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U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

MATTHEW P. DENN, Attorney General
of the State of Delaware,

Plaintiff,

CASE NO: 3:17-cv-50-J-2S PDB

v.

THE NEMOURS FOUNDATION, a
not-for-profit corporation organized
under the laws of Florida,

Defendant.

COMPLAINT FOR BREACH OF CONTRACT

Plaintiff, MATTHEW P. DENN, Attorney General of the State of Delaware (the “Delaware Attorney General”), brings this action against Defendant, THE NEMOURS FOUNDATION (“Nemours”), and alleges as follows:

Summary

1. This is an action for breach of contract brought under diversity jurisdiction. As detailed below, Nemours is a charitable organization established by the will of Alfred I. duPont for the care and treatment of children and elderly men and women. Formed in 1936 with a focus on Delaware residents, Nemours today funds healthcare services in Delaware, Florida, New Jersey, Maryland and Pennsylvania. In a 1980 Settlement Agreement, Nemours and the Delaware Attorney General agreed that “at no time will more than fifty percent (50%) annually of the funds distributed by the [Alfred I. duPont Testamentary Trust (the “Trust”)] to Nemours be spent outside the State of Delaware.” Despite this contractual

obligation, Nemours has repeatedly spent more than 50% of the Trust's annual distributions to Nemours in other States. In 2015 alone, Nemours' breach of the 50% requirement denied Delaware Beneficiaries (defined below) in excess of \$35 million in funds that should have gone to provide additional healthcare services within Delaware. Nemours' breaches have necessitated this action for damages and other relief.

Parties

2. The Delaware Attorney General is the lawful representative of the citizens of the State of Delaware and the Delaware Attorney General is a citizen of Delaware. The Delaware Attorney General is the proper legal representative of the Delaware Beneficiaries.

3. Nemours is a not-for-profit corporation organized under the laws of Florida, with its principal place of business located at 10140 Centurion Boulevard North, Jacksonville, Florida 32256. Nemours is a citizen of Florida.

Jurisdiction and Venue

4. This Court has diversity jurisdiction over this action pursuant to 28 U.S.C. § 1332(a)(1) because the action is between citizens of different states and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

5. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b) and (d) because Nemours resides in or can be found in this district and because a substantial part of the events or omissions giving rise to the claim set forth herein occurred in this district, among other reasons.

General Allegations

6. Alfred I. duPont was born and lived most of his life in Delaware.
7. Mr. duPont died testate in Florida on April 29, 1935.
8. Prior to his death, Mr. duPont executed his Last Will and Testament dated November 19, 1932, and amended it twice via codicils dated March 4, 1933, and January 15, 1935 (collectively, the “Will”).
 9. The Will was admitted to probate in Duval County, Florida, by Order of Probate dated May 24, 1935.
 10. Through his Will, Mr. duPont established the Trust, and directed that the first priority for use of the Trust funds is to maintain, preserve, and care for Mr. duPont’s Delaware home and surrounding gardens (the “Mansion and Gardens”), before any Trust income or principal could be used for any additional charitable purpose.
 11. Also through his Will, Mr. duPont directed that Nemours be created, that it be located near the Mansion and Gardens, and that the net income from the Trust corpus (the “Trust Distribution”) be used first to maintain, preserve, and care for the Mansion and Gardens, and thereafter by Nemours for the charitable purposes specified in the Will.
 12. Importantly, Mr. duPont directed in his Will that the needs of Delaware residents be the focus of Nemours. He directed that Nemours be maintained “as a charitable institution for the care and treatment of crippled children, but not of incurables, or the care of old men or old women, and particularly old couples, first consideration, in each instance, being given to beneficiaries who are residents of Delaware” (the “Delaware Beneficiaries”). Mr. duPont also directed that “the people of Delaware needing the care of such institutions

shall be properly provided for before contributions are made to institutions of any other state or states.”

13. Nemours’ healthcare network has grown substantially since its inception and now operates two children’s hospitals—one in Wilmington, Delaware (the “Delaware Children’s Hospital”), and another in Orlando, Florida—as well as children’s clinics and other healthcare facilities in several states, including Delaware, Florida, Pennsylvania, New Jersey, and Maryland.

14. In the years since the establishment of the Trust and Nemours, various parties have participated in litigation involving the Trust and Nemours’ expenditure of the annual Trust Distributions. On January 17, 1980, the Delaware Attorney General and Nemours, among others, entered into a settlement agreement in connection with litigation, styled *Ball v. Smith*, Circuit Court, Duval County, Florida, Case No. 79-1153, regarding the allocation of Trust proceeds (the “1980 Settlement Agreement”). On January 18, 1980, a Final Judgment was entered in the litigation adopting and incorporating the terms of the 1980 Settlement Agreement. A copy of the 1980 Settlement Agreement and the Final Judgment is attached hereto as Exhibit “A”.

15. The 1980 Settlement Agreement is a valid and enforceable contract.

16. The 1980 Settlement Agreement confirms that the Delaware Attorney General “is the representative of the Delaware charitable beneficiaries of the Alfred I. duPont Testamentary Trust and of the Nemours Foundation and ... is charged with protecting the rights of the said Delaware [B]eneficiaries.” 1980 Settlement Agreement at 1.

17. Among other things, the 1980 Settlement Agreement provides that “at no time will more than fifty percent (50%) annually of the funds distributed by the Trust to Nemours be spent outside the State of Delaware” (the “50% Requirement”). *Id.* at ¶ F(3). For purposes of this calculation, the amount of Trust Distributions is to be reduced by amounts spent in support of the Mansion and Gardens before assessing annual compliance with the 50% Requirement.

18. Based upon information set forth in Nemours’ financial statements and schedules, and other documents reporting on Nemours’ operations and performance, Nemours has breached the 1980 Settlement Agreement repeatedly by spending more than fifty percent (50%) of annual Trust Distributions outside the State of Delaware, resulting in a diversion of Trust funds intended to benefit the healthcare needs of Delaware residents.

19. Nemours’ breaches arise from a failure to accurately track, accurately allocate, and accurately report its expenditure of Trust Distributions. These failures, which have denied Delaware residents the benefits bestowed upon them by the 1980 Settlement Agreement and the Will, include:

- a. using a portion of Delaware’s share of the annual Trust Distributions in and for the benefit of states surrounding, but not including, Delaware such as Pennsylvania, New Jersey, and Maryland, and attributing those expenditures to “Delaware Operations;”
- b. using a portion of Delaware’s share of the annual Trust Distributions to pay administrative expenses benefitting states other than Delaware, including the cost of senior executives located in Nemours’

- Jacksonville headquarters, enterprise-wide strategy development, and certain professional liability expenses, while attributing a disproportionately large percentage of those expenses to Delaware;
- c. failing to consistently and accurately account for profits and positive cash flows generated by the Delaware Children's Hospital, and other Delaware positive cash flows, when determining what percentage of annual Trust Distributions were actually "spent outside the State of Delaware."

20. In addition, Nemours has provided financial information in a manner that has obscured Nemours' breaches of the 50% Requirement. In past years, the financial information on Nemours' operations and performance that Nemours provided to the Delaware Attorney General, through its member Trustees, has been incomplete, inconsistent, and inaccurate. As one example, financial reports provided to the Delaware Attorney General purport to state the percentage of Trust Distributions spent on "Delaware Operations"; however, in the past those amounts have included expenditures in the States of Pennsylvania, New Jersey, and Maryland in addition to the State of Delaware.

21. The Delaware Beneficiaries have been damaged by Nemours' breaches of the 50% Requirement. The Delaware Beneficiaries are entitled to recover the damages they suffered within the applicable statute of limitations period, which is an amount that greatly exceeds \$75,000, exclusive of interest and costs.

22. For example, for the year 2015 alone, based on analysis of information contained in Nemours' "Combined Financial Statements and Schedules" for 2015, and

reasonable assumptions and estimates based on past information, Nemours spent at least \$35 million less in the State of Delaware than it was required to spend in order to comply with the 50% Requirement.

23. On information and belief, Nemours is continuing to breach the 50% Requirement and, absent corrective action, is likely to continue to breach the 50% Requirement going forward.

24. All conditions precedent to the commencement of this action have either been performed, have occurred, or have been waived.

WHEREFORE, Matthew P. Denn, Attorney General of the State of Delaware, prays that this Court enter a judgment:

- a. awarding damages in favor of the Delaware Attorney General, for the benefit of the Delaware Beneficiaries, and against Nemours for Nemours' breaches of the 1980 Settlement Agreement, in an amount to be determined at trial, together with interest and costs;
- b. ordering prospectively that Nemours refrain from further breaches of the 1980 Settlement Agreement; and
- c. ordering such other and further relief as this Court deems just and proper.

Dated: January 13, 2017

Respectfully submitted,

AKERMAN LLP

By: /s/ John B. Macdonald

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