JAMS

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January 18, 2013

VIA EMAIL & FIRST CLASS MAIL

NOTICE TO ALL PARTIES
(Please See Service List)

Re: ***Jenner & Block LLP vs. Parallel Networks, LLC, et al.***
JAMS Ref. No.: 1310019934

Dear Counsel:

Enclosed please find the **Arbitration Findings and Award** executed by the arbitrator.

Please feel free to contact me should you have any questions.

Thank you,

Judy Stephenson

Judy E. Stephenson
Case Manager
jstephenson@jamsadr.com
Fax# 214-720-6010

Enclosure

CONTAINS INFORMATION SUBJECT TO PROTECTIVE ORDER

JAMS

JENNER & BLOCK LLP	§	
	§	
Claimant,	§	
	§	
v.	§	**JAMS ARBITRATION NO. 1310019934**
	§	
PARALLEL NETWORKS, LLC and epicRealm LICENSING LP	§	
	§	
	§	
Respondents.	§	

ARBITRATION FINDINGS AND AWARD

Parties and Counsel: The parties are identified in the caption and are represented as follows:

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JENNER & BLOCK, LLP,	§	
Claimant,	§	
	§	
	§	**Matter in Arbitration**
v.	§	**JAMS Reference No. 1310019934**
	§	
PARALLEL NETWORKS, LLC, and EPICREALM LICENSING, LP,	§	
	§	
	§	
Respondents.	§	

ARBITRATION FINDINGS AND AWARD

After proper notice, the parties, Jenner & Block, LLP ("Jenner"), and Parallel Networks, LLC ("Parallel"), and their counsel appeared for a hearing on their claims in arbitration on October 15-19, and 22-25, 2012, in JAMS' Dallas offices. Counsel are identified above.

The parties called the following witnesses to testify:

Witnesses called by Jenner:

1. Paul Margolis (Jenner trial attorney; represented Parallel in *Oracle* and *QuinStreet* cases).
2. Harry Roper (Senior Jenner attorney and lead counsel for Parallel in *Oracle* and *QuinStreet* cases).
3. Terry Fokas (Managing Partner and General Counsel of Parallel; called as an adverse witness).
4. Terri Mascherin (Jenner trial attorney; member of Jenner Management Committee; worked with trial team on damages issues in the *Oracle* and *QuinStreet* cases).
5. Susan Levy (Jenner attorney and Managing Partner).
6. Paul Koning (attorney with Koning Rubarts, LLP; counsel for Jenner in arbitration, and

witness on statutory attorney's fees).

7. Tom Cunningham (attorney; expert witness).

8. James Malackowski (Chairman and CEO of Ocean Tomo Intellectual Capital Equity; expert witness on damages).

9. Brian Medlock, Jr. (attorney, and rebuttal expert witness).

Witnesses called by Parallel:

1. David Bennett (attorney; formerly with Jenner; represented Parallel in *Oracle* and *QuinStreet* cases while with Jenner; then joined law firm Bosy & Bennett, and represented Parallel in the *Oracle* case; currently with Direction IP Law).

2. Larry Carlson (trial attorney; formerly with Baker & Botts; represented Parallel in patent infringement cases in the "Texas I Cases" and the *Oracle* and *QuinStreet* cases, in various capacities at different times).

3. Keith Lowery (inventor of the patents at issue and a consultant to Parallel).

4. Kevin Meek (trial attorney with Baker & Botts; represented Parallel in "Texas I" patent cases and in *Oracle* and *QuinStreet* cases).

5. Terry Fokas (Managing Partner and General Counsel at Parallel).

6. Jeffrey Lowenstein (attorney with Bell Nunnally & Martin, LLP; counsel for Parallel in the arbitration; expert witness on Parallel's statutory attorney fees).

7. David Hricik (Professor of Law, Mercer University; expert witness).

8. Chase Perry (with CAP 4 Consulting; expert witness on damages).

9. Randal Johnston (attorney with Johnston Tobey; expert witness).

Jenner introduced approximately 200 exhibits and Parallel introduced approximately 83 exhibits during the examination of witnesses and presentation of testimony.

Counsel made very thorough presentation of the parties' respective claims, counterclaims, and defenses. Having considered the evidence, authorities, and argument of counsel submitted, and based on a preponderance of the evidence, the Arbitrator makes the following observations and findings.

Claims. Jenner represented Parallel as lead counsel in patent infringement litigation (the *Oracle* and *QuinStreet* cases) pursuant to a Contingent Fee Agreement, effective June 27, 2007 (the "CFA") and seeks to recover from Parallel Jenner's attorneys' fees for its services in connection with representing Parallel in such litigation, based on claims of breach of the contingent fee contract, *quantum meruit*, and promissory estoppel, as well as its reasonable and necessary attorneys' fees incurred in connection with its efforts to enforce the contingent fee contract.

Parallel claims that Jenner may not recover its fees for services, because the CFA is unenforceable either because it violates public policy or is unconscionable, because Jenner improperly terminated its representation in violation of its fiduciary and ethical obligations, because Jenner's *quantum meruit* claim is barred by the unclean hands doctrine, and that Jenner's claim for statutory attorney's fees in connection with the arbitration is barred by its excessive demand.

Parallel also seeks to recover damages from Jenner based on its counterclaims for breach of the contingent fee contract, breach of fiduciary duty, and legal malpractice, as well as reasonable and necessary attorneys' fees incurred in connection with enforcing the contingent fee contract.

Party Status of epicRealm Licensing, LP ("epicRealm"). Respondents claim that epicRealm is not a proper party to the arbitration because it is dissolved, is no longer in existence and can no longer be sued after it has been dissolved. *Hunter v. Fort Worth Cap. Corp.*, 620 SW2d 547, 549-50 (Tex. 1981). Claimant counters with the general rule that "...a party cannot escape its obligations under a contract merely by assigning the contract to a third party. Thus, as a general rule, a party who assigns its contractual rights and duties to a third party remains liable unless expressly or implicitly released by the other party to the contract." *Seagull Energy E & P, Inc. v. Eland Energy, Inc.*, 207 SW3d, 342, 346-347 (Tex. 2006).

The CFA provided in paragraph 11 that it could not be assigned without the consent of Jenner, and thus by implication provided that it could be assigned with Jenner's consent. On September 27, 2007, Jenner agreed in writing to and accepted the assignment of the CFA by epicRealm to Parallel. In a October 27, 2007 letter to opposing counsel for QuinStreet, Mr. Bosy, an attorney with Jenner, observed, as per a prior representation, that epicRealm "has been dissolved and is no longer a proper party to this action." Moreover, the Civil Docket for the *QuinStreet* case indicates that, on November 7, 2007, the court granted a motion to substitute a party, whereby Parallel Networks LLC was added and epicRealm Licensing LP was terminated.

Although epicRealm's status as a party to the present arbitration had been mentioned or questioned in prehearing telephone conferences, no motion to dismiss epicRealm was ever filed or advanced. Jenner's claims in this arbitration all appear to arise from events that mostly occurred after the assignment. Here, based on Jenner's knowledge of epicRealm's dissolution, its representation to counsel concerning epicRealm's dissolution, and Jenner's consent to the assignment of the CFA from epicRealm to Parallel, it can reasonably be inferred that Jenner impliedly released epicRealm from its obligations under the CFA. The Arbitrator finds that epicRealm can no longer sue or be sued as a party to the arbitration, that epicRealm is not a proper party to the arbitration, and that Jenner has no right to recover against epicRealm in this matter.

Background. For a factual framework from which to begin, the following events are set forth to describe the setting from which the issues in this arbitration have arisen. These will include only some, and by no means all, of the essential background facts and landmark events.

epicRealm had a patent licensing and enforcement program which it initiated in 2005 by filing patent infringement suits against multiple defendants in the United States District Court for the Eastern District of Texas, and it was represented in these first by Locke Liddell, and later in other suits by Baker Botts as its lead counsel (collectively, the "Texas Actions"). The Texas Actions alleged that the defendants infringed epicRealm's '554 and '335 patents. Baker Botts represented Parallel in these cases on a contingent fee basis. As a result of an indemnification claim arising from the Texas Actions, Oracle Corporation ("Oracle") filed a declaratory judgment action against epicRealm in United States District Court for the District of Delaware, seeking a finding that the patents-in-suit were either not infringed or invalid. Similarly, because epicRealm had sued one of QuinStreet Inc.'s ("QuinStreet") customers, Herbalife, QuinStreet also filed a declaratory action in Delaware seeking a similar declaration. The declaratory judgment actions by Oracle and QuinStreet were filed in 2006. (Collectively, these will be referred to as the "Delaware Actions.") In the Delaware Actions, epicRealm was required to bring counterclaims for infringement and damages against Oracle and QuinStreet. There was, therefore, considerable overlap in the claims and issues in both the Delaware Actions and the Texas Actions. Baker Botts was lead counsel in the Delaware Actions until July 2007.

In May 2007, Mr. Fokas had come to believe that Baker Botts' resources were being stretched in representing epicRealm in both the Texas and Delaware Actions and approached Jenner to represent epicRealm as lead counsel. Mr. Fokas proposed that Jenner and epicRealm use the Baker & Botts contingent fee agreement as an exemplar.

Jenner made some revisions, such as changing the name of the law firm involved from Baker Botts to Jenner, and changed some other language to identify specific cases in which Jenner was agreeing to represent epicRealm. Jenner began representing epicRealm after the CFA was executed, as lead counsel in the Delaware Actions. Due to the interrelated-ness of the claims and issues, Baker Botts continued as lead counsel in the Texas cases, and continued as counsel of record in the Delaware cases, and Jenner attorneys also became counsel of record in the Texas cases so that the respective law firms could cooperate on motions, responses, and discovery issues, both for the sake of efficiency, and to assure consistency in the way issues were being handled and represented. As outlined earlier, Parallel was substituted in as a party in these lawsuits for epicRealm, in November 2007.

Parallel[1] agreed in paragraph 4 of the CFA to reimburse Jenner promptly upon receipt of an invoice for the expenses incurred in the litigation ("Enforcement Expenses"). With a few exceptions, Parallel developed a pattern of not paying Jenner's invoices for ongoing expenses, promising to pay, but not paying, paying very small invoices while ignoring larger invoices, or in some instances paying late. This first developed in 2007, and continued in 2008. Jenner grew frustrated at Parallel's lack of performance in paying the expenses, which grew to significant amounts, and to essentially being treated like a bank who was making non-interest bearing loans to its client, while Jenner continued to represent Parallel in very complicated patent litigation which required an enormous expenditure of time, all under a contingent fee arrangement.

As between the *Oracle* and *QuinStreet* cases, Jenner and Parallel agreed that the *Oracle* case was by far the larger case, and they treated *QuinStreet* as a much smaller, essentially a "tag

[1] For convenience of reference, Parallel will henceforth be identified as the party to the CFA, in light of the assignment and substitution.

along," case. Parallel agreed on this and instructed Jenner to allocate its time accordingly, giving the *Oracle* case its much greater emphasis. The *Oracle* and *QuinStreet* cases had been consolidated for discovery, but after considerable delay on discovery, the *QuinStreet* case was not progressing on the same time schedule as *Oracle,* and was detached from the *Oracle* case and set for a scheduling conference, to essentially start over, in late January or February 2009.

In the *Oracle* case, the court, in the fall of 2008, announced *sua sponte* from the bench that the court was going to bifurcate the trial in *Oracle*, which had previously been set for many months to begin in January 2009. The case had been prepared on fact discovery, expert discovery, and briefing over the willful infringement and damages issues, and Jenner was actively preparing to try the damages case. The ruling meant that the January 2009 trial would address liability and validity issues and that in the event of an unsuccessful infringement ruling, an appeal to the Federal Circuit would likely ensue; an appeal would also have been likely to follow a successful infringement ruling in favor of Parallel. Only after an appeal was resolved, either way, could a damages trial take place. This substantially elongated the time frame until a damages trial could take place to several years.

In the *QuinStreet* case, QuinStreet filed a third party complaint against Microsoft Corporation in September 2008, and in response Microsoft moved to dismiss QuinStreet's third party complaint, and in November 2008, also filed a procedurally-unusual "downward sloping Rule 13 complaint" against Parallel. There was no dispute that the involvement of Microsoft in any case, generally, or in particular with regard to *QuinStreet* represented a lot of work, according to Mr. Meek, and that according to Ms. Mascherin, it would be "*Oracle* all over again in terms of the investment that would be required."

In December 2008, the District Court issued claim construction and summary judgment rulings in *Oracle*. The claim construction ruling appeared favorable to Parallel but it was followed shortly by a summary judgment ruling in Oracle's favor that Oracle did not infringe the two Parallel patents at issue. This summary judgment ruling meant that while Parallel's infringement claims against Oracle were precluded from going forward at the January 2009 trial, absent an appeal, Oracle could still proceed to trial in January 2009 on its claims of invalidity and inequitable conduct against Parallel. According to Mr. Margolis, to proceed to trial as scheduled at that point would have left Parallel with a considerable downside, but no upside, because the patents could have been declared invalid, which in turn would have caused Parallel's licensing program to grind to a halt due to collateral estoppel, and also because Parallel would have had no opportunity to recover damages for infringement in that event.

Oracle and Parallel, after extensive negotiations, reached an agreement on the entry of a final judgment on December 28, 2008, which allowed Parallel to pursue an immediate appeal of the unfavorable summary judgment ruling, and in which Parallel agreed to withdraw its motion for reconsideration. This agreement was vetted and approved by Mr. Fokas prior to execution by counsel.

Beginning with the events in October, Jenner began to explore whether and to what degree it wanted to continue representing Parallel after these developments, which would require much more in the way of Jenner's time and services, and this in the context of Parallel's chronic pattern of not meeting its obligations to pay expenses. By December 2008, Parallel owed Jenner more than $500,000 in accrued unpaid Enforcement Expenses that Jenner had incurred.

Up until December, when Jenner communicated to Parallel that it was considering whether or not to continue its representation of Parallel, the parties had otherwise had a very good working relationship. Parallel had been extremely pleased with Jenner's work. Jenner had devoted 24,000 hours to representing Parallel, including written discovery, review and production of three to four million pages of documents on behalf of Parallel, review of more than 2 million pages of documents produced by Oracle, numerous discovery disputes which required Jenner to appear in court in Delaware, taking third party fact witness depositions, defense of approximately 15 fact witness depositions, preparation of three expert reports and defense of three expert depositions, review of three expert reports submitted by Oracle and taking of three expert depositions, and preparation of numerous *Daubert*, claim construction, and summary judgment briefs.

During this approximate 1-1/2 year time span, Parallel had not expressed any concern it had about the contingent fee agreement that had been negotiated, or that any part of it was invalid or unenforceable.

On January 2, 2009, Jenner sent Parallel a letter notifying it that Jenner was terminating its representation of Parallel.

On February 9, 2009, Jenner filed a motion for leave to withdraw as counsel in the *QuinStreet* case which stated that Parallel did not object to the motion, and that it consented, although Parallel has contended that it only intended for the "did not object" language to be in the motion instead of the "consent" language. Jenner also filed on the same date a motion to extend time for Parallel to file its reply in support of its motion to dismiss Microsoft's claims. Both motions were granted on February 25, 2009. On February 10, 2009, counsel for Parallel informed Jenner that Baker Botts would be succeeding Jenner as counsel in both the *Oracle* and *QuinStreet* cases.

Jenner made arrangements to transition both cases to Baker Botts and to notify the Federal Circuit that Baker Botts would handle the *Oracle* appeal. Mr. Carlson and Mr. Meek both testified that Jenner did everything that was necessary to perfect Parallel's right to appeal the *Oracle* summary judgment ruling. Jenner also transitioned all the material they had accumulated in the *Oracle* and *QuinStreet* cases to Baker Botts, and neither successor counsel Baker Botts or Parallel ever had any complaint about the quality or speed of the transmission and transfer of all the files from Jenner to Baker Botts. Following the transition Jenner continued to assist Parallel by conferring with Baker Botts attorneys in the drafting of the appellate brief and in responding to specific requests.

Parallel and QuinStreet settled the *QuinStreet* case on April 24, 2009 for $850,000.

On April 28, 2010, the Federal Circuit reversed the *Oracle* summary judgment of non-infringement and remanded the case to District Court on June 22, 2010. Baker Botts handled and argued the *Oracle* appeal for Parallel.

In July 2010, Parallel retained Bosy & Bennett to represent it in the trial of the *Oracle* matter on remand. George Bosy and David Bennett were previously Jenner attorneys who worked extensively on the Oracle and *QuinStreet* cases while Jenner was lead counsel for Parallel. Parallel also engaged two law firms, Baker Botts, and Hinshaw & Culbertson, to assist with the *Oracle* trial which was set for May 2011.

Parallel settled the *Oracle* case on May 13, 2011, for $16.5 million, and the settlement with Oracle also provided for a contingent recovery of up to $13 million, depending on the outcome of the reexamination proceedings before the USPTO and an arbitration between Parallel and Oracle.

Successor counsel in the *Oracle* appeal, Baker Botts, had no criticism of the body of work Jenner had done in terms of representing Parallel prior to Jenner's termination of its representation, and made significant use of Jenner's work, briefing, trial preparation, and its motion for reconsideration, in connection with the appellate brief Baker Botts filed on behalf of Parallel.

Trial counsel for Parallel after remand, David Bennett, of Bosy & Bennett, testified that there was no rebriefing of any summary judgment motion, that no additional depositions were taken, and that Bosy & Bennett relied heavily on Jenner's pretrial order that had been prepared in the fall of 2008, when Bosy & Bennett prepared the pretrial order for the May 2011 trial. Mr. Bennett also characterized Jenner's work (to which he and Mr. Bosy had contributed) as important to his firm's trial preparation for Parallel following remand.

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Jenner's Claims

Breach of Contract. Jenner seeks to recover its attorneys' fees for its representation of Parallel under the CFA. A large part of the controversy on Jenner's claim for fees has focused on the provisions of Paragraph 9.b, which are set forth here:

> 9. Termination.
>
> (a) Termination by epicRealm Licensing. [omitted]
>
> (b) Termination by Jenner & Block. If Jenner & Block determines at any time that it is not in its economic interest to continue the representation of epicRealm Licensing pursuant to this Agreement, Jenner & Block may terminate this Agreement by providing 30 days prior written notice to epicRealm Licensing, provided that the timing of such a termination shall be in full accord with any applicable ethical or legal responsibilities (e.g. those promulgated by the American Bar Association (ABA) or those outlined by the Illinois Disciplinary Rules of Professional Conduct), which bind or otherwise control the behavior or actions of Jenner & Block. ...
>
> If Jenner & Block terminates this Agreement, it shall continue to be entitled to receive compensation from epicRealm Licensing pursuant to (i), (ii) and (iii) in the preceding paragraph [9.a] up to the date of such termination LESS the reasonable cost incurred by epicRealm Licensing to transition any pending or ongoing Enforcement Activities

> that had been commenced with Jenner & Block to successor legal counsel.
>
> [Provisions imported in 9.b from Paragraph 9.a] ... epicRealm Licensing shall: (i) compensate Jenner & Block for all time expended by Jenner & Block on any Enforcement Activity undertaken on behalf of epicRealm Licensing at the regular hourly billing rates charged by Jenner & Block for its attorneys and legal assistants (in lieu of the Contingent Fee Award applicable to such Enforcement Activity); provided, however, that epicRealm Licensing has not terminated this agreement as a result of a material breach of this agreement by Jenner & Block (and such breach was not cured within thirty (30) days of the receipt by Jenner & Block of written notice from epicRealm of such material breach); (ii) reimburse Jenner & Block for all previously unreimbursed Enforcement Expenses incurred by Jenner & Block under this Agreement; and (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 as of the time of termination of this Agreement (to the extent that Jenner & Block has not already been compensated under Section 9.a.(i) hereunder).

Parallel contends that the CFA is unenforceable, as interpreted by Jenner, because it violates public policy, and because the CFA is unconscionable. Parallel also contends that Jenner abandoned Parallel without cause.

In its Demand for Arbitration, Jenner requested a binding arbitration order requiring Parallel and epicRealm to compensate, reimburse, and pay fees to Jenner & Block either at its standard hourly rate or in an amount that is fair compensation in light of the benefits received by Parallel and epicRealm. According to Jenner the value of the time it had spent in representing Parallel on the *QuinStreet* and *Oracle* cases, if charged at the then-current billing rates for the timekeepers, amounts to $10,256,706. However, Jenner made clear at a hearing at a September 11, 2012, hearing on a motion for partial summary judgment, and at the arbitration hearing, that it was not seeking to recover the full amount of its hourly fees under Paragraph 9.a.(i) as incorporated under Paragraph 9.b. Instead, Jenner seeks to recover in the arbitration only the "appropriate and fair" portion of the contingent fee, referred to herein as Paragraph 9.b.(iii) (with its incorporation of Paragraph 9.a.(iii)).

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Because the CFA is a contract, the parties naturally have advanced numerous arguments potentially applicable, generally, in contracts. However, "[w]hen interpreting and enforcing attorney-client fee agreements, it is 'not enough to simply say that a contract is a contract. There are ethical considerations overlaying the contractual relationship.'" [citations omitted.] *Hoover Slovacek LLP v. Walton*, 206 SW3d 557, 560 (Tex. 2006). The courts appear to recognize an attorney's right to recover fees by an action on the contract or in *quantum meruit*, both where the client discharges the attorney without cause, *Hoover* at 561, and where an attorney discharges the client with just cause, *Augustson v. Linea Aerea Nacional-Chile S.A. (LAN-Chile)*, 76 F3d 658, 662 (5^{th} Cir. 1996). However, the availability of such remedies is subject to (1) whether the attorney had just cause to withdraw sufficient to preserve the right to compensation, *Augustson* at 663; (2) the prohibition against charging or collecting an unconscionable fee as per Tex. Disciplinary R.Prof'l Conduct 1.04(a) [which includes whether a particular fee amount or contingency percentage is unconscionable, and whether a fee agreement is contrary to public policy and unconscionable], *Hoover* at 561-562.

The *Augustson* case involved an attorney representing his clients in a wrongful death case for damages arising from the death of their daughter in an airplane crash. The clients refused to accept a settlement offer and refused to propose a figure in response to a settlement offer, because they believed further discovery would enhance their position. Their counsel moved for withdrawal for good cause pursuant to Rule 1.15(b) of the Texas Disciplinary Rules of Professional Conduct, and the Court permitted counsel to withdraw, but deferred until later a hearing on the reasonableness of the attorney's lien and expenses. Successor counsel for the clients negotiated a settlement at a higher figure than they had previously been offered, but the Court awarded the original attorney his fees and expenses, from which award his former clients appealed. The Court of Appeals made the following observations concerning the applicable principles in determining the fundamental issue in the case, namely whether or not the attorney had just cause to withdraw sufficient under Texas law to receive compensation, on which issue the attorney bears the duty of proving just cause to withdraw. *Augustson* at 663:

> When an attorney, "without just cause, abandons his client before the proceeding for which he was retained has been conducted to its termination, or if such attorney commits a material breach of his contract of employment, he thereby forfeits all right to compensation." *Royden v. Ardoin*, 160 Tex.138, 331, SW2d 206, 209 (1960) … *Royden* may be read to imply that an attorney who withdraws with just cause may be compensated, though we would not know whether on the contract or in *quantum meruit*.[2] At 663. [Emphasis supplied.]
>
> Whether just cause exists depends on the facts and circumstances of each case. [citations omitted] Generally, just cause exists when the client has engaged in culpable conduct. Thus, for example, courts have found just cause where the client attempts to assert a fraudulent claim; fails to cooperate; refuses to pay for services; degrades or humiliates the attorney; or retains other counsel with whom the original attorney cannot work. [citations omitted] At 663.
>
> Just cause has been found where continued representation is impossible due to forces beyond the attorney's control. Thus just cause has been found where continued representation would violate ethical obligations of the attorney or where the attorney has insufficient funds to pursue litigation. [citations omitted] At 663.

Counsel in the *Augustson* case contended that it withdrew for good cause because it withdrew with permission of the Court under Texas Disciplinary R. Prof. Conduct 1.15(b), it

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[2] The Court found in this case that there was no just cause to withdraw that preserved the right to compensation, and therefore did not need to address whether the remedy to recover on contract or in *quantum meruit* was available.

therefore satisfied the Texas just cause requirement for recovering attorney's fees. However, the Court rejected counsel's argument that cause to withdraw under Rule 1.15 necessarily implies cause to receive compensation under *Royden*, because Rule 1.15 addresses withdrawal under all circumstances and is not related to the issue of compensation. At 664. The Court concluded that the record established that counsel's stated reasons for withdrawing, that counsel would not agree to settle, would not make a settlement proposal, and because the client disagreed with counsel about the scope of discovery, that the attorney in that case had no justification or cause to withdraw that would preserve its entitlement to compensation, and that under Texas law counsel terminated its right to compensation by its withdrawal. In *Augustson*, the Court recognized that courts had found just cause where the client refuses to pay for services.

Here, Jenner contends that it had just cause to terminate the engagement with Parallel, because during most of Jenner's representation of Parallel, Parallel had not timely paid the Enforcement Expenses and chronically delayed payment of such expenses.

Paragraph 4 of the CFA addressed payment of Enforcement Expenses as follows:

> 4. <u>Payment of Enforcement Expenses</u>. The Parties agree that epicRealm Licensing shall be solely responsible for the payment of all Enforcement Expenses, in the event that Jenner & Block has either ordered or paid for any Enforcement Expenses, epicRealm Licensing covenants to <u>pay</u> any third party vendor's invoices <u>promptly upon receipt</u> of such invoices or to reimburse Jenner & Block promptly upon receipt of an invoice from Jenner & Block setting forth in reasonable detail the amount and type of Enforcement Expenses paid by Jenner & Block on behalf of epicRealm Licensing. .... [Emphasis supplied.]

On a monthly basis Jenner sent Parallel an invoice detailing the amount of expenses owed by Parallel. Jenner sent invoices to Parallel in July, August, September, October and November of 2007, but Parallel did not make its first payment until December 17, 2007, at which point there was more than $53,000 in unpaid disbursements.

Mr. Fokas testified that "he has no recollection as to why" Parallel did not pay for any of the expenses incurred by Jenner until December 2007 other than it was a "very busy period" for Parallel; Mr. Fokas acknowledged that it would only have taken him a "few minutes" to send a check to Jenner.

Parallel did not make another substantial payment for expenses to Jenner until August 2008. Jenner continued to advance larger and larger amounts of expenses on behalf of Parallel which were invoiced to Parallel on a monthly basis but which Parallel continued not to pay. By July 31, 2008, the unpaid and delinquent expense total was over $575,000.

Parallel made a payment in August 2008 only after Mr. Bosy sent an email to Mr. Fokas requesting that Parallel pay $540,778.21 in outstanding expenses by August 31, 2008. Parallel paid only $200,000, but assured Mr. Bosy that he anticipated he would be able to pay the balance of the disbursements in a few weeks. According to Jenner, this did not happen.

Notwithstanding Mr. Fokas' assurance that the remaining balance of expenses would be paid in a few weeks, Parallel did not make another substantial payment to Jenner until December 24, 2008, and this payment was made only after Mr. Bosy and others approached Mr. Fokas seeking assurance that expenses would be paid by the end of the year.

Mr. Roper testified that Parallel's obligation to pay Enforcement Expenses was very important to him and that he considered it to be essential that a client in a contingent fee representation would pay the expenses in the case so that the parties would have a mutual commitment, those being Jenner's commitment to provide services and Parallel's commitment to providing money for the expenses. Further, Mr. Roper observed that in intellectual property cases generally, and in *Oracle* and *QuinStreet* in particular, expenses had the potential to "get quite heavy" due to the need for expert witnesses, the fact that the cases were pending out of state, and the vast resources available to an opponent like Oracle.

During the negotiation of a contingent fee agreement, Mr. Fokas had advised Mr. Roper that Parallel had a collection of investors who had put up a lot of money in aid of litigating infringement actions and that funds from those investors would be available to help pay expenses in the *Oracle* and *QuinStreet* cases as necessary. Notwithstanding this representation, there was no evidence submitted by Parallel that it ever requested its investors to help pay the mounting expenses owed by Parallel to Jenner.

From June 2008 through December 24, 2008 the balance of Parallel Network's unpaid expenses approached or exceeded \$500,000. Jenner observed that from its perspective it had been forced to become an "involuntary investor" in Parallel Network as it had contributed significantly more to the costs of the cases than any individual investor, including Mr. Fokas, who contributed only \$50,000, and almost as much as the combined contribution of all Parallel investors.

Mr. Cunningham, an expert witness for Jenner, testified that timely payment of case expenses can be a critical element of a case. Mr. Johnston, an expert witness for Parallel, "totally agreed" that after a certain point a delay in the payment of money is prejudicial in itself. He further agreed that outstanding expenses of \$500,000 was "real money" to his firm, Johnston & Tobey.

Parallel was also habitually delinquent on its payments to local counsel in Delaware.

Parallel observed that it had cured its breach when it made the payment on December 24, 2008. However that may be, it is appropriate for Jenner to consider the chronic pattern of Parallel's nonpayment of Enforcement Expenses on the issue of whether or not Jenner had just cause to withdraw from the representation with sufficient reason to preserve its right to compensation, as per the applicable overlay principles set forth by the *Augustson* court. Here, the nonpayment of expenses began almost from the beginning of the relationship, and continued until just prior to the termination of the relationship. The amounts of unpaid accrued expenses were quite significant. Parallel would on some occasions pay very small invoices but ignore the larger expenses that were due. Parallel would either not pay, or in some cases promise to pay but pay a smaller portion and promise to pay the balance later but not pay that. In complex cases such as the *Oracle* and *QuinStreet* cases, Jenner was justified in looking at the pattern of past conduct by Parallel in order to predict its future behavior, especially in light of developments in the *Oracle* case such as bifurcation and the radically extended time line for multiple trials and appeals on infringement issues, and for the potential dramatically increased fees and expenses in the Microsoft case, which would have been as much as had already been incurred in the *Oracle* case; Jenner had good reason to be concerned whether it wanted to continue with a client who had shown a consistent pattern of not paying, either because it was not responsible, or did not have resources. Parallel's obligation to reimburse expenses promptly was not contingent on receiving funds in settlement of other cases. In the last few weeks of the representation Parallel also communicated, that it would not have any resources to pay future expenses unless it received funds in settlement of pending cases. Parallel had also asked Jenner to modify the CFA by increasing the contingent fee percentage if Jenner would agree to pay for all expenses. This background concerning Parallel's history of not paying expenses and not having resources to pay them made the prospect of proceeding with the pending cases, much less adding the burden of the Microsoft case to the load, without a client who could and would meet its commitment and duty to pay for ongoing future expenses on a current basis, seem less than attractive to Jenner.

Thus, Jenner had good reason to be concerned that Parallel would not have the funds to pay, even if it became a more responsible partner than it had been and that intended to fulfill its obligations under the contract to pay expenses.

Parallel contended that Jenner "ratified" Parallel's failure to pay expenses promptly. Jenner observed that ratification is a plea in avoidance and is waived unless affirmatively pled, and noted that Parallel had not pled the theory of ratification. Further, even if Parallel's argument was interpreted as one of waiver, which it did plead, Paragraph 14 of the CFA, which provides that "failure on the part of either Party to complain of an act or failure to act of the other Party or to declare such other Party in default, irrespective of how long such failure continues, shall not constitute a waiver by the non-defaulting Party of its rights hereunder." The Arbitrator finds that Parallel's defense that Jenner ratified its failure to pay fails because it was not pled, and that, in any event, the CFA precludes a waiver defense by Parallel.

Therefore, the Arbitrator finds that Jenner established that it had just cause to withdraw sufficient to preserve the right to compensation. This potentially enables it to recover fees, but the remedies are still subject to the prohibitions enumerated in the *Hoover* case.

Prohibition Against An Unconscionable Fee. In setting forth the ethical considerations overlaying the contractual relationship, the Texas Supreme Court in *Hoover* discussed the bases in public policy for same as follows:

> The attorney's special responsibility to maintain the highest standards of conduct and fair dealing establishes a professional benchmark that forms much of our analysis in this case.
>
> Although contingent fee contracts are increasingly used by businesses and other sophisticated parties, their primary purpose is to allow plaintiffs who cannot afford an attorney to obtain legal services by compensating the attorney from the proceeds of any recovery. [citation omitted.] The contingent fee offers "the potential of a greater fee than might be earned under an hourly billing method" in order to compensate the attorney for

> the risk that he or she will receive "no fee whatsoever if the case is lost." [citation omitted.] In exchange, the client is largely protected from incurring a net financial loss in connection with the representation. This risk sharing feature creates an incentive for lawyers to work diligently and obtain the best results possible. …

At 561.

As previously noted, the Court observed that "In Texas, if an attorney hired on a contingent-fee basis is discharged without cause before the representation is completed, the attorney may seek compensation in *quantum meruit* or in a suit to enforce the contract by collecting the fee from any damages the client subsequently recovers." *Mandell & Wright v. Thomas*, 441 SW2d 841, 847 (Tex. 1969) (citing *Myers v. Crockett*, 14 Tex. 257 (1855)), and further noted that "both remedies are subject to the prohibition against charging or collecting an unconscionable fee." TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(a), *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. Gapp. A (TEX. STATE BAR R. art., §9). (*Hoover,* at 561.) The Court further noted that the prohibition against an unconscionable fee could be based upon the fact issue of whether or not a particular fee amount or contingency percentage charged by the attorney is unconscionable under all the relevant circumstances of the representation, or the question of law concerning whether a contract client is contrary to public policy and unconscionable at the time it is formed. (At 561-62.)

The termination provision of the contingent fee contract in that case provided as follows:

> You [the client] may terminate the Firm's legal representation at any time. … Upon termination by You, You agree to immediately pay the Firm the then present value of the contingent fee described [herein], plus all Costs then owed to the Firm, plus subsequent legal fees [incurred to transfer the representation to another firm and withdraw from litigation].

At 559.

The Court commented that the termination fee provision "purported to contract around the *Mandell* remedies in three ways:

> First, it made no distinction between discharges occurring with or without cause. Second, it assessed the attorney's fee as a percentage of the present value of the client's claim at the time of discharge, discarding the quantum meruit and contingent fee measurements. Finally, it required [the client] to pay [the attorney] the percentage fee immediately at the time of discharge.

At 562.

Noting that *Mandell* complied with the principle that a contingent fee lawyer "is entitled to receive the specified fee only when and to the extent the client receives payment," RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §35(2)(2000), the Court held that, because the lawyer Hoover's termination fee sought payment of the firm's contingent interest without regard to when and whether the client eventually prevailed, the agreement imposed an undue burden on the client's ability to change counsel, and required immediate payment of the firm's contingent fee interest at the time of discharge, the termination fee provision violated public policy and was unconscionable as a matter of law. (At 562-63.)

The Court also held that the termination fee granted the attorney a proprietary interest in the client's claim by entitling the attorney to a percentage of the claimed value without regard to the ultimate results obtained. (At 564.) The Court also characterized the termination provision as having a "heads lawyer wins, tails client loses" flavor that weighed too heavily in favor of the attorney at the client's expense, and shifted to the client the risks that accompany both hourly fee and contingent fee agreements while withholding their corresponding benefits. (At 564.)

The Court was also concerned that the termination fee in question was antagonistic to policies supporting the use of contingent fee cases in civil cases because it created an incentive for the lawyer to be discharged soon after the lawyer can establish the present value of the client's claim with sufficient certainty, and thus escape the obligations of continuing to represent the client until the case was concluded. (At 565.)

Last, but not least, the Court described the problems created by the termination provision relating to valuation and administration:

> … [T]he contract is silent with respect to valuation. Nevertheless, its silence in that respect exposes an additional defect - - the contract fails to explain how the present value of the claims will be measured. It does not describe how the nature and severity of the client's injuries will be characterized, nor does it state whether any other factors, such as venue, availability and quality of witnesses, the defendant's wealth and the strength of its counsel, and the reprehensibility of the defendant's conduct will apply to the calculation.

At 564-65.

The Termination Fee Provision. Paragraph 9.b.(i) provides that Jenner was entitled, if the CFA was terminated, to receive compensation for all its time incurred at its regular hourly billing rates, in lieu of a contingent fee. This provision potentially might have allowed Jenner to convert the contingent fee agreement to an hourly fee agreement which provided Jenner the option of recovering all of its fees billed at its regular hourly billing rates up until the time of termination. This raises questions about whether the 9.b.(i) clause creates an undue burden on the client and violates public policy because it arguably creates an incentive for the attorney to escape the contingent fee agreement, and shifts to the client all of the risks of both contingent fee and hourly fee arrangements, as mentioned in *Hoover*. However, Jenner is not seeking to enforce or to recover on Paragraph 9.b.(i), and other provisions of the contract may be enforced without that provision (as discussed herein), so it is not necessary to reach any issues about 9.b.(i) here.

Paragraph 9.b.(iii) provided that Parallel:

> (iii) … at the conclusion of any Enforcement Activity, [shall] pay Jenner … an appropriate and fair portion of the Contingent Fee Award based upon [Jenner's] contribution to the result achieved as of the time of

> termination of this Agreement (to the extent that [Jenner] has not already been compensated under Section 9.a.(i) hereunder).

Enforceability. The provision in Paragraph 9.b.(iii) provides for "an appropriate and fair portion of the Contingent Fee Award," (a defined term in the CFA), which certainly sounds and appears to be reasonable and thus not unconscionable either on its face, or in its application. Such a fee is contingent on a recovery or settlement at the "conclusion of an Enforcement Activity," only after Parallel received a payment in settlement or on a recovery, and does not require immediate payment by the client at the time of termination of representation, and it is limited in scope to an "appropriate and fair" portion of the contingent fee award that Jenner otherwise might have recovered from an actual settlement or successful outcome, based on its contribution to that outcome, had Jenner continued its representation until the time that the settlements were achieved. It does not create an impermissible proprietary interest in a cause of action, and remains a permissible contingent fee. Moreover, this provision does not require a determination of present value and an immediate payment based on a percentage of that value without regard to whether or not there will ever be a recovery, nor does it require a determination of present value of the claim at a time in the case when there was no recovery and with no explanation of how that value was to be calculated. Mr. Cunningham observed that, with Paragraph 9.b.(iii), the attorney and client continue to share the risk of recovery, and the attorney's interest does not supersede the client's. It does not appear to violate the overlay of ethical principles.

As noted by the court in *Walton v. Hoover, Bax & Slovacek, LLP*, 149 SW3d 834, 843 (Tex.Civ.App. – El Paso 2004) [citations omitted], *aff'd in part, rev'd in part on other grounds sub nom. Hoover Slovacek LLP v. Walton*, 206 SW3d 557 (Tex. 2006). Both parties to a fee agreement can bargain about what happens in the event of termination:

> "The parties may alter the [default] rules by providing in the fee agreement for the fee that will be paid upon discharge, as long as the fee is reasonable in light of the work performed."

Here, Jenner and Parallel did just that when they agreed to include a specific provision for a termination fee in the event of termination of the representation. They provided for an appropriate and fair portion of the contingent fee award based upon Jenner's contribution to the result achieved as of the time of the termination of the representation; this meets the condition outlined by the *Walton* court that a termination fee must be reasonable in light of the work performed. Here, the fee must be measured according to Jenner's contribution to the result achieved as of the time of the termination.

Parallel interprets the language to mean that Jenner would receive no fee if it had not actually achieved a settlement at the time of termination, but this construction is inconsistent with the clear meaning of the provision itself, which provides that Parallel would only pay Jenner this appropriate and fair portion of a contingent fee award "at the conclusion of any enforcement activity," namely after a favorable result has been achieved, and that Jenner's contribution would be measured then by the value of its work in achieving the eventual result as of the time of the termination of the representation.

The parties also included in the CFA the following:

> 16. <u>Severability</u>. If any provision of this Agreement or the application thereof to any person or circumstance shall be invalid or unenforceable to any extent, 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.

Even if there were more doubt about the meaning than seems to be present here, Paragraph 9.b.(iii) could and should be construed and enforced under Paragraph 16 "to the greatest extent permitted by law" and/or the *Hoover* principles of construction[3] to avoid any unconscionable result.

Here, the parties have agreed in 9.b.(iii) on a termination fee to be determined by a fair and reasonable standard, and for the contract itself to be construed and enforced by the same rules that a court would apply in interpreting and enforcing the contract.

As was noted by the court in *Hoover*, at 561, increasingly, businesses are using contingent fee agreements to retain counsel to represent them in large complex cases. Parallel had a patent enforcement program which was premised almost entirely upon a litigation strategy of suing multiple defendants whom it deemed to be infringing its patents. Parallel's chief and only representative was Terry Fokas, a lawyer who had worked in several very large firms. Parallel was not a business that only occasionally needed to retain counsel, but a business that relied upon hiring counsel to conduct its business through its litigation strategy. Parallel and Mr. Fokas had negotiated numerous other contingent fee agreements with other firms in connection with Parallel's patent infringement program. Parallel and Mr. Fokas were thus experienced and sophisticated users of legal services, and in negotiating fee agreements. They are not individuals with an injury claim or families with a wrongful death claim who may only initiate a suit and hire counsel as a singular event in their lives, and to whom the courts are especially attentive in protecting their interests in negotiating contracts with attorneys. The contingent fee agreement in this case was based upon a prior contract with similar terms that Parallel had with Baker Botts; Parallel proposed it to Jenner as a basis for the contingent fee agreement which they later

[3] *Hoover* held that its conclusion that Hoover's termination fee was unconscionable did not render the entire fee agreement unconscionable. (Citing the RESTATEMENT (SECOND) OF CONTRACTS §208 (1981): "If a contract or term thereof is unconscionable at the time a contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unreasonable term, or may so limit the application of the term as to avoid any unconscionable result." At 565.

executed after minor revisions; Parallel never claimed during Jenner's representation that the termination fee provision was unenforceable before it obtained the settlements.

Given the prodigious amount of time typically required and invested to prevail in complex patent infringement cases, like the underlying cases here, it is reasonable for the very sophisticated parties in this case, both experienced in such high stakes litigation, to agree in advance that if the representation is terminated after Jenner has invested huge amounts of time and services, that Jenner is entitled to receive some reasonable compensation such as that outlined in Paragraph 9.b.(iii). It reflects their intent to be fair and reasonable, in the event of a recovery, to both parties in that situation: fair for Parallel not to pay the entire contingent fee but instead only a fair and appropriate portion of that, fair for Jenner to receive a fair and appropriate portion of a contingent fee based on its contribution to the result, and fair by avoiding the injustice of Parallel enjoying all the benefits of Jenner's services and the fruits of the settlements, such as those here, without paying any fee whatsoever to Jenner.

The Arbitrator finds, based on the foregoing, that the termination fee outlined in Paragraph 9.b.(iii) does not violate the overlay of ethical principles, and therefore, because it does not violate public policy and is not unconscionable, the provision is enforceable. To the extent to which there is any question, the provision is certainly capable of being construed in a way that is not unconscionable and to avoid any unconscionable result, and will be construed in that manner here. Accordingly, the Arbitrator finds that Jenner is entitled to enforce its contract claim for damages based upon Paragraph 9.b.(iii). It is not disputed that Parallel has not paid Jenner any fee out of the settlements.

Quantum Meruit. Alternatively, Jenner has also demonstrated that it is entitled to recover on a *quantum meruit* claim. "*Quantum meruit* is an equitable theory of recovery which is based upon an implied agreement to pay for benefits received." *Killion v. Laneheart*, 154 SW3d 183, 190 (Tex. App. – Amarillo, 2004, Pet. denied) (internal citation omitted). To recover its fees in *quantum meruit*, Jenner must show that (1) valuable services and or materials were furnished, (2) to Parallel, (3) which were accepted by Parallel and (4) under such circumstances as reasonably notified Parallel that Jenner in performing expected to be paid. Another important function of *quantum meruit* as an equitable remedy is that it is applied as necessary to avoid injustice. "Recovery in *quantum meruit* will be had when nonpayment for the services rendered could 'result in unjust enrichment to the party benefited by the work.'" *Vortt Exploration Co., Inc. v. Chevron U.S.A., Inc.*, 787 SW2d 942, 944 (Tex. 1990).

There is little doubt that Jenner provided significant legal services to Parallel.[4] Mr. Fokas had reported being "extremely pleased" with Jenner's work, and approached Jenner about taking on additional matters, and had not expressed any criticism of Jenner's work prior to the termination of their representation. Moreover, after Jenner had terminated its representation, and after the remand of the *Oracle* case from the Appellate Court, Mr. Fokas engaged former Jenner partners, George Bosy, David Bennett and Patrick Petras (who had worked on the Parallel case up until Jenner's termination of the representation) to represent Parallel in the *Oracle* trial. The work product of Jenner was used and relied upon by successor counsel to obtain the settlements in *QuinStreet* and *Oracle*, and thus was a meaningful factor in providing significant recoveries to Parallel. It is not disputed that Parallel accepted Jenner's services.

[4] Jenner recorded 24,000 hours of its time in representing Parallel, including, but not limited to preparing written discovery requests, review and production of 3-400,000 pages of documents on behalf of Parallel, review of more than 2 million pages of documents produced by Oracle, numerous discovery disputes, and in-person hearings on same in Delaware, taking 30 fact witness depositions, defense of approximately 15 fact witness depositions, preparation of 3 expert reports, and defense of 3 expert depositions, review of 3 expert reports submitted by Oracle and the taking of 3 expert depositions, and preparation of numerous *Daubert*, claim construction and summary judgment briefs.

Mr. Fokas approached Jenner to represent Parallel in the matters referenced, and he proposed the format of the contingent fee agreement that Parallel had with Baker & Botts. Parallel, and Mr. Fokas, as the sole representative of Parallel, was essentially in the business of litigating with other parties as part of the patent enforcement program, and had negotiated contingent fee agreements with several other law firms before negotiating the Jenner agreement. Both Mr. Fokas and Mr. Roper, Jenner's lawyer in the negotiations for the contingent fee agreement, were attorneys. The termination provision in the CFA that Parallel proposed was very important to Mr. Roper. Both Jenner and Parallel apparently believed, at the time, there being no evidence to the contrary, that the CFA, and in particular the termination provision in Paragraph 9.b, was enforceable, and that they both knew, and understood that Jenner expected to be paid in the event of a termination.

Here, in the present arbitration, the Arbitrator has found that Jenner has demonstrated just cause to terminate the representation, sufficient to preserve the right to compensation, and is therefore entitled to recover under a *quantum meruit* theory. It is also important to recognize that Parallel obtained significant settlements of $850,000 from *QuinStreet* and of $16.5 million from *Oracle* as well as a contingent recovery from *Oracle* of up to $13 million depending upon the outcome of re-examination proceedings and a potential arbitration concerning these issues; *quantum meruit* can be applied as necessary to avoid unjust enrichment to Parallel if it is permitted to enjoy the benefit of the settlements without paying a fee to Jenner.

Parallel has pled that Jenner's claims for *quantum meruit* are barred by the doctrine of "unclean hands." This argument, presented here as complete bar to recovery, is based upon the same claims it has asserted as a counterclaim for breach of fiduciary duty and for fee forfeiture. The Arbitrator has addressed Parallel's counterclaim for breach of fiduciary duty in a following section of the Award, and for the reasons stated there, and because Jenner had just cause to terminate the representation, finds that Parallel has not established that the unclean hands doctrine would bar Jenner from recovering under *quantum meruit* in this arbitration.

Promissory Estoppel. Jenner also seeks to recover alternatively, under a promissory estoppel theory. The line of cases which discuss circumstances and remedies in which counsel terminate their representation with just cause, reference only the potential remedies of recovery on the contract, or in *quantum meruit*, but do not mention promissory estoppel as an available remedy. It is reasonable to interpret from this silence that the courts did not include promissory estoppel as an available remedy in this circumstance. Moreover, the Arbitrator has already addressed the equitable remedy of *quantum meruit*. Therefore, the Arbitrator finds that Jenner is not entitled to recover under its cause of action for promissory estoppel.

Damages for Breach of Contract or *Quantum Meruit*. As noted previously, the authorities permit an attorney who terminates his or her representation of a client with just cause, to recover either on the contract or for *quantum meruit*. Here, Jenner has established that it is entitled to recover on either cause of action for damages. The measure of damages on the contract claim is "an appropriate and fair portion of the Contingent Fee Award based on Jenner's contribution to the result achieved as of the time of termination" of the CFA. Under *quantum meruit*, the measure is the reasonable value of the services provided. *Quantum meruit* is also available as a remedy to prevent unjust enrichment. It is worthy of note that the words "fair" and "just" each often include the other among their dictionary definitions. "Fair" and "reasonable" are also used to define each other. The two measures of damages are thus similar, as are the considerations to be taken into account in determining damages under each measure.

Mr. Cunningham testified as an expert witness for Jenner and offered his analysis and suggestions on how to calculate a fair and appropriate portion of the contingent fee.[5] Parallel raised criticisms of Mr. Cunningham's calculations but, other than arguing that Jenner was not entitled to any fee, offered no alternative methodology for calculating a fee, in the event that a fee is awarded to Jenner in this case.[6] Parallel also offered no evidence to the effect that, if a fee is awarded to Jenner, an award of a fee in the ranges suggested by Mr. Cunningham would be other than a fair and appropriate portion of the CFA, reasonable, or just.

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5 [As summarized in Jenner's PFF 208-214] First Mr. Cunningham reviewed fee statements produced in this arbitration by Jenner and Parallel, analyzed the proportionate amounts of fees incurred by Jenner, Baker Botts, Bosy & Bennett, Hinshaw & Culbertson, and two firms that served as local counsel for Parallel, Potter Anderson and Young Conaway, relating to the *Oracle* and *QuinStreet* cases.

Mr. Cunningham determined that Parallel received services in the following amounts of hourly fees from each firm: (a) Jenner: \$10,256,706 (unbilled); (b) Baker Botts: \$1,209,959; (c) Hinshaw & Culbertson: \$230,755; (d) Young Conaway: \$51,001; (e) Potter Anderson: \$33,436; (f) Bosy & Bennett: \$606,375. In this instance Mr. Cunningham, because Bosy & Bennett was paid on a contingency for its work on the *Oracle* trial, applied an hourly rate of \$700 per hour to monetize Bosy & Bennett's contribution.

Mr. Cunningham determined that the total hourly fees incurred by the law firms was \$12,387,878, and based on this total calculated that the percentage of fees attributable to Jenner was 83%.

Mr. Cunningham proposed two alternate methods of calculating an appropriate fee that would compensate Jenner for its services and/or contribution to Parallel's recoveries in *Oracle* and *QuinStreet*.

Under the first method, Mr. Cunningham deducted \$927,717 in expenses incurred by Parallel Networks from the total recoveries in *Oracle* and *QuinStreet* cases, leaving net proceeds of \$16,423,283. Thereupon Mr. Cunningham applied the graduated contingent fee provided for in the CFA [33% up to \$15 million and 28% of amounts above \$15 million up to \$50 million] to arrive at a contingent fee of \$5,348,519. After applying his 83% factor to represent Jenner's contribution, Mr. Cunningham arrived at a fee for Jenner of \$4,439,270. Using the same formula and approach with respect to a contingent recovery from *Oracle* in an arbitration contemplated by the *Oracle* settlement agreement, Mr. Cunningham determined that Jenner would be entitled to up to an additional \$3,021,200, depending on the results of the *Oracle* arbitration.

Under the second method, Mr. Cunningham subtracted the sums paid to other law firms from the contingent fee that would have been owed to Jenner under the CFA, yielding a fee of \$3,217,347, and a potential recovery of an additional fee of up to \$3,640,000, based upon the outcome of the *Oracle* arbitration.

6 Parallel made several observations and criticisms of Mr. Cunningham's opinions, which included questioning Mr. Cunningham's emphasis on Jenner's \$10 million hourly fees as a basis for the calculations, and that he did not include in his aggregate total sum of fees for all firms time spent by Baker Botts and by Potter Anderson in their representation of Parallel during 2006-2007 and 2007-2008, respectively. Mr. Cunningham did not consider any fee statements that were not produced in connection with the arbitration, and these were not part of that submission; Mr. Cunningham testified that these were not submitted to him for review, and that even if they had been they would not have materially affected his opinions.

Having considered the quality of Jenner's services as demonstrated both by Jenner, and by the opinions of successor counsel that such services represented work on which they relied and found valuable in not only obtaining the successful reversal on appeal of the summary judgment in *Oracle*, but also in preparing for trial of the *Oracle* matter, and in achieving the settlement in *Oracle* and the potential recovery contemplated in the *Oracle* settlement; Jenner's termination of its representation for just cause; the effect of such termination in reducing in some degree the value of Jenner's work because it did not continue to represent Parallel on a contingent fee basis; attorney fees incurred by Parallel for replacement counsel; the professional manner in which Jenner transferred the representation of Parallel to successor counsel; the importance of avoiding the potential of unjust enrichment to Parallel by permitting it to completely escape the obligation of paying Jenner any fee for its considerable work that doubtless contributed significantly to obtaining Parallel's settlements in *QuinStreet* and *Oracle*; Mr. Cunningham's opinions, calculation methodologies, and suggested ranges for a fee; Parallel's criticisms of Mr. Cunningham's approaches; and adjustments in the suggested fee ranges, as deemed appropriate, the Arbitrator finds that Jenner may recover damages as follows[7]:

1. For Jenner's breach of contract claim, an appropriate and fair portion of the contingent fee award based upon Jenner's contribution to the result achieved with the *Oracle* and *QuinStreet* settlements as of the time of termination of the CFA, is $3,000,000.

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7 For the percentages found in Paragraph 3 and 4 above, with respect to the contingent recovery from *Oracle* in the arbitration contemplated in the prior *Oracle* settlement, these claims arise from the same patents as the settled litigation, although they have been subject to reexamination proceedings in which reexamination certificates issued have canceled all of the existing claims of the '335 and '554 patents, and these were replaced with new claims. It appears that Parallel will rely in significant part on Jenner's prior work, but with different counsel to prosecute its claims at the arbitration, which is expected to take, by agreement of Parallel and Oracle, up to a maximum of 2 days of hearing.

2. Alternatively, for Jenner's *quantum meruit* claim, the reasonable value of the services provided to Parallel in connection with representing Parallel in the *Oracle* and *QuinStreet* cases is $3,000,000.

3. For Jenner's breach of contract claim, in the event of a settlement or recovery from Oracle in the anticipated arbitration per the terms of the *Oracle* settlement, a fair and appropriate portion of the contingent fee award, based upon Jenner's contribution to the result achieved, as of the time of termination of the CFA, is 16% of the net proceeds of the settlement or recovery paid to Parallel.

4. Alternatively, for Jenner's *quantum meruit* claim, in the event of a settlement or recovery from Oracle in the anticipated arbitration per the terms of the *Oracle* settlement, the reasonable value of the services provided to Parallel in connection with representing Parallel in the *Oracle* case, is 16% of the net proceeds of the settlement or recovery paid to Parallel.

The amounts and percentages found above are reasonable in light of the work performed and are not unconscionable.

To be clear, Jenner has demonstrated that it is entitled to recover damages from Parallel either upon its contract claim, or on its *quantum meruit* claim, as outlined previously, but not on both.

Statutory Attorney's Fees. Jenner seeks to recover its reasonable attorneys' fees if it recovers a claim for "rendered services," or "an oral or written contract." Tex. Civ. Prac. & Rem. Code §38.001. "A party who recovers in *quantum meruit* is also entitled to recover attorney's fees." *Caldwell v. Herst*, 714 SW2d 63, 65 (Tex.Civ.App. – Houston [14th Dist. 1986, writ refused n.r.e.]). A law firm represented by its own attorneys in a contract claim against a former client is entitled to recover for the value of the law firm attorney's services under §38.001 of the Texas Civil Practice and Remedies Code. *Campbell, Athay & Zukowski v. Thomasson*, 863 F2d 398, 400 (5^{th} Cir. 1989).

Parallel argues that Jenner may not recover its attorney's fees in connection with this arbitration, because the claim is barred by excessive demand. Specifically, Jenner sent a demand letter to Parallel in June 2011 for over $10 million for its hourly fees and in its Demand for Arbitration in December 2011 for over $10.1 million, and in September 2012, for over $4.4 million and an agreement by Parallel to pay 23 percent of any monies Parallel received in the future pursuant to a certain settlement agreement between Oracle and Parallel dated May 13, 2011.

In *Panizo v. Young Men's Christian Association of the Greater Houston Area*, 938 SW2d 163, 169 (Tex. App. – Houston [1^{st} Dist.] 1996) recognized that "a creditor who makes an excessive demand on a debtor is not entitled to attorney's fees for litigation required to recover the debt. *Findlay v. Cave*, 611 SW2d 57, 58 (Tex. 1981)," but also noted "[h]owever, a demand is not excessive simply because it is greater than that which a jury later determines is actually due. *See Id.* Although this may be some evidence of an excessive demand it cannot be the only factor to consider. The dispositive inquiry for determining whether a demand is excessive is whether the claimant acted unreasonably or in bad faith. *See, Findlay*, 611 SW2d at 58."

Parallel has not demonstrated that Jenner was acting unreasonably or in bad faith in making these demands. Jenner's demands were consistent with the terms of the CFA that Parallel had proposed, and the parties had negotiated and agreed to. Prior to the demands, Parallel had settled the *QuinStreet* and *Oracle* cases, but had refused to disclose to Jenner the fact or the amounts of the settlements, as it was obligated to do by the CFA. Jenner's demand is not excessive simply because it is greater than that which a fact finder later determines, as here, is actually due. Jenner's claim for attorney's fees in the arbitration is not barred by excessive demand.

Based upon the evidence presented, Jenner & Block is entitled to recover the amount of $1,394,000.00 in statutory attorney's fees after deduction for services solely related to Parallel's counter claim and other appropriate reductions, which fees were reasonable and necessary to prosecute the claims in this case.

Pre-Award and Post-Award Interest. Jenner is entitled to recover simple pre-award interest on the amount of money damages awarded at the pre-judgment rate of interest in Texas from December 20, 2011 to the date of this Award. Jenner is also entitled to recover post-award interest on the total amount of this Award, including damages, attorney's fees, pre-judgment interest at the post-judgment interest rate in Texas from the date of this Award until paid.

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Parallel's Counterclaims

Parallel has alleged counterclaims against Jenner for breach of contract, breach of its fiduciary duty to Parallel, and legal malpractice. Parallel seeks to recover, as damages for each of the claims, the alleged reduction in or loss of settlement value of the *QuinStreet* case. Parallel also sought to recover its attorney's fees in connection with the arbitration as a result of Jenner's alleged breach of contract.

Breach of Contract. Parallel alleged in its Second Amended Counterclaim that Jenner breached its contractual duties under the CFA "not to take ... any activity or action which would or could be reasonably expected to impair [Parallel's] rights under" the CFA by terminating the CFA at a critical juncture without good cause.[8]

Parallel's breach of contract claim is premised upon Parallel's allegation that Jenner prematurely terminated its representation of Parallel and abandoned Parallel without just cause. As discussed previously, there is an overlay of principles in connection with attorney-client relationships, in which the courts have set forth the principles under which counsel may withdraw from and terminate the representation for just cause and recover their attorney's fees for services. The overlay principles control the determination of whether an attorney has terminated the representation of a client with just cause or abandoned the client. Here, the Arbitrator has found that Jenner established that it had just cause to terminate its representation of Parallel; thus, Jenner did not abandon Parallel or breach the contract by terminating it.

Parallel alleged that Jenner caused damages to Parallel by forcing Parallel to find alternate counsel to represent it on an hourly basis and to settle *QuinStreet* at a reduced value to fund the appeal in *Oracle*. The evidence cited by Parallel in support of its claim that it could not find counsel to represent it on a contingent fee basis and was required to retain Baker Botts on an hourly fee basis was weak.[9] Also, Jenner offered to proceed in representing Parallel in the *Oracle* appeal under the CFA, in which case Parallel would not have needed other counsel or to raise funds to pay such counsel to handle the appeal, but Parallel declined the offer.

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8 In its post-hearing brief, Parallel also claimed that Jenner breached its duties "to represent Parallel on a contingent fee basis in the *Oracle* and *QuinStreet* cases" and "to initiate, prosecute, and conclude Enforcement Activities against Infringing Parties." These alleged breaches were not alleged in Parallel's latest amended pleading prior to the hearing, and thus may not be considered here.

9 Parallel cited, in support of a proposed finding of fact, to the effect that Parallel could not find alternate counsel on a contingent fee basis, only Mr. Margolis' testimony that Mr. Fokas had told him Mr. Fokas' opinion that he "believed" he couldn't, without reference to any supporting facts. Parallel cited only its own Second Amended Counterclaim in support of a proposed conclusion of law that Parallel was "forced" "to settle *QuinStreet*" at a drastically reduced price.

Parallel also alleged, to support this claim, that the case was "in a ditch" after the adverse summary judgment, and that there was an approaching deadline for filing a notice of appeal in *Oracle*. Mr. Cunningham, however, described the point in time at which the trial court phase had concluded with a final judgment as a normal point of transition in a commercial case after the responsibility for the prosecution of the case is transferred to appellate counsel. Parallel was successful in timely obtaining substitute counsel in *Oracle* and in *QuinStreet* when it retained Baker & Botts,[10] attorneys who had been representing Parallel the entire time in the Texas I cases, and had been lead counsel in the *Oracle* and *QuinStreet* cases before Jenner assumed the role of lead counsel in those cases. Baker Botts had remained as counsel of record in *Oracle* and *QuinStreet* and had worked and cooperated with Jenner in coordinating the Texas I litigation and the *Oracle* and *QuinStreet* cases, and were already quite knowledgeable about the underlying issues in the cases. Mr. Meek described the two sets of the Texas I and the *Oracle* and *QuinStreet* cases as a "perfect overlap."

Jenner did a very professional job in promptly transitioning its representation to Baker Botts, and Baker Botts affirmed that Jenner streamlined all efforts to effect a smooth transition. Jenner continued to protect Parallel's rights, during the month while replacement counsel was obtained. Jenner filed a notice of appeal in *Oracle* and attended a scheduling conference in *QuinStreet* (which was at the point of "starting over" with a new scheduling order, free from a "ditch" of any emergencies or other deadlines that might adversely affect the progress of the case) to meet all deadlines and obligations of Parallel while Parallel retained successor counsel. There was no adverse impact on either case from the transition. Parallel's

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[10] On January 2, 2009, Jenner sent Parallel a letter notifying it that Jenner was terminating its representation of Parallel. On February 10, 2009, Parallel informed Jenner that Baker Botts would be succeeding Jenner as counsel for Parallel in the *Oracle* and *QuinStreet* cases.

claim of damage arising from the timing of Jenner's termination of representation and Parallel's need to bring on successor counsel, is premised more on the nature of damage which might have happened, but did not in fact occur, because of the timely and smooth transition of representation, to respected, capable counsel who were already familiar with Parallel and the issues.

The damage claim for reduced value of the *QuinStreet* settlement is discussed in the legal malpractice section. For the reasons stated there, Parallel has not established that the value of *QuinStreet* had any value higher than that which was obtained in settlement, and is thus not entitled to recover such damages for reduced value of the *Quinstreet* settlement for its contract claims.

The Arbitrator finds that Parallel has not shown that Jenner breached the CFA by terminating the CFA or by the timing of the termination, or caused any harm to Parallel thereby; thus Parallel is not entitled to recover on this claim.

Parallel also complains that Jenner breached the CFA by refusing to represent Parallel in the Microsoft portion of *QuinStreet* and by offering to act only as settlement counsel in *QuinStreet*. These allegations are based on events leading up to and immediately preceding Jenner's termination of representation. The evidence reflected that neither Parallel nor Jenner understood at the time that the CFA obligated Jenner to represent Parallel in the Microsoft portion of *QuinStreet*. Parallel had approached Jenner to inquire about the possibility of Jenner representing Parallel in the Microsoft case and suggested that a rider to modify the CFA should be prepared, and executed, and attached to the Contingent Fee Agreement under the CFA if Jenner agreed to assume that representation under the CFA. Parallel and Baker Botts had in fact previously used this approach in similar circumstances by adding a rider to their CFA, which had similar terms. Jenner declined to represent Parallel in the *Microsoft* case. No rider was executed.

Jenner's reluctance to take on the representation of Parallel in the Microsoft case was driven by Parallel's chronic pattern of not promptly reimbursing Jenner for the very large expenses incurred in the *Oracle* and *QuinStreet* cases. The expected apparently massive scope and cost of defending Parallel in the Microsoft case was significant, just because Microsoft was involved; as Ms. Mascherin described it, Microsoft's involvement in *QuinStreet* "raised the possibility that a case that was a very small case, certainly by comparison to the *Oracle* case, all of a sudden would be expanded into a case at least as big as *Oracle*, possibly bigger." The *Oracle* case had proven to be large and costly. In effect, Parallel was asking Jenner to "double down" on Jenner's commitment of resources and services to represent Parallel at exactly the time Jenner was evaluating its serious concerns about Parallel's ability or willingness to meet its obligation as a reliable partner in going forward with the *Oracle* and *QuinStreet* cases in light of its chronic failure to uphold its contract obligations to promptly reimburse expenses. Further, even if, hypothetically, Jenner had any obligation arising from the CFA to represent Parallel in the Microsoft case, it would have been dependent on Jenner continuing to represent Parallel, per the CFA, in the *QuinStreet* case; if Jenner terminated the CFA and its representation of Parallel for just cause, the entire obligation to represent Parallel would cease.

The Arbitrator finds that Parallel has not shown that Jenner's refusal to represent Parallel in the Microsoft case was a breach of the CFA or caused any damage to Parallel.

Likewise, Jenner's proposal in lieu of termination, to act as settlement counsel in *QuinStreet*, was simply an effort to continue the settlement negotiations that had been pending, and to possibly resolve the *QuinStreet* case entirely, within a reasonable time, in lieu of terminating Jenner's representation of Parallel in that case. It is also notable that Parallel did succeed in settling *QuinStreet* within the ranges of Jenner's prior negotiations soon after the transition of counsel.

The Arbitrator finds that because Parallel has not established that Jenner breached the contract or caused damages to Parallel, Parallel is not entitled to recover on its breach of contract claim.

<u>Breach of Fiduciary Duty</u>. Parallel has also alleged that Jenner breached its fiduciary duties to Parallel, and that as a result of such alleged breach, Parallel is entitled to recover consequential damages, including the reduced settlement value of the *QuinStreet* case, and that Jenner has forfeited its claims for attorneys fees incurred in the representation of Parallel.

The elements of a breach of fiduciary duty claim are: (1) a fiduciary relationship between the plaintiff and defendant; (2) the defendant must have breached his fiduciary duty to the plaintiff; and (3) the defendant's breach must result in injury to the plaintiff or benefit to the defendant. *Jones v. Blume*, 196 SW3d 440, 447 (Tex. App. – Dallas 2006, pet. denied). "However, if a client seeks the remedy of equitable fee forfeiture and proves a breach of fiduciary duty by the attorney, the client may obtain that remedy without need to approve causation or damages if the court finds the attorney's conduct was a 'clear and serious breach of duty' and that forfeiture of the fee (or some portion of it) is 'necessary to satisfy the public's interest in protecting the attorney-client relationship.' *Burrow v. Arce*, 997 SW2d 229, 246 (Tex. 1999)." *Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C.*, 284 SW3d 416, 429 (Tex. App. – Austin 2009, no pet.).

There is no dispute that Jenner has fiduciary duties to its client Parallel. As the court in *Gibson v. Ellis*, 126 SW3d 324, 330 (Tex. App. – Dallas 2004, no pet.) observed:

> The essence of a claim for breach of that duty involves the "integrity and fidelity of an attorney and focuses on whether an attorney obtained an improper benefit from representing the client. [citations omitted.] An attorney breaches his fiduciary duty when he benefits improperly from the attorney-client relationship by, among other things, subordinating his client's interest to his own, retaining the client's funds, engaging in self dealing, improperly using client confidences, failing to disclose conflicts of interest, or making misrepresentations to achieve these ends. *Goffney v. Rabson*, 56 SW3d 186, 193 (Tex. App. – Houston [14th Dist.] 2001, pet. denied).

Here, Parallel complains that Jenner breached its duties by abandoning Parallel without just cause, and by failing to disclose its ongoing strategic plans to terminate the CFA and its internal analysis of the value of the *Oracle* and *QuinStreet* cases. The Arbitrator has previously found that Jenner had just cause for terminating its representation, and that Jenner did not abandon Parallel.

Parallel has alleged for its breach of fiduciary claim the same allegations of having to settle *QuinStreet* at a reduced settlement value that it asserted in the breach of contract claim; the Arbitrator has addressed the background aspects of this claim in the discussion in the breach of contract section, and the damages aspects of the alleged reduced value of *Quinstreet* is discussed in the legal malpractice section. For the reasons stated there, Parallel is not entitled to recover such damages from Jenner for its claim of breach of fiduciary duty.

As grounds for proving a breach of fiduciary duty justifying fee forfeiture, Parallel offers the following examples:

1. Parallel claims that Jenner advised Parallel not to settle for less than $60 million at the *Oracle* mediation, but two weeks later, Ms. Mascherin recommended in an internal memorandum to Jenner management to reconvene the *Oracle* mediation with a goal of achieving a pretrial settlement of $30 million. Parallel complains that Jenner did not tell Parallel that Ms. Mascherin's opinion was that Parallel should return to mediation and attempt to settle *Oracle*.

Jenner observed that after suggesting that Parallel reconvene mediation in *Oracle*, Ms. Mascherin learned more about developments regarding BEA from other Jenner counsel and she changed her mind about the recommendation because she believed that the BEA situation was an impediment to effective settlement negotiations at that time, and so informed Jenner management. Jenner further notes that Mr. Fokas was concerned that Oracle's injection of BEA into discussions would delay the then pending January 2009 trial setting. Mr. Bosy and Mr. Fokas agreed that the best course of action regarding *Oracle* and BEA was to take the *Oracle* case to trial in January 2009. Mr. Fokas never requested that Jenner resume further settlement negotiations with Oracle.

Even if Jenner had told Mr. Fokas about Ms. Mascherin's initial recommendation, it is not likely that mediation would have reconvened, in light of Ms. Mascherin's changed recommendation and Mr. Fokas' concerns about possibly delaying the *Oracle* trial setting. Moreover, even if the mediation had been reopened, there is no evidence that Oracle ever had any interest in settling, or would have settled, with Parallel for $30 million.

There is no evidence here of injury to Parallel, or improper benefit to Jenner.

2. Parallel also complains that shortly after the adverse summary judgment in *Oracle*, Jenner focused only on its own interest as evidenced by an email from Terri Mascherin to Jenner's management committee, which stated "Once we know what happens tomorrow [at the pretrial conference], we will have a decision to make regarding how much longer Jenner & Block will continue the representation."

Ms. Mascherin was referring to a decision involving an ongoing discussion regarding Parallel's chronic failure to promptly reimburse expenses, which had accrued to a significant unpaid balance. After bifurcation, the case would be delayed and take much longer to complete, with several trials and appeals, along with their additional associated expenses; summary judgment could add another appeal, more delay, and more expense. It was not inappropriate for Jenner to consider its interest in this regard concerning whether to continue in a large complex case with mounting expenses and delayed potential recovery of its fee with a client that was not, and possibly could not, meet its obligations. The fact that Jenner considered its interest in these circumstances does not compel the conclusion that it improperly did so.

Termination of the representation might have a benefit to a law firm by relieving it of having to further invest its own services and having to pay mounting expenses owed by a non-paying client, but it is not an impermissible benefit to consider, in light of Jenner's right to terminate with just cause.

Ms. Mascherin noted that any termination had to be consistent with Jenner's ethical obligations. She may have been mistaken in her interpretation of the CFA regarding Jenner's right to be compensated for hourly fees, but this appears to have been in good faith, since she was referring to a provision in the CFA that Parallel suggested and both sophisticated parties had agreed to.

There is no evidence here of injury to Parallel or improper benefit to Jenner.

3. Parallel further complains that Jenner "actively worked to have Parallel agree to settle its claims in *Oracle* by advising Parallel to cease pursuing claims during the appeal against any customers of Oracle or BEA (a company recently acquired by Oracle) and to agree that the finding of non-infringement would apply to all of BEA's products should the Federal Circuit affirm the summary judgment. Parallel objects that Jenner encouraged Parallel to give up these valuable rights without ever disclosing to Parallel that these concessions would "ease Jenner's path to withdrawal."

The limitation on pursuing claims was only during the appeal. Mr. Fokas vetted and approved this. Both Parallel and Oracle agreed on this, and other terms, for valid reasons in order to position the case, so that the appeal could begin and the January 2009 trial would not proceed; this streamlined the issues and benefited Parallel by eliminating a potentially unnecessary trial with no upside and the risk of a real potential downside, along with additional expenses for Parallel. The strategy succeeded with a successful appeal, a $16.5 million settlement, and no more trials, all to the benefit of Parallel.

There is no evidence here of any improper benefit to Jenner or injury to Parallel.

4. Parallel also complains that, in an effort to convince Parallel to settle *QuinStreet* and *Oracle*, Jenner told Parallel that its chances of success on appeal in *Oracle* were only 30-50 percent despite internal discussions and the trial team's belief that the chances of winning on appeal were very strong. "Had Parallel followed Jenner's advice, Oracle would have settled for substantially less than eight figures."

Parallel's claimed damage is hypothetical in nature; Parallel did not follow the alleged advice and did not settle *Oracle* for less than eight figures. Instead, it settled for $16,500,000. It is an example of hypothetical injury that did not happen.

At most, this claim shows that attorneys in a firm may have different opinions. Even if this were somehow construed as a breach of fiduciary duty, there is no evidence of a resulting improper benefit to Jenner or harm or injury to Parallel.

None of Parallel's four examples show any injury to Parallel or improper benefit to Jenner.

Parallel also complained that Jenner was having internal discussions concerning whether or not to continue the representation, and evaluating the prospects of a successful recovery in the *Oracle* and *QuinStreet* cases, and that these discussions were not disclosed to Parallel, and that Ms. Mascherin's role in them was also not discussed. Ms. Mascherin had significant experience in assisting other Jenner trial teams in the damages phases of trying other clients' claims. She reviewed Jenner's files and made her own evaluation of the prospects for recovering damages in the *Oracle* and *QuinStreet* cases. In this regard, she also consulted with Jenner's trial team, and with Jenner's management committee, of which she was a member. Ms. Mascherin advised the managing partner and the management committee on the issues of the representation and potential recovery and/or settlement.

It was standard practice for the firm's contingent fee committee to report to the firm management committee on the status of pending contingent fee matters. Parallel's expert, Mr. Johnston, testified that there is nothing improper about a lawyer considering the economics of a contingent representation mid-case, or with reaching the conclusion that a matter may have reached the point when it places an undue burden on the lawyer.

Ms. Mascherin intended her analysis to "assess all of the risks and the different points of view and present everything to the trial team, to firm management, so that differences of opinion could be collected in one place and evaluated. Mr. Johnston testified that there is "no specific obligation" to inform the client every time the law firm undertakes such an analysis, or changes that analysis.

Even if Jenner had disclosed its internal discussions in more detail, it still would have had the right to consider whether or not it had just cause to terminate the representation. Jenner has shown that it had the right to terminate the representation for just cause, irrespective of whether or not it disclosed its internal investigation. It did not appear that Jenner obtained any improper benefit for itself by conducting, or by not disclosing, the internal investigation at a different time. Parallel has not shown any injury to Parallel or to the value of either the *QuinStreet* case or the *Oracle* case.

However, Parallel received and accepted the substantial benefit of Jenner's services before the termination and which contributed to Parallel's settlements with *QuinStreet* and *Oracle*.

The Arbitrator finds that Parallel is not entitled to recover damages based on its breach of fiduciary duty claim.

To recover the remedy of fee forfeiture for breach of fiduciary duty, it is not mandatory for a client to prove damages, but such relief may only be granted where the tribunal finds (1) that the attorney's conduct was a clear and serious breach of duty and (2) that forfeiture of the fee is "necessary to satisfy the public's interest in protecting the attorney-client relationship." The Arbitrator finds that there is not evidence sufficient to make either of such findings here. Therefore, the Arbitrator finds that Parallel is not entitled to a finding that Jenner has forfeited its right to recover attorneys' fees in connection with its representation of Parallel.

Legal Malpractice. In its counterclaim for malpractice, Parallel alleged that Jenner abandoned Parallel by terminating the CFA at a time when Parallel desperately needed help with the *Oracle* appeal, was unable to find counsel to represent it on a contingent fee basis and had to settle *QuinStre*et at a drastically reduced price. These are essentially the same fact allegations Parallel made in its breach of contract and breach of fiduciary duty claims, which Parallel alleges here as breaches of its duty of care.

The Arbitrator has found that Jenner had just cause to terminate the representation and did not abandon Parallel. The Arbitrator has addressed Parallel's allegations regarding its description of the above circumstances it complains of in the discussion of the breach of contract claim. For the reasons discussed there, the Arbitrator also finds here that Parallel has not shown that Parallel breached its duty of care by terminating the CFA or by the timing of the termination.

Parallel alleged in its counterclaim that the circumstances forced it to settle QuinStreet at a drastically reduced value. Parallel asserted in its post-hearing brief a second theory that Jenner should have done more in its representation of Parallel to move *QuinStreet* forward, by realizing it had information obtained in discovery sufficient to perform an analysis of the DMS business but not pursuing this. Jenner argued that this new theory was not pled by Parallel, developed in discovery, supported by expert testimony, or supported by the evidence. Because this claim was not pled, it cannot be considered as a basis for recovery. Even if it had been, the evidence did not support a recovery on this basis.

<u>Value of *QuinStreet* case</u>. The evidence did not support a finding on the claim pled that QuinStreet was settled for drastically reduced value.

Jenner observed that from the beginning in its prosecution of the *QuinStreet* case, Parallel and Mr. Fokas did not sue QuinStreet and did not desire to be in any litigation with QuinStreet, which was brought in by a third party action by Herbalife, one of the defendants that Parallel had sued. Mr. Fokas also repeatedly told Jenner to focus on *Oracle*, as the much larger case, and not the much smaller "back-burner" *QuinStreet* case. Mr. Fokas specifically instructed Jenner not to proceed with detailed analysis of the *QuinStreet* source code. Mr. Bennett and Mr. Margolis confirmed that Jenner vigorously pursued the *QuinStreet* case within the confines of Mr. Fokas' instructions and QuinStreet's recalcitrance in discovery.

When Baker Botts took over representing Parallel in the *QuinStreet* matter, a discovery schedule had just been established that would have permitted any further action required to achieve an unimpaired settlement such that Parallel and Baker Botts had a full and fair opportunity to perform any work they believed was necessary to further develop the case. Baker Botts was Parallel Networks' counsel when Parallel agreed to settle and did not perform any of the analysis that Parallel Networks now faults Jenner for not having performed. Also, Parallel settled *QuinStreet* when Baker Botts (not Jenner) was representing it; this breaks the causation chain for any malpractice claim against Jenner concerning its role in the evaluation or settlement of *QuinStreet*.

To support the calculation of its claim for damages regarding the loss of the potential value of the *QuinStreet* settlement, Parallel relied upon Chase Perry as its expert witness. Parallel's summary of his analysis in its proposed findings is included here in a footnote to conserve space.[11] Mr. Perry's damages scenario for *QuinStreet* projected damages in *QuinStreet* to exceed $19 million.

In response, Jenner summarized fact evidence concerning the history and course of

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11 Mr. Perry conducted a "but-for analysis" to determine what would have occurred in the absence of Jenner's alleged breaches and compared that to the settlement actually obtained with QuinStreet. Mr. Perry assumed in his analysis that the "but-for" settlement would have been achieved after the reversal of the *Oracle* summary judgment, and if Jenner had not terminated its representation.

Perry began his analysis by looking at the Herbalife settlement because Herbalife paid, in part, for infringement that occurred from its use of QuinStreet's allegedly infringing services and for which Herbalife made a claim for indemnification against QuinStreet. Based on the analysis prepared by Fokas, Perry determined that the amount of the Herbalife settlement that was estimated to be attributable to infringing activities on QuinStreet's platforms. According to this analysis, Herbalife's estimated damages attributable to infringing activities via QuinStreet's platforms were approximately 14.9 percent of all damages during the relevant time period. Multiplying that 14.9 percent by the total amount of the Herbalife settlement, $1,300,000, equals approximately $193,000 as an estimate of the total Herbalife settlement attributable to QuinStreet.

Next, based on available QuinStreet financial records (which were the same records produced during Jenner's representation), Perry determined that QuinStreet earned approximately $7.65 million from Herbalife during the relevant damages period. This implies that the effective royalty rate of the QuinStreet portion of the $1,300,000 Herbalife settlement is approximately 2.53 percent. Applying the 2.53 percent to all of QuinStreet's accused services' revenues of approximately $767.8 million equaled approximately $19.4 million, the amount of which Parallel and QuinStreet should have settled. Because Parallel actually settled with QuinStreet for $850,000, that amount is subtracted from the $19.4 million to yield the damages figure of $18,545,960.

settlement negotiations in the *QuinStreet* case and similar cases in its Proposed Findings at 167-168 and 170-175, and its summary is also included here in footnote form.[12]

Jenner also called Mr. Malackowski as an expert witness, in rebuttal of Mr. Perry's analysis, whose opinion it summarized in its Proposed Findings of Fact 237 and is likewise included in similar fashion.[13] He exposed many weaknesses in Mr. Perry's damage analysis.

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12 The most recent settlement negotiations between Parallel and QuinStreet, prior to Jenner's termination of representation, included Parallel's demand in November 2008 of $1.1 million and Parallel had authorized a counter demand of $950,000 in December 2008.

The nine settlements involving the '335 and '554 patents that Parallel closed prior to the *QuinStreet* settlement ranged in the amount of $440,000 to $1.5 million.

Although Parallel Networks initially suspected that QuinStreet may have hundreds of web posting customers, discovery received from QuinStreet in May 2008 revealed that, in fact, there were only 12 such customers. Mr. Carlson testified that a settlement that released hundreds of customers "presumably" would be different from a settlement that released only 12.

In the summer of 2008 an entity called Unified Corporation purported to hold rights in the '335 and '554 patents, and to grant a license to those patents to QuinStreet. This issue was received as a threat to Parallel Networks' patent enforcement program. Parallel Networks therefore delayed closing the *QuinStreet* settlement until it was successfully able to subpoena documents from Unified, which it then used to file the lawsuit against and obtain relief from Unified.

There is no evidence or testimony that anyone contemporaneously referred to the *QuinStreet* settlement as a "fire sale" or suggested that Jenner & Block's conduct had anything to do with the settlement terms or amount. Mr. Fokas could not point to any contemporaneous document suggesting that Jenner & Block's termination of the CFA had any effect on the terms or amount of the *QuinStreet* settlement.

Mr. Carlson did not recall any contemporaneous statement by anyone that the *QuinStreet* case was "settled at a fire sale," or that the terms or amount of the settlement were unfair. Despite almost daily contact from July 2010 through December 2011, Mr. Fokas never told Mr. Bennett prior to this arbitration that he believed the *QuinStreet* case was settled at a "fire sale" price. Mr. Horowitz, local counsel at the time of the settlement, testified that he could not recall anyone voicing the opinion that Jenner & Block's withdrawal had any effect whatsoever on the terms of the *QuinStreet* settlement.

There is no evidence that QuinStreet ever would have agreed to settle the *QuinStreet* case for more than $850,000. There is no document anywhere in the records to suggest that QuinStreet was willing to settle for more than the amount for which the parties actually settled. Indeed, despite having listed QuinStreet's general counsel, Dan Caul, as well as a "corporate representative of QuinStreet, Inc." on its preliminary witness list, Parallel Networks offered neither live testimony nor testimony by affidavit from any QuinStreet representative to that effect. Parallel Networks' expert on its putative counterclaim damages, Chase Perry, testified that he had no contact with any QuinStreet representative, and had no direct evidence that QuinStreet would have voluntarily settled for more than $850,000.

13 Mr. Malackowski summarized the following defects in Mr. Perry's analysis:
[FN continued on next page]

The Arbitrator finds that Mr. Malackowski's credentials and analysis were substantially more credible and convincing than Mr. Perry's, and that Parallel failed to prove that the *QuinStreet* case had any greater value than the settlement obtained.

Parallel offered no evidence to establish the "suit within a suit" requirement that, but for Jenner's work in the *QuinStreet* litigation, it would have recovered more damages. Neither did Parallel offer any evidence that QuinStreet would ever have actually paid more than it agreed to pay in the *QuinStreet* settlement. Parallel's claim for such damages also fails for lack of such evidence,

Accordingly, the Arbitrator finds that Parallel has not established that the potential damages in *QuinStreet* had any value higher than that which was obtained in settlement, or that

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(FN continued)

a) Mr. Perry admittedly did not conduct a *Georgia-Pacific* analysis to calculate damages, despite the fact that the *Georgia-Pacific* analysis is used "if not universally," then "90 percent of the time."

b) Mr. Perry admittedly "did not determine the likely result of a court-determined damage claim."

c) Mr. Perry admittedly "did not consider all the available evidence," such as the cost to design around the patents.

d) In placing significant emphasis on the Herbalife settlement, Mr. Perry did not consider the difference in the value of the Parallel Networks' patents to Herbalife and to QuinStreet, or the fact that, given the partial summary judgment ruling in favor of Herbalife, the Herbalife settlement was driven by Herbalife's use of Oracle technology, rather than QuinStreet technology.

e) Mr. Perry admittedly did not investigate the foundation of the calculations by Mr. Fokas that he relied upon for his analysis.

f) Mr. Perry did not account for changing business and economic conditions over time – specifically the significant change in the value of settlements obtained by Parallel Networks subsequent to the denial of Parallel Networks' motion for clarification of the "Texas II" claim construction order.

g) Mr. Perry failed to investigate the distinctions between QuinStreet's DSS and DMS businesses, and the relevance of those distinctions to the damage analysis in this case.

h) Mr. Perry ignored the actual history of the settlement negotiations between Parallel Networks and QuinStreet prior to Jenner & Block's termination of representation.

i) Mr. Perry ignored the fact that although each of the defendants who settled with Parallel Networks had a different revenue base, they all settled for similar amounts, indicating that the defendants (including Herbalife) were settling for below cost of defense and thus making the amount for which any individual defendant settled irrelevant to any analysis of the percentage of exposure for which QuinStreet would have settled.

j) There is no evidence that QuinStreet would have settled the case for $19 million in light of what the rest of the defendants were paying.

any act or omission of Jenner was a breach of the duty of care, or caused a reduction in the value of the *QuinStreet* settlement.

Therefore, the Arbitrator finds that Parallel, having failed to establish a right to recover under its legal malpractice claims, is not entitled to recover any damages from Jenner for these claims.

Parallel's Attorney's Fees. Inasmuch as Parallel has failed to establish a breach of contract by Jenner, it is not entitled to recover its attorney's fees in the arbitration from Jenner.

AWARD

1. Jenner's Breach of Contract and *Quantum Meruit* Claims. Jenner & Block, LLP (Jenner) is entitled to and shall recover from Parallel Networks, LLC (Parallel), and Parallel is obligated to pay Jenner, damages for breach of contract, or in the alternative, for *quantum meruit*, in the amounts and percentages set forth as follows:

A. $3,000,000, and

B. In the event that Parallel receives a recovery or settlement from Oracle in the arbitration contemplated by Parallel's prior settlement with Oracle, Jenner is entitled to and shall recover from Parallel, and Parallel is obligated to pay Jenner, 16% of the net proceeds of settlement or recovery paid to Parallel.

2. Jenner's claim for promissory estoppel is denied.

3. Parallel's counterclaims for breach of contract, breach of fiduciary duty, and legal malpractice are denied. Parallel is not entitled to recover damages from Jenner.

4. Attorney's Fees. Jenner is entitled to and shall recover from Parallel, and Parallel is obligated to pay Jenner, its reasonable and necessary attorney's fees in the amount of

$1,394,000 from Parallel.

5. Interest. Jenner is entitled to and shall recover from Parallel, and Parallel is obligated to pay Jenner: (A) pre-award interest on the amount of damages set forth in Paragraph 1.A above at the pre-judgment rate of interest in Texas from December 20, 2011, to the date of this Award; and, (B) post-award interest on the amounts set forth in Paragraph 1.A. (damages), and 4 (Attorney's Fees), and 5.A (pre-award interest) above, at the post-judgment rate of interest in Texas from the date of this Award until paid.

Date: January 18, 2013.

Jerry Grissom

JERRY GRISSOM, Arbitrator

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: Jenner & Block LLP vs. Parallel Networks, LLC, et al.
Reference No. 1310019934

I, Judy Stephenson, not a party to the within action, hereby declare that on January 18, 2013 I served the attached Cover Letter, Arbitration Findings and Award and Proof of Service on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Dallas, TEXAS, addressed as follows:

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I declare under penalty of perjury the foregoing to be true and correct. Executed at Dallas, TEXAS on January 18, 2013.

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