this action).

14 • Plaintiff Proper Media’s eighth claim for relief for removal of director fails because
15 Proper Media, the sole plaintiff asserting this cause of action (*see*, FAC, p. 19, ln. 7), it is not an
16 actual shareholder, and thus does not have standing to seek removal of any Bardav director
17 (Corp. Code §304).

18 Mr. Mikkelson has filed a demurrer to the FAC, asserting these and other grounds for the
19 dismissal of Plaintiffs’ deficiently-pleaded causes of action. The same legal flaws in these

20 _____
21 ⁴ Section 800(b) provides, in relevant part, as follows:

22 **(b) No action may be instituted or maintained** in right of any domestic or foreign corporation by
23 any holder of shares or of voting trust certificates of the corporation **unless both of the following**
conditions exist:

24 (1) The plaintiff alleges in the complaint that plaintiff was a shareholder, of record or beneficially,
25 or the holder of voting trust certificates at the time of the transaction or any part thereof of which
26 plaintiff complains or that plaintiff’s shares or voting trust certificates thereafter devolved upon
27 plaintiff by operation of law from a holder who was a holder at the time of the transaction or any
28 part thereof complained of; ...; and

(2) The plaintiff alleges in the complaint with particularity plaintiff’s efforts to secure from the
board such action as plaintiff desires, or the reasons for not making such effort, and alleges further
that plaintiff has either informed the corporation or the board in writing of the ultimate facts of
each cause of action against each defendant or delivered to the corporation or the board a true
copy of the complaint which plaintiff proposes to file. [Bold and underline emphasis added].

1 causes of action prevent Plaintiffs from showing a probability of prevailing on their claims for
2 the purposes of their Motion. Otherwise stated, Plaintiffs cannot prevail on these causes of
3 action that are defective as a matter of law; as a result, they cannot meet the first prong of their
4 preliminary injunction burden.

5 **B. Plaintiffs Cannot Show a Probability of Prevailing Because Their Claims are**
6 **Unsupported by the Facts**

7 Certain of Plaintiffs' preliminary assertions of fact are demonstrably inaccurate. For
8 example, Barbara's shares were not sold to Proper Media (*contra*, Motion p. 3, lines 12-13); they
9 were sold to Messrs. Richmond and Schoentrup, and three other individuals, as is well-
10 established by the evidence (*supra*), including Mr. Schoentrup's own declaration in a prior matter,
11 signed (tellingly) before the GSA was terminated. Plaintiffs offer no evidence to suggest that
12 there was any agreement regarding the Bardav shares between any of the individual shareholders
13 and Proper Media, nor a voting trust, nor other collaboration. There is no credible or admissible
14 evidence to support Plaintiffs' position that Proper Media has any equity interest in Bardav.

15 Moreover, Mr. Schoentrup was never appointed as a director of Bardav, nor was there
16 any such representation in the purchase agreement for Barbara's stock that such would occur.
17 (*See*, Exhibit 2 [Purchase Agreement].) In fact, the Purchase Agreement provides that the only
18 representations and warranties made in the course of such agreement are those contained in the
19 contract. (Exhibit 2, p. 4, ¶ 5(r).) There is no representation with the contract that Mr.
20 Schoentrup would become a director of Bardav.

21 In addition to these basic inaccurate factual premises asserted by Plaintiffs, the causes of
22 action on which they base their Motion are further unsupported by the facts and evidence. As to
23 Mr. Mikkelson, in particular:

24 **1. Breach of Fiduciary Duty**

25 In order to state a cause of action for Breach of Fiduciary Duty, Plaintiff must sufficiently
26 plead the basic elements of such a claim, i.e.: 1) the existence of a relationship giving rise to a
27 fiduciary duty, 2) its breach, and 3) damage proximately caused by that breach. *Pierce v. Lyman*
28 (1991) 1 Cal.App.4th 1093, 1011.

1 At the outset, Mr. Mikkelson did not and does not have a fiduciary duty to Proper Media,
2 because a commercial or contractual relationship does not, in itself, give rise to a fiduciary duty.
3 *Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 30-31; *Los Angeles Memorial Coliseum*
4 *Com. v. Insomniac, Inc.* (2015) 233 Cal.App.4th 803, 832 (nothing alleged about plaintiffs’
5 alleged commercial relationship that would give rise to fiduciary-like duties).

6 There is likewise no conduct by Mr. Mikkelson that would constitute a breach,
7 particularly against the business judgment rule presumption in favor of Mr. Mikkelson’s actions.⁵
8 Plaintiffs assert that Mr. Mikkelson breached his fiduciary duty by terminating the GSA.
9 (Motion, p. 1, lines 11-18.) However, as set forth above, the termination of the GSA was
10 effectuated in full accord with the terms of such contract. Even more, Mr. Mikkelson determined
11 and conveyed such termination in his role as the Bardav president, the same role in which he
12 effectuated Bardav’s entry into the GSA in the first instance.

13 Furthermore, the termination followed Proper Media’s repeated failure to remit timely
14 payments to Bardav under the GSA’s terms. Moreover, in the exercise of his corporate duties
15 and reasonable inquiry, Mr. Mikkelson determined that Bardav could obtain the services that it
16 needed from other vendors at a significantly lower cost than that demanded by Proper Media.
17 (Mikkelson Decl. ¶15.) Otherwise stated, the termination of the GSA was not a *breach* of Mr.
18 Mikkelson’s duty as a director, officer, and majority shareholder, but in actuality, was the
19 *satisfaction* of such duty.

20
21 ⁵ The standard of care for the duties of a director of a corporation, as is Mr. Mikkelson, is set out in Corporations
Code § 309(a) as follows:

22 A director shall perform the duties of a director, including duties as a member of
23 any committee of the board upon which the director may serve, in good faith, in
24 a manner such director believes to be in the best interests of the corporation and
25 its shareholders and with such care, including reasonable inquiry, as an
ordinarily prudent person in a like position would use under similar
circumstances.

26 This statute also contains the codification of the business judgment rule presumption, that a
27 directors’ actions are based upon sound judgment. *Will v. Engebretson & Co.* (1989) 213
28 Cal.App.3d 1033, 1040. Under the business judgment rule, a director is not liable for a purported
error in business judgment that is made in good faith and in what the director believes is in the
best interests of the corporation, where no conflict of interest exists. *Biren v. Equality Emergency*
Medical Group, Inc. (2002) 102 Cal.App.4th 125, 136-138.

1 Plaintiffs offer literally *no* admissible evidence that Mr. Mikkelson in any way
2 misappropriated Bardav funds. Indeed, the claim that he did so relative to the Compensation
3 Agreement distinctly lacks credibility, given that the other shareholders’ approval of such
4 agreement followed Mr. Schoentrup’s evaluation of Bardav records and line-by-line review of
5 Mr. Mikkelson’s expenses; that such compensation was indeed disbursed upon the authorization
6 of Mr. Schoentrup; the purported “revocation” of the 2016 Compensation Agreement was issued
7 by Messrs. Richmond and Schoentrup only *after* the GSA was terminated (albeit after approval
8 of and action on such agreement had already been completed); and, the other shareholder
9 approvals remained in place.⁶ Aside from complaining about the compensation to which they,
10 themselves, agreed, Plaintiffs do not identify *any single transaction* by Mr. Mikkelson that is
11 called into question, much less any legal or factual basis to show any particular transaction to
12 constitute a misappropriation of corporate funds.

13 As to Mr. Mikkelson’s purported “conspiracy” with Bardav shareholder Vincent Green
14 (“Mr. Green”), Plaintiffs concede that they have no evidence of this contention – just a claimed
15 “inform[ation] and belie[f]” without *any* identified supporting facts. (Schoentrup Decl. ¶ 10.)
16 Indeed, Mr. Mikkelson did not “poach” Mr. Green or convince him to violate any member’s
17 duties to Proper Media (*contra*, FAC ¶ 112); it was Proper Media, itself, that elected to part ways
18 with Mr. Green. (Mikkelson Decl. ¶7.)

19 Nor have Plaintiffs established any resultant damages to support their breach of fiduciary
20 duty theory – elements that are critical to this claim. *Pierce v. Lyman, supra*, 1 Cal.App.4th at
21 1011; *see also, Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767 (plaintiff must show
22 that a defendant’s breach of duty was a substantial factor in causing plaintiff harm). Altogether,
23 Plaintiffs have not shown, and cannot show, a probability of prevailing on this legal theory.

24 **2. Abuse of Control/Corporate Waste**

25 At the outset, Plaintiffs’ dual claims for abuse of control and corporate waste are
26 defective because they are improperly brought as direct actions, when they are required to be

27 ⁶ Notably, Mr. Mikkelson’s signature on Plaintiffs’ mere summary of the discussions is not a prerequisite for
28 demonstrating shareholder approval, as Plaintiffs appear to contend. The offer was accepted when the
corresponding actions were taken.

1 pursued as a derivative suit. It is well-established in California that claims for injury or damage
2 to a corporation or its property belong to the corporation, and not its stockholders or members
3 individually. *Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 107; *see also, Oakland Raiders*
4 *v. National Football League* (2005) 131 Cal.App.4th 621, 651-652 (held, proposed additional
5 claims asserted injury to the association and thus were derivative and could not be maintained in
6 plaintiff's direct action for breach of fiduciary duty). A corporation is its own legal entity, and
7 thus its members have no direct right of recovery against those who have allegedly harmed it.
8 *Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1108.

9 "An action is derivative if 'the gravamen of the complaint is injury to the corporation
10 ...'." *Schuster v. Gardner* (2005) 127 Cal.App.4th 305, 313. For example, "[u]nder California
11 law, 'a shareholder *cannot* bring a direct action for damages against management on the theory
12 their alleged wrongdoing decreased the value of his or her stock (e.g., by reducing corporate
13 assets and net worth). The corporation itself must bring such an action, or a derivative suit may
14 be brought on the corporation's behalf.'" *Schuster v. Gardner, supra*, 127 Cal.App.4th at 312
15 [citations omitted]. A claim for "[a]n injury to a corporation cannot be maintained in an action
16 brought by an individual shareholder on his own behalf but must be asserted in a derivative
17 action in which the shareholder is a 'mere nominal plaintiff' and the corporation is the real party
18 in interest, and any judgment recovered inures to its benefit." *Jara v. Suprema Meats* (2004) 121
19 Cal.App.4th 1238, 1253. Thus, Plaintiffs, who have not brought their action in the name of
20 Bardav, cannot prevail on this case for this reason alone.

21 Even more, besides their newly-manufacture dispute regarding the Compensation
22 Agreement, Plaintiffs have not identified any particular financial transaction conducted by Mr.
23 Mikkelson that would constitute waste. The termination of the GSA was effectuated in accord
24 with the terms of the contract, and thus not an abuse of control. On these additional grounds,
25 Plaintiffs have not shown and cannot show a probability of prevailing on these counts.

26 **3. Removal of Director**

27 The foregoing flaws in Plaintiffs' preceding legal theories similarly undermine Plaintiffs'
28 claim for removal of director. Aside from the facts that Proper Media is the sole plaintiff

1 asserting this claim (*see*, FAC, p. 19, ln. 7) and it is not an actual shareholder with standing to
2 seek removal, Plaintiffs have not identified or evidenced any act by Mr. Mikkelson which
3 constitutes “fraudulent or dishonest acts or gross abuse of authority or discretion with reference
4 to the corporation,” which the removal statute *requires*. Corp. Code §304 [emphasis added].

5 The purported “fraud and deceit” argued in Plaintiffs’ Motion (p. 8, lns. 25-26) is
6 unfounded by any evidence; their cited FAC ¶ 46 is asserted on “information and belief” only,
7 and their cited Schoentrup Decl. ¶ 9 merely states that Mr. Schoentrup agreed to the
8 Compensation Agreement, with no further information about a promise or any subsequent
9 financial conduct of Mr. Mikkelson. In contrast, the actual and admissible evidence reveals that
10 Mr. Schoentrup reviewed Mr. Mikkelson’s compensation, agreed to it, and authorized its
11 disbursement, up until the time that that GSA was terminated and Plaintiffs’ lawsuit filed, when
12 they needed to manufacture some theory for their claims in this case. (Mikkelson Decl., ¶¶ 12,
13 13.) The evidence further shows that Mr. Mikkelson did not make any such promises with
14 regard to his 2017 compensation in the first instance. (Mikkelson Decl., ¶14.)

15 Plaintiffs’ argument that Mr. Mikkelson somehow sought to force “Proper Media ... out”
16 (Motion, p. 9, lns. 2-3) is non-sensical. Not only was Proper Media never a Bardav shareholder
17 that was “in”, but also, Bardav’s termination of the GSA had no impact on Messrs. Richmond
18 and Schoentrup’s standing as shareholders.⁷ Plaintiffs’ argument that Mr. Mikkelson conspired
19 with Mr. Green is likewise non-sensical *and* unsupported, with the cited “evidence” again being
20 merely statements by Plaintiffs upon “information and belief” (Motion, p. 9, lns. 4-10, citing
21 FAC ¶¶ 48, 53-56 and Schoentrup Decl. ¶ 10.) Nor does such alleged conduct constitute damage
22 “with reference to the corporation,” as Section 304 requires.

23 Bardav’s response to Plaintiffs’ documents demands, through its counsel of record, are
24 legally supported, appropriate, and proper, as the letters themselves demonstrate. (*See*, Exhibits
25 C and D to Kronenberger Decl.) This is particularly true, given that this lawsuit was pending at
26 the time of such responses. And, again, this position does not constitute wrongful conduct “with

27 _____
28 ⁷ Furthermore, Plaintiffs’ theory that Mr. Mikkelson wanted Proper Media to default on its DCC loan is
nonsensical, as that action would not present any particular advantage to him; for example, it would not increase his
own shareholdings, as the shares would presumably be controlled or sold by DCC.

1 reference to the corporation,” and thus does not satisfy Section 304.

2 Altogether, Plaintiffs’ claim for removal is woefully unfounded, legally defective, and
3 does not have a likelihood of being successful. On this additional basis, Plaintiffs fail to satisfy
4 the first prong of their preliminary injunction burden, and thus the Motion must be denied.

5 **C. Plaintiffs Cannot Show a Probability of Prevailing Because Much of Their Proffered**
6 **Evidence is Inadmissible**

7 Plaintiffs’ Motion greatly relies on inadmissible evidence that cannot support their
8 Motion, to which Mr. Mikkelson objects and moves to strike, as follows:

- 9 • The entirety of the FAC cannot be considered evidence in support of Plaintiffs’
10 Motion because it is not properly verified, i.e., it is offered only on information and belief, and
11 therefore inherently (and admittedly) lacks the personal knowledge required pursuant to Section
12 702 of the California Evidence Code (*see*, FAC “Verification” page).
- 13 • Exhibits A and B to the Declaration of Karl S. Kronenberger (“Kronenberger Decl.”),
14 and in particular the purported shareholder documents attached as Exhibit 1 to each of Exhibits
15 A and B, all constitute inadmissible hearsay. Evid. Code § 1200. Further, Exhibit 1 to each of
16 Exhibits A and B to the Kronenberger Decl. lacks proper authentication. Evid. Code § 1401.
- 17 • The statement at Schoentrup Decl. ¶3, that “The General Services Agreement is a
18 material agreement for Bardav” lacks foundation and personal knowledge, as Mr. Schoentrup has
19 no basis or background to determine which of Bardav’s contracts are “material”, and further, it
20 constitutes improper opinion testimony. Evid. Code §§ 403, 405, 702, 720, 801.
- 21 • Schoentrup Decl. ¶ 6, in its entirety, constitutes improper opinion evidence as to the
22 purported legal effects of the transaction. Evid. Code §§ 720, 801.
- 23 • The statement at Schoentrup Decl. ¶ 9 as to Mr. Schoentrup’s “inform[ation] and
24 belie[f]” as to the understandings or actions by the other Proper Media members, in itself admits
25 to the lack of requisite personal knowledge and foundation. Evid. Code § 702.
- 26 • The statement at Schoentrup Decl. ¶ 9 that the compensation agreement was
27 somehow revoked constitutes improper opinion evidence as to the purported legal effects of the
28 Mr. Schoentrup’s conduct. Evid. Code §§ 720, 801.

1 • The statement at Schoentrup Decl. ¶ 10 “inform[ation] and belie[f]” as to who
2 assisted Mr. Mikkelson, in itself admits to the lack of requisite personal knowledge and
3 foundation. Evid. Code § 702.

4 **D. Plaintiffs Cannot Establish Any Legally Compensable Harm**

5 Plaintiffs’ argued list of potential harms are predominantly mooted by Bardav’s proper
6 termination of the GSA, in accord with the contract’s terms and pursuant to Bardav’s timely
7 notice thereof, by and through Mr. Mikkelson in this role as Bardav’s president. (*See*, Motion, p.
8 6, Ins. 10-23, items (a), (b), (c).) Notably, Proper Media’s own business decision to obtain a loan
9 from DCC is not in any way the responsibility of Mr. Mikkelson, or the result of any of his
10 alleged conduct. It is thus not proper grounds for a request for injunctive relief.

11 Moreover, Plaintiffs’ contention that they would lose “substantial time and money”
12 relative to their work with Snopes.com is neither factually supported nor credible. (Motion, p. 6,
13 Ins. 15-16.) Proper Media only came into creation in 2015; it then entered a contract with
14 Bardav in August 2015. The contract lasted for less than two years, which is *fractional*
15 compared to the 23 years that Mr. Mikkelson has invested in the website. Even more, Proper
16 Media was duly compensated for its work in accord with the terms of the GSA – indeed, based
17 upon Mr. Mikkelson’s recent evaluation of the market, Proper Media was *over*-compensated.
18 (Mikkelson Decl. ¶15.) Even more, and as is the subject of Bardav’s own motion for preliminary
19 injunction, Proper Media continues to illegally hold *all* proceeds from the Snopes.com website
20 hostage, and thus have not only incurred no loss, but are currently enjoying ill-gotten benefits.

21 Plaintiffs’ assertion that Mr. Mikkelson might somehow drain the Bardav resources is not
22 only unfounded by any articulable facts or identified evidence, but also, it defies logic based on
23 history. Prior to the GSA in August 2015, Snopes.com existed without Plaintiffs’ involvement
24 since 1994; Bardav existed since 2003. This history readily demonstrates that Mr. Mikkelson’s
25 intentions and interests are in maintaining the viability of the brand and the corporation.

26 Finally, Plaintiffs’ claim that they would be harmed in the form of a lack of
27 documentation is simply inaccurate. First, Mr. Schoentrup is a not a director (*contra*, Motion, p.
28 6, Ins. 20-21), and second, Plaintiffs are authorized to make a proper discovery request in the

1 court of this lawsuit pursuant to the Civil Discovery Act.

2 Not only have Plaintiffs failed to show that the balance of harms weighs in their favor,
3 but also, they have failed to identify any legally recoverable harm at all. The only risk that they
4 have identified is that which would be the result of Plaintiffs' own business decision in entering a
5 loan agreement with DCC – an agreement unrelated to any conduct or control of Mr. Mikkelson.
6 Altogether, Plaintiffs' mere passing arguments of allegedly impending harm, without citation to
7 authorities or supporting evidence warrant the denial of their Motion. *See e.g., Saltonstall v. City*
8 *of Sacramento*, 231 Cal.App.4th 837 (discussed in Section III, *supra*).

9 **E. In Contrast to Plaintiffs, Mr. Mikkelson and Bardav Would be Unduly Harmed by**
10 **the Order Sought in Plaintiffs' Motion**

11 By their Motion, Plaintiffs seek to seriously disrupt the status quo – the very opposite of
12 the purpose of a preliminary injunction. *Continental Baking Co. v. Katz*, *supra*, 68 Cal.2d at 528
13 (general purpose of a preliminary injunction is to preserve the status quo pending a determination
14 on the merits). Not only do they seek to disturb the status quo, but in effect, they seek to remove
15 as a director the 1994 founder of Snopes.com – i.e., the very reason that there *is* a Bardav in the
16 first instance. Snopes.com readers know Mr. Mikkelson as the face of Snopes.com and he is
17 critical to its brand. (Mikkelson Decl. ¶20.) This brand, and Mr. Mikkelson's reputation, would
18 be unduly harmed by the issuance of the preliminary injunction requested by Plaintiffs, which is
19 at its core an unfounded, retaliatory, and extortionist measure.

20 **V. CONCLUSION**

21 Based on the foregoing points and authorities, Mr. Mikkelson respectfully requests that
22 this Court deny Plaintiffs' Motion, in its entirety.

23 Dated: July 24, 2017

GORDON & REES LLP

24 By: 

25 Kimberly D. Howatt
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28