# In The Matter Of:

*JENNER & BLOCK, LLP*

*v.*

*PARALLEL NETWORKS, LLC, et al.*

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## *ARBITRATION HEARING- Vol. 1*

***September 11, 2012***

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MERRILL CORPORATION

LegaLink, Inc.

4144 North Central Expressway
Suite 850
Dallas, TX 75204
Phone: 214.720.4567
Fax: 214.720.4503

ARBITRATION BEFORE JAMS

JENNER & BLOCK, LLP, )
Claimant )
) JAMS ARBITRATION NO.
VS. ) 1310019934
)
PARALLEL NETWORKS, LLC and )
EPICREALM LICENSING, LP, )
Respondents )

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PARTIAL MOTION FOR SUMMARY JUDGMENT

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On the 11th day of September, 2012, the following proceedings came on to be heard in the above-entitled and numbered cause before Mr. Jerry Grissom, Arbitrator Presiding, held at JAMS, 8401 N. Central Expressway, Suite 610, Dallas, Texas, pursuant to JAMS Rule 17 and the provisions stated on the record or attached hereto:



A P P E A R A N C E S

APPEARING ON BEHALF OF THE PLAINTIFF:

MR. DAVID JIMENEZ-EKMAN
Jenner & Block
353 N. Clark Street
Chicago, IL 60654-3456
312-222-9350
djimenez-ekman@jenner.com

MR. PAUL KONING
Koning Rubarts
1700 Pacific Avenue
Suite 1890
Dallas, TX 75201
214-751-7901
paul.koning@koningrubarts.com

APPEARING ON BEHALF OF THE DEFENDANTS:

MR. JAMIL N. ALIBHAI
MS. KELLY P. CHEN
MS. JANE ANN NEISWENDER
Munck Wilson Mandala
600 Banner Place Tower
12770 Coit Road
Dallas, TX 75251
972-628-3600
jalibhai@munckwilson.com
kchen@munckwilson.com
jneiswender@munckwilson.com
MR. JEFFREY S. LOWENSTEIN
Bell Nunnally & Martin
3232 McKinney Avenue
Suite 1400
Dallas, TX 75204-2429
214-740-1473
jeffl@bellnunnally.com



I N D E X

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P R O C E E D I N G S

(Proceedings commmenced at 9:07 a.m.)

THE ARBITRATOR: Good morning everyone. We are here for a hearing this morning in the case of Jenner and Block, LLP versus Parallel Networks, LLC. And I know the style of our case still has EpicRealm Licensing, LP. For some reason I have a question about whether that's still an actual entity in the case. Can anybody help me with that? This is not a pop quiz. It just dawned on me as I was saying this. Is EpicRealm still a party to the case?

MR. ALIBHAI: It's an entity that Jenner and Block has brought claims against. We don't know what the basis of those claims are any longer.

THE ARBRITRATOR: But as far as you all know, it's still a named party in the case?

MR. KONING: It has not been dismissed from the case.

THE ARBITRATOR: We don't have to deal with that. I just thought if there was a quick and easy way to say, okay, it's either in or out, then I would go ahead and do that while we're covering that ground. And if I could, I would appreciate each side identifying who is here today for your respective client. And if you all would like to go first for the Jenner side.

MR. JIMENEZ-EKMAN: Sure. It's David

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09:08 Jimenez-Ekman of Jenner and Block on behalf of the Claimant,
09:08 Jenner and Block.
09:08 MR. KONING: Paul Koning of Koning Rubarts on
09:08 behalf of Jenner and Block.
09:09 THE ARBITRATOR: All right. Good morning.
09:09 MR. ALIBHAI: Good morning. Jamil Alibhai on
09:09 behalf of the Respondents.
09:09 MR. LOWENSTEIN: Jeff Lowenstein with Bell
09:09 Nunnally on behalf of the Respondents.
09:09 MS. CHEN: Kelly Chen, Munck Wilson Mandala on
09:09 behalf of Respondents.
09:09 MS. NEISWENDER: Jane Ann Neiswender, Munck
09:09 Wilson Mandala on behalf of Respondents.
09:09 THE ARBITRATOR: Very good. All right. Without
09:09 further ado, let's hear from Mr. Alibhai.
09:09 MR. ALIBHAI: Do you have a preference as to
09:09 whether we sit or stand?
09:09 THE ARBITRATOR: I have no preference. If you
09:09 are happy sitting, I am happy with you sitting. This is one of
09:09 the joys of arbitration. We can be a little bit less formal
09:09 here. And I am already a living example of that. If you're
09:09 happy doing that, that's fine. I understand. I have sat in
09:09 your chairs for over 20 years myself, so I understand if you
09:09 just can't do it without standing up, that's okay too.
09:09 MR. ALIBHAI: May I approach and hand you a copy

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09:10 of the presentation as well. We have prepared a Power Point
09:10 presentation that addresses the issues. I am handing a copy to
09:10 Mr. Koning and Mr. Jimenez-Ekman and provided you with two
09:10 copies of it. It's the same thing that will be on the screen,
09:10 and you can go through it as we go.
09:10 As the Arbitrator noted, we are here this
09:10 morning on a motion for summary judgment for which you granted
09:10 Parallel Networks leave to file regarding the enforceability of
09:10 the contingent fee agreement at issue, as well as whether
09:10 Jenner has any right to fees given that it voluntarily
09:10 abandoned the representation that it had undertaken. And so
09:10 with respect to the summary judgment that we'll be discussing
09:10 today, there are those two major points.
09:10 And with respect to paragraph 9(b) which is the
09:11 provision relating to termination by Jenner and Block of that
09:11 agreement, there's a number of factors that makes it
09:11 unenforceable. Three of them, three of the major ones that
09:11 we'll be discussing throughout the course of the morning are
09:11 that it is a unilateral option contract. That once the
09:11 provision is exercised, Jenner does not bear any risk in the
09:11 engagement but still bears all the reward. And it allows
09:11 Jenner and Block to take a proprietary interest, which is
09:11 precluded by the Texas Disciplinary Rules. Such an interest is
09:11 allowed in contingency fee contracts but not otherwise
09:11 generally allowed.

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09:11 With respect to where we are, I wanted to give
09:11 you a short factual and procedural background of the issue
09:11 here. This is a question about enforceability. The agreement,
09:12 it is a question of law for a court or a tribunal to determine.
09:12 And so I just wanted to give you a slight overview of some of
09:12 the facts.
09:12 In the summer of 2006 two different companies
09:12 decided to sue -- and I call it Parallel Networks. At one time
09:12 it was EpicRealm and becomes Parallel Networks with an
09:12 assignment of the patents and an assignment of the contingency
09:12 fee agreement, but we'll call it Parallel. Oracle and
09:12 QuinStreet filed these declaratory judgment actions. And what
09:12 Oracle and QuinStreet say is we don't infringe your patents,
09:12 and the patents are invalid. So they bring these cases in
09:12 Delaware. In response, there's some motion practice that
09:12 occurs. And Baker Botts is initially handling these cases on
09:12 behalf of Parallel Networks.
09:12 In June of 2007 when the Court in Delaware
09:12 decides that these cases are going to go forward and stay in
09:12 Delaware, Parallel Networks hires Jenner and Block to handle it
09:13 on a contingency fee basis. And they enter into this
09:13 contingent fee agreement. Jenner and Block undertakes the
09:13 representation, and we'll discuss a little bit later the
09:13 provisions of the contingent fee agreement, and starts
09:13 representing Parallel Networks in those two cases.

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09:13 In the fall of 2008 the firm and Susan Levy,
09:13 who's the managing partner who assigns Terri Mascherin, who's a
09:13 partner there to look at the case and evaluate the case. And
09:13 one of the first pieces of evidence we have of this is this
09:13 October 26, 2008 memorandum where Terri Mascherin recommends to
09:13 Jenner that the firm determined whether it's in the firm's
09:13 strategic and financial interest to continue its engagement.
09:14 So they have had a mediation. She talks about the mediation.
09:14 She talks about settlement strategy and says how much money is
09:14 involved, how much could they recover, what would our fee be,
09:14 how would this look for Jenner, what's Jenner's interest. And
09:14 finally is it Jenner's interest to even keep going with this
09:14 given where this could come out. These discussions continue
09:14 throughout the fall.
09:14 On December 4, 2008, the worse thing that could
09:14 happen in the case happened, which is the Court grants summary
09:14 judgment of non-infringement. It says that Oracle as a matter
09:14 of law does not infringe the patents that are at issue. So you
09:14 have the case almost come to an end. That same day, Terri
09:14 Mascherin who writes the memos that we have been talking about
09:14 earlier, e-mails the chairman of the firm and the managing
09:14 partner of the firm and says tomorrow is a pretrial hearing in
09:15 this Oracle case. Once we know what happens tomorrow, we'll
09:15 have a decision to make regarding how much longer Jenner and
09:15 Block wants to continue the representation. And she notes and

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she expresses her belief that Jenner and Block can terminate for any reason. She doesn't say for her economic interest. For any reason. And then she says, and if we do that, we remain entitled to be compensated at a minimum for our hourly fees. So they're making this decision-making process and this discussion internally at the firm the very day that the summary judgment ruling comes down and the day before the pretrial conference.

You will hear a lot in the papers that Jenner and Block files about this issue of expenses and how they haven't been paid. They were outstanding. December 24, 2008, all the outstanding expenses are paid in full, a check or a wire in the amount of $500,000 plus is sent to Jenner and Block. And Ms. Mascherin's testimony about that is there was no active breach, and any past breach had been cured.

January 2, 2009, after Jenner and Block negotiates a final judgment of the case, it terminates Parallel and claims compensation under the agreement. That takes us to post Jenner's involvement.

Beginning in February 2009, Baker Botts agreed to represent Parallel Networks in the Oracle appeal which was taken to the Federal Circuit on an hourly basis and to represent it in connection with settlement discussions in the QuinStreet case. The QuinStreet case settles. And we're giong to talk about these two cases sometimes together, sometimes

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separately. But the QuinStreet case settles. Baker Botts successfully obtains a reversal of the summary judgment ruling. And the Federal Circuit remands the Oracle case back to the District Court. The case proceeds towards trial.

Numerous firms are hired to assist Parallel Networks and Baker Botts in connection with those cases. And just before trial in Delaware, I believe it's the Thursday or Friday before the trial starts, Oracle settles with Parallel. As soon as that happens in May, Jenner sends a demand letter and claims hourly fees of $10,245,492 and claims that those amounts are now more than two years past due. And that's Exhibit 8 to our summary judgment evidence. It's the letter from Mr. Hoover. And it's one of the most important pieces of evidence in this case.

And then in December of 2011, Jenner files a demand for arbitration that's at issue here, and again, talks about this 10 million dollars in fees. So I think what's important is to look at why contingency fee agreements are allowed and why this one is not allowed. The Court in Hoover Slovacek goes to great length to discuss the concepts of contingency fee agreements. And generally the idea that they discuss is, look, these have usually been used by people who could not afford a lawyer. They're used quite often now in business cases, but the concept is that somebody who can't afford to have legal services provided to it allows the lawyer

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to represent it, but there has to be two things that are going on in that context.

Number one, they're both going to share in the reward. If the client recovers, the lawyer recovers. So there's that risk sharing. The client's and the lawyer's fortunes are tied together. The lawyer recovers only if the client recovers, which is the reason that the lawyer is allowed to get more than he or she would get if they were being handled on an hourly basis. You may receive multiples of what you ordinarily would have charged, but that's okay because you took this risk, and there was uncertainty as to whether you would ever collect a dime. And at the same time the client is supposed to be protected that in the event there's no recovery, the client pays nothing. So this risk sharing is what's discussed in Hoover Slovacek as to what's important.

So let's look at the contingent fee agreement that Jenner and Block entered into with Parallel Networks. And it's quite straight forward in some respects. It's a contingency fee agreement in which Jenner and Block agreed to initiate, prosecute and conclude the enforcement activities. And the enforcement activities are defined as the Oracle case and the QuinStreet case. And Jenner and Block specifically says that it accepts such retention in the second recycle.

Jenner and Block agrees that if there is any conflict or impediment which arises, it won't have any right or

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claim to the contingent fee award. And paragraph five, which is not on the slides, is the contingency fee award. It says that in the event of a recovery, that Jenner and Block will be entitled to a portion. And it sets out the different percentages that it would receive depending on the amounts recovered. And then there's two provisions which you sort of have to look at side by side, paragraph 9(a) and paragraph 9(b).

Paragraph 9(a) deals with termination by Parallel. Paragraph 9(b) deals with termination by Jenner and Block. So let's look at 9(b) first. The first part of it is if Jenner and Block determines at any time that it is not in its economic interest to continue the representation, it can terminate by providing 30 days notice, as long as ethical and legal responsibilities are met. That's one part. That relates to supposedly when Jenner and Block can terminate.

The second provision or second part of paragraph 9(b) discusses that if Jenner and Block terminates this agreement, note that it doesn't say with cause or without cause, it's just if they terminate, Jenner and Block shall continue to be entitled to receive compensation from Parallel pursuant to one, two and three in the preceding paragraph up to the date of such termination. And so if we go back to 9(a), which is the preceding paragraph referenced in 9(b), the one, two and three there say that Jenner and Block will be

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compensated for all time expended and regular hourly billing rates in lieu of the contingent fee award. Their expenses would be reimbursed. And at the conclusion of the enforcement activity that Jenner and Block would be paid an appropriate and fair portion based upon the contribution to the result achieved as of the time of the termination. Jenner and Block has taken this provision, as you can see from Ms. Mascherin's October 26, 2008 memorandum, as you see from her December 4th e-mail, as you see from Mr. Hoover's demand letter, as you see from Jenner and Block's demand for arbitration in this case, to take the position that if Jenner and Block terminates, that it receives its full hourly rates. So those are the two paragraphs relating to termination.

Paragraph 15 talks about amendments or modifications have to be in writing. To the extent that Jenner and Block argues today or tries to argue in their papers that there is some amendment or modification, this agreement would require that be in writing. So that's the agreement at issue.

And the first and foremost point, if we turn to slide 11, and this is an important point that Jenner overlooks and argues against in its papers, Jenner and Block takes the position that if the agreement for the fee itself is not unconscionable, it's an agreement between a lawyer and a client, and they may be sophisticated and they may have all this experience, and thus the arbitrator or tribunal should

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just be hands off. An agreement is an agreement. And the Supreme Court of Texas has expressly rejected that agreement. And it's quite simply put, the Court says it is not enough to simply say that a contract is a contract. There are ethical considerations overlaying the contractual relationship. So that ethical considerations is what we have to consider today. And we will talk about the Hoover Slovacek case, which was a contract is a contract, then why does the Court go through all that analysis to look at the agreement and determine whether it's unconscionable. And there's a couple of different things that we have to look at when we're talking about unconscionability.

Obviously there's the case laws. The Hoover Slovacek case, I think that's one of the most important cases that we'll be discussing today. It's also quite simply Texas Disciplinary Rule of Professional Conduct 1.04(a). A lawyer can't do three different things. They can't enter into an arrangement for it, or charge, or collect a legal fee or an unconscionable fee. Any three of those are expressly prohibited. A lawyer shall not. There is no consent provision. There is no exception. A lawyer shall not do those things.

So let's look at this contingent fee agreement and why it's unenforceable. And I think one of the easiest things to do is look at the Hoover Slovacek case. And there

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are various issues that were raised in that case. And for a slight background, the Hoover Slovacek case, the lawyer had included a provision that said upon termination, the lawyer would be entitled to a percentage of the present value of the case at the time of the termination. The lawyer gets fired by the client, which is very important because when Jenner talks about, well, look, even in Hoover, the lawyer got a fee. It's because the lawyer got fired by the client. This is not that situation. This is the lawyer fired the client. And if a lawyer fires a client without cause, the lawyer abandons the fee.

So in Hoover Slovacek they have this provision in which they try to say if we get terminated, that here's the fee that we would get. And the Supreme Court of Texas said first and foremost there's a problem with this agreement in that the lawyer is trying to receive payment now based upon what happened in that case. And it allowed the lawyer to basically stop the contingency portion and say I get a fee here and now. Jenner tries to distinguish this case and say, well, this provision doesn't say immediate. And so that's why Hoover Slovacek is completely inapplicable. Well, first of all, that's how they construed it. They didn't construe it as immediate.

Number two, it doesn't say that it's not immediate. And what it tries to do is distinguish around and

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try to contract around what the Texas Supreme Court has said are the remedies available in the lawyer-client relationship. And so the Supreme Court said that's not permissible. We have defined in Texas what a lawyer and a client have to pay or receive in that situation. And so the Court said there's a number of reasons that makes this provision unenforceable. But the Supreme Court said something very interesting. And the more you read Hoover Slovacek, you realize the Court's really getting into this provision and looking at it from the point of view it's not just a contract. We have to look at the ethical considerations. And the Court says, quote, notwithstanding its immediate payment requirement, several additional considerations lead us to conclude that Hoover's termination fee provision is unenforceable. So the Court says, look, even if you want to look past the immediate payment issue, there's a lot of other reasons why this provision is unenforceable. And, Mr. Grissom, every single one of those considerations that the Court looked at is a consideration that's problematic in this exact situation.

One of the things that they talk about is that there's a possibility that the lawyer could recover more than the client received. The present value that the lawyer was trying to get in the Hoover case was more than the client received. You will see that Jenner is doing the same thing here, asking for more than what the client received.

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09:29 The second thing that the Court found
09:29 problematic is that the fee has to be contingent on the
09:29 outcome. Here there's no fee that's contingent on the outcome.
09:29 Jenner and Block took the position that it was entitled to its
09:29 hourly fees no matter what. That it had earned those fees at
09:29 the moment the termination occurred.
09:30 The third thing that the Court found troubling
09:30 was that it doesn't distinguish between termination with or
09:30 without cause. Neither does this provision. Paragraph 9(b)
09:30 says if Jenner terminates. It's also a unilateral option
09:30 contract. And that's what's important about the Hoover
09:30 Slovacek case and the Wythe case. What the Court talks about
09:30 is you have now given Jenner the option to decide whether to
09:30 stay in the case or get out of the case. Realize that if the
09:30 judgment that is entered in the Oracle case or the final
09:30 judgment that's entered in the Oracle case is the end of the
09:30 case and there's no appeal, Jenner gets nothing. The recovery
09:30 was zero. One-third of zero is zero.
09:30 What does Jenner do instead. Jenner terminates.
09:31 Allows somebody else to take an appeal and then comes back and
09:31 says I am entitled to nine million dollars. It was better for
09:31 me to terminate. Ms. Mascherin is saying that the day the
09:31 summary judgment ruling comes out, we can always terminate and
09:31 get our fees. It's our option. It's our choice. Whatever is
09:31 better for us. The Supreme Court says those unilateral option

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09:31 contracts, that's not what we want to put the client in the
09:31 position of having to make the decision.
09:31 In Wythe it was the opposite. It was the hourly
09:31 fee contract to a contingency fee. The lawyer had the
09:31 provision of saying, wow, this case is going better than I
09:31 thought it would, and so I am going to switch. I want a
09:31 contingency fee now, instead of my hourly fee. Here it's the
09:31 opposite situation. Jenner and Block says this is not good. A
09:32 Federal District Court decided that there's no claim. That
09:32 Parallel Networks is entitled to nothing. That despite the
09:32 analysis that the firm was doing about the chances on appeal
09:32 and whether they be a 30 percent chance of success or a 50
09:32 percent chance of success. And so what does the Court say
09:32 about that in the Hoover Slovacek case. They say, quote, most
09:32 troubling is the creation of an incentive for the lawyer to be
09:32 discharged soon after he or she can establish the present value
09:32 of the client's claim with sufficient certainty. Whereas the
09:32 contingent fee encourages efficiency and diligent efforts to
09:32 obtain the best result possible. Hoover's termination fee
09:32 provision encourages the lawyer to escape the contingency as
09:32 soon as practicable. That's what Jenner did. Jenner escaped
09:32 the contingency fee as soon as practicable. As soon as the
09:33 case had gone to a zero value in its opinion, it said we will
09:33 take our hourly fees. That's a better deal.
09:33 And what's also problematic about the agreement

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09:33 is it fails to explain how the fee will be calculated. As the
09:33 hourly fee provision, there's this appropriate and fair
09:33 percentage of the contingent fee award. There's no
09:33 explanation. And the Court said, look, we require contingent
09:33 fee contracts to be in writing. They must have sufficient
09:33 detail. They must have specificity. The client has to know
09:33 what it's going to be required to pay.
09:33 And so I think I have covered on slides 13 and
09:33 14 the concepts that the Hoover Slovacek Court looked at and
09:33 says why unilateral option provisions are unenforceable, which
09:34 takes us to page 50 of the slides. And this is the Wythe case,
09:34 which is, as I said, the opposite where the lawyer tried to
09:34 convert from hourly to contingent. And the Court notes, look,
09:34 in contingent fee cases, we have the issue of risk. The lawyer
09:34 might not get paid. Here this lawyer doesn't have that. He
09:34 had an hourly fee contract, and he could switch to a
09:34 contingency fee contract. Well, that doesn't have the risk
09:34 that he would have undertaken if he had a pure contingency fee
09:34 contract. Same situation here. At the point that Jenner
09:34 determines that contingency is no good, it switches to hourly,
09:34 and it gets its hourly regardless of the result.
09:34 And then Texas Committee on Professional Ethics
09:34 has specifically said that any provision that says you get the
09:35 greater of the contingent fee or the hourly fee violates the
09:35 disciplinary rules. You don't get to make that decision. You

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09:35 don't get to have the choice of going from one to the other.
09:35 Because the reason that we let the lawyer get a higher fee in
09:35 the contingency fee case is because they're taking on risks.
09:35 They may not get anything. They may not collect. They may not
09:35 win the case. And so if you look at Jenner's response on page
09:35 16 which is discussed on slide 17, Jenner says it is true that
09:35 under Texas law a provision in a contingency fee agreement that
09:35 permits a lawyer unilaterally to eliminate the contingency and
09:35 demand immediate payment of a fixed amount is not enforceable.
09:35 You will see that Jenner and Block has, one, unilaterally made
09:36 the decision to terminate the agreement, number two, eliminate
09:36 the contingency, and number three, demand immediate payment of
09:36 a fixed amount. They have admitted that that's not
09:36 enforceable. So where does that happen. That happens if we
09:36 turn to slide 18, and this is Exhibit 8. And if I could hand
09:36 you a copy with your permission.
09:36 THE ARBITRATOR: Sure. Thank you.
09:36 MR. ALIBHAI: This is a highlighted copy. And
09:36 this is a letter from Russell Hoover. This is Exhibit 8 to our
09:36 summary judgment motion. This is a letter from Russell Hoover
09:36 who is firm counsel. And he's writing to counsel for Parallel.
09:37 And you will note that Jenner and Block took the position in
09:37 its response that it has never demanded 10 million dollars. It
09:37 says it, I think, eight times in the course of its response.
09:37 And June 17, 2011, Jenner and Block's own firm counsel sends a

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letter to Parallel's counsel, and the re line is Jenner and Block LLP's fee claim, amount 10.245 million dollars. And he says three very important things in here which under Jenner and Block's own concession in its response and the Hoover Slovacek case make 9(b) clear to be unenforceable.

The first thing he says that I have highlighted in the second paragraph is pursuant to paragraph 9(b) and 9(a)(i), Jenner's fee entitlement for that representation goal is 10.245 million. Jenner terminated the agreement effective February 9, 2009, and since then has received no payment against a fee obligation at all. So he's talking about this fee hasn't been paid since the time they terminated. Then in the fourth paragraph he discusses that the contingency is over when they terminated. He says the agreement is a contingent fee agreement with the contingency applicable up to the date of the agreement's termination. So he says, look, we were in a contingency fee, but once we terminated there's no more contingency. 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. Unilateral option. Jenner's decision. Any time. Upon such termination, Jenner was to receive compensation for all time expended by Jenner and Block up to the termination date at the regularly hourly billing rate. And then he says in the third

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line, with that to be in lieu of the contingent fee applicable to such services. He makes it clear again, look, there's no contingent fee. We get our hourly instead.

And then second full paragraph on page two, this is a very large receivable which is now more than two years past due, not which just came due. More than two years past due. We terminated in February of 2009. It's now June 2011. Parallel Networks has made no payments whatsoever against this liability. And he closes with our position is quite simple. The contract specifically spells out that to which we are entitled on termination of the agreement. So the very things that Jenner and Block say make a provision unenforceable under Texas law, unilateral, eliminate the contingency, fixed amount due is exactly what Mr. Hoover, their firm counsel, said is what their agreement allowed them. And it's not just the position that they took in the letter from their firm counsel. It's the position they took in their demand for arbitration.

On slide 19 I have excerpted two paragraphs from their demand for arbitration. One, in paragraph 18 they tell you exactly what they charged on the Oracle case and what they charged on the QuinStreet case. And then in paragraph 55, which is their breach of contract claim, they say that Parallel Networks breached by failing to compensate Jenner and Block for all time expended at the regular hourly billing rates. The regular hourly billing rates are set forth in paragraph 18.

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And then paragraph 55 they say that's one way in which Jenner and Block is claiming they're breached, again, seeking 10 million dollars.

Now, what's important about this amount is that the QuinStreet amount discussed there is $978,210. And if you turn to the next slide and you flip to the second part of the table first since we were just talking about this, they seek $978,210 of an $850,000 settlement. It's 115 percent of the settlement. Hoover Slovacek, the Court said to the lawyer there that when you use the termination provision to obtain more than what the client received, that's another reason why it's unenforceable. And it's not just of the small case that it's problematic. Even the Oracle case, the amount they're seeking is 9.2 million of the 16 and a half million dollars that the client received, which is almost 56 percent. And to make this point, we have used the gross recovery. The contingent fee agreement required that expenses be netted out. The percentage would be even higher if we subtracted out the over million dollars in expenses that were incurred in these cases.

So the amount of fees that Jenner, one, arranged for in the agreement itself is unconscionable and is now trying to collect and charge is unconscionable. And Hoover Slovacek and the Levine case that it discusses discussed this concept of a fee equaling or as in this case exceeding 100 percent of the

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recovery is not something that a reasonable client would expect, and as a result is unenforceable. They seek more than half of the gross recovery from Oracle and more than the entire recovery from the QuinStreet case.

And one other point in the -- I believe it's attached to our reply, Susan Levy, the managing partner, was deposed over this past summer. And her testimony was that the amount that Parallel Networks owed under the breach of contract claim or the quantum meruit claim, even after she had seen the settlement agreements was 10 million dollars. So they took the position in June 2011 when they sent the demand letter. They took the position in December 2011 when they filed demand for arbitration. And they took the same position during this past summer during the depositions of the managing partner of the firm.

So page 22, the argument that Jenner and Block makes is that this is okay. A lawyer and a client can reach an agreement. And if you will recall, Mr. Grissom, it was one of the telephone conferences we had earlier where they raised this issue about, well, you have to look at the Texas Appellate Court case in the Hoover case. Well, let's look at the Texas Appellate Hoover case. What the Court there said was the expert echoed this argument when he testified that the parties, quote, agreed to an assessment at the time of termination and by contract. For better or for worse, that's what their deal

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09:45 is. And the Court says, of course, not. The very concept of
09:45 Rule 1.04 that we talked about earlier is you can't even enter
09:45 into an arrangement for a fee that would be unconscionable.
09:45 You not only can't charge it, you can't enter into an agreement
09:45 for one that is unconscionable. And that's exactly the
09:45 argument that was made by the expert and the lawyers who were
09:45 trying to get the unconscionable fee in Hoover Slovacek. And
09:45 the Texas Appellate Court said, no, we will look at this. And
09:46 look at what the Texas Supreme Court does when it looks at it.
09:46 It looks at all the different reasons why it finds that such a
09:46 fee would be unconscionable. And the Texas Supreme Court uses
09:46 a very important phrase, heads the attorney wins, tails the
09:46 client loses. And that's exactly what happens in this case.
09:46 If Jenner had performed its contractual
09:46 obligation to litigate those cases and conclude them and had
09:46 concluded them successfully and obtained the result that it was
09:46 supposed to try to recover, and it shared in the risks with its
09:46 client and stuck with its client all the way through the case,
09:46 it would have been entitled to a contingent fee award pursuant
09:46 to paragraph five. But Jenner has got a great little provision
09:46 in here. Jenner says, great. And if the case goes bad like we
09:46 lose summary judgment, we will quit and we will take our full
09:46 hourly rates. There's no circumstance in which Jenner and
09:47 Block withdraws and doesn't get a dime. It always receives
09:47 money. There's nothing contingent about it. The only way that

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09:47 Jenner and Block would never receive a fee under this
09:47 contingent fee agreement is if it pursued the case and the case
09:47 all the way through appeal resulted in no recovery for the
09:47 client and Jenner and Block didn't withdraw. But what does
09:47 Jenner and Block do when the going gets bad, when the summary
09:47 judgment goes against the client, when the final judgment has
09:47 been entered and an appeal has to be taken. Let's withdraw.
09:47 We can always claim nine million dollars later. It's better
09:47 than the contingent fee award. It's better than a third of
09:47 zero. Who knows what will happen down the road. Who knows
09:47 whether this appeal will be successful. Heads Jenner wins.
09:47 Tails Parallel loses.
09:47 The last point that I want to address is this
09:47 issue of just cause. This agreement is unenforceable on its
09:47 face. It's been specifically discussed in the Hoover Slovacek
09:48 case. It's not just the immediate payment in Hoover Slovacek.
09:48 The Court specifically says there are at least five other
09:48 things that makes it unenforceable. Those same five things
09:48 make this one unenforceable. The Wythe case says options where
09:48 the lawyer chooses are unenforceable. But there's another
09:48 problem. There's another reason why Jenner and Block doesn't
09:48 get a fee.
09:48 The Texas Supreme Court has said when it comes
09:48 to how we determine fees in Texas in an attorney-client
09:48 dispute, we have to look at did the client discharge the

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09:48 attorney without cause, did the client discharge the attorney
09:48 with cause, or did the attorney terminate without cause. And
09:48 this is the Augustson case. And the Augustson case, the facts
09:48 are remarkably similar to what happens in this case. When the
09:48 attorney terminates without cause, Augustson and the Texas
09:48 Supreme Court cases on which it rely say you don't get a fee.
09:48 In fact, Augustson says that the Fifth Circuit couldn't find a
09:49 Texas case that it compensated an attorney after voluntary
09:49 withdrawal. This was a voluntary withdrawal.
09:49 Mr. Hoover tells you, Ms. Mascherin tells you
09:49 that at any time when we make the decision that we don't want
09:49 to keep going, we can walk away. That's voluntary. And what
09:49 the Fifth Circuit says, and this is very important because it's
09:49 exactly what happened here, quote, a contrary rule would
09:49 encourage attorneys to withdraw from bad cases on the grounds
09:49 that the client uncooperatively insists on going to trial
09:49 allowing the attorney to avoid the risk of representation
09:49 without losing the benefits of an eventual recovery. That's
09:49 what the Fifth Circuit says in Augustson. That's why we can't
09:49 have a contrary rule because the lawyer would just walk away
09:49 from the bad case and it didn't want to go to trial with the
09:50 attorney.
09:50 If you look at Augustson, it's sort of an
09:50 interesting case because the case deals with a claim brought
09:50 against an airline. The attorneys in that case thought that

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09:50 there was this cap on damages that might be applicable under
09:50 the Warsaw Convention, and that the settlement offers that were
09:50 being made by the other side were quite reasonable in light of
09:50 what may happen at trial. The client just wouldn't go for it.
09:50 The client said, look, we don't have enough information.
09:50 There's potential damages that we don't know about. We don't
09:50 feel comfortable taking the settlement. And so the lawyer
09:50 withdrew and said you're being completely unreasonable. This
09:50 is not a case that you should be trying to try. You should be
09:50 settling. And the client had to hire new counsel. They
09:50 pursued the case. They received a settlement. And the lawyer
09:50 comes back and says, oh, you got a fee, we want part of it now,
09:50 just like Jenner. We don't want to handle the appeal in the
09:51 Oracle case. We don't think it's worth as much as you think
09:51 it's worth. We should just withdraw now. We can always come
09:51 back later.
09:51 Fifth Circuit says you can't do that. And the
09:51 Fifth Circuit doesn't just say it. It's been the Texas Supreme
09:51 Court's position since 1960. When the lawyer doesn't complete
09:51 the contract, he doesn't get a fee. None. It's a harsh
09:51 result, but the reason is you signed up to do one thing and one
09:51 thing only, to represent the client in that case until that
09:51 case was over. If you don't do the thing that you're hired to
09:51 do, don't ask for a fee. And what Jenner says to you is, oh,
09:51 by the way, we have just cause.

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09:51 Well, Augustson goes through an analysis, and
09:52 it's listed on page 26 of the slides, of the different kinds of
09:52 things that constitute just cause, asserting a fraudulent
09:52 claim, failure to cooperate, failure to render services,
09:52 degrading and humiliating an attorney, forces beyond the
09:52 attorney's control, make representation if possible or violate
09:52 ethical obligations, the attorney has insufficient funds to
09:52 pursue litigation. Augustson even talks about a different case
09:52 where the client may have been putting on perjured testimony.
09:52 And they say that's the kind of thing that would be just cause.
09:52 No court has ever held that an unenforceable contractual
09:52 provision can therefore come back around and be your just
09:52 cause.
09:52 Jenner and Block, as the person pursuing the
09:52 breach of contract claim, has the burden of proof. And number
09:52 two, the attorney who claims that he has just cause has the
09:52 burden of proof under Texas law. And they can't cite to a case
09:52 where a Court has ever found the lawyer who decided to withdraw
09:53 because it didn't like the case anymore or it didn't think it
09:53 was worth as much or because it didn't want to handle the
09:53 appeal had just cause. That's exactly the cause that the Court
09:53 said in Augustson was not good enough. The lawyer said if you
09:53 keep going with this, the Warsaw Convention is going to say
09:53 your damages are capped. And as a result, you won't get that
09:53 much. Take this settlement. And the client said, no, and

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09:53 disregarded their advice and pursued it. Just like here, the
09:53 client disregarded Jenner's advice, hired new counsel, expended
09:53 the hourly fees with those new counsel, got the appeal, got the
09:53 Court to reverse the District Court, had the case remanded
09:53 back, pursued it all the way to the courthouse steps, and then
09:53 settled. And now Jenner and Block comes up and goes,
09:53 excellent, pay us. Heads Jenner wins. Tails Parallel loses.
09:54 So with respect to the just cause issue, and the
09:54 other case that's cited there is the Rapp case, which has the
09:54 same concept. The lawyer had walked away from the case. And
09:54 the Court says he withdrew from the case without being
09:54 requested to do so. Wanted no responsibility for the case.
09:54 Wanted to withdraw after an unfavorable Court judgment. These
09:54 are very similar to what happens here. The lawyer in Rapp
09:54 withdraws from the case without being requested to do so by the
09:54 client and wanted no responsibility for the case. Wanted to
09:54 withdraw after unfavorable Court judgment. Same circumstances
09:54 as what Jenner decided here. Doesn't want to have
09:54 responsibility and wanted to withdraw after unfavorable Court
09:54 judgment. And then after the Court of Appeals reversed in the
09:54 Rapp case, the lawyer came back and said, I would like to get
09:54 my contingency fee. The case has been reversed. And the Court
09:55 said he tried to, quote, bootstrap its way back into the case
09:55 after it was reversed by the Court of Appeals and said you
09:55 can't do that under Texas law. And so for all those reasons,

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09:55 paragraph 9(b) of the contingent fee agreement is
09:55 unenforceable. It's a unilateral option. Jenner bore no risk
09:55 and took a proprietary interest in a case which it's forbidden
09:55 to do so by Texas Disciplinary Rule 1.08. It put itself in the
09:55 position of being able to determine when it wanted to stay in
09:55 the case and when it wanted to get out of the case, when a
09:55 contingency fee would be better, when an hourly fee would be
09:55 better. And also under Augustson and the Texas Supreme Court
09:55 authority such as the Royden case and other cases we have cited
09:55 in our papers, that Jenner and Block decided not to initiate,
09:55 prosecute and conclude the Oracle or QuinStreet cases. It made
09:56 the voluntary decision to withdraw from the case. It decided
09:56 to do so in its own interests, put its interests above its
09:56 clients, which the Supreme Court says a lawyer shouldn't do.
09:56 It decided to act in its economic interest having made that
09:56 decision, having a client and other firms to bear all the
09:56 burden of handling the case thereafter. Now wants to come back
09:56 and say we withdraw, but we should have stayed in. We should
09:56 have gotten this fee. But even if we didn't do the work, we
09:56 should still get a fee. And Augustson says when you withdraw
09:56 without just cause, you forfeit your fee. For those reasons
09:56 Jenner and Block's claims against Parallel Networks should be
09:56 dismissed as a matter of law.
09:57 THE ARBITRATOR: You ready to begin?
09:57 MR. JIMENEZ-EKMAN: I am.

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09:57 THE ARBITRATOR: All right. Fire away.
09:57 MR. JIMENEZ-EKMAN: Mr. Arbitrator, I see you
09:57 have some dog-eared copies of the papers here. So it looks
09:57 like you have been doing your homework. I am going to go
09:57 through a presentation as well, but obviously my most important
09:57 function here is to answer any questions you have about what's
09:57 in the papers. So I would like to be able to do that, and I
09:58 encourage you to stop me obviously if you have anything in
09:58 particular.
09:58 THE ARBITRATOR: All right.
09:58 MR. JIMENEZ-EKMAN: We oppose the summary
09:58 judgment motion here for two basic reasons. First of all, it's
09:58 an attempt to circumvent based on inapplicable rules, Parallel
09:58 Networks' basic agreed to contractual obligation in the case.
09:58 The second is that while what you have heard from Mr. Alibhai
09:58 is a closing argument based on the evidence, what he hasn't
09:58 done and can't do is eliminate any factual disputes. There are
09:58 factual disputes on all of the key points that he's just
09:58 mentioned there. And I am going to go through that.
09:58 Now, before I get into the facts here, I want to
09:58 point out that this motion, if granted, will not prevent the
09:59 case from going forward. As you know, this is a motion
09:59 directed only at the breach of contract claim and by its merits
09:59 directed principally at the hourly fee section of the breach of
09:59 contract claim. Jenner and Block has other claims that are

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based on essentially the same evidence. This motion would not shorten or terminate these proceedings. And therefore, in this context it doesn't make sense to rule on any of these issues before you hear all of the evidence.

The basic factual scenario that you have here, as you have seen in the papers, is that Jenner and Block spent more than 22,000 hours of time at a value of approximately 10 million dollars representing Parallel Networks after Parallel Networks, a sophisticated party, had agreed to a specific arrangement. Parallel Networks later settled the claims based on Jenner and Block's work principally for 17 million dollars with a possibility of another 13 million dollars. Not only did Parallel Networks never inform Jenner and Block that they had settled the case, but when Jenner and Block two years later asked, well, did you settle and how much for, they refused to tell us anything about that settlement amount. And indeed, it was not until four months after this arbitration was commenced that we finally learned what those settlement amounts were.

The situation in this case is very unlike the basic factual scenario in the cases that Mr. Alibhai has talked about because the parties had a lengthy, detailed agreement. It specifically permitted, after negotiation regarding the risks parameters between sophisticated parties, Jenner and Block to withdraw if it was in its economic interest to do so. And it promised Jenner and Block certain compensation under

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certain circumstances if Parallel Networks ultimately recovered. You also have a different situation that hasn't really been discussed at all in that Parallel Networks was in default of its primary obligation under the contingency fee agreement from between August 2007 and December 2008. And in addition, you have got the situation that when Jenner and Block provided written notice of its intent to withdraw on January 2nd, 2009, neither party suggested that there was any kind of immediate or non-contingent compensation available. Mr. Hoover's letter, which I will address, doesn't come until more than two years after the termination. So by its deed, Jenner and Block certainly didn't indicate that it believed that it was entitled to a non-contingent fee under the contingency fee agreement.

The motion ought to be denied, Mr. Arbitrator, for two reasons. First, paragraph 9(a)(i) is not barred by the rule against the unilateral right to convert a contingency fee into a non-contingency fee agreement because the language of the agreement does not say that the contingency is eliminated. And Jenner and Block has not asserted that with the exception of this Hoover letter that I realize can be read that way under the law that I will address.

Second, Jenner and Block did not forfeit its fees by withdrawing without just cause for three reasons. First, the parties agreed that it would be cause if it became

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in Jenner and Block's economic interest to not proceed; second, Parallel Networks' material breach of its expense payment obligation; and third, and the cases including the cases relied on by Mr. Alibhai make clear, and this is a basic principle, the issue of cause is a basic factual issue that is not appropriate for summary resolution, not in litigation before a court and certainly not before an arbitrator where the evidence is going to come in anyhow.

Parallel Networks started with a discussion about the purpose of contingency fee agreements and the idea of risk sharing. And in that context, the nature of the client is important. Parallel Networks is a non-practicing entity or a patent troll. It has no other discernible business activities. Mr. Fokas, as managing partner, is an experienced attorney. He was at five different law firms before he joined Parallel Networks or before he formed Parallel Networks. And Mr. Fokas's primary duty was to select outside counsel for patent litigations and generally monitor outside counsel's activities. So we start off in the first instance in a very different situation than, for example, the aggrieved mother of the daughter who drowned in Augustson. We're talking about sophisticated business parties negotiating an agreement. But more than that, it was not Jenner and Block who proposed any of these terms.

On May 29, 2007, Mr. Fokas proposed the

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contingent fee agreement. The agreement was based on an agreement that he previously had with the law firm of Baker and Botts, and that in this case Baker and Botts testified that -- Baker and Botts' lawyer, Kevin Meek, testified it is enforceable as long as it's ethically proper. Mr. Fokas had negotiated that agreement. He gave it to Jenner and Block's Harry Roper, who made minor revisions, mostly taking out the words Baker and Botts and substituting in Jenner and Block. And Mr. Roper at that time gave Mr. Fokas an opportunity to make any further revisions, and Mr. Fokas declined. So you have this agreement that was suggested by Mr. Fokas based on its Baker and Botts' agreement and that was agreed to by Jenner and Block. And that represented a pretty sophisticated approach to this idea of the business of litigation here. And that's the starting point.

From Jenner and Block's perspective, there are four different provisions. And I don't know if you want to turn along. I see you have the exhibits there. But if not, I can go through them.

THE ARBITRATOR: I will be glad to if you give me a guidepost where you're going.

MR. JIMENEZ-EKMAN: I absolutely will. I am talking about the contingency fee agreement here. That's Exhibit 1 to the motion itself.

THE ARBITRATOR: I am there.

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10:06 MR. JIMENEZ-EKMAN: First of all, if you look at page -- looking for the page rather than the provision number here. It's page four of Exhibit 1, and it's paragraph four. And it says, the parties agree that EpicRealm Licensing, that's Parallel Networks' predecessor, shall be solely responsible for the payment of all enforcement expenses. And then it goes on to say, in the event that Jenner and Block is either ordered or paid for any enforcement expenses, EpicRealm Licensing covenants to pay any third party vendors' invoices promptly upon receipt of such invoices or to reimburse Jenner and Block promptly upon receipt of an invoice from Jenner and Block. So you have got what's going to be expensive litigation both in terms of what Jenner and Block is going to put into it and what it's going to cost because you need experts. You need transcripts and so on. And as you later see, the expenses run in excess of a half a million dollars. So you have an unambiguous obligation on the client here, Parallel Networks, to pay for these expenses. And the word used in the agreement is promptly.

Second, if you look at paragraph nine which the parties have sent spent a lot of time on, there's paragraph 9(a) and 9(b) of the agreement that's on pages six and seven. Now, it's kind of a strange structure here because 9(b) is the paragraph that covers Jenner and Block's right to terminate, and it references back to 9(a), 9(a)(i), 9(a)(ii), and

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10:08 9(a)(iii). But before I get to those provisions, I want to point out that the use of unilateral by Parallel Networks over and over again is simply wrong. This is a bilateral right. Either party can terminate. And, in fact, with the exception that if Jenner and Block has been in material breach, it doesn't apply. Essentially it's the same remedies for either party. So you have got these two sophisticated business entities represented by lawyers in the negotiation. And they have agreed to a symmetrical right regarding termination. And as you can see, there are three different aspects to compensation if the agreement is terminated by either party.

The first is shall compensate Jenner and Block for all time expended by Jenner and Block at the regular hourly rates. The second is reimburse Jenner and Block for all previously unreimbursed enforcement expenses. That's 9(a)(ii). And then there's 9(a)(iii). And that says at the conclusion of any enforceable activity pay Jenner and Block an appropriate and fair portion of the contingency fee award based on Jenner and Block's contribution to the result achieved as of the time of termination of this agreement. So what 9(a)(iii) says very clearly is that no payment is due under that provision until the conclusion of an enforcement activity. And that is also obviously part of the parties' contract.

Third, in paragraph 9(b) on page 70 of the agreement, the parties expressly agreed given the expensive and

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10:10 complex and unpredictable nature of these kinds of patent litigations that if Jenner and Block determined that it was not in its economic interest to continue the representation, it could also terminate by providing 30 days notice so long as it complied with all of its ethical obligations in the withdrawal process. So the parties in advance have considered the situation that it becomes economically infeasible for Jenner and Block to pursue what becomes this very, very expensive litigation.

And then fourth, the fourth provision I would like to draw your attention to is paragraph 16 of Exhibit 1. And that's the severability clause. The severability clause is important here because as we have seen, Parallel Networks' attack is principally as a matter of contractual language on 9(a)(i), this hourly rate measure that's contained in 9(a)(i), but that's not the only basis on which Jenner and Block is seeking to recover some compensation for its contribution to this result. Rather, Jenner and Block is also looking to 9(a)(iii) incorporated by paragraph 9(b). And what the severability clause says is if any provision of this agreement or the application thereof to any person or circumstance shall be invalid or unenforceable to any extent -- And I am pausing here and saying this is what Parallel Networks' contention is in this case, that 9(a)(i) is invalid or unenforceable. And then the severability clause continues. It picks up, quote,

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10:11 the remainder of this agreement and the application of such provisions to other persons or circumstances shall not be affected thereby and shall be enforced to the greater extent permitted by law, end quote. So this is a somewhat standard severability clause.

But one thing that I want to point out as we go through here is that it is not discretionary. It doesn't say the Court or the Arbitrator may enforce the rest of the agreement. The parties agreed that the Court or the Arbitrator shall enforce the rest of the agreement.

So to the extent that you, Mr. Arbitrator, would determine that Section 9(a)(i) is unenforceable, and we don't agree that's the case, but even if you did, you need to look at this provision here and determine, well, gee, it seems that I need to enforce that portion of the agreement that is not unconscionable as a matter of law.

After Parallel Networks -- and here I am referring that to include EpicRealm Licensing as predecessor -- and Jenner and Block entered into this agreement, Jenner and Block jumped in with both feet to represent Parallel Networks in both the QuinStreet matter and the Oracle matter. It's uncontested that this was a complex and large litigation. As I said, Jenner and Block spent 22,000 professional and paraprofessional hours. At our normal rates that's over 10 million dollars or approximately 10 million dollars. Jenner

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and Block reviewed more than one million pages of documents produced by the other parties that produced hundreds of thousands of pages on behalf of Parallel Networks. It engaged in what is by far the most expensive aspect of litigating these days oral discovery, taking the depositions of 30 witnesses and defending the deposition of 18 witnesses.

And then, of course, we heard that on December 4th, 2008 in the Oracle matter, the Judge, Judge Robinson, issued a ruling on summary judgment that was obviously unexpected, and ultimately it turns out wrong because it was reversed. So through no fault of Jenner and Block's, the summary judgment was entered against Jenner and Block. I am sorry. Against Parallel Networks in the Oracle case.

Meanwhile, as we -- as Jenner and Block was vigorously representing Parallel Networks, particularly in the Oracle case, Parallel Networks fell farther and farther behind on its obligations to pay out-of-pocket expenses. And we have the chart in our brief essentially between August of 2007 and November of 2008. In addition to all of the professional services that Jenner and Block was rendering, Jenner and Block began to, in effect, loan money to Parallel Networks to pay for the expenses in the case because Parallel Networks was not able or willing to pay those expenses. And here I want to go on a slight diversion, but I think it's an important one. I mentioned the business of Parallel Networks at the beginning.

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The only revenue stream to speak of Parallel Networks was settlement from cases. And Parallel Networks was not highly capitalized in the sense that it had a big bank account that it could draw on to pay those things. Essentially Parallel Networks was at the mercy of settlement agreements or judgments in other cases in order to pay these expenses. And in communications between the parties, Mr. Fokas communicated that his ability to pay the expenses was contingent on his ability to settle other cases or obtain judgments. And, in fact, in I believe it was October of 2008 or sometime before that in recognition of Parallel Networks' inability to meet its obligations, Mr. Fokas asked Jenner and Block whether it would modify the contingency fee agreement, Exhibit 1, in order to obtain the promise of Jenner and Block to pay the out-of-pocket costs and in exchange give Jenner and Block a higher percentage contingency fee. Jenner and Block was not willing to agree to that modification, but in that process Jenner and Block realized that Mr. Fokas was not in a position to promise that Parallel Networks would in the future necessarily be able to meet its obligations, its pretty clear obligations under the agreement.

The next thing that happens as you have heard from Parallel Networks is when the summary judgment ruling is entered by Judge Robinson in December 2008, Jenner and Block has to take stock of the case. The rulings -- both the summary

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judgment ruling and the bifurcation ruling extended the probable life of the case by many years. And it increased the probable expense of the case by many hundreds of thousands or millions of dollars because based on those two rulings at the point in December 2008, in order to obtain a favorable judgment for Parallel Networks, Jenner and Block would have had to appeal the summary judgment ruling on liability and prevail. It would have to come back to the District Court and try the liability case and win. It would have to defend the liability case on appeal, and then it would have to try the damages case in the District Court. And then it would have to defend the damages judgment on appeal. So this, I don't want to say exponentially, but I would say very substantially increased the expense and complexity, and by the way, the expenses, the out-of-pocket costs that Parallel Networks would have to come up with in order to continue the matter.

After deliberating on that issue and reviewing the agreement, on January 2nd, 2009 Jenner and Block exercised its clear, negotiated right under the agreement to terminate it and provided the requisite notice of termination. The agreement was not terminated as of January 2nd, but the notice of termination was given. It is clear based on the contemporaneous documents that are in the record that Jenner and Block did not believe that the contingency fee agreement at that time entitled it to the payment of its hourly fees. And

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at the very least, there is a factual dispute on that. But it's pretty clear that Jenner and Block internally did not consider that to be the case.

If you look at our Exhibit 25, and this is a December 12, 2008 e-mail from Ms. Mascherin, and Ms. Mascherin is writing others in the firm about the status of the case and the options for proceeding. If you turn to the third page, you will see the bolded heading that reads, Our Right To Terminate. And she writes, under our current fee agreement we may terminate on 30 days notice consistent with our ethical obligations. She then says, in the event we terminate and Parallel Networks eventually succeeds in recovering damages, we remain entitled to be paid our fees incurred up to the time of termination at our regular hourly rates to any expenses that are unpaid; and three, 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.

So what's important here is that Terri Mascherin, who is evaluating these issues and advising others in the firm about them, is recognizing internally that the contingency fee agreement, those provisions and particularly 9(a)(i), does not eliminate the contingency. She is saying if there is a later recovery, then we're entitled to these things. And then you will see there's testimony and an e-mail that

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10:21 reflects that Paul Margolis, a Jenner and Block now partner, who was working on the underlying matter, spoke with Mr. Fokas about the termination. And Mr. Fokas asked essentially what will I have to pay if we ultimately recover to Jenner and Block, if we ultimately recover to Jenner and Block, because I need to know that in order to go out and find replacement counsel.

And if you look at the next exhibit, Exhibit 26, this is the termination letter itself. So this is the January 2nd, 2009 letter sent from Mr. Margolis to Mr. Fokas. And the letter obviously makes no demand for immediate payment of any kind. And, in fact, it reflects that any payment would be contingent on some recovery by Parallel Networks. If you look at the concluding paragraph, it says, quote, you have expressed desire to determine how much Jenner and Block would be owed under the agreement in the event Parallel Networks achieves a recovery in any of the matters in which we have been representing the company, end quote. So the dialogue at that time between Jenner and Block, the lawyer most heavily involved in working on the underlying matter at Jenner and Block and Mr. Fokas centers that around not how much are you going to pay us today or how much do you owe us today, but rather in the event that we recover, or I should say in the event that you recover, Parallel Networks, how much you would have to pay us.

At that time Parallel Networks starts exploring

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its options. It is represented by other counsel. And its other counsel, including Ms. Steinberg, begins a negotiation with Jenner and Block. And that's reflected in Exhibits 27, 28, 29, 30 and 31. And I am not going to go through each of these exhibits, but I wanted to draw your attention to them. There is no suggestion in any of these exhibits, this dialogue back and forth that's basically a dialogue and a proposal and a counter proposal. And then ultimately, Mr. Arbitrator, there's no agreement because Parallel Networks decides those terms are not acceptable to them. But what is missing from any of those communications are any of the following things. Number one, any assertion that Jenner and Block was not entitled to withdraw based on the parties' agreement. Number two, any assertion by Parallel Networks that Jenner and Block was not entitled to any compensation for its work thus far. And to the contrary, the parties were attempting to agree on an arrangement where this unliquidated amount that might be due in the future was agreed upon. And number three, and this is most importantly, if you look through this exchange of correspondence and these internal Jenner and Block memos, what you do not see is any demand or suggestion by Jenner and Block that it was entitled to immediate payment of its hourly fees. It's just not there.

I think you know the basics about what happens next. Ultimately Jenner and Block does not proceed to

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represent Parallel Networks in either the Oracle case. In the Oracle case since there was a summary judgment entered, there was no reason or requirement that Jenner and Block file a motion to withdraw. And instead, other counsel came in and Jenner and Block just wrote a note to the Appellate Court, I believe, that said we won't be representing them on appeal. In the QuinStreet case -- and there's been some suggestion here that there was some kind of an objection to the withdrawal in the QuinStreet case. And on this issue if you turn to tab 39 of our exhibits --

THE ARBITRATOR: Give me a second here.

MR. JIMENEZ-EKMAN: Sure.

THE ARBITRATOR: All right.

MR. JIMENEZ-EKMAN: If you turn to page 39 of the exhibits, there were drafts exchanged. And I think those are referenced in Parallel Networks' papers, but they are drafts exchanged of a motion to withdraw. Ultimately you will see that a motion to withdraw was filed. And if you turn to the third page of the exhibit, you will see the text of the motion to withdraw. And if you look at paragraph two, it reads, quote, Parallel Networks and Jenner and Block have mutually agreed to Jenner and Block's withdrawal as counsel for Parallel Networks in this case, period, end quote. So there was not an objection. There was not a contention that Jenner and Block had no right to withdraw. There was mutual

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agreements in the terms of this pleading filed by the Court in which Parallel Networks was represented by its local counsel in the case. So it had other lawyers.

Ultimately, as you have heard, the Oracle case summary judgment ruling of Judge Robinson is reversed by the Federal Circuit. The case comes back. We don't have access to all of the records to determine exactly what was done or how much at the time was expended, but we understand that on remand there were minimal further depositions. There were no further expert reports or expert depositions. No further briefings on summary judgment motions, at least none we can see filed with the Court. And instead, on May 13, 2011 -- So we're now more than two years after Jenner and Block had terminated the agreement. On May 13, 2011 on principally the record created by the 10 million dollars worth of Jenner and Block's work, Parallel Networks settled the Oracle case for approximately 16.5 million dollars with opportunities depending on the result of certain contingencies in the agreement to recover another 13 million dollars. So the potential settlement is almost 30 million dollars, but 16 and a half million as we understand it, has already been paid.

Now, in that two year period, as I mentioned, Jenner and Block made no demand for any compensation. And although QuinStreet -- I'm sorry -- and although Parallel Networks did not advise Jenner and Block that settlements had

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occurred, Jenner and Block was aware that some kind of a settlement had occurred. And it was that that spurred Mr. Hoover to write the letter that Mr. Alibhai has mentioned here. In response to -- I believe it was in response to that letter or at least in connection with the letter, on July 11, 2011 Parallel Networks took the position for the very first time after these two years after trying to negotiate something in January and February of 2009 that paragraph 9(b) of the agreement was unenforceable and declined to compensate Jenner and Block in any way, and as I mentioned, refused to identify even how much Parallel Networks had obtained in the Oracle settlement. And it was at that time that Jenner and Block filed its claim for arbitration that gets us here.

I want to start briefly with a summary judgment rule. As we pointed out in our response brief, Parallel Networks has to show not only that it's entitled to judgment as a matter of law, but that there are no factual disputes as well. And as I have indicated, there are plenty of factual disputes here which I will point out. I also want to point out that as a matter of practice, summary judgment is disfavored in arbitration, and it's disfavored because it prevents the evidence from being considered in its totality and because it can render awards subject to challenge under 9 USC Section 10(a)(3) because the arbitrator has refused to hear all the evidence available on a particular -- the evidence pertinent

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and material to the controversy.

Now, there are two basic arguments that Mr. Alibhai and Parallel Networks have made in their summary judgment motion. The first is the attack on the conscionability or unconscionability of paragraph 9(a) and to the extent that it calls for an immediate non-contingent payment. And the second is that Jenner and Block has forfeited its right to any compensation by withdrawing without cause. And I will take these up in the same order that Parallel Networks presented them.

First of all, the basic premise of Parallel Networks' position that the language of paragraph 9(b) permits Jenner and Block to receive hourly fees on a non-contingent basis if there is no recovery is simply inaccurate. What Mr. Alibhai told you, and I wrote it down, he says Jenner and Block has construed it this way and the agreement does not say that it's not immediate. As I mentioned at the beginning, this may or may not be an appropriate argument after the evidence is in and on the merits in closing argument, but it isn't an appropriate summary judgment because, as I'll point out, Jenner and Block has not construed the agreement that way, or at least at the very least there is substantial evidence we haven't construed the agreement that way. And the idea that an agreement means one thing because it doesn't say the other shows on its face that there's ambiguous language there that

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would be subject to parole evidence.

We do start from a different legal place than Parallel Networks on the nature of the agreement. And the Texas law, while there are ethical restrictions on fee agreements and on contingent fee agreements, within the limits placed by the ethical rules of public policy, a lawyer's agreement is a matter of contract between the lawyer and client. And basically it's enforced as written when it's expressed in plain and unambiguous language. And we cited a couple of cases, the Polybutylene case and the Fulbright case. The Polybutylene case, a judge sua sponte took it on himself to evaluate the reasonableness of the fees in thousands of individual fee agreements. And the Appellate Court said, no, you can't do that. And the only issue was whether there was a specific ethical violation.

We do agree that the Hoover case stands for the proposition that you can't contract to demand an immediate non-contingent, fixed payment if you withdraw without cause. But that's not what happened here, and that's not what the agreement called for. If you look at the agreement in the Hoover Slovacek case, what it provided for was that it provided for the following. Mr. Arbitrator, the agreement in the Hoover Slovacek case said, quote, you may terminate the firm's legal representation at any time. Upon termination by you, you agree to immediately pay the firm the then present value of the

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contingent fee described herein, plus all costs then owed to the firm, plus subsequent legal fees incurred to transfer the representation to another firm and withdraw from litigation. That's on -- that's page four on the Westlaw copy, page 558 of the opinion in the Southwest Reporter. So that is a very different provision than we have here.

And I want to point out that there are two different things involved here. The first is the timing of the payment. And the second is whether the payment is contingent or non-contingent. So the use of the word immediately in the agreement that's at issue in Hoover Slovacek implicated both of those things. First of all, it said immediately, that means right away, but it also makes clear that the contingency has been eliminated. There's unambiguous language in the Hoover Slovacek agreement that says the contingency is gone. And if you separate those two things out, you will see that it's very, very different than the situation we have here, and that's for three reasons.

First of all, paragraph 9(b) as Mr. Alibhai concedes does not specify time at which Jenner and Block's hourly fees would be due. There is nothing in the language of the paragraph one way or the other which indicates that anything would be due immediately. And as I have described, the facts show that neither Jenner and Block, nor Parallel Networks interpreted it that way. Other indicia in the

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10:37 agreement seem to indicate that the contingency is not
10:37 eliminated. I mean the title is a contingent fee agreement.
10:37 Payment -- There is a provision in paragraph five. Paragraph
10:37 five of the contingency fee agreement indicates that payment is
10:37 due within 30 days of Parallel Networks' receipt of proceeds.
10:38 So that also indicates that payments remain contingent.
10:38 The second thing is if you look at paragraph
10:38 9(b), which as we have indicated, references 9(a). So 9(b) is
10:38 the Jenner and Block termination provision. It brings in the
10:38 identical provisions in 9(a). What it says is, quote, if
10:38 Jenner and Block terminates this agreement, it shall continue
10:38 to be entitled to receive compensation from EpicRealm Licensing
10:38 pursuant to little one, little two and little three in the
10:38 preceding paragraph up to the date of such termination. And
10:38 the use of the words it shall continue also lend very
10:39 substantial support to the idea that this was not creating
10:39 a new right to immediate payment, but it was continuing an
10:39 existing right of contingent payment.
10:39 The third reason that this interpretation won't
10:39 fly is that at the very most, as I indicated before, Parallel
10:39 Networks' argument shows that the agreement is ambiguous.
10:39 Paragraph 9(b) does not expressly say when payment is due. To
10:39 the extent that the Arbitrator finds that the rest of the
10:39 agreement isn't a sufficient indicator, you have got an
10:39 ambiguity, and Jenner and Block is entitled to present parole

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10:39 evidence on that. I mean the first thing that we would say on
10:40 that evidence is that to the extent that one interpretation,
10:40 the non-contingent immediate interpretation is, in fact, void
10:40 as unconscionable, you shouldn't give the language that meaning
10:40 because, as you know, it's a basic rule of construction that if
10:40 you have one permitted interpretation and one interpretation
10:40 that's not permitted, you ought to favor the one that is
10:40 permitted under the law. But even if you don't follow that
10:40 rule of construction, and you do determine it's ambiguous,
10:40 Jenner and Block is entitled to introduce the parole evidence
10:40 that I have been talking about, including the course of
10:40 dealings what it was saying internally in October, November and
10:40 December of 2008, what it said to Mr. Fokas and Mr. Fokas's
10:40 lawyers and representatives in early 2009. All of those things
10:41 would be admissible to show that, in fact, nobody thought that
10:41 this required immediate payment.
10:41 So that -- just to be clear about that evidence
10:41 that we have outlined, it would be the testimony of Parallel
10:41 Networks' principal, Mr. Fokas, that he never interpreted the
10:41 agreement requiring immediate payment. It would be the
10:41 testimony and contemporaneous document showing that Jenner and
10:41 Block reviewed the recovery as contingent including especially
10:41 the termination letter itself, as well as Ms. Mascherin's
10:41 memos. It would be the testimony and documents regarding the
10:41 post-termination negotiations over what would be paid in the

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10:41 event Parallel Networks ultimately recovered. And it would be
10:41 the testimony of Kevin Meek, one of the lawyers for Parallel
10:41 Networks, that a recovery under paragraph 9(b) can be
10:41 permissible, in other words, is not excluded as a matter of
10:42 law.
10:42 Let me talk now about the letter from Mr.
10:42 Hoover. Mr. Hoover wrote this letter after hearing that there
10:42 had been a settlement and --
10:42 THE ARBRITRAOR: If I can stop you for one
10:42 second. Let me put my eyes on it again. I don't have all the
10:42 exhibit numbers memorized.
10:42 MR. JIMENEZ-EKMAN: I apologize.
10:42 THE ARBITRATOR: No apology needed. I wanted to
10:42 be seeing it while you're talking about it.
10:42 MR. ALIBHAI: That's the letter I gave you the
10:42 copy of.
10:42 MR. JIMENEZ-EKMAN: Exhibit 8.
10:42 MR. ALIBHAI: Exhibit 8 to our motion. I can
10:42 give you a separate copy if that's easier.
10:42 THE ARBITRATOR: Well, if this one has a number
10:42 on it, I am going to go with that one. Thank you though. I
10:42 appreciate it. Okay.
10:42 MR. JIMENEZ-EKMAN: So Mr. Hoover in June of
10:42 2011 after hearing that there had been a settlement but not
10:43 hearing that from Parallel Networks -- And I should note that

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10:43 Mr. Hoover was not one of the lawyers who had worked on the
10:43 underlying matter at all. As indicated he's one of the firm
10:43 counsel. Wrote this letter which you have been shown. It's
10:43 Exhibit 8, and Mr. Alibhai has quoted extensively from. We
10:43 recognize that the letter can be read -- it's possible to read
10:43 it in the way Mr. Alibhai suggests. And that is to say that
10:43 the letter seems to be written from a point of view that the
10:43 contingency was eliminated. Respectfully the letter is wrong.
10:43 The letter does not reflect the position of Jenner and Block at
10:43 the time or for the over two years after the termination. And
10:43 it was frankly a failure of some institutional memory. So we
10:44 recognize that if it were our summary judgment motion, that Mr.
10:44 Hoover's letter might create a factual dispute on what the
10:44 folks at Jenner and Block were thinking. But it's not Jenner
10:44 and Block's motion. It's Parallel Networks' motion. And
10:44 there is nothing about Mr. Hoover's letter that makes it a
10:44 judicial admission or binding by some estoppel or anything like
10:44 that on Jenner and Block. Rather it's one piece of evidence
10:44 for you to consider at the entire hearing to determine whether
10:44 or not the parties gave the agreement the construction that Mr.
10:44 Alibhai has put on it.
10:44 Let me also address the contention that somehow
10:45 our arbitration demand in this case reflects the idea that we
10:45 think that we're entitled to a non-contingent 10 million
10:45 dollars. That's just not the case. And unfortunately, I don't

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have a full demand here. But if you look at the slide, it's slide 19 from Mr. Alibhai.

THE ARBITRATOR: I'm there.

MR. JIMENEZ-EKMAN: So Parallel Networks here has called out two paragraphs from our arbitration demand. The one, first one is paragraph 18. And it indicates that the work provided by Jenner and Block on the Oracle case comprised at least $9,217,231.25 at the firm's standard billing rates. The work on QuinStreet was at least $978,210. And the re-examination matter was at least $61,118.75 using standard billing rates. So those, Arbitrator Grissom, are just factual recitations of what the amounts were at those rates. Paragraph 55 is also an allegation regarding the facts in the case. Parallel Networks has further breached paragraph nine of the agreement by failing and refusing, one, to compensate Jenner and Block for all time expended at the regular hourly billing rates; or two, to pay Jenner and Block an appropriate and fair portion of the contingency award based upon Jenner and Block's contribution to the results achieved. In other words, this is an allegation regarding breach.

The demand for relief, the claim for relief -- and I apologize that I don't have the language with me -- does not ask for any particular amount. It certainly doesn't ask for 10 million dollars or anything like that. It asks you to look at all the evidence that we're going to permit -- that

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we're going to present. And it asks you to enter either an appropriate portion of the contingent fee award or whatever other number you determine is appropriate. So it's not the case that Jenner and Block has taken the position in this arbitration that it's entitled to 10 million dollars. And, in fact, the expert reports, and I know you have gotten a lot of paper, so I don't know if you happen to have read this particular expert report, but we have an expert that has submitted some proposed calculations for your consideration. And none of those are requesting 10 million dollars. So it's not the case that Jenner and Block has taken the position that in this arbitration that it's due 10 million dollars, and that it was a non-contingent 10 million dollars.

Let me move on past paragraph 9(a)(i) and talk about an alternative argument that Parallel Networks has simply not adequately addressed here. The Hoover Slovacek case that we have spoken so much about did not determine that given the unconscionability of the one provision that they held void that Hoover Slovacek was not entitled to any fees. In fact, the Court on page 10 of the Westlaw opinion, page 565 in the Southwest Reporter, says quote, our conclusion that Hoover's termination fee provision providing for immediate payment is unconscionable does not render the party's entire fee agreement unenforceable. And then it cites for statement Section 208, statement of contract Section 208 which says if a contract or

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term thereof is unconscionable at the time the contract is made a Court may refuse to enforce the contract or may enforce the remainder of the contract without the unconscionable term or may so limit the application of any unconscionable term as to avoid any unconscionable result. And then Hoover Slovacek goes on to say, quote, severing the termination fee provision, comma, the remainder of the fee agreement is unenforceable, end quote. I'm sorry. Is enforceable, not unenforceable. Enforceable.

So what you have in this instance, you not only have this general rule under Hoover Slovacek, but you also have, as I pointed out, paragraph 16 of the contingent fee agreement. And it tells you respectfully what to do if you did determine that this immediate payment -- First of all, if you determine contrary to the language and the construction of the parties that some immediate payment was required and you determined that it was unconscionable, it tells you, as I pointed out earlier, that you shall enforce the rest of the agreement. Now, a part of the rest of the agreement here is a very express and I would say unambiguous requirement that Jenner and Block be paid its fair and appropriate -- actually its appropriate and fair contribution.

Again, if you look back at the contingent fee agreement Section 9(a)(iii), it says at the conclusion of any enforcement activity, pay Jenner and Block an appropriate and

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fair portion of the contingent fee award based upon Jenner and Block's contribution to the result achieved as of the time of termination of this agreement. And then it says to the extent Jenner and Block has not already been compensated. So we -- even assuming you find that 9(a)(i) is unambiguous and means what Parallel Networks says it means, and therefore, even assuming you find that it's unconscionable for some reason, you have Hoover saying that doesn't mean you get no fee. It means you look at the rest of the contract.

You have paragraph 16 saying you sever out the thing that is unenforceable and you apply the rest. And then you have a very reasonable and equitable provision in the contract which allows you as the Arbitrator to determine what's fair and reasonable. And so even if you accept all the other arguments from Parallel Networks, you are still going to be making an award that's fair and reasonable under the contract. So that's my argument -- Jenner and Block's argument regarding the paragraph 9(a), and in particular 9(a)(i).

The second broad argument that Parallel Networks has that Jenner and Block somehow forfeited its right to compensation by withdrawing without just cause. The principal case on which the -- on which Parallel Networks relies for that argument is the Augustson case, which Mr. Alibhai described some of the facts in that case. And if you have read it, you may recall, yes, it's an aggrieved mother who was in basically

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10:53 a plane crash with her daughter and the daughter was not able
10:53 to get out. And the daughter dies, and the mother is the
10:54 survivor. So there's a claim obviously by kind of a very
10:54 typical personal injury type claim by an unsophisticated party
10:54 who was not represented by a lawyer in negotiating the
10:54 agreement. What Augustson says in that case is that if the
10:54 contract is silent as to post-termination because there was no
10:54 provision in the agreement about what happens when the lawyer
10:54 withdraws or under what circumstances the lawyer may withdraw,
10:54 and if the lawyer terminates without cause and if the client
10:54 does not assent, that lawyer forfeits her fee. So that was the
10:54 circumstances of the Augustson case.
10:54 You obviously -- you don't have that situation
10:54 here. The Lawyer's Manual of Professional Conduct and the
10:54 Appellate Court decision in Hoover Slovacek says the parties
10:54 may alter the above rules by providing in the fee agreement for
10:54 the fee that will be paid upon discharge as long as the fee is
10:54 reasonable in light of the work performed. So you have got a
10:54 very different factual situation with very different policy
10:54 indications than you have in the Augustson case. And here you
10:55 have got two sophisticated parties both represented by counsel
10:55 bargaining about what will happen in the presence of risk in a
10:55 case that involves many millions of dollars. And as part of
10:55 that, Parallel Networks offers to Jenner and Block -- it wasn't
10:55 Jenner and Block's suggestion. It was Parallel Networks and

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10:55 Mr. Fokas, who is a lawyer. He offers to give Jenner and Block
10:55 as part of the overall deal between the parties the ability to
10:55 withdraw if Jenner and Block determines it's not in its
10:55 economic interest.
10:55 Now, under those circumstances, which are not
10:55 covered by any of the cases cited by Parallel Networks, it is
10:55 not per se or invalid against public policy. And the only
10:55 question is whether the resulting fee is unconscionable. And
10:56 as we pointed out in our brief, there's a multi factor test
10:56 under Texas law that depends on a variety of facts such as the
10:56 time and labor required, the likelihood the lawyer will forego
10:56 other work, the customary fee. And all I am going to say about
10:56 those things right now is that Parallel Networks has not
10:56 addressed them in its brief or its argument. It hasn't
10:56 attempted to go through this multi factor test laid out in the
10:56 Hoover Slovacek case. And it's laid out from the rule. That's
10:56 going to be a factual question that you will decide after
10:56 hearing all the evidence.
10:56 So we respectfully submit the default rule that
10:56 is described in Augustson in the absence of any agreement about
10:57 this doesn't apply here. But second, even if the default
10:57 rule -- even if there were a situation where Jenner and Block
10:57 had to demonstrate just cause rather than rely on the agreement
10:57 between the sophisticated parties, Jenner and Block's
10:57 withdrawal was not a forfeiture because it had cause to

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10:57 terminate or for present purposes. And I think this is the
10:57 most important thing, there's a factual dispute about whether
10:57 it had cause to terminate. It's true that in the Augustson
10:57 case, the clients not only refused to accept the settlement
10:57 recommendation of the lawyers, but the client refused to
10:57 authorize any demand at all. And here, however, the parties
10:57 agreed what would constitute cause.
10:57 So, first of all, Parallel Networks proposed and
10:57 agreed in advance of the engagement that Jenner and Block's
10:57 economic interests would constitute cause for it to withdrawal.
10:57 And we cited some cases. I mean, parties can define what cause
10:58 is. You can agree in advance what cause is. And there's no
10:58 indication that -- There's no opinion -- There's literally no
10:58 opinion that we found or that they have found that addresses
10:58 the issue of just cause on the facts as they are here where the
10:58 parties have agreed as to what constitutes cause.
10:58 So the parties have agreed that Jenner and Block
10:58 could determine that it was not in its economic interest to
10:58 continue and that Jenner and Block would be permitted and still
10:58 receive compensation. And Jenner and Block made that
10:58 determination.
10:58 Second, there is at the very least a factual
10:58 dispute as to whether or not Jenner and Block had just cause
10:58 based on Parallel Networks' long-time failure to pay the costs
10:59 and out-of-pocket costs in the case. And as Mr. Alibhai

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10:59 pointed out, there's a set of circumstances that have
10:59 constituted just cause. And the Augustson case says generally
10:59 just cause exists when the client is engaged in culpable
10:59 conduct. Thus, for example, courts have found just cause where
10:59 the client -- and I am omitting many things on the list, but
10:59 the thing that is important here is, quote, refuses to pay for
10:59 services, end quote. And we have cited the IntelliGender case
10:59 as well that found good cause to withdraw because the clients
10:59 failed to fulfill their obligations to the attorneys, including
10:59 an obligation to pay the fee as requested.
10:59 So we have put in evidence that's in the summary
10:59 judgment record. And you were looking at the chart earlier
10:59 that over a period between August of 2007 and December 2008,
11:00 Parallel Networks breached its obligation to promptly pay more
11:00 than $500,000. And it's true that in December of 2008,
11:00 Parallel Networks made a payment which brought it current
11:00 except for the expenses that had been incurred since the last
11:00 bill, but it was in default that entire time. And Jenner and
11:00 Block was improperly -- I shouldn't say improperly -- was to
11:00 its disadvantage serving as a bank for Parallel Networks during
11:00 that time.
11:00 Jenner and Block also knew that Parallel
11:00 Networks' source of funds was unreliable. And it was
11:00 reasonable for Jenner and Block to consider, gee, Parallel
11:00 Networks has not been able to meet its obligation, its primary

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11:00 obligation under the agreement for a year and a half. And
11:00 there is no assurance it will be able to do so in the future.
11:01 And under that circumstance in addition to all the other
11:01 agreements the parties had, that can constitute just cause, and
11:01 at the very least it creates a factual question. You ought to
11:01 hear all the evidence on that issue.
11:01 Finally, we don't think there's a forfeiture
11:01 because Parallel Networks assented to withdrawal. And the
11:01 Augustson case says, quote, when both parties assent to the
11:01 contract's abandonment, the attorney can recover for the
11:01 reasonable value of the services rendered, end quote. So when
11:01 both parties assent, you can get the reasonable value of
11:01 services which is essentially what paragraph 9(a)(iii) calls
11:01 for. And the evidence that we have put in shows that Parallel
11:02 Networks agreed in two different ways.
11:02 First of all, Parallel Networks agreed in
11:02 advance in writing to Jenner and Block's withdrawal as if it
11:02 was in the firm's economic interest. And that's in paragraph
11:02 9(b). So you have an advanced agreement.
11:02 Second, as I have indicated, when advised of
11:02 Jenner and Block's decision to terminate, Parallel Networks did
11:02 not object and did not take the position that it was not Jenner
11:02 and Block's right to do so. As I said, there were attempts to
11:02 negotiate a fee to which Jenner and Block would be entitled to.
11:02 And as I pointed out, although Parallel Networks argues that it

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11:02 struck the word consent out of the motion to withdraw in the
11:02 QuinStreet case, in fact, the motion specifically says that
11:02 Parallel Networks and Jenner and Block mutually agreed to
11:02 withdraw. Under those circumstances, at the very least there
11:03 is a factual question as to whether or not Parallel Networks
11:03 assented to withdrawal; and therefore, under Augustson remains
11:03 entitled to compensation in the case. Here, the parties also
11:03 specifically agreed that the compensation would be in the form
11:03 of either 9(a)(i), 9(a)(ii), and 9(a)(iii). And 9(a)(iii)
11:03 essentially very closely mirrors what the Court held in
11:03 Augustson.
11:03 I have gone on at some length, and I appreciate
11:03 your patience. If there are any questions, I am happy to
11:03 answer them, but that's Jenner and Block's presentation on the
11:03 summary judgment motion.
11:03 THE ARBITRATOR: Thank you. We have been going
11:03 for a while. Are you anticipating some short reply on this?
11:04 MR. ALIBHAI: Sure. Do you want to take a short
11:04 break before we do that?
11:04 THE ARBITRATOR: I was going to ask you all that
11:04 very question. Would you like to do that for five minutes and
11:04 come back here?
11:04 MR. ALIBHAI: That would be acceptable.
11:04 THE ARBITRATOR: Very good. Let's do that.
11:04 We're off the record.

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11:11 (A short break ensued.)
11:11 THE ARBITRATOR: We're back on the record. Mr.
11:12 Alibhai.
11:12 MR. ALIBHAI: Arbitrator Grissom. I think the
11:12 first and fundamental point that we need to address is or has
11:12 Jenner and Block demanded 10 million dollars. And I told you
11:12 that Mr. Hoover made that demand on June 17, 2011. And now Mr.
11:12 Jimenez-Ekman, a partner of his, would stand up and say that
11:12 doesn't mean anything. It's the firm counsel. It's on Jenner
11:12 and Block letterhead. He says he has the authority to deal
11:12 with these issues, but let's say that that's right. Let's
11:12 say -- let's not take into account the June 17, 2011 letter. I
11:12 showed you the provisions in the demand for arbtiration where
11:12 they said that the amounts that were incurred were over 10
11:13 million dollars and that their breach of contract claim was the
11:13 10 million dollars. It's paragraph 18 and paragraph 55. Do
11:13 you have the demand for arbitration?
11:13 The demand for arbitration closes, contrary to
11:13 what Mr. Jimenez-Ekman just told you, Jenner and Block requests
11:13 judgment in its favor against Parallel Networks in entry of a
11:13 finding arbitration order requiring Parallel Networks and
11:13 EpicRealm to compensate, reimburse and pay fees to Jenner and
11:13 Block either at its standard hourly rate, an inordinate amount
11:13 of its fair compensation. Again, they have asked for the 10
11:13 million dollars. This was in December. That's what they want.

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11:13 That's what they have always wanted. They didn't want the
11:13 contingency. The contingency when they left the case was that
11:13 there was zero of zero dollars available. Okay. So whoever
11:13 drafted that was wrong too.
11:14 Susan Levy's testimony is attached to our reply.
11:14 It's Exhibit 1. What amounts is Jenner and Block seeking under
11:14 each of those counts. What are the fees that Jenner and Block
11:14 is claiming as its standard hourly rates. I don't have it. I
11:14 don't have the final numbers. It may be in the somewhere like
11:14 10 million dollars. I don't have the final number. Around 10
11:14 million dollars, something like that. And then I asked her --
11:14 THE ARBITRATOR: If I can stop you. Are you
11:14 reading from something?
11:14 MR. ALIBHAI: I'm sorry. That's Exhibit 1 to
11:14 our reply. That's Susan Levy, the managing partner today and
11:14 the managing partner during the time that this was going on,
11:14 testifying in May 30, 2012 that Jenner and Block received 10
11:14 million dollars in its standard hourly fees. The reply.
11:15 Sorry. The reply brief.
11:15 THE ARBITRATOR: All right. I thought these
11:15 were -- Are these your exhibits? I'm looking at your exhibits
11:15 for your response. I thought these were all cases.
11:15 MR. LOWENSTEIN: It may be at the back of the
11:15 notebook of the reply.
11:15 THE ARBITRATOR: I thought you said it was tab

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11:15 number one.
11:15 MR. ALIBHAI: Of the reply brief, which is filed
11:15 July 3rd.
11:15 THE ARBITRATOR: You're talking about your
11:15 response, right?
11:15 MR. ALIBHAI: Our reply. We're the Movant.
11:15 THE ARBITRATOR: I'm sorry. I am looking at the
11:16 wrong notebooks. I have your exhibits here somewhere.
11:16 MR. ALIBHAI: I will hand you my copy.
11:16 THE ARBITRATOR: You don't need to. I was just
11:16 in the wrong book. Sorry for the confusion. Now in which
11:16 exhibit is that?
11:16 MR. ALIBHAI: Exhibit 1 to the July 3rd reply
11:16 brief.
11:16 THE ARBITRATOR: I thought you were reading from
11:16 Ms. Levy's testimony.
11:16 MR. ALIBHAI: Yes.
11:16 THE ARBITRATOR: I'm sorry. I promise. I will
11:16 get there. Your exhibits got separated. I am there. I
11:16 apologize for the interruption. If you will tell me what page
11:16 you're on, I would appreciate that.
11:17 MR. ALIBHAI: Let's start with page 66, line
11:17 seven. I asked her what amounts Jenner and Block was seeking
11:17 under each of the counts. And then she recites from paragraph
11:17 70. And I asked her at the bottom of that page, line 24, what

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11:17 are the fees that Jenner and Block is claiming as its standard
11:17 hourly rates because she had just read me this paragraph that's
11:17 up on the screen. And she says somewhere like 10 million
11:17 dollars.
11:17 And, Arbitrator Grissom, it's not just their
11:17 breach of contract claim that they think that they're entitled
11:17 to 10 million dollars. On page 68 I asked her what was the
11:17 fair compensation -- the second part of this phrase -- what is
11:18 the fair compensation in light of the benefits received by
11:18 Parallel Networks. What's that amount. That's at the top of
11:18 page 68. And she says at the bottom on line 21, well, they got
11:18 the benefit of 10 million dollars of legal work from Jenner and
11:18 Block. So my personal opinion is it's 10 million dollars. And
11:18 she goes on to say we have sent these invoices. That's the
11:18 amount we get either as an attorney's fee for the standard
11:18 hourly rates or as for compensation.
11:18 So numerous times starting with Mr. Hoover in
11:18 June 17, 2011, their own pleading filed in this case which has
11:18 never been amended in December of 2011 and the managing partner
11:19 of their firm in May 2012 after she had seen the settlement
11:19 agreements because she even mentions the settlement agreements
11:19 on those pages that there's value received by Parallel
11:19 Networks. So this idea that they have not asked for 10 million
11:19 dollars is just not true. Maybe they don't want to ask for it
11:19 anymore because they realize it's an unconscionable fee, but

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11:19 they asked and they asked a lot.
11:19 They want you to avoid making a decision and
11:19 claim that, one, you can't make a decision on this issue, and
11:19 two, that there's some factual dispute. With respect to the
11:19 ability to make a decision on this issue, the Hoover Slovacek
11:19 case says, on the other hand, whether a contract including a
11:20 fee agreement between attorney and client is contrary to public
11:20 policy and unconscionable at the time it is formed is a
11:20 question of law. So there's no evidence required to make this
11:20 determination. There's no factual dispute. You look at the
11:20 agreement. You consider the factors that Hoover Slovacek has
11:20 set forth, and you determine whether the agreement itself is
11:20 contrary to public policy and unconscionable. The only factual
11:20 dispute that I heard today was some issue about payment of
11:20 expenses in the future and the question about whether Mr.
11:20 Hoover was wrong when he sent this letter. They can't create a
11:20 fact question by standing here and arguing that Mr. Hoover is
11:20 wrong. They didn't get an affidavit from him. They didn't
11:20 even make him available for deposition in this case. They
11:21 didn't list him as a person with knowledge. So there is a
11:21 legal question to be decided. We asked for leave. They didn't
11:21 object to us getting leave to file this motion for summary
11:21 judgment. And, in fact, have asked for leave from their own
11:21 motions for summary judgment.
11:21 What Jenner argues again, even after having read

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11:21 Hoover Slovacek is a contract is a contract. Well, if that's
11:21 the case, why is the Supreme Court of Texas in the Hoover
11:21 Slovacek case going through this entire analysis. Why is it
11:21 looking at that contract. Why didn't they just give that
11:21 lawyer that fee. It was bargained for. It said if you fire
11:21 me, here's the liquidated amount I get. Why couldn't he do
11:21 that. And the Supreme Court of Texas laid out five or six
11:21 reasons why he couldn't do that. And I think we went through
11:21 some of those this morning.
11:22 One of the things that Jenner raises today is,
11:22 well, if it's silent as to the issue, that's okay. And to the
11:22 extent that we haven't done so before, we're now raising
11:22 ambiguity on the contract that we're suing on. Hoover Slovacek
11:22 says silence is not okay. Page 565, the Court says on the
11:22 contrary. The contract is silent with respect to valuation.
11:22 Nevertheless, its silence in that respect exposes an additional
11:22 defect. The contract fails to explain how the present value of
11:22 the claims will be measured. It says lawyers have a duty at
11:22 the outset of representation to inform a client of the basis or
11:22 rate of the fee and the contract's implications for the client.
11:22 For these reasons, the failure of the lawyer to
11:22 give at outset a clear and accurate explanation of how a fee
11:23 was to be calculated weighs in favor of a conclusion that the
11:23 fee may be unconscionable. They were the lawyers. They had
11:23 these obligations. And I find it interesting that today they

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would stand up and say, well, the draft was sent to us by Mr. Fokas. Baker Botts had used it before. This is a multi national law firm that specifically decided to use an agreement. Wants to claim the benefit of that agreement and now says if there is any ambiguities, construe them against the client. The very opposite of what the Texas Supreme Court says is the lawyer's obligation as the fiduciary to look out for the client's interest especially when you're drafting the agreement, to have the most highest level of ethical conduct in dealing with your clients. The punctillio of an honor is the standard of behavior is what the Supreme Court says. And that's why they will look at a fee agreement. That's why they will look at it and say did you comply with your ethical responsibilities.

What does Jenner say. Don't blame us. Blame Baker Botts. Blame Terry Fokas. And also there's a provision in the agreement that says don't construe it against anybody, especially the drafter. And so they want you to ignore that provision and now say construe it against somebody else. What did the Texas Supreme Court say when they said there was silence in there as to the valuation. What does it mean to be a fair and appropriate portion. Mr. Jimenez-Ekman was there yesterday when their expert was deposed. The expert report that he's talking about that was submitted to you, the person says there's multiple ways to value it. One result is 3.2

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million. One way is 4.6 million. That's exactly what the Court said is not appropriate. If you can't tell looking at the contract what the client has to pay, that's a defect. It makes it unconscionable. The Supreme Court says that on page 565.

Now, what's interesting about what Mr. Jimenez-Ekman says is on December 4th, 2008, you get this awful decision. It's awful from the sense that it dooms the case. And it's awful from the sense that Jenner just didn't like it. He says on December 4th, 2008, Jenner had to take stock of the case. That's exactly what the lawyer in Augustson did. That's exactly what the lawyer in the case in Rapp did. They took stock of the case. They said we don't like it. Way too much time and money involved. Now we have to go on appeal. What a pain. What a cost. We don't want to do that. We would rather be out.

And the Supreme Court of Texas says the lawyer has the opportunity with a provision like this to, quote, escape the contingency as soon as practicable and take on other cases, thereby avoiding the demands and consequences of trials and appeals. Jenner made that decision. It had all the information. It had been representing Parallel Networks for a year and a half. It argued the summary judgment motion that it lost, and it didn't want to take the appeal. So it said let's escape the contingency. If we sue later, we get our standard

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hourly rate. Mr. Hoover said it. Mr. Pelz said it when he filed the demand for arbitration. Ms. Levy said it when she testified under oath we get 10 million dollars without having -- by avoiding the demands and consequences of trials and appeals.

Now, again, as it is in their papers, you hear this issue about the expenses and that somehow a basis for termination that was never raised in the letter that was sent on January 2nd is now the reason they terminate it. It can't be the reason they terminate it. If you turn to the reply again, Arbitrator Grissom, and you look at the testimony from Ms. Mascherin -- This is Exhibit 8.

THE ARBITRATOR: You're talking about --

MR. ALIBHAI: The reply again.

THE ARBITRATOR: Your reply?

MR. ALIBHAI: Our reply, Exhibit 8. This should be Ms. Mascherin's testimony.

THE ARBITRATOR: All right.

MR. ALIBHAI: If you turn with me to page 92, line three, I asked her, and as of December 24, 2008, the breach was gone. At that point in time there was no active breach, correct. Question, it was cured. Answer, yes. So they had no basis to terminate based upon this alleged breach. Realizing that today, Mr. Jimenez-Ekman says to you, well, it wasn't just that they hadn't paid in the past and that they had

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sent this half a million dollars on December 24th. It was the future. And he pointed you to an exhibit. And if you turn with me to that exhibit, it is page -- it's Exhibit 25 of their response. This is the document that Mr. Jimenez-Ekman showed you earlier. It should be an e-mail from Terri Mascherin dated December 12.

THE ARBITRATOR: All right.

MR. ALIBHAI: If you will turn to the bottom of the first page, and she's talking about possibility of payment of outstanding expenses. And she talks about how the client had told them that there were settlements coming in and money coming in. And if you look down about five sentences down, five lines, if that is the case, the client should also have enough money to pay us a retainer to cover the expenses for trial if that trial has to proceed in January. And then she talks about the estimation of those expenses being 157,000 or $365,000. They themselves admitted there was no breach. It had been cured, and there was money available to pay future expenses for the trial. This is not a question of expenses.

And let me clear about one thing. The reason that they're not relying on this breach thing is because Texas Disciplinary Rule 1.15 requires a lawyer who's going to withdraw on the basis of a client's failure to fulfill an obligation to give notice to the client that it will withdraw if the obligation is not fulfilled. To the extent that they

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11:31 ever gave such notice, the client fulfilled the obligation.
11:31 Mr. Jimenez-Ekman told you that other than un-billed expenses,
11:31 it was paid as of December 24th. Their own chart that he
11:31 points you to shows that the outstanding amount had dropped to
11:31 zero because there were no expenses due until December 31, 2008
11:31 when they set out the expenses of $30,000. And those were paid
11:31 too.
11:32 The final issue they want to raise is we did
11:32 withdraw for our own benefit. We withdraw because it was in
11:32 our economic interest. But the client didn't fight with us,
11:32 didn't dispute it in court. When we said we don't want to be
11:32 your lawyers anymore, he let us not be his lawyers anymore. We
11:32 should get a fee for that. No court has ever said that the
11:32 lawyer has to -- that the client has to keep a lawyer who
11:32 doesn't want to be his lawyer anymore. What was Parallel
11:32 Networks going to say. I object to your withdrawal. You have
11:32 to stay in this case and be my lawyer when you don't want to
11:32 be. You will do such a great job. I will get more in that
11:32 summary judgment ruling than I got. And they conflate the
11:33 issue of withdrawal and just cause once again.
11:33 The lawyer in Augustson made the same argument.
11:33 He said I went to the Court. I got permission. I was allowed
11:33 to withdraw. I have just cause. And the Fifth Circuit said
11:33 no. The right to withdrawal and just cause are two very
11:33 different things. So what does Mr. Jimenez-Ekman say today.

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11:33 We had just cause, the failure to pay expenses. Ms. Mascherin
11:33 says there was no active breach. She says it had been cured.
11:33 She said there was enough money to pay expenses going forward.
11:33 He can't just say it and make it so. Her sworn testimony is
11:33 she's a partner at the firm. She's a party opponent. She's an
11:33 agent. She sat on the management committee.
11:33 Now, they talk about the motion for summary
11:34 judgment standard, and they talk about these cases. But what
11:34 they ignore all of is the entire discussion in Hoover Slovacek.
11:34 And I will encourage you, even though I am sure you have read
11:34 it many, many times to read it again. And I have a copy I am
11:34 handing Mr. Jimenez-Ekman and to you that I have highlighted
11:34 this morning, if I could.
11:34 THE ARBITRATOR: Sure.
11:34 MR. ALIBHAI: Which discusses throughout that
11:34 case the various things that the Supreme Court of Texas looked
11:34 at to make a determination as to whether that fee was
11:34 unconscionable. And it begins on page five of the printout.
11:34 And they say, notwithstanding the immediate payment
11:34 requirements several additional considerations lead us to
11:34 conclude that Hoover's termination fee provisions is
11:34 unenforceable. And they go through all of them that I
11:34 discussed this morning. I won't go through them again. But
11:35 the most important ones are that this provision does not define
11:35 what amount the client will be owing to the law firm as they

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11:35 say in some fair compensation. As their expert said there's
11:35 multiple ways to calculate it. Calculated two different
11:35 numbers in his report, one of 3.2 million and one of four-point
11:35 something million.
11:35 There's issues that relate to the fact that it's
11:35 in Jenner's unilateral interest and that they don't carry any
11:35 risk anymore. They do exactly what the Court in Hoover
11:35 Slovacek says. You walk away. You see what happens. You come
11:35 back. It's the same thing that happened in the Rapp case,
11:35 R-a-p-p, where the lawyer walked away after the adverse trial
11:35 court decision just like Jenner did here. And then after the
11:35 appeal came back and said, oh, you got it reversed. Excellent.
11:35 I want back. And the Court said you can't bootstrap your way
11:35 back in. And it's not just that they have contracted for this
11:36 unconscionable fee. Realize that the firm sent the demand for
11:36 an unconscionable fee. Mr. Hoover's letter violates Rule 1.04
11:36 in the sense that he's not just arranged for, but he's trying
11:36 to charge an unconscionable fee. And so with respect to all
11:36 these issues that we have discussed this morning, the most
11:36 important concept is what are the reasons that Hoover Slovacek
11:36 looked at for why the agreement is not enforceable. And they
11:36 list about five different reasons. That there's no distinction
11:36 for termination with or without cause.
11:36 Jenner's agreement doesn't distinguish whether
11:36 Jenner can terminate with or without cause. The agreement

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11:36 provides different remedies than Texas law regarding
11:36 attorney-client contracts. There's not a single case in Texas
11:37 that says when the attorney withdraws from a contingency fee
11:37 case, he can claim his standard hourly rates. And that's why
11:37 another reason that the Hoover Slovacek Court said the
11:37 provision in that agreement was unenforceable.
11:37 It required immediate payment. That's what Mr.
11:37 Hoover says about the payment that was owed to Jenner and
11:37 Block. It's a unilateral option contract. When the case goes
11:37 bad, when they have lost, when their contingency would equal
11:37 zero, they flip the coin and they switch to an hourly fee
11:37 agreement. Jenner bears no risk. If Jenner goes through the
11:37 case, it gets a contingent fee agreement. If Jenner
11:37 terminates, it gets an hourly fee agreement or its fair
11:37 compensation of 10 million dollars according to its managing
11:37 partner. There's no downside for Jenner. It can't be a
11:38 contingency fee agreement if there is no downside. They're
11:38 supposed to share the risk. There's no shared risk here. It
11:38 gives them a proprietary interest. And most importantly it's
11:38 this incentive through Jenner to quit and escape the
11:38 contingency fee. Hoover's termination fee provision encourages
11:38 the lawyer to escape the contingency as soon as practicable.
11:38 It's like I showed you with Ms. Mascherin's
11:38 e-mail, on December 4th, we have to make a decision depending
11:38 on what happens tomorrow whether we're going to stay in this

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case. Remember, if we quit, we get our hourly fees. She was escaping the contingency fee. She got a better deal if they quit than if they stayed. And it fails to explain how the field would be calculated. That's not an ambiguity. Hoover Slovacek says that's a defect. It makes it unconscionable. The lawyers failed to fulfill its obligation to the client.

Finally on this issue of just cause, they argue just what the person did in Augustson. He had a client who wouldn't agree with him on the value of the case. There was this problem with the Warsaw Convention and the limits that it would have on damages. And just like Mr. Jimenez-Ekman said this morning, that Jenner took stock of the case and where it stood and how much more time it would have to invest. The lawyer in Augustson said I don't want to try your case. It's like the Court says in Hoover Slovacek, I want to escape or avoid the trials and appeals. You don't get to make that decision. You don't get to decide that you voluntarily want to withdraw, that you no longer want to complete the contingency fee contract and still claim that you get the full benefits of that contract.

Jenner and Block did not litigate the Oracle and QuinStreet cases to completion. They talk about all the work they did, but they decided to quit. When you quit, when you abandon, when you voluntary terminate, when you make the decision that you don't want to see a contingency fee contract

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through, since 1960 in the Royden case, the Texas Supreme Court has said you don't get a fee. That's what the Augustson case says. And so their argument is, well, there's no case like ours where there was a provision, which although it may be unenforceable is still an agreement. Well, Hoover Slovacek was in agreement. The lawyer absolutely had a provision about what happens in the event of termination. And the Court says you can't do that. We have told you what the remedies are. And what does he say to you this morning. He says, by the way, worse comes to worse, make sure that we get something because the lawyer in Hoover Slovacek got something. They enforced the rest of it and said we should remand for a determination of quantum meruit.

Look at slide 24 of our presentation. What happened in the Hoover Slovacek case. Client fired the lawyer. Client discharges attorney. Attorney may recover under see a fair quantum meruit without cause. With cause it may recover in quantum meruit. That's not them. They're not the blue boxes. Attorney terminates without cause. Attorney forfeits all right to compensation. They can't say, oh, give us the value and the benefit of the Hoover Slovacek case. That lawyer got fired by the client. Here they made a decision that they didn't want to pursue this litigation anymore. It was more than they wanted to deal with. And yes, that summary judgment ruling was painful for Parallel Networks.

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Jenner and Block decided that it didn't want to see it through. They didn't want to take it to the Federal Circuit and get it reversed and handle the remand and take it all the way up to May 2011 and see if it could obtain a recovery. It would just rather sit back, remove the risk, escape the contingency fee and say, if and when we decide, we will make a demand. And we will just take a lot more than we would have gotten under the fee agreement. And that's what's important. If you look at the slide that discusses the fee that they're seeking now and you compare it to the recovery of the case, for them to stand here and tell you today, no, no, we swear it's contingent. If it's contingent, how are you getting more than the contingency fee. The fee is 33 percent or less in the contingent fee agreement.

Look at paragraph five of the contingency fee. It says 33 percent up to a certain amount and 28 percent depending upon the amount recovered. They want 56 percent of the gross recovery from Oracle. And they want 115 percent of the gross recovery of the QuinStreet settlement. And it's not just Mr. Hoover that said that. It's Mr. Pelz that said in the pleading filed before you. And it's the managing partner that said that under oath in her own deposition. That's the only position that's been taken in this case is that they want this 10 million dollars. Their expert would not tell me whether those amounts were unconscionable as a matter of law. He said

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if he were the arbitrator, he wouldn't award them, but he wouldn't agree that they were unconscionable.

Levine and Hoover Slovacek say those numbers are unconscionable. And so they still want you to consider giving them a fee even though they, one, arranged for an unconscionable fee; and two, they have charged an unconscionable fee. And they keep on doing it. And for those reasons they have no right to recover under the breach of the contract claim. And the reason that they don't have a right to recover at all is because they don't have just cause. It was their burden today to show you just cause. It was their burden to show you there was a Texas case that allowed them to withdraw voluntarily.

There is one very important sentence in Augustson. The Court says we are aware and have not found any Texas case where an attorney who voluntarily withdraws receives fees. Jenner voluntary withdraws. It doesn't get a fee. And for those reasons our motion should be granted.

MR. JIMENEZ-EKMAN: May have a couple of short responses?

THE ARBITRATOR: You certainly can. Just give me a minute. Yes, sir.

MR. JIMENEZ-EKMAN: Thank you. I will try and make a couple of succinct points here. The first is there's a mixing of apples and oranges here when it comes to the 10

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11:48 million dollars on the one hand and the contingent versus
11:48 non-contingent major of the fee under 9(b) on the other hand.
11:48 Okay. The materials that Mr. Alibhai brought to your attention
11:48 from June 2011 from Mr. Hoover's letter, the pleading in this
11:48 case and Ms. Levy's testimony, those three materials reference
11:48 the 10 million dollar number. Okay. And that is a different
11:48 issue, Mr. Arbitrator, than whether or not the parties agreed
11:48 that the fee upon termination would be non-contingent.
11:48 I recognize that Mr. Hoover's letter has a
11:49 different view than Jenner and Block took contemporaneously,
11:49 than the parties took contemporaneously regarding the second
11:49 issue, that is whether it's contingent or non-contingent. But
11:49 the pleading that was filed in no way indicates -- The demand
11:49 in this case in no way indicates that we believe or believed
11:49 that the fee under 9(b) was non-contingent. Neither, of
11:49 course, does Ms. Levy's testimony. She's asked what were the
11:49 fees and what does she personally think the fees should be.
11:49 And she's talking about 10 million dollars. Does not affect
11:49 the question about whether or not the contract calls for a
11:49 non-contingent fee in case Jenner and Block terminates.
11:49 I think it's very important to keep those apples
11:49 and oranges separate. Because then we got into the question of
11:49 whether or not this 10 million dollars is unconscionable under
11:49 the circumstances. And what I want to say very, very
11:50 succinctly and strenuously to you is that is not the issue that

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11:50 is breached by Parallel Networks. It is not the issue. The
11:50 issue of whether the amount of the ultimate fee is
11:50 unconscionable relies on all those factors that we described
11:50 and that Parallel Networks has not made a demonstration under
11:50 any of them. So we're not here today to decide whether or not
11:50 10 million or five million or three million is unconscionable.
11:50 The challenge was to the structure of the fee as agreed to at
11:50 the time. And to mix those apples and those oranges is
11:50 inappropriate.
11:50 Next there's an issue raised by Mr. Alibhai
11:50 based on Hoover Slovacek where the contract was silent on the
11:50 method of valuation. And there's an assertion that we want you
11:50 to construe the contract against Parallel Networks in order to
11:50 give us the benefit of a better deal. I have to say that it's
11:51 exactly the opposite. What is happening here is that Parallel
11:51 Networks is asking you to interpret the contract in a way that
11:51 so much disfavors them that you then throw it out entirely.
11:51 Okay. I have got to be clear about that. If you were
11:51 interpreting it in our favor, construing it in the best
11:51 interest of Jenner and Block, you would construe it so that
11:51 there was no contingency upon termination. That's not what
11:51 we're asking you to do. Instead, in order to avoid their clear
11:51 equitable obligation to compensate Jenner and Block, they're
11:51 saying we want you to construe the contract against us in a way
11:51 that the courts have found unconscionable and then throw the

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11:51 whole thing out. So it's exactly the opposite of construing
11:51 something in Jenner and Block's favor.
11:52 On the issue of expenses, at the very most here
11:52 you have got a factual dispute. Ms. Mascherin didn't testify
11:52 that as of the specific time in December there was payment on
11:52 everything that had been outstanding. But you have got various
11:52 testimony about the ability to pay, and that is a fact issue.
11:52 You ought to hear the evidence about that and figure out and
11:52 hear how much Jenner and Block was motivated. Recall that the
11:52 termination letter does not specify any reason. It doesn't
11:52 exclude the nonpayment of the cost as a reason. It simply says
11:52 that Jenner and Block is exercising its right to terminate. So
11:52 you cannot conclude as a matter of law without hearing the
11:52 evidence to what extent that figures into it.
11:53 On the notice issue, Parallel Networks -- that
11:53 is the notice that Jenner and Block might terminate for failure
11:53 of the client to fulfill its obligation -- Parallel Networks
11:53 has strenuously argued that cause to withdraw does not equal
11:53 cause to be repaid. Those are our separate issues. And so to
11:53 that extent, we do not necessarily have to provide notice in
11:53 order to take advantage of the rest of the contract,
11:53 particularly when there was agreement about withdrawing.
11:53 On the issue of agreement, actually in response
11:53 to Mr. Alibhai's question, yes, if you're a party and you
11:53 oppose your lawyers withdrawing, you're supposed to file an

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11:53 objection to it. And if you look at the Augustson case, they
11:53 did, in fact, do that. It says on page 661, quote -- I'm
11:53 sorry -- on June 1st, 1993, moved for voluntary withdrawal for
11:54 good cause Pursuant to Rule 1.15(b) of the Texas Disciplinary
11:54 Rules of Professional Conduct. The Augustsons opposed
11:54 withdrawal in writing, end quote. So yes, if you do oppose
11:54 withdrawal, you're supposed to tell your lawyers that. You are
11:54 not supposed to file a pleading with the Court that says you
11:54 have, quote, mutually agreed to withdrawal. That has legal
11:54 consequences. And at the very least here, it creates a factual
11:54 question as to whether there was consent, whether there was
11:54 agreement about that that you cannot decide on summary
11:54 judgment.
11:54 I want to make two more points. The first is
11:54 that this issue about the alternative measure of damages and
11:54 the severability has received very short shrift. Even if you
11:54 disagree with us regarding the construction of 9(a)(i), and
11:54 even if you determine there's not a factual issue there and you
11:55 are not going to enforce that portion of it, there hasn't been
11:55 any articulation of why the contract regarding severability and
11:55 the general law regarding severability should not be enforced
11:55 here. And that leaves you to decide what a reasonable fee is
11:55 under the circumstances. That's number one.
11:55 Number two, Mr. Alibhai is right. I read the
11:55 cases again getting ready for this argument. There isn't a

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11:55 case directly on all fours here. There is not a case where you
11:55 have two extremely sophisticated parties where the client is
11:55 represented by its own lawyer in the negotiation with the
11:55 lawyers where the parties agree in advance about the right to
11:55 withdraw, the circumstances under which you can withdraw and
11:55 what happens where the client agrees to the withdrawal when the
11:55 time comes. You do not have a Texas case or any of the cases
11:56 cited from any jurisdiction where those things are present.
11:56 Now I am not telling you that you shouldn't draw rules from
11:56 some of the cases that have been cited, but what I am telling
11:56 you is that that makes this case particularly inappropriate for
11:56 summary judgment. You have elements from a variety of
11:56 different cases, but you don't have something directly on
11:56 point.
11:56 You ought to hear the evidence, and you ought to
11:56 make the decision on a full record. And that's particularly so
11:56 when you have only got one claim that's potentially at issue in
11:56 summary judgment motion, and you are going to hear the evidence
11:56 one way or the other. I have got nothing further. Thank you.
11:57 MR. ALIBHAI: I will close since it's my motion,
11:57 and I will be very brief.
11:57 THE ARBITRATOR: I'm going to give you a two
11:57 minute warning.
11:57 MR. ALIBHAI: I only want two minutes, so here's
11:57 my warning. They want you to believe it's a contingency.

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11:57 What's the contingency? We know they're claiming 10 million
11:57 dollars in June 2011 and December 2011 in Ms. Mascherin's
11:57 testimony. They're aware of what the settlement agreements
11:57 are. How is it contingent if you make the exact claim for the
11:57 exact dollar of the standard hourly rates no matter what
11:57 happened in the case? They know that QuinStreet settled for
11:57 $850,000. They still want more than 100 percent of that
11:57 amount. That's not legal in Texas. I don't know that it's
11:57 legal anywhere to claim more than 100 percent of the
11:57 contingency fee. They want 56 percent of the gross recovery in
11:58 Oracle when they would have gotten less than 33 percent of the
11:58 net recovery.
11:58 They don't want the contingency fee. They don't
11:58 want a contingent deal. They want standard hourly rates.
11:58 There's nothing contingent about their demand. There's nothing
11:58 contingent about this case. They want their hourly rates.
11:58 Their expert calculated a damage model based
11:58 upon their hourly rates. He used all $10,250,000 of their
11:58 hourly rates. Their whole case is predicated on do we get our
11:58 hourly rates. That's not contingent. They switched from
11:58 contingency to hourly. That's what the Supreme Court in Hoover
11:58 Slovacek said was not appropriate. That's what the Court in
11:58 Wythe said was not appropriate. You can't switch mid-stream.
11:58 And you can't switch when it suits you. That's a question of
11:58 law.

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11:58 I don't know what a hearing is going to do for
11:58 you in terms of giving you additional legal briefing. That was
11:59 the purpose of the summary judgment motion is that when we go
11:59 into that hearing come October, we're only discussing the
11:59 issues about things that are enforceable. If they want to try
11:59 to prove that somehow they're still entitled to quantum meruit
11:59 after you determine that there was no just cause when it was
11:59 their burden to do so, then maybe you should let them do that.
11:59 They don't have a contract claim. It's unenforceable. Hoover
11:59 Slovacek says you determine that as a question of law. And for
11:59 them to say, oh, well, in Augustson, the person objected to the
11:59 withdrawal. Well, what happened. The Court said it doesn't
11:59 matter that you objected, and it doesn't matter that you
11:59 satisfied the Court's requirements.
11:59 Speiser Krause argues that because it withdrew
11:59 for good cause by permission of the Court, it has therefore
11:59 satisfied Texas's just cause requirement. And the Court said
11:59 we reject Speiser Krause's argument, the cause to withdraw
11:59 under Rule 1.15 necessarily applies cause to receive
12:00 compensation. Royden prohibits all compensation in this case.
12:00 So even when the client did object, and the Court still allowed
12:00 the person to withdraw, the Court said you didn't meet the
12:00 requirement for compensation. And so they say, well, if we
12:00 have agreed to do something unconscionable, just sever that
12:00 out. Then you don't have any right to fees. Your only right

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12:00 to fees if you're Jenner and Block is to show that you withdrew
12:00 for just cause. They had that opportunity today. There's no
12:00 fact dispute about the expenses. It was cured is what a
12:00 partner at Jenner and Block says. There was no active breach.
12:00 She even wrote in the e-mail that he highlighted
12:00 for you that there was money to pay future expenses. These
12:00 admissions by Jenner and Block can't be avoided. They
12:01 themselves have said there's no breach. They themselves have
12:01 said the client had money.
12:01 So with respect to the two most important things
12:01 at issue here is what's contingent about their 10 million
12:01 dollar demand. Contingent on what? Taking all of the money
12:01 from the QuinStreet case. That's not contingent. Getting more
12:01 than they would have gotten under the fee agreement. That's
12:01 not contingent. Because they don't have a contingent fee
12:01 agreement, because it's a unilateral option agreement, because
12:01 it doesn't spell out the amount that would be owed, because it
12:01 allows them to make the decision unilaterally and flip-flop
12:01 when they decide, and because there's no circumstance. They
12:01 didn't address that today. There's no circumstance for Jenner
12:01 and Block where it doesn't get paid. If things are going good,
12:01 it gets its contingent fee agreement. If things go bad, say,
12:01 for example, a summary judgment ruling against its client, it
12:02 withdraws, comes back and gets nine million dollars. That's
12:02 not contingent. That's a guarantee. There's no risk sharing.

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Supreme Court says, heads lawyer wins, tails client loses. That's what happened here. That's why Hoover Slovacek is not enforceable. And those are the reasons that the motion should be granted.

THE ARBITRATOR: All right. I think I have read everything, which I will now look at again and take note of what both sides have presented today in advancing your arguments. One question I have though and really has nothing to do with so much the motion here, but I guess an underlying question I have, as we sit here right now if we're trying the case next week, is Jenner and Block going to be seeking this 10 million dollar claim on its standard hourly rates, or do we know? I felt like it was kind of moving toward the edge of the table, but I don't know if it has moved off the table or not. If you're not prepared to answer it, I am not trying to put you in an awkward position. I am trying to figure out whether that's intended to be part of Jenner and Block's claim going forward or not.

MR. JIMENEZ-EKMAN: Mr. Arbitrator, the direct answer to your question is no. We are not going to seek 10 million dollars in this arbitration. We're not going to specifically advocate that. What I have indicated is we're going to offer a number of acceptable ways for you to calculate our compensation. And it's going to be for you to decide what's fair and just under the circumstances. And if you look

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at the evidence and decided it was fair and just to award us 10 million dollars, we're not going to turn that down, but we're not specifically advocating that. As I indicated, you will hear from Mr. Cunningham two different ways of calculating the appropriate fee in this case. And neither one of them are for anywhere near 10 million dollars. So I hope I have directly answered your question but also explained that the issue is not irrelevant because we did incur those 10 million dollar fees. It forms the calculations that Mr. Cunningham has made, and we 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.

THE ARBITRATOR: Okay. Well, thank you for clarifying that. All right. Is there anything else with respect to the pending motion for partial motion for summary judgment? I think everybody has said it all and maybe said it more than once. And that's okay. Is there anything else that has not been said or that needs to be said about that, or can we put that in the box and lock it up and I will figure out what to do with it?

MR. ALIBHAI: I believe that's your determination now.

THE ARBITRATOR: All right. Very good. Okay. Now, there were other issues that we talked about. And I think

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the sense was that whatever we need to visit about -- Is it Bosy and Bennett, or Bennett and Bosy?

MR. JIMENEZ-EKMAN: Bosy.

THE ARBITRATOR: Okay. We're going to defer that until another time. And I am going to leave it to counsel to try to set up, I guess, a telephone hearing on that. I don't think you really need me to tell you that time is diminishing between now and the hearing date. So those all need to be resolved as soon as possible for really both parties' benefit. Okay.

We also had -- Both of you mentioned issues about, I guess, to some extent mirror issues. Parallel expressed some concern about access to Jenner and Block documents, and Jenner and Block had expressed concerns about access to Parallel Networks' documents. And I think these may be the documents referred to in an order that was entered in the last couple of weeks. So I am a little bit -- I don't know what those involve, whether those are something we should address here without a whole lot of notice to everybody or if that's something that will be really pinpointing things that we can deal with with some dispatch here.

MR. KONING: Could I make one comment on that? When this issue came up earlier, Mr. Jimenez-Ekman and I, we had the wrong impression. I thought he was familiar with that issue. And I think he might have thought I was familiar with

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that issue. Actually neither of us have been directly involved with the production that is at issue. I would suggest that we combine that question with not trying to cut off if anybody wants to say anything, but combine that issue with the Bosy and Bennett hearing if we can't work out whatever problems there are first. Because really the person that has been involved with at least the production from Jenner's side, none of those people are here today.

THE ARBITRATOR: Oh, okay. Okay.

MR. ALIBHAI: Do you have an understanding as to when those people will be available?

MR. KONING: I assume as soon as we get a phone hearing scheduled within a matter of days.

MR. JIMENEZ-EKMAN: I think that's right. I will add to this, I think what Mr. Alibhai wants to raise relates to a letter and production that we made yesterday. So if there are further issues about it, we don't even know what they are at this point. So I personally think that at least a discussion, if not an exchange of letters, would be appropriate before we come to you to air any further issues, but that's just my personal view about that.

MR. ALIBHAI: I raised the issue on Saturday, but I am happy to discuss it again with whoever wants to discuss it with me, but I don't think they're in compliance with the order. So it is an issue that's important to me, and

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because it's an issue about production of documents, it is time sensitive.

THE ARBITRATOR: I understand. And it's probably beneficial that both parties are at least communicating now. And if there is an issue that is not presently resolved and it needs to be put at the top of lists on both sides to resolve both of these or we can -- not just because it has to do with documents, but it seems to me we're kind of closing in on the smaller issues as they get more and more refined. So we can deal with that later. I mean I encourage everybody to put this on the radar screen ASAP so we can set something up. I know everybody in the case is very busy. It's not always possible for Judy to find the time, but we try as hard as we can. So I am just going to put down that we are deferring that to another time. If you all can't agree on some resolution, then we can have a telephone hearing like we had the other discovery. Is there anything else that is on your list or that is a concern that it would be for us to discuss while we're all together?

MR. KONING: Not from our side.

MR. ALIBHAI: Not at this time.

THE ARBITRATOR: Okay. One thing that I think I mentioned at either our last or just the hearing prior to the last that we had by phone, I had inquired if the parties are going to have a court reporter at the hearing on the merits.

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Has that been discussed or resolved at this time? Are you still working on that?

MR. ALIBHAI: Jenner and Block has requested that there be a court reporter at every hearing from today on. And they have, as you see, brought a court reporter.

THE ARBITRATOR: Oh, okay.

MR. ALIBHAI: We don't believe that one is necessary at the interim hearings. We agree that for the final arbitration hearing that it be useful because we will be actually recording testimony. And that will be beneficial, I believe, to the parties and to the arbitrator after the hearing. So we have resolved part of the question that you raised, which is at the hearing both parties are requesting and planning to arrange for a court reporter. There's a separate issue of in between now and then whether we need to have court reporters at every single hearing including today.

MR. JIMENEZ-EKMAN: Mr. Alibhai, I think, correctly states the parties' position. So we have agreement on the question you have asked. We at Jenner and Block believe it would be helpful to us and potentially to you, Mr. Arbitrator, to have a record of any other interim hearings. We're certainly willing in the first instance reserving all of our rights to be the party that engages the court reporter. And then to the extent that Parallel Networks wanted the transcript, they could arrange for one themselves. From our

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point of view, it can only be helpful. It certainly won't be prejudicial to anybody to have a record of any other further interim hearings.

THE ARBITRATOR: Just so I understand, the parties have agreed that the hearing on the merits in October will be transcribed by a court reporter. I am assuming the parties are sharing that expense?

MR. ALIBHAI: Yes.

MR. JIMENEZ-EKMAN: Yes.

THE ARBITRATOR: All right. And as far as the rest, it sounds like one party wants to have a telephone hearing transcribed, and the other party doesn't. And I will leave that to you all to work out an agreed or not on that. So I don't think you really need my help on that. What I had asked for, I think you all have resolved. So I very much appreciate that. That would be great. Really not just for me, I imagine you all are going to want to have a record of it as well for a hearing this involved of this length and this many documents.

Okay. One other thing that we have not discussed, and a lot of times this doesn't actually get discussed until we're much deeper in, if we have discussed it and I had forgotten it, just remind me, but I don't think we have. The question of the type of award the parties want. Do you want a reasoned award? Do you want an award with

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conclusions? I don't mean like a one sentence conclusion, but a conclusion on the legal issues. And I mean I go through everything exactly the same way. It's just the only difference is what you want me to write about. And I am not asking either of you to say what you want today, but it's just at some point given the history in the case and the nature of the issues involved, I just wanted to let you know that was the question we probably ought to discuss. We don't have to today unless you want to, but I wanted to put it out there so that it can be something you can consider with the clients and visit about with each other. I think the rules have a default that it will be a reasoned award, that the parties can agree to do other things if you agree on them. I just wanted to put that out there. Anybody have any questions about that at this point, or is it just enough for me to put it on your to-do list or to think about list?

MR. JIMENEZ-EKMAN: No questions from Jenner and Block.

MR. ALIBHAI: We will put that on our list.

THE ARBITRATOR: Very good. All right. Unless there's anything else we need to do, I think we can recess at this point. And I will look forward to hearing from you on whether we need to do any of the remaining issues. And I am hoping we might be able to address those sooner rather than later just if there is some big issue about documents that are

12:17 still in Neverland, we need to figure out what to do with those. It's been a great pleasure to hear lawyers who are as prepared and articulate and as convincing as both sides are in this case. So I really appreciate that. Thank you for your time.

(Proceedings concluded at 12:17 p.m.)

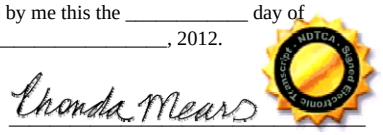


CERTIFICATE

I, Rhonda Mears, Certified Shorthand Reporter, in and for the State of Texas, do hereby certify that the foregoing is a correct transcription of the proceedings in the above-entitled matter.

I further certify that I am neither counsel for, related to, not employed by any of the parties to the action in which this hearing was taken, and further that I am not financially or otherwise interested in the outcome of the action.

Certified to by me this the _____ day of _____, 2012.



RHONDA MEARS, CSR #3665
Expiration Date: 12-31-12
MERRILL CORPORATION
Firm Registration No. 191
4144 N. Central Expressway
Suite 850
Dallas, TX 75204
214-720-4567