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CAUSE NO. 2010-CI-10977

JOHN K. MEYER, *ET AL.*,	§	IN THE DISTRICT COURT
	§	
Plaintiffs,	§	
	§	
JP MORGAN CHASE BANK, N.A., INDIVIDUALLY/CORPORATELY AND AS TRUSTEE OF THE SOUTH TEXAS SYNDICATE TRUST AND GARY P. AYMES,	§ § § § §	225th JUDICIAL DISTRICT
	§	
Defendants.	§	BEXAR COUNTY, TEXAS

OPPOSITION TO DEFENDANT'S MOTION REQUESTING COURT APPROVAL TO RETAIN ADVISERS, SEEK ALTERNATIVES AND EXPEND TRUST ASSETS

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I. INTRODUCTION.

This case involves a trust that holds the mineral rights to 132,000 contiguous acres of land located in McMullen and LaSalle Counties, Texas (the "South Texas Syndicate Trust" or "STS Trust"). The STS Trust is one of the most valuable mineral assets in the Eagle Ford shale formation, and perhaps the entire state of Texas, because there is a single point of control to an undivided interest in 132,000 contiguous acres.

The mineral rights at issue in this case were acquired with the STS Trust land more than a century ago, in 1906, and are considered by many as a family legacy asset. The Plaintiffs are beneficiaries of the STS Trust. They allege that the current Trustee, defendant J.P. Morgan, repeatedly and continuously violated its duties and caused them substantial and ongoing harm. J.P. Morgan has been exercising the single point of control over these enormous and valuable mineral rights since 2001.

Notably, J.P. Morgan was not selected as Trustee when the STS Trust was created, but instead claims this right only by virtue of its 2001 acquisition of the rights held by a former trustee, Alamo National Bank. To date, J.P. Morgan has refused to resign as Trustee, despite the repeated requests of the beneficiaries and a pending partial summary judgment motion on that issue.[1]

After mismanaging the STS Trust and repeatedly violating its duties to Plaintiffs, J.P. Morgan now seeks Court approval of a strategy that once again seeks to serve the interests of J.P. Morgan at the expense of the beneficiaries. Specifically, J.P. Morgan asks this Court to sanction a process for selling or otherwise disposing of the mineral rights in STS Trust, notwithstanding

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[1] If the Court removes J.P. Morgan as Trustee as requested, this motion will become moot.

the vigorous objections of the beneficiaries. Although J.P. Morgan cites no authority for this request, it presumably relies upon a section of the Texas Trust Code that allows a court to direct or permit a trustee to take actions that are not authorized or are forbidden by the terms of the trust. *See* Tex. Prop. Code § 112.054 ("Judicial Modification or Termination of a Trust").

J.P. Morgan's brazen request violates its duty of loyalty, which requires management of the trust assets "solely in the interests of the beneficiaries." Tex. Prop. Code § 117.007. To the contrary, J.P. Morgan is engaging in a transparent effort to: (1) improve its litigation position; and (2) collect hundreds of millions of dollars in fees from the proposed sale. First, by disposing of the STS asset, J.P. Morgan can preempt the jury's decision as to whether it should be replaced as trustee for breach of fiduciary duty. Once the asset is sold, there will be no need to remove J.P. Morgan as Trustee, because there will be no more STS Trust. Second, J.P. Morgan will seek fees for its role in selling the trust. Historically, J.P. Morgan has charged fees in excess of 10% for services that it deems "extraordinary" in nature. Thus, if J.P. Morgan obtains Court approval of a process to dispose of the STS Trust, it will have transformed a litigation liability into a massive commission for itself. This Court should not sanction J.P. Morgan's transparent attempt to continue benefitting itself at the expense of the beneficiaries.

II. ARGUMENT.

A. J.P. Morgan Has A Demonstrable History Of Failing To Act In The Best Interests Of The STS Trust Beneficiaries.

In order to fully appreciate why the beneficiaries object to J.P. Morgan's current request, it is necessary to examine J.P. Morgan's lengthy record of incompetence and misconduct as Trustee. In the spring and summer of 2008, J.P. Morgan was openly approached by Petrohawk Energy Corporation, a well-known operator in shale oil plays ("Petrohawk"). Without

undertaking a prudent or competent investigation of the potential value of the mineral rights held in the STS Trust, J.P. Morgan leased an astounding 41,749.84 acres to Petrohawk in exchange for extremely low bonus payments ranging between $150-$200 per acre and below-market lease terms. *See* Exs. 1-5.[2] Following these cut-rate leases, Petrohawk confirmed its knowledge that the Eagle Ford formation underlying the STS land was incredibly rich in oil, gas and condensate. Remarkably, *even after* the "discovery" of the Eagle Ford's immense wealth of oil, gas and condensate was publicly announced by Petrohawk in October of 2008, J.P. Morgan subsequently leased *another* 37,775.01 acres to Petrohawk for bonus payments of only $200 per acre and below-market lease terms. *See* Exs. 6-12. As an illustration of the devastating consequences of these leases, a comparable nearby ranch later obtained bonus payments of $10,000 per acre.

After bungling the Petrohawk leases, J.P. Morgan repeatedly mismanaged other existing STS Trust leases. Specifically, J.P. Morgan granted lessors several amendments and extensions without obtaining revocation of the leases or any consideration for the beneficiaries. *See, e.g.*, Exs. 13-16. In fact, in one instance, J.P. Morgan settled a dispute involving 15,786.69 acres of land that should have been released back to the STS Trust. *See JP Morgan Chase Bank, N.A., in its capacity as Trustee of the South Texas Syndicate Trust v. Pioneer Natural Resources UnSA, Inc. and EOG Resources, Inc.* in the 218th Judicial District Court, LaSalle County, Texas (Cause No. 09-04-00036-CVL). Not only did J.P. Morgan settle this matter without reclaiming the disputed acreage or obtaining any meaningful compensation, but it did so without disclosing that it had a close business and legal relationship with the adverse party, Pioneer Natural Resources

[2] For ease of reference, all Exhibits cited to herein ("Ex. __") refer to the Exhibits attached to the Affidavit of John B. Massopust ("Massopust Affidavit"), filed with this Opposition and fully incorporated herein by reference.

USA, Inc.[3] This STS acreage should have been reclaimed and leased at full market value for the beneficiaries—not handed to one of J.P. Morgan's business partners.

J.P. Morgan additionally charged the beneficiaries excessive and improper fees during the time it was mismanaging the STS Trust. The Order creating the STS Trust provides for a fee of 2.5% for "ordinary" services, and a provision for a "reasonable" fee for "extraordinary" services. *See* Ex. 17 at p. 3; *see also* Tex. Prop. Code §114.061(a) (allowing "reasonable compensation"). In 2009, after leasing out virtually all of the available STS acreage for extremely low bonus payments, J.P. Morgan inexplicably charged the beneficiaries a shocking 15.28% in fees. *See* Ex. 18.

J.P. Morgan also breached its duty to disclose basic information to the beneficiaries and even improperly withheld documents from the beneficiaries during the course of discovery in this litigation. For example, J.P. Morgan previously represented to this Court that there were no STS documents in Texas. The beneficiaries, however, subsequently learned that "there are 50 boxes of STS Trust records" at J.P. Morgan's San Antonio office. *See* Ex. 19. Similarly, after this Court ordered J.P. Morgan to produce electronically stored information, the beneficiaries further learned that J.P. Morgan had a "data room" in Dallas, where interested third parties could review STS materials. *See* Ex. 20.

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[3] Incredibly, when J.P. Morgan sued Pioneer on behalf of the STS Trust, it failed to advise the STS Trust beneficiaries that it had just settled a case against a different group of trust beneficiaries who alleged that J.P. Morgan refused to pursue claims against Pioneer based on J.P. Morgan's business relationship and conflict of interest with Pioneer. *See MOSH Holding, L.P. v. Pioneer Natural Resources Co.; Pioneer Natural Resources USA, Inc.; Woodside Energy (USA) Inc.; and JP Morgan Chase Bank, N.A.; as Trustee of the Mesa Offshore Trust* in the 334th Judicial District Court, Harris County, Texas (Cause No. 2006-01984).

B. J.P. Morgan Again Seeks To Serve Its Own Interests By Selling Or Otherwise Disposing Of The STS Trust Assets.

J.P. Morgan's request to sell or otherwise dispose of the STS Trust assets is yet another effort to further J.P. Morgan's interests at the expense of the beneficiaries. Should the Court have any doubt as to J.P. Morgan's motives, it need only look at the timing of J.P. Morgan's request. Prior to the litigation, in the fall of 2010, J.P. Morgan expressly informed the beneficiaries on two occasions that the Trust *should be maintained in its current form*. *See* Exs. 21-22.

After this litigation commenced, however, J.P. Morgan abruptly reversed its position and began exploring "exit strategies" involving the sale of the trust assets. *See* Ex. 23. In fact, one J.P. Morgan executive remarked that seeking an "exit path" would serve as a "shot across the bow" to the beneficiaries. *See* Ex. 24. In other words, J.P. Morgan's efforts to sell or otherwise dispose of the trust are not something designed to serve the interests of the beneficiaries, but are instead intended to serve J.P. Morgan's litigation interests.

Notably, J.P. Morgan never explains why it now believes that selling this century-old asset is in the best interests of the beneficiaries. Rather, J.P. Morgan alludes to nebulous "developments" and "growth" as the basis for this decision. *See* Mot. at 4, 5. Essentially, J.P. Morgan makes a vague and circular argument that the century-old trust asset should be sold simply because it is valuable.

J.P. Morgan has not advanced any substantive reasons for trying to sell the asset because it does not have any good reasons. Quite simply, it wants to sell the asset to benefit itself by collecting a massive fee on the sale, while at the same time mooting the issue of its removal as Trustee. The Court need not infer J.P. Morgan's improper motives from the circumstances—J.P.

Morgan's motion specifically states that it wants to implement a sales process because "J.P. Morgan has received notice stating that a majority of the beneficial interests of the Trust have requested that J.P. Morgan resign…" Mot. at 5. J.P. Morgan admits that it wants to sell the asset now because it may soon be fired and prevented from doing so. Yet again, J.P. Morgan is trying to advance its own interests at the expense of the beneficiaries.

It appears that J.P. Morgan has been *secretly* working on this potential "exit strategy" for more than two years. *See* Ex. 23. Obviously, J.P. Morgan had a duty to disclose its "exit path" to the beneficiaries as opposed to keeping this a secret for nearly two years. *See e.g., InterFirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882, 906 n.28 (Tex.App.—Texarkana 1987, no writ) (citing *Allard v. Pacific National Bank*, 99 Wash.2d 394, 663 P.2d 104 (1983)), *disapproved on other grounds*, *Tex. Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240, 249 (Tex. 2002). If J.P. Morgan had legitimate reasons for trying to sell the STS Trust assets, it *would have disclosed those reasons* to the beneficiaries long ago. It did not provide any such reasons, and more importantly, still has not.

J.P. Morgan's secret plan was only brought to the attention of the beneficiaries and this Court after the beneficiaries twice requested in February of 2013 that J.P. Morgan resign as Trustee.[4] If J.P. Morgan were removed as Trustee, then it would no longer have the power to sell or otherwise dispose of the STS Trust. This would also prevent J.P. Morgan from charging the Trust a substantial fee on the sale. J.P. Morgan evidently felt it necessary to bring its long-secret

[4] In fact, as recently as January 18, 2013, J.P. Morgan's counsel misleadingly asserted that "no offer or proposal for a transaction for the sale of the assets of the Trust is currently being evaluated by the Trustee…" *See* Ex. 25. This violated J.P. Morgan's duty to inform the beneficiaries about important information concerning the trust.

sale plan to the attention of the Court in a race to get approval for a sale before it could be removed as Trustee.

In 2008, when J.P. Morgan leased over 79,500 acres of STS Trust mineral rights to Petrohawk, it never bothered to consult any advisers to determine the valuation. Now, however, J.P. Morgan seeks to employ advisers in the context of helping J.P. Morgan in this litigation and assisting J.P. Morgan with collecting a large commission on the sale of the STS Trust assets—while charging the STS Trust for the expenses of these advisors.

As further evidence that J.P. Morgan is trying to benefit itself, the Court should consider the relationship between J.P. Morgan and the "adviser" it selected to assist with the sale of the STS Trust--Lazard Ltd. As set forth in Lazard's presentation in support of the sale, Lazard was retained by defense counsel for purposes related to this litigation—not to serve the interests of the beneficiaries:

> Lazard has been retained solely by Counsel in its capacity as legal advisor to the Trustee. Lazard has no duties or obligations to any person other than Counsel, including the Trustee, the members, securityholders and the beneficiaries of the Trustee or the Trust or any other recipient of these materials.

See Ex. 26. In other words, Lazard is working for J.P. Morgan's defense counsel, *not for the beneficiaries.*[5]

C. This Court Should Allow The Jury To Decide Whether J.P. Morgan Breached Its Duties To The Beneficiaries.

The beneficiaries have provided this Court with a variety of evidence indicating that J.P. Morgan repeatedly breached its fiduciary duties to the beneficiaries. The Court, however, need

[5] Remarkably, J.P. Morgan actually considered selecting its own investment banking division as the adviser to assist its trust division with the sale of the STS Trust. *See* Ex. 27. Thereafter, however, it noted internally that "the use of J.P. Morgan Investment Bank as a consultant in helping us select a financial adviser was not received well." *See* Ex. 28.

not make any findings on breach at this stage in the case. Rather, the jury should ultimately decide whether J.P. Morgan breached its fiduciary duties to the beneficiaries and should be removed as Trustee.[6]

J.P. Morgan's request to move forward with selling or liquidating the STS Trust asset effectively removes this issue from the jury. It puts the cart before the horse by requiring this Court to assume that J.P. Morgan did not breach any duties and should be allowed to continue acting as Trustee, and further empowered to take the drastic step of eliminating the Trust. Not only does J.P. Morgan's request require the Court to disregard the breach evidence provided by the beneficiaries, but it also rewards J.P. Morgan for its continued misconduct as Trustee with a potentially lucrative fee. This is both a clever and transparent litigation tactic, which this Court should not endorse. Rather, the Court should preserve the *status quo* and allow the jury to determine whether J.P. Morgan: (1) complied with its duties and may continue as Trustee; or (2) breached its duties and should be removed as Trustee.

D. The Beneficiaries Cannot Be Expected To Match Financial Resources With J.P. Morgan To Fight The Sale Of The Trust.

In an apparent effort to make its motion seem innocuous, J.P. Morgan suggests that it merely wants to "retain advisers" and "conduct a process to explore alternatives" which include the sale of the STS Trust assets. *See* Mot. at 1. Not surprisingly, J.P. Morgan also seeks "the expenditure of Trust assets in order to conduct the above-described process and implement the Plan." *Id.* at 2.

In other words, J.P. Morgan wants to hire expensive advisers, like Lazard, who will support J.P. Morgan's efforts to sell the STS Trust over the strenuous objections of the

[6] Assuming that the Court has not granted summary judgment removing J.P. Morgan as Trustee, thereby rendering this motion moot.

beneficiaries, and wants the beneficiaries to pay for these advisers. For all of the reasons discussed above, J.P. Morgan should not be allowed to even begin this "process." J.P. Morgan has repeatedly violated its duties to the beneficiaries and cannot now be presumed to be acting in their interests with regard to its efforts to sell or otherwise liquidate the STS Trust assets.

If the Court allows J.P. Morgan to move forward, J.P. Morgan will hire a myriad of expensive experts to argue in favor of selling or disposing of the Trust (even though J.P. Morgan disagreed with this approach as recently as 2010). Although J.P. Morgan claims that the beneficiaries will have an opportunity to "object," it is unfair, impractical and inefficient to expect the beneficiaries to hire expensive experts and consulting firms to oppose whatever plan is advanced by J.P. Morgan (which had first-quarter earnings of $6.5 billion in 2013). If J.P. Morgan is given the ability to proceed, the beneficiaries will not have any meaningful opportunity to object.

E. J.P. Morgan's Suggested Process Violates Additional Fiduciary Duties.

Even putting aside the above problems, J.P. Morgan's "plan" is flawed and unworkable from the outset. The "plan" is publicly opposed by the beneficiaries, who will have a right of appeal if the Court rules against them. Because a prospective buyer would not know whether J.P. Morgan can actually sell the STS Trust assets until after the beneficiaries exhaust their appeals, J.P. Morgan would find itself trying to sell an asset with an obviously clouded title. Sellers must provide substantial discounts when they cannot deliver clear title. J.P. Morgan cannot get a fair sale price without clear title, which it does not have. J.P. Morgan could obtain clear title if it ultimately prevails in this litigation, but not before that time.

Thus, if J.P. Morgan truly believes that a sales "process" is in the best interests of the beneficiaries, it should immediately resign as Trustee and provide all materials in support of this

process to a new trustee. Obviously, J.P. Morgan is not the only entity capable of evaluating and implementing the sale oil and gas assets. A new trustee could evaluate J.P. Morgan's materials impartially, and would not have a clouded title or ongoing disputes with the beneficiaries to negatively impact the sales price. This would indisputably be in the best interests of the beneficiaries. Accordingly, if the Court accepts J.P. Morgan's argument that a sale should be explored, J.P. Morgan should immediately resign and allow a qualified trustee acceptable to the beneficiaries to explore such a sale.

The only logical reason why J.P. Morgan would not accept this solution and resign is because it would not collect a massive fee on the sale. By refusing to resign and pressing for the right to sell the STS Trust assets for its own pecuniary gain, J.P. Morgan is violating its duty of loyalty. *See Risser*, 739 S.W.2d at 899 ("The duty of fidelity required of a trustee forbids the trustee from placing itself in a situation where there is or could be a conflict between its self-interest and its duty to the beneficiaries."); *see also Slay v. Burnett Trust*, 187 S.W.2d 377, 387 (Tex. 1945). The fiduciary duties of a trustee are ongoing despite the existence of litigation. *See, e.g., Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984); *Johnson v. Peckham*, 120 S.W.2d 786, 788 (Tex. 1938).

Where a fiduciary stands to benefit from conduct challenged by a beneficiary, the challenged conduct is presumed by equity to be unfair and a constructive fraud, unless proven otherwise by the fiduciary. *See Stephens County Museum, Inc. v. Swenson*, 517 S.W.2d 257, 260 (Tex. 1974). J.P. Morgan is violating its duty of loyalty by seeking to enrich itself with massive fees on the sale of the STS Trust assets. J.P. Morgan should be presumed to be violating its duty of loyalty by seeking to enrich itself with a business transaction that results in extraordinary pecuniary gain to the Trustee. *See, e.g., Ames v. Ames*, 757 S.W.2d 468, 476 (Tex.App.—

Beaumont 1988) (a "trustee must not make any incidental profits for himself, nor is he to acquire or obtain any pecuniary gain from his high, fiduciary position."), *aff'd and modified*, 776 S.W.2d 154 (Tex. 1989), *cert. denied*, 494 U.S. 1080 (1990).

F. This Court Should Not Endorse J.P. Morgan's Competence As Trustee Or Insulate J.P. Morgan From Ongoing And Further Breaches Of Duty.

J.P. Morgan has demonstrated an astounding lack of foresight with respect to its prior financial evaluations of this asset. The beneficiaries here allege that J.P. Morgan seriously miscalculated the value of the minerals contained in the Eagle Ford shale formation underlying the STS Trust acreage. If this Court were to allow J.P. Morgan to proceed, it would effectively be holding that J.P. Morgan can now be trusted to correctly evaluate the STS Trust asset. J.P. Morgan's competence is a vigorously disputed fact, and should be left for the jury.

J.P. Morgan cannot predict the future value of this asset. Although the Ryder-Scott report has been advanced to show an estimated valuation, it is flawed on many levels. The report does not acknowledge the existence of the Pearsall shale formation, which underlies the Eagle Ford shale formation. Essentially, J.P. Morgan is asking this Court for permission to potentially repeat its earlier breaches of duties, where it leased huge portions of the STS acreage without evaluating the Eagle Ford shale formation. Now, J.P. Morgan seeks to expand upon its earlier mistakes by selling (not leasing) the entire acreage (not just portions of it) without an evaluation of a different underlying shale formation (the Pearsall). This is particularly problematic given that J.P. Morgan is aware that "[t]he Pearsall Shale may eventually become a target on [the] STS [acreage]." *See* Ex. 29.[7]

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[7] It appears that J.P. Morgan specifically decided to exclude the mention of anything about the Pearsall shale in a March 2012 report to the beneficiaries. *See* Ex. 30. Again, this was a violation of J.P. Morgan's duty to provide the beneficiaries with important information about the Trust.

Any effort to proceed with J.P. Morgan's plan will likely spawn substantial additional litigation. The beneficiaries will contest: (1) J.P. Morgan's right to sell the asset; (2) J.P. Morgan's valuation; and (3) J.P. Morgan's motivations. Rather than creating a myriad of new issues to litigate, this Court should deny J.P. Morgan's request and allow this case to proceed to a jury trial on the merits. *See Barrientos v. Nava*, 94 S.W.3d 270, 277 (Tex.App.—Houston 2002) ("Texas law greatly discourages the multiplicity of suits, preferring that all disputes between the parties over the same subject matter be settled in one suit.").

Alternatively, if J.P. Morgan is moving to have the Court judicially modify or terminate the STS Trust under Texas Pr. Code §112.054, then it appears that J.P. Morgan is furtively trying to insulate its actions in connection with the proposed sale from any subsequent legal challenges. The Court should not assist J.P. Morgan with insulating its conduct, particularly given the allegations that J.P. Morgan's plan involves breaches of fiduciary duty. The Court should deny J.P. Morgan's request to judicially terminate the Trust.

III. CONCLUSION.

The Plaintiff beneficiaries strongly object to J.P. Morgan's request to move forward with disposing of their trust asset. This century-old asset should not now be dissolved to serve J.P. Morgan's interests over the objection of the beneficiaries. To the contrary, the primary consideration of the beneficiaries is *that the status quo be preserved and that they not be harmed further* by J.P. Morgan or any of its contemplated "advisers" unless and until J.P. Morgan is removed as Trustee This is not an unreasonable request, particularly given that virtually every single trust decision J.P. Morgan has made to date served the interests of J.P. Morgan at the expense of the beneficiaries. The Court need not decide the correctness of the parties' differing

factual contentions at this point. Rather, the Court can and should allow a jury to resolve the material issues of fact regarding J.P. Morgan's competence and its breaches of duties.

DATE: July 8, 2013.

Respectfully submitted,

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entities which hold Certificates of Beneficial Interest in the STS Trust

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been served on the below listed counsel of record via the method indicated, this 8th day of July, 2013:

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