

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

Curtis, et al	§	
Plaintiffs	§	
	§	Civil Action No. 4:16-cv-01969
v	§	
	§	The Honorable Alfred Bennett
Kunz-Freed, et al	§	
Defendants	§	

**PLAINTIFFS’ ANSWER TO DEFENDANT BERNARD MATHEW’S FEDERAL RULE  
OF CIVIL PROCEDURE 12(b)(1) and 12(b)(6) MOTION TO DISMISS**

**CONTENTS**

II.	INTRODUCTION .....	2
III.	NATURE AND STAGE OF THE PROCEEDING.....	3
IV.	SUMMARY OF THE CASE.....	3
V.	STATEMENT OF THE ISSUES.....	5
VI.	PLAINTIFFS REPLY .....	5
	Not a Probate Matter .....	6
	The Lis Pendens .....	7
	Mathews email to Bayless: Let’s move this to Probate.....	8
VII.	AMENDMENT AND ADOPTION BY REFERENCE.....	8
VIII.	CONCLUSION.....	9

**Cases**

<u>Marshall v Marshall</u> 547 U.S. 293, 126 S. Ct. 1735, 1736.....	6
---	---

**Statutes**

18 U.S.C. §1962(c) .....	2
18 U.S.C. §1962(d).....	2

18 U.S.C. §1964(c) ..... 3

**Rules**

Federal Rule of Civil Procedure 12(b)(1) ..... 3

Federal Rule of Civil Procedure 12(b)(6) ..... 2

1. Plaintiffs filed 18 U.S.C. 1962(c) and 18 U.S.C. 1962(d) claims along with civil rights, common law breach of fiduciary and other claims on July 5, 2016.

2. On November 2, 2016, Defendant Bernard Lisle Mathews III filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and Federal Rule of Civil Procedure 12(b)(6). (Dkt 81)

**I. INTRODUCTION**

3. In its purest form this lawsuit is about property and the intentions of Elmer and Nelva Brunsting that their worldly possessions pass to their issue without conflict, complications, or excess costs. In pursuit of that goal Elmer and Nelva Brunsting purchased a trust and estate plan package as both a product and a service of Albert Vacek, Jr.

4. According to assurances that Vacek gives his customers, his trust package was supposed to avoid what Vacek calls “the three evils”. Those evils include “probate”, “guardianship” and “taxes”.

5. Vacek partner, Candace Kunz-Freed, began drafting instruments undermining the Brunsting trust as soon as Elmer Brunsting weakened (see Dkt 26-11 and 26-14) and then continued the erosion with each subsequent “Hurrah”<sup>1</sup>, the next being the encephalitis and coma suffered by Carl Brunsting.

---

<sup>1</sup> In legal parlance a.k.a. a “qualifying event”

## II. NATURE AND STAGE OF THE PROCEEDING

6. Plaintiffs in the above titled action, brought 18 U.S.C. §1964(c) Racketeer Influenced Corrupt Organization and other claims, both individually and as private attorneys general on behalf of the public trust, on July 5, 2016 in the Southern District of Texas.

7. On November 2, 2016, Defendant Bernard Mathews filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and Federal Rule of Civil Procedure 12(b)(6). (Dkt #81).

## III. SUMMARY OF THE CASE

8. Plaintiff Candace Louise Curtis (Curtis) lives in California and is a beneficiary of inter vivos trusts having a situs in Houston, Texas. Other beneficiaries of the trusts include Plaintiff Curtis' siblings: Carl, Carole, and Defendants Amy and Anita Brunsting, and also includes the remaindermen grandchildren and great grandchildren of Grantors Elmer and Nelva Brunsting, et al., per stirpes.

9. In 1996, Plaintiff Curtis' parents, Elmer Brunsting and Nelva Brunsting, created the original Brunsting Family Living Trust for their benefit, for the benefit of their five primary issue and for the benefit of the remaindermen grandchildren and great grandchildren. (Dkt 33-1)

10. The Brunstings restated their Trust in 2005 (Dkt 33-2) and amended the restatement in 2007. (Dkt 33-3)

11. Elmer Brunsting was declared incompetent in June 2008 and passed on April 1, 2009.

12. At the death of Elmer Brunsting the inter vivos "family" trust became irrevocable and divided its assets among an irrevocable decedent's trust and a revocable survivor's trust. (Dkt 33-2, Articles III and VII)

13. Nelva Brunsting passed on November 11, 2011 and a number of instruments surfaced that had been drafted after Elmer Brunsting became incompetent and after he passed, claiming changes had been made to irrevocable trusts. The 8/25/2010 QBD (Dkt 26-14)<sup>2</sup> (also called the extortion instrument) and the several appointments of successor trustee are just such instruments (Dkt 26-14)<sup>3</sup>

14. The acting trustees, Anita and Amy Brunsting, conducted themselves in complete secrecy. After Nelva Brunsting passed they refused to answer, account or provide disclosures and after two unsuccessful demand letters<sup>4</sup> advising Anita and Amy Brunsting to do the right thing, Plaintiff Curtis brought suit in the Southern District of Texas.

15. On March 6, 2012, Defendant Bernard Matthews filed an “emergency motion” for removal of lis pendens.<sup>5</sup> In the opening paragraph of his "emergency motion" Defendant Bernard Mathews states:

*[Note: This Motion is brought subject to the Trustees contention that this Court lacks subject matter jurisdiction due to the fact that Texas Probate Code §115.001 (7) confers exclusive jurisdiction over matters related to questions “arising in the administration or distribution of a trust” to the State District Court, and by analogy this case should not be considered under the Probate Exception to Federal Court Jurisdiction, Marshall v. Marshall, 126 S.Ct. 1735, 1748 (2006). These issues will be raised by a separate Motion to Dismiss under FRCP 12(b)]*

16. Mathews also attached a perjured affidavit signed and sworn to by Amy Brunsting to his March 6, 2012 “emergency motion”<sup>6</sup> and on March 8, 2012, Curtis’ complaint was dismissed sua

---

<sup>2</sup> This instrument was the subject of Defendant Amy and Anita Brunsting’s No-evidence Motion for Partial Summary Judgment (Dkt 26-5), and Curtis answer and demand to produce evidence. (Dkt 26-11)

<sup>3</sup> This is Plaintiff Curtis 20 page Motion for Partial Summary and Declaratory Judgment with numerous exhibits that remains unanswered by Defendants Anita and Amy Brunsting.

<sup>4</sup> Case 4:12-592 Exhibits 17 and 20 in the original federal complaint (4:12-cv-592 Dkt 1 at pages 67-68, and 71-79 respectively.

<sup>5</sup> Case 4:12-cv-592 Document 10 Filed in TXSD on 03/06/12

<sup>6</sup> Case 4:12-cv-592 Documents 10 and 10-1, Filed in TXSD on 03/06/12

sponte under the Probate Exception to Federal Diversity Jurisdiction, due to the Court's reliance upon the assertions made by officer of the Court, Bernard Mathews.

#### **IV. STATEMENT OF THE ISSUES**

1. Plaintiffs do not have an actual case or controversy with Mathews;
2. Plaintiffs do not state a claim against Mathews;
3. Mathews only handled an emergency motion for removal of lis pendens;
4. Mathews has immunity from civil accountability to his tort victims because he is an attorney.

#### **V. PLAINTIFFS' REPLY**

17. Candace Curtis v Anita and Amy Brunsting (4:12-cv-592) began in the federal Court in the Southern District of Texas on February 27, 2012, seeking equitable relief in the form of accountings, answers to information requests and monetary damages for known acts and omissions.

18. Plaintiff Curtis' original lawsuit alleged that all the information in the case was uniquely in the possession of the Defendants and included an affidavit with exhibits showing exactly where the case was at that point in time.

19. The federal Court dismissed an application for injunction filed with the original complaint due to want of service on the Defendants, and in the Order the Court expressed concern over whether or not the Court had subject matter jurisdiction. (4:12-cv-592 Dkt 8)

20. Defendant Bernard Mathews appears to have intentionally manipulated the Court's previous expression of concern over whether the Court had subject matter jurisdiction, knowingly misstating Texas Property Code §115.001 to be the Probate Code, and then

bootstrapping a Route Test theory that was very harshly reversed by the Supreme Court on the second page of the *Marshall v. Marshall* opinion he cited as his authority.<sup>7</sup>

*“Nevertheless, the Ninth Circuit in the instant case read the probate exception broadly to exclude from the federal courts' adjudicatory authority "not only direct challenges to a will or trust, but also questions which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument." 392 F.3d 1118, 1133 (2004). The Court of Appeals further held that a State's vesting of exclusive jurisdiction over probate matters in a special court strips federal courts of jurisdiction to entertain any "probate related matter," including claims respecting "tax liability, debt, gift, [or] tort." Id., at 1136. We hold that the Ninth Circuit had no warrant from Congress, or from decisions of this Court, for its sweeping extension of the probate exception". Marshall v Marshall 547 U.S. 293, 126 S. Ct. 1735, 1736*

21. Curtis and Munson spent the next 14 months on an appeal before returning to the federal Court, more than four years ago. For this Court's perusal, Plaintiffs attach the "Appellants Opening Brief on Appeal", as it speaks directly to the root of matters presently before this Honorable Court. (Exhibit 1)

22. Defendant Mathews is currently listed as a staff attorney on the vacek.com web site (Exhibit 2) and was listed as a staff attorney with Vacek and Freed when he filed his disingenuous motion under the letterhead of Green and Mathews (4:12-cv-592 Dkt 10).

**1. Not a Probate Matter**

23. Plaintiff Curtis' federal appeal distinguished the Brunsting Trust from the Brunsting Estate.

24. According to the Fifth Circuit, the Brunsting Trusts are not assets belonging to any estate and are not subject to probate administration.

25. On March 2, 2012, a mere four days before his "emergency motion", Mathews filed a complaint in the Harris County District Court, on behalf of Plaintiff Reginald Parr. *Reginald D.*

---

<sup>7</sup> *Marshall v Marshall 547 U.S. 293, 126 S. Ct. 1735, 1736*

*Parr vs. Sherry Evon Dunegan CA 201213022*. In that case Mr. Parr was suing Ms. Dunegan for breach of fiduciary in the administration of a Texas trust drawn up by the law firm of Vacek and Freed.

26. It would necessarily follow that an attorney preparing a complaint for the Harris County District Court, involving a substantively identical case to that of Plaintiff Curtis, would know that trusts are not heard exclusively in the probate court, and would know the difference between the Property Code and the Estate Code (which Mathews called the "Probate Code").

27. If Mathews read the Supreme Court opinion in *Marshall v. Marshall* before citing to that authority and signing his pleading, he would also know his Route Test assertions were patently disingenuous.

## **2. Lis Pendens**

28. Defendants filed their "emergency" motion claiming to be trustees; that the property to which the lis pendens related was to be liquidated in order to distribute proceeds to the heirs, and that Plaintiff's only intent was to frustrate that sale.

29. The lis pendens at issue was amongst the papers filed with the Court, but was never on file with the County Recorder as to frustrate any sale.

30. The house itself was sold like it was on fire and neither Plaintiff Curtis nor siblings Carl or Carole have ever received any distribution of proceeds from the sale of that house.

31. After Bernard Mathew's "Emergency Motion" resulted in the improper dismissal of Plaintiff Curtis' action, Mathews immediately interfered with all three of Curtis' subpoenas for records, including the email records of Nelva Brunsting, Exxon Stock transfer records from Computershare, and Bank of America transaction records, all of which loom large in rebutting Anita and Amy's fact claims.

**3. Mathew's Email: "Intend to Move this to Probate"**

32. Subsequent to the dismissal of Plaintiff Curtis' federal lawsuit, Mathews emailed Bobbie Bayless, Carole Brunsting and Candace Freed, providing accounting spreadsheets that were shockingly revealing.

33. This email (Exhibit 3) was the first real indication of what is later revealed to be a concerted effort, with the sole purpose of converting Plaintiff Curtis' trust related breach of fiduciary claims into estate claims.

34. Mathews, and every other defendant attorney, has actively engaged in trying to accomplish what Vacek assures his customers his estate plans will avoid, "probate".

**VI. AMENDMENT AND ADOPTION BY REFERENCE**

35. Pursuant to the authority provided by Federal Rule of Civil Procedure 10(b) and 15(a)(1), Plaintiffs hereby adopt and incorporate by reference into Plaintiffs' original complaint (Dkt 1), the Addendum of Memorandum and the pleadings subsumed therein, (Dkt 26) and all of Plaintiffs' Replies to Defendants Motions, as if fully expressed in said Complaint, including but not limited to Docket entries 33, 34, 41, 45, 57, 61, 62, 65, 69, 85. this reply and the attached exhibits, as if fully expressed therein;

36. Plaintiffs further adopt by reference all of the Defendants' Motions and pleadings, the claims stated therein and the exhibits attached, as exhibits in support of Plaintiffs' Complaint, including but not limited to Docket entries 19, 20, 23, 25, 30, 35, 36, 38, 39, 40, 53, 78, 79, 81, 83, and 84, as if fully attached as exhibits thereto.



## VII. CONCLUSION

37. Bernard Mathew's "Emergency Motion" was disingenuous in its expressions of both law and fact, and was filed for the improper purpose of manipulating the Court's stated hesitancy over whether or not it had subject matter jurisdiction, thus achieving an improper dismissal.

38. This conduct multiplied the litigation for Plaintiff Curtis resulting in a 14-month delay and additional costs, and has exacerbated injury to the beneficiaries and the Brunsting Trust res.

39. Bernard Mathew's participation appears innocuous in a context vacuum, however, in hindsight, that conduct would appear to be part and parcel of the scheme and artifice to deprive.

40. Plaintiffs do have an actual controversy with Vacek and Freed staff attorney Bernard Mathews and have specifically articulated adequate in-concert aiding and abetting events and conspiracy claims that include Mr. Mathews.

41. Whether or not Mr. Mathew's conduct can be regarded as conduct normally associated with his role as an attorney in the larger view, is a valid subject for judicial consideration.

42. The entire Brunsting family has been victimized by this long con scheme fashioned by Albert Vacek Jr. and furthered by a probate court protected bully mob.

43. Only attorneys stand to benefit from embroiling the Brunsting siblings in probate court where nothing can, has been, or will be resolved without an agreement involving a flow of private wealth to public actors, with no judicial resolution of any substantive issues.

44. Bernard Mathews, and every other attorney involved in this dispute since, has demonstrated an intention to interfere with the Brunsting Beneficiaries' Trust Property interests under the guise of administering a probate estate, and have interfered with those interests.

Wherefore, Plaintiffs move this Honorable Court for an Order denying the Rule 12(b)(6) and Rule 12(b)(1) Motion to Dismiss filed by Defendant Bernard Mathews November 2, 2016, and hold Mr. Mathews to answer.

Respectfully submitted,

/s/ Candace L. Curtis  
Candace L. Curtis

/s/ Rik W. Munson  
Rik W. Munson

**Certificate of Service**

I hereby certify that a true and correct copy of the foregoing was filed into Civil Action No. 4:16-cv-01969 and served on this 23rd day of November, 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/ Rik W. Munson  
Rik W. Munson