

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF ST. LOUIS

SIXTH JUDICIAL DISTRICT

Harry R. Welty, Laurence J. Burda,  
Dean Davidson, Robert D. Sershon,  
and Art Johnson,

Court File No. 69DU-CV-09-758

Plaintiffs

v.

Independent School District No. 709,  
Duluth, and Johnson Controls, Inc.,

Defendants.

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**JOHNSON CONTROLS, INC.'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS'  
MOTION TO ADD CLAIMS FOR PUNITIVE DAMAGES**

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**I. Introduction**

Plaintiffs take the extraordinary step of seeking to add a punitive damages claim against Johnson Controls, Inc. ("JCI"), yet make no effort to show what JCI did wrong. Plaintiffs merely assert that JCI's wrongful conduct is "self-evident." This unsupported assertion falls well short of the *prima facie* case Plaintiffs must make to be entitled to add a claim for punitive damages. Plaintiffs' aggressive tactics are an abuse of the litigation process and are designed to obtain traction in what amounts to a political dispute between Plaintiffs and Independent School District No. 709, Duluth ("District") over the District's actions and policy decisions initiated over three years ago. Because Plaintiffs failed to meet their heavy burden of demonstrating by clear and convincing evidence that JCI committed tortious acts in deliberate disregard for the rights and safety of Plaintiffs, their motion to add a punitive damages claim against JCI should be denied.

## II. Factual Background<sup>1</sup>

JCI has been serving the Duluth community and its schools for over 100 years, and has operated its local Duluth office for more than 50 years. JCI Proposal, Ex. 3 to Amended Complaint, p. 1. JCI's Solutions Group provides professional services, including planning, engineering, and facilities management consulting, for schools, hospitals, and other commercial building owners. *Id.*

On January 4, 2006, the District issued Request for Proposals No. 243 entitled "Professional Services for the Study, Development, and Implementation of a Comprehensive and Strategic Long-Range Facility Plan" (the "RFP"), seeking assistance from professional service firms like JCI to "provide or coordinate all professional services required to comprehensively assess the physical condition, functional and educational adequacy of existing school sites, building and other related infrastructure." District's RFP, Ex. 1 to Amended Complaint, p. 2. The objective was to work with the District to develop and present to the community a "Comprehensive and Strategic Long-Range Facilities Plan." *Id.* The RFP also asked responding firms to "provide or coordinate all professional services required to accomplish initial construction phases of the Plan." *Id.* The RFP indicated that in ranking firms the District intended "to place greater emphasis on a firm's experience, qualifications and project approach." *Id.* at 3.

On January 24, 2006, JCI submitted a response to the RFP (the "Response"). The District received numerous responses to the RFP, and utilized a selection committee to analyze them and finalize recommendations to the School Board for selection of a firm to provide

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<sup>1</sup> JCI is opposing three separate nondispositive motions filed by the Plaintiffs. Because the factual context for each motion is the same, each of JCI's oppositions contains an identical Factual Background section.

professional services. Defendant ISD No. 709's Answer to Amended Complaint ("District Answer") ¶ 8. As a result of that process, the District found JCI's Response appropriate and responsive to the RFP, and in keeping with the District's procedures and standards in the industry. *Id.* ¶¶ 18 and 22.

Ultimately, the District selected JCI to provide services. Promptly after accepting JCI's Response, the District directed JCI to begin working on its assessment of the District's facilities. On January 29, 2007, JCI and the District executed a formal written agreement, captioned the "Master Agreement Long-Range Facilities Plan Development & Implementation" (the "Agreement"). The District has consistently maintained that the RFP process and its Agreement with JCI complied with Minnesota law and with the District's internal policies. Pursuant to the Response and Agreement, after a comprehensive assessment of the District's existing facilities and needs, JCI developed a long-range facilities plan for the District (the "Plan"). Affidavit of Leonard Fretland submitted in support of District Motion for a Surety Bond, ¶ 4.

The Plan was presented to the Duluth School Board. On June 19, 2007, the School Board approved Resolution B-6-07-2452, adopting what was commonly referred to as the "red option" under the Plan (hereinafter the "Program") (individual projects hereinafter shall be referred to as "Project" or "Projects" and the group of projects shall be referred to as the "Program"). *Id.* ¶ 5. The Program contemplates that the District will improve its facilities between 2008 and 2012. *Id.* ¶ 6. The improvements will consist of retrofit improvements, closing some existing schools, and construction of new schools. *Id.* Specifically, the following buildings are to be renovated or constructed:

<u>Project Name</u>	<u>Project Type</u>	<u>Budget</u>
Ordean High School	New Construction	\$54,752,777
Laura MacArthur	New Construction	\$18,913,586
Western Middle	New Construction	\$45,144,391
Lincoln Piedmont Elem	New Construction	\$16,942,846

Lester Park Elem	New Construction	\$18,550,944
Denfeld High School	Remodel/Addition	\$38,207,737
Grant Nettleton Elem	Remodel/Addition	\$12,535,441
Eastern Middle School	Remodel/Addition	\$28,424,018
Lakewood	Remodel/Addition	\$2,901,115
Stowe	Remodel/Addition	\$4,221,885
Transportation Bldg	Remodel/Addition	\$2,488,182
Homecroft Elem	Remodel/Addition	\$8,435,044
Congdon Elem	Remodel/Addition	\$9,177,944
Lowell Elem	Remodel/Addition	\$7,680,944
HOTC	Remodel/Addition	\$6,599,511
STC	Remodel/Addition	\$5,235,211

*Id.*

Since the School Board's adoption of the Program, JCI has performed, and continues to perform, services under the Agreement and related contracts, and has entered into various subconsulting agreements. *See id.*, ¶¶ 7-11. The District has divided the Program into discrete pieces for the purpose of soliciting bids from, and awarding contracts to, separate prime contractors (each of which will have a separate contract with the District). *Id.* ¶ 12.

Before plaintiffs commenced this lawsuit, the District had already competitively bid construction work for the Lakewood Elementary School and Stowe Elementary School projects. Construction of those projects was completed before the 2008 school year commenced. *Id.* ¶ 14. The Homecroft and Lowell Elementary School projects went out for bid during winter of 2008, construction contracts have been awarded and contractors have mobilized to the project sites to commence work. *Id.* It is expected that the District will award contracts for East Middle School, East High School (Ordean), and West High School (Denfeld) this month. *Id.* The current Program anticipates a majority of the remaining Projects will be bid by March of 2010. *Id.*

On March 9, 2009, Plaintiffs commenced this action allegedly seeking to enjoin work under the Agreement and to force disgorgement of payments the District has made to JCI. While Plaintiffs' theories are not entirely clear, it appears that they are contending that the Agreement was void *ab initio* because the District's procurement process somehow violated the District's

own internal policies. On April 8, 2009, Plaintiffs served notice of several motions, including a motion for separate trial on the issue of whether the Agreement is void, a motion for an expedited trial, and a motion seeking leave to amend its Complaint (again) to add certain individual school board members as defendants and to assert punitive damages claims against them and against JCI.

Both before and throughout the course of this litigation Plaintiff Harry R. Welty has maintained a website with an online blog, [www.letduluthvote.com](http://www.letduluthvote.com), that makes plain the purpose of this lawsuit:

Let Duluth Vote will take the School Board to court and not for a trivial offense like ignorance or arrogance. We will take them to court for stealing our right to vote. We will seek a court injunction to stop the Red Plan until it can be put to a vote. The United States Supreme Court has ruled that our right to vote is so fundamental to democracy that it deserves special protection. Half-a-dozen other laws may also have been violated to force the Red Plan down our throats while the School Board gloated that nothing could stop them. Their boast must be put to the test.

Affidavit of Steven R. Lindemann Ex. A. Welty and his supporters do not like the District's Program and are trying to use this lawsuit to stop millions of dollars of ongoing construction work to renovate Duluth's schools under the Program. According to Welty's blog, Plaintiffs have unsuccessfully used political means in an attempt to stop the District from proceeding with its Program: "The five plaintiffs are Harry Welty, Lawrence Burda, Art Johnson, Robert Scrschon and Dean Davidson. The first four have been associated with Let Duluth Vote whose calls for a referendum on the Red Plan and/or the consideration of a compromise plan have been repeatedly rebuffed by the Duluth School Board." Affidavit of William Hanson submitted in support of District's Motion for a Surety Bond, ¶ 14 and attached exhibits. Welty declares throughout his blogs that Plaintiffs' purpose in bringing this action is to stop the District from

proceeding with the Program. However, if Plaintiffs cannot stop the Program, they will settle for stalling it: "We [Plaintiffs] only have to delay construction until the Court orders a binding referendum and/or until we elect four new school board members – a majority – in November." Lindemann Aff. Ex. A. Welty has also made several comments that reveal his personal animus toward JCI. For example, on April 29, 2009, Welty commented on his other blog, [www.lincolndemocrat.com](http://www.lincolndemocrat.com), "I hope JCI is required to pay through the nose for the damage their greed has inflicted on Duluth. I mean reparations over and above simply paying Duluth back what the School Board has thrown at JCI." Hanson Aff., ¶ 14 and attached exhibits. All of this commentary, and more, reveals that plaintiffs are misleading the Court about the purpose of their lawsuit.

### III. Argument

#### A. Plaintiffs Cannot Meet the Heavy Burden Required to Plead a Claim for Punitive Damages

Punitive damages are an extraordinary measure, not generally favored by the law, and should only be allowed with caution and within narrow limits. *See Lewis v. Equitable Life Assurance Society of the United States*, 389 N.W.2d 876, 892 (Minn. 1986) ("[T]he very power of the remedy demands that judges exercise close control over the imposition and assessment of punitive damages.") Courts have recognized that allowing a claim for punitive damages to enter a case is inherently prejudicial to the defendant regardless of whether the plaintiff is ultimately awarded punitive damages. *See Lundgren v. Eustermann*, 370 N.W.2d 877, 882 (Minn. 1985).

Given the extraordinary and prejudicial nature of punitive damages, the Minnesota Legislature has enacted strict limitations on a plaintiff's ability to assert a claim to recover them. The limitations prevent the improper use of punitive damages as a litigation tactic. *See Lewis*, 389 N.W.2d at 891. ("The concern of the legislature in enacting the punitive damages statutes . . .

