NO. PR-11-3238-1

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

DEFENDANT JPMORGAN CHASE BANK, N.A.'S SUPPLEMENTAL MOTION IN LIMINE REGARDING CLOSING ARGUMENTS

Defendant JPMorgan Chase Bank, N.A. ("JPMorgan"), as Independent Administrator of the Estate of Max Hopper, Deceased (the "IA"), and in its corporate capacity (the "Bank"), files this Motion in Limine, and shows as follows:

The matters addressed by this motion are either inadmissible or are so highly prejudicial that, even though an objection would be timely made and sustained, irreparable harm would be done to JPMorgan. Permitting arguments to jurors on any of these matters would confuse the issues, mislead the jury, and create the danger of unfair prejudice. Sustaining objections to such arguments would not prevent prejudice and would create potentially incurable error.

JPMorgan moves for an Order in Limine restricting Plaintiff, Jo Hopper ("Mrs. Hopper") and Defendants, Stephen Hopper ("Dr. Hopper") and Laura Wassmer ("Ms. Wassmer") (collectively, the "Heirs"), and their counsel to refrain from doing or saying, directly or indirectly, anything in the presence of the jury that would in any way advise, suggest, or imply

any of the following matters, or from doing any of the following acts, without Mrs. Hopper or the Heirs' counsel first approaching the bench, out of the presence of the jury or jury panel, and obtaining approval from the Court:

1. **Argument that JPMorgan is liable because it should have "resigned" around August 2011.**

Neither Mrs. Hopper nor the Heirs have pled or disclosed any claims based upon the theory that JPMorgan should have "resigned" as Independent Administrator at any time. Accordingly, the Parties and their counsel should be prohibited from arguing that JPMorgan is liable for breach of contract, breach of fiduciary duty, or under some other tort because it did not resign around August 2011. *See* TEX. R. CIV. P. 301 ("The judgment of the court shall conform to the pleadings….").

2. **Argument to Award Damages Based Upon an Undisclosed Method of Calculating Economic Damages.**

Similarly, the Heirs have never disclosed any calculation of damages based upon the theory that JPMorgan should have resigned as Independent Administrator around August 2011. Because the Heirs have not pled for or disclosed such damages during discovery, any argument that the jury should award the same should be prohibited. *See C.A. Walker Const. Co. v. J.P. Sw. Concrete, Inc.*, 01-07-00904-CV, 2009 WL 884754, at *7 (Tex. App.—Houston [1st Dist.] Apr. 2, 2009, no pet.) ("We sustain the third issue to the extent the trial court erred if it based the damages award on the undisclosed method of calculating economic damages.").

3. **Arguments that Ask the Jury to Consider the Case from the Heirs' or Mrs. Hopper's Perspective ("Golden Rule" Argument)**

The Texas Supreme Court has ruled that arguments that ask the jury to put themselves in the shoes of the plaintiff or defendant are improper. *Fambrough v. Wagley*, 169 S.W.2d 478, 482 (Tex. 1943) ("To our minds, the argument used in this case amounts to a direct appeal to the jury

to consider the case from an improper viewpoint, in that its effect is to ask the members of the jury to put themselves in the defendant's place[.]") Various Texas Courts of Appeal have routinely cited and applied this rule as well. *Arocha v. State Farm Mut. Auto. Ins. Co*., 203 S.W.3d 443, 447 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (citing *Fambrough* 169 S.W.2d at 482) ("An argument that asks the jury to consider the case from an improper viewpoint, such as by putting themselves in the place of a party in order to decide the case as they would want a jury to decide it if they were that party is improper."); *Arthur J. Gallagher & Co. v. Dieterich*, 270 S.W.3d 695, 708 (Tex. App.—Dallas 2008, no pet.); ("The Company correctly argues that appeals to the jury to place themselves in the shoes of a litigant generally are improper."). *Sanchez v. Espinoza*, 60 S.W.3d 392, 395 (Tex. App.—Amarillo 2001, pet. denied) ("Admittedly, courts have held as improper argument that asks the jury to stand in the shoes of a party.").

Any argument asking the jury to consider the case from a perspective other than their own is improper, would mislead the jury as to their proper function, and should not be permitted by this Court. *See* Tex. R. Evid. 401, 403.

4. <u>Improper Closing Arguments that Call Upon the Jury to "Send A Message"</u>

The Texas Supreme Court has held that closing arguments that call upon the jury to "send a message" are inappropriate. *Phillips v. Bramlett*, 288 S.W.3d 876, 883 (Tex. 2009) (stating "counsel's plea to send a message to the doctors" was improper). This is further underlined by the requirement that the court's charge to the jury contain the admonitory instruction "[d]o not let bias, prejudice, or sympathy play any part in your decision." TEX. R. CIV. P. 226a (instructions prescribed by Supreme Court Order, Part III, Paragraph 1). Arguments that ask the

jury to "send a message" improperly inject emotion into the function of the jury, cause unfair prejudice, and should not be permitted.

Wherefore, JPMorgan respectfully prays that the Court instruct counsel for Mrs. Hopper and counsel for the Heirs to refrain from making any of the above improper arguments during closing statements.

Respectfully submitted,

HUNTON & WILLIAMS LLP

By: /s/ Grayson L. Linyard
John C. Eichman
State Bar No. 06494800
jeichman@hunton.com
Grayson L. Linyard
State Bar No. 24070150
glinyard@hunton.com

1445 Ross Avenue, Suite 3700
Dallas, Texas 75202-2700
Telephone: (214) 468-3300
Telecopy: (214) 468-3599

ATTORNEYS FOR JPMORGAN CHASE BANK, N.A. IN ITS CAPACITY AS INDEPENDENT ADMINISTRATOR OF THE ESTATE OF MAX D. HOPPER, DECEASED AND IN ITS CORPORATE CAPACITY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served on the following counsel of record via the electronic service manager and/or by email on this 24th day of September, 2017.

Alan S. Loewinsohn
Jim L. Flegle
Kerry F. Schonwald
LOEWINSOHN FLEGLE DEARY SIMON L.L.P.
12377 Merit Drive, Suite 900
Dallas, Texas 75251
alanl@lfdslaw.com
jimf@lfdslaw.com
kerrys@lfdslaw.com
Attorneys for Plaintiff

Anthony L. Vitullo
Taylor A. Horton
FEE, SMITH, SHARP & VITULLO, L.L.P.
Three Galleria Tower
13155 Noel Road, Suite 1000
Dallas, Texas 75240
lvitullo@feesmith.com
thorton@feesmith.com
Attorneys for Defendants
Laura Wassmer and Stephen Hopper

James S. Bell
JAMES S. BELL, PC
5942 Colhurst
Dallas, Texas 75230
james@jamesbellpc.com
Attorneys for Defendants
Laura Wassmer, Stephen Hopper

/s/ Grayson L. Linyard
Grayson L. Linyard