ARBITRATION BEFORE JAMS

JENNER & BLOCK LLP,	*	
	*	
Claimant,	*	JAMS ARBITRATION NO. 1310019934
	*	
vs.	*	
	*	Jerry Grissom, Esq.
PARALLEL NETWORKS, LLC,	*	Arbitrator
and EPICREALM LICENSING,	*	
LP,	*	
Respondents.	*	

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ARBITRATION PROCEEDINGS
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E X H I B I T L I S T

REPORTER'S NOTE: Pursuant to all Parties' requests, copies of

P R O C E E D I N G S

(On the record at 9:40 a.m.)

ARBITRATOR GRISSOM: All right. Let's go on the record. Good morning. We are on day nine of arbitration in the Jenner v. Parallel case. And I understand from last night I think our plan was to hear from Mr. Margolis this morning. I understand that counsel for Parallel has an objection.

Mr. Alibhai.

MR. ALIBHAI: Sure. Briefly, Your Honor. Number one, this witness has testified for four-and-a-half hours on direct and redirect. Number two, this witness was -- and most importantly, was not disclosed as a rebuttal expert witness or rebuttal witness in any sense. Jenner & Block went through the trouble on its witness list of designating four people who would be listed as rebuttal witnesses, two of whom were experts and two of whom were undisclosed fact witnesses. We made an objection to those fact witnesses. One was resolved and one was kept pending whether they would need to actually urge the motion. That was the hearing that we delayed. And, number three, this witness has been in the room and discussed testimony with a number of witnesses who have all been here during the course of this case, and thus, has had the opportunity to discuss with all those people, with counsel present, the discussions with both expert witnesses and fact witnesses, and is now going to come back and rebut things that

he's heard based upon all conversations with those people as well. So his testimony is colored by the conversation he's had over the course of these proceedings. So those are the three reasons why we object to him testifying again.

ARBITRATOR GRISSOM: All right.

MR. JIMENEZ-EKMAN: I'm happy to go -- I'll actually go in reverse order and take the last objection first, if I may.

ARBITRATOR GRISSOM: Whatever order you want is fine.

MR. JIMENEZ-EKMAN: Mr. Margolis has -- he's been designated as Jenner & Block's partnership representative and entity representative, and so, yes, he has attended these proceedings, but it's perfectly proper for him to participate as the representative and then offer testimony. I'll note that Mr. Margolis is a relatively -- only in this way, a relatively clear analog of Mr. Fokas who testified after being present during numerous proceedings and presumably had discussions with counsel and saw all the evidence. So there's no reason Mr. Margolis can't offer testimony for a similar reason.

Second, as a relates to the disclosure issue, Mr. Margolis was disclosed obviously way back in April. He was deposed at length by Mr. Alibhai. He's already testified. There's no issue about disclosure. As it relates to the form of the witness list, unfortunately, I can only say it's in the

nature of no good deed goes unpunished. Parallel Networks didn't designate anybody as rebuttal witnesses and instead said we can call anybody as rebuttal witnesses. Here we specifically designated some folks as rebuttal, fact and expert witnesses to make clear that they weren't going to be called in our opening case.

And as it relates to the fact witnesses, those were folks -- and the reason that there was an objection is that one of them hadn't been disclosed earlier on. We obviously resolved all those issues. But the bottom line here is -- you know, the purpose of these disclosures is to avoid surprise. There cannot be any possible claim for surprise here or prejudice.

And then finally, as it relates to length, as the parties were discussing yesterday, this is going to be a short exam. It's clean-up on certain issues. And I do not think this will unduly delay anything.

ARBITRATOR GRISSOM: The objection is overruled.

Mr. Margolis, you have previously been placed under oath. Do you remember that?

THE WITNESS: Yes.

ARBITRATOR GRISSOM: And you know that you're still under oath.

THE WITNESS: Yes.

ARBITRATOR GRISSOM: Thank you.

FURTHER DIRECT EXAMINATION

BY MR. JIMENEZ-EKMAN:

Q. Mr. Margolis let me start with some issues that came up in Mr. Fokas' testimony.

A. All right.

Q. Do you recall generally Mr. Fokas' testimony about the sale of the 335 and the 554 from epicRealm Licensing to Parallel Networks?

A. Yes.

Q. Do you recall in general terms his testimony about consultation with Jenner & Block in connection with that?

A. I do.

Q. Did Mr. Fokas or epicRealm Licensing or Parallel Networks consult with Jenner & Block before agreeing to enter into the transaction that we're talking about?

A. Not really.

Q. Did Jenner & Block get any input into whether or not that transaction would be a good or bad thing for the enforcement program?

A. No. The decision to sell and I believe the actual papers and formalization of the sale of the patents from epicRealm Licensing to Parallel Networks was done before Jenner & Block was told about it.

Q. And what -- when you did learn about it, what did you understand the purpose of the sale was?

A. My understanding was that the purpose of the sale from epicRealm Licensing to Parallel Networks was to extinguish any rights in the patent licensing enforcement program that shareholders of the original epicRealm entity would have. So in other words when, epicRealm went bankrupt, the people who had invested and lost money investing in epicRealm they retained a profits interest in the licensing and enforcement program should there have been any recovery in the cases. When the patents were transferred to Parallel Networks, those shareholders lost their interest in the licensing program.

Q. We heard testimony from an inventor of the 335 and the 554, Mr. Lowery?

A. Yes.

Q. Were there other inventors?

A. Yes. There were two other inventors, Ronnie Howell and Andrew Levine.

Q. Mr. Lowery testified that he was receiving compensation in connection with the patents still?

A. That's correct, he was.

Q. And did -- what's the status of Mr. Howell and Mr. Levine?

A. Mr. Howell and Mr. Levine, my understanding is that they receive no compensation from Parallel Networks.

Q. Now, there was testimony regarding consultants that Parallel Networks used. Do you remember that testimony

generally regarding Matt Dunn and Jack Wybenga?

A. Yes.

Q. And what kind of consultants were those?

A. So Mr. Wybenga and Mr. Dunn were technical consultants that were employed by Mr. Fokas to do -- I guess I would call it sort of due diligence and investigation work on various, you know, companies' Web sites and the like.

Q. So as you --

ARBITRATOR GRISSOM: I'm sorry. What was the second name? I've heard the name Wybenga.

THE WITNESS: Matt Dunn, D-u-n-n.

ARBITRATOR GRISSOM: Thank you.

THE WITNESS: He's an actor/computer programmer. An interesting fellow.

Q. (BY MR. JIMENEZ-EKMAN) And you said they were employed as consultants. Did you understand that Parallel Networks incurred incremental costs by using those folks?

A. Yes. As I think I testified, they were employed by Mr. Fokas. You know, Mr. Fokas paid them for their time.

Q. You're saying Mr. Fokas. You mean Parallel Networks?

A. Parallel Networks --

Q. Okay.

A. -- right, paid them for their time. And before that, epicRealm.

Q. And did you, in fact, need approval to use that

resource in connection with your work?

A. Yes. Because they were cost that were going to be incurred by Mr. Fokas, he wanted us to inform him when we were going to ask Mr. Dunn -- or before Mr. Dunn or Mr. Wybenga to do work on the various matters.

Q. And were there times when you suggested or asked -- I'm sorry. I'll withdraw that.

Were there times when you suggested the use of Mr. Dunn and/or Mr. Wybenga and Mr. Fokas indicated it shouldn't be done or wasn't necessary.

A. Yes. And I think there's already been at least some documents that have mentioned this at various times. But there were times when we would request -- we would ask if Mr. Fokas wanted us to have, say, Mr. Dunn look at something, and often Mr. Fokas would tell us not to do that.

Q. Do you recall testimony about whether certain issues in the Oracle case were shared with Mr. Fokas on a timely basis?

A. Yes.

Q. Let's start with this issue of whether foreign sales were improperly included. Do you recall that testimony generally?

A. Yes. I think we've heard a lot about foreign sales in this case.

Q. Was that information discussed with Mr. Fokas by

Jenner & Block lawyers?

A. Yes.

MR. ALIBHAI: Object to the form that asks him to testify as to things that are not within his personal knowledge.

MR. JIMENEZ-EKMAN: May I withdraw it and reask it?

ARBITRATOR GRISSOM: I don't think you need permission to withdraw it.

MR. JIMENEZ-EKMAN: Okay.

Q. (BY MR. JIMENEZ-EKMAN) Were you a participant in conversations and communications with Mr. Fokas and other Jenner & Block lawyers in which these issues were discussed?

A. Yes.

Q. And how -- can you give us a sense as to how often that happened?

A. So as I think has already been testified to, we included foreign sales in the damages expert report. There were a lot of discussions relating to whether or not we should do that and what the legal basis was for that. Mr. Fokas was -- was -- participated or was aware of some of that discussion. Certainly Mr. Fokas -- I discussed with Mr. Fokas the fact that Oracle was not including foreign sales and believed that foreign sales were not recoverable. And Oracle filed a motion for summary judgment that there be no foreign

sales, and I believe that Mr. Fokas received that motion for summary judgment. And if nothing else, we certainly -- we prepared for a hearing on the motion and discussed all those issues with Mr. Fokas. And then it was also discussed at the mediation in October which has been testified about a lot.

Q. How did you come up at the mediation?

A. There's been some testimony about the offers at the mediation. So the initial offer that Parallel Networks made at the mediation, one of the rationales that we provided to the mediator for our opening offer of about $90 million was we said that we understood that Oracle did not think foreign sales were recoverable, so we've taken foreign sales out of the damages model in arriving at this number.

Q. So that issue that there was a dispute over foreign sales was used as kind of the rationale for the opening demand?

A. Right. It was one of the factors that we used in explaining our opening offer to the mediator.

Q. Were there other potential risks, particularly in the damages case in Oracle, discussed with Mr. Fokas?

A. Yes. For example, in preparing Mr. Wagner's expert report, myself and Mr. Bennett, and Mr. Bennett alluded to some of these, we had extensive conversations with Mr. Fokas about what -- about the royalty rates that we were going to be seeking on the very Oracle products, and we had these disputes

with -- regarding this license agreement from epicRealm's predecessor that was being used as the starting point and whether that was appropriate. All these things were things that were discussed and -- with Mr. Fokas. He was kept in the loop on all these issues.

Q. Let me ask you about the day you sent the letter of termination, January 2nd, 2009.

A. Okay.

Q. All right. There's been testimony, I think, both from you and from Mr. Fokas about a call that you had before sending that, correct?

A. Yes.

Q. And first of all, leading up to that call, did you have any authorization from folks at the firm of Jenner & Block to express any position about what compensation Mr. -- I'm sorry -- Parallel Networks might owe Jenner & Block?

A. No. As I think I've previously testified, I did not have that type of authorization.

Q. And you heard Mr. Fokas testify that the issue of $10 million hourly rates came up during the call.

Do you recall that testimony?

A. I do.

Q. Did you bring that up during the call?

A. No.

Q. Did you express to Mr. Fokas that the firm expected

any particular payment?

A. No. And as I think is reflected in one of the e-mails we went through in my direct testimony, as I've said, that was something that was raised by Mr. Fokas. It was not raised by me.

Q. Let me move on to the QuinStreet case for a while.

Now, was -- was QuinStreet -- did it occupy a position in the supply chain similar to that of Oracle as Mr. Meek suggested?

A. No.

Q. Can you explain that?

A. I mean, it really -- Mr. Meek sort of laid the groundwork in going through his funnel in the sense that, you know, Oracle -- if you were going to look at the market that way, you know, Oracle is up at the top of that funnel, at the narrow point because, you know, they're a supplier of software. QuinStreet, we eventually learned, sort of occupied a role at the bottom of the chain and also a role just above the bottom of the chain if you look at its Web-hosting business.

Q. Now, there's been a question of a number of witnesses regarding the counterclaim that was originally filed by Baker Botts and then was subsequently --

A. Right.

Q. -- filed by Jenner & Block.

Do you have that testimony generally in mind?

A. Yes.

Q. Now, in that counterclaim did either the version filed by Baker Botts or the later version filed by Jenner & Block, did either of those specify which segment of QuinStreet's business was at issue?

A. No, you wouldn't do that.

Q. Why wouldn't you do that?

A. First of all, it's a notice pleading requirement, so you wouldn't actually -- you wouldn't actually specify the claims or the exact sort of segments of the business. And second of all, once you have something that you have an accusation of infringement on, that's sufficient to satisfy your rule on basis, at least in my opinion.

Q. And did anyone contemporaneously ever suggest there was no basis under Rule 11 to assert a claim against QuinStreet?

A. No, I mean, QuinStreet's attorneys, they were -- they said lots of the not nice things about us, but they never said that we violated Rule 11.

Q. And as it relates to what the good faith basis was, you had some information about the DSS Web-hosting business of QuinStreet from the Herbalife case, yes?

A. That's right.

Q. And did that provide, in general terms, a basis for accusing QuinStreet as a whole entity as opposed to a

particular segment?

A. Yes, it did.

Q. Now, there's been also some testimony in documents showing that in the course of discovery, certain platforms that QuinStreet used were mentioned, correct?

A. That's right.

Q. Now, is it -- is it the case that the use of those platforms, you know, definitely indicates that the infringement was going on by their use?

A. No. I mean, I think as Mr. Lowery testified, certainly as Mr. Bennett testified, as Mr. Meek testified, there's certain information that you get by knowing what the platforms are that create a universe of what might potentially infringe, and that's sort of where -- you know, at least from my perspective, that's where we were in the QuinStreet case.

Q. And, in fact, we heard testimony about how these platforms can be deployed in infringing ways, right?

A. Yeah. I mean, I think that was the language that Mr. Lowery used that if you have these things, it -- they can be configured in a way that would infringe.

Q. Now, before Jenner & Block ultimately withdrew from QuinStreet, was it ever confirmed that the DMS side of the business infringed or how much of it infringed?

A. That -- no, my understanding was that was not done.

Q. And in that connection, you recall the testimony that

the original thought was that the other side, the DSS Web-hosting side of the business, had more customers, correct?

A. Yes. When we got involved in the case, we were told QuinStreet was a Web-hosting business. And then as we got involved in discovery, particularly when we got real discovery in -- towards the spring of 2008, we learned that QuinStreet, in fact, was not really a Web-hosting business, that they had this small Web-hosting component, but that most of the business was something else.

Q. Now, when Mr. Fokas originally understood that QuinStreet was a Web-hosting business, what did Mr. Fokas communicate to you and the rest of the Jenner team about how hard he wanted the case to be pressed?

A. It was always very clear from Mr. Fokas that we were to focus principally and primarily on the Oracle case and sort of litigate the QuinStreet case as sort of the secondary case. Once we learned that QuinStreet had this very small Web-hosting business, Mr. Fokas' interest in the case declined even further, and then the strategy really became just to, you know, in effect, delay it as long as possible and not do very much on the case.

MR. JIMENEZ-EKMAN: And, Mr. Arbitrator, we're going to refer to Claimant's Exhibit 120 here, Claimant's 120.

Q. (BY MR. JIMENEZ-EKMAN) Showing you Claimant's 120. You've seen this before, correct?

A. Yes. I think this has been discussed in several different people's examinations.

Q. And does this reflect this -- the receipt finally of information that showed the DSS business was much smaller than previously believed?

A. Right. Again, as I think at least somebody had discussed, we had received these interrogatory responses in the spring of 2008 that made it very clear that QuinStreet's Web-hosting business was, in fact, very small.

Q. And if you look at the last sentence in your e-mail here that says, quote, Terry, if you would like me to have Matthew start looking at these Web sites, comma, let me know --

A. Yeah.

Q. -- period, end quote.

Did I read that correctly?

A. Yes.

Q. And who's Matthew there?

A. Yes. So Matthew is the Matthew Dunn, the technical consultant that I mentioned earlier.

Q. And did you get a response to this suggestion that Mr. Dunn start working on it?

A. Yes. Mr. Fokas responded to this.

Q. And what did he respond?

A. He told me that I should not have Mr. Dunn do anything.

Q. And did you have an understanding of why he indicated that?

A. Yes.

Q. And what's that?

A. That the -- again, once we learned that the Web-hosting business was very small, there was not really a pressing need to push this issue further, particularly since by this time the schedules in the Oracle case and QuinStreet case had been separated.

Q. Now, you heard in general some testimony about the progress or lack thereof in the QuinStreet case. And do you have that testimony generally in mind?

A. Yes.

Q. Now, over that time period that Jenner & Block handled the QuinStreet case, did you add value, did you move the case along?

A. As Mr. Bennett testified, we did, and I would agree with that testimony.

Q. And in what ways did you move the case along?

A. You know, as several witnesses have mentioned, there were extensive discovery fights. We spent a lot of time convincing Judge Robinson that QuinStreet's discovery was not served correctly, it was not in the proper form, it was not consistent with her standing orders, and we were successful in that endeavor. We met the client's objective to get the case

slowed down and detached from the Oracle case. And we also -- you know, we also gained valuable information about the business.

Q. And you say "valuable information." Part of that indicated that it wasn't necessarily worth pursuing in a hard way?

A. Yeah, we were able to understand that this was not a -- that QuinStreet was not a threat to the licensing program as some of the -- certainly was a sort of initially thought when they filed the declaratory judgment.

Q. And that was because they had so few Web-hosting customers?

A. That's right. They weren't going to materially affect, you know, Parallel Networks' ability to find and sue potential targets.

Q. And that's because any settlement with QuinStreet would only implicate on the Web-hosting-side of its customers?

A. Well, not only -- yes. And not only did the ultimate settlement, as there's been testimony about, go that way, but back in November of 2008 when I am having discussions with QuinStreet about settlement, it's along those same terms.

Q. Let me change topics to the re-examination proceedings for the 554 and 335.

A. Okay.

Q. Did Jenner & Block have a role in those re-examine

proceedings?

A. Yes.

ARBITRATOR GRISSOM: I'm going to push the pause button for this just one second.

MR. JIMENEZ-EKMAN: Oh, sure.

ARBITRATOR GRISSOM: Okay. Go ahead. Thank you.

Q. (BY MR. JIMENEZ-EKMAN) Okay. Can you describe the role that Jenner & Block played in the re-examination proceedings?

A. Yes. We had -- we designated an attorney at Jenner & Block to assist the two Baker Botts attorneys that were principally handling the re-examination. And because of the protective order, which there's been some discussion about these protective orders, anybody who was actively involved in the litigation like myself could not work on the re-examination. So we designated a Jenner & Block partner named Steve Tryvus --

Q. That's T-r-y-v-u-s?

A. T-r-y-v-u-s. -- to assist the Baker Botts attorneys in the re-examination process.

Q. And as you understood it, was an arrangement or understanding reached with Parallel Networks about how that work would be treated?

A. Yes.

MR. ALIBHAI: Object to the form. It's calling for hearsay and lack of personal knowledge.

Q. (BY MR. JIMENEZ-EKMAN) Do you have an understanding -- I'll withdraw it.

Do you have an understanding, based on your personal knowledge, as to what the arrangement was between Parallel Networks and Jenner & Block?

A. I do.

Q. And what's your understanding of the arrangement as it relates to the re-exam proceedings?

A. Myself and others had discussions with Mr. Fokas after we became involved in the case and learned about the re-examinations about whether it made sense for Jenner to have somebody participate in the re-examination. Without boring you with more patent law in this case, that actually was necessary because you don't want to be accused of having committed inequitable conduct, so you need to disclose to the patent office prior art and other things relating to invalidity that you learn about in the course of the litigation. So you need to have somebody who could be involved in conveying that information to the -- to the firm that's handling the re-examination.

Q. But as we heard previously from Mr. Meek, for example, that can't be the same person who was on the trial team, right?

A. That's right. The protective orders prohibit people who have access to highly confidential information in the re-examination -- or sorry -- in the litigation for participating in the re-examination. And that actually occurs for a good reason. It occurs because the defendants don't want you to use their own internal highly confidential information to write claims specific to their products in the patent office.

Q. Was Jenner & Block -- was the arrangement that Jenner & Block would be incrementally paid for the re-exam work?

A. No. When we discussed the re-exam -- how to handle the re-examination with Mr. Fokas, he agreed that it made sense for us to have somebody have some involvement in the re-examination, and we agreed that that would simply be part of the overall representation under the contingent fee agreement.

Q. Under the contingent fee agreement that covered Oracle and QuinStreet?

A. That's right, as it related to those matters.

Q. And you heard Mr. Meek testify that in his view the re-examination was won. Do you recall that generally?

A. I do.

Q. Do you completely agree with that?

MR. ALIBHAI: Objection. Number one, he said that he was walled from the re-examine, so any knowledge he has

of the re-exam comes after the fact. Number two, he's not been designated as an expert to testify about the effect of the re-examination proceedings. So it's improper for him to now testify as to what his understanding is for somebody who's not registered at the PTO to come and explain that I've gone, after the fact, looked at it, even though I wasn't allowed to work on it during that time, and I'm going to give you an expert opinion as to whether I think it's a win or not.

MR. JIMENEZ-EKMAN: May I respond?

ARBITRATOR GRISSOM: Yes.

MR. JIMENEZ-EKMAN: Three things. First of all, Mr. Meek, who originally said he was lead counsel, but then admitted that he was also walled off, gave this testimony, number one. Number two, he gave the testimony without any expert disclosure of any kind. And number three, respectfully, although this is a response to Mr. Meek's testimony, this cow is out of the barn, Mr. Margolis testified about these issues in his direct exam.

MR. ALIBHAI: If he's already testified about it in his direct exam, then I'm going to add that it's cumulative and repetitive and asked and answered. But Mr. Meek was barred from looking at the re-exam during the time that he was counsel, and then the bar runs out after some period of time and then he worked on it. That's what he testified to, that once the protective order ran out, he worked on it. This

lawyer was never engaged to work on it at any point, at any time, ever. He has acquired all of his knowledge after the fact, which is exactly the argument they made about Lowery, and now they want to say, but our witnesses can do that.

ARBITRATOR GRISSOM: Overruled.

Q. (BY MR. JIMENEZ-EKMAN) Do you completely agree with that, sir?

A. No, I mean, I've been involved in several re-examinations, and typically you say you won the re-examination only if the original claims of the patent or at least some subset of the original claims of the patent are included in the re-examination certificate.

Q. And based on the certificate and Mr. Meek's testimony, did that happen here?

A. No. All the original claims of the 554 and 335 patent were canceled and then amended.

Q. And as Mr. Meek has testified, what's the consequence of that?

A. So when the -- as I testified in my direct testimony, if the claims are amended, the impact that is you have this presumption of intervening rights, which means that there's a presumption that the patent is only enforceable from the day the re-examination certificate issues going forward. That's different than the original claims of the patent which are enforceable at that time. And you also, when you sue people,

you can go back for six prior years of damages. That typically doesn't happen when the claims are amended in a re-examination.

Q. I think you heard Mr. Meek and Mr. Carlson -- turning now I should say to the Oracle case and the state of the enforcement program. I think you heard both of them use the same term, that the program was in a ditch after the Oracle summary judgment ruling. Do you recall that?

A. I do.

Q. Now, the Oracle summary judgment ruling, that was a bad thing, yes?

A. Of course.

Q. But did that mean that the rest of the program -- enforcement program could no longer proceed?

A. No, and it didn't stop. It continued to proceed after that time.

Q. And why was the Oracle ruling, while bad, not the end of the program?

A. It's because the -- Judge Robinson's application of her claim construction to Oracle has no impact on the cases that are pending, for example, in the Texas actions.

Q. And why -- why is that?

A. Because every defendant can raise their own claim construction defenses. It's a personal defense. And there were different claim constructions in those proceedings. And again, the application of a claim construction to a particular

product, that would be different for any individual defendant.

Q. And do we see that there are, in fact, settlements after the Oracle ruling that Parallel Networks is able to achieve?

A. Yes. As I think have been shown in a lot of these charts, a number of settlements, in fact, some of Parallel Networks' largest settlements, are formalized after this summary judgment ruling in the Oracle case.

Q. Now, again, focusing on that time period that after the Oracle summary judgment ruling had been entered and before the appeal --

A. Yes.

Q. -- you heard Mr. Meek's testimony about Baker Botts attitude about the appeal?

A. Yes.

Q. Do you agree that -- that Baker Botts communicated that it was reluctant to take on the case in any way?

A. No. Their communications with me were to the contrary.

Q. What did you hear from Baker Botts' attorneys about that?

A. Mr. Meek called me when they -- when he found out that they were going to be handling the appeal, and he was very excited to be handling this appeal. He thought it was a very

good appeal and that they had a high likelihood of success.

Q. Now, we heard testimony about the Federal Circuit and how it reversed Judge Robinson's Oracle summary judgment ruling, correct?

A. Yes, they did.

Q. And you testified that you -- while you weren't counsel of record, you stayed involved in helping with the briefing, correct?

A. Yeah. We had discussions about the issues, you know, looked at drafts, at least of the opening brief, things like that. And then I continued to follow and monitor and listen to the oral argument.

Q. And in any of the briefs or in the oral arguments, was there any criticism of Jenner & Block's work in the district court?

A. Not that I recall, no.

Q. And did you obtain an understanding as to what the Federal Circuit's overall view of Judge Robinson's approach was?

A. Yes. I mean, there's actually a moment in the oral argument where Judge Rader --

MR. ALIBHAI: Objection; hearsay as to what Judge Rader said at the oral argument.

MR. JIMENEZ-EKMAN: Mr. Meek actually testified -- first of all, it's not for the truth of the matter

asserted. Second of all, and Mr. Meek testified about this oral argument, putting words in the judge's mouth. I mean, it's an issue of record, so I don't think there should be any problem with this, but that's our position.

ARBITRATOR GRISSOM: Overruled.

A. There's a moment in the oral argument where my recollection is Judge Rader actually says to Mr. Gilliland, who's arguing for Oracle, you know, that he had read this record and his conclusion was that arriving in her summary judgment conclusion, Judge Robinson had simply misunderstood how computers worked.

Q. (BY MR. JIMENEZ-EKMAN) Now, the Oracle ruling gets reversed. And after the remand, although, again, Jenner & Block is not counsel on record and is not obtaining compensation, does Jenner & Block have -- provide assistance after the remand?

A. Yes.

Q. Can you describe that assistance?

A. So after the remand from -- in the Oracle appeal, Baker Botts was no longer counsel of record. The case was transferred over to the law firm of Bosy & Bennett. George Bosy and David Bennett were former Jenner & Block partners. They were not able to get the full case file for Baker Botts. Baker Botts didn't have it or couldn't locate it. So they reached out to myself and David Nelson, the senior paralegal on

the case, and asked us to reprovide, for example, the pretrial order, the deposition designations, any witness outlines we had. Things like that.

Q. I'm showing you --

MR. JIMENEZ-EKMAN: And we're going to refer here to Claimant's Group Exhibit 22, Mr. Grissom.

ARBITRATOR GRISSOM: Okay.

Q. (BY MR. JIMENEZ-EKMAN) What's Group Exhibit 22, Claimant's?

A. It's basically a series of e-mails. And it's -- also includes copies of files kept by Mr. Nelson. It's basically our -- Jenner & Block index of what case materials we had, depositions, filings, all that type of stuff. And in the middle -- I know in the middle of this group exhibit, there are conversations between myself and Mr. Bennett and conversations between Mr. Nelson and Mr. Soneson where talking about the materials that need to be retransmitted.

Q. Who is Mr. Soneson?

A. Oh sorry. Mr. Soneson, Rob Soneson S-o-n-e-s-o-n, is a -- was the paralegal at Bosy & Bennett.

Q. And do you know ultimately how the materials that Jenner & Block provided were used?

A. Yes. My understanding is that in effect when they had to refile the pretrial order, that pretrial order that Mr. Nelson and I provided to Mr. Bennett was used as most of their

pretrial order.

Q. And that was the pretrial order that the Jenner & Block team had prepared back in the fall of 2008?

A. That's correct.

Q. Now, you heard Mr. Hricik testify, yes?

A. Yes.

Q. You heard Mr. Hricik say that Jenner & Block had an incentive to withdraw after the Oracle summary judgment ruling. Do you recall that generally?

A. Yes.

Q. Did the Jenner & Block lawyers or Jenner & Block itself want to withdraw from Oracle before the appeal?

A. No. As I think got discussed extensively, in December of 2008, what the firm wanted to do was to continue representing Parallel Networks in the Oracle case.

Q. And as it relates to QuinStreet, did the firm want to just withdraw from the QuinStreet matter?

A. No. And even before the summary judgment ruling, I was having discussions, at Mr. Fokas' request, with QuinStreet's attorneys about getting the case settled. And it was my understanding that that was what Mr. Fokas wanted us to do.

Q. And at the time of the discussions in December of 2008, was it your understanding, based on the conversations within the firm, that Jenner & Block thought it would get paid

if Parallel Networks did not prevail in the Oracle appeal?

A. No. It was my understanding that we would -- it was my understanding that the firm believed that they would not recover if Parallel Networks did not recover in the Oracle case.

MR. JIMENEZ-EKMAN: No further questions.

ARBITRATOR GRISSOM: I have not initiated any break on my own, but if it will not inconvenience you, we're about nine minutes from the time we would ordinarily break. And I would like for us to take a short break now if that's agreeable.

MR. ALIBHAI: Absolutely.

ARBITRATOR GRISSOM: All right. Thank you.

(Break was taken at 10:21 a.m. to 10:29 a.m.)

ARBITRATOR GRISSOM: Okay. We're back on the record. I see Mr. Mr. Margolis has exercised his promptability under the witness exercise program.

And you're ready to cross examine?

MR. ALIBHAI: Yes, sir.

FURTHER RECROSS-EXAMINATION

BY MR. ALIBHAI:

Q. Mr. Margolis, you talked about the sale of the 335 and 554 patents with Mr. Jimenez-Ekman?

A. Yes. I briefly mentioned it, yes.

Q. Are you testifying that Jenner & Block was not made

aware of that potential sale before it occurred?

A. My understanding is that the decision to sale the patents had already been made prior to the time we were informed of it, yes.

Q. Your testimony is that they were not made aware of the transaction before it closed?

A. I don't know exactly when it closed, Mr. Alibhai, but I know that the decision -- the final decision between Mr. Karl and Mr. Fokas to sell the patents from epicRealm Licensing to Parallel Networks was done prior to Jenner & Block being notified, and that Jenner & Block was told that they were only being informed of it to ensure that the transfer of the patents from epicRealm Licensing to Parallel Networks was done correctly so that no rights, for example, to past infringement damages would be lost.

Q. Well, Mr. Bosy and Mr. Fokas discussed the transfer; isn't that correct?

A. Yes.

Q. Now, with respect to epicRealm, I may have misunderstood, did you say that they filed bankruptcy?

A. Not epicRealm Licensing. I said the predecessor epicRealm entity.

Q. EpicRealm, Inc. filed bankruptcy?

A. My understanding, and I could be wrong, was that epicRealm, Inc., the operations were wound down. I thought

that was through a bankruptcy process. It might have been through some other restructuring process. But my understanding was it was through a bankruptcy.

Q. So you're not sure?

A. My -- it's been five years since I defended Ken Hills deposition, but I thought he said that the whole wind down he was doing was associated with a bankruptcy, but I'm not sure.

Q. Now, with respect to Mr. Wybenga and Mr. Dunn, those were consultants that Jenner & Block was using to assist with infringement issues?

A. Yes.

Q. And the reason that Jenner & Block needed those consults was because Jenner & Block didn't have the capacity to handle that in-house?

A. Not exactly. It wasn't -- my understanding was that Mr. Fokas typically wanted us to have some type of preliminary analysis done by the consultants in the first instance.

Q. So then the responsibility after the preliminary analysis would fall on Jenner & Block?

A. That's right.

Q. And with respect to the analysis of the infringing QuinStreet platforms, Mr. Wybenga and Mr. Bradford -- I'm sorry -- with respect to the QuinStreet platforms, Mr. Dunn and Mr. Bradford did have communications and did look at the information that QuinStreet had provided?

A. They did look at some information at various times, yes.

Q. And as I understand it, QuinStreet was using five different platforms, right?

A. Yes. QuinStreet --

Q. Yes?

A. -- continually changed its disclosures of those platforms. But, yes, eventually we learned that there were five platforms.

Q. Okay. And I want to make sure I get them right. IIS Standalone one of them?

A. Yes.

Q. IIS with JRun is another one?

A. Yes.

Q. Apache (standalone)?

A. I believe that's right.

Q. Apache/JBoss?

A. I think that's right, yes.

Q. And JBoss, that's Tomcat as well?

A. Right. That would be the -- that would be fully open source.

Q. But JBoss, some people call that Tomcat?

A. My understanding was JBoss was the modern Tomcat, was the newer Tomcat.

Q. And Apache/Weblogic?

A. Yes, that's right.

Q. And with respect to the QuinStreet case, Jenner & Block, on behalf of Parallel Networks, was asserting infringement of the 554 and 335 patents?

A. Yes.

Q. And your testimony was that it had a Rule 11 basis to do so because it knew that Herbalife infringed using a QuinStreet platform?

A. That would certainly be sufficient for a Rule 11 basis.

Q. Which platform was Herbalife using on the QuinStreet's platforms?

A. My recollection is that there was actually a disagreement between Baker Botts and QuinStreet. QuinStreet's position was that it was Apache/Weblogic.

Q. That's what QuinStreet said?

A. Yes. And Baker Botts said it was Apache/Tomcat.

Q. So which one was Jenner & Block relying on to assert infringement in the QuinStreet case in Delaware?

A. Our co-counsel Baker Botts allocation.

Q. So Apache/JBoss/Tomcat was the accused platform?

A. Yes.

Q. Now, you talked about foreign sales, and you said, if I got this wrong tell me, quote I believe that Mr. Fokas received the motion; is that correct?

A. Yes.

Q. Now, even though Mr. Fokas is listed as counsel of record, that doesn't necessarily mean that he can open the sealed pleadings that come across, correct?

A. That's right. If they were sealed, we would prepare redacted versions of them, yes.

Q. But I'm talking about when it comes from the court?

A. Yes.

Q. If you and I are getting court notices --

A. Yes.

Q. -- unless you're counsel of record, you may not get access to the sealed parts? Only outside counsel get access to the sealed pleadings?

A. Right. Right. Your first question was incorrect. That is correct, right. Only the outside counsel was receiving sealed pleadings in the first instance.

Q. And so do you know whether the motion to exclude foreign sales was sealed or not sealed?

A. I can look at the docket sheet. I don't recall if it was or if it wasn't. But certainly a redacted version would have been prepared for Mr. Fokas.

Q. And that motion was opposed?

A. Yes, we opposed that motion.

Q. And you testified that in the negotiations at the mediation --

ARBITRATOR GRISSOM: I'm sorry. Is this the motion on foreign sales?

MR. ALIBHAI: It was, yes.

ARBITRATOR GRISSOM: All right. Thank you.

MR. ALIBHAI: Yes.

Q. (BY MR. ALIBHAI) A motion to exclude foreign sales, right?

A. Yes. It was -- Oracle filed a motion for summary judgment to exclude damages for foreign sales.

Q. Now, at the mediation, that occurred after the summary judgment and Markman hearing, which was on October 3rd?

A. Yes.

Q. And the motion for foreign sales was not ruled on because the court bifurcated officially and said I'm not ruling on that motion?

A. That's correct.

Q. And you're saying that as part of the negotiation, Parallel Networks and Jenner & Block said to Judge Thynge, look, since Oracle has got an issue with foreign sales, even if we exclude that, we still have about $200 million in damages?

A. That's right.

Q. And that even if we reduce the royalty rate, we still come down to $100 million in damages?

A. That's probably what we said, yes.

Q. And you're not saying that there was something that you were conceding about the ability to get foreign sales when you made those negotiating calls, right?

A. No.

Q. In fact, you personally believed very strongly that foreign sales would be recoverable in the Oracle case?

A. At that time I did, yes.

Q. And that was because, as we discussed at your deposition and we may have even discussed last week, but I may have forgotten by now, is that you had personally with Mr. Roper worked on the Union Carbide case?

A. That's right. I had a lot of experience with 271(f) issues.

Q. 271(f) is the U.S. Code statute dealing with foreign sales?

A. Correct.

Q. And if there's some part of the sale or the infringing activity that's based in the United States, even if that's used to generate a sale outside the United States, it can still be recoverable as damages in the United States?

A. At that time, that was the law. It has since changed, but at that time, that was the law.

Q. And it wasn't just this one case that you and Mr. Roper had with Judge Robinson where you got her reversed at the Federal Circuit called Union Carbide, there were other cases

that came out that also supported your position, right?

A. Yes.

Q. One of those was the Fancy Sports case?

A. That was not a foreign sales case, but that -- we did rely on that case.

Q. And the Eolis case?

A. Yes. The Eolis case, yes.

Q. And then there was a Supreme Court case which sort of clarified when it was that you could and could not get foreign sales, and that case they couldn't, that was the AT&T v. Microsoft case, and you --

A. I had network systems claims, yes.

Q. On network systems?

A. Yes.

Q. And you had a distinguishing feature to that case, right?

A. We did.

Q. What was the distinguishing feature in the Oracle case that made it unlike the U.S. Supreme Court case where they did not allow foreign sales?

A. My recollection is that we had a product claim and method claim that we allege were covered by AT&T. And the Supreme Court AT&T v. Microsoft case, it says it is limited on its facts on a number of different ways, and so we relied on the fact that our facts were different, which I think lawyers

typically do.

Q. You said product by AT&T. You meant product by Oracle?

A. Sorry. You're right. Product by Oracle, right.

Q. Now, with respect to the QuinStreet business that you were talking about and the size of it, what was the size of the QuinStreet business that related to DSS?

A. So as I think has been discussed, you know, it ended up being about 12 customers. And, you know, I don't -- I know that there's been some testimony here that the total size of the business over a multiyear period --

Q. Let me clarify my question.

A. Okay.

Q. At the time that you're making these statements --

A. Yes.

Q. -- that the business is small in 2008 --

A. Yes.

Q. -- based on your personal knowledge and the discovery you did up till then --

A. Yes.

Q. -- focus your answer on 2008.

A. Okay.

Q. What was the size of the business?

A. My understanding was it was 12 customers and only a few tens of millions of dollar.

Q. You didn't know what the tens of millions of dollars it was, then, right?
A. I don't -- at this point, I don't remember if I didn't or I didn't.
Q. You hadn't even looked at the financial information of QuinStreet --
A. No, I had looked at the financial information.
Q. So what did you financial information show?
A. I don't remember. I just remember it was a small number.
Q. And what did the financial information show about the size of the DMS business at that time?
A. It showed that the DMS business was significantly larger.
Q. Hundreds of millions of dollars?
A. A few hundreds of millions of dollars, but not -- not an enormous case by any stretch of the imagination.
Q. Does that mean that if it's a small case, you have some lesser duty to it?
A. No. It means that -- it means that the client's interest in it is less.
Q. With respect to the re-examination proceedings --
A. Okay.
Q. -- that you testified about just now --
A. Okay.

Q. -- you're aware that Jenner & Block is seeking fees and recoveries related to the Oracle arbitration, correct?

A. I've heard that in the course of these last two weeks, yes.

Q. And with respect to that issue, have you seen the Oracle arbitration agreement -- I mean the Oracle settlement agreement?

A. I have, yes.

Q. Which discusses the arbitration?

A. Yes.

Q. And you're aware that there's two things that has to be proven, infringement of a claim with intervening rights and infringement without intervening rights?

A. I'm aware that that's increment, yes.

Q. And so your testimony today is that with respect to the claim that requires prove infringement without intervening rights, that there will be a presumption against Parallel Networks that intervening rights do attach?

A. That is the state of the Federal Circuit, yes.

Q. And those claims, as they exist today, are not claims that Jenner & Block ever litigated during the course of its representation of Parallel Networks?

A. Not exactly, no.

Q. Well, you told Mr. Jimenez-Ekman that every single claim that you were litigating was canceled --

A. Yes.
Q. -- right?
A. But a lot of those limitations in the original claims remain in the claims that were issued subsequently to re-examination.
THE REPORTER: I'm sorry.
THE WITNESS: Sorry. A lot of the limitations in the original claims remained in the claims that were subsequently issued in the re-examination.
Q. (BY MR. ALIBHAI) Okay. So are they the same claims or are they different claims?
A. They're different claims. They have additional limitations than the original claims.
Q. So as the claims are written today, okay --
A. Okay.
Q. -- they're different than the claims that Jenner & Block was litigating when it was prosecuting the QuinStreet and Oracle cases?
A. Yes.
Q. Now, you talked about the summary judgment ruling in the Oracle case. Do you recall that?
A. Yes.
Q. And are you saying that people who were defendants in cases against Parallel Networks would not use that summary judgment ruling as a basis for their own summary judgment

motion?

A. I did not testify to that, no. That would not be right.

Q. They -- in fact, you had a call with QuinStreet's counsel and Judge Robinson where QuinStreet specifically said they want to file a motion for summary judgment on the same basis that Oracle had and that she had granted, right?

A. Yes. That happened in the January 2009 scheduling conference, yes.

Q. Now, with respect to your conversations with Kevin Meek, you don't know whether Baker Botts was reluctant to take the case before he had already signed up to take the case, right?

A. I don't see how I could know that.

Q. I just wanted to make sure.

A. No. I can just tell you what he told me. And what he told me is that he was very excited and thought they were going to win.

Q. And he told you that after he had been retained and had accepted the retention?

A. He called me -- I mean, he called me before I actually got formal notification that they had been retained, but it was around that time, yes. I don't know what discussions, you know, occurred internally at Baker Botts.

Q. And you also believed that there was a high

likelihood of success on appeal?

A. I thought we had a good shot at it, yes.

Q. Well, you heard Mr. Roper testify after you testified that it was a strong appeal, right?

A. Yes.

Q. But the firm was telling the client that chance of success was 30 to 50 percent, right?

A. That's what was in something Ms. Mascherin prepared, yes.

Q. And were you on the call with Ms. Mascherin on December 18th when you spoke to Mr. Fokas?

A. Yes --

Q. And --

A. -- I was on that call.

Q. And at that time, she recommended that Mr. Fokas, on behalf of Parallel Networks, settle the Oracle and QuinStreet cases?

A. She did raise that issue, yes.

Q. And at that time that she was recommending settlement of the Oracle case, Mr. Gilliland was saying that he would only be interested in a settlement that was substantially less than eight figures?

A. That was the e-mail that Mr. Gilliland sent to Mr. Bosy, yes.

Q. And then you found out, as you sat here during the

course of these proceedings, that the only offer that Oracle made at mediation a few months later that was court ordered at the Federal Circuit was $1 million?

A. I don't have any personal knowledge of that, but I'm aware that that's what Mr. Meek testified to, yes.

Q. Now, with respect to the December 31st conversation that you had with Mr. Fokas --

A. The December 31st conversation?

Q. Yes, sir?

A. Okay.

Q. At that time, Jenner & Block is counsel in the Oracle case?

A. That's correct.

Q. And at that time, Jenner & Block is also counsel in the QuinStreet case?

A. Yes.

Q. And in the QuinStreet case, Microsoft has been brought into that case?

A. They've -- not officially.

Q. By December 31st, they're not in the case?

A. The court had granted QuinStreet leave to file its third-party complaint against Microsoft. My recollection is Microsoft moved to dismiss that and filed this upward sloping Rule 14 complaint about Parallel Networks, and then you moved to dismiss that.

Q. But they're in the case, right? They had an obligation to respond to that pleading?

A. To the -- if you consider that to be in the case, then I guess they were in the case, yes.

Q. Had they been sued?

A. Had Microsoft been sued?

Q. By QuinStreet?

A. There was a third-party complaint which there was a motion to dismiss pending on, yes.

Q. And during that December 31st conversation with Mr. Fokas, Jenner & Block says we absolutely do not want to handled the Microsoft portion of the QuinStreet case?

A. I believe what I testified to and Mr. Roper testified to and I think Mr. Fokas too, right, was that we had told him that we did not wish to represent Parallel Networks in the Microsoft case, yes.

Q. And that with respect to the QuinStreet case, that Jenner & Block would only represent Parallel Networks if it was going to settle that part of the case?

A. I believe that's correct yes.

Q. And that with respect to the Oracle appeal, that Jenner & Block would only commit to handling the appeal itself, not any further proceedings if it was -- if the appeal was successful and the case was remand?

A. That's correct, yes.

ARBITRATOR GRISSOM: Can you say that one more time. Sorry my pencil was not fast enough.

MR. ALIBHAI: Sorry.

Q. (BY MR. ALIBHAI) With respect to the Oracle appeal, Jenner & Block was only agreeing to handle the appeal itself at the Federal Circuit --

A. Yes.

Q. -- and that if there was -- if the appeal was successful and the case was remanded, Jenner & Block was not committing to handle any further proceedings in the district court?

A. That's right.

MR. ALIBHAI: No further questions. Pass the witness.

FURTHER REDIRECT EXAMINATION

BY MR. JIMENEZ-EKMAN:

Q. Mr. Margolis, let's talk briefly about the foreign sales issue. Do you have that in mind?

A. Yes.

Q. Is there a per se legal rule that applies to foreign sales regardless of the facts?

A. Is there -- at that time, no.

Q. All right. So your prior experience with these foreign sales issues, did that mean that you knew for sure how the foreign sales issue would be resolved?

A. No, certainly not.

Q. And were there factual differences between the prior foreign sales cases you've handled and been familiar with and the situation in the Oracle case?

A. Definitely. There's definitely differences between the Carbide case and the Parallel Networks case, yes.

Q. And so was there meaningful doubt as to the -- what the outcome was ultimately going to be on foreign sales?

A. Sure.

Q. Let me move on to the re-examination issue.

A. Okay.

Q. As it relates to the re-exam, you said all the original claims were canceled, correct?

A. That's correct.

Q. And as Mr. Alibhai asked you, those were the actual claims that you had litigated, correct?

A. Yes, the original claims of the 554 and 335.

Q. Now, there were differences in the re-issue claims, correct?

A. Yeah. The re-examination claims are not identical to the original claims.

Q. Were there similarities as well?

A. As I testified on cross, the -- many of the limitations were the same, and the general sort of inventive concepts were the same.

Q. So does the experience litigating the 554 and the 335 inform your views as to, you know, what these restated or reissue claims might mean for litigation?

A. Of course.

Q. This December 31st call, I think the way that Mr. Alibhai put it, you said that Jenner & Block was not willing to commit to stay in after a successful appeal; is that fair?

A. Yes. My recollection is that one of the things Mr. Fokas asked for was us to agree in writing that we would handle any trial in the Oracle case that occurred after the Federal Circuit appeal.

Q. So would that have been a modification of the rights as you understood them under the existing agreement?

A. Yes.

Q. And Jenner & Block wasn't willing to agree to that modification at that time?

A. Yes. That was my understanding, that the firm viewed it as a change in the agreement.

Q. And Jenner & Block, it was willing to proceed under the existing agreement and represent Parallel Networks in the Oracle appeal?

A. Yes, under the contingent fee agreement in place at that time, yes.

Q. And had Jenner & Block made any kind of a final decision about what would happen if it did do the appeal and

won, what would happen on remand?

A. No, there was no final decision.

Q. And then, finally, on this call where Ms. Mascherin -- that Mr. Alibhai asked you about where the topic of settlement was discussed, was the general advice from Ms. Mascherin to go to the mediation and see what might be offered?

A. Yes.

Q. I mean, she wasn't suggesting at that point that any particular settlement offer ought to accepted, was she?

A. No. And -- right. And her interest was not just monetary in suggesting settlement. There was this issue of trying to get the summary judgment vacated, which I discussed back when I testified two weeks ago.

MR. JIMENEZ-EKMAN: Nothing further.

FURTHER RECROSS-EXAMINATION

BY MR. ALIBHAI:

Q. Mr. Margolis, I do have to ask you a question.

A. All right.

ARBITRATOR GRISSOM: You need to hang on one minute.

MR. ALIBHAI: Absolutely.

ARBITRATOR GRISSOM: All right. Thank you.

Q. (BY MR. ALIBHAI) Did you just testify that Jenner & Block wasn't willing to modify the contingent fee agreement as

December 31st?

A. No.

Q. In fact, the very conversation you were having was we need to modify the contingent fee agreement, we're not going to represent you in the QuinStreet case which is referenced and agreed to be part of the representation in the contingent fee agreement?

A. That's not right.

Q. Well, if Mr. Fokas wasn't interested in settling the case, then Jenner & Block was saying it wasn't going to represent him in the QuinStreet and Microsoft part of the case, right?

A. Well, first of all, we didn't have an agreement on the Microsoft case, and we had the right to terminate the representation in the QuinStreet case.

Q. There's only one contingent fee agreement that covers QuinStreet and Oracle, right?

A. Yes.

Q. So you were going to terminate the contingent fee agreement as of December 31st with respect to QuinStreet?

A. Our recommendation was to settle the case consistent with what Mr. -- we thought Mr. Fokas wanted to do. But to the -- if Mr. Fokas did not want to settle it, yes, we were going to terminate with respect to the QuinStreet case.

MR. ALIBHAI: No further questions.

MR. JIMENEZ-EKMAN: That'll do it for us, too.

MR. KONING: At this time, we call Mr. Cunningham.

MR. ALIBHAI: How are you, sir?

THE WITNESS: Fine. How are you?

ARBITRATOR GRISSOM: Proceed.

REDIRECT EXAMINATION

BY MR. KONING:

Q. Good morning, Mr. Cunningham.

A. Good morning.

Q. You understand you're still under oath in this matter?

A. I do.

Q. I really appreciate your coming back in the middle of your trial.

I understand you're off trial today, right?

A. We are, yes.

Q. And let me show you before we get started a PowerPoint outline that we're going to mark as Claimant's 478, and ask if this is an outline that you have prepared with my long distance assistance?

(Claimant's Exhibit No. 478 was marked.)

A. Yes.

Q. Explanation of your rebuttal testimony?

A. Yeah, kind of just to note some of the points that I

knew you indicated you wanted to ask me about based upon the testimony that's taking place.

Q. And have you had the opportunity, despite your being in trial, to review some testimony of Mr. Hricik and Mr. Johnston, the experts that testified for Parallel Networks after you left?

A. I have to say I scanned some of it. I really haven't read it. I just haven't had time to read it in detail, but I sort of scanned it and looked at it.

Q. And we've discussed some of the highlights?

A. Yeah. I mean, I -- my understanding of what's been said comes as much from what you've told me as from what I've actually read.

Q. If you would turn, please, to Page 2 --

A. Okay I'm looking at it.

Q. -- which is the first real substantive page.

A. Yeah.

Q. Does it remain your opinion in this case that the contingent fee agreement between Parallel Networks and Jenner & Block is enforceable?

A. It does. And after considering what I know about the testimony of Mr. Johnston and Mr. Hricik here at the arbitration, I don't see any reason to conclude, in my opinion, that this contingent fee agreement was unconscionable or unenforceable.

Q. And I informed you or you read that Mr. Johnston testified that the determination of unconscionability is one that's made at the outset of the relationship.

Do you agree with that?

A. I do agree with that.

Q. Do you also --

A. Well, let me say this. The determine -- there's sort of two aspects of this. Number one is the determination of the unconscionability of the contract, you know, which is determined as question of law based upon the circumstances existing at the time the contract was formed. There's a separate analysis of the actual unconscionability of the fee which is a question of fact which can be determined based upon the circumstances that exist later on when the fee is charged.

Q. And is the question of the unconscionability of the contract itself at the time of the formation one of law or fact?

A. It's one of law, and that note is point -- that point is made in the Hoover Slovacek case.

Q. Notwithstanding that it is question of law, is the determination of the unconscionability of a contract at formation one that is based on consideration of determine of the contract and the surrounding circumstances?

A. Yes, I think it has to be. I think most everyone

knows that's studied it that the notion of unconscionability has, generally speaking, two aspects to it. One of procedural unconscionability which focuses primarily upon the bargaining relationship -- equal bargaining power of the relationship of the parties at the time the contract is made. And then a substantive examination of the provision that's claimed to be unconscionable but focuses primarily upon whether or not there's a legitimate objective that the parties are trying to achieve by the provision in the contract that's at issue.

Q. So to sum all that up, is it your understanding that each case must be evaluated on its own facts?

A. Obviously every contract is different and every relationship between parties is different. And so necessarily it's necessary or one must consider the circumstances existing related to each contract in determining whether that contract is unconscionable or in some other way unenforceable. And that necessarily obviously depends upon the circumstances existing at the time and each set of circumstances and each contract is different.

Q. Now, both Mr. Hricik and Mr. Johnston testified that they thought that risk sharing was not present upon termination of the Parallel Networks contract.

Do you agree with that, and is that an important factor in your analysis?

A. Well, risk sharing is an important factor. And one

of the factors in the Hoover Slovacek case had to do with whether or not the Hoover Slovacek engagement agreement or contract altered the risk sharing relationship that is contained in a contingent fee agreement. Basics of a contingent fee agreement are that the attorney bear some risk of the outcome right along with the client because his fee is dependent upon the outcome in some way. I think I understand Mr. Johnston and Mr. Hricik to say that this particular contingent fee agreement in the Jenner & Block instance alters the risk sharing relationship between Jenner & Block and Parallel Networks, and I don't agree that it does.

I realize that there's a factual dispute about whether or not the fee that is discussed in Paragraph 9 of the contingent fee agreement is payable immediately upon termination. I understand that Parallel Networks has taken the position that it was, and therefore, it somehow altered the risk. Based upon what I have seen and what I've reviewed, as I discussed in my earlier testimony, the evidence wholly preponderates in favor of the notion that this fee was, that is the object of the contingent fee agreement, was to be payable out of the recovery. There are various aspects of that, including what I understand to be the discussions between the Jenner & Block folks and separate counsel for Parallel Networks during the period of time that the termination was taking place.

So to the extent that the fee was asked for after the recovery, to the extent that the fee was intended by the parties to come out of the recovery, I don't see any -- certainly no material alteration, if any alteration at all, in the risk sharing relationship between Parallel Networks and Jenner & Block. Jenner & Block still took the risk of recovery right along with Parallel Networks.

Q. And if there is any ambiguity in the contract on that point as to when the payment is going to be, whether it's going to be immediate or after recovery, is there any other -- are there any doctrines that dictate how that ambiguity must be resolved?

A. My understanding is the courts generally don't like to contracts unconscionable. They prefer to effectuate a contract if it expresses the agreement of the parties. That's what contract law is all about. And therefore, if there's an ambiguity, it would appear to me that one would resolve the ambiguity in favor of the enforceability of the contract.

Q. If you turn now to Page 3, one of Mr. Hricik's arguments or points was that this case was -- I think he used the word "mirror of Hoover." And I understood him to mean by that that this Hoover dealt with the client firing his lawyer, and the Supreme Court's addressing that in light of the previous holding in the Mandell case, and that this case simply would have the same result but in the situation where a lawyer

fired his client.

A. Well, certainly -- I'm sorry.

Q. Go ahead.

A. Certainly, Hoover Slovacek dealt with circumstance in which the client discharged the lawyer. And in fact, there was a fact issue. I think the court remanded to resolve as to whether or not that termination was with good cause. In this case, obviously, it is the reverse of that. In this case, we have a situation where the law firm withdrew from service to the client. And so in that sense, it's -- it's -- they're opposite, so I'm not sure it's a mirror image.

Now, if the notion is that this case -- because Hoover Slovacek found the contract in the engagement agreement that was made the subject of Hoover Slovacek unconscionable and, therefore, this is somehow a mirror image of that and, therefore, necessarily this agreement is unconscionable, I can't subscribe to that because these are two separate agreements with two different provisions that are materially different, one of which, I can agree certainly with Hoover Slovacek and that that has some -- that contract has problems with it.

Q. Well, let's be specific about it since Hoover has come up so many times. Could you please summarize the provision in Hoover that was at issue and why -- and the reasons that the Supreme Court gave for striking that down?

A. Yes. The Hoover Slovacek engagement agreement contained a provision that if the client discharged the attorney, and then the client had an obligation to pay immediately a sum equal to the present value of the contingent fee that the attorney had in the case, and that created a number of problems for the court.

Number one, the immediate payment issue which altered the risk sharing relationship. Number two, the fact that if it was a payment that was required based upon a percentage interest in the case that had not arisen yet and the court found that that was a violation of a separate ethical rule -- and it's 1.08h, I think, if I'm not mistaken, but it's in the one -- yeah, here it is. You've got it on the chart here. 1.08h, which prohibits a lawyer from acquiring an interest in a client's cause of action, other than a contingent fee interest that is permitted by Rule 1.04. So they found that to be a problem.

Another thing that they found was that the contract specifically did not distinguish between the causes for termination, it didn't address the cause for termination. It just said blanketly, if you fire me, you have to pay me this sum of money. And then the fourth thing was that they -- it was difficult to calculate the sum of money because it had to do with the present value of a sum that could not be determined with certainty. And there was a lot of vagueness in my mind

about how even Hoover Slovacek valued the case. They valued it on the basis of a settlement offer and a settlement demand that had taken place previously, which in my mind, at that point had very little relationship to the actual value of the case. And I think the Supreme Court concluded that, you know -- the Supreme Court's opinion is consistent with that.

So there were a number of factors that the Supreme Court relied upon in making its decision which do not apply in this case.

Q. And compare the facts of this case in light of those considerations of Hoover?

A. Well, in this case, as we've discussed, the circumstances of termination are addressed in this contract, unlike Hoover Slovacek which was silent on the circumstances of termination. That's one of -- that's the purpose. One of the main purposes for Paragraph 9 in the contract, is to define pursuant to the agreement of the parties, the circumstances that would give rise to the right to terminate and the right to ask for and claim compensation for the contribution that the firm had made in the case after that time. That, to me, directly addresses the circumstances and cause for termination, and that's not true of Hoover Slovacek.

Again, we talked a minute ago about the time upon which the fee is payable. I think I've addressed that, but that also is a factor that distinguishes our case from

Hoover Slovacek. The third element in my mind is the fact -- is the notion that it was the purpose for this provision. Based upon my own personal experience with contracts like this, and based upon my own personal experience acting as plaintiff's counsel on a contingent fee in a large complex, expensive litigation that consumes volumes of time of attorneys and resources of law firms, including my own, provision like -- exist in 9a and b, is a necessary provision if we're going to facilitate the ability of a client to engage an attorney on a contingent fee relationship in complex cases that consume large volumes of resources.

If we -- if we tell clients and attorneys that you cannot enter into an agreement pursuant to which you can agree upon the circumstances for termination, including the fact that the case has gotten out of control economically, if you can't do that, then lawyers are not going to take those cases because they will not put themselves in the position where they will take those risks and, therefore, clients will be unable to obtain legal counsel in those kinds of cases where the client's resources are not sufficient. And so it seems to me that it really would not be in the interest of our society to limit the ability of clients to engage lawyers on contingent fees in that way.

Q. And one thing before we leave this slide, the -- you mentioned when we were talking about the Hoover situation that

there was a concern about the difficulty in calculating the fee in that case.

A. Yes.

Q. Now, in this case, under 9a(iii), the fee is to be a fair and appropriate portion of the contingent recovery?

A. Yes.

Q. Isn't --

MR. ALIBHAI: Objection; misstates 9a(iii).

MR. KONING: I was paraphrasing.

MR. ALIBHAI: Okay.

A. I know what 9a(iii) says, but we can get it out.

Q. (BY MR. KONING) The -- could you explain, if you have an opinion, about the difference in the difficulty of calculation of the fees between the Hoover case and the Parallel Networks contract?

A. The Hoover case tried to stress its concept of present value to an unknown number. And, you know, that just adds -- it's kind of like hearsay on hearsay. How do you calculate the present value of an unknown number, and how do you guess at what the value of a case is? You know, if you're going to argue about in a case, well, this case is worth this, this person, you know, will buy this claim from you for this, or this person will make a settlement offer or demand for this amount of money, is really stabbing in the dark. Evaluating cases is very, very difficult.

On the other hand, it seems to me according to -- you know, that there are legitimate, reasonable methodologies by which you can apportion the work among lawyers who participate in a case. It's addressed in disciplinary rules, at least in concept, you know, proportionate workload is acceptable. There are -- and I've expressed in my report a formula that seeks to approach that concept objectively on the basis of time and hours, as we've discussed in my previous testimony. So I think there are objective and reasonable ways by which you can determine with reasonable specificity and assurance that relative contribution of the lawyers in the case. You can debate the numbers back and forth. You can debate the -- you know, the elements of the equation. But there are reasonable and objective ways to do it that, in my mind, materially distinguishes this situation from the Hoover Slovacek case.

Q. Okay. Now, if you'd turn to Page 5. Now, that we've heard Professor Hricik and Mr. Johnston testify, I think we have general agreement that no Texas case holds that parties cannot agree to circumstances under which a lawyer may terminate, and no Texas case holds that parties cannot agree that a lawyer may terminate and still get paid something.

You agree with that, right?

A. Well, I understand that that's what they've said, and that basically, it's -- everybody seems to say that there's not

a case out there that says these parties can't contract to no other (inaudible).

Q. And is that significant to you in the context of reviewing this type of a claim of unconscionability?

A. It really is because certainly everybody also knows that contracts between attorneys and clients are bounded by the constraints set out in the ethical rules. No question about that. But fundamentally, the relationship between an attorney and a client is one of contract. And Texas public policy supports the freedom of parties to contract subject to an attorney/client situation to the disciplinary rules and ethical laws. So in my view, you know, if the parties are attempting to define their rights and obligations in a contract, unless you've got a case out there that says they can't do it, I would be reluctant to say that.

Q. Now, Mr. Johnson testified something to the effect that he viewed termination -- the effect of the termination agreement as changing the fee agreement midstream.

Do you have any opinion about that?

A. I'm familiar with that concept, and that's not the concept in this case. I'm familiar with situations where attorneys and clients sometime negotiate a different fee during the course of a case. An attorney will say, well, I -- you know, I'd really rather do it on a different basis. I've got it on a contingent fee. I'd rather you agree now to do it on

an hourly basis. I don't see that in this case at all. I see the parties agreed at the time the engagement first had its inception what the rights and obligations of the parties would be. And based upon the evidence that I have seen and the testimony I have written, that intent was effectuated and carried out during the course of the relationship, except to the extent, of course, that Parallel Networks didn't honor their obligation regarding expenses.

But in terms of this changing fee agreement midstream, I don't think this -- I think this fee agreement was defined at the headwaters. And I don't think the terms changed throughout the course until we got to the mouth.

Q. Turning to Page 6 of Claimant's Exhibit 478, I believe there has now been testimony from all the witnesses that if a lawyer terminates for cause that the lawyer may recover quantum meruit.

A. Yes.

Q. And do you continue to agree to that, and do you feel that there's cause that entitles Jenner & Block to recover under that theory here?

A. Well, yes, and I think everybody knows that if a lawyer terminates an engagement and he has good cause or just cause, and those terms are used interchangeably in my mind and the various opinions that discuss it. But if a lawyer terminates for let's say proper cause, a quantum meruit

recovery is available to the lawyer. In this instance, we know that the parties defined for themselves what those circumstances would be, and they agreed at the time the contract was formed as to what would be sufficient cause for termination and receive compensation.

We also know, I think, from the evidence that I have seen in this case, but again, this is for the arbitrator to decide, but there were discussions that I'm aware of and I've heard testimony about in this room between Laura Steinberg and some of the folks at Jenner & Block, and involving Mr. Fokas and some of the folks at Jenner & Block, at the time of the agreement -- at the time of the withdrawal and at the time of termination of the agreement where, you know, there seems to be -- to me to be evidence that Parallel Networks agreed to the termination at that point in time and basically permitted a representation to be made to a federal court that they agreed to it.

So again, that's a factual issue. But to the extent that there was an agreement by Parallel Networks and their separate counsel regarding the termination, and for fulfillment of the parties objective regarding compensation, that, to me, supports the cause to withdraw because, of course, the cases say that where the parties agree to the circumstances of withdrawal is a sufficient cause. And here, of course, even independently obligation, as I testified earlier, this notion

that a client would not be in a position to pay substantial expenses in a large and complex contingent fee case is material breach of the obligation forming the right to withdraw for just cause and to claim compensation.

Q. So are those reasons you just gave all alternative forms of cause, or they need to be considered together or --

A. Well, I think they're alternative cause.

Q. And if you turn to Page 7, please.

A. Okay.

Q. And I have this slide titled, "What happens in 9a(i) is held to be unconscionable"? And that's the hourly fee part of 9a, right?

A. Yes. This is your severance question, and the severance notion is -- really has two origins in this case in my mind. One is a Supreme Court case. The Hoover case by the Supreme Court in which they relied upon the restatement to say a couple of things. Number one, if a contractor term is unconscionable at the time the contract is made, a court may refuse to enforce it, or it may enforce the remainder of the contract without the unconscionable term, or it may limit the application of any unconscionable term so as to avoid the unconscionable result.

The notion we're talking about here is an attempt by the courts to avoid a declaration that a contract is unconscionable if there's another way to do it because, again,

a contract is an expression by the parties of their mutual intent, and courts prefer to effectuate the intent of parties in contracts unless there's -- they have to do something else. And the restatement says if you can find a way to make this contract work in a conscionable way, it's the duty of the court to do that.

Secondly, in this second origin of the notion in this case, of course, it's said Paragraph 16 of the contract itself, which appears on Page 8 of your slides, that same context -- or that same concept is expressed in severability provision. If any portion of this agreement or the application thereof to any person or circumstances shall be invalid or unenforceable, the remainder of this agreement and the application of such provisions to other persons or circumstances shall not be affected thereby and shall be enforced to the greatest extent permitted by law.

So it seems to me that the parties agree that the same sort of concepts that are expressed in the Supreme Court -- by the Supreme Court and in the restatement are to be carried out and effectuated in this contract. And inasmuch as that also is the agreement of the parties, I can't see a reason not to effectuate that in this case.

Q. And so to summarize, if 9a was held to be unconscionable, in your opinion, what needs to happen in light of these Supreme Court language and the severability clause?

A. I think you go right to (b) and (c) -- or 2(i) and 3(i). 2(i), as I recall, talks about payment of expenses, and 3(i) talks about the allocated portion of a contingent fee that comes out of the case, if any, that is allocated fairly among the lawyers that did the work on it.

Q. And the final slide I have is just a note about your fee calculation. I'm not going to go through it all again. It's contained in Exhibit 473. I would simply ask you sir, after hearing -- hearing about the testimony of Mr. Hricik and Mr. Johnston has -- and considering that, has your opinion changed about the contents of your proposed fee calculation in Exhibit 473?

A. No. And with particular reference to an exhibit I was shown during my previous testimony itemizing statements made over a period of time to the Bosy & Bennett firm, I now understand that -- well, I thought the representation was that those sums had been applicable to this case. I now understand that a significant portion of those sums were not applicable to this case. So I don't understand why I was even presented that exhibit.

Q. Okay.

A. But the other numbers that we've represented, I believe those calculations are in line. I believe that calculation is reasonable. I believe it accomplishes the intent of the parties and the expectation of the parties as it

relates to a contribution to the case that was valuable to Parallel Networks. And I believe that the fee that would come out of that calculation would be a reasonable fee under the circumstances of this case.

Q. Thank you.

MR. KONING: I pass the witness.

ARBITRATOR GRISSOM: Can you tell me what you meant by you misunderstood something, that the reference was not clear? I don't know what the "it" was.

THE WITNESS: Yes, sir.

ARBITRATOR GRISSOM: Okay.

THE WITNESS: There was an exhibit that Mr. Alibhai gave me, I don't know the exhibit number, but it was a summary of payments made to the Bosy & Bennett firm. You may recall, although I know there's a lot for you to recall over the last few days --

ARBITRATOR GRISSOM: Just a little.

THE WITNESS: -- but I recall -- I recall certainly that there was -- Mr. Alibhai presented that to me and asked me, number one, if that was a summary of payments made on a monthly basis. And I said, no, it wasn't because it obviously wasn't. The payments were not made on a monthly basis. They were a collection of payments made over other times. But then he asked me to tell him why I did not include those numbers in my calculation. And I said I didn't think I

had seen them or something to that effect. I thought when he asked me that he was suggesting to me that those sums represented work that Bosy & Bennett did on this case with the implication that maybe I should have included those numbers.

And I now find from what I understand the testimony to have been that only a very small portion of those numbers were attributable to this case because Bosy & Bennett was engaged apparently by Parallel Networks to work on a number of cases. And so my only testimony is I don't understand why that exhibit was really presented with that kind of representation.

ARBITRATOR GRISSOM: Okay. Thank you. I'm sorry to interrupt the flow, but I didn't understand what the reference was.

MR. ALIBHAI: May I proceed, Mr. Grissom?

ARBITRATOR GRISSOM: Oh, yes, sir.

FURTHER RECROSS-EXAMINATION

BY MR. ALIBHAI:

Q. Let's start with what we were just talking about.

You're aware that Bosy & Bennett was paid in two ways, a fixed monthly fee and then a contingent fee based on monies recovered?

A. Again, that's not the way, according to your summary, that they were paid.

Q. Do you understand that's --

A. We discussed that last time.

Q. Do you understand that's what their agreement provided?

A. I've never seen the agreement.

Q. Okay. So your basis in your expert report that said they were paid on a contingency fee basis, that was just based on information you'd been given by other Jenner people?

A. That's correct.

Q. So if Mr. Bennett -- you haven't reviewed Mr. Bennett's testimony?

A. No.

Q. If Mr. Bennett testified that he did receive $60,000 month, and that 25 percent of the work he did in any given month related to the Oracle case, you have no basis for disputing that?

A. No, I don't.

Q. And my whole point --

A. Other than the summary you gave me because the summary disputes his testimony that he was paid $60,000 a month, if the summary you gave me was accurate.

Q. And with respect to you knew that Mr. Bosy and Mr. Bennett were paid on contingent fee basis, but you chose to award or apportion based upon an hourly basis based on your formulas?

A. As we discussed to make it an apples and apples

comparison.

Q. Now, let's talk about some of these slides, if we could please, which is Claimant's Exhibit 478. And I want to start on Page 2.

A. On Page 2?

Q. Yes, sir.

A. Okay. I'm with you.

Q. So as I understand it, you're agreeing with the Texas Supreme Court that the question of whether a fee agreement is unconscionable is a question of law for the court to decide?

A. Yes.

Q. And a question of whether a particular fee that results from that agreement is itself unconscionable is a factual question that you'll look at the facts and circumstances?

A. Correct.

Q. And --

A. Well, no -- well, it's a factual question, let's say that.

Q. And you look at all the facts and circumstances?

A. You do, but you also look at the facts and circumstances in determining the unconscionability of the contract at the outset.

Q. With respect to risk sharing, your whole basis for the opinion that there was still risk sharing by Jenner & Block

is that they didn't get a fee until recovery?

A. That's correct.

Q. That's the only reason that you believe they were still -- had risk sharing?

A. No. No. I believe the contract is a contingent fee agreement that contains a termination provision. And I believe the contract provides that the attorney and client share the risk of the case.

Q. But they've terminated their involvement in that case, correct?

A. Certainly.

Q. And they're not doing any further work in the case?

A. I'll take your representation as to that.

Q. Well, are you aware of any work they did in the case after February 2009?

A. Yes.

Q. Besides transition?

A. Yes. Yes, I'm aware of work they did after February 2009.

Q. Besides transition work?

A. No. I'm not aware of any other work unless it had to do -- I think I heard some testimony just a moment ago about patent re-examination and providing documents that apparently Baker Botts didn't have or whatever. I don't know if they charged for that.

Q. And with respect to transition, Texas Disciplinary Rules specifically require a Texas lawyer, whether paid or unpaid, to transition the case?

A. Well, they require the lawyer to cooperate in transition of the case certainly as does this agreement.

Q. And in Texas, we don't get to hold our clients' files even if we hadn't been paid?

A. I've seen lawyers try to do that.

Q. But we can't do that, can we?

A. You're not supposed to.

Q. And here the risk that Jenner & Block was incurring during representation was that while it prosecuted a case, if the case ended in no recovery, Jenner & Block would get no recovery?

A. Correct.

Q. But at some point --

A. Subject to Paragraph 9.

Q. I want to focus on representation only.

A. Well, we have to focus on the entire contract. I don't believe it would be fair to do that.

Q. I want you to assume that Jenner & Block never withdraws from the Oracle case.

A. Okay.

Q. And that all the same things happen in the case that happened in the case apart from Jenner & Block's withdrawal

from the case.

A. Uh-huh.

Q. They go to the Federal Circuit. They argue to the chief judge. They do a fabulous job. He agrees with them. The case is reversed. It's remanded. It goes back down. There's argument about whether the case should be stayed. There's argument about the dispatching term. There's pretrial orders. There's disputes about invalidity. They get to the courthouse steps and one day before the trial starts, Oracle says we give up. We settle, and they ink a settlement agreement.

A. Uh-huh.

Q. Okay.

A. Uh-huh.

Q. Yes?

A. I'm accepting your hypothetical to the extent I understand it, but I think I do.

Q. Okay. I mean, you understand that's the course of what happened in this case aside from Jenner & Block withdrawing?

A. No, your question wasn't that. Your question -- I thought your question was assuming --

Q. I haven't asked a question yet. I want to make sure you understand --

A. Well, then, maybe -- how can I understand it if you

haven't asked it. Maybe you should ask the question.

Q. I'm asking you do you understand that I'm asking you to look at the contingency fee agreement without assuming -- assuming that Jenner & Block doesn't withdraw.

A. Okay.

Q. And there's a recovery in the Oracle case --

A. Okay.

Q. -- by settlement --

A. Okay.

Q. -- the payment would not be governed by Paragraph 9, correct?

A. If the contract was not terminated at the time the settlement occurred, the payment would not be governed by Paragraph 9.

Q. It would be governed by paragraph --

A. Five or six.

Q. Five, I think --

A. Yeah, I think it's five.

Q. -- but I want to make sure. Five.

A. Five.

Q. So in the event that Jenner & Block is in the case and hasn't withdrawn, its payment is contingent on the amount of the recovery?

A. Right.

Q. It gets the third or the 28 percent, depending on the

amount of recovery?

A. Yes.

Q. But after it terminates, it can elect, even if it's upon recovery, to be compensated for all time expended on any enforcement activity at regular hourly billing rates charged by Jenner & Block?

A. It still comes out of recovery.

Q. It comes out of recovery, but they're getting their hourly rates now?

A. Yeah, that's what it provides.

Q. And that's $10.2 million in this particular case?

A. Well, that's -- the hourly rate calculation is $10.2 million, yes.

Q. Now, assume for me that Jenner & Block has not withdrawn?

A. Uh-huh.

Q. And they handle the appeal to the Federal Circuit?

A. Uh-huh.

Q. Okay.

A. Uh-huh.

Q. I'm just asking you to say, yes, because you're not getting transcribed.

A. I'm just waiting for the -- I'm just waiting for the question.

Q. Okay.

ARBITRATOR GRISSOM: He's asking for a "yes" rather than an "uh-huh."

THE WITNESS: Oh, okay.

A. Yes.

Q. (BY MR. ALIBHAI) And at the Federal Circuit, have you seen the testimony that Oracle offered $1 million?

A. No.

Q. I want you to assume that Oracle only offered $1 million at the Federal Circuit --

A. Okay.

Q. -- which Mr. Carlson and Mr. Meek testified to.

A. Okay.

Q. What would have been the fee that Jenner & Block would have received if Parallel Networks had accepted the $1 million settlement offer made at the Federal Circuit mediation?

A. Well, the contract would provide if the net revenue or the net proceeds was a sum, then they would get either 33 percent or 28 percent or whatever other percent pursuant to what's provided in this case.

Q. So you take the million dollars?

A. If that was what was received, take the million bucks.

Q. And you subtract out approximately $900,000 in expenses.

A. Okay.

Q. Right, subtract out those expenses?
A. If there were $900,000.
Q. Okay. And then you get to the $100,000, that's the net recovery --
A. Right.
Q. -- and you multiply that by 33 percent --
A. Okay.
Q. -- and you come out with around $33,000?
A. Sounds like it.
Q. Now, you talked about the Hoover case. You said that in that case, the client fired the lawyer?
A. That's correct.
Q. Now, as I understand it, these red bullets on Page 3 --
A. Uh-huh.
Q. -- are your distinctions or your summary of the Hoover case, correct?
A. Not entirely. I mean, the Hoover case goes on and on. These are the ones I thought were significant for purposes of this case. There were other distinguishing features, but these are the ones that I thought were most significant for purposes of discussing the difference between Hoover and this case.
Q. And the second distinguishing feature is that you must calculate the contingent fee even though there's no

recovery amount?

A. Correct.

Q. And in this case, there's no recovery amount in the Oracle arbitration, correct?

A. Not yet.

Q. And with respect --

A. If you're referring to the arbitration as the arbitration yet to come?

Q. Yes, sir.

A. Yeah, there's not a recovery yet.

Q. And then -- and you don't -- you don't know if there'll even be a recovery, do you?

A. Correct.

Q. Now, if you look at the third point, you see there's no distinguishing between cause and no cause?

A. Correct.

Q. But the termination provision in the Jenner & Block contingent fee agreement doesn't distinguish between cause and no cause, right?

A. Oh, I think it absolutely does. I think it prescribes the cause.

Q. Well, if you look at 9a first -- do you need a copy?

A. Sure -- well, just go ahead. I know it pretty well. If I need to look at it, I will.

Q. Sure. So I'm handing you what's been marked as

Respondent's Exhibit 12, which is the contingent fee agreement.

A. Yes.

Q. And if you'll look at 9a --

A. Right.

Q. -- that provision governs termination by the client?

A. Yes.

MR. ALIBHAI: It's the green Volume 1.

ARBITRATOR GRISSOM: Okay.

MR. ALIBHAI: Or you can use 7A, I believe.

ARBITRATOR GRISSOM: 7A is marked in my recollection.

MR. ALIBHAI: Okay.

Q. (BY MR. ALIBHAI) So at the bottom of Page 6, looking at Paragraph 9a, although the agreement provides for a provision regarding material breach, it does not specify what amounts were due based upon cause or no cause?

A. No, sir, that's not correct. This 9a, the one you pointed to, is not the provision that I was referring to again on Page 3, because this is not the circumstance that's at issue in this case. This provision says that -- 9a says that the client may terminate the attorney. epicRealm Licensing or Parallel Networks may terminate the agreement at any time. But that's not the provision that's at issue in this case for purpose of this analysis. The provision that's at issue in this case is 9b, which provides the circumstances under which

Jenner & Block may terminate the agreement, which is the agreement of the parties, as to the proper cause of termination. And that's what distinguishes it from Parallel -- from Jenner & Block.

Q. Mr. Cunningham, Slide 3 has nothing to do with application to this case, right. This is your summary of the Hoover case and important distinguishing points from it, right?

A. No, sir. You totally misunderstood Slide 3. Slide 3 has everything to do with the application of this case. That's why I'm here testifying about this case. I'm not testifying necessarily that there is cause and needs to be cause in 9a. I'm saying that the issue we're here to talk about is 9b because that's the issue that gives rise to the right to compensation in this case and that provision is distinguishable from Hoover Slovacek.

Q. Will you look at 9a for me?

A. Sure.

Q. Does it distinguish between cause and no cause, yes or no?

A. And it does not require that there be a stated cause for the client to terminate the attorney. It does say that the client may terminate the attorney at any time.

Q. And whether the client terminates the attorney for cause or no cause, those are the amounts listed in 9a that the

client has to pay?

A. Correct.

Q. Now, with respect to Rule 1.08h --

A. Uh-huh.

Q. -- that's a rule that says in Texas, a lawyer cannot have a proprietary interest in a case except that a contingency fee agreement is not within that --

A. Under 104, that's right. What -- the contingency fee agreement prescribed to 104 is the exception to the rule that an attorney should not have an interest in the case.

Q. So if an attorney tries to get a proprietary interest in a case, that's not accepted out by 1.08, that's improper?

A. That's what Hoover Slovacek says.

Q. And that's what Rule 1.08 says by itself, right?

A. Right.

Q. Now. Let's look at Slide 4. In Texas, a contingency fee agreement must be in writing, right?

A. That's correct.

Q. And it must be entered into before the contingency occurs?

A. Correct.

Q. You have to do it at the outset?

A. Yes.

Q. And just cause for an attorney to recover when the attorney fires the client has been described in cases like

Auguston and Staples?

A. It's been addressed in those cases.

Q. And Rule 1.15, I think it's Comment 1 --

A. Uh-huh.

Q. -- says that when a lawyer has accepted the representation, a lawyer should normally endeavor to handle the matter to completion.

A. I'm familiar with that comment, and I agree that's probably a good way to say it.

ARBITRATOR GRISSOM: What was the second case you said, Auguston.

MR. ALIBHAI: Staples.

THE WITNESS: Staples v. McKnight.

ARBITRATOR GRISSOM: I've heard y'all talk about that one but --

MR. ALIBHAI: Auguston is the more popular one.

Q. (BY MR. ALIBHAI) With respect to 9a(iii) which discussed with --

A. Yes.

Q. -- Mr. Koning --

A. Yes.

Q. -- one of the things that he left out of his question and that has been an issue between you and Professor Hricik in your reports is that 9a(iii) does have language that says it's an appropriate and fair portion of the contingent fee award

based upon Jenner & Block contribution to the result achieved as of the time of termination of this agreement.

A. Yeah.

Q. And that you believe that the "as of the time of the termination of this agreement" should not modify the word "result"?

A. I think it's the contribution, yeah, not the result.

Q. So you want to look at their contribution at the time of the termination, not to the result achieved as of the time of the termination?

A. Correct.

Q. Because if you looked at it based upon the result achieved, it wasn't a very good result in the Oracle case at the time that they withdrew?

A. Well, it was inconclusive. It wasn't good or bad. It was inconclusive. The case wasn't over.

Q. So if Mr. Jimenez-Ekman and Mr. Margolis discussed this morning that it was a bad result, you would disagree with them?

A. No, an adverse summary judgment is always a bad result, but that's not the end of the case. And --

Q. They're still in appeal?

A. Excuse me. As I testified earlier, I've seen people go make millions of dollars in legal fees, and clients obtain ten of millions of dollars in judgments after an adverse

summary judgment. So the result that I'm talking about here, and I think the result that -- the only way this thing makes sense to me is if the result refers to the conclusion of the engagement or the conclusion of the case, which is the subject of the engagement, not the conclusion of any discovery motion or summary judgment motion or motion to dismiss that occurs before the case is over.

Q. Turn to Slide 5, if you would. You talked about the Hoover case. I assume that you've read it many times?

A. I've read it.

Q. Have you read the dissent?

A. I have.

Q. Justice Hecht in the dissent makes the point that he disagrees with the court in trying to say that these lawyers couldn't contract around, correct?

A. Uh-huh. Generally that's right.

Q. And in the Court of Appeals -- did you read the Court of Appeals opinion before it went to the Supreme Court?

A. Yes, it's been a while. I haven't looked at it since I first got involved in knowing about Hoover Slovacek.

Q. And with respect to the Court of Appeals, the court specifically says, look, we understand your argument is that you made a bargain, and a bargain is a bargain --

A. Sure.

Q. -- but that -- the problem we have with that is that

may run afoul of Rule 1.04 in the arranged for unconscionable agreement.

A. I don't recall that specifically, but I'll take your representation.

Q. And that you can't just say, hey, this is the deal we made, we get it?

A. Well, yeah, and there was reference to Justice Judge Bianchi's testimony as an expert on behalf of Hoover Slovacek, that this was the deal they made, good or bad, and the court made the point correctly, Supreme Court did certainly, that the contracts between attorneys and clients are governed by the ethical rules as well as the ability to (inaudible).

Q. So you're looking at January 2nd, 2009?

A. Uh-huh.

Q. That's the day that Mr. Margolis sends the Notice of Termination letter, right?

A. Okay.

Q. And he specifically says, we're terminating pursuant to Paragraph 9b?

A. Uh-huh.

Q. Right?

A. I believe that's right.

Q. And so at that moment in time, the fee that Jenner & Block is entitled to, according to you, upon recovery is governed by 9a(i), (ii) and (iii)?

A. That's correct.

Q. Now, your testimony is that you just don't read 9a(i) to be an immediate payment because it doesn't say one way or the other?

A. Well, my testimony is broader than that actually. My testimony is that it's very apparent to me that at the time this contract was written and the time that one would evaluate the contract for conscionability, the parties envisioned that the recovery would be substantially larger than it turned out to be. And for that reason, the contract says that the -- in Paragraph 9a(iii), which of course carries over to 9b(iii), at the conclusion of any enforcement activity, pay Jenner & Block an appropriate and fair portion of the contingent fee award based upon Jenner & Block's contribution to the result achieved at the time of termination of this agreement.

To the extent that Jenner & Block has not already been compensated under Paragraph 9a(i), that to me says that the expectation was that the contingent fee would very likely be greater than the hourly rate that had been -- you know, the time that had been devoted to the case at the hourly rate. Therefore, the hourly rate component, 9a(i), was thought by the parties obviously to be very likely much less than what Jenner & Block would have been entitled to had they even gotten an contingent fee apportion based upon their contribution to the result. That's why it says if even the hourly rate is not

good enough, we'll even kick in an appropriate portion of the contingent fee to recognize your contribution to the case.

And so to me, the provision anticipated, and based upon the testimony I've heard about what the parties' original settlement demand were and the mediation, et cetera, it seemed -- and their expectations when the agreement was entered into and the $100 million or more, it seems to me very clear that this provision was written with the expectation that the result would be achieved, would make the hourly rate component less than the contingent fee.

Q. Is one of the basis for your opinion that the 9a(i) hourly fee payment --

A. Uh-huh.

Q. -- was not due immediately is because it does not say that it wasn't due immediately?

A. Well, that is a basis. The other basis --

Q. Okay. I want to talk about that basis.

A. Okay.

Q. And you just mentioned that 9a(iii) says, at the conclusion of the enforcement activity, in it, correct?

A. Yes.

Q. 9a(i) doesn't say at the conclusion of the enforcement?

A. Correct.

Q. And then 9a(iii) also says that to the extent that

Jenner & Block has not already been compensated under 9a(i)?

A. Correct.

Q. Which means that 9a(i) happens first and then 9a(iii) happens second?

A. No, it doesn't mean that to me. It means that the calculation would occur. And to the extent that the fee agreement -- the hourly rate component does not already compensate Jenner & Block, then a contingent fee would kick in.

Q. So when were the expenses that had been previously unreimbursed due? Was that at the conclusion of the enforcement activity --

A. The expense --

Q. -- under 9a(ii)?

A. No, I think the -- what expenses are you talking about?

Q. 9a(ii) --

A. Yeah.

Q. -- it says that upon termination, you have to reimburse Jenner & Block for all previously unreimbursed unenforce -- enforcement expenses.

A. Right.

Q. So were those due at the end of the enforcement activity as well?

A. That's the way I read it.

Q. So if Jenner & Block was sending fee statements

asking for unreimbursed, unenforceable expenses in January, February and March, that was improper? They should have waited till the end, right?

A. Yeah, that makes sense to me.

Q. Now, on the January 2nd letter from Mr. Margolis, the reason --

A. Oh, I'm sorry. I'm sorry. No, I'm sorry. You're talking about expenses?

Q. Yes.

A. Well, expenses were not to come out of the contingent fee. I thought they were to be paid separate.

Q. Under 9a(ii), they're supposed to be paid at the conclusion of the enforcement activity, correct?

A. I think -- isn't it elsewhere in the contract where the expenses are dealt with? I don't understand expenses were part of the contingent fee. I'm sorry.

Q. Well, I'm just talking about Paragraph 9 upon termination.

A. Okay.

Q. Upon termination, the amounts that Jenner & Block is entitled to are only governed by Paragraph 9, right?

A. Well, yeah, but I don't see that 9 -- the expense portion is separately provided for in the agreement, and it is not part of a contingent fee. So you're ask -- question -- you're asking me should that also come out of the recovery at

end of the engagement, and my answer -- or at the end of the case that support it, and my answer is, no. Because the contract clearly provides that -- elsewhere that the expenses are not to be part of the contingent fee, and they're to be paid current.

Q. That's during the course of the representation?

A. No, sir, I don't see that.

Q. Well, you're not going to have ongoing expenses after you terminate, are you?

A. Presumably not. But the expenses that have not been paid are still due, not part of contingent fee, but they're still due.

Q. With respect to the January 2nd termination notice, is it your understanding that the reason that Jenner & Block terminated was because it believed, pursuant to Paragraph 9b, that it was not in its economic interest to continue the representation?

A. I think that's one reason.

Q. Have you seen any other written reasons by Jenner & Block to the client?

A. I don't recall, but I don't think so.

Q. Now, with respect to the issue of severance that you were discussing, we both agree that if a provision is unconscionable, it must severed, correct?

A. Yes.

Q. And then depending on what's left of the contract --
A. Uh-huh.
Q. -- you decide what Texas law provides for with respect to payment?
A. Okay. That -- now, I understand what your question is, and I do not agree with that.
Q. Well --
A. I agree that part of the severance concepts includes applying what would otherwise be an unconscionable provision in a unconscionable way. I think that's the meaning of the statement as quoted in Hoover, and I also believe that that's intent meeting of Paragraph 16 of the contingent fee agreement.
Q. Assume for me for one second that we sever out Paragraph 9 in its entirety?
A. Okay.
Q. If this agreement is governed by Texas law, you would look to Hoover Slovacek, Mandella & Wright and all the Texas law that says what an attorney gets when he fires the client.
A. If there is no contract.
Q. If there's no Paragraph 9?
A. Right.
Q. Right?
A. Yes.
Q. And the reason that they remand in Hoover Slovacek is

because they've severed out the unenforceable provision, the client has fired the lawyer, and so there's a question of whether it's with or without cause --

A. Right.

Q. -- and whether the lawyer gets some amount?

A. Correct.

Q. And with respect to your last slide, your opinion is, depending on which calculation you used, that for the work that Jenner & Block did in the past, it's either 3.2 million or 4.4 million?

A. Again, that's where that calculation goes, and those numbers are in the exhibit, whatever they are.

MR. ALIBHAI: No further questions.

ARBITRATOR GRISSOM: You done?

MR. KONING: One question. You don't have to move, though, for this, if it's okay.

FURTHER REDIRECT EXAMINATION

BY MR. KONING:

Q. Mr. Alibhai cut you off when you were answering your question. I just want to give you an opportunity to answer it. He was asking you about what your basis was concluding that 9a(i) payment is not due immediately. I wanted to give you an opportunity to answer that fully.

A. Well, I told him that I think he -- I don't remember the question actually. Would you restate that?

Q. Yes. I believe the question that Mr. Alibhai asked you was whether or not your conclusion for that 9a(i) payment was not due until the time of a recovery was based entirely on the fact that the 9a(i) provision did not specify whether it was due.

A. Oh, okay. I do remember that. And that is a factor certainly, and my report expresses that. But as my report also expresses, there are a number of other things that I based it upon, including and importantly the expression of the parties and the course of dealing with the parties during the period of time that this was all taking place. It seemed to me that the parties agree that that was the case, and their discussions confirmed their agreement that that was the case. And so the way they handled it, and the way that the timing upon which the request for the payment was made, the discussions they had during the time of the termination all pointed to me that the parties understood and recognized and really never questioned that the -- whatever fee would come out of this, would come out the -- out of recovery.

Q. And does 9a(i) have anything to do with calculations that you've made in Exhibit 473?

A. No, it's not involved in the calculations.

MR. KONING: No further questions.

MR. ALIBHAI: I have no further questions.

MR. KONING: May this witness be allowed to go

back to Houston.

MR. ALIBHAI: I have no objection to that.

ARBITRATOR GRISSOM: Mr. Cunningham, I have the honor of excusing you for the second time.

THE WITNESS: And I have the honor of getting out of here as fast as I can because I've got to get back to trial.

ARBITRATOR GRISSOM: Have a good trip.

THE WITNESS: Thank you.

ARBITRATOR GRISSOM: Would this be a good time for us to recess for lunch, or do you want to do something else?

MR. ALIBHAI: Mr. Pelz said we'd be done before lunch.

MR. PELZ: Lunch recess is fine.

ARBITRATOR GRISSOM: Okay. All right. Very good.

MR. PELZ: Pretty close. You know, I think the only thing remaining is attorney's fees.

MR. ALIBHAI: Subject to the attorneys' fees issues, you're resting?

MR. PELZ: Unless Paul has got some new witness that he didn't tell me about. Yes. Arbitrator Grissom, we will rest subject to the presentation on attorneys' fees.

ARBITRATOR GRISSOM: All right. All right.

Then we are in recess for lunch. We'll see you back at 1 o'clock.

I'm assuming if we begin at 1:00, all the projections (inaudible) still apply, we will be done today.

(Lunch break was taken at 11:58 p.m. to 12:59 p.m.)

ARBITRATOR GRISSOM: We are back from lunch and I understand that Mr. Koning is in the witness chair. Ms. Letourneau is going to be asking questions. All right. Please proceed.

PAUL KONING,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. LETOURNEAU:

Q. Would you please state your for the record.

A. Paul Koning.

Q. Mr. Koning, are you an attorney?

A. Yes.

Q. Are you a licensed attorney?

A. Yes, I am.

Q. And where are you licensed?

A. Texas.

Q. How long have you been licensed in Texas?

A. Since 1981.

Q. Are you licensed anywhere else?

A. Not any other state, just federal courts.

Q. And Mr. Koning, what is the nature of your practice?

A. I'm a trial lawyer and I concentrate in professional liability.

Q. And have you taken cases to trial?

A. Yes. I've tried cases and arbitrated cases, and also have a lot of experience in pretrial matters.

Q. And, Mr. Koning, are you representing Jenner & Block in this arbitration?

A. Yes.

Q. And what has your role been in this arbitration on behalf of Jenner & Block?

A. I have been the Texas counsel. I've been co-counsel. I've been more than a local counsel role. I've been actively involved in all of the strategy, motions, hearings and drafting of and reviewing of papers and briefs. So I've pretty much coordinated with the Jenner & Block attorneys on all aspects of the representation.

Q. And during the course of your representation, have you personally observed the work of the other attorneys involved in this matter?

A. Yes, I have.

Q. Mr. Koning, are you aware whether or not Jenner & Block has made a demand on Parallel Networks in this matter?

A. Yes, they've presented their claim on at least two

occasions that I'm aware of. One Ms. Mascherin testified to in August of 2011, and then we presented a revised claim more than 30 days before trial in a letter from me that's been marked already as Claimant's Exhibit 457.

Q. And what was the demand in 2011?

A. I believe that was a demand that Ms. Mascherin and Mr. Hoover made before they knew what the recovery had been, the amount of the recovery, for $3 million.

Q. I'm showing you what's been marked as Claimant's Exhibit 457. I believe you've already referred to it.

A. Right.

Q. Do you recognize this document?

A. Yes. This is presentment for a demand we made more than 30 days prior to trial for the amounts that are stated in it.

MS. LETOURNEAU: I'll give Arbitrator Grissom a moment to catch up.

ARBITRATOR GRISSOM: Which Arbitrator Grissom appreciates. Okay. Were you going to testify about this?

THE WITNESS: Just identify it as a presentment of our claim in connection with this attorneys' fees testimony.

ARBITRATOR GRISSOM: You said there was an amount in here?

THE WITNESS: Yes, the amount is in Paragraph 4.

ARBITRATOR GRISSOM: Okay. Thank you.

Q. (BY MS. LETOURNEAU) And what is the amount requesting in the September 14th letter?

A. Its $4,439,270, plus an agreement to pay a percentage of monies that Parallel Networks receives in the future pursuant to the settlement agreement.

Q. Was this demand made more than 30 days prior to the beginning of these proceedings?

A. Yes, it was.

Q. Was there a response?

A. No.

Q. Mr. Koning, have you formed an opinion as to the amount of reasonable and necessary attorneys' fees incurred by Jenner & Block in connection with its claim for breach of contract against Parallel Networks?

A. Yes, I have.

Q. What have you done to form your opinion?

A. Well, first, I'm generally familiar by -- as a result of my participation in the case with the work that has been done by the attorneys involved in representing Jenner & Block. Second, apart from that, I reviewed the time entries and invoices that have been produced in this case.

Q. Let me stop you for a moment there.

A. Okay.

Q. Now, I'm handing you what's been marked Claimant's

Exhibit 465.

A. Okay.

Q. Are you familiar with this document?

A. This is the invoices or the printout of the time entries after write-downs by Jenner & Block timekeepers. And I believe -- I just want to check.

Does this have the supplemental part in here where it's got the October -- the September time? Yes, so this is as supplemented. So it should have everything in here except October time.

Q. Have you personally reviewed this document?

A. I have.

Q. Okay. Now I'm going to show you what's been marked as Claimant's Exhibit 466.

A. Okay.

Q. Do you recognize this document?

A. This is -- the top page of this is my fee agreement in representing Jenner & Block. The remainder are my invoices and proof of payment through the end of September -- through time for the end of September. Did I say that right? It goes up until -- it goes up through the end of September in terms of charging for my services.

Q. And I assume you've reviewed this document?

A. I wrote it, the first page. But the rest of it, yes.

Q. And have you observed the work that the attorneys in

this arbitration on behalf of Jenner & Block have done since the end of September?

A. Yes, I have.

Q. And have you formed an opinion on that?

A. As far as the amount --

Q. Yes.

A. -- or the quality or both? Yes, I've made some assumptions in my overall opinion regarding that work because not everyone has gotten their time entries in.

Q. All right. And I think we'll get to that a little bit later.

So you testified that you're generally familiar with the work that has been done, and that you've reviewed the time entries of the timekeepers.

What else have you done to form your opinion?

A. Well, I also have reviewed the pleadings and correspondence in the case as it's proceeded. And I've familiarized myself with the standard rates in this area in Texas generally, in Dallas generally. I've applied what are known as the Andersen factors, which are also the factors set out in Rule 1.04, to ensure that the resulting fees are in accordance with those factors.

And then finally, I have gone through the effort of trying to segregate the fees in the case that were -- that were for services that were solely with respect to the

counterclaims -- solely with respect to nonrecoverable services. So let me say that again. I've attempted to segregate and not -- and deduct for the services that were solely with respect to nonrecoverable parts of the case, nonrecoverable for attorneys' fees purposes, within the meaning of the Supreme Court authority on how to segregate attorneys' fees.

Q. Now, Mr. Koning, you testified that you're a pretty experienced trial and arbitration lawyer?

A. I'm -- I'm about average, I guess.

Q. Through your experience as a trial attorney in commercial litigation and arbitration matters, are you familiar with the reasonable and necessary work required by attorneys at various experience levels to succeed in presenting a claim such as we have in this arbitration?

A. Yes.

Q. And are you familiar with the customary and reasonable fees charged in the State of Texas for cases of this type?

A. Yes, I am.

Q. Have you made any attempts to compare the hourly rates of the Jenner & Block attorneys in this case with the customary and reasonable fees charged by lawyers of similar skill and experience who practice in Dallas?

A. Yes, I have. And my conclusion on that is, frankly,

I was a little surprised to find that the fees being charged by the Jenner team here are pretty much in line with what you would see at a similar firm in Dallas. And I was -- until two years ago, I was with a large firm, Hughes & Luce, and then became K&L Gates, and I think it would be very hard to draw any meaningful distinction between rates that are being charged by the lawyers at Jenner & Block in this, and what you would expect to see at a firm like that.

MS. LETOURNEAU: Now, Arbitrator Grissom, I'm handing up what we're marking as Claimant's Exhibit 479. This a demonstrative that we have prepared for Mr. Koning's testimony.

Q. (BY MS. LETOURNEAU) Mr. Koning, do you have an opinion as to the amount of reasonable and necessary attorneys' fees incurred by Claimant Jenner & Block in this arbitration?

A. Yes, I do.

Q. And what is your opinion?

A. Well, it's as reflected in this chart. And if you want, I can just walk through it and explain what this charge is.

Q. I think it would be helpful if you could do that.

A. The attorneys' fees reflected on the first two areas of the, chart are the attorneys' fees that are in the exhibit that you handed me. I would note that the Jenner & Block fees that are in that exhibit, and I forget the number already,

whatever that -- Exhibit 465, are after a significant amount of write-downs that were taken before the preparation of those bills. And it's my understanding, after working with Jenner & Block and going through that, that approximately $400,000 in attorney time was written off of the bills before they were presented in the form of Exhibit 465 just as if you've -- just as you would do that for a normal client, that is, you don't always bill 100 percent. You go through and you eliminate any items that are perhaps duplicative or maybe just shouldn't be billed. That was one of the reasons for the write-down.

The second reason was, Mr. Norm Hirsch who was here on the first day of this arbitration but then had to leave for medical reasons, all of his time was taken off because he serves also as the firm's general counsel. And even though his work on the case was very substantive and he acted as a lawyer, the decision was made to just not to charge for that, and I'm sure that was a very substantial amount of time. So put together, the fees that are in Exhibit 465 are reflected in the first line here with the total amount of 1,108,237. I would also note that to get to this number, none of the time for paralegals or case clerks and none of the expenses for experts were included. So this is just attorney time.

Then on the second line, you have the period from September 30th -- or October 1st to October 26th -- actually, it should be the 25th, but I don't think it'll change

much, and that number is an assumed number. And what we did there is I assumed the -- on the extreme conservative side based on my observation of how everyone has worked on this case that each of the three attorneys that are present here has -- just picked the number of 200 hours because I know that they have been full-time, around the clock working on this case pretty much since the beginning of the month. And I think that's a -- frankly, a very conservative number, and the number is likely to be higher. But we picked that 200 hours per attorney for the three trial attorneys, and we come up with that total.

The second column are my attorneys' fees and my firm's attorney fees, although 99 percent of that is mine. The same qualifications apply to that except that the hours reflected there are the 181 hours actually -- are my actual hours through yesterday for the month of October.

So you then come up with this total of $1,743,669, and that's where we applied a further discount of 20 percent in the case. Twenty percent discount is attributable to both a segregation for the counterclaim -- or for the nonrecoverable part of the case, and which I estimated after reviewing all of the time entries to be approximately 5 to 10 percent. And then an additional 10 percent discount just to avoid any possible criticism for, you know, inefficiency or excessive billing. We wanted to err on being extremely

conservative as far as charging these bills. So there's various levels of write-downs that go into this. And I'll talk about the segregation in a minute, but I think I've rambled in response to your question.

ARBITRATOR GRISSOM: Can you help me. Is the 1.394 number, is that before a discount or after?

THE WITNESS: That's after the discount. The 1.743 -- well, that's after some discounts. That's after the write-downs that the firm did, but it is not after -- I mean, but the -- I'm sorry. The 20 percent discount -- all the discounts are reflected in the 1.394 number, so that is the final number that we're seeking and I'm testifying as a reasonable and necessary attorney fee for all the services in this case. The 1.743 number is -- there are many write-downs and discounts in that number. That does not include the final 20 percent discount.

ARBITRATOR GRISSOM: I didn't see a 1.743.

THE WITNESS: It's in the middle column there right next to the 1.394.

ARBITRATOR GRISSOM: Oh, I see. Okay. All right.

THE WITNESS: Okay. So that would be the number that if you just looked at the fee bills and added up only the attorney time after all the write-downs, you come up with that 1.743 number. On top of that, we suggest 20 percent discount,

which I think is more than reasonable, but certainly it results in a reasonable fee.

ARBITRATOR GRISSOM: All right. Very good.

Q. (BY MS. LETOURNEAU) Okay. And, Mr. Koning, your opinion includes an award of fees for the work of Jenner & Block lawyers.

Did you do anything to determine whether such fees are recoverable under Texas law?

A. Yes, because I think it's always -- it doesn't happen that often, and it's always a question mark in people's mind as to whether a law firm that seeks attorneys' fees in a case and represents itself or has lawyers from the law firm representing the law firm, whether those fees are recoverable. And that answer -- that question has been answered squarely by the Fifth Circuit in at least two cases applying Texas law, specifically the Attorneys' Fee Statute 38 -- Texas Civil Practice and Remedies Code, 38.001.

Those -- at least one of those cases is cited in our prejudgment brief, but the other case is -- one is Mcleod, Alexander, 894 F.2d 1482. And the other is Campbell, Athey & Zukowski, 863 F.2d 398. Both of those cases hold that when a law firm sues for -- to recover fees and is represented by lawyers from that law firm, that the law firm is entitled to recover for the reasonable value of its own lawyer's fees as attorneys' fees recoverable under Section 38.001.

Q. Mr. Koning, I'd like to walk through your analysis as you formed your opinion. Earlier in your testimony you referenced the Andersen factors.

What were you referring to?

A. Well, the Supreme Court decision in Arthur Andersen. I forget the other -- Perry Equipment I think is the other party. Those are the list of considerations or factors that go into other fees as reasonable and necessary. Those can be applied either before you come up with kind of a lodestar amount or afterwards. In our case, we have not adjusted this fee afterwards because we think these considerations -- or I think that these considerations are already included in it. But I'll be happy to run through those if you'd like what the Anderson Factors are and how they apply here.

The first one is the time and labor involved and the novelty and difficulty of the questions involved and the skill required to perform the services. I think this was a complex case. A lot of time was required. It's been fought -- let me just say this without -- and I know we're on the last day, but this case has been fought tooth and nail from the very beginning. From the very first thing that happened when we picked arbitrators, we got a conflict check request that's submitted to the arbitrator from the other side that has about, I don't know, 2,000 names on it. We knew this was going to be a hard-fought case, and it turned out to be. And we have

numerous issues, much more than, I think, one would ordinarily encounter in an arbitration. As the arbitrator is aware, we had numerous summary judgment motions, motions to compel, and it was a hard-fought battle and involved complex issues of law that, as many witnesses have testified, some of them are novel issues. And so I would say that that ranks high on the Andersen Factors.

Likelihood that the acceptance of the particular employment will preclude employment of another -- employment by the lawyer by other people is not really applicable in my view.

The fee customarily charged in area for similar services. As I said, I think the rates that were applied here were very well -- very much within the normal range of rates.

The amount involved and the results obtained. Well, we don't know the results, yet, but the amount involved was a -- is a high amount. And there's a lot of principals involved as well.

The time limitations imposed by the client or the circumstances. This was a fairly fast track -- I wouldn't say it was a rocket docket, but we got the whole thing done in less than a year, I think. Yeah. We started -- the case was filed in December -- end of December, so start to finish in a year. And we had quite a few depositions for an arbitration that all had to be scheduled in a short period.

The experience, reputation, ability of the

lawyers -- I skipped one. The nature and length of the professional relationship with the client. Inapplicable.

The experience, reputation and abilities of the lawyers to perform the services. I can't speak for myself, but I can speak from my opinion that these are extremely fine lawyers that I worked with and very, very impressed by the high quality of their legal services, all three and as well as the others that we've worked with.

Whether the fee is fixed or contingent is not really applicable, at least not literally. My fee was fixed fee, for which I've been paid. Jenner & Block on the other hand is in this weird situation of being both the client and the lawyers representing the client. They will not get paid unless there's a recovery in the case. So that seems to be contingent to me, but I'm not sure how that plays under Andersen. Okay. I think that's the end of it.

Q. All right. So you considered Texas law.

And were there other factors that you considered?

A. Were there other factors that I considered? Well, I've considered -- I'm not sure where you're going with that.

Q. For example, I think you testified earlier about write-downs.

A. Oh, okay. Yeah. Yeah, well, I think I've been over that. We did -- in considering whether the fees that are on

this Exhibit 479 are reasonable, I took into consideration the fact that there had already been a very substantial write-down of Jenner & Block's fees, as well as my knowledge that when I wrote down my fees, I only charged what I thought was appropriate for the services provided and took that into consideration. Also took into consideration the write off of all of Norm Hirsch's time, which made these -- made my estimation of the reasonable and necessary fees conservative in my view.

Q. And you testified that paralegal and case clerk time is not included in your calculation?

A. Correct, nor are expenses or expert fees or any out-of-pocket, which there's quite a lot.

Q. And earlier you mentioned something about segregation of time spent working on a response to Parallel Networks' counterclaim in this arbitration.

A. Right. Let me tell you how I understand that works and how I've applied it. In this case we are entitled to recover, if we are successful on our breach of contract claim, or frankly, on our quantum meruit promissory estoppel claim, we're entitled to recover reasonable and necessary attorneys' fees. However, there is also a counterclaim brought by Parallel Networks. The rule on that is, is if the matters are intertwined, then generally -- such that a particular task, you can't tell whether it's for the counterclaim or the breach of

contract affirmative claim, then the fees are still recoverable.

However, if there's discreet services that the firm -- that I provide or that Jenner & Block's lawyers provide that only relate to the counterclaim, then those fees are not recoverable. And so we went through the analysis of -- and I think the leading case on that is the Tony Gullo case.

ARBITRATOR GRISSOM: Tony who?

THE WITNESS: Tony Gullo, G-u-l-l-o. Tony Gullo Motors, 212 S.W. 3d 299.

A. And I think the standard exactly is if discreet legal services relate solely to the claim for which fees are unrecoverable, then you need to sever them out -- segregate them out. And it also held that you can do that either on an item-by-item basis or simply by percentage estimate, and that's the path we chose. The only claims that we could really identify that are -- that fall within the segregation rule are claims relating to the damages that Parallel Networks is seeking because that does not affect our affirmative claim at all. However, claims relating to the liability side of our counterclaim are basically just a mirror image; that is, we would have to defeat those in order to collect on our counterclaim because they're also asserted as defenses in one -- under one name or another. But the damages part are not.

So, for example, working with any of the damages witnesses, attending the depositions of the damages witnesses, working on reports, et cetera, those, you know, in my view, would not -- we would not be entitled to recover for those fees. So we went through all that and eyeballed the fees that were related to that, and as I said, came up with an estimate around 5 to 7, no more than 10 percent of the total services that were provided attributable to that part of the case. And then we added ten more percent just to be sure basically, just to be sure that we weren't leaving anything out for a total discount of 20 percent in the case.

ARBITRATOR GRISSOM: So that is what you just said is where the 20 percent came from?

THE WITNESS: Yes, sir.

ARBITRATOR GRISSOM: Okay.

THE WITNESS: And to the extent that is -- that is more than should really be segregated, then we just offer that to me, you know, as you might do to a client, but make sure that it's acceptable and reasonable. And make sure that it's overly conservative.

Q. (BY MS. LETOURNEAU) Does that exhaust the factors that you took into account in reaching your conclusion?

A. Pretty much, yes.

Q. So in summary, Mr. Koning, is it your opinion the amount of $1,394,936 represents the amount of reasonable and

necessary fees incurred for the services provided on Jenner & Block's breach of contract claim?

A. Yes.

MS. LETOURNEAU: I have no further questions for this witness at this time.

THE WITNESS: Thank you.

MR. LOWENSTEIN: Ready.

ARBITRATOR GRISSOM: I am.

CROSS-EXAMINATION

BY MR. LOWENSTEIN:

Q. Good afternoon, Mr. Koning.

A. Good afternoon, Mr. Lowenstein.

Q. Just a few questions. You were talking about demand presentment --

A. Yes, sir.

Q. -- and you referenced an August 2011 discussion that involved Ms. Mascherin --

A. Yes.

Q. -- and Mr. Hoover as one demand, and then this letter from you, which is Claimant's Exhibit 457, from September 2012.

A. Correct.

Q. You did not reference the demand letter from Mr. Hoover in June 2011.

A. I did not.

Q. Did you not consider that a demand?

A. That's -- that was another demand.

Q. That's the demand where Mr. Hoover demands $10 million from Parallel Networks?

A. Whatever the letter says, yes.

Q. I want to talk to you a minute about the use of in-house counsel. And I don't quibble with you that there's case law that supports that in-house counsel can be compensated under Chapter 38 in cases like this one. My question is more about the rates used.

Are you familiar with -- and I think you referenced the Fifth Circuit case of Campbell.

A. Yes, I read it.

Q. The Campbell case talks about the use of market rates. It doesn't talk about using the standard rate for the in-house counsel.

A. I think that case involved a literal in-house counsel; that is, somebody that works at a corporation, not a lawyer who's -- who provides services to other clients.

Q. And are you aware of the -- there is case law out there where courts have permitted the use of compensation for in-house counsel fees, but it's got to be based on a market rate? Isn't that what the law says?

A. I think when you're talking about corporate counsel, that's correct; that is, an employee who doesn't have a market rate, so it has to be determined. These people have market

rates. They are in the market.

Q. They're in the Chicago market?

A. They are in the Chicago -- well, they practice all over the country, but, yes, they are in the Chicago market.

Q. And it's your opinion that the Jenner's lawyer rates are consistent with the market here?

A. Yes. And I would say -- you know, I would say the market for similar lawyers and similar firms. Certainly, if these people were in any of the major Dallas firms, the rates would be the same. If not, in my opinion, a little bit higher for some of them.

Q. But you would agree that -- strike that. You said you didn't consider the second lodestar Andersen Factor of the likelihood that the acceptance of a particular employment would preclude other employment?

A. Well, I just didn't think that was one way or another. My understanding of that is when you -- if you take on a case that, for example, is particularly unpopular in the community and will keep you from getting jobs, or if you take on a case that is going to take up a 100 percent of your time, then you will not be able to take on another -- and when he's finish with it, you're not going to have any clients left. But this case, I don't think falls into any of those categories.

Q. I want to talk about the discounts -- the 20 percent discount in the last box --

A. Yes.
Q. -- of your handout.
Your segregation analysis, as I understand the Tony Gullo case, the first thing you need to do is go look for work or time entries that are specifically for -- that went to -- solely to the benefit of claims for which these are unrecoverable.
A. Correct.
Q. Did you go through that process and take out those specifics?
A. Yes.
Q. And then on top of that, with respect to nonsegregable time entries, you have to figure out a reasonable number to reduce that additionally because in every instance, there's going to be some piece of that that benefits solely claim for which fees are unrecoverable?
A. That's not my understanding of the application of the method.
Q. Well, I think the case specifically talks about if you're doing a brief, for instance, that addresses -- let's take this case specifically. There's a breach of fiduciary duty claim asserted against Jenner & Block in this case.
Do you agree with me?
A. There is, yes.
Q. The time spent by a Jenner lawyer researching breach

of fiduciary duty would not be something that -- for which Jenner can recover attorneys' fees on under Chapter 38?

A. I disagree.

Q. So it's your opinion that the only thing in this case for which Jenner can not recover fees under the Tony Gullo case is Parallel Networks damages claim?

A. Well, let me -- if I can explain. I think the answer is -- the only thing that I've been able to identify as falling within that -- the rule on Tony Gullo is the damages column. And it matters relating to that damage column.

Q. So it's your opinion that if a Jenner lawyer was researching breach of fiduciary duty, that would be 100 percent recoverable under Chapter 38 for Jenner & Block?

A. Yeah. Breach of fiduciary duty is an affirmative defense, so that's a breach of contract, yes.

Q. And it's your opinion that 100 percent of the time researching these issues about suit within a suit would be recoverable to Jenner & Block under Chapter 38?

A. No, suit within a suit would fall within the damages, I would think. That's part of the damages case. That doesn't have an application to the breach of contract or defense the breach the contract.

Q. And you're saying the 10 percent accounts for all of the time spent dealing with suit within a suit and damages --

A. Yes.

Q. And you said you applied 10 percent for the segregation, and then I think you said another 10 percent for the duplication of effort?

A. Well, I said that it could be for any -- for any excess, whether it was duplication of effort or somebody wanted to quibble about the rate or whatever. It's basically a -- it's just to allow a cushion to prevent there from being any problem with the amount.

Q. But you're familiar with the El Apple case that came out recently, El Apple v. Olivas --

A. Yes.

Q. -- 370 S.W.3d 757?

A. Yes, I'm familiar with that one.

Q. In that case --

MR. LOWENSTEIN: Did I go too fast?

ARBITRATOR GRISSOM: Yes.

MR. LOWENSTEIN: El Apple, Limited v. Olivas O-l-i-v-a-s, 370 S.W.3d 757.

Q. (BY MR. LOWENSTEIN) That case talks about when you're doing a lodestar analysis, you go through the bills and look for duplication of effort and other inefficiencies in the billing, and it's appropriate to come to a reasonable fee determination that you back that out as well?

A. Yes. Although that case didn't involve Section 38.001, I do agree that is generally the proper methodology.

Q. So you're saying this 20 percent encompasses both the principals in El Apple and the Tony Gullo segregation?

A. That, plus the write-downs that were taken before the Jenner & Block bills printed.

MR. LOWENSTEIN: Pass the witness.

ARBITRATOR GRISSOM: We can talk about this after we have concluded all this, but if there are cases that you want me to know about, we need to figure out a way to gather those instead of me trying to write things down and all that. I'm assuming that if you want me to know about all the authorities, we'll figure out a way to collect those when you do your brief.

MR. LOWENSTEIN: Yeah, I think, when we do the briefs will be a good time.

ARBITRATOR GRISSOM: I'm not asking for any more paper right this minute. I've got plenty. I have sufficient. All right.

REDIRECT EXAMINATION

BY MS. LETOURNEAU:

Q. Mr. Koning, just to be clear on the record, you testified that there were write-downs prior to the printing of the bill that's been submitted as exhibit -- Claimant's Exhibit 465.

A. Yes.

Q. What do you estimate to be the amount of those

write-downs?

A. It's in excess of $400,000 of attorneys' fees only.

MS. LETOURNEAU: No further questions.

ARBITRATOR GRISSOM: All right. Mr. Koning, I would ask if you can be excused, but under the circumstances. Can you please swear the witness.

(Witness was sworn.)

ARBITRATOR GRISSOM: Please proceed.

JEFFREY S. LOWENSTEIN,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. CHEN:

Q. Mr. Lowenstein, can you please state your full name for the record?

A. Jeffrey S. Lowenstein.

Q. And do you remember represent Parallel Networks and epicRealm Licensing in this arbitration?

A. I definitely represent Parallel Networks. I'm not sure that epicRealm Licensing exists, but to the extent it does, I represent that one as well.

Q. And are you a partner at the law firm of Bell, Nunnally & Martin?

A. I am.

Q. What other roles do you have at the firm?

A. I serve on the firm's management committee. I'm also

the chair of litigation section.

Q. And how long -- I'm sorry. What area of law do you practice?

A. General commercial litigation.

Q. And how long have you been doing that?

A. Since 1998.

Q. Do you represent both plaintiffs and defendants?

A. I do.

Q. As part of your work at Bell Nunnally, are you responsible for reviewing and analyzing bills submitted to clients?

A. I am.

Q. Prior to this arbitration, have you testified as an expert regarding recoverability of attorneys' fees?

A. I have.

Q. And have you worked on cases before that involved breach of contract claims?

A. Hundreds.

Q. Are you familiar with the legal services ordinarily and necessarily performed by attorneys in breach of contract cases?

A. I am.

Q. And are you here today to give an opinion on the attorneys' fees incurred by Parallel Networks in this arbitration?

A. Yes.
Q. And what is that opinion?
A. Well, my opinion is to a number which is the reasonable and necessary attorneys' fees incurred for -- by Parallel Networks in relation to the affirmative breach of contract claim it has and out of the total of about 2-plus million of fees that were incurred that 760,000 are fairly allocatable to the affirmative breach of contract claim. I can go through a lot of more detail.
Q. Okay.
A. I'm sure we'll go through to get there.
Q. Okay. At this time, I'll introduce exhibit -- Respondent's Exhibit 139, 140 and 141.
Mr. Lowenstein, do you recognize what these exhibits are?
A. Yes. 139 are the redacted Bell Nunnally and Martin invoices through the end of September 2012. 140 are the redacted Munck Wilson Mandala fee statements through September -- the end of September 2012. 141 are the statements of Sullivan & Worcester through the time that -- I think through the end of -- well, through February 2012 when they ceased their work on this case.
Q. And in your opinion were these fees incurred reasonable and necessary?
A. Yeah. Let me say a few things about that. One,

similar to what Mr. Koning was saying, there are numerous -- at least for Bell Nunnally and Martin and Munck Wilson, there are a lot of fees and time worked on these cases that do not appear on these bills because either Mr. Alibhai or myself wrote those down for one reason or another before they ever showed up on the bill. I haven't quantified that. The fees that end up on these bills are all reasonable and necessary benefit of the client, but I have not allocated them all to firm breach of contract claim.

Q. And in form your opinion, how did you go about calculating these fees?

A. I went through many steps. One was I looked at the Sullivan & Worcester bills, and there were two things that jumped out. One was the fact that -- at least Ms. Steinberg we understood was a fact witness in the case. She never end up being a witness in the case, but we understood that. So because there were several different law firms that Parallel Networks had at least consulted, like Baker Botts and the Bosy & Bennett firm during this process, and those lawyers all did work in helping out, because they were fact witnesses, I excluded those bills. I excluded the Sullivan & Worcester, which is 141.

Q. So you completely took out the Sullivan & Worcester bills --

A. Yeah, I just -- I mean, that was over $200,000 in

fees, but because of the overlap, I just moved those aside and only considered the Munck Wilson and Bell Nunnally bills.

Q. And what did you do after that?

A. Then I went about reviewing -- and you worked with me on it, so you know the process. We went through time entry by time entry to figure out two things. One was looking at the lodestar or Arthur Anderson Factors in considering whether the time spent by the people doing it was reasonable and necessary in applying all of those factors. The other step then after doing that was -- and let me stop there.

After going through the Arthur Andersen factors, I did consider that all of the fee statements -- all of the fees were reasonable and necessary. And I'll get to the El Apple case that we were talking about later because I apply that at the end. So the first step was going through the lodestar factors. I believe all the fees in 139 and 140 were reasonable under those factors.

Next step was segregation. And you -- Ms. Chen and I went through painstakingly entry by entry. I laid eyes on every one and figured out which ones were related to Parallel Networks' affirmative plan for breach of contract and which ones solely related to claims that -- for which Parallel Networks could not recover under Chapter 38. And as Mr. Koning pointed out, there were many facts and depositions and other things that overlapped completely with respect to those issues,

but there were clearly ones for which -- time entries for which we could segregate out completely. One thing that came to mind was there was a bunch of discovery related to the different law firms and their fee statements.

That all went to Jenner & Block's affirmative claim for damages. So we took all those out, and those were actually easy to find in here and segregate out. Once we went through and took out all of those claims, I went back through and because I only considered the redacted bills in my analysis and there was many entries that were completely blacked out, since I knew nobody else could look at those and figure out whether or not those fees went to our claim or their claim, I took those out, too. So that was big step one.

Big step two was going back through and considering the issues of the Tony Gullo case, which is if I look at all of this together, clearly when we're taking a deposition or when we're drafting a breach, there's some part of that that only relates to nonrecoverable claims.

Q. So for those tasks that did not relate to affirmatively -- Parallel Networks affirmative claims, those were taken out completely, correct?

A. Right. Like the example of the fee statements from the other law firm that were involved in the underlying case. I mean, that's just one example. There were several different examples, but that was one that jumped out as I got to take all

of those out.

Q. And after you took all of those out, then did those tasks that included a mixture of those claims -- tasks for the breach of contract claims and other claim, you then went to the next step of trying to segregate those out?

A. Yeah. I mean, if you could segregate them out, we did. If you couldn't -- I mean, for instance, flying to Chicago and sitting through a deposition of a certain witness, there's going to be issues that involve all those things and trying to figure out minute by minute what applies to what is impossible. So the Tony Gullo case suggests you can apply basically a percentage production like Mr. Koning did, and say I think 40 percent of that work went to facts that supported the Parallel Networks claim.

Q. So in your opinion after applying all these factors -- actually let me back up. In addition to reviewing the bills that were actually invoiced to the client, those bills only went up until September of 2012, correct?

A. Yes. And there's one other thing I did in reducing the bills further that I'm not sure I addressed yet. I don't know if I'm getting you out of order. So I may be leading myself out of order. But there is the --

ARBITRATOR GRISSOM: Sustained.

A. I think you were going to ask me about the El Apple case also if you wanted to do that, but --

Q. (BY MS. CHEN) Continue. Go ahead.

A. The El Apple case I talked about with Mr. Koning involves going through and making sure that there's not duplication of effort, billing errors, inefficiencies, so I considered that and I gave a pretty heavy reduction for that, not because I don't think the time was spent to the value of Parallel Networks, but because I think that's what that case requires. The considerations there there were firm transitions. There were several firms that were involved in, you know, some overlap in the transition time, so I considered that in the reduction.

And then, you know, there were depositions and there's been a lot of lawyers and paralegals involved in all of these, and I think appropriately so. There's a lot to do in a very compressed period of time. There's still inefficiencies created when you have more than one lawyer in a deposition, so I considered that, and again, gave another heavy reduction. So after I -- well, so that's where I'll stop on reductions.

Q. Okay. So all of these bills you reviewed went up through the time period of September 2012?

A. The end of September, yes.

Q. So in addition to reviewing those bills, did you also consider the time in -- that the lawyers spent in October of 2012, as well as future proceedings, for example, post-hearing briefings in November?

A. Yes. I got the information from Munck Wilson and my own firm records about how much time has been spent in October, and then considered the amount of time it's going to take and which lawyer is going to be involved in the post-hearing briefing.

Q. So after considering all the invoices that were incurred form the time in October 2012, November 2012, future proceedings, if you will, applying all the factors that we discussed today, you reached an amount of $760,000, correct?

A. Right.

Q. And in your opinion, is $760,000 the amount that you believe should be recoverable by Parallel Networks in pursuing its affirmative claims against Jenner & Block in this arbitration if Parallel were to prevail?

A. I do.

Q. Kind of changing gears a little bit. Do you know if there was a demand made in this case more than 30 days ago?

A. Yes.

Q. And was it paid?

A. No.

MS. CHEN: No further questions at this time.

ARBITRATOR GRISSOM: Did you all do a little breakdown summary of all this through October and then the other things? If you did, I just missed it. I just want to make sure I have it.

MR. LOWENSTEIN: I didn't break it down. If you'd like me to prepare something in the post hearing.

ARBITRATOR GRISSOM: I'm not asking you to do anything. I thought you had referred at some point to something that had the steps in it It's fine. Your testimony is what it is. Don't worry about it.

There's no -- let me just ask this -- in the exhibits, there appears to be a -- well, I guess all of these are the serial invoices, and there's not a cumulative invoice for Munck Wilson or Bell Nunnally.

MR. LOWENSTEIN: I don't have anything that adds it up in the way Mr. Koning's does.

ARBITRATOR GRISSOM: Okay.

MR. LOWENSTEIN: I can give testimony on that if that will be useful because I know the numbers in my head, or I can give -- we can prepare a document like that.

ARBITRATOR GRISSOM: Well, why don't we try the numbers in your head.

MR. LOWENSTEIN: Okay. The total fees, including all the firms at the top line through the end of September were right at 1.5 million. I don't know. It depends.

ARBITRATOR GRISSOM: When you say "all the firms," you're talking about both the firms?

MR. LOWENSTEIN: Well, all three. I was going

to give you the very top line number and then how I reduced it.

ARBITRATOR GRISSOM: Oh, okay.

MR. LOWENSTEIN: Is that useful?

ARBITRATOR GRISSOM: Yeah. Uh-huh.

MR. LOWENSTEIN: If you add in the month of October and the post-hearing briefing, that goes up to 2.1 million. So there's another 600,000 involved there.

ARBITRATOR GRISSOM: Okay.

MR. LOWENSTEIN: The -- then there's reductions. We took off the $200,000 worth of Sullivan & Worcester bills --

ARBITRATOR GRISSOM: Okay.

MR. LOWENSTEIN: -- taking us down to 1.9. We then -- between the application of what turned out to be about a 60 percent reduction and taking out the individual entries, that took the 1.9 down to 750,000 -- 760,000. The reduction is $1,160,000.

ARBITRATOR GRISSOM: Okay.

MR. LOWENSTEIN: Is that better?

ARBITRATOR GRISSOM: Yeah. No, I just -- I didn't have -- there was just a little gap in the pathway. I was trying to fill that in, which I appreciate it.

MR. LOWENSTEIN: Okay.

ARBITRATOR GRISSOM: Yes, sir.

MR. KONING: Ready?

ARBITRATOR GRISSOM: (Affirms.)

CROSS-EXAMINATION

BY MR. KONING:

Q. Mr. Lowenstein, you ended by saying that there had a demand in this case. Tell me what you mean by that.

ARBITRATOR GRISSOM: Mr. Koning, if you could just talk just a tiny bit louder over the airways which we have over us, I'd appreciate it.

MR. KONING: Thank you. I'll try my best.

Q. (BY MR. KONING) Mr. Lowenstein, you said that you had made a demand -- or that Parallel Networks had made a demand on Jenner & Block. Please identify it for me.

A. We -- Parallel Networks submitted a counterclaim for arbitration, that included the demand. And the time at which Parallel Networks learned of the amount of its claim was after the report of Mr. Perry's prepared, which was provided to Jenner & Block. The report was provide which set forth the demand -- the amount of the demand, and no payment was made on that.

Q. And so the two things, the counterclaim for arbitration and the report of Mr. Perry that was filed in this case?

A. And provided to Jenner & Block.

Q. And provided to Jenner & Block.

Anything else?

A. I don't know. I mean, you identified an oral

communication between Ms. Mascherin and Mr. Hoover and Parallel Networks and said that was a demand. So I'd have to think about what else could be there. So I have not -- I have -- not giving you an opinion on demand, nor am I briefing it, but my thinking is there's probably other things out there.

Q. Well, I haven't heard any evidence in this case of anything else other than what you've just testified to. So if there is any other demand for an amount on your breach of contract claim that was made to Jenner & Block, if you can let me know what that is, I'd appreciate it.

A. I can't answer your question.

ARBITRATOR GRISSOM: Since I'm not looking at these, did either of these documents have a demand for an amount? I'm just not clear what the testimony is. I'm sorry.

MR. KONING: He was asking -- the documents he referred to are pleadings in this case -- of one pleading and an expert report in this case.

ARBITRATOR GRISSOM: And I don't know whether there were numbers in those or not.

THE WITNESS: Yes, Mr. Perry's report has a specific number.

ARBITRATOR GRISSOM: Okay.

THE WITNESS: That's Respondent's Exhibit 125.

Q. (BY MR. KONING) And the counterclaim does not have a number, right?

A. It couldn't have a number in it because the number wasn't known until that report was prepared.

ARBITRATOR GRISSOM: Okay. Thank you. I'm sorry to interrupt. I wasn't (inaudible) on the details.

Q. (BY MR. KONING) Now, the basis for your attorneys's fee claim is your breach of contract counterclaim only, correct?

A. Yes.

Q. You're not entitled to recover fees on your breach of fiduciary duty counterclaim?

A. I agree with that.

Q. Or your legal malpractice claim?

A. I agree with that.

Q. And nor are you allowed to recover attorneys' fees for defending against any of Jenner & Block's claims?

A. I don't agree with that.

Q. Unless they're overlapped with --

A. Well, and that's --

Q. -- your breach of contract claim?

A. -- that's the hard part. I mean, as you pointed out in your testimony, I think when you've got counterclaims that involve the same set of facts, that involve many of the same elements -- I mean, your affirmative breach of contract claim requires proof of performance. Ours requires our proof of performance. So the overlap is huge when it comes to those

claims.

Q. Well, you agree, don't you, that you can't call a breach of an implied duty of care or implied duty of loyalty a breach of contract claim? The law doesn't allow you to do that?

A. Absolutely agree.

Q. And your breach of contract claim is -- basically comes down to the breach of certain provisions in the contract that are itemized in your breach of contract counterclaim, right?

A. What our pleading says about what the breach was is what our claim is.

Q. And so if the Court doesn't find that those provisions that are in your counterclaim are breached, would you agree that you're not entitled to get fees?

A. If Parallel Networks does not prevail on its breach of contract claim, it should not recover Chapter 38 fees.

Q. Now, you wrote off you said the Sullivan & Worcester fees?

A. I didn't write them off. The client paid them. I excluded them from my calculation.

Q. That's what I meant.

And that's where Ms. Steinberg is?

A. Yes.

Q. And I saw looking at those fees that she was charging

$900 an hour.

A. She was.

Q. Do you think that that's a reasonable fee?

A. No. Well, hold on. It may be for what she does where she does it, just in case she reads this transcript. But what I'm saying is, for this case in this setting, I think those are too high.

Q. Just checking. I know you've not included those.

Do you include in your deductions that you made a reduction for the fact that at all the depositions in this case there was either three or four lawyers from your respective firms with one or two exceptions?

A. Yes, substantial reduction.

Q. And do you take off the paralegal time as well?

A. No.

Q. You have billed for paralegal time?

A. I billed for paralegal time but cut it in the same way I cut other people's time.

Q. And what is your reasoning that you're entitled to recover for paralegal time under Section 38.01?

A. I don't have a case law with me.

Q. How much paralegal time is included in that number, do you know? Can you estimate?

A. I could do it. I'd have to go through bill by bill, but I can do it.

Q. Well, can you give a thumbnail or --

A. I mean, I would say it was probably 5 to 7 percent of the total, but that might be high.

Q. Okay. Well, I'm not going to ask everybody to sit here while you go through those bills.

A. I'm happy to do it.

Q. It might take a while -- many months, unless you have one --

A. I don't think I have the -- as Arbitrator Grissom noted, we do not have final summary statements on here.

Q. Were these bills -- have these bills all actually been paid?

A. My understanding is the Sullivan & Worcester bills were all paid. With respect to my firm, they're all paid up to date. And I believe -- well, they're all paid up. I think -- I sent out the September bill recently because we're way slow on our billing cycle. That may not have been paid yet. Obviously October bill is not out yet. I think that -- I haven't actually discussed this with Munck Wilson, but I think their bill reflects a summary of what has or hasn't been paid in the ones I've reviewed. They may be on the same cycle as were are where the September bill may not have been paid, but those probably just went out from their firm as well.

MR. KONING: Pass the witness.

MS. CHEN: We have no further questions.

ARBITRATOR GRISSOM: I wanted to hear those magic words.

MS. CHEN: May we all be excused now.

ARBITRATOR GRISSOM: Well, no.

MS. CHEN: Okay.

ARBITRATOR GRISSOM: All right. Jenner has rested?

MS. KONING: Yes.

ARBITRATOR GRISSOM: You rest?

MR. LOWENSTEIN: Yes, sir.

ARBITRATOR GRISSOM: Close?

MR. KONING: Yes, sir.

ARBITRATOR GRISSOM: Close?

MR. ALIBHAI: Close.

ARBITRATOR GRISSOM: All right. Since you've closed, I guess you have nothing else to say. What I would like to do, if you don't mind, is I'd like to go off the record and talk a little bit about our post-hearing schedule so we can visit about that, and maybe a couple of other things that we include, briefs and other things.

So we're going to go off the record now, and we'll talk about scheduling.

(Break was taken at 2:06 p.m. to 3:05 p.m.)

ARBITRATOR GRISSOM: We are back on the record after an unplanned fire drill and a good discussion of our

post-hearing schedule. I'm going to read my notes on the deadlines and some of the things we've talked about.

The understanding presently is that the court reporter will have you the transcript ready and delivered to counsel by November 2, 2012.

The proposed findings of fact and conclusions of law will be due by 5:00 p.m. on November the 12th.

The post hearing briefs of the parties will be due by 5:00 p.m. on November 16th.

Let me just do a -- press the pause button here. In your prior agreement, you had agreed to 30 pages, are we still on that?

MR. ALIBHAI: Yes.

MR. PELZ: Yes.

ARBITRATOR GRISSOM: Those briefs will be no more than 30 pages.

The understanding is that that filing deadline is to be electronic. They can -- people are going to submit a hard copy, which I hope you will. It would just be put in FedEx or courier of your choice to deliver it by next Monday.

The award will be due no later than January 18th, 2013.

The exhibits that have been referred to and the testimony of any witness or expert witness will be a part of the record that will be referable to or citable to in your

briefs. Any pleadings in this case, even if they were exhibits but were not referred to, are still citable because they are pleadings in the case.

With respect to the notebook on designated portions of deposition transcripts, parties have requested that I read all of those, but perhaps give more emphasis to those two witnesses deposition testimony who did not appear live, and that would include Mr. Bosy and Mr. Nelson.

Have I recited the agreement of the counsel in at least accurate, if not, in really wonderful pros?

MR. PELZ: Yes, sir.

MR. ALIBHAI: Yes.

ARBITRATOR GRISSOM: Okay. All right. Well, I think we have done our work. I do want to thank all of you involved for being such incredible professionals. I know we had a lot of witnesses, had very unique demands on their time. And I really was very impressed with how you managed to accommodate them in your own way and to reciprocate and not only courtesies to the witnesses, but courtesies to the others by putting some witnesses on out of order. I wish I could tell you I saw that in every case, but I'm bringing it up because perhaps I don't and I really appreciate that.

And this has been a very, very well-tried case. You-all have done a super job. And so super that you have made my job very challenging, but I will look forward to that in the

days ahead. And if we don't have anything further, I think we can conclude the hearing at this point and wish-you all an excellent trip home an maybe some more sleep tonight than you've been getting.

MR. PELZ: Thank you, sir.

MR. ALIBHAI: Thank you.

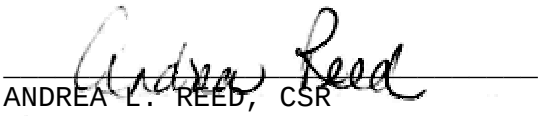
(End of proceedings at 3:09 p.m.)

STATE OF TEXAS)

I, Andrea L. Reed, Certified Shorthand Reporter, duly qualified in and for the State of Texas, do hereby certify that, pursuant to the agreement hereinbefore set forth, the following proceedings were had before me; that the transcript has been reduced to typewriting by me or under my supervision; that the record is a true record of the proceedings had before me.

I further certify that I am neither attorney or counsel for, related to, nor employed by any of the parties to the action in which this arbitration is taken, and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

SUBSCRIBED AND SWORN TO under my hand and seal of office on this the 2nd day of November, 2012.



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