

1 THE COURT: -- if that's the option I
2 select.

3 MR. PENNINGTON: The other part of that
4 is that, what you're saying now is you're going to order
5 the entire amount --

6 THE COURT: I said if I make that
7 decision, it's going to be the entire amount.

8 MR. PENNINGTON: And the only reason -- I
9 disagree with that Your Honor position --

10 THE COURT: I understand.

11 MR. PENNINGTON: And I just want to
12 specifically point out that Rule 1.14 does say
13 specifically, that if there's any amount that is not in
14 dispute, that at least that portion, should be paid to
15 the client.

16 THE COURT: All right well they're not
17 telling me that any of that is not in dispute. Are you
18 saying that it's all in dispute or not?

19 MR. LAUTEN: That's exactly right, Your
20 Honor.

21 MR. PENNINGTON: That is not true, Your
22 Honor.

23 MR. LAUTEN: I'm telling you my position.

24 MR. PENNINGTON: Well, they put in their
25 papers that they're only disputing the percentage that

1 they're owed, under the contract.

2 THE COURT: Well, as I said, I don't have
3 any information to respond to. I'm not saying yes or
4 no. I don't know what I am dealing with. And I'm
5 prohibited from knowing what I'm dealing with so, you
6 know, you've kind of got me in a difficult spot. Well I
7 haven't read all this. I will look at it and I'll look
8 at your cases.

9 MR. LAUTEN: May I leave my proposed
10 order, Your Honor?

11 THE COURT: If there's something else
12 that you think you can tell me that would be helpful,
13 I'm open to that.

14 MR. PENNINGTON: Your Honor, before we
15 leave, can I just get a formal ruling on my offer of
16 Defendant's Exhibit 1?

17 THE COURT: All right. I'll admit
18 Defendant's 1.

19 [Defendant's Exhibit No. 1 admitted]

20 MR. LAUTEN: Can I approach, Your Honor?

21 THE COURT: Yes.

22 MR. LAUTEN: This is a proposed TRO and a
23 proposed order for deposit into the registry. And if
24 you want, I've got it on a thumb drive in Word so,
25 you're welcome to it or however, you want.

1 THE COURT: All right.

2 MR. BECKWITH: And Your Honor, I do
3 object to the temporary restraining order to the extent
4 that it calls for certain amount of money to be placed
5 into the registry of the Court. I think that ruling
6 will jeopardize these proceedings, jeopardize Your Honor
7 as you are trying to work out the judgment with respect
8 to Mrs. Hopper and the JNOV take nothing judgment that I
9 requested or the judgment Mr. Loewinsohn requested and
10 so, we would object.

11 Perhaps, an easier solution is to simply
12 order that the funds be placed in some other well-known
13 bank. Bank of America could take the funds I'm sure,
14 Wells Fargo could take the funds, somebody could take
15 the funds or you could order these parties to sit down
16 and try to find a place to put these funds but, we would
17 object to Your Honor and the registry.

18 MR. LEVINGER: I join in that objection
19 for a slightly different reason, Your Honor and that is
20 if a certain percentage goes into the registry of the
21 Court, that would allow the public to determine what the
22 amount of the settlement is and that's confidential.

23 MR. BECKWITH: I hope I was making that
24 clear but that is the principal objection.

25 MR. LAUTEN: We're happy to let JPMorgan

1 Chase hold all of it as long as it takes.

2 THE COURT: Any redaction or anything
3 new?

4 MR. PENNINGTON: Nothing new, Your Honor.
5 I think it would be improper to order that they hold all
6 of it.

7 THE COURT: Well, thank you very much.

8 MR. LAUTEN: Thank you for your time,
9 Your Honor.

10 MR. PENNINGTON: Thank you, Your Honor.

11

12 [End of Proceedings]

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STATE OF TEXAS

X

COUNTY OF DALLAS X

I, Jackie Galindo, Deputy Official Court Reporter for the Probate Court Number One, Dallas County, Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this request in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings does truly and correctly reflects the exhibits, if any, offered by the respective parties.

WITNESS MY OFFICIAL HAND, this the 1st day of June, 2018.

—
/S/: Jackie Galindo _____
 Jackie Galindo, Texas CSR #7023
 Expiration Date: 12/31/19
 Official Court Reporter
 The Probate Court,
 Renaissance Tower, 2400-A
 Dallas County, Texas
 214-653-6066

REPORTER'S RECORD
VOLUME 3 OF 5
CAUSE NO. PR-11-3238-1
COURT OF APPEALS NO. 05-18-00558-CV

IN THE ESTATE OF
MAX D. HOPPER,
DECEASED

THE PROBATE COURT

JO N. HOPPER
Plaintiff,

v.

JPMORGAN CHASE BANK N.A.
STEPHEN B. HOPPER,
LAURA S. WASSMER
Defendants.

NUMBER ONE

JOHN L. MALESOVAS d/b/a
MALESOVAS LAW FIRM, and FEE
SMITH, SHARP & VITULLO, LLP
Intervenors,

v.

STEPHEN B. HOPPER, LAURA S.
WASSMER, and JPMORGAN CHASE
BANK N.A.,
Defendants.

DALLAS COUNTY, TEXAS

=====

TEMPORARY INJUNCTION HEARING

=====

On the 24th day of April, 2018, A.D., the
following proceedings came on for hearing in the above-
entitled and numbered cause before the HONORABLE COURT,
BRENDA HULL THOMPSON, Judge Presiding, held in Dallas,
Dallas County, Texas.

Proceedings reported by oral stenography.

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EXHIBITS

<u>INTERVENORS</u>	<u>DESCRIPTION</u>	<u>Offered</u>	<u>Admitted</u>
No. 1	Contingency Fee Contract signed by Laura Wassmer	24	25
No. 2	Contingency Fee Contract signed by Stephen Hopper	25	25
No. 3	Charge of the Court Filed Sept. 25, 2017	25	25
No. 6	Rule 11 Letter Filed April 4, 2018	28	31
No. 7	Letter to Mr. Lauten From Mr. Pennington Dated April 5, 2018	29	31
No. 8	Letter to Mr. Malesovas From Mr. Pennington Dated April 5, 2018	29	31

EXHIBITS, cont'd.

<u>INTERVENORS</u>	<u>DESCRIPTION</u>	<u>Offered</u>	<u>Admitted</u>
No. 11	Letter to Mr. Eichman From Mr. Vitullo Dated October 8, 2015	29	31
No. 13	Email to Mr. Vitullo From Mr. Stephen Hopper Dated Jan. 25, 2016	30	31
No. 66	Order Granting Plaintiff's Motion for Legal Rulings Dated March 28 2018	30	31
No. 70	Email to Mr. Vitullo From Mr. Levinger Dated April 3, 2018	31	31
No. 14	Email to Mr. Vitullo From Ms. Laura Wassmer Dated Jan. 25, 2016	34	33

<u>DEFENDANTS</u>	<u>DESCRIPTION</u>	<u>Offered</u>	<u>Admitted</u>
No. 2	Letter from Mr. Pennington To Mr. Vitullo and Mr. Malesovas dated 4/6/18	36	38

1 P R O C E E D I N G S

2 THE COURT: This is PR-11-3238 in the
3 Estate of Max D. Hopper. May I have the attorneys
4 announce, please?

5 MR. LAUTEN: Good Morning, Your Honor,
6 Brian Lauten appearing on behalf of the Intervenors,
7 Fee, Smith, Sharp & Vitullo and John Malesovas.

8 MS. JOHNSON: Your Honor, Anne Johnson
9 and Jim Pennington and Andrew Guthrie here on behalf of
10 the intervention Defendant Stephen Hopper and Laura
11 Wassmer.

12 THE COURT: Your last name is Johnson?

13 MS. JOHNSON: Johnson; thank you, Your
14 Honor.

15 THE COURT: And Mr. Pennington.

16 Sir?

17 MR. LOEWINSOHN: And Your Honor, Alan
18 Loewinsohn, here on behalf of the Plaintiff Jo Hopper.

19 MR. BECKWITH: Your Honor, good morning,
20 Van Beckwith and Jessica Pulliam on behalf of JPMorgan
21 Bank in its corporate capacity as well as in its
22 independent administrator capacity.

23 THE COURT: All right. We're here on the
24 matter of the Temporary Injunction as well as the
25 Defendant's Motion to Compel Arbitration. All right,

1 let's proceed.

2 MS. JOHNSON: Your Honor, in terms of the
3 order that we take the arguments today, I wanted to
4 request that we do consider the Motion to Compel
5 Arbitration first, and --

6 THE COURT: No, ma'am.

7 MS. JOHNSON: Okay.

8 THE COURT: That was not set first.

9 MS. JOHNSON: Okay, Your Honor, can I
10 just be heard for 30 seconds, because I think we can
11 short circuit the temporary injunction issue because
12 they are now moving for injunctive relief pursuant to
13 the Texas Arbitration Act, so if this Court doesn't
14 order arbitration, then the statute that they are now
15 relying on really doesn't apply. We could cover the
16 arbitration issue very quickly, Your Honor.

17 THE COURT: Thank you.

18 MS. JOHNSON: Okay.

19 THE COURT: Yes, sir.

20 MR. LAUTEN: Good Morning, Your Honor,
21 I'd like the chance to fully open, if I could, before we
22 start the injunction.

23 THE COURT: All right, how long do you
24 need?

25 MR. LAUTEN: Just a couple of minutes.

1 THE COURT: All right.

2 MR. LAUTEN: There's three things we have
3 to prove to you today: We've got to prove a probability
4 of success on the merits; we've got to prove a
5 irreparable harm; and we've got to prove no adequate
6 remedy and law. That's if you grant an injunction, but
7 germane to all of that, is your power to simply, put
8 money in the registry, which is a non-appealable order,
9 which doesn't even require injunctive relief.

10 Let me start with this issue, because
11 this seems to be the issue primarily in dispute, and
12 that is this argument out there that we have nothing to
13 fear about dissipation of assets. Let me start with
14 that. Number one: Albeit the settlement's confidential,
15 I think it's important that the Court in camera, looks
16 at that amount, for the simple reason if no other,
17 number one: We've got to show that they got a benefit
18 by our representation and two; the more important issue
19 is they're not bonded. Nobody in this Court is bonded
20 with respect to the settlement.

21 This is really important. Mr. Vitullo is
22 the seventh, the seventh lawyer hired by these clients
23 in this case. All seven were fired. Six out of the
24 seven, including Mr. Vitullo, were not paid in whole or
25 in part, what they were owed when they were fired. The

1 one that was paid was smart enough to get his money up
2 front. We find out earlier this week that this isn't a
3 legitimate business dispute, Judge. It's not. This was
4 a long, thought out and planned attempt to avoid paying
5 Mr. Vitullo.

6 In August of 2017, Dr. Hopper starts
7 surreptitiously recording Mr. Vitullo, his lawyer. He
8 starts tape recording him, right after the verdict and
9 he's tape recording him all the way through February 23rd
10 of 2018, behind his back. We find this out earlier this
11 week. Meanwhile, we find out that Mr. Pennington, he
12 wasn't brought in at the last minute to make this
13 termination. He was hired in October. October. He's
14 the legal malpractice lawyer. Then we find out -- you
15 made a great point of the TRO -- why is it that Mr.
16 Levinger, the appellate lawyer, is sitting at one table,
17 seemingly adverse to trial counsel, whose supposed to be
18 working with him, at the other table.

19 Meanwhile, the termination letter is
20 offered to evidence in the expert, who says that Mr.
21 Vitullo made mistakes and should be paid as the
22 appellate lawyer, Mr. Levinger. Well let me tell you
23 what we find out this week. As early as October, Mr.
24 Levinger is interfacing with Mr. Pennington, the legal
25 malpractice lawyer. And in his billing records, Mr.

1 Levinger is constantly talking to Mr. Pennington,
2 despite the fact that Mr. Levinger never even went and
3 got the entire trial transcript, it's his opinions to
4 the legal malpractice lawyer in the termination letter
5 as to why the guy he's supposed to be helping affirm the
6 verdict should be fired.

7 And this is what is so disturbing to me
8 and I'll prove this to you. Mr. Levinger reaches a
9 settlement in the afternoon of April 3rd. He knows he's
10 got a settlement, it's in an email and we've got those
11 emails. After Mr. Levinger knows he's got a settlement,
12 he emails Mr. Vitullo and says, hey what's our argument
13 going to be on these jury charge responses? Why in the
14 thunder is the appellate lawyer for six months, talking
15 to the legal malpractice lawyer, when my clients are
16 surreptitiously being tape recorded?

17 And after he knows he's got a settlement,
18 instead of saying let's go celebrate, let's all get
19 together and go have a cocktail, he's emailing Mr.
20 Vitullo asking what his arguments are going to be. Why?
21 Because he's trying to set him up because he knows the
22 next day, he's going to be fired. Your Honor, and let
23 me tell you what else happened. While your TRO was
24 pending, after we had a restraining order hearing, these
25 clients go huddle up with JPMorgan Chase to enter into a

1 more comprehensive settlement agreement and there's
2 language in there, we're convinced, deals with our lien
3 rights.

4 I had to deal with three different
5 lawyers in two different states to try to get my hands
6 on this settlement agreement, which I have not seen. I
7 talked to this guy Bob Sax in Los Angeles, he's not even
8 admitted in this case, who gives me a bunch of grief and
9 we go round and round. I said look, I'll make this real
10 simple. You redact out all of the confidential parts of
11 the settlement, you can designate it's highly
12 confidential under the protective order, no problem.
13 They won't do that. So I haven't even seen the
14 settlement agreement.

15 I got a nasty letter from Mr. Beckwith
16 yesterday that I'm making misrepresentations to the
17 Court, because I had a chance to go see the settlement
18 and I just turned them down. The bottom line is these
19 people have, in my opinion committed a fraud, because
20 the entire time Mr. Vitullo is trying to do his job and
21 protect the record on appeal, he doesn't know that
22 surreptitiously these clients are tape recording him for
23 six months. They have lawyers that I think knew while
24 Mr. Vitullo is on the pleadings that they were being
25 tape recorded, because when I asked those questions, oh

1 that's privilege.

2 I said Mr. Pennington, please tell me you
3 didn't know this; he wouldn't answer that question. So
4 absolutely, there's a fear of dissipation of assets.
5 Absolutely, if the money goes to these people, we'll
6 never see it again and like I said, this is a legitimate
7 business disagreement. They're sitting outside the bank
8 in the getaway car waiting to go. That's what's
9 happened since the beginning. Probability of success on
10 the merits.

11 I would just beg you to allow us to play
12 the video tape of Ms. Wassmer and Dr. Hopper from their
13 depositions. I'll limit it to ten minutes and here's
14 what they've admitted to. They've admitted to the
15 things that they have to admit to, to not have anything
16 to arbitrate, nothing to complain about and get us paid.
17 We have a summary judgment that we've already filed.
18 They've admitted they accepted the benefits of Mr.
19 Vitullo's hard work.

20 That includes the DEC action that Mrs.
21 Hopper filed on the attorney's fees claim that you ruled
22 on, the multi-million dollar deal. Mr. Vitullo wasn't
23 even retained on that, but he came down there and
24 handled it. He represented these people to a verdict.
25 He represented these people through settlement. He

1 stood by them the entire time. They accepted those
2 benefits. They admitted that he performed a valuable
3 service.

4 I can't talk to you right now about the
5 settlement offers. I can't talk to you right now about
6 the settlement they got for I guess the third set of
7 lawyers they fired, on their behalf. I can't talk to
8 you right now about the great result, because it's all
9 confidential, but let me tell you what I can tell you.
10 They can't use it as a sword and shield. They can't
11 argue to you oh, well he didn't do a good job and then
12 not tell us or not have the Court know what that result
13 was, but they admit they accepted the work and admitted
14 it was valuable.

15 That's all I have to prove under *Tillery*.
16 Under *Enochs*, once they accept the work, they're
17 completely estopped. They're not only estopped to avoid
18 paying, they're estopped to go argue about it. There's
19 nothing to arbitrate. We'll get to that in a minute,
20 but they're estopped, period.

21 So, at the end of the day there is
22 absolutely a probability of success on the merits, there
23 is irreparable harm, and the reason there is no adequate
24 remedy at law is because a judgment to these people
25 means nothing, if you can't collect it. They're not

1 bonded. They can't respond in damages or they simply
2 won't. And if I need to call all six lawyers, who have
3 been stiffed by these people, I'll do it. Thank you.

4 MR. PENNINGTON: Your Honor, for the
5 record, we do object the proceeding on the injunction
6 while the Motion to Compel is pending, but I will
7 address the temporary injunction argument.

8 THE COURT: Okay, I need to have you
9 speak up. I have some background noise here.

10 MR. PENNINGTON: Very well, Your Honor.

11 THE COURT: All right.

12 MR. PENNINGTON: Just for the record,
13 Your Honor, I was objecting to the proceeding on the
14 temporary injunction, without an opportunity to argue
15 the Motion to Compel, but --

16 THE COURT: Well, I didn't say that you
17 don't have an opportunity, I was just commenting on the
18 fact that this was set first and then the Motion to
19 Compel Arbitration was set second, so I'm just following
20 the order.

21 MR. PENNINGTON: Understood, Your Honor
22 and I just wanted to note our objection on the record
23 and the procedural way that this hearing is taking
24 place. I think the law does make it clear that the
25 Motion to Compel Arbitration should be heard first, but

1 I just wanted to put it on the record, that's all. With
2 respect to the injunction, Your Honor, we disagree with
3 a number of things Mr. Lauten said, but most
4 importantly, he told you there were three things he has
5 to prove in order to prevail on the temporary injunction
6 hearing.

7 The probability of success on the merits,
8 we dispute that issue. I don't think that Mr. Lauten
9 can meet his burden, but the other two elements are even
10 more glaring in this case. There is no evidence of any
11 imminent harm at all. And in fact, as one of the things
12 that we'll get into is Mr. Lauten mentioned was that he
13 received this letter from Mr. Beckwith yesterday, with
14 respect to the hearing today, and some of the pleadings
15 that Mr. Lauten has filed.

16 I know Mr. Beckwith has offered to show
17 the compromise settlement agreement to Mr. Lauten and
18 all he asked was that he sign a Rule 11 Agreement,
19 confirming that he would agree to maintain the
20 confidentiality of that agreement, and I believe there
21 may have been a few other terms. But Mr. Lauten was
22 given an opportunity to look at the confidential
23 settlement agreement between my clients and JPMorgan
24 Chase.

25 But, as Mr. Beckwith pointed out to Mr.

1 Lauten very clearly in a letter just yesterday, he
2 advised Mr. Lauten that one of the conditions precedent
3 to any funding by JPMorgan of the settlement is that the
4 -- One of the conditions precedent is that the funding
5 of the actual settlement amount is contingent upon
6 JPMorgan Chase receiving a release of lien from Mr.
7 Vitullo and his law firm.

8 THE COURT: Say that again, please.

9 MR. PENNINGTON: That one of the
10 conditions that has to be satisfied before JPMorgan
11 Chase will fund any part of the settlement, is that
12 JPMorgan Chase must be provided with a release of lien
13 of the attorney's lien, that's been asserted by Mr.
14 Vitullo's firm and Mr. Malesovas' firm in this case.
15 And, Mr. Beckwith made it clear to Mr. Lauten that
16 JPMorgan Chase has no intent on funding the settlement
17 until they receive a release of lien from Mr. Vitullo
18 and his law firm, in this case.

19 So, until that event happens, there will
20 be no funding of the settlement and there is no imminent
21 harm that anybody is going to receive any money, in this
22 case. So, and we'll get into that in the case, later
23 into the case in chief, but I did want to make the Court
24 aware of that. So, the position that the intervention
25 Plaintiffs have asserted in this case is they're trying

1 to show that there is some imminent danger that the
2 settlement funds are going to be paid and that they
3 won't be able to get their interest in the money. That
4 argument is just a fallacy. There is no -- that's not
5 going to happen.

6 The only person right now that controls
7 whether the funding will go through is Mr. Vitullo and
8 his law firm. So, until he provides that release of his
9 lien that he's asserted in this case, there will be no
10 funding of the settlement. JPMorgan is not obligated to
11 pay the settlement under the agreement.

12 Your Honor, the other evidence that I
13 believe that we've previously discussed at the TRO
14 hearing is the fact that, for a separate reason there's
15 no imminent harm, because Plaintiff's, or excuse me, the
16 Defendant's in this case, my clients have offered to
17 place the disputed fee amount into a separate trust
18 account, whether it's one of the attorney's trust
19 account or an independent third party escrow account or
20 trust account. We've offered to do that and to give
21 those assurances to Mr. Vitullo and his firm and Mr.
22 Malesovas so that they know that those funds will not be
23 paid to my clients, until this fee dispute matter has
24 been resolved.

25 THE COURT: Are you talking about all the

1 funds or just the alleged disputed amount of the funds?

2 MR. PENNINGTON: Well, as to that
3 particular offer, it applies only to the disputed amount
4 of the funds. The attorney's fees that are in dispute
5 as well as their expenses. But to be clear, Your Honor,
6 so there's no confusion on this issue, the letter and
7 the condition precedent of the entire settlement being
8 funded, that goes to the entire amount of the
9 settlement.

10 So JPMorgan Chase has said they're not
11 funding anything, not one penny of the settlement, until
12 they receive a release of lien from Mr. Vitullo and his
13 firm. You know, the other, the third element that Mr.
14 Lauten has to show is that he has no adequate remedy at
15 law, and that's just simply not the case here. They do
16 have an adequate remedy. They're actually suing for
17 breach of contract, trying to enforce the contract and
18 they claim an amount of money, a certain amount of fees
19 and expenses that they're claiming as damages, so they
20 do have adequate remedy in this case.

21 Mr. Lauten made a point about the fact
22 that nobody is bonded. There's no requirement that
23 anybody be bonded but more importantly, the funds are
24 not being paid, so that shouldn't even be an issue for
25 the Court in this case. Mr. Lauten mentioned about that

1 there were seven different attorney's that my clients
2 fired in this case and you know, there were -- it's
3 ironic because Mr. Vitullo represented my clients with
4 respect to at least one of those claims and he is the
5 one who advised the clients with respect to that fee.
6 But, if we have to get into all of the evidence that
7 they intend to, I'll object to much of that coming into
8 evidence because, I think they're just trying to show
9 evidence of other bad acts to show that my clients
10 conformed with that same behavior in this case so, I
11 don't think that that's admissible.

12 With respect to Dr. Hopper's recorded
13 conversations, I think what you're going to hear about
14 that is that the reason Dr. Hopper started recording
15 these conversations, in August of 2017, was because he
16 received a frantic phone call from Taylor Horton, an
17 associate who worked for Fee Smith. Mr. Horton was one
18 of the attorney's at that law firm who had been working
19 on the case and he was responsible for getting the case
20 ready for trial.

21 Mr. Horton called Dr. Hopper and told him
22 he was very concerned about the case because he was
23 actually unable to get a hold of Mr. Vitullo. He had no
24 idea of where he was, trial was coming up in and a week
25 or a week-and-a-half and Mr. Horton was panicking

1 because he didn't know how to get the case ready for
2 trial or what to do. So, Dr. Hopper became concerned
3 and started recording the conversation with Mr. Horton
4 at that point. There were also some other matters that
5 Mr. Horton told Dr. Hopper that he was concerned about,
6 about the way the case was being handled.

7 Under the contract, the contingency fee
8 contract, the clients, it's very clear in the contract
9 that the clients are not supposed to be paying for any
10 of the expenses, but yet, they were being charged with
11 all of the expenses in the case and they were being
12 required to pay a large, not just a large number, but
13 large amounts of expenses in the case and Mr. Horton was
14 concerned about that and he basically, didn't think that
15 the clients should be paying those expenses.

16 So, he had some concerns about that so
17 based on that, those are the reasons, some of the
18 reasons why Dr. Hopper began recording the
19 conversations. It's interesting that Mr. Lauten
20 accuses me of somehow knowing about this, these recorded
21 conversations, I mean obviously, based on the timing
22 that started happening before I was ever hired in the
23 case. And when this issue came up in my clients'
24 depositions, the way questions were asked by Mr. Lauten
25 he was basically, asking whether the clients told me

1 that they had recorded the conversations for other
2 evidence. And I objected to that because that is
3 attorney-client privilege. Whatever the client
4 communicates to me, during the course of the
5 representation, is privileged.

6 But, I will represent to the Court that
7 while that was going on, I did not have knowledge that
8 my clients were tape recording conversations with Mr.
9 Vitullo or anyone at his firm.

10 THE COURT: As of when?

11 MR. PENNINGTON: I'm sorry, Your Honor?

12 THE COURT: When did you learn that they
13 were taping him?

14 MR. PENNINGTON: Well, again Your Honor,
15 when I learned was much later and while I was -- I mean
16 I hesitate to be able to answer that question because I
17 think that that's privileged, about the timing of when I
18 learned, but --

19 THE COURT: All right, well, you don't
20 have to --

21 MR. PENNINGTON: But it was after the
22 fact.

23 THE COURT: You don't have to answer.

24 MR. PENNINGTON: Your Honor, the last
25 thing is Mr. Lauten makes a lot about this *Tillery* case

1 and that he believes my clients are estopped from being
2 able to dispute whether they owe a contingency fee under
3 this contract. As I have mentioned before though at the
4 previous hearing, that issue is an issue that must be
5 decided by an arbitrator, ultimately. I mean, that has
6 to do with whether, with the enforceability of the fee
7 provision of the contract and we are challenging that
8 fee provision of the contract because I believe the
9 evidence will show that prior to the time that Mr.
10 Vitullo entered into this contingency fee agreement, he
11 had already been representing the clients for a long
12 period of time.

13 And in fact, there was a prior contract
14 that Mr. Vitullo entered into with the clients -
15 actually, there were several contracts that Mr. Vitullo
16 entered into with my clients, before he entered into the
17 contingency agreement that is before you today. And so,
18 what essentially, he did was he changed the terms of the
19 agreement with the clients, regarding his fee in
20 midstream. While he's representing the clients, he
21 actually negotiated a deal for himself, with my clients
22 and that is the reason why we're challenging the
23 enforceability of the fee provision.

24 MR. LAUTEN: Your Honor, I'd call Dr.
25 Hopper by video. I've edited it down to 17 minutes.

1 I've got a copy of the designations,
2 Jim, if you want a copy.

3 THE COURT: All right.

4 MR. LAUTEN: Do you want us to dim the
5 lights, Your Honor, or can you see that okay, on the
6 projector.

7 THE COURT: I can see it.

8 MR. LAUTNE: Okay.

9 THE COURT: And I will take a copy, also.

10 MR. LAUTEN: Okay. Can I approach, Your
11 Honor?

12 THE COURT: Thank you.

13 MR. VITULLO: Thank you.

14 [VIDEO CLIP PLAYED]

15 MR. LAUTEN: Your Honor, we call Laura
16 Wassmer via video tape. We've edited that down to about
17 ten minutes; it's pretty quick.

18 Here are the designations Jim.

19 [VIDEO CLIP PLAYED]

20 MR. PENNINGTON: Your Honor, at --

21 THE COURT: Stop for just a moment.

22 [VIDEO CLIP STOPPED]

23 MR. PENNINGTON: At this point, I'm going
24 to object to any evidence regarding other attorneys that
25 my clients hired and the circumstances surrounding that.

1 I think he's going to get into the fact that my clients
2 had previously terminated some other lawyers and I
3 object to that. I think it's irrelevant and it's
4 inadmissible under Rule 404, 403 of the Texas Rules of
5 Civil Evidence.

6 THE COURT: I don't believe I can
7 determine that without hearing it. I mean I understand
8 what your representation is.

9 Sir?

10 MR. LAUTEN: Sure, 404b says you can't
11 show bad acts to show conforming there with, but one of
12 the exceptions to 404b is motive and knowledge. That's
13 why it's being offered for number one and number two, in
14 order to prove dissipation of assets, what's at the
15 forefront of this, is the credibility of the people that
16 are trying to get the money. And certainly germane to
17 that is the fact that they have not paid six out of
18 seven lawyers, and I'm entitled to explore that and put
19 on that evidence.

20 THE COURT: Well, I'll overrule the
21 objection.

22 [VIDEO CLIP CONTINUED]

23 MR. LAUTEN: Your Honor, I'd like to
24 offer some exhibits at this time.

25 THE COURT: I have a question.

1 MR. LAUTEN: Sure.

2 THE COURT: On Exhibit 12, she referred
3 to Jo. Who is she referring to?

4 MR. LAUTEN: Jo Hopper, Mr. Loewinsohn's
5 client.

6 THE COURT: All right.

7 MR. LAUTEN: Your Honor, at this time I'd
8 like to offer some exhibits, if that's okay.

9 THE COURT: All right.

10 MR. LAUTEN: I'd offer Exhibit 1, which
11 is the contingency fee contract signed by Laura Wassmer.

12 [Intervenors Exhibit 1 is offered]

13 THE COURT: Any objection?

14 MR. PENNINGTON: I haven't seen it, Your
15 Honor.

16 MR. LAUTEN: I'll get another set of
17 exhibit stickers. I only marked it as Exhibit 1 for the
18 hearing.

19 MR. PENNINGTON: They're marked at the
20 bottom.

21 MR. LAUTEN: Yeah, that's my handwriting.
22 We'll do a clean copy. Subject to the clean copy, I
23 offer Exhibit 1.

24 MR. PENNINGTON: No objection, Your
25 Honor.

1 THE COURT: All right. Exhibit 1 is
2 admitted.

3 [Intervenors Exhibit 1 is admitted]

4 MR. LAUTEN: Your Honor, I offer into
5 evidence Exhibit 2, which is the contingency agreement
6 signed by Dr. Hopper.

7 [Intervenors Exhibit 2 is offered]

8 THE COURT: Any objection?

9 Mr. PENNINGTON: No objection, Your
10 Honor.

11 THE COURT: Admitted.

12 [Intervenors Exhibit 2 is admitted]

13 MR. LAUTEN: I offer Exhibit 3, which is
14 the Charge of the Court and the verdict form, answered
15 by the jury, on September 25, 2017.

16 [Intervenors Exhibit 3 is offered]

17 MR. PENNINGTON: No objection, Your
18 Honor.

19 THE COURT: Admitted.

20 [Intervenors Exhibit 3 is admitted]

21 MR. LAUTEN: I offer Exhibit 4 -- sorry.
22 Your Honor, I'd offer into evidence Exhibit 4 and I'll
23 let the record reflect that I've redacted out the
24 settlement amount.

25 [Intervenors Exhibit 4 is offered]

1 [Counsel confer about Exhibit 4]

2 MR. BECKWITH: Your Honor, on behalf of
3 JPMorgan, I do object and I object for all the reasons
4 that I raised and the temporary restraining order
5 hearing. I have a concern about Your Honor seeing any
6 portion of this confidential settlement agreement. It's
7 confidential. This is the foundational term sheet that
8 then makes its way into the confidential settlement
9 agreement. We also worry that while Your Honor is
10 considering the JNOV motion that I made and the judgment
11 motion Mr. Loewinsohn made, that seeing any information
12 about this settlement could taint the process Your Honor
13 of working diligently towards and making a decision on
14 that.

15 And so, for those reasons, Your Honor, we
16 would object to any disclosure, whatsoever, of this term
17 sheet, this information about the settlement as well as
18 to follow along any requests Mr. Lauten to reveal the
19 settlement agreement, itself.

20 MR. LAUTEN: I think I can fix this and
21 massage this so everybody's comfortable. What I'll do
22 is I'll withdraw Exhibit 4 as offered and instead, what
23 I'll offer is simply, page 3 of Exhibit 4 and only the
24 first two lines where it says "Bob my clients are in
25 agreement" and the purpose of this to tie up the

1 relevance, is that this ties in my opening statement
2 with Mr. Levinger has reached a settlement at time X,
3 but the next exhibit will show he's emailing Mr. Vitullo
4 later, asking what his appellate argument is going to
5 be; that's the relevance. So, all I'm offering is the
6 time stamp and those first two sentences on the third
7 page as Exhibit 4.

8 MR. BECKWITH: Then perhaps, Your Honor,
9 I mean, I think first of all, some of the testimony you
10 already heard, puts much of that into the record, so I
11 don't think it's a disputed fact, perhaps even too,
12 there could be a stipulation on this point. I don't
13 think you need this document at all. I mean, I do --
14 there is a serious risk to Your Honor, to the Court, and
15 to the process, you're undertaking.

16 THE COURT: All right, well I'm going to
17 take a 10-minute break. You all can talk about it and
18 I'll be right back.

19 MR. BECKWITH: Okay.

20 [Short break taken]

21 MR. LAUTEN: Your Honor, just to kind of
22 give you a road map, I'm almost finished with our case
23 if chief. If you'll just hang with me for another
24 minute or two, I've got about a half a dozen exhibits I
25 want to admit.

1 THE COURT: All right, well what did we
2 determine on Exhibit No. 4?

3 MR. LAUTEN: On Exhibit 4, I'm going to
4 withdraw the exhibit, subject to the stipulation, open
5 court stipulation, between the lawyers on this side and
6 the clients on this side, subject to any objection JP
7 would have that on Tuesday, April 3, 2018, at 4:05 p.m.,
8 Jeff Levinger emailed Bob Sax, a lawyer on behalf of
9 JPM, and that that email reflects that there was in
10 process, was an agreement to be reached on certain
11 times. That would be my proposed stipulation.

12 MR. PENNINGTON: I'll stipulate that,
13 Your Honor.

14 MR. BECKWITH: We have no objection to
15 that stipulation, Your Honor.

16 MR. LAUTEN: So, I'll withdraw four.

17 THE COURT: All right.

18 MR. LAUTEN: The next exhibit that I'll
19 offer is the April 4, 2018 Rule 11 Agreement that was
20 filed as Exhibit 6.

21 [Intervenors Exhibit 6 is offered]

22 THE COURT: All right, so it will be
23 Exhibit 6?

24 MR. LAUTEN: Yes ma'am, I can re-mark
25 them, but they were already marked, so if it's okay,

1 even though they're out of order, that's the way I would
2 propose to do it unless --

3 THE COURT: All right, so there's no
4 five?

5 MR. LAUTEN: No five, that's correct.

6 MR. PENNINGTON: No objection to Exhibit
7 6, Your Honor.

8 THE COURT: All right.

9 MR. LAUTEN: Offer into evidence Exhibit
10 7, and this is the April 5, 2018 termination letter as
11 to Fee, Smith, Sharp & Vitullo.

12 [Intervenors Exhibit 7 is offered]

13 MR. PENNINGTON: No objection, to Exhibit
14 7, Your Honor.

15 MR. LAUTEN: Offer Exhibit 8, it's the
16 same letter to as to John Malesovas.

17 [Intervenors Exhibit 8 is offered]

18 MR. PENNINGTON: No objection as to
19 Exhibit 8.

20 MR. LAUTEN: I offer Exhibit 11; this is
21 the October 8, 2015 letter to John Eichman.

22 [Intervenors Exhibit 11 is offered]

23 THE COURT: Now that's Exhibit 8 or 9?

24 MR. LAUTEN: I'm sorry, Your Honor. It's
25 been pre-marked for identification as Exhibit 11.

1 THE COURT: 11?

2 MR. LAUTEN: I'd offer Exhibit 11.

3 MR. BECKWITH: I have no objection.

4 MR. LAUTEN: I offered 11.

5 MR. PENNINGTON: No objection to Exhibit
6 11, Your Honor.

7 THE COURT: Go ahead.

8 MR. LAUTEN: Did you admit 11?

9 THE COURT: I'm just writing down which
10 ones you are -- okay.

11 MR. LAUTEN: Okay, we can come back to it
12 at the end if that's what you want to do. I offer
13 Exhibit 13.

14 [Intervenors Exhibit 13 is offered]

15 MR. PENNINGTON: No objection.

16 MR. LAUTEN: I would offer Exhibit 66.

17 [Intervenors Exhibit No. 66 offered]

18 MR. PENNINGTON: No objection.

19 MR. LAUTEN: And Your Honor, at this time
20 I would ask the Court to take judicial notice under Rule
21 201 of its March 28, 2018 order of the disbursement of
22 attorney's fees under the DEC action.

23 THE COURT: What's the date?

24 MR. LAUTEN: March 28, 2018. I'd ask the
25 Court to take judicial notice under Rule 201 of its

1 order regarding the declaratory judgment action. I
2 offer Exhibit 70. We offer Exhibit 70.

3 [Intervenors Exhibit 70 is offered]

4 MR. PENNINGTON: No objection as to
5 Exhibit 70.

6 MR. LAUTEN: So I would offer those
7 exhibits at this time, Your Honor.

8 THE COURT: All right, what I have is
9 Exhibit 1, 2, 3, No. 4 is withdrawn, no Exhibit 5,
10 Exhibit 6, 7, 8, 11, 13, 66, and 70. And you're asking
11 me to take judicial notice under Rule 201 of the March
12 28, 2018 order of the Court?

13 MR. LAUTEN: Yes, Your Honor. That's
14 been pre-marked as Exhibit 66.

15 THE COURT: That is Exhibit 66?

16 MR. LAUTEN: Correct, Your Honor.

17 THE COURT: All right, and the Court, not
18 hearing any objections, Mr. Beckwith and Mr. Loewensohn?

19 MR. LOEWINSOHN: No objection, Your
20 Honor.

21 MR. BECKWITH: No objections, Your Honor.

22 MR. PENNINGTON: No objection, Your Honor

23 THE COURT: All right, the Court will
24 admit.

25 [Intervenors Exhibits 1-3, 6-8, 11, 13, 66, 70 admitted]

1 MR. LAUTEN: Your Honor, before I publish
2 these exhibits to the Court, I would just like to
3 briefly spend two minutes walking you through what the
4 significance of these exhibits are, in our view to our
5 case in chief. Exhibits 1 and 2 are fully executed
6 contingency agreements that were signed in writing by
7 Dr. Hopper and Ms. Wassmer. And I'm going to approach
8 and give you these after I -- may I approach?

9 THE COURT: Yes.

10 MR. LAUTEN: Exhibits 1 and 2 that were
11 admitted are the signed contingency agreements. Exhibit
12 3 is the jury charge and verdict form with the numbers
13 that the jury found.

14 THE COURT: You said they're pre-marked?

15 MR. LAUTEN: They've been admitted. Yes,
16 they're marked.

17 THE COURT: Okay, well as long as we can
18 follow what they are, then you don't need to re-do them.

19 MR. LAUTEN: Okay.

20 THE COURT: Okay.

21 MR. LAUTEN: Exhibit 6 is the Rule 11
22 Agreement that was filed on April 4th. April 5th are the
23 two termination letters that came after the Rule 11 that
24 was executed, which is germane to our position that the
25 lawyers fully perform. Exhibit 11 establishes that the

1 pre-trial initial settlement demand of the clients was
2 1.6 million and as the Court's aware from tab 3, the
3 verdict was significantly above that.

4 Exhibit 13 is Dr. Hopper telling how much
5 he appreciates the work Mr. Vitullo's doing. Exhibit 66
6 is the order where this Court found that Ms. Wassmer and
7 Dr. Hopper owed no monies on Ms. Hopper's claim for
8 attorney's fees, which you heard M. Vitullo represent
9 her on. And Exhibit 70 is really important to us
10 because the timing of this is after the stipulation you
11 just heard between Mr. Levinger, where he's writing Mr.
12 Vitullo about what arguments are going to be in the jury
13 charge questionnaire when he at least knows in his head
14 according to stipulation, he's about to reach an
15 agreement.

16 And when you look at that Exhibit 70 and
17 you reconcile it with the termination letter, which has
18 been admitted as Exhibit 5, you'll see that the
19 foundational basis for terminating Mr. Vitullo and
20 Malesovas is Mr. Levinger's complaint that there's not a
21 good record on appeal and that's the email that Mr.
22 Levinger is sending about what's our argument going to
23 be on these jury charge questions. So, subject to that
24 -- and Your Honor, before I rest and close I got one
25 more exhibit and I've redacted out all the other stuff,

1 which I'll mark as Exhibit 14.

2 MR. PENNINGTON: What was, I'm sorry,
3 what was --?

4 MR. LAUTEN: I offer Exhibit 14.

5 [Intervenors Exhibit 14 offered]

6 MR. PENNINGTON: But what was redacted?

7 MR. LAUTEN: The rest of it that could be
8 arguably confidential. I don't think you're going to
9 want us to offer the entire email, but we're happy to do
10 so if you don't have an objection.

11 MR. PENNINGTON: I just wanted to
12 understand that this is a redacted copy, that's all, and
13 I have no objection to this exhibit.

14 MR. LAUTEN: May I approach, Your Honor?

15 THE COURT: Yes.

16 MR. LAUTEN: This is Exhibit 14.

17 THE COURT: All right. Exhibit 14 will
18 be admitted.

19 [Intervenors Exhibit 14 admitted]

20 MR. LAUTEN: Your Honor, subject to any
21 rebuttal, Plaintiff's Intervenors rest and close.

22 THE COURT: One more question: With
23 respect to the exhibits referenced in these depositions,
24 are these the same? I'm not --

25 MR. MALESOVAS: Your Honor, the exhibits

1 that are admitted have the exhibit stickers from the
2 deposition on them and then down at the bottom, they
3 have the way they have been marked for purposes of this
4 hearing. So when you see the actual sticker, for
5 example, I think on Exhibit No. 1 if you look at Exhibit
6 No. 1, there's an Exhibit No. 2 sticker on it. That was
7 Exhibit No. 2, in the deposition.

8 THE COURT: All right.

9 Sir?

10 MR. PENNINGTON: Your Honor, before I
11 begin, can I just ask how much time we have remaining
12 for the hearing today?

13 THE COURT: Approximately, 30 minutes, 30
14 to 40 minutes.

15 MR. PENNINGTON: Total?

16 THE COURT: Well, this is scheduled for
17 two hours, and today is the day that I have the Probate
18 Section meeting, and so it's Professor Byers speaking
19 today and so everybody wants to hear Professor Byers.
20 And then I have another obligation, so if you need more
21 time I'll have to schedule that but that's all that we
22 have today.

23 MR. PENNINGTON: Okay, and so a total of
24 how much time remaining then?

25 THE COURT: About 30 minutes.

1 MR. PENNINGTON: 30 minutes, okay. I
2 just want to make sure that we have time remaining to
3 hear the Motion to Compel Arbitration. Your Honor, let
4 me just speed this up and get to a couple of exhibits
5 and see if we can -- I'll just introduce these and if
6 there's no objection, then --

7 MR. LAUTEN: Yeah, I object to relevance,
8 hearsay.

9 MR. PENNINGTON: Your Honor, let me, just
10 for the record, mark this.

11 THE COURT: And just so you know, don't
12 feel like I'm giving your arguments not enough
13 attention. I've read most of the materials that were
14 previously submitted to the Court.

15 MR. LAUTEN: Thank you, Your Honor.

16 THE COURT: I was up pretty late last
17 night reading that. You don't have to take me through
18 everything. All right, so Exhibits 1 and 2?

19 MR. PENNINGTON: Exhibits 1 and 2, Your
20 Honor, we'll offer those at this time.

21 [Defendant's Exhibits 1 and 2 offered]

22 THE COURT: Any objection?

23 MR. LAUTEN: I object to it as irrelevant
24 and hearsay. And just to put it in context with respect
25 to the Baker Botts letter, I have a tremendous amount of

1 respect for that firm and Mr. Beckwith and to put that
2 in the proper context, I would really have to cross-
3 examine one of the lawyers and I'm not willing to do
4 that. I don't think that's appropriate. The letter is
5 irrelevant and its hearsay and I'd ask that my objection
6 be sustained.

7 THE COURT: Well I'm in a position where
8 if this is offered, I haven't read them, so I, you know,
9 if I don't to read them I won't know whether or not
10 they're hearsay, so...

11 MR. PENNINGTON: Your Honor, I can put
12 Mr. Beckwith on the stand if I need to prove up the fact
13 that he authored this letter and sent it to Mr. Lauten,
14 yesterday but I think it is relevant, because it goes to
15 the issue of the condition precedent to the settlement.

16 MR. LAUTEN: My objection is not
17 authentication, I don't want to speak with Mr. Beckwith
18 (inaudible) or sent it; my objection is hearsay. It's
19 an out of court statement offered for the truth of the
20 matter asserted, and its hearsay.

21 THE COURT: Is it offered for the truth
22 of the matters asserted in here?

23 MR. PENNINGTON: No, Your Honor. It's
24 actually offered to show that there's no pending, or no
25 imminent harm or no pending payment of any settlement

1 because there has been no release of the lien by Mr.
2 Vitullo or his firm.

3 MR. LAUTEN: That's the truth of the
4 matter asserted.

5 THE COURT: Sir?

6 MR. PENNINGTON: Well, then I can put Mr.
7 Beckwith on the stand if I need to.

8 THE COURT: Well, I mean, I told you how
9 much time we have left. You can decide how you want to
10 use your time.

11 MR. PENNINGTON: All right. I'll come
12 back to this issue, Your Honor. And I'll offer Exhibit
13 2 then, the April 6th letter.

14 [Defendant's Exhibit No. 2 offered]

15 MR. LAUTEN: No objection, Your Honor.

16 THE COURT: All right, the Court will
17 admit Exhibit 2, Defendant's 2.

18 [Defendant's Exhibit No. 2 admitted]

19 MR. PENNINGTON: And Your Honor, at this
20 time I would call Mr. Vitullo to the stand.

21 ANTHONY L. VITULLO,
22 having been first duly sworn, testified as follows:

23 THE COURT: Be seated, please.

24 DIRECT EXAMINATION,

25 BY MR. PENNINGTON:

1 Q. Mr. Vitullo, you represented Stephen Hopper
2 and Laura Wassmer in the underlying lawsuit, correct?

3 A. Yes, sir.

4 Q. And, you're in Court today, seeking to enforce
5 the terms of a contingency fee agreement that you
6 entered into, with both of those clients, correct?

7 A. Yes, sir.

8 Q. And those agreements have been offered into
9 evidence as Exhibits 1 and 2, correct?

10 A. Yes, sir.

11 Q. At the time you entered into those contingency
12 fee agreements with Ms. Wassmer and Dr. Hopper, you were
13 already their attorney, correct?

14 A. Yes, sir.

15 Q. Okay, and you were, prior to entering into
16 these contingency agreements, you were representing both
17 Ms. Wassmer and Dr. Hopper on an hourly basis, correct?

18 A. For a very limited purpose.

19 Q. But you were representing them on an hourly
20 basis?

21 A. On an hourly basis for a limited purpose of
22 attending the mediation and getting ready for the
23 mediation.

24 Q. And that was --

25 A. That was the scope of representation in that

1 agreement.

2 Q. And that mediation was the mediation that took
3 place in this very lawsuit that we're here about today?

4 A. It took place on November the 9th of 2015.

5 Q. In the probate case, correct?

6 A. Correct.

7 Q. All right. And before that, how long had you
8 known Dr. Hopper and Ms. Wassmer?

9 A. I had met Dr. Hopper in Oklahoma City, in
10 2012.

11 Q. And you actually referred both Ms. Wassmer and
12 Dr. Hopper to another law firm here in town, Block &
13 Garden, correct?

14 A. Yes.

15 Q. For the purpose of representing Ms. Wassmer
16 and Dr. Hopper in the probate proceeding, correct?

17 A. For a very limited purpose.

18 Q. But you're the attorney that referred them to
19 Block & Garden, correct?

20 A. Correct.

21 Q. And you're aware that following your referral
22 of Dr. Hopper and Ms. Wassmer to the Block & Garden Law
23 Firm, that they actually entered into a fee contract
24 with that law firm, correct?

25 A. Correct.

1 Q. And --

2 THE COURT: Excuse me. One minute, just
3 a second. I have to take that call.

4 [Brief interruption]

5 THE COURT: All right, I'm sorry. I had
6 to take that call.

7 Q. Mr. Vitullo, are you aware that you were
8 actually named as an attorney in the Block & Garden fee
9 agreement?

10 A. I found that out later, after the fact.

11 Q. Have you seen the Block & Garden fee agreement
12 before?

13 A. Yes, I have.

14 MR. PENNINGTON: Your Honor, I'm going to
15 offer the Block and Garden fee agreement as Exhibit 3.

16 [Defendant's Exhibit 3 offered]

17 MR. LAUTEN: Objection hearsay and
18 there's been foundation to prove up that document
19 through this witness.

20 Q. (By Mr. Pennington) Mr. Vitullo, I'll show you
21 Exhibit 3 --

22 THE COURT: I'll allow him some latitude
23 to see if we have a foundation.

24 Go ahead.

25 Q. (By Mr. Pennington) Have you seen Exhibit 3

1 before?

2 A. Yes.

3 Q. Okay, and is it your understanding that that's
4 a copy of the fee agreement between Block & Garden and
5 Ms. Wassmer and Dr. Hopper?

6 A. I believe this is a copy but I'm not sure if
7 this is the version that Stephen Hopper and Laura
8 Wassmer received on October the 8th, of 2012. I cannot
9 testify to that, because on October the 8th of 2012 when
10 this exhibit was presented to Stephen Hopper and Laura
11 Wassmer, I was not copied with this, at all.

12 Q. But do you have any reason to dispute that
13 that's a true copy of the agreement between Block &
14 Garden and Ms. Wassmer and Dr. Hopper?

15 A. What I'm saying is this is an exhibit that's
16 been presented to me as being a copy of the Block &
17 Garden fee agreement. This -- what I'm saying is as of
18 October the 8th of 2012, I'm not sure if this is the
19 entire copy that was given to Stephen Hopper and Laura
20 Wassmer, because I did not see this on October the 8th of
21 2012, or during that time period.

22 Q. Did you draft any part of that agreement, sir?

23 A. No.

24 Q. Did you send any language to Steve Block at
25 Block & Garden for him to include as part of the

1 agreement that he entered into with the clients?

2 A. Not as to this agreement. What I had -- what
3 I had done in the past, prior to 2012, I had entered
4 into contingency fee agreements with other clients, with
5 the Block & Garden Law Firm, and Mr. Block and Chris
6 McNeill had a copy of my form contingency fee contract
7 that they had used in the past.

8 Q. Okay.

9 A. So, there's language in this copy Exhibit 3
10 that is similar to the contingency fee agreement form
11 that I've used in the past that Mr. Block and Mr.
12 McNeill had in the past.

13 Q. All right. But ultimately, you knew that Dr.
14 Hopper and Ms. Wassmer were going to retain Block &
15 Garden?

16 A. Correct. But I did not know that they were
17 going to retain Block & Garden and use a hybrid fee. My
18 understanding, at the time, was that they were retained
19 on a flat fee.

20 MR. PENNINGTON: I'll offer Exhibit 3,
21 Your Honor.

22 [Defendant's Exhibit No. 3 offered]

23 MR. LAUTEN: Your Honor, I object. It's
24 hearsay and it's no foundation so it's an exhibit
25 created by a different law firm that he can't prove up.

1 MR. PENNINGTON: Due to the time, Your
2 Honor, I don't have any --

3 THE COURT: I'll sustain the objection.

4 MR. PENNINGTON: Your Honor, at this
5 time, due to the time constraints of the Court, I have
6 no further questions.

7 MR. LAUTEN: I'll pass the witness, Your
8 Honor. I don't have any questions.

9 THE COURT: Does anyone else have some
10 questions?

11 MR. LOEWINSOHN: No, Your Honor.

12 MR. BECKWITH: No, Your Honor.

13 THE COURT: You may step down.

14 MR. VITULLO: Thank you, Your Honor.

15 THE COURT: Call your next witness.

16 MR. PENNINGTON: Your Honor, at this
17 time, based on the time that's remaining, that we do
18 need time remaining to argue the Motion to Compel
19 Arbitration, I have no further witnesses at this time.

20 THE COURT: Well, I want to say this. I
21 am willing to hear the Motion to Compel Arbitration;
22 this was added after the Temporary Injunction was
23 scheduled, and so I'm not trying to not give you
24 adequate time to argue your motion. It's just that I
25 couldn't promise you that you would have enough time

1 today to argue that motion and, I mean, I'm perfectly
2 willing to give you another opportunity at some other
3 time, it's just that, you know, basically, you're
4 crowding the docket today. So, you know, if you want to
5 do this another day, we can do it another day. It's
6 just that I'm not able to expend the time today. So, I
7 mean, it's up to you.

8 MS. JOHNSON: Your Honor, can I just
9 address that? We're willing to come back on the Motion
10 to Compel Arbitration. The problem we have is that
11 there's been a summary judgment motion filed that's set
12 for May 4th and our response to that would be due this
13 Friday.

14 THE COURT: It can't possibly be set for
15 May 4th because I'm out of town May 4th.

16 MS. JOHNSON: Okay. I thought Mr. Lauten
17 represented that he was going to try to --

18 MR. LAUTEN: I was going to try and I've
19 been unsuccessful, so now it's officially not set for
20 May 4th; how's that?

21 MS. JOHNSON: Okay, Your Honor --

22 THE COURT: I apologize. I'm the
23 curriculum chair for the National College of Probate
24 Judges annual meeting and so, I have to be there. So
25 I'm not going to be here; I'm leaving on the first.

1 MS. JOHNSON: Your Honor, we're happy to
2 come back on the Motion to Compel Arbitration, as long
3 as we can get an agreement from Mr. Lauten that we'll
4 have that motion heard before any response is due to the
5 summary judgment motion.

6 THE COURT: Well, I haven't seen the
7 summary judgment motion. I can't make a judgment on
8 what that is and I'm certainly, not a party to any
9 agreements that the lawyers make.

10 MR. PENNINGTON: The biggest concern,
11 Your Honor, is that in the temporary restraining order
12 that you signed that you said that they could file their
13 motion for summary judgment on 14 days' notice and I
14 think we're required to file our response five days
15 before the hearing.

16 THE COURT: I recall.

17 MR. PENNINGTON: And so, the concern here
18 is that we haven't had an opportunity to conduct any
19 discovery. We haven't been able to get all of my
20 clients' files from Mr. Vitullo's firm and that's in
21 dispute. But we haven't received any files from Mr.
22 Malesovas' firm and there's some other lawyers' files
23 we're waiting to receive, at the time. So we haven't
24 had time to really flesh out this argument, but the
25 Motion to Compel Arbitration is the most pressing issue

1 from our perspective.

2 THE COURT: I understand. It's just
3 that, as I said, I set this for the temporary
4 conjunction hearing and I didn't set it for the Motion
5 to Compel Arbitration. I mean, you could have gotten a
6 different date this week; it's just that you've chose to
7 put it on this docket and it's not working.

8 MR. PENNINGTON: Well, with all due
9 respect, Your Honor, when I had contacted your Court
10 Coordinator, we sent a couple of letters in and I
11 received a phone call from her and she said that, after
12 she spoke with you, this was the earliest possible day
13 that we could get it set so we just asked for it to be
14 set, at that time.

15 THE COURT: I understand. I'm just
16 trying to be fair, okay? And so, I don't want you to
17 feel like I'm not willing to give you equal time or
18 adequate time to explain your motion to me or argue your
19 motion to me. It's just that today was crowded and so,
20 that's the situation.

21 Sir, did you have something that you
22 wanted to say?

23 MR. LAUTEN: No, Your Honor.

24 THE COURT: Okay, go ahead.

25 MS. JOHNSON: So, Your Honor, we're happy

1 to proceed today. About how much time do we have,
2 approximately?

3 THE COURT: About eight minutes.

4 MS. JOHNSON: Your Honor, I guess I would
5 ask that we be able to reschedule this hearing, but with
6 the understanding that it's not going to be until --

7 THE COURT: That's an agreement you can
8 make with the lawyers.

9 MS. JOHNSON: Okay. All right.

10 THE COURT: I'm not going to be --

11 MS. JOHNSON: Okay. I'm going to do this
12 in eight minutes, Your Honor.

13 MR. LAUTEN: Okay, wait, can we -- I'm
14 not going to interrupt you but --

15 MS. JOHNSON: Sure.

16 MR. LAUTEN: -- procedurally the record
17 does not reflect that they've rested and closed yet and
18 I'm going to -- they need to either rest and close or we
19 need to move on.

20 MR. PENNINGTON: We rest and close.

21 MR. LAUTEN: Okay. So much for that.

22 THE COURT: Mr. Beckwith?

23 MR. BECKWITH: Your Honor, I do think we
24 need to make a couple of points very quickly, before
25 they actually make their closing arguments, Your Honor.

1 First of all, we've advised Your Honor that we have a
2 confidential settlement agreement and I would ask that
3 Your Honor take judicial notice of the notice that I
4 filed and what it was was JPMorgan's Notice of Receipt
5 of Temporary Restraining Order. I believe I filed it on
6 April 11 of 2018. I'm looking here and I'll find it for
7 Your Honor.

8 I'd ask that you take judicial notice of
9 it because what it establishes is that there is a
10 confidential settlement agreement that's been entered
11 into and that the conditions precedent for payment have
12 not been fulfilled. But if those conditions precedent
13 are fulfilled, that JPMorgan will abide by any temporary
14 restraining order that might exist at the time the
15 conditions precedent are fulfilled. So we want to make
16 sure that Your Honor take judicial notice of that notice
17 that we filed.

18 THE COURT: When was it filed?

19 MR. BECKWITH: It was filed on April 11,
20 2018. And I want to make sure Your Honor, as a part of
21 that -- I'm still trying to find it. Yes, it is April
22 11, 2018 at 3:26 p.m. And I could read it to Your Honor
23 if it would help. It just advises on the Rule 11
24 Agreement, pending negotiations on the Settlement and
25 Release Agreement, and that the conditions precedent

1 payment that had not been made.

2 THE COURT: All right, I don't -- I'm
3 sure if you said that you filed it, it hasn't -- I don't
4 think I have it.

5 MR. BECKWITH: It does have a file stamp
6 of 3:08 p.m. Your Honor. If I could, can I read it into
7 the record just so that Your Honor can hear it.

8 THE COURT: All right.

9 MR. BECKWITH: "At 3:08 p.m. on April 11,
10 2018, JPMorgan Chase Bank N.A, JPMorgan in its capacity
11 as the Independent Administrator of the Estate of Max D.
12 Hopper, Deceased and in its corporate capacity has
13 received this Courts April 10, 2018 temporary
14 restraining order. As the Court is aware, the parties
15 signed and filed on April 4, 2018, a Rule 11 Agreement
16 announcing that's their settlement pursuant to a
17 confidential term sheet." I believe the Rule 11 was put
18 into evidence by Mr. Lauten, and so that's the reference
19 there, Your Honor.

20 "JPMorgan notifies the Court that as of
21 today, the parties have not yet signed their Settlement
22 and Release Agreement. Once signed, JPMorgan notifies
23 the Court that certain conditions precedent must occur
24 before JPMorgan has any obligation to make any
25 settlement payment. JPMorgan writes simply to inform

1 the Court that it is aware of, and will abide by the
2 temporary restraining order, if it remains in effect, of
3 JPMorgan's obligations to make a settlement payment
4 arises."

5 So that was the notice that we provided
6 to Your Honor. Your Honor, I think it also is incumbent
7 that it protects JPMorgan's rights to the confidential
8 settlement that we see if we can obtain a stipulation
9 that, as of today, there is a confidential settlement
10 agreement that exists between JPMorgan and the Heirs. I
11 don't think that was disputed between either of the
12 parties, so I'd ask the parties to confirm that.

13 MR. PENNINGTON: We'll stipulate to that
14 Your Honor.

15 MR. LAUTEN: Your Honor, just to be real
16 clear procedurally here, I don't have a problem with the
17 Court taking judicial notice that they filed something
18 and the filing says what it says, but I need -- I want
19 to make sure the record is clear, I've never seen this
20 settlement agreement, ever. It's been subpoenaed to be
21 here. I'm not picking a fight over it, but I'm not in a
22 position to agree or disagree as to what JPM's
23 obligations are under an agreement that I haven't
24 signed, that I haven't seen and that my clients aren't
25 even a party to that contract, so I don't agree or

1 disagree. But if the Court wants to simply take
2 judicial notice that they filed something and that's
3 what it says, I don't have a problem with that.

4 MR. BECKWITH: And here's the issue, Your
5 Honor. I need to make sure that the record is clear
6 that there is a confidential settlement agreement in
7 place, to protect JPMorgan's rights. I thought that was
8 part of the hearing that both Mr. Lauten and Mr.
9 Pennington established. And then I have represented to
10 the Court as an officer of the Court that conditions
11 precedent exist to payment. The money stays, as of
12 right now is at JPMorgan, and that conditions precedent
13 exist prior to any payment to the Heirs.

14 And so if I need to put on further
15 evidence on that I will, but those are the only two
16 points, I think, that should Your Honor make a decision
17 and JPMorgan need to seek review of that decision that
18 we need to establish. As for Mr. Lauten, Mr. Lauten and
19 I exchanged a number of messages last week, trying to
20 provide Mr. Lauten the chance to go read the settlement
21 agreement and the dispute broke down on whether Mr.
22 Lauten could obtain a copy of the settlement agreement.

23 THE COURT: Read the settlement agreement
24 un-redacted or in full or just read --

25 MR. BECKWITH: Read the settlement in

1 full, un-redacted, right. And so Your Honor knows my
2 concerns with Your Honor reading the settlement in full,
3 with all due respect to the Court, and so that is the
4 only concern that we have with respect to that. We want
5 to make sure that our record is established that there's
6 a confidential settlement agreement and conditions
7 precedent that exist to payment of any money.

8 MR. LAUTEN: Just so this is clear, Your
9 Honor, it is true that we talked about me going over and
10 looking at the settlement without taking it, but then
11 they wanted me to sign an agreement on confidentiality,
12 and I'm not going to put myself in a position to be
13 sued. I don't have a contract with these people; my
14 clients don't have a contract with these people.

15 My alternative proposal is a Rule 11 that
16 I signed and it says send it to me, you can redact
17 whatever you want with confidentiality and I'll agree
18 it's protected, and if I don't abide by it, you can
19 sanction me, but you're not going to enter a contract
20 with me unless you pay me to enter a contract with you.
21 So that's how the disagreement broke down. But even as
22 we sit here today, I don't even know what they're
23 claiming is confidential. Is it the payment amount? Is
24 it the payment instructions? Is it the entire thing?
25 Every settlement I've ever seen has an exception for a

1 subpoena or Court order.

2 So, anyway I'm not in a position to agree
3 or disagree because I simply haven't seen it. And I'll
4 take ownership of my share of the fault for the
5 disagreement breaking down, but as a practical matter, I
6 haven't seen it; that's the point.

7 MR. BECKWITH: And to be clear, the
8 entire settlement agreement is confidential. That's the
9 way it was negotiated and signed by the parties as a
10 confidential settlement agreement.

11 THE COURT: Well, I will tell you the
12 Court is in a curious position. There seems to be a
13 whole body of information that the Court is not privy
14 to, which is problematic. In my view, it's hard for me
15 to feel secure in any decision that I'm going to make
16 without sufficient information. I mean, I'm just
17 astounded at the absence of information that I am
18 operating with and I'm expected to make a decision.
19 However, that's the way you choose to operate so, --

20 MR. BECKWITH: Well, the information --

21 THE COURT: I'll take judicial notice of
22 the fact that you have filed a piece of paper that
23 indicates that you have a settlement agreement. I'm not
24 representing to you or saying that I agree that it is a
25 confidential settlement agreement because I don't know

1 that it is because I've not seen it. So I can't
2 acknowledge it as a confidential settlement agreement.
3 And of course, I don't know whether or not it is an
4 enforceable settlement agreement. I have not seen the
5 terms of the condition precedent, and so I don't know
6 anything about those terms, other than what you've told
7 me.

8 And so, I have merely the representation
9 that you will abide by an agreement that I've not seen
10 and conditions that I've not reviewed. And that I am
11 supposed to rely on Chase not to release the funds until
12 or unless these unknown conditions are performed, I
13 mean, that's from my advantage point.

14 MR. BECKWITH: And part of what puts us
15 in this situation is the prior points that I raised last
16 time, which is Your Honor is still considering our
17 pending JNOV as well as Mr. Loewensohn's motion for
18 judgment as to Mrs. Hopper. And JPMorgan believes it
19 would be prejudicial to the process, prejudicial to the
20 Court, prejudicial to JPMorgan and perhaps, Mrs. Hopper
21 for Your Honor to receive in the settlement agreement,
22 to see it's terms, to see any payment amount, and then
23 to be, with all of that information, also be deciding
24 the JNOV and the motion for judgment.

25 We do think that's problematic. I've

1 raised that with Your Honor before and so that is the
2 awkward situation I think we all find ourselves in. I
3 tried to raise it last time, or perhaps these parties
4 could agree to some escrow agent or some bank or some
5 lawyer to take these funds so that we wouldn't even have
6 to bother Your Honor but that apparently, wasn't taken
7 up. I'm kind of in the box Your Honor is in, at this
8 point.

9 THE COURT: Mr. Loewinsohn?

10 MR. LOEWINSOHN: A couple of points, Your
11 Honor. First of all, if it is helpful to the process, I
12 want to make clear whatever the Court decides regarding
13 the settlement agreement or settlement amount, Ms.
14 Hopper and myself are not seeking to know that amount.
15 We don't need to know that amount and so I want to make
16 that clear if the Court ends up looking at something in
17 camera, I'm not going to take the position because we're
18 a party in the lawsuit, we need to see it. So I wanted
19 to make that clear.

20 Second, just for the record, I think Mr.
21 Beckwith's suggestion that the Court is not able to
22 divorce whatever information it learns in this
23 proceeding, from its consideration of the motion for
24 judgment by Mrs. Hopper and motion for JNOV, I think
25 that it does not give the Court enough credit.

1 Court's all the time find out about
2 settlements between one set of parties and still have to
3 decide what to do about the remainder set of the
4 parties. As long as the Court is honest and focused on
5 the materials before them, which I greatly expect that
6 this Court would be, I don't agree with Mr. Beckwith's
7 suggestion and I can assure you, we don't believe it
8 would prejudice Mrs. Hopper as the suggestion was made
9 because I believe the Court would give no consideration
10 to that, and will make its decisions independently,
11 based on the information presented to you. Thank you,
12 Your Honor.

13 MR. LAUTEN: If I could just make one
14 final point, because this really, really bothers me
15 immensely. These parties can enter into whatever
16 agreement they want. I'm not a party to that contract.
17 They can walk out of here and tear it up and enter a new
18 agreement. What they've agreed to amongst themselves is
19 of no moment as to my clients. The only way my clients'
20 rights are going to be protected is by this Court making
21 a decision to protect those rights.

22 THE COURT: Okay. Anything else?

23 MR. BECKWITH: Your Honor, I think if
24 that's the position the parties are going to take then I
25 think I should take a stand and testify to the

1 confidential settlement agreement, that it exists and
2 that there are conditions precedent to payment under it
3 so that you have that record.

4 MR. LAUTEN: Well I don't have a problem
5 with that but if he's going to testify then we're going
6 to have to get the agreement out and we're going to have
7 to see it. I'm not going to take -- I have a tremendous
8 amount of respect for Mr. Beckwith. I know he's a
9 fantastic lawyer and good person. But like any other
10 witness, I'm not going to take a witness's word on it on
11 what a document says that I don't have in Court. So if
12 we're going to put on some evidence we're going to have
13 to get it out or the Court's going to have to look at it
14 in camera. I don't care how we do it, but I gotta be
15 able to cross-examine somebody about a document if it's
16 going to be proven up without me seeing it.

17 MR. BECKWITH: What we've just heard is
18 the parties are entitled to have a confidential
19 settlement agreement. The fact that a fee dispute has
20 broken out between the parties, one of the parties that
21 are lawyers does not abrogate our confidential
22 settlement agreement and does not expose it to public
23 view, Your Honor.

24 THE COURT: Well, I'm not trying to make
25 you do anything you don't want to do. I'm just trying

1 to figure out what is reasonable and equitable in this
2 particular situation. And as I said, I seem to be
3 making a decision without very much information, so I
4 mean, of course, I guess I've been put in that position
5 before so I will do the best that I can do.

6 MR. BECKWITH: But I've tried to
7 represent to Your Honor as a member of this Bar and
8 member of this Court, Your Honor precisely what's
9 happened here, which is that there is a confidential
10 settlement agreement that exists between the parties.
11 All indicia of evidence that was put in by Mr. Lauten
12 and that was discussed by Mr. Pennington, points towards
13 that fact, but as a member of the Bar I'm telling you
14 there is a confidential settlement agreement in place
15 and I have filed a notice again, as a member of the Bar
16 that that confidential settlement agreement has
17 conditions precedent to payment.

18 And lastly, I'm telling you that the
19 money that is associated with the settlement agreement
20 remains today at JPMorgan Chase Bank. So, I'm making
21 all of those representations to the Court; I don't think
22 they're refuted representations, Your Honor.

23 THE COURT: Well --

24 MR. BECKWITH: I might be --

25 THE COURT: I understand that. I guess

1 in the back of my mind, I mean, I have seen people make
2 confidential settlement agreements and I've seen people
3 brought back out of them. I've seen people figure ways
4 around them and I mean, lawyers do what lawyers do and
5 so you know, there are a lot of agreements that are
6 presented in the morning and that are, you know, torn up
7 in the afternoon. So, you know, I'm in the position of
8 being aware of that fact; now, I haven't heard you say
9 that the confidential settlement agreement is not
10 subject to revocation or modification or something else.

11 MR. BECHWITH: Whether it is or isn't
12 Your Honor, I can tell you it is in existence today
13 that, no doubt about it, it exists today.

14 THE COURT: I understand.

15 MR. BECKWITH: What effect the parties
16 make up, the Heirs and their lawyers and this dispute
17 may have on that confidential settlement agreement
18 remains to be seen, but what I can tell you is there is
19 a condition precedent to payment.

20 THE COURT: I heard that. What I'm
21 saying to you is that what you're not telling me is that
22 there's no way that that settlement might not change, or
23 might not be modified or that JPMorgan Chase may decide
24 to walk away from it.

25 MR. BECKWITH: Your Honor, that doesn't

1 change the fact that today, there's a confidential
2 settlement agreement is in place, --

3 THE COURT: I understand --

4 MR. BECKWITH: -- fully in writing, fully
5 integrated, fully in existence.

6 THE COURT: All right.

7 MR. LAUTEN: I know we're running out of
8 time. I do want two minutes for final argument if I can
9 get it before we run out.

10 MS. JOHNSON: Your Honor, can I just say
11 first -- I'm sorry.

12 THE COURT: Just a minute.

13 MS. JOHNSON: Okay.

14 THE COURT: So everybody can hear what
15 you have to say.

16 MS. JOHNSON: I'm sorry, Your Honor. I
17 just wanted to say for the record that we will reset our
18 Motion to Compel Arbitration.

19 THE COURT: I understand.

20 MS. JOHNSON: We understand the Court's
21 time constraints. I do want to make clear our position
22 on the record that if anything further goes on in this
23 litigation, while there is a pending Motion to Compel
24 Arbitration that that cannot happen. That will be an
25 abuse of discretion.

1 THE COURT: Ma'am, I'll decide that.

2 Thank you.

3 MS. JOHNSON: Okay. Thank you, Your
4 Honor.

5 MR. BECKWITH: Your Honor, I will further
6 represent that we will not -- I know Mr. Pennington
7 would bear the same representation -- We will not
8 change, alter or revoke the settlement agreement without
9 notifying Your Honor, so you now have the confidential
10 settlement agreement exist, conditions precedent to
11 payment exist that have not been fulfilled so there's no
12 payment obligation. And as officer of the Court I'm
13 representing to you we will not change, revoke, or alter
14 it without notifying the Court, in advance.

15 MR. PENNINGTON: I agree with that on
16 behalf of my clients, Your Honor.

17 THE COURT: Okay. All right. Thank you.

18 MR. PENNINGTON: Your Honor, may I at
19 this point, request a stay of any further proceedings
20 until we have a hearing on our Motion to Compel
21 Arbitration?

22 MR. LAUTEN: It's not before you today,
23 Your Honor.

24 MR. PENNINGTON: Well it is part of our
25 Motion to Compel and because we're unable to have a