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September 27, 2017

BY HAND

Hon. Jon R. Zug, Clerk
Albemarle Circuit Court
Court Square
501 E. Jefferson Street
Charlottesville, VA 22902

Re: John H. Birdsall et al. v. Foxfield Racing Association, Inc. et al.
Case No. CL17-01

Dear Mr. Zug:

Enclosed for filing are the following:

(1) Plaintiffs' Motion for Leave to File Surreply in Opposition to Defendants' Motions to Dismiss and Demurrer; and

(2) Plaintiffs' Surreply in Opposition to Defendants' Motions to Dismiss and Demurrer.

Thank you for your assistance in this matter.

Sincerely,

Stephen C. Piepgrass

Enclosures

cc: William H. Hurd, Esq.
C. James Summers, Esq. (w/encs.)
F. Douglas Ross, Esq. (w/encs.)
Richard E. Carter, Esq. (w/encs.)
Ashleigh M. Pivonka, Esq. (w/encs.)

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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.

MOTION FOR LEAVE TO FILE SURREPLY IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS AND DEMURRER

Plaintiffs, by counsel, respectfully move that the Court allow them to file the accompanying Surreply in Opposition to the Motions to Dismiss and Demurrer filed by the Defendants, Foxfield Racing Association, Inc. and Thomas J. Dick. The grounds for this Motion are as follows:

1. Plaintiffs seek leave to file this Surreply because Defendants have raised a number of arguments in their Reply Memorandum that were not raised in their Motions to Dismiss and Demurrer. These arguments include:

(a) that the Court should not treat as fatal their assertion of new facts in Defendants Motions to Dismiss and/or Demurrer, but should simply disregard those allegations and focus on arguments not raised in those pleadings;

(b) that because the will (the "Will") of Marianne S. de Tejeda ("Mrs. Tejeda") stated that certain property was being devised to Foxfield Racing Association, Inc. in "fee simple," no trust could have been created; and

(c) that the provision in Mrs. Tejeda's Will that Plaintiffs allege created the trust constituted "precatory words" and "wishful language" that could not have created a trust.

2. While these arguments should be disregarded because they were not raised in the Motions to Dismiss and Demurrer filed with the Court, to the extent that the Court considers them, Plaintiffs should be given an opportunity to address them.

WHEREFORE, Plaintiffs respectfully request that the Court grant their Motion for Leave to File a Surreply in Opposition to the Motions to Dismiss and Demurrer.

JOHN H. BIRDSALL, et al.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of September, 2017 a true copy of the foregoing was sent by FedEx and email to the following:

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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.

SURREPLY IN OPPOSITION TO
DEFENDANTS' MOTIONS TO DISMISS AND DEMURRER

Plaintiffs, by counsel, submit this Surreply in Opposition to the Motions to Dismiss and Demurrer filed by the Defendants, Foxfield Racing Association, Inc. (the "Foxfield Racing" or the "Association") and Thomas J. Dick ("Tom Dick") (collectively, "Defendants").

INTRODUCTION

Plaintiffs file this Surreply because Defendants have raised a number of arguments in their Reply Memorandum that were not raised in their Motions to Dismiss and Demurrer. These arguments include: (i) that the Court should not treat as fatal their assertion of new facts in Defendants Motions to Dismiss and/or Demurrer, but should simply disregard those allegations and focus on arguments not raised in those pleadings; (ii) that because the will (the "Will") of Marianne S. de Tejeda ("Mrs. Tejeda") stated that certain property was being devised to Foxfield Racing in "fee simple," no trust could have been created; and (iii) that the provision in Mrs. Tejeda's Will that Plaintiffs allege created the trust constituted "precatory words" and "wishful language" that could not have created a trust. While these arguments should be disregarded because they were not raised in the Motions to Dismiss and Demurrer filed with the Court, to the

extent that the Court considers them, as Plaintiffs will explain, Defendants are wrong on each of these points.

ARGUMENT

I. Defendants Concede that References to Facts Outside the Complaint Are Improper; the Demurrers Therefore Should Be Overruled.

Defendants concede that their references to matters outside the four corners of the Amended Complaint and exhibits thereto are improper and should not be considered by the Court. Reply Br. at 2. They contend, however, that the Court can ignore the fact that they have submitted an improper "speaking demurrer," and proceed to consider the other arguments in their pleadings. Defendants are wrong on this point. *See, e.g.*, *Patel v. Anjali*, 81 Va. Cir. 264, 265 (Chesapeake City 2010) ("'[A] demurrer which alleges new facts is a 'speaking demurrer' and will be stricken from the record.'") (quoting W. Hamilton Bryson, 1-6 *Bryson on Virginia Civil Procedure* ("*Bryson*") § 6.03(5)(a) (4th ed. 2005); *Landes v. Erie Ins. Exch.*, 48 Va. Cir. 298, 298 (Chesterfield Co. 1999)).

Defendants rely primarily on *Kuley v. Fayez*, 89 Va. Cir. 238, 245 (Fairfax Co. 2014), to make this argument.[1] *Kuley* involved a defamation complaint, to which the defendant demurred, claiming that certain statements were not actionable. *Kuley* is distinguishable from this case for two reasons.

First, in *Kuley* the extrinsic evidence was a very minor part of a much larger demurrer. The defendant's demurrer addressed *nineteen* allegedly defamatory statements and relied on extrinsic evidence to address only *one* of those statements. The court overruled the demurrer

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[1] Defendants also discuss *Commonwealth v. Jackson*, 4 Va. 501 (1826). Defendants are correct that the statement quoted earlier by Plaintiffs, including the term "speaking demurrer," does not appear in the body of the opinion; it appears instead in a case note appended to the text of the opinion. Numerous other cases in Virginia, however, have discussed the rule prohibiting "speaking demurrers." *See, e.g.*, cases cited in this section.

with respect to that statement, and proceeded to consider the grounds for demurrer to the other eighteen statements. Here, in contrast to *Kuley*, Defendants do not simply mention extrinsic facts in passing, but make those allegations a central part of their argument. *See* Motion to Dismiss Count I, p. 2 (extrinsic facts and exhibits are meant "to provide a framework" for determining [Mrs.] Tejeda's intentions as expressed in the language of her Will."); Motion to Dismiss Count II, p. 2 (incorporating and adopting extrinsic facts).

As such, this case is more similar to *Smith v. GMC*, 35 Va. Cir. 112 (Fredericksburg City 1995), which involved a "lemon law" claim, where the court applied the rule that a "speaking demurrer" must be overruled. *Id.* at 113. In that case, the defendant attempted to rely on a purchase order attached to the demurrer, to raise the defense that the car in question was co-owned by a third party. Likewise, the defendant appended various documents to pleas in bar in order to assert a statute of limitations defense. This extrinsic evidence was a significant part of the demurrer and special pleas. Noting that the same rules prohibiting the consideration of extrinsic evidence applied to both the demurrer and special pleas, the court overruled the demurrer and denied the special pleas in their entireties. *Id.* at 114; *see also Rodriguez v. N. Va. Elec. Coop.*, 79 Va. Cir. 266, 271 (Loudoun Co. 2009) ("The demurrer is overruled on this ground because it is a classic 'speaking demurrer.'" (citing *Bryson* § 6.03(5)(a)). Just like in *Smith*, Defendants' extrinsic allegations and exhibits are not a side-note to their demurrers, but a central part of them. Consequently, the demurrers should be overruled.

Second, and most important, the defendants in *Kuley* made multiple arguments apart from the extrinsic facts, which the court went on to consider after overruling the "speaking" portion of the demurrer. Contrastingly, here, Defendants *did not make the arguments on which they now rely* in their Demurrer and their Motions to Dismiss when they filed them with the Court. Absent

from the pleadings are Defendants' two primary arguments: (i) that devising property to Foxfield Racing in "fee simple" precludes the creation of a trust; and (ii) that the language describing the perpetuation of Foxfield Races was "precatory" or "wishful" and could not have created a trust. Indeed, the words "fee simple," "precatory," and "wishful" appear nowhere in those pleadings. Thus, even if the Court had discretion to ignore extrinsic facts pled in the Demurrer and Motions to Dismiss in order to reach other arguments, it cannot consider the arguments briefed by Defendants because they were not made in those pleadings.

II. The Words "Fee Simple" Do Not Preclude the Creation of a Trust.

If the Court considers arguments not made in the Demurrer and Motions to Dismiss, a review of Virginia law demonstrates that those arguments are flawed. Defendants assert that the words "fee simple" in the clause devising the Foxfield Property to Foxfield Racing stand as a complete bar to finding that the Will subjected that property to a trust. But, that is not the law. Indeed, there is ample precedent for property to be devised in fee simple, but subject to a trust. For example, in *Maymont Foundation v. City of Richmond*, 11 Va. Cir. 375 (Richmond City Law & Eq. Ct. Nov. 22, 1972), the court dealt with the will of another public-spirited woman, Sallie M. Dooley, whose famous residence, "Maymont," was the subject of litigation years after her death. In the *Maymont* case, the court saw no contradiction between the fee simple estate held by the City of Richmond and the City's obligation as a trustee:

> [T]he court determines, first, that the City, under the language of Mrs. Dooley's Will . . . holds Maymont in *fee simple absolute*, subject to a restriction that it be used as a public park, and that the Manor House be used as a museum, for the use, benefit and pleasure of the people of the City of Richmond.
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> * * * * *
>
> If such restrictions are violated, *the people of the City may enforce this trust for charitable purposes* since the City is bound to hold this property for the use prescribed by the testatrix.

Id. at 381 (emphasis added). Similarly, under the language of Mrs. Tejeda's will, Foxfield Racing holds the Foxfield Property in fee simple, subject to a restriction that it be used "for the continued perpetuation of the Foxfield Races and all of the related activities on its property," Will at 2, for the "recreation, education and enjoyment of the people of Albemarle County and their friends and visitors and of Virginia who appreciate the equestrian sports. . . ." *Id.* If such restrictions are violated – as Defendants seek to do – the people of Albemarle County and other beneficiaries (including Plaintiffs) may enforce the trust.

The cases cited by Defendants do not suggest otherwise, as the following discussion will demonstrate:

***Farmers Bank v. Kinser,* 169 Va. 69 (1937):** In *Farmers Bank*, the testator bequeathed to his wife "all my interest in the farm we jointly own . . . [to] have and to hold the same *in fee simple* and to dispose of the same among the children *as she may think best*." *Id.* at 71 (emphasis added). If the words "fee simple" created the bar claimed by Defendants, the Court would have stopped there. There would have been no need to engage in the lengthy analysis of various facts leading to its conclusion that, in that case, the property was not subject to a trust.

Instead, as the Court explained: "The intention of the testator, if it can be perceived, is the key that unlocks the door of every will." *Id.* at 73. And, in attempting to perceive the intention of the testator in *Farmers Bank*, the Court took into account the "relations and facts which may be gathered." *Id.* Among the facts discussed by the Court was the relationship between the testator, his wife and the land at issue. The Court noted, for example, that "[the testator] and his wife owned the land jointly. Each owned an undivided one-half interest of it." *Id.* at 72. Thus "[h]e simply gave to her his interest [so] that she might deal with the whole as

she could always have done with a part." *Id.* at 72-73. The Court also presumed that the testator would have "the utmost confidence in his wife and . . . is not only willing but glad to trust her with everything." *Id.* at 73. These facts contrast sharply with the case at bar.

First, the Association owned no part of the Foxfield Property before receiving its interests under the Will. So, unlike the testator in *Farmers Bank*, Mrs. Tejeda was not trying to unite her interests with those of an existing part-owner.

Second, unlike the *Farmers Bank* case, there is no grant of discretion to the Association. Mrs. Tejeda did not say that she wanted the Association to use the Foxfield Property "as it may think best." Instead, she said she "wish[ed] ***to dedicate*** whatever estate I may leave at my death for the continued perpetuation of the Foxfield Races and all of the related activities on its property." Will, at 1 (emphasis added). Such words of dedication are incompatible with the concept of discretion.

Third, a husband may very well have the "utmost confidence" in a surviving wife in her disposition of their property to the next generation. But, it is a far different matter when the object of the testator's concern is something, such as the Foxfield Races, which is intended to last for many generations, and the property is placed in the hands of a wholly artificial person, such as the Association, which will eventually come under the control of persons who are complete strangers to the testator.

Thus, instead of presenting "relations and facts" analogous to those in *Farmers Bank*, the case at bar is more akin to the situation in *Wellford v. Powell*, 197 Va. 685 (1956), where the Court said that "[s]urely the testator could not have intended to place his confidence in a board of directors the personnel of which he could not envision." *Id.* at 689. In *Wellford*, the Court held that testator's gift to a non-profit, non-stock Virginia corporation with mainly educational

purposes was gifted to the recipient as a trustee and not gifted to the recipient in its own right. This Court should reach the same result here.

***Whitehead v. Whitehead*, 174 Va. 379 (1940):** In *Whitehead,* as in *Farmers Bank*, the testator used the term "fee simple" in describing the devise of his estate to his wife. The will also contained this statement: "I request... My Wife to give My Sister... $150.00 a year as long as She lives and has the money to give her." And, the testator explained that, "Upon the Death or Re-Marriage of My Wife. . . . ," he wanted his estate divided among various relatives. *Id.* at 381.

The wife in that case – just like the Defendants here – argued that use of the words "fee simple" were all the Court needed to see, in order to reject the claim that the will created a trust: "The simple proposition, [the wife] urges, is that if one devises to another all that he has, in fee simple, it is a complete divestiture of his estate and *that is the end of the matter.*" *Id.* at 382 (emphasis added) (explaining position of the "fee simple" recipient). The Court rejected this argument. While the Court ultimately decided that there was no trust, it reached that decision only after "examin[ing] with care the whole will." *Id.*[2]

Of particular interest are the legal principles that guided the Court in that examination, including the principle of "*general or paramount intent*," which must prevail over any "particular intent." As the Court noted: "It is definitely settled as a rule of law that where there is [1] a particular and [2] a general or paramount intent, the latter shall prevail, and the courts are

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[2] Among the reasons given by the Court for finding no trust were: (i) the legal impossibility of allowing an annuity to be grafted onto an estate (*id.* at 382, 384), (ii) the presumption that a husband wanted to leave his property to "his wife, his companion through the years, his helpmeet, she whom he must keep, 'foresaking all others'" (*id.* at 384). No such considerations are present in the case at bar.

bound to give effect to the paramount intent." *Id.* at 386 (internal quotation marks and citations omitted).

A review of the Will at issue here leaves no doubt as to Mrs. Tejeda's "general or paramount intent." She explained it quite clearly. Early in the Will, she wrote this heading: "*Statement of General Intent*; First Bequest." Will, at 2 (emphasis added). And, beneath that heading, she wrote:

> I have *but one wish* for the remainder of my lifetime and *after my death*, and that is to apply all my time, energies and financial resources to the perpetuation of the Foxfield Races in Albemarle County for the recreation, education and enjoyment of *the people of Albemarle County and their friends and visitors and of Virginia who appreciate the equestrian sports, competition, and related activities*. . . . It is for the perpetuation of the Foxfield Races in Albemarle County that *I wish to dedicate whatever estate I may leave at my death for the continued perpetuation of the Foxfield Races and all of the related activities on its property*.

Will, at 2 (emphasis added). Surely, there can be no clearer statement of "paramount intent" than for Mrs. Tejeda to have said that she has "but one wish . . . after her death." Thus, while it was Mrs. Tejeda's "particular intent" to leave the Foxfield Property to the Association in "fee simple," it was her "general or paramount" intent that the property be "dedicate[d] for the continued perpetuation of the Foxfield Races and all of the related activities on its property." Under the principle recognized in *Whitehead* and other authorities, *see infra* n. 3, the general or paramount intent prevails over the particular intent, and the Association takes the Foxfield Property subject to the terms of the trust found in the First Bequest.

***Smith v. Trustees of Baptist Orphanage*, 194 Va. 901 (1953):** In this case, there was, again, no suggestion that devising property in fee simple is enough to foreclose any claim that the will created a trust. Instead, Baptist Orphanage's claim to a trust simply was not persuasive. That claim was based on codicil language expressing the testator's wish as to how his son, the recipient of the fee interest, would dispose of the property upon the son's own death if he had no

issue. In order for *Smith* to be analogous to the case at bar, the Will of Mrs. Tejeda would have to express her wishes about how the devisee, the Association, would dispose of the property if the corporation were ever to be dissolved (the corporate equivalent of death). But, that is plainly not what her Will says. The Will does not say what Mrs. Tejeda wished the Association to do with the Foxfield Property if it is ever dissolved, nor does her Will otherwise direct any precatory words to the Association. *See* discussion *infra* at 11-14. Thus, *Smith* does not help Defendants.

***McKinsey v. Cullingsworth*, 175 Va. 411 (1940):** In a final attempt to bolster their fee-not-trust theory, Defendants cite the *McKinsey* case, where the words at issue were found in a letter, which simply said: "I want you to have my home and everything and you take care of Lula as best you can." *Id.* at 413. Finding that the letter devised the property in fee, the Court went on to say that the words "you take care of Lula as best you can" were insufficient to create a trust. But, in reaching this conclusion, the Court relied upon a set of facts quite the opposite of those present in the case at bar:

- In *McKinsey*: "The subject-matter out of which the care is to be provided for Lula is *uncertain*. The language of the will does not provide that Lula shall be cared for out of the *proceeds of the testatrix's property*." 175 Va. at 416 (emphasis added). In sharp contrast, Mrs. Tejeda plainly "dedicated *whatever estate* I may leave at my death [to be used] for the continued perpetuation of the Foxfield Races..." Will, at 2 (emphasis added).
- In *McKinsey*: "The care provided for is not only discretionary on the part of the defendant, but is contingent upon his ability to help her, and *subject to his own needs*." 175 Va. at 416 (emphasis added). Mrs. Tejeda did not vest the Association