

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.

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT THOMAS J.
DICK'S DEMURRER TO SECOND AMENDED COMPLAINT**

Plaintiffs, by counsel, submit this Memorandum in Opposition to Defendant Thomas J. Dick's Demurrer to Second Amended Complaint.

**THOMAS DICK'S DEMURRER TO COUNT I
OF THE SECOND AMENDED COMPLAINT SHOULD BE OVERRULED.**

Thomas Dick's Demurrer to Count I of the Second Amended Complaint repeats the same arguments that he previously made in Defendant's Demurrer to Count I of the Amended Complaint and Defendants' Motions to Dismiss, by which he sought to dismiss Counts I and II of the Amended Complaint.¹ All of these pleadings were treated as demurrers, and all were overruled. *See* Order, Dec. 2, 2017 (copy attached as **Exhibit A**).

Specifically, Thomas Dick again asserts that:

- Plaintiffs have "fail[ed] to plead the existence of a valid trust," (Dem. ¶ 23), an argument he previously raised. *See* Defendants Motion to Dismiss Count I, at 2

¹ *See* Defendants Motion to Dismiss Count I of the Plaintiffs Amended Complaint for Lack of Standing and Subject Matter Jurisdiction ("Defendants Motion to Dismiss Count I") (dated Feb 8, 2017), *and* Defendants Motion to Dismiss Count II of the Plaintiffs Amended Complaint for Lack of Standing and Subject Matter Jurisdiction ("Defendants Motion to Dismiss Count II").

(“The will did not establish a trust....”), Defendants Motion to Dismiss Count II, at 2 (“The Will did not create a trust....”).

- Plaintiffs have “failed to plead a justiciable interest in an actual controversy” (Dem. ¶ 24), an argument he previously raised. *See* Defendants Motion to Dismiss Count I, at 6 (“Plaintiffs have no standing....”), Defendants Motion to Dismiss Count II, at 4 (“The Plaintiffs do not have standing.”).
- The request for a declaratory judgment is “an impermissible speculative inquiry from the Court” (Dem. ¶ 25), an argument subsumed under the previous claim that the Court lacks jurisdiction. *See* Defendants Motion to Dismiss Count I, at 7 (“the Court lacks subject matter jurisdiction....”), Defendants Motion to Dismiss Count II, at 4 (arguing that “this court ... lacks subject matter jurisdiction.”)
- Plaintiffs have “failed to plead a cause of action” (Dem. ¶ 25), an argument intrinsic to any demurrer, including the ones previously filed by Thomas Dick.

By its Order of December 2, 2017, the Court rejected each of these arguments. Thus, Thomas Dick’s Demurrer to Count I appears intended only to preserve his arguments on these points on which the Court already has ruled. In any event, that ruling is both correct and the law of the case. The Court should overrule the Demurrer as to Count I.

**THOMAS DICK’S DEMURRER TO COUNT II
OF THE SECOND AMENDED COMPLAINT SHOULD BE OVERRULED.**

The Uniform Trust Code Applies.

Thomas Dick claims that “[t]he Uniform Trust Code does not apply in this action.” Dem. ¶ 28. But, he does not explain his position. Perhaps, this statement is simply his way of restating his mistaken view that there is no trust. Surely, if Plaintiffs prevail on their claim that the

Will created a trust, then the Uniform Trust Code *must* apply because that law expressly applies to “testamentary trusts.” Va. Code § 64.2-700.

**Plaintiffs Properly Allege That
Thomas Dick Plans to Sell the Foxfield Property,
Which Would Violate the Trust.**

Thomas Dick focuses on the letter by which he was given an opportunity to deny any plans to sell the Foxfield Property (an opportunity he refused). Dem. ¶ 32. But, he ignores the main thrust of Plaintiffs’ allegation: “Defendants have attempted to sell the Foxfield Property and/or have plans to list the Foxfield Property for sale.” Sec. Amend. Compl. ¶ 41.

Moreover, as Thomas Dick acknowledges, the law requires a trustee “[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.” Dem. ¶ 33 (quoting Va. Code § 64.2-766) (emphasis added). Selling the Foxfield Property would deliberately and intentionally end the running of the races there. Thus, any such sale would be inconsistent with both the purposes and terms of the Will, which created the trust and calls for the races to be run on the Foxfield Property in perpetuity. *See* Sec. Amend. Compl. ¶ 23 (quoting Will, which “dedicate[s] whatever estate I may leave at my death for the continued *perpetuation of the Foxfield Races* and all of the related activity *on its property*.”) (emphasis added). Given the conflict between a sale of the Foxfield Property and the purposes and terms of the Will, there is no merit whatsoever in Thomas Dick’s boilerplate claim that Plaintiffs have failed to plead facts constituting a “violation of the prudent administration” of the trust. Dem. ¶ 34.

**Plaintiffs Properly Allege That
Thomas Dick Is Liable for Improper Payments
to Himself and to Benjamin Dick.**

Thomas Dick says the Second Amended Complaint does not contain any factual or legal basis for ordering Thomas Dick to “disgorge and pay a special fiduciary or such new trustee as the Court shall name, a sum equal to the total of the Improper payments of *Thomas Dick*.” Dem. ¶ 29 (emphasis added). Similarly, Thomas Dick contends that the Second Amended Complaint does not contain any factual or legal basis for “imposing judgment against the Defendant Thomas Dick related to alleged improper payments of *Benjamin Dick*.” Dem. ¶ 30 (emphasis added). He is wrong on both points.

With respect to both sets of improper payments – those to Benjamin Dick and those to Thomas Dick – the pertinent allegations in the Second Amended Complaint are found at ¶¶ 39 and 42 – 45, which read as follows:

39. The director and officers of Foxfield Racing have, at all relevant times, been *subject to the same duties* as Foxfield Racing. [Emphasis added.]

42. During Benjamin Dick’s many years as an officer or director of Foxfield Racing, he caused Foxfield Racing to make *numerous payments to his own account* (and/or to his family members or other third parties), using funds that were *part of – and/or impressed with – the trust* created by the Will of Mrs. Tejada. In the period from January 1, 2011, forward (the only period for which records have been reviewed by Plaintiffs), the improper payments of Benjamin Dick total *hundreds of thousands of dollars*. Many of those payments did not represent legitimate expenses of the trust and, thus, *constituted misappropriations of trust funds* (“the Improper Payments of Benjamin Dick”). By causing and making the Improper Payments of Benjamin Dick, Benjamin Dick and/or Foxfield Racing breached their duties as trustee. [Emphasis added.]

43. Some of the Improper Payments of Benjamin Dick were made during the period in which Thomas Dick served as an officer or director of Foxfield Racing; however Thomas Dick did not object to those payments, took no steps to determine their propriety, reasonableness and/or necessity, but rather permitted them to occur, thus *breaching his duties as trustee and/or causing or allowing* Foxfield Racing to breach its duties as trustee. [Emphasis added.]

44. In addition, if Thomas Dick had acted *with prudence and exercised reasonable care, skill and caution*, he would have discovered the history of Improper Payments of Benjamin Dick and taken steps to recover those funds for Foxfield Racing. *See* Va. Code § 64.2-766. [Emphasis added.]

45. Upon becoming the sole director and officer of Foxfield Racing in 2015, Thomas Dick not only undertook a plan to sell the Foxfield Property in violation of the trust created by the Will of Mrs. Tejada, *he also caused Foxfield Racing to make numerous payments (a) to his own account* for fees and expenses charged by him to Foxfield Racing in pursuing that improper sale; (b) to various third parties for fees and expenses charged by them to Foxfield Racing in *pursuing that improper sale*; and (c) to his own account or to attorneys engaged by him in connection with the pending action. In so doing, Thomas Dick caused Foxfield Racing to make those payments using *funds that were part of – and/or impressed with – the trust* created by the Will of Mrs. Tejada (“the Improper Payments of Thomas Dick”). By *causing and making the Improper Payments* of Thomas Dick, Thomas Dick and/or Foxfield Racing *breached their duties as trustee*. [Emphasis added.]

A trustee who spends trust assets for some improper purpose, as Plaintiffs allege here, is liable for the funds misspent. *See Carlson v. Wells*, 281 Va. 173, 184 (2011) (“The trustee is liable for loss in value of any improper investment”); *Jones v. Abraham*, 75 Va. 466, 469, 474 (1881) (holding that party participating with a trustee in a misappropriation of a trust fund is jointly and severally liable). And, where the trustee is a corporation, the individuals who control the corporation are liable not only to disgorge funds that they improperly paid to themselves, but also for such improper payments as they deliberately or negligently caused or allowed to be made to others. *Cook v. The 1031 Exchange Corp.*, 29 Va. Cir. 302, 1992 WL 885015, at *2-3 (Fairfax County Nov. 12, 1992) (holding officer and director of corporate trustee liable for conversion and awarding damages, where corporation could not account for trust’s funds).

Nor would it suffice for Foxfield Racing Association to be liable for the misspent money because, unlike some corporate trustees (*e.g.*, banks), it has no money of its own to make good on its obligation to the trust it administers. *Cf. Jones*, 75 Va. at 472-474 (holding

a participant in a misappropriation of trust funds jointly and severally liable, where the trustee that misappropriated the funds was insolvent). *See* Sec. Amend. Compl. ¶ 38. (“[S]ince the time of Mrs. Tejada’s death or shortly thereafter, Foxfield Racing has not had – and it does not have – any assets that are not part of and/or impressed with the trust created by the Will of Mrs. Tejada.”) Thus, the Second Amended Complaint has stated a claim that Thomas Dick is liable for the money that Foxfield Racing improperly paid to his brother while Thomas Dick was a director or officer, as well as for the money that Foxfield Racing improperly paid to Thomas Dick.

**THOMAS DICK’S DEMURRER TO COUNT III
OF THE SECOND AMENDED COMPLAINT SHOULD BE OVERRULED**

The Uniform Trust Code Applies.

Thomas Dick again claims that “[t]he Uniform Trust Code does not apply in this action.” Dem. ¶ 38. But, again, if Plaintiffs prevail on their claim that the Will created a trust, then the Uniform Trust Code *must* apply because that law expressly applies to “testamentary trusts.” Va. Code § 64.2-700.

Thomas Dick then points out that “friction between the trustee and the beneficiary is not in itself sufficient grounds for removal.” Dem. ¶ 40. But, no one who reads the Second Amended Complaint could seriously contend that the allegations there are simply about “friction” between Defendants and Plaintiffs. Nor does the Second Amended Complaint “allege only generalized and non-specific malfeasance by Benjamin Dick and Thomas J. Dick.” Dem. ¶ 41. On the contrary, the Second Amended Complaint alleges, *inter alia*:

- Since January 1, 2011, including while Thomas Dick served as an officer or director of Foxfield Racing, Benjamin Dick made hundreds of thousands of dollars of improper payments to his own account (and/or to his family members or other third parties), using

funds that were part of – and/or impressed with – the trust created by the Will of Mrs. Tejada. Sec. Am. Compl. ¶ 42-43.

- Defendants improperly made “numerous payments (a) to [Thomas Dick’s] own account for fees and expenses charged by him to Foxfield Racing in pursuing [the] improper sale [of the Foxfield Property]; (b) to various third parties for fees and expenses charged by them to Foxfield Racing in pursuing that improper sale; and (c) to his own account or to attorneys engaged by him in connection with the pending action. Sec. Am. Compl. ¶¶ 41 & 45.
- Defendants have attempted to sell the Foxfield Property and to cease running the races, thereby violating the central purpose of the trust. Sec. Am. Compl. ¶ 45.

These allegations do not constitute mere “friction” between trustees and beneficiaries or “generalized non-specific malfeasance.” Instead, the allegations specifically state the malfeasance in which Defendants have participated, which constitute a gross breach of the duties of the trustees and which, if allowed to continue, necessarily would result in destruction of the purpose of the trust. These allegations adequately support Plaintiffs’ claim to remove Defendants as trustees. Sec. Am. Complaint ¶ 72-73. The Demurrer to Count III therefore should be overruled.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that the Court overrule the Demurrer and grant them such other relief as the Court deems proper.

JOHN H. BIRDSALL et al.



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent by first class mail and by e-mail to the following:

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this 25th day of July, 2018.



Exhibit A

VIRGINIA:

IN THE CIRCUIT COURT OF ALBEMARLE COUNTY

JOHN H. BIRDSALL et al.,

Plaintiffs,

v.

Case No. CL17-01

FOXFIELD RACING ASSOCIATION, INC.,
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Defendants.

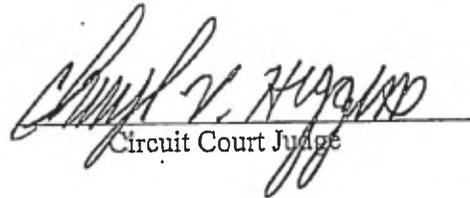
**ORDER OVERRULING DEMURRER AND
DENYING MOTIONS TO DISMISS**

The parties, by counsel, appeared before the Court on October 2, 2017, for a hearing on Defendants' Demurrer to Count I of the Amended Complaint and Defendants' Motions to Dismiss. Defendants agreed that each of these pleadings should be treated as demurrers.

Upon consideration of the pleadings and briefs filed by the parties and argument of counsel and for the reasons stated from the bench, it is hereby ORDERED that the Demurrer to Count I is OVERRULED and the Motions to Dismiss are DENIED.

The Clerk shall send copies of this Order to all counsel of record.

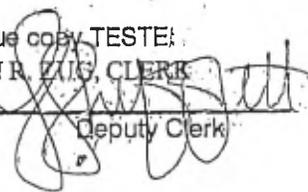
Entered this 2 ^{December} day of October, 2017.


Circuit Court Judge

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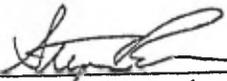
JON R. ZIG, CLERK

by:


Deputy Clerk

SEEN AND AGREED:

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SEEN AND OBJECTED TO FOR THE REASONS STATED ON BRIEF AND IN ORAL ARGUMENT

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The holding in Dodge v. Trustees of Randolph-Macon
woman's College requires this court to refrain from
declaring that Foxfield Racing, a non-stock corporation, is a
de facto trustee because the clear language of the will
devises absolute ownership of the Foxfield Property to the
corporation and does not establish a trust.
The holding in Commonwealth v. JOCO Foundation requires
the court to refrain from exercising its jurisdiction because
the alleged actions of the Defendant are purely corporate
matters within the exclusive jurisdiction of the State Corporation
Commission.