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IN THE  
SUPREME COURT OF THE UNITED STATES

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WAYNE. ENGLISH – PETITIONER

vs.

ENERGY FUTURE HOLDINGS CORP., et al, - RESPONDENTS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR REHEARING

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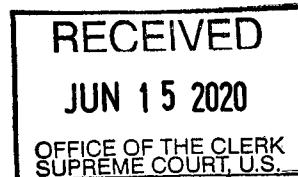
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## **PETITION FOR REHEARING**

Pursuant to Supreme Court Rule 44.1, Wayne English (“English”) respectfully petitions for rehearing of the Court’s denial of his Writ of Certiorari issued on April 20, 2020. English moves this Court to grant this petition for rehearing and consider his case with merits briefing. Pursuant to Supreme Court Rule 44.1, this petition for rehearing is filed within 25 days of this Court’s decision in this case. Mr. English is proceeding in forma pauperis under Rule 39.

### **BACKGROUND**

In April 2014, after suffering years of financial difficulties, Energy Future Holdings Corp., (“EFH”) filed chapter 11 bankruptcy. On the petition date, English was a holder of \$100,000 of the Series R Bonds (the “Bonds”). Approximately five months after the bankruptcy filing, English sold his Bonds for \$75,000 and submitted a timely proof of claim for \$25,000. EFH filed an objection to English’s claim as invalid. English filed his response which pled as an affirmative defense the doctrine of mitigation of damages. Both the Bankruptcy Court and the District Court denied English’s proof of claim. The Third Circuit Court of Appeals concurred with the lower courts and all three courts dismissed and would not address English’s claim of mitigation.

### **REASON FOR GRANTING THE PETITION**

Texas law, Federal law, and previous rulings issued in the Delaware Bankruptcy Court require parties to mitigate damages if it can do so with “trifling expense or with reasonable exertions.” *Gunn Infiniti, Inc., v. O’Byrne*, 996 S. W.

2d 854, 857 (Tex. 1999). See also *In re Worldcom, Inc.*, 361 Bankr. 675 (Bankr. S.D.N.Y. 2007) (“The appropriate inquiry is whether the breaching party has made reasonable efforts ... to mitigate damages.”); *In re Orion Refining Corp.*, 445 B.R. 312, 314 (D. Del. 2011) (the bankruptcy court did not err as a matter of law in ruling that appellant “failed to mitigate his damages”).

Additionally, at the Delaware bankruptcy hearing on EFH’s objection to English’s proof of claim on December 13, 2016, EFH’s senior counsel, Sinead Soesbe, testified that under Texas law, parties are required to mitigate damages.

Forty-two states, including the State of Texas and the State of Delaware, along with the District of Columbia have recognized that a party has a duty to mitigate damages in at least some situations. Texas has implemented a long standing requirement that parties are required to mitigate damages. See *Gunn, supra.*, (“Under mitigation principles, the long-standing law of this state requires a claimant to mitigate damages ”); *Atrium v Houston Red LLC.*, Tex. Sup. Ct. case # 18-0228, opinion 2/7/20, (Mitigation is usually required in breach of contract cases).

Petitioner, Wayne English, at all times relevant hereto was a resident of Texas. Respondent, Energy Future Holdings Corp., is a corporation duly organized and existing under the laws of the State of Texas, having its principal office in Dallas, Texas. EFH was incorporated in Delaware which granted Jurisdiction to the Delaware Bankruptcy Court pursuant to 28 U.S.C. #157 and 1334. As an entity owned and operated in the State of Texas, Texas laws have

priority over the bankruptcy filing. *Bryant v. Swoford Bros.*, 214 U. S. 279, 290-291 (A purpose of bankruptcy is to administer an estate as to bring about a ratable distribution of assets among the bankrupt's creditors. What claims of creditors are valid and subsisting obligations against the bankrupt at the time a petition in bankruptcy is filed is a question which, in the absence of overruling federal law, is to be determined by reference to state law); See also *Security Mortgage Co. v. Powers*, 278 U.S. 149, 153-154.

## TEXAS LAW ON MITIGATION

In a recent Texas Supreme Court decision, *JCB v. Horsburgh*, pursuant to two Certified Questions from the United States Court of Appeals for the Fifth Circuit, the Texas Supreme Court provided that Texas citizens and Texas entities have an obligation and a duty to mitigate damages. See *JCB, Inc., v. Horsburgh & Scott Co.*, No. 18-1099 (Tex. Jun. 7, 2019) (“Yet even in tort cases, plaintiffs have an obligation to mitigate damages before trial ...”, pg. 14-15; “recognizing in negligence suit that plaintiff’s recovery excludes damages caused by plaintiff’s failure to mitigate” *JCB* quoting *Moulton v. Alamo Ambulance Serv., Inc.*, 414 S.W. 2d 444, 449 (Tex. 1967); “Even DTPA plaintiffs hoping for treble damages have an obligation to mitigate their actual damages, thereby reducing their trebled amount.”, page 15; and, “holding ‘that a plaintiff in a DTPA case has the same duty to mitigate damages as in other cases’”, *JCB* quoting *Gunn, supra.*, at 854, 858..

Additionally, the Texas Supreme Court provided in *JCB* that, “{T}he doctrine of mitigation of damages ... prevents a party from recovering for damages resulting

from a breach of contract that could be avoided by reasonable efforts on the part of the plaintiff.” *JCB* quoting *Great Am. Ins. Co. v. N. Austin Mun. Util. Dist.*, 908 S.W.2d 415, 426 (Tex. 1995); and “Where a party is entitled to the benefits of a contract and can save himself from damages resulting from its breach at a trifling expense or with reasonable exertions, it is his duty to incur such expense and make such exertions ....”, *JCB* quoting *Walker v. Salt Flat Water Co.*, 96 S.W.2d 231, 232 (Tex. 1936). In their ruling, the Texas Supreme Court quoted a leading treatise on remedies, “The avoidable consequences rules, or rules for minimizing damages, are cardinal instruments of damages measurement .... Minimizing damages rules apply in all kinds of cases, including contract, tort, and statutory claims.” 1 DAN D. DOBBS, LAW OF REMEDIES 380 (2D ED. 1993) (footnotes omitted).

In the Order issued by the Fifth Circuit Court of Appeals, to certified two questions to the Texas Supreme Court, the Honorable James Ho, Circuit Judge, and a former law clerk for the United States Supreme Court and a former Solicitor General for the State of Texas provided additional statements supporting the Texas mitigation doctrine. See *JCB, Inc., v. Horsburgh & Scott Co.*, 912 F.3d 238 (“Contract damages can decrease if opportunities to mitigate subsequently arise,”; “diminishing damages award by the amount attributed to a failure to mitigate”, Judge Ho quoting *Pulaski Bank & Tr. Co. v. Texas Am. Bank*, 759 S.W.2d 723, 736 (Tex. App.—Dallas 1988, writ denied); “{A}n event that indicates that the conduct is less harmful than had been supposed prevents or diminishes damages for the

consequences.", Judge Ho quoting RESTATEMENT (SECOND) OF TORTS #910 cmt.b (AM. LAW INST. 1979).

In Texas the doctrine of mitigation of damages, sometimes referred to as the doctrine of avoidable consequences, requires an injured party to use reasonable efforts to avoid or prevent losses. *Pulaski*, *supra*. at 723 & 735. In the context of a breach of contract case, the doctrine has been stated as follows: "Where a party is entitled to the benefits of a contract and can save himself from the damages resulting from its breach at a trifling expense or with reasonable exertions, it is his duty to incur such expense and make such exertions." *See Great Am. Ins. Co. v. N. Austin Mun. Util. Dist. No. 1*, 908 S.W.2d 415, 426 (Tex. 1995) (quoting *Walker v. Salt Flat Water Co.*, 128 Tex. 140, 96 S.W.2d 231, 232 (1936)).

Under Texas law, this doctrine has been applied in breach of contract and tort cases. *See Gunn Infiniti, Inc. v. O'Byrne*, 996 S.W.2d 854, 858 (Tex. 1999) (applying doctrine in DTPA case); *Pulaski*, *supra*. at 735 (noting that "Texas has applied the mitigation doctrine in both tort and breach of contract cases"); *see also* Restatement (Second) of Torts § 918 (Am. Law Inst. 1979) (stating general rule that "one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort," ).

The Texas legislature has codified a multitude of statutory regulations that require parties to minimize a damage claim or loss. See Texas Finance Code

#123.11·Right to Act to Mitigate or Avoid Loss; Texas Insurance Code #1115.01·Mitigation; Texas Labor Code #61.053(4)(... any other matter, including mitigating circumstances); Texas Occupations Code #301.4531(4) –(any mitigating factors); and Texas Property Code 27.003(i)·(take reasonable action to mitigate the damages).

See also the Texas Civil Practice and Remedies Code: Code #34.068·Rules Governing Actions under this Chapter (... defend the action by stating and proving any defenses ... that would mitigate damages); Code #73.003·Mitigating Factors; Code #73.051·Short Title (cited as the Defamation Mitigation Act); and Code #147.123·Mitigation of Damages.

#### BANKRUPTCY LAW ON MITIGATION

A non-breaching party in bankruptcy litigation has a duty to mitigate its damages.. *In re Worldcom, Inc.*, 361 Bankr. 675 (Bankr. S.D.N.Y. 2007). (“The appropriate inquiry is whether the breaching party has made reasonable efforts in the form of affirmative steps to mitigate damages.”). “An injured party is required to mitigate damages that could have been avoided without undue risk, burden, or humiliation.” *Id.*

Creditors in a bankruptcy proceeding are required to make a good faith effort to mitigate its damages. A supplier of product to the debtor, for example, is required to make a good faith effort to find another buyer for its product and a purchaser of goods from the debtor is required to make good faith efforts to find a replacement source for those goods. See e.g. *In re Orion Refining Corp.*, 445 B.R.

312, 315 (D. Del. 2011) ( upholding a Bankruptcy Court decision that a creditor failed to mitigate damages as required by applicable state law).

Debtors have a legal duty to mitigate damages to resolve stay violations. In *In re Oksentowicz*, 324 B.R. 628, 630 (Bankr. E.D. Mich. 2005) ( In cases involving automatic stay violations, in which debtors frequently file motions for contempt or for damages under 11 U.S.C. 362(h), courts have overwhelming held that debtors have an obligation to attempt to mitigate damages prior to seeking court intervention."), See also *In re Risner*, 317 B.R. 830, 840 (Bankr.D.Idaho 2004) ("[I]n determining reasonable damages under § 362(h), the bankruptcy court must examine whether the debtor could have mitigated the damages[.]"); *In re Rosa*, 313 B.R.1,9 (Bankr.D.Mass.2004) ("Debtors are indeed under a duty to mitigate their damages resulting from automatic stay violations."); *In re Esposito*, 154 B.R. 1011, 1015 (Bankr.N.D.Ga.1993) (Debtor has a duty to mitigate damages.).

When the Debtor terminates its commercial real estate lease, the landlord creditor has a duty to mitigate its damages. See *In re Highland Superstores, Inc.*, 154 F.3d 573 (6<sup>th</sup> Cir. 1998) ("As with any claim for damages arising out of the breach of a lease, a claim for damages under section 502(b)(6) is subject to mitigation including an obligation on the part of the landlord to attempt the reletting of the premises."); *In re Bob's Sea Ray Boats, Inc.*, 143 B.R. 229, 231 (Bankr. D.N.D. 1992) (a lessor has a duty to mitigate its damages).

## CONCLUSION

The Third Circuit Court of Appeals denied Mr. English, a Texas resident, his right to mitigate his bankruptcy claim as required under Texas law. The Third Circuit ruling also allowed EFH, a Texas corporation, to circumvent Texas law by not requiring the Debtor to mitigate damages.

English, as a resident of Texas, had an obligation, a duty, and a right to mitigate his damages. The ruling by the Third Circuit violated and conflicted with Texas law and several Texas court decisions that mandate their residents are required to mitigate any damages.

For the foregoing reasons, Mr. English respectfully requests that this Court grant the petition for rehearing and order full briefing and arguments on the merits of this case.

Respectfully submitted,

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June 5, 2020

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### Certificate of counsel

I hereby certify that this petition for rehearing is presented in good faith and not for delay due to substantial grounds not previously presented.

Wayne English