

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION

CANDACE LOUISE CURTIS

*Plaintiff,*

V.

ANITA KAY BRUNSTING, AND  
AMY RUTH BRUNSTING

*Defendants.*

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4:12-CV-00592

MOTION TO STRIKE ATTACHMENTS UNDER RULE 12(F) AND,  
SUBJECT TO THE MOTION TO STRIKE,  
DEFENDANTS' ANSWER TO PLAINTIFF'S COMPLAINT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Defendants Anita Kay Brunsting and Amy Ruth Brunsting move to strike the Declaration and accompanying exhibits attached to Plaintiffs' Complaint under Rule 12(f).

MOTION TO STRIKE DECLARATION AND EXHIBITS

Defendants object to, and move to strike under Rule 12(f), the inclusion in the Complaint of a 13-page Declaration and exhibits, adopted by reference in paragraphs 6, 13, 18, and 25 of the Complaint.

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." The Rule 8 pleading standard does not require "detailed factual allegations." *See Ashcroft v. Iqbal*, 556 U.S. 662, 677-78, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). Rule 10 permits the inclusion of a written instrument that is an exhibit to a pleading, but Plaintiff's Declaration is not a written instrument within the meaning of Rule 10 nor is it central to

the Plaintiff's claims. Moreover, it includes self-serving references to family history; personal history; alleged hearsay conversations and declarations of her deceased father and mother; criticisms of her sisters including "cruelty" and "character assassinations"; conclusory statements; and other immaterial matters.

Rule 12(f) grants the Court discretion to strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter." Evidence pleading, as distinguished from the pleading of ultimate facts, is not favored under the Federal Rules. *See In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1169 (5th Cir.1979). Under the Rules, unnecessary evidentiary details that are prejudicial, or of no consequence to the controversy, may be stricken. In this case, so much of the Declaration includes redundant, immaterial, impertinent, and scandalous matters that parsing the attachment is not possible and the attachment as whole should be stricken. Defendants move to strike the Declaration attached to the Complaint, and its 44 exhibits (totaling 379 pages).

#### ANSWER TO COMPLAINT

Subject to the Motion, Defendants file this Answer to the complaint of Plaintiff. Unless expressly admitted, Defendants deny each allegation of the complaint. Defendants answer by corresponding paragraph numbers as follows:

#### I. PARTIES

1. Defendants, on information and belief, admit the allegations of the first sentence of paragraph 1. Defendants admit the balance of paragraph 1.

#### II. JURISDICTION AND VENUE

2. Defendants admit the allegations of paragraph 2 to the extent that the allegations

of the complaint would confer subject matter diversity jurisdiction on this Court under the alleged statutory ground of 28 U.S.C. § 1332(a)(1). Defendants deny 28 U.S.C. § 1332(b) is presently applicable. Defendants deny 28 U.S.C. § 1332 (C)(2) is applicable.

3. Defendants understand Plaintiff's suit to be *in personam* and not *in rem*, and the reference to the trust as "the Res" in this matter is therefore not fully accurate, but Defendants understand Plaintiff's causes of action arise from the referenced trust. The real property of the Trust is located in Iowa, and the allegation of the second sentence is denied with regard to the reference to Texas real property. With regard to the third sentence of paragraph 3, there is a Texas state action that includes claims about the Trust and legal representation of the former trustees of the Trust, but such action had not been filed "previous" to the filing of this suit. Defendants deny the allegation in the balance of the paragraph that the wills of the Settlor have not been filed with a court for probate, and both wills have in fact been admitted to probate in Texas.

4. Defendants admit the allegations of the first sentence of paragraph 4. Defendants admit the allegations of the second sentence of paragraph 4 to the extent that the allegations of the complaint would confer venue in this Court under the alleged statutory grounds.

### III. NATURE OF ACTION

5. Defendants admit the first and second sentences of paragraph 5 only to the extent that they are Plaintiff's characterization of her suit. Defendants deny the last sentence of the paragraph, and assert that Plaintiff's right to amend, if any, is governed by Rule 15.

IV.  
CAUSE OF ACTION COUNT ONE

Defendants, to the extent necessary, deny the assertion of law and citation of law in the first numbered paragraph of paragraph IV, as it is not an allegation of fact asserted against them by an opposing party.

6. Subject to the motion to strike, and only to the extent necessary, Defendants deny the allegations of paragraph 6.

7. Defendants admit the allegations of paragraph 7, except that Plaintiff is not a “named successor beneficiary.”

8. Defendants admit the duty of the trustees is the general duty to administer the trust in good faith according to its terms and the Texas Trust Code, and that in the absence of any contrary terms in the trust instrument or contrary provisions of the Texas Trust Code, when administering the trust the trustees shall perform all of the duties imposed on trustees by the common law. Defendants otherwise deny the allegations of paragraph 8, and deny anyone is a “successor beneficiary.”

9. Defendants deny the allegations of paragraph 9.

10. Defendants deny the allegations of paragraph 10.

11. Defendants deny the allegations of paragraph 11.

12. Defendants deny the allegations of paragraph 12.

COUNT TWO

13. Defendants reassert their response to paragraph 6.

14. Defendants deny the allegations of paragraph 14.

15. Defendants deny the allegations of paragraph 15, which is a repeated allegation of paragraph 10.

16. Defendants deny the allegations in paragraph 16.
17. Defendants deny the allegation of paragraph 17, which is a repeated allegation of paragraph 12.

COUNT THREE

18. Defendants reassert their response to paragraph 6.
19. Defendants deny the allegations in paragraph 19.
20. Defendants deny the allegations in paragraph 20.
21. Defendants deny the allegations in paragraph 21.
22. Defendants deny the allegations in paragraph 22.
23. Defendants deny the allegations in paragraph 23, which are a repeated allegation of paragraph 16.
24. Defendants deny the allegations in paragraph 24, which are a repeated allegation of paragraph 17.

COUNT FOUR

25. Defendants adopt by reference their answer to paragraph 6.
26. Defendants deny the allegations in paragraph 26.
27. Defendants deny the allegations in paragraph 27 and Plaintiff's attribution of a "principal defendant" label.
28. Defendants deny the allegations in paragraph 28.
29. Defendants deny the allegations in paragraph 29.

V.

Defendants object and move to strike the "Memorandum of Points and Authorities in the unnumbered paragraph of V as the material from treatises and case law recitals are

not allegations of fact and are not a short, plain statement of the claim against Defendants. Defendants cannot otherwise admit or deny the matters that are not factual allegations, and therefore they are denied to the extent necessary.

30. Defendants object and move to strike the “Memorandum of Points and Authorities in paragraph 30 as the statutory material is not an allegation of fact and is not a short, plain statement of the claim against Defendants. Defendants cannot otherwise admit or deny the matters that are not factual allegations, and therefore they are denied to the extent necessary.

31. [There is no paragraph 31 in the complaint].

VI.  
PRAYERS FOR RELIEF

32. Defendants deny that the allegation of the prayer and all relief sought in the prayer, paragraphs 33-37.

REQUEST FOR EX PARTE TEMPORARY RESTRAINING ORDER

38. Defendants deny the allegations in paragraph 38 and the temporary relief there requested.

39. Defendants deny the allegations in paragraph 39.

40. Defendants deny the allegations in paragraph 40.

41. Defendants deny the allegations in paragraph 41.

42. Defendants deny the allegations in paragraph 42 and the temporary relief there requested.

VII.  
AFFIRMATIVE DEFENSES

43. Defendants would show that the complaint fails to state a claim by which relief may be granted.

44. Defendants further plead the defenses of waiver, estoppel, laches, ratification (express or implied) and acceptance of benefits.

45. Defendants would show that to the extent Plaintiff has sustained damages, which Defendants deny, then Plaintiff has failed to mitigate or avoid damages.

46. Defendants plead all applicable provisions of the Trust and sub-trust instruments concerning the duties and liabilities of a person serving as Trustee, including any exculpatory provision applicable to alleged errors of judgment or mistake of fact or law or ordinary negligence.

47. Defendants would show that a claim of intentional infliction of emotional distress is a “gap-filler” tort, judicially created in Texas for the limited purpose of allowing recovery in those rare instances in which a defendant intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress. Where the main charge in the plaintiff’s complaint is another tort, intentional infliction of emotional distress should not be available as a matter of law. Further, Defendants deny that the intended consequence or primary risk of their alleged conduct was severe emotional distress; as a result the tort of intentional infliction of emotional distress is unavailable as a matter of law.

48. Defendants would show that any claim for declaratory relief set out in the Prayer is without merit as the claim is subsumed within the other claims of Plaintiff.

49. Defendants plead the doctrine of comparative responsibility as provided in Chapter 33 of the Tex. Civ. Prac. & Rem. Code and its application to the Plaintiff's claims of fraud and all other torts (intentional or otherwise) that may be alleged against Defendants.

50. Plaintiff is not entitled to punitive damages, and any and all excessive amounts of such damages sought violate Chapter 41 of the Tex. Civ. Prac. & Rem. Code, the Texas Constitution, and the United States Constitution, all of which set limits on the award of punitive damages. Defendants' alleged actions and omissions were undertaken in good faith, with the absence of malicious intent to injure Plaintiff, and constitute lawful, proper and justified means to further the purposes of the Trust and sub-trusts.

WHEREFORE, Defendants Anita Kay Brunsting and Amy Ruth Brunsting pray that the Court grant the Rule 12(f) motion and strike the Declaration of Plaintiff and its exhibits; that subject to the motion to strike, Plaintiff takes nothing by her Complaint; that Defendants recover their taxable costs and disbursements under the applicable statutory provision; and for such other and further relief as this Court may find proper.

Respectfully submitted,

MILLS SHIRLEY L.L.P.

By: /s/ George W. Vie III

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ATTORNEYS FOR DEFENDANTS



**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that service on known Filing Users will be automatically accomplished through the Notice of Electronic Filing; those who are not filing users will be served by email and regular mail.

*/s/ George W. Vie III*

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George W. Vie III