No. 16-0080

In the
Supreme Court of Texas

PARALLEL NETWORKS, LLC,

Petitioner,

v.

JENNER & BLOCK LLP,

Respondent.

From the Court of Appeals for the Fifth District of Texas at Dallas
No. 05-13-00748-CV
On Appeal from the 101st Judicial District Court, Dallas County, Texas
No. DC-13-01146-E

REPLY IN SUPPORT OF MOTION FOR REHEARING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

As a bedrock principle of Texas law, Texas courts have traditionally reviewed arbitration awards for violations of public policy. This tradition has served as a reliable, fundamental safeguard against unlawful and illegal conduct, and it has protected the interests of Texas citizens for decades.

According to Jenner, however, this vital safeguard was swept aside in the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* Jenner reads the FAA as foreclosing any review on public-policy grounds. It understands the FAA's statutory review as restricted to technical matters of process, and it understands Congress as preempting the State's independent common-law authority in this critically important area.

Jenner is mistaken. Under a proper construction, public-policy review fits comfortably within the FAA's statutory framework. The context in which Congress acted included a long history of public-policy review, and there is no indication that Congress intended such a stark departure from that settled practice. But even if the FAA somehow intended a break on the federal side—without uttering a single word to that effect—nothing in the FAA clearly or unmistakably preempts the State's independent common-law authority. Public-policy review is a bulwark against serious and intolerable violations of fundamental Texas law. There is no indication that Congress intended to intrude on the power of Texas courts, acting under settled Texas common-law, to resist FAA arbitration awards that violate Texas public policy.

Texas courts urgently need guidance on these exceptionally important issues, and Jenner's latest response only confirms why this Court's review is plainly warranted. Rather than use this reply to refute each of Jenner's errors, Parallel submits three key points underscoring why Parallel's petition for review should be granted.

1. As Jenner itself concedes (MFR Resp:10 n.18), these issues have sharply divided courts nationwide, and there is no reason to believe that Texas courts are somehow immune from that confusion. Yet Jenner insists there is clarity in Texas (MFR Resp:2), as supposedly no Texas court has allowed traditional public-policy review after *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). Jenner overlooks the palpable *lack* of clarity on the ground. Plainly, this issue was not clear in the Fifth Circuit, which explicitly refused to resolve the question. *McKool Smith, P.C. v. Curtis Int'l, Ltd.*, No. 15-11140, 2016 WL 2989241, at *3 (5th Cir. May 23, 2016). And it has not been clear in Texas appellate courts, which have not addressed whether public policy is subsumed within "exceeded the arbitrators' powers" or provides an extra-statutory basis for review. *See, e.g., Aspri Invs., LLC v. Afeef*, No. 04-10-00573-CV, 2011 WL 3849487, at *7 n.4 (Tex. App.—San Antonio Aug. 31, 2011, pet. dism'd) (mem. op.). This persistent confusion will continue until this Court finally establishes the rule for Texas courts.

Even if Jenner's wishful thinking were correct, Jenner overlooks a critical point: Texas litigants often looked to the *Texas* Arbitration Act to protect against

arbitrator abuse. Now that litigants, such as Jenner, are arguing that *Hoskins* shut the door on public-policy review under the TAA, parties will predictably shift their focus to the *FAA*—increasing the likelihood of exactly the same confusion and uncertainty that this Court sought to resolve in *Hoskins*. Up or down, Texas citizens and businesses need answers to these questions. Granting Parallel's petition will provide the necessary guidance for the "quagmire" currently plaguing the FAA. *Hoskins v. Hoskins*, No. 15-0046, 2016 WL 2993929, slip op. at 2 (Tex. May 20, 2016) (Willett, J., concurring).[1]

Arbitration requires certainty and predictability; uncertainty over these issues threatens to eliminate the key advantages of arbitration. If this Court believes that Texas public policy is not a basis to vacate arbitration awards under the FAA, this

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[1] Jenner argues that it would be incongruous to read similar language in the TAA and FAA to mean two different things. MFR Resp:3, 16-17. But whereas the Texas Legislature passed the TAA, Congress passed the FAA. No rule of law or logic holds that state and federal legislative bodies assign the identical meaning to every word in every statute—indeed, this Court *already has refused to construe the two statutes exactly the same way*. *See, e.g.*, *Hoskins*, slip op. at 8 n.7 (rejecting *Hall Street* and construing effectively same language in the FAA and TAA to mean two different things). Furthermore, there is no indication in the FAA that Congress intended the federal statute to preempt bedrock principles of public-policy review entrenched in traditional state practice. This legislative intent not to disturb state public policy review, by which the FAA should be construed, remains true even if the Texas Legislature decided to narrow the scope of review under its own laws. *Cf. Humitech Dev. Corp. v. Perlman*, 424 S.W.3d 782, 791 (Tex. App.—Dallas 2014, no pet.) ("*Hall Street* indicates that Texas's common-law grounds for vacating an arbitration award—gross error, manifest disregard of the law, and violation of public policy—would not be preempted by the FAA").

Court should make that clear, so Texas courts and Texas residents do not waste their time and resources by lodging public-policy challenges to arbitration decisions. And if Parallel is right that arbitrators cannot brazenly violate Texas public policy, the decision below eliminated a fundamental check on arbitral abuse, undermining the critical balance struck by parties in agreeing to give up their constitutional right to litigate in court. Under settled law for decades, parties were not forced to endure endless litigation and appeals to avoid arbitration awards that contravene a State's important public policies. *See, e.g.*, *Campbell Harrison & Dagley, L.L.P. v. Hill*, 782 F.3d 240, 244-245 (5th Cir. 2015). If that safeguard no longer exists, Texas businesses and residents need to know immediately, so that they can structure their dealings and contracts accordingly.

2. There is no real doubt that this issue is exceptionally important, making it a clear-cut candidate for this Court's review. Perhaps realizing that the issue's importance cannot be credibly discounted, Jenner insists this case is a bad vehicle for the Court's review. Jenner argues that Parallel is simply attacking the arbitrator's fact-finding, and that Parallel's public-policy challenge would fail no matter how the Court resolves the question presented. MFR Resp:1, 8.

Jenner is wrong. As Parallel has repeatedly explained, this award violates public policy even accepting the *entirety* of the arbitrator's fact-findings as true.[2]

[2] Notably, however, the arbitrator's version of events was flatly contradicted by Jenner's own general counsel, who unequivocally explained *in writing* that Jenner

The law is clear. Jenner violated public policy when it abandoned its client without just cause and then demanded a contingency fee based on the efforts of the other lawyers called in to clean up Jenner's mess. *See, e.g.*, *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 562 (Tex. 2006); *Augustson v. Linea Aerea Nacional-Chile S.A.*, 76 F.3d 658, 664 (5th Cir. 1996).

The arbitrator speculated that Jenner had "just cause" to withdraw because it was worried Parallel might not cover its future costs. However, the Texas Disciplinary Rules of Professional Conduct unequivocally forbid a firm to withdraw from a case based on future, hypothetical predictions of client behavior. TEX. DISC. R. PROF. CONDUCT 1.15(b)(5). The arbitrator's speculation is not a factual finding—rather, it is a clear violation of a fundamental rule of ethics governing lawyers' conduct. This established public policy requires an attorney to give the client notice and an opportunity to cure any breaches.

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withdrew because the representation was no longer in Jenner's own economic self-interest: "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…." CR:85 (emphasis added). Jenner maintained this true version of events until it later realized during the arbitration that pursuing *its own interests at its client's expense* conclusively disqualified Jenner from any compensation. At that point, Jenner revised history and suggested that a fear of recovering future costs had provided "just cause" to withdraw.

These protections are designed to avoid exactly what Jenner has done in this case: concocting after-the-fact excuses about why it abandoned its client but should still get paid. The reason Jenner violated Rule 1.15(b)(5) and never gave Parallel notice of a breach or an opportunity to cure is because there was *nothing to cure*. There is no dispute that Jenner had been reimbursed, in full, at the time of its withdrawal. Jenner dropped Parallel as a client even though Parallel's outstanding balance was *zero*.[3]

Parallel's challenge thus turns on whether Jenner's "fears" excused its conduct. That is a legal challenge, not a factual challenge. The legal challenge turns on fundamental Texas public policy governing the attorney-client relationship.[4]

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[3] According to Jenner (but not the arbitrator), "Parallel failed to honor its contractual pledge to reimburse Jenner for patent enforcement expenses," and "[t]he amount of Parallel's deficiency had reached a staggering $500,000 before Jenner terminated the engagement." MFR Resp:4. This rendition of the facts is misleading in at least two significant ways. First, although there was a "deficiency" during the representation, Jenner never told Parallel that it had "failed to honor its contractual pledge" or even complained about how Parallel was paying expenses until *after* Jenner lost the case on summary judgment. Second, any outstanding deficiency was 100% cured by the time of Jenner's termination. The "staggering" outstanding balance due to Jenner at the time it quit was, in fact, *zero*.

[4] The general rule expressly prohibits an attorney from obtaining any recovery when he abandons his client without "just cause." *Augustson*, 76 F.3d at 663. Defining "just cause" to include an attorney's subjective, after-the fact excuse of purported concerns about a client's future behavior would render the rule meaningless. Under that scenario, parties could argue effectively that "just cause" is anything propounded by a departing attorney and accepted by an arbitrator. Preventing this scenario is precisely why the law has strictly cabined the qualifying bases for establishing "just cause."

There is no need to overturn one iota of the arbitrator's fact-findings to resolve that issue.

In any event, Jenner's contentions put the cart before the horse. Jenner says this Court should deny review because Jenner ultimately will win on the merits of the public-policy issue—an issue that *no court reviewing this case has squarely resolved*. Jenner should not be allowed to duck the important, threshold question by predicting how Parallel's challenge will fare on the merits once it is finally entertained. The critical threshold issue is whether this Court should clarify the scope of available review. Once this Court resolves that threshold issue, it can decide the underlying merits or remand for the lower courts to address it. But Jenner cannot dodge the threshold question by insisting it will later prevail on the merits.

3. Jenner offers an elaborate (and incorrect) theory that traditional public-policy review was somehow jettisoned by the FAA. MFR Resp:11-17. Suffice it to say that Jenner's extensive discussion highlights the desperate need for this Court's input. The parties emphatically disagree about the scope of the FAA, the correct reading of 9 U.S.C. § 10(a)(4), and the preemptive effects of the FAA on traditional Texas public policy. Those sharp disagreements—which echo disagreements among litigants and trial courts statewide—tee up the issue perfectly for the Court's consideration. The fact that the parties disagree is not a basis for denying review. On the contrary, the sharp disagreement and the confusion out of which it arises confirm that the petition in this case should be granted.

Respectfully submitted,

/s/ Ron Chapman, Jr.

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), the undersigned certifies that this Reply complies with the length limitations of Rule 9.4(i)(2)(E) and the typeface requirements of Rule 9.4(e).

1. Exclusive of the contents excluded by Rule 9.4(i)(1), this Reply contains 1,923 words as counted by the Word Count function (including textboxes, footnotes, and endnotes) of Microsoft Office Word 2013.

2. This Reply has been prepared in proportionally spaced typeface using:

Software Name and Version: Microsoft Office Word 2013
Typeface Name: Times New Roman
Font Size: 14 point

/s/ Kirsten M. Castañeda
Kirsten M. Castañeda

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of October, 2016, a true and correct copy of the foregoing motion, with appendix, is served via e-mail and via e-service through efile.txcourts.gov on Respondent through counsel for Respondent listed below:

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APPENDIX TO REPLY IN SUPPORT OF MOTION FOR REHEARING

Tab

Tab A

EXHIBIT L

JENNER&BLOCK

June 17, 2011

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Re: ***Jenner & Block LLP's Fee Claim***
Amount: $10.245 Million
Client: Parallel Networks LLC

Dear David and George:

This letter is addressed to you as a result of my conversation with David last week. It is written in my role as counsel to Jenner & Block LLP ("Jenner") or ("we"). You may remember that one of my jobs as firm counsel was to consult with the Finance Committee concerning, and then assist that Committee in the collection of, delinquent receivables. When there are legitimate disputes over our fee entitlement, I am charged with resolving those disputes, and have authority to compromise our claim if I deem it appropriate.

As you know, Jenner served as counsel to Parallel Networks, and its predecessor epicRealm Licensing between June 2007 and early 2009 in connection with the Oracle, QuinStreet and re-examination of certain U.S. patents ("Parallel Networks matters"). The engagement was pursuant to a written Contingent Fee Agreement, entered into with epicRealm in June 2007, which was then assigned to Parallel Networks on September 21, 2007 ("the Agreement") 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.

I told David that unless there was an objection, I intended to contact Mr. Fokas directly regarding the delinquent fees to which we are entitled under the terms of the Agreement. David asked for an opportunity to check into the matter. He called me back shortly after I called him requesting that I not contact the client directly but rather communicate through your firm. Hence this letter. I request that you bring it to your client's attention.

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

RESPONDENTS' EXHIBIT 112

EXHIBIT 23 5-24-12

IRRN 00008262

EXHIBIT L

termination date] on any Enforcement Activity undertaken on behalf of epicRealm Licensing [Parallel Networks] 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, less the reasonable costs incurred by Parallel Networks "to transition any pending or ongoing enforcement activities that had been commenced with Jenner & Block to successor legal counsel." [1]

Jenner had sent monthly statements to Parallel Networks, detailing more than 23,000 hours of time devoted by Jenner attorneys and legal assistants to the representation and quantifying those services by the regular hourly rates of the persons performing 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. As best I have been able to determine Parallel Networks has never even communicated with us regarding this fee obligation. I do not know whether Parallel Networks contests any of these charges. Nor do I know what bases there would be for any such a dispute. If in fact Parallel Networks disputes these charges, the Agreement requires that such a dispute be "finally adjudicated by arbitration in Dallas, Texas under the auspices of JAMS," which is to follow the parties making a "good faith effort to resolve any dispute relating in any manner to the Agreement or to any services provided pursuant to this Agreement in accordance with the general spirit of this Agreement". So, if there is a legitimate dispute related to our fee entitlement, now is the time to try to resolve that dispute if we can. I stand ready to participate in good faith in such an effort. I simply ask that Parallel Networks outline for us just what it disputes and why. Our position is quite simple: The contract specifically spells out that to which we are entitled on termination of the Agreement.

If I do not hear from you prior to June 30, 2011, I will assume that your client refuses to pay the amount owed and is unwilling to engage in a voluntary effort to explain the reasons for its refusal or to resolve the dispute short of arbitration. In that event, we will file the arbitration contemplated by the Agreement and resolve the issues in that manner.

If you have any questions regarding this matter, please feel free to call.

Sincerely,

Russell J. Hoover

[1] We do not seek to recover for the time devoted by our lawyers and legal assistants between February 9 and April 9, 2009 to transition the matter to new counsel.

cc: Susan C. Levy
Catherine L. Steege

bcc: Harry J. Roper
Mary Ann O'Donnell
Paul D. Margolis
Terri L. Mascherin