

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

IN THE ESTATE OF  
 MAX D. HOPPER,  
 DECEASED

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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

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BANK N.A.,  
Defendants.

DALLAS COUNTY, TEXAS

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**TEMPORARY RESTRAINING ORDER HEARING**  
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On the 9th 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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1 [P R O C E E D I N G S]

2 THE COURT: All right, this is PR-11-3238  
3 the Estate of Max Hopper versus Jo Hopper versus  
4 JPMorgan Chase and John L. Malesovas versus Stephen  
5 Hopper, et al. All right so, let's start with the  
6 announcements over here.

7 MR. LAUTEN: Good afternoon Your Honor,  
8 Brian Lauten appearing on behalf of John Malesovas and  
9 Lenny Vitullo of Fee Smith Sharp & Vitullo, the  
10 interveners.

11 MR. PENNINGTON: Good afternoon Your  
12 Honor, I'm Jim Pennington I'm here appearing on behalf  
13 of Stephen Hopper and Laura Wassmer as defendants to the  
14 intervention filed by Mr. Malesovas and the Fee Smith  
15 Sharp and Vitullo law firm.

16 MR. LEVINGER: Your Honor, my name is  
17 Jeff Levinger together with Mr. Cecere here, sitting  
18 behind me and we represent Laura Wassmer and Stephen  
19 Hopper in the Estate, in connection with their claims  
20 against JPMorgan Chase, that have now settled, effective  
21 last Wednesday, according to the Court's hearings on  
22 Thursday and Friday.

23 MR. BECKWITH: Your Honor, Van Beckwith  
24 and Jessica Pulliam on behalf of JPMorgan Chase N.A.  
25 Your Honor, we're here just simply to make sure that the  
26 ~~settlement agreement, proposed settlement agreement, the~~

1 terms of which are protected and remain confidential,  
2 which one of the key terms. So, we'll enter an  
3 appearance for that purpose.

4 MR. TOBEY: Your Honor, Robert Tobey for  
5 Block Garden & McNeill. That is another law firm for  
6 the Plaintiffs in this lawsuit.

7 THE COURT: For the Plaintiffs?

8 MR. TOBEY: For the -- I'm sorry, we're  
9 in a different lawsuit. For Ms. Wassmer and Dr. Hopper.  
10 And we're not a party to this case but, we're here as an  
11 interested observer.

12 THE COURT: All right so what other case  
13 are you talking about?

14 MR. TOBEY: The primary case that was  
15 pending against JPMorgan.

16 THE COURT: So are you replacing --

17 MR. TOBEY: We are not replacing anybody.

18 THE COURT: Which side are you joining  
19 on?

20 MR. TOBEY: We're an interested observer  
21 in this hearing. My clients have a contingent fee  
22 agreement with the clients --

23 THE COURT: All right well --

24 MR. TOBEY: -- Mrs. Wassmer and Dr.  
25 Hopper.

1 THE COURT: All right, so your client is  
2 who?

3 MR. TOBEY: Our client is the law firm of  
4 Block Garden & McNeill.

5 THE COURT: Sir?

6 MR. LOEWINSOHN: And way in the back,  
7 Your Honor, Alan Loewinsohn is here representing Mrs.  
8 Hopper. I don't anticipate I will be participating but,  
9 not knowing the direction of the hearing, I thought I  
10 needed to make sure that I didn't need to participate.  
11 So, I will be here but probably relatively quiet in the  
12 back.

13 THE COURT: Thank you. All right so what  
14 I have set today is the Application for Temporary  
15 Restraining Order; is that correct?

16 MR. LAUTEN: Yes, Your Honor.

17 THE COURT: All right.

18 MR. LAUTEN: Your Honor, I'll try to be  
19 really brief. Let me tell you four things: The facts,  
20 the law, what we want, and why we're entitled to it.  
21 First, on April 4<sup>th</sup>, a confidential settlement was  
22 reached in this case, and as this Court is undoubtedly  
23 aware, Mr. Vitullo has lived and breathed this case for  
24 two years or so. He tried a jury trial in this Court  
25 for a month.

1                   On April 5<sup>th</sup> I believe he was in this  
2 Court an actually had a conversation with the Court off  
3 the record, and said look there's a confidential  
4 settlement, enjoyed being in here. Literally, within an  
5 hour of that announcement, we get a letter terminating  
6 us, as the lawyer for the clients, in this case. After  
7 all the works been done, within minutes of the  
8 settlement, we're terminated and we're told that the  
9 agreement, the contingency agreement is unenforceable;  
10 we're not going to pay you for your work. They won't  
11 tell us the exact amount that's in dispute but, they say  
12 you know what, we'll take the entire contingency fee  
13 interest and we'll put it in our new lawyer's trust  
14 account.

15                   Let me tell you first and foremost what  
16 the law is on that. I've got these cases and I'll  
17 approach in a minute and ask you if I can and give them  
18 to you highlighted. I've done a bunch of fee disputes;  
19 this is what I do. A big part of my practice is  
20 representing lawyers, in these kind of cases. The law's  
21 real clear. Once an attorney under a contingency fee  
22 agreement has performed, substantially performed or  
23 completed his work, at that moment in time, the clients  
24 are estopped to not pay the lawyer. That's *Tillery v.*  
25 *Zurich*.

1                   Actually Dale Tillery who's the Judge in  
2 the 134<sup>th</sup> District Court, when he was a lawyer he had  
3 this issue in the *Enoch's* case. They say look, if you  
4 could do this Your Honor, people would do it. I just  
5 settled this big contingency case; I've got a great  
6 idea. I'm going to fire my lawyer and not pay him. You  
7 lose all of your defenses under the agreement, if the  
8 client does that. As a matter of law, once there's  
9 substantial performance, the lawyer's entitled to his  
10 fee. That's the law; I've got those cases.

11                   So what do we want? What we're asking  
12 the Court to do, number one is, they need to tell us  
13 what's in dispute. Are they saying we're entitled to 20  
14 percent of the fee, 30 percent of the fee? 45 percent  
15 is what the agreement says. I'm happy to tender the  
16 contingency agreement in camera. I'm happy to tender  
17 the termination letter in camera. They won't tell us  
18 that.

19                   What we're asking the Court to do,  
20 therefore, to keep the status quo, is to deposit  
21 whatever they say the disputed funds are, with respect  
22 to the contingency fee interest at issue, into the  
23 registry of the Court; we can do it under seal. We're  
24 not here to violate the confidential agreement; the  
25 Court doesn't need to know what that is. But we want

1 the money put in the registry of the Court, if they're  
2 going to take the position, we get to keep your work and  
3 we don't get to pay you.

4           They've raised this point, I think, which  
5 is: Does the Court have jurisdiction to do this? The  
6 Court absolutely, has jurisdiction to do it. The Court  
7 has the inherit power to do it. Those cases are *Prodego*  
8 *v. Ware*, *Diana River v. Calvillo* and the Supreme Court's  
9 case in *Castilleja*. I've got those cases highlighted  
10 and before I finish, if I can, I'll approach and give  
11 them to you. And here's what they say. They say the  
12 Court absolutely has jurisdiction, under its inherit  
13 authority, to put money in the registry of the Court  
14 especially, in Probate Court 37.005 of the Civil  
15 Practice and Remedies Code, that says this Court has  
16 declaratory judgment relief to decide money that's  
17 ancillary to an estate.

18           It gets better, Your Honor. You don't  
19 have to grant a TRO today, you don't have to grant an  
20 injunction today because what these cases say is that  
21 putting money into the registry of the Court that's in  
22 dispute, which this is, we have a property right. We've  
23 earned the money; we did the work; is a non-appealable  
24 order. It cannot be appealed. The Court has inherent  
25 authority to do it and the Court can put that money into

1 the registry. Can I approach and show you these cases?

2 THE COURT: Yes.

3 MR. LAUTEN: And I've got copies for the  
4 other side. The first one is *River*, and the second is  
5 *Prodego* and I've got copies. Can I approach, Your  
6 Honor?

7 THE COURT: Yes.

8 MR. LAUTEN: In other cases exactly like  
9 this one that was put in dispute. So, we want the  
10 disputed funds put in the registry and we want the Court  
11 to enter an expedited discovery order. I'd like to go  
12 depose these Plaintiffs. And I want to come back and  
13 next month and I want a summary judgment, because we're  
14 entitled to be paid; it's just that simple. Now let me  
15 briefly respond to what the position of the clients is.  
16 And just look at this from the optics of fairness.

17 You did all the work. You got a  
18 favorable jury verdict. You successfully defended a  
19 three-million-dollar counter claim. We're not going to  
20 pay you, now that the case is settled. We want you to  
21 put the money in our lawyer's, our new lawyer's trust  
22 account, where you can't get it outside the registry of  
23 the Court. And we want to go to arbitration, under the  
24 agreement we say, is unenforceable. That doesn't work.  
25 So at the end of the day what we're -- oh, and they made



1 one argument: Oh, we've waived the right to be here.  
2 The Court -- you can't waive subject matter  
3 jurisdiction, Your Honor.

4 So here's what we're asking the Court to  
5 do. Number one, the precedent of allowing a client to  
6 allow a lawyer to allow a lawyer to spend two years  
7 working on a file, to terminate the day they did the  
8 settlement, allow the client to take the money into  
9 their new lawyer's trust account and say 'we'll get it  
10 back to you in a couple of years after arbitration' is  
11 absolutely preposterous and it's offensive. We're  
12 asking the Court to put the money in the registry up to  
13 the disputed percentage; they need to say what that is.

14 The Court can enter that order under seal  
15 so there's no prejudice of the confidentiality. I want  
16 an expedited discovery order, which this Court can  
17 grant, under the TRO rules germane to fee disputes, and  
18 this Court has jurisdiction because the corpus is  
19 germane to an estate, and I want to come back in 30 days  
20 and have a summary judgment and my client needs to be  
21 paid. That's what I'm asking the Court to do. I'm  
22 happy to answer any of your questions and again, I've  
23 got these cases.

24 I'd like to approach if I could give you  
25 the Enoch's case because this case stands for a

1 proposition that, they can talk about their defenses all  
2 they want. Once you perform, it's over. You can't eat  
3 the cake at the restaurant and say, God I just didn't  
4 like it; I'm not going to pay for it. That's the  
5 situation we're in. We wanted a TRO. The money needs  
6 to be put in the registry. We can do all this under  
7 seal. And we want to depose these people and we want to  
8 get to the bottom of it, and we're entitled to be paid.

9 I'm happy to answer any of your questions  
10 you've got but that's the situation we're in. I also  
11 have a copy of 37.005, which is the Civil Practice and  
12 Remedies Code provision that gives this Court  
13 jurisdiction over DEC actions germane to the estate.  
14 And subject to any of the questions you've got, I  
15 appreciate the time. I'm happy to respond to whatever  
16 they come up with.

17 MR. PENNINGTON: May I respond, Your  
18 Honor?

19 THE COURT: Yes, sir.

20 MR. PENNINGTON: Your Honor, have you had  
21 an opportunity to read our objection that we filed, with  
22 the Court, earlier today?

23 THE COURT: No sir, I've been on this  
24 bench all day long.

25 MR. PENNINGTON: I understand Your Honor.

1 I just ask so I'll know ahead of time, how much detail I  
2 wanted to go into with you, with respect to our  
3 objection and response. If I could approach the bench?

4 THE COURT: Yes.

5 MR. PENNINGTON: Thank you, Your Honor.  
6 Your Honor, we have raised a number of objections in our  
7 response. The first, foremost objection is that the  
8 contingency fee agreement that their trying to enforce  
9 in this case, contains an arbitration clause. And when  
10 we claim the Court does not have jurisdiction, as I put  
11 in my objection my response, the reason why we put that  
12 in there is because Mr. Vitullo and his law firm, waived  
13 their right to pursue any action, in Court. It doesn't  
14 specify all the different types of action but, it was  
15 clear the language in there, I've quoted it in my  
16 response on page 2, but this is the exact wording taken  
17 out of the contingency fee agreement, which they are now  
18 seeking to enforce, in this Court.

19 The clear language of this provision  
20 shows, that they waived their right to pursue any claim  
21 in Court. Any action at all. The case law is very  
22 clear, with respect to this issue, and because of that,  
23 I think that this case does not belong to this Court; it  
24 belongs in arbitration. We have asked the Court to  
25 sustain our objection and to compel Mr. Vitullo, his

1 firm, and Mr. Malesovas to pursue their claims in  
2 arbitration, if they wish to pursue those. But, those  
3 claims are not ripe, this Court does not have -- should  
4 not have allowed them to pursue this claims before this  
5 Court.

6 And Your Honor, a copy of the contingency  
7 fee agreement was actually attached to one of the, it  
8 was the initial intervention filed by Mr. Malesovas. He  
9 attached the copy of the fee agreement to his petition  
10 in intervention, as an exhibit, which is why I did not  
11 attach it to my response. But it is in the Court's  
12 record. Now, I might add, Your Honor that the  
13 attorney's at Fee Smith, including Mr. Vitullo, were the  
14 ones who actually drafted this agreement so, I don't  
15 think they can claim that they weren't aware of it or  
16 that the arbitration provision is somehow unfair.

17 The other objection that I have raised  
18 Your Honor, is that with respect to the request for  
19 temporary restraining order, subject to our objections  
20 of this matter going forward in this Court, we had  
21 pointed out in our response, there is no imminent harm  
22 here. That is obviously, one of their requisite  
23 elements that they have to satisfy, in order to get any  
24 type of injunctive relief. And the reason why there is  
25 no imminent harm Your Honor, is because we have offered,

1 I have offered specifically, on behalf of my clients, to  
2 allow the disputed portion of the settlement proceeds to  
3 remain in a trust account, specifically Mr. Levinger's  
4 trust account. If they're not happy with that, I've  
5 offered to receive the funds, disputed portion of the  
6 funds, in my trust account.

7 THE COURT: All right well, I guess I'm  
8 not understanding; what is the disputed portion of the  
9 funds that we're talking about?

10 MR. LAUTEN: Good question.

11 MR. PENNINGTON: Well they claim, they  
12 claim --

13 THE COURT: I'm sorry. Excuse me. Sir?

14 MR. BECKWITH: Oh, I didn't say anything  
15 it yet, Your Honor but I do want to be really careful  
16 just on behalf of JPMorgan Chase. We haven't agreed to  
17 pay anybody anything, yet. I mean, we're still working  
18 through the terms of the settlement agreement. And we  
19 certainly haven't agreed to pay money in the registry of  
20 the Court. So, I do want to be careful that if Your  
21 Honor ordered something to be placed into the registry  
22 of the Court, we worry about the confidentiality of the  
23 settlement agreement, which is inviolate is not supposed  
24 to be disclosed to anyone.

25 Mr. Loewinsohn and I, as Your Honor

1 knows, and Your Honor spent a lot of time last Thursday  
2 and Friday working though Ms. Hopper's request for  
3 judgment, and I do have concerns that if the value or  
4 amount of this settlement agreement, the one between the  
5 heirs and JPMorgan Chase, was disclosed even to Your  
6 Honor, given where we find ourselves with a pending  
7 request for a judgment, that that would be potentially  
8 prejudicial to and certainly objected to by JPMorgan  
9 Chase.

10 I just want to make sure we're crystal  
11 clear on that. We have no agreement to pay any money  
12 right now, into a registry of the Court. And we have no  
13 agreement, right now signed, to pay the heirs money. I  
14 do join though, in Mr. Pennington's request, and Mr.  
15 Levinger's request; I know you asked to see Mr. Vitullo  
16 and Mr. Levinger in Court so, here we are. But it does  
17 seem that, since a lawyer's bar license is tied to their  
18 trust account, that that would be the most logical place  
19 to place this money.

20 So, I just wanted to make that objection  
21 clear, Your Honor.

22 THE COURT: Well, things disappear from  
23 trust accounts too but I'm willing to listen so, go  
24 ahead.

25 MR. PENNINGTON: Well, Your Honor with

1 respect to that issue, I have put my request in writing  
2 to the extent that there's any dispute about that and  
3 I'm happy to offer that letter and will do so into  
4 evidence. But, on April 6<sup>th</sup> I sent a letter to Mr.  
5 Lauten and Mr. Malesovas, offering to place the entire  
6 45 percent interest, that they claim as a contingency  
7 fee, to allow that to remain in Mr. Levinger's trust  
8 account.

9           And to be clear, I cited the ethical  
10 obligations, under Rule 1.14 of any attorney receiving  
11 funds, that he knows are in dispute. That rule makes it  
12 clear, that any lawyer in possession of funds, has an  
13 obligation to place those funds into his trust account  
14 and not to disburse those funds, until the matter has  
15 been finally, resolved. So, I cited the rule, assured  
16 Mr. Lauten that we would comply with that rule, and  
17 alternatively, if they weren't happy with that Your  
18 Honor, we even offered to place those funds into another  
19 escrow account, maintained by an independent third  
20 party.

21           And so, we're not, by any means we're not  
22 trying to just make a quick grab for the settlement,  
23 then pay the money all directly to my clients. What  
24 we're trying to do is we acknowledge that the dispute  
25 exists, we're trying to comply with the remedy that's

1 set forth in Rule 1.14 of the Texas Disciplinary Rules,  
2 which govern all attorney's, and we've suggested that we  
3 would comply with all of those obligations. And if  
4 there's a dispute about whether it's Mr. Levinger or my  
5 trust account, as I mentioned, we're willing to agree to  
6 a third party to set up a different trust account, to  
7 place those funds until the matter is resolved.

8 One thing is clear Your Honor, is that  
9 they also, under that rule, there's actually case law on  
10 point, with respect to this issue, to emphasize how  
11 important an attorney's obligation is under Rule 1.14  
12 but, if Mr. Levinger received those funds and he paid  
13 them out knowing there's a dispute, his bar license  
14 would be on the line. And I can cite the Court the case  
15 law but, if that is a concern notwithstanding that, as  
16 I've mentioned, we've offered to alleviate that concern,  
17 by putting them into a third parties trust account.

18 In addition to that Your Honor, there has  
19 been no threat; no one has actually threatened to pay  
20 out those funds to anyone. And one of the things I  
21 pointed out in my response was that, just the fear alone  
22 that someone may do something, is not enough. That's  
23 insufficient to support the Court entering a temporary  
24 restraining order. You have to have actual evidence,  
25 that someone has threatened to do something against the



1 law or inappropriate with your property, and that simply  
2 does not exist, in this case.

3 To the contrary, we have shown the other  
4 side that we are willing not to pay those funds, or  
5 disburse those funds to the clients, until the matter  
6 has been finally resolved. The other problem with this  
7 matter pending in this Court Your Honor is that there's  
8 an extreme risk of a violation of Rule 1.05. Rule 1.05  
9 has to do with the confidentiality of information  
10 regarding clients, and this goes back to our claim for  
11 arbitration. If this case goes forward in this Court,  
12 or the Court allows that to happen, then the problem is  
13 that there's a risk that all of this disclosure of  
14 confidential information will end up happening in this  
15 Court, and will be a matter of public record.

16 And not only that, but, it'll leave  
17 something to the adverse parties, to which my clients  
18 were previously, on the opposite side of the case from.  
19 And there is an exception in Rule 1.05, which I'm sure  
20 Mr. Lauten would address with you but the exception  
21 under that rule says that under certain circumstances,  
22 when a lawyer is trying to recover a fee, he can, to the  
23 extent reasonably necessary, reveal confidential  
24 information but there are limitations on that. The rule  
25 itself says, to the extent reasonably necessary.

1           In our position, in this case, is that it  
2 is not reasonable or necessary to disclose any  
3 information in this Court, regarding the merits of the  
4 fee dispute claim. All that should be taken in an  
5 arbitration setting, where the privacy interest of the  
6 parties, can be protected. And so for that reason, we  
7 feel, in addition to all the other reasons that we set  
8 forth in our response, that this case has no place in  
9 this Court, and the Court should compel arbitration and  
10 compel Mr. Vitullo and his firm to seek their claims in  
11 arbitration. They simply have another place to do that.

12           In addition to that, Your Honor, by going  
13 forward in this case, they threaten to change the status  
14 quo. The whole purpose of a temporary restraining order  
15 is to preserve the status quo of the parties, until the  
16 dispute can be resolved, or there could be a further  
17 hearing. In this case, by them taking the actions they  
18 have, they're actually endangering and jeopardizing the  
19 very settlement that my clients have reached, with  
20 JPMorgan Chase. If they wanted to pursue their fee  
21 dispute claim, they can do it in arbitration, under the  
22 protection of the privacy interest, which would serve to  
23 protect all of the parties and would also not jeopardize  
24 the settlement, because all of those matters would be  
25 protected, under the stroke of the arbitration statute.

1                   Your Honor, after they filed their  
2 initial request for a temporary restraining order, then  
3 we filed our objection and our response, and then they  
4 shifted their strategy. And now their strategy, what  
5 they put in their amended petition and intervention, is  
6 now they've asked the Court to deposit the funds in the  
7 registry of the Court.

8                   THE COURT: I'm not following you, sir.

9                   MR. PENNINGTON: I'm sorry.

10                  THE COURT: What are you saying the  
11 initial strategy was and what is the shift?

12                  MR. PENNINGTON: The initial strategy  
13 Your Honor, was they asked for a temporary restraining  
14 order and injunctive relief. And their initial papers  
15 they filed, with respect to the intervention, they  
16 mentioned nothing about putting the funds in the  
17 registry of the Court, under a motion to deposit the  
18 funds. They have now amended their petition in  
19 intervention and actually, filed a motion to deposit the  
20 funds in the registry of the Court. And they've cited  
21 these cases that Mr. Lauten handed to you just a moment  
22 ago.

23                  The River case, and I've forgotten the  
24 other cases he mentioned but, there are a series of  
25 cases that he cites in his motion and that he provided

1 to you just a moment ago, that allows for, in certain  
2 instances, for funds to be put into the registry of the  
3 Court. The problem that Mr. Lauten has though, in this  
4 case, is that his client and Mr. Malesovas, have waived  
5 their right to seek any kind of action in Court, under  
6 the arbitration clause.

7 So, they cannot even come into Court and  
8 request those funds to be put in the registry of the  
9 Court. They would have to do that under the --with the  
10 Triple A or some other arbitration panel but one thing  
11 is clear they cannot do it in this Court. But separate  
12 and apart from that Your Honor, they have another even  
13 bigger problem, and that is those cases require, before  
14 this Court can order funds to be paid under the registry  
15 of the Court, they have to present evidence that the  
16 funds are in danger of being lost or depleted. And  
17 there simply is no evidence of that in this case.

18 And if I can approach Your Honor, I have  
19 a case I'd like to show the Court that stands for that  
20 very proposition. May I approach, Your Honor?

21 THE COURT: Yes.

22 MR. PENNINGTON: This is a Dallas Court  
23 of Appeals case, that actually deals with this very  
24 issue, and in that case, the Applicant sought both a  
25 temporary restraining order and asked the Court to

1 deposit funds in the registry of the Court. That went  
2 up on appeal and the Dallas Court of Appeals said that  
3 it was an abuse of discretion for the Court in that  
4 case, to order the funds to be paid in the registry of  
5 the Court, because there was no evidence that the funds  
6 were in danger of being lost or depleted. And that is  
7 the exact situation, here. We are not -- there's no  
8 threat that my clients are going to run away with the  
9 money. Instead, it's just the opposite.

10 We have offered to take the disputed  
11 portion of the funds, and whether we put them in my  
12 trust account, or in Mr. Levinger's account, or some  
13 other third party, we've offered a remedy to them under  
14 Rule 1.14 and they have remedy of law under that same  
15 rule. So, they just don't like it but, they do have a  
16 remedy. In addition to that Your Honor, they can also  
17 go to the arbitration association the American  
18 Arbitration Association and obtain the same relief with  
19 the Triple A if they want but, they haven't done that.

20 So, for all of those reasons Your Honor,  
21 we would request that their motion be denied, and we  
22 would request that this Court compel this matter, compel  
23 Mr. Vitullo, his firm, and Mr. Malesovas to pursue their  
24 claims in arbitration and to strike the interventions  
25 and to otherwise, deny all their relief.

1 MR. LAUTEN: Can I respond, Your Honor?

2 THE COURT: Yes.

3 MR. LAUTEN: First of all, there is no  
4 Motion to Compel binding arbitration, before you or set  
5 for hearing today, at all, point number one; it's not  
6 even before you. Point number two, is you asked a great  
7 question and it's a question that I have emailed them  
8 about and I've asked them about. What is the dispute?  
9 What's the amount in dispute? What's the dispute? He  
10 can't even tell you that. What's in dispute is simply  
11 his clients don't want to pay. That's it. That's all  
12 I've heard.

13 He offered into evidence the termination  
14 letter. I have no objection to that. I hope you'll  
15 admit it because what you'll find in that letter is that  
16 he's taking the position, that the agreement that he now  
17 want to enforce in arbitration, he terminated on the  
18 basis that it probably, wasn't enforceable.

19 THE COURT: All right. I have not seen  
20 the termination letter and I'm looking through what I  
21 have here, and I don't have any contingency fee  
22 agreement.

23 MR. LAUTEN: And I brought that to admit  
24 into evidence, in camera. I figured they would say, oh,  
25 that's confidential, you can't enforce your rights,

1 which they're now doing. They're saying well, we hold  
2 all the cards, we get to keep your money, you can't try  
3 to get your money because you breaching confidentiality.  
4 I anticipate that argument. I've got the contingency  
5 agreements. I'll offer them into evidence right now, as  
6 Exhibits 1 and 2, in camera. If they want a foundation  
7 or a predicate, I'll put Mr. Vitullo on the stand right  
8 now, we can prove them up; I brought them.

9 If he's got a problem with  
10 confidentiality, let's kick everybody out, we'll do it  
11 in camera, and I'll put Mr. Vitullo on the stand right  
12 here, Your Honor.

13 MR. PENNINGTON: Your Honor I --

14 MR. LAUTEN: Tell me what you want to do.

15 MR. PENNINGTON: If I could see a copy of  
16 the agreement, I doubt very seriously, that I would  
17 dispute the authenticity of the agreement. But, it was  
18 attached and I can show the Court a copy, with the  
19 attachment.

20 THE COURT: I'm just saying I don't have  
21 it.

22 MR. PENNINGTON: I understand, Your  
23 Honor.

24 THE COURT: All right.

25 MR. PENNINGTON: I was going to show you

1 a copy, that was actually attached, to the petition in  
2 intervention.

3 THE COURT: Well I need to know whether  
4 or not there's an offering to admit it into evidence and  
5 if there's an objection. And if the offer is in camera,  
6 whether or not that makes a difference to you.

7 MR. LAUTEN: I'd offer into evidence  
8 right now Exhibits 1 and 2, which are the signed  
9 agreements of the client. If he has an objection of  
10 confidentiality, then I'm happy to offer them, subject  
11 to in camera, in camera of evidentiary finding.

12 MR. PENNINGTON: Your Honor, I have no  
13 objection to the authenticity of these documents. I  
14 would prefer that they be submitted in camera.  
15 Although, this one, as I said was -- it's my  
16 understanding it was attached to the petition in  
17 intervention so it's already a public record.

18 MR. LAUTEN: No, it's -- the two  
19 agreements are different, Your Honor and I'm offering  
20 two separate exhibits, Exhibits 1 and 2. If I could  
21 approach, I can give you copies.

22 THE COURT: All right, let me see what  
23 you're talking about.

24 MR. LAUTEN: Do you have stickers?

25 [Exhibits marked]



1                   Your Honor, I've handed you what I've  
2 already marked, pre-marked for identification, as  
3 Exhibits 1 and 2 to the hearing, and I'd offer those  
4 into evidence now.

5                   [Intervenors Exhibits 1 and 2 offered]

6                   THE COURT: Mr. Pennington?

7                   MR. PENNINGTON: No objection, Your  
8 Honor.

9                   MR. LAUTEN: Your Honor, I'd offer the  
10 termination letter, as Exhibit 3 into evidence, dated  
11 April 5, 2018.

12                   [Intervenors Exhibit 3 offered]

13                   THE COURT: All right. Now, let me  
14 understand that your Exhibit 1 is a contingency contract  
15 of representation and then, we have the same caption on  
16 Exhibit 2. Are they the same thing or--?

17                   MR. LAUTEN: Good question, Your Honor.  
18 Exhibits 1 and 2 are signed by each client. They're the  
19 same underlying agreement but, different signatures on  
20 both but it's really important that the Court  
21 understands this is a big deal. If you look at Ms.  
22 Wassmer's interlineations on the contingency agreement,  
23 she said we're responsible for defending the counter  
24 claims. Why is that important? Because there was a  
25 three-million-dollar defense of those claims. We're

1 entitled to a contingency fee on those claims, above the  
2 45 percent. I've been trying to find out for three  
3 days, what is in dispute.

4 THE COURT: All right. Well my question  
5 is -- as I said, are both of these documents the  
6 operative documents?

7 MR. LAUTEN: Correct, your Honor.

8 THE COURT: All right so, -- Sir?

9 MR. PENNINGTON: Your Honor, with respect  
10 to Exhibit 3, I do not --

11 THE COURT: Let's not move to three.  
12 Let's stay with one and two okay?

13 MR. PENNINGTON: I understand.

14 THE COURT: All right, I need to  
15 understand. Exhibit 1 has some interlineations and it  
16 looks like they're initialed by at least, Laura Wassmer.  
17 And then Exhibit 2 doesn't have any -- All right Exhibit  
18 1 is not dated; Exhibit 2 seems to be dated so --

19 MR. LAUTEN: I'd offer Exhibit's 1 and 2.  
20 If there's a problem with the foundation, I'm happy to  
21 put Mr. Vitullo up on the stand right now. I'm happy to  
22 prove it up, if that's what you want me to do.

23 MR. PENNINGTON: Your Honor, we don't  
24 object to the authenticity of either of those exhibits.  
25 We believe those to be duplicate copies of the

1 contingency fee agreements that were signed by my  
2 clients.

3 THE COURT: Okay. So, I guess the  
4 question is: Were these two signed at two different  
5 times, or what?

6 MR. PENNINGTON: My understanding, Your  
7 Honor, is I think that one client signed one version,  
8 and the other client made some interlineations, and then  
9 signed -- it's the same contract. At least, that's my  
10 understanding but, that the, one of the clients made  
11 some notes, on their version that they signed, then they  
12 sent it back.

13 MR. LAUTEN: That's correct. I agree  
14 with that.

15 THE COURT: Okay so one client agrees on  
16 a different scope of representation than the other  
17 client?

18 MR. LAUTEN: That's my position, Your  
19 Honor. My position is that Laura Wassmer is at risk for  
20 an additional contingency fee for the successful defense  
21 of the claims, based on the very interlineations she  
22 wrote. That would only go to show one thing, the 45  
23 percent they want escrow, is insufficient under the  
24 agreements they signed, if that's what they want to do.  
25 But be that as it may, all we're really here -- what

1 that documents prove is this.

2 THE COURT: Well, I'm not asking you  
3 that. I'm just asking the question. Am I to understand  
4 that we are operating under one agreement for Laura  
5 Wassmer, and another agreement for Stephen Hopper?

6 MR. LAUTEN: That's my position, Your  
7 Honor, yes. Albeit, they're the same with respect to  
8 the contingency, on the affirmative claims.

9 MR. PENNINGTON: Your Honor, the more  
10 important matter is that both of these agreements  
11 contain an arbitration clause.

12 THE COURT: Well, I'm just trying to get  
13 my question answered, okay?

14 MR. PENNINGTON: I'm sorry.

15 THE COURT: I see that they both have an  
16 arbitration clause.

17 MR. VITILLO: Your Honor, I can speak to  
18 that question, since I'm the one that presented the  
19 contingency fee contracts, to both my clients. If I  
20 may, without revealing any -- I want to make sure I  
21 don't reveal any confidential information; I don't  
22 believe it is but the first contract, Your Honor, was  
23 signed by Stephen Hopper. The second contract, which is  
24 the same contract, was signed by Laura Wassmer, which  
25 she may interlineations, but she made changes to that

1 contract to include the defense of the JPMorgan Chase  
2 counterclaims.

3           After those two contracts were signed,  
4 fist by Stephen Hopper and the Laura Wassmer, I then had  
5 a conversation, a phone conversation with both of them,  
6 to make sure all of us were on the same page, okay? So,  
7 that's how those contracts evolved. And so, it was  
8 first signed by Stephen Hopper, then it was signed and  
9 changed by Laura Wassmer, and then I had a conference  
10 call with Stephen and Laura to make sure that my scope  
11 of representation does, in fact, include defending the  
12 counterclaims of JPMorgan Chase.

13           THE COURT: Okay. And is there  
14 documentation of that?

15           MR. VITULLO: Of me defending the  
16 counterclaims, yes, Your Honor. But, -- absolutely.

17           THE COURT: All right. I'm sorry I  
18 interrupted you.

19           MR. PENNINGTON: That's all right, Your  
20 Honor.

21           THE COURT: Okay what was your --

22           MR. LAUTEN: Before you do that -- I'm  
23 sorry to interrupt. Can I please get a ruling on  
24 offering Exhibit 3 into evidence, Your Honor? I offered  
25 Exhibit 3, the termination letter and I didn't get a

1 ruling on that.

2 THE COURT: Well, I'm going to get to it  
3 but I'm trying to get finished with 1 and 2 --

4 MR. LAUTEN: Sure.

5 THE COURT: -- okay? So, I think I've  
6 gotten my questions answered with respect to 1 and 2.  
7 Do you have anything you want to add?

8 MR. PENNINGTON: With respect to 1 and 2,  
9 Your Honor, the only thing is what I've just pointed out  
10 which is, that they both contain an arbitration  
11 provision.

12 THE COURT: All right.

13 MR. PENNINGTON: So, it's now undisputed  
14 that both of the agreements they're trying to enforce,  
15 contain that arbitration clause, which requires this  
16 matter to go to arbitration. And it contains the  
17 language that I quoted in my response.

18 THE COURT: Okay.

19 MR. PENNINGTON: Are you ready for me to  
20 respond to the rest of the arguments or are you --

21 THE COURT: No, just a minute.

22 MR. PENNINGTON: Yes, Your Honor.

23 THE COURT: All right. Now, the Court's  
24 going to admit Exhibits 1 and 2. And then, with respect  
25 to Exhibit 3?

1 [Intervenors Exhibits 1 and 2 admitted]

2 MR. PENNINGTON: Your Honor, with respect  
3 to Exhibit 3, which I believe is the termination letter,  
4 I don't dispute -- I would agree to the authenticity of  
5 this letter. The authenticity of it is not disputed.  
6 The only objection I have, with respect to this exhibit  
7 being admitted into evidence, is that it does contain  
8 what is information I consider not to be or to be  
9 confidential. And this goes back to my previous claim,  
10 about part of the problem why this case should be in  
11 arbitration and not in your Court is because, we're now  
12 getting into matters which are confidential.

13 If I have to start explaining why my  
14 clients terminated Mr. Vitullo to justify their  
15 termination, that opens up a whole can of worms and  
16 matters, which should not be disclosed to the public.  
17 They are private and especially, in light of the fact  
18 that all the parties signed an arbitration provision,  
19 those matters should be decided in arbitration and not  
20 here in this Court.

21 But, I have no objection to this Exhibit  
22 3 being admitted into evidence, provided that there's  
23 some, that it's done under seal or under some order of  
24 confidenti --

25 THE COURT: What portion of this letter

1 is confidential?

2 MR. PENNINGTON: It's in the first  
3 paragraph where we start getting into the decision, the  
4 reason for the --

5 THE COURT: Well, just tell me exactly,  
6 what language you consider to be confidential.

7 MR. PENNINGTON: Well, Your Honor, if I  
8 may, if I point that language out on the record, counsel  
9 for JPMorgan Chase is here in the courtroom, and I don't  
10 want to reveal any confidential information that might  
11 have an adverse effect on the settlement. So, that's my  
12 concern. I feel like I'm being put in a box right now.

13 THE COURT: Well, I mean I appreciate  
14 what you're saying but, you know, I guess you know --

15 MR. PENNINGTON: Well maybe I could do it  
16 this way, Your Honor. If I start with the sentence that  
17 I believe, contains the confidential information but,  
18 this is on the -- it's the third sentence that says:  
19 "Their decision to terminate this relationship is based  
20 on a number of factors." That sentence all the way  
21 through the next-to-last sentence, which says: "As a  
22 result, I'm notifying you that my clients are, effective  
23 immediately, terminating the relationship." Everything  
24 in between that, I believe, is confidential. And I  
25 would ask the Court to have that be admitted, just in



1 camera.

2 THE COURT: Mr. Lauten?

3 MR. LAUTEN: I don't have any objection  
4 to it being admitted either under seal or in camera but,  
5 I would like it to be before the Court, for the purpose  
6 of this hearing so, it's up to you.

7 THE COURT: Well, it's before the Court;  
8 I'm holding it.

9 MR. LAUTEN: Well I'm offering it into  
10 evidence but, I don't want someone to, you know, have  
11 some basis to file a grievance against us. So, if  
12 that's what the implication is, I'm happy to offer it  
13 into evidence, you know, in camera, outside the presence  
14 of parties that are adverse, to us. But, at the same  
15 time, my point though obviously, is there's nothing  
16 confidential in here.

17 THE COURT: Mr. Beckwith?

18 MR. BECKWITH: Your Honor, I just want to  
19 make sure, since I've been shown this letter and I've  
20 been told I shouldn't see the letter, that it doesn't  
21 say anything about the terms of the settlement and the  
22 amount of the settlement. That's my biggest concern,  
23 Your Honor. I don't think anybody wants to --

24 MR. PENNINGTON: I'll represent to you  
25 it's not.

1 MR. PENNINGTON: Okay. Then with that  
2 representation, Your Honor, I'll sit back down.

3 THE COURT: All right. So, the Court is  
4 going to admit Exhibit 3.

5 [Intervenors Exhibit 3 admitted]

6 MR. PENNINGTON: Is it going to be  
7 admitted in camera, Your Honor or for all purposes?

8 THE COURT: I think I'm going to admit  
9 Exhibit 3, for all purposes.

10 MR. PENNINGTON: So, my objection is  
11 overruled, Your Honor?

12 THE COURT: Yes.

13 MR. LAUTEN: I don't know exactly where  
14 we are but could I make a big point here? Were you -- I  
15 can't remember where we left it.

16 MR. PENNINGTON: I'm sorry but I wasn't  
17 through.

18 MR. LAUTEN: Oh, go ahead, that's fine.

19 MR. PENNINGTON: Your Honor, in response  
20 to that letter, I would like to offer Exhibit 4.

21 [Exhibit No. 4 offered]

22 MR. LAUTEN: Object hearsay, object  
23 relevance.

24 MR. PENNINGTON: Your Honor, Exhibit 4, I  
25 mean, if I have to -- if they won't stipulate to the

1 authenticity of this, I will represent to the Court that  
2 this is a true and correct copy of a letter that was  
3 sent to Mr. Lauten on April 6, 2018. And I would  
4 request that this document be admitted, at this time.

5 MR. LAUTEN: My objection is not to  
6 authenticity. My objection is to relevance and hearsay.

7 MR. PENNINGTON: Your Honor, the  
8 relevance is that this letter shows that I have agreed  
9 to put the funds into either Mr. Levinger's trust  
10 account, my trust account or that of an offer to put it  
11 into that of a third party. And it goes to the very  
12 heart, I mean, they have to show that there's some  
13 imminent harm that the funds will be lost or depleted or  
14 removed. And if those funds -- if I'm agreeing on  
15 behalf of my client, to put those funds and to hold them  
16 at the Trust, until the settlement or until this matter  
17 is finally resolved, there is no danger or imminent  
18 threat of the funds being lost or depleted because  
19 they're going to remain in a trust account, either mine  
20 Mr. Levinger's or some other third parties.

21 MR. LAUTEN: This is important point,  
22 Your Honor, and this is the big issue here. This is why  
23 we're in a separate box. This is an ownership issue at  
24 this point and Mr. Loewinsohn, back there, had this  
25 issue in the Hunton Hill fee dispute and that is this:

1 On the one hand you have the Mandal right line of cases  
2 that say, if you terminate your contingency fee lawyer  
3 without cause, you get the entire contingency fee  
4 interest but, if with cause, you get quantum meruit.

5 We're not under that body of case law.  
6 The reason is because we've done the work. The case is  
7 over. It's our property. We own those funds. We have  
8 a vested interest. There's no dispute here. They  
9 can't wait until aha, we've got a settlement now and we  
10 don't want to pay you. And when they argue we want to  
11 put it in Mr. Levinger's account, he's the one that is  
12 criticizing Mr. Vitullo in Exhibit 3, that you've just  
13 admitted.

14 Why should we surrender control of our  
15 money that we own? We have a property right per Exhibit  
16 1 and 2 and they're in evidence. And those contingency  
17 fee agreements, the moment we do the work, we own it.  
18 Not their portion, our portion. It works both ways. We  
19 can't hold their money any more than they can hold our  
20 money. And if they think that it's all protected  
21 because lawyers are subject to bar rules, well then,  
22 give it to us and let us put it in our trust account.

23 I mean under the rule of *Goose v. Gander*,  
24 it works both ways. So, but that's the big issue here,  
25 these aren't disputed funds. We own the property right,

1 because we've done the work. The *Tillery* case and the  
2 *Enoch* case that I handed you, say they are estopped. If  
3 you could do this Your Honor, every time Mr. Branson or  
4 Ted Lyon or somebody went and got a thirty or forty-  
5 million dollar-settlement, it would be malpractice for  
6 the client to say, I'm firing you. Let me keep the  
7 money we'll go arbitrate. Let me see if I can get a  
8 discount on what I already owe you. People would do  
9 that if you could do that. You can't. And that's what  
10 *Enoch* said.

11 If we were six months before trial or  
12 three months before trial or a year before trial,  
13 absolutely. But they can't tie up the money that we now  
14 own. That is the distinction between the former and the  
15 latter is we have done the work and now that Exhibits 1  
16 through 3 are in evidence, it is undisputed in this  
17 courtroom, that they terminated on the very day the  
18 settlement was announced, in here. You've got  
19 undisputed proof that they terminated the day the case  
20 ended, for all practical purposes.

21 MR. PENNINGTON: Your Honor --

22 THE COURT: All right. It's almost 5  
23 O'clock so let's wrap it up.

24 MR. PENNINGTON: I'll make it quick, Your  
25 Honor. You know, Rule 1.14 gives the Court the exact

1 remedy that needs to be applied in this case and that  
2 is, I mean, they don't like it but, the ethical rules  
3 require that any disputed funds, be held in a large  
4 trust account or escrow account. We've agreed to comply  
5 with that. The only disagreement we're having is the  
6 place where those funds are going to be held.

7           And Your Honor, I mean they may not, you  
8 know, he's citing this good for the goose, good for the  
9 gander rule but, the bottom line here is, Rule 1.14 says  
10 exactly what the remedy is and that's, it's held in  
11 trust or escrow. If they don't like it, they can go to  
12 the Triple A, the arbitration panel, and ask them for  
13 some kind of injunctive relief or ask them to put the  
14 funds into the registry of the arbitration panel.

15           They have many other remedies available  
16 to them but, they don't have the remedy of coming into  
17 this Court and asking for the funds to be deposited into  
18 the registry. They waived it when they signed the  
19 arbitration agreement. And the problem I've got right  
20 now is, I can't fairly defend my client and explain to  
21 you, why they terminated their clients, and give you a  
22 full explanation, which I think if I could give it to  
23 you, I think it might affect whether or not you believe  
24 that they're entitled to their fee or not.

25           I'm in a box right now and I shouldn't be

1 here, because we should be in arbitration where I can  
2 explain to an arbitrator why my clients are disputing  
3 the fee. Mr. Lauten is trying to put the burden on me  
4 and say that I have the burden to tell this Court the  
5 amount that's in dispute. I don't have that burden.  
6 He's the one who's trying to have the Court put funds in  
7 the registry.

8 He's got to come forward and tell the  
9 Court how much those funds are, without disclosing any  
10 settlement amount. That's why I said we would withhold  
11 the entire 45 percent. I'm not going to give you an  
12 amount but, I'll tell you the percentage and I've also  
13 asked them to tell me if they've got any expenses that  
14 they've incurred, and we'll withhold those, too. But  
15 all that can be done under the arbitration umbrella, and  
16 not in this Court.

17 Now, I did move to compel, in my  
18 response, on page three, at the bottom of my objection,  
19 I specifically asked this Court to compel that their  
20 claims be submitted to binding arbitration. So, Mr.  
21 Lauten is incorrect on that. They filed their petition  
22 in intervention at noon on Friday so, I have had all  
23 weekend, that's it, to get ready. But I did ask for  
24 that relief in my papers, my objection I filed, I asked  
25 the Court to compel this matter to arbitration.

1                   His other point about, he continues to  
2 repeat this line of cases, the *Tillery* case, which say  
3 that my plan is estopped, once they fully perform. Well  
4 first of all, it's a disputed issue about whether they  
5 have fully performed. We have put that in our response  
6 that if that agreement is enforceable, which we have an  
7 issue over but, if it is enforceable, we believe that  
8 Mr. Vitullo's firm breached that agreement. And, I  
9 can't go into the details as to why, because that would  
10 breach confidentiality and so forth but, one thing I can  
11 tell you is that the case law he relies upon, the  
12 *Tillery* case and the *Enoch's* case, both of those cases  
13 were questioned by a more recent case, a Dallas Court of  
14 Appeals case, called *Neece v. Lyon*.

15                   And this is a 2015 case, where the Dallas  
16 Court of Appeals specifically, addressed this issue, and  
17 they said that -- and this was a fight between a client  
18 and a lawyer over some fees, and then that case, the  
19 Court recognized that the clients could, even after the  
20 lawyer fully performed, the clients could assert a claim  
21 for restitution and rescission of the agreement, after  
22 the fact, and that they did have those defenses  
23 available to them.

24                   MR. LAUTEN: I'm the lawyer in that case.  
25 That was a barratry case; still pending and that's not



1 what it says. I represent Mr. Lyon in that case. If  
2 you want to talk about it, that's not what it says.  
3 It's a barratry case.

4 MR. PENNINGTON: Well, I --

5 MR. LAUTEN: In fact, Rod Phelan and I  
6 did that case.

7 THE COURT: Excuse me, sir. I don't  
8 allow --

9 MR. LAUTEN: I apologize for the  
10 interruption. I'm sorry.

11 MR. PENNINGTON: I've got a copy of the  
12 case Your Honor, if you want it.

13 THE COURT: All right, thank you.

14 MR. PENNINGTON: But the bottom line,  
15 Your Honor is whatever the remedy is and whatever  
16 defenses my clients may or may not have, those are all  
17 issues that should be decided in arbitration and not in  
18 this Court. Your Honor, I just want to make sure before  
19 I finish, if I could get a ruling on my offer of exhibit  
20 four.

21 THE COURT: Uh, let's see --

22 MR. PENNINGTON: That was the April 6<sup>th</sup>  
23 letter, Your Honor.

24 THE COURT: Any objection?

25 MR. LAUTEN: I object to relevance and

1 hearsay.

2 MR. PENNINGTON: Your Honor, I apologize,  
3 I misspoke. I said Exhibit 4, It's Defendants Exhibit  
4 1, that I handed to you, I apologize.

5 THE COURT: Sir?

6 MR. LAUTEN: Here's the problem with the  
7 relevance: 1.14 that he keeps citing you about putting  
8 the money in the lawyer's trust account, that's this  
9 lawyer's trust account. Not the person criticizing is  
10 over here. If he wants us to put the disputed money in  
11 Mr. Vitullo's trust account as 1.14 says, and hold it  
12 there, I have no problem with that.

13 MR. PENNINGTON: Your Honor, but --

14 MR. LAUTEN: Hold on, let me finish.

15 MR. PENNINGTON: Sorry.

16 MR. LAUTON: But, what he's trying to say  
17 is, the ethical rule when there's a dispute between a  
18 lawyer and a client, it goes in that lawyer's trust  
19 account. That's Mr. Vitullo. What he's saying is put  
20 the money in this lawyer's account, who follows our  
21 instructions, not yours. Well what happens when that  
22 happens, Your Honor? Who's going to tell Mr. Levinger  
23 what to do with that money? A Court's going to have to  
24 tell him to give it back. He's not going to give it  
25 back to us because he thinks it's right. It's our

1 property.

2 THE COURT: Okay. Mr. Beckwith?

3 MR. BECKWITH: Yes, Your Honor, just  
4 briefly. The status quo as we are here today, is we  
5 have a Rule 11 Agreement that's been filed with the  
6 Court, there was an announcement that announced that the  
7 heirs and JPMorgan had reached a settlement. There is a  
8 definitive, confidential term sheet and the parties are  
9 negotiating a final definitive settlement agreement.  
10 The money that is part of the settlement, is at JPMorgan  
11 today. A material term of the settlement is  
12 confidentiality and I don't think Mr. Vitullo, Mr.  
13 Lauten, Mr. Pennington, Mr. Levinger or anybody wants to  
14 violate that. But the material term of the settlement  
15 is the confidentiality.

16 I've expressed to you my deep concern  
17 that after all of the time that you invested in the  
18 judgment hearing last week, I do think it would be  
19 inappropriate for Your Honor to gain knowledge of the  
20 heirs' settlement, as you're trying to weigh the  
21 decision on the judgment of that important decision.  
22 Here's what -- I did say earlier that I joined in Mr.  
23 Pennington's request for the trust account. I join in  
24 Mr. Lauten's request, too. There are five lawyers in  
25 front of the bar here, all of whom are duty bound to

1 keep money in their trust account subject to licensure  
2 literally, their state bar license hangs on the line.  
3 And so any of the five lawyers ought to be able to take  
4 the money, Mr. Vitullo, Mr. Lauten, anybody.

5           The other thing I suggested, when I was  
6 on the phone this morning trying to solve this is, there  
7 are a ton of banks and title companies and trust  
8 companies. Your Honor could say, you-all go find one  
9 and send it there. But I think those are the simple  
10 solutions here. So then, we can keep the settlement on  
11 track, and then let the lawyers go fight about it as  
12 they need to fight about it in arbitration, or in Your  
13 Honors Court. But let's just find a place to put the  
14 money. There are five trust accounts here that we could  
15 put it in or, in a bank or, a title or, a trust company.  
16 I hope that's helpful.

17           MR. LAUTEN: And to Mr. Beckwith's point,  
18 we're happy to agree to an independent third party to  
19 hold this money, as long as, it's subject to your order  
20 on when it gets released. If you simply just tell us to  
21 leave and put it in Mr. Levinger's trust account, we're  
22 never going to get that money back until we go to you or  
23 a different court and say give it back. That's why we  
24 need the Court to maintain jurisdiction over the corpus.  
25 But I don't have a problem with Mr. Beckwith's

1 suggestion, if it's a third-party escrow agent or bank  
2 or whoever.

3 But Mr. Levinger, he's a great lawyer,  
4 dear friend of mine; he answers to his clients as we all  
5 do. He doesn't answer to me and he doesn't answer to  
6 Mr. Vitullo. If you want to do a third party, that's  
7 duty bound to follow the order of you or this Court, I'm  
8 fine with that.

9 THE COURT: All right. We need to wrap  
10 up. We're past the allocated time. Can you hear me?

11 MR. PENNINGTON: I'm sorry?

12 THE COURT: I said can you hear me?

13 MR. PENNINGTON: Yes, Your Honor.

14 THE COURT: Okay. This is my concern and  
15 you know we have invested a considerable amount of time  
16 in this Hopper case. And, I guess, Mr. Pennington, I  
17 believe that your clients have created a problem that  
18 jeopardizes all the work that's in this case. And I'm  
19 concerned that, I mean based on what I'm hearing from  
20 Mr. Beckwith, I'm just kind of reading between the lines  
21 and basically, he's saying that they're negotiating the  
22 terms of the agreement.

23 And so, I guess one of my concerns is,  
24 that the agreement may fall apart, which would be  
25 problematic for your clients and possibly, for this

1 case. And also, there's an intervention that was filed,  
2 which means that it may be problematic, in terms of  
3 getting a final judgment on all of the work that has  
4 already been done. And with respect to your client's  
5 concerns about -- I mean, there's something here that I  
6 don't understand.

7 I don't understand how Mr. Levinger and  
8 Mr. Cecere were the Appellate Counsel on a case with Mr.  
9 Vitullo and now they're on opposite sides. So, that's  
10 not clear to me how that works and I find that an odd  
11 posture. And I find it an odd posture to suggest that  
12 given that circumstance, that Mr. Levinger should be the  
13 person that I should trust to hold the funds. Because  
14 it appears that his interest now, is adverse to Mr.  
15 Vitullo.

16 And, of course, you've got the Court in  
17 the position of, you don't want me to understand what  
18 the settlement is because of the effect on the  
19 confidentiality, and Mr. Beckwith doesn't want the Court  
20 to know or doesn't want it put into the Court registry  
21 because, somebody can do the math and figure out what  
22 they paid. And so, you know, when I look at the root  
23 cause of all this problem, it comes back to your clients  
24 and your client's decisions.

25 And I'm concerned that, I mean, I

1 understand that there's an issue with respect to whether  
2 or not the arbitration agreement is enforceable but, I  
3 don't think that the issue should be whether or not the  
4 Court has authority to protect whatever assets are in  
5 the case or not in the case. And you know, I'm really  
6 challenged to understand why this issue cannot be worked  
7 out because of the risk to all of the work that we have  
8 put into this case. And I --

9 MR. PENNINGTON: As to that point, Your  
10 Honor, and I'm not trying to interrupt you, I apologize  
11 but, as to that very issue, I mean, I heard Mr. Lauten  
12 just agree on behalf of his clients, that they would do  
13 that, with a third party.

14 THE COURT: Well, I have been party to  
15 cases, in fact, I probably have some cases down here  
16 where there's been some funny business with trust  
17 accounts, so I'm not persuaded that that's the most  
18 protection that I can give, okay because, even if I put  
19 funds in a trust account, that person is not bonded.  
20 And that law firm may not be bonded sufficiently or  
21 insured sufficiently if that person decides to take a  
22 permanent vacation on that money.

23 And so, I mean, I'm very concerned about  
24 the protection of everyone's interest but, I think that,  
25 you know, I'm kind of in a box too, without knowing what

1 I'm protecting. I mean, as I said, this whole thing has  
2 developed from your clients' decisions. And your  
3 clients are not providing the Court, in my judgment, an  
4 appropriate resolution. So, I mean, I'm willing to give  
5 you a chance to talk with Mr. Lauten but, I mean, maybe  
6 the resolution is that Chase Bank keeps the money, until  
7 you-all work out your disputes.

8 MR. BECKWITH: That's what I was just  
9 asking my client, Your Honor, but the settlement --

10 MR. LAUTEN: I think we're okay with  
11 that.

12 MR. BECKWITH: The final terms of the  
13 settlement is that we have finality, you can sign the  
14 settlement agreement and then, the money can be funded,  
15 once the arbitration is solved.

16 THE COURT: Well, I'm not --

17 MR. LAUTEN: Well, I'm not agreeing to  
18 that part. But, I was with you until you said  
19 arbitration.

20 THE COURT: I'm not going to say whether  
21 or not -- I need to read this stuff -- but I'm not going  
22 to say whether or not I'm going to refer you to  
23 arbitration today. But I am saying to you that I think  
24 it's disingenuous to suggest that the assets will be  
25 protected. And no disrespect to Mr. Levinger or any of



1 you-all but, I just, -- You know, the bar rules, and I  
2 teach ethics all the time, are, you know, they're the  
3 rules but they're not the protection.

4 MR. BECKWITH: Your Honor, I didn't mean  
5 to suggest arbitration order, Your Honor, but we are  
6 happy to finalize settlement and the money will just sit  
7 there and someday, be funded upon the proper orders of  
8 the arbitrators or the Court.

9 MR. LEVINGER: Well, for clarity, the  
10 portion of the money that indisputably belongs to the  
11 clients, should go to the clients.

12 THE COURT: Well, sir, I mean, they have  
13 created this problem. And so, why should I put them in  
14 a better position than they were in, before they created  
15 this problem?

16 MR. PENNINGTON: Your Honor, with all due  
17 respect, I mean, my clients haven't really been afforded  
18 an opportunity to explain their position.

19 THE COURT: Well, but you come down here,  
20 I mean, I guess my frustration is I've spent a huge  
21 amount of time on this case, and I would expect, that as  
22 officers of the Court, that issues like this would have  
23 been worked out. I understand that they haven't and  
24 that's why you're here but, as I said, I'm really  
25 concerned about the impact on getting to a point of

1 final judgment on the underlying case. And what you're  
2 doing is basically, you're taking the Court's time away  
3 from that case, moving into this issue.

4 MR. PENNINGTON: Well Your Honor, we're  
5 not doing that. That's what Mr. Vitullo's doing.

6 THE COURT: Well, you are doing it.

7 MR. LAUTEN: We got terminated, yeah,  
8 sorry.

9 THE COURT: Okay, you are doing it. I  
10 mean I have a mountain of stuff to read from the last  
11 couple days of the hearing and now, I'm having to turn  
12 my attention to this issue and that's a problem.

13 MR. PENNINGTON: Well and I regret that  
14 you're having to do that, Your Honor and that's why I've  
15 asked for this matter to be compelled in arbitration.

16 THE COURT: Well and as I said, I have to  
17 even read a lot of stuff to decide whether or not that  
18 makes sense to me. And, you know, I haven't been fully  
19 informed on that issue because, I mean, this is just  
20 basically, a TRO hearing. And I'm sure that you have  
21 more information to provide me on whether or not the  
22 arbitration provision is enforceable, or whether or not  
23 there's waiver.

24 I'm not in a position to make that  
25 decision, today but, I need a resolution that protects

1 the alleged property interest that Mr. Vitullo or Mr.  
2 Lauten is asserting and I want to come up with something  
3 that is fair to your clients, as well as protect the  
4 interest of JPMorgan Chase, and hopefully not damage Ms.  
5 Hopper's interest.

6 MR. PENNINGTON: Your Honor, if Mr. --

7 MR. LOEWINSOHN: Your Honor, if I may  
8 state on that. Your Honor raises obviously, a very  
9 important procedural point. I'm just going to put all  
10 parties on the notice here that, we're going to need to  
11 figure out procedurally how to remove this action from  
12 the rest of the actions because, it will prejudice Mrs.  
13 Hopper from obtaining her final judgment. And I will be  
14 speaking to all counsel here about dealing with these  
15 proceedings and separating them out.

16 MR. PENNINGTON: We can sever. We'll  
17 agree to severance. It's no problem. Don't worry  
18 Allan.

19 MR. LEVINGER: Further, Your Honor, --

20 THE COURT: I don't know that The Court's  
21 going to agree to it so we just need to -- I need to  
22 have all of the information before I make that decision.  
23 I mean you're piling the decisions that I need to make  
24 pretty high that's what I'm saying to you. And I'm  
25 willing to make the decisions but, I think that you

1 can't -- you can't expect me to just agree with you.

2 MR. PENNINGTON: Your Honor, what I heard  
3 Mr. Beckwith offer just a moment ago was that his client  
4 would be willing to retain the funds, the disputed  
5 amount and that --

6 THE COURT: If I agree that Mr.  
7 Beckwith's client retain the funds, he's going to retain  
8 all of it.

9 MR. PENNINGTON: Well Your Honor --

10 MR. BECKWITH: Your Honor, we are not --  
11 I'm not retaining them in some sort of special escrow  
12 account. I'm just agreeing not to pay them until  
13 somebody tells me the settlement is scheduled.

14 MR. PENNINGTON: Your Honor, --

15 MR. BECKWITH: When the settlement  
16 agreement is done, it's going to be signed. But then  
17 the funding of the settlement can depend upon  
18 appropriate orders of the Court or the arbitrators.

19 THE COURT: I mean, why should I put your  
20 clients in a better position and they've created this  
21 issue?

22 MR. PENNINGTON: Your Honor, the reason  
23 why is because Rule 1.14 is --

24 THE COURT: Sir, I'm very familiar with  
25 1.14. And as I said, I don't agree that a trust account

1 just of --

2 MR. PENNINGTON: And no, I'm not talking  
3 about that right now, Your Honor. What I was going to  
4 say was Rule 1.14 addresses the portion that's  
5 undisputed.

6 THE COURT: Well but, you're unwilling to  
7 tell me what's disputed or undisputed or why there is a  
8 dispute and so, I am without sufficient information to  
9 make an informed decision.

10 MR. PENNINGTON: I'm sorry Your Honor,  
11 but as to that issue, I think my letter, Defendant's  
12 Exhibit 1, the April 6<sup>th</sup> letter says that the amount, we  
13 can calculate the amount without telling the Court  
14 because we know that they're claiming a 45 percent  
15 interest. So what I'm suggesting is that if Mr.  
16 Beckwith wants to retain 45 percent of the settlement  
17 proceeds, and not pay that portion --

18 THE COURT: I'm not --

19 MR. LAUTEN: I can't agree to that.

20 THE COURT: We're not saying the same  
21 thing, sir. If I have to order Mr. Beckwith to retain  
22 the settlement, I'm going to order him to retain all of  
23 it --

24 MR. PENNINGTON: Can I just point out one  
25 other thing?

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.

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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