

NO. 09-CI-5292

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FAYETTE CIRCUIT COURT
DIVISION 3
HONORABLE JAMES D. ISHMAEL

AMERICAN SADDLEBRED
HORSE ASSOCIATION, INC.

PLAINTIFF

**AMERICAN SADDLEBRED HORSE ASSOCIATION'S
RESPONSE TO THE DEFENDANT MEMBERS' POST-HEARING
MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO
HOLD ASHA IN CONTEMPT OF COURT AND TO SANCTION
ASHA FOR ITS CONDUCT**

v.

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

DEFENDANTS

Comes the Plaintiff/Appellant, American Saddlebred Horse Association (hereinafter "ASHA"), by counsel, and for its Response in Opposition to Defendants'/Appellees' (hereinafter "Defendant members") Post-Hearing Memorandum in Support of Their Motion to Hold ASHA in Contempt of Court and to Sanction ASHA for its Conduct, states as follows:

I. INTRODUCTION

At the close of the October 14, 2011 evidentiary hearing on the Defendant members' motion to hold ASHA in contempt of court and to sanction ASHA for its conduct, this Court requested briefs on the burden of proof required to hold ASHA in contempt; the proposed findings of fact and conclusions of law as to the evidence presented by the two testifying witnesses at the hearing; the proper remedy, if any; and any supplemental matter the parties want the Court to consider before ruling on the motion. Defendant members' motion is one for indirect criminal contempt, not civil contempt. Therefore, to hold ASHA in contempt for the conduct alleged in their motion and to impose the remedy suggested in Defendant members'

post-hearing memorandum the Court must find that the Defendant members elicited evidence at the October 14, 2011 hearing sufficient to prove all elements of contempt - willful disobedience toward or open disrespect for, the rules or orders of a court – beyond a reasonable doubt. The burden to make this showing rests solely on the Defendant members. Moreover, since the remedies proposed in the Defendant members post-hearing memorandum are “serious,” ASHA is also entitled to a jury trial if it so requests.

As is clear from the testimony of the two witnesses called to testify at this Court’s October 14, 2011, evidentiary hearing, the Defendant members failed to prove beyond a reasonable doubt that any books and records of ASHA requested in this litigation were destroyed, altered or otherwise made unavailable for inspection in “willful disobedience toward or open disrespect for, the orders or rules of this Court.” In fact, Eleanor Joan Jones (“Ms. Jones”) and William Wood, Jr. (“Mr. Wood”) both unequivocally testified that neither they, nor anyone else at ASHA to their knowledge, deleted, altered or destroyed books and records of the ASHA during the pendency of this litigation. Instead, they acknowledged the existence of ASHA’s Document Retention and Destruction Policy, which was adopted four months prior to the commencement of this litigation (in July 2009), and testified under oath that they and everyone else at ASHA, including the former Executive Director of ASHA, Alan F. Balch (“Mr. Balch”), kept and maintained all books and records in accordance with ASHA’s Document Retention and Destruction Policy.¹

For these reasons, the Defendant members’ motion to hold ASHA in contempt and to sanction ASHA for its conduct must be denied in its entirety. As for a remedy, ASHA respectfully requests this Court to find that ASHA has satisfied the Court’s final judgment and

¹ See ASHA Document Retention and Destruction Policy, adopted July 6, 2009, attached hereto as Exhibit (“Ex.”) 1.

order of January 6, 2011 and to relieve the parties from further proceedings in this Court so that they may proceed efficiently and expeditiously with the appeal currently pending in the Kentucky Court of Appeals. ASHA further requests that its proposed findings of fact and conclusions be entered therewith.²

II. BURDEN OF PROOF

Under Kentucky law, the contempt at issue here is “indirect criminal contempt”, not civil contempt as the Defendant members suggest. A beyond a reasonable doubt standard therefore applies. The Defendant members’ discussion about “clear and convincing evidence” and “preponderance of the evidence” standards is wholly inapposite.³

Contempt can be characterized as “civil or criminal in nature.”⁴ Whether contempt is civil or criminal depends upon the character of the conduct and the purpose for the sanction sought.⁵

Civil contempt is “the failure ... to do something under order of court, generally for the benefit of a party litigant.” The U.S. Supreme Court has held that because those cited with contempt “carry ‘the keys of their prison in their own pockets,’” the offense is civil rather than criminal contempt. The purpose of holding one in civil contempt is **to compel some action.**

By contrast, criminal contempt is conduct that demonstrates disrespect toward the court, obstructs justice, or brings the court into disrepute. “If the court’s **purpose is to punish**, the sanction is criminal contempt.”⁶

² See Proposed Findings of Fact and Conclusions of Law, attached hereto as Ex. 2.

³ Even if the Court were to find that the proper standard is clear and convincing evidence or preponderance of the evidence, the Defendant members have failed to make the required showing under these two standards as well.

⁴ Kentucky River Community Care, Inc. v. Stallard, 294 S.W.3d 29, 31 (Ky. App. 2008).

⁵ Id.; see also, International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 827 (1994).

⁶ Stallard, 294 S.W.3d at 31. (emphasis in original).

Criminal contempt can be further characterized as either direct or indirect. Direct criminal contempt “involves an act committed in the presence of the court,” while indirect criminal contempt “is a violation that ‘is committed outside the presence of the court and requires a hearing and the presentation of evidence to establish a violation of the court’s order.” When a motion seeks relief for alleged criminal contempt, either direct or indirect, willful disobedience toward or open disrespect for, the rules or orders of a court “must be proven beyond a reasonable doubt, and the accused has the right to a jury trial if the fine is ‘serious.’”⁷

Defendant members either misinterpret or ignore the above law in characterizing their motion as seeking civil contempt sanctions.⁸ The Defendants request the Court to hold ASHA in contempt for the alleged destruction of “electronically stored information, computer hard drives and records maintained on backup servers during the pendency of this litigation.”⁹ They further request the Court to sanction ASHA for this conduct by ordering ASHA to pay all legal fees and expenses incurred by the Defendant members in litigating this dispute and to disclose all attorney-client privilege and work product protected documents listed on ASHA’s privilege log.¹⁰ Since the backup disk, computers, and electronically stored information at issue in the Defendant members’ motion no longer exist and/or are incapable of being produced in the form they are requested (paper copies of records from the disk, computers and e-mails have been retained and produced pursuant to ASHA’s document retention policy), the purpose of the motion and the relief sought is to punish for past, out-of-court conduct, not to compel some future act. Therefore, the Defendant members’ motion can only be characterized as indirect criminal contempt.

⁷ Id. at 31-32.

⁸ See Defendant members’ memorandum, p. 2.

⁹ Id. at p. 3.

¹⁰ Id. at pp. 9-13.

The Stallard case, a Kentucky Court of Appeals case ordered published by the Kentucky Supreme Court in 2009, best illustrates this point. In Stallard, the trial court ordered mediation and directed the parties to file a certificate of full authority for settlement with the trial court prior to mediation. The defendant forwarded the order to its insurance carrier, but did not file a certificate of authority or follow-up with its carrier to file the certificate. The parties mediated as ordered but failed to reach a settlement. Plaintiff filed a motion to compel the filing of the certificate of full authority and requested sanctions against the defendant for failure to comply with court's mediation order.¹¹

The trial court issued a second order, scheduling a second mediation. A week later, the court entered an order imposing sanctions on the defendant, including total costs of first mediation, attorney fees, and a fine of \$500 per day “until the parties return[ed] to mediation.”¹² The defendant moved to vacate the trial court order, which the trial court denied. The defendant appealed to the Kentucky Court of Appeals on the grounds that the sanction was punitive and improper.

On appeal, the Kentucky Court of Appeals set out the above civil vs. criminal framework for characterizing contempt motions and the burden or standard of proof for each type. The Court then held that the sanctions imposed against the defendant for the total costs of first mediation, attorney fees, and a fine of \$500 per day “until the parties return[ed] to mediation” fell into the criminal contempt category. “[I]t involved punishment for a past act or omission rather than an attempt to compel a future act.”¹³ The Court further held that “the failure to file the certification of authority occurred outside the presence of the court...[and therefore] the

¹¹ Id. 30.

¹² Id.

¹³ Id. at 32.

order was equivalent to a citation for indirect criminal contempt.”¹⁴ Thus, the Court of Appeals vacated the trial court order denying appellant’s motion to vacate and remanded the case for trial to determine whether the appellant was guilty of contempt.¹⁵

Here, the relief requested is of the exact same nature. The purpose of imposing the sanctions sought by the Defendant members based upon a finding that ASHA allegedly destroyed “electronically stored information, computer hard drives and records maintained on backup servers during the pendency of this litigation” would indeed be to punish ASHA for past, out of court conduct or omissions. If these allegations were true, there would be no further action to compel. The disk, computers, and electronically stored information no longer exists in the form the Defendant members request it. These proceedings are therefore indirect criminal contempt proceedings.

To hold ASHA in contempt for the conduct alleged in the Defendant members’ motion and to impose the remedies suggested in Defendant members’ post-hearing memorandum the Court must find that the Defendants and the Court elicited evidence at the October 14, 2011 hearing sufficient to prove all elements of contempt - willful disobedience toward or open disrespect for, the rules or orders of a court – beyond a reasonable doubt. The burden to make this showing rests solely on the Defendant members. Moreover, since the remedies proposed in the Defendant members memorandum are very “serious,” ASHA is also entitled to a jury trial if it so requests.

¹⁴ Id.

¹⁵ Id.

III. ARGUMENT

A. **The Defendant Members Failed to Prove Beyond A Reasonable Doubt That ASHA Willfully Disobeyed or Openly Disrespected Rules of This Court**

The Defendants request the Court to hold ASHA in contempt for the alleged destruction of “electronically stored information, computer hard drives and records maintained on backup servers during the pendency of this litigation.” The crux of this allegation is that ASHA failed to preserve electronic documents and records in their native format in violation of general rules of this Court. However, the evidence and testimony taken at the October 14, 2011 hearing establishes just the opposite. ASHA made a good faith effort to preserve all relevant books and records of the association. In fact, the hearing established that ASHA’s Board of Directors followed best practices for information governance by adopting a Document Retention and Destruction Policy in July of 2009, four months prior to commencement of this litigation. The Policy provides for document preservation under these precise circumstances.¹⁶ Specifically, the Policy requires that: “[i]f a user has sufficient reason to keep an e-mail message, the message should be printed in hard copy and kept in an appropriate file or moved to an ‘archive’ computer file folder.”¹⁷ It further provides that “[d]ocument destruction will be suspended immediately upon any indication of an official investigation or when a lawsuit is filed or appears imminent.” The evidence and testimony elicited at the October 14, 2011 evidentiary hearing demonstrates that ASHA did not delete, alter or destroy books and records of ASHA during the pendency of this litigation. ASHA management and staff were advised of the Document Retention and Destruction Policy and records were routinely and regularly kept and maintained at ASHA in accordance with this Policy.

¹⁶ See new Fed. R. Civ. P. 37(d)(1)(e), which provides safe harbors with regard to sanctions for litigants who lose electronically stored information as a result of routine, good faith operation of an electronic information system.

ASHA's controller, Joan Jones, testified that to her knowledge books and records of ASHA were preserved pursuant to the Policy. As an example of ASHA's compliance with this Policy, Joan Jones testified about a November 2, 2009 e-mail that she sent to Mr. Balch asking whether documents from 2000 and prior years and old accounting records stored in the cave storage facility in Louisville should be destroyed pursuant to the Document Retention and Destruction Policy. Joan Jones testified that in response to this e-mail, Mr. Balch advised her keep these old records during the pendency of the litigation.¹⁸

Joan Jones further testified that she had no direct knowledge regarding the Defendant members' allegation that ASHA altered, destroyed or deleted Mr. Balch's e-mails after he left ASHA.¹⁹ Rather, she testified that to her knowledge Mr. Balch printed a box of e-mails prior to his resignation as Executive Director/Secretary of ASHA in January/February 2010.²⁰ She further testified that no one destroyed, deleted, or altered books and records in violation of any court order.²¹ As to her specifically, she testified that she was the bookkeeper in charge of retaining financial books and records and producing them pursuant to court orders in this litigation. She confirmed that she never personally destroyed, altered, or deleted any financial books and records prior to producing them.²²

Mr. Wood, ASHA's Technology Manager, was called to testify after Joan Jones regarding his knowledge about matters pertinent to allegations that ASHA destroyed "electronically stored information, computer hard drives and records maintained on backup

¹⁷ See Document Retention Policy, attached hereto for the Court's reference as Exhibit ("Ex.") 1.

¹⁸ Testimony of Joan Jones, VR: 02:50:40 – 02:51:13 and VR 02:52:20-02:53:14

¹⁹ Testimony of Joan Jones, VR: 02:48:48-02:50:14; 03:04:54-03:06:03 and 03:11:19-03:12:30

²⁰ Testimony of Joan Jones, VR: 03:15:40-03:16:04

²¹ Testimony of Joan Jones, VR: 03:14:00-03:14:26

²² Testimony of Joan Jones, VR: 03:03:47-03:04:05

servers during the pendency of this litigation.”²³ Mr. Wood testified that he has never destroyed books and records of ASHA.²⁴ He further stated that he has no knowledge of Mr. Balch deleting or destroying e-mail records.²⁵ Rather, he understands that Mr. Balch printed his e-mails before departing ASHA in January/February, 2010.²⁶ If they were deleted or lost at all, the e-mails were lost in the Google Apps for Business system after Mr. Balch had printed them.

Mr. Wood further testified that in late 2009, ASHA performed a standard upgrade of its computers, and Mr. Balch’s computer, along with most other older computers were recycled in late 2009. The upgraded “second” computer Mr. Balch received was later repurposed and put to use by another ASHA employee after he resigned in early 2010. This was done in the ordinary course of business at ASHA and items left on Mr. Balch’s computer were copied to a shared server. Neither the Defendant members nor the Court elicited testimony sufficient to prove beyond a reasonable doubt that Mr. Wood or anyone else at ASHA recycled, upgraded and repurposed computers at ASHA’s corporate offices in “willful disobedience toward or open disrespect for, the rules of this Court.”

With respect to the “snapshot” backup tape, Mr. Wood further testified that Mr. Balch asked him to work with the Cipher Group, a computer forensics firm, in 2009. Mr. Wood stated that he created a one-day disaster recovery backup of ASHA’s Windows 2003 server on September 17, 2009. He testified that the backup disk sat on his desk until mid-2010, when he repurposed it in the ordinary course of his business at ASHA. Mr. Wood denied destroying ASHA books and records by repurposing this disk because he understood that the backup was not a “document” under the Document Retention and Destruction Policy adopted in 2009.

²³ Testimony of Will Wood, VR: 03:21:34

²⁴ Testimony of Will Wood, VR: 03:24:27-03:24:34

²⁵ Testimony of Will Wood, VR: 03:57:41-03:59:32

²⁶ Testimony of Will Wood, VR: 03:52:07-03:52:49

Rather, he considered the purpose of the backup disk to back up data and information that had already been printed and preserved pursuant to the Document Retention and Destruction Policy. Mr. Wood further denied deleting, destroying, or altering any books and records pending this litigation. Again, given this testimony, the Defendant members failed to elicit evidence sufficient to prove beyond a reasonable doubt that Mr. Wood or anyone else at ASHA repurposed computer disks or equipment in “willful disobedience toward or open disrespect for, the rules of this Court.”

B. The Defendant Members Failed to Prove Beyond A Reasonable Doubt That ASHA Willfully Disobeyed or Openly Disrespected An Order of this Court

The Defendant members have not alleged or established any violation of an Order of this Court, let alone established it beyond a reasonable doubt.²⁷ “A court may impose punishment for criminal contempt only if proof exists to show the defendant ‘had knowledge of a valid order

²⁷ The Motion and Memorandum are instead based on purported spoliation of evidence, the elements of which have not been established. Even if the elements of spoliation had been established, at most, the permissible remedy would be a “missing evidence” instruction should there arise a substantive claim by the Members for some legally cognizable wrongdoing by the ASHA. See Monsanto Co. v. Reed, 950 S.W.2d 811, 815 (Ky. 1997); see also Courtney v. Big O Tires, Inc., 87 P.3d 930, 933 (Idaho 2003) (“[T]he merely negligent loss or destruction of evidence is not sufficient to invoke the spoliation doctrine.”) (citing McCormack On Evidence, 4th Ed. § 265). Here no evidence was destroyed, let alone deliberately destroyed to hide something. Mills v. Commonwealth, 170 S.W.3d 310, 331-332 (Ky. 2005) (“[T]he missing evidence instruction . . . is necessary ‘only when the failure to preserve or collect the missing evidence was intentional . . .’”). The Defendant members have not cited any case with facts similar to the ones here. This is not surprising because courts have refused to find spoliation under circumstances such as the ones alleged here. See, e.g., Village of Roselle v. Commonwealth Edison Co., 859 N.E.2d 1, 6, 15-20 (Ill. App. 2006) (Loss of a laptop computer containing “snapshots” of records did not amount to spoliation when the information existed in another form.); Crescendo Investments, Inc. v. Brice, 61 S.W.3d 465, 478-79 (Tex. App. 2001) (deletion of e-mails pursuant to user’s normal practice of deleting them after reading them did not establish “fraudulent intent or purpose”). Moreover, spoliation requires a showing of prejudice by the Defendant members. Tinsley v. Jackson, 771 S.W.2d 331, 332 (Ky. 1989). The Defendant members have not contended that there was any prejudice to them by receiving hard copies of e-mails. Their contempt papers and the evidentiary record are completely devoid of any indication of what information the Members are seeking that they do not already have. To the contrary, the Defendant members’ contention here is a purely speculative one for “spoliation on the air” – a doctrine that has never been recognized by any court.

which prohibited the conduct in question and that he intentionally violated it.”²⁸ “Furthermore, in the case of criminal contempt, all elements, including willful disobedience, must be proven beyond a reasonable doubt.”²⁹ (“[I]t is necessary for all elements of the contempt to be proven beyond a reasonable doubt” including “willful disobedience” of an order of the court.) Inadvertent action is insufficient to establish contempt.³⁰

The Defendant members’ motion fails for several reasons. First, with respect to the repurposing of the laptop computer once used by Mr. Balch, the evidence is uncontradicted that this occurred in the spring or summer of 2010, many months before this Court entered its December 2, 2010 Opinion, Order and Judgment. So there was no order in effect at that time and certainly never one that prohibited the conduct in question. Second, Mr. Wood’s testimony is undisputed that Mr. Balch’s routine business practice and that prescribed by the ASHA’s written policy was to print all e-mails related to ASHA business and that he did so.³¹ Mr. Balch’s affidavit also is undisputed that it was his “custom and practice ... to print any document or letter that I personally prepared on my computer and to provide a hard copy of that document to the appropriate ASHA staff member for filing.”³² Mr. Balch also testified in his affidavit that he “carefully reviewed all of my e-mails and printed every responsive e-mail” prior to his departure from the ASHA. This testimony also is undisputed. Ms. Jones and Mr. Wood testified that all of Mr. Balch’s e-mails were produced to the Defendant members. The Defendant members have not contended otherwise. Thus, the e-mails were printed, preserved and produced to the Members.

²⁸ Buddenberg v. Buddenberg, 304 S.W.3d 717 (Ky. App. 2009) (citation omitted).

²⁹ Id. at 722; see also Commonwealth v. Pace, 15 S.W.3d 393, 396 (Ky. App. 2000)..

³⁰ Pace, 15 S.W.3d at 396.

³¹ Testimony of Will Wood, VR: 03:24:27 and 03:31:29-03:52:49

³² See Affidavit of Alan F. Balch, dated August 24, 2011, attached hereto as Ex. 3. His Affidavit remains undisputed. Defendant members did not subpoena him to testify at this Court’s October 14 evidentiary hearing.

With respect to the “snapshot” backup tape made by Mr. Wood on September 17, 2009, he repurposed that tape in the spring or summer of 2010, again long before this Court’s December 2, 2010 Order.³³ So there could be no violation, let alone a willful one, of an order that did not exist with respect to the backup tape. In any event, there is no evidence that the backup tape contained any information at all about Mr. Balch’s e-mails, let alone copies of them. It would be purely speculative to conclude that anything relevant to this matter was contained on the back up tape. Finally, Mr. Balch’s e-mails are the only issue mentioned by the Defendant members with respect to the backup tape and all of them were produced.

With respect to the e-mails of Paula Johnson (“Ms. Johnson”), ASHA’s current Executive Director, the Defendant members did not call Ms. Johnson to testify or otherwise offer any evidence about the production of her e-mails. The burden to make any showing with regard to her conduct rests solely on the Defendant members. Her actions in printing all of her ASHA e-mails did not violate any order of the Court because there was no order in effect at that time requiring her to produce her e-mails in any specific format. All previous document inspections involved the production of documents in paper form.³⁴ She acted in good faith in meeting an upcoming production date and, at that production, all of her e-mails were produced in paper copy to the Defendant members. The Defendant members offered no evidence whatsoever to the contrary.

This case is neither close nor difficult. There was no order in effect prohibiting Mr. Wood or Ms. Johnson from taking the good faith actions that they did or requiring them to act other than as they did. There was no willful action by Mr. Wood, Ms. Johnson or anyone else to

³³ Testimony of Will Wood, VR: 03:45:39-03:46:06

³⁴ KRS §273.233 expressly provides for copies. It does not require non-profit membership associations to produce records for inspection in native, electronic format. Ms. Johnson was attempting in good faith to comply with the statute.

violate any order of this Court. To the contrary, the evidence at the October 14, 2011 hearing was that ASHA acted to provide the Defendant members with every shred of information requested by the Defendant members and in fact did so.

C. The Remedies Requested by the Defendant Members Are Improper Under These Circumstances

For the reasons stated above, the Defendant members' motion to hold ASHA in contempt and to sanction ASHA for its conduct must be denied in its entirety. The Defendant members have not alleged nor established any "willful disobedience toward or open disrespect for, the rules of this Court," let alone established it beyond a reasonable doubt.

The Defendant members' request that the Court order ASHA to pay all legal fees and expenses incurred by the Defendant members in litigating this dispute would be a very "serious" fine necessitating a jury trial if ASHA so requests.³⁵ As to the request that the Court order ASHA to disclose all attorney-client privilege and work product protected documents listed on ASHA's privilege log, the Defendant members do not cite any case setting forth the standards to breach the attorney-client privilege, such as the "crime-fraud" exception. The cases cited by the Defendant members stand for the benign and inapplicable principle that failing to assert a privilege is a waiver. However, "waiver of the attorney-client privilege is a harsh sanction reserved generally for unjustified, inexcusable or bad faith conduct, and a waiver may be unnecessary where other remedies are available."³⁶ In this case there is no contention and no evidence of any waiver. Nor is the request to breach the privilege limited in time, scope, subject

³⁵ See Stallard, 294 S.W.3d at 31-32.

³⁶ USF Insurance Company v. Smith's Food and Drug Center, Inc., 2011 U.S. Dist. LEXIS 63926 (D. Nev. June 16, 2011).

matter or persons involved. More importantly, “minor procedural violations, good faith attempts at compliance, and other mitigating circumstances will militate against finding waiver.”³⁷

IV. PROPER REMEDY

This matter should be brought to a conclusion. Otherwise, ASHA and this Court will be subjected to endless requests for more documents as evidenced by the Defendant members’ latest request to pierce the attorney client privilege and obtain yet another category of documents that will require more time, expense, briefing, and ultimately might require the Court to review documents in camera. The Defendant members learned nothing new at the October 14, 2011 hearing, except that the actions of Mr. Wood and Ms. Jones were in absolute good faith and without the intent or effect of destroying any information about ASHA.

Lest we forget, ASHA filed this complaint for declaratory relief to request that the Court construe the scope of KRS §273.233, which provides in its entirety as follows:

Each corporation shall keep correct and complete **books and records of account** and shall keep **minutes of the proceedings** of its members, board of directors and committees having any of the authority of the board of directors; and shall keep at its registered office or principle office in this state a record of the **names and addresses of its members entitled to vote**. 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.³⁸

This Court gave due consideration to the arguments of both parties and rendered an interpretation in its Opinion, Order and Judgment on December 2, 2010. The case now presents an issue of first impression for our appellate courts. The statute is very clear about what books and records ASHA must keep at its corporate offices at the Kentucky Horse Park in Lexington,

³⁷ *United Steelworkers of America v. IVACO, Inc.*, 2003 U.S. Dist. LEXIS 10008 (N.D. Ga. 2003).

³⁸ Emphasis added to the specific terms in dispute. This was the language of the statute in 2009 when the dispute arose. KRS §273.233 was amended by the 2010 General Assembly to explicitly provide that the books and records inspected by a member may be copied by said member. The amendment in 2010 also expressly provides that the member’s right of inspection shall not be abolished or limited by the corporation’s articles of incorporation or bylaws.

Kentucky – correct and complete books and records of account, minutes of the proceedings of its members, board of directors, committees having any of the authority of the board of directors, and names and addresses of members entitled to vote. The current contempt motion does not relate in any way to records of account, minutes, or members’ names and addresses. There is no dispute that ASHA, in fact, kept, and keeps, the records that the statute requires it to maintain. Indeed, it produced five years worth of these records. Through their contempt motion, the Defendant members are now seeking to expand ASHA’s statutory duty beyond the records that the legislature expressly stated ASHA was required to keep.

This Court was clear in its December 2, 2010 Opinion, Order and Judgment that ASHA’s duty to keep records is to be distinguished from the right of the Defendant members to inspect other records, holding that “These are separate and distinct duties, responsibilities and rights mandated by the legislature as to both the non-profit corporation and its Members say the Members.” “Looking at the plain and ordinary everyday language of the referenced statute, it appears to this Court that there are separate and distinct rights, responsibilities and duties of first, the non-profit corporation, and secondly, its members.”³⁹ The ASHA cannot be sanctioned for violating a statute, much less an Order, that tells ASHA, the Defendant members and this Court exactly what records it must keep, and no more.

The Defendant members have been provided all financial records of ASHA for the past five years and tens of thousands of non-financial records to boot. They have yet to substantiate a single allegation of mismanagement or conflict of interest or any other allegation of wrongdoing against an ASHA board member, director, officer, executive director, or employee. ASHA is the victim of an endless fishing expedition without any defenses such as relevance, burden, or

³⁹ Id. at p. 9.

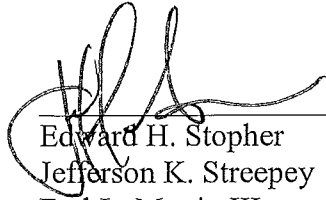
materiality that otherwise would be available if it were defending some specific accusation of wrongdoing.

The Court noted at the hearing that it desired to bring closure to this matter. Imposing penalties on a party for an issue that literally is based on form over substance is unprecedented, especially when the whole matter is rooted in an underlying issue that had never been decided in Kentucky. The Court should bring this matter to a proper close by denying the Members' motion and relieving the parties from further proceedings in this Court so that the parties may proceed efficiently and expeditiously with the appeal currently pending in the Kentucky Court of Appeals.

V. CONCLUSION

For the foregoing reasons, ASHA respectfully requests that the Court deny the Defendant members' motion to hold ASHA in contempt and to sanction ASHA for its conduct in its entirety. As for a remedy, ASHA requests this Court to find that ASHA has satisfied the Court's final judgment and order of January 6, 2011 and to relieve the parties from further proceedings in this Court so that they may proceed efficiently and expeditiously with the appeal currently pending in the Kentucky Court of Appeals. ASHA further requests that its proposed findings of fact and conclusions be entered therewith.

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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was served via first class mail on this 28th day of October, 2011 to the persons and addresses listed below.

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345321.1

EXHIBIT 1

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 2

AMERICAN SADDLEBRED
HORSE ASSOCIATION, INC.

PLAINTIFF

v. **PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

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

DEFENDANTS

This matter came before the Court on Defendants' (hereinafter "Defendant members") Motion to Hold American Saddlebred Horse Association (hereinafter "ASHA") in Contempt of Court and Sanction ASHA for its Conduct. The Court, having reviewed the motion with all attachments, Response in Opposition to the motion, affidavits, deposition testimony and having conducted an evidentiary hearing, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Eleanor Joan Jones ("Ms. Jones") has been employed by ASHA as a bookkeeper since June of 2000. Ms. Jones is responsible for all of ASHA's financial records.
2. Ms. Jones unequivocally testified that she has never destroyed, shredded or altered ASHA's financial records in any way. Accordingly, there are no financial records that ASHA has failed to produce because they were destroyed or deleted.
3. Ms. Jones unequivocally testified that neither she, nor anyone else at ASHA to her knowledge, deleted, altered or destroyed books and records of the ASHA during the pendency of this litigation. Instead, she acknowledged the existence of ASHA's Document Retention and

Destruction Policy, which was adopted four months prior to the commencement of this litigation (in July 2009), and testified under oath that she and everyone else at ASHA, including the former Executive Director of ASHA, Alan F. Balch (“Mr. Balch”), kept and maintained all books and records in accordance with ASHA’s Document Retention and Destruction Policy.

4. To date, no ASHA records dating back prior to 2006 have been requested by Defendant members. Initially, Defendant members requested ASHA records concerning only 2006 and 2007. However, Defendant members subsequently requested ASHA records for 2008 to 2010.

5. ASHA made a good faith effort to preserve all relevant books and records of the association. The ASHA’s Board of Directors followed best practices for information governance by adopting a Document Retention and Destruction Policy in July of 2009, four months prior to commencement of this litigation. The Policy provides for document preservation under these precise circumstances. Specifically, the 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.” The Policy further requires that: “[i]f a user has sufficient reason to keep an email message, the message should be printed in hard copy and kept in an appropriate file or moved to an ‘archive’ computer file folder.” It also provides that “[d]ocument destruction will be suspended immediately upon any indication of an official investigation or when a lawsuit is filed or appears imminent.” ASHA did not delete, alter or destroy books and records of ASHA during the pendency of this litigation. ASHA’s management and staff were advised of the Document Retention and Destruction Policy and records were routinely and regularly kept and maintained at ASHA in accordance with this Policy.

6. ASHA's Document Retention Policy refers to business documents only, not to personal emails.

7. Former ASHA Executive Director Alan Balch ("Mr. Balch") printed his emails concerning ASHA business in compliance with ASHA's Document Retention Policy. None of Mr. Balch's emails relating to ASHA have been deleted or destroyed.

8. Ms. Jones testified that to her knowledge books and records of ASHA were preserved pursuant to the Policy. As an example of ASHA's compliance with this Policy, Joan Jones testified about a November 2, 2009 email that she sent to Mr. Balch asking whether documents from 2000 and prior years and old accounting records stored in the cave storage facility in Louisville should be destroyed pursuant to the Document Retention and Destruction Policy. Joan Jones testified that in response to this email, Mr. Balch advised her keep these old records during the pendency of the litigation.

9. Ms. Jones further testified that she had no direct knowledge regarding the Defendant members' allegation that ASHA altered, destroyed or deleted Mr. Balch's emails after he left ASHA. Rather, she testified that to her knowledge Mr. Balch printed a box of emails prior to his resignation as Executive Director/Secretary of ASHA in January/February 2010. She further testified that no one destroyed, deleted, or altered books and records in violation of any court order. As to her specifically, she testified that she was the bookkeeper in charge of retaining financial books and records and producing them pursuant to court orders in this litigation. She confirmed that she never personally destroyed, altered, or deleted any financial books and records prior to producing them.

10. William Wood, Jr. ("Mr. Wood") has worked as ASHA's technology manager since 2007.

11. During the course of Mr. Wood's tenure at ASHA the organization switched from utilizing Outlook email services to Google G Apps service.

12. Unlike the Google G Apps email service, Google does not offer an archival system for free. Indeed, there is a cost associated with archival systems provided by Google.

13. Mr. Wood testified that ASHA has never purchased a backup archival system for its emails.

14. Upon the termination of an ASHA employee access to the former employee's email is turned over to ASHA supervisor, a rebound message is set all incoming mail for thirty days and after the expiration of thirty days the email account is close.

15. Mr. Wood testified that he created the backup tape solely for the purpose of disaster recovery. Later Mr. Wood in the ordinary course of business repurposed the tapes when a need arose to utilize the tapes for another task. Mr. Wood denied destroying ASHA books and records by repurposing this disk because he understood that the backup was not a "document" under the Document Retention and Destruction Policy adopted in 2009. Rather, he considered the purpose of the backup disk to back up data and information that had already been printed and preserved pursuant to the Document Retention and Destruction Policy.

16. Mr. Wood unequivocally testified that neither he, nor anyone else at ASHA to his knowledge, deleted, altered or destroyed books and records of the ASHA during the pendency of this litigation. Instead, he acknowledged the existence of ASHA's Document Retention and Destruction Policy, which was adopted four months prior to the commencement of this litigation (in July 2009), and testified under oath that he and everyone else at ASHA, including the former Executive Director of ASHA, Alan F. Balch ("Mr. Balch"), kept and maintained all books and records in accordance with ASHA's Document Retention and Destruction Policy.

17. With respect to Paula Johnson's ("Ms. Johnson") emails, the current Executive Director of ASHA, the Defendant members did not call Ms. Johnson to testify or otherwise offer any evidence about the production of her emails. The burden to make any showing with regard to her conduct rests solely on the Defendant members. Her actions in printing all of her ASHA emails did not violate any order of the Court because there was no order in effect at that time requiring her to produce her emails in any specific format. In all previous document inspections, the documents had been provided in paper form. She acted in good faith in meeting an upcoming production date and, at that production, all of her emails were produced in paper copy to the Defendant members. The Defendant members offered no evidence whatsoever to the contrary.

18. The Defendant members have been provided all financial records of ASHA for the past five years and tens of thousands of non-financial records. They have yet to substantiate a single allegation of mismanagement or conflict of interest or any other allegation of wrongdoing against an ASHA board member, director, officer, executive director, or employee.

19. The Defendant members have presented no evidence sufficient to prove ASHA waived its attorney-client and/or work product protected information.

CONCLUSIONS OF LAW

1. Contempt is defined as "the willful disobedience toward or open disrespect for, the rules or orders of a court." Kentucky River Community Care, Inc. v. Stallard, 294 S.W.3d 29, at 31. (Ky.App. 2008).

2. "Contempt can be civil or criminal in nature. Civil contempt is the failure...to do something under order of court, generally for the benefit of a party litigant. The U.S. Supreme Court has held that because those cited with contempt carry the keys of their prison in their own

pockets, the offense is civil rather than criminal contempt. The purpose of holding one in civil contempt is to compel some action.” Id.

3. “Criminal contempt is conduct that demonstrates disrespect toward the court, obstructs justice, or brings the court into disrepute. If the court’s purpose is to punish, the sanction is criminal contempt. Criminal contempt may be direct or indirect. Direct contempt involves an act committed in the presence of the court; indirect contempt is a violation that is committed outside the presence of the court and requires a hearing and the presentation of evidence to establish a violation of the court’s order.” Id.

4. “In the case of criminal contempt, all elements, including willful disobedience, must be proven beyond a reasonable doubt.” Id. at 32.

5. In the case of criminal contempt, the accused has the right to a jury trial if the fine is “serious.” Id. at 31-32.

6. As the present motion requests sanctions for conduct that indisputably occurred outside the presence of this Court and seeks to punish ASHA rather than moving for an Order to compel future action by ASHA, this Court concludes that this motion is one for criminal contempt. Therefore, the Defendant members must prove all elements of contempt beyond a reasonable doubt. This burden of proof rests solely upon them.

7. This Court finds that the Defendant members failed to proffer evidence sufficient to prove all elements of contempt beyond a reasonable doubt.

8. This Court finds that the initiation of litigation against ASHA does not as a matter of law automatically render all of the ASHA’s documents and records for the entity’s entire existence relevant to the pending litigation. This is especially true in light of the fact that the Defendant

members only sought documents from a specific time period, 2006-2010, and those documents remain preserved.

9. This Court further finds that the deletion of documents and/or records in compliance with an entity's longstanding document retention policy, which are not pertinent to pending litigation, is not egregious conduct sufficient to warrant a finding of criminal contempt. Indeed, Defendant members have failed to present any evidence of willful disobedience.

10. Waiver of attorney client privilege and/or work product doctrine is an extreme sanction and is not warranted under the facts of this case. The Defendant members failed to proffer evidence that ASHA waived the attorney-client privilege and/or work product protected documents and information. Further, the Defendant members failed to proffer evidence of bad faith, crime-fraud, or some other exception necessary to pierce the attorney-client privilege. Lastly, the Defendant members failed to show a substantial need to inspect the work-product protected documents as they have not provided any indication of what information they are seeking that they do not already have. The Defendant members have received all relevant books and records of ASHA in paper form during the course of this litigation.

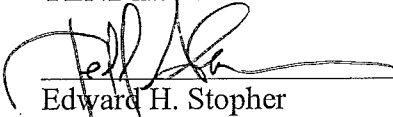
ORDER

WHEREFORE, it is ordered that Defendants' Motion to Hold ASHA in Contempt of Court and Sanction ASHA for its Conduct is **DENIED** in its entirety. It is further ordered that ASHA satisfied the Court's final judgment and order of January 6, 2011 and the parties are hereby relieved from further proceedings in this Court.

Judge, Fayette Circuit Court

Date: _____

TENDERED BY:



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EXHIBIT 3

FAYETTE CIRCUIT COURT
22ND JUDICIAL CIRCUIT
THIRD DIVISION

Civil Action No. 09-CI-5292

AMERICAN SADDLEBRED
HORSE ASSOCIATION, INC.

PLAINTIFF

V.

AFFIDAVIT OF ALAN F. BALCH

EDWARD R. BENNETT, et al.

DEFENDANTS

* * * * *

I, Alan F. Balch, having been first duly sworn, do depose and state as follows:

1. I am currently employed as the Executive Director of the California Thoroughbred Trainers, based at Santa Anita Park. I have held this position since early April 2010.
2. Prior to taking this position I was the Executive Secretary of the American Saddlebred Horse Association ("ASHA") and the Registrar of the American Saddlebred Registry (the "Registry"). I held these positions as an independent contractor from April 1, 2004 until November 1, 2006. From November 1, 2006 forward I was employed by ASHA pursuant to an employment agreement. My employment with ASHA ended in mid-February 2010. The terms of my departure were set forth in a Settlement Agreement and Release of All Claims (the "Settlement Agreement"), entered into between me, ASHA and the Registry on or about April 29, 2010. The Settlement Agreement includes a confidentiality provision, pursuant to which the contents of the Settlement Agreement, but not the fact of the agreement, must be held in strict confidence by all parties to the agreement.

3. The financial aspects of my settlement with ASHA, as memorialized in the Settlement Agreement, were included in the 2010 audited financial statements of ASHA. These statements are available to all ASHA members, including the Defendants in this litigation. It is my desire that the remaining provisions of the Settlement Agreement remain confidential and that the Settlement Agreement not be produced to the Defendants or their counsel.

4. Since at least as early as September 2009, I have been subjected to countless false accusations regarding my character, my integrity, my honesty and my capability. These attacks have come from the Defendants in this case, and in many instances have been made through the Defendants' counsel, Stephen A. Houston. For example, I understand that Mr. Houston once advised this Court that I had "fled" Kentucky in order to avoid giving my deposition in this case. Nothing could be further from the truth. After I left my position at ASHA in mid-February 2010, I was unemployed until early April 2010, when I was hired in my current position with the California Thoroughbred Trainers. Between mid-February and April 2010 I was applying and interviewing for jobs, attending to my duties as volunteer president of USA Equestrian Trust, Inc., a New York not-for-profit organization, and as a Director of the University of Kentucky, Gluck Equine Research Foundation and of the USA Equestrian Trust, Inc. I also traveled to Europe in late March and early April – this trip was a commitment made by me long before my departure from ASHA. I have been based in California for my job since April 2010.

5. After my departure from ASHA in February 2010 and, to the best of my knowledge and belief, through mid-April 2010, my attorney, Richard A. Getty, and ASHA's attorneys corresponded with the Defendants' attorneys about a date to take my deposition in this matter. My recollection is that the difficulties in finding an agreeable date resulted not from any objections or conflicts on my part, but from scheduling issues with the various attorneys'

calendars. In mid-April 2010 Mr. Getty provided ASHA's counsel with two available dates at the end of May 2010. Around that same time I relocated to California, but had agreed to return to Kentucky for my deposition. After the May 2010 dates were provided by Mr. Getty, I did not hear anything more about my deposition from Mr. Getty, from ASHA's counsel or from the Defendants' counsel.

6. I was recently provided with a copy of an August 16, 2011 letter from Stephen A. Houston to Jefferson K. Streepey regarding a document production that apparently occurred on August 15, 2011. That letter includes statements about me that are simply not true and that I wish to correct through this Affidavit.

7. During my time at ASHA, I never destroyed any ASHA financial records or corporate documents and I never instructed anyone else to destroy such documents. My custom and practice at ASHA – which has been my custom and practice since computers and e-mail came into use in the workplace – was to print any document or letter that I personally prepared on my computer and to provide a hard copy of that document to the appropriate ASHA staff member for filing. I did not believe then, and I do not believe now, that it is reliable to store documents exclusively on a computer, which is why I always ensured that a hard copy was placed into the ASHA files. I did not maintain official, permanent ASHA files in my office, except for those relating to confidential personnel evaluations of the staff. Those personnel files were provided to ASHA's bookkeeper to maintain with the general personnel files upon my departure.

8. Sometime in early 2009 ASHA began using "Gmail," provided through Google. Gmail for business does not require that business users have a server. When ASHA transitioned to Gmail, it did not purchase the archive service for e-mails from Google, largely because it was cost-prohibitive. Because of this, and in keeping with my custom and practice, I would print for filing any important ASHA-related e-mail sent or received by me and provide that hard copy to a staff member for filing or direct the staff member involved to print the e-mail for filing.

9. On or about August 25, 2009, Mr. Houston made a request by letter to Mr. Streepey requesting copies of e-mail correspondence between me and any and all members of

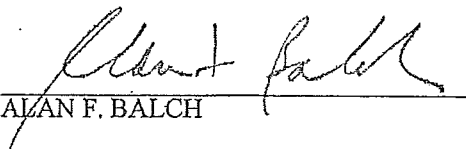
the Executive Committee of the ASHA Board of Directors from January 1, 2008 forward. I carefully reviewed all of my e-mails and printed every responsive e-mail at that time. I provided these e-mails to ASHA's counsel, Mr. Streepey, and to my best knowledge and belief they were kept and maintained by ASHA's counsel thereafter. This was the first and only request I ever received for e-mail correspondence while I was employed at ASHA.

10. To the best of my knowledge and belief, my ASHA-provided Gmail account and password were deactivated when I left ASHA. Also when I left ASHA the computer I had used remained with ASHA. I have no personal knowledge about what happened to that computer after I left.

11. I categorically deny Mr. Houston's accusation that I intentionally destroyed records, intentionally deleted records and/or intentionally deleted e-mails "during the pendency of this litigation" and state further that Mr. Houston does not have, and cannot have, any proof to support these allegations against me.

Further Affiant sayeth naught.

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)


ALAN F. BALCH

Subscribed and sworn to before me by Alan F. Balch on this the 24th day of August, 2011.

My Commission expires: _____

NOTARY PUBLIC

CALIFORNIA JURAT WITH AFFIANT STATEMENT

GOVERNMENT CODE § 8202

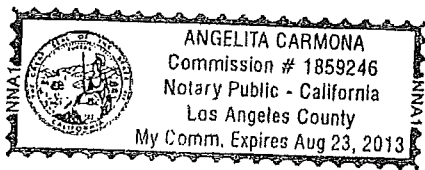
- See Attached Document (Notary to cross out lines 1-6 below)
- See Statement Below (Lines 1-6 to be completed only by document signer[s], *not* Notary)

 Signature of Document Signer No. 1

 Signature of Document Signer No. 2 (if any)

State of California
 County of Los Angeles

Subscribed and sworn to (or affirmed) before me
 on this 29th day of Aug., 2011
Date Month Year
 by
 (1) Alvin F. Baker
Name of Signer



proved to me on the basis of satisfactory evidence
 to be the person who appeared before me (1)(1)
 (and)
 (2) _____
Name of Signer

proved to me on the basis of satisfactory evidence
 to be the person who appeared before me.)
 Signature Angelita Carmona
Signature of Notary Public

Place Notary Seal Above

ATTACHED TO BOARD OF EQUALITY

OPTIONAL

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

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Signer(s) Other Than Named Above: _____

RIGHT THUMBPRINT OF SIGNER #1
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RIGHT THUMBPRINT OF SIGNER #2
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