NO. 412,249-**401**

CARL HENRY BRUNSTING, et al	§	IN PROBATE COURT
	§	
v.	§	NUMBER FOUR (4) OF
	§	
ANITA KAY BRUNSTING, et al	§	HARRIS COUNTY, TEXAS

CO-TRUSTEES RESPONSE TO
CURTIS'S MOTION TO VACATE OR SET ASIDE FEBRUARY 25, 2022 ORDER

TO THE HONORABLE JUDGES HORWITZ & COMSTOCK:

Defendant Co-Trustees, ANITA BRUNSTING ("Anita") and AMY BRUNSTING ("Amy") (collectively "Co-Trustees"), file this response to Candace Louise Curtis's ("Curtis") motion to vacate or set aside this Court's February 25, 2022 Order Granting Summary Judgment as to Candace Curtis **only**.

I. SUMMARY

The Court should deny Curtis's Motion to Vacate or Set Aside the February 25, 2022 Order because it presents ten (10) allegations that do not have merit. More specifically:

1. Curtis' motion addresses matters that are outside the summary judgment record.
   A) More specifically, Curtis raises issues and arguments that must be disregarded and stricken because they are outside the summary judgment record.
   B) Curtis also submits exhibits and allegations that must be disregarded and stricken as outside the summary judgment record.
2. Even if Curtis's arguments presented in the Motion to Vacate could be considered, which is denied, the arguments lack merit and the Motion to Vacate must be denied.

II. INTRODUCTION

On February 25, 2022, the Court announced its ruling and signed the Order Granting Co-Trustees' Motion for Summary Judgment as to Candace Louise Curtis Only (the "Order"). Co-

Trustees' Motion for Summary Judgment had been ripe for consideration and ruling via submission since December 14, 2021.

On March 28, 2022, Curtis filed her Motion to Vacate or Set Aside February 25, 2022 Order (the "Motion to Vacate"). In it, she sets forth ten (10) reasons why her Motion to Vacate should be granted. For the reasons discussed herein, the Motion to Vacate must be denied.

III. ARGUMENT AND AUTHORITY

A. The Motion to Vacate must be denied because it addresses matters that are outside the summary judgment record.

Curtis incorrectly argues that the Motion to Vacate is to be considered under the standards of review associated with motions for summary judgment.[1] This is incorrect. When summary judgment is granted, and then challenged, **any issues not expressly presented to the trial court in a response cannot be considered** as a grounds for reversing a summary judgment ruling. Tex. R. Civ. P. 166a(c); *ExxonMobil Corp. v. Lazy R. Ranch, LP*, 511 S.W.3d 538, 545 (Tex.2017); *Wells Fargo Bank v. Murphy*, 458 S.W. 3d 912, 916 (Tex.2015). [Emphasis Added].

On November 5, 2021, the Co-Trustees filed their Motion for Summary Judgment. On November 17, 2021, Curtis filed her response, captioned as "Answer to Co-Trustee's Motion for Summary Judgment and Motion to Strike" ("Curtis's SJ Response"). On December 13, 2021, the Co-Trustees filed a Reply to Curtis's SJ Response. Curtis made no additional summary judgment filings between November 17, 2021 and February 25, 2022, the date of the Order. The summary judgment record is therefore "locked" as of February 25, 2022 and the Motion to Vacate is limited only to those issues, arguments, allegations and exhibits presented to the Court in Curtis's SJ Response of November 17, 2021. *See ExxonMobil*, 511 S.W.3d at 545; *see also Wells Fargo Bank*, 458 S.W.3d at 916.

[1] Motion to Vacate at Pages 3-4, including Footnote 1.

Curtis's 51-page Motion to Vacate and its 32 exhibits exceed the scope of the summary judgment record. Therefore, any issues, arguments, allegations and/or exhibits presented in the Motion to Vacate not already part of the summary judgment record must be disregarded and stricken.

1. <u>Issues/Arguments to be disregarded and stricken as outside the summary judgment record</u>.

The following issues/arguments were presented in opposition to summary judgment via Curtis's SJ Response:

a. That the Motion for Summary Judgment should be stricken as untimely;

b. That the Court should not grant summary judgment without first ruling on the validity of the trust documents;

c. That the Court should not grant summary judgment without next identifying the Settlors' intentions based on the construction of the controlling documents;

d. That claims for breach of trust, misapplication of fiduciary, a trustee's failure to exercise discretion/perform trust duties do not trigger forfeiture via violation of any *in terrorem* clauses; and

e. That attorneys' fees should not be awarded because "no accounting for legal fees for trust administration" had been provided, and a trustee is not entitled to litigation expenses resulting from the fault of the trustee.[2]

By comparison, only one (1) of the issues above appears among the ten (10) presented in the Motion to Vacate. Specifically, **Item C** of the Motion to Vacate suggests that the Co-Trustees' Motion and the Court's Order were untimely. No other issue presented in the Motion to Vacate overlaps with Curtis's SJ Response. Accordingly, all such issues/arguments (i.e., Items A-B, D-J) exist outside the summary judgment record, and therefore, must be dismissed.

[2] See Curtis's Response at Pages 1-4.

2. <u>Exhibits/Allegations to be disregarded and stricken as outside the summary judgment record</u>.

a. Exhibits to be stricken/disregarded.

As part of the Order, the Court sustained all objections presented by the Co-Trustees in regard to the purported summary judgment evidence included with Curtis's SJ Response. Curtis's Motion to Vacate does not specifically address this aspect of the Order, and therefore, Curtis failed to challenge the Court's rulings in this regard. Because the Co-Trustees' objections and the Order encompass all seven (7) exhibits submitted as part of Curtis's SJ Response, Curtis has no summary judgment evidence in the summary judgment record. By extension each of the 32 exhibits submitted with the Motion to Vacate are outside the summary judgment record and as such, must be disregarded and stricken.

This notwithstanding, even if the Co-Trustees' objections had not been sustained and the seven (7) exhibits submitted as part of Curtis's SJ Response were part of the summary judgment record, the vast majority of the 32 exhibits attached to Curtis' Motion to Vacate remain outside the summary judgment record. Specifically, Exhibits A and B to the Motion to Vacate **partially** overlap with two (2) of the seven (7) exhibits to Curtis's SJ Response. Exhibit A purports to be the entire Restatement of the Brunsting Family Living Trust, while Curtis's SJ Response included only Pages 4 and 5. Exhibit B purports to be the entire 1st Amendment to the Restatement of the Brunsting Family Living Trust, while Curtis's SJ Response included only the first page of the document.

None of the other exhibits presented in the Motion to Vacate overlap with exhibits presented as part of Curtis's SJ Response. Accordingly, all such exhibits (i.e., Exhibits C - DD)

exist outside the summary judgment record relative to Curtis's SJ Response and must be disregarded and stricken.[3]

b. Allegations to be disregarded.

Section III of the Motion to Vacate purports to set forth the facts and procedural history of this case.[4] However, Section III goes well beyond a clinical, objective presentation of dates and events. It contains multiple unsubstantiated, unproven statements of Curtis's opinions, legal positions, and her incorrect, incomplete and conclusory statements of law and fact. Moreover, it asserts theories of recovery that are not and never have been part of Curtis's live pleading. Examples include but are not limited to:

1. That no valid amendments exist after June 9, 2008 and that any other documents are void. (Page 4; Paragraph 3).

2. That the June 10, 2010 Qualified Beneficiary Designation is the only valid Designation and that the Designation of August 25, 2010 is void. (Page 4; Paragraph 4).

3. That Curtis sent two letters which were ignored, motivating her decision to file suit (Page 4-5; Paragraph 6).

4. That there was a misapplication of fiduciary assets and that the co-trustees breached a duty to keep accurate books and records. (Page 6; Paragraph 10).

5. That issuance of a drop order prevents cases from being designated ancillary, incident to or related to an estate matter (Page 7; Paragraph 28).

6. That Judge Kenneth Hoyt found a substantial likelihood that Curtis would prevail on the merits of her claims and that the only thing left to do was to distribute trust assets. (Pages 7-8; Paragraph 30).

7. That Carl Brunsting's Petition for Declaratory Judgment mirrored Curtis's claims (Page 8; Paragraph 31).

8. That attorney, Jason Ostrom, never had authority to act on Curtis's behalf. (Pages 8-9; Paragraph 35).

[3] The Co-Trustees note that Exhibit D and H to the Motion to Vacate overlap with their own summary judgment evidence (see Exhibit C and J).
[4] See Motion to Vacate at Pages 4 – 24.

9. That naming Carl Brunsting as an involuntary plaintiff in Curtis's First Amended Complaint was improper. (Page 9; Paragraph 36).

10. That Curtis's federal court claims could not be transferred to Probate Court No. 4 by a wrongful pollution of diversity, so that attorneys could raid the trusts. (Page 9; Paragraph 37).

11. That actions taken by certain Judges were in error, unlawful or improper (Pages 9-10; Paragraph 38).

12. That Curtis's case was only allegedly made part of the probate court record and incorrectly captioned (Page 10; Paragraph 39).

13. That Curtis's claims vanished into thin air due to an order signed by Probate Court No. 4. (Page 10; Paragraph 40).

14. That Curtis was named successor Independent Administrator by Will and that there was nothing left to administer. (Pages 10-11; Paragraph 41).

15. That the Court's appointment of a successor independent administrator was not legally possible. (Page 11; Paragraph 42).

16. That there was no estate to which Cause Nos. 412249-401, 402, 403, 404 and 405 could be deemed ancillary. (Page 11; Paragraph 44).

17. That the Court severed Curtis's claims in Cause No. 412249-401 and that Co-Trustees made certain admissions (Page 12; Paragraph 45).

18. That attorney's fees are not recoverable from Curtis/Curtis's forfeited share of the Trust. (Page 12; Paragraph 46).

19. That Curtis registered a foreign judgment in Harris County District Court, which immediately became enforceable and required distributions of Trust assets. (Pages 12-13; Paragraph 47).

20. That a Rule 11 Agreement pertaining to the severance of Carl Brunsting's claims was void, served as a relinquishment of forfeiture claims against Carl, or was a breach of duties owed to Curtis. (Page 13; Paragraph 48).

21. That Probate Court No. 4 was required to or failed to render judgement against Curtis upon signing the Order granting summary judgment, and that the Order was based on a void document. (Page 13; Paragraph 49).

22. That the Court failed to consider the summary judgment record in determining that Co-Trustees' Motion for Summary Judgment should be granted. (Pages 13-14; Paragraph 50).

23. That Co-Trustees' summary judgment evidence (August 2010 QBD) was not properly in evidence and void. (Page 14; Paragraph 51).
24. That Judge Stone abused her discretion, resulting in an Order that much be vacated and set aside. (Page 14; Paragraph 52).

25. That Judge Stone was required to and/or failed to comply with bond and/or oath requirements. (Page 14; Paragraph 53).

26. That no changes to the Trust could be made after June 9, 2008. (Page 15; Paragraph 58).

27. That the designation of successor trustees could not be changed after June 9, 2008. Page 15; Paragraph 59).

28. That an Appointment of Successor Trustee was only allegedly executed, and is void. (Pages 15-16; Paragraph 60).

29. That the June 2010 QBD was executed so that Curtis could receive money, or that any QBD is limited in its scope. (Page 16; Paragraph 61).

30. That a Power of Appointment is void; that the August 25, 2010 QBD was drafted as a result, and is itself void. (Page 16; Paragraph 62).

31. That Curtis was the sole successor trustee of the Trust and that the Court was required to make such a determination. (Pages 16-17; Paragraph 63).

32. That Curtis's share of the trusts vested, requiring distributions to her. (Page 17; Paragraph 64).

33. That Curtis never violated the no-contest provisions of the Trust, and only challenged the August 2010 QBD . (Pages 18-19; Paragraphs 66-67).

34. That the Co-Trustees breached the no-contest provisions of the Trust. (Page 19, Paragraph 68).

35. That the Co-Trustees challenged the Trust through their mother's execution of the August 2010 QBD; that this QBD contradicts the Trust; that the QBD is void; that Curtis's share of the Trust, when forfeited would flow to her descendants; and that it does not constitute proper summary judgment evidence. (Pages 19-20; Paragraphs 69-72).

36. That the August 2010 QBD enlarges the Co-Trustees share of the Trust, requiring forfeiture of their interests. (Page 20, Paragraph 73).

37. That the August 2010 QBD is digitally forged. (Page 20; Paragraph 74).

38. That in considering the Co-Trustees Motion for Summary Judgment of November 2021, the Court was required to consider Curtis's SJ Response to a Motion for Summary

Judgment filed in 2015, but never presented to the court via hearing or submission, and that the Co-Trustees' Motion for Summary Judgment of November 2021 and the Court's determination of same were untimely. (Pages 20-21; Paragraphs 75-77).

39. That there is sufficient evidence "in the record" to support Curtis's affirmative claims. (Pages 21-22; Paragraphs 78-79).

40. That the Co-Trustees admitted to breaching fiduciary duties; that Curtis's initiation of litigation did not properly preclude distributions from being made; that self-dealing or fraud occurred. (Pages 22-23; Paragraphs 80-82).

41. That Curtis's share of the trust vested and was required to be distributed. (Page 23; Paragraph 83).

42. That Curtis was not properly notified of matters set to be considered on February 25, 2022. (Page 23; Paragraph 84).

43. That Judge Stone presiding over the matters set to be considered on February 25, 2022 was improper due to lack of notice, oath, or both; and that a "rendering" was required prior to the Motion for Summary Judgment being granted. (Page 23; Paragraph 85).

44. That the Pre-Trial Conference did not occur on February 25, 2022, that hearings on certain Motions were not properly passed and that the Order granting Co-Trustees' Motion for Summary Judgment was unlawful; that recovery of attorneys' fees was not authorized or that Judge Stone abused her discretion by signing the Order granting Co-Trustees Motion for Summary Judgment in the 401-proceeding and subsequently denying Curtis's Bill of Review in an entirely separate proceeding, i.e., Case No. 412,249-404. (Pages 23-24; Paragraphs 86-88).

45. That Curtis properly, timely filed an objection to Judge Stone; that the Orders signed by Judge Stone are void; and that Judge Stone must disqualify herself. (Page 24; Paragraph 89).

None of the allegations set forth in Section III of the Motion to Vacate were presented as part of Curtis's SJ Response. Moreover, several of these allegations assert theories of recovery that are not and never have been part of Curtis's live pleading (like, by way of example but not limitation, Curtis's suggestion that Co-Trustees breached the no-contest clause). The allegations set forth in Section III exist fully and completely outside of the summary judgment record and must not/may not be considered.

c. *If Exhibits BB and CC are to be considered filings, then they are untimely and leave to file either or both has not been requested or granted.*

As noted, at least 30 of the 32 Exhibits attached to the Motion to Vacate are not properly before the Court. This includes Exhibits BB and CC if they actually are exhibits. However, based on the title of each, it appears that Curtis may be improperly attempting to supplement the summary judgment record.

Exhibit BB is entitled Qualified Beneficiary Designation Memorandum of Law Supplementing Response to Partial Summary Judgment.[5] Exhibit CC is entitled Addendum to Response to Partial Summary Judgment.

Although attached to the Motion to Vacate as an exhibit, Exhibit BB contains its own Certificate of Service. That Certificate reflects that Exhibit BB was filed on March 27, 2022, thirty (30) days after the Order Granting Summary Judgment was signed, and over 100 days after Curtis's summary judgment response deadline. If Exhibit BB was filed as its own independent document or at any time prior to March 27, 2022, no record of such filing can be located. Thus, Exhibit BB should not be considered as part of the summary judgment record.

Meanwhile, Exhibit CC is not signed and has no Certificate of Service. Like Exhibit BB, there is no indication that it was filed as its own independent document, or at any time prior to March 27, 2022. Equally problematic is Exhibit CC's reference to a list of additional purported exhibits, which are not attached to Exhibit CC and do not appear to have ever been filed. Thus, Exhibit CC should not be considered as part of the summary judgment record.

[5] There is some indication that a document similar to Exhibit BB may have been filed with the Court on September 28, 2020, for consideration by the Court in its determination of Carl Brunsting's then pending Motion for Partial Summary Judgment. Relative to the August 2010 QBD, Carl Brunsting's Motion for Partial Summary Judgment (and by extension, Curtis's memo is support) was/were denied on November 12, 2021.

In addition to previously stated reasons why Exhibits BB and CC should not be considered, if they were intended to be or are promoted as being independent pleadings to be considered as part of the summary judgment record, they have not been properly presented to the Court. A non-movant's summary judgment response must be filed at least seven (7) days before the hearing. In this case, Curtis's SJ Response deadline was December 7, 2021.

There is no indication that Exhibit BB or Exhibit CC were filed prior to the December 7, 2021 deadline. Likewise, there is no indication that either Exhibit was filed for consideration as part of the summary judgment record prior to summary judgment being granted on February 25, 2022. Moreover, Curtis has never sought, and even now does not seek leave to file a late response or late evidence. She has never presented evidence or argument that there is good cause for and an absence of prejudice regarding a late response or late evidence. Similarly, Curtis made no effort to obtain a continuance of the December 14, 2021 submission date.

In short, Curtis took no action to properly, timely present Exhibits BB and CC to the Court for inclusion in the summary judgment record. As exhibits or filings, Exhibits BB and CC are not properly before the Court and must be disregarded and stricken.

B. Even if the argument presented in the Motion to Vacate could be considered, the arguments lack merit and the Motion to Vacate must be denied.

As noted, neither Items A-B and D-J, nor Exhibits C-DD of the Motion to Vacate are properly before the Court. None were addressed in Curtis's SJ Response, and as such, exist outside the summary judgment record. For these reasons, the Motion to Vacate must be denied.

However, if the arguments presented in the Motion to Vacate could be considered, they lack merit and do not support the relief requested. Taken in the order in which the issues are presented in the Motion to Vacate, consider the following:

Item A. Subject Matter Jurisdiction.

The Probate Court has jurisdiction over this proceeding under TEX. EST. CODE § 32.001(b) as a matter ancillary to a probate mater. This is so for several reasons, which include, but are not limited to, the following:

1. The signing of a "drop order' is ***not*** tantamount to closing an estate. Thus, the probate case known as C.A. 412249 is still pending. In order to close an independent administration, the requirements of TEX. EST. CODE Chap. 405 must be met. They have not.

2. The Fifth Circuit confirmed that actions taken by Curtis, by her own conduct, destroyed the diversity component of her claims. See Exhibit A (Hoyt) and Exhibit B (Fifth Circuit Opinion)

3. While represented by counsel and as a pro-se party, Curtis availed herself of and acquiesced to the jurisdiction of this Court by, among other things, seeking affirmative relief, filing multiple pleadings, participating in various hearings, and participating in the deposition of Candace Kunz-Freed.[6]

Item B Involvement of Judge Kathleen Stone.

Judge Kathleen Stone rendered a valid judgment in this cause on February 25, 2022 because Judge Stone was assigned to Probate Court # 4 by Minute Order, dated January 27, 2022 by the Honorable Guy Herman, Presiding Judge of the Statutory Probate Courts of Texas. See Exhibit C. By virtue of Judge Herman's order, Judge Stone was "assigned to preside over all matters, with all rights, powers, and privileges held by the regular judge of the court assigned and the attendant jurisdiction of a Statutory Probate Court." As confirmed by Judge Herman's Minute Order 2022-017, Judge Kathleen Stone also has an Oath on file.

Additionally, during the Pre-Trial Conference of March 31, 2022, the Court determined that Curtis's objections to Judge Stone are moot under Chapter 25 of the Texas Government Code.

[6] See also Motion to Vacate at Paragraph 132 (Curtis pled for and paid for a jury trial…).

The Court held that those portions of Chapter 74, upon which Curtis relies, are not applicable to a statutory probate court.

Further, even if Chapter 74 does apply, Curtis's objection was not timely. Her objection and amended objection were filed on March 21, 2022. The Motion to Vacate was filed on March 28, 2022. Under Section 74.053, a timely objection is one made "not later than the seventh day after the date the party receives actual notice of the assignment or before the date of the first hearing or trial, including pretrial hearings, commences, whichever date occurs earlier." According to Curtis, she first received notice of Judge Stone's assignment during the Pre-Trial Conference of February 25, 2022. For an objection to be timely, it would have had to been made during the February 25, 2022 Pre-Trial Conference, but no later than by March 4, 2022.

Regarding Curtis's various references to an alleged failure to "render" judgment, it should be noted that Curtis presents no actual argument or authority to support her position. There are no indications that TEX. R. CIV. P. 300 is triggered by the events surrounding Judge Stone's announcing of the Court's decision and the signing of the Order.

Item C Summary Judgment Motion and Court's Order Untimely.

Co-Trustees' Motion for Summary Judgment was timely filed and heard pursuant to the June 10, 2021 Docket Control Order for this cause. More specifically, Defendant/Co-Trustee's motion was filed on November 5, 2021, and noticed for hearing to occur on December 14, 2021. After noticing the motion for hearing, the Court indicated that the Judge preferred to consider this motion via submission, and the motion proceeded on the Court's December 14, 2021 submission docket, which was within the time limitations imposed by the Docket Control Order, which required dispositive motions "…to be ***heard*** on or before…" (Emphasis added). "Heard before"

does not mean "ruled upon by" a certain date. Thus, the Court's issuance of a ruling via the February 25, 2022 Order is valid.

Moreover, Curtis's argument is little more than a recasting of her prior, unfounded argument that Judge Stone lacked authority to sign the Order/failed to "render" a judgment.[7] As those arguments are invalid and unfounded, so too are these.

Item D. Failure to Identify Grounds for Summary Judgment.

In presenting this argument, Curtis fails to appreciate the fact that Co-Trustees' Motion for Summary Judgment was submitted on traditional and no-evidence grounds. Moreover, summary judgment was sought by the Co-Trustees as counter-plaintiffs and defendants. The Order specifically grants summary judgment on the Co-Trustees' traditional and no-evidence points. Thus, even if Curtis's no-evidence arguments are correct – which is denied – the Order remains effective since it was granted on traditional grounds.

Regarding the traditional motion points presented, from the date of the filing of the Co-Trustees' motion for summary judgment to the date of the Court's ruling on same, approximately 142 days passed. During that entire time, Curtis had notice of the substance of the motion for summary judgment, which clearly sought forfeiture of Curtis's interest in the Trust. Curtis failed to submit any evidence of a fact issue during the relevant time period, and the Court properly granted summary judgment as there was no genuine issue of material fact.

Regarding the no-evidence points, the Co-Trustees properly identified the elements of the claims for which there was no evidence. Without limitation, the identified elements and associated no-evidence points addressed issues regarding capacity/competency, forgery and coercion/undue influence. Each of these issues implied Curtis's request for a declaration that certain documents,

[7] See Motion to Vacate at Page 35, Paragraph 115.

including the August 2010 QBD were invalid. Because she failed to meet her summary judgment burden in the face of these no-evidence points, the Court properly granted summary judgment denying Curtis's request for a declaration that the August 2010 QBD was invalid.

Item E. Ample Evidence "In the Record."

The Co-Trustees' objected to Curtis's alleged evidentiary support for her claims of breach of fiduciary duty. The Court sustained all of the Co-Trustees' objections. As such, Curtis presented no credible, admissible evidence of a genuine issue of material fact that precluded summary judgment in favor of Co-Trustees.

Moreover, the supposed "ample evidence" is not referenced in Curtis's SJ Response and is not part of the summary judgment record. Nevertheless, Curtis appears to suggest that the "ample evidence" derives from her incorrect presentation of Judge Hoyt's preliminary injunction as a "final judgment." In doing so, she again ignores Judge Hoyt's Order of September 23, 2020 and the Fifth Circuit's affirmation of same, wherein it was determined that the preliminary injunction was "not a final judgment." See Exhibit A (Judge Hoyt's Order) and Exhibit B (Fifth Circuit Opinion).

Further, in a separate proceeding, the Fifth Circuit affirmed the Order entered by The Honorable Alfred H. Bennett, in which among other things, it was determined that claims asserted by Curtis against Amy, Anita, and various attorneys, judges and court representatives were frivolous and without merit. See Exhibit D (Judge Bennett's Order) and Exhibit E (RICO Fifth Circuit). As Judge Bennett and/or the Fifth Circuit note, Curtis's allegations, which include allegations of RICO violations, common law fraud, and breach of fiduciary duty, are devoid of "*any facts supporting the delusional scenario articulated in their Complaint, much less facts giving*

rise to a plausible claim for relief." See Exhibit D (Judge Bennett's Order) and Exhibit E (RICO Fifth Circuit Opinion).

Curtis's allegation that "ample evidence" of improper conduct by the Co-Trustees exists has been proven as ***false*** on multiple occasions. This Court has made such a determination. Judge Hoyt has made such a determination. Judge Bennett has made such a determination. The Fifth Circuit, on two separate occasions, has made such a determination.

Item F. Violation of Due Process – August 2010 QBD

Curtis incorrectly asserts that the Court failed to issue a declaratory judgment regarding the validity of the August 2010 QBD. As addressed relative to Item D, above, the Court considered Curtis' claims for declaratory relief via its consideration of the Co-Trustees' summary judgment. The Court considered Curtis's SJ Response and found it lacking.

Curtis also, incorrectly, suggests that the Court failed to identify which documents constitute "the trust" and that the alleged failure somehow prevents the Court from granting summary judgment. In taking this position, Curtis clearly ignores the content of the Order and the Co-Trustees Motion for Summary Judgment. The former clearly states that "Curtis has forfeited her interest in the Trust by taking one or more actions in violation of the Trust and/or the August 2010 QBD (as such terms are defined in the Motion.)" The latter clearly defines the "Trust" as The Brunsting Family Living Trust a/k/a The Restatement of The Brunsting Family Living Trust, while the "August 2020 QBD" is clearly defined as The Qualified Beneficiary Designation and Exercise of Testamentary Powers of Appointment Under Living Trust Agreement executed on or about August 25, 2010.

Additionally, Curtis's allegation that she is entitled to a declaration that the August 2010 QBD is void for allegedly violating TEX. EST. CODE § 251.051 is not only outside the summary

judgment record, but also asserts a basis for declaratory relief that is outside the scope of Curtis's live pleading.[8] Accordingly, Curtis is not entitled to such a declaration and, therefore, her constitutional rights cannot have been violated in this (or any) regard.

Curtis's constitutional rights were not violated regarding the August 2010 QBD. Curtis had notice from November 5, 2021 (the date that the Co-Trustees' MSJ was filed) through December 7, 2021 (the deadline for Curtis to file a response in advance of consideration of the MSJ), a period of approximately 32 days, to submit credible evidence to create a material fact issue regarding the validity of the QBD, and she did not do so. Thereafter, the Court's execution of the Order Granting Summary Judgement as to Candice Curtis Only implicitly confirmed the August 2010 QBD's validity.

Item G. Burden of Proof – *In Terrorem* Clauses

The Motion to Vacate incorrectly argues that the Exhibits submitted by Co-Trustees as summary judgment evidence were not properly authenticated. However, Curtis never objected to these Exhibits. Accordingly, they are waived. Moreover, even if Curtis's argument is true – which is denied – any alleged "error" associated with the Court's consideration of the Co-Trustees' summary judgment evidence is at most, harmless error. Indeed, the same two documents specifically identified by Curtis in the Motion to Vacate (the Trust and the August 2010 QBD) are attached to the Motion to Vacate as certified and/or true and correct copies. The Motion to Vacate notes no material differences between the Trust and the August 2010 QBD as submitted by the Co-Trustees and as submitted by Curtis.

Further, in April 2015, Curtis's own responses to requests for production self-authenticated the Trust and the August 2010 QBD instruments, and are further grounds that Curtis waived any

[8] See Section IV of Plaintiff's Second Amended Petition of January 27, 2015, including sections identified as "Declaratory Judgment Action."

objections to the Trust and August 2010 QBD as attached to the motion for summary judgment. See Exhibit F (Curtis' 2015 Responses to Requests for Production).

Thereafter, in 2019, Candace Kunz-Freed, the attorney who drafted the Trust and the August 2010 QBD instruments was deposed. Curtis attended that deposition, as noted in the Court's records, and had another opportunity to challenge the instruments, and still, Curtis failed to do so. Thus, there are multiple grounds on which Curtis waived her objections to the Trust and the August 2010 QBD.

The Co-Trustees' met their burden of proof that Curtis violated the *in terrorem* clauses of the Trust and/or August 2010 QBD. More specifically, since 2012, Curtis filed two federal court actions, as well as numerous causes of action in state court. The Trust and the August 2010 QBD clearly identify that such actions by a beneficiary of the Trust allow, and even require, the Co-Trustees to seek enforcement of *in terrorem* clauses. The Co-Trustees sought court enforcement of same, and the Court approved the enforcement because of Curtis's very actions within the federal and state court systems since 2012.

Item H. Trust Share inalienable

In arguing that the award of attorneys' fees is void, Curtis mistakenly relies on Trust provisions applicable to beneficiaries. Curtis likewise presents her arguments without consideration of the August 2010 QBD. Among other mistakes in taking this approach, is Curtis's failure to recognize that the attorneys' fee award is made by virtue of Amy and Anita's status as co-trustees, not beneficiaries. Both the Trust and the August 2010 QBD allow for the recovery of attorneys' fees by the co-trustees. Moreover, the award of fees in the Order occurs subsequent to the Court's confirmation that Curtis violated the *in terrorem* clauses of the Trust and/or August

2010 QBD. Consequently, Curtis's share was forfeited. As such, that share of the Trust became available to use for the payment of the Co-Trustees' attorneys' fees incurred.

Curtis also seems to suggest that her forfeited share must pass to her descendants. The August 2010 QBD says otherwise. Consider by way of example, but not limitation:

> Prohibition Against Contest: If any devisee, legatee or beneficiary under the Trust Agreement or any amendment to it…directly or indirectly does any of the following, then in that event the Trustor specifically disinherits each such person, and all such legacies, bequests devises and interests….shall be forfeited and shall be **distributed as provided elsewhere herein as though he or she had predeceased the Trustor <u>without issue</u>**:…[9] (Emphasis added).

Attorneys' fees are recoverable by the Co-Trustees. The Court's award of attorneys' fees was not improper, and addressed on the record during the Pre-Trial Conference of March 31, 2022, where the Co-Trustees announced to the Court an agreement-in-principal has been reached as between Amy, Anita, Carl and Carole relative to the attorneys' fee award in the Order.

Item I. No Basis for Awarding Attorneys' Fees

The Trust, the August 2010 QBD, and the Declaratory Judgment Act all provide for the payment of attorneys' fees. Regardless of whether attorneys' fees were awarded under the Trust, August 2010 QBD, the Declaratory Judgment Act, or some combination of the foregoing, the Court's award of attorneys' fees is proper. The language contained in the four corners of the Trust and August 2010 QBD are clear, as is the language of the Declaratory Judgment Act.

Item J. Violation of Due Process – Notice and Opportunity to be heard

Curtis complains that her right to due process was violated, suggesting that she neither had notice nor an opportunity to be heard. Both concepts are patently false. As the Court's file reflects, on November 5, 2021, the Co-Trustees filed their Motion for Summary Judgment. On November 9, 2021, Co-Trustees filed/served a Notice of Hearing. The hearing was set for December 14,

[9] August 2010 QBD at Page 22.

2021. On November 17, 2021, Curtis filed Curtis's SJ Response. On December 7, 2021, the Court advised all parties that the Motion for Summary Judgment was being transitioned to the Court's submission docket of December 14, 2022. On December 13, 2021, the Co-Trustees filed a Reply to Curtis's SJ Response. Curtis made no additional summary judgment filings between November 17, 2021 and February 25, 2022, the date of the Order.

Texas law requires 21-day notice prior to a hearing on a motion for summary judgment. In this case, Curtis had more than 21-days' notice of the date the Co-Trustees' Motion for Summary Judgment would be considered. Moreover, Curtis had the opportunity to respond and did so. Curtis lodged no objection to the Motion's transition to the Court's submission docket, and took no other action evidencing a desire, need, or request to present oral argument.

As noted, Curtis was not denied due process relative to consideration of the Co-Trustees' Motion for Summary Judgment. Looking beyond just the Motion for Summary Judgment, Curtis's Motion to Vacate fails to identify any other matter about which she was denied notice or opportunity to be heard (whether by oral argument or submission) by the Court or any other party. In the absence of such denials, it can be said that the loss of opportunity, if any, which is denied, to be heard rests squarely on Curtis's own shoulders. The Court is reminded that the issue of Curtis's failure to participate in this proceeding was addressed as far back as January 29, 2019.[10]

Since initiating litigation in February 2012, Curtis has had nothing but opportunities to be heard. She has sought relief in this Court, in Harris County District Court, and in two separate federal court actions. She has presented her positions to the Fifth Circuit on three occasions (racking up a record of 1-2). Across the span of 10 years, arguably, no Brunsting Sibling has been

[10] See Motion for Clarification and/or Motion to Dismiss, including Page 8 ("Inaction and/or misinformation by or about Curtis require clarification and/or rulings by the Court").

heard from more than Curtis. The fact that she may not agree with the results does not amount to a denial of due process.

IV. PRAYER

Co-Trustees, Anita Brunsting and Amy Brunsting, pray that the Court deny Curtis's Motion to Vacate or Set Aside the February 25 2022 Order Granting Summary Judgment Against Curtis only, and grant the Co-Trustees such other and further relief, general and special, legal and equitable, to which they may be entitled.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing instrument has been sent to the following:

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via eService, email, telefax, or first class mail, on this April 8, 2022.

// s // Stephen A. Mendel

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