

CAUSE NO. 2018-CI-05727

WILLIAM W. OCHSE IV and CHLOE OCHSE SEILER	§ § §	IN THE DISTRICT COURT
V.	§ §	37 th JUDICIAL DISTRICT
WILLIAM W. OCHSE III, INDIVIDUALLY AND AS TRUSTEE OF THE WILLIAM W. OCHSE III FAMILY 2008 TRUST	§ § § §	BEXAR COUNTY, TEXAS

DEFENDANT'S FIRST AMENDED ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes William W. Ochse III, Individually and as Trustee of the William W. Ochse III Family 2008 Trust, Defendant in the above-entitled and numbered cause, and makes and files this his First Amended Original Answer, and in support thereof, would respectfully show the Court as follows:

1. Pursuant to Rule 92 of the Texas Rules of Civil Procedure, Defendant denies each and every, all and singular, the material allegations of Plaintiffs' pleadings and demand strict proof thereof by a preponderance of the evidence.

2. Defendant denies that Plaintiffs are vested current beneficiaries of the Trust and further denies that Cynthia Cadwallader Ochse is a vested current beneficiary of said Trust. Defendant would show that, pursuant to the terms of the Trust, distribution, if any, of the income or principal of the Trust to Plaintiffs is left to Defendant's sole discretion.

3. Defendant denies that he owed a duty to Plaintiffs to notify them of the formation of the Trust, or the fact that the Trust listed his "descendants" as contingent beneficiaries. Defendant would show that Plaintiffs never requested an accounting and that their first request for an accounting occurred when they filed their Original Petition. Defendant denies that he breached his

fiduciary duties to Plaintiffs, denies that Plaintiffs are entitled to have him removed or suspended as Trustee and denies that Plaintiffs are entitled to appointment of a Receiver.

4. In that Plaintiffs are not Will's only "descendants," and as acknowledged by Plaintiffs' Petition, Plaintiffs have children, who are also Will's descendants, Plaintiffs have failed to include all necessary parties. (Original Petition ¶16) Assuming Plaintiffs have taken the position that they are not contingent beneficiaries designated as a class, all of Will's other descendants are also similarly situated, and therefor Plaintiffs have not complied with §115.011 of the Trust Code setting out necessary parties to an action.

5. Defendant would show that Plaintiffs' request for damages, temporary injunction and other relief should be denied because Will has the sole and exclusive discretion, as provided for in the Trust, to decide what distributions, if any, are to be made and he is not and was not required to make any distributions to Plaintiffs under the specific terms of the Trust. The Trust did not require Will to "make an inquiry" as to their needs, but merely indicates that he "take into consideration, other income or means of support *known to the Trustee.*" (emphasis added) There is no evidence of the information "taken into consideration" by Will, nor is there evidence of what information was "known to Will" and was the basis for his determination, if any, not to distribute income or corpus of the Trust to William and Chloe. Further, because of the terms of the exculpatory clause, Will is not liable, individually, or as Trustee, for any actions taken in his role as Trustee because Plaintiffs cannot and will not show that Will's actions constituted actual fraud, embezzlement, willful breach of trust, or bad faith and that none of his conduct was intentionally adverse to a beneficiary or reckless indifference to the interest of a beneficiary.

6. Defendant would further show that Plaintiffs' request for injunction, damages and other relief should be denied because Plaintiffs cannot establish that they will suffer probable injury

by any purported or anticipated distribution of income or corpus to be used to pay debts owed by Will. Because the Trust grants to Will, the discretion to determine whether to or when to, or what amount to distribute to any descendant as beneficiary, they are not entitled to and are restrained from anticipating, encumbering, alienating or in any way assigning or disposing of any income or distribution of the corpus of the Trust under the spendthrift provision of ¶4.3, and therefore cannot show that they will suffer imminent harm. Because the Trust grants to Will, the power and discretion to distribute income and corpus for his own health, maintenance and support, he is authorized to deplete the entire Trust for such purpose during his lifetime and therefore, Plaintiffs cannot show that they will suffer imminent harm. Because the Trust permits Will, by way of Non-General Inter Vivos Power of Appointment at any time, or by Testamentary Power of Appointment upon his death, to completely terminate Plaintiffs' interests in the Trust, they cannot show that they will suffer probable injury harm by Will's alleged future intention to use approximately \$1,000,000 in distributable funds to pay his alleged debts.

7. Defendant would show that Plaintiffs' request for injunction, damages and other relief should be denied because Plaintiffs cannot established that any alleged harm is irreparable. There is and can be no evidence that a distribution of income to Will in the purported amount of \$1,000,000 will cause irreparable harm. The evidence will show that the Trust contains a significant amount of money and that the distribution of \$1,000,000 (an amount which is in dispute and has not been established by credible evidence) will not adversely impact the Trust or the right of any beneficiary to receive a distribution, should Will, in exercising his discretion, determine that such a distribution should be made. Irreparable harm is shown only when the conduct sought to be enjoined affects property that is unique in its nature or character, such as land, cattle or precious jewels. *Ballenger v. Ballenger*, 694 S.W.2d 72, 77 (Tex. App.--Corpus Christi-Edinburg, 1985, no writ)(any harm

possibly suffered as result of wrongful distribution of corpus can be adequately cured by monetary damages). It is clear that the *Ballenger* holding controls in this case and that Plaintiffs cannot show irreparable harm because any damages that might ensue are "capable of exact calculation." *Id.*

8. Defendant would further show that Plaintiffs' request for injunction, damages and other relief should be denied because, by Plaintiffs' own judicial admissions, they obtained a copy of the Trust and knew about the Trust in 2012 or, at the latest, in January of 2013 and took no steps to seek redress for their alleged damages. Defendant would show that Plaintiffs' claims are barred by the applicable statute of limitations. Plaintiffs clearly knew (1) of the existence of the Trust; (2) that they were "descendants;" (3) that no distributions had been made to them; (4) that they were allegedly not previously "told about the Trust;" (5) that Will never gave them a copy of the Trust; (6) that Will allegedly "talked" as if they had no interest in the trust; (7) that Will never gave them an accounting; and (8) that Will allegedly never made an inquiry to see if they needed funds. Plaintiffs, with such knowledge, failed to request distributions, failed to request an accounting and failed to take any action to address Will's alleged acts or omissions, prior to the filing of this suit. Defendant assert the defenses of waiver, estoppel, equitable estoppel, estoppel in pais and limitations and would show that Plaintiffs' claims are thus barred.

9. Defendant would show that Plaintiffs' request for injunction should be denied because the injunction is sought to enjoin the Trustee, and Will, as Primary Beneficiary, from taking actions specifically authorized by the terms of the Trust and the Texas Trust Code. A temporary injunction would go well beyond maintaining the status quo in that it would interfere with the discretionary powers and administrative authority specifically granted to the Trustee by the Trust. *Ballenger*, 694 S.W.2d at 78-79. A court cannot substitute its judgment for that of the Trustee and cannot interfere with the existence of discretionary powers in the absence of fraud, misconduct or

clear abuse of discretion. *DiPortanova v. Monroe*, 229 S.W.3d 324, 330 (Tex. App.--Houston [1st Dist.] 2006, pet. denied) citing *Beaty v. Bales*, 677 S.W.2d 750, 754 (Tex. App.--San Antonio 1984, writ ref'd n.r.e.). Section 114.008 of the Trust Code sets out the remedies available for breach of trust, and it does not include the remedy of re-writing the trust, or preventing the Trustee from carrying out acts and powers specifically granted or authorized by the Trust or by the Trust Code. TEX. PROP. CODE ANN. §114.008 (West). The temporary injunction requested will improperly restrict Will's power of appointment, restricted distribution of income or corpus to anyone and prevents Will from using Trust funds to retain attorneys or accountants. This is clearly an abuse of discretion. *Id.* Because Plaintiffs' request to temporary injunction exceeds that authorized by statute, the Trust, and by case law, Plaintiffs' request for injunctive relief should be denied.


10. Defendant would show that, because of the TRO previously and improperly obtained, the Trustee has been unable to exercise his authority to invest Trust assets and that this failure has resulted in loss of income to the Trust, for which Defendant seeks to recover as damages. Further, Plaintiffs' actions have prevented Will from exercising his sole discretion to retain and pay attorneys, accountants and other professionals and to respond to a recently received demand for satisfaction of tax liens by Cynthia. This requires Will to breach his fiduciary duty as Trustee to defend and protect the Trust estate. Will is prohibited from proceeding *pro se* because he represents others having an interest in the Trust and, appearing without counsel would be the unauthorized practice of law. *In re Gueterstoh*, 326 S.W.3d 737, 739-40 (Tex. App.--Amarillo 2010, original proceeding).

11. Defendant would further show that the requested injunction, if granted, will restrain and enjoin Will, as Primary Beneficiary, from exercising his absolute right and power of appointment of the Trust corpus. There is no authority, whatsoever, which supports a Court's ability

to prevent a Primary Beneficiary from taking actions which are specifically authorized in the Trust document.

WHEREFORE, PREMISES CONSIDERED, Defendant William W. Ochse III, Individually and as Trustee of the William W. Ochse III Family 2008 Trust, prays that Plaintiffs take nothing by reason of their suit, that Defendant be discharged with all costs expended, and that Defendant has such other and further relief, general and special, at law and in equity, to which he may show himself justly entitled.

Respectfully submitted,


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FAMILY 2008 TRUST

CERTIFICATE OF SERVICE


I hereby certify that a true and correct copy of the above and foregoing document was transmitted as indicated below to each of the following on this the 2nd day of July, 2018:

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