NO. _____

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

In re Stephen B. Hopper and Laura S. Wassmer,

Relators.

PETITION FOR WRIT OF MANDAMUS

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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Other Authorities

STATEMENT OF THE CASE

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

Respondent: The Honorable Brenda Hull Thompson, Probate Court No. 1, Dallas County, Texas

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

The Clients sought to compel the dispute into arbitration. (MR: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 TRO (which was granted) and later a request for a temporary injunction. (MR:25; Tab 1, MR:58.)

Over the Clients' objections, the probate court deferred ruling on the motion to compel arbitration and issued a "Temporary Injunction" that required the Clients to deposit *all* of the settlement proceeds in a safekeeping account with JP Morgan "to be treated as a deposit in the registry of the Court." (Tab 2, MR:296.) Weeks later, the probate court compelled the case to arbitration and stayed the litigation—but did not take down its temporary injunction. (MR:676.)

Relief Requested: In the event the Court determines that the probate court's injunction was not really an injunction—and was simply an order to deposit funds into the court's registry—Relators seek a writ of mandamus directing the probate court to set aside its order.

STATEMENT OF JURISDICTION

The Court has jurisdiction over this mandamus proceeding under Texas Rule of Appellate Procedure 52 and section 22.221(b) of the Texas Government Code, which provides that a court of appeals "may issue all writs of mandamus, agreeable to the principles of law regulating those writs, against a … judge of a district court or county court …." TEX. GOV'T CODE § 22.221(b). Mandamus is available when (1) a trial court abuses its discretion and (2) remedy by appeal is inadequate. *See In re Prudential Ins. Co. of America*, 148 S.W.3d 124, 135-36 (Tex. 2004) (orig. proceeding). Both requirements are met here in the event the Court declines to exercise jurisdiction in a related interlocutory appeal arising from the probate court's temporary injunction, Case No. 05-18-00558-CV.

STATEMENT REGARDING ORAL ARGUMENT

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

ISSUES PRESENTED

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

2. Did the probate court abuse its discretion by ordering funds into the court's registry absent evidence that (a) the funds were in danger of being lost or depleted, or (b) that the Lawyers had an ownership interest in the entire amount of the funds?

3. Do the Clients lack an adequate remedy by appeal?

ABBREVIATIONS

PARTIES:

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

"The Lawyers" means Real Party in Interest John Malesovas, d/b/a Malesovas Law Firm, and Real Party in Interest 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, MR:93; Tab 4, MR: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. (MR:63, 115.)

RECORD REFERENCES:

References to the Mandamus Record shall be in the form of "MR:[pg#]"

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

INTRODUCTION

This original proceeding arises from a temporary injunction in which the Lawyers prevented their Clients from receiving *any* proceeds from a settlement agreement signed in April 2018—even though the Lawyers only claim an interest in 45% of those proceeds. Because that injunction order was an abuse of discretion in a number of respects, the Clients have filed an interlocutory appeal seeking reversal of the injunction, Case No. 05-18-00558-CV. The Clients believe the probate court's injunction can and should be reversed under that cause alone.

However, the Lawyers argued below that the probate court could simply order a deposit of the settlement proceeds into the registry of the court and thereby evade appellate review. The court never seemed to adopt that suggestion, and issued an order entitled "Temporary Injunction" that does more than simply order funds into the court's registry. (Tab 2, MR:292.) The Clients therefore believe the Court has appellate jurisdiction. The Clients do acknowledge the case authorities that preclude review by interlocutory appeal of certain orders into the registry of the court, even those called "injunctions."[1] But that does not mean such orders are

[1] *See, e.g., O'Brien v. Baker*, 05-15-00489-CV, 2015 WL 6859581, at *2–3 (Tex. App.—Dallas Nov. 9, 2015, no pet.); *Behringer Harvard Royal Island, LLC v. Skokos*, 05-09-00332-CV, 2009 WL 4756579, at *2 (Tex. App.—Dallas Dec. 14, 2009, no pet.).

unreviewable, and this Court has often granted mandamus relief for improper orders to deposit funds into the court's registry.[2]

Thus, in an abundance of caution, Relators file this alternative, original proceeding in the event the Lawyers argue, and this Court determines, that the injunction is simply an order to deposit funds into the court's registry. In that case, mandamus is appropriate—and required—because the probate court abused its discretion by ordering such relief without satisfying either of the requirements for this extraordinary remedy. Relators respectfully request that the Court consolidate this original proceeding with the appeal in Cause No. 05-18-00558-CV and that, regardless of how the order is ultimately characterized, it is reversed.[3]

STATEMENT OF FACTS

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

[2] *O'Brien*, 2015 WL 6859581, at *3-4; *Behringer*, 2009 WL 4756579, at *4; *see also In re Deponte Invs.*, No. 05-04-01781–CV, 2005 WL 248664, at *2 (Tex. App.—Dallas Feb. 3, 2005, orig. proceeding).

[3] Given the significant overlap between the issues, Relators hereby incorporate by reference all of the arguments raised in their Appellant's Brief in Cause No. 05-18-00558-CV.

Chase Bank, N.A., as the administrator of their late-father Max Hopper's estate. (*See* MR:93.) The Clients were represented in the probate litigation by the Lawyers, along with other counsel. (MR:93, 101, 499-500.)

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, MR:93; Tab 4, MR:101.)[4] 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. (MR: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..**

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

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

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* MR: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 verdict. (MR:169, 171.) So on April 5th, after 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. (MR:11, 18.) The Lawyers swore the Fee Agreements were

"valid and enforceable," but said nothing about the binding arbitration provision contained therein. (*E.g.*, MR:20.) The Lawyers instead asked the probate court to declare they are entitled to "immediate possession" of 45% of the settlement proceeds. (MR: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." (MR:25.)

The Clients immediately objected to the petitions in intervention on a number of grounds. (MR: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." (MR:35, 412-13.) The Clients also objected that there was 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. (MR:413-17, 440.) The probate court overruled both objections. Instead, the court granted a temporary restraining order that required JP Morgan to hold any settlement proceeds in a safekeeping account. (Tab 1, MR:58, 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. (MR:33-35, 63.)[5] 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. (MR: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. (MR: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. (MR:465, 472-73.) Instead, the Court permitted the Lawyers to argue the merits of their claims in the fee dispute

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

and their claimed need for a temporary injunction. (MR:466-72.)[6] 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. (MR:503-07.) As a result, the hearing on the Motion was reset for May 8th. (MR:297.)

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, MR: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."

[6] Alternatively, the Lawyers argued the court could compel a deposit of the settlement funds into the registry of the court and thereby evade appellate review. (MR:82-83.) The court gave no indication at the hearing that it intended to adopt this approach.

(MR: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." (MR: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 Chase Bank NA "to be treated as a deposit in the registry of the Court." (Tab 2, MR: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%).

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. (MR:527-67.) By this point, the Lawyers had no choice but to concede that the arbitration provision is valid and enforceable. (MR: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." (MR:79.) The Lawyers nevertheless argued that "there is nothing to arbitrate" because the Clients should be estopped from denying them their contingency fee. (MR: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. (MR:676-77.)

SUMMARY OF THE ARGUMENT

Mandamus is appropriate and necessary in the event the Court declines to exercise appellate jurisdiction in the injunction appeal (Case No. 05-18-00558-CV) on the theory that the probate court's injunction was simply an order to deposit funds into the court's registry. In that case, the probate court clearly abused its discretion and the Clients have no adequate remedy by appeal.

First, the probate court abused its discretion by issuing preliminary rulings on the merits of this dispute rather than simply compelling the case 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 to compel arbitration so that it could make merits determinations. 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, orders compelling deposits into the registry of the court are only permitted if evidence is presented showing the funds are in dispute and that there is

a risk the funds will be lost or depleted. Here, the probate court did not require the Lawyers to present any such evidence and instead ordered the funds be deposited into the court's registry based solely on the unsupported arguments of counsel. And there is no such evidence. Moreover, and at a minimum, the probate court's order is overbroad because it purports to freeze even the portion of the settlement proceeds that is not in dispute. The issuance of such a broad order without evidentiary support directly contravenes the requirement that all funds deposited into the court's registry be in dispute. Thus, the probate court abused its discretion.

Third, the Clients do not have an adequate appellate remedy in the event the Court declines to exercise appellate jurisdiction in Case No. 05-18-00558-CV. This Court and others have held on numerous occasions that a party who is deprived of the use of its own money because of an improper order compelling it to deposit that money into the court's registry pending the outcome of litigation has no adequate remedy by appeal. That is exactly what happened here, and the benefits of mandamus review outweigh the detriments.

Because the probate court abused its discretion and may have left the Clients with no adequate appellate remedy, mandamus relief is appropriate.

ARGUMENT

Mandamus is appropriate when (1) the trial court abused its discretion and (2) an appeal would be inadequate to remedy that error. *See In re Christus Santa*

Rosa Health Sys., 492 S.W.3d 276, 279 (Tex. 2016) (orig. proceeding); *In re Prudential Ins. Co. of America*, 148 S.W.3d 124, 135 (Tex. 2004) (orig. proceeding). "A trial court clearly abuses its discretion if 'it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law.'" *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding) (quoting *Johnson v. Fourth Ct. App*., 700 S.W.2d 916, 917 (Tex. 1985)). Further, a trial court abuses its discretion if its decision is not supported by sufficient evidence. *Zhao v. XO Energy LLC*, 493 S.W.3d 725, 736 (Tex. App.—Houston [1st Dist.] 2016, no pet.); *In re Deponte Invs*., 2005 WL 248664, at *2. Here, if this Court finds the probate court's order was an order to deposit funds into the court's registry, both requirements for mandamus relief are easily met.

I. Given a valid arbitration agreement, the probate court had no discretion to make merits rulings.

As an initial matter, and however the order is characterized, the probate court abused its discretion in making merits determinations before compelling the case to arbitration. 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 order that improperly addresses 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,[7] injunctive relief,[8] or summary judgment proceedings.[9] The probate court violated this basic principle—and abused its discretion—in refusing to hear

[7] *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 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").

[8] *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).

[9] *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).

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, MR:58; Tab 2, MR:292; *see also* MR:66, 70, 74, 116, 465-66, 472-73.)

Worse yet, the probate court abused its discretion in issuing an order 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.], 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 order—however characterized—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 a "Temporary 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, MR: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, MR:99: Tab 4, MR: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 relief was necessary. *Flat Wireless, LLC v. Cricket Communc'ns, Inc.*, No. 07-14-00036-CV, 2014 WL 812831, *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 the order should be reversed for this reason alone.

II. Assuming the probate court's order is treated as an order to deposit funds into the court's registry, that order was an abuse of discretion.

The order should also be reversed because the Lawyers did not nearly meet their burden of proof for an order into the registry of the court. Although trial courts are vested with some authority to order disputed funds into the registry of the court, they may do so only if: (1) the funds are in dispute, and (2) there is a risk the funds will be lost or depleted. *See Castilleja v. Camero*, 414 S.W.2d 431, 433 (Tex. 1967); *O'Brien*, 2015 WL 6859581, at *3; *Behringer*, 2009 WL 4756579, at *4; *N. Cypress Med. Ctr. Operating Co., Ltd. v. St. Laurent*, 296 S.W.3d 171, 179 (Tex. App.—Houston [14th Dist.] 2009, no pet.).[10] A trial court abuses its discretion when it orders funds into the registry without requiring evidence of both of these elements. *O'Brien*, 2015 WL 6859581, at *3; *In re Deponte Invs.*, 2005 WL 248664, at *2. The probate court did just that and thus abused its discretion.

[10] The Lawyers invoked the probate court's "inherent authority" to order deposits into the court's registry, rather than seeking the related remedy of pre-judgment attachment. (MR:134.) *See Behringer*, 2009 WL 4756579, at *3-4. The Clients thus focus on the probate court's errors under the "inherent authority" prong, but a pre-judgment attachment order would have been improper for all the same reasons, in addition to the fact that the Lawyers did not comply with the strict requirements for pre-judgment attachment. *Behringer*, 2009 WL 4756579, at *3.

A. The probate court abused its discretion because there was no evidence that the settlement proceeds are in danger of being lost or depleted.

The order fails in its entirety because there was and is no evidence that the settlement proceeds "are actually in danger of being lost or depleted." *N. Cypress Med. Ctr.*, 296 S.W.3d at 179; *see also O'Brien*, 2015 WL 6859581, at *3. This Court has held on numerous occasions that a trial court abuses its discretion when it orders funds to be deposited into the court's registry without requiring such evidence. *O'Brien*, 2015 WL 6859581, at *3; *Deponte Invs.*, 2005 WL 248664, at *2. In *O'Brien*, for example, the Court granted mandamus relief and held that mere allegations—unaccompanied by any affidavits or other evidence—were insufficient to prove the funds were at risk of being lost or depleted. *O'Brien*, 2015 WL 6859581, at *3. Other courts have reached the same conclusion when presented with similar facts. *See, e.g., In re Reveille Res. (Texas), Inc.*, 347 S.W.3d 301, 304 (Tex. App.—San Antonio 2011, orig. proceeding); *N. Cypress Med. Ctr.*, 296 S.W.3d at 179.

Here, as in the cases discussed above, no evidence was presented showing the settlement funds were in danger of being lost or depleted. At the temporary injunction hearing, the Lawyers presented no evidence of an impending sale or transfer of the settlement funds. While they repeatedly referred to the risk that the settlement funds would be "lost or depleted," they offered absolutely no evidence

to support that claim. As noted above, mere allegations that disputed funds are in danger are insufficient to justify an order compelling funds to be deposited in a court's registry. *See O'Brien*, 2015 WL 6859581, at *3; *In re Reveille*, 347 S.W.3d at 304 (holding the arguments of counsel were insufficient to prove funds were in danger of being lost or depleted).

And in fact, the evidence in this case established just the opposite—there is no risk of the settlement funds being lost or depleted. For one thing, the Clients have acknowledged that the Lawyers are entitled to some amount of compensation, and testified that they intended to pay the Lawyers after an appropriate amount of compensation was determined by an arbitrator. (MR:537.) 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. (MR:71, 317.) Thus, the evidence contradicts the Lawyers' conclusory allegations of loss or depletion, and the probate court abused its discretion by ordering funds into the court's registry without any supporting evidence.

B. The probate court further abused its discretion by ordering a deposit of funds that the Lawyers have no possible right to recover.

Even if the Lawyers had presented sufficient evidence to prove the settlement funds were in danger of being lost or depleted (and they did not), the

order is overbroad and must be substantially narrowed so that only the disputed portion of the settlement funds (45%, plus any reimbursable expenses) is frozen pending arbitration.[11]

As noted above, courts may only order *disputed* funds into the registry. *Behringer*, 2009 WL 4756579, at *4. To show that funds are disputed, a party must present evidence that it has an ownership interest in the funds to be deposited into the court's registry. *See id.* A trial court abuses its discretion when it orders funds to be deposited into its registry in which the moving party does not have such an ownership interest. *See Behringer*, 2009 WL 4756579, at *4; *O'Brien*, 2015 WL 6859581, at *3.

The probate court did just that here by issuing a blanket freeze on *all* of the settlement funds—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 reimbursable expenses. (*E.g.*, MR: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 there is no basis to restrict the Clients' access to this portion. At a minimum, no evidence was presented to support the Lawyers'

[11] Per Section 5 of the Fee Agreements, the Lawyers may be reimbursed for certain expenses incurred on the Clients' behalf. (Tab 3, MR:95; Tab 4, MR:103.) The Clients have agreed to set aside 45% of the settlement funds plus an amount for any reimbursable expenses—but the Lawyers have not provided any information on the expenses that they claim. (MR:413-17, 440.)

ownership interest in more than 45% of the settlement proceeds, and the probate court abused its discretion by issuing an overbroad order lacking the prerequisite evidentiary support. *See Behringer*, 2009 WL 4756579, at *4; *O'Brien*, 2015 WL 6859581, at *3. Mandamus is therefore necessary to correct this overreach.

Further, by seeking—and now presumably defending—this overbroad order, 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) & cmt. 2. 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 probate court's overreach and the unprincipled manner in which the Lawyers requested and the probate court granted this extraordinary relief. So while the Clients believe the order should be reversed in full, for the reasons discussed *supra* Sections I & II, at the very least, this Court should grant mandamus and instruct the probate court 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.

III. Mandamus is proper because there is no adequate remedy by appeal for an improper order into the court's registry.

Mandamus is available and appropriate here because Relators have no adequate remedy by appeal—assuming the Court declines to exercise jurisdiction in the injunction appeal, Case No. 05-18-00558-CV. An appellate remedy is not adequate when the benefits of mandamus review outweigh the detriments. *In re Prudential Ins. Co. of America*, 148 S.W.3d 124, 135-36 (Tex. 2004) (orig. proceeding); *N. Cypress Med. Ctr.*, 296 S.W.3d at 179. Mandamus is especially appropriate where essential "to preserve important substantive and procedural rights from impairment or loss" and to "spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings." *Prudential*, 148 S.W.3d at 136.

This is just such a case. This Court and others have held on numerous occasions that a party who is improperly required to deposit money into the court's registry pending the outcome of litigation has no adequate remedy by appeal. *See, e.g.*, *O'Brien*, 2015 WL 6859581, at *3; *Behringer*, 2009 WL 4756579, at *4; *In re Deponte Invs.*, 2005 WL 248664, at *2; *see also In re Radiant Darkstar Productions, LLC*, 05-13-00586-CV, 2013 WL 3718065, at *2 (Tex. App.—Dallas July 12, 2013, orig. proceeding); *N. Cypress Med. Ctr.*, 296 S.W.3d at 179. As explained by this Court in *Behringer*, the effect of such an order is to improperly deny a party access to and use of its own money. *Behringer*, 2009 WL 4756579,

at *4; *see also In re Mitchell*, 342 S.W.3d 186, 192–93 (Tex. App.—El Paso 2011, orig. proceeding).

Here, allowing the probate court's order to stand will deprive the Clients of their substantive right to money that belongs to them and will result in a waste judicial resources by requiring the continued litigation of well-established principles of Texas law. Thus, as in the cases discussed above, the benefits of mandamus outweigh the detriments, and this is exactly the type of situation that warrants mandamus relief. *See Prudential*, 148 S.W.3d at 135–36; *N. Cypress Med. Ctr.*, 296 S.W.3d at 179–80.

CONCLUSION AND PRAYER

In the alternative to their interlocutory appeal (Case No. 05-18-00558-CV), and in the event the Court determines that the probate court's order is simply an order to deposit funds into the registry of the court, Relators pray that the Court grant this petition for writ of mandamus and order the probate court to vacate its Temporary Injunction order in its entirety, or in the alternative, order the court to modify the order to release the undisputed funds to the Clients. Relators also pray for any further relief to which they are justly entitled at law or in equity.

Respectfully Submitted,

/s/ Anne M. Johnson

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RULE 52.3(j) and 52.7(a)(2) CERTIFICATION

I hereby certify that I have reviewed the foregoing Petition for Writ of Mandamus and concluded that every factual statement in the Petition for Writ of Mandamus is supported by competent evidence included in the Appendix or Mandamus Records and that all documents in the Mandamus Records and Appendix are true and correct copies.

/s/ *Anne M. Johnson*
Anne M. Johnson

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 5,145 words on pages 1-21, excluding the parts of the brief exempted by Texas Rule of Appellate Procedure 9.4(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 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 and will be hand delivered to the probate court.

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/s/ *Anne M. Johnson*
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APPENDIX

Tab	Description	Record Cite
1	Temporary Restraining Order	MR:58-62 (App. 1-5)
2	Temporary Injunction Order	MR:292-296 (App. 6-10)
3	Contingency Agreement between Lawyers and Client Hopper	MR:93-100 (App. 11-18)
4	Contingency Agreement between Lawyers and Client Wassmer	MR: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~~ Corporate Surety or cash bond in the amount of $ 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 4:00 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

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

EXHIBIT A

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.

6. **POWER OF ATTORNEY:** Client gives Attorneys a power of attorney to execute and negotiate all reasonable and necessary documents connected with the handling of this cause of action, including pleadings, contracts, checks or drafts, settlement agreements, compromises and releases, verifications, dismissals and orders, proofs of claim, ballots, verified statements including those pursuant to Bankruptcy Rule 2019,

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.

14. **NO GUARANTEE OF RECOVERY:** Client understands that no guarantee or assurances of any kind have been made regarding the likelihood of success of Client's claim, but that Attorneys will use their skill and diligence, as well as their experience, to diligently pursue Client's action.

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.

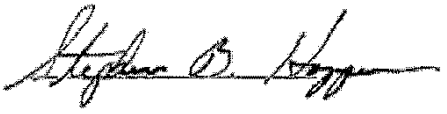
18. NOTICE TO CLIENTS: Attorneys are only licensed to practice law in the State of Texas. To the extent that Attorneys are required to appear in Court in other States, Attorneys will seek permission of the appropriate Court to appear pro hac vice. If pro hac vice admission is granted, Attorneys will 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



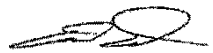
Stephen Hopper

Date: 11/19/2015

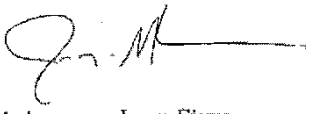
Address: 3625 N Classen Blvd Oklahoma City, OK 7318

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.

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.

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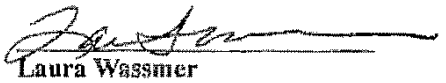
CLIENT HAS READ AND UNDERSTANDS THIS CONTRACT AND AGREES AS STATED ABOVE AS OF THE DATE NOTED BELOW.



Laura Wassmer

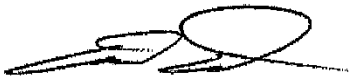
Stephen Hopper

Date: _____

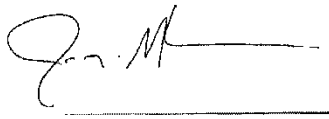
Address: _____

Telephone Numbers:

ATTORNEYS:



Fee, Smith, Sharp &Vitullo, LLP



Malesovas Law Firm