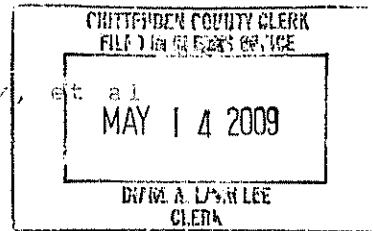


STATE OF VERMONT
CHITTENDEN SUPERIOR COURT

DOCKET NUMBER: S1231-08 CrC

Hazelwood, Marjorie, et al VS Mugnier, Cindy, et al



ENTRY REGARDING MOTION

TITLE OF MOTION: Plaintiffs' Motion to Add the American Morgan Horse Association as a Party

DATE MOTION FILED: 11/13/08

RESPONSE FILED:

Robert S. DiPalma, Esq. 12/01/08 Defs' response

GRANTED COMPLIANCE BY _____
 DENIED
 SCHEDULED FOR HEARING ON: _____ AT _____; TIME ALLOTTED _____
 OTHER

See Decision & Order herewith

Dennis R. Pearson

JUDGE DENNIS R. PEARSON

5/14/09

DATE

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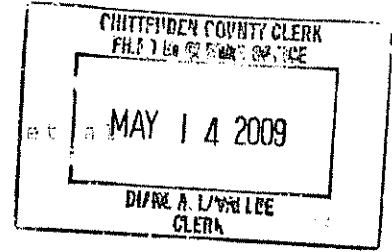
Eric A. Poehlmann, Esq.
Robert S. DiPalma, Esq.

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STATE OF VERMONT
CHITTENDEN SUPERIOR COURT

DOCKET NUMBER: S1231-08 CnC

Hazelwood, Marjorie, etal VS Huglier, Cindy, et a



ENTRY REGARDING MOTION

TITLE OF MOTION: Defs' Motion to Dismiss for Lack of Jurisdiction, Failure to Join an Indispensable Party & Failure to State a Claim Upon

DATE MOTION FILED: 10/21/08

ADDITIONAL MEMO: 11/12/08 Defs' reply

RESPONSE FILED:

Eric A. Poshmann, Esq. 11/13/08 Plere's opposition

GRANTED *In Part* COMPLIANCE BY _____

DENIED *In Part*

SCHEDULED FOR HEARING ON: _____ AT _____ ; TIME ALLOTTED _____

OTHER _____

See Decision & order herewith

Bennis P. Pearson

JUDGE BENNIS P. PEARSON

5/14/09

DATE

COPIES SENT TO:

Eric A. Poshmann, Esq.
Robert S. DiPalma, Esq.

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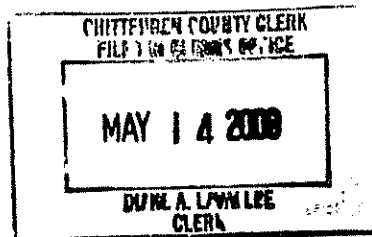
STATE OF VERMONT
CHITTENDEN COUNTY, SS.

CHITTENDEN SUPERIOR COURT
DOCKET NO. S1231-08 CnC

MARJORIE HAZELWOOD, in her)
Individual Capacity, and as a Member of the)
Board of Directors of the American)
Morgan Horse Association; LOUISE)
BOYD, SHERMAN BRONSON, THOMAS)
B. BRUCE, ANGELINA BRUMMETT,)
JESSICA CAMPMANS, ANNE)
CANAVAN, SUSAN U.)
CHRISTIENSEN, 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, all derivatively)
on behalf of the AMERICAN MORGAN)
HORSE ASSOCIATION)

v.)

CINDY MUGNIER, President of the Board)
of the American Morgan Horse Association;)
and MICHAEL GOEBIG, Past President of)
the Board of the American Morgan Horse)
Association)



DECISION AND ORDER

Introduction

This case is a derivative action brought by a group of shareholders (“Life Members”) of the American Morgan Horse Association, Inc. (“AMHA”). Plaintiffs’ 26-page Complaint, which asserts seven separate claims, names as defendants AMHA President Cindy Mugnier, and former President Michael Goebig.

The Complaint (dated 09/15/08) alleges that: 1) Defendants violated New York law and AMHA Bylaws by failing to produce financial and related documents upon the request of other members; 2) Defendants instituted illegal and procedurally invalid election proceedings; 3) certain members of the AMHA Board of Directors (“Board”) were “improperly constituted,” allegedly in contravention of AMHA Bylaws; 4) multiple instances of mismanagement contributed to an increase in AMHA membership dues and a decrease in AMHA revenues and overall membership; 5) certain Board members with a conflict of interest engaged in self-interested transactions, resulting in pay-outs of large sums and reduction of AMHA revenues; 6) certain directors (including Defendants) failed to exercise their duties of good faith and due care; and 7) these same directors comingled and mismanaged funds of the American Morgan Horse Educational Charitable Trust.

Defendants move to dismiss all of these claims, and the entire Complaint, under Vermont Rule of Civil Procedure 12(b)(7), for failure to join an indispensable party under Rule 19. They argue that the AMHA is an indispensable party because Mugnier and Goebig “cannot, either practically or legally speaking, provide the relief requested.” (Mot. to Dismiss (filed 10/21/08), at 8.) Defendants move, in the alternative, for dismissal of Plaintiffs’ Count 3, which requests that the court order the removal of certain directors from the Board. The basis for this motion is Plaintiffs’ lack of standing to bring a cause of action specifically to remove a board member. Also before the court is Plaintiffs’ motion to add, and name the AMHA itself as a defending party (filed 11/13/08), which motion Defendants support, assuming their first motion to dismiss is unavailing.

For the reasons discussed below, Defendants’ motion to dismiss for failure to join an indispensable party is **denied**; Plaintiffs’ motion to join the AMHA as a named defendant is **granted**; and Defendants’ motion to dismiss Plaintiffs’ Count 3 is **granted**.

Failure to Add an Indispensable Party

Defendants correctly argue that the AMHA is a necessary party to this action, pursuant to Vermont Rule 19(a)(1), which mandates the joinder of a party if, without that party, “complete relief cannot be accorded among those already parties.” The AMHA allegedly refuses to join as a plaintiff. It can, alternatively, be compelled by the court to join as a defendant. V.R.C.P. 19(a). Therefore, Plaintiffs move to add the AMHA as a defendant, and Defendants stipulate their support to the addition of AMHA.

The court has “substantial discretion” in granting or denying joinder motions. *Envirotech Corp. v. Bethlehem Steel Corp.*, 729 F.2d 70, 75 (2d Cir. 1984). The corporation, as a legal “person,” is typically a necessary party to derivative action suits. *See Ross v. Bernhard*, 396 U.S. 531, 538 (1970); V.R.C.P. 21 (“Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.”). If the AMHA could not be joined for some reason, a possibility neither party has suggested or addressed, dismissal as a matter of equity under Rule 19(b) might be appropriate. Here, however, the AMHA has not only consented to personal jurisdiction in Vermont, its bylaws require it: “Unless the Corporation agrees otherwise, the sole venue for any lawsuit shall be in the courts of the State of Vermont” (Bylaws of The American Morgan Horse Ass’n, Inc., § 2.16(a).) As such, the court allows the joinder of American Morgan Horse Association as a defendant and Defendants’ motion to dismiss under Rule 12(b)(7) is therefore denied.

Motion to Dismiss Count 3

Defendants’ second motion for dismissal pertains to Plaintiffs’ third claim, which pleads that the court remove certain members of the AMHA Board because they were “improperly constituted” under the AMHA Bylaws. Defendants argue that Plaintiffs lack standing to bring this claim, and thus the court must dismiss the claim and the remedy sought pursuant to those allegations. Specifically, Defendants cite the statute creating the cause of action for this claim as barring the captioned Plaintiffs from asserting such an action, because they cannot meet the minimum standing requirements.

The AMHA is incorporated in the state of New York, so the law to be applied in this case is New York Not-for-Profit Corporation Law (“N-PCL”). N.Y. N-PCL § 103. Plaintiffs appropriately asserted their various claims under these laws. N.Y. N-PCL §§ 602 *et seq.* The relevant statute for Plaintiffs’ request of the court to remove certain directors is N-PCL § 706. This statute grants authority to a corporation’s directors and members to remove sitting directors, with or without cause, by vote, unless the corporation’s bylaws otherwise dictate. N.Y. N-PCL § 706(a)–(b). It also provides a cause of action “to procure a judgment removing a director for cause” by either “the attorney-general or by ten percent of the members whether or not entitled to vote.” N.Y. N-PCL § 706(d) (emphasis added).

Defendants insist that Plaintiffs do not meet the necessary 10% membership requirement, in order to be able to assert the request that the court order removal of directors for cause. Plaintiffs, who describe themselves as “more than 5% of the Life General Members” (Compl. at 2), do not dispute this assertion—indeed, they have never averred that they meet, or have met the statutory requirement. Instead, they argue, their basis for standing is “inapposite” to § 706 because it relies on the court’s “broad equitable powers . . . [to] direct a new election where the election under review is so clouded with doubt or tainted with questionable circumstances that the standards of fair dealing require the court to order a new, clear and adequate expression” (quoting *Faraldo*

v. Standardbred Owners Ass'n, Inc., 406 N.Y.S.2d 336, 337 (N.Y. Sup. Ct. 1978)). See Pls.'s Opp'n to Defs.'s Mot. to Dismiss, at 5.

Faraldo does not support Plaintiffs' argument that they are excused from meeting the numerosity threshold of § 706. The basis for the plaintiff's action in *Faraldo* was N-PCL § 618, which allows, upon petition, "any member aggrieved by an election" an avenue by which he or she may duly challenge the election in a local supreme court. N-PCL § 618 (emphasis added). Plaintiffs' claim is not asserted under § 618. The appropriate cause of action based on the allegations in the Complaint arises under § 706.¹

"The question of standing 'involves both constitutional limitations on . . . jurisdiction and prudential limitations on its exercise.'" *Agency of Natural Res. v. United States Fire Ins. Co.*, 173 Vt. 302, 306 (2001) (quoting *Bennett v. Spear*, 520 U.S. 154, 162 (1997)). Prudential standing limits prevent a person or party from "raising another person's legal rights." *Id.* Standing is a threshold to jurisdiction in Vermont courts, *Bischoff v. Bletz*, 2008 VT 16, ¶ 15 (02/08/08), so a complaint must "aver the capacity to sue or be sued . . . to the extent required to show the jurisdiction of the court." V.R.C.P. 9(a). As this claim invokes New York law, the court must look to jurisprudence from our sister state for guidance.

New York courts assiduously enforce the express standing provisions set forth in the New York corporation laws, as Defendants properly observe. See, e.g., *People ex. rel. Spitzer v. Grasso*, 11 N.Y.S.3d 64, 68–69 (N.Y. Ct. App. 2008) (ruling that the Attorney General could only proceed on express, statutory-based causes of action and had no standing under the *parens patriae* doctrine to bring non-statutory-based claims against the defendant corporation); *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 812 (N.Y. App. Ct. 2003) (emphasizing the critical nature of standing as a "threshold issue" to "the proper functioning of the judicial system"); see also *Agency of Natural Res.*, 173 Vt. at 306 (recognizing standing for plaintiffs who "raise general grievances or seek to enforce the rights of another party . . . [when the statute] expressly or by *clear implication* grants a right of action"); *Thompson v. Dewey's South Royalton, Inc.*, 169 Vt. 274, 281 (1999) (finding the plaintiffs had standing because they fell within the statutory definitions in Vermont dram shop laws). The statute central to this question, N-PCL § 706(d), expressly awards a cause of action to a proportional number of shareholders (10%), and there is no reasonable room for implication that this requirement is either flexible or may be waived.

Therefore, to proceed on a cause of action to "procure a judgment removing a director for cause," Plaintiffs must represent "ten percent of the members" of the corporation. N-PCL § 706(d). Plaintiffs aver only that they are "more than 5% of the

¹ The court notes that Plaintiffs are not entirely without recourse, as they also allege that, under the Bylaws, several members of the Board were unqualified to stand for election, and that another director has served considerably longer than allowed. Plaintiffs' second claim, that the Board improperly amended the Bylaws to alter the election requirements, could result in the declaration that the adopted bylaws be rendered void. See *Sealey v Amer. Soc. of Hypertension*, 809 N.Y.S.2d 421, 425 (N.Y. Sup. Ct. 2005).

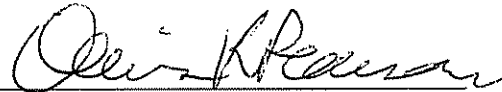
Life General Members” of the AMHA,² not 10% of all shareholders. Therefore, Plaintiffs have failed to establish the required standing to sue for the relief sought by Count 3, which is their obligation under Vermont Rule 9(a). Count 3, brought under N-PCL § 706, must be dismissed.

ORDER

For the reasons discussed herein, Plaintiffs’ 11/13/08 Motion for Joinder and to add American Morgan Horse Association, Inc. as a named Defendant is **granted**. Defendants’ 10/21/08 Motion to Dismiss (for failure to add an indispensable party) is **denied**, and as to Plaintiffs’ Count 3 (under N.Y. N-PCL § 706), is **granted**.

The Amended Complaint in compliance herewith shall be served on the AMHA, as required by VRCP 4, and filed with this court, no later than June 15, 2009.

IT IS SO ORDERED, at Burlington, Vermont, this 14th day of May, 2009.


Dennis R. Pearson, Presiding Judge

² Notably, the statute requires “ten percent of the members” not “ten percent of a class of members,” a fact which might present additional considerations for Plaintiffs.