NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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March 26, 2024

VIA EMAIL ONLY

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RE: Donna Hauer, Executrix of Estate of Chesley L. Crump, et al. v. Rebecca Crump, et al.
Case No. CL-2022-10907

OPINION LETTER

Dear Counsel:

This matter comes before the Court on the demurrers to the Second Amended Counter-Claim and Cross-Claim for Reformation or in the Alternative an Interpretation of a Trust, a Conditional Claim for Unjust Enrichment, and a Breach of Trust (the "***Second Amended Counterclaim***") filed by Plaintiff / Counter-Defendant / Cross-Claim Defendant Donna Hauer ("***Hauer***") and Defendant / Cross-Claim Defendant Robin Haar ("***Haar***").

Hauer, individually and as Executor of the Estate of Chesley Crump and Trustee of the Crump Revocable Living Trust (the "***Trust***"), demurs to Count I of the Second Amended Counterclaim (Reformation), asserting that it fails to allege any mistake of fact or law that affected both the Settlor's intent and the Trust's terms. She demurs to Count III (Unjust Enrichment) on the grounds that it alleges an impermissible "conditional counterclaim" and fails to properly allege the necessary element of understanding, expectation, or acceptance of benefit with expectation of repayment.

Haar demurs to Count I of the Second Amended Counterclaim, asserting that: the *in terrorem* clause of the applicable trust bars the claim, Count I fails to properly allege a mistake of fact or law that would support a claim for reformation, Count I only alleges that the Second Amendment failed to properly express the intent of Donald and not Chesley, and proof of "many" of the allegations plead in support of Count I would be barred by Virginia's Dead Man's Statute. She demurs to Count II (Determination as to What Property Passes to Haar Under the Second Amendment)) on the grounds that: the *in terrorem* clause of the applicable trust bars the claim, Count II joins claims and argument not stated in the alternative but that are nonetheless inconsistent or contradictory, Rebecca lacks standing to seek aid and direction from the Court on behalf of the trustee of the applicable trust, and that the claim is not yet ripe, because no property has yet been distributed. Haar demurs to Count III, contending that it sets forth a conditional counterclaim that is not permissible under Virginia law, that any such claim would be barred by the doctrine of unclean hands, lacks properly pled allegations of acceptance of benefit and reasonable expectation of repayment, and incorporates conflicting allegations. Haar demurs to Count IV on the basis of the *in terrorem* clause, because the claim is not ripe, because the claim incorporates conflicting allegations, and because the claim seeks a judgment in favor of Rebecca instead of the applicable trust.

Count I of the Second Amended Counterclaim properly alleges all elements of a claim for reformation, including a mistake of fact or law that may support reformation under Code section 64.2-733, that cannot be attacked on demurrer by the affirmative defense purportedly provided by the *in terrorem* clause of the Trust or an evidentiary rule such as the Dead Man's Statute. Accordingly, the demurrers to Count I are OVERRULED.

Count II of the Second Amended Counterclaim purports to set forth a claim by a beneficiary of the Trust to force upon the trustee the aid and direction of the Court, which is not cognizable under Virginia law. Accordingly, Haar's demurrer to Count II is SUSTAINED with leave to amend within ten days after the date of this letter.

Count III of the Second Amended Counterclaim properly alleges that Rebecca and Brian provided improvements to the Henderson Road Property under a mistake of fact, that is, under the mistaken understanding that the Settlors intended to give the property to Rebecca upon their deaths. It properly pleads the facts supporting the claim in the alternative to other allegations set forth in the Second Amended Counterclaim, as permitted by Virginia law. Accordingly, the demurrers to Count III are OVERRULED.

Count IV of the Second Amended Counterclaim properly alleges a claim for breach of trust/breach of fiduciary duty that cannot be attacked on demurrer by the affirmative defense purportedly provided by the *in terrorem* clause of the Trust. Accordingly, Haar's demurrer to Count IV is OVERRULED.

ALLEGATIONS OF THE SECOND AMENDED COUNTERCLAIM

The Second Amended Counterclaim alleges the following facts:

Defendant / Counter-Plaintiff and Cross-Claim Plaintiff Rebecca Crump ("***Rebecca***") is one of three daughters of Donald E. Crump ("***Donald***") and Chesley L. Crump ("***Chesley***"), who are deceased. Second Am. Counterclaim ¶¶ 1, 5 & 6. Defendant / Counter-Plaintiff and Cross-Claim Plaintiff Brian Bennett ("***Brian***") is Rebecca's husband. Second Am. Counterclaim ¶ 2.

Hauer and Haar are the other two daughters of Donald and Chesley. Second Am. Counterclaim ¶¶ 1, 3 & 4. Rebecca, Hauer, and Haar are beneficiaries of the Crump Revocable Living Trust (the "***Trust***"). *Id.* Hauer is the trustee of the Trust. Second Am. Counterclaim ¶ 3.

The Trust instrument has been amended at least twice, most recently on November 7, 2019, by virtue of the Second Amendment. Second Am. Counterclaim ¶ 11 & Exs. 1 & 2. The Trust instrument includes an *in terrorem* clause that reads:

> [if] any beneficiary or guardian and conservator thereof, in any manner, directly or indirectly contests or attacks the agreement or any of its provisions, any share or interest in the said beneficiary is hereby revoked and such contesting beneficiary shall receive no part of the trust funds hereunder.
>
> Second Am. Counterclaim ¶ 14 & Ex. 1.

The Trust and the Second Amendment were drafted by the late James Eisenhower, an attorney with no substantial experience in drafting trusts and estates documents. Second Am. Counterclaim ¶ 17. Mr. Eisenhower also drafted the First Amendment to the Trust, which is defective. Second Am. Counterclaim ¶¶ 90-92.

The Second Amendment purports to have been signed by Donald on behalf of Chesley, under a power-of-attorney. Second Am. Counterclaim ¶ 18. It provides, *inter alia*, that:

The Trustee shall distribute the following properties, free of mortgage encumbrances:

a. To daughter Rebecca Crump: the property known as Davis' [*sic*] Store and all stock in the company of Don's Texaco Service, Inc.

b. To daughter Robin Haar: the building known as Don's Shell Service Station in West Springfield.

c. To daughter Donna Hauer: the property known as the Leesburg Office Building

Second Am. Counterclaim ¶ 19 & Ex. 2. Hauer drafted this language, which was simply "cut and pasted" by Mr. Eisenhower into the Second Amendment. Second Am. Counterclaim ¶¶ 20-21.

At the time the Second Amendment was executed, Donald and Chesley (together, the "***Settlors***" of the Trust) owned a property known commonly as the Davis Store, on which a business was operated by DLKR, Inc., which was purchased from Donald by Rebecca and Brian in 2002. Second Am. Counterclaim ¶¶ 23 & 30. When the Second Amendment was executed, the Settlors also owned a property known as Don's Shell Service Station, on which a business known as Don's Texaco Service, Inc. was operating, and a property known as the Leesburg Office Building. Second Am. Counterclaim ¶¶ 31-32.

Rebecca and Brian assisted Donald with his businesses and lived with the Settlors at 12020 Henderson Road in Clifton, Virginia (the "***Henderson Road Property***"). Second Am. Counterclaim ¶¶ 35-36 & 59-60. "Rebecca and Brian used their own funds to make significant improvements and repairs to the Henderson Road Property, since it was always [the Settlors'] intent that Rebecca get the Henderson Road Property following their deaths." Second Am. Counterclaim ¶ 36, 61-63 & 67.

After the execution of the Second Amendment, Donald told his longtime attorney that he was giving Don's Texaco, Inc. to Rebecca but that he wanted Rebecca to pay Haar $20,000 per month for ten years, to help keep Haar financially solvent. Second Am. Counterclaim ¶¶ 47-49. The total of those payments would approximate the appraised value of the property on which Don's Texaco, Inc. sits. Second Am. Counterclaim ¶ 49. Donald was concerned about Haar receiving a large lump sum payment and wanted her to have a secure income instead. *Id.* Donald made similar statements to others. Second Am. Counterclaim ¶ 50. Donald's statements are inconsistent with the devise in the Second Amendment. Second Am. Counterclaim ¶ 52.

Hauer's Complaint alleges that Rebecca improperly used a power-of-attorney to deed the Henderson Road Property to herself and takes the position that the property properly belongs to the Trust. Second Am. Counterclaim ¶ 65. However, the subject power-of-attorney authorized Rebecca's action. *Id.*

Hauer took Donald's Cadillac Escalade and traded it in for at least $58,000 on a new Cadillac Escalade titled in her name, without compensating the Trust; doubled her annual salary

for managing the Leesburg Office Building, to $130,189; spent almost $170,000 of Trust funds on improvements, taxes, and maintenance on the Leesburg Office Building while failing to spend any amounts to maintain properties to be distributed to her sisters, and is using Trust assets to fund her personal representation in the instant litigation. Second Am. Counterclaim ¶¶ 72-76 & 78. She also overvalued properties to be distributed to Rebecca, with the effect of reducing Rebecca's inheritance by more than $5,000,000 and increasing her own inheritance by almost $2,000,000. Second Am. Counterclaim ¶ 77.

ANALYSIS

I. LEGAL STANDARD ON DEMURRER

> [T]he contention that a pleading does not state a cause of action or that such pleading fails to state facts upon which the relief demanded can be granted may be made by demurrer. All demurrers shall be in writing and shall state specifically the grounds on which the demurrant concludes that the pleading is insufficient at law. No grounds other than those stated specifically in the demurrer shall be considered by the court.

Va. Code § 8.01-273.

"A demurrer admits the truth of the facts contained in the pleading to which it is addressed, as well as any facts that may be reasonably and fairly implied and inferred from those allegations." *Yuzefovsky v. St. John's Wood Apartments*, 261 Va. 97, 102, 540 S.E.2d 134, 136-37 (2001) (citation omitted). "A demurrer does not, however, admit the correctness of the pleader's conclusions of law." *Id.* (citation omitted).

"To survive a challenge by demurrer," factual allegations "must be made with 'sufficient definiteness to enable the court to find the existence of a legal basis for its judgment.'" *Squire v. Virginia Hous. Dev. Auth.*, 287 Va. 507, 514, 758 S.E.2d 55 (2014) (citation omitted). "A plaintiff may rely upon inferences to satisfy this requirement, but only 'to the extent that they are reasonable.'" *A.H. v. Church of God in Christ, Inc.*, 297 Va. 604, 613, 831 S.E.2d 460, 465 (2019) (quoting *Coward v. Wellmont Health Sys.*, 295 Va. 351, 358, 812 S.E.2d 766, 770 (2018)). "Distinguishing between reasonable and unreasonable inferences is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense,' guided by the principle that 'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable,'" *Church of God in Christ, Inc.*, 297 Va. at 613, 831 S.E.2d at 465 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

II. COUNT I (REFORMATION)

Virginia has enacted Uniform Trust Code section 415 at Virginia Code section 64.2-733, which permits the Court to

> reform the terms of a trust even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

Va. Code § 64.2-733.[1] The section

> applies whether the mistake is one of expression or one of inducement. A mistake of expression occurs when the terms of the trust misstate the settlor's intention, fail to include a term that was intended to be included, or include a term that was not intended to be included. A mistake in the inducement occurs when the terms of the trust accurately reflect what the settlor intended to be included or excluded but this intention was based on a mistake of fact or law.

See Uniform Trust Code § 415 cmt (2023).

A. Count I sufficiently alleges a mistake of fact or law that may support reformation under Virginia Code section 64.2-733.

The Second Amended Counterclaim purports to plead a mistake in expression, that the terms of the Trust misstate the Settlors' intent. It alleges that the disposition of property set forth in the Trust is contrary to Donald's actual intentions, as expressed to others after the execution of the Second Amendment. *See* Second Am. Counterclaim ¶¶ 49-52. It further alleges that the Second Amendment was prepared by an attorney without substantial experience drafting trusts and estates documents, who made material errors in preparing the First Amendment. *See* Second Am. Counterclaim ¶¶ 16 & 90-91. It also alleges that the language set forth in the Second Amendment was drafted by Hauer and copied *verbatim* by the attorney who prepared the Second Amendment. *See* Second Am. Counterclaim ¶¶ 20-22.

These factual allegations give rise to an inference that a specific drafting error occurred by which the language of the Second Amendment did not conform to the Settlors' true intent.[2] Such

[1] A number of other states have enacted identically worded trust reformation statutes. *See, e.g.*, Ala. Code § 19-3B-415 (Alabama); Ariz. Rev. Stat. § 14-10415 (Arizona); D.C. Code § 19-1304.15 (District of Columbia); Fla. Stat. Ann. § 736.0415 (Florida); Kan. Stat. Ann. § 58A-415 (Kansas); Mich. Comp. Laws Serv. § 700.7415 (Michigan); Mo. Rev. Stat. § 456.4-415 (Missouri); Neb. Rev. Stat. Ann § 30-3841 (Nebraska); N.D. Cent. Code § 59-12-15 (North Dakota); Vt. Stat. Ann. tit. 14A, § 415 (Vermont); W. Va. Code § 44D-4-415 (West Virginia).

[2] Though the Second Amended Counterclaim sets forth no allegations regarding Chesley's intent in executing the Second Amendment, it is a reasonable inference that the intent of Donald and Chesley was similar in all material aspects. This is particularly true because Donald signed the Second Amendment on behalf of Cheasley, under a power of attorney. Second Am. Counterclaim ¶ 18. If the intent of Donald and Chesley was similar in all material aspects, then it is axiomatic that the intent of at least one Settlor of the Trust was not properly expressed in the Second Amendment; thus, the Settlors' "shared" intent could not possibly have been expressed.

an inference is a reasonable one, and, if proven by clear and convincing evidence, would demonstrate a mistake of fact in expression under Code section 64.2-733. *See Agnes M. Gassmann Tr. Wells Fargo Bank, N.A. v. Reichert*, 2011 ND 169, ¶ 8, 802 N.W.2d 889, 892 (2011) ("Evidence from the attorney who drafted the trust that a specific drafting error occurred and, as a result, the trust language did not conform to the settlor's true intent may, if believed by the trier of fact, constitute clear and convincing evidence sufficient to warrant reformation of the trust. Such testimony, if believed, is direct evidence of a mistake of fact in expression under N.D.C.C. § 59-12-15, [which is identical to Virginia Code section 64.2-733]."); *Antal v. Floyd*, No. 0257, 2015 Md. App. LEXIS 205, at *27 (2015) (holding that the incorrect inclusion of a "boilerplate" provision in a trust was a mistake in expression warranting reformation, under the D.C. Code section that is identical to Virginia Code section 64.2-733).

Accordingly, Count I of the Second Amended Counterclaim properly sets forth a mistake of fact or law sufficient to state a claim for reformation under Code section 64.2-733 and the demurrers on this basis must be OVERRULED.

B. To the extent that the Trust's *in terrorem* clause is alleged to bar the claim set forth in Count I, that assertion is an affirmative defense unreachable on demurrer.

The demurring parties have conceded that the assertion of an *in terrorem* clause to bar a claim is an affirmative defense. *See, e.g.,* Donna Hauer's Answer to the Counterclaim, filed on 9/15/2023.[3] Affirmative defenses "may not be raised in a demurrer, which tests only the facial validity of the allegations in a complaint rather than the validity of affirmative defenses." *Church of God in Christ, Inc.*, 297 Va. at 638 n.23, 831 S.E.2d at 479 n.23 (2019) (citing *Duggin v. Adams*, 234 Va. 221, 229, 360 S.E.2d 832 (1987)).

Accordingly, Haar's demurrer to Count I, asserting that the *in terrorem* clause bars Rebecca's claim for reformation, must be OVERRULED.

C. Whether Virginia's Dead Man's Statute would bar certain proof of the allegations set forth in the Counterclaim is a matter unreachable on demurrer.

"Virginia's Dead Man's Statute contains two distinct, but related, evidentiary rules applicable in actions by or against persons incapable of testifying or their representatives." *Shumate v. Mitchell*, 296 Va. 532, 546, 822 S.E.2d 9, 15 (2018). As such, it addresses the issue of what proof Counter-Plaintiffs may be able to present at trial. Such issues cannot be addressed by demurrer. *See, e.g., Augusta Mut. Ins. Co. v. Mason*, 274 Va. 199, 204, 645 S.E.2d 290, 293 (2007)

[3] The assertion of an *in terrorem* clause to bar a claim is an affirmative defense. *See also In re Estate of Maloy*, 2022 NY Slip Op 22100, ¶ 6, 75 Misc. 3d 390, 400, 167 N.Y.S.3d 719, 727 (Sur. Ct.) (in which an *in terrorem* clause in a will is raised as an affirmative defense); *In re Estate of Bollenbach*, 2018 NYLJ LEXIS 2726, at *6 (Sur. Ct. Aug. 10, 2018).

("A demurrer tests the legal sufficiency of facts alleged in pleadings, not the strength of proof. . .. .") (internal citations and quotation marks omitted).

Accordingly, Haar's demurrer to Count I on the assertion that Virginia's Dead Man's Statute may limit the proof that Rebecca is permitted to admit at trial is OVERRULED.

III. VIRGINIA LAW DOES NOT RECOGNIZE A SUIT BROUGHT BY A BENEFICIARY OF A TRUST, SUCH AS THAT ALLEGED IN COUNT II OF THE SECOND AMENDED COUNTERCLAIM, ASKING THE COURT TO PROVIDE AID AND DIRECTION TO THE TRUSTEE.

A fiduciary is permitted to seek the aid and direction of the Court in the performance of their duties. *See Wayland v. Crank's Ex'r*, 79 Va. 602, 607 (1884) ("Here the executor was himself an interested party, and as evidence of his desire to faithfully perform his duty, he sought, as he had a right to do, the aid and direction of a court of chancery."); *Gaymon v. Gaymon*, 63 Va. Cir. 264, 282 (Fairfax Co. 2003). In fact, in some cases, a fiduciary may have a duty to seek such assistance. *See Bremer v. Bitner*, 44 Va. Cir. 505, 512 (Fairfax Co. 1996) (citing *Morriss v. Virginia State Ins. Co.*, 90 Va. 370, 18 S.E. 843 (1893); *Hogan v. Duke*, 61 Va. (20 Gratt.) 244, 253 (1871)) ("[A] trustee [on a deed of trust] has a duty to seek the aid and direction of a court of equity before foreclosing if the amount of the debt is uncertain.").

As a fiduciary,[4] the trustee of a trust may, and in some cases must, file an aid and direction suit. *See, e.g., Schmidt v. Wachovia Bank, Nat'l Ass'n*, 271 Va. 20, 22, 624 S.E.2d 34, 35 (2006) (in which a bank sought the aid and direction of the court in determining the ownership interests in the remainder of two trusts); *Old Dominion Tr. Co. v. Geiger*, 56 Va. Cir. 522, 522 (Norfolk 2001) (in which the executor of certain estates and trustee of certain trusts requested the court's aid and direction as to how it should properly proceed in administering those estates and trusts). *See also Spencer v. McCleneghan*, 202 N.C. 662, 669, 163 S.E. 753, 757 (1932) ("A trustee finding himself embarrassed by uncertainty as to his duties or rights may under proper conditions apply to a court of equity for instructions and advice.") (quoting Lawrence on Equity Jurisprudence (1929), Vol. 1, part sec. 495, p. 569-70-71); *Passaic Trust & Safe Deposit Co. v. E. Ridgelawn Cemetery*, 101 A. 1026, 1027 (N.J. Ch. 1917) (citations omitted); *McCrum v. Lee*, 38 W. Va. 583, 591, 18 S.E. 757, 760 (1893) ("Nothing is more common, and nothing is better settled, than the right, and in a proper case the duty, of a trustee to invoke the aid and direction of a court of equity in the execution of his trust."). There appears to be no grounds upon which the beneficiary of a trust, who is not a fiduciary, may seek the aid and direction of the Court on behalf of the trustee.[5]

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[4] *See Rowland v. Kable*, 174 Va. 343, 3676 S.E.2d 633, 643 (1940) (noting the fiduciary nature of a trustee's duties); Restatement (Third) of Trusts § 2 (2003) ("A trust . . . is a fiduciary relationship with respect to property.").

[5] No case supporting such a claim has been cited to the Court; the Court has been unable to find any such case, in the Commonwealth of Virginia or elsewhere.

Accordingly, Haar's demurrer to Count II of the Second Amended Complaint must be SUSTAINED. Rebecca will be granted leave to amend Count II of the Second Amended Counterclaim within ten days after the date of this letter.

IV. COUNT III OF THE SECOND AMENDED COMPLAINT PROPERLY STATES A CLAIM FOR UNJUST ENRICHMENT.

"To recover for unjust enrichment, the plaintiff must prove that: (1) she conferred a benefit on the defendant(s); (2) the defendant(s) knew of the benefit and should reasonably have expected to repay the plaintiff; and (3) the defendant(s) accepted or retained the benefit without paying for its value." *Higgerson v. Farthing*, 96 Va. Cir. 58, 72 (Chesapeake 2017) (citing *Schmidt v. Household Fin. Corp., II*, 276 Va. 108, 116, 661 S.E.2d 834, 838 (2008). *See also T. Musgrove Constr. Co. v. Young*, 298 Va. 480, 486, 840 S.E.2d 337, 341 (2020) (citation omitted). "Typical examples of unjust enrichment involve a *payment or overpayment under a mistake of fact*, *Central Nat. Bank of Richmond v. First & Merchants Nat. Bank of Richmond*, 171 Va. 289, 311, 198 S.E. 883, 892 (1938), or the acceptance of services without a contract for those services. *See Po River Water & Sewer Co.*, 255 Va. 108, 115, 495 S.E.2d 478, 482 (1998) (unjust enrichment compelled payment for water and sewer services the association accepted and received)." *James G. Davis Constr. Corp. v. FTJ, Inc.*, 298 Va. 582, 591, 841 S.E.2d 642, 647 (2020) (emphasis added). *See also* Restatement (Third) of Restitution and Unjust Enrichment, § 5 (2011) ("A transfer induced by invalidating mistake is subject to rescission and restitution. The transferee is liable in restitution as necessary to avoid unjust enrichment.") and *Id.* at cmt. b ("A transfer induced by a misapprehension of fact or law is subject to avoidance unless, in the circumstances of the transaction, the claimant bears the risk of the mistake in question.").

Here, Rebecca and Brian allege the conveyance of a benefit (payment for improvements to real property) under a mistake of fact (the intent of the owners to give the property to Rebecca). Rebecca and Brian allege that: (1) they conferred a benefit upon the Settlors, by virtue of paying to improve and repair the Henderson Road Property; (2) the Settlors knew of the benefit and should reasonably have expected to repay Rebecca and Brian; and (3) the Settlors accepted the benefit without paying for its value. Second Am. Counterclaim ¶¶ 67-69 & 103-105. They further allege that the Settlors intended to give the Henderson Road Property to Rebecca following their deaths, Second Am. Counterclaim ¶¶ 36 & 61, and that their unjust enrichment claim asserted only "[i]n the event the Court, or jury, finds that Rebecca deeding the Henderson Road Property to herself is improper." Second Am. Counterclaim ¶¶ 66, 71, 101 & 107. They further characterize this claim as a "conditional [counter]claim for unjust enrichment to the extent [Hauer] prevails on her position [seeking to undo Rebecca's receipt of the Henderson Road Property]." Second Am. Counterclaim ¶¶ 71 & 107.

The Second Amended Counterclaim alleges that Rebecca and Brian paid to repair and renovate the Henderson Road Property because they believed that the Settlors intended to give the property to Rebecca upon their deaths. Second Am. Counterclaim ¶¶ 36 & 61. The Settlors' intent, at the time that the benefit was conferred upon them, constitutes a fact. *See, e.g., Lloyd v. Smith*, 150 Va. 132, 145, 142 S.E. 363, 366 (1928) ("It has been said that the state of the promisor's

mind at the time he makes the promise is a fact, and one which is exclusively within the promisor's own knowledge . . ..").

Considering all the factual allegations set forth in the Second Amended Counterclaim and the reasonable inferences arising therefrom, the Court concludes that Count III pleads that the Settlors did not intend to give the Henderson Road Property to Rebecca, alternatively[6] to the allegations of the remainder of the Second Amended Counterclaim's allegations that they did so intend.[7] It further alleges that Rebecca and Brian conveyed a benefit upon the Settlors based upon their mistake as to the Settlors' intent.[8] These allegations give rise to a claim for unjust enrichment.

Accordingly, the demurrers to Count III must be OVERRULED.

V. COUNT IV PROPERLY STATES A CLAIM FOR BREACH OF TRUST / BREACH OF FIDUCIARY DUTY THAT CANNOT BE DEFEATED ON DEMURRER BY THE IN TERROREM CLAUSE OF THE TRUST.

"A claim for breach of fiduciary duty requires proof of the general elements of duty, breach, causation, and damages." *Carstensen v. Chrisland Corp.*, 247 Va. 433, 444, 442 S.E.2d 660, 668 (1994). The Second Amended Counterclaim alleges that Hauer, as trustee of the Trust, owed

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[6] Virginia law provides that

> [a] party asserting either a claim, counterclaim, cross-claim, or third-party claim or a defense *may plead alternative facts and theories of recovery against alternative parties*, provided that such claims, defenses, or demands for relief so joined arise out of the same transaction or occurrence. Such claim, counterclaim, cross-claim, or third-party claim may be for contribution, indemnity, subrogation, or contract, express or implied; it *may be based on future potential liability*, and it shall be no defense thereto that the party asserting such claim, counterclaim, cross-claim, or third-party claim has made no payment or otherwise discharged any claim as to him arising out of the transaction or occurrence.

Va. Code § 8.01-281(A) (emphasis added).

[7] It is not that unusual for a party to claim unjust enrichment for improvements made to real property that they believed was going to be theirs. *See, e.g., ACA Fin. Guar. Corp. v. City of Buena Vista*, 298 F. Supp. 3d 834, 845-46 (W.D. Va. 2018) (in which plaintiffs pled unjust enrichment in the alternative in the event a particular deed of trust was found to be void); *Young v. Young*, 164 Wash. 2d 477, 481, 191 P.3d 1258, 1260 (2008) (in which an unjust enrichment counterclaim for improvements to real property was brought in response to, and conditioned upon, a claim to quiet title).

[8] Thus, the counterclaim is not conditioned upon the success of Hauer's attempt to invalidate the transfer of the Henderson Road Property to Rebecca but upon a mistake as to the Settlors' intent to give the property to Rebecca. It does not matter whether this mistake of fact was unilateral or mutual. *See* Restatement (Third) of Restitution and Unjust Enrichment, § 5 cmt. d ("The distinction drawn in the law of contracts between mutual and unilateral mistake has no direct application to the law of restitution.").

fiduciary duties to the beneficiaries of the trust. Second Am. Counterclaim ¶¶ 109-115. *See also Rowland v. Kable*, 174 Va. 343, 367 (1940) (noting the fiduciary nature of a trustee's duties); Restatement (Third) of Trusts § 2 (2003) ("A trust . . . is a fiduciary relationship with respect to property."). It alleges that Hauer breached those duties, Second Am. Counterclaim ¶¶ 116-117, and that Rebecca was damaged thereby. Second Am. Counterclaim ¶¶ 109-115.

Count IV thus states a cause of action for breach of trust / breach of fiduciary duty. The fact that Count IV incorporates paragraphs the other paragraphs of the Second Amended Complaint does not render it fatally flawed, as it states a cause of action and clearly informs the responding party of the true nature of the claim. *See, e.g., Allison v. Brown*, 293 Va. 617, 624, 801 S.E.2d 761, 765 (2017) ("Under Virginia's notice pleading regime,'[e]very pleading shall state the facts on which the party relies in numbered paragraphs, and it shall be sufficient if it clearly informs the opposite party of the true nature of the claim or defense.' Stated another way, a pleading must be 'drafted so that [the] defendant cannot mistake the true nature of the claim.'") (quoting Va. R. 1:4(d); *CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 24, 431 S.E.2d 277, 279 (1993)).

For the reasons stated in Section II(B), above, any bar to the claim created by the *in terrorem* clause of the applicable trust is unreachable on demurrer.

Accordingly, Haar's demurrer to Count IV must be OVERRULED.

CONCLUSION

The demurrers to Count I of the Second Amended Counterclaim are OVERRULED, because Count I properly alleges all elements of a claim for reformation, including a mistake of fact or law that may support reformation under Virginia Code section 64.2-733, that cannot be defeated on demurrer by the affirmative defense purportedly provided by the *in terrorem* clause of the Trust or an evidentiary rule such as the Dead Man's Statute. Haar's demurrer to Count II is SUSTAINED, with leave to amend within ten days, because the claim purportedly alleged in Count II is not recognized in law or equity. The demurrers to Count III of the Second Amended Counterclaim are OVERRULED, because Count III properly alleges the conveyance of a benefit under a mistake of fact and otherwise properly states a claim for unjust enrichment. Haar's demurrer to Count IV is OVERRULED because Count IV properly alleges a claim for breach of trust / breach of fiduciary duty that cannot be attacked on demurrer by the affirmative defense purportedly provided by the *in terrorem* clause of the Trust. An order consistent with this ruling accompanies this letter.

Sincerely,

[redacted]

Jonathan D. Frieden
2024.03.26 10:05:00-04'00'

Jonathan D. Frieden
Judge, Fairfax County Circuit Court

Enclosure

OPINION LETTER

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

DONNA HAUER, EXECUTRIX OF ESTATE OF CHESLEY L. CRUMP, *et al.*	)	
Plaintiff,	)	
v.	)	
REBECCA CRUMP, *et al.*	)	Case Nos. CL-2022-10907
Defendant.	)	

ORDER

THIS MATTER came before the Court on the demurrers to the Second Amended Counter-Claim and Cross-Claim for Reformation or in the Alternative an Interpretation of a Trust, a Conditional Claim for Unjust Enrichment, and a Breach of Trust (the "***Second Amended Counterclaim***") filed by Plaintiff / Counter-Defendant / Cross-Claim Defendant Donna Hauer and Defendant / Cross-Claim Defendant Robin Haar ("***Haar***") (together, the "***Demurrers***").

FOR THE REASONS SET FORTH IN THE COURT'S LETTER TO COUNSEL OF THIS DATE, it is hereby

ORDERED that:

1. Haar's demurrer to Count II of the Second Amended Counterclaim is SUSTAINED.

2. Counter-Plaintiffs are granted leave to amend Count II of the Second Amended Counterclaim within ten days after the entry of this Order. Counter-Defendants must serve their responsive pleading to the amended pleading within seven days after service thereof. If no

amended pleading is filed, Counter-Defendants must serve their responsive pleading to the Second Amended Counterclaim within 17 days after entry of this order.

3. As to all other Counts of the Second Amended Counterclaim, the Demurrers are OVERRULED.

ENTERED AS OF THE DATE AFFIXED WITH THE SIGNATURE BELOW.

[redacted]
Jonathan D. Frieden
2024.03.26 11:39:44-04'00'

Judge Jonathan D. Frieden,
Fairfax County Circuit Court

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA. EACH PARTY MAY FILE WRITTEN OBJECTIONS TO THIS ORDER WITHIN TEN DAYS AFTER ITS ENTRY.