MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Phi Mu Alpha Sinfonia Fraternity of America, by and through its National Executive Committee,

Appellant-Plaintiff,

v.

Edward A. Klint and Mark Lichtenberg,

Appellees-Defendants

February 18, 2021

Court of Appeals Case No. 20A-PL-1349

Appeal from the Vanderburgh Circuit Court

The Honorable Robert R. Aylsworth, Special Judge

Trial Court Cause No. 82C01-1912-PL-7011

Crone, Judge.

Case Summary

[1] The underlying lawsuit is rooted in a dispute between certain alumni members of Phi Mu Alpha Sinfonia Fraternity of America (the Fraternity) over the continued employment of the Fraternity's national executive director, Edward A. Klint. The dispute escalated when the Fraternity's national president, Mark R. Lichtenberg, wrote a letter to thousands of Fraternity members expressing his support for Klint's continued employment and denouncing the members of the Fraternity's national executive committee (the NEC) with whom he disagreed. Those NEC members conducted meetings without Lichtenberg and resolved to oust Klint and suspend Lichtenberg. They subsequently took steps to reconfigure their membership and to oust Lichtenberg and replace him with another president. All the while, Lichtenberg and Klint continued to work for the Fraternity, claiming that the newly reconfigured NEC (the NEC2) lacked authority to oust them. The NEC2 filed a civil complaint in the name of the Fraternity, seeking injunctive and declaratory relief against Lichtenberg and Klint (Appellees) in their individual capacities and compensatory and punitive damages against Lichtenberg for alleged breach of fiduciary duty. Appellees filed separate motions to dismiss pursuant to Indiana Trial Rule 12(B)(6). Finding that the NEC2 acted outside its authority and lacked standing to prosecute its claims in the name of the Fraternity, the trial court dismissed the action. We affirm that dismissal and deny Klint's request for appellate attorney's fees.

Facts and Procedural History[1]

[2] The Fraternity is a national organization comprising approximately 6000 male students from 249 colleges and universities, plus 200,000 alumni, all of whom have demonstrated an interest in music as a profession or in advancing the cause of music in America. The Fraternity was incorporated in New York in 1904 and operates as a nonprofit corporation under the New York Not-For-Profit Corporation Law (N-PCL). Its national headquarters are in Evansville, Indiana. Its certificate of incorporation lists as its officers a national president, a national vice president, a national secretary/treasurer, and a national historian. The certificate lists no other leaders, committees, or members. The Fraternity also operates under its national constitution and bylaws, which establish qualifications for membership as well as leadership committees, assemblies, and councils to handle various responsibilities within the vast Fraternity network. The Fraternity's 249 collegiate chapters are organized into thirty-eight provinces, each of which is led by a province governor and a council member chosen from among the collegiate chapter province representatives.

[3] The Fraternity's national president is elected by its national assembly (the Assembly). Appellant's App. Vol. 2 at 48. He is elected once every three years during the triennial national convention and may serve no more than two

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[1] We remind Klint's counsel that the statement of the case section of a brief should not be argumentative in tone and that the standard of review belongs in the argument section of the brief. Ind. Appellate Rules 46(A)(5), 46(A)(8)(b), and 46(B).

consecutive terms. *Id*. at 45. New York law states that an officer of a not-for-profit corporation may be removed only by a vote of the same body that elected him. N-PCL § 714(a). The Fraternity's constitution and bylaws do not include a specific provision granting the Assembly or any committee or council the power to remove the national president. The bylaws specify that if a vacancy occurs in the position of national president, the Assembly is the body that fills that vacancy (by election). Appellant's App. Vol. 2 at 48. The voting members/delegates of the Assembly are the province governors, the collegiate province representatives' council, and the members of the NEC. The NEC comprises seven members: the national president, the national vice president, two at-large members, a national collegiate representative, the chairman of the province governors, and the chairman of the college representatives. The NEC is required to meet at least once a year. *Id*. at 49. It oversees the Fraternity's affairs, sets a budget, ratifies appointments made by the president, makes other appointments as necessary, and hires staff as necessary. The Fraternity also has a national council (the Council), which comprises the NEC, the province governors, and all the college chapter presidents. The province governors' council advises the NEC concerning the Fraternity's operations. *Id*. at 51. Pursuant to Article III of the bylaws, all the Fraternity's officers and other leaders must be members in good standing.

[4] In April 2015, Klint negotiated an employment contract with then-president John Mongiovi, whereby Klint would serve as the Fraternity's national executive director. Appellant's Ex. B. The Assembly elected Lichtenberg as

national president at the July 2015 national convention and reelected him in 2018. Meanwhile, Klint continued to serve as executive director. In the spring of 2019, a rift developed between Lichtenberg and certain members of the NEC concerning Klint's continued employment as executive director. In May 2019, those NEC members called for and conducted a conference call to set the agenda for the regularly scheduled June 7, 2019 NEC meeting. They notified Lichtenberg by email one week prior to the conference call. Lichtenberg had a conflict, and the remaining NEC members held the call without him. They added to the June meeting agenda a proposal for Lichtenberg to solicit Klint's resignation. Lichtenberg attended the June meeting, and the remaining NEC members introduced their proposal for a vote. Lichtenberg abstained, and the remaining six voted in favor of Klint's ouster, by forced resignation if possible but by termination if resignation could not be accomplished by June 15.

[5] Lichtenberg did not seek Klint's resignation. Instead, on June 27, 2019, he sent a fraternity-wide email declaring a state of emergency and indicating that he would not execute the NEC's proposal to terminate Klint, whom he supported and of whose work he approved. He sent a separate email to the remaining NEC members notifying them that he was removing them from any and all special positions to which he had appointed them, e.g., governorships and seats on the various committees and commissions, effective immediately, per the bylaws. *See* Appellant's App. Vol. 2 at 46 (provision in bylaws stating that national president "may … remove his appointees from their positions at any time."). On July 3, 2019, a cadre of college chapter representatives issued a

letter supporting the NEC's proposed termination of Klint's contract, denouncing Lichtenberg's removal of NEC members from their other appointed committees, etc., demanding their restoration, and indicating that they had no confidence in Lichtenberg.

[6] The remaining NEC members set a meeting for August 4, 2019. They gave Lichtenberg three days' notice of the meeting, and he did not attend. During the meeting, the members adopted a resolution suspending Lichtenberg's authority, rights, and duties as national president and launching an investigation against Lichtenberg, alleging willful neglect of duty, waste and diversion of Fraternity assets, breach of conduct, and dishonesty and misuse of office. The next day, NEC member and national vice president, John Israel, notified Klint that Lichtenberg had been suspended and that Israel would be assuming the duties of national president. Two days later, the NEC members notified Lichtenberg of the allegations against him and a resolution to that effect. The following day, Lichtenberg notified the remaining NEC members that all actions taken and resolutions passed at the August 4, 2019 meeting were null and void. He also sent Klint a notice to that effect. On August 9, Israel abruptly resigned as national vice president. The remaining NEC members set a conference call meeting for the next day and notified Lichtenberg that the purpose of the meeting was to elect a new vice president. Lichtenberg did not participate in the conference call, and the remaining members approved a resolution to refer charges against Lichtenberg and to set a date for an internal trial.

[7] On September 30, 2019, thirty-four members of the Assembly called a special meeting of the Assembly for November 30, 2019. Lichtenberg notified the remaining members of the NEC that the special meeting was not properly called. He published a letter to the Fraternity to the same effect. In the ensuing weeks, the two sides went back and forth with communications to Fraternity members, one claiming the invalidity and other the validity of the upcoming special meeting. In November, Lichtenberg notified the province governors and other potential attendees that the headquarters would be closed during the Thanksgiving weekend and that anyone coming on the grounds for the allegedly invalid special meeting on November 30 would be considered a trespasser. He posted "no trespassing" signs on the property, and when Assembly members arrived on November 30, two law enforcement vehicles were parked outside the headquarters. The Assembly relocated its meeting and conducted it at the alternate venue. Twenty-nine Assembly members were present for the meeting and voted to remove Lichtenberg, to install a new national president and vice president, and to amend the certificate of incorporation to specify that the NEC is the corporate board of directors.

[8] Ten days later, the newly appointed president notified Klint concerning the actions taken at the meeting and issued certain directives to him. Klint emailed Lichtenberg, and the two did not comply with the directives of the newly appointed president and NEC members, i.e., the NEC2. Lichtenberg and Klint continued to act in their corporate capacities, claiming that the meeting was not

properly called[2] and that all action taken at the meeting was invalid due to noncompliance with corporate documents and lack of a quorum.[3]

[9] In January 2020, the NEC2 filed a complaint in the trial court in the name of the Fraternity, seeking injunctive and declaratory relief against Lichtenberg and Klint in their personal capacities and seeking damages from Lichtenberg for alleged breach of fiduciary duty. In Count I, the NEC2, through the Fraternity, sought to enjoin Appellees from controlling Fraternity assets and operations and from undertaking or asserting any of their duties as president and executive director of the Fraternity. In Count II, it sought declaratory relief concerning the legitimacy of the actions taken by the NEC/NEC2 during its meetings in the summer and fall of 2019. In Count III, it sought damages against Lichtenberg for alleged recklessness, willful misconduct, and misuse of Fraternity assets for personal gain in violation of his fiduciary duty.

[10] Appellees filed separate motions to dismiss for failure to state a claim upon which relief can be granted pursuant to Indiana Trial Rule 12(B)(6). Both motions listed numerous bases for dismissal, including an allegation that the NEC2 lacked standing to file an action in the name of the Fraternity. The trial court found that the NEC2 acted outside its authority and lacked standing to

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[2] New York law requires that notice of special meetings be given to all members of the Fraternity. N-PCL § 603.

[3] *See* Appellant's App. Vol. 2 at 52 (Fraternity constitution defining quorum of Assembly as majority of voting members on the roll).

file a complaint in the name of the Fraternity. The court dismissed the complaint for failure to state a claim. Instead of filing an amended complaint as of right pursuant to Indiana Trial Rule 12(B), Appellant filed a motion to set aside and/or clarify. In response, Appellees raised the issue of mootness and attached minutes from a December 2019 meeting of the Fraternity's commission on standards indicating that the NEC2 members had been expelled from Fraternity membership. Appellees also argued that the members are no longer real parties in interest, pursuant to Indiana Trial Rule 17. Appellant responded that the mootness issue would require extensive additional briefing, which would require the order to be treated as a summary judgment.

[11] The trial court struck Appellees' mootness objection and issued an order denying Appellant's motion to set aside dismissal and specifying that Appellant could either amend the complaint or appeal the order as a final judgment pursuant to Indiana Trial Rule 54(B). The court specifically found as follows:

> 2. The Court believes the NEC[2] overreached its authority as an executive committee, both in the actions it took before the filing of this action and in the filing of this action in the name of the organization itself. While other issues raised by the Defendants may also have merit, once the Court made this finding the Defendants were entitled to the order of dismissal because of the lack of standing by the NEC[2] to file and prosecute these claims against the Defendants. The Court therefore entered the dismissal for failure to state a claim upon which relief may be granted, finding the NEC[2] lacks standing to bring and to prosecute this action against Klint and Lichtenberg.

Appealed Order at 2. The trial court certified the order as final and appealable.

[12] Appellant now appeals the trial court's denial of its motion to set aside dismissal. Appellees have filed separate motions to dismiss this appeal, which the motions panel of this Court held in abeyance for the writing panel. We deny Appellees' motions to dismiss this appeal in orders issued contemporaneously with this decision.

Discussion and Decision

Section 1 – The trial court properly dismissed the complaint based on the NEC2 members' lack of standing to sue in the name of the Fraternity.[4]

[13] Appellant contends that the trial court erred in granting Appellees' motions to dismiss for failure to state a claim. We review de novo a trial court's ruling on a Trial Rule 12(B)(6) motion. *Kapoor v. Dybwad*, 49 N.E.3d 108, 119-20 (Ind. Ct. App. 2015), *trans. denied* (2016). Such a motion tests the legal sufficiency of a claim, which means that we ascertain whether the allegations in the complaint establish any set of circumstances under which a plaintiff would be entitled to relief. *Id.* at 120. Although we do not test the sufficiency of the facts alleged with respect to their adequacy to provide recovery, we do test their sufficiency with respect to "whether or not they have stated some factual scenario in which a legally actionable injury has occurred." *Id*. While we accept as true the facts alleged in the complaint, we "need not accept as true

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[4] Appellant also raises the issue of whether Lichtenberg was properly removed and replaced as national president at the November 2019 meeting. The trial court found that the NEC2 exceeded its authority. We need not resolve this issue due to our holding on the issue of standing.

'allegations that are contradicted by other allegations or exhibits attached to or incorporated in the pleading.'" *Id*. (quoting *Trail v. Boys & Girls Clubs of Nw. Ind.*, 845 N.E.2d 130, 134 (Ind. 2006)). We may affirm the trial court's ruling on any basis found in the record. *PricewaterhouseCoopers, LLP v. Massey*, 860 N.E.2d 1252, 1256-57 (Ind. Ct. App. 2007), *trans. denied*.

[14] Appellees raised numerous bases for dismissal. The trial court found that the NEC2 had exceeded its authority in its actions taken before filing the complaint but ultimately granted dismissal based on NEC2's lack of standing to file a complaint in the name of the Fraternity. "Standing focuses generally upon the question whether the complaining party is the proper person to invoke the Court's power." *Clark Cnty. Drainage Bd. v. Isgrigg*, 963 N.E.2d 9, 18 (Ind. Ct. App. 2012) (quoting *Pence v. State*, 652 N.E.2d 486, 488 (Ind. 1995)).

[15] Appellant argues that its insertion of a claim for declaratory relief insulates the action from dismissal for lack of standing. Indiana Code Section 34-14-1-1 states, in part, "Courts of record … have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding is open to objection on the ground that a declaratory judgment or decree is prayed for." "To prosecute a declaratory judgment action, a party must have a substantial present interest in the relief sought and the party must show that a question has arisen affecting his rights which ought to be decided in order to safeguard such rights." *Brenner v. Powers*, 584 N.E.2d 569, 574 (Ind. Ct. App. 1992), *trans. denied*. In claiming that the present action amounts to a controversy over membership status and rights in a nonprofit

corporation, which is properly brought before a trial court, Appellant relies on *Brenner*, where a group of former minority members of a nonprofit foundation filed an action against the foundation and its individual board members, challenging their exclusion from membership following an allegedly ultra vires amendment of the foundation's certificate of incorporation. *Id*. at 572. The *Brenner* plaintiffs sought declaratory relief concerning the revocation of their membership status and their rights in the foundation as well as a declaration concerning the defendants' allegedly ultra vires activities. The trial court granted the defendants' Trial Rule 12(B)(6) motion to dismiss for lack of standing, and another panel of this Court reversed in part, holding that the plaintiffs had standing to prosecute their declaratory claims related to their own rights and membership status. *Brenner*, 584 N.E.2d at 574. With respect to standing, we note that the *Brenner* plaintiffs filed the action individually and on behalf of minority members similarly situated; they did not file the action in the name of the foundation. Thus, *Brenner* is distinguishable.[5]

[16] Here, the NEC2 filed its complaint in the name of the Fraternity, and the trial court dismissed the complaint for lack of standing. The NEC2 maintains that it is essentially the Fraternity's board of directors and therefore has the right to

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[5] The *Brenner* court pointed out that "[g]enerally courts will not interfere with the internal affairs of a private organization unless a personal liberty or property right is jeopardized" and that the certificate and bylaws of a nonprofit corporation "are generally considered to be a form of contract between the corporation and its members and among the members themselves." 584 N.E.2d at 574. We see nothing in Appellant's complaint or attached exhibits indicating jeopardy to a personal liberty or property right of the NEC2 members.

prosecute claims in the name of the Fraternity. As a New York not-for-profit corporation, the Fraternity is governed by N-PCL. N-PCL Section 102(6) defines "board" as "'board of directors' or any other body constituting a 'governing board.'" The "governing board" is "the body responsible for the management of a corporation." N-PCL § 102(15). The NEC2 acknowledges that neither the certificate of incorporation nor the constitution or bylaws reference the NEC as the corporate board of directors. Nevertheless, the NEC2 maintains that it essentially operates as the Fraternity's governing board, equivalent to a corporate board of directors in its function, and therefore is properly situated to file a complaint in the Fraternity's name. In contrast, Appellees submit that the NEC is merely an executive committee, which is subject to the board and limited in its authority to bind the board.

[17] Appellant did not attach a copy of the certificate of incorporation to its complaint, and based on our review of New York's not-for-profit corporation law, as well as the Fraternity's constitution and bylaws, we do not believe that the NEC is the equivalent of a board of directors. First, New York law states that executive committees are board-appointed (by board supermajorities), are subject to the board, and have only limited powers, as extended by a board resolution or as specified in the statute, the certificate of incorporation, or the bylaws. N-PCL § 712(a). Second, the Fraternity's constitution includes the phrase "directors, officers, or NEC members" when describing certain matters such as who may be insured or indemnified by the Fraternity. *See*, *e.g.*, Appellant's App. Vol. 2 at 40 (Article V, Section 2 of constitution, attached to

complaint as Exhibit A). If the NEC members were the equivalent of directors, the phrase would be redundant. Third, other exhibits attached to the complaint indicate that during the disputed November 2019 special meeting, the Assembly purported to amend the certificate of incorporation to specify that the NEC is the board of directors of the Fraternity. Amendments to the Fraternity's constitution require notice and a three-fourths vote by the Assembly. *Id*. at 41. Amendments to the bylaws require notice and a vote of two-thirds of the Assembly or a vote of two-thirds of the Council, on recommendation of the NEC. *Id*. at 60, 63, 71-72. Even assuming that Appellant is correct in asserting that a quorum was present at the November 2019 special meeting, Appellant does not assert that the supermajority thresholds were met at that meeting. Fourth and more significantly, we find no mechanism in the constitution or bylaws for amending the certificate of incorporation. In short, Appellant's complaint and attached exhibits do not allege that the certificate of incorporation specifies that the NEC is the board of directors of the corporation, and the NEC2's eleventh-hour attempt to amend the certificate of incorporation indicates its members' awareness of such.

[18] The NEC2 asserts that it *must* be the body that can prosecute an action in the name of the Fraternity because concluding otherwise would create an absurd result in which no person or body would possess that power. We acknowledge that the founding documents of the Fraternity reflect an unusual structure when compared with that of the average nonprofit corporation. From what we can discern, the certificate of incorporation reflects a structure that is extremely

simple, and the constitution and bylaws reflect an internal structure that is extremely complex. While it is not unusual for a corporation's bylaws to be much more detailed than its certificate of incorporation, we find the Fraternity's inner workings, as described in the constitution and detailed in the bylaws, to be extremely complicated, multilayered, and vast, due to the Fraternity's numerous assemblies, councils, and committees all working to bring together its four distinct classes of members. If all these assemblies, councils, and committees were to be deemed equivalent to a corporate board, that would produce an absurd result in the other direction. In fact, taking Appellant's argument at face value, one could make an equally plausible argument that because the Assembly (with its voting delegates numbering approximately seventy-six to eighty-four members) is the only body that can elect and remove the national president and because it also is tasked with electing other key positions and amending the constitution and bylaws, the Assembly is the only body (if any) that is equivalent to a corporate board of directors. *See* N-PCL § 714(a) (providing that a corporate officer can be removed only by same body that elected him).

[19] The parties do not dispute that the certificate of incorporation is silent regarding the corporate board of directors and that it specifies only that the officers of the corporation are the national president, national vice president, national secretary/treasurer, and national historian. The constitution and bylaws specify the same four positions as the officers of the Fraternity. It would seem then, that those officers would be the only ones with standing to prosecute an action

in the Fraternity's name. Nothing in the complaint or corporate documents attached to it indicates that the NEC is the corporate board of directors or its equivalent.[6]

[20] Moreover, having reviewed the complaint and exhibits, we find this lawsuit to be less reflective of a concern over harm to the Fraternity and more akin to an internal power struggle between two factions within the Fraternity. Yet, by filing the case as they have, the NEC2 members seem to assume that *they* represent the Fraternity's interests and that Appellees oppose the Fraternity's interests. This is reflected not only in the NEC2's decision to file its complaint in the Fraternity's name but also in its decision to pursue Klint and Lichtenberg in their *individual* rather than their corporate capacities. The question here is not whether the NEC2 members have a personal stake in the outcome. Rather, the question is whether the NEC2 members are the proper parties to legally enforce the Fraternity's interests. We conclude that they are not. The trial court dismissed the action due to NEC2's lack of standing to prosecute its grievances in the name of the Fraternity. We agree and conclude that dismissal was proper. We therefore affirm.

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[6] To the extent that the NEC2 can be considered a group of shareholders/members, it has not filed the action as a derivative suit to redress an injury to the corporation, within the parameters of Indiana Trial Rule 23.1. *See PricewaterhouseCoopers*, 860 N.E.2d at 1257 ("shareholders of a corporation may not bring actions in their own name to redress an injury to the corporation."). Nor have its members sought declaratory relief on their own behalf to determine their rights within the Fraternity, as the *Brenner* plaintiffs did. 584 N.E.2d at 574.

Section 2 – Klint has waived review of his request for appellate attorney's fees.

[21] Klint requests that we order Appellant to pay his appellate attorney's fees. Indiana Appellate Rule 66(E) reads in pertinent part, "The Court may assess damages if an appeal … is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorneys' fees." Our discretion to impose damages is "limited, however, to instances when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay." *Thacker v. Wentzel*, 797 N.E.2d 342, 346 (Ind. Ct. App. 2003). "[T]he sanction is not imposed to punish mere lack of merit but something more egregious." *Troyer v. Troyer*, 987 N.E.2d 1130, 1148 (Ind. Ct. App. 2013) (citation omitted), *trans. denied*. As such, we exercise caution in awarding appellate attorney's fees because of the "potentially chilling effect the award may have upon the exercise of the right to appeal." *Holland v. Steele*, 961 N.E.2d 516, 529 (Ind. Ct. App. 2012), *trans. denied*. Claims for appellate attorney fees are categorized into "substantive bad faith" claims, where appellant's contentions are "utterly devoid of all plausibility," and "procedural bad faith" claims, where a party "flagrantly disregards" the rules of appellate procedure, omits and misstates relevant facts, and files briefs in a manner calculated to maximize the expenditure of time by the opposing party and this Court. *Thacker*, 797 N.E.2d at 346-47.

[22] Klint requests appellate attorney's fees but has failed to establish or even allege that Appellant acted in substantive or procedural bad faith. Rather, he simply

characterizes as "petty and personal" the NEC2 members' decision to name him as a defendant. Klint's Br. at 39. His argument is cursory and largely undeveloped and does not meet the cogency requirements found in Indiana Appellate Rule 46(A)(8). As such, he has waived his appellate attorney's fees request for our consideration. *Basic v. Amouri*, 58 N.E.3d 980, 985 (Ind. Ct. App. 2016). Accordingly, we deny it.

[23] Affirmed.

Najam, J., and Riley, J., concur.