

No. 4222-A

IN THE ESTATE OF

IDA BALDWIN DENISON,

DECEASED

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§
§

IN THE DISTRICT COURT OF

STONEWALL COUNTY, TEXAS

39TH JUDICIAL DISTRICT

SECOND MOTION TO SET ASIDE SETTLEMENT AGREEMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Bob Marshall Denison, Movant herein, requests that this Court set aside the Settlement Agreement among the parties in the above-styled and numbered cause and in support thereof would respectfully show the Court as follows:

A. Summary

1. The parties to this action signed a Mediation Settlement Agreement dated May 28, 2002. In entering into the Mediation Settlement Agreement, **Movant relied on the statements, representations and warranties (many of which were made under oath) of John Wayne Denison, Defendant herein, who is the independent executor of the Estate of Ida Baldwin Denison, Deceased. Since the Mediation Settlement Agreement was signed, Movant has discovered that many of the statements, representations and warranties of Defendant were untrue. Movant also has discovered that Defendant failed to disclose material information to Movant prior to the signing of the Mediation Settlement Agreement. Some of these misstatements and omissions have only recently been discovered.**

2. Defendant has breached fiduciary duties owed to Movant and to the estate beneficiaries since the Mediation Settlement Agreement was signed. These breaches are material and detrimental to Movant and his interests.

STATE OF TEXAS
COUNTY OF STONEWALL
CERTIFIED TO BE A TRUE AND CORRECT COPY
OF THE ORIGINAL IN MY CUSTODY
GIVEN UNDER MY HAND AND SEAL OF OFFICE
Dated 5-26 A.D., 2009
COUNTY/DISTRICT CLERK OF STONEWALL CO., TEXAS
BY Belinda Page DEPUTY

FILED
County / District Court
Stonewall Co., Texas
JUN 30 2003
8:00 AM
BELINDA PAGE, Clerk
Belinda Page Clerk/Deputy

3. Defendant has failed to comply with his obligations under the Mediation Settlement Agreement and has failed to fulfill his duties since the Mediation Settlement Agreement was signed.

4. For the foregoing reasons, the Medication Settlement Agreement should be set aside and this matter should proceed to trial.

B. Defendant's Misstatements and Omissions Discovered
Since Mediation Settlement Agreement Was Signed

1. Defendant misrepresented the value of estate assets and failed to disclose material information about the value of estate assets to Movant. Movant relied on the misrepresentations and omissions in entering into the Mediation Settlement Agreement. Without limiting the generality of the foregoing:

a. A key asset of the estate is approximately 9.5 sections of land (the "West Ranch"). Under the terms of the Mediation Settlement Agreement, Defendant was to receive the West Ranch.

b. In the Inventory, Appraisement and List of Claims of the estate filed by Defendant in the County Court of Stonewall County, Texas – a sworn statement by Defendant – Defendant said that the West Ranch was worth approximately \$725,000.

c. Nothing in the Accounting provided by Defendant – a sworn statement by Defendant which required the Defendant to disclose all facts necessary to a full and definite understanding of the exact condition of the estate – disclosed any different value for the West Ranch.

d. Movant relied on Defendant's representations as to the value of the West Ranch in entering into the Mediation Settlement Agreement.

e. Prior to the mediation Defendant had in his possession material information relevant to the value of the West Ranch which Defendant failed to disclose to Movant. Had the information been disclosed to Movant, Movant would not have entered into the Mediation Settlement Agreement.

f. Since the Mediation Settlement Agreement was signed, Movant has discovered that the West Ranch in fact is worth considerably more than what Defendant represented it to be worth. In fact, Defendant has listed the West Ranch for sale for approximately \$3,350,000 – more than \$2,000,000 more than what Defendant represented to Movant that the property was worth.

g. Defendant's failure to disclose the true value of the West Ranch was a material breach of Defendant's duties and, by itself, makes the Mediation Settlement Agreement unenforceable.

2. Defendant misstated the number of cattle in the estate and/or failed to disclose Defendant's loss of cattle due to theft, death or other causes. Movant relied on these material misrepresentations and omissions in entering into the Mediation Settlement Agreement. Without limiting the generality of the foregoing:

a. The number of cattle disclosed in the Inventory, the purchases and sales of cattle listed by Defendant in the Accounting, and the number of cattle purported to be in the estate at the time of mediation simply do not add up.

b. In the Accounting – a sworn statement by Defendant which required the Defendant to disclose all facts necessary to a full and definite understanding of the exact condition of the estate – Defendant said that there were 128 adult cattle and a number of

calves in the estate. Movant relied on this representation in entering into the Mediation Settlement Agreement. Under the terms of the Mediation Settlement Agreement, Defendant was to receive all of the cattle in the estate.

c. Defendant represented prior to the mediation that there were just enough cattle remaining to make the June 2002 note payment to Hamlin National Bank. Movant relied on this representation in signing the Mediation Settlement Agreement because, under its terms, the cattle would pass to Defendant in order to service the June 2002 payment.

d. Since the Mediation Settlement Agreement, Movant has had the Accounting reviewed by a certified public accountant, and Defendant's accounting of the number of cattle does not make sense. According to the Defendant's own accounting, there must be more cattle in the estate.

e. The actions of Defendant are consistent with the fact that there are more cattle in the estate than was represented by Defendant. Expenditures by Defendant reported in the accounting are consistent with the fact that there are more cattle in the estate than was represented by Defendant.

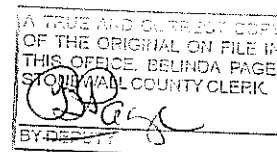
f. After the Mediation Settlement Agreement was signed, Movant learned that a number of cattle in the Estate apparently died, possibly due to starvation, lack of water or other mistreatment or neglect by Defendant. Defendant failed to disclose this material information to Movant prior to the signing of the Mediation Settlement Agreement. Had Movant known of this fact, Movant would not have signed the Mediation Settlement Agreement.

3. Movant relied on the truthfulness and completeness of the Accounting provided by Defendant – a sworn statement by Defendant which required the Defendant to disclose all facts necessary to a full and definite understanding of the exact condition of the estate – in entering into the Mediation Settlement Agreement. Movant has discovered since the Mediation Settlement Agreement was signed that the Accounting contains a number of misstatements, omissions and/or inconsistencies. This misstatements, omissions and/or inconsistencies are material, and had Movant known of them, he would not have signed the Mediation Settlement Agreement. Without limiting the foregoing:

a. While the Accounting looked “good” on a superficial level, it failed to meet the requirements of Section 149A of the Texas Probate Code. Without limiting the foregoing, it failed to disclose all facts necessary to a full and definite understanding of the exact condition of the estate, as required by Section 149A of the Texas Probate Code.

b. The discrepancies in the Accounting only became apparent after the Mediation Settlement Agreement was signed when Movant retained a certified public accountant to review the Accounting. It was then that the additional misstatements, omissions and malfeasance of Defendant were revealed.

c. Here is an example: On the surface, the Accounting appears to show appropriate deductions from wage-earners for FICA and withholding and corresponding payments to the IRS. However, with the certified public accountant’s help, Movant has discovered that the amounts reportedly withheld from wage-earners exceeds the amount reportedly paid to the IRS. Movant discovered this discrepancy after the Mediation Settlement Agreement was signed. Defendant’s failure to disclose this was a material



omission.

4. Defendant misrepresented the condition of estate property and/or failed to disclose information of which he was aware regarding the condition of estate property. The misrepresentations and omissions were material. Movant relied on these misrepresentations and omissions in entering into the Mediation Settlement Agreement. Without limiting the foregoing:

a. Defendant, having previously resided at the Raynor courthouse, knew that the line supplying water to the Raynor courthouse was in disrepair at the time of mediation. Defendant not only failed to disclose the condition of the waterline, he and his agents actively misled Movant, telling Movant's agent that the only waterline in disrepair on estate property was on the West Ranch and not at the Raynor Courthouse.

b. After the Mediation Settlement Agreement was signed, Movant discovered that the waterline at the Raynor courthouse was in disrepair. This was a material fact. Had Movant known that the waterline was in disrepair, he would not have signed the Mediation Settlement Agreement.

c. Defendant stated that the Raynor courthouse was insured and/or failed to disclose at the time the Mediation Settlement Agreement was signed that the Raynor courthouse was uninsured. Movant relied on these misstatements and/or omissions when he signed the Mediation Settlement Agreement.

d. In his sworn Accounting, Defendant disclosed expenditures for insurance but does not specify what was insured. Previously Defendant had provided "proof of insurance" on the Raynor courthouse. Defendant failed to disclose to Movant that Defendant had allowed the insurance coverage on the Raynor courthouse to lapse prior to

the time the Mediation Settlement Agreement was signed.

e. Movant discovered after the Mediation Settlement Agreement was signed that the Raynor courthouse was not insured. The existence of insurance on the property is material and significant because it is evidence of the condition of the property. By stating that the property was insured and/or failing to disclose that it was not insured, Defendant was misleading Movant as to the true condition of the property.

f. Defendant and his agents misrepresented the condition of the Raynor courthouse at the time the Mediation Settlement Agreement was signed. Movant relied on these misrepresentations to his detriment.

g. Defendant represented to Movant that he and his family were living in the Raynor courthouse at the time the Mediation Settlement Agreement was signed. This was used as an excuse to prevent Movant from inspecting the Raynor courthouse prior to the signing of the Mediation Settlement Agreement. Had Movant been allowed to inspect the Raynor courthouse prior to signing the Mediation Settlement Agreement, he would have discovered the true condition of the Raynor courthouse, which was much worse than Defendant had represented it to be – in fact, it was uninhabitable.

5. Defendant continues to act as independent executor of the estate. As such, he owes fiduciary duties to Movant and to the estate beneficiaries. One of the fiduciary duties owed by Defendant is the duty to fully disclose all material facts. Defendant has failed to fully disclose all material facts since the Mediation Settlement Agreement was signed. Without limiting the foregoing, some of the breaches of fiduciary duty committed by Defendant after the Mediation Settlement Agreement was signed are detailed in the next section of this pleading. Defendant

failed to disclose these breaches to Movant.

C. Additional Breaches of Duty

1. Defendant continues to act as independent executor of the estate. As such, he owes fiduciary duties to Movant and to the estate beneficiaries. These duties include without limitation: the duty of prudence and competence; the duty of loyalty; the duty of impartiality; and the duty to fully disclose all material facts.

2. Defendant has taken estate assets and converted them for his personal use and benefit. Defendant has not disclosed his recent actions, but based upon the information available to Movant it appears that Defendant continues to convert estate assets for his own use and benefit.

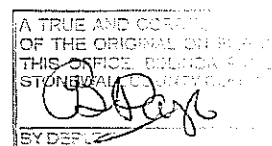
3. Defendant has mismanaged the assets of the estate with remarkable consistency, breaching his duty of prudence and competence.

4. Defendant has failed to timely collect insurance proceeds payable to the estate.

5. Defendant has failed to pay the taxes and debts of the estate on time, causing damage to the estate. Without limiting the foregoing, Defendant has failed to pay all of the ad valorem taxes due on the estate property, causing the estate to incur interest expenses and jeopardizing the property of the estate. If the taxes are not paid in full by June 30, additional penalties and interest will be due, further damaging the estate.

6. Defendant has borrowed money on behalf of the estate in violation of the terms of the Will of Ida Baldwin Denison, Deceased, which permit loans only for the purpose of paying debts of the estate. These loans have damaged Movant and the estate.

7. Defendant has failed to account properly for his actions as independent executor,



and the accounting and information he has provided contains material misstatements and

omissions. These material misstatements and omissions have harmed Movant and the Estate.

8. Defendant has failed to disclose all material facts to Movant and to the estate beneficiaries, to the detriment of Movant and the estate beneficiaries.

9. Defendant is attempting to sell real property belonging to the estate, despite the fact that Defendant is enjoined from selling any such property by order of this Court dated July 18, 2001. Sale of any of the property of the estate would irreparably harm Movant and the estate.

10. Defendant has failed to pay oil and gas proceeds as ordered to do so by this Court, and the failure to do so has harmed Movant and the other estate beneficiaries.

11. These additional breaches by Defendant justify setting aside the Mediation Settlement Agreement.

D. Defendant's Failure to Comply with Mediation Settlement Agreement
And to Fulfill Obligations

1. This proceeding is still pending before the Court. No judgment has been entered and no distribution of estate property has been made.

2. Defendant and his agents have taken advantage of the Mediation Settlement Agreement when it suits them and have failed to comply with many of their obligations.

Defendant's actions and inactions justify setting aside the Mediation Settlement Agreement.

Without limiting the foregoing:

a. Under the standing orders of this Court, Defendant is required to pay oil and gas royalties to or for the benefit of Movant. If the Mediation Settlement Agreement was in force, Defendant would be required to pay even greater amounts of oil and gas royalties to or for the benefit of Movant. Instead of paying the amounts required by the

Court order, or the larger amount required by the Mediation Settlement Agreement, Defendant is not paying anything.

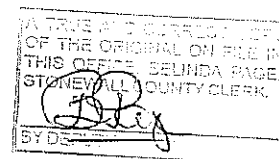
b. Defendant's attorney has represented to the Court and to Movant and the other parties on two occasions that he would take actions to bring this matter to a conclusion. At the hearing in August 2002, he said he would circulate "final" settlement documents the next day. At the hearing in December 2002 he stated or implied that he would be filing a motion or other pleading to enforce the Mediation Settlement Agreement in the next day or two. In neither case has Defendant or his attorney done what he said he was going to do. It has now been over a year since the Mediation Settlement Agreement was signed. If there was an agreement of the parties, it should have been put in place long before now. The fact that it has not been put in place, with a judgment, distribution deeds, etc., is an indication that there was and is no agreement. Therefore, the Mediation Settlement Agreement should be set aside and the case should proceed to trial on the merits.

E. Nature of Defendant's Obligations and Bases for Setting Aside Agreement

1. As independent executor and trustee, Defendant is a fiduciary. As a fiduciary, Defendant has an affirmative duty to make a full disclosure, a disclosure of all material facts and a disclosure of all facts that may be necessary to a full and definite understanding of the exact condition of the estate.

a. Defendant is independent executor and trustee. As such, he is a fiduciary.

Geeslin v. McElhenney, 862 S. W. 2d 683 (Tex. App. – Austin 1990, no writ); Texas Trust Code §111.004(4).



b. Fiduciaries are held to the highest standard of conduct known in the law:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A [fiduciary] is held to something stricter than the morals of the marketplace. *Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.*

Meinhard v. Salmon, 249 N. Y. 458, 164 N. E. 545 (1928) (Justice Cardozo) [emphasis added], cited with approval and quoted in part in *Langford v. Shamburger*, 417 S. W. 2d 438 (Tex. Civ. App. – Fort Worth 1967, writ ref'd, n. r. e.).

[An independent executor] is a 'fiduciary' of whom the law requires *an unusually high standard of ethical and moral conduct* in reference to the beneficiaries and their interests. His 'duties' are more than the ordinary 'duties' of the marketplace. They connote *fair dealing, good faith, fidelity, and integrity*. He may have *additional duties that he would not in an ordinary business relationship – a duty of full disclosure*, for example, and a duty not to use the fiduciary relationship for personal benefit except with the full knowledge and consent of the beneficiaries."

Geeslin v. McElhenney, 862 S. W. 2d 683 (Tex. App. – Austin 1990, no writ) [emphasis added].

c. **Among the duties of a fiduciary are the duty to disclose.** This duty is imposed both by the common law and by statute.

(1) **Common Law Duty of Disclosure.** The "fail safe" mechanism of the fiduciary relationship is the **duty of full disclosure**. **A fiduciary has much more than the traditional obligation not to make any material misrepresentations, he has an affirmative duty to make a full and accurate confession of all his fiduciary activities, transactions, profits and mistakes – even when, and especially if, it hurts.** Joyce W. Moore, *Litigation Involving Fiduciaries: Trial Handbook 2000*, p. 37 (2000);

Montgomery v. Kennedy, 669 S. W. 2d 309 (Tex. 1984); *Kinzbach Tool Co., Inc. v. Corbett-Wallace Corp.*, 160 S. W. 2d 509 (Tex. 1942). The breach of the duty of full disclosure by a fiduciary is tantamount to *fraudulent concealment*. *Willis v. Maverick*, 760 S. W. 2d 642 (Tex. 1988); *Montgomery v. Kennedy*, 669 S. W. 2d 309 (Tex. 1984). The beneficiary is not required to prove the elements of fraud, or even that he relied on the fiduciary to disclose the information. *Montgomery v. Kennedy*, 669 S. W. 2d 309 (Tex. 1984); *Johnson v. Peckham*, 120 S. W. 2d 786 (Tex. 1938); *Miller v. Miller*, 700 S. W. 2d 941 (Tex. App. – Dallas 1985, writ ref'd, n. r. e.); *Langford v. Shamburger*, 417 S. W. 2d 438 (Tex. Civ. App. – Fort Worth 1967, writ ref'd, n. r. e.). The fiduciary duty of full disclosure operates before and after litigation has been filed and is in addition to any obligations of disclosure imposed by the “discovery” provisions of the Texas Rules of Civil Procedure. *Huie v. DeShazo*, 922 S. W. 2d 920 (Tex. 1996).

(2) ***Statutory Duty of Disclosure.*** In addition to the common law duty of disclosure, the Texas Probate Code imposes additional disclosure duties on independent executors. **Movant has demanded and Defendant has provided an accounting under Section 149A of the Texas Probate Code.** In addition to requiring a disclosure of specific, listed information, that section requires the disclosure of “such other facts as may be **necessary to a full and definite understanding of the exact condition of the estate.**” Section 149A specifically makes this right cumulative to other statutory and common law rights.

2. **This action is a suit for breach of Defendant’s fiduciary duties, including but not limited to the duty to make the required disclosures. Therefore, the failure of Defendant to**

disclose breaches of trust concealed two breaches – the undisclosed breach *and* the failure to disclose the undisclosed breach. These breaches not only affect the value of what Movant bargained for, they strengthen Movant's case in chief. For this reason, a failure to disclose something prior to or at mediation that may seem relatively insignificant in a non-fiduciary case becomes significant and material here.

a. Movant has sued Defendant for, among other things, breach of his fiduciary duties. Defendant has denied that he breached his fiduciary duties. Therefore, proving that Defendant has breached his fiduciary duties is an important element of this case.

b. Discovery of additional examples of breaches of fiduciary duties by Defendant in this case are significant even if the dollar amounts involved are not terribly significant because each one strengthens Movant's underlying case. For each breach, there really are two breaches – the breach itself, and the failure to disclose the breach. Of course, the breaches discovered since the Mediation Settlement Agreement was signed *do* involve significant dollar amounts – Defendant's actions regarding the West Ranch could cost Movant millions of dollars. Thus, these double breaches are significant and material by any measure one cares to apply. These breaches also show a consistent pattern of behavior on the part of the Defendant, not just isolated incidents of malfeasance or neglect, and they are the type of breaches that are easy for a jury to understand.

c. For this reason, determining whether or not the undisclosed information adversely affected the value of what the trust benefiting Movant was to receive in the settlement is only part of the analysis in this case. Also significant is the fact that

undisclosed breaches strengthen Movant's underlying case, making settlement on the agreed terms unfair to Movant.

3. The mediation settlement agreement would, among other things, constitute a release of Defendant from certain liabilities. No agreement between Defendant and Movant constituting a release is binding upon Movant unless Defendant makes a full disclosure.

a. Under both the common law and Texas statutory law, a beneficiary is not bound by the terms of an agreement releasing the fiduciary unless the fiduciary has made a full disclosure. Texas Trust Code §114.005 (beneficiary must be "acting on full information"); *Slay v. Burnett Trust*, 187 S. W. 2d 377 (Tex. 1945) (beneficiary "must have full knowledge of all the material facts"). Thus, while in a non-fiduciary case, a party's discovery of facts that might have affected his decision to settle after the settlement agreement is signed may have significance only if the party is able to prove that the adverse party affirmatively misrepresented the fact, it is not necessary to show an affirmative misrepresentation in a fiduciary case because of the fiduciary's affirmative *duty* to disclose.

b. As noted above, Defendant's failure to disclose breaches of his duties involving relatively small amounts of property become material in this case because they help Movant establish a pattern of breaches of fiduciary duties that help Movant prove his case in chief.

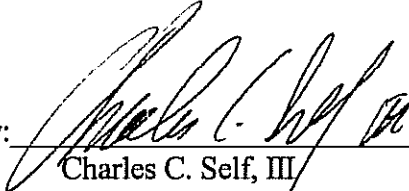
4. Even where fiduciary relationships are not involved, the failure of a party to disclose material information prior to entering into a settlement agreement can be grounds for setting aside the settlement agreement. In *Boyd v. Boyd*, 67 S. W. 3d 398 (Tex. App. – Fort

Worth 2002, no pet.), the court refused to enforce a mediated settlement agreement in a divorce case where the husband failed to disclose to his wife a bonus he knew he was going to receive. This result was reached even though the court found no fiduciary relationship to exist. In a case such as the one at bar, where Defendant undeniably is a fiduciary, the court should set aside a settlement agreement where the misstatements and omissions are so egregious.

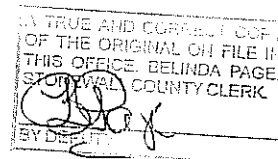
F. Prayer

For the foregoing reasons, Movant prays that this motion will be granted, that the Mediation Settlement Agreement will be set aside so that this matter can proceed to trial, and that the Court will grant such other and further relief to which Movant may be entitled.

Respectfully submitted,

By: 
Charles C. Self, III
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CERTIFICATE OF SERVICE

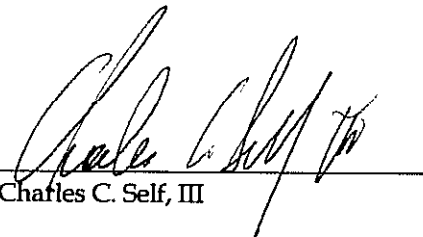
This is to **CERTIFY** that a true and correct copy of the above and foregoing was mailed on the **27th day of June, 2003**, as follows:

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