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January 3, 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 *Expedited* Motion for Advancement of Attorneys' Fees**, 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.

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 in Support of *Expedited* Motion for Advancement of Attorneys' Fees** 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 3rd 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 *EXPEDITED* MOTION FOR ADVANCEMENT OF ATTORNEYS' FEES

"With respect to the advancement of fees, courts have consistently observed that the governing standard 'is not a stringent one.'" *Feldmeier v. Feldmeier Equip., Inc.*, 164 A.D.3d 1093, 1101 (N.Y. App. Div. 2018) (quoting *Kaloyeros v. Fort Schuyler Mgt. Corp.*, 157 A.D.3d 1152, 1153 (N.Y. App. Div. 2018)) (reversing order denying advancement of legal fees). While Plaintiff's Opposition pays lip service to this principle, Plaintiff asks the Court to impose decidedly stringent prerequisites to advancement, including "affirmative evidence showing that [Defendants] acted in good faith" and a demonstration that Defendants are "unable to pay their legal fees." No such requirements are found in New York law. Rather, all that the governing statute requires to justify advancement of litigation expenses is that

Defendants raise "genuine issues of fact or law." Defendants have done that, and are entitled to an order approving the advancement of fees.

A. Section 724(c) Does Not Require "Affirmative Evidence" that Defendants Acted in Good Faith—and, in Any Event, the Amended Complaint Does Not Allege Bad Faith Conduct.

Plaintiff's lead argument is that advancement must be denied because "Defendants fail to provide the required affirmative evidence showing that they acted in good faith." Opposition at 1. This is a misreading of the statute. While the ultimate determination of whether indemnification is warranted certainly requires an affirmative showing of good faith, *see* N.Y. N-PCL §§ 722(c), 724(a), advancement of litigation expenses requires only that "the court . . . 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) (emphasis added).[1] Here, Defendants have, through their Motion to Dismiss, raised genuine questions of law that more than suffice to carry their burden under § 724(c). Moreover, nowhere does the Amended Complaint allege bad faith, nor can it be plausibly inferred from the Complaint's allegations.

Defendants' Motion to Dismiss raises exactly the type of question contemplated by § 724(c): whether, given the legal characteristics and relationships of the entities at issue, the allegations of the Amended Complaint make out self-dealing and bad faith conduct actionable under New York law. The main thrust of

[1] The reason for this relaxed standard is simple: if indemnification is ultimately determined to be unwarranted, the officers and directors must repay all advanced fees. *See* N.Y. N-PCL § 725(a); *see also Prof. Ins. Co. of New York v. Barry*, 303 N.Y.S.2d 556, 560 (N.Y. Sup. Ct. 1969) (rejecting requirement that party requesting advancement show a likelihood of success on the merits and observing that "[a]dequate protection for a corporation making a payment . . . pursuant to court direction under subdivision (c) is provided for by" the provision requiring repayment of advanced funds), *aff'd*, 302 N.Y.S.2d 722 (N.Y. App. Div. 1969).

Plaintiff's Complaint is that Defendants improperly conveyed benefits to AMHECT by, among other things, licensing the Grand National and World Championship Morgan Horse Show marks to AMHA for inadequate consideration; failing to adequately oversee the Show and ensure that excess proceeds were conveyed to AMHA; and transferring certain funds to the Vermont Community Foundation where, Plaintiff alleges, AMHECT gained control of their disposition. *See, e.g.*, Am. Compl. ¶¶ 114, 123, 130. Plaintiff now characterizes this alleged conduct—using unfounded and inflammatory rhetoric—as "theft" and "self-dealing transactions between companies controlled by Defendants." Opposition at 1, 2.

Placed in context, it is clear that there has been no such "theft" or "self-dealing." AMHA itself formed AMHECT to support the "educational mission" of AMHA by grants to AMHA and "other . . . § 501(c)(3) public charities closely related in purpose or function." Motion to Dismiss at 5-6. Although some of the Defendants serve as trustees of AMHECT, there is no allegation that any one of them has used AMHA or AMHECT funds for his or her own benefit.[2] Rather, Plaintiff Bennett effectively complains that Defendants have caused AMHA to be too generous in its dealings with AMHECT, the entity that, again, AMHA established to further its own educational mission. As Defendants' Motion to Dismiss explains, this is inadequate to state a claim under New York law: absent plausible allegations of self-dealing or bad faith, Defendants' actions are protected by the business judgment rule, and in any event they do not make out the type of corporate waste,

[2] Nor is there any allegation that AMHECT has made improper grants to entities or for purposes that lie outside of its mandate to forward the educational mission of AMHA.

unlawful transfer, or distribution of corporate property to directors and officers actionable under the statutes pursuant to which Plaintiff brings her suit. *Id.* at 16-26.

For purpose of the present motion, the critical point is that Defendants have raised genuine questions about the legal import of the conduct alleged by Plaintiff and whether it could make out bad faith. For example, Plaintiff contends that there was self-dealing and unlawful distributions of property to Defendants based on the alleged transfers of AMHA property to AMHECT, reasoning that "[b]ecause individual Defendants also served on the AMHECT Board . . . , these transactions were effective distributions of AMHA's property to those Defendants." Opposition to Motion to Dismiss at 19. While Defendants believe this line of reasoning is wholly erroneous, at the very least there exists a genuine question as to whether the law will support the tenuous inference Plaintiff seeks to draw from these allegations: that a conveyance of property by a nonprofit to a related, supporting entity is the legal equivalent of a conveyance of property to the trustees of the donee entity personally.

Plaintiff relies on *Kaloyeros v. Fort Schuyler Mgmt. Corp.*, 49 N.Y.S.3d 867 (N.Y. Sup. Ct. 2017) for the proposition that advancement of legal fees requires "some affirmative showing" by the proponent. It is true that there must be some basis for the Court to find a "genuine" issue of fact or law, but that does not mean, as Plaintiff suggests, that courts "have required an 'affirmed statement' by the director or officer that he or she acted in good faith." Opposition at 3. Rather, it

has long been the case—as reflected in the statute itself—that genuine issues may be raised in the pleadings or otherwise. *See Prof. Ins. Co. of New York v. Barry*, 303 N.Y.S.2d 556, 560 (N.Y. Sup. Ct. 1969) (genuine issues of fact and law raised in answer and third-party complaint), *aff'd*, 302 N.Y.S.2d 722 (N.Y. App. Div. 1st Dept. 1969); *see also Galante v. Queens Borough Pub. Lib.*, No. 15CV6267ARRRLM, 2016 WL 4573978, at *4 (E.D.N.Y. Sept. 1, 2016) (party's denial of counterclaim, along with proffer of "reasoned basis for doing so" in his briefing on the motion to advance fees, sufficed to carry burden of raising genuine issue of fact or law); *Gen. Plumbing Corp. v. Parklot Holding Co.*, 997 N.Y.S.2d 98 (N.Y. Sup. Ct. 2014) (granting advancement of fees based on issues raised in answer, counterclaim and motion to dismiss).

Moreover, *Kaloyeros*—a rare case in which advancement of fees was denied under § 724(c)—presented a unique set of circumstances absent here. The plaintiff in that case, the president and CEO of SUNY Polytechnic Institute, had been indicted in federal and state criminal actions on allegations that he conspired with real estate developers to award them lucrative contracts. The plaintiff brought suit seeking indemnification, under § 724 as well as contract and promissory estoppel theories, for his criminal defense costs and the costs of an affirmative lawsuit he was planning related to his public employment. The court held that indemnification was not available for his affirmative claims, and that the record—which consisted of his complaint, his motion for advancement of fees, and his not

guilty pleas in the criminal cases—failed to raise a genuine issue of fact or law. 49 N.Y.S.3d at 873.

In *Kaloyeros*, there appears to have been no dispute that the underlying criminal charges, if proven, would have constituted bad faith conduct disqualifying the plaintiff from indemnification. Here, in contrast, Defendants have shown through their Motion to Dismiss that there is at a minimum a genuine question, both of law and of fact, as to whether the conduct at issue could properly be characterized as being carried out in bad faith. That is sufficient under § 724(c). To require that each of the fourteen defendants submit an affidavit affirming that they acted in good faith—where, on the face of the Amended Complaint, there is no unambiguous allegation of bad faith—would be an empty exercise, and one not required under New York law.

B. Defendants Do Not Need to Demonstrate Inability to Pay Defense Costs to Warrant Advancement of Fees.

Plaintiff's suggestion that Defendants' Motion fails because they have not established an inability to pay legal fees likewise lacks any foundation in the law. Section 724(c) does not set forth such a requirement—and, indeed, requiring officers and directors to exhaust their own resources before seeking advancement and indemnification would largely defeat the policy goals of providing indemnification (i.e., to encourage service and civic engagement).

Plaintiff again turns to the *Kaloyeros* case for support, but it is unavailing. In *Kayoleros*, the plaintiff did not simply bring a motion pursuant to § 724(c); he moved for a preliminary injunction requiring the defendants to forward his legal

costs, because he had also asserted contract and promissory estoppel claims based on alleged promises by defendants to pay his fees. In the context of evaluating irreparable harm, the court noted that the plaintiff had made no sworn representation that he was unable to fund his legal defense from his own fees. *See Kayoleros*, 49 N.Y.S.3d at 874-75. The issue of his ability to pay was only relevant because he was moving for a preliminary injunction, which Defendants have not done here. Plaintiff cites no other case in which a party's ability to pay had been discussed in considering advancement of fees under § 724(c)—for it is simply not a requirement.

Plaintiff attempts to make an issue out of the fact that AMHA's bylaws require insurance coverage, suggesting that Defendants are "hiding this fact from the Court." Opposition at 5. The inference that Defendants and their counsel have "hidden" a material fact from the Court is both offensive and inappropriate. While not relevant to the § 724(c) analysis, the undersigned can affirm that AMHA does have Directors & Officers insurance coverage; that the claim was promptly tendered to the insurance carrier when the lawsuit was filed; and that the carrier denied coverage due to an exclusion applying to derivative suits brought by a current or former director. To the extent that coverage became available at any point in the future, it would, of course, offset or obviate AMHA's obligation to advance fees for the defense going forward. None of this, however, has any relevance to the showing required under § 724(c), which Defendants have amply satisfied.

Conclusion

For the foregoing reasons and those set forth in Defendants' initial Motion, Defendants respectfully request that the Court issue an order approving the advancement of litigation expenses by AMHA to the Defendants.

DATED at Burlington, Vermont, this 3rd day of January 2020.

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