

CAUSE NO. DC-13-01146

PARALLEL NETWORKS, LLC,

Plaintiff,

v.

JENNER & BLOCK, LLP,

Defendant.

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IN THE DISTRICT COURT OF

DALLAS COUNTY, TEXAS

101<sup>st</sup>-E JUDICIAL DISTRICT

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2013 JAN 29 AM 11:35  
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DEPUTY

**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 rewrite 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").<sup>1</sup>

#### **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.

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<sup>1</sup> 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.<sup>2</sup>

An arbitrator exceeds his powers when his award does not “draw its essence” from the contract.<sup>3</sup> To determine whether an award meets this “essence test,” courts assess “whether the award, however arrived at, is rationally inferable from the contract.”<sup>4</sup> 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.”<sup>5</sup> If the arbitrator ignores his responsibility to construe the parties’ agreement in an “evenhanded way” and instead dispenses his “own brand of industrial

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

<sup>3</sup> *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)).

<sup>4</sup> *Executone*, 26 F.3d at 1325.

<sup>5</sup> *Id.*

justice,” the award must be set aside.<sup>6</sup> An award that is not anchored in any recognized law is improper.<sup>7</sup>

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.”<sup>8</sup> If the arbitrator “appreciated the existence of a clearly governing principle but decided to ignore or pay no attention to it,” vacatur is required.<sup>9</sup>

**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.”<sup>10</sup> “If the language of the agreement is clear and unequivocal, an arbitrator is not free to change its meaning.”<sup>11</sup> Here, the arbitrator’s award cannot be reconciled with the provisions of the CFA.

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

<sup>7</sup> *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]”).

<sup>8</sup> *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).

<sup>9</sup> *Brabham*, 376 F.3d at 381-82 (quotation omitted).

<sup>10</sup> *Executone*, 26 F.3d at 1325.

<sup>11</sup> *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.”<sup>12</sup> Thus, a lawyer may not enter into an arrangement for, charge, or collect an unconscionable fee.<sup>13</sup>

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.<sup>14</sup> 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.<sup>15</sup> Lawyers and their clients cannot waive or contract around these public policies.<sup>16</sup>

In Texas, a “contingent” fee is allowed when the fee is dependent on the outcome of a matter.<sup>17</sup> 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.’”<sup>18</sup> This element of risk justifies the attorney’s potential for a greater contingent fee.<sup>19</sup> This risk-sharing also incentivizes lawyers to

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<sup>12</sup> *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 560 (Tex. 2006).

<sup>13</sup> TEX. DISCIPLINARY R. OF PROF’L CONDUCT 1.04(a).

<sup>14</sup> 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.).

<sup>15</sup> *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).

<sup>16</sup> 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).

<sup>17</sup> TEX. DISCIPLINARY R. OF PROF’L CONDUCT 1.04(d).

<sup>18</sup> *Hoover Slovacek LLP*, 206 S.W.3d at 561.

<sup>19</sup> *Id.*

work diligently and to obtain the best results possible.<sup>20</sup>

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.<sup>21</sup> 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.<sup>22</sup>

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.

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<sup>20</sup> *Id.*

<sup>21</sup> *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).

<sup>22</sup> 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:

<b>Contract Language</b>	<b>Arbitrator's Re-write</b>
[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); <u>provided, however,</u> 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.<sup>23</sup>

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.”<sup>24</sup> Failure to do so renders a fee unconscionable.<sup>25</sup>

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.<sup>26</sup> 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

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<sup>23</sup> See, e.g., *Timegate Studios, Inc.*, 2012 WL 948282, at \*11 (vacating arbitration award where arbitrator violated provisions of the contract).

<sup>24</sup> See TEX. DISCIPLINARY R. OF PROF’L CONDUCT 1.04.

<sup>25</sup> *Id.*; see also *Hoover Slovacek LLP*, 206 S.W.3d at 565.

<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> 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*

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<sup>27</sup> See Ex. M (filed under seal), Award at 30 n.5.

<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup> Thus, the arbitrator clearly exceeded his authority in re-writing the CFA and awarding

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<sup>29</sup> 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).

<sup>30</sup> See Ex. A, CFA at 1, ¶ 1.b.

Jenner an award based upon a future, hypothetical, and not yet occurred arbitration.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup>

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<sup>31</sup> 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").

<sup>32</sup> 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).

<sup>33</sup> 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.<sup>34</sup>

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

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<sup>34</sup> *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.<sup>35</sup> The arbitrator then found that Parallel Networks offered no evidence to establish the “suit within a suit” requirement.<sup>36</sup> 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.<sup>37</sup> A lawyer may only receive compensation when he terminates the representation with “just cause.” Jenner had the burden to prove just cause.<sup>38</sup> 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

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<sup>35</sup> See Ex. N, Excerpt from Oct. 22, 2012, Arbitration Hr’g Tr., at 1669:3-11.

<sup>36</sup> 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.

<sup>37</sup> See, e.g., *Baird v. Ratcliff*, 10 Tex. 81 (1853).

<sup>38</sup> *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.<sup>39</sup> 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.<sup>40</sup> 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).

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<sup>39</sup> *Staples*, 763 S.W. 2d at 917.

<sup>40</sup> *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.<sup>41</sup>

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.<sup>42</sup> 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.

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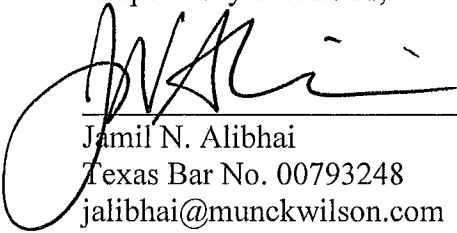
<sup>41</sup> 127 S.W.3d 888, 898 (Tex. App.—Corpus Christi 2004, pet. denied) (internal citations omitted) (emphases added).

<sup>42</sup> 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,



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