

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

2 FOURTH JUDICIAL DISTRICT AT FAIRBANKS

3 TOK COMMUNITY UMBRELLA)
CORPORATION 2,)

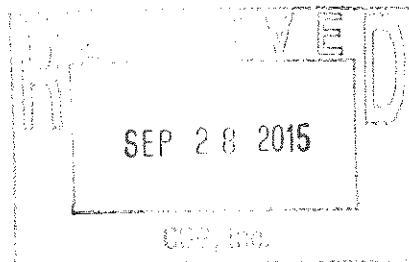
4 Plaintiff,)

5 vs.)

6 TOK COMMUNITY UMBRELLA)
CORPORATION 1,)

7 Defendant.)

Case No. 4FA-15-1930 CI



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10 **OPPOSITION TO TCUC 2's MOTION FOR SUMMARY JUDGMENT**
REGARDING THE MEMBERSHIP'S RIGHT TO REMOVE BOARD MEMBERS
AND THE VALIDITY OF JULY 9, 2015 ELECTION

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12 TCUC 2's Motion for Summary Judgment Regarding the Membership's Right to
13 Remove Board Members and the Validity of July 9, 2015 Election ("Motion" or "Motion
14 for Summary Judgment") should be denied because there are numerous material
15 questions of fact for trial and the purported removal of TCUC 1 directors is inextricably
16 tied to the TCUC Policy on Disciplinary and Board Removal Procedures. The minutes of
17 the June 19, 2015, meeting presented by Ms. Conrad (the accuracy of which is yet to be
18 determined), indicate than any decision allegedly made to "remove" TCUC 1 directors
19 from their seats was made in executive session as part of an alleged trial under the TCUC
20 Policy on Disciplinary and Board Removal Procedures. The minutes reflect that the
21 subsequent vote outside of executive session was a motion to "vacate" four director seats
(specifically amended from a motion to "remove" the directors).

1 The parties to this case have a fiduciary obligation to carefully evaluate whether
2 and to what extent director removal must be accomplished through compliance with the
3 TCUC Policy on Disciplinary & Board Removal Procedures or other TCUC policies. If
4 the Court ultimately decides that the TCUC Policy on Disciplinary & Board Removal
5 Procedures is entirely invalid, the result of such finding is not to uphold the June 19
6 removal of the TCUC 1 directors. The Policy cannot be ignored, because it was
7 expressly relied upon by the membership at the June 19 meeting where the alleged
8 removal occurred. If the Policy was invalid, so was the June 19 removal vote.

9 Moreover, TCUC 1 has not yet been provided the opportunity to conduct
10 discovery relating to the facts alleged in and bearing on TCUC 2's motion. TCUC 2's
11 Motion relies heavily upon affidavit testimony of Lisa Conrad, but Conrad has not yet
12 been deposed and TCUC 1 is still working to develop its evidence to contest her
13 assertions and veracity. In particular, TCUC 1 is currently preparing written discovery
14 requests and intends to conduct depositions of Lisa Conrad, members of the Investigative
15 Committee, and those who played a key role in the June 19, 2015 meeting. TCUC 1
16 intends to conduct careful discovery regarding the events occurring during the June 19
17 meeting and the executive session conducted during that meeting.

18 From the beginning, the procedures that led to the purported removal of TCUC 1
19 directors and the election of TCUC 2 have been a series of rushed, haphazard and
20 arbitrary actions that fail to comply with the governing regulations of the Corporation.

21 Rather than respect the rules that govern the Corporation, TCUC 2 and those who

1 pursued this action before it are simply inclined to take whatever course of action might
2 possibly help them achieve their end goal as quickly as possible. This course is not only
3 unlawful, but it fails to appreciate or respect the corporate governance structure the
4 alleged directors are obligated to uphold and ignores the fiduciary duties of all
5 individuals purporting to act as directors on behalf of the Corporation.

6 **I. FACTUAL BACKGROUND**

7 TCUC 1 directors Theresa Woody, Rhonda VanZandt and Tanya Tito were not
8 validly removed from their seats on June 19, 2015, and the July 9, 2015 election did not
9 validly seat Bill Drake, Lisa Shultz, and Frank Cook on the TCUC Board. The evidence,
10 particularly when viewed in a light most favorable to TCUC 1, indicates that any alleged
11 removal of TCUC 1 directors was indisputably tied to the actions purportedly undertaken
12 to comply with the Policy on Disciplinary & Board Removal Procedures. If that Policy
13 was not valid, neither was the alleged removal.

14 TCUC's Articles of Incorporation are silent regarding removal of board of
15 directors members. Forcible Entry and Detainer Hearing before the Honorable John
16 McConahy, Fourth Judicial District at Fairbanks, June 23, 2015 ("FED Hearing"), Pl.'s
17 Ex. 1. However, Section 7 states, "The internal affairs of the corporation shall be
18 regulated by the Board of Directors, which shall exercise all powers of the corporation
19 and shall provide for the internal regulation of the corporation in accordance with the
20 bylaws." *Id.* at p. 2. Chapter 1, Section 4 of the Bylaws states, "Any director may be
21 removed by a majority of the members who vote on the issue, or by two-thirds (2/3) of

1 the Board of Directors, whenever, in their judgment, the best interests of the corporation
2 would be served by doing so.” FED Hearing, Pl.’s Exh. 2. The Bylaws are silent as to
3 any procedure required to comply with this Section. *Id.*

4 The TCUC Board enacted the “TCUC Policy on Disciplinary & Board Removal
5 Procedures” (the “Policy”) on July 8, 1999, restated and adopted on March 10, 2015.
6 FED Hearing, Pl.’s Exh. 11. On its face, the Policy is vague and ambiguous regarding
7 which provisions apply to removal of Directors as opposed to officers or members of the
8 Corporation. *Id.* However, the introductory paragraph of the policy states in part, “...a
9 nonprofit corporation has the ultimate right to make and enforce its own rules and to
10 require its members to refrain from conduct injurious to the corporation or its purpose.”

11 *Id.* The Policy further provides:

12 A proceeding to remove a member must not violate any rules, bylaws, or
13 procedures of the corporation or any of the member’s rights under the law.
14 The primary requisite for removal proceedings are due notice and a fair
hearing. Robert’s Rules of Order Newly Revised, 9th Edition, shall apply to
procedure.

15 *Id.*

16 The April 30, 2015 “Affidavit” that initiated the alleged investigation and removal
17 process regarding the TCUC 1 directors specifically states that it is submitted “[p]ursuant
18 to [] TCUC[’s] Policy on Disciplinary & Board Removal Procedures, we submit this
19 affidavit....” Memorandum in Support of TCUC[1]’s Submission Regarding July 9
20 Election and Motion to Retain Status Quo Pending Outcome of this Litigation (“TCUC1
21 Mtn. Re July 9 Election”), Exh. C. That document states:

1 We expect that the current Board [will] appoint a committee to investigate
2 these charges promptly. At the conclusion of the investigation, we expect a
3 trial in which they will be found guilty. We expect that the membership
4 will be allowed a vote to remove them from office under Section 4 of the
5 TCUC Bylaws...Since there will be more than 3 vacancies we will invoke
6 Section 3 of the TCUC Bylaws.

7 *Id.* at p. 4.

8 An investigative committee was allegedly formed on May 14, 2015. FED Hearing
9 Transcript, pp. 67-68; TCUC1 Mtn. Re July 9 Election, Exh. D, Exh. E. Lisa Conrad
10 offered testimony on the selection of the committee at the FED Hearing, but such
11 testimony was offered for purposes of preliminary ruling relating to claims against the
12 Chamber of Commerce and the Plaintiff's Complaint had not yet been amended to
13 include allegations about the purported June 19, 2015 removal, nor had the July 9
14 election occurred. Thus, TCUC 1 has not yet fully cross-examined her on the subject of
15 how that committee was selected and whether they were "selected for known integrity
16 and good judgment" as set forth in the Policy. FED Hearing, Pl.'s Exh. 11. Likewise,
17 TCUC 1 has not yet had an opportunity to depose the committee members regarding their
18 selection and purported investigation process.

19 Prior to June 19, 2015, TCUC 1 directors exchanged certain correspondence with
20 members of the purported Investigative Committee. Affidavit of Elizabeth P. Hodes
21 (September 24, 2015) ("Hodes Aff."), Exh. A. TCUC 1 directors raised significant
questions about the process and sought time to provide information on their behalf. *Id.* at
p. 2. Specifically, on or around May 26, 2015, Scott MacManus requested information

1 from TCUC 1 directors on behalf of the purported Committee, but he did not provide a
2 deadline for responding to the request and did not disclose any information regarding the
3 planned investigation process. Hodes Aff., Exh. A at p. 1; FED Hearing Transcript, pp.
4 140-141. Theresa Woody promptly responded that she would provide information in
5 response to the request, but it would take her several days. Hodes Aff., Exh. A at p. 2.
6 MacManus e-mailed her shortly thereafter, advising her he was stepping down from the
7 Investigative Committee. FED Hearing Transcript, p. 141. No member of the
8 Investigative Committee subsequently contacted Woody or told her where to send the
9 documents or who to contact if she wished to meet with the Investigative Committee.
10 FED Hearing Transcript, pp. 141-142. TCUC 1 has not yet had the opportunity to depose
11 Mr. MacManus regarding his experience on the purported Investigative Committee or the
12 reasons for his resignation.

13 The next communication Woody received was an e-mail from Bill Drake
14 indicating that the investigative committee had, in eight days time, without any input or
15 information from the accused, determined that there was cause to assert charges and hold
16 a trial. FED Hearing Transcript, pp. 141-142; Hodes Aff., Exh. A at p. 3. The Notice of
17 Hearing and Trial set forth new allegations that were not part of the original Affidavit.
18 FED Hearing Transcript, pp. 138-139; TCUC1 Mtn. Re July 9 Election, Exh. E.

19 Thereafter, TCUC 1 directors sent a letter to the Investigative Committee "in an
20 effort to carry out [their] fiduciary obligations to the TCUC and ensure compliance with
21 its bylaws." FED Hearing, Pl.'s Exh. 7. The letter questioned whether the Policy on

1 Disciplinary & Board Removal Procedures conflicted with and/or failed to comply with
2 the TCUC Bylaws. *Id.* They also asserted that the Investigative Committee was not
3 validly chosen, and they identified various flaws in the investigation process and failures
4 to comply with potentially applicable aspects of the Policy of Disciplinary & Board
5 Removal Procedures. *Id.* The concerns presented in TCUC 1's letter were not addressed
6 and the errors in process were not corrected. *See* FED Hearing, Pl's Exh. 8. Woody
7 testified at the June 23 FED Hearing that she objected to the trial because (1) charges
8 were never filed with the TCUC Secretary; (2) the investigative committee did not follow
9 the requirement of "strictest confidence"; (3) the charges in the original affidavit were
10 altered by the investigative committee; (4) the information provided to her indicated she
11 would not be able to have representation by an attorney which was her right according to
12 the Policy; and (5) she was not going to get her due process rights according to the
13 Policy. FED Hearing Transcript, pp. 138-140. Woody, VanZandt, and Tito did not
14 attend the hearing because they believed proper procedures had not been followed. *See*
15 FED Hearing Transcript, pp. 138-142.

16 Despite TCUC 1's concerns, the Investigative Committee continued to charge
17 forward, purporting to carry out the process outlined in the Policy on Disciplinary &
18 Board Removal Procedures. *See* FED Hearing, Pl.'s Ex. 8. The errors and concerns
19 raised by TCUC 1 were not conveyed to the membership during the June 19 meeting and
20 were never corrected or adequately addressed.

1 According to the minutes of the June 19, 2015, meeting, a purported trial was held
2 in executive session. FED Hearing, PI's Exh. 8. TCUC 1 intends to conduct further
3 discovery regarding that alleged event and to determine the veracity of the purported
4 minutes. According to the minutes (the accuracy of which has yet to be determined), the
5 meeting came out of executive session and "Chairman Frank Cook announced that during
6 executive session all three of the accused were found guilty on all charges." The minutes
7 further state:

8 Frank Cook further announced that as part of their punishment, Theresa
9 Woody and Rhonda VanZandt were removed from the Board of Directors.
10 All three were reprimanded and/or censured by the membership. All three
are further not allowed to serve on the Board of Directors for a period of at
least five years beginning 6/19/15.

11 *Id.* at p. 3 (emphasis added). According to the minutes, immediately after this decision
12 was announced, a motion was made to "exercise Section 4 of the Bylaws" to remove
13 Tito, Woody and VanZandt, which motion was specifically amended to be a motion to
14 "vacate" those directors' seats rather than "remove" those directors. *Id.* at p. 4. TCUC 1
15 has not yet had the opportunity to depose those involved, to determine their alleged
16 reasons for changing the motion, but it would appear that they believed the removal had
17 already been accomplished as part of the "trial" process, pursuant to the Policy.

18 The minutes state that the motion passed with all in favor. *Id.* On information and
19 belief, there were dissenting votes and the meeting minutes are not accurate. According
20 to the minutes, Kelleyhouse then moved to schedule an election on July 9, 2015, to fill
21 the seats purportedly vacated as a result of the vote. *Id.* TCUC 1 did not believe the
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1 events of June 19 validly removed them from their seats and, to ensure such position was
2 not waived, they did not participate in the July 9 election process. Reply to Opposition to
3 TCUC[1]'s Submission Re July 9 Election, Non-Opposition to Motion to Late File
4 Conrad's Statement of Position and Response to Conrad's Statement of Position and
5 Response to Conrad's Statement of Position Regarding the July 9 Election ("TCUC 1's
6 Reply Re July 9 Election"), p. 5 at ¶¶ 12-15.

7 TCUC 1's Answer to the First Amended Complaint¹ in this case alleges in part:

8 7. In contrast to statutory provisions for removal of directors of for-
9 profit corporations, there is no provision in the Alaska Nonprofit
10 Corporations Act or the TCUC Bylaws allowing for removal of a TCUC
11 director by judicial action. Theresa Woody, Rhonda Van Zandt and Tanya
12 Tito remain validly seated directors of TCUC whose authority cannot be
13 removed by the Court based upon the claims and allegations currently
14 before it.

15

16 16. Conrad has further engaged in misconduct by encouraging and
17 supporting unlawful proceedings to improperly remove other directors from
18 the Board of TCUC who disagree with her position regarding TCUC's
19 eviction action against the Chamber of Commerce.

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21 19. Proper procedures to remove TCUC Board members pursuant to
TCUC's Bylaws were not followed.

20. Any election held on July 9, 2015, to fill the alleged "vacant board
seats" was invalid. The individuals allegedly elected on July 9, 2015, are
not properly elected members of the TCUC board.

¹ This case has evolved substantially since it was initially filed by TCUC as an FED action
against the Chamber of Commerce. The pleadings likely still require amendment in light of the
recent order to substitute TCUC 2 directors for Lisa Conrad as the plaintiff, because much of the
Answer to the First Amended Complaint was directed toward Conrad.

1 TCUC 1's Answer to Amended Complaint, Affirmative and Other Defenses. TCUC 1
2 has consistently taken the position that the procedure undertaken to allegedly remove
3 them from their seats did not comply with applicable rules and regulations of the
4 Corporation. TCUC 1 has a fiduciary duty to the corporation to ensure compliance with
5 all the Corporation's governing rules, not just some of them.

6 The evidence, viewed in a light most favorable to TCUC 1, indicates that the
7 membership's removal decision was inextricably tied to the actions purportedly
8 undertaken to comply with the Policy on Disciplinary & Board Removal Procedures.
9 The membership vote to "vacate" board seats on June 19 cannot stand on its own as a
10 valid removal. There are material questions of fact regarding the meaning and validity of
11 the Policy. If the Policy is not valid, neither is the June 19 vote. If the Policy is valid,
12 material questions of fact exist as to whether and to what extent the events leading to the
13 June 19 membership vote complied with the Policy or other applicable rules and
14 regulations.

15 II. LAW AND ARGUMENT

16 Summary judgment is appropriate only when there are no genuine issues of
17 material fact and the moving party is entitled to judgment as a matter of law. *Lincoln v.*
18 *Interior Regional Housing Authority*, 30 P.3d 582, 586 (Alaska 2001). "Where the
19 parties dispute the facts, all reasonable factual inferences must be drawn in favor of the
20 non-movant. The movant bears the burden of proving the absence of material facts." *Id.*

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A. The Court Cannot Rule on the Validity of the Alleged June 19 Removal Without Evaluating the TCUC Policy on Disciplinary & Board Removal Procedures and the Process Purportedly Undertaken Pursuant to that Policy.

Article 7 of TCUC’s Articles of Incorporation states that the internal affairs of the corporation shall be regulated by the Board of Directors which shall provide for the internal regulation of the corporation in accordance with the Bylaws. FED Hearing, Pl.’s Exh. 1. Thus, TCUC’s Articles of Incorporation permit the Board to issue policies. Once a policy is issued by the Board, it has legal force and effect as a governing document of the Corporation so long as it is consistent with the Bylaws and Articles of Incorporation. Robert’s Rules of Order (10th Ed.), § 2, pp. 9-10, 16, § 25, p. 257.

The TCUC Policy on Disciplinary & Board Removal Procedures appears to be a memorialized procedure for regulating the discipline and removal of board members, officers, and/or members, adopted by the Board of Directors. FED Hearing, Pl.’s Exh. 11. While the Policy is vague and ambiguous in many respects, it is not on its face entirely inconsistent with the Bylaws of TCUC. To the extent a Policy is a lawful exercise of the Board’s authority to regulate the internal affairs of TCUC, this Policy is a binding corporate governance instrument. Such instruments must be interpreted using the normal tools of contract interpretation. *See Hibbert v. Hollywood Park, Inc.*, 457 A.2d 339, 342-43 (Del. 1983) (interpretation of corporation bylaws and articles of corporations is governed by rules of normal interpretation for written instruments); *Berkowitz v. Delaire Country Club, Inc.*, 126 So.3d 1215, 1218-19 (Fla. Dist. Ct. App. 2012) (extrinsic

1 evidence is needed where silence in a corporation articles and bylaws created a latent
2 ambiguity).

- 3 1. The Policy on Disciplinary and Board Removal Procedures was
4 Purportedly Relied Upon by Conrad, the Investigative Committee
5 and the Membership to Remove TCUC 1 and therefore Cannot be
6 Ignored in Deciding the Validity of the June 19 Removal Vote.

7 There is no question in this case that those attempting to remove TCUC 1 from the
8 Board purported to do so in accordance with TCUC's Policy on Disciplinary and Board
9 Removal Procedures before, during and after the June 19 special meeting. TCUC1 Mtn.
10 Re July 9 Election, Exhs. C, E; FED Hearing Transcript, p. 67. Having done so, they
11 cannot now entirely ignore that policy. *Schroder v. Scotten, Dillon Co.*, 299 A.2d 431,
12 436 (Del.Ch. 1972) ("A quorum obtained by trickery is invalid and the reasoning which
13 forbids trickery in securing a quorum applies equally well to securing the absence of
14 opposing directors from a meeting by representing that such a meeting will not be held."
15 (internal citation omitted)). If the policy itself is not valid, neither was the June 19, 2015
16 removal vote (or the subsequent July 9 election).

17 In *City of Westland Police & Fire Retirement System v. Axcelis Technologies, Inc.*,
18 a Board-enacted governance policy was triggered by a plurality vote to elect certain
19 directors. 2009 WL 3086537, 2 (Del. Ch. Jul. 8, 2009) (unpublished), *aff'd City of*
20 *Westland Police & Fire Retirement System v. Axcelis Technologies, Inc.*, 1 A.3d 281
21 (Del. 2010). The bylaws allowed directors to be elected by plurality; but the Board-
enacted policy required that any directors receiving only a plurality vote must submit

1 their resignations to the remaining board, which would then decide whether or not to
2 accept them. *Id.* at 2, 6. The policy established a more specific procedure for
3 implementing the bylaw provision, and created an additional requirement before a
4 plurality election allowed under the bylaws would be valid. *Id.*

5 The court explained, “[t]he plaintiff argues that a sufficient number of
6 shareholders withheld their votes *in reliance on, and out of a desire to trigger, the Policy.*
7 If so, they were successful; these shareholders achieved their desired goal and the Policy
8 was triggered.” *Id.* at 5 (emphasis added). The Court further noted, “Reasonable people
9 might disagree as to the utility and propriety of the Policy. However, this Court is not
10 prepared to eliminate functionally its use at this juncture.” *Id.* at 6. On appeal, the
11 Supreme Court of Delaware affirmed the trial court’s decision, stating that:

12 [T]he Axcelis “plurality plus” policy was adopted unilaterally as a
13 resolution of the Board, rather than as a by-law or as part of the certificate
14 of incorporation, both of which would require shareholder approval. Here,
15 the Axcelis Board unilaterally conferred upon the shareholders the right to
16 elect directors by majority vote. But, the Board also conditioned that right
upon the board’s discretionary power to accept (or reject) the resignations
of those directors who were elected by a plurality, but not a majority,
shareholder vote.

17 *City of Westland Police & Fire Retirement System v. Axcelis Technologies, Inc.*, 1 A.3d
18 at 290-291. Thus, the Board was permitted to implement a more strict rule than was set
19 forth in the bylaws, and compliance with that rule was required by the Court.

20 The Policy in the instant case appears to establish (or at least attempt to establish)
21 some procedure or refined process for implementing the Board removal section of the

1 Bylaws. Lisa Conrad, the Investigative Committee, and some portion of the membership
2 obviously had some interpretation of the Policy in mind when they undertook to remove
3 directors because they purported to be following the Policy. *See e.g.* FED Hearing
4 Transcript, p. 67; TCUC1 Mtn. Re July 9 Election, Exhs. C, E. The Policy was, in fact,
5 relied upon by the “Affidavit” bringing charges against Woody and VanZandt, which
6 clearly states it allegations are being presented “Pursuant to the TOK COMMUNITY
7 UMBRELLA CORPORATION TCUC Policy on Disciplinary & Board Removal
8 Procedures.” TCUC1 Mtn. Re July 9 Election, Exh. C at p.1. Likewise, the Investigative
9 Committee and others purported to be acting pursuant to the policy. The Investigative
10 Committee’s Notice of Hearing and Trial specifically states: “A Trial by the
11 Membership of [TCUC] will be commenced in a Membership Assembly at 6pm on June
12 19th at Tok Civic Center in accordance with the TCUC Disciplinary and Board Removal
13 Policies, following the procedures outlined in Robert’s Rules of Order for a Members
14 trial...” TCUC1 Mtn. Re July 9 Election, Exh. E at p. 4. Significant questions of
15 material fact remain with respect to interpretation of the Policy, validity of the Board
16 removal procedures, the intent of those parties conducting the removal procedures, and
17 the intent of the Board when adopting the Policy.

18 2. Corporate Policies Cannot be Entirely Ignored When Evaluating the
19 Validity of Corporate Actions.

20 Corporate policies or rules must be interpreted by reading them together with the
21 Articles of Incorporation and Bylaws to determine the scope and validity of the rule or

1 policy. *Francis v. United Jersey Bank*, 87 N.J. 15, 31-36, 432 A. 2d 814, 822-24 (1981)
2 (directors are obligated to “exercise reasonable supervision and control over the policies
3 and practices of a corporation. The institutional integrity of a corporation depends upon
4 the proper discharge by directors of those duties”). Whether and to what extent a policy
5 can be suspended or ignored depends upon the type of rule, how it was adopted, and what
6 it means. Robert’s Rules of Order (10th Ed.) § 2, *Rules of an Assembly or Organization*,
7 pp. 9-18 (“Whatever names an assembly may apply to its various rules, the vote required
8 to adopt, amend, or suspend a particular rule is determined by the nature of its content
9 according to the definitions given above”).

10 It is not unusual for a Corporation to adopt rules or policies that govern its
11 operations and order with more specificity than is provided in the Articles and Bylaws.
12 Thus, TCUC has a series of policies adopted over the years, including the following:
13 TCUC Policy on Disciplinary & Board Removal Procedures (FED Hearing, Pl.’s Exh.
14 11); TCUC Meeting Rules and Procedures (FED Hearing, Def.’s Exh. 12A); TCUC
15 Policy on Conduct (FED Hearing, Def.’s Exh. 10A); TCUC Conflict of Interest Policy
16 (Hodes Aff., Exh. A at p. 6-7); TCUC Goods & Services Procurement Policy (*Id.* at p. 8);
17 TCUC Revenue Sharing and Other Community Grants Policy (*Id.* at p. 9-10). More than
18 one policy states that TCUC will abide by Robert’s Rules of Order.²

19
20 ² See e.g., TCUC Policy on Disciplinary & Board Removal Procedures, FED Hearing, Pl.’s
21 Exh. 11 (“Robert’s Rules of Order Newly Revised, 9th Edition, shall be followed....
Robert’s Rules of Order Newly Revised, 9th Edition, shall apply to procedure....*Trial*:
Robert’s Rules of Order Revised, 9th Edition, shall be followed.”); TCUC Meeting Rules
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Robert's Rules of Order explains:

An organized society requires certain rules to establish its basic structure and manner of operation. In addition, a need for formally adopted rules of procedure arises in any assembly, principally because there may be disagreement or a lack of understanding as to what is parliamentary law regarding points that can affect the outcome of substantive issues.

Within this framework under the general parliamentary law, an assembly or society is free to adopt any rules it may wish (even rules deviating from parliamentary law) provided that, in the procedure of adopting them, it conforms to parliamentary law or its own existing rules. The only limitations upon the rules that such a body can thus adopt might arise from the rules of a parent body . . . , or from national, state or local law affecting the particular type of organization.

The various kinds of rules which a society may formally adopt include the following: Corporate Charter, Constitution and/or Bylaws, Rules of Order (which include a standard work on parliamentary law adopted as the society's Parliamentary Authority, and any Special Rules of Order), and Standing Rules.

Robert's Rules of Order (10th Ed.) § 2, *Rules of an Assembly or Organization*, pp. 9-10.³

Additionally, Roberts Rules explain:

When a society or an assembly has adopted a particular parliamentary manual—such as this book—as its authority, the rules contained in that manual are binding upon it in all cases where they are not inconsistent with the bylaws (or constitution) or any special rules of order of the body, or any provisions of local, state, or national law applying to the particular type of organization.

and Procedures, FED Hearing, Def.'s Exh. 12A ("Where not inconsistent with these rules and procedures, the current version of *Robert's Rules of Order* will be used as a supplementary guideline and general parliamentary procedure will be observed in the conduct of the meetings....The President, or a majority of the Board, may suspend strict observance of these rules and procedures and any applicable provision of *Robert's Rules* for the timely and orderly progression of the meeting.").

³ The 9th Edition of Robert's Rules of Order § 2 is substantially similar to §2 of the 10th Edition.
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1 *Id.* at § 2, p. 16. Rules adopted by a corporation cannot simply be ignored. *Id.* at § 25,
2 *Suspend the Rules*, p. 257 (“Sometimes standing rules are called ‘policies,’ but whatever
3 term is used, if such a rule has its application outside of a meeting context, it cannot be
4 suspended.”).

5 Case law confirms the requirement that a corporation must comply with its
6 policies and procedures in connection with director elections. *See e.g., City of Westland*
7 *Police & Fire Retirement System v. Axcelis Technologies, Inc.*, 1 A.3d at 290-291
8 (discussed above); *Safai v. The Permanente Medical Group, Inc.*, 2003 WL 1022701, 1
9 (Cal. Ct. App., Mar. 11, 2003) (unreported); *Glover v. Overstreet*, 984 S.W.2d 406, 407
10 (Ark. 1999) (challenging removal of board members on procedural grounds); *Barcia v.*
11 *Fenlon*, 37 A.3d 1, 7 (Pa. Commw. Ct. 2012) (nullifying vote on removal of directors
12 because of procedural issues); *Braude v. Auto. Club of S. Cal.*, 178 Cal. App. 3d 994,
13 1001 (Cal. Ct. App. 1986) (challenging election of directors alleging election procedures
14 were unfair).

15 In *Safai*, a shareholder and unsuccessful candidate for reelection to the board of
16 directors brought suit challenging the election which was conducted in accordance with
17 the corporation’s articles, bylaws, and a policy manual. *Safai*, 2003 WL 1022701 at 1.
18 The policy manual put the physician-in-chief in charge of the election and delegated the
19 power of the board of directors to the physician-in-chief with the regard to the election.
20 *Id.* at 3. The Court read the corporation’s articles together with the power granted in the
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1 policy to conclude that the physician-in-chief had the power under the policy to decide
2 which shareholders were entitled to vote. *Id.* The Court explained,

3 The provisions of the [policy] are clearly intended to augment and
4 implement the general purposes stated in the articles of incorporation and
5 bylaws. Unlike plaintiff, we do not view the manual and its provisions as
6 contrary to the articles and therefore illegitimate. Reliance upon the
7 manual by the persons conducting the election was entirely proper.

8 *Id.*

9 Like *City of Westland* and *Safai*, this case requires analysis of whether and to what
10 extent the Policy on Disciplinary and Board Removal Procedures is valid and applicable,
11 and the extent to which the alleged removal proceeding complied with relevant portions
12 thereof. These are material questions of fact that cannot be avoided.

13 3. The Policy at Issue in this Case is Ambiguous; Material Questions of
14 Fact Exist Regarding the Validity, Scope and Meaning of the Policy,
15 How it Was Interpreted for Purposes of the Alleged June 19
16 Removal, and Whether Any Required Compliance with the Policy
17 was Achieved with Respect to the Alleged Removal.

18 Material questions exist regarding the validity and scope of the Policy in the
19 instant case. TCUC's Articles and Bylaws are silent regarding the procedures for
20 conducting a vote to remove a board member, and the Bylaws provision regarding
21 removal is fairly broad. FED Hearing, Pl.'s Exh. 2. Under the Policy, it appears that the
Board has adopted specific procedures and incorporated the procedures in Robert's Rules
to achieve a director removal.

Material questions remain regarding interpretation of the Policy. For example, it
is difficult to surmise exactly which parts of the Policy relate to director removal as

1 opposed to removal of a member or officer (*see* TCUC 1 Mtn. Re July 9 Election pp. 8-
2 10). The title of the Policy states “TCUC Policy on Disciplinary & Board Removal
3 Procedures,” but the term “board member” is actually referenced only once in the text of
4 the Policy and there is no reference to the term “director.” FED Hearing, Pl.’s Exh. 11.
5 The Policy also contains a brief section purporting to cite from the Bylaws regarding the
6 removal of “elected officers” serving “fixed terms.” *Id.* Aside from the fact that the
7 Bylaws do not contain the cited text, TCUC officers are neither elected nor do they serve
8 fixed terms. Since the Policy appears to be facially ambiguous as to which position the
9 removal procedures apply to, material questions of fact remain regarding the scope and
10 validity of the Policy, how it was interpreted by those involved in the alleged removal
11 process, as well as whether the alleged removal adequately complied with applicable
12 rules.

13 Furthermore, interpretation of whether the Policy governs is also necessary to
14 determine whether the Notice of the vote was proper. Notice for special meetings must
15 state the purpose or purposes for which the meeting is called. AS 10.20.066. Robert’s
16 Rules requires that the notice of a special meeting specify the exact purpose of the
17 meeting. Robert’s Rules § 9 (10th Ed.), at p. 89. Furthermore, Robert’s Rules states that
18 “only business mentioned in the call of a special meeting can be transacted at such a
19 meeting.” *Id.* at 90. The only exception is where it becomes urgent in an emergency to
20 take action, in which case the action must be ratified by the organization at a regular
21 meeting. *Id.*

1 To the extent two separate and distinct events took place at the June 19 meeting, a
2 trial (which TCUC 2 now argues was not necessary) and a removal vote under Section 4
3 of the Bylaws, there is a question of fact regarding whether the Notice was sufficient in
4 regard to the removal vote under Section 4 of the Bylaws. Conrad in her testimony on
5 June 23 implied that two votes took place. FED Hearing Transcript, pp. 73-74. The
6 meeting minutes also seem to imply there may have been two votes: one in executive
7 session and one to “vacate” seats afterwards. FED Hearing, Pl’s Exh. 8. However, the
8 Notice only stated that the meeting was “for the purposes of holding a trial of three
9 TCUC members....” See FED Hearing, Pl’s Exh. 9. Similarly, the Agenda only listed
10 one possible punishment vote. *Id.* Therefore, to the extent TCUC 2 is now arguing that
11 two votes took place, one punishment vote during the trial and a separate vote to
12 allegedly accomplish removal under Section 4 of the Bylaws, a material question remains
13 as to whether the Notice was effective as to a Section 4 vote.

14 **B. Regardless of the Validity of the Policy, TCUC 1 has Presented Facts**
15 **and Allegations that, if Viewed in a Light Most Favorable to TCUC 1,**
16 **Preclude Validation of the June 19 Removal.**

17 The directors of nonprofit corporations owe a fiduciary duty, including the duties
18 of loyalty and good faith, to the corporation they serve. AS 10.20.151(d) (articles may
19 not eliminate or limit the duties of loyalty and good faith). Thus, votes secured by
20 material misrepresentations are void. While there is limited Alaska case law in the non-
21 profit context, there is no doubt that it is a breach of fiduciary duty to provide a material
misrepresentation to voters in the context of a director election. *Henrichs v. Chugach*

1 *Alaska Corp.*, 250 P.3d 531, 539 (Alaska 2011) (jury found that director committed both
2 a general breach of fiduciary duty and a specific breach of fiduciary duty by authorizing a
3 false and misleading proxy solicitation letter); *Brown v. Ward*, 593 P.2d 247, 249 (Alaska
4 1979) (proxy solicitations must be free from materially false or misleading statements);
5 *Rude v. Cook Inlet Region, Inc.*, 294 P.3d 76, 94 (Alaska 2012) (Alaska law prohibits
6 material misrepresentations in proxy solicitations); *see also, Hockessin Cmty. Ctr., Inc. v.*
7 *Swift*, 59 A.3d 437, 458 (Del. Ch. 2012) (board action will be deemed invalid if obtained
8 through trickery and misrepresentation).

9 The membership obviously voted at the June 19 meeting in reliance on
10 representations that Conrad and the Investigative Committee had acted in compliance
11 with the TCUC Policy on Disciplinary & Board Removal Procedures in the weeks
12 leading up to June 19, that the June 19 proceedings were being conducted in compliance
13 with that Policy, and that the motion to vacate the TCUC 1 seats was an appropriate
14 mechanism for implementing the “punishment” allegedly established during executive
15 session. Material questions of fact exist with respect to each of these issues.

16 Misrepresentation is defined as material “if there is a substantial likelihood that a
17 reasonable shareholder would consider it important in deciding how to vote.” 3 AAC
18 08.315(a). The issue of materiality is generally a mixed question of law and fact.

19 *Meidinger v. Koniag, Inc.*, 31 P.3d 77, 82 (Alaska 2001). *See also Rude v. Cook Inlet*
20 *Region, Inc.*, 294 P.3d 76, 95 (Alaska 2012) (stating that materiality is generally one of
21 fact, but materiality may be resolved as a matter of law “if the established

1 [misrepresentations] are so obviously important to an investor, that reasonable minds
2 cannot differ of the question of materiality”). In determining whether the issue of
3 materiality may be resolved as a matter of law on a motion for summary judgment the
4 court must “bear in mind that the determination of materiality involves assessments that
5 are peculiarly ones for the trier of fact....” *Meidinger*, 31 P.3d at 83. The determination
6 of materiality “requires delicate assessments of the inferences a ‘reasonable shareholder’
7 would draw from a given set of facts and the significance of those inferences to him, and
8 these assessments are peculiarly one for the trier of fact.” *Id.*

9 It is not necessary to show that without the misrepresentation a different result
10 would have ensued. *See Meidinger*, 31 P.3d at 83; *Goldfield Corp. v. General Host*
11 *Corp.*, 277 N.E.2d 387, 391 (N.Y.S.2d 1971). The Supreme Court of Alaska has
12 determined that a misrepresentation is material “if there is a substantial likelihood that a
13 reasonable shareholder would consider it important in deciding how to vote. Subjective
14 proof that one or more shareholders actually granted a proxy because of a falsehood is
15 not required; only the objective standard encompassed in the definition of materiality
16 need be met.” *Meidinger v. Koniag, Inc.*, 31 P.3d at, 83.

17 In a director election context, it is not necessary to show that a substantial number
18 of the shareholders were actually deceived or that a different result would have ensued.
19 *Goldfield Corp.*, 277 N.E.2d at 391-92. “The materiality of the misrepresentation, the
20 completeness of other information from which shareholders could determine the truth,
21 and the likelihood, given the circumstances of the election, that some shareholder might

1 have voted differently as a result of the misrepresentation, without going so far as to
2 show an entirely different result...should all be considered.” *Id.* at 391. In the context of
3 a proxy solicitation, the Court of Appeals of New York has stated, “The test is whether
4 there is a substantial likelihood that the misstatement may have led a stockholder to grant
5 a proxy to the solicitor or to withhold (it) whereas in the absence of this he would have
6 taken a contrary course.” *Id.* at 392.

7 TCUC 1’s Answer to Amended Complaint asserted that: “Proper procedures to
8 remove TCUC Board members pursuant to TCUC’s Bylaws were not followed.” Answer
9 to Amended Complaint, p. 7 at ¶¶ 1-2. TCUC 1 believes the voters were misled and
10 substantially misinformed about the facts presented to them and the validity of the
11 procedures that took place leading up to and during the June 19 hearing. TCUC 1’s
12 Reply Re July 9 Election, pp. 7-8. By way of example, TCUC 1 asserts that the
13 investigative committee misled the membership about the ability of the directors on trial
14 to have counsel present at the trial. The investigative committee originally told Woody
15 and VanZandt that they could only be represented by another Member of TCUC. FED
16 Hearing Transcript, pp. 140; TCUC 1 Mtn. Re July 9 Election, Exh. E, at p. 4. Woody
17 and VanZandt stated in their letter to the Committee that they believed this violated their
18 rights under the Policy. FED Hearing, Pl.’s Exh. 7. This issue was not resolved prior to
19 the June 19, 2015 hearing and it was one of the reasons Woody and VanZandt did not
20 appear at the trial. They believed that this and other errors violated their due process
21

1 rights under the Policy. FED Hearing, Pl.'s Exh. 7; TCUC 1's Reply Re July 9 Election,
2 p. 10 at ¶¶ 5-13.

3 TCUC 2 alleges that it "fixed" this error by an announcement *at the trial* (when
4 Woody and VanZandt were not present) that Woody and VanZandt could be represented
5 by a non-member attorney. FED Hearing Transcript, p. 86. The Investigative Committee
6 purporting in front of the membership to comply with the procedures of the Policy while
7 it had consistently denied that right prior to the trial was obviously an ineffective means
8 of resolving the deficiency and was misleading to the membership.

9 TCUC 1 also believes the membership was misled regarding other aspects of the
10 validity of the Investigative Committee process. For example, on June 3, 2015, Woody
11 wrote the Investigative Committee challenging the way the Investigative Committee was
12 chosen, the validity of the affidavit bringing the charges, the authority of the investigative
13 committee to suspend the directors' powers until this disposition of the trial, and the lack
14 of time for Woody to respond to the Investigative Committee's request for information.
15 Hodes Aff., Exh. A at pp. 5-6. There is no indication in the meeting minutes that any of
16 these issues were ever adequately discussed, nor has TCUC 2 presented evidence that any
17 of these issues were resolved prior to the purported removal vote.

18 Ultimately, the vote was held in reliance upon various material misrepresentations
19 made by Conrad and the purported Investigative Committee to the membership. To the
20 extent TCUC 2 now is attempting to implement the vote while at the same time

21 recognizing the invalidity of the Policy, the membership was even more substantially

1 misled as to the basis for and procedural legitimacy of the process leading up to their
2 vote.

3 **C. The Validity of the July 9 Election Rests Largely Upon the Validity of**
4 **the June 19 Removal.**

5 The July 9 election obviously cannot be deemed valid unless the June 19 removal
6 is upheld. If the removal was improper, then the seats allegedly filled at the July 9
7 election were not vacant for election. TCUC's Bylaws provide a three year term for
8 directors. FED Hearing, Pl.'s Exh. 2. If the June 19 trial was invalid and/or the
9 membership's vote on June 19 was invalid, then the seats were not vacant and the seats
10 were not eligible for election.

11 **D. The Motion for Summary Judgment Ignores Various Other Factual**
12 **and Legal Questions at Issue in this Case.**

13 Plaintiff's Motion should properly be titled a Motion for *Partial* Summary
14 Judgment because it entirely ignores a variety of the legal claims and factual allegations
15 at issue in this case beyond the validity of the events arising on June 19 and July 9, 2015.

16 Factual allegations regarding the appointment of Tanya Tito remain to be resolved.
17 Determination of whether Tito was a properly appointed board member is directly
18 relevant to the validity of the July 9 election. The purported trial did not include charges
19 against Tito. TCUC1 Mtn. Re July 9 Election, Exh. E. The Notice of the meeting did not
20 mention or infer removal of Tito. FED Hearing, Pl.'s Exh. 9. Any vote to remove Tito
21 from the board in the June 19 meeting was invalid for lack of proper notice. If Tanya

1 Tito was a validly appointed director and was not properly removed, then Tito's seat was
2 not vacant and the July 9 election to fill her seat is void.

3 **E. If the Court is Not Willing to Deny the Motion, TCUC 1 Requests, in**
4 **the Alternative, a Continuance Pursuant to Alaska R. Civ. P. 56(f).**

5 If the Court is not willing to deny the Motion, TCUC 1 requests, in the alternative,
6 a continuance pursuant to Alaska R. Civ. P. 56(f). Rule 56(f) provides:

7 Should it appear from the affidavits of a party opposing the motion that the
8 party cannot for reasons stated present by affidavit facts essential to justify
9 the party's opposition, the court may refuse the application for judgment or
10 may order a continuance to permit affidavits to be obtained or depositions
11 to be taken or discovery to be had or may make such other order as is just.

12 Requests under Rule 56(f) should be freely granted. *Mitchell v. Teck Cominco*
13 *Alaska Inc.*, 193 P.3d 751, 758 (Alaska 2008), *McCormick v. Chippewa, Inc.*, 330 P.3d
14 345, 351 (Alaska 2014); *Munn v. Bristol Bay Housing Authority*, 777 P.2d 188, 193
15 (Alaska 1989). Rule 56(f) "provides a safe guard against premature grants of summary
16 judgment." *Mitchell*, 193 P.3d at 758. *See McCormick*, 330 P.3d at 351. "The
17 prerequisites for granting a Rule 56(f) motion are not onerous: the movant does not need
18 to 'state what specific facts further discovery will produce' or provide an affidavit in
19 support of the motion." *McCormick*, 330 P.3d at 351 (*quoting Munn*, 777 P.2d at 193).
20 A party requesting a continuance under Rule 56(f) "(1) must unambiguously request
21 relief of Rule 56(f) grounds...; (2) must not have been dilatory during discovery; (3) must
provide adequate reasons why additional time is needed." *Mitchell*, 193 P.3d at 758.

1 At this time, discovery is just starting. There has been substantial pretrial motion
2 practice which has hindered TCUC 1's ability to conduct discovery and prepare
3 discovery requests. TCUC 1 is currently preparing written discovery requests and neither
4 party has conducted any depositions. Hodes Aff., p. 2 at ¶¶ 15-16. Depositions are
5 important in identifying the factual discrepancies between different individuals' versions
6 of events. Much of TCUC 2's Motion relies upon an Affidavit of Lisa Conrad, yet
7 TCUC 1 has not had an opportunity to cross-examine her on many of the allegations
8 contained therein to determine the scope of her alleged personal knowledge, the
9 reliability of her sources and the veracity of the statements therein. While Ms. Conrad
10 was cross-examined with respect to certain matters at a hearing on June 23, 2015, the
11 context of the case was very different at that time. She had not yet amended her
12 Complaint at that time to include allegations about the removal and the July 9 election
13 had not yet occurred. Cross-examination at an FED hearing is far from a discovery
14 opportunity with respect to later-asserted allegations and subsequent events.

15 TCUC 1 has repeatedly argued and this Court has already recognized the need for
16 discovery in this case. *See* FED Hearing Transcript, pp. 181-182; Order Regarding
17 Pending Motions, p. 3; TCUC 1's Reply Re July 9 Election, p. 7-9. TCUC 1 has not
18 been dilatory in its discovery efforts. It has already submitted its initial disclosures. As
19 stated above, TCUC 1 is in the process of drafting its first set of discovery requests and is
20 planning depositions of key witnesses. If the Court is not willing to deny the motion for
21 summary judgment outright, the motion should be held in abeyance so TCUC 1 can

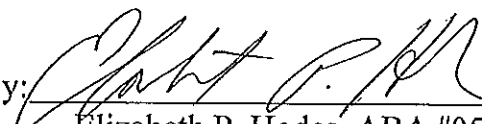
1 conduct discovery and provide more comprehensive evidence in support of its position
2 and arguments.

3 **III. CONCLUSION**

4 This court should deny TCUC 2's Motion for Summary Judgment because there
5 are numerous material questions of fact for trial. TCUC 2 cannot rely upon any alleged
6 June 19, 2015, removal vote because any such vote was conducted as part of and in
7 reliance upon alleged application of corporate rules and policy, not just the corporate
8 bylaws. Material deficiencies in the process and misrepresentations to the membership
9 preclude removal based upon the alleged "removal" vote. If the Court is not willing to
10 deny the Motion, TCUC 1 requests, in the alternative, a continuance pursuant to Alaska
11 R. Civ. P. 56(f).

12 DATED this 24th day of September, 2015.

13 DAVIS WRIGHT TREMAINE LLP
14 Attorneys for Tok Community Umbrella
Corporation 1

15 By: 
16 Elizabeth P. Hodes, ABA #0511108

1 Certificate of Service

2 On the 24th day of September, 2015, a true and
3 correct copy of the foregoing document was sent
4 by U.S. Mail, postage paid to the following parties:

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