

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE NO. 2011-CA-000232-MR
CASE NO. 2011-CA-001572-MR

AMERICAN SADDLEBRED
HORSE ASSOCIATION, INC.

APPELLANT

v.

EDWARD R. BENNETT, ET AL.

APPELLEES

Appeal from Fayette Circuit Court
No. 09-CI-05292

BRIEF OF APPELLEES

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CERTIFICATE OF SERVICE

A copy of this document was served by hand delivery to Edward H. Stopher, Jefferson K. Streepey, Raymond G. Smith and Jeff W. Adamson, Boehl Stopher & Graves, LLP, 400 West Market Street, Suite 2300, Louisville, KY 40202-3354, and Theodore T. Myre, Jr., Byron E. Leet, Wyatt, Tarrant & Combs, LLP, 500 West Jefferson Street, Suite 2800, Louisville, KY 40202 and by United States First Class Mail, postage prepaid, to Hon. James D. Ishmael, Jr., Fayette Circuit Court, Robert F. Stephens Courthouse, 120 N. Limestone, Lexington, KY 40507 on the 27th day of December, 2011, and the record on appeal has been returned to the clerk of the Fayette Circuit Court.



Stephen A. Houston

I. STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to CR 76.12(4)(d)(i), Appellees state that oral argument is not likely to assist the Court in determining (1) whether the Fayette Circuit Court correctly interpreted the plain language of KRS § 273.233; (2) whether the Fayette Circuit Court retained jurisdiction to enforce its orders; and (3) whether the Fayette Circuit Court's finding of fact that the Appellees had stated a proper purpose to inspect Appellant's records was clearly erroneous.

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III. COUNTERSTATEMENT OF THE CASE

A. Background

The American Saddlebred Horse Association (“ASHA” or “Appellant”) is a Kentucky non-profit corporation responsible for, among other things, maintaining the integrity of the American Saddlebred breed of horse and promoting the American Saddlebred industry. Many of the members of ASHA have invested significant assets in the American Saddlebred industry and, therefore, have a strong interest in the success of ASHA. The general public is only entitled to review basic information about a non-profit corporation, such as its articles of incorporation and its annual IRS Form 990. Members of the non-profit corporation, on the other hand, are entitled, by law, to a much more detailed inspection of the corporate records under KRS § 273.233.

ASHA brought the underlying action in Fayette Circuit Court seeking a declaratory judgment to preclude the Appellees (“Members”) from exercising their rights to inspect the non-profit corporation’s books and records.¹ The Fayette Circuit Court granted summary judgment in favor of the Members and confirmed that, under the plain language of KRS § 273.233, the Members are entitled to inspect all of ASHA’s corporate records.² The Fayette Circuit Court rejected ASHA’s request to stay enforcement of the

¹ ASHA’s Complaint (2011-CA-000232-MR Record on Appeal (hereinafter “232-RA”)) at 1 – 12.

² See Opinion, Order and Judgment dated December 2, 2010 and Final Judgment and Order dated January 6, 2011; attached to Appellant’s Brief as Appendix 1 and Appendix 2.

decision pending an appeal.³ A similar motion for a stay was also rejected by this Court.⁴ Despite a valid and enforceable order requiring ASHA to produce its records for inspection by the Members, ASHA refused to produce all of the records sought for inspection. The Fayette Circuit Court entered two subsequent orders enforcing its original decision and requiring ASHA to produce specific records improperly withheld by ASHA.

ASHA filed three separate appeals arising out of the same Fayette Circuit Court case. First, ASHA appealed the Fayette Circuit Court's interpretation of the plainly worded inspection statute, KRS § 273.233.⁵ Second, ASHA appealed the Fayette Circuit Court order dated August 9, 2011, enforcing its original ruling and requiring ASHA to produce specific categories of records being improperly withheld from inspection, including financial records that were created during the pendency of the litigation.⁶ Third, ASHA appealed the Fayette Circuit Court order dated September 1, 2011, enforcing its original ruling and requiring ASHA to produce records relating to the termination of ASHA's highest ranking employee including, without limitation, copies of ASHA's out-of-court settlement with that former employee.⁷ By order dated, September

³ See Order entered February 25, 2011; attached to Appellant's Brief as Appendix 3.

⁴ See Appellant's Brief at 9; *see also* 2011-CA-000232-MR Order dated May 18, 2011.

⁵ See 2011-CA-00232-MR.

⁶ See 2011-CA-01572-MR.

⁷ See Appellant's Brief at 12 – 13; *see also* 2011-CA-01800-MR.

23, 2011, the first two appeals were consolidated. The third appeal, 2011-CA-01800-MR, remains pending as a separate case in this Court.⁸

B. Chronology of Events Before ASHA Initiated Litigation

By letter dated February 10, 2009, a certified public accountant retained by ASHA identified “significant deficiencies” in the accounting policies of ASHA, which has an annual budget of approximately \$2,000,000.⁹ By letter dated April 20, 2009, the Members requested to inspect books and records containing certain information and identified a proper purpose for seeking the information.¹⁰ By letter dated May 15, 2009, ASHA denied having any legal obligation to allow the Members to inspect its corporate records.¹¹ By letter dated May 20, 2009, the Members referred ASHA to KRS § 273.233, which authorizes members of a non-profit corporation to inspect all books and records of the corporation.¹²

On June 15, 2009, ASHA allowed the Members’ representatives to inspect portions of ASHA’s books and records but refused to permit inspection of certain important records including, without limitation, records relating to the salaries, bonuses

⁸ On December 22, 2011, ASHA filed a fourth appeal arising out of the same litigation. ASHA appealed the Fayette Circuit Court’s post-judgment order dated November 23, 2011, holding ASHA in civil contempt for destroying records during the litigation.

⁹ 232-RA at 425 – 6; *see also* Members’ Memorandum in Opposition to ASHA’s Motion for Summary Judgment and in Support of the Members’ Cross-Motion for Summary Judgment (“Members’ MSJ”) at 1 – 2 (232-RA at 406 – 7).

¹⁰ 232-RA at 428 – 434; *see also* Members’ MSJ at 2 (232-RA at 407).

¹¹ 232-RA at 436 – 7.

¹² 232-RA at 439.

and commissions paid to ASHA's employees.¹³ Furthermore, ASHA refused to allow the Members to copy the records that it chose to produce for inspection.¹⁴

By letter dated June 26, 2009, the Members appealed to ASHA to comply with KRS § 273.233.¹⁵ By letter dated July 13, 2009, ASHA refused to acknowledge that KRS § 273.233 authorized the Members to inspect the non-profit corporation's books and records. Although refusing to produce all of the documents requested, ASHA offered to make some of the documents which had been previously withheld available for inspection on July 29, 2009 at its offices in Lexington, Kentucky.¹⁶

On July 29, 2009, ASHA produced a few boxes of historic records which had not been requested but once again refused to produce documents that were responsive to the requests made by the Members including, without limitation, documents relating to salaries, commissions, bonuses and correspondence between the Board of Directors and the Executive Secretary relating to the resignation of one of the members of the finance committee.¹⁷ Furthermore, the Members were only permitted to copy portions of the records produced.¹⁸

¹³ See Houston letter to Streepey dated June 26, 2009 (232-RA at 441 – 7); see also Members' MSJ at 2 – 3 (232-RA at 407 – 8).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 232-RA at 449 – 450.

¹⁷ See Affidavit of Alan Balch, (RA-232 at 458 – 460).

¹⁸ *Id.*

After continued negotiations between the parties, ASHA offered to allow the Members to “inspect or review whatever they want.”¹⁹ By electronic mail dated August 12, 2009, a representative of the Members accepted ASHA’s offer.²⁰ By electronic mail dated August 14, 2009, ASHA confirmed the agreement to allow the Members to inspect or review whatever they want, and ASHA subsequently scheduled a meeting for the inspection and potential discussion to occur on October 5, 2009.²¹

On August 25, 2009, the Members requested an opportunity to inspect the books and records before the October 5, 2009 meeting so that the meeting would be more productive.²² ASHA balked at that request but agreed to produce for inspection in September 2009 some of the records previously withheld.²³

Upon arrival for the mutually agreed inspection on September 18, 2009, ASHA hand-delivered to the Members a letter from the personal attorney for ASHA’s highest ranking employee, Alan Balch. The letter threatened legal action against the Members arising out of their questions about the oversight of ASHA.²⁴ ASHA argued that the agreement was to produce the records on October 5, 2009.

On October 5, 2009, the Members traveled to Lexington, Kentucky to inspect the previously withheld books and records of ASHA, but ASHA continued to withhold responsive records including, without limitation, records relating to salaries, bonuses,

¹⁹ RA-232 at 469.

²⁰ 232-RA 471 – 2.

²¹ 232-RA at 474 – 5.

²² 232-RA at 477 – 9.

²³ 232-RA at 481 – 2.

²⁴ 232-RA at 484 – 6.

commissions and correspondence between the Board of Directors and ASHA's Executive Secretary, Alan Balch.²⁵ In fact, ASHA refused to produce a single new document despite its offer to allow the Members to "inspect and review whatever they want." The next day, ASHA filed the underlying lawsuit against the Members.

C. Important Records Withheld by ASHA

ASHA argued that it withheld what it deemed to be "confidential information," "communications made with an expectation of privacy" and "private personnel and individually identifying payroll files and information."²⁶ ASHA attempted to minimize the type of information that it withheld under these broad categories based on its own unfettered discretion. For example, ASHA implied that much of the information it withheld related to employee social security numbers and credit card account numbers.²⁷ In fact, ASHA withheld important corporate records such as the amounts that it paid individual employees in the form of salaries, commissions and bonuses.²⁸ It also withheld monthly financial reports.²⁹

²⁵ See ASHA's Memorandum in Support of its Motion for Summary Judgment ("ASHA's MSJ") at 7 (232-RA at 258).

²⁶ See, e.g., ASHA's MSJ at 7, 12 and 14 (232-RA at 258, 263 and 265).

²⁷ See, e.g., ASHA's MSJ at 14 (232-RA at 265). ASHA conveniently failed to note that concerns about social security numbers and credit card numbers can be, and were, addressed by redaction when necessary. See 232-RA at 410 - 1.

²⁸ See ASHA's MSJ at 7 (232-RA at 258); see also Affidavit of Alan Balch (RA-232 at 458 - 460).

²⁹ See excerpt of Jones Deposition (pp. 48-51) (232-RA at 488 - 92).

D. The Fayette Circuit Court's Decisions

By orders dated December 2, 2010, and January 6, 2011, the Fayette Circuit Court entered summary judgment in favor of the Members and confirmed that KRS § 273.233 requires ASHA to produce its records for inspection by the Members.³⁰ The Fayette Circuit Court denied ASHA's request to stay enforcement of those orders pending appeal.³¹ This Court subsequently denied a similar request for a stay.³² Nonetheless, ASHA continued to withhold certain categories of records from inspection by the Members. On August 9, 2011, the Fayette Circuit Court entered an order enforcing its original ruling and requiring ASHA to produce the records being withheld from the Members.³³ ASHA still continued to withhold certain records. On September 1, 2011, the Fayette Circuit Court again entered an order enforcing its original decision and ordered ASHA to produce records relating to the termination of ASHA's highest ranking employee including, without limitation, records relating to the out-of-court settlement agreement with that former employee.³⁴

E. Issues on Appeal

The issues before this Court are: (1) whether the Fayette Circuit Court correctly interpreted the plain language of KRS § 273.233; (2) whether the Fayette Circuit Court

³⁰ Appellant's Brief, Appendices 1 and 2.

³¹ Appellant's Brief, Appendix 3.

³² See Appellant's Brief at 9; see also 2011-CA-000232-MR Order dated May 18, 2011.

³³ Appellant's Brief, Appendix 4.

³⁴ See Appellant's Brief at 12 – 13; see also 2011-CA-01800-MR. This appeal has not been consolidated with the above-styled matters.

had the authority to enforce its original ruling despite the pending appeal; and (3) whether the Fayette Circuit Court was clearly erroneous when it found that the Members stated a proper purpose to inspect ASHA's records.

As set forth more fully below, none of the errors alleged by ASHA have merit. First, the Fayette Circuit Court's interpretation of KRS § 273.233 is based upon the plain language of the statute, and it is consistent with the intent of the legislature and interpretations of similar statutes in other states. On the other hand, ASHA's interpretation of the statute requires inserting words that the legislature did not choose to include. Second, ASHA did not obtain a stay of any enforcement of the decision, and the Fayette Circuit Court retained jurisdiction to enforce its decision, despite the pending appeal. Third, the Fayette Circuit Court's finding of fact that the Members stated a proper purpose to inspect ASHA's records is not clearly erroneous.

IV. ARGUMENT

A. **The Fayette Circuit Court's Interpretation of the Plain Language of KRS § 273.233 Is Correct**

(i) Courts Must Construe Kentucky Statutes Based Upon Their Plain Meaning and Without Reading Words into the Statutes that Are Not There

"The plain meaning of the statutory language is presumed to be what the legislature intended, and if the meaning is plain, then the court cannot base its interpretation on any other method or source."³⁵ "In other words, [courts] assume that the [legislature] meant exactly what it said, and said exactly what it meant."³⁶ In doing so,

³⁵ *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005).

³⁶ *Id.* (internal quotations omitted).

courts must examine the precise language used in the statute without reading into it words that are not there.³⁷ Courts must not attempt to guess what the General Assembly might have intended to say, but did not.³⁸

(ii) The Plain Meaning of KRS § 273.233 Subjects All Records of a Non-Profit Corporation to Inspection by Its Members

The first sentence of KRS § 273.233, identifies records that non-profit corporations are required to maintain. It states:

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 principal office in this state a record of the names and addresses of its members entitled to vote.

The second sentence of the statute provides to the members of a non-profit corporation a right to inspect “all books and records.” Specifically, it states:

All books and records of a corporation may be inspected and copied by any member, or the member's agent or attorney, for any proper purpose at any reasonable time.

(Emphasis added).³⁹ Accordingly, the plain language of the statute provides that, although the Kentucky non-profit corporation is only required to keep certain categories of records, its members (should it choose to have members) are entitled to inspect all

³⁷ *Bohannon v. City of Louisville*, 193 Ky. 276, 235 S.W. 750, 752 (1921).

³⁸ *Lewis v. Creasey Corporation*, 198 Ky. 409, 248 S.W. 1046, 1048 (1923).

³⁹ The 2010 General Assembly amended KRS § 273.233 to make express that (a) the right to inspect extends to the right to copy and (b) that neither the articles nor the by-laws may restrict a member’s right of inspection. *See* 2010 Acts, ch. 133, § 17, eff. July 15, 2010. Those amendments provide further evidence of the General Assembly’s intent to provide broad oversight of non-profit corporations by their members.

records maintained by the corporation. Both sentences have clear meaning under their plain language. The first sentence sets forth the minimum categories of records that Kentucky non-profits must maintain. The second sentence entitles members to inspect all records maintained by the non-profit so long as the members state a proper purpose and the inspection is conducted at a reasonable time. Since the language of the statute is plain and easy to understand, there is no need to attempt to interpret the statute based upon any other source, nor is there a need to guess if the General Assembly meant something different. As the cases in subsection (i) above make clear, this Court must assume that the legislature said what it meant and meant what it said.

Both ASHA and the Amicus argue that the second sentence of KRS § 273.233, providing that “all books and records of a corporation may be inspected,” is actually limited in application to the books and records recited in the first sentence.⁴⁰ They cite no authority for this proposition.⁴¹ The General Assembly knows how to draft an inspection statute when the provisions are cross-referenced and thereby limited. *See* KRS

⁴⁰ Amicus states at note 1 of its brief that “[i]t is believed that this has been treated as the scope of this provision by common practice in this state for decades and should not now be changed by judicial fiat.” Amicus cites no authority for that proposition. In fact, at least one monograph, which was co-authored by counsel for Amicus, noted the broad scope of the right to inspect “[a]ll books and records of the corporation . . .” *See* Jesse T. Mountjoy and Theodore T. Meyer, Jr. – *Non-Profit Corporations in Kentucky* (2d ed. UKCLE Monograph, 1991). The monograph did not suggest that inspection rights are limited to certain categories of records. Moreover, Amicus offers no authority that, to the extent common practice followed an erroneous interpretation of the statute, such an interpretation would authorize this Court to disavow the plain language as written by the General Assembly.

⁴¹ At note 39 of the Appellant’s Brief, ASHA cites to an affidavit of a purported “expert,” Conley Salyer. Mr. Salyer’s affidavit purports to address the precise issue of law that is before this Court. Of course, the interpretation of statutes is the province of the courts, and Mr. Conley’s affidavit should be disregarded.

§§ 271B.16-020(1)(2); *id.* § 362.441(1). The General Assembly chose not to limit the scope of the second sentence in KRS § 273.233. There is nothing out of the ordinary in the General Assembly both requiring that certain minimum records be maintained while at the same time affording inspection rights as to all records. *See* KRS §§ 275.185(1), (2). If ASHA and the Amicus wish to change the clear language of the law, they must convince the General Assembly to do so.

(iii) Interpretation of Similar Statutes

While there is no Kentucky case interpreting the scope of the inspection rights granted to members pursuant to KRS § 273.233, other courts provide persuasive guidance.

South Dakota Codified Laws (“SDCL”) §§ 47-24-1 and 47-24-2 are identical in all material respects to the language in KRS § 273.233 requiring non-profit corporations to maintain certain records, but entitling members to inspect all records actually maintained. Accordingly, the Supreme Court of South Dakota’s interpretation of its statute is persuasive guidance on the proper interpretation of KRS § 273.233. In 2004, the Supreme Court of South Dakota held that “as long as a member has stated a proper purpose, which is presumed, the member may inspect all books and records necessary to make an intelligent and searching investigation.” *Lang v. W. Providers Physician Org.*, 688 N.W.2d 403, 407-08 (S.D. 2004) (citing *Patel v. Ill. State Med. Soc’y*, 698 N.E.2d 588 (Ill. App. Ct. 1998)).⁴²

⁴² At note 51 of the Appellant’s Brief, ASHA claims that *Lang* is not instructive on the interpretation of “books and records.” While the *Lang* court noted that the precise scope of “books and records” had not been preserved for appeal, the court confirmed that

Illinois' statute is almost identical.⁴³ The only difference is that the Illinois statute limits the right to inspection to only those members entitled to vote.⁴⁴ In 1998, the Appellate Court of Illinois held:

The right to examine records may even extend to records for which a proper purpose has not been directly shown, so long as one has been shown for some records: "the shareholder is *not* required to establish a proper purpose for each record he requests. Once that purpose has been established, the shareholder's right to inspect extends to all books and records necessary to make an intelligent and searching investigation and from which he can derive any information that will enable him to better protect his interests."

Patel v. Ill. State Med. Soc'y, 698 N.E.2d 588, 593 (Ill. App. Ct. 1998) (quoting *Meyer v. Bd. of Managers of Harbor House Condo. Ass'n*, 583 N.E.2d 14, 18 (Ill. App. Ct. 1991) (additional citations omitted).

(iv) Inspection Statutes are Construed Liberally

Statutes granting the right of inspection are construed liberally.⁴⁵ "Books and records" has been given a broad construction so as to extend to all records, contracts, paper, and correspondence to which the common law right of inspection of a stockholder

the right to inspection covered a broad category of documents, including all business documents and communications. As noted above, the *Lang* court interpreted an inspection statute that is identical to the language in KRS § 273.233.

⁴³ 805 ILCS 105/107.75 states "All books and records of a corporation may be inspected by any member entitled to vote, or that member's agent or attorney, for any proper purpose at any reasonable time."

⁴⁴ Although KRS § 273.233 has no such requirement, there is no dispute that all of the Members are entitled to vote.

⁴⁵ 88 A.L.R.3d 663 § 2[a]. See also *Bank of Heflin v. Miles*, 318 So. 2d 697, 701 (Ala. 1975) ("The applicable statute is not limited to 'relevant' books and records; it is to be liberally construed."); 18 C.J.S. *Corporations* § 409.

might properly apply.⁴⁶ Other jurisdictions have determined that “books and records” include more than the narrow categories of “books and records of account, minutes and the record of shareholders.”⁴⁷

⁴⁶ 18A AM.JUR. 2d *Corporations* § 330. See also *Meyer v. Ford Indus., Inc.*, 538 P.2d 353, 358 (Or. 1975) (holding that “books and records of account” was not limited to books and records of account “in any ordinary, literal or otherwise limited sense, but to be the subject of a broad and liberal construction so as to extend to all records, contracts, papers and correspondence to which the common law right of inspection of a stockholder may properly apply.”); *State v. Malleable Iron Range Co.*, 187 N.W. 646 (Wis. 1922) (“The right of a stockholder to examine the records and books of account of a corporation extends to all papers, contracts, minute books, or other instruments from which he can derive any information which will enable him to better protect his interest and perform his duties.”). The Kentucky Supreme Court has held that the common law right of inspection extends to all correspondence which relates to the business affairs of the corporation if the shareholder has a proper purpose. *Otis-Hidden Co. v. Scheirich*, 219 S.W. 191, 194 (Ky. 1920) (“At common law the right of inspection covers all the books and records of the corporation. But the word ‘record’ is not used in the narrow sense of minutes of official action taken by the board of directors, but has been held to include the documents, contracts, and papers of the corporation. . . . We therefore conclude that all of the correspondence in question, which relates to the business affairs of the corporation, is subject to inspection by plaintiff, who has an interest to protect, and whose purpose is not shown to be improper or unlawful.”) (citations omitted). At note 57 of Appellant’s Brief, it cites *Lewis v. Pa. Bar Ass’n*, 701 A.2d 551 (Penn. 1997) for the proposition that Kentucky’s statute should be interpreted narrowly. The Pennsylvania inspection statute, however, is substantially different than KRS § 273.233. While the Kentucky statute allows for the inspection of “all books and records,” the Pennsylvania statute specifically limits the right of inspection, providing, *inter alia*, “Every member shall, upon written verified demand stating the purpose thereof, have a right to examine, in person or by agent or attorney, during the usual hours for business for any proper purpose, the membership register, books and records of account, and records of the proceedings of the members, directors and any other body, and to make copies or extracts therefrom.” 15 PA. STAT. ANN. § 5508.

⁴⁷ See *Riser v. Genuine Parts Co.*, 258 S.E.2d 184 (1979) (The court found that “books and records of account” included records relating to the investment of the amount which the defendant contributed to its employee pension plan. The court also suggested that the other documents requested, including attorneys’ opinions and work sheets, profit and loss projections, further breakdowns of monthly records, income tax records, and merger and investigatory files, could have been subject to inspection.); *Bank of Heflin*, 318 So. 2d 697 (finding that “books and records” included certain confidential memoranda, individual files, and materials from which the books and records of the

(v) Directors of Corporations, Including Non-Profits, are Fiduciaries Responsible for Maintaining the Corporate Records for the Benefit of Their Members

ASHA also contends that a member of a non-profit corporation has only a minimal right of inspection. It argues that because a non-profit corporation is subject to the private inurement rules the members expect to receive no ongoing benefit from their contributions to its activities.⁴⁸ First, this is a policy argument, and it is one that has been rejected by the General Assembly based upon the plain language of KRS § 273.233. Clearly, the General Assembly believes that non-profits should be subject to exact oversight by their members.

In addition, ASHA's policy argument is both unjustified and misleading. Rather, as set forth in a leading treatise on corporate law:

In a sense, the right to inspection arises out of the fact that those in charge of the corporation are merely the shareholders' agents, concerning whose good faith in discharging their duties, the shareholders have an interest and right to be informed. While the books and papers of the corporation are necessarily in the hands of the corporate officers and agents, they are the common property of the shareholders who have the right to know what the corporation is doing.

Managers of some corporations deliberately keep the shareholders in ignorance or under misapprehension as to the true condition of affairs. Business prudence demands

account were prepared); *Burton v. Cravey*, 759 S.W.2d 160 (Tex. App. 1988) (The trial court found that all of the files and records of the attorney for the non-profit condominium association which related to the association were "books and records" of the association; that holding was not challenged on appeal.); *Corwin v. Abbott Labs.*, 819 N.E.2d 1249 (Ill. App. Ct. 2004) (holding that "books and records of account" included internal investigatory reports as well as any and all documents received by any board members).

⁴⁸ See Appellant's Brief at 18 – 19.

that the investor keep a watchful eye on the management and condition of the business. Those in charge of the company may be guilty of gross incompetence or dishonesty for years and escape liability if the shareholders can not inspect the records and obtain information.⁴⁹

Numerous courts have endorsed this rationale of the member's right to information. For example, in *Bill Reno, Inc. v. Rocky Mountain Ford Dealers' Advertising Association*, the court observed that "A member of a non-profit corporation is entitled to be informed concerning the business activities conducted by the corporation."⁵⁰ As observed by the Delaware Supreme Court in *Saito v. McKesson HBOC, Inc.*, "[a]s a matter of self-protection, a stock holder was entitled to know how his agents were conducting the affairs of the corporation of which he or she was a part owner."⁵¹ As observed in *Left Hand Ditch Co. v. Hill*:

Shareholders have a common law right to inspect the books and records of the corporation. This right of inspection is available to the shareholders of a nonprofit corporation. . . . The rationale for this rule derives from the notion that "the books are not the private property of the directors or

⁴⁹ 5A WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2213 (2004 Rev. Ed.) (citations omitted). See also Mary Grace Blasko, Kurt S. Crossley and David Lloyd, *Standing to Sue in the Charitable Sector*, 28 U.S.F.L.R. 37, 54 (Fall 1993) ("Although members may not have 'pecuniary interest' in a charitable corporation, it has gradually been recognized that they do have an "interest' in the corporation distinct from that of the general public.") (footnote omitted). It has even been suggested that the interests of the members of a non-profit corporation are broader than those of the shareholders in a for-profit venture. "Many state non-profit corporation acts contain provisions granting members the right to inspect records and the courts have been willing to enforce those rights. Such rights stem from the 'member's interest as a member, which may be broader than a shareholder's interest in a business corporation.'" *Id.* at 57-58.

⁵⁰ 378 P.2d 206, 207 (Colo. 1963).

⁵¹ *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 116 (Del. 2002) (quoting *Shaw v. Agri-Mark, Inc.*, 663 A.2d 464, 467 (Del. 1995)).

managers, but are the record of their transactions as trustees for the stockholders.”⁵²

It is axiomatic that the directors of a corporation, including a non-profit corporation, are fiduciaries to the business organization.⁵³ Being fiduciaries, it is entirely appropriate that they be subject to exacting review by those on whose behalf they direct the corporation and its assets. Again, in reliance upon a leading treatise:

The modern tendency of the courts is to permit shareholders to examine the books and records of the corporation for the purpose of ascertaining whether the business of the corporation has been properly conducted and for the purpose of soliciting proxies for use at the shareholders’ meeting. It is the general rule that shareholders are entitled to full information relating to the management of the corporation and the manner of expenditure of its funds, and to inspection in order to obtain that information, especially where it appears that the company is being mismanaged or that it is being managed for the personal benefit of officers or directors or certain of the shareholders to the exclusion of others.⁵⁴

In other instances of business organization law the right of inspection exists even though there is no expectation of economic return. For instance, in an LLC, one can be a member enjoying full rights of inspection of company records⁵⁵ even though that same member does not have an economic interest in the LLC.⁵⁶ The Plaintiff’s assertion that

⁵² *Left Hand Ditch Co. v. Hill*, 933 P.2d 1, 5 (Colo. 1997) (quoting *Dines v. Harris*, 291 P. 1024, 1028 (Colo. 1930)).

⁵³ See KRS § 273.215.

⁵⁴ Fletcher CYCLOPEDIA, *supra* note 49 at § 2223 (citations omitted).

⁵⁵ See KRS § 275.185(2).

⁵⁶ See KRS § 275.195(3); *see also* Thomas E. Rutledge, *The 2007 Amendments to the Kentucky Business Entity Statutes*, 97 KY. L.J. 229, 258-9 (2008-09).

rights of inspection must be based upon an expectation of economic return is simply not supported.

(vi) The “Proper Purpose” Requirement Provides Appropriate Safeguards for Non-Profit Corporations

Dissatisfied with the plain language of the statute, ASHA and the Amicus resort to an argument that the Court should impose a creative interpretation on the statute because they claim that, if the statute is enforced as written, the sky would fall on Kentucky non-profits. ASHA and the Amicus argue that, if Kentucky courts construe the statute based upon its plain language, Kentucky non-profits would be required to (1) disclose records in violation of federal laws such as the Health Insurance Portability and Accountability Act (“HIPAA”) and (2) respond to unfettered requests to inspect records regardless of their reasonableness. Neither is true. The General Assembly provided ample protections for Kentucky non-profits to avoid inappropriate requests to inspect corporate records. The plain language of the statute makes clear that members may only inspect records for a “proper purpose” and at a “reasonable time.” Any non-profit that is aggrieved by its members who seek to inspect records without a proper purpose or at unreasonable times may simply deny the inspection.⁵⁷ Any dispute would be subject to review by the appropriate court.

⁵⁷ Furthermore, there is no requirement that non-profits have members. If a non-profit corporation chooses to have members, it must comply with KRS § 273.233.

B. The Fayette Circuit Court Had Jurisdiction to Enforce Its Judgment Regardless of the Pending Appeals

ASHA contests the Circuit Court's jurisdiction to enter its Order dated August 9, 2011. ASHA argues that the filing of this appeal removed such jurisdiction. That argument is wrong. As Kentucky's then-highest court made clear, "The pendency of an appeal would not affect the jurisdiction of the circuit court to compel compliance with any of its injunctive orders as long as they were effective." *Hale v. Cundari Gas Transmission Co.*, 454 S.W.2d 679, 680 (Ky. 1969); *see also* 7 Kurt A. Phillips, Jr., *et al.*, *Kentucky Practice Rules of Civil Procedure Annotated* Rule 65.06(3) (6th ed. 2005) (noting the same). The Court went on to note that it is particularly appropriate for the Circuit Court to retain jurisdiction to enforce its orders "when we have a situation such as here presented which requires a construction of the terms of the injunction order. Under the circumstances, the circuit judge is in a much better position than we to construe his own judgment, to take any necessary proof and to grant such relief as may be appropriate." *Hale*, 454 S.W.2d at 680.

The procedure followed here complies with that set forth in *Hale* precisely. First, the injunctive order of the Circuit Court was enforceable. ASHA attempted to stay the enforcement of the Circuit Court's orders in both this Court and the Circuit Court. Both courts denied ASHA's motion to stay. Second, the Circuit Court was called upon to construe and enforce the terms of its orders. The order dated December 2, 2010, stated that the "right of inspection and copying is not limited to the enumerated items set out in the first sentence of KRS § 273.233 but shall include each and every item, document or

record of any description responsive to the written requests of the Members.”⁵⁸ The order dated January 9, 2011 (which incorporated in full the order dated December 2, 2010) expressly stated that the Circuit Court “retains jurisdiction to enforce this Final and Appealable Order.” Since ASHA’s efforts to stay the Fayette Circuit Court’s orders pending this appeal failed, the Circuit Court retained jurisdiction to enforce those orders.

During post-judgment proceedings, the Circuit Court interpreted its previous rulings and determined that ASHA was required to produce the records sought for inspection by the Members. First, the Fayette Circuit Court confirmed that “[t]he Defendants’ have stated a proper purpose to inspect records of the [ASHA], and they are entitled to inspect such records pursuant to this Court’s orders dated December 2, 2010 and January 6, 2011.”⁵⁹ The Circuit Court went on to confirm that ASHA shall produce the records being withheld, and outlined the logistics for that production, such as requiring ASHA to produce electronic mail in electronic format and requiring ASHA to produce a privilege log.⁶⁰ The Fayette Circuit Court acted within its authority to interpret and enforce its previous orders.

C. The Fayette Circuit Court’s Finding of Fact That The Members Stated a Proper Purpose to Inspect ASHA’s Records Was Not Clearly Erroneous

ASHA contests the Circuit Court’s finding that the Members stated a proper purpose in asking to review ASHA’s records. That argument has no merit. First, ASHA admits that, in its complaint, it did not challenge the Members’ purpose for inspecting the

⁵⁸ Appellant’s Brief, Appendix 1, at 7 – 8.

⁵⁹ Appellant’s Brief, Appendix 3, at 1.

⁶⁰ *Id.*, at 1 – 2.

non-profit's corporate records.⁶¹ ASHA did not challenge the Members' "proper purpose" to inspect ASHA's records until after the Fayette Circuit Court granted summary judgment in favor of the Members and confirmed their right to inspect ASHA's records.⁶² Accordingly, ASHA failed to preserve that argument.

To the extent that this Court determines that ASHA preserved its argument regarding the Members' proper purpose to inspect the corporate records, the Fayette Circuit Court's finding should be affirmed. The finding by the Circuit Court was a finding of fact during post-judgment proceedings to enforce the previous orders.⁶³ It was not a conclusion of law as ASHA attempts to cast it. As is well-settled in Kentucky, "the factual findings of the trial court shall not be set aside unless they are clearly erroneous, that is not supported by substantial evidence." *Phillips v. Akers*, 103 S.W.3d 705,709 (Ky. App. 2002); *see also* CR 52.01 ("Findings of fact shall not be set aside unless clearly erroneous . . .").

Here, there was substantial evidence from which the Circuit Court could determine that the Members had a proper purpose in seeking to inspect the records of ASHA. The Members' first requests to inspect certain categories of records came after ASHA's own auditor identified "significant deficiencies" in ASHA's accounting and internal control policies.⁶⁴ Furthermore, ASHA's annual report identified large sums of money being spent with very little detail about the benefit received by the non-profit

⁶¹ Appellant's Brief, at 19.

⁶² *Id.*

⁶³ Appellant's Brief, Appendix 4, at 1.

⁶⁴ 232-RA at 425 – 6; *see also* Members' MSJ at 1 – 2 (232-RA at 406 – 7).

entity.⁶⁵ For example, expenses for “Meetings/Conferences” and “Printing” totaled \$222,166 and \$200,796, respectfully, in 2007.⁶⁶ The Members’ explained to ASHA their concern that ASHA’s assets were being utilized in a prudent manner and in furtherance of the purposes of ASHA.⁶⁷ Rather than provide transparency, ASHA opted to sue its own members to prevent disclosure of records containing more detail relating to ASHA’s management. ASHA even refused to produce records relating to its compensation of its employees in the form of salaries, bonuses and commissions.⁶⁸ Ultimately, ASHA’s highest ranking employee resigned before his scheduled deposition and hired private counsel. ASHA subsequently entered into an out-of-court settlement with him.⁶⁹ There can be no doubt that the Members had a proper purpose to inspect ASHA’s corporate records. The Fayette Circuit Court had the benefit of reviewing both parties’ respective memoranda in support of their motions for summary judgment, including attachments, and post-judgment memoranda and attachments. Accordingly, the Fayette Circuit Court was in the best position to determine if the Members had a proper purpose to inspect the records they sought from ASHA. The Circuit Court’s factual finding was not clearly erroneous.

⁶⁵ 232-RA at 428 – 434; *see also* Members’ MSJ at 2 (232-RA at 407).

⁶⁶ *Id.*

⁶⁷ *Id.*

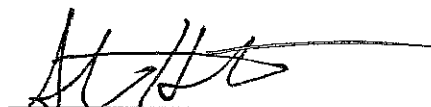
⁶⁸ *See* Houston letter to Streepey dated June 26, 2009 (232-RA at 441 – 7); *see also* Members’ MSJ at 2 – 3 (232-RA at 407 – 8); Affidavit of Alan Balch, (RA-232 at 458 – 460).

⁶⁹ *See* Defendants’ Motion For The Court To Order Plaintiff [ASHA] To Appear And Show Cause Why It Should Not be Held In Contempt Of Court and ASHA’s Response, 2011-CA-01572 Record on Appeal at 228 – 338.

V. CONCLUSION

For the foregoing reasons, Appellees, Edward R. Bennett, Carl T. Fischer, Jr., Kris Knight, Tom Ferrebee, Simon Fredricks, M.D. and Lynn W. Via, respectfully request the Court to affirm the Fayette Circuit Court's orders dated December 2, 2010, January 6, 2011 and August 9, 2011.

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