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DALLAS COUNTY

CAUSE NO. PR-11-3238-1

IN RE: ESTATE OF MAX D. HOPPER DECEASED	§ § §	**IN THE PROBATE COURT**
JO N. HOPPER **Plaintiff,**	§ § §	
v.	§ §	**NO. 1**
JPMORGAN CHASE BANK, N.A. STEPHEN B. HOPPER, Individually and On behalf of the Estate of Max D. Hopper, Deceased, LAURA S. WASSMER, Individually and on behalf of the Estate of Max D. Hopper, Deceased **Defendants.**	§ § § s § § §	**DALLAS COUNTY, TEXAS**

DEFENDANTS STEPHEN B. HOPPERS' AND LAURA S. WASSMERS' OPPOSITION TO DEFENDANT JPMORGAN CHASE BANK, N.A.'S FIRST AMENDED MOTION FOR DIRECTED VERDICT

Defendants Stephen B. Hopper and Laura S. Wassmer ("the Heirs") file this their Opposition to Defendant JPMorgan Chase Bank, N.A.'s ("the Bank's") First Amended Motion for Directed Verdict on Defendants' claims and would respectfully show the following:

I. Standard of Review[1]

"A court may instruct a verdict if no evidence of provative forec raises a fact issue on the material questions in the suit." *Prudential Ins. Co. of America v. Financial Review Services, Inc.*, 29 S.W.3d 74, 77 (Tex. 2000). A directed verdict is not proper if there is more than a scintilla of evidence to raise a fact issue on the material question presented. *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 233 (Tex. 2004). In analyzing a request for a directed verdict, the evide4nce must be evaluated in the light most favorable to the non-movant (here,

[1] The recitation of evidence in opposition to the Bank's motion for directed verdict is not meant to be exhaustive.

Defendants Stephen B. Hopper and Laura S. Wassmer), and all contrary evidence and inferences must be disregarded. *Id.* at 234.

II. Argument and Authorities

1. There is Evidence that the Bank Defrauded the Estate.

The Bank's no-evidence argument completely glosses over a key question: how does an IA make misrepresentations to an Estate if not through the Estate's beneficiaries? The only element of fraud that the Bank attacks in this portion of its motion is the "representation" element, which the Heirs herein address.

By way of example only and not by limitation, the Bank committed fraud upon the Estate when it failed to disclose to the Estate's beneficiaries (the people the Bank needed to acquiesce to the Bank's continued status as independent administrator) that it had erred in paying nearly $380,000 in taxes to the IRS when it did not need to do so. Not only did the Bank's actions constitute fraud by non-disclosure, they also constituted fraud by misrepresentation, as evidenced by the e-mail correspondence between Barbara Wong, Wendy Bessette, and Susan Novak in which the women concocted a plan to cover up the error. This scenario constituted both fraud by non-disclosure and fraud by misrepresentation.

2. There is Evidence that JPMorgan's Declaratory Judgment Action was a Breach of Contract and a Breach of Fiduciary Duty.

The evidence adduced at trial was that the Bank's actions in seeking the declaratory judgment action placed the interests of the Bank ahead of the interests of the Heirs, which constituted a breach of fiduciary duty. The Bank committed in its Fee Agreement that it would remain impartial to distribute property in accordance with state laws. By seeking declaratory judgment that the Bank's conduct with respect to Robledo did not violate a fiduciary duty—and by pilfering the Estate funds to bankroll that declaratory judgment action—the Bank was not

acting impartially and in accordance with state laws; rather, it was self-dealing. This violates both the Fee Agreement and the Bank's fiduciary duties to the Heirs.

3. The Economic Loss Doctrine Does Not Bar the Heirs' Negligence, Gross Negligence, and Conversion Claims.

Texas law recognizes an exception to the economic loss doctrine in situations involving the negligence of professionals, regardless of the existence of a contract. *See LAN/STV v. Markin K. Eby Constr. Co.*, 435 S.W.3d 234, 243-44 (Tex. 2014). The Texas Supreme Court noted in *LAN/STV* that appellate courts have uniformly disregarded the economic loss rule in the context of negligence actions against attorneys. *Id.* at 244. The Texas Supreme Court observed that in the attorney/client relationship, fee agreements (except contingency fee agreements) are not legally required and have not traditionally been the norm. *Id.* It also observed that the standards governing legal representation are deeply developed and their application uniform and well-settled. *Id.* Crucially, the Texas Supreme Court then noted: "These factors also support negligence actions against other professionals." *Id.*

The Bank unambiguously held itself out as a professional corporate administrator in the Fee Agreement:

> "JPMorgan handles estates of all sizes and types—***professionally*** and impartially. When you name JPMorgan Chase Bank, N.A. as personal representative, executor or agent for the executor, there's security in the knowledge that ***professionals will handle all estate settlement responsibilities.***"

The evidence at trial has also established that JPMorgan used a wide array of professionals in various fields to perform tasks related to estate administration.

This scenario falls squarely within this well-recognized exception to the economic loss doctrine. The Bank, as a professional corporate fiduciary, was tasked with performing a service (estate administration), the fiduciary standards governing which are deeply developed, uniformly

applied, and well-settled. Furthermore, contractual relationships between independent administrators and beneficiaries of an estate are not necessarily the norm. Outside the corporate fiduciary context, individual family members often serve as independent administrators without the need for or existence of a formal contract. The reasons for that are simple and directly analogous to the attorney/client relationship discussed by the Texas Supreme Court cited above: the rules governing the relationship are deeply developed, uniformly applied, and well-settled such that the relationship does not necessarily need to be defined by the bounds of a contract for the parties to understand their relative rights and obligations.

4. The Heirs' Conversion Claim is not Barred as a Matter of Law.

The Bank challenges only whether the money made the subject of the Heirs' conversion claim can be identified as "specific chattel". "An action will lie for conversion of money when identification of the money is possible and there is a breach of an obligation to deliver the specific money in question or to otherwise treat specific money." *Southwest Industries Inv. Co. v. Berkeley House Investors*, 695 S.W.2d 615, 617 (Tex. App.—Dallas 1985, writ ref'd) (finding sufficient evidence of conversion); *Paschal v. Great W. Drilling, Ltd.*, 215 S.W.3d 437, 456 (Tex. App.—Eastland 2006, pet. denied) (finding life insurance proceeds to constitute a "specific chattel" for purposes of conversion); *Lawyers Title Co. v. J.G. Cooper Dev., Inc.*, 424 S.W.3d 713 (Tex. App.—Dallas, 2014, pet. denied) (finding plaintiff had created a fact issue as to whether an escrow agent converted $1.8 million by improperly using money wired into an escrow account for a specified purpose); *Houston Nat'l Bank v. Biber*, 613 S.W.2d 771, 774-75 (Tex. App.—Houston [14th Dist.] 1981, no pet.) ("An action for conversion of money will lie where it is delivered for safe keeping, to which the keeper claims no title and which money is required and intended to be kept segregated, substantially in the form in which it was received or

as an intact fund. Also money which is deposited in a bank under a special deposit agreement having the characteristics of a bailment contract may be the subject of a conversion action . . . .").

In this case, the money made the subject of the Heirs' conversion claim qualifies as specific chattel. The money was brought into the bank, housed in a special fiduciary account, and was held in trust for the benefit of the Heirs. *See Ali Akbar Mohseni v. Hartman*, 363 S.W.3d 652, 658 (Tex. App—Houston [1st Dist.] 2011, no pet.) (an executor holds estate property in trust for the beneficiaries of an estate). This same money was intended to be kept segregated form other accounts and not commingled with other funds. This identifiable block of money was used improperly and inconsistently with the Heirs' rights in order to pay the Bank's legal fees to Hunton & Williams. This factual context satisfies the "specific chattel" requirement for a conversion claim.

5. The Heirs' Claim for Money had and Received is not Barred as a Matter of Law.

Money had and received is an equitable action. If the Jury were to determine that the Fee Agreement did not constitute a contract, then it would be proper to submit a question with respect to money had a received because the evidence at trial supports that the Bank has retained monies that, in good conscience, belong to the Heirs.

6. There is Evidence of Malice to Support an Award of Exemplary Damages. Alternatively, no Showing of Malice is Necessary under *Estate of Preston*, 346 S.W.3d 137 (Tex. App.—Fort Worth 2011, no pet.).

a. Evidence of Malice

Texas Civil Practice and Remedies Code Ch. 41 defines malice as "a specific intent by the defendant to cause substantial injury or harm to the claimant." Ample evidence supports that the Bank specifically intended their actions to harm the Heirs, while simultaneously benefitting

itself. On July 7, 2011, John Eichman makes his first time entry in Hunton & Williams' legal invoices in this case:

> "Reviewed materials from Tom Cantrill regarding background of potential dispute and objections filed by Jo Hopper; conference with Tom Cantrill regarding background."

DX375 at IA 032074. The Bank saw trouble brewing and brought in Mr. Eichman, a litigator, in early July of 2011.

Shortly thereafter, on July 22, 2011, Susan Novak approved a transfer of $230,000 from the fiduciary account to the Bank. DX373 at LWASSMER 002102. The testimony at trial establishes that Susan Novak make a point to inform her superiors that this transfer to the Bank had occurred. Then, on August 1, 2011, Tom Cantrill admitted that "[t]he Administrator is now in a litigation or near litigation mode . . . ." PX126 (admitted). Therefore, the Jury has evidence that as of August 1, 2011, the Bank had brought a litigator on board to analyze a potential legal conflict, the Bank knew this, the Bank grabbed their fee, and that the Bank's lawyers were primed for litigation to start.

At this point, the Bank had two options: (1) it could have either pursued at 149A Application for Accounting and Discharge (which Tom Cantrill admitted was the only sensible path forward and which Lois Stanton testified would take only about fifty hours of labor) or a Resignation Application (which Tom Cantrill testified the Court would have granted), or (2) it could have dug its heels in, maintained its control over the fiduciary account, and used the Estate's money to fund the legal fees it incurred defending against Jo Hopper's claims for breach of fiduciary duty. The Bank intentionally chose the latter course of action knowing it would cause substantial harm to the Heirs and because paying for its legal fees out of the Estate's assets

benefitted the Bank. This is sufficient evidence of malice to submit a question of punitive damages for breach of fiduciary duty to the jury.

b. Alternatively, the Heirs Need Not Show Malice to Recover Punitive Damages for Breach of Fiduciary Duty Because the Breach Involved Self-Dealing.

The Heirs need not actually show evidence of malice to be entitled to recover exemplary damages for breach of fiduciary duty because the Bank's conduct involved self-dealing. In a relatively recent opinion, the Fort Worth Court of Appeals wrote:

> "While it is a general rule that Texas courts allow the recovery of punitive damages where the defendant, in committing a tort, acted willfully, maliciously, or fraudulently, where punitive damages are awarded for breach of fiduciary duty the actual motives of the defendant and whether the defendant acted with malice are immaterial. ***But something more than a simple breach is required for the recovery of punitive damages; the acts constituting the breach must have been fraudulent, or at least intentional. An intentional breach may be found where the fiduciary intends to gain an additional benefit for himself. [T]he Supreme Court [has] suggested that willful and fraudulent acts are presumed when the fiduciary . . . gains an additional benefit for himself as a result of his breach***.

Estate of Preston, 346 S.W.3d 137 (Tex. App.—Fort Worth 2011, no pet.) (citing *Lesikar v. Rappeport*, 33 S.W.3d 282 (Tex. App.—Texarkana 2000, pet. denied). At least one well-respected Dallas practitioner and legal commentator agrees with this position. *See* TEXAS REMEDIES IN EQUITY FOR BREACH OF FIDUCIARY DUTY: DISGORGEMENT, FORFEITURE, AND FRACTURING, George P. Roach[2], 45 St. Mary's L.J. 367, 411 (2014) ("For claims of breach of fiduciary duty, the claimant only needs to prove that the fiduciary demonstrated her intent to gain an additional benefit. Proof that the fiduciary breached her duty and gained an additional benefit has also been held as sufficient proof [supporting exemplary damages].").

[2] George P. Roach practices damages law and provides consulting on litigation damages and valuations in Dallas. He is also Senior Adviser to the litigation consulting firm of Freeman & Mills, Inc. in Los Angeles. His background includes an M.B.A. (Harvard), J.D. (University of Texas), and a B.A. in Economics (University of California, Davis).

In this case, the evidence clearly establishes that the Bank used the Estate's money—rather than its own—to defend Jo Hopper's claims for breach of fiduciary duty and the Heirs' claims (which never involved a removal action). The Bank did this at the Heirs' expense so that it would not have to foot millions of dollars in legal fees. The Bank's conduct constitutes a breach of fiduciary duty in which it used its' position as fiduciary, including its control of the fiduciary account, to its benefit and to the Heirs' detriment. This supports a submission of exemplary damages to the jury for breach of fiduciary duty, regardless of whether the Court finds evidence of malice.

7 and 9. The Court has Already Decided that the Heirs May Seek Fees Paid to Certain of Their Attorneys as Damages.

The Bank attempts to resurrect an argument it lost in a motion for summary judgment. The Heirs have sought to recover certain of the fees they paid various attorneys prior to Jo Hopper filing her suit in September of 2011 as compensatory damages under an exception to the American Rule. The Bank initially sought dismissal of these damage amounts through summary judgment in 2016 on the same grounds raised in their motion for directed verdict, and the Court denied the motion. As it did almost a year ago, the Court should do now: deny the Bank's motion and allow the Heirs to present these measures of damages to the Jury.

8. The Heirs' Claim for "Contingent Damages" is not Barred as a Matter of Law.

To the extent the Jury awards damages against the Heirs in favor of Jo Hopper on her claim for declaratory judgment attorneys' fees, the Heirs seek that amount of money as damages against the Bank. The Bank's reliance on *McKnight v. Hill & Hill Exterminators, Inc.*, 689 S.W.2d 206 (Tex. 1985) is particularly puzzling because this case supports the Heirs' position. The Texas Supreme Court explained in *McKnight*: "[t]here is a distinction between uncertainty as to the *fact* of damages and uncertainty merely as to the *amount* of damages." *Id.* at 207.

"Uncertainty as to the fact of legal damages is fatal to recovery, but uncertainty as to the amount will not defeat recovery." *Id.* Unlike *McKnight* and *Spera v. Fleming, Hovenkamp & Grayson, P.C.*, 25 S.W.3d 863, the other case the Bank cites in support of its argument, this case involves the *amount* of exposure the Heirs' face against Jo Hopper's claims for declaratory judgment attorneys' fees, not *whether* the Heirs face any exposure at all.

As the Bank well knows, the Heirs have entered a settlement agreement with Jo Hopper that fixes a minimum amount of exposure to her attorneys' fees. The *fact* of the Heirs' damages, therefore, is not in dispute. The only issue remaining is the *amount* of Jo Hopper's attorneys' fees they will be liable for. Uncertainty as to the *amount* of damages is not fatal to the Heirs' claims in this respect, and the Court should deny the Bank's motion for directed verdict on this point.

10. The Heirs Bear no Legal Burden to Prove that Any Amount of Money Paid from the Estate Account to Hunton & Williams was Unreasonable or Unnecessary.

The Bank incorrectly argues that the Heirs bear a burden to prove that the amount of money it unlawfully paid to Hunton & Williams was *unnecessary* or *unreasonable*. Tellingly, the Bank offers this Court *no* legal authority in support of its argument. There's a good reason: this argument is a red-herring. The money paid to Hunton & Williams from the fiduciary account—although it was paid to lawyers for legal fees—represents ***the Bank's*** legal fees. If any entity in this suit bears the burden of proof with respect to the reasonableness and necessity of these fees, it's the Bank.

From the Heirs' perspective, this amount of money represents ***compensatory damages*** flowing from, at the very least, breach of fiduciary duty. The Heirs did ***not*** elect to pay this money to lawyers—the ***Bank*** elected to pay this money to Hunton & Williams to the Heirs' detriment. The Bank's argument on this point is baseless and must be disregarded.

11. There is Evidence that the Bank "Profited."

This argument is based on the Heirs' First Amended Jury Charge. The Heirs have filed subsequent amended jury charges; therefore, this argument is moot. Even if it were not, there is evidence that the Bank "profited" at least in the amount of $230,000, which represents the partial administration fee the Bank took from the fiduciary account for itself immediately before breaching its fiduciary duties to the Heirs to step down as IA. *See* DX373.

12. There is Ample Evidence that the Bank Committed Breaches of Fiduciary Duty.

"Claims based upon a breach of fiduciary duty require expert testimony on the issues of breach and causation of damages ***where the determination of those issues 'is not one that lay people would ordinarily be competent to make.'"*** *Kothmann v. Cook*, No. 07-05-0335-CV, 2007 WL 1075171, at *4 (Tex. App.—Amarillo Apr. 11, 2007, no pet.).

The Heirs' breach of fiduciary duty claim is simple, and the facts substantiating breach and causation are well within the understanding of laymen; as such, the Heirs were not legally required to adduce expert testimony on breach and causation. While the Bank breached its fiduciary duties to the Heirs in numerous ways, the simplest and most profound is this: despite knowing that *all* the beneficiaries of Max Hopper's estate were completely dissatisfied with the Bank's performance, the Bank put its own interests ahead of the beneficiaries to get a "free ride" on legal fees while defending Jo Hopper's breach of fiduciary duty claims and the Heirs' subsequent suit.

The Bank's conduct, as briefed in Section 6 above, constitutes a theory of breach of fiduciary duty that is simple enough for a jury to understand without the aid of expert testimony. The evidence has shown the Jury (and the Court will instruct the jury) on the meaning of "fiduciary duty". The Jury will be able to assess, based on the Court's instruction, whether the

Bank placed its own interests ahead of the Heirs'. If the Bank did place its interests ahead of the Heirs', causation is simple: the evidence has consistently shown (1) that as of August 2011 there were no other known creditors of Max Hopper's Estate; (2) the Heirs stood to inherit the remaining funds in the fiduciary account as of August 2011; (3) per Tom Cantrill's testimony, the Court would have approved either a 194A Application for Accounting and Discharge or an Application for Discharge; and (4) but for the Bank's decision *not* to step down as IA (but, rather, to defend itself against Jo Hopper's breach of fiduciary duty claim with the Estate's money) the Heirs would not have been damaged by the loss of the funds in the fiduciary account. Nothing about that scenario is so complicated that it requires the testimony of an expert to understand.

13. There is Evidence that the IA Breached Its Fiduciary Duty, Breached the Fee Agreement, Committed Fraud, Committed Negligence, and Committed Conversion Against the Estate or the Heirs by not Filing a Resignation Application or by not Filing a Section 149A Accounting and Request for Discharge.

While the Bank's argument under this section is couched as a "no evidence" point, the crux of the Bank's complaint is that these issues were, purportedly, not plead. Assuming, *arguendo*, they were not, the Bank failed to object to evidence supporting these theories at trial in circumstances where they Bank clearly was on notice of what the Heirs were attempting to try. The Bank has, therefore, tried these issues by consent.

Even if the Bank's argument could be construed truly as a "no evidence" point, the Heirs have clearly adduced sufficient evidence to place these issues before the Jury, as briefed thoroughly in this Response, for instance in Sections 6, 14, and 15.

14. There is Evidence that the IA's Failure to File a Resignation Application or a Section 149A Accounting and Request for Discharge Caused the Heirs' Damages.

The Heirs testified that by the time Jo Hopper filed her lawsuit on September 21, 2011, they wanted the Bank to step down as Independent Administrator of Max Hopper's estate. The

Heirs further testified that they would have absolutely acquiesced had the Bank sought to step down from that position voluntarily. The accounting process, as evidenced by Lois Stanton's testimony, would only have taken about fifty (50) hours of work. Deposition of Lois Stanton, September 13, 2016 183:24-184:16.

Had the Bank done so, Jo Hopper would not have been in a position to file a removal action against the Bank in late September of 2011—it would no longer be Independent Administrator, it would no longer control the fiduciary account, and no removal action would have been possible. Simply put, but for the Bank's failure to voluntarily step down through either a 149A accounting or a resignation application, the Bank would not have been in a position to exercise control over the fiduciary account at the point Jo Hopper filed her lawsuit. This is sufficient evidence of causation between the Bank's failure to voluntarily step down and the Heirs' resulting damages.

15. The Bank Itself has Offered Evidence of the Heirs' Damages Resulting from the Bank's Failure to File a Resignation Application or a 149A Application for Accounting and Request for Discharge.

The Bank's argument on this topic ignores (1) the legal standard governing proof of the amount of damages, and (2) the fact that *the Bank itself offered evidence of the Heirs damages.* In Texas, a party must merely "prove its damages with a reasonable degree of certainty." Juries "have discretion to award damages within the range of evidence presented at trial, so long as a rational basis exists for the jury's calculation." *See U.S. Renal Care, Inc. v. Jaafar*, 345 S.W.3d 600 (Tex. App.—San Antonio 2011, pet. denied).

The jury will has a very rational basis for calculating the Heirs' damages caused by the Bank's failure to promptly seek a 149A Application for Accounting and Request for Discharge or a Resignation Application: DX 373 and DX 374. These exhibits, which have been admitted for all purposes, reflect balances in the "fiduciary" or "master account" at various points in time.

On August 1, 2011, Tom Cantrill advised that the only sensible way forward in the Hopper Estate was to seeking a 149A accounting and discharge. *See* DX221. As of July 31, 2011, the day before Cantrill sent his e-mail, $3,465,157.97 in cash remained in the fiduciary account. DX373, LWASSMER 002090. Lois Stanton, the Bank's expert, testified that to formally close the independent administration under the Estates Code through an accounting would only have taken approximately fifty hours of work. Deposition of Lois Stanton, September 13, 2016 183:24-184:16.

This evidence provides the jury with a completely rational basis for assessing damages against the Bank in favor of the Heirs for at least $3.46 million.

16. The Heirs Have Presented Ample Evidence of Fraud and Fraud in the Inducement.

Fraud requires a showing that (1) a party made a material misrepresentation; (2) the representation was false; (3) when the representation was made, the party making the representation knew it was false or made it recklessly without any knowledge of the truth as a positive assertion; (4) the representing party made the representation with the intent that the suing party should act upon it; (5) the suing party acted in reliance on the representation; and (6) the suing party thereby suffered injury. Fraudulent inducement requires a showing of the elements of fraud, and that the "reliance" on the part of the suing party was the entering of a contract. Specifically with respect to fraudulent inducement, the Texas Supreme Court has made clear that breach of contract combined with even "slight circumstantial evidence of fraud is enough to support a verdict for fraudulent inducement." *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 305 (Tex. 2006).

The evidence at trial has amply established each element of both fraud and fraudulent inducement. While the Bank made multiple material misrepresentations to the Heirs, principally through the Fee Agreement, one stands out: that Bank would conduct itself "impartially" during

the administration of the Estate. Not only did the Bank fail to conduct itself impartially *during* administration of the Estate, it failed to conduct itself impartially *prior* to administration of the estate while actively *concealing* its favoritism of Jo Hopper from the Heirs. *Nothing* about the administration was impartial, and the Bank never intended for the administration to *be* impartial.

The documentary and testimonial evidence has established at least the following:

The Bank badly wanted to administer Max Hopper's estate because it wanted Jo Hopper's future business in the Private Wealth Management group. It viewed the Hopper Estate—one of the largest the Bank had handled in years—as a "terrific win". To that end, the Bank began pitching its PWM services to Jo Hopper (through Kal Grant and Todd Baird, among others) almost immediately after Max Hopper's death, while *failing* to concurrently offer those same PWM services to the Heirs. However, the Bank understood it needed Stephen Hopper's and Laura Wassmer's consent (NOT Jo Hopper's consent) to serve as independent administrator of Max Hopper's Estate. The evidence shows that to induce the Heirs' to sign the Fee Agreement and assent to the Bank's appointment as Independent Administrator, the bank (1) misrepresented Tom Cantrill's familiarity with Max Hopper's financial situation to secure the Heirs acceptance of Hunton & Williams' services; (2) failed to inform the Heirs that Susan Novak subjectively considered using Tom Cantrill to be a conflict of interest in light of his prior representation of Jo Hopper (despite understanding that the Heirs disapproved of using Ron Cresswell because he had represented Jo Hopper); and (3) wholly failed to advise the Heirs that the Bank was angling for Jo Hopper's PWM business.

Had the Heirs known any one of these facts, they would not have signed the Fee Agreement. However, based on the Bank's misrepresentations of material facts, the Heirs signed the Fee Agreement. As the administration progressed, the Bank continued to treat Jo Hopper

with favoritism, as evidenced by the "dog and pony show" they treated Jo Hopper to in New York—and which they never disclosed to the Heirs.

Based on this evidence (and much more as developed in trial), the Bank made misrepresentations to the Heirs through the Fee Agreement that the Bank never intended to fulfill at the time the representations were made. The Bank made these represntations with the specific intent to induce the Heirs into signing the Fee Agreement so the Bank could secure the Estate administration and hopefully achieve Jo Hopper's PWM business. The Heirs relied on the Bank's utter misrepresentations of material fact when signing the Fee Agreement, and they were harmed thereby. The Heirs have unquestionably adduced evidence of fraud and fraud in the inducement.

17. The Heirs Have Presented Ample Evidence of Self-Dealing.

In a single sentence with absolutely no legal support, the Bank baldly states that the Heirs have not presented evidence of self-dealing. The Bank's assertion is false. The Texas Court of Appeals recently defined "self-dealing" as follows:

> Self-dealing can be generally defined as an occurrence in which the fiduciary uses the advantage of his position to gain a benefit at the expense of those to whom he owes a fiduciary duty. *See Jochec v. Clayburne*, 863 S.W.2d 516, 521 (Tex. App.—Austin 1993, writ denied) (discussing self-dealing of trustee as defined in jury charge); *see also Gonzales v. Am. Title Co.*, 104 S.W.3d 588, 598 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (discussing self-dealing of escrow agent who "places its interests in conflict with its obligations to the beneficiaries").

At the heart of all self-dealing transactions is a conflict between the best-interests of fiduciary and the beneficiaries, as the Court in *Jochec v. Clayburne* stated in a case concerning self-dealing:

> The duty of fidelity and the duty not to self-deal are substantially related. In fact, we have difficulty imagining how the duty not to self-deal could be violated without a threshold violation of the duty of fidelity. By the very nature of the act, a trustee may self-deal (profit to the detriment of the beneficiaries) only by

> asserting the trustee's own interest before that of the beneficiaries. In order to assert the trustee's own interest over the beneficiaries, however, a conflict of interest must first exist.

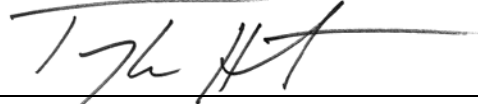
Jochec v. Clayburne, 863 S.W.2d 516, 521, 1993 Tex. App. LEXIS 2526, *16 (Tex. App. Austin Sept. 15, 1993).

Stephen Hopper, Laura Wassmer—even Jo Hopper—have testified that the Bank controlled the "fiduciary" or "master" account. *Before* Jo Hopper filed her lawsuit seeking, in part, removal of the Bank as Independent Administrator, Tom Cantrill of Hunton & Williams wrote in an e-mail that the "only sensible" path forward with the Hopper Estate was a 149A accounting and discharge, which would have finished the Bank's involvement with this Estate. Rather than listening to its Counsel and pursuing this path, the Bank elected to not pursue a 149A accounting and discharge. Instead, it *leveraged its position of control over the fiduciary account* knowing full well that it was in "litigation mode" in order to drain it of money to fund what it perceived to be an impending legal threat. That is *exactly* what the Bank did.

Moreover, as was revealed during Tom Cantrill's testimony, the Bank made a secret loan to Hunton & Williams—completely without the Heirs knowledge or consent—that purported to encumber the Estate. This "loan" was for Hunton & Williams' legal fees that exceeded the *staggering* $3 million that had already been paid to Hunton & Williams since the inception of the fiduciary account. *The net effect of this secret "loan" was to benefit the Bank—as fiduciary—at the clear expense of the Bank's beneficiaries—Stephen Hopper and Laura Wassmer*.

It is virtually inconceivable how the evidence in this trial could more clearly establish self-dealing by the Bank.

Respectfully submitted,



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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 September 25, 2017, in accordance with the Texas Rules of Civil Procedure to:

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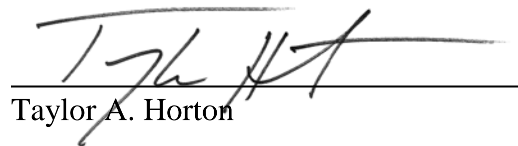
in its Capacity as Independent Administrator of the
Estate of Max D. Hopper, Deceased, and in its Corporate Capacity



Taylor A. Horton