CAUSE NO. 18-06835

FEE, SMITH, SHARP & VITULLO, LLP, ANTHONY VITULLO and JOHN MALESOVAS, individually and d/b/a MALESOVAS LAW FIRM 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' *SUPPLEMENT* TO MOTION TO STAY ARBITRATION (FILED ON MAY 30, 2018), AND BRIEF IN SUPPORT

I.
Argument & Authorities

This pleading supplements Plaintiffs'[1] Motion to Stay Arbitration (the "Motion") filed on May 30, 2018,[2] upon which this Court can take judicial notice.[3] The Motion is set for hearing on Friday, July 20, 2018, at 11 a.m. in this Court. After Plaintiffs' Motion was filed, and on June 25, 2018, Hopper and Wassmer initiated an arbitration proceeding against Plaintiffs with the AAA ("AAA Arbitration"). *See* Exhibit "A." However, the AAA Arbitration filed by Hopper and Wassmer also improperly joins Defendants in this lawsuit in that action. *See id.* As articulated in the Motion, and in Plaintiffs' live pleading on file, Plaintiffs cannot be compelled to arbitrate with Defendants, because they have no agreement with Defendants. Plaintiffs' claims

[1] For purpose of clarity, John Malesovas individually and d/b/a Malesovas Law Firm, who are now plaintiffs in this civil action, join as movants in the Motion to Stay filed on May 30, 2018, and in the filing of this supplement herein for all purposes.
[2] Plaintiffs' Motion to Stay Arbitration and Brief in Support thereof filed on May 30, 2018 is hereby incorporated by reference as set forth fully herein at length.
[3] *See* TEX. R. EVID. 201 (authorizing judicial notice).

against Hopper and Wassmer and Defendants' claims against Hopper and Wassmer are separate, distinct, and are predicated upon entirely different agreements.

Indeed, Plaintiffs and Defendants' claims against Hopper and Wassmer stand and fall on their own individualized merits. It is ironically clear that Hopper, Wassmer, and Defendants are working together in furtherance of the same strategic goal: to reduce the amount of attorney's fees Plaintiffs are justifiably owed so that they can both profit at Plaintiffs' expense. Forum shopping from JAMS to the AAA is the same problem re-cast in a different forum; that is, there is no agreement between Plaintiffs and Defendants—a fact that will not change regardless of how or where any would-be arbitration proceeding is initiated.

Because Plaintiffs have no arbitration agreement with Defendants, they cannot be compelled to arbitrate with Defendants—regardless of whether the action is pending before JAMS or the AAA. *See* TEX. CIV. PRAC & REM. CODE ANN. § 171.001 et seq. (Vernon 2014) (arbitration agreements must be in writing to be enforceable); see also *In re Big 8 Food Stores*, 166 S.W.3d 869, 876 (Tex. App.—El Paso 2005, orig. proceeding) (Defendants have the burden to prove a valid arbitration agreement with Plaintiffs; a burden they cannot meet, given that no such agreement exists); *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").

Accordingly, this Court should similarly stay the AAA arbitration proceeding, in part, so that Plaintiffs do not have to arbitrate with Defendants.

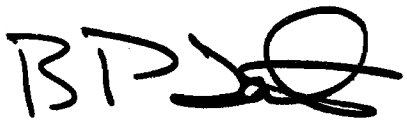
II.
Conclusion

In conclusion, there is no agreement to arbitrate between these parties. Accordingly, this Court should grant the Motion and stay the AAA and JAMS arbitration proceedings to the extent those actions would require Plaintiffs to arbitrate with Defendants.

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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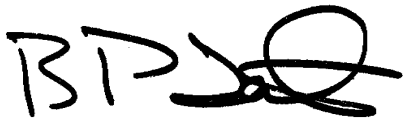
CERTIFICATE OF SERVICE

In accordance with Rule 21a of the Texas Rules of Civil Procedure, the undersigned hereby certifies that a true and correct copy of the foregoing instrument has been served on all counsel of record on this the 12th day of July 2018, through the ECF case manager system.



BRIAN P. LAUTEN
ATTORNEY FOR PLAINTIFFS

AMERICAN ARBITRATION ASSOCIATION

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

DEMAND FOR ARBITRATION

Claimants, Laura S. Wassmer Dr. Stephen B. Hopper, file this Demand for Arbitration against Respondents Fee, Smith, Sharp & Vitullo, LLP ("Fee Smith"), Anthony L. Vitullo ("Vitullo"), John Malesovas ("Malesovas"), and Block, Garden & McNeill, LLP f/k/a Block & Garden, LLP ("B&G"), and would show as follows:

I. Introduction

1. This is a fee dispute between Claimants, Laura Wassmer and Dr. Stephen Hopper ("the Clients"), and their attorneys, Fee Smith, Vitullo, Malesovas and B&G. Initially, the Clients contacted Vitullo, an attorney at Fee Smith, to represent them in a lawsuit. Vitullo agreed to represent the Clients, but he recommended – in addition to himself – that the Clients retain associate counsel, B&G, who he had worked with in the past. Based on Vitullo's recommendation, the Clients signed a fee agreement with B&G, which also named Vitullo in the agreement. A few years later, Vitullo told the Clients he would continue his representation *only if*

EXHIBIT
A

the Clients signed another contingent fee agreement which more than doubled the fee and apparently cut out B&G.

II. Parties

2. Respondent Fee, Smith, Sharp & Vitullo, LLP 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.

3. Respondent Anthony Vitullo is a licensed attorney and partner in Fee Smith and may be served at 13155 Noel Road, Suite 1000, Three Galleria Tower, Dallas, Texas 75240.

4. Respondent John Malesovas is a licensed attorney and may be served at the Malesovas Law Firm, 1801 South Mopac Expressway, Suite 320, Austin, Texas 78746.

5. Respondent Block, Garden & McNeill, LLP, f/k/a Block & Garden LLP, is a Texas limited liability partnership with its principal place of business in Dallas, Texas and may be served by and through its attorney, Robert Tobey, Johnston Tobey Baruch, P.C., 3308 Oak Grove Ave., Dallas, Texas 75204.

III. Jurisdiction and Venue

6. Jurisdiction is proper with AAA because the engagement agreement between Fee, Smith, Vitullo, Malesovas, and the Clients states as follows:

> ARBITRATION: It is Attorney's goal to maintain at all times a constructive and positive relationship with Client on the matter described above and on future matters in which Attorney may perform services for Client. However, should a dispute arise between Attorney and Client, a prompt and fair resolution is in the interests of all concerned. To this end, if any controversy or claim arises out of is related to this agreement, any services provided by Attorneys to Client in connection with Client's Claims, or any other matter that may arise between Client and Attorney (including malpractice claims and fee disputes), Attorneys and Client both waive any right to bring a court action or have a jury trial and agree that the dispute shall be submitted to binding arbitration to be conducted in Dallas, Texas before the American Arbitration Association ("AAA") in accordance with

the Commercial Arbitration Rules of the AAA with one arbitrator who must be an attorney licensed to practice law in the State of Texas.[1]

7. The Dallas office of AAA is the appropriate venue for the Clients' arbitration claims against Respondents since all of the events giving rise to the claims in this case occurred in Dallas, Texas, the engagement agreement was performed in Dallas, Texas, and the arbitration clause in the engagement agreement specifies that any arbitration will be conducted in Dallas, Texas.

8. As explained below, the Clients initially entered into an agreement with B&G which also contained an arbitration provision.[2] The B&G agreement specified that any claims would be filed with JAMS; however, B&G has agreed these claims may be filed with AAA, in order to avoid multiple proceedings with JAMS and AAA.

IV. Factual Background

A. Retention of B&G, Vitullo and Fee Smith

9. Following the death of their father, the Clients became embroiled in litigation involving the administration of their father's estate (the "Probate Lawsuit"). During the pendency of the Probate Lawsuit, the Clients became dissatisfied with their attorneys, Glast, Phillips & Murray, so they contacted Vitullo to take over their representation.

10. Vitullo agreed to represent the Clients, but he indicated that he wanted to bring in another firm, B&G (who he had worked with in the past) to assist on the case. Vitullo then arranged for a meeting between the Clients and B&G, which occurred on or about September 21, 2012.

11. Following the aforementioned meeting, B&G sent the Clients a fee agreement, which indicated that Vitullo, along with B&G, would be representing the Clients. The attorneys' fee for their legal services consisted of two components: (1) a fixed fee in the amount of $100,000 for

[1] See para. 20 -- Exhibits 4-5 attached hereto. Vitullo and Fee Smith were also named in the B&G agreement.
[2] See page 7 of Exhibit 1 attached hereto.

all pre-trial services; and – if the case went to trial – (2) a hybrid fee comprised of a 20% contingent fee, plus an hourly fee based on ½ the attorneys' normal hourly rates (for time spent during trial). This particular fee structure was proposed by Vitullo.

12. After receiving the aforementioned fee agreement from B&G, the Clients discussed it with Vitullo. Subsequently, the Clients requested that the agreement be amended to include a list of specific items that would be included within the scope of legal services to be performed by the attorneys.

13. On October 8, 2012, B&G amended the agreement (to include certain matters within the scope of the pre-trial services) and sent the revised agreement to the Clients. The Clients executed the revised agreement ("B&G Contract") and, thereafter, B&G, along with Vitullo, began representing the Clients.[3]

14. According to the B&G Contract, the representation involved the Clients' claims against JP Morgan Chase Bank for breach of fiduciary duty and mismanagement in the administration of their father's estate.

15. At all times, it was understood that both B&G and Vitullo would represent the Clients in the Probate Lawsuit. Notably, however, the B&G Contract did not contain any provision describing how the fees would be shared between B&G and Vitullo, as required by Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct.

16. At all relevant times mentioned herein, Vitullo was acting as an employee and/or agent of Fee Smith. Therefore, Fee Smith is liable for all of Vitullo's wrongful actions and/or conduct pursuant to the doctrine of respondent superior.

B. The Glass, Phillips & Murray Contract

[3] A copy of the B&G agreement is attached as Exhibit 1.

17. Based on events that had previously occurred in the Probate Lawsuit, Vitullo advised the Clients that they should pursue a legal malpractice claim against Glass, Phillips & Murray ("GPM"). In connection with this matter, Vitullo offered to represent the Clients, along with another attorney, James Bell, who was going to work as associate counsel on the case.

18. On August 3, 2015, Vitullo sent the Clients a draft of a proposed contingent fee agreement, which included – not only the legal malpractice claim against GPM – but it also included the claims against Chase Bank, which were within the scope of the previously signed B&G contract. The new agreement provided for a 40% contingent fee prior to filing suit; 45% after a lawsuit was filed; and 50% if the case went to trial. It mentioned nothing about B&G.

19. After receiving this new agreement, the Clients informed Vitullo that they did not fully understand the new proposal, or how B&G and/or James Bell (the new lawyer) fit into the equation. Specifically, they wanted to understand how signing the new agreement would impact the pre-existing arrangement with B&G.

20. Vitullo never provided the Clients with an explanation regarding their questions; instead, he sent them a revised agreement, which limited the scope of claims covered under the new agreement to the legal malpractice claim against GPM.

21. The initial draft of this revised agreement indicated that the attorney being retained as associate counsel to work on the case, along with Vitullo, was an attorney named John Malesovas – not James Bell.[4] After sending this draft, Vitullo advised the Clients that it contained a typo, and he requested that they sign another draft which substituted James Bell as the associate attorney, in lieu of Malesovas.

[4] At that time, the Clients didn't know John Malesovas.

22. On or about August 12, 2015, the Clients signed the contingent fee agreement with Vitullo and Bell regarding the legal malpractice claims against GPM ("GPM Contract").[5] Although the GPM Contract disclosed that the fees would be shared 50/50 between Vitullo and Bell, it did not disclose that the fees would be shared with Malesovas.

23. Ultimately, Malesovas worked on the GPM case and he received a portion of the contingent fees on that case.[6] However, none of the attorneys ever disclosed to the Clients the fee sharing arrangement with Malesovas and/or the amount of fees paid to Malesovas.

C. Vitullo Ignores the B&G Contract and Insists on a New Contract

24. In September, 2015, Vitullo informed the Clients that, if he was going to represent them in the Probate Lawsuit, he would need a separate agreement from the existing B&G Contract. Vitullo failed to inform or disclose to the Clients that he was *obligated* to represent them based on the B&G Contract.

25. On September 14, 2015, Vitullo sent the Clients another contract for them to sign. This contract provided that Vitullo would be paid hourly and required the Clients to pay him an initial retainer of $10,000. Notably, the services that Vitullo performed under this agreement were the same legal services that both he and B&G had agreed to perform under the B&G contract.

26. On September 15, 2015, the Clients executed the aforementioned hourly contract with Vitullo ("Hourly Contract").[7] Subsequently, Vitullo billed the Clients approximately $12,250 for his legal services between September, 2015 and November, 2015. The Clients paid these invoices as requested.

[5] A copy of this agreement is attached as Exhibit 2.
[6] Upon information and belief, Malesovas received ½ of the contingent fees from the settlement with GPM.
[7] A copy of this contract is attached as Exhibit 3.

27. On November 9, 2015, the Clients and Vitullo attended mediation in the Probate Lawsuit. The mediation was unsuccessful. The next day, Vitullo emailed the Clients a status report and analysis of the claims in the Probate Lawsuit.

28. In his report, Vitullo *recommended* the Clients convert his Hourly Contract to a contingency fee agreement – giving Vitullo a 40% contingent fee (45% in the event of trial). Additionally, Vitullo recommended the Clients hire James Bell to defend certain claims in the Probate Lawsuit for a flat fee of $200,000 (the Clients' step-mother, Jo Hopper, was attempting to recover attorney's fees from the Clients in connection with a declaratory judgment action in the Probate Lawsuit). Finally, Vitullo recommended the Clients continue to use B&G to resolve a portion of the Probate Lawsuit.

29. Nowhere in Vitullo's report, however, did he explain to the Clients that the legal services (mentioned in his report) were *already included* within the scope of the B&G Contract and that Vitullo was *already obligated* to provide these same services to the Clients. In fact, there is no discussion or analysis of several material facts that should have been considered by the Clients in connection with Vitullo's recommendations, including, but not limited to, the following:

a. That the $100,000 fixed fee under the B&G Contract covered the same legal services proposed in Vitullo's email;

b. That Vitullo was already obligated to perform the same legal services under the B&G contract;

c. An explanation regarding why the Clients should pay Vitullo a 40% contingent fee for performing the same pre-trial services covered under the B&G Contract (which only required a fixed fee of $100,000);

d. An explanation regarding why the Clients should pay James Bell an *additional* flat fee of $200,000 for performing a *portion* of the pre-trial services covered under the B&G Contract (which only required a fixed fee of $100,000 for *all* pre-trial services);

e. An explanation regarding why the Clients should pay Vitullo a 45% contingent fee, if the case went to trial, when the B&G Contract only required a 20% contingent fee (plus a reduced hourly rate);

f. A full discussion of all the material benefits and disadvantages to the Clients under the new proposed deal;

g. Any recommendation or advice that the Clients consult with another lawyer regarding the new proposed deal;

30. A few days later, pursuant to the aforementioned recommendation, Vitullo sent the Clients a new contingent fee agreement. Under the new agreement, Vitullo and his firm (Fee, Smith), along with associate counsel, John Malesovas, would receive a contingent fee of 40% if the case settled before trial and a 45% fee of the case went to trial. The agreement also provided that the Clients would *not* be responsible for paying any expenses as they were incurred.

31. On or about November 19, 2015, the Clients signed the new agreement (the "Second Contingent Fee Contract").[8] One of the Clients (Laura Wassmer) made some handwritten interlineations to the contract before signing it.

D. Vitullo, Malesovas and Fee Smith Breach the Second Contingent Fee Contract

32. Paragraph 4 of the Second Contingent Fee Contract states as follows: "Clients **WILL NOT BE** responsible to pay for costs and expenses as incurred."[9] Notwithstanding this clear

[8] Copies of the executed Second Contingent Fee Contract, signed by each client are attached as Exhibits 4-5.
[9] Exhibits 4 and 5 at 3 (emphasis original).

language, Vitullo, Malesovas and Fee Smith required the Clients to pay in excess of $100,000 in expenses during their representation in the Probate Lawsuit.

33. On or about August 3, 2016, Vitullo, Malesovas and Fee, Smith invoiced the Clients for over $67,000 in expenses related to the Probate Lawsuit. All of those expenses were paid by the Clients.

34. In October, 2016, Vitullo, Malesovas and Fee, Smith required the Clients to pay another $20,238.15 in expenses in connection with the Probate Lawsuit. At the time, however, the Clients were led to believe those expenses were incurred in connection with the settlement of the GPM legal malpractice claim. These expenses were deducted from the GPM settlement; however, they were actually expenses incurred in the Probate Lawsuit.

35. In August, 2017, prior to the trial of the Probate Lawsuit, the Clients were requested to pay (and did pay) additional expenses in excess of $35,000.

E. Trial of the Probate Lawsuit

36. In September, 2017, the Probate Lawsuit went to trial. At the close of evidence, the jury returned a remarkable verdict: actual damages in excess of $3 million and exemplary damages of $4 billion. Unfortunately, this verdict was severely jeopardized by several problems created by the attorneys, including but not limited to their failure to plead an exception to the exemplary damage cap – which would have allowed the Clients to recover more than the statutory maximum.

37. The attorneys also failed to present any expert testimony supporting the Clients' claims, although the Clients paid in excess of $60,000 in expert witness fees. The attorneys also failed to designate an expert witness regarding their own attorney's fees. There were also numerous

problems with the jury charge submitted by the attorneys.[10]

38. As a result of these and other problems with the verdict, the Clients determined it was in their best interest to settle their claims with JPMorgan Chase. On April 4, 2018, the Clients reached a confidential settlement with JPMorgan Chase.

F. Termination of Vitullo, Malesovas and Fee Smith

39. On April 5, 2018, the Clients terminated their attorneys, Vitullo, Fee Smith and Malesovas.[11] The termination was based on a number of factors, including, but not limited to, those facts previously set forth herein. The Clients had good cause to terminate their attorneys.

40. On the same date, Vitullo and Fee Smith were requested to provide the Clients with their entire file regarding their representation of the Clients.[12] The file was requested to be produced in the same manner that it was maintained by Vitullo and Fee Smith, including all electronic files and physical files.[13]

41. As of this date, Vitullo and Fee Smith have not complied with the Clients' request for their files. They have failed to provide *any* physical files. With respect to electronic files, they have failed to produce all emails and other electronic files in the same manner those files were maintained – making it very difficult for the Clients to review the files. Moreover, several emails appear to be missing from these files.

42. In the April 5, 2018 termination notice, the Clients agreed to instruct Jeff Levinger, the appellate lawyer who negotiated the settlement with JPMorgan Chase, to retain a percentage of the settlement in his trust account until the fee dispute was resolved.

43. Unsatisfied with the Clients' offer to retain the disputed fee amount in Mr. Levinger's

[10] Many of these problems were disclosed to the Clients by another attorney, Jeff Levinger, who they retained to assist with the case following the jury verdict.
[11] A copy of the termination letter dated April 5, 2018 is attached hereto as Exhibit 6.
[12] Exhibit 6 at 1-2.
[13] Exhibit 6 at 2.

trust account, Malesovas immediately filed an intervention the Probate Lawsuit, seeking to enforce the Second Contingent Fee Contract.

44. On April 6, 2018, the Clients reiterated and clarified their agreement to place the settlement funds into Mr. Levinger's trust account and agreed the disputed fees would not be disbursed until the dispute was resolved.[14] The Clients stated they would fully comply with Rule 1.14 of the Texas Disciplinary Rules of Professional Conduct and that Mr. Levinger would retain 45% of the settlement (plus expenses) in his trust account until this matter was resolved.[15] Alternatively, the Clients agreed to deposit the disputed funds with an independent escrow agent.[16]

G. Vitullo, Malesovas and Fee Smith Breach the Arbitration Agreement and Interfere with the Settlement

45. Notwithstanding the Clients' agreement to leave the disputed funds in trust, Malesovas, Vitullo and Fee Smith decided to move forward with their intervention lawsuit in breach of the agreement to arbitrate all disputes – including fee disputes – with the Clients.[17]

46. Moreover, they requested the probate court to issue a temporary restraining order to protect their disputed fee, even though there was no basis for this request. Specifically, there was no imminent danger of any harm regarding their attorney's fee because the Clients agreed that the disputed funds would remain in Mr. Levinger's trust account (or the account of an independent escrow account) until the dispute was resolved.

47. Their actual plan – as it turned out – was to interfere with the Clients' right to obtain the *undisputed* portion of the settlement proceeds. In furtherance of this plan, they requested and

[14] See April 6, 2018 letter attached as Exhibit 7.
[15] See Exhibit 7.
[16] See Exhibit 7 at 2.
[17] The fee agreements, drafted by the attorneys, require all disputes – including fee disputes – to be submitted to binding arbitration. See Exhibit 1 at 6; Exhibits 4 and 5 at 7.

obtained an injunction prohibiting the Clients from receiving *any portion* of the settlement funds, including the *undisputed* portion. They did this in violation of Rule 1.14, which mandates that the undisputed portion of any settlement "shall be distributed" to the client.[18]

48. After the attorneys prevented the Clients from receiving the undisputed portion of the settlement funds and – after they forced the Clients to incur substantial legal fees in the intervention lawsuit – the court finally compelled the attorneys to arbitrate their fee dispute.[19]

V. Claims against Respondents

49. At all relevant times mentioned herein, Vitullo was acting as an employee and/or agent of Fee Smith. Therefore, Fee Smith is liable for all of Vitullo's wrongful actions and/or conduct pursuant to the doctrine of respondent superior.

A. Claims against B&G, Vitullo and Fee Smith

50. The Clients entered into an agreement with B&G, whereby B&G, Vitullo and Fee Smith agreed to represent the Clients in the Probate Lawsuit; however, the contingent fee portion of the B&G Contract is unenforceable because it fails to comply with Rule 1.04(f) of the Texas Disciplinary Rules of Professional Conduct.

51. Rule 1.04(f) provides that if attorneys from more than one law firm join together to share a fee or to jointly represent a client, the attorneys *must* obtain from the client consent in *writing* to the terms of the arrangement *prior* to the time of the association, including:

> (i) the identity of all lawyers or law firms who will participate in the fee-sharing agreement, and

[18] Vitullo, Malesovas and Fee Smith may claim that, technically, they haven't violated Rule 1.14 because they've never had possession of these funds; however, this is a distinction without a difference because they *requested* that the court *prevent the Clients from receiving* the undisputed funds. Rule 1.14(c) requires any undisputed funds to be distributed to the Clients. Thus, it cannot be seriously disputed that they violated this Rule.

[19] A copy of the order compelling arbitration is attached as Exhibit 8. The Clients attempted to compel arbitration of this dispute immediately after the intervention was filed, but Vitullo and Fee Smith fought these attempts – insisting the court had jurisdiction and that the dispute shouldn't be referred to arbitration.

(ii) whether fees will be divided based on the proportion of services performed or by lawyers agreeing to assume joint responsibility for the representation, and

(iii) the share of the fee that each lawyer or law firm will receive or, if the division is based on the proportion of services performed, the basis on which the division will be made[.]

52. The B&G Contract fails to meet elements (ii) and (iii). Consequently, B&G may not enforce the contingent fee portion of the agreement. "No attorney shall collect or seek to collect fees or expenses in connection with any such agreement that [does not comply with this Rule.]" *Rule 1.04(g), Texas Disciplinary Rules of Professional Conduct*. Instead, the attorneys are limited to recovering the reasonable value for their legal services based on quantum meruit. *Id.*

1. Declaratory Judgment

53. The Clients request a declaration, pursuant to Section 37.002, et. seq. of the Tex. Civ. Prac. & Rem. Code (the Declaratory Judgments Act) regarding the parties' rights pursuant to the B&G Contract. Specifically, the Clients seek a declaration that the contingent fee provision in the B&G Contract is unenforceable, void and/or illegal because it fails to comply with the mandatory fee sharing provisions contained in Rule 1.04(f) of the Texas Disciplinary Rules of Professional Conduct. As a result, B&G may not enforce this portion of the agreement and it is limited to recovering the reasonable value for its legal services based on quantum meruit.

54. Pursuant to Section 37.009 of the Tex. Civ. Prac. & Rem. Code, the Clients seek recovery of their costs and reasonable and necessary attorney's fees.

2. Breach of Contract

55. B&G and/or Vitullo and Fee Smith breached the B&G Contract by failing to perform the pre-trial services for the fixed fee, pursuant to the contract. The Clients seek to recover all damages caused by the breach of this contract. All conditions precedent to the Clients' recovery for breach of contract have been performed or have occurred. Finally, the Clients seek recovery

of their reasonable and necessary attorneys' fees, costs and expenses through a final hearing, any enforcement proceedings and/or any appeals of this arbitration, pursuant to applicable Texas law, including, but not limited to, Section 38.001 of the Tex. Civ. Prac. & Rem. Code.

B. Claims against Vitullo, Malesovas and Fee Smith

1. Breach of Fiduciary Duty

56. Beginning on or about October 8, 2012, an attorney-client relationship existed between Vitullo, Fee Smith and the Clients. As a result of the attorney client relationship, Vitullo and Fee Smith owed a fiduciary duty to the Clients. Vitullo and Fee Smith breached their fiduciary duty to the Clients and such breach was a proximate cause of damages to the Clients.

57. Among other things, Vitullo and Fee Smith breached their fiduciary duty to the Clients by failing to fully and fairly disclose all important information to the Clients before the Clients executed the Hourly Contract and the Second Contingent Fee Contract. It was not in the Clients' best interest to enter into either one or both of these contracts; instead, it was in the best interests of Vitullo and Fee Smith to enter into these contracts. Vitullo and Fee Smith placed their own best interests ahead of the Clients' interest with respect to these contracts, and they used their position to gain a benefit for themselves at the expense of the Clients. The contracts were not fair and equitable to the Clients and Vitullo and Fee Smith did not act in the utmost good faith and exercise the most scrupulous honesty toward the Clients regarding the contracts.

58. Contracts between attorneys and their clients negotiated during the existence of the attorney-client relationship are closely scrutinized and – there is a presumption of unfairness or invalidity which attaches to such contracts. *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co.,* 20 S.W.3d 692, 699 (Tex. 2000). Attorneys are held to the highest standards of ethical conduct in their dealings with their clients, and this duty is the highest when an attorney contracts with his

client. *Hoover Slovacek LLP v. Walton,* 206 S.W.3d 557 (Tex. 2006). As a result, the attorney has the burden to show such any such contract is fair and reasonable. *Keck, Mahin & Cate*, 20 S.W.3d at 699.

59. Additionally, Vitullo and Fee Smith breached their fiduciary duty to the Clients in connection with the improper fee sharing arrangement with Malesovas. Vitullo and Fee Smith failed to disclose the terms of the fee sharing arrangement with Malesovas and they failed to obtain the Clients consent in writing as required by Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct.

60. As a result of Vitullo and Fee Smith's breach of fiduciary duty, the Clients have sustained damages and they seek recovery of all of their actual damages herein. Additionally, the Clients seek a fee forfeiture of any attorney's fees, which Vitullo and/or Fee Smith have received or may be entitled to receive, in connection with their representation of the Clients.

61. Finally, the Clients seek exemplary damages from Vitullo and Fee Smith based on their conduct set forth herein. Vitullo and Fee Smith are liable for exemplary damages because their conduct constitutes fraud, malice or gross negligence, as defined under Chapter 41 of the Texas Civil Practice and Remedies Code.

2. Breach of Contract – (in the alternative)

62. In the alternative, and in the event that the Second Contingent Fee Contract is determined to be a valid and enforceable contract, Vitullo and Fee Smith breached the contract as a result of their actions set forth herein. Specifically, Vitullo and Fee Smith breached the contract by requiring the Clients to pay for expenses in the Probate Lawsuit, when the contract expressly stated the Clients would NOT be required to pay the expenses.

63. Moreover, this was a material breach of the contract which effectively discharged or excused the Clients from any future performance under the contract. *Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.*, 518 S.W.3d 432 (Tex. 2017). As a result, the Clients are discharged from any obligation to pay the contingency fee, if any, under the contract and Vitullo and Fee Smith are limited to recovering their attorney's fees under quantum meruit.

64. Additionally, Vitullo and Fee Smith breached the contract by filing the intervention lawsuit, when the contract expressly required all disputes – including fee disputes – to be submitted to binding arbitration.

65. The Clients seek to recover all damages caused by Vitullo and/or Fee Smith's breach. All conditions precedent to the Clients' recovery for breach of contract have been performed or have occurred. Finally, the Clients seek recovery of their reasonable and necessary attorneys' fees, costs and expenses through a final hearing, any enforcement proceedings and/or any appeals of this arbitration, pursuant to applicable Texas law, including, but not limited to, Section 38.001 of the Tex. Civ. Prac. & Rem. Code.

3. Fraud

66. Vitullo and Fee Smith had a duty to fully and fairly disclose all important information to the Clients regarding the Hourly Contract and the Second Contingent Fee Contract. However, they failed to fully and fairly disclose all important information to the Clients regarding the aforementioned contracts. As a result of their fraud, the Clients were damaged and they seek recovery of their actual damages herein.

67. Vitullo and Fee Smith also had a duty to fully and fairly disclose all important information to the Clients regarding the GPM Contract, including any fee sharing arrangements with Malesovas. However, they failed to fully and fairly disclose all important information to

the Clients regarding the GPM Contract. As a result of their fraud, the Clients were damaged and they seek recovery of their actual damages herein, including a forfeiture of all fees received or recovered in connection with the GPM settlement.

68. Additionally, the Clients seek exemplary damages from Vitullo and Fee Smith based on their conduct set forth herein. Vitullo and Fee Smith are liable for exemplary damages because their conduct constitutes fraud, malice or gross negligence, as defined under Chapter 41 of the Texas Civil Practice and Remedies Code.

4. Conversion

69. As a result of their conduct set forth herein, Vitullo, Malesovas and Fee Smith have converted property rightfully belonging to the Clients. The property converted includes the Clients' files and the undisputed portion of the settlement funds from the JPMorgan Chase settlement. This property rightfully belongs to the Clients; however, Vitullo, Malesovas and Fee Smith wrongfully exercised control over this property. They have refused to deliver all of the Clients' files and they have intentionally acted to deprive the Clients of the undisputed portion of the settlement funds. Accordingly, Vitullo, Malesovas and Fee Smith are liable for conversion and the Clients seek the immediate return of their property, or the equivalent value and other damages caused by the conversion of their property.

70. Additionally, the Clients seek exemplary damages from Vitullo, Malesovas and Fee Smith based on their conduct set forth herein. Vitullo, Malesovas and Fee Smith are liable for exemplary damages because their conduct constitutes fraud, malice or gross negligence, as defined under Chapter 41 of the Texas Civil Practice and Remedies Code.

5. Negligence

71. As a result of their conduct set forth herein, Vitullo, Malesovas and Fee Smith were

negligent and their negligence was the proximate cause of damages to the Clients. Specifically, Vitullo, Malesovas and Fee Smith were negligent in failing to plead an exception to the limitation on exemplary damages and failing to submit a jury question regarding this same matter. They also failed to present any expert testimony supporting the Clients' claims, which was negligent. They also failed to designate an expert witness regarding attorney's fees in connection with the Clients' breach of contract claim, which was negligent. Finally, they were negligent in failing to properly prepare and submit a correct jury charge in the Probate Lawsuit.

72. As a result of Vitullo, Malesovas and Fee Smith's negligence, the Clients determined it was in their best interest to settle their claims with JPMorgan Chase. The negligence of Vitullo, Malesovas and Fee Smith was a substantial factor in the Clients' decision to settle with JPMorgan Chase. Therefore, the Clients seek recovery of all of their actual damages proximately caused by their attorneys' negligence.

CONCLUSION

Wherefore, Claimants, Laura S. Wassmer Dr. Stephen B. Hopper, request the following:

1. That Respondents be required to appear and answer this Demand for Arbitration;

2. That Claimants have the declaratory relief requested above from all of the Respondents;

3. That Claimants recover all of their actual damages from Respondents;

4. That Claimants recover exemplary damages from Respondents Vitullo, Malesovas and Fee Smith;

5. That Respondents forfeit their attorney's fees;

6. That Claimants recover their reasonable attorneys' fees for the filing, preparation and hearing of this arbitration or otherwise incurred with this matter;

7. For pre- and post-award interest at the highest rates allowed by law;

8. For costs and expenses of this proceeding; and

9. For such other and further relief at law or in equity to which Claimants may show themselves to be justly entitled.

Respectfully submitted,

s/ James E. Pennington
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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 2018, the foregoing Demand for Arbitration was served on the following parties via email and/or certified mail:

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