✓1 CIT ATTY

ORIGINAL

JAN 29 2013

FILED

2013 JAN 29 AM 11:35

DISTRICT CLERK DALLAS CO., TEXAS

SHAZZNIC BECKS DEPUTY

CAUSE NO. DC-13-01146

PARALLEL NETWORKS, LLC,	§	**IN THE DISTRICT COURT OF**
Plaintiff,	§	
	§	
v.	§	**DALLAS COUNTY, TEXAS**
	§	
JENNER & BLOCK, LLP,	§	
	§	
Defendant.	§	**101st-E JUDICIAL DISTRICT**

PETITION AND MOTION TO VACATE ARBITRATION AWARD

Plaintiff Parallel Networks, LLC ("Parallel Networks" or "Plaintiff") files this Petition and Motion to Vacate Arbitration Award because the arbitrator: (1) exceeded his powers by re-writing the contract and granting Jenner & Block, LLP ("Jenner") an award that did not draw its "essence" from the contract; (2) excluded and refused to hear evidence pertinent and material to Parallel Networks' claims; and (3) manifestly disregarded Texas law, ethical rules, and public policy governing contingency fee contracts.

INTRODUCTION

The fundamental issue before the arbitrator was whether a termination provision in a contingent fee agreement that allowed Jenner to terminate and seek hourly fees instead of a contingency fee was enforceable. The arbitrator refused to rule on the enforceability of this provision during summary judgment and again in the arbitration award. Instead, the arbitrator fashioned his "own brand of industrial justice" and awarded Jenner a fee based on a sweeping re-write of the termination provision in the contingent fee agreement. In doing so, the arbitrator grossly exceeded his powers, blatantly disregarded over 150 years of well-settled Texas law governing attorney-client fee agreements, set aside Texas public policy, and ignored Texas ethical rules.

Parallel Networks engaged Jenner on a contingent-fee basis to represent Parallel Networks in two patent litigation lawsuits in Delaware. In its contingent fee agreement with Parallel Networks, Jenner included an unenforceable and unconscionable termination provision that allowed it to terminate the representation and to convert the contingency fee arrangement into an hourly fee arrangement at Jenner's sole and unfettered discretion. After a summary judgment hearing in one of the Delaware cases, Jenner began to calculate which course of action would result in a recovery that would be more favorable for Jenner: seeing the cases through conclusion, which would have allowed Jenner to be paid through a contingency fee, or terminating the representation which Jenner thought would allow it to be paid its hourly fees. Jenner ultimately determined that it was not in its economic interests to continue to represent Parallel Networks and terminated its representation of Parallel Networks so that it could seek its hourly fees.

With the assistance of successor counsel (and despite Jenner's bad advice before termination to settle the Delaware cases for "whatever it could get"), Parallel Networks succeeded on appeal when the Federal Circuit Court of Appeals vacated the district court's adverse summary judgment of non-infringement. After remand, Parallel Networks retained additional law firms to prepare one of the cases for trial. Through the efforts of successor counsel, Parallel Networks ended up settling that case shortly before the commencement of jury selection. Shortly after Parallel Networks settled that case, and more than two and a half years after it abandoned Parallel Networks, Jenner reappeared and demanded that it be paid its full hourly fees, despite its unilateral termination of the representation of Parallel Networks based solely upon Jenner's economic interests. In its demand letter, Jenner claimed that it was entitled to over $10 million in hourly fees. When Parallel Networks refused to pay Jenner its hourly fees because such fees were unconscionable—fees which amounted to more than half of Parallel Networks' total recovery in one case and more than the entire recovery Parallel Networks had received in the second case—Jenner filed its demand for arbitration and again sought more than $10 million in hourly fees.

For over a year during the course of the arbitration, Jenner forced Parallel Networks to defend against this unconscionable $10 million fee demand. It was not until an arbitration summary judgment hearing when Jenner finally retreated from this untenable position. Finally conceding that its initial demand for its full hourly fees was unconscionable, Jenner changed course and asked the arbitrator instead to award it damages of either $3.2 million or $4.4 million which was calculated as a percentage of the $10 million in hourly fees that Jenner had initially demanded from Parallel Networks.

Despite Texas law precluding the award of any recovery to a contingent-fee attorney who withdraws without just cause, the arbitrator issued an award in favor of Jenner. The arbitrator's award was premised upon the arbitrator finding that Jenner's subjective concerns and self-driven motivations entitled Jenner to receive compensation—a finding that contradicts Texas Supreme Court and Fifth Circuit precedent as well as Texas disciplinary rules governing attorney-fee agreements. In addition, the arbitrator's award was devoid of any mathematical calculation for determining attorney compensation as required by the Texas Disciplinary Rules of Professional Conduct. Finally, the award was wholly unsupported by the text of the contingent fee agreement. Parallel Networks moves to vacate the award.

PARTIES

1. Plaintiff Parallel Networks, LLC is a limited liability company organized and existing under the laws of the State of Delaware, with its office in Texas located at 1700 Pacific

Avenue, Suite 2320, Dallas, Texas 75201.

2. Defendant Jenner & Block, LLP is a limited liability partnership with its principal office in Chicago, Illinois, and with offices in Washington, D.C.; New York, New York; and Los Angeles, California. Jenner may be served with process by serving its managing partner, Susan Levy, at 353 N. Clark Street, Chicago, Illinois 60654.

JURISDICTION AND VENUE

3. This Court has jurisdiction under Texas Government Code § 24.007.

4. Venue is proper pursuant to Texas Civil Practice & Remedies Code § 15.002 because all or a substantial part of the events giving rise to this action occurred within this County. Venue is also proper in this County because this is the County in which the arbitration award was made.

FACTUAL BACKGROUND

A. Jenner's Representation of Parallel Networks

5. On June 27, 2007, Parallel Networks and Jenner entered into a Contingent Fee Agreement pursuant to which Jenner agreed to represent Parallel Networks in two Delaware cases involving Oracle and QuinStreet (the "Delaware Actions").[1]

B. The Contingent Fee Agreement

6. The contingent fee agreement between Jenner and Parallel Networks (the "CFA") is governed by Texas law. *See* Ex. A, CFA. Under the CFA, Parallel Networks was not obligated to pay hourly fees, but instead Jenner's fee was contingent on proceeds from any Enforcement Activities concluded by Jenner. *Id.* at 4, ¶ 5.

---

[1] A more detailed recitation of the parties' dealings is in Respondents' Second Amended Answering Statement and Counterclaims, attached as Ex. R (filed under seal).

7. Paragraph 2 of the CFA requires Jenner to represent Parallel Networks "on all matters arising out of or related to Enforcement Activities in which Jenner & Block is retained by [Parallel Networks]."

8. Paragraph 3 of the CFA states Jenner shall not have any right or claim to a Contingent Fee Award in the event of "ethical or business conflicts or other commercial or legal impediments."

9. Under Paragraph 7 of the CFA, entitled "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] is representing [Parallel Networks]."

10. Paragraph 9.a of the CFA discusses termination by Parallel Networks; Paragraph 9.b discusses termination by Jenner.

11. Paragraph 9.a of the CFA provides that if Parallel Networks terminates the CFA, it shall:

> (i) compensate Jenner & Block for all time expended . . . *at the regular hourly billing rates charged by Jenner & Block* for its attorneys and legal assistants (in lieu of the Contingent Fee Award applicable to such Enforcement Activity . . .; (ii) reimburse Jenner & Block for all previously unreimbursed Enforcement Expenses incurred by Jenner & Block under this Agreement; and (iii) *at the conclusion of any Enforcement Activity*, pay Jenner & Block an appropriate and fair portion of the Contingent Fee Award based upon Jenner & Block' [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*). (Emphasis added).

12. Paragraph 9.b of the CFA provides that if "Jenner & Block determines at any time that it is not in its economic interest to continue the representation . . .," it may terminate the CFA upon 30 days' written notice. Paragraph 9.b further states that if Jenner terminates, it "shall

continue to be entitled to receive compensation from [Parallel Networks] pursuant to (i), (ii), and (iii) in the preceding paragraph up to the date of such termination . . . ."

13. Jenner selected Texas law to govern the CFA but did not research whether Paragraph 9 was enforceable under Texas law.

14. The CFA also contains an integration clause (Paragraph 15) stating that it may only be amended or modified in writing, executed by both parties.

C. The *QuinStreet* Case

15. QuinStreet has two business segments: (1) a web hosting business (DSS) and (2) a lead generating business (DMS), which allows a website visitor to fill out a form to request more information about that website owner's products or services.

16. The information necessary to prove QuinStreet infringed the patents-in-suit includes, among other things, QuinStreet's source code, configuration files, and other technical documentation.

17. In October and November 2007, Jenner accused QuinStreet's Apache platforms (including Apache and Apache/Tomcat (JBoss)) of infringement. By April 2008, Jenner knew that QuinStreet's DMS business used the Apache and Apache JBoss platforms. *See* Ex. B, April 3, 2008, email from B. Bradford to H. Roper, G. Bosy, et al. Despite knowing that DMS used an accused platform, Jenner did not evaluate QuinStreet's DMS business, prepare any infringement claim charts (required in patent infringement cases), or assess the magnitude of Parallel Networks' damages based upon revenues generated by QuinStreet's infringing DMS platforms at any time during its representation of Parallel Networks. Instead, as Paul Margolis, a Jenner partner, testified during the arbitration, Jenner only focused on QuinStreet's web-hosting business, DSS—"[t]hat's all we cared about."

18. Jenner possessed more than sufficient information to know that QuinStreet's use of Apache in its DMS business infringed Parallel Networks' patents and that such claims were lucrative. Jenner, however, failed to follow-up on such information and to advise Parallel Networks about the valuable infringement claims Parallel Networks had against QuinStreet for its DMS business.

19. During the course of the *QuinStreet* case, QuinStreet provided source code, various technical documentation, financial documents, and interrogatory responses which confirmed that QuinStreet's DSS and DMS businesses infringed the patents-in-suit.

D. Jenner Internally Discusses Termination of the CFA

20. Beginning in the fall of 2008, Jenner began to have internal discussions regarding the economics of representing Parallel Networks. Despite exchanging several memoranda outlining the merits of the Delaware Actions, case strategy (including Jenner's internal dichotomy in views on damages and settlement strategy), and Jenner's business decision regarding whether to continue its representation of Parallel Networks, none of these communications, details, or recommendations were ever conveyed to Parallel Networks. Incredibly, Ms. Mascherin billed Parallel Networks for the time spent on drafting these memoranda that were for Jenner's internal use and that were never disclosed to the client.

21. Ms. Mascherin, who had been assigned to the case by Susan Levy, Jenner's managing partner, was looking out for Jenner's interests as she plotted what course of action Jenner would take to obtain the most money.

22. For example, Ms. Mascherin wrote and distributed to Jenner management a "Settlement Strategy" memo dated October 21, 2008, in which she urged Jenner to "re-examine the Contingent Fee Agreement with [Parallel Networks] and determine whether it is in the firm's

strategic and financial interests to continue its engagement with [Parallel Networks] and to pursue additional lawsuits." *See* Ex. E, Oct. 21, 2008, Memorandum at 7. Ms. Mascherin took all of the information she knew about Parallel Networks and its litigation position in account when considering whether terminating Jenner's relationship with Parallel Networks or continuing the representation was the better financial deal for Jenner. Ms. Mascherin did not tell Parallel Networks about her assessment.

23. At the same time that Jenner was internally discussing whether it should terminate its representation of Parallel Networks, George Bosy, the senior patent litigator on the Parallel Networks trial team, was in discussions with Mr. Fokas for Jenner to take on additional Parallel Networks matters and recommending to management that Jenner consider representing Parallel Networks in other patent cases. *See* Ex. F, Oct. 24, 2008, Memorandum from G. Bosy to Jenner Contingent Fee Committee.

24. On December 4, 2008, the Delaware district court granted summary judgment of non-infringement in the *Oracle* case. The effect of the summary judgment ruling against Parallel Networks' patent enforcement program was devastating. According to Kevin Meek, the senior patent litigation partner from Baker Botts who argued Parallel Networks' appeal at the Federal Circuit, unless the summary judgment ruling was reversed, Parallel Networks' entire patent licensing "program [was] comatose. It's dead."

25. Within three hours of receiving the adverse summary judgment ruling, Jenner attorneys internally discussed how much longer Jenner wanted to continue the representation of Parallel Networks and how best to recoup Jenner's investment in the case. *See* Ex. G, Dec. 4, 2008, e-mail from T. Mascherin to A. Valukas and S. Levy. Jenner believed that it could

"terminate the engagement for any reason" and "[Jenner] would remain entitled to be compensated at a minimum for [its] fees incurred, based upon [] regular hourly rates."

26. At a time when Parallel Networks needed its counsel to fight to overturn the catastrophic summary judgment ruling, Jenner was working on how to terminate the attorney-client relationship and get paid the maximum amount. No one from Jenner told Parallel Networks that Jenner was considering terminating its representation of Parallel Networks. Instead, on December 18, 2008, Ms. Mascherin telephoned Mr. Fokas to convey Jenner's recommendation that Parallel Networks should try to settle the Delaware Actions for whatever it could. This recommendation was made to Mr. Fokas despite the widespread internal belief by the Jenner trial and appellate team that the summary judgment ruling would be overturned on appeal. The sentiments of the Jenner trial and appellate teams about the merits of the appeal were never conveyed by anyone at Jenner to Mr. Fokas.

27. Indeed, Jenner's appellate group felt "strongly about the merits of [an] appeal," given that their team had been "personally involved in three prior appeals of patent cases where [Judge] Robinson was reversed in the Federal Circuit." Ex. H, Dec. 30, 2008, email from P. Margolis to S. Levy and T. Mascherin. Multiple Jenner attorneys (all members of the trial team), including Harry Roper, George Bosy, David Bennett, and Paul Margolis, all testified that they also thought it was a very winnable appeal. They believed that the adverse summary judgment opinion was wrong and inconsistent with the claim construction opinion upon which summary judgment of non-infringement had been granted. Mr. Bosy, who was the senior patent litigator on the Parallel Networks trial team, believed that the ruling was "wholly erroneous" and that it would get reversed. The trial team believed it was "probably one of the best [appeals they'd] seen."

28. Despite the strong belief of Jenner's appellate and trial teams in the merits of the appeal, *i.e.*, that the summary judgment ruling would get reversed on appeal, Jenner withheld that information from Parallel Networks and instead told Parallel Networks that its chance of success on appeal was only 30-50%. Remarkably, Jenner went so far as to tell Mr. Fokas, "In this case, we think that the arguments and circumstances that would lead the Federal Circuit to uphold the decision are relatively stronger than the arguments and circumstances that would lead to reversal." Ex. I, Jan. 8, 2009, email from P. Margolis to T. Fokas.

29. Jenner also was more interested in figuring out how to get paid than in continuing to expend effort on prosecuting the Delaware Actions. For example, in a December 2008 internal e-mail, Ms. Mascherin noted that damages in the *QuinStreet* case ranged "from a few million (in which case [Jenner] would not recoup [its] investment in the case) to approximately $20-30 million (at which level [Jenner] would probably recoup [its] investment, perhaps plus a small bonus)." *See* Ex. J, Dec. 13, 2008, e-mail from T. Mascherin to S. Levy at 3. This email and Jenner's damages assessment were never shared with Parallel Networks. Ms. Mascherin also reiterated that in the event Jenner terminated and Parallel Networks recovered damages, Jenner remained entitled to be paid its "fees incurred up to the time of termination, at [its] regular hourly rates; . . . [and] a fair portion of the contingent fee award based upon [Jenner's] contribution to the result achieved at the time of termination, to the extent that [Jenner has] not yet been paid for all of [its] fees incurred." *Id.* at 4.

30. In another internal e-mail, Ms. Mascherin stated that "[d]epending on what [Parallel Networks] decides to do re. pursuing settlement or prosecuting [its] appeal, the firm will need to decide whether to terminate [its] engagement with the client . . . ." *See* Ex. K, Dec. 18, 2008, e-mail from T. Mascherin to S. Levy and R. Bricker, ¶ 1. Jenner was continuously

weighing whether it should fulfill its contingency fee agreement or terminate and seek hourly fees but did not tell its client that its advice during this time was tainted by its own financial considerations.

E. Parallel Networks Pays Jenner all Outstanding Expenses Prior to Jenner's Termination

31. When Jenner agreed to represent Parallel Networks on a contingent basis, it knew that Parallel Networks' only source of revenue was from settlements received from its patent licensing and enforcement program. Indeed, Harry Roper (the head of Jenner's intellectual property section) testified that Mr. Fokas had informed him during Jenner's due diligence of the Delaware Actions that Parallel Networks' revenues were from its licensing program.

32. Throughout Jenner's and Parallel Networks' relationship, Parallel Networks paid Jenner as it received monies from its various litigation settlements. George Bosy, a senior Jenner partner who was on Parallel Networks' trial team, testified that it was common for Jenner to contact clients at the end of the year to try to collect on bills—Jenner "did that with everybody."

33. It was only in mid-December 2008—shortly after an adverse summary judgment ruling in the *Oracle* case—that Jenner told Parallel Networks for the first time "that the firm's position is that expenses must be paid by year end or we will not proceed with any further work, and that if the trial is going ahead we require a retainer to cover the out of pocket expenses". *See* Ex. C, Dec. 17, 2008, email from T. Mascherin to G. Bosy.

34. Seven days later, and in response to Jenner's request for payment, Parallel Networks paid all outstanding expenses *before* Jenner terminated the CFA.

35. Terri Mascherin, a member of Jenner's Management Committee, conceded that after Parallel Networks paid the outstanding expenses on December 24, 2008, there was no active breach by Parallel Networks, and any prior breach was cured. *See* Ex. Q, Dec. 31, 2008,

Memorandum from T. Mascherin to S. Levy at 2.

36. Jenner ultimately determined that it was not in its interests to continue its representation of Parallel Networks under the terms of the CFA. On January 2, 2009, Jenner terminated its representation of Parallel Networks. The termination letter did not state any cause for termination, referencing only Paragraph 9.a of the CFA, which permits Jenner to terminate solely based upon the firm's economic interests. *See* Ex. D, Jan. 2, 2009, letter from P. Margolis to T. Fokas. Jenner could not have terminated based on unpaid expenses (as it initially claimed when it filed its Demand for Arbitration) because Parallel Networks had already paid all outstanding expenses owed to Jenner.

37. Given Jenner's intimate familiarity with the *Oracle* case and the summary judgment arguments, Parallel Networks attempted to convince Jenner to represent it through the Federal Circuit appeal. Ms. Mascherin testified that pursuing the appeal was Jenner's responsibility under the CFA; however, Jenner refused to live up to its contractual responsibilities to handle the appeal on a contingent fee basis and instead refused to represent Parallel Networks in the appeal unless Parallel Networks agreed to a different financial arrangement with Jenner, including payment of hourly fees for the appeal and a substantial retainer. The parties could not agree on revised financial terms, and Jenner proceeded with terminating the client relationship instead of fulfilling its obligations under the CFA.

F. Parallel Networks Prosecutes the *Oracle* and *QuinStreet* Cases with Substitute Counsel

38. Because of the adverse summary judgment ruling in the *Oracle* case, Parallel Networks could only find substitute counsel to represent it on an hourly basis.

39. To fund the hourly fees for the *Oracle* appeal, Parallel Networks quickly settled the *QuinStreet* case based upon the information given to it by Jenner. Parallel Networks later

learned during the course of the arbitration proceeding that Jenner failed to properly prosecute the *QuinStreet* case, causing Parallel Networks to settle with QuinStreet at a substantially reduced amount.

40. On April 28, 2010, the Federal Circuit vacated the adverse summary judgment ruling in the *Oracle* case and remanded the case back to the district court for further proceedings.

41. On May 13, 2011, just three days before the commencement of trial, Parallel Networks and Oracle settled. The settlement with Oracle included a provision for a future arbitration proceeding that would address new or amended claims that came out of patent reexamination proceedings of the patents-in-suit at the U.S. Patent & Trademark Office, which were being handled exclusively by Baker Botts. Jenner had no role in the re-examinations or in negotiating the *Oracle* settlement. As of the date of the arbitration hearing between Parallel Networks and Jenner, the potential *Oracle* arbitration had not occurred.

42. Jenner is not counsel for the future arbitration with Oracle nor has it ever done any work with respect to the *Oracle* arbitration.

G. Jenner Demands its Hourly Fees

43. More than two-and-a-half years after Jenner abandoned its representation of Parallel Networks, and a month after Parallel Networks and Oracle settled, Jenner's firm counsel, Russell Hoover, sent a demand letter to Parallel Networks for $10,245,492 in hourly fees, which Jenner claimed were "more than two years past due" from when Jenner terminated its representation of Parallel Networks. Mr. Hoover stated that Jenner's demand was for payment in full at the time of termination and was not contingent on anything:

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

* * *

> The Agreement is a Contingent Fee Agreement, ***with the contingency applicable up to the date of the Agreement's termination***. Jenner was given the option to terminate the Agreement on 30 days prior written notice if we determined at any time that it was not in Jenner's "economic interest to continue the representation pursuant to the Agreement". ***Upon such termination***, Jenner was to receive compensation "for all time expended by Jenner & Block [up to the termination date] on any Enforcement Activity undertaken on behalf of [Parallel Networks] at the regular hourly billing rate charged by Jenner & Block for its attorneys and legal assistants" with that to be "in lieu" of the Contingent Fee applicable to such services . . . .
>
> * * *
>
> This is a very large receivable, ***which is now more than two years past due.*** Parallel Networks has made no payments whatsoever against this liability and we have received no explanation of why. [. . .] Our position is quite simple: The contract specifically spells out that to which we are entitled ***on termination of the Agreement.***

See Ex. L, June 17, 2011, letter from R. Hoover to D. Bennett.

44. Parallel Networks' counsel responded by informing Jenner that the provision of the CFA pursuant to which Jenner was seeking its hourly fees was unconscionable and unenforceable under Texas law, and that given the significant injury that Jenner had caused to Parallel Networks, any payment to Jenner was unwarranted.

45. When Parallel Networks refused to pay Jenner in accordance with its demand letter, Jenner filed its Demand for Arbitration ("Demand") with JAMS, in Dallas, Texas, asserting three claims: (1) breach of contract, (2) quantum meruit, and (3) promissory estoppel.

H. The Arbitration Proceeding

46. In its Demand, Jenner sought over $10 million in fees which amounted to more than half of the total recovery obtained from Parallel Networks in the *Oracle* case and more than the entire amount Parallel Networks received in the *QuinStreet* case. During her deposition in

the arbitration, Susan Levy, Jenner's managing partner, testified that it was Jenner's position that Parallel Networks owed Jenner $10 million.

47. Jenner initially claimed that it terminated its representation of Parallel Networks due to a failure to pay past expenses. Faced with irrefutable evidence from its own internal emails and memoranda that Parallel Networks paid outstanding expenses in full prior to termination, Jenner later dropped this false contention.

48. In response to Jenner's demand, Parallel Networks asserted counterclaims against Jenner for breach of the CFA, breach of fiduciary duty, and legal malpractice.

49. In its breach of contract claim, Parallel Networks asserted that Jenner prematurely terminated its representation of Parallel Networks, forcing Parallel Networks to find substitute counsel to represent it on an hourly basis and to settle the *QuinStreet* case at a substantially reduced value in order to fund the *Oracle* appeal.

50. After obtaining discovery in the arbitration, Parallel Networks first learned that Jenner had failed to do the necessary work to determine the extent of QuinStreet's infringement. Parallel Networks discovered that the information received from QuinStreet during the arbitration contradicted information Jenner gave it when Jenner represented it in the underlying *QuinStreet* case. In particular, Parallel Networks learned that despite Jenner's claims to Parallel Networks that it did not have enough information to determine whether QuinStreet's DMS business infringed the patents-in-suit, QuinStreet had in fact produced (as early as the fall of 2007) sufficient information to show that DMS did in fact infringe.

51. On September 11, 2012, the arbitrator held a hearing on Parallel Networks' motion for summary judgment. Recognizing that demanding its full hourly fees ($10 million) was unconscionable under the terms of the CFA, Jenner belatedly conceded in response to the

arbitrator's questions that it was no longer seeking its full hourly fees (notwithstanding that Jenner had forced Parallel Networks for over a year to defend against a $10 million demand).

52. On September 14, 2012, after the close of discovery and a month before the scheduled arbitration hearing, Jenner sent a new demand letter to Parallel Networks, seeking $4,439,270 ***plus*** 23% of any settlement Parallel Networks received from a future, and not yet filed, arbitration with Oracle. However, Jenner's own expert, Tom Cunningham, testified that he "had not expressed the opinion" that $4,439,270 plus 23% of any settlement Parallel Networks may receive from a future arbitration with Oracle "is a number that should be paid to Jenner & Block under any circumstances that exist today."

53. From October 15, 2012, through October 25, 2012, the parties conducted an arbitration hearing at JAMS in Dallas, Texas.

54. During the hearing, the arbitrator improperly excluded testimony from Keith Lowery, an inventor of the patents-in-suit, regarding QuinStreet's configuration files and excluded QuinStreet technical documents, which materially affected Parallel Networks' ability to present its legal malpractice claim against Jenner.

55. Throughout the hearing, Jenner changed its position as to how much it was seeking in damages, eventually requesting the arbitrator rewrite Paragraph 9 to now award Jenner a "fair" fee, a formulation found nowhere in the CFA.

56. On January 18, 2013, the arbitrator issued the Arbitration Findings and Award. *See* Ex. M, Arbitration Findings and Award ("Award"), a true and correct copy of which is filed under seal. For Jenner's breach of contract and quantum meruit claims, the arbitrator awarded Jenner $3,000,000 and 16% of the net proceeds of any settlement or recovery paid to Parallel Networks from any future arbitration or settlement with Oracle. Because he found for Jenner on

its quantum meruit claim, Jenner's promissory estoppel claim was denied. The arbitrator denied all of Parallel Networks' counterclaims, finding that Parallel Networks was not entitled to recover any damages from Jenner. Finally, the arbitrator awarded Jenner its attorneys' fees in the amount of $1,394,000 and pre- and post-judgment interest.

57. Parallel Networks now files this petition and motion to vacate the Award.

ARGUMENT AND AUTHORITIES

A. Legal Standard

Under the Federal Arbitration Act ("FAA"), an arbitration award may be vacated when: (1) the arbitrator exceeded his powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made, or (2) the arbitrator was guilty of misconduct 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.[2]

An arbitrator exceeds his powers when his award does not "draw its essence" from the contract.[3] To determine whether an award meets this "essence test," courts assess "whether the award, however arrived at, is rationally inferable from the contract."[4] Vacatur is proper if "there is no rational way to explain the remedy handed down by the arbitrator as a logical means of furthering the aims of the contract."[5] If the arbitrator ignores his responsibility to construe the parties' agreement in an "evenhanded way" and instead dispenses his "own brand of industrial

---

[2] 9 U.S.C. § 10; *see also Gulf Coast Indus. Workers Union v. Exxon Co., USA*, 70 F.3d 847, 850 (5th Cir. 1995).

[3] *Exxon Corp. v. Exxon Emps.' Fed'n of Tex.*, 874 F. Supp. 138, 142 (N.D. Tex. 1994); *Timegate Studios, Inc. v. Southpeak Interactive, LLC*, No. 4:09-cv-3958, 2012 WL 948282, at *3 (S.D. Tex. Mar. 20, 2012) (citing *Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314, 1324 (5th Cir. 1994)).

[4] *Executone*, 26 F.3d at 1325.

[5] *Id.*

justice," the award must be set aside.[6] An award that is not anchored in any recognized law is improper.[7]

Additionally, if an arbitration award "indisputably runs contrary to clearly applicable law known to the arbitrators, then the district court can vacate the award as manifestly disregarding the law."[8] If the arbitrator "appreciated the existence of a clearly governing principle but decided to ignore or pay no attention to it," vacatur is required.[9]

B. The Arbitrator Exceeded his Powers by Re-writing the CFA and Awarding Jenner an Award That Did Not Draw its "Essence" From and Was Contrary to the Language of the CFA

"'[A]rbitral action contrary to express contractual provisions will not be respected' on judicial review."[10] "If the language of the agreement is clear and unequivocal, an arbitrator is not free to change its meaning."[11] Here, the arbitrator's award cannot be reconciled with the provisions of the CFA.

---

[6] *Int'l Union of Op. Eng'rs, Local 351 v. Cooper Natural Res. Inc.*, 163 F.3d 916, 919-20 (5th Cir. 1999).

[7] *Timegate Studios, Inc.*, 2012 WL 948282, at *10; *see also Beaird Indus. Inc. v. Int'l Union*, 404 F.3d 942, 946 (5th Cir. 2005) (affirming the district court's decision to vacate the arbitration award because "the Arbitrator has failed utterly to draw his conclusions from the essence of the [agreement]").

[8] *Brabham v. A.G. Edward & Sons, Inc.*, 376 F.3d 377, 385 (5th Cir. 2004). The Supreme Court of the United States has not yet decided whether "manifest disregard" of the law is an independent ground for review or a judicial gloss on the enumerated grounds set forth in 9 U.S.C. § 10. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1768 n.3 (2010).

[9] *Brabham*, 376 F.3d at 381-82 (quotation omitted).

[10] *Executone*, 26 F.3d at 1325.

[11] *Houston Lighting & Power Co. v. Int'l Brotherhood of Elec. Workers*, 71 F.3d 179, 184 (5th Cir. 1995); *see also Rock-Tenn Co. v. Paper, Allied-Indus. Chem. & Energy Workers Int'l Union (Pace), AFL-CIO, CLC and Local Union No. 4-0895*, No. 3:02cv2582, 2003 WL 22398814, at *5 (N.D. Tex. Sep. 30, 2003).

1. Texas law prohibits enforcement of the termination provision relied upon by Jenner

When interpreting and enforcing fee agreements, it is "not enough to simply say that a contract is a contract. There are ethical considerations overlaying the contractual relationship."[12] Thus, a lawyer may not enter into an arrangement for, charge, or collect an unconscionable fee.[13]

In determining whether a fee contract is unconscionable, courts use the Texas Disciplinary Rules of Professional Conduct to determine whether a fee agreement is contrary to or violates public policy.[14] For example, Texas law holds that unilateral option provisions in fee agreements—where the attorney transforms the fee structure from a contingency fee to an hourly billing arrangement, or vice versa, at his or her sole discretion—are unenforceable.[15] Lawyers and their clients cannot waive or contract around these public policies.[16]

In Texas, a "contingent" fee is allowed when the fee is dependent on the outcome of a matter.[17] Thus, an attorney who undertakes a contingent fee representation bears "the risk that he or she will receive 'no fee whatsoever if the case is lost.'"[18] This element of risk justifies the attorney's potential for a greater contingent fee.[19] This risk-sharing also incentivizes lawyers to

---

[12] *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 560 (Tex. 2006).

[13] TEX. DISCIPLINARY R. OF PROF'L CONDUCT 1.04(a).

[14] *See, e.g., Lemond v. Jamail*, 763 S.W.2d 910 (Tex. App.—Houston [1st Dist.] 1988, writ denied); *Fleming v. Campbell*, 537 S.W.2d 118, 119 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.).

[15] *Hoover Slovacek LLP*, 206 S.W.3d at 561; *see also Wythe II Corp. v. Stone*, 342 S.W.3d 96, 103 (Tex. App.—Beaumont 2011, pet. denied) (finding provision of fee agreement giving attorney sole option to convert hourly billing to contingent fee unenforceable).

[16] *See, e.g., Hoover Slovacek LLP*, 206 S.W.3d at 561 (finding that contingent fee provision was unconscionable and unenforceable); *Scoville v. Spring Park Homeowners Ass'n, Inc.*, 784 S.W.2d 498 (Tex. App.—Dallas 1990, writ denied).

[17] TEX. DISCIPLINARY R. OF PROF'L CONDUCT 1.04(d).

[18] *Hoover Slovacek LLP*, 206 S.W.3d at 561.

[19] *Id.*

work diligently and to obtain the best results possible.[20]

Despite the arbitrator's failure to consider the enforceability of Paragraph 9.a(i), Paragraph 9.a(i) gives Jenner the option to unilaterally convert its contingent fee into an hourly fee. The Texas Supreme Court has held that such a unilateral option provision is unenforceable as a matter of law because the attorney's fee is no longer contingent, and because it subverts the purpose served by contingency fee agreements by shifting all the risk of the representation to the client.[21] The Texas Committee on Professional Ethics has adopted the same view as in *Hoover Slovacek LLP* and in *Wythe II*:

> An agreement obligating a client to pay the attorney *the greater of* (a) a fee that is reasonable if determined and collectable strictly on a contingent basis or (b) the highest fee that would be reasonable based strictly on an hourly rate appears to violate DR 1.04 because (1) the uncertainty of collection normally would not be considered in arriving at a fee for services on an hourly rate and (2) a higher fee payable only out of a recovery on a contingent fee basis normally would be justified due to the uncertainty of collection.[22]

Jenner did exactly what the courts in *Hoover Slovacek LLP* and *Wythe II* and the Texas Committee on Professional Ethics admonish against. During its representation of Parallel Networks, Jenner evaluated when was the best time to drop Parallel Networks, noting that Jenner could walk away at any time and be compensated at its hourly fees. *See* Ex. G, Dec. 4, 2008, e-mail from T. Mascherin to A. Valukas and S. Levy. After the adverse summary ruling, Jenner determined that the contingency fee would not pay off, so it terminated its representation of Parallel Networks.

---

[20] *Id.*

[21] *Id.* at 559; *see also Wythe II Corp.*, 342 S.W.3d at 103 (finding provision of fee agreement giving attorney sole option to convert hourly billing to contingent fee unenforceable).

[22] TEX. ETHICS OP. 518 (September 1996) (emphasis added).

2. Jenner acknowledged the unenforceability of Paragraph 9.a(i)

Recognizing the problems with Paragraph 9.a(i), Jenner abandoned its attempt to recover under Paragraph 9.a(i). Instead, Jenner asked the arbitrator to ignore that provision, re-write Paragraph 9, and award a "fair" fee based upon several alternative—and unsupported—calculations performed by Jenner's expert, which were unsupported by the text of the severed paragraph. Under Jenner's proposed rewritten Paragraph 9, Jenner would be given whatever "fair" fee the arbitrator thought it should be awarded. In effect, Jenner sought a pro rata portion of the Contingent Fee Award even though it terminated the CFA, and the CFA and Texas law do not provide such a remedy.

Such an interpretation and rewriting of Paragraph 9 conflicts with the CFA for at least four reasons. First, Paragraph 9.a of the CFA provides for payment of hourly fees, followed by expenses, and then a portion of the contingent fee award based upon Jenner's "contribution to the result achieved as of the time of termination" of the CFA, but only "*to the extent that [Jenner] has not already been compensated under Section 9.a(i) hereunder.*" The arbitrator turned Paragraph 9.a(iii) into a stand-alone provision because Jenner knew that a recovery under 9.a(i) was impermissible.

Second, the result achieved by Jenner at the time of termination was an adverse summary judgment ruling. The arbitrator awarded Jenner fees based on the ultimate result achieved by Parallel Networks' successor counsel *more than 2 years* after Jenner terminated instead of the result achieved "as of the time of [Jenner's] termination."

Thus, the Arbitrator rewrote Paragraph 9.a as follows:

Contract Language	**Arbitrator's Re-write**
[Parallel Networks] shall: (i) compensate Jenner & Block for all time expended by Jenner & Block on any Enforcement Activity undertaken on behalf of [Parallel Networks] 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 Networks] 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 Networks] 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 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 Networks] shall pay Jenner & Block a fair portion of the Contingent Fee Award based upon the result achieved.

Third, the arbitrator's re-write violated Paragraph 3 of the CFA which states that Jenner will not be entitled to any contingent fee if it terminates for business or commercial reasons.

Fourth, the arbitrator also violated Paragraph 15 of the CFA, which provides that "[t]his Agreement may be amended or modified from time to time but only by a written instrument executed by the Parties." Under Paragraph 15 of the CFA, the arbitrator did not have authority to re-write the CFA. Thus, the arbitrator exceeded his powers by repeatedly changing the express terms and provisions of the CFA. In doing so, the arbitrator violated the "essence" test.[23]

Even with the arbitrator's re-write, Paragraph 9 still violates Texas law because it fails to provide a clear and accurate explanation of how a fee was to be calculated. Texas Disciplinary Rule of Professional Conduct 1.04(d) and comment 8 require that contingent fee agreements state the method by which the fee is to be determined and "to give at the outset a clear and accurate explanation of how a fee was to be calculated."[24] Failure to do so renders a fee unconscionable.[25]

Significantly, the arbitrator's Award also failed to mention anywhere the testimony or expert reports of Professor David Hricik, a preeminent expert on ethics in patent litigation.[26] Professor Hricik submitted a 56-page expert report and a 14-page supplemental report regarding, among other things, the unenforceability and unconscionability of Paragraph 9 of the CFA and Jenner's forfeiture of attorneys' fees because it withdrew from the representation without "just cause." The arbitrator's failure to take into account Professor Hricik's expert testimony discussing relevant Texas case law is further evidence of the arbitrator's manifest disregard of Texas law.

During the arbitration, Jenner's expert conceded that there were numerous ways to calculate a fee under Paragraph 9, testifying to at least two different amounts based on different

---

[23] *See, e.g.*, *Timegate Studios, Inc.*, 2012 WL 948282, at *11 (vacating arbitration award where arbitrator violated provisions of the contract).

[24] *See* TEX. DISCIPLINARY R. OF PROF'L CONDUCT 1.04.

[25] *Id.*; *see also Hoover Slovacek LLP*, 206 S.W.3d at 565.

[26] Professor Hricik has also written a book, "Ethical Considerations in Patent Litigation," that specifically addresses the issues presented in the underlying dispute, as well as taught courses on legal ethics in patent litigation. Professor Hricik is currently on sabbatical from Mercer University School of Law to clerk for Chief Judge Rader of the United States Court of Appeals for the Federal Circuit.

calculations: $4,439,270 or $3,287,347.[27] And, Jenner's ever-changing position on the amount and calculation of fees that it was seeking throughout the arbitration demonstrate that even Jenner did not have a clear idea of the amount due under Paragraph 9. To make matters even worse, the arbitrator used neither of Jenner's calculations, choosing instead a $3 million amount without any explanation as to how the arbitrator calculated such a fee. Thus, the arbitrator's award violates both the Texas Disciplinary Rules of Professional Conduct and the express terms and provisions of the CFA.

Each of these failures to follow the express terms of the CFA—awarding Jenner an arbitrary fee of $3 million unanchored to the terms of the CFA in disregard of Texas law and the Texas Disciplinary Rules of Professional Conduct—constitutes an independent basis for vacatur under 9 U.S.C. § 10(a)(4). In addition, because the award is contrary to the CFA's express contractual provisions, the award fails the "essence test" and should be vacated in its entirety.

C. The Arbitrator Exceeded the Scope of His Authority by Awarding Jenner 16% of a Future, Speculative Arbitration

Notwithstanding the unenforceability of Paragraph 9, the arbitrator also awarded Jenner an additional 16% of the net proceeds of any settlement or recovery paid to Parallel Networks from any *future* arbitration or settlement by Oracle.[28] In doing so, the arbitrator exceeded the scope of his authority in at least three ways.

First, the arbitrator fashioned an award not expressed in the CFA by providing a measure of damages not enumerated in the CFA. Paragraph 9.a(iii) states that under certain circumstances, Parallel Networks is to pay Jenner "an appropriate and fair portion of the Contingent Fee Award based upon Jenner & Block's contribution to the result ***achieved at the***

[27] *See* Ex. M (filed under seal), Award at 30 n.5.

[28] *See id.* at 50.

time of termination of the Agreement . . . ." Based upon this contractual provision, the arbitrator awarded Jenner 16% of a future arbitration with Oracle, which may or may not occur, where the uncontroverted evidence is that the future arbitration relates to different claims, issues, and parties, and for which Jenner has not and will not perform any work. In other words, Jenner has not contributed to—let alone achieved a result for—this not-yet-filed arbitration; nonetheless, the arbitrator randomly granted Jenner 16% of its total value. Jenner was not even counsel for Parallel Networks when it entered into the settlement agreement with Oracle, which contains the provision regarding a future arbitration proceeding with Oracle.

Second, the arbitrator exceeded the scope of his authority because he provided no basis for his 16% award. Jenner never amended its Demand to seek a percentage of the future arbitration as a damages award. The arbitrator failed to perform any analysis to explain the 16% figure. Instead, he plucked a random number from thin air and awarded it to Jenner.

Third, the arbitrator exceeded his authority by awarding speculative damages not permitted by Texas law. In Texas, damages must be proved with reasonable certainty.[29] Here, the arbitrator arbitrarily picked damages award numbers for which there was no expert testimony and for which there is no calculated basis.

Moreover, the arbitrator compounded his error by rewriting the CFA to permit Jenner to share in a portion of claims not covered by the CFA. Paragraph 9 of the CFA permits recovery of a Contingent Fee Award for an Enforcement Activity. The future Oracle arbitration is not an Enforcement Activity on which Jenner did any work nor is it included within the scope of the CFA.[30] Thus, the arbitrator clearly exceeded his authority in re-writing the CFA and awarding

---

[29] *See Gulf Coast Inv. Corp. v. Rothman,* 506 S.W.2d 856, 858 (Tex. 1974); *Taub v. Houston Pipeline Co.,* 75 S.W.3d 606, 617 (Tex. App.—Texarkana 2002, pet. denied).

[30] *See* Ex. A, CFA at 1, ¶ 1.b.

Jenner an award based upon a future, hypothetical, and not yet occurred arbitration.[31] The arbitrator's award fails the "essence test" by changing the express terms of the CFA, and as a result, the award must be vacated.

The arbitrator also failed to perform any analysis regarding the reasonableness and necessity of the attorneys' fees sought by Jenner, as required by Texas law.[32] From Jenner's June 17, 2011, demand letter through the September 11, 2012, summary judgment hearing during the arbitration, Jenner claimed that it was owed over $10 million in hourly fees, which broken out, represented more than half the settlement amount Parallel Networks received from Oracle and more than the entire amount Parallel Networks received from QuinStreet. Jenner's own expert, Mr. Cunningham, even testified that it would "not be appropriate for Jenner & Block to charge" a fee greater than Parallel Networks' recovery and that he did not "think it's a good idea for a lawyer to take more out of a case than his client. And I would be very, very concerned about that kind of a fee or that kind of a charge." Not until the end of the summary judgment hearing, when pressed by the arbitrator, did Jenner concede that it was no longer seeking that amount. Despite Jenner's concession, the arbitrator, without making any effort to perform any analysis on the reasonableness and necessity of the fees actually sought, awarded Jenner all but $936 of attorneys' fees that it sought. For this additional reason, the arbitrator's award should be vacated.[33]

---

[31] *See* TEX. DISCIPLINARY R. OF PROF'L CONDUCT 1.08(h) ("[a] lawyer shall not acquire a proprietary interest in the cause of action or subject matter of the litigation the lawyer is conducting for the client").

[32] *See Arthur Andersen v. Perry Equipment Corp.*, 945 SW.2d 812, 818 (Tex. 1997) (discussing factors that must be determined when analyzing the reasonableness of attorneys' fees); *see also* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04 (same).

[33] *See, e.g., Findlay v. Cave,* 611 S.W.2d 57, 58 (Tex. 1981) (discussing doctrine of excessive demand).

D. The Arbitrator Excluded and Refused to Hear Evidence Pertinent and Material to Parallel Networks' Claims

The award should also be vacated because, by excluding Parallel Networks' Exhibits 142 and 144 and precluding Mr. Lowery (the inventor of the technology that formed the basis of the patents-in-suit) from testifying regarding those documents, the arbitrator failed to hear material evidence regarding Parallel Networks' counterclaims against Jenner. Under 9 U.S.C. § 10(a)(3), a court may vacate an arbitration award if "the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy." The award should be vacated if the arbitrator's failure to hear material evidence has rendered the proceedings fundamentally unfair.[34]

Parallel Networks' Exhibits 142 and 144, as well as Mr. Lowery's testimony regarding those documents, were essential to establishing Parallel Networks' legal malpractice claim. The exhibits consisted of QuinStreet's configuration files, and Mr. Lowery's testimony would have concerned his personal knowledge of how the technology worked and how to determine whether systems infringe Parallel Networks' patents.

Jenner argued that Parallel Networks was required to establish the "suit within a suit" requirement for its breach of contract and legal malpractice claims. Parallel Networks produced QuinStreet's source code and configuration files, and Mr. Lowery was prepared to testify regarding those documents. In overruling Jenner's previous objections to the use of the materials, the arbitrator held that the documents were timely produced. At the hearing, the arbitrator changed course and refused to hear Mr. Lowery's testimony regarding those

[34] *Gulf Coast Indus. Workers Union v. Exxon Co., USA*, 70 F.3d 847, 850 (5th Cir. 1995) (affirming district court's vacatur decision).

documents or allow Parallel Networks to introduce those documents into evidence.[35] The arbitrator then found that Parallel Networks offered no evidence to establish the "suit within a suit" requirement.[36] But for the arbitrator's exclusion of pertinent and material testimony and evidence, Parallel Networks would have been able to establish the "suit within a suit" requirement. Thus, the arbitrator's award should be vacated because the arbitrator refused to hear and excluded evidence material and pertinent to Parallel Networks' claims.

E. The Arbitrator Manifestly Disregarded Texas Law Regarding Attorney Fee Contracts

Jenner first sought to enforce a contingent fee contract that permitted Jenner to shift all risk to Parallel and to recover its hourly fee. Then, realizing that such a provision is unethical and unenforceable, Jenner changed tack and sought the greatest fee possible under some "fairness" formulation not expressed in the CFA.

Texas law provides that a lawyer who quits before the contingency occurs forfeits his or her right to be paid any fee.[37] A lawyer may only receive compensation when he terminates the representation with "just cause." Jenner had the burden to prove just cause.[38] During the arbitration, Jenner took the position that its subjective belief about the length of the case and Parallel Networks' ability to pay future expenses could constitute "just cause." Jenner's speculation that Parallel Networks might not pay expenses timely in the future is not a

---

[35] *See* Ex. N, Excerpt from Oct. 22, 2012, Arbitration Hr'g Tr., at 1669:3-11.

[36] *See* Ex. M (filed under seal) Award at 49; *see also Gulf Coast Indus. Workers Union*, 70 F.3d at 850 (affirming vacatur of arbitration award where arbitrator prevented defendant from presenting evidence and issued a final decision adverse to the defendant based on defendant's failure to present evidence). Such evidence was not necessary under Texas law. *See, e.g., Heath v. Herron,* 732 S.W.2d 748 (Tex. App.— Houston [14th Dist.] 1987, writ denied). But if the arbitrator was going to require Parallel Networks to introduce this type of evidence, he should have allowed Parallel Networks to do so.

[37] *See, e.g., Baird v. Ratcliff,* 10 Tex. 81 (1853).

[38] *Augustson v. Linea Aerea Nacional-Chile S.A.(LAN-CHILE)*, 76 F.3d 658, 663 (5th Cir. 1996).

recognized form of "just cause" sufficient to allow Jenner to withdraw and later be entitled to compensation.

Under Texas Disciplinary Rule of Professional Conduct 1.15, a lawyer must give his or her client reasonable warning before withdrawing for reasons relating to payment. Jenner gave Parallel Networks no such warning regarding Parallel Networks' ability to pay future expenses. To the contrary, Mascherin thought that Parallel Networks had more than sufficient funds to cover future expenses. *See* Ex. J, Dec. 13, 2008, e-mail from T. Mascherin to S. Levy at 2.

In *Staples v. McKnight*, 763 S.W.2d 914 (Tex. App.—Dallas 1989, writ denied), the court held that when an attorney withdrew because he thought his client *might* perjure himself the attorney was not entitled to recover any fee under the contingent fee agreement.[39] Similarly, Jenner's subjective belief that Parallel Networks might not pay expenses in a timely manner in the future (an argument that Jenner crafted during this arbitration when it realized that it did not have "just cause" sufficient to terminate its representation of Parallel Networks and be entitled to any payment of fees) is simply not a valid basis to find "just cause". And, Jenner's notice of termination only referenced Paragraph 9.a, not any issues relating to payment of expenses. Nonetheless, the arbitrator errantly found that Jenner could manufacture "just cause" based on subjective belief not raised before the arbitration.

In addition, the Fifth Circuit has held that withdrawing because a law firm disagrees with its client about settlement strategy is not just cause for withdrawal entitling the lawyer to compensation.[40] Here, one of the primary reasons Jenner withdrew was because Parallel Networks, like the client in *Augustson*, did not agree on settlement strategy. Jenner was focused solely on settling the cases (so it could get paid).

---

[39] *Staples*, 763 S.W. 2d at 917.

[40] *Augustson*, 76 F.3d at 663.

In *Rapp v. Mandell & Wright, P.C.*, a Texas court rejected a law firm's claim to fees in similar circumstances:

> Appellee's connection with the plaintiffs' case was effectively severed at the time it terminated appellant . . . ***Appellee withdrew from the plaintiffs' case without being requested to do so by the plaintiffs.*** Appellee wanted no responsibility for the case, and made plans to claim the case as a loss for tax purposes. ***Appellee wanted to withdraw after the unfavorable trial court judgment***, but appellant objected and maintained the case had merit. Even if withdrawal for just cause was an issue, appellee's separation from the plaintiffs' case was voluntary and without just cause. In any event, appellee failed to meet its burden to prove its withdrawal was for just cause. To the contrary, as a matter of law, ***appellee cannot claim it withdrew for just cause after it [] filed a motion to withdraw without the agreement of the clients with the belief the case had no value, and later, as an afterthought, when it discovered the court of appeals reversed the case in favor of the plaintiffs, tried to bootstrap its way back into the case in order to collect the contingent fee without earning it.*** Appellee had no justifiable cause to withdraw without plaintiffs' consent. Therefore, appellee has no right to recover any fees from plaintiffs.[41]

The Texas Supreme Court has further held that attorneys cannot contract around Texas law regarding attorney fee contracts, but that is what Jenner asked the arbitrator to do and what the arbitrator did.[42] These legal principles were explained multiple times in, among other places, Ex. O, Respondents' Motion for Partial Summary Judgment (filed under seal), and Ex. P, Respondents' Post-Hearing Brief (redacted). Instead of considering the ethical overlay applicable to attorney fee contracts, the arbitrator determined that the termination provision was "important" to Jenner and was thus enforceable. Even then, the arbitrator refused to consider the enforceability of Paragraph 9.a(i) and awarded a fee based on a re-write of Paragraph 9.a(iii). Because the arbitrator failed to follow the express terms or "essence of the contract" and manifestly disregarded Texas law, the award must be vacated.

---

[41] 127 S.W.3d 888, 898 (Tex. App.—Corpus Christi 2004, pet. denied) (internal citations omitted) (emphases added).

[42] *See Hoover Slovacek, LLP*, 206 S.W.3d at 560. Without an enforceable or ethical termination provision, Jenner needed to show an ability to recover under Texas common law and prove damages with a reasonable certainty. Jenner failed to do so and instead relied on its $10 million in fees.

PRAYER FOR RELIEF

Plaintiff Parallel Networks, LLC respectfully requests the Court enter an order vacating the arbitrator's award and granting it such other and further relief at law or in equity to which it may be entitled.

Respectfully submitted,

Jamil N. Alibhai
Texas Bar No. 00793248
jalibhai@munckwilson.com
Ryan S. Loveless
Texas Bar No. 24036997
rloveless@munckwilson.com
Jane Ann R. Neiswender
Texas Bar No. 24048312
jneiswender@munckwilson.com
Kelly P. Chen
Texas Bar No. 24062664
kchen@munckwilson.com
MUNCK WILSON MANDALA, LLP
12770 Coit Road, Suite 600
Dallas, Texas 75251
(972) 628-3600 Telephone
(972) 628-3616 Facsimile

COUNSEL FOR PLAINTIFF PARALLEL NETWORKS, LLC

575872

EXHIBIT A

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 collectively 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 Activities 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 cash 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. Accountings and Reporting Obligations. The Parties covenant to provide each other with certain accounting and financial information as provided below:

a. epicRealm Licensing Reporting Obligations. 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 NonMonetary 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, demands, 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:
Name: Terry Fokas
Title: Managing Member

Address: 1700 Pacific Avenue, Suite 2320
Dallas, Texas 75201 Facsimile (214) 397-0778

JENNER & BLOCK LLP

By:
Name: Greg Gallopoulos
Title: ~~Partner~~ 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

BB File No.	Application or Patent No.	App. or Issue Date	Inventor(s)	Title
066241.0102	6446111	09/03/02	Lowery, Keith A.	Method and Apparatus for Client-Server Communication Using a Limited Capability Client Over a Low-Speed Communications Link
066241.0104 CVP	09/590760	06/08/00	Davidson, David K. Saxena, Avinash C. Lowery, Keith A.	Method and Apparatus for Content Synchronization
066241.0105 CVP	09/592486	06/08/00	Davidson, David K. Saxena, Avinash C. Lowery, Keith A.	Method and Apparatus for Dynamic Data Flow Control
066241.0109	09/731365	12/06/00	Saxena, Avinash C.	Method and System for Adaptive Prefetching
066241.0110	09/759392	01/12/01	Chin, Bryan S. Consolver, David A. DeMasters, Gregg A. Lowery, Keith A.	Method and System for Community Data Caching
066241.0111	09/640478	08/16/00	Saxena, Avinash C.	Method and System for Uniform Resource Locator Transformation
066241.0117	09/759406	01/12/01	Chin, Bryan S. Consolver, David A. DeMasters, Gregg A. Lowery, Keith A.	Method and System for Dynamic Distributed Data Caching
066241.0119 DIV	6415335	07/02/02	Howell, Ronald L. Levine, Andrew B Lowery, Keith A.	System and Method for Managing Dynamic Web Page Generation Requests
066241.0125	5894554	04/13/99	Howell, Ronald L. Levine, Andrew B Lowery, Keith A.	System for Managing Dynamic Web Page Generation Requests by Intercepting Request at Web Server and Routing to Page Server Thereby Releasing Web Server to Process Other Requests

(including, without limitation, all know-how, trade secrets, discoveries, concepts, ideas, technologies, whether patentable or not, including processes, methods, formulas and techniques related to the foregoing, any and all written, unpatented technical or scientific information developed or acquired by epicRealm, including laboratory and clinical notebooks, research data, research memoranda, computer software (including source code or database code), computer records, scientist's notes, consultant reports, research reports from third parties, abandoned patent applications, invention disclosures, patentability reports and searches, patent and literature references, and the like related to such patents and patent applications; (ii) any and all trademarks, copyrights, copyright registrations and copyrightable subject matter owned or controlled by epicRealm related to such patents and patent applications; and (iii) any domain names, URLs, source code, trademarks, copyrights, copyright registrations and copyrightable subject matter owned or controlled by epicRealm that are not otherwise related to such patents and patent applications)

EXHIBIT B

Erickson, Amy H

From: Bradford, Benjamin J
Sent: Thursday, April 03, 2008 5:11 PM
To: Roper, Harry J; Bosy, George S; Patras, Patrick L; Bennett, David R; Margolis, Paul D; Terry, Angela M; Johnson, Emily C.
Cc: Nelson, David A
Subject: Summary of QuinStreet Meet and Confer

Paul and I attended a meet and confer this morning at Vedder Price's office. In attendance for QuinStreet were Bob Beiser and Luke Kohlman of Vedder and Adam Heller of QuinStreet. In addition, two other QuinStreet employees were teleconferenced into the meeting.

Generally, the meeting was productive. Both sides expressed their concerns with the current state of discovery and discussed the best way to move forward. Adam Heller demonstrated how you could index and search the documents produced. The procedure was to copy a small portion of the documents onto a computer and then index that small portion using Windows Search. Vedder did not have a solution for indexing all of the information. Paul then discussed all of the technical problems we were having with QuinStreet's production. We also expressed our concern about QuinStreet's production not having bates numbers and individual confidentiality designations which QuinStreet recognized as a valid concern.

In terms of the different QuinStreet Platforms, we learned that there are actually five different platforms - IIS Standalone (Active Server Pages), IIS with JRun, Apache Standalone (PHP), Apache JBoss (Tomcat), and Apache Weblogic.

We also learned about their different business operations.

The DSS business is a web hosting business. It is what they provided to Herbalife. DSS uses IIS JRun, Apache Weblogic and Apache JBoss

The DMS business is a lead gathering system. Essentially, it provides forms on the internet for people to provide their information if they want to receive additional information on a subject. DMS uses IIS Standalone, Apache Standalone, and Apache JBoss. The difference between DMS On and DMS Off is that DMS On refers to the fact that it is configured as a standard QuinStreet DMS installation, *i.e.* it is "On" the QuinStreet platform. DMS On means that it is configured to use Apache JBoss. DMS Off means that QuinStreet purchased the website from someone else and thus they are "Off" the QuinStreet platform. These websites are generally Apache standalone.

Both DSS and DMS deliver dynamic web pages.

Both parties are going to work to solve some of the discovery disputes and discuss the best way to complete discovery. As part of the process, we are going to serve additional interrogatories on QuinStreet to ask about their configurations.

Please let me know if you have any further questions.

Ben

Benjamin Bradford
Jenner & Block LLP
330 N. Wabash Avenue
Chicago, IL 60611-7603
Tel (312) 840-7224

EXHIBIT
73
6-5-12

4/4/2008

RESPONDENTS
EXHIBIT
32

JBPN 00097362

EXHIBIT B

EXHIBIT C

Erickson, Amy H

From: Willette, Timothy M
Sent: Wednesday, December 17, 2008 11:16 AM
To: Erickson, Amy H
Subject: FW: Expenses

This one, too. Thanks.

From: Levy, Susan C
Sent: Wednesday, December 17, 2008 10:37 AM
To: Mascherin, Terri L; Bosy, George S
Cc: Roper, Harry J
Subject: RE: Expenses

I agree with this. In my view, this warrants a personal phone call with the client to discuss this expense issue as well as the other issues we discussed yesterday. Please let me know when you've had this discussion. Thank you. Susan

---

From: Mascherin, Terri L
Sent: Wednesday, December 17, 2008 10:31 AM
To: Bosy, George S
Cc: Roper, Harry J; Levy, Susan C
Subject: RE: Expenses

George, I had understood that Terry was giving us assurances that he would pay all outstanding expenses by year end. I don't think this message says that.

I still think we should ask for specific confirmation in writing. I think you can represent, based upon our meeting yesterday, that the firm's position is that the expenses must be paid by year end or we will not proceed with any further work, and that if the trial is going ahead we require a retainer to cover the out of pocket expenses, in light of his delinquency in paying expenses to date.

From: Willette, Timothy M **On Behalf Of** Bosy, George S
Sent: Wednesday, December 17, 2008 10:23 AM
To: Mascherin, Terri L
Subject: FW: Expenses

From: terryfokas@yahoo.com [mailto:terryfokas@yahoo.com]
Sent: Tuesday, December 16, 2008 12:24 PM
To: Bosy, George S
Subject: Re: Expenses

George,

This is my plan:

If I only settle out Herbalife, I will pay Jenner $150,000 out of the approximately $500,000 owed.

EXHIBIT
10
5.29.12n

12/17/2008

RESPONDENTS' EXHIBIT 63

JBPN 00095532

EXHIBIT C

I'll also try to raise more money (either from my existing investors or Altitude Capital) to pay down more of what I owe.

If I settle out Herbalife (I'm awaiting their signature pages so that's a done deal) and Quinstreet and/or Friendfinder, I will pay Jenner in full.

Johnny Ward just emailed me re FF. It looks like they will settle (I'll send you that email).

I know you're getting pressure on the bills and I really appreciate you covering for me.

Please be a bit more patient with me. I'm painfully aware of the long past due expenses that I owe Jenner and no one wants to get that paid more than me.

Thanks,
Terry

Sent via BlackBerry by AT&T

From: "Bosy, George S"
Date: Tue, 16 Dec 2008 10:49:56 -0600
To: tfokas@parallelnetworks.com<tfokas@parallelnetworks.com>
Subject: Expenses

Terry,

Are we still on track for getting our expenses paid by year's end?

George

Timothy M. Willette
Legal Secretary
Jenner & Block LLP
330 N. Wabash Avenue
Chicago, IL 60611-7603
Tel (312) 923-4784
Fax (312) 527-0484
TWillette@jenner.com
www.jenner.com

EXHIBIT D

JENNER&BLOCK

January 2, 2009

Jenner & Block LLP
330 N. Wabash Avenue
Chicago, IL 60611
Tel 312-222-9350
www.jenner.com

Chicago
New York
Washington, DC

Paul D. Margolis
Tel 312 923-8323
Fax 312 923-8423
pmargolis@jenner.com

<u>VIA E-MAIL</u>

Terry Fokas
Parallel Networks, LLC
1700 Pacific Avenue, Suite 2320
Dallas, TX 75201

Re: Termination of Representation

Dear Terry:

As we have discussed, we have determined that our firm should discontinue its involvement in the matters that are governed by the June 27, 2007 Contingent Fee Agreement ("the Agreement") between the firm and epicRealm Licensing, LP, which was subsequently assigned to Parallel Networks, LLC. This letter, therefore, constitutes notice under paragraph 9(b) of Jenner & Block LLP's termination of the Agreement.

We will be withdrawing from the Oracle Corp. and Oracle U.S.A., Inc. v. Parallel Networks, LLC matter (06-civ-414-SLR) and the QuinStreet, Inc. v. Parallel Networks, LLC matter (06-civ-495-SLR). We will, of course, satisfy all of our professional obligations to Parallel Networks in connection with our withdrawal and all obligations under the terms of the Agreement related to the termination of our representation.

You have expressed desire to determine how much Jenner & Block would be owed under the Agreement in the event Parallel Networks achieves a recovery in any of the matters in which we have been representing the company. That is set forth in paragraph 9(a) of the Agreement. If you wish we would be pleased to provide additional information concerning amounts that would be owed under that provision.

Very truly yours,

Paul D. Margolis

Paul D. Margolis

cc: Harry J. Roper, Esq.
George S. Bosy, Esq.
Susan L. Levy, Esq.
Terri L. Mascherin, Esq.

RESPONDENTS EXHIBIT 87

EXHIBIT 1 5-29-09

PARALLEL-001645

EXHIBIT D

EXHIBIT E

CONFIDENTIAL:
ATTORNEY WORK PRODUCT

MEMORANDUM

JENNER&BLOCK

October 21, 2008

Jenner & Block LLP
Chicago
New York
Washington, DC

To: Anton R. Valukas
Susan C. Levy

Cc: Harry J. Roper
George S. Bosy
Ross B. Bricker

From: Terri L. Mascherin

Re: *EpicRealm v. Oracle*
47269-10037

Subject: Settlement Strategy

You requested an update concerning the firm's investment in this lawsuit, and potential settlement strategy. After consulting with Harry and George about the case, with Don Harris about his recent assessment of the case, and with Ross Bricker, Chair of the Contingent Fee Committee, about our Contingent Fee Agreement, I recommend as follows:

1. We should reconvene mediation in *EpicRealm v. Oracle* with the goal of achieving a settlement before trial, and if possible before the pretrial conference, in an amount of $30 million or more. In my opinion that would be a reasonable settlement in light of the risks and opportunity in the case.

2. EpicRealm is currently in breach of our Contingent Fee Agreement for failure to pay expenses timely when billed. As a result we are carrying a significant sum in expenses, which will increase greatly as we prepare to try the case, and through trial in January 2009. In

RESPONDENTS
EXHIBIT
46

EXHIBIT
6
5-29-12

JBPN 00098287

EXHIBIT E

the event a settlement is not achieved before serious trial preparation work begins, we should attempt to amend our Contingent Fee Agreement with EpicRealm Licensing to increase our percentage recovery by eliminating the current declining sliding scale fee structure, to account for EpicRealm's failure to pay expenses.

3. The Contingent Fee Committee should consider whether the firm should continue its Contingent Fee Agreement with EpicRealm and whether we should pursue other lawsuits to enforce the patents that it owns.

DISCUSSION

Jenner & Block entered into a Contingent Fee Agreement with EpicRealm Licensing L.P. on June 27, 2007. That Agreement provides that Jenner & Block is engaged as primary counsel to represent EpicRealm in enforcing patents owned by EpicRealm. To date, Jenner & Block has brought two lawsuits on behalf of EpicRealm to enforce the same two patents. The larger and more active of those cases is *EpicRealm v. Oracle*, pending in the United States District Court for the District of Delaware. The smaller case, *Parallel Networks v. Quinn Street*, is also pending in the District of Delaware. The case is still in the pleading stages; Quinn Street recently filed a third-party claim for indemnity against Microsoft.

The *Oracle* case is set for trial beginning on January 12, 2009. At a recent pre-trial hearing, the Judge announced that she would bifurcate liability and damages, and would try only the liability phase in January. Our local counsel advises us that the judge likely will not try damages until any appeal of the liability verdict is resolved.

The trial team believes there is a good likelihood of prevailing at the liability phase of the *Oracle* trial. A similar case by EpicRealm against a single website defendant was tried recently

JBPN 00098288

in federal court in Texas and EpicRealm prevailed. However, the damages awarded by the jury in that case were significantly lower than what EpicRealm requested.

EpicRealm's total damages claim in the *Oracle* case is approximately $400 million, which would represent a royalty of 3% on 57% of Oracle's accused products worldwide and a royalty of 11% on 43% of its accused products. If the jury were to apply a royalty rate of 3% to all sales, the total damages would be $180 million. Foreign sales represent approximately 50% of the damages model. Thus, foreign sales represent approximately $200 million of the damages case, or $90 million if damages are measured based upon a royalty rate of 3%.. Oracle's damages expert sets damages at a range from $12 million to about $15 million. The trial team believes it is likely to recover foreign sales. EpicRealm does not have a viable claim for injunctive relief.

Don Harris reviewed the merits of the case for the firm this past summer. Don reports to me that the client has colorable, triable claims. He and I both believe that an 11% royalty is aggressive, and that, assuming success in the liability phase, an award of 3-4% is more likely. Don disagrees with the trial team's view that we are likely to recover damages for foreign sales. The maximum award based upon application of a 3% royalty on domestic sales only would be approximately $90 million. Assessing all risks, Don reports that his gut estimate is that the case is probably worth more than $25-30 million if tried successfully, but less than $100 million. It should be noted that the patents in suit are under re-examination before the PTO, and that the examiner has disallowed all claims in an initial action in a very detailed opinion. There is disagreement between Don and the team regarding whether the preliminary rejection can be sustained. That action likely will not be admissible at trial, but the judge is aware of it.

If we succeed in the liability phase, it likely would take approximately 18 months for the Federal Circuit to resolve Oracle's appeal on liability. Because we have no claim for injunctive relief, I believe that our leverage over Oracle would not increase substantially upon a finding of liability. It is likely that the PTO would issue further action on the re-examination during the pendency of that appeal. Such an action could have a significant bearing on the outcome of any appeal.

Assuming that we prevail on liability, and if our local counsel is correct that the judge will not try the damages portion of the case until any liability appeal is resolved, I estimate that we would not go to trial on damages until at least January 2011. Following the damages trial, Oracle may post a bond and appeal. Thus, we may not receive a final judgment until 2012 or later.

In sum, there is risk of: (1) an adverse finding on liability; (2) an adverse result on appeal from the liability trial; and (3) a damages verdict lower than may be achieved in settlement now. There also are substantial risks of recovery and delay relating to the PTO proceedings, designing around EpicRealm's patent claims, and other issues.

I believe it may be possible to settle the *Oracle* case before trial at an amount that represents a reasonable assessment of the risks and opportunities presented by the litigation as it currently stands. The Federal Magistrate recently conducted a mandatory settlement conference in the *Oracle* case. While Oracle did not put any firm offer on the table at that conference, the Magistrate reported at the conclusion of the conference that she believed she had "a soft $30-50 million" from Oracle, but that those numbers "would be a stretch." Oracle reported to the Magistrate that it has never paid more than $20 million to settle a patent infringement lawsuit. We have no information to the contrary.

The Federal Magistrate remains willing to reconvene the mediation at the parties' request. We believe it likely that Oracle will not make substantial movement on its own accord toward settlement until the Court rules upon its pending motion for summary judgment and claim construction, both of which were argued on October 3, 2008. The Court has indicated she likely will rule on those matters during the first week of December.

As of October 20, 2008, the firm's total investment in the *Oracle* case was $8,548,116. (See detail in Exhibit A.) As of October 20, total fees and WIP on the matter were $8,055,902. In the event the case proceeds to trial, the team estimates that Jenner & Block's investment will increase by approximately $1 million through preparation of the pre-trial order and final pre-trial conference, (set for December 5, 2008) and by at least an additional $1.5 million through trial.[1] If Jenner & Block continues to pursue the case through the liability trial and, assuming success, through any appeal, damages trial and damages appeal, we project that Jenner & Block's total investment in the case will likely exceed $15 million.

EpicRealm has not paid any expenses in the case for over four months. The total billed and unpaid expenses are slightly under $500,000 as of October 20. EpicRealm's failure to pay expenses is a violation of our Fee Agreement with EpicRealm. That Agreement provides:

> 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 &

---

[1] The firm's total investment to date in the *Quinn Street* case is $934,286.27. In addition, we have invested $59,783 in fees and expenses in connection with the re-examination of the patents in suit by the PTO.

Block on behalf of EpicRealm Licensing. Any Enforcement Expenses in excess of $20,000 must be approved in advance by EpicRealm Licensing.

I understand that EpicRealm has informed us that it currently has no money and is unable to pay expenses. EpicRealm has asked us to amend the Contingent Fee Agreement to provide that Jenner & Block will front the payment of expenses. That would require the firm to take on significantly more financial risk than we agreed to take in the Contingent Fee Agreement. Given that the damages trial is not likely to occur for at least another few years, we would be required to carry the full expense of trial, including expert fees, for several years. We should only agree to do that if we receive additional reward in exchange for assuming the additional risk. Any amendment should be undertaken in compliance with Ethical Rule 1.8.

Our Contingent Fee Agreement with EpicRealm provides for a declining sliding scale of contingent fee recovery as follows:

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%

I propose that we reopen the mediation as soon as possible and attempt to achieve a settlement as discussed above. If we are unable to achieve a settlement which reflects our assessment of the case and is acceptable to the client before substantial trial preparation work begins, and if it appears likely that the trial will proceed, we should seek to amend the Contingent Fee Agreement to provide for 33% fee across the board, to compensate Jenner & Block for fronting the payment of all expenses in the case due to EpicRealm's inability to perform its contractual commitment to pay expenses on an ongoing basis.

I also recommend that the Contingent Fee Committee re-examine the Contingent Fee Agreement with EpicRealm and determine whether it is in the firm's strategic and financial interests to continue its engagement with EpicRealm and to pursue additional lawsuits. EpicRealm is currently requesting that we initiate at least two additional lawsuits.

TLM

CONFIDENTIAL:
ATTORNEY WORK PRODUCT

EXHIBIT A

		Unbilled Time					
		Current	31-60	61-90	91-120	Over 120	Total
10010	Quinstreet Inc v EpicRealm	1,007.50	8,921.25	5,018.75	29,066.25	867,778.75	911,792.50
10037	Oracle Corporation v EpicRealm	392,480.00	587,518.75	711,948.75	469,082.50	5,867,968.75	8,028,998.75
10043	Reexaminations of US Patent Nos.	156.25	6,250.00	156.25	2,968.75	50,181.25	59,712.50
	Total Parallel Networks	393,643.75	602,690.00	717,123.75	501,117.50	6,785,928.75	9,000,503.75

		Unbilled Costs					
		Current	31-60	61-90	91-120	Over 120	Total
10010	Quinstreet Inc v EpicRealm	10.14	11.10	-	-	-	21.24
10037	Oracle Corporation v EpicRealm	17,171.19	6,497.48	1,578.26	1,656.27	-	26,903.20
10043	Reexaminations of US Patent Nos.	-	-	-	-	-	-
	Total Parallel Networks	17,181.33	6,508.58	1,578.26	1,656.27	-	26,924.44

		Total WIP					
		Current	31-60	61-90	91-120	Over 120	Total
10010	Quinstreet Inc v EpicRealm	1,017.64	8,932.35	5,018.75	29,066.25	867,778.75	911,813.74
10037	Oracle Corporation v EpicRealm	409,651.19	594,016.23	713,527.01	470,738.77	5,867,968.75	8,055,901.95
10043	Reexaminations of US Patent Nos.	156.25	6,250.00	156.25	2,968.75	50,181.25	59,712.50
	Total Parallel Networks	410,825.08	609,198.58	718,702.01	502,773.77	6,785,928.75	9,027,428.19

		Accounts Receivable - Fees					
		Current	31-60	61-90	91-120	Over 120	Total
10010	Quinstreet Inc v EpicRealm	-	-	-	-	-	-
10037	Oracle Corporation v EpicRealm	-	-	-	-	-	-
10043	Reexaminations of US Patent Nos.	-	-	-	-	-	-
	Total Parallel Networks	-	-	-	-	-	-

CONFIDENTIAL:
ATTORNEY WORK PRODUCT

		Accounts Receivable - Costs					
		Current	31-60	61-90	91-120	Over 120	Total
10010	Quinstreet Inc v EpicRealm	-	-	593.52	-	21,879.01	22,472.53
10037	Oracle Corporation v EpicRealm	27,669.29	101,973.12	-	143,219.25	219,352.56	492,214.22
10043	Reexaminations of US Patent Nos.	-	-	-	-	70.75	70.75
	Total Parallel Networks	27,669.29	101,973.12	593.52	143,219.25	241,302.32	514,757.50

		Total Accounts Receivable					
		Current	31-60	61-90	91-120	Over 120	Total
10010	Quinstreet Inc v EpicRealm	-	-	593.52	-	21,879.01	22,472.53
10037	Oracle Corporation v EpicRealm	27,669.29	101,973.12	-	143,219.25	219,352.56	492,214.22
10043	Reexaminations of US Patent Nos.	-	-	-	-	70.75	70.75
	Total Parallel Networks	27,669.29	101,973.12	593.52	143,219.25	241,302.32	514,757.50

		Total Investment					
		Current	31-60	61-90	91-120	Over 120	Total
10010	Quinstreet Inc v EpicRealm	1,017.64	8,932.35	5,612.27	29,066.25	889,657.76	934,286.27
10037	Oracle Corporation v EpicRealm	437,320.48	695,989.35	713,527.01	613,958.02	6,087,321.31	8,548,116.17
10043	Reexaminations of US Patent Nos.	156.25	6,250.00	156.25	2,968.75	50,252.00	59,783.25
	Total Parallel Networks	438,494.37	711,171.70	719,295.53	645,993.02	7,027,231.07	9,542,185.69

EXHIBIT F

From:	Willette, Timothy M
Sent:	Friday, October 24, 2008 3:10 PM
To:	Contingent Fee Committee
Cc:	Roper, Harry J; Bosy, George S
Subject:	Parallel Networks
Attachments:	Bosy to Contingent Fee Committee 081024.DOC

Attached please find George Bosy's memorandum to the Contingent Fee Committee re Parallel Networks.

Tim

Timothy M. Willette
Legal Secretary
Jenner & Block LLP
330 N. Wabash Avenue
Chicago, IL 60611-7603
Tel (312) 923-4784
Fax (312) 527-0484
TWillette@jenner.com
www.jenner.com

EXHIBIT
78
6-5-12

RESPONDENTS EXHIBIT
49

JBPN 00047077

EXHIBIT F
Redacted

MEMORANDUM

JENNER&BLOCK

OCTOBER 24, 2008

Jenner & Block LLP
Chicago
New York
Washington, DC

To: Contingent Fee Committee

cc: Harry J. Roper

From: George S. Bosy

Subject: Parallel Networks

The purpose of this memorandum is to address two new contingency fee cases offered to us by Parallel Networks.

As you know, Jenner & Block represents Parallel Networks in *Oracle v. Parallel Networks* and *QuinStreet v. Parallel Networks*, both pending in the District of Delaware. The Oracle case is set for trial beginning January 12, 2009. The issues there and in the QuinStreet case were recently addressed in a memo from Terri Mascherin and will not be repeated here.

The client has offered us two additional actions with respect to the same patents at issue in the two Delaware cases. In one, we would represent Parallel Networks in a patent infringement action against BEA Systems, Inc. ("BEA"). BEA was recently acquired by Oracle, and it is our understanding that Oracle is replacing the Oracle Application Server product accused of infringement in the *Oracle v. Parallel Networks* litigation to the BEA platform. A preliminary analysis of what we know about BEA is that, at minimum, BEA's middleware application server product infringes the patents in suit. That preliminary infringement analysis was done by Ben Bradford. Also based on our preliminary estimates, it is our understanding that BEA's sales of its application server product exceed Oracle's sales of Oracle's application server product. Oracle's past sales of its application server product are about (worldwide). Consequently, at a 3% royalty rate, BEA's exposure for past infringement is at least $75 million (not including pre-judgment interest). Moreover, there are additional BEA products that we likely would accuse of infringement. BEA's exposure for all of its products could approach $7 billion worldwide. We would propose filing suit against BEA in Delaware at a point in time when we could be certain that our January 12, 2009 trial date would not be delayed. Of course, if we win on validity in the January trial, Oracle would be estopped from contesting validity in the action against BEA. Thus, in the BEA litigation, the only issues would be infringement and damages.

1704435.1

EXHIBIT G

From: Mascherin, Terri L
Sent: Thursday, December 04, 2008 5:04 PM
To: Valukas, Anton R; Levy, Susan C
Cc: Roper, Harry J; Bosy, George S
Subject: Parallel Networks v. Oracle

Tony and Susan:

Harry and I spoke with George Bosy, who is out in Wilmington for the pretrial conference in the case, set for tomorrow. At the pretrial, George will ask the court to strike the January trial date on the ground that there is no case or controversy on Oracle's claims seeking a DJ that the patents are invalid, because the court has held that the only products that we accused of infringing do not infringe.

Under the local rules in the D.Del., we have 10 days to file a motion to reconsider the summary judgment ruling. There may be good grounds for such a motion -- the team is reviewing the issues and we will have further discussions on that point.

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

Terri

Terri L. Mascherin
Jenner & Block LLP
330 N. Wabash Avenue
Chicago, IL 60611-7603
Tel (312) 923-2799
Fax (312) 840-7799
TMascherin@jenner.com
www.jenner.com

EXHIBIT G

EXHIBIT H

Erickson, Amy H

From: Margolis, Paul D
Sent: Tuesday, December 30, 2008 9:24 AM
To: Levy, Susan C; Mascherin, Terri L
Cc: Roper, Harry J
Subject: Outstanding issues relating to the firm's representation of Parallel Networks

Susan and Terri-

As I believe you are aware, we have entered into an agreement with Oracle to take the Oracle v. Parallel Networks case directly to appeal, and the client (Terry Fokas) has now paid all of his outstanding obligations to Jenner and Block.

However, the question of what the firm wishes to do with the Oracle case and with the pending litigation against Microsoft and QuinStreet remain open. I was just informed by the client that I do not have authority to settle the QuinStreet portion of that case until he is comfortable with what Jenner & Block's intentions are regarding him as a firm client.

From my conversation with Mr. Fokas, I believe that there are three open questions that need to be answered.

1) Does Jenner & Block want to handle the appeal in the Oracle v. Parallel Networks case? I believe that in a vacuum, that the answer to this question is "YES." Not only does the appellate group feel strongly about the merits of our appeal, but much of the work is already done based on the motion for reconsideration that we prepared. Additionally, we have been personally involved in three prior appeals of patent cases where Robinson was reversed in the Federal Circuit.

2) Does Jenner & Block want to handle the QuinStreet/Microsoft v. Parallel Networks case? Last I had heard, the answer in a vacuum was "NO." Our answer to Microsoft's declaratory judgment complaint is due in just under a month and the case is set for mediation before the Magistrate Judge Thynge on January 30, 2009 in Wilmington. Weil Gotshal is representing Microsoft and would likely employ a huge team of lawyers much as Oracle did because we are again talking about a royalty base in the billions. Additionally, it is our understanding that Microsoft IIS is one of the few Microsoft businesses that is growing. On the flipside, Microsoft would need to produce documents before fact discovery could really start according to the Court's standard schedule so it is my expectation that there would not be much effort needed on the part of Jenner & Block prior to the spring of 2009.

3) If Jenner & Block does not want the QuinStreet/Microsoft case, is it willing to give up the appeal in the Oracle v. Parallel Networks case? The client is not sure that he can find a qualified firm to undergo the risk and expense of handling the QuinStreet/Microsoft case if the appeal in the Oracle case is not part of the package. Therefore, he wants to know what the answer to this question is before beginning the task of finding another law firm to handle the QuinStreet and Microsoft case, assuming Jenner & Block wants to withdraw from that case.

I am happy to discuss these issues further with you at any time or provide you with any additional facts or opinions about these lawsuits. I know the client is eager to get our answers to these questions, as are the attorneys that have been working on these cases over the past 16 months.

Thanks,
Paul

Paul D. Margolis
Jenner & Block LLP
330 N. Wabash Avenue

RESPONDENTS EXHIBIT 81

EXHIBIT 67 5-30-12

JBPN 00095502

EXHIBIT H

EXHIBIT I

From: Margolis, Paul D
Sent: Thursday, January 08, 2009 3:02 PM
To: tfokas@parallelnetworks.com
Cc: Roper, Harry J; Bosy, George S; Levy, Susan C; Mascherin, Terri L
Subject: RE: Termination of representation-- privileged & confidential

Terry-

In response to your email of January 2, 2009, our views are as follows:

Our appellate lawyers have described the likelihood of overturning Judge Robinson's opinion on appeal as being around 30-50%. Please understand that the use of percentages to describe possible outcomes is intended only to be a general assessment of the relative strengths of the arguments. In our experience, litigation is inherently uncertain and should not be reduced to a mathematical equation.

In this case, we think that the arguments and circumstances that would lead the Federal Court to uphold the decision are relatively stronger than the arguments and circumstances that would lead to a reversal. To be clear, our appellate lawyers believe that the summary judgment opinion of Judge Robinson can be attacked, and that the grounds for reversal laid out in the motion for reconsideration were good arguments. But it is difficult, if not impossible, to predict what the Federal Circuit will do in any particular case. The Federal Circuit sometimes aggressively reviews district court decisions and other times essentially rubber stamps them. If it chose to uphold the summary judgment decision, the Federal Circuit would have several avenues by which it could do so. For example, it could determine that (a) "releasing" requires freeing the web server to process new requests (rather than already-pending requests), as the District Court's decision suggests, (b) the web server that must be released consists of the individual OHS child process or Web Cache fiber, or (c) our expert's analysis of the releasing limitation did not carry our burden, as the District Court found. In addition, the Federal Circuit could hold that the District Court's claim construction on "releasing" was in error and apply Oracle's more restrictive construction.

With respect to the second paragraph of your email, we have had several discussions with you regarding settlement, in different contexts. In the middle of December we discussed with you two proposals presented by Oracle for avoiding a trial on validity and inequitable conduct.

Oracle's Proposal A was the proposal that you ultimately agreed to. Under that proposal, the parties agreed that Oracle would dismiss its remaining claims without prejudice so that the trial would not take place and Parallel Networks could take an immediate appeal of the summary judgment ruling, and that in the event Oracle succeeded in defending the non-infringement ruling on appeal, the parties would agree to treat that decision as applying to BEA products as well as Oracle products.

Proposal B was to engage in settlement negotiations with Oracle. Oracle's counsel indicated at that time that Oracle would only be interested in a settlement of "significantly less than 8 figures." We viewed that as Oracle's opening position, and not determinative of what an ultimate settlement amount might be.

As to Proposal B, we discussed several issues. These included that it may take several years for Parallel Networks to monetize its claims through litigation, given that Judge Robinson has made clear that she would bifurcate any trial on damages from liability and allow an appeal on liability to go forward before she would try the damages case. We also discussed how important it is to you to have Judge Robinson's summary judgment decision vacated, and explained that if a settlement could be achieved soon there may be a greater likelihood of

RESPONDENTS EXHIBIT 91

EXHIBIT 90 6-5-12

JBPN 00049102

EXHIBIT I

getting that decision vacated than if you were to proceed with litigation. We recommended that you consider accepting Oracle's invitation to reopen settlement negotiations in light of all of those issues. We discussed the possibility of reconvening the mediation with the magistrate before the Court entered an order vacating the trial, and also discussed the possibility of hiring a private mediator or convening a settlement negotiation without a mediator, once the trial date was vacated.

You told us you would like to think about all of the options. You later informed us that you had decided to proceed with Proposal A, and that you would reconsider Oracle's proposal to reopen settlement negotiations after the trial was put off and after it was clear which law firm would be handling the case going forward. Last week, we reiterated our willingness to assist you in settlement negotiations with Oracle if you wished to pursue it, but we did not recommend any particular settlement amount or recommend that you settle the case at this time. We also offered to continue to represent you through appeal with the strategy of attempting to achieve a more favorable settlement after a successful appeal.

With respect to the QuinStreet case, we did recommend that you accept Gordon Atkinson's settlement offer of $750,000. Whether to choose to settle a case is, of course, your decision as the client, but our view rested on our understanding that you are not particularly interested in pursuing the case against QuinStreet. If that understanding is incorrect, our analysis could change. We also explained that there are other advantages to settling the QuinStreet case. In particular, settling that dispute would increase the probability that Microsoft would be dismissed from the case, which in turn would increase the possibility that you would be able to avoid litigating with Microsoft in Delaware, as opposed to Texas.

Paul

From: Terry Fokas [mailto:tfokas@parallelnetworks.com]
Sent: Friday, January 02, 2009 5:44 PM
To: Margolis, Paul D
Cc: Roper, Harry J; Bosy, George S; Levy, Susan C; Mascherin, Terri L
Subject: Re: Termination of representation– privileged & confidential

Paul,

Two weeks ago, you, George Bosy and Terri Mascherin called me to discuss the case against Oracle. During that call Terri Mascherin conveyed your firm's recommendation that Parallel Networks settle its case against Oracle because (as she put it), your appellate lawyers put the likelihood of success on appeal at "30-50%" due to the fact that the trial record regarding "releasing" of the application server operating system was very sparse.

Earlier this week, you and Harry Roper called me to discuss your firm's representation of Parallel Networks and it was again conveyed to me that your firm's recommendation was that Parallel Networks settle its case against Oracle and Quinstreet.

Please confirm in writing that settlement of the cases against Oracle and Quinstreet were and are your firm's recommendations.

Terry

— On Fri, 1/2/09, Margolis, Paul D <*PMargolis@jenner.com*> wrote:
From: Margolis, Paul D <PMargolis@jenner.com>

Subject: Termination of representation-- privileged & confidential
To: "tfokas@parallelnetworks.com" <tfokas@parallelnetworks.com>
Cc: "Roper, Harry J" <HRoper@jenner.com>, "Bosy, George S" <GBosy@jenner.com>, "Levy, Susan C" <SLevy@jenner.com>, "Mascherin, Terri L" <TMascherin@jenner.com>
Date: Friday, January 2, 2009, 5:06 PM

Terry-

Our termination letter is attached.

Paul

Paul D. Margolis
Jenner & Block LLP
330 N. Wabash Avenue
Chicago, IL 60611-7603
Tel (312) 923-8323
Fax (312) 923-8423
PMargolis@jenner.com
www.jenner.com<http://www.jenner.com/>

EXHIBIT J

Erickson, Amy H

From: Mascherin, Terri L
Sent: Saturday, December 13, 2008 4:28 PM
To: Levy, Susan C
Cc: Roper, Harry J; Bosy, George S; Bricker, Ross B; Steege, Catherine L; Hirsch, Norman M; Markowski, Robert T
Subject: RE: Update on Parallel Networks

Susan:

We will be prepared to recommend a precise course of action this week. I agree that a meeting is a good idea, and I'll get one set up. I'm copying Bob, because he's the one I've been consulting on firm counsel issues re. this case.

Terri

From: Levy, Susan C
Sent: Saturday, December 13, 2008 10:43 AM
To: Mascherin, Terri L
Cc: Roper, Harry J; Bosy, George S; Bricker, Ross B; Steege, Catherine L; Hirsch, Norman M
Subject: RE: Update on Parallel Networks

Thank you Terri. I would appreciate if you and your team would make a recommendation as to how the firm should best proceed here and, if necessary, set up a meeting for all of us soon. Thanks. Susan

---

From: Mascherin, Terri L
Sent: Friday, December 12, 2008 5:39 PM
To: Levy, Susan C
Cc: Roper, Harry J; Bosy, George S; Bricker, Ross B; Steege, Catherine L
Subject: Update on Parallel Networks

Susan:

This is an update on where we are in the Parallel Networks cases following the summary judgment ruling last week.

A. **Oracle:** Court (Judge Robinson of the D. Del.) entered summary judgment against us last week on our client's infringement claims. Trial remains set for January on Oracle's claims for a DJ on invalidity of the patents, and on its claim for inequitable conduct, for which it is seeking to recover its attorneys' fees against our client.

Possibility that the Trial will not occur: We have approached Oracle and proposed that Oracle dismiss its invalidity and inequitable conduct claims without prejudice to avoid the trial in exchange for our client agreeing that if Oracle wins the appeal of the infringement judgment, our client would agree not to sue Oracle for infringement of the products sold by BEA, which Oracle acquired earlier this year. Oracle's lawyer said that his client has no interest in going forward with the invalidity trial, and that he thought our proposal would be of interest to Oracle. He was to call his client today and we are waiting to hear back from him. He raised an issue

RESPONDENTS' EXHIBIT 60

EXHIBIT 61 5-30-12

JBPN 00095542

EXHIBIT J

about two cases which our client has brought in Texas against Oracle licensees (Orbitz and Netflix -- Sussman is handling those cases.) The licensees are seeking indemnification from Oracle for those cases. We agreed that we would discuss with our client finding some way to deal with those cases. We have not yet discussed this specific proposal with our client, but from past discussions George believes that our client will agree.

Possibility of settlement: Oracle's lawyer also told George that Oracle is interested in reconvening the mediation with the magistrate and discussing whether there is a way to reach agreement to settle this litigation, including the BEA products. He suggested mediating on Dec. 22. He said, "We can't talk about paying eight figures." We will discuss this with our client -- our client may be interested in a 7-figure settlement now that he faces the need to appeal the non-infringement judgment before he has the prospects of trying an infringement case against Oracle.

In the meantime, in case the trial does proceed, we are preparing a motion to reconsider the summary judgment ruling.

Possibility of Payment of Outstanding Expenses: Our client told Harry yesterday that he expects to finalize settlements of two TX cases before the end of the year and he will pay the back expenses (about $550,000) that he owes us when he gets the settlement money. We estimate that the client would net about $1.8 million from both settlements, based upon the draft agreements and other information we have been provided. If that is the case, the client should also have enough money to pay us a retainer to cover the expenses for a trial if that trial has to proceed in January. George and Paul Margolies have estimated those expenses as follows:

<u>VALIDITY ONLY TRIAL</u>

Projected Cost: $157,000

Work Space, Hotel, Food and Travel expenses: $112,000
Trial Presentation expenses: $30,000
Expert Witness Fees: $15,000

<u>TRIAL ON ALL ISSUES (assumes we win Motion to Reconsider)</u>

Projected Cost: $365,000 ($315,000 if we were not able to go forward with a jury study based on timing)

Work Space, Hotel, Food and Travel expenses: $200,000
Trial Presentation Expenses: $115,000
Expert Witness Fees: $50,000
Jury Study: $50,000

Oracle Background:

- We have approximately $9.3 million in fees invested in the Oracle case.
- We anticipate that any appeal from the Oracle summary judgment ruling (and Jan. trial, if

the trial goes forward) would not be decided until January or February 2010, at the earliest.

- If the appeal is successful, trial on remand would take place in two phases: (1) trial on infringement, approximately in the summer 2010, followed by appeal; then (2) trial on damages, followed by appeal if we succeed. Thus. we estimate that we could be 3-4 years or more from realizing anything on the contingent fee agreement and recouping any fees.
- If we keep the case through appeal, liability trial and damages trial, we estimate that our additional fee investment will be at least $5-7 million.
- If trial does proceed in January, we will have to decide after trial whether to terminate the engagement.

B. **Quinn Street**: This case is also pending before Judge Robinson. Quinn Street sued Parallel Networks, seeking a DJ that it does not infringe the patents. We counterclaimed for infringement. Quinn Street then brought Microsoft in as a third party defendant, seeking indemnity in the event Quinn Street is found to have infringed. Microsoft moved to dismiss the third party complaint, and also filed a DJ complaint against us seeking a declaration that its products do not infringe. There must be an independent basis for jurisdiction over Microsoft's complaint. We do not believe the court has jurisdiction because, while Parallel Networks' predecessor was a DE corporation, PN is a TX corporation and there is no basis for personal jurisdiction over PN in DE. Our response to the Microsoft Complaint is due on Jan. 22.

Possibility of Settlement: We have had on-going settlement discussions with Quinn Street's counsel, and believe that we can achieve a settlement in the amount of about $750,000. Such a settlement would include Quinn Street dismissing its claim against Microsoft, which should end Microsoft's involvement in the case. To date our client has not been willing to accept a settlement in that amount. His view may change if we are able to make an agreement with Oracle.

Quinn Street Background:

- Our total investment in this case to date is about $1 million.
- If the court adopts a schedule for the expanded case that is analogous to the schedule in place before Microsoft was brought in to the case, we anticipate that trial could occur as early as summer 2010. Under that schedule, when the decision comes down in the Oracle appeal we would be completing expert discovery. If Microsoft stays in the case we anticipate that fees through Jan. 2010 would be at least $3-5 million, and fees through trial could be $8-10 million. (We think it is likely that Microsoft would remain in the case at least through some stage of discovery).
- There is a possibility the court would agree to stay the case pending decision in the Oracle appeal in the Federal Circuit.
- If only Quinn Street is a defendant in the case, we anticipate that damages range from a few million (in which case we would not recoup our investment in the case) to approximately $20-30 million (at which level we would probably recoup our investment, perhaps plus a small bonus.
- We have told the client that we wish to terminate our engagement on this case. He has responded that if we terminate on this case he would want to terminate the engagement on Oracle as well, because the Quinn Street case is not big enough for a firm to be interested in taking over only that case. Presently we are waiting to see what we are

able to work out with Oracle before taking further action toward terminating the engagement on Quinn Street.

Our Right to Terminate: Under our current fee agreement, we may terminate on 30 days notice, consistent with our ethical obligations. In the event we terminate and Parallel Networks eventually succeeds in recovering damages, we remain entitled to be paid: (1) our fees incurred up to the time of termination, at our regularly hourly rates; (2) any expenses that are unpaid; and (3) a fair portion of the contingent fee award based upon our contribution to the result achieved as of the time of termination, to the extent that we have not yet been paid for all of our fees incurred.

Let us know if you would like to discuss any of this.

Terri

Terri L. Mascherin
Jenner & Block LLP
330 N. Wabash Avenue
Chicago, IL 60611-7603
Tel (312) 923-2799
Fax (312) 840-7799
TMascherin@jenner.com
www.jenner.com

EXHIBIT K

From: Mascherin, Terri L
Sent: Thursday, December 18, 2008 3:25 PM
To: Levy, Susan C; Bricker, Ross B
Cc: Roper, Harry J; Bosy, George S; Margolis, Paul D
Subject: Parallel Network/Oracle settlement talks

This is an update on where we are on efforts to resolve the Parallel Networks cases and to get paid.

1. On the Oracle case, we have reached agreement with Oracle to dismiss Oracle's invalidity and inequitable conduct claims without prejudice and ask the court to enter final judgment on the summary judgment rulings, as outlined in (A) in the first message below. This will allow the parties to avoid having to try Oracle's claims in January. The papers on this are being drafted now. The lawyers have spoken with the Magistrate, she is supportive and will work with the parties to get the Judge to enter the orders that we need entered.

Once that agreement is done, we will discuss with our client what he would like to do regarding pursuing a monetary settlement with Oracle, as outlined in (B) below. We have discussed with the client the risks and costs associated with continuing to pursue the case, and have recommended that he discuss settlement with Oracle. Depending on what the client decides to do re. pursuing settlement or prosecuting his appeal, the firm will need to decide whether to terminate our engagement with the client, which we have the right to do on 30 days notice.

2. The client told George today that he "will do his best to pay up promptly" the expenses that he owes us (currently about $550,000 on all matters). We see three prospects for him bringing in the money necessary to pay us:

a. Settlement of the Herbalife case in TX: the parties are exchanging signatures on a final settlement agreement today. We are not counsel in the case, and TX counsel must be paid first from the proceeds, but the client has told us he should net between $200,000-250,000 to pay us.

b. Settlement of the Friendfinder case in TX: the parties have agreed upon a number and are working on documentation. There is some time pressure. This is the case in which PN won a jury verdict in August on damages. The court has scheduled an injunction hearing for late Dec. or early Jan. The settlement will yield enough for the client to pay the remainder of our outstanding expenses.

c. Settlement of the Quinn Street case: we are counsel in this case. We have invested about $1 million in fees in the case, which is still in the pleading stage. We have an offer from the plaintiff to pay PN $750,000. Our client is currently demanding $950,000. Paul M. believes there is a good chance he can get the case settled for close to $750,000. We would receive our expenses plus 33% of the Net Proceeds of any settlement. (I note that "Net Proceeds" is not defined in the Contingent Fee Agreement. Net Revenues is, and means the gross proceeds of any settlement, minus our expenses. Thus, it is unclear whether we would get 33% of $750,000, or 33% of the net settlement after our expenses are paid.)

I will keep you posted.

Terri

EXHIBIT
11
5-25-12

RESPONDENTS' EXHIBIT 69

JBPN 00048706

EXHIBIT K

From: Willette, Timothy M **On Behalf Of** Bosy, George S
Sent: Wednesday, December 17, 2008 11:52 AM
To: Roper, Harry J; Mascherin, Terri L; Patras, Patrick L; Bennett, David R; Margolis, Paul D; Bradford, Benjamin J; Johnson, Emily C.
Cc: Levy, Susan C
Subject: Oracle settlement talks

I had a discussion with Jim Gilliland with respect to items (A) and (B) in his email (attached). He said that he was very favorably disposed to (A), as are we. We talked through the issues, and there seem to be no impediments (subject to the Court's approval) to reaching an agreement on (A). I told him that we were still thinking about (B).

George

Timothy M. Willette
Legal Secretary
Jenner & Block LLP
330 N. Wabash Avenue
Chicago, IL 60611-7603
Tel (312) 923-4784
Fax (312) 527-0484
TWillette@jenner.com
www.jenner.com

From: Gilliland, James G. [mailto:jggilliland@townsend.com]
Sent: Monday, December 15, 2008 8:17 PM
To: Bosy, George S
Cc: Gilliland, James G.
Subject: Further Settlement Discussions

CONFIDENTIAL SETTLEMENT COMMUNICATION – FRCP 408

George:

1) Oracle is willing to proceed with another settlement conference next Monday, December 22, based upon the general outlines you and I discussed on the telephone on Friday. Specifically Oracle is willing to discuss either:

A.) Dismissal of Oracle's invalidity case without prejudice (assuming Judge Robinson will allow us do so), preservation of all of Oracle's invalidity defenses; immediate appeal of Judge Robinson's noninfringement ruling; a stay as to all cases and claims against Oracle and BEA customers pending appeal; and, agreement that if the summary judgment of non-infringement is affirmed on appeal then the same ruling will apply to BEA products; or

B.) Complete/final settlement for payment by Oracle of significantly less than 8 figures, which would include releases and licenses for all Oracle and BEA products.

In order to climb on a plane just a few days before Christmas I and my client need a representation in advance from you and your client that Parallel Networks is willing to settle along the lines of one or both of these proposals.

2) Irrespective of whether we are going to get together one week from today, would you please let me know as soon as possible which Oracle witnesses you plan to call at the invalidity trial; we need to release (pun intended) the remainder of these folks as soon as possible.

JBPN 00048707

I am in a mediation Tuesday and Wednesday, so the best way to communicate with me is by email. I have not copied anyone with this email but do not mind if you forward it to your client provided it remains confidential, for settlement purposes only.

Jim

EXHIBIT L

JENNER&BLOCK

Jenner & Block LLP
353 N. Clark Street
Chicago, IL 60654-3456
Tel 312-222-9350
www.jenner.com

Chicago
Los Angeles
New York
Washington, DC

Russell J. Hoover
Tel 312 923-2779
Fax 312 840-7779
rhoover@jenner.com

June 17, 2011

VIA FIRST CLASS MAIL

David R. Bennett
George S. Bosy
Bosy and Bennett
300 North LaSalle St.
49th Floor
Chicago, IL 60654-3406

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

Dear David and George:

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

As you know, Jenner served as counsel to Parallel Networks, and its predecessor epicRealm Licensing between June 2007 and early 2009 in connection with the Oracle, QuinStreet and re-examination of certain U.S. patents ("Parallel Networks matters"). The engagement was pursuant to a written Contingent Fee Agreement, entered into with epicRealm in June 2007, which was then assigned to Parallel Networks on September 21, 2007 ("the Agreement") Pursuant to Paragraphs 9(b) and 9(a)(i) of the Agreement, Jenner's fee entitlement for that representation totals $10,245,492. Jenner terminated the Agreement effective February 9, 2009, and since then has received no payment against the fee obligation at all.

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

The Agreement is a Contingent Fee Agreement, with the contingency applicable up to the date of the Agreement's termination. Jenner was given the option to terminate the Agreement on 30 days prior written notice if we determined at any time that it was not in Jenner's "economic interest to continue the representation pursuant to the Agreement". Upon such termination, Jenner was to receive compensation "for all time expended by Jenner & Block [up to the

RESPONDENTS' EXHIBIT 112

EXHIBIT 23 5-24-12

EXHIBIT L

termination date] on any Enforcement Activity undertaken on behalf of epicRealm Licensing [Parallel Networks] at the regular hourly billing rate charged by Jenner & Block for its attorneys and legal assistants" with that to be "in lieu" of the Contingent Fee applicable to such services, less the reasonable costs incurred by Parallel Networks "to transition any pending or ongoing enforcement activities that had been commenced with Jenner & Block to successor legal counsel." [1]

Jenner had sent monthly statements to Parallel Networks, detailing more than 23,000 hours of time devoted by Jenner attorneys and legal assistants to the representation and quantifying those services by the regular hourly rates of the persons performing such services.

This is a very large receivable, which is now more than two years past due. Parallel Networks has made no payments whatsoever against this liability and we have received no explanation of why. As best I have been able to determine Parallel Networks has never even communicated with us regarding this fee obligation. I do not know whether Parallel Networks contests any of these charges. Nor do I know what bases there would be for any such a dispute. If in fact Parallel Networks disputes these charges, the Agreement requires that such a dispute be "finally adjudicated by arbitration in Dallas, Texas under the auspices of JAMS," which is to follow the parties making a "good faith effort to resolve any dispute relating in any manner to the Agreement or to any services provided pursuant to this Agreement in accordance with the general spirit of this Agreement". So, if there is a legitimate dispute related to our fee entitlement, now is the time to try to resolve that dispute if we can. I stand ready to participate in good faith in such an effort. I simply ask that Parallel Networks outline for us just what it disputes and why. Our position is quite simple: The contract specifically spells out that to which we are entitled on termination of the Agreement.

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

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

Sincerely,

Russell J. Hoover

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

cc: Susan C. Levy
Catherine L. Steege

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

EXHIBIT M

FILED UNDER SEAL.

EXHIBIT N

ARBITRATION BEFORE JAMS

JENNER & BLOCK LLP,	*	
	*	
Claimant,	*	JAMS ARBITRATION NO. 1310019934
	*	
vs.	*	
	*	Jerry Grissom, Esq.
PARALLEL NETWORKS, LLC,	*	Arbitrator
and EPICREALM LICENSING,	*	
LP,	*	
Respondents.	*	

****

ARBITRATION PROCEEDINGS
October 22, 2012
Dallas, Texas
Volume 6

****

REPORTED BY:

Andrea L. Reed
Texas CSR NO.: 7773
Expiration Date 12/31/12
Esquire Deposition Solutions
Firm Registration No. 286
1700 Pacific Avenue, Suite 1000
Dallas, Texas 75201
214.257.1436

EXHIBIT N

an additional ruling. If it does, let me know and I'll make it.

MS. NEISWENDER: I think we would prefer to have a ruling on the record that -- to be clear, that Parallel Networks will not be able to question Mr. Lowery about the configuration files that are set forth in Exhibits 142 and 144 so that it's clear that Mr. Lowery is prepared to testify about those files and that Parallel Networks was precluded from eliciting that testimony on the record.

ARBITRATOR GRISSOM: It's said another way, but I think that that is a correct interpretation of it. As it is, all of those files would be beyond the can of a non-expert witness, and they would be beyond Mr. Lowery's personal knowledge, as I understand how the other avenue in which you're advancing his role as a lay witness for his testimony today. So, yes. All right.

MS. NEISWENDER: I think that settles the issues. I think we -- can we bring Mr. Lowery back in at this point?

ARBITRATOR GRISSOM: I forgot all about him.

Welcome back.

THE WITNESS: Thank you.

MS. NEISWENDER: And I get to play chair rodeo as we pass the witness to Jenner & Block. So, Mr. Lowery, if you'd come sit over here, please.

STATE OF TEXAS)

I, Andrea L. Reed, Certified Shorthand Reporter, duly qualified in and for the State of Texas, do hereby certify that, pursuant to the agreement hereinbefore set forth, the following proceedings were had before me; that the transcript has been reduced to typewriting by me or under my supervision; that the record is a true record of the proceedings had before me.

I further certify that I am neither attorney or counsel for, related to, nor employed by any of the parties to the action in which this arbitration is taken, and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

SUBSCRIBED AND SWORN TO under my hand and seal of office on this the 1st day of November, 2012.

Andrea Reed

ANDREA L. REED, CSR
TEXAS CSR NO: 7773
Expiration Date 12/31/12
Esquire Deposition Solutions
Firm Registration No. 286
1700 Pacific Avenue, Suite 1000
Dallas, Texas 75201
(214)257-1436

EXHIBIT O

FILED UNDER SEAL.

EXHIBIT P

ARBITRATION BEFORE JAMS

JENNER & BLOCK LLP, **Claimant,** **v.** **PARALLEL NETWORKS, LLC and EPICREALM LICENSING LP,** **Respondents.**	§ § § § § § § § § §	**CASE NO. 1310019934**

RESPONDENTS' POST-HEARING BRIEF

Jeffrey S. Lowenstein
Texas State Bar No. 24007574
BELL NUNNALLY & MARTIN LLP
1400 One McKinney Plaza
3232 McKinney Avenue
Dallas, Texas 75204-2429
(214) 740-1400 Telephone
(214) 740-1499 Facsimile

Jamil N. Alibhai
Texas State Bar No. 00793248
Ryan S. Loveless
Texas State Bar No. 24036997
Jane Ann R. Neiswender
Texas State Bar No. 24048312
Kelly P. Chen
Texas State Bar No. 24062664
MUNCK WILSON MANDALA, LLP
12770 Coit Road, Suite 600
Dallas, Texas 75251
(972) 628-3600 Telephone
(972) 628-3616 Facsimile

COUNSEL FOR RESPONDENTS

EXHIBIT P
Redacted

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION[1]

Since 1853, the Texas Supreme Court has held that an attorney who has "voluntarily abandoned the case of his client" cannot recover fees. *Baird v. Ratcliff*, 10 Tex. 81 (1853). The Texas Supreme Court reaffirmed this rule in 1960 when the Court held that an attorney who voluntarily abandons his client "is not entitled to collect either the contract or quantum meruit for the services, if any, that have been rendered." *Royden v. Ardoin,* 331 S.W.2d 206, 209 (Tex. 1960). Jenner wants the Arbitrator to disregard a century-and-a-half of Texas law to claim a substantial portion of a contingency fee after its abandonment of the *Oracle* and *QuinStreet* cases. Jenner has not and cannot cite a single Texas case in its favor on which the Arbitrator could rely in making such an award. Even the Fifth Circuit observed that it had "uncovered no Texas case that has compensated an attorney" after a voluntary withdrawal. *Augustson v. Linea Aerea Nacional-Chile S.A. (LAN-CHILE),* 76 F.3d 658, 664 n. 6 (5th Cir. 1996).

Texas law governs the Contingent Fee Agreement ("CFA"), but Jenner now incorrectly argues that it can contract around Texas law. Jenner's position is unsupported by Texas law, and the Court of Appeals and the Supreme Court of Texas rejected it in the landmark *Hoover Slovacek* cases. *See Walton v. Hoover, Bax & Slovacek, L.L.P.*, 149 S.W.3d 834 (Tex. App.—El Paso 2004), *aff'd in part, rev'd in part*, 206 S.W.3d 557 (Tex. 2006); *Hoover Slovacek, LLP v. Walton,* 206 S.W.3d 557 (Tex. 2006). Like Jenner, the Hoover Slovacek firm also had a provision in its fee agreement that purported to establish the fee owed upon termination. Both the Court of Appeals and the Supreme Court found that such a fee agreement was unconscionable as a matter of law. *See Hoover,* 206 S.W.3d at 560.

[1] References to Claimant's Exhibits are: CX___. References to Respondents' Exhibits are: RX___. References to the Hearing Transcript are: TR. at ___ [page: line]. References to Claimant's findings of fact and conclusions of law are: CFF or CCL at ___ [page], ¶ ___. References to Respondents' findings of facts and conclusions of law are: RFF or RCL at ___ [page], ¶ ___.

Because the CFA's termination provision is unenforceable, Jenner's claim for fees must be decided based upon Texas common law regarding compensation owed to an attorney who withdraws from a contingency fee case prior to its conclusion. To recover fees, Jenner has the burden to show that it had "just cause" to withdraw. But, no case in Texas has found just cause in this circumstance, and the same reasons that Jenner posits, *e.g.*, the case was difficult or the client did not want to settle, have been rejected by Texas courts.

Importantly, this case raises no novel or previously undecided questions of law. Each of the issues has been conclusively determined in: *Baird, Royden, Hoover*, and *Augustson*. The Texas Supreme Court (over the dissent of Justice Hecht in *Hoover*) has made clear that attorneys cannot contract around the remedies set forth in *Mandell & Wright v. Thomas*, 441 S.W.2d 841 (Tex. 1969). Jenner cannot do so either, and the Arbitrator should not be led into error by Jenner's desire to get paid. Jenner receives no fee because it chose not to conclude the contracted representation.

Jenner agreed to "initiate, prosecute and conclude" on a contingent fee basis two patent infringement cases: *Oracle* and *QuinStreet*. Instead, after losing on summary judgment, Jenner quit, stranding Parallel with a take-nothing summary judgment ruling against it in *Oracle* that would have foreclosed Parallel from enforcing its valuable patents against other infringers. The timing of Jenner's abandonment, which Jenner had been plotting since October 2008, could not have been worse. Because of the summary judgment ruling of non-infringement, and the impact such a ruling had on the case's value, Parallel was unable to retain successor counsel on the same terms as Jenner. In other words, because the risk of no recovery was so high, Parallel could not find a law firm willing to take the appeal on a contingent fee basis. Jenner thus forced Parallel to choose between two bad outcomes: (1) settle *Oracle* for whatever Oracle would pay and not appeal the summary judgment ruling, which would have permanently impacted its ability to enforce its patents; or (2) settle *QuinStreet* at a fraction of its value to raise the money necessary to hire hourly counsel to appeal the adverse *Oracle* summary judgment ruling.

Parallel chose what it believed at the time to be the lesser of the two evils, sacrificing *QuinStreet* and ultimately succeeding (despite Jenner's bad advice) in having the *Oracle* summary judgment ruling reversed. What Parallel did not know, because Jenner failed to properly investigate and tell its client, was that *QuinStreet* was worth significantly more than the settlement numbers Jenner had recommended. For these reasons, the Arbitrator should deny Jenner's claims for fees and award Parallel the damages caused by Jenner's unethical and improper conduct.

ARGUMENT AND AUTHORITIES

I. JENNER'S BREACH OF CONTRACT CLAIM FAILS

To recover on its breach of contract claim, Jenner must prove: (1) the existence of a valid and enforceable contract; (2) performance by Jenner; (3) breach of the contract by Parallel; and (4) damages to Jenner as a result of the alleged breach.[2] Jenner cannot meet its burden of proof to show: (1) Paragraph 9 is valid and enforceable; (2) Jenner performed its obligations under the CFA; (3) a breach of the CFA by Parallel at the time of Jenner's termination; and (4) damages with any reasonable certainty.

[2] *See, e.g., Foley v. Daniel*, 346 S.W.3d 687, 690 (Tex. App.—El Paso 2009, no pet.).

A. Jenner Cannot Cite a Single Case Holding that the Termination Provision Is Enforceable under Texas Law

1. Jenner's "economic interest" does not allow it to recover fees

The root of this controversy is Jenner's reliance on the at-will "economic interest" provision within Paragraph 9 of the CFA. Jenner interpreted that provision to mean it could terminate "at any time" and recoup its "investment" of $10 million. Such a provision is unenforceable, unethical, and violates Texas public policy.

Under Texas Disciplinary Rule 1.15(a), a lawyer *must* withdraw from representing a client under three defined circumstances.[3] Subject to these instances where withdrawal is required, a lawyer "*shall not* withdraw from representing a client" unless certain enumerated circumstances exist.[4] Comment 1 to Rule 1.15 further reinforces that, in Texas, "a lawyer normally should endeavor to handle the matter to completion."[5]

Jenner ignored this guiding principle by consistently balancing its continued representation of Parallel against what the firm could get paid. For example, in October 2008, Mascherin: (i) calculated Jenner's "investment" in the *Oracle* and *QuinStreet* cases, (ii) reassessed the damages without the trial team's input, and (iii) recommended the firm "determine whether it is in the firm's strategic and financial interests to continue its engagement with EpicRealm [sic]." (RX46) By December 2008, Jenner believed that the CFA permitted it "to terminate the engagement for any reason on 30 days notice" and be "compensated at a minimum

---

[3] TEX. DISCIPLINARY R. PROF'L CONDUCT 1.15(a) (emphasis added).

[4] *Id.* at 1.15(b) (emphasis added).

[5] *Id.* at cmt. 1; *see also Staples v. McKnight*, 763 S.W.2d 914, 916 (Tex. App.—Dallas 1989, writ denied) ("We adopt the generally prevailing rule that in the absence of a manifest contrary intent, an attorney who is retained to conduct a legal proceeding presumably enters into a contract to conduct the proceeding to its conclusion."); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(4) ("To the extent consistent with the lawyer's other legal duties . . . a lawyer must, in matters within the scope of the representation . . . fulfill valid contractual obligations to the client.").

for our fees incurred, based upon our regular hourly rates . . . ." (RX55; RX60) Throughout December 2008, Mascherin updated Jenner management on "efforts to resolve the Parallel Networks cases and to get paid" and evaluated whether the firm should terminate depending on whether Parallel would settle the *Oracle* and *QuinStreet* cases. (RX69)

Jenner's concept—that it could terminate at any time and recoup its investment—is contrary to its ethical obligations.[6] As Hricik explained, under Texas' ethics rules, when a lawyer signs on to represent a client, the lawyer is "signing on to represent [the client] to the bitter end" unless one of the situations set forth in Rule 1.15 arises. (TR. at 1259:19-1260:2) Johnston, a veteran Texas contingent-fee lawyer, agreed. (TR. at 2051:24-2052:13) By terminating based upon its "economic interest," Jenner improperly and unethically broadened what constitutes permissive withdrawal in Texas. In fact, Jenner's view that it can terminate at any time is "broader than just cause." (TR. at 1251:21-1252:18) This renders Paragraph 9(b) unenforceable. (TR. at 1309:19-1310:17) In fact, Johnston called the ability to terminate based on "economic interests" shocking. (TR. at 2054:12-2056:9) Hricik determined this provision renders the CFA illusory. (TR. 1228:11-1230:22)

2. The remedies in Paragraph 9.a violate *Hoover* and *Mandell & Wright*

In *Hoover*, the Texas Supreme Court identified multiple, independent reasons why a provision like Paragraph 9 is unenforceable. Those same reasons apply here. First, it eliminates all risk to Jenner. (TR. at 2055:6- 2056:9) Jenner can withdraw, sit back and watch Baker Botts argue the appeal Jenner was supposed to handle, watch multiple law firms handle the remanded district court proceedings to trial, and then still claim 83% of the total Contingent Fee Award

[6] *See Hoover*, 206 S.W.3d at 564 ("Hoover's termination fee provision encourages the lawyer to escape the contingency as soon as practicable, and take on other cases, thereby avoiding the demands and consequences of trials and appeals.").

without any further risk to Jenner. Under Texas law, the potentially greater fee a lawyer can recover in a contingency fee case is appropriate "to compensate the attorney for the risk that he or she will receive 'no fee whatsoever if the case is lost.'"[7] In *Hoover*, the Texas Supreme Court held that a termination provision in a contingent fee agreement was unconscionable, in part, because it shifted the risk almost entirely from the lawyer to the client. By the same token, Paragraph 9, which establishes a "heads lawyer wins, tails client loses" paradigm, is contrary to Texas law, unconscionable, invalid, and unenforceable.[8]

Second, Paragraph 9 is unenforceable because it envisions payment of fees to Jenner regardless of whether Jenner terminated with or without just cause. It is well-established that "[w]hen an attorney, 'without just cause, abandons his client before the proceeding for which he was retained has been conducted to its termination . . . he thereby forfeits all right to compensation.'"[9] The attorney in *Hoover*—like Jenner here—attempted to contract around this rule.[10] The Texas Supreme Court, however, held that the fee provision was unconscionable and unenforceable as a matter of law because it made no distinction between discharges occurring with or without cause.[11] In so doing, the Court expressly rejected the very argument Jenner has presented here—that "a contract is a contract."[12]

3. 9.a(i) is unenforceable because it creates an option contract

Paragraph 9.a(i) gives Jenner the option to unilaterally convert its contingent fee into an hourly fee. Such a unilateral option provision in a contingent fee agreement is unenforceable as

---

[7] *Hoover*, 206 S.W.3d at 561 (quoting *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997)).

[8] *Id.* at 564-65.

[9] *Augustson*, 76 F.3d at 662 (citing and quoting *Royden*, 331 S.W.2d at 209).

[10] *Hoover*, 206 S.W.3d at 558.

[11] *Id.*

[12] *Id.* at 560-61; *see also Walton*, 149 S.W.3d at 845-46.

a matter of law because the attorney's fee is no longer contingent.[13]

4. 9.a(iii) is unenforceable because it permits payment before the contingency occurs and does not explain how the value of the claim is to be measured

Paragraph 9.a(iii) permits Jenner to demand payment even if the "contingency" has not yet occurred. (RCL at 59, ¶ 250) Jenner has argued that this case is not like *Hoover* because Paragraph 9 does not have an immediate-payment requirement. But Jenner seeks an immediate and fixed payment of 20% of what Parallel *may* recover in the Oracle arbitration. (*See* RX117; CCL at 80, ¶ 22)[14] This is exactly like the lawyer's request in *Hoover*, which the Court "viewed as transforming a traditional contingent fee into a fixed fee" and "impermissibly grant[ing] the lawyer a proprietary interest in the client's claim by entitling him to a percentage of the claim's value without regard to the ultimate results obtained."[15]

Paragraph 9.a(iii) is also unenforceable because it fails to explain how the value of the claim will be measured.[16] Here, Jenner has presented multiple, ever-changing calculations of what an "appropriate and fair" fee would be. (CFF at 60-61, ¶¶ 211-212; CCL at 80, ¶ 22) A lawyer must "give at the outset a clear and accurate explanation of how a fee [is] to be calculated."[17] Because Paragraph 9.a(iii) does not provide this requisite explanation, it is unconscionable.[18]

---

[13] *Hoover*, 206 S.W.3d at 559; *Wythe II Corp. v. Stone*, 342 S.W.3d 96, 103 (Tex. App.—Beaumont 2011, pet. denied).

[14] In fact, Jenner sent a demand on September 14, 2012, seeking $4,439,270 and 23% of the not-yet-filed *Oracle* arbitration. *See* RX117. Now, after the arbitration hearing, Jenner appears to be seeking only 20% of the unfiled *Oracle* arbitration. *See* CCL at 80, ¶ 22.

[15] *Hoover*, 206 S.W.3d at 564; *see* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(h).

[16] *Id.* at 565.

[17] *Hoover*, 206 S.W.3d at 565; *see also* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04 cmt. 8.

[18] *Hoover*, 206 S.W.3d at 565 ("And while experts can calculate the present value of a claim at the time of discharge, this extra time, expense, and uncertainty can be avoided . . . .").

5. Whether Parallel consented to Jenner's withdrawal is irrelevant to whether Jenner is entitled to fees

Jenner claims that Parallel consented to its withdrawal in *QuinStreet* and insinuates that somehow such "consent" bears on whether Jenner can recover its fees. (CCL at 82-83, ¶ 24(e)) Jenner is wrong. First, in connection with Jenner's motion for withdrawal in *QuinStreet*, Parallel only authorized Jenner to represent that Parallel did not object to Jenner's withdrawal. (*See* RX103; RFF at 38, ¶ 162) Jenner drafted and filed the motion to withdraw and only incorporated Parallel's counsel's comments into part, but not all, of the motion. (*See* CX16; RFF at 38, ¶ 163) Accordingly, to the extent that the motion to withdraw represents anything other than that Parallel did not object to Jenner's withdrawal, such a misrepresentation to the Court was made by Jenner, not Parallel. Additionally, no such motion was filed in *Oracle*. (CX13)

Regardless, whether Parallel consented to Jenner's withdrawal has no bearing on whether Jenner is entitled to recover its fees. Jenner's argument has been specifically rejected by the Fifth Circuit in *Augustson*.[19] Accordingly, the circumstances surrounding Jenner's withdrawal from *QuinStreet* are irrelevant to whether Jenner is entitled to recover fees relating to either *QuinStreet* or *Oracle*.

B. Jenner Failed To Perform Its Obligations Under the Agreement

Jenner's breach of contract claim fails for the separate reason that Jenner has not carried its burden to prove that it performed its contractual obligations. Under the CFA, Jenner was required to:

- "initiate, prosecute and conclude" the *Oracle* and *QuinStreet* cases (RX12 at 3, ¶ 2);
- defend Parallel "against any suit, action, proceeding, counterclaim or other similar causes of action" occurring "as a direct result of the threat, initiation or prosecution of such Enforcement Activity" (RX12 at 3, ¶ 2(c)); and

[19] *See Augustson*, 76 F.3d at 663-64.

- not take any action or forbear from taking action that would impair the parties' rights under the CFA or in any Enforcement Activity in which Jenner was representing Parallel. (RX12 at 6, ¶ 7)

Jenner breached these obligations ***before*** it terminated the CFA. (RCL at 53-54, ¶¶ 222-226)

First, despite knowing that Microsoft could become a party to the *QuinStreet* case (RX18; RFF at 13-14, ¶ 67), Jenner refused to handle the *Microsoft* portion of the case. (RFF at 29-30, ¶¶ 125 & 127) Second, despite expressly taking on the representation in *Oracle* and *QuinStreet*, Jenner abandoned its representation of *QuinStreet*. (*Id.*) Notably, this decision was made after the adverse summary judgment ruling in *Oracle*. Third, Jenner unilaterally changed the scope of its representation in the *Oracle* case. Jenner informed Parallel that (i) it would only handle the *Oracle* appeal and no further proceedings upon remand; (ii) Parallel would have to agree to settle after remand; and (iii) Jenner could terminate its representation of Parallel at any time. (RX82; RFF at 28-30, ¶¶ 123-130 & 35, ¶ 151; TR. at 2366:10-2367:12 & 2371:16-24)

Under Texas law, a party cannot enforce the contract unless he shows that he has performed the obligations imposed upon him.[20] Further, "'it is a fundamental principle of contract law that when one party to a contract commits a material breach of that contract, the other party is discharged or excused from further performance.'"[21] Because Jenner breached the CFA first (by not performing its obligations under the CFA), it cannot recover contract damages.[22]

---

[20] *Acme Pest Control Co. v. Youngman*, 216 S.W.2d 259, 263 (Tex. App.—Waco 1948, no writ).

[21] *BFI Waste Sys. of N. Am. v. N. Alamo Water Supply Corp.*, 251 S.W.3d 30, 30-31 (Tex. 2008) (per curiam) (quoting *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195 (Tex. 2004)).

[22] *Barnett v. Coppell N. Tex. Court, Ltd., NTC*, 123 S.W.3d 804, 815 (Tex. App.—Dallas 2003, pet. denied) ("[A] breach of contract by one party excuses performance by the other party.").

C. Jenner Has Conceded Parallel Was Not in Breach when Jenner Terminated the CFA

Jenner alleges in its Demand for Arbitration that Parallel breached its "contractual obligation to pay expenses." (RX115 at 15, ¶ 54) But, as Jenner now concedes, Parallel was not in breach when Jenner terminated, because on December 24, 2008, Parallel paid—in full—the outstanding expenses it owed. (RFF at 32, ¶¶ 136-137) Accordingly, as of December 24, 2008, any breach for failure to pay expenses was cured and is irrelevant. (*Id.*)[23] Plus, it would be unethical to rely on payment issues for withdrawal because the payment obligation was fulfilled.[24]

Now, in its Conclusions of Law, Jenner claims that Parallel breached the CFA by refusing to pay Jenner an "appropriate and fair portion of the Contingent Fee Award." (CCL at 79, ¶¶ 17-18) But that is not what Jenner demanded. Jenner first demanded $10,245,492 in hourly fees "[p]ursuant to Paragraph 9(b) and 9(a)(i) of the Agreement" on June 17, 2011 and stated that these fees were "in lieu of the Contingent Fee" and were "more than two years past due." (RFF at 42, ¶ 181; RX112) In July and August 2011, Parallel explained to Jenner that Jenner forfeited its right to compensation when it terminated its representation of Parallel in January 2009 and that Paragraph 9(b) was unenforceable. (RFF at 42-44, ¶¶ 184-186) Under Texas law, failure to comply with an unenforceable contract provision is not a breach.[25]

---

[23] *T-M Vacuum Prods. v. TAISC, Inc.*, 336 Fed. Appx. 441, 442-43 (5th Cir. 2009) ("[I]f the non-breaching party elects to treat the contract as continuing and insists the party in default continue performance, the previous breach constitutes no excuse for nonperformance on the part of the party not in default and the contract continues in force for the benefit of both parties.") (quotation omitted); *see also Henry v. Masson*, 333 S.W.3d 825, 840-41 (Tex. App.—Houston [1st Dist.] 2010, pet. filed) ("Seeking to benefit from the contract after the breach operates as a conclusive choice depriving the non-breaching party of an excuse for his own non-performance.") (citations omitted).

[24] TEX. DISCIPLINARY R. PROF'L CONDUCT 1.15(b)(5); TR. 1256:10-16.

[25] *See Juliette Fowler Homes, Inc. v. Welch Assocs., Inc.*, 793 S.W.2d 660, 663 (Tex. 1990) (holding party cannot recover monetary damages for breach of an unenforceable contract provision).

After being told that Paragraph 9 of the CFA was unenforceable, Jenner offered to settle its claim for (TR. at 914:18-21 & 916:1) But in its subsequent Demand for Arbitration, Jenner went back to seeking $10 million in hourly fees. (RX115 at 5, ¶ 18; 15, ¶ 55; & 17, ¶ 70) This claim was confirmed by its managing partner Levy at her May 2012 deposition. (TR. at 1050:9-15) Jenner did not retreat from this claim until the conclusion of the summary judgment hearing. (Tr. of Sept. 11, 2012, Hearing on Partial Mt. for Summary Judgment at 93:5-94:13) Only on September 14, 2012, did Jenner shift to seeking a portion of the Contingent Fee Award based on its expert's report. (RFF at 45, ¶¶ 190-91)

D. Jenner Has No Evidence of Damages Because of an Alleged Breach by Parallel

Jenner terminated the CFA on *January 2, 2009,* but now wants to claim Parallel breached the CFA when it did not pay the amount demanded on September 14, *2012.* In addition to presenting no evidence of a *material* breach by Parallel as of the time of termination, Jenner has failed to establish that Parallel was in breach of the CFA at the time of termination.

Jenner is seeking two types of damages. First, 83% of the contingency fee from Paragraph 5 of the CFA multiplied by the settlements, or . Second, Jenner is seeking 20% (previously 23%) of any amounts recovered in a future arbitration with Oracle.

Jenner has failed to establish its entitlement to either sum with reasonable certainty.[26] As Jenner concedes, the *Oracle* settlement includes a release of all claims Parallel had against BEA. (CFF at 52, ¶ 186) And the *Oracle* settlement granted a portfolio license, which licensed all of Parallel's patent interests, including the '111, '457, '217, '935, '911, and '145 patents—not just the '335 and '554. (CX32 at Ex. 1; CFF at 52, ¶ 186) Jenner has presented no evidence that the CFA covers BEA, that any of its work related to BEA, or that it had any involvement or worked

---

[26] *See Gulf Coast Inv. Corp. v. Rothman,* 506 S.W.2d 856, 858 (Tex. 1974); *Taub v. Houston Pipeline Co.,* 75 S.W.3d 606, 617 (Tex. App.—Texarkana 2002, pet. denied).

on any issues related to any Parallel patents other than the '335 and '554. To the contrary, Jenner declined to take on the representation relating to the '111 patent or BEA. (TR. 426:7-427:8; 428:2-17; RX45, RX49) In such circumstances, Jenner cannot claim a percentage of the *Oracle* settlement (under any damages theory) for claims it was never hired to pursue and for work it never performed, because the CFA is expressly limited to matters Jenner initiates, prosecutes, and concludes. (RX12 at ¶¶ 1.b., 2) Jenner presented no evidence segregating the value given by Oracle for the BEA claims and a portfolio license from the overall settlement value. By simply demanding a percentage of the entire *Oracle* settlement, Jenner has failed to meet its burden of proof.

E. Jenner's Attempt To Rely on Parol Evidence To Interpret the CFA Should Be Rejected

Jenner argues that because it did not demand its fees immediately, and because Jenner's course of dealing suggests that it believed it only could get paid if Parallel ultimately recovered, that these circumstances somehow cure the fact that Paragraph 9 is unethical and unenforceable. Ironically, Jenner ignores that it is seeking an award of 20% (previously 23%) of the not-yet filed or litigated *Oracle* arbitration. (CCL at 80, ¶ 22, & 100, ¶ 122(c)) Jenner's course of dealing argument must be rejected for two primary reasons.

First, Jenner has presented no evidence that the CFA is ambiguous.[27] Extrinsic evidence (such as what the parties said or how they acted after the CFA was entered into) cannot be used to vary or contradict the CFA's written terms.[28]

---

[27] *Dynergy MidStream Servs. Ltd. P'ship v. Apache Corp.*, 294 S.W.3d 164, 170 (Tex. 2009) ("Experts have a proper (if confined) role in litigation, but it is not to supply parol evidence to vary or contradict the terms of unambiguous contracts.").

[28] *See David J. Sacks, P.C. v. Harden*, 266 S.W.3d 447, 450 (Tex. 2008) ("An unambiguous contract will be enforced as written, and parol evidence will not be received for the purpose of creating an ambiguity or to give the contract a meaning different from that which its language imports.").

Second, the CFA contains an integration clause (RX12 at 7-8, ¶ 15), which similarly prevents the introduction of parol evidence.[29] For these reasons, whatever Jenner might have said regarding the CFA (or how it acted) cannot alter the CFA's written terms. Additionally, Jenner, *while still representing Parallel*, used Paragraph 9 to leverage a new agreement that would have provided it contingent, hourly, *and* quantum meruit compensation. (RFF at 34-37, ¶¶ 148-158; TR. at 1256:17-1257:12) Lastly, Jenner ignores that either arranging for or charging an unconscionable fee is unethical and prohibited.[30]

II. JENNER IS NOT ENTITLED TO ANY RECOVERY BASED ON QUANTUM MERUIT OR PROMISSORY ESTOPPEL

Under Texas law, an attorney may recover under quantum meruit on a contingency fee contract only when: (1) the client discharges the attorney after partial or full performance; (2) the client settles the case without the attorney's knowledge or consent; or (3) the attorney and client mutually abandon the contract.[31]

To recover under promissory estoppel, Jenner bears the burden of proving: (1) Parallel made a promise; (2) which Parallel should reasonably expect would induce action or forbearance on the part of Jenner; (3) which did in fact induce the action or forbearance by Jenner; and (4) which must be enforced to prevent injustice.[32]

A. Jenner Cannot Recover under Quantum Meruit or Promissory Estoppel Because an Express Contract Exists

Texas law precludes a party from recovering under quantum meruit or promissory

---

[29] *Wilkins v. Bain*, 615 S.W.2d 314 (Tex. App.—Dallas 1981, no pet.).

[30] TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(a).

[31] *Comm'n for Lawyer Discipline v. Eisenman*, 981 S.W.2d 737, 740 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (citations omitted).

[32] *Conway v. Saudi Arabian Oil Co.*, 867 F. Supp. 539, 543 (S.D. Tex. 1994).

estoppel when there is an express contract governing the dispute.[33] In other words, "[t]he law will not imply a contract when one already exists."[34] Indeed, Cunningham conceded that quantum meruit is available only in absence of an agreement. (TR. at 1105:7-16)

The "appropriate and fair" fees Jenner claims to seek in this Arbitration as its quantum meruit or promissory estoppel damages are calculated based upon Paragraph 5 of the CFA. Paragraph 5 governs the contingent fees to which Jenner would have been entitled had it stayed in the cases through conclusion. (TR. 2397:2-2398:2) Thus, Jenner cannot escape its unconscionable fee arrangement by resorting to quantum meruit or promissory estoppel.[35]

B. Jenner Is Not Entitled to Quantum Meruit Because Jenner Quit Without Just Cause

Jenner ignores that the CFA is an attorney-client fee agreement that is subject to Texas law regarding the prohibition against arranging for, charging, or collecting an unconscionable fee.[36] Texas law determines under what circumstances and how much a withdrawing attorney receives. Jenner forfeited all right to compensation when it withdrew from its representation of

---

[33] *Kiva, Inc. v. Cent. Tex. Barricades*, No. 03-07-00684-CV, 2010 WL 58981, at *5-6 (Tex. App.—Austin Jan. 8, 2010, no pet.) (citing *Truly v. Austin*, 744 S.W.2d 934, 936 (Tex. 1988)); *see also Balfour Beatty Rail Inc. v. Kansas City S. Ry. Co.*, No. 3:10-CV-1629-L, 2012 WL 3100833, at *12 (N.D. Tex. July 31, 2012) ("In general under Texas law, a party seeking to recover for services rendered will only be able to recover under quantum meruit when there is no express contract between the parties.") (citation and quotation omitted); *Pantaze v. Iskander*, No. 05-95-00984-CV, 1996 WL 640604, at *1 (Tex. App.—Dallas Oct. 29, 1996, no pet.) (finding that "[a] claim in quantum meruit was not established by a preponderance of the evidence because any services rendered by Plaintiff were all accepted by Defendant on the basis of an understanding that Plaintiff was to be paid on a contingent fee recovery of Defendant's claims against third parties."); *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 226 (Tex. 2002) (citing *Wheeler v. White*, 398 S.W.2d 93, 96-97 (Tex. 1965)).

[34] *Kiva*, 2010 WL 58981, at *6.

[35] *See* Respondents' Pre-Hearing Brief No. 2 Regarding the Law on Quantum Meruit and Promissory Estoppel.

[36] TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04; *Hoover*, 206 S.W.3d at 561.

Parallel without just cause.[37] As the Fifth Circuit has explained, 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."[38] Thus, the terminating attorney—Jenner—may not recover "either on the contract or quantum meruit for the services [] that have been rendered."[39] This rule is not novel or unique to Texas. It is also followed by at least Arkansas, California, Florida, Georgia, Kentucky, Louisiana, Missouri, Montana, New Jersey, New York, Ohio, Washington, and Wisconsin.[40]

The Fifth Circuit has explained that for an attorney to have just cause sufficient to

---

[37] *See* Respondents' Pre-Hearing Brief No. 1 Regarding the Law on Attorney Withdrawal and the Ability to Receive Compensation.

[38] *Augustson*, 76 F.3d at 662 (quoting *Royden*, 331 S.W.2d at 209); *see also* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.15(b) (prohibiting lawyers from terminating representation except in specific circumstances).

[39] *Royden*, 331 S.W.2d at 341-42.

[40] *Beaumont v. J.H. Hamlen & Son*, 81 S.W.2d 24 (Ark. 1935); *Rus, Miliband & Smith v. Conkle & Olesten*, 113 Cal. App. 4th 656 (2003); *Faro v. Romani*, 641 So.2d 69, 71 (Fla. 1994) (holding that "when an attorney withdraws from representation upon his own volition, and the contingency has not occurred, the attorney forfeits all rights to compensation"); *Kocha & Jones, P.A. v. Greenwald*, 660 So.2d 1074 (Fla. Dist. Ct. App. 1995) (holding that attorney forfeited all rights to compensation under contingency agreement by withdrawing as counsel before contingency occurred); *Sosebee v. McCrimmon*, 492 S.E.2d 584 (Ct. App. Ga. 1997); *B. Dahlenburg Bonar, P.S.C. v. Waite, Schneider, Bayless & Chesley Co., L.P.A.*, 373 S.W.3d 419, 423 (Ky. 2012); *Weinberg v. Gharai*, 338 S.W.3d 307 (Ky. Ct. App. 2011) (holding that an attorney who was retained on contingency fee basis, but withdrew after an adverse summary judgment ruling and failed to take the case on appeal, could not seek fee under the contingency fee agreement); *Kyle v. Glickman*, No. Civ. A. 99-3111, 2001 WL 35996143, at *4 (E.D. La. June 29, 2001) (holding that attorney's withdrawal was not for just cause and "he forfeited his right to a fee by abandoning Kyle's case" where he, among others, "testified that he withdrew only because he anticipated that Kyle's case would be arduous and expensive"); *In re Thomasson's Estate*, 144 S.W.2d 79 (Mo. 1940); *Bell & Marra, pllc v. Sullivan*, 6 P.3d 965, 969 (Mont. 2000) (rejecting financial burden as good cause and stating "the majority rule in American jurisdictions and the rules of professional conduct establish that an attorney may not collect a fee for services arising from a contingency arrangement if the attorney withdraws from representation without good cause."); *Dinter v. Sears, Roebuck & Co.*, 651 A.2d 1033, 1038-40 (N.J. Super. Ct. App. Div. 1995); *Kahn v. Kahn*, 186 A.D.2d 719, 720 (N.Y. App. Div. 1992); *W. Wagner & G. Wagner Co., L.P.A. v. Block*, 669 N.E.2d 272, 276 (Oh. Ct. App. 1995); *Ausler v. Ramsey*, 868 P.2d 877, 881-82 (Wash. Ct. App. 1994); *Hardison v. Weinshel*, 450 F. Supp. 721 (E.D. Wis. 1978).

terminate and receive compensation, the client must have engaged in culpable conduct.[41] Just cause exists where the client (1) attempts to assert a fraudulent claim; (2) fails to cooperate; (3) refuses to pay for services; (4) degrades or humiliates the attorney; or (5) retains other counsel with whom the original attorney cannot work.[42] All of these factors focus on the conduct of the client and not the firm's own financial interest or developments in the case. Jenner has presented no evidence to support a finding that any of these client-focused situations apply here. To the contrary, Jenner believed it could terminate for any reason "at any time" and still recover. (RX55)

Jenner terminated its representation of Parallel because it determined that such representation was no longer in the firm's economic interests. (RFF at 19, ¶ 91; 22, ¶ 101; 24, ¶¶ 110-111; 26-27, ¶¶ 118-119; 30, ¶¶ 129-130; 32-33, ¶ 140; RX87; CX303) Termination that is in Jenner's economic interests is not "just cause."[43]

Jenner also terminated its representation of Parallel because Parallel refused to settle *Oracle* and *QuinStreet* "for whatever [Parallel] could get," as Jenner recommended. (RFF at 25, ¶ 114 & 29-30, ¶¶ 126-130) Failure to settle a case is not just cause. In *Augustson*, the lawyers terminated a contingency fee contract because the client refused to settle and then sought to recover their fees. The Fifth Circuit held—in accord with long-established Texas law—that a client's refusal to settle is not just cause to withdraw *and* be paid.[44] Accordingly, Jenner did not have just cause to withdraw and for that reason, Jenner forfeited its right to recover fees.

---

[41] *Augustson,* 76 F.3d at 663.

[42] *See id* at 665-66.

[43] *Augustson*, 76 F.3d at 663; *see* TR. at 2060:6-2064:17.

[44] *Augustson*, 76 F.3d at 666.

[redacted]

C. Jenner Cannot Contractually Define "Just Cause"

Jenner has taken the position that the CFA contractually defines "just cause" and, for that reason, it is entitled to its fees from the underlying lawsuits. (CCL at 76-78, ¶¶ 9-10) Jenner's claim is nothing more than a reiteration of the "contract is a contract" argument rejected by both the Court of Appeals and the Supreme Court in *Hoover*.[45] For Jenner to prove it had "just cause" to terminate the CFA and its representation of Parallel and get paid, Jenner bears the burden of showing that the contractual provision on which it relies has been recognized in Texas as "just cause" and does not violate Jenner's ethical duties to Parallel.[46] This Jenner cannot do. Jenner's "just cause" was based on Parallel's *past* failure to pay expenses; Parallel's "reluctance to consider settlement discussions;" and the protracted nature of the cases. (CX303 at 2) The past failure to pay expenses is irrelevant because (i) the expenses were paid in full before termination; (ii) Mascherin knew that there were sufficient monies to pay future expenses (RX60 at 2); (iii) the appeal expenses were "relatively minimal" (RX80); and (iv) Parallel had offered to pay a retainer to cover expenses. (CX303)

Parallel's reluctance to settle, about which Jenner complained multiple times (*see, e.g.*, RX58; RX62 at 2; RX78; RX81;TR. at 837:8-838:20; 839:3-21 & 993:18-994:4), has been held as a matter of law not to be just cause.[47] The final reason cited by Jenner—the complex nature of the cases, including potential multiple appeals—are all things Jenner knew about going into the case and are also not just cause. (*See, e.g.*, RX11; RX124 at 3-4; TR. at 378:19-382:21, 401:6-

---

[45] *See Walton*, 149 S.W.3d at 845-46; *Hoover*, 206 S.W.3d at 560.

[46] *Staples*, 763 S.W.2d at 916-917.

[47] *Augustson*, 76 F.3d at 666.

403:25 & 2297:7-2301:13)[48] Because Jenner has not satisfied its burden to prove it terminated with just cause,[49] it is not entitled to recover any fees.

D. Jenner's Request for What Is "Fair" Is Not a Proper Measure of Quantum Meruit or Promissory Estoppel Damages

Jenner repeatedly has asked the Arbitrator to award it what is "fair."[50] Jenner's vague request only underscores the lack of legal support for its position. Indeed, Jenner has failed to cite any legal basis to support such a measure of damage. In a fee-dispute case, there are only two potential measures of damage—contract damages or quantum meruit. To the extent that Jenner seeks to have "fair" equate to quantum meruit, Jenner has failed to carry its burden to prove the reasonable value of its services to Parallel.[51]

"Unlike an award of attorney's fees to a prevailing party, a quantum meruit award must take into account the actual value of the services to the client."[52] Thus, "while the time

[48] *See Rapp v. Mandell & Wright, P.C.*, 127 S.W.3d 888, 898 (Tex. App.—Corpus Christi 2004, pet. denied); *Kyle*, 2001 WL 35996143, at *4 (holding attorney forfeited right to fee because attorney "withdrew only because he anticipated that Kyle's case would be arduous and expensive", which was not just cause); *Bell & Marra*, 6 P.3d at 970-71 (unanticipated length of case and appeals not good cause to withdraw and law firm was not entitled to its fees).

[49] *Staples*, 763 S.W.2d at 917. In *Staples*, the lawyer withdrew because he thought the client would commit perjury. *Id.* at 916-17. The Dallas Court of Appeal found—as a matter of law—that he did not meet his burden of proving the client was going to commit perjury and thus, was not entitled to recover fees. *Id.* at 917-18.

[50] *See, e.g.*, Tr. of Sept. 11, 2012, Hearing on Partial Mt. for Summary Judgment at 93:5-94:13; Pre-Hearing Brief of Claimant Jenner & Block, LLP at 33-34; CCL at 84.

[51] Quantum meruit permits a plaintiff to recover only for the reasonable value of services provided. *Thompson v. Smith*, 248 S.W. 1070, 1072-73 (Tex. Comm'n App. 1923, judgm't adopted).

[52] *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Poletz*, 652 So.2d 366, 369 (Fla. 1995); *see also Bell & Marra*, 6 P.3d at 970 n.1 ("[W]e also question whether an attorney's normal hourly rate should always be the basis of *quantum meruit* recovery. We also see no nexus between the attorney's normal hourly rate, a rate usually obtained for completed legal work, and the fee he or she deserves in an uncompleted contingency fee case.") (citing *Ausler v. Ramsey*, 868 P.2d 877, 881 n.6 (Wash. Ct. App. 1994) ("We also question whether an attorney's normal hourly rate should always be the touchstone of quantum meruit.")); *Sosebee*, 492 S.E.2d at 587 ("if the services of the attorney have no value to the client under quantum meruit, then the client has no financial obligation to pay for services that did not achieve the contingency.").

reasonably devoted to the representation and a reasonable hourly rate are factors to be considered in determining a proper quantum meruit award, the court must consider all relevant factors surrounding the professional relationship to ensure that the award is fair to both the attorney and client."[53] Accordingly, any recovery by Jenner is limited to the reasonable value of its services, and Jenner bears the burden of proving such value.

The Arbitrator cannot make such an award because Jenner has presented no evidence that the fees it seeks are reasonable. Jenner also has failed to provide any evidence regarding the actual value of Jenner's services to Parallel. Cunningham, Jenner's only expert witness on fees, admitted that he did not review or analyze Jenner's underlying time records, instead reviewing a summary prepared by Jenner. (RFF at 46-47, ¶ 197; TR. at 1117:5-10) Cunningham also conceded that he "did not qualitatively evaluate the work that was done on any particular hour in any particular way." (TR. at 1182:10-14)

Under Texas law, there are at least eight factors used when determining the reasonableness of attorneys' fees.[54] Because Cunningham simply reviewed the summaries Jenner prepared of its and other firms' bills, Jenner has not provided any competent evidence that could support an award of attorneys' fees based on quantum meruit.[55]

Cunningham's fee calculation should further be rejected because, among other things, his calculations are mathematically flawed, fail to consider all of the appropriate data, improperly use Jenner's $10 million hourly fees as the basis, and are an unethical fee-splitting arrangement. (RFF at 46-47, ¶ 197) These significant errors render Cunningham's calculation unreliable.

[53] *Santini v. Cleveland Clinic Fla.*, 65 So.3d 22, 33 (Fla. Dist. Ct. App. 2011).

[54] *See Arthur Andersen*, 945 S.W.2d at 818; *see also* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(b).

[55] *See Arthur Andersen*, 945 S.W.2d at 818; *Nguyen Ngoc Giao v. Smith & Lamm, P.C.*, 714 S.W.2d 144, 148 (Tex. App.—Houston [1st Dist.] 1986, no writ).

Jenner's damages calculation should also be rejected because it requires the Arbitrator improperly to rewrite the CFA. Paragraph 9.a(iii) states that "at the conclusion of any Enforcement Activity, pay Jenner & Block an appropriate and fair portion of the Contingency 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*)." (RX12) (emphasis added). Yet, Cunningham's "calculation" does not take the "result achieved as of the time of termination" into account and reads it out of the CFA completely. (TR. 2405:17-2406:21; RCL at 56-57, ¶¶ 243-44) And, Cunningham's calculation also ignores that 9.a.(iii) is not a stand-alone provision; it provides compensation *only in addition to* the unconscionable 9.a.(i) provision. (RX12) These required re-writes only underscore the CFA's unenforceability.

There is nothing fair to Parallel about Jenner's calculations. Parallel has been forced to spend approximately $2 million in this fee dispute. (RX139-141) Parallel paid Bosy Bennett approximately (RX130-132) for which Jenner and Cunningham have not credited Parallel; Baker Botts over (RX129); Hinshaw & Culbertson approximately RX134); plus local counsel, Potter Anderson (RX135) and Young Conaway (RX136). On top of that, Jenner wants between $3.2 million and $4.4 million (CFF at 60-61, ¶¶ 210-212). If Jenner is able to recover even $3 million, this will mean that Parallel will have been paid fees exceeding

in *Oracle* and *QuinStreet* settlements.

III. JENNER CANNOT RECOVER UNDER QUANTUM MERUIT BECAUSE IT HAS UNCLEAN HANDS

Quantum meruit is an equitable remedy and to recover under it, Jenner is required to have "clean hands."[56] In other words, Jenner is required to prove that it did not act unfairly. Jenner cannot do so because Jenner breached its fiduciary duties to Parallel and committed legal malpractice. (*See infra* Sections VII and VIII) The Texas Supreme Court has held that fee forfeiture is appropriate in these circumstances.[57]

IV. JENNER CANNOT RECOVER BECAUSE IT MADE AN EXCESSIVE DEMAND

Jenner's consistent demand for $10 million in attorneys' fees up until the month before the arbitration hearing also precludes it from recovering its attorneys' fees in this arbitration. (RFF at 45, ¶¶ 192-193) Jenner required Parallel to defend against a $10 million claim which it now disclaims. (*See* CCL at 73, ¶ 7) Jenner's September 2012 demand is equally excessive in that it seeks a 23% fee for the *Oracle* arbitration, which has not even commenced. (RX117) Jenner's excessive and unconscionable demands preclude recovery of attorneys' fees.[58]

V. EPICREALM IS NOT A PROPER DEFENDANT IN THIS ARBITRATION

epicRealm Licensing, L.P. is dissolved and is no longer in existence. (RFF at 9, ¶ 44) Once epicRealm dissolved, it could no longer sue or be sued.[59] Jenner consented to the assignment of the CFA from epicRealm to Parallel. (CX8) Jenner—during the *QuinStreet* case—also litigated the issue of whether epicRealm was a proper party after the transfer of the patents to Parallel. (CX12 at 25 [Docs. 55, 56]; *see* RX22 at 2 ("epicRealm has been dissolved

---

[56] *Truly v. Austin*, 744 S.W.2d 934, 938 (Tex. 1988).

[57] *See Burrow v. Arce*, 997 S.W.2d 229, 238 (Tex. 1999).

[58] *Findlay v. Cave*, 611 S.W.2d 57, 58 (Tex. 1981); Respondents' Pre-Hearing Brief No. 4 on the Doctrine of Excessive Demand and Attorneys' Fees at 2-3.

[59] *Hunter v. Fort Worth Cap. Corp.*, 620 S.W.2d 547, 549-50 (Tex. 1981).

as a legal entity, and is no longer a proper party to this action.")) Accordingly, Jenner should take nothing on its frivolous claims against epicRealm.

VI. JENNER BREACHED THE CFA

Jenner's premature termination of its representation of Parallel without just cause constitutes a breach of contract under the terms of the CFA. Jenner agreed, *inter alia*, to: (1) represent Parallel on a contingent fee basis in the *Oracle* and *QuinStreet* cases; (2) "initiate, prosecute and conclude Enforcement Activities against Infringing Parties"; and (3) not take or forbear from taking any activity or action that would or could be reasonably expected to impair [Parallel's] rights under the CFA. (RX12 ¶¶ 1, 2, 7) Jenner violated each of these contractual duties by abandoning Parallel for Jenner's own economic interests. (RFF at 28-30, ¶¶ 123-130; Bosy Depo. 173:15-17 (testifying that Jenner "abandoned" Parallel and that the abandonment was "harmful" to Parallel)).

Jenner terminated its representation of Parallel on January 2, 2009, well in advance of the conclusion of *QuinStreet* and *Oracle*. (RX87) The timing of Jenner's termination could not have come at a worse time for Parallel, as Jenner terminated its representation less than a month after Judge Robinson's December 4, 2008, summary judgment of non-infringement in favor of Oracle. (TR. 361:15-19; Bosy Depo. 173:15-17) In the words of the counsel who picked up the pieces of the *Oracle* and *QuinStreet* cases after Jenner jumped ship, "[t]he case was in a ditch" because it had been lost due to the adverse summary judgment ruling of non-infringement. (TR. 1487:10-21)

As of January 2, 2009, the *Oracle* and *QuinStreet* cases were far from concluded. In *Oracle*, Parallel needed to appeal the adverse summary judgment ruling to the Federal Circuit (and then proceed with the case depending on the outcome of the appeal). Jenner's trial team universally believed that Judge Robinson's adverse summary judgment ruling was wrong and

/

would be reversed on appeal. (RFF at 22, ¶ 104) In fact, the trial team thought "it was a very winnable appeal . . . probably one of the best [they'd] seen." (RFF at 22, ¶ 104; Bosy Depo. 61:14-21, 62:5-9 (testifying that the ruling was "wholly erroneous," "had no merit," and "would be reversed")) Even so, Jenner refused to perform the CFA and represent Parallel in the *Oracle* case to its conclusion. Similarly, Jenner informed Parallel that it was not interested in continuing to represent Parallel in *QuinStreet*. (RFF at 28-30, ¶¶ 123-130)

Jenner further breached the CFA by refusing to represent Parallel in the *Microsoft* portion of *QuinStreet* and by acting only as settlement counsel in *QuinStreet*. (RFF at 29, ¶ 125) The CFA required Jenner to initiate, prosecute, and conclude the *QuinStreet* case—not just settle it. (RX12 ¶ 2) The CFA also required Jenner to represent Parallel in connection with *Microsoft* because it was a matter "arising out of or related to Enforcement Activities," *i.e., QuinStreet*. (RX12 ¶ 2) Jenner was aware by September 2007 that Microsoft may become involved in *QuinStreet*. In fact, QuinStreet disclosed it was using Microsoft's IIS system, and Fokas asked Jenner to check conflicts to confirm Jenner could handle the Microsoft claims in the event Microsoft became part of the case. (CX202; RFF at 13-14, ¶ 67; TR. 1372:5-12 & 19-21) Thus, Jenner's refusal to represent Parallel with respect to *Microsoft* constituted an additional breach of the CFA. (RX12 ¶ 2)[60]

Section VIII.C. sets forth a summary of the damages sustained by Parallel as a result of Jenner's breach of the CFA. In addition, Parallel had to pay multiple firms

---

[60] Some evidence was presented that, when the Microsoft issue arose, Parallel asked Jenner whether it would handle the Microsoft claims. Parallel's inquiry did not change Jenner's obligation to handle the Microsoft claims. Indeed, the CFA can only be modified in writing. (RX12, ¶ 15)

[redacted]

handle the cases. (RX129-132 & 134-136) Finally, Parallel is also entitled to attorneys' fees in the amount of $760,000 as a result of Jenner's breach of contract.[61]

VII. JENNER WILLFULLY BREACHED ITS FIDUCIARY DUTIES TO PARALLEL

The elements of a breach of fiduciary duty claim are: (1) the existence of a fiduciary relationship between the plaintiff and the defendant; (2) defendant's breach of the fiduciary duties accompanying the relationship; and (3) the breach of the duty that either injured the plaintiff or benefited the defendant.[62]

A. Jenner Owed Parallel Fiduciary Duties

Attorneys owe fiduciary duties to their clients upon the creation of the attorney-client relationship.[63] "The term 'fiduciary' refers to integrity and fidelity; thus, 'the attorney-client relationship is one of the most abundant good faith, requiring absolute perfect candor, openness and honesty, and the absence of any concealment or deception.'"[64] Because Jenner was Parallel's counsel, Jenner owed Parallel fiduciary duties.[65]

B. Jenner Breached its Fiduciary Duties to Parallel

Breach of fiduciary duty by an attorney most often involves the attorney's failure to disclose conflicts of interest, placing personal interests over the client's interests, improper use of

[61] *See* TEX. CIV. PRAC. & REM. CODE § 38.001; TR. 2451:11-15. This claim was properly presented. *See Jones v. Kelley*, 614 S.W.2d 95, 100 (Tex. 1981) (discussing possible forms of presentment).

[62] *Jones v. Blume*, 196 S.W.3d 440, 447 (Tex. App.—Dallas 2006, pet. denied).

[63] *See, e.g.*, *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988).

[64] *Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C.*, 284 S.W.3d 416, 429 (Tex. App.—Austin 2009, no pet.) (quoting *Goffney v. Rabson*, 56 S.W.3d 186, 190-94 (Tex. App.—Houston [14th Dist.] 2001, pet. denied)); *see also Duerr v. Brown*, 262 S.W.3d 63, 71 (Tex. App.—Houston [14th Dist.] 2008, no pet.) ("A legal malpractice claim focuses on whether an attorney represented a client with the requisite level of skill, while a breach of fiduciary duty claim encompasses whether an attorney obtained an improper benefit from the representation.").

[65] *See Willis*, 760 S.W.2d at 645; RX12.

client confidences, engaging in self-dealing, and making misrepresentations.[66] Here, Jenner breached its fiduciary duties of candor, loyalty, and care 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 at a time when it was advising Parallel on case-dispositive decisions. (RFF at 18-30, ¶¶ 89-130) For example, at the *Oracle* mediation, Jenner advised Parallel not to settle for less than (RFF at 18, ¶ 87) But less than two weeks later, Mascherin recommended to Jenner management to reconvene the *Oracle* mediation with a goal of achieving a pre-trial settlement of $30 million and to "consider whether the firm should continue its Contingent Fee Agreement with epicRealm." (RX46 at 1-2) Levy approved Mascherin's recommendation (RX50; TR. at 937:21-938:21), but Jenner did not tell Parallel that its opinion was that Parallel should return to mediation and attempt to settle *Oracle* for (TR. at 939:4-20; RFF at 20, ¶ 95)

Similarly, just *three hours* after the adverse summary judgment in *Oracle*, Jenner focused only on its own interests as evidenced by an e-mail from Terri Mascherin to Jenner's management committee, which stated "once we know what happens tomorrow [at the pre-trial conference], we will have a decision to make regarding how much longer Jenner & Block will continue the representation." (RX55) Mascherin highlighted Jenner's unconscionable "heads we win; tails you lose" philosophy regarding the CFA by erroneously explaining:

> [O]ur contingent fee agreement allows us to terminate the engagement for any reason on 30 days notice, so long as that is consistent with our ethical obligations. In the event we terminate and the client ultimately succeeds in recovering money in a judgment or settlement of its claims, we remain entitled to be compensated at a minimum for our fees incurred, based upon our regular hourly rates, plus expenses incurred as of the date we withdraw, minus any cost that the client incurs in bringing new counsel on board. (RX55)

---

[66] *See Gibson v. Ellis*, 126 S.W.3d 324, 330 (Tex. App.—Dallas 2004, no pet.).

Jenner also actively worked to have Parallel agree to settle its claims in *Oracle* and *QuinStreet*. For example, Jenner advised Parallel to give up valuable rights in *Oracle* in December 2008 in order to persuade Oracle to pass on the January 2009 trial without disclosing to Parallel its contemporaneous intent to terminate the Agreement. (RX73; RX76; RFF at 26, ¶ 117) Specifically, Jenner advised Parallel to cease pursuing claims 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. Jenner encouraged Parallel to give up all these valuable rights without ever disclosing to Parallel that these concessions would ease Jenner's path to withdrawal.

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% despite internal discussions and the trial team's belief that the chances of winning on appeal were very strong. (RFF at 22, ¶ 104; TR. 2363:25-2364:18) Had Parallel followed Jenner's advice, *Oracle* would have settled for Oracle only at a Federal Circuit mediation; a figure that would have netted Jenner a $33,000 fee. (RFF at 40, ¶ 171; TR. at 2399:13-2400:9)

Despite agreeing to "prosecute and conclude" *Oracle* and *QuinStreet*, Jenner terminated the CFA on January 2, 2009, in the midst of looming deadlines in *QuinStreet* and the impending appeal of the *Oracle* summary judgment. (RFF at 34, ¶ 147) Parallel's enforcement initiatives were "dead" pending the outcome of the *Oracle* appeal. (TR. 1942:21-1943:22) Jenner's sudden abandonment of its representation of Parallel put Parallel in the position of having to retain new counsel on an hourly-fee basis with a $100,000 retainer to prosecute and conclude the ongoing *Oracle* and *QuinStreet* cases when Jenner knew Parallel was unable to pursue the cases on anything but a contingent-fee arrangement. (RFF at 38-39, ¶¶ 164-166) As Jenner's replacement counsel aptly summarized:

> The timing of Jenner's withdrawal left Parallel Networks in a position where they had to secure counsel when the case was in a ditch. And the status of the case being in a ditch means that it is highly unlikely, if not impossible, that you can secure counsel on a contingent basis. (RFF at 38-39, ¶¶ 164-165)

In violation of its fiduciary duties, Jenner put its interests ahead of Parallel's. In October 2008, Jenner calculated the value of the *Oracle* and *QuinStreet* cases and determined it had become more valuable to quit than to stay in the cases. (TR. 1232:17-1234:14) Rather than disclose Mascherin's new analysis of the *Oracle* case and its contemplation of termination of the CFA, Jenner encouraged Parallel to settle so that Jenner could get its 33% contingency fee. After losing on summary judgment in *Oracle*, Jenner knew that the January trial in *Oracle* and impending deadlines in *QuinStreet* would have impeded its immediate withdrawal; Jenner pushed Parallel to make many important decisions about the lawsuits without disclosing its intentions to terminate the relationship. Jenner's self-centered approach exemplifies the breach of its fiduciary duties.

C. Parallel Is Entitled to a Forfeiture of Jenner's Fees as a Result of Its Breaches of Fiduciary Duties

As a result of Jenner's repeated breaches of fiduciary duties to Parallel, Parallel is entitled to damages or, at a minimum, the forfeiture of any fees to which Jenner might otherwise be entitled. This is because "a person who agrees to perform compensable services in a relationship of trust and violates that relationship breaches the agreement, express or implied, on which the right to compensation is based."[67] Parallel is not required to show damage.[68] Fee forfeiture is

[67] *Burrow*, 997 S.W.2d at 237-38.

[68] *Id.* at 240.

appropriate because Parallel has shown clear and serious breaches by Jenner, and forfeiture of the fee is necessary to protect the attorney-client relationship.

VIII. LEGAL MALPRACTICE

In a legal malpractice claim, a plaintiff must prove that (1) the attorney owed the plaintiff a duty, (2) the duty was breached, (3) the breach proximately caused the plaintiff's injuries, and (4) the plaintiff incurred damages.[69] A lawyer in Texas is held to the standard of care which would be exercised by a reasonably prudent attorney.[70] Jenner is liable for legal malpractice because: (1) it abandoned its duties under the CFA; and (2) it failed to adequately investigate and advise Parallel on the value of *QuinStreet* which caused Parallel to negotiate and ultimately accept an impaired, drastically reduced settlement.

A. Jenner Abandoned Parallel and Its Duties under the CFA

Jenner was contractually bound to (1) prosecute and conclude the *Oracle* and *QuinStreet* cases and (2) not to take any actions which would impair Parallel's rights under the Agreement or in any Enforcement Activity. Jenner terminated its representation of Parallel long before the conclusion of the *Oracle* and *QuinStreet* cases. Knowing that Parallel required counsel for the *Oracle* appeal and could not obtain alternative representation in *QuinStreet* on a contingent fee basis. No lawyer exercising ordinary care would put its client in such a position.

B. Jenner's Failure To Properly Prosecute the *QuinStreet* Case Caused Parallel To Negotiate and Accept an Impaired Settlement

Jenner's breach caused Parallel damages, including, but not limited to, the reduced settlement value in *QuinStreet*. By virtue of Parallel's discovery efforts in the *Herbalife* case coupled with QuinStreet's early production of the necessary source code, wiki files,

---

[69] *See McMahan v. Greenwood*, 108 S.W.3d 467, 495 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (citing *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 496 (Tex. 1995)).

[70] *Cosgrove v. Grimes*, 774 S.W.2d 662, 664 (Tex. 1989).

configuration files, financial documents, proprietary software, and other documents for its DSS and DMS businesses, Jenner possessed everything it needed to establish that QuinStreet's DSS and DMS products infringed Parallel's patents. (RX27, 29) QuinStreet disclosed that its DSS and DMS businesses used the same web servers and infringing architecture that QuinStreet had provided to Herbalife. (TR. 2352:21-2354:22) Jenner did not study the DMS side of QuinStreet's business and never prepared claim charts for DMS. (RFF at 13, ¶ 64) Indeed, as Margolis testified, Jenner's only concern was the web-hosting business, DSS—"[t]hat's all we cared about." (*Id.*) Compounding Jenner's lack of initiative to work up the case, the technical and financial information produced by QuinStreet were subject to a protective order that prevented Parallel from viewing any of the information. (TR. 1377:11-18)

By simply focusing on the DSS side of QuinStreet's business, Jenner's valuation of Parallel's case against QuinStreet was fatally flawed and resulted in Parallel settling for which has been described as "a fire sale" and a "terrible deal." (RFF at 39, ¶ 168; RX15) Had Jenner exercised reasonable prudence, Jenner and Parallel would have known QuinStreet's settlement value was approximately million. (RX125 at 16 and Ex. 6) Indeed, Mascherin opined that the value of *QuinStreet* was up to (RX60 at 3) Instead, Jenner left Parallel in the dark (yet again) to negotiate and ultimately accept an impaired settlement based on an incomplete set of facts. Accordingly, Jenner wholly failed to comply with its duty to act as a reasonably prudent lawyer.

C. Jenner's Legal Malpractice Caused Parallel Damages

In cases like this—where a poor settlement is achieved as a result of legal malpractice—the appropriate measure of damage is the difference between the value the case settled at, and the value the case could have settled but for the malpractice.[71] Contrary to Jenner's contention that the value must be established at trial, impairment of settlement value is an appropriate measure of damages, especially where, as here, the sole data point for comparison is a settlement and not a final judgment or jury verdict.[72] Therefore, the appropriate measure of damage in this case is the difference between the value of the actual *QuinStreet* settlement and the amount at which the case should have settled had it not been for Jenner's abandonment.

In calculating the amount of damages Parallel suffered as a result of Jenner's wrongful termination and neglect, Parallel's damages expert, Chase Perry, conducted a "but-for analysis" to determine what would have occurred in the absence of Jenner's breaches and compared it to the settlement with QuinStreet that actually occurred. (RFF at 50-51, ¶¶ 211-214) Based on Perry's analysis, Parallel suffered damages in the amount of $18,545,960. (*Id.*; RX148; RX149)

Jenner's expert concedes that applying Perry's 2.53% effective rate to the DSS (webhosting) revenues yields a reasonable settlement value of (TR. 2227:20-2231:25) This leaves only to compensate Parallel for the million of DMS revenue. (*Id.*) Jenner's expert agrees that applying the both sides of the business results in the same settlement value by Perry. (*Id.*)

[71] *Heath v. Herron*, 732 S.W.2d 748, 753 (Tex. App—Houston, [14th Dist.] 1987, writ denied) (allowing damages based on "the difference between the value of the settlement handled properly and improperly"); *see also Stonewall Surplus Lines Ins. Co. v. Drabek*, 835 S.W.2d 708, 712 (Tex. App.—Corpus Christi 1992, pet. denied) (finding a fact issue as to damages in a legal malpractice case due to evidence of the settlement value before and after the defense attorney's conduct resulted in the striking of the defendant's pleadings); *Ballesteros v. Jones*, 985 S.W. 2d 485, 498-99 (Tex. App.—San Antonio 1998, pet. denied); *Alexander v. Turtur & Assoc.*, 146 S.W.3d 113, 117 (Tex. 2004) (citing *Haynes & Boone v. Bowser Bouldin, Ltd.*, 896 S.W.2d 179, 181 (Tex. 1995) (holding "[i]in order to recover damages, a plaintiff must produce evidence from which the jury may reasonably infer that the damages sued for have resulted from the conduct of the defendant.")).

[72] *See Heath*, 732 S.W.2d at 753.

Dated: November 16, 2012

Respectfully submitted,

Jeffrey S. Lowenstein
Texas State Bar No. 24007574
jeffl@bellnunnally.com
BELL NUNNALLY & MARTIN LLP
1400 One McKinney Plaza
3232 McKinney Avenue
Dallas, Texas 75204-2429
(214) 740-1400 Telephone
(214) 740-1499 Facsimile

Jamil N. Alibhai
Texas State Bar No. 00793248
jalibhai@munckwilson.com
Ryan S. Loveless
Texas State Bar No. 24036997
rloveless@munckwilson.com
Jane Ann R. Neiswender
Texas State Bar No. 24048312
jneiswender@munckwilson.com
Kelly P. Chen
Texas State Bar No. 24062664
kchen@munckwilson.com
MUNCK WILSON MANDALA, LLP
12770 Coit Road, Suite 600
Dallas, Texas 75251
(972) 628-3600 Telephone
(972) 628-3616 Facsimile

COUNSEL FOR RESPONDENTS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has been served via e-mail to all counsel of record and via Federal Express to Joel Pelz in accordance with the JAMS Comprehensive Rules on November 16, 2012.

Jamil N. Alibhai

571713

EXHIBIT Q

From: Mascherin, Terri L
Sent: Wednesday, December 31, 2008 5:19 PM
To: Levy, Susan C
Cc: Roper, Harry J; Bosy, George S; Smith, Paul M; Markowski, Robert T; Margolis, Paul D; Bricker, Ross B
Subject: Parallel Networks
Attachments: CHICAGO-#1723055-v1-TLM__Memo_to_Susan_Levy_re_Parallel_Networks_Termination_of_Engagement.DOC

Susan:

Attached is the memorandum that you requested summarizing the several discussions that we have had in recent days with the client and among the firm lawyers working on this engagement.

Terri

Terri L. Mascherin
Jenner & Block LLP
330 N. Wabash Avenue
Chicago, IL 60611-7603
Tel (312) 923-2799
Fax (312) 840-7799
TMascherin@jenner.com
www.jenner.com

EXHIBIT
15
5-29-12

RESPONDENTS EXHIBIT
82

EXHIBIT Q

[redacted]

CONFIDENTIAL

MEMORANDUM

JENNER&BLOCK

DECEMBER 31, 2008

Jenner & Block LLP
Chicago
New York
Washington, DC

To:	Susan C. Levy
cc:	Harry J. Roper George S. Bosy Paul M. Smith Paul D. Margolis
From:	Terri L. Mascherin
Re:	Parallel Networks File No. 47269-10037
Subject:	Termination of Engagement

This Memorandum summarizes our recent internal discussions concerning whether and if so under what terms Jenner & Block should continue representing Parallel Networks in two cases pending in federal court in Delaware, and our discussions with the client on the same topic.

We currently represent Parallel Networks in two actions pending in Delaware: *Oracle v. Parallel Networks*, and *Quinn Street v. Parallel Networks*. Our contingent fee agreement provides that the client is to pay expenses on 30-day terms, and that we will be compensated for our work exclusively through a contingent fee which is set as a declining percentage based upon the size of any recovery. The Agreement permits us to terminate the representation at any time, consistent with our ethical obligations. If we terminate and the client later achieves a recovery through trial or settlement, we are entitled to be paid all unpaid expenses, as well as to be compensated for the time we devoted to the representation through termination, at our regular hourly rates.

In early December, the Federal District Court entered summary judgment against our client on its infringement claims in the *Oracle* case, leaving several of Oracle's claims of invalidity, as well as a claim of inequitable conduct, set to be tried in January 2009. Our client recently reached an agreement with Oracle to avoid that trial pursuant to which Oracle voluntarily dismissed its remaining claims, without prejudice, and the summary judgment was converted to a final judgment so that our client may take an immediate appeal from that judgment. During the course of working out that agreement, we advised our client that it would be in the client's best interest to accept Oracle's invitation to reconvene settlement discussions. At the time, Oracle's counsel indicated that Oracle was interested in settling, and that in his view any settlement would not reach eight figures. Our client was not willing to engage in settlement talks at that time.

Our outstanding fee investment in the Oracle case is approximately $10 million. Until recently, the client was several months in arrears on its obligation to pay expenses. The client paid the past-due expenses (totaling about $550,000) last week with proceeds from the settlement of two other cases that had been handled by other law firms.

The second case, *Quinn Street*, was filed more recently and is still in the pleading stage. Recently, Quinn Street (which is the plaintiff in this declaratory judgment action) filed a third-party complaint against Microsoft, seeking indemnification against our counterclaims for infringement. Microsoft, in turn, filed a "downward sloping Rule 14 Complaint" against our client, seeking a declaratory judgment that none of its products infringe. Quinn Street moved to dismiss that Complaint, and our client also expects to move to dismiss. If Microsoft remains in the case, the case will require an investment of attorney time comparable to the Oracle case. Without Microsoft, the case is small and potential damages may not justify the investment necessary to prepare and try the case. Prior to Microsoft filing its claims, we had been in settlement discussions with Quinn Street's lawyers. Based upon those discussions, we believe that the case against Quinn Street could be settled in the near future for approximately $750,000. Two weeks ago, we recommended to the client that he permit us to continue settlement discussions with Quinn Street. He did not authorize us to do so. There is a court-ordered mediation in the case set for the end of January. We have invested approximately $1 million in attorneys' fees in the case to date.

Yesterday, Paul Margolis spoke with the client. At that time, the client said that he did not want to split the Oracle and Quinn Street cases between two firms, and that we should decide whether we wish to continue to represent Parallel Networks in both cases. Following that discussion, Susan, Harry, Paul Smith, Paul Margolis and I spoke about what the firm should do. We decided to recommend to the client that we stay in the Oracle case through appeal, and to advise the client that if the appeal is successful, he should reopen settlement negotiations with Oracle. If Parallel Networks were to win the appeal, it would have leverage in settlement, and would still be facing the time and investment necessary to try the liability and damages cases seriatim, defending appeals of each, before it realized any recovery through a verdict. Thus, we concluded, a settlement after appeal should be attractive to our client. We decided to tell the client that we prefer not to continue in the Quinn Street case, but that we would be willing to remain in the case to assist the client in negotiating a settlement with Quinn Street. We agreed that Harry and Paul Margolis would call the client again today.

This morning Harry and Paul spoke with the client. The client suggested that Jenner & Block stay in both cases, but that we suggest a figure now at which we would recommend that Parallel Networks settle the Oracle case if the appeal is successful. If the client agreed to settle at that amount and we were able to obtain a settlement with Oracle, Jenner & Block would receive 33% of the settlement. If the client did not agree that the amount was sufficient, Jenner & Block could then withdraw from the case, and if Parallel Networks ultimately received a recovery we would receive 33% of the amount at which we had advised the client to settle.

Susan, Harry, Paul and I discussed that proposal this morning. We agreed that it was not attractive because: (1) given the size of our existing investment, it is unlikely a settlement could be achieved that would allow us to recoup our full investment, while under the existing fee agreement we retain that right; and (2) we are not interested in prosecuting the Quinn Street case to trial.

In our discussion this morning we agreed that the firm should terminate the existing engagement at this time, pursuant to the Contingent Fee Agreement provisions permitting us to terminate, rather than pursuing the client's proposed arrangement. Given the agreement obviating the need for the January trial there are no pressing dates in the *Oracle* case. The only upcoming dates in *Quinn Street* are the mediation and the deadline for Parallel Networks to file its motion to dismiss Microsoft's complaint. Thus, we believe that we may terminate the engagement at this time consistent with our ethical obligation not to disadvantage our client. We will, of course, cooperate with new counsel to get them up to speed on the two cases.

TLM