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January 17, 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 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 **CIVIL DIVISION**
CHITTENDEN UNIT **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 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 17th day of January 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 IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Plaintiff's Opposition adheres to a principle presently much in vogue in the public sphere: say something enough times, and it just might begin to assume a veneer of truth, regardless of what the facts might be. And so, the Opposition repeatedly claims that Defendants engaged in "self-dealing." It accuses them of "fraud." And it suggests that Defendants "intended to cause harm" to AMHA, the organization all fourteen of them volunteered their time and energy to serve as unpaid directors, for sheer love of the Morgan Horse breed. However often repeated, not one of these serious indictments finds any support in the actual, specific allegations of the Amended Complaint. Nor, more importantly, do they overcome the fatal deficiencies in Plaintiff's pleading.

For deficiencies there are, and the Opposition spends more time leveling accusations at Defendants and sowing confusion—expounding on irrelevant allegations unconnected to her actual legal claims (such as, for example, the abandoned MWC licensing transaction) and appealing to inapposite legal theories—than engaging with the substance of their arguments. There can be no genuine question that significant portions of Plaintiff's claims are time-barred; that others rest on alleged conduct relating to AMHECT, which is not properly subject to a derivative suit against directors of AMHA; and that Plaintiff has failed to plausibly allege waste or conveyances of AMHA property to Defendants individually, such as could support her claims. As Plaintiff's Opposition fails to squarely respond to these and the other issues raised by Defendants' Motion, the Court should grant the Motion and dismiss Plaintiff's suit.

Argument

A. Plaintiff's Allegations of Wrongdoing at AMHECT Lie Beyond the Permissible Scope of Her Lawsuit.

There is a fundamental inconsistency to the Opposition's arguments on the relationship of AMHECT to the present lawsuit. Plaintiff claims that she has standing to pursue all aspects of her claims because they only concern "violations Defendants committed as directors of AMHA." Opposition at 9. And yet, throughout her Opposition, Plaintiff consistently cites the alleged wrongdoings of AMHECT as a primary reason the Court should allow this case proceed to discovery. Among the AMHECT conduct that assumes a central role in her legal theories are AMHECT's alleged misstatements to the IRS (Opposition at 3, 12, 13,

16), AMHECT's 2012 adoption of election bylaws (Opposition at 4, 16), and the claim that certain trustees of AMHECT allegedly "secreted away . . . surplus proceeds" from the Show operated by AMHECT (Opposition at 7, 12). To be clear, Defendants do not argue that all of Plaintiff's claims arise from conduct at AMHECT. However, it is plain from the Amended Complaint and the Opposition that a central core of the allegations offered in support of Plaintiff's claims relates to actions taken by or within AMHECT, and thus lies outside the permissible scope of Plaintiff's claims and must be dismissed.

In the same breath that she argues that her claims relate only to actions by Defendants as AMHA directors, Plaintiff also contends that both she and AMHA have standing to challenge the actions of AMHECT. This argument misses the mark for several reasons. To start with the obvious, Plaintiff has not in fact sued AMHECT or the Defendants in their capacity as AMHECT trustees on AMHA's behalf. Such a suit against a third party on behalf of AMHA would require that she initiate a member derivative action pursuant to § 623 of New York's Not-for-Profit Corporation Law and comply with the procedural requirements of that statute (including the requirement that suit be initiated by 5% of the organization's membership).[1] She has not done so.

Nor does Plaintiff's assertion that she has standing to sue AMHECT under New York's "special interest" exception have any merit. In *Alco Gavure, Inc.*, the

[1] New York law permits directors to initiate a derivative action against a third party only where the organization has no members (and requires specific allegations by the director-plaintiff of his or her efforts to secure Board action against the third party or the reasons why doing so would be futile). *See* N.Y. N-PCL § 720(c). As AMHA has members, the only route for a derivative action against a third party is supplied by § 623 (member derivative actions).

Court of Appeals of New York articulated a narrow rule for standing applicable to trusts where named beneficiaries, or a sharply defined class of potential beneficiaries, are allowed to sue for trust enforcement in cases involving an anticipated disposition of trust assets that jeopardizes distribution priority. *See Alco Gavure, Inc., v. Knapp Foundation* 479 N.E.2d 752, 755-56 (N.Y. 1985). New York courts rarely apply this exception and generally cabin it to instances where the plaintiff is, at a minimum, named as beneficiary in a trust document. *Compare id.* at 756 (applying exception where distribution would liquidate trust assets) *with Sagtikos Manor Historical Soc'y, Inc. v. Robert David Lion Gardiner Found., Inc.*, 9 N.Y.S. 3d 80, 82 (N.Y. App. Div. 2015) (reversing denial of motion to dismiss for lack of standing; plaintiff was not named as a beneficiary in foundation's trust documents) *and Matter of Estate of May*, 623 N.Y.S.2d 650, 652 (N.Y. App. Div. 1995) (upholding dismissal and collecting cases).

This is not a trust enforcement case. Plaintiff fails to identify any trust terms she is purportedly seeking to enforce; she cites to no trust language in either her Amended Complaint or in her Opposition, even though she acknowledges that "standing is found by looking to the trust's chartering documents." *See* Opposition at 10 (quoting *Sagtikos Manor Historical Soc'y, Inc.*, 9 N.Y.S. 3d 80 at 82.) Indeed, the Amended Complaint contains none of the claims or requests for relief typically associated with an action to enforce a trust, be it an injunction, breach, or cy pres. And, in any event, Plaintiff is not a named beneficiary of AMHECT who could claim

standing to bring any such enforcement action under the "special interest" exception.[2]

Lastly, Plaintiff's contention that those Defendants serving as AMHECT trustees are not entitled to immunity under § 720-a lacks the slightest support. As Defendants explained in their Motion, § 720-a renders nonprofit directors immune from suit by third parties absent a claim of gross negligence or that the directors intended to harm the organization. Plaintiff attempts to circumvent this provision by baldly asserting that "the conduct of Defendants was intended to cause the resulting harm to AMHA." Opposition at 10. There is absolutely no such allegation in the Amended Complaint, nor facts from which it can reasonably be inferred that the volunteer directors sued in this suit intended to cause harm to the organization they served. Plaintiff cannot cure a deficiency in her pleading through a conclusory assertion in motion papers.

B. Plaintiff Has Pleaded No Basis for Tolling the Statute of Limitations—and Her Claims Would Be Untimely Even if Tolling Applied.

The Opposition's attempt to salvage Plaintiff's time-barred claims by characterizing them as having been "tainted" by "fraud"—a word that appears nowhere in the Amended Complaint—is unavailing. There is nothing in the actual

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[2] Nor is AMHA a named beneficiary of AMHECT, for that matter (although, again, Plaintiff has not filed a member-derivative suit on AMHA's behalf against AMHECT or its trustees). Plaintiff does not identify any trust language designating AMHA as a beneficiary or as a priority recipient of AMHECT funds, and, indeed, AMHECT, as AMHA's supporting organization, cannot distribute funds to AMHA for general operations. *See* Rev. Rul. 76-401. In fact, AMHECT's Declaration of Trust does not name any beneficiary, is silent as to distribution priorities, and expressly authorizes AMHECT to distribute funds for any "religious, charitable, scientific, literary or educational" purpose the Board of Trustees selects. *See* Exh. A to Motion to Dismiss (AMHECT Declaration of Trust) at Article Fourth, ¶¶ A, D. *Cf. Sagtikos Manor Historical Soc'y, Inc.*, 9 N.Y.S. 3d 80 at 82 (noting that the foundation's declaration did not name any beneficiary).

allegations of the Amended Complaint that suggests "fraud," and certainly not in the manner that could offer a ground for tolling. Moreover, even if the statute of limitations were tolled on the basis of "fraud," the limitations period runs two years from the time the conduct was or could reasonably have been discovered—and Plaintiff knew or was in a position to know of all the events that form the basis for her claims more than two years before filing.

As Defendants explained in their Motion, Plaintiff's claims against Defendants on behalf of AMHA are subject to a six-year statute of limitations. *See* N.Y. CPLR § 213(7) (governing claims "by or on behalf of a corporation against a present or former director . . . to recover damages for waste or for injury to property or for an accounting in conjunction therewith"). Plaintiff, however, argues that her claims should instead be considered under the statute of limitations governing actions "based upon fraud," which allows a plaintiff to commence suit "two years from the time the plaintiff discovered the fraud . . . or could with reasonable diligence have discovered it." N.Y. CPLR § 213(8).

This effort to evade the statute of limitations fails. Rule 9(b) provides that that "the circumstances constituting fraud . . . shall be stated with particularity," V.R.C.P. 9(b), which "requires that plaintiffs identify the particular statements or acts by particular defendants that they claim were fraudulent." *Sutton v. Vermont Reg'l Ctr.*, 2019 VT 71, ¶ 75 (affirming dismissal under Rule 9(b) of fraud claim resting on broad allegations of deceitful comments by defendants). There are no actual fraud allegations here that could bring Plaintiff's claims within the statute of

limitations for fraud, let alone any pleaded with the requisite particularity: the words "fraud" and "fraudulently" are found only within the pages of Plaintiff's Opposition. *See generally* Am. Compl.

Moreover, the discovery rule under § 213(8) "applies only to claims of actual fraud—that is, fraud claims alleging an intent to deceive. Claims of constructive fraud, i.e., a fiduciary's simple nondisclosure of facts it is obligated to disclose, accrue upon breach." *Whitney Holdings, Ltd. v. Glovtovsky*, 988 F. Supp. 732, 744 (S.D.N.Y 1997); *Kaufman v. Cohen*, 307 A.D.2d. 113, 126 (N.Y. 2003) ("[T]he discovery accrual rule does not apply in cases alleging constructive fraud."). "A cause of action sounding in actual fraud must state that the defendant knowingly misrepresented or concealed a material fact for the purpose of inducing another party to rely upon it, and that the other party justifiably relied upon such misrepresentation or concealment to his or her own detriment." *Levin v. Kitsis*, 920 N.Y.S.2d 131, 135 (N.Y. App. Div. 2011).

As Plaintiff acknowledges in her Opposition, the alleged pre-2013 wrongdoings involve AMHA conveyances to VCF, AMHECT's 2011 charter change, and AMHECT's adoption in 2012 of a bylaw. None of these actions are alleged to have occurred in secrecy or with intent to deceive anyone. More to the point, notwithstanding her loose characterization of these matters as "tainted" by fraud, none of the actual allegations—nor any others in the Amended Complaint—come close to suggesting that (a) Plaintiff (or AMHA) justifiably relied on a purported intentional misrepresentation by the Defendants or (b) the Defendants intentionally

concealed facts from AMHA. *See generally Kaufman*, 307 A.D.2d. at 119 -120; *see also Eisensberg v. Grossman*, 84 N.Y.S.2d 118, 121-122 (N.Y. Sup. Ct. 1946) ("[A]llegations without facts to support them are insufficient. It is not enough to charge the defendants with fraud 'adverbially.'" (internal citations omitted)). As there is no plausible claim of actual fraud, § 213(7) governs Plaintiff's claims and requires dismissal to the extent they rely on allegations of pre-2013 conduct.

Even if the discovery rule for fraud claims did apply, it would not save Plaintiff's claims. Plaintiff admits in her Amended Complaint that, as early as February of 2017, she either discovered (or was in a position to discover) the alleged wrongdoings. Paragraph 40 of the Amended Complaint unequivocally states, "Plaintiff discovered the newfound corporate status of AMHECT . . . upon being elected as President of AMHA in February of 2017, and after [past-President] Broadway had left AMHA for a position as President of the American Horse Council." Am. Compl., ¶ 40. Plaintiff did not commence suit until September of 2019, two years and seven months from when she either discovered or "could with reasonable diligence have discovered" the subject pre-2013 charter change, bylaws, and conveyances. N.Y. CPLR § 213(8). *See also TMG-II v. Price Waterhouse & Co.*, 572 N.Y.S.2d 6, 8 (N.Y. App. Div. 1991) ("Once an actual fraud has been or could have reasonably been discovered, the discovery of new information about the same

fraudulent act does not toll the statute of limitations.").[3] For all of these reasons, the portions of Plaintiff's claims arising from these allegations are time-barred and must be dismissed.

C. The Opposition Fails to Supply a Basis for Allowing Claims to Proceed Against Defendants Kirsch, Grunden, Handy, Sturm, and Mortensen.

While Plaintiff insists in her Opposition that she has alleged sufficient facts to proceed against Defendants Kirsch, Grunden, Sturm, Handy, and Mortensen, she fails to identify how any of the allegations concerning these individuals relate to the actual causes of action asserted in this case and provide a colorable basis for liability.

To start with, Plaintiff's Opposition says nothing about Bennett's claims against Steven Handy. Remarkably, despite the fact that Plaintiff has failed to identify any allegations that would support a claim against Mr. Handy, she does not concede that Mr. Handy is improperly joined in this suit. Similarly, Plaintiff's only explanation for joining Terri Sturm as a defendant is that, by virtue of her election to the AMHA Board in 2018, Ms. Sturm "was in a position to know" about AMHECT's 2018 tax filings (which Plaintiff alleged contained misstatements). Being "in a position to know" is not itself a violation of any of the provisions of N.Y. N-PCL §719 or §720. Moreover, this allegation, as well as the allegation that

[3] In another section of her Opposition, Plaintiff argues that Defendant Terri Sturm is properly joined in this suit because Sturm "was in a position to know" about all of the alleged wrongdoings by virtue of having been elected to the AMHA Board in 2018. *See* Opposition at 13. By this token, Plaintiff can hardly contest that she, as President of the Board starting in 2017 and a director before that, was not in a position where she "reasonably could have discovered" the alleged wrongdoing by February 2017 at the latest.

Defendant Mortensen signed AMHECT's tax filings, relate to AMHECT, not AMHA, and do not provide a basis for liability under §§ 719 and 720.

Plaintiff next argues that three of the individuals (Mortensen, Grunden, and Kirsch) participated in discussion of a sub-license agreement to MWC, and that Defendant Mortensen worked with AMHA's counsel on preparing a license agreement. Opposition at 13. These allegations concern a transaction that Plaintiff admits was never completed. There is no cause of action asserted that relates to consideration of the MWC transaction, and thus the alleged participation of these individuals in exploring the transaction is irrelevant.

Lastly, Plaintiff contends that Defendants Kirsch and Grunden are properly joined because they voted in 2017 to ratify the 2011 AMHECT charter amendment changing the composition of the AMHECT Board. Opposition at 13. There is no viable claim to be found in this allegation. The ratification of the AMHECT charter amendment did not constitute the waste or negligent loss of corporate assets actionable under § 720, nor the distribution of corporate property to officers and directors prohibited under § 719. As Defendants have explained, AMHECT is a distinct legal entity, not an asset of AMHA. The ratification of a change in the AMHECT Board composition is not the type of conduct for which a claim may be pursued against a director of AMHA under New York law.

In short, the Amended Complaint's few, thin allegations concerning these five Defendants cannot justify keeping them in the lawsuit. To the extent that the Court does not dismiss them entirely from the suit, Defendants request that the

Court dismiss all claims except those for which Plaintiff has provided some allegations supporting her claims.

D. The Opposition Fails to Supply Grounds for Plaintiff's Legally Insufficient Claims to Proceed.

1. There Is No Plausible Allegation of "Self-Dealing" and Conflicts of Interest Sufficient to Overcome the Business Judgment Rule.

Plaintiff's argument against application of the Business Judgment Rule boils down to the following proposition: because some of the Defendants "shared overlapping roles" in AMHA, AMHECT, MWC,[4] and the GNSC, they had "inherent conflicts" and engaged in "self-dealing" that brings their actions outside the aegis of the Business Judgment Rule. Opposition at 15. Not so. The type of conflict of interest that would defeat the Business Judgment Rule is not present here, nor is there any plausible allegation of self-dealing. Rather, the circumstances alleged in the Amended Complaint are precisely the type to which the Business Judgment Rule applies, barring Plaintiff's claims from proceeding.

As Defendants explained in their Motion, the Business Judgment Rule shields nonprofit director actions from liability absent self-dealing or bad faith. *See generally Van Der Lande v. Stout*, 786 N.Y.S.2d 515 (N.Y. App. Div. 2004) ("[T]he . . . allegations in the complaint constituted mere business disagreements with respect to how the property was managed, and should not be questioned by the courts where, as here, there is no evidence of bad faith or self-dealing on the part of

[4] Again, no transaction with Morgan World Championship was ever approved. While plainly a fixation for Plaintiff, the contemplated transaction has zero relevance to the legal claims she actually asserts in this lawsuit—and, by the same token, the fact that some of the Defendants were involved with MWC carries no legal significance.

the individual defendants."); *Stern v. General Elec. Co.*, 924 F.2d 472, 476 (2d Cir. 1991) (declining to engage in judicial scrutiny at the 12(b)(6) stage absent sufficiently pleaded bad-faith allegations). For purposes of the Business Judgment Rule, director conflicts of interest exist where "a director stands to receive a personal benefit from the transaction that is different from that received by all shareholders." *Higgins v. New York Stock Exchange*, 808 N.Y.S.2d 339, 368 (N.Y. Sup. Ct. 2005) (citing *Marx v. Akers*, 666 N.E.2d 1034 (N.Y. 1996)). That is simply not the case here.

Notwithstanding the Opposition's characterization of Defendants' actions as "self-dealing," Plaintiff has failed to allege facts showing that the Defendants benefitted financially from any of the challenged transactions. Again, the challenged transactions at issue are (1) transfers from AMHA to VCF, (2) AMHECT's charter change in 2011, (3) AMHECT's IRS tax filings, (4) AMHA's alleged failure to control the GNSC budget, and (5) AMHA's license agreement with AMHECT. Plaintiff's Opposition makes no effort to explain how any of these transactions specifically benefitted Defendants so as to remove them from the protections of the Business Judgment Rule.[5] Rather, she simply states that they all

[5] As Defendants explained in their Motion, none of these actions can plausibly be characterized as self-dealing. The alleged transfers to VCF were, on their face, transfers to the Vermont Community Foundation in trust, and there is no allegation that Defendants benefited. Likewise, Plaintiff does not attempt to explain how AMHA's alleged failure to control the GNSC budget and recover Show surpluses amounts to self-dealing, especially where the AMHECT trustees serve without compensation. As to AMHECT's charter change and tax filings, nothing in the Amended Complaint or in Plaintiff's Opposition suggests that the change resulted in any financial remuneration to the Defendants. And finally, with respect to the AMHA-AMHECT license agreement, Plaintiff does not—and cannot—explain why a license agreement from one not-for-profit to a related but separate charity equates to a financial benefit to the Defendant directors individually.

involved "self-dealing between the companies," Opposition at 15, suggesting that this is enough to proceed with her claims. It is not.

In support of her argument, Plaintiff cites the principle that the Business Judgment Rule does not apply in cases of "inherent conflict of interest," Opposition at 15 (quoting *Wolf v. Rand,* 685 N.Y.S.2d 708 (N.Y. App. Div. 1999)), and suggests that such a conflict of interest will exist where there is a common directorship between companies that are party to a transaction. However, the cases on which Plaintiff relies involved defendants who stood to gain financially from the "interested" transactions alleged. At issue in *Alpert v. 28 Williams Street Corp.*, 473 N.E.2d 19 (N.Y. 1984) was a two-step freeze-out merger where the defendants controlled the corporations on both sides of the transaction and the alleged "sole purpose" of the merger was to personally benefit the majority shareholders through the acquisition of the target's primary asset, a 17-story office building located on Madison Avenue in Manhattan. *Id.* at 22-23. Similarly, *Stillwell Value Partners, IV, L.P., v. Cavanaugh*, an unreported trial court decision, involved a challenge to the defendants' decision not to initiate a second-step conversion, where the failure to dissolve a mutual holding company allegedly allowed the defendants to continue their perpetual appointments as directors of subsidiary publicly traded companies. 981 N.Y.S.2d 639, 2013 WL5715136, *2-*3 (N.Y. Sup. Ct. 2013); *see also Wolf*, 685 N.Y.S.2d 708 (derivative shareholder claim to recover unrecorded profits to majority shareholders and other payments by the corporation to the defendants, including payment of their personal income taxes). There is no plausible allegation that any

of the Defendants here stand to benefit personally from any of their actions as directors, such as to give rise to the sort "inherent conflict of interest" that animated those cases.

Plaintiff also suggests that, because some of the Defendants were directors of both AMHA and AMHECT, the "burden is on Defendants to show that there has been fair dealing between the corporations." Opposition at 15. This gets things precisely backwards. Plaintiff extracts this proposition from *Alpert*, a case which addressed a very specific question: there, the "task facing [the] court [was] to prescribe a standard for evaluating the validity of a corporate transaction that forcibly eliminates minority shareholders by means of a two-step merger." *Id.* 473 N.E.2d at 24. The court observed that the general rule in challenges to mergers was that the "plaintiff has the burden of proving that the merger violated the duty of fairness," but concluded that the inherent conflict presented by a freeze-out merger shifted the burden to the interested directors or shareholders. *Id.* at 26. The present case falls outside the special parameters of *Alpert*: there is no merger contemplated, no minority stock-holder's share price to protect, let alone any claim of financial remuneration to any Defendant. *Id.* at 27-28. Absent such circumstances, the Business Judgment Rule presumptively applies, and the burden remains with Plaintiff to overcome it with plausible allegations of self-dealing or bad faith. She has not done so.

It is hard to miss the irony in Plaintiff's argument that the close relationship and overlapping boards between AMHA and AMHECT demand heightened scrutiny

to ensure the fairness of transactions between the two. Central to Plaintiff's complaints in this case is the notion that the AMHA and AMHECT boards erred in restructuring the AMHECT board so that it was no longer a "mirror" of AMHA's—i.e., she protests that they do not overlap *enough*. And yet, she suggests that Defendants could only establish the fairness of transactions between the two by showing their independence, through measures such as "the appointment of an independent negotiating committee made up of neutral directors." Opposition at 15. The truth, of course, is that AMHECT *is* closely linked to AMHA, and the fact that there are transactions between the two that further the purposes of one or the other is no indication of an "inherent conflict"; rather, it is consistent with the intended structure and relationship of the two entities. There is no justification for the Court to intervene and second-guess decisions made by AMHA directors in this area.

2. The Opposition Fails to Establish Waste or Injury Caused by the Alleged Wrongdoing Actionable Under § 720.

Arguing against dismissal of Count I, the Opposition attempts to deflect scrutiny of the claim by suggesting that the issue of waste or injury to AMHA cannot be resolved at the pleadings stage: Plaintiff recites a handful of conclusory allegations, characterizes them as having resulted in the "loss" or "impairment" of "corporate assets," and contends that the parties simply disagree about that characterization. *See* Opposition at 17. But legal assertions unsupported by facts cannot save a defective pleading from dismissal. *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 10, 184 Vt. 1, 955 A.2d 1082; *Aranoff v. Bryan*, 153 Vt. 59, 62-64, 569 A.2d. 466 (1989). Whether or not the challenged transactions, as pleaded by Plaintiff,

constitute corporate waste or injury to AMHA is a legal question—and one that Plaintiff has not even attempted to answer in her briefing.

For example, one of the primary issues is whether AMHECT can be construed as an "asset" of AMHA such that decisions affecting AMHECT might constitute waste cognizable under § 720(a)(1). *See Aronoff v. Albanese*, 446 N.Y.S.2d 368, 370 (N.Y. App. Div. 1982) ("The essence of waste is the diversion of corporate assets for improper or unnecessary purposes."). That is fundamentally a legal question. As Defendants explained in their briefing, the legal structure of AMHECT as a supporting organization prohibits its assets from being used to fund the ordinary, noncharitable operations of AMHA—and, moreover, AMHECT's declaration of trust does not require AMHECT to provide funds to AMHA, or limit it from funding other entities consistent with its founding, tax-exempt mission. And yet, Plaintiff's arguments assume that AMHECT is an asset of AMHA (contending that Defendants have "impaired AMHECT's role as a charitable trust intended to support AMHA" and thereby wasted a corporate asset) without any discussion of the applicable Treasury Regulations or IRS rules governing supported and supporting organizations.

Defendants have explained in their Motion why, on this and other grounds, Plaintiff's allegations do not make out actionable waste. The Court need not wait to dismiss Count I where Plaintiff has so clearly failed to advance a cognizable legal theory as to how the Defendants allegedly caused injury to AMHA under § 720(a)(1).

3. Plaintiff's Opposition Fails to Address the Actual Requirements to Plead Unlawful Conveyance in Support of Count II.

Plaintiff's arguments on Count II ignore the actual requirements to plead an unlawful conveyance claim under § 720(a)(2) and do little more than restate the allegations of the Amended Complaint.

Plaintiff begins by noting that the "allegations under Count II state that Defendants knowingly licensed the Show trademarks to AMHECT for insufficient funds and that Defendants placed trust funds with VCF." Opposition at 17. However, § 720(a)(2) requires that the transferee, not the transferor, had knowledge of the alleged unlawfulness of the conveyance. There is no allegation in the Amended Complaint, nor does Plaintiff point to one, that VCF had any knowledge of the supposed unlawfulness of the funds transferred to it.

Nor does Plaintiff explain how the license of trademarks by AMHA to AMHECT was "unlawful" so as to be actionable under § 720(a)(2). Plaintiff again protests that these are questions that should not be resolved at the pleadings stage—but, in fact, whether the alleged license constitutes an unlawful transfer sufficient to state a claim under § 720(a)(2) is *precisely* the type of question resolved on a Rule 12(b)(6) motion, and Plaintiff offers no argument or explanation on the relevant issue. Liberal pleading standards do not permit Plaintiff to bring forward a cause of action without support in the law, and legal arguments clothed as facts need not be accepted as true on a Rule 12(b)(6) motion. *Aranoff v. Bryan*, 153 Vt. 59, 62-64, 569 A.2d. 466 (1989).

Finally, it is unclear what Plaintiff means when she asserts that, "by amending the Declaration of Trust of AMHECT, changing the governance structure, and failing to inform the IRS, Defendants knowingly allowed the transfer of assets from AMHA to AMHECT." Opposition at 18. Beyond Plaintiff's ipse dixit, there is no recognizable indication of any unlawful conveyance of assets or property in those allegations, and certainly not of the sort that has been found actionable under § 720(a)(2). *Compare People ex rel. Spitzer v. Grasso*, 11 N.Y.3d 64, 66- 67 (N.Y. 2008) (challenged conveyance was the New York Stock Exchange's excessive, above-benchmark compensation paid out to its Chairman). Count II should be dismissed for lack of any support in the Amended Complaint.

4. The Opposition Fails to Establish Any Unlawful Distribution Supporting Count III.

Plaintiff's arguments in opposition to dismissal of Count III verge on specious. The Opposition acknowledges, as it must, that § 719(a)(1) requires "the distribution of the corporation's cash or property to members, directors, or officers." However, Plaintiff contends that her claim is sufficient as a matter of law because, "by vitiating AMHECT's role and status as a charitable trust, Defendants effectively distributed AMHA's cash and property to AMHECT, instead of holding the cash and property in trust," which, "because individual Defendants also served on the AMHECT Board, . . . were effective distributions of AMHA's property to those Defendants." Opposition at 19. This proposition is thoroughly incorrect.

To start with, Plaintiff mischaracterizes the legal consequences of the alleged mishandling of AMHECT: AMHECT's status as a charitable trust has not been

"vitiated" as Plaintiff claims, nor is it in any danger of losing its 501(c)(3) status. Even if the Plaintiff were correct (and she is not) that AMHECT's charter change may somehow cause it to no longer operate as a supporting organization, AMHECT would continue to operate consistent with its charitable purpose. *See* IRC §509(b); Reg. §1.509(b)-1(a) (noting conversion to private foundation status).

Second, and more to the point, a distribution requires an actual pay-out or transfer. There is no such thing as an "effective" distribution to officers, directors, or members: there either is a pay-out and it is unlawful, or there is a pay-out and it is expressly authorized by statute. *See* N.Y. N-PCL §§ 719(a)(1); *id.* § 515 (prohibiting dividends but authorizing certain distributions). Section 719(a)(1) does not contemplate or regulate non-distributions. Third, Plaintiff does not provide any legal authority for her argument that money transferred to a not-for-profit corporation equates, by some legal version of the transitive property, to a money transfer to a director or officer who serves on the board of that not-for-profit corporation. The logical precondition of this argument is that volunteer service on the board of a charity gives one an effective property right to the charity's assets. That is plainly wrong—as is Plaintiff's argument that there has been an unlawful distribution. Count III must be dismissed accordingly.

5. Plaintiff Implicitly Concedes that Count IV Must Be Dismissed to the Extent Counts I-III Are Dismissed.

Plaintiff's Opposition does not dispute that Count IV of the Amended Complaint (requesting the removal of several AMHA officers from their positions and barring them from re-election) rests entirely on the allegations supporting

Counts I-III. Thus, to the extent the Court dismisses Counts I-III, Plaintiff implicitly concedes that Count IV fails as well and must be dismissed.

6. The Continuing Violation Doctrine Has No Application to Count V, and Plaintiff Fails to Contest the Other Grounds for Dismissal of Her Belated Election Challenge.

While acknowledging that a four-month statute of limitations applies to her challenge to AMHA's 2017 election, Plaintiff claims that the limitations period was tolled, allowing her untimely claim to proceed, because of "ongoing unlawful acts." This is an unambiguous misstatement of the law: there is no alleged "continuing unlawful act" related to her claim that could possibly toll the statute of limitations. Moreover, Plaintiff fails to offer any response to Defendants' arguments for dismissal on other grounds, each of which independently requires that Count V be dismissed.

It is true that a statute of limitations may be tolled in New York where the claimant establishes a "series of continuing wrongs," such that the limitations period runs from "the date of the commission of the last wrongful act." *Selkirk v. State of New York*, 249 A.D.2d 818, 819 (N.Y. App. Div. 1998). Here, Count V of the Amended Complaint challenges a single, discrete alleged wrongful act: the restructuring of AMHA's Board and election provisions in 2016, which led to Plaintiff having to run for office a year early in 2017. *See* Am. Compl. ¶¶ 142-48. The only relief requested by Plaintiff is that the Court "restore the year unlawfully eliminated" from her term in 2016/2017. *Id.*, ¶ 148 and Prayer for Relief. The Amended Complaint alleges no "continuing unlawful act" that has anything to do

with the alleged injury Plaintiff seeks to remedy through Count V. Rather, it is clear that Plaintiff seeks a remedy for the continuing *effect* of an alleged wrong in 2017—the fact that Plaintiff feels she was deprived of a year of her prior term as director. That continuing effect does not provide a basis for tolling the statute of limitations. *See Salomon v. Town of Wallkill,* 174 A.D.3d 720, 721-22 (N.Y. App. Div. 2019) (rejecting argument for tolling statute of limitations under continuing violation doctrine where plaintiff was merely challenging the continuing consequences of conduct that occurred outside of the limitations period).

To try to sidestep the limitations period, Plaintiff points to other supposed election-related misconduct alleged in the Complaint, and casts the 2017 election as merely one entry in a list of ongoing unlawful acts involving other individuals and elections. *See* Opposition at 20-21; Am. Compl. at 108. There are a couple of issues with this logic. First, while Plaintiff makes mention of these other alleged election incidents in her pleading, the actual allegations of Count V make plain that she is only suing (and only has standing to sue) over the 2017 election. The other allegations are irrelevant, as they relate to other individuals (such that Bennett is not an "aggrieved" party who can sue under § 618), and, in any event, she seeks no relief related to these other elections. Second, the last "unlawful" act alleged—supposed interference with an election in 2018—was significantly more than four months prior to Plaintiff's initiation of the present lawsuit, and thus could not save

her claim from dismissal.[6] *See Selkirk*, 249 A.D.2d at 819 (where continuing violation doctrine applies, period runs from "the date of the commission of the last wrongful act").

Additionally, as Defendants' Motion explained, Count V also fails on several other grounds: Plaintiff is not an "aggrieved" member authorized to assert a claim under § 618 (because she was reelected for a full term in the election at issue) and, in any event, her claim is barred by the equitable doctrines of waiver, estoppel, and laches. Plaintiff does not even respond to these points. Because each independently requires dismissal of Count V, the Court should grant Defendants' Motion as to that claim.

E. Defendants Goebig, Mugnier, Cole, Green, Gove, and Mortensen Must Be Dismissed for Failure to Effect Service Within the Prescribed Period.

Finally, Plaintiff's Opposition offers no authority for the proposition that the service of Defendants Goebig, Mugnier, Cole, Green, Gove, and Mortensen more than sixty days after she initiated suit—and without making any effort to request an extension from the Court—was timely under V.R.C.P. 3. Plaintiff cites the reporter's notes to Rule 3 for the proposition that "the rule runs from the time of service on the first defendant served where there are multiple defendants," suggesting that all she needed to do to comply with Rule 3 was to serve *a* defendant and file the complaint within twenty-one days. But there is nothing in the Rule that supports that notion. It cannot be the case that, where the Rule sets a sixty-

[6] Plaintiff alleges that she was able to "compel compliance" with the settlement terms of a prior lawsuit related to AMHA elections in 2019, *see* Am. Compl. ¶ 108(a); she does not allege that any ongoing "unlawful acts" occurred in 2019, let alone within the four months prior to initiating suit.

day deadline for completion of service for suits initiated by filing, there is effectively no deadline for completing service of all defendants in a suit initiated by service, provided that the complaint is filed within the twenty-one-day window from service of the first defendant. Service of Defendants Goebig, Mugnier, Cole, Green, Gove, and Mortensen was manifestly untimely, and the complaint should be dismissed on that basis.

Conclusion

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

DATED at Burlington, Vermont, this 17th day of January, 2020.

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