

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

NOV - 4 2011  
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<p><b>AMERICAN SADDLEBRED HORSE ASSOCIATION, INC.</b></p> <p style="text-align: center;"><b>Plaintiff</b></p> <p>v.</p> <p><b>EDWARD R. BENNETT, et al.</b></p> <p style="text-align: center;"><b>Defendants</b></p>	<p><b>Case No. 09-CI-05292</b></p> <p><b>REPLY 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**

Defendants ("Members") have moved the Court to hold Plaintiff American Saddlebred Horse Association ("ASHA") in civil contempt for destroying records that were the subject matter of this litigation and to order remedies that are appropriate under such circumstances. In its response to the Members' post-hearing memorandum, ASHA argues that the Members' motion should be denied because ASHA believes the motion seeks criminal, not civil, contempt, and ASHA claims that the Members did not meet their burden of showing conduct warranting a finding of criminal contempt. In its response, ASHA declined to discuss what remedies are appropriate if the Court finds ASHA in civil contempt.

## II. ARGUMENT

### A. The Members Are Seeking A Finding Of Civil, Not Criminal, Contempt

Kentucky courts recognize that there are *two* reasons for civil contempt: “[1] to force compliance with [the Court’s] orders [or rules] or [2] to compensate for losses or damages caused by noncompliance.” *Kentucky Retirement Systems v. Foster*, 338 S.W.3d 788, 801 (Ky. App. 2010). The Members ask the Court to hold ASHA in contempt for both reasons. As discussed in the Members’ post-hearing memorandum, there can be no doubt that the record supports holding ASHA in civil contempt for willfully destroying electronically stored information during the pendency of this litigation.

The record overwhelmingly proves that ASHA destroyed management records which ensured that, no matter the outcome of this litigation, the Members would never see all of the information ASHA chose to destroy. ASHA has demonstrated a persistent and continuing disregard for the orders and rules of the Court regarding the preservation and production of its records for inspection. There are two ways to remedy, albeit partially, this situation created by ASHA’s egregious conduct.

First, the Court has the authority to compel ASHA to produce its remaining records which have become the last means available for the Members to inspect information relating to management issues addressed by ASHA’s highest ranking employee. While such an order will not entirely fill the void created by ASHA’s willful destruction of records, it will shed some light on the management of ASHA during the relevant time period.

Second, there can be no doubt that the Members have suffered “losses or damages” as a result of ASHA’s conduct. ASHA filed this lawsuit and forced the Members to spend significant amounts of money defending their right to inspect the non-profit association’s records. Although

the Members prevailed in defending their inspection rights, the Members' efforts and money was for naught because ASHA destroyed electronically stored information, including deleting emails associated with its highest ranking employee, wiping clean computer hard drives, destroying computer hard drives and destroying records on backup servers. In today's world, most management decisions are contained within the electronic records of an organization's highest ranking employees. Certainly, ASHA cannot be given the benefit of a presumption that the records it destroyed were benign. ASHA went to great lengths to avoid producing its records for inspection, and its destruction of electronic records relating to Mr. Balch was not accidental.

The Members deserve to be compensated for this damage caused by ASHA. *See State ex rel. Crown Inv. Group, LLC v. City of Bend*, 136 P.3d 1149 (Or. App. 2006) (affirming court's contempt order without jury trial to compensate party for loss where opposing party destroyed the subject-matter of the lawsuit prior to Court's ruling). While the amount to compensate the Members may be large, that does not mean criminal, rather than civil, contempt has been found. The difference between civil and criminal contempt is not determined by the amount the party in contempt is ordered to pay; it is determined by whether payment is ordered to compensate the party injured by the contemptuous conduct or to punish the party in contempt. *Foster*, 338 S.W.3d at 801. Here, both remedies sought by the Members are clearly designed to compensate the Members – not to punish ASHA. Allowing the Members access to management records which ASHA is withholding based upon claims of privilege or work product will partially fill the void created by ASHA's destruction of records. Ordering ASHA to reimburse the Members for their costs incurred in defending against ASHA's lawsuit will, in part, compensate the Members for the money they spent obtaining an order which ASHA ensured would be, in part, hollow.

ASHA relies on *Kentucky River Community Care, Inc. v. Stallard*, 294 S.W.3d 29, 31 (Ky. App. 2008), for its contention that the Members' motion presents a case of criminal, as opposed to civil, contempt. ASHA's reliance on *Stallard* is misplaced. In *Stallard*, the trial court specifically "noted that the sanctions imposed on KRCC were punitive." *Id.* at 31. The \$40,500 fine was not to compensate for damages incurred by the aggrieved party but clearly intended to punish KRCC for its disrespect for the trial court. *Id.* at 32. It was those factors, not the size of the award, which made the contempt at issue in *Stallard* criminal in nature. Here, on the other hand, the Members seek to compel some action, *i.e.* the production of documents that have become the only remaining source for information relating to management issues addressed by ASHA's highest ranking employee, and compensate the Members for the expenses incurred in defending their rights only to discover that significant portions of the subject matter of the litigation was destroyed by ASHA during the litigation. As the *Stallard* court recognized, when a party, here ASHA, "fail[s] to do something . . . for the benefit of a party litigant [Members]," that failure amounts to a *civil* contempt. *Id.* at 31.

**B. ASHA Failed To Preserve Relevant Records As Required By Kentucky Courts And Failed to Comply With Its Own Document Retention And Destruction Policy**

ASHA states that its "management and staff were advised of the Document Retention and Destruction Policy" and argues that ASHA complied with that policy during this litigation.<sup>1</sup> This is not true.

As was made clear during the evidentiary hearing on the Members' motion, ASHA's document retention and destruction policy prohibited the destruction of any records once

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<sup>1</sup> ASHA's post-hearing response, p. 7.

litigation was imminent. ASHA's privilege log in this matter indicates that ASHA anticipated litigation as of April 15, 2009. Accordingly, all document destruction should have ceased at ASHA at least as of that date. Nonetheless, ASHA has admitted that ASHA's highest ranking employee only preserved what he deemed to be "important" emails, albeit in paper format, during this litigation.<sup>2</sup> That is consistent with the testimony of ASHA's employee Will Wood who confirmed that all of Mr. Balch's email had been deleted and, despite being ASHA's highest ranking employee for several years, only one small banker's box of email had been printed and all that remained on Mr. Balch's computer when he resigned during the litigation were a few random photographs.<sup>3</sup> ASHA also admitted that computer hard drives and backup servers were destroyed during the pendency of the litigation.<sup>4</sup> Finally, ASHA admitted that its current executive director, Paula Johnson, printed some of her emails for inspection by the Members and deleted the rest.<sup>5</sup> ASHA's argument that there is no evidence that it destroyed any records is clearly not true.<sup>6</sup>

ASHA also cites to an affidavit of Mr. Balch. The statements contained in Mr. Balch's affidavit, however, do not contradict the sworn testimony of Will Wood or the admissions of ASHA in the record. For example, Mr. Balch may have continued record destruction based upon his usual practice, but that practice should have ceased when ASHA was aware litigation was

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<sup>2</sup> ASHA's response dated September 29, 2011, p. 5.

<sup>3</sup> Testimony of Will Wood, VR 10/14/11; 15:26:30 – 15:28:10; 16:07:15 – 16:11:18.

<sup>4</sup> See Members' post-hearing memorandum, pp. 5 – 7.

<sup>5</sup> See *Id.* at pp. 6 – 7.

<sup>6</sup> At page 12 of its response, ASHA also argues that "all" of Mr. Balch's emails were produced. However, as discussed herein, ASHA's own statements to the Court and the testimony of Will Wood make clear that only one bankers' box of Mr. Balch's emails were produced in paper format and then they were deleted with the rest of his emails.

imminent. Moreover, Mr. Balch's statements in the affidavit were not subject to cross-examination and should be given less weight, if any, than the testimony elicited during the evidentiary hearing and the admissions of ASHA in the record.<sup>7</sup> To the extent ASHA wished to present testimony in defense of its conduct, the Court provided ASHA that opportunity during the evidentiary hearing.

In the alternative to its flat denial that any records were destroyed, ASHA attempts to justify its destruction of records by arguing that it did not violate an order or rule of the Court,<sup>8</sup> it made a good faith effort to preserve all records,<sup>9</sup> and Will Wood, ASHA's IT manager, did not believe that destroying computer hard drives and backup servers would qualify as destroying ASHA records.<sup>10</sup> Obviously, none of those arguments have any merit. Kentucky courts have established a clear rule regarding a party's duty to preserve potentially relevant records when litigation is imminent or pending.<sup>11</sup> Moreover, for obvious reasons, "[it] is the general rule that when litigation is pending the destruction, removal, concealment, or disposal of the subject matter of a lawsuit by a party to the action is contempt of the court even in the absence of a court order regarding the property."<sup>12</sup> Here, ASHA knew that all of its records were at issue.<sup>13</sup>

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<sup>7</sup> See *Fortune v. Fortune*, 61 So.3d 441, 445 (Fla. App. 2 Dist. 2011) ("It is well settled that affidavits are not admissible to prove facts in issue at an evidentiary hearing because they are not subject to cross-examination . . .").

<sup>8</sup> ASHA post-hearing response, p. 10.

<sup>9</sup> *Id.* at 7.

<sup>10</sup> *Id.* at 9.

<sup>11</sup> See Members' post-hearing memorandum, pp. 3-5.

<sup>12</sup> *Edmiston v. First Nat'l Bank of Holcomb*, 744 P.2d 829, 833 (Kan. 1987); see also *State ex rel. Chaudoin v. Superior Court for Kittitas County*, 39 P.2d 388, 390 (Wash. 1934) ("The willful disposal of the subject-matter of the litigation by a party in a pending action is contempt of court."); *State ex rel. Crown Inv. Group, LLC v. City of Bend*, 136 P.3d 1149, 1153 (Or. App. 2006) (finding that party committed contempt

ASHA's own policy prohibited the destruction of any records once litigation was imminent, and Will Wood received express instructions from the forensic computer consultant to keep the backup server and backup database in his office and not to give them to anyone because they will be important if litigation began.<sup>14</sup> Mr. Wood received those instructions approximately two weeks before ASHA filed this lawsuit. Nonetheless, ASHA's highest ranking employee and its IT manager systematically destroyed electronic records along with the computer hard drives and backup servers which would have made it possible to recover the destroyed records. It is beyond the pale for ASHA to argue that it acted in good faith. ASHA's destruction of records was not accidental but willful. It was in direct contravention of the law, ASHA's own policy, instructions from ASHA's counsel and instructions from ASHA's computer consultant.

**C. The Members' Are Not Expanding ASHA's Duties Under Kentucky Law, And This Is Not A Fishing Expedition**

ASHA contends that the Members' motion to hold ASHA in contempt for destroying records of its highest ranking employee during the pendency of this litigation would somehow "expand ASHA's statutory duty [to maintain] the records" beyond those which the legislature set forth in the first part of KRS § 273.233. This is simply not true. When not embroiled in litigation, ASHA is only required to maintain the records as mandated by KRS § 273.233. However, when ASHA recognized that litigation was imminent (as of April 15, 2009, according to ASHA's privilege log), ASHA was required to preserve all potentially relevant records

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of court despite lack of a specific order where the party destroyed a house that was the subject matter of the pending litigation).

<sup>13</sup> "Defendants insist . . . that 'all books and records' means all documents of whatever nature in the custody or control of the nonprofit association . . ." ASHA's Memorandum in Support of Motion for Summary Judgment, p. 17.

<sup>14</sup> September 21, 2009 email from Cipher Group to William Wood, attached as Exhibit 7 to Members' motion to hold ASHA in contempt.

throughout the litigation. As discussed above, ASHA knew that all of its records were at issue in this litigation, and its own policy required all records to be preserved throughout the litigation. Despite ASHA's argument otherwise, the Members are not asking the Court to sanction ASHA for violating KRS § 273.233. The Members are asking the Court to sanction ASHA for violating well-established Kentucky law, as reflected in ASHA's own policy, that a party has a duty to preserve its records during litigation.

ASHA makes its typical, last ditch, argument that somehow it should be given a free pass to violate the rule of law and its own document destruction policy because ASHA claims this dispute has been "an endless fishing expedition" and the best thing for this Court to do would be to deny any further relief to the Members regardless of ASHA's conduct.<sup>15</sup> Nothing could be further from the truth. The Court has made clear that the Members had a proper purpose to inspect certain records of ASHA in April 2009. Nonetheless, ASHA refused to produce significant records for inspection regarding substantial expenditures, and ASHA, not the Members, ultimately filed this lawsuit. Since the Members first voiced their concerns, ASHA's obstructionist conduct has done nothing but elevate concern about the management of ASHA. Despite having lost on the merits of the case, and having been denied a stay of enforcement of that decision by two separate courts, ASHA continued its efforts to avoid complying with the decision. ASHA forced the Members to incur significant fees and costs arguing about whether ASHA must produce records and whether it should produce them in their native format (also the most efficient and cost effective format). This motion would not have been filed, if ASHA had simply honored its obligations under the law, and its own policy, to preserve records during

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<sup>15</sup> ASHA's response to post-hearing memorandum, pp. 15-16.



litigation, and then complied with the Court's ruling in an efficient and good faith manner. ASHA, not the Members, caused this litigation to be drawn out unnecessarily.

**D. ASHA Stubbornly Refused To Proffer Any Remedy In The Event That The Court Finds That ASHA Destroyed Relevant Records And Holds ASHA In Civil Contempt**

ASHA declined to discuss proposed remedies should the Court find ASHA in contempt.<sup>16</sup> Accordingly, the only proposed remedies before the Court are the reasonable and appropriate remedies suggested by the Members. The Members have presented the best remedies available to compensate them for their losses and provide them with access to at least some of the information which was otherwise destroyed by ASHA.

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<sup>16</sup> In footnote 27 of its response dated October 21, 2011, ASHA cites several cases which purportedly support ASHA's argument that the remedies proposed by the Members are not appropriate. Of course, ASHA could not distinguish the cases cited in the Members' post-hearing memorandum in support for the Court's authority to grant the relief requested, but the cases cited by ASHA are easily distinguishable from the situation here: *See Mills v. Commonwealth*, 170 S.W.3d 310, 332 (Ky. 2005) (ruling on a convicted murderer's ineffective assistance of counsel claim and noting that the Commonwealth had no duty to collect evidence of moonshine that defendant claimed may have been beneficial to his later-derived intoxication defense; here, ASHA had a clear duty to preserve the subject-matter of the litigation and willfully destroyed it); *Crescendo Inv., Inc. v. Brice*, 61 S.W.3d 465, 479 (Tex. App. 2001) (finding that plaintiffs waived the issue of missing documents by failing to preserve it at the trial court level and affirming lack of spoliation instruction because the destruction of emails was pursuant to a normal practice and the emails were not relevant to the case; here, ASHA willfully destroyed records despite knowledge of the pending litigation regarding its records and the prohibition contained in ASHA's retention and destruction policy); *Village of Roselle v. Commonwealth Edison Co.*, 859 N.E.2d 1 (Ill. App. 2006) (finding that plaintiff failed to establish that defendant had a duty to preserve records and finding that all underlying information was still available, in the same format; here, there is no doubt that ASHA had a duty to preserve the destroyed records and the Members have clearly shown that not all records are still available, whether in native format or otherwise); *Courtney v. Big O Tires, Inc.*, 87 P.3d 930 (Idaho 2003) (finding that spoliation instruction was not required where an independent third-party accidentally picked up and recycled a tire when picking up other tires to be recycled; here, the evidence is clear that the documents were destroyed by ASHA itself despite a clear policy that none of its records should be destroyed during litigation). In short, ASHA's spoliation footnote is nothing more than an attempt to divert the Court's attention from the real issue here – the fact that ASHA intentionally destroyed the very documents about which it brought this lawsuit. The Members agree that the issue cannot be resolved by a simple instruction to a jury. ASHA removed the ability of this Court to effectively rule on the issues presented by ASHA's Complaint and the Members' counterclaim by destroying the records created and received by ASHA's highest ranking employee, thus assuring that they would never be produced regardless of the result the Court reached. There can be no doubt that a party's destruction of the subject-matter of litigation is contempt of court and, therefore, sanctionable. *See* 17 C.J.S., Contempt § 43 (2011); the Members' post-hearing memorandum at 7 – 9.

ASHA filed this lawsuit in an effort to prevent the Members from inspecting records regarding the operation and management of ASHA. ASHA protested that all of its records would be subject to inspection by the Members unless it could obtain relief from this Court. When the Court confirmed that the plainly worded statute at issue, KRS § 273.233, entitled the Members to inspect all of its records, ASHA attempted to bury the Members in thousands upon thousands of paper records rather than simply provide the records in their native electronic format. Only after being ordered to produce its records in their native electronic format did ASHA finally admit that it had destroyed electronic records during the litigation. Not only did it destroy the originals, but it also destroyed the hard drives and backups. ASHA confirmed that all that was left of Mr. Balch's records fell into three categories: (1) a single box of paper records Mr. Balch chose to print before he resigned during the litigation, (2) various photographs and an article regarding Santa Anita and (3) records that ASHA continues to withhold based upon claims of privilege and work product.

ASHA's destruction of electronic records, computer hard drives and backup servers was not the result of a series of accidents or bad luck. ASHA's conduct was willful and in direct violation of Kentucky law and ASHA's clearly worded document retention and destruction policy. The Court should order ASHA to reimburse the Members for the costs incurred defending their inspection rights under Kentucky law. The Members should not be forced to bear the complete cost of defending their rights since it is now clear that ASHA had fixed the outcome regardless of the Court's decision.<sup>17</sup>

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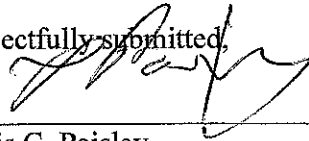
<sup>17</sup> The U.S. Supreme Court affirmed an award of *all* attorneys' fees, over \$1,000,000, for a party's contempt of court. The Court explained that all fees were appropriate because the party's "actions were part of a sordid scheme of deliberate misuse of the judicial process designed to defeat Masco's claim by harassment, repeated and endless delay, mountainous expense and waste of financial resources." *Chambers v. MASCO, Inc.*, 501 U.S. 32, 56-57 (1991).

Moreover, ASHA's attorneys have represented that they informed ASHA during the pendency of the litigation of ASHA's obligation to preserve all records. ASHA's conduct caused the records on its privilege log to be the last remaining chance for the Members to inspect information to which they are entitled. This remedy is designed to, in part, undo the harm caused by ASHA and allow the Members access to information otherwise destroyed by ASHA. In fact, the privilege log is riddled with correspondence to, from and relating to Alan Balch – much of which includes chains of email that do not appear to be sent to or from counsel for ASHA. As discussed in the Members' post-hearing memorandum, courts have awarded this remedy in situations involving less egregious conduct than that exhibited by ASHA. ASHA should not be permitted to hide the only remaining records relating to Mr. Balch based upon claims of privilege and work product when ASHA destroyed the other records.

### III. CONCLUSION

For the reasons given in the Members' post-hearing memorandum and herein, the Court should grant the Members' motion and hold ASHA in civil contempt, order ASHA to compensate the aggrieved Members in an amount equal to all of their expenses, including attorneys' fees, incurred litigating this dispute and order ASHA to produce all of the records listed on its privilege log.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

A copy of the foregoing Defendants' Reply In Support Of 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 November 4, 2011:

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