

CAUSE NO. DC-09-09458

DAVID GOETTSCHKE and
TERI GOETTSCHKE,
Plaintiffs,

VS.

MOWERY CAPITAL
MANAGEMENT, LLC; FREDERICK E.
MOWERY a/k/a FRITZ E. MOWERY,
INDIVIDUALLY; and WARREN
KENNETH PAXTON, JR. a/k/a
KEN PAXTON
Defendants.

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IN THE DISTRICT COURT OF

DALLAS COUNTY, TEXAS

-191ST JUDICIAL DISTRICT

PLAINTIFFS' ORIGINAL PETITION AND REQUEST FOR DISCLOSURE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW PLAINTIFFS, DAVID GOETTSCHKE and TERI GOETTSCHKE, referred to herein as Plaintiffs, complaining of and against MOWERY CAPITAL MANAGEMENT, LLC; FREDERICK E. MOWERY a/k/a FRITZ E. MOWERY, INDIVIDUALLY; and WARREN KENNETH PAXTON, JR. a/k/a KEN PAXTON, herein referred to as Defendants, and in support thereof would show unto this Honorable Court as follows:

A. DISCOVERY CONTROL PLAN

1. The Plaintiffs in this suit allege discovery should be conducted under Level 2 of the Texas Rules of Civil Procedure.

B. PARTIES

2. Plaintiff, DAVID GOETTSCHKE, is an individual residing in Dallas County, Texas. The last three digits of his Social Security number are [REDACTED]

3. Plaintiff, TERI GOETTSCHKE, is an individual residing in Dallas County, Texas. The last three digits of her Social Security number are [REDACTED]

4. Defendant, MOWERY CAPITAL MANAGEMENT, LLC, is a Texas limited liability company, and may be served with process by Certified Mail, Return Receipt Requested, by serving its registered agent, Frederick E. Mowery, at 201 W. Virginia Street #200, McKinney, Texas 75248.

5. Defendant, FREDERICK E. MOWERY a/k/a FRITZ MOWERY, is an individual residing in Collin County, Texas, who may be served with process of service by Certified Mail, Return Receipt Requested, at 2507 Saint Remy Drive, McKinney, Texas 75070-4761.

6. Defendant, WARREN KENNETH PAXTON, JR. a/k/a KEN PAXTON, is an individual residing in Collin County, Texas, who may be served with process of service by Certified Mail, Return Receipt Requested, at 5613 S. Woodcreek Circle, McKinney, Texas 75070.

C. JURISDICTION & VENUE

7. The Court has jurisdiction over the Defendants because Defendants are Texas residents. The court has jurisdiction over the controversy because the damages are within the jurisdictional limits of the Court.

8. Venue is proper in this county as the contract was executed in Dallas County, Texas.

D. FACTUAL ALLEGATIONS

9. Plaintiff Teri Goettsche secured the services of Defendant WARREN KENNETH PAXTON, JR. a/k/a KEN PAXTON (hereinafter referred to as “Paxton”) to prepare a post-nuptial agreement. During the course of preparing the post-nuptial agreement, Paxton recommended and encouraged Teri Goettsche to hire FREDERICK E. MOWERY a/k/a FRITZ MOWERY (hereinafter referred to as “Mowery”) and MOWERY CAPITAL MANAGEMENT, LLC (hereinafter referred to as “Mowery Capital”) to manage both her separate assets and community assets subject to her sole management.

10. Teri Goettsche entered into an Investment Advisory Agreement (the “Investment Agreement”) with Mowery and Mowery Capital. Mowery and Mowery Capital managed stock, bond, and/or mutual fund investments for Plaintiff Teri Goettsche for approximately one year before Plaintiff David Goettsche entered into an Investment Advisory Agreement with Mowery and Mowery Capital.

11. Mowery and Mowery Capital introduced Plaintiffs to and encouraged Plaintiffs to invest in real estate development and heavy construction equipment purchasing ventures owned in part and operated by James H. “Jim” Moore, III. Mowery, however, owned part of at least one of these entities (High Point Construction & Development, LLC) and was at that time and is currently registered with the Texas Secretary of State’s Office as a Manager of High Point Construction & Development, LLC.

12. At the time Mowery and Mowery Capital encouraged Plaintiffs to invest in ventures owned in part by Jim Moore, the United States Bankruptcy Court for the Northern District of Texas supervised Moore’s assets. Moore filed a voluntary petition for relief in the bankruptcy court on May 2, 2006, owing creditors more than \$33 million. Moore’s assets - including heavy earth-moving equipment titled in his name and in which Moore sought outside capital investment - were subject to the bankruptcy court’s automatic stay as of that date. *See* 11 U.S.C. § 362.

13. Moore represented to Plaintiffs that any investment share they took in any of Moore’s ventures would be a percentage interest in a limited liability company or another business entity with liability protection. Rather, Moore created general partnerships and joint ventures with Plaintiffs’ capital contributions and entered into agreements and promissory notes in the entity’s name, making Plaintiffs personally liable on entity debt.

14. On or about July 28, 2006, Mowery Capital and Mowery notified Plaintiffs that, unbeknownst to Plaintiffs, Paxton was a solicitor on behalf of Mowery Capital and had acted as such when advising Plaintiffs to entrust their assets to the management of Mowery and Mowery Capital. In consideration for his services soliciting business on Mowery Capital's behalf, Paxton received a portion of Mowery's fee for managing Plaintiffs' investments. Neither Paxton nor Mowery or Mowery Capital disclosed to Plaintiffs before that time that Mowery shared his fee with Paxton.

15. Upon learning that Paxton had acted as a solicitor on behalf of Mowery Capital, Plaintiffs requested that Mowery provide documentation of the previously undisclosed relationship between Mowery Capital, Mowery, and Paxton, along with the identity of the state agency having oversight of the business conducted by Mowery Capital.

16. On or about September 25, 2006, Mowery and Mowery Capital notified Plaintiffs that the fee agreement between Mowery Capital, Mowery, and Paxton was a verbal agreement and that Paxton received one-third (1/3) of the two percent (2%) management fee paid by Plaintiffs on each of Plaintiffs' accounts held by Mowery Capital. The notice further stated that Mowery did not think that Plaintiffs' concerns could be resolved and Mowery Capital and Mowery resigned as investment manager for Plaintiffs' accounts and transferred all Plaintiffs' accounts to Worth Financial Group. Mowery's notice stated nothing about any sums Plaintiffs invested in entities, ventures, or partnerships in which he or Jim Moore were part-owners.

E. COUNT 1 - COMMON LAW FRAUD

17. Plaintiffs replead and reallege each allegation in paragraphs 1 through 16, as if fully set forth herein.

18. Defendants Mowery and Mowery Capital represented to plaintiffs that Jim Moore's

business ventures were trustworthy investments. Further, Defendants Mowery and Mowery Capital represented that Moore's personal character was sufficiently reliable to make Moore's business ventures a sound investment.

19. Defendants' representations to Plaintiffs were material because they caused Plaintiffs to invest in Moore's business ventures. Had Mowery and Mowery Capital never introduced Plaintiffs to Moore nor encouraged Plaintiffs to invest in Moore's business ventures, Plaintiffs would not have had the opportunity to lose money in Moore's business ventures because they would have kept their savings in more prudent investments.

20. Defendants Mowery and Mowery Capital's representations to Plaintiffs were false statements of opinion that Defendants knew to be false. Defendants Mowery and Mowery Capital represented to Plaintiffs that Jim Moore's business ventures were trustworthy investments. Further, Defendants Mowery and Mowery Capital represented that Moore's personal character was sufficiently reliable to make Moore's business ventures a sound investment. Specifically, they knew because of Mowery's service as a member-manager in High Point Construction & Development, LLC, that Moore owed millions of dollars to various creditors and either had declared or would soon declare bankruptcy.

21. Defendants Mowery and Mowery Capital made the false representation either knowingly or recklessly, as a positive assertion, and without knowledge of its truth. Moore's financial status, of which Mowery should have been aware because of his position as both a director in High Point Construction & Development, LLC, as well as his close personal relationship with Moore, indicated that he was not trustworthy, that his business ventures were not sufficiently capitalized, and that individuals should not invest in his ventures. Mowery and Mowery Capital

knew that other referrals sought refunds of their initial investments and recruited new investors for Moore with false representations to sufficiently capitalize Moore's ventures to refund other investors.

22. Defendants Mowery and Mowery Capital both intended for Plaintiffs to rely on and had reason to expect that Plaintiffs would act in reliance on their representations. Mowery's status as an investment advisor necessarily suggests that his clients would follow his investment advice. Plaintiffs followed Mowery and Mowery Capital's advice and invested in Moore's business ventures.

23. Plaintiffs relied on defendant's false representations when they invested in Jim Moore's business ventures.

F. COUNT 2 - NEGLIGENT MISREPRESENTATION

24. Plaintiffs replead and reallege each allegation in paragraphs 1 through 24, as if fully set forth herein.

25. Defendants Mowery and Mowery Capital represented to plaintiffs that Jim Moore's business ventures were trustworthy investments. Further, Defendants Mowery and Mowery Capital represented that Moore's personal character was sufficiently reliable to make Moore's business ventures a sound investment.

26. Defendants Mowery and Mowery Capital made the representation in both the course of their business and in the course of a transaction in which they had an interest. Mowery and Mowery Capital worked as investment advisors who agree to identify investments for clients and potential clients, assess investments' relative risk, and counsel clients about prudent ways in which they should invest. Additionally, Mowery and Mowery Capital took a two percent (2%) fee on any returns Plaintiffs earned from investments identified by Mowery and/or Mowery Capital. However,

Mowery served as a part owner of at least one of Moore's business entities in which he advised Plaintiffs to invest, receiving at least a 10 percent (10%) ownership interest in the partnership created to develop residential real property near Mineola, Texas.

27. Defendants Mowery and Mowery Capital made its representations about Moore's character and the quality of his business ventures for the guidance of others. Specifically, as alleged above, Mowery and Mowery Capital were in the business of advising clients in which vehicles they should invest their money. Mowery and Mowery Capital made its representations in an attempt to guide the Plaintiffs into investing in Jim Moore's business ventures.

28. Defendants Mowery and Mowery Capital in no way used reasonable care or competence in obtaining information on which to base their representations regarding Jim Moore's character, business expertise, and the quality of Moore's business ventures. Had they performed a background check on Moore, who personally obligated himself on part of the business ventures' debt, they would have found that Moore declared bankruptcy in 2006. Moreover, to the extent Mowery and Mowery Capital advised Plaintiffs to invest funds in Moore's business ventures before Moore filed bankruptcy, they would have known by virtue of Mowery's service as a member-manager in High Point Construction & Development, LLC, that Moore owed millions of dollars to various creditors.

29. Plaintiffs justifiably relied on Defendants Mowery and Mowery Capital's representations when they invested in Moore's residential real estate development in Mineola, Texas.

G. MOWERY & MOWERY CAPITAL'S BREACH OF FIDUCIARY DUTY

30. Plaintiffs replead and reallege each allegation in paragraphs 1 through 29, as if fully set forth herein.

31. A fiduciary relationship existed between Plaintiffs and Defendants Mowery and Mowery Capital at the time of the misrepresentations, omissions, and tortious conduct set forth above, such that Defendants owed Plaintiffs a duty to fairly and honestly advise Plaintiffs. Such a duty prohibits self-dealing.

32. Defendants Mowery and Mowery Capital each breached their respective fiduciary duties when they advised Plaintiffs to invest in business ventures in which Mowery had an ownership interest.

33. In addition to Plaintiffs' damages, set forth more fully below, Defendants Mowery and Mowery Capital's breach of fiduciary duty benefitted Defendants in the following ways:

- a. Mowery's share of Moore's business ventures in which Plaintiffs invested became more profitable;
- b. Business ventures in which Mowery had a personal interest were, as a result, better capitalized;
- c. Business ventures in which Mowery had a personal interest were able to, with Plaintiffs' capital contribution, repurchase ownership interests from other investors; and
- d. Because other investors were able to sell back their ownership interest in Moore's business ventures, Mowery and Mowery Capital were able to avert other potential claimants from filing claims.

H. PAXTON'S BREACH OF FIDUCIARY DUTY

34. Plaintiffs replead and reallege each allegation in paragraphs 1 through 34, as if fully set forth herein.

35. Paxton's liability for breach of fiduciary duty stems from his status as the Plaintiffs' attorney. Paxton's State Bar of Texas number is 15649200.

36. A fiduciary, attorney-client relationship existed between Plaintiffs and Defendant

Paxton at the time of the misrepresentations, omissions, and tortious conduct set forth above, such that Paxton owed Plaintiffs a duty to deal fairly, honestly, and equitably in making decisions regarding any interest in Mowery Capital and to disclose all material facts relating to Paxton's relationship with Mowery Capital and Mowery to Plaintiffs.

37. Paxton breached his fiduciary duty to Plaintiffs by failing to disclose his agreement to share Mowery and Mowery Capital fees that Mowery and Mowery Capital collected from clients Paxton referred.

38. Paxton's breach of fiduciary duty injured Plaintiffs by essentially stripping them of their ability to consent to an agreement to split fees between Paxton and a non-lawyer. Paxton's breach benefitted him by providing him with one-third (1/3) of the two percent (2%) fee Mowery and Mowery Capital collected on the Plaintiffs' capital gains and/or return on investment.

I. BREACH OF DUTY OF LOYALTY

39. Plaintiffs replead and reallege each allegation in paragraphs 1 through 38, as if fully set forth herein.

40. Defendants breached the duty of loyalty owed to Plaintiff under the law when Defendants failed to disclose their interest in Moore's business ventures and their relationship with each other. Defendants' duty of loyalty required that they place Plaintiffs' interests above their own. Defendants' actions are representative of their breach of their duty of loyalty when they utilized their own position to benefit themselves at the expense of the Plaintiffs. Defendants conduct was unfair to Plaintiffs, thus representing a self-dealing transaction further evidencing Plaintiffs' claim of a breach of fiduciary duty.

41. In addition to Plaintiffs' damages, set forth more fully below, Defendants Mowery and Mowery Capital's breach of the duty of loyalty benefitted Defendants in the following ways:

- a. Mowery's share of Moore's business ventures in which Plaintiffs invested became more profitable;
- b. Business ventures in which Mowery had a personal interest were, as a result, better capitalized;
- c. Business ventures in which Mowery had a personal interest were able to, with Plaintiffs' capital contribution, repurchase ownership interests from other investors; and
- d. Because other investors were able to sell back their ownership interest in Moore's business ventures, Mowery and Mowery Capital were able to avert other potential claimants from filing claims.

42. Paxton's breach of the duty of loyalty injured Plaintiffs by essentially stripping them of their ability to consent to an agreement to split fees between Paxton and a non-lawyer. Paxton's breach benefitted him by providing him with one-third (1/3) of the two percent (2%) fee Mowery and Mowery Capital collected on the Plaintiffs' capital gains and/or return on investment.

J. DAMAGES

43. Plaintiffs seek unliquidated damages within the jurisdictional limits of this court.

44. Defendants' fraud, negligent misrepresentation, breach of fiduciary duty, and duty of loyalty caused injury to Plaintiffs, which resulted in the following damages:

- a. Plaintiffs are now personally liable on a promissory note held by Capital One Bank (Hibernia National Bank is the predecessor-in-interest on the note). Plaintiffs received no property from Moore's business ventures with which to collateralize the loan;
- b. Plaintiffs lost the amount of their initial capital investment in Moore's business ventures, specifically those ventures involving the development of residential real property in or near Mineola, Texas;
- c. Because of these liabilities, Plaintiffs paid sums on their obligations to avoid adverse effects to their credit rating. Plaintiffs seek the amounts of payments

- made on these obligations between the time of the fraud or misrepresentation;
- d. Plaintiffs seek a refund of the investment management fees paid to Mowery, Mowery Capital, and/or Paxton as a result of Plaintiffs' investments in Moore's business ventures;
 - e. Time spent investigating the impact of Moore's, Mowery's and Mowery Capital's misrepresentations to Plaintiffs;
 - f. Physical pain and mental anguish in the past and future; and
 - g. Past lost wages.

K. JURY DEMAND

45. Plaintiff demands a jury trial and tenders the appropriate fee with this petition.

L. REQUEST FOR DISCLOSURE

46. Pursuant to TEX. R. CIV. P. 194, you are requested to disclose, within fifty (50) days of service of this request, the information or material described in Rule 194.2 (a)-(l).

M. DOCUMENTS TO BE USED

47. Pursuant to TEX. R. CIV. P. 193.7, Plaintiffs intend to use all documents exchanged and produced between the parties including, but not limited to, correspondence and discovery responses during the trial of the above-entitled and numbered cause.

N. PRAYER

48. Plaintiffs hereby plead for all actual damages, a full accounting, and any remedies allowed by law, including but not limited to forfeiture, for the Defendants' breach of fiduciary duties.

49. Plaintiffs further plead for all attorneys fees incurred at trial or appeal, costs of court, plus pre- and post-judgment interest in the maximum amounts allowed by law.

Respectfully submitted,

BY:  _____

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