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February 11, 2020

Via Hand Delivery

Jill Mongeon, COM
Vermont Superior Court
Chittenden Civil Division
175 Main Street
Burlington, VT 05401

Re: Victoria Bennett v. Mari Sanderson, et al.
Docket No. 883-9-19 Cncv

Dear Ms. Mongeon:

Regarding the above-referenced matter, enclosed please find *Defendants' Reply to Plaintiff's Sur-Reply in Support of Motion to Dismiss Plaintiff's Amended Complaint*, along with the *Certificate of Service* for filing with the Court.

Thank you for your attention to this matter.

Sincerely,

Justin B. Barnard

JBB/pjg
Enclosure

cc: Kevin A. Lumpkin, Esq.
Devin T. McKnight, Esq.

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STATE OF VERMONT

SUPERIOR COURT
CHITTENDEN UNIT

CIVIL DIVISION
Docket No. 883-9-19 Cncv

Plaintiff(s)	*vs.*	*Defendant(s)*
VICTORIA BENNETT		**MARI SANDERSON, KATE KIRSCH, CLARENCE A. "TONY" LEE, III, CAROL FLETCHER, HARLAN GRUNDEN, KRIS BREYER, TERRI STURM, STEVEN HANDY, WILLIAM "MIKE" GOEBIG, JR., CINDY MUGNIER, SHARON "SHERRY" COLE, GEORGIE GREEN, JEFF GOVE, and CARRIE MORTENSEN**

CERTIFICATE OF SERVICE

I certify that I have today delivered **Defendants' Reply to Plaintiff's Sur-Reply in Support of Motion to Dismiss Plaintiff's Amended Complaint** to all other parties to this case as follows:

X By first class mail by depositing it in the U.S. mail;

● By personal delivery to _____or his/her counsel;

X Other. Explain: **VIA EMAIL**

The names and addresses of the parties/lawyers to whom the mail was addressed or personal delivery was made are as follows:

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Dated at Burlington, Vermont this 11th day of February 2020.

Signature: _____
Print Name: Justin B. Barnard, Esq.

Counsel for: Defendants

STATE OF VERMONT

SUPERIOR COURT
Chittenden Unit

CIVIL DIVISION
Docket No 883-9-19 Cncv

VICTORIA BENNETT,
Plaintiff,

v.

MARI SANDERSON, KATE KIRSCH, CLARENCE A. "TONY" LEE, III, CAROL FLETCHER, HARLAN GRUNDEN, KRIS BREYER, TERRI STURM, STEVEN HANDY, WILLIAM "MIKE" GOEBIG, JR., CINDY MUGNIER, SHARON "SHERRY" COLE, GEORGIE GREEN, JEFF GOVE, and CARRIE MORTENSEN,

Defendants.

DEFENDANTS' REPLY TO PLAINTIFF'S SUR-REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Defendants submit this limited Reply to Plaintiff's Sur-Reply in Support of Defendants' Motion to Dismiss in order to clarify the Defendants' position on standing and address Plaintiff's newly raised arguments.

Argument

A. New York's Statute of Limitations Governs Plaintiff's N-PCL Causes of Action.

In her Sur-Reply, Plaintiff attempts to side-step the effect of New York's statute of limitations by arguing in the alternative—and for the first time—for application of Vermont's statute of limitations. Plaintiff contends that, because Defendants ask the Court to apply Vermont's heightened pleading standard for

fraud to Plaintiff's tolling claim, Vermont's statute of limitations and accrual law must likewise apply. That is simply incorrect; the pleadings standard and statute of limitations are distinct matters. New York's statute of limitations unambiguously applies to Plaintiff's claims and requires dismissal of the time-barred portions of the Complaint. And, whether measured under the pleading standards of Vermont or New York, Plaintiff has not sufficiently alleged fraud to justify tolling the statute of limitations under New York law.

The general rule is that "when a cause of action is brought in Vermont, Vermont law determines the accrual date and the limitations period." *Marine Midland Bank v. Bicknell*, 2004 VT 25, ¶ 7, 848 A.2d. 1134. However, Vermont will apply the limitations period of a foreign state "when a foreign statute creates a new right of action and prescribes a specific limitation period." *Id.* (citing *Jacques v. Jacques*, 128 Vt. 140, 141-142, 259 A.2d. 779 (1969) (recognizing exception under Restatement (First) of Conflict of Laws)); Restatement (Second) of Conflict of Laws, §143 ("An action will not be entertained in another state if it is barred in the state of the otherwise applicable law by a statute of limitations which bars the right and not merely the remedy."). Such is the case here. Plaintiff's Amended Complaint is predicated on New York's Not-for-Profit Corporations Law, and New York's statute of limitations expressly bars Plaintiff's claims after a six-year period. N.Y. CPLR § 213(7). There is no plausible argument that Vermont law supplies the statute of limitations for these New York statutory claims. Cf. *Hausman v. Buckley*, 299 F. 2d 696, 701 (2d Cir. 1962) (dismissing Venezuelan derivative shareholder suit as

untimely, as statute of limitations for derivative suit under Venezuelan law was substantive rather than procedural).

Vermont law *does*, however, supply the pleading standard, including the requirements for pleading fraud. *See* Restatement (Second) of Conflict of Laws, §127; *Amiot v. Ames*, 166 Vt. 288, 291, 693 A.2d. 675, 677 (1997). Even if New York law were to apply, it likewise imposes a heightened burden to plead fraud. *See* N.Y. CPLR § 3016(b). Plaintiff's argument that she is entitled to toll the statute of limitations based on fraud fails because Plaintiff has not satisfied those demanding standards. Plaintiff makes a bare-bones assertion that she has adequately pleaded fraud based on the "circumstances" at issue, but does not reference the transactions challenged or offer any specific averments as to how any of the individually named defendants engaged in fraud with respect to these transactions. This falls well short of Rule 9(b)'s particularity requirement. *Sutton v. Vermont Reg'l Ctr.*, 2019 VT 71, ¶ 74 ("Rule 9(b) requires that plaintiffs identify the particular statements or acts by particular defendants that they claim were fraudulent."). For all of these reasons, Plaintiff's claims based on pre-2012 allegations are untimely and must be dismissed.

B. Plaintiff Does Not Gain Standing for AMHECT Trustee Conduct by Asserting that AMHA Engaged in Wrongdoing.

Plaintiff contends in her Sur-Reply that "she has standing to pursue violations Defendants committed as Directors of AMHA" and that the Defendants' standing arguments "ignore AMHA entirely." Sur-Reply at pg. 2. That is uncontested—and misses the point. The thrust of Defendants' standing argument,

made clear in both the Motion to Dismiss and the Reply, is that Plaintiff cannot make a claim against the Defendants individually for action they took as *AMHECT* trustees, not that she lacks standing to sue them for AMHA-related conduct. Again, Plaintiff is not—nor has she ever been—a director, officer, or trustee of AMHECT, and she cannot bring a claim on behalf of AMHA against AMHECT under New York law. *See* N.Y. N-PCL § 720(b), (c). But Plaintiff nevertheless attempts to gain standing for claims against the AMHECT trustee Defendants for their AMHECT-related conduct by treating the Defendants' AMHA- and AMHECT-related conduct as if it were one and the same. That she cannot do. To the extent Plaintiff has authority to sue, her claims are limited to allegations concerning actions the Defendants took in their capacities as AMHA directors only.

C. The Business Judgment Rule Applies Because This Is Not a Case Involving Claims of Self-Dealing or Inherent Conflicts of Interest.

Plaintiff's Sur-Reply cites a number of cases rejecting the Business Judgment Rule's good-faith presumption on the grounds of self-dealing and inherent conflict of interest in an attempt to jump the Rule 12(b)(6) hurdle. Defendants agree that *if* this were a case involving self-dealing or conflicts as New York defines such terms, then perhaps the presumption would not be applicable at this stage of the proceedings. But this is not such a case. Looking at the actual allegations of Plaintiff's prolix Amended Complaint—and ignoring her loose deployment of terms such as a "self dealing" in her motion papers—there is no alleged conduct of the type that might bring this case outside the aegis of the Business Judgment Rule and justify delaying dismissal until summary judgment.

Each of the cases Plaintiff cites involved financial remuneration or excessive compensation to officers and directors—in other words, conduct that might, if proven, defeat application of the Business Judgment Rule. *See Higgins v. New York Stock Exch., Inc.*, 806 N.Y.S.2d 339 (N.Y. Sup. Ct. 2005) (unfair dealing in acquisition due to conflicts of interest of some NYSE board members who had personal business with the acquiring company); *Lippman v. Shaffer*, 836 N.Y.S.2d 766 (N.Y. Sup. Ct. 2006) (excessive compensation and improper distribution of preferred stock to shareholders in closely-held corporation); *In re Croton River Club, Inc.*, 52 F.3d 41, 44 (2d Cir. 1995) (improper allocation of construction budget benefitting directors personally); *Levy v. Young Adult Inst. Inc.*, 103 F. Supp. 3d 426 (S.D.N.Y. 2015) (excessive compensation to YAI director based on director's misrepresentations to the board about YAI's financial performance). Here, in contrast, the Amended Complaint sets forth no allegations that any of the Defendants benefitted financially from any of the challenged actions, nor is there any basis for a plausible inference of self-dealing or conflicted actions by Defendants. Plaintiff merely notes that some of the Defendants had "overlapping positions," and suggests that this is enough to forestall application of the Business Judgment Rule. It is not. In the absence of plausible, affirmative allegations of self-dealing or bad faith, the Business Judgment Rule applies and the presumption of good-faith warrants Rule 12(b)(6) dismissal.

Conclusion

For the reasons set forth above and in Defendants' Motion and Reply, Defendants respectfully request that this Court dismiss Plaintiff's Amended Complaint.

DATED at Burlington, Vermont, this 11th day of February, 2020.

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