No.

In the Supreme Court of the United States

PARALLEL NETWORKS, LLC, PETITIONER

v.

JENNER & BLOCK LLP

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS AT DALLAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents a square and entrenched conflict regarding the scope of judicial review under the Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*

For decades, courts have traditionally reviewed arbitration awards for violations of public policy, refusing to enforce unlawful awards. In the past decade, however, intolerable "uncertainty" has persisted over the "continuing viability" of this type of review. *Raymond James Fin. Servs., Inc.*, v. *Bishop*, 596 F.3d 183, 193 n.13 (4th Cir. 2010). This "uncertainty" is a direct result of a sharp disagreement over the meaning of this Court's decision in *Hall Street Associates* v. *Mattel, Inc.*, 552 U.S. 576 (2008).

According to the Eleventh Circuit, the Florida Supreme Court, and the Alabama Supreme Court, *Hall Street* construed Section 10(a) of the FAA to foreclose public-policy challenges to arbitration awards. The Second, Fourth, Seventh, and Ninth Circuits have reached the opposite conclusion. The Fifth and Eighth Circuits have issued decisions that different courts have construed different ways, and still other courts have acknowledged the issue but refused to resolve it. Because this conflict turns directly on the proper understanding of this Court's decision in *Hall Street*, this Court alone can resolve the confusion.

In the decision below, the court of appeals picked the minority view, refusing to address petitioner's argument that the award here violated deep-rooted Texas law and dominant Texas public policy.

The question presented is:

Whether Congress intended Section 10(a) of the FAA to categorically foreclose public-policy challenges to arbitration awards.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

Petitioner is Parallel Networks, LLC, the plaintiff-appellant below.

Respondent is Jenner & Block LLP, the defendant-appellee below.

Parallel Networks, LLC has no parent corporation, and no publicly held company owns 10% or more of its stock.

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Parallel Networks, LLC respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth District of Texas at Dallas in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is unreported but available at 2015 WL 5904685. The orders of the Supreme Court of Texas denying discretionary review and denying petitioner's motion for rehearing (App., *infra*, 85a-86a) are unreported. The judgment of the trial court confirming the arbitration award (App., *infra*, 17a-19a) is unreported.

JURISDICTION

The judgment of the court of appeals was originally entered on August 26, 2015, and revised on October 9,

2015. A petition for review was denied by the Supreme Court of Texas on June 27, 2016. A motion for rehearing was denied by the same court on January 20, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Federal Arbitration Act (FAA), 9 U.S.C. 1-16, are reproduced in the appendix to this petition (App., *infra*, 87a-90a).

INTRODUCTION

This case presents a deep and acknowledged conflict over an important and recurring question of federal law: whether public-policy challenges remain viable under the FAA after this Court's decision in *Hall Street*.

That question has squarely divided the federal courts of appeals and generated intolerable confusion in the lower courts. After *Hall Street*, parties have struggled with deep uncertainty about the permissible grounds for vacating arbitration awards. This widespread confusion has left parties guessing when arbitration awards are subject to judicial review and when they are not. That uncertainty has generated *added* litigation over a process (arbitration) designed to *avoid* litigation. And until the issue is resolved, this untenable situation will continue to permit a patchwork of judicial review depending on the happenstance of where a dispute arises—leaving courts in Texas and Florida no choice but to enforce plainly unlawful decisions, while courts in California and New York invoke traditional authority to avoid explicit threats to public safety and welfare.

This case is an ideal vehicle for resolving this significant issue. The court of appeals below held that, under

Hall Street, the FAA compels courts to enforce an arbitration award even if it violates "'explicit,' 'well defined,' and 'dominant'" public policy. *Eastern Associated Coal Corp.* v. *United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62 (2000). That holding was outcome-determinative below; because the court believed that the FAA preempted traditional state authority to engage in public-policy review, it refused even to consider petitioner's arguments on the merits. The question presented is a pure issue of federal law, and there is no obstacle to review. Indeed, the only relevant "fact" is undisputed: petitioner raised a public-policy challenge to the arbitration award, and the lower court rejected that challenge as categorically foreclosed by the FAA.

Review is also warranted because the court of appeals was wrong. Contrary to the decision below, the FAA does not compel courts to *order* parties to carry out an arbitration decision that violates public policy.[1] And the costs of the court's error are especially high in this context: under the decision below, the FAA not only dictates the rule in federal courts, but fully preempts *the States'* independent authority in this area. There is simply no indication that Congress intended to intrude on the power of state courts, acting under settled state law, to resist arbitration awards that violate core state public policies.

[1] Imagine, for example, an arbitration award enforcing a restrictive covenant prohibiting the sale of property to racial or religious minorities. There is little doubt that courts would refuse to enforce such a repugnant contract outside arbitration. Cf., *e.g.*, *Hurd* v. *Hodge*, 334 U.S. 24, 34-35 (1948). Yet according to the decision below, courts are powerless to refuse to enforce an arbitration award that (mistakenly) upholds such an unlawful agreement. Contra, *e.g.*, *E. Associated Coal Corp.* v. *United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62-63 (2000). That is an untenable reading of the FAA.

Public-policy review is a bulwark against serious and intolerable violations of law, and provides a modest check on the arbitral process. It does not permit the relitigation of facts or interfere with the fair and swift disposition of disputes—just as it did not impair the arbitration process for decades pre-*Hall Street*. Under its proper construction, the FAA does not categorically displace the fundamental powers that courts have traditionally exercised in reviewing arbitration awards. This case provides an ideal opportunity for the Court to resolve this substantial legal question. The petition for a writ of certiorari should be granted.

STATEMENT

1. a. The FAA provides federal rules and standards governing commercial arbitration agreements. See 9 U.S.C. 1, 2; *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 109, 111-112 (2001) (explaining the FAA regulates contracts involving interstate commerce, with a narrow exception for employment contracts of transportation workers). As part of its coverage, the FAA both "supplies mechanisms for enforcing arbitration awards," *Hall Street*, 552 U.S. at 582, and specifies certain grounds for "vacat[ing]" arbitration awards, 9 U.S.C. 10(a) (listing four separate grounds). Those vacatur grounds include "where the arbitrators exceeded their powers." 9 U.S.C. 10(a)(4).

In addition to the FAA's express statutory grounds, courts have long recognized "non-statutory grounds" for vacating arbitration decisions, including where the award violates public policy or the arbitrator acted in "manifest disregard of the law." See, *e.g.*, *Sheldon* v. *Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001); *Diapulse Corp. of Am.* v. *Carba, Ltd.*, 626 F.2d 1108, 1110 (2d Cir. 1980) ("Although contravention of public policy is not one of the specific grounds for vacation set forth in section 10 of the Federal Arbitration Act, an award may be set aside if it compels the violation of law or is contrary to a well accepted and deep rooted public policy.").

These non-statutory grounds are modest in scope. Courts "do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." *United Paperworkers Int'l Union, AFL-CIO* v. *Misco, Inc.*, 484 U.S. 29, 38 (1987). But if the award "violates some explicit public policy," courts "are obligated to refrain from enforcing it." *W.R. Grace & Co.* v. *Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 766 (1983). This Court has "made clear that any such public policy must be 'explicit,' 'well defined,' and 'dominant,'" *E. Associated*, 531 U.S. at 62, and "'ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests,'" *Misco*, 484 U.S. at 43 (quoting *W.R. Grace*, 461 U.S. at 766). Vacating an award on public-policy grounds is "a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy." *Misco*, 484 U.S. at 42; see also *McMullen* v. *Hoffman*, 174 U.S. 639, 654 (1899) ("authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract").

b. Notwithstanding its long history, public-policy review (and other non-statutory grounds) were called into doubt by *Hall Street*. The Court there held that parties cannot privately contract for expanded judicial review under the FAA. 552 U.S. at 583-584. The Court explained that the FAA "supplies mechanisms" for enforcing and vacating arbitration awards, and it found that those mechanisms "provide the FAA's exclusive grounds for expedited vacatur and modification." *Id.* at 582, 584; see *id.* at 590 ("§§ 10 and 11 provide the exclusive regimes for the review provided by the statute"). "Any other reading," the Court explained, would "open[] the door to the full-bore legal and evidentiary appeals that can rende[r] informal arbitration merely a prelude to more cumbersome and time-consuming judicial review process.'" *Id.* at 588 (citation omitted; second alteration in original).

At the same time, however, *Hall Street* explicitly declined "to say that [the FAA] exclude[s] more searching review based on authority outside the statute," such as "state statutory or common law." 552 U.S. at 590. The Court accordingly "decid[ed] nothing about other possible avenues for judicial enforcement of arbitration awards." *Ibid.* To that end, the Court acknowledged that some circuits had "recogniz[ed] 'manifest disregard of the law' as a further ground for vacatur on top of those listed in § 10," whereas others viewed that non-statutory exception as "merely refer[ring] to the § 10 grounds collectively"—*i.e*, as a judicial gloss on the statutory text. *Id.* at 585. The Court declined to further explore the subject, noting solely that it had taken manifest-disregard language "as [it] found it, without embellishment." *Ibid. Hall Street* did not discuss public-policy review.

2. In proceedings below, respondent convinced Texas courts to enforce an arbitration award compelling the payment of contingency fees—after it lost a case on summary judgment and abandoned its client—in direct violation of core Texas public policy.

In 2007, respondent agreed to represent petitioner in two patent cases under a contingency-fee agreement.

App., *infra*, 2a.[2] The agreement was governed by Texas law and required all disputes to be resolved by arbitration.[3] Under the agreement, if respondent successfully prosecuted the infringement litigation, it earned a contingency-fee award computed as a percentage of petitioner's net proceeds. Petitioner was required to pay litigation expenses associated with the suits. *Id.* at 2a-3a, 99a.

Critically, the fee agreement also contained a provision that allowed respondent (according to respondent's interpretation) to withdraw from the representation—and still get paid—whenever it unilaterally "determine[d] at any time that it is not in its economic interest to continue the representation." App., *infra*, 3a-5a (quoting *id.* at 104a). In that event, petitioner was obligated to compensate respondent "an appropriate and fair portion of the Contingent Fee Award" at "the conclusion of any" patent lawsuit, "based upon [respondent's] contribution to the result achieved as of the time of termination." *Id.* at 4a. Such a provision is squarely prohibited under longstanding Texas law.

After representing petitioner for 1.5 years under this agreement, respondent lost one of the cases on summary judgment. App., *infra*, 31a. To that point, petitioner had been behind in repaying respondent's expenses. But within weeks of respondent's summary-judgment loss, petitioner satisfied the entire unpaid amount and was current under the agreement. *Id.* at 5a, 43a. Nonetheless, barely a week later, respondent invoked the contract's

[2] The agreement was signed by respondent and epicRealm Licensing LP, but petitioner succeeded epicRealm shortly after the agreement went into effect. App., *infra*, 2a n.1.

[3] The agreement was not expressly subject to the FAA, but it was undisputed below that the FAA governed. See App., *infra*, 12a n.2.

termination provision and withdrew from the representation. Respondent later argued that it withdrew based on speculation about petitioner's ability to cover expenses—even though at the time of termination the balance of petitioner's unpaid-expense account was zero.

Petitioner was forced midstream to find new counsel, who ultimately managed to reverse respondent's loss on appeal and successfully settled both cases. App., *infra*, 5a-6a. Thereafter, in December 2011—nearly three years after losing and then abandoning its client—respondent returned and demanded over $10 million in fees. *Id.* at 5a-6a.

After petitioner refused that demand, respondent invoked the parties' arbitration agreement. Respondent initially justified its $10-million demand based on its hourly rates. But it later acknowledged that demanding hourly fees (in the context of a contingency-fee agreement) might violate Texas public policy. So it instead sought relief based on a contingent recovery (despite abandoning petitioner after losing on summary judgment) or on quantum meruit. App., *infra*, 6a-7a.

In the arbitral proceedings, petitioner explained that Texas law prohibited lawyers from collecting fees after abandoning a client without "just cause." While respondent argued it had just cause because petitioner was often late in reimbursing respondent's litigation costs, it was undisputed that those costs were paid in full at the time of withdrawal, and Texas law forbids attorneys from abandoning their clients (and then demanding future fees) after a client has already cured an alleged deficiency. See, *e.g.*, Tex. Disc. R. Prof. Conduct 1.15(b)(5). Notwithstanding these clear prohibitions, the arbitrator rejected petitioner's contention and awarded respondent over $3 million in "contingency" fees—plus a 16% future contingent stake—on cases respondent lost and then abandoned before settlement. App., *infra*, 6a (finding "just cause" to withdraw given respondent's speculation that petitioner's likelihood of paying future expenses "made the prospect of proceeding with the pending cases 'less than attractive'"); *id.* at 9a.

3. In Texas state court, petitioner moved to vacate the arbitration award and respondent moved to confirm it. The trial court denied the petition and confirmed the award, App., *infra*, 17a, and petitioner appealed to the Texas Court of Appeals. Petitioner argued that the award should be vacated because it violates explicit and dominant Texas public policy. *Id.* at 11a; see also, *e.g.*, *Hoover Slovacek LLP* v. *Walton*, 206 S.W.3d 557, 562 (Tex. 2006) (explaining that contingent-fee agreements that violate Texas law are unenforceable); *Augustson* v. *Linea Aerea Nacional-Chile S.A.*, 76 F.3d 658, 662, 664 (5th Cir. 1996); *Royden* v. *Ardoin*, 331 S.W.2d 206, 209 (Tex. 1960); *Rapp* v. *Mandell & Wright P.C.*, 127 S.W.3d 888, 898 (Tex. App. 2004) (not "just cause" to withdraw where attorney concluded that the case had "no value" after unfavorable trial-court judgment); Tex. Disc. R. Prof. Conduct 1.15(b)(5) (forbidding withdrawal unless the client "has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled").

The court of appeals affirmed. App., *infra*, 1a-16a. The court refused to consider petitioner's argument that the arbitrator's award violated established Texas law. Although it acknowledged that courts had traditionally "recognized certain common law exceptions for vacating an arbitration award," it read *Hall Street* as "foreclos[ing] [its] review of non-statutory grounds." *Id.* at 13a (citing *Citigroup Glob. Mkts., Inc.* v. *Bacon*, 562 F.3d 349, 350 (5th Cir. 2009), for the proposition that "*Hall Street* restricts grounds for vacatur to those set forth in section 10 [of the FAA]"). It accordingly affirmed the trial court's judgment without engaging petitioner's argument on the merits. *Id.* at 15a-16a.

The Texas Supreme Court subsequently denied review. App., *infra*, 85a. In its petition for review, petitioner argued that the arbitration award violates core Texas public policy and the FAA authorizes (and assuredly does not prohibit) courts to engage in public-policy review. Petitioner further identified the deep confusion surrounding *Hall Street*, including the conflicts over public-policy challenges. The Texas Supreme Court requested a response before denying review; petitioner sought rehearing, and the Court again denied review after requesting another response. *Ibid.*

Tellingly, in a different case decided just five weeks earlier, Justice Willett outlined the post-*Hall Street* "quagmire" surrounding the FAA, and remarked that courts must "await a definitive answer" from *this* Court to resolve the "disarray." *Hoskins* v. *Hoskins*, 497 S.W.3d 490, 498, 500 (Tex. 2016) (Willett, J., concurring) (deciding a different question under the Texas Arbitration Act).

REASONS FOR GRANTING THE PETITION

A. The Lower Courts Are Intractably Divided Over The Question Presented

According to the court of appeals below, "*Hall Street* forecloses our review of non-statutory grounds [under the FAA]." App., *infra*, at 13a. That holding deepens a direct and acknowledged conflict among the federal courts of appeals and highest state courts regarding whether public-policy challenges are still permitted under the FAA. The decision below conflicts with decisions of four courts of appeals—the Second, Fourth, Seventh, and Ninth Circuits—that have authorized public-policy challenges after *Hall Street*. Three more circuits—the First, Eighth, and

Tenth—have not squarely decided the issue but have strongly indicated that public-policy review remains alive. In contrast, the Eleventh Circuit and the Florida and Alabama Supreme Courts have read *Hall Street* to foreclose public-policy review.

1. The Second, Fourth, Seventh, and Ninth Circuits have acknowledged *Hall Street*'s potential effect on non-statutory vacatur grounds but nonetheless held that an award can be challenged on public-policy grounds. In a pre-*Hall Street* decision, the Seventh Circuit had recognized that "an arbitrator may not direct the parties to violate the law," and thus an award may be set aside on that basis. *George Watts & Son, Inc.* v. *Tiffany & Co.*, 248 F.3d 577, 580 (7th Cir. 2001) (Easterbrook, J.). After *Hall Street*, the court explained that the Section 10(a) "list is exclusive," but held that *George Watts & Son*'s holding nonetheless remained viable. *Affymax, Inc.* v. *Ortho-McNeil-Janssen Pharm., Inc.*, 660 F.3d 281, 284-285 (7th Cir. 2011) (Easterbrook, C.J.). The Seventh Circuit later reaffirmed *Affymax* and the survival of public-policy review, explaining that, while *Hall Street* held that the Section 10(a) grounds are "exclusive," this "Court did not overrule [its earlier cases that] recognized a public policy exception to the general prohibition on overturning arbitration awards." *Titan Tire Corp. of Freeport, Inc.* v. *United Steel, Paper & Forestry, Rubber, Mfg., Energy Allied Indus. & Service Workers Int'l Union*, 734 F.3d 708, 717 n.8 (7th Cir. 2013); cf. *Immersion Corp.* v. *Sony Computer Entmt. Am. LLC*, 188 F. Supp. 3d 960, 968-969 (N.D. Cal. 2016) (citing *Titan Tire* as part of circuit conflict on "the continuing validity of non-statutory grounds—such as violation of public policy—as a basis for vacating an arbitration award," and holding that the public-policy exception survives *Hall Street*). *Titan Tire* ac-

cordingly vacated the arbitrator's award because it effectively required one party to violate federal law. *Titan Tire*, 734 F.3d at 729 ("Because the arbitrator's order to Titan to reinstate direct salary payments to the President and Benefit Representative would require Titan to violate Section 302, its decision must be vacated.").

Similarly, the Ninth Circuit has twice entertained a public-policy challenge after *Hall Street*. See *Matthews* v. *Nat'l Football League Mgmt. Council*, 688 F.3d 1107, 1111 (9th Cir. 2012); *Lagstein* v. *Certain Underwriters at Lloyd's, London*, 607 F.3d 634, 641 n.4 (9th Cir. 2010). In *Matthews*, the court explained that both public-policy review and manifest disregard are "narrow exception[s] to the general principle of deference to arbitration awards," and cited Ninth Circuit precedent holding that manifest disregard survived *Hall Street* as a gloss on Section 10(a)(4). 688 F.3d at 1115 (citing *Comedy Club, Inc.* v. *Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009)).[4] *Matthews* thus analyzed the public-policy challenge at length before rejecting it on the merits. See *id.* at 1111-1115. In *Lagstein*, the Ninth Circuit again considered both public-policy and manifest-disregard challenges, and cited circuit precedent "establish[ing]" that manifest disregard "does [] survive" *Hall Street*. *Lagstein*, 607 F.3d at 641 n.5. As to public-policy review, the court reversed the district court, holding that its "conclusions that the total size of the award contravened public policy" were "without support." *Id.* at 641 n.4.

Consistent with those opinions, district courts within the Ninth Circuit have concluded that public-policy review accords with post-*Hall Street* circuit precedent. See *Immersion*, 188 F. Supp. 3d at 969 (citing *Lagstein* and

[4] *Matthews* applied the FAA to the collective-bargaining agreement at issue there. See 688 F.3d at 1115 n.7.

Matthews and concluding that the public-policy exception is consistent "with Supreme Court and Ninth Circuit precedent"); *City of Alturas* v. *Adkins Consulting Eng'rs, Inc.*, No. 2:13-cv-00354-TLN-CMK, 2014 WL 1255848, at *6 (E.D. Cal. Mar. 26, 2014) ("The Ninth Circuit recognizes a narrow exception to enforcement of arbitration awards under the FAA when an award is contrary to public policy.") (citing *Matthews*). Further, in an unpublished opinion, the Alaska Supreme Court cited *Matthews* in entertaining a public-policy challenge. *Dunham* v. *Lithia Motors Support Servs., Inc.*, No. S-15068, 2014 WL 1421780, at *6 (Alaska Apr. 9, 2014).[5]

The Second Circuit has likewise considered *Hall Street*'s effects but continued to recognize the viability of public-policy review. See *Schwartz* v. *Merrill Lynch & Co., Inc.*, 665 F.3d 444, 451-452 (2d Cir. 2011). In *Schwartz*, the panel first explained that, under circuit precedent, manifest disregard survived *Hall Street*. *Ibid.* It then discussed how public-policy review also provides a basis for vacating an award, *id.* at 452, before rejecting the public-policy challenge on the merits, *id.* at 454.

Like the Second and Ninth Circuits, the Fourth Circuit's initial look at *Hall Street* held that the manifest-disregard exception survived, and it expressly "decline[d] to adopt" the Eleventh Circuit's contrary position. *Wachovia Secs., LLC* v. *Brand*, 671 F.3d 472, 483 (4th Cir. 2012). *Wachovia* acknowledged, however, the circuit split "about the meaning of the word 'exclusive' in *Hall Street*" and the accompanying "uncertainty surrounding" non-

[5] *Dunham* did not directly discuss *Hall Street*, but the appellees had argued that *Hall Street* forecloses public-policy review. Br. of Appellees 29-31, No. S-14068 (Alaska filed Nov. 5, 2013), available at 2013 WL 7206235. Had the Court agreed, its opinion would have been written quite differently.

statutory grounds generally. *Id.* at 481 & n.7. Importantly, in a later case, the Fourth Circuit entertained both public-policy and manifest-disregard challenges while citing *Wachovia* on the scope of the manifest-disregard exception. See *Wells Fargo Advisors, LLC* v. *Watts*, 540 F. App'x 229, 231 (4th Cir. 2013).[6]

On top of those holdings, three other circuits have strongly implied that public-policy review remains viable. Although the First Circuit has not resolved the issue squarely, it assumed "with some confidence" that public-policy review survives *Hall Street*. *Bangor Gas Co., LLC* v. *H.Q. Energy Servs. (U.S.) Inc.*, 695 F.3d 181, 188 (1st Cir. 2012) ("FERC rules and regulations are, so far as they are valid, in the nature of sovereign commands representing a public purpose; and we will assume (*arguendo* but with some confidence) that an arbitration award would be vulnerable to the extent that it directed one or both of the parties clearly to violate such a mandate"). And in a post-*Hall Street* decision, the Tenth Circuit has explained that "a violation of public policy" provides a basis for vacating an award. *Burlington N. & Sante Fe Ry. Co.* v. *Pub. Serv. Co. of Okla.*, 636 F.3d 562, 567 (10th Cir. 2010). Although *Burlington* did not cite *Hall Street*, the appellee's brief alerted the Tenth Circuit that the question "whether these non-statutory grounds for vacatur

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[6] *Schwartz*, *Matthews*, *Lagstein*, and *Wells Fargo* did not explicitly reject the proposition that *Hall Street* foreclosed the public-policy exception, but the implication is inescapable. Those decisions directly acknowledged *Hall Street* in declaring that manifest-disregard survived, and accordingly rejected the view of other courts (like the Eleventh Circuit and the court below) that *Hall Street* limited judicial review to the strict grounds appearing explicitly in Section 10(a). And those decisions each expressly considered the public-policy challenge on the merits—an inappropriate task if the FAA foreclosed that review.

survive" *Hall Street* was unsettled. Br. of Appellee/Respondent Pub. Serv. Co. of Okla. 29 n.6, No. 09-5133 (10th Cir. filed Jan. 19, 2010); cf. *Kendall State Bank* v. *W. Point Underwriters, L.L.C.*, No. 10-2319-JTM, 2012 WL 3890264, at *3 n.2 (D. Kan. Sept. 7, 2012) (citing *Burlington* and holding that, under Tenth Circuit precedent, *Hall Street* does not foreclose the public-policy exception). Similarly, the year after *Hall Street*, the Eighth Circuit explained that "'[a]n arbitrator's award can be vacated for the reasons provided'" in the FAA, then entertained a public-policy challenge on its merits (albeit without citing *Hall Street*). *Williams* v. *Nat'l Football League*, 582 F.3d 863, 883-885 (8th Cir. 2009).[7]

2. In conflict with those decisions, the Eleventh Circuit has explicitly foreclosed public-policy review. See *Frazier* v. *CitiFinancial Corp., LLC*, 604 F.3d 1313, 1314, 1322, 1324 (11th Cir. 2010). *Frazier* considered challenges based on public-policy review and manifest disregard. *Id.* at 1321. Starting with *Hall Street*'s statement that Section

[7] The Eighth Circuit later interpreted *Hall Street* to limit vacatur grounds to those in Section 10(a). *Medicine Shoppe Int'l, Inc.* v. *Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010) ("an arbitral award may be vacated only for the reasons enumerated in the FAA."). But while that decision accordingly found manifest-disregard review barred, it dismissed the public-policy challenge instead on waiver grounds. *Ibid.* Consistent with that disparate treatment of the two non-statutory exceptions, district courts within the Eighth Circuit have acknowledged *Hall Street* yet considered a public-policy challenge. See *Riniker* v. *UnitedHealth Grp. Inc.*, No. 12-CV-2875 JNE/TNL, 2015 WL 1782566, at *6-*7 (D. Minn. Apr. 20, 2015); *Bd. of Trs.* v. *Miron Constr. Co., Inc.*, No. 13-CV-2080-LRR, 2014 WL 789200, at *2, *11 (N.D. Iowa Feb. 26, 2014); *St. Mary's Med. Ctr.* v. *Int'l Union of Operating Eng'rs, Local 70*, Civ. No. 11-1641 (PAM/LIB), 2013 WL 3270388, at *3 (D. Minn. June 26, 2013) (explaining that "there is some indication that the public policy inquiry survives *Hall Street*" but it "remains an open question").

10(a) "'provide[s] the FAA's exclusive grounds for expedited vacatur,'" *id.* at 1322 (quoting *Hall Street*, 522 U.S. at 584), the court reviewed the "different approach[es]" other circuits have taken to *Hall Street*. *Id.* at 1323-1324. The court ultimately decided "that the categorical language of *Hall Street* compels" the conclusion that "judicially-created bases for vacatur are no longer valid." *Id.* at 1324. It accordingly refused to consider the public-policy challenge. *Ibid.*

Two state high courts have followed *Frazier* in refusing public-policy review. The Florida Supreme Court recognized the "federal circuit court split regarding whether *Hall Street* prohibits all extra-statutory grounds for vacating an award," and aligned itself with *Frazier* in rejecting the public-policy exception. See *Visiting Nurse Ass'n of Fla., Inc.* v. *Jupiter Med. Ctr., Inc.*, 154 So. 3d 1115, 1130, 1132 (Fla. 2014). And the Alabama Supreme Court held that a party challenging an arbitration award "must frame its arguments by *specific* reference to the § 10 grounds" and thus public-policy review was "no longer valid in light of *Hall Street*." *Cavalier Mfg., Inc.* v. *Gant*, 143 So. 3d 762, 769 & n.5 (Ala. 2013) (citing *Frazier*, 604 F.3d at 1322-1324).[8]

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[8] *Visiting Nurse Association* underscores the hopeless confusion surrounding *Hall Street*. The Florida Supreme Court opined that the Seventh and Eighth Circuits supported its decision that public-policy review is not available. See 154 So. 3d at 1132. As explained above, however, the Seventh Circuit *endorsed* public-policy review and the Eighth Circuit, at best, is undecided. But this shows that this question is so perplexing that it can be difficult even to discern a court's position. For instance, in the Florida Supreme Court's defense, the Eighth Circuit's holding in *Medicine Shoppe* could be viewed as categorical: "an arbitral award may be vacated only for the reasons enumerated in the FAA," 614 F.3d at 489—a view that would make this a 4-2 circuit split (instead of 4-1). As discussed above, however, that

Had any of these cases arisen in the Second, Fourth, Seventh, or Ninth Circuits, this critical predicate issue would have come out the other way.

3. In addition to the deep conflict over public-policy challenges, there has been similar confusion over manifest-disregard review—highlighting the urgent need for this Court's intervention.

In confronting these issues, many courts frame the issue as whether the FAA excludes *any* review not explicitly identified in Section 10(a). These decisions thus treat *Hall Street* as an all-or-nothing proposition: Either the FAA permits vacatur challenges not explicitly listed in Section 10(a) or it does not—without exception. Cf., *e.g.*, *Abbott* v. *Law Office of Patrick J. Mulligan*, 400 F. App'x 612, 623 n.10 (10th Cir. 2011) ("*Hall Street*, insofar as it calls into question *any* judicially created grounds for vacating an arbitrator's award, necessarily calls the public policy basis for doing so into question."); *Hicks* v. *Cadle Co.*, 355 F. App'x 186, 196-197 (10th Cir. 2009) (canvassing the circuits' "differing conclusions" on "whether judicially-created grounds for vacatur survive" *Hall Street*, but declining to itself decide whether *Hall Street* eliminated manifest-disregard and public-policy review). Under this logic, a decision to foreclose manifest disregard also suggests a decision to foreclose public policy (and vice versa).[9]

For example, in permitting manifest-disregard review, the Sixth Circuit adopted a categorical approach to

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view of *Medicine Shoppe* has not been shared by Eighth Circuit district courts.

[9] Courts concluding that manifest disregard survives have necessarily held that, contrary to the conclusion of the court below, "the grounds listed in" Section 10(a) are *not* "the exclusive grounds for vacat[ur]." App., *infra*, 13a. Indeed, we are unaware of any case allowing a manifest-disregard challenge but not public-policy review.

Hall Street that effectively endorses public-policy review. See *Coffee Beanery, Ltd.* v. *WW, LLC*, 300 F. App'x 415, 418-419 (6th Cir. 2008). *Coffee Beanery* interpreted *Hall Street* narrowly as only forbidding "*private parties* to supplement by contract the FAA's statutory grounds for vacatur," rather than eliminating a "judicially-invoked" ground like manifest disregard. *Ibid.*; cf. *Frazier*, 604 F.3d at 1323-1324 (explaining that *Coffee Beanery* concluded that *Hall Street* did not "expressly address[] whether [the Section 10(a)] grounds may be supplemented judicially"). The "universally recognized" manifest-disregard exception consequently survived. *Coffee Beanery*, 300 F. App'x at 419. That logic would equally preserve longstanding public-policy review, which emanates not from contractual expansion but fundamental judicial authority.

By stark contrast, two state high courts have followed *Frazier* and rejected manifest disregard in holding that *Hall Street* categorically limits vacatur to those grounds in Section 10(a). See *Cunningham* v. *LeGrand*, 785 S.E.2d 265, 270 (W. Va. 2016) ("the grounds set forth in the FAA remain the only mechanism for challenging arbitration awards."); *Worman* v. *BP Am. Prod. Co.*, 248 P.3d 644, 648 (Wyo. 2011) (explaining that the court will interpret "literally" *Hall Street*'s statement that the Section 10(a) grounds are "exclusive"). This risks an intra-circuit conflict in the Tenth Circuit on public-policy review. Although *Worman* expressly rejected manifest disregard, not public policy, the Wyoming Supreme Court interpreted "literally" *Hall Street*'s statement that the FAA provides "'exclusive grounds'" for vacatur. 248 P.3d at 647-648 (quoting *Hall Street*). That reasoning might also foreclose a public-policy challenge. Yet, as discussed above, the Tenth Circuit has considered such challenges post-*Hall Street*.

The Fifth Circuit's contribution to the debate further exemplifies the chaos of *Hall Street*'s wake. In addressing manifest disregard, that court initially concluded that "*Hall Street* unequivocally held that the statutory grounds are the exclusive means for vacatur under the FAA," and so "arbitration awards under the FAA may be vacated only for reasons provided in § 10." *Citigroup Glob. Mkts., Inc.* v. *Bacon*, 562 F.3d 349, 355, 358 (5th Cir. 2009); see also *Campbell Harrison & Dagley, L.L.P* v. *Hill*, 782 F.3d 240, 244-245 (5th Cir. 2015) (stating in dicta that *Hall Street* "eliminated all non-statutory grounds for vacating arbitration awards," including public policy). Other courts interpreted that holding as categorical in nature, including in cases involving public-policy review. See, *e.g.*, *Wachovia*, 671 F.3d at 481 n.7; *Frazier*, 604 F.3d at 1323; *Visiting Nurse Ass'n*, 154 So. 3d at 1131; *Am. Postal Works Union, AFL-CIO* v. *U.S. Postal Serv.*, No. No. 3:09–CV–1084–B, 2010 WL 1962676, at *2 (N.D. Tex. May 14, 2010) (citing *Citigroup* for the proposition that public-policy review is no longer available). But the Fifth Circuit later revisited the issue in an unpublished disposition, suggesting that *Citigroup* eliminated manifest disregard only as a purely *independent* ground for vacatur, and assumed *arguendo* that both manifest disregard and public-policy review might survive as a judicial gloss on Section 10(a). See *McKool Smith, P.C.* v. *Curtis Int'l, Ltd.*, 650 F. App'x 208, 212 (5th Cir. 2016). Courts are accordingly so hopelessly confused after *Hall Street* that they not only disagree with each other directly, but they also disagree about how to interpret each other's opinions.

4. The conflict regarding public-policy review is deep, square, and entrenched. The courts that have entertained public-policy challenges were well aware of *Hall Street* but authorized public-policy review anyway. In contrast,

the Eleventh Circuit canvassed the circuits' "different approach[es]" to *Hall Street* and adopted the "categorical" view of that decision. *Frazier*, 604 F.3d at 1323-1324. There is no reason to believe that the Eleventh Circuit will suddenly reconsider its position—or that if it did, both the Florida and Alabama Supreme Courts would follow suit. Further percolation is pointless: Going forward, courts will simply have to pick sides until this Court finally resolves the issue.

B. Whether Public-Policy Review Is Permitted Is A Recurring Question Of Great Importance

The scope of judicial review under the FAA is a recurring question of exceptional importance.

First, resolving this issue is important to preserving the benefits of arbitration as a cost-effective alternative to litigation. See, *e.g.*, *Rodriguez de Quijas* v. *Shearson/Am. Exp., Inc.*, 490 U.S. 477, 479-480 (1989). Arbitration is attractive because it reduces litigation costs. When the standard for judicial review of arbitration awards is unsettled, however, parties have no choice but to litigate what that standard is. In the wake of *Hall Street*, parties thus have engaged in wasteful litigation about whether public-policy review and other non-statutory grounds survive, as reflected by the staggering multitude of decisions addressing that question (including those declining to decide it). Until the question is resolved, parties will continue litigating over whether litigation is even allowed—a result that needlessly burdens the judiciary and parties alike.

Second, there is a reason that public-policy review operated effectively before *Hall Street*. This modest judicial check prevents violations of law and protects the parties from egregious errors and the public from serious harm. This small modicum of judicial oversight does not interfere with the arbitration process: it does not permit parties to relitigate facts or redo dispositions of law; it simply allows a limited review to determine whether the product of the arbitration—the award itself—is contrary to public policy or compels conduct in violation of public policy. Those questions are virtually always suited for swift disposition, and the high standards for satisfying those claims deter their misuse. If public-policy challenges interfered with arbitration—or offered little countervailing benefit—courts presumably would have abandoned the mechanism long before *Hall Street* unintentionally cast doubt on the issue by resolving a decidedly different question. The fact that arbitration and public-policy review have peacefully co-existed for such a steady period of time suggests that the two systems work well in tandem. The decision below further upsets this important balance, and immediate review is warranted to correct it.

Finally, this case illustrates the great stakes of deciding this issue incorrectly. The FAA is a federal law, and it applies in both federal and state courts. Under the minority view, the FAA eliminates this traditional judicial check and interferes with state laws designed to protect state interests. Indeed, under this view, the FAA compels state courts to *order* parties to carry out an arbitration decision that violates state law. This flouts the settled principle that courts will not enforce illegal contracts—and does so without regard to federalism interests. Contra, *e.g.*, *Misco*, 484 U.S. at 42 ("no court will lend its aid to one who founds a cause of action upon an immoral or illegal act").

Under the proper view, the FAA respects federalism and preserves the States' interest in enforcing their own laws and public policy—and most certainly does not preempt state authority by compelling state courts to enforce awards that violate state law. There is no indication that Congress intended to displace the fundamental powers that States have exercised for decades in reviewing arbitration awards. See, *e.g.*, *Gregory* v. *Ashcroft*, 501 U.S. 452, 464 (1991).[10]

C. The Decision Below Is Incorrect

Review is also warranted because the court below is mistaken that *Hall Street* foreclosed public-policy review. Public-policy review derives from the judiciary's centuries-old authority to refuse to enforce illegal contracts. The FAA did not eliminate that settled power, which survives as either a purely independent exception to the statutory grounds or a judicial gloss on Section 10(a)(4). It is black-letter law that parties may not contract to accomplish an illegal object; inserting an arbitration clause in their agreement does not unwind that rule.

1. a. Refusing to enforce an arbitration award on public-policy grounds "is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy." *Misco*, 484 U.S. at 42; see, *e.g.*, *W.R. Grace & Co.* v. *Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 766 (1983) ("As with any contract, however, a court may

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[10] The answer to the question whether Section 10(a) permits public-policy review must be the same regarding both federal and state public policies, because at heart this is a question of statutory interpretation. Cf. *Clark* v. *Martinez*, 543 U.S. 371, 378 (2005) ("To give these same words a different meaning for each category would be to invent a statute rather than interpret one."). Accordingly, because the exclusivity of Section 10(a) carries federalism consequences, this petition—arising from state court and implicating core state public policy—is the ideal vehicle to resolve the *Hall Street* morass. Petitioner never received a judicial ruling on its state-law-based challenge because of the lower court's error of federal law.

not enforce a collective bargaining agreement that is contrary to public policy."). The vitality of that general doctrine has been confirmed by "authorities from the earliest time to the present," which "unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract." *McMullen* v. *Hoffman*, 174 U.S. 639, 654 (1899); see *Misco*, 484 U.S. at 42 (citing *McMullen*); *Hurd* v. *Hodge*, 334 U.S. 24, 35-36 (1948) ("The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents. Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.") (footnotes omitted). The justification for the refusal is "that the public's interest * * * will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements." *Misco*, 484 U.S. at 42; see also, *e.g.*, *Seymour* v. *Blue Cross/Blue Shield*, 988 F.2d 1020, 1023 (10th Cir. 1993) ("The public policy exception is rooted in the common law doctrine of a court's power to refuse to enforce a contract that violates public policy or law. It derives legitimacy from the public's interest in having its views represented in matters to which it is not a party but which could harm the public interest.").

Texas, too, adheres to this principle. See, *e.g.*, *Phillips* v. *Phillips*, 820 S.W.2d 785, 789 (Tex. 1991) (explaining that "[c]ourts will not enforce a plainly illegal contract even if the parties do not object" because "[e]nforcement of an illegal agreement violates public policy"); *Miller* v. *Long-Bell Lumber Co.*, 222 S.W.2d 244, 246 (Tex. 1949) (noting "well-recognized" principle "that courts will not lend their aid in enforcing illegal contracts").[11] Public-policy review accordingly upholds in the arbitration context the traditional judicial authority to refuse to enforce illegal agreements. Cf. *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006) (explaining that the FAA "places arbitration agreements on equal footing with all other contracts").

Nothing in *Hall Street* suggests that Section 10(a) compels a court to confer its official imprimatur on an otherwise illegal private contract. *Hall Street* of course had no occasion to address public-policy challenges, and in rejecting contractual expansions of Section 10(a), this Court held merely that Section 10(a) provides *the FAA*'s exclusive grounds for vacatur. See 552 U.S. at 584 ("We now hold that §§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification."); *id.* at 583 ("The Act also supplies mechanisms for enforcing arbitration awards * * * ."). That holding does not foreclose public-policy review as an independent source of vacatur. On the contrary, *Hall Street* expressly left this opening intact: "In holding that §§ 10 and 11 provide exclusive regimes for *the review provided by the statute*, we do not purport to say that they exclude more searching review based on authority outside the statute as well." 552 U.S. at 590 (emphasis added). Indeed, the Court explicitly spared the prospect that another non-statutory exception (manifest disregard) represents "a new ground for re-

[11] In fact, Texas recognizes a public-policy exception under the Texas Arbitration Act. See *CVN Group, Inc.* v. *Delgado*, 95 S.W.3d 234, 239 (Tex. 2002) ("We agree [with *W.R. Grace* and *Misco*] that an arbitration award cannot be set aside on public policy grounds except in an extraordinary case in which the award clearly violates carefully articulated, fundamental policy.").

view." *Id.* at 585. The Court later reaffirmed that possibility, recognizing that the survival of manifest disregard "as an independent ground for review or as a judicial gloss" remained unsettled. *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672 n.3 (2010). That would be an unusual statement had *Hall Street* truly meant to eliminate all common-law sources of vacatur.[12]

b. Public-policy review also fits comfortably with the text of Section 10(a)(4), which expressly empowers a court to vacate an award "where the arbitrators exceeded their powers." 9 U.S.C. 10(a)(4). "[A]n arbitrator acts as the parties' agent and as their delegate may do anything the parties may do directly." *George Watts & Son, Inc.* v. *Tiffany & Co.*, 248 F.3d 577, 580 (7th Cir. 2001) (Easterbrook, J.) (quoting *E. Associated*, 531 U.S. at 62, for the proposition that "'we must treat the arbitrator's award as if it represented an agreement between' the parties themselves"); see *Stolt-Nielsen*, 559 U.S. at 682 ("an arbitrator derives his or her powers from the parties' agreement to forgo the legal process"). The parties, of course, may not validly agree to violate the law, and accordingly "an arbitrator may not direct the parties to violate the law." *George Watts & Son*, 248 F.3d at 580. Therefore, if the arbitrator (as here) interprets the underlying agreement in a way that renders it illegal, she has "exceeded [her] powers." 9 U.S.C. 10(a)(4).

[12] To be sure, some language in *Hall Street* could suggest a more limiting view of Section 10(a). See, *e.g.*, 552 U.S. at 587 (the FAA "unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions applies"). But this language arises in the context of explaining that Section 10(a) is not a mere "default provision" that can be supplemented by the parties, *ibid.*, and closing "the door to [] full-bore legal and evidentiary appeals," *id.* at 588, not the "narrow" public-policy challenge, *E. Associated*, 531 U.S. at 63.

2. That the FAA permits public-policy review—under Section 10(a)(4) or otherwise—is confirmed by the "longstanding" interpretive rule that "'[s]tatutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.'" *United States* v. *Texas*, 507 U.S. 529, 534 (1993) (alterations in original) (citation omitted); cf. *Mississippi ex rel. Hood* v. *AU Optronics Corp.*, 134 S. Ct. 736, 742 (2014) (This Court "presume[s] that 'Congress is aware of existing law when it passes legislation.'") (citation omitted). "In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *Texas*, 507 U.S. at 534. The FAA did not expressly abolish the judiciary's power to enforce fundamental public policy in the arbitration context. It thus must be read to preserve that authority. See *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1363 (2013) ("'[W]hen a statute covers an issue previously governed by the common law,' we must presume that 'Congress intended to retain the substance of the common law.'") (citation omitted) (alteration in original).

3. The FAA also cannot be interpreted to jettison public-policy review because that would have the FAA displace *state*-court authority to refuse to aid violations of fundamental *state* public policy. The upshot of the court's decision here is that the FAA allows an arbitrator to direct a violation of state law, then forces a state court to approve that violation. Yet "'the historic police powers of the States [are] not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress.'" *Altria Group, Inc.* v. *Good*, 555 U.S. 70, 77 (2008) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (first alteration in original); see *Gregory*, 501

U.S. at 464. Public-policy review ensures that States retain their traditional authority for protecting their citizens from abuse and unlawful conduct (just as it also protects federal interests in federal court). Far from unmistakably preempting that authority, the FAA—through Section 10(a)(4)—is best read to preserve it. Cf. *Allied-Bruce Terminix Cos., Inc.*, v. *Dobson*, 513 U.S. 265, 292-293 (1995) (Thomas, J., dissenting) (arguing that, particularly in light of the presumption against preemption, the FAA does not apply in state courts); *Southland Corp.* v. *Keating*, 465 U.S. 1, 27 (1984) (O'Connor, J., dissenting) ("There is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement.") (quoting drafter of the bill that became the FAA).

4. While public-policy review protects this fundamental judicial power, it remains sufficiently muted to uphold the "national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Hall Street*, 552 U.S. at 588. That is because this exception is "narrow" and satisfied only where the agreement violates "an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed public interests." *E. Associated*, 531 U.S. at 63. It does not permit the court to reevaluate facts, nor does it allow the court to engage in second-guessing of a mere contractual (mis)interpretation. See *George Watts & Son*, 248 F.3d at 580 ("[J]udges may not deprive arbitrators of authority to reach compromise outcomes that legal norms leave within the discretion of the parties to the arbitration agreement."). The challenge succeeds only when the award itself violates fundamental, well-established public policy. This exception is accordingly con-

sistent with the limited judicial review that the FAA demands. Cf. *ibid.* (explaining that allowing "the judiciary [to] step in when the arbitrator has commanded the parties to violate legal norms" "preserves the established relation between court and arbitrator"). Moreover, it even enhances the attractiveness of arbitration by giving parties comfort that radical arbitrator error will be reined in.

5. Petitioner argued below that the arbitration award compels it to pay respondent in violation of fundamental Texas public policy as embodied by positive Texas law, and the arbitrator thus lacked the authority to compel that payment. Had petitioner and respondent simply contracted for such a payment, the agreement would have been illegal under Texas law. The FAA does not demand a different result merely because the parties agreed to arbitrate their dispute.

Petitioner had no opportunity to resolve this issue on the merits because the court below held that the FAA foreclosed the issue. That error of federal law warrants review.

D. This Is An Ideal Vehicle For Considering The Question Presented

This case is an ideal vehicle for resolving the question presented. It raises a pure question of law: whether *Hall Street* forecloses public-policy review under the FAA. That question was directly pressed and passed upon below, and it does not turn on any disputed facts. The court of appeals explicitly decided the issue and it was dispositive of the litigation. And because the court did not alternatively resolve the question on the merits, there is no alternative grounds supporting affirmance: If respondent believes it can prevail on the merits of the Texas issue (which it cannot), it can litigate that issue in the first instance before the Texas courts on remand.[13]

This issue has been sufficiently vetted in the lower courts, and additional percolation promises nothing more than additional conflicts and additional confusion. This case permits the full and fair consideration of the question presented, and review is urgently warranted.

[13] Some courts repeatedly duck the issue by assuming the challenge is permitted but rejecting it on the merits. For example, the Third Circuit has repeatedly declined to decide whether public-policy review survives *Hall Street*. See *CD & L Realty LLC* v. *Owens Ill., Inc.*, 535 F. App'x 201, 205 n.3 (3d Cir. 2013); *Rite Aid N.J., Inc.* v. *United Food Commercial Workers Union, Local 1360*, 449 F. App'x 126, 129 (3d Cir. 2011); *Andorra Servs. Inc.* v. *Venfleet, Ltd.*, 355 F. App'x 622, 628 n.6 (3d Cir. 2009).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2017

APPENDIX

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APPENDIX A

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

No. 05-13-00748-CV

PARALLEL NETWORKS, LLC, Appellant

v.

JENNER & BLOCK LLP, Appellee

No. 05-13-00748-CV

On Appeal from the 101st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-13-01146-E

Filed: October 9, 2015

MEMORANDUM OPINION

Before Justices Bridges, Francis, and Lang-Miers
Opinion by Justice Bridges

On August 27, 2015, we withdrew our opinion and vacated our judgment in this case. The following is now the opinion of the Court.

Parallel Networks, LLC[1] appeals the trial court's judgment confirming an arbitration award under the Federal Arbitration Act (FAA) in favor of Jenner & Block, LLP. In four issues, Parallel argues the trial court erred in confirming an arbitration award that allowed recovery of attorney's fees based upon a termination provision that was unconscionable and against public policy; an award under the alternative theory of quantum meruit was also against public policy; Jenner abandoned its client, Parallel, and thereby forfeited all compensation; and the trial court erred by confirming the arbitration award after the arbitrator refused to hear certain evidence. We affirm the trial court's judgment.

Jenner, a law firm, represented Parallel in patent infringement litigation against two defendants pursuant to a contingent fee agreement. Parallel and its managing partner and lead counsel, Terry Fokas, had negotiated numerous other contingent fee agreements with other firms in connection with Parallel's patent infringement program. In fact, the contingent fee agreement between Parallel and Jenner was based upon a prior contract with similar terms that Parallel had with another law firm. Parallel proposed the contract to Jenner as a basis for the contingent fee agreement which the parties later executed after minor revisions.

The agreement provided Parallel would be solely responsible for paying the up-front expenses associated with patent infringement lawsuits and that Parallel agreed to pay any third-party vendor's invoices promptly upon receipt of such invoices or to reimburse Jenner for

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1 Parallel succeeded epicRealm Licensing LP in the contingent fee agreement in September 2007. All references herein are therefore to Parallel.

expenses paid by Jenner on behalf of Parallel. In consideration for Jenner undertaking a patent infringement lawsuit, Jenner was to receive a percentage of net proceeds paid to Parallel according to a sliding percentage scale depending on the amount of the proceeds.

The agreement provided the parties would submit disputes to arbitration:

> 8. Arbitration of Disputes
>
> (a) Generally: The parties acknowledge that situations may arise which are not specifically addressed or contemplated in this Agreement. In that event, the Parties shall make a good faith effort to resolve any dispute relating in any manner to the Agreement or to any services provided pursuant to this Agreement in accordance with the general spirit of this Agreement. If the Parties cannot reach a satisfactory resolution, the Parties (or their authorized successors or assigns) agree that such dispute shall be finally adjudicated by arbitration conducted in Dallas, Texas under the auspices of JAMS®. The details concerning such arbitration, will be agreed upon by the Parties prior to the commencement of arbitration or, failing such agreement, by JAMS®. The arbitrator shall be selected by the mutual agreement of the Parties or, failing such agreement, from a panel of three arbitrators nominated by JAMS®, with each Party having the right to strike one of the arbitrators nominated by the other Party.

The agreement further provided Texas law would govern any dispute. The contingent fee agreement contained a provision addressing the termination of the agreement by either party:

> 9. Termination.

a. Termination by [Parallel]. This Agreement may be terminated by [Parallel] at any time by providing 30 days prior written notice to Jenner & Block. If [Parallel] elects to terminate this Agreement, [Parallel] shall: (i) compensate Jenner & Block for all time expended by Jenner & Block on any Enforcement Activity undertaken on behalf of [Parallel] at the regular hourly billing rates charged by Jenner & Block for its attorneys and legal assistants (in lieu of the Contingent Fee Award applicable to such Enforcement Activity); provided, however, that [Parallel] has not terminated this Agreement as a result of a material breach of this Agreement by Jenner & Block (and such breach was not cured within thirty (30) days of the receipt by Jenner & Block of written notice from [Parallel] of such material breach); (ii) reimburse Jenner & Block for all previously unreimbursed Enforcement Expenses incurred by Jenner & Block under this Agreement; and (iii) at the conclusion of any Enforcement Activity, pay Jenner & Block an appropriate and fair portion of the Contingent Fee Award based upon Jenner & Block [sic] contribution to the result achieved as of the time of termination of this Agreement (to the extent that Jenner & Block has not already been compensated under Section 9.a.(i) hereunder).

b. Termination by Jenner & Block. If Jenner & Block determines at any time that it is not in its economic interest to continue the representation of [Parallel] pursuant to this Agreement, Jenner & Block may terminate this Agreement by providing 30 days prior written notice to [Parallel] provided that the timing of such a termination shall be in full accord with any applicable ethical or legal responsibilities (e.g. those promulgated by the American Bar Association (ABA)

> or those outlined by the Illinois Disciplinary Rules of Professional Conduct), which bind or otherwise control the behavior or actions of Jenner & Block. Subsequent to the termination, Jenner & Block shall use best efforts to secure substitute counsel for [Parallel]. If Jenner & Block terminates this Agreement, it shall continue to be entitled to receive compensation from [Parallel] pursuant to (i), (ii) and (iii) in the preceding paragraph up to the date of such termination LESS the reasonable costs incurred by [Parallel] to transition any pending or on-going Enforcement Activities that had been commenced with Jenner & Block to successor legal counsel.

Jenner continued representing Parallel in the two patent infringement lawsuits. However, by December 2008, Parallel owed Jenner approximately $500,000 in unpaid expenses associated with the lawsuits. Although Parallel paid the $500,000 out of a settlement in another patent infringement lawsuit, Jenner concluded it needed to terminate the representation. After logging approximately 24,000 hours in the patent infringement cases, Jenner withdrew in February 2009 and transferred the cases along with the trial preparation materials to successor counsel.

In April 2009, Parallel settled one of the patent infringement lawsuits, and it settled the other lawsuit in April 2010, with the possibility of further settlement proceeds. In December 2011, Jenner filed a demand for arbitration before JAMS pursuant to the arbitration provision in the parties' agreement. The arbitration demand alleged Jenner provided more than $10 million worth of legal services to Parallel, yet Parallel refused to pay any amount for those services. Jenner alleged claims for breach of contract, quantum meruit, and promissory estoppel based on the contingent fee agreement. Jenner also sought to recover attorney's fees for its services in connection with the two lawsuits and the fees associated with the enforcement of the contingent fee agreement.

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

In October 2012, the arbitrator conducted hearings on the parties' claims. The arbitrator made written findings and an award. The arbitrator found Jenner had just cause to withdraw from representing Parallel. The arbitrator found that Parallel's history of failing to pay expenses timely and not having resources to pay expenses made the prospect of proceeding with the pending cases "less than attractive to Jenner."

The arbitrator next turned to a discussion of the theories under which Jenner could recover and the amount of such recovery. First, the arbitrator discussed paragraph 9.a.(i) incorporated by 9.b of the agreement, which provided Jenner was entitled, if the agreement was terminated, to receive compensation for all of its time incurred at its regular hourly billing rates in lieu of a contingent fee. The arbitrator stated this provision "raises questions about whether the [9.a.(i)] clause creates an undue burden on the client and violates public policy because it arguably creates an incentive for the attorney to escape the contingent fee agreement and shifts to the client all of the risks of both contingent fee and hourly fee agreements." However, the arbitrator concluded it was "not necessary to reach any issues about [9.a. (i)]" because Jenner was "not seeking to enforce or to recover on

Paragraph [9.a.(i)], and other provisions of the contract may be enforced without that provision."

The arbitrator cited paragraph 9.a.(iii), which provided for "an appropriate and fair portion of the Contingent Fee Award" to be paid to Jenner after Parallel received a payment or settlement at "the conclusion of an Enforcement Activity." Such a payment, the arbitrator continued, would be only after Parallel received a payment in a lawsuit and would not require immediate payment at the time the representation was terminated. The payment would also be limited in scope to an "appropriate and fair" portion of "the contingent fee award that Jenner otherwise might have recovered from an actual settlement or successful outcome, based on its contribution to that outcome, had Jenner continued its representation until the time that the settlements were achieved." He also found, "with Paragraph [9.a.(iii)], the attorney and client continue to share the risk of recovery, and the attorney's interest does not supersede the client's." In summing up the considerations underlying the application of paragraph 9.a.(iii) in this case, the arbitrator stated the following:

> Given the prodigious amount of time typically required and invested to prevail in complex patent infringement cases, like the underlying case here, it is reasonable for the very sophisticated parties in this case, both experienced in high stakes litigation, to agree in advance that if the representation is terminated after Jenner had invested huge amounts of time and services, that Jenner is entitled to receive some reasonable compensation such as that outlined in paragraph 9.b.(iii). It reflects their intent to be fair and reasonable, in the event of a recovery, to both parties in that situation: fair for Parallel not to pay the entire

> contingent fee but instead only a fair and appropriate portion of that, fair for Jenner to receive a fair and appropriate portion of a contingent fee based on its contribution to the result, and fair by avoiding the injustice of Parallel enjoying all the benefits of Jenner's services and the fruits of the settlements, such as those here, without paying any fee whatsoever to Jenner.

Based on this reasoning, the arbitrator found that the termination fee set out in paragraph 9.a.(iii) did not "violate the overlay of ethical principles" and, because it did not violate public policy and was not unconscionable, the provision was enforceable.

Alternatively, the arbitrator determined that Jenner was also entitled to recover on a quantum meruit claim. The arbitrator stated Jenner provided significant legal services to Parallel; Fokas, Parallel's managing partner and lead counsel, reported being "very pleased" with Jenner's work; Fokas engaged three of Jenner's partners to represent Parallel after Jenner terminated its representation; successor counsel used and relied upon Jenner's work product to obtain settlements in the two patent infringement actions; and Jenner's work product was therefore a "meaningful factor in providing significant recoveries to Parallel." The arbitrator noted Parallel argued Jenner's quantum meruit claims were barred by the doctrine of "unclean hands" but rejected Parallel's argument because Jenner had just cause to terminate the representation.

As to damages, the arbitrator noted the measure of damages on the contract claim was an "appropriate and fair portion" of the contingent fee award, and the measure of damages on the quantum meruit claim was "the reasonable value of the services provided." The arbitrator stated the two measures of damages were similar, as were the considerations to be taken into account in determining damages under each measure. For Jenner's breach of contract claim, the arbitrator determined that $3,000,000 was an appropriate and fair portion of the contingent fee award based on Jenner's contribution to the result achieved with the patent infringement actions. Alternatively, on Jenner's quantum meruit claim, the arbitrator concluded $3,000,000 was the reasonable value of the services Jenner provided. Under either the breach of contract claim or the quantum meruit claim, the arbitrator determined Jenner should recover sixteen percent of future settlement proceeds in the April 2010 settlement.

The arbitrator next addressed Parallel's counterclaims for breach of contract, breach of fiduciary duty, and legal malpractice. The arbitrator stated Parallel's breach of contract claim was premised upon Parallel's allegation that Jenner prematurely terminated its representation without just cause. The arbitrator concluded Jenner had just cause to terminate the representation and "did a very professional job" in effecting a smooth transition to successor counsel. The arbitrator also rejected Parallel's claim that Jenner breached the agreement by refusing to take on an additional patent infringement case. Because Jenner had just cause to terminate the representation it had already undertaken, the "entire obligation to represent Parallel" ceased. The arbitrator stated Parallel's breach of fiduciary duty claim was also based on Parallel's claim Jenner "breached its duties by abandoning Parallel without just cause" and by failing to disclose Jenner's plans to terminate the agreement. The arbitrator concluded none of Parallel's examples showed any injury to Parallel or improper benefit to Jenner, and there was nothing improper about Jenner "considering the economics of a contingent representation mid-case."

Thus, the arbitrator concluded Parallel was not entitled to recover on its breach of fiduciary duty claim. As to legal malpractice, Parallel's claim was based on "essentially the same fact allegations Parallel made in its breach of contract and breach of fiduciary duty claims, which Parallel alleges here as breaches of its duty of care." The separate argument the arbitrator identified was Parallel's assertion the April 2009 settlement was "settled for drastically reduced value." The arbitrator set out the testimony of Parallel's expert that the April 2009 settlement should have been higher and Jenner's expert testimony that the April 2009 settlement could not have been higher. The arbitrator found the credentials and analysis of Jenner's expert "substantially more credible and convincing" than Parallel's expert. Further, the arbitrator found Parallel failed to prove the April 2009 settlement "had any greater value than the settlement obtained." The arbitrator thus concluded Parallel failed to establish a right to recovery under its legal malpractice claims. The arbitrator awarded Jenner $3,000,000 as damages for breach of contract or, alternatively, for quantum meruit and sixteen percent of future settlement proceeds paid in the April 2010 settlement.

In January 2013, Parallel filed its petition and motion to vacate the arbitration award in which it raised essentially the same issues it raised at the arbitration. In April 2013, the trial court confirmed the award and denied Parallel's motion to vacate the arbitration award. This appeal followed.

In its first issue, Parallel argues the trial court erred by confirming the arbitration award based upon a termination provision that is unconscionable and against public policy. Specifically, Parallel argues that public policy prohibits agreements allowing attorneys to convert a contingency fee contract into another type of fee contract and that the provision is vague. In its second issue, Parallel argues that, because the quantum meruit recovery substitutes for the very recovery under the contract that is unconscionable as against public policy, the quantum meruit recovery was also against public policy. In its third issue, Parallel argues an attorney who has abandoned a client without just cause before completing a contingency fee contract forfeits all compensation, and the trial court therefore erred in confirming an award of attorney's fees based upon quantum meruit.

We review de novo a trial court's confirmation of an arbitration award under the FAA based on the entire record. *Ancor Holdings, LLC v. Peterson, Goldman & Villani, Inc.*, 294 S.W.3d 818, 825–26 (Tex. App.—Dallas 2009, no pet.); *Myer v. Americo Life, Inc.*, 232 S.W.3d 401, 407 (Tex. App.–Dallas 2007, no pet.). An arbitration award is treated the same as the judgment of a court of last resort. *Bailey & Williams v. Westfall*, 727 S.W.2d 86, 90 (Tex. App.—Dallas 1987, writ ref'd n.r.e.). All reasonable presumptions are indulged to uphold the arbitrator's decision, and none is indulged against it. *Bailey*, 727 S.W.2d at 90; *see also CVN Grp., Inc. v. Delgado*, 95 S.W.3d 234, 238 (Tex. 2002). An arbitration award is presumed valid and entitled to great deference. *Myer*, 232 S.W.3d at 407–08; *Crossmark, Inc. v. Hazar*, 124 S.W.3d 422, 429 (Tex.App.—Dallas 2004, pet. denied). When reviewing an arbitration award, we may not substitute our judgment merely because we would have reached a different decision. *Bailey*, 727 S.W.2d at 90; *see also CVN Grp., Inc.*, 95 S.W.3d at 238. Judicial review of an arbitration award adds expense and delay and thereby diminishes the benefits of arbitration as an efficient, economical system for resolving disputes. *CVN Grp., Inc.*, 95

S.W.3d at 238; *Crossmark*, 124 S.W.3d at 429. Accordingly, our review of the arbitration award is "extraordinarily narrow." *Myer*, 232 S.W.3d at 408; *see also Statewide Remodeling, Inc. v. Williams*, 244 S.W.3d 564, 568 (Tex. App.—Dallas 2008, no pet.). Importantly, our review is so limited that we may not vacate an award even if it is based upon a mistake in law or fact. *Crossmark*, 124 S.W.3d at 429 (citing *Anzilotti v. Gene D. Liggin, Inc.*, 899 S.W.2d 264, 266 (Tex. App.—Houston [14th Dist.] 1995, no writ)). Because of the deference given to arbitration awards, judicial scrutiny focuses on the integrity of the process, not the propriety of the result. *See Ancor*, 294 S.W.3d 833.

Under the terms of the FAA[2], an arbitration award must be confirmed unless it is vacated, modified, or corrected under one of the limited grounds set forth in sections 10 and 11 of the Act. *See* 9 U.S.C. §§ 9–11. Section 10(a) permits a court to vacate an arbitration award:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent

---

[2] The agreement did not expressly provide that the FAA applied; instead, the agreement provided for arbitration to be "conducted in Dallas, Texas under the auspices of JAMS®." Because the parties both refer to the FAA, and neither party disputes that the FAA applies, we apply the FAA.

> and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Id. § 10(a). Although, over time, the courts have recognized certain common law exceptions for vacating an arbitration award, the United States Supreme Court has held that the grounds listed in the statute are the exclusive grounds for vacating an arbitration award under the FAA. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008) (statutory grounds for vacating or for modifying or correcting arbitration award are exclusive grounds for expedited vacatur and modification of award pursuant to FAA); *see also Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 350 (5th Cir. 2009) (concluding *Hall Street* restricts grounds for vacatur to those set forth in section 10).

Hall Street forecloses our review of non-statutory grounds. *Ancor*, 294 S.W.3d at 827. If we were to overturn the arbitration award as unconscionable and violative of public policy, we would be substituting our judgment merely because we would have reached a different decision. *See Campbell Harrison & Dagley, L.L.P. v. Hill*, 782 F.3d 240, 245–46 (5th Cir. 2015) (reversing federal district court's judgment vacating contingency fee portion of arbitration award as unconscionable; in rejecting arbitrators' determination regarding unconscionability, court substituted its judgment for that of arbitrators merely because court would have reached different decision). Further, the record shows the arbitrator did not reach any issues concerning the provision that Jenner was entitled, if the agreement was terminated, to receive compensation for all of its time incurred at its regular hourly billing rates in lieu of a contingent fee. Thus, we overrule Parallel's first, second, and third issues. *See Ancor*, 294 S.W.3d at 827.

In its fourth issue, Parallel argues the arbitrator improperly excluded and refused to hear the expert testimony of Keith Lowery, "one of the inventors of the technology that formed the basis of the relevant patents-in-suit." Parallel argues the exclusion of this testimony and associated exhibits amounted to a refusal to hear evidence pertinent and material to the controversy, specifically the patent infringement action that settled in April 2009.

The two excluded exhibits, Exhibits 142 and 144, are printouts of computer source code consisting of arcane words and short phrases interspersed with numbers and symbols. At the arbitration hearing, Parallel's counsel stated:

> what I would—I would question Mr. Lowery on is to show him the pieces of the configuration files and ask him if the open source files that we discussed, like jk_mount and workers.properties, et cetera, are present in the [defendant's] documents. And if your ruling is that we are not permitted do that, then I would respectfully submit Exhibits 144 and 142 in addition to the patents and the demonstrative [sic] as our offer—as Parallel Network's offer of proof on this issue.

The arbitrator stated the files in Exhibits 144 and 142 were beyond a non-expert witness's and beyond Lowery's personal knowledge. Parallel was therefore not allowed to question Lowery about the configuration files. However, Lowery then testified that he was a consultant for

Parallel beginning in 2007. Lowery testified on cross-examination that the presence or absence of four modules or programs he described "doesn't tell you anything about whether they're infringing." Parallel did not submit an affidavit from Lowery indicating what his testimony would have been concerning the source code in Exhibits 142 and 144.

> The arbitrator is not bound to hear all of the evidence tendered by the parties; however, he must give each of the parties to the dispute an adequate opportunity to present its evidence and argument. An evidentiary error must be one that is not simply an error of law, but which so affects the rights of a party that it may be said that he was deprived of a fair hearing.

Cowle v. Dain Raushcer, Inc., 66 F.App'x. 525 (5th Cir. 2003), quoting *Forsythe Intern., S.A. v. Gibbs Oil Co. of TX.*, 915 F.2d 1017, 1023 (5th Cir. 1990).

Here, Parallel did not indicate in what manner Lowery's testimony concerning the presence of certain open source files in a particular defendant's documents were relevant to any issue involving Jenner's representation or the April 2009 settlement with that defendant. Lowery himself testified the presence or absence of certain modules or programs he described "doesn't tell you anything about whether they're infringing." The record is silent as to what Lowery would have testified concerning the source code in Exhibits 142 and 144. Under these circumstances, we conclude the exclusion of Lowery's testimony and Exhibits 142 and 144 did not so affect Parallel's rights that it may be said Parallel was deprived of a fair hearing. *See Cowle.*, 66 F.App'x. 525. Thus, the trial court did not err in denying Parallel's motion to vacate the arbitrator's award on the basis the arbitrator refused to hear evidence pertinent and material to the controversy. *See* 9

U.S.C. § 10(a); *Crossmark*, 124 S.W.3d at 429. We overrule Parallel's fourth issue.

We affirm the trial court's judgment.

130748F.P05

/David L. Bridges/
David L. Bridges
JUSTICE

APPENDIX B

IN THE DISTRICT COURT OF
DALLAS COUNTY, TEXAS
101st JUDICIAL DISTRICT

Cause No. DC-13-01146

PARALLEL NETWORKS, LLC, Plaintiff

vs.

JENNER & BLOCK LLP, Defendant

FINAL JUDGMENT CONFIRMING ARBITRATION AWARD

Pending before the Court are (1) Plaintiff's Petition and Motion to Vacate Arbitration Award ("Motion to Vacate"), and (2) Jenner & Block's Motion for Confirmation of Arbitration Award ("Motion to Confirm"). After considering the pleadings, the briefs and exhibits, the evidence, the arguments of counsel and the law, the Court finds and hereby orders that the Motion to Vacate should be and is DENIED and the Motion to Confirm should be and is GRANTED. Accordingly, it is

ORDERED, ADJUDGED AND DECREED that the arbitration award issued on January 18, 2013 in the arbitration captioned *Jenner & Block LLP vs. Parallel*

Networks, LLC et al., JAMS Reference No 1310019934, be and hereby is CONFIRMED, and it is further

ORDERED, ADJUDGED AND DECREED that final judgment is entered that Jenner & Block LLP have and recover from Defendant Parallel Networks LLC ("Parallel Networks") the following amounts, for which execution may issue:

1) The amount of $3,000,000 in damages, plus

2) Pre-award interest on the damages in the amount of $162,328.77, consisting of interest at the rate of 5% from December 20, 2011 to January 18, 2013, plus

3) The amount of $1,394,000 as reasonable and necessary attorneys' fees, plus

4) Post-award, prejudgment interest on the amounts set forth in items 1-3 above at the rate of 5%, equaling $63,039.60 from January 18, 2013 until the date of this judgment, plus

5) Post-judgment interest on all amounts set forth in items 1-4 above, at the rate of 5% from the date of this judgment until paid; plus

6) In the event Parallel Networks receives a recovery or settlement from Oracle in the arbitration contemplated by Parallel Networks' prior settlement with Oracle, Jenner & Block is entitled to and shall recover from Parallel Networks, and Parallel Networks is obligated and ordered to pay Jenner & Block, 16% of the net proceeds of settlement or recovery paid to Parallel Networks, and it is further

ORDERED, ADJUDGED AND DECREED that Parallel Networks recover nothing on its Petition and Motion to Vacate, and it is further

ORDERED, ADJUDGED AND DECREED that all counterclaims asserted by Parallel Networks' in the arbitration are denied, with prejudice to refiling.

All costs of court are awarded against Parallel Networks.

All writs and processes for the enforcement and collection of this Judgment or the costs of Court may issue as necessary.

This judgment finally disposes of all parties and claims and is appealable

SIGNED this 29th day of April, 2013

/s/ Martin Lowy
Judge Presiding

APPENDIX C

CONTAINS INFORMATION SUBJECT TO PROTECTIVE ORDER

JAMS

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

ARBITRATION FINDINGS AND AWARD

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

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CONTAINS INFORMATION SUBJECT TO PROTECTIVE ORDER

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

ARBITRATION FINDINGS AND AWARD

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

The parties called the following witnesses to testify:

Witnesses called by Jenner:

1. Paul Margolis (Jenner trial attorney; represented Parallel in *Oracle* and *QuinStreet* cases).

2. Harry Roper (Senior Jenner attorney and lead counsel for Parallel in *Oracle* and *QuinStreet* cases).

3. Terry Fokas (Managing Partner and General Counsel of Parallel; called as an adverse witness).

4. Terri Mascherin (Jenner trial attorney; member of Jenner Management Committee; worked with trial team on damages issues in the *Oracle* and *QuinStreet* cases).

5. Susan Levy (Jenner attorney and Managing Partner).

6. Paul Koning (attorney with Koning Rubarts, LLP; counsel for Jenner in arbitration, and witness on statutory attorney's fees).

7. Tom Cunningham (attorney; expert witness)

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

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

Witnesses called by Parallel:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

epicRealm had a patent licensing and enforcement program which it initiated in 2005 by filing patent infringement suits against multiple defendants in the United States District Court for the Eastern District of Texas, and it was represented in these first by Locke Liddell, and later in other suits by Baker Botts as its lead counsel (collectively, the "Texas Actions"). The Texas Actions alleged that the defendants infringed epicRealm's '554 and '335 patents. Baker Botts represented Parallel in these cases on a contingent fee basis.

As a result of an indemnification claim arising from the Texas Actions, Oracle Corporation ("Oracle") filed a declaratory judgment action against epicRealm in United States District Court for the District of Delaware, seeking a finding that the patents-in-suit were either not infringed or invalid. Similarly, because epicRealm had sued one of QuinStreet, Inc.'s ("QuinStreet") customers, Herbalife, QuinStreet also filed a declaratory action in Delaware seeking a similar declaration. The declaratory judgment actions by Oracle and QuinStreet were filed in 2006. (Collectively, these will be referred to as the "Delaware Actions.") In the Delaware Actions, epicRealm was required to bring counterclaims for infringement and damages against Oracle and QuinStreet. There was, therefore, considerable overlap in the claims and issues in both the Delaware Actions and the Texas Actions. Baker Botts was lead counsel in the Delaware Actions until July 2007.

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

Jenner made some revisions, such as changing the name of the law firm involved from Baker Botts to Jenner, and changed some other language to identify specific cases in which Jenner was agreeing to represent epicRealm. Jenner began representing epicRealm after the CFA was executed, as lead counsel in the Delaware Actions. Due to the interrelated-ness of the claims and issues, Baker Botts continued as lead counsel in the Texas cases, and continued as counsel of record in the

Delaware cases, and Jenner attorneys also became counsel of record in the Texas cases so that the respective law firms could cooperate on motions, responses, and discovery issues, both for the sake of efficiency, and to assure consistency in the way issues were being handled and represented. As outlined earlier, Parallel was substituted in as a party in these lawsuits for epicRealm, in November 2007.

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

As between the *Oracle* and *QuinStreet* cases, Jenner and Parallel agreed that the *Oracle* case was by far the larger case, and they treated *QuinStreet* as a much smaller, essentially a "tag along," case. Parallel agreed on this and instructed Jenner to allocate its time accordingly, giving the *Oracle* case its much greater emphasis. The *Oracle* and *QuinStreet* cases had been consolidated

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

for discovery, but after considerable delay on discovery, the *QuinStreet* case was not progressing on the same time schedule as *Oracle*, and was detached from the *Oracle* case and set for a scheduling conference, to essentially start over, in late January or February 2009.

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

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

In December 2008, the District Court issued claim construction and summary judgment rulings in *Oracle*.

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

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

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

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

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

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

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

25, 2009. On February 10, 2009, counsel for Parallel informed Jenner that Baker Botts would be succeeding Jenner as counsel in both the *Oracle* and *QuinStreet* cases.

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

Parallel and QuinStreet settled the *QuinStreet* case on [redacted].

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

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

Parallel settled the *Oracle* case on [redacted] for [redacted], and the settlement with Oracle also provided for [redacted].

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

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

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Jenner's Claims

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

9. Termination.

(a) Termination by epicRealm Licensing. [omitted]

(b) Termination by Jenner & Block. If Jenner & Block determines at any time that it is not in its economic interest to continue the representation of epicRealm Licensing pursuant to this Agreement, Jenner & Block may terminate this Agreement by providing 30 days prior written notice to epicRealm Licensing, provided that the timing of such a termination shall be in full accord with any applicable ethical or legal responsibilities (e.g. those promulgated by the American Bar Association (ABA) or those outlined by the Illinois Disciplinary Rules of Professional Conduct), which bind or otherwise control the behavior or actions of Jenner & Block. . . .

If Jenner & Block terminates this Agreement, it shall continue to be entitled to receive compensation from epicRealm Licensing pursuant to (i), (ii) and (iii) in the preceding paragraph [9.a] up to the date of such termination LESS the reasonable cost incurred by epicRealm Licensing to transition any pending or ongoing Enforcement Activities that had been commenced with Jenner & Block to successor legal counsel.

[Provisions imported in 9.b from Paragraph 9.a] . . . epicRealm Licensing shall: (i) compensate Jenner & Block for all time expended by Jenner & Block on any Enforcement Activity undertaken on behalf of epicRealm Licensing at the regular hourly billing rates charged by Jenner & Block for its attorneys and legal assistants (in lieu of the Contingent Fee Award applicable to such Enforcement Activity); <u>provided</u>, <u>however</u>, that epicRealm Licensing has not terminated this agreement as a result of a material breach of this

> agreement by Jenner & Block (and such breach was not cured within thirty (30) days of the receipt by Jenner & Block of written notice from epicRealm of such material breach); (ii) reimburse Jenner & Block for all previously unreimbursed Enforcement Expenses incurred by Jenner & Block under this Agreement; and (iii) at the conclusion of any Enforcement Activity, pay Jenner & Block an appropriate and fair portion of the Contingent Fee Award based upon Jenner & Block's contribution to the result achieved as of the time of termination of this Agreement (to the extent that Jenner & Block has not already been compensated under Section 9.a.(i) hereunder).

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

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

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Because the CFA is a contract, the parties naturally have advanced numerous arguments potentially applicable, generally, in contracts. However, "[w]hen interpreting and enforcing attorney-client fee agreements, it is 'not enough to simply say that a contract is a contract. There are ethical considerations overlaying the contractual relationship.'" [citations omitted.] *Hoover Slovacek LLP v. Walton*, 206 SW3d 557, 560 (Tex. 2006). The courts appear to recognize an attorney's right to recover fees by an action on the contract or in *quantum meruit*, both where the client discharges the attorney without cause, *Hoover* at 561, and where an attorney discharges the client with just cause, *Augustson v. Linea Aerea Nactional-Chile S.A. (LAN-Chile)*, 76 F.3d 658, 662 (5th Cir. 1996). However, the availability of such remedies is subject to (1) whether the attorney had just cause to withdraw sufficient to preserve the right to compensation, *Augustson* at 663; (2) the prohibition against charging or collecting an unconscionable fee as per Tex. Disciplinary R.Prof'l Conduct 1.04(a) [which includes whether a particular fee amount or contingency percentage is unconscionable, and whether a fee agreement is contrary to public policy and unconscionable], *Hoover* at 561-562.

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

> When an attorney, "without just cause, abandons his client before the proceeding for which he was retained has been conducted to its termination, or if such attorney commits a material breach of his contract of employment, he thereby forfeits all right to compensation." *Royden v. Ardoin*, 160 Tex.138, 331, SW2d 206, 209 (1960) . . . *Royden* may be read to imply that an attorney who withdraws <u>with just cause</u> may be compensated, though we would not know whether on the contract or in *quantum meruit*.[2] At 663. [Emphasis supplied.]

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

> Whether just cause exists depends on the facts and circumstances of each case. [citations omitted] Generally, just cause exists when the client has engaged in culpable conduct. Thus, for example, courts have found just cause where the client attempts to assert a fraudulent claim; fails to cooperate; refuses to pay for services; degrades or humiliates the attorney; or retains other counsel with whom the original attorney cannot work. [citations omitted] At 663.
>
> Just cause has been found where continued representation is impossible due to forces beyond the attorney's control. Thus just cause has been found where continued representation would violate ethical obligations of the attorney or where the attorney has insufficient funds to pursue litigation. [citations omitted] At 663.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> The attorney's special responsibility to maintain the highest standards of conduct and fair dealing establishes a professional benchmark that forms much of our analysis in this case.
>
> Although contingent fee contracts are increasingly used by businesses and other sophisticated parties, their primary purpose is to allow plaintiffs who cannot afford an attorney to obtain legal services by compensating the attorney from the proceeds of any recovery. [citation omitted.] The contingent fee offers "the potential of a greater fee than might be earned under an hourly billing method" in order to compensate the attorney for the risk that he or she will receive "no fee whatsoever if the case is lost." [citation omitted.] In exchange, the client is largely protected from incurring a net financial loss in connection with the representation. This risk sharing feature creates an incentive for lawyers to work diligently and obtain the best results possible. . . .

At 561.

As previously noted, the Court observed that "In Texas, if an attorney hired on a contingent-fee basis is discharged without cause before the representation is completed, the attorney may seek compensation in *quan-*

tum meruit or in a suit to enforce the contract by collecting the fee from any damages the client subsequently recovers." *Mandell & Wright v. Thomas*, 441 SW2d 841, 847 (Tex. 1969) (citing *Myers v. Crockett*, 14 Tex. 257 (1855)), and further noted that "both remedies are subject to the prohibition against charging or collecting an unconscionable fee." TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(a), *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. Gapp. A (TEX. STATE BAR R. art., §9). (*Hoover*, at 561.) The Court further noted that the prohibition against an unconscionable fee could be based upon the fact issue of whether or not a particular fee amount or contingency percentage charged by the attorney is unconscionable under all the relevant circumstances of the representation, or the question of law concerning whether a contract client is contrary to public policy and unconscionable at the time it is formed. (At 561-62.)

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

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

At 559.

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

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

At 562.

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

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

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

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

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

At 564-65.

<u>The Termination Fee Provision</u>. Paragraph 9.b.(i) provides that Jenner was entitled, if the CFA was terminated, to receive compensation for all its time incurred at its regular hourly billing rates, in lieu of a contingent fee. This provision potentially might have allowed Jenner to convert the contingent fee agreement to an hourly fee agreement which provided Jenner the option of recovering all of its fees billed at its regular hourly billing rates up until the time of termination. This raises questions about whether the 9.b.(i) clause creates an undue burden

on the client and violates public policy because it arguably creates an incentive for the attorney to escape the contingent fee agreement, and shifts to the client all of the risks of both contingent fee and hourly fee arrangements, as mentioned in *Hoover*. However, Jenner is not seeking to enforce or to recover on Paragraph 9.b.(i), and other provisions of the contract may be enforced without that provision (as discussed herein), so it is not necessary to reach any issues about 9.b.(i) here.

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

> (iii) . . . at the conclusion of any Enforcement Activity, [shall] pay Jenner . . . an appropriate and fair portion of the Contingent Fee Award based upon [Jenner's] contribution to the result achieved as of the time of termination of this Agreement (to the extent that [Jenner] has not already been compensated under Section 9.a.(i) hereunder).

<u>Enforceability</u>. The provision in Paragraph 9.b.(iii) provides for "an appropriate and fair portion of the Contingent Fee Award," (a defined term in the CFA), which certainly sounds and appears to be reasonable and thus not conscionable either on its face, or in its application. Such a fee is contingent on a recovery or settlement at the "conclusion of an Enforcement Activity," only <u>after</u> Parallel received a payment in settlement or on a recovery, and does not require immediate payment by the client at the time of termination of representation, and it is limited in scope to an "appropriate and fair" <u>portion</u> of the contingent fee award that Jenner otherwise might have recovered from an actual settlement or successful outcome, based on its contribution to that outcome, had Jenner continued its representation until the time that

the settlements were achieved. It does not create an impermissible proprietary interest in a cause of action, and remains a permissible contingent fee. Moreover, this provision does not require a determination of present value and an immediate payment based on a percentage of that value without regard to whether or not there will ever be a recovery, nor does it require a determination of present value of the claim at a time in the case when there was no recovery and with no explanation of how that value was to be calculated. Mr. Cunningham observed that, with Paragraph 9.b.(iii), the attorney and client continue to share the risk of recovery, and the attorney's interest does not supersede the client's. It does not appear to violate the overlay of ethical principles.

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

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

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

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

The parties also included in the CFA the following:

> 16. Severability. If any provision of this Agreement or the application thereof to any person or circumstance shall be invalid or unenforceable to any extent, the remainder of this Agreement and the application of such provisions to other persons or circumstances shall not be affected thereby and shall be enforced to the greatest extent permitted by law.

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

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[3] *Hoover* held that its conclusion that Hoover's termination fee was unconscionable did not render the entire fee agreement unconscionable. (Citing the RESTATEMENT (SECOND) OF CONTRACTS §208 (1981): "If a contract or term thereof is unconscionable at the time a contract is made a court may refuse to enforce the contract, or

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

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

may enforce the remainder of the contract without the unreasonable term, or may so limit the application of the term as to avoid any unconscionable result.") At 565.

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

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

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

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

There is little doubt that Jenner provided significant legal services to Parallel.[4] Mr. Fokas had reported being

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

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

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

Here, in the present arbitration, the Arbitrator has found that Jenner has demonstrated just cause to terminate the representation, sufficient to preserve the right to compensation, and is therefore entitled to recover under a *quantum meruit* theory. It is also important to recognize that Parallel obtained [redacted]; *quantum meruit* can be applied as necessary to avoid unjust enrichment to Parallel if it is permitted to enjoy the benefit of the settlements without paying a fee to Jenner.

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

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

entitled to recover under its cause of action for promissory estoppel.

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

Mr. Cunningham testified as an expert witness for Jenner and offered his analysis and suggestions on how to calculate a fair and appropriate portion of the contingent fee.[5] Parallel raised criticisms of Mr. Cunningham's

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

Mr. Cunningham determined that Parallel received services in the following amounts of hourly fees from each firm: (a) Jenner: $10,256,706 (unbilled); (b) Baker Botts: $1,209,959; (c) Hinshaw &

calculations but, other than arguing that Jenner was not entitled to any fee, offered no alternative methodology for calculating a fee, in the event that a fee is awarded to Jenner in this case.[6] Parallel also offered no evidence to

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Culbertson: $230,755; (d) Young Conaway: $51,001; (e) Potter Anderson: $33,436; (f) Bosy & Bennett: $606,375. In this instance Mr. Cunningham, because Bosy & Benett was paid on a contingency for its work on the *Oracle* trial, applied an hourly rate of $700 per hour to monetize Bosy & Bennett's contribution.

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

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

Under the first method, Mr. Cunningham deducted $927,717 in expenses incurred by Parallel Networks from the total recoveries in *Oracle* and *QuinStreet* cases, leaving net proceeds of [redacted]. Thereupon Mr. Cunningham applied the graduated contingent fee provided for in the CFA [33% up to $15 million and 28% of amounts above $15 million up to $50 million] to arrive at a contingent fee of [redacted]. After applying his 83% factor to represent Jenner's contribution, Mr. Cunningham arrived at a fee for Jenner of $4,439,270. Using the same formula and approach [redacted], Mr. Cunningham determined that Jenner would be entitled to up to an additional [redacted].

Under the second method, Mr. Cunningham subtracted the sums paid to other law firms [redacted].

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

the effect that, if a fee is awarded to Jenner, an award of a fee in the ranges suggested by Mr. Cunningham would be other than a fair and appropriate portion of the CFA, reasonable, or just.

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

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were not submitted for him for review, and that even if they had been they would not have materially affected his opinions.

Arbitrator finds that Jenner may recover damages as follows[7]:

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

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

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

4. Alternatively, for Jenner's *quantum meruit* claim, in the event of a settlement or recovery from Oracle in the anticipated arbitration per the terms of the *Oracle* settlement, the reasonable value of the services provided

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

to Parallel in connection with representing Parallel in the *Oracle* case, is 16% of the net proceeds of the settlement or recovery paid to Parallel.

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

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

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

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

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

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

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

<u>Pre-Award and Post-Award Interest</u>. Jenner is entitled to recover simple pre-award interest on the amount

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

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Parallel's Counterclaims

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

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

Parallel's breach of contract claim is premised upon Parallel's allegation that Jenner prematurely terminated its representation of Parallel and abandoned Parallel without just cause. As discussed previously, there is an

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

overlay of principles in connection with attorney-client relationships, in which the courts have set forth the principles under which counsel may withdraw from and terminate the representation for just cause and recover their attorney's fees for services. The overlay principles control the determination of whether an attorney has terminated the representation of a client with just cause or abandoned the client. Here, the Arbitrator has found that Jenner established that it had just cause to terminate its representation of Parallel; thus, Jenner did not abandon Parallel or breach the contract by terminating it.

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

Parallel also alleged, to support this claim, that the case was "in a ditch" after the adverse summary judg-

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

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

Jenner did a very professional job in promptly transitioning its representation to Baker Botts, and Baker Botts affirmed that Jenner streamlined all efforts to effect a smooth transition. Jenner continued to protect Parallel's rights, during the month while replacement counsel was obtained. Jenner filed a notice of appeal in *Oracle* and attended a scheduling conference in *QuinStreet* (which was at the point of "starting over" with a

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

new scheduling order, free from a "ditch" of any emergencies or other deadlines that might adversely affect the progress of the case) to meet all deadlines and obligations of Parallel while Parallel retained successor counsel. There was no adverse impact on either case from the transition. Parallel's claim of damage arising from the timing of Jenner's termination of representation and Parallel's need to bring on successor counsel, is premised more on the nature of damage which might have happened, but did not in fact occur, because of the timely and smooth transition of representation, to respected, capable counsel who were already familiar with Parallel and the issues.

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

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

Parallel also complains that Jenner breached the CFA by refusing to represent Parallel in the Microsoft portion of *QuinStreet* and by offering to act only as settlement counsel in *QuinStreet*. These allegations are based on events leading up to and immediately preceding Jenner's termination of representation. The evidence reflected that neither Parallel nor Jenner understood at the time that the CFA obligated Jenner to represent

Parallel in the Microsoft portion of *QuinStreet*. Parallel had approached Jenner to inquire about the possibility of Jenner representing Parallel in the Microsoft case and suggested that a rider to modify the CFA should be prepared, and executed, and attached to the Contingent Fee Agreement under the CFA if Jenner agreed to assume that representation under the CFA. Parallel and Baker Botts had in fact previously used this approach in similar circumstances by adding a rider to their CFA, which had similar terms. Jenner declined to represent Parallel in the *Microsoft* case. No rider was executed.

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

QuinStreet case; if Jenner terminated the CFA and its representation of Parallel for just cause, the entire obligation to represent Parallel would cease.

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

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

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

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

The elements of a breach of fiduciary duty claim are: (1) a fiduciary relationship between the plaintiff and defendant; (2) the defendant must have breached his fiduciary duty to the plaintiff; and (3) the defendant's breach must result in injury to the plaintiff or benefit to the defendant. *Jones v. Blume*, 196 SW3d 440, 447 (Tex. App. –

Dallas 2006, pet. denied). "However, if a client seeks the remedy of equitable fee forfeiture and proves a breach of fiduciary duty by the attorney, the client may obtain that remedy without need to approve causation or damages if the court finds the attorney's conduct was a 'clear and serious breach of duty' and that forfeiture of the fee (or some portion of it) is 'necessary to satisfy the public's interest in protecting the attorney-client relationship.' *Burrow v. Arce*, 997 SW2d 229, 246 (Tex. 1999)." *Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C.*, 284 SW3d 416, 429 (Tex. App. – Austin 2009, no pet.).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Parallel also complains that, in an effort to convince Parallel to settle *QuinStreet* and *Oracle*, Jenner told Parallel that its chances of success on appeal in *Oracle* were only 30-50 percent despite internal discussions and the trial team's belief that the chances of winning on appeal were very strong. "Had Parallel followed Jenner's advice, [redacted]."

Parallel's claimed damage is hypothetical in nature; Parallel did not follow alleged advice and [redacted]. It is an example of hypothetical injury that did not happen.

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

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

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

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

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

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

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

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

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

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

which Parallel alleges here as breaches of its duty of care.

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

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

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

Jenner observed that from the beginning in its prosecution of the *QuinStreet* case, Parallel and Mr. Fokas did not sue QuinStreet and did not desire to be in any litigation with QuinStreet, which was brought in by a third party action by Herbalife, one of the defendants that Parallel had sued. Mr. Fokas also repeatedly told

Jenner to focus on *Oracle*, as the much larger case, and not the much smaller "back-burner" *QuinStreet* case. Mr. Fokas specifically instructed Jenner not to proceed with detailed analysis of the *QuinStreet* source code. Mr. Bennett and Mr. Margolis confirmed that Jenner vigorously pursued the *QuinStreet* case within the confines of Mr. Fokas' instructions and QuinStreet's recalcitrance in discovery.

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

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

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11 Mr. Perry conducted a "but-for analysis" to determine what would have occurred in the absence of Jenner's alleged breaches and compared that to the settlement actually obtained with QuinStreet. Mr.

In response, Jenner summarized fact evidence concerning the history and course of settlement negotiations in the *QuinStreet* case and similar cases in its Proposed Findings at 167-168 and 170-175, and its summary is also included here in footnote form.[12]

Perry assumed in his analysis that the "but-for" settlement would have been achieved after the reversal of the *Oracle* summary judgment, and if Jenner had not terminated its representation.

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

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

12 [redacted]

Although Parallel Networks initially suspected that QuinStreet may have hundreds of web posting customers, discovery received from QuinStreet in May 2008 revealed that, in fact, there were only

12 such customers. Mr. Carlson testified that a settlement that released hundreds of customers "presumably" would be different from a settlement that released only 12.

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

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

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

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

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

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[13] Mr. Malackowski summarized the following defects in Mr. Perry's analysis:

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

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

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

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

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

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

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

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

i) Mr. Perry ignored the fact that although each of the defendants who settled with Parallel Networks had a different revenue base, they all settled for similar amounts, indicating that the defendants (including Herbalife) were settling for below cost of defense and thus making weaknesses in Mr. Perry's damage analysis. The Arbitrator finds that Mr. Malackowski's credentials and analysis were substantially more credible and convincing than Mr. Perry's, and that Parallel failed to prove that the *QuinStreet* case had any greater value than the settlement obtained.

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

Accordingly, the Arbitrator finds that Parallel has not established that the potential damages in *QuinStreet* had any value higher than that which was obtained in settlement, or that any act or omission of Jenner was a breach of the duty of care, or caused a reduction in the value of the *QuinStreet* settlement.

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

<u>Parallel's Attorney's Fees</u>. Inasmuch as Parallel has failed to establish a breach of contract by Jenner, it is not

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the amount for which any individual defendant settled irrelevant to any analysis of the percentage of exposure for which QuinStreet would have settled.

j) There is no evidence that QuinStreet would have settled the case for [redacted] in light of what the rest of the defendants were paying.

entitled to recover its attorney's fees in the arbitration from Jenner.

AWARD

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

A. $3,000,000, and

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

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

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

4. Attorney's Fees. Jenner is entitled to and shall recover from Parallel, and Parallel is obligated to pay Jenner, its reasonable and necessary attorney's fees in the amount of $1,394,000 from Parallel.

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

set forth in Paragraph 1.A (damages), and 4 (Attorney's Fees), and 5.A (pre-award interest) above, at the post-judgment rate of interest in Texas from the date of this Award until paid.

Date: January 18, 2013. /s/ Jerry Grissom
JERRY GRISSOM,
Arbitrator

PROOF OF SERVICE BY EMAIL & U.S. MAIL

[Omitted]

APPENDIX D

IN THE SUPREME COURT OF TEXAS

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NO. 16-0080

PARALLEL	§	
NETWORKS, LLC	§	Dallas County,
v.	§	
JENNER & BLOCK,	§	5th District.
LLP	§	
	§	

June 17, 2016

Petitioner's petition for review, filed herein in the above numbered and styled case, having been duly considered, is ordered, and hereby is, denied.

January 20, 2017

Petitioner's motion for rehearing of petition for review, filed herein in the above numbered and styled case, having been duly considered, is ordered, and hereby is, denied.

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I, BLAKE A. HAWTHORNE, Clerk of the Supreme Court of Texas, do hereby certify that the above is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appear of record in the minutes of said Court under the date shown.

It is further ordered that petitioner, PARALLEL NETWORKS, LLC, pay all costs incurred on this petition.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this the 20th day of January, 2017.

/s/ Blake A. Hawthorne
Blake A. Hawthorne, Clerk

By Monica Zamarripa, Deputy Clerk

APPENDIX E

1. 9 U.S.C. 1 provides:

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

2. 9 U.S.C. 2 provides:

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

3. 9 U.S.C. 9 provides:

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

4. 9 U.S.C. 10 provides:

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

APPENDIX F

CONTINGENT FEE AGREEMENT

This CONTINGENT FEE AGREEMENT (this "Agreement") is entered into this 27th day of June, 2007 (the "Effective Date"), by and between epicRealm Licensing LP, a Delaware limited partnership ("epicRealm Licensing") and Jenner & Block LLP, an Illinois limited liability partnership ("Jenner & Block"). epicRealm Licensing and Jenner & Block are individually referred to in this Agreement as a "Party" and are collective referred to in this Agreement as the "Parties."

RECITALS:

WHEREAS, epicRealm Licensing believes that certain of its Intellectual Property has been infringed upon or unlawfully used by Infringing Parties and epicRealm Licensing desires to protect its rights in its Intellectual Property by pursuing Enforcement Activities against such Infringing Parties; and

WHEREAS, epicRealm Licensing desires to retain Jenner & Block to counsel, advise and represent it with regard to legal matters arising out of or related to the Enforcement Activities and Jenner & Block wishes to accept such retention; and

WHEREAS, because of the potential cost in prosecuting the Enforcement Activities, epicRealm Licensing desires to compensate Jenner & Block on a contingent fee basis pursuant to the terms and conditions set forth in this Agreement.

NOW, THEREFORE, in consideration of the mutual promises, covenants and conditions hereinafter set forth, the Parties, intending to be legally bound, hereby agree as follows:

AGREEMENT:

1. Definitions. In addition to any other defined terms used herein, the following words and phrases (whether used in the singular or in the plural tense) shall be defined terms in this Agreement and shall mean the following:

a. "Contingent Fee Award" shall mean the applicable percentage (as more particularly set forth in Section 5 herein) of the Net Revenues received by epicRealm Licensing from an Enforcement Activity and which is payable to Jenner & Block for its representation of epicRealm Licensing in such Enforcement Activity.

b. "Enforcement Activities" shall mean: (i) representation of epicRealm Licensing in the existing cases of *Oracle Corp. and Oracle U.S.A., Inc. v. epicRealm Licensing, L.P.*, Civ. No. 06-CV-414-SLR (D.Del.) and *QuinStreet, Inc. v. epicRealm Licensing, L.P.*, Civ. No. 06-CV-495-SLR (D.Del.); (ii) any litigation, arbitration, mediation, judicial or administrative hearing, legal or equitable cause of action or such other similar proceedings that epicRealm Licensing (or its legal counsel) may initiate, prosecute and conclude or threaten to initiate against an Infringing Party for infringement of the Intellectual Property; (iii) any action or activity undertaken by epicRealm Licensing (or its legal counsel) that results in an intellectual property licensing agreement with an Infringing Party for infringement of the Intellectual Property; or (iv) any action or activity undertaken by epicRealm Licensing (or its legal counsel) that results in an any other type of licensing agreement, covenant not to sue agreement, sale or assignment of commercialization rights or intellectual property rights, or any other contract or agreement by and between epicRealm Licensing and an Infringing Party arising out of or related to a grant of rights to the Intellectual Property or forbearance from prosecution of an Enforcement Activity against an Infringing Party.

c. "Enforcement Expenses" shall mean all reasonable expenses arising out of or related to an Enforcement Activity including, without limitation, telephone, copy, facsimile transmission, special delivery, postage, attorney and paralegal travel and lodging and other expenses customarily billed and charged by Jenner & Block, as well as expenses that may be charged by third-party vendors, such as expert witnesses, document management providers, licensing investigation, court reporters, local counsel and other vendors which are necessary or reasonably required to initiate, prosecute and conclude an Enforcement Activity. For purposes of clarity, nothing in this Agreement shall be deemed to give rise to any right or claim by epicRealm Licensing against Jenner & Block to recoup any Enforcement Expenses.

d. "Gross Revenues" shall mean any money, income, fees, revenues, proceeds or other forms of pecuniary compensation (including, without limitation, attorneys' fees, court costs, enhanced or punitive damages awards or any other types of awards) or Non-Monetary Compensation arising out of or as a result of any Enforcement Activities threatened, initiated, prosecuted and/or concluded by Jenner & Block on behalf of epicRealm Licensing after the Effective Date, including, without limitation, (i) money, income, fees, revenues, proceeds or other forms of pecuniary compensation or Non-Monetary Compensation received by epicRealm Licensing as a result of any agreements entered into with an Infringing Party to license some or all of the Intellectual Property; and (ii) final awards, judgments or settlements (which are not subject to appeal) against an Infringing Party as a result of patent infringement litigation (or similar cause of action) initiated, prosecuted and concluded by or on behalf of epicRealm Licensing. In the event that Jenner & Block is unable to represent or has to discontinue its representation of epicRealm Licensing in connection with any Enforcement Activity as a result of a conflict (or other impediment not in the control of epicRealm Licensing) and epicRealm Licensing is required to retain substitute legal counsel, any Gross Revenues or Non-Monetary Compensation received by epicRealm Licensing as a result of that particular Enforcement Activity shall not be included in the definition of "Gross Revenues" used to calculate the Contingent Fee Award payable to Jenner & Block (if any).

e. "Infringing Party" shall mean Oracle Corporation and Oracle U.S.A., Inc. (collectively "Oracle"); Oracle parent, subsidiaries, and otherwise related companies; Oracle licensees and assignees, Oracle's customers, clients, and purchasers of Oracle products and services, excluding Safelite Group Inc.; Quinstreet, Inc. ("Quinstreet"); Quinstreet parent, subsidiary, and otherwise related companies; Quinstreet licensees and assignees; and Quinstreet customers, clients, and purchasers of Quinstreet products and services, which in the reasonable opinion of epicRealm Licensing infringe or have infringed upon the Intellectual Property and in which an Enforcement Activity is threatened, initiated, prosecuted or concluded against such individual or entity by or on behalf of epicRealm Licensing.

f. "Intellectual Property" shall mean the intellectual property portfolio of epicRealm Licensing including, without limitation, trademarks, service marks, trade and business names, filed and issued United States and foreign patents (including, without limitation, all future or existing foreign equivalents or counterparts, reexaminations, reissues, divisionals, continuations or continuations-in-part related thereto), copyrights, software, computer and source code as more particularly set forth in Exhibit A attached hereto (as such may be amended or modified from time to time by further agreement between the Parties).

g. "Net Revenues" shall mean Gross Revenues less the Enforcement Expenses.

h. "Non-Monetary Compensation" shall mean the monetary value of all consideration, benefit or value received by epicRealm Licensing arising out of or as a result of any Enforcement Activity, including without limitation, non-monetary court orders, cross-license agreements, business arrangements or other benefits that inure to epicRealm Licensing.

2. Scope of Representation. During the term of this Agreement, epicRealm Licensing agrees to retain Jenner & Block on a non-exclusive basis to represent epicRealm Licensing as its legal counsel to initiate, prosecute and conclude Enforcement Activities against Infringing Parties. In consideration for the Contingent Fee Award, Jenner & Block agrees to provide epicRealm Licensing with legal counsel on all matters arising out of or related to Enforcement Activities in which Jenner & Block is retained by epicRealm Licensing. Specifically excluded from the scope of this Agreement are matters which do not arise out of or are not related to the Enforcement Ac-

tivities including, by way of example and without limitation, the drafting, filing and prosecution of patent applications with the United States Patent and Trademark Office (or any other successor governmental agency) or foreign patent offices and the representation of epicRealm Licensing in corporate transactions or other litigation unrelated to the infringement of the Intellectual Property.

a. Jenner & Block as Primary Legal Counsel. The Parties acknowledge and confirm that although Jenner & Block is being retained to represent epicRealm Licensing on a non-exclusive basis, it is the intent of the Parties to utilize Jenner & Block during the term of this Agreement as epicRealm Licensing's primary legal counsel for the Enforcement Activities and for Jenner & Block to act in a supervisory and coordinating capacity in connection with other legal counsel that may be retained from time to time by epicRealm Licensing in connection with any Enforcement Activities brought by or on behalf of epicRealm against Infringing Parties.

b. Authority. Jenner & Block shall not initiate any discussions or negotiations with or any Enforcement Activities against any individual or entity identified by epicRealm Licensing as an Infringing Party without the prior consent of epicRealm Licensing. epicRealm Licensing shall have the sole and exclusive authority regarding the scope and nature of the terms and conditions of: (i) any licensing agreement entered into with an Infringing Party; and (ii) the disposition of any litigation against an Infringing Party (including, without limitation, whether to accept a settlement offer and the terms and conditions related thereto). The decision whether to initiate an Enforcement Activity against an Infringing Party shall be made by the mutual agreement of the Parties on a case-by-case basis. Jenner & Block shall promptly provide copies to epicRealm Licensing of all correspondence received from an Infringing Party. Prior to distribution, Jenner & Block shall provide to epicRealm Licensing copies of all correspondence to be made to an Infringing Party.

c. Additional Representation; Excluded Litigation. In connection with any Enforcement Activities in which Jenner & Block is representing epicRealm Licensing, Jenner & Block agrees to defend epicRealm Licensing (and its members, officers, directors, employees, representatives, consultants and agents, collectively, the "epicRealm Licensing Parties") against any suit, action, proceeding, counterclaim or other similar causes of action asserted against any of the epicRealm Licensing Parties by an Infringing Party that occurs as a direct result of the threat, initiation or prosecution of such Enforcement Activity (including, without limitation and by way of example, a declaratory judgment action, which is related to the validity of a patent(s) included in the Intellectual Property). The legal fees incurred by an epicRealm Party for such representation by Jenner & Block would be paid to Jenner & Block through the terms of the Contingent Fee Award, as outlined in Section 5. In addition, all legal costs and expenses arising out of or related to such representation would be the responsibility of the epicRealm Party the subject of such litigation and would be paid to Jenner & Block through the terms of the Contingent Fee Award, as outlined in Section 5. Jenner & Block' agreement to defend any of the epicRealm Licensing Parties expressly excludes any other types of suits, actions, proceedings, counter-claims or other similar causes of action brought against any of the epicRealm Licensing Parties by an Infringing Party which do not arise out of or are not related to an Enforcement Activity (the "Excluded Litigation"). In the event that Excluded Litigation is brought against any of the epicRealm Licensing Parties by an Infringing Party, Jenner & Block agrees to offer to represent such epicRealm Licensing Party (subject to any conflicts or other impediments on Jenner & Block' ability to offer and/or to accept such representation) in such Excluded Litigation at a rate that is at a 5% discount from its regular billing rates. The scope, terms and conditions of such representation shall be governed by a separate engagement letter to be entered into by and between Jenner & Block and the represented epicRealm Licensing Party prior to the commencement of such representation.

3. Conflicts. It is anticipated that from time to time Jenner & Block may have ethical or business conflicts or other commercial or legal impediments that might limit, prevent or preclude Jenner & Block from representing epicRealm Licensing in an Enforcement Activity or which might require Jenner & Block to withdraw from representing epicRealm Licensing in a pending or on-going Enforcement Activity against an Infringing Party. The determination of whether such a conflict or impediment exists or has arisen shall be in the sole and exclusive discretion of Jenner & Block.

a. Conflict or Impediment After Commencement of An Enforcement Activity. In the event that a conflict or an impediment arises or is discovered by Jenner & Block after an Enforcement Activity has been commenced against an Infringing Party, Jenner & Block covenants to promptly inform epicRealm Licensing of such conflict and/or impediment and to use its best efforts to transition the pending Enforcement Activity to another legal counsel as expeditiously as possible in order to minimize or eliminate any disruption or adverse impact to epicRealm Licensing.

b. No Claim to Contingent Fee Award. In the event that Jenner & Block is required to cease its representation of epicRealm Licensing as a result of a conflict or impediment which arises or is discovered by Jenner & Block after an Enforcement Activity has been commenced against an Infringing Party, Jenner & Block shall not have any right or claim to a Contingent Fee Award from any Net Proceeds that may be received by epicRealm Licensing as a result of such Enforcement Activity.

4. Payment of Enforcement Expenses. The Parties agree that epicRealm Licensing shall be solely responsible for the payment of all Enforcement Expenses in the event that Jenner & Block has either ordered or paid for any Enforcement Expenses, epicRealm Licensing covenants to pay any third-party vendor's invoices promptly upon receipt of such invoices or to reimburse Jenner & Block promptly upon receipt of an invoice from Jenner & Block setting forth in reasonable detail the amount and type of Enforcement Expenses paid by Jenner & Block on behalf of epicRealm Licensing. Any Enforcement Expenses in excess of $20,000 must be approved in advance by epicRealm Licensing.

5. Contingent Fee Award. In consideration for undertaking an Enforcement Activity on behalf of epicRealm Licensing, Jenner & Block shall be paid a Contingent Fee Award computed as a percentage of the Net Proceeds paid to epicRealm Licensing from such Enforcement Activity and as more particularly set forth below:

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

a. Payment of the Contingent Fee Award. Except as noted in the following paragraph, epicRealm Licensing covenants to pay to Jenner & Block the entire Contingent Fee Award earned by Jenner & Block for representing epicRealm Licensing in an Enforcement Activity within a reasonable time (but in any event, no later than 30 days) after the receipt by epicRealm Licensing of the Net Proceeds arising from such Enforcement Activity.

b. Payment of the Contingent Fee Award Over Time. It is understood by the Parties that epicRealm Licensing may from time to time enter into licensing or other types of agreements or settlements to resolve an Enforcement Activity (each, a "Settlement Agreement") where the Net Proceeds will be paid to epicRealm Licensing over the course of the term of the Settlement Agreement. In such event, the Parties agree that the Contingent Fee Award payable to Jenner & Block shall also be paid over the course of the term of such Settlement Agreement. The Parties further agree that Jenner & Block shall continue to be entitled to such Contingent Fee Award even in the event of the termination of this Agreement.

c. Examples. The following examples of how the Contingent Fee Award may be calculated and/or paid to Jenner & Block are provided merely for illustrative purposes and are not meant to be an exhaustive or complete treatment of how these calculations or payment methods may be determined during the term of this Agreement:

Example 1: If epicRealm Licensing resolves an Enforcement Activity with an Infringing Party through an agreement that results in the payment to epicRealm Licensing of an annual licensing or settlement payment during the term of the agreement, epicRealm Licensing is obligated to pay to Jenner & Block an annual Contingent Fee Award during the term of this agreement equal to the applicable percentage of the Net Proceeds arising out of such agreement.

Example 2: If epicRealm Licensing receives a judgment or enters into a settlement which results in a one-time case payment, epicRealm Licensing is obligated to pay to Jenner & Block a one-time Contingent Fee Award equal to the applicable percentage of the Net Proceeds applicable to such judgment or settlement.

Example 3: If epicRealm Licensing receives intellectual property rights from an Infringing Party in exchange for a license, release, covenant not to sue agreement or other contractual arrangement, epicRealm Licensing is obligated to pay to Jenner & Block a Contingent Fee Award equal to the applicable percentage of the Net Proceeds (as calculated by the fair market value of the intellectual property rights received by epicRealm Licensing).

Example 4: If epicRealm Licensing receives goods, services, property, business contract or benefit or other type of non-monetary consideration in exchange for a license, release, covenant not to sue agreement or other contractual arrangement, epicRealm Licensing is obligated to pay to Jenner & Block a Contingent Fee Award equal to the applicable percentage of the Net Proceeds (as calculated by the fair market value of the goods, services, real property, business contract or benefit or other type of non-monetary consideration received by epicRealm Licensing).

6. <u>Accountings and Reporting Obligations.</u> The Parties covenant to provide each other with certain accounting and financial information as provided below:

a. <u>epicRealm Licensing Reporting Obligations.</u> epicRealm Licensing shall provide Jenner & Block with a bi-annual accounting of all Gross Revenues arising out or of related to any Enforcement Activities in which Jenner & Block has represented epicRealm Licensing.

b. Jenner & Block Reporting Obligations. Jenner & Block shall provide epicRealm Licensing with a monthly statement setting forth in reasonable detail all Enforcement Expenses incurred by Jenner & Block or paid by Jenner & Block on behalf of epicRealm Licensing. This monthly statement shall also include an accounting of the time expended by Jenner & Block attorneys and legal assistants in representing epicRealm Licensing in each Enforcement Activity and shall specifically identify the applicable Infringing Party for such Enforcement Activity.

7. Impairment of Rights. The Parties covenant that they will not take or forebear from taking any activity or action that would or could be reasonably expected to impair the other Party's rights under this Agreement or in any Enforcement Activity in which Jenner & Block is representing epicRealm Licensing.

8. Arbitration of Disputes.

a. Generally. The Parties acknowledge that situations may arise which are not specifically addressed or contemplated in this Agreement. In that event, the Parties shall make a good faith effort to resolve any dispute relating in any manner to the Agreement or to any services provided pursuant to this Agreement in accordance with the general spirit of this Agreement. If the Parties cannot reach a satisfactory resolution, the Parties (or their authorized successors or assigns) agree that such dispute shall be finally adjudicated by arbitration conducted in Dallas, Texas under the auspices of JAMS®. The details concerning such arbitration, will be agreed upon by the Parties prior to the commencement of arbitration or, failing such agreement, by JAMS®. The arbitrator shall be selected by the mutual agreement of the Parties or, failing such agreement, from a panel of three arbitrators nominated by JAMS®, with each Party having the right to strike one of the arbitrators nominated by the other Party.

b. Disputes Regarding Non-Monetary Compensation. The valuation of any Non-Monetary Compensation shall be made in the reasonable judgment of the Parties in accordance with generally acceptable accounting principles or other appropriate methodologies related to the valuation of non-cash consideration or nonmarketable securities. If the Parties are unable to agree, the value shall be set by a binding arbitration before a single arbitrator in Dallas, Texas, under a "baseball format" (as defined below). The arbitrator shall be selected by the mutual agreement of the Parties or, failing such agreement, from a panel of three arbitrators nominated by JAMS®, with each Party having the right to strike one of the arbitrators nominated by the other Party. For purposes of this Agreement "baseball format" means that each of the Parties shall submit to the arbitrator on an ex parte basis, a proposal on the correct value of the Non-Monetary Compensation and the arbitrator shall select one of these proposals (as opposed to the arbitrator's separate determination of the value of such Non-Monetary Compensation).

9. Termination.

a. Termination by epicRealm Licensing. This Agreement may be terminated by epicRealm Licensing at any time by providing 30 days prior written notice to Jenner & Block. If epicRealm Licensing elects to terminate this Agreement, epicRealm Licensing shall: (i) compensate Jenner & Block for all time expended by Jenner & Block on any Enforcement Activity undertaken on behalf of epicRealm Licensing at the regular hourly billing rates charged by Jenner & Block for its attorneys and legal assistants (in lieu of the Contingent Fee Award applicable to such Enforcement Activity); provided, however, that epicRealm Licensing has not terminated this Agreement as a result of a material breach of this Agreement by Jenner & Block (and such breach was not cured within thirty (30) days of the receipt by Jenner & Block of written notice from epicRealm Licensing of such material breach); (ii) reimburse Jenner & Block for all previously unreimbursed Enforcement Expenses incurred by Jenner & Block under this Agreement; and (iii) at the conclusion of any Enforcement Activity, pay Jenner & Block an appropriate and fair portion of the Contingent Fee Award based upon Jenner & Block' contribution to the result achieved as of the time of termination of this Agreement (to the extent that Jenner & Block has not already been compensated under Section 9.a.(i) hereunder).

b. Termination by Jenner & Block. If Jenner & Block determines at any time that it is not in its economic interest to continue the representation of epicRealm Licensing pursuant to this Agreement, Jenner & Block may terminate this Agreement by providing 30 days prior written notice to epicRealm Licensing provided that the timing of such a termination shall be in full accord with any applicable ethical or legal responsibilities (e.g. those promulgated by the American Bar Association (ABA) or those outlined by the Illinois Disciplinary Rules of Professional Conduct), which bind or otherwise control the behavior or actions of Jenner & Block. Subsequent to the termination, Jenner & Block shall use best efforts to secure substitute counsel for epicRealm Licensing. If Jenner & Block terminates this Agreement, it shall continue to be entitled to receive compensation from epicRealm

Licensing pursuant to (i), (ii) and (iii) in the preceding paragraph up to the date of such termination LESS the reasonable costs incurred by epicRealm Licensing to transition any pending or on-going Enforcement Activities that had been commenced with Jenner & Block to successor legal counsel.

10. Right to Files; Cooperation. Within sixty (60) days of the termination of this Agreement or promptly upon receipt of a written request from epicRealm Licensing, Jenner & Block shall deliver copies of all files and documents, including, without limitation, all reports, memoranda, or other materials held by Jenner & Block arising out of or related to any Enforcement Activity in which Jenner & Block represented epicRealm Licensing. Jenner & Block covenants to cooperate with any successor or additional legal counsel engaged by epicRealm Licensing in connection with any Enforcement Activities.

11. Successors and Assigns. This Agreement (and the right, duties and obligations arising hereunder) may not be assigned without the prior, written consent of the non-assigning Party. In the event that a Party ceases to exist as a legal entity, the other Party shall have the right (but not the obligation) to continue under the terms of this Agreement with any successor entity to the dissolving Party.

12. Notices. All notices, demand, or requests provided for or permitted to be given pursuant to this Agreement must be in writing to be effective and shall become effective either when: (a) personally delivered to the Party to which such notice, demand, or request is directed; (b) mailed by registered or certified mail with return receipt requested on the earlier of the date actually received by the Party to which such is directed or (whether ever received or not) or three (3) Business Days

after the same is deposited in the United States Mail, addressed to such Party at the address set forth in the signature page; or (c) if sent via facsimile upon receipt with proof of confirmed answer back of the date of transmission.

13. Choice of Law. THIS AGREEMENT AND THE OBLIGATIONS OF THE PARTIES HEREUNDER SHALL BE INTERPRETED, CONSTRUED, AND ENFORCED IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS WITHOUT REGARD TO CONFLICTS OF LAWS PROVISIONS THEREUNDER.

14. Waiver. No consent or waiver, express or implied, by any Party to, or of, any breach or default by the other Party in the performance by such other Party of its obligations hereunder shall be deemed or construed to be a consent or waiver to or of any other breach or default in the performance by such other Party of the same or any other obligations hereunder. Failure on the part of either Party to complain of any act or failure to act of the other Party or to declare such other Party in default, irrespective of how long such failure continues, shall not constitute a waiver by the non-defaulting Party of its rights hereunder.

15. Amendment; Modification. This Agreement may be amended or modified from time to time but only by a written instrument executed by the Parties. This Agreement may not be amended by oral statements. This written Agreement represents the final and complete agreement of the Parties regarding the subject matter of this Agreement and may not be contradicted by evidence of prior, contemporaneous or subsequent oral agreements. There are no oral or unwritten agreements regarding the subject matter of this Agreement.

16. Severability. If any provision of this Agreement or the application thereof to any person or circumstance shall be invalid or unenforceable to any extent, the remainder of this Agreement and the application of such provisions to other persons or circumstances shall not be affected thereby and shall be enforced to the greatest extent permitted by law.

17. Further Assurances. The Parties agree to promptly execute such other documents and instruments as are necessary or reasonably necessary to consummate this Agreement and the transactions contemplated hereunder.

18. Counterparts. Multiple originals of this Agreement may be executed simultaneously, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

19. Confidentiality. The terms and conditions of this Agreement as well as the existence thereof, is strictly confidential and (except as otherwise required by law) shall not be disclosed (in whole or in part) by either Party (including such Party's agents, representatives, officers, directors, principals, stockholders, members or legal counsel) without the prior, written consent of the other Party.

20. Rules of Construction. It is acknowledged and confirmed that each Party and its respective legal counsel have reviewed this Agreement and that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting Party shall not be employed in the interpretation of this Agreement or any subsequent amendments hereto.

21. No Other Rights. Nothing in this Agreement, or in any transaction contemplated hereby, express or implied, shall give or be construed to give to any individual or entity other than the Parties any legal or equitable right, remedy, privilege, immunity or claim under this Agreement or by reason of such transaction, all of the covenants and provisions of this Agreement being for the sole benefit of the Parties.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the Effective date.

EPICREALM LICENSING, LP
By: /s/ Terry Fokas
Name: Terry Fokas
Title: Managing Member
Address: 1700 Pacific Avenue,
Suite 2320
Dallas, Texas 75201
Facsimile (214) 397-0778

JENNER & BLOCK LLP
By: /s/ Greg Gallopoulos
Name: Greg Gallopoulos
Title: Managing Partner
Address: 330 N. Wabash Avenue
Chicago, Illinois 60611
Facsimile: 312 923 8405

[SIGNATURE PAGE TO THE CONTINGENT FEE AGREEMENT]

EXHIBIT A

INTELLECTUAL PROPERTY PORTFOLIO

[Omitted]