

COMMONWEALTH OF KENTUCKY  
FAYETTE CIRCUIT COURT  
22<sup>nd</sup> JUDICIAL CIRCUIT  
DIVISION 3

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AMERICAN SADDLEBRED  
HORSE ASSOCIATION, INC.,

Plaintiff

v.

EDWARD R. BENNETT, et al.

Defendants

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Case No. 09-CI-05292

**DEFENDANTS' MOTION TO  
HOLD ASHA IN CONTEMPT  
OF COURT AND SANCTION  
ASHA FOR ITS CONDUCT**

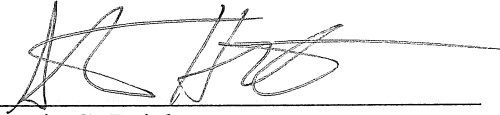
**NOTICE**

The parties will please take notice that the Defendants shall present the following motion to be heard before the Fayette Circuit Court on Friday, September 30, 2011, at 8:30 a.m. or as soon thereafter as counsel may be heard.

**MOTION**

Defendants Edward R. Bennett, Carl T. Fischer, Jr., Kris Knight, Tom Ferrebee, Simon Fredericks, M.D. and Lynn W. Via, move this Court to, after holding an evidentiary hearing, grant the Members' motion and hold ASHA in contempt and order it to immediately and without further delay comply with this Court's previous orders, and impose a monetary sanction against ASHA in an amount equal to the costs, including attorneys' fees, incurred by the Members as a result of the lawsuit. A memorandum in support of this motion is attached.

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 Defendants' Motion To Hold ASHA In Contempt of Court And To Sanction ASHA For Its Conduct was served via first class United States Mail, postage prepaid, to the following on September 22, 2011:

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

and

James B. Cooper  
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444 West Second Street  
Lexington, Kentucky 40507-1009



*Counsel for Defendants*

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COMMONWEALTH OF KENTUCKY  
FAYETTE CIRCUIT COURT  
22<sup>ND</sup> JUDICIAL CIRCUIT  
DIVISION 3

<p><b>AMERICAN SADDLEBRED HORSE ASSOCIATION, INC.,</b></p> <p style="text-align:center"><b>Plaintiff</b></p> <p><b>v.</b></p> <p><b>EDWARD R. BENNETT, et al.</b></p> <p style="text-align:center"><b>Defendants</b></p>	<p style="text-align:right"><b>Case No. 09-CI-05292</b></p> <p style="text-align:center"><b>MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO HOLD ASHA IN CONTEMPT OF COURT AND TO SANCTION ASHA FOR ITS CONDUCT</b></p>
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**I. INTRODUCTION**

The Court entered its Final Judgment and Order granting the Defendant members' ("Members") motion for summary judgment and requiring Plaintiff American Saddlebred Horse Association ("ASHA") to produce its records for inspection by the Members on January 6, 2011. After much delay, the Members' inspection of ASHA records took place on August 15, 2011. At that time, ASHA's counsel advised the Members' attorneys for the first time that ASHA had destroyed significant electronically stored records during the pendency of this litigation, including records stored on the computers of ASHA's highest ranking employees.<sup>1</sup> ASHA's counsel also advised the Members that ASHA did not have a server or backup files which would assist in recovering the records deleted from ASHA computers.

In an attempt to avoid bringing this matter before the Court, the Members agreed to allow ASHA a reasonable amount of time to investigate the circumstances surrounding the destruction

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<sup>1</sup> Apparently, this only came to light when ASHA was compelled to produce its electronic records in their native format.

of records and to make a good faith attempt to retrieve all of the records that could be recovered. Instead of advising the Members of the results of its investigation, and producing the records that could be recovered, ASHA has just advised the Members that it has only now identified a computer consultant that may assist it with a search for the deleted records. Apparently, ASHA is not aware that among the records it has produced are emails showing that, immediately before it filed this lawsuit, ASHA engaged a computer forensic consultant to assist in creating backups of its database, servers and email, apparently in anticipation of filing the lawsuit. In other words, unless those backups were destroyed along with the originals, ASHA should have had no difficulty in providing without delay the records deleted from its computers.

Accordingly, the Members move the Court to hold ASHA in contempt. The Members request that this Court schedule an evidentiary hearing of the motion at a time convenient for the Court. The hearing will allow for the parties to introduce evidence upon which the Court may base its ruling.

## II. ARGUMENT

### A. ASHA Had A Duty To Preserve All Records

The sole issue in this case was whether ASHA was required to produce all of its records for inspection by its members or only a certain portion of its records. From the outset of this litigation, ASHA made clear that it understood that all of its records would be subject to inspection by its members under KRS § 273.233 unless it could convince this Court otherwise.<sup>2</sup> In its summary judgment brief, ASHA confirmed its understanding that all of its records were at

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<sup>2</sup> See ASHA's Complaint, Prayer for Relief ¶ 2.

issue in this litigation.<sup>3</sup> There can be no doubt that ASHA understood that all of its records were relevant to this litigation.

Kentucky courts have made clear that a duty to preserve evidence arises where there is a pending litigation and the evidence would be relevant, *Tinsley v. Jackson*, 771 S.W.2d 331 (Ky. 1989), or if an attorney reasonably can expect that an adversary will be seeking all or portions of potentially relevant evidence, *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988). Counsel for ASHA advised its “directors, officers, managers, and employees . . . to preserve all relevant documents for purposes of this litigation.”<sup>4</sup> Furthermore, ASHA’s own Document Retention and Destruction Policy (adopted July 6, 2009) states that “[d]ocument destruction will be suspended immediately upon any indication of an official investigation or when a lawsuit is filed or appears imminent.”<sup>5</sup> That policy confirms that it “covers all records and documents, regardless of physical form (including electronic documents) . . . .”<sup>6</sup> Accordingly, ASHA was aware of its duty to preserve all relevant records, and it knew that all of its records were relevant to this action.

**B. ASHA Admitted That It Destroyed Relevant Records During This Litigation**

Despite advice from its counsel, and in direct contravention of its document retention policy, ASHA destroyed relevant records during this litigation. ASHA scheduled the Members to appear at ASHA’s headquarters on August 15, 2011, to inspect and copy the requested records, which included certain categories of email communications. Upon arrival at ASHA’s headquarters with a team for inspection, the Members were informed for the first time of the

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<sup>3</sup> See ASHA’s Memorandum in Support of Its Motion for Summary Judgment, at pp. 1, 16, 17 and 22.

<sup>4</sup> See June 25, 2011 letter from Adamson to Houston, p.8, ¶ 16, attached as Exhibit 1.

<sup>5</sup> ASHA’s Document Retention and Destruction Policy, Section VI, attached as Exhibit 2.

<sup>6</sup> *Id.* at Section I.

destruction of large amounts of relevant electronic records. Specifically, the Members were informed by ASHA's counsel that (1) ASHA deleted all email of ASHA's highest ranking employee, Alan Balch, in early 2010, when Mr. Balch resigned; and (2) ASHA's current executive director, an attorney, printed email she believed to be appropriate for inspection and subsequently deleted all email from her computer in 2011. ASHA's counsel also represented to the Members that ASHA did not have servers or backup copies of its files.

By letter dated August 17, 2011, ASHA advised the Members that, not only did ASHA delete all of Mr. Balch's email when he resigned, ASHA subsequently "recycled" Mr. Balch's computer.<sup>7</sup>

**C. ASHA Has Not Made A Good Faith Effort To Produce The Records It Says Were Destroyed**

Following the revelation that ASHA destroyed relevant records during the pendency of this litigation, ASHA advised the Members that it would retain consultants to assist in recovering a portion or all of the records that were destroyed. However, after more than a month, ASHA informed the Members that the only progress it had made toward recovering the records was to identify a company that could assist in the search.<sup>8</sup>

In the meantime, the Members have discovered evidence which indicates that ASHA did backup its files, including email, immediately before it filed this lawsuit. An email from ASHA's Bookkeeper, Joan Jones, to ASHA's current Executive Director, Paula Johnson states that "[d]irectly before the lawsuit was filed, Alan [Balch] hired a firm called The Cipher Group LLC to do some electronic forensic work for us."<sup>9</sup> Ms. Jones told ASHA's President, Judith

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<sup>7</sup> August 17, 2011 letter from Streepey to Houston attached as Exhibit 3.

<sup>8</sup> September 19, 2011 letter from Adamson to Houston attached as Exhibit 4.

<sup>9</sup> September 28, 2010 email from Ms. Jones to Ms. Johnson attached as Exhibit 5.

Werner, that she thought Mr. Balch retained The Cipher Group LLC (“Cipher Group”) to “protect[] emails or something . . . ,” and she asked Ms. Werner if ASHA would need Cipher Group’s services in the future “since ASHA is waiting on a ruling now . . . .”<sup>10</sup> Moreover, the Cipher Group assisted ASHA’s technology manager, William Wood, Jr., in making backups of ASHA’s database and server immediately before ASHA initiated this lawsuit.<sup>11</sup> Mr. Wood also conferred with the Cipher Group regarding “acquiring copies of all emails contained in the Google Apps hosted email service.”<sup>12</sup>

ASHA has not acknowledged the existence of these backup files. Indeed, ASHA has represented that there are no backup files. Moreover, it is perplexing that ASHA has not consulted the Cipher Group to determine if the backup it performed preserved at least some of the information that ASHA destroyed. The backups and copies of ASHA’s records should be an easy source for recovering some of the destroyed records, unless the backups and copies were also destroyed. Instead, ASHA proposes that it use an entirely different consulting company to search for the destroyed records. The Members may have never learned of the Cipher Group’s assistance in creating backups of ASHA’s files if ASHA had not been forced to produce emails in their native format.

**D. ASHA Should Be Held In Contempt And Sanctioned For Its Conduct**

The actions of ASHA exhibit a flagrant disregard for this litigation, this Court’s orders and ASHA’s obligations to its members. ASHA filed this lawsuit. The sole issue was whether ASHA would ultimately be required to produce its records for inspection by the Members. As

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<sup>10</sup> September 9, 2010 email from Ms. Jones to Ms. Werner attached as Exhibit 6.

<sup>11</sup> September 21, 2009 email from Cipher Group to William Wood, Jr. attached as Exhibit 7.

<sup>12</sup> *Id.*

discussed above, ASHA knew that it had a responsibility to preserve its records during the pendency of this litigation, but it failed to do so. The records that were destroyed were those relating to its highest ranking employee who resigned during the pendency of this litigation and entered into a settlement agreement with ASHA. ASHA has yet to disclose the precise nature or reasons for negotiating a settlement which required ASHA to pay \$50,000 plus benefits to an employee who voluntarily resigned. Additional records that were destroyed related to Mr. Balch's replacement, who happens to be an attorney. ASHA's conduct may prevent the members of this non-profit organization from ever discovering the information contained in the records that were destroyed. ASHA destroyed those records in spite of the advice it received from counsel and in direct violation of its own document retention policy. ASHA's egregious conduct warrants civil penalties:

As a general matter, it is beyond question that a party to civil litigation has a duty to preserve relevant information, including ESI [electronically stored information], when that party has notice that the evidence is relevant to litigation or should have known that the evidence may be relevant to future litigation.

*John B. v. Goetz*, 531 F.3d 448, 459 (6th Cir. 2008) (quotation marks and citations omitted). Kentucky courts agree with the Sixth Circuit's analysis. See *Monsanto Co. v. Reed*, 950 S.W.2d 811, 815 (Ky. 1997) (finding that "civil penalties" are appropriate "to counteract a party's deliberate destruction of evidence"). Furthermore, this Court should exercise its inherent authority and award appropriate relief to compel ASHA to comply with its orders and to compensate the Members for ASHA's noncompliance:

A trial court has inherent power to punish individuals for contempt, and nearly unfettered discretion in issuing contempt citations. . . . Contempt is the willful disobedience of—or open disrespect for—the rules or orders of a court. . . . The purpose of a court's exercising its civil contempt powers is to force compliance with its orders or to compensate for losses or damages caused by noncompliance . . . .



*Kentucky Retirement Systems v. Foster*, 338 S.W.3d 788, 800-01 (Ky. App. 2010) (citations omitted).

### III. CONCLUSION

For the foregoing reasons, the Court should, after holding an evidentiary hearing, grant the Members' motion and hold ASHA in contempt and order it to immediately and without further delay comply with this Court's previous orders, and impose a monetary sanction against ASHA in an amount equal to the costs, including attorneys' fees, incurred by the Members as a result of the lawsuit.

Respectfully submitted,



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*Counsel for Defendants*

# **EXHIBIT 1**



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TELEPHONE: 502-589-5980  
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JEFF W. ADAMSON  
EXTENSION 299  
JADAMSON@BSG-LAW.COM

June 25, 2011

VIA ELECTRONIC MAIL AND U.S. MAIL

Mr. Stephen A. Houston, Esq.  
Stoll Keenon Ogden PLLC  
2000 PNC Plaza  
500 West Jefferson Street  
Louisville, KY 40202  
[Stephen.Houston@skofirm.com](mailto:Stephen.Houston@skofirm.com)

Re: American Saddlebred Horse Association, Inc. v. Edward R. Bennett, et al.

Dear Stephen:

We appreciate the opportunity to meet with you and party representative of the Appellee Members, Edward R. Bennett, during the document inspection on June 15, 2011. As a follow up to our late afternoon meeting on June 15, you made several supplemental and additional document requests for "financial records." We mutually agreed that ASHA would outline these requests as we understand them and to advise of ASHA's position on responding to each and every one in a subsequent letter. ASHA representatives and counsel have worked diligently over the last week to honor this agreement as is clearly evident from the enumerated response to each of your requests below.

We further understood you and your representatives were not able to review all of the ASHA documents provided for inspection and copied for your convenience on June 15. We agreed to make the documents previously produced available for a continued inspection at ASHA's corporate offices upon a mutually agreeable date and time.

444 WEST SECOND STREET  
LEXINGTON, KENTUCKY 40507-1040

TELEPHONE: 859-252-6721  
FACSIMILE: 859-253-4445

410 BROADWAY  
PADUCAH, KENTUCKY 42001

TELEPHONE: 270-442-4369  
FACSIMILE: 270-442-4689

137 MAIN STREET, SUITE 200  
PIKEVILLE, KENTUCKY 41502

TELEPHONE: 606-432-9670  
FACSIMILE: 606-432-9680

ELSBY EAST · SUITE 204, 400 PEARL STREET  
NEW ALBANY, INDIANA 47150

TELEPHONE: 812-948-5053  
FACSIMILE: 812-948-9233

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Stephen A. Houston, Esq.  
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We are now in receipt of your correspondence received yesterday, June 24, 2011, which frankly is unexpected and grossly misrepresents the discussion we had at the June 15 meeting. This letter under your signature contains numerous misstatements and errors of fact and purposely omits any reference to the mutual understanding we reached at the end of the day on June 15. Your letter is written to inflame the matter rather than to further the Appellee Members' stated purpose for their inspection of ASHA's books and records. ASHA will address and correct each of these errors and omissions directly in a subsequent letter to you early next week.

With regard to the response below, we have categorized your requests made in the late afternoon of the June 15 document inspection as either a "supplemental" or an "additional" request. A "supplemental request" is one which derives from the previously enumerated requests served upon ASHA in the pending litigation and ordered produced under the Opinion, Order and Judgment of the Fayette Circuit Court entered on December 2, 2010 or the Court's Final Judgment and Order of January 6, 2011 ("Fayette Circuit Court orders"). An "additional request" is a request that was never made in the pending litigation and is therefore outside the scope and relevant time period of the Fayette Circuit Court orders. ASHA will consider additional requests for books and records only upon a written demand which states with particularity the documents sought to be examined and a proper purpose for each request pursuant to KRS §273.233.

1. A copy of the most current independent audit of ASHA.

ASHA has in the past made available to its members the most current audited financials either by publication in its magazine or by placing the information on its website. Consistent with its past practice, ASHA will again publish its financials audited by Dean, Dorton, Allen, Ford, PLLC.

In response to the request herein, we are enclosing the Audit Report and related Financial Statements of ASHA for the years ended Dec. 31, 2010 and 2009 as Exhibit ("Ex.") A, bates-labeled ASHA 024049-024065, to this correspondence. Please note with particular attention the "Independent Auditors Report" as prepared by Dean, Dorton, Allen, Ford, PLLC. Dean, Dorton, Allen, Ford, PLLC began auditing the financial results of ASHA in 2010. ASHA changed audit firms last year in conformity with the generally accepted practice of rotating auditors on a periodic basis. Dean, Dorton, Allen, Ford, PLLC is a significantly larger audit firm than previously used by ASHA, with offices in Lexington and Louisville, and has several horse-related and nonprofit organizations as audit clients.

We also call your attention to the specific language in the "Independent Auditor's Report" section of the audit. The report states that "[o]ur responsibility is to express an opinion on these financial statements based on our audit." The report further states:

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We conducted our audit in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement....We believe that our audit provides a reasonable basis for our opinion.

The report concludes with “[i]n our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of American Saddlebred Horse Association, Inc. as of December 31, 2010 and the results of its operation and its cash flows for the year then ended in conformity with accounting principles generally accepted in the United States of America.”

We believe the Audit Report and related “unqualified opinion” by the independent auditors helps confirm for the entire membership of ASHA that the association is managed properly and addresses the “oversight questions” put forth by the Appellee Members as the stated purpose for their document inspection.

2. A copy of minutes from the ASHA Board of Directors meetings from January 1, 2006 to the present.

Copies of minutes from the ASHA Board of Directors meetings are available to all ASHA members in downloadable and printable format from ASHA’s website, [www.asha.net](http://www.asha.net), and are equally available to the Appellee Members. ASHA stands ready to assist the Appellee Members if they encounter any problems obtaining these records on their own.

3. E-mail correspondence between the former ASHA Executive Director, Alan Balch, and members of the ASHA Executive Committee.

ASHA produced these records at the June 15 inspection. ASHA will conduct a second search of Mr. Balch’s e-mails to the best of its ability in order to confirm all such documents have been produced. If any additional e-mail correspondence is discovered, ASHA will make copies available at the continued inspection.

4. Any employment contracts with the current ASHA employees and staff.

ASHA will provide copies of such employment contracts, if any, for the relevant time period at the agreed upon date and time for the continued inspection.

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5. Attachments to the e-mails reflecting, regarding and relating to correspondence among members of the ASHA executive committee between January 1, 2006 and today.

ASHA will conduct a search for the attachments to e-mails previously produced at the June 15 document inspection and will make them available for the continued inspection at ASHA's corporate offices upon a date and time mutually agreed upon by the parties.

6. An electronic download of the ASHA "financial records" from January 1, 2006 to present.

Members of ASHA's financial management and technology staff spent two full business days attempting to comply with this request. Upon review of the downloaded files, however, ASHA must object to the production of all financial records in this "native" format for numerous reasons. First, it is ultimately more costly and cumbersome to redact personal identifying data, such as social security numbers, and bank account numbers during the process of generating the data in this format than it is to print the documents from the system and perform the redactions manually.

Second, the downloaded file or files will not contain many of the supporting documentation, e.g., invoices, cancelled checks, and the like, that the Appellee Members have been requesting. Thus, the statement in your June 24, 2011, letter that "[i]f ASHA produces all of the records in their native format...the Members' may have few, if any, follow up requests of ASHA" cannot be relied upon. ASHA will ultimately be faced with yet more demands from you and your clients for additional records to support the data provided in the "native" format.

Third, ASHA is obligated to produce books and records that are true and accurate copies of the original documents. ASHA cannot ensure the ongoing integrity of the data after it is produced in this format. ASHA will produce financial records in hard copy format in compliance with the Fayette Circuit Court orders and pursuant to a member's written request supported by a proper purpose, but ASHA simply cannot produce books and records in a format that is not secure.

Lastly, with respect to producing downloaded financial data from January 1, 2008 to present, this request constitutes an "additional request" not contemplated under the Fayette Circuit Court orders. The Fayette Circuit Court order of December 2, 2010, provides that the Appellee Members "are entitled to inspect and copy any and all books and records of the ASHA and make copies thereof at a reasonable expense pursuant to their enumerated written request (sic) previously submitted." See Opinion, Order and Judgment, entered December 2, 2010, at page 7. Your clients' request for financial data from January 1, 2008 to present in its native format was not included in the "enumerated written request (sic) previously submitted."

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ASHA personnel and members of the Board of Directors have spent countless hours preparing to meet the requests of the Appellee Members at the document inspections held prior to this litigation and on June 15, 2011. All financial records from years 2006 and 2007 were reviewed, redacted and produced in hard copy at the June 15 inspection as requested by the Appellee Members in the pending litigation and pursuant to the Fayette Circuit Court orders. Please understand your request for the same data in yet another format, as well as your additional request for years 2008 to present outlined above, requires ASHA to take more time away from serving the entire ASHA membership and preparing for the most important showcase for the Saddlebred breed, the 2011 World Championship Horse Show, August 21 through 27, 2011.

Accordingly, so as not to be taken further away from its charitable and educational purpose, ASHA must now inquire on behalf of its entire membership whether the Appellee Members have been provided enough financial data and other records to confirm the association is being operated in a manner consistent with its educational and charitable purpose. Specifically, ASHA requests that the Appellee Members set forth a proper purpose for this additional request for three more years worth of data for which the most current 2010 audited financials have been provided and to explain why the two years of data, from 2006 to 2007, already provided does not allow the Appellee Members enough information to confirm that ASHA is managed properly. KRS §273.233; See also, Nozik v. Mentor Lagoons Yacht Club, 678 N.E.2d 948 (Ohio Ct. App. 1996) (member of a non-profit corporation did not meet the prerequisite requiring the non-profit corporation to turn over the book and records of the club); Towle v. Robinson Springs Corporation, 719 A.2d 880 (Vt. 1998) (the Court held under a statute containing a proper purpose provision that a purpose based upon claims of mismanagement must be supported by evidence and cannot be used as a means of harassment).

7. “Payroll reports” from January 1, 2006 to present.

ASHA attempted to comply with the Appellee Members’ requests and the Fayette Circuit Court orders by providing annual payroll records by individual for the years in question. The Appellee Members now request bi-weekly payroll records, time cards and tracking of vacation and other time of all ASHA employees. This is a supplemental request that will take ASHA staff substantial time to assemble. Nevertheless, in an effort to comply with the Fayette Circuit Court orders and to accommodate the Appellee Members’ request for “financial records,” ASHA will provide such “payroll reports” at an agreed upon date and time for the continued inspection.

With regard to “payroll reports” from January 1, 2008 to present, ASHA requests that the Appellee Members set forth a proper purpose as mandated under KRS §273.233 to warrant taking ASHA and its employees away from the association’s charitable and educational purpose to comply with this additional request.

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8. Employee attendance and vacation records of the ASHA employees.

ASHA will produce copies of employee attendance and vacation records "pursuant to [the] enumerated written request (sic) previously submitted." ASHA objects to this request generally on the grounds that it is not limited in time or scope. Accordingly, to the extent the Appellee Members' request for employee attendance and vacation records exceeds the scope and relevant time period of the Fayette Circuit Court orders, ASHA requests that the Appellee Members set forth a proper purpose, as mandated by KRS §273.233.

9. ASHA "financial records" from January 1, 2008 through January 1, 2011.

The Appellee Members' request for "financial records" from January 1, 2008 through January 1, 2011, are additional requests not contemplated under the Fayette Circuit Court orders to produce ASHA books and records "pursuant to [the] enumerated written request[s] previously submitted." Accordingly, ASHA requests that the Appellee Members set forth a proper purpose for the additional request for all "financial records" from January 1, 2008 through January 1, 2011, as required under KRS §273.233.

10. "Board packets" provided to the Directors of ASHA prior to meetings of the ASHA Board of Directors from January 1, 2006 to present.

ASHA will produce portions of the ASHA "Board packets" from January 1, 2006 to January 1, 2008, which contain information not previously provided under the auspices of other requests. ASHA considers this to be a supplemental request and it will be met at the agreed upon date and time for the continued inspection.

With regard to "Board packets" distributed prior to meetings of the ASHA Board of Directors from January 1, 2008 to present, this request constitutes an additional request not contemplated under Fayette Circuit Court orders. Your clients' request for "Board packets" distributed prior to meetings of the ASHA Board of Directors from January 1, 2008 to present was not impliedly or expressly included in the "enumerated written request (sic) previously submitted."

Again, in order to allow ASHA, its Board of Directors and personnel to focus on its charitable and educational purpose, ASHA must inquire on behalf of its entire membership whether the Appellee Members have been provided enough financial data and other records, including the most current independent audit, to determine if the association is being operated in a manner consistent with its educational and charitable purpose. Please set forth a proper purpose for the additional request for "Board packets" distributed prior to meetings of the Board of Directors from January 1, 2008 to present as required under KRS §273.233.



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11. All agreements between ASHA and its employees which permit the employee to work outside the Association.

ASHA will provide the employment contracts, if any, at an agreed upon date and time for the continued inspection. For your convenience, attached as Ex. B, bates-labeled ASHA024046-024048, is a copy of the contract between ASHA and USA Equestrian Trust, Inc., (the "Trust"), wherein the Trust agreed to reimburse ASHA for a shared staffperson and for use of shared office space, equipment, supplies and materials.

12. A copy of the resignation of former Executive Director of ASHA, Alan Balch, and any Settlement Agreement reached with him after his resignation.

These documents are outside the scope of the Fayette Circuit Court orders and are the subject of an additional request for which the Appellee Members must state a proper purpose under KRS §273.233.

13. A copy of e-mail correspondence regarding the "Mother Mary" transfer and any e-mail correspondence containing allegations of wrongdoing by members of the ASHA Board of Directors, including potential violations of ASHA and USEF rules by ASHA board members and employees.

ASHA produced e-mail communications exchanged between and among members of the ASHA Board of Directors at the June 15 document inspection. To the extent this request is seeking disclosure of the same documents again, ASHA objects on the grounds that any such response would be duplicative, cumulative and unduly burdensome on ASHA and its membership. With regard to any allegation of wrongdoing by members of the ASHA's Board of Directors, ASHA encourages the Appellee Members to review the sworn testimony of Ms. Jennifer Wasserzug. During this deposition, counsel for the Appellee Members was given ample time to examine Ms. Wasserzug on the "Mother Mary" transfer (referenced by Mr. Bennett at the June 15 document inspection as an example of "violations" of ASHA and USEF rules) and her testimony under oath and penalty of perjury clearly indicates this particular transfer was appropriate and proper under the exigent circumstances. See Deposition of Jennifer Wasserzug, dated April 8, 2010, pp. 20-23.

To the extent this request seeks production of American Saddlebred Registry, Inc. ("Registry") records, ASHA will not produce Registry records at the continued inspection on the grounds that the Registry is not a party to the pending litigation and is therefore not subject to the Fayette Circuit Court orders. As was stated to you and Mr. Bennett at the June 15 inspection, the Registry is a separate and distinct 501(c)(5) non-profit corporation and is governed by its own Board of Directors. The Registry has no members and is not subject to the mandates of KRS

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§273.233. Further, the Registry Board of Directors has not otherwise authorized ASHA to permit its membership access to the Registry records. Stated simply, ASHA does not have the authority to produce these records and the Court could not have compelled the Registry to do so as it was not afforded an opportunity to be heard when the declaratory judgment action was briefed and argued before the Court.

14. All Registry records, including a copy of the "Mother Mary" registry file.

As stated above, ASHA will not produce Registry records at the continued inspection on the grounds that the Registry is not a party to the pending litigation and is therefore not subject to the Fayette Circuit Court orders.

15. The Page One invoice for cost of copies made for inspection by the Appellee Members.

The Appellee Members' request for a copy of "The Page One" invoice is outside the scope of the Fayette Circuit Court order to produce ASHA books and records "pursuant to [the] enumerated written request[s] previously submitted." Accordingly, ASHA requests that the Appellee Members set forth a proper purpose for the additional request for this document, as mandated by KRS §273.233.

16. A copy of the litigation hold letter sent to the ASHA directors, officers, and employees at the outset of this litigation.

This is an additional request and not subject to the Fayette Circuit Court orders. Without waiving this objection, and subject to this objection, ASHA did not issue a litigation hold letter. Rather, counsel for ASHA advised the directors, officers, managers, and employees of the association to preserve all relevant documents for purposes of this litigation.

\*\*\*\*\*

ASHA has provided, or will provide at the continued inspection, all of the financial records necessary for the Appellee Members to conduct their oversight of the Association's business practices and activities. We look forward to completing the continued inspection of documents previously produced and to meet the supplemental requests outlined above. Please advise on dates when you and your clients are available to continue the document inspection at ASHA's corporate offices. Also, we look forward to your response to ASHA's request for a statement of proper purpose for each and every additional document request outlined above.

BOEHL STOPHER & GRAVES, LLP

Stephen A. Houston, Esq.  
June 25, 2011  
Page 9

Yours very truly,

A handwritten signature in black ink, appearing to read 'Jeff W. Adamson', with a long horizontal flourish extending to the right.

Jeff W. Adamson

JWA/jaa

cc: The Honorable Lewis G. Paisley, [lewis.paisley@skofirm.com](mailto:lewis.paisley@skofirm.com)

# **EXHIBIT 2**

# AMERICAN SADDLEBRED HORSE ASSOCIATION

## Document Retention and Destruction Policy

Adopted July 6, 2009

### I. Purpose

This policy provides for the systematic review, retention and destruction of documents received or created by the American Saddlebred Horse Association in connection with the transaction of organization business. This policy covers all records and documents, regardless of physical form (including electronic documents), contains guidelines for how long certain documents should be kept and how records should be destroyed. The policy is designed to ensure compliance with federal and state laws and regulations, to eliminate accidental or innocent destruction of records and to facilitate the organization's operations by promoting efficiency and freeing up valuable storage space.

### II. Document Retention

The organization follows the document retention procedures outlined below. Documents that are not listed, but are substantially similar to those listed in the schedule will be retained for the appropriate length of time.

### III. Corporate Records

Annual Reports to Secretary of State/Attorney General	Permanent
Articles of Incorporation	Permanent
Board Meeting and Board Committee Minutes	Permanent
Board Policies/Resolutions	Permanent
By-laws	Permanent
Construction Documents	Permanent
Fixed Asset Records	Permanent
IRS Application for Tax-Exempt Status (Form 1023)	Permanent
IRS Determination Letter	Permanent
State Sales Tax Exemption Letter	Permanent
Contracts (after expiration)	15 years
Correspondence (general)	3 years

#### Accounting and Corporate Tax Records

Annual Audits and Financial Statements	Permanent
Depreciation Schedules	Permanent
General Ledgers	Permanent

IRS 990 Tax Returns	Permanent
Business Expense Records	7 years
IRS 1099s	7 years
Journal Entries	7 years
Invoices	7 years
Sales Records (box office, concessions, gift shop)	5 years
Petty Cash Vouchers	3 years
Cash Receipts	3 years
Credit Card Receipts	3 years

#### **Bank Records**

Check Registers	Permanent
Bank Deposit Slips	7 years
Bank Statements and Reconciliation	7 years
Electronic Fund Transfer Documents	7 years

#### **Payroll and Employment Tax Records**

Payroll Registers	Permanent
State Unemployment Tax Records	Permanent
Earnings Records	7 years
Garnishment Records	7 years
Payroll Tax returns	7 years
W-2 Statements	7 years

#### **Employee Records**

Employment and Termination Agreements	Permanent
Retirement and Pension Plan Documents	Permanent
Records Relating to Promotion, Demotion or Discharge	7 years after termination
Accident Reports and Worker's Compensation Records	5 years
Salary Schedules	5 years
Employment Applications	3 years
I-9 Forms	3 years after termination
Time Cards	2 years
Donor Records and Acknowledgement Letters	7 years
Grant Applications and Contracts	5 years after completion

#### **Legal, Insurance and Safety Records**

Appraisals	Permanent
Copyright Registrations	Permanent
Environmental Studies	Permanent
Insurance Policies	Permanent
Real Estate Documents	Permanent
Stock and Bond Records	Permanent
Trademark Registrations	Permanent

Leases	6 years after expiration
OSHA Documents	5 years
General Contracts	3 years after termination

#### **IV. Electronic Documents and Records**

Electronic documents will be retained as if they were paper documents. Therefore, any electronic files, including records of donations made online, that fall into one of the document types on the above schedule will be maintained for the appropriate amount of time. If a user has sufficient reason to keep an email message, the message should be printed in hard copy and kept in the appropriate file or moved to an "archive" computer file folder. Backup and recovery methods will be tested on a regular basis.

#### **V. Emergency Planning**

The organization's records will be stored in a safe, secure and accessible manner. Documents and financial files that are essential to keeping the organization operating in an emergency will be duplicated or backed up at least every week and maintained off site.

#### **VI. Document Destruction**

The organization's Executive Secretary is responsible for the ongoing process of identifying those records which have met the required retention period and overseeing their destruction. Destruction of financial and personnel-related documents will be accomplished by shredding.

Document destruction will be suspended immediately upon any indication of an official investigation or when a lawsuit is filed or appears imminent. Destruction will be reinstated upon conclusion of the investigation.

#### **VII. Compliance**

Failure on the part of employees or contract staff to follow this policy can result in possible civil and criminal sanctions against the organization and its employees or contract staff and possible disciplinary action against responsible individuals. The Treasurer will periodically review these procedures with legal counsel or the organization's certified public accountant to ensure that they are in compliance with new or revised regulations.

Source: National Council of Nonprofit Associations

# **EXHIBIT 3**





BOEHL STOPHER & GRAVES LLP

AEGON CENTER · SUITE 2300  
400 WEST MARKET STREET · LOUISVILLE, KENTUCKY 40202-3354

TELEPHONE: 502-589-5980  
FACSIMILE: 502-561-9400

JEFFERSON K. STREEPEY  
PARTNER  
EXTENSION 234  
JSTREEPEY@BSG-LAW.COM

August 17, 2011

**By E-Mail**

Mr. Stephen A. Houston  
STOLL KEENON OGDEN, PLLC  
2000 PNC Plaza  
500 West Jefferson Street  
Louisville, KY 40202-2828

Re: American Saddlebred Horse Association, Inc. v. Edward R. Bennett, et al.

Dear Stephen:

This replies to your August 16, 2011 letter.

ASHA filed a motion on August 15, 2011 to withhold records related to Alan Balch's settlement agreement. There is nothing in the Court's order which required a motion to withhold that agreement be filed prior to the beginning the production of records on August 15, 2011, as you assert. The motion is scheduled for hearing on Thursday, August 18, 2011.

Mr. Balch printed his e-mails responsive to your letter request in 2009. You did not request additional e-mails until after Mr. Balch's employment with ASHA was terminated. Alan Balch's personal e-mails no longer exist in electronic form. Whether he deleted the e-mails, or whether they were deleted in accordance with ASHA's regular policy, ASHA does not know. As you were advised, ASHA does not maintain a server, but rather its e-mails are handled through Google. We have no evidence whatever that Mr. Balch deleted any ASHA records, or that anything is deleted other than his personal e-mails.

444 WEST SECOND STREET  
LEXINGTON, KENTUCKY 40507-0400  
TELEPHONE: 859-252-6721  
FACSIMILE: 859-253-1445

410 BROADWAY  
PADUCAH, KENTUCKY 42001  
TELEPHONE: 270-442-4369  
FACSIMILE: 270-442-4689

137 MAIN STREET, SUITE 200  
PIKEVILLE, KENTUCKY 41502  
TELEPHONE: 606-432-9670  
FACSIMILE: 606-432-9680

ELSBY EAST · SUITE 204, 400 PEARL STREET  
NEW ALBANY, INDIANA 47150  
TELEPHONE: 812-948-5053  
FACSIMILE: 812-948-9233

Mr. Stephen A. Houston  
August 17, 2011  
Page 2


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After Mr. Balch left his computer was reformatted and reused with existing staff. That computer has now been recycled as a part of ASHA's normal upgrade policy, where older computers are recycled when newer technology is purchased. Balch's computer was recycled during one of these routine upgrades. ASHA last recycled computers in August 2010, and it is most likely that the computer Balch used was recycled in April 2010. However, as noted his e-mails would not have been on that computer since ASHA does not host e-mails on its server; they are hosted on Gmail and ASHA does not have archive capability on Gmail.

Paula Johnson printed her e-mails responsive to your June 24, 2011 letter on the weekend after the July 22, 2011 hearing, after being instructed by counsel that e-mails were to be produced in paper form. This was many days before the August 9, 2011 order related to electronic format. Nothing has been lost. All of her responsive e-mails are available in paper form. Note that ASHA's document retention policy provides that e-mails may be retained in hard copy. When Ms. Johnson acted she very much believed she was in good faith complying with the Court order as it then existed.

You were advised in Jeff Adamson's June 25, 2011 letter concerning litigation hold.

Sincerely,

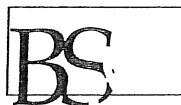


Jefferson K. Streepey

JKS:mfk

cc: Edward H. Stopher (by e-mail)  
Jeffrey W. Adamson (by e-mail)

# **EXHIBIT 4**



BOEHL STOPHER & GRAVES II<sup>p</sup>

AEGON CENTER · SUITE 2300  
400 WEST MARKET STREET · LOUISVILLE, KENTUCKY 40202-3354

TELEPHONE: 502-589-5980  
FACSIMILE: 502-561-9400

Jeff W. Adamson  
Extension 299  
jadamson@bsg-law.com

September 19, 2011

*Via U.S. Mail*

Mr. Stephen A. Houston  
Stoll Keenon Ogden PLLC  
2000 PNC Plaza  
500 West Jefferson Street  
Louisville, KY 40202

Re: American Saddlebred Horse Association, Inc. v. Edward R. Bennett, et al.

Dear Stephen:

As a follow up to our letter to you, dated September 2, 2011, and per the Appellee members' request, we write to provide the enclosed Forensic Analysis Protocol for retrieving any lost e-mails of Alan Balch. Please advise if the Appellee members agree with this proposal. We will proceed with the forensics analysis as soon as we have the Appellee members' agreement on a protocol for conducting it.

With regard to Paula Johnson's e-mails, all requested, non-privileged messages were printed and provided to the Appellee members at the August 15, 2011 document inspection. ASHA is retaining copies of all of these e-mails and will provide them to the Appellee members upon request.

ASHA did not include retrieval of Paula Johnson's e-mails in the proposed Protocol because her employment at ASHA began in late June, 2010 after ASHA had terminated its Outlook messaging system in favor of Google Apps for e-mail. Access to her e-mails has therefore always been strictly through the Chrome browser to the hosted Google Apps page

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TELEPHONE: 859-252-6721  
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TELEPHONE: 270-442-4369  
FACSIMILE: 270-442-4689

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NEW ALBANY, INDIANA 47150

TELEPHONE: 812-948-5053  
FACSIMILE: 812-948-9233

BOEHL STOPHER & GRAVES, LLP

Stephen A. Houston  
September 19, 2011  
Page 2

ASHA maintains at <http://mail.asha.net>. None of these messages has ever been accessed using Outlook, Outlook Express, Thunderbird or any other such software client. Due to these circumstances, all of Paula Johnson's e-mail messages remain on Google's servers and have never been downloaded to a hard drive or any computer. As per Google's policy on the deleting of messages, once they are deleted, they are unrecoverable from a user standpoint. The parties may attempt to obtain these e-mails via an out-of-state subpoena issued to Google, but Google is unlikely to respond given the standard agreement with its users.

Yours very truly,

A handwritten signature in black ink, appearing to read "Jeff Adamson", written in a cursive style.

Jeff W. Adamson

JWA/jaa

cc: Hon. Lewis G. Paisley

## **Forensic Analysis – Project Overview**

**Requested Service:** Examine the personal computer previously used by Alan F. Balch during his employment with American Saddlebred Horse Association, Inc (ASHA). ASHA requests a comprehensive report on any e-mail correspondence that might still exist on the PC. It is suspected that all active files and correspondence which might have existed on the computer are purged or removed as part of ASHA standard policy with re-issuing computers internally.

**Acquisition Procedure:** The original PC will be turned over to a forensic investigator onsite. The original device will be inspected and a detailed chain of custody and evidence intake forms completed and signed on-site. The investigator will create a dual copy forensic image of the hard drive from the original PC. The investigator will use a write-blocking, forensic imaging device to generate logs of all activity during the collection phase. A pristine copy will be sealed and stored at the investigators secure facility. A working copy will also be generated for use for further evaluation.

**Analysis Procedure:** An examination computer will be prepared by the forensic examiner in our secure facility. The examiner will utilize industry accepted software to inspect the computer image for any e-mail correspondence originally sent or received by Alan F. Balch during his employment. Any and all positive hits will be reported and turned over to Boehl Stopher & Graves for review.

**Search Criteria:** the examiner will follow these steps to identify potential e-mail correspondence sent or received by Alan F. Balch during his employment:

- 1) Any mail store existing on the forensic image will be identified and inspected for ownership. A date filter will be applied to determine if any of the messages fall within the employment tenure.
- 2) The examiner will create a word index from the extractable text that is associated with the active files on the forensic image. The word index will then be searched against Alan F. Balch's e-mail address. A date filter will be applied to determine if any of the messages fall within the employment tenure.
- 3) Positive Hits will be reported and provided in native format to Boehl Stopher & Graves for review.

# EXHIBIT 5

## Houston, Stephen

---

From: Joan Jones [j.jones@asha.net]  
Sent: Tuesday, September 28, 2010 3:27 PM  
To: p.johnson@asha.net  
Subject: Re: Question

Will do.

Joan

On Tue, Sep 28, 2010 at 3:09 PM, Paula Johnson <p.johnson@asha.net> wrote:

Wait until the court issues its opinion. P

-----Original Message-----

From: [j.jones@asha.net](mailto:j.jones@asha.net)  
To: Paula Johnson  
Sent: Sep 28, 2010 1:37 PM  
Subject: Question

Paula,

Directly before the lawsuit was filed, Alan hired a firm called The Cipher Group LLC to do some electronic forensic work for us. I don't even know what they were doing or looking for, but we paid them \$5000 retainer. We still have a balance of \$1,548.75 yet on the retainer. Do you think we'll ever need this again or shall I request the refund?

I was going to handle this earlier but Judy suggested I run this past you.

What say you?

--

Joan Jones  
Bookkeeper  
American Saddlebred Horse Assn. &  
American Saddlebred Registry  
4083 Iron Works Parkway  
Lexington, KY 40511  
859-259-2742, Ext. 318  
[j.jones@asha.net](mailto:j.jones@asha.net) <<mailto:j.jones@asha.net>>

Sent via BlackBerry by AT&T

--

8/19/2011



# **EXHIBIT 6**

## Houston, Stephen

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**From:** Joan Jones [j.jones@asha.net]  
**Sent:** Thursday, September 09, 2010 10:45 AM  
**To:** Judith Werner  
**Subject:** Question

Judy,

Do you remember the company Alan contracted with called The Cipher Group LLC who did something for us (never really was sure what they did), but I think it had to do with protecting emails or something? We paid this company a retainer fee of \$5,000. We still have a balance of \$1,548.75 left from the \$5,000. I contacted Mr. Cross from that company, and he told me to send him an email requesting the refund and to state that we no longer needed his services, that this case was closed.

Since ASHA is waiting on a ruling now, do you think we will need this service in the future? They have done nothing since September, 2009, so I would guess we would have used them by now, don't you think?

What say you?

--

Joan Jones  
Bookkeeper  
American Saddlebred Horse Assn. &  
American Saddlebred Registry  
4083 Iron Works Parkway  
Lexington, KY 40511  
859-259-2742, Ext. 318  
[j.jones@asha.net](mailto:j.jones@asha.net)

# EXHIBIT 7

## Houston, Stephen

---

**From:** Jonathan [jcross@ciphergroup.net]  
**Sent:** Monday, September 21, 2009 3:04 PM  
**To:** 'William Wood Jr'  
**Cc:** 'Alan Balch'  
**Subject:** RE: ASHA Technology

Excellent, please hold in your office, and in your custody, ( don't give them to anyone) both the backups. All the steps you are taking will make the time and cost, (IF litigation happens), much reduced.

If nothing else this will also provide you with a platform for a litigation preparedness plan in the future.

---

**From:** William Wood Jr [mailto:w.wood@asha.net]  
**Sent:** Monday, September 21, 2009 2:30 PM  
**To:** jcross@ciphergroup.net  
**Cc:** Alan Balch  
**Subject:** ASHA Technology

Jonathan,

As per our conversation last week, I made complete backups of both the IBM AS400 database & Windows 2003 Server on Thursday night (Sept 17th). I have both backups in my office. Currently, I am drafting a report of the remote access structure which includes methods, persons involved, security, etc... Additionally I am investigating the best method possible of acquiring copies of all emails contained in the Google Apps hosted email service. I will get back to you soon with results from both these tasks.

Thank you,

William Wood Jr  
Technology Manager  
American Saddlebred Horse Association  
859-259-2742 x 347  
[www.saddlebred.com](http://www.saddlebred.com)