

STATE OF VERMONT
CHITTENDEN COUNTY, SS:

MARJORIE HAZELWOOD, LOUISE)
BOYD, SHERMAN BRONSON, THOMAS)
B. BRUCE, ANGELINA BRUMMETT,)
JESSICA CAMPMANS, ANNE CANAVAN,)
SUSAN U. CHRISTIANSEN, TOODIE)
CONNOR, CAROL COTTRILL, JUDITH)
SPURLING DEIST, CAROL DOMBROWSKY,)
LINDA DUFFY, LINDA FINK, CAROLYN)
FIRCH, BRYAN FOX, MEL FRANDBSEN,)
ROBERT FRIEDMAN, MARGARET)
GARDINER, JUDY GIANINO, CLAIRE)
GLENN, GARY GRAY, MARY HAZELWOOD,)
ANNE HOBBS, MARJORIE HODGE, RICHARD)
JORGENSEN, LESLIE KENNARD, DIANE M.)
KUBIS, WENDY LeGATE, JOHN LONGWELL,)
MICHAEL MARTIN, MICHELE McENTEE,)
VICKY McKANE, JAN NELSON, MARK)
OSBORNE, NATHAN PAINTER, SHERRY)
PATTILLO, GAIL PERLEE, CARL RAMSOUR,)
JULIA ROSE, ANNE C. SNYDER, SUZANNE)
STEWART, KEN THOMAS, JUDY VanTASSEL,)
JACK WARNER, DANIE C. WEAVER,)
CHARLES WEISER, BILL WILLIAMS, and)
DAVID WILLIAMS, derivatively on behalf of)
The AMERICAN MORGAN HORSE)
ASSOCIATION, and MARJORIE HAZELWOOD)
In her Individual Capacity as a Member of the)
Board of Directors,)

CHITTENDEN SUPERIOR COURT

DOCKET NO. S1231-08 CnC

Plaintiffs,)

v.)

CINDY MUGNIER, President of the Board of)
The American Morgan Horse Association, and)
MIKE GOEBIG, Past President of the Board of)
The American Morgan Horse Association,)

Defendants.)

DEFENDANTS' REPLY TO PLAINTIFFS'
OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

On October 20, 2008, Defendants moved to dismiss the Plaintiffs' Complaint. The first basis for dismissal was that Plaintiffs failed to sue the real party in interest, the American Morgan

Horse Association (the “AMHA”). Apparently realizing their mistake, on November 11, 2008, Plaintiffs moved to add the AMHA as a party to this action. The Defendants response to that motion is filed simultaneously with this filing. Assuming the Court grants Plaintiffs’ Motion, the first basis for the dismissal of Plaintiffs’ Complaint is now moot.

Defendants have also moved to dismiss Count III and paragraphs E and F of Plaintiffs’ Complaint on the grounds that Plaintiffs do not have standing to “procure a judgment” for removal of a director under Section 706 of the New York Not-For-Profit Corporation Law (“NPCL”). As Defendants have previously noted, NPCL § 706 requires that an action to remove a director be brought “by the attorney-general or by ten percent of the members whether or not entitled to vote.” *NPCL § 706*. This action is not being brought by the attorney general or by ten percent of the AMHA members.

In their Opposition, Plaintiffs try to get around this explicit statutory language by arguing that it is inapposite because this Court has the “equitable power” to remove a director. In support of their argument, Plaintiffs primarily rely on one case, *Faraldo v. Standardbred Owners, Assn., Inc.*, 63 A.D.2d 1010, 1011, 406 N.Y.S.2d 336, 337 (1978) (citation omitted). However, *Faraldo* does not stand for the proposition asserted by Plaintiffs. *Faraldo* actually supports Defendants’ position.

In *Faraldo*, the plaintiffs filed suit in an attempt to set aside an election. The defendants moved to dismiss the action and the motion was granted without a hearing. On appeal, the court overturned the dismissal, relying on NPCL § 618, which explicitly grants to the court equitable powers to take action with respect to elections. More specifically, NPCL § 618 provides that the court shall hear the proof and allegations of the parties and either confirm the election, order a new election, or take other action as justice may require. In *Faraldo*, the appellate court found that the lower court erred by failing to hear proof from the parties as required by NPCL § 618.

In their Opposition, Plaintiffs mistakenly leave the impression that the “equitable powers” discussed in *Faraldo* derive from general common law principles. However, even a cursory reading of the *Faraldo* decision (which incidentally is only three paragraphs long) reveals that the equitable powers with respect to director elections derive directly from NPCL § 618. In this regard, *Faraldo* actually supports Defendants’ — and not Plaintiffs’ — position. *Faraldo* makes clear that a Court must defer to the provisions of the NPCL and cannot, as Plaintiffs would like, simply ignore statutory law. Thus, just as the *Faraldo* court relied on NPCL § 618 in considering the issue of election irregularities, this Court must rely on NPCL § 706 with respect to the issue of removal of directors.


This gets to the next problem with Plaintiffs’ argument — Plaintiffs’ assertion that the Court has the same power with respect to both election irregularities and director removal. As evidenced by the separate provisions of the NPCL and the *Faraldo* case, these two issues are separate and distinct under New York law. The Legislature is presumed to know the laws which it enacts and it can be presumed that the Legislature intended to treat the issue of election irregularities separate and apart from the issue of director removal. *See Matter of Custody and Guardianship of Alexandra C.*, 596 N.Y.S.2d 958, 962 (1993).

In sum, while it is true that this Court has equitable powers, those powers do not usurp binding statutory law. In this case, NPCL § 706 is clear—it requires that an action to remove a director be brought “by the attorney-general or by ten percent of the members whether or not entitled to vote.” That has not been done here. Therefore, Count III and paragraphs E and F of Plaintiffs’ Complaint should be dismissed. To find otherwise would allow courts, in the name of “equity,” to impermissibly legislate from the bench.

DATED at Burlington, Vermont, this 1st day of December, 2008.

CINDY MUGNIER, President of the Board of
The American Morgan Horse Association, and
MIKE GOEBIG, Past President of the Board of
The American Morgan Horse Association

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