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FELICIA PITRE
DISTRICT CLERK

CAUSE NO. 18-06835

FEE, SMITH, SHARP & VITULLO, LLP AND ANTHONY VITULLO Plaintiffs, v. BLOCK GARDEN & McNeill, LLP, f/k/a BLOCK & GARDEN, LLP CHRISTOPHER McNEILL and STEVEN BLOCK Defendants.	§ § § § § § § § § § § § §	IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS 95th JUDICIAL DISTRICT

PLAINTIFFS' MOTION TO STAY ARBITRATION, AND BRIEF IN SUPPORT THEREOF

I. Summary of Argument

Any claims between Plaintiffs and Defendants are appropriately in this Court. Block, Garden & McNeill LLP's ("B&G") have filed an arbitration action against Vitullo and FSSV. A copy of this arbitration demand is attached hereto. *See* Exhibit "A." However, there is no basis for this arbitration demand because there is no contract, much less an arbitration agreement, between B&G and Vitullo or FSSV. B&G's arbitration demand is part of a larger scheme to seek money for work they never performed. B&G claims it was counsel for Stephen Hopper ("Hopper") and Laura Wassmer ("Wassmer") with respect to a trial against JP Morgan Chase Bank ("Chase"), despite the fact that its lawyers never appeared at the trial. In order to obfuscate this undisputed fact that is fatal to its claims, B&G improperly postulates that it somehow hired Vitullo at a fraction of his rate, albeit it never paid Vitullo, and, even though Vitullo never sought payment from B&G despite working on Hopper and Wassmer's lawsuit for

two years. Of course, B&G has no evidence of any of this because it is not true. Moreover, the available evidence, including an email to Christopher McNeill of B&G setting forth that (1) Vitullo was entering into a direct engagement with Hopper and Wassmer to represent them; and (2) B&G would only be acting as counsel in a partition action related to the Max Hopper estate, not the trial of an action JP Morgan Chase, entirely contradicts B&G's theory.

B&G's arbitration demand avoids these details, and another critical fact: there is no arbitration agreement between B&G and Vitullo/FSSV. Simply put, B&G has no right to arbitrate any claims with Vitullo and FSSV. Plaintiffs have the right to have these claims decided in a Texas courthouse in front of a Texas jury. B&G has the burden to show that its alleged claims against Vitullo and FSSV are subject to arbitration. Absent an agreement to arbitrate, B&G cannot satisfy this burden. Accordingly, this Court should stay the arbitration.

II.
Facts

In 2012, Stephen Hopper and Laura Wassmer approached Anthony Vitullo to inquire about legal services related to the Estate of their deceased father, Max Hopper. Vitullo then introduced Hopper and Wassmer to B&G. Thereafter, B&G executed a fee agreement with Hopper and Wassmer, which provided that B&G would represent Hopper and Wassmer with respect to Pre-Trial Issues for a flat fee ("B&G/Hopper Contract"). **Neither FSSV nor Vitullo were parties to the B&G/Hopper Contract**.

The terms of the B&G/Hopper Contract included a provision that purported to convert the flat fee to a hybrid contingency fee agreement, in the event that B&G chose to represent Hopper and Wassmer's claims at trial. The hybrid contingency fee provision

stated that, should the claims go to trial, Steven Block and Christopher McNeill would perform their legal services at a rate of 50% of their normal rate (as opposed to the 100% charge for Pre-Trial Issues), but they would also receive 20% of the Client's gross recovery "if [Block & Garden] is successful in recovering money or anything of value for the Client after trial begins…."[1] This purported hybrid contingency fee agreement contemplated that B&G would "retain on your behalf the services of Anthony L. Vitullo with Fee, Smith, Sharp & Vitullo, LLP whose current hourly rate is $500." The purported hybrid contingency fee agreement also stated that if B&G did hire Mr. Vitullo, B&G would be responsible for paying their legal fee.

However, none of these things ever happened. B&G did not represent Hopper and Wassmer at trial, and, in fact, B&G never even appeared at trial. At no time did B&G hire FSSV or Mr. Vitullo. Moreover, at no time did B&G pay FSSV or Vitullo any hourly rate (or 50% hourly rate) for the hours of work Vitullo and other attorneys employed with FSSV performed over the course of **more than two years**. B&G, despite their representations to Hopper and Wassmer, had no right to hire either Vitullo or FSSV, no authority to hire either Vitullo or FSSV, and it never made any effort to hire either Vitullo or FSSV.

Despite an actual awareness that none of these events occurred, which is provable by an email from November 2015 to McNeill, B&G has fraudulently sued Vitullo and FSSV in an arbitration proceeding—demanding a contingency fee it did not earn. In the fall of 2015, Hopper and Wassmer informed Vitullo that they did not wish to continue to use the services of B&G and instead wished to retain Vitullo to represent

[1] Of course, this contingency never happened because Block & Garden was not "successful" in doing anything because it did nothing.

them in their legal dispute with Chase. To that end, on November 13, 2015, Anthony Vitullo, Stephen Hopper, and ***Christopher McNeill, a B&G partner***, met in person to discuss the future legal services that B&G would provide to Hopper and Wassmer. At this conference, the parties agreed that (1) Christopher McNeill of B&G would only represent Hopper and Wassmer with respect to the partition of limited assets (wine, golf clubs, personal belongings and storage costs) with respect to Max Hopper's estate; (2) and FSSV and Vitullo would represent Hopper and Wassmer on a contingency basis, with a separate contingency fee agreement. **This agreement was documented in writing via an email to all parties the following day on November 14, 2015.**

Thereafter, all parties performed in accordance with the plan set forth in this meeting and in this confirmatory November 14, 2015 email. Hopper and Wassmer entered into a separate contingency agreement with FSSV, upon which B&G was fully aware of and, in fact, had consented to at the November 13, 2015 meeting, and which was memorialized in the November 14, 2015 email. B&G represented Hopper and Wassmer in the partition agreement, but it performed no legal services after the spring of 2016.

Vitullo and FSSV represented Hopper and Wassmer against Chase pursuant to its contingency contract in a contentious piece of litigation. In the fall of 2017, Hopper and Wassmer went to trial against Chase. Consistent with the November 2015 agreement, B&G did no more work. B&G did not appear for trial or otherwise assist in the trial, which lasted more than one month. At no time during the trial (or before or after for that matter) did B&G offer to pay either Vitullo or FSSV any legal fee, whether reduced or otherwise, pursuant to any alleged contractual agreement to hire Plaintiffs.

In September 2017, via the representation of Vitullo and FSSV, a jury awarded a substantial verdict against Chase and in favor of Hopper and Wassmer. Following the jury verdict, McNeill congratulated Vitullo on the verdict and never once mentioned any entitlement to an attorney fee. It was only a week after the public jury verdict did B&G even inquire about how or why his firm was terminated years earlier.

On October 13, 2017, Steven Block of B&G then threatened Vitullo telling him that B&G would intervene in the Chase Lawsuit and "muck everything up for the next period of time" unless Vitullo agreed to pay Block and Garden. Once Vitullo balked at Block's baseless demand, Steve Block and B&G have done everything and anything to "muck everything up" including the filing of an arbitration action.

III.
Argument & Authorities

A.
This Court Must Decide Whether B&G Had an Agreement to Arbitrate with Vitullo or FSSV (it did not)

The issue of whether two parties have an agreement to arbitrate is a gateway issue that is appropriately decided by this Court. *See In re Rubiola*, 334 S.W.3d 220, 224 (Tex. 2011)*; In re Morgan Stanley & Co*., 293 S.W.3d 182, 197 (Tex. 2009) (holding that whether there is an agreement to arbitrate is a threshold issue for a court to consider). Courts have repeatedly held that the determination of whether a non-signatory can be compelled to arbitrate goes directly to the validity of an arbitration clause and thus is for courts to decide, and is not an appropriate question for arbitrators. *See In re Labatt Food Serv*., 279 S.W.3d 640, 643 (Tex. 2009); *In re Weekly Homes, L.P*., 180 S.W.3d 127, 130 (Tex. 2005).

Just recently, the Texas Supreme Court re-emphasized that the threshold issue of whether two parties agreed to arbitrate with each other is a question for the courts, even if the parties claim that one of the parties agreed to arbitrate with a third party. *See Jody James Farms, JV v. The Altman Group*, __S.W.3d __, No. 17-0062, 2018 WL 2168306, *4 (Tex. May 11, 2018). In this case, the Texas Supreme Court noted:

> The involvement of a non-signatory is an important distinction because a party cannot be forced to arbitrate absent a binding agreement to do so. The question is not whether Jody James agreed to arbitrate with someone, but whether a binding arbitration agreement exists between Jody James and the Agency. What might seem like a chicken-and-egg problem is resolved by application of the presumption favoring a judicial determination.

Id.

Here, there is no dispute that FSSV and/or Vitullo do not have any agreement, much less a signed written arbitration agreement, with B&G. As such, there can be no question that the scope of the arbitration obligation between B&G and FSSV and/or Vitullo must be decided in this Court.

B.
B&G's Arbitration Action Should be Stayed Because There is No Arbitration Agreement Between the Parties

"Since 1846, Texas law has provided that parties to a dispute may choose to arbitrate rather than litigate." *See Perry Homes v. Cull*, 258 S.W.3d 580, 584 (Tex. 2008) (emphasis added). But, arbitration is by choice or agreement only. Absent a valid agreement between the parties to arbitrate the dispute, as is here, no party can be compelled to arbitrate. As a prerequisite to arbitration, a party must show both (1) the existence of a valid enforceable agreement to arbitrate and (2) that the claims at issue fall within the scope of that agreement. *See G.T. Leach Builders, LLC v. Sapphire*, 458

S.W.3d 502, 524 (Tex. 2015). But there is no agreement to arbitrate any claims between B&G and Vitullo or FSSV, much less a clear one. As such, B&G cannot satisfy the prerequisites to arbitration, an issue for which B&G bears the burden. Indeed, in its demand for arbitration, B&G does not even attempt to establish a basis for arbitration against Vitullo and/or FSSV. Rather, B&G merely states that it had an arbitration agreement with Hopper and Wassmer.

To the extent B&G claims some oral agreement, Texas law requires that an arbitration agreement be in writing. *See* TEX. CIV. PRAC & REM. CODE ANN. § 171.001 et seq. (Vernon 2014). Moreover, where the party seeking to enforce arbitration cannot produce a signature to the agreement to arbitrate, that party bears the burden to show that the parties had a clear agreement to arbitrate the dispute. *See In re Big 8 Food Stores*, 166 S.W.3d 869, 876 (Tex. App.—El Paso 2005, orig. proceeding); *Mohamed v. Auto Nation USA Corp*, 89 S.W.3d 830, 836 (Tex. App.—Houston [1st Dist.] 2002, no pet.) ("the initial burden of the party seeking to compel arbitration—to establish the arbitration agreement's existence- includes the entity seeking to enforce the arbitration agreement was a party to it or had the right to enforce the agreement notwithstanding").

B&G cannot escape the simple fact that there is no agreement with Vitullo or FSSV. For this most basic reason, Vitullo and FSSV move this Court for an ordering staying B&G's arbitration as to any claims against Vitullo or FSSV and ordering B&G to dismiss any claims it has asserted against FSSV and Vitullo in that arbitration.

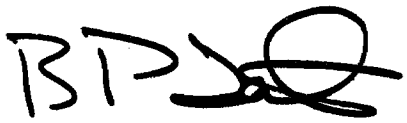
IV.
Conclusion

In conclusion, there is no agreement to arbitrate between these parties. Accordingly, this Court should grant this Motion to stay arbitration.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully pray that this Honorable Court stay any and all arbitration proceedings between these parties; and further grant Plaintiffs any and all such further relief whether in law or in equity upon which they may show themselves justly entitled.

Respectfully Submitted,

BRIAN LAUTEN, P.C.



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JAMS ARBITRATION TRIBUNAL

Block, Garden & McNeill, LLP f/k/a Block & Garden, LLP	§	
Claimant,	§	
vs.	§	**ARBITRATION NO. _____**
Laura Wassmer, Dr. Stephen Hopper, Fee, Smith, Sharp & Vitullo, LLP and Anthony L. Vitullo	§	
Respondents.	§	

DEMAND FOR ARBITRATION

Claimant, Block, Garden & McNeill, LLP f/k/a Block & Garden, LLP ("B&G"), files its Demand for Arbitration complaining of Respondents, Laura Wassmer; Dr. Stephen Hopper; Fee, Smith, Sharp & Vitullo, LLP ("Fee Smith") and Anthony L. Vitullo and would show as follows:

I. Introduction

1. This is a fee dispute between Claimant, its clients, Laura Wassmer and Dr. Stephen Hopper, and another law firm, Fee Smith, and one of its partners, Vitullo, who entered into a second contingent fee agreement with B&G's clients. Claimant has not been paid the money it is owed by its clients under its contingent fee agreement.

II. Parties

2. Claimant is Block, Garden & McNeill, LLP, f/k/a Block & Garden LLP, a Texas limited liability partnership with its principal place of business in Dallas, Texas.

EXHIBIT A

3. Respondent, Laura Wassmer, is an individual who resides in Johnson County, Kansas, and may be served through her counsel, James E. Pennington, Law Offices of James E. Pennington, P.C., at 900 Jackson Street, Suite 440, Dallas, Texas 75202-4473.
4. Respondent, Dr. Stephen Hopper, is an individual who resides in Oklahoma City, Oklahoma, and may be served through his counsel, James E. Pennington, Law Offices of James E. Pennington, P.C., at 900 Jackson Street, Suite 440, Dallas, Texas 75202-4473.
5. Respondent Fee Smith is a Texas limited liability partnership and may be served at its principal place of business, 13155 Noel Road, Suite 1000, Three Galleria Tower, Dallas, Texas 75240.
6. Respondent Vitullo is a partner in Fee Smith and may be served at 13155 Noel Road, Suite 1000, Three Galleria Tower, Dallas, Texas 75240.

III. Jurisdiction and Venue

7. Jurisdiction is proper with JAMS because the Agreement between B&G and Wassmer and Hopper states as follows:

Arbitration

In the event you believe that any statement for our services is erroneous for any reason, please notify us of the same within 10 days after receipt of such statement stating the basis for such belief. If agreement cannot be reached with respect to the amount owed, you agree to pay promptly the nondisputed portion of our statement. Any dispute over fees and/or costs (a Dispute) will be submitted to and settled exclusively by binding arbitration, in accordance with the provisions of this Legal Services Agreement, subject only to any applicable requirement of state law that the parties engage in a preliminary non-binding mediation or arbitration regarding fee disputes. A party to the Dispute may commence arbitration by sending written notice to the other party demanding resolution of the Dispute through arbitration and setting forth the nature of the controversy, the dollar amount involved, if any, and the remedies sought (an "Arbitration Notice').

Binding arbitration shall be conducted in accordance with the Judicial Arbitration and Mediation Service/Endispute Rules and Procedures for commercial disputes (the "'JAMS Rules"). Arbitration shall be held in Dallas County, Texas before an arbitrator

selected pursuant to the JAMS Rules who will have no personal or pecuniary interest, either directly or indirectly, from any business or family relationship with either of the parties, and who the parties agree will be the same person for any and all Disputes which are arbitrated pursuant to the terms of this Legal Services Agreement. As soon as reasonably practicable, a hearing with respect to the Dispute will be conducted by the arbitrator. As soon as reasonably practicable thereafter, the arbitrator will arrive at a final decision, which will be reduced to writing, signed by the arbitrator and mailed to each of the parties and their legal counsel. No discovery will be permitted.

The substantive laws of the State of Texas will be applied by the arbitrator, without regard to the choice of law provisions thereof. The rules of evidence applicable to judicial proceedings will not apply at the arbitration proceedings; evidence submitted by the parties may be admitted or excluded in accordance with the JAMS Rules applicable to the proceeding.

All decisions of the arbitrator will be final, binding and conclusive on the parties and will constitute the only method of resolving Disputes subject to arbitration pursuant to this Legal Services Agreement. The arbitrator or a court of competent jurisdiction may issue a writ of execution to enforce the arbitrator's award. Judgment may be entered upon such an award in accordance with applicable law in any court having jurisdiction thereover.

The parties will equally share the costs of the arbitrator and the arbitration fee (if any). Each party will bear that party's own attorneys' fees and costs, and the prevailing party will not be entitled to reimbursement by the other party of any of its fees or costs incurred in connection with the arbitration hereunder, regardless of any rule to the contrary in the applicable arbitration rules.

Either party may seek confirmation of the arbitration award in the courts situated in Dallas County, Texas, and each party hereby consents to the exclusive jurisdiction and venue of the courts situated in Dallas County, Texas in any claim or action arising hereunder.

By entering into this Legal Services Agreement, you hereby agree to waive any and all rights to a jury trial regarding any Dispute.

8. The Dallas office of JAMS is the appropriate venue for B&G's arbitration claims against Respondents since all of the events giving rise to the claims in this case occurred in Dallas, Texas, B&G's engagement agreement was performed in Dallas, Texas, and the arbitration clause in the engagement agreement specifies that any arbitration between B&G and its clients will be conducted in Dallas County, Texas.

IV. Factual Background

9. On October 8, 2012, Dr. Hopper and Ms. Wassmer, pursuant to Vitullo's introduction and recommendation, retained B&G to pursue claims against JP Morgan Chase Bank, N.A. for breach of fiduciary duty and mismanagement in the administration of the Estate of Max D. Hopper and to handle the probate matters associated with the Estate pending resolution of an appeal arising out of the probate court's rulings on the partition of the homestead (the "Claims"). A copy of the engagement agreement is attached as Exhibit 1. B&G was to be compensated by a fixed fee in the amount of $100,000 for "Pre-Trial Services" described in the engagement agreement. Although B&G performed the Pre-Trial Services contemplated by the engagement agreement, only $51,900 in fees were paid to B&G.

10. In addition, Dr. Hopper and Ms. Wassmer agreed to compensate B&G with a hybrid fee of one half of B&G's standard hourly rates for services performed at trial and a contingent fee of 20% of the gross recovery on the Claims.

11. The engagement agreement also authorized B&G to retain Vitullo and his firm, Fee Smith, to perform legal services on behalf of Dr. Hopper and Ms. Wassmer, which happened. Vitullo had reviewed the B&G engagement agreement and was aware of its terms. B&G and Vitullo agreed that if the case against JP Morgan went to trial, Vitullo would serve as the lead trial lawyer. As a result, the services of Fee Smith and Vitullo were covered by B&G's hybrid contingent fee agreement with Dr. Hopper and Ms. Wassmer, and B&G and Vitullo agreed to split the 20% contingent fee equally. Vitullo then brought in James Bell to assist in representing the clients in the defense of claims asserted by Jo Hopper, the clients' stepmother. B&G has never been terminated as counsel for Dr. Hopper and Ms. Wassmer, so its engagement agreement remains in full force and effect according to its

terms.

12. Subsequently without the knowledge or consent of B&G, Vitullo and Fee Smith entered into a separate contingent fee agreement with Dr. Hopper and Ms. Wassmer whereby the clients were obligated to pay Vitullo and Fee Smith 45% of any recovery. On information and belief, Vitullo and Fee Smith did not advise the clients that they might have to pay a contingent fee to both B&G and to Fee Smith.

13. The Claims were successfully tried to a verdict. Throughout the proceedings against JP Morgan and the trial, B&G was copied on Fee Smith's internal distribution service list and B&G remains as counsel of record for the clients to date.

14. After the verdict was rendered in favor of the clients with respect to the Claims in April 2018, the clients reached a confidential settlement with JP Morgan. The terms of the settlement including the amount to be paid to the clients are unknown to B&G. As a result, B&G does not know the amount of the fee it is owed. Fee Smith and Vitullo have filed an action in probate court in Dallas County against the clients seeking to recover 45% of the amount of the settlement.

V. Claims

15. B&G incorporates the factual allegations contained in paragraphs 1-14 into all of its claims.

1. Declaratory Judgment

16. B&G requests that the arbitrator declare the rights of the parties as follows:

a. That B&G has a valid and existing contingent fee agreement with its clients, Dr. Hopper and Ms. Wassmer, that has never been terminated and B&G is

entitled to receive 20% of any recovery made by clients on the Claims.

b. That B&G has a valid and subsisting attorneys' fees lien on the proceeds of the settlement with JP Morgan.

2. Breach of Contract

17. The engagement agreement between B&G and its clients, Dr. Hopper and Ms. Wassmer, is valid and existing and has never been terminated. Despite these facts, the clients have failed to pay B&G $48,100, which is the balance of the $100,000 flat fee that is owed to B&G, and have indicated they will not pay any of the 20% contingent fee owed from the recovery made by the clients on the Claims.

VI. Damages

18. B&G is entitled to receive $48,100, which is the balance of the $100,000 flat fee that is owed to B&G, and 20% of the recovery made by the clients on the Claims. Since the amount of the settlement to be paid to the clients has not been disclosed to B&G, it is unable to quantify this element of damages at the time of filing this Demand for Arbitration.

VII. Attorneys' Fees

19. Pursuant to Section 37.009 of the Texas Civil Practice and Remedies Code and Chapter 38 of the Texas Civil Practice and Remedies Code, B&G is entitled to recover an award of reasonable attorneys' fees from Respondents. B&G will disclose the amount of attorneys' fees sought at a reasonable time prior to the

final hearing in this case.

VIII. Right to Amend

20. B&G reserves the right to amend this Demand For Arbitration as additional facts are learned in discovery in this matter.

IX. Prayer

Wherefore, Claimant, Block, Garden & McNeill, LLP, prays:

1. That Respondents be served and be required to appear and answer this Demand for Arbitration;
2. That B&G have the declaratory relief requested above from all of the Respondents;
3. For recovery of its actual damages from Dr. Stephen Hopper and Laura Wassmer of $48,100 and 20% of any recovery made by the clients on the Claims;
4. For an award of reasonable attorneys' fees for the filing, preparation and hearing of this arbitration;
5. For pre- and post-award interest at the highest rates allowed by law;
6. For costs of this proceeding; and
7. For such other and further relief at law or in equity to which B&G may show itself to be justly entitled.

Respectfully submitted,

Johnston Tobey Baruch, PC
By: /s/ Robert L. Tobey
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Randy Johnston
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Attorneys for Claimant Block, Garden & McNeill, LLP

Certificate of Service

On May 8, 2018, a copy of this pleading was served on all parties, via email and via facsimile.

/s/ Robert L. Tobey