

**VIRGINIA: IN THE CIRCUIT COURT OF ALBEMARLE COUNTY**

**JOHN H. BIRDSALL et al.,  
Plaintiffs,**

**v.**

**Case No. CL17000001-00**

**FOXFIELD RACING ASSOCIATION, INC., et al.,  
Defendants.**

**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO  
SUSPEND DISCOVERY**

Defendants, by counsel, submit this Memorandum in Support of Defendants' Motion To Suspend Discovery Pending Rulings On Defendants Motions To Dismiss and Demurrer.

**INTRODUCTION**

The defendants Foxfield Racing Association and Thomas J. Dick became aware, on January 9, 2017 that this complaint had been filed and on January 19, 2017 prior to being served with the complaint they filed an "Affidavit" pursuant to Section 8.01-628 Code of Virginia of 1950. Because the complaint asked for the issuance of a temporary injunction, the defendants were concerned that the plaintiffs would move for the Court to issue a temporary injunction with little or no notice and they decided that the because of that possibility they should file an affidavit. It was right and proper for the defendants, in anticipation of that possibility to file an affidavit which recited facts to support their position that a temporary injunction should not be issued and they did exactly that as quickly as possible.

“When any court authorized to award injunctions shall grant a temporary injunction, either with or without notice to the adverse party...” Code of Virginia 1950 Section 8.01-624

The Affidavit, which addressed the factual issues which this court might and should consider when and if it decided to consider whether to issue a temporary injunction is specifically authorized by statute. Code of Virginia Section 8.01-628 both authorizes and suggests the use of affidavits in opposition to an application for a temporary injunction.

“No temporary injunction shall be awarded unless the court shall be satisfied of the plaintiff’s equity. An application for a temporary injunction may be supported **or opposed by an affidavit** or verified pleading. (Emphasis supplied)

The Affidavit was filed because the defendants wanted to immediately defend against the possibility that this Court could, if it felt the circumstances presented solely by plaintiffs required it, issue a temporary injunction upon very short or no notice to the defendants.

While preparing their Affidavit the defendants realized that the plaintiffs’ pleadings with respect to the application for a temporary injunction were defective and they filed a Demurrer contesting whether the pleadings, as submitted by the plaintiffs, were adequate to support their claim that a temporary injunction should be issued. The Demurrer attacked the viability of the pleadings, arguing that the pleadings were inadequate to justify moving forward with a factual inquiry. The Affidavit was intended to provide the Court with facts to support the defendants’ position that a temporary injunction should not issue if the Court did move forward to address that issue. Although both the Affidavit and the Demurrer focus upon the plaintiffs’ application for a temporary injunction, they are unrelated.

Subsequently, on February 8, 2017 the defendants filed two Motions To Dismiss arguing that the Virginia Supreme Court decisions in *Dodge v. Trustees Of Randolph-Macon Woman's College*, 276 Va. 10, 661 S.E. 2d 805 (2008) and *Commonwealth of Virginia v. The JOCO Foundation, et al.* 263 Va. 151, 558 S.E. 2d 280 (2002), which involved analogous fact patterns, required the dismissal of the plaintiffs' complaint. Despite the defendants' aggressive attempt to bring the Demurrer and Motions To Dismiss before the Court for a quick hearing and because of the plaintiffs' resistance to those efforts (see Defendants Motion To Suspend Discovery Pending Rulings On Defendants motions To Dismiss And Demurrer), the defendants were unable to schedule a hearing on its several motions before the plaintiffs filed their First Interrogatories and First Requests For Production Of Documents. On April 25, 2017 defendants filed their Motion To Suspend Discovery, which is the subject of the hearing scheduled for June 2, 2017.

## ARGUMENT

**I. This Court has the authority to suspend discovery under the circumstances of this case.**

Rule 4:1(d)(2) anticipates the suspension of discovery, in the court's discretion, and specifically authorizes suspension on some or all issues in an action. Absent an abuse of discretion the trial court's decision concerning the suspension of discovery will be upheld by the appellate courts.

**II. The Affidavit filed by the Defendants Is not Part of The Demurrer and Discovery based upon the allegations in the Affidavit is unnecessary and**

**irrelevant to a decision about the defendants' Demurrer and should be suspended at this time.**

Plaintiffs Interrogatories and Requests For Production of Documents have focused on the issues set out in the Affidavit filed by the defendants pursuant to Code of Virginia Section 8.01-628. The only purpose of the defendants' affidavit was to provide the Court with affidavit styled evidence to consider in the event that the Court proceeded with a hearing at the urging of the plaintiffs upon their application for a temporary injunction. The plaintiffs' application has not been acted upon or addressed by the plaintiffs in any way for five (5) months. The allegations in the defendants' Affidavit address issues which are relevant only to the plaintiffs' application for a temporary injunction and that action has not been pursued. There is no need to proceed with discovery about statements in an Affidavit whose only purpose is to defeat an action which is not being actively prosecuted by the plaintiffs. Absent an actual hearing on the temporary injunction the Affidavit filed by the defendants is not under consideration and is irrelevant to the issues raised by defendants' Demurrer and Motions To Dismiss.

The extraordinary breadth and scope of the plaintiffs' discovery requests will lead to the needless expenditure of time and money on issues that are not even before the Court at this time. It is apparent, from the Memorandum filed by the plaintiffs, that the plaintiffs see in the defendants Affidavit not what is there but what they want to see. Incredibly, at page four (4) of their memorandum the plaintiffs even rename the Affidavit which was filed by the defendants in opposition to the application for a temporary injunction "*Affidavit of Thomas J. Dick in Support of Demurrer*". In actuality the Affidavit filed by the defendants for the purpose of opposing a possible temporary

injunction is styled AFFIDAVIT and the Certificate at the end certifying that it was sent to counsel of record refers to it as an Affidavit. It has nothing to do with the demurrer. The renaming of the Affidavit, by opposing counsel, replete with capital letters, as though that was the style of the document as drafted by the defendants and submitted to the Court, is a testament to a desperation to engraft that document, which is unrelated to the defendants' demurrer, onto the demurrer so that counsel can make the argument that it is a "speaking demurrer".

The cornerstone of the plaintiffs' arguments in their Memorandum In Opposition To Defendants' Motion To Stay Discovery is that the Affidavit is part and parcel of the defendants' Demurrer and that those pleadings are therefore defective. In fact, the Affidavit is not a part of those pleadings and the entirety of the Demurrer rests upon an analysis of the facts or lack thereof as pled by the plaintiffs within the four corners of the complaint. With the removal of that purported cornerstone the plaintiffs' argument falls like a house of cards.

In fact, the defendants' demurrer is well pleaded, it restricts itself to the four corners of the plaintiffs' complaint, and it does not allege any new facts which are outside of the complaint, and most importantly it clearly reveals the defect in the plaintiffs pleadings which simply recite the conclusions of law which the court must arrive at in order to issue a temporary injunction, rather than pleading facts from which the Court could reach those conclusions.

An inquiry into whether the defendants' Demurrer should be granted does not require a contest over the facts and in fact the Court must assume that the facts, as pled,

are all correct. The problem with the plaintiffs' pleadings as currently crafted is that they contain no facts on any of the salient issues which a court needs to consider in deciding whether a temporary injunction should be issued. The defendants' demurrer, which points this out and asks for relief does not incorporate the Affidavit which was filed, or reference a single sentence or phrase in the defendants' 'multiple paragraph Affidavit because the Affidavit was **not** filed to support the demurrer but instead to defeat the plaintiffs' application for a temporary injunction when and if the plaintiffs ever moved forward with that issue and this Court decided to consider their application.

Defendants' demurrer argues that, with the current state of the plaintiffs' pleadings, the Court should not consider any facts because they have failed to state an actionable case for the issuance of a temporary injunction. Plaintiffs have submitted pleadings which only state conclusions of law regarding the issuance of a temporary injunction unsupported by any factual allegations and consequently that part of their complaint should not be considered. If their pleadings are not artfully drafted no amount of pretrial discovery is going to improve their position or correct their ineffectively drafted pleadings. Based upon the pleadings filed they ought to be denied access to the court on the temporary injunction issue and discovery will not add one jot to the efficacy of those pleadings.

"In order to survive demurrer, we have held that a complaint must allege sufficient facts to constitute a foundation in law for judgment sought, and not merely conclusions of law. 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."

*Dunn, McCormack & MacPherson v. Gerald Connoly*, 281 Va. 553, 558, 708 S.E. 2d 867 (2011)

**III. The Defendants' Motions To Dismiss do not require discovery because the arguments made therein do not depend upon facts outside of the complaint and are not defective.**

Because the plaintiffs have not sought to move forward with their application for a temporary injunction, the true crux of substantive issues before the Court are those presented by the Defendants' Motions to dismiss, which are based on the Virginia Supreme Court's decision in *Dodge v, Trustees of Randolph-Macon Woman's College*, where the Court affirmed the trial court's dismissal of the plaintiffs' claim on demurrer, where the plaintiffs, represented by the same counsel as plaintiffs in this case, raised the same argument they seek to raise again in this case.

The arguments set out by the defendants in these two Motions To Dismiss do not reference or incorporate a single line of information from the defendants' "Affidavit". The motions focus on the application of the Virginia statutory and case law to the facts outlined in the complaint. While there is a narrative in the Introduction and Relevant Facts section of the Motions To Dismiss Count I which provides background information, a review of the actual arguments set forth in the Motions To Dismiss reveals that are no new facts introduced and there is no reference to the facts contained in the Introduction and Relevant Facts section except perhaps tangentially the statement "*She had soured on the trust as an appropriate vehicle for accomplishing her purpose because of the poor treatment she had received by the trustees of the California trust.*", which statement is found in the motion To Dismiss Count I. The arguments put forward by the defendants in both the Motion To Dismiss Count I and Motion To Dismiss Count II involve the discussion of and the interpretation of the Will, the applicable Virginia

statutes, the corporate charter of Foxfield Racing Association, and relevant case law. The arguments focus on exhibits attached to the plaintiffs' complaint, statutes which apply to non-stock Virginia corporations and decisions of the Virginia Supreme Court. The above quoted statement does not add or contribute to the arguments made in the Motions To Dismiss and it does not render the pleading invalid or require the court to deny the Motion.

Plaintiffs assertion at page 10 of their Memorandum In Opposition To Defendants' Motion To Stay Discovery that "Defendants misread *Dodge v. Trustees of Randolph-Macon Woman's College*, which they claim stands for the proposition that a corporation cannot be a trustee" is incorrect. This appears to be yet another example of plaintiffs' counsel seeing not what is there but what they want to see. Plaintiffs' seek to attribute to the defendants a mistake made by the defendants and the trial judge in an unreported decision styled *Commonwealth ex rel. Bowyer v. Sweet Briar Inst.* Presumably this was done so that plaintiffs could argue that the defendants misunderstand the law. A reading of page six (6) of the Defendants' Motion To Dismiss Count I, however, confirms that the statement "a corporation cannot be a trustee" was never made. This is a similarity between this new assertion and the previous assertion that the AFFIDAVIT filed by the defendants was the "*Affidavit of Thomas J. Dick in Support of Demurrer*" ,when it clearly was not, so that the argument that the Demurrer was defective could be made.

**IV. Statements made by Thomas J. Dick in his AFFIDAVIT filed with the Court are not misleading.**



Except for the erroneous spelling of the last word in numbered paragraph three (3) of the AFFIDAVIT which resulted in the word eminent being used instead of the word imminent thereby inadvertently changing the meaning of Mr. Dick's statement from likely to happen without delay, which he intended to use, to standing high by comparison to others, the statements in his AFFIDAVIT are not misleading.

### CONCLUSION

Suspension of discovery on issues set out in the defendants' Affidavit which was not incorporated into either the Demurrer or the Motions To Dismiss will allow the parties to concentrate on the dispositive motions filed by the defendants which do not require a consideration of factual matters outside of the plaintiffs' complaint and would prevent the unnecessary expenditure of the parties resources and this Court's time. Once those motions have been decided discovery could proceed normally.

FOXFIELD RACING ASSOCIATION INC. et al.

By: 

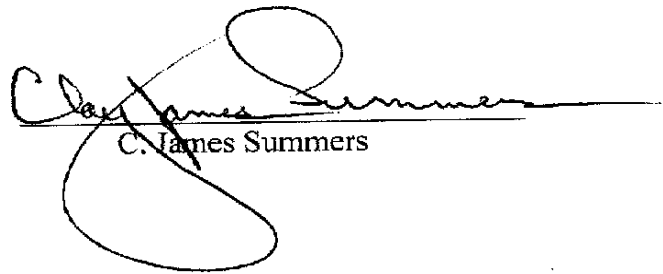
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**CERTIFICATE**

I hereby certify that I sent by first class mail postage prepaid a true copy of the foregoing Memorandum In Support of Defendants Motion To Suspend Discovery this 30<sup>th</sup> day of May, 2017 to:

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