

DISCLOSURE BY A FIDUCIARY/TRUSTEE OUTSIDE FORMAL DISCOVERY: NON-TRADITIONAL RULES AND ALTERNATIVE METHODS

1. INTRODUCTION

This paper contains an analysis of a trustee's duty to disclose information to trust beneficiaries. While it is outside the scope of this paper, many of these duties apply to other fiduciaries such as executors and administrators. The duty of a trustee to disclose information is an **equitable duty**. Enforcement of this duty should therefore be through an **equitable remedy** rather than by the formal legal remedies that are set forth in the Texas Rules of Civil Procedure and apply to legal causes of action. Many Texas courts, however, have trouble recognizing this distinction.

2. AN OVERVIEW OF THE TRUSTEE'S DUTY TO DISCLOSE

1. The Commentators

American Law Institute, *Restatement Of The Law, Trusts 2d*, §173 states that:

“The trustee is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property, and to permit him, or a person duly authorized by him, to inspect the subject matter of the trust and the accounts and vouchers and other documents relating to the trust.”

William E. Fratcher, *Scott On Trusts*, §173 (Fourth Edition) states that:

“The trustee is under a duty to the beneficiaries to give them on their request at reasonable times complete and accurate information as to the administration of the trust. The beneficiaries are entitled to know what the trust property is and how the trustee has dealt with it. They are entitled to examine the trust property and the accounts and vouchers and other documents relating to the trust and its administration. Where a trust is created for several beneficiaries, each of them is entitled to information as to the trust. Where the trust is created in favor of successive beneficiaries, a beneficiary who has a future interest under the trust, as well as a beneficiary who is presently entitled to receive income, is entitled to such information, whether his interest is vested or contingent.”

George Gleason Bogert and George Taylor Bogert, *The Law of Trusts and Trustees*, § 961 (Revised Second Edition) explain this duty in the following manner:

“The beneficiary is the equitable owner of the trust property, in whole or in part. The trustee is the mere representative whose function is to attend to the safety of the trust

property and to obtain its avails for the beneficiary in the manner provided by the trust instrument. That the settlor has created a trust and thus required that the beneficiary enjoy his property interest indirectly does not imply that the beneficiary is to be kept in ignorance of the trust, the nature of the trust property and the details of its administration. **If the beneficiary is to be able to hold the trustee to proper standards of care and honesty and to obtain the benefits to which the trust instrument and doctrines or equity entitle him, he must know what the trust property consists and how it is being managed.** (emphasis supplied)

From these considerations it follows that the trustee has the duty to inform the beneficiary of important matters concerning the trust and that the beneficiary is entitled to demand of the trustee all information about the trust and its execution for which he has any reasonable use. It further follows that the trustee is under a duty to notify the beneficiary of the existence of the trust so that he may exercise his rights to secure information about trust matters and to compel an accounting from the trustee. **For the reason that only the beneficiary has the right and power to enforce the trust and to require the trustee to carry out the trust for the sole benefit of the beneficiary, the trustee's denial of the beneficiary's right to information consists of a breach of trust.** (emphasis supplied)

If the beneficiary asks for relevant information about the terms of the trust, its present status, past acts of management, the intent of the trustee as to future administration, or other incidents of the administration of the trust, and these requests are made at a reasonable time and place and not merely vexatiously, it is the duty of the trustee to give the beneficiary the information which he is asked. Furthermore, the trustee must permit the beneficiary to examine the account books of the trust, trust documents and papers, and trust property, when a demand is made at a reasonable time and place and such inspection would be of benefit to the beneficiary.”

2. The Cases

In examining Texas cases involving this duty it is important to distinguish between cases that relate to transactions where a trustee has some personal dealing with a beneficiary (which impose very harsh disclosure requirements) from those cases that relate to disclosure in general. The following cases relate to the general disclosure rules.

In *Shannon v. Frost National Bank*, 533 S.W.2d 389 (Tex. App. - San Antonio, 1975, writ ref'd n.r.e), the court stated that:

“However, it is well settled that a trustee owes a duty to give to the beneficiary upon request complete and accurate information as to the administration of the trust. 2 Scott, Trusts §173 (3rd. ed. 1967).”

In *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984) the Texas Supreme Court held that:

“As trustees of a trust and executors of an estate with Virginia Lou as a beneficiary,

Jack Jr. and his mother owed Virginia Lou a fiduciary duty of full disclosure of all material facts known to them that might affect Virginia Lou's rights....The existence of strained relations between the parties did not lessen the fiduciary's duty of full and complete disclosure..... The concealment of a material fact by a fiduciary charged with the duty of full disclosure is extrinsic fraud.”

In *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996) the Texas Supreme Court observed that:

Trustees and executors owe beneficiaries “a fiduciary duty of full disclosure of all material facts known by them that might affect [the beneficiaries] rights. *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984). See also TEX. PROB. CODE §113.151(a) (requiring trustee to account to beneficiaries for all trust transactions.) This duty exists independently of the rules of discovery, applying even if no litigious dispute exists between the trustee and beneficiaries.....**The trustees duty of full disclosure extends to all material facts affecting the beneficiaries rights...** (emphasis supplied)

3. A TRUSTEE'S SPECIFIC DUTIES OF DISCLOSURE

1. A trustee has the fiduciary duty, without demand **by the beneficiary, to inform all current trust beneficiaries of the existence of the trust.**

1. See *Bogert, supra §961*.

2. A trustee has the fiduciary duty, without demand **by the beneficiary, to inform all trust beneficiaries of the material facts in connection with any non-routine transaction which significantly affects the trust estate and the interest of the beneficiaries prior to the transaction taking place.**

1. This duty was first recognized by the Washington Supreme Court in *Allard v. Pacific National Bank*, 99 Wash.2d 394, 663 P.2d 104 (1983). This duty was first examined by Texas Courts in *Interfirst Bank v. Risser*, 739 S.W.2d 882, 906 (footnote 28.) (Tex. App. - Texarkana 1987, no writ).

3. A trustee has the fiduciary duty, without demand **by the beneficiary, to disclose all relevant information relating to any transaction in which the trustee has a personal interest.**

1. *Restatement Of The Law, Trusts 2d*, supra §170; *Scott On Trusts*, supra §170 and *Bogert, The Law of Trusts and Trustees*, supra § 543

2. A lead Texas case on this issue is *Kinzbach Tool Co. v. Corbett-Wallace Corporation*, 160 S.W.2d 509 (Tex. 1942). See also *Gaynier v. Ginsberg*, 715 S.W.2d 749 (Tex. App.-Dallas 1986, writ ref'd n.r.e.); *Miller v. Miller*, 700 S.W.2d 941 (Tex. App.-Dallas 1985, writ ref'd n.r.e.); *Johnson v. Peckham*, 120 S.W.2d 786

(Tex. 1938)

4. A trustee has the fiduciary duty, upon demand by the beneficiary (or, if the trust instrument requires periodic accountings, without demand) to furnish to the beneficiaries with a formal trust accounting.
 1. It is probably against the public policy of the State of Texas for a Settlor to relieve a trustee from his duty to account. See *Hollenbeck v. Hanna*, 802 S.W.2d 412 (Tex. App. - San Antonio 1991, no writ)
 1. A trust instrument may impose a duty on the trustee to periodically account to the trust beneficiaries. See *Beaty v. Bales*, 677 S.W.2d 750 (Tex. App. - San Antonio 1984, writ ref'd n.r.e.)
 2. A trustee is required to keep full, accurate, and orderly records concerning the status of the trust estate and of all acts performed thereunder. *Shannon v. Frost National Bank*, 533 S.W.2d 389 (Tex. App. - San Antonio 1975, writ ref'd n.r.e.)
 2. Tex. Trust Code Ann. §113.151 and 113.152 grant the beneficiaries the right to obtain a statutory trust accounting from the trustee of the trust.
5. A trustee has the fiduciary duty, upon demand by the beneficiary, to inform a beneficiary of the nature and amount of the trust property.
 1. *Restatement Of The Law, Trusts 2d*, supra §173; *Scott On Trusts*, supra §173 and *Bogert, The Law of Trusts and Trustees*, supra § 961.
 2. Tex. Trust Code Ann. §113.152 contains the requirements for the contents of a statutory trust accounting. Tex. Trust Code Ann. §113.152 (3) requires that the trustee disclose “a listing of all property being administered, with an adequate description of each asset.”
6. A trustee has the fiduciary duty, upon demand by the beneficiary, to inform a beneficiary of the past acts of management of a trustee.

1. *Restatement Of The Law, Trusts 2d*, supra §173; *Scott On Trusts*, supra §173 and Bogert, *The Law of Trusts and Trustees*, supra § 961
 2. Authority for the existence of this duty exists in the writings of the commentators set forth above as well in the general recitations contained in *Shannon v. Frost National Bank*, supra; *Montgomery v. Kennedy*, supra; and *Huie v. DeShazo*, supra.
7. A trustee has the fiduciary duty, upon demand by the beneficiary, to inform a beneficiary of the intent of the trustee regarding the future administration of the trust estate.
1. *Restatement Of The Law, Trusts 2d*, supra §173; *Scott On Trusts*, supra §173 and Bogert, *The Law of Trusts and Trustees*, supra § 961.
 2. Authority for the existence of this duty exists in the writings of the commentators set forth above as well in the general recitations contained in *Shannon v. Frost National Bank*, supra; *Montgomery v. Kennedy*, supra; and *Huie v. DeShazo*, supra.
- 8. A trustee has the fiduciary duty, upon demand by the beneficiary, to allow a beneficiary to inspect the books and records of the trust.**
1. *Restatement Of The Law, Trusts 2d*, supra §173; *Scott On Trusts*, supra §173 and Bogert, *The Law of Trusts and Trustees*, supra § 961.
 2. Authority for the existence of this duty exists in the writings of the commentators set forth above as well in the general recitations contained in *Shannon v. Frost National Bank*, supra; *Montgomery v. Kennedy*, supra; and *Huie v. DeShazo*, supra.

4. OBTAINING INFORMATION FROM A TRUSTEE

1. Who is Authorized to Demand Information

The policy underlying a trustee's duty to disclose is to give beneficiaries of trusts access to sufficient information to allow them to enforce the trust. The beneficiaries are the only persons authorized by law to enforce the trust.

The only persons who may enforce this duty are beneficiaries of the trust regardless of the nature of their interest. The duty may be enforced by the income beneficiaries or by either vested or contingent remainder beneficiaries.

The settlor of a trust has no equitable power to enforce this duty.

Neither creditors nor persons having tort claims against the trustee have a common law equitable power to enforce this duty. Their claims against the trust are of a legal nature (rather than an equitable nature), consequently, they are required to obtain information through the legal discovery methods contained in the Texas Rules of Civil Procedure.

There is one exception to the rule set forth in the preceding paragraph. Tex. Trust Code Ann. §113.151(b) provides that:

An interested person may file suit to compel the trustee to account to the interested person. The court may require the trustee to deliver a written statement of account to the interested person on finding that the nature of the interest in the trust of, the claim against the trust by, or the effect of the administration of the trust on the interested person is sufficient to require an accounting by the trustee.

Tex. Trust Code Ann. §111.004 defines “interested person” to mean:

a trustee, beneficiary, or any other person having an interest in or a claim against the trust or any person who is affected by the administration of the trust. Whether a person, excluding a trustee or named beneficiary, is an interested person may vary from time to time and must be determined according to the particular purposes and manner involved in any proceeding.

Note that an “interested person” may not obtain an accounting on demand. Such person must file a motion with the court to compel the trustee to provide an accounting.

2. Who Is Required To Pay The Costs Incident To Disclosure

The trustee is usually allowed to utilize the trust estate of the trust to pay costs necessary for him to comply with any demand for information. If a trustee resists disclosure (and thereby breaches his fiduciary duty to disclose) the beneficiaries should be able to convince a court of equity to make such trustee reimburse the trust for any costs incident to such resistance.

A harder question is whether these costs should be allocated to the income account or the principal account of the trust estate. Tex. Trust Code Ann. §113.111 is not particularly helpful in this regard [see §113.111 (a) (3) and (4) versus 113.111 (b) (2)]. If the cost is substantial, then the trustee should probably seek court instruction pursuant to Tex. Trust Code Ann. §115.001.

The trustee should never allocate these costs in a manner that would constitute retaliation against the beneficiary seeking the information.

3. Demands For Information From A Trustee:

1. Policy Distinctions Between a Trustee’s Fiduciary Duty to Disclose and a Litigants Rights to Discovery under the Texas Rules of Civil Procedure.

The public policy considerations involved in a common law information demand are different than those involved in a discovery request under the Texas Rules Of Civil Procedure for the following reasons:

1. The trustee is administering property (the trust estate) that belongs to the beneficiaries of the trust (*i.e.* the beneficiaries hold equitable title to the trust estate).

The trustee, acting in his individual capacity, usually has no personal interest whatsoever in the trust estate of the trust that he is administering.

2. Consequently, the information requested does not “belong” to the trustee (*i.e.* the trustee has no equitable interest in the trust estate of the trust). In legal discovery requests (under the Texas Rules Of Civil Procedure) a party to a lawsuit is requesting proprietary information and documents that belong to another party. This is not the case with respect to equitable demands for information. The trustee of a trust holds the trust estate for the benefit of the trust beneficiaries who have an equitable interest in all information and documents.
3. There is usually a financial disparity between the beneficiary (who is usually using his personal financial resources to obtain information) and the trustee (who is usually using the trust estate of the trust to pay for the cost of his compliance with the information demand). In essence, the beneficiary is paying everyone’s fees. This situation does not occur in legal discovery requests where independent parties are involved in litigation.
- d. The beneficiary of a trust is the only person authorized to enforce the trust. It is not possible for him to perform this function without disclosure from the trustee regarding how the trust is being administered.

Legal discovery, even under the new rules, is a time consuming and expensive process. The Texas Rules of Civil Procedure impose stringent limits on the amount of discovery available to the party to a law suit.

Public policy should dictate that courts of equity afford a beneficiary an expedited and relatively inexpensive method of obtaining information regarding his or her trust. Subject to equitable rules relating to the harassment of a trustee by a beneficiary, there should be no restrictions on the number of information requests that a beneficiary is entitled to make.

2. Demand Should Be In Writing

Note that any demand for information should be in writing and must be delivered to the trustee.

If a beneficiary can prove an oral demand on the trustee for information, the beneficiary may still have a common law right to obtain the information. An oral demand, however, is an uncertain and risky way to request information.

The Texas Trust Code requires that a statutory accounting demand be in writing.

3. Demand Should Be Sent By Certified Mail

The demand should be sent by certified mail so that the beneficiary has a receipt to show when the demand was made. If the trustee refuses to accept a certified letter, then it may be

necessary to personally serve the notice on the trustee.

4. Demand Should Specify Compliance Date

I usually demand compliance with an accounting demand on or before sixty (60) days from the receipt of the demand by the trustee. This time period is consistent with estate statutory accounting periods. See Tex. Prob. Code Ann. §149A (dealing with accounting demands to independent executors of estates) This time period is also longer than the discovery deadlines set forth in the Texas Rules of Civil Procedure (which are usually 30 days from receipt of the discovery request).

I typically request compliance with common law information demands and common law demands for production of documents on or before thirty (30) days from the receipt of the demand. This is more or less consistent with the time periods set forth in the Texas Rules of Civil Procedure for responding to interrogatories and document production requests.

After years of waiting for the demand deadline to expire and then having to compel disclosure of information, I have modified my demand forms as follows:

“Please confirm to me in writing, within ten (10) days of your receipt of this demand, that you intend to furnish all of the information requested in this demand on or before the date specified in this demand. If I do not receive such written confirmation within such time then my client reserves the right to immediately file a motion in any court of competent jurisdiction to compel compliance with this demand. Any motion to compel compliance with this demand may also contain a request that, because of your breach of your fiduciary duty to disclose, you, acting in your individual capacity, pay all legal fees and costs incident to the enforcement of this demand.

While it does not completely resolve the problem, this language has noticeably increased timely compliance with my accounting demands. I have not had the opportunity to see if a court would enforce this request.

5. Demand Should Specify The Name and Address of the Person To Whom The Information Is To Be Sent.

6. The Existence of Litigation at The Time The Demand Is Made

1. No Existing Litigation At The Time That The Demand Is Made

If there is no litigation pending at the time that a common law information demand or a common law demand for production of documents is made, then courts are likely to apply equitable remedies to the enforcement of the demands.

2. Existing Litigation At The Time That The Demand Is Made

If litigation is pending at the time that a common law information demand or a common law demand for production of documents is made, then the trustee’s attorneys will almost always seek to have the demands treated as legal discovery under the Texas Rules of Civil Procedure.

In this situation, many courts will force the beneficiary to treat the information demands as quasi-legal discovery. They will usually allow the beneficiary unlimited requests (*e.g.* will not treat common law demands for information as interrogatories for the purpose of limiting the number of requests) but will frequently force the beneficiary to enforce the demands using the legal remedies contained in the Texas Rules of Civil Procedure. They will sometimes try to limit the information requested to information that falls within the “scope of discovery” under such rules.

These approaches stem from the difficulty courts have in applying equitable remedies rather than the more familiar legal remedies to attempts to discover information.

5. STATUTORY TRUST ACCOUNTING

1. Demand for a Statutory Trust Accounting:

1. The Demand: See Forms: D 1.00 *Demand For Statutory Trust Accounting*.

Tex. Trust Code Ann. §115.151 (a) governs demands for trust accountings. This section provides that:

(a) A beneficiary by written demand may request the trustee to deliver to each beneficiary of the trust a written statement of accounts covering all transactions since the last accounting or since the creation of the trust, whichever is later.... However, the trustee is not obligated or required to account to the beneficiaries of a trust more frequently than once every 12 months unless a more frequent accounting is required by the court.

2. Practice Tips:

1. Specify The Date and Time of Compliance

Tex. Trust Code Ann. §113.151 requires that the trustee furnish the beneficiary with a formal trust accounting within “a reasonable time after the demand is made.”

As a practical matter, this means that the trustee will frequently refuse to furnish the beneficiary with an accounting within the time specified in the demand. In drafting demands the author usually requests production of the accounting within sixty (60) days of receipt of the demand. This time period is consistent with estate statutory accounting periods. See Tex. Prob. Code Ann. §149A (dealing with accounting demands to independent executors of estates).

2. Incorporate The Statutory Contents Of An Accounting Into The Demand

Even if the demand specifically states that it is being made pursuant to Tex. Trust Code Ann. §113.151, my experience has been that few trustees really know what should be reported on a statutory accounting. For this reason, you should include the

statutory contents of a formal trust accounting in your demand.

Banks want to give you their computer generated accountings (which usually do not comply with the statute).

Individuals usually have their personal accountant prepare the statutory trust accounting. Accountants usually have no concept of fiduciary accounting principals.

Even when the required statutory contents are included in the accounting demand, there will usually be problems with compliance with Tex. Trust Code Ann. §113.152 (2), which addresses the allocation of receipts and disbursements between the income and principal accounts. See Subchapter D. Texas Trust Code, *Allocation of Principal and Income*.

3. Contents of a Formal Trust Accounting

Tex. Trust Code Ann. §113.152 provides that the accounting must show that:

1. all trust property that has come to the trustee's knowledge or into the trustee's possession and that has not been previously listed or inventoried as property of the trust;
2. a complete account of receipts, disbursements, and other transactions regarding the trust property for the period covered by the account, including their source and nature, with receipts of principal and income shown separately;
3. a listing of all property being administered, with an adequate description of each asset;
4. the cash balance on hand and the name and location of the depository where the balance is kept; and
5. all known liabilities owed by the trust.

4. The Motion To Compel: See Form M 1.00 *Motion To Compel Compliance With Statutory Trust Accounting Demand*.

Tex. Trust Code Ann. §113.151 (a) provides in part that:

...If the trustee fails or refuses to deliver the statement within a reasonable time after the demand is made, **any beneficiary of the trust may file suit to compel the trustee to deliver a written statement of account to all beneficiaries on finding that the nature of the beneficiaries interest is sufficient to require an accounting by the trustee.** (emphasis added)

Texas cases do not adequately explain the phrase “upon a finding that the nature of the beneficiary's interest is sufficient to require an accounting by the trustee.” The

common law rule is that any beneficiary may request an accounting. This language may leave a court the option of deciding that a beneficiary's interest in the trust is so remote that he does not have standing to demand an accounting from the trustee. It has also been suggested that this language only applies to situations where the beneficiary files a motion to compel the trustee to deliver a statutory accounting to all of the beneficiaries of the trust (rather than only to the beneficiary making the demand). The court is then given discretion to determine which beneficiaries get accountings.

6. COMMON LAW DISCLOSURE

1. Common Law Demands for Information and/or Common Law Demands For Production of Documents: See Form D2.00 *Common Law Information Demand*, D3.00 *Common Law Demand For Production of Documents*, and D4.00 *Common Law Demand For Information and For Production of Documents*.

1. The Demand

As set forth above the demand should be in writing and should be mailed by certified mail, return receipt requested, to the trustee.

The demand should contain both instructions and definitions of terms used in the demand. The instructions should specifically request that the trustee give narrative answers to the questions asked in addition to providing inspection of the documents requested. Trustees will frequently inundate a beneficiary with documents and state that the answers to all of his questions may be found by examining the documents.

It is permissible to seek information regarding: (1) the nature and amount of the trust property; (2) the past acts of management of a trustee; and/or (3) the intent of the trustee regarding the future administration of the trust estate.

It is permissible for the demand to be phrased in a way similar to interrogatory requests under the Texas Rules of Civil Procedure. Likewise the common law demand for inspection of documents may be phrased in a way similar to document production requests under the Texas Rules of Civil Procedure.

If the beneficiary is seeking both information and access to documents, then use the same demand to obtain both information and inspection of documents. See Forms: D4.00 *Common Law Demand for Information and For Production Of Documents*.

2. Practice Tips

The common law relating to demands for information and/or production of documents is not as clear as, for example, a statutory accounting demand where the process to obtain the accounting is prescribed by statute. While the law seems to be quite clear that a beneficiary is entitled to information from a trustee; the process by which this information is obtained has not been clearly

defined by Texas Courts.

3. The Motion To Compel: See Form M2.00 *Motion To Compel Compliance with Common Law Information Demand*, M3.00, *Motion To Compel Compliance With Common Law Document Production Demand*, and M4.00 *Motion To Compel Compliance with Common Law Information Demand and Common Law Demand For Production of Documents*.

A trustee's refusal to properly furnish information is a breach of the fiduciary duty to disclose. If such a breach is proven, in addition to compelling compliance, the additional remedies set forth in Tex. Trust Code Ann. §114.001 may be granted. These include waiver of the trustee's commissions and/or removal.

Any person bringing an action to compel disclosure of information pursuant to Tex. Prob. Code Ann. §115.001 is also eligible to receive an award from the court of costs and attorneys' fees as may seem equitable and just pursuant to Tex. Trust Code Ann. §114.064. If the trustee has wrongfully refused to disclose information, the beneficiary should be able to recover his attorneys' fees and costs from the trustee individually (rather than from the trust estate of the trust)¹. In this situation, he should also be entitled to cause the trustee to reimburse the trust estate of the trust for any costs and/or fees that the trustee has incurred in his unsuccessful defense of the motion to compel.

If a trustee fails or refuses to comply with a common law demand for information and/or a common law demand for production of documents, then the beneficiary may petition the court pursuant to Tex. Prob. Code Ann. §115.001 to compel compliance. Unfortunately, Texas courts are almost always reluctant to deal with equitable remedies. Courts are familiar with legal remedies, and equitable causes of action represent uncharted waters for most Texas judges (including statutory probate judges).

When disclosure of information is requested, Texas courts prefer to rely on discovery rules set forth in the Texas Rules of Civil Procedure. It is very difficult to get most Texas courts to take the time to understand and/or impose equitable disclosure remedies.

What frequently happens is that a court will recognize the beneficiary's equitable right to unlimited information requests but will force the beneficiary to treat all information requests as interrogatories and/or document production requests under the Texas Rules of Civil Procedure. Thus, courts recognize the equitable duty of the trustee to disclose information, but depend on legal, rather than equitable, remedies to compel compliance.

7. INFORMATION THAT A BENEFICIARY MAY NOT OBTAIN FROM A TRUSTEE

1. Information Subject To The Attorney-Client Privilege

¹ When seeking legal fees and costs a beneficiary should plead for recovery from the trustee, acting in his individual capacity, and alternatively from the trust estate of the trust.

1. The Attorney-Client Privilege

The attorney-client privilege protects from disclosure confidential communications between a client and his or her attorney “made for the purpose of facilitating the rendition of professional legal services to the client.” Tex. R. Civ. Evid. 503 (b).

2. A Privilege Exists Between a Trustee and His or Her Attorney

Confidential communications between a trustee and his or her attorney are subject to the attorney-client privilege. *Huie v. DeShazo*, 922 S.W.2d 920 (Tex.1996).

3. A Trustee Cannot Cloak A Material Fact By Communicating It To An Attorney

While the attorney-client privilege extends to the entire communication between a trustee and his attorney, including facts contained therein, a trustee cannot cloak a material fact with the privilege merely by communicating it to his or her attorney. *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 199 (Tex. 1993).

The *Huie* court explained this distinction as follows:

This distinction may be illustrated by the following hypothetical example: Assume that a trustee who has misappropriated money from a trust confidentially reveals this fact to his or her attorney for the purpose of obtaining legal advice. The trustee, when asked at trial whether he or she misappropriated money, cannot claim the attorney-client privilege. The act of misappropriation is a material fact of which the trustee has knowledge independently of the communication. The trustee must therefore disclose the fact (assuming no other privilege applies), even though the trustee confidentially conveyed the fact to the attorney. However, because the attorney’s only knowledge of the misappropriation is through he confidential communication, the attorney cannot be called on to reveal this information.

2. Information Relating To The Trustee’s Individual Activities

1. Information Regarding Matters other than a Trustee’s Administration of a Trust

The trustee’s duty to disclose relates only to information concerning his or her administration of a trust. If a beneficiary desires to obtain information from the trustee regarding his personal affairs then such person will probably be required to use the traditional discovery methods contained in the Texas Rules of Civil Procedure.

When a beneficiary is demanding information regarding self-dealing transactions by a trustee, the line between trust transactions and the trustee’s personal transactions becomes blurred. In this situation a court of equity should probably allow the beneficiary disclosure (outside of formal discovery) of the trustee’s personal transactions with the trust or trust property.

3. Harassing or Vexatious Discovery Demands

A court of equity should allow a beneficiary wide latitude in demanding information or inspection of documents from a trustee. If, however, the beneficiary's demands become repetitive, harassing or vexatious, then the court should prevent the beneficiary from successfully engaging in this behavior.

8. FORMS

1. Index To Forms:

- Form D1.00 Demand For Statutory Trust Accounting
- Form M1.00 Motion To Compel Compliance With Statutory Trust Accounting Demand
- Form O1.00 Order Compelling Compliance With Statutory Trust Accounting Demand
- Form D2.00 Common Law Information Demand
- Form M2.00 Motion To Compel Compliance With Common Law Information Demand
- Form O2.00 Order Compelling Compliance With Common Law Information Demand
- Form D3.00 Common Law Demand For Production of Trust Documents
- Form M3.00 Motion To Compel Compliance With Common Law Demand For Production of Trust Documents
- Form O3.00 Order Compelling Compliance With Common Law Demand For Production Of Trust Documents
- Form D4.00 Common Law Demand For Information and Production of Trust Documents
- Form M4.00 Motion To Compel Compliance With Common Law Information Demand and With Common Law Demand For Production Of Trust Documents
- Form O4.00 Order Compelling Compliance With Common Law Information Demand and With Common Law Demand For Production Of Trust Documents

Form D1.00 *Demand For Statutory Trust Accounting*

Note that this form assumes that the Trustee is not represented by an attorney. If the Trustee is represented by an attorney then this demand should be modified and sent to the Trustee's attorney rather than directly to the Trustee.

Date

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

*Mr./Ms. ___(name of the trustee)___
(address of trustee)*

RE: Demand For Statutory Trust Accounting

Dear ___(name of the trustee)___:

I represent ___(name of beneficiary)___ (the "Beneficiary") who is a beneficiary of the ___(name of the trust)___ Trust (the "Trust") which was created by and between ___(name of the settlor of the trust)___ as settlor and ___(name of the original trustee of the trust)___ as trustee on or about the ___day of ____, ____. It is my understanding that you are presently serving as trustee (the "Trustee") of the Trust. As a beneficiary of the Trust, my client has standing to demand a written statement of account and other information from you.

This letter constitutes a formal demand for a written statement of accounts covering all transactions since the last accounting or since the creation of the Trust, whichever is later. To the extent that written statements of account with respect to such trusts have been prepared for any prior period or periods and have been delivered to any beneficiary, then this letter constitutes formal legal demand for copies of such statements of account.

You are required by Tex. Trust Code Ann. §113.152 to furnish me (as the legal representative of the Beneficiary) with a written statement of accounts which shall show:

7. . All trust property that has come into the Trustee's knowledge or into the Trustee's

possession and that has not been previously listed or inventoried as property of the Trust;

8. . A complete account of receipts, disbursements, and other transactions regarding the Trust property for the period covered by the account, including their source and nature, with receipts of principal and income shown separately;
9. . A listing of all property being administered with an adequate description of each asset;
10. . The cash balance on hand and the name and location of the depository where the balance is kept; and
11. . All known liabilities owed by the Trust.

Tex. Trust Code Ann. §113.151 provides that this statement of accounts be delivered to me within a "reasonable time." It is my position that a reasonable time is on or before sixty (60) days after your receipt of this demand.

The statement of account should be sent to the undersigned at ___[*address of attorney representing the beneficiary*]___ on or before 5:00 P.M. on or before the first business day to occur after sixty (60) days after your receipt of this demand.

Please confirm to me in writing, within ten (10) days of your receipt of this demand, that you intend to furnish all of the information requested in this demand on or before the date specified. If I do not receive written confirmation within such time then my client reserves the right to immediately file a motion in any court of competent jurisdiction to compel compliance with this demand. Any motion to compel compliance with this demand may also contain a request that, because of your breach of the fiduciary duty to disclose, you, acting in your individual capacity, pay all legal fees and costs incident to the enforcement of this demand.

If you have any questions regarding this matter please do not hesitate to contact me.

Very truly yours,

Name of the Attorney Representing the Beneficiary

Form M1.00 *Motion To Compel Compliance With Statutory Trust
Accounting Demand*

CAPTION

MOTION TO COMPEL COMPLIANCE WITH STATUTORY TRUST ACCOUNTING

DEMAND

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, *_(name of beneficiary)_* (the “Movant”), acting individually as a beneficiary of the *_(name of trust)_* (the “Trust”), and derivatively on behalf of the Trustee of the Trust because *he/she* will not or cannot bring this cause of action, and files this *his/her* Motion To Compel Compliance With A Statutory Trust Accounting Demand from *_(name of the trustee)_* (the “Trustee”), acting individually and/or in *his/her* capacity as Trustee of the Trust, pursuant to Texas Trust Code §113.151(a). In support of his Motion, the Movant would respectfully show the Court the following:

1.

FACTS (BACKGROUND)

1. *(Optional: A true and correct copy of the Trust is attached hereto as Exhibit A and is specifically incorporated by reference herein.)*
2. The Trustee is currently serving as Trustee of the Trust.
3. The Movant is a beneficiary of the Trust.
4. On or about the ___ day of ____ the Trustee received a statutory demand for accounting (the “Demand”), made by the Movant pursuant to Tex. Trust Code Ann. §113.151.
5. *(Optional but recommended: A true and correct copy of the Demand is attached hereto as Exhibit B and is specifically incorporated by reference herein).*
6. The Trustee has failed to deliver the statement of accounts required by Tex. Trust Code Ann. §113.151 and §113.152 within a reasonable time after the

Demand was made.

2.

ARGUMENT AND AUTHORITIES REGARDING TRUSTEE'S DUTY TO DISCLOSE

7. The Trustee has a statutory duty to furnish the Movant with a trust accounting when proper demand is made. See Tex. Trust Code Ann. §113.151. If the Trustee fails or refuses such an accounting at the time and in the manner prescribed by the statute then the beneficiary making the demand has a right to compel the Trustee to comply with the statute. See Tex. Trust Code Ann. §113.151(a).

3.

ATTORNEYS' FEES UNDER THE TEXAS TRUST CODE

8. The Movant is entitled to this Court's ruling that the Defendant has breached his statutory duty to furnish *him/her* with the written statement of accounts described in Tex. Trust Code Ann. §113.151 and §113.152. The Movant is also entitled to an award for costs and reasonable and necessary attorneys' fees as may seem equitable and just pursuant to Texas Trust Code §114.064 against the Trustee, acting in *his/her/its* individual capacity and not as trustee. Alternatively, if Movant is not awarded costs and fees against the Trustee, acting in *his/her/its* individual capacity, *he/she* is entitled to be awarded costs and reasonable and necessary attorney's fees as may seem equitable and just against the Trustee, in *his/her/its* capacity as Trustee.

4.

PRAYER

9. WHEREFORE, premises considered, Movant PRAYS that, after a hearing on this motion, the Court grant the following relief:
1. COMPEL the Trustee to immediately deliver to the Movant a full and complete written statement of accounts containing the information required by Tex. Trust Code Ann. §113.152;
 2. FIND that the Trustee breached *his/her/its* fiduciary duty of disclosure to the Movant;

3. AWARD the Movant, in *his/her* individual capacity as a beneficiary of the Trust, costs and reasonable and necessary attorneys' fees as may seem equitable and just; and
4. GRANT such other relief at law or in equity as to which the Movant may show *himself/herself* entitled.

Respectfully submitted,

Closing

If there is a legal proceeding pending where persons interested in the trust are represented by attorneys or if you are aware that the trustee is represented by counsel then ADD A CERTIFICATE OF SERVICE.

**Form O1.00 *Order Compelling Compliance With Statutory Trust
Accounting Demand***

CAPTION

**ORDER COMPELLING COMPLIANCE WITH
STATUTORY TRUST ACCOUNTING DEMAND**

On the __ day of _____, _____, this court considered ___(name of beneficiary)_____’s (the “Movant”) Motion To Compel Compliance With Statutory Trust Accounting Demand. The court, after considering the motion and the arguments of counsel makes the following rulings:

12. . ___(name of the trustee)_____ (the “Trustee”), acting in *his/her* capacity as trustee of the ___(name of the trust)___ trust (the “Trust”), is ORDERED to furnish Movant (*optional: and the following beneficiaries of the Trust: list the names and addresses of each beneficiary*) with a written statement of accounts containing all of the information required by Tex. Trust Code Ann. §113.152 (the “Trust Accounting”). The Trustee is further ORDERED to deliver the Trust Accounting to the Movant by making delivery to ___(name of Movant’s attorney)___, the attorney for the Movant, at *his/her* office located at ___(attorney’s office address)___ on or before 5:00 P.M. on the ___ day of _____, _____. (*Optional: The Trustee is further ORDERED to deliver the Trust Accounting to each of the other beneficiaries of the Trust designated above by mailing such accounting to each of them, at their addresses set forth above, by certified mail, return receipt requested, on or before 5:00 P.M. on the ___ day of _____, _____.*)
13. . This Court FINDS that the Trustee has breached *his/her/its* fiduciary duty to comply with a statutory accounting demand made in compliance with Tex. Trust Code Ann. §113.151 .
14. This Court AWARDS to the Movant costs and fair and reasonable legal fees in the amount of \$_____ against the Trustee, acting in *his/her/its* individual capacity and not as trustee of the trust (*optional alternative: acting in his/her*

capacity as trustee of the Trust).

SIGNED this ____ day of _____, _____.

Presiding Judge

Form D2.00

Common Law Information Demand

Note that this form assumes that the Trustee is not represented by an attorney. If the Trustee is represented by an attorney then this demand should be modified and sent to the Trustee's attorney rather than directly to the Trustee.

Date

CERTIFIED MAIL

RETURN RECEIPT REQUESTED

Mr./Ms. ___(name of trustee)___

(address of trustee)

RE: Common Law Information Demand

Dear *__(name of trustee)___*:

I represent *__(name of beneficiary)___* (the "Beneficiary") who is a beneficiary of the *__(name of trust)___* Trust (the "Trust") which was created by and between *__(name of settlor)___* as settlor and *__(name of original trustee)___* as trustee on or about the ___day of _____, _____. It is my understanding that you are presently serving as trustee (the "Trustee") of this Trust.

This letter constitutes a formal common law demand for information regarding the Trust. This demand is not a discovery request and is not subject to the rules of discovery. See *Huie v. DeShazo*, 922 S.W.2d 920 (Tex.1996) and *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984).

The Beneficiary demands disclosure of the information set forth on Exhibit A which is attached hereto and is specifically incorporated by reference herein to me as *his/her* attorney.

Your response to this demand should be sent to the undersigned at *___[address of attorney representing the beneficiary]___* on or before 5:00 P.M. on the first business day to occur after thirty (30) days after your receipt of this demand.

Please confirm to me in writing, within ten (10) days of your receipt of this demand, that you intend to furnish all of the information requested in this demand on or before the date specified. If I do not receive written confirmation within such time then my client reserves the right to immediately file a motion in any court of competent jurisdiction to compel compliance with this demand. Any motion to compel compliance with this demand may also contain a request that, because of your breach of your fiduciary duty to disclose, you, acting in your individual capacity, pay all legal fees and costs incident to the enforcement of this demand.

If you have any questions regarding this matter please do not hesitate to contact me.

Very truly yours,

*Name Of The Attorney Representing The
Beneficiary*

EXHIBIT A TO COMMON LAW INFORMATION DEMAND

15. Instructions³:

1. Please specifically answer each request for information in narrative form. Do not answer a question by stating that the information requested may be found in another document. If your answer includes a reference to another document or file then please specifically identify the document or file, the page of the document or file on which the information is located, and the specific language in the document or file that contains the information requested.
2. For each document or other requested information that you assert is privileged or for any other reason is excludable from response to this demand, identify that document or other requested information. State the specific grounds for the claim of privilege or other ground for exclusion. Also, for each document, state the date of the document; the name, job title, and address of the person who prepared it; the name, address and job title of the person to whom it was addressed or circulated or who saw it; the name, job title, and address of the person now in possession of the document; and a description of the subject matter of the document.
3. For any requested information about a document that no longer exists or cannot be located, identify the document, state how and when it passed out of existence, or when it passed out of existence, or when it could no longer be located, and the reason(s) for the disappearance. Also identify each person having knowledge about the disposition or loss and identify each document evidencing the existence or nonexistence of each document that can not be located.

16. Definitions: The following words and phrases shall have the following meanings:

³ Some of the instructions and some of the definitions contained in this exhibit (and the following exhibits) were based on instructions and definitions contained in *O'Connor's Texas Forms, Civil Trial and Appeal (1994)*; others were taken from Tex. Trust Code Ann. §111.003

1. “Affiliate” means a person directly or indirectly controlling, controlled by, or under common control with another person, including a person with whom a trustee has an express or implied agreement regarding the direct or indirect purchase of trust investments by each from the other, except a broker or stock exchange.
2. “And” means “and/or”.
3. “Beneficiary” shall mean a person for whose benefit property is held in trust, regardless of the nature of the interest. “Beneficiaries” shall mean more than one Beneficiary.
4. “Communication” means any oral or written communication of which the person has knowledge, information, or belief.
5. The “Compensation” of a person shall mean the aggregate of any and all salary, wages, bonuses, deferred compensation, contributions to pension or profit-sharing plans, insurance benefits, perquisites and other things of value received directly or indirectly by such person.
6. “Concerning” means, in whole or in part, directly or indirectly, referring to, relating to, connected with, commenting on, responding to, showing, describing, analyzing, reflecting, and constituting.
7. “Date” means the exact date, month, and year, if ascertainable, or, if not, the best available approximation.
8. “Describe” or “Identify” when referring to a person, means you must state the following;
 1. the full name,
 2. the present or last known residential address,
 3. the present or last known residential and office telephone numbers,
 4. the present occupation, job title, employer, and employer’s address at the time of the event or period referred to in each particular request for information, and
 5. in the case of any person other than an individual, identify the officer, employee, or agent most closely connected with the subject matter of the request for information, and the officer who is responsible

for supervising that officer or employee.

9. “Describe” or “Identify” when referring to a document, means you must state the following;
 1. the nature (*e.g.*, letter, handwritten note) of the document,
 2. the title or heading that appears on the document,
 3. the date of the document and the date of each addendum, supplement, or other addition or change,
 4. the identity of the author and of the signor of the document, and of the person on whose behalf or at whose request or direction the document was prepared or delivered, and
 5. the present location of the document, and the name, address, position or title, and telephone number of the person or persons having custody of the document.
10. “Document(s)” means all written, typed, or printed matter and all magnetic or other records or documentation of any kind or description that have any relationship whatsoever to the Trust or the administration or distribution of the Trust Estate of the Trust (including, without limitation, letters, correspondence, telegrams, memoranda, notes, records, minutes, contracts, agreements, records, or notations of telephone or personal conversations, conferences, inter-office communications, E-mail, microfilm, bulletins, circulars, pamphlets, photographs, facsimiles, invoices, tape recordings, computer printouts, work sheets and electronic data stored in any computer or other electronic device), including drafts and copies not identical to the originals, all photographs and graphic matter, however produced or reproduced, and all compilations of data from which information can be obtained, and any and all writings or recordings of any type or nature, in your actual possession, custody, or control, including those in the possession, custody, or control of any and all present and former directors, officers, employees, consultants, accountants, attorneys, or other agents, whether or not prepared by you.
11. “Entity” shall mean any organization, business, enterprise, venture or association,

including but not limited to any corporation, close corporation, partnership, limited partnership, limited liability company, sole proprietorship, joint venture, trust, association, assumed or fictitious name, trade name, parent or subsidiary.

12. “File” means any collection or group of documents maintained, held, stored, or used together, including, without limitation, all collections of documents maintained, held, or stored in folders, notebooks, or other devices for separating or organizing documents.
13. You shall be considered “knowing” a fact and a fact shall be considered within “your knowledge” if the fact is known to you, to any person employed by you acting as trustee of the Trust or to the any of the officers, directors or management of any Trust-Related Entity.
14. “Or” means “and/or”.
15. “Ownership Units” shall mean shares of common stock, preferred stock, units, partnership or venture interests, partnership or venture percentages or other evidence or measure of ownership regardless of class, series or type and regardless of whether such units entitle the holder thereof the right to vote or otherwise participate in management. “Ownership Units” shall also include, but not be limited to, exercised or unexercised warrants, options, conversion rights, or other rights to acquire ownership interests.
16. “Person” means any natural person, corporation, firm, association, partnership, joint venture, proprietorship, governmental body, or any other organization, business, or legal entity, and all predecessors or successors in interest.
17. “Property” means any type of property, whether real, tangible or intangible, legal or equitable. The term also includes choses in action, claims, and contract rights, including a contractual right to receive death benefits as designated beneficiary under a policy of insurance, contract, employee’s trust, retirement account, or other arrangement.
18. “Relating to” and “relates to” mean, without limitation, embodying, mentioning, or concerning, directly or indirectly, the subject matter identified in the

request for information.

19. “Settlor” means the person who created the trust. The terms “grantor” and “trustor” mean the same as “settlor”.
20. “Terms of the Trust” means the manifestation of intention of the settlor with respect to the trust expressed in a manner that admits of its proof in judicial proceedings.
21. “Transaction” means any act performed by a settlor, trustee, or beneficiary in relation to a trust, including the creation or termination of a trust, the investment of trust property, a breach of duty, the receipt of trust property, the receipt of income or the incurring of expense, a distribution of trust property, an entry in the books and records of the trust, and an accounting by a trustee to any person entitled to receive an accounting.
22. The “Trust” shall mean the ___(*name of trust*)___ created on or about the ___ day of ___, ___ by and between ___(*name of settlor*)___ as settlor and ___(*name of original trustee*)___.
23. “Trust Property” or “Trust Estate” means property placed in trust or property otherwise transferred or acquired or retained by the Trustee for the Trust.
24. An Entity is a “Trust-Related Entity” at all times that the aggregate number of the Entity’s Ownership Units of any particular class, series or type which are owned directly or indirectly by you, your *wife/husband*, either or both of the Trusts, or any other Trust-Related Entity equals _____ percent (___%) or more of the Entity’s Ownership Units of that particular class, series or type which then are outstanding. Ownership Units held directly in the name of a person or Entity are deemed owned “directly” by such person or Entity, and Ownership Units which are legally or beneficially owned or controlled through any other means, including but not limited to through the use of parent Entities, subsidiary Entities, holding companies, trusts, voting trusts, voting agreements and straw-man arrangements, are deemed to be owned “indirectly.”
25. “Trustee” means the person holding the property in trust and specifically refers to ___(*name of trustee*)___.

26. “You” shall mean ___(*name of trustee*)___, regardless of the capacity in which you are acting, including but not limited to your capacity both as an individual and as trustee of the Trust.
17. Requests For Information:
- 1.**

**Form M2.00 *Motion To Compel Compliance With Common Law
Information Demand***

CAPTION

**MOTION TO COMPEL COMPLIANCE WITH
COMMON LAW INFORMATION DEMAND**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, ___(*name of beneficiary*)___ (the “Movant”), acting individually as a beneficiary of the ___(*name of the trust*)___ Trust (the “Trust”) and derivatively on behalf of the Trustee of the Trust because *he/she/it* will not or cannot bring this cause of action, and files this *his/her* Motion To Compel Compliance With Common Law Information Demand from ___(*name of the trustee*)___ (the “Trustee”), acting individually and/or in *his/her/its* capacity as Trustee of the Trust. In support of his Motion, the Movant would respectfully show the Court the following:

1.

FACTS (BACKGROUND)

2. (*Optional: A true and correct copy of the Trust is attached hereto as Exhibit A and is specifically incorporated by reference herein.*)
3. The Trustee is currently serving as Trustee of the Trust.
4. The Movant is a beneficiary of the Trust.
5. On or about the ___ day of _____ the Movant sent the Trustee a common law information demand (the “Demand”).
6. (*Optional but recommended: A true and correct copy of the Demand is attached hereto as Exhibit B and is specifically incorporated by reference herein.*)
7. The Trustee has failed to disclose the information requested in the Demand within the time specified in the demand.
8. (*Optional if applicable, The Trustee has refused to respond to the Demand and indicate whether or not he/she intends to comply with the Demand.*)

2.

ARGUMENT AND AUTHORITY REGARDING TRUSTEE'S DUTY TO DISCLOSE

9. The Movant has an absolute right to receive the information sought to be compelled by this Motion to Compel. Texas law does not permit the Trustee to refuse to disclose information requested by a beneficiary. Trustees owe beneficiaries a fiduciary duty of full disclosure of all material facts known to them that might affect the beneficiaries' rights. *Restatement Of The Law, Trusts 2d*, supra §173; *Scott On Trusts*, supra §173 and Bogert, *The Law of Trusts and Trustees*, supra § 961; *Shannon v. Frost National Bank*, 533 S.W.2d 389 (Tex. App. - San Antonio, 1975, writ ref'd n.r.e); *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984) ; and *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996).
10. A fiduciary has 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. *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); *City of Fort Worth v. Pippen*, 439 S.W.2d 660 (Tex. 1969). 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). The beneficiary is not required to prove the elements of fraud, *Archer v. Griffith*, 309 S.W.2d 735 (Tex. 1965); *Langford v. Shamburger*, 417 S.W.2d 438, (Tex. App.--Ft. Worth 1967, writ ref'd n.r.e.), and need not even prove that he relied on the fiduciary to disclose the information. *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.).
11. Bogert explains the rationale for this rule as follows:

The beneficiary is the equitable owner of the trust property, in whole or in part. The trustee is a mere representative whose function is to attend to the safety of the trust property and to obtain its avails for the beneficiary in the manner provided by the trust instrument. That the settlor has created a trust and thus required that the beneficiary enjoy his property

interest indirectly does not imply that the beneficiary is to be kept in ignorance of the trust, the nature of the trust property and the details of its administration. If the beneficiary is to be able to hold the trustee to proper standards of care and honesty and to obtain the benefits to which the trust instrument and doctrines of equity entitle him, he must know of what the trust property consists and how it is being managed.

From these considerations it follows that the trustee has the duty to inform the beneficiary of important matters concerning the trust and that the beneficiary is entitled to demand of the trustee all information about the trust and its execution for which he has any reasonable use . . . For the reason that only the beneficiary has the right and power to enforce the trust and to require the trustee to carry out the trust for the sole benefit of the beneficiary, the trustee's denial of the beneficiary's right to information constitutes a breach of trust.

Bogert, Trusts and Estates, 2nd Ed. Rev., § 961.

12. The Trustee has an affirmative duty to provide the information requested in the Demand. The Trustee cannot fail to provide such information merely because it is inconvenient for *him/her/it* to do so. The Trustee has been under a duty to disclose this information since the inception of the Trust and should not be permitted to use the inconvenience of gathering this information as an excuse to avoid providing such information.
13. When, as here, the Trustee has refused to deliver, unreasonably delayed delivery, or unreasonably placed conditions or restrictions on delivery of information requested in the Demand, the court may order the Trustee to deliver the requested information, and hold the Trustee personally liable for the costs of the proceeding and the beneficiaries' attorney's fees. *See* Tex. Prop. Code § 113.151; Tex. Prop. Code § 114.064; Bogert, Trusts and Estates, 2nd Ed. Rev., § 961.
14. The Movant's Demand is not discovery in the sense it is governed by the Texas Rules of Civil Procedure. As recently stated by the Texas Supreme Court in *Huie v. DeShazo*, 922 S. W. 2d 920 (Tex. 1996), "Trustees and

Executors owe beneficiaries ‘a fiduciary duty of full disclosure of all material facts that might affect [the beneficiaries] rights.’ **This duty exists independently of the rules of discovery**, applying even if no litigious dispute exists between the trustee and beneficiaries.” (emphasis supplied) The reason for this rule is obvious to anyone knowledgeable about the relationship between a fiduciary and his beneficiary. According to the Supreme Court, “When persons enter into fiduciary relations, each consents, as a matter of law, to have his conduct towards the other measured by the standards of the finer loyalties exacted by courts of equity. That is a sound rule and should not be whittled down by exceptions.” *Johnson v. Peckham*, 120 S.W.2d 786 (Tex. 1938).

15. Texas courts of equity have long recognized a trustee’s fiduciary duty of disclosure. If a beneficiary cannot enforce this right in a court of equity, then this fiduciary duty has no substance. If a trustee can hide self-dealing and breach of trust within a haystack of superfluous documentation and unfounded objections, then equity will not be accomplished.

3.

ATTORNEYS’ FEES UNDER THE TEXAS TRUST CODE

16. The Movant PRAYS that this Court rule that the Trustee has breached his common law duty to disclose to *him/her* the information requested in the Demand. The Movant further PRAYS that *he/she* be awarded costs and reasonable and necessary attorneys’ fees as may seem equitable and just pursuant to Texas Trust Code §114.064 against the Trustee, acting in *his/her/its* individual capacity and not as trustee. The Movant alternatively PRAYS that if *he/she* is not awarded costs and fees against the Trustee, acting in *his/her/its* individual capacity, that *he/she* be awarded costs and reasonable and necessary attorney’s fees as may seem equitable and just against the Trustee, in *his/her/its* capacity as Trustee.

4.

PRAYER

17. WHEREFORE, premises considered, Movant PRAYS that, after a hearing on this

motion, the Court grant the following relief:

1. COMPEL the Trustee to immediately disclose to the Movant all information requested in the Demand;
2. FIND that the Trustee breached *his/her/its* fiduciary duty of disclosure to the Movant;
3. AWARD the Movant, in *his/her* individual capacity as a beneficiary of the Trust, costs and reasonable and necessary attorneys' fees as may seem equitable and just; and
4. GRANT such other relief at law or in equity as to which the Movant may show *himself/herself* entitled.

Respectfully submitted,

Closing

If there is a legal proceeding pending where persons interested in the trust are represented by attorneys or if you are aware that the trustee is represented by counsel then ADD A CERTIFICATE OF SERVICE.

**Form O2.00 *Order Compelling Compliance With Common Law
Information Demand***

CAPTION

**ORDER COMPELLING COMPLIANCE WITH
COMMON LAW INFORMATION DEMAND**

On the ___ day of _____, _____, this court considered ___ (*name of beneficiary*) _____'s (the "Movant") Motion To Compel Compliance With Common Law Information Demand. The court, after considering the motion and the arguments of counsel makes the following rulings:

1 ___ (*name of the trustee*) _____ (the "Trustee"), acting in *his/her/its* capacity as trustee of the ___ (*name of the trust*) _____ trust (the "Trust"), is ORDERED to furnish the Movant (*optional: and the following beneficiaries of the Trust: list the names and addresses of each beneficiary*) with all of the information requested in the Motion To Compel Compliance With Common Law Information Demand that *he/she* filed in this cause. The Trustee is further ORDERED to disclose such information in writing to the Movant by making delivery of such information to ___ (*name of beneficiary's attorney*) _____, the attorney for the Movant, at *his/her* office located at ___ (*attorney's office address*) _____ on or before 5:00 P.M. on the ___ day of _____, _____. (*Optional: The Trustee is further ORDERED to disclose such information to each of the other beneficiaries of the Trust designated above by mailing such information to each of them, at the addresses set forth above, by certified mail return, receipt requested, on or before 5:00 P.M. on the ___ day of _____, _____.)*)

2 This court FINDS that the Trustee has breached *his/her/its* fiduciary duty to disclose information to trust beneficiaries.

3 This court further AWARDS the Movant costs and fair and reasonable legal fees in the amount of \$ _____ against the Trustee, acting in *his/her/its* individual capacity and not as trustee of the trust (*optional alternative: acting in his/her/its capacity as trustee of the Trust*).

SIGNED this ___ day of _____, _____.

Presiding Judge

Form D3.00

Common Law Demand For Production of Trust Documents

Note that this form assumes that the Trustee is not represented by an attorney. If the Trustee is represented by an attorney then this demand should be modified and sent to the Trustee's attorney rather than directly to the Trustee.

Date

CERTIFIED MAIL

RETURN RECEIPT REQUESTED

Mr./Ms. ___(name of trustee)___

(address of trustee)

RE: Common Law Demand For Production Of Documents

Dear ___(name of trustee)___:

I represent ___(name of beneficiary)___ (the "Beneficiary") who is a beneficiary of the ___(name of trust)___ Trust (the "Trust") which was created by and between ___(name of settlor)___ as settlor and ___(name of original trustee)___ as trustee on or about the ___day of _____, _____. It is my understanding that you are presently serving as trustee (the "Trustee") of this Trust.

This letter constitutes a formal demand for examination of documents regarding the Trust. This demand is not a discovery request and is not subject to the rules of discovery. See *Huie v. DeShazo*, 922 S.W.2d 920 (Tex.1996) and *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984).

The Beneficiary demands that you allow me as *his/her* attorney to examine and copy the documents set forth on Exhibit A which is attached hereto and is specifically incorporated by reference herein.

Your response to this demand should be sent to the undersigned at ___[address]___ on or before 5:00 P.M. on the first business day to occur after thirty (30) days after your receipt of this demand. Your response should identify the time and place where the documents may be examined and/or copied. The time for examination should not be later than fifteen (15) days after your response.

Please confirm to me in writing, within ten (10) days of your receipt of this demand, that you intend to allow inspection and copying of the documents requested in this demand on or before the date specified in this demand. If I do not receive such written confirmation within such time then my client reserves the right to immediately file a motion in any court of competent jurisdiction to compel compliance with this demand. Any motion to compel compliance with this demand may also contain a request that, because of your breach of your fiduciary duty to disclose, you, acting in your individual capacity, pay all legal fees and costs incident to the enforcement of this demand.

If you have any questions regarding this matter please do not hesitate to contact me.

Very truly yours,

Name of the Attorney Representing the Beneficiary

EXHIBIT A TO COMMON LAW DEMAND FOR PRODUCTION OF TRUST DOCUMENTS:

1. Instructions:

- a. Answer each request for production of documents separately by listing the documents and by describing them as defined below. If documents are numbered for production, in each response provide both the information that identifies the document and the document's number.
- b. For each document or other requested information that you assert is privileged or for any other reason is excludable from this demand, identify that document or other requested information. State the specific grounds for the claim of privilege or other ground for exclusion. Also, for each document, state the date of the document; the name, job title, and address of the person who prepared it; the name, address and job title of the person to whom it was addressed or circulated or who saw it; the name, job title, and address of the person now in possession of the document; and a description of the subject matter of the document.
- c. For any requested information about a document that no longer exists or cannot be located, identify the document, state how and when it passed out of existence, or when it passed out of existence, or when it could no longer be located, and the reason(s) for the disappearance. Also identify each person having knowledge about the disposition or loss and identify each document evidencing the existence or nonexistence of each document that can not be located.

2. Definitions: The following words and phrases shall have the following meanings:

- a. "Affiliate" means a person directly or indirectly controlling, controlled by, or under common control with another person, including a person with whom a trustee has an express or implied agreement regarding the direct or indirect purchase of trust investments by each from the other, except a broker or stock exchange.
- b. "And" means "and/or".
- c. "Beneficiary" shall mean a person for whose benefit property is held in trust,

regardless of the nature of the interest. “Beneficiaries” shall mean more than one Beneficiary.

- d. “Communication” means any oral or written communication of which the person has knowledge, information, or belief.
- e. The “Compensation” of a person shall mean the aggregate of any and all salary, wages, bonuses, deferred compensation, contributions to pension or profit-sharing plans, insurance benefits, perquisites and other things of value received directly or indirectly by such person.
- f. “Concerning” means, in whole or in part, directly or indirectly, referring to, relating to, connected with, commenting on, responding to, showing, describing, analyzing, reflecting, and constituting.
- g. “Date” means the exact date, month, and year, if ascertainable, or, if not, the best available approximation.
- h. “Describe” or “Identify” when referring to a person, means you must state the following;
 - 2.8.1 the full name,
 - 2.8.2 the present or last known residential address,
 - 2.8.3 the present or last known residential and office telephone numbers,
 - 2.8.4 the present occupation, job title, employer, and employer’s address at the time of the event or period referred to in each particular request for information, and
 - 2.8.5 in the case of any person other than an individual, identify the officer, employee, or agent most closely connected with the subject matter of the request for information, and the officer who is responsible for supervising that officer or employee.
- i. “Describe” or “Identify” when referring to a document, means you must state the following;
 - 2.9.1 the nature (*e.g.*, letter, handwritten note) of the document,
 - 2.9.2 the title or heading that appears on the document,
 - 2.9.3 the date of the document and the date of each addendum, supplement, or other addition or change,

2.9.4 the identity of the author and of the signor of the document, and of the person on whose behalf or at whose request or direction the document was prepared or delivered, and

2.9.5 the present location of the document, and the name, address, position or title, and telephone number of the person or persons having custody of the document.

- j. “Document(s)” means all written, typed, or printed matter and all magnetic or other records or documentation of any kind or description that have any relationship whatsoever to the Trust or the administration or distribution of the Trust Estate of the Trust (including, without limitation, letters, correspondence, telegrams, memoranda, notes, records, minutes, contracts, agreements, records, or notations of telephone or personal conversations, conferences, inter-office communications, E-mail, microfilm, bulletins, circulars, pamphlets, photographs, facsimiles, invoices, tape recordings, computer printouts, work sheets and electronic data stored in any computer or other electronic device), including drafts and copies not identical to the originals, all photographs and graphic matter, however produced or reproduced, and all compilations of data from which information can be obtained, and any and all writings or recordings of any type or nature, in your actual possession, custody, or control, including those in the possession, custody, or control of any and all present and former directors, officers, employees, consultants, accountants, attorneys, or other agents, whether or not prepared by you.
- k. “Entity” shall mean any organization, business, enterprise, venture or association, including but not limited to any corporation, close corporation, partnership, limited partnership, limited liability company, sole proprietorship, joint venture, trust, association, assumed or fictitious name, trade name, parent or subsidiary.
- l. “File” means any collection or group of documents maintained, held, stored, or used together, including, without limitation, all collections of documents maintained, held, or stored in folders, notebooks, or other devices for separating or organizing documents.
- m. You shall be considered “knowing” a fact and a fact shall be considered within

“your knowledge” if the fact is known to you, to any person employed by you acting as trustee of the Trust or to the any of the officers, directors or management of any Trust-Related Entity.

- n. “Or” means “and/or”.
- o. “Ownership Units” shall mean shares of common stock, preferred stock, units, partnership or venture interests, partnership or venture percentages or other evidence or measure of ownership regardless of class, series or type and regardless of whether such units entitle the holder thereof the right to vote or otherwise participate in management. “Ownership Units” shall also include, but not be limited to, exercised or unexercised warrants, options, conversion rights, or other rights to acquire ownership interests.
- p. “Person” means any natural person, corporation, firm, association, partnership, joint venture, proprietorship, governmental body, or any other organization, business, or legal entity, and all predecessors or successors in interest.
- q. “Property” means any type of property, whether real, tangible or intangible, legal or equitable. The term also includes choses in action, claims, and contract rights, including a contractual right to receive death benefits as designated beneficiary under a policy of insurance, contract, employee’s trust, retirement account, or other arrangement.
- r. “Relating to” and “relates to” mean, without limitation, embodying, mentioning, or concerning, directly or indirectly, the subject matter identified in the request for information.
- s. “Settlor” means the person who creates the trust. The terms “grantor” and “trustor” mean the same as “settlor”.
- t. “Terms of the Trust” means the manifestation of intention of the settlor with respect to the trust expressed in a manner that admits of its proof in judicial proceedings.
- u. “Transaction” means any act performed by a settlor, trustee, or beneficiary in relation to a trust, including the creation or termination of a trust, the investment of trust property, a breach of duty, the receipt of trust property, the receipt of income or the incurring of expense, a distribution of trust property, an entry in the

books and records of the trust, and an accounting by a trustee to any person entitled to receive an accounting.

- v. The “Trust” shall mean the ___(*name of trust*)___ created on or about the ___ day of ____, ___ by and between ___(*name of settlor*)___ as settlor and ___(*name of original trustee*)___.
- w. “Trust Property” or “Trust Estate” means property placed in trust or property otherwise transferred or acquired or retained by the trustee for the trust.
- x. An Entity is a “Trust-Related Entity” at all times that the aggregate number of the Entity’s Ownership Units of any particular class, series or type which are owned directly or indirectly by you, your husband/wife, either or both of the Trusts, or any other Trust-Related Entity equals _____ percent (___%) or more of the Entity’s Ownership Units of that particular class, series or type which then are outstanding. Ownership Units held directly in the name of a person or Entity are deemed owned “directly” by such person or Entity, and Ownership Units which are legally or beneficially owned or controlled through any other means, including but not limited to through the use of parent Entities, subsidiary Entities, holding companies, trusts, voting trusts, voting agreements and straw-man arrangements, are deemed to be owned “indirectly.”
- y. “Trustee” means the person holding the property in trust and specifically refers to ___(*name of trustee*)___.
- z. “You” shall mean ___(*name of trustee*)___, regardless of the capacity in which you are acting, including but not limited to your capacity both as an individual and as trustee of the Trust.

3. Requests For Production of Trust Documents:

- a.

Form M3.00 *Motion To Compel Compliance With Common Law Demand
For Production Of Documents*

CAPTION

**MOTION TO COMPEL COMPLIANCE WITH
COMMON LAW DEMAND FOR PRODUCTION OF DOCUMENTS**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, ___(name of beneficiary)___ (the “Movant”), acting individually as a beneficiary of the ___(name of the trust)___ Trust (the “Trust”) and derivatively on behalf of the Trustee of the Trust because they will not or cannot bring this cause of action, and files this *his/her* Motion To Compel Compliance With Common Law Demand For Production of Documents and request for damages for breach of fiduciary duty from___(name of the trustee)___ (the “Trustee”), acting individually and/or in *his/her/its* capacity as Trustee of the Trust. In support of his Motion, the Movant would respectfully show the Court the following:

1.

FACTS (BACKGROUND)

- a. *(Optional: A true and correct copy of the Trust is attached hereto as Exhibit A and is specifically incorporated by reference herein.)*
- b. The Trustee is currently serving as Trustee of the Trust.
- c. The Movant is a beneficiary of the Trust.
- d. On or about the ___ day of ____ the Movant sent the Trustee a Common Law Demand For Production of Trust Documents (the “Demand”).
- e. *(Optional but recommended: A true and correct copy of the Demand is attached hereto as Exhibit B and is specifically incorporated by reference herein).*
- f. The Trustee has failed to disclose the information requested in the Demand within the time specified in the demand.
- g. *(Optional if applicable, The Trustee has refused to respond to the Demand and indicate whether or not he/she/it intends to comply with the Demand).*

2.

ARGUMENT AND AUTHORITY REGARDING TRUSTEE'S DUTY TO DISCLOSE

a. The Movant has an absolute right to examine the books and records of the Trust. See *Restatement Of The Law, Trusts 2d*, supra §173; *Scott On Trusts*, supra §173 and Bogert, *The Law of Trusts and Trustees*, supra § 961.

b. Bogert explains the rationale for this rule as follows:

The beneficiary is the equitable owner of the trust property, in whole or in part. The trustee is a mere representative whose function is to attend to the safety of the trust property and to obtain its avails for the beneficiary in the manner provided by the trust instrument. That the settlor has created a trust and thus required that the beneficiary enjoy his property interest indirectly does not imply that the beneficiary is to be kept in ignorance of the trust, the nature of the trust property and the details of its administration. If the beneficiary is to be able to hold the trustee to proper standards of care and honesty and to obtain the benefits to which the trust instrument and doctrines of equity entitle him, he must know of what the trust property consists and how it is being managed.

From these considerations it follows that the trustee has the duty to inform the beneficiary of important matters concerning the trust and that the beneficiary is entitled to demand of the trustee all information about the trust and its execution for which he has any reasonable use . . . For the reason that only the beneficiary has the right and power to enforce the trust and to require the trustee to carry out the trust for the sole benefit of the beneficiary, the trustee's denial of the beneficiary's right to information constitutes a breach of trust.

Bogert, *Trusts and Estates*, 2nd Ed. Rev., § 961.

c. The Trustee has an affirmative duty to provide the information requested in the Demand. The Trustee cannot fail to provide such information merely because it is inconvenient for *him/her* to do so. The Trustee has been under a duty to disclose this information since the inception of the Trust and should not be permitted to use the inconvenience of

gathering this information as an excuse to avoid providing such information.

- d. When, as here, the Trustee has refused to deliver, unreasonably delayed delivery, or unreasonably placed conditions or restrictions on delivery of information requested in the Demand, the court may order the Trustee to deliver the requested information, and hold the Trustee personally liable for the costs of the proceeding and the beneficiaries' attorney's fees. *See* Tex. Prop. Code § 114.064; Bogert, Trusts and Estates, 2nd Ed. Rev., § 961.
- e. The Movant's Demand is not discovery in the sense it is governed by the Texas Rules of Civil Procedure. As recently stated by the Texas Supreme Court in *Huie v. DeShazo*, 922 S. W. 2d 920 (Tex. 1996), "Trustees and Executors owe beneficiaries 'a fiduciary duty of full disclosure of all material facts that might affect [the beneficiaries] rights.' **This duty exists independently of the rules of discovery**, applying even if no litigious dispute exists between the trustee and beneficiaries." (emphasis supplied) The reason for this rule is obvious to anyone knowledgeable about the relationship between a fiduciary and his beneficiary. As the Supreme Court stated, "When persons enter into fiduciary relations, each consents, as a matter of law, to have his conduct towards the other measured by the standards of the finer loyalties exacted by courts of equity. That is a sound rule and should not be whittled down by exceptions." *Johnson v. Peckham*, 120 S.W.2d 786 (Tex. 1938).
- f. Texas courts of equity have long recognized a trustee's fiduciary duty of disclosure. If a beneficiary cannot enforce this right in a court of equity, then this fiduciary duty has no substance. If a trustee can hide self-dealing and breach of trust within a haystack of superfluous documentation and unfounded objections, then equity will not be accomplished.

3.

ATTORNEYS' FEES UNDER THE TEXAS TRUST CODE

- a. The Movant PRAYS that this Court rule that the Trustee has breached his statutory duty to allow *him/her* to examine the documents specified in the Demand. The Movant further PRAYS that *he/she* be awarded costs and reasonable and necessary attorneys' fees as may seem equitable and just pursuant to Texas Trust Code §114.064 against the Trustee, acting in *his/her/its* individual capacity and not as trustee. The Movant

alternatively PRAYS that if *he/she* is not awarded costs and fees against the Trustee, acting in *his/her/its* individual capacity, that *he/she* be awarded costs and reasonable and necessary attorney's fees as may seem equitable and just against the Trustee, in *his/her/its* capacity as Trustee.

4.

PRAYER

- a. WHEREFORE, premises considered, Movant PRAYS that, after a hearing on this motion, the Court grant the following relief:
- i. COMPEL the Trustee to immediately allow the Movant to examine and copy all of the documents identified in the Demand;
 - ii. FIND that the Trustee breached *his/her/its* fiduciary duty of disclosure to the Movant;
 - iii. AWARD the Movant, in *his/her* individual capacity as a beneficiary of the Trust, costs and reasonable and necessary attorneys' fees as may seem equitable and just; and
 - iv. GRANT such other relief at law or in equity as to which the Movant may show *himself/herself* entitled.

Respectfully submitted,

Closing

If there is a legal proceeding pending where persons interested in the trust are represented by attorneys or if you are aware that the trustee is represented by counsel then ADD A CERTIFICATE OF SERVICE.

**Form O3.00 *Order Compelling Compliance With Common Law Demand
For Production Of Trust Documents***

CAPTION

**ORDER COMPELLING COMPLIANCE WITH
COMMON LAW DEMAND FOR PRODUCTION OF TRUST DOCUMENTS**

On the ___ day of _____, _____, this court considered ___ (*name of beneficiary*) _____'s (the "Movant") Motion To Compel Compliance With Common Demand For Production of Trust Documents. The court, after considering the motion and the arguments of counsel makes the following rulings:

1. ___ (*name of the trustee*) _____ (the "Trustee"), acting in *his/her* capacity as trustee of the ___ (*name of the trust*) _____ trust (the "Trust"), is ORDERED to allow the Movant (*optional: and the following beneficiaries of the Trust: list the names and addresses of each beneficiary*) to examine and copy all of the documents identified in the Motion To Compel Compliance With Common Law Demand For Production Of Trust Documents that *he/she* filed in this cause. The Trustee is further ORDERED to allow such examination and copying of such documents at the following location: ___ (*describe location*) ___ on or before 5:00 P.M. on the ___ day of _____, _____. (*Optional: The Trustee is further ORDERED to allow each of the other beneficiaries of the Trust designated above to examine and copy such documents at the time and place set forth above.*)
2. This court FINDS that the Trustee has breached *his/her/its* fiduciary duty to disclose information to trust beneficiaries.
3. This court further AWARDS the Movant costs and fair and reasonable legal fees in the amount of \$ _____ against the Trustee, acting in *his/her/its* individual capacity and not as trustee of the trust (*optional alternative: acting in his/her/its capacity as trustee of the Trust*).

SIGNED this ___ day of _____, _____.

Presiding Judge

Form D4.00

***Common Law Demand For Information and For Production
of Trust Documents***

Note that this form assumes that the Trustee is not represented by an attorney. If the Trustee is represented by an attorney then this demand should be sent to the Trustee's attorney rather than directly to the Trustee.

Date

CERTIFIED MAIL

RETURN RECEIPT REQUESTED

Mr./Ms. ___(name of trustee)___

(address of trustee)

RE: Common Law Information Demand

Dear ___(name of trustee)___:

I represent ___(name of beneficiary)___ (the "Beneficiary") who is a beneficiary of the ___(name of the trust)___ Trust (the "Trust") which was created by and between ___(name of settlor)___ as settlor and ___(name of original trustee)___ as trustee on or about the ___day of _____, _____. It is my understanding that you are presently serving as trustee (the "Trustee") of this Trust.

This letter constitutes a formal demand for information regarding the _____ Trust. This demand is not a discovery request and is not subject to the rules of discovery. See *Huie v. DeShazo*, 922 S.W.2d 920 (Tex.1996) and *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984).

The Beneficiary demands disclosure of the information set forth in paragraph 3 of Exhibit

A which is attached hereto and is specifically incorporated by reference herein to me as *his/her* attorney. Your response to this demand for information should be sent to the undersigned at ___[address]___ on or before 5:00 P.M. on the first business day to occur after thirty (30) days after your receipt of this demand.

The Beneficiary also demands that you allow me as *his/her* attorney to examine and copy the documents set forth in paragraph 4 of Exhibit B which is attached hereto and is specifically incorporated by reference herein. Your response to this demand for examination of documents should be sent to the undersigned at ___[address]___ on or before 5:00 P.M. on the first business day to occur after thirty (30) days after your receipt of this demand. Your response should identify the time and place where the documents may be examined and/or copied. The time for examination should not be later than fifteen (15) days after your response.

Please confirm to me in writing, within ten (10) days of your receipt of this demand, that you intend to furnish all of the information requested in this demand on or before the date specified in this demand. If I do not receive such written confirmation within such time then my client reserves the right to immediately file a motion in any court of competent jurisdiction to compel compliance with this demand. Any motion to compel compliance with this demand may also contain a request that, because of his breach of your fiduciary duty to disclose, you, acting in your individual capacity, pay all legal fees and costs incident to the enforcement of this demand.

If you have any questions regarding this matter please do not hesitate to contact me.

Very truly yours,

*Name of The Attorney Representing The
Beneficiary.*

EXHIBIT A TO COMMON LAW DEMAND FOR INFORMATION AND PRODUCTION OF TRUST DOCUMENTS:

1. Instructions:

- a. Please specifically answer each request for information in narrative form. Do not answer a question by stating that the information requested may be found in another document. If your answer includes a reference to another document or file then please specifically identify the document or file, the page of the document or file on which the information is located, and the specific language in the document or file that contains the information requested.
- b. Answer each request for production of documents separately by listing the documents and by describing them as defined below. If documents are numbered for production, in each response provide both the information that identifies the document and the document's number.
- c. For each document or other requested information that you assert is privileged or for any other reason is excludable from this demand, identify that document or other requested information. State the specific grounds for the claim of privilege or other ground for exclusion. Also, for each document, state the date of the document; the name, job title, and address of the person who prepared it; the name, address and job title of the person to whom it was addressed or circulated or who saw it; the name, job title, and address of the person now in possession of the document; and a description of the subject matter of the document.
- d. For any requested information about a document that no longer exists or cannot be located, identify the document, state how and when it passed out of existence, or when it passed out of existence, or when it could no longer be located, and the reason(s) for the disappearance. Also identify each person having knowledge about the disposition or loss and identify each document evidencing the existence or nonexistence of each document that can not be located.

2. Definitions: The following words and phrases shall have the following meanings:

- a. "Affiliate" means a person directly or indirectly controlling, controlled by, or

under common control with another person, including a person with whom a trustee has an express or implied agreement regarding the direct or indirect purchase of trust investments by each from the other, except a broker or stock exchange.

- b. “And” means “and/or”.
- c. “Beneficiary” shall mean a person for whose benefit property is held in trust, regardless of the nature of the interest. “Beneficiaries” shall mean more than one Beneficiary.
- d. “Communication” means any oral or written communication of which the person has knowledge, information, or belief.
- e. The “Compensation” of a person shall mean the aggregate of any and all salary, wages, bonuses, deferred compensation, contributions to pension or profit-sharing plans, insurance benefits, perquisites and other things of value received directly or indirectly by such person.
- f. “Concerning” means, in whole or in part, directly or indirectly, referring to, relating to, connected with, commenting on, responding to, showing, describing, analyzing, reflecting, and constituting.
- g. “Date” means the exact date, month, and year, if ascertainable, or, if not, the best available approximation.
- h. “Describe” or “Identify” when referring to a person, means you must state the following;
 - 2.8.1 the full name,
 - 2.8.2 the present or last known residential address,
 - 2.8.3 the present or last known residential and office telephone numbers,
 - 2.8.4 the present occupation, job title, employer, and employer’s address at the time of the event or period referred to in each particular request for information, and
 - 2.8.5 in the case of any person other than an individual, identify the officer, employee, or agent most closely connected with the subject matter of the request for information, and the officer who is responsible for supervising that officer or employee.

- i. “Describe” or “Identify” when referring to a document, means you must state the following;
 - 2.9.1 the nature (*e.g.*, letter, handwritten note) of the document,
 - 2.9.2 the title or heading that appears on the document,
 - 2.9.3 the date of the document and the date of each addendum, supplement, or other addition or change,
 - 2.9.4 the identity of the author and of the signor of the document, and of the person on whose behalf or at whose request or direction the document was prepared or delivered, and
 - 2.9.5 the present location of the document, and the name, address, position or title, and telephone number of the person or persons having custody of the document.
- j. “Document(s)” means all written, typed, or printed matter and all magnetic or other records or documentation of any kind or description that have any relationship whatsoever to the Trust or the administration or distribution of the Trust Estate of the Trust (including, without limitation, letters, correspondence, telegrams, memoranda, notes, records, minutes, contracts, agreements, records, or notations of telephone or personal conversations, conferences, inter-office communications, E-mail, microfilm, bulletins, circulars, pamphlets, photographs, facsimiles, invoices, tape recordings, computer printouts, work sheets and electronic data stored in any computer or other electronic device), including drafts and copies not identical to the originals, all photographs and graphic matter, however produced or reproduced, and all compilations of data from which information can be obtained, and any and all writings or recordings of any type or nature, in your actual possession, custody, or control, including those in the possession, custody, or control of any and all present and former directors, officers, employees, consultants, accountants, attorneys, or other agents, whether or not prepared by you.
- k. “Entity” shall mean any organization, business, enterprise, venture or association, including but not limited to any corporation, close corporation, partnership, limited partnership, limited liability company, sole proprietorship, joint venture,

trust, association, assumed or fictitious name, trade name, parent or subsidiary.

- l. “File” means any collection or group of documents maintained, held, stored, or used together, including, without limitation, all collections of documents maintained, held, or stored in folders, notebooks, or other devices for separating or organizing documents.
- m. You shall be considered “knowing” a fact and a fact shall be considered within “your knowledge” if the fact is known to you, to any person employed by you acting as trustee of the Trust or to the any of the officers, directors or management of any Trust-Related Entity.
- n. “Or” means “and/or”.
- o. “Ownership Units” shall mean shares of common stock, preferred stock, units, partnership or venture interests, partnership or venture percentages or other evidence or measure of ownership regardless of class, series or type and regardless of whether such units entitle the holder thereof the right to vote or otherwise participate in management. “Ownership Units” shall also include, but not be limited to, exercised or unexercised warrants, options, conversion rights, or other rights to acquire ownership interests.
- p. “Person” means any natural person, corporation, firm, association, partnership, joint venture, proprietorship, governmental body, or any other organization, business, or legal entity, and all predecessors or successors in interest.
- q. “Property” means any type of property, whether real, tangible or intangible, legal or equitable. The term also includes choses in action, claims, and contract rights, including a contractual right to receive death benefits as designated beneficiary under a policy of insurance, contract, employee’s trust, retirement account, or other arrangement.
- r. “Relating to” and “relates to” mean, without limitation, embodying, mentioning, or concerning, directly or indirectly, the subject matter identified in the request for information.
- s. “Settlor” means the person who creates the trust. The terms “grantor” and “trustor” mean the same as “settlor”.
- t. “Terms of the Trust” means the manifestation of intention of the settlor with

respect to the trust expressed in a manner that admits of its proof in judicial proceedings.

- u. “Transaction” means any act performed by a settlor, trustee, or beneficiary in relation to a trust, including the creation or termination of a trust, the investment of trust property, a breach of duty, the receipt of trust property, the receipt of income or the incurring of expense, a distribution of trust property, an entry in the books and records of the trust, and an accounting by a trustee to any person entitled to receive an accounting.
- v. The “Trust” shall mean the ___(*name of trust*)___ created on or about the ___ day of ___, ___ by and between ___(*name of settlor*)___ as settlor and ___(*name of original trustee*)___.
- w. “Trust Property” or “Trust Estate” means property placed in trust or property otherwise transferred or acquired or retained by the trustee for the trust.
- x. An Entity is a “Trust-Related Entity” at all times that the aggregate number of the Entity’s Ownership Units of any particular class, series or type which are owned directly or indirectly by you, your husband/wife, either or both of the Trusts, or any other Trust-Related Entity equals _____ percent (___%) or more of the Entity’s Ownership Units of that particular class, series or type which then are outstanding. Ownership Units held directly in the name of a person or Entity are deemed owned “directly” by such person or Entity, and Ownership Units which are legally or beneficially owned or controlled through any other means, including but not limited to through the use of parent Entities, subsidiary Entities, holding companies, trusts, voting trusts, voting agreements and straw-man arrangements, are deemed to be owned “indirectly.”
- y. “Trustee” means the person holding the property in trust and specifically refers to ___(*name of trustee*)___.
- z. “You” shall mean ___(*name of trustee*)___, regardless of the capacity in which you are acting, including but not limited to your capacity both as an individual and as trustee of the Trust.

3. Requests For Information:

- a.

4. Requests For Production Of Trust Documents:

a.

Form M4.00 *Motion To Compel Compliance With Common Law
Information Demand and Common Law Demand For
Production Of Trust Documents*

CAPTION

**MOTION TO COMPEL COMPLIANCE WITH
COMMON LAW INFORMATION DEMAND AND
COMMON LAW DEMAND FOR PRODUCTION OF TRUST DOCUMENTS**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, ___(name of beneficiary)___ (the “Movant”), acting individually as a beneficiary of the ___(name of the trust) ___ Trust (the “Trust”) and derivatively on behalf of the Trustee of the Trust because they will not or cannot bring this cause of action, and files this *his/her* Motion To Compel Compliance With Common Law Information Demand And Common Law Demand For Production of Trust Documents and request for damages for breach of fiduciary duty from ___(name of the trust)___ (the “Trustee”), acting individually and/or in *his/her/its* capacity as Trustee of the Trust. In support of his Motion, the Movant would respectfully show the Court the following:

1.

FACTS (BACKGROUND)

- a. (Optional: A true and correct copy of the Trust is attached hereto as Exhibit A and is specifically incorporated by reference herein.)
- b. The Trustee is currently serving as Trustee of the Trust.
- c. The Movant is a beneficiary of the Trust.
- d. On or about the ___ day of ____ the Movant sent the Trustee a Common Law Information Demand and Common Law Demand For Production of Trust Documents (the “Demand”).
- e. (*Optional but recommended:* A true and correct copy of the Demand is attached hereto as Exhibit B and is specifically incorporated by reference herein).

- f. The Trustee has failed to disclose the information requested in the Demand within the time specified in the Demand.
- g. The Trustee has failed to allow the Movant to examine and copy all of the documents identified in the Demand at the time specified in the Demand.
- h. (*Optional if applicable*, The Trustee has refused to respond to the Demand and indicate whether or not *he/she* intends to comply with the Demand).

2.

ARGUMENT AND AUTHORITY REGARDING TRUSTEE'S DUTY TO DISCLOSE

- a. The Movant has an absolute right to receive the information sought to be compelled by this Motion to Compel. Texas law does not permit the Trustee to refuse to disclose information requested by a beneficiary. Trustees owe beneficiaries a fiduciary duty of full disclosure of all material facts known to them that might affect the beneficiaries' rights. *Restatement Of The Law, Trusts 2d*, supra §173; *Scott On Trusts*, supra §173 and Bogert, *The Law of Trusts and Trustees*, supra § 961; *Shannon v. Frost National Bank*, 533 S.W.2d 389 (Tex. App. - San Antonio 1975, writ ref'd n.r.e); *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984) ; and *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996).
- b. A fiduciary has 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. *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); *City of Fort Worth v. Phippen*, 439 S.W.2d 660 (Tex. 1969). 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). The beneficiary is not required to prove the elements of fraud, *Archer v. Griffith*, 309 S.W.2d 735 (Tex. 1965); *Langford v. Shamburger*, 417 S.W.2d 438, (Tex. App.--Ft. Worth 1967, writ ref'd n.r.e.), and need not even prove that he relied on the fiduciary to disclose the information. *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.).
- c. The Movant has an absolute right to examine the books and records of the Trust. See *Restatement Of The Law, Trusts 2d*, supra §173; *Scott On Trusts*, supra §173 and Bogert, *The Law of Trusts and Trustees*, supra § 961.

- d. Bogert explains the rationale for this rule as follows:

The beneficiary is the equitable owner of the trust property, in whole or in part. The trustee is a mere representative whose function is to attend to the safety of the trust property and to obtain its avails for the beneficiary in the manner provided by the trust instrument. That the settlor has created a trust and thus required that the beneficiary enjoy his property interest indirectly does not imply that the beneficiary is to be kept in ignorance of the trust, the nature of the trust property and the details of its administration. If the beneficiary is to be able to hold the trustee to proper standards of care and honesty and to obtain the benefits to which the trust instrument and doctrines of equity entitle him, he must know of what the trust property consists and how it is being managed.

From these considerations it follows that the trustee has the duty to inform the beneficiary of important matters concerning the trust and that the beneficiary is entitled to demand of the trustee all information about the trust and its execution for which he has any reasonable use . . . For the reason that only the beneficiary has the right and power to enforce the trust and to require the trustee to carry out the trust for the sole benefit of the beneficiary, the trustee's denial of the beneficiary's right to information constitutes a breach of trust.

Bogert, *Trusts and Estates*, 2nd Ed. Rev., § 961.

- e. The Trustee has an affirmative duty to provide the information requested in the Demand. The Trustee cannot fail to provide such information merely because it is inconvenient for *him/her* to do so. The Trustee has been under a duty to disclose this information since the inception of the Trust and should not be permitted to use the inconvenience of gathering this information as an excuse to avoid providing such information.
- f. When, as here, the Trustee has refused to deliver, unreasonably delayed delivery, or unreasonably placed conditions or restrictions on delivery of information requested in the Demand, the court may order the Trustee to deliver the requested information, and hold the Trustee personally liable for the costs of the proceeding and the beneficiaries' attorney's fees. *See* Tex. Prop. Code § 113.151; Tex. Prop. Code § 114.064; Bogert,

Trusts and Estates, 2nd Ed. Rev., § 961.

- g. The Movant's Demand is not discovery in the sense it is governed by the Texas Rules of Civil Procedure. As recently stated by the Texas Supreme Court in *Huie v. DeShazo*, 922 S. W. 2d 920 (Tex. 1996), "Trustees and Executors owe beneficiaries 'a fiduciary duty of full disclosure of all material facts that might affect [the beneficiaries] rights.' **This duty exists independently of the rules of discovery**, applying even if no litigious dispute exists between the trustee and beneficiaries." (emphasis supplied) The reason for this rule is obvious to anyone knowledgeable about the relationship between a fiduciary and his beneficiary. As the Supreme Court explained, "When persons enter into fiduciary relations, each consents, as a matter of law, to have his conduct towards the other measured by the standards of the finer loyalties exacted by courts of equity. That is a sound rule and should not be whittled down by exceptions." *Johnson v. Peckham*, 120 S.W.2d 786 (Tex. 1938).
- h. Texas courts of equity have long recognized a trustee's fiduciary duty of disclosure. If a beneficiary cannot enforce this right in a court of equity, then this fiduciary duty has no substance. If a trustee can hide self-dealing and breach of trust within a haystack of superfluous documentation and unfounded objections, then equity will not be accomplished.

3.

ATTORNEYS' FEES UNDER THE TEXAS TRUST CODE

- a. The Movant PRAYS that this Court rule that the Defendant has breached his common law duty to disclose the information contained in the Demand and to allow *him/her* to examine the documents specified in the Demand. The Movant further PRAYS that *he/she* be awarded costs and reasonable and necessary attorneys' fees as may seem equitable and just pursuant to Texas Trust Code §114.064 against the Trustee, acting in *his/her/its* individual capacity and not as trustee. The Movant alternatively PRAYS that if *he/she* is not awarded costs and fees against the Trustee, acting in *his/her/its* individual capacity, that *he/she* be awarded costs and reasonable and necessary attorney's fees as may seem equitable and just against the Trustee, in *his/her/its* capacity as Trustee.

4.

PRAYER

WHEREFORE, premises considered, Movant PRAYS that, after a hearing on this motion, the Court grant the following relief:

- a. COMPEL the Trustee to immediately disclose to the Movant all of the information requested in the Demand;
- b. COMPEL the Trustee to immediately allow the Movant to examine and copy all of the documents identified in the Demand;
- c. FIND that the Trustee breached *his/her/its* fiduciary duty of disclosure to the Movant;
- d. AWARD the Movant, in *his/her* individual capacity as a beneficiary of the Trust, costs and reasonable and necessary attorneys' fees as may seem equitable and just; and
- e. GRANT such other relief at law or in equity as to which the Movant may show *himself/herself* entitled.

Respectfully submitted,

If there is a legal proceeding pending where persons interested in the trust are represented by attorneys or if you are aware that the trustee is represented by counsel then ADD A CERTIFICATE OF SERVICE.

Closing

Form O4.00 *Order Compelling Compliance With Common Law
Information Demand And Common Law Demand For
Production Of Trust Documents*

CAPTION

**ORDER COMPELLING COMPLIANCE WITH
COMMON LAW INFORMATION DEMAND AND
DEMAND FOR PRODUCTION OF TRUST DOCUMENTS**

On the ___ day of _____, _____, this court considered ___(name of beneficiary)_____’s (the “Movant”) Motion To Compel Compliance With Common Law Information Demand and Common Demand For Production of Trust Documents. The court, after considering the motion and the arguments of counsel makes the following rulings:

1. ___(name of the trustee)_____ (the “Trustee”), acting in *his/her/its* capacity as trustee of the ___(name of the trust)___ trust (the “Trust”), is ORDERED to furnish the Movant (optional: and the following beneficiaries of the Trust: *list the names and addresses of each beneficiary*) with all of the information requested in the Motion To Compel Compliance With Common Law Information Demand and Common Law Demand For Production of Trust Documents that *he/she* filed in this cause. The Trustee is further ORDERED to disclose such information in writing to the Movant by making delivery of such information to ___(name of Movant’s attorney)___, the attorney for the Movant, at *his/her* office located at ___ (attorney’s office address)___ on or before 5:00 P.M. on the ___ day of _____, _____. (Optional: The Trustee is further ORDERED to disclose such information to each the other beneficiaries of the Trust designated above by mailing such information to each of them, at the addresses set forth above, by certified mail return receipt requested mailed on or before 5:00 P.M. on the ___ day of _____, _____.)
2. ___(name of the trustee)_____ (the “Trustee”), acting in *his/her/its* capacity as trustee of the ___(name of the trust)___ trust (the “Trust”), is ORDERED to allow the Movant (optional: and the following beneficiaries of the Trust: *list the names and addresses of*

each beneficiary) to examine and copy all of the documents identified in the Motion To Compel Compliance With Common Law Information Demand and Common Law Demand For Production of Trust Documents that *he/she* filed in this cause. The Trustee is further ORDERED to allow such examination and copying of such documents at the following location: __(describe location)__ on or before 5:00 P.M. on the ___ day of _____, _____. (*Optional: The Trustee is further ORDERED to allow each of the other beneficiaries of the Trust designated above to examine and copy such documents at the time and place set forth above.*)

3. This court FINDS that the Trustee has breached *his/her/its* fiduciary duty to disclose information to trust beneficiaries.
4. This court further AWARDS the Movant costs and fair and reasonable legal fees in the amount of \$_____ against the Trustee, acting in *his/her* individual capacity and not as trustee of the trust (*optional alternative: acting in his/her capacity as trustee of the Trust*).

SIGNED this ___ day of _____, _____.

Presiding Judge