

SUPREME COURT OF LOUISIANA

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NO.

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IN RE: HARRIER TRUST

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ON DIRECT REVIEW FROM AN “ORDER REQUESTING THE  
SUPREME COURT TO ASSIGN AN AD HOC JUDGE” ISSUED BY  
JUDGE CLAYTON DAVIS OF THE 14TH JUDICIAL DISTRICT COURT,  
PARISH OF CALCASIEU, SUIT NO. 2016-3020

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ELAINE T. MARSHALL’S APPLICATION FOR WRIT OF  
CERTIORARI AND REVIEW OF AN “ORDER REQUESTING THE  
SUPREME COURT TO ASSIGN AN AD HOC JUDGE”

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CIVIL CASE

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**REQUEST FOR EXPEDITED CONSIDERATION**

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SUPREME COURT OF LOUISIANA  
WRIT APPLICATION FILING SHEET

NO. \_\_\_\_\_

TO BE COMPLETED BY COUNSEL or PRO SE LITIGANT FILING APPLICATION

TITLE

In Re: Harrier Trust \_\_\_\_\_ VS. \_\_\_\_\_  
Applicant: Elaine T. Marshall  
Have there been any other filings in this Court in this matter? ☐ Yes ☒ No

Are you seeking a Stay Order? \_\_\_\_\_  
Priority Treatment? ☒ X  
If so you **MUST** complete & attach a Priority Form

LEAD COUNSEL/PRO SE LITIGANT INFORMATION

APPLICANT:

RESPONDENT:

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Pleading being filed: ☐ In proper person, ☐ In Forma Pauperis

Attach a list of additional counsel/pro se litigants, their addresses, phone numbers and the parties they represent.

TYPE OF PLEADING

☒ Civil, ☐ Criminal, ☐ R.S. 46:1844 protection, ☐ Bar, ☐ Civil Juvenile, ☐ Criminal Juvenile, ☐ Other  
☐ CINC, ☐ Termination, ☐ Surrender, ☐ Adoption, ☐ Child Custody

ADMINISTRATIVE OR MUNICIPAL COURT INFORMATION

Tribunal/Court: \_\_\_\_\_ Docket No. \_\_\_\_\_  
Judge/Commissioner/Hearing Officer: \_\_\_\_\_ Ruling Date: \_\_\_\_\_

DISTRICT COURT INFORMATION

Parish and Judicial District Court: Calcasieu Parish, 14th JDC Docket Number: 2016-3020  
Judge and Section: Judge Clayton Davis, recused Date of Ruling/Judgment: 6/27/2018

APPELLATE COURT INFORMATION

Circuit: \_\_\_\_\_ Docket No. \_\_\_\_\_ Action: \_\_\_\_\_  
Applicant in Appellate Court: \_\_\_\_\_ Filing Date: \_\_\_\_\_  
Ruling Date: \_\_\_\_\_ Panel of Judges: \_\_\_\_\_ En Banc: ☐

REHEARING INFORMATION

Applicant: \_\_\_\_\_ Date Filed: \_\_\_\_\_ Action on Rehearing: \_\_\_\_\_  
Ruling Date: \_\_\_\_\_ Panel of Judges: \_\_\_\_\_ En Banc: ☐

PRESENT STATUS

☒ Pre-Trial, Hearing/Trial Scheduled date: None \_\_\_\_\_, ☐ Trial in Progress, ☐ Post Trial  
Is there a stay now in effect? ☐ No Has this pleading been filed simultaneously in any other court? ☐ No  
If so, explain briefly \_\_\_\_\_

VERIFICATION

I certify that the above information and all of the information contained in this application is true and correct to the best of my knowledge and that all relevant pleadings and rulings, as required by Supreme Court Rule X, are attached to this filing. I further certify that a copy of this application has been mailed or delivered to the appropriate court of appeal (if required), to the respondent judge in the case of a remedial writ, and to all other counsel and unrepresented parties.

6/29/2018 \_\_\_\_\_  
DATE

\_\_\_\_\_  
SIGNATURE

IN RE : No. 2016-3020 Div. F

HARRIER TRUST : 14<sup>TH</sup> JUDICIAL DISTRICT COURT

: PARISH OF CALCASIEU

: STATE OF LOUISIANA

LIST OF COUNSEL

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
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LOUISIANA SUPREME COURT  
CIVIL

PRIORITY FILING SHEET

Elaine T. Marshall

In Re: Harrier Trust

Applicant's Name

Case Title

1. What is the nature of the priority?

Application made by:

☐ Child in Need of Care (Ch.C. Title VI)

☒ PLAINTIFF

☐ Judicial Certification for Adoption (Ch.C. Title X)

☐ DEFENDANT

☐ Surrender of Parental Rights (Ch.C. Title XI)

☐ OTHER

☐ Adoption of Children (Ch.C. Title XII)

☐ Child Custody

☒ Other (specify): Pending request for judicial Ad Hoc appointment

2. Is a hearing or trial date set? (NO) YES DATE: TIME:

IN PROGRESS Jury trial? (NO) YES

Any out of state witnesses? NO YES

3. Was relief applied for in the trial court? (NO) YES By: PLAINTIFF DEFENDANT OTHER

Stay: DENIED / GRANTED Until:

Ruling of Dist. Court:

4. Was an application made to the court of appeal? (NO) YES

Which Circuit? 1ST 2ND 3RD 4TH 5TH

Application was made by? PLAINTIFF DEFENDANT OTHER

Date of Court of Appeal action:

Court of Appeal action:

If you did not apply to the Circuit Court of Appeal state why:

5. How and when will applicant be adversely affected if relief is not granted?

Intervenor, Preston Marshall, has already twice quoted this improper order in amendments filed in other litigation. Other courts are being misled by the improper order to the great detriment of Applicant.

6. List of Lead Counsel & Judge involved in case:

PHONE NUMBERS

Name: Michael Reese Davis, Counsel for Elaine Marshall Home ( )

Day Bus. (225 ) 298-8118 Night Bus. ( )

Name: Hunter Lundy, Counsel for Preston Marshall Home ( )

Day Bus. (337 ) 439-0707 Night Bus. ( )

Name: Judge Clayton Davis, recused Home ( )

Day Bus. (337 ) 721-3100 Night Bus. ( )

Name: Home ( )

Day Bus. ( ) Night Bus. ( )

Dist. Ct. Judge: Home ( )

Day Crt. ( ) Night Crt. ( )

CERTIFICATION

I am requesting ☐ priority consideration of this application or ☐ a stay pending consideration of this application. Pursuant to Supreme Court Rule 10, Section 2(e), I have notified all counsel and unrepresented parties by telephone or other equally prompt means of communication that said writ application has been or is about to be filed in this court and that I have served on all parties at interest or their counsel, by a means equal to the means used to effect filing in this court. ☐ I SHALL IMMEDIATELY NOTIFY THE COURT IF THE NEED FOR EXPEDITED CONSIDERATION CHANGES DUE TO SETTLEMENT, CONTINUANCE OR ANY OTHER CIRCUMSTANCE. FAILURE TO NOTIFY THE COURT SHALL SUBJECT ME TO PUNISHMENT FOR CONTEMPT OF THE AUTHORITY OF THE COURT.

6/29/2018

DATE

SIGNATURE

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I.

**Statement of Jurisdiction and Writ Grant Considerations**

Under La. Const. Art. 5 § 5(A), this Court “has general supervisory jurisdiction over all other courts.” “It is well recognized the constitutional grant of supervisory authority to this court is plenary, unfettered by jurisdictional requirements, and exercisable at the complete discretion of the court.” *Unwired Telecom Corp. v. Par. of Calcasieu*, 2003-0732, p. 8 (La. 1/19/05), 903 So. 2d 392, 400.

Rule X § 5(b) of this Court provides that an application seeking review of the action of a trial court may be filed directly in this Court provided that the trial court fixes a reasonable time within which the application shall be filed. However, in this case, a motion to recuse the trial judge presiding over this action in the 14th Judicial District Court (“14th JDC”) has been filed, the district judge to whom the motion to recuse was allotted has self-recused, and the duty judge has declined to get involved in this matter due to his own potential conflict.

Within 24 hours of being allotted the original motion to recuse, the district judge self-recused based upon his prior and current business relationships with the defendant’s counsel and because of his self-proclaimed belief that he “has the real potential of being a witness in a hearing involving the recusal of Judge Wilson.” Appendix (“Appx.”) D. However, the district judge then requested depositions from the defendant’s counsel and without conducting any sort of hearing issued a bizarre “Order” which contains a false factual narrative parroting that of the defendant’s counsel in this lawsuit, fails to “order” anything, and “requests” this Court to appoint an ad hoc judge to hear the original motion to recuse. *See* Appendix (“Appx.”) A.

The district court judge to whom the motion to recuse was allotted so grossly departed from proper judicial proceedings that it calls for the exercise of this Court’s supervisory authority under Rule X § 1(a)(5). The ruling was also procedurally improper and erroneously interpreted Louisiana law, calling for the exercise of this Court’s supervisory authority under Rule X § 1(a)(4). This Writ

Application asks this Court to declare the purported order to be invalid and stricken.

## II.

### Statement of the Case

On May 5, 2006, the Harrier Trust was settled and formed as a Louisiana *inter vivos* trust by E. Pierce Marshall Sr. (“Pierce Sr.”). In the trust indenture, Pierce Sr. specifically declared he was “availing [him]self of the laws of the State of Louisiana, and, in particular, the Louisiana Trust Code, Louisiana Revised Statute 9:1721, *et seq.*, as amended . . .” Section 6.2(H) of the Harrier Trust Indenture unequivocally provided:

The Trust shall be governed under the Louisiana Trust Code, Louisiana Revised Statutes 9:1721, *et. seq.*, as amended. The Trustee shall apply to the 14th Judicial District Court for Calcasieu Parish, Louisiana, for instructions regarding any questions that might arise regarding administration of the Trust.

See Act of Donation in Trust (“Harrier Trust Indenture”), Appx. B.

Pierce Sr. named his wife, Elaine T. Marshall (“Mrs. Marshall”) as the sole trustee and specifically granted her the power to name co-trustees. *Id.* § 6.2(G). Piece, Sr. and Mrs. Marshall had two sons, E. Pierce Marshall, Jr. (“Pierce Jr.”) and Preston L. Marshall (“Preston”), who were both adults when Pierce Sr. settled the Harrier Trust. Preston was designated as the income and principal beneficiary of the Harrier Trust. Although Pierce Sr. originally funded the Harrier Trust with \$1,000, Mrs. Marshall voluntarily and generously donated roughly \$17 million of assets to fund the Harrier Trust. The Harrier Trust currently earns about \$500,000 in annual dividends and has about \$1.5 million in cash.

Pierce Sr. passed away in 2006, and a probate proceeding was opened in probate court in Houston, Texas. However, the Harrier Trust was not part of Pierce Sr.’s estate.

Ever since Preston was terminated from the family business for his misconduct in June 2015, he has waged a campaign of lawsuits in Louisiana and Texas, seeking to disinherit his mother and brother (Pierce Jr.) and trying to seize the family fortune and control over family trusts, foundations, and entities.

Preston's favorite venue is probate court in Houston, where he has sued Mrs.

Marshall and convinced a probate judge to exercise jurisdiction over the

Louisiana Harrier Trust.

In July 2016, Mrs. Marshall filed a petition in the 14th JDC, as the proper court, seeking a declaration that the Harrier Trust accountings to be provided to Preston as beneficiary were sufficient. The lawsuit was randomly allotted to Judge Sharon Wilson, who has duly and properly presided over the case for the past two years. Early on, Judge Wilson overruled Preston's declinatory exceptions of *lis pendens* and lack of subject matter jurisdiction. Judge Wilson ruled that the 14th JDC has subject matter jurisdiction over the Harrier Trust and that the 14th JDC "is the proper Court for anything that relates to this Harrier trust." Preston never sought review of the ruling denying his exception of lack of subject matter jurisdiction, and the Third Circuit Court of Appeal found no abuse of discretion in Judge Wilson's denial of the exception of *lis pendens*.

Preston's lead lawyer in the 14th JDC litigation is Hunter Lundy of the Lake Charles law firm Lundy, Lundy, Soileau & South, L.L.P. ("the Lundy Firm"). Hunter Lundy's longtime partner was Clayton Davis, who was elected to the bench in November 2008. Another partner of the firm, Matthew Lundy, enrolled as additional counsel in this action just days before the recusal filing discussed herein. Besides being law partners for well over 10 years, Judge Clayton Davis also has a longstanding business investment relationship with members of the Lundy Firm, including Hunter and Matthew Lundy. Further, from his election in 2008 until last year, Judge Davis was a co-owner of the office building occupied by the Lundy Firm. Perhaps most noteworthy, Judge Davis has an ongoing ownership interest in an LLC with Hunter Lundy and other attorneys from his firm.

Because of Preston's attacks on his mother's administration as sole trustee of the Harrier Trust, Mrs. Marshall exercised her explicit authority to appoint co-trustees. See Harrier Trust Indenture § 6.2(G) ("The Trustee shall be empowered to select one or more disinterested individuals to serve as co-trustee . . ."). Mrs.

Marshall relied on her longtime estate lawyer, Edwin K. Hunter, to locate high integrity, disinterested individual candidates from a cross-section of Lake Charles society, and to draft the appropriate trust appointment documents. In December 2016, Mrs. Marshall named five co-trustees: Pastor Edward Alexander, Adam P. Johnson, Dr. Wayne S. Thompson, PhD, Lilynn Cutrer, and Dr. Karen Aucoin, PhD.

On January 11, 2017, following appointment of co-trustees, Mrs. Marshall, along with co-trustees Edward Alexander and Adam Johnson, filed a second amended petition seeking, *inter alia*, a declaration that appointment of the co-trustees was within Mrs. Marshall's powers under the Harrier Trust Indenture.<sup>1</sup> The other co-trustees of the Harrier Trust, including Lilynn Cutrer, are not parties to this lawsuit.

During this action, Preston has continually revisited Houston probate court to bemoan and demean the handling of the Harrier Trust lawsuit and to obtain relief denied him in the 14<sup>th</sup> JDC. For example, on May 10, 2017, Mrs. Marshall, Edward Alexander, and Adam Johnson, moved for partial summary judgment approving appointment of the co-trustees. On June 19, 2017, Preston moved for a stay of the hearing on that motion claiming he needed to depose all of the co-trustees prior to a ruling on the motion. On July 12, 2017, Preston then obtained a temporary injunction in Houston probate court prohibiting Mrs. Marshall from administering aspects of the Harrier Trust in the 14<sup>th</sup> JDC, including taking any action to approve or ratify appointment of the co-trustees.<sup>2</sup>

On August 8, 2017, Judge Wilson granted Preston's motion to stay the hearing on the motion for partial summary judgment. Just two days later, despite claiming he needed discovery to address the co-trustees' motions for summary judgment, Preston then filed his own motion for summary judgment in Houston

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<sup>1</sup> In this lawsuit, the co-trustees are separately represented by Adam & Reese.

<sup>2</sup> As a result, Mrs. Marshall was improperly forced to abstain from any further action regarding the motion for partial summary judgment. The co-trustees were not subject to the injunction order because they were not yet parties to the Houston probate proceeding.

probate court seeking a declaration that the appointment of the Harrier Trust co-trustees was invalid and challenging the compensation formula. Thereafter, on September 19, 2017, Judge Wilson lifted the stay of this action and reset the hearing on the motion for partial summary judgment.

Just ten days later, Preston went back to Houston probate court and sued the co-trustees, making various claims which arose out of administration of the Harrier Trust. In December 2017, Judge Wilson heard the co-trustees' motion for partial summary judgment and ruled that the co-trustees were validly and properly appointed in accordance with the Harrier Trust Indenture.<sup>3</sup> Judgment was signed on January 18, 2018. Preston's appeal of that judgment is currently pending in the Third Circuit.

More recently, on June 1, 2018, Judge Wilson ruled that a draft agreement between the co-trustees and drafted by their Louisiana counsel was subject to the attorney-client privilege. Therefore, Judge Wilson granted co-trustees Alexander and Johnson's motion for protective order. Four days later, on June 5, 2018, Preston obtained an order from Houston probate court ordering the co-trustees to produce the same document that Judge Wilson had found to be privileged. A Texas appellate court recently granted the co-trustees' motion for temporary relief, which was filed along with their writ of mandamus, staying production of the privileged document until that appellate court rules on the privilege issue.

Perhaps fed up with the expense and uncertainty of a Houston probate judge second-guessing the rulings of the proper court in the 14th JDC, on June 11, 2018, the co-trustees requested that Judge Wilson issue a temporary restraining order and preliminary injunction prohibiting Preston from filing and participating in litigation or proceedings related to administration of the Harrier Trust outside of the 14th JDC. On June 11th, Judge Wilson granted the TRO and set a hearing on the preliminary injunction for June 21st.<sup>4</sup>

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<sup>3</sup> At that time, Judge Wilson also denied an exception of no cause of action which had been filed by Preston.

<sup>4</sup> On the afternoon of June 20th, the Third Circuit Court of Appeal vacated that TRO

The evening before the June 21st hearing, Preston filed a motion to recuse Judge Wilson. Two years after the lawsuit was filed and eighteen months after the co-trustees were appointed, Preston argued for the first time that Judge Wilson should be recused because of the “presence of probable bias and/or actual bias” presented by co-trustee Lilynn Cutrer, who sits as a family court judge in the 14th JDC. On June 21st, Judge Wilson found the allegations in Preston’s motion to recuse to be conclusory. However, she stated that, given the nature of the allegations, having the motion to recuse randomly allotted to another judge was the right thing to do. She did not believe that the motion needed to be appointed to an ad hoc judge. Judge Clayton Davis received the random allotment that afternoon.

Shortly thereafter, Judge Davis took the bench and divulged that he has an ongoing business relationship with Hunter Lundy and Matt Lundy of the Lundy Firm involving investments in property through a jointly owned entity. Judge Davis also mentioned that he previously jointly owned the building occupied by the Lundy Firm with Hunter Lundy and others but had sold that interest within the last year. Judge Davis, who revealed nothing about any prior knowledge of the case or preconceived opinions, stated that he would set a hearing on the motion to recuse in August. During the brief appearance, Judge Davis asked for all counsel’s email address and indicated that he would communicate with counsel through his secretary (Dusty Higgs).

The following morning, after researching the public record, Mrs. Marshall’s counsel sent a letter to Judge Davis requesting recusal. *See* Appx. C, Email and Letter of June 22nd. The letter indicated that Judge Davis and members of the Lundy Firm have ownership in two active Louisiana LLCs, which were created after Judge Davis took the bench and have each existed for some time, and that there appeared to be other business ventures in Lake Charles in which Judge Davis and Matt or Hunter Lundy or both were involved. *Id.* The letter concluded:

It is clear that you have long time, currently ongoing, business

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due to improper form and notice (not on its substantive merits).

investment relations with your former partners Hunter and Matt Lundy. As you know, there are unique judicial conduct allegations directed at Judge Lilynn Cutrer of the Calcasieu Parish Family Court. The allegations authored by the Lundy firm in the pleading that led to your temporary assignment to this matter, and the separate allegations directed therein at the judge presiding over this matter, Judge Sharon Wilson, in light of your long-standing relationship with Hunter and Matt Lundy, are a basis for recusal. On behalf of my client I ask you to recuse yourself. I appreciate your frankness in court; it is clear you wish to proceed in an appropriate manner.

*Id.*

Within minutes, Judge Davis agreed that recusal was appropriate for the reasons stated in Mr. Sherburne's letter. *See* Appx. D, Email of June 22nd, 12:18 p.m. However, Judge Davis also revealed an additional basis for self-recusal: that he considered himself to be a witness on the issue of Judge Wilson's recusal. *Id.*

Judge Davis conveyed his findings to all counsel through an email from his secretary on June 22nd at 12:18 p.m.:

Judge Davis is going to recuse himself in the referenced matter. In addition to the points raised by Mr. Sherburne in his letter that has just been delivered, Judge Davis has asked me to advise counsel that in recalling the events surrounding Judge Cutrer's appointment as a trustee in this case, and reviewing the transcript of her deposition attached to the Motion to Recuse, he believes he has the real potential of being a witness in a hearing involving the recusal of Judge Wilson. Pursuant to art. 151(a)(1), he could not hear the Motion to Recuse.

*Id.*

Later that afternoon, Preston's counsel asked Judge Davis to order the recusal motion referred to an ad hoc judge for the reasons stated in Preston's motion to recuse. *See* Appx. E, Email of June 22nd 1:18 p.m. Counsel for Mrs. Marshall objected to that, noting that under La. Code Civ. Proc. art. 155(B), the motion to recuse had to be referred to another judge of the 14th JDC and requesting that it be sent to the clerk for random assignment. *See* Appx. E, Email of June 22nd, 3:47 p.m. Preston's counsel then filed an Amended Motion for Recusal asking to have the original recusal motion assigned to an ad hoc judge; it attached Judge Davis's self-recusal email as the exhibit.

During that weekend, Judge Davis asked Preston's counsel to email for the judge's review materials which were not attached to the original motion to recuse. For example, on Saturday, June 23<sup>rd</sup>, Judge Davis asked Preston's counsel to

send the “entire Cutrer deposition.” *See* Appx. E, Email of June 23rd, 8:30 a.m. Preston’s counsel complied with Judge Davis’s request. *See* Appx. F, Email of June 23rd, 9:42 a.m. Preston’s counsel later went so far as to provide Judge Davis with materials outside of the 14th JDC record, including the deposition of Lilynn Cutrer in the Houston probate proceeding. *See, e.g.*, Appx. G.<sup>5</sup>

On Sunday, June 24th, Mrs. Marshall’s counsel emailed Judge Davis and reiterated counsel’s position that Judge Davis’s self-recusal on Friday, June 22nd, should comply with La. Code Civ. Proc. art. 155(B). Mrs. Marshall’s counsel stated:

Although I now understand that you had personal opinions before this case was assigned to you and have recused yourself based on the email from Dusty Higgs at 12:18 p.m. Friday, the massive amounts of additional information dumped by Mr. Chambers appears unnecessary.

*See* Appx. H, Email of June 24th, 4:21 p.m. Judge Davis did not respond.

On Wednesday, June 27, 2018, at 10:51 a.m., Judge Davis issued a three-page document entitled, “Order Requesting the Supreme Court to Assign an Ad Hoc Judge.” *See* Appx. A. The purported order does not order anyone to do anything. Instead, the purported order requests the Supreme Court to appoint an ad hoc judge to preside over the entire action or alternatively the motion to recuse. Despite never having conducted a hearing, Judge Davis’s purported order includes a false factual narrative that just so happens to mimic the exact arguments, positions, and opinions pushed by Preston’s counsel in the 14th JDC and Houston probate proceeding. *See id.*

Moreover, the purported order contains gratuitous, erroneous statements that undermine the prior rulings by Judge Wilson and criticize the co-trustee appointments, particularly Lilynn Cutrer’s. *See id.* The erroneous statements were made despite the fact that no hearing was conducted, no evidence was ever properly submitted or considered, and no basis in fact or law exists.

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<sup>5</sup> Preston’s counsel even provided Judge Davis with a Dropbox link containing exhibits to Lilynn Cutrer’s deposition in the Houston probate proceeding. *See* Appx. G.

### III.

#### **Assignment of Error**

Judge Davis erred by accepting and reviewing materials from Preston's counsel after self-recusal, by issuing the purported order after self-recusal, and by issuing an "order" which orders nothing and includes gratuitous, inaccurate statements addressing the merits of this case and related cases in Texas, all of which occurred without a hearing or even providing Mrs. Marshall the opportunity to be heard.

### IV.

#### **Summary of Argument**

Judge Davis's purported order is absolutely null. It was entered after Judge Davis recused himself and while he was proceeding under an admitted conflict that required his recusal. Moreover, the purported order was a gross departure from proper judicial proceedings and violates Mrs. Marshall's right to due process. Specifically, it contains numerous findings of fact despite the fact that no hearing was ever held and that no evidence was properly submitted. Those findings of fact will be used to the prejudice of Mrs. Marshall in this case and in the Houston probate proceeding. Since the issuance of the purported order, Preston has already amended two pleadings in Texas to incorporate verbiage from the purported order. Furthermore, those findings undermine rulings already entered by Judge Wilson in this case. Simply put, the purported order should be vacated and stricken from the record.

### V.

#### **Law and Argument**

##### **A. The Purported Order Is Absolutely Null and Violates the Very Purpose of Why Judge Davis Recused Himself in the First Place**

"It has long been recognized in our civil procedure that once a judge is recused, or a motion for his recusal has been filed, he has no power to act (except to appoint the proper person to sit ad hoc when the law provides for such an appointment). **Any action taken by a recused judge is an absolute**

nullity.” *State v. Price*, 274 So. 2d 194, 197 (La. 1973); *Tatum v. Orleans Par. Sch. Bd.*, 2004-1190, p. 3 (La. App. 4 Cir. 1/26/05), 894 So. 2d 1180, 1181 (same).

“In considering the particular action taken by a recused judge, our courts have made no distinction between ministerial and judicial acts. We have determined that no action may be performed by the recused judge.” *Price*, 274 So. 2d at 197.

The theory of recusation is based upon public policy, for it is applied not only **for the protection of the litigants but generally to see that justice is done by an impartial court.** *Id.* (emphasis added). “It is, therefore, for the sake of appearance to the general public as well as protection against the acts themselves that a judge be prohibited from any activity in a case in which he has been recused.” *Id.* “It therefore clearly follows that if a trial judge recuses himself or herself from a case, the trial judge may not take any further action in that case, including that of rescinding the prior order of recusal,” *Tatum*, 894 So. 2d at 1181 (citing *State v. Clarke*, 2003-0129, p. 5 (La. App. 1 Cir. 9/29/03), 857 So. 2d 599, 602).

In this case, Judge Davis recused himself on Friday, June 22nd, and gave his reasons for doing so. Any action he took after that, including issuing the purported order, is an absolute nullity.

Moreover, Judge Davis had the case for less than 24 hours before he recused himself. He then requested information from Preston’s counsel and considered that one-sided information before issuing his purported order. Nearly all of the statements in the purported order were completely unnecessary in order for Judge Davis to ask this Court to appoint an ad hoc judge. They go well beyond the issue of recusing Judge Wilson, or any other judge, and amount to a press release parroting and promoting the arguments of Preston’s counsel in this case and the Houston probate court. The whole purpose of Judge Davis recusing was to avoid that bias and the appearance of such impropriety.

**B. The Purported Order Was Procedurally Improper and Violated Mrs. Marshall's Right to Due Process**

“The due process clauses of the Louisiana Constitution and the Fourteenth Amendment to the United States Constitution guarantees litigants a right to a fair hearing.” *Chauvin v. Chauvin*, 2010-1055, p. 5 (La. App. 1 Cir. 10/29/10), 49 So. 3d 565, 570. This Court has long held that an order granted without evidence adduced in support of it, and without opportunity afforded to the other side to adduce evidence, “is irregular, null, and void, and will be set aside in the exercise of the supervisory jurisdiction.” *Brouillette v. Judge of Tenth Judicial Dist.*, 45 La. Ann. 243, 12 So. 134 (1893).

Furthermore, La. Code Civ. Proc. art. 155(B) provides that “[i]n a district court having more than two judges, the motion to recuse shall be referred to another judge of the district court for trial through the random process of assignment in accordance with the provisions of the Code of Civil Procedure Article 253.1.

Judge Davis circumvented the requirements of La. Code Civ. Proc. art. 155, assuming that all of his colleagues share his opinion. Clearly, that is not the case. In fact, it does not even appear that Preston shares his opinion, as a parallel trust (the Falcon Trust) is currently involved in litigation in the 14th JDC before Judge David Ritchie, whom Preston has not moved to recuse. Judge Wilson obviously did not believe that she needed to self-recuse. For 18 months, Preston did not believe that either, as he filed and defended numerous motions and exceptions in front of Judge Wilson, not once mentioning recusal. When the risk that Judge Wilson would enjoin Preston from using the Houston probate court to undermine the jurisdiction and rulings of the 14th JDC arose (specifically designated as the proper court in the Harrier Trust Indenture), Preston then raised recusal.<sup>6</sup>

Additionally, although Judge Davis's purported order lacks any decretal language, it tries granting Preston the relief he requests, and then some. While Judge Davis recused himself from addressing whether Judge Wilson should be

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<sup>6</sup> Ironically, the June 23rd, 8:30 a.m. email from Preston's counsel claimed that Mrs. Marshall had somehow waived recusal of Judge Davis by waiting until the next day to request his recusal, immediate after confirming the basis for it.

recused, his purported order states that “[n]o purpose is served in pretending that [Lilynn Cutrer’s] actions can be justified or that the taint of her actions would not infect any other judge of this Court.” Purported Order at 2. In no uncertain terms, Judge Davis ruled on what he recused himself from ruling on in the first place.<sup>7</sup>

Moreover, that purported order and its prejudicial findings were based exclusively upon the materials Preston’s counsel presented via emails and without affording Mrs. Marshall or the co-trustees any hearing or chance to present counter-evidence. None of those materials constitute evidence. Some of those materials were even from depositions taken in a different case. Importantly, the evidence, including the Harrier Trust Indenture, would show that Judge Davis’s “findings” are wrong.

For example, the purported order makes the following incorrect statements, among others, which were based on the deposition questions or pleadings of

Preston’s counsel:

- “[This case] involves control of Marshall family trusts whose primary assets are significant shares of Koch Industries, this country’s second largest privately owned company.”<sup>8</sup>

Control of the Harrier Trust is not and never has been at issue in the 14th JDC. Indeed, the Trust Indenture speaks for itself. It appoints Mrs. Marshall as Trustee, and it gives her the power to appoint co-trustees. Moreover, the Harrier Trust does not currently own and never will own a single share of Koch Industries stock.

- “At issue are billions of dollars.”<sup>9</sup> *Id.*

Billions of dollars are not at issue in this lawsuit. See Statement of Facts,

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<sup>7</sup> Any assertion that the purported order constitutes Judge Davis’s reasons for recusing himself would be incorrect. Judge Davis had already given those on Friday, June 22<sup>nd</sup>. In fact, nowhere in the purported order does Judge Davis even mention that he recused himself, because he had already done so.

<sup>8</sup> During Lilynn Cutrer’s deposition, Preston’s counsel asked her, “Are you aware that the primary asset underlying asset of the Harrier Trust will be and is Koch Industries and Koch Holdings stock?”

<sup>9</sup> During Lilynn Cutrer’s deposition, Preston’s counsel asked her, “You understand this is a multi-billion dollar trust, correct?”

*supra*.

- “These cases promise to bring heightened public scrutiny to the Louisiana judiciary, especially in light of Lilynn Cutrer’s role as trustee.” *Id*.

There has already been several years of Marshall-related litigation in the 14<sup>th</sup> JDC, including many public filings in the 14th JDC, the Third Circuit Court of Appeal, and this Court. Preston, his lawyers, and now Judge Davis are the only people to have made an issue of Lilynn Cutrer’s appointment.

- “The present value of Judge Cutrer’s trustee’s fee is estimated to be in the range of \$18,000,000 (deposition p. 68, attached).”<sup>10</sup> *Id*.

That question from Preston’s counsel was based upon his own unauthenticated, hearsay expert report in the Houston probate proceeding (talking about the present value of all of the co-trustee fees, not just Lilynn Cutrer’s) which is riddled with errors and contradicted by Mrs. Marshall’s expert in that case.

- There is “a recently inserted provision that increases the fee if the trustees do not make distributions to the trust’s beneficiary; the beneficiary to whom they owe a fiduciary obligation.”<sup>11</sup> *Id*.

Like most trusts, the compensation formula provides for a fixed percentage of various items. Preston complains that if the assets retained in the trust are higher, applying the percentage results in higher compensation. This is true in every trust where an institutional trustee is compensated based on a percentage of the trust assets. The same type of issue would occur if a trustee was being paid by the hour – the more hours worked, the higher the compensation. Furthermore, there is no “recently inserted provision.” The

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<sup>10</sup> During Lilynn Cutrer’s deposition, Preston’s counsel asked her, “Were you aware that, by the point in time where Ms. Marshall would be passing, that the cumulative discounted co-trustee fees would be \$18,252,000?” To that question and a number of other related leading questions about whether Lilynn Cutrer was “aware” of certain things, Lilynn Cutrer answered “no.”

<sup>11</sup> Preston’s opposition to the co-trustees’ motion for preliminary injunction, Preston asserted:

“Elaine took it upon herself to appoint five new co-trustees . . . , and established for them a lavish compensation scheme which was designed to increase their fees in direct proportion to the amount of money withheld from the beneficiary. This new and unlawful scheme presents a stark contrast to the trustee’s fees allowed by the trust instrument . . . .”

Harrier Trust Indenture provides that “[t]he Trustee shall be entitled to reasonable compensation for services actually rendered, which shall not exceed the customary charge imposed by banks or trust companies in the locality for discharging equivalent duties.” The compensation formula merely spelled out the “reasonable compensation” that, according to Edwin K. Hunter and Mrs. Marshall’s expert in the Houston probate proceeding, does not exceed what a bank or trust company would charge.

- “Her [Mrs. Marshall’s] attorneys prepared this irrevocable trust.” *Id.* at 1.

This is misleading. Pierce Sr.’s attorney, Edwin K. Hunter, prepared the Harrier Trust Indenture for Pierce Sr., the settlor back in 2006.

- “Her attorneys recently devised new trust provisions to add several co-trustees.” *Id.*

Again, this is erroneous. Mrs. Marshall appointed the co-trustees pursuant to section 6.2(G) of the Harrier Trust Indenture.

- “These same attorneys for Elaine Marshall approached Judge Cutrer with this once-in-a-lifetime opportunity at immense wealth.”

This is actually inconsistent with Lilynn Cutrer’s testimony about what she actually was told about the opportunity.

- “She admits to bringing nothing to the table to justify her selection as a trustee to billion dollar family trusts. Prior to her appointment, she did not know this family. They did not know her.”

The Harrier Trust Indenture **requires** that any co-trustee be a “disinterested individual.”

- “She knows nothing of finance. She does not know the basics of how these trusts were put together. She has never served as a trustee. She will rely on experts to advise her.” *Id.* at 2.

None of these items are required in the Harrier Trust Indenture, nor under the law or practice. In fact, the Louisiana Trust Code provides that a trustee may consult such experts in administering a trust. *See* La. Rev. Stat. § 9:2087(B)(1) (providing that “[a] trustee may, by power of attorney, delegate the performance of ministerial duties”); *City of New Orleans v. Cheramie*, 509 So. 2d 58, 60 (La. App. 1 Cir. 1987) (“a trustee may delegate those duties which a person of ordinary prudence might in like circumstances in the management of his own affairs

entrust others to perform”). In fact, Preston routinely relies upon accountants and tax advisors in administering the Marshall trusts for which he is trustee. Indeed, he has blamed them for his failures as a trustee.

- “These [experts she will rely upon] will be the same professional trust company experts who could serve as trustees without charging the exorbitant and unconscionable fees that the current trustees stand to collect.” *Id.* at 2

This is false. The Harrier Trust Indenture requires the appointment of a disinterested “individual,” thus specifically excluding a professional trust company from serving as a trustee.

- “One can only speculate as to what drew the Elaine Marshall interests to seek the services of a sitting judge in the same judicial district where they were embroiled in fierce litigation involving billions of dollars.” *Id.* at 2.

That is an unfair personal attack. Any such determination can be made upon a proper evidentiary record. Moreover, billions of dollars are not at issue and have never been at issue in the Harrier Trust litigation in the 14th JDC.

These “findings” also undermine Judge Wilson’s rulings in this case which, based on a proper evidentiary and procedural record, adjudged the appointment of the co-trustees to be proper. Specifically, the purported order, *inter alia*, questions the propriety of the appointment of the co-trustees, accuses Lilynn Cutrer of violating the Code of Judicial Conduct by accepting the appointment, and questions the co-trustees’ compensation. *See* Appx. A at 1-2.

Every one of the issues commented upon in the purported order happens to be at issue in the 14<sup>th</sup> JDC litigation and in Houston probate court. In fact, within 24 hours of Judge Davis’s purported order, Preston relied upon and quoted substantial portions of the purported order in his opposition to the co-trustees’ amended mandamus in the Texas appellate court and in his amended application in the Houston probate court for appointment of a receiver over the Louisiana Harrier Trust. The purported order provides Preston with a false “record” which was issued wrongfully and without due process or compliance with basic evidentiary rules.

## VI.

### Conclusion

Based on the foregoing, Applicant Elaine T. Marshall requests that this Court grant this Application for Writs, vacate the “Order Requesting the Supreme Court to Assign an Ad Hoc Judge,” and order that it be stricken from the record.

Respectfully submitted,

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VII.

VERIFICATION AND CERTIFICATE OF SERVICE

I hereby verify that the allegations in this Application for Writ of Certiorari are true and correct to the best of my knowledge. I further verify that on June 29, 2018, the Application was filed with the Louisiana Supreme Court using the Court's electronic Data/Document Exchange, served on all counsel below via equally prompt means using email, and sent via First Class United States Mail to all counsel for the parties:

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/s/ Richard Sherburne, Jr.

IN RE: : 14TH JUDICIAL DISTRICT COURT  
VS. NO. 2016-3020 : PARISH OF CALCASIEU  
HARRIER TRUST : 14TH JUDICIAL DISTRICT COURT  
FILED: JUN 27 2018 : *Shelba Lynne Hardy*  
: DEPUTY CLERK OF COURT

ORDER REQUESTING THE SUPREME COURT TO ASSIGN AN AD HOC JUDGE

Preston Marshall asks the Court to have an *ad hoc* judge appointed to hear the pending Motion to Recuse Judge Wilson. An *ad hoc* judge would insulate the judges of the 14th JDC from presiding in this case in which their colleague, Judge Cutrer, is a trustee for the trust at issue in the case. Judge Cutrer also accepted an appointment as a trustee for the Falcon Trust, the subject of similar proceedings in the 14th JDC, No. 2016-3022, Div. E. Judge Cutrer's acceptance of the trustee appointments and her continued participation in that role are undeniable violations of the Louisiana Code of Judicial Conduct.

The appointment of Judge Cutrer and other co-trustees is at the heart of the litigation. The Motion to Recuse was allotted to Div. B. Div. B will not hear the case or the recusal motion, but because of the "paramount importance of maintaining public confidence in the judiciary" and because the presence of Judge Cutrer undermines public confidence in our civil justice system, the intervention of the Supreme Court at this time is necessary. *State v. Brown*, 2015-0122 (La. App. 4 Cir. 7/6/15), 174 So.3d 95. See *Cosse v. Orihuala*, 12-486 (La. App. 5 Cir. 1/30/13), 109 So.3d 950 for the authority of a single judge in a multi-division judicial district to make this request and the Supreme Court's "complete discretion" to act on this request.

This is not your garden variety civil suit. It involves control of Marshall family trusts whose primary assets are significant shares of Koch Industries, this country's second largest privately owned company. At issue are billions of dollars. These cases promise to bring heightened public scrutiny to the Louisiana judiciary, especially in light of Judge Cutrer's role as trustee.

The present value of Judge Cutrer's trustee's fee is estimated to be in the range of \$18,000,000 (deposition p. 68, attached). It could be much more depending on some variables, including, unbelievably, a recently inserted provision that increases the fee if the trustees do not make distributions to the trust's beneficiary; the beneficiary to whom they owe a fiduciary obligation.

Elaine Marshall is the trustee named in the original trust document. Her attorneys prepared this irrevocable trust. Her attorneys recently devised new trust provisions to add several co-trustees.

According to Preston Marshall, the addition of new co-trustees was designed to keep those aligned against him in control of the trusts. These same attorneys for Elaine Marshall approached Judge Cutrer with this once-in-a-lifetime opportunity at immense wealth.

The undersigned has read Judge Cutrer's depositions in these cases. She admits to bringing nothing to the table to justify her selection as a trustee to billion dollar family trusts. Prior to her appointment, she did not know this family. They did not know her. She knows nothing of finance. She does not know the basics of how these trusts were put together. She has never served as a trustee. She will rely on experts to advise her. These will be the same professional trust company experts who could serve as trustees without charging the exorbitant and unconscionable fees that the current trustees stand to collect. One can only speculate as to what drew the Elaine Marshall interests to seek the services of a sitting judge in the same judicial district where they were embroiled in fierce litigation involving billions of dollars.<sup>1</sup>

Judge Cutrer accepted these appointments despite having sworn to uphold the Code of Judicial Conduct. She swore to avoid the appearance of impropriety. She swore to refuse to serve as a trustee in these types of trusts. She swore to refuse association with any entity, like these trusts, that might be in litigation in the 14th JDC (the trusts were litigating in the 14th JDC when she accepted her trustee appointments). She swore to avoid situations which would put her fellow judges in the kind of conflict they now find themselves. The list goes on. Judge Cutrer has ignored it all. At the time of her deposition, Judge Cutrer had "earned" a \$50,000 fee. No purpose is served in pretending that her actions can be justified or that the taint of her actions would not infect any other judge of this Court.<sup>2</sup>

ACCORDINGLY, the undersigned Judge of the 14th JDC requests the Louisiana Supreme Court to appoint an *Ad Hoc* judge to hear this case; alternatively, to hear the Motion to Recuse.

THUS DONE AND SIGNED this 27th day of June, 2018, at Lake Charles, Louisiana.<sup>3</sup>

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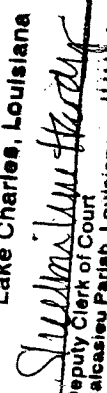
<sup>1</sup> The undersigned is aware that one of the co-trustees, Pastor Alexander, is pastor to Judge Ware of the 14th JDC. Another co-trustee, Adam Johnson, formerly clerked for the 14th JDC and worked under the direction of Judge Wyatt.

<sup>2</sup> Judge Cutrer's deposition of November 20, 2017 is attached and made a part of this ruling.

<sup>3</sup> This is a stamped signature used due to Judge Davis being out of state. He will place his original signature on this order upon his return.

  
CLAYTON DAVIS, District Judge  
Division "B"

A TRUE COPY  
Lake Charles, Louisiana

  
Deputy Clerk of Court  
Calcasieu Parish, Louisiana

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