

July 16, 2012

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RE: Letter dated July 12, 2012 TERMINATION OF MEMBERSHIP & CEASE AND DESIST NOTICE
Our File No. : T443

Dear Ms. Kammerling:

This firm represents Mr. Adam Rakunas in connection with the purported validity of the Wilshire/Montana Neighborhood Coalition ("Wilmont") Board of Director's July 11, 2012 action to "irrevocably and permanently" terminate Mr. Rakunas' membership in Wilmont.

I am not certain who advised this organization on the legality of terminating Mr. Rakunas' membership. But as you will see, the purported termination suffers from a number of infirmities; none-the-least is the Board's absolute failure to comply with Corporations Code section 5341. Additionally, I am unable to fathom how legal counsel to Wilmont could publish defamatory and libelous statements about Mr. Rakunas. It is also incomprehensible to me why you would threaten criminal sanction against Mr. Rakunas, a member of your client, in contravention to California Rule of Professional Conduct, Rule 5-100.

Notwithstanding the legal, factual and judgment errors in your letter, I am confident that upon review of this correspondence and applicable law, something you probably should have consulted prior to penning your July 12th letter, you will quickly apprise the Board of Directors of the following:

1. That their actions on July 11, 2012 to "permanently and irrevocably terminate" Mr. Rakunas' membership were *ultra vires* actions and are "void and without effect." Cal. Corp. Code § 5341(a);
2. The letter you penned contained defamatory libelous and slanderous statements against my client for which you and the Board of Directors could be held liable; and
3. The threatening of criminal sanction in this dispute could reasonably be viewed as violating California Rules of Professional Responsibility, Rule No. 5-100.

I'll take each of these very serious concerns in order.

1. The Board's July 11th Action is Void *Per Se* Because It Does Not Comply with Section 5341.

California Corporations Code section 5341 governs the procedure for terminating membership in a nonprofit public benefit corporation, such as Wilmont. Upon a review of your letter and the actual facts of Mr. Rakunas' circumstances, I see no plausible way that either you or the Board of Directors can claim the Board conducted itself in "good faith" and in a "fair and reasonable manner", as required by that code section.

The only provision of Wilmont's bylaws addressing termination of membership is Article II, § 4. This provision is brief and almost certainly violates Corporations Code section 5341 in that it provides *absolutely no procedural safeguards* to afford due process to members faced with termination. While Section 5341 is not the sole means to terminate membership, other means to terminate membership contained in an organization's bylaws "must be done in good faith and in a fair and reasonable manner." Cal. Corp. Code § 5341(b).

In full, Section 4 of Article II provides:

Any members acting in opposition to the rules and procedures of this organization shall have his or her membership terminated *by approved action of the Board of Directors*. (Emph. supp.)

Other than a vote of the Board of Directors, this provision is silent on procedural elements necessary to afford members any form of due process. Interestingly, it appears in this case that all process is being provided *ex post facto* – that is *after* the Board voted to terminate memberships "permanently and irrevocably." Indeed, Mr. Rakunas indicates he did not receive any notice of the special meeting that occurred on July 11, 2012.

Frankly, I do not see how this bylaw provision could be lawfully used to terminate *any* member's rights, let alone those of Mr. Rakunas.

In any event, absent some established process in the bylaws, which obviously does not exist at this time, Corporations Code section 5341(c) provides a "safe harbor" procedure that is deemed reasonable and may be used by nonprofits to terminate member rights. Presuming for the moment that Wilmont can take advantage of subdivision (c)'s safe harbor provisions, of I am sad to say it appears the Board of Directors entirely failed to meet those requirements as well.¹

First, my client received no notice that the Board of Directors was planning to "permanently and irrevocably" terminate his membership at the July 11th meeting. At a minimum, Section 5341 requires "15 days *prior notice* of the expulsion, suspension or termination and the reasons therefor" Further, given

¹ In order for Wilmont to rely on Section 5341(c), the procedures must be described in the bylaws or mailed annually to membership. See Cal. Corp. Code § 5341(c)(1): "The provisions of the procedure have been set forth in the articles or bylaws, or copies of such provisions are sent annually to all the members as required by the articles or bylaws." Absent this procedure being followed, applying 5341(c) to member termination is without authority. This calls into question whether at this point Wilmont may terminate *any* member rights.

the expulsion was “irrevocable and permanent” I see no way to assert that, any “effective date” aside, a court of competent jurisdiction would uphold the Board's actions.

I view your July 12th letter as a not-so-clever attempt to bootstrap the Board’s July 11th “irrevocable and permanent” termination into the language of Section 5341(c) by claiming the termination is “effective” on July 27th. This subterfuge is illusory and poorly covers what is otherwise an *ultra vires* action of the Board.

Second, given that the termination is unable to be changed because it is “permanent and irrevocable,” I find little value in the Board's self-serving offer for Mr. Rakunas to dispute his purported termination by providing a written challenge five days prior to the “effective date.” Again, I cannot see any court sanctioning such an illusory and pre-determined process, especially in light of the fact your letter claims that the Board does not even have an obligation to hear the challenge.

The only reasonable conclusion I am able to reach, one which I am sure an educated third party would reach too, is that this purported termination is “void and without effect.” Cal. Corp. Code § 5341(a).

2. The Reasons Given to Terminate are False – They Do Not Support Termination and Constitute Defamatory Libelous and Slanderous Statements.

More troublesome than Wilmont's failure to apply a fair process to member termination, is the fact that your correspondence contains false statements directed at Mr. Rakunas. The falsity of the reasons (listed 1-3 in your July 12th letter) not only renders termination unsupportable but is defamatory.

Your correspondence contains a litany of allegations that you allege support terminating Mr. Rakunas’ membership. The only problem is that each allegation is predicated on Mr. Rakunas’ presence at a June 9th meeting. Disregarding for the moment whether the activity occurring at the meeting was actually sufficiently detailed to authorize terminating his membership, there is one dispositive fact that demonstrates the falsity of the statements made: Mr. Rakunas was not at the June 9th meeting. Rather, he was at home watching his child while his wife was out of the home.

Your letter alleges that Mr. Rakunas engaged in a number of uncomplimentary actions. For instance, (1) “participating in and conducting an unauthorized election”, (2) “your actions on June 9th, 2012 . . . were in contravention to . . . exercise[ing] self-control” and (3) “your action . . . has failed to keep the community safe and secure and has *caused* many individuals . . . to not feel safe in your presence.” (Emph. supp.) Mr. Rakunas did none of these as he was not at the June 9th meeting. Nor does your letter describe facts demonstrating how Mr. Rakunas “caused” individuals to “not feel safe.” Such a serious charge certainly warrants precision (not to mention truth).

I find it perplexing that an attorney for a membership organization would pen such a letter directed at one of the organization's own members without first undertaking due diligence to establish the truth of the allegations. Surely your duties to the organization and its membership would at least lean towards doing some nominal confirmation of facts.

3. Threats of Criminal Action Violate Rule 5-100.

Your letter states that if Mr. Rakunas does not cease and desist from certain activity he may be exposed to criminal sanction. As an initial matter, Mr. Rakunas does not have a copy of the membership's contact information. Further, Mr. Rakunas does and will continue to exercise his rights as a member of Wilmont to fully participate and support the organization – rights he is afforded by his payment of membership dues – as well as his rights to be critical of persons or activity he believes is not in the best interest of the organization and the community. Those rights are protected speech and any further effort to limit or stifle them will be met with swift action, including pursuant to the Anti-SLAPP provisions of Code of Civil Procedure Section 425.16.

Keep in mind that Wilmont is a government funded and sponsored organization. That point should not be lost on the current leadership. Mr. Rakunas reserves all rights to express his views to his civic leaders regarding the propriety of providing city grant fund to a private organization that defames its members and does not provide due process in membership termination proceedings.

However, more problematic is the not-so-veiled threat you make in the final paragraph of your letter. In that paragraph you caution Mr. Rakunas that failure to abide by certain demands “may give rise to criminal . . . action against you, and you are advised to refrain from such activity.”

I remind you of Rules of Professional Conduct, Rule No. 5-100 which states:

A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.

I am highly troubled that you would make such statements in a communication to a member of your client in light of this rule.

4. Demand

Mr. Rakunas is a dues paying member of Wilmont and paid his annual dues earlier this year. He is a member that strongly believes in the mission of Wilmont and in the importance of public participation in community matters. Having not attended the June 9th meeting and given that Wilmont's bylaws fail to provide a fair process to terminate membership, we demand that the following occur prior to July 27, 2012:

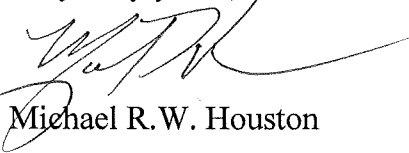
- a. The Board reinstate (to the extent the termination is not already void as a matter of law) Mr. Rakunas' s membership.
- b. The Board and you provide a full and unconditional retraction of the letter dated July 12th, including a retraction of each and every statement of falsity contained therein.
- c. The Board and you provide a full and unconditional apology to Mr. Rakunas for the statements contained in the letter and for the improper termination of his membership.

d. You refrain from further threatening criminal sanction in this matter.

If the above-mentioned actions are not taken within the time period specified, Mr. Rakunas reserves all of his rights and remedies. I urge you and the Board not to provide platitudes or carefully-crafted and innuendo laden statements in an effort to superficially comply with these demands. Nothing absent a full, unconditional and clear response will be acceptable.

In addition, Mr. Rakunas believes strongly that transparency should be a guiding principle of Wilmont. Indeed, Wilmont cannot fully accomplish its purpose stated in Article I, Section 2 of the bylaws without transparency. Mr. Rakunas strongly urges that the organization also promptly post its bylaws and adopted budget on Wilmont's official website. Are those actions something that Wilmont would do for its membership and the community?

Very truly yours,



Michael R.W. Houston

MRWH:ec

cc: Adam Rakunas (*via electronic mail*)

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