ORAL ARGUMENT REQUESTED

NO. 05-13-00748-CV

# IN THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS AT DALLAS, TEXAS

PARALLEL NETWORKS, LLC

Appellant v.

JENNER & BLOCK LLP

Appellee.

Appealed from the 101st Judicial District Court Of Dallas County, Texas, Case No. DC-13-01146-E

# BRIEF OF APPELLANT, PARALLEL NETWORKS, LLC

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TO THE HONORABLE FIFTH COURT OF APPEALS:

**STATEMENT OF THE CASE**

*Nature of the Case:* This appeal arises from the district court’s denial of the Petition and Motion to Vacate Arbitration Award filed by Plaintiff/Appellant Parallel Networks LLC (“Parallel”) and the court’s granting of the Motion for Confirmation of Arbitration Award filed by Defendant/Appellee Jenner & Block LLP (“Jenner”).

*Course of Proceedings:* Parallel filed suit on January 29, 2013, petitioning the district court to vacate an arbitration award in favor of Jenner. The arbitrator awarded damages to Jenner on its breach of contract claim or, alternatively, as *quantum meruit.* The award required Parallel to pay Jenner (i) $3,000,000; (ii) 16% of the net proceeds of a future settlement or recovery in another arbitration that Parallel expected to prosecute against a third-party; (iii) $1,394,000 in attorneys’ fees; and (iv) pre-judgment and post-judgment interest. The arbitration award also denied Parallel’s counterclaims against Jenner for breach of contract, breach of fiduciary duty, and legal malpractice. On March 11, 2013, Jenner moved the district court to confirm the arbitration award.

*Trial Court’s Disposition:* On April 29, 2013, the district court signed a Final Judgment Confirming Arbitration Award. Thereafter, Parallel timely filed its notice of appeal from the Final Judgment.

**STATEMENT REGARDING ORAL ARGUMENT**

Pursuant to Texas Rule of Appellate Procedure 39.1, Parallel requests oral argument because it would materially aid the Court’s decision in this case, which involves a fundamental question of law: must an unlawful fee agreement be enforced simply because it contains an arbitration provision?

**ISSUES PRESENTED**

An unconscionable termination provision in an attorney-client fee agreement violates public policy and is unenforceable in Texas courts. *Hoover Slovacek LLP*

1. *Walton*, 206 S.W.3d 557 (Tex. 2006). Such a provision cannot be enforced in an arbitration proceeding. *Lee v. Daniels & Daniels*, 264 S.W.3d 273 (Tex. App.— San Antonio 2008, pet. denied). Did the trial court err by confirming the arbitration award allowing recovery of attorneys’ fees based upon a termination provision that is unconscionable and against public policy?

As alternative relief (presumably in case the contract was against public policy), the arbitrator awarded an identical recovery under *quantum meruit*. Is a *quantum meruit* recovery against public policy where it substitutes for the very recovery under the contract that is unconscionable as against public policy?

An attorney who has abandoned a client without just cause before completing a contingency fee contract forfeits all compensation. *Royden v. Ardoin*, 331 S.W.2d 206 (Tex. 1960). Did the trial court err by confirming an alternative award of attorneys’ fees based upon *quantum meruit*?

Did the trial court err by confirming the arbitration award after the arbitrator improperly excluded and refused to hear evidence pertinent and material to Parallel’s claims?

**STATEMENT OF FACTS**1

As the United States economy went over a cliff in late 2008, one of the world’s largest law firms concluded it was no longer in its financial interests to continue representing a client in two expensive and protracted contingency fee cases. The firm believed its fee agreement, which was governed by Texas law, allowed it to pull out of those cases unilaterally, convert its unrealized contingency fee into a retroactive hourly fee, and also claim a portion of any recovery the client might ultimately receive through the efforts of successor counsel. After losing one of the cases on summary judgment, the law firm invoked the fee agreement’s termination provision and abandoned its former client with two expensive cases in a ditch. After the former client and its successor counsel successfully appealed the summary judgment and prosecuted the cases, the law firm then demanded payment of over $10 million in hourly fees.

Because the arbitrator omitted many facts from his award and the trial court did not issue a written opinion, a full recitation is necessary here to allow this Court to evaluate the legal and public policy issues at stake.[2](#_bookmark7) For purposes of clarity, the following individuals played significant roles in the underlying facts:

* + Terry Fokas: Managing Partner of Parallel;

1 Where not otherwise specified, these facts are drawn from the Arbitration Findings and Award (“AFA”). *See* AFA pp. 5–10. (CR Supp. 31-36). (App. Tab 3).

2 These facts, to the extent not taken from the arbitrator’s award, are drawn largely from Jenner’s proposed findings of fact and the testimony of Jenner witnesses.

* + Harry Roper: Senior Jenner partner and lead counsel for Parallel in the

*Oracle* and *QuinStreet* cases;

* + Paul Margolis: Jenner Partner and member of Jenner team representing Parallel in the *Oracle* and *QuinStreet* cases;
  + Susan Levy: Jenner’s Managing Partner; and
  + Terri Mascherin: Member of Jenner’s Management Committee.

# Parallel retained Jenner to prosecute its *Oracle* and *QuinStreet* cases potentially worth tens of millions of dollars.

In 2006, Oracle Corporation (“Oracle”) filed a declaratory judgment action against Parallel,[3](#_bookmark9) seeking a finding that certain patents-in-suit were either not infringed or invalid. QuinStreet Inc. (“QuinStreet”) filed a declaratory action that same year seeking a similar declaration. Parallel brought counterclaims for infringement and damages against Oracle and QuinStreet, and Baker Botts initially served as Parallel’s lead counsel.

In May 2007, Terry Fokas, the managing partner of Parallel, contacted Henry Roper of Jenner about representing Parallel as lead counsel in the *Oracle* and *QuinStreet* actions on a contingency fee basis.4

3 epicRealm Licensing, LP (“epicRealm”) was Parallel’s predecessor-in-interest. In September 2007, epicRealm dissolved, and in November 2007, Parallel was substituted as a party in place of epicRealm in certain litigation. For simplicity, this brief uses “Parallel” to refer to either epicRealm or Parallel.

4 Claimant Jenner & Block LLP’s Proposed Findings And [sic] Facts And Conclusions Of Law (“Jenner’s Proposed Findings”) ¶ 30. (CR:209).

Roper put together a team of Jenner attorneys to conduct due diligence.[5](#_bookmark12) Over about 41 days, Roper and other Jenner attorneys reviewed information from Parallel to assess the cases.[6](#_bookmark13) Based on their due diligence, Jenner concluded Parallel’s patents at issue were good and Parallel had valid claims for infringement against Oracle and QuinStreet.[7](#_bookmark14) Roper and Jenner anticipated it would be “a major battle” to take on Oracle as an opponent.8 At the same time, Jenner and Parallel anticipated recoveries in the *Oracle* and *QuinStreet* cases could be very large, with net proceeds upward of $75 million.9 After the review process, Jenner agreed to represent Parallel.[10](#_bookmark17)

# Jenner entered a contingency fee agreement that violates Texas public policy.

Jenner and Parallel entered into the Contingent Fee Agreement (“Agreement” or “CFA”) effective June 27, 2007.[11](#_bookmark18) The Agreement recited that Jenner would represent Parallel in “Enforcement Activities” against parties infringing certain patents and that “because of the potential cost in prosecuting the

5  *Id.* ¶ 31. (CR:209).

6 Tr. 389:3-10 (Roper). (CR:660). Unless otherwise noted, citations to the arbitration hearing transcript will be to “Tr. [page]:[line numbers] (witness)”.

7  Tr. 392:22 – 393:13 (Roper). (CR:661).

8  Tr. 395:25 – 396:13 (Roper). (CR:662).

9  Jenner’s Proposed Findings ¶ 47. (CR:214).

10  Tr. 393:14-16 (Roper). (CR:661).

11  CFA at p.1. (CR:37).

Enforcement Activities,” Parallel “desire[d] to compensate [Jenner] on a contingent fee basis.”[12](#_bookmark19)

The CFA provided that Jenner would be paid a contingency fee award computed as a percentage of the net proceeds paid to Parallel from an Enforcement Activity.[13](#_bookmark20) The percentages to be paid to Jenner were as follows14[:](#_bookmark21)

|  |  |  |  |
| --- | --- | --- | --- |
| Net Proceeds: $0 to $15,000,000 | Net Proceeds:  $15,000,000.01 to $50,000,000 | Net Proceeds:  $50,000,000.01 to $75,000,000 | Net Proceeds:  $75,000,000.01  and above. |
| 33% | 28% | 24% | 20% |

Significantly, the CFA also provided that Jenner could determine “at any time that it [was] not in its economic interest to continue the representation of [Parallel] pursuant to this [CFA],” and Jenner could terminate the CFA under those circumstances by providing 30 days’ notice.1[5](#_bookmark22) According to the CFA, if Jenner terminated the agreement based on the law firm’s financial self-interest, Parallel would be required to pay (i) Jenner retroactive hourly fees at Jenner’s usual rates for all of Jenner’s time expended on any Enforcement Activities, (ii) reimburse Jenner for unpaid expenses, and (iii) on top of the retroactive hourly fees, also pay Jenner at the conclusion of any Enforcement Activity “an appropriate and fair

12  CFA at p.1. (CR:37).

13  CFA ¶ 5. (CR:40).

14  CFA ¶ 5. (CR:40).

15  CFA ¶ 9(b). (CR:43).

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 [by the payment of the retroactive hourly fees]).”[16](#_bookmark24) In other words, the CFA purported to allow Jenner to

(1) quit its representation if it decided it was in the firm’s economic interests to

discontinue and (2) nevertheless recover its full hourly fees plus a portion of any subsequent recovery by Parallel.

The CFA also included an arbitration clause and provided that the CFA was to be governed by Texas law.[17](#_bookmark25)

# Jenner began to consider terminating its representation of Parallel based on its own financial self-interests in late 2008.

In the latter half of 2008, the United States economy entered a period of extraordinary crisis.[18](#_bookmark26) The general economic collapse hit large law firms hard, resulting in unprecedented layoffs of attorneys and other significant cost-cutting

16  CFA ¶ 9(b). (CR:43).

17 CFA ¶¶ 8 & 13. (CR:42-43).

18 This Court may take judicial notice of the state of the economy. *See Office of Pub. Utility Counsel v. Pub. Utility Comm’n of Tex.*, 878 S.W.2d 598, 600 (Tex. 1994) (“A court of appeals has the power to take judicial notice for the first time on appeal.”); 35 TEX. JUR. 3D EVIDENCE §

70 (“Economic conditions, generally, such as eras of depression or inflation, are known judicially, as are certain particular matters pertaining to the public economy.”); *see also S. Tex. Coaches v. Eastland*, 101 S.W.2d 878, 882 (Tex. Civ. App.—Dallas 1937, writ dism’d) (taking judicial notice of the fact that “the Nation was in the throes of an unusual economic crisis”); *accord Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 458 (9th Cir. 1995) (taking judicial notice of newspaper article describing widespread layoffs by defendant where the fact of the layoffs was generally known in Southern California); *Hunt v. Astrue*, No. 10C2874, 2012 WL 1044744, at

\*12 (N.D. Ill. Mar. 26, 2012) (“[T]his court takes judicial notice of the significant decline in the national economy beginning in 2008.”).

measures as firms sought to protect their profits.[19](#_bookmark27) In October 2008, Jenner laid off ten of its partners, equal to about 6% of its equity headcount.[20](#_bookmark28) A few months later in March of 2009, Jenner also laid off 34 staffers.[21](#_bookmark29) At the time of the latter layoff, Jenner’s Managing Partner, Susan Levy, publicly explained that “price-sensitivity in the marketplace demands that we more closely align the firm’s cost structure to best serve clients.”[22](#_bookmark30)

During the last quarter of 2008, Jenner’s management also began to explore whether and to what degree Jenner would continue representing Parallel on a contingency fee basis. In or around August of 2008, Levy and Jenner’s Chairman at the time, Tony Valukas, assigned Terri Mascherin to join the firm’s team representing Parallel.[23](#_bookmark31) Mascherin was a member of Jenner’s management committee appointed by the managing partner.[24](#_bookmark32) The management committee was responsible for overseeing the operations of the firm, including billing and

19 *See, e.g.*, Eli Wald, *The Economic Downturn and the Legal Profession, Foreword: The Great Recession and the Legal Profession*, 78 FORDHAM L. REV. 5, 2051-52 (Apr. 2010).

20 Lynne Marek, *Jenner & Block Shows 10 Partners the Door*, LAW.COM (Oct. 21, 2008), [http://www.law.com/jsp/article.jsp?id=1202425427223&Jenner](http://www.law.com/jsp/article.jsp?id=1202425427223&amp;Jenner) Block\_Shows\_10\_Partners\_th e\_Door; *see also* Andrew Longstreth, *THE AM LAW 100: Jenner & Block Shows Solid Gains in Revenues, Profits*, THE AMLAW DAILY: THE SCORE (Feb. 13, 2009), <http://amlawdaily.typepad.com/amlawdaily/2009/02/jenner-block-squeaks-out-solid-gains-in-> revenues-profits.html. (App. Tabs 26 & 27).

21 Ameet Sachdev, *Law firms cutting staff, pay; Katten Muchin, Jenner & Block react to drop in business*, CHICAGO TRIBUNE, Chicagoland Final Edition, Mar. 20, 2009, at C32. (App. Tab 28).

22 *Id.*

23  Tr. 363:17-19 (Roper); 782:13 – 783:4 (Mascherin). (CR:654, 760).

24  Tr. 789:21 – 790:3 (Mascherin). (CR:761-62).

collections.[25](#_bookmark34) Levy and Valukas told Mascherin the firm had a “big investment” in Parallel’s *Oracle* case and they wanted an assessment of it.[26](#_bookmark35) According to Mascherin, “[t]hey wanted to know is it a good case or what are our prospects like, [because] we have a big investment in the case.”[27](#_bookmark36)

# While Jenner was handling the *Oracle* and *Q**uinStreet* lawsuits, there were adverse developments in the litigation.

Initially, the *Oracle* case was set for trial in January 2009. However, the court announced at a hearing on October 3, 2008, that it was going to bifurcate the issues of damages and willful infringement from the issue of liability for purposes of the January trial.[28](#_bookmark37) The ruling meant the January 2009 trial would address only liability and validity issues. [29](#_bookmark38) Only after the inevitable appeal could a damages trial take place, several years after the initial trial, thereby delaying any recovery significantly.

On October 8, 2008, following the October 3 bifurcation order, Jenner engaged in a mediation with Oracle on behalf of Parallel during which Oracle did not make a settlement offer.[30](#_bookmark39) In addition, in the *QuinStreet* case, QuinStreet filed

25  Tr. 790:3-15 (Mascherin). (CR:762).

26  Tr. 789:14-20 (Mascherin). (CR:761).

27  Tr. 789:19-20 (Mascherin). (CR:761).

28  Jenner’s Proposed Findings ¶ 86. (CR:225).

29  *Id.* ¶ 89.

30  *Id.* ¶ 90. (CR:226).

a third-party complaint against Microsoft Corporation in September 2008.[31](#_bookmark41) In November 2008, Microsoft filed a complaint against Parallel.[32](#_bookmark42) The entry of Microsoft into the case threatened to require substantially more work because the terms of the CFA required Jenner to defend Parallel against Microsoft’s entry into the *QuinStreet* case.[33](#_bookmark43)

# In the wake of the adverse developments, Jenner management began to consider whether it would be in Jenner’s financial self- interests to terminate the representation.

Shortly after the mediation in *Oracle* and the entry of Microsoft in *QuinStreet*, Mascherin prepared a memorandum to Levy (Jenner’s Managing Partner) and Valukas (Jenner’s Chairman) dated October 21, 2008 providing an update “concerning the firm’s investment” in the *Oracle* case and “potential settlement strategy.”[34](#_bookmark44) She stated the trial team believed there was a likelihood of prevailing on liability.[35](#_bookmark45) However, she noted there was disagreement among

Jenner attorneys regarding whether Parallel’s likely damages award would be

.”36

31  AFA p. 7. (CR Supp. 33). (App. Tab 3).

32 *Id.*

33 *Id.*; *see also* CFA ¶ 2(c) (requiring Jenner to defend Parallel “against any suit, action, proceeding, counterclaim or other similar causes of action asserted against [it] by an Infringing Party that occurs as a direct result of the threat, initiation or prosecution of such Enforcement Activity,” including declaratory judgment actions). (CR:39).

34  Claimant’s Ex. 35 p. 1. (CR:15). (App. Tab 6).

35  *Id.* p. 2.

36  *Id.* p. 3.

Mascherin also explained the procedural posture of the case and reported that pursuing the case through trials, a damages award, and any resulting appeal meant “we may not receive a final judgment until 2012 or later.”[37](#_bookmark47) Mascherin further reported that Jenner’s current investment in the case was $8,548,116.[38](#_bookmark48) If the case proceeded to trial, Jenner could expect to invest at least an additional $2.5 million in pre-trial and trial work.[39](#_bookmark49) If Jenner continued to pursue the case through the liability trial and, assuming success, through any appeal, damages trial, and damages appeal, she projected Jenner’s total investment would “exceed $15 million.”[40](#_bookmark50)

Finally, Mascherin noted that Parallel was in arrears in paying its expenses and owed slightly under $500,000 as of October 20, 2008.[41](#_bookmark51) She claimed Parallel “has informed us that it currently has no money and is unable to pay expenses” and that it had asked Jenner to amend the CFA to provide that Jenner would front the payment of expenses.[42](#_bookmark52)

Based on this assessment, Mascherin proposed to Levy and Valukas that Jenner advise Parallel to reopen mediation and attempt to achieve a settlement “in

37  *Id.* p. 4.

38  *Id.* p. 5.

39 *Id.*

40 *Id.*

41 *Id.*

42  *Id.* p. 6.

an amount of $30 million or more.”[43](#_bookmark54) She further proposed that Jenner amend the CFA to provide that Jenner would front expenses in exchange for an increased percentage of recovery as a contingency fee.[44](#_bookmark55) Finally, she recommended that “the Contingent Fee Committee re-examine the Contingent Fee Agreement with [Parallel] and determine whether it is in the firm’s strategic and financial interests to continue its engagement with [Parallel] and to pursue additional lawsuits.”45

# Additional adverse developments in *Oracle* caused Jenner to consider withdrawing for its own financial self-interests while it simultaneously advised Parallel to settle.

On December 4, 2008, the district court issued its summary judgment ruling in *Oracle*, rejecting Jenner’s arguments. The court found Oracle did not infringe the two Parallel patents at issue. This ruling meant Parallel’s infringement claims against Oracle were precluded from going forward at the January 2009 trial.

Within hours of receiving the adverse summary judgment ruling, Mascherin sent an e-mail to Levy and Valukas regarding Jenner’s next moves.[46](#_bookmark57) She noted there was a pre-trial conference the next day at which Jenner would ask the Court to strike the January 2009 trial date. In addition, Jenner would file a motion to reconsider the summary judgment ruling. Finally, Mascherin advised:

43  *Id.* p. 1.

44  *Id.* pp. 1-2.

45  *Id.* p. 7.

46  Resp’t’s Ex. 55. (CR:68). (App. Tab 7).

Once we know what happens tomorrow, we will have a decision to make regarding how much longer Jenner & Block will continue the representation. Our contingent fee agreement allows us to terminate the engagement for any reason on 30 days notice, so long as that is consistent with our ethical obligations. In the event we terminate and the client ultimately succeeds in recovering money in a judgment or settlement of its claims, **we remain entitled to be compensated at a minimum for our fees incurred, based upon our regular hourly rates**, plus expenses incurred as of the date we withdraw, minus any cost that the client incurs in bringing new counsel on board.47

On December 12, 2008, Mascherin sent a longer status report and analysis to Levy.[48](#_bookmark59) She stated Parallel had informed Roper it would pay outstanding expenses owed to Jenner by the end of the year.[49](#_bookmark60) Mascherin noted that Parallel “should also have enough money to pay us a retainer to cover the expenses for a trial if that trial has to proceed in January.”[50](#_bookmark61) She also estimated expenses for the January trial would be between $157,000 and $365,000, depending on the scope of the trial.51

Regarding *Oracle*, Mascherin noted Jenner’s investment was then approximately $9.3 million in fees.5[2](#_bookmark63) She observed that if Jenner kept the case through appeal, liability trial, and damages trial, “we estimate that our additional fee investment will be at least $5-$7 million.”[53](#_bookmark64) She also noted the elongated

47  *Id.* (emphasis added).

48  Resp’t’s Ex. 60. (CR:76). (App. Tab 8).

49  *Id.* p. 2.

50 *Id.*

51 *Id.*

52 *Id.*

53  *Id.* p. 3

timeline for any appeal and trial, estimating that “we could be 3-4 years or more from realizing anything on the contingent fee agreement and recouping any fees.”[54](#_bookmark65) She recommended that if *Oracle* did go to trial in January, “we will have to decide after trial whether to terminate the engagement.”5[5](#_bookmark66)

Regarding *QuinStreet*, Mascherin noted Jenner had invested about $1 million in the case; if Microsoft remained in the case, Jenner’s fees through trial “could be $8-$10 million;” and if only QuinStreet was a defendant, damages would likely “range from a few million (in which case we would not recoup our investment in the case) to approximately $20-$30 million (at which level we would probably recoup our investment, perhaps plus a small bonus).”56

Mascherin closed her December 12, 2008 e-mail by reiterating her view that

Jenner could terminate its representation and claim hourly fees. She advised:

**Our Right to Terminate:** Under our current fee agreement, we may terminate on 30 days notice, consistent with our ethical obligations. In the event we terminate and Parallel Networks eventually succeeds in recovering damages, **we remain entitled to be paid: (1) our fees incurred up to the time of termination, at our regularly [sic] hourly rates;** (2) any expenses that are unpaid; and **(3) a fair portion of the contingent fee award based upon our contribution to the**

# result achieved as of the time of termination, to the extent that we have not yet been paid for all of our fees incurred.[57](#_bookmark68)

54 *Id.*

55 *Id.*

56 *Id.*

57  *Id.* p. 4 (emphasis added).

Levy responded to Mascherin by e-mail on December 13, 2008, asking her to “make a recommendation as to how the firm should best proceed,” which Mascherin agreed to provide that week.5[8](#_bookmark69)

On December 15, 2008, Oracle offered Parallel terms for dismissing its invalidity case without prejudice to allow the January 2009 trial date to be vacated and Parallel to take an immediate appeal from the court’s non-infringement ruling.[59](#_bookmark70) Oracle also offered to proceed with another settlement conference, but only with the understanding that any settlement would involve a payment by Oracle “of significantly less than 8 figures.”6[0](#_bookmark72)

On December 17, 2008, five days after authoring an email considering withdrawal and agreeing to provide a recommendation regarding same, Mascherin instructed another Jenner attorney to inform Parallel that “the firm’s position is that the expenses must be paid by year end or we will not proceed with any further work, and that if the trial is going ahead we require a retainer to cover the out of pocket expenses, in light of [its] delinquency in paying expenses to date.”61

The next day, December 18, 2008, Mascherin provided Levy another update

on the cases’ status, noting that Parallel and Oracle had agreed to vacate the

58  *Id.* p. 1.

59  Resp’t’s Ex. 69 p. 2. (CR:81). (App. Tab 10).

January trial date.[62](#_bookmark73) She stated that Jenner also had recommended to Parallel that it discuss settlement with Oracle.[63](#_bookmark74) She added that “[d]epending on what the client decides to do re. [sic] pursuing settlement or prosecuting [its] appeal, the firm will need to decide whether to terminate our engagement with the client, which we have the right to do on 30 days notice.”[64](#_bookmark75) Finally, Mascherin reported that Parallel anticipated paying outstanding expenses by year-end.65

On that same day, December 18, 2008, Mascherin telephoned Fokas.[66](#_bookmark78)

During that call, Mascherin did not advise Fokas that Jenner was considering termination of the engagement; instead, Mascherin recommended that Parallel settle its case against Oracle because, according to Mascherin, Jenner’s appellate lawyers put the likelihood of Parallel’s success on appeal from the district court’s adverse summary judgment ruling at “30-50%.”67

62  Resp’t’s Ex. 69 p. 1. (CR:81). (App. Tab 10).

63 *Id.*

64 *Id.*

65 *Id.*

# After Parallel declined to follow Jenner’s self-interested advice to settle and paid all outstanding expenses, Jenner management terminated Jenner’s representation.

Parallel paid all outstanding expenses in full on December 24, 2008,[68](#_bookmark80) just as Parallel had said it would.[69](#_bookmark81)

On December 30, 2008, Paul Margolis, one of the Jenner trial attorneys working on the pending cases, sent an e-mail to Levy and Mascherin with the subject line: “Outstanding issues relating to the firm’s representation of Parallel Networks.”[70](#_bookmark83) Margolis noted that Parallel “**has now paid all of [its] outstanding**

**obligations to Jenner and Block**,” but the “question of what the firm wishes to do

with the Oracle case and with the pending litigation against Microsoft and QuinStreet remain open.”[71](#_bookmark82) Margolis advised that he believed Jenner should handle Parallel’s *Oracle* appeal. In contrast to Mascherin’s representation to Fokas only 12 days earlier that Jenner’s appellate lawyers estimated Parallel’s chances on appeal were 30-50% and therefore Parallel should settle, Margolis wrote:

Not only does the appellate group feel strongly about the merits of our appeal, but much of the work is already done based on the motion for reconsideration that we prepared. Additionally, we have been

68  E-mail from T. Roberson to G. Bosy & H. Roper, dated Dec. 24, 2008. (CR Supp. 125). (App. Tab. 11).

69  Resp’t’s Ex. 60 p. 2. (CR:76). (App. Tab 8).

personally involved in three prior appeals of patent cases where [District Judge] Robinson was reversed in the Federal Circuit.72

Jenner did not inform Fokas of the more optimistic assessment provided in Margolis’s December 30 internal e-mail.

Margolis also stated that “[l]ast [he] had heard,” Jenner did not want to continue its representation in the *QuinStreet* case. That position raised the question of whether Jenner was willing to give up the *Oracle* appeal because Parallel was concerned it could not “find a qualified firm to undergo the risk and expense of handling the [*QuinStreet*] case if the appeal in the *Oracle* case is not part of the package.”[73](#_bookmark87) Margolis informed Levy and Mascherin that Parallel was “eager to get our answers” to these questions, “as are the attorneys that have been working on these cases over the past 16 months.”7[4](#_bookmark86)

On December 30, 2008, Margolis also spoke with Fokas, who confirmed

that Parallel did not want to split the *Oracle* and *QuinStreet* cases.[75](#_bookmark85) Following that conversation, Margolis met with Levy, Mascherin, Roper, and another Jenner lawyer to discuss what the firm should do.[76](#_bookmark84) They decided to recommend to Parallel that Jenner stay in the *Oracle* case through appeal and, if the appeal was

successful, advise the client to re-open settlement discussions. They further decided that Jenner would be willing to stay in the *QuinStreet* case but only to negotiate a settlement.[77](#_bookmark89)

On the morning of December 31, 2008, Margolis and Roper called Fokas to convey Jenner’s position.[78](#_bookmark94) Fokas responded that he wanted Jenner to stay in both cases, and he proposed certain modifications to the CFA for that to happen.79

Following that call, Levy, Mascherin, Roper, and Margolis discussed Fokas’ proposal.[80](#_bookmark92) According to Mascherin, Parallel’s proposed change to the CFA was “not attractive,” in part, because “given the size of our existing investment, it is unlikely a settlement could be achieved that would allow us to recoup our full investment, while under the existing fee agreement we retain that right.”81

Later that day on December 31, 2008, Mascherin prepared a memorandum at Levy’s request summarizing Jenner’s recent discussions with Parallel and its decision to terminate the engagement.[82](#_bookmark90) Mascherin again started with the premise that:

77 *Id.*

The Agreement permits us to terminate the representation at any time, consistent with our ethical obligations. If we terminate and the client

later achieves a recovery through trial or settlement, **we are entitled** to be paid all unpaid expenses, as well as **to be compensated for the time we devoted to the representation through termination, at our regular hourly rates**.[83](#_bookmark95)

Mascherin further noted that following the adverse summary judgment ruling in *Oracle*, Jenner had advised Parallel to settle.[84](#_bookmark96) Parallel had declined to engage in settlement talks at that time. Mascherin noted that Jenner’s outstanding fee investment in *Oracle* was approximately $10 million and Parallel had recently paid past-due expenses.[85](#_bookmark97) Mascherin also recounted that the firm’s fee investment in *QuinStreet* was approximately $1 million and she believed the case could be settled for $750,000 in the near future, but Parallel did not authorize Jenner to continue such settlement discussions.[86](#_bookmark98) Mascherin concluded that during the Jenner attorneys’ discussion that morning, “we agreed that the firm should terminate the existing engagement at this time.”[87](#_bookmark99)

On January 2, 2009, nine days **after** Parallel paid all outstanding expenses in

full, Margolis sent a letter to Parallel giving notice that Jenner was terminating its representation of Parallel.[88](#_bookmark100) The termination letter did not provide any reason for the termination but simply referenced paragraph 9(b) of the CFA. Margolis’ letter

83  *Id.* (emphasis added).

84 *Id.*

85  *Id.* p. 2.

86 *Id.*

87  *Id.* p. 3.

also stated that if Parallel achieved a recovery in any of the matters in which Jenner had been representing the company, Jenner would be entitled to compensation as “set forth in paragraph 9(a) of the Agreement.”8[9](#_bookmark101)

Later that day, Fokas sent an e-mail to Margolis noting that Jenner had advised him over the prior two weeks that Parallel’s likelihood of success on appeal in *Oracle* was “30-50%” and that Parallel should settle its cases against Oracle and QuinStreet.[90](#_bookmark102) Fokas asked Margolis to confirm Jenner’s recommendations in writing.

Margolis responded six days later on January 8, 2009. In contrast to his own internal email from nine days earlier, Margolis stated to Fokas that Jenner’s appellate lawyers “have described the likelihood of overturning Judge Robinson’s opinion on appeal as being around 30-50%,” but added that “the use of percentages” was “intended only to be a general assessment of the relative strengths of the arguments.”[91](#_bookmark104) Margolis further recounted that Jenner had made various settlement recommendations at different times, summarized several

scenarios, and concluded “[w]hether to choose to settle a case is, of course, your decision as the client.”[92](#_bookmark103)

89 *Id.*

90  Resp’t’s Ex. 91 p. 2. (CR:72). (App. Tab 15).

Jenner ended 2008 by posting gains in its revenues and profits over the prior year despite reduced headcount.[93](#_bookmark106) Jenner’s 2008 revenues climbed by 4% to $347 million and its profits increased nearly 7% to about $835,000 per equity partner.[94](#_bookmark108) Although 2008 had been a difficult year for law firms, Levy reported 2008 was the second-most profitable year in Jenner’s history.95

# Parallel was forced to employ substitute counsel, which won the *Oracle*

**appeal and obtained a significant settlement.**

On February 9, 2009, Jenner filed its motion to withdraw from the *QuinStreet* litigation and moved for an extension of time to file its reply in support of its motion to dismiss Microsoft’s claims. The motions were granted on February 25, 2009. Parallel and QuinStreet settled *QuinStreet* on April 24, 2009

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Parallel retained Baker Botts to handle the *Oracle* appeal. On April 28, 2010, the Federal Circuit reversed the *Oracle* summary judgment of non- infringement and remanded the case to the district court.

In July 2010, Parallel retained Bosy & Bennett to represent it in the *Oracle*

trial on remand. Parallel also engaged two other law firms, Baker Botts and

93  Longstreth, *supra* note 20.

Hinshaw & Culbertson, to assist with the *Oracle* trial, which was set for May 17, 2011.

On May 13, 2011, three days before the trial, and more than two years after

Jenner terminated its representation, Parallel settled the *Oracle* case for

. The settlement with Oracle also provided for a contingent recovery of up

to , depending on reexamination proceedings involving the patents in suit before the USPTO and a future arbitration between Parallel and Oracle. Parallel compensated the successor law firms pursuant to their respective fee agreements.

# Years after Jenner withdrew, and following the victories of substitute counsel, Jenner demanded Parallel pay it $10,245,492 in hourly attorneys’ fees.

More than two-and-a-half years after Jenner terminated its representation of Parallel, Jenner’s counsel sent a letter to Parallel dated June 17, 2011, demanding for the first time payment of $10,245,492 in hourly fees, which Jenner claimed were “now more than two years past due.”[96](#_bookmark110) Jenner’s counsel stated Jenner’s demand was based on its representation of Parallel under the CFA:

Pursuant to Paragraphs 9(b) and 9(a)(i) of the Agreement, Jenner’s fee entitlement for that representation totals $10,245,492. Jenner terminated the Agreement effective February 9, 2009, and since then has received no payment against the fee obligation at all.

# \*\*\*\*

96  Resp’t’s Ex. 112 pp. 1 & 2. (CR:85). (App. Tab 16).

The Agreement is a Contingent Fee Agreement, with the contingency applicable up to the date of the Agreement’s termination. Jenner was given the option to terminate the Agreement on 30 days prior written notice **if we determined at any time that it was not in Jenner’s “economic interest to continue the representation pursuant to the Agreement.” Upon such termination, Jenner was to receive compensation for all time expended by Jenner & Block [up to the termination date] on any Enforcement Activity undertaken on behalf of [Parallel] at the regular hourly billing rate charged by Jenner & Block for its attorneys and legal assistants” with that to be “in lieu” of the Contingent Fee applicable to such services.**

# \*\*\*\*

This is a very large receivable, **which is now more than two years past due.** Parallel Networks has made no payments whatsoever against this liability and we have received no explanation of why. . . . Our position is quite simple: The contract specifically spells out that to which we are entitled on termination of the Agreement.97

# The arbitrator awarded Jenner millions in fees.

When Parallel refused to pay Jenner in accordance with its demand letter, Jenner filed its Demand for Arbitration (“Demand”) with JAMS, in Dallas, Texas, asserting four claims: (1) breach of contract, (2) *quantum meruit*, (3) promissory estoppel, and (4) statutory attorneys’ fees. In its Demand, filed on December 20,

2011, Jenner sought over $10 million in fees which amounted

.9[8](#_bookmark113)

97  *Id.* (emphasis added).

98  Resp’t’s Ex. 115 ¶¶ 4, 15-18, 55 & “Wherefore” ¶ A. (App. Tab 17).

In response to Jenner’s demand, Parallel asserted counterclaims against Jenner for breach of the CFA, breach of fiduciary duty, and legal malpractice. In its breach of contract claim, Parallel asserted that Jenner prematurely terminated its representation of Parallel, forcing Parallel to find substitute counsel to represent it on an hourly basis and to settle *QuinStreet* at a substantially reduced value in order to fund the *Oracle* appeal.

Through discovery in the arbitration proceeding, Parallel learned Jenner had failed to do the necessary work to determine the extent of QuinStreet’s infringement. Parallel discovered information from QuinStreet during the arbitration proceeding that contradicted information Jenner had given Parallel when Jenner represented it in the underlying *QuinStreet* case. In particular, Parallel learned that despite Jenner’s claims to Parallel that it did not have enough information to determine whether a portion of QuinStreet’s business called DMS infringed the patents-in-suit, QuinStreet in fact had produced (as early as the fall of 2007) sufficient information to show that DMS did infringe.

On September 11, 2012, the arbitrator held a hearing on Parallel’s motion for summary judgment. Finally recognizing that demanding over $10 million in

retroactive hourly fees was unconscionable, Jenner belatedly conceded it was no longer seeking its full hourly fees.9[9](#_bookmark114)

On September 14, 2012, after the close of discovery, a month before the scheduled arbitration hearing, and over a year after Jenner sent its demand letter seeking more than $10 million in hourly fees, Jenner sent a new demand letter to Parallel, seeking a portion of the contingency fee award equal to $4,439,270 plus 23% of any settlement Parallel received from a future, and at that time not yet filed, arbitration with Oracle.[100](#_bookmark115)

From October 15, 2012, through October 25, 2012, the parties conducted an

arbitration hearing at JAMS in Dallas, Texas. During the hearing, the arbitrator excluded testimony from Keith Lowery, an inventor of the patents-in-suit, regarding QuinStreet’s configuration files and excluded QuinStreet technical documents, on which Parallel sought to rely in presenting its legal malpractice claim against Jenner.[101](#_bookmark116)

By the conclusion of the hearing, Jenner had again changed its position as to

how much it was seeking in damages, eventually requesting that the arbitrator

99 AFA p. 12. (CR Supp. 38). (App. Tab 3); *see also* Tr. of Hearing on Partial Motion for Summary Judgment (Sept. 11, 2012) 93:5 – 94:13 (Arbitrator: “[I]s Jenner and Block going to be seeking this 10 million dollar claim on its standard hourly rates . . . ?”; Jenner Attorney: “[W]e don’t think that there’s any reason as a matter of law that we wouldn’t necessarily be entitled to those fees, but that is not what we are seeking from you specifically in this arbitration.”). (App. Tab 18).

100  Tr. 1174:8-23. (CR:860).

101  Tr. 1669:3-16. (CR:92).

award Jenner a “fair” portion of the contingency fee award as provided in CFA ¶ 9(b)(iii).[102](#_bookmark119)

On January 18, 2013, the arbitrator issued his Arbitration Findings and Award. For Jenner’s breach of contract and *quantum meruit* claims, the arbitrator awarded Jenner $3,000,000 and 16% of the net proceeds of any settlement or recovery paid to Parallel from any future arbitration or settlement with Oracle. Because he found for Jenner on its *quantum meruit* claim, the arbitrator denied Jenner’s promissory estoppel claim. The arbitrator denied all of Parallel’s counterclaims, finding Parallel was not entitled to recover any damages from Jenner. Finally, the arbitrator awarded Jenner its attorneys’ fees in the amount of

$1,394,000 for prosecuting the arbitration and pre- and post-judgment interest.

# The district court confirmed the arbitrator’s award.

Parallel filed its petition to vacate the arbitration award on January 29, 2013. Following briefing by the parties, the district court issued a short order dated April 29, 2013, summarily denying Parallel’s petition and granting Jenner’s motion to confirm the award.

**SUMMARY OF THE ARGUMENT**

Jenner’s contingency fee agreement contains provisions that indisputably are directly contrary to Texas law and public policy. The fee agreement allowed Jenner to terminate its contingency fee representation of Parallel whenever Jenner

102  (CR:42-43; 276).

unilaterally concluded the case was no longer in the law firm’s financial self- interests and upon such termination demand fees retroactively on an alternative basis. The termination provisions are unconscionable and violate Texas public policy. *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557 (Tex. 2006).

As the United States economy went into a nose-dive in late 2008, and less than a month after receiving a disastrous adverse summary judgment ruling on behalf of Parallel, Jenner specifically invoked and sought to enforce its unconscionable termination provision. At the time it withdrew, Jenner had recovered absolutely nothing for Parallel.

Fortunately, Parallel was able to find replacement counsel, who ultimately got the summary judgment decision reversed, prepared the *Oracle* case for trial, and achieved an impressive settlement. Jenner then re-appeared with its hand out, demanding exorbitant retroactive hourly fees in lieu of the potential contingency fee Jenner had abandoned over two years earlier. Parallel, being advised the fee- conversion provision was unconscionable, refused to accede to Jenner’s demand, and Jenner invoked the fee agreement’s arbitration clause to try to enforce it.

In arbitration, the arbitrator awarded Jenner exactly the type of fees that Texas public policy emphatically forbids. The arbitrator applied his own brand of economic justice in disregard of Texas public policy to reach this result. The

arbitrator’s award of millions in fees condones Jenner’s misconduct and effectively enforces its unconscionable fee agreement.

Under the Federal Arbitration Act, courts refuse to confirm arbitration awards that contravene public policy. The Supreme Court has explained this “doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act.” *United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc.,* 484 U.S. 29, 42 (1987).

In this case, the trial court erroneously confirmed an arbitration award that is directly contrary to decades of well-established and clearly defined Texas public policy. The trial court evidently, and mistakenly, concluded this improper result was compelled by the FAA. Nothing could be further from the truth. The FAA protects arbitration, but it does not set up arbitration as a shield to conceal an unconscionable, unethical, and unenforceable contract from judicial scrutiny.

The arbitrator’s award in this case must be vacated. If left to stand, the award will serve as a roadmap for how a contingency fee attorney may enter into an unconscionable fee forbidden by Texas law and public policy and try to use arbitration to enforce the unlawful agreement while evading judicial review of it.

**ARGUMENT**

# Standard of Review

* 1. **This Court co****nducts a *de novo*****review****.**

This Court reviews the trial court’s confirmation of an arbitration award *de novo*. *Symetra Nat’l Life Ins. Co. v. Rapid Settlements, Ltd.*, No. 14–07–00880– CV, 2009 WL 1057339, at \*2 (Tex. App.—Houston [14th Dist.] Apr. 21, 2009, no pet.) In addition, the “determination of whether a fee agreement between an attorney and client is unconscionable at the time it is formed is a question of law that [this Court] review[s] *de novo*.” *Lee v. Daniels & Daniels*, 264 S.W.3d 273, 280 (Tex. App.—San Antonio 2008, pet. denied).

# Texas courts are required to enforce Texas public policy.

In the district court, Jenner attempted to avoid judicial review of its unconscionable fee agreement by arguing that “violation of public policy is no longer a permissible basis for vacating an arbitration award.”[103](#_bookmark127) In support of this proposition, Jenner cited decisions in which the Fifth Circuit and this Court held they would no longer review arbitration awards for “manifest disregard of the law” in light of *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008)*.* Jenner claimed this reasoning also barred application of the public policy doctrine. Jenner is wrong.

103 Def.’s Sur-Reply Opp’n Pl.’s Pet’n & Mot. Vacate Arbitration Award (“Jenner’s Sur-Reply”) at p. 5. (CR:514).

First, the Federal Arbitration Act (“FAA”) identifies four circumstances in which a court may vacate an arbitration award. 9 U.S.C. § 10(a). These include where “the arbitrator[] [was] guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy,” 9 U.S.C. § 10(a)(3), and “where the arbitrator[] exceeded [his] powers,” 9 U.S.C. § 10(a)(4).

The Supreme Court has explained that under § 10(a)(4), a court may vacate an arbitrator’s award if “‘the arbitrator act[ed] outside the scope of his contractually delegated authority’—issuing an award that ‘simply reflect[ed] [his] own notions of [economic] justice’ rather than ‘draw[ing] its essence from the contract.’” *Oxford Health Plans LLC v. Sutter,* U.S. , 133 S. Ct. 2064, 2068 (2013) (citations omitted).

In addition, the Supreme Court made clear 30 years ago in *W.R. Grace & Co. v. Local Union 759, International Union of the United Rubber, Cork, Linoleum & Plastic Workers of America*, 461 U.S. 757, 766 (1983) that courts may not enforce arbitral awards “[i]f the contract as interpreted by [the arbitrator] violates some explicit public policy.” In such circumstances courts “are **obliged** to refrain

from enforcing [the award].” *Id*. (emphasis added). Although the public policy doctrine “does not ... sanction a broad judicial power to set aside arbitration awards as against public policy,” a court will refuse enforcement of an arbitrator’s award as contrary to public policy where the public policy is “‘well defined and

dominant’” and can be “‘ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.’” *Misco, Inc.* 484 at 43 (quoting *W.R. Grace*, 461 U.S. at 766 (other internal quotation marks omitted)).[104](#_bookmark137) Moreover, it is well settled that “the question of public policy is ultimately one for resolution by the courts,” not arbitrators. *W.R. Grace,* 461 U.S. at 766 (1983); *see also* *Gulf Coast Indus. Workers Union v. Exxon Co., USA*, 991 F.2d 244, 248 n.5 (5th Cir. 1993) (same); *see also Lee*, 264 S.W.3d at 279–81

(vacating arbitration award enforcing provision in attorney services contract that allowed recovery of fee prohibited by Texas Disciplinary Rules of Professional Conduct).

The Texas Supreme Court has similarly explained that “one can readily see that an illegal contract unenforceable by litigation should not gain legitimacy through arbitration.” *CVN Group, Inc. v. Delgado,* 95 S.W.3d 234, 238-39 (Tex. 2002) (an arbitration award may “be set aside on public policy grounds” where “the award clearly violates carefully articulated, fundamental policy”). Thus “[a] debt that indisputably arises from gambling, for example, should have no greater claim to judicial enforcement by confirmation of an arbitration award than by litigation.” *Id.*; *see also* *Continental Airlines, Inc. v. Air Line Pilots Ass’n, Int’l*,

104*See also**Eastern Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 61-62 (2000); *Seymour v. Blue Cross/Blue Shield*, 988 F.2d 1020, 1023 (10th Cir. 1993) (“The public policy exception is rooted in the common law doctrine of a court’s power to refuse to enforce a contract that violates public policy or law.”).

555 F.3d 399, 415 (5th Cir. 2009) ( “A court will not assist a party’s violation of public policy by using its powers to enforce an agreement contrary to the public interest.”).

Jenner did not—and cannot—cite any United States Supreme Court, Texas Supreme Court, or Fifth Circuit decision rejecting those courts’ long-standing application of the public policy doctrine to arbitration awards. Indeed, contrary to Jenner’s claim in the district court, federal and state courts continue to apply the doctrine in reviewing arbitration awards following *Hall Street*. *See, e.g.*, *Symetra*, 2009 WL 1057339, at \*3 (vacating arbitration award as contrary to public policy).[105](#_bookmark143)

Jenner’s suggestion that the public policy doctrine is just another “non-

statutory ground[] for vacatur” like the “manifest disregard of the law” test

105*See also* *Wang v. Marks Transport, Inc.*, No. 14-11-01072-CV, 2012 WL 4754002, at \*1 (Tex. App.—Houston [14th Dist.] Oct. 4, 2012, no pet.) (“[W]e should not confirm an award that is contrary to public policy.”); *Aspri Investments, LLC v. Afeef*, No. 04-10-00573-CV, 2011 WL 3849487, at \*8 (Tex. App.—San Antonio August 31, 2011, pet. dism’d) (considering whether arbitration award violated public policy); *In re Guardianship of Cantu De Villarreal*, 330 S.W.3d 11, 21-25 (Tex. App.—Corpus Christi 2010, no pet.) (considering whether an “arbitrator exceeded his authority by issuing an award that violates public policy”). Legal scholars likewise conclude the public policy doctrine remains applicable after *Hall Street*. *See, e.g.*, Kenneth R. Davis, *The End of an Error: Replacing “Manifest Disregard” with a New Framework for Reviewing Arbitration Awards*, 60 CLEV. ST. L. REV. 87, 127 (2012) (The “public policy exception” must survive *Hall Street Associates* because courts “would seem compelled to invalidate dangerous and illegal awards” and “[i]t is inconceivable that the Court would confirm an award that blessed the unlawful monopolization of the high tech industry, or the dangerous operation of a nuclear facility”); Richard C. Reuben, *Personal Autonomy & Vacatur After* Hall Street*,* 113 PENN. ST. L. REV. 1103, 1143 (Spring 2009) (“The public policy exception is well- grounded and well-established, and nothing in the *Hall Street* opinion evinces an intent to eliminate it.”).

misapprehends the doctrine. The “manifest disregard of the law” test – to the extent it was anything more than a judicial gloss on § 10(a) of the FAA – purported to give courts additional, non-statutory authority to insert themselves into the arbitration process, contrary to the FAA’s policy “favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway.” *Hall Street*, 552 U.S. at 588; *see generally,* *Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009); *Ancor Holdings, LLC v. Peterson, Goldman & Villani, Inc.*, 294 S.W.3d 818, 827-28 (Tex. App.— Dallas 2009, no pet.) (refusing to review arbitration award for manifest disregard of the law and for “gross mistake”).

In contrast to the manifest disregard standard, a court applying the public policy doctrine “**is not concerned with the correctness of the arbitrator’s decision, but rather with the lawfulness of enforcing the award**.”[106](#_bookmark146) This

inquiry actually arises from a fundamental **limitation** on judicial power. For

centuries, courts have acknowledged they may not legitimately use their authority to issue orders that are contrary to the law and public policy. *See, e.g., McMullen*

*v. Hoffman*, 174 U.S. 639, 654-55 (1899) (“The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought

106  Reuben, *Personal Autonomy*, *supra* note 105, at 1114 (emphasis added).

in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract.”). A court’s refusal to confirm an arbitration award contrary to public policy is the same as a court’s refusal to enforce a contract that violates public policy. *Misco*, 484 U.S. at 42 (a court’s refusal to enforce an arbitrator’s award because it is contrary to public policy “derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act”); *see* *Eastern Associated Coal Corp.*, 531 U.S. at 62. This inherent restriction on judicial power exists separate and apart from the FAA.

Thus, this court’s ability – indeed, duty – to vacate an arbitration award on public policy grounds is not limited by *Hall Street* or *Ancor Holdings*. Any number of hypotheticals demonstrate why. Consider the following:

A and B enter into a murder-for-hire contract in which B agrees to kill A’s business partner. The contract contains an arbitration clause. After B incurs certain expenses, A backs out of the agreement prior to B’s complete performance. B initiates arbitration to recover his unreimbursed expenses, and the arbitrator grants an award in B’s favor.

If the arbitrator anchored his award in the contract language, would a Texas court be bound under the FAA to confirm this award because the arbitrator was

“arguably construing or applying the contract”? Although Jenner argues yes, common sense, and the law, obviously say no.10[7](#_bookmark150)

Moreover, the public policy doctrine and § 10 of the FAA are entirely consistent. One way an arbitrator may “exceed his powers” within the meaning of

§10(a)(4) is to grant an award that is contrary to public policy. *See, e.g.*, *In re Guardianship of Cantu De Villarreal*, 330 S.W.3d at 21-25 (assuming an arbitrator could exceed his authority “by issuing an award that violates public policy”). Private parties cannot validly agree to empower an arbitrator to issue an award violating public policy, and thus any such award necessarily would exceed the arbitrator’s properly delegated powers.1[08](#_bookmark151)

Finally, the public policy doctrine is especially pertinent when the public

policy at issue relates to attorneys’ professional conduct and ethical rules. Where an arbitration award conflicts with attorneys’ rules of professional conduct, it would be nonsensical to suggest a court – made up of attorneys – must enforce the award. To the contrary, the Texas Code of Judicial Conduct provides that “[a] judge who receives information clearly establishing that a lawyer has committed a

107 The Texas Supreme Court’s gambling hypothetical in *CVN Group*, 95 S.W.3d at 238, makes the same point, and commentators have generated similar hypotheticals. *See, e.g.*, Jonathan A. Mercantel*, The Crumbled Difference Between Legal & Illegal Arbitration Awards:* Hall Street Associates *and the Waning Public Policy Exception*, 14 Fordham J. Corp. & Fin. L. 597, 597-98 (2009).

108*See* Mercantel*, supra* note 107, at 634 (nothing precludes courts from interpreting § 10(a)(4) to include the public policy exception).

violation of the Texas Disciplinary Rules of Professional Conduct should take appropriate action.” TEX. CODE OF JUDICIAL CONDUCT, Canon 3(D)(2); *see also Evans & Luptak, PLC v. Lizza*, 650 N.W.2d 364, 369 (Mich. Ct. App. 2002) (“It would be absurd if an attorney were allowed to enforce an unethical fee agreement through court action, even though the attorney potentially is subject to professional discipline for entering into the agreement.”).

The Court of Appeals’ decision in *Lee* illustrates these points. There, an attorney entered a fee agreement that provided he would be paid for “all time spent” incident to withdrawal and included an arbitration provision. After relations soured between attorney and client, the attorney moved several times to withdraw over the client’s objection, incurring significant expense. The client refused to pay for such time, and the matter went to arbitration. The arbitrator awarded the attorney fees for time spent on the withdrawal motions, and the district court confirmed the award. On appeal, the court found the fee provision was unconscionable and contrary to public policy. Of particular application to this case, the court ruled (i) Texas courts have authority to set aside arbitration awards that “clearly violate[] carefully articulated, fundamental policy,” (ii) “[a]n unconscionable fee violates public policy,” and (iii) Texas courts must vacate an arbitration award of fees based on an unconscionable fee agreement as contrary to public policy. *Lee,* 264 S.W.3d at 278-82.

Accordingly, under long-standing Supreme Court and Texas precedent and common sense, this Court should refuse to enforce an arbitrator’s award of attorneys’ fees when the award violates a “‘well defined and dominant’” Texas public policy.

# The arbitration award granting Jenner millions of dollars in fees violates well defined and dominant Texas public policy.

Texas law holds attorneys “to the highest standards of ethical conduct in their dealings with their clients,” and this duty is highest “when the attorney contracts with his or her client.” *Hoover Slovacek LLP*, 206 S.W.3d at 560-61. Therefore, when attorney fee agreements are interpreted and applied under Texas law, it is “not enough to simply say that a contract is a contract. There are ethical considerations overlaying the contractual relationship.” *Id.* at 560. Accordingly, under Texas law, it is unethical for a lawyer to enter into, charge, or attempt to collect an unconscionable fee. TEX. DISCIPLINARY R. PROF’L CONDUCT 1.04(a).

To determine whether a fee agreement is unconscionable and unenforceable, courts consider the Texas Disciplinary Rules of Professional Conduct. *See, e.g.*, *Lemond v. Jamail*, 763 S.W.2d 910 (Tex. App.—Houston [1st Dist.] 1988, writ denied); *Fleming v. Campbell*, 537 S.W.2d 118, 119 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref’d n.r.e.). The Texas Disciplinary Rules of Professional Conduct may be viewed as “an expression of public policy, **so that a contract**

**violating them is unenforceable as against public polic**y.” *Cruse v. O’Quinn*,

273 S.W.3d 766, 775 (Tex. App.–Houston [14 Dist.] 2008, pet. denied) (emphasis added); *see also Lee*, 264 S.W.3d at 279–81 (vacating award enforcing provision in attorney services contract that allowed recovery of fee prohibited by Texas Disciplinary Rules of Professional Conduct). Attorneys and their clients cannot waive or contract around such public policies. *See, e.g., Hoover Slovacek LLP*, 206 S.W.3d at 561; *Scoville v. Spring Park Homeowners’ Ass’n, Inc.*, 784 S.W.2d 498, 502 (Tex. App.—Dallas 1990, writ denied) (“The law recognizes the right of parties to contract . . . as they see fit, provided they do not contravene public policy and their contracts are not otherwise illegal.”).

# Texas law and public policy prohibit certain termination and fee- conversion provisions in contingency fee agreements.

Texas law generally permits a contingency fee where that fee is dependent on the outcome of a matter. TEX. DISCIPLINARY R. PROF’L CONDUCT 1.04(d). The primary purpose of contingency fee agreements is “to allow plaintiffs who cannot afford an attorney to obtain legal services by compensating the attorney from the proceeds of any recovery.” *Hoover Slovacek LLP*, 206 S.W.3d at 561. The Texas Supreme Court has explained the rationale for contingency fee agreements as follows:

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.” 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

*Id.* (citations omitted).

# Texas public policy prohibits agreements giving an attorney the option to convert a contingency fee into another form of fee to the attorney’s advantage.

Texas law forbids attorneys from attempting to insulate themselves from the risks associated with a contingency fee arrangement while benefiting from such an agreement’s potential to yield higher fees beyond usual hourly rates. For example, Texas courts refuse to enforce unilateral option provisions in fee agreements under which an attorney may convert a contingency fee to an hourly billing arrangement, or vice versa, at his or her sole discretion. *See, e.g.*, *Hoover Slovacek LLP*, 206 S.W.3d at 561 (finding contingency fee provision unconscionable and unenforceable); *Wythe II Corp. v. Stone*, 342 S.W.3d 96, 103 (Tex. App.— Beaumont 2011, pet. denied); *see also*Tex. Center for Legal Ethics, Opinion 518 (Sept. 1996) (“An agreement obligating a client to pay the attorney the greater of

(a) a fee that is reasonable if determined and collectable strictly on a contingent basis or (b) the highest fee that would be reasonable based strictly on an hourly rate appears to violate DR 1.04.”). Such agreements are unconscionable and “antagonistic to many policies supporting the use of contingent fees in civil cases” because they “shift[] to [the client] the risks that accompany both hourly fee and

contingent fee agreements while withholding their corresponding benefits.”

*Hoover Slovacek LLP*, 206 S.W.3d at 564.

# Texas public policy mandates that attorneys who terminate contingency fee representations without “just cause” forfeit any claim to compensation.

Texas law also regulates attorneys’ ability to terminate contingency fee agreements prior to the occurrence of the contingency and still claim compensation. *See Augustson v. Linea Aerea Nacional-Chile S.A. (LAN-CHILE)*, 76 F.3d 658, 662 (5th Cir. 1996). For more than a half-century, the settled public policy in Texas has been that a lawyer who terminates his or her representation “without just cause” before the contingency occurs forfeits all right to compensation—whether under the contract or in *quantum meruit*. *Royden v. Ardoin*, 331 S.W.2d 206, 209 (Tex. 1960). Only under limited circumstances may an attorney be deemed to have “just cause” to withdraw and remain entitled to a

fee.[109](#_bookmark161) *Augustson*, 76 F.3d at 662-63 & n.6. “Just cause” to withdraw must involve

culpable conduct by the client, such as the client’s attempt to assert a fraudulent claim, failure to cooperate, refusal to pay for services, humiliation of the attorney, or retention of co-counsel with whom the attorney cannot work. *Id.* at 663.

109Courts distinguish between good cause for withdrawing from a case and “just cause” for terminating a contingency fee representation without forfeiting compensation. *See, e.g.*, *Augustson*, 76 F.3d at 662-63; *Rus, Miliband & Smith v. Conkle & Olesten*, 113 Cal. App. 4th 656, 673 (2003). Thus, good cause to withdraw from a case, or a client’s consent to such withdrawal, does not establish an attorney had “just cause” to terminate a contingency fee representation and retained a right to compensation. *Id.* at 673.

Courts have identified many circumstances that do **not** constitute “just cause” for an attorney to terminate a contingency fee agreement.[110](#_bookmark165) For example, the “cases are in almost universal agreement” that the failure of the client to accept a settlement offer does not provide “just cause.” *Augustson*, 76 F.3d at 663; *see also* RESTATEMENT (THIRD) OF RESTITUTION § 36 cmt. e & illus. 17.[111](#_bookmark166) “A

contrary rule would ... encourage attorneys to withdraw from ‘bad’ cases on the grounds that the client uncooperatively insists on going to trial, allowing the attorney to avoid the risks of representation without losing the benefits of an eventual recovery.” *Augustson*, 76 F.3d at 664.

# In addition, and significantly in this particular case, a lawyer’s re-

**assessment of his or her own economic interests as a case advances does not**

**provide “just cause” to terminate a contingent fee representation.** *See, e.g.*,

*Rapp v. Mandell & Wright P.C.*, 127 S.W.3d 888, 898 (Tex. App.—Corpus Christi

110 *See generally,*David Hricik*, Dear Lawyer: If you decide it’s not economical to represent me, you can fire me as your contingent fee client, but I agree I will still owe you a fee*, 64 Mercer L. Rev. 363 (Winter 2013) (reviewing policy justifications for contingency fee awards and the many limitations courts place on them). Professor Hricik testified as one of Parallel’s expert witnesses during the arbitration hearing in this matter.

111  The Restatement provides the following illustration:

Attorney represents Client in litigation on a contingent-fee basis. Attorney recommends that Client accept a settlement offer that Client rejects. Attorney withdraws from the representation. Client engages other counsel and eventually obtains a settlement; Attorney sues Client to recover a fee. The court finds that Attorney’s withdrawal was without justification and a violation of Attorney’s fiduciary duty to Client. **Although Attorney’s services conferred a net benefit** **on Client, Attorney is not entitled to restitution.**

RESTATEMENT (THIRD) OF RESTITUTION § 36 illus. 17 (emphasis added).

2004, pet. denied) (not “just cause” to withdraw where attorney concluded the case had “no value” after unfavorable trial court judgment, terminated representation, and then later sought to recover contingency fee after the court of appeals reversed and revived the case).[112](#_bookmark172) Indeed, an attorney’s ability to terminate a contingency fee agreement at any time based on the attorney’s evolving assessment of his or her own economic interests in a case would be fundamentally irreconcilable with the attorney’s fiduciary duty to place his or her client’s interests first. *See, e.g.*, *Lee*, 264 S.W.3d at 281 (“[A]n attorney’s relationship to his client is **not** to be guided

by ‘the morals of the marketplace.’ Otherwise, we relegate our profession to an ordinary business relationship.”) (emphasis in original).

# Texas public policy bans fee agreements that fail to give clients at the outset a clear and accurate explanation of how a fee will be calculated.

Finally, Texas law imposes on attorneys “a duty, at the outset of the representation, to ‘inform a client of the basis or rate of the fee’ and ‘the contract’s implications for the client.’” *Hoover Slovacek LLP*, 206 S.W.3d at 565 (citation omitted); *see also* TEX. DISCIPLINARY R. PROF’L CONDUCT 1.04 cmt. 8. Therefore the failure of a lawyer to give at the outset “a clear and accurate explanation of

112 *See also* *In re Kiley*, 947 N.E.2d 1, 8 (Mass. 2011) (“[Law firm] may not withdraw from a [contingency fee] case simply because it recognizes belatedly that the case will not be profitable for the law firm.”); *Haines v. Liggett Group Inc.*, 814 F. Supp. 414 (D.N.J. 1993) (lawyer cannot withdraw from contingency fee suit because of probable unprofitability; lawyer assumed that risk); *Suffolk Roadways, Inc. v. Minuse*, 287 N.Y.S.2d 965 (N.Y. Sup. Ct. 1968) (that case turns out less profitable than lawyer hoped because client refuses to accept settlement is no ground for withdrawal).

how a fee [will] be calculated” weighs in favor of a conclusion that the fee is unconscionable. *Hoover Slovacek LLP*, 206 S.W.3d at 565.

In *Hoover Slovacek LLP*, for example, a fee agreement provided that in the event the attorney was discharged before completing the representation, the client had to pay immediately a fee equal to the present value of the attorney’s interest in the client’s claim. The court held this fee-conversion provision was unconscionable, in part, because the fee agreement “fail[ed] to explain how the present value of the claims will be measured.” *Id.* at 565. This deficiency was not mitigated by the fact that experts could be retained to calculate the present value because that would involve extra time, expense, and uncertainty that could be avoided with a simple hourly-fee or contingency fee agreement. *Id.*

# The arbitrator awarded fees prohibited by Texas public policy.

Under the “well defined and dominant” policies set forth above, which may be “ascertained by reference to the laws and legal precedents” of Texas courts and the Texas Disciplinary Rules of Professional Conduct, the fees sought by and awarded to Jenner in this case are unconscionable and contrary to public policy. Regardless of whether the arbitration award is rooted in the parties’ fee agreement or in *quantum meruit*, the award must be vacated as contrary to public policy.

# Public policy prohibits enforcement of the award of fees based on Paragraph 9(b) of the CFA.

“[W]hether a contract, including a fee agreement between attorney and client, is contrary to public policy and unconscionable at the time it is formed is a question of law.” *Hoover Slovacek LLP*, 206 S.W.3d at 562. Here, as one of two alternative bases for his award, the arbitrator relied on paragraph 9(b) of the CFA, which was unconscionable as a matter of law at the time it was formed. That paragraph states:

**If Jenner & Block determines at any time that it is not in its economic interest to continue the representation of [Parallel] pursuant to this Agreement**, Jenner & Block may terminate this Agreement by providing 30 days prior written notice . . . . If Jenner & Block terminates this Agreement . . . [[Parallel] shall (i) compensate Jenner & Block **for all time expended by Jenner & Block on any Enforcement Activity undertaken on behalf of [Parallel] 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**). . . ; (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 [](i) hereunder**] LESS the reasonable costs incurred by [Parallel] to transition any pending or on-going Enforcement Activities that

had been commenced with Jenner & Block to successor counsel.1[13](#_bookmark176)

Jenner expressly invoked this provision (i) in its letter dated January 2, 2009, terminating its representation, (ii) in its letter dated June 17, 2011, demanding that Parallel pay over $10 million in hourly attorneys’ fees, and (iii) in its arbitration demand dated December 20, 2011.

# The provision granting Jenner the option to convert the contingency fee to a retroactive hourly fee is contrary to public policy.

Paragraph 9(b)(i) purportedly allowed Jenner to convert its contingent fee into a retroactive hourly fee at its discretion. That provision was plainly unconscionable under *Hoover Slovacek LLP.* Strikingly, *Hoover Slovacek LLP* was decided in 2006, yet Jenner terminated the CFA in 2009 on the premise that it could recover its hourly fees, demanded its hourly fees in 2011, and pursued those hourly fees for 16 of the 17 months in the arbitration proceeding until it finally abandoned its claim to hourly fees at the summary judgment hearing on September 11, 2012.[114](#_bookmark177)

113 CFA ¶ 9(b) (incorporating the relevant portions of ¶ 9(a) for convenience) (emphasis added). (CR:42-43). (App. Tab 2).

114 AFA pp. 12-13, 22. (CR Supp. 38-39, 48). (App. Tab 3); Tr. of Hearing on Partial Motion for Summary Judgment 93:5 – 94:13. (CR:1214).

# The provision granting Jenner a contingency fee based on the result others achieved after Jenner withdrew is contrary to public policy.

The compensation sought by Jenner under paragraph 9(b)(iii) is unconscionable for at least three reasons.

First, paragraph 9(b) purportedly provided Jenner a right to be paid a “portion” of the contingency fee award if Jenner terminated its representation based on Jenner’s own “economic interest,” which Jenner admittedly did.[115](#_bookmark179) This provision was a blatant attempt to “contract around” the public policy rule that an attorney who terminates a contingency fee representation before its conclusion forfeits his or her compensation absent “just cause.” *See Hoover Slovacek LLP*, 206 S.W.3d at 562. A termination for the attorney’s own economic interest is nearly the direct opposite of “just cause.” *Cf. id.* at 562 (An attorney’s duty to his client is “highest when the attorney . . . takes a position adverse to his or her client’s interests . . . . [A] lawyer must conduct his or her business with inveterate honesty and loyalty, always keeping the client’s best interests in mind.”) (citation omitted).

Second, paragraph 9(b)(iii) improperly allowed Jenner to shift the burdens and risks of continuing to pursue the litigation to Parallel and relieved Jenner from

115 *See* Resp’t’s Ex. 112 pp. 1-2 (“Jenner was given the option to terminate the Agreement on 30 days prior written notice if we determined at any time that it was not in Jenner’s ‘economic interest to continue the representation pursuant to the Agreement.’”). (CR:85).

making any further investments in the cases. By withdrawing, Jenner totally insulated itself from the risks and costs of continuing to pursue the litigation. Nevertheless, Jenner purported to retain a right to payment based on any recovery ultimately obtained by Parallel and successor counsel years after Jenner abandoned its client.

Paragraph 9(b)(iii) is thus directly contrary to Texas public policies regulating contingency fee agreements and the “just cause” requirement. *Hoover Slovacek LLP* makes clear an attorney cannot shift the risks of loss to his or her client without sharing in those risks. *Hoover Slovacek LLP,* 206 S.W.3d at 564. Other courts have similarly recognized that the just cause rule exists because of an “attorney’s possible economic motivations in seeking to reduce his or her ‘own losses’” in a contingency fee case and seeks to prevent such lawyer “bet hedging.” *Rus, Miliband & Smith*, 113 Cal. App. 4th at 675. The public policies behind the prohibition on this “bet hedging” by lawyers are both clear and fundamental:

To allow an attorney under a contingency fee agreement to withdraw without compulsion and still seek fees from any future recovery is to shift the time, effort and risk of obtaining the recovery (economists would refer to these things as the “costs” of obtaining recovery) from the attorney, who originally agreed to bear those particular costs in the first place, to the client. The withdrawing attorney gets a free ride as to many of the headaches of litigation which he or she otherwise would have had to endure.... It is a very tough row which a contingency fee attorney originally agrees to hoe. Thus it is unassailably unfair to allow him or her to escape that labor absent the most compelling of permissive reasons.

*Id.* at 675-76.

Here, Jenner hedged its bets. After Jenner lost the *Oracle* case on summary judgment in late 2008, it decided to opt-out, abandon its client, and invest no more time and effort in reversing its client’s loss. As of January 2, 2009, the return on Jenner and Parallel’s investments in the cases was zero. Any recovery Parallel finally achieved two-and-a-half years later was the result of its willingness (and its successor counsels’ willingness) to take on **more** risk and to invest **more** time and

millions of dollars of **more** money in the cases after Jenner lost on summary

judgment and well after Jenner decided to cut its losses by abandoning the cases and its client. Jenner had no share in those costs and risks incurred after its withdrawal, and therefore, under Texas public policy, Jenner had no claim to compensation.

Third, paragraph 9(b)(iii) was also unconscionable because it failed to provide “a clear and accurate explanation [to Parallel] of how a fee [would] be calculated.” *Hoover Slovacek LLP*, 206 S.W.3d at 565. In particular, this provision failed to inform Parallel how any purported fee representing “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” would be determined. This provision is even less clear than the one struck down in *Hoover Slovacek LLP* which purported to award an attorney a percentage of the

“present value” of the client’s claims. *Id.* at 565. Like that ill-defined fee, the one at issue here inevitably would provoke disputes and require the testimony of experts to attempt to calculate Jenner’s alleged contribution to the final result, meaning unnecessary “extra time, expense, and uncertainty [that could] be avoided under hourly billing and the traditional contingent fee.” *Id.* In fact, the arbitrator relied on extensive expert testimony to try to calculate this award.

Indeed, under this extraordinarily vague provision, the arbitrator not only awarded Jenner $3,000,000, but also 16% of the net proceeds of any settlement or recovery to be paid to Parallel in a **future** arbitration between Parallel and Oracle.

Even now it is a mystery how the arbitrator could divine the amount of Jenner’s contribution to a result that had not yet occurred. Certainly paragraph 9(b)(iii) provided no clear explanation to Parallel at the outset of how that fee was to be calculated.

* 1. **The arbitra****tor’s award of fees in *quantum meruit* violates public policy.**

The *quantum meruit* award in this case also violates public policy. A fee agreement so egregious as to violate public policy cannot be circumvented with an equitable remedy so that the lawyer may still recover the unconscionable fee. It is a violation of public policy for a lawyer to “make an arrangement for, charge, or

collect an illegal or unconscionable fee.”[116](#_bookmark182) As shown above, this multi-million dollar fee is unconscionable under the contract. The identical fee cannot mysteriously become conscionable because a different name is given to the remedy. Arbitrators are restrained by public policy. They cannot “wire around” a public policy problem by disguising the unconscionable fee as another remedy. If they do, the courts must intervene and reverse. To hold otherwise would render Texas public policy on this issue meaningless.

Here, Texas public policy provides that an attorney forfeits the value of his or her services when he or she abandons a client without just cause before completing a contingency fee contract. *See Royden*, 331 S.W.2d at 209. Texas courts have been extremely reluctant to find “just cause” for an attorney’s voluntary termination of a contingency fee representation. The reasons underlying this reluctance are firmly rooted in the public policy rationale for contingency fee representation. As *Hoover Slovacek LLP* explains, it would be “antagonistic to many policies supporting the use of contingent fees” to allow attorneys to “escape the contingency as soon as practicable . . . thereby avoiding the demands and consequences of trials and appeals.” *Hoover Slovacek LLP,* 206 S.W.3d at 564. If attorneys could withdraw without just cause, sit back for two years while their brethren at the bar clean up their messes, and then spring forth with hands out

116 TEX. RULES PROF’L CONDUCT R. 1.04(a).

demanding payment, the opportunities for strategic withdrawal and gamesmanship would be limitless.

*Royden*’s forfeiture rule is essential to preserve “the trust that is vital to the attorney-client relationship,” *see Hoover Slovacek LLP,* 206 S.W.3d at 563, and to avoid “encourag[ing] attorneys to withdraw from ‘bad’ cases [and] allowing attorneys to avoid the risks of representation without losing the benefits of an eventual recovery,” *Augustson*, 76 F.3d at 664. It is thus unsurprising that *quantum meruit* awards to contingency fee attorneys who withdraw remain largely hypothetical under Texas law: **no Texas court in any published decision in the**

# last 150 years has found just cause to exist and awarded such compensation.

*See Augustson*, 76 F.3d at 662 n.6; David Hricik*, Dear Lawyer*, 64 Mercer L. Rev. 363, 379 (Winter 2013) (noting “Texas courts have rejected every argument that just cause existed” except in one unpublished decision involving waived errors following a jury trial and one decision from 1853 involving an attorney who had been appointed to be a judge).

In contrast to the extremely high bar Texas courts have imposed upon attorneys in order to find “just cause,” the arbitrator went out of his way to find Jenner had “just cause” to terminate its representation of Parallel.[117](#_bookmark183) Indeed, the arbitrator purported to recognize a new form of “just cause” never before identified

or approved by Texas authority. He held Jenner’s belated claim that it was concerned about Parallel’s possible late payment of ***future*** expenses was sufficient “just cause” for Jenner to abandon Parallel and still get paid. This Court should not sanction the arbitrator’s award of *quantum meruit* for at least two reasons: (1) the arbitrator far exceeded his authority by purporting to alter Texas public policy, which is strictly an issue for Texas courts and cannot be outsourced to an arbitrator, and (2) the arbitrator’s novel “just cause” rationale directly undermines existing Texas public policy.

# The arbitrator attempted to change Texas public policy regarding fee forfeiture and just cause.

First, the arbitrator improperly tried to alter Texas public policy regarding an attorney’s right to compensation after voluntarily terminating a contingent representation. Citing no Texas or other authority, the arbitrator explained he thought the rules should be different for “sophisticated” parties in contingency fee cases as opposed to “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.”[118](#_bookmark185) The arbitrator further stated

that it was “reasonable” in “complex” contingency fee cases involving

“sophisticated parties” for the attorney to receive compensation after a voluntary

withdrawal if the attorney had “invested huge amounts of time and services.”[119](#_bookmark187) Spurning Texas public policy’s forfeiture rule, the arbitrator indicated he believed it would be “injustice” if Parallel “enjoy[ed] all the benefits of Jenner’s services and the fruits of the settlements . . . without paying any fee whatsoever to Jenner.”[120](#_bookmark188)

Texas public policy is clear and to the contrary. The Texas Supreme Court

has expressly instructed that an attorney who abandons a client prior to the contingency without just cause “thereby forfeits all rights to compensation.” *Royden*, 331 S.W.2d at 209. The forfeiture rule serves to deter attorneys from gaming the contingency fee system to their own benefit and improperly shifting risks to their clients. Texas courts have never recognized any public policy rationale for a different rule for allegedly “sophisticated” clients or in “complex” contingency fee cases. To the contrary, an attorney has no less of a fiduciary duty to his or her client simply because the client’s case is complex.

The arbitrator’s rejection of the forfeiture rule in complex cases like this one led him to fabricate a new form of “just cause” to avoid the rule. The arbitrator retroactively deemed Jenner’s alleged speculation in late 2008 that Parallel might delay in paying expenses **in the future** to be “just cause” for Jenner to terminate

119  AFA p. 26. (CR Supp. 52).

120 *Id.*

the representation and still get paid.[121](#_bookmark191) The arbitrator again set off on his own path guided only by his own notions of justice rather than the parties’ agreement or Texas public policy. Neither the arbitrator nor Jenner cited any decision in which a Texas court had ever found an attorney’s speculation about his or her client’s ability to pay **future** expenses constituted “just cause” to withdraw. To the

contrary, Texas courts have expressly rejected an attorney’s rank speculation about a client’s future conduct as “just cause” for withdrawing without forfeiture. *See Staples v. McKnight*, 763 S.W.2d 914, 917 (Tex. App.—Dallas 1989, writ denied) (attorney’s speculation client might give perjured testimony was not “just cause”). Certainly no Texas court has ever come to the astounding conclusion that a client’s delay in paying expenses constituted “just cause” for withdrawal **after** the client

has paid expenses in full, as was the case here.

The arbitrator’s award altering the forfeiture rule and conjuring up a new form of “just cause” based on his own sense of “injustice” and his own “sliding scale” of ethics far exceeded his authority. The Supreme Court explained in *Stolt- Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 671-72 (2010) that “when [an] arbitrator strays from interpretation and application of the agreement and effectively ‘dispense[s] his own brand of industrial justice,’” his decision is unenforceable. “In that situation, an arbitration decision may be vacated under §

121  AFA pp.17-19. (CR Supp. 43-45).

10(a)(4) of the FAA on the ground that the arbitrator ‘exceeded [his] powers,’ for the task of an arbitrator is to interpret and enforce a contract, not to make public policy.” *Stolt-Nielsen S.A.,* 559 U.S. at 672. That is precisely what happened here.

# The arbitrator’s new “just cause” ground violates Texas public policy.

The arbitrator’s new “just cause” rationale and his award also violate Texas public policy as expressed in the ethics rules governing the termination of representation. *Cf. Cruse*, 273 S.W.3d at 775. Specifically, the arbitrator’s “just cause” rationale directly violates the ethical requirement that an attorney first give his or her client reasonable warning and a chance to cure before the attorney may abandon the client for failure to pay. Rule 1.15(b)(5) provides that an attorney may ethically terminate a representation when:

The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services, including an obligation to pay the lawyer’s fee as agreed, and **has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled**.

TEX. DISCIPLINARY R. PROF’L CONDUCT 1.15(b)(5) (emphasis added).[122](#_bookmark193) The

rationale for the reasonable warning requirement is straight-forward:

122 *See also* DISCIPLINARY R. PROF’L CONDUCT 1.15(b)(5) cmt. 7 (a lawyer may withdraw “**if the client refuses, after being duly warned**, to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs”) (emphasis added); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §32(3)(g) (2002) (a lawyer may

withdraw from representing a client if the client “fails to fulfill a substantial financial obligation to the lawyer regarding the lawyer’s services **and the lawyer has given the client reasonable warning** that the lawyer will withdraw”) (emphasis added). As noted above, even when withdrawal is ethically permissible under these rules, it still may fall short of “just cause” for purposes of avoiding fee forfeiture.

A lawyer engaged in strategic conduct may forfeit any right to withdraw. One form of strategic behavior is waiting until the client is over a barrel and then springing a demand for payment (perhaps enhanced payment)…. Avoiding such tactics is a point of the proviso in Model Rule 1.16(b)(5) that counsel must give “reasonable warning.”

*Fidelity Nat’l Title Ins. Co. of N.Y. v. Intercounty Nat’l Title Ins. Co.*, 310 F.3d 537, 540-41 (7th Cir. 2002).

The “reasonable warning” principle – like the “just cause” requirement –thus serves to prevent attorneys from gaming the system to their clients’ disadvantage. By dispensing with the “reasonable warning” requirement, the arbitrator allowed Jenner to do just that.

Here, Jenner’s internal documents show it decided to withdraw based on its misperception it could convert its unrealized contingency fee into a huge retroactive hourly fee. Jenner cited the economic self-interest provision of the CFA when it informed Parallel of its withdrawal decision and again two-and-a-half years later when it demanded payment of more than $10 million in hourly fees. *See supra*. In short, Jenner relied on and expressly invoked the very provision of the CFA that was unconscionable in deciding to terminate its representation and in demanding payment.

By the time of the arbitration summary judgment hearing, however, even Jenner understood Texas law does not allow an attorney to abandon his contingency fee client for his own interests without forfeiting all compensation.

Recognizing its predicament, Jenner claimed for the first time in this arbitration that it had “just cause” to terminate the agreement due to Parallel’s previous delayed payment of expenses, even though Parallel had paid all expenses at the time Jenner withdrew.

Only by totally ignoring the ethics rules’ “reasonable warning” requirement could the arbitrator accept Jenner’s post-hoc “just cause” rationalization nearly four years after Jenner withdrew based on ¶ 9(b). The arbitrator, in disregard of the important policies underlying Rule 1.15(b)(5), found “just cause” for Jenner’s withdrawal even though (i) Parallel did pay all expenses shortly after Jenner requested and (ii) Jenner never warned Parallel that its (alleged) concern about future tardy payments would lead it to terminate the representation. Certainly the arbitrator was not authorized to re-write the Texas Disciplinary Rules of Professional Conduct to find his way to an arbitration award that accorded with his own personal sense of justice.

Ultimately, the arbitrator’s award stands for the proposition that Texas attorneys who terminate a contingency fee representation based on an unconscionable termination provision can manufacture “just cause” after-the-fact to avoid fee forfeiture. Awarding fees based on post hoc and ad hoc “just cause” rationales, as the arbitrator did here, turns *quantum meruit* into a fee safety net for

attorneys who improperly invoke unconscionable termination provisions to get out of contingency fee cases early. That cannot possibly be the public policy of Texas. For all the reasons set forth above, the arbitrator’s award of millions of dollars in fees to Jenner after it terminated its contingency fee representation for its own economic interest in the midst of litigation violates Texas public policy. This Court should refuse to validate Jenner’s unconscionable agreement and should vacate the arbitration award, making clear that Texas courts will not tolerate and enforce unconscionable fee arrangements simply because attorneys attempt to hide

them from court review in arbitration.

# The arbitrator improperly excluded and refused to hear evidence pertinent and material to Parallel’s claims.

Section 10(a)(3) of the FAA permits a court to vacate an arbitration award where “the arbitrator[] [was] guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy.” 9 U.S.C. § 10(a)(3). The award should be vacated if the arbitrator’s failure to hear material evidence has rendered the proceedings fundamentally unfair. *Gulf Coast Indus. Workers Union v. Exxon Co., USA*, 70 F.3d 847, 850 (5th Cir. 1995) (affirming district court’s vacatur decision).

Here, the arbitrator improperly excluded Parallel’s Exhibits 142 and 144 and precluded Keith Lowery (one of the inventors of the technology that formed the basis of the relevant patents-in-suit) from testifying regarding the information contained in those documents. Those exhibits and Lowery’s expected testimony

relating to those documents were essential to establishing Parallel’s legal malpractice claim against Jenner. The exhibits consisted of QuinStreet’s configuration files, and Lowery’s testimony would have related to his personal knowledge of how the technology worked and how to determine whether QuinStreet’s systems infringed Parallel’s patents.

This evidence was essential because Jenner argued Parallel was required to establish the “suit within a suit” requirement for its breach of contract and legal malpractice claims. Parallel produced QuinStreet’s source code and configuration files, and Lowery was prepared to testify regarding those documents. In overruling Jenner’s previous objections to the use of the materials, the arbitrator held the documents were timely produced. At the hearing, however, the arbitrator changed course and refused to hear Lowery’s testimony regarding those documents or allow Parallel to introduce those documents into evidence.[123](#_bookmark197) The arbitrator then found that Parallel offered no evidence to establish the “suit within a suit” requirement.[124](#_bookmark199) But for the arbitrator’s exclusion of pertinent and material testimony and evidence, Parallel would have been able to establish the “suit within a suit” requirement.

123  Tr. at 1669:3-11. (CR:986).

124 *See Gulf Coast Indus. Workers Union,* 70 F.3d at 850 (affirming vacatur of arbitration award where arbitrator prevented defendant from presenting evidence and issued a final decision adverse to the defendant based on defendant’s failure to present evidence). Such evidence was not necessary under Texas law. *See, e.g., Heath v. Herron,* 732 S.W.2d 748 (Tex. App.–Houston [14th Dist.] 1987, writ denied). But if the arbitrator was going to require Parallel to introduce this type of evidence, as he did, he should have allowed Parallel to do so.

Thus, the arbitrator’s award should be vacated because he refused to hear and instead excluded evidence material and pertinent to Parallel’s claims.

# Conclusion: Jenner made a poor business decision and must live with it.

Jenner’s abandonment of Parallel at the end of 2008 could have resulted in a total disaster for the company. Not only did Parallel risk losing the value of its very substantial claims in two pending lawsuits, but the adverse summary judgment ruling in *Oracle* threatened Parallel’s entire licensing program. Fortunately, Parallel was able to obtain successor counsel, salvage the cases, and avoid that disaster.

In the arbitration and its briefing to the district court, Jenner made much of the fact it invested substantial work in the *Oracle* and *QuinStreet* cases before withdrawing from them. According to Jenner, it devoted more than 24,000 hours of professional time to representing Parallel that had a value at Jenner’s standard hourly rates of more than $10 million. Assuming for the sake of argument Jenner’s representation is accurate, that fact hardly shows Jenner is now entitled to an award. That fact shows only that Jenner made a poor business decision to walk away from its substantial investment. No one compelled Jenner to abandon the cases. To the contrary, Parallel practically begged Jenner to continue.

Moreover, in these proceedings, Jenner has suggested it did most of the work that ultimately led to Parallel’s recoveries before it withdrew. Following

Jenner’s logic for the sake of argument, Jenner, if it had stayed in the cases, would not have had to substantially increase its investment in the cases between the time it withdrew and when the settlements finally occurred. That (alleged) fact further underscores the short-sightedness of Jenner’s rush to get out of the cases at the end of 2008. According to Jenner’s current view of its contribution, it could have stayed in the cases, not done much more, and recovered millions in fees pursuant to the CFA. That is exactly what it should have done in compliance with its ethical and professional duties and Texas law, what Parallel pleaded for it to do, and what it declined to do based on its then-assessment of its own best economic interests.

It is not inequitable to leave a party to the consequences of its own bad business decisions. Equity is not an insurance policy against one’s own poor judgment. The arbitrator became convinced otherwise, believing Jenner must be compensated in some way based on his private notions of fairness and irrespective of the parties’ agreements and the law.

The arbitrator’s award violates Texas public policy. If left to stand, the arbitration award will serve as a road map for how to use arbitration to circumvent Texas requirements for contingency fee agreements. Any contingency fee attorney could include similar unconscionable provisions in his or her agreements and an arbitration clause to shield them. That is not, and cannot be, the law.

**PRAYER**

Parallel respectfully asks the Court to reverse the district court’s April 23, 2013 Final Judgment Confirming Arbitration Award and render judgment in favor of Parallel, vacating the January 18, 2013 Arbitration Findings and Award. Parallel also seeks any other relief to which it may be entitled.

Respectfully submitted,

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**COUNSEL FOR APPELLANT CERTIFICATE OF SERVICE**

I hereby certify that on this 16th day of September, 2013, a true and correct

copy of the foregoing document was sent via certified mail, return receipt requested, to counsel for Appellees:

OGLETREE, DEAKINS, NASH, SMOAK, & STEWART P.C.

s/Ron Chapman, Jr.

**CERTIFICATE OF COMPLIANCE**

Pursuant to Tex. R. App. P. 9.4(i)(3), I certify that this Brief complies with the typeface and volume limitations of Tex. R. App. P. 9.4(e) & (i)(2)(B) because this computer-generated Brief has been prepared using Times New Roman 14- point font in the body and 12-point font in the footnotes and because this Brief contains 14,973 words, excluding the parts of the Brief exempted by Tex. R. App. P. 9.4(i)(1).

Dated this 16th day of September, 2013.

OGLETREE, DEAKINS, NASH, SMOAK, & STEWART P.C.

s/ Ron Chapman, Jr.

Ron Chapman, Jr.

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