

To: AMHA Members and former Members

From: Marjorie Hazelwood

Re: Derivative Action Update

Date: November 25, 2009

I knew it had been a long time since I updated all of you on the derivative action, but I didn't realize it had been six months! You may have assumed that nothing much was going on but that is not true. Even though litigation seems to move at a glacial pace, we have gained some significant ground and I have good news to report.

After the 2009 annual meeting (when the defendants held elections for directors for a second year under the same improper conditions as the 2008 elections) we filed an Amended and Supplemental Complaint adding our objections to the 2009 elections. In their Answer, the defendants asserted a counterclaim against me personally. New York law prohibits counterclaims against plaintiffs in a derivative action and we said so in our Motion to Dismiss Defendants' Counterclaim which we filed on July 28, 2009. I am delighted to report that, at a hearing on November 24<sup>th</sup>, the Court agreed with us and dismissed the Counterclaim.

In my last memo, I described the defendants's partial and late production of documents we had requested in discovery. They again insisted that they would not produce certain documents unless we signed a confidentiality agreement. It was clear we needed court intervention to resolve this conflict and move discovery along. To put an end to their stonewalling, we served a Motion to Compel Discovery on July 30<sup>th</sup>.

On November 24<sup>th</sup>, at the same hearing where the Court dismissed their Counterclaim, the Court ordered the defendants to produce the documents we requested over a year ago. However, the Court did impose a confidentiality order. That means that only our lawyers and I can see the documents for the time being. However, once we see them, we have a right to go back to the Court to challenge the need for continued confidentiality on an item-by-item basis. Then the defendants will have to prove to the Court that each challenged document must remain confidential. The Court pointed out that one of the things we have asked for in the derivative action is full disclosure to the members and the judge was reluctant to give us that relief so early in the litigation. The main thing is that they can no longer withhold the information they have hidden for so long. Their stone wall is beginning to crumble. Good news indeed!

By the way, shortly after my last memo to you, I was deposed in Vermont for 5 ½ hours.

We are entitled to depose the defendants and other witnesses too, but since we will be able to ask better questions once we have seen all the documents, we have not yet deposed anyone. We intend to exercise our right to do so in the coming months.

The counterclaim and discovery battles are not all that has been happening. The defendants made a motion for Summary Judgment on October 26, 2009. Summary Judgment means that with respect to certain issues we have raised, there is no dispute about the facts. Ordinarily the court must hear the evidence at trial and decide which version of the facts is true before applying the law. When the facts are not in dispute, the court only needs to apply the law to those facts.

Many of the facts underlying the allegations in our Complaint and Supplemental Complaint have been admitted by the defendants. Essentially they claim that I am no longer entitled to information since I was not reelected to the board and that the elections were conducted properly. Since we agree about the facts, but believe the defendants' interpretations of the law are dead wrong, we are not only opposing their Motion, but we are cross-moving for Summary Judgment ourselves. This gives us the opportunity to resolve some of our claims without a trial. Our papers are due on November 30<sup>th</sup>. After that, the defendants will have 30 days to respond to our Motion and we will have time to reply. When the Court will decide these Motions is anybody's guess. We will post the papers on [www.GoMorgans.net](http://www.GoMorgans.net) once they are filed with the Court.

I think the Court has given us a lot to be grateful for this Thanksgiving!