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July 28, 2009

Ms. Diane A. Lavallee
Court Manager
Chittenden Superior Court
175 Main Street
P. O. Box 187
Burlington, VT 05402-0187

Re: Marjorie Hazelwood, et al v. Cindy Mugnier and Mike Goebig and the American Morgan Horse Association
Docket No. S1231-08 Cnc

Dear Ms. Lavallee:

Enclosed for filing in the above-referenced matter please find Plaintiffs' Motion to Dismiss Defendants' Counterclaim Pursuant to Rule 12(b)(6) and Memorandum in Support thereof. Thank you for your assistance.

Sincerely,

Eric Poehlmann

Enclosures

cc: Robert S. DiPalma, Esq.

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STATE OF VERMONT
CHITTENDEN COUNTY, SS.

CHITTENDEN SUPERIOR COURT
DOCKET NO. S1231-08 Cnc

MARJORIE HAZEL WOOD, 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 FRANDSEN,)
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,)

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.)

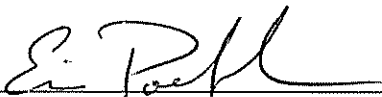
**PLAINTIFFS' MOTION TO DISMISS DEFENDANTS' COUNTERCLAIM PURSUANT
TO RULE 12(b)(6)**

COME NOW the Plaintiffs, pursuant to Rule 12(b)(6) of the Vermont Rules of Civil Procedure, and move this Court to dismiss Defendants' counterclaim against Marjorie Hazelwood for failure to state a claim upon which relief can be granted. As further explained in the accompanying Memorandum of Law in Support of Plaintiffs' Motion to Dismiss, Defendants' counterclaim is barred by the governing statutes and case law.

WHEREFORE, Plaintiffs respectfully request that Defendants' counterclaim be dismissed with prejudice and award costs to the Plaintiffs.

Burlington, Vermont
July 28, 2009

DOWNS RACHLIN MARTIN PLLC

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ATTORNEYS FOR PLAINTIFFS
MARJORIE HAZELWOOD ET AL.

3150088

STATE OF VERMONT
CHITTENDEN COUNTY, SS.

CHITTENDEN SUPERIOR COURT
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In her Individual Capacity as a Member of the)
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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.)

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO
DISMISS DEFENDANTS' COUNTERCLAIM PURSUANT TO RULE 12(b)(6)**

COME NOW the Plaintiffs, and submit this memorandum of law in support of their motion to dismiss Defendants' Counterclaim against Marjorie Hazelwood because such counterclaims are barred by New York law.

Introduction

The underlying action is a derivative action, brought by members, and a director, on behalf of the American Morgan Horse Association, in an attempt to address the fiscal mismanagement, election irregularities and undisclosed conflicts of interest which have plagued the AMHA for many years. Ms. Hazelwood, one of the plaintiffs, was a member of the board of directors at the time the action was brought. The action, however, seeks no remedies that would inure directly to Ms. Hazelwood. Defendants have attempted to raise a counterclaim against Ms. Hazelwood in her individual or personal capacity. Such a counterclaim is plainly prohibited. Therefore, Plaintiffs bring this motion to dismiss the counterclaim for failure to state a claim upon which relief can be granted. V.R.C.P. 12(b)(6).

Standard of Review

“Dismissal under Rule 12(b)(6) is proper only when it is beyond doubt that there exist no facts or circumstances, consistent with the complaint, that would entitle the plaintiff to relief.” Bock v. Gold, 2008 VT 81 ¶4 (citing Union Mut. Fire Ins. Co. v. Joerg, 2003 VT 27, ¶ 4, 175 Vt. 196, 824 A.2d 586). In evaluating a motion to dismiss, the court “accept[s] as true the well-pleaded allegations in the complaint and all of the reasonable inferences that may be derived therefrom.” Girouard v. Hoffmann, 2009 VT 66 ¶ 2 (citing Richards v. Town of Norwich, 169 Vt. 44, 48-49, 726 A.2d 81, 85 (1999)). But where, even taking all the allegations in the complaint as true, no set of circumstances would entitle the pleader to relief, the claim must be dismissed. Richards v. Town of Norwich, 169 Vt. at 48, 726 A.2d 81, 85.

Argument

Defendants' counterclaim against Ms. Hazelwood, a plaintiff in a derivative action, is barred both by statute and case law. Defendants have alleged no set of facts under which they are entitled to relief, and therefore, the counterclaim should be dismissed with prejudice and costs.

Section 3019(c) of the New York Civil Practice Law and Rules ("CPLR") protects trustees or nominal plaintiffs from counterclaims in suits where the trustee or nominal plaintiff "has no actual interest" in the subject matter of the suit. CPLR § 3019 (c). New York courts have long sustained the rule that plaintiffs in a derivative action are not individually subject to counterclaims. Handler v. Belmar Lighting Co., 8 Misc. 2d 687, 690, 168 N.Y.S. 2d 288 (1957) ("It is well settled that stockholders suing derivatively are not subject to counterclaims against them as individuals.").

Indeed, in a similar case, the counterclaimants alleged that the plaintiff was a director and officer and personally participated in acts which the derivative complaint alleged to be improper and actionable. Binon v. Boel, 271 A.D. 505, 507-08, 66 N.Y.S.2d 425 (1st Dept. 1946). The counterclaim further alleged that "plaintiff herself" intentionally directed the wrongful acts, "for her pecuniary advantage." Id. at 508. Finally the counterclaim alleged that plaintiff was "responsible and accountable as an officer and director [of the corporation] for damages." Id. The court was nonplussed. "That defendants' claim if successful would bring additional benefits to the corporation in whose behalf plaintiff is suing would not make them proper as counterclaims. If anything, this circumstance would tend to show they were parallel claims and not counterclaims." Id. at 509. The court dismissed the counterclaims holding that "the counterclaims are not such as may be interposed in this action." Id. at 508. This rule has been

repeatedly affirmed. In Select Theatres Corp. v. Harms, Inc., 273 A.D. 505, 506 (78 N.Y.S. 2d 159 (1st Dept. 1948)) the court held that “the cause of action, nevertheless is, in essence a derivative one brought on behalf of the corporation and not for the plaintiff’s individual benefit. It was error therefore, to refuse to strike out counterclaims interposed not against the corporation, but against the plaintiff individually.” See also Handler, 8 Misc. 2d at 690 (holding that whether termed a “derivative action” or a “representative suit” the action brought by stockholders and directors was brought for the benefit of the corporation).

Finally, where courts have any doubts about whether a counterclaim against derivative plaintiffs is proper, they look to the prayer for relief. Aschkenasy v. Teichman, 12 A.D. 2d 904 (1961). In Aschkenasy, the court ruled that “[a] reading of the prayer for relief indicates that the individual plaintiff is suing solely in the right of the corporation and not for his individual benefit. Under the circumstances, a counterclaim may not be asserted against him as an individual.” *Id.* at 904.

Defendants allege that the counterclaim is proper because Ms. Hazelwood brought the complaint “non-derivatively in her individual capacity.” (Counterclaim paragraph 4). To support this claim, they rely on the “Nature of the Action” section of Plaintiffs’ Amended and Supplemental Complaint. (*Id.*) That section of the Complaint merely alleges that Ms. Hazelwood brought the action “in her capacity at the time as a current Director of the AMHA, pursuant to the NPCL and the AMHA’s own bylaws.” (Supplemental and Amended Complaint p.2). This allegation is not sufficient to save defendants’ counterclaim. Indeed, Ms. Hazlewood’s position in this lawsuit as both a member and a director is no different from the position of plaintiffs in the many similar cases where the courts have struck counterclaims. See

Aschkenasy v. Teichman, 12 A.D. 2d 904; Handler v. Belmar Lighting Co., 8 Misc. 2d 687, 690; Binon v. Boel, 271 A.D. 505, 507-08.

In addition, as noted above, a court must look at the prayer for relief to determine whether any of the relief sought will benefit the plaintiff, or merely the corporation on whose behalf the suit has been brought. Here, the prayer for relief does not ask for any relief on Ms. Hazelwood's behalf as an individual. It only asks for relief on behalf of the AMHA, relief that will make the AMHA more transparent to its member and directors, fairer in its election processes, and free from the taint of undisclosed conflicts of interest.

Conclusion

Because Ms. Hazelwood bought this complaint as a member and director, because she does not seek any personal benefit from the derivative action, and because the counterclaim fails to state a claim upon which relief can be granted, the counterclaim should be dismissed with prejudice and award costs to Plaintiffs.

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