

CAUSE NO. PR-11-3238-1

<b>IN RE: ESTATE OF MAX D. HOPPER</b>	§	<b>IN THE PROBATE COURT</b>
	§	
	§	
<b>JO N. HOPPER,</b>	§	
	§	
<b>Plaintiff.</b>	§	
<b>v.</b>	§	
	§	<b>NO. 1</b>
<b>JP MORGAN CHASE BANK, NA, STEPHEN B. HOPPER; LAURA S. WASSMER.</b>	§	
	§	
	§	
<b>Defendants.</b>	§	
	§	
	§	
	§	<b>DALLAS COUNTY, TEXAS</b>

**DEFENDANTS STEPHEN B. HOPPER’S AND LAURA S. WASSMER’S RESPONSE TO  
JPMORGAN CHASE BANK, N.A.’S PLEA TO THE JURISDICTION AND  
ALTERNATIVE REQUEST FOR SPECIAL EXCEPTION**

COME NOW Defendants, Stephen B. Hopper and Laura S. Wassmer, collectively (“the Heirs”), who file this Response to JPMorgan Chase Bank, N.A’s (“the Bank”) Plea to Jurisdiction and, in the alternative, its Request for Special Exception, and in support thereof respectfully show the following:

**I.  
INTRODUCTION**

The Bank’s “plea to the jurisdiction”<sup>1</sup> is confusing: while the Bank admits the Heirs have capacity to bring claims on behalf of the Estate of Max D. Hopper and the Bank’s authorities primarily deal with capacity, the bank nevertheless tries to frame its argument in terms of standing. Seemingly, the Bank has tried to circumvent its waiver of a capacity argument by improperly

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<sup>1</sup> The Heirs will refer to the Bank’s pleading as a “motion” throughout this response because the Heirs dispute that the Bank’s pleading actually involves substantive issues of subject matter jurisdiction.

framing its motion as a plea to the jurisdiction. Regardless, the Heirs have standing to assert the claims they have brought against the Bank, and have sued in the proper capacity...and have done so for years. Even if a capacity defect existed in the Heirs' pleadings, the Bank has waived the right to challenge that alleged defect by failing to file a verified plea by the dispositive motion deadline established by this Court as required by Tex. R. Civ. P. 93.

## **II.** **ARGUMENT AND AUTHORITY**

### **A. Standing and Capacity are Distinct Concepts.**

Standing is a necessary component of subject-matter jurisdiction. *Steele v. Milburn*, No. 10-13-00426-CV, 2015 WL 4864725, \*5 (Tex.App.—Waco August 13, 2015, no pet.). In Texas, “a plaintiff must have both standing and capacity to bring a lawsuit.” *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848, (Tex. 2005). However, standing and capacity are distinct: “[t]he issue of standing focuses on whether a party has a sufficient relationship with the lawsuit so as to have a justiciable interest in its outcome, whereas the issue of capacity is conceived of as a procedural issue dealing the with personal qualification of a party to litigate.” *Id.* Further, “a plaintiff has standing when it is personally aggrieved, regardless of whether it is acting with legal authority; a party has capacity when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy.” *Id.* at 848-49.

Under Texas law, “the standing doctrine requires there to be (1) “a real controversy between the parties,” that (2) will be actually determined by the judicial declaration sought.” *Lovato*, 171 S.W.3d at 849. Standing requires that “plaintiff must have a personal stake in the outcome of the suit . . . and his injury must be concrete and particularized, actual or imminent, not hypothetical.” *Haddy v. Caldwell*, 355 S.W.3d 247, 251 (Tex.App.—El Paso 2011). Standing is a component of

subject matter jurisdiction and may be raised at any time, even on appeal. Capacity, however, is waivable. To challenge capacity, a party must timely raise the issue through verified pleading. Tex. R. Civ. P. 93.

**B. The Bank Failed to Timely Challenge Capacity and *Admits* the Heirs Have Capacity.**

Analysis begins with the following admission by the Bank: “Based upon these authorities, JPMorgan does not dispute that the Estate has standing to pursue claims against JPMorgan for alleged injury to the Estate, or that the Heirs have capacity to bring such claims **on behalf of the Estate.**” Def. Mot. P. 4 (emphasis in original). The Bank admits to this Court that the Heirs have capacity to bring their claims. If the Court decides that the Bank’s authorities and the gravamen of its motion really is the *capacity* in which the Heirs have pled their suit, then the Court should deny the Bank’s motion as untimely as it is not supported by verified pleading.

However, the rest of the Bank’s motion involves misapplication of two primary authorities to suggest that the real issue is lack of *standing*. The Bank’s reliance on these authorities is misplaced and must be addressed.

*1. The Bank’s Authorities are Materially Distinguishable*

The Bank relies primarily on *Burns v. Burns*, 2 S.W.3d 339 (Tex. App.—San Antonio 1999, no pet.) and *Austin Nursing Cts., Inc. v. Lovato*, 171 S.W.3d 845 (Tex. 2005) to couch their arguments in terms of standing. Neither case is on point.

a. *Burns* is Distinguishable and did not Decide the Issue Before this Court.

*Burns* involved a scenario where *two* estate administrations were proceeding concurrently in different counties and raised questions about *dominant jurisdiction as between courts*. Richard Burns died and left his estate to his three children (Tom, Dorothy, and Dick) in equal parts. Tom

and Dick were appointed co-independent executors. Richard Burns' will was admitted to probate in Harris County in 1987. Dorothy died in August of 1992. She devised almost her entire estate to Dick and Tom in equal shares, and she appointed Dick and Tom co-independent executors of her estate. Dorothy's will was admitted to probate in Kerr County while Richard Burns' estate was actively being administered in Harris County.

Tom sued Dick with respect to the administration of Dorothy's estate. Theo Pinson, III ("Pinson") was appointed independent administrator of Dorothy's estate and intervened in Tom's suit. Pinson moved for an accounting. The Court appointed an auditor, who reviewed the contents and transactions of three accounts: (1) an account held in the name of The Estate of Dorothy Jane Burns; and (2) two accounts held in the name of the Estate of Richard Fairs Burns. The Court ultimately found Dick liable on summary judgment and awarded damages related to both Dorothy's and Richard Burns' estate.

The appellate court, in dicta, addressed Tom's standing to pursue estate claims after Pinson's appointment as independent administrator. But this passage on which the Bank so heavily relies is simply that—dicta. It is not directly related to either of the two points of error on appeal, which were (1) summary judgment was erroneous because the trial court lacked subject matter jurisdiction *since the claim [was] incident to the Estate of Richard Fairs Burns . . . which was already pending in Harris County*, and (2) there was no evidence of Dick's liability. The appellate court was not asked to address—and did not articulate a holding—with respect to Tom's standing to pursue claims of Dorothy's Estate after Pinson's appointment. Rather, the Court analyzed whether the Kerr County court improperly exercised subject matter jurisdiction over issues pertaining to the administration of the Estate of Richard Burns.

The appellate court ultimately held that the Kerr County Court had improperly exercised

subject matter jurisdiction over matters pertaining to the administration of the Estate of Richard Burns. The appellate court held that the Harris County court, in which Richard Burns' will was probated *prior to* Dorothy's will, had *dominant jurisdiction* over issues pertaining to the administration of Richard Burns' Estate. Thus, the *Burns* decision was not decided upon whether Tom or Dick lacked standing to assert claims for damages estate property. *Burns* does not support the Bank's position.

b. *Lovato* is Distinguishable and did not Decide the Issue Before the Court.

*Lovato* was a case about capacity, not standing. The *Lovato* court expressly noted: "The parties dispute whether Lovato had standing to assert a survival claim on behalf of Wilson's estate. Although courts and parties have sometimes blurred the distinction between standing and capacity, we believe that the issue presented here is more appropriately characterized as one of capacity." The *Lovato* court correctly observed that parties conflate standing and capacity, and the Bank's motion proves the point: the Bank concedes the Heirs have capacity to bring their claims, then seem to argue standing, but then cite cases deciding issues of capacity.

*Lovato* decided the narrow issue of whether a litigant's "post-limitations capacity cured her pre-limitations lack thereof." Margarita Torres Wilson ("Margarita") passed away on August 18, 1998. Margarita's daughter, Lovato, filed a lawsuit against defendants within the statute of limitations period on behalf of Margarita's (her mother's) estate, alleging she was the estate's "Personal Representative". However, at the time Lovato filed her suit, no personal representative had been appointed. After the statute of limitations had run, the probate court appointed Lovato administrator of Margarita's estate. The issue before the *Lovato* court was *not* whether Lovato had standing to pursue claims on behalf of Margarita's estate, but whether her capacity to bring such claims—which only arose *after* the statute of limitations had run—cured her lack of capacity during

the statute of limitations period. The *Lovato* court held that the post-limitation conferral of capacity by appointment as administrator cured the post-limitations lack of capacity.

Neither *Lovato* nor *Burns* helps the Bank. *Lovato* is a capacity case. *Burns*, though jurisdictional, answered a question involving dominant jurisdiction as between probate courts. The Bank has provided this Court no basis for finding that the Heirs lack standing to assert their claims.

**C. The Heirs Have Both Standing and Capacity to Assert their Claims.**

The situation at bar is similar to the scenario in *Steele v. Milburn*, 2015 Tex. App. LEXIS 8525, 2015 WL 4864725, NO. 10-13-00426-CV (Tex. App.—Waco 2015, no pet.) (holding appellant had standing to assert claims against estate). Mary King Steele (“Mary”) died. She was survived by her natural child, Rayellen J. Milburn (“Milburn”). She was also survived by the two children of her deceased husband: Michael Steele and Sheila Steele Howard. Mary’s will created an exempt trust and a non-exempt trust for each of the three children, who were named as beneficiaries of the trusts. Mary’s will appointed Milburn as Trustee of each trust.

Ultimately, Steele sued Milburn. He alleged that Milburn had been dilatory in performance of her duties as administrator of Mary’s estate, and that for four years there had been little progress made in the administration. Milburn countered with two pleadings: (1) a verified plea challenging Steele’s right to sue her in his individual capacity since he was “not an interested person” in Mary’s estate; and (2) a plea to the jurisdiction arguing that the court lacked subject matter jurisdiction over Steele’s suit because he was not an “interested person” in Mary’s estate. Milburn’s standing argument was predicated on the observation that the trusts—not Michael—were technically the beneficiaries of Mary’s estate, and that any suit against Mary’s estate should properly be brought by the trustees of the trusts, not Steele.

The court rejected Milburn’s argument. The Court held that Steele, as a named

testamentary-trust beneficiary, was an “interested person” because he had a property right in Mary’s estate by virtue of the testamentary trusts. The Court held that Steele, individually, had standing to pursue a claim against Milburn, the administrator of Mary’s estate.

Stephen B. Hopper and Laura S. Wassmer are the heirs of Max D. Hopper. They, like Steele, sued *as individuals* the administrator of an estate in which they have interests. To the extent the Bank’s motion might actually challenge standing (and thus subject matter jurisdiction), *Milburn* makes clear that the Heirs have standing to pursue the claims they have alleged against the Bank. And as discussed above, the Bank has waived its right to challenge any defect in the *capacity* in which the Heirs have sued. That ship sailed on September 12, 2016, the dispositive pleading deadline.

**D. The Bank Inappropriately Tries to End-Run Summary Judgment Procedures.**

The Bank, under the guise of “expedit[ing] resolution of . . . issues before trial” urges the Court to rule that “any attempt to assert claims on behalf of the Estate of Max Hopper for breach of contract or fraud against JPMorgan would be futile.” This relief is absolutely inappropriate. It seeks a ruling by the Court on the substantive merit of claims *without* affording the Heirs the procedural protections to which they are entitled. Tex. R. Civ. P. 166a. The relief the Bank seeks is properly obtained through a traditional motion for summary judgment. Had the Bank raised the issues in its current motion with the Court earlier (and actually secured a favorable ruling forcing the Heirs to replead), the Bank could have followed the Heirs’ pleading amendment with a traditional motion for summary judgment if it believed it could prove, as a matter of law, that the Heirs’ claims should be dismissed. But the Bank was dilatory. The Bank did not raise the issues in this current motion until well after the dispositive motion deadline. If the Court finds a problem

with the Heirs' pleadings (it should not), the Bank realizes it has passed the dispositive motion deadline and seeks relief that would relieve it of compliance with the Texas Rules of Civil Procedure and with this Court's scheduling order (essentially, a prospective ruling on the substantive merits of a claim). The Court should flatly DENY this relief.

**III.**  
**ALTERNATIVE REQUEST TO AMEND PLEADING**

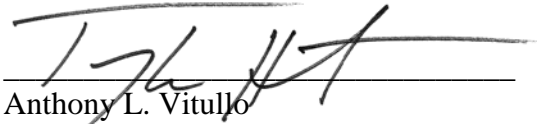
Strictly in the alternative and only if the Court is inclined to grant the Bank's special exception, the Heirs request an opportunity to replead. Rather than the Bank's highly compressed three-day window in which to replead, the Heirs request a seven-day window in which to amend their claims. As noted above, the Bank—not the Heirs—seek to disrupt the status quo a month from trial. Any ill-effect caused by an eleventh-hour amendment should be borne by the Bank, who had the legal burden to raise the issues in this motion far earlier in this litigation.

**PRAYER**

WHEREFORE, PREMISES CONSIDERED, Heirs respectfully pray this Court (1) DENY the Bank's Plea to the Jurisdiction and Special Exception entirely, or (2) should the Court find fault with the Heirs pleadings, to allow the Heirs seven days in which to replead.



Respectfully submitted,



Anthony L. Vitullo  
State Bar No. 20595500  
Taylor A. Horton  
State Bar No. 24086402  
**FEE, SMITH, SHARP & VITULLO, L.L.P.**  
Three Galleria Tower  
13155 Noel Road, Suite 1000  
Dallas, Texas 75240  
(972) 934-9100 Telephone  
(972) 934-9200 Facsimile  
[lvitullo@feesmith.com](mailto:lvitullo@feesmith.com)  
[thorton@feesmith.com](mailto:thorton@feesmith.com)

and

James Bell  
State Bar No. 24049314  
**JAMES S. BELL, PC**  
2808 Cole Avenue  
Dallas, TX 75204  
Telephone: (214) 668-9000  
Facsimile: (214) 594-9462  
[james@jamesbellpc.com](mailto:james@jamesbellpc.com)

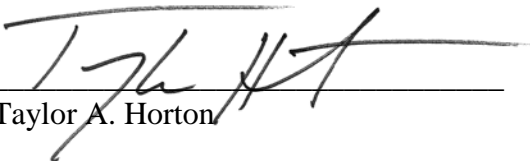
**ATTORNEY FOR DEFENDANTS  
STEPHEN B. HOPPER AND  
LAURA S. WASSMER**

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the above and foregoing document has been served on all counsel of record on July 19, 2017, in accordance with the Texas Rules of Civil Procedure to:

Alan S. Loewinsohn  
Jim L. Flegle  
Kerry F. Schonwald  
Loewinsohn Flegle Deary Simon LLP  
12377 Merit Dr., Suite 900  
Dallas, Texas 75251  
214-572-1717 Facsimile  
[alanl@lfdslaw.com](mailto:alanl@lfdslaw.com)  
[jimf@lfdslaw.com](mailto:jimf@lfdslaw.com)  
[kerrys@lfdslaw.com](mailto:kerrys@lfdslaw.com)  
*Attorneys for Plaintiff Jo Hopper*

John C. Eichman  
Grayson L. Linyard  
Hunton & Williams, LLP  
1445 Ross Avenue, Suite 3700  
Dallas, TX 75202  
214-468-3599 Facsimile  
[jeichman@hunton.com](mailto:jeichman@hunton.com)  
[glinyard@hunton.com](mailto:glinyard@hunton.com)  
*Attorneys for Defendant, JPMorgan Chase Bank, N.A.,  
as Independent Administrator of the Estate of Max D. Hopper, Deceased,  
and JPMorgan Chase Bank, N.A., in its Corporate Capacity*

  
Taylor A. Horton