NO. 05-18-00558-CV

IN THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS AT DALLAS

STEPHEN B. HOPPER AND LAURA S. WASSMER

Appellants

V.

JOHN MALESOVAS, D/B/A MALESOVAS LAW FIRM, AND FEE, SMITH, SHARP, & VITULLO, LLP

Appellees

BRIEF OF APPELLANTS

From the Probate Court No. 1, Dallas County, Texas,
Cause No. PR-11-03238-1, Hon. Brenda Hull Thompson, Presiding.

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ORAL ARGUMENT REQUESTED

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ABBREVIATIONS

PARTIES:

"The Clients" means Appellant Stephen B. Hopper and Appellant Laura Wassmer

"The Lawyers" means Appellee John Malesovas, d/b/a Malesovas Law Firm, and Appellee Fee, Smith, Sharp & Vitullo, LLP

"JP Morgan" means JP Morgan Chase, the adverse party in the underlying probate proceeding.

DOCUMENTS:

"Fee Agreements" means, collectively, the two "Contingency Fee Contract[s] of Representation" signed by Dr. Hopper and Ms. Wassmer individually. (Tab 3, CR:93; Tab 4, CR:101.)

"Motion" means, collectively, the Motion to Compel Arbitration, filed April 11, 2016, and the Supplement to Motion to Compel Arbitration, filed April 20, 2018. (CR:63, 115.)

RECORD REFERENCES:

References to the Corrected Clerk's Record shall be in the form of "CR:[pg#]"

References to the Supplemental Clerk's Record shall be in the form of "Supp.CR."[1]

References to the Reporter's Record shall be in the form of "[vol#]RR:[pg#]"

References to the Appendix shall be in the form of (Tab[#], [record cite]).

[1] As of the filing of this brief, the Clients have requested that the clerk supplement the Clerk's Record with several documents filed in the trial court that were not included in the original Clerk's Record. Because the supplemental record has not yet been filed, the Clients will cite generally to the Supp.CR.

STATEMENT OF THE CASE

Nature of the Case:

This is an appeal from a temporary injunction that prevents the Clients from accessing *any* portion of settlement proceeds that belong to them while their former Lawyers' claim—to receive 45% of those proceeds—is resolved in arbitration.

Course of Proceedings:

After discovering a number of significant errors and omissions by their Lawyers in prosecuting the underlying probate court litigation, the Clients negotiated a settlement agreement with the adverse party (JP Morgan) and terminated their Lawyers for cause. (CR:169, 171.) One day later, the Lawyers sued the Clients in probate court to recover 45% of the settlement the Clients had reached with JP Morgan—even though the controlling Fee Agreements plainly require arbitration of all fee disputes. (CR:11, 18, 93, 101.)

The Clients sought to compel the fee dispute into arbitration. (CR:33, 63, 115.) The Lawyers opposed arbitration and asked the probate court to enjoin any payment of the settlement proceeds to the Clients through both a temporary restraining order (which the probate court granted) and later a request for a temporary injunction. (CR:25; Tab 1, CR:58.)

Probate Court's Disposition:

Over the Clients' objections, the probate court deferred ruling on the Clients' motion to compel arbitration and instead issued an injunction that prohibits JP Morgan from disbursing any of the settlement proceeds to the Clients. (Tab 2, CR:292.) Several weeks later, the probate court compelled the case to arbitration and stayed the litigation—but did not take down its temporary injunction.

STATEMENT REGARDING ORAL ARGUMENT

The issues in this appeal are straightforward and the law is well-established. But if the Court believes oral argument would be helpful, Appellants wish to participate.

ISSUES PRESENTED

1. Did the probate court abuse its discretion by making merits determinations and issuing injunctive relief in a lawyer-client dispute that must be resolved in arbitration?

2. Did the probate court abuse its discretion by issuing a temporary injunction when there is no evidence that the settlement funds will be lost or depleted?

3. Alternatively, should the probate court's temporary injunction be modified because it improperly enjoins the Clients from receiving *any* settlement proceeds, including the portion to which the Lawyers have no possible claim?

STATEMENT OF FACTS

This is an interlocutory appeal from a temporary injunction in which the Lawyers succeeded in enjoining their Clients from receiving *any* proceeds from a settlement agreement signed in April 2018—even though the maximum the Lawyers can possibly obtain is 45% of those proceeds, plus an additional amount for reimbursable expenses. The relevant facts giving rise to the probate court's unauthorized, overbroad injunction are set forth below.

A. The Lawyers were terminated for cause based on numerous errors and omissions committed in the underlying probate litigation.

The fee dispute in this case arises from the administration of the Estate of Max D. Hopper, and specifically, from a lawsuit that was tried to a verdict in the fall of 2017. *See In re Estate of Hopper*, Case No. PR-11-03238-1 (Dallas County Probate Court No. 1). In that suit, the Clients asserted claims against JP Morgan Chase Bank, N.A., as the administrator of their late-father Max Hopper's estate. (*See* CR:93.) The Clients were represented in the probate litigation by the Lawyers, along with other counsel. (CR:93, 101; 3RR:40-41.)

The Lawyers represented the Clients pursuant to two separate "Contingency Fee Contract[s] of Representation," which were signed by Dr. Hopper and Ms. Wassmer individually (collectively, the "Fee Agreements"). (Tab 3, CR:93; Tab 4,

CR:101.)[2] The Fee Agreements stated that the Lawyers would represent the Clients in pursuing claims against JP Morgan and provided for a contingency fee of 45% if the case went to trial. (CR:94, 102.) The Fee Agreements also contained a broad, unlimited, and unambiguous arbitration provision:

> **20. ARBITRATION: It is Attorney's goal to maintain at all times a constructive and positive relationship with Client on the matter described above and on future matters in which Attorney may perform services for Client. However, should a dispute arise between Attorney and Client, a prompt and fair resolution is in the interests of all concerned. To this end, if any controversy or claim arises out of is related to this agreement, any services provided by Attorneys to Client in connection with Client's Claims, or any other matter that may arise between Client and Attorney (including malpractice claims and fee disputes), Attorneys and Client both waive any right to bring a court action or have a jury trial and agree that the dispute shall be submitted to binding arbitration to be conducted in Dallas, Texas before the American Arbitration Association ("AAA") in accordance with the Commercial Arbitration Rules of the AAA with one arbitrator who must be an attorney licensed to practice law in the State of Texas..**

(CR:99, 106.) (highlighting added).

After a favorable jury verdict in the underlying litigation—but prior to the entry of judgment—the Clients settled their claims against JP Morgan for a confidential amount. (*See* CR:13, 71, 317.) One significant driver of that settlement was that, in the course of post-verdict proceedings, the Clients discovered the Lawyers had committed a number of errors and omissions that would have made it very difficult for the Clients to obtain (and protect on appeal) a favorable judgment on the jury's verdict. (CR:169, 171.) So on April 5th, after

[2] The two agreements are largely identical, with the exception of some interlineations made by Ms. Wassmer regarding the scope of representation. (CR:101.) The arbitration provisions are identical, and thus the two agreements will be referenced collectively unless otherwise noted.

entering into the settlement agreement with JP Morgan, the Clients terminated the Lawyers for cause. (*Id.*)

The Clients contend the contingency fee arrangement in the Fee Agreements is unenforceable for a number of reasons, including because the Lawyers were fired for cause. (*See id.*) The Clients have never suggested the Lawyers are not entitled to *any* fee; they contend only that the Lawyers should be limited to the reasonable value of their services under the circumstances, rather than 45% of the Clients' settlement proceeds. (*Id.*).

B. Despite waiving "any right to bring a court action" and agreeing to submit all disputes to arbitration, the Lawyers sued the Clients in probate court.

One day after being terminated, the Lawyers sued the Clients—through petitions in intervention in the probate proceeding—to recover 45% of the Clients' settlement proceeds. (CR:11, 18.) The Lawyers swore the Fee Agreements were "valid and enforceable," but said nothing about the binding arbitration provision contained therein. (*E.g.,* CR:20.) The Lawyers instead asked the probate court to declare they are entitled to "immediate possession" of 45% of the settlement proceeds. (CR:21-23.) The Lawyers also sought temporary injunctive relief, claiming the settlement proceeds would otherwise "not be protected from unauthorized distributions, conversion, or bank failure." (CR:25.)

The Clients immediately objected to the petitions in intervention on a number of grounds. (CR:33.) Most notably, the Clients directed the court to the mandatory arbitration provision in the Fee Agreements and asked the court to "strike the interventions and/or compel the Intervenors to pursue their claims in arbitration." (CR:35; 2RR:14-15.) The Clients also objected that there was no imminent harm, and no evidence the funds would be lost, as they had offered to keep 45% of the settlement funds in their lawyer's or a third-party trust account—plus an additional amount for any reimbursable expenses—pending resolution of the fee dispute in arbitration. (2RR:15-19, 42.) The probate court overruled both objections and instead granted a temporary restraining order that required JP Morgan to hold any settlement proceeds in a safekeeping account. (CR:58, 62.) Further, and without any pleading from the Lawyers requesting discovery, the court ordered the Clients to appear for emergency depositions (within one week of the TRO) and set a temporary injunction hearing for April 24. (CR:61, 62.)

C. The probate court refused to hear the Clients' motion to compel arbitration before conducting an evidentiary hearing on the Lawyers' merits arguments for injunctive relief.

In the meantime, the Clients filed a "Motion to Compel Arbitration" (the "Motion") that again invoked the mandatory arbitration provision in the Fee Agreements, explained how the Lawyers' claims were clearly a "fee dispute" covered by that provision, and requested an order compelling arbitration. (CR:33-

35; CR:63.)[3] The Clients also sent two letters to the probate court requesting an immediate hearing on their motion, in light of authorities holding that a trial court abuses its discretion by deferring a ruling on a motion to compel arbitration in favor of proceeding on the merits. (CR:70, 74.) The court agreed to set the Motion for hearing on April 24, 2018—the same day as the hearing on the Lawyers' request for a temporary injunction. (CR:76.)

But the probate court did not hear the Motion on the 24th. At the start of the hearing, the Clients requested that the Motion be heard first—again in light of the authorities prohibiting courts from deferring their ruling on motions to compel arbitration—but the Court refused that request. (3RR:6, 13-14.) Instead, the Court permitted the Lawyers to argue the merits of their claims in the fee dispute and their claimed need for a temporary injunction. (3RR:7-13.) By the time the Lawyers' evidentiary presentation on the temporary injunction had concluded, the Court had no time left to hear arguments on the Motion. (3RR:44-48.) As a result, the hearing on the Motion was reset for May 8th. (CR:297.)

[3] The Clients later filed a Supplement to Motion to Compel Arbitration, to provide additional arguments and evidence in support of arbitration. (CR:115.) Unless otherwise noted, the Motion and Supplement will be referenced collectively as the "Motion."

D. Despite a pending motion to compel arbitration, the probate court entered a temporary injunction that made various "findings" about the merits of the fee dispute.

Just a few hours after the hearing, and over the Clients' repeated objections, the probate court granted a temporary injunction that purported to make various "findings" about the merits of the fee dispute. (Tab 2, CR:292.) Among other things, the probate court found that the following facts "appear to be true:"

- The Contingency Agreement was "valid and enforceable."
- The Lawyers have filed "valid and enforceable" attorneys' fees liens in support of the Settlement.
- The Lawyers "fully performed; or at the very least, substantially and materially performed all of their duties, responsibilities, and obligations under the Contingency Agreement[.]"
- "Clients are estopped, quasi-estopped, and/or have waived any and all defenses, if any, that could or would be lodged to the CA or the quality of the legal services performed by Intervenors."

(CR:293-95.) As a result, the Court concluded that the Lawyers are "entitled to immediate payment of a portion of the settlement funds once they become due and payable under the terms of the settlement." (CR:294.)

In light of those "findings," the Court ordered the Clients to deposit all of the settlement proceeds due to them—both the 45% portion in dispute *and* the remaining 55%—in a safekeeping account with JP Morgan "to be treated as a deposit in the registry of the Court." (Tab 2, CR:296.) In other words, even though it is clear that only 45% of the settlement funds could possibly be owed to

the Lawyers (plus any reimbursable expenses), the Court denied the Clients the right to recover the portion that undisputedly belongs solely to them (up to 55%).

Having secured an injunction despite waiving all rights to bring a court action and without having to honor the arbitration provision in their own Fee Agreements, the Lawyers turned their attention to obtaining a dispositive final ruling on the merits of the fee dispute from the probate court. They moved for summary judgment on their so-called "secured and fully vested property and ownership right to the disputed funds," seeking immediate possession of 45% of the settlement proceeds. (CR:145.) The Lawyers set their summary-judgment motion for hearing on May 23. (CR:301.)

E. The probate court finally heard and granted the Clients' motion to compel arbitration, but did not take down its temporary injunction.

The court finally heard the Motion on May 8th. (4RR:1-41.) By this point, the Lawyers had no choice but to concede that the arbitration provision is valid and enforceable. (CR:79.) Indeed, the Lawyers "fully embrace[d] the language and contractual obligations of the parties as set forth and articulated in [the Fee Agreements] including, specifically, its arbitration provision." (CR:79.) The Lawyers nevertheless argued that "there is nothing to arbitrate" because the Clients should be estopped from denying them their contingency fee. (CR:81.)

The probate court granted the Motion on May 10, 2018, thus finally compelling arbitration and staying the litigation, but left the improperly-obtained temporary injunction in place. (Supp.CR.)

SUMMARY OF THE ARGUMENT

The temporary injunction should be reversed for three independent reasons.

First, the probate court abused its discretion by issuing an injunction rather than simply compelling the dispute to arbitration, as required by Texas law. In the face of binding arbitration agreements like those at issue here, trial courts have extremely limited authority to do anything other than enforce the arbitration agreement. The probate court far exceeded that authority by deferring its ruling on the Motion so that it could make merits determinations and issue injunctive relief. This was a clear abuse of discretion, as it intrudes on the province of the arbitrator and undermines the bargain struck by the parties in their arbitration agreement.

Second, the probate court had no authority enjoin the Clients from receiving the settlement proceeds under either the Federal Arbitration Act (FAA) or the Texas Arbitration Act (TAA). Under the FAA, courts cannot issue injunctions pending arbitration unless the parties' agreement expressly allows it—and the Fee Agreements do not. And although the TAA allows certain limited injunctions "in support of arbitration," that provision requires proof that the "subject matter of the

controversy" will be ***destroyed*** unless an injunction is entered. There was no such evidence here, and thus no basis for an injunction.

Third, and at a minimum, the injunction must be substantially narrowed so that only the disputed portion of the settlement funds (45%, plus any reimbursable expenses) is frozen pending arbitration. As it currently stands, the Clients are restrained from accessing even the undisputed portion of the settlement funds—up to 55%—rendering the injunction impermissibly overbroad and potentially subjecting the Lawyers to discipline by the State Bar for impeding their clients' access to these undisputed funds. If the injunction is not reversed in full (and it should be), it should at least be modified so that the Clients have access to the undisputed 55% portion of the settlement proceeds.

ARGUMENT

I. Standard of review.

"A temporary injunction is an extraordinary remedy and does not issue as a matter of right." *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002); *Allied Capital Partners, LP v. Proceed Tech. Res., Inc.*, 313 S.W.3d 460, 466 (Tex. App.—Dallas 2010, no pet.) ("A temporary injunction should be extraordinary, not routine."). To obtain a temporary injunction, the applicant bears the burden of offering competent evidence of each of the following elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a

probable, imminent, and irreparable injury in the interim. *Id.*; *In re Tex. Nat. Res. Conservation Comm'n*, 85 S.W.3d 201, 204 (Tex 2002) (orig. proceeding); *Allied Capital*, 313 S.W.3d at 464.

A trial court's grant of a temporary injunction is reviewed for an abuse of discretion. *Allied Capital*, 313 S.W.3d at 464. "The trial court abuses its discretion when it misapplies the law to established facts or when the evidence does not reasonably support the findings of probable injury or probable right of recovery." *Rugen v. Interactive Bus. Sys., Inc.*, 864 S.W.2d 548, 551 (Tex. App.—Dallas 1993, no pet.) (citing *State v. Sw. Bell Tel. Co.*, 526 S.W.2d 526, 528 (Tex. 1975)); *see also Branch Banking & Trust Co. v. TCI Luna Ventures, LLC*, No. 05-12-00653-CV, 2013 WL 1456651, at *2 (Tex. App.—Dallas April 9, 2013, no pet.).

II. The probate court abused its discretion in entering the temporary injunction.

The temporary injunction must be dissolved in its entirety for two reasons. *First*, the probate court had no authority to grant injunctive relief that included merits determinations before ruling on a pending motion to compel. *Second*, the probate court had no authority to grant injunctive relief under the limited exceptions permitting court intervention under either the FAA or the TAA, including because the Lawyers presented no evidence of any imminent risk that the settlement funds would be lost or depleted without injunctive relief—and there is no such risk.

A. Given a valid arbitration agreement, the probate court had no discretion to make merits rulings in issuing injunctive relief.

When parties have entered into a valid agreement to arbitrate, it is axiomatic that courts are empowered to do little more than to enforce that agreement, compel the parties to arbitration, and stay further judicial proceedings. *See* TEX. CIV. PRAC. & REM. CODE § 171.021; *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 56 (Tex. 2008); *In re FirstMerit Bank, N.A.,* 52 S.W.3d 749, 753–54 (Tex. 2001) (orig. proceeding). The probate court did eventually compel arbitration, but abused its discretion in deferring that ruling to first issue an injunction improperly addressing the merits of this dispute.

Because arbitration is intended to be an efficient alternative to litigation, motions to compel arbitration "should be resolved without delay." *In re Houston Pipe Line Co.*, 311 S.W.3d 449, 451 (Tex. 2009) (orig. proceeding); *see also In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185, 195 (Tex. 2007) (orig. proceeding) (noting that arbitration is intended to be a "rapid, inexpensive alternative to traditional litigation") (internal citations omitted). Thus, courts have no discretion to defer their ruling on a motion to compel arbitration in favor of merits discovery,[4] injunctive relief,[5] or summary judgment proceedings.[6] The probate

[4] *In re Houston Pipeline Co.*, 311 S.W.3d at 452 (granting mandamus where trial court ordered merits discovery "rather than ruling on the legal issues raised by the motion to compel [arbitration]"); *In re Susan Newell Home Builders, Inc.*, 420 S.W.3d 459, 462-63 (Tex. App.—Dallas 2014, orig. proceeding) (granting mandamus where trial court ordered discovery that "goes directly to the merits of [plaintiff's] claims" and deferred ruling on certain motions to

court violated this basic principle—and abused its discretion—in refusing to hear argument on the Motion until *after* it: (1) issued a temporary restraining order; (2) allowed merits discovery; (3) held an evidentiary hearing on the temporary injunction; and (4) issued a temporary injunction. (Tab 1, CR:58; Tab 2, CR:292; RR3:6-7, 13-14; *see also* CR:66, 70, 74, 116.)

Worse yet, the probate court exceeded its (even arguable) authority in issuing an injunction that addresses the merits of the dispute. As this Court recently held, "a party's right to arbitration encompasses a right to an arbitration unaffected by erroneously rendered judicial rulings on the case's merits." *Tantrum Street* 2017 WL 3275901, at *10. Premature merits rulings therefore can (and do) interfere with a party's right to a fair arbitration by influencing the arbitrator's independent determination of the issues. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith v. McCollum*, 666 S.W.2d 604, 609 (Tex. App.—Houston [14th Dist.],

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compel arbitration); *In re MHI Partnership, Ltd.,* 7 S.W.3d 918, 923 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding) (granting mandamus where trial court forced parties to litigate before ruling on motion to compel arbitration and holding "the trial judge had no discretion to defer his ruling until after discovery had been completed in the case").

[5] *In re MetroPCS Comms., Inc.*, 391 S.W.3d 329, 340 (Tex. App.—Dallas 2013, orig. proceeding) (granting mandamus where trial court granted TRO and set temporary injunction for hearing "without first ruling on relators' motions respecting the forum selection clause in question"); *see also Pinto Tech. Ventures, L.P. v. Sheldon*, 526 S.W.3d 428, 437 (Tex. 2017) (Texas courts may "draw analogies between forum-selection clauses and arbitration clauses, which are 'a specialized kind of forum-selection clause.'") (internal citations omitted).

[6] *Tantrum Street, LLC v. Carson*, No. 05-16-01096-CV, 2017 WL 3275901, at *9-10 (Tex. App.—Dallas July 25, 2017, orig. proceeding) (granting mandamus where trial court ruled on summary judgment motion while motion to compel arbitration was pending).

writ ref'd n.r.e.) (citing cases); *see also Grasso Enterprises, LLC v. CVS Health Corp.*, 143 F. Supp. 3d 530, 543 (W.D. Tex. 2015).

The probate court's injunction flies in the face of this binding precedent. After deferring its decision on the Motion so that the Lawyers' could put on evidence related to the merits of their claims, the court issued an injunction that purports to make a number of merits findings, including that the Lawyers "fully performed, or at the very least, substantially and materially performed all of their duties, responsibilities, and obligations under the [Fee Agreements]" and that the Clients "are estopped, quasi-estopped, and/or have waived any and all defenses, if any, that could or would be lodged to the [Fee Agreements] or the quality of the legal services performed by" the Lawyers. (Tab 2, CR:294.) These findings go to the heart of the fee dispute in the arbitration and thus improperly intrude on the province of the arbitrator. *Tantrum Street*, 2017 WL 3275901, at *9; *McCollum*, 666 S.W.2d at 609.

This overreach is particularly egregious because the parties incorporated the AAA Rules into their arbitration agreement, and thus the Lawyers could have secured any truly necessary relief from the arbitrator. (Tab 3, CR:99; Tab 4, CR:106.) The AAA Rules make clear that an arbitrator is authorized to enter injunctive relief if necessary to protect or conserve property. *See* AAA Commercial Arbitration Rule 37(a) (empowering arbitrator to "take whatever

interim measures he or she deems necessary . . . for the protection or conservation of property"). Thus, under the bargain struck by the Lawyers—and the agreements they drafted—the arbitrator, not the probate court, should have decided whether preliminary injunctive relief was necessary. *Flat Wireless, LLC v. Cricket Comms., Inc.*, No. 07-14-00036-CV, 2014 WL 812831, at *2 (Tex. App.—Amarillo Feb. 24, 2014, no pet.) (holding that "questions pertinent to the arbitration and within the authority of the arbitrator," including injunctive relief, "should be decided by the arbitrator where practicable").

The probate court thus abused its discretion in making merits determinations and issuing the challenged injunction. The injunction can and should be reversed for this reason alone.

B. The probate court had no basis for an injunction under either the FAA or the TAA.

The injunction should also be reversed because neither the FAA nor the TAA—both of which arguably apply to this dispute[7]—authorizes injunctive relief in the situation presented here.

[7] The Lawyers do not dispute that the FAA applies. Indeed, the Fee Agreements involved interstate commerce—the provision of legal services by Texas lawyers, in Texas litigation, to clients that reside in Oklahoma and Kansas respectively. 9 U.S.C. § 2; *In re L&L Kempwood Assocs., L.P.*, 9 S.W.3d 125, 127 (Tex. 1999) (orig. proceeding) (observing that the FAA "extends to any contract affecting commerce, as far as the Commerce Clause of the United States Constitution will reach"). Further, the Texas Supreme Court has held that "[t]he mere fact that a contract affects interstate commerce, thus triggering the FAA, does not preclude enforcement under the TAA as well" and that both laws will apply absent a conflict. *In re D. Wilson Const. Co.*, 196 S.W.3d 774, 779-80 (Tex. 2006).

Under the FAA, courts cannot issue preliminary injunctions pending arbitration unless the parties' agreement expressly allows it. *See e.g., Metra United Escalante, L.P. v. Lynd Co.,* 158 S.W.3d 535, 539-40 (Tex. App.—San Antonio 2004, no pet.); *Feldman/Matz Interests, L.L.P. v. Settlement Capital Corp.,* 140 S.W.3d 879, 886 (Tex. App.—Houston [14th Dist.] 2004, orig. proceeding); *McCollum*, 666 S.W.2d at 609. Because the Fee Agreements contain no such provision, the probate court had *no authority* under the FAA to grant injunctive relief. (*See* Tab 3, CR:99; Tab 4, CR:106.)

Under the TAA, there is a statutory provision that allows for certain limited injunctions "in support of arbitration." TEX. CIV. PRAC. & REM. CODE § 171.086(a)(3). There is no indication in the record that the probate court intended to invoke this authority in granting the temporary injunction. (*See* Tab 2, CR:292-96.) But in any event, Section 171.086 does not support this injunction because there is no evidence to satisfy its requirements.

Among other things, Section 171.086 provides that "[b]efore arbitration proceedings begin, in support of arbitration" a party may ask a court to "restrain or enjoin" the: (1) destruction of all or an essential part of the subject matter of the controversy, or (2) destruction or alteration of books, records, documents, or other evidence needed for the arbitration. TEX. CIV. PRAC. & REM. CODE §

171.086(a)(3).[8] This Court and others have interpreted this provision as a "limited authorization to issue certain types of orders in support of arbitration as opposed to the merits." *Tantrum Street*, 2017 WL 3275901, at *9 (quoting *Comed Med. Sys. Co., Ltd. v. AADCO Imaging, LLC*, No. 03-14-00593-CV, 2015 WL 869456, at *4 (Tex. App.—Austin Feb. 25, 2015, no pet.).

Texas courts have therefore upheld injunctive relief under this statute only where there is evidence that assets or real property that were the subject of the arbitration were about to be sold before the arbitration could occur. *See, e.g., Senter Investments v. Veerjee*, 358 S.W.3d 841, 843-44 (Tex. App. — Dallas 2012, not pet.) (injunction prevented impending sale of real property); *Frontera Generation Ltd. P'ship v. Mission Pipeline Co.,* 400 S.W.3d 102, 111 (Tex. App.—Corpus Christi 2012, no pet.) (injunction prevented foreclosure sale of real and personal property that would "dissolve the company").

But there is no such evidence here—far from it. At the temporary injunction hearing, the Lawyers presented no evidence of an impending sale or transfer of the settlement funds. The Lawyers repeatedly referred to the risk that the settlement funds would be "lost or depleted" but offered absolutely no evidence to support that claim. And in fact, the evidence established just the opposite—there is no risk

[8] Although the Lawyers cited other provisions in Section 171.086—including provisions regarding the possibility of pre-arbitration attachment proceedings—they offered no evidence or argument to support these requests. (CR:85-86.)

of the settlement funds being lost or depleted. For one thing, the Clients have acknowledged the Lawyers are entitled to some amount of compensation, and testified they intended to pay the Lawyers after an appropriate amount of compensation was determined by an arbitrator. (4RR:11.) Moreover, JPMorgan offered evidence that—under the terms of the settlement agreement—it has no current obligation to make *any* settlement payment to *anyone* because the Lawyers have not satisfied certain conditions precedent. (CR:71, 317.) For all these reasons, there is no risk the "subject matter of the controversy" will be destroyed pending arbitration—and thus no basis for an injunction under Section 171.086.[9]

III. At a minimum, the temporary injunction is overbroad and should be modified so that the Clients can access the portion of the settlement proceeds over which there is no dispute.

Finally, and even if the injunction is not reversed in full, it must be substantially narrowed so that only the disputed portion of the settlement funds (45%, plus any reimbursable expenses) is frozen pending arbitration. As it currently stands, the Clients are restrained from accessing even the undisputed portion of the settlement funds (up to 55%), rendering the injunction an abuse of

[9] For the same reasons, there is no evidence of imminent harm under the basic standards for temporary injunctive relief. *Butnaru*, 84 S.W.3d at 204. Texas courts have long held that there is no imminent harm if the evidence shows no intention on the part of a defendant to do the thing sought to be enjoined. *Luccous v. J.C. Kinley Co.*, 376 S.W.2d 336, 341 (Tex. 1964); *see also State v. Morales*, 869 S.W.2d 941, 946 (Tex. 1994).

discretion and potentially subjecting the Lawyers to discipline for impeding their clients' access to these undisputed funds.[10]

A temporary injunction should be broad enough to safeguard a party's protectable interests pending a trial on the merits, but it should not be so broad that it prohibits the restrained party from engaging in lawful activities that are a proper exercise of its rights. *Webb v. Glenbrook*, 298 S.W.3d 374, 384 (Tex. App.—Dallas 2009, no pet.); *Kaufmann v. Morales*, 93 S.W.3d 650, 655-56 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (injunction overbroad where it improperly restrains legal rights); *Munson v. Milton*, 948 S.W.2d 813, 817 (Tex. App.—San Antonio 1997, pet. denied) (modifying overbroad injunction). Where a party's acts are divisible, and some acts are permissible and some are not, an injunction should not issue to restrain actions that are legal or about which there is no asserted complaint. *RCI Entm't (San Antonio), Inc. v. City of San Antonio*, 373 S.W.3d 589, 603 (Tex. App.—San Antonio 2012, no pet.); *Webb*, 298 S.W.3d at 384.

The probate court's injunction violates these limitations by issuing a blanket freeze on *all* of the funds from the settlement—even though only a portion of those funds is in dispute. At most, the Lawyers are entitled to 45% of the settlement proceeds under the contingency fee provisions of the Fee Agreements, plus any

[10] Per Section 5 of the Fee Agreements, the Lawyers may be reimbursed for certain expenses incurred on the Clients' behalf. (Tab 3, CR:95; Tab 4, CR:103.) The Clients have agreed to set aside 45% of the settlement funds plus an additional amount for any reimbursable expenses—but the Lawyers have not provided any information on the expenses they claim. (2RR:15-19, 42.)

reimbursable expenses. (*E.g.,* CR:145.) That leaves up to 55% of the settlement proceeds that undisputedly belong to the Clients; the Lawyers have no possible claim to this portion of the funds and thus there is no basis to restrict the Clients' access to this portion. The injunction must therefore be reversed and, at a minimum, modified to grant the Clients' access to the undisputed portion of the funds.

By seeking—and now presumably defending—this overbroad injunction, the Lawyers have likely breached their ethical duties under Rule 1.14 of the Texas Disciplinary Rules of Professional Conduct. Although that rule allows a lawyer to retain *disputed* funds from a client when there is a disagreement over fees, the lawyer has an obligation to promptly distribute the "undisputed portion." TEX. DISCIPLINARY R. PROF'L CONDUCT 1.14(c). As comment 2 notes, a lawyer "may not hold funds to coerce a client into accepting the lawyer's contention" and "[t]he undisputed portion of the funds should be promptly distributed to those entitled to receive them by virtue of the representation." By seeking to prohibit the Clients from accessing even the undisputed portion of the settlement funds, the Lawyers have violated the spirit, if not the letter, of Rule 1.14.

Although this is ultimately a matter of bar discipline beyond the scope of this Court's review, it highlights the overreach of this injunction and the unprincipled manner in which the Lawyers requested and the probate court granted

this extraordinary relief. So while the Clients believe the injunction should be reversed in full, for the reasons discussed *supra* Section II, at the very least, this Court should reverse and remand to the probate court with instructions to immediately reform the temporary injunction so that only the disputed portion of the settlement funds (45%, plus any reimbursable expenses) is frozen pending arbitration.

CONCLUSION AND PRAYER

The Clients respectfully request that this Court reverse the probate court's temporary injunction order and dissolve the temporary injunction entered on April 24, 2018, in its entirety. Alternatively, the Lawyers request that this Court modify the trial court's injunction to permit distribution to the Clients of the undisputed funds. The Lawyers also request any and all additional relief to which they may be entitled.

Respectfully Submitted,

/s/ Anne M. Johnson

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CERTIFICATE OF COMPLIANCE
WITH RULE 9.4(e), (i)

1. This brief complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i)(2)(B) because, according to the Microsoft Word 2010 word count function, it contains 4,794 words on pages 1-20 excluding the parts of the brief exempted by Texas Rule of Appellate Procedure 9.4(e)(i)(1).

2. This brief complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 software in Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes.

/s/ Anne M. Johnson
Anne M. Johnson

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was forwarded to all counsel of record in accordance with the Texas Rules of Civil Procedure on the 26th day of July, 2018.

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APPENDIX

Tab	Description	Record Cite
1	Temporary Restraining Order	CR:58-62 (App. 1-5)
2	Temporary Injunction Order	CR:292-296 (App. 6-10)
3	Contingency Agreement between Lawyers and Client Hopper	CR:93-100 (App. 11-18)
4	Contingency Agreement between Lawyers and Client Wassmer	CR:101-107 (App. 19-25)

ORIGINAL

CAUSE NO. PR-11-3238-1

IN RE: ESTATE OF MAX D. HOPPER, DECEASED,	§	IN THE PROBATE COURT
JO N. HOPPER, Intervenor,	§	
v.	§	NO. 1
JPMORGAN CHASE BANK, N.A., STEPHEN B. HOPPER, and LAURA S. WASSMER, Defendants.	§	OF DALLAS COUNTY, TEXAS
JOHN L. MALESOVAS, d/b/a MALESOVAS LAW FIRM, and FEE, SMITH, SHARP & VITULLO, LLP Intervenors,	§	
v.	§	
STEPHEN B. HOPPER, LAURA S. WASSMER, individually and as Beneficiaries of the ESTATE OF MAX D. HOPPER, DECEASED, the ESTATE OF MAX D. HOPPER, DECEASED, JPMORGAN CHASE BANK, N.A., Defendants.	§	

TEMPORARY RESTRAINING ORDER

Came to be heard on the 9TH day of April 2018, the minimum amount of notice having been duly provided pursuant to Local Rule 2.02(a) of Dallas County, Fee Smith Sharp & Vitullo, LLP and John L. Malesovas d/b/a Malesovas Law Firm's (collectively, "Intervenors") *Verified Petition(s) in Intervention, Application for Temporary Restraining Order, Temporary Injunction, and Application for Declaratory Relief* against, *inter alia*,

Stephen Hopper and Laura Wassmer, individually and as beneficiaries of the Estate of Max D. Hopper, deceased, (hereinafter jointly "Clients") and JPMorgan Chase Bank, N.A. (hereinafter "JPM") (Clients and JPM hereinafter jointly, "Defendants" with respect to the claims now pending in this Intervention).

The Court, after considering the *Intervenors' Collective Verified Original Petition in Intervention, Application for Temporary Restraining Order, Temporary Injunction, and Application for Declaratory Relief*, the evidence submitted by Intervenors *in camera*, the relevant exhibits, the arguments of counsel, concludes that—unless immediately restrained, Defendants will irreparably injure Intervenors.

This Court has subject matter jurisdiction over the dispute brought before it under both, TEX. ESTATES CODE ANN. § 32.007 et seq. (Vernon 2014), *and*, TEX. CIV. PRAC. & REM. CODE § 37.005 et seq. (Vernon 2014) (authorizing declaratory judgment actions in probate court when such relief is germane to an Estate).

Intervenors respective Pleas and application for TRO are timely filed, given that this Court has yet to sign a judgment; and, therefore, retains plenary power over this proceeding. *See* TEX. R. CIV. P. 60 et seq.

This Court has, preliminarily, taken judicial notice, pursuant to Rule 201 of the Texas Rules of Evidence, of the following facts that, in reasonable probability, appear to be true at this preliminary stage of the proceeding:

1.) In, around, or about November of 2015, Clients executed a valid and enforceable contingency agreement ("CA") with Intervenors;

2.) On or about April 5, 2018, attorneys for Clients and JPM appeared before this Court and announced, without revealing any of the substantive terms, that a confidential settlement had been reached between them in the underlying dispute pending in this Court (hereinafter "Settlement");

3.) On or about the same day, April 5, 2018, but—literally what appears to have been within minutes after the Court was informed that a settlement had been reached by the parties in this underlying dispute—Clients terminated their CA with Intervenors by and through their attorney, James Pennington;

4.) Intervenors have filed what, by all accounts, appears to be a valid and enforceable First Party Attorney's Fees Lien in the proceeds of the Settlement;

5.) Intervenors fully performed; or, at the very least, substantially and materially performed all of their duties, responsibilities, and obligations under the CA at or before the time Clients terminated the CA—as those legal terms are meant in, *Tillery & Tillery v. Zurich Ins. Co.*, 54 S.W.3d 356, 360-61 (Tex. App.—Dallas 2018, no pet.), *Enochs v. Brown*, 872 S.W.2d 312, 317 (Tex. App.—Austin 1994, no writ), *disapproved of on unrelated grounds*, by *Roberts v. Williamson*, 111 S.W.3d 113 (Tex. 2003), and *Mandell & Wright*, 441 S.W.2d 841, 847 (Tex. 1969); and

6.) Given the timing of the termination of Intervenors, Clients are estopped, quasi-estopped, and/or have waived any and all defenses, if any, that could or would be lodged to the CA or the quality of the legal services performed by Intervenors.

Based upon these preliminary findings, this Court is of the opinion that Intervenors have established a probability of success on the merits on their application for, *inter alia*, declaratory relief. *See* TEX. CIV. PRAC. & REM. CODE § 37.004 et seq. (Vernon 2014). This Court is of the opinion that, unless restrained, one or more Defendants are likely to cause permanent damage to Intervenors, should they be allowed to transfer, hypothecate, assign, or take title to Intervenors' interest in the settlement proceeds before the pleas in Intervention are adjudicated on the merits. Such harm would be irreparable because this Court is of the opinion that there is no showing; or, in the alternative, an inadequate showing that Defendants could timely and immediately pay the disputed funds to Intervenors, should Intervenors ultimately prevail in this proceeding, and because Intervenors have a security interest in and lien upon a portion of the settlement proceeds which would be eviscerated by allowing Clients to dispose of 100% of the settlement proceeds as they saw fit. Moreover, given the

Court's preliminary findings set forth above in (i)-(vi), Intervenors have established a property right and secured interest in the proceeds at issue.

The Court is, **THEREFORE**, of the opinion that Intervenors are entitled to the issuance of a Temporary Restraining Order and that such an Order is necessary to protect Intervenors' rights. This **ORDER** is necessary because of the immediate need to enforce the security interest and lien which Intervenors have in a portion of the settlement proceeds and to stop the wrongful flow of funds in the near future from being disseminated to either Clients or their attorneys, or some other third party subject to Clients' direction and control, upon which Intervenors would have no adequate remedy at law. Without intervention by this Court, Intervenors' property right, that is Intervenors' security interest in and lien upon the settlement proceeds, would be destroyed and there would be no way to restore that property right in the Settlement proceeds themselves.

This Court is further of the opinion that Intervenors are entitled to an **EXPEDITED DISCOVERY ORDER**. Therefore, Stephen Hopper and Laura Wassmer shall be made available for deposition on and certainly no later than **Tuesday, April 17, 2018**. If the parties cannot agree on a suitable location for these depositions, they shall be taken in this Court's jury room. The depositions are limited solely to the matters in dispute in the pled Intervention filings and shall last no longer than two hours per deponent (per side). In addition, Intervenors may serve a *duces tecum* with the deposition notices, which shall be limited to no more than seven (7) discovery requests. The deposition notice shall provide two business days notice to the deponent.

It is further **ORDERED** that Intervenors may move this Court for a dispositive summary judgment on 14 days notice of any hearing; and any response shall be due to be filed within 5 days of the hearing; and any reply shall be due to be filed within 2 days of the hearing.

It is therefore **ORDERED, ADJUDGED**, and **DECREED** that Defendants, Stephen Hopper, Laura Wassmer, and JPMorgan Chase, N.A., and any of his, her, their, or its agents, servants, employees, successors, assigns and those persons in active concert or participation therewith, must:

1) Deposit all of the settlement proceeds due to Stephen B. Hopper and Laura s. Wassmer, individually and as beneficiaries of the Estate of Max Hopper, Deceased, into a safekeeping account with JPMorgan Chase Bank, NA, to be held in trust until further Order of this Court. Funds in the safekeeping account shall be withdrawn **only** upon Order of this Court;

2) The parties are **ORDERED** to preserve and prevent the destruction of all documents, including electronic data, emails, and notes, that relate in any way to the matters and claims set forth in the Intervenors' respective Pleas on file—and, moreover, all electronic storage devices must be imaged and preserved.

IT IS FURTHER ORDERED that this order is effective immediately upon Intervenors' deposit with the appropriate clerk of this Court a ~~bond in the amount of~~ Corporate Surety or cash bond BMT $ 10,000.00 XX.00 (U.S. dollars).

IT IS FURTHER ORDERED that Intervenors' application for a temporary injunction is set for an evidentiary hearing and will be heard before this Court on April 24, 2018 at 9 o'clock a.m., and that Stephen Hopper, Laura Wassmer, and JPMorgan Chase, N.A. appear and show cause, if any, why this Temporary Restraining Order should not be continued and converted into a Temporary Injunction until final hearing and trial hereon.

Signed and issued this the 10th day of April 2018, at 4:50 o'clock p.m.

Brenda Lee Thompson
JUDGE PRESIDING

PR 11-3238-1

ORIGINAL

CAUSE NO. PR-11-3238-1

IN RE: ESTATE OF MAX D. HOPPER, DECEASED,	§	IN THE PROBATE COURT
JO N. HOPPER, Intervenor,	§	
v.	§	NO. 1
JPMORGAN CHASE BANK, N.A., STEPHEN B. HOPPER, and LAURA S. WASSMER, Defendants.	§	OF DALLAS COUNTY, TEXAS
JOHN L. MALESOVAS, d/b/a MALESOVAS LAW FIRM, and FEE, SMITH, SHARP & VITULLO, LLP Intervenors,	§	
v.	§	
STEPHEN B. HOPPER, LAURA S. WASSMER, individually and as Beneficiaries of the ESTATE OF MAX D. HOPPER, DECEASED, the ESTATE OF MAX D. HOPPER, DECEASED, JPMORGAN CHASE BANK, N.A., Defendants.	§	

TEMPORARY INJUNCTION ORDER

Came to be heard on the 24TH day of April 2018, after appropriate notice to the parties and after the parties presented arguments, Fee Smith Sharp & Vitullo, LLP and John L. Malesovas d/b/a Malesovas Law Firm's (collectively, "Intervenors") *Verified Petition(s) in Intervention, Application for Temporary Restraining Order, Temporary Injunction, and Application for Declaratory Relief* against, *inter alia*, Stephen Hopper and

Laura Wassmer, individually and as beneficiaries of the Estate of Max D. Hopper, deceased, (hereinafter jointly "Clients") and JPMorgan Chase Bank, N.A. (hereinafter "JPM") (Clients and JPM hereinafter jointly, "Defendants" with respect to the claims now pending in this Intervention).

The Court, after considering the *Intervenors' Collective Verified Original Petition in Intervention, Application for Temporary Restraining Order, Temporary Injunction, and Application for Declaratory Relief,* the evidence submitted by Intervenors *in camera*, the relevant exhibits, the arguments of counsel, concludes that—unless immediately restrained, Defendants will irreparably injure Intervenors.

This Court has subject matter jurisdiction over the dispute brought before it under both, TEX. ESTATES CODE ANN. § 32.007 et seq. (Vernon 2014), *and*, TEX. CIV. PRAC. & REM. CODE § 37.005 et seq. (Vernon 2014) (authorizing declaratory judgment actions in probate court when such relief is germane to an Estate).

Intervenors respective Pleas and application for Injunctive Relief are timely filed, given that this Court has yet to sign a judgment; and, therefore, retains plenary power over this proceeding. *See* TEX. R. CIV. P. 60 et seq.

This Court has, preliminarily, taken judicial notice, pursuant to Rule 201 of the Texas Rules of Evidence, of the following facts that, in reasonable probability, appear to be true at this preliminary stage of the proceeding:

1.) In, around, or about November of 2015, Clients executed a valid and enforceable contingency agreement ("CA") with Intervenors;

2.) On or about April 5, 2018, attorneys for Clients and JPM appeared before this Court and announced, without revealing any of the substantive terms, that a confidential settlement had been reached between them in the underlying dispute pending in this Court (hereinafter "Settlement");

3.) On or about the same day, April 5, 2018, but—literally what appears to have been within minutes after the Court was informed that a settlement had been reached by the parties in this underlying dispute—Clients terminated their CA with Intervenors by and through their attorney, James Pennington;

4.) Intervenors have filed what, by all accounts, appears to be a valid and enforceable First Party Attorney's Fees Lien in the proceeds of the Settlement;

5.) Intervenors fully performed; or, at the very least, substantially and materially performed all of their duties, responsibilities, and obligations under the CA at or before the time Clients terminated the CA—as those legal terms are meant in, *Tillery & Tillery v. Zurich Ins. Co.*, 54 S.W.3d 356, 360-61 (Tex. App.—Dallas 2018, no pet.), *Enochs v. Brown*, 872 S.W.2d 312, 317 (Tex. App.—Austin 1994, no writ), *disapproved of on unrelated grounds*, by *Roberts v. Williamson*, 111 S.W.3d 113 (Tex. 2003), and *Mandell & Wright*, 441 S.W.2d 841, 847 (Tex. 1969); and

6.) Given the timing of the termination of Intervenors, Clients are estopped, quasi-estopped, and/or have waived any and all defenses, if any, that could or would be lodged to the CA or the quality of the legal services performed by Intervenors.

The Court finds that Clients have admitted that some of the settlement funds belong to Intervenors, but Clients refuse to identify the amount that belongs to Intervenors and refuse to allow the undisputed amount that belongs to Intervenors to be paid to Intervenors. Based on this, as well as the Court's findings above, Intervenors are entitled to immediate payment of a portion of the settlement funds once they become due and payable under the terms of the settlement. The Court finds that within hours after the Court heard Intervenors' Application for a Temporary Restraining Order where Intervenors were asking this Court to protect the settlement funds in dispute pending the outcome of their Petition in Intervention and after the Court took the matter under advisement, Clients executed a settlement agreement with JPM which required JPM to wire transfer the settlement funds to any location designated by Clients, which would necessarily include a foreign bank account, and further required Intervenors to waive their lien on the settlement funds and to withdraw their Petition in Intervention claiming an interest in the settlement funds, and that Clients still refused to pay

Intervenors any of the settlement funds. The Court finds that this action by Clients was designed to attempt to circumvent this Court's inherent power to protect the disputed funds and to circumvent Intervenors' lien on the Settlement funds.

The Court finds that based on all of the foregoing and all of the other evidence and stipulations presented, the settlement funds are in danger of being lost or depleted unless this Court exercises its inherent power to protect the settlement funds pending the outcome of Intervenors' Petition in Intervention.

Based upon these preliminary findings, this Court is of the opinion that Intervenors have established a probability of success on the merits on their application for, *inter alia*, declaratory relief. *See* TEX. CIV. PRAC. & REM. CODE § 37.004 et seq. (Vernon 2014). This Court is of the opinion that, unless restrained, one or more Defendants are likely to cause permanent damage to Intervenors, should they be allowed to transfer, hypothecate, assign, or take title to Intervenors' interest in the settlement proceeds before the pleas in Intervention are adjudicated on the merits. Such harm would be irreparable and injury would be imminent because this Court is of the opinion that there is no showing; or, in the alternative, an inadequate showing that Defendants could timely and immediately pay the disputed funds to Intervenors, should Intervenors ultimately prevail in this proceeding, and because Intervenors have a security interest in and lien upon a portion of the settlement proceeds which would be eviscerated by allowing Clients to dispose of 100% of the settlement proceeds as they saw fit and/or by risk that such funds will be lost or depleted or otherwise disposed of. Moreover, given the Court's preliminary findings set forth above in (i)-(vi), Intervenors have established a property right and secured interest in the proceeds at issue, and the loss of such funds and property right would leave Intervenors with no adequate remedy at law.

The Court is, **THEREFORE**, of the opinion that Intervenors are entitled to the issuance of an Order of Temporary Injunction and that such an Order is necessary to protect Intervenors' rights. This **ORDER** is necessary because of the immediate need to enforce the security interest and lien which Intervenors have in a portion of the settlement proceeds and to stop the wrongful flow of funds in the near future from being disseminated to either Clients or their attorneys, or some other third party subject to

Clients' direction and control, upon which Intervenors would have no adequate remedy at law. Without intervention by this Court, Intervenors' property right, that is Intervenors' security interest in and lien upon the settlement proceeds, would be destroyed and there would be no way to restore that property right in the Settlement proceeds themselves.

It is therefore **ORDERED, ADJUDGED**, and **DECREED** that Defendants, Stephen Hopper, Laura Wassmer, and JPMorgan Chase, N.A., and any of his, her, their, or its agents, servants, employees, successors, assigns and those persons in active concert or participation therewith, must:

1) Deposit all of the settlement proceeds due to Stephen B. Hopper and Laura S. Wassmer, individually and as beneficiaries of the Estate of Max Hopper, Deceased, into a safekeeping account with JPMorgan Chase Bank, NA, to be treated as a deposit in the registry of the Court, and to be held in trust until further order of this Court. Funds in this safekeeping account shall be withdrawn only upon Order of this Court;

2) The parties are **ORDERED** to preserve and prevent the destruction of all documents, including electronic data, emails, and notes, that relate in any way to the matters and claims set forth in the Intervenors' respective Pleas on file—and, moreover, all electronic storage devices must be imaged and preserved.

IT IS FURTHER ORDERED that the $10,000 corporate or surety cash bond currently deposited with the appropriate clerk of this Court shall remain in place.

IT IS FURTHER ORDERED that trial in this matter is set for October 1, 2018 at 9:30 o'clock a.m.; All Parties are Ordered to appear for a scheduling conference on or before June 15, 2018.

Signed and issued this the 24th day of April 2018, at 2:05 o'clock p.m.

JUDGE PRESIDING

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App. 010

CONTINGENCY FEE CONTRACT OF REPRESENTATION

The undersigned **Stephen Hopper, and Laura Wassmer** referred to as "Client" or "Clients" employ and retain Fee, Smith, Sharp & Vitullo, LLP, and Malesovas Law Firm, (herein "Attorneys") to represent Client as set forth herein.

1. **SCOPE OF REPRESENTATION:** Attorneys agree to investigate and evaluate and litigate Client's possible claim or claims of negligence, fraud, breach of contract, and breach of fiduciary duty against JP MORGAN CHASE and persons and companies relating to JP MORGAN CHASE BANKs wrongful acts in acting as the independent administrator of the Estate of Max Hopper..

Client understands and agrees that the scope of representation herein does not include the filing of any claim against any state or federal entity or employee or filing or pursuing an appeal from disposition in the Trial Court. Client understands and agrees that the scope of representation herein does not include defending any claims or lawsuits filed against Client. Client is retaining separate counsel on a flat fee agreement or other fee arrangement to defend them against any claims filed by any parties.

Client understands and agrees that the scope of representation herein does not include representing Clients in the probate lawsuit or lawsuit involving Chase bank, and defending Client against Chase bank or any other party.

Client understands and agrees that Attorneys will not file suit against entities that are in a foreign jurisdiction or are international companies whom in attorney's opinion cannot be sued in a United States court. Client understands and agrees that Attorneys are not obligated to pursue entities that are defunct and/or bankrupt.

Client hereby agrees and understands that Attorneys retain the right to withdraw from representation of Client at any time, so long as said withdrawal would not unduly prejudice Client's right to bring suit or to seek or retain another attorney to represent Client. In such event, Client agrees to timely sign an appropriate Motion for Substitution of Counsel. If after disposition in the trial court, Client desires to appeal, a new and separate agreement shall be entered into by the parties as to services and fees for any appeal, or Client shall retain separate counsel to handle any appeal and Attorneys shall retain their interest in the case under this agreement applicable to any recovery obtained by settlement or otherwise.

2. **AUTHORITY OF ATTORNEYS:** Client empowers Attorneys to take all steps in this matter deemed by them to be advisable for the investigation and handling of Client's

Claims, including hiring investigators, expert witnesses, and/or other attorneys and filing any legal action necessary. Client authorizes and empowers Attorneys to do any and all things necessary and proper in the enforcement, compromise, settlement, adjustment and collection of Client's Claim, and Client further authorizes and empowers them to sign any and all pleadings and all releases, checks, drafts, authorizations and other papers necessary and proper in connection with the prosecution or enforcement of Client's Claims and collection or settlement of the damages awarded or to be paid therefore, and to receive such funds or other property in Client's name and for Client on account of any judgment recovered or any settlement agreed upon in connection with Client's Claim. Full power and authority is given by Client to Attorneys to adjust, settle or compromise Client's Claim, but no final settlement shall be made and consummated by Attorneys without first submitting the offer, compromise, or adjustment to Client for approval, and Client agrees not to compromise or settle Client's Claim without the Attorneys' authority, agreement and consent. Should Client make a settlement in violation of this Agreement, Client agrees to pay Attorneys the full fee agreed upon under paragraph 3 "Attorneys' Fee", below.

3. **ATTORNEYS' FEE:** This Agreement is a contingency fee contract. Specifically, if Attorneys are successful in recovering money or anything of value for Client, by settlement prior to trial begins, Attorneys shall receive attorneys' fees in the amount of forty percent (40%) of the gross recovery. The attorney fee will be split amongst the attorneys as follows: FSSV 50% Malesovas Law Firm 50% If the matter is resolved after trial begins, Attorneys shall receive attorneys' fees in the amount of forty-five (45%) of the gross recovery. All attorneys' fees shall be a percentage of the gross recovery. Gross recovery means the gross amount of money or other value or property recovered for Client, before the deduction of expenses. Trial is considered to have commenced at 5:00 p.m. on the Friday closest to ten (10) days before jury selection begins or evidence is first presented to the trier of fact, whichever is the earlier of these two events. If Attorneys do not recover any money or other value or property for Client, Client will not owe any attorneys' fees. Client agrees that Attorneys may, in their discretion, employ associate counsel to assist in prosecuting Client's cause of action, and Client does not object to the participation of any lawyers Attorneys may choose to involve in this representation of Client. With the exceptions set forth below, payment of attorneys' fees to associate counsel is the responsibility of Attorneys. In the event that the case is settled by way of a structured settlement, Client approves and authorizes attorneys' fees to be based upon the present value benefit of the settlement and further authorizes Attorneys to take attorneys' fees either in cash or in structured payment, as Attorneys deem appropriate.

In some instances, it may be necessary for Attorneys to retain special outside counsel to assist on matters other than prosecuting Client's claims for damages. Examples of such instances include the following: a defendant may seek bankruptcy protection; or a defendant may attempt to fraudulently transfer some of its assets to

avoid paying the Client's claim; a defendant may transfer assets out of the country thereby necessitating the retention of foreign counsel, or a complex, multi-party settlement may require an ethics opinion from outside counsel; or special action in probate court may be necessary apart from the usual probate proceedings involved in an estate; or a separate lawsuit may need to be filed against a defendant's insurance company. Client agrees that Attorneys may retain such special outside counsel to represent Client when Attorneys deem such assistance to be reasonably necessary, and that the fees of such counsel will be deducted from Client's share of the recovery.

4. **COSTS AND OTHER EXPENSES:** Clients **WILL NOT BE** responsible to pay for costs and expenses as incurred. Such costs include filing fees, expert witness fees, court reporter and video fees, copy charges, postage, mailing, travel, witness fees, electronic document conversion fees, delivery fees, internal operating costs and other related charges incurred or paid as an expense on behalf of Client and paid to third-party vendors or incurred internally by Attorneys and charged to Client in connection with Attorneys' representation of Client.

5. **DISBURSEMENT OF PROCEEDS TO CLIENT:** Client understands that Attorneys make no guarantee or assurance of any kind regarding the likelihood of success of Client's claims. Upon receipt by Attorneys of the proceeds of any settlement or judgment, Attorneys shall (1) retain either forty percent (40%) of the proceeds as their attorneys' fees if the matter is settled or resolved before trial begins or forty-five (45%) percent of the proceeds as their attorneys' fees if the matter is settled or resolved after trial begins, (2) deduct from Client's share of the proceeds any costs and expenses, including the fees of any special outside counsel that Attorneys may incur on Client's behalf, and (3) disburse the remainder of Client's share of the proceeds to Client. At the time of disbursement of any proceeds, Client will be provided with a disbursement sheet reflecting the attorneys' fees, the expenses deducted out of Client's share, and the remainder of Client's share.

Upon some circumstances, health insurers, workers compensation carriers, or others who have paid benefits or provided services on Client's behalf may claim a right to recover a portion of the proceeds of any action brought on behalf of the Client and may place Attorneys on notice of their claim. Except as may be required by law, Attorneys will not agree to protect any claim of a subrogation carrier or other creditor without Client's consent.

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and all other documents that Client could properly execute. Client's claims will not be settled without obtaining Client's consent.

7. **COOPERATION; ADDRESS CHANGE; RETURN OF DOCUMENTS:** Client agrees to cooperate with Attorneys to permit Client's claims to be investigated and developed; to disclose to Attorneys all facts relevant to the claim; and to be reasonably available to attend any necessary meetings, depositions, preparation sessions, hearings and trial. Client shall appear on reasonable notice at any and all depositions and Court appearances and shall comply with all reasonable requests of Attorneys in connection with preparation and presentation of Client's claims. The Client acknowledges and agrees that all communications with Attorneys are privileged. The Client acknowledges that Attorneys may represent other individuals on the same or similar matters and therefore may communicate matters of common interest to all of Attorneys' clients. Therefore, Client agrees and understands that other individuals who are clients of Attorneys may also invoke the attorney client privilege as to Attorneys' communications with Client. The Client acknowledges and agrees not to provide attorney work product or attorney client communications to any other person.

Client shall promptly notify Attorneys of any change of marital status or death of spouse. Client shall promptly notify Attorneys of any bankruptcy proceedings involving Client or Client's spouse. Client shall promptly notify Attorneys of any other legal proceedings to which Client or Client's spouse is a party.

Client agrees to notify Attorneys in writing of each change in Client's mailing address (work or home) or telephone number (work, home and cell) during the term of this representation within seven (7) days of each such change of address or telephone number. When the case is completed, and subject to any Court orders, Attorneys will provide Client the opportunity to retrieve any documents and/or materials that Client provided to Attorneys or that Attorneys have obtained from other sources in connection with the case. However, if Client has not retrieved those documents and/or materials within ninety (90) days after Attorneys have mailed to Client written notice that the case is completed and that those documents and/or material are available to Client, Attorneys may dispose of those documents and/or materials.

8. **NO TAX ADVICE:** Attorneys have advised Client that the pursuit of resolution of this claim may have various tax consequences. Client understands that Attorneys do not render tax advice and are not being retained to offer such advice to Client or to represent Client before the IRS. Moreover, Client accepts responsibility for making any payment or filings necessitated by the resolution of Client's claim.

Client understands that applicable State law may impose sales, service or other tax on any amount that Client may recover or the fees due Attorneys hereunder. Client also understands that applicable Federal income tax law may require that Client pay

income tax on the fees due Attorneys hereunder, separate and apart from and in addition to any taxes owed by Attorneys. Client agrees that any such taxes (other than Federal and/or State income taxes that Attorneys may owe on monies actually received by them) shall be paid out of my share of any recovery.

9. DEATH OF CLIENT: The provisions of this Agreement will not terminate upon the death of Client. In the event of the death of Client, any duly appointed Representative of Client's heirs and/or estate will be bound by this Agreement to the extent allowed by applicable law, including without limitation, the provisions of this Agreement relating to the recovery of attorneys' fees and costs and other expenses. Any such Representative shall, upon request by Attorneys, execute a new Agreement in the capacity as Representative for the heirs and/or estate of the Client.

10. OFFER OF SETTLEMENT: Client understands that applicable law may, under certain circumstances, allow a Defendant to make an offer of settlement to Client and if Client rejects or does not accept such an offer, such may result in any award, verdict or judgment in Client's favor being reduced as provided by such law. Client understands that Client has the final authority to accept or reject any offer of settlement. Client understands that if Client rejects or does not accept such an offer, and Client's recovery is subsequently reduced, the fees owed to Attorneys will be calculated on the amount of any award, verdict or judgment before reduction, and the reduction shall be out of Client's share of any recovery.

11. SECURITY INTEREST: Client hereby assigns, transfers and conveys over to Attorneys an amount equal to either forty percent (40%) of the proceeds if the matter is settled or resolved before trial begins or forty-five percent (45%) of the proceeds if the matter is resolved after trial begins, of any property, money or other value recovered by settlement, compromise, verdict or judgment of the claims described in this contract. Client does hereby give and grant to Attorneys an express security interest, in addition to any statutory lien, upon Client's claims and any and all judgments recovered, and any and all funds or property realized or paid by compromise or settlement, as security for the compensation and costs and expenses advanced or due to be paid or reimbursed to Attorneys hereunder. This security interest is to continue in the event Attorneys are discharged without good cause. If the claims are not assignable at law, Client expressly assigns to Attorneys, to the extent of attorneys' fees and disbursements, any sum realized by way of a settlement or any judgment obtained thereon.

12. BINDING EFFECT: This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, legal representatives, successors and assigns.

13. TERMINATION OF REPRESENTATION: Client understands that Client can terminate Attorneys' representation of Client at any time by providing written notice to

Attorneys. Should Client elect to terminate Attorneys' representation prior to the full conclusion of Attorneys' representation, Client understands and agrees that Attorneys have a claim for expenses of litigation and unpaid attorneys' fees which will become due upon receipt by Client or any successor attorney of Client or any proceeds for any remaining portion of Client's claim. Client understands that the obligation for unpaid attorneys' fees will be calculated based on the percentage of work completed on the case or claims at the time Client terminates Attorneys.

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15. MISCELLANEOUS: In case any one or more of the provisions contained in this agreement shall, for any reason, be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision thereof, and this agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained herein.

This contract constitutes the sole and only agreement of the parties hereto and supersedes any prior understandings, or written or oral agreements between the parties respecting within the subject matter.

16. STATUTE OF LIMITATIONS: Client understands that an issue may exist as to whether the applicable statute of limitations has expired. This issue is raised in many lawsuits even if the Client's claims are not beyond the Statute of Limitations. Client understands that Attorneys must perform an evaluation of Client's claim prior to filing Client's lawsuit, and that this evaluation will first require Client to provide Attorneys with all relevant documents and other information requested. It is possible that the statute of limitations has already expired or may expire during the interim between the date of Client's signature below and the filing of Client's lawsuit. Client agrees to accept this risk.

17. REFERRAL OR ASSOCIATION OF ADDITIONAL COUNSEL: Client agrees that Attorneys may refer this matter to another lawyer or associate additional lawyers to assist in representing Client and prosecuting the Client's cause of action. Prior to the referral or association becoming effective, Client shall consent in writing to the terms of the arrangement after being advised of (1) the identity of the lawyer or law firm involved, (2) whether the fees will be divided based on the proportion of services rendered or by lawyers agreeing to assume joint responsibility for the representation, and (3) the share of the fee that each lawyer or law firm will receive or, if the division is based on the proportion of services performed, the basis on which the division will be

made. The referral or association of additional attorneys will not increase the total fee owed by the Client.

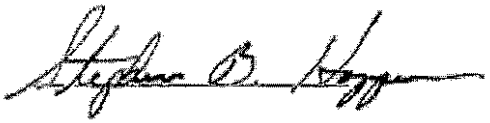
18. NOTICE TO CLIENTS: Attorneys are only licensed to practice law in the State of Texas. To the extent that Attorneys are required to appear in Court in other States, Attorneys will seek permission of the appropriate Court to appear pro hac vice. If pro hac vice admission is granted, Attorneys will be subject to the disciplinary rules of that particular jurisdiction. Attorneys are also subject to the disciplinary jurisdiction of the State Bar of Texas. The State Bar of Texas investigates and prosecutes professional misconduct committed by Texas attorneys. For more information call (800) 932-1900.

20. ARBITRATION: It is Attorney's goal to maintain at all times a constructive and positive relationship with Client on the matter described above and on future matters in which Attorney may perform services for Client. However, should a dispute arise between Attorney and Client, a prompt and fair resolution is in the interests of all concerned. To this end, if any controversy or claim arises out of is related to this agreement, any services provided by Attorneys to Client in connection with Client's Claims, or any other matter that may arise between Client and Attorney (including malpractice claims and fee disputes), Attorneys and Client both waive any right to bring a court action or have a jury trial and agree that the dispute shall be submitted to binding arbitration to be conducted in Dallas, Texas before the American Arbitration Association ("AAA") in accordance with the Commercial Arbitration Rules of the AAA with one arbitrator who must be an attorney licensed to practice law in the State of Texas..

CLIENT HAS READ AND UNDERSTANDS THIS CONTRACT AND AGREES AS STATED ABOVE AS OF THE DATE NOTED BELOW.

_____

Laura Wassmer



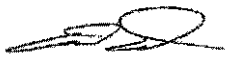
Stephen Hopper

Date: 11/19/2015

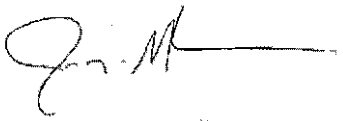
Address: 3625 N Classen Blvd Oklahoma City, OK 7318

Telephone Numbers: 405-639-9186

ATTORNEYS:



Fee, Smith, Sharp &Vitullo, LLP



Malesovas Law Firm

CONTINGENCY FEE CONTRACT OF REPRESENTATION

The undersigned **Stephen Hopper, and Laura Wassmer** referred to as "Client" or "Clients" employ and retain Fee, Smith, Sharp & Vitullo, LLP, and Malesovas Law Firm, (herein "Attorneys") to represent Client as set forth herein.

1. **SCOPE OF REPRESENTATION:** Attorneys agree to investigate and evaluate and litigate Client's possible claim or claims of negligence, fraud, breach of contract, and breach of fiduciary duty against JP MORGAN CHASE and persons and companies relating to JP MORGAN CHASE BANKs wrongful acts in acting as the independent administrator of the Estate of Max Hopper..

Client understands and agrees that the scope of representation herein does not include the filing of any claim against any state or federal entity or employee or filing or pursuing an appeal from disposition in the Trial Court. ~~Client understands and agrees that the scope of representation herein does not include defending any claims or lawsuits filed against Client.~~ Client is retaining separate counsel on a flat fee agreement or other fee arrangement to defend them against any claims filed by any parties. other than Chase, LW

Client understands and agrees that the scope of representation herein does not include representing Clients in the probate lawsuit, ~~or lawsuit involving Chase bank, and defending Client against Chase bank or any other party.~~ LW

Client understands and agrees that Attorneys will not file suit against entities that are in a foreign jurisdiction or are international companies whom in attorney's opinion cannot be sued in a United States court. Client understands and agrees that Attorneys are not obligated to pursue entities that are defunct and/or bankrupt.

Client hereby agrees and understands that Attorneys retain the right to withdraw from representation of Client at any time, so long as said withdrawal would not unduly prejudice Client's right to bring suit or to seek or retain another attorney to represent Client. In such event, Client agrees to timely sign an appropriate Motion for Substitution of Counsel. If after disposition in the trial court, Client desires to appeal, a new and separate agreement shall be entered into by the parties as to services and fees for any appeal, or Client shall retain separate counsel to handle any appeal and Attorneys shall retain their interest in the case under this agreement applicable to any recovery obtained by settlement or otherwise.

2. **AUTHORITY OF ATTORNEYS:** Client empowers Attorneys to take all steps in this matter deemed by them to be advisable for the investigation and handling of Client's Claims, including hiring investigators, expert witnesses, and/or other attorneys and filing any legal action necessary. Client authorizes and empowers Attorneys to do any and all things necessary and proper in the enforcement, compromise, settlement, adjustment and collection of Client's Claim, and Client further authorizes and empowers them to sign any and all pleadings and all releases, checks, drafts, authorizations and other papers necessary and proper in connection with the prosecution or enforcement of Client's Claims and collection or settlement of the damages awarded or to be paid therefore, and to receive such funds or other property in Client's name and for Client on account of any judgment recovered or any settlement agreed upon in connection with Client's Claim. Full power and authority is given by Client to Attorneys to adjust, settle or compromise Client's Claim, but no final settlement shall be made and consummated by Attorneys without first submitting the offer, compromise, or adjustment to Client for approval, and Client agrees not to compromise or settle Client's Claim without the Attorneys' authority, agreement and consent. Should Client make a settlement in violation of this Agreement, Client agrees to pay Attorneys the full fee agreed upon under paragraph 3 "Attorneys' Fee", below.

3. **ATTORNEYS' FEE:** This Agreement is a contingency fee contract. Specifically, if Attorneys are successful in recovering money or anything of value for Client, by settlement prior to trial begins, Attorneys shall receive attorneys' fees in the amount of forty percent (40%) of the gross recovery. The attorney fee will be split amongst the attorneys as follows: FSSV 50% Malesovas Law Firm 50% If the matter is resolved after trial begins, Attorneys shall receive attorneys' fees in the amount of forty-five (45%) of the gross recovery. All attorneys' fees shall be a percentage of the gross recovery. Gross recovery means the gross amount of money or other value or property recovered for Client, before the deduction of expenses. Trial is considered to have commenced at 5:00 p.m. on the Friday closest to ten (10) days before jury selection begins or evidence is first presented to the trier of fact, whichever is the earlier of these two events. If Attorneys do not recover any money or other value or property for Client, Client will not owe any attorneys' fees. Client agrees that Attorneys may, in their discretion, employ associate counsel to assist in prosecuting Client's cause of action, and Client does not object to the participation of any lawyers Attorneys may choose to involve in this representation of Client. With the exceptions set forth below, payment of attorneys' fees to associate counsel is the responsibility of Attorneys. In the event that the case is settled by way of a structured settlement, Client approves and authorizes attorneys' fees to be based upon the present value benefit of the settlement and further authorizes Attorneys to take attorneys' fees either in cash or in structured payment, as Attorneys deem appropriate.

In some instances, it may be necessary for Attorneys to retain special outside counsel to assist on matters other than prosecuting Client's claims for damages. Examples of such instances include the following: a defendant may seek bankruptcy protection; or a defendant may attempt to fraudulently transfer some of its assets to avoid paying the Client's claim; a defendant may transfer assets out of the country thereby necessitating the retention of foreign counsel, or a complex, multi-party settlement may require an ethics opinion from outside counsel; or special action in probate court may be necessary apart from the usual probate proceedings involved in an estate; or a separate lawsuit may need to be filed against a defendant's insurance company. Client agrees that Attorneys may retain such special outside counsel to represent Client when Attorneys deem such assistance to be reasonably necessary, and that the fees of such counsel will be deducted from Client's share of the recovery.

4. **COSTS AND OTHER EXPENSES:** Clients **WILL NOT BE** responsible to pay for costs and expenses as incurred. Such costs include filing fees, expert witness fees, court reporter and video fees, copy charges, postage, mailing, travel, witness fees, electronic document conversion fees, delivery fees, internal operating costs and other related charges incurred or paid as an expense on behalf of Client and paid to third-party vendors or incurred internally by Attorneys and charged to Client in connection with Attorneys' representation of Client.

5. **DISBURSEMENT OF PROCEEDS TO CLIENT:** Client understands that Attorneys make no guarantee or assurance of any kind regarding the likelihood of success of Client's claims. Upon receipt by Attorneys of the proceeds of any settlement or judgment, Attorneys shall (1) retain either forty percent (40%) of the proceeds as their attorneys' fees if the matter is settled or resolved before trial begins or forty-five (45%) percent of the proceeds as their attorneys' fees if the matter is settled or resolved after trial begins, (2) deduct from Client's share of the proceeds any costs and expenses, including the fees of any special outside counsel that Attorneys may incur on Client's behalf, and (3) disburse the remainder of Client's share of the proceeds to Client. At the time of disbursement of any proceeds, Client will be provided with a disbursement sheet reflecting the attorneys' fees, the expenses deducted out of Client's share, and the remainder of Client's share.

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This contract constitutes the sole and only agreement of the parties hereto and supersedes any prior understandings, or written or oral agreements between the parties respecting within the subject matter.

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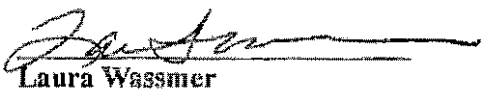
CLIENT HAS READ AND UNDERSTANDS THIS CONTRACT AND AGREES AS STATED ABOVE AS OF THE DATE NOTED BELOW.



Laura Wassmer

Stephen Hopper

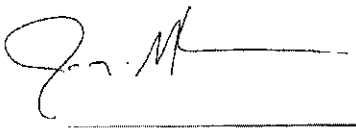
Date: _____

Address: _____

Telephone Numbers:

ATTORNEYS:

Fee, Smith, Sharp &Vitullo, LLP



Malesovas Law Firm