

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 GREGORY LESTERS' MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(B)(6)**

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**I. Introduction**

1. On July 5, 2016, Plaintiffs filed a complaint into the Southern District of Texas, individually and as private attorneys general, alleging a public corruption conspiracy under the Racketeer Influenced Corrupt Organization Act, 18 U.S.C. §§1961-1968, and the right of private claims provided for at 18 U.S.C. §1964(c). (Dkt 1)

2. On November 7, 2016, Defendant Gregory Lester filed a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6). (Dkt 83)

## **II. The Issues**

- A. Plaintiffs have not adequately pleaded the necessary predicate acts.
- B. The Plaintiffs have not stated a RICO claim under section 1962(c).
  - 1. Plaintiffs have failed to adequately plead with particularity their fraud-based predicate acts as required by Federal Rule 9(b).
  - 2. Plaintiffs have failed to plead reliance in connection with their fraud related claims.
- C. Plaintiffs have failed to plead a cognizable RICO enterprise.
  - 1. Plaintiffs have failed to plead reliance in connection with their fraud related claims.
  - 2. Plaintiffs' enterprise allegations are too vague and conclusory.
  - 3. Plaintiffs' alleged enterprise lacks continuity.
- D. Plaintiffs have failed to adequately plead a pattern of racketeering activity.
- E. The Plaintiffs have not stated a RICO claim under section 1962(d).
  - 1. Plaintiffs' claims should be dismissed because Plaintiffs' allegations do not satisfy RICO's proximate cause standard.
- F. Plaintiffs' claims for "Hobbs Act," "wire fraud," "fraud under 18 U.S.C. §1001" and "Honest Services" fail because those statutes do not create private causes of action.
  - 1. The Hobbs Act does not create a private cause of action.
  - 2. The Wire Fraud statute does not create a private cause of action.
  - 3. The claim for "Fraud under 18 U.S.C. §1001" is not a private cause of action.
  - 4. The claim for "Honest Services" is not a private cause of action.
  - 5. Plaintiffs rely on impermissible collective pleading.

### III. Plaintiffs' Argument

3. Defendant challenges the sufficiency of the RICO Complaint on all of the usual substantive ground, in every subdivision of the nine necessary pleading elements for 18 U.S.C. 1962(c) and 18 U.S.C. 1962(d) claims, but fails to consider the ambit of federal “aiding and abetting” and “conspiracy” statutes.

4. Defendant asks the Court to take a disjointed view of the mosaic as if its parts were somehow unrelated, but Defendants are each charged with “participation” in the affairs of an enterprise through “in-concert aiding and abetting”. Plaintiffs need only show that Defendant performed an act in furtherance of the goals of the enterprise.

#### **Participation**

5. Gregory Lester is charged with participation in the affairs of an enterprise through a pattern of racketeering activity involving the commission of two or more predicate acts. Mr. Lester’s Motion admits there are almost fifty predicate acts claims, but argues that none specifically relate to him.

6. Mr. Lester’s Motion actually admits to his participation and, while claiming Plaintiffs’ Addendum of Memorandum is “replete with inaccuracies”, Mr. Lester’s introduction claims Plaintiff Candace Curtis is a disgruntled sibling in a probate case.

7. The record will show that Candace Curtis is a Plaintiff in a federal breach of fiduciary lawsuit, involving only the Brunsting Trusts<sup>1</sup> (Exhibit 1), that the case was dismissed under the probate exception, (Exhibit 1 entry 14) and appealed to the Fifth Circuit Court of Appeals,

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<sup>1</sup> Curtis v Brunsting 4:12-cv-592 filed TXSD 2/27/2012 and 704 F.3d 406.

(Exhibit 1 entry 16) where the dismissal was reversed and remanded back to the U.S.D.C. (Dkt 34-4)<sup>2</sup>

8. Back in the U.S.D.C. “Plaintiff Curtis” obtained a preliminary injunction to prevent wasting of trust assets.<sup>3</sup> On that very same day, federal Plaintiff Candace Curtis was named a “Nominal Defendant” in a state probate court suit styled “Carl Henry Brunsting Individually and as Executor for the Estates of Elmer and Nelva Brunsting”, (Dkt 33-6) hereinafter “The Probate Matter”.

9. “The Probate Matter” raises only claims relating to the Brunsting Trusts. It should be noted that the Brunsting Trusts were in the custody of a federal Court when the state court claims were filed.

10. The record will also show that Defendant Jason Ostrom filed an unopposed motion to remand Curtis v Brunsting to state probate court, to be consolidated with the “Estate of Nelva Brunsting” 412,249, where federal “Plaintiff Curtis” was named “Defendant Curtis”.

11. Curtis v Brunsting, in the Fifth Circuit, soured the market for looting inter vivos trusts under the pretext of probate administration and these Defendant “legal professionals” are a bunch of disgruntled members of a probate bully mob seeking vengeance for being on the losing end of a fully litigated Federal Fifth Circuit determination, that inter vivos trusts are not assets of a probate estate and are not subject to their degenerate version of probate administration.<sup>4</sup>

12. Mr. Lester’s participation involved drafting a false report for a purpose other than that for which it was authorized and Mr. Lester’s participation is easily shown by the documented sequence of events and his own admissions.

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<sup>2</sup> Also Docket entry 24 in Curtis v Brunsting 4:12-cv-592

<sup>3</sup> Curtis v Brunsting 4:12-cv-592 Docket entry 40 (Dkt 26-2 in this case)

<sup>4</sup> See the Brunsting Wills (Dkt 41-3 and 41-4)

#### **IV. The Report of Temporary Administrator Gregory Lester**

13. The “Report of Temporary Administrator Pending Contest”, (Dkt 83-2) was filed in the “Estate of Nelva Brunsting” 412249 on January 14, 2016.

14. The “Report” is not a report but a caricature of the racketeering conspiracy itself. It is a confession of the intention of all of these Defendants, as exemplified by the public record, to redirect the Brunsting inter vivos trust assets into a probate court, where there is not, and has never been, in Rem jurisdiction over the Brunsting Trusts.

15. The manifest purpose for the “Report” was to further the artifice initiated by Bayless when she filed exclusively trust related lawsuits in state courts, in the name of an estate, on January 29, 2013 and April 9, 2013.

16. Gregory Lester and Jill Willard Young agreed to further that plan on and before September 10, 2015<sup>5</sup>. Part of that scheme was to bully the beneficiaries of the Trusts into a sham mediation, staged for the sole purpose of extracting attorney fees from the Brunsting Trusts. (Dkt 26-16)

17. The “Report”, when compared to the record, displays numerous misstatements and contradictions, while merely posing as a report on the validity of “Estate” claims, as hereinafter more fully appears.

18. The “Report” never once mentions the Wills of Elmer or Nelva Brunsting and never once identifies an heir nor any assets belonging to the “Estates”.

19. In evaluating the “Estate” claims, the substance of the “Report” mentions Trustees and the Brunsting Trusts one-hundred fifty-five (155) times, while the words “Estate” (7) and probate (17) appear only in non-substantive contexts.

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<sup>5</sup> This is the hearing referred to by Defendant Neal Spielman on March 9, 2016 (Dkt 26-16) and Plaintiffs have been unable to obtain a transcript or an explanation from Mr. Baiamonte for the lack thereof.

20. It has already been shown that the approved inventories (Dkt 41-7) contain only one-half of an old car and the pending claims against Candace Freed in the District Court, but neither is mentioned in the “Report”.

21. The “Report” never mentions the merits of the “Estate” claims, but focuses entirely on claims relating to beneficiaries of the heir-in-fact “Trust”, which had already been held in the Fifth Circuit not to be property belonging to the “Estates”. (Dkt 34-4)

22. It should also be noted that administration of both Estates had been dropped on April 4, 2013, (Dkt 41-5 and 41-6) just five days before “The Probate Matter” involving only the Brunsting Trusts was filed. (Dkt 34-7)

23. In the Addendum to the report, later filed by Mr. Lester, (Exhibit 2) he states the following (emphasis added):

**Trustees of the Brunsting Family Living Trust**

*On July 1, 2008 an Appointment of Successor Trustees was executed by Nelva Erleen Brunsting, also known as Nelva E. Brunsting, pursuant to Article IV. Section B. of the Brunsting Family Living Trust. This document appointed Carl Henry Brunsting and Anita Kay Brunsting as successor co-trustees if Nelva E. Brunsting fails or ceases to serve. If either Carl Henry Brunsting or Anita Kay Brunsting should fail or cease to serve, then the remaining successor trustee would serve alone. If neither successor co-trustee is able or willing to serve, then **The Frost National Bank** shall serve as the sole successor trustee. A copy of the Appointment of Successor Trustees is attached hereto as the first exhibit to first supplement.*

24. What the instrument actually says is (emphasis added):

*“If a successor Co-Trustee should fail or cease to serve by reason of death, disability or for any other reason, then the remaining successor Co-Trustee shall serve alone. However, if neither successor Co-Trustee is able or willing to serve, then **CANDACE LOUISE CURTIS** shall serve as sole successor Trustee. In the event **CANDACE LOUISE CURTIS** is unable or unwilling to serve, then **THE FROST NATIONAL BANK** shall serve as sole successor Trustee.”*

**Defendant Exhibit A**

25. Defendant's Exhibit A (Dkt 83-1) is the Order Appointing Temporary Administrator Gregory Lester.

26. The appointment was made pursuant to Estates Code 452.051 which reads:

*SUBCHAPTER B. TEMPORARY ADMINISTRATION PENDING CONTEST OF A WILL OR ADMINISTRATION*

*Sec. 452.051. APPOINTMENT OF TEMPORARY ADMINISTRATOR. (a) If a contest related to probating a will or granting letters testamentary or of administration is pending, the court may appoint a temporary administrator, with powers limited as the circumstances of the case require.*

*(b) The appointment may continue until the contest is terminated and an executor or administrator with full powers is appointed.*

*(c) The power of appointment under this section is in addition to the court's power of appointment under Subchapter A.*

*Added by Acts 2009, 81st Leg., R.S., Ch. 680 (H.B. 2502), Sec. 1, eff. January 1, 2014.*

*Amended by:*

*Acts 2015, 84th Leg., R.S., Ch. 949 (S.B. 995), Sec. 44, eff. September 1, 2015.*

27. In the Order the Probate Court found that it had jurisdiction and venue over the Decedent's Estate and appointed Mr. Lester "Temporary Administrator" with limited powers to evaluate all claims filed against 1) Candace Freed 2) Anita Kay Brunsting, 3) Amy Ruth Brunsting, and 4) Carole Ann Brunsting, (Dkt 83-1 Numbered paragraph 1) and report to the Court regarding the merits of those claims.

28. The cestui que (beneficiary) is "the Trust" and the Trust is the only heir-in-fact to the Estates. Assets in the inter vivos trusts are not property belonging to the Estates and do not come within the purview of "probate administration".<sup>6</sup>

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<sup>6</sup> Curtis v Brunsting 704 F.3d 406, 410 (Jan 2-13)

29. Does the “Estate” have standing to bring claims against beneficiaries for trespass against the cestui que trust, committed during the life of a Grantor, or do those claims belong to the beneficiaries and the heir-in-fact Trust?

30. This question was settled in the Fifth Circuit in connection with the very Trusts at issue here, but was never considered in the report on the merits of any “Estate” claims.

#### **V. The Report and the Extortion Instrument**

31. The “Report” contains numerous assertions that misapplications of fiduciary are benign, justified, or can simply be “equalized” with more distributions of Brunsting Trust assets.

32. The “Report” ultimately concludes that if the Court were to rule on the “No Contest Clause” in the 8/25/2010 QBD, Curtis and her brother Carl would take nothing from the litigation.

33. The “Report” does not mention the controversy regarding the instrument, (Dkt 26-5 and 26-11) or which of the three alleged versions he selected for what reasons, or how it stretches beyond the limits stated in the report to reach to the irrevocable, un-amendable Trusts, or how any of that relates to property belonging to an Estate.

34. The “Report” contains warped conclusions, and while paraphrasing the irrevocable and unamendable trust provisions, the “Report” ultimately determines that changes alleged to have been made by Nelva alone were proper, “unless it can be shown Nelva was incompetent”. (Dkt 83-2 page 10)

35. The facts of record are that Nelva wrote to Candace Curtis in her own hand verifying that what Anita and Amy claim Nelva said and did (through the 8/25/2010 QBD) is “not true”. (Exhibit 3)



36. Nelva was not incompetent, the laws of the Trusts do not allow changes to be made by Nelva alone, no court of competent jurisdiction changed the trusts, and Nelva's state of mind at the time changes were made is irrelevant.

#### **VI. Amendment and Adoption by Reference**

37. 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, 86, this reply, and the attached exhibits, as if fully expressed therein.

38. Plaintiffs further adopt and incorporate 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**

39. Plaintiffs have more than adequately pled person, enterprise, conspiracy, pattern and fraud with the necessary particularity, and with each response to Motions to Dismiss, Plaintiffs establish participation and continuity more fully.

40. Defendant may not assert opposing claims of fact under federal Rule 12(b)(6).

41. None of the Brunsting siblings are heir to the estates of Elmer or Nelva Brunsting, none have challenged either Will, and none have individual standing in the "Estates of Elmer or Nelva Brunsting". (Dkt 41-3 and 41-4)

42. Assets in the Brunsting inter vivos trusts are not assets belonging to any “Estate” and are not subject to probate administration. (Dkt 34-4) The Executor of the Estates has no standing to bring “Estate” claims relating to the inter vivos trusts in any probate court.

43. Curtis v Brunsting 4:12-cv-592 is a lawsuit involving only the Brunsting Trusts<sup>7</sup>.

44. Upon the death of Elmer Brunsting the family trust not only became irrevocable, but it became unamendable, and the Decedent’s Trust was created both irrevocable and unamendable. The only exception is “Court of Competent Jurisdiction”. The Brunsting trusts could not even be decanted without court intervention and were not lawfully decanted, amended or revoked.

45. There is no 8/25/2010 QBD as a matter of law and nothing in the Lester report can be defended against the record of proceedings or the law of the trust.

46. Gregory Lester should be held to defend his “Report” under oath, just as all of these Defendants should.

WHEREFORE, Plaintiffs respectfully move this Honorable Court for an Order denying the Motion to Dismiss filed by Defendant Gregory Lester November 7, 2016. (Dkt 83)

Respectfully submitted,

November 27, 2016,

/s/Candace L. Curtis  
Candace L. Curtis

/s/Rik W. Munson  
Rik W. Munson

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<sup>7</sup> Curtis v Brunsting 704 F.3d 406 (Jan. 2013)

**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 27<sup>th</sup> day of November 2016, through the Court's CM/ECF system, which constitutes service on all parties.

/s/Candace L. Curtis  
Candace L. Curtis

/s/Rik W. Munson  
Rik W. Munson