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	§	IN THE DISTRICT COURT
V.	§	OF ORANGE COUNTY, TEXAS
IDA MARIE STARK, INDIVIDUALLY AND AS INDEPENDENT EXECUTOR OF THE ESTATE OF W.H. STARK II, DECEASED, ET AL.	§	260th JUDICIAL DISTRICT

PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS' AMENDED MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Eunice R. Benckenstein, Walter G. Riedel III, and Roy Wingate, as Independent Co-Executors of the Estate of Nelda C. Stark, Deceased, Eunice R. Benckenstein, as Successor Independent Executor of the Estate of H.J. Lutcher Stark, Deceased, and The Nelda C. and H.J. Lutcher Stark Foundation, Plaintiffs, and make the following Reply to the Response filed by Ida Marie Stark, individually and as Independent Executor of the Estate of William H. Stark, II, Deceased, William H. Stark III, Randall Hill Stark, and Lynn Marie Stark Barras, Defendants, to Plaintiffs' Amended Motion for Summary Judgment:

INTRODUCTION AND BACKGROUND

Plaintiffs filed this action for declaratory judgment against Defendants pursuant to the Texas Uniform Declaratory Judgments Act on July14, 2000. Plaintiffs' sole claim in their Petition was for the adjudication of the validity of a Release executed by Defendants ten years ago in the Previous Litigation[1] between the same parties as to claims asserted by Defendants.[2] Defendants filed their Original Answer on August 10, 2000. After propounding written discovery and receiving only inadequate answers and improper objections,[3] Plaintiffs filed a Motion for Summary Judgment on October 19, 2000.

A status conference was held in this case before then-presiding Judge Eric Andell on June 5, 2001. Four days before the status conference, Defendants filed a Counterclaim against Plaintiffs and brought in additional Counter-Defendants.[4] Because of this eleventh hour pleading, Plaintiffs requested and obtained from Judge Andell additional time to amend their Motion for Summary Judgment so that the new allegations which were pled for the first time in Defendants' Counterclaim might be examined and such claims included within Plaintiffs' request for summary judgment as

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[1]The term "Previous Litigation" shall mean Cause No. D-880162-C, in the 260th Judicial District Court of Orange County, Texas, styled *Ida Marie Stark, Individually and as Independent Executrix of the Estate of William H. Stark II, Deceased, et al vs. Nelda Childers Stark, Individually and as Independent Executrix of the Estate of H.J. Lutcher Stark, Deceased, et al.*

[2]This Release, referred to hereafter as the 1991 Release, is attached to Plaintiffs' Amended Motion for Summary Judgment as Exhibit "B." A summary of the pertinent terms of the 1991 Release is set forth on pages 7-9 of Plaintiffs' Amended Motion for Summary Judgment.

[3] On October 16, 2000, Plaintiffs filed their Motion to Strike Defendants' Objections to Plaintiffs' Requests for Admissions and Motion to Deem Defendants' Objections to Requests for Admissions Admitted, and, Alternatively, Motion to Compel Response. On the same date, Plaintiffs filed their Motion to Strike Defendants' Objections to Discovery and Motion to Compel Discovery Responses from Defendants. These Motions have now been pending before this Court for nearly a year, and Plaintiffs still seek a hearing on these Motions.

[4]The new Counter-Defendants were: Eunice R. Benckenstein, Roy Wingate, Walter G. Riedel, III and Clyde V. McKee, in their individual capacities.

Plaintiffs deemed proper. Judge Andell set July 15, 2001 (a Saturday) as the deadline for filing the Amended Motion for Summary Judgment and ordered that Defendants file a response within 30 days, with any reply to be made by Plaintiffs to be due within 15 days thereafter.

On July 17, 2001, the first business day after July 15, 2001, Plaintiffs filed their Amended Motion for Summary Judgment. The Amended Motion for Summary Judgment includes summary judgment grounds for all of the counterclaims asserted by Defendants for the first time in their pleadings filed on June 1, 2001.

On or about August 15, 2001, Defendants filed a 63-page Response to the Amended Motion for Summary Judgment made by Plaintiffs on July 17, 2001. This instrument, entitled "Defendants' Motion for Stay, Continuance, and/or Abatement and Response to Plaintiffs' Amended Motion for Summary Judgment," is hereafter referred to as "Defendants' Response." On the same date, Defendants filed their First Amended Original Counter-Petition, Third Party Petition, and Petition for Bill of Review, their First Amended Motion to Dismiss for Lack of Jurisdiction, and a Motion for Continuance on the Summary Judgment Hearing.

In Defendants' Response, Defendants have, for the first time, furnished Plaintiffs and this Court with a list of specific properties which Defendants allege Plaintiffs and/or their predecessors, Nelda C. Stark and H.J. Lutcher Stark, concealed from Defendants during the course of the Previous Litigation. Defendants have asserted the concealment of these properties since the initial meeting between Defendants' counsel, Clay Burgess, and Plaintiffs' counsel a few days before the filing of Plaintiffs' Original Petition. Defendants, however, while threatening the Independent Co-Executors of the Nelda C. Stark Estate with litigation against them individually in Louisiana and even criminal

charges, refused to disclose the specific properties alleged to have been concealed.[5] Defendants further refused to disclose such properties in response to written discovery requests made by Plaintiffs in this litigation over a year ago. Now, at the very last possible moment in an effort to salvage their alleged claims in Texas, Defendants have decided to reveal these properties to Plaintiffs and this Court for the first time.

Simply stated, Defendants' Response is a virtual collage of misstatements of law, misrepresentations of facts, and irrelevancies. Nothing in this 63-page diatribe rises to the level of a response to the central point made in Plaintiffs' Amended Motion for Summary Judgment: that Plaintiffs are entitled to summary judgment with respect to all issues raised in this litigation as a matter of law. Instead, Defendants are attempting to mislead the Court by asserting duties that do not exist, making distinctions that have no relevancy, and asserting claims of fraud and conversion based on alleged "facts" that Defendants and their counsel either know or should know to be utterly false.

In this Reply, Plaintiffs will demonstrate conclusively to the Court that:

1. Defendants have failed to allege genuine issues of material fact. Indeed, the so-called "facts" put forth by Defendants in support of their assertions of conversion and fraud constitute to a colossal lie. The falsehood of these claims is obvious, blatant and easily verifiable by documents on file in the public record.

2. Not only have Defendants and their counsel made untrue statements of fact to this Court, but Defendants have in their possession from the Previous Litigation the very documents that

[5] For a complete and accurate reporting of this initial meeting, see the Affidavits of Plaintiffs' Counsel, attached as Exhibit "A" to Plaintiffs' Response to Defendants' Motion to Dismiss Plaintiffs' Petition for Declaratory Relief, attached as Exhibit 3 to Response.

conclusively disprove their factual allegations. Thus, not only have Defendants failed to investigate the truth and accuracy of their claims by searching the public records before presenting them as true to this Court, but Defendants have actual knowledge of the falsity of their claims even as they are swearing under oath that such claims are true.

3. Defendants have consistently misstated and misapplied the law. They have created fiduciary duties that do not exist as a matter of law, as determined by this very Court in the Previous Litigation.[6] They have failed to distinguish the *Schlumberger* decision in any meaningful way, but instead have attempted to use their false factual allegations to create an exception to the rule announced by the Texas Supreme Court in the *Schlumberger* case.[7]

Plaintiffs offer the following attached documents, which are pertinent to the arguments stated

Exhibit E - Exhibit A to Affidavit of Louis T. LaBruyere (Cameron Parish), with properties numbered sequentially.

Exhibit F - Affidavit of Darrell Alston, together with supporting documents. [Other Louisiana properties].

Exhibit F-1 - Unauthenticated copies of Bates-Stamped Documents provided to Defendants in the Previous Litigation on Caddo Parish Mineral Interest.

Exhibit F-2 - Unauthenticated Bates-Stamped H.J.L. Stark Audit Report - 12/31/46.

Exhibit G - Affidavit of Roy Wingate, with supporting documents [Texas properties].

Exhibit H - Affidavit of Roy Wingate, with supporting documents [Colorado property].

Exhibit I - Affidavit of Norma Clark.

Exhibit J - Petition for Sworn Detail Descriptive List, Final Accounting and Recover Decedent's Assets and/or Funds, filed by Defendants on November 30, 2000, in Succession of H.J. Lutcher Stark, Case No. 15404 in the 14th Judicial District Court of Calcasieu Parish, Louisiana.

Exhibit K - Order Continuing Independent Administration and Appointing Successor Independent Executrix entered on March 27, 2001, in the Estate of the H.J. Lutcher Stark, Deceased, Cause No. 3006 in the County Court of Orange County, Texas.

Exhibit L - Inventory, Appraisement and List of Claims field by Eunice R. Benckenstein, as Successor Independent Executor of the Estate of H.J. Lutcher Stark, Deceased, on June 25, 2001.

Further, Plaintiffs have on this date filed their Supplemental Motion for Summary Judgment, in which Plaintiffs contend that limitations is an additional reason why summary judgment would be proper, on the basis of so-called summary judgment evidence presented by Defendants for the first time in their filings on August 15, 2001. Plaintiffs have also filed a separate document entitled Objections to Defendants' Summary Judgment Evidence, in which Plaintiffs have delineated each of the technical objections to the various affidavits and sworn statements offered by Defendants in

support of their Response. Plaintiffs request that these additional filings be considered by this Court, along with their Amended Motion for Summary Judgment and the summary judgment evidence attached thereto, as well as this Reply and the documents attached hereto, in rendering a final decision.

I.

DEFENDANTS' FACTUAL CLAIMS ARE KNOWINGLY FALSE

The essence of Defendants' claims may be found in the following passage on Page 4 of Defendants' Motion for Stay, Continuance, and/or Abatement and Response to Plaintiffs' Amended Motion for Summary Judgment (hereinafter "Defendants' Response"):

> After much time, expense and investigation, Defendants have found numerous assets and pieces of property (amounting to thousands of acres of land) that belonged to Nita Hill Stark and that should have been distributed to her sons, William and Homer. However, although Plaintiffs, among others, had an affirmative duty to disclose the existence of those assets and properties, such information was deliberately and intentionally withheld from William and Homer (and their heirs) in the prior litigation. These assets and properties were passed along through the estates of H. J. Lutcher Stark, Nelda C. Stark, the Nelda C. and H.J. Lutcher Stark Foundation, and Eunice R. Benckenstein, they were deliberately and intentionally withheld from the inventories of Nita Hill Stark, H.J. Lutcher Stark, Nelda C. Stark, and the Nelda C. and H.J. Lutcher Stark Foundation. Also, Defendants have recently found that many of the assets and properties that were hidden from them have, in fact, been transferred and/or sold.

In the following pages, Plaintiffs will show that (1) such allegations are completely false, and (2) Defendants and their counsel had both constructive notice and actual knowledge of the falsity of their allegations when they were made.

A. Fictional Fable No. 1: The Legend of Big Lake

In Section 4.00 of Defendants' Amended Counterclaim, (ironically entitled "Factual Background"), Defendants assert under oath that a tract of real estate located in Cameron Parish, Louisiana, until recently in the Estate of Nelda C. Stark, Deceased (subsequently referred to herein as "the Big Lake Property"), was concealed from Defendants in the Estate of H.J. Lutcher Stark from 1965 until recently:

> ...[D]uring her tenure as the succession executor for the Estate of H.J. Lutcher Stark, [Nelda C.] Stark hid more assets from the Louisiana succession and never informed the Stark heirs of their claims of said assets. For example, Ms. Stark, as executor of the Estate of H.J. Lutcher Stark, transferred to herself what is now known as the 'Big Lake Property'....She transferred this property to herself without ever contacting the heirs, although they were entitled to 50% of the property. Nelda Stark never listed it on the inventory in Louisiana....
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> ...This property should have been listed in the Estate of H.J. Lutcher Stark and the heirs of William Stark should have received one-half of this property. It was never listed in the estate in Louisiana, she never contacted the heirs about this property, she breached her fiduciary duty and she sold it to herself without knowledge of any of the other owners....In 1965 when H.J. Lutcher Stark died he owned the 'Big Lake Property.' Nelda Stark intentionally failed to list it on his inventory and in 1972, sold it to herself....[8]

In Section 5.01 of Defendants' Amended Counterclaim, entitled "Breach of Fiduciary Duty" the same allegation is made again:

> First, with respect to the 'Big Lake' Property, Counter-Plaintiffs would show that they were never informed that the Estate of H. J. Lutcher Stark owned the 'Big Lake' Property in Louisiana at the time of his death. The 'Big Lake' Property was never listed in the Estate of H.J. Lutcher Stark and was sold by Nelda Stark to Nelda Stark without any court approval. Thirty years later, when Nelda Stark died in 1999, the 'Big Lake' Property appears in her estate and

[8] Exhibit A, Defendants' Amended Counterclaim, pages 15-16 (emphasis added).

> Eunice Benckenstein sells the property to her relatives, the C.L. Benckenstein Trust....[9]

In Section 7.04 of Defendants' Amended Counterclaim, Defendants request relief from this Court with respect to the alleged concealment of the Big Lake Property in the Estate of Nita Hill Stark:

> The Court determine and declare the properties, including but not limited to, the 'Big Lake' Property and the Rosalyn [sic] Ranch, which should have been made a part of the Estate of Nita Hill Stark, Deceased, wherever located and whether real, personal or mixed, and which are instead reflected as assets in the Estate of H.J. Lutcher Stark, Deceased, and/or Estate of Nelda C. Stark, Deceased, or otherwise omitted entirely from any inventory or accounting and order their return or the cash equivalent....[10]

In a verification attached as page 28 to Defendants' Amended Counterclaim, Defendants' counsel of record, Kevin Isern, swears under oath that the allegations in the Amended Counterclaim, including those set forth hereinabove, are within his personal knowledge and are true and correct.

On pages 28-33 of their Response, Defendants contend that H.J. Lutcher Stark breached a fiduciary duty to Defendants by concealing, among other things, the Big Lake Property, from Homer Stark and W. H. Stark II in the Nita Hill Stark Estate.[11] Nita Hill Stark died in 1939. Defendants further assert that Nelda C. Stark, as Independent Executrix of the Estate of H.J. Lutcher Stark, and now Eunice R. Benckenstein, as Successor Independent Executrix of the Estate of H.J. Lutcher Stark, breached and continue to breach a fiduciary duty to Defendants by failing to disclose the same

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[9] *Id.* at page 17.

[10] *Id.* at page 25.

[11] Defendants' Response, pages 28-29.

property to them.[12] Defendants further complain that Nelda C. Stark never listed the Big Lake Property on an inventory in the H.J. Lutcher Stark Estate, even though (Defendants claim) "[i]n 1965 when H.J. Lutcher Stark died he owned the 'Big Lake Property.' "[13] Defendants would have this Court believe that they were entitled to one-half of the Big Lake Property under a wholly erroneous theory of forced heirship in Louisiana.[14]

In support of their claims, Defendants have attached affidavits of each of the Defendants (Exhibits 5, 10, 11 and 12 to Defendants' Response) and two affidavits from a purported title examiner in Louisiana (Exhibit 8 to Defendants' Response). Each of the sworn affidavits of Defendants contain the same statements: that during the Prior Litigation, "numerous requests were made of [Plaintiffs] to provide full, complete and accurate disclosures of all properties and assets were owned by Nita Hill Stark, H.J. Lutcher Stark, and the Stark Foundation;" that numerous properties were not disclosed; that the affiant "*was never informed that the Estate of H.J. Lutcher Stark owned the 'Big Lake' property in Louisiana at the time of his death*" [emphasis added]; and that the Big Lake Property was never listed in the Estate of H.J. Lutcher Stark but "appears" in the Estate of Nelda C. Stark 30 years later.[15] Each of the Affiants swear under oath that the statements made therein are within his or her own personal knowledge and are true and correct.

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[12] *Id.* at pages 29-31. Defendants' misstatements of the law of fiduciary duty are discussed fully in Part II below.

[13] *Id.* at page 38.

[14] Defendants' misstatements of the law regarding the Louisiana law of forced heirship are exposed in Part III below.

[15] *See* Defendants' Response, Exhibits 5, 10, 11, and 12.

1. **Fictional Fable No. 1A: The Big Lake Property was an Asset of the Estate of Nita Hill Stark.**

The Big Lake Property was never an asset of the Estate of Nita Hill Stark. Nita Hill Stark died in 1939. H.J. Lutcher Stark acquired the seven lots that became the Big Lake Property in two transactions in 1944 and 1946, long after Nita Hill Stark's death. This is conclusively shown in documents appearing in the public record in Cameron Parish, Louisiana. See Exhibit B, Affidavit of Darrell Alston. Thus, H.J. Lutcher Stark, as independent executor of the Estate of Nita Hill Stark, could not possibly have owed Defendants a fiduciary duty with respect to the Big Lake Property and no forced heirship rights could have attached to such property under Louisiana law.[16]

2. **Fictional Fable No. 1B: The Big Lake Property was an Asset of H.J. Lutcher Stark at his Death.**

When H.J. Lutcher Stark died in September 1965, he did not own the Big Lake Property. In 1950, H.J. Lutcher Stark had sold the Big Lake Property to Lutcher & Moore Lumber Company in an arms-length transaction. In 1967, two years after his death, the Estate of H.J. Lutcher Stark reacquired the Big Lake Property for its then fair market value. Five years later, in 1972, Nelda C. Stark acquired the Big Lake Property from the H.J. Lutcher Stark Estate for the same price. Each of these transactions also appear in the public records of Cameron Parish, Louisiana. See Exhibit B, Affidavit of Darrell Alston.

Thus, the statements of Defendants that H.J. Lutcher Stark owned the Big Lake Property at his death are false. That being the case, no forced heirship rights attached to this property

[16] See discussion of Louisiana law of forced heirship at Part III below.

in the H.J. Lutcher Stark Estate, and Nelda C. Stark owed Defendants no fiduciary duty with respect to this property.[17]

3. Fictional Fable No. 1C: Defendants have just recently discovered that the Big Lake Property was in the H.J. Lutcher Stark Estate.

It is bad enough that Defendants and their counsel would misrepresent facts to this Court when the falsity of those statements can be so easily evidenced from documents in the public record with which Defendants are charged with constructive notice. Far worse, however, is the fact that Defendants and their attorneys had actual knowledge of the falsity of their claims through documents provided to them and copied by their attorneys in the Previous Litigation, or in many cases provided by Defendants themselves during the discovery process in the Previous Litigation. See Exhibit C, Affidavit of Roy Wingate, and documents attached thereto, in which it is conclusively shown that Defendants were furnished copies of documents in the Previous Litigation that established the chain of title to the Big Lake Property from 1944 through 1988. According to representations made by Defendants' counsel, these documents are still in the possession of Defendants. Thus, Defendants have known for more than 10 years that the Estate of Nita Hill Stark did not have an interest in the Big Lake Property and that H.J. Lutcher Stark did not own the Big Lake Property at the time of his death. The Affidavits of Defendants and their counsel are false and

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[17]See discussion of forced heirship, Part III below. Defendants also complain that Nelda C. Stark violated a duty to them by transferring the Big Lake Property to herself in 1972 without prior court approval. See Exhibit A, Defendants' Amended Counterclaim, page 17. This issue is a red herring. Because the Big Lake Property was not an asset of H.J. Lutcher Stark at the time of his death, no forced heirship rights attached. And because all legacies to Homer Stark and William H. Stark II under the Will of H.J. Lutcher Stark were fully satisfied, Defendants have no standing to complain now about a mere technical defect in a transfer of title almost 30 years ago that did not involve them in anyway.

the misrepresentations repeatedly made to this Court are so obvious that they must have been intentional.

B. Fictional Fable No. 2: The Myth of the Missing Marshes.

Throughout their Amended Counterclaim and Response, Defendants assert that H. J. Lutcher Stark, Nelda C. Stark and others have concealed from them "tens of thousands of acres, if not hundreds of thousands of acres" in Louisiana which (Defendants claim) were assets of the Nita Hill Stark Estate and/or the H.J. Lutcher Stark Estate; that Defendants have only recently learned of the existence of such properties; and that Plaintiffs and their predecessors have breached a fiduciary duty by failing to disclose such properties to Defendants.

The summary judgment evidence offered by Defendants in support of these claims consists of two affidavits from a purported Louisiana title examiner, Louis R. LaBruyere IV, identifying 85 properties in Cameron Parish (including Big Lake) and one property in Iberia Parish. According to LaBruyere's Affidavits, these properties were acquired by either H.J. Lutcher Stark or Lutcher & Moore Lumber Company between 1900 and 1965, and title had not been divested at the time of H. J. Lutcher Stark's death in 1965.[18] In addition, Defendants have each sworn under oath that they have recently discovered that the properties listed in the LaBruyere Affidavits were withheld by Plaintiffs in the Previous Litigation.[19] Finally, Defendants' counsel, Kevin Isern, has sworn under

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[18] Defendants' Response, Exhibit 8. These Affidavits have obvious defects that render them worthless as summary judgment evidence. See Exhibit D, Plaintiffs' Objections to Defendants' Summary Judgment Evidence.

[19] Defendants' Response, Exhibits 5, 10, 11, and 12.

oath, in a verification attached to Defendants' Amended Counterclaim, that such allegations are within his personal knowledge and are true and correct.[20]

1. **Fictional Fable No. 2A: "Hundreds of thousands of acres "of land in Louisiana were concealed in the Nita Hill Stark or H.J. Lutcher Stark Estates.**

The simplest way to demonstrate the utter falsity of this claim and the extent of Defendants' efforts to mislead this Court is to examine, item by item, the properties listed on Exhibit A attached to the LaBruyere Affidavit for the Cameron Parish title research. Attached as Exhibit E is a copy of the LaBruyere Affidavit (Cameron Parish) with the specific properties numbered sequentially. The numbers below correspond to properties described on Exhibit E.

1. Properties 1 and 2 are the Big Lake Property. As stated in subpart A above, this property was not acquired by H.J. Lutcher Stark until after the death of Nita Hill Stark. On the date of H.J. Lutcher Stark's death, it was owned by Lutcher & Moore Lumber Company, having been conveyed by H. J. Lutcher Stark to Lutcher & Moore Lumber Company by deed dated November 8, 1950, and filed in the Public Records of Cameron Parish, Louisiana.

2. Properties 3, 4, 7, 15, 19, 20, 21, 22, 23, 24, 75, 76, 77, 78, 79, and 80 were owned at one time by H. J. Lutcher Stark, but he conveyed his interest in such Properties to Lutcher & Moore Lumber Company by deed dated November 8, 1950, and filed in the Public Records of Cameron Parish, Louisiana.

3. The Public Records of Cameron Parish, Louisiana reflect that H. J. Lutcher Stark and Lutcher & Moore Lumber Company **never owned** Properties 5, 6, 8, 16, 17, 25,26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 73, 81, 82, 83, 84 and 85. This includes **55** of the **85** Properties on the LaBruyere Affidavit.

[20] Exhibit A, Defendants' Amended Counterclaim, page 28.

4. Properties 14, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 82, 83, 84 and 85, a total of **30** properties, *do not even exist*! These properties, if they existed at all, would be either in the middle of the Gulf of Mexico or Sabine Lake. Both the Public Records of Cameron Parish and the Tax Assessor's Office in Cameron Parish do not show these Properties on any maps or other records on file there.

5. The only properties that were at one time owned by H. J. Lutcher Stark, and for which record title may not have been conveyed by H. J. Lutcher Stark before 1965, are Properties 14, 18, 69, 71, and 74. [Properties 69 and 70 are duplicates, as are Properties 71 and 72.] Property 18 was acquired by H. J. Lutcher Stark by inheritance through the Estates of his parents, W. H. Stark and Miriam M. Stark, in 1937; no record of its subsequent transfer could be located, but the records of the Tax Assessor's Office of Cameron Parish do not show this property to be in the name of H. J. Lutcher Stark or any member of the Stark family. Property 14 was acquired by H. J. Lutcher Stark many years after the death of Nita Hill Stark, but such property may not exist, as reflected above. Properties 69, 71 and 74 were acquired by H. J. Lutcher Stark many years after the death of Nita Hill Stark, but the Office of the Tax Assessor of Cameron Parish does not show these properties currently in the name of H. J. Lutcher Stark or any other member of the Stark family.

All of the documents (for properties that exist) proving the facts indicated above appear in the public records of Cameron Parish, Louisiana. For supporting details, see Exhibit F, Affidavit of Darrell Alston (other Louisiana Properties).

In addition, any remaining Properties that may have been owned by H.J. Lutcher Stark at one time in Cameron Parish were presumably conveyed to The Largo Company, as part of a $15 million sale from H. J. Lutcher Stark and Lutcher & Moore Lumber Company to The Largo Company on June 29, 1956. In the original contract of sale between H.J. Lutcher Stark and Lutcher & Moore

Lumber Company, as Sellers, and John Mecom, owner of The Largo Company, as Buyer, Sellers contracted to sell to Buyer all of their surface and mineral properties in Cameron Parish except for Big Lake and certain properties owned in common with the Benckenstein Family:

> "All land, water bottoms, royalty interests in oil, gas and other minerals, mineral interests, over-riding royalty interests in oil, gas and other minerals, production payment interests in oil, gas and other minerals, and, without limitation, all other right, title and interest, whether present, future or reversionary, owned or claimed by Sellers in Cameron Parish, Louisiana, except that land owned jointly with the Benckenstein Syndicate and Sellers' recreational property at Big Lake, in Sections 10 and 37 of TS 125, R9W."[21] [emphasis added]

Thus, it is clear that, with only the exception of Big Lake and a few other properties owned by Lutcher & Moore Lumber Company, all of the properties on LaBruyere Affidavit A had been conveyed by H. J. Lutcher Stark and Lutcher & Moore Lumber Company by no later than 1956.

Plaintiffs have also raised numerous objections challenging the competency of the LaBruyere Affidavits as summary judgment evidence. See Exhibit D, Plaintiffs' Objections to Defendants' Summary Judgment Evidence, filed herein and incorporated by reference.

Thus, the claim that "hundreds of thousands of acres of land" were owned by H. J. Lutcher Stark but never disclosed is demonstrated to be absolutely false by the public records in Louisiana. Not only is such claim false, but it is so blatantly false that the only logical conclusion that may be

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[21] See Exhibit C, Affidavit of Roy Wingate, Attachment No. 29.

reached is that Defendants, their counsel and their witness, Mr. LaBruyere, intentionally sought to mislead this Court with their false affidavits.

2. Fictional Fable No. 2B: Defendants only "recently discovered" the "hundreds of thousands of acres" of land in Louisiana.

Equally as false is the claim that "hundreds of thousands of acres, if not hundreds of thousands of acres" belonging to the H.J. Lutcher Stark Estate were concealed from the Defendants. In the Previous Litigation, more than 400,000 pages of documents were produced by Plaintiffs' predecessor, Nelda C. Stark, to Defendants. In addition, many such documents were located by Defendants and produced to Plaintiffs in the Previous Litigation. Many of these documents pertain to land once owned by members of the Stark family or Stark family businesses in Cameron Parish, including many of the properties listed on Exhibit A of the LaBruyere Affidavit.[22]

In Exhibit C, Affidavit of Roy Wingate, attached hereto, Roy Wingate has identified many of these documents produced in the Previous Litigation. A number of these documents were produced by Plaintiffs, but amazingly, many of these documents were furnished by Defendants themselves more than ten years ago. It is incredible that Defendants can now maintain with a straight face that these same properties were concealed from them. Not only were Defendants on constructive notice of documents filed in the Cameron Parish records, but they had actual knowledge of the title to these properties. Equally incredible is the fact that Defendants' counsel, Kevin Isern, has sworn out a false affidavit claiming that these allegations of fact are within his personal knowledge and are true and correct.

In addition, the Iberia Parish property described on the LaBruyere Affidavit (Exhibit 8) was also disclosed to the Defendants in the Previous Litigation. See Exhibit F-2, Unauthenticated

[22] Exhibit E, Affidavit of Louis T. LaBruyere (Cameron Parish); see also, Defendants' Response, Exhibit 8.

H.J.L. Stark Audit Report of 12/31/46, pages E002533-35, E002568, E002601-02, showing the Iberia Parish property was reported at the value of TWO DOLLARS.

3. Fictional Fable No. 2C: The "Hidden" Caddo Parish Mineral Interest.

On page 15 of their Amended Counterclaim, Defendants make much ado about an alleged false affidavit of Nelda C. Stark submitted in support of her Motion for Partial Summary Judgment in the Previous Litigation. To prove that such affidavit was false, they have submitted ancillary succession documents filed by Nelda C. Stark in Louisiana in 1982 for the purpose of clearing title to a newly-discovered mineral interest in Caddo Parish. Besides allegedly contradicting a statement made by Nelda C. Stark in her 1989 Affidavit submitted to this Court along with her Motion for Partial Summary Judgment,[23] Defendants complain that such mineral interest was never revealed to Homer Stark or William H. Stark II, in alleged violation of Louisiana forced heirship law and in breach of Nelda C. Stark's alleged fiduciary duty.

Nelda C. Stark's statement that the independent administration of the Estate of H.J. Lutcher Stark, a Texas estate proceeding, was closed was entirely truthful, as the passage of title to assets in Louisiana through the succession on file in that State was an entirely separate proceeding. Moreover, aside from the obvious misstatements of the law of forced heirship and fiduciary duty,[24] Defendants are again making false statements to this Court when they state that:

> In sum, when the Stark heirs commenced litigation in the late 80's and early 90's, Mrs. Nelda Stark, in yet another attempt to conceal and hide assets, signed a false affidavit in an attempt to throw them off

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[23] See f.n. 28 below.

[24] See Parts II and III below.

the trail and mislead this Court which ultimately resulted in summary judgment in their favor.[25]

Once again, Defendants cannot hope to convince this Court that there has been a concealment when Defendants had actual knowledge of the ancillary succession and of the Caddo Parish mineral interest in documents produced in the Previous Litigation. These documents conclusively establish that Defendants were aware of this information more than 10 years ago. See Exhibit F-1, Unauthenticated copies of Bates-Stamped Documents provided to Defendants in the Previous Litigation on Caddo Parish Mineral Interest.[26] Though Defendants have no legal claim to this mineral interest, their claim is clearly barred by the 1991 Release (which expressly covers the H. J. Lutcher Stark Succession in Louisiana), by res judicata, and by limitation.

C. Fictional Fable No. 3: Tall Tales of Texas Timber.

On page 32 of their Response, Defendants refer to an Affidavit executed by Nelda C. Stark in support of her Motion for Partial Summary Judgment in the Previous Litigation. Defendants again misrepresent to this Court that "...Nelda C. Stark submitted an affidavit in support of her contention that she had not made any property transfers since 1965."[27] This is absolutely false, as a plain reading of the document would indicate. In her Motion for Partial Summary Judgment in the Previous Litigation, Nelda C. Stark merely stated that "all of the debts of the Lutcher Stark Estate had been paid and all of the assets had been distributed by 1979." The Affidavit supported that allegation, the purpose of which was to show merely that the Estate of H.J. Lutcher Stark was no

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[25] Exhibit A, Defendants Amended Counterclaim, page 15.

[26] These documents shall be resubmitted, together with an authenticating affidavit, in a separate, supplemental filing.

[27] Defendants' Response, page 32.

longer under administration.[28] Defendants' sinister reading of the Affidavit simply does not square with the plain facts demonstrated by the Affidavit itself.

Defendants have, nevertheless, used this false allegation of fact as an excuse to attach an incredible piece of summary judgment evidence, in the form of the Affidavit of Sam O. Smith (the "Smith Affidavit") (Exhibit 9 to Defendants' Response). Though lacking the bizarre color of the LaBruyere's Affidavits' falsity – there are no misrepresentations to the Court of a concealment of submerged properties – the Smith Affidavit is equally as flawed as the LaBruyere Affidavits and is no less offensive through its blatant misstatements of law and errant speculations. That the Smith Affidavit wholly fails as competent summary judgment evidence is demonstrated conclusively in Exhibit D, Plaintiffs' Objections to Defendants' Summary Judgment Evidence.

Moreover, Defendants have misrepresented the Smith Affidavit by stating that it proves that the Nelda C. Stark Affidavit "...was false and constitutes a fraud not only on the Defendants, but on this count [sic]."[29] Even if the Smith Affidavit were competent evidence and even if the factual allegations contained therein were correct, they are based wholly on information available both in the public record and provided to Defendants in the Previous Litigation.[30] In particular, as the Wingate Affidavit shows, Defendants have, for more than 10 years, had in their possession documents which show that H.J. Lutcher Stark acquired his interest in Weir Long Leaf Company and the 86.000 acres of timber land in Sabine, Newton and Jasper Counties, Texas as a gift from his

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[28] See Motion for Partial Summary Judgment, page 12; Exhibit "L" to Plaintiffs' Amended Motion for Summary Judgment; and Affidavit of Nelda C. Stark, Exhibit 17 to Defendants' Response.

[29] Defendants' Response, page 32.

[30] See Exhibit G, Affidavit of Roy Wingate (Texas Property).

grandmother, Frances A. Lutcher; that, contrary to Smith's allegations, Weir Long Leaf Lumber Company paid out substantial cash to its stockholders each year and there was no substantial accumulation of income; and that a 60-year-old legal opinion advised H.J. Lutcher Stark that the stock dividends paid by Weir Long Leaf Lumber Company were his separate property.[31] Thus, Sam O. Smith's attempt to render a legal opinion is not only incompetent summary judgment evidence, it is factually and legally wrong.

Most significantly, Defendants have not just recently discovered the matters raised in the Smith Affidavit, but have had actual knowledge of them for more than 10 years. The sole issue raised in the Smith Affidavit – the alleged community property interest of Nita Hill Stark in Weir Long Leaf Lumber Company, the 86,000 acres of timber land, and other properties of H.J. Lutcher Stark – was the very issue raised in Defendants' pleadings in the Previous Litigation.[32] Thus, any asserted claim of Defendants supported by the Smith Affidavit is barred as a matter of law by release, res judicata, and limitations.[33]

D. Fictional Fable No. 4: The Riddle of Roslyn Ranch.

Defendants also make certain assertions in their Amended Counterclaim and Response with respect to Colorado real property held by H.J. Lutcher Stark's family for more than a century, which property is known as the Roslyn Ranch. There has never been any question that this property was H.J. Lutcher Stark's separate property and that the Estate of Nita Hill Stark never owned an interest.

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[31] *Id.*

[32] See Plaintiffs' Third Amended Original Petition (filed by Defendants in the Previous Litigations), Sections VII-XIII, pages 4-8, Exhibit A to Plaintiffs' Amended Motion for Summary Judgment.

[33] See Parts IV, V, and VIII below.

Moreover, this issue was squarely presented in the Previous Litigation and the relevant documents were furnished to Defendants at that time.

Defendants make two factual assertions about the Roslyn Ranch:

(1) That the Roslyn Ranch was a part of the Estate of Nita Hill Stark[34]; and

(2) That the Roslyn Ranch was improperly transferred by Nelda C. Stark out of the H. J. Lutcher Stark Estate as a fee to herself.[35]

These allegations of fact are sworn to under oath by Defendants' counsel, Kevin Isern, on page 28 of Defendants' Amended Counterclaim.

The obvious falsity of the first allegation is shown by the documents attached as a part of Exhibit H, Affidavit of Roy Wingate. These documents conclusively establish that H.J. Lutcher Stark acquired most of the Roslyn Ranch as a bequest from his grandmother, Frances A. Lutcher, in 1924 (constituting his separate property under Texas law), and that H. J. Lutcher Stark and Nelda C. Stark acquired the remaining portions of the Roslyn Ranch after the death of Nita Hill Stark in 1939.[36] Thus, these documents conclusively establish that the Estate of Nita Hill Stark had no interest in the Roslyn Ranch and, by extension, Defendants have no interest through her estate.

The second allegation is both false and irrelevant. It is false because the deeds attached as supporting documentation (Defendants' Response, Exhibit 19) state merely that Nelda C. Stark, as Independent Executrix of the Estate of H.J. Lutcher Stark, Deceased, conveyed the Roslyn Ranch to herself, individually ,"for the consideration of carrying out the provisions of said Decedent's

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[34]Exhibit A, Defendants' Amended Counterclaim, Section 7.04, page 25.

[35]Exhibit A, Defendants' Amended Counterclaim, Section 5.01, page 18; Defendants' Response, page 54 and Exhibit 19.

[36]Exhibit H, Affidavit of Roy Wingate.

Will." Defendants have distorted the last phrase by claiming that it means that Nelda C. Stark transferred the property to herself as an executor's fee, in apparent violation of the Will of H. J. Lutcher Stark. The quoted language, however, instead appears to indicate that Nelda C. Stark, as Independent Executrix, transferred such property to herself in distribution of the bequest made to her of such property under the Will of H.J. Lutcher Stark.

Nevertheless, even if Defendants' interpretation of the quoted language were correct, so what? Defendants' predecessor, William H. Stark II, received his full bequest under the Will of H. J. Lutcher Stark (comprised of a single cash bequest of $1 million) and signed a release for it more than 30 years ago.[37] The Roslyn Ranch passed through the residuary estate of H.J. Lutcher Stark to the residuary beneficiaries, Nelda C. Stark and the Nelda C. and H.J. Lutcher Stark Foundation (hereinafter "the Foundation").[38] Surely Defendants are not trying to tell this Court that they have forced heirship rights in Colorado as well! Clearly, in addition to the impediments to any such claim involving the Roslyn Ranch set forth below, Defendants have no standing to complain about the manner in which Nelda C. Stark distributed this property out of the Estate of H.J. Lutcher Stark to herself as a residuary beneficiary under the terms of his Will. Consequently, any claim as to the Roslyn Ranch is a nonissue.

Moreover, the summary judgment record clearly establishes that all of the allegations raised by Defendants about the Roslyn Ranch are either shown to be false by, or are based on, documents

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[37]See Receipt and Full and Final Release of William H. Stark II, Plaintiffs' Amended Motion for Summary Judgment, Exhibit "K".

[38]See, Will of H.J. Lutcher Stark, Plaintiffs' Amended Motion for Summary Judgment, Exhibit "J".

produced to and copied by Defendants in the Previous Litigation.[39] Because Defendants received and possess documents relating to the Roslyn Ranch and the true nature of its ownership in the Previous Litigation, Defendants have actual knowledge of the falsity of their assertion that the Estate of Nita Hill Stark had an interest in the Roslyn Ranch. Moreover, any claim alleged by Defendants in connection with the H.J. Lutcher Stark Estate is fully discharged by the 1991 Release, res judicata, and limitations.[40]

E. Fictional Fable No. 5: The Ex-Security Guard Evidence is Competent, Controverting Summary Judgment Evidence.

Finally, Defendants have submitted the sworn testimony of two ex-employees of Nelda C. Stark as summary judgment evidence that information was concealed from Defendants in the Previous Litigation.

The flaws of the statements taken of the ex-security guards are both obvious and fatal. Those flaws are detailed in Exhibit D, Plaintiffs' Objection to Defendants' Summary Judgment Evidence, which is attached hereto and is incorporated herein by reference.

Nevertheless, even if the statements of the ex-security guards were taken as factually correct, they do not support Defendants' contention that the 1991 Release should be set aside for fraud. At best, these statements could establish that some information or data was not produced in the Previous Litigation. It does not state – because the Affiants cannot possibly know – whether such information was privileged or even whether it was in fact ultimately disclosed to Defendants. Most important, since the Affiants cannot identify the information or data that was allegedly hidden, they cannot

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[39] See Exhibit H, Affidavit of Roy Wingate (Colorado Property).

[40] See Parts IV, V and VIII below.

possibly provide credible evidence that such information or data was material and that Defendants relied on such information in executing the 1991 Release. Proof of materiality is absolutely essential to any attempt by Defendants to set aside the 1991 Release on the basis of fraud.[41]

In *Ryland Group, Inc. v. Hood*,[42] the Texas Supreme Court set forth the applicable standards for an affidavit presented in rebuttal of a motion for summary judgment. The starting point is the applicable Rule, which states that an affidavit "shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."[43] In addition, the Court held that the affidavit must present some probative evidence of the facts at issue and must state something more than mere conclusions.[44] A witness' affidavit that he "believes" certain facts to be true is insufficient. Testimony based on the "best knowledge" or "belief" of the affiant is also insufficient as summary judgment evidence.[45]

The ex-security guards' statements offered by Defendants as summary judgment evidence fail to meet this minimum standard. With regard to the Affidavit of Charles M. Kinney, at no place in this Affidavit does Mr. Kinney state that he has actual or personal knowledge of the facts he is

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[41] *Fletcher v. Fletcher*, 26 S.W.3d 66, 77 (Tex. App. – Waco 2000, pet. denied) and *Balogh v. Ramos*, 978 S.W.2d 696, 701 (Tex. App. – Corpus Christi 1998, pet. denied), *and cert. denied*, 528 U.S. 822 (1999) and *Cart v. Christie*, 970 S.W.2d 620, 624 (Tex. App. – Austin 1998, pet. denied) both citing *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 698 (Tex. 1990) *and cert. denied*, 498 U.S. 1048 (1991) for the proposition that the Texas Supreme Court has defined fraudulent inducement as a simple fraud claim.

[42] 924 S.W.2d 120 (Tex. 1996).

[43] Tex.R.Civ.P. 166a(f).

[44] *Ryland*, 924 S.W.2d at 122; see also: *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984) (holding that "[a]ffidavits consisting only of conclusions are insufficient to raise an issue of fact in a summary judgment proceeding").

[45] *Ryland*, 924 S.W.2d at 122.

asserting; rather, he merely claims to have knowledge of the whereabouts of concealed evidence, that such knowledge was "passed on" to him, and that he knew "secondhand" about an alleged concealment.[46] The closest he comes to stating that he has knowledge of anything pertinent to the alleged concealment is when he agrees that, to the best of his knowledge, the "boxes" were never turned over to Defendants,[47] though his status as a mere casual observer of the discovery process in the Previous Litigation hardly enables "to the best of my knowledge" to carry any weight. Finally, when Mr. Kinney is asked if the information contained in his Affidavit is to the best of his knowledge, he agrees but goes no further.[48] This Affidavit is completely inadequate as summary judgment evidence under the *Ryland* standard.

The sworn statement of Clayton Newberry also fails to present competent summary judgment evidence. First, on several instances, Mr. Newberry states that the information he provides is to the best of his knowledge.[49] Also, he answers questions based on just his "understanding."[50] To one question, he answers: "I believe so."[51] Then, within the last portion of the Statement, Defendants' counsel, Clayton Burgess, changes the form of his questions to reflect the statement that the answers to the questions are based on Mr. Newberry's personal knowledge. He includes this in several questions. Nonetheless, Mr. Burgess' questions all ask Mr. Newberry to state conclusions rather

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[46]Affidavit of Charles M. Kinney, Exhibit 6 to Defendants' Response (hereinafter the "Kinney Affidavit"), page 7, line 22; page 8, line 7.

[47]Kinney Affidavit, page 9, line 6.

[48]Kinney Affidavit, page 9, line 19.

[49]Sworn Statement of Clayton Newberry, Exhibit 7 to Defendants' Response (hereinafter, the "Newberry Statement"), page 5, line 13; page 8, line 3.

[50]Newberry Statement, page 5, line 21; page 6, line 13.

[51]Newberry Statement, page 10, line 23.

than to verify facts with any probative value.[52] Mr. Newberry's conclusions are not based on facts within his actual knowledge because he does not know what information, if anything, was actually being kept in the alleged "briefcases/suitcases." None of these conclusory statements meet the minimum standard of *Ryland*.

On one occasion, Mr. Burgess asks Mr. Newberry to state whether or not the information contained in his Statement is based on his personal knowledge. The question, however, is overly broad and does not refer to any specific testimony.[53] With all of the statements of conclusion and belief running through Mr. Newberry's Statement, this question alone does not salvage anything.

The Kinney Affidavit and the Newberry Statement also fail as competent summary judgment evidence because they fail to support any "genuine issue of material fact." In this regard, the Texas courts have stated that materiality depends on the substantive law of the legal issues presented, and "... only disputes over facts that might affect the outcome of the governing law will properly preclude the entry of summary judgment."[54] To constitute evidence of a genuine issue, the evidence must be such that a reasonable jury could return a verdict for the nonmoving party.[55] "If the evidence simply shows that some metaphysical doubt as to [if] the fact exists, or if the evidence is not significantly probative, the material fact issue is not genuine."[56]

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[52]Newberry Statement, page 9, lines 13-24; page 10, line 19; page 11, lines 3-20; page 12, line 23.

[53]Newberry Statement, page 10, line 16.

[54]*Moore v. K Mart Corp.*, 981 S.W. 2d 266, 269 (Tex. App. - San Antonio 1998, pet. denied), citing *Anderson v. Liberty Lobby, Inc.*, 477 U. S. 242 (1986).

[55]*Moore*, 981 S.W.2d at 269; *Anderson*, 477 U.S. at 248.

[56]*Moore*, 981 S.W.2d at 269.

Additionally, when evaluating summary judgment evidence, more than a scintilla of probative evidence must be present in order to raise a genuine issue of material fact. "Less than a scintilla of evidence exists when the evidence is so weak as to do no more than create a mere surmise or suspicion of a fact.[57] Several Texas appellate courts have cited this proposition and concluded that evidence amounting to less than a scintilla is the legal equivalent of no evidence for summary judgment purposes.[58]

The ex-security guard statements fail to raise more than a scintilla of any probative evidence. Kinney and Newberry are unable to testify with the certainty of personal knowledge that the information alleged withheld was in fact withheld from Defendants in the Previous Litigation. For all that they know, the information withheld may have been privileged, or it may have been personal information of Nelda C. Stark not covered by the discovery requests, or it may not have been withheld at all from Defendants. They can only testify about what they heard other people say, and none of that is very specific. They cannot even agree whether the allegedly concealed information was held in boxes or briefcases/suitcases.

Most significantly, they cannot tell the Court *what information* was allegedly concealed as they never actually saw any of it. Their statements are mere speculations and surmises, interspersed with the conclusions that Defendants want to hear. At best, the statements raise a mere "metaphysical doubt" or a suspicion that someone may have been intending to withhold something at some time

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[57] *Moore*, 981 S.W. 2d at 269, citing *Kindred v. Con/Chem, Inc.*, 650 S.W. 2d 61, 63 (Tex. 1983).

[58] *See Century 21 Real Estate Corp. v. Hometown Real Estate Co.*, 890 S.W.2d 118, 126 (Tex. App.- Texarkana 1994, writ denied); *Rayburn v. KJI Bluechip Investments*, 50 S.W. 3d 699 (Tex. App.- Fort Worth 2001, no pet.); *Allen v. Virnau & Sons, Inc.*, 28 S.W. 3d 226 (Tex. App.- Beaumont 2000, writ denied); *Melendez v. Exxon Corp.*, 998 S.W. 2d 266 (Tex. App.- Houston [14th Dist.] 1999, no writ); *Ebasco v. Rex*, 923 S.W. 2d 694 (Tex. App.- Corpus Christi 1996, writ denied); *Keene Corp. v Gardner*, 837 S.W.2d 224 (Tex. App.- Dallas 1992, writ denied).

during the Previous Litigation. Defendants, however, would ask this Court to make a quantum leap and find that such alleged evidence is probative of fraud sufficient to set aside the 1991 Release. The Texas courts have made it clear that this Court is not required to make such a leap, and the Court should not make it. The statements are simply worthless as summary judgment evidence and should be given no weight.

Finally, there is a perfectly logical response to the assertions made of documents allegedly concealed in boxes from Defendants. In the Previous Litigation, counsel for Nelda C. Stark and the Foundation withheld from production certain documents claimed to be exempt from production due to privilege or lack of relevancy. Those documents were kept in boxes and a "large manilla envelope" in Clyde McKee's office and on a shelf in another room. Among the documents were "current computer printouts" of properties of Nelda C. Stark. A list of these documents was prepared and given to Defendants' counsel in the Previous Litigation along with a letter dated May 24, 1990. After the conclusion of the Previous Litigation, such documents were returned to the general files of Nelda C. Stark and the Foundation in the Foundation offices.[59] It is probable that this information is what the ex-security guards now think they recall 10 years later. If so, the matters raised by the ex-security guards in their statements reflect merely a long-moot issue on the scope of discovery requests between counsel in the Previous Litigation, which hardly rises to the level of a sinister plot to conceal information.

[59] See Exhibit I, Affidavit of Norma Clark.

II.

PLAINTIFFS DO NOT OWE DEFENDANTS A FIDUCIARY DUTY

As the factual basis of Defendants' claims consists entirely of false affidavits and incompetent summary judgment evidence, so the legal basis of Defendants' Response is grounded on misstatements and misapplications of Texas law. The entire basis of Defendants' argument that the 1991 Release does not effectively bar their claims under the *Schlumberger* case is that Plaintiffs purportedly have breached a fiduciary duty to Defendants.

Defendants sum up their argument on fiduciary duty as follows:

> As a general proposition, Defendants would show that Eunice Benckenstein, Walter Riedel, and Roy Wingate, in their various capacities involving the Estates of H.J. Lutcher Stark, Nelda C. Stark, and Nelda C. and H.J. Lutcher Stark Foundation, owe William and Homer Stark a high fiduciary duty of full and accurate disclosure of information pertaining to the assets of H.J. Lutcher Stark, Nelda C. Stark, and Nita Hill Stark's Estates that have been improperly and fraudulently made part of the Estates of H.J. Lutcher Stark, Nelda C. Stark, the Nelda C. and H.J. Lutcher Stark Foundation, and now, part of the property and/or assets possessed by Eunice Benckenstein in her official and unofficial capacities.[60]

Condensed in this short summary passage – and repeated in detail throughout the Defendants' Response – are no less than five (5) separate fiduciary relationships that Defendants are seeking to impose on Plaintiffs: (1) between (a) the Independent Co-Executors of the Estate of Nelda C. Stark, as Independent Executor of the Estate of H.J. Lutcher Stark, as Executor of the Estate of Nita Hill Stark, and (b) Defendants, as beneficiaries of the Estate of Nita Hill Stark; (2) between (a) the Independent Co-Executors of the Estate of Nelda C. Stark, as Independent Executor of the Estate of

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[60] Defendants' Response, page 42.

H.J. Lutcher Stark, and (b) Defendants, as beneficiaries of the Estate of H.J. Lutcher Stark; (3) between (a) the Independent Co-Executors of the Estate of Nelda C. Stark, and (b) Defendants, as alleged creditors of the Estate of Nelda C. Stark; (4) between (a) Eunice R. Benckenstein, as Successor Independent Executor of the Estate of H.J. Lutcher Stark, and (b) Defendants, as beneficiaries of the Estate of H.J. Lutcher Stark (and, by further extension, the Estate of Nita Hill Stark, Deceased); and (5) between the Foundation and Defendants.

As will be shown below, none of these fiduciary relationships exist as a matter of law. In what is obviously a desperate attempt to avoid the clear ruling of the Texas Supreme Court's *Schlumberger* decision, Defendants have repeatedly and intentionally misstated and misapplied Texas law on fiduciary duties against Plaintiffs. Disregarding basic and well-established principles of Texas law, Defendants would instead impose fiduciary duties everywhere and upon everyone in sight. These claimed fiduciary duties and the alleged breach of them by Plaintiffs exist only in the imagination of Defendants and their highly creative counsel. But as no such fiduciary relationships have ever existed under Texas law, Defendants may not maintain a claim for breach of those non-existent duties. The argument that Plaintiffs have breached fiduciary duties to Defendants is a mere foundation laid in sand which, when swept away, brings down with it Defendants' entire framework for their various causes of action.

A. <u>This Court has Previously Ruled that Nelda C. Stark Owed No Fiduciary Duty to Defendants</u>.

Defendants have ignored the Partial Summary Judgment entered by this Court in the Previous Litigation on many of the same issues raised again by Defendants in their Amended Counterclaim and in their Response to Plaintiffs' Amended Motion for Summary Judgment. While the language

of the Partial Summary Judgment would support summary judgment in this case on the basis of *res judicata*,[61] discussion of the Partial Summary Judgment is necessary here because, after applying some of the basic principles outlined above, *this Court has already held that Nelda C. Stark did not owe any fiduciary duties to these Defendants as Independent Executor of the Estate of H.J. Lutcher Stark, Deceased.*

1. <u>The Partial Summary Judgment in the Previous Litigation</u>.

On May 18, 1989, Nelda C. Stark filed a Motion for Partial Summary in the Previous Litigation. In her Motion, Nelda C. Stark sought "dismissal of all claims against her as Independent Executrix of the Estate of H.J. Lutcher Stark, leaving at this time the claims against her individually and the claims against the Stark Foundation."[62] Nelda C. Stark requested that this Court enter a Partial Summary Judgment dismissing the claims of plaintiffs (Defendants herein) that she account for the assets of the Estate of Nita Hill Stark, and all claims asserted against her in her capacity as Independent Executrix of the Estate of H.J. Lutcher Stark, Deceased.[63] Stating her argument in favor of her Motion, Nelda C. Stark contended that:

> By this Motion, Nelda C. Stark does not seek dismissal of the claims against her or against the Stark Foundation. Rather, Nelda C. Stark seeks a dismissal of plaintiffs' claim that, just because she served as the Independent Executrix of the Estate of Lutcher Stark, she is obligated to provide an accounting of the Estate of Nita Hill Stark, an

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[61] See Part VIII below.

[62] See Plaintiffs' Amended Motion for Summary Judgment, Exhibit "L," Defendant Nelda Childers Stark's Motion for Partial Summary Judgment, page 1.

[63] *Id.*, at page 13.

Estate over which Lutcher Stark (not Nelda C. Stark) served as Independent Executor almost fifty years ago.[64]

On April 24, 1990, this Court entered a Partial Summary Judgment granting the relief requested by Nelda C. Stark. In such Judgment, this Court dismissed all claims of Defendants against Nelda C. Stark as Independent Executrix of the Estate of H.J. Lutcher Stark, Deceased.[65]

On March 5, 1991, following settlement of the Previous Litigation and execution of the 1991 Release, this Court entered its Order of Dismissal with Prejudice.[66] By entry of this Order, the Partial Summary Judgment entered on April 24, 1990 became a final judgment.

2. The Fiduciary Claims Alleged in Defendants' Amended Counterclaim are Essentially Identical to the Claims Disposed of in the Partial Summary Judgment.

In the Previous Litigation, the entire basis for Defendants' cause of action was their assertion that H.J. Lutcher Stark, as Independent Executor of the Estate of Nita Hill Stark, Deceased, fraudulently and intentionally converted to his own benefit assets belonging to the Nita Hill Stark Estate. Defendants, as beneficiaries of the Nita Hill Stark Estate, brought their lawsuit against Nelda C. Stark and the Foundation, seeking relief for the alleged wrongdoing of H.J. Lutcher Stark that occurred some 50 years ago. Specifically, in their pleadings on file in the Previous Litigation, Defendants asked this Court to (a) order Nelda C. Stark, as Independent Executrix of the Estate of

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[64] *Id.*, at page 3.

[65] See Plaintiffs' Amended Motion for Summary Judgment, Exhibit "N," Partial Summary Judgment granted on April 24, 1990.

[66] See Plaintiffs' Amended Motion for Summary Judgment, Exhibit "C," Order of Dismissal with Prejudice entered on March 5, 1991.

H.J. Lutcher Stark, to provide a full and complete accounting of the assets of the Estate of Nita Hill Stark; (b) determine and declare if any properties were converted from the Estate of Nita Hill Stark; and (c) award actual damages or, alternatively, impose a constructive trust on the allegedly converted assets in the hands of Nelda C. Stark and/or the Foundation.[67]

In Sections 7.03-7.10 of the Amended Counterclaim filed by Defendants in this action on or about August 15, 2001, Defendants again (a) demand an accounting of the Estate of Nita Hill Stark, (b) request that the Court determine and declare (where have we seen that language before?) the properties that should have been made a part of the Estate of Nita Hill Stark but were instead reflected as assets of the Estate of H.J. Lutcher Stark and/or the Estate of Nelda C. Stark; and (c) request an award of actual damages and imposition of a constructive trust. In support thereof, Defendants repeat the same allegations made in the Previous Litigation that H.J. Lutcher Stark failed to account for and converted assets belonging to the Estate of Nita Hill Stark. Defendants attempt to disguise their counterclaim herein as a different claim by couching it in terms of H.J. Lutcher Stark's alleged fiduciary duty to Homer Stark and William H. Stark, II, but factually it is the same claim as alleged before.[68]

While the Amended Counterclaim makes other allegations against Plaintiffs relating to the H.J. Lutcher Stark Estate and the Nelda C. Stark Estate, virtually all of these additional allegations are derivative of Defendants' underlying claim against H.J. Lutcher Stark in connection with his administration of the Nita Hill Stark Estate. For example, the allegation that Eunice R.

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[67] See Plaintiffs Amended Motion for Summary Judgment, Exhibits "A" (Third Amended Petition) and "M" (First Amended Petition).

[68] *Id.*; see particularly Section 4.00, pages 5-8; see also: Defendants' Response, pages 27-30.

Benckenstein, Walter G. Riedel, III and Roy Wingate, as Independent Executors of the Estate of Nelda C. Stark, have breached a fiduciary duty to Defendants in connection with assets allegedly concealed from them necessarily relates back to their allegation in the Previous Litigation that H.J. Lutcher Stark did not account properly to them in the Nita Hill Stark Estate and that he breached his fiduciary duty by concealing from them assets that belonged in that Estate. In addition, the allegation that Eunice R. Benckenstein, as Successor Independent Executor of the Estate of H.J. Lutcher Stark, somehow owes Defendants' fiduciary duties is derivative of the original claim alleged by Defendants in the Previous Litigation. Thus, to the extent that claims against fiduciaries have been disposed of in the Previous Litigation by this Court, they are equally inapplicable here.[69]

Only two claims raised in Defendants Amended Counterclaim are arguably not derivative of the original claims made with respect to the Nita Hill Stark Estate in the Previous Litigation. First, Defendants have stated a claim against the Independent Co-Executors of the Estate of Nelda C. Stark for alleged fraud in connection with the settlement of the Previous Litigation, for which Defendants seek rescission of the 1991 Release and damages. This claim is both factually false (see Part I above) and barred by the language of the 1991 Release itself (see Part V below). Second, Defendants have made allegations against the Estate of Nelda C. Stark and the Foundation for assets allegedly concealed during the administration of the Estate of H.J. Lutcher Stark, primarily in

[69] See also Part VIII below for discussion of *res judicata*.

Louisiana.[70] This claim is also based on false affidavits (see Part I above), and thus no claim exists under the laws of forced heirship in Louisiana as a matter of law (see Part III below).

While much of Defendants' assertions about fiduciary duty have already been disposed of by this Court in the Partial Summary Judgment in the Previous Litigation, independent legal grounds exist under which this Court may rule that, as a matter of law, the Plaintiffs have never owed and do not presently owe a fiduciary duty to Defendants.

B. The Independent Executor of an Estate *does not* have an Obligation to Determine the Character of the Assets of the Estate.

Throughout their Response, Defendants make the ridiculous claim, *unsupported by any legal authority*, that Nelda Stark as the Independent Executor of the Estate of H.J. Lutcher Stark owed Homer Stark and William H. Stark II a fiduciary duty to determine whether assets included within the Estate of H.J. Lutcher Stark were fraudulently obtained from the Estate of Nita Hill Stark. Defendants take this ridiculous claim even one step further by asserting that, as Co-Independent Executrix of the Estate of Nelda C. Stark, Eunice R. Benckenstein owes Homer Stark and the heirs of William H. Stark II this same fiduciary duty to ensure that the assets contained within the Estate of Nelda C. Stark were not fraudulently obtained from the Estate of Nita Hill Stark through the conduit of the Estate of H.J. Lutcher Stark. The implicit assumption made within this claim is that an independent executor owes a fiduciary obligation to the beneficiaries of an estate to determine whether all of the assets contained within that estate truly belong to the decedent. The imposition

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[70] Exhibit A, Defendants' Amended Counterclaim, pages 6, 15; see also: Defendants' Response, pages 29-30; 32-34; 37-39.

of such a duty on an independent executor would turn hundreds of years of Texas probate law directly on its head.

The Court must analyze closely exactly what Defendants are claiming concerning this alleged fiduciary obligation. Nita Hill Stark died in 1939. Homer Stark and William H. Stark II were beneficiaries to her Estate, which was administered by H.J. Lutcher Stark as Independent Executor. In this lawsuit (and in the Previous Litigation) Defendants claim that H.J. Lutcher Stark converted property that should have gone to Homer Stark and William H. Stark II pursuant to Nita Hill Stark's will. H.J. Lutcher Stark died in 1965 leaving a will that provided specific bequests to Homer Stark and William H. Stark II and that named Nelda C. Stark as the Independent Executrix of the Estate. Nelda C. Stark had absolutely nothing to do with the administration of the Estate of Nita Hill Stark. Therefore, at no time did Nelda C. Stark serve in *any* fiduciary capacity to Homer Stark and William H. Stark, II concerning the Estate of Nita Hill Stark.

Defendants claim, however, that when H.J. Lutcher Stark died and Nelda C. Stark became Independent Executrix of his Estate, Nelda C. Stark owed Homer Stark and William H. Stark II an affirmative obligation to determine whether the assets in the Estate of H.J. Lutcher Stark included assets that should have been distributed to Homer and Bill Stark by H.J. Lutcher Stark from their mother's estate.[71] However, at no time during the administration of the Estate of H.J. Lutcher Stark did either Homer Stark or William H. Stark, II make a claim against that Estate for the assets allegedly included within that Estate that they now claim belonged to them as beneficiaries of the

[71] It is unclear whether plaintiffs claim this affirmative fiduciary obligation was created by the fact that Homer Stark and William H. Stark, II were beneficiaries to the Estate of H.J. Lutcher Stark or "creditors" to the Estate of H.J. Lutcher Stark as a result of the alleged fraud of H.J. Lutcher Stark. Regardless, the result is the same.

Estate of Nita Hill Stark. Those claims were not made until the filing of the Previous Litigation in 1988, well after the Estate of Lutcher Stark was closed.

When the Court strips Defendants' claims of their conclusory rhetoric, the issue boils down to whether an independent executor owes a fiduciary obligation to the beneficiaries of the estate to determine whether the assets of the decedent include assets that were wrongfully procured by the decedent prior to its death. Texas law is clear: no such obligation exists. An independent executor's obligation is to administer the decedents assets found upon the death of the decedent:

> When a person dies, leaving a lawful will . . .upon the issuance of the letters testamentary or of administration of such estate, *the executor or administrator shall have the right to possession of the estate as it existed at the death of the testator or intestate*. . .and he shall recover possession of and hold such estate in trust to be disposed of in accordance with the law.[72]

In addition to the assets found upon the death of the decedent, the independent executor has an affirmative obligation to "collect all claims and debts due the estate and to recover possession of all property of the estate to which its owners have claim or title."[73] Defendants have not cited one case in which a court holds that the fiduciary duty to beneficiaries of an estate held by an independent executor includes a duty to determine whether the assets of the decedent were procured by fraud by the decedent. Plaintiffs' counsel have searched through over a hundred years of Texas probate jurisprudence in an attempt to find a case squarely on point. This search has been in vain because the imposition of such a duty would be in direct contravention to the duties imposed upon

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[72]TEX. PROB. CODE ANN. § 37 (Vernon Supp. 2001) (emphasis added).

[73]TEX. PROB. CODE ANN. § 233 (Vernon Supp. 2001).

an independent executor by Texas law to hold *all* estate assets in trust and distribute them to the beneficiaries.

What is abundantly clear is that an independent executor has an affirmative obligation to collect *all* assets and to oppose the actions of any person who makes an invalid claim to those assets. Pursuant to Texas Probate Code Section 301, an independent executor may not voluntarily pay a claim made against the estate without proper presentment of that claim.[74] Yet in this case Defendants would have the Court hold that Nelda C. Stark had an affirmative obligation to segregate from the assets of the Estate of H.J. Lutcher Stark those that were allegedly improperly obtained from the Estate of Nita Hill Stark and deliver them to Homer Stark and William H. Stark II when neither Homer Stark nor William H. Stark II ever presented a claim for those allegedly improperly obtained assets.

If Homer Stark or William H. Stark II had ever made a claim against the Estate of H.J. Lutcher Stark for assets that allegedly belonged to them through the Estate of Nita Hill Stark, Nelda C. Stark's obligation as independent executrix would be the exact opposite of what Defendants claim, given the years that had passed since the closing of the Estate of Nita Hill Stark. An independent executor has a fiduciary obligation to assert a statute of limitations defense against claims made against estate assets.[75] In one case, the administrator son allowed a claim of $18,300 to be paid out of his father's estate in favor of his mother's estate for a debt that was 23 years old. The Court, holding that he breached his fiduciary duties in doing so, stated that "[a]n executor or

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[74] *Kriegel v. Scott*, 439 S.W.2d 445 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.).

[75] *Pinkston v. Pinkston*, 266 S.W.2d 515 (Tex. Civ. App.—Waco 1954, writ ref'd n.r.e.).

administrator is not permitted by law to pay an indebtedness barred by limitation. To do so is a fraud upon the estate."[76]

The factual pattern in this case is strikingly similar to the factual pattern discussed in *Kruse v. Sanders*.[77] In *Kruse*, appellants were the children of the decedent and the decedent's first wife who died in 1893. The decedent/father had qualified as community survivor of the mother's estate and had inventoried one tract of land as belonging to the estate of himself and his deceased wife but listed no debts. He later conveyed the land to a third party. The father later re-married and had four additional children. The father died testate in 1949, without ever having made an accounting to the children of his first wife of the proceeds of the sale of community property from the first marriage. The father's will gave his land to the children of his second marriage and, after payment of debts, the remainder to the children of first marriage. Because the only asset in the estate after payment of debts was the land owned by the father, the children of the first marriage received nothing. One of the children from the second marriage was named as independent executrix of father's will. The children of the first marriage sued to recover a share in the tracts of land bequeathed to the children of the second marriage arguing that a "debt" had been created as a result of their father's failure to provide to them their portion of the community property from their mother's estate. The Court held that the claims were barred by limitations and the fact that the father's will directed the independent

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[76] *Id.* at 519.

[77] 231 S.W.2d 747 (Tex. Civ. App.—Austin 1950, no writ).

executor to pay all "debts" did not change the fact that the independent executor had a fiduciary obligation not to pay debts clearly barred by limitations.[78]

Even if Nelda C. Stark as Independent Executrix of the Estate of H.J. Lutcher Stark had determined that H.J. Lutcher Stark had fraudulently conveyed assets to himself that should have been conveyed to Homer Stark and William H. Stark II under their mother's will, Nelda C. Stark was legally powerless to remove those assets from the Estate of H.J. Lutcher Stark. In *Lagow v. Glover*,[79] the decedent died and under the will appointed an independent executor. Subsequent to decedent's death, the independent executor caused a portion of decedent's property to be deeded to a third party because of claims made against the estate by that third party. The Court held that the executor did not have the power to give away a portion of the land "for that would involve the power to give away a part of the estate."[80]

Additionally, Texas courts since the 19th Century have consistently held that an estate representative has *no power* to "attack the act of conveyance by his intestate for fraud upon his part."[81] The Texas Supreme Court reiterated this rule in 1939 by its adoption of the opinion of the Texas Commission of Appeals decision in *John Hancock Mut. Life Ins. Co. v. Morse*.[82] In *Morse*, the administrator of an estate filed suit against the decedent's daughters to cancel a deed executed

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[78] *Id.* at 749-50.

[79] 77 Tex. 448, 14 S.W. 141 (1890).

[80] *Id.* at 450, 142.

[81] *Burges v. New York Life Ins. Co.*, 53 S.W. 602 (Tex. Civ. App. 1899, no writ). *See also, William Lemp Brewing Co. v. LaRose*, 50 S.W. 460 (Tex. Civ. App. 1899, no writ).

[82] 152 Tex. 534, 124 S.W.2d 330 (Tex. Comm. App. 1939) (opinion adopted).

by the decedent to them prior to his death for the purpose of defrauding his creditors. The Court held that:

> The controlling question for decision in this case is whether or not an administrator has the right to maintain a suit for the cancellation of a deed executed and delivered by his intestate during his lifetime upon the grounds that same was made in fraud of his creditors. . .. [A]n administrator cannot maintain an action to cancel the deed of his intestate as being fraud of the creditors....He administers the estate as it existed at the death of the intestate.[83]

This same proposition has been upheld as recently as 1969 in *Meletio Electrical Supply Co. v. Martin*,[84] which was an action brought against a decedent's widow by the executor of the decedent to set aside a deed by which the decedent had conveyed two tracts of land to his wife prior to his death. The Court held that:

> Assuming the deed was executed in fraud of appellant [judgment creditor], neither the executor nor appellant [judgment creditor] can maintain an action to divest title out of appellee [widow] and vest it in the executor or the estate of the deceased. The executor cannot because he administers the estate as it existed at the death of the deceased. The deceased would have been bound by the deed and could not himself have maintained a suit to set it aside.[85]

It is crystal clear that Nelda C. Stark's obligations as a fiduciary in her capacity as the Independent Executrix of the Estate of H.J. Lutcher Stark were to collect all of the assets of the H.J. Lutcher Stark – regardless of how such assets were obtained – and distribute them to the beneficiaries under the Will of H.J. Lutcher Stark. Because she was bound by law to administer the

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[83] *Id.* at 535, 331 (emphasis added).

[84] 437 S.W.2d 927 (Tex. Civ. App.—Waco 1969, no writ).

[85] *Id.* at 928.

estate as it existed at the death of H.J. Lutcher Stark, Nelda C. Stark had *absolutely no obligation* to determine whether the assets were wrongfully obtained by H.J. Lutcher Stark.

Accordingly, Defendants' contention that Nelda C. Stark owed them a fiduciary duty to distribute to them assets allegedly wrongfully obtained by H.J. Lutcher Stark from the Estate of Nita Hill Stark is entirely without merit. By extension, Walter G. Riedel III, Eunice R. Benckenstein, and Roy Wingate, as Independent Co-Executors of the Estate of Nelda C. Stark, Deceased, clearly have no such fiduciary duty, as their obligations to Defendants, if any, can be no greater than the obligations of Nelda C. Stark to Defendants. In addition, just as Nelda C. Stark, as Independent Executrix of the Estate of H.J. Lutcher Stark, had no duty to Defendants, the Successor Independent Executrix of the H.J. Lutcher Stark Estate, Eunice R. Benckenstein, owes no such duty to them.

C. An Independent Executor Owes No Duties to Creditors Holding Unproven, Unliquidated Claims.

Another fatal defect in Defendants' argument in support of fiduciary duties in this case is that their argument ignores the most basic question of all: fiduciary duties to whom?

It is not enough merely to tag a person a fiduciary because he or she is an executor and from that premise assert that he or she owes a fiduciary duty to the entire world. Rather, a fiduciary relationship is a special type of relationship in which one person holds a position of trust to another person. That a fiduciary duty requires a fiduciary relationship necessarily implies a relationship between two persons, arising out of the special circumstances giving rise to the relationship. Defendants ignore this basic rule of law and would have this Court hold that Plaintiffs owe fiduciary duties over estates they did not administer in favor of beneficiaries whose interests in those estates were fully satisfied decades ago.

An independent executor of an estate owes a fiduciary duty only to persons who are interested in the estate.[86] In an estate involving a decedent who died leaving a valid will, the executor owes a fiduciary duty to the beneficiaries named in the will.[87] In fulfilling this duty, an executor or other fiduciary is bound to administer an estate or trust in accordance with the provisions of the will or other governing document.[88] A prime example of these principles is the case of *Montgomery v. Kennedy*[89], a case upon which Defendants rely heavily in their attempt to distinguish the *Schlumberger* decision.[90] In tripping over themselves in 16 pages of tortured logic to force the *Montgomery* case to match up with the facts of this case, Defendants ignore the most basic premise for the executor's fiduciary duty in *Montgomery*: the fiduciary relationship in *Montgomery* arose between the executor of an estate and a beneficiary of the same estate.[91]

By contrast, Defendants do not and cannot assert that they are beneficiaries of the Estate of Nelda C. Stark. Even Defendants would admit that the most they can claim to be are creditors of the Estate of Nelda C. Stark, holding claims against assets now in the hands of the executors of that

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[86] *Humane Society of Austin and Travis County v. Austin Nat'l. Bank*, 531 S.W.2d 574, 577 (Tex. 1975); *McAdams v. McAdams*, No. 07-99-0082-CV (Tex. App. – Amarillo March 28, 2000, no pet.) 2000 Tex. App. LEXIS 2042.

[87] *Humane Society*, 531 S.W.2d at 577; *Estate of McGarr*, 10 S.W.3d 373, 376 (Tex.. App. – Corpus Christi 2001, pet. denied).

[88] *Republic Nat'l. Bank & Trust Co. v. Bruce*, 130 Tex. 136, 105 S.W.2d 882, 885 (1937); *First Nat'l. Bank of Port Arthur v. Sassine*, 556 S.W.2d 116, 117 (Tex. Civ. App. – Beaumont 1977, no writ).

[89] 669 S.W.2d 309 (Tex. 1984).

[90] See a full discussion of this case under Part IV below.

[91] *Montgomery*, 669 S.W.2d at 313 ("As trustees of a trust and executor of an estate with Virginia Lou as a beneficiary, Jack, Jr. and his mother owed Virginia Lou a fiduciary duty of full disclosure of all material facts known to them that might affect Virginia Lou's rights.") (Emphasis added).

Estate. Moreover, though Homer Stark and William H. Stark II were named beneficiaries of the Estate of H.J. Lutcher Stark under his will, which was admitted to probate in 1965, even Defendants do not dispute that Homer Stark and William H. Stark II each received the sum of $1,000,000 that was bequeathed to them under the will of H. J. Lutcher Stark and that they each signed a release of the Estate of H.J. Lutcher Stark under which they acknowledged receipt of their legacy and relinquished any further claim as beneficiary under the will.[92] Thus, Defendants' sole claim to any relationship with Nelda C. Stark, as Independent Executrix of H.J. Lutcher Stark's Estate, or to Eunice R. Benckenstein, as Successor Independent Executrix of that Estate, is that they are creditors holding claims against assets that passed through the Estate of H.J. Lutcher Stark to Nelda C. Stark and the Foundation and which were allegedly a part of the Nita Hill Stark Estate.[93]

Texas law is clearly established that an independent executor owes no fiduciary duty to the holder of an unproven, unliquidated claim against assets of the estate. In *Neyland v. Brammer*,[94] a creditor filed a *lis pendens* against estate property, claiming the property belonged to him. The executor ignored the *lis pendens* and distributed the property to the beneficiary named in the will. When the recipient of the property filed suit to remove the cloud on title created by the *lis pendens*, the Court ruled in his favor, holding that an executor owes no duties to an unliquidated creditor.[95]

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[92]See Plaintiffs' Amended Motion for Summary Judgment, Exhibit "B." The release executed by Homer Stark, identical to the one signed by the Defendants, is not in the summary judgment record as it is not in issue.

[93]The only claim of Defendants that does not ultimately derive from H.J. Lutcher Stark's administration of the Nita Hill Stark Estate is the forced heirship claim to alleged properties in Louisiana, which has been both factually disproved (see Part I above) and is groundless as a matter of law (See Part III below).

[94]146 S.W.2d 261 (Tex. Civ. App. – Galveston 1940, writ dism'd.).

[95]*Id.* at 263.

An executor owes a fiduciary duty to the beneficiaries under a will to defend the assets of the estate against attacks by third parties.[96] Moreover, as stated above, an executor has an affirmative duty to not pay claims that are barred by legal defenses. Thus, the only fiduciary duty owed by the Independent Co-Executors of the Nelda C. Stark Estate is in favor of the Foundation, the residuary devisee of the Estate. The Independent Co-Executors owe a duty to the Foundation, and indirectly to the State of Texas, to protect the assets of the Estate passing to the Foundation under the Will against the Defendants' claims, not the other way around, as Defendants would have this Court rule. By the same token, Eunice R. Benckenstein, as Successor Independent Executrix of the H. J. Lutcher Stark Estate, owes a fiduciary duty only to the Estate of Nelda C. Stark and the Foundation, as the residuary beneficiaries of the Estate of H.J. Lutcher Stark (and only with respect to assets coming into her hands – see below).

D. No Claim May Be Asserted Against an Independent Executor Based on a Fiduciary Duty After an Estate Administration is Closed.

An estate is considered to be closed when all claims and debts against the estate are paid and the assets of the estate have been distributed.[97] In two recent cases, Texas courts have held that, in the absence of the filing of an affidavit closing the estate pursuant to Texas Probate Code Section 151, an independent administration is considered closed when all debts have been paid and all

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[96] "It is the duty of the trustee and he is so empowered to defend the trust against all assailants." *Mason v. Mason*, 366 S.W.2d 552, 554 (Tex. 1963); *see also Sassine*, 556 S.W.2d at 117.

[97] *Pugh v. Turner*, 145 Tex. 292, 197 S.W.2d 822, 826 (1946); *InterFirst Bank – Houston, N.A. v. Quintana Petroleum Corp.*, 699 S.W.2d 864, 874 (Tex. App. – Houston [1st Dist.] 1985, writ ref'd. n.r.e.). See also: Defendant Nelda C. Stark's Motion for Summary Judgment, Exhibit "L" to Plaintiffs' Amended Motion for Summary Judgment, pages 11-12.

known assets have been distributed.[98] Once an estate is considered to be closed, no judgment may be rendered against the executor in her fiduciary capacity.[99] The Estate of H.J. Lutcher Stark was fully administered by 1979, as per the Affidavit of Nelda C. Stark filed in the Previous Litigation.[100] Thus, when the Release was executed and the Previous Litigation was settled in 1991, the Estate of H. J. Lutcher Stark was no longer under administration and Nelda C. Stark owed no fiduciary duty to any of the beneficiaries of the H.J. Lutcher Stark Estate, including Defendants. By extension, the Independent Co-Executors of the Nelda C. Stark Estate and Eunice R. Benckenstein, as Successor Independent Executrix of the H.J. Lutcher Stark Estate, owe no fiduciary duties arising out of the Estate of H.J. Lutcher Stark.

E. The Executor of the Estate of a Deceased Executor of a First Estate owes no Fiduciary Duty to the Beneficiaries of the First Estate.

This is one of the most elementary principles of Texas probate law. If an executor of an estate dies, the executor appointed to administer the estate of the deceased executor has no continuing fiduciary duties to the beneficiaries of the first estate. This is the central point of *McClellan v. Mangum*, in which the Court stated:

> The relation of the executor or administrator to the estate of the decedent is one of trust, and the general rule is that a trust, not coupled with an interest, ceases to exist when the trustee dies, and

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[98] *Estate of McGarr*, 10 S.W.3d at 376; *In Re Estate of Hanau*, 806 S.W.2d 900, 903 (Tex. App. – Corpus Christi 1991, writ denied).

[99] *Pugh v. Turner*, 197 S.W.2d at 826.

[100] See Exhibit "L" to Plaintiffs Amended Motion for Summary Judgment, page 12. Defendants have asserted that this Affidavit was false because of the discovery of a small mineral interest in Louisiana in 1982, but Defendants' assertions are both misleading and legally irrelevant. See, Part I. B. 3. above.

> that the legal representative of the estate of trustee does not succeed to the original trust, in the absence of a statute declaring that result.[101]

This is such a fundamental rule of Texas probate jurisprudence that appellate courts have never directly addressed this issue in a reported case since 1903.[102] Defendants have asserted, in an incomprehensible argument on page 47-48 of their Response, that this case does not apply, but fail to make a meaningful distinction. In fact, it is hard to imagine a case of clearer application to allegations of fiduciary duty made by the Defendants against Nelda C. Stark. Clearly, this was the basis of this Court's granting of the partial summary judgment in the Previous Litigation, dismissing all claims of Defendants against Nelda C. Stark as Independent Executrix of the Estate of H. J. Lutcher Stark, Deceased. By extension, this same authority bars any cause of action against the Independent Co-Executors of her Estate or against the Successor Executrix of the Estate of H. J. Lutcher Stark, Eunice R. Benckenstein, arising out of the same alleged facts, namely, the administration by H.J. Lutcher Stark of the Nita Hill Stark Estate 60 years ago.

F. A Successor Executor Does Not Assume All Liabilities of her Predecessor Executor, but is only Responsible for Assets Coming into her Hands.

This is another cardinal principle of Texas probate law. When an independent executor dies and a successor independent executor is appointed, the successor executor's duties commence when

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[101] *McClellan v. Mangum*, 75 S.W. 840 (Tex. Civ. App. 1903, no writ).

[102] *McClellan* is cited with approval by the Court in *Walling v. Hubbard* 389 S.W.2d 581, 589 (Tex. Civ. App. – Houston [1st Dist.] 1965, writ ref'd. n.r.e.). In that case, Gilvie Hubbards had been appointed executor of the Estate of T. B. Hubbard, then Gilvie Hubbard died, and Lorece B. Hubbard was appointed Executor of the Estate of Gilvie Hubbard. Citing *McClellan*, the Court stated that Lorece B. Hubbard had no authority to act on behalf of the Estate of T. B. Hubbard; *see also Greene v. Schuble*, 654 S.W.2d 436, 437 (Tex. 1983) (the death of a managing conservator ends the conservatorship.)

she is appointed and continue from that moment forward. Though an executor is charged with the duty of finishing any business of her predecessor that remained unfinished, the successor executor has no responsibility to re-examine or reverse transactions, demand monies returned by creditors and beneficiaries, or otherwise reopen matters that were completed by the predecessor executor.

There are no provisions of the Texas Probate Code imposing affirmative fiduciary duties on successor independent executors. Texas Probate Code Section 224 states that a successor personal representative succeeds to the duties of his predecessor, but does not specify what those duties are. In *Bozeman v. Folliott*,[103] the Court held that, once a successor administrator is duly appointed and qualified under Section 224, he becomes the successor personal representative of the estate *with the power and duty to take possession of only the unadministered effects of the decedent, but she would gain no new rights in estate properties that had been disposed of by her predecessor.*

Observing that a successor executor's authority begins on the date of her appointment, the court held that her authority was prospective only, not retroactive, and as successor executrix she had the power and duty to further administer the estate and nothing more. Moreover, the successor executrix gained no further new rights in the estate properties which had been sold during the tenure of her predecessor personal representative. It was her duty to take possession of only unadministered effects of the decedent.[104]

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[103] 556 S.W.2d 608, 615 (Tex. Civ. App. - Corpus Christi 1977, writ ref'd n.r.e.).

[104] *Id.* at 614-15, *citing Todd, Adm'r v. Willis*, 66 Tex. 704, 1 S.W. 803 (1886).

This is the prevailing rule of law in other states as well. For instance, in *Kjorvestad v. Conway*,[105] the North Dakota Supreme Court held that a successor administrator had no fiduciary duty to fully investigate a claim that its predecessor failed to account for estate assets:

> Its responsibility extended only to remaining property of the estate that actually came into its hands. We perceive no basis to impose a fiduciary responsibility on [the successor estate representative] for assets that were never turned over to it by [the initial estate representatives]....[M]ere possibility of misconduct by a prior fiduciary is not alone sufficient reason to hold a successor fiduciary responsible for it.[106]

Other jurisdictions have come to the same conclusion on similar facts.[107]

Defendants, however, ignore this rule of law and would attempt to impose on Eunice R. Benckenstein liability for the alleged acts of her predecessor, Nelda C. Stark, in the handling of the administration of the Estate of H.J. Lutcher Stark. Defendants would have this Court believe that Eunice R. Benckenstein owes a continuing duty to account for the assets of the Estate of H.J. Lutcher Stark, which assets were fully administered and distributed by Nelda C. Stark, the predecessor independent executor, more than 30 years ago. As if this claim were not ridiculous enough, Defendants go on to urge that Eunice R. Benckenstein owes a fiduciary duty to Defendants relating to H.J. Lutcher Stark's administration of the Estate of Nita Hill Stark more than 60 years ago! As the above authorities show, Eunice R. Benckenstein owes no such duties.

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[105] 375 N.W.2d 160 (N.D. 1985).

[106] *Id.* at 169.

[107] See *Theisen v. Hoey*, 51 A.2d 61, 65 (Del. Ch. 1947); *Bemboom v. Nat'l. Surety Corp.*, 31 N.W.2d 1.3 (Minn. 1947); *Brown v. Brown*, 78 S.E. 1040, 1042 (W. Va. 1913). See also 31 Am. Jur. 2d, *Executors and Administrators*, § 1140, Assets for Which Successor is Responsible (1989).

Defendants have presented no factual allegations to controvert the statement made under oath by Nelda C. Stark more than 10 years ago in the Previous Litigation that the Estate of H.J. Lutcher Stark was closed in 1979. All debts, taxes and administration expenses had been paid and all known assets had been conveyed to the two residuary beneficiaries, Nelda C. Stark and the Foundation, by 1979. Defendants have introduced no competent summary judgment evidence to show the falsity of the Affidavit.[108]

Even the circumstances surrounding Eunice R. Benckenstein's appointment do not contradict the fact that the Estate of H.J. Lutcher Stark was closed many years ago. On November 30, 2000 Defendants filed pleadings in the H.J. Lutcher Stark Succession, Cause No. 15,405 in the 14th Judicial District Court of Calcasieu Parish, Louisiana. In these pleadings, Defendants demanded affirmative relief from the Louisiana Court against the Estate of H. J. Lutcher Stark and requested that the Louisiana Court appoint Randall Hill Stark as successor administrator in Louisiana. At about the same time, Defendants filed a $200,000,000 claim against the Succession of Nelda C. Stark in Louisiana. This was a transparent attempt to litigate in Louisiana the same claims asserted by Defendants here. When the Co-Executors of the Estate of Nelda C. Stark attempted to defend against the claim, Defendants tried to disqualify the Estate's legal counsel in

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[108]Defendants have made much about the small mineral interest discovered in 1982 and the amendment filed to the ancillary succession for purposes of clearing title, but the fact remains that such a small, technical amendment to a document filed in 1982 is not inconsistent with the statement that the administration of the Estate of H.J. Lutcher Stark was completely administered by 1979. As shown above, completion of an estate administration occurs when all known debts have been paid and all known assets have been distributed. Defendants have introduced no facts to show that such was not the case. In addition, since the succession proceeding in Louisiana was separate from the independent administration pending in Texas, Nelda C. Stark's statement about the Texas administration was entirely truthful. Finally, Defendants had actual knowledge of the alleged false affidavit in the Previous Litigation, so they have no standing nor any grounds on which right to complain of it now. See footnote 26 above.

Louisiana.[109] On the advice of Louisiana counsel, Eunice R. Benckenstein, the named Successor Independent Executor under the Will of H.J. Lutcher Stark, was appointed and qualified as Successor Independent Executrix in Texas on March 27, 2001.[110] Eunice R. Benckenstein was appointed Successor Independent Executrix for the sole purpose of defending the Estate of H.J. Lutcher Stark against Defendants' $200 million claim in Louisiana. No assets of the Estate of H.J. Lutcher Stark have passed into the hands of Eunice R. Benckenstein, as evidenced by the Inventory, Appraisement and List of Claims filed by Eunice R. Benckenstein on June 25, 2001.[111]

G. **There is no Fiduciary Relationship between the Foundation and Defendants.**

Finally, Defendants assert, without any authority, that there is somehow a fiduciary relationship between the Foundation and Defendants. There is no such fiduciary relationship. The Foundation owes no greater duties to Defendants than any other residents of the State of Texas.

The allegations on page 43 of Defendants' Response that the Foundation has not complied with the terms of its Charter are simply wrong. Defendants state that, "Specifically, the Stark Foundation was set up to provide public, charitable, religious and educational purposes in Orange County and Southwestern Louisiana."[112] This is simply false, and it leads Plaintiffs to wonder what

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[109] See Exhibit J, Petition for Sworn Detail Descriptive List, Final Accounting and Recover Decedent's Assets and/or Funds filed by Defendants on November 30, 2000, in the Succession of H.J. Lutcher Stark.

[110] See Exhibit K, Order Continuing Independent Administration and Appointing Successor Independent Executrix, dated March 27, 2001, in the Estate of H.J. Lutcher Stark.

[111] See Exhibit L, Inventory, Appraisement and List of Claims filed by Eunice R. Benckenstein on June 25, 2001, in the Estate of H.J. Lutcher Stark.

[112] Defendants' Response, page 43.

charter the Defendants have been reading, as it is clearly not the Foundation's charter. Defendants then go on to say:

> Until recently, when members of the Stark family pointed out the discrepancies, the Stark Foundation has been acting beyond these boundaries. Once the discrepancies were pointed out, the Stark Foundation apparently ceased to act outside of its designated scope.[113]

This statement is both false and irrelevant. Even if it were true, it has nothing to do with the reason Defendants contend that the Foundation owes them fiduciary duties. As happens often in their Response, Defendants attempt to cover their lack of legal support by indulging in flights of fancy, manufacturing facts out of thin air and then throwing them loosely around in the desperate hope that some of them might be seen as "material."

The central point for the Court to consider is that the Foundation, as a charitable trust, owes a fiduciary duty only to the State of Texas and the people of Texas that it will administer its assets for charitable purposes and in accordance with its charter. The Foundation owes no greater duties to Defendants simply because their name is Stark or because Defendants claim assets held by the Foundation belong to them. Defendants made the exact same claim in the Previous Litigation and were unable to prove it. Once again, Defendants assert that the Foundation has assets of the Nita Hill Stark Estate that belong to them.[114] Defendants ignore the fact that they asserted this very claim against the Foundation in the Previous Litigation and that they released such claim for a valuable consideration.

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[113] *Id.*

[114] *Id.* at page 44.

Defendants are further disregarding their own burden of proof by attempting to impose on the Foundation a nonexistent duty to account for assets without proving or even alleging any specific assets that they contend the Foundation is improperly holding. Defendants attempt now to avoid summary judgment by making the unsupported and incorrect assertion that, "the Stark Foundation is in possession of assets that it is not entitled to administer for any purpose and actually belong to the Defendants and Homer Stark."[115] Defendants also attempt to give their position a credibility it does not have by stating, "the Attorney General's Office acknowledged as much when it approved and agreed to the settlement that occurred in the prior litigation"[116], when Defendants and their counsel know full well that all of the consideration paid in the Previous Litigation came from Nelda Stark personally and the Foundation did not pay a dime.

H. Conclusion: No Fiduciary Relationships Exist Between the Parties.

By page after page of misstatement, misapplication, mischaracterization, irrationality, illogic, and repetition, Defendants attempt to create and impose on Plaintiffs a bundle of fiduciary duties where none exist as a matter of law. Defendants would impose on the individual Plaintiffs, due to the executor position they hold, an unbroken chain of fiduciary liability into the future. Defendant have cited no cases in Texas or elsewhere to support this bizarre argument for the very good reason that no such cases exist and no such duty exists. Instead, Defendants expect this Court to assume that, because the Plaintiff co-executors are fiduciaries to someone, they must owe fiduciary duties to Defendants. That is not the way fiduciary relationships are created and it is not how the concept

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[115] *Id.*

[116] *Id.* at page 45.

of fiduciary duties operates. Defendants cite this Court to much black letter law on the fiduciary duty of an executor without bothering to prove to this Court the existence herein of the very relationship that is the basis of the alleged duty.

If Defendants' misstatements of the law were to ever become the law, no one would ever willingly become an executor. For by accepting the appointment, an executor would be personally assuming any actions of his decedent in administering the estate of a third person, the actions of the third person in administering the estate of a fourth person, ad infinitum. The principle of unlimited fiduciary liability is, of course, the only way Defendants can avoid the finality of the 1991 release under *Schlumberger*, but it is legally meritless and defies logic and common sense.

If Defendants really believe that assets belonging to them are hidden in the Estate of Nelda C. Stark and the Foundation, they must prove their allegations just like any other claimant. They cannot be allowed to shift the burden of proof by hiding behind the nebulous concept of fiduciary duties. This is not the first time that Defendants have tried this ploy.[117] This Court should give their untenable position no more weight now than when this Court summarily dismissed Defendants' claims against Nelda C. Stark as independent executor of the Estate of H.J. Lutcher Stark, Deceased, more than 10 years ago.

Defendants are intentionally confusing fiduciary duties with claims against assets in the hands of third parties. Suppose, for example, Defendants could actually show what they claim: that an asset belonging to the Nita Hill Stark Estate had been concealed and diverted through the H.J. Lutcher Stark Estate and then the Nelda C. Stark Estate to the Foundation. All that would mean is

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[117]See Plaintiffs" Amended Motion for Summary Judgment, Exhibit "L", page 5.

that Defendants would have a claim (subject to legal defenses) against the Foundation to recover the asset in its hands. It does not mean, however, that the directors of the Foundation would have a fiduciary duty to turn it over. By the same token, if Defendants could show that an allegedly concealed asset is currently in the Nelda C. Stark Estate, it does not necessary follow that the Co-Executors owe a fiduciary duty to Defendants to relinquish the asset. Indeed, the law clearly holds to the contrary. Because they are fiduciaries, the Co-Executors owe a duty to the Foundation, Nelda C. Stark's primary beneficiary, to defend the assets of the Estate against the claims of outsiders. And the Directors of the Foundation owe the same fiduciary duty to the people of the State of Texas to oppose any attempt to waste the assets of the Foundation – even if the ones who would commit waste bear the name of Stark.

III.

DEFENDANTS HAVE MISREPRESENTED THE LAW OF FORCED HEIRSHIP RIGHTS IN LOUISIANA

On pages 34-39 of their Response, Defendants again attempt to mislead this Court by wrapping their false claims of concealment in a misstatement of Louisiana forced heirship law. Initially, it should be noted that their contentions, after the first three sentences[118], are incoherent, mostly inaccurate ramblings about Louisiana forced heirship law.

There is no dispute that Homer Stark and William H. Stark II received all of the legacy bequeathed to them under the Will of H.J. Lutcher Stark, which legacy consisted of a bequest of $1,000,000 to each individual. As the 1969 Release plainly sets forth, the respective legacies were

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[118]Not surprisingly, the first three sentences are copied from Swaim and Lorio, *Successions and Donations, A Louisiana Civil Law Treatise*, §11.1, p. 260 (1995) without proper credit to the authors.

paid in full. Therefore, the claim of Defendants under Louisiana law can be characterized only as one for reduction.

Reduction is the right of a forced heir to demand his percentage of the decedent's patrimony, even to the extent of reclaiming donations *inter vivos* by the decedent to third persons or blocking attempted donations *mortis causa* of the decedent when those donations *inter vivos* or *mortis causa* impinge upon the legitime or forced portion.[119] The legitime is only *impinged* if the forced heir does not receive his forced portion of the estate. Under the law in effect at the time of H. J. Lutcher Stark's death in 1965, the forced portion would have been one-half, or one-fourth for each son.[120]

The forced portion of H.J. Lutcher Stark's estate is computed by considering only the value of property owned by H.J. Lutcher Stark located in Louisiana.[121] Further, the forced portion can be satisfied with a decedent's Louisiana property, as well as, the non-Louisiana property.[122] Defendants erroneously contend they are entitled to both the $1,000,000 legacy paid to them in 1969 *and* their legitime. Of course, any legacy received by a forced heir is credited in satisfaction of their legitime.[123] Accordingly, unless Defendants can prove that H.J. Lutcher Stark's Louisiana immovable property exceeded $4,000,000 in value at the time of his death in 1965, their claim for reduction must fail.

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[119] Swaim and Lorio, *Successions and Donations, A Louisiana Civil Law Treatise*, §11.5, p. 272 (1995).

[120] La. Civ. Code art. 1493 (La. Ann. 1965).

[121] *Sachnowitz v. Nelson*, 357 So.2d 894, 896 (La. App. 1 Cir. 1978), writ denied, 359 So.2d 627 (La. 1978), citing *Jarel v. Moon's Succession*, 190 So. 867 (La. App. 2 Cir. 1939).

[122] *Sachnowitz*, 357 So.2d at 896, citing *Jarel v. Moon's Succession*, 190 So. 867 (La. App. 2 Cir. 1939); see also *Succession of Sherrouse, Jr.*, 690 So.2d 879, 881 (La. App. 2 Cir. 1997).

[123] *Sachnowitz*, 357 So.2d at 896.

Even if Defendants could prove $4,000,000 of immovable property was somehow concealed from the public records in Louisiana, their action is untimely. An action for reduction prescribes in five years.[124] The prescription applicable to a suit to reduce a donation *mortis causa* begins to run from the date that the will is filed for probate.[125] In this case, the Will of H.J. Lutcher Stark was first filed for probate in Louisiana in 1972; accordingly, the claim for reduction prescribed in 1977.

Defendants brashly argue that Nelda C. Stark "hid" assets from the Louisiana estate. Presumably, they contend that such alleged action interrupts the running of prescription on any reduction action. Defendants' only specific "proof" that assets were hidden is the deed of the Big Lake property. This deed, by its own terms, acknowledges that the Estate of H.J. Lutcher Stark acquired this property in 1967, two years after H.J. Lutcher Stark died. A Louisiana reduction action applies only to property owned by the decedent on the date of his death.[126] Beyond this single specious claim of the "hidden" Big Lake property, Defendants contentions consist of nothing but reckless, groundless claims of fraud and concealment.

In Louisiana, facts giving rise to a claim of fraud must be plead with particularity.[127] In order to maintain a claim that the prescription has not run on their claim for reduction, Defendants must come forth with positive proof of fraud or hidden assets. Not surprisingly, they have not done so, but rather are content to make vague and unsupported claims of fraud and concealment.

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[124]La. Civ. Code art. 3497.

[125]*In re Andrus*, 221 La. 996, 60 So.2d 899 (La.1952); *Kilpatrick v. Kilpatrick*, 625 So.2d 222 (La.App.2d Cir.1993), *writ denied*, 631 So.2d 445 (La.1/7/94).

[126]La. Civ. Code art. 1505(A).

[127]La. Code Civ. P. art 856.

Quite clearly, Defendants have no claim for reduction under Louisiana law. First, their claims have prescribed. Second, and most importantly, they must come forth with proof that H.J. Lutcher Stark owned over $4,000,000 in immovable property in Louisiana at the time of his death in 1965. This, they cannot do.

Defendants further claim that the settlement of their Louisiana forced heirship claims is invalid because the other attorneys put this language in the 1991 Release. This defense is not recognized by Louisiana law. In Louisiana, a party may not avoid the provisions of a written contract he signed but failed to read or have explained to him.[128] In *Tweedel*, the Louisiana Supreme Court stated:

> [S]ignatures to obligations are not mere ornaments. Additionally, the courts of our state have long held that "[i]f a party can read, it behooves him to examine an instrument before signing it; and if he cannot read, it behooves him to have the instrument read to him and listen attentively whilst this is being done.[129]

A person who signs a written instrument is presumed to know its contents and cannot avoid its obligations by contending that he did not read it, or that it was not explained, or that he did not understand it.[130] Failure to read a written compromise agreement is not a legitimate defense.[131] The law does not compel people to read or to inform themselves of the contents of an instrument which they may choose to sign, but it holds them to the consequences – in the same manner and to the same

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[128] *Tweedel v. Brasseaux*, 433 So.2d 133 (La. 1983); see also *Brabham v. Harper*, 485 So.2d 231 (La. App. 3rd Cir. 1986).

[129] Internal citations omitted, *Tweedel*, 433 So.2d at 137.

[130] *Carter's Insurance Agency, Inc. v. Franklin*, 428 So.2d 808 (La. App. 1st Cir. 1983).

[131] *Thigpen v. Guarisco*, 197 So.2d 904 (La. App. 1st Cir. 1967).

extent – as though they had exercised those rights.[132] In *Billingsley v. Bach Energy Corp.*,[133] the Court stated that a court cannot undermine a contract simply because it is claimed to be a bad deal for one of the parties.[134]

For these reasons, Plaintiffs urge this Court to disregard all references to Louisiana forced heirship claims asserted by Defendants.

IV.

DEFENDANTS' CLAIMS ARE BARRED BY LIMITATIONS

The specific claims alleged for the first time in Defendants' Amended Counterclaim and Defendants' Response are clearly barred by limitations. Though not originally stated as a ground for summary judgment, Plaintiffs have on this date filed a Supplemental Amended Motion for Summary Judgment raising this additional basis for which the entry of a summary judgment would be proper. Limitations have been plead as an affirmative defense in Plaintiffs' Original Answer to Defendants' Counterclaim.

Defendants' claims are covered by the four year statute of limitations.[135] Limitations may be tolled by the "discovery rule," which provides that a cause of action does not accrue until the

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[132] *Dugas v. Modular Quarters, Inc.*, 561 So.2d 192 (La. App. 3d Cir.1990).

[133] 588 So.2d 786 (La. App. 2d Cir.1991),

[134] See also, *McGoldrick v. Lou Ana Foods, Inc.*, 94-400, p. 8 (La. App. 3rd Cir. 11/2/94); 649 So.2d 455, 460.

[135] The statute of limitations for fraud is four years. *Williams v. Khalaf*, 802 S.W.2d 651, 656-58 (Tex. 1990). The limitations period for breach of fiduciary duty is also four years. *Bonner v. Henderson*, No. 05-99-01582-CV (Tex. App. – Dallas March 29, 2001, no pet.) 2001 Tex. App. LEXIS 2024; *In re Estate of Herring*, 970 S.W. 2d 583, 587 (Tex. App. - Corpus Christi 1998, no pet.).

plaintiff knows of the facts giving rise to the cause of action.[136] In cases involving fraud or breach of fiduciary duty, limitations does not begin to run until the claimant knew, or in the exercise of reasonable diligence should have known, of facts that would have led to the discovery of the wrongful act.[137] However, one is charged with constructive notice of the actual knowledge that one could gain an examination of public records.[138] Even in probate cases involving allegations of fraud, Texas courts have refused to apply to the discovery rule because of the doctrine of constructive notice and the strong public interest in according finality to probate proceedings.[139]

Defendants assert repeatedly that they have only recently discovered that, for instance, "hundreds of thousands of acres of land," including the Big Lake Property and the Roslyn Ranch, were concealed from them in the Previous Litigation. This type of statement appears numerous times in Defendants' Response and Defendants' Amended Counterclaim. Each of the Defendants have sworn to the veracity of these claims under oath in affidavits attached to their Response. In addition, their counsel, Kevin Isern, has sworn by affidavit attached to their Amended Counterclaim that each of these so-called facts are within his personal knowledge and are true and correct.

In response, Plaintiffs will show that Defendants are lying to this Court when they say that they have only recently discovered facts they allege about properties in Louisiana and Colorado. As shown conclusively in Part I above, Defendants' allegations about "hundreds of thousands of acres"

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[136] *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 262 (Tex. 1994).

[137] *Little v. Smith*, 943 S.W.2d 414, 420 (Tex. 1997).

[138] *Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex. 1981); *Matter of Estate of Matejek*, 928 S.W.2d 742, 744 (Tex. App. – Corpus Christi 1996), *writ den'd.* 960 S.W.2d 650 (Tex. 1997).

[139] *Little*, 943 S.W.2d at 420-21; *Estate of McGarr*, 10 S.W.3d at 377.

of hidden properties in Louisiana are completely false. Defendants' statements about the nature of the ownership of the Big Lake Property and the Roslyn Ranch are also false. But, more significantly, Defendants are lying to this Court when they state that they only recently discovered the factual basis for their claims. As the Affidavits of Roy Wingate prove without a doubt, documents were produced to Defendants more than 10 years ago which prove the falsity of their claims about the ownership of Big Lake, the other Louisiana properties, and the Roslyn Ranch. The "revelations" of Sam O. Smith in his Affidavit about Wier Longleaf Lumber Company are derived wholly from documents furnished to Defendants more than 10 years ago.[140] Defendants' claims are barred because they acquired actual knowledge of the basis for their claims more than 10 years ago, when they received copies of the relevant documents in the Previous Litigation.

But suppose that Defendants only learned of their purported claims within the last year or two, as they allege, and that Defendants are not charged with knowledge of the contents of the documents given to them 10 years ago, or of documents filed many years before that and appearing in the public record for the general populace to see. The result is the same. Defendants' claims are barred by limitations because reasonable diligence required them to investigate the very same claims which they raised in the Previous Litigation when they received documents in discovery in that Litigation.

Defendants would again conceal themselves in the cloak of fiduciary relationships. They would have this Court think that, because Plaintiffs were fiduciaries, such a special relationship of trust existed between Plaintiffs and Defendants that Defendants were excused from exercising

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[140] *See* Exhibits C, F and H, Affidavits of Roy Wingate.

reasonable diligence in investigating these actions of fraud. Of course, as shown in Part II above, no such fiduciary duty exists currently between these parties and, as this Court has previously ruled, no such duty existed 10 years ago between Nelda C. Stark and these Defendants. Defendants and the predecessor of Plaintiffs were in hotly contested litigation more than 10 years ago and, if there was a special relationship of trust before 1988, it was no longer present when the Previous Litigation was filed. But even if this Court were to find that a fiduciary relationship has existed between Plaintiffs and Defendants or between Nelda C. Stark and these Defendants at any time since the Previous Litigation, Texas law would nevertheless bar the prosecution of Defendants' claims by limitations.

In *Eastman v. Biggers*,[141] the plaintiff, Mrs. Eastman sued her former lawyer, Biggers, in 1967 for an alleged concealment made by him 30 years previously in 1937, when Biggers handled a mineral interest that she owned through her first husband's estate. Mrs. Eastman argued that because she and Biggers had an attorney-client relationship, she was excused from not discovering the fraud sooner.[142] The Court disagreed with Mrs. Eastman because her fiduciary relationship with Biggers ended when she discharged him in 1938, and the means were at hand for her to have readily discovered the alleged fraud long before the statute of limitations expired.[143] For instance, Mrs. Eastman, like Defendants, had signed numerous documents, including a settlement agreement and release, in which the basis of her claim would have been revealed to her if she had read them.[144]

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[141] 434 S.W.2d 439 (Tex. Civ. App. - Dallas 1968, no writ).

[142] *Id.* at 442.

[143] *Id.* at 442-43.

[144] *Id.* at 443-44.

While acknowledging that in the case of a fiduciary relationship the degree of diligence required of a plaintiff is not as prompt or searching as otherwise, the Court rejected Mrs. Eastman' excuse, stating that "...**the fact that a fiduciary relation exists does not justify a party in neglecting every precaution until something occurs to arouse his suspicions.**"[145]

The Court noted that the former fiduciary relationship between the parties did not excuse Mrs. Eastman's failure to discover the alleged fraud for 29 years. "The law does not permit a person to close his eyes to facts which would put him on inquiry in the exercise of reasonable diligence to discover fraud."[146] For that reason, the Court concluded "as a matter of law that Mrs. Eastman either knew, or in the exercise of reasonable diligence, should have discovered the alleged fraud" more than four years before she filed suit.[147]

In *Estate of McGarr*, the beneficiaries of an estate sued the former administrators for an accounting and alleged damages for fraud and breach of fiduciary duty. The Court found that, because documents in public records showed the administrators' potential self-dealing and breach of fiduciary duty 10 years before suit was filed, the four-year statute of limitations barred the suit.[148]

Finally, in *Andress v. Condos*,[149] a fiduciary relationship existed between former partners of a law firm. Three partners sued a fourth for an accounting of legal work performed by him and for

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[145] *Id.* at 442 (emphasis added).

[146] *Id.* at 443.

[147] *Id.* at 442.

[148] *Estate of McGarr*, 10 S.W.3d at 378.

[149] 672 S.W.2d 627 (Tex. App. – Fort Worth 1984, writ ref'd. n.r.e.).

which the firm had not been paid. Though the law firm split up in 1968, the plaintiffs waited until 1980 – after they discovered a 1966 deed to the defendant for services rendered while he was a member of the law firm – to file suit. While recognizing that the former fiduciary relationship was a factor to consider in determining whether the fraud could have been discovered sooner by reasonable diligence, the Court determined that the plaintiffs had adequate information (via the public records) to put them on notice of the alleged fraud and that plaintiffs failed to provide an adequate explanation for their inaction.[150] Thus, the Court affirmed the trial court's decision that, as a matter of law, the plaintiffs could have discovered the fraud by the exercise of reasonable diligence more than four years before the suit was filed, that there was no issue of material fact, and that the defendant was entitled to summary judgment.[151]

Like the plaintiffs in this case, Defendants have been on constructive notice of the contents of the documents attached to the Darrell Alston Affidavits and the Roy Wingate Affidavits attached hereto. Moreover, Defendants have been in actual possession of many of these documents for over ten years, and thus is deemed to have knowledge thereof. Defendants' claims are clearly barred by limitations.

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[150] *Id.* at 631-32.

[151] *Id.*

V.

THE 1991 RELEASE IS AN ABSOLUTE BAR TO THE COUNTERCLAIMS OF DEFENDANTS

The principal ground upon which Plaintiffs have asked this Court to grant summary judgment is that the 1991 Release executed by the Defendants operates as an absolute bar to any claims of fraud or conversion alleged by Defendants as a matter of law. Because of particular language in the 1991 Release which negates the element of detrimental reliance,[152] Defendants cannot maintain a cause of action for fraud in the inducement, which is the only legal theory plead by Defendants in support of their argument that the 1991 Release should be set aside and invalidated.

One preliminary comment must be noted before replying to the substantive arguments made by Defendants on this issue. Throughout their Response, Defendants attempt to mislead the Court that Plaintiffs have somehow admitted to acts of fraud in connection with the Previous Litigation. Plaintiffs have never admitted to any such acts of fraud, and Plaintiffs deny the spurious and baseless accusations made by Defendants in their pleadings. What Plaintiffs have said consistently to this Court is that, even if Defendants were able to prove any of their allegations, Defendants would still be unable to set aside the 1991 Release as a matter of law. This is because specific language in the 1991 Release negates any reliance by Defendants on representations or disclosures of Plaintiffs.

For this reason, Defendants are **conclusively presumed** to have relied, not on the Plaintiffs or their counsel, but on their own evaluation of the 400,000 pages of documents turned over to

[152] See pages 20-23 of Plaintiffs' Amended Motion for Summary Judgment.

Defendants in the Prior Litigation and the advice of their own attorneys.[153] This principle is particularly important in consideration of the issue on summary judgment as the Court is required to assume that the summary judgment evidence raised by Defendants is true. It is the contention of Plaintiffs that, even if the Court indulges such an assumption, Defendants have no cause of action they can maintain in this Court as a matter of law. That is very different from saying, as Defendants have, that Plaintiffs admit to any wrongdoing, as Plaintiffs certainly have not done so.

A. ***Schlumberger Technology Corp. v. Swanson.***

The holding of the Texas Supreme Court in *Schlumberger Technology Corp. v. Swanson*[154] forms the cornerstone and the basis of Plaintiffs' Amended Motion for Summary Judgment. In *Schlumberger*, the Court held that a release containing a disclaimer of reliance on the representations of the released party is binding on the releasing parties and precludes, as a matter of law, any subsequent claim by the releasing parties that they were frequently induced to release their rights.[155]

Recognizing rightly that *Schlumberger* is squarely on point and holds the key to summary judgment in this case, Defendants have attempted to distinguish *Schlumberger* in every possible way.

First, Defendants attempt to create an exception to *Schlumberger* on the basis of an alleged fiduciary duty owed by Plaintiffs to Defendants. It is true that the Texas Supreme Court implies in its *Schlumberger* decision that its holding might be different if there had been evidence of a fiduciary or confidential relationship. Indeed, the plaintiffs in *Schlumberger* had argued that such a

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[153] See Plaintiffs' Amended Motion for Summary Judgment, page 19.

[154] 959 S.W.2d 171 (Tex. 1997)

[155] *Id.* at 179-80.

relationship did exist between them and the defendant, but the Court rejected their argument.[156] This argument completely misses the mark here as well, as Defendants have wholly failed to establish a fiduciary relationship between themselves and Plaintiffs.[157]

In early 1991, the only period of time relevant to this analysis, Defendants, then acting as plaintiffs, had been engaged in intense, bitter litigation with Nelda C. Stark and the Foundation for three years. Extensive discovery had been conducted by both sides. More than 400,000 pages of documents had been produced by Nelda C. Stark and the Foundation to Defendants, and numerous depositions of fact witnesses had been taken. Defendants were represented by one of the most capable trial lawyers in the State of Texas who, after diligently searching the archives of the Stark Family, concluded that there was no evidence of fraudulent concealment of assets in the Nita Hill Stark Estate. Moreover, shortly before the settlement, this Court entered a partial summary judgment in favor of Nelda C. Stark, holding that, as a matter of law, Nelda C. Stark, as Independent Executrix of the H.J. Lutcher Stark Estate, owed no fiduciary duties, including any duty to account, to the Defendants. Acting on the advice of counsel, Defendants then agreed to settle all of their claims for a cash sum of $2,500,000. In return for such payment, Defendants released all claims against Nelda C. Stark, the Foundation, the H.J. Lutcher Stark Estate, and the Nita Hill Stark Estate.

It is important to put the execution of this Release in its proper context. This was not a simple case of estate administration – as Defendants would have this Court believe – in which an executor was under an obligation to furnish information to a beneficiary in connection with that

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[156] *Id.* at 177.

[157] See Part II above.

beneficiary's expected distribution from the estate. Such may have been the case in 1945, when H.J. Lutcher Stark, acting as Independent Executor of the Nita Hill Stark Estate, distributed to William H. Stark II his share of the Nita Hill Stark Estate and William H. Stark executed a full and complete release. But it was no longer the case when the Defendants sued Nelda C. Stark in 1988. At that time, the Nita Hill Stark Estate had been closed for more than 40 years and its sole Independent Executor, H.J. Lutcher Stark, had been dead for 23 years. Rather, the Release was given as part of a comprehensive settlement of all matters between parties who had been at war for the past three years. This is a critical distinction between this case and the cases cited by Defendants, most notably *Montgomery v. Kennedy*, discussed below.

Second, Defendants argue that *Schlumberger* is inapplicable because it involved a jury trial, not a ruling on a motion for summary judgment. If anything, this distinction makes the ruling in *Schlumberger* all the more significant. Even in the face of a finding of fact that Schlumberger had fraudulently induced the execution of the release by the Swansons, the Texas Supreme Court reversed the judgment and rendered a decision for Schlumberger on the basis of the language in the release, holding that no claim for fraudulent inducement could be maintained as a matter of law.[158] By contrast, in this case there is no finding of fact and, as shown above, the Defendants have presented no competent summary judgment evidence of fraud.[159]

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[158] 959 S.W.2d at 181.

[159] See Part I above.

Third, Defendants argue that *Schlumberger* involved a business transaction that did not rise to the level of a special trust and confidence. As shown conclusively above, no such special or fiduciary relationship exists between Plaintiffs and Defendants.[160]

Fourth, Defendants contend that "the *Schlumberger* case dealt with the failure to properly inform the Swansons about the feasibility of a project rather than the existence of the project itself."[161] Even if that were true, the Supreme Court makes no distinction on that basis. Moreover, Defendants' statement that they "were defrauded about the existence of hundreds of thousands of acres of properties and assets, as well as the value of these items" is simply false.[162]

Defendants' reliance on *Prudential v. Jefferson Associates, Ltd.* is totally misplaced.[163] *Prudential* involved the validity of an "as-is" clause in a commercial real estate sales contract when the seller prevents the buyer from inspecting the condition of the premises. Not only is there is no evidence that – as Defendants assert – Plaintiffs "thwarted" Defendants from making an inspection of the contents and value of the Nita Hill Stark Estate, but all of the properties that Defendants now claim were concealed from them were fully disclosed to them in the Previous Litigation and appear in the public record.[164] Assuming arguendo (but not admitting) that some portion of the Nita Hill Stark Estate had not been disclosed, Defendants had the capability to search the public records in

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[160] See Part II above.

[161] See Defendants' Response, page 17.

[162] See Part I above.

[163] 896 S.W.2d 156 (Tex. 1995).

[164] See Part I above.

1988 and could have hired – as they now have – title examiners to check the records for them. They are charged with notice of the public filings.

Fifth, Defendants attempt to make a distinction based on the alleged superior knowledge of the Swansons in the *Schlumberger* case who (Defendants assert) knew all about the project in question and were dealing with Schlumberger at arms length. Even if this characterization of the facts in *Schlumberger* were accurate, Defendants' assertion is just the same specious argument, disproved above, that Defendants were misled by persons bearing fiduciary duties and possessing superior knowledge. Would Defendants actually have this Court believe that they did not possess adequate bargaining power when they were represented by Houston attorney Michael Gallagher, had engaged in litigation for three years, had reviewed over 400,000 pages of Stark family documents (and found nothing of any legal consequence), and had just suffered a major defeat on a motion for partial summary judgment on the exact same point they now raise today? The fact is that Defendants settled their case not because they were unsophisticated and ignorant bumpkins, or because they trusted Nelda Stark, or because of the alleged black-hearted deceit practiced on them by Nelda Stark and her minions, or because they did not have competent counsel to evaluate their claims fairly. Defendants settled their case because they had no case. And, in early 1991, even Defendants realized it.

Sixth, and finally, Defendants attempt to make a distinction between this case and *Schlumberger* because the Supreme Court did not rule as a matter of law that the presence of independent legal counsel would always preclude a claim of fraudulent inducement. Once again, Defendants have apparently missed the point completely. The presence of legal counsel in the

negotiation of the release was obviously a fact worth mentioning in the *Schlumberger* ruling,[165] and it is equally important in this case, particularly given the substance of Paragraph 5 of the 1991 Release:

> Each Releasing Party states that he or she is entering into and executing this Full, Final and Complete Release based on his or her own free evaluation of the facts and circumstances surrounding his or her claims, demands, and causes of action and in reliance upon the advice of his or her own attorneys. Each Releasing Party expressly states that no representations, promises or agreement other than the payment of Two Million Five Hundred Thousand Dollars ($2,500,000.00) has been made by any Released Party and each Released Party expressly states that the entering into and execution and execution of this Full, Final and Complete Release is in no way conditioned upon or in reliance upon any representations, promises, or other agreements made by any of the Released Parties.[166]

B. ***Montgomery v. Kennedy.***

It is obvious that Defendants place great weight on the case of *Montgomery v Kennedy*,[167] as they have devoted 16 pages of their 63-page Response alone to the analysis of *Montgomery* and a tortured and misguided application of its facts and principles to this case. In *Montgomery*, the Court held that an executor's intentional failure to disclose a material fact regarding an asset of the estate he is currently administering constitutes a breach of fiduciary duty and fraud and entitles the defrauded beneficiary to maintain an action even after settlement of the estate.[168]

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[165] "In negotiating the release, highly competent and able legal counsel represented both parties. . . ." *Schlumberger*, 959 S.W.2d at 180.

[166] See Exhibit "B" to Plaintiffs Amended Motion for Summary Judgment, paragraph 5.

[167] 669 S.W.2d 309.

[168] *Id.* at 314.

Despite a lengthy and strained effort to make the *Montgomery* case fit into the same mold as the case at bar, Defendants have overlooked three crucial distinctions. First, despite Defendants' efforts to the contrary, the facts in *Montgomery* are extremely different. Unlike this case, there was no long history of litigation, no descendants of beneficiaries who had signed releases in their parents' estates long ago now suing the executor (and the executor of the estate of the executor) many years later, and no second, comprehensive settlement.

Second, as there was no prior litigation in *Montgomery*, so was there no issue of a final release. And since there was no release, there was no clause in the release disclaiming any reliance on the disclosures of the alleged fiduciary and stating that the beneficiary was relying only on her own investigation and that of her attorney. Thus, the court in *Montgomery* was not facing the very issue before this Court today, and for that reason, the *Montgomery* decision carries little weight.

Third, and equally as importantly, *Montgomery* involved a direct relationship between a living executor and a living beneficiary over a pending estate. It did not involve, as the Court is facing here, a lawsuit between the heirs of a deceased beneficiary and the executor of the estate of the executor of a second estate over the handling of that second estate 50 years ago. The statements in the *Montgomery* decision about fiduciary duties have absolutely no relevance here since Plaintiffs do not owe Defendants any such duties.[169]

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[169] See Part II above.

The other cases cited by Defendants in Part VI of their Response, *Burrow v. Arce*[170] and *Huie v. Deshazo*,[171] also have no relevance because Defendants have failed to show that Plaintiffs owe them any fiduciary duties.

VI.

DEFENDANTS HAVE FAILED TO SATISFY A CONDITION PRECEDENT TO MAINTAINING AN EQUITABLE ACTION TO SET ASIDE THE 1991 RELEASE

In their Amended Motion For Summary Judgment, Plaintiffs further contend that Defendants are estopped from seeking cancellation of the Release executed in the Prior Litigation because Defendants have failed to comply with the condition precedent of restitution. Plaintiffs have cited numerous cases that stand for the proposition that a party demanding the cancellation of a contract must restore or offer to restore to the other party whatever he may have received under the contract.[172] A considerable amount of discussion is devoted to the *Guion* case,[173] which is parallel with the Stark case as it involves a family dispute in the handling of a trust, an alleged breach of duty by the trustees and, subsequently, a settlement of the unliquidated claim at issue. Defendants fail to distinguish or even address *Guion* and other cases cited by Plaintiffs. Indeed, Defendants merely make a broad, baseless statement that "...the holdings of *Rosenbaum, Spellman, and Guion* relied

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[170] 997 S.W.2d 229 (Tex. 1999). Defendants cite this case for the proposition that a breach of fiduciary duty is a fact issue.

[171] 992 S.W.2d 920 (Tex. 1996). Defendants cite this case for the proposition that an executor or trustee owes a beneficiary a duty of full disclosure.

[172] See Plaintiffs' Amended Motion for Summary Judgment, pages 11-14.

[173] *Guion v. Guion*, 475 S.W.2d 865 (Tex.Civ.App.-- Dallas 1971, writ ref'd n.r.e.).

upon by Plaintiffs, do not apply" to the issues of restitution/ratification.[174] In this Part VI, Plaintiffs will set the record straight on the issue of condition precedent and how it applies in this case.

A. Seeking Cancellation of a Release is an Equitable Remedy, While Seeking Damages is a Legal Remedy

It is interesting to note that Defendants' claim that restitution is not a condition precedent is under the heading "Restitution is Not a Condition Precedent to Suing for Damages".[175] Notwithstanding this heading, Defendants then muddle the issue by speaking of cancellation of the 1991 Release in the same vein as their discussion concerning a lawsuit for "additional damages". Things become hopelessly blurred from that point on. To bring the issue back into focus, the Court should recognize that there is a difference between "suing for damages" (a legal remedy) and seeking cancellation of a release (an equitable remedy).

1. One Who Seeks Equity (i.e. Cancellation of Release) Must First Do Equity (i.e. Make Restitution)

In their Amended Counterclaim, Defendants specifically plead for a cancellation of the 1991 Release, an *equitable* proceeding.[176] In fact, under the express provisions of the 1991 Release, Defendants are precluded from pursuing further claims and, thus, damages (whether couched as damages or "additional damages"), without first setting aside the 1991 Release. Therefore, before they may pursue any claim for "additional damages", Defendants must first engage in the equitable proceeding of setting aside or canceling the 1991 Release. And in order to set aside

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[174] Defendants' Response, page 12.

[175] *Id.* at page 10.

[176] For full discussion, see Plaintiffs' Amended Motion for Summary Judgment, page 11 et seq.

the 1991 Release, the key point is that *the parties to the settlement must be restored to their prior status. This means that Defendants must repay all of the money they received for signing the Release.*[177]

The Court should note that Defendants' argument in their Response[178] is nearly verbatim to the language in the opinion of the Texas Court of Appeals in *Swanson v. Schlumberger Technology Corp.*,[179] which opinion was reversed and rendered by the Texas Supreme Court.[180] Yet, even if this the case had not been reversed, the *Swanson* opinion itself makes a crucial distinction between the legal remedy of suing for damages versus the equitable remedy of canceling a transaction and seeking restitution of the rights relinquished in a transaction. The appellate court in *Swanson* stated that the plaintiffs did not need to tender the money that they received in the prior settlement, but only because they "took the option of standing on the transaction and suing for damages as opposed to rescinding the transaction and seeking restitution of the rights and interest they had given up."[181] Defendants have failed to appreciate this critical distinction.

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[177] As recission 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 v. Bryan*, 101 S.W.2d 895, 897 (Tex. Civ. App. – Eastland 1937, no writ), *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.).

[178] See Defendants' Response, Pages 10 *et seq.*, especially the 2nd and 3rd paragraphs of Article IV(C).

[179] 895 S.W.2d 719, 735 (headnote 44).

[180] *Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997).

[181] 895 S.W.2d at 738.

2. Defendants are Precluded from Seeking Legal Remedy unless and until 1991 Release is Set Aside in an Equitable Proceeding

Defendants in this case do not even have the choice of equitable vs legal remedies. As a matter of law, Defendants are precluded under the 1991 Release (which has not be set aside) from pursuing further damages at this time.[182] The **sole** avenue available to Defendants herein is to first cancel the Release in an equitable proceeding. Instead of facing this head on, however, Defendants are attempting to mislead this Court by blurring the lines between what they have claimed in their pleadings (cancellation of the 1991 Release) versus what they state in their Response (that they are merely suing for additional damages). Because of this distinction, the reversed *Swanson* case on which they rely does not even support the proposition for which it is cited.

B. Restitution IS a Condition Precedent to Cancellation of Release in Equitable Proceeding for Unliquidated Claim and No Exception is Applicable Herein.

Defendants cite three cases in their argument that restitution is not a condition precedent, each of which can be distinguished. First, Defendants state that "Texas law is clear that Defendants need not to render the actual consideration received when they are suing for the difference between what they were paid and what they should have been paid."[183] Again, as stated in Section A of this Part VI above, Defendants are precluded from making any types of claims in this regard without first cancelling the 1991 Release. Moreover, the case that defendants cite for the foregoing proposition

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[182] See Part V above; see Full, Final and Complete Release attached as Exhibit "B" to Plaintiffs' Amended Motion for Summary Judgment.

[183] Defendants' Response, page 11.

is the *reversed opinion* of the Texas Court of Appeals in the *Swanson* case, which has no precedential value.

Defendants further attempt to mislead this Court by couching their claims as merely seeking "additional damages"; that is, damages in addition to what they received in the prior litigation. These so-called "additional damages" would allegedly result from "additional claims" against Plaintiffs pursuant to the Amended Counterclaim filed by Defendants, which claims are barred by the 1991 Release.[184] However, Defendants blatantly ignore the fact that they only received prior monies following a bargained-for settlement in which, in exchange for $2.5 million, Defendants agreed to release any and all claims, known or unknown, arising out of or connected with any actions or omissions in any capacity of the parties thereto in any way connected with the estate of Nita Hill Stark, the Estate of H.J. Lutcher 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. Lutcher Stark or Nelda Stark. It is a general rule of equity that, if Defendants are seeking to cancel their end of the agreement, then they should not retain the benefits with which that agreement was acquired. In any equitable proceeding for cancellation of a release (such as this one), the general rule is that **"he who seeks equity must do equity."**[185]

Rather than complying with the general rule of equity by tendering the $2.5 million consideration received under the 1991 Release in the Previous Litigation, Defendants are instead attempting to utilize alternative excuses for their failure to return the amount they received when they

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[184] For further discussion, see Part V above.

[185] See Part VI, Section A(1) above; see authorities cited in Plaintiffs' Amended Motion for Summary Judgment, pages 11-12.

executed the Release that they now seek to set aside, including the credit argument. In addition to being precluded from seeking "additional damages" without first setting aside the Release, there are no exceptions or other excuses that the Defendants may employ to avoid the doctrine of restitution as it applies to the case at bar.

1. Concept of Credit/Offset does not Apply in Cases Involving Unliquidated, Indefinite Amounts.

Defendants claim to the contrary, that they need not tender actual consideration received when they are suing for the difference between what they were paid and what they allege that they should have been paid. Defendants state that they have plead a willingness to credit any sum that they might recover with a sum previously received.[186] While this argument may appear reasonable on its face, it is inherently flawed in its operation because there is no guarantee of any recovery by the Defendants on their claims for a myriad of reasons, including those raised in Plaintiffs' Amended Motion for Summary Judgment. Defendants themselves even acknowledge that a recovery is not a given by stating that they are willing to credit any sum they "might recover".[187] But if Defendants were to receive nothing in the current litigation, then there would be nothing to credit, and yet Defendants would have been permitted to side-step the doctrine of restitution, which is contrary to the general rule of equity as well as general public policy.

The credit theory can only logically work where recovery is guaranteed and involves an amount certain, such as a claim on a note or other liquidated claim. By any stretch of the

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[186] Defendants' Response, page 11.

[187] *Id.*

imagination, Defendants' claim for "additional damages" due to alleged fraud is unliquidated and uncertain. Texas courts have disallowed the credit approach in cases involving unliquidated claims because the credit is unworkable and, in the event of a zero recovery, the opposing party would have been subjected to costs and expense that should have only been allowed if proper steps of restitution and cancellation of the release were first completed. To hold to the contrary would make the doctrine of restitution, as well as principles of equity and restoration of parties, of no consequence. For this important policy reason, the credit theory advanced by Defendants is completely unworkable in this type of lawsuit.

The few cases relied upon by Defendants in their Response -- *Texas Employers Insurance Association v. Kennedy*[188] and *Pattison v. Highway Insurance Underwriters*[189] -- are limited to their facts and are distinguishable because each involved a liquidated claim or an amount certain.

(a) *Kennedy Involved Statutory Claim with Liquidated Amount.*

The *Kennedy* case involved a statutory claim with regard to the Industrial Accident Board, the predecessor to the current Texas worker's compensation system. Significantly, the *Kennedy* opinion expressly recognizes and upholds the general equitable rule expressed in many cases, including *Casualty Reciprocal Exchange v. Bryan*,[190] which states that a plaintiff in a suit for a cancellation of a contract to which he is a party must offer to return or offer to return any

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[188] 135 Tex. 486, 143 S.W.2d 583, 585 (1940).

[189] 278 S.W.2d 207, 212 (Tex. Civ. App. – Galveston 1955, writ ref'd. n.r.e.).

[190] 101 S.W.2d 895 (Tex. Civ. App. -- Eastland 1937, no writ).

consideration that he has received under the contract. This same general rule of equity is upheld and reiterated in subsequent opinions, including those cited in Plaintiffs' Amended Motion for Summary Judgment.[191]

The *Kennedy* court distinguished between the foregoing rule of equity and a common law action for damages for personal injuries in which a tender or offer to tender is not required, citing the following cases: *Smith v. Atchison T. & S. F. Ry Co.*[192]; *Texas & P. Ry Co. v. Jowers*;[193] *International and G.N.R. Co. v. Shuford*;[194] and *Galveston H & S A Ry Co. vs Cade.*[195] None of these cases are applicable.[196]

Kennedy is clearly distinguished from the case before this Court because it involved a suit to set aside a compromise agreement in a worker's compensation (Industrial Accident Board) case. Moreover, the *Kennedy* case is expressly limited to "the facts of this record". In fact, the case was brought merely because the Industrial Accident Board lost its jurisdiction upon the completion of the settlement agreement. The Court in *Kennedy* wrote that, where the plaintiff establishes that he has a meritorious claim for compensation in an amount greater than that which

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[191] See Plaintiffs' Amended Motion for Summary Judgment, pages 11 et seq.

[192] 232 S.W. 290 (Tex. Comm'n App. 1921, judgm't adopted).

[193] 110 S.W. 946 (Tex. Civ. App. 1908, writ ref'd).

[194] 81 S.W. 1189 (Tex. Civ. App. 1904, writ ref'd).

[195] 93 S.W. 124 (Tex. Civ. App. 1906), *writ ref'd*, 94 S.W. 219 (Tex. 1906).

[196] Neither *Shuford* nor *Cade* has application to the issue of restitution because, in both cases, the plaintiff actually tendered the monies previously received and, thus, there was no question of any failure to tender back. The *Smith* and *Jowers* cases involved special situations, inapplicable here, where an excuse was made for failure to provide restitution. See Section (B)(2) below.

he has received, he should not be required to make a tender.[197] The fact a plaintiff may have a claim in an amount greater than that which he has received contemplates that the "amount greater" is an "amount certain", that is a definite, liquidated amount that can be established. In cases involving the Industrial Accident Board and Worker's Compensation issues, this may generally be established since it concerns a statutory compensation scheme. And in its conclusion, the *Kennedy* court again states that "cases like the instant one" should be governed by the rule applicable to cases brought to set aside a release and recover damages in a common law action and that, in such cases, the plaintiff should not be required to tender back the amount received as a condition precedent to his right to obtain relief.[198] In other words, the *Kennedy* court expressly limits its holding to the facts of the record before it and "cases like the instant one" which are cases stemming from compromised agreements with the Industrial Accident Board based on an amount certain/statutory scheme where a maximum entitlement amount is readily established and, thus, available for comparison to the amount received for an immediate determination of any discrepancy.[199]

(i) Illustration of Suit to Cancel Release Involving Liquidated Claim.

The case of the *Brannon v. Pacific Employers Insurance Co.*[200] illustrates a situation involving a suit to set aside a compromise settlement in a worker's compensation case and how such a case is distinguishable from a case seeking to set aside a release based on unliquidated

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[197] 135 Tex. 486, 143 S.W.2d at 585.

[198] *Id.* at 586.

[199] *Id.*

[200] 224 S.W.2d 466 (Tex. 1949)

damages. The Court specifically looked at what is put in issue by such a suit to cancel a release and recognized that the Texas statutes fix a maximum compensation in an amount certain for total disability.[201] The Court further found that the amount that a petitioner asserts is owed to him is the difference between the total amount which he is entitled under the statutory compensation scheme versus the amount he has already been paid; thus, such difference is the amount that the petitioner is attempting to recover in a suit to cancel a previous compromise agreement. In other words, where the petitioner can show an objective pay rate and the difference between the amount received in compromise versus the amount under the computation of wage rates authorized by the worker's compensation law, then the petitioner can show that his disability would have entitled him to receive benefits greater in amount then in settlement. As a result, the petitioner in *Brannon* was able to establish a definite amount to which he would be entitled to seek, by asserting credit for what he has already received.[202]

(ii) Illustration of Suit to Cancel Release Involving Unliquidated Claim.

The credit theory relied upon by Defendants is operational in the particular situation in *Brannon* regarding the worker's compensation scheme only because it involved a definite amount. It would not work, does not work and has not been found to work, however, in a situation involving an unliquidated, uncertain and indefinite claim.[203] This was specifically

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[201] *Id.* at 468.

[202] *Id.* at 468-469.

[203] *Id.* at 468 ("If plaintiff should show only that he would be entitled to receive as compensation on a trial of his cause for compensation a smaller amount, or the same amount, as that already paid to him, of course, he could not have the release cancelled. To so cancel the release would be a vain and useless thing which the courts would not do").

recognized by the Court in *Casualty Reciprocal Exchange v. Bryan*, where, on rehearing, the Court examined the plaintiff's claim that the Court erred in holding that it was a prerequisite to the cancellation of a compromise settlement agreement that the plaintiff tender back the consideration received, place the defendant in its prior position or else sufficiently excuse himself from that duty by proper allegations.[204] The appellate court examined this issue in detail on rehearing and found that the plaintiff failed to tender return of the consideration, failed to plead he was willing to restore the status quo of the other party, and failed to allege any circumstance excusing him from the duty of offering to do so, much less any reason that would entitle him to retain the consideration.[205] The Court specifically discussed the credit/offset issue and found that there would be "no good reason" for allowing any credit or offset (or even an allegation of credit/offset), since "...the sole purpose of the lawsuit is to set aside a compromise settlement agreement of **an uncertain, indefinite, and unliquidated claim."**[206]

In *Casualty Exchange,* the Court recognized that a plaintiff would not be required to restore monies previously paid when seeking cancellation of a contract if he would otherwise be entitled to retain such monies.[207] In the case before this Court, however, Defendants would not be entitled to retain $2,500,000.00 if the release were rescinded, nor would they be

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[204] *Casualty Reciprocal Exchange*, 101 S.W.2d at 898. See also Section (B)(2) below.

[205] *Id.* at 898-899.

[206] *Id.* at 899.

[207] *Id.*, *citing* Black on Rescission, §621 ("One seeking the rescission of a contract or other transaction is not required to make a tender or offer of restoration of that which he would be entitled in any event to retain, that is, either by virtue of the original liability of the other party if the contract should be rescinded, or under the contract itself if rescission should be refused."); also *citing* 9 C.J. §97, p. 1210 ("One who seeks to rescind an instrument is not bound to restore that which he would be entitled in any event to retain.")

entitled to retain the money if the cancellation was refused but their claims proceeded, since the amount was an unliquidated, uncertain amount paid solely in a bargained-for settlement of hotly-disputed claims for unliquidated damages.

(iii) Texas Supreme Court has Upheld Restitution in Cases Involving Unliquidated Claims.

Kennedy is not the only Texas Supreme Court case on the issue of restitution. In their Amended Motion for Summary Judgment, Plaintiffs cited a number of other cases which are more applicable to the facts of the case at bar, including the Texas Supreme Court opinions in *Stewart v. H & TC Ry Co.*[208] and *Texas Company v. State*.[209] Defendants have ignored these authorities in their Response.

The *Stewart* case involved a lawsuit against a company for personal injury damages in which the plaintiff signed a written agreement acknowledging receipt of $1,600.00 in full satisfaction of his claim and dismissal of his lawsuit. An intervenor then claimed that Stewart had employed the intervenor to prosecute the suit and had agreed to a one-third contingency fee. Following the intervenor's claim, the plaintiff stated that he had been fraudulently induced to make the settlement and that he had retained and used the money paid to him by the defendants upon the release and was now insolvent and unable to tender back the money. The plaintiff asked that the

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[208] 62 Tex. 264 (1884).

[209] 281 S.W.2d 83 (Tex. 1955).

previous release be vacated and that he be permitted to pursue damages against the defendant, allowing a credit upon the judgment recovered for the amount received by him.[210]

The Texas Supreme Court held that, because the plaintiff had received $1,600.00 in settlement of the matter and had retained and used the money, he was unable to restore the defendant to its former status:

> Having received the money, if [plaintiff] desired to repudiate the adjustment...it was incumbent upon him to promptly inform [defendant] of that fact, and to tender back the money received. By having failed to do this he comes into the court with soiled hands, and no relief can be obtained. 'As he has bound himself, so must he be bound'."[211]

The Texas Supreme Court expressly held that, if a party has compromised his claim for damages and used up the money he received in exchange for compromising the claim, he cannot be heard to assert fraud as to the compromise, when he does not first tender back the amount already received.[212] It is important to note that the plaintiff in *Stewart*, like Defendants here, was maintaining an *unliquidated* claim.

In *Texas Company v. State*, the Texas Supreme Court reiterated the general rule that one seeking the cancellation of an instrument must restore the original status; one cannot repudiate an instrument and simultaneously retain the payments.[213]

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[210] 62 Tex. at 247.

[211] *Id.* at 249.

[212] *Id.* at 247-49.

[213] *Texas Company*, 281 S.W.2d at 91..

(b) *Pattison Involved Maximum Insurance Policy Limits of Amount Certain.*

Defendants also rely on *Pattison v. Highway Insurance Underwriters.*[214] This case also involved an amount certain and, therefore, is factually distinguished both from the case at bar as well as the authorities cited by Plaintiffs in their Amended Motion For Summary Judgment on the application of the general doctrine of restitution to an unliquidated claim.

The *Pattison* case primarily concerned a procedural issue, namely the appeal of a dismissal following a judgment pertaining to special exceptions to the plaintiffs' petition. The Court noted that the main cause of action in the plaintiffs' pleadings presented a case of first impression, and the overall opinion, as in *Kennedy*, was limited to "a case of this sort".[215] The *Pattison* case involved a suit seeking cancellation of a compromise settlement agreement and release for personal injuries and full recovery under an original cause of action based on the misrepresentations of an insurer as to maximum liability limits under an insurance policy.

Because the Court recognized that the release by plaintiffs of their claims, unless and until voided, stood as a bar to any suit brought by them to recover damages suffered in excess of the settlement amount of $12,500.00, the court found that it was necessary for them to prove that the claims for injury warranted a recovery greater than $12,500.00. Otherwise, the plaintiffs could not prove they had suffered damages by reason of the alleged wrongful obtaining of

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[214] 278 S.W.2d 207.

[215] 278 S.W.2d at 211-212.

the release.[216] The *Pattison* plaintiffs then pled a willingness to credit any sum they might recover with the sum of $12,500.00 that had been received by them at the time the release was executed.[217]

The *Pattison* case is distinguishable from the case before this Court. The primary issue in *Pattison* involved an insurer's misrepresentation of the maximum policy limits under the insurance policy that covered the plaintiffs' injuries. As a result, the plaintiffs settled for less than the maximum policy limits, which limits consisted of a certain defined amount. Consequently, given the existence of a definite maximum policy limit, there was an amount certain to which the plaintiffs could show they would have been entitled to receive but for the fraudulent inducement of the insurer in the release. The *Pattison* plaintiffs could show a definite difference between the maximum policy limits versus the amount they had received, and a definite liquidated amount representing the difference between the two numbers would be due to the plaintiffs. To the contrary in this case, Defendants are unable to show with any degree of exactness, or even probability, the amount they "should have received", since their claims involve an unliquidated, indefinite and uncertain amount. Accordingly, *Pattison* fails to provide authority for any contention that the credit theory should be applied to the case at bar.

It is further noteworthy that the appellate court's opinion in *Pattison*, relied upon by Defendants, has never been cited by any Texas court for the proposition that a credit may be pled against any future sum to be recovered, other than the appellate court's opinion in *Swanson*, which was reversed and rendered by the Texas Supreme Court. The *Pattison* case is distinguished

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[216] *Id.* at 211.

[217] *Id.* at 212.

from the case at bar because it was based on maximum policy limits that involved a liquidated amount. The credit was allowed because the amount received in settlement was clearly below the available maximum policy limits. In addition, the case at bar does not involve a maximum liquidated amount set for any "injury" as in the *Pattison* injury case involving maximum policy limits or in the *Kennedy* case and its related cases involving the worker's compensation scheme and the maximum statutory amount thereunder. It cannot be established herein that Defendants will definitely recover an amount in excess of the previous consideration or that they will recover anything at all.

2. Defendants Fail to Allege Any Reason and in any event, Lack Reason Sufficient to Excuse Duty of Restitution.

In *Casualty Exchange,* a case relied on by the Court in the *Kennedy* decision, the Court examined previous decisions and observed that, in certain circumstances, courts had permitted various excuses for a plaintiff's failure to tender back the sum previously received.[218] The Court in *Casualty Exchange* stated that it was not concerned with the nature or sufficiency of any excuses or explanations allowed in other cases where the general equitable rule of restitution would, under ordinary circumstances, be applied.[219]

However, the Court in *Casualty Exchange* did declare that many of the excuses or purported reasons given in other cases for not complying with the general rule of equity "...appeared to be so light and frivolous as to amount to a repudiation of such equitable maxims as 'he who seeks

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[218] *Casualty Reciprocal Exchange*, 101 S.W.2d at 900-901.

[219] *Id.* at 901.

equity must do equity' or 'he who comes into equity must come with clean hands.' "[220] With regard to the case before it, the *Casualty Exchange* Court recognized:

> ...[T]he [plaintiff] seeking to set aside a written agreement settling a doubtful, uncertain and unliquidated claim for a valuable consideration makes no allegation whatever of tenderness, readiness to tender, or excuse for not tendering into court the consideration received as a prerequisite to the cancellation of the written instrument."[221]

The bottom line in *Casualty Exchange* (which remains good law and has been cited by numerous subsequent opinions, including with approval by the Texas Supreme Court in *Kennedy*) is that the plaintiff failed to tender back or plead that it was willing to do so, or even give an excuse for failing to do so, in its effort to cancel a written agreement, and further that there was no authority to exonerate a plaintiff from doing so in that case, which involved an indefinite amount.[222]

With regard to the option of pleading an excuse for failing to tender back, the Court in *Casualty Exchange* recognized that such an alternative had been allowed in other situations, but the Court did not examine the soundness of a rule that permitted excuses for not tendering back; it merely found that no excuse was alleged in the case before it and pointed out that the fact that excuses for not tendering money (as a prerequisite to a right to cancel a compromise settlement agreement) apparently were held sufficient in the cases in which the excuses were permitted.[223]

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[220] *Id.*

[221] *Id.*

[222] *Id.* at 902.

[223] 101 S.W.2d at 900-901.

For example, the plaintiffs in *Pattison* submitted an excuse for failing to repay the $12,500 amount they had received under their release, claiming it had been expended for "necessaries" that stemmed directly from the personal injuries for which they received the monies, including medical bills and hospital bills.[224] As a result, the Court in *Pattison* found that such excuse was offered sufficient and provided a justifiable basis to show the plaintiffs could not return the sum received at the time of the execution of the release.[225]

On the other hand, the Texas Supreme Court expressly held in *Stewart* that, where a party who compromised his claim used up/expended the money he received in exchange for compromising the claim and asserts such depletion as his failure to tender back, such excuse for failing to make restitution and restore the other party to its status quo is impermissible and the plaintiffs must first tender back the amount already received.[226]

In addition to failing to make restitution or offer to tender the money back, Defendants have failed to allege an excuse for not doing so. In fact, unlike the cases cited in *Kennedy* and the *Pattison* case, in which limited excuses for failing to tender back were deemed sufficient and thus permitted as exceptions to tender back, Defendants have failed to state any excuse whatsoever for failing to return the money previously received by them. Rather, Defendants have lamely stated that the parties could not be returned to the status quo because it is Plaintiffs who have

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[224] *Pattison*, 278 S.W.2d at 212.

[225] *Id.*

[226] *Id.* at 247-49.

caused changed circumstances, including the selling of properties and the death of Nelda C. Stark.[227]

This is total nonsense. It is not a justifiable excuse for Defendants' failure to make restitution or even offer restitution, and it does not address, much less have any bearing on, the true nature of Defendants' ability to make restitution. Defendants' excuse for failing to return the consideration itself, and the sufficiency of that excuse would certainly be an issue, given the fact that this issue was examined by the court in *Pattison*. However, changed circumstances involving the original payor or changes in the assets that she owned 10 years ago have no bearing on and do not suffice as a permissible excuse for the inability of Defendants to repay the consideration they received. The only fact relevant to restitution is that Defendants were enriched by $2.5 million ten years ago, while Plaintiffs' predecessor, Nelda C. Stark, sustained a loss in the same amount. Restitution under would require the return of the $2.5 million to the Estate of Nelda C. Stark out of the pockets of Defendants.

Even if Defendants had made an allegation (which is denied) of an excuse for their failure to tender back the $2.5 million previously received, Defendants did not have hospital bills, medical bills or other "necessaries" stemming directly from the alleged injuries to which expenditures of the $2.5 million could be justifiably attributed as was done in *Pattison*. In this respect, *Pattison* is clearly distinguished from the case at bar, where there is no definitive purpose for which the settlement proceeds from the Previous Litigation were expended and no justifiable basis for failing to return the money was even offered by Defendants. In fact, if Defendants are unable to make restitution, it is likely because they just depleted or otherwise used up the money,

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[227] Defendants' Response, page 11.

which, as stated by the Texas Supreme Court in *Stewart*, is an insufficient reason for failing to tender back.[228]

C. Recent Texas Case Law Mandates Restitution in Equitable Proceeding Involving Cancellation of Release.

Decisions rendered by the Courts since *Pattison* and *Kennedy* - including the *Guion* case relied on by Plaintiffs in the Amended Motion Summary Judgment - require restitution prior to any cancellation of an instrument.

In *Guion*, an unliquidated claim had been settled for $100,000. In subsequent pleadings to cancel and set aside the release, the plaintiffs failed to tender back the money previously received. The Court held the primary legal bar to the plaintiffs' claim for cancellation of the compromise agreement was the **undisputed ratification**[229] of the settlement agreement by his acceptance, retention and exercise of dominion over the settlement proceeds, as well as his **failure and refusal to make restitution of the proceeds of settlement.**[230] Citing the general equitable rule as well as the holding of the Court in *Casualty Reciprocal Exchange,* the Court in *Guion* held that the requirement of restitution or pleading or proof of an exception thereto is a condition precedent to the granting of relief.[231]

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[228] "Having received the money if [plaintiff] desired to repudiate the adjustment...it was incumbent upon him to promptly inform [defendant] of that fact and to tender back the money received. By having failed to do this he come to the court with soiled hands and no relief can be obtained." *Stewart*, 62 Tex. at 249.

[229] See Part VII below.

[230] *Guion v. Guion*, 475 S.W.2d 865, 869 (Tex. Civ. App. – Dallas 1971 writ. ref'd. n.r.e.).

[231] *Id.*; see also *Guadalupe-Blanco River Authority v. City of San Antonio*, 200 S.W.2d 989 (Tex. 1947) (a party cannot repudiate an instrument and retain the benefits received thereunder, nor can a party retain a beneficial part of the transaction and repudiate a disadvantageous part because of alleged fraud.)

While the *Guion* Court recognized in a footnote that the law recognizes certain exceptions to the general rule of offer and proof of restoration of benefits, the Court referred discussion of such exceptions to the *Casualty Reciprocal Exchange* and the *Kennedy* cases.[232] Because the *Guion* plaintiff (like the Defendants herein) did not plead any recognized exceptions, the Court held that the excuse alternative to making restitution was not applicable. In fact, the *Guion* Court noted that not only did the plaintiff not make any effort to restore any of the proceeds of the compromise settlement agreement, the acts and conduct of the plaintiff made it impossible to effectuate restoration of the proceeds.[233] The Court then cited Black's "Recission and Cancellation" treatise:

> If it is attributable to the party seeking to rescind, -- if, by his own act, he has disabled himself from restoring the consideration which he has received, -- he cannot maintain an action for recission....[234]

In the discussion in *Casualty Reciprocal Exchange*, several of the cited cases excused a failure to tender restitution based on the impoverishment of the plaintiff, while in the *Pattison* case, the plaintiffs' excuse is based on the fact that the minimal settlement monies of $12,500 were expended for debts stemming from the personal injury before the settlement was obtained. As previously discussed, the Defendants herein have made no excuse for their failure and refusal to return the $2,500,000, and Defendants lack the *Pattison* excuse that monies were expended for debts

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[232] *Id.* at 870.

[233] *Id.* at 870-871.

[234] *Id.* at 871, *citing*, Black on Rescission, 2nd Edition, Vol. 3, § 618, Page 1498-1499; *see also* Tex. Jur. 3d *Cancellation of Instruments* §44 ("As a general rule, relief [of cancellation] is not available to a party seeking cancellation who has placed himself, or the property received, in such a position where restoration is impossible. In such a case, it is unconscionable to permit a plaintiff to rescind an agreement, recover what he paid and, at the same time, retain the consideration received....").

incurred as a result of the alleged injury in the Previous Litigation. Whether any excuse based on the fact they are financially unable to return the money would be sufficient is unlikely given the significant amount in controversy, the Supreme Court's decision in *Stewart* that a plaintiffs' depletion funds is an insufficient reason for failure to restore the status quo of a defendant in equitable proceeding, as well as the general principles set forth above. Moreover, as stated in Black's commentary set forth in *Guion*, since Defendants have disabled themselves from restoring the consideration they have received, they cannot proceed on an action for cancellation of an instrument.

In *Guion* and other cases cited in Plaintiffs' Amended Motion for Summary Judgment, the courts have held as a matter of law that the doctrine of restitution serves as a complete bar to a cause of action for cancellation of a settlement agreement.[235] The *Guion* court goes on to discuss that, despite the plaintiffs' effort to raise issues of fact concerning alleged misrepresentations, fraud, etc., the undisputed fact remains that, when the compromise agreement was consummated, the plaintiffs elected freely and of their own volition to accept and retain proceeds of the agreement so as to ratify and affirm that which had transpired.[236]

The *Guion* court cited the *Rosenbaum* case[237] for this principle of ratification and emphasized that the general principal of equity as outlined in *Casualty Reciprocal Exchange* and as voiced by the Texas Supreme Court in the *Stewart* case likewise applied to prevent the plaintiffs from entering

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[235] See full discussion in Plaintiffs' Amended Motion for Summary Judgment, pages 11-15.

[236] *Guion*, 475 S.W.2d at 871.

[237] *Rosenbaum v. Texas Building and Mortgage Co.*, 167 S.W.2d 506 (Tex. 1943); see Part VII below.

the court seeking equitable relief.[238] Other cases cited in Plaintiffs' Amended Motion for Summary Judgment include the recent cases of *Guerrero v. Hagco Bldg. Systems, Inc., Finch v. McVea, Clark v. Perez, Daniel v. Goesl,* all of which stand for the proposition that retention of proceeds of settlement renders a party with unclean hands in an action seeking to cancel the agreement, as well as serves as a ratification of the previous contract.[239]

D. Because Defendants have Failed to Comply with the Doctrine of Restitution in the Absence of any Sufficient Exception, Defendants are Estopped from Seeking Cancellation of the 1991 Release.

The *Kennedy* and *Pattison* cases cited by Defendants are distinguishable because each of those cases involved liquidated claims in which the parties were able to show a maximum amount certain to which they would be entitled and, thus, ultimately retain the settlement monies previously paid to them and receive the definite difference upon a cancellation of the prior settlement agreement. That is not true in the case at bar, where due to the unliquidated nature of their claims, Defendants are unable to establish a maximum amount certain to which they would be entitled and, thus, Defendants are not entitled to retain any of the $2.5 million as a credit against a maximum amount certain that does not exist.

Moreover, in addition to failing to tender back the monies previously received, Defendants have not pled any excuse, much less a sufficient excuse, for failing to make restitution nor are they able to do so, since any expenditure of the settlement monies was caused by them and is not directly related to their alleged injury.

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[238] *Guion*, 475 S.W.2d at 871-872.

[239] See Plaintiffs' Amended Motion for Summary Judgment, pages 11-17.

Of most significance is the general rule of equity and its direct application herein. The Defendants have expressly sought cancellation of the 1991 Release, which is an equitable proceeding. In order to seek equity, the Defendants must first do equity. This means that if Defendants seek cancellation of the release, they must restore the original status of the parties and cannot repudiate the release while at the same time retaining its benefits. The original status of the parties simply means that the Defendants must return the consideration paid to them in the prior litigation by the Plaintiffs. The fact that one of the parties has passed away and that the nature of the properties owned by the parties has changed has no bearing, as the key issue involves the ownership of the $2.5 million dollars.

It goes without saying that, as recognized by Judge Andell in a prior status conference in this case, "the Release has got to mean something". It would be unconscionable if the Defendants were allowed to retain $2,500,000 obtained in the prior litigation in exchange for their full release and bar to further claims, yet at the same time be allowed to ignore the Release and pursue further claims. This is contrary to the general rule of equity and fails to protect Plaintiffs in the declaratory judgment action. The credit theory is unsound and unworkable herein because it presumes (1) that Defendants will be successful in setting aside the 1991 Release and (2) the Defendants will recover damages in excess of $2.500,000 in any subsequent litigation. Both of these are uncertain. To allow Defendants to proceed in equity without clean hands and without first doing equity is improper and unconscionable, which is why restitution is a prerequisite to any cancellation of the 1991 Release.

VII.

DEFENDANTS HAVE RATIFIED THE 1991 RELEASE

In the Amended Motion for Summary Judgment, Plaintiffs further contend that Defendants have ratified the Release as a matter of law by retaining the benefits that they received under the release. Defendants respond nonsensically that retention of the previous benefits paid does not constitute ratification since restitution is not a condition precedent in this matter. This attempt to muddy the issue by discussing the doctrine of restitution in conjunction with the doctrine of ratification must fail, as the two concepts are distinct.

In their Response, Defendants summarily dismiss the holdings of *Rosenbaum, Spellman, and Guion*, cases relied upon by Plaintiffs in their Amended Motion for Summary Judgment. Defendants then state that ratification is a fact question and purport to cite the Texas Supreme Court case of *Guthrie v. National Homes Corp.* as support for this proposition. This is an erroneous statement of the law.

A. Defendants Misconstrue Determination of Ratification: Under Texas law, Ratification may be Determined as a Matter of Law if Unconverted

The *Guthrie* opinion states in dicta that "ratification is *ordinarily* a jury issue."[240] This is far from a precise and uniform rule of law. In fact, numerous cases state that, if evidence of ratification is uncontroverted or uncontrovertible, then the question of ratification may be determined as a matter

[240] *Guthrie v. National Homes Corp.*, 394 S.W.2d 494, 495 (Tex. 1985).

of law.[241] This proposition is also explicitly held in *Sawyer v. Pierce*,[242] cited by Defendants themselves in their response. *Sawyer* specifically states that "if the evidence of ratification is uncontroverted or uncontrovertible, then the question of ratification could be determined as a matter of law".[243] In fact, the *Sawyer* court rendered judgment in a cancellation transaction after determining the issue of ratification as a matter of law.[244] Thus, Defendants' blanket statement that ratification is a fact question is erroneous.

B. Defendants Misconstrue Plaintiffs' Statement of Ratification: Under Texas law, General Principle of Ratification Contemplates Fraudulent Inducement

Defendants further contend – again erroneously – that Plaintiffs *admit* that "ratification occurs when one induced by fraud to enter into a contract continues to expect 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 is binding and any retention of the beneficial part of the transaction affirms the contract and bars an action for rescission as a matter of law."[245] Defendants state that the quoted provision constitutes an admission by Plaintiffs that they fraudulently induced them into entering

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[241] *Rosenbaum v. Texas Building & Mortgage Co.*, 167 S.W.2d 506 (Tex. 1943); *Wise v. Pena*, 552 S.W.2d 196, 200 (Tex. Civ. App. – Corpus Christi 1977, writ dismissed w.o.j.).

[242] 580 S.W.2d 117, 124 (Tex. Civ. App. – Corpus Christi 1979 writ ref'd. n.r.e.).

[243] *Id., citing Rosenbaum*, 167 S.W.2d at 506.

[244] *Id.*

[245] Defendants' Response, page 13.

into the release on one hand and are now attempting to assert ratification due to retention of benefits by Defendants on the other hand.[246] This is absurd.

The quoted provision states the general principle of law with regard to ratification that is repeated in most discussions of ratification throughout Texas case law, including the *Sawyer* case cited by Defendants themselves. This general proposition of law, as stated by numerous courts, is as follows:

> Ratification occurs when one, induced by fraud to enter into a contract, continues to accept 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 is binding. Once the contract has been ratified by the defrauded party, the defrauded party waives any right to seek rescission.[247]

This same principle of law is recited verbatim in the *Johnson v. Smith* and *Spangler v. Jones* cases subsequently cited by Defendants in their Response (see below). It is merely a verbatim recitation of statement of law rather than any admission by Plaintiffs of a fraudulent inducement.

C. Defendants Have Ignored Clear Evidence of Ratification Supplied by Plaintiffs: Plaintiffs have met Burden of Proof as to Defendants' Ratification.

In their Response, Defendants assert that "at least two Texas courts have held that the burden is on the party relying on ratification as a defense to prove that the other party had knowledge of the fraud and to prove a voluntary, intentional choice to ratify the contract in light of that knowledge."

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[246] *Id.*

[247] *Sawyer*, 580 S.W.2d at 122; *Wise*, 552 S.W.2d at 199; *Rosenbaum*, 167 S.W.2d at 506; *Daniel v. Goesl*, 341 S.W.2d 892 (Tex. 1960).

Defendants cite *Spangler v. Jones* and *Johnson v. Smith* in this regard.[248] Defendants go on to say that Plaintiffs have not met their burden in this regard.[249]

While both the *Spangler* case and the *Johnson* case do appear to place the burden on the party relying on ratification as a defense, Defendants are clearly in error when they assert that Plaintiffs have not met this burden and have supplied no evidence of the Defendants' knowledge of any alleged fraud. The record is undisputed that Defendants have been aware of the basic nature of their allegations of fraud at least as early as January 2000, the date of the redacted affidavit that Defendants' counsel, Mr. Burgess, presented at the so-called settlement conference in July 2000.[250] Moreover, Defendants have made assertions to Plaintiffs of the existence of alleged fraud since July of 2000.[251] Whether of the veracity of these allegations, Defendants have been claiming (and thus must believe) that such allegations are true, yet from January 2000 until the present date (more than 20 months), Defendants have retained every penny of the $2,500,000 they had received in settlement in the Previous Litigation. Defendants even admit to this critical fact in their Response to Plaintiffs' Request for Admissions.[252]

Defendants also admit in their own pleadings that they have become aware of certain alleged facts that they believe to be fraud. In fact, Defendants state in their Response to Plaintiffs' Amended

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[248] Defendants' Response, page 13.

[249] *Id.* at page 14.

[250] See Exhibit "A" to Plaintiffs' Response to Defendants' Motion to Dismiss Plaintiffs' Petition for Declaratory Relief. Exhibit 3 to Defendants' Response.

[251] See Affidavits of Plaintiffs' Counsel attached to Plaintiffs' Original Petition filed herein.

[252] Defendants' Response to Plaintiffs' Request for Admissions, Exhibit "D" to Plaintiffs' Amended Motion for Summary Judgment.

Motion for Summary Judgment that "as soon as the Defendants had any knowledge that fraud had been committed against them..., defendants sought a meeting with plaintiffs...."[253] Defendants also state that since this lawsuit was commenced, Defendants have been "attempting to put together evidence to show this court the depth of the fraud that was committed..." on them.[254] Both of these statements clearly support the Defendants' belief for well over a year of the existence of fraud on the part of Plaintiffs.[255] Coupled with their admissions that they have retained the $2,500,000 previously paid to them, Defendants' statements and actions constitute ratification that is easily proved on the basis of admissions made by Defendants themselves.

The Defendants' retention since January 2000 of the previous benefits received is voluntary and intentional on their part, and their conduct in seeking to cancel the 1991 Release is clearly inconsistent with their retention of the monies paid in exchange for the Release. Defendants cannot assert that there has been no voluntary or intentional act on their part.

D. Defendants' Acts of Ratification are Uncontroverted, Establishing Ratification as a Matter of Law

Finally, Defendants argued that acts of ratification have been controverted by them, and they cite the affidavits filed by each of the Defendants. While it is true that ratification becomes a question for a jury when acts of ratification are controverted, this principle does not apply here because, despite their assertions, Defendants have in fact not controverted any acts of ratification by

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[253] Defendants' Response, page 14.

[254] *Id.*

[255] Here, Plaintiffs are admitting no fraud, only recounting what Defendants have said themselves. There is no competent evidence of such fraud. See Part I above.

their affidavits. Not only have the affidavits of Defendants been conclusively shown to be false and made in bad faith,[256] the affidavits are completely useless and fail to address (much less controvert) the ratification issue. The affidavits only discuss the , property that is alleged to have only recently been discovered and which was allegedly never previously disclosed to the Defendants (Big Lake, etc.). Not only do Defendants' affidavits not controvert the ratification issue, but at no point in any of the affidavits do the Defendants even raise any fact issue pertaining to the question of whether or not they have retained benefits under the 1991 Release.[257] Ratification is simply not addressed and, thus, not controverted.

Retention of benefits is the only issue with regard to ratification, as the general principle is that, if a person continues to receive benefits under a contract after he becomes aware of alleged fraud, he thereby affirms the contract and waives his right of rescission.[258] Any conduct inconsistent with an intention of avoiding a contract has the effect of waiving the right of rescission and constitutes ratification. As expressed by the Texas Supreme Court in the *Spellman* case, mental intent or reservation on the part of a party does not affect the determination of the question of ratification.[259] It is legally irrelevant whether a party intends to return the money, or even whether he disputes that he is required to return the money. Thus, as Defendants' state of mind has no

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[256] See Part I above.

[257] See Affidavits attached to Defendants' Response.

[258] *Rosenbaum*, 167 S.W.2d at 508; *Sawyer*, 580 S.W.2d at 122.

[259] *Spellman v. American Universal Inv. Co.*, 687 S.W.2d 27 (Tex. App. – Corpus Christi 1984, writ ref'd. n.r.e.).

bearing on the legal issue of ratification, it is Defendants' actions and admissions alone as set forth above that evidence their ratification of the 1991 Release.

E. Conclusion

Defendants' conduct is a classic example of ratification. Defendants have retained and continue to this day to retain the full benefit of the contract they now repudiate. That action alone is a clear and unmistakable act of ratification. Defendants received $2,500,000 in consideration for executing a full, final and complete release and, as of this date, Defendants have failed to return any of this money despite their attempts to cancel the 1991 Release. The failure of Defendants to return the money is uncontroverted (and is not even addressed) in any of the Defendants' affidavits and is, in fact, admitted by the Defendants in their responses to Plaintiffs' Request for Admission as well as in their pleadings. Thus, Defendants have clearly retained the benefits they received under the 1991 Release.

Texas law is clear that ratification occurs when a person who receives a benefit under a contract conducts himself in a manner inconsistent with any intention of avoiding that contract. In this case, Defendants have unquestionably and uncontrovertibly ratified the 1991 Release by their actions in retaining the benefits received under the Release, since such actions manifest confirmation of the validity of the release instrument under which the money was paid. Such confirmation of validity is inconsistent with the Defendants' allegations that the 1991 Release was procured by fraud and should be canceled. Defendants' conduct constitutes ratification of the 1991 Release. Texas law is also clear that, where such action is uncontroverted, as here, it is determined as a matter of law. Thus, as a matter of law, the 1991 Release bars any further claims by Defendants.

VIII.

RES JUDICATA BARS CLAIMS OF DEFENDANTS

Defendants are further barred from re-asserting their claims under the doctrine of *res judicata*, for two reasons: (1) this Court's entry of a partial summary judgment dismissing all claims against Nelda C. Stark, as Independent Executrix of the Estate of H. J. Lutcher Stark, Deceased, in the Previous Litigation, and (2) this Court's Order of Dismissal With Prejudice entered in the Previous Litigation pursuant to the compromise settlement agreement between the parties.

In their Response, the Defendants make several contentions that do not square with the law. First, Defendants assert that the Previous Litigation was not "actually litigated" and was not "actually adjudicated" and, because it was resolved by a compromise settlement agreement, *res judicata* does not apply.[260] Defendants claim that the doctrine of *res judicata* requires a final judgment "on the merits".[261] Second, Defendants claim that the parties in the current lawsuit are different. Defendants point out that Nelda C. Stark, who was among the defendants in the Previous Litigation, is not among the parties in the current litigation (for the simple reason that she is dead) and that Eunice Benckenstein, Roy Wingate, and Walter G. Riedel III were not parties to the Previous Litigation. Along the same line, Defendants point out that Homer Stark and his children, plaintiffs in the Previous Litigation, are not parties herein. Defendants even make the preposterous claim that the fact that Plaintiffs herein were defendants in the Previous Litigation somehow makes a difference.[262]

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[260] Defendants' Response, pages 39-40.

[261] *Id.* at page 40.

[262] *Id.* at page 41.

A. A Judgment by Agreement Entered Pursuant to a Settlement is Res Judicata to All Issues Raised in the Previous Litigation.

The doctrine of *res judicata* states that all questions of law and fact determined by a court of competent jurisdiction are conclusively settled by the final judgment or decree in that proceeding, so that those questions cannot be further litigated in a subsequent suit between the same parties *or their privies*.[263] The public policy behind the doctrine of *res judicata* reflects the need to: (1) bring all litigation to an end, (2) protect parties from multiple law suits, (3) prevent double recovery, (4) promote judicial economy, (5) promote judicial efficiency, (6) preserve the sanctity of judgment, (7)maintain the stability of court decisions, and (8) prevent vexatious litigation.[264]

The doctrine of *res judicata* is founded on the fundamental doctrine and public policy that, a matter should be concluded once the claims of parties have been determined by the ultimate tribunal provided by law and should not be litigated again as between the same parties or those in privity with them.[265] As stated by the Texas Supreme Court, it is recognized that there must be an end to litigation at some point, because "[w]ithout finality of judgments, litigants might face harassment by contentious adversaries and courts might generate inconsistent dispositions of the same dispute, causing confusion and wasting judicial time."[266]

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[263] *Hammonds v. Holmes*, 559 S.W.2d 345, 346 (Tex.1977).

[264] *See* 48 Tex. Jur. 3d *Judgments* § 388 *et seq.*

[265] *Wilson v. Henwood*, 337 S.W.2d 194, 197 (Tex. Civ. App.-- Amarillo 1960, writ ref'd n.r.e.).

[266] *Hammonds*, 559 S.W.2d at 346, *citing* Steakley and Howell, Ruminations on Res Judicata, 28 Sw.L.J. 355 (1974).

Defendants obviously do not grasp this important concept. They would bring lawsuit after lawsuit, all on the same worn-out, 60-year old issues, in a desperate hope that Nelda C. Stark and her successors would continue to pay them ransom for the rest of their lives to go away one more time. *Res judicata* is a doctrine invoked to preclude for this type of claimant and this type of lawsuit.

It is true that, in order to invoke the operation of *res judicata*, there must be a final judgment that settles all rights between the parties, and there is case law to the effect that such judgment must have been rendered "on the merits" of the controversy.[267] This is the phrase seized on by the Defendants in their Response, and they attempt to couch the phrase "on the merits" as requiring a full-blown bench trial or jury trial. This is a blatant misstatement of the law.

What does constitute a judgment? A judgment is the consideration and determination by a court of competent jurisdiction on matters submitted to it in an action or proceeding.[268] A judgment may be entered by agreement or stipulation of the parties.[269] A consent judgment may be reflected by actual consent of the parties,[270] or it may be reflected by an attorney who is properly authorized to consent to a judgment.[271] A consent or agreed judgment is contractual in nature and, in effect, is a written agreement between the parties as well as an adjudication.[272]

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[267] *Cooper v. Cooper*, 168 S.W.2d 686, 689 (Tex. Civ. App.-- Galveston 1943, no writ).

[268] *Southwestern Bell Telephone Company v. Griffith*, 575 S.W.2d 92, 96 (Tex. Civ. App.-- Corpus Christi 1978, writ ref'd n.r.e.).

[269] *Reppert v. Beasley*, 943 S.W.2d 172 (Tex. App.-- San Antonio 1997, no writ).

[270] *Quintero v. Jim Walter Homes, Inc.*, 654 S.W.2d 442, 444 (Tex. 1983).

[271] *Reppert*, 943 S.W.2d at 174.

[272] *Wagner v. Warnasch*, 295 S.W.2d 890, 893 (Tex. 1956).

Although a consent judgment is contractual in nature, it is more that a contract; it constitutes a final judgment on the merits.[273] **As a result, it has the same degree of finality and binding force as a judgment render at the conclusion of an adversarial proceeding.**[274]

Thus, a consent judgment is as conclusive as any other judgment, including a judgment from bench trial or jury trial, as to matters adjudicated, and it stands as a final disposition of a cause unless set aside in a manner prescribed by law. An agreed judgment with prejudice is both a judgment and a contract, and the pleadings of that case are not open to review in a subsequent proceeding to re-determine issues that were resolved by such final judgment.[275]

Other courts have also held that a judgment of dismissal is a final judgment, and that such judgment terminates a lawsuit unless and until that judgment is properly set aside.[276] Additionally, an order dismissing a suit may be construed as a dismissal of all causes of action in the suit.[277] Most

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[273] *Neller v. Kirschke*, 922 S.W.2d 182, 185 (Tex. App.-- Houston [1st Dist.] 1995, writ denied), *citing Bell v. Moores*, 832 S.W.2d 749, 754 (Tex. App.– Houston [14th Dist.] 1992, writ denied).

[274] *Id.* (declaring that "[a]n agreed judgment has the same binding force and effect as a judgment resulting from trial to the bench or a jury...."); *Liberty Mutual Fire Ins. Fire Co., v, Crane*, 898 S.W.2d 944, 948 (Tex. App. -- Beaumont 1995, no writ); *Nielson v. Ford Motor Co.*, 612 S.W.2d 209, 211 (Tex. Civ. App.-- San Antonio 1980, writ ref'd n.r.e.).

[275] *Texas & N.O.R. Co. v. Barnhouse*, 293 S.W.2d 261, 266 (Tex Civ. App.-- San Antonio 1956, writ ref'd n.r.e.).

[276] *Wynn v. Epps*, 456 S.W.2d 562, 564 (Tex. Civ. App.-- Tyler 1970, writ dismissed); *Witty v. Rose*, 148 S.W.2d 962 (Tex. Civ. App.-- El Paso 1941, writ dismissed).

[277] *Ley v. Ley*, 62 S.W.2d 503, 504 (Tex. Civ. App.-- Galveston 1933, writ dismissed).

significantly, the rule that a judgment of dismissal is final **applies where the dismissal is entered by agreement of parties pursuant to a compromise settlement of an action.**[278]

A judgment by agreement is *res judicata* in a subsequent suit and is as conclusive as a judgment rendered after a contest.[279] Moreover, a judgment made under a compromise settlement agreement is *res judicata* on every provision authorized by the agreement over which the court had jurisdiction.[280] A dismissal with prejudice has the same effect as a take-nothing judgment and may be asserted as a bar to a subsequent action on the same claim.[281] Further, a judgment of dismissal entered by agreement of the parties pursuant to a compromise or settlement of a controversy becomes a judgment "on the merits" and, if the dismissal is with prejudice, res judicata applies and bars another action for the same cause of action.[282]

In the Previous Litigation, the 1991 Release signed by the plaintiffs therein (Defendants herein) expressly stated the agreement of the parties that an order for dismissal with prejudice would be entered with the court as part of the settlement agreement. The 1991 Release also set forth in detail the determination of the parties as to fact of a settlement and the terms of the compromise

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[278] *Lubbock Mfg. Co. v. Int'l Harvester Co.*, 584 S.W.2d 908 (Tex. Civ. App.-- Dallas 1979, writ ref'd n.r.e.) (holding that, as a general rule, "...a judgment of dismissal entered by agreement of the parties pursuant to a compromise or settlement of a suit becomes a judgment on the merits and constitutes a final judgment); *citing Stephenson v. Gaines*, 298 S.W. 401 (Tex. Comm'n App. 1927, holding approved).

[279] *Pollard v. Steffens*, 343 S.W.2d 234, 239 (Tex. 1961); *Wagner*, 295 S.W.2d at 893; *Sawyer v. Smith*, 552 S.W.2d 936, 940 (Tex. Civ. App.-- Waco 1977, writ ref'd n.r.e.) (emphasis added).

[280] *Brown v. Wood*, 239 S.W.2d 195, 199 (Tex. Civ. App.-- Dallas 1951, writ ref'd n.r.e.); See also 48 Tex. Jur. 3d *Judgments* §399 *et. seq.*

[281] *Republic Royalty Co. v. Evins*, 931 S.W.2d 338, 343 (Tex. Civ. App.– Corpus Christi 1996, rehearing denied); *McConnell v. Attorney General of Texas*, 878 S.W.2d 281, 283 (Tex. App. – Corpus Christi 1994, no writ) (emphasis added).

[282] *Bell*, 832 S.W.2d at 754; *Murray v. Murray*, 611 S.W.2d 172, 174 (Tex. Civ. App.-- El Paso 1981, no writ).

agreed to by the parties, including the payment of valuable consideration to Defendants.[283] Therefore, the Previous Litigation involved a definite compromise and settlement for which a full release was executed by Defendants and by which Defendants were paid $2.5 million.

Furthermore, pursuant to the express terms of the compromise settlement agreement entered by the parties, this Court entered an "Order of Dismissal With Prejudice" that expressly stated that the plaintiffs therein (Defendants herein) "...advised the Court that this litigation has been the subject of a compromise settlement agreement, that full consideration had been received, and that their action should be dismissed with prejudice against re-filing, and the Court acting upon said Motion and representations of the Plaintiffs does hereby ORDER, ADJUDGE, AND DECREE:" that all claims, demands and actions of the plaintiffs in the Previous Litigation (Defendants herein) against the defendants in the Previous Litigation (Plaintiffs herein) "...are dismissed with prejudice against re-filing."[284] This Order of Dismissal was signed by all of the attorneys for all of the parties to the prior litigation, including the attorney for Defendants, as plaintiffs therein, indicating the agreement to the entry of the judgment of dismissal. As stated above, an attorney may consent to a judgment, and this is reflected on the Order itself in the Previous Litigation. In addition, the actual consent of Defendants to the judgment of dismissal is reflected in the 1991 Release signed by them.

Texas courts have clearly held that a dismissal is a final judgment and this rule applies even where the dismissal is entered by agreement of the parties pursuant to a compromise settlement

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[283] *See* Full, Final and Complete Release from Previous Litigation, attached as Exhibit "B" to Plaintiffs' Amended Motion for Summary Judgment.

[284] *See* Order of Dismissal With Prejudice from Previous Litigation attached as Exhibit "C" to Plaintiffs' Amended Motion For Summary Judgment.

agreement. Therefore, notwithstanding the fact that there was neither a bench trial nor a jury trial in the Previous Litigation, this Court's Order of Dismissal nevertheless constituted a judgment "on the merits" as it determined the rights and liabilities of the parties thereto. Such Order of Dismissal With Prejudice, therefore, must be accorded *res judicata.*

B. The Current Action Involves Essentially the Same Parties as the Previous Litigation.

There is no question that the allegations raised in Defendants' current pleadings are the same allegations raised and disposed of in the Previous Litigation.[285] The Defendants, however, assert that the parties are different in the current litigation than they were in the Previous Litigation.

It is true that individuals are generally not bound by a judgment in a suit which they were not parties. However, as stated in the Texas Supreme Court's decision in *Amstadt v. U. S. Brass Corp.*, (a case relied upon by Defendants), the doctrine of *res judicata* creates an exception to this rule by forbidding a second suit arising out of the same subject matter of an earlier suit by those in privity with the parties to the original suit.[286] Thus, the conclusive effect of prior judgments extends beyond the exact parties named in the suit and applies to the privies of those parties.

The concept of privity expresses the idea that, as to certain matters, persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action as if they were parties. A person who is not a party but who is in privity with the parties in an action terminating in a valid judgment is bound by the rules

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[285] See Part II A. above.

[286] *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644 (Tex. 1996).

of res judicata.[287] A privy, within the meaning of the doctrine of *res judicata*, includes one whose interest is derived from a party bound by a judgment through a transfer made after the suit commenced in which the judgment was rendered.[288] The Texas Supreme Court has defined the word "privy" as including those persons who are successors in interest.[289]

Of course, in the matter at bar, the Co-Executors of the Estate of Nelda C. Stark are the privies of Nelda C. Stark, individually, from the Previous Litigation, since they are her successors in interest as representatives of her estate. The same holds true for Eunice Benckenstein, the successor executor for the estate of H. J. Lutcher Stark.

The mere fact that, only a few months ago, Defendants added Roy Wingate, Walter G. Riedel III, and Eunice R. Benckenstein, individually, as counter-defendants herein is of no consequent. Even though these individuals were not parties to the Previous Litigation and even though they are not successors in interest to Nelda C. Stark in their individual capacities, there is no basis for the claims against them individually, and Defendants cannot avoid the effect of *res judicata* by adding parties for whom claims are baseless, simply in an effort to side-step the application of the doctrine.

Moreover, the doctrine of virtual representation would apply. Even though they were not parties to the Previous Litigation, the individual counter-defendants are nevertheless bound by the

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[287] *See Avila v. St. Luke's Lutheran Hospital*, 948 S.W.2d 841, 851-52 (Tex. Civ. App.–San Antonio 1997, writ denied), *citing* Restatement of Judgments, Section 83 (1942).

[288] 48 Tex. Jur. 3d *Judgment* §524.

[289] *Getty Oil Co. v. Insurance Co. of N. Am.*, 845 S.W.2d 794, 798 (Tex. 1992).

prior judgment on the theory that their interests were sufficiently represented by persons who were parties. Further, they are clearly parties covered by the language of the 1991 Release.[290]

It is further irrelevant that Plaintiffs have not joined Homer Stark and his children as additional defendants in this litigation. Although Homer Stark and his children were additional plaintiffs in this Previous Litigation, they are not necessary parties to the current litigation.[291]

C. The Partial Summary Judgment Entered in the Previous Litigation is Res Judicata Against All Claims Made Against Nelda C. Stark or Her Successors.

It has been conclusively held that a summary judgment is a judgment on the merits and must be accorded *res judicata* effect.[292] The *res judicata* effect of a summary judgment is also upheld in the *Jones* decision cited by Plaintiffs in their Amended Motion for Summary Judgment.[293]

Consequently, Partial Summary Judgment that was granted in favor of Nelda C. Stark, as independent executor of the Estate of H.J. Lutcher Stark, Deceased, in the Previous Litigation, is a judgment on the merits and, with the application of res judicata, it serves to bar any the same claims by the same parties against Eunice R. Benckenstein, successor executor to the Estate of H.J. Lutcher Stark, Deceased, as privy to Nelda C. Stark in such capacity.

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[290] See Exhibit "B" to Plaintiffs' Amended Motion for Summary Judgment, Section 1, which defines "Parties Released" expansively to include "any individual . . . or other entity alleged now or in the past or in the future to be owners or possessors of or participants in any transactions involving any property alleged to have properly belonged to. but withheld from or misappropriated in the Estate of Nita Hill Stark, Deceased."

[291] Tex.Civ.Prac.Rem.Code §37.006(a); *Lede v. Aycock*, 630 S.W.2d 669 (Tex. App.–Houston [14th Dist.] 1981, no writ).

[292] *Fernandez v. Memorial Healthcare System, Inc.*, 896 S.W.2d 227 (Tex. App.-- Houston [1st Dist.] writ denied).

[293] *Jones v. Jones*, 888 S.W.2d 849 (Tex. App.–Houston [1st Dist.] 1994, writ denied); See full discussion in Plaintiffs' Amended Motion for Summary Judgment, pages 25-27.

IX.

DECLARATORY RELIEF IS PROPER IN THIS CASE

Plaintiffs have filed this declaratory judgment action for the purpose of obtaining a finding by this Court that the 1991 Release is valid and binding on Defendants. The filing of this action was necessitated by the threats made by Defendants' counsel at a meeting a few days prior to the filing of Plaintiff's Original Petition herein, during which meeting Mr. Burgess repudiated the Release and stated unequivocally that it would not protect the Plaintiffs from any action in Louisiana for the alleged concealment of assets during the Previous Litigation, despite clear language to the contrary in the 1991 Release.[294] There is no question that a justiciable dispute exists between the parties over the scope and effect of the 1991 Release. While continuing to deny such in their words,[295] Defendants have all but admitted this point by their actions, including the counterclaims they have filed alleging that the 1991 Release is vitiated by fraud.

The Texas Uniform Declaratory Judgments Act[296] is the proper method by which the validity and binding effect of a written contract between two parties, including a release, and the rights of the parties thereunder, are to be adjudicated.[297] Contrary to the assertions made by Defendants on pages 9-10 of their Response, Plaintiffs' declaratory action is not a mere attempt to establish non-liability in a tort case. By merely stating that they have asserted counterclaims in tort against

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[294]See Affidavits of Plaintiffs Counsel, attached at Exhibit "A" to Plaintiffs' Response to Defendants' Motion to Dismiss Plaintiffs' Petition for Declaratory Judgment, Defendants' Response, Exhibit 3.

[295]See Defendants' Amended Motion to Dismiss, filed herein.

[296]TEX. CIV. PRAC. & REM. CODE ANN. § 37.001 *et seq.*

[297]*Id.* at § 37.004.

Plaintiffs, Defendants cannot change the fact that the subject of Plaintiffs' Original Petition and Plaintiffs' Amended Motion for Summary Judgment is the construction of a contract and its legal effect on the parties.

Defendants' argument is a mere attempt to divert the Court by intentionally mischaracterizing Plaintiffs' action, which seeks a proper construction of and declaration of the validity of a written instrument pursuant to Section 37.004 of the Texas Civil Practice and Remedies Code. The written instrument at issue was previously signed by the plaintiffs in the Previous Litigation and, in that instrument, the Defendants herein (plaintiffs in the prior litigation) already bargained for and agreed to future non-liability. Plaintiffs are merely seeking to enforce and validate the terms of that written instrument.

Even if Defendants accurately characterized Plaintiffs' lawsuit as a declaration of nonliability, there is no authority to support Defendants' legal position. Indeed, the Texas Supreme Court has indirectly approved of such use of a declaratory judgment proceeding in the case of *Republic Ins. Co. v. Davis*.[298] In that case, a reinsurer filed a declaratory judgment action seeking the declaration of its obligations with respect to reinsurance proceeds, a declaration that it owed no duties to certain plaintiffs, and an injunction that would prohibit the same parties from filing a lawsuit to recover the reinsurance proceeds. The Texas Supreme Court recognized that, through its declaratory judgment action, the plaintiff sought relief that was in reality defensive in nature and confirmed that such defensive use is permissible.[299] Moreover, the dissent in *Republic* cited the *Abor*

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[298] 856 S.W.2d 158 (Tex. 1993).

[299] *Id.* at 164.

v. Black case cited by Defendants in their Response, and the dissent recognized that the majority in *Republic Ins. Co.* was allowing the use of the declaratory judgment action as a strike on the defendants' grounds for liability. The cases relied on by Defendants in their Response, *Abor v. Davis* and *Amaro v. Texas State Bank*, are clearly distinguishable on their facts and do not support a contrary result.[300]

CONCLUSION

For all of the reasons stated above, entry of summary judgment against all causes of action raised by Defendants in their Amended Counterclaim may properly be made as a matter of law.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that the Court grant their Amended Motion for Summary Judgment against Defendants and award Plaintiffs such other and further relief to which Plaintiffs show themselves entitled to receive.

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[300] In *Abor v. Black*, 695 S.W.2d 564 (Tex. 1985), a hospital sued a potential personal injury plaintiff for a declaration of non-liability for an incident at the hospital. In *Amaro v Texas State Bank*, 28 S.W.3d 789 (Tex. App. - Corpus Christi 2000, pet. granted), a trustee brought a statutory action under the Texas Trust Code for termination of a "Section 142 Trust," and among other things requested a declaration of non-liability to the trust beneficiary for its handling of administration of the trust. Neither case involved construction of a release or the settlement of prior litigation between the parties.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing was forwarded to all counsel of record on this the 4th day of OCTOBER, 2001 by certified mail, return receipt requested according to Texas Rules of Civil Procedure.

Kurt M. Andreason