

Case No. 20-20566

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CANDACE LOUISE CURTIS,

Plaintiff – Appellant

V.

ANITA KAY BRUNSTING and AMY RUTH BRUNSTING

Defendants – Appellees

On appeal from the United States District Court
for the Southern District of Texas, Houston Division

**BRIEF OF APPELLEES ANITA KAY BRUNSTING
and AMY RUTH BRUNSTING**

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of Fifth Circuit Rule 28.2.1, have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Candace Louise Curtis, Plaintiff & Appellant	Sister to the Defendants & Appellees, and a beneficiary under the Brunsting Family Trust, amended and restated January 12, 2005. Ms. Curtis is <i>Pro Se</i> .
2. Anita Kay Brunsting, Defendant & Appellee	Sister to the Plaintiff & Appellant, and a co-trustee of and a beneficiary under the Brunsting Family Trust, amended and restated January 12, 2005.
3. Amy Ruth Brunsting, Defendant & Appellee	Sister to the Plaintiff & Appellant, and a co-trustee of and a beneficiary under the Brunsting Family Trust, amended and restated January 12, 2005.
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Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

This is a case involving Appellant pursuing relief pursuant to her Fed. R. Civ. P. 60(b)(3) motion, following her requested transfer of the case to a Harris County probate court. The district court denied the Rule 60 motion on various grounds set forth in its order.

The transfer of the case resulted from Appellant amending her complaint in the district court proceeding, adding parties to the case that Appellant knew would defeat the district court's diversity of citizenship jurisdiction over the case, and Appellant moving to have the case "remanded" to an active case pending in a state probate court.

Based on the legal issues presented in this case, and also the fact issues that relate to Appellant's factual assertions in support of her appeal, Appellees believe oral argument will aid the court in its review of the record and also its decision and disposition of the case.

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**BRIEF OF APPELLEES ANITA KAY BRUNSTING
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TO THE HONORABLE COURT OF APPEALS:

COME NOW, Anita Kay Brunsting and Amy Ruth Brunsting, Appellees in the above-styled and numbered cause, and present this their brief and would respectfully state and show the court the following:

STATEMENT OF JURISDICTION

A. Jurisdiction of the District Court.

Appellant asserted in her original complaint, filed with the district court on February 27, 2012, that jurisdiction existed due to diversity of citizenship, as authorized by 28 USC § 1332(a)(1), (b), and (c)(2). After filing an amended complaint on May 9, 2014, whereby additional parties were added to the case, Appellant, acting through her counsel of record, informed the district court that absolute diversity no longer existed, and moved that the case be remanded to a state court proceeding in a Harris County Probate Court.

Years later, in 2016, and again in 2020, Appellant, acting *pro se*, in violation of the district court's order requiring her to retain counsel, asserted in separate Fed. R. Civ. P. 60(b)(6) motions filed with the district court that diversity of citizenship jurisdiction at all times existed in the district court, and that her attorney acted in a fraudulent manner, without her knowledge or consent, in moving for remand of the case to the state probate court. Appellant asserts that diversity of citizenship still exists in the case. For the reasons set forth herein, Appellant is wrong.

B. Jurisdiction of the Court of Appeals.

The order that Appellant complains of on appeal was entered by the district court on September 23, 2020. (*ROA 20-20566.2902–2903*). On October 23, 2020, Appellant filed her notice of appeal. (*ROA 20-20566.2904–2905*). Appellees

argue that Appellant filed essentially the same Fed R. Civ. P. 60(b)(6) motion with the district court on August 3, 2016, and failed to pursue an appeal of the district court's ruling on May 8, 2019, that it (the district court) had no further jurisdiction over the case. Thus, Appellant's appeal is untimely and should be dismissed.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This case was originally filed by Appellant with the district court on February 27, 2012. The case was filed against both Appellees. Appellant and the Appellees are sisters and beneficiaries of the trust established by their parents. The trust is generally known as The Restatement of the Brunsting Family Living Trust.

Appellant sued the Appellees, the trustees of the family trust, originally alleging fraud, constructive fraud, breach of fiduciary duty, and intentional infliction of emotional distress by Appellees in the handling of the trust. Subject matter jurisdiction over the case was based on diversity of citizenship. Appellant, at the time acting *pro se*, later attempted to amend her complaint so as to add additional parties to the lawsuit. That effort was unsuccessful, and the district court required Appellant to retain counsel to represent her in the case.

Appellant eventually complied with the district court's direction, and acting through her retained counsel, was granted leave of court to file an amended complaint. The amended complaint added the additional parties that Appellant had previously sought to add as a *pro se* litigant. Following amendment of her

complaint, which added parties to the case that defeated the diversity of citizenship jurisdiction over the case, Appellant, again acting through her counsel, filed an unopposed motion to “remand” the case to the Harris County probate court where a related probate case was pending. Both the amended complaint, along with an unopposed motion for leave to file the amended complaint, along with the motion for remand of the case to the state probate court, were filed by Appellant with the district court on May 9, 2014.

On May 15, 2014, the district entered an order granting Appellant leave to file the amended complaint, and also “remanding” the case to the state probate court.

On June 3, 2014, the state probate court, acting on the motion of Appellant, entered an order accepting transfer of the federal case filed by Appellant with the district court, and also accepting her claims asserted in the district court case. Appellant’s claims have remained part of that state probate court proceeding from June 3, 2014 to the present, and presently remain the subject of litigation in the state probate court. It is worth noting that in addition to the four causes of action Appellant asserted in the district court, Appellant added causes of action in the state probate court for conversion, money had and received, unjust enrichment, conspiracy, demand for an accounting, tortious interference with inheritance, and declaratory judgment regarding, *inter alia*, the *in terrorem* provisions.

On August 3, 2016, Appellant filed a motion for relief with the district court pursuant to Fed. R. Civ. P. 60. Appellant asserted in that motion that the action taken by her attorney on May 9, 2014, in amending her complaint and seeking remand of the case, was done without her knowledge or consent, and constituted a fraud on the court. Appellant apparently took no further action to seek a ruling on that motion. However, on May 8, 2019, with the state probate court case still pending, the district court entered an order finding and ruling that the district court, “having transferred the case to the Harris County Probate Court, it no longer has jurisdiction of the case.” While that order was not specifically addressing Appellant’s Rule 60 motion, it effectually denied all pending relief sought by Appellant in the district court.

Fourteen months later, on July 17, 2020, Appellant filed essentially the same Rule 60 motion with the district court asserting the same fraud by her attorney in filing the amended complaint on her behalf on May 9, 2014, and the motion to remand the case to the state probate court on that same date.

On August 28, 2020, Appellant filed a related motion seeking to have the case “reopened” on the district court’s docket. The district court, following briefing and a telephonic hearing on September 10, 2020, reopened the case for the limited purpose of considering Appellant’s July 2020 Rule 60 motion. On

September 23, 2020, the district court denied Appellant's July 2020 Rule 60 motion. It is the September 23, 2020 order and ruling that Appellant now appeals.

The issues presented for review and determination by this court include:

1. Whether the action taken by Appellant by and through her counsel of record on May 9, 2014, can later serve as the basis for a motion by Appellant pursuant to Fed. R. Civ. P. 60.

2. Whether actions taken solely by a litigant, or by counsel on behalf of that same litigant, can itself constitute the fraud that supports a motion and relief pursuant to Fed. R. Civ. P. 60.

3. Whether the motions filed by Appellant pursuant to Fed. R. Civ. P. 60, both in 2016 and again in 2020, were timely and complied with the timing requirements of Rule 60 in general, and Rule 60(c)(1) in particular.

4. Whether the district court abused its discretion in denying Appellant's Rule 60 motion, and also her related motion to reinstate Appellant's federal case, previously transferred to the Harris County probate court and removed from the docket of the district court.

5. Whether Appellant's pursuit of this appeal is untimely, and whether Appellant was required to pursue any appeal of her Rule 60 motion following the district court's explicit ruling on May 8, 2019, that it had transferred the case to the

state probate court, and that it (the district court) no longer had jurisdiction over the case.

6. Whether the absence of any documentary evidence or sworn testimony establishing the factual basis for Appellant's claim of fraud as to the actions taken by her attorney, on her behalf, defeats her Rule 60 motions as a matter of law.

7. Whether Appellant is judicially estopped from now asserting that diversity of citizenship jurisdiction existed at all times in the district court, and that the "remand" or transfer of the case to the state probate court was improper and ineffectual due to: (a) Appellant's own motions filed with the district court on May 9, 2014; (b) the district court relying on and granting the motions filed by Appellant pursuant to its orders dated May 15, 2014; and (c) Appellant's own subsequent actions, both through her counsel and also *pro se*, in the state probate court, including her motion that the state probate court accept transfer of her federal case, which the state probate court relied on and granted.

8. Whether the proper forum for the claims originally asserted by Appellant in the district court, following entry of the district court's May 15, 2014 orders, has been and continues to be the state probate court where those claims are now being litigated, and not in the district court.

STATEMENT OF THE CASE

A. Nature of this Case.

The substance of the claims asserted in this case relate to a family trust created by the parents of Appellant, Appellees, and two other siblings, and the Appellant's claims that her two sisters serving as trustees of the trust, engaged in fraud, constructive fraud, breach of fiduciary duty, and intentional infliction of emotional distress in the handling of the trust.¹

The issues in the case are procedural, and arise from Appellant's own actions, and do not relate in any way to action by Appellees. In fact, the action taken by the district court, which Appellant now complains of, was taken by the district court on May 15, 2014, pursuant to two unopposed motions filed by Appellant, and the district court simply granting the two motions.

The first motion was for leave of court to file an amended complaint for the purpose of adding additional parties to the case. Based on the resulting defeat of diversity of citizenship jurisdiction resulting from adding the new parties to the case, the second motion sought "remand" of the case to a Harris County probate court, and the probate case pending in that court.

¹ After the case was transferred/remanded to the state probate court, Appellant added causes of action for conversion, money had and received, unjust enrichment, conspiracy, demand for an accounting, tortious interference with inheritance, and declaratory judgment regarding, *inter alia*, the *in terrorem* provisions.

Appellant now complains of that action by the district court, claiming that the motions filed on her behalf by her attorney, were the result of fraud by that same attorney, and not any actions or fraud of the Appellees. In 2016, and again in 2020, Appellant, as a *pro se* litigant, filed motions pursuant to Fed. R. Civ. P. 60, seeking to have her case reinstated due to the purported fraud perpetrated by Appellant's attorney.

B. Course of Proceedings in the District Court.

Appellant filed her original complaint with the district court on February 27, 2012. Following initial proceedings in the case, the district court, *sua sponte*, entered an order dismissing the case due to absence of jurisdiction. Specifically, the court found and ruled that the probate exception to diversity of citizenship jurisdiction applied in the case, and thus the district court lacked jurisdiction over the case. Appellant appealed that ruling in 2012. On January 9, 2013, this court reversed the ruling of the district court and remanded the case for further proceedings.

On May 1, 2013, Appellant, acting *pro se*, filed her proposed first amended complaint. In conjunction with the amended complaint, and at the same time, Appellant filed her related motion for joinder of parties supported by her sworn affidavit. On May 22, 2013, the district court struck Appellant's first amended

complaint because it was filed without obtaining leave of court. Concurrently, the district court denied Appellant's motion for joinder of parties.

The next event significant to this appeal occurred on February 28, 2014, at which time there was a telephonic hearing with the district court. Following the hearing the district court made the following finding and order:

Pursuant to phone conference conducted this day, *the plaintiff, who determines that additional parties and claims may be necessary for a complete resolution of the case, also fears loss of diversity jurisdiction on the part of the Court.* In this regard, and with an eye toward resolving these concerns, the plaintiff is to report the nature and extent of this progress to the Court on or before March 30, 2014. (Emphasis added).

That action and representation to the court by counsel for Appellant, followed Appellant's own 2013 efforts to add parties to the lawsuit in conjunction with her motion and argument that federal questions would support the continuation of jurisdiction in the district court. Apparently her attorney rejected that spurious argument, and recognized the jurisdictional issue that would arise by adding parties to the case. Whether Appellant participated in that telephone conference with the district court is not known by Appellees, and the record does not reflect the participants on the call.

On May 9, 2014, Appellant, acting through the same attorney, filed her motion for leave of court to file her first amended petition in conjunction with her proposed first amended complaint. At the same time, Appellant filed her motion to

remand the case to the state probate court, and the related probate case pending in that court.

On May 15, 2014, the district court granted Appellant's motion for leave, and entered a second order remanding the case to the state probate court. The state probate court thereafter accepted transfer of the federal case, where Appellant's claims against Appellees are now pending and remain the subject of ongoing litigation. The federal proceeding was then closed and removed from the district court's docket.

On August 3, 2016, Appellant filed in the district court a motion pursuant to Fed. R. Civ. P. 60, seeking to have her federal case reinstated. The basis for her motion was the purported May 2014 fraud by her attorney in filing the amended complaint, without her knowledge or consent, and also the May 2014 motion to remand also filed on her behalf. Per the district court's docket sheet, Appellant never took any action to pursue a ruling on that Rule 60 motion.

On May 8, 2019, the district court found and entered an order to the effect that the case had been transferred to the Harris County probate court and, because of the transfer the case had been closed and removed from the district court's docket, and the district court no longer had jurisdiction over the case.

On July 17, 2020, Appellant filed essentially the same Rule 60 motion she had filed on August 3, 2016, and followed it with her August 28, 2020 motion to

“reopen” the case. A hearing on those motions was conducted by the court on September 10, 2020. The district court reopened the case for the limited purpose of considering Appellant’s Rule 60 motion. On September 23, 2020, the district court denied Appellant’s July 2020 Rule 60 motion. Appellant filed her notice of appeal to this court on October 23, 2020.

STATEMENT OF FACTS

The facts pertinent to this appeal are the procedural actions, especially those of Appellant, in the district court. The underlying facts asserted by Appellant as the basis for her claims against Appellees are not pertinent to Appellant’s appeal.

Appellant and Appellees are sisters. The case and Appellant’s claims originally pursued in the district court, arise from and relate to a family trust created by the parents of Appellant and the Appellees.

Appellant filed her original complaint against Appellees in the district court on February 27, 2012. (***ROA 20-20566.17 - 424***). The basis of subject matter jurisdiction asserted by Appellant in her complaint was exclusively diversity of citizenship.

On March 8, 2012, following a telephonic hearing on the prior day, the court entered an order finding and ruling that the probate exception to diversity of

citizenship jurisdiction was applicable to the case, that the court lacked jurisdiction over the case, and ordered the dismissal of the case. **(ROA 20-20566.493 - 494)**.

Appellant appealed the order of dismissal to this court. This court found that the probate exception was not applicable to Appellant's claims, and reversed and remanded the case to the district court for further proceedings. **(ROA 20-20566.528, 529 - 534)**.

Following remand of the case to the district court, Appellant, acting *pro se*, determined that she wanted to amend her complaint and add additional parties to the case. On May 1, 2013, Appellant, acting unilaterally and without leave of court, filed her first amended complaint with the district court. **(ROA 20-20566.647 - 679)**. In conjunction with the amended complaint, Appellant also filed her motion for joinder of parties, and also her supporting affidavit. **(ROA 20-20566.680 - 689, 690 - 739)**.

It is noteworthy that Appellant understood the potential impact on diversity of citizenship jurisdiction that could result from adding additional parties to the case. Specifically, Appellant asserted in her motion to join additional parties that the district court should maintain jurisdiction over the case due to her purported claims under federal law. While Appellant clearly was aware of the jurisdictional issue at that time, it did not materialize then because, on May 22, 2013, the district court struck Appellant's amended complaint because it was filed without leave of

court. The district court also denied her motion to add additional parties. (*ROA 20-20566.764*).

Those same issues arose again on February 28, 2014, during a telephonic hearing with the district court. At that time Appellant was represented by attorney Jason B. Ostrom (“Ostrom”). Following the telephonic hearing, the district court entered an order addressing information provided by Ostrom during the hearing. Specifically, the court stated in its order on that same date:

Pursuant to phone conference conducted this day, the plaintiff, who determines that additional parties and claims may be necessary for a complete resolution of the case, also fears loss of diversity jurisdiction on the part of the Court. In this regard, and with an eye toward resolving these concerns, the plaintiff is to report the nature and extent of this progress to the Court on or before March 30, 2014.

(*ROA 20-20566.949*).

Over two months later, on May 9, 2014, Appellant sought leave to file her first amended complaint (*ROA 20-20566.976 – 986*), and included a copy of her proposed first amended complaint. (*ROA 20-20566.987 - 992*). At the same time, Appellant also filed her motion to “remand” the case to the Harris County probate court, where the parties that Appellant sought to add to the federal case were already participating in related state court probate litigation. (*ROA 20-20566.993 - 997*).

On May 15, 2014, the district court entered two orders. The first order granted Appellant leave to file her first amended complaint, which destroyed the district court's jurisdiction based on diversity. (*ROA 20-20566.999*). The second order granted Appellant's motion to remand, and ordered remand of the case to the Harris County probate court. (*ROA 20-20566.1000 – 1001*).

Following transfer of the federal case to the state probate court, all actions in the district court immediately ceased. Further, the claims asserted by Appellant against Appellees became part of the **state probate court proceeding**, and were and continue to be litigated as part of that probate case.

On June 3, 2014, upon the motion of Appellant, the state probate court entered an order accepting transfer of the federal case. (*ROA 20-20566.2689*). Since June 3, 2014, the claims asserted by Appellant against Appellees have been and continue to be part of the state probate court case.

Some time after June 3, 2014, Appellant became disenchanted with the state probate court and the rulings in that case, and initiated another effort to pursue her fraud claims against her former attorney and others. More specifically, in July 2016, Appellant filed suit again in federal district court (Hon. Alfred H. Bennett presiding). The defendants were the presiding probate judge, the associate probate judge, eleven attorneys, and one temporary court reporter. In his May 2017 Rule 12(b) order of dismissal, Judge Bennett wrote:

The Court will therefore give Plaintiffs, as pro se litigants, the benefit of the doubt, and credit their filing of this lawsuit to their misunderstanding of applicable legal rules. Accordingly, the Court denies Young's Motion for Sanctions. That being said, **Plaintiffs should now realize that all claims brought in this litigation – or any new claims related to the subject matter of Plaintiffs' Complaint – lack merit, and cannot be brought to this, or any other court, without a clear understanding that Plaintiffs are bringing a frivolous claim.** (Emphasis added).

Of course, Appellant ignored Judge Bennett, as she has ignored so many other federal and state court justices, and appealed Judge Bennett's decision to this court. In June 2018, this court affirmed Judge Bennett's order, noting:

Plaintiffs' appeal focuses on the dismissal of their RICO claim. They set forth the elements of that offense and attempt to address each one. **But the factual allegations they use to support those elements are mostly, as the district court put it, "fantastical" and often nonsensical.** We agree with the district court that **the allegations are frivolous and certainly do not rise to the level of plausibility that the law requires.**

The ruling of the court in that separate proceeding was likewise appealed to this court, and the ruling of that lower court was affirmed.

Appellant was also disenchanted with the state probate court in 2019, when the state probate court twice found her in contempt and sanctioned her once for discovery abuse. The state probate court also ordered Appellant to comply with discovery requests in the probate case, including the taking of her deposition,

which she refused to attend resulting in the issuance of a certificate of nonappearance.

As a result of the July 2016 federal lawsuit, activity in the state probate court essentially ceased. Thereupon, in August 2016, Appellant, acting *pro se*, filed a Fed. R. Civ. P. 60 motion to reinstate her 2012 federal district court case.

As grounds for her Rule 60 motion, Appellant alleged that her own attorney, Ostrom, in filing the May 9, 2014 motion for leave to file Appellant's amended complaint, the amended complaint, and the motion to remand/transfer the case to the state probate court, did so without her knowledge and consent, and that Ostrom's actions constituted a fraud on the district court. (***ROA 20-20566.1006 - 1032***). While Appellant attached documents and pleadings to her motion, she presented no sworn statement or testimony establishing her claims against her attorney.

Though Appellant filed the motion with the district court, she did not request a hearing or ruling by the court on her motion. Finally, on May 8, 2019, in response to a separate motion pursued by Appellant, the district court entered an order expressly ruling that following the 2014 transfer/remand of the case to the state probate court, it (the district court) had no further jurisdiction over the case. The district court found and ruled:

The court is of the opinion that, having transferred the case to the Harris County Probate Court, it no longer has jurisdiction of the case.

(ROA 20-20566.2671).

Appellant took no action to appeal the district court's May 2019 ruling. Rather, she simply continued litigating her claims in the state probate court.

That circumstance, *i.e.*, Appellant continuing to litigate her state probate claims, continued until July 17, 2020, when Appellant again filed essentially the same Rule 60 motion, relying on the same fraud allegations, without evidence.

(ROA 20-20566.2672 - 2752).

When the district court took no immediate action on the July 2020 filing, Appellant filed a motion to reopen the 2012 case. The motion to reopen was filed on August 28, 2020. ***(ROA 20-20566.2850 - 2897).***

A hearing on both motions, to reopen and reinstate, was held on September 10, 2020. The district court reopened the case for the limited purpose of considering Appellant's Rule 60 motion. A transcript of that hearing is part of the appellate record. ***(ROA 20-20566.3023 - 3059).***

On September 23, 2020, the district court entered an order denying Appellant's Rule 60 motion and made findings supporting the ruling. ***(ROA 20-20566.2902 – 2903).*** Following that ruling of the district court, Appellant filed her notice of appeal. ***(ROA 20-20566.2904 - 2905).***

SUMMARY OF ARGUMENT

The substance of this appeal, and the ultimate decision by this court, rests on the procedural history of the case. Specifically, Appellant complains, and seeks redress by this court, of actions taken by the district court at her own insistence.

In May 2014, Appellant requested the district court to allow her to amend her complaint, thereby adding additional parties that were necessary to a final resolution of her claims. Appellant and her attorney knew that action would end the district court's diversity of citizenship jurisdiction over the case, but sought to amend Appellant's complaint anyway. Knowing that fact, Appellant at the same time filed her motion to "remand" the case to a pending probate case in a Harris County probate court. The district court granted both of Appellant's motions, transferred the case to the state probate court, and the federal case was closed.

The state probate case, including Appellant's claim against Appellees, has been continuously litigated in the state probate court since June 2014, when that court accepted transfer of the federal case.

In August 2016, Appellant filed a Rule 60 motion with the district court seeking to have her federal case reopened. The district court entered an order in 2019, in response to another motion filed by Appellant, that due to the transfer of the case to the Harris County probate court, the district court no longer had

jurisdiction over the case. Appellant neither appealed that ruling of the district court, nor pursued a specific ruling on her 2016 Rule 60 motion.

Instead, Appellant continued participating in the state probate court litigation. In July 2020, Appellant filed a second Rule 60 motion with the district court, followed a month later with a motion to reopen her federal case.

In September 2020, the district court conducted a hearing on both motions. Later that same month, the district court entered an order denying the July 2020 Rule 60 motion. The findings of the district court and the grounds for denying Appellant's motion were included in the order.

Based on the procedural history of this case, and Appellant's own actions, Appellees contend that Appellant's pursuit of this appeal is untimely. Appellant was obligated to pursue this appeal, at the latest, following the district court's 2019 finding and ruling that it no longer had jurisdiction over the case. Filing a second Rule 60 motion, based on the same grounds, four years after the first Rule 60 motion, and appealing a second ruling of the court that it lacked jurisdiction over the case following transfer to the state probate court, is untimely and the appeal must be dismissed.

Appellant's Rule 60 motion also fails due to the specific requirements of Rule 60. The motion was not pursued by Appellant within a reasonable time. In addition, Appellant's claim of fraud in her Rule 60 motion was not pursued within

one year of the order that is the subject of her appeal. Appellant's Rule 60 motion was untimely and fails as a matter of law.

Appellant's Rule 60 motion is also defective based on the substance of the motion and the factual assertions therein. The only fraud alleged by Appellant was supposedly perpetrated by her attorney. Such cannot be the case because it was the Appellant who in 2013, while acting *pro se*, first attempted to add parties to destroy the district court's diversity jurisdiction. It can hardly be considered fraud when her attorney took the same action months after raising the issues with the district court in a telephonic hearing. Thus, Appellant's claim of fraud by her own attorney cannot satisfy the requirements of Rule 60.

In addition, Appellant has presented no evidence of the purported fraud. The district court acted properly, and did not abuse its discretion, in denying Appellant's Rule 60 motion.

The position Appellant now asserts before this court is totally inconsistent with the position she asserted to the district court in May 2014. The district court relied on the representations and motions filed by Appellant at that time, and granted her request to transfer/remand the federal case to the state probate court. Appellant also requested the state probate court to accept the transfer of the federal case and her claims asserted therein. The state probate court accepted the transfer as requested by Appellant.

Appellant should not be permitted, years after requesting transfer of the case to the state probate court, and after litigating her claims in that forum for over six years, to seek to have the case returned to the district court. Appellees request this court to find that Appellant is judicially estopped from asserting this position and seeking to have the case reopened in the district court.

ARGUMENT

I. Applicable Standard of Review.

Decisions on Rule 60 motions are reviewed for abuse of discretion. “A district court abuses its discretion if it bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence.” *Kennedy v. Texas Utilities*, 179 F.3d 258, 265 (5th Cir. 1999) (quoting *Esmark Apparel, Inc. v. James*, 10 F.3d 1156, 1163 (5th Cir. 1994)).

II. The District Court Acted Properly Entering Its May 15, 2014 Order Granting Appellant’s Motion to Remand.

In the 2012 appeal to this court by Appellant, this court ruled that jurisdiction was proper in the district court, and that the probate exception to diversity jurisdiction was inapplicable to the claims asserted by Appellant. Upon remand of the case to the district court, Appellant amended her complaint, adding additional plaintiffs to the case, and thereby defeated absolute diversity in the case.

After taking that action, of her own volition, Appellant, again acting through her counsel of record, with no inducement, participation, or action of any kind by Appellees or their counsel, filed her motion to remand. In filing the motion, Appellant requested the district court to enter an order remanding the entire case, and all of the claims asserted by her in the proceeding, to a state probate court on substantive and procedural grounds. Those grounds included a lack of complete diversity between the parties, which resulted from the amended complaint she filed.

In addition, Appellant asserted in her motion to remand the existence of similar questions of law and fact between those presented in the district court proceeding, and the state probate case involving the same parties. The state probate case was pending as Cause Number 412,249 in Harris County Probate Court Number Four.

On May 15, 2014, the district court granted Appellant's motion and entered an order remanding the case, with the practical result that the federal court proceeding was dismissed and removed from the district court's docket.

Appellant is correct that the motion she filed should not have requested a remand of the case to state court, since the case was originally filed in the district court based on absolute diversity of citizenship between Appellant and the originally named defendants (Appellees) in the case. Since the case was originally

filed in the district court, “remand” of the case to an existing state probate court proceeding was technically incorrect.

However, that error in nomenclature was inconsequential. That is so because following entry of the district court’s order that effectively transferred the case to the state probate court identified by Appellant, Appellant asserted and pursued in the state court proceeding claims comparable to those alleged in the district court and, therefore, was not harmed by the alleged error in nomenclature.

Furthermore, Appellant should not be heard to complain about something she requested. On multiple occasions, at first unsuccessfully, she sought to take and then took the very actions that resulted in the destruction of diversity jurisdiction. She requested the district court’s May 15, 2014 dismissal of the federal case. She also requested the transfer/remand to the state probate court.

Those outcomes were the result of Appellant’s action.



In fact, following the district court’s order “remanding” the case to the existing state court probate proceeding, Appellant moved for the state probate court to accept the transfer of the federal case and her claims asserted therein. The state probate court did so, just as Appellant requested, entering an order on June 3, 2014 accepting the transfer of the federal case, and also Appellant’s claims asserted therein. (*ROA 20-20566.2689*).

As previously indicated, Appellant cannot now be heard to complain about actions by the district court granting her the very relief she requested. If she is troubled by the language of the order, remand as opposed to transfer and dismissal, that can be resolved by a correction of the order pursuant to Fed. R. Civ. P. 60(a), with leave of this court. But the modification of the language of the district court's order would merely affirm the prior dismissal of the district court case, and would not affect Appellant's claims in the state probate court, which Appellant has been litigating in that forum for the past seven years.

A. Appellant's Notice of Appeal Was Untimely, and the Appeal Should be Dismissed.

Following remand/transfer of the case to the state probate court, and the state probate court's acceptance of the transfer, Appellant's claims against Appellees proceeded as part of the state probate court proceeding. That is true even now.

As was the case while Appellant's claims were pending before the district court, Appellant is frequently dissatisfied with the rulings by the state probate court. With that dissatisfaction as an impetus, Appellant filed her first Rule 60 motion to reopen the federal case with the district court on August 3, 2016. (*ROA 20-20566.1006 - 1032*). No ruling was made on that motion until the order of the district court on May 8, 2019. (*ROA 20-20566.2671*).

At that time the district court, in response to a motion for contempt filed by Appellant against Appellees, found and ruled that the "[t]he court is of the opinion

that, *having transferred the case to the Harris County Probate Court*, it no longer has jurisdiction of the case. Therefore, the relief requested is Denied.” (ROA 20-20566.2671)(emphasis added). That ruling would likewise have applied to Appellant’s Rule 60 filed on August 3, 2016, thereby triggering the appellate timetable.

Yet, despite the district court’s May 2019 ruling that disposed of all parties and all claims, by virtue of the district court’s finding of no jurisdiction over the case, Appellant did not perfect an appeal or take any further action in the federal case until July 2020, when she filed a second Rule 60 motion seeking to reinstate the federal case. During the span of four years between the two Rule 60 motions (2016-2020), Appellant continued participating in the state probate court proceeding, pursuing her claims against Appellees as part of that case.

To the extent Appellant was entitled to pursue an appeal related to her assertion of rights under Fed. R. Civ. P. 60, that right would have existed at least following the district court’s May 8, 2019 order. She did not do so, and having failed to perfect an appeal following that order, this current proceeding is improper and barred as untimely.

B. Appellant’s Rule 60 Motion that is the Subject of this Appeal Was Untimely.

After pursuing her claims in the state probate court for years, and following rulings by the probate court that were apparently displeasing to her, including two

contempt orders and one sanction order, Appellant filed her second Rule 60 motion in the district court on July 17, 2020, again seeking to resurrect her district court case. It is that second Rule 60 motion, and the resulting order that denied the Rule 60 motion, that is the sole subject of this appeal. All of the superfluous issue screeds raised by Appellant in her brief are simply irrelevant to the case.

As already discussed, Appellant never pursued an appeal of the district court's rejection of her August 2016 Rule 60 motion. That 2016 motion asserted essentially the same grounds as those presented in her motion over four years later, in the July 2020 Rule 60 motion.

Appellant pursued that second Rule 60 motion, claiming that the May 15, 2014 remand order of the district court, entered in response to Appellant's own motion for remand, was the result of a fraud perpetrated on the court. In asserting the presence of such fraud, Appellant glosses over the fact that the transfer/remand of her district court case was the result of her action, acting through her attorney of record.

Further, if Appellant is serious in asserting that the action of her attorney was without her consent and knowledge, she fails to explain why she did not pursue any action against her attorney. More specifically, the July 2020 Rule 60 motion is devoid of any explanation as to why, after she terminated her attorney, she litigated her same claims in the state probate case for over six years prior to

seeking to return to the district court to again pursue the same claims. Appellant was clearly aware of the termination of the district court proceeding, and the pursuit of her claims in the state probate court, from 2014 through 2020, yet she took no action to correct the purported fraud of which she now complains.

Appellant relies on Fed. R. Civ. P. 60 as the basis for her 2020 motion filed with the district court, and also her appeal of the district court's September 2020 denial of her motion.

Rule 60(b) provides six bases for relief from an order. It also requires that motions for relief "shall be made within a reasonable time, and for reasons (1), (2), and (3) no more than a year after the entry of the . . . order" Fed. R. Civ. P. 60(c)(1). Appellant's motion was not filed within a reasonable time of the May 15, 2014 order of the district court, and was certainly not within one year of the order. Consequently, Appellant's reliance on Rule 60(b)(3) is barred by the one year limitation period required by Rule 60(c)(1).

Appellant has not stated any other valid reason justifying relief *from her own actions*, but even if there was such a reason, it was not pursued within a reasonable time. Appellant choosing to litigate her claims in the state probate court, for six years, until she received rulings by that court that displeased her, cannot justify her unreasonable delay in seeking relief in 2020 from the very order

she requested from the district court in 2016, and which 2016 relief was denied in 2019 for a lack of jurisdiction.

Appellant also asserts a right to relief pursuant to Fed. R. Civ. P. 60(d)(3). That provision notes that Rule 60 does not limit a court's power to "set aside a judgment for fraud on the court." As discussed in the following section, Appellant has not pled or submitted evidence that supports her reliance on Rule 60(d)(3). Appellant's reliance on that provision is misplaced.

C. Appellant's Own Action Cannot be Basis for Fraud Under R. 60.

Appellant nowhere alleges that Appellees were in any way involved in a fraud on the court, or in any way elicited a favorable ruling by the district court through fraud, misrepresentation, or misconduct of any kind. There is no allegation by Appellant before the district court or on appeal to this court, that Appellees engaged in any type of conduct to which Fed. R. Civ. P. 60(b)(3) would apply. Consequently, Appellant's reliance on that provision of Rule 60 as the basis for her appeal is wholly misplaced.

This court has held that the purpose of Rule 60(b)(3) is to provide parties relief from judgments (in this instance an order) that are *unfairly obtained*, not one that might be factually incorrect. *Hernandez v. Results Staffing, Inc.*, 907 F.3d 354, 364 (5th Cir. 2018). To prevail on a Rule 60(b)(3) motion, the moving party must establish by clear and convincing evidence "(1) that the *adverse party*

engaged in fraud or other misconduct, and (2) that the misconduct prevented the moving party from fully and fairly presenting his case.” *Rozier v. Ford Motor Co.*, 573 F. 2d 1332, 1339 (5th Cir. 1978); *see also Hernandez*, 907 F.3d at 364, and n. 20.

Appellant’s sole basis for asserting the existence of fraud in pursuing this appeal is the action by her own attorney. Specifically, Appellant alleges that her attorney in the district court proceeding in 2014, acted fraudulently and without her consent in acknowledging the absence of diversity jurisdiction in the district court following Appellant’s amendment of her complaint. Based on the absence of jurisdiction, counsel for Appellant moved for “remand” of the case to state probate court.

Appellant asserts that her counsel was acting fraudulently in taking such action on her behalf, the same action she attempted while acting *pro se* in 2013, that she is the victim of such conduct by her attorney, and that she is entitled to relief pursuant to Rule 60. Yet Appellant cites no authority, within the rule or otherwise, allowing the actions by Appellant, or on her behalf by her attorney, to warrant relief of any kind pursuant to Rule 60.

D. Appellant Has Presented No Evidence In Support of Her 2020 Ex Parte Motion for Relief.

This court has addressed the requirements for establishing and proving the fraud necessary to satisfy the requirements of Fed. R. Civ. P. 60(b)(3) and (d)(3).

"Fraud upon the court" is reserved for only the most egregious misconduct and requires a showing of 'an unconscionable plan or scheme which is designed to improperly influence the court in its decision.'" *Wilson v. Johns-Manville Sales Corp.*, 873 F.2d 869, 872 (5th Cir. 1989) (quoting *Rozier v. Ford Motor Co.*, 573 F.2d at 1338).

The egregious misconduct necessary to satisfy the existence of such fraud includes acts "such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated...." *Rozier*, 573 F.2d at 1338 (citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S. Ct. 997 (1944)). This court has noted that fraud upon the court should "embrace only the species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *Johns-Manville*, 873 F.2d at 872.

The party claiming relief under Rule 60(d)(3), as with Rule 60(b)(3), must prove the requisite fraud by clear and convincing evidence. *See Rozier*, 573 F.2d at 1338. This Court has repeatedly held that whether relief should be granted based on fraud on the court under Rule 60(d) is committed to the sound discretion of the district court, and district courts are given wide discretion in denying such

motions. *Buck v. Thaler*, 452 Fed. Appx. 423, 431 (5th Cir. 2011). The same standard of review applies for rulings on Rule 60(b)(3) motions.

Appellant has made no effort to assert, explain, or present evidence as to how she was the subject of any such “fraud” by her own counsel, how she was unaware of the action to which she now objects, why she thereafter knowingly participated and asserted, in part as a *pro se* party, her claims against Appellees in the state probate case from 2014 through the present, without any action in the district court, and she took no action to raise claims of purported fraud by her attorney in the district court proceeding until July 17, 2020, when she filed her motion for relief with the district court. Rule 60 does not countenance such action by a litigant or her counsel to serve as the basis for relief pursuant to Rule 60, does not excuse such delay in asserting such claims, and cannot allow such action and grant relief when there is not a scintilla of evidence establishing the existence of fraud.

Appellant knew about the 2014 action by her attorney in the district court at some point in 2014, 2015, or 2016. Since she filed a similar Rule 60 motion on August 3, 2016, she certainly learned of the action by her attorney prior to that date. Yet, we do not know when or how she allegedly learned of the action by her attorney because she has presented no evidence to support her claim of fraud by

her own attorney, or for that matter, any fraud by any other person relative to her motion to remand the case to the state probate court.

Appellant has not even attempted to explain why she waited over two years, after she requested remand of the case to the state probate court, and then requested the state probate court to accept transfer of her claims from the federal court proceeding, to file her first Rule 60 motion. And there is certainly no rational explanation for her waiting another four years to file a second Rule 60 motion, and only at that point seek a ruling by the district court on her motion. The total absence of evidence concerning these critical issues undermine her specious claim of fraud by her attorney, and is a further ground for rejecting Appellant's claim in this proceeding.

III. The Court of Appeals Should Find that Appellant is Judicially Estopped from Asserting Her Current Position, That Diversity of Citizenship Jurisdiction Exists and At All Times Existed in the District Court.

In filing her July 2020 Rule 60 motion, Appellant alleged that the transfer of the case to the state probate court was improper and the result of a fraud on the court. Appellees have already noted herein a number of factual, legal, and procedural defects in Appellant's motion, both the 2020 motion that is the subject of this appeal, and also her prior 2016 motion, based on almost identical grounds and argument.

Appellant argued to the district court, without evidentiary support, that her attorney in the district court somehow perpetrated a fraud against her and also against the district court. Appellant claims that her attorney, in amending her complaint in May 2014, in moving to have the case remanded to the state probate court, and the district court in entering an order granting the motion, effectuated a fraud against her interest. Again, Appellant presents no evidence or sworn statement of any kind supporting her assertion of fraud.

Appellant's position asserted in the district court, and continued before this court, is additionally undermined by her conduct and pursuit of her claims in the state probate court, following entry of the May 15, 2014 remand order by the district court.

Following the state probate court's entry of the June 3, 2014 order accepting transfer of the federal case, Appellant willingly and knowingly participated in the state probate proceeding. Appellant initially did so through the same attorney that represented her in the case before the district court. After his representation of Appellant ended in the state probate court proceeding, Appellant continued representing herself in the state court proceeding. After participating in that proceeding, first through counsel and then as a *pro se* litigant, for over two years, only then, in August 2016, did Appellant file her initial Rule 60 motion in an attempt to revive her case in the district court.

Even then Appellant continued litigating her claims in the state probate court, and did so through July 17, 2020, when she filed her second Rule 60 motion in the district court in another effort to revive her claims in the district court. From that date through the present, Appellant's claims in the state probate court remain active, with Appellant pursuing them in that proceeding. And those are the same claims that Appellant sought to be remanded by order of the district court in May 2014, and sought to have the state probate court accept as transferred from the district court.

Both the district court and the state probate court acted in reliance on the requests and representations of Appellant. Appellees also relied on those same representations, and have been litigating Appellant's claims as part of the state probate court proceeding for the past seven years, and will continue doing so until the state probate court matter is resolved.

The claims now asserted by Appellant before this court are contrary to the representations she made to the district court, requesting remand of the case due to absence of diversity jurisdiction following amendment of her complaint. Appellant's current claims are also contrary to the action she took in requesting the state probate court to accept transfer of her claims from the district court.

Finally, Appellant's contentions set forth in both of her Rule 60 motions, which are four years apart, are contrary to and inconsistent with her involvement in

the state probate case, through counsel and later as a *pro se* litigant, from 2014 through filing her first Rule 60 motion in August 2016, and from that date through July 2020, when she filed her second Rule 60 motion, and even to the present.

Based on these indisputable facts, Appellees request this court to find that Appellant is judicially estopped from now asserting, both in the district court and now before this court, that the dismissal of the proceeding in the district court, and the transfer of the case to the state probate court, based on Appellant's on factual assertions and motion, is in any way improper. Specifically, Appellant should be judicially estopped from asserting purported facts and seeking redress from actions taken by the district court based on prior unilateral representations and requests submitted by Appellant to the district court.

This court addressed the appropriateness of judicial estoppel in a federal court proceeding, even one where jurisdiction is based on diversity of citizenship, in *Hall v. GE Plastic Pacific PTE LTD., et al.*, 327 F.3d 391 (5th Cir. 2003). See also *Aldous v. Darwin Nat'l Assur. Co.*, 851 F.3d 473, 478 (5th Cir. 2017); *Gabarick v. Laurin Maritime (American) Inc.*, 753 F.3d 550, 553 (5th Cir. 2014).

In *Hall*, this court noted that judicial estoppel is a matter of federal procedure, and thus applies even in cases where state substantive law is to be applied. *Id.* at 395. The court in *Hall* noted that "it is the federal court that is subject to manipulation and in need of protection." *Id.* The manipulation warned

of in *Hall* is the same type of manipulation that is being perpetrated by Appellant here, and why the district court, this court, and even the Appellees are in need of protection.

Judicial estoppel was not previously raised by the district court or Appellees in this case. However, it is still appropriate to apply judicial estoppel at this juncture of the case by this court. This court has noted that judicial estoppel is an equitable doctrine, and the decision whether to invoke judicial estoppel is within the court's discretion. *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001); *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999).

In *Hall*, this court addressed a number of issues that are applicable in the present case, issues that were addressed and resolved in prior cases before this court. The equitable principle of judicial estoppel exists and is applied by courts to “prevent a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding.” *Ergo Science, Inc. v. Martin*, 73 F.3d 595, 598 (5th Cir. 1996). This court stated in the *Ergo* case that the purpose of the judicial estoppel doctrine is to prevent litigants “from ‘playing fast and loose’ with the courts” *Id.*

This court has repeatedly held that two elements or requirements must be satisfied in order for a court to apply judicial estoppel to a litigant. *Ahrens v. Perot Systems Corp.*, 205 F.3d 831, 833 (5th Cir. 2000). First, it must be shown that the

position of the party to be estopped is clearly inconsistent with its prior position. The second requirement is that the party must have convinced the court to accept the prior position. *Id.*

Both requirements are certainly satisfied in the present case. First, Appellant's current position that diversity of citizenship jurisdiction now exists and has at all times existed in the case is directly contradicted by Appellant's own May 9, 2014 motion to remand the case to state probate court. Appellant clearly stated in that motion that diversity jurisdiction no longer existed in the case due to the amendment of her complaint, and based on that fact she posited to the district court, the case should be remanded to the state probate court.

The second requirement, that the position was accepted and acted on by the court is likewise indisputable. The court accepted the position advanced by appellant, and granted the Appellant's motion. The district court's May 15, 2014 order, denominated as an order of remand, effectively dismissed the federal court proceeding and transferred Appellant's claims to the state probate court proceeding per her request. Thereafter, Appellant, in furtherance of her unilateral action, requested the state probate court to accept the transfer of her claims. The state probate court did just as it was requested by Appellant, entering its June 3, 2014 order accepting the transfer. (**ROA 20-20566.2689**). It is clear that both requirements for applying judicial estoppel in this case are satisfied.

A second issue is whether statements by an attorney can justify the application of judicial estoppel to a party. This court has ruled in various circumstances that statements by an attorney can be imputed to a party, and thus give rise to the application of judicial estoppel against the client. In the *Hall* case, this court noted the holding by the United States Supreme Court that such statements at oral argument could justify the application of judicial estoppel. Other circumstances found to be sufficient to warrant application of judicial estoppel to a party include statements made at a charge conference, *Hidden Oaks Ltd. v. City of Austin*, 138 F.3d 1036, 1047 (5th Cir.1998), and statements made at a pre-trial hearing. *Ergo Science*, 73 F.3d at 598.

This court has also held that the application of judicial estoppel does *not* require the presence of a party's sworn statement to justify the application of judicial estoppel. *Hall*, 327 F.3d at 396. Of particular note is this court's holding in *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir. 1988). There the court stated that a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position. *Id.* The identical principle applies in this case.

Appellant should be judicially estopped by this court from asserting a position that is opposite of her position taken to have the federal case dismissed and transferred to the state probate court. Appellant attempts to circumvent her

prior inconsistent position by attributing the action to her attorney, and asserting, without evidence, that such action was without her knowledge and consent, and constitutes a fraud on the court.

If Appellant is allowed to circumvent the action of her attorney, action which she later ratified by her own actions in the state probate court, then no ruling involving Appellant will ever be final and binding and, as the district court found in its September 23, 2020 order, Appellant will continue “forum shopping” her jurisdictional arguments. (*ROA 20-20566.2902*).

Appellees respectfully request the court to end this process, to allow the parties to continue the claims and disputes between the parties in the state probate court forum that Appellant requested, without opposition in May 2014, and to stop Appellant from “playing fast and loose” with the district court, and now this court. This court has the authority to grant such relief on appeal, or even to raise the issue *sua sponte*. *Ford-Evans v. United Space Alliana LLC*, 329 Fed. Appx. 519, 525 (5th Cir. 2009).

IV. Appellant Was Never Denied a Forum or Opportunity to Pursue Her Purported Claims Against Appellees.

Appellant generally asserts that she has been deprived of constitutional rights as the result of the district court dismissing her case. There are two glaring failures in the argument made by Appellant. First, she ignores the fact that the district court acted only pursuant to her own request and motion. Appellant cannot

now complain of action by the court which she requested. Second, Appellant fails to explain why, after pursuing her claims against Appellees in the state probate court for years, and only when she is displeased with the results and rulings in that court, she now attempts to pursue her claims again in the district court. Whatever might be Appellant's state of mind and desires at this time, she has not been victimized by Appellees or the district court, and her attempt to pursue her claims at this late date in a new forum cannot be countenanced.

CONCLUSION

For the reasons stated herein, based on the applicable authorities and the record, Appellees Anita Kay Brunsting and Amy Ruth Brunsting respectfully request that this court find that the district court was correct, based on the record in this case, the applicable and undisputed facts, and the applicable law of the case, in denying Appellant's motion filed pursuant to Rule 60 of the Federal Rules of Civil Procedure, and in entering the order denying such motion. Appellees further request that this court affirm the ruling of the district court, and that it also grant Appellees any further relief to which they show themselves to be entitled.

Respectfully submitted,

s/ Stephen Anthony Mendel

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing instrument was served on the counsel of record, and also *pro se* parties, as listed below, on this the 19th day of April, 2021, in accordance with the Federal Rules of Appellate Procedure:

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s/ Stephen Anthony Mendel

Stephen A. Mendel

CERTIFICATE OF COMPLIANCE WITH TYPE/VOLUME LIMIT

This document complies with the type-volume limit of FED. R. APP. P. 32(g)(1) and Fifth Circuit Rule 32.3 because, excluding the parts of the document exempted by FED. R. APP. P. 32(f), this document contains 9,552 words. This document also complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft WORD 2016 in the Times New Roman font, size 14.

Signed this 19TH day of April 2021.

s/ Stephen Anthony Mendel

Stephen A. Mendel