CAUSE NO. PR-11-3238-3

IN RE: ESTATE OF MAX D. HOPPER DECEASED	§	**IN THE PROBATE COURT**
JO N. HOPPER *Plaintiff*	§	**NO. 1**
v.	§	
JPMORGAN CHASE BANK, N.A. STEPHEN B. HOPPER and LAURA S. WASSMER *Defendants.*	§	**DALLAS COUNTY, TEXAS**

LAURA S. WASSMER AND STEPHEN B. HOPPER'S
TRIAL BRIEF ON JPMORGAN CHASE BANK, N.A.'s SELF-DEALING

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Stephen B. Hopper (Hopper) and Laura S. Wassmer (Wassmer)(collectively "the Heirs"), and present the Court with this Trial Brief on the JPMorgan Chase Bank, N.A.'s Self-Dealing and would show the Court as follows:

I.
Sum and Substance of this Trial Brief: A Question to the Jury as to the Bank's Self-Dealing is Appropriate and Wholly Supported by the Law

A jury question to the Court as to whether JP Morgan Chase Bank, N.A. (the "Bank") breached its fiduciary duties to the Heirs by engaging in self-dealing is appropriate. Texas law allows for such an instruction, and the facts of this case support such an instruction in the charge. The Heirs allege that the Bank engaged in self-dealing in two main ways:

- The Bank engaged in self-dealing by using the funds in the Estate for the Bank's own personal benefit in paying attorneys at Hunton & Williams (1) to conduct administrative work that the Bank itself was capable of doing but wanted to outsource to Hunton & Williams to benefit the Bank and Hunton & Williams; and (2) to engage in litigation to protect the Bank's own interests above that of the Heirs and the Estate.

- The Bank engaged in self-dealing by taking out a loan from the JPMorgan corporate banking division in the name of the Estate of almost $1,000,000 and then did not give these funds to the Estate but instead transferred the funds to Hunton & Williams to pay the Bank's own attorney fees. Doing so not only created a liability of the Estate for the benefit of the Bank and Hunton & Williams but also the Heirs as the Bank now seeks to hold them personally liable for amount of the Loan. And the Bank took out this loan to benefit itself and Hunton & Williams without the consent or even the knowledge of the Estate's Beneficiaries, i.e, the Heirs.

These transactions are the very definition of self-dealing and are referred to in this brief collectively as the "Self-Dealing Transactions."

II.
The Heir's Damages

The Heirs have sustained substantial damages as s direct result of the Bank's self-dealing. $3,465,175.97 was taken from the master account by the Bank—the Heirs' fiduciary—to fund the Bank's legal defense. Prior to incurring these fees, the Bank's own lawyer has admitted that stepping down as IA was the only sensible course of action. Rather than following the advice of their lawyer, the Bank persisted in its course and frittered away millions of dollars that rightfully should have been distributed to the Heirs.

And now the Bank is attempting to hold the Beneficiaries of the Estate personally liable for an almost $1,000,000 loan the Bank took out against the Estate and in the Estate's name to benefit the Bank and Hunton & Williams .

III.
Texas Law's Definition of Self-Dealing

There is of course no dispute that the Bank as Independent Administrator of the Estate of Max D. Hopper (the "Estate") owes and continue to owe the Heirs various fiduciary duties as Beneficiaries of that Estate. *Humane Soc'y, Etc. v. Austin Nat'l Bank*, 531 S.W.2d 574, 577 (Tex. 1975)

The Heirs have alleged that the Bank has breached those fiduciary duties in various ways, including by engaging in the Self-Dealing Transactions.

Under Texas law, the elements of a breach of fiduciary duty claim are: (1) a fiduciary relationship between the plaintiff and defendant; (2) the defendant must have breached his fiduciary duty to the plaintiff; and (3) the defendant's breach must result in injury to the plaintiff or benefit to the defendant. *Jones v. Blume*, 196 S.W.3d 440, 447 (Tex. App.—Dallas 2006, pet. denied). The fiduciary duties of an executor of an estate are the same as the fiduciary duties of a trustee. *Humane Soc'y, Etc. v. Austin Nat'l Bank*, 531 S.W.2d 574, 577 (Tex. 1975). As trustee of the estate's property, the executor is subject to high fiduciary duties. *Id*. at 577. As a fiduciary, an executor has a duty to protect the beneficiaries' interest by fair dealing in good faith with fidelity and integrity. *Geeslin v. McElhenney*, 788 S.W.2d 683, 685 (Tex. App.—Austin 1990, no writ). His personal interests may not conflict with his fiduciary obligations to the estate. *See Humane Soc'y, Etc*., 531 S.W.2d at 577.

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").

Mims-Brown v. Brown, 428 S.W.3d 366, 374-375 (Tex. App. – Dallas, 2014, no pet.)

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 (Tex. App. -- Austin Sept. 15, 1993, no writ).

A trustee of a trust or representative of an estate breaches his fiduciary duty if he takes out a loan in the name of the trust or estate for his own personal benefit. *See Guaranty Bank v. National Surety Corp*., 508 S.W.2d 928, 932 (Tex. Civ. App. -- Dallas Mar. 21, 1974, no writ).

IV.
The Bank Engaged in Self-Dealing Under Texas Law

Here, there can be no dispute that it was not in the best interest of the Estate and the Beneficiaries of the Estate for almost $4 million dollars to be drained from the Estate for the purposes of paying the Bank's attorneys at Hunton & Williams.

There's also no dispute that the Bank benefitted by being able to have the Estate pay the Bank's attorneys' fees at Hunton & Williams (1) to conduct administrative work that the Bank itself was capable of doing but wanted to outsource to Hunton & Williams to benefit the Bank and Hunton & Williams; and (2) to engage in litigation to protect the Bank's own interests above that of the Heirs and the Estate.

The Bank also cannot dispute that it benefitted by using the Estate to loan money to itself to pay its attorneys' fees to Hunton & Williams.

The Bank cannot legitimately claim that it had no choice but to rack up these fees and keep paying Hunton & Williams. The evidence presented at trial shows that the Bank admits that it could have stepped down as Independent Administrator, and that Jo Hopper and the Heirs wanted

the Bank to step down. But it also realized it was facing a potential breach of fiduciary duty claim. Rather than step down and have to pay attorneys' fees itself to defend any such claim if it was forthcoming, the Bank chose to stay on as administrator and use the Estate as its own personal piggy bank and loan collateral to pay additional attorneys' fees to Hunton & Williams.

IV.
Self-Dealing Under Texas Law Includes a Fiduciary Giving a Benefit to a Third Party at the Expense of the Estate and its Beneficiaries

The Bank in this instant case suggests that the payment of the fees out of the Estate and the loan benefited Hunton & Williams and not itself and therefore could not constitute self-dealing. This argument is incorrect on two fronts.

First, the fact that the Estate paid the Bank's fees owed to Hunton & Williams fees means that the Bank didn't have to pay those fees, which of course confers a benefit on the Bank.

Second, a fiduciary commits self-dealing if it engages in a transaction to gain a benefit for itself ***or any third person*** at the expense of the estate or trust and therefore its beneficiaries. Therefore, the Bank using the Estate to benefit Hunton & Williams to the detriment of Estate and its beneficiaries can constitute self-dealing.

For example, the Dallas Court of Appeals has upheld a jury instruction defining self-dealing as follows:

> "Self-dealing" as used herein means the Trustee used the advantage of its position to gain any benefit for the Trustee, other than reasonable compensation, ***or any benefit for any third person, firm, corporation, or entity,*** at the expense of the Trust and its beneficiaries.

Grider v. Boston Co., 773 S.W.2d 338, 343, (Tex. App. Dallas 1989, no writ.)(emphasis added).

Similarly, the Dallas Court of Appeals held that there was sufficient evidence to uphold a jury's finding of self-dealing by a bank acting as trustee where that bank sold stocks of a trust to

one of its lenders for below market value. *InterFirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882, 905 (Tex. App. -- Dallas 1987, no pet.)

The Dallas Court of Appeals stated in relevant part as follows:

> In the present case, if InterFirst had sold the stock to Southwest Pump Company at fair market value, there would have been no damage to the beneficiaries. If InterFirst had made a diligent effort to get the best price possible for the stock by publicizing its sale, by notifying the beneficiaries, by getting an outside appraisal, and by then accepting the highest offer, its actions would not have been in bad faith. If InterFirst had not been in the position of obtaining an advantage for itself as a lender to Southwest Pump Company, a self-serving motive could not be inferred from the situation. But the combination of these three factors presents circumstances evincing bad faith and self-dealing to the detriment of the beneficiaries of the trusts.
>
> The same evidence which was offered to support bad faith also supports self-dealing. The circumstances surrounding the sale show that the trustee did not put forth a proper effort to obtain the best price possible for the stock. The price of one-third of the market value is a fact from which inferences of bad faith and self-dealing can be drawn. The trustee admits that the self-serving motive existed to the extent that the bank did not want the stock to cost Southwest Pump Company too much, nor did the trustee want to see a sale of the stock made which could result in a change in the management of Southwest Pump Company. Thus, the jury had a basis from which to conclude that the trustee acquired a gain by reason of its trusteeship. Under these circumstances, we find sufficient evidence in the record to uphold the jury's finding on both bad faith and self-dealing.
>
> *Id.*

Here, there is evidence that the Bank paid excessive fees out of the Estate -- and even took out a loan against the Estate to pay additional fees – for the benefit of the Bank and Hunton & Williams and to the detriment of the Estate. Therefore, a self-dealing question to the jury is appropriate.

V.
There is No Statutory Basis That Authorizes the Bank's Conduct

Furthermore, the Bank cannot claim (as it alleges in its expert reports) that it was "authorized" to take these fees from the Estate pursuant to:

- Texas Estates Code 404.0037(a)[1](concerning an Independent Administrator or Executor's defense of a removal action in good faith)
- Texas Estates Code § 352.051[2] (allowing, after *"**proof satisfactory to the Court***," the administrator's "reasonable attorney's fees necessarily incurred in connection with the proceedings and management of the estate.")
- Texas Civil Practice & Remedies Code § 37.009, which is part of the Uniform Declaratory Judgments Act (providing that "in any proceeding under this chapter, the court may ***award*** costs and reasonable and necessary attorney's fees as are equitable and just.")

Each of these statutes requires that ***before*** such fees are authorized, there must be finding by the Court that such fees are allowable. Furthermore, the Estates Code does not authorize the payment of such fees when they are not incurred for the benefit of the Estate.

Texas Estates Code 404.0037(a):

This statutory provision only authorizes payment of fees out of the Estate *at the conclusion of the removal action **after** there is a finding of good faith on the part of the administrator*. "An independent executor may not be awarded expenses or attorney's fees until the removal issue is resolved." Texas Litigation Guide, Dorsaneo, 3-60 Texas Probate, Estate and Trust Administration § 60.04 (2016)(citing *Klein v. Klein*, 641 S.W.2d 387, 390 (Tex. App. – Dallas, 1982, no pet.).

Furthermore, even if the Bank had followed proper procedures to obtain payment of these fees from the Estate, the statute does not give the Bank carte blanche to take whatever it wants

[1] Formerly cited as Tex. Prob. Code §149C
[2] Formerly cited as Tex. Prob. Code § 242

from the Estate for payment of fees for any purpose. Instead, the law holds that payment of such fees out of the Estate are only authorized when they are shown to benefit the estate. *In re Estate of Washington*, 289 S.W.3d 362, 369 (Tex. App. Texarkana June 30, 2009, no pet). "Such fees should not be authorized where the evidence fails to show that the contest for the administratorship was in the interest of the estate, but indicates it was rather in the interest of the removed administrator…" *Id.*

Texas Estates Code § 352.051:

This statutory provision only authorizes payment of fees out of the Estate only after *"proof satisfactory to the Court. " Id.*

And again, even if the Bank had followed proper procedures to obtain payment of these fees from the Estate, the statute does not give the Bank carte blanche to take whatever it wants from the Estate for payment of fees for any purpose. Specifically, this statute does not authorize payment of attorneys' fees out of the Estate that have been incurred in litigation where the Independent Administrator's wrongdoing is basis for litigation. *Tindall v. Texas Dep't of Mental Health and Mental Retardation*, 671 S.W.2d 691, 693 (Tex.App.—San Antonio 1984, writ ref'd n.r.e.); *Estate of Norma L. Bessire*, 399 S.W.3d 642, 650, 2013; (Tex. App. Amarillo Apr. 2, 2013).

As the Court in Bessire stated:

> "Section 242 [currently section 352.0151] provides that the personal representative shall be entitled to all reasonable attorney's fees necessarily incurred in connection with proceedings and management of an estate. However, when the personal representative's own omission or malfeasance is at the root of the litigation, the estate will not be required to reimburse the personal representative for his attorney's fees."

Bessire, 399 S.W.3d at 650.

Texas Civil Practice & Remedies Code § 37.009:

This statute plainly states that the "Court may award reasonable and necessary attorneys' fees as are equitable and just." *Id.* The statute speaks for itself and there is no dispute that no "award" has been made. Furthermore, the statute does not authorize a fiduciary to take such an award out of the trust or estate belonging to beneficiaries

The Bank never obtained any ruling or finding from the Court under any of these statutes before it took the fees from the Estate. The Bank therefore did not comply with any of these statutes as a matter of law.

The Bank is essentially asking for permission to take money from the bank after robbing it. It put its own interests ahead of the Beneficiaries and the Estate to drain the Estate of almost $4 million dollars to its pay its own attorneys and is now, ex-post facto, asking the Court and the jury for permission to do so. None of these statutes authorize such conduct.

Furthermore, even if these statutes did authorize the payment of attorneys' fees, it does not give the Bank carte blanche to use an Estate to pay its attorney's fees that are of no benefit to the Estate.

And finally, none of these statutes address, much less authorize, a fiduciary to take out a loan against the Estate for that fiduciary to pay its lawyers for litigation against the beneficiaries of that Estate.

VI.
There is No Contractual Basis That Authorizes the Bank's Conduct

Furthermore, the Fee Agreement itself does not authorize or otherwise give the Bank permission to engage in self-dealing. In fact, it cannot as a matter of law. The fiduciary duty not to self-deal cannot be modified or waived. *See Grider v. Boston Co*., 773 S.W.2d 338, 343 (Tex. App.--Dallas 1989, writ denied); see also *Neuhaus v. Richards*, 846 S.W.2d 70, 76 (Tex. App.--Corpus Christi 1992, no writ); *Interfirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882, 888 (Tex. App.--Texarkana 1987, no writ).

And the Fee Agreement doesn't even attempt to make such a waiver. Nowhere in the Fee Agreement does it state that the Beneficiaries or the Estate are waiving the Bank's fiduciary duties to them, much less giving the Bank permission to engage in self-dealing and put its own interests ahead of those of the Beneficiaries and the Estate.

VII.
PRAYER

For these reasons, the Heirs request that this Honorable Court provide a question to the jury in the charge that addresses the Bank's self-dealing and damages to Estate and Heirs as a result of the Bank's conduct. The Heirs further request any other relief in law or equity to which they may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of the above was served on each attorney of record or part in accordance with the Texas Rules of Civil Procedure.

/s/ James S. Bell
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