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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' FIRST AMENDED PETITION AND APPLICATION FOR DECLARATORY RELIEF

Plaintiffs Fee Smith Sharp & Vitullo LLP ("FSSV"), Anthony Vitullo ("Vitullo") and John Malesovas, individually and d/b/a Malesovas Law Firm ("Malesovas") (FSSV, Vitullo and Malesovas collectively, "Plaintiffs") file this First Amended Petition against Defendants Block, Garden & McNeill, LLP f/k/a Block & Garden, LLP, Christopher McNeill, and Steven Block and would show the Court as follows:

I.
INTRODUCTION

Plaintiffs represented Stephen B. Hopper and Laura S. Wassmer ("Hopper and Wassmer") in a lawsuit, which resulted in a highly publicized jury verdict against JP Morgan Chase ("Chase") in October 2017, and an eventual settlement not long thereafter. In that litigation ("Chase Lawsuit"), Plaintiffs represented Hopper and Wassmer on a contingency basis pursuant to a contract between Plaintiffs on the one hand and Hopper and Wassmer on the other hand. Defendants claim to represent

Hopper and Wassmer, but Defendants stopped working for Hopper and Wassmer on the Chase Lawsuit in November 2015. In fact, Defendants performed virtually no legal services in representing Hopper and Wassmer throughout the duration of the Chase Lawsuit.

Defendants now seek to recover a portion of Plaintiffs' contingency fee, not based on any legal work that Defendants performed at the trial (that they never even attended), but instead based on a novel theory that Defendants hired Anthony on a separate verbal contingency fee agreement to perform legal services for Hopper and Wassmer. But Defendants' theory summarily fails because Plaintiffs and Defendants never agreed to a written and enforceable contingency fee, fee sharing or any other contract between themselves to provide legal services for Hopper and Wassmer (nor did Hopper and Wassmer consent to such a fee sharing arrangement). In addition, Defendants' alleged contingency fee agreement with Hopper and Wassmer is void *ab initio* because it does not comply with the fee sharing rules (required under Rule 1.04(f) of the Texas Rules of Disciplinary Conduct) and, moreover, the agreement upon which Defendants rely was terminated "for cause" by Hopper and Wassmer in November 2015.

Plaintiffs did not agree to a joint venture contingency arrangement with Defendants in the Chase Lawsuit; and, furthermore, the lack of a signature of Plaintiffs to Defendants' agreement with Hopper and Wassmer is *ipso facto* dispositive of same. Indeed, Plaintiffs were never even approached by Defendants with such an offer. There is absolutely no contract between Defendants and Plaintiffs that could provide the basis for any percentage split fee for Defendants. To this end, Defendants purported attempt

to bind Plaintiffs to a hybrid contingency fee contract that Defendants unilaterally created and that Plaintiffs neither signed nor even saw at the time of formation violates the Texas Government Code's requirement that an attorney sign a contingency fee contract in order for it to be enforceable—that is notwithstanding Rule 1.04(f)'s fee division requirement applicable to contingency agreements when multiple law firms undertake one, consolidated representation. Defendants are fully aware that they have no contract with Plaintiffs, and no right to assert any right to a contingency fee from the settlement of a jury verdict from a trial that they did not attend—much less prosecute.

Defendants knew that Hopper and Wassmer had hired Plaintiffs on a contingency basis to represent them in the Chase Lawsuit. Defendants knew that they had been terminated "for cause" by Hopper and Wassmer in November 2015 in the Chase lawsuit; and, furthermore, documentary evidence establishes that Defendants knew their obligations to Hopper and Wassmer had not only been marginalized, but their role in multiple pieces of litigation had been re-assigned to a *separate* lawsuit altogether involving the partition of assets ("Partition Lawsuit").

Distilled to its essence, in November 2015, Hopper and Wassmer terminated Block and Garden for cause in the Chase Lawsuit. At that time, Christopher McNeill, a Block & Garden partner, agreed that Defendants would only represent Hopper and Wassmer with respect to the partition of their father's Estate. McNeil, on behalf of and in furtherance of Block & Garden, further agreed that Block and Garden would no longer represent Hopper and Wassmer in the Chase Lawsuit. McNeill also consented to Hopper's and Wassmer's retention of Plaintiffs in a separate contingency fee contract, regarding the prosecution of the Chase Lawsuit. The parties' understanding was

memorialized in a November 14, 2015, electronic communication.

Despite the fact that Defendants have no right to a contingency fee on the Chase Lawsuit (either from Hopper and Wassmer or from Plaintiffs), Defendants have and continue to tortuously interfere with Plaintiffs' contract with Hopper and Wassmer by asserting their alleged right to a fee based upon an agreement, which is facially void and clearly in violation of Rule 1.04(f). Hopper and Wassmer have apparently received Defendants' demand for a fee; and, consequently, have refused to compensate Plaintiffs for their legal services. Thus, Defendants have not only illegally interfered with Plaintiffs' contract with Hopper and Wassmer, that interference has successfully prevented Plaintiffs from being duly compensated for their legal services, which have been and were fully performed in the Chase Lawsuit. Moreover, despite the fact that Defendants never retained Plaintiffs, nor did they ever enter into any agreement with Plaintiffs regarding the Chase Lawsuit, nor did they perform any legal services at trial, Defendants still maintain that they are entitled to a contingency fee, which has no basis in either fact or in law.

An actual and justiciable controversy exists between Plaintiffs and Defendants. Accordingly, Plaintiffs seek a declaration and findings that establish: (i) Defendants' purported contingency agreement is void *ab initio* because it fails Rule 1.04(f)'s fee division requirements; (ii) there is no contract between Plaintiffs on the one hand and Defendants on the other hand—and certainly no such enforceable contract, given the absence of any signature to same on behalf of any Plaintiff (TEX. GOV'T CODE ANN. § 82.065(a) (Vernon 2014)); (iii) and, finally, to risk stating the obvious, there is certainly no arbitration agreement whatsoever between Plaintiffs and Defendants.

II.
PARTIES

Plaintiffs FSSV, Vitullo and Malesovas are citizens of the state of Texas.

Defendant **Block, Garden & McNeill, LLP f/k/a Block & Garden, LLP** is a Texas limited liability partnership, with its principal place of business located at **5949 Sherry Lane, Suite 900, Dallas, TX 75225**. It is being served herewith through its attorney of record pursuant to TRCP 21a.

Defendant **Christopher McNeil** is a citizen of Texas who can be served with process by in hand service at his place of business located at **5949 Sherry Lane, Suite 900, Dallas, TX 75225**. He is being served herewith through its attorney of record pursuant to TRCP 21a.

Defendant **Steven Block** is a citizen of Texas who can be served with process at his place of business located at **5949 Sherry Lane, Suite 900, Dallas, TX 75225**. He is being served herewith through its attorney of record pursuant to TRCP 21a.

III.
JURISDICTION AND VENUE

Subject matter jurisdiction is properly vested in this Court. Jurisdiction is proper in this Court as the damages sought by Plaintiffs are within the jurisdictional limits of this Court.

Pursuant to Texas Rule of Civil Procedure 47, Plaintiffs seek monetary relief in excess of $1,000,000.00, which is within the jurisdictional limits of this Court.

This Court has personal jurisdiction over Defendants because they do business in and are citizens of the state of Texas.

Venue is proper in Dallas County under Texas Civil Practice and Remedies Code §15.002 as all or a substantial portion of the events giving rise to the claim(s) occurred in whole or in part in Dallas County. Venue is also proper in Dallas County, Texas, pursuant to § 15.002 because Dallas County is the county of residence for Defendant Block & Garden.

IV.
FACTUAL BACKGROUND

In 2012, Hopper and Wassmer approached Vitullo of FSSV to inquire about legal services related to the Estate of their deceased father, Max Hopper. Vitullo introduced Hopper and Wassmer to Defendants. Thereafter, Defendants purportedly executed a fee agreement with Hopper and Wassmer, which provided that Defendants would represent Hopper and Wassmer with respect to Pre-Trial Issues only for a flat fee ("the Pre-Trial Issues Fee Agreement").

Critically, Plaintiffs were not parties to the Pre-Trial Issues Fee Agreement between Defendants and Hopper/Wassmer. However, Plaintiffs have subsequently been provided a copy of this Pre-Trial Issues Fee Agreement. This Pre-Trial Issues Fee Agreement stipulated that Defendants would receive a flat fee for their legal services in the amount of $100,000. Thereafter, Defendants are believed to have received a legal fee for performing these purported services, and billed Hopper and Wassmer for their fee, per the express terms of the Pre-Trial Issues Fee Agreement.

The Pre-Trial Issues Fee Agreement included a provision that purported to convert the flat fee services agreement to a hybrid contingency fee agreement in the event that Hopper and Wassmer's claims went to trial and Defendants were successful in obtaining a recovery in their favor. Critically, the terms of this hybrid contingency fee

agreement were that Steven Block and Christopher McNeill would perform legal services at a rate of 50% of their normal rate (as opposed to the 100% charge for Pre-Trial Issues), but they would also receive 20% of the Client's gross recovery "if [Block & Garden] is successful in recovering money or anything of value for the Client after trial begins…." This purported hybrid contingency fee agreement contemplated that Defendants would "retain on your behalf the services of Anthony L. Vitullo with Fee, Smith, Sharp & Vitullo, LLP who current hourly rate is $500." The purported hybrid contingency fee agreement also stated that if Defendants did hire Mr. Vitullo, Defendants would be responsible for paying his legal fee. No mention was made of Malesovas in Defendants' Pre-Trial Issues Fee Agreement.

However, none of these events ever occurred. At no time did Defendants hire FSSV or Vitullo. In fact, there was zero discussion of this alleged retention. Additionally, the purported contingency (that is, Block & Garden successfully recovering money or anything of value for Hopper and Wassmer) never happened, **because Block & Garden never appeared at trial nor did any work in the Chase Lawsuit after November 2015.** As such, Block & Garden did not "recover" anything. Moreover, at no time did Defendants compensate either FSSV or Vitullo any hourly rate (or 50% hourly rate) for the hours of work Vitullo and other attorneys employed with FSSV performed over the course of more than two years.

Defendants, despite their representations to Hopper and Wassmer, had no right to hire Vitullo or FSSV, no authority to hire Vitullo or FSSV, and never made an effort to hire Vitullo or FSSV. More importantly, Defendants never entered into any collateral

agreement with either FSSV or Mr. Vitullo to represent Hopper and Wassmer under any fee agreement Defendants had or may have had with Hopper and Wassmer.

It is undisputed that these events never materialized. In November 2015, Defendants willingly agreed and represented to all parties that their engagement would be limited to Pre-Trial Issues, or, exactly what was set forth in Defendants' Pre-Trial Issues Fee Agreement. Defendants, in fact, knew and freely consented to Hopper and Wassmer's independent retention of Plaintiffs, including Anthony Vitullo of FSSV, specifically.

Defendants completed their legal services related to the Partition Lawsuit in the spring of 2016. To this end, Defendants' invoices (at least the ones that have been made available to Plaintiffs) reflect no additional legal services were provided to Hopper and Wassmer after spring 2016. Defendants' work was completed at that time; and no further legal work is believed to have been provided after this date. More than one year later, in the fall of 2017, Hopper and Wassmer's claims proceed to trial against Chase. Consistent with their November 2015 agreement, Defendants did not appear for trial or otherwise assist in the trial, which lasted more than one month. At no time during the trial did Defendants offer to compensate Plaintiffs any legal fee, whether reduced or otherwise, pursuant to any alleged contractual agreement to hire Plaintiffs. The only work performed by Defendants on the Chase Litigation before November 2015 was attending an isolated hearing, and a mediation.

In December 2017, Defendants demanded that FSSV and Vitullo turn over legal fees allegedly owed to Defendants. The purported reason for this demand was an alleged hybrid contingent fee agreement for "services performed at trial." Defendants

claimed that they had hired Anthony Vitullo, though they declined to produce any details of this alleged retention. Defendants also omitted any reference to the November 2015 agreement that their services would be limited to the partition litigation. Defendants also failed to explain why they ceased performing the pre-trial services set forth in the Pre-Trial Issues Fee Agreement. Defendants also omitted the fact that they never showed up for trial.

Importantly, Section 82.065(a) of the Texas Government Code requires that any contingency fee agreement must be signed by both the attorney and the client. The only contingency fee agreement signed by Plaintiffs is the contingency fee agreement between Plaintiffs and Hopper and Wassmer, not the Pre-Trial Issues Fee Agreement that Defendants claim entitles them to a hybrid contingency fee.

Rule 1.04(f) of the Texas Disciplinary Rules of Professional Conduct plainly states that a contingency fee contract that involves a fee sharing agreement or fee division agreement between multiple law firms must specify and explain the basis for this fee sharing arrangement—and the compensation must be commensurate with the services provided by each Firm—and there must be signatures of all parties and informed consent by the Client(s). The Pre-Trial Issues Fee Agreement that Defendants claim entitles them to a hybrid contingency fee provision fails to satisfy any of these requirements. In fact, the contingency upon which Defendants base their claim to a contingency interest is not even in the body of the contract; rather, its in an exhibit attached to that agreement separate from the signature page.

Germane to all of this is a temporary injunction that was recently granted in Plaintiffs' favor in the underlying case where the Chase Lawsuit was filed. *See* Exhibit

"A." The probate court where the Chase Lawsuit was filed and ultimately tried has already found that Plaintiffs have shown a probability of success on the merits and that they have established that they are entitled to be paid for the full value of their contingency fee, especially given that the work has been completed.

V.
CLAIMS FOR RELIEF

Count I—Application for Declaratory Relief
(§ 37.001 TEX. CIV. PRAC. & REM. CODE et seq.)

Plaintiffs seek a declaratory judgment pursuant to the Texas Uniform Declaratory Judgment Act ("UDJA"), Texas Civil Practice & Remedies Code Section 37.001 et seq. An actual and justiciable controversy exists and has arisen between Plaintiffs and Defendants. Plaintiffs seek a declaratory judgment against Defendants pursuant to the UDJA declaring the rights, status, and other legal relations between and among these parties regarding the payment of legal fees, if any. As such, the Court should declare that: (1) Plaintiffs are not a party to any contingency fee contract with Defendants; (2) Defendants never retained Plaintiffs for services related to Hopper and Wassmer's claims against Chase; (3) Defendants and Plaintiffs have no contractual agreement to perform legal services related to Hopper and Wassmer's claims against Chase; (4) Defendants have no legal rights to the proceeds of any settlement obtained by Hopper and Wassmer via their post-trial settlement with Chase because Defendants failed to perform any legal services that are compensable on a contingency fee basis pursuant to any such contract; (5) Defendants have no legal rights to the proceeds of any settlement obtained by Hopper and Wassmer via their post-trial settlement with Chase because they waived and/or are estopped from claiming an interest; (6) Defendants

have no legal rights to the proceeds of any settlement obtained by Hopper and Wassmer via their post-trial settlement with Chase because any purported contingency in the purported contract never occurred; and, most importantly, (7) the hybrid contingency provision in Defendants' contract is void *ab initio* because it fails to comply with Rule 1.04(f) of the Texas Disciplinary Rules of Professional Conduct and Section 82.065(a) of the Texas Government Code.

Count II—Tortious Interference with Plaintiffs' Contract and Business Relationship(s) with Hopper & Wassmer

Plaintiffs have a valid and subsisting contract with Hopper and Wassmer. Defendants knew of this contract existed as early as November of 2015. Defendants, however, willfully and intentionally interfered with this contract by making a false claim to settlement proceeds based on an agreement that is facially void and by claiming that Plaintiffs' valid contingency agreement with Hopper and Wassmer was invalid because Defendant's agreement took precedence over Plaintiffs' agreement. Defendants' interference with Plaintiffs' contract with Hopper and Wassmer proximately caused Plaintiffs' injury, and Plaintiffs have incurred actual damages and/or losses including attorney's fees far in excess of the minimum jurisdictional limits of this Court as a result of same for which they now sue.

Count III—Common Law Fraud (affirmatively and by omission) and Fraudulent Inducement

Defendants made misrepresentations (both affirmatively and by omission) to FSSV and Vitullo; Defendants knew that FSSV and Vitullo would rely on those acts and/or omissions; FSSV and Vitullo did in fact rely and reasonably rely on their mutual understanding of the parties' agreements when Plaintiffs prosecuted the Chase Lawsuit

to completion; and Defendants' misrepresentations to FSSV and Vitullo caused the later damages for which they sue.

In November 2015, Defendant Christopher McNeill, acting on behalf of and with the authority of Defendant Block & Garden, represented in a meeting with Vitullo, Stephen Hopper, and others that (1) he would represent Hopper and Wassmer solely on the partition lawsuit and not for a trial of Chase; and (2) he understood that FSSV would enter into a direct contingency contract with Hopper and Wassmer. However, Defendants' McNeill and Block & Garden ostensibly had a plan to violate these representations. Defendants McNeill and Block & Garden failed to disclose that they would later falsely claim that (1) they represented Hopper and Wassmer during the trial of the Chase Lawsuit; (2) they would falsely claim they hired Vitullo for that trial; and (3) that they would deny ever knowing that FSSV had a direct contingency contract with FSSV. When Defendants' McNeill and Block & Garden made these representations and omissions, they knew that such representations and omissions were false and material and/or made such representations and omissions recklessly, as a positive assertion, without knowledge of their truth. Defendants made these representations with the intent that FSSV and Vitullo rely on these representations. FSSV and Vitullo relied on such representations and omissions in contracting directly with Hopper and Wassmer and by trying the Chase Lawsuit to verdict and through settlement. Such representations caused FSSV and Vitullo injury, for which they now sue.

ATTORNEY'S FEES UNDER SECTION 37.009

Pursuant to Section 37.009 of the Texas Civil Practice & Remedies Code, Plaintiffs seek to recover their attorneys' fees upon which this Court may and should

find to be “equitable” and “just.”

ACTUAL DAMAGES, SPECIAL DAMAGES, & CONSEQUENTIAL DAMAGES

Plaintiffs seek actual damages, special damages, consequential damages, and attorney’s fees. Plaintiffs are entitled to punitive damages in an amount to be determined by the trier of fact for which they sue.

CONDITIONS PRECEDENT

All conditions precedent to Plaintiffs’ right of recovery have been performed, have occurred, or have been waived.

JURY DEMAND

Plaintiffs hereby demand a jury trial on their tort claims. TEX. R. CIV. P. 216.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully request judgment in their favor against Defendants as follows:

A. Defendants shall compensate Plaintiffs for their actual, special and consequential damages;

B. Plaintiffs shall recover punitive damages against Defendants;

C. Plaintiffs shall be granted Declaratory Relief as set forth herein;

D. Defendants shall compensate Plaintiffs for their attorney’s fees;

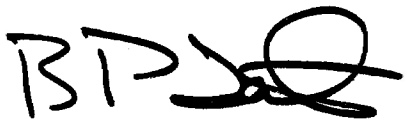
E. Defendants shall pay prejudgment and post-judgment interest at the maximum legal rate;

F. Plaintiffs shall recover their costs in bringing this action; and

G. Plaintiffs shall recover any and all such other relief whether in law or in equity upon which this this Court may deem just and appropriate.

Respectfully Submitted,

BRIAN LAUTEN, P.C.



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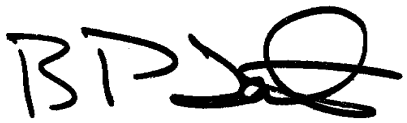
CERTIFICATE OF SERVICE

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 27th day of June 2018, through the ECF case manager system.



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