

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
22ND JUDICIAL CIRCUIT
DIVISION 3

AMERICAN SADDLEBRED
HORSE ASSOCIATION, INC.,

Plaintiff

v.

EDWARD R. BENNETT,
CARL T. FISCHER, JR.,
KRIS KNIGHT, TOM FERREBEE,
SIMON FREDRICKS, M.D.,
and LYNN W. VIA,

Defendants

Case No. 09-CI-05292

**RESPONSE IN OPPOSITION TO ASHA'S
MOTION TO WITHHOLD RECORDS**

AUG 17 2011

I. INTRODUCTION

Pursuant to this Court's August 9, 2011 Order, the defendant members ("Members") went to the headquarters of the plaintiff, American Saddlebred Horse Association, Inc. ("ASHA"), on August 15, 2011 to inspect and copy "all ASHA records responsive to the requests contained in the letter from counsel for the Defendants to counsel for ASHA dated June 24, 2011."¹ The June 24 letter specifically requested documents related to the termination of ASHA's highest ranking employee, Alan Balch, and the settlement between ASHA and Mr. Balch. If ASHA wished to withhold the Balch records from inspection on August 15, ASHA was required to file a motion and supporting memorandum. Although ASHA had not filed a

¹ During the August 15 document inspection, ASHA, for the first time, disclosed that certain e-mails have been deleted, including those of Mr. Balch, and computers have been destroyed, including Mr. Balch's computer, during the pendency of this litigation. As a result of that egregious conduct coming to light at this late date, the Members plan to file a motion for this Court to hold ASHA in contempt and impose appropriate sanctions.

motion to withhold the Balch records before the August 15 inspection, ASHA refused to produce the Balch records on that date. ASHA has belatedly filed a motion to withhold such records on the basis that ASHA promised Mr. Balch that it would not disclose the settlement agreement to the members of the ASHA. ASHA's motion should be denied for a number of reasons.²

II. ARGUMENT

A. **The Court Has Already Considered And Rejected ASHA's Argument**

In its motion for summary judgment, ASHA argued that it should not be required to produce "confidential information that was exchanged with a reasonable expectation of privacy." (ASHA Mot. Summ. J. at 7, 12, 14.) ASHA now argues the same position, *i.e.* that it should not be required to produce records related to Balch's termination because ASHA and Balch had an expectation that those documents would be kept confidential. The Court has already rejected any such argument, finding that

the fact that the legislature . . . included the all-inclusive description of "all books and records" is a clear indication to this Court that it was the intent of the legislature to do exactly what the language of the statute, in its plain and ordinary every day meaning, expressly set forth, *i.e.* that "All books and records of a corporation may be inspected by any member, or his agent or attorney, for any proper purpose at any reasonable time."

(Dec. 2, 2010 Order at 5-6 (emphasis in original).)

Further, the Court found that ASHA could not limit the right of inspection by amending its by-laws in a manner contrary to the statute. *Id.* at 7. If ASHA cannot avoid the statutory mandate that it make "all books and records" available for production by amendment of its by-laws, it certainly cannot avoid that mandate through a written agreement with a third party.

² ASHA's election to delay filing the underlying motion until *after* the date of the document inspection was merely an effort to further delay complying with its obligations under the statute and this Court's previous decisions. The Members' should not be forced to continue incurring additional costs due to ASHA's delay tactics. ASHA should be required to produce, at ASHA's expense, all of the documents that were withheld during the August 15 inspection.

Because the Court has already considered and rejected ASHA's argument that it can protect those documents "exchanged with a reasonable expectation of privacy," ASHA cannot now re-litigate that point. *See Moorhead v. Dodd*, 265 S.W.3d 201, 203-04 (Ky. 2008) ("The rule that issues which have been once litigated cannot be the subject matter of later action is not only salutary but necessary in the administration of justice.") (quoting *Hays v. Sturgill*, 193 S.W.2d 648, 650 (Ky. 1946)).

B. ASHA Cannot Circumvent The Kentucky Legislature's Clear Mandate That "All Books And Records" Be Produced

Even if ASHA's argument had not previously been rejected by this Court, the motion still fails on the merits. Without citation to any legal authority, ASHA contends that it should be permitted to withhold the records because of a confidentiality clause in the settlement agreement entered into between ASHA and Blach. Put simply, ASHA cannot circumvent the mandates of the Kentucky Legislature simply by signing an agreement with a third party saying that it will keep the documents at issue "confidential." As the Court held, ASHA's attempt to shield documents, even through its own by-laws, "is invalid and carries no force or affect as it is in direct violation of the statute." (Dec. 2, 2010 Order at 7.) To hold otherwise would lead to the absurd result that a non-profit organization can avoid any statutory duties simply by entering agreements that contradict those duties. Such a position is not, and cannot be, the law. *See, e.g., Rogers v. Wheeler*, 864 S.W.2d 892 (Ky. 1993) (voiding an agreement between a car dealership and its customer on the ground that it violated Kentucky vehicle registration statutes); *Hanks v. McDanell*, 210 S.W.2d 784, 246-47 (Ky. 1948) ("An agreement is against public policy if it . . . violates some public statute . . .").

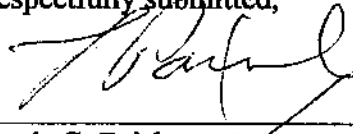
C. ASHA Has Not Proven That Disclosure Of The Settlement Agreement With Balch Would Be A Violation Of The Confidentiality Clause

Disclosure of the documents to the Members does not even violate the confidentiality clause. ASHA admits that it was a party to this agreement. The Members, by Kentucky statute, are part of ASHA. Thus, disclosure to the Members would not be disclosure to a non-party. In addition, most confidentiality clauses contain an exception that acknowledges that the documents may be produced if required by court order or other legal obligation. ASHA failed to disclose whether the settlement agreement at issue contains such a routine clause. Finally, ASHA has had ample time to inform Mr. Balch of the order requiring the production of the Balch agreement unless ASHA prevails on this motion, and Mr. Balch has not appeared to object to the production of the agreement.

CONCLUSION

For the foregoing reasons, ASHA's Motion to Withhold Records should be denied, and ASHA should be ordered to produce all records relating to Alan Balch's termination of employment with ASHA, including without limitation the settlement agreement, immediately.

Respectfully submitted,



Lewis G. Paisley
Culver V. Halliday
Stephen A. Houston
STOLL KEENON OGDEN PLLC
2000 PNC Plaza
500 West Jefferson Street
Louisville, Kentucky 40202

Counsel for Defendants

CERTIFICATE OF SERVICE

A copy of the foregoing Response in Opposition to ASHA's Motion to Withhold Records was served via first class United States Mail, postage prepaid, to the following on the 17th day of August, 2011:

Edward H. Stopher
Jefferson K. Streepey
Jeff W. Adamson
Boehl Stopher & Graves, LLP
400 West Market Street, Suite 2300
Louisville, KY 40202-3354

and

James B. Cooper
Boehl Stopher & Graves LLP
444 West Second Street
Lexington, Kentucky 40507-1009



Counsel for Defendants

752080.1