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CAUSE NO. 2020-46985

MARK CANFORA and MARK CANFORA INVESTMENTS, LLC	§	**IN THE DISTRICT COURT**
Plaintiff,	§	
V.	§	**234TH JUDICIAL DISTRICT**
BRENT W. COON, PC d/b/a BRENT COON & ASSOCIATES, D. MILLER & ASSOCIATES, PLLC, BRENT W. COON, ERIC NEWELL, JOHN R. THOMAS, LORI J. SLOCUM, ROBERT A. SCHWARTZ, MARY CATHRYNE CARAWAY JACOB and DAREN A. MILLER	§	
Defendants,	§	**HARRIS COUNTY, TEXAS**

DEFENDANTS' NO EVIDENCE AND TRADITIONAL MOTIONS FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Defendants Brent W. Coon, P.C. d/b/a Brent Coon & Associates, Brent W. Coon, Eric Newell, Lori K. Slocum, John R. Thomas, Robert Schwartz and Mary Cathryne Caraway Jacob (Collectively referred to a "BCA") and Darren A. Miller and Darren Miller and Associates, PLLC ("Miller" and collectively referred to with BCA as "Defendants") file their No Evidence and Traditional Motions for Summary Judgment against Mark Canfora, Mark Canfora Investments, LLC, (Collectively referred to as "CANFORA"), James Glick, Russell Lengacher, Luke Martin and Nelson Mast (Collectively referred to as "Investor Plaintiffs") and respectfully show the following:

I. INTRODUCTION

1. Defendants bring this No Evidence and Traditional Motions for Summary Judgment because there are no genuine issues of material fact and BCA is entitled to judgment as a matter of law as to the following:

a. *accord and satisfaction;*

b. *no negligence and gross negligence;*

c. *release;*

d. *the absence of any legal or fiduciary duty after the accord and satisfaction and release;*

e. *the inability of the investor Plaintiffs to bring a claim for the losses of the corporation;*

f. *Mark Canfora's claims are barred by the Statute of Limitations; and*

g. *Lori K. Slocum, John R. Thomas, Robert Schwartz and Mary Cathryne Caraway Jacob did not owe or breach a fiduciary duty to Plaintiffs.*

2. Specifically, CANFORA requested BCA and Miller to waive their attorney's fees and expenses and agreed in return for a Release "from all claims, demands, charges, costs of court, *including but not limited to attorney fees and causes of action of whatever nature, on any legal theory arising out of the circumstances of Attorneys representation of Client* and releases Attorneys from all liability and damages of any kind, known or unknown, arising their representation of client." Emphasis added. The Agreement attached hereto as "Exhibit A" that memorialized those terms and was executed by CANFORA unequivocally creates an accord and satisfaction upon its execution by the recitation that CANFORA "accepts this consideration in full satisfaction of all damages or claims owed to Client or that may be owed to Client arising from this cause of action, including any claims against BP, Halliburton, Transocean, or other Defendants in the MDL 2179 other than for *his* individual claim. Client acknowledges that if he wishes to pursue his individual claim or any other claims against BP, Halliburton, Transocean, or other

Defendants in the MDL 2179 he will have to seek other counsel as Attorneys will be withdrawing as attorneys of record in those cases."

3. The Agreement also unequivocally creates a release not only of any further responsibilities of BCA to CANFORA but for any claims for more consideration or money:

> "Client, in consideration of the the fact that Attorneys are waiving their legal fees and expenses, releases Attorneys from all claims, demands, charges, costs of court, including but not limited to attorney fees and causes of action of whatever nature, on any legal theory arising out of the circumstances of Attorneys representation of Client and releases Attorneys from all liability and damages of any kind. known or unknown, arising their representation of client."

This release language is fair and reasonable and CANFORA, who requested and agreed to the same, was informed and received full disclosure of all material facts and all important information relating to the release. Thereafter, BCA did not owe a single legal much less fiduciary duty to CANFORA.

4. Further, Plaintiffs James Glick and Russell Lengacher were Voting Members of and shareholders in Infinity Blu Development Group, LLC ("Infinity Blu"), a corporation owned by Ohio Holdings Development Group, LLC. James Glick, Russell Lengacher, Luke Martin and Nelson Mast were of the approximate 20 investors in Infinity Blu. Mark Canfora was a member of Infinity Blu's Risk Management Advisory Board and was hired as Project Manager to handle the sales for Infinity Blu from 2006-2012 to actively develop what was promoted as the $250,000,000-Phase One, 23 story high-rise with 435 Units and 3200 plus fractional residences.

5. Infinity Blu made a claim on January 18, 2013, in the BP in the Oil Spill litigation[1] for the losses Infinity Blu sustained related to the BP Oil Spill. Its investors did not have a legal claim for any losses suffered by Infinity Blu related to the BP Oil Spill. Infinity Blu and Ohio Holdings settled their claims with BR.

[1] The claim was made by "John Jurgensen attorney for the Estate of Nathan Glick, sole member of Ohio Holdings Development Group, LLC which was the managing member of Infinity Blu Development Group, LLC.

6. It is Texas black-letter corporations law that a cause of action for injury to the property of a corporation, or the impairment or destruction of its business, is vested in the corporation, as distinguished from its stockholders, even though it may result indirectly in the loss of earnings to the stockholders. Not having a cause of action against BP they are not now able to maintain this action against BCA related to BCA's representation of Infinity Blu in that litigation. Moreover, Infinity Blu was subsequently offered a settlement in the MDL Court ordered "neutrals program" which was accepted, thereby severing any remaining claims by or through Infinity Blu ownership to causes of action alleged to have emanated through the BP oil spill.

7. Last but not least, BCA Associate Attorneys Lori K. Slocum, , Robert Schwartz and Mary Cathryne Caraway Jacob did not owe or breach a fiduciary duty to Plaintiffs. These lawyers did not work on BCA clients' BP Oil Spill cases, they did not work on CANFORA's BP Oil Spill cases and know little if anything about those cases. Their names were added to BCA's signature block on BCA clients' pleadings solely for MDL filing purposes when thousands of documents had to be filed in the MDL in a very short period of time. Notice of Appearance was not even filed for these associate attorneys to be a designated attorney authorized to receive service or all pleadings, notices, orders and other papers relating to practice before that MDL Court.

II. UNDISPUTED FACTS

8. Plaintiff Mark Canfora and Mark Canfora Investments, LLC ("CANFORA") filed their Original Petition on August 6, 2020, against BCA and its lawyers, Brent W. Coon, Eric Newell, Lori K. Slocum, John R. Thomas, Robert Schwartz, and Mary Cathryne Caraway Jacob and Miller for the alleged legal malpractice in the underlying lawsuit involving very complicated MDL claims and lawsuits arising out of the Deep Water Horizon Oil Spill. Seventy-four days later, on October 19, 2020, CANFORA filed a First Amended Petition joining and naming four other Plaintiffs which CANFORA evidently solicited through his company, BP Oil Spill Malpractice, LLC. All Defendants generally denied the allegations and asserted Affirmative Defenses related to that

representation.[2]

9. The relationship of the individual parties Plaintiffs James Glick, Russell Lengacher, Luke Martin and Nelson Mast to Mark Canfora and Mark Canfora Investments, LLC as described in Plaintiffs' Second Amended Petition is that they are or were each owners of real property, land and homes with a percentage ownership interest in the Infinity Blu project, a proposed 24 story, 435-unit condominium complex located in Panama City Beach, Florida to be built by Ohio developer, Nathan Glick and his company, Glick Construction and Development, LLC d/b/a Infinity Blu ("Glick Construction"), and was owned, in part, by the developer and various investors who collectively were known as Ohio Holdings, LLC. Mark Canfora and his company, Canfora Investments LLC were engaged to manage the sales for this development.

10. Plaintiffs each hired D. Miller & Associates ("Miller") to handle "BP OIL SPILL CLAIMS" that they alleged they had that arose out of the massive spill aboard the Deepwater Horizon rig operated by BP in 2010. Miller associated BCA to assist in the resolution of those claims after obtaining a Consent to Refer from each of the clients. In that underlying litigation, BCA was able to help CANFORA procure settlement of three of CANFORA's separate business entity claims well into the six figures. Although CANFORA accepted those sums in settlement of his claims and had advised BCA in writing NOT TO PURSUE two other highly dubious claims, CANFORA complained subsequently (in 2017) that the two other claims should have been pursued regardless. CANFORA's retained experts with Case Strategies Group advised him that his records in support of those two other claims were so BAD that attempting to even argue for them would result in a complete loss of credibility to his other (also admittedly speculative) claims. CANFORA ultimately conceded those points and DROPPED those claims and advised his lawyers (BCA and Miller) of this in writing. Please see attached hereto "Exhibit B".

[2] At all times relevant to the allegations made the basis of Plaintiffs' Original, First and Second Amended Petitions, neither Lori K. Slocum, Robert Schwartz, or Mary Cathryne Caraway Jacob performed *any* legal work for Plaintiffs on their cases.

11. Later, when CANFORA had settled his other claims and felt that he had nothing else to risk, CANFORA tried to revive those claims and alleged BCA and Miller were at fault in not pursuing them further. CANFORA approached BCA and Miller to waive their legal fees and expenses on the resolved claims, and rather than argue the point, and in a desire to finalize their representation of CANFORA, BCA and Miller executed an Agreement on June 23, 2018, with CANFORA signing it as "MARK CANFORA and his associated companies", all of whom where under contract with Miller and/or BCA. That Agreement provides for BCA's and Miller's waiver of their legal fees and expenses on the resolved claims. CANFORA released BCA and Miller "from all claims, demands, charges, costs of court, including but not limited to attorney fees and causes of action of whatever nature, on any legal theory arising out of the circumstances of Attorneys representation of Client and releases Attorneys from all liability and damages of any kind, known or unknown, arising their representation of client."

12. CANFORA obtained an additional $105,000 in legal fees and expenses from BCA and Miller's representation, and he released BCA and Miller from all liability and damages of any kind, known or unknown, arising from their representation of client. Then, almost two years later, he turned around and sued BCA and Miller alleging legal malpractice and breach of fiduciary duty.

13. CANFORA obtained the benefit of the bargain of that Agreement, breached that Agreement, and kept the waived $105,000 in waived legal fees and expenses. BCA's payment and CANFORA's unconditional acceptance of that payment is an accord and satisfaction of the claim, and CANFORA may not bring this lawsuit for a greater amount.[3]

[3] *Boland v. Mundaca Inv. Corp*., 978 S.W.2d 146, 148–149 (Tex. App.—Austin 1998, no pet.)

III. SUMMARY JUDGMENT STANDARD

Traditional Motions for Summary Judgment

14. A traditional summary judgment movant is entitled to judgment when it establishes that there are no genuine issues of material fact to be determined by jury or court. *Park Place Hosp. v. Estate of Milo*, 909 S.W.2d 508, 510 (Tex. 1995). The movant may do so by conclusively negating at least *one* essential element of each claim. *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). When the movant does so, summary judgment must be granted *unless* the non-movant produces *sufficient admissible evidence* showing that there exists at least one genuine issue of *material* fact that must be resolved by the fact-finder. *Alanis v. Univ. of Tex. Health Science Ctr.*, 843 S.W.2d 779, 784 (Tex. App.−Houston [1st Dist.] 1992, writ denied). If the non-movant produces no more than a *scintilla* of supporting evidence for challenged claim elements, the Court must grant judgment to the movant. *Forbes, Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 172 (Tex. 2003). When the evidence produced by the nonmovant is so weak that it creates no more than a suspicion that facts *might* be disputable, the nonmovant has not met its burden and the cause of action cannot survive summary adjudication. *Id*. at 172.

15. Texas Rule of Civil Procedure 166a(b) provides that "a party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."

No Evidence Motions for Summary Judgment

16. The purpose of the summary judgment procedure is to allow the trial court to properly dispose of cases that involve unmeritorious claims. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 n.5 (Tex. 1979). A "no-evidence" motion for summary judgment shifts the burden of proof to the non-movant to present enough evidence to be entitled to a trial. To succeed on a no-evidence motion for summary judgment, a Defendant must allege that, after an adequate

time for discovery has elapsed, there is no evidence of an essential element of a Plaintiff's claim. Tex. R. Civ. P. 166a(i). *See Boerjan v. Rodriquez*, 436 S.W.3d 307, 310 (Tex. 2014). If the Defendant meets its burden, the burden shifts to the Plaintiff to produce more than a scintilla of evidence to raise a genuine issue of material fact on the challenged element. Tex. R. Civ. P. 166a(i). *See Boerjan*, 436 S.W.3d at 312. When the evidence offered is so weak as to do no more than create a mere surmise of suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence. *Jelinek v. Casas*, 328 S.W.3d 526, 532 (Tex. 2010) (internal citations omitted). The same is true when the evidence equally supports two alternatives: when the circumstances are equally consistent with either of two facts, neither fact may be inferred. *Id.* If less than a scintilla of evidence is produced, the Defendant is entitled to a summary judgment on the Plaintiff's causes of action. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 755 (Tex. 2003).

IV. ADEQUATE TIME FOR DISCOVERY HAS PASSED

17. An adequate time for discovery has passed. Plaintiffs filed their Original Petition in September 2020. This Honorable Court issued its Second Amended Docket Control Order in September 2022. In that Order, the Honorable Court set the deadline for hearings on Motion for Summary Judgment on January 31, 2023 and prohibited any hearing on a No-Evidence Motion for Summary Judgment before January 6, 2023. The parties have exchanged written discovery but Plaintiffs have not taken a single depositions to date. Furthermore, Rule 166a(i) of the Texas Rules of Civil Procedure does not require that discovery be completed only that the parties have had adequate time to conduct discovery. *E.g., Specialty Retailers, Inc. v. Fuqua,* 29 S.W.3d 140, 145 (Tex.App.—Houston [14th Dist.] 2000, pet. denied). *Miguel Saravia v. Ji Li*, 14-18-00715-CV, 2020 WL 5200935, at *1 (Tex. App.—Houston [14th Dist.] Sept. 1, 2020, no pet. h.). Therefore, an adequate time for discovery has passed based on the Amended Docket Control Order.

18. Discovery has not been completed, but the rule does not require that discovery must have been completed, only that there was 'adequate time. The trial court has discretion to determine whether an adequate time has passed, considering: 1) the nature of the case, 2) the nature of evidence necessary to controvert the no-evidence motion, 3) the length of time the case was active, 4) the amount of time the no-evidence motion was on file, 5) whether the movant had requested stricter deadlines for discovery, 6) the amount of discovery already completed, and 7) whether the discovery deadlines in place were specific or vague. *See Madison v. Williamson*, 241 S.W.3d 145, 155 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). When a lawsuit has been on file for more than one year at the time the trial court decides a no-evidence motion, an adequate time for discovery has passed. *Id.* When a party does not pursue any discovery despite having many months to do so, that strongly indicates that an adequate time for discovery has passed. S*ee Rest. Teams Intern., Inc. v. MG Sec. Corp., 95 S.W.3d 336, 341 (Tex. App.—Dallas 2002, no pet.) (affirming summary judgment despite discovery period not being complete).* There are many factors weigh in favor of finding an adequate time for discovery has passed:

a. The case has been on-file for over two years. That has been an adequate time for discovery.

b. Plaintiffs have resisted discovery by make hundreds of frivolous objections and answer very few questions or requests.[4]

c. This Court denied Plaintiffs' three Motions for Protection from BCA's written discovery and twice ordered Plaintiffs to answer discovery. The parties engaged in dozens of hours meeting and conferring on , and Plaintiffs and Plaintiffs' counsel simply refuse to abide by those Orders. Instead of answering the discovery, Plaintiffs and Plaintiffs' counsel continued to fail and refuse to respond to the discovery, asserting repetitive, baseless, and frivolous objections. Plaintiffs have abused the discovery process in resisting discovery and made responses, which are unreasonably frivolous or made for purposes of delay.

[4] BCA incorporates herein as if set forth at length their Defendants' Second Motion To Compel Discovery Responses And Response To Plaintiffs' Second And Third Motions For Protection From Written Discovery and First Amended Motion to Hold Plaintiffs and Plaintiffs' Counsel in Contempt and Impose Sanctions for Resisting Discovery.

d. Plaintiffs unilaterally noticed the depositions of Brent Coon and Eric Newell, which depositions were quashed. Plaintiffs have not requested dates for or unilaterally notice the deposition of Defendants Lori K. Slocum, John R. Thomas, Robert Schwartz, and Mary Cathryne Caraway Jacob.

Plaintiffs have clearly not prosecuted this case, much less aggressively so, and have not pursued any additional discovery despite having many months to do so, strongly indicating that an adequate time for discovery has passed.

V. ARGUMENT AND AUTHORITY

No-Evidence Motion for Summary Judgment

19. Defendants move for a No Evidence summary judgment pursuant to Rule 166a(i) of the Texas Rules of Civil Procedure on all claims asserted by Plaintiffs on grounds that an adequate time for discovery has passed and Plaintiffs have no evidence that would raise a genuine issue of material fact on each of the following claims:

a. There is no evidence to support Plaintiffs' claims of negligence and gross negligence against Defendants in that Plaintiffs have no evidence that Defendants breached that any duty to Plaintiffs, that any breach caused damages, that Plaintiffs would be entitled to recover the damages sought in their capacity or the amount of any such damages to which Plaintiffs' would be entitled to recover.

b. There is no evidence to support Plaintiffs' breach of fiduciary duty claim against Defendants in that Plaintiffs have no evidence that that Defendants breached any duty to Plaintiffs, that any breach caused damages, that Plaintiffs would be entitled to recover the damages sought in their capacity or the amount of any such damages to which Plaintiffs' would be entitled to recover.

c. There is no evidence to support Plaintiffs' joint liability claim against Defendants in that Plaintiffs have no evidence that that Defendants entered into an agreement for a common purpose with a community of interest and an equal right to control or direct. Additionally, Plaintiffs have no evidence that Defendants breached any duty to Plaintiffs, that any breach caused damages, that Plaintiffs would be entitled to recover the damages sought in their capacity or the amount of any such damages to which Plaintiffs' would be entitled to recover.

Traditional Motion for Summary Judgment

Accord And Satisfaction

20. Mark Canfora, on behalf of himself, Mark Canfora Investments, LLC and Infinity Blu executed several separate Attorney's Employment Agreements hiring D. Miller & Associates, PLLC to represent them in the BP Oil Spill Litigation MDL 2179. D. Miller & Associates, PLLC associated BCA. Consent to Refer Agreements were executed by Mark Canfora on behalf of Prepaid Real Estate Florida LLC, Fractional Real Estate Advisors LLC, Mark Canfora Investments, and Mark Canfora Ministries. Initially, Canfora also signed an Attorney 's Employment Agreement on behalf of the Infinity Blu Development Group. The individual investor Plaintiffs and the personal representative of the Estate of Nathan Glick, the sole member of Ohio Holdings Development Group LLC which is the managing member of Infinity Blu Development Group LLC, also executed Consent to Refer Agreements.

21. CANFORA was considered a "hold out" in the already long-winded BP oil spill litigation. He continued to maintain that if he held out long enough that BP would "just offer more" to wrap up the litigation. Unfortunately, he overplayed his hand and instead of the amounts offered from the settlement program going "up" over time, they went "down". Realizing he had overplayed his hand, he mitigated the damage by approaching his counsel with a proposal. "I'll take this amount and go away, permanently if you drop all your legal fees". BCA had already long since settled the vast majority of their original docket of approximately10,000 cases and were equally desirous of ending the relationship. CANFORA was fully compensated in the BP Oil Spill litigation. Nonetheless, CANFORA requested BCA and Miller to waive their attorney's fees and expenses amid general mumbling about the amount awarded by the Magistrate and the ill-fated resolution of his other suspect claims. He BCA and Miller agreed, and CANFORA – an astute businessman - then approved and executed the Brent Coon & Associates, P.C. June 21, 2018, Settlement Closing

Statements for Prepaid Real Estate Florida LLC, Fractional Real Estate Advisors LLC and Agreement.

22. CANFORA then brought suit against BCA and Miller for patently frivolous claims for negligence, gross negligence and/or breach of fiduciary duty, even though CANFORA executed the Agreement that CANFORA requested that provided for an accord and satisfaction. Nor are these the first vexatious claims he has filed. He has left a long string of failed and vexatious cases against churches and ministers and even police officers. Although Canfora requested some of his other claims be dropped, and voluntarily settled his other claims to his satisfaction at the time, and then on top of that manipulated a waiver of fees and expenses for 7 years of litigation work, he filed suit here. Moreover, he solicited his "partners" in this lawsuit through a bogus company he set up called "BP OIL SPILL MALPRACTICE LAWSUIT, LLC. It is likewise worth noting that CANFORA, while soliciting the other Plaintiffs through this fabricated entity, did so on contingency fee contracts which appear to patently violate Texas State Law AND Florida State Law regarding practicing law without a license and engaging in illegal fee sharing, something his counsel in this very case purportedly specialize in. (Please see attached here to "Exhibit C"). BCA and Miller move for summary judgment on their affirmative defenses of accord and satisfaction.

23. BCA and Miller's evidence (the Agreement) establishes an assent of the parties to an agreement that the amount paid by BCA to CANFORA was in full satisfaction of the entire claim. *McCarty v. Humphrey*, 261 S.W. 1015 (Tex.Comm'n App. 1924, judgment adopted). The Agreement reflects the unmistakable communication from BCA and Miller to CANFORA that tender of the lesser sum is upon the condition that acceptance will constitute satisfaction of the underlying obligation of representation and waiver of BCA's attorney's fees and expenses. It has been said that the conditions must be made plain, definite and certain, *Clay v. Rossi*, 62 Idaho 140, 108 P.2d 506 (1940); that the statement accompanying the tender of a sum less than the contract price must be so clear, full and explicit that it is not susceptible of any other interpretation. *Sanders*

v. Standard Wheel Co., 151 Ky. 257, 151 S.W. 674 (1912); that the offer must be accompanied with acts and declarations which the creditor is "bound to understand," *Preston v. Grant*, 34 Vt. 201 (1861); *Crucible Steel Co. v. Premier Mfg. Co.*, 94 Conn. 652, 110 A. 52 (1920); *Jenkins v. Henry C. Beck Co.*, 449 S.W.2d 454, 455 (Tex. 1969). The Agreement meets every one of these elements. It was a new, express contract between "Mark Canfora and his associated entities" and Brent W. Coon, PC d/b/a Brent Coon & Associates and D. Miller & Associates that discharged any and all existing obligation of the later to represent the former by means of the attorneys' waiver of the attorneys' fees and expenses, the same being in full satisfaction of any potential entire claim CANFORA might have:

> "Client, in consideration of the fact that Attorneys are waiving their legal fees and expenses, releases Attorneys from all claims, demands, charges, costs of court, including but not limited to attorney fees and causes of action of whatever nature, on any legal theory arising out of the circumstances of Attorneys representation of Client and releases Attorneys from all liability and damages of any kind. known or unknown, arising their representation of client."

24. CANFORA further accepted the waiver of attorneys' fees and expenses, the acceptance of which constituted satisfaction of any underlying obligation:

> "Client hereby accepts this consideration in full satisfaction of all damages or claims owed to Client or that may be owed to Client arising from this cause of action, including any claims against BP, Halliburton, Transocean, or other Defendants in the MDL 2179 other than for his individual claim. Client acknowledges that if he wishes to pursue his individual claim or any other claims against BP, Halliburton, Transocean, or other Defendants in the 'MDL 2179 he will have to seek other counsel as Attorneys will be withdrawing as attorneys of record in those cases."

25. This language is so clear, full and explicit that it is not susceptible of any other interpretation. *Sanders v. Standard Wheel Co.*, 151 Ky. 257, 151 S.W. 674 (1912) and the offer was accompanied with acts and declarations which the creditor is "bound to understand," *Preston v. Grant*, 34 Vt. 201 (1861); *Crucible Steel Co. v. Premier Mfg. Co.*, 94 Conn. 652, 110 A. 52 (1920); *Jenkins v. Henry C. Beck Co.*, 449 S.W.2d 454, 455 (Tex. 1969).

26. As the non-movant, CANOFRA must provide more than a mere scintilla of evidence to defeat summary judgment. *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). "More than a scintilla of evidence exists when the evidence supporting the finding, as a whole, rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." Id. CANFORA is simply not able to do that. Further, the Agreement is clear and precise and reasonable and fair-minded people could not come to different conclusions regarding its meaning and effect, and it establishes that BCA is entitled to judgment as a matter of law. The Agreement is an enforceable contract and meet the elements of mutual assent expressed by a valid offer and acceptance, adequate consideration, capacity and legality.

27. Because of the accord and satisfaction CANFORA cannot present even a mere scintilla of evidence raising a genuine issue of material fact supporting his right to bring these actions, much less each element of his causes of action against BCA. *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009).

Release

28. In that Agreement, that in return for BCA and Miller's waiver of all attorneys' fees and expenses, CANFORA released BCA and Miller from any further obligation of representation and related claims. The Agreement's ethical considerations and enforceability is discussed in the 2000 Texas Supreme Court case *Keck v. National Union Fire Ins. Co*:

> "Contracts between attorneys and their clients negotiated during the existence of the attorney-client relationship are closely scrutinized. *See Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964). Because the relationship is fiduciary in nature, there is a presumption of unfairness or invalidity attaching to such contracts. **3** *See Ames v. Putz*, 495 S.W.2d 581, 583 (Tex. Civ. App. -- Eastland 1973, writ ref'd). Further, our disciplinary rules forbid an attorney from making an agreement that prospectively limits the attorney's malpractice liability to the client unless (1) the agreement is permitted by law, and (2) the client is independently represented in making the agreement. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(g)."

Agreements with release language like the one here are “closely scrutinized” but not void *ab initio* or on their face. The presumption of unfairness or invalidity attaching to such contracts can be rebutted by evidence that it was fair and reasonable, and that CANFORA was informed of all material facts relating to the release. Mark Canfora, who fashions himself as an astute businessman, requested the waiver of attorney’s fees and expenses and agreed to the release of liability. Unlike in *Keck* where the summary judgment record did not establish the state of Granada's information or that the agreement was fair and reasonable, this record does. There, the only evidence that KMC identifies is a recitation in the release that KMC "advised Granada in writing that independent representation [would be] appropriate in connection with the execution of this Agreement." This bare recitation is not sufficient to rebut the "presumption of unfairness or invalidity attaching to the contract." *Archer*, 390 S.W.2d at 739; *see also Ames*, 495 S.W.2d at 583. Accordingly, KMC has not carried its summary judgment burden. Because KMC has not established that the release agreement is a complete defense to National's and INA's equitable subrogation claim, we next consider if any other defenses are available to KMC. *Keck v. Nat'l Union Fire Ins. Co.*, 20 S.W.3d 692, 699 (Tex. 2000). BCA and Miller recognized at the time it entered into this Agreement that CANFORA requested that disciplinary rules forbid an attorney from making an agreement that prospectively limits the attorney's malpractice liability to the client *unless* (1) the agreement is permitted by law, which it is and (2) the client is independently represented in making the agreement. BCA and Miller do not know if CANFORA was independently represented in making the agreement, but upon information and belief CANFORA had formed BP Oil Spill Malpractice LLC and was working with the Kassab Law Firm when CANFORA entered into this Agreement on June 23, 2018, signed the Settlement Closing Statements and received the settlement funds with attorneys’ fees and expenses waived.

29. Moreover, CANFORA has breached the Agreement by filing this lawsuit, and did not return the amounts he negotiated for the release in the first place. Basically, CANFORA feels like

he can have his cake and eat it too. Such is not the law. Moreover, by negotiating this agreement in the first place at arm's length and then suing anyway, CANFORA is in breach for which BCA and Miller seek their legal costs of defense. Alternatively, if this Court does not deem the release conclusive and binding, BCA and Miller would request immediate reimbursement of all monies previously paid. *See Alexander*, *Alexander v. Handley*, 136 Tex. 110, 115-17, 146 S.W.2d 740, 742-43 (1941); *BACM 2001-1 San Felipe Rd. Ltd. P'ship v. Trafalgar Holdings I, Ltd*., 218 S.W.3d 137, 146 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). The consideration for BCA and Miller entering into the Agreement with CANFORA was CANFORA's agreement to accept a waiver of attorney's fees and expenses and agree to discharge BCA and Miller as CANFORA's attorneys and not make any further claims against BCA and Miller. Having breached that Agreement, BCA and Miller are entitled to enforcement of the prior agreement and terms of release or alternatively at least the immediate reimbursement of his ill-gotten gains.

30. By this motion, BCA and Miller are entitled to judgment as a matter of law because Plaintiffs cannot produce any competent evidence to raise a genuine issue of material fact on one or more of the following essential elements of CANFORA's causes of action. Specifically, and as discussed herein, CANFORA voluntarily entered into an Agreement with BCA and Miller that was fair and reasonable, and that CANFORA was informed of all material facts associated with the release because he requested the waiver of fees and expenses in return for the release and negotiated its terms. Whether CANFORA sought outside counsel prior to signing it is unknown to BCA and Miller. BCA and Miller did not fail to make any disclosures to CANFORA.

31. BCA and Miller are entitled to summary judgment that the CANFORA take nothing by this action because the movant has pleaded and established by summary judgment evidence each element of the affirmative defense of accord and satisfaction and release, barring any recovery by the Plaintiff.

32. Lastly, the Dallas Court of Appeals held that without diminishing to any degree the ethical obligations of attorneys, courts are mindful that the parties to an agreement determine its terms, and courts must respect those terms absent compelling reasons to do otherwise. *See Royston*, 467 S.W.3d at 503-04. *Douglas-Peters v. Cho, Choe & Holen, P.C.*, No. 05-15-01538-CV, 2017 Tex. App. LEXIS 1836, at *49-50 (Tex. App.—Dallas Mar. 3, 2017, no pet.). CANFORA has not pled unconscionability or illegality as an affirmative defense to the Agreement's enforceability. CANFORA simply cites *Keck* for the required scrutiny of the and rebuttable presumption of invalidity of the Agreement. More importantly, violation of a rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached. TEX. DISCIPLINARY R. PROF'L CONDUCT preamble P 15, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998) (TEX. STATE BAR R. art. X, § 9) . Restatement (Third) of the Law Governing Lawyers. *Further,* Restatement (Third) Of The Law Governing Lawyers § 52(2) & cmt. (f) (2000) provides that a rule or statute regulating the conduct of lawyers does not give rise to an implied cause of action for professional negligence or breach of fiduciary duty. *Two Thirty Nine Joint Venture v. Joe*, 60 S.W.3d 896, 905 (Tex. App.—Dallas 2001), rev'd, 145 S.W.3d 150 (Tex. 2004). For completeness, the provision states however that it may be considered by a trier of fact in understanding and applying the standard of care for malpractice or determining a breach of fiduciary duty. *Id.* § 52(2). *Two Thirty Nine Joint Venture v. Joe*, 60 S.W.3d 896, 905 (Tex. App.—Dallas 2001), rev'd, 145 S.W.3d 150 (Tex. 2004).

The absence of any legal or fiduciary duty after the accord and satisfaction and release

33. CANFORA and BCA and Miller entered into the Agreement to end all legal ties between each other and establish and end BCA and Miller's representation of CANFORA related to the BP Oil Spill. The Agreement specifically provides that BCA and Miller will no longer represent CANFORA in the BP Oil Spill Litigation:

> "Client hereby accepts this consideration in full satisfaction of all damages or claims owed to Client or that may be owed to Client arising from this cause of action, including any claims against BP, Halliburton, Transocean, or other Defendants in the MDL 2179 other than for *his* individual claim. Client acknowledges that if he wishes to pursue his individual claim or any other claims against BP, Halliburton, Transocean, or other Defendants in the MDL 2179 he will have to seek other counsel as Attorneys will be withdrawing as attorneys of record in those cases."

34. At that point, BCA and Miller ceased to owe a duty to CANFORA, and hence could not breach a duty or proximately cause any damages to CANFORA. See *Maldonado v. Sumeer Homes, Inc.*, 05-12-01599-CV, 2015 WL 3866561, at *2 (Tex. App.—Dallas June 23, 2015, no pet.). Clearly, BCA and Miller did not owed a duty to CANFORA after the execution of the Agreement. Not owing a duty, there could not be a breach of duty, nor any proximately caused damages.

Inability Of The Investor Plaintiffs To Bring A Claim For The Losses Of The Corporation

35. Martin, Lengacher, Gluck and Mast's had no viable Underlying Claims. With respect to the legal malpractice claim, Plaintiffs must establish both that Defendants breached the standard of care in handling the claims and the amount of any damages that would have been recoverable and collectible in the underlying litigation. *Akin, Gump, Strauss, Hauer & Feld, LLP v. Nat. Devel. and Research Corp.*, 299 S.W.3d 106, 112 (Tex. 2009); *Cosgrove v. Grimes*, 744 S.W.2d 662, 666 (Tex. 1989). In other words, the Plaintiff must try the underlying claim and win in order to establish any potential liability for legal malpractice.

36. Texas law is clear that a shareholder cannot individually recover damages suffered by a corporation or separate legal entity including loss of the shareholder's investment. *Orion Refining Corp. v. UOP*, 259 S.W.3d 749 (Tex. App-Houston [1st Dist. 2007, review denied); *Kenneth Hughes Interests, Inc. v. Westrup*, 879 S.W.2d 229 (Tex. App-Houston [1st Dist. 1994, writ denied). In *Westrup*, a corporation and its shareholders brought suit against the lessor as a result of issues regarding the property. The shareholders attempted to recover the loss of their investment. The Court rejected the shareholders' position. The Court reasoned that if a shareholder is injured

by an act that damages the company, the shareholder is made whole when the company recovers. *Westrup*, 879 S.W.2d at 2234-35(citing *Wingate v. Hajdik*, 795 S.W.2d 717, 719[(Tex. 1990]).

37. Plaintiffs Martin, Lengacher, Gluck and Mast all filed claims with the BP claims Program. As part of the form, the claimant was required to describe their occupation and provide a description of how the Spill economically effected them. They all stated that they were fractional owners in a real estate development and identified the development as Infinity Blu. (CS 0000112-131); (CS000136-155); (CS000333-352);(BCA 002751-2769. The evidence is uncontested that all four were shareholders in Infinity Blu (or Ohio Holdings) and are seeking to recover their lost investment in the development. The evidence is further undisputed that both Infinity Blu and Ohio Holdings settled their BP claims.

38. Accordingly, Plaintiffs Martin, Lengacher, Gluck and Mast cannot nor could not legally recover in any claim against BP and therefore cannot establish that they would have recovered in the underlying litigation and their claims herein fail as a matter of law.

39. Further, because of the accord and satisfaction and release entered into by the corporation Infinity Blu and the MDL Defendants, the "CANFORA investors" cannot present even a mere scintilla of evidence raising a genuine issue of material fact supporting each element of their causes of action against BCA. *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009).

40. The investor group of Plaintiffs in this litigation maintain that the company they invested in, Infinity Blu, lost money due to the oil spill. However, Infinity Blu filed its own claim in the BP oil spill litigation. It was pursued by an attorney for the company, who then hired Miller as outside counsel on that case to prosecute that claim. Miller in turn retained BCA to assist in the handling as well. In addition, some of the individual "investors" in Infinity Blu also entered into "me too" contracts for potential claims for losses associated by Infinity Blu. Although throughout the early years of the litigation real estate "deals" were excluded from compensation consideration (see terms and conditions of the Gulf Coast Claims Fund and the MDL Economic and Property

Settlement Class Action), several "categories" of excluded cases and opt out cases were later reviewed by a panel of assigned "neutrals", (which included Judge Barbier's own Magistrate and former Mississippi Attorney General Michael Moore). The company Infinity Blu was a "planned project" for a real estate development that never really got off the drawing board. In addition, the project organizer, Nathan Glick, died in a car wreck shortly after the oil spill occurred, essentially ending any potential opportunity for the development and completely unrelated to the spill.

41. Due to the highly unlikely ability for Infinity Blu to proceed past a summary judgment in the BP oil spill litigation, the company accepted a relatively small settlement for all claims it owned. The investors in Infinity Blu would obtain any compensation for any loss associated to Infinity Blu through a distribution from the company, NOT from a direct action for losses. A shareholder to a company does not "stand in the shoes" of the corporation to initiate litigation on behalf of the company nor make a claim for a loss sustained by an investor to the company. Accordingly, the Infinity Blu investors HAD NO STANDING to bring any claim in the BP oil spill litigation and therefore HAVE NO STANDING to make a claim against prior counsel. *MBank Abilene, N.A. v. LeMaire,* 1989 Tex. App. LEXIS 801 (Tex. App.-Houston [14th Dist.] 1989) (designated for published) (quoting *Commonwealth of Mass. v. Davis*, 140 Tex. 398, 168 S.W.2d 216, 221-22 (1942)). *Bilodeau v. Webb*, 170 S.W.3d 904, 912 (Tex. App.—Corpus Christi 2005, pet. denied). The only claims the Infinity Blu investors can make in this case are for failed representation of an investor claim that is legally barred from being pursued. For these grounds alone, each of the investor claims should be DISMISSED.

42. Moreover, when the Infinity Blu entity DID settle, it provided a full release of claims. This release would absolve BP or any other Defendant to the oil spill litigation from further liability and would be the only method of recourse for individual investors. Since Infinity Blu RELEASED the corpus of the company from the litigation, there is not only a lack of derivative standing, but an underlying release of the claims remitted by the company itself.

43. Black-letter corporations law provides that a cause of action for injury to the property of a corporation, or the impairment or destruction of its business, is vested in the corporation, as distinguished from its stockholders, even though it may result indirectly in the loss of earnings to the stockholders. *MBank Abilene, N.A. v. LeMaire*, Supra. Generally, the individual stockholders have no separate and independent right of action for injuries suffered by the corporation which merely result in the depreciation of the value of their stock. Id. *Bilodeau v. Webb*, Id.

44. For these reasons as well, the investor claims should be in all things DISMISSED.

Mark Canfora's individual claim is barred by the Statue of Limitations

45. Mr. Canfora and Canfora Investments filed their claims against BCA and Miller more than 2 years after the end of representation and therefore are barred by the Statue of Limitations.

46. The statute of limitations for legal malpractice claims in Texas is two years. *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988). If the claim is one for legal malpractice, the two-year limitations period applies whether the Plaintiff pleads the claim in tort, contract, fraud or some other theory. *Streber v. Hunter*, 14 F. Supp. 2d 978, 985 (W.D. Tex. 1998); *Burnap v. Linnartz*, 914 S.W.2d 142, 148 (Tex. App.—San Antonio 1995, writ denied).

47. Mark Canfora Investments was dismissed when he, by his own choice choose not to file a response to PTO 65. PTO 65 was an order coming from the MDL 2179 Court that mandated a form that had to be signed by the client be filed by the April 11, 2018. Canfora filed two forms, one on behalf of Prepaid Real Estate and one on behalf of Fraction Real Estate (Mark Canfora). At the recommendation of the Case Strategies group, who were helping to prepare these forms for various claimants, he chose not to file a claim on behalf of Mark Canfora Investments.

48. BCA responded to the Courts Show Cause Order on behalf of Mark Canfora, Individually. However, the Court ultimately dismissed his individual claim on July 10, 2018. BCA notified him of this dismissal on July 13, 2018 and informed him that we would not

be appealing this decision. Canfora attempted to appeal the decision on his own on August 7, 2018. Canfora latter apparently hired new counsel as evidenced by the Motion to Substitute. Canfora did not file suit against the Defendants for their alleged wrongdoing until August 6, 2020, more than two years after any alleged wrongdoing on the part of the Defendants.

Lori K. Slocum, Robert Schwartz And Mary Cathryne Caraway Jacob Did Not Owe Or Breach A Fiduciary Duty To Plaintiffs

49. To establish breached a fiduciary duty, a Plaintiff must prove that a fiduciary duty existed between the parties. *Lori K. Slocum, Robert Schwartz, and Mary Cathryne Caraway Jacob did not perform any legal work for CANFORA.* As attorneys employed by BCA, their names were put on the firms signature block simply and solely for the purpose of filing MDL pleadings. That alone did not create a fiduciary duty and they seek summary judgment on the grounds that there is no evidence of any element of Plaintiff's breach of fiduciary duty claim against them.

VI. REQUEST FOR COSTS AND ATTORNEY'S FEES

50. Pursuant to Texas Civil Practice And Remedies Code Sec. 10.001 et seq. BCA request an order from the Court that CANFORA and the investor Plaintiffs pay its reasonable expenses incurred in defending this case, including reasonable attorney's fees. Specifically, CANFORA's lawyers signed pleadings bringing this frivolous lawsuit for the improper purpose of harassing BCA to and as a "shake down" to bully them into a settlement. CANFORA's legal contentions in the pleadings are not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. It is rife with tantalizing and fictitious allegations of fraud, theft, and such solely to prompt the Defendants to pay something just to make it all go away and avoid public scrutiny and character assassination (The case was reported to the legal press when it was filed by someone by way of example. Not a SINGLE allegation or other factual contention in the pleadings have evidentiary or legal support. Likewise, further discovery would only operate to further disprove them.

VII. PRAYER

WHEREFORE PREMISES CONSIDERED, Defendants request that the Court dismiss the claims against them with prejudice, that the Court award attorneys' fees and costs, and for any other and further relief to which they may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been forwarded in accordance with the Texas Rules of Civil Procedure to all counsel of record on this 10th day of January, 2023

/s/ Brent W. Coon
BRENT W. COON

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