LOCAL FORUM OF SAN FRANCISCO LODGE NO. 3
BENEVOLENT AND PROTECTIVE ORDER OF ELKS
UNITED STATES OF AMERICA

ARTHUR BRUNWASSER,
Accuser

vs.

WILLIAM B. DARR, JR.,
Accused.

Case No. 3c

FACTORS IN AGGRAVATION AGAINST ACCUSED DARR

Prosecutor/Loyal Knight Chris Robison submits the following factors in aggravation of the sentence/punishment of Accused William Darr, as supported by previous submissions in this case or as otherwise identified herein:

APPLICABLE TO ALL CONVICTIONS OF ACCUSED

1. The Accused knew the Statutes. William Darr was Exalted Ruler in 2002-2003, and is a long time Member. Even as a junior Lodge Officer, he was charged to learn the Statutes. As an Exalted Ruler, he was charged to know the Laws of the Order and to enforce them.[1] After becoming a PER, he served as a Lodge Trustee and continued to be active in leadership positions within our Order, including as a State Vice President, Deputy District Grand Exalted Ruler, and now District Leader. During the course of his leadership tenure, the Accused was also required to attend leadership clinics where statutory requirements were discussed. In fact, the Accused has presented and even presided over such clinics.

2. The Accused had easy access to others who knew the Statutes. The Statutory sections which the Accused has been convicted for violating are clear on their face. However, even if the plain language in the Statutes created any uncertainty in the mind of the Accused, he had easy access to senior leaders within our Order who did understand the Order's statutory requirements. Chief among these resources was the Area 7 Representative on the Grand Lodge Judiciary Committee, a person charged to give advice to the leaders within our state. If required, the Accused could even have requested advice from any of the Justices of the Grand Forum. There is no evidence that the Accused bothered to avail himself of these Elk resources prior to committing the violations for which he has been convicted.

[1] See attached true and correct page copies of the Exalted Ruler–Lodge Officers–Committee Members Manual.

3. The Accused's purported reliance on Non-Elk outside counsel is not credible. Instead of consulting with the Area 7 Judiciary or even a Justice of the Grand Forum on these issues, the Accused expended funds that would have otherwise been available to our Lodge to engage a non-Elk attorney to advise him. Creating "legal cover" by using a person who was unfamiliar with our Statutes is suspect on its face. Doing so however when there were Elk lawyers available, who both knew the Statutes and would offer their opinion free of charge, makes the Accused's purported reliance even less credible. Where the Accused knew the Statutes, was capable of researching them on his own, and where a fully knowledgeable source was but a phone call or email away should there still have been any question, the logical inference is that the Accused sought an interpretation more to his liking, one that could only be given to him by someone who was not an Elk.

4. The Accused did nothing to mitigate his Statutory violations even after they were known. Even after the Accused was formally made aware of the specific Statutory provisions related to his unlawful actions, the Accused refused to acknowledge their illegality and made no attempt to mitigate their effects. The Accused took no corrective measures nor changed his behavior with regard to those violations which were continuing.

5. The Accused has refused to accept any responsibility for his actions. At no time has the Accused acknowledged the illegality of his actions, or expressed any remorse over their consequences suffered by the Members of our Lodge. To this time, and only when pressed, the Accused has simply offered excuses. Where excuses are but mere evasions as to the underlying reasons why an Accused committed violations of his Obligation, they are not expressions of repentance. Therefore, thus far, the Accused remains unrepentant.

6. The Accused, as a leader within our Order, had a higher duty. The Accused has worked his way up the ranks within our Order. His dedication to what is commonly known as his "Elk's career" is undisputed. But as a leader within our Order, charged with not only knowing our Statues but with guiding others in complying with them, a violation of our Laws is a greater matter than one committed by Members. Even for regular Members, ignorance of our Statutes offers no excuse. But a violation by someone in Leadership, and a willful violation –and in some cases, a continuous violation, at that- represents a grave breach of trust deserving greater penalty.

7. The Accused, as a Lodge fiduciary at the time, had a personal duty to our Members. All Lodge officers are servants of the Members. The Accused's attitude in committing the violations for which he has been convicted was one of privilege and disregard to the principles of transparency and full disclosure. This does not demonstrate an attitude of service to the Lodge or to the Order.

Conviction for Not Allowing Inspection of Records

1. In participating in the denial of a Member inspecting the Articles of Incorporation, By-Laws and Minutes of Directors' meetings of the Building Association, and in later denying the inspection of financial documents of the Building Association by a Member,

the Accused adopted the reasoning that they should not be produced because of a "fiduciary duty."

The relevant statutory provisions are simple and straightforward:

GLS §12.050, Opinion 08: "All Lodge records should be open for inspection by a Member at all reasonable times."

GLS §16.110, Opinion 01: "…all Lodge records should be open for inspection by any Member at all reasonable times…"

GLS §16.030, Opinion 02, relating specifically to the Building Association: "All separate corporations, regardless of when organized, are subject to all provisions of the Laws of the Order."

GLS §16.030, Opinion 03, again, relating specifically to the Building Association: "A separate corporation must comply with the Laws of the Order."

All word-games and non-Elk lawyer "spins" aside, the Statutes speak for themselves. The requirement being clear, a violation should carry more than the minimum sentence.

2. Responding to a comment that the Articles were a matter of public record filed with the California Secretary of State, Josh Hachadourian told the affected Member to get them from Sacramento himself. By remaining silent, the Accused adopted this attitude and regard for a Member of our Lodge as his own. In this the Accused was rude and disrespectful, and acted as though these fundamental records were private to everyone except Building Association directors. The Accused also said nothing about having an opinion letter from a private, non-Elk attorney, who apparently failed to read or understand the four citations above.

   The Accused's conduct was arrogant, indefensible and unworthy of an Elk, let alone an officer of many years charged with knowing the Statutes. For this reason, his violation should result in more than the minimum sentence.

3. The Accused was made specifically aware of the above statutory citations when the inspection request was made, and again when the Notice of Intent was filed against him. For all of the ensuing months when the Accused was in a position to comply with the Statutory requirements, he callously continued to ignore them.

   Under our Laws, neither the Building Association nor the Lodge can harbor secrets from the Members. The Accused knew that. But even if he had any doubts, he could have consulted with an Elk attorney who actually had a working knowledge of our Statutes: our Area 7 Judiciary. Instead, the Accused chose to obtain the advice he wanted from a non-Elk lawyer, whose clear unfamiliarity with the Laws of the Order prevented any reasonable reliance on his opinions. For all of these reasons, the Accused's violation should result in significantly more than the minimum sentence.

Conviction for Violation of §16.030

1. The Building Association has the statutory duty "to present to the Lodge for approval, not later than the final regular Lodge meeting in April, a separate and comprehensive budget for the proposed operation of the corporation." It is also mandated to "submit a monthly written report to the Lodge showing the financial condition of the corporation and the condition of the budget."

   As with the previous violation, the relevant statutory provisions are simple and straightforward. Again, all of the word-games and non-Elk lawyer "spins" are but feeble excuses, indicative of a person unwilling to take responsibility for his actions. The requirements being clear, a violation should carry more than the minimum sentence.

2. The Accused did not comply with these requirements and had no legitimate excuse for not doing so. His stated reason for not complying, that Lodge Members were free to attend Building Association meetings and hear the financial information, obviously falls far short of the statutory requirements.[2] At the regularly monthly Building Association meetings, only directors have a vote. Thus, it was impossible for "the Lodge" to approve the Building Association's budget, for such approval can only occur on the Lodge floor during a Lodge meeting. Likewise, the point of the requirement for the monthly *written* financial report "to the Lodge" is so that the report can be subject to inspection by any Member at any reasonable later time. At the end of all Building Association meetings, all financial documents under review by the directors were routinely collected back, so that they would not be available to anyone not in attendance.

   The excuse offered by the Accused thus only further exemplifies an evasiveness and artificial barrier of secrecy around Building Association financial information while under the direction of the Accused. Arguably, it is this secrecy which one of the reasons necessitating the coming 3-year *forensic* audit of the Building Association and the Lodge, which will come at a cost in the tens of thousands of dollars.

   This is not merely a technical violation of our Statutes. Not only did this conduct show a lack of respect for our Members and a disregard for their rights, it has also resulted in tangible financial consequences to our Lodge. For these reasons, the violation should carry significantly more than the minimum sentence.

[2] In his Declaration in Opposition to Motion for Summary Judgment, the Accused states "That while Treasurer of the Building Association, I attended monthly meetings which were open to all Elk's Lodge members and attended by an *incalculable* number of Lodge members" (page 3, ¶17, emphasis added). This does not meet the plain language of the Statute. Moreover, it is intentionally misleading. Included in the Meeting Minutes of the Building Association are the names of everyone in attendance, both Directors and everyone who was *not* a director.

In that same Declaration, the Accuser states: "That while Treasurer of the Building Association a budget was annually presented at one of the Building Association meetings which were attended by Elk's Lodge members" (page 3, ¶18). He further states: "That while Treasurer of the Building Association financial records and reports were presented at each of the Building Association meetings which were attended by Elk's Lodge members" (page 3, ¶19). These statements are also intentionally misleading. BA Directors are all required to be Lodge Members.

Conviction for Violation of §16.050

1. As with the above violations, the relevant Statutory provisions relating to the Building Association, for which the Accused was convicted, are simple and straightforward:

   GLS §16.050: "…any corporation…under the control of the Lodge, must obtain a permit from the Board of Grand Trustees before it may: …(g) Lease its real property…for a term of more than five (5) years, whether it be an original term…or extension."
   For reasons already stated above, it is beyond believability that the Accused was unaware of this Statute. As with the other statutes involved in this case, nowhere in the records of this case has the Accused denied knowing them.

   For this particular violation however, knowledge of the unqualified mandate of §16.050 is undeniable, because the Accused was a signatory in a §16.050 permit application for work on the Lodge balcony (under §16.050(d)).

   Thus, by participating in extending the master lease on our building until August 31, 2035, the Accused knowingly and willfully violated §16.050. For this reason, the Accused deserves far more than the minimum penalty for his violation.

2. By violating the clear requirements of §16.050, the Accused denied the Members of our Lodge their right to participate in the process of determining whether or not to enter into the subject lease extension to August 31, 2035. The business soundness of the subject deal has been highly questioned, not only for the provisions of the deal itself (which have been deemed very bad by our new Building Association officers and by expert counsel), but also because it was entered into in with a veil of secrecy, it being done with the Lodge knowing any of the details.[3]

   The Accused has made no denial that, as a Director and Treasurer of the Building Association, he knew fully well what was going on with the lease extension, entered into in contravention of the Statutes.[4] Certainly, as a fiduciary, the Accused should have known and made it his business to know. But his lack of denial knowing aside, the Accused has also done nothing to explain why he allowed (if not actively participated in) what amounted to a secret negotiation with the Master Leaseholder done behind the back of the Lodge and of Grand Lodge. Regardless, his participation in these events, however passive he may later affirmatively claim, supports heightened sentencing.

[3] §16.050 requires that, prior to making the permit application to the Board of Grand Trustees, that the details of the proposed transaction be explained in written form sent to all Members of the Lodge, it be read on the Lodge Floor at a regular meeting, and that it be adopted by a two-thirds vote of the Lodge Membership in attendance at such meeting. If that is accomplished, the Grand Trustees conduct an investigation, and will refuse to issue a permit "if the proposed project is financially unsound and otherwise not in the best interest of the Lodge or the Order." By acting outside the view of the Lodge and of the Grand Trustees, the Accused denied the Lodge the benefit of added review of the lease extension.

[4] On these points, the Accused carefully states in his Declaration that "I am informed and believe," language designed to suggest personal ignorance of these facts. Still, this is not a denial of knowledge, and so such knowledge should be deemed admitted, unless and until the Accused affirmatively throws Brother Hachadourian under the bus.

3. By violating the clear requirements of §16.050, the Accused also needlessly put the continued existence of our Lodge at risk.

GLS §16.050 provides, in relevant part: "If a Lodge shall permit a violation of this Section, the Grand Exalted Ruler, with the consent of the Board of Grand Trustees, shall have the power to suspend or revoke its Charter."

The loss of our Lodge Charter would automatically terminate our existence as a Lodge. Such a loss would be catastrophic to all that we have as a Lodge. Under GLS §9.170, this could lead to a subsequent appointment of Grand Lodge trustees with the power, among other things, to sell our "450 Post Street" building if, in their best business judgment as fiduciaries, such a sale is prudent. That the Accused would risk condemning us all, for what can be at best described as a questionable financial deal,[5] done without proper authorization and done purposely outside the view of the Lodge and of Grand Lodge, warrants the highest penalty: Expulsion from our Order.

4. In his carefully worded Declaration for Opposition to Summary Judgment, the Accused prefaces a number of assertions with the words "I am informed and believe." While clearly designed to suggest that the Accused lacked/lacks his own knowledge of these events, it would have been a simple thing to make such a declaration directly. That such a declaration would have the effect of placing all responsibility related to these events on Brother Hachadourian, who actually signed the lease extension, should not be ignored.

Unless and until the Accused makes such a denial of knowledge however, it should be deemed admitted that he had such knowledge, and was a willing participant in these events. Certainly the Accused had a fiduciary duty to investigate these matters if he did not know, and surely he knew enough to be on notice of the need for any clarification.

It is therefore urged that the assertions referred to below be deemed as being directly made by the Accused, without the "escape-hatch" that might otherwise be argued with the "I am informed and believe" language.

This said, the Accused has declared that the reason for violating GLS 16.050(g), by extending the master lease on the Lodge building until August 31, 2035, was because "on August 16, 2010 a stipulation for entry of judgment was filed by the plaintiff *against* the Elks Lodge and Building Association and entered by the court" (page 4, ¶23, line 11).

This statement was intentionally misleading, in that it sets up the suggestion that entering into the lease extension was somehow against the will of the Accused. What the Accused fails to acknowledge is that a stipulated judgment can only be entered by a court pursuant to a stipulated agreement. In order words, the stipulated judgment only came about because the judgment *had already been agreed upon* by stipulation.

The assertion that the stipulated judgment was "*against* the Elks Lodge and Building Association" is a falsehood.

[5] The cost to our Lodge from this deal is estimated to be in excess of $25,000,000.00.

In the August 16, 2010 Stipulated Judgment (attached), the Master Lease "Tenant" being charged to maintain and repair all exterior and structural elements of the Lodge building, including the balcony, is the plaintiff in the case, TCC (¶¶1 and 2). This is because, under the *Master* Lease, the Building Association is the Landlord. The "Landlord" in the Lodge *Sublease* being charged to maintain and repair the exterior walls of the Building, including the balcony (¶¶3 and 4), is also the plaintiff in the case, TCC. This is because the Lodge subleases back from TCC the third floor and other areas it occupies.

Thus, to the extent the stipulated judgment is "against" anyone, it is against the plaintiff, TCC, not the Lodge or Building Association, as the Accused had declared.

In his same Declaration, the Accused stated that "(a)s a result of remaining outstanding issues regarding the declaratory relief…a stipulated amended judgment on November 30, 2010 was entered by the court whereby plaintiff recovered for all three causes of action *against* the Elks Lodge, Building Association and the subtenant" (page 4, ¶24, line 14).

Again, the assertion that this stipulated judgment was *against* the Elks Lodge and Building Association is a falsehood.

This amendment to the first stipulated judgment (also attached), was a judgment "against" defendant Frank E. Lembi, allowing TCC to hold him responsible for its obligations to the Lodge and Building Association, as provided for in the August 2010 stipulated judgment.

The Accused finally states in his Declaration that, in order "(t)o *resolve and satisfy the judgment*, a settlement agreement was entered into by the Elks Lodge and Building Association" (page 4, ¶25, line 18), and "(t)hat rather [than] being bound by a similar terms as those contained in a judgment, one of the terms of the settlement agreement was Amendment No. 8 to the lease" (page 4, ¶27, line 23), and so, in conclusion, "the settlement agreement was entered into and the lease was executed in order to *mitigate the impact of the judgment*" (page 4, ¶28, line 26).

In other words, the Master Lease *had* to be extended to August 31, 2035.

But this is patently untrue.

Nowhere in either stipulated judgment is the lease extension to August 2035 mentioned, let alone required. And even if this lease extension had been mentioned, entry of both *stipulated* judgments required the Accused's prior consent. Further, there is no basis for the claim that the October 2010 settlement agreement was signed in order "to resolve and satisfy the judgment," such stipulated judgment affecting the Lodge and the Building Association being entered two months earlier in August 2010. Given these facts, the statement that the October 2010 settlement agreement and the lease extension to August 2035 were entered into "in order to mitigate the impact of the judgment ['against']" the Lodge and the Building Association is simply untrue.

These explanations, inherently misleading where not outright false, made as representations before the Local Forum in an attempt to justify the actions of the Accused and made under penalty of perjury, constitute an action in aggravation touching on the very character of the Accused, and supporting a penalty of Expulsion from the Order.

Conviction for Violation of §9.070(c)

1. Violations of our Obligation to obey Grand Lodge Statutes are treated very, very seriously. It is considered bad enough to have a single conviction in the Local Forum for one offense. But to have a second conviction in the Local Forum, whether or not the convictions are related to the same matter, constitutes a wholly separate and independent Offense against the Laws of the Order under §9.070(c).

   Thus, a second conviction by the Local Forum is itself a violation of §9.070(c), necessitating a sentence of suspension from membership for not less than six (6) months nor more than three (3) years *or expulsion*.

   Here the Accused does not just have a second conviction, but has been convicted of several violations, including one or more counts under GLS §§12.050, 16.030, 16.050(g), 16.110, Contumacy (§9.070(d)), and Conduct Unbecoming An Elk (§9.070(j)). Given the multiplicity of offenses, their degree of seriousness, their impact on the Members and on our Lodge, the fact that many were continuous, and were done with any attempt at mitigation, a penalty of Expulsion from the Order is well supported.

2. Attached herewith is a listing of Examples of Expulsion, taken from the Annotated B.P.O.E. Constitution and Grand Lodge Statutes. Some are rather technical, while some involve dishonesty on one level or another.

   Comparing the singular examples in the attached List, each one grounds for Expulsion from the Order, with the multiple violations in the instant case, it is clear that a penalty of Expulsion from the Order is appropriate.

CONCLUSION

For all of the reasons stated above, it is urged that the Accused, having been convicted on all counts, and such convictions accompanied by the aforesaid factors in aggravation, should be

Expelled from the Order.

Respectfully submitted,

DATED: September 10, 2014

Christopher O. Robison

Chris Robison, Prosecutor/Loyal Knight

I, Chris Robison, under the Obligation of the Order, says that he has read the foregoing submission to the Local Forum, knows the contents thereof, and believes the same to be true.

DATED: September 10, 2014

Christopher O. Robison

Chris Robison, Prosecutor/Loyal Knight