VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

RICHARD PHAY TU, M.D.,
THAO PHUONG DANG, M.D.,
LAN CHAU TU, M.D.,
NU THI DANG, D.D.S.,
and
TRAM BUI, RPh
Plaintiffs,

v.

Case No. 2009-18307

VIETNAMESE MEDICAL SOCIETY
OF NORTHEAST AMERICA,

VINH DUC NGUYEN, M.D.,
SANG VAN TRAN, M.D.,
LOC BICH NGUYEN, D.D.S.,
ANH HUU PHAM, D.D.S.,
and
TRUONG SON VAN, M.D.,
Defendants.

DEFENDANT'S REPLY BRIEF TO PLAINTIFF'S OPPOSITION TO DEMURRER

COMES NOW the Defendant, Vietnamese Medical Society of Northeast America, by counsel, and for its reply brief to Plaintiff's Opposition to Defendant's Demurrer (the "Opposition"), respectfully states as follows:

1. Plaintiffs' first paragraph of the "Statement of the Case" is wholly unresponsive to the Demurrer therefore no reply is deemed necessary.

2. Plaintiffs' second paragraph of the "Statement of the Case" only paraphrases a number of allegations of the Amended Complaint and therefore no reply is deemed necessary as the Amended Complaint, as filed, speaks for itself.

3. Plaintiffs' third paragraph of the "Statement of the Case" asserts that the Complaint filed on December 23, 2009 was "a derivative shareholder action." Plaintiffs cite Va. Code § 13.1-672.1 to emphasize its basis for this contention.

4. Without more, Plaintiffs proceed to their "Legal Analysis" which Defendant shall address in turn.

5. Plaintiffs' rely upon Va. Code § 17.1-513 as the basis for the Circuit Court's jurisdiction in this matter and concede that the Circuit Courts have jurisdiction to determine "the **validity of** an ordinance or **bylaw of any corporation**." (Compl. at ¶ II, emphasis added)

6. This concession by Plaintiff supports Defendant's contention that while the validity of the bylaws of the Defendant corporation would be appropriate under § 17.1-513 and the Declaratory Judgment Act upon which it has sued, the Plaintiffs have not requested any such relief in its Amended Complaint. (*see* Dem. at pp. 6-8) Instead, Plaintiffs seek adjudication of alleged violation of the bylaws which is not provided for by Plaintiffs' reading of § 17.1-513.

7. Plaintiff cites Va. Code § 13.1-681 and § 13.1-672.2 in support of its position. However, Plaintiff's reliance upon these statutes in the context of this Demurrer is misplaced and of no avail. Specifically, Plaintiff's Amended Complaint relies solely upon the Declaratory Judgment Act and makes mention of only Va. Code §8.01-184 as the statutory basis for the relief requested. No mention whatsoever is made of Va. Code §§ 13.1-681 or 13.1-672.2.

8. Defendant contends that in the context of a Demurrer, the Court accepts "as true all facts properly pleaded in the bill of complaint and all reasonable and fair inferences that may be drawn from those facts." Eagle Harbor v. Isle of Wight County, 271 Va. 603, 611, 628 S.E.2d 298, ___ (2006) *citing* Glazebrook, 266 Va. at 554, 587 S.E.2d at 591.

9. Defendant contends that, while the Court may draw reasonable and fair inferences from facts properly pleaded, the Plaintiffs are attempting to supplement and amend their Amended Complaint with statutory bases for relief that were not properly pleaded and cannot be reasonably and fairly inferred from the facts pleaded.

10. The Plaintiffs' proper recourse is to request leave of court to amend their Complaint a second time should they wish incorporate additional counts based on additional statutes. Plaintiffs have not attempted to avail themselves of such recourse.

11. Defendant further relies upon Eagle Harbor for the proposition that:

> To survive a challenge by demurrer, a pleading must be made with "sufficient definiteness to enable the court to find the existence of a legal basis for its judgment." Eagle Harbor, 271 Va. 603, 611, 628 S.E.2d 298,___(2006) *citing* Moore v. Jefferson Hospital, Inc., 208 Va. 438, 440, 158 S.E.2d 124, 126 (1967).

12. Defendant additionally relies upon Ames v. American Nat. Bank, 163 Va. 1 at 37 (1934) for the proposition that:

> Facts sufficiently alleged must be taken as true (unless they are inherently impossible, or contradicted by other facts pleaded) even though the court may be of opinion that it is improbable that they are true. Id at p. 37.

13. Defendant argues that the references to Va. Code §§ 13.1-681 and 13.1-672.2 in the Amended Complaint are wholly contradicted by the reference to § 8.01-184 upon which it solely and expressly relies.

14. Defendant argues that, to the extent Plaintiffs' seek to rely upon statutes not alleged in their Amended Complaint, this should be taken as a tacit acknowledgement by Plaintiffs that their Amended Complaint does not have sufficient definiteness to survive a challenge by demurrer as required by the holding in Eagle Harbor.

15. Plaintiffs' reliance upon US.F&G. Co v. Parris, 13 Va. Cir. 405 (1963) is misplaced as it appears to be a Circuit Court case from 1963 and has no precedential effect in this matter.

16. Plaintiffs make yet another unresponsive argument and references Andrews to support their contention that "a plaintiff may maintain a declaratory judgment in parallel matters as a matter of the courts'[sic] discretion." (Opp'n at p. 3) Defendant argues that the procedural posture of the instant case is entirely different to that in Andrews and there is no "parallel" matter (defined in Andrews as a "pending action or proceeding") to this case pending in this Court or any other court.

> The authorities are in conflict as to whether a court should refuse to entertain an action for a declaratory judgment as to questions which are determinable in a pending action or proceeding. Andrews v. Univ. Moulded Prod. Corp., 189 Va. 527, 529, 53 S.E.2d 837, ___ (1949)

Therefore, the holding of Andrews does not apply and Plaintiffs' reliance thereupon is misplaced. In fact, a close reading of Andrews seems to support the Defendant's argument rather than undermine it.

17. Plaintiffs rely on a quote from a case they refer to as Goth v. Goth. Defendant presumes that they are referring to Gloth v. Gloth, 154 Va. 511, 153 S.E. 879 (1930). Plaintiffs reliance upon the one single quote is misplaced as it is found nowhere in the text of the court's written opinion. In fact, the quote is taken from headnote #25 of the published opinion and is a summary created by an unnamed person of unknown affiliation and surely is of no precedential or persuasive effect before this Court.

18. To further illustrate Plaintiffs' misapplication of Gloth, the Court's opinion text (in reference to a predecessor statute to § 8.01-189) states:

> section 6140f, Code of Virginia 1924, Annotated, which provides: "The **mere** pendency of any action or **suit brought merely to obtain a declaration of rights** or a determination of a question of construction

shall not be sufficient grounds for the granting of any injunction." Id at 531. (emphasis added)

19. The actual opinion text differs substantially from the headnote due to the presence of the words "mere" and "merely" in the opinion text.

20. A careful reading of Gloth reveals that the plaintiff in that case did not bring suit "merely to obtain a declaration of rights". Rather, the court stated:

> ...the allegations of the bill summarized as briefly as is practical, are as follows:
>
> (1) The execution and delivery of said deed and deed of trust...were procured by coercion, fraud, and duress...
> (2) The consideration for the execution of said deed and deed of trust...have wholly failed.
> (3) Marjorie Gloth, his divorced wife, has repeatedly, since February 1, 1928, been guilty of adultery with one James Jarrett...
> (4) When he (William C. Gloth), after having been advised of her adultery, went to her residence on May 7, 1928...she maliciously and wantonly shot him through the chest with a pistol...
> (5) None of the funds and property received under the said agreement... his capacity to earn a proper support has been impaired...
> (6) ...seeking to annul the marital rights of the complainant and his wife ...are null and void...
> (7) By reason of said misconduct of his wife...has not since...made any payments of...alimony...
> (8) There is, by reason of said things, a *bona fide* dispute...with reference to their respective rights under said contract and deed of trust, and said decree, and that he is, therefore, entitled... to have the court...and declare the respective rights...
> (9) The Citizens National Bank of Alexandria has notified William C. Gloth that it intends to proceed to make sale of the stocks and bonds... which if it is permitted to do will do him irreparable damage and injury.
>
> The specific prayers for relief contained in the bill, arranged in somewhat different order than in the bill set forth, are as follows:
>
> (1) "That the complainant be granted a divorce *a vinculo*...
> (2) "That the decree...be annulled...
> (3) "That the court adjudge...custody of their son...

(4) "That the rights of this complaint under the said contract and deed...be ascertained and declared by order of this court...

(5) "That the trusts...deed...be declared terminated...

(6) "That the said Marjorie Gloth be required to account for all property...

(7) "That pending the determination of this suit, the Citizens National Bank of Alexandria...be enjoined and restrained from disposing of any of the property held by said bank under said deed of trust."

Gloth v. Gloth, 154 Va. 511, 525-529, 153 S.E. 879, ___ (1930)

21. Clearly, Gloth was not a suit brought "merely" to obtain a declaration of rights and as such, its holding does not apply to the instant case which is, by all indications, brought merely to obtain a declaratory judgment.

22. Further, the injunctions requested by the plaintiff in Gloth pertain to disposal of disputed property being held in trust to which he claimed an ownership interest, the disposal of which would "do him irreparable damage and injury" of a financial nature. The Plaintiffs in the instant case have pleaded nothing approaching that which was pleaded by the plaintiff in Gloth and their reliance upon that case is misplaced.

23. Plaintiffs then reiterate their newly found reliance upon Va. Code § 13.1-681 to establish this Court's jurisdiction for granting injunctions. Unfortunately for Plaintiffs, Va. Code § 13.1-681 has been repealed so their reliance upon that statute must fail.

24. Plaintiffs reiterate their reliance upon Va. Code § 13.1-672.1 and make the misleading argument that it has filed a derivative action. Plaintiffs have done nothing remotely resembling a derivative action and even if they had properly situated themselves procedurally, they failed to satisfy the requirements of the statute they cite. Va. Code § 13.1-672.1(B)(1) states in pertinent part:

B. No shareholder may commence a derivative proceeding until:

1. A written demand has been made on the corporation to take suitable action...

Plaintiffs mention only a "formal complaint made to the corporation" (Opp'n at p. 4) but fail to allege that any "written demand has been made on the corporation to take suitable action." Further, the Amended Complaint states that Plaintiff Thao P. Dang simply "*voiced* concerns regarding voting irregularities" which supports the notion that no written demand was made. (Compl. at ¶ 11, emphasis added) Therefore, Plaintiffs lack standing even if the Court were to accept that what it has filed is a derivative action, which Defendant contends it clearly is not.

25. Plaintiffs counter the Demurrer as to attorney's fees simply by reference to Va. Code § 13.1-672.5. For the above-state reasons, Plaintiffs have not pleaded a derivative action and if somehow the Court determines that they have, they lack standing to bring such action. Defendant maintains its reliance upon Russell County Dept. v. O'Quinn, 523 S.E.2d 492,493,259 Va. 139 (2000) that bars an award of attorneys' fees in actions under the Declaratory Judgment Act unless otherwise permitted by contract between the parties. No such contract for attorneys' fees exists or has been pleaded by Plaintiffs.

26. Defendant contends that based on the facts conceded by Plaintiffs in their Opposition, juxtaposed against the facts and conclusions of law alleged in their Amended Complaint before this Court, there is no basis for this Court to grant Plaintiffs leave to amend their Complaint a second time.

27. Instead of filing a derivative action that is properly brought by a shareholder in the name of or on behalf of the corporation, the Plaintiffs have inexplicably sued the Defendant corporation itself.

28. Plaintiffs have clearly stated the intention that this case be in the nature of a derivative action. To amend the current pleadings to reflect a derivative action would require the Defendant corporation to become the plaintiff despite having been served and sued in an

adversarial manner for nearly nine (9) months and at considerable expense to the Defendant corporation. What Plaintiffs seek to do is a procedural impossibility, especially since Plaintiffs have acknowledged their lack of standing due to the lack of written notice to the corporation and the lack of expiration of the requisite time period prior to filing a derivative action. (*see* Va. Code § 13.1-671.2)

29. Defendant contends that in the event the Court sustains its Demurrer, the proper relief would be to dismiss the Amended Complaint with prejudice as there is no practical way Plaintiffs can amend their Amended Complaint to a derivative action. More importantly, Va. Code § 13.1-681 upon which the Plaintiffs intend to seek relief has been repealed.

WHEREFORE, the Defendant, Vietnamese Medical Society of Northeast America, by counsel, having fully replied to Plaintiff's Opposition to Demurrer, requests that this Court enter an order dismissing Plaintiffs' Amended Complaint with prejudice and without leave to amend.

Respectfully submitted,
VIETNAMESE MEDICAL SOCIETY OF NORTHEAST AMERICA
By Counsel

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CERTIFICATE OF SERVICE

I HEREBY certify that on this the 8th day of September, 2010, a true and accurate copy of the foregoing Defendant's Reply Brief to Plaintiff's Opposition to Defendant's Demurrer was sent via facsimile to:

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