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CAUSE NO. 2013-05455

CARL HENRY BRUNSTING, INDEPENDENT EXECUTOR OF THE ESTATES OF ELMER H. BRUNSTING AND NELVA E. BRUNSTING	§	**IN THE DISTRICT COURT OF**
V.	§	**HARRIS COUNTY, TEXAS**
CANDACE L. KUNZ-FREED AND VACEK & FREED, PLLC f/k/a THE VACEK LAW FIRM, PLLC	§	**164TH JUDICIAL DISTRICT**

DEFENDANTS' RESPONSE TO PLAINTIFF'S NOTICE OF VACANCY OF PARTY AND MOTION TO ABATE PROCEEDING, DEFENDANTS' MOTION FOR SANCTIONS, AND REQUEST FOR ORAL HEARING

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Defendants Candace L. Kunz-Freed and Vacek & Freed, PLLC f/k/a The Vacek Law Firm, PLLC (collectively referred to as "V&F") and file this their Response to Plaintiff's Notice of Vacancy of Party and Defendants' Motion to Abate Proceeding and Request for Oral hearing and, in support thereof, Defendants respectfully show unto the Court the following:

I.
BACKGROUND INFORMATION

1. On **March 9, 2012**, Carl Henry Brunsting ("Brunsting") filed a Verified Petition to take Depositions Before Suit in Cause No. 2012-14538; *In re Carl Brunsting*; In the 80th Judicial District Court of Texas. In that proceeding Brunsting conducted extensive written discovery and deposed at least one individual. On **August 24, 2012** the parties entered into a Tolling Agreement Regarding Statute of Limitations, which tolled the applicable statute of

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limitations until **December 31, 2012.**[1] On **January 29, 2013** [almost a year after filing the presuit petition], arguably past the applicable statute of limitations, Brunsting filed his Original Petition in this case (the "Legal Malpractice Lawsuit"). On **April 9, 2013** [70 days later] Brunsting filed his Petition for Declaratory Judgment, for an Accounting for Damages, for Imposition of a Constructive Trust, and for Injunctive Relief in Cause No. 412,249-401; *Estate of Nelva E. Brunsting*; In Probate Court Number Four of Harris County, Texas (the "Probate Proceeding").

2. Since the filing of the present lawsuit, the parties have conducted extensive written discovery and exchanged thousands of pages of documents. Over two years after filing this lawsuit, Brunsting concluded that he no longer had mental capacity to serve as the Independent Executor and now wants to abate this case. Furthermore, Brunsting is requesting that the judge of Probate Court Number Four consolidate the Legal Malpractice Lawsuit into the Probate Proceedings. The Court should take note that Brunsting's Motion to Abate and Motion to Transfer [both filed 145 days after his resignation as the Independent Executor] only came after V&F filed a dispositive motion. This untimely delay demonstrates Brunsting's lack of diligence and supports V&F's contention that the Motion to Transfer is purely a delay tactic. The following timeline illustrates the activity in the Legal Malpractice Lawsuit, which demonstrates the time and effort incurred by the party's litigating this matter:

- January 29, 2013 – Original Petition filed
- January 30, 2013 – First Amended Petition filed
- February 25, 2013 – V&F file Original Answer
- March 15, 2013 – Second Amended Petition filed
- July 11, 2013 – Plaintiff responded to written discovery

[1] The presuit litigation was dismissed for want of prosecution on **October 23, 2012.**

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- September 30, 2013 – Third Amended Petition filed
- October 1, 2013 – Plaintiff responded to written discovery
- November 24, 2013 – V&F responded to written discovery
- March 3, 2014 – Plaintiff filed Expert Witness Designation
- March 4, 2014 – V&F responded to written discovery
- April 28, 2014 – Motion for Continuance filed
- May 16, 2014 – Discovery hearing with the Court
- June 2, 2014 – First trial setting
- November 21, 2014 – V&F filed Expert Witness Designation
- December 10, 2104 – Plaintiff filed Amended Expert Witness Designation
- February 2, 2015 – Second trial setting (case not reached)
- February 3, 2015 – Plaintiff deposed
- February 19, 2015 – Plaintiff filed Application to Resign as Independent Executor in Probate Proceeding (no related filing in Legal Malpractice Lawsuit)
- May 27, 2015 – V&F filed Traditional and No-Evidence Motion for Summary Judgment
- July 14, 2015 – Plaintiff filed the present Motion to Transfer Related District Court Case to Probate Court 4 and Notice of Vacancy of Party and Motion to Abate Proceeding
- July 31, 2015 – Hearing on V&F's Traditional and No-Evidence Motion for Summary Judgment
- October 5, 2015 – Current trial setting

3. Brunsting has actively litigated the Legal Malpractice Lawsuit. After at least two trial settings and his deposition Brunsting now believes that the Legal Malpractice Lawsuit would be better decided in the Probate Proceeding. Brunsting is clearly forum shopping and belatedly seeks to transfer this case in order to avoid the upcoming **July 31, 2015** summary

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judgment hearing. V&F adamantly opposes such transfer and believes this Court should decide the dispute between Brunsting and V&F.

II.
ARGUMENTS AND AUTHORITIES

4. The general common law rule in Texas is that the court in which suit is first filed acquires dominate jurisdiction to the exclusion of other coordinate courts. *Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex. 1974); *Cleveland v. Ward*, 285 S.W. 1063 (Tex. 1926); *Hardy v. McCorkle*, 765 S.W.2d 910, 913 (Tex. App.—Houston [1st Dist.] 1989, orig. proceeding). In this case, the first lawsuit was the Legal Malpractice Lawsuit, which would therefore be the court of dominate jurisdiction. Although Brunsting could have certainly filed similar claims against V&F in the Probate Proceeding, he decided to file separate proceedings. Brunsting has offered no basis for transferring the Legal Malpractice Lawsuit over two years after first filing his claim. The principle of dominant jurisdiction dictates that this case should not be transferred arbitrarily once a lawsuit has been assigned to a particular court. *Republic Royalty Co. v. Evins*, 931 S.W.2d 338, 342 (Tex. App.—Corpus Christi 1996, no writ). To allow Brunsting to transfer the Legal Malpractice Lawsuit at this juncture only encourages improper forum or judge shopping.

5. A party who needs additional time to respond to a motion for summary judgment must ask for it. *Tenneco Inc. v. Enterprise Prods.*, 925 S.W.2d 640, 647 (Tex. 1996). In seeking to continue the hearing on V&F's Traditional and No-Evidence Motion for Summary Judgment, Brunsting has not complied with either Texas Rule of Civil Procedure 166a(g) or Texas Rule of Civil Procedure 252. The discovery period in this case has come and gone. Brunsting has not identified any further discovery that he (or anyone else) needs in order to respond to the pending motion. *Wal-Mart Stores Tex., LP v. Crosby*, 295 S.W.3d 346, 356 (Tex. App.—Dallas 2009, pet. denied). More importantly, there is no additionally discovery that can defeat the motion. *See*

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White v. Mellon Mortg. Co., 995 S.W.2d 795, 804 (Tex. App.—Tyler 1999, no pet.) (continuance of summary judgment hearing was unnecessary when additional discovery was irrelevant to determination of legal issues); *McClure v. Attebury*, 20 S.W.3d 722, 729 (Tex. App.—Amarillo 1999, no pet.) (when threshold issue is question of law, discovery is unnecessary).

III.
MOTION FOR SANCTIONS

6. Sanctions under §10.004 of the Texas Civil Practice and Remedies Code are available when a pleading is brought for an improper purpose, including harassment, delay, or increasing the cost of litigation, even if the pleadings are not groundless or frivolous. See TEX. CIV. PRAC. & REM. CODE §§10.001, 10.004. Brunsting's untimely filing of a Motion to Transfer is unmistakably done for harassment, to delay this lawsuit, and to increase V&F's cost of litigation.

7. After over two years of litigation and mere months from the present trial setting [and mere days before the hearing on the pending Motion for Summary Judgment], Brunsting has filed a Motion to Transfer this case to another court. V&F questions the veracity of this sudden change and presumes Brunsting is simply forum shopping. This case belongs in the 164th Judicial District Court of Harris County. Brunsting can offer no legitimate reason to suddenly transfer this case to the probate court. An award of sanctions against Brunsting is therefore justified in this situation.

8. Sanctions available under §10.004 are: (1) ordering the party to perform or refrain from performing an act; (2) ordering a monetary penalty paid to the court; and (3) ordering the party to pay the other party the amount of reasonable expenses incurred because of the filing of the frivolous pleading, including attorney's fees. TEX. CIV. PRAC. & REM. CODE §10.004(c).

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9. V&F respectfully requests that this Court award sanctions against Brunsting under Texas Rule of Civil Procedure §10.004 of the Texas Civil Practice and Remedies Code. Furthermore, V&F pleads that this Court award sanctions against Brunsting by striking all or part of his pleadings, dismissing with prejudice all or part of Brunsting's lawsuit, ordering Brunsting to pay V&F the amount of reasonable expenses V&F incurred in defending against the claims in the Legal Malpractice Lawsuit, including attorney's fees, and any other sanctions the Court deems just. As a result of Brunsting's attempt to circumvent this Court and transfer the case, V&F was forced to incur additional legal expenses and attorneys' fees. V&F has and will incur additional fees associated with drafting and attending the hearing on the Motion for Sanctions. The sanctions requested bear a direct relationship to the offensive conduct and are not excessive. *E.g. Spohn Hasp. v. Mayer,* 104 S.W.3d 878, 882 (Tex. 2003).

10. In summary, V&F argues that Brunsting should not be awarded for litigating the Legal Malpractice Lawsuit for over two years and then suddenly seek a change in the judge. Simply put, Brunsting cannot offer any basis for transferring the case at this juncture. Nor can Brunsting dispel the fact that he should be sanctioned for filing his Motion to Transfer Related District Court Case to Probate Court 4. This Court must sanction Brunsting!

IV.
REQUEST FOR ORAL HEARING

11. Defendants request an oral hearing on Plaintiff's Motion to Abate Proceeding and its Motion for Sanctions, which are currently set to be heard by submission on the 27th day of July, 2015. An oral hearing will permit the parties to fully present the arguments submitted in their respective motions and responses.

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V.
PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendants Candace L. Kunz-Freed and Vacek & Freed, PLLC f/k/a The Vacek Law Firm, PLLC respectfully request that this Motion for Sanctions and Attorneys' fees be granted and for such other and further relief as this Court deems just.

Respectfully submitted,

THOMPSON, COE, COUSINS & IRONS, L.L.P.

By:_____

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CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of the foregoing instrument in accordance with the *TEXAS RULES OF CIVIL PROCEDURE* on the 20 day of July, 2015 to the following counsel of record:

Bobbie G. Bayless
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2931 Ferndale
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Cory S. Reed

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