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Harris County
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2013-05455 / Court: 164

NO._____

CARL HENRY BRUNSTING, INDEPENDENT EXECUTOR OF THE ESTATES OF ELMER H. BRUNSTING AND NELVA E. BRUNSTING	§	**IN THE DISTRICT COURT OF**
vs.	§	**HARRIS COUNTY, T E X A S**
CANDACE L. KUNZ-FREED AND VACEK & FREED, PLLC f/k/a THE VACEK LAW FIRM, PLLC	§	**_____ JUDICIAL DISTRICT**

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PLAINTIFF'S ORIGINAL PETITION AND REQUEST FOR DISCLOSURES

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiff, Carl Henry Brunsting, Independent Executor of the estates of Elmer H. Brunsting and Nelva E. Brunsting and files this Original Petition against **Defendants, Candace L. Kunz-Freed, Individually ("Freed") and Vacek & Freed, PLLC f/k/a The Vacek Law Firm, PLLC (the "Law Firm") (collectively, the "Defendants")**, and in support thereof would show the Court the following:

I. PARTIES

1. Plaintiff is the duly appointed personal representative of the estates of both his father, Elmer H. Brunsting ("Elmer"),[1] and his mother, Nelva E. Brunsting ("Nelva").[2]

2. Defendant Freed is an attorney licensed to practice law in the State of Texas who can be served at her principal place of business, 11777 Katy Freeway, Suite 300, Houston, Texas 77079.

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[1]Elmer died on April 1, 2009. Plaintiff qualified as Independent Executor of his estate on August 28, 2012.

[2]Nelva died on November 11, 2011. Plaintiff qualified as Independent Executor of her estate on August 28, 2012.

3. Defendant Law Firm is a professional limited liability company formed under the laws of the State of Texas for the practice of law which can be served through its registered agent, Albert E. Vacek, Jr., at 11777 Katy Freeway, Suite 300, Houston, Texas 77079. Defendant Law Firm is believed to be the successor to the Law Offices of Albert E. Vacek, Jr., P.C.

4. Other parties and entities involved in the facts relevant to this petition but who are not named as defendants herein include the following:

a. The Brunsting Family Living Trust was created in 1996 by Elmer and Nelva based on the advice of the Law Firm. The trust instrument was prepared by the Law Firm. The Brunsting Family Living Trust, any amendments thereto, and the trusts created pursuant to its terms are collectively referred to herein as the "Family Trust". Plaintiff was to be the successor trustee of the Family Trust until that was changed through documents prepared by the Defendants at a time when it is believed Nelva was either misled about what she was signing, unduly influenced to sign it, or did not have the capacity to sign it.

b. Anita Kay Brunsting f/k/a/ Anita Kay Riley ("Anita") is Plaintiff's sister. Anita became trustee of the Family Trust through documents prepared by Defendants at a time when it is believed Nelva was either misled about what she was signing, unduly influenced to sign it, or did not have the capacity to sign it. During that same period, Anita was named to act on Nelva's behalf in a power of attorney prepared by Defendants.

c. Amy Ruth Brunsting f/k/a/ Amy Ruth Tschirhart ("Amy") is Plaintiff's sister. Amy became trustee of the Family Trust through documents prepared by Defendants at a time when it is believed Nelva was either misled about what she was signing, unduly influenced to sign it, or did not have the capacity to sign it (Anita and Amy in their capacity as trustees of the Family Trust are sometimes collectively referred to herein as the "Current Trustees").

d. Carole Ann Brunsting ("Carole") is Plaintiff's sister, the party named in Nelva's health care power of attorney prepared by Defendants, and the party made a joint signatory on a bank account which received significant transfers from the Family Trust after Anita became trustee of the Family Trust. According to Carole, that arrangement was Freed's idea.

e. Candace Louise Curtis ("Candy") is Plaintiff's sister. Candy and Carl were the only beneficiaries of the Family Trust whose rights were diminished by the changes implemented by the Defendants at a time when it is believed Nelva was either misled about what she was signing, unduly influenced to sign it, or did not have the capacity to sign it.

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II. JURISDICTION AND VENUE

5. This Court has jurisdiction and venue over this case because all of the Defendants maintain their principal places of business in Harris County, Texas, and the acts and omissions giving rise to Plaintiff's claims occurred in Harris County, Texas. The damages being sought by Plaintiff exceed the minimum jurisdictional limits of the court.

6. Venue is proper in this Court pursuant to Tex. Civ. Prac. & Rem. Code §15.002(a)(1), and (3) because all of the Defendants have their principal office in Harris County, Texas; Elmer and Nelva resided in Harris County, Texas; and all, or substantially all, of the acts and omissions giving rise to Plaintiff's claims occurred in Harris County, Texas.

III. FACTUAL BACKGROUND

7. This is a case involving Defendants' negligence, breach of fiduciary duty and other acts or omissions in their representation of Elmer and Nelva, both individually and in their capacities as trustees of the Family Trust. Defendants' actions constitute negligent misrepresentation, negligence *per se*, deceptive trade practices, conversion, fraud, commercial bribery, breaches of their fiduciary duties, as well as aiding and abetting, assisting and encouraging repeated breaches of fiduciary duty. Alternatively, a conspiracy existed between Defendants, and the Current Trustees for that unlawful purpose.

8. The Defendants assisted the Current Trustees in implementing a scheme to change the terms of the Family Trust, to ultimately remove Nelva from her position as trustee of the Family Trust, and to improperly remove assets from Elmer and Nelva's estates and from the Family Trust. Because of the actions of the Defendants, the Current Trustees were able to alter Elmer and Nelva's wishes, resulting in the improper transfer of assets to Anita, Amy, and Carole, all to Plaintiff's detriment.

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9. Despite the Law Firm's representations to Elmer and Nelva that the Family Trust would preserve their plans for their estate, Defendants took direction from the Current Trustees, while representing Nelva, with the result being just the opposite. It is believed that Defendants not only failed to inform Nelva that they had established a relationship with the Current Trustees which put them in a conflict of interest with regard to their representation of Nelva's interests but that Defendants actually ignored that conflict of interest and their obligations to Nelva and assisted the Current Trustees in changing the terms of the Family Trust in ways which it is believed that Nelva did not have capacity to change and/or did not understand or want. Defendants also took steps to undermine and even remove Nelva's control of her own assets, of the assets of Elmer's estate, and of the Family Trust assets, thereby placing those assets at risk of loss to Anita, Amy, and Carole and facilitating the loss which actually occurred.

10. Moreover, it is believed that Defendants assisted the Current Trustees in various ways intended to prevent Nelva from even understanding that documents were being prepared by Defendants at the Current Trustee's request, why those documents were being prepared, and what the impact of the documents would be. It is believed that in assisting the Current Trustees in obtaining their improper objectives, Defendants, among other things:

a. failed to address Nelva's lack of capacity to make changes to the Family Trust and her power of attorney,

b. failed to address the undue influence being exercised over Nelva by the Current Trustees,

c. planned for and prepared documents without explaining the impact of those documents to Nelva and without obtaining reasonable input directly from Nelva,

d. instead discussed changes to the terms of the Family Trust, and ultimately changes to Nelva's control over the Family Trust with the Current Trustees, with some, but not all, of Nelva's children, and to the exclusion of Nelva,

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e. facilitated signatures by Nelva in circumstances which allowed there to be confusion about what was being signed and which failed to insure that Nelva signed documents with consent, with proper capacity, and with knowledge and understanding of what she was signing,

f. failed to properly advise Elmer and Nelva on the terms of the Family Trust and the proper administration of the Family Trust,

g. failed to insure that documents being prepared and arrangements being made in cooperation with the Current Trustees were not being used to improperly remove assets to the improper benefit of Anita, Amy, and Carole,

h. failed to protect Nelva's rights, both individually and as trustee of the Family Trust,

i. preferred the rights of the Current Trustees to those of Nelva and it is believed even suggested methods of undermining Nelva's rights and wishes to the Current Trustees so as to accomplish the objectives of the Current Trustees,

j. failed to refuse the representation of the Current Trustees so as to prevent a conflict of interest and failed to advise Nelva that Defendants' role in advising the Current Trustees was in direct conflict with Defendants' role as Nelva's counsel,

k. failed to take steps to inform Nelva of the objectives of the Current Trustees or to otherwise prevent those objectives,

l. failed to take steps to prevent the Current Trustees and Carole from converting assets belonging to Nelva, Elmer's estate, or the Family Trust, and even facilitated the conversion of assets, and

m. failed to require the Current Trustees to administer the Family Trust properly, in keeping with the terms of the Family Trust, and in the best interests of the beneficiaries, including Nelva.

11. Defendants' knowledge of the Nelva's lack of consent to the actions taken by Defendants is evident from, among other things, the apparent existence of documents which were not signed in Freed's presence but were made to appear as if they were, Nelva's refusal to sign documents prepared at the request of the Current Trustees, and Defendants' involvement in arranging and participating in discussions behind Nelva's back.

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12. With Defendants' assistance, Nelva's power of attorney was changed, the terms of the Family Trust were changed, Nelva was ultimately removed as trustee of the Family Trust, and the Current Trustees and Carole improperly obtained control of assets belonging to Nelva, Elmer's estate, and the Family Trust of which Nelva was still a beneficiary. Thereafter, the Current Trustees and Carole were in a position to take those assets for their own benefit, and they did so, either in the form of alleged but improper expenses, improper trustee fees, other improper payments for their benefit, and unexplained and improper transfers. Once Nelva was removed as trustee of the Family Trust, the Defendants continued to claim to be representing the Current Trustees but failed to insure that the Family Trust was properly administered and that the assets of the Family Trust were properly preserved for the benefit of the beneficiaries, including Nelva.

IV. ATTORNEY-CLIENT RELATIONSHIP

13. At all times material hereto, Freed was a partner, shareholder, representative, agent and/or associate attorney engaged in the practice of law at the Law Firm. All of the specific acts complained of herein are attributable to Freed's conduct while associated with the Law Firm as a partner, agent, servant, representative and/or employee. Freed's liability and responsibility is vicarious and joint and several. Plaintiff further pleads the legal theory of *respondeat superior* as between Freed and the Law Firm.

14. Also, at all times material hereto, the Law Firm, whether acting directly, or indirectly or vicariously through its partners, agents, servants, representatives and/or employees, acted as legal counsel for Elmer and Nelva, both individually and as trustees of the Family Trust. Therefore, as the Law Firm's clients, Elmer and Nelva were entitled to absolute fidelity from all of the Defendants because of the fiduciary duty owed to them by Defendants. Plaintiff, as the personal representative

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of Elmer and Nelva's estates, is the successor to Elmer and Nelva's rights for purposes of establishing privity with Defendants.

V. CAUSES OF ACTION

A. Negligence

15. Defendants' actions as described herein constitute negligence. Of course, nothing Elmer or Nelva did, or failed to do, caused or in any way contributed to cause the occurrences that resulted in the losses and damages complained about herein. To the extent Defendants did not properly, adequately, and/or timely understand the terms of the Family Trust or other documents Defendants themselves prepared or to the extent Defendants failed to apply the applicable Texas law as it related to their representation of and responsibilities to Elmer and Nelva, Defendants' acts or omissions set out herein constitute violations of the applicable standard of care for reasonably prudent and competent attorneys practicing law in Texas.

16. But for Defendants' actions as set forth herein, the damages complained of herein would not have been suffered. Thus, Defendants' conduct was a proximate and/or producing cause of losses and damages suffered by Plaintiff. Those damages exceed the jurisdictional limits of this court.

B. Negligence *Per Se* – Violation of Texas Penal Code § 32.43; Commercial Bribery

17. Additionally, without waiving any of the foregoing, Defendants' acts are a violation of Penal Code Section 32.43. Specifically, that statute, in pertinent part, states:

> (b) A person who is a fiduciary commits an offense if, without the consent of his beneficiary, intentionally or knowingly solicits, accepts or agrees to accept any benefit from another person on agreement or understanding that the benefit will influence the conduct of the fiduciary in relation to the affairs of his beneficiary.
>
> (c) A person commits an offense if he offers, confers, or agrees to confer any benefit, the acceptance of which is an offense under Subsection (b).

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18. Defendants' actions fall squarely within the statutory definition of commercial bribery set forth above. Defendants, while aware of their fiduciary duties to Nelva and with knowledge of applicable Texas law, violated subsection (b) above by accepting and/or agreeing to accept payments from the Current Trustees for changes made which directly impacted Nelva's rights, and by agreeing to continue to represent the Current Trustees after facilitating Nelva's removal as trustee of the Family Trust. This violation of this section of the Penal Code forms an additional basis for Plaintiff's assertion that such acts constitute negligence *per se.*

C. Negligence *Per Se* – Violation of Texas Penal Code §7.02(a)(2) & (3); Criminal Responsibility for Conduct of Another

19. The Current Trustees also violated Section 32.45 of the Texas Penal Code (misapplication of Fiduciary Property). Pursuant to section 32.45, a violation occurs when a trustee intentionally, knowingly or recklessly misapplies property he holds as a fiduciary in a manner that involves substantial risk of loss to the owner of the property or to a person for whose benefit the property is held. The Current Trustees' actions involved substantial risk of loss for Nelva and the Family Trust, and ultimately that risk became reality.

20. Defendants' actions violate Section 7.02(a)(2) & (3) of the Texas Penal Code in that they acted with the intent to assist the commission of the Current Trustees' violation of Section 32.45 of the Texas Penal Code and aided or attempted to aid in the Current Trustees' violation of that section. Additionally, the Defendants, having a legal duty to prevent the Current Trustees from violating Section 32.45 of the Texas Penal Code, acted instead with the intent to assist the Current Trustees in violating Section 32.45 of the Texas Penal Code and failed to make a reasonable effort to prevent the commission of the offense.

21. These statutes are designed to protect a class of persons to which Nelva, the Family Trust, and its beneficiaries, including Nelva, belong against the type of injury suffered. The language

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of the statutes set out a clear prohibition from dealing inappropriately with property held by a fiduciary or assisting another in doing so. The Defendants did just that in assisting or allowing the Current Trustees to improperly obtain control of and misuse assets owned by Nelva or the Family Trust. As a result, the statues are of the type that impose tort liability because they codify the duties owed by parties such as Defendants when dealing with fiduciaries and fiduciaries' obligations.

22. The Defendants' violation of these statues was without legal excuse as all attorneys are charged with knowledge of the law. The Defendants' breach of the duty imposed by these statutes proximately caused injury to Plaintiff because it resulted in the depletion of Nelva's assets or of the Family Trusts' assets. This conduct also amounts to negligence *per se*.

D. Negligent Misrepresentation

23. In the alternative and without waiving any of the foregoing, Defendants are liable for damages based on negligent misrepresentation. Defendants made representations to Elmer and Nelva. Those representations supplied false information for Elmer and Nelva's guidance. Defendants did not exercise reasonable care or competence in making the representations or in obtaining or communicating information described herein. Elmer and Nelva had no choice but to rely on the representations to their detriment, and Elmer and Nelva were in the identifiable class of people who would be expected to rely on such representations.

24. Specifically, Defendants represented, among other things, that Elmer and Nelva's plan for their estate would be protected, and Defendants negligently failed to disclose to Nelva that the Current Trustees were changing that plan in ways Nelva did not know, understand, or approve. Defendants also failed to disclose to Nelva that Defendants were representing the interests of the Current Trustees, rather than Nelva's interests. The circumstances described herein indicate Defendants knew their representations were false and that there were failures to properly disclose

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relevant information to Nelva. Representations to Elmer and Nelva to the contrary and the lack of disclosure to Nelva amount to misrepresentations of facts and law material to Defendants' representation of Elmer and Nelva.

25. But for Defendants' actions, the damages sought herein would not have been sustained. Those damages are in excess of the jurisdictional limits of this court.

E. Breach of Fiduciary Duty

26. Defendants, acting for the benefit of Elmer and Nelva, owed them duties to act with loyalty and utmost good faith, to act with perfect candor, to act with integrity of the strictest kind, to be fair and honest in dealing with them, to provide full disclosure to them of all circumstances concerning their representation of Elmer and Nelva's interests, and to act without concealment or deception–no matter how slight. Defendants breached these duties owed to Elmer and Nelva through, among other things, the actions described herein. Instead of protecting or benefitting their original clients, Defendants took on the representation of the Current Trustees and made it possible for the Current Trustees to enrich themselves and Carole at Nelva's expense. In doing so, Defendants benefitted by being compensated for their actions and by taking up the representation of the Current Trustees which apparently continues to this day. Thus, both Defendants' interests and the interests of Defendants' new clients, the Current Trustees, were placed above Nelva's interests, resulting in a breach of Defendants' fiduciary duties.

F. Aiding & Abetting Current Trustees' Breaches of Fiduciary Duty

27. Alternatively, and without waiving any of the foregoing, Defendants are liable under all three doctrines of aiding and abetting a breach of fiduciary duty and the Current Trustees' violation of certain Penal Code statutes described herein by: (1) assisting and encouraging; (2) assisting and participating; and (3) concert of action. The Current Trustees and Anita acting under

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Nelva's power of attorney were the primary actors who committed torts and crimes which amount to breaches of fiduciary duties as described herein. Defendants had knowledge of the Current Trustees' tortious/criminal conduct and had the intent to assist them in committing those acts.

28. The Current Trustees' acts and omissions constitute breaches of fiduciary duty. A fiduciary relationship existed between the Current Trustees and the Family Trust and its beneficiaries, including Nelva. An additional fiduciary relationship was also created because of Anita's appointment in the power of attorney also prepared by Defendants for execution by Nelva. The Current Trustees, and Anita acting under Nelva's power of attorney, breached their fiduciary duties through, among other things, acts of self-dealing; concealing material facts about their disbursement of assets belonging to Nelva, Elmer's estate, and/or the Family Trust; and making unauthorized disbursements of such assets to or for the benefit of themselves and their children, to Carole, and to Defendants, all to Plaintiff's financial detriment. Defendants assisted and/or participated in those breaches of fiduciary duty.

a. Assisting & Encouraging

29. Defendants gave the primary actors assistance and encouragement in committing the torts by, among other things, drafting the instruments which gave the Current Trustees and Anita control of the assets, drafting instruments which were used to improperly transfer those assets, assisting in obtaining Nelva's signature on documents and/or notarizing such documents, and advising the Current Trustees about such actions. This assistance and encouragement was a substantial factor in causing the breach of fiduciary duty because Defendants' voluntary assistance provided the very apparatus that allowed the Current Trustees and Anita to take unfair advantage of Nelva, Elmer's Estate, the Family Trust, and its beneficiaries, including Nelva.

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b. Assisting & Participating

30. Defendants' actions alleged herein also constitute aiding and abetting the Current Trustees' and Anita's breaches of fiduciary duties by assisting and participating in those breach of trust and fiduciary duties. Defendants substantially assisted the Current Trustees and Anita in their actions to take control from Nelva and to then improperly disburse the assets over which the Current Trustees and Anita had assumed control from Nelva. Defendants' assistance and participation, separate from the Current Trustees' acts, breached Defendants' duties to Nelva. Defendants, by virtue of their purported representation of the Current Trustees and the other actions described herein, violated their duties as Nelva's legal counsel.

c. Concert of Action

31. Defendants are also liable for aiding and abetting the Current Trustees' and Anita's tortious conduct by their concert of action. Defendants' actions in helping the Current Trustees and Anita obtain control was not only likely to cause damage, it did cause damage by resulting in changes to the terms of the Family Trust and Nelva's power of attorney without Nelva's effective consent and, thereafter, resulting in improper disbursements to or for the benefit of Amy, Anita, and Carole. Defendants' actions in assuming the Current Trustees' representation when it was in conflict with Nelva's representation was intentional and/or grossly negligent. Defendants' own acts, along with the Current Trustees' and Anita's acts, caused the damages sustained by Plaintiff which are in excess of the jurisdictional limits of this court.

G. Fraud

32. In the alternative and without waiving any of the foregoing, Plaintiff will show that Defendants' acts and omissions constituted fraud in that Defendants made material misrepresentations or omissions which included, among others, that Elmer and Nelva's plan for their

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estate would be protected, as well as Defendants' failure to disclose to Nelva that the Current Trustees were changing that plan in ways Nelva did not know, understand, or approve. Defendants also failed to disclose to Nelva that Defendants were representing the interests of the Current Trustees, rather than Nelva's interests. The circumstances described herein indicate Defendants knew that the representations were false and that there were failures to properly disclose relevant information to Nelva. Representations to Elmer and Nelva to the contrary and the lack of disclosure to Nelva amount to misrepresentation of facts and law material to Defendants' representation of Elmer and Nelva. Defendants either made those misrepresentations or omissions with knowledge of their falsity or made them recklessly without any knowledge of the truth and as a positive assertion. The misrepresentations and omissions were made with the intention that they should be acted on by Elmer and Nelva, and, indeed, Elmer and Nelva were compelled to rely on the misrepresentations or omissions. As a result, Elmer and Nelva suffered damages in excess of the jurisdictional limits of this court.

33. All of the foregoing acts or failures to disclose were a proximate cause of Plaintiff's damages which are in excess of the jurisdictional limits of this court.

H. Conversion

34. Defendants' actions constitute conversion of assets to which Elmer's estate and Nelva had a superior legal right. Those actions are the proximate cause of the damages specified herein which are in excess of the jurisdictional limits of this court.

I. Conspiracy

35. Defendants' actions further constitute conspiracy to commit fraud and/or breach of fiduciary duty. Defendants and the Current Trustees were a combination of two or more persons.

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The object of the combination was to accomplish an unlawful purpose. Specifically, the object of the combination was to commit the breaches of fiduciary duty described herein.

36. The Current Trustees, Anita, and the Defendants had a meeting of the minds and had knowledge of the object and purpose of the conspiracy. The Current Trustees and Anita committed unlawful, overt acts to further the conspiracy by breaching their fiduciary obligations to Nelva, the Family Trust, and the beneficiaries of the Family Trust, including Nelva. Defendants committed overt acts to further the conspiracy by taking the improper actions they took to place the Current Trustees and Anita in a position of control and then to assist in the improper transfer of assets to or for the benefit of Amy, Anita, and Carole. As a proximate result of the wrongful acts underlying the conspiracy, Plaintiff suffered damages in excess of the jurisdictional limits of this court.

J. Deceptive Trade Practices

37. Defendants are liable under the Texas Deceptive Trade and Practices Act (hereinafter "DTPA") because (i) Elmer and Nelva were consumers, (ii) Defendants violated specific provisions of the DTPA, and (iii) the violations were a producing cause of Plaintiff's damages.

38. An express misrepresentation constitutes an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion, and thus violates Section 17.49(c)(3) of the DTPA. Defendants violated the DTPA by the actions described herein while accepting representation of and payment from Elmer and Nelva and thereafter facilitating the Current Trustees' improper actions.

39. Defendants' knowledge of the language of the Family Trusts, Elmer and Nelva's wishes, and Nelva's lack of understanding or consent to the changes sought by the Current Trustees, shows that Defendants' conduct, described herein, was committed knowingly and intentionally as those terms are defined by TEX. BUS. & COM. CODE ANN. Section 17.46 *et seq*. Accordingly,

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Defendants are liable to Plaintiff for additional damages as provided by the DTPA, including treble damages and reasonable attorney's fees necessary to bring this cause of action, all of which are being sought herein.

VI. TOLLING, FRAUDULENT CONCEALMENT, AND DISCOVERY RULE

40. Plaintiff would show that suit has been brought within the applicable statutory limitations periods. Such cause of action does not accrue until such time as there has been a legal injury and Plaintiff has brought suit within the applicable limitations of the time that Plaintiff suffered a legal injury, as that term is described in law.

41. Because Defendants fraudulently concealed information related to their involvement as described herein and/or failed to disclose same to Elmer, Nelva, or Plaintiff, this action has been brought within the applicable period of limitations based upon when the injured parties learned, or in the exercise of reasonable diligence, could have learned of the actions.

42. To the extent any party pleads the statute of limitations as a defense, Plaintiff hereby asserts the discovery rule and would show that suit was filed within two years of Plaintiff's knowledge of such facts as would lead a reasonably prudent person to discover the Defendants' wrongful acts.

43. Further, Elmer's and Nelva's deaths resulted in a tolling of the statute of limitations, pursuant to Tex. Civ. Prac. & Rem. Code §16.062.

VII. DAMAGES

A. Actual Damages

44. Regarding the causes of action and conduct alleged above, Plaintiff has sustained actual losses which were proximately caused by the joint conduct of Defendants. Plaintiff's damages

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exceed the minimum jurisdictional limits of this court. After completion of discovery, Plaintiff will amend the pleadings in order to indicate more specifically the type and amount of damages suffered.

B. Forfeiture of Fees

45. Defendants' breaches of fiduciary duty and violations of the Texas Penal Code legally deprive them of any right to a fee. Nonetheless, Defendants received fees for their services. Therefore, as additional damages, Plaintiff is entitled to a return of all fees actually collected by Defendants in their representation of Elmer, Nelva, or the Family Trust.

C. Treble Damages

46. As previously stated herein, Plaintiff seeks a money judgment as allowed by the DTPA, including treble damages.

D. Punitive Damages

47. Plaintiff seeks to recover punitive damages from Defendants, taking into consideration the nature of the wrong, the character of the conduct involved, the degree of Defendants' culpability, the situation and sensibilities of the parties concerned, the extent to which such conduct offends a public sense of justice and propriety, and Defendants' net worth. Additionally, Plaintiff will also show by clear and convincing evidence that Defendants acted with malice because their acts and omissions were either with a specific intent to substantially cause damage to Elmer and Nelva, or, when viewed objectively from the standpoint of Defendants at the time of the occurrences in question, involved an extreme degree of risk, considering the probability and magnitude of harm to Elmer and Nelva. Defendants had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of Elmer and Nelva. Thus, Plaintiff requests that the fact finder determine an appropriate punitive damages award.

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E. Attorney's Fees

48. Because of Defendants' violation of the DTPA, the Trusts are entitled to reasonable attorney's fees necessary to prosecute this action. A reasonable attorney's fee recovery, including appellate fees, should be assessed against the Defendants. Plaintiff is also entitled to recover attorney's fees against Defendants pursuant to Tex. Prop. Code Ann. §114.064.

VIII. INTEREST AND CONDITIONS

49. Plaintiff is entitled to prejudgment interest.

50. All conditions precedent to Plaintiff's right to recover have been performed or have occurred. The 60 day pre-suit notice normally required by Tex. Bus. & Comm. Code §17.505(a) is not required because it is impracticable in light of the potential argument that certain limitations periods are nearing expiration.

IX. PLAINTIFF'S REQUESTS FOR DISCLOSURES TO DEFENDANTS

51. Pursuant to Rule 194, T.R.C.P., the Defendants are requested to disclose, within fifty (50) days of service of this request, the information or material described in Rule 194.2 (a) - (l).

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendants be cited to appear and answer herein and that, after a trial on the merits, the Court grant the relief sought herein and award such other and further relief, both legal and equitable, to which Plaintiff is entitled.

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Respectfully submitted,

BAYLESS & STOKES

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