No. 21-10027

In the United States Court of Appeals for the Fifth Circuit

MURPHY OIL USA, INC.,

Plaintiff—Appellant,

versus

LOVE'S TRAVEL STOPS & COUNTRY STORES, INC., MUSKET CORPORATION, GEMINI MOTOR TRANSPORT, LP, STANLEY BOWERS, SCOTT DODD, LARRY JONES, MICHAEL WOOD, ROY TAYLOR, MATT TUGMAN, EDWARD WASHINGTON, and ALAN SVAJDA,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas, Dallas Division,
USDC No. 3:18-CV-01345-X

APPELLEES' BRIEF

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CERTIFICATE OF INTERESTED PERSONS

1. **Number and Style of Case:** No. 21-10027, *Murphy Oil USA, Inc. v. Love's Travel Stops & Country Stores, Inc., et al.*, on appeal from the United States District Court for the Northern District of Texas, Dallas Division, No. 3:18-CV-01345-X.

2. The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of Rule 28.2.1, have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal:

a. **Plaintiff—Appellant:**

Murphy Oil USA, Inc.

b. **Defendants—Appellees:**

Love's Travel Stops & Country Stores, Inc.;
Musket Corporation; Gemini Motor Transport, LP;
Stanley Bowers; Scott Dodd; Larry Jones; Michael Wood; Roy Taylor;
Matt Tugman; Edward Washington; and Alan Svajda.

c. **Counsel for Plaintiff—Appellant:**

Mark T. Josephs and Brian H. Oates;
JACKSON WALKER LLP.

[*continued* …]

d. **Counsel for Defendants—Appellees:**

Thomas G. Ciarlone, Jr. and Demetri J. Economou;
KANE RUSSELL COLEMAN LOGAN PC.

/s/ Thomas G. Ciarlone, Jr.
THOMAS G. CIARLONE, JR.
Attorney of Record for
Defendants—Appellees

STATEMENT REGARDING ORAL ARGUMENT

Appellees believe oral argument is unnecessary. This appeal involves the application of well-established standards of review and principles of law.

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I.

STATEMENT OF THE ISSUES

① Did Appellant waive its claims for the alleged theft of 220,000 gallons of diesel when—with knowledge of the alleged theft and in direct response to it—Appellant charged and received a "special" price for the diesel?

② Did the district court abuse its discretion by awarding attorney's fees to Appellees as prevailing parties under the Texas Theft Liability Act?

II.
STATEMENT OF THE CASE

Murphy sued Love's under the Texas Theft Liability Act and for conversion, conspiracy, and unjust enrichment, after Love's loaded approximately 220,000 gallons of diesel during Hurricane Harvey at Magellan's Frost Terminal in Mertens, Texas.[1] ROA.154–65.[2] Murphy contends the diesel was earmarked for delivery to its own stores—what is known in the industry as "branded" fuel. ROA.160 at ¶ 4.9; ROA.650–51 at ¶ 3.2. Because the diesel was purportedly branded, Murphy alleges that Love's was wrong to take the diesel for itself, at a time when Murphy's stores were running low on fuel. ROA.160 at ¶¶ 4.9–4.10.

Love's was not a stranger to Murphy. To the contrary, Love's and Murphy had been commercial partners for ages. Love's has purchased millions of gallons of fuel from Murphy over the years, and Murphy relies on its "wholesale business relationship" with Love's in support of its arguments on appeal. Br.10.[3] Incongruously, however, Murphy suggests the diesel loads at Frost were an

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1 "Frost" or the "Frost Terminal." Collectively, "Love's" refers to Defendants-Appellees. "Murphy" refers to Plaintiff-Appellant. "Magellan" refers to Magellan Midstream Partners, L.P., a third party.

2 References to "ROA.____" are to pages of the record on appeal.

3 References to "Br.____" are to pages of Murphy's opening brief.

aberration with no historical precedent: purely "[b]y happenstance," Murphy says, Love's "drivers stumbled upon an access code," which "the drivers used … to load [the] 220,000 gallons of diesel[.]" Br.2. But on a series of earlier occasions, Love's drivers had keyed in the same code (334-597101) to obtain unbranded fuel from Murphy. ROA.823–28. The bill of lading for each such load clearly identifies a Love's store as the destination for the fuel. *Id.*

It is undisputed that Murphy raised no objections to any of these transactions. This is unsurprising: Murphy's own personnel testified that the only way for Love's to secure a loading code in the first place was through a so-called "Form 61," a document internal to Murphy that is completed by a Murphy sales manager and subsequently approved or denied by Murphy's credit department. ROA.780–81 at 36:25–37:25. During discovery, Murphy produced several Form 61s for Love's, each of which had been approved. ROA.819, 821. A Murphy employee confirmed that the forms—which cover "all available products"—"authorize the purchase of fuel from the Frost Terminal." ROA.814 at 57:10–14. Notably, it was not until after Love's picked up the disputed diesel that Murphy revoked Love's authorization to load diesel at Frost.[4] ROA.803 at 13:13–25; ROA.806 at 27:19–28:19.

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4 Whether Love's was authorized to load the diesel is ultimately irrelevant. Aside from attorney's fees, the only live issue is whether the trial court correctly determined that Murphy's claims—regardless of their underlying merit—

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When it learned of the diesel loads at Frost, Murphy did not demand their return, object, or otherwise cry foul. Instead, after careful deliberation by senior management, Murphy elected to bill Love's for the diesel at a "special" price—up to $0.29 more per gallon than Murphy's publicly posted wholesale prices at the time. ROA.2493–518; ROA.2520–22. Love's promptly paid the invoices, which totaled $462,379.20. ROA.2493–518.

These events unfolded as Hurricane Harvey dumped 27 trillion gallons of rain across Texas. ROA.311.n.3. The storm killed 88 people. ROA.311.n.4. In the final tally, it caused $125 billion in losses. ROA.311.n.5. Over 200,000 homes were damaged or destroyed. ROA.311.n.6. One million vehicles were ruined beyond repair. ROA.311.n.7. Emergency personnel, including 24,000 National Guard troops, rescued 10,000 people trapped in homes and on flooded roads. ROA.311–12.n.8. Approximately 750,000 people registered for assistance with the Federal Emergency Management Agency. ROA.312.n.10.

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were waived when Murphy charged, and Love's paid, a "special" price. But because Murphy's briefing includes a discussion of loading codes, Love's is providing some broader context.

"Harvey is a 1,000-year flood event, unprecedented in scale," declared a headline in the *Washington Post*. ROA.312.n.12. Another headline was shorter, a quick punch in the gut: "Devastation in Texas." ROA.312.n.13. The *Dallas Observer* opined that "biblical" was the only "proper adjective to describe Hurricane Harvey." ROA.312.n.14. Government leaders were issuing somber predictions: "FEMA director says Harvey is probably the worst disaster in Texas history." ROA.312.n.15. Joel Myers—the founder of meteorological firm Accuweather—went even further, dubbing Harvey the "worst natural disaster in *American* history." ROA.312.n.16 (emphasis added).

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If Murphy was to be believed, amid the death and destruction left behind by Harvey, consumers were so upset with Murphy—simply because it ran out of diesel at some of its stores during a natural disaster of epic proportions—that they would stop patronizing Murphy for decades to come. But fuel shortages were endemic at the time. Exxon, Chevron, 7-Eleven, H-E-B, Shell, Kroger, Texaco, Sam's Club, Kwik Chek, Valero, Sunoco, and Mobil stations were all experiencing shortages at their Texas locations. ROA.313–14.n.19. Quik-Trip, one of the largest fuel retailers in Dallas, closed half of its 135 DFW-area stores during Harvey. ROA.314.n.20. According to reporter Merrill Hope, "[a]nyone who got behind the wheel in Dallas

on [August 31, 2017] saw unusually long lines at gas stations, higher prices, and 'out of service' bags placed on pumps that ran out of gasoline altogether[.]" ROA.314.n.21. Oil-and-gas specialist Bernard Weinstein, an economist and the associate director of SMU's Maguire Energy Institute, told local CBS-affiliate KTVT that "[m]any stations are out of product," because of "panicked" drivers "draining tanks at gas stations." ROA.314.n.23. John Benda, the owner of four Fuel City stores in Dallas, expressed borderline disbelief: "I have never seen it this tight, since 1980, even when we were rationing." ROA.314.n.24.

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All of this begged a (borderline rhetorical) question: Who were these irate drivers who would hold an irrational, decades-long grudge against Murphy under such extraordinary circumstances, when fuel retailers across the board were experiencing outages in Texas, as panic buying and social media hysteria generated unprecedented demand? Murphy suggested that its damages from this ostensible boycott, one that would span generations according to Murphy's projections, might total in the eight figures. ROA.4403.

Notwithstanding such stratospheric damages, Murphy sidestepped whenever Love's tried to obtain the specific contours of Murphy's damages model and calculations:

① In its original disclosures, Murphy did not even articulate categories of damages, much less dollar amounts. ROA.2538.

② Love's therefore sent a discovery conference letter requesting damages computations on April 24, 2019. ROA.2541–43.

③ After receiving no response, Love's sent another message requesting damages computations on May 13th. ROA.2545.

④ Murphy responded on May 17th that, while its damages disclosures were "proper," it would amend its disclosures. ROA.2547–48.

⑤ But when Murphy served its amended disclosures, they still lacked any computation of damages. ROA.2530.

⑥ So Love's again demanded Murphy's damages disclosures by e-mail on May 26th. ROA.2550–51.

⑦ On May 31st, in a status report to the court, Murphy stated: "Defendants' demand for the specific methodology and amount of Plaintiff's damages … is premature, and Plaintiff will provide this information at the Court ordered deadline for expert reports" ROA.219–20. At this point, the case had been on file for over a year.

⑧ The original expert deadline of June 21st was thereafter extended, at Murphy's request, through July 12th. ROA.224 at ¶ 4.

⑨ But Murphy did not serve an expert report on or before July 12th.

⑩ Thereafter, on July 16th, the Court ordered Murphy to serve its expert disclosures no later than July 18th. ROA.297.

Staring down the barrel of this deadline, and after Love's had labored for almost a year and a half under the fiction that this was a $12,000,000 case, Murphy announced that its damages ceiling was actually less than $100,000. ROA.660.n.2. In the wake of its concession that its damages were anemic at best, Murphy sought to dismiss its complaint without prejudice. Chief Judge Lynn, however, recognized this would be unfair to Love's because it would be unable to recover its attorney's fees. ROA.414–17. She therefore gave Murphy two options: (1) dismiss the case, with prejudice, and she would then "consider what fees, if any, should be awarded"; or (2) continue litigating. ROA.417. Murphy chose the latter. ROA.624.

In other words, Murphy could have capped its fee exposure, but instead it forged ahead. Thereafter, twenty depositions were taken, not just in Texas, but in Arkansas, Oklahoma, and Iowa; arguments were held on Love's motion for summary judgment; the parties submitted supplemental briefing on damages; Love's began preparing for the trial that would have ensued had its summary judgment motion been denied; the parties briefed Love's application for attorney's fees; and Love's defended against Murphy's request that the trial court reconsider its final judgment. The point is this: most of Love's fees were for work performed after Murphy opted to proceed with litigation, rather than accept a dismissal with prejudice—an option explicitly offered to Murphy by Judge Lynn. ROA.417.

Yet according to Murphy, Love's is the one that refused to "stand down" and thereby "preserve assets[.]" Br.30. It was Love's, Murphy contends, that "literally hit the litigation accelerator" (*id.*):

① even though it was Love's that offered to pay Murphy—before this case was filed—more than double the $42,911 that Murphy would belatedly claim as damages, all to avoid the same litigation expenses about which Murphy now complains;

② even though it was Love's that, in this way, tried to avoid a fight with Murphy, not instigate one;

③ even though it was Love's that was unceremoniously hauled into court by Murphy in the first place (ROA.20–29);

④ even though it was Love's that was targeted by Murphy with the unorthodox (and ultimately abandoned) theory that drivers would boycott Murphy for decades to come—just because some of Murphy's stores temporarily ran out of diesel during Hurricane Harvey (ROA.2530 at §§ 3.3–4);

⑤ even though it was Love's that had eight figures in damages held menacingly over its head for almost a year and a half of litigation (ROA.4403);

⑥ even though it was Love's that Murphy stonewalled whenever it was asked to pull back the curtain on its damages model and calculations;

⑦ even though it was Love's that was forced—in the vacuum of Murphy's refusal to disclose any details about its elephantine damages case—to retain an expert to prepare an economic analysis showing that Murphy suffered no reputational harm in the marketplace (ROA.968–1017);

⑧ even though it was Love's that saw its expert's work rendered moot when Murphy sheepishly admitted that its eight figures in damages were, at best, less than $100,000 (ROA.660.n.2); and

⑨ even though it was Love's that watched from the sidelines as Murphy declined an invitation from Chief Judge Lynn to end the litigation—when attorney's fees were a fraction of what they are today—by accepting a dismissal with prejudice.

Despite all this, if Murphy is to be believed, Love's is the party that refused to relent, that dug in its heels, that insisted this case proceed to judgment. Murphy has it backwards. This is of no small moment because Murphy's primary objection to the fee award is that Love's fees—from this point forward—"were unnecessary as a matter of law," inasmuch as Love's did not "agree[] to Murphy's Rule 41(a) motion." Br.32.

Murphy has fashioned from whole cloth a rule that fees are unrecoverable for any work a defendant performs after withholding consent to a motion for voluntary dismissal. But there is no such rule, and Love's had no obligation to capitulate—especially not after Murphy put Love's to profound expense by peddling the false narrative that Murphy's damages were off the charts when, in fact, they were "minimal." Br.30.

Love's decision to withhold consent was validated by Chief Judge Lynn when she declined to dismiss Murphy's complaint without prejudice, instead ordering

Murphy to choose between continued litigation or a prompt dismissal with prejudice. ROA.414–17. Murphy chose the former. ROA.624.

Murphy did not seek leave to appeal Judge Lynn's Rule 41(a) order at the time, nor does Murphy's opening brief assign any error to her order. Accordingly, the natural consequences of Murphy's decision to keep litigating pursuant to Judge Lynn's order—including the fact that Love's fees continued to mount—are not proper subjects of this appeal.[5] Regardless, the binary choice that Judge Lynn offered Murphy—accept her conditions for dismissal or, alternatively, resume litigation—is uncontroversial. It is standard operating procedure in federal court.[6] As such, even if its brief had included the argument that Judge Lynn erred when she imposed conditions for dismissal, Murphy would have been fighting an uphill battle against

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5 *See Galvan v. Calhoun County*, 719 Fed. Appx. 372, 374 (5th Cir. 2018) ("When an appellant fails to advance arguments in the body of its brief in support of an issue … we consider such issues abandoned.") (citation and internal quotes omitted).

6 *See Welsh v. Correct Care, L.L.C.*, 915 F.3d 341, 344 (5th Cir. 2019) ("A plaintiff typically 'has the option to refuse a Rule 41(a)(2) voluntary dismissal and to proceed with its case if the conditions imposed by the court are too onerous.'") (quoting *Mortgage Guar. Ins. Corp. v. Richard Carlyon Co.*, 904 F.2d 298, 301 (5th Cir. 1990)).

the weight of authority—particularly since "orders granting or denying a Rule 41(a)(2) motion are reviewed by an abuse of discretion standard of review."[7]

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Murphy learned that Love's was loading fuel at the Frost Terminal not through its own sleuthing, but only because Love's went out of its way to bring the loads to Murphy's attention. This was the chronology, which is undisputed:

- **8/30/2017, 9:48 a.m.**—Matthew Elliott (a buyer at Love's) is starting his day. He writes to his counterpart at Murphy (David Ridings): "GM [Good Morning] David, how is your supply looking in Frost today?" ROA.2470.
- **8/30/2017, 9:50 a.m.**—Mr. Ridings writes back to Mr. Elliott two minutes later: "Hey Matt, Murphy is cutoff at Frost so we have no gas or diesel. Sorry about that." *Id.*
- **8/30/2017, 9:52 a.m.**—Because he is under the impression that Love's pulled diesel from Murphy at Frost earlier the same morning, Mr. Elliott is confused by Mr. Ridings' message. He immediately responds to Mr. Ridings, giving him a heads up: "OK, logistics is telling me that we got 2 loads off Murphy there. May want to check into that." *Id.*
- **8/30/2017, 10:41 a.m.**—Less than an hour later, Mr. Ridings' response is not to instruct Love's to stop loading or to tell Love's that the diesel at Frost is "branded." To the contrary, Mr. Ridings' lighthearted reply to Mr. Elliott jokes that "[m]aybe y'all

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7 *Simridge Techs., Ltd. v. Wells Fargo Bus. Credit, Inc.*, No. CIV. A. SA-03-CA0677OG, 2004 WL 1055706, at *2 (W.D. Tex. Apr. 13, 2004) (citing *Elbaor v. Tripath Imaging, Inc.*, 279 F.3d 314, 318 (5th Cir. 2002)).

got some free fuel!" *Id.* By this point, Love's has pulled only two loads. ROA.2443–44.

- **8/31/2017, 4:18 p.m.**—Mr. Elliott, as a courtesy to Mr. Ridings, obtains a bill of lading (a "BOL") for Mr. Ridings' review. Mr. Elliott sends the BOL to Mr. Ridings under cover of the following e-mail: "Attached is a BOL from a load we pulled in Mertens [*i.e.*, at the Frost Terminal]. It clearly shows Murphy as the supplier." ROA.1211.

- **8/31/2017, 4:45 p.m.**—Just minutes before the close of business, Mr. Ridings responds to Mr. Elliot's e-mail attaching the BOL: "Oh, now I see what happened." Mr. Ridings proceeds to tell Mr. Elliott that "[o]ur Retail has product still at Frost but I don't have anything on the Wholesale side." *Id.*

- **9/1/2017, 8:00 a.m.**—When he gets to the office the next morning and sees Mr. Ridings' e-mail, Mr. Elliott writes to Jimmy Villarreal—the supervisor for Love's truck drivers in the vicinity—instructing him to tell his drivers not to load off Murphy at Frost. ROA.2477. Thereafter, loading quickly subsides. ROA.2468.

- In the days that follow, Murphy personnel at the highest levels of its diesel organization—including Kent Rice (Senior Sales Manager, Fuel Marketing), Pat Kennedy (Director, Marine/Diesel), and Kim Poff (Central Billing Coordinator)—decide what to do next. Ultimately, after careful deliberation, they would choose to invoice Love's at a "special price."

- **9/5/17, 8:55 a.m.**—On the morning of September 5th, Ms. Poff asks Mr. Rice: "[A]ny news on how to invoice these yet?" Mr. Rice responds: "Pat [Kennedy] and I are working on this … should have something for you later today." Less than an hour later, Mr. Rice tells Ms. Poff the price to be invoiced to [Love's] is $2.1018 per gallon of diesel. In this same e-mail exchange

between him and Ms. Poff, Mr. Rice confirms he is aware that all the diesel was delivered to Love's stores. ROA.2481–82.

- → **9/5/17, 10:00 a.m.**—Mr. Rice e-mails Jacob Gutierrez, a Supply Manager at Love's: "See BOL's below pulled out of Frost, TX … *they did not go to Murphy stores. We assume the loads went to Musket (Love's) stores.* The gas price that we will bill is $1.9908 per gallon. *The ULSD [diesel] price to be billed will be $2.1018 per gallon.*" ROA.2489 (emphasis added).

- → **9/5/17, 10:12 a.m.**—Ms. Poff reports to other members of Murphy's billing department that "per Kent [Rice] I'll be invoicing all the loads pulled out of Frost by [Love's] at a special price." ROA.2486.

- → **9/6/17**—Murphy issues invoices to Love's for all the diesel, at the "special price" of $2.1018 per gallon, which is as much as $0.29 higher than Murphy's publicly posted diesel prices during the three days on which Love's loaded at Frost. ROA.2493–518.

- → There is no dispute that Love's then promptly paid all of the invoices.

- → **9/22/17 (over two weeks later)**—Out of the blue, Murphy sends a demand letter to Love's, for the first time accusing it of theft. ROA.4014.

In its opening brief, Murphy assures this Court (not just once, but twice) that it sent the demand letter "immediately" after it drafted Love's account for $462,379.20. Br.2, 23. This is far from the truth: Murphy drafted Love's account on September 6th; Murphy did not send its demand letter, however, until September 22nd—sixteen days later. Contrary to Murphy's repeated representations to this

Court, Oxford Languages defines "immediately" as: (i) "at once"; (ii) "instantly"; and (iii) "without any intervening time or space."[8]

It is inconceivable that Murphy failed to appreciate it was mischaracterizing the timing of its demand letter to this tribunal. In its own summary judgment briefing, Murphy acknowledged that its demand letter was dated "approximately two weeks after [it had] invoiced" Love's and "drafted [its] account." ROA.651 at § 3.4. Furthermore, during summary judgment arguments, when Murphy explained that it dispatched a demand letter "after it invoiced [Love's] and charged [Love's] account for the fuel," Judge Starr interrupted to observe that the letter was sent "not at the time," but over "two weeks later." ROA.2384 at 28:17–18.

Judge Starr proceeded to emphasize that, "contemporaneous[ly] with its invoice[s]," Murphy could have advised Love's in a separate writing that, while the invoices "cover[] the cost of the diesel," Murphy was "reserving [its] rights for other damages[.]" ROA.2386 at 30:15–18; ROA.2386 at 31:1–6. Murphy's responsive refrain has been that bank drafts on Love's account are "automatic," with "no communications between the parties during that process." ROA.2386 at 30:22–25. This too is inaccurate and, on that score, Judge Starr reminded Murphy that there were, in fact, contemporaneous communications about the "special" price that

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8 <*https://www.google.com/search?d&q=immediately+definition*>.

Love's would be charged for the diesel. As embodied in the preceding timeline, for example, Kent Rice at Murphy informed Love's that it would be charged $2.1018 per gallon and, shortly thereafter, Kim Poff acknowledged this "special" price to her billing team at Murphy.

It was only after these communications that Murphy issued the invoices, which Love's then approved and paid. A reservation of rights is not so much as hinted at anywhere in these writings.

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Murphy's manufactured excuse for invoicing Love's and accepting its $462,379.20 payment—without attaching any conditions or caveats—is that "[t]his was not a mechanism … [for] Murphy … to recoup all of its damages that it could possibly recover"; rather, it was only "trying to actually calculate … *Murphy's cost in the diesel* [and] recover that immediately[.]" ROA.2386 at 30:5–14 (emphasis added). Leaving no room for doubt, Murphy stated on the record that, when deciding what to bill Love's, it "look[ed] at what was [its] *actual cost*" for the fuel. ROA.2386 at 30:5–7 (same).

But by virtue of Murphy's own admissions, the $2.1018 per gallon that Love's was invoiced—and that Love's subsequently paid—could not have been Murphy's "actual cost" for the diesel. Murphy designated Donald Smith as its corporate

representative on damages. Mr. Smith testified that Murphy's cost basis in the diesel defies calculation: we "don't know where those gallons originated or what we paid for them." ROA.925 at 15:20–21. In short, the $2.1018 per gallon billed to Love's could not have been Murphy's "actual cost" for the diesel. In reality, it was something quite different:

① In the first instance, Murphy "survey[ed] the market to determine the wholesale price[s] at which others had sold diesel during this time of crisis." ROA.4023 at ¶ 2.

② Once its survey was complete, Murphy "charged Love's … a high wholesale price," based on the results of its survey. *Id.*

These are, to be clear, Murphy's own words. So to summarize: *first*, Murphy researched wholesale prices for diesel at the height of Hurricane Harvey—prices that already reflected "crisis" conditions, including low supply and high demand; *second*, Murphy arbitrarily plucked a dollar figure, from the "high" end of the pricing spectrum generated by its market research, and this then became the price at which Murphy invoiced Love's. Thus, Murphy's excuse—that it was just "trying to actually calculate … Murphy's cost in the diesel [and] recover that immediately"—is a self-serving litigation exercise in revisionist history, one with Love's waiver defense squarely in its crosshairs.

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The trial court held oral arguments on Love's motion for summary judgment on November 12, 2019. At the conclusion of the hearing, Judge Starr expressed concern over the lack of any evidence of Murphy's damages in the summary judgment record:

> [Because] there's an MSJ on file that says there is no evidence of damages[,] it shifts from an allegation case to an evidence case. And you have a duty at that point to do one of two things, either put on your evidence of damages in your response to the MSJ or … ask the Court for more time[.] *And I don't understand Murphy to have done either.*

ROA.2401 at 45:7–13 (emphasis added).

Although it was "troubled that Murphy didn't include evidence of damages in its response or ask for more time," the trial court gave Murphy a second chance, inviting it to supplement the evidentiary record after the hearing. ROA.854–55. Murphy accepted Judge Starr's invitation, submitting deposition testimony from Donald Smith, its 30(b)(6) witness on damages. ROA.887 at 10:11–15. Mr. Smith opined that Murphy suffered $42,911 in damages. This is the profit Murphy supposedly would have generated if the diesel, which Love's purchased from Murphy on a wholesale basis, had instead been sold at Murphy's retail stores. According to Mr. Smith's arithmetic, $42,911 represents the sum of the profit that

Murphy would have derived from the retail sale of: (i) approximately 220,000 gallons of diesel (at a margin of $0.091 per gallon); and (ii) convenience store merchandise, like soda and cigarettes, which drivers would have bought while filling up (at a margin of $0.104 per gallon). ROA.887 at 10:11–21. Taking fuel and merchandise together, Murphy contends it lost $0.195 in profits for every gallon of diesel loaded by Love's at Frost. *Id.*

In response, Love's objected that Murphy's calculation left out an obligatory variable: the profit Murphy generated by wholesaling the same diesel to Love's. ROA.1013 at ¶ 127. Through this omission, Murphy sought to (i) retain the money it made by selling the 220,000 gallons to Love's and, at the same time, (ii) recover from Love's the profits Murphy estimates it would have made by selling the same gallons at retail. *Id.* Love's noted that this would constitute an impermissible double recovery. ROA.899.

Love's adduced expert testimony—from Allen Jacobs, who has held tenured faculty positions at Harvard, M.I.T., and the University of Texas—that Murphy's damages are, in fact, "negative." ROA.982 at ¶ 39. This is to say it was more profitable for Murphy to sell the 220,000 gallons of diesel to Love's than it would have been for Murphy to sell the same diesel at its retail stores. ROA.999 at ¶ 86. Murphy never designated an expert of its own with a countervailing opinion, nor did

Murphy otherwise controvert Mr. Jacobs' conclusion that Murphy's damages case is infirm because it fails to account for Murphy's wholesale profits.

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On December 10, 2020, the trial court issued a memorandum opinion and order granting Love's motion for summary judgment. ROA.1062–1071. "[T]he Court held that Murphy waived its claims when it charged, and Love's paid, a 'special' or high price for the fuel." ROA.4422, 1065–66. The "opinion also contained … analysis from Murphy's own records demonstrating the high nature of that special price[.]" ROA.4422–23, 1066. This analysis, in turn, became "the basis for [a] motion for reconsideration" that Murphy filed on January 6, 2021, and that the trial court would deny on March 3, 2021. ROA.4423, 1126–35. According to Judge Starr, "[b]ecause that analysis was unnecessary, and apparently greatly vexed Murphy, the court … revised its opinion to stand [exclusively] on the key facts that Murphy ended this dispute under the doctrine of waiver when it charged and Love's paid the special price." ROA.4423. Further to its revised opinion, the trial court entered final judgment against Murphy, from which this appeal was taken. ROA.4432–33.

Appellate briefing was thereafter stayed pending Judge Starr's decision on Love's application for costs and attorney's fees. On May 24, 2021, Judge Starr

approved Love's application, awarding (i) $1,024,006.25 in fees; (2) costs in the amount of $22,557.23; and (3) conditional attorney's fees for the appeal of this case. ROA.4443–56.

Murphy contends it was reversible error for the trial court to award attorney's fees in any amount. Br.5. To put this into perspective, Murphy takes the position that awarding Love's as little as a penny in attorney's fees would constitute an abuse of discretion by the trial court.

III.
SUMMARY OF THE ARGUMENT

Waiver

The trial court correctly held that Murphy waived its claims when it charged, and Love's paid, a "special" price for the diesel. More specifically:

① Despite Murphy's arguments to the contrary, waiver is not necessarily a question of fact for the jury. Where, as here, the facts are undisputed but the parties disagree about the legal significance of the facts, waiver is properly resolved by the court as a matter of law. *See infra* Part IV.A.2.

② Waiver need not turn on the subjective intent of the plaintiff. Waiver also applies when a plaintiff engages, as Murphy did, in intentional conduct inconsistent with a known right. *See infra* Parts IV.A.1, IV.A.3.

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Attorney's Fees

The trial court neither abused its discretion nor committed clear error by awarding mandatory attorney's fees to Love's under the Texas Theft Liability Act (sometimes, the "TTLA"). More specifically:

① Love's was a "prevailing party," for purposes of a fee award, because it succeeded on its affirmative defense of waiver. *See infra* Part IV.B.1.

② Pursuant to Rule 41(a), the trial court gave Murphy the choice between dismissing its complaint with prejudice or continuing to litigate. Because it chose the latter, Murphy is incorrect that

Love's cannot recover its fees associated with continued litigation. *See infra* Part IV.B.2.

③ It was necessary and appropriate for Love's to prepare for trial after the case was stayed pending the trial court's summary judgment ruling because, as Judge Starr himself confirmed, a trial could have been set in short order had he denied Love's motion for summary judgment. *See infra* Part IV.B.3.

④ Counsel for Love's billed a reasonable number of hours. Murphy's competing arguments ignore counsel's detailed billing records, as well as the nature and volume of the services rendered by counsel. *See infra* Part IV.B.4.

⑤ Especially given Murphy's belated disclosures, which reduced its alleged damages from over $12 million to just $42,911, Love's attorney's fees were not disproportionate to the amount in controversy. *See infra* Part IV.B.5.

⑥ Because Love's demonstrated that virtually all its attorney's fees covered work that advanced both recoverable and unrecoverable claims, segregation was unnecessary. Alternatively, to the extent segregation was required, Love's established that a discount to its fees of no more than 5% would suffice. *See infra* Part IV.B.6.

⑦ Finally, Murphy has not shown that the trial court abused its discretion by declining to adjust the lodestar downward using the *Arthur Andersen* factors. *See infra* Part IV.B.7.

IV.

ARGUMENT

A. The trial court correctly determined that Murphy waived its claims by charging Love's a "special" price for the diesel.

1. Murphy ignores the applicable legal standard on which the trial court predicated its finding of waiver.

According to Murphy, whether a party waived a right is a one-dimensional inquiry. Specifically, Murphy submits that waiver always "turns on the subjective intent of the … plaintiff," such that the only way a defendant can establish waiver is to "demonstrate [the] plaintiff's actual intent to relinquish [a] right." Br.22 (citing *Ironclad, L.P. v. Poly-Am., Inc.*, No. 3:98-CV-2600, 2000 WL 1400762, at *14 (N.D. Tex. July 28, 2000)). Murphy similarly posits that, "[f]or waiver to apply under Texas law, a party must have the actual intent to relinquish an existing right." Br.15. This is an incomplete statement of the law, however, because waiver is not invariably a function of a party's subjective motive and state of mind.

On this score, although "[w]aiver may be asserted as an affirmative defense against a party who intentionally relinquishes a known right," it may also be asserted against a party who "engages in intentional conduct inconsistent with claiming that right." *Singleton v. Elliott*, No. 14-13-00040-CV, 2014 WL 1922260, at *4 (Tex. App.—Houston [14th Dist.] May 13, 2014, no pet.) (quoting *Tenneco, Inc. v. Enter.*

Prods. Co., 925 S.W.2d 640, 643 (Tex. 1996)) (internal quotes omitted). As later framed by the Texas Supreme Court, "[t]he elements of waiver include … [i] the party's actual intent to relinquish the right, or [ii] intentional conduct inconsistent with the right." *Ulico Cas. Co. v. Allied Pilots Association*, 262 S.W.3d 773, 778 (Tex. 2008).

The test is disjunctive, yet Murphy's arguments are limited to the first prong. For example, Murphy maintains that Judge Starr erred because, "[i]nstead of looking to Murphy's subjective intent and ascertaining whether it actually intended to waive its claims against [Love's], the District Court decided to impute intent into Murphy's actions[.]" Br.23. But Love's (and, more importantly, the trial court) relied on the second prong, into which subjective intent does not factor. ROA.4426. Murphy's myopic focus on its subjective intent to relinquish its right to sue—to the exclusion of its intentional conduct inconsistent with this right—means that Murphy spends the majority of its brief arguing against a strawman.

As this Court has taught, waiver "can occur either [i] expressly, through a clear repudiation of the right, or [ii] impliedly, through conduct inconsistent with a claim to the right." *Boren v. U.S. Nat'l Bank Association*, 807 F.3d 99, 106 (5th Cir. 2015). Simply put, "[w]aiver can be express or implied." *Bunnell v. Netsch*, No. 3:12-CV-3740-L, 2016 WL 1242626, at *3 (N.D. Tex. Mar. 29, 2016) (citing *Motor Vehicle*

Board v. El Paso Indep. Auto. Dealers Ass'n, Inc., 1 S.W.3d 108, 111 (Tex. 1999)). This has always been an implied waiver case. Murphy misses the mark by analyzing it through the lens of the law on express waiver.

Whether a party has engaged in "intentional conduct" resulting in waiver is judged by an objective standard. The natural corollary to this is that "Plaintiff's subjective awareness or expectations are not relevant to the question of waiver." *Cross v. Bank of New York Mellon*, No. H-20-1322, 2021 WL 2581584, at *8 (S.D. Tex. June 23, 2021). Were it otherwise, the distinction between express and implied waiver would collapse, and there could be no implied waiver because regardless of their conduct, waiving parties could always vow in hindsight that they did not intend for their actions to constitute waiver.

2. Murphy incorrectly states that waiver is always a question of fact for the jury.

Murphy announces a bright-line rule that does not, in fact, exist in our jurisprudence: namely, that "it is settled in Texas that [t]he intent of the plaintiff is a question of fact for the jury." Br.22 (citation and internal quotes omitted). In some circumstances, this certainly can be true. "Where facts are clearly established and are undisputed, however, waiver becomes a question of law." *Sedona Contracting, Inc.*

v. Ford, Powell & Carson, Inc., 995 S.W.2d 192, 195 (Tex. App.—San Antonio 1999, pet. denied) (citing *Tenneco*, 925 S.W.2d at 643).[9]

This Court has itself taught that "[w]aiver is a question of law when the facts that are relevant to a party's relinquishment of an existing right are undisputed." *Boren*, 807 F.3d at 106. There is, of course, a fundamental difference between (i) disputed facts, on the one hand, and (ii) the legal significance of undisputed facts, on the other hand.[10] The former can preclude summary judgment, whereas the latter is within the province of trial courts to decide as a matter of law.

Here, the facts undergirding the trial court's finding of implied waiver are not in dispute. Love's and Murphy are in agreement about what was said and done. The chasms that divide the parties are not competing views of the facts, but instead their disagreements about the legal significance of Murphy's decision to charge Love's a "special" price for the diesel.

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9 *Accord In re General Elec. Capital Corp.*, 203 S.W.3d 314, 316 (Tex. 2006); *Tesco Corp. v. Weatherford Intern., Inc.*, 632 F. Supp. 2d 654, 658 (S.D. Tex. 2009); *Jernigan v. Langley*, 111 S.W.3d 153, 156–57 (Tex. 2003); *Trelltex, Inc. v. Intecx, L.L.C.*, 494 S.W.3d 781, 790–91 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

10 "[W]here underlying facts are not disputed, the significance of those facts becomes a question of law." *Bass v. Stryker Corp.*, 669 F.3d 501, 507 (5th Cir. 2012) (citation omitted)

3. Because Murphy engaged in intentional conduct inconsistent with its right to sue Love's, the trial court's judgment should be affirmed.

The genesis of the "special" price for the disputed diesel is crystal clear. Murphy has stated that "the 'special price' [it] charged" Love's for the diesel "stems from two facts":

> (1) the diesel was not for sale when Defendants took it, and (2) Hurricane Harvey caused a severe shortage in diesel availability resulting in a higher wholesale cost for the commodity. After Murphy discovered Defendants' theft, it … manually calculate[d] the market price of wholesale diesel, which it did by surveying the market to determine the wholesale price at which others had sold diesel during this time of crisis.

This is Murphy's explanation, copied verbatim from its own submissions to the trial court. ROA.655. Murphy went a step further, characterizing the price it charged Love's as relatively "high." It did this both in its briefing in the proceedings below and, again, in a declaration sworn to by one of its ranking executives. ROA.651, 4023. Thus, based on Murphy's own admissions, the following is undisputed:

① Murphy discovered Love's alleged theft of the fuel.

② Only then, after Love's purported misconduct had been revealed, Murphy formulated a "special" price for the express purposes of:

- ➝ accounting for the fact that the fuel was ostensibly "not for sale" (that the fuel was "branded" rather than "unbranded"); and

→ adjusting for supply and demand during a "time of crisis" in the market.

③ The "special price" that Murphy calculated was, in its own words, on the "high" side.

This is a textbook case of waiver. The preceding conduct is irreconcilable with a subsequent lawsuit against Love's. In this regard, the trial court seized on further admissions made by Murphy that were inconsistent, on their face, with its right to sue Love's over the diesel:

> Murphy even admits that it issued the invoices for the express purpose of "recoup[ing] its losses as quickly as possible." *And recouping losses is exactly the goal of lawsuits to recover damages.* If Murphy incorrectly calculated [the] special price it charged Love's, then it should have … calculated that rate [more] carefully or waited for the fullness of litigation to make that calculation.

ROA.4426 (emphasis added). The inescapable reality is that Murphy personnel—including several senior executives at the apex of Murphy's diesel organization—were active participants in a sequence of events and decisions that, taken together, cannot be squared with Murphy's later attempt to sue Love's for theft and conversion:

AUGUST 30th

→ Matthew Elliot, a buyer at Love's, writes his counterpart at Murphy, David Ridings. Mr. Elliott brings it to Mr. Ridings' attention that Love's is loading fuel from Murphy at Frost. ROA.2470.

AUGUST 31st

- "Oh, now I see what happened," Mr. Ridings remarks to Mr. Elliott the next day, after determining that Love's had been loading what Murphy considered "branded" fuel. ROA.1211.

SEPTEMBER 5th

- Kim Poff (Murphy's Central Billing Coordinator) asks Kent Rice (Murphy's Senior Sales Manager for Fuel Marketing) about the fuel that Love's loaded at Frost: "[A]ny news on how to invoice these yet?" ROA.2482.
- Mr. Rice responds: "Pat [Kennedy (Murphy's Director of Diesel Operations)] and I are working on this," and we "should have something for you later today." *Id.*
- Less than an hour later, Mr. Rice instructs Ms. Poff to invoice Love's $2.1018 per gallon. Mr. Rice confirms he is aware that the diesel all went to Love's stores. *Id.*
- Mr. Rice then e-mails Jacob Gutierrez, Love's Supply Chain Manager, about the loads "pulled out of Frost, TX." After Mr. Rice acknowledges that the loads "did not go to Murphy stores" but instead to "Love's stores," he tells Mr. Gutierrez that "[t]he ULSD [diesel] price to be billed will be $2.1018 per gallon." Mr. Rice's message contains no caveats or reservations of rights. ROA.2489.
- Internally, Ms. Poff reports to other members of Murphy's billing department that "per Kent [Rice] I'll be invoicing all the loads pulled out of Frost by [Love's] at a special price." ROA.2486.

SEPTEMBER 6th

- Murphy issues invoices to Love's for the fuel, at the "special" price of $2.1018 per gallon. ROA.2493–518. Murphy has itself characterized the "special" price as comparatively "high."

> ROA.651. Whether styled as special, high, or something else entirely, the price is one that Murphy admits it developed specifically to reflect that Love's took fuel that was allegedly not for sale during a period of upheaval and diminished supply. *Id.*

→ Everyone agrees that the invoices were promptly paid by Love's.

⁂

Murphy's only response is its conclusory assertion that, by engaging in the preceding conduct, it did not mean to waive its right to sue. Murphy acts the part of a Monday morning quarterback when it now professes that it "intended to pursue" additional damages—even though, at the time, it charged Love's a "special" price that Murphy calculated to account for "crisis" conditions and the scarcity of fuel during Hurricane Harvey. Br.10; ROA.1130. A party's subjective, self-interested interpretations of its own conduct—long after the fact, during the throes of litigation—cannot serve to negate conduct that would otherwise support a finding of waiver.

Indeed, the Supreme Court has cautioned against crediting a party's "subjective determination not to waive or to abandon a claim." *Murch v. Mottram*, 409 U.S. 41, 46 (1972). Murphy cannot "simply announc[e] that [it] did not choose to be bound" by the plain effects—waiver principal among them—of its earlier decision to charge Love's a special price for the diesel. *Id.* This is consistent with the general rule that a "[p]laintiff's subjective awareness or expectations are not relevant

to the question of waiver." *Cross*, 2021 WL 2581584, at *8; *cf. Corman v. Lifecare Acquisitions Corp.*, No. CIV. A. 3:96-CV-0755-D, 1998 WL 75908, at *2 (N.D. Tex. Feb. 10, 1998) ("[T]he unilateral, *subjective* intentions of one party do not override the unambiguously expressed *objective* intentions of the parties[.]") (emphasis added).[11]

B. The trial court did not abuse its discretion or commit clear error when it awarded Love's its costs and attorney's fees.

As the trial court observed in its order granting summary judgment (ROA.4430), a fee award to Love's is mandatory under the TTLA. *See* TEX. CIV. PRAC. & REM. CODE 134.005(b). The court's award of attorney's fees to Love's is variously reviewed for clear error and abuse of discretion. *Rodney v. Elliott Sec. Sols., L.L.C.*, 853 Fed. Appx. 922, 923–24 (5th Cir. 2021) ("We review an award of

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11 Murphy hypothesizes that implied waiver only applies to prevent "fraud or inequitable consequences." Br.25. Not so. A more complete statement of the law is that, "*in the absence of a clear intent expressed in words, acts, or conduct*, waiver will be implied only to prevent fraud or inequitable consequences." *Continental Casualty Co. v. Dr. Pepper Bottling Co. of Tex., Inc.*, 416 F. Supp. 2d 497, 508 (N.D. Tex. 2006) (emphasis added); *Resource Bldg. Materials, Inc. v. Bird Inc.*, No. CIV. A. 3:98-CV-2597-D, 1999 WL 794875, at *5 (N.D. Tex. Oct. 1, 1999) (same); *Tapatio Springs Builders, Inc. v. Maryland Cas. Ins. Co.*, 82 F. Supp. 2d 633, 646 (W.D. Tex. 1999) (same). Here, there is no such "absence." *See supra* Part IV.A. Besides, it would be inequitable to let Murphy pursue its claims after it charged Love's a "special" price and received and retained Love's $462,379.20 payment.

attorney's fees and a district court's application of the *Johnson* factors for abuse of discretion, though we review the initial determination of reasonable hours and rates for clear error."). The district court is afforded wide discretion in crafting an award, given its "superior understanding of the litigation" (*id.*) and because it is "intimately involved with the case, the litigants, and the attorneys" (*U.S. v. Georgia Gulf Corp.*, 208 Fed. Appx. 280, 282 (5th Cir. 2006)).[12]

As explained in *Rodney*, the district court's fixing of the lodestar is reviewed for clear error. 853 Fed. Appx. at 924–25. Clear error review means that, "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *McCuller v. Nautical Ventures, L.L.C.*, 434 Fed. Appx. 408, 411 (5th Cir. 2011) (quoting *Anderson v. City of Bessemer*, 470 U.S. 564, 573–74 (1985)).

This is a highly deferential standard of review. "To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must, as one

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12 "We cannot overemphasize the concept that a district court has broad discretion in determining the amount of a fee award. This tenet is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Alexander v. City of Jackson*, 456 Fed. Appx. 397, 400 (5th Cir. 2011) (citation and internal quotes omitted).

member of this court recently stated ... strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." *United States v. Becerra*, 155 F.3d 740, 756 (5th Cir. 1998) (quoting *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)) (internal quotes omitted).

Adjustments to the lodestar—including whether any were necessary—are reviewed for abuse of discretion. *Rodney*, 853 Fed. Appx. at 925. "[A] district court only abuses its discretion if it: '(1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts.'" *Id.* at 924 (quoting *Allen v. C&H Distribs., L.L.C.*, 813 F.3d 566, 572 (5th Cir. 2015)).

When reviewing lodestar adjustments under this standard, this Court "generally require[s] a district court to 'explain with a *reasonable* degree of specificity the findings and reasons upon which the award is based.'" *Id.* (internal citation omitted) (emphasis in original). This includes the district court's treatment of the *Johnson* or *Arthur Andersen* factors, as may be applicable,[13] but the "district court need not provide a lengthy analysis of each factor." *Id.* (citing *Torres v. SGE Mgmt., L.L.C.*, 945 F.3d 347, 354 (5th Cir. 2019)).

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13 When Texas law applies in diversity cases, courts employ the factors enumerated in *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812 (Tex. 1997), as Judge Starr did here. ROA.4445.

1. Love's was a prevailing party for purposes of the fee award.

Murphy maintains that Love's was not a prevailing party because the trial court did "not find that Love's had not violated the Texas Theft Liability Act; instead, it merely found that Appellees could avoid liability for their … actions." Br.28. *Id.* Murphy is incorrect as a matter of law.

Murphy invokes two cases in support of its contention that Love's is not a prevailing party. In *Brinson Benefits, Inc. v. Hooper*, 501 S.W.3d 637 (Tex. App.—Dallas 2016, no pet.), the Court held that, "[t]o recover fees, the defendant[s] must … prevail on the merits of the claim, which one court has interpreted to mean 'establish [they] did not commit theft.'" *Id.* at 642 (quoting *Travel Music of San Antonio, Inc. v. Douglas*, No. 04-00-00757-CV, 2002 WL 1058527, at *3 (Tex. App.—San Antonio May 29, 2002, pet. denied)). But in *Brinson*, the defendant lost at trial. To be clear, a jury affirmatively determined that the defendant was a thief. *Id.* at 640. The trial court nevertheless awarded fees to the defendant. Naturally, the Fourth Court of Appeals reversed the fee award. *Id.* at 646. *Brinson* is inapplicable on its face: it was never found that Love's committed theft.

Moreover, as the trial court observed in its fee order, the language from *Brinson* on which Murphy relies "was dicta and merely highlighted the opinion of a single court." ROA.4446–47. Judge Starr also noted that the *Brinson* "court held that the

'widely accepted definition' of prevailing party is '[t]he party to a suit who successfully prosecutes the action or successfully defends against it, even though not necessarily to the extent of his original contention.'" *Id.* But "[s]uccessfully defending against a suit does not imply proving that a party did not commit theft; rather, it implies that the defendant avoided liability—which is what [Love's] did here." ROA.4447.

Murphy also points to *Travel Music*. There, the defendants could not recover fees because they never "establish[ed] [they] did not commit theft." 2002 WL 1058527, at *3. The underlying reason, however—which Murphy omits from its briefing—was that the plaintiff had dismissed its theft claim nine months before trial. *Id.* As such, "whether any of the [defendants] committed theft was not litigated in this case. [B]ecause no party successfully prosecuted or successfully defended the merits of the Texas Theft Liability Act claim, no party 'prevailed[.]'" *Id.* at *3. Judge Starr correctly recognized that, because "Murphy did not nonsuit its Texas Theft Liability Act claim," *Travel Music* is "inapposite." ROA.4447.

More to the point, Murphy's essential premise—that a successful affirmative defense to theft does not confer "prevailing party" status on a defendant—has been rejected by courts in Texas. *Pemex Exploración Y Producción v. BASF Corp.*, No. H-10-1997, 2015 WL 12763538, at *6 (S.D. Tex. Dec. 31, 2015) ("[D]efendants seeking

attorneys' fees in this action did not need to prove that they did not commit theft to recover attorneys' fees reasonably and necessarily incurred defending against the TTLA claim[.]"); *accord Chieftain Expl. Co. v. Gastar Expl., Inc.*, No. 10-15-00037-CV, 2017 WL 3860357, at *5 (Tex. App.—Waco Aug. 30, 2017, pet. denied) (rejecting a TTLA plaintiff's theory that the defendant "was not a prevailing party because [it] did not prove it did not commit theft"); *cf. Arrow Marble, LLC v. Killion*, 441 S.W.3d 702, 706–07 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (dismissal of a TTLA claim with prejudice—not on the merits, but due to plaintiff's want of prosecution—entitles defendant to attorney's fees as the prevailing party).

These decisions dovetail with the general principle that a "prevailing party is one who has been awarded some relief by the court," resulting in "a judicially sanctioned change in the legal relationship of the parties." *Lightsource Analytics, LLC v. Great Stuff, Inc.*, No. A–13–CV–931, 2014 WL 4744789, at *5 (W.D. Tex. Sept. 23, 2014) (citation and internal quotes omitted). A "successful defense," such as the one mounted by Love's, "materially alters the plaintiff's legal relationship with the defendant[.]" *BHL Boresight, Inc. v. Geo-Steering Solutions, Inc.*, No. 4:15-CV-00627, 2017 WL 2730739, at *17 (S.D. Tex. June 26, 2017). Even before verdict or summary judgment there can be a "successful defense," including through dismissal with prejudice. *Id.*

By contrast, "a dismissal without prejudice does not satisfy the prevailing party requirement because the plaintiff is free to resurrect its claims against the defendant and may prevail at a later date." *Id.* This is why Murphy balked at a dismissal with prejudice when one was offered by Judge Lynn: Murphy did not want to pay Love's attorney's fees. It strains credulity for Murphy to acknowledge that a dismissal with prejudice would have entitled Love's to fees—and then to argue, in the next breath, that a summary judgment ruling culminating in a take-nothing judgment entitles Love's to no fees whatsoever. In either instance, the legal relationship between the parties is altered in precisely the same way: Murphy's claims are compromised for good, and Murphy can never again sue Love's over the diesel loads at Frost. *See Automation Support, Inc. v. Humble Design, L.L.C.*, 734 Fed. Appx. 211, 215 (5th Cir. 2018) (A "change in the legal relationship between the parties correlates with the test embraced both by Texas and the Fifth Circuit for determining prevailing party status.").

Perplexingly, Murphy criticizes the trial court for "refus[ing] to consider the case's outcome to ascertain whether [Love's] should have been awarded fees at all … given that [Love's] did not prevail[.]" Br.16. The trial court did no such thing. To the contrary, the trial court's analysis of this very issue spans three pages of its order granting Love's fee application. ROA.4446–48 at Part III.1.

2. Love's incurred attorney's fees after July 2019 only because Murphy chose to keep litigating pursuant to Chief Judge Lynn's order under Rule 41(a).

Upon the implosion of its damages case, Murphy considered it incumbent on Love's to promptly surrender: Love's should have consented to dismissal without prejudice; absorbed all of its own costs and fees; and, in the words of Chief Judge Lynn, thereby "suffer[ed] plain legal prejudice." ROA.415; Br.29–30. Because Love's did not fall in line with its demands, Murphy reckons that all fees subsequently incurred by Love's were "unnecessary" and therefore unrecoverable "as a matter of law."[14] Br.32.

As the trial court aptly put it, "Murphy's ire is misplaced." ROA.4449. Elaborating, Judge Starr explained that, "[j]ust as Chief Judge Lynn found in 2019, "this Court also finds that [it] was not a suitable solution" for "the defendants … [to] eat[] their losses and dismiss[] the case, knowing that Murphy could refile it." ROA.4449–50.

Murphy impresses upon this Court that, when "Murphy announced its intention to dismiss the lawsuit … the bulk of litigation tasks had not yet occurred."

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14 Murphy's briefing to this Court includes a bar chart showing that, up to this point, each side had billed roughly 1,100 hours. Br.32. The average hourly rate for Love's counsel was $282—less than Murphy's paralegals, and about half as much as Murphy's associate attorneys. ROA.1173.

Br.30. When Murphy made the same observation in opposition to Love's fee application, the trial court parried, noting that this actually cuts against Murphy's position. ROA.4449–50. Because Murphy chose to "proceed with the case," rather than "dismiss the case *with* prejudice," this lawsuit "went forward and followed a natural progression: the parties took depositions, filed motions, and prepared for trial." *Id.* (emphasis in original). As such, the trial court properly rejected Murphy's claim "that the fees [Love's] incurred were unnecessary because [Love's] should not have opposed the motion to dismiss without prejudice." *Id.*

Murphy also suggests that Love's should not be awarded any fees incurred after it refused to agree to a dismissal without prejudice, because Murphy could have kept its "relatively minimal," "five-figure" damages under wraps and "moved forward using a flawed damages analysis with a large damages figure." Br.12, 30. It is troubling that Murphy apparently believes subterfuge was an available option, particularly given the ethical obligation to always display candor toward the tribunal. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 3.03.

3. It was necessary and appropriate for Love's to prepare for trial after the case was stayed pending the trial court's summary judgment ruling.

In the proceedings below, "Murphy claim[ed] that the fees incurred after the Court stayed the case in February 2020 were unnecessary." ROA.4450. Murphy's

reasoning was twofold: Love's "should have stopped preparing for trial because (1) the case was stayed and (2) the COVID-19 pandemic was underway." *Id.* Murphy urges the same argument again on this appeal. Br.33–34.

Murphy's argument ignores that the vast majority of Love's fees (for work performed after the case was stayed) were incurred between February and April 2020, when trial was imminent given: (i) Judge Starr's stated intention to decide Love's summary judgment motion by March 2020 (ROA.2413 at 57:14–16); and (ii) the age of this case relative to other matters, presumptively placing it toward the top of the civil trial docket. This was a fluid environment, when the pandemic was still in its infancy, and trials went forward despite COVID-19: Chief Judge Lynn held a jury trial in June 2020, for example, and Judge Starr tried a case in August 2020. To this end, the trial court noted that, "when it stayed the case in February 2020, it did so pending the Court's resolution of the outstanding motion for summary judgment—not because of COVID-19, which became a disruption in the United States in March 2020." ROA.4450 n.25. If Love's had simply mothballed the case—as Murphy suggests it should have, with the benefit of 20/20 hindsight—Love's would have been unprepared for a trial setting on a short fuse were summary judgment denied.

For his part, Judge Starr likewise found Murphy's "reasoning unconvincing." ROA.4450. He offered this explanation:

> [Love's] reasonably assumed that the motion for summary judgment would be resolved in March 2020 and that due to the case's age, it could be set for trial soon after. And despite the pandemic's onset, litigation continued. This very Judge conducted a jury trial in August and held many hearings virtually. Arguing that [Love's] should have ceased all litigation simply because the case was stayed is an erroneous claim: to do so could have left the parties entirely unprepared for trial.

Id.

This comes straight from the horse's mouth. The judge presiding over this case in the district court has confirmed that, had he denied Love's motion for summary judgment, a trial could have been set in short order. This is proof positive that Love's trial preparation efforts were prudent even in light of the stay. When Murphy argues otherwise it is challenging Judge Starr's stated expectations for his own docket. This is unavailing, especially since "[t]he district court has broad discretion in the management of its docket and the trial of lawsuits pending before it[.]" *Myles v. Garner*, 20 F.3d 466 (5th Cir. 1994) (citing *Prudhomme v. Tenneco Oil Co.*, 955 F.2d 390, 392 (5th Cir. 1992)).

4. Counsel for Love's billed a reasonable number of hours.

Murphy laments that Love's "failed to explain" the need for legal fees which Murphy has dubbed—summarily, without any elucidation—"unreasonable" and "exorbitant." Br.34–35. Contrary to this hyperbole, Love's granular fee statements amply support these billings. ROA.1238–1511, 4410–21.

For instance, Murphy grumbles that Love's attorneys worked 406 hours in September 2019. Br.36. Just between September 17th and October 2nd, however, nine depositions were taken, all in cities to which defense counsel had to travel—including by car to El Dorado, Arkansas, which no commercial airline services. ROA.1200–01. Additionally, the individual defendants were prepared for their depositions in September. ROA.1201. During the same month, Love's was grappling with Murphy's opposition to its summary judgment motion and, also, preparing a reply in further support of its motion. ROA.1199–1201. Murphy's motion to strike the summary judgment evidence was filed at the end of August, as well, and Love's submitted its opposition on September 11th. ROA.1200. As shown by this example, in context Love's fees were necessary and reasonable.[15]

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15 By way of a bar chart, Murphy makes much of the fact that it billed fewer hours than Love's in the period after Judge Lynn refused Murphy's request to dismiss without prejudice. Br.32. But the Texas Supreme Court has underscored that

Murphy accuses the trial court of doing "nothing to address Murphy's concerns about the reasonableness of [Love's] hours spent on specific tasks." Br.38. In support of this claim, Murphy fancies that Judge Starr "speculated that 'it is not inconceivable that the defendants prepared vigorously for trial to avoid' a verdict finding that Love's committed civil theft." *Id.* (quoting ROA.4451). But this is not what the trial court did—although one would never know this from the quotation that Murphy cherry-picked from Judge Starr's opinion and then presented to this Court out of context. Here is what the trial court actually said:

> Regardless of the money at stake, a verdict finding that Love's, or any of the defendants, engaged in theft would have been a significant reputational wound. It is not inconceivable that the defendants prepared vigorously for trial to avoid that stain and the cascading impact it may have had. The suggestion that the defendants should have pumped the brakes and advocated less zealously for their clients because there was not much money at stake misses the point.

ROA.4451.

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a "party may freely choose to spend more or less time or money than would be 'reasonable' [for] the [opposing] party[.]" *In re Nat'l Lloyds Insurance*, 532 S.W.3d 794, 808 (Tex. 2017). The Court explained that "comparisons between the … fee expenditures of opposing parties are inapt, as differing motivations of plaintiffs and defendants impact the time and labor spent[.]" *Id.* ("[T]he tasks and roles of counsel on opposite sides of a case vary fundamentally[.]") (quoting *McClain v. Lufkin Industries*, 649 F.3d 374, 384 (5th Cir. 2011) (internal quotes omitted)).

The trial court was not, as Murphy insists, speculatively endorsing the number of "hours [Love's] spent on specific tasks." Br.38. Rather, the trial court was dismantling Murphy's misplaced criticism that Love's overall billings were disproportionate to the amount in controversy after Murphy's slashed its damages to the bone. It is ironic—and, candidly, hypocritical—for Murphy to marginalize the reputational harm that Love's would suffer if it had left Murphy's allegations of theft unanswered, given that the entire impetus for this lawsuit in the first place was the myth that the Frost loads led to fuel shortages that would damage Murphy's reputation with its customers for years to come.

5. Love's attorney's fees were not disproportionate to the amount in controversy.

When it sought dismissal, Murphy specifically acknowledged that "[t]he bulk of litigation expenses lies ahead." ROA.365. Yet now Murphy objects to Love's incurring those same expenses—which would have been avoided had Murphy accepted a dismissal with prejudice or, for that matter, Love's pre-suit settlement offer—because they are incommensurate with the "minimal" damages that Murphy tardily disclosed after almost a year and a half of litigation.

Love's attorney's fees (a little more than $1 million) should be placed in the balance against the damages that Murphy first presented to Love's. When this is the point of reference, Love's total fees are: (i) less than Murphy's alleged actual

damages ($1,238,515.920); (ii) approximately 1/5th of Murphy's stated punitive damages floor ($4,954,063.68); and (iii) approximately 1/12th of Murphy's stated punitive damages ceiling ($12,385,519.20). ROA.4403.

Even if Murphy's eleventh-hour damages disclosure is the barometer, Murphy did not reveal that its damages were $42,911 in July 2019. When Murphy sought to dismiss, it admitted—less precisely—that its damages were in some unspecified amount less than $100,000. In other words, if the Court treats as the benchmark Murphy's damages estimate from July, this was more than double $42,911. At this level, and ignoring that Murphy's original damages projections were exponentially higher, Love's fees are about ten times greater than Murphy's approximately $100,000 in damages. This is well within the range that courts in Texas have found proportionate to the amount in controversy:

① **102 × greater.** *Herring v. Heron Lakes Estates Owners Association*, No. 14-09-00772-CV, 2011 WL 2739517, at *5 (Tex. App.—Houston [14th Dist.] Jan. 4, 2011, no pet.) (fees of $71,804 on $700 in damages).

② **54 × greater.** *Meineke Disc. Muffler v. Jaynes*, 999 F.2d 120, 126 (5th Cir. 1993) (fees of $564,748 on $4,420 in actual damages and $6,000 in punitive damages).

③ **27 × greater.** *Jetall Companies v. Plummer*, No. 01-18-01091-CV, 2020 WL 5900577, at *1 (Tex. App.—Houston [1st Dist.] Oct. 6, 2020, no pet.) (fees of $61,662.50 on $2,285.34 in damages).

④ **10 × greater.** *Young v. Sanchez*, No. 04-10-00845-CV, 2011 WL 4828021, at *5 (Tex. App.—San Antonio Oct. 12, 2011, no pet.) (fees of $9,201.57 on $907 in damages).

⑤ **10 × greater.** *Northwinds Abatement, Inc. v. Employers Ins. of Wausau*, 258 F.3d 345, 354–55 (5th Cir. 2001) (fees of $712,000 on $74,570 in damages).

These authorities harmonize with the more basic axiom that "an attorneys' fee award need not be proportionate to the damage award." *Borst v. O'Brien*, 979 F.2d 511, 516 (7th Cir. 1992). This is why fee "awards have been held reasonable even when the amount of attorneys' fees far surpasses the amount of actual damages." *Bear Ranch, LLC v. Heartbrand Beef, Inc.*, No. 6:12-CV-14, 2016 WL 3549483, at *4 (S.D. Tex. June 30, 2016), *aff'd*, 885 F.3d 794 (5th Cir. 2018). Consistent with the foregoing case law, the trial court explained that "the time required to take depositions and prepare for trial cannot always expand and compress relative to the money at stake; for example, issue complexity does not always correlate to monetary value." ROA.4451.

Finally, Murphy accused all the defendants of committing a felony. These allegations have been covered by the press,[16] and Love's reputation in the marketplace impacts its relationships with customers and business partners. The individual defendants are truck drivers whose ability to obtain employment and

16 ROA.4374.n.1.

credit would have been impaired by a judgment in which they were portrayed as criminals. These facts are of no small moment. *See McCown v. City of Fontana*, 565 F.3d 1097, 1105 (9th Cir. 2009) ("[N]onmonetary victory may constitute an excellent result for the purpose of calculating attorney's fees.").

6. The trial court's fee award is consistent with the strictures of segregation.

The Texas Supreme Court teaches that, when fees "would have been incurred on a recoverable claim alone, they are not disallowed simply because they do double service." *Tony Gullo Motors v. Chapa*, 212 S.W.3d 299, 313 (Tex. 2006). Thus, if "a legal service necessary to the litigation of a claim for which attorneys' fees are available also advanced a claim for which attorneys' fees are not recoverable, then … the service need not be segregated[.]" *In re Lesikar*, 285 S.W.3d 577, 585 (Tex. App.—Houston [14th Dist.] 2009, no pet.). Murphy contends that Love's segregation analysis addresses only whether the "facts are interrelated," to the exclusion of the services or "tasks performed." Br.39. This is incorrect.

Without overlapping legal and factual issues, rarely will legal services advance both recoverable and unrecoverable claims. Love's first step in its fee application, therefore, was to observe: (i) that unjust enrichment is not an independent cause of action and that, regardless, Murphy abandoned it; (ii) that conspiracy is a derivative tort, which rises or falls with the success or failure of Murphy's claims for theft and

conversion; and (iii) that, as compared to those of a conversion claim, "the elements of [a TTLA] claim are no different[.]"[17] ROA.1161.

Murphy suggests that Love's analysis ended there. Br.39–40. It did not. Love's proceeded to explain that both theft and conversion—functionally the only causes of action, since Murphy gave up on unjust enrichment and the conspiracy count rides the coattails of the statutory and common law theft claims—hinged on the same inquiries: (i) *authorization* (was Love's authorized to take the diesel?); (ii) *defenses* (were Murphy's claims precluded by Love's affirmative defenses, like waiver?); and (iii) *damages* (did Murphy sustain any and, if so, in what amount?). ROA.1162–66. What followed was an analysis of the specific legal services performed by Love's counsel, to ascertain whether they were related to one or more of these three categories. *Id.* Love's reviewed all its written discovery, every deposition transcript, and its briefing at the dismissal and summary judgment stages. ROA.1205–12. Love's allocated this work product by page ranges and, through calculations reproduced in its briefing, determined that only 2.3% of the tasks performed were unrelated to authorization, defenses, or damages. *Id.* Murphy did not dispute Love's calculations in the trial court, nor does Murphy challenge them in its briefing here.

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17 *Ledesma v. D.R. Horton, Inc.*, No. SA-08-CA-128-OG, 2008 WL 1912531, at *3 (W.D. Tex. Apr. 29, 2008).

Based on the foregoing, Love's concluded: (i) that segregation is unnecessary; but, alternatively, (ii) that a 5% reduction in fees would represent a sufficient segregation discount. ROA.1212. Murphy's own submissions, to the trial court and on appeal, validate this figure. In this regard, Murphy lists a series of billing entries it says should have been segregated. ROA.4348–49; Br.41. Accepting Murphy's list at face value, which is charitable,[18] the total fees for the entries are **$31,252.50.** ROA.4404–08. By comparison, after applying the 5% downward adjustment proposed by Love's, the segregation discount is **$51,200.31** (*i.e.*, $1,024,006.25 [total fees] × 0.05).[19]

The process employed by Love's, and adopted by Judge Starr, was not necessarily accurate down to the dollar—nor did it have to be. "[T]rial courts need

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18 Murphy overlooks that Love's already segregated some fees. For example, Murphy cites an entry for "work related to 'malicious prosecution.'" Br.41. This was excluded from Love's fee request. ROA.1231–32. Murphy also cites time spent interviewing truck drivers as uncompensable. Br.41. But the drivers' only knowledge surrounds the loading of fuel, which relates to all of Murphy's claims.

19 Murphy also protests that counsel billed for "clerical tasks." Br.37. According to Murphy, functions like communicating with the court and reviewing court notices are ones lawyers should not perform. *Id.* Accepting this dubious assumption, the associated fees are no more than $12,437.50. This amount, together with the $31,252.50 in fees that Murphy says should be segregated, yields $43,690.00—which is less than the 5% (or $51,200.31) segregation discount that Love's proposed in the proceedings below.

not, and indeed should not, become green-eyeshade accountants." *In re Rose*, No. 17-42053, 2020 WL 6877927, at *18 (Bankr. E.D. Tex. Oct. 14, 2020) (quoting *Fox v. Vice*, 563 U.S. 826, 838 (2011)). After all, "[t]he essential goal in shifting fees … is to do rough justice, not to achieve auditing perfection." *Id.* This is why "trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time." *Id.* In the final analysis, "allocating attorneys' fees is not a precise science." *Navigant Consulting, Inc. v. Wilkinson*, No. 3:02-CV-2186-B, 2008 WL 2765334, at *4 (N.D. Tex. July 16, 2008) (citing *Chapa*, 212 S.W.3d at 313).

7. The trial court did not abuse its discretion by declining to adjust the lodestar downward using the *Arthur Andersen* factors.

The Supreme Court of Texas has stated that, "[l]ike our federal counterpart, we recognize that the base lodestar figure [already] accounts for most of the relevant *Arthur Andersen* considerations." *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 500 (Tex. 2019) (citing *Arthur Andersen*, 945 S.W.2d at 818). This is to be expected, because the "lodestar method … is essentially a short-hand version of the *Arthur Andersen* factors." *Taylor v. Cantu*, No. 01-19-00353-CV, 2020 WL 6878729, at *3 (Tex. App.—Houston [1st Dist.] Nov. 24, 2020, no pet. h.).

A court may in its discretion, however, "adjust the lodestar up or down if [the *Arthur Andersen*] factors indicate an adjustment is necessary to reach a reasonable fee in the case." *Lozoya Constr., Inc. v. H&E Equip. Services, Inc.*, No. 11-19-00287-CV, 2020 WL 1467268, at *9 (Tex. App.—Eastland Mar. 26, 2020, pet. denied). Love's did not seek or receive an upward adjustment, and Murphy argues that—while the majority of the factors are "neutral"—three of them militate in favor of a downward adjustment. Murphy is mistaken:

① The trial court explained that, while "the issues … were not particularly novel[,] … mounting a successful defense required extensive research and legal work, in part because Murphy sued multiple companies and drivers," and, "[a]s a result, [Love's] defense required significant time and labor." ROA.4453. Further, "[b]ecause the case involved a large damages claim (although Murphy eventually reduced it) and reputational harm, it required skilled lawyers to perform the legal services in order to avoid a judgment against the defendants." *Id.*

On this appeal, Murphy's only response to the trial court's thoughtful reasoning is to brandish the conclusory statement that this "was not a complicated case." Br.44. This hardly establishes that Judge Starr abused his discretion.

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② Although "[t]he amount ultimately at issue was less than $100,000," the trial court emphasized that "Murphy began the litigation claiming it could recover eight figures." ROA.4453. In the face of this staggering sum, Love's "defeated all of Murphy's claims, preventing reputational and monetary harm."

> *Id.* Judge Starr furthermore cited authority for the proposition that "Texas courts routinely approve fee awards that exceed the underlying amount in dispute." ROA.4453–54.
>
> In response to this multifaceted rationale, Murphy offers only its self-serving opinion—unsupported by any analysis—that Love's accomplished very little by winning an affirmative defense in a case worth only $42,911. Br.45. This is not nearly enough to show that the trial court abused its discretion.
>
> ⁂
>
> ③ Finally, Murphy chides Love's for not identifying any specific matters that it was unable to accept because of this case. Br.44–45. The trial court correctly recognized that this was unnecessary, since "the sheer size of this engagement necessarily precluded other employment opportunities." ROA.4453. The proof was in the pudding, in other words. Murphy's own briefing supports Judge Starr's conclusion, inasmuch as it recites several months during which defense counsel worked hundreds of hours just on this case. Br.35.

In short, the three *Arthur Andersen* factors incanted by Murphy in passing fall far short of showing that the trial court abused its discretion when it declined to adjust the lodestar downward.

V.

CONCLUSION

For the foregoing reasons, Love's respectfully requests that this Court:

① affirm the district court's judgment and award of costs and attorney's fees; and

② remand this case to the district court to fix the amount of its award of appellate attorney's fees.

DATED: October 27, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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/s/ Thomas G. Ciarlone, Jr.

THOMAS G. CIARLONE, JR.

CERTIFICATE OF SERVICE

I certify that on October 27, 2021, I filed the foregoing document with the Clerk of the United States Court of Appeals for the Fifth Circuit, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to all attorneys of record who have consented in writing to such Notice as service of the document by electronic means, including the following:

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