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VIA HAND-DELIVERY
February 5, 2020

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 Jill:

Enclosed please find the following for filing in the above-referenced matter:

1. Plaintiff's Surreply In Opposition To Defendants' Motion To Dismiss; and
2. Certificate of Service.

Please do not hesitate to contact me should you have any questions.

Sincerely,

SHEEHEY FURLONG & BEHM P.C.

Devin T. McKnight

DTM/kco
Enclosures

cc: Justin B. Barnard, Esq.
Margarita I. Warren, Esq.

STATE OF VERMONT

SUPERIOR COURT **CIVIL DIVISION**
Chittenden Unit **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.	)

PLAINTIFF'S SURREPLY IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

In their Reply, Defendants assert that Ms. Bennett's claims only "assume the veneer of truth, regardless of what the facts might be." (Defendants' Reply at 4.) That, in a nutshell, is the problem with much of Defendants' Motion to Dismiss. At this stage of the proceedings, the Court must assume that all Ms. Bennett's factual allegations are true. Defendants have the right to deny the allegations in an answer, but not to skip discovery and declare victory because they believe the facts are on their side. The Court should deny Defendants' Motion because the Amended Complaint clearly and specifically sets forth cognizable claims under New York Not-for-Profit Corporation Law §§ 720, 719, and 714. Although Ms. Bennett's Opposition comprehensively addresses the reasons for denying Defendants' Motion to Dismiss, she submits this surreply to clarify several of her arguments.[1]

[1] Plaintiff files this surreply in accordance with this Court's guidance that it will accept surreplies as a matter of course without the need to move for leave to file one.

A. Plaintiff Has Standing To Pursue Violations Defendants Committed As Directors Of AMHA.

In arguing that Ms. Bennett lacks standing, Defendants focus exclusively on AMHECT, and ignore AMHA entirely. This elides a critical fact: over the years described in the Amended Complaint, Defendants have shared overlapping roles as both AMHA Directors and AMHECT Trustees. (*See, e.g.*, Amended Complaint ¶¶ 28, 43, 44, 53, 54.) In these dual roles—*each of which* came with its own set of fiduciary duties—Defendants engaged in a series of improper transactions that put AMHA's assets at risk.

As set forth in the Amended Complaint, Defendants repeatedly violated their obligations to AMHA by executing a series of transfers from AMHA to AMHECT that unlawfully wasted the assets of AMHA. (Amended Complaint ¶¶ 114, 123, 130, 139.) For example, in 2011, the AMHA Board, including Defendants Gove, Mugnier, Breyer, Fletcher, G. Green and Sanderson, improperly voted to cede funds intended for AMHA to AMHECT. (*See* Amended Complaint ¶ 39.) Similarly, in 2012, Defendant Cole drafted a license purportedly transferring the rights to the Marks and Show from AMHA to AMHECT for a five-year period. (Amended Complaint ¶ 50.) That transfer was never approved by a vote of the AMHA Board, as required. (*Id.*) These actions were not ones taken by AMHECT alone, but rather ones taken by Defendants in their capacities as *both* AMHA Board members and AMHECT Trustees. The whole point here is that *because* Defendants occupied positions of power in all of the relevant acronyms—AMHA, AMHECT and GNSC (*see infra*)—they were able to funnel AMHA's property to AMHECT and

GNSC where there would be far less oversight from the AMHA Board and membership.[2]

This issue is further complicated by the fact that a group of AMHA Directors and insiders, including Defendants Cole, Fletcher, G. Green, Lee, and Mugnier, created the Grand National Show Committee ("GNSC") and began operating the Grand National & World Championship Morgan Horse Show ("the Show"). (Amended Complaint ¶ 53.) GNSC is nominally under the auspices of AMHECT, but it keeps its own books using its own bookkeeper against the advice of AMHECT's auditors, and has exclusive control over more than $532,000 in Show money. (Amended Complaint ¶¶ 57–58.) Because GNSC does not appear to be operating with the oversight of *either* AMHA *or* AMHECT despite supposedly being under the auspices of AMHECT, it is not clear who should be exercising control over it.

In sum, the allegations in the Amended Complaint make clear that Defendants share overlapping further roles in AMHA, AMHECT, and GNSC, and all of the transactions described in the Amended Complaint involve self-dealing among these entities. To the extent that Defendants violated their duties to AMHA by participating in these transactions, Ms. Bennett has standing to challenge those violations.

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[2] Indeed, as set forth in the Amended Complaint, Defendants continually sought to undermine AMHA's oversight of AMHECT and, specifically, the property that AMHECT controlled on behalf of AMHA. As originally intended, the AMHECT Board of Trustees was to be a "mirror board" of the AMHA Board to ensure that AMHECT would comply with the mandate in its IRS Form 1023 to fund AMHA's educational programs and activities pursuant to AMHECT's special relationship with AMHA. (Amended Complaint ¶ 28; *see also* Form 1023, attached to Plaintiff's Amended Complaint as Exhibit 1.) But Defendants voted to change the composition of the AMHECT Board of Trustees from a mirror board. (Amended Complaint ¶ 35.) This governance change put select Defendants who remained trustees of AMHECT in control of AMHA's property without full oversight from the AMHA Board and membership. (See Amended Complaint ¶¶ 28, 37, 44.) Defendants compounded this oversight problem by unlawfully adopting bylaws providing that the AMHECT Board of Trustees would be self-perpetuating, i.e., the Trustees would elect themselves rather than being elected by the AMHA Directors. From 2012 through 2017, the AMHECT Trustees elected themselves. Not only were these invalid elections of Trustees, but also Defendants' decision to dispense with AMHA oversight violated their duties to AMHA. (Amended Complaint ¶ 52.)

B. Under Either New York Or Vermont Law, Ms. Bennett Has Satisfied The Statute Of Limitations.

In their Reply, Defendants alternate between relying on New York and Vermont Law to argue that certain claims in this suit are time-barred.[3] Plaintiff asserts that New York applies to this suit, but in either case, this suit is timely.

N.Y. C.P.L.R. § 213(8) provides that, in an action based on fraud, the suit may be commenced within two years from the time the plaintiff discovered the fraud, or could with reasonable diligence have discovered it. New York law further states that, at the complaint stage, a plaintiff need only provide "sufficient detail to inform defendants of the substance of the claims" to satisfy the discovery rule set forth in N.Y. C.P.L.R. § 213(8). *Kaufman v. Cohen*, 307 A.D.2d 113, 120, 760 N.Y.S.2d 157, 166 (2003). To put it another way, a complaint may not be dismissed at the preliminary stages if the claims are "susceptible" of being construed as tainted by fraud. *See Quadrozzi Concrete Corp. v. Mastroianni*, 56 A.D.2d 353, 358, 392 N.Y.S.2d 687, 690 (2d Dep't) (1977) (stating that complaint discloses allegations which are sufficient to construe it as an action for actual fraud).

The Amended Complaint easily satisfies this standard. The Amended Complaint triggers New York's discovery rule because the claims outside of the normal six-year statute of limitations are "susceptible" to being construed as tainted by fraud. *See Quadrozzi Concrete Corp.*, 56 A.D.2d at 357. Specifically, the four dates challenged by Defendants are plainly tainted by fraud: for example, Defendants voted in 2011 to change the governance of AMHECT and, in 2012, Defendants changed the standards for reelection; in both cases, Defendants made knowing and material misstatements to the IRS regarding the changes in governance. (Amended

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[3] Defendants do not dispute that the majority of Ms. Bennett's claims fall within the six-year statute of limitations.

Complaint ¶¶ 37–39, 46, 52.) Moreover, the Amended Complaint alleges that Defendants fraudulently conveyed money from the Registry Trust and the corpus of the Epperson Trust by knowingly transferring the money without a vote of the AMHA members. (*See* Amended Complaint ¶ 39.) Further, Ms. Bennett began to discover the scope of these intentional misstatements and fraudulent conveyances during the period of 2017–2019.[4] (Amended Complaint at 2, *id.* ¶ 40.) Taking these allegations as true, Defendants cannot now claim that their intentional misstatements and knowing conveyances occurred outside of the statute of limitations.

Switching from New York to Vermont law, Defendants argue that the Amended Complaint fails to satisfy the heightened pleading standard under Rule 9(b). But if *Vermont* procedural law applies, then ***Vermont's statute of limitations and discovery rule*** also apply. That statute of limitations is six years, and the discovery rule does not require any allegation of fraud in order to apply. *See* 12 V.S.A. § 511; *Kalanges v. Champlain Valley Exposition, Inc.*, 160 Vt. 644, 645 (1993) (applying 12 V.S.A. § 511 to non-profit shareholder suit); *Univ. of Vt. v. W.R. Grace & Co.*, 152 Vt. 287, 290 (1989) (holding that discovery rule applies to § 511). In other words, in Vermont, the six-year statute of limitations period begins to run upon "discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a

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[4] Defendants assert that Ms. Bennett "discovered (or was in a position to discover)" the alleged wrongdoings when she was elected as President of AMHA in February 2017 and, as a result, her claims fall outside the two-year statute of limitations. (Reply at 8.) But Defendants misread the Amended Complaint. The Amended Complaint does not state that, in the month of her election, Ms. Bennett immediately discovered (or had the means to discover) the change in corporate governance or the fraudulent conveyances. (*See* Amended Complaint ¶ 40.) Moreover, to the extent "there are questions raised concerning the accrual date of the alleged cause of actions and the possible tolling of the Statute of Limitations, the better practice is to allow the defendant to stand until trial." *Mahfouz v. Mahfouz*, 24 A.D.2d 988, 988, 265 N.Y.S.2d 114, 115 (1965); *see also Turner v. Roman Catholic Diocese of Burlington, Vermont*, 2009 VT 101, ¶ 48, 186 Vt. 396 (2009) (stating that a Court may determine the accrual-date issue only "when there is no legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving party on that issue").

person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery." *Union Sch. Dist. No. 20 v. Lench*, 134 Vt. 424, 427, (1976) (quotation omitted). Here, the Amended Complaint states that Ms. Bennett began to discover these intentional misstatements and fraudulent conveyances during the period of 2017–2019. (Amended Complaint at 2.) Accordingly, under the Vermont rules, she would have standing whether or not she specifically plead fraud under V.C.P.R. 9(b).[5]

In sum, Ms. Bennett asserts that she has made sufficient allegations of fraud to satisfy New York law and, under Vermont law, she need not satisfy V.C.P.R. 9(b) to comply with the statute of limitations.

C. The Business Judgment Does Not Apply At This Stage Of The Proceedings.

Finally, the business judgment rule cannot save Defendants at the pleading stage, because the allegations regarding Defendants' overlapping roles in AMHA, AMHECT, GNSC, and MWC is sufficient to rebut the business judgment rule. (*See, e.g.*, Amended Complaint ¶¶ 28, 43.) "The presumptive applicability of the business judgment rule is rebutted, and judicial inquiry thereby triggered, . . . by a showing that a breach of fiduciary duty occurred, which includes evidence of bad faith, self-dealing, or by decisions made by directors' demonstrably affected by inherent conflicts of interest." *Higgins v. New York Stock Exch., Inc.*, 10 Misc. 3d 257, 278, 806 N.Y.S.2d 339, 357 (N.Y. Sup. 2005); *see also Lippman v. Shaffer*, 15 Misc. 3d 705, 719, 836 N.Y.S.2d 766, 778 (N.Y. Sup. Ct. 2006) (same); *In re Croton River Club, Inc.*, 52

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[5] In any case, although Ms. Bennett satisfies Vermont's statute of limitations without specifically pleading fraud under V.C.P.R. 9(b), Ms. Bennett's claims are also sufficient under Rule 9(b). According to Defendants, Ms. Bennett's allegations are not sufficient because the words "fraud" and "fraudulently" are not in the Amended Complaint. (Reply at 6.) But Rule 9(b) requires only that "the *circumstances* constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." *Id.* (emphasis added). As set out above and in Ms. Bennett's Opposition to the Motion to Dismiss, the Amended Complaint plainly alleges the circumstances constituting fraud. If Defendants require the magic words "fraud" and "fraudulently" to be fully apprised of the claims, Ms. Bennett would happily amend the Amended Complaint for a second time.

F.3d 41, 44 (2d Cir. 1995) ("It is black-letter, settled law that when a corporate director or officer has an interest in a decision, the business judgment rule does not apply."). Here, Defendants' overlapping positions on these entities suggest that they were not acting in good faith, but rather were engaging in self-dealing and ignoring their conflicts of interest. As a federal court in New York recently put it, "it is improper to dismiss a suit at the motion to dismiss stage on the basis of the business judgment rule if the plaintiff's pleadings allege that directors or officers did not act in good faith." *See Levy v. Young Adult Inst., Inc.*, 103 F. Supp. 3d 426, 430 (S.D.N.Y. 2015).

Conclusion

For the reasons set forth above and for the reasons set forth in Ms. Bennett's Opposition, Ms. Bennett asks the Court to deny Defendants' Motion to Dismiss.

Dated at Burlington, Vermont this 5 day of February, 2020.

VICTORIA BENNETT

By: _____

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	)
Defendants.	)

CERTIFICATE OF SERVICE

I, Devin T. McKnight, counsel for Plaintiff Victoria Bennett, do hereby certify that on February 5, 2020, I served Plaintiff's Surreply In Opposition To Defendants' Motion To Dismiss, by Email and U.S. First-Class Mail, postage-prepaid mail, addressed as follows:

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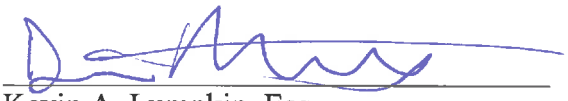
Dated at Burlington, Vermont, this 5th day of February, 2020.

VICTORIA BENNETT

By: 

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