

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

JUN 15 2010

AMERICAN SADDLEBRED
HORSE ASSOCIATION, INC.,

Plaintiff

v.

EDWARD R. BENNETT, et al.

Defendants

Case No. 09-CI-05292

THE MEMBERS' REPLY TO THE ASHA'S
RESPONSE TO THE MEMBERS' CROSS-
MOTION FOR SUMMARY JUDGMENT

Defendants and Counterclaimants Edward R. Bennett, Carl T. Fischer, Jr., Kris Knight, Tom Ferree, Simon Fredricks, M.D. and Lynn W. Via (collectively "Members") tender this reply to the response filed by the Plaintiff American Saddlebred Horse Association, Inc. ("ASHA" or "Corporation") to the Members' cross-motion for summary judgment.¹

I. INTRODUCTION

The Members have asked this Court to declare (1) that KRS § 273.233 should be given its plain meaning and that the Members are entitled to inspect all books and records of the corporation and (2) that the Members are entitled to copies of the corporation's books and records. The ASHA, in its response, argues that as a matter of public policy members of non-profit corporations do not have an interest sufficient to justify a right to inspect the books and records of the corporation. The Kentucky General Assembly obviously disagreed with that

¹ Pursuant to the Scheduling Order dated February 24, 2010, the ASHA filed a motion for summary judgment on April 15, 2010, the Members filed a response to ASHA's motion and a cross-motion for summary judgment on May 14, 2010, and the ASHA filed a response to the Members' motion and reply in support of its motion on June 1, 2010. This is the Members' reply to ASHA's response to the Members' motion. Pursuant to the Scheduling Order, the parties will contact the Court to discuss potential oral arguments.

policy argument because it granted the Members the right to inspect “all books and records of [the] corporation.”² The ASHA is in violation of the plain language of the statute because the ASHA admits that it has refused to allow the Members to inspect books and records of the corporation including, without limitation, compensation records, contracts and records relating to potential violations of corporate rules by ASHA employees and board members.³

II. ARGUMENT

A. **The Plain Language of KRS § 273.233 Entitles Members of Non-Profit Corporations to Inspect All Books and Records of the Corporation**

The plain language of KRS § 273.233 grants members of non-profit corporations the right to inspect “all books and records.” Although the ASHA acknowledges that statutes should be interpreted according to the plain meaning of the language adopted by the legislature, the ASHA wants this Court to insert restrictions that the legislature chose not to include in KRS § 273.233. The legislature did not limit the right of inspection to cover only the books and records required to be maintained by the corporation. Nor did the legislature grant non-profit corporations the right to withhold books and records that they unilaterally deem to be personal, confidential or created with an unfounded expectation of privacy.

Certainly, the Kentucky legislature has established that it is aware of the importance of inspection rights, and it is capable of placing limitations on those rights as it deems appropriate.⁴ For example, the Kentucky legislature chose to place precise limitations on the inspection rights

² KRS § 273.233

³ See Affidavit of ASHA’s former Executive Secretary, Alan Balch, attached as Exhibit 8 to The Members’ Memorandum in Opposition to the ASHA’s Motion for Summary Judgment and in Support of the Members’ Cross-Motion for Summary Judgment (“Members’ MSJ”).

⁴ In its response, the ASHA attempts to re-write the history of the common law right of inspection of books and records by members of a corporation and its impact on the interpretation of KRS § 273.233. The Members’ MSJ provides an accurate description of the common law and its impact on the proper interpretation of KRS § 273.233. See Members’ MSJ, pp. 9-13.

of a member of a for-profit corporation.⁵ It is telling that the Kentucky legislature chose not to place such restrictions on the inspection rights of members of non-profit corporations, and the ASHA's request for this Court to read into the statute such restrictions should be denied.

The Members' MSJ referenced two decisions which discuss statutes that contain language identical or almost identical to KRS § 273.233.⁶ The cases, *Lang v. W. Providers Physician Organization*⁷ and *Patel v. Illinois State Medical Society*,⁸ make clear that language identical to KRS § 273.233 should be interpreted broadly. These two cases reflect the general rule that statutes granting the right of inspection are construed liberally.⁹

B. KRS § 273.233 Provides the Members the Right to Obtain Copies of the Books and Records of the Corporation

The Members are entitled to not only inspect, but also copy the books and records of the corporation pursuant to KRS § 273.233. It is well recognized that the right to inspect includes the right to copy.¹⁰ However, the ASHA argues that members of the non-profit corporation may not copy the corporate books and records. Of course, this disagreement between the ASHA and the Members has been rendered moot by the Kentucky General Assembly. As of July 15, 2010, the effective date of the Kentucky General Assembly's clarification of KRS § 273.233, the

⁵ See KRS § 271B.16-020.

⁶ Members' MSJ pp. 7-8.

⁷ 688 N.W.2d 403 (S.D. 2004).

⁸ 698 N.E.2d 588 (Ill. App. Ct. 1998).

⁹ See Members' MSJ pp. 9-10.

¹⁰ See, e.g., 18A AM.JUR.2D *Corporations* § 338; 5A FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2241 ("The right of a shareholder to make copies, abstracts and memoranda of documents, books and papers is an incident to the right of inspection, being recognized at common law.") (citations omitted); *Kaufman v. The Bryn Mawr Trust Co.*, 28 Pa. D. & C.3d 594, 600-01, 1981 WL 394, at *4 (Pa. Com. P1. 1981); *State v. Jessup & Moore Paper Co.*, 77 A.16 at 19-20 (Del. 1910); *Mickman v. Am. Int'l Processing, LLC*, 2009 WL 2244608 (Del. Ch. July 28, 2009).

statute will read in pertinent part, "All books and records of a corporation may be inspected and copied by any member" ¹¹ After July 15, 2010, there can be no doubt that the Kentucky General Assembly intends for members of non-profit corporations to have the right to inspect and copy the corporation's books and records. ¹²

Rather than accept that its members have the right to inspect and copy the ASHA's books and records, the ASHA is determined to make it as difficult as possible for the members to enforce their rights. The ASHA now argues that, although its members are entitled to receive copies, the ASHA does not have the responsibility to provide the copies. The ASHA contends that the burden is on the members to copy documents by longhand or transport their own copying machine to ASHA headquarters. In short, the ASHA insists that it is not responsible for making copies for its members because the statute does not contain a cost-shifting clause similar to other inspection statutes. It is true that the Business Corporation Act, ¹³ Limited Liability Company Act, ¹⁴ the Kentucky adoption of the Revised Uniform Limited Partnership Act, ¹⁵ the Kentucky Revised Uniform Partnership Act, ¹⁶ and the Kentucky Uniform Limited Partnership Act, ¹⁷

¹¹ It is important to note that the issue regarding the proper interpretation of "all books and records" will not be moot after July 15, 2010. The General Assembly chose to clarify that members of non-profit corporations are entitled to copies and the corporation cannot limit members' inspection and copying rights. However, the General Assembly did not amend the language defining the scope of those members' inspection rights. Accordingly, the right to inspection still covers "all books and records."

¹² See 2010 Acts, ch. 133, § 17, eff. July 15, 2010.

¹³ KRS § 271B.16-030(2) ("The right to copy records under KRS 271B.16-020 shall include, if reasonable, the right to receive copies made by photographic, xerographic, or other means.").

¹⁴ KRS § 275.185(2) ("Upon reasonable written request, a member may, at the member's own expense, inspect and copy during business hours any limited liability company record, where the record is located or at a reasonable location.").

¹⁵ KRS § 362.409(2) ("Records kept under this section may be inspected and copied during ordinary business hours at the reasonable request, and at the expense of any partner.").

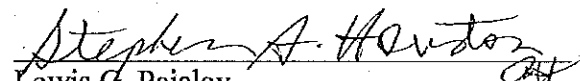
¹⁶ KRS § 362.1-403(2) ("A partnership may impose a reasonable charge, covering the costs of labor and material, for copies of documents furnished.").

provide for cost shifting for copies. It is also true that the Kentucky adoption of the Uniform Partnership Act does not contain a fee shifting provision.¹⁸ Clearly the Kentucky General Assembly is aware of how to provide document inspection rights and how to shift the burden of the copying costs. The Kentucky General Assembly chose not to include a cost-shifting provision in KRS § 273.233. Accordingly, the General Assembly did not intend to shift to the members of non-profit corporations the burden and costs associated with copying.

III. CONCLUSION

For the foregoing reasons, the ASHA's motion for summary judgment should be denied and the Members' motion granted.

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
(502) 333-6000

Attorneys for Defendants

¹⁷ KRS § 362.2-304(8) ("A limited partnership may charge a limited partner or person dissociated as a limited partner who makes a demand under this section reasonable costs of copying, limited to the costs of labor and material."); § 362.2-407(7) ("A limited partnership may charge a person dissociated as a general partner that makes a demand under this section reasonable costs of copying, limited to the costs of labor and material.").

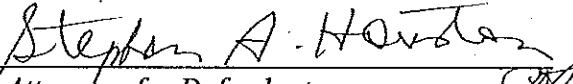

¹⁸ KRS § 362.240 ("The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them.").

CERTIFICATE OF SERVICE

A copy of the foregoing was served on June 15, 2010 by First Class Mail to the following:

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

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


Attorneys for Defendants 

639627.1