

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' EXPEDITED MOTION  
FOR ADVANCEMENT OF ATTORNEYS' FEES**

Defendants, by and through their counsel, Dinse P.C., move for an order approving the advancement of funds to Defendants by the American Morgan Horse Association, Inc. ("AMHA") for payment of attorneys' fees pursuant to Section 724(c) of New York's Not-for-Profit Corporation Law. Because Defendants have significant expenses approaching in the near future and have more than exhausted the initial retainer they paid to counsel out of their own pockets, they respectfully request that the Court expedite its consideration of and ruling on this Motion.

**Memorandum**

Defendants, fourteen current and former directors and officers of AMHA, seek an order approving advancement of funds by AMHA so that they may pay the

attorneys' fees occasioned by Plaintiff's suit. New York law, which governs in this case, provides for advancement of litigation expenses to directors and officers of nonprofit corporations with judicial approval. There can be no genuine question that advancement is appropriate here. AMHA's bylaws require indemnification of directors and officers in suits arising from their service to AMHA, and, although the bylaws do not expressly address advancement of fees during pendency of an action, the only reasonable reading is that authorization for advancement is implicit in that guarantee of indemnity. Indeed, indemnification would be an ineffectual protection for volunteer officers and directors in many cases if they had to wait until the end of litigation to seek reimbursement, facing financial ruin in the interim.

While AMHA is within the authority of its bylaws to unilaterally advance expenses, Plaintiff inevitably would add any decision to advance expenses to the lengthy roster of illusory wrongs she alleges her fellow directors have committed. Out of an excess of caution, Defendants thus request that the Court issue an order approving advancement of litigation expenses by AMHA pursuant to its bylaws and New York law.

### **Relevant Background**

AMHA is a New York not-for-profit corporation headquartered in Shelburne, Vermont, formed in 1909 to preserve, promote, and perpetuate the Morgan horse breed. Plaintiff Victoria Bennett, currently a director of AMHA, has asserted claims against all of her current colleagues on AMHA's Board (as well as a handful of prior directors) alleging a "nefarious" and concerted scheme to "strip" AMHA of assets.

Her Amended Complaint, spanning 52 pages, asserts five counts against Defendants under New York law. Four of these are derivative claims on behalf of AMHA related to purported mismanagement of assets, and the fifth she brings on her own behalf concerning an alleged issue with a 2017 election. As explained in detail in Defendants' pending Motion to Dismiss, all five of these counts fail as a matter of law.

To encourage AMHA members to volunteer as directors, AMHA's bylaws expressly provide for indemnification of officers and directors in litigation arising from their service to the organization. Article VI of the Bylaws states, in relevant part:

The Corporation shall indemnify all Directors, Officers, and employees of the Corporation to the full extent permitted or required by applicable law. The foregoing right of indemnification shall not be exclusive of any other rights to which any such person may be entitled as a matter of law or which may be lawfully granted to him and the indemnification hereby granted by the Corporation shall be in addition to, and not in restriction or limitation of, any other privilege or power that the Corporation may lawfully exercise with respect to the indemnification or reimbursement of Directors, Officers, or employees.  
...

See Exhibit A.

### **Argument**

#### **A. Advancement of Expenses Is Warranted Under New York Law.**

Defendants find themselves in a bind. Sued by a fellow director in a lawsuit alleging various violations of their duties to AMHA, Defendants face rapidly escalating litigation costs: their expenses to date in responding to Plaintiff's wide-ranging Amended Complaint are significant, and, given that Plaintiff has

apparently chosen to pursue an aggressive course of litigation—among other things, in the first month following the filing of her complaint, she had already issued six subpoenas to AMHA’s accountants and other entities—those expenses can be expected to grow apace. AMHA’s bylaws provide express protections for directors and officers from the potentially ruinous financial burden of litigation. However, the bylaws’ provisions are silent on the specific question of whether litigation costs may be advanced before a final judgment. While Defendants believe AMHA has sufficient legal authority to advance litigation costs, if AMHA’s directors—all of whom are parties to this lawsuit—were to vote to advance fees, Plaintiff would almost certainly cry foul.<sup>1</sup> To preempt an unnecessary and costly fight over this issue, Defendants request that the Court issue an order approving advancement.

Section 724 of New York’s Not-for-Profit Corporation Law authorizes a court to award indemnification to directors and officers sued in a derivative suit where they acted in good faith for a purpose that they reasonably believe to be in the best interest of the corporation. N.Y. N-PCL § 722(c), 724(a). As this is a determination that, in many cases, may only reliably be made upon completion of the litigation, New York law also permits a court to advance reasonable litigation expenses during the pendency of litigation under a less stringent standard. Specifically, advancement of expenses may be ordered “if the court shall find that the defendant has by his pleadings or during the course of the litigation raised genuine issues of fact or law.” *Id.* § 724(c). A request for advancement may be made either in the

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<sup>1</sup> Because all of AMHA’s directors are parties, there are no independent directors who could vote on the issue of advancement.

proceeding for which expenses are sought or by initiating a separate action, and must be made upon notice to the New York Attorney General's Office and the corporation itself. *Id.* § 724(a), (b).

Here, Defendants have filed a Motion to Dismiss raising genuine issues of law as to the sufficiency of all of Plaintiff's claims; among other things, Plaintiff seeks to challenge Board decisions protected from liability under the business judgment rule, raises claims concerning an entirely separate organization (AMHECT) for which she lacks standing to proceed, fails to state colorable claims under the New York statutes under which she sues, and asserts claims that are, in substantial part (including all of Count V) barred by the statute of limitations. While Defendants believe they are entitled to dismissal of the Amended Complaint in its entirety, even if the Court were to allow certain claims to proceed, there can be no question that Defendants have at a minimum raised genuine issues of law. Defendants have also satisfied the procedural requisites for advancement. Consistent with Section 724, Defendants have provided notice of their request for advancement of litigation expenses to both the New York Attorney General's Office and AMHA. *See Exhibits B, C.*

It is important to note that, in the unlikely event that the Court determines at the end of this case that Defendants were not entitled to indemnification under the law, Defendants must pay all advanced litigation expenses back to AMHA. *See N.Y. N-PCL § 725(a)* ("All expenses . . . which are advanced by the corporation under paragraph (c) of section 723 . . . shall be repaid in case the person receiving

such advancement or allowance is ultimately found . . . not to be entitled to indemnification . . .”). Thus, AMHA bears no risk of ultimately having to bear the cost of any indemnification improvidently extended to Defendants.

**B. Defendants Request an Expedited Ruling on Their Motion.**

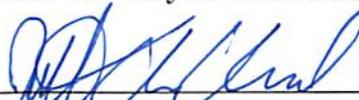
Defendants respectfully ask that the Court consider this Motion on an expedited basis given the rapidity with which litigation costs are accruing in this matter. When they initially retained the undersigned, Defendants put together a retainer paid out of their own pockets. Having now prepared and filed a motion to dismiss Plaintiff’s Amended Complaint, Defendants have exhausted their retainer and have substantial expenses owing. In the near future, Defendants will need to prepare a reply in support of their Motion (Plaintiff is due to file her Opposition by December 23), and expect to incur significant additional expenses. The question of advancing fees has thus taken on some urgency for Defendants, and they ask that the Court issue a decision as soon as its schedule permits.

**Conclusion**

AMHA has chosen to mandate indemnification of its volunteer officers and directors to protect them against precisely the type of burdensome legal expenses that Plaintiff’s suit is visiting upon them—and to ensure that the risk of such costs does not deter members from volunteering to serve. Requiring directors and officers to foot the bill for their legal expenses until entry of a final judgment would fatally undercut these protections. For all of these reasons, Defendants respectfully

request that the Court take up this Motion on an expedited basis and issue an order approving the advancement of litigation expenses by AMHA to the Defendants.

DATED at Burlington, Vermont, this 12<sup>th</sup> day of December 2019.



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