UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

CARMELA RIVERO, **Plaintiff,** v. FIDELITY INVESTMENTS, INC. and FIDELITY BROKERAGE SERVICES, LLC, **Defendants.**	§ § § § § § § § § § §	CIVIL CAUSE NO. 4:18-cv-00909

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Carmela Rivero, through undersigned counsel, moves for summary judgment pursuant to Federal Rule of Civil Procedure 56(c).[1]

I. Introduction

Ms. Rivero seeks a declaratory judgment that she is the owner of a brokerage account (the "Fidelity Account") managed by the Defendants, and that she is entitled to access the account. She established the account solely in her name. Ms. Rivero funded the account with stock that was her sole property—she funded 100-percent of the account with her sole property. She subsequently added an individual, and decades-long friend, Jorge Diaz-Gonzalez Medrano (who is now deceased),[2] to the account, granting him right of survivorship with respect to the account purely to ensure it would pass to him if she died.

Mr. Medrano was a Mexican citizen and resident with no property in the United States—only rights of survivorship with respect to Ms. Rivero's assets. Mr. Medrano never contributed to the

[1] In support of this motion, Ms. Rivero respectfully refers the Court to the brief contained in this document pursuant to Local Rule CV-7(c).
[2] There is no dispute about his death or any issue with respect to his death. (Original Pet. Dkt. # 1 ¶ 15); (Answer, Dkt. # 8 ¶ 15).

account. Upon Mr. Medrano's death, the right of survivorship account automatically transferred by "operation of law" to Ms. Rivero, the sole account holder. Ms. Rivero seeks to have the account titled in her name (to reflect what has already occurred by operation of law) and access thereto.

In most respects, this case is not contentious. Fidelity does not claim ownership of the Fidelity Account. It does not even dispute Ms. Rivero's claim of ownership. It has, however, declined to designate the account in Ms. Rivero's name (and to grant her access/control) because it is (understandably) concerned about avoiding liability exposure by doing so. Its concern stems from a good-faith, but ultimately incorrect, view of Treasury Regulation § 20.6325-1(a). Fidelity interprets this regulation to require that Ms. Rivero produce a government-issued Transfer Certificate in order to access funds in an account that she alone funded and that was held in "right of survivorship" form with a person whom she survived.

The relevant facts are straightforward and are not in dispute. The outcome hinges solely on an interpretation and application of the law at issue. A ruling from this Court granting this Motion for Summary Judgment would effectively remove Fidelity from the exposure that gives rise to its concern. In other words, if Ms. Rivero wins, everyone wins.

II. Statement of Undisputed Material Facts

1. Ms. Rivero opened the Fidelity Account solely in her name on July 29, 2010. (Original Pet. Dkt. # 1 ¶ 10); (Answer, Dkt. # 8 ¶ 10); (Exh. A, Declaration of Carmela Rivero, ¶ 3).
2. Ms. Rivero solely funded the Fidelity account by transferring 1,900 shares of PepsiCo, Inc. stock with an approximate value of $121,600.00 from another individual brokerage account (Account No. ending in 1496) with Merrill Lynch held solely in her name. (Original Pet. Dkt. # 1 ¶ 11); (Answer, Dkt. # 8 ¶ 11); (Exh. A ¶ 4).
3. On August 13, 2010, Ms. Rivero filed a Fidelity Account Change of Registration Form to change the Fidelity account to be held as Joint Tenants with Rights of Survivorship, listing her

as the primary account owner and granting Jorge Diaz-Gonzalez Medrano right of survivorship. Ms. Rivero established the right of survivorship purely to ensure that the account would pass to Mr. Medrano if she died before him. Mr. Medrano expressed to Ms. Rivero that he understood and agreed that the account was not his property, but that he was being given survivorship rights to ensure that it passed to him if Ms. Rivero died before him. Ms. Rivero did not intend to, nor did she, give the account to him during her life. (Original Pet. Dkt. # 1 ¶ 12); (Answer, Dkt. # 8 ¶ 12). (Exh. A ¶ 6).

4. Ms. Rivero subsequently sought to change the status of the account to joint tenants with right of survivorship at the suggestion and guidance of Fidelity, which advised her that this mechanism would allow the account to be transferred to her selected beneficiary "without a problem" if she were to pass away. (Exh. A ¶ 5).

5. Ms. Rivero met Mr. Medrano in 1976. The two bonded over their passion for protecting animals, and the two became close friends over the course of the forty-year friendship. Ms. Rivero chose Mr. Medrano as her beneficiary as she knew, in the event something happened to her, he would dedicate her assets to the benefit of protecting animals. (Exh. A ¶ 7).

6. At no time did Mr. Medrano contribute any money or property to the Fidelity Account, or any account owned by Ms. Rivero. At no point did Mr. Medrano own the account. He never contributed any money or property to any account that Ms. Rivero held. She had added him to one other, prior account as a joint right of survivorship right, but she had opened and funded that account with her property entirely. (Exh. A ¶¶ 8, 10).

7. Mr. Medrano was a citizen and resident of Mexico, and his only relation to any property in the United States was his right of survivorship with respect to Ms. Rivero's assets. (Original Pet. Dkt. # 1 ¶ 13); (Exh. A ¶ 9–10).

8. Mr. Medrano did not furnish any of the purchase price of the stock or any property held in the account at any time. All such stock used to fund the account was stock in Pepsico that Ms. Rivero earned by providing services for Pepsico. Ms. Rivero never gave him any property in the account; she only listed him as right of survivorship after she formed and funded the account with her sole property. (Exh. A ¶ 10).

9. Mr. Medrano died on October 24, 2016. (Original Pet. Dkt. # 1 ¶ 15); (Answer, Dkt. # 8 ¶ 15); (Exh. A ¶ 11).

10. Ms. Rivero has personal knowledge of Mr. Medrano's property due to their close relationship that they formed over the course of forty years. Mr. Medrano told her that he did not have any property in the United States. He was not an employee. He did not own property either in the US or in Mexico where he was a resident. He did not have bank accounts or real estate property. He leased the home where he lived. He did not have any accounts in his name, except insofar as Ms. Rivero granted him a right of survivorship in her accounts. He did not make any taxable gifts during his lifetime as he never had any property in the United States. (Exh. A ¶¶ 7, 12, 15).

11. Ms. Rivero submitted requests to change the Fidelity Account ownership back to her as sole owner. The Defendants denied this request, maintaining that a government-issued Transfer Certificate was required to change ownership. (Original Pet. Dkt. # 1 ¶ 16); (Answer, Dkt. # 8 ¶ 16); (Exh. A ¶ 13).

12. Ms. Rivero is a Mexican citizen and has a United States visa. She has lived in the United States since the 1990's, and she has property in the United States. (Exh. A ¶ 2).

13. Attached to the Declaration is a true and correct copy of Ms. Rivero's affidavit that she provided with the original petition. Also attached to the Declaration is a true and correct copy of a letter sent to Fidelity by Ms. Rivero's counsel of record on September 26, 2018. This

letter contains all of the pertinent account information (though it is redacted in this submission). Ms. Rivero approved such information before authorizing the letter's transmittal. These documents are incorporated by reference. (Exh. A ¶ 16–17).

III. Summary of the Issue and Authorities

This case presents the question of whether Fidelity can condition access to Ms. Rivero's property on her obtaining and providing it with a Transfer Certificate. Fidelity rests its position on Treasury Regulation § 20.6325-1(a). But that provision does not apply for three reasons, each of which is sufficient, but none of which are necessary, to sustain her position: (1) The property at issue transferred automatically by operation of state law upon Mr. Medrano's death; (2) federal law does not include the account at issue in Mr. Medrano's "gross estate;" and (3) Ms. Rivero has demonstrated that a Certificate of Transfer is not required.

Treasury Regulation § 20.6325-1(a) is the regulatory provision that is fundamentally at issue. It provides as follows:

> (a) A transfer certificate is a certificate permitting the transfer of property of a nonresident decedent without liability. **Except as provided in paragraph (b) of this section**, no domestic corporation or its transfer agent **should** transfer stock **registered in the name of a non-resident decedent** (regardless of citizenship) except such shares which have been submitted for transfer by a duly qualified executor or administrator who has been appointed and is acting in the United States, without first requiring a transfer certificate covering all of the decedent's stock of the corporation and showing that the transfer may be made without liability. Corporations, transfer agents of domestic corporations, transfer agents of foreign corporations (except as to shares held in the name of a nonresident decedent not a citizen of the United States), banks, trust companies, or other custodians in actual or constructive possession of property, of such a decedent can insure avoidance of liability for taxes and penalties only by demanding and receiving transfer certificates before transfer of property of nonresident decedents.

Treasury Regulation § 20.6325-1(a) (emphasis added).

Treas. Reg. § 20.6325-1(b)(1)(i) provides that a Transfer Certificate is not required if the value of the decedent's gross estate situated in the United States does not exceed $60,000:

> In the case of a nonresident not a citizen of the United States . . . a transfer certificate is not required with respect to the transfer of any property of the decedent if the value on the date of death of that part of the decedent's gross estate situated in the United States did not exceed the lesser of $60,000 or $60,000 reduced by the adjustments, if any, required by section 6018(a)(4) for certain taxable gifts made by the decedent and for the aggregate amount of certain specific exemptions.

I.R.C. § 2040(a) provides that certain property is excluded from the gross estate of a decedent. In pertinent part, § 2040 provides as follows:

> The value of the gross estate shall include the value of all property to the extent of the interest therein held as joint tenants with right of survivorship by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, **except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth** . . .

I.R.C. § 2040(a) (emphasis added). Treas. Reg. § 20.2040-1(c)(3) elaborates on the exclusion of property held in "right of survivorship" form that originally belonged to the survivor: "if the decedent furnished no part of the purchase price, no part of the value of the property is so included" in the decedent's gross estate. Treas. Reg. § 20.2040-1(c)(3).

Treas. Reg. § 20.6325-1(b)(3) provides another relevant exception. That subsection specifically provides that a person will not incur any liability exposure for transferring the decedent's property without a Transfer Certificate if a person who may be reasonably regarded as having possession of the pertinent facts provides a statement of the facts relating to the estate, demonstrating that a Transfer Certificate is not required:

> A corporation, transfer agent, bank, trust company, or other custodian will not incur liability for a transfer of the decedent's property without a transfer certificate if the corporation or other person, having no information to the contrary, first receives from the executor or other responsible person, who may be reasonably regarded as in possession of the pertinent facts, a statement of the facts relating to the estate showing that the sum of the value on the date of the decedent's death of that part of his gross estate situated in the United States, and, if applicable, any amounts includible in his gross estate under section 2107(b), is such an amount that, pursuant to the provisions of paragraph (b) (1) and (2) of this section, a transfer certificate is not required.

With this background, the question presented is as follows: Can Fidelity condition access to Ms. Rivero's property on her obtaining and providing it with a Transfer Certificate?

IV. Argument

The Court should hold that Ms. Rivero is the owner of the Fidelity Account and that she is entitled to access the account. The Court should further hold that the account be titled in her name. Moreover, although it is not necessary to reach these holdings, the Court should further hold that, under the circumstances presented here, a government-issued Transfer Certificate is not required to transfer ownership of the Fidelity Account to Ms. Rivero.

The Fidelity account transferred by operation of law upon Mr. Medrano's death. It is not includible in his gross estate. The regulation at issue does not apply, and a Transfer Certificate is not required. Ms. Rivero has provided pertinent facts demonstrating that the regulation does not apply.

A. Standard of Review

Summary judgment under Federal Rule of Civil Procedure 56 is appropriate when the pleadings and record show that no genuine issue of material fact exists and, as a matter of law, the movant is entitled to judgment. *Hart v. Hairston*, 343 F.3d 762, 764 (5th Cir. 2003). The movant bears the burden of proving that no genuine issue of material fact exists. *Provident Life & Accident Ins. Co. v. Goel*, 274 F.3d 984, 991 (5th Cir. 2001). To determine whether a genuine issue of material fact exists, the court should view all evidence in the light most favorable to the non-movant, and the evidence must be sufficient such that a reasonable jury could not return a verdict for the non-movant. *Chaplin v. NationsCredit Corp.*, 307 F.3d 368, 371-72 (5th Cir. 2002).

To raise a genuine issue of material fact, the non-movant must proffer some evidence that directly contradicts the evidence provided by the movant with respect to the salient facts. *Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1264 (5th Cir. 1991). Merely raising an issue of fact with respect to

minor aspects of the claim does not preclude summary judgment in favor of the movant. *Id.* ("Of course, the court need only concern itself with contradictions of salient facts.")

B. The Account Transferred Automatically by Operation of Law Upon Mr. Medrano's Death.[3]

While Mr. Medrano was alive, Ms. Rivero owned 100 percent of the account because she contributed 100 percent of the property in the account. Upon his death, the account transferred automatically by operation of law.

Massachusetts law states that property that is held by joint tenancy "passes to the survivor by operation of law and does not constitute a part of the decedent's estate." *In re Smith*, 361 Mass. 733, 737 (1972). Texas law applies a similar rule by statute, providing that an account transfers by operation of law to the surviving party if there is a right of survivorship in place:

> Sums remaining on deposit on the death of a party to a joint account belong to the surviving party or parties against the estate of the deceased party if the interest of the deceased party is made to survive to the surviving party or parties by a written agreement signed by the party who dies.

Tex. Est. Code § 113.151(a); *see also Punts v. Wilson*, 137 S.W.3d 889, 892 (Tex. App.—Texarkana 2004) ("The party to the account owns the account. On the death of the party, ownership of the account passes to the P.O.D. beneficiaries of the account. The account is not a part of the party's estate."). Here, it is undisputed that there was a right of survivorship in place. (Original Pet. Dkt. # 1 ¶ 12); (Answer, Dkt. # 8 ¶ 12). Under both Massachusetts law and Texas law, the Fidelity Account transferred by operation of law to Ms. Rivero on the death of Mr. Medrano. Mr. Medrano's estate has no property interest in the Fidelity Account. Thus, the Court should declare that Ms. Rivero is the owner of the Fidelity Account and require that Fidelity provide her with access to the account.

[3] Texas or Massachusetts law governs—either under a choice-of-law provision or the fact that Ms. Rivero resided in Texas and all dealings with Fidelity took place in Texas. (Exh. ¶ 15). The outcome is not impacted by which state's laws are operative.

C. The Decedent's Gross Estate Does Not Include the Fidelity Account.

I.R.C. § 2040(a) provides that certain property is excluded from the gross estate of a decedent. In pertinent part, § 2040 provides as follows:

> The value of the gross estate shall include the value of all property to the extent of the interest therein held as joint tenants with right of survivorship by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, **except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth** . . .

I.R.C. § 2040(a) (emphasis added). Treas. Reg. § 20.2040-1(c)(3) elaborates on the exception set forth in § 2040(a) for property held in "right of survivorship" form that originally belonged to the survivor: "if the decedent furnished no part of the purchase price, no part of the value of the property is so included" in the gross estate of the decedent. Treas. Reg. § 20.2040-1(c)(3).

Ms. Rivero owned the PepsiCo stock solely in her name and transferred it into the Fidelity Account. (Original Pet. Dkt. # 1 ¶ 11); (Answer, Dkt. # 8 ¶ 11); (Exh. A ¶¶ 4, 8, 10). The Decedent did not furnish any part of the purchase price of the original PepsiCo stock that Ms. Rivero transferred into the Fidelity Account. (Original Pet. Dkt. # 1 ¶ 14); (Exh. A ¶¶ 4, 8, 10). Ms. Rivero did not receive or purchase the PepsiCo stock from the decedent. (Original Pet. Dkt. # 1 ¶ 14); (Exh. A ¶ 4, 8, 10). He did not contribute any property to the account; it was funded entirely by Ms. Rivero with her property. (Exh. A ¶¶ 4, 8, 10, 12). The Decedent at no point owned the PepsiCo stock or the account. (Exh. A ¶¶ 4, 8, 10). He was merely added to Ms. Rivero's account as a right of survivorship interest. (Original Pet. Dkt. # 1 ¶ 14); (Exh. A ¶¶ 5–8).

The uncontroverted facts establish that the account "originally belonged" to Ms. Rivero, and that the Decedent did not receive or acquire the property. (Exh. A ¶¶ 4–10). As such, the account was not includible in the Decedent's gross estate; in fact, because the Decedent had no other property in the United States, (Exh. A ¶¶ 9–10, 12, 14), the Decedent's gross estate was zero. There is no

material issue of fact or directly controverting evidence. As such, Treas. Reg. § 20.6325-1(b)(1)(i) requires the relief requested herein. *See also* §2040(a); Treas. Reg. § 20-2040-1(c)(3).

D. A Transfer Certificate is not Required

i. The Regulation Regarding Transfer Certificates Does Not Apply

On its face, the regulation does not apply. The regulation provides that a transfer certificate relates to the "*transfer* of property *of* a nonresident decedent," such as Mr. Medrano. *See* Treas. Reg. § 20.6325-1(a). Here, however, there is no property *of* Mr. Medrano that is being *transferred*.

First, the property at issue is the property *of* Ms. Rivero, not Mr. Medrano. In other words, the property at issue was not "property *of a* nonresident decedent." *See* Tex. Estates Code § 113.102 ("During the lifetime of all parties to a joint account, the account belongs to the parties in proportion to the net contributions by each party to the sums on deposit unless there is clear and convincing evidence of a different intent.") (emphasis added); *Punts v. Wilson*, 137 S.W.3d 889, 892 (Tex. App.—Texarkana 2004) ("The party to the account owns the account. On the death of the party, ownership of the account passes to the P.O.D. beneficiaries of the account. The account is not a part of the party's estate."); *see Buckley v. Buckley*, 301 Mass. 530, 531, 17 N.E.2d 887, 888 (1938) ("The determination of the interest the [joint tenants] had in the deposits in the joint accounts is dependent primarily on what their intention was . . ."); *Campagna v. Campagna*, 337 Mass. 599, 604 (1958). The evidence provided shows that Ms. Rivero was the only party who contributed property to the account. The evidence further shows that the parties both intended for Ms. Rivero to be the true owner of the property. *See* (Exh. A ¶¶ 4–5, 7–8, 10, 14). The regulation, therefore, does not apply.

Indeed, the regulation's introductory sentence begins with the assumption that the property at issue (in order to fall within the scope of the regulation) is actually the property *of* the decedent.

Treas. Reg. § 20.6325-1(a) ("property *of* a nonresident decedent") (emphasis added).[4] Likewise, its last sentence ends with a similar description. *Id.* ("receiving transfer certificates before transfer of *property of* nonresident decedents") (emphasis added). But where, as here, the undisputed facts demonstrate that the property at issue is not the property *of* the decedent, but the property of another (Ms. Rivero), the regulation simply does not apply.

Second, the "transfer" at issue occurred by operation of state law and was thus outside the scope of the regulation. Tex. Estates Code § 113.151 ("Sums remaining on deposit on the death of a party to a joint account belong to the surviving party"); *Punts v. Wilson*, 137 S.W.3d 889, 892 (Tex. App.—Texarkana 2004) ("The party to the account owns the account. On the death of the party, ownership of the account passes to the P.O.D. beneficiaries of the account. The account is not a part of the party's estate."); *In re Smith*, 361 Mass. 733, 737 (1972) ("Property held either by tenancy by the entirety or by joint tenancy passes to the survivor by operation of law and does not constitute a part of the decedent's estate."). An account held by "right of survivorship" transfers "automatically" by operation of law. *Punts v. Wilson*, 137 S.W.3d 889, 892 (Tex. App.—Texarkana 2004); *In re Smith*, 361 Mass. 733, 737, 282 N.E.2d 412, 415 (1972). Merely memorializing what has already happened by operation of law—by properly titling the account and granting access thereto—is not a "transfer" of property. Fidelity, could not, therefore, "transfer" the property at issue. The activities at issue are thus outside the scope of the regulation.

The contextual language of the regulation at issue further supports this reading. For example, the regulation provides that its general rule applies "except [with respect to] such shares which have been submitted for transfer by a duly qualified executor or administrator who has been appointed and is acting in the United States." Treas. Reg. § 20.6325-1(a) (emphasis added.). This language implies—

[4] Other sections of the regulation use the same language. For example, "in the case of a nonresident not a citizen of the United States . . . a transfer certificate is not required with respect to the transfer . . . of any property *of the decedent* . . ." Treas. Reg. § 20.6325-1(b)(1)(ii) (emphasis added).

and reinforces the underlying assumption—that the property at issue is still the property "of" the decedent (or his estate) and can thus be "transferred" (i.e., that it has not already transferred by operation of law). Notably, an executor or estate administrator cannot transfer property that passes outside of probate (as with an account transferring by right of survivorship), because a person functioning in such capacity has authority only over property "of" the decedent's estate. *See, e.g., Punts v. Wilson*, 137 S.W.3d 889, 892 (Tex. App.—Texarkana 2004) ("The party to the account owns the account. On the death of the party, ownership of the account passes to the P.O.D. beneficiaries of the account. The account is not a part of the party's estate."); *In re Smith*, 361 Mass. 733, 737, 282 N.E.2d 412, 415 (1972) ("Property held either by tenancy by the entirety or by joint tenancy passes to the survivor by operation of law and does not constitute a part of the decedent's estate.").

Continuing with the text of the regulation, it is also clear that the regulation does not apply because Fidelity Brokerage Services LLC (the defendant here) is not a "domestic corporation." Nor is it a "transfer agent." It is instead a limited liability company. By its very words, the regulation at issue applies only with respect to a "domestic corporation or its transfer agent." This limited scope is not a mere or fortuitous technicality. It is a product of the embedded assumption that the stock being "transferred" is "*its*" stock; that is, that it is stock that was issued by the very corporation itself—or that the corporation's assigned transfer agent is performing the transfer. *See also* the second sentence of Treas. Reg. § 20.6325-1(a) ("no domestic corporation . . . should transfer . . . without . . . a transfer certificate covering all of the decedent's stock *of the* corporation," further making clear that it refers to *the issuing* corporation) (emphasis added). This makes sense, as a "transfer agent" is traditionally an entity hired by the issuing corporation to manage and keep track of registered shareholders of its own stock. *See* U.S. Securities and Exchange Commission, *Transfer Agents*, available at https://www.sec.gov/divisions/marketreg/mrtransfer.shtml ("Transfer agents record changes of

ownership, maintain the issuer's security holder records, cancel and issue certificates, and distribute dividends.").

Moreover, the text of the regulation demonstrates that it does not apply for another reason: the stock at issue is not registered in the name of "a nonresident decedent," (i.e., Mr. Medrano). The stock was never registered in the name of Mr. Medrano. (Exh. A ¶ 4–8, 10). Again, this underscores the conclusion that the regulation does not apply.

Other aspects of the text of the regulation further demonstrate that it does not prohibit any transfer. Even where the regulation applies, it provides merely that a domestic corporation or its transfer agent "should [not]," rather than "shall [not]," transfer stock. *See Hines v. Graham*, 320 F. Supp. 2d 511, 525-26 (N.D. Tex. 2004) ("use of the word 'shall' is 'language of an 'unmistakably mandatory character.'") (quoting *Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983)); *cf Marshall v. Anaconda Co.*, 596 F.2d 370, 375 (9th Cir. 1979)(stating that the words "should . . . unless" are more advisory than the words "shall . . . unless"); *United States v. Maria*, 186 F.3d 65,70 (2d Cir. 1999)(stating that the common meaning of "should" suggests or recommends a course of action, while the ordinary understanding of "shall" describes a course of action that is mandatory.). It is, in other words, a cautionary or protective recommendation (and one that, as a practical matter, works in the vast majority of situations) but not a positive legal directive or proscription. This is notable because, as stated above, state law provides the mechanism of transfer.

Not only does the contextual language support Ms. Rivero's reading, but the absence of certain language further reinforces the conclusion that the regulation does not apply. Indeed, the regulation does not purport to override state law where state law provides the mechanism of property transfer. *See Louisiana Public Service Comm. v. FCC*, 476 U.S. 355, 368–69 (1986) ("Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is

outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible . . .") (emphasis added).[5]

There is no indication that this regulation was intended to displace state law and usurp a subject traditionally governed by state law. The statute, in other words, provides a protective device where a transfer has not yet occurred, but does not displace state law governing the transfer of property where that transfer occurred automatically upon the decedent's death. Because state law provided for the transfer by operation of law, the property belongs to Ms. Rivero.

ii. Applying the Regulation Also Shows That a Transfer Certificate Is Not Required.

Even if the Court determines that a transfer has not yet occurred by operation of state law, and the Court determines that the regulations apply, the regulations provide that a Transfer Certificate is not required to transfer a nonresident decedent's property under the circumstances presented here. For example, the regulation states as follows:

> (i) In the case of a nonresident not a citizen of the United States . . . a transfer certificate is not required with respect to the transfer of any property of the decedent if the value on the date of death of that part of the decedent's gross estate situated in the United States did not exceed the lesser of $60,000 or $60,000 reduced by the adjustments, if any, required by section 6018(a)(4) for certain taxable gifts made by the decedent and for the aggregate amount of certain specific exemptions.

Treas. Reg. § 20.6325-1(b)(1)(i). Here, the Decedent was not a citizen or resident of the United States. (Exh. A ¶ 9). He died in 2016, well after the date required by the regulation. (Original Pet. Dkt. # 1 ¶ 15); (Answer, Dkt. # 8 ¶ 15); (Exh. A ¶ 11). Other than his right of survivorship interest in Ms. Rivero's accounts, the Decedent had no other property located in the United States. (Exh. A ¶ 9–10, 12, 14).

The regulations provide that where, as here, a person who may be reasonably regarded as

[5] Nowhere does the I.R.C. or regulation indicate an intent to preempt transfer by operation of law as a result of a right of survivorship. There is, thus, no conflict between state law and the regulation.

having possession of the pertinent facts provides a statement of the facts relating to the estate, demonstrating that a Transfer Certificate is not required, then no transfer certificate is necessary. Treas. Reg. § 20.6325-1(b)(3). That section provides as follows:

> A corporation, transfer agent, bank, trust company, or other custodian will not incur liability for a transfer of the decedent's property without a transfer certificate if the corporation or other person, having no information to the contrary, first receives from the executor or other responsible person, who may be reasonably regarded as in possession of the pertinent facts, a statement of the facts relating to the estate showing that the sum of the value on the date of the decedent's death of that part of his gross estate situated in the United States, and, if applicable, any amounts includible in his gross estate under section 2107(b), is such an amount that, pursuant to the provisions of paragraph (b) (1) and (2) of this section, a transfer certificate is not required.

Treas. Reg. § 20.6325-1(b)(3).

Ms. Rivero has provided a declaration pursuant to 28 U.S.C. § 1746 demonstrating that she is indeed a person who may be reasonably regarded as having the pertinent facts—especially as the owner of the account and long-time, close friend of Mr. Medrano, and when at the time she wanted him to be her beneficiary. (Exh. A ¶¶ 5, 7, 12).[6] That fact has not been controverted. Here, Ms. Rivero has provided a statement of the facts to Fidelity relating to the Decedent's estate showing that the gross value of the estate falls under the exception provided by Treas. Reg. § 20.6325(b)(1)(i) and that the property at issue belongs to her. *See* (Exh. A ¶¶ 4–5, 8, 10, 12). There is no evidence to the contrary.[7] Accordingly, the Court should grant the relief requested herein.

Notably, with respect to this particular ground for relief, the applicable legal standard is <u>not</u> whether the summary judgment evidence establishes that the account transferred to Mr. Medrano. The issue is technically whether the specific standard of Treas. Reg. § 20.6325-1(b)(3) is satisfied:

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[6] These are not mere self-serving statements lacking credibility. Ms. Rivero is in the United States on a work visa. (Exh. A ¶ 2). She has been in the United States since the 1990s and owns property in the United States. *Id.* Under such circumstances, a false statement in proceedings before the Court would subject her to very harsh consequences, such as revocation of the visa—a fact that lends particular credibility to her statements proffered here.

[7] The non-movant must go past the pleadings and support his or her contentions with some evidence to sustain a defense to a summary judgment motion. *Geiserman v. MacDonald*, 893 F.2d 787, 794 (5th Cir. 1990). The Defendants have not introduced any actual contradictory evidence indicating that Ms. Rivero is not a person having knowledge of the pertinent facts. (Answer, Dkt. # 8 ¶ 27).

Whether Fidelity has received a statement of facts relating to the estate indicating that Mr. Medrano's gross estate situated in the United States was such that no transfer certificate was required, and that Ms. Rivero is a responsible person reasonably regarded as having the relevant facts. This is, notably, a lower standard and burden than proving that the facts themselves are actually true. It is, thus, the case that even if some evidence were submitted that raised a question to some degree, as long as the offered evidence was not directly contrary, Ms. Rivero has still satisfied the standard and this Court can grant this Motion for Summary Judgment.

V. Conclusion

Ms. Rivero seeks a declaratory judgment that she is the owner of the Fidelity Account, and that she is entitled to access the account. Massachusetts law and Texas law both provide that she is the sole owner of the account by operation of law. As a corollary, the account was not includible in Mr. Medrano's gross estate. As such, the regulation at issue does not apply.

Nonetheless, even if the regulation were on point, it makes clear that the Fidelity Account should not be included in Mr. Medrano's gross estate for purposes of applying Treas. Reg. § 20.6325-1(b)(1)(i), and because Ms. Rivero has provided a statement of facts so demonstrating, a Transfer Certificate is not required. Treas. Reg. § 20.6325-1(b)(1)(i).

WHEREFORE, Ms. Rivero requests that this Court declare that (1) she is the sole owner of the Fidelity Account, (2) a Transfer Certificate is not necessary to transfer ownership of the Fidelity Account, and (3) Fidelity may grant Ms. Rivero access to the Fidelity Account.

Respectfully submitted,

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ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of August 2019, I have electronically filed the foregoing document with the Clerk of Court through the CM/ECF document filing system, which sent notification and copies of the filing to all counsel of record.

/s/ Jason B. Freeman
Jason B. Freeman