

**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.****DEFENDANTS MOTION TO SUSPEND DISCOVERY PENDING RULINGS ON  
DEFENDANTS MOTIONS TO DISMISS AND DEMURRER**

COMES NOW the Defendants Foxfield Racing Association and Thomas J. Dick pursuant to Rules Of Supreme Court Of Virginia 4:1(d)(2) and move this court to suspend discovery pending this Court's rulings on the two Motions To Dismiss and the Demurrer filed by the Defendants herein and in support of this motion represent that :

1. Plaintiffs filed their Complaint in this Court on December 30, 2016 and thereafter on January 17, 2017 Plaintiffs Motion For Leave To File Amended Complaint was filed and this Court's Order dated January 19, 2017 allowing the amendment was entered and the Amended Complaint was then filed on January 19, 2017.

2. Although the Complaint had not been served upon the Defendants, they filed a Demurrer on January 19, 2017 contesting the sufficiency of the Plaintiffs

pleadings to support a temporary injunction which Demurrer has not yet been heard by this Court.

3. On February 8, 2017 the Defendants also filed two separate Motions To Dismiss seeking to dismiss the Plaintiffs requests for relief under Counts 1 and 2 of the Complaint. These Motions To Dismiss have also not been heard by this Court and the Defendants have aggressively asserted that this complaint should be disallowed because of the controlling case law in Virginia prohibiting the imposition of the Virginia Uniform Trust Code and its standards onto a Virginia nonstock corporation Dodge, et al. v. Trustees of Randolph- Macon Woman's College, 661 S. E. 2d 805, 276 Va. 10 (2008) and because of the lack of subject matter jurisdiction. Commonwealth of Virginia v. The JOCO Foundation, et al. 558 S.E. 2d 280, 263 Va. 151 (2002)

4. On March 23, 2017 Defendants through counsel filed a Praecipe and sent facsimile transmissions of that Praecipe to counsel for the Plaintiffs attempting to schedule a hearing on the Motions To Dismiss and the Demurrer at the first available docket call. See Defendants Exhibit #4 attached.

5. Plaintiffs, through their counsel, declined to agree to the scheduling of this matter at the calling of the docket on March 30, 2017. See Defendants Exhibit #5 attached.

6. Defendants, through counsel, then promptly filed a second Praecipe on March 31, 2017 scheduling the matter of setting the Motions and Demurrer for a hearing at the calling of the Docket on April 27, 2017 the next available Docket on this Court's calendar.

7. Defendants have sought a quick resolution to this litigation by promptly filing dispositive motions which, if granted, would terminate this litigation and obviate the need for the extensive discovery sought by the plaintiffs in their First Interrogatories and First Requests For Production Of Documents.

8. The issues brought before the Court by the Plaintiffs complaint are addressed in the Defendants dispositive Motions To Dismiss and Defendants Demurrer.

9. If this Court decides that the Defendants Motions To Dismiss should be granted this matter would be ended and there will be no need for discovery.

10. If this Court grants Defendants Demurrer the request for a temporary injunction will not be allowed to proceed as it is currently drafted.

11. Subsequent to the Defendants scheduling these matters for the calling of this Court's docket on April 27, 2017, in an effort to have the Defendant's dispositive Motions heard promptly, the Plaintiffs served its First Interrogatories and First Request For Production Of Documents on the Defendants counsel on April 11, 2017.

12. Defendants have not filed their answers to the Plaintiffs Complaint at this point in this litigation and are not required to until the pending motions and Demurrer are decided.

13. The efficient use of the Court's time would require that the dispositive motions being urged upon the Court by the Defendants be decided before full discovery is allowed.

14. This Court has the power to suspend discovery in its discretion pursuant to Supreme Court Rules 4:1 (d) (2).

15. Some of the Interrogatories will needlessly increase the cost of this litigation even if it goes forward and result in effective harassment of the Defendants. Interrogatory #3, for example, asks for 34 years of information on social networking sights.

16. Many of the Requests For Production Of Documents call for documentation from the inception of the nonstock corporation to the present which is a forty (40) year period from 1977 to the present. The effect of this length of time and the amount of documentation called for is an effective harassment of the Defendants.

17. Suspending discovery pending resolution of Defendants Motions To Dismiss is particularly appropriate because a basis of the Motions is that this Court lacks subject matter jurisdiction .

18. Allowing this case to proceed through the pretrial process with an invalid claim will increase the cost of the case and wastes the resources of the litigants .

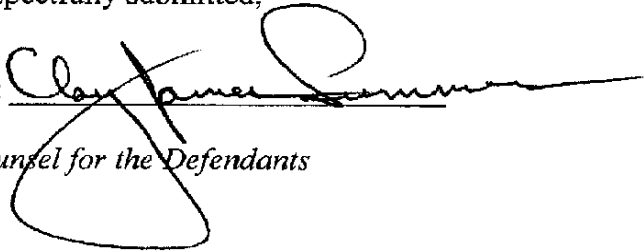
19. Pursuant to Supreme Court Rules 4:1 (b) (8) the movant has in good faith conferred or attempted to confer with counsel for the Plaintiffs in an effort to resolve the dispute without court action. Defendants exhibits #6 and #7 attached.

20. Defendants and Plaintiffs are unable to agree on whether discovery should be suspended as anticipated in Supreme Court Rule 4:1 (d)(2).

WHEREFORE the Defendants, by counsel, move this Court to enter an Order suspending discovery pending a decision on the Defendants Demurrer and Motions To Dismiss.

Respectfully submitted,

By:

  
*Counsel for the Defendants*

C. James Summers (VSB#16338)  
415 Park Street  
Charlottesville, VA 22902  
Telephone: (434) 295-7709  
Facsimile: (434) 295-3151  
sumlaw01@comcast.net

**CERTIFICATE**

I hereby certify that I sent by first class mail postage prepaid a true copy of the foregoing Answer and Affirmative Defenses this 25th day of April 2017 to:

William H. Hurd (VSB#16967)  
Ashley L. Taylor (VSB#36521)  
Stephen C. Piepgrass (VSB#71361)  
TROUTMAN SANDERS LLP  
P.O. Box 1122  
Richmond, Virginia 23218-1122

  
C. James Summers

**DEFENDANTS EXHIBIT # 4**

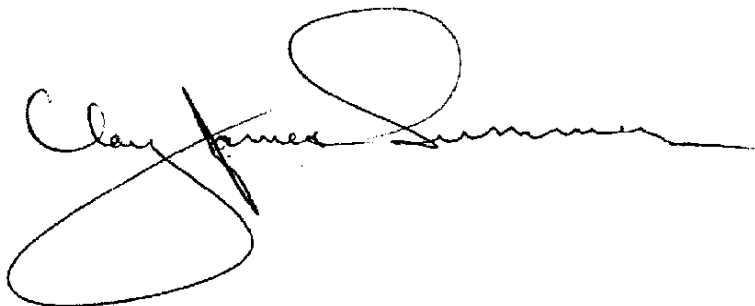
**C. JAMES SUMMERS**  
Attorney at Law  
415 Park Street  
Charlottesville, VA 22902-4737

Tel: (434) 295-7709  
Fax: (434) 295-3151

# ***Fax***

To:	Stephen Piepgrass, Esq.	From:	Clay James Summers
Fax:	(804) 697-5159	Fax:	434-295-3151
Phone:	(804) 697-1320	Phone:	434-295-7709
<hr/>			
Date:	3/23/2017		
Subject:	John H. Birdsall, et al. v. Foxfield Racing Association, Inc.		

Comments: Stephen, attached is the praecipe I have filed asking for this matter to be called at the Tuesday March 30, 2017 Docket Call in Albemarle County for the purpose of scheduling a hearing on my Demurrer and Motions To Dismiss. I have suggested a two hour hearing and I am requesting that you agree to the calling of this matter because yesterday was the time for filing without agreement of counsel.



If you have any problems or questions concerning this fax please call 434-295-7709.  
The above fax is confidential. It is intended only for use by the individual or entity named above. If you are not the intended recipient (or acting on behalf of the intended recipient in your authorized capacity), you may not disseminate, distribute, or copy the message above. If the cover sheet and the above listed documents have been received in error, you are asked to notify our office immediately by telephone and to return the material received to us by U.S. Mail at the address listed above. You will be reimbursed for postage.

**DEFENDANTS EXHIBIT # 5**



Mar-23-17 03:24pm From:TROUTMAN SANDERS LLP

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T-292 P. 01/01 F-632

STEPHEN C. PIEPGRASS  
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# TROUTMAN SANDERS

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March 23, 2017

**BY FACSIMILE (434-295-3151)**

C. James Summers, Esquire  
Attorney at Law  
415 Park Street  
Charlottesville, Virginia 22902-4737

Re: ***John H. Birdsall, et al. v. Foxfield Racing Association, Inc., et al.***  
Case No. CL17000001-00

Dear James:

I received your faxed letter and voicemail this afternoon. Unfortunately, due to the press of other matters, we are not able to accommodate your request for next Thursday's docket call.

We can, however, make someone from our Firm available at the April 27 docket call. Alternatively, we would be glad to work with you to identify a mutually agreeable date for motions to be heard, as permitted under Rule 1:20(a).

Please let us know how you would like to proceed.

Sincerely,

  
Stephen C. Piepgrass

cc: Ashley L. Taylor, Jr., Esq.  
William H. Hurd, Esq.

**DEFENDANTS EXHIBIT # 6**

**C. JAMES SUMMERS**  
Attorney at Law  
415 Park Street  
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April 21, 2017

Stephen C. Piepgrass, Esq.  
Troutman Sanders LLP  
P.O. box 1122  
Richmond, Virginia 23218

RE: Birdsall et al. v. Foxfield Racing Association, Inc. et al.

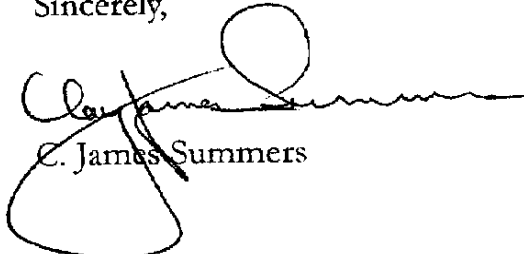
Dear Stephen:

I am following up my telephone message this morning in which I suggested that we agree to suspend the discovery which you have filed pending a decision on the dispositive motions which I have filed. As you know the Defendants have not even filed an answer in this matter and we are really not at issue yet. It seems to me that a more efficient use of the court's and the litigants time would be to resolve the Motions To Dismiss and Demurrer before proceeding with the extensive discovery which you anticipate.

Also some of the interrogatories and document requests cover extensive periods of time. Social networking sights for the last 34 years and documents on all vendors for the last 40 years. There may be independent objections to those requests but it seems like a general suspension of discovery until we are certain this matter will proceed is desirable at this point. Please let me know your position.

-2-

Sincerely,



C. James Summers

cc: Thomas Dick

**DEFENDANTS EXHIBIT # 7**

Apr-23-17 02:51pm From-TROUTMAN SANDERS LLP

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STEPHEN C PIEPGRASS  
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# TROUTMAN SANDERS

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April 21, 2017

**VIA FACSIMILE (434-295-3151)**

C. James Summers, Esquire  
Attorney at Law  
415 Park Street  
Charlottesville, Virginia 22902-4737

**RE: *John H. Birdsall, et al. v. Foxfield Racing Association, Inc., et al.*  
Case No. CL17000001-00**

Dear Jim:

I received your voicemail and letter earlier today requesting that my clients agree to suspend discovery in the above-captioned case pending resolution of your outstanding demurrer and motion to dismiss.

You will recall that when we filed the Complaint and *lis pendens*, we did not serve the Complaint on your client, hoping instead that there would still be an opportunity to discuss a mutually satisfactory resolution before turning to active litigation. It was your client who chose to actively litigate the matter. It was also your client who chose to go outside the four corners of the Complaint by alleging numerous facts in a supporting affidavit and in the body of the pleadings you filed. Your assertion of these facts makes discovery critical.

In addition, as you know, Va. S. Ct. R. 4:1(c)(2) provides that "[d]iscovery shall continue after a demurrer, plea or dispositive motion addressing one or more claims . . . has been filed and while such motion is pending decision," unless the court enters an order suspending discovery. Thus, the default rule in Virginia is that discovery is to take place regardless whether a demurrer or other dispositive motion is pending.

That said, in an effort to accommodate your concerns, we are willing to suspend the due date for any documents created or received before January 1, 2011, until after we have had the opportunity to review your initial production of documents and give you written notice of a new deadline.

We also are willing to suspend the due date for responses to interrogatories to the extent those interrogatories seek information regarding events occurring before January 1, 2011.

Apr-21-17 02:52pm From=TROUTMAN SANDERS LLP

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**TROUTMAN  
SANDERS**

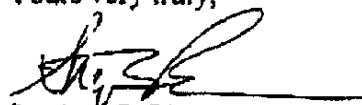
April 21, 2017

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Again, we will provide you written notice of a new deadline after we have reviewed your initial responses to those interrogatories.

Please confirm that you will be responding to our discovery requests within the twenty-one days provided in the Rules. We are not asking you to waive, at this point, any specific objections that you may have to any individual discovery items, however, we are asking that you not use the pendency of your demurrer and motion to dismiss as a blanket excuse not to provide the information and documents that our discovery seeks.

Yours very truly,



Stephen C. Piegrass

cc: Ashley L. Taylor, Jr., Esq.  
William H. Hurd, Esq.