No. 05-18-00558-CV

# In the Fifth District Court of Appeals
# Dallas, Texas



**STEPHEN B. HOPPER and LAURA S. WASSMER,**

**Appellants/Relators,**

**v.**

**JOHN MALESOVAS d/b/a MALESOVAS LAW FIRM and FEE, SMITH, SHARP & VITULLO, LLP**

**Appellees/Real-Parties-in-Interest.**

On Appeal from Dallas County Probate Court No. 1,
the Hon. Brenda Hull Thompson, Presiding

## APPELLEES/REAL-PARTIES-IN-INTEREST'S JOINT APPELLEES' BRIEF AND RESPONSE TO PETITION FOR WRIT OF MANDAMUS

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**ORAL ARGUMENT REQUESTED**

## IDENTITY OF PARTIES AND COUNSEL

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|---|---|
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## STATEMENT ON ORAL ARGUMENT

Appellees believe that oral argument would facilitate the Court's consideration of the issues presented in this appeal and respectfully request that the Court set this matter for oral argument.

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## STATEMENT OF THE CASE

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| *Nature of the Case:* | This appeal and original proceeding results from a fee dispute arising from one of the largest jury verdicts in Dallas County history, entered in favor of Appellants Stephen Hopper and Laura Wassmer. Appellees John L. Malesovas d/b/a Malesovas Law Firm ("MLF") and Anthony L. Vitullo, a partner with Appellee Fee, Smith, Sharp and Vitullo, LLP ("FSSV") (collectively "the Attorneys"), represented Hopper and Wassmer in the underlying trial. The representation was conducted pursuant to a valid and enforceable contingency fee agreement. On April 5, 2018, after announcing a post-verdict confidential settlement, Hopper and Wassmer unilaterally terminated the representation and, on April 6, 2018, the Attorneys withdrew from representing Hopper and Wassmer. Thereafter, the Attorneys intervened in the underlying lawsuit and sought injunctive relief to preserve the settlement proceeds pending resolution of the fee dispute. (CR 11-32, 42-57). Hopper and Wassmer subsequently sought to compel the dispute to arbitration. (CR 63-79). |
| *Course of Proceedings:* | The Honorable Brenda Hull Thompson, Probate Court No. 1, Dallas County, Texas. |
| *Trial Court's Disposition:* | After hearings held on April 9, and April 24, 2018, the probate court entered a temporary restraining order and temporary injunction, ordering the preservation of the confidential settlement proceeds pending resolution of the fee dispute. (CR 292-296). On May 10, 2018, the probate court entered its order granting the motion to compel the fee dispute to arbitration. (Supp. CR 8-9). |

## ISSUES RE-STATED

1. Did the probate court exercise its sound discretion in issuing a temporary injunction and making findings in support of the injunction based on the evidence before the probate court when the record showed that the Attorneys had a property interest in and lien upon settlement proceeds, which was in jeopardy of being lost or depleted without an injunction prior to compelling the parties' fee dispute to arbitration? [Appellants'/Relators' Issues Nos. 1 & 2 for Appeal and Mandamus Relief Re-stated]

2. Did the probate court exercise its sound discretion in issuing a temporary injunction over the entire settlement proceeds to maintain the confidential nature of the settlement amount? [Appellants' Issue No. 3 for Appeal Re-stated]

3. Do Relators have an adequate remedy by appeal when the trial court's order granting the temporary injunction was clearly an order falling within the scope of section 51.014(a)(4) of the Texas Civil Practice & Remedies Code permitting interlocutory appeals from orders granting a temporary injunction? [Relators' Issue No. 3 for Mandamus Relief Re-stated]

## RECORD

The record on appeal consists of a one volume Clerk's Record, one volume Corrected Clerk's Record, one volume Supplemental Clerk's Record, five volume Reporter's Record and one volume Supplemental Reporter's Record. Appellees will cite to the Corrected Clerk's Record as "(CR __)," the Supplemental Clerk's Record will be cited by volume and page number as "(__Supp. CR __)," the Reporter's Record will be cited by volume and page number as "(__RR__)," and the Supplemental Reporter's Record will be cited as ("Supp. RR __)."

The Mandamus Record consists of a one volume record prepared by Relators' counsel and will be cited as "(MR__)." Real-Parties-in-Interest have prepared and filed a Supplemental Mandamus Record to include the Supplemental Reporter's Record, which was filed by the court reporter in the Dallas Court of Appeals on September 27, 2018. This record will be cited as "(Supp. MR__)."

## STATEMENT OF FACTS

This is an interlocutory appeal from a temporary injunction[1] in which the probate court carefully balanced the need to maintain the confidential nature of a post-verdict settlement amount with the need to preserve the status quo by preserving the entirety of the settlement proceeds in a safekeeping account pending resolution of the dispute in arbitration. The relevant facts establishing the probate court's proper exercise of its discretion in granting the injunction are set forth below.

### A. Hopper and Wassmer entered into a contingency fee agreement with the Attorneys to represent them in a lawsuit, which was tried to a favorable jury verdict.

The Attorneys represented Stephen B. Hopper and Laura S. Wassmer (collectively, "the Clients") in probate litigation brought by the Clients against JP Morgan Chase Bank, N.A. ("JPM"), as the administrator of the estate of the Clients' late-father. (CR 93). The Attorneys represented the Clients pursuant to a valid and enforceable Contingency Fee Contract of Representation (the "Fee Agreement") through trial of an underlying lawsuit involving JPM. (CR 93-107; 3 RR 39; 4 RR Ex. 1).

[1] On July 26, 2018, Hopper and Wassmer also filed an alternative petition for writ of mandamus in the event that the probate court's order granting the temporary injunction could somehow be considered not as an injunction but as simply an order requiring the settlement proceeds to be deposited into the registry of the court. This Court consolidated the original proceeding into this appeal by Order dated July 30, 2018 and ordered that the Attorneys file any response to the petition for writ of mandamus in their Appellees' Brief. Thus, this brief responds to both the Appellants' Brief and the petition for writ of mandamus.

The parties entered into the Fee Agreement in November 2015. (CR 93-107). Rather than being paid on an hourly basis as the work was performed, and instead taking on full risk of not being paid anything if the Clients did not recover anything, the Attorneys and the Clients entered into a fee agreement whereby the Attorneys would receive a contingent fee of any gross amounts recovered, including amounts recovered by way of a settlement. (CR 93-107; 5 RR Ex. 1 & 2). Gross recovery is defined as "the gross amount of money or other value or property recovered for the Client, before the deduction of expenses." (CR 94, 102). Through the terms of the Fee Agreement, the Clients assigned, transferred and conveyed to the Attorneys an amount equal to 45% of the proceeds recovered by compromise or settlement as fees for the Attorneys' work in representing the Clients in the underlying lawsuit. (CR 97). The Fee Agreement also gave the Attorneys an express security interest and statutory lien on such amounts. (CR 97).

After nearly two years of legal work, the lawsuit between the Clients and JPM went to trial in September 2017, and a substantial jury verdict was returned in favor of the Clients and against JPM for amounts totaling billions of dollars. (CR 196-249; 5 RR 3). Ultimately, on April 3, 2018 and April 4, 2018, the Clients settled their claims against JPM and, on April 4, 2018, their appellate counsel, Jeffrey Levinger, filed a Rule 11 agreement with the Probate Court notifying the Court that there was a settlement between the Clients and JPM. (CR 71; 5 RR Ex.

6). At approximately 9:05 am on April 5, 2018, FSSV attorney Anthony Vitullo appeared before the probate court on behalf of the Clients and announced in open court and on the record the confidential settlement between the Clients and JPM. (CR 45).

### B. After reaching a post-verdict settlement, Hopper and Wassmer fired the Attorneys and advised the Attorneys that Hopper and Wassmer would not pay the Attorneys the fee agreed upon under the contingency Fee Agreement.

Just one hour later, at approximately 10:10 am on April 5, 2018, the Clients' separate attorney, Jim Pennington, terminated the Attorneys, and advised the Attorneys that they were not going to pay the fee due under the Fee Agreement. (CR 45; 5 RR Ex. 3). Pennington also advised the Attorneys that he was going to instruct Levinger to retain an unspecified percentage of the settlement proceeds in his trust account. (CR 45; 5 RR Ex. 3). Although Pennington faintly stated that he and Levinger discovered issues in handling the case which would have made the appeal difficult, no evidence was presented at the injunction hearing of any justification for terminating the Attorneys. (CR 113, 169; 3 RR 1-67).

### C. The Attorneys withdrew from representing Hopper and Wassmer and intervened in the lawsuit to preserve the settlement proceeds.

On April 6, 2018, the Attorneys withdrew from representing the Clients, and thereafter intervened in the lawsuit. (CR 45). FSSV filed a verified petition in intervention, petition for declaratory relief, application for temporary restraining

order and for temporary injunction and requests for disclosures (CR 18-32), while MLF filed a separate petition in intervention. (CR 11-17). On April 9, 2018, the Attorneys filed a consolidated first amended joint petition in intervention, petition for declaratory relief and application for temporary restraining order, for temporary injunction, and motion to deposit funds in the registry. (CR 42-57). The purpose of the requested injunctive relief was to prevent the settlement proceeds, if disbursed to the Clients by JPM, from evaporating in the face of a valid property right and lien on the part of the Attorneys arising out of the Fee Agreement. *Id.*

### D. The probate court entered a temporary restraining order to preserve the settlement proceeds in a safekeeping account with JPM.

On April 9, 2018, the probate court heard the Attorneys' Application for Temporary Restraining Order and, on April 10, 2018, entered its Temporary Restraining Order ("TRO") ordering the preservation of the settlement proceeds in a safekeeping account with JPM, to be withdrawn only upon further order of the probate court. (2 RR 1-61). In so doing, the probate court found that the Attorneys have a security interest in and lien upon the settlement proceeds, which constituted a property interest in the settlement proceeds, and ordered an expedited discovery and summary judgment procedure to resolve the Attorneys' claims. (CR 58-62). The probate court's temporary restraining order set the temporary injunction for hearing on April 24, 2018. (CR 62).

Thereafter, on April 11, 2018, JPM filed a notice of receipt of temporary restraining order in which JPM indicated its willingness and intent to comply with the probate court's order. (CR 71-75). On the same day, the Clients filed a motion to compel arbitration in connection with the fee dispute. (CR 63-69).

### E. Wassmer and Hopper testified admitting their acceptance, use and benefit of the Attorneys' legal services but refusing to pay the Attorneys in accordance with their previously agreed-upon Fee Agreement.

On April 16, 2018, the Clients were each deposed in connection with their termination of the Fee Agreement, as contemplated by the probate court. In their depositions, the Clients each fully admitted that they accepted the legal services and benefits of such services from the Attorneys under the Fee Agreement, that all such services had been fully performed at the time of termination, and that the Clients terminated the Fee Agreement only after they reached the post-verdict settlement with JPM. (Supp. RR Ex. A at 2-5; Ex. B at 5-7).

Specifically, Hopper testified at his April 16, 2018 deposition as follows:

> Q. All right. And at the time that you terminated Mr. Vitullo, all of the work that needed to be done to obtain a Rule 11 settlement agreement to fully resolve all claims had been completed, correct?
>
> A. Correct.
>
> Q. You accepted all of the legal services that Mr. Vitullo performed from the time he entered into an appearance until April 5th, when you terminated, correct?
>
> A. That's correct.

Q. All right. And he provided you a valuable legal service from the time he appeared in the case until the time you terminated him on April 5th, correct?

A. He provided some valuable services, yes.

Q. All right. So the answer to my question is, Yes. He provided valuable legal services, correct?

A. Provided some valuable legal services, yes.

Q. And you accepted the benefits of those services, correct?

A. That's correct.

Q. And your sister accepted the benefits of those services, correct?

A. That is correct.

(Supp. RR Ex. B at 5).

Q. You got a valuable legal service from Mr. Vitullo, correct?

A. There were times when I got a valuable service from Mr. Vitullo.

Q. You accepted the benefits of Mr. Vitullo's work, correct?

A. That's correct.

Q. And you waited until after you settled the case to terminate him, correct?

A. No.

Q. Okay. Was the termination letter dated April 5th?

A. Yes.

Q. And that was after a Rule 11 had been executed to settle the case, correct?

A. Yes, that's correct.

Q. All right. So you terminated him after you settled the case, right?

A. After we got the Rule 11 agreement, yes.

(Supp. RR Ex. B at 7).

Q. I'm talking about performed his obligations to you, the client. At the time that he was terminated, he had fully performed – you already had a deal, right?

A. Yes.

(Supp. RR Ex. B at 7).

Wassmer testified at her April 16, 2018 deposition regarding the extensive benefits obtained by the Attorneys as part of the representation, as well as her long history of hiring and firing attorneys while disputing their compensation:

Q. And the Judge ordered that you pay zero in attorney's fees to Ms. Hopper, correct?

A. Correct.

****

Q. So let's just go through this. You have a zero pretrial offer, correct?

A. Yes.

Q. You have over a million dollars that Mr. Vitullo successfully argued to prevent Ms. Hopper from getting attorney's fees against you, correct?

A. Uh-huh, yes.

Q. In a matter that you had not even retained him to represent you on, correct?

A. Correct.

Q. You go to trial and you get a 4 billion plus verdict with punitive damages, correct?

A. Yes.

(Supp. RR Ex. A 4-5).

Q. All right. So in this lawsuit, before we even talk about Mr. Vitullo, six lawyers have been fired by you or your brother, correct?

A. Correct.

Q. And five out of those six all claimed, at least at one point in time, that they were not paid in whole or in part, correct?

A. Correct.

Q. All right. And of those six, the only one that claims – or did not claim that he wasn't paid was Mr. Bell, because that fee was paid in advance, correct?

A. Yes.

Q. All right. So Mr. Vitullo would be the seventh lawyer that you fired in this case, correct?

A. Correct.

Q. And he would be the sixth of seven lawyers who claims he's entitled to money that he was not paid, correct?

A. Correct.

(Supp. RR Ex. A at 2).

**F. The probate court conducted an evidentiary hearing on the temporary injunction and exercised its sound discretion to enter an injunction to preserve the entirety of the confidential settlement proceeds in a safekeeping account.**

On April 24, 2018, after appropriate notice to the parties, a temporary injunction hearing was held in the probate court, in which the Attorneys played videotaped deposition excerpts for the court, including those set forth above, and argued that they had a security interest in the JPM settlement proceeds which would be destroyed by dissipation of the proceeds, especially in light of the Clients' repeated attempts to avoid paying previous counsel. (3 RR 7-13, 21-23; Supp. RR Ex. A & B). After hearing such testimony and the arguments of counsel, the probate court entered its temporary injunction, again ordering the preservation of the settlement proceeds in a safekeeping account with JPM, to be withdrawn only upon further order of the probate court. (CR 292-296).

The probate court determined, after extensive evidence and argument, that the injunction was necessary "because of the immediate need to enforce the security interest and lien which Intervenors have in a portion of the settlement proceeds" and the fact that, if the funds were disbursed, the Attorneys' security

interest in and lien upon the settlement proceeds would be destroyed. (CR 295-296).

### G. The probate court heard and granted the Clients' motion to compel arbitration.

After entering temporary injunctive relief, and on May 8, 2018, the probate court heard the Clients' motion to compel arbitration. (4 RR 1-41; CR 297). On May 10, 2018, the probate court signed its order granting the motion to compel arbitration and ordered that the fee dispute proceed to arbitration. (Supp. CR 8-9). The court also stayed any further proceedings in the probate court. (Supp. CR 8-9).

### H. The Clients appealed the probate court's order granting injunctive relief.

On May 14, 2018, the Clients filed their interlocutory appeal of the probate court's order granting the temporary injunction. (Supp. CR 10-13). The Clients also filed an alternative petition for writ of mandamus, which was consolidated into this appeal by Order dated July 30, 2018.

## SUMMARY OF THE ARGUMENT

The probate court's order granting injunctive relief prior to compelling the parties' fee dispute to arbitration should be affirmed, and the Clients' petition for writ of mandamus should be denied.

First, the probate court properly exercised its discretion in ruling on the request for injunctive relief prior to compelling arbitration as the application for temporary injunction was filed and set for hearing ***before*** the motion to compel arbitration and was requested and issued to preserve the status quo while the parties address the fee dispute in arbitration. The probate court's power to preserve the status quo pending arbitration is well-established and supported by case law, the Texas Arbitration Act, the Federal Arbitration Act, the AAA Commercial Arbitration Rules and Mediation Procedure, and the Fee Agreement.

Second, the probate court properly exercised its discretion to grant a temporary injunction protecting the security interest of the Attorneys in the settlement proceeds where the Attorneys established, through evidence and testimony presented to the probate court, that they had a probable security interest in the settlement proceeds and that, absent an injunction, that security interest was likely to be destroyed and the funds disbursed.

Third, the probate court properly exercised its discretion to enjoin the entire settlement proceeds to preserve the confidential nature of the settlement amount. Because the settlement amount was confidential, and even the probate court could not know the settlement amount, the probate court carefully balanced the need to preserve the settlement's confidentiality with the need to preserve the status quo pending arbitration. In carefully balancing these two interests, the probate court

exercised its sound discretion in granting an injunction for the full amount of the settlement proceeds.

Finally, the Clients' petition for writ of mandamus should be denied because the Clients have not shown, and cannot show, the two required elements for mandamus relief: (1) that the probate court somehow abused its discretion and (2) no adequate remedy by appeal exists. The petition for writ of mandamus is predicated on the incorrect notion that the probate court's order was simply an order to deposit funds into the court's registry. The probate court's order was clearly an injunction rather than an order to deposit the settlement proceeds into the registry of the court. The Texas Civil Practice and Remedies Code provides for an interlocutory appeal from an order that grants or denies a temporary injunction. Therefore, the Clients have an adequate remedy by appeal. Additionally, for the same reasons supporting affirmance of the injunction order, this Court should deny the mandamus relief requested because the probate court did not abuse its discretion in enjoining the settlement proceeds. The Clients have not met, and cannot meet, the elements required for mandamus relief and the probate court's order granting the temporary injunction should stand.

## ARGUMENT

### A. Standard of Review and Applicable Law on Temporary Injunctions.

The decision to grant or deny a temporary injunction is within the trial court's sound discretion. *See Leighton v. Rebeles*, 343 S.W.3d 270, 273 (Tex. App.—Dallas 2011, no pet.) (citing *Butnaru v. Ford Motor Co*., 84 S.W.3d 198, 204 (Tex. 2002)). This Court's review of a trial court's grant or denial of a temporary injunction is strictly limited to evaluating whether there has been an abuse of discretion by the trial court in granting or denying the interlocutory order. *Id*. "A trial court does not abuse its discretion if it bases its decision on conflicting evidence and at least some evidence in the record reasonably supports the trial court's decision." *Frequent Flyer Depot, Inc. v. Am. Airlines, Inc*., 281 S.W.3d 215, 220 (Tex. App.—Fort Worth 2009, pet. denied); *HMS Holdings Corp. v. Pub. Consulting Grp., Inc*., No. 05-15-00925-CV, 2016 WL 1179436, *1 (Tex. App.—Dallas Mar. 28, 2016, no pet.) (mem. op.) (citing *Butnaru*, 84 S.W.3d at 211). The ultimate merits of the underlying case are not presented for appellate review. *Davis v. Huey*, 571 S.W.2d 859, 861 (Tex. 1978); *Leighton*, 343 S.W.3d at 273; *HMS Holdings Corp.,* 2016 WL 1179436 at *2. This Court may not substitute its judgment for that of the trial court. *Butnaru*, 84 S.W.3d at 204.

Here, when this Court reviews the probate court's order granting the temporary injunction, this Court should view the evidence in the light most

favorable to that order, indulging every reasonable inference in its favor, and determine whether the order is so arbitrary that it exceeds the bounds of reasonable discretion. *Amend v. Watson*, 333 S.W.3d 625, 627 (Tex. App.—Dallas 2009, no pet.); *HMS Holdings Corp.*, 2016 WL 1179436 at *1. When doing so, this Court should conclude that the probate court did not exceed the bounds of reasonable discretion and in fact, exercised sound discretion in granting the temporary injunction to preserve the status quo pending the fee dispute.

The purpose of a temporary injunction is to preserve the status quo of the subject matter of the litigation pending a trial on the merits. *Butnaru*, 84 S.W.3d at 204; *Minexa Arizona, Inc. v. Staubach,* 667 S.W.2d 563, 567 (Tex. App.—Dallas 1984, no writ). To obtain a temporary injunction, the applicant must plead and prove: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Butnaru*, 84 S.W.3d at 204; *Minexa Arizona, Inc.,* 667 S.W.2d at 567.

"Findings and conclusions made by the trial court in conjunction with the interlocutory order may be 'helpful' in determining whether the trial court exercised its discretion in a reasonable and principled fashion, but they are not binding." *HMS Holdings*, 2016 WL 1179436 at *2. Additionally, this Court should "not assume that the evidence presented at the injunction hearing is the same as the evidence that will be developed at a full trial on the merits." *Id*. Under

these standards and applicable law, this Court should affirm the probate court's order granting the temporary injunction.

### B. The probate court properly granted a temporary injunction preserving and protecting the Attorneys' security interest in the settlement proceeds.

Without question, the probate court properly exercised its discretion to grant the temporary injunction where the Attorneys established, through evidence and testimony presented to the probate court, that they had a cause of action against the Clients for breach of the Fee Agreement, a probable right to the fees set forth in the Fee Agreement and a probable, imminent and irreparable injury in the interim because the Attorneys have a security interest in the settlement proceeds and that, absent an injunction, there was an imminent risk that their security interest would be destroyed and the funds disbursed.[2]

#### 1. The Attorneys have a security interest in and lien upon the settlement proceeds.

The Attorneys' property interest in the settlement proceeds is manifest. Pursuant to both the express terms of the Fee Agreement and applicable Texas law, the Attorneys have a vested and existing attorneys' lien against the settlement

[2] The Clients only challenge the probate court's power to enter the injunction order before compelling arbitration and the probable, imminent and irreparable injury element of injunctive relief. *See* App.'s Br. generally. The Clients do not raise any argument, and therefore have waived any error, as to the first two elements of injunctive relief; namely, whether the Attorneys pled and proved (1) a cause of action against the Clients and (2) a probable right to the relief sought. *See* TEX. R. APP. P. 38.1(i); *see also Oliphant Financial LLC v. Angiano,* 295 S.W.3d 422, 423-24 (Tex. App.—Dallas 2009, no pet.).

proceeds and are entitled to disbursement of an amount representing 45% of those proceeds and anything else of value obtained by the Clients as a result of the Attorneys' services. (CR 94-97).

Under Texas law, "a contract may establish an attorney's lien for money received in judgment or settlement of a matter." *Norem v. Norem*, Civ. Action No. 3:07-CV-0051-BF(G), 2008 WL 2245821, *6 (N.D. Tex. June 2, 2008) (quoting *United States v. Betancourt*, No. CRIM. B-03-090-S1, 2005 WL 3348908, *2 (S.D. Tex. Dec. 8, 2005)). Here, the Fee Agreement does exactly that, in paragraph 11, and *expressly* grants the Attorneys a security interest in and lien upon any settlement proceeds, and anything else of value obtained by the Clients as a result of the Attorneys' Services:

> Client hereby assigns, transfers and conveys over to Attorneys an amount equal to either forty percent (40%) of the proceeds if the matter is settled or resolved before trial begins or forty-five percent (45%) of the proceeds if the matter is resolved after trial begins, of any property, money or other value recovered by settlement, compromise, verdict or judgment of the claims described in this contract. Client does hereby give and grant to Attorneys an express security interest, in addition to any statutory lien, upon Client's claims and any and all judgments recovered, and any and all funds or property realized or paid by compromise or settlement, as security for the compensation and costs and expenses advanced or due to be paid or reimbursed to Attorneys hereunder. This security interest is to continue in the event Attorneys are discharged without good cause. If the claims are not assignable at law, Client expressly assigns to Attorneys, to the extent of attorneys' fees and disbursements, any sum realized by way of a settlement or any judgment obtained thereon.

(CR 97). A contractual attorneys' lien is fully enforceable in Texas. *See Norem*, 2008 WL 2245821, at *6; *Betancourt*, 2005 WL 3348908 at *3. By the language of the Fee Agreement itself, a 45% lien applies to any "property, money or other value recovered" when the "matter is resolved after trial begins … by settlement." (CR 97). The Clients announced such a settlement to the probate court on April 5, prior to the termination of the Attorneys' representation, and the Attorneys' express security interest attached. (CR 45).

Even in the absence of an expressly granted security interest, the Attorneys' property interest in and lien upon the settlement proceeds is recognized in well-established Texas law. An attorney's right to compensation pursuant to a contingency fee agreement "is a property right determined under applicable state law." *Marre v. United States*, 117 F.3d 297, 307 (5th Cir. 1997); *Madeksho v. Abraham, Watkins, Nichols & Friend,* 112 S.W.3d 679, 689 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). Under Texas law, a contingency fee contract "is generally considered to be an executory contract." *Marre,* 117 F.3d at 307-308 (citing *Lee v. Cherry*, 812 S.W.2d 361, 363 (Tex. App.—Houston [14th Dist.] 1991, reh'g of writ overruled); *Brenan v. LaMotte*, 441 S.W.2d 626, 630 (Tex. Civ. App.—San Antonio 1969, no writ); *White v. Brookline Trust Co*., 371 S.W.2d 597, 600 (Tex. Civ. App.—Amarillo 1963, writ ref'd n.r.e.); *Carroll v. Hunt*, 168 S.W.2d 238, 240 (Tex. Com. App. 1943, opinion adopted)). Once the contingency

occurs, however, the agreed upon contingency fee is no longer executory, and it is beyond question that an attorney has a lien on any judgment or settlement securing his or her services. *Marre,* 117 F.3d at 308. Indeed, such a lien "is paramount to the rights of the parties in the suit and is superior to other liens on the money or property involved, subsequent in point of time." *Id.* (quoting *In re Willis*, 143 B.R. 428, 4321 (Bankr. E.D. Tex. 1992)).

Here, the Fee Agreement expressly provides in paragraph 3 that:

> [I]f Attorneys are successful in recovering money or anything of value for Client, by settlement prior to trial begins, Attorneys shall receive attorneys' fees in the amount of forty percent (40%) of the gross recovery…. If the matter is resolved after trial begins, Attorneys shall receive attorneys' fees in the amount of forty-five (45%) of the gross recovery.

(CR 94). The contingency is resolution of the Clients' claims after trial begins and the recovery of "money or *anything* of value." *Id.* Under Texas law, therefore, following the settlement as agreed to and announced by the Clients and JPM, an attorney's lien attached to the settlement proceeds and the Attorneys have a property right in the amount recovered. *See, e.g. Marre,* 117 F.3d at 307-08; *Madeksho,* 112 S.W.3d at 689. Without presenting any argument or evidence, the Clients intimate that some sort of malpractice occurred and therefore the Attorneys are not entitled to their full fee under the Fee Agreement. *See* App.'s Br. at 2. But other than a vague reference to having discovered issues in handling the case which would have made the appeal difficult, no evidence was presented at the

injunction hearing of any justification for terminating the Attorneys.[3] (CR 113, 169; 3 RR 1-67). Even the Clients agreed that they owed the Attorneys some amount. (Supp. RR Ex. A at 3, Ex. B at 3-5). They just refused to state what amount. *Id.* Without credible evidence, the Clients cannot deprive the Attorneys of their property right in the settlement proceeds. *See In re Willis,* 143 B.R. at 433.

The Clients ignore the fact that the Attorneys are not just mere claimants to the settlement proceeds. Rather, the Attorneys actually have a property interest in their portion of the judgment. *Madeksho,* 112 S.W.3d at 689. The Houston Fourteenth Court of Appeals explained: "If we ignore the law firm's equitable interest and order the entire judgment paid to the clients, the law firm will be deprived of property with no assurance it will be returned. Property rights cannot be treated so indifferently." *Id.*

In short, the Attorneys' property rights are fully vested in the settlement proceeds and protected by an attorneys' lien for one or both of the following reasons: (1) by application of the *express security interest* granted in paragraph 11 of the Fee Agreement as to "any and all funds or property realized or paid by compromise or settlement"; and/or (2) by applicable Texas law regarding the contingent fee provision as expressed in paragraph 3 of the Fee Agreement. Under

[3] Additionally, the Clients have presented no argument as to any errors committed by the Attorneys to support any suggestion that the Attorneys were fired for cause. *See* App.'s Br. at 9-20. Thus, the Clients have waived any such argument in this appeal. *See* TEX. R. APP. P. 38.1(i); *see also Oliphant Financial LLC,* 295 S.W.3d at 423-24.

both Texas law and the terms of the Fee Agreement itself, and as determined by the probate court, the Attorneys manifestly have a property interest in and secured lien upon the settlement proceeds.

**2. The Attorneys established that, absent an injunction, they would incur a probable, imminent and irreparable injury.**

Unquestionably, an injunction properly applies "to prevent the dissipation of specific funds that would otherwise be available to pay a judgment." *Hartwell v. Lone Star*, *PCA,* 528 S.W.3d 750, 764 (Tex. App.—Texarkana 2017, pet. dism'd) (citing *Minexa Arizona, Inc.*, 667 S.W.2d at 567-568).

Here, the evidence presented to the probate court firmly established a high likelihood that, in the absence of injunctive relief, the settlement proceeds would soon be disbursed and/or no longer capable of being traced in such a manner for the Attorneys' lien and security interest to attach. (Supp. RR Exs. A and B). The probate court, in the exercise of its discretion, properly determined that the Attorneys were facing probable, imminent, and irreparable injury in the absence of injunctive relief.

The Clients suggest that there is no concern that the settlement proceeds will be lost or depleted because under the terms of the settlement agreement, JPM has no current obligation to make any settlement payment to anyone "because the Lawyers have not satisfied certain conditions precedent." *See* App.'s Br. at 17. The "conditions precedent" to which the Clients refer is the alleged provision in

the settlement agreement between JPM and the Clients requiring the Attorneys to release their attorney's lien before JPM will disburse the settlement proceeds. (CR 318). While JPM submitted its Notice regarding April 24, 2018 Temporary Injunction Order setting forth this condition precedent before release of the settlement funds, such Notice was filed on May 4, 2018 – well after the probate court heard and issued the temporary injunction on April 24, 2018. (3 RR 1; CR 292-296, 317-320). Additionally, this is merely a pleading – not evidence. *See Hersh v. Tatum,* 526 S.W.3d 462, 470 (Tex. 2017). Moreover, while Pennington, counsel for the Clients, made mention of this provision in argument at the temporary injunction hearing, no evidence was admitted at the temporary injunction hearing of this provision in the settlement. (3 RR 14-18). In fact, JPM's counsel objected to any portion of the settlement agreement being presented to the probate court because the entire agreement was confidential. (3 RR 26-27, 48-63). Although this term arguably provides some protection, this term can be modified by JPM and the Clients by entering into subsequent agreements. JPM's counsel stated at the hearing that JPM and the Clients will not "change, alter or revoke the settlement agreement without notifying [the probate court]," but there's no indication that they will not seek any change in the settlement agreement with notice to the probate court. (3 RR 60-62). Further, the Attorneys are not parties to the settlement agreement and have no rights of enforcement under the agreement.

(3 RR 57). Thus, a substantial risk still remains that without the injunction, the Attorneys' security interest would be destroyed, and the funds disbursed. (3 RR 57, 59-60).

If the funds are disbursed to the Clients, the Attorney's lien or security interest no longer attaches to funds which have been commingled with other funds or have been distributed or dissipated in such a manner that they can no longer be traced back to the interest in question. The Attorneys would be faced with trying to recover the money owed to them by imposing a constructive trust on the distributed proceed, which would be possible only if the Attorneys could establish: (1) breach of a special trust or fiduciary relationship or actual or constructive fraud; (2) unjust enrichment of the wrongdoer; and (3) an identifiable res that can be traced back to the original property. *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 87 (Tex. 2015).

The proponent of a constructive trust must strictly prove these elements. *See, e.g., Hubbard v. Shankle*, 138 S.W.3d 474, 485 (Tex. App.—Fort Worth 2004, pet. denied). To prove an identifiable res over distributed settlement proceeds, the Attorneys would have to show that the specific funds in the hands of the Clients are the same exact funds distributed to them by JPM. *See, e.g., KCM Fin. LLC,* 457 S.W.3d at 88; *Wheeler v. Blacklands Prod. Credit Ass'n*, 627 S.W.2d 846, 851 (Tex. App.—Fort Worth 1982, no writ). When money sought to be recovered by

the Attorneys has been dissipated so that it is no longer possible to specifically trace those funds back to the settlement proceeds, the Attorneys' only claim would be that of general creditors. A constructive trust on unidentifiable cash proceeds is inappropriate. *Meadows v. Bierschwale*, 516 S.W.2d 125, 131 (Tex. 1974).

Without an enforceable lien or security interest, the Attorneys would be left with simply "trusting" clients to pay the amounts owing to the Attorneys under the Fee Agreement, and significant evidence was presented to the probate court concerning the Clients' lack of trustworthiness in that regard. Among other things, the Clients fired and refused to pay (to one degree or another) seven different attorneys in connection with the same matter. Wassmer testified as follows:

> Q. All right. So in this lawsuit, before we even talk about Mr. Vitullo, six lawyers have been fired by you or your brother, correct?
>
> A. Correct.
>
> Q. And five out of those six all claimed, at least at one point in time, that they were not paid in whole or in part, correct?
>
> A. Correct.
>
> Q. All right. And of those six, the only one that claims – or did not claim that he wasn't paid was Mr. Bell, because that fee was paid in advance, correct?
>
> A. Yes.
>
> Q. All right. So Mr. Vitullo would be the seventh lawyer that you fired in this case, correct?

A. Correct.

Q. And he would be the sixth of seven lawyers who claims he's entitled to money that he was not paid, correct?

A. Correct.

(Supp. RR Ex. A at 2).

The extent of the Clients' hostility towards the Attorneys, as well as evidence of a clear intention to deprive the Attorneys of the full amount owing, can be seen from the fact that Hopper was recording his communications with the Attorneys prior to, during, and immediately after the trial:

Q. And you were recording your phone calls with Mr. Vitullo during that period of time, correct?

A. I believe so.

Q. How many recordings do you have, sir?

A. I believe there are six recordings.

Q. You started recording Taylor Horton before the trial. When did you first record Lenny Vitullo?

A. Day after the trial.

Q. Where were you when you made that recording?

A. As I said, it – I was in his office.

Q. So you were in his office and who else was present?

A. My sister.

Q. You, Mr. Vitullo, and your sister present in Mr. Vitullo's office the day after the jury verdict?

A. That's correct.

Q. And you were surreptitiously recording that conversation?

A. That's correct.

Q. Did you record the whole thing?

A. Yes, I did.

Q. Did you ever tell Mr. Vitullo you were recording him?

A. No, I did not.

Q. Why were you recording him the day after you received what you've characterized as a very favorable jury verdict?

A. Because I knew that Mr. Vitullo would be putting his interest over mine and pushing for a quick settlement. And I knew that – or I didn't feel that that would be in my best interest.

Q. So why were you recording him?

A. Again, because at that point, I did not trust that Mr. Vitullo would be giving us proper legal advice that was in my best interest, and I wanted to document that fact.

Q. So your testimony you did – is you didn't trust your own lawyer, who had just secured a – what was it – $4 billion jury verdict for you?

A. I don't agree that it was Mr. Vitullo that secured that jury verdict.

(Supp. RR Ex. A at 2).

When determining a probable, imminent, and irreparable injury, trial courts consider the defendants course of conduct and may assume such conduct will continue absent proof to the contrary. *See Hartwell,* 528 S.W.3d at 764. Here, the evidence undisputedly showed that the Clients had fired seven lawyers in the case. (Supp. RR Ex. A at 2). None of those lawyers have been paid except for one lawyer, who was paid in advance. (Supp. RR Ex. A at 2). Clearly, the Clients have a course of conduct of avoiding paying their lawyers. Moreover, the evidence showed that the Clients were secretly recording their meetings with the Attorneys. (Supp. RR Ex. A at 2). The evidence also undisputedly showed that despite the Attorneys having fully performed, the Clients intend to not pay the Attorneys, who achieved an extremely favorable jury verdict for them, in accordance with the Fee Agreement. (CR 45; 5 RR Ex. 3; Supp. RR Ex. A at 3, Ex. B at 3-8).

All in all, the probate court had before it more than enough evidence to show that: (a) the Attorneys had a security interest in the settlement proceeds; and (b) they were unlikely to see much if any of the settlement proceeds paid to them by the Clients in accordance with the Fee Agreement if the Court allowed such proceeds to be distributed. As such, the temporary injunction was properly issued.

### 3. The probate court's temporary injunction was justified to preserve the status quo in support of arbitration.

The Clients contend that the probate court did not have the power to enter the injunction before it compelled arbitration. *See* App.'s Br. at 11-17. But the Clients' position is unsubstantiated.

Under either the Federal Arbitration Act ("FAA") or the Texas Arbitration Act ("TAA"), a trial court may enter injunctive relief to preserve the status quo pending arbitration. *See, e.g., Senter Invs., L.L.C. v. Amirali & Asmita Veerjee & Al-Waahid, Inc.,* 358 S.W.3d 841, 845 (Tex. App.—Dallas 2012, no pet.); *Frontera Generation L.P. v. Mission Pipeline Co*., 400 S.W.3d 102, 109-110 (Tex. App.—Corpus Christi 2012, no pet.); *see also* TEX. CIV. PRAC. & REM. CODE § 171.086(a); *Janvey v. Alguire,* 647 F.3d 585, 593-95 (5th Cir. 2011). "Requesting either a temporary injunction or an order requiring the deposit of disputed funds into the court's registry is not inconsistent with the right to arbitrate." *Structured Capital Res. Corp. v. Arctic Cold Storage, LLC,* 237 S.W.3d 890, 895 (Tex. App.—Tyler 2007, no pet.). The probate court reasonably exercised its discretion to find that the Attorneys established probable, imminent and irreparable injury in the absence of a temporary injunction, as discussed above, and such an injunction was appropriately issued to preserve the status quo and the meaningfulness of the arbitration process.

The Clients' argument that the TAA does not permit an injunction in support of arbitration absent proof that the "subject matter of the controversy" would be otherwise destroyed is disingenuous. *See* App.'s Br. at 16. The Texas Civil Practices and Remedies Code provides that "[b]efore arbitration proceedings begin, in support of arbitration" a party may ask a court to "restrain or enjoin … the destruction of all or an essential part of the subject matter of the controversy…." TEX. CIV. PRAC. & REM. CODE § 171.086(a)(3); *see also Senter Invs., L.L.C.,* 358 S.W.2d at 845; *Comed Medical Sys., Co., Ltd. v. AADCO Imaging, LLC,* No. 03-14-00593-CV, 2015 WL 869456, *4 (Tex. App.—Austin Feb. 25, 2015, no pet.). The Code also permits a trial court to grant an injunction or any other relief needed "to permit the arbitration to be conducted in an orderly manner and to prevent improper interference [with] or delay of the arbitration." TEX. CIV. PRAC. & REM. CODE § 171.086(a)(6). So long as the trial court believes the injunction is necessary to preserve the status quo and support arbitration, then the injunction is justified under the TAA.

Even if the potential "destruction" of an essential part of the dispute between the parties was required, that is exactly what the Attorneys established here. As explained above, the Attorneys' lien upon and security interest in the settlement proceeds, an essential part of their claims against the Clients, would have been entirely destroyed if the funds at issue were to be distributed to Clients and

commingled with other assets. *See* supra § B(1) & (2). Thus, the probate court's order granting the temporary injunction was not in contradiction of the TAA and was expressly permitted by the TAA.

To the extent the FAA applies, then an injunction in support of arbitration is appropriate under that statute as well. *See Janvey,* 647 F.3d at 593-95. Relying on opinions from the San Antonio and Houston Fourteenth Court of Appeals, the Clients argue that "[u]nder the FAA, courts cannot issue preliminary injunctions pending arbitration unless the parties' agreement expressly allows it." App.'s Br. at 15 (citing *Metra United Escalante, L.P. v. Lynd Co.,* 158 S.W.3d 535, 539-40 (Tex. App.—San Antonio 2004, no pet.) and *Feldman/Matz Interests, L.L.P. v. Settlement Capital Corp*., 140 S.W.3d 879 (Tex. App.—Houston [14th Dist.] 2004, orig. proceeding)). But the Clients, like the courts in *Metra* and *Feldman,* incorrectly conclude based on an overly broad reading of Fifth Circuit authority that the FAA ***only*** allows a court to enter a temporary injunction prior to compelling arbitration if the parties' agreement contemplates such injunctive relief. *See* App.'s Br. at 15; *see also Metra United Escalante, L.P.,* 158 S.W.3d at 539-40 (citing *RGI, Inc. v. Tucker Assocs., Inc.,* 858 F.2d 227, 228 (5th Cir. 1988)); *Feldman/Matz Interests, L.L.P.,* 140 S.W.3d at 885-86 (citing *RGI, Inc.,* 858 F.2d at 230). While the Fifth Circuit has approved of a trial court's issuing an injunction when the arbitration agreement contemplates such relief, the Fifth

Circuit has expressly declined to rule that this is the only circumstance under which a trial court may order injunctive relief. *See RGI, Inc.,*858 F.2d at 228-29.

More specifically, in *RGI, Inc. v. Tucker Assocs., Inc.,* the Fifth Circuit acknowledged a split among the circuit courts of appeals on the question of whether preliminary injunctive relief is available in an action involving an agreement to arbitrate under the FAA. *RGI, Inc.,* 858 F.2d at 228-29. But the Fifth Circuit specifically refused to take a side in the split. *Id.* Rather, the Fifth Circuit concluded that it was able to decide the case based on an area of split-bridging consensus; namely, when the parties' agreement contemplates judicial injunctive relief, such relief may be granted pending arbitration. *Id.* The Fifth Circuit affirmed the district court's order granting a preliminary injunction because the parties' written agreement included a "bargained for provision clearly contemplate[ing] that the status quo is to continue pending arbitration." *Id.* The Fifth Circuit held that where an arbitration agreement contemplates the use of a preliminary injunction to maintain the status quo, the district court has the power to issue such injunction. *Id.* But in reaching such conclusion, the Fifth Circuit did ***not*** hold that this was the ***only*** circumstance in which the district court could grant injunctive relief – which is exactly what the Clients improperly suggest.

The Clients contend that the probate court should have stopped everything as soon as the Clients moved to compel arbitration. *See* App.'s Br. at 11-12. But this

argument has been specifically rejected by the Fifth Circuit in *Janvey v. Alguire,* 647 F.3d 585, 594 (5th Cir. 2011). In *Janvey,* the Fifth Circuit found such argument unavailing when it affirmed a district court's order granting preliminary injunctive relief before deciding whether to compel arbitration. *Janvey,* 647 F.3d at 593-94. The Fifth Circuit agreed with the district court's reasoning that such holding would create a harsh procedural rule requiring motions to compel arbitration, where a request for injunctive relief is involved, to be resolved before any temporary restraining order expires in order to avoid irreparable injury. *Id.* (quoting *Janvey v. Alguire,* No. 3:09-CV-724-N, at 6 n. 5 (N.D. Tex. June 6, 2010)). Like the district court, the Fifth Circuit concluded that such a rule would be "both burdensome and impracticable." *Id.*

Moreover, nothing in the language of the FAA expressly prohibits a trial court from entering an injunction to preserve the status quo prior to compelling arbitration. *See* 9 U.S.C. §§ 1-16. In fact, the Fifth Circuit examined the FAA and determined that "the FAA does not touch on the ancillary power of the federal court to act before it decides whether the dispute is arbitrable." *Janvey,* 647 F.3d at 593. Although there is a strong preference for arbitration, the FAA does not preclude a trial court from issuing a temporary injunction before deciding the motion to compel arbitration. *Id.* The Fifth Circuit concluded: "Meaningful review of the main issues on appeal – the district court's power to issue a preliminary

injunction and whether the district court abused its discretion in granting the preliminary injunction – are not dependent upon the outcome of the motion to compel arbitration or vice versa." *Id.* at 604. Thus, the *Janvey* Court has clearly held that the FAA does not preclude a trial court from granting a temporary injunction before ruling on a motion to compel arbitration. Just like in *Janvey*, the probate court entered its order granting injunctive relief before it compelled arbitration. And, just like the Fifth Circuit held in *Janvey,* this Court should hold that the probate court had the power to grant temporary injunctive relief before deciding whether to compel arbitration. *See Janvey,* 647 F.3d at 592.

Once the court determines the case before it is arbitrable, the question still remains open in the Fifth Circuit as to whether the FAA would require a federal court to immediately divest itself of any power to act to maintain the status quo. *Janvey,* 647 F.3d at 594; *see also Amegy Bank Nat. Ass'n v. Monarch Flight II, LLC,* 870 F.Supp.2d 441, 451 (S.D. Tex. 2012). The majority view among circuits that have addressed the issue have held that a district court may enter injunctive relief to preserve the status quo pending arbitration. *Amegy Bank Nat. Ass'n,* 870 F.Supp.2d at 451-52 (citing *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 910 F.2d 1049, 1052 (2nd Cir. 1990); *Ortho Pharm. Corp. v. Amgen, Inc.,* 882 F.2d 806, 812 (3rd Cir. 1989); *Teradyne, Inc. v. Mostek Corp.,* 797 F.2d 43, 51 (1st Cir. 1986); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley,* 756 F.2d

1048, 1051-54 (4th Cir. 1985)). The rationale for such approach is that "[a]rbitration can become a 'hollow formality' if parties are able to alter irreversibly the status quo before the arbitrators are able to render a decision in the dispute." *Id.* (quoting *Blumenthal,* 910 F.2d at 1053)). The Southern District of Texas recognized that "[m]ost district courts in the Fifth Circuit follow the majority position." *Id.* The majority view comports more closely with the FAA's purpose to further arbitration as a meaningful dispute resolution. *Id.* Thus, this Court should likewise hold that the probate court was within its discretion to order the temporary injunction to preserve the status quo.

Additionally, the American Arbitration Association ("AAA") Commercial Arbitration Rules permitted the probate court to enter an injunction prior to arbitration. The parties incorporated the American Arbitration Association ("AAA") Commercial Arbitration Rules into the arbitration provision of the Fee Agreement. (CR 99, 106). AAA Rule 37 expressly allows the Attorneys to seek an injunction from *either* the arbitrator or from a court. Although Rule 37(a) provides that the arbitrator may issue an injunction "for the protection or conservation of property," Rule 37(c) goes on to provide that "[a] request for interim measures addressed by a party to a judicial authority *shall not be deemed incompatible with the agreement to arbitrate* or a waiver of the right to arbitrate." *See* AAA Commercial Arbitration Rules and Mediation Procedures, at Rule 37 (emphasis

added).[4] Here, the probate court's temporary injunction simply preserves the settlement proceeds while the parties arbitrate the merits of their fee dispute. (CR 292-296). There is nothing incompatible with the agreement to arbitrate. By incorporating the AAA Commercial Arbitration Rules into the Fee Agreement, the Fee Agreement expressly contemplated the very injunction issued here. (CR 99, 106). Thus, the probate court's temporary injunction was fully permitted in aid of arbitration.

#### 4. The probate court did not improperly address the "merits" of the fee dispute.

The Clients also argue that, in issuing its injunction, the probate court improperly addressed the "merits" of the fee dispute. *See* App.'s Br. at 12-13. But a ruling on an injunction is *not* a ruling on the merits. *See Frontera Generation*, 400 S.W.3d at 110 ("we emphasize that a ruling on a temporary injunction is not a ruling on the merits, but rather a determination regarding whether the applicant has shown a probable right to relief and a probable, imminent, and irreparable injury in the interim") (citing *Dallas/Fort Worth Int'l Airport Bd. v. Ass'n of Taxicab Operators, USA*, 335 S.W.3d 361, 364-65 (Tex. App.—Dallas 2010, no pet.)).

Obviously, to address an applicant's probable right to recovery, a trial court must consider and examine to some extent the "merits" of an applicant's claim.

[4] https://www.adr.org/sites/default/files/Commercial%20Rules.pdf (accessed September 7, 2018).

But a finding of a "probable right of recovery" just indicates that there is evidence to potentially sustain a recovery and has no conclusive effect on further proceedings. *See HMS Holdings Corp.,* 2016 WL 1179436 at *2.

For example, in *Intercontinental Terminals Co., LLC v. Vopak N. Am., Inc*., 354 S.W.3d 887 (Tex. App.—Houston [1st Dist.] 2011, no pet.), the court stated as follows:

> We recognize that courts are often particularly careful when it comes to the element of "probable right of recovery," sometimes referred to as "likelihood of success on the merits," because, by its plain language, this element seems to infringe upon two well-engrained judicial prohibitions: against advisory opinions and against forming opinions about the merits of the case before the conclusion of the evidence. But the phrase "probable right of recovery" is a term of art in the injunction context. To show a probable right to recover, an applicant need not show that it will prevail at trial. Nor does a finding of probable right of recovery indicate a trial court's evaluation of the probability that the applicant will prevail at trial. ***Consequently, a finding of probable right to recover has no precedential effect on the case at the trial stage.***
>
> Instead, to show a probable right of recovery, the applicant must plead a cause of action and present some evidence that tends to sustain it. The evidence must be sufficient to raise "a bona fide issue [] as to [the applicant's] right to ultimate relief."

*Id*. at 897 (emphasis added) (citations omitted). Such necessary but limited consideration of the merits does not in any way "improperly intrude on the province of the arbitrator" as suggested by the Clients. As stated by the court in *Frontera Generation*, "in examining this issue [probable right of recovery], we apply the foregoing standard of review and do not interfere with the ultimate

discretion that will be vested in the arbitration proceeding." *Frontera Generation*, 400 S.W.3d, at 110. The arbitrator will be free to decide the merits of the arbitration based on the evidence before the arbitrator and will not be bound by the probate court's findings in support of the temporary injunction. *See id.*

Likewise, although the Clients complain that the probate court allowed limited discovery on the "merits" prior to conducting the temporary injunction hearing, (App.'s Br. 12), the probate court clearly had the discretion to do so. A trial court, prior to arbitration, may issue, "in its discretion an order for a deposition for discovery, perpetuation of testimony, or evidence needed before the arbitration proceedings begin." TEX. CIV. PRAC. & REM. CODE § 171.086(a)(4). Here, limited discovery was needed to establish the basic facts and the Attorneys' probable right of recovery. The Probate Court was within its discretion in allowing such discovery.

Thus, the probate court's issuance of findings to support the probable right of recovery element of injunctive relief and the allowance of limited discovery related to the request for temporary injunction do not warrant any reversal of the probate court's temporary injunction order. The Clients' argument suggesting some sort of error is unsubstantiated and must be rejected.

### 5. The probate court correctly balanced the need to preserve the confidential nature of the settlement in issuing its injunction over the entire settlement proceeds.

The Clients' final argument is to contend that the order is overbroad because it enjoins the entire settlement proceeds rather than the 45% attorneys' fee, plus reimbursable expenses. *See* App.'s Br. at 17-20. But the Clients failed to raise to the probate court this alternative argument that the probate court should issue an injunction on a partial, rather than full, amount of the settlement proceeds, and therefore, have failed to preserve this argument on appeal. (CR 33-41, 3 RR 1-67); TEX. R. OF APP. P. 33.1; *FDIC v. Lenk,* 361 S.W.3d 602, 611 (Tex. 2012); *see also Affordable Motor Co., Inc. v. LNA, LLC,* 351 S.W.3d 515, n. 2 (Tex. App.—Dallas 2011, pet. denied). Additionally, the Clients presented absolutely no evidence of any suggested partial amount of the settlement proceeds that the probate court could even enjoin. (CR 33-41; 3 RR 1-67).

Even if this Court could find that the argument was preserved, the Clients overlook the important fact that the probate court was in an unusual predicament of having to maintain the confidential nature of the settlement. (3 RR 54-62). Here, the settlement amount was confidential. (CR 71; 5 RR Ex. 6). The trial court could not even know the amount. Thus, there was no way for the trial court to even calculate a percentage of the settlement proceeds to be enjoined. In light of the circumstances here, the probate court's order enjoining the entire settlement

proceeds was not overbroad. The probate court properly exercised its discretion to enjoin the entire settlement proceeds to preserve the confidential nature of the settlement amount. (3 RR 1-66). Because the settlement amount was confidential, and even the probate court could not know the settlement amount, the probate court carefully balanced the need to preserve the settlement's confidentiality with the need to preserve the status quo pending arbitration. *Id.*

The Clients rely on Rule 1.14 of the Texas Disciplinary Rules of Professional Conduct to argue that the injunction was somehow improper. *See* App.'s Br. at 19. Although Rule 1.14 provides that the Attorneys should promptly distribute undisputed funds, comment 2 to that rule advises that "[i]f there is a risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid." TEX. DISCIPLINARY R. PROF'L CONDUCT 1.14, cmt. 2. Moreover, the amount owed to the Attorneys under the Fee Agreement is 45% of the gross recovery, which was defined as "the gross amount of money ***or other value or property recovered for the Client***, before the deduction of expenses." (CR 146, 154; 5 RR Ex. 1 & 2) (emphasis added). Thus, the attorneys' fee could also include 45% of other benefits flowing to the Clients as a result of the representation. *See id; see also* (Supp. RR Ex. A at 3, Ex. B at 3-4). Even if the court knew the amount of the settlement, it would not have been clear exactly how much should be protected. In carefully balancing all

the interests presented to the probate court, the probate court exercised its sound discretion in granting an injunction for the full amount of the settlement proceeds. (CR 292-296).

### C. The Clients have not met the required elements of abuse of discretion and no adequate remedy by appeal to be entitled to mandamus relief.

Finally, this Court should deny the Client's petition for writ of mandamus. The petition for writ of mandamus is premised on the incorrect notion that if this Court were to decline to exercise appellate jurisdiction in the injunction appeal on the theory that the probate court's injunction was simply an order to deposit funds into the court's registry, then mandamus is appropriate. *See* Pet. at 1-2, 9. The Clients' theory is unsubstantiated because the probate court's order was clearly an injunction rather than simply an order to deposit the settlement proceeds into the registry of the court. (MR 292-96). The Clients even agree. *See* Pet. at 1, 6 n.6. Even if the injunction could be construed as simply an order to deposit the proceeds into the registry of the court, the trial court exercised its sound discretion in issuing its order. *See* supra §B of this Brief.

Mandamus is available when: (1) a trial court clearly abuses its discretion; and (2) there is no adequate remedy by appeal. *In re Prudential Ins. Co. of Am*., 148 S.W.3d 124, 135-136 (Tex. 2004). Here, there is an adequate remedy by appeal because section 51.014(a)(4) of the Texas Civil Practice and Remedies Code permits an interlocutory appeal from an order that "grants or refuses a

temporary injunction." *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(4). Appeals from interlocutory orders, when allowed by statute, are accelerated appeals. TEX. R. APP. P. 28.1. Accordingly, because the Clients have an adequate remedy by appeal, their petition for writ of mandamus should be denied.

Moreover, even if mandamus review was appropriate in this context, a trial court only abuses its discretion where it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992). For all the same reasons set forth in sections A & B of this Brief, the probate court's order was clearly reasonable under the circumstances, entirely justified by Texas law, and the probate court did not abuse its discretion. *See* supra §§ A, B of this Brief.[5]

The case authority presented by the Clients to suggest that there is no evidence of the settlement proceeds being in any danger of being lost or depleted is distinguishable and unavailing to the Clients' position here. *See* Pet. at 16-17. For example, in *O'Brien v. Baker,* the court held that the trial court abused its discretion in ordering disputed funds to be deposited into the registry of the court because there was absolutely no evidence that the plaintiff had an ownership

[5] For judicial economy, the Attorneys' adopt and incorporate the arguments presented in sections A & B of this Brief showing that the Court had the power to issue the order it did to preserve the status quo pending arbitration of the fee dispute and the court properly exercised its discretion in ordering the settlement proceeds to be preserved pending arbitration. *See* supra §§ A & B. The very same arguments supporting the conclusion that the probate court's temporary injunction should be affirmed equally support the conclusion that the Client's petition for writ of mandamus should be denied. *Id.*

interest in the disputed funds and that the funds were in danger of being lost or depleted. *See O'Brien v. Baker,* No. 05-15-00489-CV, 2015 WL 6859581, *3 (Tex. App.—Dallas Nov. 9, 2015, no pet.). Likewise, in *In re DePonte Investments, Inc.* and in *In re Reveille Resources (Texas), Inc.,* there was no factual evidence to show the disputed funds were in danger of being lost or depleted. *See In re DePonte Inv., Inc.,* No. 05-04-01781-CV, 2005 WL 248664, *2 (Tex. App.—Dallas Feb. 3, 2005, orig. proceeding); *see also In re Reveille Resources (Texas), Inc.,* 347 S.W.3d 301, 304-05 (Tex. App.—San Antonio 2011, orig. proceeding). And, in *North Cypress Medical Center Operating Co., Ltd. v. St. Laurent,* the court abused its discretion in ordering funds to be deposited into the registry of the court where there was no showing of liability or an intent to hide assets from a possible judgment. *North Cypress Med. Center Op. Co., Ltd. v. St. Laurent,* 296 S.W.3d 171, 179 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

Distinct from these cases and what the Clients ignore is the fact that the Attorneys presented evidence of their property interest in the settlement proceeds and risk that such interest in the settlement proceeds will be lost or depleted. (MR 481-482, 572-605, 661, Supp. MR 7-25); *see also Zhao v. XO Energy, LLC,* 493 S.W.3d 725, 736-38 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (holding the trial court did not abuse its discretion in ordering the funds to be deposited into the registry of the court). The Attorneys will be deprived of that property interest if

the settlement proceeds are disbursed to the Clients. *See Madeksho,* 112 S.W.3d at 689. The attorneys' lien will be of no use because the *res* to which it attaches will be gone or comingled with other funds. Although counsel for the Clients mentioned at the temporary injunction hearing that the settlement agreement only allowed JPM to disburse the funds once the attorneys' lien is released and counsel for JPM represented that JPM and the Clients will not change the settlement agreement without notifying the probate court, this gives little comfort to the Attorneys, who have a property interest in those settlement proceeds but who are not parties to, and have no ability to enforce, the settlement agreement. (MR 473-74, 519-521). Moreover, there is absolutely no evidence in the record of the settlement agreement, and certainly no evidence of the particular term in the settlement agreement requiring the attorneys' fee lien to be released before JPM could disburse the funds. (MR 460-526, 568-677). Although JPM filed its notice regarding April 24, 2018 temporary injunction hearing and quoted the provision of the settlement agreement requiring the attorneys' fee lien to be released before JPM was allowed to disburse the settlement proceeds, such filing was made on May 4, 2018 – ***after*** the April 24, 2018 the probate court heard and entered the temporary injunction. (MR 317-320). Additionally, this is merely a pleading – not evidence. *See Hersh v. Tatum,* 526 S.W.3d 462, 470 (Tex. 2017). The Clients very complaint that they would be deprived of the use of their own money shows

that they wish to use the settlement proceeds before the fee dispute is resolved, and the Attorneys are paid under the agreed-upon terms of the Fee Agreement. *See* Pet. at 10. Likewise, their own arguments in this original proceeding requesting that only 45% of the settlement proceeds be enjoined rather than the full amount shows that the Clients want these funds to be disbursed – which would no doubt affect the Attorneys' lien in the settlement proceeds.[6] *See* Pet. at 17-18. As explained in section B(5) of this Brief, the probate court carefully balanced the need to preserve the confidentiality of the settlement amount and could not simply enjoin 45% of the total amount as anyone could calculate the full settlement amount by making a simple mathematical calculation. *See* supra § B(5). Thus, such action would necessarily and improperly reveal the confidential settlement amount. *Id.*

All in all, the probate court had before it more than enough evidence to show that: (a) the Attorneys had a security interest in the settlement proceeds; and (b) that security interest was in danger of being lost or destroyed and the Attorneys were unlikely to see much if any of the settlement proceeds paid to them by the

[6] As set forth in section B(5) above, the Clients failed to raise as an argument that the probate court should issue an injunction on a partial, rather than full, amount of the settlement proceeds to the probate court, and therefore, have failed to preserve this argument on appeal. *See* supra § B(5); (CR 33-41, 3 RR 1-67); TEX. R. OF APP. P. 33.1; *see also FDIC v. Lenk,* 361 S.W.3d 602, 611 (Tex. 2012); *see also Affordable Motor Co., Inc. v. LNA, LLC,* 351 S.W.3d 515, n. 2 (Tex. App.—Dallas 2011, pet. denied). Additionally, the Clients presented absolutely no evidence of any suggested partial amount of the settlement proceeds that the probate court could even enjoin. (CR 33-41; 3 RR 1-67).

Clients in accordance with the Fee Agreement if the Court allowed such proceeds to be distributed. Thus, there was no abuse of discretion whether the probate court's order is construed as an injunction or order to deposit funds into the registry of the court.

## CONCLUSION AND PRAYER

In conclusion, and for all the reasons stated, the probate court's temporary injunction should stand. Accordingly, Appellees respectfully request that this Court affirm the probate court's temporary injunction in their favor, deny the petition for writ of mandamus, and award Appellees their costs on appeal. Appellees further request such other relief to which they may be justly and equitably entitled.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing has been forwarded to all counsel of record via electronic filing in accordance with the Texas Rules of Appellate Procedure on this 15th day of October 2018, as follows:

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## CERTIFICATE OF COMPLIANCE

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## RULE 52.3 (j) AND RULE 52.7(a)(2), (b) CERTIFICATION

I hereby certify that I have reviewed the foregoing Response to the Petition for Writ of Mandamus and concluded that every factual statement in the Response to the Petition for Writ of Mandamus is supported by competent evidence included in the Appendix or Mandamus Records, including Supplemental Mandamus Record. I certify that all documents in the Supplemental Mandamus Record and Appendix are true and correct copies.

*/s/ Katherine Elrich*
Katherine Elrich