

Troutman Sanders LLP
Troutman Sanders Building, 1001 Haxall Point
Richmond, VA 23219

troutman.com

BY: _____
CIRCUIT COURT CLERK'S OFFICE
ALBEMARLE COUNTY, VA
JON R. ZUG, CLERK
2017 SEP 18 PM 2:56

troutman
sanders

William H. Hurd
D 804.697.1335
F 804.698.6058
william.hurd@troutmansanders.com

FILED

September 18, 2017

BY HAND

Hon. Jon R. Zug, Clerk
Albemarle Circuit Court
Albemarle County Courthouse
Court Square
501 East Jefferson Street
Charlottesville, Virginia 22902

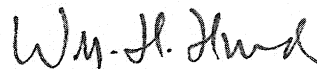
**Re: John H. Birdsall et al. v. Foxfield Racing Association, Inc.
Case No. CL17-01**

Dear Mr. Zug:

Please find enclosed Plaintiffs' Memorandum in Opposition to Defendants' Motions to Dismiss and Demurrer.

Thank you for your assistance in this matter.

Sincerely,



William H. Hurd

Enclosure

cc: C. James Summers, Esq. (w/enc.)
F. Douglas Ross, Esq. (w/enc.)

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.

FILED

2017 SEP 18 PM 2:56

CIRCUIT COURT CLERK'S OFFICE
ALBEMARLE COUNTY, VA
JON R. ZOG, CLERK

BY: _____ D.C.

**MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTIONS TO DISMISS AND DEMURRER**

Plaintiffs, by counsel, submit this Memorandum 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

The Foxfield Races are an important feature of the culture of Albemarle County. On this, there is no dispute. *See, e.g.*, June 2 Hearing Tr., at 7 (statement by counsel for Defendants, conceding that "the races... have increased in popularity and become... a substantial portion of this community, this community's culture.").¹

What is in dispute is whether the founder of those races, Mrs. Mariann S. de Tejada ("Mrs. Tejada"), created a *trust* for "the continued perpetuation of the Foxfield Races" (the purpose set forth in her will (the "Will")), or whether she left the future of those races to the *whim* of whoever might eventually come to control Foxfield Racing.

Defendants have tried to assure the Court that "Foxfield Racing Association has every intention to follow the wishes of Ms. de Tejada's will." June 2 Hearing Tr., at 13. And, while

¹ All cited excerpts from the June 2, 2017 hearing are included in the attached **Exhibit A**.

that certainly sounds like a concession that they are bound by the Will, they have elsewhere denied that the Will created a trust, and they claim that Foxfield Racing Association is a “for profit corporation” and that [t]he Foxfield Races are not conducted for charitable purposes.” Affidavit of Tom Dick, ¶¶ 11, 12 (Jan. 16, 2016).

Seeking to make any sale of the Foxfield Property² seem innocuous and consistent with the Will, they have also told the Court that they will “establish a ... 501(c) or a foundation where those monies [from the sale] would be deposited so they can continue promoting steeplechase races.” June 2 Hearing Tr., at 13 (statement by Defendants’ counsel). But, this hypothetical use of the money does not coincide with Mrs. Tejada’s wishes to have steeplechase races continue in *Albemarle County* and, more specially, at the *Foxfield Property*. See June 2 Hearing Tr., at 15 (inquiry from Court).

In any event, Defendants have not asserted some *cy pres* theory under which they might seek the Court’s permission to deviate from the terms of the trust that Mrs. Tejada created by her Will; rather, they have filed pleadings seeking to have this case dismissed at the threshold, so they can be completely free from their trust obligations and do whatever they want with the Foxfield Property, as if it were entirely their own, without any accountability whatsoever.³ As this memorandum will explain, their arguments have no merit and should be overruled.

² As in the Amended Complaint, the term “Foxfield Property” refers to the acreage where the Foxfield Races are run; however, all property conveyed to the Foxfield Racing Association by Mrs. Tejada’s Will – and all proceeds therefrom – are subject to the trust obligations created by the Will.

³ While not directly pertinent to the issues now before the Court, it should not be forgotten that Defendants have also sought to mask their intentions, suggesting that there were no plans to sell the Foxfield Property, even though discovery revealed a report on their proposed development of the Foxfield Property, which they would re-name “Hermit Thrush” and carve up into as many as 17 separate lots (with a subdivision road running over Mrs. Tejada’s gravesite). See Memorandum in Opposition to Defendants’ Motion to Stay Discovery, and attached Exhibits; June 2 Hearing Tr., at 25-26.

POSTURE OF THE CASE

In their Complaint, Plaintiffs have asserted two Counts. In Count I, Plaintiffs seek a declaratory judgment that (a) the Foxfield Property and all proceeds derived from the use thereof are held in trust by Foxfield Racing, and (b) Defendants may not lawfully sell or use the Foxfield Property, or any portion thereof, or any proceeds derived from the use thereof, in a manner inconsistent with Mrs. Tejada's Will. In Count II, Plaintiffs seek damages and injunctive relief to prevent Defendants, as trustees of the Foxfield Property, from breaching their duties of loyalty, prudent administration and trust, and from taking any more steps to sell the Foxfield Property, or any part thereof.

In response, Defendants have filed two "Motions to Dismiss," one aimed at Count I, and the other aimed at Count II, as well as a "Demurrer," aimed at the request for a temporary injunction. At the hearing held on June 2, 2017, counsel for Defendants explained that the motions to dismiss also were intended as demurrers, and the Court agreed to treat them as such. June 2 Hearing Tr., at 8-9, 21. For ease of reference, Plaintiffs will refer to those pleadings by the titles appearing on them – two styled "Motion to Dismiss" and one styled "Demurrer" – but will substantively treat all three as demurrers.

ARGUMENT

I. Defendants' Factual Assertions Are Fatal to Their "Motions to Dismiss".

In their Motion to Dismiss Count I, Defendants offer two pages of densely packed factual allegations, including references to three exhibits, which they attach to that motion. *See* Motion to Dismiss Count I, pp. 2-3 and exhibits.⁴ And, they draw heavily from those factual allegations

⁴ The exhibits include two documents purportedly signed by Mrs. Tejada, naming J. Benjamin Dick (the late brother of the Defendant, Tom Dick) and another individual to carry out

as they attempt to argue that no trust was created. *See* Motion to Dismiss Count I, pp. 4-5. Likewise, in their Motion to Dismiss Count II, Defendants “incorporate and adopt” the factual allegations set forth in their Motion to Dismiss Count I. Motion to Dismiss Count II, p. 2.

According to Defendants, these factual allegations and exhibits are intended to “provide a framework” for “determining [Mrs.] Tejada’s intentions as expressed in the language of her Will.” Motion to Dismiss Count I, p. 2. But, none of this is sworn. Much of it is hearsay. None of it is admissible. And, most importantly, none of it has any place in a demurrer.

Indeed, Defendants’ factual assertions make their “Motions to Dismiss” fatally defective. They must be overruled out of hand, as Virginia law has long recognized. “A demurrer cannot introduce new facts in support of itself. *When it is defective in this regard it is also called a speaking demurrer, and will be overruled.*” *Commonwealth v. Jackson*, 4 Va. 501, 504 (1826) (emphasis added). This well-established principle has been applied repeatedly by Virginia circuit courts. *See, e.g., Kuley v. Favez*, 89 Va. Cir. 238, 245 (Fairfax 2014) (not simply ignoring factual claims, but overruling speaking demurrer); *Patel v. Anjali*, 81 Va. Cir. 264, 265 (Chesapeake 2010) (same). The principle also has been recognized by an eminent scholar of Virginia procedure, Professor Hamilton Bryson, who writes: “Since a demurrer searches the record, the defendant may not assert new matter in his or her demurrer; a demurrer that alleges new facts is a ‘speaking demurrer, and will be stricken from the record.’” *Bryson on Virginia Civil Procedure* § 6.03(5)(a)). The Court need go no further. Both of Defendants’ “Motions to Dismiss” must be overruled.

certain functions, and one document purportedly signed by J. Benjamin Dick as counsel for Mrs. Tejada.