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October 23, 2017

BY HAND

The Hon. Jon R. Zug, Clerk
Albemarle County Circuit Court
Court Square
501 E. Jefferson Street
Charlottesville, VA 22902-5110

**Re: In Re: Foxfield Racing Association, Inc.
Case No. CL17-733**

Dear Mr. Zug:

Enclosed is an Answer and Counterclaim of Intervenors to be filed in the above-styled case.

Thank you for your courtesy in this matter.

Sincerely,



Stephen C. Piepgrass

Enclosure

cc: William H. Hurd, Esq.
Ashley L. Taylor, Esq.
C. James Summers, Esq.
F. Douglas Ross, Esq.
Ashleigh M. Pivonka, Esq.

FILED

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

VIRGINIA:

IN THE CIRCUIT COURT OF ALBEMARLE COUNTY

IN RE:

FOXFIELD RACING ASSOCIATION, INC.,

Case No. CL17-733

FILED

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CIRCUIT COURT OF ALBEMARLE COUNTY
ALBEMARLE COUNTY, VIRGINIA
JULY 11, 2017

ANSWER AND COUNTERCLAIM OF INTERVENORS

Intervenors John H. Birdsall, Harry Burn, Reynolds Cowles, Landon Hilliard, Kiwi Hilliard, John G. Macfarlane, III, Dudley Macfarlane, and Jack Sanford, Jr. (“Intervenors”), by counsel, having been allowed to intervene in this matter by the ruling of this Court at the October 2, 2017 hearing, hereby give their Answer to the Complaint to Quiet Title and assert their Counterclaim, as follows:

ANSWER

1. In response to Paragraph 1 of the Complaint, Intervenors admit that the Plaintiff, Foxfield Racing Association Inc. (“Foxfield Racing”), holds *legal* title to the 5.654 acres of property described in Paragraph 1 of the Complaint (“the Pantops Property”); however, Intervenors deny that Foxfield Racing is the *beneficial* owner of the Pantops Property. Instead, Foxfield Racing holds legal title to the Pantops Property in trust for the purposes created by the will of Mariann S. de Tejada (“Mrs. Tejada”). Intervenors deny the remaining allegations in Paragraph 1 of the Complaint.

2. In response to Paragraph 2 of the Complaint, Intervenors admit that Foxfield Racing acquired legal title to the Pantops Property following the death of Mrs. Tejada, that Mrs. Tejada passed away leaving a will that was probated in the Circuit Court of Albemarle County (the “Will”), that the Will was recorded at Will Book 63, page 681, and that Exhibit A appears to be a true copy of the Will. Intervenors deny that Foxfield Racing is the *beneficial* owner of the

Pantops Property. Instead, Foxfield Racing holds legal title to the Pantops Property in trust for the purposes created by the Will. Intervenor deny the remaining allegations in Paragraph 2 of the Complaint.

3. In response to Paragraph 3 of the Complaint, Intervenor admit that, under Article II, Section 2 of the Will, the Executors of Mrs. Tejada's estate were ordered to sell the Pantops Property and add the proceeds to the residuary estate; however, Intervenor deny the allegation that the Executors were ordered to sell "all" of Mrs. Tejada's real estate. While the Will speaks for itself, Intervenor note that the land on Garth Road used for the running of the Foxfield Races was not to be sold but was devised to Foxfield Racing in trust. *See* Will, Article II, and "Statement of General Intent, First Bequest." Intervenor deny the remaining allegations in Paragraph 3 of the Complaint.

4. In response to Paragraph 4 of the Complaint, Intervenor admit that, under Article IV of the Will, the entire residuary estate was to go to Foxfield Racing; however, Intervenor deny that Foxfield Racing is the beneficial owner of the residuary estate. Instead, the residuary estate is subject to the trust created by the Will. *See* Will, "Statement of General Intent, First Bequest. Intervenor deny the remaining allegations in Paragraph 4 of the Complaint.

5. In response to Paragraph 5 of the Complaint, Intervenor deny that title to the Pantops Property passed to Foxfield Racing under the Will. Instead, the Executors of the estate acted in disregard of the Will (which instructed them to sell the Pantops Property) and executed a deed conveying the Pantops Property to Foxfield Racing. Intervenor deny the remaining allegations in Paragraph 5 of the Complaint.

6. In response to Paragraph 6 of the Complaint, Intervenor admit that there is recorded in the land records of the Circuit Court of Albemarle County, Virginia, at Deed Book

2974, page 51, a document purporting to be a Deed of Easement, and that a copy of that document appears to be attached to the Complaint as Exhibit C. Intervenor deny that the document conveyed a valid and enforceable easement. Intervenor further deny that the recordation of the document evidences the passing of title of the Pantops Property to Foxfield Racing or the passing of any other property to Foxfield Racing, especially since that was neither the putative purpose nor the effect of the document. Intervenor deny the remaining allegations in Paragraph 6 of the Complaint.

7. In response to Paragraph 7 of the Complaint, Intervenor admit that there is recorded in the land records of the Circuit Court of Albemarle County, Virginia, a document purporting to be a deed from Foxfield Racing to George A. Cason of a lot previously owned by Mrs. Tejada and that a copy of that document appears to be attached as Exhibit D to the Complaint; however, Intervenor are without sufficient knowledge to permit them either to admit or deny what legal effect, if any, said document may have had, especially given (a) the fact that the lot that is the subject of the deed was the subject of the trust created by the Will, (b) the publicly recorded chain of title by which Foxfield Racing acquired title to the lot gives notice of that trust, and (c) the price paid for Mr. Cason lot was so far below fair market value as to call into question the validity of the transaction. Accordingly, Intervenor deny that the deed from Foxfield Racing to Mr. Cason had the legal effect alleged in the Complaint. Intervenor deny the remaining allegations in Paragraph 7 of the Complaint.

8. In response to Paragraph 8 of the Complaint, Intervenor admit that the document attached as Exhibit E purports to be a contract for the sale of the Pantops Property; however, Intervenor are without sufficient knowledge to permit them either to admit or deny what legal effect, if any, the alleged contract may have, especially given (a) the fact that the Pantops

Property is the subject of the trust created by the Will, (b) the publicly recorded chain of title by which Foxfield Racing acquired title to the Pantops Property gives notice of that trust, (c) the putative purchasers have actual knowledge of Intervenor's claim that the Pantops Property is the subject of that trust, and (d) the price named in the contract is so far below fair market value as to call into question the validity of the transaction. Accordingly, Intervenor's deny that the alleged contract has any binding legal effect whatsoever. Intervenor's deny the remaining allegations in Paragraph 8 of the Complaint.

9. In response to Paragraph 9 of the Complaint, Intervenor's admit that there is a cloud on the title of the Pantops Property, not only because the Executors of the estate acted in disregard of the Will (which instructed them to sell the Pantops Property) and executed a deed conveying the Pantops Property to Foxfield Racing, but also because the Pantops Property is the subject of the trust created by the Will.

10. Intervenor's deny the allegations in the WHEREFORE clause of the Complaint and deny that Foxfield Racing is entitled to any of the relief requested therein.

11. All allegations of the Complaint not expressly admitted are hereby denied.

WHEREFORE, Intervenor's ask that all relief sought by Foxfield Racing in the Quiet Title Action be denied.

COUNTERCLAIM

Intervenors state as follows for their Counterclaim against Foxfield Racing Association, Inc. (“Foxfield Racing”):

Factual and Procedural Background

1. On or about December 30, 2016, Intervenors filed a Complaint in this Court in an action styled *Birdsall, et al. v. Foxfield Racing Association, Inc., et al.*, Case No. CL 17-001, against Foxfield Racing and its sole director and officer, Thomas J. Dick (“Tom Dick”), as the result of a dispute over issues related to approximately 179 acres of land on which the Foxfield Races are held (the “Race Property”). (Said action is referred to herein as the “Foxfield Racing Case”.) Intervenors filed an Amended Complaint in the Foxfield Racing Case on January 19, 2017, a copy of which is attached hereto as **Exhibit A**.

2. The Amended Complaint in the Foxfield Racing Case seeks (a) entry of a Declaratory Judgment that: (i) the Race Property and all proceeds derived from the use thereof are held in trust by Foxfield Racing, and (ii) Foxfield Racing may not lawfully sell or use the Race Property, or any portion thereof, or any proceeds derived from the use thereof in a manner inconsistent with the purposes established by the Will; (b) injunctive relief restraining Foxfield Racing and Tom Dick from taking any further steps to sell the Race Property or any portion thereof, and requiring Foxfield Racing and Tom Dick to continue operating the Foxfield Races in the normal course of business, pending a final decision in the case; and (c) such other relief as the Court deems just and proper.

3. The Pantops Property at issue in this action to quiet title (the “Quiet Title Action”) is not contiguous with the Race Property; however, as conceded by Foxfield Racing, the Pantops Property is a portion of the real estate obtained by Foxfield Racing through the Will of Mrs.

Tejeda and the deed executed by her Executors, and is subject to the terms of the trust for the perpetuation of Foxfield Races established in that Will.

4. Although Foxfield Racing claims that it holds title to the Pantops Property in fee simple and is free to use that asset for any purpose it sees fit, in fact, the Pantops Property and any proceeds from the sale thereof are imbued with Mrs. Tejeda's testamentary purpose of perpetuating the Foxfield Races, as established in the Will, which creates a trust for this purpose.

5. Intervenors now ask the Court to (a) declare that the Pantops Property and any proceeds derived from the sale thereof are subject to the trust described herein; (b) enjoin sale of the Pantops Property for less than its fair market value, which would violate Foxfield Racing's duties as trustee; and (c) enjoin use of the proceeds from the sale of the Pantops Property for any purposes not in keeping with the terms of the trust, which also would violate Foxfield Racing's duties as trustee.

The Parties

6. As further described in Paragraphs 6 through 11 of the Amended Complaint in the Foxfield Racing Case (Exhibit A), Intervenors in this action are concerned citizens and owners of land near the Race Property who have attended the steeplechase event known as the Foxfield Races, and participated in equestrian activities on the Race Property, for many years. As such, Intervenors are beneficiaries of the testamentary trust created by Mrs. Tejeda through the Will pursuant to which the Race Property and the Pantops Property were conveyed in trust to Foxfield Racing.

7. Petitioner Foxfield Racing is a non-stock, non-member corporation chartered by the Commonwealth of Virginia and holds title to the Race Property as well as the Pantops Property, having acquired the property from the estate of Mrs. Tejeda through the Will and the deed

executed by Mrs. Tejada's Executors. Foxfield Racing is a testamentary trustee. It is also a trustee as defined by Virginia Code § 64.2-701.

Relevant Facts

8. As described in the Foxfield Racing Case, Mrs. Tejada purchased the Race Property for use in equestrian pursuits, founded Foxfield Racing in 1977, and served as its first president. Mrs. Tejada established Foxfield Racing to promote the sport of steeplechasing and equestrian activities in Albemarle County.

9. The Will provides the following, as a "Statement of General Intent" and "First Bequest":

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 1.

10. In her Will, Mrs. Tejada bestowed legal title to the Race Property on Foxfield Racing; however, Foxfield Racing holds the Race Property in trust and subject to the Statement of General Intent and First Bequest.

11. Article III, ¶ 2 of the Will, provides: "My Executors shall sell . . . my other real estate assets . . . as promptly as possible after my death and add the net proceeds less expenses to my residuary estate." Article IV of the Will, in turn, provides: "'my residuary estate,' I devise and bequeath to the Foxfield Racing Association, Inc." Any and all claims by Foxfield Racing that it is entitled to the residuary estate, including the Pantops Property, are subject to the trust created by the Will, including its Statement of General Intent and First Bequest.

12. In this Quiet Title Action, Foxfield Racing proposes to enter into a transaction that appears to represent a waste of the resources held in trust by Foxfield Racing, to carry out the terms of the trust of which Foxfield Racing is a trustee. The February 2017 real estate contract that Foxfield Racing attached to its Complaint to Quiet Title lists a purchase price of \$120,000 for the Pantops Property and Foxfield Racing has subsequently agreed to reduce the purchase price to \$110,000 or less. The Pantops Property is valued by the Albemarle County tax assessment at \$190,600, and a recent professional appraisal shows the fair market value to be \$175,000.

13. This is not the first time that Foxfield Racing has attempted to sell property it received in trust under the Will for far less than fair market value. As shown by the \$25.00 in grantor's tax paid on the lot allegedly sold to George A. Cason in 2005 (the sale alleged in Paragraph 7 of the Complaint to Quiet Title), the purchase price of that putative sale was only \$25,000. *See* Complaint to Quiet Title, Exhibit D, last page (Clerk's Stamp showing payment); Va. Code § 58.1-802 (establishing grantor's tax as "50 cents for each \$500 or fraction thereof"). But, according to a professional appraisal, the fair market value of that lot in 2005 was \$82,500.

14. In addition, in this Quiet Title Action, Foxfield Racing seeks an order declaring that Foxfield Racing owns the Pantops Property in fee simple and without restriction, thereby wrongfully seeking to insulate the proceeds from any claims that the proceeds are held in trust.

15. The Quiet Title Action also asks "that the Court authorize Foxfield Facing Association, Inc. to sell *any and all* property that passed under Ms. Tejada's will" (emphasis added), a request that wrongfully implicates not only the Pantops Property but also the Race Property.

COUNT I
DECLARATORY JUDGMENT

16. Intervenor's restate the allegations in the foregoing paragraphs of the Counterclaim as if set forth fully herein.

17. Notwithstanding the terms of the Will, which imposes on Foxfield Racing the duties of a trustee and requires it to use its assets to carry out the terms of the trust, Foxfield Racing denies that the Pantops Property or any proceeds from the sale thereof are held in trust.

18. Foxfield Racing claims, instead, that it may dispose of the Pantops Property free from any restrictions arising under the Will.

19. There is, therefore, an actual controversy between Intervenor's and Foxfield Racing involving the actual antagonistic assertion and denial of right, so as to make appropriate the exercise by the Court of its power to make binding adjudications of right, pursuant to Virginia Code § 8.01-184.

20. Intervenor's seek a declaration from the Court, pursuant to Virginia Code § 8.01-184, that (a) the Pantops Property and any proceeds derived from the sale thereof must be used by Foxfield Racing in a manner consistent with the terms of the trust, and (b) Foxfield Racing may not lawfully sell the Pantops Property, or any portion thereof, for an amount below the Pantops Property's fair market value, as such sale would constitute a waste of assets held in trust.

COUNT II
VIOLATION OF THE UNIFORM TRUST CODE

21. Intervenor's restate the allegations in the foregoing paragraphs of the Counterclaim as if set forth fully herein.

22. The Uniform Trust Code applies to "testamentary trusts." Va. Code § 64.2-700.

23. This Court may exercise its jurisdiction “over the supervision or administration of trusts,” and it “may determine that application of the policies, procedures, or rules of the Code is appropriate to resolution of particular issues.” Va. Code § 64.2-700.

24. Foxfield Racing is subject to the Uniform Trust Code because it is a testamentary trustee under the Will.

25. As trustee of this charitable trust, Foxfield Racing is required to administer the trust “solely in the interests of the beneficiaries.” Va. Code § 64.2-764 (duty of loyalty).

26. As trustee of this charitable trust, Foxfield Racing is required to “administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.” Va. Code § 64.2-766 (prudent administration).

27. By their actions as alleged herein – including but not limited to moving to sell the Pantops Property for less than fair market value and/or to use the proceeds of such sale for purposes other than and contrary to the purpose of the trust (*i.e.*, the perpetuation of the Foxfield Races), Foxfield Racing is and will be breaching its duties as trustee by using assets of the charitable trust in a manner inconsistent with (a) its duty as trustee as established in the governing documents of the trust, including the Will, pursuant to Virginia Code § 64.2-792; (b) its duty or loyalty, as set forth in Virginia Code § 64.2-764 (duty of loyalty); and (c) its duty of prudent administration, as set forth in Virginia Code § 64.2-766.

28. Because of the foregoing, the beneficiaries of the trust, including Intervenors, are suffering and will continue to suffer irreparable harm.

WHEREFORE, Intervenor prays that the Court grant the following relief:

(a) A judgment, pursuant to Virginia Code § 8.01-184, declaring that (i) the Pantops Property and any proceeds derived from the sale thereof must be used by Foxfield Racing in a manner consistent with the terms of the trust, and (ii) Foxfield Racing may not lawfully sell the Pantops Property, or any portion thereof, for an amount below the Pantops Property's fair market value, as such sale would constitute a waste of assets held in trust;

(b) A permanent injunction (i) restraining Foxfield Racing from selling the Pantops Property except for such sum and upon such terms as Intervenor can prove to the satisfaction of the Court represent fair market value; and (ii) requiring that all proceeds from any sale of the Pantops Property be held in escrow and not used for any purpose pending a final decision in *Birdsall, et al. v. Foxfield Racing Association, Inc., et al*, Case No. CL 17-001; and

(c) Such other relief as the Court deems proper.

JOHN H. BIRDSALL, HARRY BURN,
REYNOLDS COWLES, LONDON
HILLIARD, KIWI HILLIARD, JOHN G.
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By: 
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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October, 2017 a true copy of the foregoing was delivered by fax and mail to the following:

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