No. 04-14-00666-CV

COURT OF APPEALS
for the
FOURTH DISTRICT OF TEXAS
San Antonio, Texas

In re Dean Davenport, Dillon Water Resources, Ltd., 5D Drilling and Pump Service, Inc. f/k/a Davenport Drilling & Pump Service, Inc., 5D Water Resources, LLC f/k/a Davenport Oper., LLC, Water Exploration Co., Ltd., WAD, Inc., Water Investment Leasing Company, LLC, Blue Gold Resources Management, LLC, Blue Gold Properties, LLC, and Blue Gold Development, LLC,

Relators.

Original Proceeding from the
225th Judicial District Court of Bexar County, Texas
Honorable Peter Sakai, Presiding Judge

PETITION FOR WRIT OF MANDAMUS

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IDENTITY OF PARTIES AND COUNSEL

Pursuant to TEX. R. APP. P. 52.3(a), the following is a complete list of all parties and the names and addresses of all counsel:

1. Relators (Defendants in the trial court):

Dean Davenport ("Davenport")
Dillon Water Resources, Ltd. ("Dillon")
5D Drilling and Pump Service, Inc. f/k/a Davenport Drilling & Pump Service, Inc. ("5D Drilling")
5D Water Resources, LLC f/k/a Davenport Oper., LLC ("5D Water")
Water Exploration Co., Ltd. ("WECO")
WAD, Inc. ("WAD")
Water Investment Leasing Company, LLC
Blue Gold Resources Management, LLC
Blue Gold Properties, LLC
Blue Gold Development, LLC

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3. Respondent:

The Honorable Peter Sakai
225th Judicial District Court - Bexar County Courthouse
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4. Real Parties in Interest (Plaintiffs in the trial court):

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TABLE OF CONTENTS

RECORD REFERENCES

"MR" refers to Relators' Record in Support of Petition for Writ of Mandamus. A citation to the mandamus record begins with the volume number and is followed by the PDF bates-labeled page number(s) on which the information appears.[*] For example, a citation to 3.MR.114 refers to page 114 of volume 3 of the mandamus record. The mandamus record consists of nine volumes containing the following:

Volumes 1-2:	Trial court pleadings
Volume 3:	Transcripts from trial
Volumes 4-6:	Plaintiffs' Exhibits from trial
Volume 7:	Defendants' Exhibits from trial
Volume 8:	Post-trial hearing transcripts
Volume 9:	Exhibits admitted at the April 14, 2014 post-trial hearing

References to admitted trial exhibits will additionally be identified as "PX" (Plaintiffs' Exhibit) or "DX" (Defendants' Exhibit) with the corresponding exhibit number. For example, a citation to 7.MR.12 [DX:1] refers to Defendants' Exhibit 1, which can be found on page 12 of volume 7 of the mandamus record.

"App." refers to items included in the Appendix attached to the Petition for Writ of Mandamus. A citation to the Appendix is followed by the electronically bookmarked tab letter where the item appears.

[*] The PDF bates-labeled page number can be found on the bottom right corner of each page. Those bates labels will also correspond with the electronic page number found in the toolbar of Adobe Acrobat.

INDEX OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

STATEMENT OF THE CASE

Nature of the Underlying Proceeding:	This is a breach-of-contract case arising from a contingency fee agreement between a client and his attorneys providing that the attorney's fees would be calculated based on "the total sums recovered." (7.MR.12 [DX:1; App. D]; *see* 1.MR.773-87) Although the client paid the attorneys over $498,000 for their proportionate share of the "sums" (or monies) recovered in the underlying litigation (7.MR.49-50 [DX:26]; 7.MR.51 [DX:28]; 7.MR.199 [DX:163]), the attorneys filed suit claiming that the fee agreement also entitled them to an ownership interest in a limited partnership and corporation the client purchased or acquired as part of the settlement of the underlying lawsuit (1.MR.773-87).
Respondent:	The Honorable Peter Sakai, 225th Judicial District Court of Bexar County, Texas
Respondent's Action from which Relators Seek Relief:	This petition for writ of mandamus arises from the trial court's order granting Plaintiffs a new trial after a three-week jury trial. (2.MR.895-98 [App. A]) Plaintiffs and Real Parties in Interest Tom Hall, Thomas C. Hall, P.C., and Blake Dietzmann (collectively, "Plaintiffs") filed suit, alleging, in relevant part, that Dean Davenport breached the fee agreement by not transferring ownership interests in two companies (Water Exploration Company, Ltd. and WAD, Inc.) that Davenport purchased or acquired as part of the settlement of the underlying lawsuit. (1.MR.773-87) After a three-week jury trial, the trial court, at Plaintiffs' insistence, determined the fee agreement was ambiguous and submitted an issue regarding its interpretation. (2.MR.80 [App. B]; *see* 2.MR.52, 107] The jury found that Davenport did not agree that Plaintiffs' attorney's fees could include an ownership interest in the two companies. (App. B at 5) The jury further found that Plaintiffs are "estopped" from seeking an ownership interest and had "waived [their] right, if any, to seek an ownership interest." (*Id.* at 16-17)

The trial court denied Plaintiffs' motion for judgment notwithstanding the verdict and rendered judgment on the verdict, thereby denying Plaintiffs relief on their claim for an ownership interest. (2.MR.783-86 [App. C])[†] Plaintiffs' motion for new trial was overruled by operation of law (*see* 2.MR.787-90), and all parties appealed to this Court in No. 04-14-00581-CV (2.MR.839, 846).

But on the 105th day after rendering judgment, the trial court vacated the judgment in its entirety and granted Plaintiffs a new trial based on three reasons that are neither valid nor correct when reviewed on the merits:

> (1) the trial court's post-judgment finding that the fee agreement is "unambiguous";
>
> (2) even though the trial court "does not make a specific finding that any of the jury answers or findings, in themselves, justifies the granting of the new trial," the court found that, "in totality," the "verdict is against the great weight and preponderance of the admissible evidence"; and
>
> (3) "the reasons set forth in the motion [for new trial] and presented during the hearing."

(2.MR.895-98 [App. A])

STATEMENT OF JURISDICTION

The Court has jurisdiction to issue a writ of mandamus pursuant to TEX. GOV'T CODE § 22.221.

[†] The judgment did, however, award Plaintiffs $226,795.01 in damages on their separate claim that Davenport failed to repay expenses incurred in the underlying lawsuit, plus over $1.3 million in attorney's fees incurred in the trial court. (*Id.*; *see* App. B at 9-10)

ISSUES PRESENTED

In *In re Toyota Motor Sales, U.S.A., Inc.*, 407 S.W.3d 746, 759 (Tex. 2013), the Texas Supreme Court held that "the reasons articulated in a new trial order are reviewable on the merits by mandamus." In this case, the trial court's order granting a new trial and vacating the judgment in its entirety articulates three reasons for its decision and presents the following issues:

1. Did the trial court abuse its discretion in granting a new trial based on its post-judgment finding that the fee agreement is "unambiguous" when:

    a. the trial court's finding that the fee agreement is "unambiguous" does not, in and of itself, justify the grant of a new trial because:

        (i) the jury's amply supported findings that Plaintiffs are estopped from seeking an ownership interest and have waived their purported right to seek an ownership independently bar Plaintiffs' claim for an ownership interest, and

        (ii) if anything, the fee agreement unambiguously supports Davenport's position and cannot be construed as a matter of law in Plaintiffs' favor;

    b. the fee agreement unambiguously provides that the attorney's fees would be calculated based on the total monies recovered -- not any non-cash benefits or ownership interest -- because:

        (i) the fee agreement does not expressly provide that attorney's fees will be calculated on non-cash benefits, as required by *Levine v. Bayne, Snell & Krause, Ltd.*, 40 S.W.3d 92, 95 (Tex. 2001), to recover an ownership interest or other non-cash benefits as a contingency fee, and

(ii) the plain meaning of the term "total sums recovered" limits Plaintiffs' contingency fee to a share of any monies recovered -- not an ownership interest;

c. any contrary reading of the fee agreement is not reasonable, and even if it were, it is not the only reasonable interpretation and, at best, merely raises an ambiguity that the jury properly resolved in Davenport's favor; and

d. in any event, Plaintiffs waived their right to have the trial court construe the fee agreement in their favor after trial because they requested -- without objection -- that the trial court submit an issue to the jury on the interpretation of the agreement, and the jury rejected Plaintiffs' theory?

2. Did the trial court, without making a "specific finding that any of the jury answers or findings, in themselves, justifies the granting of the new trial," abuse its discretion by substituting its judgment for the jury's and granting a new trial based on the legally inappropriate reason that, "in totality," the "verdict is against the great weight and preponderance of the admissible evidence"?

3. Did the trial court abuse its discretion in granting Plaintiffs' motion for new trial "for the reasons set forth in the motion and presented during the hearing" when:

a. the fee agreement does not unambiguously establish that the parties intended to pay attorney's fees out of the recovery of a business;

b. the evidence is legally and factually sufficient to support the jury's findings on Davenport's affirmative defenses that Plaintiffs are (i) estopped from seeking an ownership interest and (ii) waived their purported right to seek an ownership interest; and

c. a new trial is not necessary to obtain a jury finding on Davenport's additional affirmative defense of unconscionability?

4. Did the trial court additionally abuse its discretion in vacating the judgment in its entirety when Plaintiffs abandoned many of their claims at trial and never challenged the jury's adverse findings on other claims, and the trial court did not articulate any reason -- let alone a valid and correct reason -- for resurrecting and granting a new trial on those claims?

INTRODUCTION

"The right of trial by jury shall remain inviolate," and the importance of protecting that right has long been recognized by Texas courts. TEX. CONST. art. I, § 15. The trial court vitiated this right and, in the process, undermined public confidence in the judicial system by substituting its judgment for the jury's verdict and granting a new trial without articulating any valid and correct reason for doing so. This is precisely why "[a]ppellate courts must be able to conduct merits-based review of new trial orders," and mandamus relief is warranted here. *In re Toyota Motor Sales, U.S.A., Inc.*, 407 S.W.3d 746, 758 (Tex. 2013).

In this case, Dean Davenport entered into a contingency fee agreement under which he agreed to pay his attorneys a percentage of "the total sums recovered" in litigation. (App. D) Under that agreement, Davenport paid his attorneys approximately $500,000 based on the "sums" (or money) they actually recovered. Nonetheless, the attorneys filed suit, alleging that the fee agreement supposedly gave them an ownership interest in portions of two companies Davenport purchased or acquired as part of the settlement of the underlying litigation.

After a three-week trial, the jury disagreed. At Plaintiffs' urging, the trial court submitted an issue regarding the interpretation of the fee agreement, and the jury found that Davenport did not agree to give the attorneys an ownership interest. (App. B at 5) And regardless of the interpretation of the fee agreement, the jury

further found that the attorneys (1) are estopped from seeking an ownership interest and (2) waived their purported right to seek an ownership interest. (*Id.* at 16-17) Based on these amply supported jury findings, the trial court correctly rendered judgment denying the attorneys any relief on their claim for an ownership interest. (App. C)

But after the attorneys' motion for new trial was overruled by operation of law and all parties appealed to this Court, the trial court -- on the last day it had jurisdiction -- suddenly reversed course, nullified the jury's findings, and granted a new trial based on three reasons that are not supported by Texas law or the extensive trial record:

(1) the trial court's finding that the fee agreement is "unambiguous";

(2) even though the trial court "does not make a specific finding that any of the jury answers or findings, in themselves, justifies the granting of the new trial," the trial court's finding that, "in totality," the "verdict is against the great weight and preponderance of the admissible evidence"; and

(3) the "reasons set forth in the motion [for new trial] and presented during the hearing."

(App. A) None of these reasons can withstand a merits-based review.

As a threshold matter, the trial court's ruling that the fee agreement is unambiguous does not itself support a new trial. To grant a new trial, the trial court was required, at a minimum, to conclude the fee agreement is unambiguous in the *attorneys*' favor. If the agreement is unambiguous in Davenport's favor or if

it is ambiguous, the attorneys would not be entitled to a new trial. For at least two reasons, the fee agreement and Texas law unambiguously support Davenport's position that the attorney's fees would be calculated based on the total monies recovered -- not any non-cash benefits or ownership interest:

- the fee agreement does not expressly provide that attorney's fees will be calculated on non-cash benefits, as required by *Levine v. Bayne, Snell & Krause, Ltd.*, 40 S.W.3d 92 (Tex. 2001), to recover an ownership interest as a contingency fee; and
- the plain meaning of the term "total sums recovered" limits the contingency fee to a share of any monies recovered.

Alternatively, and at worst, the fee agreement is ambiguous, and the jury properly resolved that ambiguity in Davenport's favor. There is simply no valid basis under which the fee agreement can be construed, as a matter of law, to give the attorneys an ownership interest in Davenport's companies.

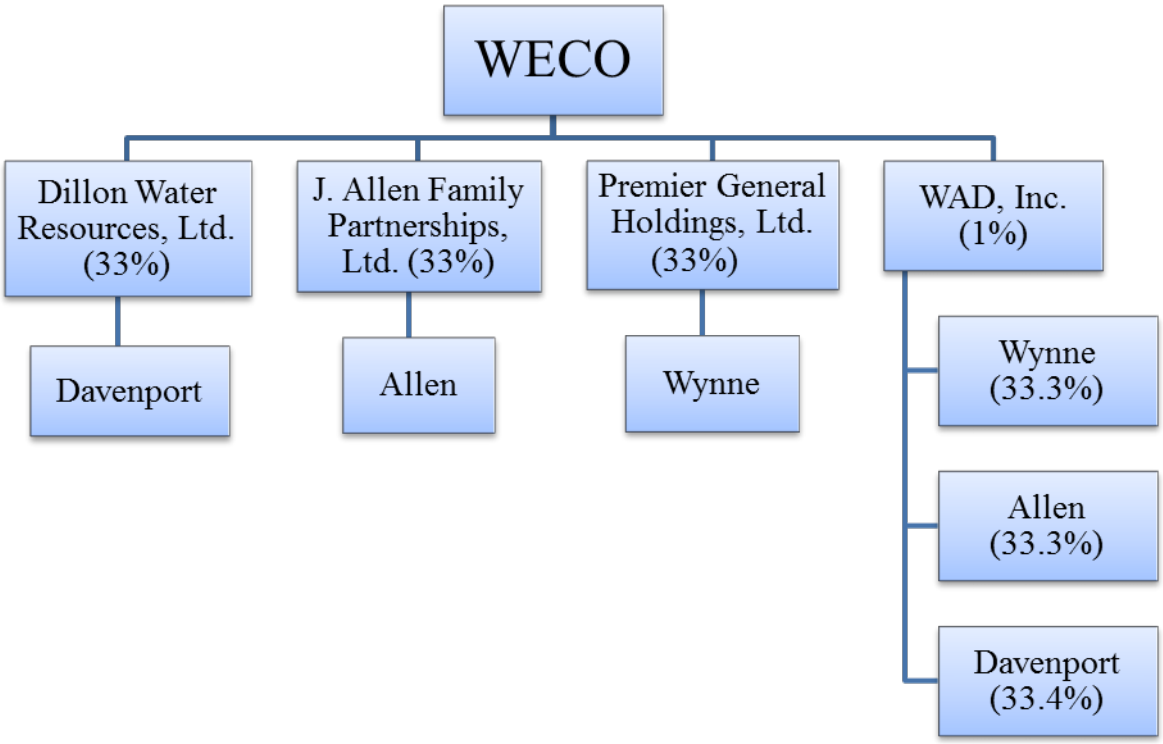
A new trial is also not warranted even if the fee agreement could be construed in the attorneys' favor. Either of the jury's findings on Davenport's affirmative defenses of estoppel and waiver is alone sufficient to bar the attorneys' claim for an ownership interest, and the evidence overwhelmingly supports those findings. The trial court apparently agreed, because it did "not make a specific finding that any of the jury answers or findings, in themselves, justifies the granting of the new trial." (App. A) Nonetheless, the trial court granted a new trial based on its view that, "in totality," the "verdict is against the great weight and

preponderance of the evidence." (*Id.*) This is not a legally appropriate basis to grant a new trial, and the trial court was not free to substitute its judgment for the jury's verdict. *See In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 212 (Tex. 2009) (a trial court has no discretion to "substitute his or her own views for that of the jury").

Because a merits-based review of the reasons set forth in the new trial order establish that those reasons are not valid and correct, the trial court abused its discretion in granting a new trial. Accordingly, mandamus relief is necessary to compel the trial court to vacate its order granting a new trial and reinstate judgment on the verdict.

STATEMENT OF FACTS

The origins of this dispute can be traced to 1999 when Dean Davenport, James Allen, and Mark Wynne formed Water Exploration Co., Ltd. ("WECO") to find, drill for, and produce commercial drinking water. (7.MR.13-48 [DX:9]) Davenport, Allen, and Wynne each owned a 33% interest in WECO through their respective limited partnerships, and WAD, Inc. owned the remaining 1% interest and served as WECO's general partner:



(7.MR.43 [DX:9]; 4.MR.55-59 [PX:4 at Ex. B])

Davenport files suit against Allen and Wynne. By 2006, the relationship between the partners soured after Allen and Wynne claimed Davenport had forfeited his interest in WECO. (*See* 4.MR.12-24 [PX:4]; 3.MR.395-402, 1881-82) As a result, Davenport and Dillon Water Resources, Ltd. ("Dillon), represented by Haynes and Boone, LLP, filed suit against Allen, Wynne, and their partnerships, seeking (in principal part) a declaratory judgment that Dillon still owned a 33% interest in WECO. (4.MR.12-24 [PX:4]; 3.MR.395-404) Through the efforts of Haynes and Boone, the trial court granted partial summary judgment

that Dillon "is now and always has been a partner in good standing in WECO." (4.MR.126-41 [PX:12]; 4.MR.184-85 [PX: 31]; 3.MR.410-13, 1885-86)

Davenport enters into a contingency fee agreement with Hall & Bates, LLP. In early 2008, Davenport decided to switch attorneys because he felt no progress was being made in the case. (3.MR.1883) Davenport contacted Blake Dietzmann and Tom Hall about taking over the case. (3.MR.390, 1883-85) After Hall reviewed the file and conducted legal research, he concluded that they had "a real good chance at prevailing on [a] conversion theory" under which they "were going to get something like a [$]50 to $70 million verdict against Wynne and Allen." (3.MR.375)

Hall and Dietzmann subsequently discussed the conversion theory with Davenport and expressed their assessment that they could "get a big monetary verdict against [Allen and Wynne]" for converting Dillon's one-third interest in WECO. (3.MR.657, 1885-86, 1895) Thereafter, Davenport terminated his relationship with Haynes and Boone, and met with Hall at Hall's law firm (Hall & Bates, L.L.P.) to review and sign a fee agreement. (3.MR.653, 1887-89)

The agreement was based on Hall's form contract for personal-injury cases. (3.MR.660-62, 745-46) Before signing it, there was no discussion about (1) using the conversion theory to recover Allen's and Wynne's interest in WECO, (2) Davenport getting ownership of the entire company and paying the attorneys by

giving them a percentage of the company (or the cash value of an ownership interest), or (3) Davenport becoming partners with Hall and Dietzmann. (3.MR.1893-94; *see* 3.MR.757) To the contrary, because Hall had previously explained that there was "going to be a big cash recovery" on the conversion theory, Davenport believed the attorney's fee would be calculated based on any "monies recovered." (3.MR.1894-96; *see* 3.MR.649-50) That explanation was consistent with Davenport's past experience with two contingency fee agreements (including one with Dietzmann), which also involved the recovery of money. (3.MR.1895)

Without being advised to seek independent counsel (*see* 3.MR.2331-35), Davenport entered into a Contract of Employment and Power of Attorney ("Fee Agreement") with Hall & Bates, L.L.P. in March 2008. (7.MR.12 [DX:1; App. D]) Davenport signed the agreement as the "Client" on his own behalf and on behalf of 5D Drilling and Pump Service, Inc. ("5D Drilling") and Dillon. (*Id.*) Hall and Dietzmann signed the agreement on behalf of Hall & Bates, L.L.P. (*Id.*)[1] In relevant part, the Fee Agreement provides:

[1] The agreement misnames Dillon as "Dillon Water Services, L.P." and misspells Dietzmann. (*Id.*; *see* 3.MR.647-48, 650-52, 957-58)

> Client agrees to sell, transfer, assign and convey to HALL & BATES, L.L.P AND BLAKE DIETZMAN [sic] an undivided interest in the above claim to be calculated as follows:
>
> Forty percent (40%) of the gross amount recovered . . . .
>
> By "GROSS AMOUNT" is meant the *total sums* recovered.

(App. D, emphasis added)

Notably, the Fee Agreement nowhere provides that the attorneys were entitled to a share of any non-cash benefits -- let alone that the attorney's fees could include an ownership interest in WECO and WAD. (*See id*; 3.MR.1796, 2196) Rather, it simply provides that attorney's fees would be calculated on "the total sums recovered." (App. D) This language further confirmed Davenport's understanding that attorney's fees would be based on any money recovered. (3.MR.1896)

The Fee Agreement also provides that Hall & Bates and Dietzmann would pay all reasonably necessary expenses incurred in the prosecution of the case, and that such "*sums* shall be repaid by Client out of any *monies* recovered." (App. D, emphasis added) Finally, Davenport acknowledged that "any proceeds from this claim are to be paid jointly to client and HALL & BATES, L.L.P AND BLAKE DIETZMAN [sic]," and Davenport agreed to "endorse any and all drafts for the purpose of depositing in the trust account of attorney for disposition." (*Id.*)

Davenport prevails at trial against Allen and Wynne, but is advised by his attorneys to settle the case because the jury's verdict will not stand up on appeal. Based, in part, on concerns about the viability of the conversion theory, Hall recommended that Davenport also retain an appellate attorney, Tim Patton. (3.MR.448, 675-78) Davenport agreed to give Patton's firm a 13% contingency fee, with Hall & Bates agreeing to reduce its contingency fee from 40% to 33.5%. (3.MR.448-51, 771-72, 1896-97; *see* App. D)

After a January 2009 trial, the jury found, in relevant part, that Allen and Wynne converted Dillon's partnership interest in WECO and that the value of Dillon's interest was $70,000,000. (5.MR.27-34 [PX:60]) But despite this great result, Hall, Patton, and Dietzmann gave Davenport a "pessimistic" view that "the verdict probably wouldn't have much chance at all to stand up on appeal." (3.MR.1188, 1791-92, 1901-02; *see* 3.MR.758-60, 2229) Among other issues, there was uncertainty concerning whether an intangible property interest like a partnership interest can even be converted under Texas law. (*See* 3.MR.456-57, 1186-87)[2] The attorneys thus devised a strategy to try to quickly settle the case

[2] Further, reconciling the jury's finding that Dillon's partnership interest in WECO was converted (5.MR.33 [PX 60 at 7]) with the trial court's summary judgment order that Dillon "is now and always has been a partner in good standing in WECO" (4.MR.184-85 [PX 31]) would have been difficult. (*See* 3.MR.758-60, 1901-02)

under which the "first taker [between Allen and Wynne] gets a very serious discount." (7.MR.91 [DX:101]; *see* 3.MR.1902-03)

Davenport settles with Allen. Allen entered into a settlement with Davenport in March 2009. (7.MR.442-82 [DX:251]) Under that settlement, Allen agreed to pay $200,000 to Dillon. (*Id.* at 443) Upon receipt of that $200,000, Davenport paid Hall & Bates $59,500 as its contingent share of the "sums recovered" in the settlement. (7.MR.51 [DX:28]; *see* 3.MR.503-05) Allen also agreed to transfer his 33% interest in WECO and WAD to Dillon. (7.MR.443-44 [DX:251]) In return, Davenport and Dillon assigned an 8% overriding royalty interest on WECO's primary leases to Allen. (7.MR.446, 477-80 [DX:251])

Hall negotiated and drafted the settlement agreement. (3.MR.1904-06) During and after the settlement, Hall and Dietzmann never asked Davenport to transfer an ownership interest in WECO and WAD to them as part of the fees owed under the Fee Agreement. (3.MR.1910-11, 1924-25)

With Allen out of the case, the trial court (after applying a settlement credit) rendered judgment against Wynne and Premier General Holdings ("Premier") for approximately $60 million. (5.MR.156-62 [PX:88]) Wynne and Premier appealed (*see* 5.MR.243 [PX:166]; 3.MR.720-21), and Hall and Patton became even more pessimistic about recovering from Wynne under the judgment (*see* 7.MR.90 [DX:94]).

As the attorneys advised Davenport, Wynne did not have much to lose because "his only real asset is his interest in WECO -- which realistically is not subject to execution." (*Id.*) Thus, Wynne had no incentive to settle unless Wynne "gets paid some serious money or a very substantial override." (*Id.*) Further, the attorneys warned Davenport that "the downside of an appeal is not just losing the $60M judgment" against Wynne; rather, "[i]t is losing the $60M judgment and [Dillon's original] 1/3 interest in WECO" from Wynne's appeal of the summary judgment order. (*Id.*; *see* 3.MR.1188-89) Based on these concerns, the attorneys advised Davenport that "he might have to give Wynne a better deal than Allen." (7.MR.90 [DX:94]; *see* 3.MR.1925-26)

Davenport pays additional attorney's fees for "sums recovered." To put further pressure on Wynne and delay his appeal, Davenport's legal team filed an involuntary bankruptcy petition against Premier. (7.MR.220-21 [DX:190]; 3.MR.430, 2229)[3] Over Wynne's opposition, Hall and Dietzmann also litigated and successfully obtained an order from the trial court to distribute WECO funds held in the trial court's registry to Dillon. (7.MR.105-08 [DX:141]; 7.MR.142-44

[3] Although the Fee Agreement provides that Hall & Bates would "pursue Client's claim arising out of business dealings with WECO" (App. D), Hall brought in a bankruptcy attorney (Robert Barrows), and later charged Davenport for those attorney's fees as expenses incurred in the case (7.MR.78-81 [DX:72]; 3.MR.378, 577). But after Barrows prematurely filed the bankruptcy petition, and thereby subjected Dillon to a counterclaim and potential liability, Davenport was forced to hire another bankruptcy attorney (Elliott Cappuccio) to take over and to pay him $141,000 in additional fees for his services. (3.MR.1930-33, 2226, 2229-30)

[DX:145]; *see* 3.MR.547-51, 1936-38) Because these monies constituted "sums recovered" in a "claim arising out of business dealings with WECO" (App. D), Dillon promptly paid Hall & Bates an additional $297,813.30 in attorney's fees as their contingent share (7.MR.49-50 [DX:26]; 3.MR.838-39, 1936-40, 2066).

In total, Dillon and Davenport paid Hall & Bates $357,313.30, as well as $141,569.35 to Patton. (7.MR.199 [DX:163]; 3.MR. 2627)[4] All of those sums were paid to Hall & Bates as attorneys -- not as a partner in WECO. (7.MR.199 [DX:163]; 7.MR.216-19 [DX:182]; 3.MR.840-42)

Davenport settles with Wynne by buying his interest for $3,300,000. In July 2010, Davenport and Wynne attended mediation. (*See* 7.MR.103 [DX:139]; 3.MR.1964) Although the jury had found that a one-third interest in WECO was supposedly worth $70 million (5.MR.34 [PX:60 at 8]), Hall advised Davenport and Dietzmann that a one-third interest was only worth $1.2 million before discounts for lack of control and marketability or $850,000 after discounts. (7.MR.53-54 [DX:58]; 3.MR.1974-77) When Davenport informed Hall, Dietzmann, and Patton that he had secured funds to end the litigation (by buying Wynne out) and asked them if they wanted to contribute any money, the attorneys declined. (3.MR.1965-68)

[4] Hall and Dietzmann had a separate agreement about how they were going to split the fees paid to Hall & Bates. (3.MR.391-92)

Thereafter, the parties entered into a Mediated Settlement Agreement. (7.MR.103-04 [DX:139]) Davenport and Dillon did not recover any money from that settlement. (*See id.*) Rather, Dillon agreed to *pay* Premier $3.3 million. (*Id.*) In return, Premier and Wynne agreed to transfer and assign 100% of their interests in WECO and WAD to Dillon and Davenport:

> It is the intent of the parties that any and all interest Premier, Wynne or their affiliates may have or have ever had in WECO [and] WAD . . . shall be assigned and transferred to Dillon and Davenport as set forth herein, and that after this transaction closes, Dillon will own 100% of WECO and Davenport will own 99% of WAD, Inc.

(*Id.*) Hall and Dietzmann signed the settlement agreement. (*Id.*) As a result, Davenport relied on it as assurance that he and Dillon were the sole owners of WECO and WAD. (3.MR.1968-69)

To fund the purchase of Wynne's interest in WECO and WAD, Dillon signed a promissory note for $3,000,000. (7.MR.147-52 [DX:154]) Davenport -- not any of the attorneys -- personally guaranteed the note. (7.MR.168-73 [DX:154])

Following mediation, the parties signed a formal Mutual Release and Settlement Agreement in August 2010. (7.MR.112-41 [DX:142]) This agreement also provided that Dillon and Davenport -- not any of the attorneys -- would own all of WECO and WAD "*free and clear of any and all liens and encumbrances and claims of any party of any kind whatsoever.*" (*Id.* at 117-18, emphasis added) Hall

reviewed the settlement agreement before Davenport signed it; he advised Davenport of its effect; and he obtained the bankruptcy court's approval of the agreement. (3.MR.701; 7.MR.124 [DX:142) And once again, Hall never asked Davenport to assign an ownership interest in WECO and WAD to him and Dietzmann. (3.MR.1814, 1981-82) To the contrary, he and Dietzmann confirmed that Davenport and Dillon would be the *sole* owners of WECO and WAD. (7.MR.103-04 [DX:139]; 7.MR.117-18 [DX:142])

After the case, Davenport operates WECO as the sole owner. The end result of the litigation was "totally different" than what Davenport and the attorneys contemplated at the beginning -- *i.e.*, a "big cash recovery" on the conversion theory. (3.MR.2003; *see* 3.MR.1894-95, 1920) Instead, Davenport expended over $3 million and gave up an overriding royalty interest worth millions of dollars to acquire Wynne's and Allen's interests in WECO and WAD. (7.MR.103-04 [DX:139]; 7.MR.112-41 [DX:142]; 7.MR.442-82 [DX:251]; *see* 7.MR.92 [DX:107]; 3.MR.775-77)

Nonetheless, Davenport thought Hall, Dietzmann, and Patton had done a "very good job." (3.MR.1995) Although Davenport had already paid those attorneys approximately $500,000 in fees for their work (and did not believe they were owed any more under the Fee Agreement), Davenport discussed paying them

a "lump sum [bonus] payment" if WECO was able to raise some money. (3.MR.1995-96, 2002-05, 2195)

Over the next sixteen months, Plaintiffs did nothing to act like they were part-owners of WECO or entitled to an ownership interest under the Fee Agreement. (*See, e.g.*, 3.MR.826, 829, 831, 833, 955, 1811-12, 2067-68) Meanwhile, Davenport worked for WECO without receiving a salary until 2011; he had to hire others to run one of his other businesses; and Davenport -- not any of the attorneys -- has been solely responsible for operating WECO. (3.MR.1911-12, 2068-69, 2193)

The attorneys meet with Davenport to discuss expenses. In October 2011 -- more than a year after the conclusion of the case -- Hall forwarded a firm expense report to Davenport for $226,795.01 in expenses, including over $20,000 in attorney's fees for bankruptcy counsel and $56,257.44 in finance interest charges (which had been accruing at $1,900 per month) from Advocate Capital. (6.MR.58 [PX:239]; 6.MR.59-67 [PX:244]; 3.MR.604-05, 2045) Around the same time, Hall signed a Case Ownership Confirmation form in which he stated that Hall & Bates "does not *presently hold any interest in or right to payment*" from various legal proceedings funded by Advocate Capital, including Davenport's lawsuit against Allen and Wynne. (6.MR.78-79 [PX:253], emphasis added; 3.MR.871-73)

To discuss the expenses and other issues, Hall and Dietzmann met with Davenport in January 2012. (3.MR.2046-47) At that meeting, Hall and Dietzmann could not even agree between themselves what, if anything, they were supposedly entitled to under the Fee Agreement. (3.MR.2047-48) Dietzmann "wasn't clear" if he had a right to an ownership interest, but thought Davenport owned him some additional fees. (3.MR.1827-28, 2047-48) Meanwhile, Hall claimed he was owed "an interest" and that Davenport could not "borrow enough money" for what Hall thought he was owed. (3.MR.2047-48)

Plaintiffs file suit against Davenport based on their claimed ownership interest in WECO and WAD. The next month, Hall and Dietzmann filed suit in their individual capacities against Davenport, Dillon, 5D Drilling, and 5D Water Resources LLC. (1.MR.15-30)[5] Three months later, Hall and Dietzmann added Thomas C. Hall, P.C. ("Hall P.C.") as a plaintiff and joined WAD, WECO, and other companies affiliated with Davenport (*i.e.*, Water Investment Leasing Company, LLC, Blue Gold Resources Management, LLC, Blue Gold Properties, LLC, and Blue Gold Development, LLC) as defendants. (1.MR.31-61)

Based on their claim that Dillon and Davenport were "'paid' in ownership interests," Hall, Dietzmann, and Hall P.C. (collectively, "Plaintiffs") alleged that

[5] Patton and Timothy Patton, P.C. were also originally named as plaintiffs. (1.MR.15) But they voluntarily dismissed their claims with prejudice before trial. (1.MR.771-72)

they were entitled to an ownership interest in WECO and WAD and that Davenport, Dillon, and 5D Drilling breached the Fee Agreement by refusing to "transfer ownership interests in WECO/WAD to Plaintiffs." (1.MR.41-44, 783-87) Plaintiffs also alleged Davenport breached the Fee Agreement by failing to pay expenses incurred in the underlying lawsuit. (1.MR.783-84) In addition, Plaintiffs asserted claims for ratification, quasi-estoppel, conversion, breach of fiduciary duty, fraud, violations of the Fraudulent Transfer Act, oppression, and conspiracy. (1.MR.787-94)

In response to Plaintiffs' claim for an ownership interest, Davenport moved for partial summary judgment that, under *Levine*, the unambiguous terms of the Fee Agreement do not permit recovery of an ownership interest in WECO or WAD. (1.MR.62-72) At Plaintiffs' urging (1.MR.208), the trial court denied the motion (1.MR.737-38).

The case proceeds to trial. The case proceeded to jury trial in September 2013 in the 225th Judicial District Court (the Honorable Peter Sakai, presiding) of Bexar County. (3.MR.13-17) Defendants moved the trial court to determine that the Fee Agreement is unambiguous and to construe it as a matter of law before trial. (2.MR.12-21) Once again, Plaintiffs opposed the motion (2.MR.29-35), arguing, in part, that the court "has the authority to analyze the agreement for ambiguity even when neither party has raised the issue" (2.MR.34; 3.MR.66).

Plaintiffs also opposed Davenport's motion in limine to exclude extrinsic evidence regarding the intended meaning of the Fee Agreement. (2.MR.36-45; *see* 3.MR.117-26)

At Plaintiffs' urging, the trial court denied Defendants' motion to determine that the Fee Agreement is unambiguous. (3.MR.87) Instead, over Defendants' objection (3.MR.362), the trial court allowed Plaintiffs to litter the trial record with their self-serving statements about the supposed meaning of the Fee Agreement and parol evidence that the parties allegedly discussed giving the attorneys an ownership interest (*see, e.g.*, 3.MR.367-72, 446-47, 498, 620-21). At the close of the evidence, Plaintiffs chose not to submit their claims for ratification, estoppel, fraudulent transfer, conspiracy, and breach of fiduciary duty, or to pursue any claims against 5D Water, Water Investment Leasing Company, Blue Gold Resources Management, Blue Gold Properties, and Blue Gold Development. (2.MR.212-13; *see* 2.MR.216-46)

The jury rejects Plaintiffs' interpretation of the Fee Agreement and also finds that Plaintiffs are estopped from seeking an ownership interest and have waived their right to seek an ownership interest. After a three-week trial, Plaintiffs asked the trial court -- without objection -- to submit an issue to the jury regarding the interpretation of the Fee Agreement. (2.MR.52, 223; *see* 3.MR.2628-34) The trial court determined the Fee Agreement was ambiguous (*see*

2.MR.107; 8.MR.19) and submitted Plaintiffs' requested issue (App. B at 5). In response to Question 1, the jury found that Davenport, on his own behalf and on behalf of Dillon and 5D Drilling, did not "agree in the Fee Agreement that Plaintiffs' attorneys' fees could include a 33.5% ownership interest in 2/3 of WECO and WAD." (*Id.*)

The jury also answered questions on Defendants' affirmative defenses of estoppel and waiver in Defendants' favor, finding that:

- Plaintiffs are "estopped from seeking an ownership interest in WAD and WECO" (Question 12); and
- Plaintiffs "waive[d] [their] right, if any, to seek an ownership interest in WAD and WECO" (Question 13).

(*Id.* at 16-17) The jury further found that:

- Davenport failed to comply with the Fee Agreement in connection with the payment of expenses out of any monies recovered (Question 5), and $226,795.01 would compensate Plaintiffs for reasonably necessary expenses incurred in the prosecution of the Allen/Wynne Lawsuit (Question 6);
- Davenport, Dillon, 5D Drilling, WAD, and WECO did not commit fraud (Questions 7 and 8);
- Plaintiffs had an attorney-client relationship with Davenport, 5D Drilling, or Dillon before the signing of the Fee Agreement (Question 14); and

- Plaintiffs complied with their fiduciary duties in entering into the Fee Agreement and after entering into the Fee Agreement (Questions 16 and 17).[6]

(App. B at 9-12, 18-19, 21)

After the adverse verdict, Plaintiffs proffer a new interpretation of the Fee Agreement. After trial, Plaintiffs acknowledged that the trial court "determined that the Fee Agreement was ambiguous" as to whether the terms "total sums recovered" include an ownership interest and that the jury "resolve[d] the ambiguity" in Davenport's favor. (2.MR.107; *see* 8.MR.19, 28) Nonetheless, Plaintiffs treated the trial as if it were a nullity by requesting a declaratory judgment that Davenport breached the Fee Agreement based on Plaintiffs' new interpretation that the agreement unambiguously entitles them to a proportionate share of the "gross profits" earned by Davenport, 5D Drilling, and Dillon in perpetuity. (2.MR.105-11) Plaintiffs also requested a post-trial accounting and audit to determine Plaintiffs' purported damages. (2.MR.109-10) Following a hearing, the trial court denied Plaintiffs' motion. (8.MR.106; *see* 2.MR.142-72)

[6] Given the jury's finding that Plaintiffs were not entitled to an ownership interest in WECO and WAD (App. B at 5), it is not surprising the jury found that Plaintiffs complied with their fiduciary duties (*id.* at 19, 21). Indeed, Davenport's breach-of-fiduciary-duty defense was based on the argument that, *if* the Fee Agreement gave Plaintiffs an ownership interest, then the attorneys breached their fiduciary duties to Davenport by not making that explicit or advising Davenport to seek the advice of independent counsel. (*See, e.g.*, 3.MR.76-79, 125, 2329-30, 2333-34)

The trial court awards Plaintiffs over $1.3 million in attorney's fees and renders judgment on the verdict. Plaintiffs subsequently moved for judgment notwithstanding the verdict, challenging the jury's interpretation of the Fee Agreement and its findings on estoppel and waiver. (2.MR.254-65) Because the jury found in Plaintiffs' favor on one of their breach-of-contract theories (*i.e.*, for $226,795.01 in unpaid expenses), Plaintiffs also moved the trial court to award them over $1.3 million in attorney's fees -- including all the fees they incurred in unsuccessfully pursuing their breach-of-contract claim for an ownership interest. (2.MR.268-80; *see* 2.MR.638-53; 8.MR.243, 253-55)[7]

After a contested bench trial on Plaintiffs' claim for attorney's fees (8.MR.217-347), the trial court granted Plaintiffs' motion for attorney's fees in its entirety, denied Plaintiffs' motion for JNOV, and rendered judgment on the verdict based upon "all the answers" to the jury charge (2.MR.756-57). On May 20, 2014, the trial court signed a final judgment that Plaintiffs recover from Davenport $226,795.01 in damages, as well as $1,386,745.96 in trial attorney's fees, up to $200,000 in conditional appellate attorney's fees, plus interest and costs. (2.MR.783-86 [App. C]) The court further rendered judgment that Plaintiffs take nothing from the other defendants and denied all relief not expressly granted. (*Id.*)

[7] The parties agreed to submit any claim for attorney's fees to the trial court after trial.

Plaintiffs' motion for new trial is overruled by operation of law. Thereafter, Plaintiffs filed a cursory motion for new trial on three grounds: (1) the jury's finding in Question 1 is "legally immaterial" because "[t]he contract unambiguously establishes that the parties intended to pay an attorneys' fee out of the recovery of a business"; (2) the jury's estoppel and waiver findings in Questions 12 and 13 are not supported by "legally sufficient evidence" and are "against the great weight and preponderance of the evidence"; and (3) a new trial is "appropriate for Defendants to present their unconscionability defense," which the jury never reached because of a conditional instruction. (2.MR.787-90)

At the hearing on Plaintiffs' motion, the trial court ordered the parties to mediate the case. (8.MR.408) Plaintiffs' motion for new trial was overruled by operation of law on August 3, 2014. (*See id.*; 2.MR.787-90); TEX. R. CIV. P. 329b(c). Defendants timely appealed to this Court (2.MR.839), and two weeks later, Plaintiffs filed a cross-appeal (2.MR.846).

The trial court grants a new trial. After the trial court learned that mediation "resulted in no settlement" of the case -- and days before the expiration of its plenary power -- the trial court sent a letter to all counsel "find[ing] that the verdict of the jury is against the great weight and preponderance of the admissible evidence." (2.MR.848-50) Although the court was of the opinion that this finding was alone "sufficient to justify its ruling," the court further stated that:

- it found the contract is "unambiguous"; and

- after taking note of the jury's answers to unrelated issues (Questions 5, 6, 14, 15, and 17) regarding (1) Davenport's alleged failure to comply with the Fee Agreement by failing to pay litigation expenses, (2) the existence of an attorney-client relationship before the signing of the Fee Agreement, and (3) whether Plaintiffs complied with their fiduciary duties, "the Court does not make a specific finding that any of the jury answers or findings, in themselves, justifies the granting of the new trial, but rather the Court finds that the Court findings, as stated herein, the admissible testimony of the trial and the jury's answers be taken, in totality, in determining that the verdict is against the great weight and preponderance of the admissible evidence."

(*Id.*)

In so ruling, the trial court never construed the Fee Agreement. (*See id.*) Nor did the trial court address the jury's findings on Defendants' affirmative defenses of waiver and estoppel (*see id.*) -- each of which is alone sufficient to support the take-nothing judgment on Plaintiffs' claim for an ownership interest.

The trial court directed Plaintiffs' counsel to draft and submit an order to opposing counsel for approval as to form only. (*Id.*) Plaintiffs' proposed order, however, did not bear any resemblance to the trial court's letter rulings. (*Compare id. with* 2.MR.851-54) Instead, the proposed order interpreted the Fee Agreement in Plaintiffs' favor and concluded that the evidence is legally or factually insufficient to support the jury's findings on estoppel and waiver. (2.MR.853-54) Because Plaintiffs' proposed order did not "accurately reflect the actual substance

or basis" of the trial court's rulings, Defendants objected to the form of the order. (2.MR.889)

Undaunted, Plaintiffs submitted a revised order. (2.MR.890-94) Although this revised order parroted selected *parts* of the trial court's letter ruling, it also contained an extraneous (and inconsistent) rationale for ordering a new trial based on "the reasons set forth in the motion [for new trial] and presented during the hearing." (*See id.*) Nonetheless, on the 105th day after rendering judgment, the trial court promptly signed the revised order drafted by Plaintiffs, granted Plaintiffs' motion for new trial, and vacated the judgment in its entirety. (2.MR.895-98 [App. A])

ARGUMENT

Although a trial court has discretion to grant a new trial for "good cause," TEX. R. CIV. P. 320, "that discretion is not limitless." *In re Columbia Med. Ctr.*, 290 S.W.3d at 210. A trial court has no discretion in determining what the law is or applying the law to the facts. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135 (Tex. 2004). An appellate court may review an order granting a motion for new trial in a mandamus proceeding. *See In re Toyota Motor*, 407 S.W.3d at 762.

In *In re United Scaffolding*, 377 S.W.3d 685 (Tex. 2012), the Texas Supreme Court set out standards for orders granting new trials. At a minimum, the order must (1) state "a reason for which a new trial is legally appropriate," and

(2) be "specific enough to indicate that the trial court did not simply parrot a pro forma template, but rather derived the articulated reasons from the particular facts and circumstances of the case at hand." *Id.* at 688-89.

But even if a trial court signs an order for a new trial that facially complies with the requirements of *Columbia Medical Center* and *United Scaffolding*, "an appellate court may conduct a merits-based review of the reasons given." *In re Toyota Motor*, 407 S.W.3d at 762. Under *Toyota Motor*, "[s]imply articulating understandable, reasonably specific, and legally appropriate reasons is not enough; the reasons must be *valid* and *correct*." *Id.* at 759 (emphasis added). "If the record does not support the trial court's rationale for ordering a new trial," mandamus relief should issue. *Id.* at 749. That is precisely the case here.[8]

To justify the granting of a new trial on Plaintiffs' claim for an ownership interest, the trial court was required to overcome at least three insurmountable jury findings:

[8] In the wake of *Toyota Motor*, several courts have conducted a merits-based review of new trial orders and granted mandamus relief. *See In re Health Care Unlimited, Inc.*, 429 S.W.3d 600, 601-04 (Tex. 2014); *In re Whataburger Restaurants LP*, 429 S.W.3d 597, 598-600 (Tex. 2014); *In re United Servs. Auto. Ass'n*, ___ S.W.3d ___, No. 01-13-00508-CV, 2014 WL 4109756, at *1-17 (Tex. App.—Houston [1st Dist.] Aug. 21, 2014, orig. proceeding); *In re Stearns*, No. 02-14-00079-CV, 2014 WL 1510059, at *1-2 (Tex. App.—Fort Worth Apr. 17, 2014, orig. proceeding) (mem. op.); *In re Baker*, 420 S.W.3d 397, 399-405 (Tex. App.—Texarkana 2014, orig. proceeding); *In re City of Houston*, 418 S.W.3d 388, 390-99 (Tex. App.—Houston [1st Dist.] 2013, orig. proceeding).

- Davenport did not agree to give Plaintiffs an ownership interest (Question 1);
- Plaintiffs are estopped from seeking an ownership interest (Question 12); *and*
- Plaintiffs have waived their right, if any, to an ownership interest (Question 13).

There is no basis under Texas law and this record to overcome any of these jury findings -- let alone *all* of them. In short, nothing supports the trial court's stated rationale (and arbitrary decision) to order a new trial.

I. The trial court abused its discretion in ordering a new trial based on its finding that the Fee Agreement is unambiguous.

The trial court's first basis for granting a new trial was its post-judgment "find[ing]" that the Fee Agreement is "unambiguous" in light of the circumstances present when the parties entered into the contract. (App. A) But this finding is not a "legally appropriate" basis to grant a new trial because, irrespective of the interpretation of the Fee Agreement, the jury's amply supported findings on estoppel and waiver independently bar Plaintiffs' claim for an ownership interest. *See In re United Servs. Auto. Ass'n*, 2014 WL 4109756, at *5 ("good cause" for granting new trial exists "only if 'the error complained of affected the result'").

In any event, the Fee Agreement cannot be construed in *Plaintiffs'* favor as a matter of law. Because the trial court's finding of no ambiguity does not constitute good cause or a "valid and correct" reason to grant a new trial, the trial court

abused its discretion in relying on that finding to order a new trial. *See In re Toyota Motor*, 407 S.W.3d at 759-60.

A. The Fee Agreement unambiguously provides that attorney's fees would be calculated based on the total monies recovered -- not any non-cash benefits or ownership interests in WECO and WAD.

If the trial court had correctly construed the contract under Texas law, only one conclusion can be reached: the Fee Agreement unambiguously supports Davenport's position that Plaintiffs are not entitled to any ownership interests in WECO and WAD. Alternatively, and at worst, there is an ambiguity in the Fee Agreement that the jury properly resolved in Davenport's favor. In either case, a new trial is unwarranted. There is simply no circumstance under which the Fee Agreement can correctly be construed as a matter of law in Plaintiffs' favor.

1. To recover an ownership interest as a contingency fee, the fee agreement must expressly provide that attorney's fees will be calculated on non-cash benefits.

Under Texas law, a contract between an attorney and client is not an ordinary arms-length contract. Thus, special rules govern the interpretation of attorney-client fee agreements. *See Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 560 (Tex. 2006) ("When interpreting and enforcing attorney-client fee agreements, it is 'not enough to simply say that a contract is a contract. There are ethical considerations overlaying the contractual relationship.'"). Because the object of a fee agreement is that the client be informed, "[a] tribunal should

construe a contract between client and lawyer as a reasonable person in the circumstances of the client would have construed it." *Anglo-Dutch Petroleum Int'l, Inc. v. Greenberg Peden, P.C.*, 352 S.W.3d 445, 451 (Tex. 2011).

Here, any interpretation of the Fee Agreement in Plaintiffs' favor is not only unreasonable and unsupported by the plain language of the contract, it violates Texas law. Under longstanding Texas law, when an attorney seeks to collect a contingent fee based on the client's recovery of non-cash benefits, the attorney must specifically state so in the fee agreement because "the lawyer is better able than the client to predict and provide for fee arrangements based on recoveries diverging from the traditional payment actually received." *Levine v. Bayne, Snell & Krause, Ltd.*, 40 S.W.3d 92, 95 (Tex. 2001). In *Levine*, the Texas Supreme Court thus recognized that "*the burden should fall on the lawyer to express in a contract with the client whether the contingent fee will be calculated on non-cash benefits as well as money damages*." *Id.* (emphasis added).

Placing this burden on the attorney is justified by (1) the attorney's sophistication, (2) the relationship of trust between attorney and client, and (3) the attorney's duty to inform the client of the basis or rate of the fee at the outset of the matter. *Id.* at 95-96. The rule also furthers public policy by "encouraging better communication and thereby reducing later disputes about what was communicated." *Id.* at 96. These principles are particularly applicable here

because the jury found that Plaintiffs had an attorney-client relationship with Davenport *before* the signing of the Fee Agreement (App. B at 18), and Plaintiffs have never challenged that finding (*see* 2.MR.254-65, 987-90).[9] Moreover, the parties sharply dispute what was communicated about the contingent fee. (*Compare* 3.MR.1889-96 *with* 3.MR.367-76, 414-26, 431-33)

The Texas Supreme Court's holding in *Levine* that the lawyer has the burden to express in the fee contract "whether the contingent fee will be calculated on non-cash benefits as well as money damages," 40 S.W.3d at 95, is squarely on point and controlling. The Fee Agreement nowhere provides that the contingent fee "will be calculated on non-cash benefits as well as money damages." *Id.* Rather, it simply provides that the fee would be calculated based on a percentage of "the gross amount recovered," and it specifically defines "GROSS AMOUNT" as "the *total sums* recovered." (App. D, emphasis added) The trial court abused its discretion in disregarding *Levine* and concluding instead that the Fee Agreement entitles Plaintiffs to a contingent fee based on non-cash benefits or ownership interests in WECO and WAD when no such language expressly appears in the agreement. *See In re Prudential*, 148 S.W.3d at 135 (a trial court has no discretion in applying the law to the particular facts).

[9] During closing argument, Plaintiffs urged the jury to answer Question 14 affirmatively and find an attorney-client relationship before the signing of the Fee Agreement. (3.MR.2764-65)

If anything, the fee provision at issue in this case is the antithesis of a contingent-fee agreement that expressly and unambiguously provides for fees based on a client's non-monetary recovery. In stark contrast to the fee provision here, courts have repeatedly reviewed other contingency-fee agreements that specifically provide for the payment of fees based on a client's recovery of property or other non-monetary interest:

- *Archer v. Griffith*, 390 S.W.2d 735, 738 (Tex. 1964) (contingent fee agreement provided that attorney would be entitled to one-fourth of "*whatever property either personal, real or money* which shall be determined to be [client's] either through settlement or suit") (emphasis added);

- *In re Akin Gump Strauss Hauer & Feld, LLP*, 252 S.W.3d 480, 483 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding) (agreement based the recovery of contingent fees on: "(i) all cash, monies, or substantial equivalent recovered by Tanox as a result of the litigation, plus (ii) the economic value to Tanox of *all tangible property* (*real, personal, or mixed*) obtained for Tanox as a result of the litigation") (emphasis added);

- *In re Dykeswill, Ltd.*, 365 B.R. 683, 686 (S.D. Tex. 2007) (contingent fee agreement granted attorney "50% of any recovery that is made whether it be money, *property, tangible or intangible rights, constructive trusts or other monetary benefits or thing of value*") (emphasis added).

Critically, there is no such similar provision in the Fee Agreement here. Rather, the Fee Agreement only provides for the calculation of attorney's fees based on the "total sums recovered" in the underlying lawsuit. (App. D) And the only mention of ownership rights in the Fee Agreement provides that the attorneys "will *not take a fee out of the ownership*" of 5D Drilling and Dillon. (*Id.*, emphasis

added). Thus, as Dietzmann conceded, "the one thing that didn't make it into [the] contract" was that the attorneys "would get a fee out of the ownership" of Allen and Wynne. (3.MR.1796)

In the final analysis, the law imposes on Plaintiffs, as the attorneys who drafted the Fee Agreement, the duty to appreciate the importance of the words used in the agreement and to "detect and repair [any] omissions." *Anglo-Dutch*, 352 S.W.3d at 453. Thus, if Plaintiffs wanted the term "gross amount" or "sums" to include an ownership interest or other non-cash benefits, it was their duty to so specify in the Fee Agreement. They failed to do so, and the trial court's erroneous interpretation of the Fee Agreement in Plaintiffs' favor does not comport with Texas law or support the granting of a new trial after a merits-based review.

2. The plain meaning of the term "total sums recovered" limits Plaintiffs' contingency fee to a share of any monies recovered -- not ownership interests in two companies that Davenport purchased or acquired through a settlement.

Apart from the special rules that govern agreements between attorneys and clients, the plain language of the Fee Agreement unambiguously supports Davenport's interpretation and demonstrates why any contrary interpretation is not valid or correct. Specifically, the meaning of "sums" is at the heart of interpreting the Fee Agreement and, in particular, whether the agreement provides for a recovery of attorney's fees based on any property or non-cash benefits acquired by Davenport (as the trial court found post-judgment) or whether attorney's fees

should be calculated based on monies recovered by Davenport or Dillon (as Defendants contend and the jury determined).

When interpreting an agreement, contract terms are given "their plain, ordinary, and generally accepted meaning." *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996); *Fitzgerald v. Schroeder Ventures II, LLC*, 345 S.W.3d 624, 629 (Tex. App.—San Antonio 2011, no pet.); *see Epps v. Fowler*, 351 S.W.3d 862, 866 (Tex. 2011) (courts should "consult dictionaries to discern the natural meaning of a common-usage term not defined by contract"). And here, the word "sums" is subject to only one reasonable interpretation: it means "a quantity of *money*." BLACK'S LAW DICTIONARY 1573 (9th ed. 2009) (emphasis added); *see* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2289 (1986) (defining "sum" as "an indefinite or specified amount of money"); (*see also* 3.MR.637-40, 915-16 [other dictionaries defining "sum" as an amount of "money"]).[10]

Further, "[w]ords used in one sense in one part of a contract are, as a general rule, deemed to have been used in the same sense in another part of the instrument, where there is nothing in the context to indicate otherwise." *Gonzalez v. Mission*

[10] Hall himself uses this same meaning in his legal practice. Indeed, just days after entering into the Fee Agreement, Hall used the term "sums" to mean "money" in a demand letter he sent to Allen and Wynne and in an amended petition he filed on Davenport's behalf. (4.MR.146 [PX:23]; 4.MR.162, 166, 169 [PX:24 at 16, 20, 23]; 3.MR.630-35) Nonetheless, Hall took the incredulous position that his contingent fee agreement is the "only time" he uses the word "sums" to refer to something other than money. (3.MR.640)

Am. Ins. Co., 795 S.W.2d 734, 736 (Tex. 1990). The word "sums" is used twice in the same paragraph of the Fee Agreement that defines "gross amount":

> By "GROSS AMOUNT" is meant the total *sums* recovered. It is agreed that all reasonably necessary expenses incurred in the prosecution of the case . . . shall by paid by HALL & BATES, L.L.P. AND BLAKE DIETZMAN [sic] and, which *sums* shall be repaid by Client out of any monies recovered after the payment of attorney's fees.

(App. D, emphasis added)

The first use of the word "sums" plainly refers to the total amount of money the clients would recover in the underlying lawsuit. (*Id.*) The second use of the word "sums" similarly refers to the amount of money the clients would have to repay the attorneys for "expenses" out of any "monies" recovered after the payment of attorney's fees. (*Id.*) Indeed, Plaintiffs conceded that this second use of the term "sums" refers to "money." (3.MR.629) These consistent references to the word "sums," coupled with the plain and ordinary meaning of that term, make clear that the only reasonable meaning of "sums" is a quantity of money. *See Gonzalez*, 795 S.W.2d at 736.[11]

Even before the Texas Supreme Court's opinions in *Levine*, *Anglo-Dutch*, and *Hoover Slovacek*, the Dallas Court of Appeals interpreted a similar

[11] This interpretation is further confirmed by the next paragraph of the Fee Agreement which refers to "proceeds from this claim" and contemplates that the client will "endorse any and all drafts for the purpose of depositing in the trust account of attorney for disposition." (App. D)

contingency-fee provision in *Affiliated Computer Services, Inc. v. Kasmir & Krage, L.L.P.*, No. 05-98-00227-CV, 2000 WL 1702635 (Tex. App.—Dallas Nov. 15, 2000, pet. denied) (not designated for publication). In that case, the fee agreement provided that ACS would pay the law firm "thirty percent (30%) of all amounts . . . collected, by judgment or settlement." *Id.* at *1. ACS obtained a judgment for $11,250,000, but subsequently entered into a settlement agreement under which the opposing party agreed to (1) pay ACS $6,129,167 and (2) forgive a $5 million note. *Id.* at *1-2 & n.1. The law firm sued ACS based on the fee agreement, and the trial court granted summary judgment that the firm was entitled to 30% of $11,129,167 as "amounts collected." *Id.* at *1.

On appeal, ACS argued that the "amounts collected" did not include the forgiveness of the $5 million note, and thus, the law firm was only entitled to recover 30% of $6,129,167. *Id.* The court of appeals agreed and determined that the language of the fee agreement was "subject to only one reasonable interpretation" and therefore unambiguous. *Id.* The court also concluded that the plain meaning of "amount" refers to "something quantifiable" and that the plain meaning of "collected" is "to claim due and receive payment." *Id.* Because the extinguishment of the note was not an "amount collected," the court held that the trial court erred in holding that the law firm was entitled to 30% of the release of the $5 million note. *Id.* at *2.

The same reasoning applies with equal force here. Like ACS's agreement, the Fee Agreement here provides that the attorneys were entitled to a share of the "gross *amount recovered*," which was defined as the "total sums recovered." (App. D, emphasis added) Thus, the trial court erred in concluding that "sums recovered" unambiguously refers to ownership interests that Davenport and Dillon acquired or purchased in settlement agreements by (1) giving Allen an overriding royalty interest worth millions of dollars (7.MR.442-82 [DX:251]; *see* 7.MR.92 [DX:107]; 3.MR.775-77), and (2) paying Wynne $3.3 million (7.MR.103-04 [DX:139]; 7.MR.112-41 [DX:142]).

B. A contrary interpretation of the Fee Agreement is not reasonable, and even if it were, it is not the *only* reasonable interpretation.

Instead of applying the principles discussed above, the trial court adopted "the reasons set forth" in Plaintiffs' motion for new trial, including Plaintiffs' strained interpretation of the term "sums" that would include an ownership interest in a limited partnership and corporation. (App. A; *see* 2.MR.787-88) But that interpretation is not reasonable or supported by the language of the agreement, particularly when viewed from the client's perspective. *See Anglo-Dutch*, 352 S.W.3d at 453 (attorney-client agreements must be construed "from the perspective of a reasonable client").

1. Plaintiffs advanced multiple interpretations of the Fee Agreement.

Plaintiffs have acknowledged that "[a] contract is ambiguous when its meaning is uncertain and doubtful or is reasonably susceptible to more than one interpretation." (2.MR.817); *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). At the conclusion of the trial, the trial court "determined that the Fee Agreement was ambiguous." (2.MR.107; 8.MR.19) Although Plaintiffs now claim the Fee Agreement is unambiguous in their favor, Plaintiffs themselves offered at least three *different* interpretations of the Fee Agreement in the trial court.

Before filing suit, Hall and Dietzmann could not even agree between themselves as to the meaning of the Fee Agreement and whether they were entitled to an ownership interest. (3.MR.1827-28, 2047-48) At the outset of the lawsuit, Plaintiffs took the position that the Fee Agreement entitled them to a share of WECO's gross revenues before deducting royalties, overhead, or other costs. (1.MR.20-21; *see* 3.MR.1824-25) Plaintiffs later took the position that the Fee Agreement gave them "ownership interests in WAD, WECO and their assets, funds, contracts and accounts." (1.MR.786) And after the jury disagreed, Plaintiffs came up with another interpretation -- *i.e.*, the Fee Agreement supposedly entitles Plaintiffs to a "33.5 percent share of two-thirds of the gross profits earned" by Davenport, 5D Drilling, and Dillon in perpetuity. (2.MR.108)

Given that Plaintiffs have themselves proffered more than one interpretation of the Fee Agreement and cannot decide what it means, it is difficult to imagine how the trial court could find the Fee Agreement unambiguous in Plaintiffs' favor as a matter of law.

2. Any contrary interpretation of the Fee Agreement is nonsensical.

In urging the trial court to grant a new trial, Plaintiffs argued the Fee Agreement "mean[s] that they are entitled to recover their percentage attorneys' fees out of the *total recovery* by Davenport," including "any money recovered" and a "proportionate share of the ownership interest in WECO and WAD." (2.MR.819, emphasis added) But in so arguing, Plaintiffs (and, in turn, the trial court) ignore the actual terms of the Fee Agreement.

Critically, the Fee Agreement does *not* provide for attorney's fees to be calculated based on "the total recovery" by Davenport. (*See* App. D) Rather, it states that the fees would be calculated based on "the total *sums* recovered." (*Id.*, emphasis added) And in construing a contract, a court must "give effect to *all the provisions* of the contract so that none will be rendered meaningless." *Coker*, 650 S.W.2d at 393 (emphasis in original). By reading the term "sums" out of the Fee Agreement, the trial court violated this basic principle and impermissibly rewrote the agreement. *See American Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154,

162 (Tex. 2003) (courts may "neither rewrite the parties' contract nor add to its language").

The reason Plaintiffs read the term "sums" out of the Fee Agreement is self-evident: as discussed above, the plain and ordinary meaning of "sums" does not include an ownership interest in a company. Plaintiffs have even conceded that the term "'sums recovered' . . . certainly can and does mean a recovery of money." (2.MR.820; *see* 8.MR.130) That concession is fatal because it demonstrates that Davenport's interpretation is *reasonable* and supported by the plain, generally accepted meaning of the terms in the Fee Agreement. Indeed, "an indefinite or specified amount of money" is the primary definition of the word "sum." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2289 (1986); (*see* 3.MR.637-40, 915-16 [other dictionaries defining "sum" as an amount of "money"])

Nevertheless, Plaintiffs rely on alternative definitions of "sum" to suggest it also can refer to the "total" or "whole amount" of adding numbers together. (2.MR.821) There are at least three fundamental flaws with this argument.

First, the Fee Agreement specifically defines "gross amount" as the "*total* sums recovered." (App. D, emphasis added) And under well-settled Texas law, contractual provisions must be read to "give effect to *all the provisions* of the contract so that none will be rendered meaningless." *Coker*, 650 S.W.2d at 393

(emphasis in original). Reading the term "sums" to refer to the "total" (such that the "gross amount" would be defined as the "total total recovered") impermissibly renders the word "total" superfluous and is nonsensical. *See Ewing Constr. Co. v. Amerisure Ins. Co.*, 420 S.W.3d 30, 37 (Tex. 2014).

Second, although Plaintiffs also argued that "sums recovered" is not limited to money and includes the "total" from adding two numbers together (2.MR.821), Plaintiffs' broader interpretation of "sums" ultimately makes no difference. The issue is *not* whether "total sums recovered" can "*only* mean money recovered." (2.MR.820, emphasis in original) Rather, the issue is whether "total sums recovered" unambiguously includes "ownership interests" in a partnership and corporation. The answer to that question is a resounding "no." And tellingly, Plaintiffs have never proffered a definition of "sums" that includes an ownership interest. There are no such definitions. Nor are there any numbers to add together to give meaning to Plaintiffs' alternative (and illogical) definition of "sums."

Third, the interpretation also violates the established rule (discussed in Part I.A(2) above) that "[w]ords used in one sense in one part of a contract" are generally "deemed to have been used in the same sense in another part of the instrument." *Gonzalez*, 795 S.W.2d at 736. Here, the word "sums" is used twice in the same paragraph of the Fee Agreement (App. D), and even Hall admits that the second use of the term "sums" (when referring to the repayment of expenses by

the client) refers to "money" (3.MR.629). These consistent references to the word "sums," coupled with the plain and ordinary meaning of that term, make clear that the only reasonable meaning of "sums" is a quantity of money. At a minimum, it is *a* reasonable interpretation of the Fee Agreement. To the extent any other reasonable interpretations exist, the jury was properly tasked with resolving the ambiguity, and they did so in Davenport's favor. (App. B at 5)

Because the Fee Agreement does not expressly or unambiguously provide that the attorneys are entitled to a contingent fee based on non-cash benefits or ownership interests, the trial court's first stated reason for granting a new trial "lack[s] substantive merit." *In re Toyota Motor*, 407 S.W.3d at 762. The trial court thus abused its discretion in interpreting the Fee Agreement in Plaintiffs' favor as a matter of law and ordering a new trial.

3. The clause in the Fee Agreement providing that "the Attorneys would not take a fee out of the ownership" of 5D Water and Dillon does not unambiguously mean that Plaintiffs are entitled to an ownership interest in WECO and WAD.

Plaintiffs' reliance on other contractual language to concoct its insupportable interpretation of the Fee Agreement fares no better. For example, based on the provision that the "Attorneys will *not* take a fee out of the ownership" of 5D Water

and Dillon (App. D, emphasis added),[12] Plaintiffs inexplicably argued that "the parties *expressly* stated that the fee at issue might potentially be 'taken out of' the ownership of a business" (2.MR.822, emphasis in original). But it does not follow that a clause which specifically *prohibits* Plaintiffs from taking a fee out of ownership means the parties intended that Plaintiffs were *entitled* to take a fee out of other ownership interests. *See Schaefer*, 124 S.W.3d at 162 (courts cannot "rewrite the parties' contract nor add to its language"). At best, this clause raises an ambiguity that the jury resolved against Plaintiffs. It does not unambiguously support a contrary reading of the Fee Agreement as a matter of law.

4. Plaintiffs' reliance on the contractual provision regarding "proceeds" is also misplaced.

Equally meritless is the final contention advanced by Plaintiffs -- that the term "proceeds" (as used in the contractual provision that "any proceeds from this claim are to be paid jointly to client and Hall & Bates, L.L.P. and Blake Dietzman") is "not limited to money" (2.MR.823). Plaintiffs now suggest that, in addition to cash or money, "proceeds" also refers to amounts obtained by "the sale of property." (*Id.*) But this definition has no application here because Davenport did not sell any property or receive any "proceeds" from the sale of property.

[12] Hall inserted this clause into his form contract to forego any fee stemming from Haynes and Boone's successful efforts in confirming Dillon's pre-existing interest via summary judgment. (3.MR.1890-92)

Moreover, Plaintiffs impermissibly ignore the rest of the contractual provision, which contemplates that the client will "endorse any and all drafts for the purpose of depositing in the trust account of attorney for disposition." (App. D) Like the rest of the Fee Agreement, this provision also refers to cash or money that Davenport might recover -- not an ownership interest.

For these reasons, the trial court abused its discretion in granting a new trial based on its finding that the Fee Agreement is unambiguous. When this Court reviews the Fee Agreement on the merits, the contract is either (1) unambiguous in Davenport's favor or, (2) at worst, ambiguous, presenting a fact issue that the jury answered in Davenport's favor. In either case, Plaintiffs are not entitled to a new trial. There is simply no circumstance under which the Fee Agreement providing for fees to be calculated on "the total sums recovered" can be interpreted as a matter of law in Plaintiffs' favor to include an ownership interest in a limited partnership and corporation. Accordingly, mandamus relief should issue to order the trial court to withdraw its new trial order and reinstate the judgment on the verdict.

C. Because Plaintiffs requested the trial court to submit the interpretation of the Fee Agreement to the jury without objection, Plaintiffs waived their right to ask the trial court to construe the Fee Agreement in their favor after the verdict.

In any event, the trial court had no discretion to find the Fee Agreement "unambiguous" in Plaintiffs' favor after rendering judgment on the verdict because Plaintiffs waived their right to challenge the submission of the interpretation of the Fee Agreement to the jury.

At the end of the three-week trial, Plaintiffs did not object to the submission of a jury question concerning the interpretation of the Fee Agreement. (*See* 3.MR.2628-34) To the contrary, Plaintiffs specifically *requested* the very question the trial court submitted to the jury regarding contract interpretation. (*Compare* 2.MR.52 *with* App. B at 5)[13] As a result, Plaintiffs waived their right to claim, after the verdict, that the jury's finding in Question 1 is immaterial (and should be disregarded) because the Fee Agreement is unambiguous and the interpretation of an unambiguous contract is a question of law for the court:

> Because [plaintiff] did not object to the charge on the ground that it submitted a pure question of law involving the interpretation of an unambiguous lease to the jury, the error was not preserved and nothing is presented for review. Further, because [plaintiff] requested that the trial court include substantially the same question in the

[13] Before trial, Plaintiffs likewise opposed Davenport's motion to have the trial court determine the Fee Agreement was unambiguous and to construe it as a matter of law. (2.MR.29-35) And after the close of the evidence, Plaintiffs never moved for a directed verdict asking the trial court to interpret the Fee Agreement. (*See* 3.MR.2626-34)

> charge to the jury, [plaintiff's] contention is barred by the doctrine of invited error.

Haley v. GPM Gas Corp., 80 S.W.3d 114, 120 (Tex. App.—Amarillo 2002, no pet.).

Other Texas courts have reached the same result. For example, in *Furnace v. Furnace*, 783 S.W.2d 682 (Tex. App.—Houston [14th Dist.] 1989, writ dism'd w.o.j.), the court held that a party could not, following an unfavorable jury finding on the interpretation of an agreement, argue that they were entitled to judgment as a matter of law by the terms of the agreement when that party urged the trial court to submit the interpretation of the agreement to the jury. *Id.* at 685.

Similarly, in *Calce v. Dorado Exploration, Inc.*, 309 S.W.3d 719 (Tex. App.—Dallas 2010, no pet.), the court concluded that a party did not preserve the issue of whether the interpretation of a contract was properly left to jury because the party failed to object to the jury charge. *Id.* at 748-49. And in *Corpus Christi National Bank v. Gerdes*, 551 S.W.2d 521 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.), the court held that a bank which requested the submission of issues to the jury could not later complain that these were issues for the trial judge because "a litigant cannot ask something of a court and then complain that the trial court committed error in giving it to him." *Id.* at 525; *see also* TEX. R. APP. P. 33.1(a); *Sage Street Assocs. v. Northdale Constr. Co.*, 863 S.W.2d 438, 445-46 & nn.12-13 (Tex. 1993) (party tried ambiguity issue by consent by introducing

testimony on the interpretation of the contract and failing to object to the jury question).

For these reasons as well, the trial court had no discretion to disregard the jury's answer to Question 1, construe the Fee Agreement in Plaintiffs' favor, and grant a new trial.

II. The trial court abused its discretion in granting a new trial based on the legally inappropriate reason that, "in totality," the "verdict is against the great weight and preponderance of the admissible evidence."

A trial court abuses its discretion if its stated reason for granting a new trial is not "legally appropriate" and "valid." *In re Toyota Motor*, 407 S.W.3d at 759; *In re United Scaffolding*, 377 S.W.3d at 688-89. The trial court's second reason for granting a new trial -- as set forth in ¶ 2 of its order -- fails this test.

Remarkably, in ¶ 2, the trial court -- after noting with "great deference" the jury's answer to Question 1 and "tak[ing] note" of other jury answers that have nothing whatsoever to do with the dispositive issues (*i.e.*, the interpretation of the Fee Agreement and the jury's findings on Davenport's affirmative defenses of waiver and estoppel) -- stated that it "does not make a *specific* finding that *any of the jury answers or findings*, in themselves, justifies the granting of the new trial."[14] (App. A, emphasis added) Under the well-settled test for granting a new

[14] The trial court's reference to the jury findings in Questions 5, 6, 14, 15, and 17 does not make sense -- let alone support the grant of a new trial. Questions 5 and 6 deal with the

(Continued . . .)

trial, this should have been the end of the inquiry. Nevertheless, in the next breath, the trial court inexplicably found that, "in totality," the "verdict is against the great weight and preponderance of the admissible evidence." (*Id.*)

This unprecedented rationale for granting a new trial has never been recognized as a "legally appropriate" or "valid" basis for granting a new trial under TEX. R. CIV. P. 320. Because the sufficiency of the evidence must be reviewed "in light of the charge submitted," *Bradford v. Vento*, 48 S.W.3d 749, 754 (Tex. 2001), courts are simply not permitted to review a verdict "in totality" -- as the trial court impermissibly did here -- and conclude that it is "against the great weight and preponderance of the evidence." Rather, a factual sufficiency review must be conducted with respect to "*a* jury finding." TEX. R. CIV. P. 324(b)(2)-(3) (emphasis added). And tellingly, the Order does not "explain how the evidence (or lack of evidence) undermines [any of] the jury's findings." *In re United*

(Continued . . .)
completely separate and unrelated issue of whether Davenport breached the Fee Agreement by failing to repay litigation expenses (and is, in part, the subject of Davenport's appeal of the judgment). Further, both Plaintiffs and Davenport asked the jury to answer Question 14 affirmatively and find the existence of an attorney-client relationship before the signing of the Fee Agreement. (3.MR.2764-65, 2873-74) And the jury's findings in Questions 15 and 17 that Plaintiffs complied with their fiduciary duties proves nothing because Davenport's breach-of-fiduciary-duty defense was based on the argument that, *if* the Fee Agreement gave Plaintiffs an ownership interest, then the attorneys breached their fiduciary duties by not making that explicit or advising Davenport to seek the advice of independent counsel. (*See, e.g.*, 3.MR.76-79, 125, 2329-30, 2333-34) Because the jury found Plaintiffs were not entitled to an ownership interest under the Fee Agreement (App. B at 5), it is not surprising the jury found that Plaintiffs complied with their fiduciary duties (*id.* at 19, 21).

Scaffolding, 377 S.W.3d at 689. Nor can it, because the trial court expressly concluded that no *specific* jury finding justifies the granting of a new trial. (App. A) In any event, the extensive record, as detailed in the Statement of Facts and Part III, does not support a finding that the "verdict is against the great weight and preponderance of the evidence."

In nonetheless granting a new trial, the trial court has effectively substituted its judgment for that of the jury's based on the court's view that "the totality" of the evidence supports a different verdict or outcome. It did so despite the Texas Supreme Court's repeated admonition that a trial court has no discretion to "substitute[] its own judgment for the jury's" and that mandamus relief should issue if a court does so. *See In re United Scaffolding*, 377 S.W.3d at 689 ("[M]andamus would lie if the articulated reasons plainly state that the trial court merely substituted its own judgment for the jury's . . . ."); *In re Columbia Med. Ctr.*, 290 S.W.3d at 212 (a trial court's discretion "should not, and does not, permit a trial judge to substitute his or her own views for that of the jury without a valid basis"). In the final analysis, ¶ 2 of the new trial order is simply the trial court's impermissible attempt to avoid applying the law to the jury's findings because the court does not like the legal effect of those findings or the final outcome of the case. Because ¶ 2 does not state a "valid" or "legally appropriate" reason for

granting a new trial, the order cannot stand. *See In re United Scaffolding*, 377 S.W.3d at 688-89.[15]

III. The trial court abused its discretion in granting Plaintiffs' Motion for New Trial "for the reasons set forth in the motion and presented during the hearing."

The trial court's final omnibus basis for granting a new trial -- *i.e.*, "the reasons set forth in the motion [for new trial] and presented during the hearing" (App. A) -- was not contained in the trial court's letter ruling (*see* 2.MR.848-50) and was slipped in by Plaintiffs in the new trial order they drafted (2.MR.890-93). Nonetheless, it is equally meritless for multiple reasons.

To begin with, this broad incorporation of "the reasons" set forth in the motion and at the hearing states no reason at all and makes a mockery of the requirement that parties who choose to have their dispute resolved by a jury are "entitled to know why the verdict was disregarded." *In re Columbia Med. Ctr.*, 290 S.W.3d at 211. Moreover, Plaintiffs' rewrite of the trial court's letter ruling is not only inconsistent with the trial court's findings in its letter ruling, it makes the new trial order internally inconsistent. Indeed, in ¶ 2 of the order, the trial court "does not make a specific finding that *any* of the jury answers or findings, in

[15] If the Court does not order the trial court to vacate its new trial order and reinstate the judgment on the verdict, it should, at the very least, grant mandamus relief to require the trial court to provide a more "cogent and reasonably specific explanation of the reasoning that led the court to conclude a new trial was warranted." *Id.* at 688.

themselves, justifies the granting of the new trial." (App. A, emphasis added) But in blindly adopting "the reasons set forth in the motion [for new trial] and presented during the hearing" (*id.*), the trial court says just the opposite because Plaintiffs' motion was based on attacking the jury's specific findings in Questions 1 (interpretation), 12 (estoppel), and 13 (waiver) (*see* 2.MR.787-89).

In any event, a merits-based review of the three "reasons" argued by Plaintiffs in their motion (2.MR.787-90) and at the hearing (8.MR.349-412) shows those reasons also are "unsupported by the law or the evidence." *In re Toyota Motor*, 407 S.W.3d at 758.

A. The Fee Agreement does not unambiguously establish that the parties intended to pay attorney's fees out of the recovery of a business.

The first reason Plaintiffs urged in their motion and at a hearing for a new trial -- that the Fee Agreement "unambiguously establishes that the parties intended to pay an attorneys' fee out of the recovery of a business" and that the jury's finding in Question 1 is therefore "legally immaterial" (2.MR.787-88; 8.MR.352-59) -- is simply a rehash of their arguments described in Part I above and fails for the same reasons. It does not provide a "valid" and "correct" reason for the trial court to order a new trial. *In re Toyota Motor*, 407 S.W.3d at 759.

B. Regardless of the interpretation of the Fee Agreement, the jury's amply supported findings on the affirmative defenses of estoppel and waiver are alone sufficient to defeat Plaintiffs' purported right to recover an ownership interest in WECO and WAD.

Equally meritless is the second reason Plaintiffs advanced in support of their motion for new trial -- *i.e.*, the jury's findings on the affirmative defenses of estoppel and waiver are not "supported by legally sufficient evidence" and are "against the great weight and preponderance of the evidence." (2.MR.788-89; *see* 8.MR.353-54, 359-72) Even indulging the fiction that the Fee Agreement unambiguously means what Plaintiffs now claim, it ultimately makes no difference because the jury found that (1) Plaintiffs are "estopped from seeking an ownership interest in WAD and WECO" (Question 12), and (2) Plaintiffs "waive[d] [their] right, if any, to seek an ownership interest in WAD and WECO" (Question 13). (App. B at 16-17)

Based on a full record review, the evidence overwhelmingly supports both of these findings.[16] *Either* finding is alone sufficient to defeat any purported claim by Plaintiffs for an ownership interest and the new trial order. As a result, the trial court abused its discretion in granting a new trial instead of upholding the jury's verdict and the denial of Plaintiffs' claim for an ownership interest. *See Mancorp*,

[16] In recognition that there was ample evidence of these two defenses, Plaintiffs' proposed jury charge included questions on both of these affirmative defenses. (2.MR.55-56)

Inc. v. Culpepper, 802 S.W.2d 226, 228 (Tex. 1990) ("If more than a scintilla of evidence supports the jury's finding, it must be upheld.").

1. Standard of review

Because Plaintiffs did not object to the jury questions on estoppel and waiver (*see* 3.MR.2628-34), the sufficiency of the evidence must be measured against the charge as submitted. *See, e.g.*, *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 112 (Tex. 2009); *Bradford*, 48 S.W.3d at 754; *Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000).

Under well-settled Texas law, courts must view the evidence in the light most favorable to the jury's verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005). In conducting this review, "[j]urors are the sole judges of the credibility of the witnesses and the weight to give their testimony." *Id.* at 819. Jurors may thus choose to believe one witness and disbelieve another, and a court is not free to impose its own opinion to the contrary. *Id.*

A court reviewing the evidence in the light most favorable to the verdict must therefore assume that (1) jurors credited testimony favorable to the verdict and disbelieved testimony contrary to it, (2) jurors resolved all conflicts in the evidence in accordance with the verdict, and (3) jurors made all inferences in favor

of their verdict if reasonable minds could. *Id.* at 819-21. When these established principles are applied to the record here, any conclusion that the evidence is legally insufficient to support the jury's findings on estoppel and waiver is not "valid and correct." *In re Toyota Motor*, 407 S.W.2d at 759.

To the extent the trial court concluded that the jury's findings were "against the great weight and preponderance of the evidence," as Plaintiffs additionally argued (2.MR.788), that is *not* even a legally appropriate or applicable standard for reviewing a jury finding when, as here, Defendants had the burden of proof on their affirmative defenses.[17] Rather, a party attacking the factual sufficiency of an adverse finding "on which the other party had the burden of proof must demonstrate that there is insufficient evidence to support the adverse finding." *Lefton v. Griffith*, 136 S.W.3d 271, 275 (Tex. App.—San Antonio 2004, no pet.). "The amount of evidence necessary to affirm a judgment is far less than that necessary to reverse a judgment" in a factual sufficiency review. *In re Baker*, 420 S.W.3d at 402. A court can therefore set aside the verdict "only if the evidence that supports the jury finding is so weak as to be clearly wrong and manifestly unjust." *Lefton*, 136 S.W.3d at 275.

[17] The "great weight and preponderance of the evidence" standard relied upon by Plaintiffs applies when a party is challenging the factual sufficiency of a jury finding upon which it had the burden of proof. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001).

Significantly, the trial court never made any such determination in its new trial order -- either expressly or by adopting "the reasons" set forth in Plaintiffs' motion. And even assuming it did, the record "squarely conflicts" with any such reason, *In re Toyota Motor*, 407 S.W.3d at 759, and the trial court was not free to "merely substitute its judgment for that of the jury." *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003).

2. The evidence overwhelmingly supports the jury's finding in Question 12 that Plaintiffs are estopped from seeking an ownership interest in WAD and WECO.

Under Texas law and Question 12, "estoppel" is "a rule to prevent one from taking advantage of a condition or situation, when, with knowledge of the facts, [the party] has so conducted himself as to lead the other party to believe that he would not do as he did." *Steubner Realty 19, Ltd. v. Cravens Road 88, Ltd.*, 817 S.W.2d 160, 163 (Tex. App.—Houston [14th Dist.] 1991, no writ). Estoppel thus occurs when a party "says or does something and another person reasonably rel[i]es on such statement or action to such an extent that it would be unfair to allow the first person to change his statement or action." *Id.*; *see also Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000) ("Quasi-estoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken.").

Viewing the evidence in the light most favorable to the jury's verdict, as required, the evidence is legally and factually sufficient to support the jury's finding of estoppel here. Both during and after the underlying lawsuit, Plaintiffs conducted themselves as to lead Davenport to believe they were not claiming an ownership interest in WECO and WAD. Davenport relied on Plaintiffs' statements and actions, and it would be unfair to allow Plaintiffs to claim otherwise.

At the outset of the attorney-client relationship, Hall and Dietzmann discussed using the conversion theory to "get a big monetary verdict" against Allen and Wynne. (3.MR.649-50, 657, 1885, 1894-96) Conversely, there was no discussion about using that theory to recover Allen's and Wynne's interest in WECO, paying the attorneys by giving them a share of WECO (or based on the value of Wynne's and Allen's ownership interests), or Davenport becoming partners with Hall and Dietzmann. (3.MR.757, 1893-94) Davenport relied on Plaintiffs' statements that there was going to be "a big cash recovery" and signed the Fee Agreement providing the attorneys with a contingent share of the "total sums recovered." (App. D; *see* 3.MR. 657, 1885, 1894-96)

Thereafter, Plaintiffs were involved in negotiating, drafting, and signing the settlement agreement with Allen in March 2009, under which Allen transferred all of his interests in WECO and WAD to Dillon. (3.MR.1904-09; *see* 7.MR.443-44, 449-52 [DX:251]) Plaintiffs did not include their names as transferees.

(3.MR.1905-09; *see* 7.MR.443-44, 467-72 [DX:251]) And although the Fee Agreement provides for any proceeds to be paid jointly to client and the attorneys (App. D), Plaintiffs never asked to have the transfer from Allen made jointly to them and Dillon (3.MR.1910-11).[18] Nor did Plaintiffs ask Davenport to transfer a portion of Allen's interest in WECO and WAD to them after the settlement.

This same pattern continued with the Wynne mediation and settlement in the summer of 2010. At the time of that mediation, Hall "thought [he] had a contract claim" for an ownership interest in WECO and WAD. (3.MR.699) But when Davenport asked Hall and Dietzmann if they wanted to contribute to buying Wynne out, Plaintiffs declined. (3.MR.1966-68) Instead, Hall and Dietzmann signed a Mediated Settlement Agreement in which they unequivocally confirmed:

> It is the intent of the parties that any and all interests Premier, Wynne or their affiliates may have or have ever had in WECO [and] WAD. . . shall be assigned and transferred to Dillon and Davenport . . ., and that after this transaction closes, Dillon will own 100% of WECO and Davenport will own 99% of WAD, Inc.

(7.MR.103-04 [DX:139]; *see* 3.MR.695-98) Because the attorneys signed off on this language, Davenport relied on it as assurance that he and Dillon were the sole owners of WECO and WAD. (3.MR.1968-69) Consequently, Dillon borrowed $3 million to pay Wynne for his interest, and Davenport -- not any of the attorneys --

[18] In the court below, Plaintiffs argued that the term "proceeds" is not limited to money and includes ownership interests. (2.MR.823)

personally guaranteed the loan. (7.MR.147-52, 168-73 [DX:154]; 3.MR.1967-68, 1983-84)

Like the mediated settlement agreement, the formal Mutual Release and Settlement Agreement with Wynne similarly provides that "Wynne and Premier shall transfer and assign one hundred percent (100%) of their ownership interests in WECO and WAD to Dillon and Davenport respectively," and that Dillon and Davenport -- not any of the attorneys -- would own WECO and WAD "*free and clear of any and all liens and encumbrances and claims of any party of any kind whatsoever*." (7.MR.117-18 [DX:142 at ¶ 2(c)], emphasis added) Hall reviewed the agreement before Davenport signed it; he advised Davenport of the effect of the agreement; and he obtained the bankruptcy court's approval of the agreement. (3.MR.701; 7.MR.124 [DX:142 at ¶ 5])

In reliance on the settlement agreements that Hall and Dietzmann negotiated and approved making Davenport and Dillon the sole owners of WECO, Davenport -- not any of the attorneys -- began working full-time for WECO, and he thus had to hire others to run one of his other businesses. (3.MR.2068-69, 2193; *see* 3.MR.1968-69, 1982) Meanwhile, Plaintiffs never asked Davenport to transfer an ownership interest or otherwise acted like they were part owners in WECO or entitled to an interest. (*See* 3.MR.826, 829, 955, 1811-12, 2067-68) From the summer of 2010 until filing suit in February 2012, Plaintiffs never asked for

financial information about WECO; they never requested distributions; and they never inquired about important company events, including financing and renegotiating WECO's sole contract. (3.MR.829, 831, 2067-68) Instead, Plaintiffs remained utterly silent about their alleged ownership interest for 18 months after the underlying litigation ended.

Moreover, Plaintiffs represented to third-parties that they were not owed any additional fees. For example, Hall signed a Case Ownership Confirmation in 2011 in which he confirmed that his law firm did "not presently hold any interest in or right to payment from" legal proceedings funded by Advocate Capital, including Davenport's lawsuit against Allen and Wynne. (6.MR.78-79 [PX:253]; 3.MR.871-73)

Any or all of this evidence is legally and factually sufficient to support the jury's estoppel finding. Because the "trial court's articulated reasons are not supported by the underlying record, the new trial order cannot stand." *In re Toyota Motor*, 407 S.W.3d at 758.

3. The evidence overwhelmingly supports the jury's finding in Question 13 that Plaintiffs waived their purported right to seek an ownership interest in WAD and WECO.

For similar reasons, the evidence is also legally and factually sufficient to support the jury's finding in Question 13 that Plaintiffs waived their right, if any, to seek an ownership interest in WAD and WECO. (App. B at 17) Under Texas

law and Question 13, "[t]he affirmative defense of waiver can be asserted against a party who intentionally relinquishes a known right or engages in intentional conduct inconsistent with claiming that right."[19] *Tenneco Inc. v. Enterprise Prods. Co.*, 925 S.W.2d 640, 643 (Tex. 1996). Significantly, waiver is "ordinarily a question of fact" for a jury. *Id.* It can be established by (1) "[a] party's express renunciation of a known right," or (2) "[s]ilence or inaction, for so long a period as to show an intention to yield the known right." *Id.*

Based on the evidence of estoppel recited above -- including the express statements in the settlement agreement with Wynne (7.MR.103-04 [DX:139]; 7.MR.12-41 [DX:142]) and the Case Ownership Confirmation (6.MR.78-79 [PX:253]) -- Plaintiffs expressly renounced any rights they allegedly had in an ownership interest in WECO and WAD. Moreover, Plaintiffs' silence and inaction after the Allen and Wynne settlements and the end of the attorney-client relationship also showed an intention to yield a known right. For example:

- After receiving WECO funds in December 2009 that were in the trial court's registry and that were obtained through a litigated court order that allowed for the distribution of those funds (7.MR.105-08 [DX:141]; 7.MR.142-44 [DX:145]), Plaintiffs never discussed the issue of profit distribution with Davenport for the next two years until weeks before filing suit (3.MR.569-70).

[19] Waiver is unilateral in its character because it results as a legal consequence from some act or conduct of the party against whom it operates, and no act of the party in whose favor it is made is necessary to complete it. *Massachusetts Bonding & Ins. Co. v. Orkin Exterminating Co.*, 416 S.W.2d 396, 401 (Tex. 1967).

- Both at the time and after the Allen settlement, Plaintiffs never requested that an interest in WECO and WAD be assigned to them or provided Davenport (or Allen) with a form to assign Plaintiffs their supposed interest. (*See* 3.MR.826, 1910-11, 1924-25)[20]

- Plaintiffs also never requested that a share of Wynne's interest be transferred to them. (3.MR.1981-82) Even after the case was over, Plaintiffs never asked Davenport to execute a transfer certificate. (*Id.*)

- Hall never asked Davenport for an ownership interest in writing between July 2009 and the end of 2012. (3.MR.955)

- Despite believing he had an ownership interest in WECO and WAD in 2009, 2010, and 2011, Dietzmann never asked WECO's receiver to authorize a transfer of his purported ownership interest. (3.MR.1814)

- Dietzmann never asked Davenport for an ownership interest. (3.MR.1811-12)

Under the appropriate standard of review, there is no basis to set aside the jury's finding of waiver or grant a new trial. Because "the record does not support the articulated reason, the trial court abused its discretion by granting a new trial on th[is] ground" as well. *In re Toyota Motor*, 407 S.W.3d at 761.

In short, even assuming the Fee Agreement unambiguously gave Plaintiffs the right to recover an ownership interest in WAD and WECO, the trial court still

[20] Instead, in July 2009, Hall sent a blank one-paragraph form to Davenport for him to transfer and assign an interest in Dillon -- not WECO or WAD. (7.MR.88-89 [DX:85]) But under the Fee Agreement, the attorneys agreed they "will not take a fee out of the ownership of" 5D Water and Dillon. (App. D) In any event, Hall never sent Davenport another transfer certificate after July 2009, followed up on the Dillon transfer certificate, or made another request for an assignment. (3.MR.826, 1924-25) In fact, Hall admitted that he did not expect Davenport to sign the Dillon transfer certificate (3.MR.825-26), and WECO's partnership agreement prohibited the partners from transferring their interests (7.MR.20-21 [DX:9 at ¶ 3.3(g)]; 3.MR.1921-22). Thus, Davenport correctly recognized this as mere "posturing" by Hall. (3.MR.1922-23)

had no discretion to grant a new trial. The jury's amply supported findings on either of these affirmative defenses are alone sufficient to defeat Plaintiffs' purported claim to an ownership interest in WECO and WAD.

C. A new trial is not necessary to obtain a jury finding on Defendants' unconscionability defense

The final reason Plaintiffs urged for a new trial -- to allow "Defendants to present their unconscionability defense to the unambiguous agreement" (2.MR.788-89; 8.MR.353-54, 372-73) -- is both invalid and nonsensical. To be sure, the jury never reached Question 4 regarding whether the attorney's fees sought by Plaintiffs were "unconscionable" because that question was properly conditioned on an affirmative answer to Question 1. (App. B at 8) But there was no valid reason for the trial court to grant Plaintiffs a new trial to allow Defendants to "obtain a finding on this affirmative defense" to Plaintiffs' breach-of-contract claim. (2.MR.788) Simply put, because there is no basis to set aside the jury's answers to Question Nos. 1, 12, *and* 13 for all the reasons discussed above, a new trial is neither warranted nor necessary for Defendants to obtain a finding on an additional affirmative defense that also would bar Plaintiffs' claim. Because this ground for granting a new trial also "lack[s] substantive merit," mandamus relief should issue. *See In re Toyota Motor*, 407 S.W.3d at 762.

IV. The trial court abused its discretion in vacating the judgment in its entirety when Plaintiffs abandoned many of their claims at trial.

In granting a new trial, the trial court vacated the judgment "in its entirety." (App. A) But neither the order nor Plaintiffs' motion for new trial articulates *any* reason -- much less a valid reason -- why Plaintiffs are entitled to resurrect and re-try all of their claims against all parties. (*See id.*; 2.MR.787-90)

Before trial, Plaintiffs alleged multiple claims against 5D Water, Water Investment Leasing Company, Blue Gold Resources Management, Blue Gold Properties, and Blue Gold Development. (1.MR.773-807) But Plaintiffs never presented any evidence on those claims during trial. Nor did they ask the trial court to submit any of those claims to the jury. (*See* App. B; 3.MR.2628-34) To the contrary, Plaintiffs made the deliberate decision to abandon their claims against these defendants: "With regard to the parties, [Plaintiffs] will be dropping everyone but the contracting defendants (Davenport, Dillon, and 5D), WAD, and WECO." (2.MR.212; *see* 2.MR.216-46)

Because Plaintiffs did not seek or obtain any favorable jury findings against these defendants (or object to their omission in the charge), they abandoned any claims they may have previously asserted against them. *See Gulf States Utils. Co. v. Low*, 79 S.W.3d 561, 565 (Tex. 2002) ("[A] party waives an entire theory of recovery . . . by not objecting to its omission from the charge."). The trial court correctly rendered judgment that Plaintiffs take nothing from these defendants.

(App. C) The trial court abused its discretion in setting aside that part of its judgment and granting a new trial without stating any reason for doing so.

The trial court likewise erred in resurrecting many of Plaintiffs' other claims without articulating any reason. Before the charge conference, Plaintiffs also abandoned their claims for fraudulent transfer, breach of fiduciary duty, ratification, estoppel, and conspiracy and did not submit any issue to the jury on those claims. (2.MR.46-75, 212-13, 216-46) Further, although the trial court did submit two questions on Plaintiffs' fraud claims, the jury failed to find any fraud (App. B at 11-12), and Plaintiffs never challenged those adverse findings in any post-trial motion (*see* 2.MR.254-65, 287-90). As a result, the trial court correctly rendered judgment denying all relief not expressly granted. (App. C) Because there is no valid or correct reason for granting Plaintiffs a new trial on these claims, mandamus relief should issue for this reason as well.

CONCLUSION AND PRAYER

The trial court articulated its reasons for granting a new trial. But those reasons "lack[] substantive merit" and are neither valid nor correct. *In re Toyota Motor*, 407 S.W.3d at 762. No rationale exists for giving the trial court a second chance to find new and different reasons based on its opinion that the Fee Agreement is "unambiguous" and that, "in totality," twelve jurors got the verdict wrong. Because jury trials are "essential to our constitutionally provided method

for resolving disputes," *In re Columbia Med. Ctr.*, 290 S.W.3d at 211, one judge's view of the outcome should not trump the collective wisdom of twelve jurors.

Accordingly, Relators/Defendants respectfully pray that the Court grant their petition for writ of mandamus, compel the trial court to withdraw its Order Granting Plaintiffs' Motion for New Trial and reinstate judgment on the verdict, and award them such other relief to which they may be entitled.

Respectfully submitted,

/s/ *Deborah G. Hankinson*

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RULE 52.3(J) CERTIFICATION

I have reviewed the petition for writ of mandamus and concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record.

/s/ *Brett Kutnick*
Brett Kutnick

CERTIFICATE OF COMPLIANCE

Relying on the word count function of the computer software used to prepare this document, the undersigned certifies that the Petition for Writ of Mandamus contains 14,994 words (excluding the sections excepted under TEX. R. APP. P. 9.4(h)(i)(1)) and was typed in 14-point font with footnotes in 12-point font.

/s/ *Brett Kutnick*
Brett Kutnick

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Petition for Writ of Mandamus was served in accordance with TEX. R. APP. P. 9.5 upon the Respondent and following counsel of record on this 23rd day of September, 2014:

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