CAUSE NO. 462505

IN RE:	§	**IN THE PROBATE COURT**
	§	
THE MURIEL MINTZ	§	**HARRIS COUNTY, TEXAS**
FAMILY TRUST	§	
	§	**COURT NO. 2**

VERIFIED MOTION TO TRANSFER VENUE, VERIFIED & GENERAL DENIAL & MOTION TO COMPEL ARBITRATION UPON TRANSFER

BARBARA LATHAM, files this Verified motion to transfer venue, verified & general denial, and motion to compel arbitration upon transfer to the County of Mandatory venue, Brazoria County, pursuant to the TRUST instrument, Texas Aribtration Act, and Supreme Court decision, *Reitz vs. Rachal* (Tex. 2013), Texas Trust Code Section 115.002, Texas Rules of Civil Procedure 92 and 93. In support of the foregoing, BARBARA LATHAM asserts the following:

I. MOTION TO TRANSFER VENUE

BARBARA LATHAM first files this MOTION TO TRANSFER VENUE of this trust case under the mandatory venue provision of the Texas Trust Code, Section 115.002b, which states that venue for trust disputes is determined by the character and location of operation of the trustee. Tex. Trust Code Ann. 115.002b. TTC §115.002(b) states that "the action **shall be brought in the county in which (1) the trustee resides or has resided at any time during the four-year period preceding the date the action is filed or (2) the situs of administration of the trust is**

maintained or has been maintained at any time during the four-year period preceding the date the action is filed. TTC §115.002 is a "mandatory venue" statute, so a suit under the TTC must be filed in a county of proper venue.

II. VERIFIED DENIAL OF PROPER VENUE

Pursuant to Texas Rule of Civil Procedure 93, BARBARA LATHAM files a verified denial and special exception to DONALD MINTZ'S Original Petition and Motion for Temporary Restraining Order and Injunctive Relief, swearing that pursuant to TTC 115.002b, Harris County is not the county of mandatory venue, but Brazoria. LATHAM therefore requests that the Court transfer this case to Brazoria County, Texas where RESPONDENT will pursue mandatory arbitration required by the Trust and Texas law. Tex. R. Civ. P 93 (stating that an assertion of improper county of suit must be verified under Rule 93). Given Harris County statutory probate court must transfer this action to the county of mandatory venue under the foregoing Trust Code section, the Court's TEMPORARY RESTRAINING ORDER and any other ORDER concerning the MINTZ FAMILY TRUST, whether in Cause No. 462505 (Mintz Family Trust) or 456059 (Guardianship of Muriel Mintz) must be severed and transferred or simply transferred to Brazoria County, Texas at which time RESPONDENT intends to seek an ORDER compelling mandatory arbitration from the Court.

III. GENERAL DENIAL TRCP 92

Pursuant to Texas Rule of Civil Procedure 92, LATHAM asserts a general denial of all allegations made against her by DONALD MINTZ, denies each and every allegation of MINTZ against her, and demands that each and every element of his claims be established by strict proof according to the standard required by law. Tex. R. Civ. P. 92. LATHAM further asserts that DONALD MINTZ has colluded with MICHELE GOLDBERG, temporary guardian, committing fraud upon the court by making knowingly false statements of fact to the Court to force guardianship upon MURIEL MINTZ by false pretenses with the agenda of seizing all of her assets and the MINTZ FAMILY TRUST assets which both DONALD AND MICHELE knew was not an asset subject to the jurisdiction of the guardianship court, MURIEL'S ownership or control. Given fraud vitiates everything it touches and the foregoing individuals' unclean hands, the guardianship was initiated by fraud and should be dismissed. There are less restrictive alternatives to this "most restrictive" guardianship in which family access to MURIEL is already being denied illegally.

IV. IMMINENT DANGER OF IRREPARABLE HARM NEGATES BEST INTEREST

Given MURIEL is in imment danger by the appointment of a stranger with virtually no understanding of MURIEL'S medical history and conditions at the

age of 93, MICHELE GOLDBERG is not qualified and incapable of giving informed consent to medical care, such that all treatment given to MURIEL as a result of MICHELE'S purported consent—constitutes medical battery and is likely criminal. GOLDBERG'S retaliation based upon false accusations against ESTELLE NELSON AND BARBARA LATHAM violates the Ward's bill of rights, Texas Human Resource Code Section 102.003, and constitutes reckelessness and/or gross negligence.

Goldberg's refusal to allow MURIEL'S daughters to speak with medical personnel concerning her medical history and treatment at St. Luke's for a fall suffered within days of Michele Goldberg assuming responsibility for her care is placing her life in imminent danger for which no adequate remedy at law exists. LATHAM seeks injunctive relief in the appropriate venue for the same.

This is evidence that this appointment is NOT in the best interest of MURIEL MINTZ and indeed there has been hardly an attempt to define how this guardianship has been in the best interest of MURIEL MINTZ financially or to her person.

V. FRAUD ON THE COURT AND UNCLEAN HANDS

MICHELE GOLDBERG just submitted a bill for half of MURIEL'S annual pension income, approximately $18,000 and most of these charges would never have been incurred had DONALD MINTZ AND MICHELE GOLDBERG not

perpetrated deception upon the tribunal. Fraud on the Court justifies dismissal of this case and unclean hands is an equitable basis which adds to the justification for dismissal. Had MINTZ and his attorneys or GOLDBERG simply follows the law they know or should know applies on a mandatory basis, this case would never have been filed nor would the guardianship case have been "expanded" in terms of GOLDBERG'S authority to harass and intimidate BARBARA LATHAM and unlawfully threaten LATHAM with jail for contempt for failing to provide GOLDBERG access to sensitive financial account information that GOLDBERG had no right or standing to request and knew was not relevant to the guardianship and her authority therein because MURIEL MINTZ had no control, authority, ownership, or beneficial interest in the trust, which was a separate instrument--inter vivos gift to her three children made while she was presumed competent two years ago with no evidence to the contrary to suggest the transfer was fraudulent or can be undone by any court of law. In fact, the trust prohibits any dispute arising from the MINTZ FAMILY TRUST NOT BE LITIGATED IN COURT, BUT MEDIATED OR ARBITRATED.

VI. FAILURE TO SATISFY CONDITIONS PRECEDENT AND VIOLATIONS OF TRUST TERMS

Aside from filing this case in the wrong county as opposed to the county of mandatory venue and seeking arbitration instead of litigation, with knowledge that

litigation of disputes involving the trust are prohibited in favor of mandatory arbitration, DONALD MINTZ has caused a wasting of personal and trust assets through frivolous litigation by failing to satisfy known conditions precedent before even seeking to enforce the aribtration provision of the trust to which he is bound by agreement and accepting benefits of the trust. The most egregious failures include the following:

1. Failing to seek an accounting after relinquishing his role as trustee before making unsubstantiated slanderous accusations against LATHAM which have caused extreme stress, an unnecessary prolonged campaign of harassment and threats to LATHAM for not producing documents demanded by a temporary guardian with no standing to force LATHAM to turn them over; Texas law requires that a beneficiary FIRST demand an accounting as a condition precedent to filing suit for an accounting and DONALD MINTZ ignored the Code's requirements, rendering this lawsuit frivolous and in bad faith for purposes of harassment, such that Rule 91a mandates dismissal, transfer or abatement;
2. Violating Section 10.03 by attempting to have this trust set aside in the guardianship by fraudulently mischaracterizing the MINTZ FAMILY TRUST as a revocable asset of MURIEL MINTZ'S estate in order to have GOLDBERG or the Court seize it and invade the corpus for which he forfeits his share of the proceeds by commencing the guardianshp and/or trust lawsuits.
3. Falsely accusing LATHAM of malfeasance for closing accounts and moving trust property to other accounts knowing she was acting to protect the trust assets from his various and sundry underhanded attempts to self-deal and usurp the trust and MURIEL'S estate for his own use and benefit to the exclusion of ESTELLE NELSON and/or BARBARA LATHAM, with knowledge that Section 10.04 expressly authorized LATHAM to do this.

4. Falsely accusing LATHAM of wrongdoing by exercising her authority to defend the trust by employing attorneys, accountants, consultants, advisors, agents or other professionals to advise her or assist her in the performance of her duties, provided reasonable compensation is paid from the income or principal of the trust—in a scam that is actually listed in OSTROM MORRIS' article "Prejudgment processes and procedure to level the playing field--Tricks and Traps and opportunities from a litigator and judicial perspective" which outrageously outlines the very below the belt tricks being used against LATHAM to cripple her ability to defend herself against fraudulent accusations which were knowingly false when made for the purpose of securing an unfair advantage which violates the express terms of the trust.
5. The procedures mentioned include PREJUDGMENT restraining orders, garnishments, freezing and blocking a party's access to funds they would otherwise be entitled to use to defend themselves or for their minimum support needs to survive, which is unconscionable. The article admits that the procedures chosen are geared to squeeze out their opponent and force them to settle on your terms by impairing their ability to hire an attorney;
6. MINTZ fraudulently obtained injunctive relief with no evidentiary hearing or proof of actual breach and possibly not even proof of an anticipatory brief after his attorney acknowledges that Texas Property Code 114.008 requires that an actual breach be proven to enjoin a trustee; Not only was there a failure to prove irreparable injury, no adequate remedy at law or that the equities were in favor of injunctive relief as mandated for the TRO, but there was no evidentiary hearing at all and GOLDBERG / MINTZ actually demonstrated that they had an adquate remedy by seizing or freezing LATHAM'S IRA and personal funds in the amount of approximately $100,000 and seizing over $100,000 of MURIEL'S estate while spending $18,000 to persecute the only trustee actually complying with her duties to the trust and beneficiaries out of sheer malice;
7. Falsely accusing LATHAM of breaching fiduciary duties when the trust permits her to use discretion in authorizing disbursements according to each beneficiaries' need for health, education, maintenance and support, LATHAM provided each beneficiary the $14,000 annual disbursement and provided additional support permitted by the trust, hiding nothing from

MINTZ, who decided unilaterally to relinquish control and authority for decisions under the Trust to LATHAM while breaching his duties, such that if any tort was committed, he is jointly liable;

8. Falsely accusing LATHAM of malfeasance in closing accounts and moving funds to secure accounts to protect the trust when section 9.04 on banking powers expressly authorizes her to "establish any type of bank account in any banking institution" that she chooses, knowing she has the right to authorize withdrawals from any account in any manner, open accounts with or without disclosing fiduciary capacity, may open accounts in the name of the trust and has wide discretion in management of the trust and the decisions on the use of the funds; with Section 4.09 expressly stating that unequal distributions are permitted.
9. Failing to identify any means by which LATHAM actually VIOLATED the trust, knowing that the trust's express terms govern prior to the application of the trust code, which comes into play only in the event of ambiguity, which has further not been identified.

VII. **MANDATORY ARBITRATION**

Any competent lawyer who read the trust, such as MICHELE GOLDBERG (who read it multiple times, researched questions about its provisions and filed a 73 page show cause motion and order, followed by an order comanding LATHAM to produce documents referenced in the show cause motion), STACY KELLY, JASON OSTROM, and/or OSTROM MORRIS would know and certainly did know that this trust prohibits disputes arising thereunder from being litigated in court, in Section 8.04, which states:

"My Trustee shall administer the trust…with freedom from court intervention" and further mandating mediation and if necessary arbitration in accordance with the

Unfirom arbitration act, with each interested party selecting an arbitrator to resolve any disputes between the parties. Section 8.04. The Supreme Court case of Reitz vs. Rachal held in 2013 that this very language mandates arbitration and it is an abuse of discretion for a court to refuse to compel arbitration where the beneficiary accepted benefits of the trust (estoppel), much less was a signatory to the instrument as MINTZ was here. DONALD MINTZ has violated the trust's provisions in so many ways and caused his mother to be placed in a nursing home that he promised he would accomplish 20 years ago knowing she was adamantly opposed to being placed in a nursing home and had more than sufficient resources and support from her daughters, registered nurses, to not ever need a nursing home.

MOTION TO COMPEL ARBITRATION

In *Rachal v. Reitz*, 403 S.W.3d 840 (Tex. 2013), the Texas Supreme Court upheld a trust's mandatory arbitration clause. What's most interesting about this case is that the court upheld the arbitration clause on testamentary-intent grounds — in the absence of a specific authorizing statute. By accepting a share of the estate, the beneficiaries also accept the strings attached to that gift, including the mandatory arbitration clause. In a unanimous opinion, the Texas Supreme Court reversed the appellate court and concluded that the arbitration clause was enforceable against John for two reasons. First, *as the settlor, John's father determined the conditions attached to his gifts, and the father's intent in this case was to arbitrate any disputes*

over the trust. Second, the Texas Arbitration Act requires enforcement of written agreements to arbitrate. Although such an agreement requires mutual assent and a party typically manifests his assent by signing an agreement, the *Rachal* court recognized that assent may be proven by the beneficiary's acceptance of the benefits of the trust and/or his suit to enforce the terms of the trust.

Andrew Francis Reitz established the A.F. Reitz Trust in 2000, naming his sons, James and John, as sole beneficiaries and himself as trustee. The trust was revocable during Andrew's lifetime and irrevocable after his death. Upon Andrew's death, Hal Rachal, Jr., the attorney who drafted the trust, became the successor trustee. In 2009, John Reitz sued Rachal individually and as successor trustee, alleging that Rachal had misappropriated trust assets and failed to provide an accounting to the beneficiaries as required by law. Reitz sought a temporary injunction, Rachal's removal as trustee, and damages.

Rachal generally denied the allegations and later moved to compel arbitration of the dispute under the TAA, relying on the trust's arbitration provision. That provision states:

> Arbitration. Despite anything herein to the contrary, I intend that as to any dispute of any kind involving this Trust or any of the parties or persons concerned herewith (e.g., beneficiaries, Trustees), arbitration as provided herein shall be the sole and exclusive remedy, and no legal proceedings shall be allowed or given effect except as they may relate to enforcing or implementing such arbitration in accordance herewith.

> Judgment on any arbitration award pursuant hereto shall be binding and enforceable on all said parties.

Rachal moved to compel arbitration under the TAA, which provides that a "written agreement to arbitrate" is enforceable if it provides for arbitration of either an existing controversy or one that arises "between the parties after the date of the agreement." Tex. Civ. Prac. & Rem.Code § 171.001(a). As a threshold matter, a party seeking to compel arbitration must establish the existence of a valid arbitration agreement and the existence of a dispute within the scope of the agreement. Meyer v. WMCO–GP, LLC, 211 S.W.3d 302, 305 (Tex.2006).

Based upon Texas law which has always tried to give effect to the settlor's intent, from the four corners of unambiguous trusts and the theory that a benficiary who receives a benefit from the trust is estopped to deny the arbitration clause within it even though the arbitration clause may not have been part of an agreement in which the beneficiary was a signatory (unlike this case where Donald Mintz created the language and picked the arbitration clause himself). Frost Nat'l Bank of San Antonio v. Newton, 554 S.W.2d 149, 153 (Tex.1977); see also Huffman v. Huffman, 161 Tex. 267, 339 S.W.2d 885, 888 (Tex.1960)

Noting that in this case, the settlor unequivocally stated his requirement that all disputes be arbitrated and arbitration would be "the sole and exclusive remedy"

for “any dispute of any kind involving this Trust or any of the parties or persons connected herewith (e.g., beneficiaries, Trustees),” the Court held that the settlor’s intent must be enforced, if the arbitration provision is valid and the underlying dispute is within the provision's scope. Meyer, 211 S.W.3d at 305.

The TAA provides that a “written agreement to arbitrate is valid and enforceable if the agreement is to arbitrate a controversy that: (1) exists at the time of the agreement; or (2) arises between the parties after the date of the agreement.” Tex. Civ. Prac. & Rem.Code § 171.001(a) (emphases added). The TAA further states that a “party may revoke the agreement only on a ground that exists at law or in equity for the revocation of a contract.” Id. § 171.001(b) (emphasis added).

Noting that the Court has found assent by nonsignatories to arbitration provisions when a party has obtained or is seeking substantial benefits under an agreement under the doctrine of direct benefits estoppel, the Court held that an express contract to arbitrate was not needed.

Applying estoppel by direct benefits, such as the $14,000 check Donald Mintz received to the facts in Reitz, the Court noted that a beneficiary may disclaim an interest in a trust. See Tex. Prop.Code § 112.010; see also Aberg v. First Nat'l Bank, 450 S.W.2d 403, 407 (Tex.App.-Dallas 1970, writ ref'd n.r.e.) (stating the well-

settled rule that a trust beneficiary who has not manifested his acceptance of a beneficial interest may disclaim such interest).

Concluding that it would not be fair or equitable to hold the trustee to the terms but not the beneficiaries, the Court stated that Reitz both sought the benefits granted to him under the trust and sued to enforce the provisions of the trust and never disclaimed any interest in the trust, much like MINTZ. See Tex. Prop.Code § 112.010 (presuming a beneficiary accepts an interest in a trust and establishing time period to disclaim that interest). Reitz also sued to enforce the trust's provisions against the trustee.

Like Mintz, Reitz claimed Rachal "has materially violated the terms of the Trust and his fiduciary duty by failing to account to the beneficiary and . has materially violated th[e] terms of the Trust by his conversion of the Trust assets which has resulted in material financial loss to the Trust." In accepting the benefits of the trust and suing to enforce its terms against the trustee so as to recover damages, Reitz's conduct indicated acceptance of the terms and validity of the trust, so the doctrine of direct benefits estoppel applied to bar Reitz's claim that the arbitration provision in the trust was invalid. See Weekley Homes, 180 S.W.3d at 131–32; Kellogg Brown & Root, 166 S.W.3d at 739–40; FirstMerit Bank, 52 S.W.3d at 755–56.

The only two questions are whether the arbitration provision is enforceable against the person seeking to sue and whether the dispute and accusations fall within the scope of the provision. As in Reitz, in this case the answer is a resounding yes such that this action cannot continue and must be dismissed, transferred or abated and arbitration compelled immediately with no further court action. 211 S.W.3d at 305. The court reversed the appeals court decision denying the motion to compel, stating that direct benefits estoppel and the fact that the facts and accusations were within the scope of the arbitration clause dictated that arbitration must occur and not litigation. See Rachal, 403 S.W.3d at 842.

VIII. CONCLUSION AND PRAYER

For the reasons stated herein and based upon the actions of DONALD MINTZ AND MICHELE GOLDBERG, which have are not in the best interest of the trust or the ward and have only served to persecute LATHAM with no evidence of wrongdoing but instead, proof that she was authorized to engage in the very distributions and activities complained about by MINTZ when he was in breach of his duties as trustee by simply walking out and relinquishing control of the trust to BARBARA LATHAM without objection, lying to this Court in stating that LATHAM prohibited his access when GOLDBERG freely admits he provided full access to the accounts to her in violation of the trust, LATHAM prays for this Court

to transfer venue of this case to Brazoria County where she will seek to compel arbitration as the mandatory remedy for any dispute arising under the trust instrument. LATHAM seeks all other and further relief to which she may be justly entitled at law or in equity, including immediate dissolution of the temporary restraining order against her based upon fraud on the court, which vitiates everything it touches and unclean hands. *See affidavits of Barbara Latham, Estelle Nelson, Accounting of Donald Mintz, documents produced to temporary guardian pursuant to void court order by a court lacking mandatory venue, show cause order and motion, order to produce documents, ADA request for accomodation which was denied (violating LATHAM'S right to the statutory period to complete an accounting prior to making claims in a suit for accounting or otherwise), Michele Goldberg's bill for over $18,000, Donald Mintz's $14,000 cashed check to show he received benefits and is estopped, Mintz's application for guardianship in which he defrauded the court by stating the trust assets belonged to Muriel Mintz and the trust was revocable when he knew that neither were true, Reitz vs. Rachal Supreme Court case; Email from Schwager to Goldberg explaining the reasons for Latham's seeming non-compliance and that she feels harassed and terrorized; Mintz Family Trust and attached TRO.*

Respectfully,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Motion for Substitution of Counsel was served upon all counsel of record this 8th day of December at 2:15 p.m. 2017 by e-file and e-mail.

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