

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ALBERT G. HILL, III,	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. 3:07-CV-2020-O
	§	
TOM HUNT, ET AL.,	§	
Defendants.	§	

**ORDER FINDING ALBERT G. HILL, JR.
SUBMITTED SUMMARY JUDGMENT MATERIALS TO THE COURT IN BAD FAITH
AND TESTIFIED FALSELY AT THE JANUARY HEARING**

Before the Court are:

- i. *Motion for Sanctions and for an Order to Show Cause Why Albert G. Hill, Jr. and Joyce E. Waller Should Not Be Held in Contempt* (Doc. #439) filed January 7, 2010 (“Motion” or “Mtn.”) by Plaintiff Albert G. Hill, III (“Al, III”);
- ii. *Brief in Support of Motion for Sanctions and for an Order to Show Cause Why Albert G. Hill, Jr. and Joyce E. Waller Should Not Be Held in Contempt* (Doc. #440) filed January 7, 2010 (“Pl. Br.”) by Al, III;
- iii. *Appendix– Motion for Sanctions and for an Order to Show Cause Why Albert G. Hill, Jr. and Joyce E. Waller Should Not Be Held in Contempt* (Docs. #440-2 and #440-3) filed January 7, 2010 (“Pl. App.”) by Al, III;
- iv. *Albert G. Hill, Jr.’s and Joyce E. Waller’s Response to Plaintiff Albert G. Hill III’s Motion for Sanctions and for an Order to Show Cause* (Doc. #458) filed January 13, 2010 (“Def. Resp.”) by Defendant Albert G. Hill, Jr. (“Al, Jr.”) and Joyce E. Waller (“Waller”);
- v. *Appendix to Defendant Response to Albert G. Hill III’s Motion for Sanctions and for an Order to Show Cause* (Doc. #458-2), filed January 13, 2010 by Al, Jr. and Waller (“Def. App.”);
- vi. *Plaintiff’s List of Witnesses for Show Cause Hearing and Request for Expedited Consideration* (Doc. #461) filed January 15, 2010 by Al, III;
- vii. *Defendant Albert G. Hill, Jr.’s Witness List and Notice of Conflicting*

Trial Setting (Doc. #462) filed January 15, 2010 by Al, Jr.;

- viii. The Court's Order setting a hearing on Doc. #439 (Doc. #474) filed January 20, 2010;
- ix. *Albert G. Hill, Jr. 's Motion for Clarification* (Doc. #476) filed January 20, 2010 by Al, Jr.;
- x. The Court's Order clarifying Doc. #474 (Doc. #477) filed January 21, 2010;
- xi. *Plaintiff's Reply to Albert G. Hill, Jr. 's and Joyce E. Waller's Response to Plaintiff Albert G. Hill III's Motion for Sanctions and for an Order to Show Cause* (Doc. # 479) filed January 21, 2010 by Al, III;
- xii. Appendix in support of his reply (Doc. #480) filed January 21, 2010 by Al, III;
- xiii. Transcript of the January 22, 2010 evidentiary hearing ("January hearing") on the Motion ("Jan. Trans.")¹ and related exhibits;
- xiv. Sur-reply filed by Al, III (Doc. #485) on January 22, 2010;
- xv. Amended response to Doc. #485 (Doc. #487) filed by Al, Jr. on January 24, 2010;
- xvi. *Order to Show Cause Why Albert G. Hill, Jr. and Joyce E. Waller Should Not Be Sanctioned and Held in Contempt* (Doc. #506) filed by the Court on February 2, 2010;
- xvii. *Defendant Albert G. Hill, Jr. 's Response to Order to Show Cause Why Albert G. Hill, Jr. and Joyce E. Waller Should Not Be Sanctioned and Held in Contempt* (Doc. #529) filed by Al, Jr. on February 12, 2010;
- xviii. *Appendix to Defendant Albert G. Hill, Jr. 's Response to Order to Show Cause Why Albert G. Hill, Jr. and Joyce E. Waller Should Not Be Sanctioned and Held in Contempt* (Doc. #529-2) filed by Al, Jr. on February 12, 2010;

¹All citations in this opinion to the January Transcript and to the February Transcript are to the Court Reporter's rough drafts of the transcripts, as provided to the Court. Page numbers may vary slightly from the final, edited transcripts that the Court assumes the Court Reporter has and/or will make available to the parties.

- xix. *Order Setting Show Cause Hearing* (Doc. #531) filed by the Court on February 12, 2010;
- xx. Transcript of the February 16, 2010 show cause hearing (“February hearing”) (“Feb. Trans.”)² and related exhibits;
- xxi. *Plaintiff’s Motion for Partial Summary Judgment on His Status as a Beneficiary and for an Accounting of the Margaret Hunt Trust Estate* (Doc. #286) filed by Al, III on September 3, 2009 (“Pl. Sum. Jdmt. Mtn.”);
- xxii. *Appendix in Support of Plaintiff’s Motion for Partial Summary Judgment on His Status as a Beneficiary and for an Accounting of the Margaret Hunt Trust Estate* (Doc. #286-2 through Doc. #286-4) filed by Al, III on September 3, 2009 (“Pl. Sum. Jdmt. App.”);
- xxiii. *Plaintiff’s Brief in Support of His Motion for Partial Summary Judgment on His Status as a Beneficiary and for an Accounting of the Margaret Hunt Trust Estate* (Doc. #287) filed by Al, III on September 3, 2009 (“Pl. Sum. Jdmt. Br.”);
- xxiv. *Defendant Albert G. Hill, Jr.’s Response to Plaintiff’s Motion for Partial Summary Judgment on His Status as a Beneficiary and for an Accounting of the Margaret Hunt Trust Estate* (Doc. #377) filed by Al, Jr. on December 2, 2009 (“Def. Sum. Jdmt. Resp.”);
- xxv. *Defendant Albert G. Hill, Jr.’s Brief in Support of Response to Plaintiff’s Motion for Partial Summary Judgment* (Doc. #378) filed by Al, Jr. on December 2, 2009 (“Def. Sum. Jdmt. Resp. Br.”); and
- xxvi. *Appendix to Defendant Albert G. Hill, Jr.’s Brief in Support of Response to Plaintiff’s Motion for Partial Summary Judgment* (Doc. #379 and #379-2) filed by Al, Jr. on December 2, 2009 (“Def. Sum. Jdmt. Resp. App.”).

All of these pleadings relate to Plaintiff Al, III’s motion for sanctions (Doc. #439). Al,

²The Court considers only the portion of the February Transcript that constitutes the show cause hearing. After the parties rested (*Feb. Trans.* at 108) and closed (*Feb. Trans.* at 137) the show cause portion of the February hearing, the Court undertook a separate matter, an attempt to locate, by witness testimony, all of the original copies of the various disclaimers pertinent to this case. The Court does not consider this portion of the February Transcript (*Feb. Trans.* after 137), or any subsequent transcripts.

III has moved for sanctions and for an order to show cause why Defendant Albert G. Hill, Jr. (“Defendant” or “Al, Jr.”) should not be held in contempt.³ Plaintiff contends Al, Jr. should be held in contempt because he submitted his affidavit and the affidavit of Joyce E. Waller (“Waller”) (each attached to Al, Jr.’s response in opposition to Plaintiff’s motion for partial summary judgment) in bad faith. Plaintiff contends these affidavits are “flatly at odds with facts indisputably within [Al, Jr.’s] knowledge.”⁴ Al, Jr. has responded that the statements contained in the respective affidavits are factually true and, therefore, may not serve as a basis for sanctions. *See generally* Doc. #458.

After considering the briefing and the evidence, including testimony and evidence provided at the January hearing, the Court issued a show cause order (Doc. #506). After Defendant Al, Jr. filed his response to the show cause order (Doc. #529), the Court ordered a show cause hearing (the “February hearing”), which was held on February 16, 2010.

Having considered Plaintiff’s motion for sanctions, all related briefing, the evidence, and the applicable law, and as set out in more detail below, the Court finds that the affidavits of Al, Jr. and Waller are materially misleading, contain false statements, and were presented to the Court by Al, Jr. in bad faith. Additionally, the Court finds that Al, Jr. presented live testimony at an evidentiary hearing held January 22, 2010 (the “January hearing”) that was untrue.

³This order addresses the bad faith conduct attributable to Al, Jr. Plaintiff’s motion for sanctions also asks for similar relief against non-party Joyce E. Waller, and the Court has also ordered Waller to show cause why she should not be sanctioned and held in contempt. *See* Doc. #506. Waller’s show cause response has not yet been filed (*see* Docs. ##516, 523). Accordingly, the Court will determine Waller’s bad faith, if any, at the appropriate time.

⁴*Pl. Br.* at 3 (citing *Fort Hill Builders, Inc. v. Nat’l Grange Mut. Ins. Co.*, 866 F.2d 11,16 (1st Cir. 1989)).

I. Background

A general understanding of the background in this case is helpful to resolving Plaintiff's motion for sanctions.⁵ This case involves causes of action arising out of management of the Margaret Hunt Trust Estate ("Margaret Trust") and Haroldson Lafayette Hunt, Jr. Trust Estate ("Hassie Trust"). *See* Doc. No. 1 (3:07-CV-2020-O) (N.D. Tex. Dec. 3, 2007). These trusts were created by H.L. Hunt, a wealthy Texas oilman, for his two eldest children, Margaret Hunt Hill ("Margaret") and Haroldson ("Hassie") Lafayette Hunt, Jr. *Id.*

Defendants Al Jr, Alinda Wikert, and Lyda Hill are Margaret's three children. Plaintiff Al, III, and Defendants Heather Washburne and Elisa Summers are Al, Jr.'s three children. *Id.* Each of these individuals either holds an interest (whether vested or contingent, current or remainder), or has disclaimed an interest in the Margaret Trust.

Among the allegations asserted in this lawsuit and relevant to this motion is Plaintiff's contention that he is a current income beneficiary of the Margaret Trust. Plaintiff contends that his father, Defendant Al, Jr., has executed at least two irrevocable documents disclaiming a portion of his interest in the Margaret Trust, including at least 75% of his income interest. If one or both of the disclaimers are valid, then by operation of law, Al, III is a current income beneficiary of the Margaret Trust and is entitled to at least 8.33% of the income generated by the Margaret Trust each year.⁶ The evidence in the record indicates that an 8.33% current income

⁵The Court assumes the parties' familiarity with the factual background, and only details herein background relevant to resolving the motion for sanctions.

⁶*See Pl. Orig. Pet.* (Doc. #1) at Ex. 3. Margaret held 100% of the current income interest in the Margaret Trust. *See id.* at Ex. 1. At her death, each of her three children, including Al, Jr., received a 33.33% interest in the trust. *See id.* at 11–12, Ex. 1, Ex. 3. Unless Al, Jr.'s interest disclaimer(s) are invalid, he has disclaimed at least 75% of his current income interest, and this

interest in the Margaret Trust amounts to at least \$5.5 million dollars in income each year (Doc. #1 at Ex. 3),⁷ and Al, Jr. has stated that the amount at issue is approximately \$92 million dollars (Doc. #539 at 36). In addition to substantial annual income, as a current income beneficiary of the Margaret Trust, Al, III would also be entitled to other rights related to the trust.⁸

Al, III's rights under the trust, including at least \$5.5 million dollars in income a year, or approximately \$92 million dollars total, turn on whether Al, Jr. effectively disclaimed his interest and/or validly revoked his disclaimer.

In September 2009, Al, III filed a motion for partial summary judgment seeking an order that: (1) he is a current beneficiary of the Margaret Trust; and (2) his status as a beneficiary entitles him to an accounting of the trust. Al, III based his motion, in part, on his contention that his father disclaimed an interest in the Margaret Trust which gave Al, III a right to income from that trust, and entitled him to an immediate accounting of the trust.

This order addresses the misrepresentations presented to the Court by Defendant Al, Jr., (1) in response to Al, III's motion for partial summary judgment, and (2) during the January hearing. These misrepresentations center around two disclaimers, which Plaintiff alleges Al, Jr. executed in 2005 and 2007, and which disclaim portions of Al, Jr.'s interest in the Margaret

disclaimed portion passed in equal shares to his three children, including Al, III. *See id.* at 12, Ex. 3. In this event, Al, III holds at least an 8.33% current income interest in the Margaret Trust.

⁷A review of the record suggests that \$5.5 million may be a conservative number, as it is based only on projected income from the sale of Hunt Petroleum Corporation ("HPC"). *See Pl. Orig. Comp.* (Doc. #1) at Ex. 3. At the time this suit was filed, the Margaret Trust's interest in HPC was its largest asset, but not its sole asset. *Id.* at 9.

⁸ For example, Al, III would likely be entitled to receive the statutory accounting of the trust, which he sought in his motion for partial summary judgment.

Trust. As explained below, the facts Al, Jr. recently presented at the January hearing are grossly inconsistent with the facts as Al, Jr. represented them in his opposition to Plaintiff's motion for partial summary judgment.

In summary, the Court finds:

- i. Al, Jr. misrepresented to the Court that he signed and executed an Amended Disclaimer on March 22, 2005, when that document was not actually created until June 2007;
- ii. Al, Jr. misrepresented to the Court that Waller notarized the Amended Disclaimer on March 22, 2005, which was not possible because it was not created until June 2007;
- iii. Al, Jr. testified falsely at the January hearing that on March 22, 2005, Waller signed Al, Jr.'s name on his behalf on a particular copy of the 2005 disclaimer.

The Court's conclusions are based on the facts set out below.

A. Representations in Al, Jr.'s Response to Plaintiff's Motion for Partial Summary Judgment

1. Plaintiff's Motion for Partial Summary Judgment

As stated above, Plaintiff Al, III filed for partial summary judgment on September 3, 2009, stating that his father had executed "at least two irrevocable disclaimers that passed certain beneficial interests in the [Margaret Trust] to Plaintiff and his sisters." *Pl. Sum. Jdmt. Br.* at 1, 6–7. In his summary judgment brief, Plaintiff identified the two versions of the disclaimer on

which he relied.⁹ Plaintiff first identified a version that all parties agree Al, Jr. signed on March 22, 2005 (the “2005 Disclaimer”).¹⁰ Plaintiff also alleged that a second version of the disclaimer was executed by Al, Jr., “the dispositive terms of which are virtually identical to those of the first disclaimer,” and “which purports to have been executed on March 22, 2005, [but] was actually¹¹ executed in 2007 shortly after Margaret’s death”¹² (the “Amended Disclaimer”).¹³ *Id.* at 7. Based on this information, Plaintiff moved the Court to grant partial summary judgment: (1) declaring him to be a current beneficiary of the Margaret Hunt Trust Estate (“Margaret Trust”) and (2) ordering a statutory accounting of the Margaret Trust. *See generally Pl. Sum. Jdmt. Mtn.*

2. Al, Jr.’s Response Filed December 2, 2009

⁹Both the 2005 Disclaimer and the Amended Disclaimer are appropriately cited in Plaintiff’s summary judgment brief and were included in the corresponding appendix. *Id.* at 6–7; *Declaration of Albert G. Hill III* ¶¶ 6–7, Ex. A, Ex. B. (Doc. #286-3) at App. 002, 004–009.

¹⁰The 2005 Disclaimer appears numerous times in the record, with various exhibit numbers. Each of the following citations are to the 2005 Disclaimer: (1) *Declaration of Albert G. Hill III*, Ex. A (Doc. #286-3) at App. 004–006; (2) *Affidavit of Albert G. Hill, Jr.*, Ex. 1 (Doc. #379) at App. 004–App. 006; (3) Pl. Ex. 4. to the January hearing; (4) Pl. Ex. 15 to the January hearing at App. 004–006; (5) Pl. Ex. 19 to the January hearing at pages 3–5; (6) Def. Ex. 1 to the January hearing at App. 004–006; (7) Def. Ex. 21 to the January hearing; (8) Pl. Ex. 1 to the February hearing at App. 004–006; and (9) Def. Ex. 1 to the February hearing at App. 004–006.

¹¹Al, III testified that Al, Jr. told him this Amended Disclaimer was signed and executed in 2007. *Jan. Trans.* at 133.

¹²Margaret Hunt Hill died on June 14, 2007. *See, e.g., Affidavit of Albert G. Hill, Jr.* (Doc. #379) at App. 002, ¶6.

¹³The Amended Disclaimer appears numerous times in the record, with various exhibit numbers. Each of the following citations are to the Amended Disclaimer: (1) *Declaration of Albert G. Hill III*, Ex. B (Doc. #286-3) at App. 007–009; (2) *Affidavit of Albert G. Hill, Jr.*, Ex. 1 (Doc. #379) at App. 007–App. 009; (3) Pl. Ex. 6. to the January hearing; (4) Pl. Ex. 15 to the January hearing at App. 007–009; (5) Pl. Ex. 19 to the January hearing at pages 6–8; (6) Def. Ex. 1 to the January hearing at App. 007–009; (7) Def. Ex. 22 to the January hearing; (8) Pl. Ex. 1 to the February hearing at App. 007–009; and (9) Def. Ex. 1 to the February hearing at App. 007–009.

Al, Jr. failed to timely respond to Al, III's partial summary judgment motion, and instead asked for a continuance. *See* Doc. #301. The Court ordered Al, Jr. to respond to the motion on or before December 2, 2009. *Order dated November 25, 2009* (Doc. #372). Al, Jr. filed his response on December 2, 2009.

In his brief in response, Defendant Al, Jr. represented to the Court that both the 2005 Disclaimer and the Amended Disclaimer were signed and notarized on the same day, March 22, 2005. Defendant wrote: “[i]n March 2005, Hill, Jr. signed a document purporting to disclaim a portion of his beneficial interest in the [Margaret Trust] (the ‘Disclaimer’).[footnote 7]” *Def. Sum. Jdmt. Resp. Br.* at 2. In support of this statement, Al, Jr. referenced footnote seven, which contains a citation to the “Affidavit of Hill, Jr. at ¶4.” Paragraph 4 of the Affidavit of Hill, Jr. reads, “[i]n March 2005, while I was incapacitated, I signed a partial disclaimer (the ‘Disclaimer’) [footnote 1] purporting to disclaim a portion of my beneficial interest in the Margaret Hunt Trust Estate.” *Affidavit of Albert G. Hill, Jr.* ¶4, (Doc. #379) at App. 002. The footnote referenced in this sentence of the affidavit refers to the papers, “[a]ttached as Exhibit 1.” Exhibit 1 contains six pages. *Id.* at App. 004–009. The first three pages comprise the 2005 Disclaimer. This document is entitled “Disclaimer, Margaret Hunt Trust Estate,” refers to a “general” power of appointment (see ¶5), is signed by Al G. Hill, Jr., and reflects the notarization of his signature by Joyce E. Waller on March 22, 2005.¹⁴ The latter three pages of Exhibit 1 contain a slightly different version of what appears at first glance to be the same

¹⁴The parties do not dispute that this version of the disclaimer was actually signed by Al, Jr. on March 22, 2005, and was notarized by Waller on the same day.

disclaimer. For purposes of this order, the Court calls this the “Amended Disclaimer.”¹⁵ The Amended Disclaimer is also entitled “Disclaimer, Margaret Hunt Trust Estate,” and it also purports to bear the signature of “Al G. Hill Jr.,” having been notarized by Joyce E. Waller on March 22, 2005. However, a careful review of this version of the disclaimer shows that it is not identical to the 2005 Disclaimer.¹⁶ Significantly, the Amended Disclaimer omits the word “general” when referring to “a power of appointment” in paragraph 5.¹⁷

¹⁵As evidenced by the January hearing transcript and the February hearing transcript, at various points in the January and February hearings, the parties referred to the Amended Disclaimer as the “2007 Disclaimer” or the “updated Disclaimer.”

¹⁶Differences include: (1) the heading of “Disclaimer, Margaret Hunt Trust Estate, Recitals” is double spaced on the 2005 Disclaimer, but single spaced on the Amended Disclaimer; (2) in paragraphs 5, 6, 7, and 11, the word “general” modifies the phrase “power of appointment” in the 2005 Disclaimer, but the word “general” is omitted in the Amended Disclaimer; (3) paragraph 10 in the Amended Disclaimer adds a reference to Section 2518(b)(2)(A) of the Internal Revenue Code; (4) the placement and characteristics of the handwritten signatures of “Al G. Hill Jr.,” “March 22,” “Joyce Waller,” and “Tom Hunt, Trustee,” which appear on the 2005 Disclaimer, are not identical to those that appear on the Amended Disclaimer; and (5) the placement and angle of Notary Public Seal of Joyce Waller which appears on the 2005 Disclaimer is not identical to that which appears on the Amended Disclaimer. *Compare* 2005 Disclaimer, *with* Amended Disclaimer; *see also Jan. Trans.* at 40–50.

¹⁷The omission of the word “general” is significant because characterization of the power of appointment as “general” could impose substantial additional tax exposure on a trust. The Hassie Trust was created by the same settlors as the Margaret Trust, at the same time, and under a virtually identical Trust Agreement. *Compare Pl. Orig. Pet.* (Doc. #1) at Ex. 1 (Margaret Trust Agreement), *with id.* at Ex. 2 (Hassie Trust Agreement). Following Hassie’s death, the power of appointment created by the Hassie Trust Agreement was characterized as a “general” power of appointment, and the Hassie Trust Estate may have avoided approximately half a billion dollars of tax liability if its power of appointment were characterized as “special” rather than “general.” *See Jan. Trans.* at 93–94, 141; *see also Pl. Ex. 21* to the January hearing. According to Ivan Irwin, the correct characterization of the Hassie Trust power of appointment “has never been decided.” *Jan. Trans.* at 8–9. The record also suggests that the Trustees and beneficiaries of the Margaret Trust, and the executors of Margaret’s estate, considered taking the position that the Margaret Trust power of appointment was properly characterized as “special” rather than “general,” and recognized that the characterization had “enormous tax consequences.” *Pl. Ex. 21* to the January hearing; *see Jan. Trans.* at 93–94, 141.

Al, Jr.'s summary judgment response summarily dismisses Plaintiff Al, III's contention that a second disclaimer was executed in 2007.¹⁸ Al, Jr. contends that "according to Joy Waller, who notarized the Disclaimer, the second version of the Disclaimer was executed on the same day as the first version." *Def. Sum. Jdmt. Resp. Br.* at 3. Accompanying this statement is a footnote citation to Waller's affidavit. *Id.* at n.11. In relevant part, Waller's affidavit recites, "[o]n or about March 22, 2005, I notarized a Disclaimer for Mr. Hill, Jr. I notarized a second version of the Disclaimer on the same day as the first version." *Affidavit of Joyce Ellen Waller* ¶8 (Doc. #379) at App. 058. Al, Jr.'s response continues, "[f]or purposes of this Response, the term 'Disclaimer' encompasses the two versions of the disclaimer executed on the same day." *Def. Sum. Jdmt. Resp. Br.* at 3.

Waller's affidavit and Al, Jr.'s affidavit were each signed and notarized on December 2, 2009. Defendant Al, Jr.'s response to Plaintiff's motion for partial summary judgment, and his supporting brief, each bear the signature of Defendant Al, Jr.'s counsel, Mike Lynn, and, along with the related appendix in support, were electronically submitted to the Court by Mr. Lynn's co-counsel, Kent Krabill, on December 2, 2009.

On December 29, 2009, the Court denied Al, III's motion for partial summary judgment. The Court will now address the basis for this decision.

B. Court's Reliance on Al, Jr.'s Evidence and Arguments

Based on the arguments propounded in Al, Jr.'s summary judgment response brief, as supported by the affidavits of Waller and Al, Jr., which Al, Jr. submitted in his appendix, the

¹⁸Al, Jr.'s response notes that "the dispositive terms of the alleged second partial disclaimer are virtually identical to those of the first disclaimer." *Def. Sum. Jdmt. Resp. Br.* at 3 n.8.

Court, at the time it denied the partial summary judgment motion on December 29, 2009, relied on Al, Jr.'s representation that the two versions of the Disclaimer — the 2005 Disclaimer and the Amended Disclaimer — were both executed by Al, Jr. on March 22, 2005, and were notarized by Joyce Waller on the same day.¹⁹ Otherwise stated, in his response to Plaintiff's motion for partial summary judgment, Al, Jr. failed to notify the Court of a fact issue over *whether* he executed the Amended Disclaimer, and furthermore, he represented that the dispute was instead over *when*—March 2005 or June 2007—he executed the Amended Disclaimer. *See Def. Sum. Jdmt. Resp.* at 3 n.12 (“Thus, at a minimum,” Defendant stated, “there are genuine issues of material fact as to *when* a second version was executed, as well as to the effect of such a version, if any” (emphasis added)).

Because the Court believed a fact issue existed over when Al, Jr. executed the Amended Disclaimer, and because the Court narrowly found a fact issue as to whether Al, Jr. lacked mental capacity on March 22, 2005, the date the 2005 Disclaimer was executed, the Court did not reach other issues presented, including: (1) whether the Texas Trust Code or the Texas Probate Code governs the effectiveness of a Margaret Trust interest disclaimer; (2) whether Al, Jr. failed to raise a fact issue as to the effectiveness or the enforceability of the Amended Disclaimer; or (3) whether Al, Jr. ratified the 2005 Disclaimer at a time when he admits mental

¹⁹The Court's reliance is evidenced by footnote three of the Court's December 29, 2009 *Memorandum Opinion and Order* (Doc. #423), which disposed of Plaintiff's partial summary judgment motion. The Court stated, “[t]he parties seem to agree that Al Hill, Jr. also signed a second disclaimer [the Amended Disclaimer], bearing the same title and signature date, and also stating that Al, Jr. was disclaiming various interests in the trust. The date this second document [the Amended Disclaimer] was *actually* signed is in dispute, however. Defendant Al, Jr. claims it was signed on March 22, 2005, and Plaintiff Al, III claims it was in fact signed in 2007 but was fraudulently back-dated to bear the 2005 date” (citing *Def. Sum. Jdmt. Resp.* at 2–3).

capacity, and the effect, if any, of such ratification.²⁰

C. Irwin and Al, Jr. Depositions Confirm the Amended Disclaimer Was Not Created Until June 2007

Ivan Irwin's deposition was taken on December 29, 2009, and Al, Jr.'s deposition was taken on January 7, 2010. In their respective depositions, Irwin and Al, Jr. were questioned about the Amended Disclaimer. Their testimony confirmed that the Amended Disclaimer was not created until June of 2007.²¹

D. Motion for Sanctions Filed January 7, 2010

On January 7, 2010, Plaintiff filed the instant motion for sanctions and for an order to show cause, citing Al, Jr.'s and Irwin's deposition testimony as support that the affidavits of Al, Jr. and Waller contained "knowingly false and misleading" statements. *Pl. Br.* at 8. Based on these contentions, Plaintiff asks the Court to apply Federal Rule of Civil Procedure 56(g) or to exercise the Court's inherent power to sanction Al, Jr. and hold him in contempt. *Id.* at 11.

²⁰While the Court narrowly found a fact issue had been presented as to Al, Jr.'s lack of mental capacity on March 22, 2005, the parties agree Al, Jr. possessed mental capacity in June 2007. As discussed later in this opinion, Defendant subsequently admitted to the Court that the Amended Disclaimer was not created until June 2007. This fact makes it impossible for Al, Jr. or Waller to have executed or notarized the Amended Disclaimer on March 22, 2005. Additionally, had Al, Jr. disclosed this fact and other related facts to the Court at the appropriate time, Plaintiff's partial summary judgment motion may have been granted.

²¹For example, Irwin testified that "[i]n 2007 Tom Hunt recommended to Al, Jr. that he eliminate the word 'general' in the recitals [of the 2005 Disclaimer]. . . , so Al, Jr. had the word 'general' taken out of the recitals." *Deposition of Ivan Irwin* 58:8–15 (Doc. #440-3) Pl. App. at 26. According to Irwin, the changes to the disclaimer were made "just after" June 14, 2007. *Id.* at 101:5-22, Pl. App. 37. Defendant Al, Jr. admitted that in June of 2007, he "participated in . . . a updating of the recital of something that [he] had previously signed." *Deposition of Albert Hill, Jr.* 11:24–13:14 (Doc. #440-3) Pl. App. 63–64. Al, Jr. stated his understanding that the "update" made in 2007 "clarified that the power of appointment. . . was merely a power of appointment." *Id.*

Defendant Al, Jr. responded to the motion for sanctions and argued that the statements made in Al, Jr.'s affidavit and Waller's affidavit are true and are confirmed by the testimony of Irwin that the Amended Disclaimer was never separately executed or notarized in 2007. *Def. Resp.* at 8–9. Al, Jr. contends that regardless of any updates made in 2007 to the 2005 Disclaimer, no new document was “signed,” “notarized,” or “executed” in June of 2007, and therefore, the statements contained in the affidavits at issue are factually correct and not sanctionable. *Id.* at 11–14.

The Court ordered an evidentiary hearing in an attempt to gain a better understanding of the facts.

E. Evidentiary Hearing, January 22, 2010

The pertinent testimony of Irwin, Waller, and Al, Jr. at the evidentiary hearing is summarized below.

1. Irwin: Amended Disclaimer Created in June 2007

Ivan Irwin testified that he has been an attorney for the Hunt and/or Hill families for fifty years and currently works part-time for A.G. Hill Partners. *Jan. Trans.* at 4. Irwin identified the 2005 Disclaimer as a disclaimer executed and notarized on March 22, 2005.²² *Id.* at 7. Irwin

²²Irwin identified Plaintiff's Exhibit 3 as a disclaimer Al, Jr. executed on March 22, 2005. Defendant Al, Jr. has represented that four disclaimers were signed on March 22, 2005, and “[e]xcept for the signatures. . .the four were identical.” *Jan. Trans.* at 97. Plaintiff's Exhibit 3 and Plaintiff's Exhibit 4 are two of these four disclaimers. The Court has never seen the remaining two. Plaintiff's Exhibit 3 and Plaintiff's Exhibit 4 are identical in every respect with the following exception: by comparing the placement and characteristics of the handwritten signatures of “Al G. Hill Jr.,” “March 22,” “Joyce Waller,” and “Tom Hunt, Trustee,” as well as the placement and angle of Notary Public Seal of Joyce Waller, between the two exhibits, it is apparent that two documents were independently signed. One document is not a mere photocopy of the other, but is instead a duplicate original. Plaintiff's Exhibit 4 is the disclaimer that was attached as pages App. 004–App. 006 of Exhibit 1 to Al, Jr.'s affidavit. Unless otherwise noted,

testified that he “sent four copies [of the 2005 Disclaimer] to Al, Jr. in March of 2005” and then some days later, he received back four executed and notarized documents with original signatures (as opposed to photocopies). *Id.* at 21–22.

Irwin also identified the Amended Disclaimer.²³ According to Irwin, the Amended Disclaimer reflects a change made in June of 2007 to the 2005 Disclaimer to correct “a possible error in one of the recitals [. . .] so instead of saying a general power of appointment it just wouldn’t say whether it was general or special.” *Jan. Trans.* at 8. The change was made at the request of Al, Jr. and Tom Hunt. *Jan. Trans.* at 8, 16. According to Irwin, the change was made to address conflicting opinions over whether the power of appointment created by the 2005 Disclaimer was a “general” power of appointment or a “special” power appointment. *Id.* at 9. The record indicates potential adverse consequences to the Margaret Trust if the power of appointment were characterized as “general.” *Id.*; *see also* Pl. Ex. 21 to the January hearing (a printout of an email sent to individuals, including Al, Jr., acknowledging the “enormous tax consequences” of the “power of appointment contained in the Margaret Hunt Trust Estate.”); *Jan. Trans.* at 112–14 (Al, Jr. admitting that he received the email and wrote “AL3 FYI” at the top of the email printout).

According to Irwin, his secretary edited the first two pages of the 2005 Disclaimer in 2007 and “then stapled [the updated two pages] back on to the original signature page, which

the use of “2005 Disclaimer” in this opinion refers to Plaintiff’s Exhibit 4 rather than to Plaintiff’s Exhibit 3.

²³Plaintiff’s Exhibit 6 is the exact Amended Disclaimer that was attached as pages App. 007–App. 009 of Exhibit 1 to Al, Jr.’s affidavit. Unless otherwise noted, the use of “Amended Disclaimer” in this opinion refers to Plaintiff’s Exhibit 6.

was signed in 2005. There was no new signing or no new notarization or anything that I know anything about.” *Jan. Trans.* at 8. Based on his testimony and a comparison of the Amended Disclaimer to the 2005 Disclaimer, it appears that Irwin had the first two pages of the 2005 Disclaimer re-typed so that the changes directed by Al, Jr. could be confined to the first two pages, without altering the third page in any way (for example, by having additional text spill over from the second page onto the third page). It appears this was done to allow Al, Jr. the option of using a signature page from the 2005 Disclaimer to create the appearance that the Amended Disclaimer was created on (or before), and signed and notarized on, March 22, 2005 as reflected by the notarization date.

Irwin testified that after June 14, 2007, he affixed the signature page from the 2005 Disclaimer to the Amended Disclaimer at Al, Jr.’s house, at the direction of Al, Jr., and with the help of Al, Jr.’s caretaker, since Al, Jr. was “physically unable to” affix the signature page on his own, due to his limited motor skills. *Jan. Trans.* at 16.

2. Joyce Waller: New Explanation for “Version” of the Disclaimer

Waller testified that she has worked for Al, Jr. or for one of his companies for forty years, during which time she has held a number of different positions. *Jan. Trans.* at 30–32. Waller testified that she has been a notary public for over thirty years and is aware that the State of Texas imposes rules on the profession. *Id.* at 33. Waller also recognized that the Secretary of State promulgates the rules governing notary publics. *Id.* at 70–71. Waller testified that she notarized four copies of Al, Jr.’s disclaimer in March of 2005. *Id.* at 34. Waller testified that Al, Jr.’s attorney, Mike Lynn, asked her to sign an affidavit, that Mr. Lynn or Kent Krabill discussed with her what should be put in her affidavit, and Lynn then wrote her affidavit. *Id.* at 37; *see*

also id. at 42–43.

In her affidavit, Waller states: “On [. . .] March 22, 2005, I notarized a Disclaimer for Mr. Hill, Jr. I notarized a second version of the disclaimer on the same day as the first version.” When explaining what she meant by the term “version,” Waller testified: “[t]he first version is the one that Mr. Hill [Jr.] personally signed. The second version is the one that I signed Mr. Hill’s name to.” *Id.* at 43; *see also id.* at 72–73. Plaintiff’s Exhibit 4 to the hearing is a copy of the 2005 Disclaimer to which Al, Jr. signed his own name on March 22, 2005 (*See id.* at 53, 67).²⁴ Waller testified that: (1) Plaintiff’s Exhibit 3 to the hearing reflects the disclaimer to which she signed Al, Jr.’s name on March 22, 2005 (*Id.* at 45, 49); and (2) the signature page from that disclaimer (Plaintiff’s Exhibit 3) was later attached to the Amended Disclaimer (*Id.* at 45–46, 47). Waller further explained that the reason she signed Al Hill, Jr.’s name to one of the disclaimers was because she received and notarized four copies of the disclaimer, but only three of them had actually been signed by Al, Jr. because he had accidentally “missed” one of the signature pages. *Id.* at 55–58. Waller testified that she has the authority to sign Al, Jr.’s name “when he misses a signature.” *Id.* at 56. Waller also testified that she kept a book which recorded the identity of the documents and the signatories that she notarized, but she lost the notary book that contains the entries for the March 2005 time period. *Id.* at 68–69.

²⁴Al, Jr. told the Court that he was presented with four original copies of the disclaimer in March of 2005. *Jan. Trans.* at 90–91, 97. He intended to sign all four disclaimers, but he accidentally failed to sign one. *Id.* at 97. When the original copies were sent to Waller, she noticed his missing signature on one document and signed his name for him. *Id.* at 45, 55, 97. This document is Plaintiff’s Exhibit 3 to the January hearing. Al, Jr. has told the Court he personally signed three of the original copies on March 22, 2005. *Id.* at 97; *see also id.* at 56, 73–74. Only one of the three original copies that Al, Jr. admits personally signing on March 22, 2005 (Plaintiff’s Exhibit 4 to the January hearing) has been presented as an exhibit to this Court.

3. Al Hill, Jr.: Confirms the Amended Disclaimer was Created in 2007

Al, Jr. also testified at the hearing. He stated that on March 22, 2005, he was on his porch with four unexecuted copies of the 2005 Disclaimer. *Id.* at 90. He testified that he signed three of these copies, and that he “intended to sign all of them, but I don’t turn the pages very well and apparently I missed a signature.” *Id.* He testified that Waller signed his name for him on the fourth copy. *Id.* at 97. Al, Jr. testified that he understood all four copies were the same. *Id.* at 90.

Al, Jr. also testified that in the latter part of June 2007, after Margaret died, he and Irwin created the Amended Disclaimer. *Id.* at 91–93, 128. Al, Jr. testified that he understood that the Amended Disclaimer omitted the word “general,” and that he assented to the changes. *Id.* at 93. Al, Jr. testified that the only disclaimer he personally signed was the 2005 Disclaimer. *Id.* at 117. He also testified, however, that he had a signature page from a 2005 disclaimer²⁵ affixed to the Amended Disclaimer when Irwin brought the Amended Disclaimer to Al, Jr.’s home in June of 2007. *Id.* at 92–93, 104–06, 117. It is undisputed that Al, Jr. was mentally competent in 2007 when the Amended Disclaimer was created. *Id.* at 113.

4. Joyce Waller’s Handwriting Exemplar

Waller’s testimony that she signed a disclaimer on Al, Jr.’s behalf on March 22, 2005 is important to issues raised by Plaintiff’s motion for sanctions, and the Court believed an exemplar

²⁵ Al, Jr. alleges that the signature page affixed to the Amended Disclaimer is from the disclaimer that Waller allegedly signed on Al, Jr.’s behalf in 2005. For clarification, testimony at the February hearing suggests that more than one original copy of the 2005 Disclaimer was disassembled, and each of the 2005 signature pages was affixed to a 2007 copy of the amended disclaimer. Relevant to this order is the Amended Disclaimer as it was attached to Al, Jr.’s affidavit, and not these additional copies of the amended disclaimer which carry a different 2005 signature page.

of Waller's signature of "Al G. Hill, Jr." would be useful to compare to the signature of "Al G. Hill, Jr." she claims to have signed in 2005. Therefore, at the conclusion of the hearing, the Court had Waller sign the name "Al G. Hill, Jr." three times on a piece of paper. *Id.* at 146. This exemplar was admitted as Court's Exhibit 1 to the hearing. *Id.*

F. Show Cause Order

The Court issued a show cause order on February 6, 2010. The show cause order contained two separate orders directed at Al, Jr. As requested in Plaintiff's motion for sanctions, the first part ordered Al, Jr.

to show cause why he should not be sanctioned and held in contempt under Rule 56(g) and/or the Court's inherent powers for presenting his affidavit, Waller's affidavit, and his brief in response to Plaintiff's motion for partial summary judgment to the Court in bad faith, and for committing fraud on the Court.

Doc. #506 at 5. The second part *sua sponte* ordered Al, Jr. to "show cause why [he] should not be sanctioned and held in contempt under the Court's inherent powers" for falsely testifying "at the January hearing that, on March 22, 2005, Waller signed Al, Jr.'s name on his behalf on a particular original copy (Plaintiff's Exhibit 3 to the January hearing. . .) of the 2005 disclaimer." *Id.* at 6–7.

After receiving and reviewing Al, Jr.'s response to the order to show cause (Doc. #529), the Court ordered a show cause hearing to take place on February 16, 2010.

E. Al, Jr.'s Show Cause Hearing, February 16, 2010

At the show cause hearing (the "February hearing"), Al, Jr. and an expert he retained on handwriting analysis testified. Al, Jr.'s testimony was largely cumulative of his testimony at the January hearing. The handwriting expert testified that after reviewing known handwriting

exemplars of Waller and Al, Jr., he was unable to form an opinion as to who authored the signature of “Al G. Hill, Jr.” at issue (the “disputed signature”).

II. Legal Standards

Plaintiff asks the Court to impose sanctions against and hold in contempt Al Hill, Jr. pursuant to: (1) Federal Rule of Civil Procedure 56(g), or (2) the Court’s inherent powers. The Court first addresses the legal standard of Rule 56(g).

A. Rule 56(g)

Federal Rule of Civil Procedure 56(g) provides:

Affidavit Submitted in Bad Faith. If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses, including attorney’s fees, it incurred as a result. An offending party or attorney may also be held in contempt.

As a prerequisite to imposing sanctions under Rule 56(g), the Court must find that the affidavit(s) at issue were submitted either in bad faith or solely for delay. *Id.* As the Fifth Circuit has acknowledged, case law applying Rule 56(g) is “sparse,” but the provision vests a district court with authority similar to that granted by Rule 11 to “impose sanctions, and if it decides to do so, select the appropriate one.” *Kelly v. City of Leesville*, 897 F.2d 172, 176 (5th Cir. 1990) (citing, *Fort Hill Builders, Inc. v. Nat’l Grange Mut. Ins. Co.*, 866 F.2d 11, 15-16 (1st Cir. 1989)). The First Circuit has noted that sanctions under Rule 56(g) are imposed for “particularly egregious” conduct, including the submission of an “affidavit flatly at odds with facts indisputably within affiant’s knowledge.” *Fort Hill Builders*, 866 F.2d at 16 (citing

Acrotube, Inc. v. J.K. Fin. Group, Inc., 653 F.Supp. 470, 478 (N.D.Ga.1987)).²⁶

B. Court's Inherent Powers

A court may sanction parties and their attorneys under the court's inherent powers. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43–46 (1991). Ordinarily, a court should rely on sanctioning power granted by rule or statute, rather than imposing sanctions under its inherent powers. *Id.* at 50; *Allstate Ins. Co. v. Mader*, 201 Fed. Appx. 261, 265 (5th Cir. 2006). A court should impose sanctions under its inherent powers “only when satisfied that fraud has been practiced upon it” and when “in the informed discretion of the court, neither the statute nor the Rules are up to the task. . .” *Chambers*, 501 U.S. at 50. The court should “conduct an independent investigation in order to determine whether it has been the victim of fraud.” *Chambers*, 502 U.S. at 44. “Courts have the authority to make credibility determinations to resolve whether such misconduct has occurred.” *Howard v. State Farm Lloyds*, 2005 WL 2600442, at *9 (S.D. Tex. Oct. 13, 2005) (No. H-04-0352).

A primary purpose in imposing sanctions is to deter wrongful conduct. *Id.* (citing *Chambers*, 501 U.S. at 32). “The sanction imposed must be the least severe sanction adequate to achieve the purpose of the rule under which it was imposed.” *Chambers*, 501 U.S. at 44. Courts

²⁶See also *Modica v. United States*, 518 F.2d 374, 376 (5th Cir.1975) (affirming award of costs under Rule 56(g) where store owner's affidavit stated that he had no knowledge of violations of food stamp regulations, although he had admitted such knowledge in earlier administrative proceedings); *Scott v. Metropolitan Health Corp.* 234 Fed. Appx. 341 (6th Cir. 2007) (affirming finding of bad faith under 56(g) and award of sanctions amounting to \$1.6 million where submitting party submitted affidavits that she knew were not truthful), *cert. denied*, 76 U.S.L.W. 3427 (U.S. Feb. 19, 2008) (No. 07-630); *Travelers Ins. Co. v. St. Jude Med. Office Bldg., Ltd. P'ship*, 843 F. Supp. 138, 146–48 (E.D. La. 1994) (predicating a finding of bad faith under 56(g) on a party's failure to produce or acknowledge evidence at the appropriate time, despite the party's “indisputable ongoing knowledge” of the evidence, which was later provided by summary judgment affidavit).

may use their inherent power to sanction parties for lying under oath or backdating relevant documents. *Brady v. U.S.*, 877 F.Supp. 444, 452–53 (C.D. Ill. 1994).

III. Application

Plaintiff Al, III first asks the Court to find that Al, Jr. submitted his affidavit and the affidavit of Waller in bad faith, impose sanctions against him under Rule 56(g), and hold him in contempt as permitted by Rule 56(g). Alternatively, Plaintiff asks the Court to utilize its inherent powers to punish Al, Jr. for committing fraud on the Court.

For the reasons detailed below, the Court finds Al, Jr. submitted affidavits in opposition to Plaintiff's motion for partial summary judgment in bad faith and with the intent of misleading the Court. In addition, the Court also finds that Al, Jr. provided untruthful testimony at the January hearing, and this untruthful testimony independently warrants the imposition of sanctions *sua sponte*.

The Court first addresses Al, Jr.'s bad faith submissions at the summary judgment stage.

A. Submission of Summary Judgment Affidavits

The Court has ordered Al, Jr. to "show cause why he should not be sanctioned and held in contempt under Rule 56(g) and/or the Court's inherent powers for presenting his affidavit, Waller's affidavit, and his brief in response to Plaintiff's motion for partial summary judgment to the Court in bad faith, and for committing fraud on the Court." Doc. #506 at 5.

1. Affidavits Submitted by Al, Jr.

The Court finds that Al, Jr. acted in bad faith when he submitted his affidavit and Waller's affidavit in connection with his response to Plaintiff's motion for partial summary judgment. The Court finds that in his affidavit, Al, Jr. intended to, and did, represent to the

Court that on March 22, 2005, he executed both of the two versions of the disclaimer that he attached as a single exhibit to his affidavit (the 2005 Disclaimer and the Amended Disclaimer). By Al, Jr.'s own admission at the January hearing, one of these two versions—the Amended Disclaimer—was not in existence until June of 2007. Accordingly, Al, Jr. did not execute the Amended Disclaimer in March of 2005 as his affidavit was intended to, and did, represent.

Additionally, the Court finds that by submitting Waller's affidavit, Al, Jr. intended to, and did, represent to the Court that Waller notarized both versions—the 2005 Disclaimer and the Amended Disclaimer—on March 22, 2005. By Al, Jr.'s own admission at the January hearing, as well as the admission of Waller at the January hearing, the Amended Disclaimer was not in existence until June of 2007 and, accordingly, could not have been notarized by Waller on March 22, 2005.

To state the obvious, the Court finds that Al, Jr. knew he could not have executed the Amended Disclaimer on March 22, 2005 when he had it created in June 2007, and likewise, he knew Waller could not have notarized the Amended Disclaimer on March 22, 2005 because it was not created until June 2007. After careful consideration of the evidence, the Court holds a firm conviction that Al, Jr. submitted the two affidavits in bad faith and with the intent of misleading the Court, in violation of Rule 56(g).²⁷

2. Partial Summary Judgment Response Brief Submitted by Al, Jr.

A review of Al, Jr.'s brief in response to Plaintiff's motion for partial summary judgment

²⁷The materiality of these misrepresentations, including the inability of the Court to consider the information in determining whether Al, Jr. had raised a genuine issue of material fact as to his mental incapacity to execute the 2005 Disclaimer, is addressed in more detail later in this opinion.

bolsters the Court's finding that Al, Jr. submitted the two affidavits in bad faith.²⁸ In this brief, Al, Jr. admits that he signed a disclaimer in March 2005. *Def. Sum. Jdmt. Resp. Br.* at 2. He acknowledges Plaintiff's contention that Al, Jr. "executed and delivered a second partial disclaimer" in 2007 and even cites to Plaintiff Al, III's affidavit, presented in support of Plaintiff's motion for partial summary judgment, which includes as exhibits a copy of both the 2005 Disclaimer and the Amended Disclaimer. *Id.* at 3. However, rather than explaining the circumstances surrounding the 2007 Amended Disclaimer, Al, Jr. uses his brief to further perpetuate the misrepresentation that both versions were executed on March 22, 2005. He states,

according to Joy Waller, who notarized the Disclaimer, the second version of the Disclaimer was executed on the same day as the first version. In reality, there is no evidence of any second version being executed anytime other than March of 2005.[footnote 12]

Id. at 3. Footnote twelve reads, "[t]hus, at a minimum, there are genuine issues of material fact as to when a second version was executed, as well as to the effect of such a version, if any." *Id.* at n.12.

In addition, Al, Jr. continues, "[f]or purposes of this Response, the term 'Disclaimer' encompasses the two versions of the disclaimer executed on the same day." *Id.* at 3. Throughout his response, Al, Jr. consistently uses the defined term "Disclaimer" to support arguments that

²⁸The Court is not satisfied that Rule 56(g) reaches these misrepresentations contained in Al, Jr.'s partial summary judgment response brief. The Court finds the affidavits were submitted by Al, Jr. in bad faith, even if Rule 56(g) does not reach his response brief. However, Al, Jr. did present his response brief at the same time he submitted the bad-faith affidavits, and his response brief relies on the bad-faith affidavits. Further, Al, Jr. continues to stand by the representations as presented his response brief (*see Feb. Trans.* at 81–85). If, even in light of the affidavits he contemporaneously submitted in bad faith, Al, Jr. may not be sanctioned under 56(g) for the false portions of his response brief which the Court finds he also submitted in bad faith, then, alternatively, the Court exercises its inherent powers to reach this behavior.

cannot be true. For example, Al, Jr. represents that the Disclaimer was executed in 2005 when he lacked mental capacity. However, it is now undisputed that the Amended Disclaimer was not *created* until after Margaret's death in June of 2007, and it is also undisputed that Al, Jr. regained mental capacity before her death. Accordingly, Al, Jr.'s statement that he lacked mental capacity when he executed the "Disclaimer," as he defined the term, cannot be true.

Based on the foregoing, the Court finds that Al, Jr.'s response and supporting affidavits present a position "flatly at odds with facts indisputably within" his knowledge. It is impossible to sign, notarize, or execute the Amended Disclaimer on March 22, 2005 when it was not created until June 2007. The Court finds that Al Hill, Jr. intended to, and did, submit these documents to the Court in bad faith in violation of Rule 56(g).

3. Al, Jr.'s Contentions

Al, Jr. has presented a number of reasons that he contends sanctions are not warranted. The Court rejects each of these contentions, and will now address them in further detail.

a. Statements Factually Correct

Al, Jr. contends that his representations are not sanctionable because, even if misleading or incomplete, the statements are factually correct. Al, Jr. testified at the January hearing that the representations made in the affidavits were technically true because he never "signed" the Amended Disclaimer in 2007, but rather, he had a pre-existing signature page from 2005 attached to an "updated" version created in 2007. Likewise, Al, Jr. contends that Waller did not notarize the Amended Disclaimer in 2007, since the pre-existing signature page from 2005 already bore her notarization. Therefore, Al, Jr. argues, the Amended Disclaimer was never "signed," "executed," or "notarized" in 2007.

The Court rejects this contention. In his affidavit and Waller's affidavit, Al, Jr. affirmatively represented to the Court that the Amended Disclaimer was signed and notarized in 2005. The Court now knows that the Amended Disclaimer did not exist in 2005. It is accordingly impossible for the Amended Disclaimer to have been signed, notarized, or executed in 2005, as Al, Jr.'s summary judgment materials represent. Following the testimony of Irwin, Waller, and Al, Jr. at the January hearing, it is undisputed that Al, Jr. was aware of, and agreed to, the changes made to the disclaimer in June of 2007, and that the signature page was attached to the Amended Disclaimer at his direction. Whether these activities are termed an "update," "change," "execution," "notarization," "alteration," "signing," "assent," or other similar term, is semantics in this context and asks the Court to recognize a futile distinction.²⁹

Al, Jr.'s argument that the Amended Disclaimer was a mere update to the 2005 Disclaimer because the changes made did not substantively alter the 2005 Disclaimer lacks credibility. Indeed, the evidence is clear that Al, Jr. agreed to make these changes to alleviate concerns over potentially enormous tax consequences—which could have amounted to half a billion dollars. Changes made to alleviate such concerns are, *ipso facto*, substantive. Accordingly, the Court rejects Al, Jr.'s recent attempt to portray the Amended Disclaimer as a meaningless retroactive update to the 2005 Disclaimer.

b. Amended Disclaimer Not Raised in Plaintiff's Motion for Partial Summary Judgment

²⁹That Al, Jr. did not physically sign the document in 2007 does not preclude Irwin's 2007 act, at Al, Jr.'s direction, of affixing the signature pages previously signed by Al, Jr. to the 2007 documents, from signaling Al, Jr.'s intent for the attachment to represent his signature to the Amended Disclaimer. *In re Estate of Romancik*, 281 S.W.3d 592, 596–598 (Tex. App.—El Paso 2008, no writ).

Al, Jr. also testified that he did not explain, in response to Plaintiff's motion for partial summary judgment, the circumstances surrounding the creation and alleged execution of the Amended Disclaimer in 2007 "because the [partial summary judgment] motion that was filed did not specifically ask that question, so therefore my affidavit did not specifically direct anything to that."³⁰ *Jan. Trans.* at 99. This is incorrect. The arguments presented in Plaintiff's motion for partial summary judgment did assert that Al, Jr. disclaimed his interest again in 2007.³¹ *See Pl. Sum. Jdmt. Br.* at 7; *Declaration of Albert G. Hill III*, Ex. B (Doc. #286-3) at App. 007–009. Additionally, by attaching the Amended Disclaimer to his affidavit, Al, Jr. independently imposed an obligation upon himself to explain the circumstances surrounding the Amended Disclaimer to

³⁰Al, Jr. expands on this argument in his show cause response (Doc. #529). In his show cause response, Al, Jr. relies on a footnote in the Court's opinion denying partial summary judgment (Doc. #423 at 12 n.6) to support his contention Plaintiff's motion for partial summary judgment did not adequately raise the Amended Disclaimer created in 2007, and therefore, Al, Jr. argues, the events surrounding the Amended Disclaimer were not put in issue by Plaintiff, and Al, Jr.'s misrepresentations should be excused. Al, Jr. misconstrues the Court's footnote. The Court's footnote 6 does not mention or address the Amended Disclaimer, which was clearly placed into issue by Plaintiff's brief in support of his motion for partial summary judgment. *See* Doc. #287 at 5, 6–7; Doc. #286-3 Ex. A at App. 002, 004–006; *see also* Doc. #287 at 7 n.3. Instead, the Court's footnote 6 addresses and cites exclusively to several instances of Al, Jr.'s alleged ratification of the 2005 Disclaimer throughout 2006 and 2007 (including emails written and forwarded by Al, Jr. in 2007 which unequivocally state that he had disclaimed interests in the Margaret Trust to his children, a release and indemnification sent to his children as "current beneficiaries of the Trust," and the repeated inclusion of his children in meetings and information exchange regarding various options for trust beneficiaries to consider) which were not presented in Plaintiff's initial brief in support of his motion for partial summary judgment. These instances of ratification were presented for the first time in Plaintiff's reply in favor of his motion for partial summary judgment. *See* Doc. #423 at 12 n.6 (citing Doc. #287 at 13 n.56; 396 at 17–22).

³¹It makes no difference to this analysis whether or not the events in June of 2007 resulted in a *legally effective* execution of the Amended Disclaimer. This a matter for the Court to decide after careful consideration of facts as presented by the parties, and of the law. The Court will address this matter at the appropriate time.

correct the misrepresentation he created. *See In re Grant*, 385 B.R. 627, 637 (Bankr. E.D. La. 2008) (a party commits fraud on the court by failing to correct misrepresentations presented to the court on his behalf); *Declaration of Albert G. Hill III*, Ex. B (Doc. #286-3) at App. 007–009; *Def. Sum. Jdmt. Resp. Br.* at 3; *see also The Nereide*, 13 U.S. 388, 417 (1815) (distinguishing between accidental misrepresentations which are corrected as soon as possible by the offering party and “wilful falsehoods which are detected by the testimony of others, or confessed by the party when detection becomes inevitable.”); *Sealed Appellant 1 v. Sealed Appellee 1*, 211 F.3d 252, 255 (5th Cir. 2000) (affirming the imposition of sanctions for failure to correct misrepresentations made to the court). Based on these circumstances, Al, Jr. had an obligation, at the summary judgment stage, to explain to the Court what he now claims are the details surrounding the Amended Disclaimer.

c. Plaintiff's Knowledge

Al, Jr. also claims that he should be excused from his misrepresentations to the Court because Plaintiff Al, III was already aware, at the time he filed for partial summary judgment, that an updated disclaimer was created in 2007. Thus, Al, Jr. claims Al, III cannot say that he was surprised by the information that Al, Jr. failed to accurately present to the Court.

Al, Jr. overstates Al, III's knowledge. The record does reveal Al, III was aware that Al, Jr. had an Amended Disclaimer created in 2007, which appeared to be “virtually identical” to the 2005 Disclaimer. Al, III has consistently admitted this knowledge, and also admits that Al, Jr. provided him with a photocopy of the Amended Disclaimer sometime in 2007. Indeed, Al, III relied on this information in his motion for partial summary judgment. Specifically, Al, III stated that, in addition to the 2005 Disclaimer, Al, Jr. executed a second, virtually identical disclaimer in

2007 which was fraudulently back-dated to bear the 2005 signature date. *Pl. Sum. Jdmt. Br.* at 7.

However, the record does not suggest that Al, III knew of the peculiar manner in which Al, Jr. now claims he assembled the Amended Disclaimer, by affixing a pre-existing signature page dated March 22, 2005 to two newly-revised pages. Rather, the record suggests that Al, III believed, at the time he filed for partial summary judgment, that Al, Jr. created, signed, and had notarized the Amended Disclaimer in 2007, but back-dated the document so that it appeared to have been executed on March 22, 2005. *Id.*

In any event, considering all of the circumstances, the Court will not excuse the affirmative misrepresentations that Al, Jr. made to the Court based upon his argument that Al, III was aware of the existence of the Amended Disclaimer.

d. Rushed Advocacy

Al, Jr. also contends that sanctions against him are not warranted because the representations presented in the two affidavits and in his partial summary judgment response brief, although perhaps sloppily drafted, were permissible advocacy based on his characterization of the facts in light of his rushed deadline to respond. The Court will first address Al, Jr.'s contention that his response was rushed.

Al, III filed his motion for partial summary judgment on September 3, 2009. Under the Rules of Civil Procedure, the deadline for all Defendants, including Al, Jr. to respond was September 24, 2009. *See* FED. R. CIV. P. 56(c)(1)(B). Except for Al, Jr., all defendants filed a timely partial summary judgment response. However, at 4:00 p.m. on September 22, 2009, Al, Jr. filed an emergency motion for a continuance, arguing that he needed more time to obtain expert testimony to "demonstrate that [Al] Jr., due to his mental and physical condition at the time, did

not have sufficient mental capacity to understand the disclaimers and their effect.” Doc. #301 at 6. In light of this argument, Al, Jr. asked for a “minimum 100 day extension” to allow him to obtain such expert testimony. Alternatively, Al, Jr. asked for a 30 day extension “to permit [him] to adequately confer with his lead counsel” or, as a last resort, for “an additional two days after this Court denies” his requested continuance to allow him to “file a response, so as to avoid being prejudiced from having nothing on the record.” *Id.* at 2. The Court denied Al, Jr.’s request for a continuance on November 25, 2009, and provided Al, Jr. an additional seven days (rather than only the requested two) to file a summary judgment response. Doc. #372.

The Court rejects Al, Jr.’s argument that his misrepresentations should be excused because he was “rushed” in responding to Al, III’s motion for partial summary judgment. Al, Jr. had from September 3, 2009 until December 2, 2009—90 days—to formulate his response. Under the rules, he was entitled to only 20 days. When he did not file a response at the expiration of these 20 days, the Court had the authority to decide the partial summary judgment motion without waiting for his untimely response. Further, Al, Jr.’s request for a continuance contemplated that, in the event the Court denied his 100 or 30 day extension request, he would be given only an additional two days to place a response on the record. The Court instead gave him a full seven days. Accordingly, this portion of Al, Jr.’s argument is without merit. Further, the Court finds that the precise words and phrasing selected by Al, Jr. and his attorneys were carefully calculated to mislead the Court. The Court rejects the suggestion that these misrepresentations were accidental or the result of a sloppy drafting, particularly given the experience and competence of Al, Jr.’s team of attorneys. The Court will now address Al, Jr.’s argument that his submissions contained nothing more than permissible advocacy.

Al, Jr. further claims that he cannot be sanctioned based on his representations to the Court because the representations are nothing more than permissible advocacy based on his characterization of the facts. The Court also rejects this argument. In reality, Al, Jr.'s representations far exceeded the bounds of advocacy, permissible or otherwise. Advocacy must be based on the facts. To quote John Adams, "[f]acts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of the facts and the evidence." In his submissions to the Court, Al, Jr. attempted to alter the state of the facts and the evidence. As stated thoroughly throughout this order, Al, Jr. represented to the Court that he signed and Waller notarized both the 2005 Disclaimer and the Amended Disclaimer on March 22, 2005. Later, only after the commencement of these show cause proceedings, did Al, Jr. admit to the Court that the Amended Disclaimer was not in existence in 2005, and was instead created in 2007. Accordingly, Al, Jr.'s prior submissions contained patently untrue statements.

e. Materiality

Al, Jr. also argues that even if the Court finds he acted in bad faith, sanctions may not be imposed against him because his misrepresentations were immaterial to the outcome of the summary judgment motion. The Court rejects this contention and finds that Al, Jr.'s misrepresentations were material.

Al, Jr.'s misrepresentations concealed facts surrounding the creation of the Amended Disclaimer in 2007 when he admits mental capacity. The misrepresentations are material, for example, because the concealed facts support one or more of the following propositions, all of which are beneficial to Al, III and his partial summary judgment motion, and are damaging to Al, Jr. and his efforts to overcome Plaintiff's request that partial summary judgment be granted: (1)

the Amended Disclaimer is a legally effective, stand-alone disclaimer regardless of the potential voidability of the 2005 Disclaimer, as a result of Al, Jr.'s purported incapacity in 2005; (2) the creation of the Amended Disclaimer in 2007, which was requested or assented to by Al, Jr., evidences Al, Jr.'s ratification of the 2005 Disclaimer at a time when he admits mental capacity; and (3) the facts surrounding the creation of the Amended Disclaimer in 2007, which was requested or assented to by Al, Jr. at a time when he admits mental capacity, and which purports to divest Al, Jr. of the same interests as the 2005 Disclaimer, undermines Al, Jr.'s contention that he lacked mental capacity in 2005 to understand the effect of the 2005 Disclaimer. As previously stated, in his motion for partial summary judgment, Al, III alleged that he is a current beneficiary of the Margaret Trust as a result of at least two irrevocable disclaimers executed by Al, Jr. Al, Jr. responded that the disclaimers are voidable because they were executed in 2005 at a time when he lacked mental capacity. Each of the propositions listed above tend to undermine Al, Jr.'s claim that he lacked mental capacity in 2005, and/or to provide a ground on which Al, III is entitled to summary judgment notwithstanding Al, Jr.'s claim that he lacked mental capacity in 2005.

f. Summary

After reviewing the evidence, the Court finds that, at the summary judgment stage, Al, Jr. submitted his affidavit and Waller's affidavit to the Court in bad faith. Al, Jr. also used his summary judgment response in bad faith, to perpetuate his misrepresentations. In these documents, Al, Jr. failed to acknowledge the 2007 creation and 2007 adoption of the Amended Disclaimer. Further, the Court finds that in these documents, Al, Jr. affirmatively misrepresented to the Court that the Amended Disclaimer was created, signed, and notarized in 2005, all facts that he knew were not true. The Court further finds that these actions constituted fraud on the

Court.

The Court now turns to the separate issue of Al, Jr.'s January hearing testimony.

B. Testimony Given Under Oath at the January Hearing

The second part of the Court's show cause order required Al, Jr. to show cause why he should not additionally be sanctioned and held in contempt for providing false testimony at the January hearing. Doc. #506 at 6–7. After reviewing the evidence, the Court finds that Al, Jr. falsely testified at the January hearing that Joy Waller signed "Al G. Hill, Jr." on his behalf on a particular original copy of the 2005 disclaimer (the "disputed signature").³²

At the January hearing, Al, Jr. told the Court that in March of 2005, he was presented with four original and unsigned copies of the 2005 disclaimer. *Jan. Trans.* at 90–91, 97. Al, Jr. told the Court he personally signed three of the original copies on March 22, 2005. *Id.* at 97; *see also id.* at 56, 73–74. Al, Jr. testified that he intended to sign all four disclaimers, but accidentally failed to sign one. *Id.* at 97. He further testified that when the original copies were sent to Waller, she signed his name for him on the disclaimer he failed to sign.³³ *Id.* at 97. As explained above, the signature page containing the disputed signature was attached to the Amended Disclaimer in June 2007.

³²This signature is found on the signature page of Plaintiff's Exhibit 3 to the January hearing, which is the same signature page that is attached to the Amended Disclaimer found at Plaintiff's Exhibit 6 to the January hearing. A color copy of this signature page, which was utilized by Al, Jr.'s handwriting expert, may be found at Defendant's Exhibit 8 to the February hearing.

³³Waller provided corroborating testimony at the January hearing. Because the Court has an outstanding show cause order against Waller based on this same testimony, this opinion does not address Waller's testimony in detail. It is worth noting, however, that the Court, as the judge of credibility in this matter, found Waller to be an incredible witness.

At the February hearing, Al, Jr. presented a handwriting expert to give an opinion as to whether Joyce Waller signed the signature at issue. This expert testified that he had reviewed known signature exemplars of both Waller and Al, Jr. *Feb. Trans.* at 34. He further testified that based on his analysis, he was unable to draw a conclusion as to who authored the disputed signature. *See, e.g., id.* at 43.

The Court has compared the appearance of the disputed signature of “Al G. Hill, Jr.” to the signature of “Al G. Hill, Jr.” on Waller’s handwriting exemplar (Court’s Exhibit 1).³⁴ In doing so, the Court observed obvious differences in the two handwriting styles. “The law is well-settled that the identity of handwriting need not be proved by expert testimony.” *U.S. v. Fields*, 923 F.2d 358, 360 (5th Cir. 1991) (overruled on other grounds by *U.S. v. Lambert*, 984 F.2d 658 (5th Cir. 1993)). Rather, a fact-finder is entitled to draw its own conclusion as to the authorship of a signature by comparing the signature at issue with an authentic signature exemplar of the purported author. *U.S. v. Ismoila*, 100 F.3d 380, 388 (5th Cir. 1996). Based on the comparison of Waller’s authentic handwriting exemplar (Court’s Exhibit 1) to the disputed signature, and in light of the other evidence before it, the Court finds that the disputed signature was not written by Waller, contrary to Al, Jr.’s testimony under oath.³⁵ Accordingly, the Court finds that the same disputed signature, which also appears on the signature page of the Amended Disclaimer, was not

³⁴A color copy of the signature at issue is attached to this opinion as Exhibit A. A color copy of Waller’s handwriting exemplar is attached to this opinion as Exhibit B.

³⁵After comparing the signature at issue with other signatures of Al, Jr. before the Court, which the parties do not dispute were truly penned by Al, Jr., the Court notes that the signature at issue appears to be the actual handwriting of Al, Jr. rather than the handwriting of Waller. *Compare Affidavit of Albert G. Hill, Jr.* (Doc. #379) at App. 003, *and id.* Ex. 1 at App. 006, *with id.* Ex. 1 at App. 009, *with* Court’s Exhibit 1. In any event, it was not authored by Waller.

written by Joyce Waller, contrary to Al, Jr.'s sworn testimony.

The Court finds that Al, Jr. presented this false testimony in an effort to fabricate an alternate explanation for the reference in Waller's affidavit to a "second version of the Disclaimer." Accordingly, the Court finds that Al, Jr.'s testimony was intentionally false and was presented in an attempt to explain away his prior false submission. In presenting this false testimony, at the January hearing, Al, Jr. committed fraud on the Court.

The Court now turns to its sanctioning authority.

C. Sanctioning Authority

1. Summary Judgment Affidavits

The Court has found that Defendant Albert G. Hill, Jr. submitted summary judgment materials to the Court in bad faith.³⁶ When a party employs an affidavit submitted in bad faith, Rule 56(g) provides that the Court "must order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result." FED. R. CIV. P. 56(g); *see also Howard*, 2005 WL 2600442 (awarding attorneys' fees and court costs incurred as a result of opposing party's bad faith allegations). Accordingly, the Court will order Al, Jr. to pay Al, III's reasonable expenses.

Although Rule 56(g) provides an appropriate vehicle for addressing some of the wrongful conduct of Al, Jr., the repayment of fees does not come close to adequately addressing the gravity of Al, Jr.'s misconduct. In addition, it may also be appropriate for the Court to hold Al, Jr. in contempt under 56(g). *See* FED. R. CIV. P. 56(g). However, the Court is satisfied that neither

³⁶These materials are: (1) Al, Jr.'s affidavit and exhibit 1; (2) Waller's affidavit; and (3) Al, Jr.'s brief in response to Plaintiff's partial summary judgment motion, particularly pages 2–3.

Rule 56(g), nor various other statutes and Rules “are up to the task” of adequately addressing the misconduct.³⁷ *Chambers*, 501 U.S. at 50; *see also Allstate*, 201 Fed. Appx. 261. It is therefore appropriate for the Court to invoke its inherent powers to sanction Al, Jr. for committing fraud on the Court.

2. January Hearing Testimony

The Court has found that Al, Jr. presented false testimony at the January hearing.³⁸ When a party testifies falsely, the Court is “not confined to the process of criminal contempt, but may impose other sanctions” for the conduct. *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 894 F.2d 696, 703 (5th Cir. 1990) (affirmed by *Chambers, supra*). Aside from criminal proceedings, in the informed discretion of the Court, the various statutes and Rules that vest this Court with the authority to sanction are not “up to the task” of addressing the false testimony presented by Al, Jr. *Chambers*, 501 U.S. at 50. Accordingly, sanctions are appropriate under the Court’s inherent powers, including a possible sanction of holding Al, Jr. in contempt of court.

³⁷Other sources of sanctioning power for Federal courts include: Federal Rule of Civil Procedure Rule 11 for wrongful conduct by attorneys; Federal Rule of Civil Procedure Rule 16(f) for failing to participate in pretrial conferences; Federal Rule of Civil Procedure 26(g) for filing frivolous or unreasonable discovery requests and responses; Federal Rule of Civil Procedure 37(b)-(c) for refusing to obey discovery orders and make mandatory disclosures; 18 U.S.C. § 401 for contempt of court; 28 U.S.C. § 1447(c) for improper removal of a case to federal court; 28 U.S.C. § 1927 for unreasonably and vexatiously multiplying court proceedings; and Northern District of Texas Local Rule 83.8 for the discipline of attorneys admitted to the Northern District of Texas.

³⁸Al, Jr. argues that a person does not commit perjury where the answer given is “literally accurate, technically responsive, or legally truthful.” *United States v. Makris*, 483 F.2d 1082, 1084–85 (5th Cir. 1973). The Court finds that Al, Jr. presented testimony, both by affidavit and on the witness stand, that is neither literally accurate, technically responsive, nor legally truthful. *See Brady v. U.S.*, 877 F.Supp. 444 (C.D. Ill. 1994) (dismissing the case because the plaintiff provided false information during discovery and at an evidentiary hearing).

3. Sanctions Under Consideration

The Court does not take lightly the task of determining what sanctions are appropriate to adequately address the grave misconduct committed by Al, Jr. In addition to the reimbursement of Plaintiff's fees, which is mandatory under Rule 56(g) upon a finding of bad faith, the Court has identified several possible sanctions, including: (1) striking all or part of Al, Jr.'s response to Plaintiff's motion for partial summary judgment, brief in support, and/or appendix in support; (2) entering summary judgment in favor of Plaintiff Al, III, declaring him to be a current beneficiary of the Margaret Trust; (3) striking the answer of Al, Jr.; and (4) holding Al, Jr. in contempt.

The scheduling order of this case requires the parties to mediate this matter before February 22, 2010, which is merely days from the date of this order. Due to the seriousness of Al, Jr.'s misconduct, and the corresponding seriousness of probable sanctions, the Court will defer determining the appropriate sanctions to impose on Al, Jr. until after the parties have attempted to resolve the case in mediation.

V. Conclusion

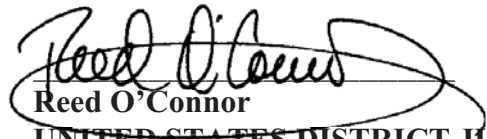
For the foregoing reasons, the Court hereby **GRANTS** Plaintiff's motion for sanctions (Doc. # 439). Accordingly:

1. **Defendant Albert G. Hill, Jr.** is **ORDERED** to pay Plaintiff Albert Hill, III the reasonable expenses, including attorney's fees, Plaintiff incurred as a result of the bad faith submissions;
2. **Plaintiff** is **ORDERED** to file with the Court, by March 2, 2010, a brief outlining the reasonable expenses, including attorneys' fees, that Plaintiff incurred as a result of Al, Jr.'s bad faith submissions. Plaintiff's request should be supported by

an appendix that includes relevant invoices, receipts, affidavits, and/or other evidence, as appropriate;

3. The Court reserves imposing additional sanctions for Al, Jr.'s bad faith submissions at the summary judgment stage until after the parties' February 22, 2010 mediation deadline;
4. The Court reserves imposing sanctions on Al, Jr. for the false testimony he provided at the January hearing until after the parties' February 22, 2010 mediation deadline.

SO ORDERED on this **18th** day of **February, 2010**.


Reed O'Connor
UNITED STATES DISTRICT JUDGE