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**IN THE COURT OF COMMON PLEAS FOR
DAUPHIN COUNTY PENNSYLVANIA
ORPHANS' COURT DIVISION**

IN RE: MILTON HERSHEY SCHOOL :
TRUST : NO. 712-1963
IN RE: APPLICATION BY NONPROFIT :
CORPORATION MANAGER TO :
COMPEL INSPECTION OF :
CORPORATE INFORMATION :

**PETITIONER ROBERT HEIST'S RESPONSE TO MILTON HERSHEY SCHOOL'S
MOTION FOR SUMMARY JUDGMENT AND/OR TO DISMISS THE PETITION OF
ROBERT HEIST TO COMPEL INSPECTION OF CORPORATE INFORMATION**

Petitioner Robert C. Heist, Esq., by and through his undersigned counsel, responds to Milton Hershey School's ("MHS") Motion for Summary Judgment and/or to Dismiss the Petition of Robert Heist to Compel Inspection of Corporate Information.

RESPONSE TO INTRODUCTION

MHS's Motion is just the latest in a long line of delay tactics employed by MHS to deny Mr. Heist access to corporate information to which he is entitled as a member of the Board of Managers ("BOM") of MHS. Nothing set forth in the Motion warrants dismissal of this action. Specifically, MHS's arguments lack merit because: (1) MHS has not afforded Mr. Heist access to the corporate information at the heart of Mr. Heist's Petition; (2) Mr. Heist has a *prima facie* case

for relief under Pennsylvania's Nonprofit Corporation Law; and (3) Mr. Heist's demand for access to corporate information is reasonably related to his duties as a Member of the BOM.

To the extent that MHS's Introduction contains averments to which this Court believes a response is required, Mr. Heist incorporates by reference his Response to MHS's Statement of Undisputed Facts. For all of the reasons set forth below, MHS's Motion should be denied.

RESPONSE TO MHS' STATEMENT OF UNDISPUTED FACTS

1. Admitted.
2. Admitted.
3. Admitted.
4. Denied as stated. By way of further response, whether and how Mr. Heist has voted on the budgets presented during each year in which he was a Member of the BOM calls for confidential information. Additionally, MHS's use of the phrase "accepted financial statements" is so vague and ambiguous as to prevent Mr. Heist from accurately responding thereto.
5. Admitted.
6. Admitted in part and denied in part. It is admitted only that in September 2019, Mr. Heist first requested access to information about the significant legal expenses MHS was incurring pertaining to actions for which MHS had applicable insurance coverage. It is further admitted that it took months for MHS to begin producing piecemeal and incomplete information in response to his request. MHS's characterization of Mr. Heist's request as "evolving and expanding inquiries" is denied. By way of further response, the allegations in this paragraph of the Motion pertain to documents, the terms of which speak for themselves. All mischaracterizations or misstatements of the documents are denied.
7. Admitted in part and denied in part. It is admitted only that in July 2020, MHS provided a memorandum prepared by the School's Office of General Counsel with limited

accompanying documents to Mr. Heist. It is denied that the memorandum constituted a “comprehensive response” to Mr. Heist’s request. By way of further response, the allegations in this paragraph of the Motion pertain to a document, terms of which speak for itself. All mischaracterizations or misstatements of the document are denied.

8. Admitted in part and denied in part. It is admitted only that in August 2020, MHS’s Office of General Counsel provided a memorandum to Mr. Heist with limited accompanying exhibits. It is denied that the August 2020 memorandum constituted a sufficient response to Mr. Heist’s demand for corporate information. By way of further answer, the allegations in this paragraph refer to a document, the terms of which speak for itself. All mischaracterizations or misstatements of the documents are denied.

9. Admitted in part and denied in part. It is admitted that in September 2020, MHS provided Mr. Heist with copies of the applicable insurance policies for policy years 2013-2014 through 2019-2020. It is denied that the provision of the insurance policies to Mr. Heist constituted a sufficient response to Mr. Heist’s request for corporate information.

10. Denied as stated. Mr. Heist explained on multiple occasions that he demanded access to the corporate information to better understand how millions of dollars could not be budgeted or accounted for annually while relating to “school operations.” This included a concern that MHS was incurring legal expenses relating to matters for which there was applicable insurance coverage.

11. Admitted in part and denied in part. It is admitted only that on or about November 20, 2020, Mr. Heist attended a meeting with MHS General Counsel, the MHS Senior Director of Insurance and Risk Management, MHS’s outside counsel, and MHS’s insurance broker. Mr. Heist admits that he expressed appreciation for the meeting and for addressing some of his questions

during the meeting. Mr. Heist denies that this meeting concluded his questions. It is further denied that MHS “promptly addressed his follow-up questions.”

12. Denied as stated. It is denied that Mr. Heist requested that MHS pay for the services of his own law firm. Further, MHS conflates Mr. Heist’s right to independent counsel in a separate and unrelated lawsuit in which MHS and numerous directors, including Mr. Heist, were named as defendants with the relief Mr. Heist seeks here. That lawsuit is separate and distinct from Mr. Heist’s request for access to books and records related to MHS school operations and millions of dollars of unbudgeted and unaccounted for expenses.

13. Admitted.

14. Denied as stated. It is denied that Mr. Heist requested that MHS pay for the services of his own law firm. Further, MHS conflates Mr. Heist’s right to independent counsel in a separate and unrelated lawsuit in which MHS and numerous directors, including Mr. Heist, were named as defendants with the relief Mr. Heist seeks here. That lawsuit is separate and distinct from Mr. Heist’s request for access to books and records related to MHS school operations and millions of dollars of unbudgeted and unaccounted for expenses. By way of further response, the allegations in this paragraph of the Motion refer to documents, the terms of which speak for themselves. All mischaracterizations or misstatements of the documents are denied.

15. Admitted in part and denied in part. It is admitted only that the BOM ultimately approved Mr. Heist’s request for separate counsel in the unrelated litigation. By way of further response, MHS conflates Mr. Heist’s right to independent counsel in a separate and unrelated lawsuit in which MHS and numerous directors, including Mr. Heist, were named as defendants with the relief Mr. Heist seeks here. That lawsuit is separate and distinct from Mr. Heist’s request

for access to books and records related to MHS school operations and millions of dollars of unbudgeted and unaccounted for expenses.

16. Admitted in part and denied in part. It is admitted only that on January 15, 2021, Mr. Heist submitted a memorandum. See Ex. A, Pet. to Compel Access to Corporate Information, at Ex. E. The remaining allegations in this paragraph of the Motion refer to a document, the terms of which speak for itself. All mischaracterizations or misstatements of the document are denied. By way of further response, the contents of the memorandum are confidential information. Additionally, in what can only be considered an attempted excuse for its refusal to afford Mr. Heist access to the Corporate Information, MHS comments in a footnote that the corporate information encompasses information protected by the attorney-client privilege and attorney work product privilege. Under Pennsylvania law, “[t]he party invoking a privilege must initially ‘set forth facts showing that the privilege has been properly invoked; then the burden shifts to the party seeking disclosure to set forth facts showing that disclosure will not violate the attorney-client privilege, e.g., because the privilege has been waived or because some exception applies.’” Custom Designs & Mfg. Co. v. Sherwin-Williams Co., 39 A.3d 372, 376 (Pa. Super. Ct. 2012) (quoting Nationwide Mut. Ins. Co. v. Fleming, 924 A.2d 1259, 1266 (Pa. Super. Ct. 2007 (citations omitted))). “‘If the party asserting the privilege does not produce sufficient facts to show that the privilege was properly invoked, then the burden never shifts to the other party, and the communication is not protected under attorney-client privilege.’” Custom Designs & Mfg. Co., 39 A.3d at 376. Such is the case here. MHS does not specify the allegedly privileged information or offer any facts to establish that the privilege has been properly invoked. Accordingly, any argument by MHS that it should be excused from affording Mr. Heist access to the corporate information on the basis that it is privileged should be rejected.

17. Admitted in part and denied in part. It is admitted only that on January 22, 2021, Mr. Heist reiterated his demand for the corporate information. See Ex. A at Ex. E. By way of further response, the allegations in this paragraph of the Motion pertain to a document, the terms of which speak for itself. All mischaracterizations or misstatements of the document referenced herein are denied.

18. Admitted in part and denied in part. It is admitted only that on January 27, 2021, Mr. Heist reiterated his demand for the corporate information. By way of further response, the allegations in this paragraph of the Motion pertain to a document, the terms of which speak for itself. All mischaracterizations or misstatements of the document referenced herein are denied.

19. Admitted in part and denied in part. It is admitted only that on January 29, 2021, MHS Board Chair, Diane Koken, forwarded correspondence to Mr. Heist that indicated that MHS remained unwilling to respond to and/or intent on delaying response to Mr. Heist's demand for access to corporate information. Mr. Heist denies the characterization of his demand for access to corporate information as "evolving." By way of further response, the allegations in this paragraph of the Motion pertain to a document, the terms of which speak for itself. All mischaracterizations or misstatements of the document referenced herein are denied.

20. Admitted.

21. Denied as stated. Having heard nothing following the February 5, 2021 meeting, on February 18, 2021, Mr. Heist sent an email to the Chair of the BOM yet again demanding access to the corporate information. See Ex. A at Ex. E.

22. Denied as stated. Despite Mr. Heist's demand for access to the corporate information, in February 2021, there was no response to his request and no response from MHS seemed forthcoming.

23. Denied as stated. Still being denied access to the Corporate Information, on March 1, 2021, Petitioner sent yet another follow-up email to the Chair of the BOM, demanding access to the Corporate Information. See Ex. A at Ex. F. Mr. Heist denies any characterization of Ms. Koken's response as "prompt." Mr. Heist further denies that Ms. Koken's March 3, 2021 response "confirmed the BOM's intentions to address his requests." Rather, they reflected the BOM's intention to continue to delay Mr. Heist's access to the corporate information.

24. Denied as stated. The BOM's decision in March 2021 to confer consideration of the 2021-22 Budget effectively stifled discussion about the issues giving rise to Mr. Heist's demand for access to corporate information. Further, the BOM's decision to confer consideration of the 2021-22 Budget can only be considered a delay tactic to avoid providing Mr. Heist access to the corporate information.

25. Denied as stated. It is denied that the March 3, 2021 correspondence referenced in this paragraph of the Motion "confirmed the BOM's intentions to address [Mr. Heist's] request." By way of further response, the allegations in this paragraph of the Motion pertain to a document, the terms of which speak for itself. All mischaracterizations or misstatements of the document referenced herein are denied.

26. Denied. By way of further response, Mr. Heist denies that his demand for access to corporate information is "over-broad" or "burdensome." It is further denied that Mr. Heist "reformulated" his demand. Rather, met with continued refusal by the BOM to afford him access to the corporate information and continued delay tactics by the BOM, Mr. Heist made efforts to refine and narrow his demand in an effort to secure the corporate information. By way of further response, the allegations in this paragraph of the Motion pertain to a document, the terms of which

speak for itself. All mischaracterizations or misstatements of the document referenced herein are denied.

27. Denied. The allegations in this paragraph of the Motion pertain to a document, the terms of which speak for itself. All mischaracterizations or misstatements of the document referenced herein are denied. By way of further response, it is denied that “counsel for Heist and outside counsel for MHS agreed that a confidentiality agreement among the parties would be appropriate.” Further, MHS’s continued reference to discussions about a potential confidentiality agreement is a red herring with regard to Mr. Heist’s demand for access to corporate information and Mr. Heist suspects that MHS mentions the confidentiality in a failed effort to make Mr. Heist look bad. Notably, when mentioning its demand for a confidentiality agreement, MHS continually neglects to add that in response to MHS’s proposed confidentiality agreement, counsel for Mr. Heist pointed out that to Mr. Heist’s knowledge, no Board member has ever been asked to sign a confidentiality agreement in response to a demand for access to corporate information, and no other Board member had been asked to sign the Confidentiality Agreement proposed by MHS here. Counsel for Mr. Heist further argued that the Confidentiality Agreement proposed by MHS attempted to impose obligations on Mr. Heist greater than those imposed upon him as a Board member under Pennsylvania law. See MHS’s Mot. for Summ. J. at Ex. 16.

28. Denied. Mr. Heist incorporates by reference his response to Paragraph 27 of this Motion.

29. Denied. On March 9, 2021, MHS produced a handful of reports in response to Mr. Heist’s demand. MHS’s March 9, 2021 was deficient in that it did not encompass the specific budget years identified by Mr. Heist, itemized reports for the specific budget line items identified by Mr. Heist, or source documents. On March 11, 2021, MHS produced two additional reports

and on March 12, 2021, MHS produced one additional report that fell short of satisfying Mr. Heist's demand for the same reasons.

30. Denied as stated. Mr. Heist incorporates by reference his response to Paragraph 29 of this Motion.

31. Admitted in part and denied in part. It is admitted only that MHS did not and has not afforded Mr. Heist access to the source documents he demanded. After reasonable investigation, Mr. Heist lacks knowledge or information necessary to admit or deny whether MHS "began to research" Mr. Heist's demand for source documents.

32. Admitted. By way of further response, the formation of the Special Committee at this juncture was no more than yet another delay tactic to avoid affording access to the corporate information.

33. Denied as stated. In response to Mr. Heist's comment during the March 17, 2021 meeting that the other Board members had not attempted to discuss his demand directly with him, there was discussion of a separate "board members only" meeting to discuss Mr. Heist's demand.

34. Admitted.

35. Denied as stated. After Mr. Heist continued to be denied access to the corporate information he requested and in response to questions concerning the motivation and rationale behind Mr. Heist's demand, counsel for Mr. Heist directed correspondence to then counsel for MHS, setting forth in detail the basis for Mr. Heist's demand. See MHS's Mot. for Summ. J. at Ex. 19. It is denied that Mr. Heist "reformulated and expanded Mr. Heist's request." Rather, in continued effort to gain access to the corporate information, Mr. Heist attempted to refine and narrow his demand.

36. Denied as stated. In the March 24, 2021 correspondence, Mr. Heist reiterated his demand for access to corporate information. See MHS's Mot. for Summ. J. at Ex. 19. By way of further response, the allegations in this paragraph of the Motion pertain to a document, the terms of which speak for itself. All mischaracterizations or misstatements of the document referenced herein are denied.

37. Admitted.

38. Denied. By way of further response, the allegations in this paragraph of the Motion pertain to a document, the terms of which speak for itself. All mischaracterizations or misstatements of the document referenced herein are denied.

39. Admitted.

40. Denied. It is denied that Mr. Heist's demand was not in proper form pursuant to 15 Pa.C.S. § 5512. It is further denied that MHS "had not 'refused to permit an inspection or obtain or provide information.'" MHS's failure to afford Mr. Heist access to the corporate information to which he was entitled and which he had been demanding for years can only be interpreted as a "refusal to perform an inspection or obtain or provide information." To the extent that the allegations in this paragraph of the Motion refer to documents, the terms of which speak for themselves, all mischaracterizations or misstatements of the documents are denied.

41. Denied. After reasonable investigation, Mr. Heist lacks knowledge or information sufficient to admit or deny the allegations regarding the alleged time spent by MHS staff and outside counsel, if any, to respond to Mr. Heist's demand.

42. Admitted in part and denied in part. It is admitted only that Mr. Heist is a member of the Education and Student Life Committee. Ironically (in light of the fact that MHS continues to raise the issue of a confidentiality agreement), the remaining allegations in this paragraph of the

Motion pertain to details concerning a vote by the BOM, which is confidential information. If deemed necessary by the Court, Mr. Heist can provide further detail in response to the allegations set forth in this paragraph of the Motion *in camera*.

43. Denied as stated. By way of further response, the allegations in this paragraph of the Motion pertain to details concerning a vote by the BOM, which is confidential information. If deemed necessary by the Court, Mr. Heist can provide further detail in response to the allegations set forth in this paragraph of the Complaint *in camera*.

44. Denied. After reasonable investigation, Mr. Heist lacks knowledge or information sufficient to admit or deny the allegations in this paragraph of the Motion regarding the alleged work of the Special Committee, which allegations are therefore denied.

I. ARGUMENT

A. MHS Has Not Afforded Mr. Heist Access to the Corporate Information at the Heart of Mr. Heist's Petition.

On January 15, 2021, Mr. Heist sent a memorandum to the Chair of the BOM in which he requested access to the corporate information. See Ex. A at Ex. E. MHS ignored Petitioner's January 15, 2021 request. On January 22, 2021, Mr. Heist reiterated his demand for access to the corporate information via January 22, 2021 email to the Chair of the BOM. Id.

On February 5, 2021, Petitioner had a meeting with the Chair of the BOM during which he again requested access to the corporate information and confirmed his willingness to appropriately respect and respond to all reasonableness considerations of his request for access to information. Id. Having heard nothing following that meeting, on February 18, 2021, Mr. Heist sent an email to the Chair of the BOM yet again demanding access to the corporate information. Id.

Still being denied access to the corporate information, on March 1, 2021, Mr. Heist sent yet another follow-up email to the Chair of the BOM, demanding access to the Corporate

Information. Id. On March 3, 2021, Ms. Koken notified Mr. Heist that MHS would be providing responsive financial information by the end of the week.

On March 9, 2021, MHS, produced a handful of reports in response to Mr. Heist's demand. However, MHS's March 9, 2021 production was deficient in that it did not encompass the specific budget years identified by Mr. Heist, itemized reports for the specific budget line items identified by Mr. Heist, or source documents.

On March 11, 2021, MHS produced two additional reports that fell short of satisfying Mr. Heist's demand for the same reasons. On March 12, 2021, MHS produced one additional report.

On March 17, 2021, Mr. Heist attended a Special Meeting of the Board, during which his demand was discussed. As a result of the Special Meeting, however, there was no date certain by which Mr. Heist was promised access to the corporate information.

In further effort to secure access to the corporate information following the Special Meeting, on March 24, 2021, undersigned counsel directed to counsel for MHS correspondence detailing the rationale for Mr. Heist's demand and demanding access to the Corporate Information by March 26, 2021. See MHS's Mot. for Summ. J. at Ex. 19. However, as of the time of the filing of the Petition in this matter, despite Mr. Heist's multiple demands, Mr. Heist has received only limited access to the corporate information, deficient in several respects, including but not limited to the fact that Mr. Heist continues to be denied access to the source documents necessary to reconcile the inconsistencies in the limited information to which Mr. Heist has been provided access to date.

MHS's contention that Mr. Heist's demand was "increasing," "demanding," or "changing" is belied by the record and does not excuse MHS's inexplicable refusal to afford Mr. Heist access to the corporate information. If anything, when met with continued resistance from MHS to his

request for access to the corporate information and claims that his demand was overbroad, Mr. Heist attempted to refine his demand. Finally and notably, nowhere in its Motion does MHS contend that it has provided Mr. Heist with access to the source documents to which he has demanded access or offered any justification for its failure to do so.

B. Mr. Heist Has a *Prima Facie* Case for Relief Under Pennsylvania's Nonprofit Corporation Law.

1. Mr. Heist is entitled to access to the corporate information.

The Pennsylvania Nonprofit Corporation Law specifically authorizes Managers¹ to access corporate information that relates to the performance of their duties, such as the Corporate Information at issue here.

15 Pa. C.S.A. § 5512 states, in pertinent part, as follows:

To the extent reasonably related to the performance of the duties of the director, including those arising from service as a member of a committee of the board of directors, a director of a nonprofit corporation is entitled:

(1) in person or by any attorney or other agent, at any reasonable time, to inspect and copy corporate books, records and documents and, in addition, to inspect, and receive information regarding, the assets, liabilities and operations of the corporation...

15 Pa. C.S.A. §5512(a)(1).

Section 5512(b) of 15 Pa. C.S.A further provides, in pertinent part, as follows:

If the corporation, or an officer or agent thereof, refuses to permit an inspection or obtain or provide information sought by a director or attorney or other agent acting for the director pursuant to subsection (a) or does not reply to the request within two business days after the request has been made, the director may apply to the court for an order to compel the inspection or the obtaining or providing of the information. The court shall summarily order the corporation to permit the

¹ By virtue of the Deed of Trust, MHS is managed and governed by a Board of Managers. For purposes of the Nonprofit Corporation Law, "board of directors" and "directors" are defined as the persons vested with the management and affairs of the corporation regardless of the name by which they are designated. See 15 Pa. C.S.A §5103 (defining "board of directors" and "directors"). Thus, the right conferred on directors in 15 Pa. C.S.A. §5512 applies to the Managers of MHS.

requested inspection or to obtain the information unless the corporation establishes that the information to be obtained by the exercise of the right is not reasonably related to the performance of the duties of the director or that the director or the attorney or agent of the director is likely to use the information in a manner that would violate the duty of the director to the corporation....

15 Pa. C.S.A §5512(b).

Additionally, the Second Restated Deed of Trust expressly provides, in pertinent part, that “separate and true accounts of the corpus or principal and income shall be kept ... and at all times during customary business hours ... the Managers shall have access to said accounts.” See Ex. A at Ex. C. Indeed, all of MHS’s internal governing documents consisting of the Second Restated Deed of Trust, the Bylaws and the Board Member’s Responsibilities and Expectations certification impose an obligation and a responsibility on Petitioner to be informed about MHS’s annual budget, its financial statements and financial positions, its revenue and expenses as well as provide appropriate oversight with respect to MHS’s annual budget and its financial matters including “expenses and disbursements” out of the MHST.

Moreover, Pennsylvania courts have consistently recognized that a director of a corporate entity has a near absolute right to inspect corporate records. In 1912, in the case of Machen v. Machen & Mayer Electrical Manufacturing Co., 237 Pa. 212, 85 A. 100 (1912), the Pennsylvania Supreme Court considered a director’s request to inspect corporate books and documents of a New Jersey corporation. The court’s opinion stated that in fulfilling their duties to manage the affairs of the corporation, corporate directors must secure all information affecting the corporation obtainable from every available source. Machen, 237 Pa. at 217. Important and essential information must come from the books and documents of the corporation itself. Id. Consequently, a director has an unqualified right to inspect corporate books, records, and documents. Id. at 219. In support of this position, the Machen court stated that differences of opinion will arise among

directors as to the management of the affairs of the corporation. *Id.* at 218. While the majority will control, it cannot be permitted to deprive the minority of its right to obtain information as to the affairs of the corporation by refusing an inspection of corporate books and records. *Id.* To deny the director "this right is, in effect, to exclude him from the directorate of the corporation, as well as to announce the principle that a majority of the directors may, at their pleasure, exclude the minority from all participation in the management of the corporation." *Id.* at 221.

In 1939, the Pennsylvania Supreme Court considered the same issue in Strassburger v. Philadelphia Record Co., 335 Pa. 485, 6 A.2d 922 (1939). The court's opinion stated that a director, as a fiduciary, is entitled to all the information available to enable him to perform his duties to the stockholders who are the real owners of the corporation. *Id.* at 489-90. A director is entitled at any time to make such inspection of corporate records as the director considers necessary to inform himself of the proper performance of the duties owed to the shareholders. *Id.* at 490.

More recently, in Simms v. Exeter Architectural Products Inc., 868 F.Supp. 668 (M.D. Pa. 1994), the court considered the request of a former president and a present director to review corporate records where evidence had not been offered to indicate any wrongdoing or breach of duty on his part. The court explained that the documents need not be scrutinized, "for a director enjoys an unqualified right to inspect the books of a corporation." *Id.* at 675. The court ultimately concluded that "[i]n the absence of any articulated allegations as to plaintiff's fiduciary duty and some evidence that would tend to support such allegations, and in consideration of the relevant case law, we will overrule the defendants' belligerent withholding of information and grant plaintiff's motion to compel production of corporate books and records." *Id.*

"A director, therefore, at common law, has been held to have an absolute and unqualified right to examine such records. Such rule has received wide acceptance in other jurisdictions."

Chappel v. Applied Control Sys., 39 Pa. D. & C.4th 168, 180 (C.P. 1998) (citing 19 C.J.S. Corporations §780; 18 Am.Jur., Corporations, section 183, pp. 712, 713; 5 Fletcher Cyc. Corp., section 2235, p. 872.). The court in Chappel explained that the strongest justification for a rule that a director has an absolute right to immediate access to the corporate books and records is similar to the justification for the exclusionary rule for Fourth Amendment violations. Id. at 185. If the court recognizes any exception, corporations will deny access by claiming that the director's request falls within an exception. Id. If the director can lose the right to immediate access to corporate records through allegations raised by directors on the other side of a corporate split, the exception can become the rule. Id. at 185-86. The court explained that a director's right to inspect corporate records is consistent with her "legal obligation to the corporation to perform her duties as a director in good faith and in a manner that she reasonably believes to be in the best interests of the corporation." Id. at 175. To that end, "[i]f a director cannot promptly obtain information, he or she is not actually a director because, without information, he or she cannot perform oversight functions or otherwise participate in the management of the company." Id. at 185. The court held that if a corporation denies a director's request to review corporate records reasonably within the purview of his obligations, the "burden must be on the corporation to present clear and convincing evidence that disclosure will create a substantial likelihood of significant harm; the corporation should be permitted to withhold only specific information for which it has made such a showing; and the corporation should be given only a short time in which to assemble its evidence." Id. at 186. The court ultimately held that, "[a] director's right to inspect corporate records will be enforced unless evidence provided by the corporation -- rather than allegations within the pleadings -- establishes a prima facie ground for denying a director access to corporate records." Id. at 189.

Although MHS attempts to characterize Mr. Heist's demand as "changing" and "evolving," MHS does not dispute the fact that Mr. Heist, as a Member of the BOM, is entitled to the information to which he has demanded access. Instead, MHS takes issue with the form in which Mr. Heist has made his demand. For the reasons set forth below, however, MHS's argument lacks merit.

2. The form of Mr. Heist's demand complies with the statute.

MHS argues that Mr. Heist has not satisfied the conditions for obtaining relief from the Court pursuant to §5512 because: (1) the letter did not "seek and failed to request to inspect documents at MHS's location at a reasonable time" and "did not seek access to corporate books and records or information so that [Mr.] Heist could select, inspect, and copy items that he wanted" and (2) that MHS replied the next day that it was "researching what information is available to be shared with Mr. Heist." Both arguments fail.

At the outset, MHS cites no Pennsylvania authority to support the argument that the language in Mr. Heist's March 24, 2021 letter failed to comply with the statute. MHS instead cites two non-binding California state court cases, expressly acknowledged by MHS as concerning a *shareholder's* rights to inspect corporate documents. See MHS's Mot. for Summ. J. at pp. 19-20. Here, however, as set forth above, by virtue of the Deed of Trust, MHS is managed and governed by a Board of Managers. For purposes of the Nonprofit Corporation Law, "board of directors" and "directors" are defined as the persons vested with the management and affairs of the corporation regardless of the name by which they are designated. See 15 Pa. C.S.A §5103 (defining "board of directors" and "directors"). Thus, the right conferred on directors in 15 Pa. C.S.A. §5512 applies to the Managers of MHS and MHS's reliance on inapposite case law outside from outside of this jurisdiction is misplaced.

Additionally, in critiquing the form of Mr. Heist's demand, MHS reads language out of the statute. Specifically, in addition to entitling Mr. Heist "to inspect and copy corporate books, records and documents," Section 5512(a)(1) entitles Mr. Heist to "*receive* information regarding, the assets, liabilities and operations of the corporation. . . ." Further, Section 5512(b) provides, in pertinent part, that Mr. Heist "may apply to the court for an order to compel the inspection *or the obtaining or providing of the information*. The court shall summarily order the corporation to permit the requested inspection *or to obtain the information*." 15 Pa. Cons. Stat. Ann. § 5512(b) (emphasis added). MHS's argument, therefore, ignores the plain language of the statute. Thus, even if Mr. Heist's demand was framed as a request for MHS to send or provide the information to him, it would not have been improper under Section 5512(a) or 5512(b).

Finally, MHS misstates Mr. Heist's demand set forth in the March 24, 2021 correspondence. On March 24, 2021, it was communicated to counsel for MHS that Mr. Heist "requests *access* to the above information by March 26, 2021, so that no Petition need be filed with the Court." See MHS's Mot. for Summ. J. at Ex. 19. Any argument that the letter "did not seek and failed to request to inspect MHS's documents at MHS's location at a reasonable time" or that Mr. Heist "did not seek access to corporates books and records or information so that [Mr.] Heist could select, inspection, and copy items that he wanted" is, therefore, contradicted by the March 24, 2021 correspondence. Further, any argument by MHS that Mr. Heist was required to use that exact language in his demand imposes an obligation on Mr. Heist above and beyond what is required by the statute.

Finally, MHS fails to point to any support for its argument that MHS's counsel's reply to the March 24, 2021 correspondence constitutes a response under Section 5512. In that reply, counsel for MHS indicated only that it was "researching what information is available to be shared

with Mr. Heist.” He did not indicate that Mr. Heist would be provided access to the information or offer any date by which Mr. Heist could expect access to the information. Further, any argument that the March 26, 2021 correspondence constituted a valid response under Section 5512 is further undercut by the fact that Mr. Heist had repeatedly demanded, but was denied access to the corporate information. Indeed, despite the fact that Mr. Heist described in detail the information to which he demanded access in the March 24, 2021 correspondence and the rationale behind the request, it has been almost four months since the March 24, 2021 correspondence was sent, and MHS still has not afforded Mr. Heist access to the source documents. To deem MHS’s counsel’s reply to the March 24, 2021 correspondence a valid response under the statute would gut the statute.

For the reasons set forth above, Mr. Heist’s demand complies with Section 5512(a) and (b), Mr. Heist is entitled to the information at issue under Pennsylvania law, and MHS’s arguments do not support dismissal of this action.

C. Mr. Heist’s Demand for Access to Corporate Information is Reasonably Related to His Duties as a Member of the BOM.²

As set forth in Mr. Heist’s Petition, on November 15, 1909, Mr. and Mrs. Hershey executed a Deed of Trust, which was properly recorded on July 7, 1910, with the Recorder of Deeds of Dauphin County, in Book "E", Volume 14, Page 331. See Ex. A at Ex. B. After the filing by the Managers of an Application for Charter, the Court of Common Pleas of Dauphin County ("this Court") on December 30, 1919, entered a Decree approving the Articles of Incorporation and incorporating the School in perpetuity as an entity designated as a corporation of the first class

² Mr. Heist is prepared to present for *in camera* review and discussion the documents attached to his Petition and this Response, to the extent that the Court deems them necessary or helpful, regarding the rationale behind his demand for corporate information, and explaining how and why the demand is reasonably related to his duties as a Member of the BOM.

under the name "The Hershey Industrial School" with the Managers serving as the governing board.

While the School was initially incorporated as a corporation of the first class, on October 30, 1933, after enactment of the Pennsylvania Nonprofit Corporation Law, this Court entered a Decree approving certain amendments to the Articles of Incorporation of the School to coincide with the provisions of the new act and, thereafter, the corporation has been governed by that act, as amended. On December 17, 1951, this Court entered a Decree approving Articles of Amendment which changed the name of the nonprofit corporate entity to "Milton Hershey School." On multiple prior occasions this Court has authorized modification of the terms of the Original Deed of Trust based on petitions filed by various parties.

The most recent restatement of the Original Deed of Trust, which reflects all modifications of the Original Deed of Trust to date, is the Second Restated Deed of Trust dated as of November 15, 1976, which is recorded in the Office of the Recorder of Deeds of Dauphin County, Pennsylvania in Charter Book "L", Volume 2, Pages 459,463, and 464-482. See Ex. A at Ex. C. The Second Restated Deed of Trust provides, in pertinent part, that Mr. and Mrs. Hershey conveyed certain property in trust to the Trustee for "the purpose of founding and endowing in perpetuity an institution to be known as 'Milton Hershey School' ... to be located in Derry Township", Pennsylvania, and managed by a group of Managers (hereinafter the "Managers") "to erect, equip, maintain, direct and manage the School upon, under and subject to the trusts and conditions" set forth in the Restated Second Deed of Trust "which Managers and their successors shall be known as the Managers of Milton Hershey School..." See Ex. A at Ex. C.

Pursuant to the Second Restated Deed of Trust, the Managers "shall at all times keep books and accounts of the financial condition of the ... School ... exhibiting in detail all receipts and

disbursements”. See Ex. A at Ex. C. The Second Restated Deed of Trust further provides in pertinent part that “[i]n the month of September of each year the Managers shall make a report of the operations of the ... School ... showing the receipts and expenditures of the ... operations of the ... School during the year. The report must include a statement showing the exact financial condition of the ... School at the end of the year...” Id.

Mr. Heist is a duly elected Manager of the BOM who is entrusted with managing the affairs of MHS pursuant to and in accordance with the Second Restated Deed of Trust. In addition to the Second Restated Deed of Trust, Section 5 of the MHS Bylaws expressly impose on the Petitioner the following “General Duties and Responsibilities”:

“The duties of the Board include, but are not limited to:

1. Authorizing major corporate actions and the annual budget;
3. Assuring effective auditing procedures;
4. Remaining adequately informed of the School’s financial status;...”³

As a Manager of the BOM, Mr. Heist was required to certify his “Responsibilities and Expectations” as a Manager and as “the highest leadership bodies of each of the organizations, ... responsible for oversight of the management of the business and affairs of the organizations... which includes: “...

- adhere to the Board Commitments:... Transparency...
- understand the organizations’ financial statements and financial positions.
- actively engage in the organizations’ material business discussions and understand Board Member’s legal duties and fiduciary responsibilities.
- stay informed and educated on topics relevant to the Boards and organizations.

³ The May 24, 2018 current MHS Bylaws can be made available to the Court for *in camera* review.

... while expressly being responsible for oversight of the management of the business and affairs of the organizations... which includes:

- providing oversight of the financial management and risk management functions.
- adopting and approving an annual budget for each organization.
- reviewing long term financial (revenue and expense) projections.
- continuously evaluating its performance and the overall performance of each organization in achieving the missions.
- providing overall oversight of the organizations.”

See Ex. A at Ex. D.

As such, one of the express duties of the Manager is to oversee and ensure that all expenditures of the funds available to MHS are for the sole use for the School and not for the benefit of any non-MHS educational institution or other entity as required by the Second Restated Deed of Trust. In this regard and in pertinent part, the Second Restated Deed of Trust provides that all property conveyed in trust is to be held and used for “the only proper use, benefit ... that is to say: in trust for a permanent institution for the residence and accommodation of poor children...” that permanent institution being Milton Hershey School. See Ex. A at Ex. C.

Information related to the School operations budget and financial variances profoundly impact the finances, operations, educational opportunities, personnel, policies, and administration of MHS as well as impacting “the only proper use” of budgeted funds. Mr. Heist’s fiduciary oversight responsibilities plainly encompass and are reasonably related to each of these subjects. Thus, Mr. Heist seeks access to the corporate information to inform and effectively discharge his oversight duties as a Manager, including:

- a. To understand all “receipts and disbursements” and costs and expenses related to School operations inclusive of budget line items for “President’s Office”, “Operating Contingency Fund”, “President’s Initiative” and “School Operations”;
- b. To establish and oversee an appropriate budget related to School operations inclusive of budget line items for “President’s Office”, “Operating

Contingency Fund”, “President’s Initiative” and “School Operations” consistent with the Second Restated Deed of Trust;

- c. To objectively review and assess whether all “receipts and disbursements” and costs and expenses related to School operations, including but not limited to the substantial and significant multi-million dollar School operations budget variances are consistent with the requirements of the Second Restated Deed of Trust;
- d. To ensure that funds available to MHS are properly allocated and spent, including funds that have been appropriated or may be appropriated to settle and/or otherwise resolve one or more lawsuits filed against MHS;
- e. To ensure that funds available to MHS are properly allocated and spent, including funds that have been appropriated or may be appropriated to be paid to consultants and/or legal representatives that are independent and without any conflicts of interest;
- f. To ensure that funds available to MHS are properly allocated and spent consistent with the expectation and understanding of the BOM and Manager;
- g. To ensure that funds available to MHS are not “wasted” and remain available to fund appropriate School operations consistent with the Second Restated Deed of Trust;
- h. To determine whether any third-party consultant and/or recipient of funds allocated to School operations exerted undue influence in order to receive funds;
- i. To determine whether all funds allocated to School operations have been appropriately accounted for in annual regulatory Form 990 tax filings;
- j. To determine whether appropriate insurance funds are utilized as opposed to School operations allocated funds to pay legal representatives who are representing MHS in various legal matters;
- k. To determine whether all funds allocated to School operations have in fact been paid for School operations related solely to “the only proper use” to benefit MHS;
- l. To determine whether any funds allocated to School operations have been paid to any non-MHS educational institution located outside of Derry Township, Pennsylvania;

- m. To evaluate whether past and proposed expenditures of funds available to MHS relating to pending civil lawsuits and other matters are in the best interest of MHS; and
- n. For other proper purposes related to the Petitioner's discharge of his independent fiduciary duties to MHS.

Among other things, the corporate information is reasonably related to the performance of the duties of Mr. Heist in maintaining "books and accounts of the financial condition of the ... School ... exhibiting in detail all receipts and disbursements ..." in order to "make a report of the operations of the ... School ... showing the receipts and expenditures of the ... operations of the ... School during the year" which said "report must include a statement showing the exact financial condition of the ... School at the end of the year..." See Ex. A at Ex. C.

The fact that the 2021-2022 budget has been passed does not absolve Mr. Heist of his duties as a member of the BOM. Further, MHS sets forth no facts in its Motion to deprive Mr. Heist of his right to access to the corporate information.

II. CONCLUSION

For all of the reasons set forth above, MHS is not entitled to summary judgment and dismissal of this action is not warranted. Mr. Heist, therefore, respectfully requests that this Court enter an Order in form submitted denying MHS's Motion.

Respectfully submitted, this 22nd day of July, 2021,

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