

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CANDACE LOUISE CURTIS
Plaintiff,

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§

Civil Action No. 4:12-cv-00592

v

The Honorable Kenneth Hoyt

ANITA KAY BRUNSTING, et al
Defendants

Opposed Motion

Curtis, et al
Plaintiffs

§
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§
§
§
§
§

Civil Action No. 4:16-cv-01969

v

The Honorable Alfred Bennett

Kunz-Freed, et al
Defendants

Rule 42(a) Courtesy Copy

PLAINTIFF’S MOTION FOR CONSOLIDATION OF RELATED CASES PURSUANT TO 28 U.S.C. §1367, RULE 42(A) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND LOCAL RULE 7.6 WITH SUPPORTING MEMORANDUM

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1. Above named Plaintiff respectfully moves this Court to order consolidation of the following cases pursuant to 28 U.S.C. §1367, Rule 42(a) of the Federal Rules of Civil Procedure and Local Rule 7.6:

a. Candace Louise Curtis v. Anita Kay Brunsting and Amy Ruth Brunsting, Civil Action No. 4:12-CV-00592 (TXSD Filed 2/27/2012) currently pending before the Honorable Kenneth Hoyt, and

b. Civil Action No. 4:16-cv-01969 currently pending before the Honorable Alfred H. Bennett (TXSD filed 7/5/2016)

2. Plaintiff moves for consolidation of pre-trial proceedings and trial, but not consolidation for the purposes of judgment and appeal. The two cases are appropriate for consolidation for the following reasons:

3. The two cases share common parties. Candace Curtis is a Plaintiff in both federal suits and Amy and Anita Brunsting are Defendants in both suits.

4. The later suit is the cumulative product of events occurring in the course of litigating the earlier matter and although the remedies requested and the jurisdictions upon which the authorities of the Court have been invoked are divergent, all the facts flow from common acts and events.

5. The two cases involve common questions of law and fact because both arise from the same factual situation; namely, the rupture and looting of the Brunsting family of trusts and injuries resulting from the Defendants' efforts to evade accountability; and thus the two cases also involve common questions of law.

6. Through a series of awkward circumstances, the earlier diversity matter was remanded to Harris County Probate Court No. 4. The probate court experience produced evidence of a sinister design, resulting in the necessity for Plaintiff to again seek remedy in this Court and, thus, Plaintiff filed a separate action into the Southern District of Texas, Case No. 4:16-cv-01969, in

concert with Federal Rule of Civil Procedure Rule 11(b) motion for sanctions and with Federal Rule of Civil Procedure 60(b) and (d) motion for vacatur in the above titled Court.

7. While the earlier suit was a simple breach of fiduciary seeking disclosures and accounting, the later filed case is a Racketeer Influenced Corrupt Organization (RICO) suit brought under federal question jurisdiction, implicating the Probate Court's officers' participation in the conduct of an enterprise through a pattern of racketeering activity.

8. Judicial convenience and economy will be enhanced by consolidation of the actions.

9. Consolidation will result in one trial under one judge, which will bind all plaintiffs and defendants for all purposes. This will save time and avoid unnecessary costs to the Defendants, to the Plaintiffs in both actions, and to the witnesses who would otherwise be required to testify in two cases.

10. Consolidation will not delay final disposition of any matter.

11. Consolidation of these two cases will promote the uniformity of decision and eliminate any potential for conflicting rulings, provide for judicial economy and the convenience of witnesses and parties, and will promote the expeditious disposal of all matters.

HISTORY AND NATURE OF THE PROCEEDINGS

12. Plaintiff Candace Louise Curtis (Curtis) lives in California and is a beneficiary of inter vivos trusts having a situs in Houston, Texas. Other beneficiaries of the trusts include Plaintiff Curtis' siblings: Carl, Carole, Amy and Anita Brunsting, and also includes the remaindermen grandchildren and great grandchildren of Grantors Elmer and Nelva Brunsting et al, per stirpes.

13. Plaintiff Candace Curtis filed a Pro se Petition in the United States District Court for the Southern District of Texas, Houston Division, on February 27, 2012, claiming breach of fiduciary, seeking disclosures and a full, true, complete accounting.¹

14. Plaintiff Curtis complaint was dismissed under the probate exception to federal diversity jurisdiction and Curtis appealed. The Fifth Circuit reversed and Ordered remand on January 9, 2013.

15. On January 29, 2013, attorney Bobbie Bayless filed suit against Nelva Brunsting's trust attorneys, Candace Kunz-Freed, Albert Vacek Jr. and Vacek & Freed P.L.L.C., in the Harris County District Court on behalf of Carl Brunsting as executor of the estate of Nelva Brunsting² raising claims only related to the Brunsting trusts then in the custody of a federal court.

16. On April 9, 2013, this Honorable Court issued an Order enjoining Defendants Amy and Anita Brunsting from spending trust funds or liquidating trust assets without the Court's prior approval.

17. Also on April 9, 2013, Bobbie Bayless filed suit in Harris County Probate Court No. 4, on behalf of Carl Brunsting individually (412249-401) and as executor of the estate of Nelva Brunsting (412249) naming federal Plaintiff Curtis a "Nominal Defendant" in both suits.

18. Not only did Bayless advance claims exclusively related to the trusts already in the custody of the federal Court, she claimed the breaches of fiduciary against the beneficiaries of the Brunsting trusts were claims belonging to the estate of Nelva Brunsting. That theory was disposed of in the Fifth Circuit in *Curtis v Brunsting* 710 F.3d 406. The "Trust(s)" is the only heir in fact to the estate and assets in the trusts are not property of the estate of Nelva Brunsting.

¹ No. 4:12-CV-00592; Candace Louise Curtis v. Anita Kay Brunsting; USDC for the Southern District of Texas, Houston Division

² No. 2013-05455; Carl Henry Brunsting as Executor of the Estate of Nelva Brunsting v. Candace Freed and Vacek & Freed P.L.L.C.; 164TH Judicial District Court of Harris County, Texas.

19. At paragraph 1, page 2 of *Curtis v Brunsting* 710 F.3d 406:

In 1996, Elmer H. and Nelva E. Brunsting, Texas residents, established the Brunsting Family Living Trust (“the Trust”) for the benefit of their offspring. At the time of its creation, the Trust was funded with various assets. Both the will of Mr. Brunsting and the will of Mrs. Brunsting (collectively “the Brunstings’ Wills”) appear to include pour-over provisions, providing that all property in each estate is devised and bequeathed to the Trust. Elmer H. Brunsting passed away on April 1, 2009, and Nelva E. Brunsting passed away on November 11, 2011. The current dispute arises out of the administration of the Trust.

20. Under the wills Carl Brunsting has no standing to bring claims against trustees as heir or executor of an estate. He only has standing to bring claims individually as a trustee or beneficiary of the trust and that trust was in the custody of the federal court.

21. In *Curtis v Brunsting* the Fifth Circuit explained the doctrine of comity by citing to the Supreme Court’s clarification of the “distinctly limited scope” of the probate exception,³ explaining:

[W]e comprehend the ‘interference’ language in Markham as essentially a reiteration of the guiding principle that, when one court is exercising in rem jurisdiction over a res, a second court will not assume in rem jurisdiction over the same res. Thus, the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent’s estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.⁴

22. In or about November of 2013, Pro se Plaintiff Curtis retained the services of Houston Attorney Jason Ostrom. On May 15, 2014, Attorney Jason Ostrom caused this Honorable Court to issue an Order for Remand of *Curtis v Brunsting* to the custody of Harris County Probate Court No. 4 (412,249-402) for consolidation with the claims of Carl Brunsting (412,249-401).

³ *Marshall v Marshall* 546 U.S. 293, 310

⁴ *Marshall v Marshall* 546 U.S. 293, 311–12

23. On July 5, 2016, Plaintiff Curtis, along with her domestic partner Rik Munson, both individually and as private attorneys general on behalf of the public trust, filed a RICO suit into the United States District Court for the Southern District of Texas, Houston Division (No. 4:16-cv-01969), accusing the Harris County Probate Court and its officers of public corruption conspiracies involving schemes and artifices to deprive Plaintiff Curtis, the People of Texas, and others, of the honest services of an elected public official.

24. The record will show the Probate Court has refused to resolve any substantive matter on the merits and the reason is clearly that no court can assume in rem jurisdiction over a res in the custody of another court. Thus, the probate court never had jurisdiction over the Brunsting trust, which renders the Order for remand to the state probate court void ab initio.

25. Rather than dismiss and return Curtis v Brunsting to the federal court, the RICO Defendants chose a less honorable course, forcing Plaintiff Curtis to respond accordingly.

26. On August 3, 2016, Plaintiff Curtis filed a F.R.C.P. Rule 11(b) motion for sanctions and F.R.C.P. Rule 60(b) and (d) motions for vacatur of the remand to state court, on the ground that the remand was obtained by fraud upon Plaintiff Curtis and upon the Court, thus vitiating the application to amend the original petition that facilitated the remand in the first instance.

27. Plaintiffs respectfully request this Honorable Court take Judicial Notice of the complaint, motions to dismiss and Plaintiffs' replies in the closely related proceedings pursuant to Federal Rules of evidence §201.⁵

STAGE OF THE PROCEEDINGS

28. The RICO suit is in the opening phase and the initial conference is set for October 28, 2016 at 9:00 a.m. before the Honorable Alfred Bennett.

⁵ Case 4:16-cv-01969 TXSD Motions to dismiss Dkt 19, 20, 23, 25 and replies Dkt 33, 34, and 41

29. The earlier breach of fiduciary matter, Candace Curtis v. Anita and Amy Brunsting 4:12-cv-00592, is ripe for F.R.C.P. Rule 12(c) relief on the unresolved summary and declaratory judgment pleadings. Those motions have not been answered and the probate court refused to set the motions for hearing. A proper determination on the merits of those unresolved motions will be necessary to support the racketeering conspiracy and predicate act claims arising under the later filed RICO suit.

30. Plaintiff hereby incorporates by reference the Rule 11⁶ and 60⁷ motions referred to in item 18 supra, and the federal civil RICO complaint referred to in item 17 supra, as if fully restated herein, and further asks this Honorable Court to take Judicial notice of the relevant public records.

MEMORANDUM IN SUPPORT OF RULE 42(A) MOTION

31. Above named Plaintiff has moved this Court, pursuant to Rule 42(a) of the Federal Rules of Civil Procedure, to consolidate the following cases: Candace Louise Curtis v. Anita Kay Brunsting and Amy Ruth Brunsting, No. 4:12-CV-00592 (TXSD Filed 2/27/2012) and Curtis, et al. v Kunz-Freed, et al, No. 4:16-cv-01969 (TXSD Filed 07/05/16).

32. Plaintiffs' motion requests consolidation for the limited purposes of pre-trial proceedings and trial only, it does not request consolidation for the purposes of judgment or rights to appeal.

33. Rule 42(a) of the Federal Rules of Civil procedure provides:

Rule 42. Consolidation; separate trials.

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it

⁶ Case 4:12-cv-00592 Document 120 Filed in TXSD on 08/05/16

⁷ Case 4:12-cv-00592 Document 115 Filed in TXSD on 08/03/16

may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

34. The purpose of Rule 42(a) "is to give the court broad discretion to decide how cases on its docket are to be tried so that the business of the court may be dispatched with expedition and economy while providing justice to the parties." *Wright & A. Miller, Federal Practice and Procedure*, § 2381 (1971).

35. Local Rule 7.6 and Federal Rule of Civil Procedure 42(a) requires the motion be filed in the earlier Court and the above Court is the earlier Court. However, Federal Rule of Civil Procedure 42(b) prevents consolidation, when doing so would pollute diversity and deprive the Court of jurisdiction.

36. The earlier matter was filed under diversity with the allegation that Defendants were acting in secret and were uniquely in exclusive possession of all of the information relating to the case.

37. Plaintiff Curtis submitted a First Amended Complaint in the above Court on April 29, 2013, seeking to amend the claim to federal question jurisdiction based upon newly discovered evidence involving fraudulent securities transfers. That amendment was properly rejected by the Court due to Plaintiff's failure to provide a certificate of conference as required by local rule.

BOTH ACTIONS INVOLVE COMMON QUESTIONS OF LAW AND FACT

38. Rule 42(a) permits a district court to consolidate separate actions when they involve "a common question of law or fact." Fed.R.Civ.P. 42(a).

39. Even if there are some questions that are not common, consolidation is not precluded. *Batazzi v. Petroleum Helicopters, Inc.*, 664 F.2d 49, 50 (5th Cir. 1981); *See Central Motor Co. v. United States*, 583 F.2d 470 (10th Cir. 1978).

40. Common questions of law and fact abound in these cases, as both stem from the same (long con) conspiracy and the later controversy is based upon evidence evolving out of Defendants' continued attempts to foreclose remedy in the trust suit case, aided and abetted by the state court and its officers.

41. It was the process of seeking remedy and Defendants' continued efforts to obstruct justice and evade accountability, that has produced a clear picture of a larger mosaic involving a pattern of racketeering activity targeting familial wealth.

42. Although the lawsuits were filed at separate times and in separate forums, and although multiple actions were improperly brought in state courts, all of it is, in fact, only one continuous event and therefore, it necessarily follows that the matter is particularly appropriate for consolidation.

A COURT HAS BROAD DISCRETION IN ORDERING CONSOLIDATION

43. A court has broad discretion in determining whether consolidation is practical. *Atlantic States Legal Foundation Inc. v. Koch Refining Co.*, 681 F. Supp 609, 615 (D. Minn. 1988). In exercising this discretion, a court should weigh the time and effort consolidation would save, with any inconvenience or delay it would cause. *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1495 (11th Cir. 1985); *Huene v. United States*, 743 F.2d 703, 704 (9th Cir. 1984). See also *Kramer v. Boeing Co.*, 134 F.R.D. 256 (D. Minn. 1991).

44. Consolidation offers efficiency and convenience in this case. Consolidation will result in one trial which will bind all plaintiffs and defendants. This will save time and avoid unnecessary costs to the defendants, the plaintiffs, this Court, and the witnesses who would otherwise be required to testify in both cases.

45. Consolidation will not delay the disposition of this case. In fact, it will minimize delays. The cases are at different stages of the discovery process, but this does not bar consolidation. (*United States v. City of Chicago*, 385 F. Supp. 540, 543 (N.D. Ill. 1974).

46. The earlier case was filed under diversity, but evidence discovered in the course of pursuing remedy has produced racketeer influenced corrupt organization claims under federal question jurisdiction and the record will show No. 4:12-cv-00592 has been brought back to the federal court in direct response to the probate court's unwillingness to ensure Plaintiff's right to be heard and blatant refusal to resolve any matter on the merits.

47. Consolidation is necessary to the ends of justice and for complete resolution of all matters for all parties and, whereas, the rules will not allow all of the related cases and necessary parties to be consolidated under diversity jurisdiction, all of the related cases and necessary parties can and should be consolidated under federal question jurisdiction pursuant to 28 U.S.C. §1367.

48. Thus, whether the economy and efficiency of the Court will best be served by transferring the federal question suit to this Honorable Court or by transferring the diversity case to Judge Bennett's Honorable Court, Plaintiffs' do not presume to suggest, but do believe that justice can only be served by consolidation of all related matters under one roof for all purposes.

CONCLUSION

49. Jurisdiction of the probate court at the point in time when its jurisdiction was invoked, is a proper subject of inquiry under Rule 60. "Courts can always consider questions as to subject matter jurisdiction whenever raised and even sua sponte." *U.S. v. White*, 139 F.3d 998 cert den 119 S.Ct 343, 525 U.S. 393, 142 L.Ed.2d 283 (1998).

50. The remand Order is void ab initio for want of jurisdiction in the state court. Want of, and acts excess of, subject matter jurisdiction can never be cured after the fact. Furthermore,

Plaintiff Curtis was named a nominal defendant in the estates probate suit and simply cannot be consolidated with a plaintiff that has named her a defendant in the same lawsuit.

STANDARD OF REVIEW

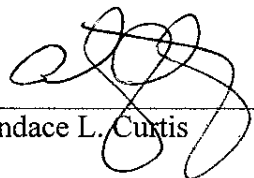
51. Rule 60(b) motions are reviewed for abuse of discretion. *American Bankers Ins. Co. v. Northwestern Nat'l Ins. Co.*, 198 F.3d 1332, 1338 (11th Cir. 1999); *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1316 (11th Cir. 2000).

52. However, motions under Rule 60(b)(4), on the ground that a judgment is void are reviewed de novo. *Burke v. Smith*, 252 F.3d 1260,1263 (11th Cir. 2001).

WHEREFORE, Petitioner respectfully requests the motion for consolidation be granted.

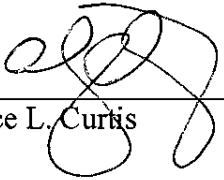
Respectfully submitted,

October 5, 2016


Candace L. Curtis

CERTIFICATE OF CONFERENCE

I certify that I have communicated with Defendants and they are opposed to the relief requested herein.



Candace L. Curtis

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on this 5th day of October, 2016, on the following via email and deposit in USPS Priority Mail:

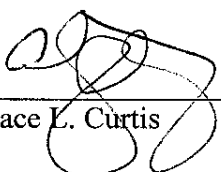
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Attorney for Anita Brunsting

I hereby certify that a true and correct courtesy copy of the foregoing was filed into Civil Action No. 4:16-cv-01969 and served on all parties this 5th day of October, 2016, through the Court's CM/ECF system, which constitutes service on all parties.



Candace L. Curtis

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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|----------------------------|---|--------------------------------|
| CANDACE LOUISE CURTIS | § | |
| Plaintiff | § | |
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| v | § | |
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| v | § | |
| | § | The Honorable Alfred Bennett |
| Kunz-Freed, et al | § | |
| Defendants | § | |

ORDER FOR CONSOLIDATION

Upon consideration, the Motion for Transfer and Consolidation for pre-trial proceedings and trial, but not consolidation for the purposes of judgment and appeal (Doc. No.____), filed by Plaintiff in Candace Louise Curtis v. Anita Kay Brunsting and Amy Ruth Brunsting, Civil Action No. 4:12-CV-00592, is hereby Granted.

The following actions are hereby consolidated for pre-trial proceedings and trial only: Civil Action No. 4:12-cv-00592 Candace Louise Curtis v. Anita Kay Brunsting and Amy Ruth Brunsting, (Filed TXSD 2/27/2012) and Civil Action No. 4:16-cv-01969 Curtis et al., v Kunz-Freed et al (Filed TXSD 7/05/2016).

All depositions, interrogatory responses, materials produced in response to requests for production, and responses to requests for admissions in any of these actions may be used in any

other action consolidated by this Order. All notices, requests, responses, motions and other filings relating to pretrial proceedings must be served on all counsel in each of these actions and bear the case caption for each action that has been consolidated pursuant to this order.

SO ORDERED

Date: _____, 2016

The Honorable Kenneth Hoyt
United States District Judge