**CAUSE NO. DC-18-06835**

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

**DEFENDANTS BLOCK GARDEN & McNEILL, LLP, CHRISTOPHER McNEILL, AND STEVEN BLOCK'S REPLY IN SUPPORT OF MOTION FOR TRADITIONAL SUMMARY JUDGMENT**

TO THE HONORABLE JUDGE OF SAID COURT:

Defendants Block Garden & McNeill, LLP ("BGM"), Christopher McNeill ("McNeill"), and Steven Block ("Block") (collectively, "Defendants"), file this Reply in Support of their Motion for Traditional Summary Judgment (the "Motion") regarding all claims asserted by Plaintiffs Fee, Smith, Sharp & Vitullo, LLP ("FSSV"), and Anthony Vitullo ("Vitullo") (collectively, "Plaintiffs"), and in support thereof would respectfully show the following:

## I. ARGUMENT & AUTHORITIES

Plaintiffs' Response fails to raise any genuine issue of material fact necessary to defeat Defendants' Motion for Summary Judgment. First, Plaintiffs advance a strawman argument that Defendants are not entitled to attorney immunity, but fail to address the judicial proceedings privilege that Defendants actually advanced. Second, Plaintiffs offer nothing except conclusory assertions that they have suffered any damages. Third, Plaintiffs fail to establish that they are not

judicially estopped from asserting that Defendants caused any alleged damages. Accordingly, this Court should grant Defendants' Motion and dismiss Plaintiffs' claims.

## A. The Judicial Proceedings Privilege Applies to Defendants.

Defendants are entitled to summary judgment on each of Plaintiffs' claims under the judicial proceedings privilege. Plaintiffs assert that Defendants are not entitled to summary judgment based on "attorney immunity." This is a strawman argument, and the Court should reject it. Defendants have not asserted attorney immunity in their Motion. Rather, Defendants are not liable because of the "judicial proceedings privilege."

The judicial proceedings privilege immunizes communications by judges, jurors, ***parties***, witnesses, or counsel made in the course or contemplation of a judicial proceeding. *See Bird v. W.C.W.*, 868 S.W.2d 767, 771 (Tex. 1994). In contrast, attorney immunity provides that attorneys are immune from civil liability to non-clients for actions taken within the scope of representing a client. *See Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481-82 (Tex. 2015). The judicial proceedings privilege is distinct from attorney immunity. Although courts sometimes interchange the terms, the Texas Supreme Court has noted that the judicial proceedings privilege is an independent doctrine from attorney immunity and serves a different purpose. *See id.* at 485 n.12; *see also Kappos v. Baxter*, 05-19-00020-CV, 2019 WL 5615147, at *4 n.4 (Tex. App.—Dallas Oct. 30, 2019, no pet. h.) ("Having concluded that Baxter established the defense of attorney immunity, we do not address whether he established the judicial-proceedings privilege."). The two doctrines converge only when the communications are made by an attorney in the scope of her representation of a client in connection with litigation. *See Youngkins v. Hines*, 546 S.W.3d

675, 679 n.2 (Tex. 2018)[1]; *NFTD, LLC v. Haynes & Boone, LLP*, ___ S.W.3d ___, No. 14-17-00999-CV, 2019 WL 6876459, at *7 (Tex. App.—Houston [14th Dist.] Dec. 17, 2019, no pet. h.). That is not the case here.

In this case, Defendants made a demand to recover their portion of a contingency fee pursuant to a fee agreement. When that demand was not honored, Defendants resorted to judicial process to vindicate their rights. This is precisely what the judicial proceedings privilege protects. Defendants' statements made in the course or contemplation of vindicating their claim are absolutely privileged. *See Perdue, Brackett, Flores, Utt & Burns v. Linebarger, Goggan, Blair, Sampson & Meeks, L.L.P.*, 291 S.W.3d 448, 451 (Tex. App.—Fort Worth 2009, no pet.).

Defendants have not asserted that the demand for their contingent fee was made as part of or in furtherance of Clients' representation, and have accordingly not asserted that the doctrine of attorney immunity should apply. Rather they made their demand—and pursued the arbitration—as creditors of their fee agreement with Clients. The judicial proceedings privilege affords them an absolute immunity to have done so, and the Court should reject Plaintiffs' strawman argument to place Defendants' actions outside the judicial proceedings privilege.

**B. <u>Plaintiffs Have Failed to Raise Any Competent Evidence of Damages.</u>**

Plaintiffs' claims also fail as a matter of law because they have suffered no damages. As explained in Defendants' Motion, Plaintiffs received everything they were entitled to recover from

[1] In *Youngkin*, the attorney (Youngkin) represented clients in litigation regarding the ownership of property and negotiated a settlement agreement. Youngkin, along with his clients, were sued for fraud for violating the agreement. Youngkin asserted attorney immunity. The Court noted that "Youngkin referred in his briefs to litigation privilege rather than attorney immunity, but both labels describe the same doctrine." *Youngkin v. Hines*, 546 S.W.3d 675, 679 n.2 (Tex. 2018). Although some courts have expressed this footnote as holding the judicial proceeding privilege is called attorney immunity when the statements are made by an attorney, this mistakes the Texas Supreme Court's express distinction between the doctrines. *See Landry's, Inc. & Houston Aquarium, Inc. v. Animal Legal Def. Fund*, No. 14-17-00207-CV, 2018 WL 5075116, at *9 (Tex. App.—Houston [14th Dist.] Oct. 18, 2018, no pet. h.) (citing *Youngkin*, 546 S.W.3d at 679 n.2 (explaining, in a case in which an attorney claimed non-liability for acts taken in the course of representing a claim, that the judicial proceedings privilege, called "litigation privilege," and "attorney immunity" describe the same doctrine)).

Clients, and thus suffered no recoverable damages. At arbitration, Plaintiffs were awarded (i) their entire 45-percent contingent fee, (ii) their unpaid litigation expenses, (iii) their reasonable attorney's fees and costs incurred in litigating their claim, and (iv) pre-award and post-award interest. Thus, Plaintiffs have been made entirely whole.

In an effort to establish the existence of recoverable damages in this case, Plaintiffs offer the following unsupported and conclusory allegations:

> 18. As a direct and proximate result of Defendants' conduct as described herein, both FSSV and I lost profits as the natural and probable consequences of Defendants' conduct. Some of those lost profits occurred in 2018 because of the amount of time we spent recovering our fee form [*sic*] [Clients] that we would have otherwise spent on other cases generating income. I was forced to turn down work and to spend time litigating with [Clients] because of Defendants' interference with the contract I had with [Clients] and Defendants' claim that [Clients] owed them a contingent fee in addition to the fee that [Clients] owed FSSV and me under our contingent fee agreement. Compared to the profits I was able to generate for myself and FSSV in prior years, and based on my personal knowledge of matters that I was unable to devote time and attention to in 2018 as a result of Defendants' conduct as described herein, I was unable to generate substantial profits because of Defendants' conduct. As a direct and proximate result of Defendants' conduct as described herein, I have sustained a loss in value in my interest in FSSV for the years 2018 and 2019. As a direct and proximate result of Defendants' conduct as described herein, I have sustained a loss of goodwill and injury to my business reputation. In addition, I was unable to devote the necessary time on my existing lawsuits and work during this period and lost profits as a result of Defendants' conduct.
>
> 19. In addition, as a natural and proximate of Defendants' interference with FSSV's and my contract with [Clients], FSSV and I incurred substantial legal fees and other expenses in litigation with [Clients] in 2018 for which we seek recovery from Defendants in this proceeding.
>
> 20. Further, as a result of Defendants' fraud, misrepresentations, tortious interference and other wrongful conduct as described herein, I suffered damage by losing compensation percentages in my ownership interest in Fee, Smith, Sharp and Vitullo LLP. I also suffered damage to my business reputation, physical manifestations of mental anguish, and emotional distress for which I seek recovery against Defendants in this proceeding.

Pls. Resp., Ex. A (Affidavit of Vitullo). These conclusory assertions fail to provide competent summary-judgment evidence to raise a genuine issue of fact.

To support summary judgment, an interested witness affidavit, such as this one from Vitullo, must be clear, positive, and direct, otherwise credible and free from contradictions and inconsistencies. *See* TEX. R. CIV. P. 166a(c); *S & I Mgmt., Inc. v. Sungju Choi,* 331 S.W.3d 849, 855 (Tex. App.—Dallas 2011, no pet.). Affidavits that state conclusions without providing underlying facts to support those conclusions are not proper summary judgment evidence. *Leonard v. Knight*, 551 S.W.3d 905, 911 (Tex. App.—Houston [14th Dist.] 2018, no pet.). "A conclusory statement is one that expresses a factual inference without providing underlying facts to support that conclusion." *Id.* Conclusory affidavits are not enough to raise fact issues. *See Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996). "They are not credible, nor susceptible to being readily controverted." *Id.* The purported damages evidence offered by Vitullo consists entirely of self-serving, conclusory statements for which he provides no factual support. Accordingly, the Court should give no weight to Plaintiffs' conclusory claims that they have suffered any damages which have not already been remedied.

Additionally, mental-anguish damages are not available for tortious interference or negligent misrepresentation. *See Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 818 (Tex. 2005) (no mental anguish for tortious interference with contract); *Boyles v. Kerr*, 855 S.W.2d 593, 598 (Tex. 1993) (no mental anguish damages for negligent misrepresentation). And, to the extent mental-anguish damages are available for Plaintiffs' fraud claim, an award of mental anguish damages must be supported by direct evidence that the nature, duration, and severity of mental anguish was sufficient to cause, and caused, either a substantial disruption in the plaintiff's daily routine or a high degree of mental pain and distress. *See Parkway Co. v. Woodruff*, 901 S.W.2d

434, 444 (Tex. 1995). Plaintiffs' summary-judgment evidence wholly fails to reflect the nature, duration, or severity of such alleged anguish or show "a high degree of mental pain and distress" that is "more than mere worry, anxiety, vexation, embarrassment, or anger" necessary to support any award of damages. *See id.*

Furthermore, Plaintiffs' claim for exemplary damages must also fail as a matter of law. Actual damages are a necessary predicate to the recovery of exemplary damages. *See* TEX. CIV. PRAC. & REM. CODE § 41.004; *Upjohn Co. v. Freeman*, 885 S.W.2d 538, 550 (Tex. App.—Dallas 1994, writ denied) (exemplary damages are contingent on an actual damage award).

The Court should further reject Plaintiffs' attempt to receive a second, underserved recovery for the time and opportunity to generate income forgone during arbitration. As discussed in Defendants' Motion, these are not compensable injuries. *See, e.g., Eberts v. Businesspeople Pers. Services, Inc.*, 620 S.W.2d 861, 863 (Tex. App.—Dallas 1981, no writ) ("Expenses of litigation are not recoverable as damages unless expressly provided by contract or statute. This rule applies to a litigant's loss of time.") (internal citations omitted); *Profitlive P'ship v. Surber, No.* 02-09-00104-CV, 2010 WL 1999461, at *4 (Tex. App.–Fort Worth May 20, 2010, pet. denied) (mem. op.) (same); *Texas Mut. Ins. Co. v. Ray Ferguson Interests, Inc.*, No. 01-02-00807-CV, 2006 WL 648834, at *8 (Tex. App.–Houston [1st Dist.] Mar. 16, 2006, no pet.) (mem. op.) (same). Plaintiffs rely on *Qwest Commc'ns Intern., Inc. v. AT&T Corp.*, to assert otherwise. *See* 114 S.W.3d 15, 33 (Tex. App.—Austin 2003), *rev'd.*, 167 S.W.3d 324 (Tex. 2005). Plaintiffs' reliance is misplaced. While some Texas courts, such as the *Qwest Commc'ns* court, have recognized the "tort of another" exception to the well-established rule that litigation expenses, including lost time, are recoverable only pursuant to a statute or contract, the Dallas Court of Appeals has not. The Dallas Court of Appeals has consistently rejected this "tort of another" exception. *See City of*

*Garland v. Booth*, 895 S.W.2d 766, 771 (Tex. App.—Dallas 1995, writ denied); *Petersen v. Dean Witter Reynolds, Inc.*, 805 S.W.2d 541, 549 (Tex. App.—Dallas 1991, no writ) ("In Texas, attorney's fees expended in prior litigation with third parties are not recoverable as damages: attorney's fees are only recoverable when provided for by statute or by agreement between the parties."); *El Dorado Motors, Inc. v. Koch*, 168 S.W.3d 360, 366 (Tex. App.—Dallas 2005, no pet.) ("This Court has long held that attorney's fees incurred in another action are not evidence of damages in an action of the type now before us."); *In re Marriage of Pyrtle*, 433 S.W.3d 152, 170 (Tex. App.—Dallas 2014, pet. denied) ("Neither the Texas Supreme Court nor this Court has expressly adopted the 'tort of another' exception.").

Plaintiffs have recovered their "lost-profit" (i.e. their contingent fee) from Clients. They have recovered their attorney's fees and expenses incurred in pursuing that claim. The income that might have been generated on other matters while pursuing that claim are not cognizable "lost profits." *See Eberts*, 620 S.W.2d at 863. Moreover, Plaintiffs provide no competent summary-judgment evidence about such alleged lost-profit from working on other matters. And, their mere speculation that, but-for their time in arbitration, Plaintiffs would have profited from work on other matters does not raise a genuine issue of material fact. *See El Dorado Motors, Inc.*, 168 S.W.3d at 366 ("[T]he injured party must do more than show that it suffered some lost profits. The amount of the loss must be shown by competent evidence with reasonable certainty.").

Plaintiffs have already recovered their attorney's fees and expenses incurred in arbitration. Plaintiffs have already recovered their full contingent fee owed by Clients—that is, the "lost profit" allegedly caused by Defendants. Plaintiffs cannot now evade the long-standing American Rule by submitting an unsupported, conclusory, and self-serving affidavit in an attempt to recover for other speculative income allegedly forgone due to the time spent in arbitration.

## C. Plaintiffs Are Judicially Estopped from Asserting a New Theory of Causation

Finally, the Court should reject Plaintiffs strained attempt to distance themselves from their prior, repeated assertion that Clients' long-standing plan to avoid paying their contingent fee caused the fee dispute underlying this case. First, Plaintiffs contention that Defendants' demand for their portion of the contingent fee caused Clients' non-payment is clearly an inconsistent position. Defendants made their first demand for their portion of the contingent fee only after the verdict in Client's favor at trial. But as detailed in Defendants' Motion, Plaintiffs repeatedly contended that it was Clients' plan to not pay since before trial. Defendants' demand to Clients after the verdict could not have caused Clients to decide to do something they had already planned to do. Accordingly, Plaintiffs present theory of causation for their claims[2] is inconsistent with their position at arbitration. In their Response, Plaintiffs' attempt to thread a needle by now alleging that it was the Clients' intent to avoid only some of Plaintiffs' fees but it was Defendants' demand that drove Clients to avoid Plaintiffs' entire fee. *See* Pls. Resp. at 18. The Court should reject Plaintiffs' convenient new some/all assertion: even if this avoid-some-of-the-fees-only position were valid (and Plaintiffs have produced no evidence to support it), Plaintiffs have recovered ***all*** of their fees, ***plus*** attorney's fees, expenses, and interest.

[2] Plaintiffs assert, in their Third Amended Petition, that: "Once Defendants made their claim, Plaintiffs immediately informed [Clients] and [Clients] immediately retained a separate lawyer and refused to compensate Plaintiffs for their legal services because of the spurious competing claim of Defendants to a contingent fee. Thus, Defendants have not only illegally interfered with Plaintiffs' contract with [Clients], that interference prevented Plaintiffs from being timely compensated for their legal services and caused Plaintiffs to spend the better part of a year trying to recoup their rightfully earned fee." These assertions directly contradict Plaintiffs' repeated statements and positions in the arbitration. *See, e.g.*, Defs. Mot., Ex. A-5 (Plaintiffs' JAMS Amended Crossclaims p. 8) ("Clients had been preparing to not pay [Plaintiffs] since before trial began and had been secretly recording [Plaintiffs] as part of this scheme."); Defs. Mot., Ex. A-4 (Plaintiffs' JAMS Answering Statement pp. 3-4) ("[T]heir termination without any pay after receiving one of the largest verdicts in the history of Western Civilization was a carefully orchestrated event by Clients that commenced before trial began. Clients, who have a history of frequently switching and not paying attorneys, never intended to pay [Plaintiffs]. … During the entire time period from the September 2017 trial through the April 2018 settlement, Clients (and their post-trial attorneys) never disclosed that they always intend to fire [Plaintiffs] prior to paying [Plaintiffs] any fee.").

Second, Plaintiffs seek to cast this prior arbitration argument as opinion rather than fact, unnecessary to their recovery and, thus, inapplicable to judicial estoppel. The Court should similarly reject this argument. Judicial estoppel applies to inconsistent "positions" or statements to "prevent parties from playing fast and loose with the judicial system for their own benefit." *See Ferguson v. Bldg. Materials Corp. of Am.*, 295 S.W.3d 642, 643 (Tex. 2009). At arbitration, Plaintiffs repeatedly asserted Clients' plan to avoid paying Plaintiffs. In support of that position, Plaintiffs alleged that Clients recorded conversations and hired malpractice lawyers to avoid Plaintiffs' contingent fee. And this position was successfully maintained. The Arbitration final award noted "The evidence establishes that Clients' claims of attorney misconduct are without merit and stated for the purpose of avoiding payment of a fully earned contingent fee." *See* Defs. Motion, Ex. A-2.

Third, Plaintiffs argue that they did not assert these arguments in sworn pleadings or testimony but rather through unsworn filings by their attorney. Although some courts have declined to impose judicial estoppel in this situation, the Dallas Court of Appeals allows it. In *Webb v. City of Dallas*, the Dallas Court of Appeals noted that "Although the doctrine [judicial estoppel] is most commonly applied to the sworn statements of witnesses, it also applies to the statements of attorneys explaining their clients' position in the ligation." 211 S.W.3d 808, 820 (Tex. App.—Dallas 2006, pet. denied). In *Webb*, the Court found that the Appellee's counsel's statements to an administrative law judge regarding the basis of a claim was sufficient to judicially estop Appellee from asserting a contrary position in the district court. *Id.*

Accordingly, Plaintiffs are judicially estopped from asserting a new, inconsistent position that Defendants' demand for their portion of a contingent fee allegedly caused Plaintiffs harm.

Therefore, Plaintiffs cannot carry their burden of proof, and the Court should grant Defendants summary judgment on each of Plaintiffs' claims.

## II. CONCLUSION

For the foregoing reasons, Defendants respectfully submit that their Motion for Summary Judgment should be granted, that this case should be dismissed in its entirety, and that they should be granted all other relief to which they are justly entitled.

DATED: January 6, 2020

Respectfully submitted,

*/s/ Eric W. Pinker*

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**ATTORNEYS FOR DEFENDANTS BLOCK GARDEN & McNEILL, LLP, CHRISTOPHER McNEILL, AND STEVEN BLOCK**

## CERTIFICATE OF SERVICE

The undersigned certifies on January 6, 2020, a true and correct copy of the foregoing document was served on all counsel of record via electronic filing.

*/s/ Daniel C. Polese*

Daniel C. Polese