

EUNICE R. BENCKENSTEIN,	§	IN THE DISTRICT COURT
WALTER G. RIEDEL III, AND ROY	§	
WINGATE, INDEPENDENT CO-	§	
EXECUTORS OF THE ESTATE OF	§	
NELDA C. STARK, DECEASED,	§	
EUNICE R. BENCKENSTEIN,	§	
INDEPENDENT EXECUTRIX OF THE	§	
ESTATE OF H.J. LUTCHER STARK,	§	
DECEASED, AND WALTER G.	§	
RIEDEL III, GENERAL MANAGER OF	§	
THE NELDA C. AND H.J. LUTCHER	§	
STARK FOUNDATION	§	
	§	
V.	§	OF ORANGE COUNTY, TEXAS
	§	
IDA MARIE STARK, INDIVIDUALLY	§	
AND AS INDEPENDENT EXECUTOR	§	
OF THE ESTATE OF W.H. STARK II,	§	
DECEASED, ET AL.	§	260 <sup>th</sup> JUDICIAL DISTRICT

**PLAINTIFFS' AMENDED MOTION FOR SUMMARY JUDGMENT**

TO THE HONORABLE JUDGE OF SAID COURT:

COMENOW Eunice R. Benckenstein, Walter G. Riedel III and Roy Wingate, as Independent Co-Executors of the Estate of Nelda C. Stark, Deceased, Walter G. Riedel III, as General Manager of the Nelda C. and H.J. Lutcher Stark Foundation, a Texas non-profit corporation, and Eunice R. Benckenstein, as Successor Independent Executrix of the Estate of H.J. Lutcher Stark, Deceased, Plaintiffs in the above-entitled and numbered cause (hereinafter sometimes collectively referred to as "Plaintiffs"), and file this their Amended Motion for Summary Judgment under Rule 166a, Texas Rules of Civil Procedure, and as grounds therefor would respectfully show unto the Court as follows:

I.  
BACKGROUND

This is a declaratory judgment action involving the construction of a Full, Final and Complete Release instrument previously executed by each of the named Defendants hereto in that certain lawsuit styled *Ida Marie Stark, Individually and as Independent Executor of the Estate of W.H. Stark II, et al. v. Nelda C. Stark, et al.*, being Cause No. D880162-C in the 260th Judicial District Court of Orange County, Texas (the "prior litigation").

A. The Prior Litigation

The prior litigation was filed more than 13 years ago by the Defendants, among others, against Nelda C. Stark, individually and as Independent Executor of the Estate of H.J. Lutchter Stark, Deceased, and against the Nelda C. and H.J. Lutchter Stark Foundation. The Defendants herein, who were acting as plaintiffs in the prior litigation, alleged mismanagement and fraudulent concealment regarding the assets of the Estate of Nita Hill Stark (the first wife of H.J. Lutchter Stark and the adoptive mother of W.H. Stark II and Homer B.H. Stark) and the assets of the Estate of H.J. Lutchter Stark. See Exhibit "A", a true and correct copy of Plaintiffs' Third Amended Petition filed in Cause No. D880162-C, *Ida Marie Stark, Individually and as Independent Executor of the Estate of W.H. Stark II, et al. v. Nelda C. Stark, et al.*, in the 260<sup>th</sup> Judicial District Court of Orange County, Texas, attached hereto and incorporated herein by reference.

B. The Release Instrument

A mutual agreement for settlement was negotiated between the parties to the prior litigation and, following the receipt by Defendants of valuable consideration in the amount of \$2,500,000.00, each of the Defendants named herein executed an instrument entitled "Full, Final and Complete Release" (the "Release "). See Exhibit "B", a true and correct copy of the Full, Final and Complete

Release executed by the family members of W.H. Stark II, which is attached hereto and incorporated herein by reference.

The plaintiffs in the prior litigation (Defendants herein) submitted a Motion to Dismiss With Prejudice (the "Dismissal"), which recited that the plaintiffs had settled the prior litigation, received full consideration and now requested dismissal of all claims, demands and causes of action with prejudice against refiling. This Court granted said Motion by Order of Dismissal with Prejudice dated January 17, 1991. See Exhibit "C", a true and correct copy of the Motion to Dismiss with Prejudice and Order of Dismissal with Prejudice, attached hereto and incorporated herein by reference.

C. The Dispute at Bar

Notwithstanding their settlement of the prior litigation for a significant monetary consideration, their execution of a full and final release in the prior litigation, and this Court's dismissal with prejudice of the prior litigation, the Defendants have alleged herein that the Release executed in the prior litigation should be canceled and not held as binding against them. Specifically, the Defendants have filed a counterclaim herein seeking a rescission of the Release, demanding an accounting and the imposition of a constructive trust, and making the same allegations of fraud, conversion and breach of fiduciary duty as made by Defendants in the prior litigation. Consequently, a dispute has arisen between the Plaintiffs and Defendants regarding the meaning and construction of the Release executed in the prior litigation.

In an effort to establish the validity and enforceability of the Release and declare the rights, duties, and responsibilities of the parties thereto, the Plaintiffs sought relief under the Uniform Declaratory Judgment Act, Chapter 37 of the Texas Civil Practice & Remedies Code, for a judicial

declaration of the validity of the Release, the rights and legal relations under the Release, the full and final disposition of all claims under the Release, and the binding effect of the Release as against any and all subsequent claims based on, directly or indirectly, issues adjudicated as part of the settlement and dismissal of the prior litigation. *See* Plaintiffs' First Amended Petition for Declaratory Relief filed herein.

Plaintiffs file this Motion for Summary Judgment as a matter of law, as any and all further claims that the Defendants herein may attempt to assert and/or equitable remedies that the Defendants may attempt to obtain in connection with the assets of the Estate of H.J. Lucher Stark, the Estate of Nita Hill Stark, the Estate of Nelda C. Stark, and the Foundation are barred as a matter of law by the Release instrument executed by the Defendants and filed of record in the prior litigation, by the equitable doctrines of ratification and restitution, by estoppel, by waiver, by the absence of any fiduciary duties owed to Defendants, and by the doctrine of res judicata.

## II. SUMMARY JUDGMENT STANDARD

Rule 166a(a) of the Texas Rules of Civil Procedure states that a party seeking "...to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor...." Tex.R.Civ.P. 166a(a). A movant for summary judgment has the burden of showing that there is no issue of material fact and that it is entitled to summary judgment as a matter of law. *Williams v. Glash*, 789 S.W.2d 261, 264 (Tex. 1990); *Nixon v. Mr. Property Mgmt.*, 690 S.W.2d 546, 548 (Tex. 1985).

Plaintiffs are entitled to summary judgment because there are no issues of material fact in connection with the Release instrument executed in the prior litigation. Section 37.004 of the Texas

Civil Practice and Remedies Code provides that a court may determine any question of construction or validity of an instrument and declare the rights, status and legal relations under said instrument. Tex. Civ. Prac. Rem. Code §37.004. Accordingly, the construction and validity of the Release instrument executed in the prior litigation is an issue that may be declared as a matter of law. Likewise, there are no issues of material fact with regard to Defendants' failure to satisfy the requirement of restitution in conjunction with their attempt to cancel the Release and, thus, the Defendants' ratification of the Release and lack of equitable standing before the Court may be declared as a matter of law. Finally, there are no issues of material fact regarding the preclusive effect of this Court's prior judgment of dismissal with prejudice in the prior litigation, nor are there any issues of material fact regarding the extent of the fiduciary obligations of Plaintiffs, all of which may properly be determined as a matter of law.

This motion is based on the pleadings on file with this Court and on the exhibits filed contemporaneously with this motion, upon which the Plaintiffs intend to rely as summary judgment evidence pursuant to Tex.R.Civ.P. 166a(c) and (d). The discovery and other materials attached hereto are incorporated in this motion by reference. The summary judgment evidence consists of the following:

1. Exhibit "A", a true and correct copy of Plaintiffs' Third Amended Original Petition filed in Cause No. D880162-C, *Ida Marie Stark, Individually and as Independent Executor of the Estate of W.H. Stark II, et al. v. Nelda C. Stark, et al.*, in the 260<sup>th</sup> Judicial District Court of Orange County, Texas;
2. Exhibit "B", a true and correct copy of the Full, Final and Complete Release signed in the prior litigation by Ida Marie Stark, individually and as independent executrix of the Estate of W.H. Stark II, Deceased, William Henry Stark III, Randall Hill Stark, and Linda Marie Stark Barras;

3. Exhibit "C", a true and correct copy of the Motion to Dismiss with Prejudice and Order of Dismissal with Prejudice filed in the prior litigation;
4. Exhibit "D", true and correct copies of the initial and supplemental Responses to Requests for Admission of Ida Marie Stark, William Henry Stark III, Randall Hill Stark, and Linda Stark Barras;
5. Exhibit "E", true and correct copies of the initial and supplemental Response to Requests for Production of Ida Marie Stark, William Henry Stark III, Randall Hill Stark, and Linda Stark Barras;
6. Exhibit "F", true and correct copy of the transcript of the settlement hearing held before this Court in the prior litigation, on or about December 7, 1990;
7. Exhibit "G", a true and correct copy of the Affidavit of Audice Locke, former court reporter for the 260<sup>th</sup> Judicial District Court of Orange County, Texas, attesting to accuracy and authenticity of the transcript attached as Exhibit "F", with attachment "G-1";
8. Exhibit "H", true and correct copy of the Affidavit of Walter G. Riedel III a true and correct copy of the affidavit of Walter G. Riedel III, attesting to attachments H-1, a true and correct copy of the Articles of Incorporation of the Nelda C. and H.J. Lutcher Stark Foundation, H-2, a true and correct copy of the Certificate of Incorporation of Nelda C. and H.J. Lutcher Stark Foundation, and H-3, a true and correct copy of the Articles of Amendment to the Articles of Incorporation of the Nelda C. and H.J. Lutcher Stark Foundation, dated October 14, 1986;
9. Exhibit "I", a true and correct copy of the Will of Nelda C. Stark;
10. Exhibit "J", a true and correct copy of the Will of H.J. Lutcher Stark;
11. Exhibit "K", a true and correct copy of the Receipt and Full and Final Release of William H. Stark II, executed on or about September 3, 1969, in the Estate of H.J. Lutcher Stark, Deceased;
12. Exhibit "L", a true and correct copy of the Motion for Partial Summary Judgment filed in the prior litigation, including the Affidavit of Clyde McKee with attachments;
13. Exhibit "M", a true and correct copy of Plaintiffs' First Amended

Petition filed in Cause No. D880162-C, *Ida Marie Stark, Individually and as Independent Executor of the Estate of W.H. Stark II, et al. v. Nelda C. Stark, et al.*, in the 260<sup>th</sup> Judicial District Court of Orange County, Texas;

14. Exhibit "N", a true and correct copy of the Partial Summary Judgment issued April 24, 1990 by the 260<sup>th</sup> Judicial District Court of Orange County, Texas, in *Ida Marie Stark, Individually and as Independent Executor of the Estate of W.H. Stark II, et al. v. Nelda C. Stark, et al.*, being Cause No. D880162-C;
15. Exhibit "O", a true and correct copy of the Will of Nita Hill Stark; and
16. Exhibit "P", a true and correct copy of the Receipt and Full and Final Release of William H. Stark II, executed on or about May 4, 1948, in the Estate of Nita Hill Stark, Deceased.

### III.

#### THE FULL, FINAL AND COMPLETE RELEASE EXECUTED BY DEFENDANTS IN THE PRIOR LITIGATION

The Release instrument executed in the prior litigation by each of the Defendants hereto is a comprehensive document that releases all parties and all claims in exchange for consideration paid to the Defendants (as the plaintiffs in the prior litigation) of Two Million Five Hundred Thousand and No/100 Dollars (\$2,500,000.00). See Exhibit "B".

#### A. The Extent of the Language of the Release Instrument

##### 1. Claims Released.

The Release instrument recites the release and discharge of (a) all claims, demands and causes of action alleged by plaintiffs in the prior litigation, (b) all claims, demands and causes of action, known or unknown, which could have been alleged by plaintiffs in the prior litigation, and (c) all claims, demands and causes of action, known or unknown, arising out of or connected with any actions or omissions in any capacity by H.J. Lucher Stark and Nelda C. Stark, or in any way

connected with the Estate of Nita Hill Stark, the Estate of H.J. Lutchter Stark or the heirship, inheritance, guardianship or tutorship relationship of W.H. Stark II and Homer B.H. Stark to Nita Hill Stark, H.J. Lutchter Stark or Nelda C. Stark. *See* Exhibit "B". The Release also releases any claims, demands, or causes of action, known or unknown, arising out of or connected with the operation or activities of the Nelda C. and H.J. Lutchter Stark Foundation or any other foundation or charity principally supported by Nelda C. Stark, including any corporation or partnership or business entity in which H.J. Lutchter Stark or Nelda C. Stark had a controlling interest. *See* Exhibit "B".

## 2. Parties Released.

The claims released in the Release instrument extend to and include Nelda C. Stark, individually and as independent executrix of the Estate of H.J. Lutchter Stark, Deceased; the Estate of H.J. Lutchter Stark, Deceased; the Nelda C. and H.J. Lutchter Stark Foundation and all officers, directors, attorneys and employees of the Foundation; and all individuals or entities who owned, possessed or participated in any transactions involving property alleged to have belonged to but misappropriated in the Estate of Nita Hill Stark, Deceased (collectively "the Released Parties"). *See* Exhibit "B".

## 3. Releasing Parties

The releasing parties specifically named in the Release are Ida Marie Stark, individually, Ida Marie Stark, as Independent Executrix of and acting on behalf of the Estate of W.H. Stark II, Deceased, William Henry Stark III, Randall Hill Stark, and Linda Marie Stark Barras, as well as their heirs, beneficiaries and assigns (collectively "the Releasing Parties"). *See* Exhibit "B".

## B. The Circumstances of the Execution of the Release Instrument

In the Release instrument, the Releasing Parties (Defendants herein) specifically agree that



they are entering into and executing the Full, Final and Complete Release based upon their "...own free evaluation of the facts and circumstances surrounding [their] claims, demands and causes of action and in reliance upon the advice of [their] own attorneys". See Exhibit "B".

The Defendants further state in the Release that their actions in executing the Full, Final and Complete Release are "...in no way conditioned upon or in reliance upon any representations, promises or other agreements made by any of the Released Parties". See Exhibit "B". In fact, the Defendants expressly state in the Release that the payment of the \$2,500,000.00 consideration is the only representation, promise or agreement made by the Released Parties. See Exhibit "B". In addition to executing the Release, the Defendants agree to a dismissal of the prior litigation with prejudice to the refiling of any subsequent litigation. See Exhibits "B", "C".

C. Admissions by Defendants Regarding the Release Instrument.

In their respective Responses to Requests for Admission propounded by Plaintiffs herein, each of the Defendants admits several pertinent facts pertaining to the Release instrument, eliminating any possible factual dispute regarding the Release. First, each of the Defendants admits that he or she was a plaintiff in the prior litigation and was represented by legal counsel. See Exhibit "D", true and correct copies of the Defendants' respective Responses to Plaintiffs' Requests for Admission, attached hereto and incorporated herein by reference. Additionally, each of the Defendants admits that he or she was part of the settlement negotiated in the prior litigation and that he or she executed the Release instrument as part of such settlement. *Id.*

The Responses to Requests for Admission further admit that each Defendant signed the Release on his or her own volition and without any duress, and that his or her respective signature to the Release is authentic. *Id.* Finally, each of the Defendants admits that he or she has not repaid

the cash consideration remitted to the Defendants as part of settlement of the prior litigation. *Id.*

Even if Defendants attempt to construe the existence of fact issues in the declaratory judgment sought herein, the only possible fact issues involve the Defendants' execution of the Release, the circumstances of the execution, and the authenticity of the signatures. Because Defendants have admitted each of these points, there are no disputed facts and this Court may make a judicial determination as a matter of law regarding the construction and validity of the Release.

In fact, Defendants' attorney in the prior litigation, Michael T. Gallagher, acknowledged on the record in the prior litigation that he wanted the settlement hearing to be of record so that it would be binding on all parties thereto, and he specifically stated his certainty that the defendants in the prior litigation (Plaintiffs herein) were interested in having the Release binding on him and his clients. *See* Exhibit "F", a true and correct copy of the transcript of the settlement hearing held December 7, 1990 in *Ida Marie Stark, Individually and as Independent Executor of the Estate of W.H. Stark II, et al. v. Nelda C. Stark, et al.*, being Cause No. D880162-C in the 260th Judicial District Court of Orange County, Texas, attached hereto and incorporated herein by reference. *See also*, Exhibit "G", a true and correct copy of the Affidavit of Audice Locke, former court reporter for the 260<sup>th</sup> Judicial District Court of Orange County, Texas, attesting to accuracy and authenticity of the transcript attached as Exhibit "F".

Notwithstanding their own attorney's explicit declaration to the contrary, Defendants now seek to undo the binding Release. Such action must fail as a matter of law given the existence of the Release, the Defendants' ratification of the Release, Defendants' express disclaimer of reliance set forth in the Release, Defendants' lack of equitable and legal standing, and the doctrine of res judicata.

IV.  
DEFENDANTS ARE EQUITABLY ESTOPPED  
FROM SEEKING CANCELLATION OF RELEASE DUE TO  
NONCOMPLIANCE WITH DOCTRINE OF RESTITUTION

A. Restitution is a Condition Precedent to Rescission

A release is a contract and, like any other contract, is subject to avoidance on grounds such as fraud or mistake. *Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997); *Williams v. Glash*, 789 S.W.2d 261 (Tex. 1990). Texas law is well-established that a party demanding the rescission or cancellation of a contract to which he is a party must restore or offer to restore to the other party whatever he may have received under the contract in the way of money, property or other consideration or benefit. *Guerrero v. Hagco Bldg. Systems, Inc.*, 733 S.W.2d 635, 637 (Tex. App.—San Antonio 1987, no writ); *Guion v. Guion*, 475 S.W.2d 865, 869 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e.); *Casualty Reciprocal Exchange v. Bryan*, 101 S.W.2d 895, 897 (Tex. Civ. App. — Eastland 1937, no writ). Because restitution is a condition precedent to the granting of relief in an action for cancellation of an agreement, there can be no rescission as a matter of law until restitution is first made. *Guion*, 475 S.W.2d at 870, citing *Williston on Contracts*, 3d Ed., §1460, p. 117; see also, *Howard v. Burkholder*, 281 S.W.2d 764 (Tex. Civ. App. —Amarillo 1955, writ dismissed); *Casualty Reciprocal Exchange*, 101 S.W.2d at 897.

B. Defendants Lack Equitable Standing to Seek Rescission

As rescission is a remedy in equity, Texas courts have generally applied the fundamental maxim of equity that "he who seeks equity must do equity". *Stewart v. Houston & T.C. Ry. Co.*, 62 Tex. 246 (1884); *Guion*, 475 S.W.2d at 872; *Casualty Reciprocal Exchange*, 101 S.W.2d at 897, citing Black on Rescission and Cancellation, Vol. 2, Page 1414, § 616 et seq. Under this principle, "...one seeking a cancellation of an instrument...must restore the original status; he cannot repudiate

the instrument and retain the benefit received thereunder.” *Guion*, 475 S.W.2d at 869, quoting *Texas Co. v. State*, 154 Tex. 494, 281 S.W.2d 83, 91 (1955); see also *Clark v. Perez*, 679 S.W.2d 710, 715 (Tex. App.—San Antonio 1984, no writ); *Finch v. McVea*, 543 S.W.2d 449, 453 (Tex. Civ. App.—Corpus Christi 1976, writ ref’d n.r.e.).

Where a party retains the consideration received under an instrument and refuses to restore it, that party is estopped from seeking a cancellation of the instrument. See *Wilhite v. Davis*, 298 S.W.2d 928 (Tex. Civ. App.—Dallas 1957, no writ). The *Wilhite* case concerned a claim on a lost deed and the release of notes that a grantee had assumed and paid. The appellate court held that the parties who accepted the benefit of the payments on the notes, but who failed to tender to the court the amount received on the notes, were estopped to question the existence, validity and effect of the deed. *Id.* at 933.

The same rationale applies even if rescission of a contract is sought on the basis of fraud or fraudulent inducement. In fact, even taking as true all allegations of fraud, it is the primary objective in a suit for the rescission or cancellation of a contract obtained by fraud to undo the original transaction and place the parties in their original positions. *Guion*, 475 S.W.2d at 869; *Howard*, 281 S.W.2d at 766; *Casualty Reciprocal Exchange*, 101 S.W.2d at 897; see also, *Guadalupe-Blanco River Authority v. City of San Antonio*, 200 S.W.2d 989 (Tex. 1947) (holding that, in an action to rescind based on fraudulent representation, a party may not seek to retain the beneficial part of the transaction and to repudiate the disadvantageous part because of the alleged fraud of the other party). More specifically, “...if an instrument is [allegedly] fraudulently induced, the party defrauded is not entitled to benefit under the instrument.” *Finch*, 543 S.W.2d at 453, citing *Arnold v. Wheeler*, 304 S.W.2d 368 (Tex. Civ. App.—San Antonio 1957, writ ref’d n.r.e.). Therefore, the original status of

the parties must be restored. *Id.*

The *Guion* case, which is parallel with the case at bar, involved a family dispute that included an action for an accounting with regard to a family trust and damages for alleged breach of duty by the trustees. *Guion*, 475 S.W.2d at 866. The parties thereafter entered into extended negotiations for settlement of the dispute, which resulted in a written agreement of settlement being signed by the parties and the transfer and acceptance by the settling parties of monetary consideration in excess of \$100,000.00. *Id.* at 867, 870. After the settlement agreement was signed, several individuals who received an interest in the property under the agreement filed a suit for cancellation and rescission of the compromise and settlement agreement on the basis that it was allegedly procured through fraud, misrepresentation and conspiracy. *Id.*

The defendants filed motions for summary judgment, which were granted by the trial court following its denial of the cancellation and rescission of the settlement agreement. *Id.* The trial court found that the *Guion* plaintiffs expressly authorized their attorneys to negotiate the settlement agreement and that, subsequent to the agreement, the plaintiffs knowingly and willfully accepted the fruits of the agreement and exercised volitional dominion over the various properties that had comprised the settlement proceeds. *Id.* at 867-68. Because of these acts, the trial court granted summary judgment in favor of the defendants, concluding that (1) the settlement agreement was made with the authorization and consent of the plaintiffs; (2) the agreement was fairly negotiated and supported by consideration and mutual assent of the parties; (3) the plaintiffs failed to make restoration of the properties received under the agreement and were unable to do so; (4) the plaintiffs waived all rights to rescind the agreement; and (5) the plaintiffs were "without equitable standing and [had] unclean hands". *Id.* at 868.

The appellate court affirmed the summary judgment granted by the trial court, holding that "...the doctrine of restitution is a complete legal bar to appellants' cause of action for cancellation and rescission." *Id.* at 871. Because the appellants in *Guion* received and accepted the proceeds of the settlement and never offered or made any effort to restore any part of the proceeds of the settlement agreement in their subsequent action to cancel the agreement, the appellate court in *Guion* noted that the appellants failed to present clean hands when they entered the court seeking equitable relief. *Id.* at 872. The *Guion* court further found that, even assuming that appellants presented issues of fraud, misrepresentation and conspiracy against the trustees, the findings on the part of the trial court concerning waiver and retention of consideration "...support appellees' contention that appellants' cause of action for equitable relief is barred, as a matter of law." *Id.*

C. Failure to Plead Restitution Renders Claim Fatally Defective

One seeking rescission of a contract must, as a condition precedent, allege facts relied upon to avoid the agreement and must allege the fact of a return or tender of the benefit or consideration received by virtue of the settlement agreement. *Id.* at 869. Not only must there be an adequate pleading concerning an offer to restore or actual restoration, there must be proof that the benefits of the agreement sought to be canceled have been returned or some legal justification for failure to do so. *Id.* A pleading that lacks an allegation of restitution is fatally defective, which is merely enforcement of the ancient rule of equity described in the foregoing Section (B). *Howard*, 281 S.W.2d at 766; *Casualty Reciprocal Exchange*, 101 S.W.2d at 897 (holding that the complainant in a petition must offer to restore whatever property or valuable consideration he may have received under it, and a "...pleading without such averments is fatally bad.")

D. Application

Defendants herein are not able to plead or prove the return of the \$2,500,000.00 paid to them under the Release because they have unequivocally and inexplicably retained such monetary consideration. *See* Exhibit "D". Not only does Defendants' pleading fail to set forth a proper basis for rescission of the Release, Defendants have failed to return the benefits they received under the Release. *Id.* No legal justification exists for Defendants to fail or refuse to return the consideration that they received under the Release in the prior litigation. Accordingly, Defendants' pleading for the cancellation of the Release is fatally defective and, as Defendants are bound by the allegations in their pleading, it is wholly without merit and must fail as a matter of law.

Moreover, because Defendants failed and refused to make restitution of the \$2,500,000.00 previously paid to them under the Release that they now seek to cancel, the Defendants herein appear herein with unclean hands and are, thus, estopped from seeking the equitable remedy of rescission. The Texas Supreme Court set forth the general rule of equity more than 100 years ago that, if a party fails to tender back a monetary benefit received, "...he comes into court with soiled hands and no relief can be obtained. As he has bound himself, so must he be bound." *Stewart*, 62 Tex. at 249. As in the parallel case of *Guion*, the Court herein should grant summary judgment in favor of Plaintiffs as a matter of law on the grounds of waiver, lack of equitable standing, estoppel, and retention of consideration contrary to the doctrine of ratification. *See* Article V, *infra*.

V.

BY RETAINING THE CONSIDERATION RECEIVED,  
DEFENDANTS HAVE RATIFIED THE RELEASE AS A MATTER OF LAW  
AND CANNOT NOW SEEK TO RESCIND IT

In addition to being a condition precedent to the cancellation of a release and a condition

precedent to possessing the required equitable standing (*see* Article IV, *infra*), the return of consideration received under a release is necessary in order to avoid ratification of that release. Ratification occurs when one, induced by fraud to enter into a contract, continues to accept the benefits under the contract after he becomes aware of the fraud or if he conducts himself in such a manner as to recognize the contract as binding. Any retention of the beneficial part of the transaction affirms the contract and bars an action for rescission as a matter of law. *Rosenbaum v. Texas Building and Mortgage Co.*, 167 S.W.2d 506 (Tex. 1943); *Spellman v. American Universal Inv. Co.*, 687 S.W.2d 27 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.); *Guion*, 475 S.W.2d at 869. As stated by the appellate court in *Guion*:

[t]he primary legal bar to appellants' claim for equitable relief of cancellation and rescission of the compromise and settlement agreement entered into between the parties...is the undisputed ratification of the settlement agreement by [the appellants] in accepting, retaining and exercising dominion over the settlement proceeds....

*Guion*, 475 S.W.2d at 869; *see* Article IV *supra*.

The *Guion* plaintiffs, on appeal of the trial court's summary judgment disposition against them, alleged that the settlement agreement was obtained by fraud was sufficient to raise a fact issue that would defeat summary judgment. *Id.* at 871. Nevertheless, the appellate court affirmed the trial court's summary judgment disposition of the appellants' claims on the basis of ratification, among other findings:

Although appellants seek to raise issues of fact concerning alleged misrepresentations, fraud and conspiracy against the appellees and their attorneys, yet the fact remains that when the compromise and settlement agreement was finally consummated...appellants, with full knowledge of the details of the agreement, elected freely and of their own volition to accept and retain the proceeds of the settlement



agreement so as to thereby ratify and affirm that which had transpired leading to the culmination of the agreement.

*Id.* (emphasis added).

The Texas Supreme Court held in *Rosenbaum* that if a person who is induced by fraud to enter into a contract continues to receive benefits under the contract after he becomes aware of the fraud, or if he otherwise conducts himself in such a manner as to recognize the contract as subsisting and binding, he affirms the contract and waives his right of rescission. *Rosenbaum*, 167 S.W.2d at 506. Ratification need not be express in order to defeat cancellation of an instrument and any act of recognition of a contract or conduct inconsistent with a party's effort to avoid the contract has the effect of an election to affirm the contract. *Id.*; *Daniel v. Goestl*, 341 S.W.2d 892 (Tex. 1960) (affirming the doctrine in *Rosenbaum* that any retention of the beneficial part of a transaction affirms the contract and bars an action for rescission as a matter of law); *see also, Guion*, 475 S.W.2d at 872.

Prior to the filing of their Original Counter-Petition and Third-Party Petition, Defendants failed or refused to tender the full cash consideration of \$2,500,000.00 received by them in the prior litigation in exchange for their execution of the Release. By their conduct in retaining the monetary benefits of the Release, the Defendants have elected to affirm the Release and, thus, have ratified the Release as a matter of law. Under Texas law, such ratification operates as a bar to any attempts by Defendants to now vitiate the Release. Under the controlling authority of *Guion*, any attempts by the Defendants herein to raise fact issues should fail, and the Court should grant summary judgment on the basis of election and ratification as a matter of law.

VI.

THE RELEASE EXECUTED BY DEFENDANTS IN THE PRIOR LITIGATION IS  
AN ABSOLUTE BAR TO THE ASSERTION OF ANY FURTHER CLAIMS

A. Disclaimed Reliance Precludes Claim of Fraud and/or  
Claim of Fraudulent Inducement: *Schlumberger Technology Corp. v. Swanson*

Under Texas law, a release is viewed as a contract and is subject to avoidance only on grounds of fraud or fraudulent inducement. *See Schlumberger*, 959 S.W.2d at 178; *Williams*, 789 S.W.2d at 264. Notwithstanding the foregoing, a release that disclaims reliance on the representations of the released party precludes, as a matter of law, the recovery of damages by the releasing party for fraudulent inducement in a previous settlement. *Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997).

The *Schlumberger* case involved a commercial dispute between the Schlumberger Technology Corporation (the "corporation") and John and George Swanson (the "individuals") in connection with a South African diamond mining operation (the "project"). *Id.* at 173. The corporation disputed the validity of the individuals' rights and interests in the project, as well as the feasibility and viability of the individuals' claims. In exchange for a consideration of more than \$800,000, the individuals relinquished all rights, claims and interests in the project and released all causes of action against the corporation, known or unknown. In their release, the individuals stated that they were not relying on any statement or representation of the corporation, that they were relying on their own judgment, and that they had been represented by legal counsel who had explained the contents and consequences of the release. *Id.* at 173-174.

Following the execution of the release, the corporation engaged in transactions involving the project that yielded a greater amount of money than contemplated during the settlement with the individuals. *Id.* at 174. The individuals then attempted to vitiate the release by asserting that the

corporation had misrepresented the project's viability and fraudulently induced the individuals to sell their interest at an undervalued price. *Id.* While the jury found in favor of the individuals, the trial court rendered a judgment notwithstanding the verdict, which was affirmed by the Texas Supreme Court on the basis that the release precluded the individuals' claims as a matter of law. *Id.* at 175.

Even assuming that the corporation misrepresented the project's viability and that such misrepresentation was actionable as fraudulent inducement, the Court noted that the individuals "...unequivocally disclaimed reliance upon representations by [the corporation] about the project's feasibility and value." *Id.* at 178, 180. The language of the release in *Schlumberger* provided as follows:

Each of [the individuals] expressly warrants and represents and does hereby state...and represent...that no promise or agreement which is not herein expressed has been made to him or her in executing this release, and that **none of us is relying upon any statement or representation of any agent of the parties being released hereby. Each of us is relying on his or her own judgment** and each has been represented by [independent legal counsel] in this matter.

*Id.* at 180 (emphasis in original text).

The Court further noted that, because courts must assume that every contractual provision is intended to have some meaning, the Court "...must presume that the parties contemplated, by the inclusion of [the foregoing] clause, that the [individuals] would not rely on any representations of [the corporation] about the...project, which, after all, was the very dispute that the release was supposed to resolve." *Id.*

Throughout its decision, the Texas Supreme Court recognized the broader policy issues related to a release instrument, including the issues of finality of litigation and the ability of parties to fully and finally resolve disputes between them:

Parties should be able to bargain for and execute a release barring all further dispute. This principle necessarily contemplates that parties may disclaim reliance on representations. And such a disclaimer, where the parties' intent is clear and specific, should be effective to negate a fraudulent inducement claim.

*Id.* at 179.

The Court also found that, in negotiating the release at issue in *Schlumberger*, the parties were dealing at arm's length and were represented by competent legal counsel. *Id.* at 180.

Based on the elements of independent legal representation, arm's length negotiation, the inclusion of an express disclaimer of reliance, and the parties' attempt to finally resolve their dispute, the Court concluded that the disclaimer of reliance was binding and precluded, as a matter of law, the individuals' claim that they were fraudulently induced to release their rights and interests in the project. *Id.*

B. Application of *Schlumberger* to Case at Bar  
Precludes Defendants' Claims

Defendants have made allegations that the Release instrument executed by them in the prior litigation should be vitiated on the grounds of fraud, fraudulent inducement, breach of fiduciary duty, breach of good faith and fair dealing, illegality, unconscionability and violation of public policy on the basis that the consideration paid in settlement of the prior litigation was undervalued. *See* Counter-Petition and Third-Party Petition filed by Defendants herein; *See* Exhibit "E", true and correct copies of the Defendants' respective Responses to Plaintiffs' Request for Production, attached hereto and incorporated herein by reference.

1. Legal Representation in Prior Litigation

As admitted by Defendants in their Responses to Requests for Admission, the Defendants were represented by legal counsel in their capacities as plaintiffs in the prior litigation. *See* Exhibit

"D". As stated by each of the Defendants in the Release executed by them in the prior litigation, they entered and executed the Release "...in reliance upon the advice of his or her own attorneys." See Exhibit "B". In fact, Plaintiffs ask this Court to take judicial notice that Defendants herein were represented by Fisher, Gallagher, Perrin & Lewis, a well-known law firm based in Houston, Texas with a reputation for being highly competent in the handling of civil litigation.

2. Arm's Length Negotiation of Settlement of Prior Litigation

As admitted by Defendants in their Responses to Requests for Admission, the Defendants each signed the Release instrument in the prior litigation of his or her own volition and without any duress. See Exhibit "D". As stated by each of the Defendants in the Release executed by them in the prior litigation, they entered and executed the Release "...based upon his or her own free evaluation of the facts and circumstances surrounding his or her claims, demands and causes of action...." See Exhibit "B".

3. Disclaimer of Reliance in Settlement of the Prior Litigation

As stated by the Defendants in the Release executed by them in the prior litigation, the execution of the Release "...is in no way conditioned upon or in reliance upon any representations, promises, or other agreements made by any of the Released Parties." See Exhibit "B".

4. Finality of the Prior Litigation

As part of their execution of the Release in the prior litigation, the Defendants herein agreed that a Motion and Order of Dismissal with Prejudice would be entered with the Court. See Exhibits "B", "C".

5. Analysis

As in *Schlumberger*, the plaintiffs in the prior litigation (Defendants herein) engaged in

adversarial negotiations for the settlement of the prior litigation and were represented by competent legal counsel in said settlement and in the execution of the settlement documentation, including the Release. As part of the Release, the Defendants herein unequivocally disclaimed any reliance on statements or representations outside the release. See Exhibit "B". Therefore, Defendants may not now attempt to claim reliance on representations made by the Released Parties, given the competence of the Defendants' representation in the prior litigation made and the fact that the issues were hotly contested. Defendants' disclaimer-of-reliance clause in their Release precludes any fraud or fraudulent inducement claim as a matter of law. *Schlumberger*, 959 S.W.2d at 175; see also, *Automaker, Inc. and U.S. Modular, Inc. v. C.C.R.T. Company, Ltd., et al.*, 976 S.W.2d 744 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1998, no writ) (holding that parties' disclaimer of reliance clause in release precluded fraudulent inducement claim).

Further, as with the release in *Schlumberger*, the purpose of the Release instrument in the prior litigation was to end all dispute between the parties thereto with regard to all claims that were or that could have been asserted therein, whether directly or indirectly related. If releasing parties – who are represented by independent legal counsel and who agree that they are not relying on any representation of the released parties – are permitted to refute their reliance, litigation would never end because "...dissatisfied parties could always break their settlement by claiming that the other party, through its misrepresentations, fraudulently induced them to enter into the settlement or release." *Schlumberger*, 959 S.W.2d at 175. This is contrary to public policy.

Of most significance is the fact that the language of the Release instrument in the prior litigation is nearly identical in substance to the language of the release in *Schlumberger*, as the Releasing Parties recite their reliance on their own judgment and the legal representation of their

separate counsel, as well as the affirm that they are not relying on any representation of the Released Parties. *See* Exhibit "B".

Accordingly, Plaintiffs request that this Court determine that a disclaimer of reliance, coupled with the factors of legal representation and arms' length transaction, and the policy considerations of finality of litigation, are binding and preclude, as a matter of law, the subsequent claims of fraud or fraudulent inducement asserted by Defendants herein in an attempt to undo the previous settlement. *Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997).

VII.  
DOCTRINE OF RES JUDICATA BARS DEFENDANTS' CLAIMS

In the alternative and without waiving the foregoing, this Court's Order of Dismissal with Prejudice entered on January 17, 1991 in the prior litigation serves to bar any subsequent claims against the Plaintiffs under the doctrine of res judicata, as Defendants' claims herein were adjudicated in the prior litigation.

A. Defendants Claimed Fraud, Breach, Conversion and Sought Accounting and Constructive Trust Against Plaintiffs in the Prior Litigation

In the prior litigation, the Defendants herein (acting as plaintiffs in the prior litigation) alleged breach of fiduciary duty, fraud, and conversion against Nelda C. Stark, individually, and the Nelda C. and H.J. Lucher Stark Foundation. *See* Exhibit "A". (Defendants' pleading in the prior litigation erroneously included Nelda C. Stark, as independent executrix of the Estate of H.J. Lucher Stark, Deceased, as a defendant in their Third Amended Original Petition in the prior litigation, but this Court had granted a partial summary judgment in favor of Nelda C. Stark, as independent executrix of the Estate of H.J. Lucher Stark, Deceased, prior to such pleading. *See* Section VIII(C)(3), *infra.*). In the prior litigation, the Defendants also demanded an accounting of the Estate

of Nita Hill Stark, Deceased, and the Estate of H.J. Lutchter Stark, Deceased, and they sought constructive trust over all assets. *See* Exhibit "A".

B. This Court Rendered Order of Dismissal with Prejudice as to All Claims and All Parties in Prior Litigation

On final hearing in the prior litigation, this Court rendered a take-nothing judgment in favor of the defendants thereto (the Plaintiffs herein) and dismissed all of Defendants' claims with prejudice. *See* Exhibit "C". Specifically, by Order of Dismissal with Prejudice rendered January 17, 1991, this Court adjudged that all claims of the Defendants hereto against Nelda C. Stark, individually, Nelda C. Stark, as independent executrix of the Estate of H.J. Lutchter Stark, Deceased, and the Nelda C. and H.J. Lutchter Stark Foundation, "...are hereby dismissed with prejudice against refiling. *Id.* The claims pending at the time of the dismissal included fraud, conversion, breach of fiduciary duty, as well as the demands for an accounting and a constructive trust. *See* Exhibit "A".

C. Defendants Claim Fraud, Breach, Conversion and Seek Accounting and Constructive Trust against Plaintiffs in the Subsequent Litigation

Notwithstanding the Order of Dismissal with Prejudice rendered in the prior litigation, Defendants again allege breach of fiduciary duty, fraud, and conversion in their Original Counter-Petition and Third-Party Petition filed herein against the independent co-executors of the Estate of Nelda C. Stark, Deceased (as successor to Nelda C. Stark, individually), the successor independent executor of the Estate of H.J. Lutchter Stark, Deceased, and the Nelda C. and H.J. Lutchter Stark Foundation. *See* Defendants' Counter-Petition and Third-Party Petition filed of record herein. The Defendants also demand an accounting of the Estate of Nita Hill Stark, Deceased, the Estate of H.J. Lutchter Stark, Deceased, the Estate of Nelda C. Stark, Deceased, and the Nelda C. and H.J. Lutchter Stark Foundation, and they seek a constructive trust over the assets of the same entities. *Id.*



D. The Doctrine of Res Judicata Bars Subsequent Litigation  
Involving Same Claims and Same Parties

The claims asserted by Defendants in their Counter-Petition filed herein are asserted by the same parties against the same parties (and/or privies to the same parties) involving the same subject matter as in the prior litigation, and the claims herein are based on identical issues of breach of fiduciary duty, fraud, and conversion as asserted in the prior litigation. The current matter likewise seeks an accounting of the Estates of Nita Hill Stark and H.J. Lutcher Stark, as well as the imposition of a constructive trust against the assets of those estates. Because all of these issues were fully litigated in the prior suit, Defendants are barred by the doctrine of res judicata from re-litigating these issues.

The doctrine of res judicata declares that:

[a] cause of action once finally determined between the parties on the merits by a competent tribunal cannot afterward be litigated by new proceedings. The judgment in the first suit precludes a second action by the parties...on matters actually litigated and on causes of action...arising out of the same subject matter that might have been litigated in the first suit.

*Gracia v. RC Cola-7 Up Bottling Co.*, 667 S.W.2d 517, 519 (Tex. 1984).

By barring subsequent collateral attacks on a final judgment, the doctrine of res judicata preserves the sanctity of judgments. *Matthews Construction Co. v. Rosen*, 796 S.W.2d 692, 694 (Tex. 1990); *Jones v. Jones*, 888 S.W.2d 849 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1994, writ denied).

In *Jones*, which is on point with the case at bar, the plaintiff initiated an action against an estate executor, claiming fraudulent concealment of certain property that was owned by the decedent and not revealed during divorce proceedings that occurred prior to the decedent's death. *Id.* at 850. The trial court granted summary judgment in favor of the defendants to the initial fraudulent

concealment action, which judgment concluded that “any and all claims and causes of action against all defendants asserted by [the plaintiff]...are in all things denied....”. *Id.* at 851. The plaintiff thereafter filed a subsequent action in another court, again alleging fraudulent concealment of property by the decedent and again naming the decedent’s executor as a defendant). *Id.* The second action was transferred to the court in which the prior action had been disposed of by summary judgment. *Id.*

Upon the transfer of the second action, the estate executor filed a motion for summary judgment, asserting that the final judgment in the prior lawsuit precluded any recovery by the plaintiff in the second action under the doctrine of res judicata. *Id.* The trial court granted the defendant’s motion for summary judgment. On appeal, the plaintiff’s argument that the doctrine of res judicata did not apply was denied. The appellate court noted that the plaintiff made allegations of fraudulent concealment against the estate executor (as representative of the decedent) in the prior litigation, which claims were “in all things denied” by the trial court’s initial judgment. *Id.* at 853. In the subsequent litigation, the plaintiff again made allegations of fraudulent concealment against the estate executor (as representative of the decedent). *Id.*

The appellate court stated that the plaintiff’s claim had already been resolved against her by a court of competent jurisdiction on the merits in the prior lawsuit, and that the same plaintiff brought a second lawsuit “...against the same defendant via the same cause of action for the same alleged wrongful act perpetrated by the same person concerning the same subject matter”. *Id.* at 854. Therefore, the second proceeding was precluded by the doctrine of res judicata. *Id.*

As applied herein, the claims asserted by Defendants in this cause are made against the same parties via the same cause of action for the same alleged wrongful act perpetrated by the same parties

and/or their privies concerning the same subject matter. *See* Defendants' Counter-Petition and Third-Party Petition filed herein; *see* Exhibit "A". These issues were adjudicated in the prior litigation by this Court's Order of Dismissal with Prejudice, which dismissed "...all claims, demands and causes of action of [Defendants]...against [Plaintiffs]...with prejudice against refiling." *See* Exhibit "C". The doctrine of res judicata must apply to enforce the prejudice against refiling expressed in this Court's prior Order and to bar Defendants' claims and demands as a matter of law.

#### VIII.

#### CLAIMS OF BREACH OF FIDUCIARY DUTY ARE WITHOUT MERIT GIVEN THE ABSENCE OF FIDUCIARY DUTIES OWED TO DEFENDANTS

In addition to the foregoing, Defendants claim that Plaintiffs "...owed and continue to owe [Defendants] fiduciary duties in this matter". *See* Defendants' Counter-Petition and Third-Party Petition, Article IV, filed of record herein. Although the term "in this matter" is vague – and is the subject of special exceptions filed by Plaintiffs herein – given the fact that "this matter" is limited to a declaratory judgment action regarding the construction and validity of the Release – Plaintiffs would show that they are appearing in this pleading in the following capacities:

1. Walter G. Riedel III, as General Manager of the Nelda C. and H.J. Lutcher Stark Foundation (the "Foundation representative");
2. Eunice R. Benckenstein, Walter G. Riedel III and Roy Wingate, as Independent Co-Executors of the Estate of Nelda C. Stark, Deceased (collectively the "Nelda Stark Estate representatives"); and
3. Eunice R. Benckenstein, as Successor Independent Executor of the Estate of H.J. Lutcher Stark, Deceased (the "Lutcher Stark Estate representative").

A party must have a justiciable interest in a controversy in order to have standing to assert a claim. *Nootsie, Ltd. v. Williamson Cty. Appr. Dist.*, 925 S.W.2d 659, 661 (Tex. 1996). Standing

is an aspect of subject matter jurisdiction. *Texas Ass'n of Bus. v. Texas Air Control Bd.* 852 S.W.2d 440, 443 (Tex. 1993). Defendants lack the standing necessary to invoke the Court's jurisdiction on the issue of a purported breach of fiduciary duties, since Defendants have no justiciable interest in the performance of the fiduciary obligations of the Foundation representative, the Nelda Stark Estate representatives, and the Lutcher Stark Estate representative. *See infra*.

A. The Nelda C. and H.J. Lutcher Stark Foundation

1. No Fiduciary Duty Owed to Individuals  
Who are not Direct Beneficiaries of the Foundation

The Nelda C. and H.J. Lutcher Stark Foundation is a Texas non-profit corporation that functions as a charitable trust under the Texas Trust Code and conducts public, charitable, religious and educational activities. *See* Exhibit "H", a true and correct copy of the affidavit of Walter G. Riedel III, attached hereto and incorporated herein by reference, with attachments "H-1", a true and correct copy of the Articles of Incorporation of the Nelda C. and H.J. Lutcher Stark Foundation, "H-2", a true and correct copy of the Certificate of Incorporation of Nelda C. and H.J. Lutcher Stark Foundation, and "H-3", a true and correct copy of the Articles of Amendment to the Articles of Incorporation of the Nelda C. and H.J. Lutcher Stark Foundation, all of which are attached to Exhibit "H" attached hereto and incorporated herein by reference; *see also* Tex. Prop. Code Ann. §123.001 (West 2000). The charter of the corporation provides that its purpose is "[t]o conduct and carry on the work of the corporation not for profit but exclusively for public charitable, religious and educational purposes", which permanently established its charitable identity. *See* Exhibit "H".

Under Texas law, a charitable trust is a fiduciary relationship with respect to the property arising as a result of the manifestation of an intention to create it, and subjecting the person by whom

the property is held to equitable duties to deal with the property for a charitable purpose. *G.A.C. Halff Foundation v. Calvert*, 281 S.W.2d 178 (Tex. Civ. App.—San Antonio 1955, writ ref'd n.r.e.), citing 2 Restatement, Trusts, p. 1095, §348. Because a charitable organization is organized for the benefit of the public and not for private profit or its own benefit, the public has a beneficial interest in all the property of a public, non-profit corporation. *Blocker v. State.*, 718 S.W.2d 409, 415 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1986, writ ref'd n.r.e.). It is therefore the duty of the Attorney General as representative of the State — as opposed to any individuals — to remedy any breach of fiduciary relationship regarding a charitable trust. *Id.* at 416.

In the case at bar, the Attorney General has indeed made its appearance by intervention. However, such intervention is not as a result of any alleged impropriety regarding the Foundation, but in order to defend the Foundation against the allegations of Defendants that seek to undermine the valid purpose of the Foundation, as well as to join Plaintiffs hereto in seeking to uphold the Release instrument from the prior litigation. See Attorney General's Petition in Intervention filed of record herein.

The Foundation is for the benefit of the general public, not specific individuals such as Defendants. Because Defendants are not beneficiaries of the Foundation and lack a personal stake in its operation, Defendants lack standing to assert a claim for breach of fiduciary duties against the Foundation representative and summary judgment may be granted as a matter of law. *Id.* at 416.

## 2. Release Bars Claims Against Foundation

Additionally, under the Release in the prior litigation, Defendants released "...any claims, demands or causes of action, known or unknown, arising out of or connected with the operation or activities of the Nelda C. and H.J. Lutchter Stark Foundation". See Exhibit "B". The Release by its

terms serves to bar the assertion of any additional claims against the Foundation by Defendants.

*Schlumberger*, 959 S.W.2d at 175; *see* Article VI *supra*.

3. Order of Dismissal in Prior Litigation Bars  
Subsequent Claims under Doctrine of Res Judicata

In the alternative, this Court's Order of Dismissal with Prejudice entered on January 17, 1991 in the prior litigation serves to bar any subsequent claims against the Foundation under the doctrine of res judicata. This Court specifically adjudged and ordered that all claims of the Defendants hereto against, among others, the Nelda C. and H.J. Lutzer Stark Foundation, "...are hereby dismissed with prejudice against refiling. *See* Exhibit "C"; *see* Article VII *supra*.

B. The Estate of Nelda C. Stark

1. No Fiduciary Duties Owed to Individuals  
Who are not Beneficiaries of an Estate

The existence of a fiduciary relationship is to be determined from the actualities of the relationship between the persons involved. *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962). With regard to an estate administration, Texas law is clear that a representative of an estate is in a fiduciary relationship with those persons entitled to the assets of the estate. *Humane Soc'y of Austin & Travis County v. Austin Nat'l Bank*, 531 S.W.2d 574, 580 (Tex. 1975), *cert. denied*, 425 U.S. 976 (1976) (emphasis added); *McLendon v. McLendon*, 862 S.W.2d 662 (Tex. App.—Dallas 1993, writ denied) (noting that an estate executor is a fiduciary whose obligation is to protect the interest of the estate beneficiaries) (emphasis added).

Defendants' presumptive charge that a fiduciary relationship exists between Plaintiffs and Defendants is without basis, as there exists no confidential relationship between Plaintiffs and Defendants that would create such a relationship. *See Thigpen*, 363 S.W.2d at 253. Because the

probated Will of Nelda C. Stark does not provide for any gifts, devises, or legacies to any of the Defendants, Defendants are not persons entitled to the assets of the Estate of Nelda C. Stark, nor are Defendants persons interested in the Estate of Nelda C. Stark. See Exhibit "I", a true and correct copy of the Will of Nelda C. Stark, attached hereto and incorporated herein by reference; see Tex. Prob. Code Ann. §3(r) (West 2000) (defining "persons interested" as heirs, devisees and others with a property right in the estate being administered).

Since any fiduciary duties of the Nelda Stark Estate representatives are limited solely to the beneficiaries of the Estate of Nelda C. Stark, Deceased, and since Defendants are not beneficiaries of the Estate of Nelda C. Stark, there are no fiduciary duties owed by the Nelda Stark Estate representatives to Defendants as a matter of law. *Humane Soc'y*, 531 S.W.2d at 580; *McLendon*, 862 S.W.2d at 662.

2. Fiduciary Duties of a Decedent Do Not Extend to a Decedent's Estate Representatives as Matter of Law

Prior to her death, Nelda C. Stark was duly-appointed and served as the independent executrix of the Estate of H.J. Lutchter Stark, Deceased, being Cause No. 3006 in the County Court at Law of Orange County, Texas. In the prior litigation, Defendants (then acting as plaintiffs) sued Nelda C. Stark in such capacity, alleging fraudulent concealment, mismanagement, and fraud. See Exhibit "A". While Nelda C. Stark may have held a fiduciary position with regard to another estate during her lifetime, Texas law is clear that her fiduciary obligations as an executor ceased to exist upon her death and are not imposed on the personal representatives of her estate. See *McClellan v. Mangum*, 75 S.W. 840 (Tex. Civ. App. 1903).

In *McClellan*, the executor of an estate died and the personal representative for the deceased executor attempted to step into the shoes of the deceased executor with regard to the handling of the

estate formerly represented by the deceased executor. *Id.* In the meantime, a successor administrator was appointed by the court in the estate proceeding formerly represented by the deceased executor, and the court reviewed the issue of the corresponding obligations and responsibilities upon the death of an executor. *Id.*

According to the *McClellan* court, the general rule is that the fiduciary obligations of an executor cease to exist when the executor dies; as such, the legal representative of the estate of the deceased executor does not succeed to the original fiduciary obligation. *Id.* at 840. Furthermore, the court held that, when an executor dies, his relation to the estate that he represented during his lifetime is severed and the court has no jurisdiction over the deceased executor's legal representatives. *Id.* at 841. In essence, the *McClellan* court recognized that it is a successor administrator, duly appointed by the probate court in which the estate proceeding is pending, who assumes the powers and duties to continue to handle the original estate. *Id.*

This principle is also recognized under the applicable provisions of the Texas Probate Code. Under §220, when an executor of an estate dies and leaves an estate unrepresented, the proper procedure is for a court to affirmatively appoint a successor personal representative upon application – the fiduciary obligations of the deceased executor do not merely pass on to his or her legal representatives. Tex. Prob. Code Ann. §220; *see also* Tex. Prob. Code Ann. §223 (when an estate is unrepresented by reason of death of the personal representative, the court shall grant further administration upon application by a qualified person).

Therefore, as a matter of law, the fiduciary obligation of Nelda C. Stark as the initial independent executrix of the Estate of H.J. Lutchter Stark ceased at her death and did not succeed to the Nelda Stark Estate representatives upon their subsequent appointment and qualification. Not



only did the independent co-executors of the Estate of Nelda C. Stark not assume Mrs. Stark's fiduciary obligation as executor of the H.J. Lutchter Stark estate, this Court has no jurisdiction over the Nelda Stark Estate representatives in any context of the Estate of H.J. Lutchter Stark, in light of (1) the severance of any obligation upon her death and (2) the fact that another individual has been appointed to succeed Nelda Stark as the independent executrix of the Estate of H.J. Lutchter Stark in Cause No. 3006 pending in the County Court at Law of Orange County, Texas.

3. Release Bars Claims against Estate of Nelda C. Stark  
as Successor to Nelda C. Stark, Individually

Even if Defendants had legal standing to assert a claim of breach of fiduciary duty against the Nelda Stark Estate representatives, which is denied, Defendants would be barred as a matter of from pursuing such claim under the terms of the Release instrument signed by Defendants in the prior litigation. Specifically, in the Release, Defendants released "...all claims, demands and causes of action, known or unknown, arising out of, or connected with any actions or omissions by Nelda C. Stark either as an individual or as independent executrix of the Estate of H.J. Lutchter Stark, Deceased...." See Exhibit "B".

Thus, the Release bars any further actions against Nelda C. Stark, individually, or her estate representatives as a matter of law. *Schlumberger*, 959 S.W.2d at 175; see Article VI, *supra*. Moreover, the Release extends to Nelda C. Stark in her capacity as the independent executrix of the Estate of H.J. Lutchter Stark, which evidences the fact that Nelda Stark's fiduciary obligations were not only severed by her death, but were previously discharged from further claims by the Defendants upon the Defendants' execution of the Release, leaving Defendants without standing to assert further claims. *Womble v. Atkins*, 331 S.W.2d 294, 297 (Tex. 1960) (holding that party who executed a release had no standing to contest an estate proceeding until such release was first set aside).

4. Order of Dismissal in Prior Litigation Bars  
Subsequent Claims under Doctrine of Res Judicata

In the alternative, this Court's Order of Dismissal with Prejudice entered on January 17, 1991 in the prior litigation serves to bar any subsequent claims against the Nelda Stark Estate representatives, as successors to Nelda C. Stark, under the doctrine of res judicata. This Court specifically adjudged and ordered that all claims of the Defendants hereto against, among others, Nelda C. Stark, individually, "...are hereby dismissed with prejudice against refiling. See Exhibit "C"; see Article VII, *supra*.

C. Estate of H.J. Lutcher Stark, Deceased

1. No Fiduciary Duties Owed to Individuals  
Who are not Beneficiaries of an Estate

As set forth in Section B(1) above and incorporated herein by reference, the fiduciary obligation of an estate representative extends to those persons entitled to the assets of an estate. *Humane Soc'y*, 531 S.W.2d at 580; see also *McLendon*, 862 S.W.2d at 662. Because the probated Will of H.J. Lutcher Stark does not provide for any gifts, devises, or legacies or to Defendants Ida Marie Stark, individually, William H. Stark III, Linda Marie Stark Barras, and Randall Hill Stark, these individuals are not persons entitled to the assets of the Estate of H.J. Lutcher Stark. See Exhibit "J", a true and correct copy of the Will of H.J. Lutcher Stark, attached hereto and incorporated herein by reference.

Since any fiduciary duties of the Lutcher Stark Estate representative are limited solely to the beneficiaries of the Estate of H.J. Lutcher Stark, Deceased, and since Defendants Ida Marie Stark, individually, William H. Stark III, Linda Marie Stark Barras, and Randall Hill Stark are not beneficiaries of the Estate of H.J. Lutcher Stark, there are no fiduciary duties owed by the Lutcher

Stark Estate representative to Defendants Ida Marie Stark, individually, William H. Stark III, Linda Marie Stark Barras, and Randall Hill Stark as a matter of law. *See Humane Soc'y*, 531 S.W.2d at 580; *see McLendon*, 862 S.W.2d at 662.

2. Fiduciary Duty to Specific Devisee  
Terminated in 1969 on Satisfaction of Bequest

Of the Defendants hereto, only W.H. Stark II (now represented by Ida Marie Stark, as Independent Executrix of the Estate of W.H. Stark II, Deceased) was a beneficiary of the Estate of H.J. Lutchter Stark, Deceased. The only devise to W.H. Stark II under the Will of H.J. Lutchter Stark was a cash bequest in the amount of \$1,000,000.00. *See* Exhibit "J".

Under Texas law, the primary duty of an executor is to preserve the assets of an estate for distribution to the estate beneficiaries. *See Humane Soc'y*, 531 S.W.2d at 580. As stated by the Texas Supreme Court in *Thigpen*, the existence of a fiduciary relationship is determined by the actualities of the relationship between the persons involved. *Thigpen*, 363 S.W.2d at 253. Once a full and final distribution of estate property is made to the person entitled thereto and a receipt and release is executed, the dealings between an executor and beneficiary are concluded and there is no longer an underlying relationship between the parties that would support a fiduciary duty. *See Id.*

As applied to the case at bar, any fiduciary duty owed by the executrix of the Estate of H.J. Lutchter Stark, Deceased, to William H. Stark II was extinguished following the satisfaction of the specific bequest to William H. Stark II under the Will of H.J. Lutchter Stark. The specific bequest was satisfied on or about September 3, 1969, as evidenced by a separate receipt and release document (the "1969 release") executed by William H. Stark II upon his receipt of the monetary gift. *See* Exhibit "K", a true and correct copy of the Receipt and Full and Final Release of William H. Stark II, executed on or about September 3, 1969, in the Estate of H.J. Lutchter Stark, Deceased,

attached hereto and incorporated herein by reference. After his receipt of such bequest, William H. Stark II was no longer a person entitled to assets of that estate.

Moreover, the 1969 release executed by William H. Stark II recites a release of "...any and all claims and demands which [he] may have or may have had under the terms and provisions of said will of H.J. Lucher Stark". See Exhibit "K". When William H. Stark II accepted his full benefit under the Will of H.J. Lucher Stark and, in exchange released all claims to any further benefits, he relinquished any standing to make any objections regarding the Estate of H.J. Lucher Stark. The 1969 release signed by William H. Stark II is valid and, unless the 1969 release is invalidated, which has not even been attempted, it operates to bar William H. Stark II – during his life and, in his death, the personal representative of his estate -- from asserting any further demands against the Decedent's Will or Estate. *Womble*, 331 S.W.2d at 297.

Therefore, Defendant Ida Marie Stark, as Independent Executor of the Estate of W. H. Stark II, Deceased, has no standing herein to assert a breach of fiduciary duty by the Lucher Stark representative because Defendant is barred as a matter of law by the terms of the 1969 release and by the termination of any fiduciary relationship upon complete satisfaction of the benefit to which William H. Stark was entitled under the Will of H.J. Lucher Stark.

3. Summary Judgment Rendered in Favor of Estate of H.J. Lucher Stark in Prior Litigation Bars Subsequent Claims by Doctrine of Res Judicata

Even if Defendants had legal standing to assert a claim of breach of fiduciary duty against the Lucher Stark Estate representative, which is denied, Defendant Ida Marie Stark, Individually and as Independent Executrix of the Estate of W.H. Stark II, Deceased, is barred as a matter of law from pursuing such claim because of a prior judgment by this Court in the prior litigation.

Specifically, the predecessor of the Lucher Stark Estate representative filed a Motion for

Partial Summary Judgment in the prior litigation, seeking dismissal of all claims against her as Independent Executrix of the Estate of H.J. Lutchter Stark, Deceased. See Exhibit "L", a true and correct copy of Defendant Nelda Childers Stark's Motion for Partial Summary Judgment filed in the prior litigation, attached hereto and incorporated herein by reference. Plaintiffs request that this Court take judicial notice of its prior judgment in the prior litigation, as well as the arguments and authorities set forth in Motion for Partial Summary Judgment filed by defendant Nelda C. Stark in the prior litigation, which position is adopted by Plaintiffs hereto as successors-in-interest to the movant in the prior litigation and incorporated herein by reference for all purposes. It is proper for a trial court to take judicial notice of its own records. *Walton v. City of Midland*, 24 S.W.3d 853 (Tex. App.—El Paso 2000, n.w.h.); *Jones v. Jones*, 888 S.W.2d 849, 852 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1994, writ denied).

At the time the summary judgment was rendered, the only Defendant hereto that was a named plaintiff in the prior litigation was Ida Marie Stark, individually and as Independent Executrix of the Estate of W.H. Stark II, Deceased.) See Exhibit "M", a true and correct copy of Plaintiffs' First Amended Petition filed in Cause No. D880162-C, *Ida Marie Stark, Individually and as Independent Executor of the Estate of W.H. Stark II, et al. v. Nelda C. Stark, et al.*, in the 260<sup>th</sup> Judicial District Court of Orange County, Texas, attached hereto and incorporated herein by reference. The claims asserted by the plaintiffs in the prior litigation consisted of claims of misrepresentation and concealment, as well as demands for an accounting regarding the Estate of Nita Hill Stark and the imposition of a constructive trust. *Id.*

This Court thereafter granted a partial summary judgment in favor of Nelda C. Stark, as Independent Executrix of the Estate of H.J. Lutchter Stark, which judgment expressly stated that

"...all of plaintiffs' claims against Nelda C. Stark as independent executrix of the Estate of H.J. Lutchter Stark...are dismissed." See Exhibit "N", a true and correct copy of the Partial Summary Judgment issued April 24, 1990 by the 260<sup>th</sup> Judicial District Court of Orange County, Texas, in *Ida Marie Stark, Individually and as Independent Executor of the Estate of W.H. Stark II, et al. v. Nelda C. Stark, et al.*, being Cause No. D880162-C, attached hereto and incorporated herein by reference. Therefore, because of the prior judgment by this Court, Defendants are precluded by the doctrine of res judicata from making any allegations against the current Lutchter Stark Estate representative and/or in connection with the Estate of H.J. Lutchter Stark, Deceased.

The doctrine of res judicata bars subsequent collateral attacks on a final judgment. *Jones*, 888 S.W.2d at 853. In *Jones*, the appellate court held that, because a party's claims were disposed of in a prior lawsuit by summary judgment, the claims were barred from subsequent litigation by the doctrine of res judicata, and the appellate court affirmed an award of summary judgment in favor of the movant. *Id.* at 854. Likewise, the allegations of fraud and concealment and the demands for an accounting and for a constructive trust made by Ida Marie Stark, individually and as Independent Executrix of the Estate of W.H. Stark II, Deceased, herein are barred from re-litigation since these claims were previously disposed of by this Court by summary judgment in the prior litigation.

#### 4. Release from Prior Litigation Bars Claims against Estate

In addition to the 1969 release executed by the predecessor-in-interest of Defendant Ida Marie Stark, as Independent Executor of the Estate of W.H. Stark II, Deceased, in favor of the Estate of H.J. Lutchter Stark, Defendants are barred as a matter of law from asserting any claims concerning the administration of the Estate of H.J. Lutchter Stark under the terms of the Release instrument signed by them in the prior litigation. Specifically, the Release provides that the Defendants release

"...any claims, demands or causes of action, known or unknown, arising out of or connected with the Estate of H.J. Lutchter Stark, Deceased." See Exhibit "B". Under Texas law, the Release operates to bar any subsequent litigation of claims connected with the Estate of H.J. Lutchter Stark, Deceased, including but not limited to a claim of breach of fiduciary duty. *Schlumberger*, 959 S.W.2d at 175; see Article VI, *supra*. The Release also precludes the Defendants' standing to make further claims against the Estate. See *Womble*, 331 S.W.2d at 297.

The Release executed by Defendants in the prior litigation further provides for a release of "...all claims, demands and causes of action, known or unknown, arising out of, or connected with any actions or omissions by Nelda C. Stark...as independent executrix of the Estate of H.J. Lutchter Stark, Deceased...." *Id.* As the successor independent executrix of the Estate of H.J. Lutchter Stark, Eunice R. Benckenstein succeeds to the prior rights of Nelda C. Stark as the initial estate representative, which includes the right to assert the Release as a bar to further claims by the Defendants against the Estate of H.J. Lutchter Stark. See Tex. Prob. Code Ann. §224 (West 2000).

5. Order of Dismissal in Prior Litigation Bars  
Subsequent Claims under Doctrine of Res Judicata

In the alternative, this Court's Order of Dismissal with Prejudice entered on January 17, 1991 in the prior litigation serves to bar any subsequent claims against the Lutchter Stark Estate representative, as successor to Nelda C. Stark as independent executrix of the Estate of H.J. Lutchter Stark, Deceased, under the doctrine of res judicata. This Court specifically adjudged and ordered that all claims of the Defendants hereto against, among others, Nelda C. Stark as independent executrix of the Estate of H.J. Lutchter Stark, Deceased, "...are hereby dismissed with prejudice against refiling. See Exhibit "C"; see Article VII, *supra*.

6. No Fiduciary Duty is Breached by Executor's  
Conveyance of Property to Herself as Beneficiary

In addition to and without waiving the foregoing, Plaintiff Eunice R. Benckenstein, as Independent Executor of the Estate of H.J. Lutcher Stark, Deceased, would show that any attempts by Defendants to claim a breach of fiduciary duty and/or conversion with regard to the Estate of H.J. Lutcher Stark by the fact of the initial executor's previous distribution of assets of the estate to herself must fail as a matter of law, since Nelda C. Stark, as the initial executor, was among the primary beneficiaries of the Will of H.J. Lutcher Stark. *See* Exhibit "J".

Under Texas law, a beneficiary who is also the personal representative of an estate does not breach a fiduciary duty upon the conveyance of property to herself pursuant to the terms of the Will. *American Finance & Inv. Co. v. Herrera*, 20 S.W.3d 829 (Tex. App.—El Paso 2000, n.w.h.). Therefore, Nelda C. Stark, as predecessor to the Lutcher Stark Estate representative, properly distributed and conveyed estate property to herself in satisfaction of the gifts made to her under the Will of H.J. Lutcher Stark, and such actions may not be asserted as part of any breach of fiduciary duty and/or conversion claim against the current Lutcher Stark Estate representative as a matter of law. *Id.*

7. Fiduciary Duties of a Decedent Do Not  
Extend to Decedent's Estate as a Matter of Law

Prior to his death, H.J. Lutcher Stark was duly-appointed and served as the independent executor of the Estate of Nita Hill Stark, Deceased, being Cause No. 1101 in the County Court at Law of Orange County, Texas. In the prior litigation, Defendants (then acting as plaintiffs) made allegations of fraudulent concealment, mismanagement, and fraud in connection with the administration of the Estate of Nita Hill Stark. *See* Exhibit "A".



As outlined in Section B(2) above, the fiduciary obligations of an executor cease upon the death of the executor and are not imposed on the personal representatives of the deceased executor's estate. *See McClellan*, 75 S.W. at 840. Just as the fiduciary duties of Nelda C. Stark as independent executrix of the Estate of H.J. Lutchter Stark, Deceased, did not succeed to the Nelda Stark Estate representatives (*see* Section B *supra*), the fiduciary duties of H.J. Lutchter Stark as independent executor of the Estate of Nita Hill Stark, Deceased, ceased at his death and did not succeed to Nelda C. Stark, as the executrix of his estate. Under the same analysis, since any fiduciary duties of H.J. Lutchter Stark did not succeed to his estate representative at his death, such duties certainly did not pass to Plaintiffs herein as the estate representatives of the executrix of H.J. Lutchter Stark.

Therefore, contrary to Defendants' allegations, the Nelda Stark Estate representatives owe no fiduciary duties to Defendants in connection with the Estate of H.J. Lutchter Stark, Deceased, or in connection with the Estate of Nita Hill Stark, Deceased, as a matter of law.

D. Estate of Nita Hill Stark

1. Lack of Estate Representative Precludes Claim of Breach of Fiduciary Duty as Matter of Law

The Estate of Nita Hill Stark, Deceased, was administered more than 50 years ago by H.J. Lutchter Stark, who served as independent executor of that estate. *See* Section C(7) *supra*. Following the death of H.J. Lutchter Stark in 1965, no successor executor was appointed to administer the Estate of Nita Hill Stark and, thus, there is no individual serving in such capacity at this time.

Where there is no executor or other personal representative acting with regard to an estate, an allegation of breach of fiduciary duty fails as a matter of law. *Whitaker v. Huffaker*, 790 S.W.2d

761, 764 (Tex. App.—El Paso 1990, writ denied). Given the absence of an estate representative acting for the Estate of Nita Hill Stark, Defendants are precluded from alleging any breach of fiduciary duty in connection with this estate as a matter of law.

2. No Fiduciary Duties Owed to Individuals  
Who are not Beneficiaries of an Estate

Alternatively, as set forth in Section B(1) above and incorporated herein by reference, any fiduciary obligation of an estate representative extends only to estate beneficiaries. *Humane Soc'y*, 531 S.W.2d at 580; *see also McLendon*, 862 S.W.2d at 662. The probated Will of Nita Hill Stark does not provide for any gifts, devises, or legacies or to Defendants Ida Marie Stark, individually, William H. Stark III, Linda Marie Stark Barras, and Randall Hill Stark. *See* Exhibit "O", a true and correct copy of the Will of Nita Hill Stark, attached hereto and incorporated herein by reference. Because Defendants Ida Marie Stark, individually, William H. Stark III, Linda Marie Stark Barras, and Randall Hill Stark are not persons entitled to the assets of the Estate of Nita Hill Stark, there are fiduciary duties owed to them under the Estate of Nita Hill Stark to as a matter of law. *See Humane Soc'y*, 531 S.W.2d at 580; *see McLendon*, 862 S.W.2d at 662.

Of the Defendants hereto, only William H. Stark II (now represented by Ida Marie Stark, as Independent Executrix of the Estate of W.H. Stark II, Deceased) was a beneficiary of the Estate of Nita Hill Stark, Deceased. William H. Stark II was a primary beneficiary under the Will of Nita Hill Stark, receiving a one-half interest in the residuary estate. *See* Exhibit "O". This gift was fully satisfied and, on or about May 4, 1948, after he had attained the age of 21, William H. Stark executed a separate receipt and release document (the "1948 release") acknowledging his receipt of the final accounting of the Estate of Nita Hill Stark and his satisfaction that "...the estate has been properly distributed and that all distributions to beneficiaries have been made in full accordance with

the terms and requirements of the Will [of Nita Hill Stark]." See Exhibit "P", a true and correct copy of the Receipt and Final Release of William H. Stark II executed on or about May 4, 1948 in the Estate of Nita Hill Stark, Deceased, attached hereto and incorporated herein by reference. See also Exhibit "L", a true and correct copy of the Motion for Partial Summary Judgment filed in the prior litigation which includes a sworn copy of the 1948 release, attached hereto and incorporated herein by reference.

The 1948 Release specifically ratifies the administration of the Estate of Nita Hill Stark and acknowledges the receipt of the full amounts of cash and property to which William H. Stark II was entitled under the Will of Nita Hill Stark. It further recites that William H. Stark II releases "...H.J. Lucher Stark, in his capacity as independent executor of said will and estate and in his individual capacity as well, from all further obligation and liability...with respect to said will and the administration thereof and said estate and the administration and distribution thereof..." See Exhibit "P".

When William H. Stark II accepted his full benefit under the Will of Nita Hill Stark and, in exchange, released the independent executor from any further liability and obligation, he relinquished any standing to make any further objections regarding the Estate of Nita Hill Stark. The 1948 release instrument signed by William H. Stark II herein is valid and, unless the 1948 release is invalidated, which has not even been attempted, it operates to bar William H. Stark II -- during his life and, after his death, the personal representative of his estate -- from asserting any further demands with regard to the Will and estate administration of Nita Hill Stark. *Womble*, 331 S.W.2d at 297.

Accordingly, any claims against the Estate by Defendant Ida Marie Stark, as Independent Executrix of the Estate of W.H. Stark, II, were waived by her predecessor-in-interest (W.H. Stark II) upon his receipt of his interest under the Will of Nita Hill Stark and his execution of the 1948 release. Even if there were an executor of the Estate of Nita Hill Stark against whom an allegation of breach of fiduciary duty could be asserted, which is denied, Defendant Ida Marie Stark, as Independent Executor of the Estate of W. H. Stark II, Deceased, has no standing herein to assert any claims with regard to the Estate of Nita Hill Stark.

3. Release from Prior Litigation Bars Claims Against Estate

Even if there were a personal representative for the Estate of Nita Hill Stark against whom a claim of breach of fiduciary duty could be asserted, which is denied, Defendants would be barred as a matter of from pursuing such claim under the terms of the Release instrument signed by Defendants in the prior litigation. Specifically, in the Release, Defendants released all claims, demands and causes of action, known or unknown, arising out of or in any way connected with the Estate of Nita Hill Stark. *See* Exhibit "B". Thus, the Release bars any further actions involving the Estate of Nita Hill Stark as a matter of law. *Schlumberger*, 959 S.W.2d at 175; *see* Article VI, *supra*.

4. Order of Dismissal in Prior Litigation Bars  
Subsequent Claims under Doctrine of Res Judicata

In the alternative, this Court's Order of Dismissal with Prejudice entered on January 17, 1991 in the prior litigation serves to bar any subsequent claims involving the Estate of Nita Hill Stark, Deceased, under the doctrine of res judicata. This Court specifically adjudged and ordered that all claims of the Defendants "...are hereby dismissed with prejudice against refiling", and chief among Defendants' claims at that time were allegations and demands pertaining to the Estate of Nita Hill Stark. *See* Exhibits "A" and "C"; *see* Article VII, *supra*.

IX.  
SUMMARY JUDGMENT IS WARRANTED AS A MATTER OF LAW

At the conclusion of the prior litigation, Defendants hereto received \$2,500,000.00 in exchange for their execution of a Full, Final and Complete Release. It is Plaintiffs' position that the Release instrument must have some significance, given the costly amount with which it was obtained. The Release may not merely be undone at the whim of Defendants upon bare allegations of fraud, fraudulent concealment or other alleged wrongdoing by Plaintiffs' predecessors in interest, especially in light of the Defendants' express disclaimer of reliance on statements or representations outside the Release. Nor may Defendants even seek cancellation of the Release without first returning the monetary benefit that they received for executing it. *See Article IV, supra.*

Defendants have failed to satisfy the condition precedent of restoration of consideration prior to seeking cancellation of the Release. As such, the general principle of equity precludes the cancellation of the Release, while the general rule of law holds that Defendants have ratified the Release as a matter of law. *See Articles IV and V, supra.* In addition, Defendants' express disclaimer of reliance under the Release instrument precludes any attempt to vitiate the Release on the basis of fraud, misrepresentation or fraudulent inducement. *See Article VI, supra.* Moreover, Defendants are barred by the doctrine of res judicata from attempting to undermine this Court's previous Order of Dismissal with Prejudice rendered in the prior litigation, which preserves the sanctity of the prior judgment rendered by this Court in the prior litigation. *See Article VII, supra.*

Finally, Defendants are precluded as a matter of law from making claims of breach of fiduciary duty against the Foundation representative, the Lutcher Stark Estate representative and the Nelda C. Stark Estate representatives with regard to the Nelda C. and H.J. Lutcher Stark Foundation, the Estate of Nelda C. Stark, the Estate of H.J. Lutcher Stark, and/or the Estate of Nita Hill Stark

because (1) they are barred by the express provisions of the Release executed by them in the prior litigation, (2) they are barred by the doctrine of res judicata given this Court's judgment of dismissal with prejudice in the prior litigation, (3) Defendants are not beneficiaries of the Foundation or the Estate of Nelda C. Stark and, therefore, lack legal standing, (4) Defendants Ida Marie Stark, individually, William H. Stark III, Linda Marie Stark Barras, and Randall Hill Stark are not beneficiaries of the Estate of H.J. Lutchter Stark, Deceased or the Estate of Nita Hill Stark, Deceased, and, thus, lack legal standing, (5) W.H. Stark II, the predecessor-in-interest of Defendant Ida Marie Stark, as Independent Executrix of the Estate of W.H. Stark II, Deceased, previously executed a release in favor of the Estate of H.J. Lutchter Stark and in favor of the Estate of Nita Hill Stark upon full satisfaction of his benefits thereunder, (6) this Court has previously disposed of all claims by Defendants against the executor of the Lutchter Stark Estate by summary judgment, which judgment serves as a bar to the relitigation of claims under the doctrine of res judicata, and (7) with regard to the Estate of Nita Hill Stark, there is no personal representative against whom an allegation of breach of fiduciary duty may be alleged. *See Article VIII, supra.*

Based on the foregoing, the Court should grant summary judgment in favor of Plaintiffs as a matter of law as to each of Defendants' pending claims and demands for equitable relief.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that this Honorable Court consider their Amended Motion for Summary Judgment; that this cause be set for hearing, with notice to all Defendants; that, upon a hearing, the Court determine that the Release instrument from the prior litigation is valid and binding on all parties, that there exists no basis on which to vitiate the Release, and that the Release precludes, as a matter of law, any and all contrary allegations, demands and claims made by Defendants herein in any way related to the Estates or the Foundation

or any other matters at issue in the prior litigation, including but not limited to any claims of fraud, conversion, fraudulent inducement and breach of fiduciary duty, which claims are precluded by Defendants' express disclaimer of reliance in the Release; that Defendants have ratified the Release by the failure to return the consideration received under the Release and have waived any claim against the Release; that Defendants lack equitable standing, appear before the Court herein with unclean hands, and are estopped from seeking cancellation of the Release due to their noncompliance with the doctrine of restitution; that the doctrine of res judicata bars relitigation of all claims and remedies sought in connection with the Estate of Nita Hill Stark, the Estate of H.J. Lutcher Stark, the Estate of Nelda C. Stark, and the Nelda C. and H.J. Lutcher Stark Foundation; that the Court enter judgment for Plaintiffs and against all Defendants; and for such other and further relief to which Plaintiffs may be justly entitled.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the above and foregoing instrument has been forwarded to all known counsel of record by certified mail, return receipt request, pursuant to the Texas Rules of Civil Procedure on this the 16<sup>th</sup> day of July, 2001.

  
\_\_\_\_\_  
JOHN CASH SMITH



NO. D-000298C

EUNICE R. BENCKENSTEIN, WALTER §  
G. RIEDEL III, AND ROY WINGATE, §  
INDEPENDENT CO-EXECUTORS OF §  
THE ESTATE OF NELDA C. STARK, §  
DECEASED, EUNICE R. §  
BENCKENSTEIN, INDEPENDENT §  
EXECUTRIX OF THE ESTATE OF H.J. §  
LUTCHER STARK, DECEASED, AND §  
WALTER G. RIEDEL III, GENERAL §  
MANAGER OF THE NELDA C. AND §  
H.J. LUTCHER STARK FOUNDATION §

V. §

IDA MARIE STARK, INDIVIDUALLY §  
AND AS INDEPENDENT EXECUTOR §  
OF THE ESTATE OF W.H. STARK II, §  
DECEASED, ET AL. §

IN THE DISTRICT COURT

OF ORANGE COUNTY, TEXAS

260<sup>th</sup> JUDICIAL DISTRICT

**ORDER**

ON THIS DAY, came on to be heard and considered the Plaintiffs' Amended Motion for Summary Judgment, and it appearing unto the Court and the Court finding that such motion has been made in proper form and time, that proper service thereof has been made and that the parties, appearing by and through their respective attorneys of record, are before the Court for a hearing thereon; and the Court, having considered the motion and the response, if any, of opposing parties, is of the opinion that there is no genuine issue as to any material fact and that the motion is meritorious and summary judgment should be GRANTED as to the declarations sought by Plaintiffs in their Original Petition, and that the Release instrument executed in the prior litigation styled *Ida Marie Stark, Individually and as Independent Executor of the Estate of W.H. Stark II, et al. v. Nelda*

*C. Stark, et al.*, being Cause No. D880162-C in the 260th Judicial District Court of Orange County, Texas, is valid and binding on all parties, that there exists no basis on which to vitiate the Release, and that the Release precludes, as a matter of law, any and all contrary allegations, demands and claims that may be made by Defendants herein in any way related to the Estate or the Foundation or any other matters at issue in the prior litigation, including but not limited to any claim of fraudulent inducement, which claims are precluded by Defendants' express disclaimer of reliance in the Release, that Defendants have ratified the Release by the failure to return the consideration received under the Release and lack equitable standing to appear before the Court, that Defendants are estopped from seeking cancellation of the Release due to their noncompliance with the doctrine of restitution, and that the doctrine of res judicata bars relitigation of all claims and remedies sought in connection with the Estate of Nita Hill Stark, the Estate of H.J. Lutcher Stark, the Estate of Nelda C. Stark and the Nelda C. and H.J. Lutcher Stark Foundation.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the counterclaims asserted by Defendants herein are disposed of by summary judgment in favor of the Plaintiffs, and that Defendants shall go hence without day.

All relief not expressly granted herein is denied.

SIGNED this \_\_\_\_ day of \_\_\_\_\_, 2001.

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JUDGE PRESIDING