

II. PARTIES

2.01 Plaintiff Carolyn J. Clark, as Independent Executrix of Patricia Burns Clark Dailey's estate, and individually.

2.02 Plaintiff Michele Dailey Cadwallader, individually.

2.03 Plaintiff Christopher Clark, individually.

2.04 Plaintiff Craig William Clark, individually.

2.05 Plaintiff Richard Burns Clark, individually.

2.06 Defendant J.P. Morgan Chase Bank, N.A., Individually, Corporately, and in its Capacity as Trustee of the Patricia Burns Clark Trust under the Will of T.E. Burns, and The Patricia Burns Clark Irrevocable Trust.

2.07 Defendant Patricia Schultz-Ormond (referred to herein as "Ormond") is a former JPMorgan employee.

III. BACKGROUND

3.01 Defendant J.P. Morgan served as the trustee of two trusts for the primary benefit of Patricia Burns Clark Dailey (collectively referred to herein as the "Burns Trusts"). One trust was established by her father, T.E. Burns, on May 1, 1961, as an irrevocable, *inter vivos* trust for her benefit and is referred to herein as the "Burns Irrevocable Trust." The second trust was established pursuant to the Last Will and Testament of her father, T.E. Burns, dated July 25, 1962, and is referred to herein as the "Burns Testamentary Trust." The Burns Trusts owned interests in approximately 29,958 acres, more or less, of land and the underlying minerals in Frio and La Salle Counties, Texas, known as the Burns Ranch.

3.02 Patricia Burns Clark Dailey was the sole income beneficiary of the Burns Trusts and this suit (the "Dailey Suit") was originally brought on her behalf by her attorney-in-fact at

the time, Carolyn J. Clark. Ms. Dailey died on August 5, 2011, and Carolyn J. Clark was appointed as the Independent Executrix of Ms. Dailey's estate. Carolyn J. Clark, as Independent Executrix of Ms. Dailey's estate, then filed a Suggestion of Death in the Dailey Suit on October 7, 2011, and substituted in as Plaintiff. Carolyn J. Clark, Michele Dailey Cadwallader, and Christopher Clark are also Ms. Dailey's children, and likewise were contingent remainder beneficiaries of the Burns Trusts. After Ms. Dailey's death, they joined as plaintiffs in the Dailey Suit.

3.03 Carolyn J. Clark, as Independent Executrix of Ms. Dailey's estate, and individually, Michele Dailey Cadwallader, and Christopher Clark (collectively referred to herein as the "Dailey Plaintiffs") filed their Second Amended Petition on October 12, 2011 (the "Dailey Petition"). The Dailey Petition alleges the following causes of action against J. P. Morgan: (i) breach of fiduciary duty; (ii) breach of trust; (iii) fraud by nondisclosure; and (iv) negligent misrepresentation. The Dailey Petition further alleges the Dailey Plaintiffs' entitlement to exemplary damages.

3.04 Craig William Clark and Richard Burns Clark (collectively referred to herein as the "Clark Plaintiffs") are two of Ms. Dailey's children and were contingent remainder beneficiaries of the Burns Trusts. The Clark Plaintiffs originally brought suit against Defendants in the Probate Courts of Bexar County, Texas, but subsequently nonsuited the Probate Court suit, and filed their Plaintiffs' Original Petition on October 11, 2011, in cause number 2011-CI-16542, styled *Craig William Clark and Richard Burns Clark v. JP Morgan Chase Bank, N.A., Individually and Corporately and as Trustee of The Burns Irrevocable Trust and the Burns Testamentary Trust, and Patricia Schultz-Ormond*, in the 73rd Judicial District Court of Bexar County, Texas (the "Clark Suit").

3.05 The Clark Plaintiffs assert the following causes of action in their Plaintiffs' Original Petition (the "Clark Petition") against J.P. Morgan: (i) breach of fiduciary duty for the alleged negligence and mismanagement of the mineral estate; (ii) breach of trust; (iii) breach of fiduciary duty – failure to disclose; (iv) breach of fiduciary duty – unreasonable fees and expenses; and (v) breach of fiduciary duty - waste. The Clark Petition further alleges the Dailey Plaintiffs' entitlement to exemplary damages.

3.06 Defendants filed their Motion to Consolidate the Clark Suit and the Dailey Suit on November 2, 2011. Judge Peter Sakai signed the Order Granting Defendants' Motion to Consolidate on November 15, 2011, ordering that the Clark Suit be consolidated for all purposes into the Dailey Suit.

IV. PROCEDURAL BASIS

4.01 This "No Evidence" Motion for Summary Judgment ("Motion") is filed in accordance with TEXAS RULE OF CIVIL PROCEDURE 166(a)(i), and is directed against certain claims brought by the Dailey Plaintiffs and the Clark Plaintiffs against J.P. Morgan. *See Timpte Indus. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009).

4.02 The Clark Plaintiffs instituted their Probate Court suit on February 3, 2011, and the Dailey Plaintiffs instituted this suit on February 8, 2011. Over sixteen (16) months have elapsed since these actions were instituted. Further, pursuant to the Docket Control Order entered on February 21, 2012 controlling this suit, the discovery deadline is June 22, 2012. Furthermore, Defendants have produced over 14,800 pages of documents during the course of discovery, and at least fifteen (15) individuals have been deposed. Therefore an adequate time for discovery has elapsed and this Motion is properly before the Court. *See Restaurant Teams Int'l v. MG Sec. Corp.*, 95 S.W.3d 336, 339-341 (Tex. App.—Dallas 2002, no pet.).

V. SUMMARY JUDGMENT GROUNDS

A. DAILEY PLAINTIFFS HAVE NO EVIDENCE OF ANY ELEMENTS OF FRAUD BY NONDISCLOSURE CLAIM

5.01 In order to succeed on their cause of action for fraud by nondisclosure, the Dailey Plaintiffs must prove all of the following elements: (i) J.P. Morgan concealed from or failed to disclose certain material facts to the Dailey Plaintiffs, (ii) J.P. Morgan had a duty to disclose these material facts to the Dailey Plaintiffs, (iii) J.P. Morgan knew that the Dailey Plaintiffs were ignorant of the facts and that they did not have an equal opportunity to discover these material facts, (iv) J.P. Morgan was deliberately silent when it had a duty to speak, (v) by failing to disclose the material facts, J.P. Morgan intended to induce the Dailey Plaintiffs to take some action or refrain from acting, (vi) the Dailey Plaintiffs relied on J.P. Morgan's nondisclosure, and (vii) the Dailey Plaintiffs were injured as a result of acting without the knowledge of the undisclosed material facts. See *Bradford v. Vento*, 48 S.W.3d 749, 754-755 (Tex. 2001); *Insurance Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998); *Worldwide Asset Purchasing, L.L.C. v. Rent-A-Center East, Inc.*, 290 S.W.3d 554, 566 (Tex. App.—Dallas 2009, no pet.); *McCarthy v. Wani Venture, A.S.*, 251 S.W.3d 573, 585-586 (Tex. App—Houston [1st Dist.] 2007, pet. denied).

5.02 The Dailey Plaintiffs have no evidence to raise a genuine issue of material fact that J.P. Morgan concealed from or failed to disclose any material facts from the Dailey Plaintiffs. The Dailey Plaintiffs further have no evidence to raise a genuine issue of material fact that J.P. Morgan had a duty to disclose these alleged material facts to the Dailey Plaintiffs. The Dailey Plaintiffs likewise have no evidence to raise a genuine issue of material fact that J.P. Morgan knew the Dailey Plaintiffs were ignorant of these alleged material facts and that the

Dailey Plaintiffs did not have an equal opportunity to discover the alleged material facts. Nor do the Dailey Plaintiffs have any evidence to raise a genuine issue of material fact that J.P. Morgan was deliberately silent when she had a duty to speak. Further, the Dailey Plaintiffs have no evidence to raise a genuine issue of material fact that by failing to disclose the alleged material facts, J.P. Morgan intended to induce the Dailey Plaintiffs to take some action or refrain from acting. The Dailey Plaintiffs also have no evidence to raise a genuine issue of material fact that the Dailey Plaintiffs relied in any way on J.P. Morgan's alleged nondisclosure. Finally, the Dailey Plaintiffs have no evidence to raise a genuine issue of material fact that they were injured as a result of acting without knowledge of the allegedly undisclosed material facts.

5.03 The Dailey Plaintiffs have had more than an adequate time to discover any evidence of their fraud by nondisclosure claim, and they have none. The Court should therefore grant the Motion regarding the Dailey Plaintiffs' fraud by nondisclosure claim.

B. DAILEY PLAINTIFFS HAVE NO EVIDENCE OF NEGLIGENT MISREPRESENTATION

5.04 The Dailey Plaintiffs allege that J.P. Morgan made negligent misrepresentations to Plaintiffs. In order to prevail on this cause of action, Plaintiffs must show the following elements: (i) J.P. Morgan made a representation to Plaintiffs in the course of J.P. Morgan's business or in a transaction in which J.P. Morgan had an interest; (ii) J.P. Morgan supplied false information for the guidance of others; (iii) J.P. Morgan did not exercise reasonable care or competence in obtaining or communicating the information; (iv) Plaintiffs justifiably relied upon the representation, and (v) J.P. Morgan's negligent misrepresentation proximately caused the

Plaintiffs' injury. *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W. 2d 787, 791 (Tex. 1999).

5.05 The Dailey Plaintiffs have no evidence that (i) J.P. Morgan made a representation to Plaintiffs in the course of J.P. Morgan's business or in a transaction in which J.P. Morgan had an interest; (ii) J.P. Morgan supplied false information for the guidance of others; (iii) J.P. Morgan did not exercise reasonable care or competence in obtaining or communicating the information; (iv) Plaintiffs justifiably relied upon the representation, and (v) J.P. Morgan's negligent misrepresentation proximately caused the Plaintiffs' injury.

5.06 The Dailey Plaintiffs have had more than an adequate time to discover any evidence of their negligent misrepresentation claim, and they have none. The Court should therefore grant the Motion regarding the Dailey Plaintiffs' negligent misrepresentation claim.

C. CLARK PLAINTIFFS HAVE NO EVIDENCE OF BREACH OF FIDUCIARY DUTY – UNREASONABLE FEES AND EXPENSES

5.07 The Clark Plaintiffs allege a breach of fiduciary duty claim against J.P. Morgan claiming that J.P. Morgan has charged and collected unreasonably and excessive fees and commissions as trustee of the trusts and paid unreasonable and excessive expenses, in breach of its fiduciary obligations. The Clark Plaintiffs further allege that the charging of such excessive and unreasonable fees, commissions and expenses has been a proximate cause of damages

5.08 The Clark Plaintiffs must prove all of the following elements to succeed on their Fiduciary Duty Claims: (i) the Clark Plaintiffs and J.P. Morgan had a fiduciary relationship; (ii) J.P. Morgan breached its fiduciary duty to the Clark Plaintiffs, and (iii) J.P. Morgan's breach resulted in injury to the Plaintiffs or a benefit to J.P. Morgan. *See Burrow v. Arce*, 997 S.W.2d 229, 237 (Tex. 1999); *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 513-514

(Tex. 1942); *Graham v. Mortg. Corp. v. Hall*, 307 S.W.3d 472, 479 (Tex. App.—Dallas 2010, no pet.).

5.09 The Clark Plaintiffs have no evidence to raise a genuine issue of material fact that J.P. Morgan charged excessive fees and expenses and therefore, breached any fiduciary duties to the Plaintiffs. See *Priddy v. Rawson*, 282 S.W.3d 588, 599 (Tex. App.—Houston [14th Dist.] 2009, pet. denied)(to prove an action for breach of fiduciary duty, plaintiff must establish that defendant breached its fiduciary duty). Because the Clark Plaintiffs cannot produce any evidence that J.P. Morgan breached any fiduciary duties to the Clark Plaintiffs with regard to charging and collecting excessive fees and expenses, summary judgment should be entered as to this breach of fiduciary duty claim.

5.10 Finally, because the Clark Plaintiffs have no evidence to raise a genuine issue of material fact that J.P. Morgan breached its fiduciary duties by charging (or did charge) excessive fees and expenses, the Clark Plaintiffs likewise have no evidence that J.P. Morgan's alleged breach resulted in injury to them or a benefit to J.P. Morgan. Because the Clark Plaintiffs cannot produce any evidence that J.P. Morgan's alleged breach resulted in any injury to them or any benefit to J.P. Morgan, summary judgment should be entered as to this breach of fiduciary duty claim.

D. CLARK PLAINTIFFS HAVE NO EVIDENCE OF BREACH OF FIDUCIARY DUTY – WASTE

5.11 The Clark Plaintiffs allege a breach of fiduciary duty claim against J.P. Morgan claiming that J.P. Morgan has failed to properly manage the surface of a portion of the Burns Ranch. Specifically, the Clark Plaintiffs allege that J.P. Morgan granted a grazing lease to Billy

Applewhite covering the middle tract of the Burns Ranch, permitted and allowed the surface to be severely overstocked and over-grazed, and failed to effectively manage the surface estate.

5.12 The Clark Plaintiffs allege that J.P. Morgan's wrongful acts and omissions constitute failure to exercise the judgment and care under the circumstances then prevailing that ranchers of ordinary prudence exercise in the management of their own affairs, failure to properly monitor and administer the grazing lease, failure to exercise its duty to investigate the condition of the property, and demonstration of a lack of basic competency and knowledge in administering and managing the surface of the ranch. The Clark Plaintiffs allege that J.P. Morgan's breaches of fiduciary duty constitute waste of the surface estate in the middle tract and have caused damages to Plaintiffs, including loss of market value of the land, loss of grazing and hunting, lost income, and costs of remediation.

5.13 The Clark Plaintiffs must prove all of the following elements to succeed on their Fiduciary Duty Claims: (i) the Clark Plaintiffs and J.P. Morgan had a fiduciary relationship; (ii) J.P. Morgan breached its fiduciary duty to the Clark Plaintiffs, and (iii) J.P. Morgan's breach resulted in injury to the Clark Plaintiffs or a benefit to J.P. Morgan. *See Burrow v. Arce*, 997 S.W.2d 229, 237 (Tex. 1999); *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 513-514 (Tex. 1942); *Graham v. Mortg. Corp. v. Hall*, 307 S.W.3d 472, 479 (Tex. App.—Dallas 2010, no pet.).

5.14 The Clark Plaintiffs have no evidence to raise a genuine issue of material fact that J.P. Morgan failed to properly manage the surface estate and thereby breached any fiduciary duties to the Clark Plaintiffs. *See Priddy v. Rawson*, 282 S.W.3d 588, 599 (Tex. App.—Houston [14th Dist.] 2009, pet. denied)(to prove an action for breach of fiduciary duty, plaintiff must establish that defendant breached its fiduciary duty). Because the Clark Plaintiffs cannot

produce any evidence that J.P. Morgan breached any fiduciary duties to the Clark Plaintiffs with regard to its management of the surface estate, summary judgment should be entered as to this breach of fiduciary duty claim.

5.15 Further, the Clark Plaintiffs have no evidence to raise a genuine issue of material fact that J.P. Morgan's alleged breach resulted in injury to them or a benefit to J.P. Morgan. The Clark Plaintiffs have no evidence to support any damages allegedly sustained by them, including the damages pled for loss of market value of the land, loss of grazing and hunting, lost income, and costs of remediation. Because the Clark Plaintiffs cannot produce any evidence that J.P. Morgan's alleged breach resulted in any injury to them or any benefit to J.P. Morgan, summary judgment should be entered as to this breach of fiduciary duty claim.

E. PLAINTIFFS HAVE NO EVIDENCE OF EXEMPLARY DAMAGES

5.16 In order to succeed in their claim for exemplary damages, Plaintiffs must prove all of the following elements (i) the parties and the underlying claim come within the purview of Chapter 41 of the TEXAS CIVIL PRACTICE & REMEDIES CODE (the "Damages Act"), (ii) the Plaintiffs must recover actual damages against J.P. Morgan on the Fiduciary Duty Claims and/or the fraud by nondisclosure claim, and (iii) the Plaintiffs must prove J. P. Morgan's conduct amounted to gross negligence, malice, or fraud. *See* TEX. CIV. PRAC. & REM. CODE §§41.001-41.013; *Diamond Shamrock Ref. Co. v. Hall*, 168 S.W.3d 164, 170 (Tex. 2005); *Quest Int'l Comms. v. AT&T Corp.*, 167 S.W.3d 324, 326 (Tex. 2005); *Bunton v. Bentley*, 153 S.W.3d 50, 54 (Tex. 2004).

5.17 Plaintiffs have no evidence to raise a genuine issue of material fact that J.P. Morgan acted with gross negligence, malice, and/or fraud. See *Bennett v. Reynolds*, 315 S.W.3d 867, 871 n. 13 (Tex. 2010); *Vela v. Marywood*, 17 S.W.3d 750, 761 (Tex. App.—Austin 2000, pet. denied).

5.18 In order to provide gross negligence, Plaintiffs must show by clear and convincing evidence either that (1) J.P. Morgan's acts or omissions, when viewed objectively from J.P. Morgan's standpoint at the time they occurred, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others; or (2) J.P. Morgan had actual, subjective awareness of the risk but proceeded with conscious indifference to the rights, safety and welfare of others. TEX. CIV. PRAC. & REM. CODE §41.001(11)(A) and (B). Plaintiffs have no evidence to support these necessary elements that J.P. Morgan's alleged acts or omissions constituted gross negligence.

5.19 In order to prove malice, Plaintiffs must show by clear and convincing evidence that J.P. Morgan has a specific intent to cause substantial injury or harm to Plaintiffs. TEX. CIV. PRAC. & REM. CODE §41.001(7). Plaintiffs have no evidence that J.P. Morgan's alleged acts or omissions constituted malice under this standard.

5.20 In order to sustain an award for exemplary damages due to fraud, Plaintiffs must show actual fraud by clear and convincing evidence. As previously discussed, Plaintiffs have no evidence that J.P. Morgan committed actual fraud. Plaintiffs' only allegations of fraud are allegations by the Dailey Plaintiffs that J.P. Morgan committed fraud by non-disclosure, which requires proof of the following elements: (i) J.P. Morgan concealed from or failed to disclose certain material facts to the Dailey Plaintiffs, (ii) J.P. Morgan had a duty to disclose these material facts to the Dailey Plaintiffs, (iii) J.P. Morgan knew that the Dailey Plaintiffs were

ignorant of the facts and that they did not have an equal opportunity to discover these material facts, (iv) J.P. Morgan was deliberately silent when it had a duty to speak, (v) by failing to disclose the material facts, J.P. Morgan intended to induce the Dailey Plaintiffs to take some action or refrain from acting, (vi) the Dailey Plaintiffs relied on J.P. Morgan's nondisclosure, and (vii) the Dailey Plaintiffs were injured as a result of acting without the knowledge of the undisclosed material facts. See *Bradford v. Vento*, 48 S.W.3d 749, 754-755 (Tex. 2001); *Insurance Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998); *Worldwide Asset Purchasing, L.L.C. v. Rent-A-Center East, Inc.*, 290 S.W.3d 554, 566 (Tex. App.—Dallas 2009, no pet.); *McCarthy v. Wani Venture, A.S.*, 251 S.W.3d 573, 585-586 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). Plaintiffs cannot show any of these elements by clear and convincing evidence necessary to sustain an award of exemplary damages.

5.21 The elements of common law fraud (not pled by Plaintiffs) are as follows: (i) Defendant made a representation to Plaintiffs; (ii) that was material; (iii) that was false; (iv) Defendant knew the representation was false when made or made the representation recklessly, as a positive assertion, and without knowledge of its truth; (v) with the intent that Plaintiffs would rely upon the representation; (vi) Plaintiffs relied upon the representation; and (vii) the representation caused the Plaintiffs injury. *Italian Cowboy Partners v. Prudential Ins.*, 341 S.W. 3d 323, 337 (Tex. 2011). Plaintiffs cannot show any of these elements by clear and convincing evidence necessary to sustain an award of exemplary damages.

5.22 Because Plaintiffs have no evidence that J.P. Morgan acted with gross negligence, malice, and/or fraud, the Court should therefore grant this Motion regarding the Plaintiffs' exemplary damages claim.

WHEREFORE, PREMISES CONSIDERED, J.P. Morgan prays that the Court grant this Motion and enter a judgment that the Plaintiffs take nothing under their claims against J.P. Morgan addressed herein; and for such other relief to which J.P. Morgan is justly entitled.

Respectfully submitted,

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The foregoing is set for hearing on June 21, 2012 at 8:30 a.m. in the Presiding District Court, Bexar County, Texas.

Signed on the 30th day of May 2012.

DAVID A. BERCHELMANN,
PRESIDING JUDGE
37th DISTRICT COURT
BEXAR COUNTY, TEXAS

JUDGE PRESIDING

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was served upon the following, as indicated, on this the 30th day of May 2012:

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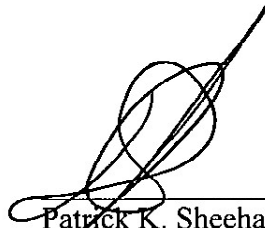
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