APPENDIX

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APPENDIX A

SUPREME COURT OF TEXAS

No. 20-0932

TRANSCOR ASTRA GROUP S.A., ET AL.,
PETITIONERS

v.

PETROBRAS AMERICA INC., ET AL.,
RESPONDENTS

Filed: April 29, 2022

OPINION

JUSTICE BOYD delivered the opinion of the Court.

This dispute arises from a billion-dollar break-up between two large corporations engaged in the international petroleum business. The break-up resulted in numerous claims and lawsuits, which the parties ultimately resolved through a comprehensive settlement agreement. One party later filed both this suit and a separate arbitration proceeding, asserting that the other party's extensive corrupt and criminal conduct, along with its failure to disclose that conduct prior to the settlement agreement, renders the settlement agreement and the parties' earlier agreement unenforceable. The trial court granted summary

judgment for the defendant, holding that the settlement agreement—and, in particular, its release provisions and a disclaimer of reliance—bars the claims asserted both in this suit and in the arbitration proceeding. The court of appeals affirmed in part and reversed in part, and both parties petitioned for our review. Because we agree with the trial court that the parties fully and finally resolved the current claims through their comprehensive settlement agreement, we reverse and render judgment reinstating the trial court's final judgment.

I.
Background

Petrobras[1] and Astra[2] are international corporations engaged in the petroleum industry. In 2006, they entered into a Stock Purchase and Sale Agreement that resulted in a joint venture in which each company owned half the interests in a Texas oil refinery.[3] The parties quickly became embroiled in numerous disputes, resulting in 2009 in an arbitration award[4] that terminated their joint venture and required Astra to sell its fifty-percent interest to Petrobras. Petrobras accepted the interest but then failed

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[1] We generally use "Petrobras" to refer to one or more related entities including Petróleo Brasileiro S.A. and Petrobras America Inc.

[2] We generally use "Astra" to refer to one or more entities and individuals related to and aligned with Transcor Astra Group.

[3] The parties formed a new corporation, Pasadena Refining System, Inc., to serve as the refinery's owner. Each party owned fifty percent of PRSI's shares. The parties also formed and became equal partners in PRSI Trading Company, LP, to supply feedstocks to the refinery.

[4] The stock-purchase agreement contained an arbitration clause requiring the parties to arbitrate "any claim of fraud, misrepresentation or fraudulent inducement" and "any question of validity or effect of [the] Agreement including [the arbitration] clause."

to pay Astra the $640 million purchase price. The parties' relationship soon disintegrated into a dozen or more separate lawsuits and disputes. By 2011, Astra obtained judgments against Petrobras totaling more than $750 million and had other pending claims demanding $400 million more.

The parties engaged in extended negotiations and reached a comprehensive settlement agreement in 2012. As part of the 2012 settlement agreement, Petrobras agreed to pay Astra over $820 million to satisfy all the judgments and pending claims and each party agreed to release any and all claims against the other.

Petrobras alleges it later discovered that Astra engaged in substantial corruption to convince Petrobras to accept the 2006 stock-purchase agreement and the 2012 settlement agreement on terms that were highly favorable to Astra. Specifically, Petrobras alleges that Astra's representatives paid $15 million to bribe certain Petrobras officials to agree to the 2006 stock-purchase agreement and then offered other bribes totaling $80–$100 million to "solve the problem" during the settlement negotiations. Unlike the bribes paid in connection with the 2006 stock-purchase agreement, Petrobras does not allege that anyone accepted the bribes offered in connection with the 2012 settlement agreement.

In 2016, Petrobras initiated two legal proceedings against Astra. First, Petrobras[5] filed this suit against

[5] The plaintiffs were Petrobras America Inc., Petróleo Brasiliero S.A.-Petrobras, Pasadena Refining System, Inc., PRSI Trading LLC, and PRSI Real Property Holdings, LLC.

Astra[6] and several of its employees,[7] asserting that the defendants committed fraud (including common-law fraud and statutory fraud) and negligent misrepresentation and breached fiduciary duties by offering bribes and then failing to disclose the offers during the settlement negotiations. Petrobras included derivative claims for declaratory judgment, conspiracy, aiding and abetting, unjust enrichment, and exemplary damages and attorney's fees, and sought to invalidate the 2012 settlement agreement and render it unenforceable. Second, because the 2006 stock-purchase agreement included a clause requiring binding arbitration, Petrobras initiated an arbitration proceeding to invalidate the 2006 stock-purchase agreement based on the bribes allegedly paid in connection with that agreement.

Astra filed counterclaims in the lawsuit, seeking a judgment declaring that both agreements are valid and enforceable and that the settlement agreement bars the claims Petrobras asserted in the lawsuit and the arbitration proceeding. Astra asserted that Petrobras released its breach-of-fiduciary-duty claims, as well as the claims it asserted in the arbitration proceeding, as part of the settlement agreement. And Astra asserted that Petrobras could not rely on Astra's alleged fraud to undo the 2012

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[6] The corporate defendants were Astra Oil Trading NV, Transcor Astra Group S.A., Astra Oil Company, LLC, Astra Energy Holdings, Inc., Astra GP, Inc., Astra Tradeco LP, LLC, Pasadena Refinery Holding Partnership, and AOT Bis B.V.

[7] The individual defendants were Alberto Feilhaber, Clifford L. Winget, III, Kari Burke, John T. Hammer, Carlos E. Ortiz, Thomas J. Nimbley, Ireneusz Kotula, Charles L. Dunlap, Eric Bluth, Stephen Wade, Rolf Mueller, and Daniel Burla.

settlement agreement because Petrobras expressly disclaimed any reliance on any of Astra's representations leading up to that agreement.

Astra filed a series of summary-judgment motions based on the release and the disclaimer of reliance.[8] The trial court granted those motions and, in June 2018, signed a final judgment ordering that Petrobras take nothing on its claims. The judgment declared that the 2012 settlement agreement and the release contained within it are valid, binding, and enforceable and that they bar Petrobras's claims, including the claims asserted in the arbitration proceeding. The judgment also awarded Astra about $1.3 million in attorney's fees and costs.

Petrobras appealed the final judgment,[9] and the court of appeals reversed. 633 S.W.3d 606 (Tex. App.–Houston [14th Dist.] 2020). The court held that Petrobras released its fiduciary-duty claims to the extent they relate to the 2006 stock-purchase agreement but not to the extent they relate to the negotiation and signing of the 2012 settlement agreement. *Id.* at 621. The court also held that the settlement agreement's reliance disclaimer bars Petrobras's fraud claims against the Astra entities but not the fraud claims against the individual defendants in their individual capacities. *Id.* at 629–30. It held that the release

[8] The Astra defendants first moved for summary judgment in response to Petrobras's original petition. They later supplemented their motions in response to Petrobras's first-amended, second-amended, and third-amended petitions. The trial court ultimately granted summary judgment on all claims in favor of all the Astra defendants.

[9] Petrobras also appealed two post-judgment orders, one granting Astra's motion for an anti-suit injunction to prohibit further proceedings in the arbitration and one denying Petrobras's motion to dismiss that motion under the Texas Citizens Participation Act. The court of appeals consolidated the three appeals for argument, but these other two appeals are not at issue in this Court.

bars Petrobras's remaining claims (for conspiracy, aiding and abetting, unjust enrichment, and exemplary damages) to the extent they are derivative of the fraud claims. *Id.* at 628. Finally, the court reversed the award of attorney's fees and costs. *Id.* at 633–34. It remanded the case to the trial court with instructions to render partial summary judgment in favor of the Astra entities and the individual defendants "as limited to their corporate capacities" and to conduct further proceedings on the remaining claims. Both Astra and Petrobras petitioned this Court for review.

II.
Release of the Fiduciary-Duty Claims

We begin by considering Petrobras's claims attacking the 2012 settlement agreement on the ground that the Astra defendants breached their fiduciary duties by paying bribes to obtain the 2006 stock-purchase agreement, offering bribes when negotiating the 2012 settlement agreement, and failing to disclose those actions to Petrobras. Petrobras alleges the individual Astra defendants owed fiduciary duties to Petrobras during the parties' settlement negotiations because they served as officers and directors of the joint-venture entities the parties created when they began their joint venture in 2006. And, according to Petrobras, the remaining Astra defendants knew about the bribery offers and conspired with and aided and abetted the individual defendants to breach their fiduciary duties.

Astra obtained summary judgment dismissing these claims on the ground that Petrobras released them when it entered into the 2012 settlement agreement. The 2012 settlement agreement includes broad releases in which each party released and discharged the other parties from "any and all claims, demands, and causes of action of

whatever kind or character, which the . . . Parties have, or may have in the future, based on any acts or omissions, whether known or unknown, that have occurred on or before" the agreement's effective date. The agreement expressly states that the release should be "construed as the broadest type of general release" and includes, "without limitation," all claims connected with the parties' then-pending disputes, all claims related to the 2006 stock-purchase agreement, all claims "growing out of, or connected in any way with, the Astra Parties' dealings with the Petrobras Parties," and all claims based on activities alleged to violate foreign or domestic laws or administrative rules.

Petrobras does not dispute that this language is broad enough to release the breach-of-fiduciary-duty claims it asserts against Astra in this case. But the 2012 settlement agreement also provides that, "[n]otwithstanding anything to the contrary," the released claims "shall not include any and all claims . . . arising out of, related to, or connected in any way with the alleged breach, enforcement, or interpretation" of the settlement agreement. Petrobras argues, and the court of appeals agreed, that—to the extent the fiduciary-duty claims sought to invalidate the 2012 settlement agreement (as opposed to the 2006 stock- purchase agreement)—the claims fell within this "notwithstanding" provision because they involved "acts or omissions of the Astra defendants in connection with the negotiation and signing of the 2012 Settlement and sought to limit and undo payments made pursuant to that agreement." 633 S.W.3d at 621.

We do not agree that Petrobras's fiduciary-duty claims fall within the "notwithstanding" provision. The provision states that the released claims do not include claims "arising out of, related to, or connected in any way

with" the "breach," "enforcement," or "interpretation" of the 2012 settlement agreement. Although the "in any way" language is broad, the language following it ("the alleged breach, enforcement, or interpretation") limits the "notwithstanding" provision more narrowly than if it referred to claims that generally "arise from, relate to, or are connected in any way with the 2012 settlement agreement." Some of the agreement's other provisions, for example, specify a forum for the resolution of disputes "arising out of or related to" the agreement, waive Petrobras's sovereign immunity for "any action related to" the agreement, waive a jury trial for any litigation "connected in any way with" the agreement, and allocate costs "incurred in connection with the negotiation and drafting of" the settlement agreement. By contrast, the "notwithstanding" provision does not cover all claims that "relate to" or "arise out of" the agreement or those made "in connection with the negotiation and drafting" of the agreement. Instead, it more narrowly covers only those claims that arise out of, relate to, or are connected with the agreement's "breach, enforcement, or interpretation." We must presume the parties intended that these words bear a particular "significance and meaning." *Gates v. Asher*, 280 S.W.2d 247, 249 (Tex. 1955).

Petrobras contends that its fiduciary-duty claims relate to the "enforcement" of the settlement agreement because they seek to declare the agreement unenforceable, and they relate to the "interpretation" of the agreement because they require interpretation of the release and reliance-disclaimer provisions. We are not convinced. "Enforcement" means the act of "compelling compliance with a[n] . . . agreement." *Enforcement*, BLACK'S LAW DICTIONARY (11th ed. 2019). Petrobras's fiduciary-duty claims do not seek to compel compliance with the 2012 settlement agreement. Instead, Petrobras seeks to avoid

compliance by invalidating the agreement based on Astra's conduct during the "negotiation and signing" of the agreement. In fact, Petrobras completed compliance years ago when it paid the settlement amount and now seeks to undo its compliance and recover some of those funds. Petrobras did not sue to enforce the agreement by complaining of its breach or by seeking clarification of its meaning but instead sued to invalidate the agreement by declaring it *un*enforceable. Within this context, at least, we think an important distinction exists between claims that relate to an agreement's "enforcement" and those that relate to its "enforceability."

Perhaps if we considered only the "notwithstanding" provision's language, Petrobras's argument could present a close call. If, for example, one party refused to comply with the settlement agreement and the other party filed suit to enforce it, that suit would likely relate to the agreement's "breach" or "enforcement." And although we need not decide the issue here, it might be that the "notwithstanding" provision would permit the refusing party to assert counterclaims or defenses against enforcement based on the suing party's fraud or fiduciary breaches. But even if that were true, the difference between that example and this case is that the "peace" the parties purchased through the settlement agreement would initially be broken by a claim that seeks to "enforce" or uphold the settlement agreement, not undo it.

But even if the "notwithstanding" provision's language leaves room for debate, its context confirms our conclusion that it does not encompass Petrobras's claims to invalidate the agreement. As explained, the provision excepts certain claims from what is otherwise "the broadest type of general release," through which both parties

released "any and all claims . . . of whatever kind or character," to the extent those claims are "based on any acts or omissions, whether known or unknown, that have occurred on or before" the agreement's effective date. Petrobras's claims that Astra breached its fiduciary duties by offering and failing to disclose bribes during the period leading up to the agreement's effective date fall squarely within this description. To construe the "notwithstanding" provision as allowing claims based on then-"unknown" conduct that occurred before the agreement's effective date would effectively nullify the broad release.

Instead, we read the "notwithstanding" provision as clarifying and confirming that although the parties agreed to "the broadest type of general release," it was not so broad as to preclude claims seeking to maintain the peace the parties purchased on the terms stated in the settlement agreement. In this sense, although both parties refer to the provision as a "carve-out provision," we think that label is a misnomer. The provision does not "carve out" or "except" from the general release claims that would otherwise be included within the release. Instead, it states that the released claims "*shall not include*" claims related to the agreement's breach, enforcement, or interpretation. Reading the release and the notwithstanding provisions together, the parties agreed to release certain claims and further agreed that those claims do not include other claims. They did not agree to release certain claims except for some portion of those claims.

Petrobras's fiduciary-duty claims—based on allegations that, unbeknownst to Petrobras, Astra paid bribes to Petrobras representatives in connection with the 2006 stock-purchase agreement, offered bribes in connection with the 2012 settlement agreement, and then failed to

disclose that misconduct during the parties' negotiations—fall squarely within the scope of the general release. These claims seek to nullify the settlement agreement based on conduct that occurred before its effective date; they do not relate to any effort to interpret or enforce the agreement or recover for its breach. As a result, they do not fall within the scope of claims the release "shall not include." We conclude that the court of appeals erred by reversing summary judgment for Astra on the fiduciary-duty claims related to the 2012 settlement agreement. And to the extent that Petrobras's claims for conspiracy, aiding and abetting, unjust enrichment, declaratory judgment, and exemplary damages are derivative of and dependent upon the fiduciary-duty claims, Astra is entitled to summary judgment on those claims as well.

III.
Fraud and the Disclaimer of Reliance

We next consider Petrobras's claims that Astra committed fraud and made negligent misrepresentations by offering and failing to disclose bribes during the parties' negotiations leading up to the 2012 settlement agreement. According to Petrobras, this fraudulent conduct induced Petrobras to enter into the settlement agreement and thus rendered the agreement unenforceable. Astra obtained summary judgment dismissing these claims on the ground that Petrobras expressly disclaimed any reliance on any "statement or representation" made by Astra or its agents, and instead, Petrobras confirmed that it relied solely on its "own judgment" and the advice of its own

counsel.[10] The court of appeals (1) agreed that the disclaimer of reliance is enforceable and (2) agreed that the disclaimer bars Petrobras's fraud claims against the Astra entities, but (3) concluded that the disclaimer does not bar the fraud claims against the individual Astra defendants. 633 S.W.3d at 627–28, 630. In this Court, Petrobras challenges the first two holdings, and the Astra individuals challenge the third. We agree with Astra on all three.

A. Enforceability of the Reliance Disclaimer

Texas law encourages parties to resolve their disputes by agreement, but settlement agreements—like all other contracts—are unenforceable if they are procured by fraud. *Italian Cowboy Partners, Ltd. v. Prudential Ins.*

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[10] Petrobras made these representations within the following provision of the 2012 settlement agreement:

> **EACH PARTY EXPRESSLY WARRANTS THAT IT HAS CAREFULLY READ THIS SETTLEMENT AGREEMENT AND ANY EXHIBITS ATTACHED TO IT, UNDERSTANDS THEIR CONTENTS, AND SIGNS THIS SETTLEMENT AGREEMENT AS ITS OWN FREE ACT. EACH PARTY EXPRESSLY WARRANTS THAT NO PROMISE OR AGREEMENT WHICH IS NOT HEREIN EXPRESSED HAS BEEN MADE TO IT IN EXECUTING THIS SETTLEMENT AGREEMENT, AND THAT IT IS NOT RELYING UPON ANY STATEMENT OR REPRESENTATION OF ANY AGENT OF THE OPPOSING PARTIES BEING RELEASED IN THIS SETTLEMENT AGREEMENT. EACH PARTY IS RELYING ON ITS OWN JUDGMENT, AND EACH PARTY HAS BEEN REPRESENTED BY LEGAL COUNSEL IN THIS MATTER. EACH PARTY EXPRESSLY WARRANTS THAT ITS RESPECTIVE LEGAL COUNSEL HAS READ AND EXPLAINED THE ENTIRE CONTENTS OF THIS SETTLEMENT AGREEMENT IN FULL, AS WELL AS THE LEGAL CONSEQUENCES OF IT. EXPLAINED THE ENTIRE CONTENTS OF THIS SETTLEMENT AGREEMENT IN FULL, AS WELL AS THE LEGAL CONSEQUENCES OF IT.**

Co. of Am., 341 S.W.3d 323, 331 (Tex. 2011); *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 178 (Tex. 1997). To establish such fraudulent inducement, a party seeking to invalidate an agreement must prove that it reasonably relied on the other party's misrepresentations to its detriment. *Int'l Bus. Machs. Corp. v. Lufkin Indus., LLC*, 573 S.W.3d 224, 228 (Tex. 2019); *Italian Cowboy*, 341 S.W.3d at 337 (quoting *Aquaplex, Inc. v. Rancho La Valencia, Inc.*, 297 S.W.3d 768, 774 (Tex. 2009) (per curiam)). Because "[a]fter-the-fact protests of misrepresentation are easily lodged," *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 60 (Tex. 2008), parties who mutually desire to resolve all disputes and buy complete and final peace often include provisions in their settlement agreements expressly disclaiming any reliance on each other's representations.

The law must balance society's interest in protecting parties against fraudulently induced promises with its interest in enabling parties to "fully and finally resolve disputes between them." *Schlumberger*, 959 S.W.2d at 179. To achieve this balance, we have held that contractual disclaimers of reliance may be enforceable and may negate a subsequent fraudulent-inducement claim if the disclaimer is clear, specific, and unequivocal. *See Lufkin*, 573 S.W.3d at 229; *Italian Cowboy*, 341 S.W.3d at 336; *Forest Oil*, 268 S.W.3d at 60; *Schlumberger*, 959 S.W.2d at 179. Whether a reliance disclaimer is effective in any given case "depends on the contract's language and the totality of the surrounding circumstances." *Lufkin*, 573 S.W.3d at 226; *Forest Oil*, 268 S.W.3d at 60; *Schlumberger*, 959 S.W.2d at 179. Specifically, courts must consider such factors as whether

> (1) the terms of the contract were negotiated, rather than boilerplate, and during negotiations

the parties specifically discussed the issue which has become the topic of the subsequent dispute;

(2) the complaining party was represented by counsel;

(3) the parties dealt with each other at arm's length;

(4) the parties were knowledgeable in business matters; and

(5) the release language was clear.

Forest Oil, 268 S.W.3d at 60. In considering these factors, our ultimate purpose is to determine whether the contract clearly confirms that "the parties intended once and for all to resolve specific disputes." *Italian Cowboy*, 341 S.W.3d at 335; *see also Forest Oil*, 268 S.W.3d at 58; *Schlumberger*, 959 S.W.2d at 181.

The parties here agree that the second, fourth, and fifth factors weigh in favor of enforcing the reliance disclaimer in this case. Petrobras is a sophisticated international corporation with extensive experience in the petroleum industry and was ably represented by top-notch attorneys during the negotiation and signing of the 2012 settlement agreement. And as we have explained, the language through which Petrobras broadly released all claims against Astra was clear and effective. But Petrobras argues that the first and third factors, as well as the overall equities of the circumstances, weigh against enforcing the reliance disclaimer in this case.

1. The first factor

The first factor concerns whether "the terms of the contract were negotiated, rather than boilerplate, and during negotiations, the parties specifically discussed the

issue which has become the topic of the subsequent dispute." *Forest Oil*, 268 S.W.3d at 60. Petrobras acknowledges that the parties carefully negotiated the settlement agreement's terms, including the terms of the release, but contends that Astra did not disclose—and thus the parties did not discuss—the bribery scheme that gave rise to the current dispute.

According to Petrobras, this first factor at least requires that the parties' settlement negotiations included discussions about the negotiations leading to the 2006 stock-purchase agreement and the parties' subsequent disputes. *See, e.g.*, *Baker v. City of Robinson*, 305 S.W.3d 783, 796 (Tex. App.–Waco 2009, pet. denied); *Residencial Santa Rita, Inc. v. Colonia Santa Rita, Inc.*, No. 04-06-00778-CV, 2007 WL 2608564, at *3 (Tex. App.–San Antonio Sept. 12, 2007, no pet.) (mem. op.). By requiring that the parties specifically discussed these topics, Petrobras contends, the first factor ensures that Petrobras truly intended to disclaim any reliance on representations Astra made about these topics during the parties' discussions. Otherwise, Petrobras asserts, the circumstances cannot support the conclusion that Petrobras truly intended to disclaim reliance and would instead allow Astra to exploit Petrobras's ignorance of the actual facts and benefit from its wrongdoing.

Astra, by contrast, contends that the first factor requires only that the parties specifically discuss the scope and effect of the release, which is ultimately the subject of the parties' current dispute. *See, e.g.*, *Leibovitz v. Sequoia Real Estate Holdings, L.P.*, 465 S.W.3d 331, 344 (Tex. App.–Dallas 2015, no pet.); *McLernon v. Dynegy, Inc.*, 347 S.W.3d 315, 331 (Tex. App.–Houston [14th Dist.] 2011, no pet.). This factor is met, Astra contends, because the parties specifically discussed the fact that the settlement

agreement's mutual releases purchased full and final peace, barring each party from ever asserting claims based on pre-settlement conduct, regardless of whether the party knew about that conduct when it signed the agreement. According to Astra, Petrobras's approach would require that the parties disclose and discuss "the very facts allegedly misrepresented or concealed," in which case the reliance disclaimer would serve no purpose.

As Petrobras insists, we found it significant in *Schlumberger* that the plaintiff had expressly and clearly disclaimed reliance on the defendant's representations about the feasibility and value of a diamond-mining project because that topic, "after all, was the very dispute that the release was supposed to resolve." 959 S.W.2d at 180. But in *Forest Oil*, we held that a reliance disclaimer was enforceable even though the settlement resolved disputes over royalty-payment issues and not over environmental issues for which the plaintiff later sued. 268 S.W.3d at 58. So "while the misrepresentation in *Schlumberger* 'pertained to the very matter negotiated, settled, and released,'" the misrepresentation in *Forest Oil* "did not concern known disputed matters (which were settled and released) but potential future disputes (which were set aside and reserved)." *Id.* at 57. Although we ultimately noted that the parties in *Forest Oil* did discuss environmental issues during their settlement negotiations, we explained that *Schlumberger*'s observation that the misrepresentations there led to "the very dispute that the release was supposed to resolve" is "more accurately interpreted as emphatic language, not limiting language." *Id.* at 58. The important point from *Schlumberger*'s first factor, we explained, is that when "parties expressly discuss material issues during contract negotiations but nevertheless elect to include waiver-of-reliance and release-of-

claims provisions, the Court will generally uphold the contract." *Id.* Ultimately, the question is whether the circumstances and nature of the parties' settlement discussions demonstrate that the parties considered the consequences of the reliance disclaimer in light of the material issues of the dispute, which supports the conclusion that an "all-embracing disclaimer of any and all representations" actually "shows the parties' clear intent." *Id.*

Here, the evidence does not suggest that the parties actually considered or discussed allegations that Astra representatives bribed Petrobras officials to approve the 2006 stock-purchase agreement or offered to bribe them to approve the 2012 settlement agreement. But the evidence—including the terms of the settlement agreement itself—does establish that the parties entered into the settlement agreement only after an extended series of complex and hotly contested negotiations that included discussions about the need to resolve all prior, pending, and possible claims between the parties, including those that were "unknown" at the time. The circumstances leave no doubt that both parties intended to fully and finally resolve all their disputes "once and for all" and, to accomplish that objective, they knowingly agreed to disclaim any reliance on the other parties' representations. Although they may not have "specifically discussed the issue which has become the topic of the subsequent dispute," they expressly discussed the "material issues" and "nevertheless elect[ed] to include waiver-of-reliance and release-of-claims provisions" in their settlement agreement. *Id.* Even if the first factor does not carry the weight here that it carried in *Schlumberger*, we conclude it nevertheless tilts in favor of enforcing the reliance disclaimer.

2. The third factor

The third *Forest Oil* factor considers whether the parties dealt with each other in an arm's-length transaction. *Id.* at 60. "Generally, an arm's-length transaction is one between two unrelated parties with generally equal bargaining power, each acting in its own interest." *Hous. Unlimited, Inc. Metal Processing v. Mel Acres Ranch*, 443 S.W.3d 820, 832 (Tex. 2014). As a general rule, a transaction between fiduciaries is not an arm's-length transaction but instead requires higher fiduciary standards that require full disclosure of all material facts. *Schlumberger*, 959 S.W.2d at 175.

Petrobras contends this factor weighs against enforcement of the reliance disclaimer because the Astra individuals owed fiduciary duties to Petrobras during the negotiations leading to the 2012 settlement agreement. Specifically, Petrobras asserts that the individuals served as directors and officers of the jointly owned entities that Astra and Petrobras created to own, operate, and supply the oil refinery, and thus owed fiduciary duties to those entities and their shareholders, including Petrobras. And, according to Petrobras, the individuals continued to owe fiduciary duties to Petrobras even after they ceased serving as officers and directors—even during the subsequent years of disputes and litigation between Petrobras and Astra up until (and even after) the 2012 settlement agreement.[11]

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[11] *See Thywissen v. Cron*, 781 S.W.2d 682, 686 (Tex. App.–Houston [1st Dist.] 1989, writ denied) ("Once a fiduciary relationship has been established, it is presumed to continue until it is repudiated."); *see also Pacelli Bros. Transp. v. Pacelli*, 456 A.2d 325, 329 (Conn. 1983) ("[A] settlement agreement and general release cannot shield an officer or director who has failed in his fiduciary duty to disclose information relevant to a transaction with those whose confidence he has

We have doubts about Petrobras's contention that the directors and officers of the jointly owned entities assumed eternal fiduciary duties to Petrobras. In the first place, the directors and officers of the jointly owned entities owed fiduciary duties to those specific entities, not to each of the entities' individual shareholders. *See Ritchie v. Rupe*, 443 S.W.3d 856, 869 (Tex. 2014) ("[A] director is duty-bound to exercise business judgment for the sole benefit of the corporation, and not for the benefit of individual shareholders . . . ."). Petrobras has not cited any authority to support the idea that the individuals owed fiduciary duties to Petrobras, separate and apart from the duties they owed to the entities they served. And second, we find it difficult to accept the proposition that the individuals must forever bear a fiduciary duty to Petrobras long after leaving their positions and even during extensive and protracted litigation between the two entities. Under Petrobras's theory, the Astra individuals would even now—in the midst of this present litigation—owe ongoing fiduciary duties to act in Petrobras's best interest.

But more importantly, even if the Astra individuals owed lingering fiduciary duties to Petrobras during the parties' settlement negotiations, we do not see how their failure to disclose the alleged bribe offers to Petrobras could affect the enforceability of the reliance disclaimer when Petrobras does not allege that anyone accepted the

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abused . . . ."); *BelCom, Inc. v. Robb*, No. CIV. A. 14663, 1998 WL 229527, at *3 (Del. Ch. Apr. 28, 1998) ("A former director, of course, breaches his fiduciary duty if he engages in transactions that had their inception before the termination of the fiduciary relationship or were founded on information acquired during the fiduciary relationship."), *aff'd*, 725 A.2d 443 (Del. 1999).

bribes or that the offers in any way affected Petrobras's decision to enter into the 2012 settlement agreement.[12]

Finally, as we explained in *Forest Oil* and reaffirmed in *Lufkin*, the existence of an arm's-length transaction is only one of the factors we must consider when deciding whether a reliance disclaimer is enforceable. *See Lufkin*, 573 S.W.3d at 229; *Forest Oil*, 268 S.W.3d at 60. Even if the Astra individuals owed fiduciary duties to disclose material information to Petrobras during the negotiations leading up to the 2012 settlement agreement, we cannot conclude that Petrobras could not have knowingly and intentionally disclaimed reliance on the individuals' representations under these circumstances. The individuals ceased serving as directors and officers in 2009 when, as a result of an arbitration award resolving numerous longstanding disputes, Astra transferred all of its interests in the jointly owned entities to Petrobras, and the joint venture ended. From that point until the parties entered into the 2012 settlement agreement, the parties continued vigorously litigating numerous disputes, and Astra obtained judgments against Petrobras totaling more than $750 million. As the adverse parties negotiated and ultimately signed the settlement agreement, Astra asserted additional pending claims seeking over $400 million more. Under these circumstances, any lingering fiduciary duties the Astra individuals may have owed do not support the conclusion that—contrary to its clear and express agreement otherwise—Petrobras relied on Astra's statements and representations rather than on its "own judgment"

[12] We do not pass judgment on the continuing validity of the reliance disclaimer had Astra successfully bribed Petrobras into accepting the settlement agreement because Petrobras has not alleged such facts. *See Schlumberger*, 959 S.W.2d at 181 ("We emphasize that a disclaimer of reliance . . . will not always bar a fraudulent inducement claim.").

and the advice of its own counsel. Even if this third factor weighs against enforcing the reliance disclaimer, it does not weigh so heavily as to overcome the other factors.

3. The totality of the circumstances

When considering and balancing the *Forest Oil* factors to determine the enforceability of a reliance disclaimer, "[c]ourts must always examine . . . the totality of the surrounding circumstances." *Forest Oil*, 268 S.W.3d at 60. Petrobras argues that, under these circumstances, in which Astra paid millions of dollars in bribes to induce the 2006 stock-purchase agreement and then offered many millions more to obtain the 2012 settlement agreement, the law should not permit Astra to hide behind a reliance disclaimer to benefit from its wrongful and criminal conduct. Although we share Petrobras's concern over the equities at play, the "totality of the circumstances" that courts must consider in this context are those circumstances relating not to the fairness or unfairness of the parties' settlement agreement, but to the likelihood that, when they entered into the agreement, the parties truly intended to disclaim any reliance on each other's representations and "intended once and for all to resolve" their disputes. *Italian Cowboy*, 341 S.W.3d at 335; *see also Forest Oil*, 268 S.W.3d at 58; *Schlumberger*, 959 S.W.2d at 180.

As we explained in *Forest Oil*, "parties who contractually promise not to rely on extra-contractual statements—*more than that, promise that they have in fact not relied upon such statements*—should be held to their word." 268 S.W.3d at 60. Considering the *Forest Oil* factors within the context of the totality of the circumstances here, we can only conclude that Petrobras expressly and intentionally represented and agreed that it was not relying on any of Astra's statements or representations when it decided

to execute the 2012 settlement agreement. We thus conclude that Petrobras's reliance disclaimer is enforceable.

B. Applicability of the Reliance Disclaimer

Petrobras next contends that, even if its reliance disclaimer is enforceable, it does not apply to and preclude the fraud claims Petrobras asserts in this case. Specifically, Petrobras notes that it disclaimed reliance only on any "statement or representation" made by Astra prior to execution of the settlement agreement, and it asserts that its fraud claims complain not of any statements or representations but of Astra's failure to disclose the bribery payments and offers. According to Petrobras, it disclaimed reliance on affirmative misrepresentations but not on any failure to make statements or representations that should have been made.

Petrobras's pleaded allegations, however, are not limited to non-disclosures. Instead, Petrobras expressly alleged in its petition that Astra "made untrue representations of fact and/or omitted to state facts necessary to correct or make the statements and/or omissions that were made." And in any event, the settlement agreement expressly releases claims "based on any acts or omissions, whether known or unknown," so Petrobras could not rely on any omissions. Moreover, the reliance disclaimer warrants that "each party is relying on its own judgment," not on the disclosure of the other party. Because the settlement agreement forecloses Petrobras's argument, we hold that the reliance disclaimer applies to claims of both misrepresentations and omissions.

C. Applicability to the Individual Defendants

Finally, with regard to the reliance disclaimer, Astra argues that the court of appeals erred by holding that the

individual defendants are not entitled to summary judgment on Petrobras's fraud claims. The court of appeals noted that Petrobras sued the individual defendants "in their individual capacities," but concluded that the individuals' summary-judgment motion did not "expressly present any ground or explain why as a matter of law" they are entitled to "the benefit of the reliance disclaimer" in their "individual capacities." 633 S.W.3d at 630. In other words, the court reversed summary judgment in the individual defendants' favor, not on the merits, but because the defendants' motion did not adequately specify that the reliance disclaimer protected them in their "individual," as opposed to their "corporate," capacities. *Id.* at 629.

We disagree. A summary-judgment motion "must stand or fall on the grounds expressly presented in the motion." *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993), but the "[g]rounds may be stated concisely, without detail and argument," *id.* at 340 (quoting *Roberts v. Sw. Tex. Methodist Hosp.*, 811 S.W.2d 141 (Tex. App.–San Antonio 1991, writ denied)). We conclude that the Astra individuals' motion sufficiently sought summary judgment against liability in their "individual" capacity because that is the only capacity in which Petrobras sought to impose liability on the individuals and the only capacity in which they could have been liable.

Individuals can "act" in a "corporate capacity" in the sense that they are acting as an agent, employee, or representative of a corporation. *See Bennett v. Reynolds*, 315 S.W.3d 867, 884 (Tex. 2010). If they commit a tort while acting in their corporate capacity, their employer may be held vicariously liable for their actions under the doctrine of respondeat superior. *Los Compadres Pescadores, L.L.C. v. Valdez*, 622 S.W.3d 771, 779 (Tex. 2021); *Painter v. Amerimex Drilling I, Ltd.*, 561 S.W.3d 125, 130 (Tex.

2018). But the fact that an individual was acting in a corporate capacity does not prevent the individual from being held personally—or "individually"—liable for the harm caused by those acts. *Franka v. Velasquez*, 332 S.W.3d 367, 383 (Tex. 2011) ("[P]ublic employees (like agents generally) have always been individually liable for their own torts, even when committed in the course of employment, and suit may be brought against a government employee in his individual capacity."); *Miller v. Keyser*, 90 S.W.3d 712, 717 (Tex. 2002) (explaining that an agent who "personally ma[kes] misrepresentations . . . can be held personally liable"). When an individual commits a tort while acting in a "corporate capacity," either the corporation can be held vicariously liable or the individual can be held personally liable, or both, but the individual cannot be held "corporately" liable.

Petrobras relies on *Ambrosio v. EPS Wireless, Inc.*, No. 05-99-01442-CV, 2000 WL 1160696, at *3–4 (Tex. App.–Dallas Aug. 18, 2000, no pet.) (not designated for publication), for the proposition that a settlement agreement that releases all claims against a corporation and its "agents, employees[, and] officials" only releases those individuals from liability in their "corporate" or "official" capacity and does not release them from liability in their "individual" capacity. The issue in *Ambrosio*, however, was whether a corporate official could benefit from a release when the plaintiff alleged that the official promised to transfer stock to the plaintiff both "from the company *and himself*." *Id.* at *1 (emphasis added). The court held that the official was not entitled to summary judgment based on the release because a fact issue existed as to whether, "at the time he made the promise to transfer" the stock, the official "was acting in the course and scope of his employment with" the company. *Id.* at *3.

Ambrosio is distinguishable from this case because the parties here do not dispute that the Astra individuals were acting within the course and scope of their employment when they paid, offered, and failed to disclose the bribes. Petrobras pleaded that the individuals were individually liable for that conduct, and the individuals moved for summary judgment on those claims. Because the only claims Petrobras pleaded—or could have pleaded—against the individuals were claims to hold them individually liable, the individuals did not have to seek summary judgment expressly against "individual" liability.

In addition to agreeing with the trial court that the individual defendants' summary-judgment motion was sufficient to obtain summary judgment against individual liability, we agree with the trial court that the individual defendants demonstrated that they were entitled to that relief. Petrobras relies on *Ambrosio* for the proposition that Petrobras's release was not sufficient to release claims against the individual defendants in their individual capacities because the release referred only to Astra's "agents" and did not expressly identify the individual defendants. But the issue here is whether the individuals were entitled to summary judgment on Petrobras's fraud claims, and on that issue, the question is not whether Petrobras released those claims but whether the reliance disclaimer prevents Petrobras from establishing the reliance necessary to recover from the individuals on those claims. Because Petrobras expressly disclaimed reliance on any statement or representation by any "agent" of Astra, we conclude that Petrobras cannot establish that any representation by the Astra individuals defrauded Petrobras.

Because Petrobras's disclaimer of reliance on Astra's statements and representations is enforceable and applies

to the representations about which Petrobras now complains, and because the disclaimer negated the reliance element of Petrobras's fraud claims, we conclude that the Astra defendants were entitled to summary judgment on those claims. And to the extent that Petrobras's claims for conspiracy, aiding and abetting, unjust enrichment, declaratory judgment, and exemplary damages are derivative of and dependent upon the fraud claims, the defendants are entitled to summary judgment on those claims as well.

IV.
Arbitration Claims

In addition to declaring that the 2012 settlement agreement bars the claims Petrobras asserted in this lawsuit, the trial court's final judgment also declared that the agreement bars the claims Petrobras asserted in the separate arbitration proceeding it filed shortly after it filed this lawsuit. As in this lawsuit, Petrobras asserted in the arbitration proceeding that Astra "engaged in bribery and corruption in connection with" the parties' 2006 stock-purchase agreement and brought multiple claims, including claims for fraud, breach of contract, declaratory judgment, aiding and abetting breach of fiduciary duty, unjust enrichment, and racketeering, seeking exemplary damages, attorney's fees, and costs. But in the arbitration, Petrobras asserted the claims to challenge the enforceability of the 2006 stock-purchase agreement, rather than the 2012 settlement agreement. It did so because the stock-purchase agreement required arbitration of any claim or controversy arising out of or related to "any question of the validity or effect of this Agreement including this clause." Based on this arbitration clause, Petrobras argues that the court of appeals erred by affirming the trial court's declaratory judgment.

Petrobras contends the arbitration clause requires the arbitrator, and not the courts, to resolve the claims filed in the arbitration. Astra argues, however, that the parties' 2012 settlement agreement resolved all claims between the parties and replaced and superseded the 2006 stock-purchase agreement, including the arbitration clause, so the arbitration agreement ceased to exist after the settlement agreement. But Petrobras contends that only the arbitrator can decide the "gateway" issue of whether the claims are arbitrable because the parties delegated to the arbitrator "any question of the validity or effect of [the arbitration] clause." *See Henry Schein, Inc. v. White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) ("Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator.").

The dispute over the arbitration, then, is whether, in light of the 2012 settlement agreement, the parties' agreement to arbitrate as set forth within the 2006 stock-purchase agreement still exists at all. And as the Supreme Court and this Court have explained, courts—and not arbitrators—must decide whether the parties "in fact delegated the arbitrability question to the arbitrator," *id.* at 531, "whether the parties are bound by a given arbitration clause," *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002), and "whether the parties made a valid *and presently enforceable* agreement to arbitrate," *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 519 (Tex. 2015) (emphasis added). In short, courts must decide "whether an enforceable agreement to arbitrate . . . exists." *Id.* at 522. Because the parties here dispute whether their arbitration agreement continued to exist after the 2012 settlement agreement, we agree with the trial

court and court of appeals that courts must decide that issue.

The Supreme Court has also instructed that "courts 'should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.'" *Henry Schein*, 139 S. Ct. at 531 (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 939 (1995)); *see Howsam*, 537 U.S. at 83. Here, the 2006 stock-purchase agreement indisputably includes a clear and unmistakable agreement that the arbitrator will decide any question regarding the "validity" of the parties' arbitration agreement. But the 2012 settlement agreement just as clearly confirms that the parties later agreed to resolve all claims and to supersede the stock-purchase agreement. Several of the settlement agreement's provisions provide this confirmation.

First, the 2012 settlement agreement includes a merger clause in which the parties agreed that the settlement agreement "represents the entire agreement of the [p]arties and *supersedes all prior written or oral agreements.*" [emphasis added.] The merger clause contains no language that could somehow be interpreted to except or preserve the parties' "prior written . . . agreement" to arbitrate disputes over the 2006 stock-purchase agreement.

Second, the settlement agreement includes a forum-selection clause in which the parties agreed that the state courts of Harris County and the federal district court for the Southern District of Texas, Houston Division, would be "the exclusive forums for any dispute arising out of or related to this Settlement Agreement." Again, the clause contains no language that could be interpreted to except a dispute over the stock-purchase agreement or its arbitration clause or over the settlement agreement's effect on that clause. While arbitration clauses can survive and

be harmonized with forum-selection clauses in subsequent agreements between parties, *see Sharpe v. AmeriPlan Corp.*, 769 F.3d 909, 915 (5th Cir. 2014), the forum-selection clause in the 2012 settlement agreement states that Harris County courts and the Southern District of Texas are "the *exclusive* forums for any dispute" regarding the settlement agreement, indicating the parties' intent to supersede the arbitration clause in the 2006 stock-purchase agreement. *See id.* at 917 ("The 'submit[ted] to the . . . jurisdiction' language demonstrates an intent for a court to adjudicate the merits of the claims."), 915–17 (comparing a "mere" venue clause, which can be harmonized with an arbitration clause, with "far more extensive" dispute-resolution clauses requiring all claims to be "submit[ted] to" particular courts, which could not be harmonized with an arbitration clause).

And finally, the parties agreed through the mutual release clauses to release "all claims, demands, and causes of action of whatever kind or character," including "any claim arising out of or related to the 2006 [stock-purchase agreement], including without limitation, any claims related to [any] covenants." The releases, again, contain no language that could be interpreted to preserve any claims regarding the stock-purchase agreement or its arbitration clause. In fact, although the settlement agreement describes at length how and where any disputes over the settlement agreement should be resolved, it never mentions arbitration.

We conclude that the settlement agreement confirms that the parties agreed to supersede all prior agreements and to resolve any disputes over the settlement agreement in court. At a minimum, reading the arbitration agreement and the subsequent settlement agreement together, we cannot conclude that a presently enforceable

arbitration agreement clearly and unmistakably exists. We thus conclude that courts, rather than the arbitrator, must decide whether an agreement to arbitrate claims regarding the 2006 stock-purchase agreement presently exists, and for the reasons we have explained, we conclude it does not.

In the absence of an arbitration agreement, the trial court properly decided whether the 2012 settlement agreement bars the claims Petrobras asserted in the arbitration proceeding. And we conclude the court correctly decided that it does. As we have explained, the settlement agreement included "the broadest type of general release" in which Petrobras released "any and all claims . . . of whatever kind or character, . . . whether known or unknown," including, "without limitation," all claims related to the 2006 stock-purchase agreement and all claims "growing out of, or connected in any way with, the Astra Parties' dealings with the Petrobras Parties." Because the claims Petrobras asserted in the arbitration proceeding squarely fit within this release, we conclude that the trial court correctly held that the settlement agreement bars those claims.

V.
Attorney's Fees and Costs

Finally, as mentioned, the trial court granted summary judgment to Astra and awarded Astra about $1.3 million in attorney's fees and costs. Because the court of appeals reversed the judgment, it also reversed the fees-and-costs award and remanded that issue for the trial court to reconsider. 633 S.W.3d at 633–34. Because we reinstate the trial court's judgment, we elect to review the issues Petrobras raised on appeal regarding the fee award, which the parties renew here.

Petrobras argues that the trial court erred in granting attorney's fees and costs under section 37.009 of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE § 37.009. Petrobras challenged the fee award on three bases: (1) Astra cannot collect attorney's fees because its declaratory-judgment claim merely duplicated issues that were already before the court, *see MBM Fin. Corp. v. Woodlands Operating Co.*, 292 S.W.3d 660, 670–71 (Tex. 2009); (2) Astra failed to segregate its fees between its declaratory-judgment claim and claims for which attorney's fees are not available, *see Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 311 (Tex. 2006) (stating that parties must generally segregate fees); and (3) the fee is unjust because of Astra's alleged criminal conduct.

We review section 37.009 fee awards under an abuse-of-discretion standard. *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). "It is an abuse of discretion for a trial court to rule arbitrarily, unreasonably, or without regard to guiding legal principles . . . or to rule without supporting evidence." *Id.* (citations omitted). First, although both parties' claims for declaratory judgment addressed the issue of whether the 2012 settlement agreement is valid and enforceable, Astra's counterclaim sought additional relief in the form of a declaration that the settlement agreement bars the separate arbitration proceeding as well as Petrobras's claims in this lawsuit. We thus conclude that Astra's counterclaim did not merely duplicate Petrobras's claim.

Second, the duty to segregate between recoverable and nonrecoverable attorney's fees does not apply when the services for which the fees are incurred "advance both a recoverable and unrecoverable claim," such that the

"fees are so intertwined that they need not be segregated." *Chapa*, 212 S.W.3d at 313–14. Here, Astra reduced and segregated fees by eliminating hundreds of thousands of dollars in fees, reducing the hourly rate for certain attorneys as requested, and applying a thirty- to fifty-percent discount to hours billed. Moreover, because Astra sought to halt the arbitration proceeding by enforcing the settlement agreement's forum-selection clause, it necessarily had to prove that the agreement was valid and enforceable. We conclude that the trial court did not abuse its discretion by finding that any work completed to achieve those goals was sufficiently intertwined to negate any need for the fees to be segregated further. *See id.*

Third, we disagree that the trial court abused its discretion by concluding that its award of attorney's fees to Astra was equitable and just. Although we do not discount the seriousness of Petrobras's accusations of bribery and other corrupt conduct by Astra, the trial court correctly concluded that Petrobras agreed to release and forgo any claims based on any conduct by Astra—whether known or unknown—when it agreed to the 2012 settlement agreement. By asserting claims it had agreed never to assert, Petrobras broke the promise it made in the settlement agreement and caused Astra to incur substantial fees and costs to enforce that promise. We conclude the trial court did not abuse its discretion by awarding Astra its fees and costs.

VI.
Conclusion

We hold that the 2012 settlement agreement bars Petrobras's claims against Astra because the release bars the fiduciary-duty claims and the reliance disclaimer prevents Petrobras from establishing the fraud claims. We

reverse the court of appeals' judgment and render judgment reinstating the trial court's final judgment.

APPENDIX B

THE STATE OF TEXAS
FOURTEENTH COURT OF APPEALS

No. 14-18-00728-CV, No. 14-18-00793-CV

PETROBRAS AMERICA, INC. AND
PETRÓLEO BRASILEIRO S.A.-PETROBRAS,
APPELLANTS,

v.

ASTRA OIL TRADING NV AND
ASTRA OIL COMPANY, LLC,
APPELLEES.

No. 14-18-00798-CV

PETROBRAS AMERICA, INC.; PETRÓLEO BRASILEIRO S.A.-PETROBRAS; PASADENA REFINING SYSTEM, INC.; PRSI TRADING LLC; AND PRSI REAL PROPERTY HOLDINGS, LLC, APPELLANTS,

v.

ASTRA OIL TRADING NV; TRANSCOR ASTRA GROUP S.A.; ASTRA OIL COMPANY, LLC; ASTRA ENERGY HOLDINGS, INC.; ASTRA GP, INC.; ASTRA TRADECO LP, LLC; PASADENA REFINING HOLDING PARTNERSHIP; AOT BIS B.V.; CLIFFORD L. WINGET, III; ALBERTO FEILHABER; KARI BURKE; JOHN T. HAMMER; CARLOS E. ORTIZ; THOMAS J. NIMBLEY; IRENEUSZ KOTULA; CHARLES L. DUNLAP; ERIC BLUTH; STEPHEN WADE; ROLF MUELLER; AND DANIEL BURLA, APPELLEES.

Filed: August 20, 2020

Before: CHRISTOPHER, SPAIN, and POISSANT, JJ.

MEMORANDUM OPINION

SPAIN, J.

Stated simply, this case involves an often-contentious business relationship and the parties' attempt to settle their disputes. There are three related appeals. In appellate case number 14-18-00798-CV, Petrobras America, Inc.; Petróleo Brasileiro S.A.-Petrobras (Petrobras); Pasadena Refining System, Inc. (PRSI); PRSI Real Property Holdings, LLC; and PRSI Trading LLC (together, the Petrobras Plaintiffs) appeal the trial court's final judgment, signed June 12, 2018, in which it rendered final summary judgment in favor of Astra Oil Trading NV (AOT); Transcor Astra Group S.A.; Astra Oil Company, LLC (Astra Oil);[1] Astra Energy Holdings, Inc.; Astra GP, Inc.; Astra TradeCo LP, LLC; Pasadena Refining Holding Partnership (PRHP); AOT Bis B.V. (AOT BV); Clifford L. Winget, III; Alberto Feilhaber; Kari Burke; John T. Hammer; Carlos E. Ortiz; Thomas J. Nimbley; Ireneusz Kotula; Charles L. Dunlap; Eric Bluth; Stephen Wade; Rolf Mueller; and Daniel Burla[2] (together, the Astra Defendants). In appellate case number 14-18-00728-CV, Petrobras America and Petrobras appeal from the trial

[1] The predecessor of Astra Oil Company, LLC is Astra Oil Company, Inc.

[2] A suggestion of death was filed regarding Burla. *See* Tex. R. App. P. 7.1(a)(1).

court's August 21, 2018 amended order granting supplemental relief enforcing the judgment in the form of an anti-suit injunction in favor of AOT and Astra Oil. And in appellate case number 14-18-00793-CV, Petrobras America and Petrobras appeal from the trial court's August 28, 2018 amended order denying their motion to dismiss under the Texas Citizens Participation Act (TCPA)[3] in favor of AOT and Astra Oil.

In appellate case number 14-18-00728-CV, we reverse and render judgment ordering the amended order granting supplemental relief enforcing the judgment in the form of an anti-suit injunction dissolved. In appellate case number 14-18-00793-CV, we affirm the amended order denying the motion to dismiss under the TCPA. In appellate case number 14-18-00798-CV, we reverse the trial court's final judgment and remand with instructions for the trial court to render partial summary judgment in accordance with our judgment and conduct additional proceedings.

I. BACKGROUND

In 2006, Petrobras, AOT, and Astra Oil Company, Inc. entered into the Stock Purchase and Sale Agreement and Limited Partnership Formation Agreement (2006 SPA)

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[3] All citations to the TCPA in this opinion are to the version in effect before the September 2019 amendments became effective. *See* Act of May 21, 2011, 82d Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961, 961–64 (current version at Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001–011), *amended by* Act of May 24, 2013, 83d Leg., R.S., ch. 1042, §§ 1–3, 5, 2013 Tex. Gen. Laws 2499, 2499–500 (the version at issue in this opinion); *see also* Act of May 17, 2019, 86th Leg., R.S., ch. 378, §§ 1–12, 2019 Tex. Gen. Laws 684, 684–87 (amending TCPA and providing that suit filed before amendments become effective "is governed by the law in effect immediately before that date").

in connection with an oil refinery in Pasadena, Texas. Disputes arose, resulting in an arbitration and several lawsuits in state and federal courts.

In 2012, Petrobras America, Petrobras, PRSI, PRSI Real Property, PRSI Trading, AOT, Astra GP, Astra TradeCo, Astra Oil, Astra Energy, PHRP, and Transcor Astra entered into the Settlement Agreement and Mutual General Release (2012 Settlement). Among other provisions, the 2012 Settlement contains mutual releases and reliance disclaimers.

In June 2016, the Petrobras Plaintiffs filed suit against the Astra Defendants in Harris County District Court. The Petrobras Plaintiffs alleged:

- declaratory relief;
- breach of fiduciary duty against Winget, Feilhaber, Hammer, Burke, Nimbley, Kotula, Dunlap, Bluth, and Wade;
- aiding and abetting breach of fiduciary duty against all Astra Defendants except AOT and Astra Oil;
- civil conspiracy as to breach of fiduciary duty against all Astra Defendants except AOT and Astra Oil;
- unjust enrichment/money had and received;
- common-law fraud;
- statutory fraud under Business and Commerce Code section 27.01;
- negligent misrepresentation;
- civil conspiracy as to "other claims";
- "exemplary and punitive damages";
- attorney's fees and costs; and

- joint-and-several liability of PRHP.[4]

AOT, Transcor Astra, Astra Oil, Astra Energy, Astra GP, Astra TradeCo, PRHP, AOT BV, Winget, Feilhaber, Burke, Hammer, Ortiz, Nimbley, Kotula, Dunlap, Bluth, and Wade filed declaratory-judgment counterclaims and sought attorney's fees.[5]

In July 2016, Petrobras America and Petrobras filed an original demand for arbitration against AOT and Astra Oil because they allegedly "engaged in bribery and corruption in connection with" the parties' 2006 SPA. They alleged that the parties agreed to arbitrate this dispute under the 2006 SPA, which contains an arbitration provision.[6] In September 2016, AOT and Astra Oil filed a motion to stay the arbitration in the trial court, which the

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[4] The Petrobras Plaintiffs also alleged breach-of-contract claims against all Astra Defendants except Feilhaber, Mueller, and Burla and sought attorney's fees. The trial court severed those claims into cause number 2016-43650A.

[5] AOT and Astra Oil also alleged breach-of-contract claims against Petrobras America and Petrobras for pursuing the arbitration and sought attorney's fees but subsequently requested the trial court nonsuit without prejudice, which the trial court did on May 1, 2018.

[6] Article 15 of the 2006 SPA, entitled "Arbitration," in pertinent part provides:

> 15.01. Dispute Resolution. Any controversy or claim ("Claim"), whether based on contract, tort, statute or other legal or equitable theory (including but not limited to any claim of fraud, misrepresentation or fraudulent inducement or any question of validity or effect of this Agreement including this clause) arising out of or related to this Agreement (including any amendments or extensions), or the breach or termination thereof or as to any Related Agreements, shall be submitted to mediation and consultations between the Parties initiated upon the notice of any Party ("Mediation Notice"). In the event of failure of such mediation and consultations to settle such Claim in a manner acceptable to all Parties within thirty (30) days following the Mediation Notice,

trial court denied by written order signed October 26, 2016. Both the litigation and the arbitration proceeded.

In November 2017, AOT, Transcor Astra, Astra Oil, Astra Energy, Astra GP, Astra TradeCo, PRHP, AOT BV, Winget, Burke, Hammer, Ortiz, Nimbley, Kotula, Dunlap, Bluth, and Wade filed an amended motion for summary judgment, seeking dismissal of the claims in the Petrobras Plaintiffs' second amended petition and arguing that they were entitled to judgment on their declaratory-judgment counterclaims.[7] Feilhaber adopted this amended summary-judgment motion. The Petrobras Plaintiffs responded[8] and filed a third amended petition,

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> then any such Claim shall be settled by binding arbitration in accordance with this provision and the then current rules of American Arbitration Association ("AAA"). The arbitration shall be governed by the United States Arbitration Act, 9 U.S.C. §§ 1–16, to the exclusion of any provision of state law inconsistent therewith or which would produce a different result, and Judgment upon the award rendered by the arbitrator may be entered by any court having jurisdiction.

[7] Attached to the amended summary-judgment motion were: a November 2017 affidavit by Beth Bivans Petronio; the 2012 Settlement; three draft settlement agreements; affidavits by Winget, Yvonne Roellin, Burke, Hammer, Ortiz, Nimbley, Kotula, Dunlap, Bluth, and Wade; transcripts from the depositions of Winget, Roellin, Burke, Hammer, Ortiz, Kotula, Dunlap, and Wade; and Petrobras America's and Petrobras's amended arbitration demand.

[8] Attached to the Petrobras Plaintiffs' response were: a December 2017 affidavit by William Katz; a translation of "collaboration agreement" by Nestor Cunat Cervero; a translation of a supplementary "cooperation agreement" by Cervero; translations of two "declarations" by Agosthilde Monaco de Carvalho; a translation of "statements" by Fernando Antonio Falcao Soares; a translation of a "statement of declaration" by Soares; witness statements in the arbitration by Winget, Feilhaber, and Hammer; the October 2017 award on jurisdiction issued by the tribunal; transcripts from the depositions of Bluth and Nimbley; and excerpts from the deposition of Feilhaber.

adding the claims for breach of fiduciary duty against Winget, Feilhaber, Hammer, Burke, Nimbley, Kotula, Dunlap, Bluth, and Wade.

The trial court signed interlocutory orders granting the amended motions for summary judgment. AOT, Transcor Astra, Astra Oil, Astra Energy, Astra GP, Astra TradeCo, PRHP, AOT BV, Winget, Burke, Hammer, Ortiz, Nimbley, Kotula, Dunlap, Bluth, and Wade then filed a motion for summary judgment regarding the third amended petition. Feilhaber adopted this motion. Mueller and Burla also filed a conditional[9] motion for summary judgment regarding the third amended petition.

The trial court signed interlocutory orders granting the motions for summary judgment regarding the third amended petition. On June 12, 2018, the trial court signed a final judgment,[10] which ordered that the Petrobras Plaintiffs take nothing on their claims and granting AOT, Transcor Astra, Astra Oil, Astra Energy, Astra GP, Astra TradeCo, PRHP, AOT BV, Winget, Burke, Hammer, Ortiz, Nimbley, Kotula, Dunlap, Bluth, and Wade a declaratory judgment, ruling:

a. the June 29, 2012 Settlement Agreement and Mutual General Release (the "Settlement Agreement") is valid, binding and enforceable in all respects;

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[9] Mueller's and Burla's summary-judgment motion was filed subject to their special appearances, which the trial court later denied by order signed March 27, 2018.

[10] The final judgment states: "All claims relating to all parties remaining in Cause No. 2016-43650 are determined and disposed of by this Final Judgment. All relief requested but not granted herein is denied. . . . This Final Judgment is appealable." The trial court rendered a final and appealable judgment. See *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 206 (Tex. 2001).

b. the Petrobras Release given by the "Petrobras Parties" in Section 5.11 of the Settlement Agreement is valid, enforceable and binding; and

c. the Petrobras Release bars (i) the claims asserted in the proceeding for Breach of Fiduciary Duty[,] Aiding and Abetting Breach of Fiduciary Duty, and Civil Conspiracy–Breach of Fiduciary Duty; (ii) the claims sought to be asserted by Petrobras in the ICDR Arbitration commenced by Petrobras and styled *Petrobras America, Inc., et al. v. Astra Oil Trading NV, et al*[.], Cause No. 01-16-0003-1149; and (iii) any other claims arising out of or related to the 2006 SPA or the dealings between the parties.

The trial court separately ordered Feilhaber have a final declaratory judgment that the 2012 Settlement was valid, binding, and enforceable in all respects and the Petrobras Release was enforceable and binding. The trial court awarded these Astra Defendants various amounts of chapter-37 attorney's fees.

In July 2018, AOT and Astra Oil filed a motion for supplemental relief to enforce the judgment, requesting that the Petrobras parties be enjoined from further pursuit of the arbitration. The trial court granted this motion. AOT and Astra Oil subsequently filed a motion for an amended order granting supplemental relief to enforce the judgment. The Petrobras Plaintiffs filed a motion to dismiss under the TCPA. The trial court held a hearing, granting AOT's and Astra Oil's motion for an amended order granting supplemental relief enforcing the judgment and denying the Petrobras Plaintiffs' TCPA motion to dismiss. These three appeals—from the final judgment, the amended order granting supplemental relief in the form of an anti-suit injunction, and the order denying the TCPA motion—followed.

II. ANALYSIS

A. No. 14-18-00798-CV

In their amended motions for summary judgment, the Astra Defendants raised the following grounds against the Petrobras Plaintiffs' claims:

- the claims for fraud, statutory fraud, and negligent misrepresentation based on alleged misrepresentations and failures to disclose the alleged 2006 bribe and the alleged settlement bribe offer during settlement discussions were barred by the disclaimer-of-reliance provision in section 5.29 of the 2012 Settlement;
- the claims for fraud, statutory fraud, and negligent misrepresentation fail because the Astra Defendants had no duty during settlement discussions to make any disclosures about the alleged settlement bribe offer;
- the claims for declaratory judgment, unjust enrichment, civil conspiracy as to "other claims," joint-and-several liability of PRHP, punitive damages, and attorney's fees also fail because they are derivative of the underlying misrepresentation claims; and
- the claims for aiding and abetting breach of fiduciary duty and civil conspiracy as to breach of fiduciary duty were barred by the Petrobras Release.

In addition, the Astra Defendants (except for Mueller and Burla) argued they were entitled to declaratory judgment on their claims for "declaratory judgment confirming the validity and enforceability of the Petrobras Release and that the Petrobras Release bars any claims by Petrobras

arising out of or relating to the 2006 SPA or any of the parties' prior dealings."

The Petrobras Plaintiffs argued in response that the reliance disclaimer did not apply to the failure to disclose the 2006 bribery scheme; the reliance disclaimer did not bar their claims considering the Astra Defendants' criminal conduct and the totality of the circumstances; and the release expressly excluded the Petrobras Plaintiffs' claims. They further argued that the Astra Defendants were not entitled to summary judgment on their declaratory-judgment counterclaims.

The Astra Defendants' motions for summary judgment regarding the third amended petition incorporated all the reasons and evidence from the amended summary-judgment motions. In addition, the Astra Defendants argued that the new claims for breach of fiduciary duty were "barred by the Petrobras Release." The Petrobras Plaintiffs argued in response that, even if enforceable, the reliance disclaimer did not apply to nine of their claims; the broad exception in the release preserved their non-reliance-based claims; the individual defendants were not entitled to summary judgment in their individual capacities on any claims; the Astra Defendants were not entitled to declaratory relief that affected the arbitration; and the Astra Defendants were not entitled to an award of attorney's fees or costs.

1. Summary judgment dismissing the Petrobras Plaintiffs' claims

In their first issue, broken into sub-issues, the Petrobras Plaintiffs argue that the trial court erred in granting the motions for summary judgment on their claims in favor of the Astra Defendants. Our review of a summary judgment is de novo. *Mann Frankfort Stein &*

Lipp Advisors, Inc. v. Fielding, 289 S.W.3d 844, 848 (Tex. 2009). Because the trial court's summary-judgment orders do not specify the ground or grounds upon which they were granted, we uphold the court's judgment if properly supported by any ground alleged in the motions. *See Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989). When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). To be entitled to traditional summary judgment, a movant must establish there is no genuine issue of material fact so that the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Mann Frankfort*, 289 S.W.3d at 848. A defendant who conclusively negates a single essential element of a cause of action or conclusively establishes an affirmative defense is entitled to summary judgment on that claim. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508–09 (Tex. 2010). Once the movant produces evidence entitling it to summary judgment, the burden shifts to the nonmovant to present evidence raising a genuine issue of material fact. *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996).

a. The Petrobras release

We first consider the Petrobras Plaintiffs' first sub-issue regarding the Astra Defendants' summary-judgment ground of release. The release at issue provides:

> Release of the Astra Parties
>
> 5.11 On the Effective Date, and once payment of the amount set forth in Section 5.02 is made and except as otherwise provided in Sections 5.03 and 5.06 and

this Section 5.11, the Petrobras Parties generally release and forever discharge the Astra Parties from any and all claims, demands, and causes of action of whatever kind or character which the Petrobras Parties have, or may have in the future, based on any acts or omissions, whether known or unknown, that have occurred on or before the Effective Date, including, without limitation: (a) any claim that was or could have been asserted in, that grew out of, or that was in any way connected with, the Disputes; (b) any claim arising out of or related to the 2006 SPA, including without limitation, any claims related to the indemnities, representations, warranties, covenants and purchase price adjustments provided for therein; (c) any claim arising out of, or connected in any way with, any environmental issues of any kind at the refinery owned and operated by PRSI; (d) any claim growing out of, or connected in any way with, the Astra Parties' dealings with the Petrobras Parties; (e) any claim based in whole or in part on the activities of the Astra Parties that may have been alleged to violate any laws or administrative rules of the United States, or any state or subdivision of the United States, or any foreign country or subdivision of any foreign country, (f) any claim based in whole or in part on the activities of the Astra Parties that may have been alleged to create any right or action for recovery for damages or injunction, under any federal or state statutes or administrative rule or other judicial decisions or the common law of the United States, or any state or subdivision of the United States, or any foreign country or subdivision of any foreign country; (g) any claim based in whole or in part on the activities of the Astra Parties that may have been alleged to create or contribute to any other right, claim or cause of action of the Petrobras Parties

> against the Astra Parties; and (h) claims for punitive or exemplary damages, attorney's fees, costs, or penalties (collectively, the "**Petrobras Claims**"). This release is to be construed as the broadest type of general release and is intended to constitute a general release by the Petrobras Parties of the Astra Parties of the Petrobras Claims, whether known or unknown. Notwithstanding anything to the contrary, the Petrobras Claims shall not include any and all claims, demands, and causes of action arising out of, related to, or connected in any way with the alleged breach, enforcement, or interpretation of this Settlement Agreement or the Common Interest Agreement.

Release is an affirmative defense under the Texas Rules of Civil Procedure. Tex. R. Civ. P. 94. A release is a writing which provides that a duty or obligation owed to one party to the release is discharged immediately or upon the occurrence of a condition. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Ins. Co. of N. Am.*, 955 S.W.2d 120, 127 (Tex. App.–Houston [14th Dist.] 1997), *aff'd sub nom. Keck, Mahin & Cate v. Nat'l Fire Ins. Co. of Pittsburgh, Pa.*, 20 S.W.3d 692 (Tex. 2000); *Baty v. ProTech Ins. Agency*, 63 S.W.3d 841, 848 (Tex. App.–Houston [14th Dist.] 2001, pet. denied) (op. on reh'g). A release of a claim or cause of action extinguishes the claim or cause of action. *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993). Like any other agreement, a release is a contract subject to the rules of contract construction. *Baty*, 63 S.W.3d at 848; *see Williams v. Glash*, 789 S.W.2d 261, 264 (Tex. 1990). When construing a contract, the court must give effect to the true intentions of the parties as expressed in the written instrument. *Lenape Res. Corp. v. Tenn. Gas Pipeline Co.*, 925 S.W.2d 565, 574 (Tex. 1996); *Baty*, 63 S.W.3d at 848.

The contract must be read as whole, not by "isolating a certain phrase, sentence, or section of the agreement." *Baty*, 63 S.W.3d at 848. Rather, the court must examine the entire contract in an effort to harmonize and give effect to all of its provisions so that none are rendered meaningless and no single provision controls. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003). The language is to be given its plain grammatical meaning unless doing so would defeat the intent of the parties. *Baty*, 63 S.W.3d at 848. A contract is unambiguous if it can be given a definite legal meaning. *Webster*, 128 S.W.3d at 229. The interpretation of an unambiguous contract is a matter of law to be determined by the court. *Gulf Ins. Co. v. Burns Motors, Inc.*, 22 S.W.3d 417, 423 (Tex. 2000). In construing a contract, the court may not rewrite it or add to its language. *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 162 (Tex. 2003).

To effectively release a claim, the releasing instrument must mention the claim to be released. *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 938 (Tex. 1991); *Baty*, 63 S.W.3d at 848. Claims that are not clearly within the subject matter of the release are not discharged, even if they exist when the release is executed. *Brady*, 811 S.W.2d at 938; *Baty*, 63 S.W.3d at 848. It is not necessary, however, that the parties anticipate and identify every potential cause of action relating to the subject matter of the release. *Keck*, 20 S.W.3d at 698; *Baty*, 63 S.W.3d at 848. Although releases generally contemplate claims existing at the time of execution, a valid release may also encompass unknown claims and future damages. *Keck*, 20 S.W.3d at 698; *Baty*, 63 S.W.3d at 848. General categorical release clauses are narrowly construed. *Brady*, 811 S.W.2d at 938.

In their summary-judgment motions, the Astra Defendants argued that the Petrobras Plaintiffs' claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and conspiracy as to breach of fiduciary duty fell within the release as claims "arising out of or related to the 2006 SPA"; "growing out of, or connected in any way with, the Astra Parties' dealings with the Petrobras Parties"; "based . . . on the activities of the Astra Parties that may have been alleged to violate any laws"; and "based . . . on the activities of the Astra Parties that may have been alleged to create any right or action [for Petrobras]."

The trial court granted the motions for summary judgment in favor of the Astra Defendants on the Petrobras Plaintiffs' claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and conspiracy as to breach of fiduciary duty. To show their entitlement to judgment as a matter of law, the Astra Defendants had to conclusively establish that these claims were not viable because they were barred by the release. *See* Tex. R. Civ. P. 166a(c). We conclude that the Astra Defendants did not meet their burden and therefore conclude that the trial court erred by granting their motions for summary judgment on these claims.

The Petrobras Plaintiffs contend that the trial court erred because all their "claims fall outside the scope of the Release." As they did in the trial court, they point to the carve-out language in section 5.11: "Notwithstanding anything to the contrary, the Petrobras Claims shall not include any and all claims, demands, and causes of action arising out of, related to, or connected in any way with the alleged breach, enforcement, or interpretation of this Settlement Agreement." They argue that this language is subject to a broad, inclusive construction.

On appeal, the Astra Defendants point out that they only raised the release to defeat the Petrobras Plaintiffs' claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and conspiracy as to breach of fiduciary duty. They argue that "[t]he only reasonable interpretation of the Release is exactly what it says, namely, that it applies to the 2006 SPA Claims," which according to the Astra Defendants were "based on . . . alleged misconduct relating to the 2006 SPA."[11]

No party argues that the release is ambiguous. The release states that it "is to be construed as the broadest type of general release and is intended to constitute a general release . . . of the Petrobras Claims, whether known or unknown." The term "Petrobras Claims" is defined to include "any and all claims, demands, and causes of action of whatever kind or character which the Petrobras Parties have, or may have in the future, based on any acts or omissions, whether known or unknown, that have occurred on or before the Effective Date,"[12] including "any claim arising out of or related to the 2006 SPA." But the release also

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[11] The Astra Defendants did not mention or address the carve-out portion of the release in their summary-judgment motions.

[12] The release goes on to "includ[e], without limitation" and define the following as the "Petrobras Claims":

> (a) any claim that was or could have been asserted in, that grew out of, or that was in any way connected with, the Disputes; (b) any claim arising out of or related to the 2006 SPA, including without limitation, any claims related to the indemnities, representations, warranties, covenants and purchase price adjustments provided for therein; (c) any claim arising out of, or connected in any way with, any environmental issues of any kind at the refinery owned and operated by PRSI; (d) any claim growing out of, or connected in any way with, the Astra Parties' dealings with the Petrobras Parties; (e) any claim based in whole or in part on the activities of the Astra Parties that may have been alleged to violate any laws or

includes an express carve-out, which states that "[n]otwithstanding anything to the contrary, the Petrobras Claims shall not include any and all claims, demands, and causes of action arising out of, related to, or connected in any way with the alleged breach, enforcement, or interpretation of this Settlement Agreement."[13]

"When parties use the clause 'notwithstanding anything to the contrary contained herein' in a paragraph of their contract, they contemplate the possibility that other parts of their contract may conflict with that paragraph, and they agree that this paragraph must be given effect regardless of any contrary provisions of the contract." *Helmerich & Payne Int'l Drilling Co. v. Swift Energy Co.*, 180 S.W.3d 635, 643 (Tex. App.–Houston [14th Dist.] 2005, no pet.); *see also Horseshoe Bay Resort, Ltd. v. CRVI CDP Portfolio, LLC*, 415 S.W.3d 370, 384 (Tex. App.–Eastland 2013, no pet.) (describing "notwithstanding" and "despite" as "[s]uperordinating language" that "shows which provision prevails in the event of a clash"). In addition, we ordinarily read the clause "arising out of, related

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administrative rules of the United States, or any state or subdivision of the United States, or any foreign country or subdivision of any foreign country, (f) any claim based in whole or in part on the activities of the Astra Parties that may have been alleged to create any right or action for recovery for damages or injunction, under any federal or state statutes or administrative rule or other judicial decisions or the common law of the United States, or any state or subdivision of the United States, or any foreign country or subdivision of any foreign country; (g) any claim based in whole or in part on the activities of the Astra Parties that may have been alleged to create or contribute to any other right, claim or cause of action of the Petrobras Parties against the Astra Parties; and (h) claims for punitive or exemplary damages, attorney's fees, costs, or penalties.

[13] The same carve-out language is used in section 5.09 of the 2012 Settlement, which concerns the release of the "Astra Claims."

to, or connected in any way with" broadly. *See Branch Law Firm L.L.P. v. Osborn*, 532 S.W.3d 1, 19–20 (Tex. App.–Houston [14th Dist.] 2016, pet. denied) ("The use of such broad language ["arising out of or in connection with"] evidences the parties' intent to be inclusive rather than exclusive."); *Grant Prideco, Inc. v. Empeiria Conner L.L.C.*, 463 S.W.3d 157, 161–62 (Tex. App.–Houston [14th Dist.] 2015, no pet.) ("The words 'arising out of' have been interpreted by courts as broad, general, and comprehensive terms effecting broad coverage in that the words are understood to mean originating from, having its origin in, growing out of, or flowing from." (internal quotation marks omitted)).

The question therefore is, keeping in mind that we construe general categorical releases narrowly and must give effect to the "notwithstanding" carve-out, even if the Petrobras Plaintiffs' claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and conspiracy as to breach of fiduciary duty otherwise fit within the release, can these claims, applying Texas's fair-notice pleading standard,[14] be broadly and reasonably categorized as growing out of or flowing from the alleged

[14] *See Roark v. Allen*, 633 S.W.2d 804, 810 (Tex. 1982) ("A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim.").

breach,[15] enforcement,[16] or interpretation[17] of the 2012 Settlement such that they fall within the exception? We conclude that, as pleaded by the Petrobras Plaintiffs, they can.

Contrary to the Astra Defendants' assertion, the Petrobras Plaintiffs did not solely limit their claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and conspiracy as to breach of fiduciary duty to the Astra Defendants' "alleged misconduct relating to the 2006 SPA." In their third amended petition, the Petrobras Plaintiffs alleged that certain defendants[18] owed them fiduciary duties by virtue of their director and officer roles in PRSI, PRSI Trading, or both. While the Petrobras Plaintiffs did allege that these defendants breached their fiduciary duties by paying about $15 million in bribes in connection with the initial purchase of 50% of PRSI, the Petrobras Plaintiffs further alleged that these defendants breached their fiduciary duties by offering to pay between $80 and $100 million in bribes to reach a settlement "during the ongoing litigation that culminated in the" 2012 Settlement and by failing to disclose such facts while the 2012 Settlement was being negotiated

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[15] "Breach" means "[a] violation or infraction of a law, obligation, or agreement, esp. of an official duty or a legal obligation, whether by neglect, refusal, resistance, or inaction." Black's Law Dictionary (11th ed. 2019).

[16] "Enforcement" means "[t]he act or process of compelling compliance with a law, mandate, command, decree, or agreement." Black's Law Dictionary (11th ed. 2019).

[17] "Interpretation" means "[t]he ascertainment of a text's meaning; specif., the determination of how a text most fittingly applies to particular facts." Black's Law Dictionary (11th ed. 2019).

[18] Again, these defendants were Winget, Feilhaber, Hammer, Burke, Nimbley, Kotula, Dunlap, Bluth, and Wade.

and signed. In addition, the Petrobras Plaintiffs alleged that these defendants were knowing participants in the breaches, fully liable, and had a personal financial interest in the 2012 Settlement through their respective ownership interests in PRHP, which received at least $135 million of the funds paid under the agreement. In addition, the Petrobras Plaintiffs alleged that the Astra Defendants[19] knew of the fiduciary relationships owed by certain defendants, knew they were participating in breaches of those duties, and therefore aided and abetted the breaches. Finally, the Petrobras Plaintiffs alleged that the Astra Defendants[20] agreed and/or conspired with each other and possibly third parties in connection with aiding and abetting the breaches of fiduciary duties by performing acts, making statements, and concealing information in furtherance of such conspiracy. The Petrobras Plaintiffs sought any and all legal and equitable remedies, including damages, disgorgement, rescission, restitution, and imposition of a constructive trust.

To the extent that the Petrobras Plaintiffs' claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and conspiracy as to breach of fiduciary duty are alleged to involve acts or omissions of the Astra Defendants "in connection with the initial purchase of 50% of PRSI," they are properly barred by the general release as claims "arising out of or related to the 2006 SPA." However, the Petrobras Plaintiffs also alleged claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and conspiracy as to breach of fiduciary duty involving acts or omissions of the Astra Defendants in connection with the negotiation and signing of the 2012 Settlement and sought to limit or undo payments made

[19] Again, these defendants did not include AOT or Astra Oil.

[20] *See supra* note 19.

pursuant to that agreement. We conclude that these claims reasonably fall within the inclusive, "superordinating" carve-out language of the release as claims "arising out of, related to, or connected in any way with the alleged breach, enforcement, or interpretation of this Settlement Agreement" and therefore are not barred by the release.[21]

Because the Astra Defendants did not conclusively establish that all the Petrobras Plaintiffs' claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and conspiracy as to breach of fiduciary duty against them fall clearly within the scope of the release, we conclude that the trial court erred by granting the motions for summary judgment, dismissing all these claims with prejudice, and declaring that all these claims were barred by the release.

Accordingly, we sustain this portion of the Petrobras Plaintiffs' first issue.

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[21] We note that other sections of the 2012 Settlement tend to reinforce the inclusive nature of the carve-out, including the forum-selection provision in section 5.20 governing where the parties agreed to file "any dispute arising out of or related to Settlement Agreement" and where they irrevocably submitted to jurisdiction "for any legal proceeding arising out of or related to this Agreement," as well as the provision in section 5.22 by which the parties waived their right to a jury trial "in respect to any litigation, action, suit, or proceeding (whether at law or equity) based on, arising out of, related to, or connected in any way with this Settlement Agreement, whether arising in contract, tort or otherwise and whether asserted by way of complaint, answer, cross-claim, counterclaim, affirmative defense or otherwise."

b. The disclaimer of reliance

We next consider the Petrobras Plaintiffs' second and third sub-issues regarding the Astra Defendants' summary-judgment ground of disclaimer of reliance. The disclaimer of reliance at issue provides:

> 5.29 **EACH PARTY EXPRESSLY WARRANTS THAT IT HAS CAREFULLY READ THIS SETTLEMENT AGREEMENT AND ANY EXHIBITS ATTACHED TO IT, UNDERSTANDS THEIR CONTENTS, AND SIGNS THIS SETTLEMENT AGREEMENT AS ITS OWN FREE ACT. EACH PARTY EXPRESSLY WARRANTS THAT NO PROMISE OR AGREEMENT WHICH IS NOT HEREIN EXPRESSED HAS BEEN MADE TO IT IN EXECUTING THIS SETTLEMENT AGREEMENT, AND THAT IT IS NOT RELYING UPON ANY STATEMENT OR REPRESENTATION OF ANY AGENT OF THE OPPOSING PARTIES BEING RELEASED IN THIS SETTLEMENT AGREEMENT. EACH PARTY IS RELYING ON ITS OWN JUDGMENT, AND EACH PARTY HAS BEEN REPRESENTED BY LEGAL COUNSEL IN THIS MATTER. EACH PARTY EXPRESSLY WARRANTS THAT ITS RESPECTIVE LEGAL COUNSEL HAS READ AND EXPLAINED THE ENTIRE CONTENTS OF THIS SETTLEMENT AGREEMENT IN FULL, AS WELL AS THE LEGAL CONSEQUENCES OF IT.**

A contract is subject to avoidance on the ground of fraudulent inducement. *Williams*, 789 S.W.2d at 264. However, "a disclaimer of reliance may conclusively negate the element of reliance, which is essential to a fraudulent inducement claim." *Schlumberger Tech. Corp. v.*

Swanson, 959 S.W.2d 171, 179–80 (Tex. 1997) (concluding that disclaimer-of-reliance clause effectively precluded claim for fraudulent inducement).

The question of whether an adequate disclaimer of reliance exists is a matter of law, which we review de novo. *See Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 55 (Tex. 2008). In *Forest Oil*, the Supreme Court of Texas applied *Schlumberger* to uphold a disclaimer of reliance in a settlement agreement that was intended to resolve both future and past claims. *Id.* at 58. The *Forest Oil* court "clarified" the factors that guided its reasoning:

(1) the terms of the contract were negotiated, rather than boilerplate, and during negotiations the parties specifically discussed the issue which has become the topic of the subsequent dispute;

(2) the complaining party was represented by counsel;

(3) the parties dealt with each other in an arm's length transaction;

(4) the parties were knowledgeable in business matters; and

(5) the release language was clear.

268 S.W.3d at 60 (as in *Schlumberger*, "[c]ourts must always examine the contract itself and the totality of the surrounding circumstances when determining if a waiver-of-reliance provision is binding"); *see also Int'l Bus. Machines Corp. v. Lufkin Indus., LLC*, 573 S.W.3d 224, 229–30 (Tex. 2019) (applying same factors). "[T]he five *Forest Oil* considerations a[re] 'facts . . . that guide[] our reasoning' and 'factors'—not elements that all must be established before a disclaimer of reliance is enforceable." *McLernon v. Dynegy*, Inc., 347 S.W.3d 315, 333 (Tex.

App.–Houston [14th Dist.] 2011, no pet.) (quoting *Forest Oil*, 268 S.W.3d at 60).

In their summary-judgment motions, the Astra Defendants argued that the Petrobras Plaintiffs' claims for fraud, statutory fraud, and negligent misrepresentation should be dismissed because they were barred as a matter of law by the disclaimer of reliance in section 5.29 of the 2012 Settlement. They argued that justifiable reliance was an essential element of these three claims, and the disclaimer conclusively negated any claim of reliance pursuant to the *Schlumberger* doctrine. In addition, they argued that because the Petrobras Plaintiffs' remaining "claims"—for declaratory relief, unjust enrichment, civil conspiracy as to "other claims," joint-and-several liability of PHRP, punitive damages, and attorney's fees—required proof of the underlying misrepresentation claims, they also had to be dismissed.

The trial court granted the motions for summary judgment in favor of the Astra Defendants on the Petrobras Plaintiffs' claims for declaratory relief, unjust enrichment/money had and received, common-law fraud, statutory fraud, negligent misrepresentation, civil conspiracy as to "other claims," exemplary damages, attorney's fees and costs, and joint-and-several liability of PRHP. To show their entitlement to judgment as a matter of law, the Astra Defendants had to conclusively establish that these claims of the Petrobras Plaintiffs were not viable either because the claims were barred by the reliance disclaimer or were derivative claims. *See* Tex. R. Civ. P. 166a(c).

In their second sub-issue, the Petrobras Plaintiffs argue that the reliance disclaimer cannot affect nine of their claims because reliance is not an element of those claims: namely, declaratory relief, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, civil conspiracy

as to breach of fiduciary duty, unjust enrichment/money had and received, civil conspiracy as to "other claims," exemplary damages, attorney's fees and costs, and joint-and-several liability of PHRP. In their third sub-issue, the Petrobras Plaintiffs argue that even on the three claims for which reliance is an element, the reliance disclaimer does not entitle the Astra Defendants to summary judgment because it is unenforceable under *Schlumberger*. They also contend that their claims are based on omissions, not affirmative misrepresentations, so the reliance disclaimer does not apply. Finally, they assert that the reliance disclaimer should not be enforced due to "the surrounding facts and circumstances."

The Astra Defendants attack the Petrobras Plaintiffs' second sub-issue as a "straw man" argument because they did not seek summary judgment on the nine other "claims" based on the reliance disclaimer. As to the third sub-issue, the Astra Defendants argue that the trial court properly applied the *Schlumberger* doctrine when all the factors favor enforcement of the reliance disclaimer; the disclaimer also covers nondisclosure claims; and this court should not create any public-policy exception to the *Schlumberger* doctrine.

In their third amended petition, with regard to their claims for common-law fraud, statutory fraud, and negligent misrepresentation, the Petrobras Plaintiffs alleged that the Astra Defendants made false "representations and/or omissions" either with knowledge of their falsity, or negligently, to induce the Petrobras Plaintiffs to enter into the 2012 Settlement. Significantly, with regard to all three claims, the Petrobras Plaintiffs alleged that they "reasonably relied to their detriment on the omissions, misstatements [false statements], and/or misrepresentations" made by the Astra Defendants.

The Petrobras Plaintiffs do not dispute that reliance is an essential element of common-law fraud, statutory fraud, and negligent misrepresentation. They also do not dispute—and the summary-judgment record confirms—that certain of the Forest Oil factors clearly are present here: the disclaimer language was clear and unequivocal, the terms of the contract were negotiated and not boilerplate, they were represented by counsel, and the parties are knowledgeable in business matters. *See* 268 S.W.3d at 60. Instead, the Petrobras Plaintiffs argue that two factors weigh against enforcing the disclaimer.

We turn first to the Petrobras Plaintiffs' third sub-issue.

> *Whether during negotiations the parties specifically discussed the issue which has become the topic of the subsequent dispute*

The Petrobras Plaintiffs first argue that the matter in dispute was not specifically negotiated, *i.e.*, the parties did not specifically discuss the 2006 bribery scheme and the Astra Defendants instead concealed it while they were negotiating the 2012 Settlement. The Petrobras Plaintiffs point to evidence that the parties did not have "specific discussions" about the 2006 SPA or "any potential bribery and corruption related to the earlier 2006 transaction." The Astra Defendants respond that the parties did not need to specifically discuss the very facts of the alleged 2006 bribery scheme to meet this factor, and that "Petrobras was fully aware that it was disclaiming reliance on any representations or disclosures relating to the mutual releases, including the release of any claims relating to the to 2006 SPA."

The *Schlumberger* doctrine properly can be applied whether the settlement agreement at issue involves one

known, current dispute, or older or future disputes, whether known or unknown. *See Forest Oil*, 268 S.W.3d at 57–58 (applying *Schlumberger* to parties' settlement and rejecting plaintiff's argument that "the disclaimer [was] insufficiently specific to be applied to every representation made").

Our court considered and rejected an argument similar to that made by the Petrobras Plaintiffs in *Texas Standard Oil & Gas, L.P. v. Frankel Offshore Energy, Inc.*, 394 S.W.3d 753 (Tex. App.–Houston [14th Dist.] 2012, no pet.). There, we held that although the plaintiff attempting to bring a fraudulent-inducement claim was unaware of the defendant's particular potential transaction to sell certain oil and gas prospects (which subsequently took place) when it executed a settlement agreement to terminate their business relationship relating to developing prospects, this factor was met and the fraudulent-inducement release at issue was enforceable under circumstances wherein the parties had discussed the broader "issue" of whether the plaintiff had interests in various prospects. *Id.* at 773, 778. In so holding, we explained:

> We acknowledge that the present case seems to present an atypical situation because the extra-contractual concealments forming the grounds for Frankel's fraudulent-inducement claim are the same concealments forming, in part, the grounds for its breach-of-fiduciary-duties claim. Thus, if the parties had discussed the exact grounds on which Frankel based its present breach-of-fiduciary-duties claim, there likely would not have been any fraudulent inducement because Frankel would not have executed the Settlement Agreement if it had known of the Probe transac-

> tion or at least that GTP was concealing material information. However, the *Forest Oil* court did not opine that the parties must have discussed the exact grounds that form the basis of the subsequent dispute, in order to satisfy this factor. *See generally*, 268 S.W.3d at 58. In fact, Frankel released all "known and unknown" claims "which have accrued or may ever accrue to [Frankel] . . . ."

Tex. Standard Oil, 394 S.W.3d at 772.

Our court again considered and rejected a similar argument in *McLernon*. There, we held that a former executive's assertion that he was fraudulently induced to enter into a severance agreement was barred by a disclaimer of reliance. 347 S.W.3d at 330. In doing so, we rejected the executive's argument that the parties did not discuss the fraud claim (based on misrepresentations concerning repayment of a loan to purchase stock) before execution of the severance agreement. *Id.* at 331. We explained:

> [T]he relevant fact under the first guideline is that the parties discussed McLernon's obligation to repay the loan and execution of the replacement note because this issue is the topic of the present dispute. The inquiry under this guideline cannot be whether they discussed the fraudulent-inducement claim or whether he was aware of the misrepresentations at issue. Axiomatically, if contracting parties discussed a fraudulent-inducement claim and the complaining party was aware of the material misrepresentations before signing the agreement, there would be no such fraud claim because he could not have been deceived into signing the agreement. The significant point with respect to the *Forest Oil* factors is that McLernon was aware of Dynegy's specific representations concerning the

> topic of the present dispute yet elected to disclaim reliance on those representations.

McLernon, 347 S.W.3d at 331.

In other words, we do not require that the parties discussed the specific factual basis for the "fraud" concern to meet this portion of the *Forest Oil* factor.[22] The relevant inquiry is not whether the parties specifically discussed, the Petrobras Plaintiffs were aware of, or the Astra Defendants disclosed the facts of the alleged 2006 bribery scheme, which surely would have given the Petrobras Plaintiffs a reason not to execute the 2012 Settlement (and so they would not be bringing any fraudulent-inducement claims), but rather whether the parties specifically discussed the broader issue or topic of the existence and treatment of older claims, whether known or unknown, such as those related to the 2006 SPA.

The summary-judgment record includes testimony by Winget, who participated in the negotiations and signed the 2012 Settlement for the Astra Defendants, that the parties discussed their intent for the agreement to be a "[t]otal adios, you know, with the complete general release . . . absolute, complete never come back, no matter what happened in the past." According to Winget, the 2012 Settlement "was—in [his] nonlawyer language—let's say capped by a mutual—there's a word for it. But it basically means no more litigation. That's—mutual disclaimer release, excuse me. And, you know, that was the end of it. Like we'd never be here today . . . was the intent." The record also includes a comparison of drafts of

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[22] The Petrobras Plaintiffs do not address this court's holdings in *Texas Standard Oil* and *McLernon* interpreting this factor. Nor do the cases relied on by the Petrobras Plaintiffs control our analysis or otherwise persuade us.

the 2012 Settlement tending to demonstrate that the mutual release provisions specifically were negotiated among the parties and ultimately revised to expressly include "any claim arising out of or related to the 2006 SPA." In addition, in his affidavit, counsel for the Petrobras Plaintiffs acknowledged that the parties, during negotiations, specifically discussed releasing claims "related to the 2006 purchase of 50% of PRSI" (albeit at the Astra Defendants' insistence). Under these circumstances, we conclude the summary-judgment evidence sufficiently supports that during negotiations the parties specifically discussed the issue which has become the topic of their subsequent dispute.

Whether the parties dealt with each other in an arm's-length transaction

Next, the Petrobras Plaintiffs argue that the 2012 Settlement was not an arm's-length transaction because certain of the Astra Defendants owed fiduciary duties to PRSI, PRSI's shareholders Petrobras and Petrobras America, and PRSI Trading. They contend that such duties to disclose were owed before, during, and after the settlement negotiations, and therefore as a matter of law the 2012 Settlement cannot have been an arm's-length transaction. According to the Astra Defendants, even assuming certain of them owed fiduciary duties to the Petrobras Plaintiffs during the settlement negotiations, "that would not militate against enforcement of the disclaimer."

Schlumberger did not address this particular situation; there, the court concluded there was no evidence that the parties were fiduciaries either as partners or based on a confidential relationship. *See* 959 S.W.2d at 175–77. However, our court in *Texas Standard Oil* directly con-

sidered whether a fraudulent-inducement release in a settlement was unenforceable as a matter of law assuming the negotiating parties were fiduciaries. 394 S.W.3d at 773–78.[23] There, as here, the plaintiff argued essentially that "the mere existence of [a] duty to disclose automatically vitiated any fraudulent-inducement release." *Id.* at 774. We rejected that either *Schlumberger* or *Forest Oil* stood for such a proposition and refused to adopt such a blanket rule, explaining:

> [E]ven if execution of the Settlement Agreement was not entirely an arm's length transaction because GTP still owed Frankel some fiduciary duty to disclose, existence of such fiduciary relationship did not automatically vitiate the fraudulent-inducement release. . . . Axiomatically, fiduciaries, like any other business associates, might wish to ensure finality to their disputes. Thus, their expressed intent to ensure finality, via a fraudulent-inducement release or disclaimer of reliance, as well as their freedom to contract, should be accorded the same respect as the intent of other parties. See [*Forest Oil*, 268 S.W.3d at 60–61].
>
> . . . .
>
> Accordingly, we disagree with Frankel's suggestion that a fraudulent-inducement release between fiduciaries is per se unenforceable simply because they generally owed each other a duty to disclose.

Tex. Standard Oil, 394 S.W.3d at 774–76.

Under *Texas Standard Oil*, "the pertinent inquiry is whether, considering all of the circumstances, existence of the fiduciary relationship vitiates a conclusion that" the

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[23] Again, the Petrobras Plaintiffs do not discuss *Texas Standard Oil*.

Petrobras Plaintiffs bindingly disclaimed their reliance. *See id.* at 776. There, when all the other *Forest Oil* factors were met, we concluded:

> These facts negate any notion that Frankel was somehow dependent on GTP as its fiduciary to explain the fraudulent-inducement release or that Frankel's ability to understand the release was inhibited due to the fiduciary relationship. Likewise, these facts demonstrate that, irrespective of any fiduciary relationship, Frankel voluntarily assented to the fraudulent-inducement release.

Tex. Standard Oil, 394 S.W.3d at 776. In doing so, we also considered it significant that the plaintiff "was afforded the opportunity to question for itself GTP's motives in wishing to terminate FGP and own prospects free and clear of Frankel and whether GTP was concealing information regarding its plans for the prospects; yet, Frankel chose to execute the fraudulent-inducement release." *Id.* (citing *Forest Oil*, 268 S.W.3d at 58). As an additional factor, we also considered that the parties "were adverse litigants when they executed the Settlement Agreement." *Id.* at 776–77. In addition, "the fact the Settlement Agreement contains mutual fraudulent-inducement releases supports a conclusion that each party knew the other party was protecting its own interests." *Id.* at 777. Finally, we considered the "additional factor mentioned in *Forest Oil*": that the settlement agreement at issue "terminated the parties' relationship." *Tex. Standard Oil*, 394 S.W.3d at 777; see *Forest Oil*, 268 S.W.3d at 58 ("A 'once and for all' settlement may constitute an *additional* factor urging rejection of fraud-based claims . . . .").

Here, we already have concluded that all the other *Forest Oil* factors were met. As discussed above, the

Petrobras Plaintiffs (represented by counsel and sophisticated in business affairs) were aware of and specifically discussed the release of claims related to the 2006 SPA. The parties were longtime adverse litigants, and the Petrobras Plaintiffs understood that the Astra Defendants were representing their own interests in negotiating the reliance disclaimer and that the Petrobras Plaintiffs needed to evaluate for themselves whether the provision was in their best interests. That the disclaimer of reliance was mutual supports the conclusion that all the parties knew they needed to protect their own interests. Additionally, the parties entered the 2012 Settlement intending that it be the "absolute" and "complete" "end of" their disputes. In sum, considering all the *Forest Oil* factors, we conclude that, "despite any fiduciary relationship, sophisticated parties, represented by their own counsel, negotiated and voluntarily agreed to clear and unequivocal, mutual provisions" disclaiming any reliance on any representation of the opposing parties in executing the 2012 Settlement. *See Tex. Standard Oil*, 394 S.W.3d at 777.

The Petrobras Plaintiffs' additional arguments

The Petrobras Plaintiffs further argue their reliance-based claims are based on omissions that are not mirror images of any affirmative misrepresentations. Thus, by its terms, the reliance disclaimer does not apply to the Astra Defendants' failure to disclose their bribery scheme. The Astra Defendants respond that as in *Schlumberger* the Petrobras Plaintiffs' omission or nondisclosure allegations are simply the converse of the alleged affirmative misrepresentations and also are covered by the reliance disclaimer.

The *Schlumberger* court considered and rejected the plaintiffs' argument that even if the reliance disclaimer at issue precluded fraudulent-inducement claims based on

affirmative representations, it did not preclude fraud by nondisclosure "because it does not disclaim reliance on Schlumberger's non-disclosures." 959 S.W.2d at 181–82 (agreeing with defendant and concluding that nondisclosures were covered: "In short, had Schlumberger disclosed all the true facts about the project, it would not have misrepresented the truth.").

Here, in their third amended petition, the Petrobras Plaintiffs alleged the Astra Defendants both "misrepresented and/or omitted facts concerning their criminal and fraudulent conduct, including their payment of approximately $15 million in bribes in connection with the initial purchase of 50% of PRSI and their offer to pay between $80 million and $100 million in bribes to 'solve the problem' between the parties and reach a settlement." They further alleged that the Astra Defendants made "voluntary or partial disclosures about the negotiation of the initial purchase of 50% of PRSI, while affirmatively concealing their payment of $15 million in bribes and conveying the false impression that the negotiation was a legitimate arm's-length transaction." Under these circumstances, we conclude that *Schlumberger* applies. *See id.*

Finally, the Petrobras Plaintiffs contend that "the summary judgment is erroneous because the surrounding facts and circumstances do not justify enforcing the Reliance Disclaimer" to insulate the Astra Defendants "from the consequences of their criminal behavior." The Astra Defendants respond that applying the Petrobras Plaintiffs' "proposed policy exception" to *Schlumberger* does not "immunize" them from any criminal liability and instead would frustrate public policy.

After considering all the circumstances here, we already have concluded that the *Forest Oil* factors favor the

enforceability of the reliance disclaimer. Moreover, careful application of the *Forest Oil* factors adequately protects the public policies at issue. Such analysis not only ensures that parties are protected "from unintentionally waiving a claim for fraud," *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 332 (Tex. 2011), but also upholds and preserves the ability of "knowledgeable parties" advised by "knowledgeable counsel" to exercise their freedom of contract to enter "highly favored" settlement agreements and hold others to their word, *Forest Oil*, 268 S.W.3d at 60–61. We cannot conclude this case presents any "extreme circumstances" that preclude applying the *Schlumberger* doctrine.

We overrule the Petrobras Plaintiffs' third sub-issue.

Turning back to the Petrobras Plaintiffs' second sub-issue, because we already have concluded that the trial court properly granted the motions for summary judgment regarding their claims for common-law fraud, statutory fraud, and negligent misrepresentation based on the reliance disclaimer, certain claims also were properly barred because their predicate claims were rejected. So, because the Petrobras Plaintiffs' claims for declaratory judgment, unjust enrichment/money had and received, and civil conspiracy as to "other claims" were solely based on the Astra Defendants' alleged fraudulent conduct, the trial court properly granted the motions for summary judgment on those claims. Therefore, the trial court properly dismissed the Petrobras Plaintiffs' claims for declaratory relief, unjust enrichment/money had and received, and civil conspiracy as to "other claims."

However, we also already have concluded that the trial court erred in granting the motions for summary judgment on all the Petrobras Plaintiffs' claims for breach of fiduciary duty, aiding and abetting breach of fiduciary

duty, and civil conspiracy as to breach of fiduciary duty, and in granting the summary-judgment motions on the Astra Defendants' counterclaims for declaratory judgment tied to those claims. Exemplary damages are available for breach of fiduciary duty. *See Manges v. Guerra*, 673 S.W.2d 180, 184–85 (Tex. 1984). In addition, a party who conspires in connection with a breach of fiduciary duty may be found jointly and severally liable in appropriate circumstances. *Cf. ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 881 (Tex. 2010). Finally, trial courts have discretion to award attorney's fees and costs under the Uniform Declaratory Judgment Act (UDJA) to any party, whether that party prevailed or not, or was the plaintiff or defendant. *See* Tex. Civ. Prac. & Rem. Code Ann. § 37.009; *MBM Fin. Corp. v. Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 669 (Tex. 2009) ("[T]he Declaratory Judgments Act allows fee awards to either party in all cases."). Here, the Petrobras Plaintiffs did not limit their "claims" for exemplary damages, attorney's fees and costs, and joint-and-several liability of PHRP just to fraud. The Astra Defendants did not conclusively demonstrate that they were entitled to summary judgment as a matter of law on the Petrobras Plaintiffs' claims for exemplary damages, attorney's fees and costs, and joint-and-several liability of PHRP. Therefore, the trial court erred in granting the motions for summary on, and dismissing, those claims.

We sustain, in part, the Petrobras Plaintiffs' second sub-issue.

c. Claims against individual Astra Defendants in their individual capacities

In their fourth sub-issue, the Petrobras Plaintiffs argue that the individual Astra Defendants were not entitled to summary judgment on tort claims alleged against

them in their individual capacities as opposed to in their capacities as corporate representatives.[24] Again, we already have concluded that the trial court erred by granting the motions for summary judgment based on the release on all the Petrobras Plaintiffs' claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and conspiracy as to breach of fiduciary duty, as well as their claims for exemplary damages, attorney's fees and costs, and joint-and-several liability of PHRP.

We also already have concluded that the reliance disclaimer in the 2012 Settlement was valid and enforceable to bar the reliance-based claims included in the Petrobras Plaintiffs' claims for common-law fraud, statutory fraud, and negligent misrepresentation, as well as the derivative claims of declaratory relief, unjust enrichment/money had and received, and civil conspiracy as to "other claims." Certainly, the disclaimer is enforceable by AOT, Astra GP, Astra TradeCo, Astra Oil, Astra Energy, PHRP, and Transcor Astra—all express parties to the 2012 Settlement Agreement. However, according to the Petrobras Plaintiffs, the reliance disclaimer only references the individual Astra Defendants "in their corporate or partnership capacities as agents of the parties to the Settlement Agreement" and therefore does not entitle them to summary judgment in their individual capacities.

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[24] The longstanding rule in Texas is that "a corporate agent is personally liable for his own fraudulent or tortious acts." *Miller v. Keyser*, 90 S.W.3d 712, 717 (Tex. 2002). If a corporate agent directs or participates in a tort during his employment, then he faces personal liability for the tortious act. *Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 375 (Tex. 1984). Accordingly, regardless of whether the individual Astra Defendants performed the alleged tortious acts as corporate agents, as a general matter, they can still face individual liability for those acts if they prove to be tortious. *See Miller*, 90 S.W.3d at 717–18; *Leyendecker*, 683 S.W.2d at 375.

A traditional motion for summary judgment must "stand or fall on the grounds expressly presented in the motion." *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 338, 341 (Tex. 1993) ("We conclude that grounds for summary judgment must be expressly presented in the summary judgment motion itself."); *see* Tex. R. Civ. P. 166a(c). Summary judgment cannot be granted, or affirmed, on grounds not presented in the motion. *See Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 204 (Tex. 2002). For example, our court has held that the trial court erred in granting a motion for summary judgment when the motion addressed claims brought by the appellant in his individual capacity but did not address claims the appellant brought in his capacity as an independent co-executor on behalf of his parents' estates. *Guest v. Cochran*, 993 S.W.2d 397, 405–06 (Tex. App–Houston [14th Dist.] 1999, no pet.) ("Cochran simply cannot, *ex post facto*, legitimize a summary judgment based on a motion that failed to address the co-executor's causes of action. Our mandate is clear—we cannot affirm a summary judgment on a ground not included in the motion for summary judgment.").

The Astra Defendants do not dispute that the Petrobras Plaintiffs brought tort claims and claims derivative of those tort claims against the individual Astra Defendants in their individual capacities. However, in their motions for summary judgment, the Astra Defendants did not expressly present any ground or explain why as a matter of law the individual Astra Defendants personally should be extended the benefit of the reliance disclaimer.[25]

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[25] Perhaps tellingly, in their response to this sub-issue, the Astra Defendants do not include any discussion of the reliance disclaimer. We further note in section 5.18 the parties to the 2012 Settlement agreed that "there are no third-party beneficiaries to this Settlement

Under these circumstances, we sustain the Petrobras Plaintiffs' fourth sub-issue.

2. Declaratory judgment

Under the UDJA, "[a] person interested under a . . . written contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status, or other legal relations thereunder." Tex. Civ. Prac. & Rem. Code Ann. § 37.004(a). The UDJA "is remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered." *Id.* § 37.002(b). A contract may be construed either before or after a breach. *Id.* § 37.004(b). We review declaratory judgments under the same standards as other judgments and decrees. *Id.* § 37.010. We look to the procedure used to resolve the issue at trial to determine the standard of review on appeal. *See id.* Because the trial court determined the challenged declaratory-judgment issue through summary judgment, we review the propriety of the trial court's declarations under the same standards we apply to summary judgments. *Lidawi v. Progressive Cty. Mut. Ins. Co.*, 112 S.W.3d 725, 730 (Tex. App.–Houston [14th Dist.] 2003, no pet.).

In their second issue, the Petrobras Plaintiffs argue "the trial court erred in granting a declaratory judgment as to the effect of the Release on the Arbitration." The Petrobras Parties argue that the trial court cannot interfere with an arbitrator's jurisdiction; the effect of the release on the claims in the arbitration is a matter for the

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Agreement, and that the Parties have no intention of conferring third-party-beneficiary status on any person or entity through this Settlement Agreement."

tribunal, not the trial court; any argument that the 2006 SPA's arbitration clause has been superseded fails; and in any event, the release is unenforceable because the 2012 Settlement was procured by fraud.

The Petrobras Plaintiffs alleged that the trial court had subject-matter jurisdiction over the dispute because the amount in controversy exceeded minimal jurisdictional limits. *See* Tex. Const. art. V, § 8; Tex. Gov't Code Ann. § 24.007. They alleged that the 2012 Settlement contains "an exclusive venue provision which provides that any lawsuit arising out of or related to the Settlement Agreement, or the transactions contemplated therein, must be filed in Harris County." In their declaratory-relief claims, the Petrobras Plaintiffs alleged that actual controversies existed regarding "the parties' respective rights, duties, and obligations under the Settlement Agreement" and sought declarations concerning the validity of the contract pursuant to the UDJA. In their declaratory-judgment counterclaims, the Astra Defendants likewise sought declarations concerning the validity and enforceability of the 2012 Settlement, including the release, and that it barred claims in the arbitration and other claims arising out of or related to the 2006 SPA. Texas courts in declaratory-judgment actions regularly construe and determine the validity of contracts, including release provisions, and how they affect parties.[26]

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[26] *See Garza v. Bunting*, No. 05-06-01307-CV, 2007 WL 1545937, at *4–8 (Tex. App.–Dallas May 30, 2007, no pet.) (mem. op.) (affirming summary judgment in declaratory-judgment action in which trial court construed unambiguous language of mutual release in settlement agreement to bar counterclaims); *Trinity Universal Ins. Co. v. Sweatt*, 978 S.W.2d 267, 271 (Tex. App.–Fort Worth 1998, no pet.) ("Construction and validity of contracts are the most obvious and common uses of the declaratory judgment action.").

We already have construed the unambiguous language of the release in concluding that the trial court erred in granting the motions for summary judgment on all the Petrobras Plaintiffs' claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and conspiracy as to breach of fiduciary duty. The trial court erred in rendering a take-nothing judgment on and in issuing a declaration that the release bars all these claims. As discussed above, aside from the carve-out, the language of the general mutual release is broad, which is permissible so long as the release "mentions" the claim to be released. *Keck*, 20 S.W.3d at 698. The plain language is clearly intended to release "any and all claims, demands, and causes of action of whatever kind or character which the Petrobras Parties have, or may have in the future, based on any acts or omissions, which known or unknown, that may have occurred on or before the Effective Date, including without limitation . . . any claim arising out of or related to the 2006 SPA."

In their amended arbitration demand, which was attached to the Astra Defendants' amended summary-judgment motion, Petrobras America and Petrobras alleged that AOT and Astra Oil "engaged in bribery and corruption in connection with" the parties' 2006 SPA and brought multiple claims, including declaratory relief, aiding and abetting breach of fiduciary duty, unjust enrichment/money had and received, breach of contract, common-law fraud, statutory fraud, negligent misrepresentation, racketeering activity, exemplary damages, and attorney's fees, costs, and expenses. All of these claims asserted in the arbitration demand fall within the subject matter of the general release, even narrowly construed. Stated another way, but for the existence of the 2006 SPA, Petrobras America and Petrobras would not be bringing these claims in an arbitration against AOT and Astra Oil.

In addition, these claims do not fall within the carve-out of the release since they are not alleged to arise out of "the alleged breach, enforcement, or interpretation" of the 2012 Settlement.[27] We conclude that the claims asserted "in the ICDR Arbitration . . . styled *Petrobras America, Inc., et al. v. Astra Oil Trading NV, et al*[.], Cause No. 01-16-0003-1149" therefore were "mentioned" within the broad language of the mutual release and were properly barred.

The cases relied on by the Petrobras Plaintiffs for their argument that the trial court could not issue its declaratory judgment without interfering with the arbitrators' jurisdiction do not persuade us that the trial court erred. Those cases are distinguishable procedurally and factually; they involved whether a trial court should compel arbitration and stay trial proceedings of a case brought pursuant to an agreement containing an arbitration provision,[28] or confirm an arbitration award stem-

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[27] In their amended arbitration demand, Petrobras America and Petrobras expressly disavowed that their arbitration claims based on the 2006 SPA had anything to do with the 2012 Settlement: "To be clear, Claimants are not asserting in this arbitration any claims that arise out of or relate to the Settlement Agreement. Instead, Claimants are parties to a separate lawsuit filed in Harris County, Texas, in which they are asserting their claims that arise out of or relate to the Settlement Agreement."

[28] *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Feldman/Matz Interests, L.L.P. v. Settlement Capital Corp.*, 140 S.W.3d 879 (Tex. App.–Houston [14th Dist.] 2004, orig. proceeding); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McCollum*, 666 S.W.2d 604 (Tex. App.–Houston [14th Dist.] 1984, writ ref'd n.r.e.); *see also Metra United Escalante, L.P. v. Lynd Co.*, 158 S.W.3d 535 (Tex. App.–San Antonio 2004, no pet.) (discussing *Feldman/Matz*).

ming from an agreement containing an arbitration provision.[29] Here, the parties brought declaratory-judgment claims and requested the trial court interpret and either declare enforceable or invalidate a release in their settlement agreement that does not contain an arbitration agreement.[30]

Next, the Petrobras Plaintiffs contend that the trial court's declaration "infringed" on the tribunal's jurisdiction to determine the merits of the arbitration, specifically, the affirmative defense of release. However, the trial court did not make any declaration deciding any affirmative defense in the arbitration, but rather, after construing the 2012 Settlement's release and comparing it to the allegations brought in a demand by Petrobras America and Petrobras, the trial court declared that the release barred those claims.[31]

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[29] *See Babcock & Wilcox Co. v. PMAC*, Ltd., 863 S.W.2d 225 (Tex. App.–Houston [14th Dist.] 1993, writ denied).

[30] Indeed, no party submitted the 2006 SPA with, much less discussed the substance of the arbitration agreement in, their summary-judgment briefing. The Petrobras Plaintiffs' citations in their brief to the 2006 SPA are to an exhibit attached to their counsel's affidavit in opposition to AOT's and Astra Oil's motion for supplemental relief enforcing the judgment. We consider Petrobras America's and Petrobras's appeal from the trial court's decision to grant post-judgment supplemental relief below.

[31] Again, the Petrobras Plaintiffs point to procedurally- and factually-distinct cases. *In re Jindal Saw Ltd.*, 264 S.W.3d 755 (Tex. App.–Houston [1st Dist.] 2008), *subsequent mandamus proceeding*, 289 S.W.3d 827 (Tex. 2009), involved whether a trial court should compel arbitration pursuant to an agreement containing an arbitration agreement. *Klay v. United Healthgroup, Inc.,* 376 F.3d 1092 (11th Cir. 2004), involved a federal district court's decision to grant an injunction under the federal All Writs Act to prevent the arbitration of claims, based on contracts involving arbitration agreements, which

The Petrobras Plaintiffs also contend that any argument that the 2006 SPA's arbitration clause has been superseded fails. But the Astra Defendants did not make this argument on summary judgment, and the trial court did not issue any declaration that the 2006 SPA's arbitration agreement was revoked or superseded by the 2012 Settlement. Again, the request for declaratory judgment asked the trial court to construe and rule on whether the release in the 2012 Settlement was valid and barred claims as asserted in the arbitration, as opposed to the validity of any arbitration agreement or question of arbitrability.

Finally, we already have determined that, aside from those claims brought against the individual Astra Defendants in their individual capacities, the trial court properly granted the motions for summary judgment on the Petrobras Plaintiffs' fraud-based and solely derivative claims based on the reliance disclaimer. Therefore, we reject the Petrobras Plaintiffs' argument that the release is unenforceable because the 2012 Settlement was procured by fraud.

We overrule the Petrobras Plaintiffs' second issue.

3. Attorney's fees and costs

In their third and final issue in this appeal, the Petrobras Plaintiffs argue that the trial court erred in awarding attorney's fees and costs to the Astra Defendants (except Mueller and Burla) under UDJA section 37.009. In any proceeding under the UDJA, the court "may award costs and reasonable and necessary attorneys' fees as are equitable and just." Tex. Civ. Prac. & Rem. Code Ann. § 37.009. The UDJA "entrusts attorney

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arbitration already had been compelled, after the plaintiffs subsequently dropped the arbitrable claims.

fee awards to the trial court's sound discretion, subject to the requirements that any fees awarded be reasonable and necessary, which are matters of fact, and to the additional requirements that fees be equitable and just, which are matters of law." *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). Although we conclude that the trial court properly granted the motions for summary judgment on the Petrobras Plaintiffs' claims for declaratory relief, unjust enrichment/money had and received, common-law fraud, statutory fraud, negligent misrepresentation, and civil conspiracy as to "other claims," we conclude that the trial court erred in granting the motions on their claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, civil conspiracy as to breach of fiduciary duty, exemplary damages, attorney's fees and costs, and joint-and-several liability of PRHP. We also conclude that the trial court erred in granting the summary-judgment motions on the Petrobras Plaintiffs' claims of declaratory relief, unjust enrichment/money had and received, common-law fraud, statutory fraud, negligent misrepresentation, and civil conspiracy as to "other claims" against the individual Astra Defendants in their individual capacities. Although we conclude that the trial court properly granted the motions for summary judgment on the Astra Defendants' counterclaims for declaratory relief concerning the validity of the 2012 Settlement, including the release, and declaring that the release bars claims related to the 2006 SPA, including those in the arbitration, we conclude that the trial court erred with regard to declaring that the release bars "the claims asserted in this proceeding for Breach of Fiduciary Duty, Aiding and Abetting Breach of Fiduciary Duty, and Civil Conspiracy–Breach of Fiduciary Duty." Because our disposition of this case on appeal substantially affects the trial court's judgment, reversal and remand is warranted so that the trial

court can address what attorney's fees and costs, if any, should be awarded to the Astra Defendants (except Mueller and Burla) under the UDJA. *See Funes v. Villatoro*, 352 S.W.3d 200, 217 (Tex. App.–Houston [14th Dist.] 2011, pet. denied).

We therefore resolve the Petrobras Plaintiffs' third issue in their favor to this extent. [32]

B. No. 14-18-00728-CV

After the trial court rendered its final judgment, AOT and Astra Oil filed a motion for supplemental relief enforcing the judgment. AOT and Astra Oil requested that Petrobras America and Petrobras be permanently enjoined from further pursuit of the arbitration. Petrobras America and Petrobras opposed this request.

The record does not indicate that the trial court held a hearing before granting AOT's and Astra Oil's motion and issuing a permanent anti-suit injunction. AOT and Astra Oil subsequently filed a motion to modify the injunction. After holding a hearing,[33] the trial court granted this motion and issued an amended injunction order, which permanently enjoined "Petrobras and its officers, employees, agents, representatives, attorneys and/or anyone acting in active concert or participation with Petrobras" from "continuing to pursue" the arbitration. It is from this

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[32] Because of our disposition of this issue, we do not address the Petrobras Plaintiffs' arguments concerning duplication of nonrecoverable fees, lack of segregation, and that a fee award is unjust. *See* Tex. R. App. P. 47.1.

[33] The hearing also concerned AOT's and Astra Oil's motion to reconsider the request to stay the arbitration, Petrobras America's and Petrobras's motion to dismiss under the TCPA, and Petrobras America's and Petrobras's emergency motion to stay the original anti-suit injunction.

amended permanent anti-suit injunction that Petrobras America and Petrobras appeal.

An anti-suit injunction is a unique and extraordinary remedy and will issue "only in very special circumstances." *Golden Rule Ins. Co. v. Harper*, 925 S.W.2d 649, 651 (Tex. 1996) (per curiam) (citing *Christensen v. Integrity Ins. Co.*, 719 S.W.2d 161, 163 (Tex. 1986); *Gannon v. Payne*, 706 S.W.2d 304, 306 (Tex. 1986)).[34] The Supreme Court of Texas has identified those circumstances as: (1) addressing a threat to a court's jurisdiction; (2) preventing the evasion of important public policy; (3) preventing a multiplicity of suits; and (4) protecting a party from vexatious or harassing litigation. *Frost Nat'l Bank*, 315 S.W.3d at 512; *Golden Rule*, 925 S.W.2d at 651. An anti-suit injunction is a remedy to be employed "sparingly" and only in the most "compelling" circumstances when "clear equity demands" it and when required to prevent an "irreparable miscarriage of justice." *See Golden Rule*, 925 S.W.2d at 651; *Gannon*, 706 S.W.2d at 306–07. The party seeking the injunction bears the burden to demonstrate that a clear equity is present. *Christensen*, 719 S.W.2d at 163. We review a trial court's anti-suit injunction under an abuse-of-discretion standard. *Gannon*, 706

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[34] We are confronted with a permanent anti-suit injunction that the trial court issued post judgment, not a pre-judgment temporary anti-suit injunction of the sort at issue in *Golden Rule*. However, all parties on appeal engage the presumption that (at the least) *Golden Rule* applies. *See Wyrick v. Bus. Bank of Tex., N.A.*, 577 S.W.3d 336, 356 & n.14 (Tex. App.–Houston [14th Dist.] 2019, no pet.). The parties disagree over whether AOT and Astra Oil also had to establish the traditional factors for a permanent injunction. *See 1717 Bissonnet, LLC v. Loughhead*, 500 S.W.3d 488, 500 (Tex. App.–Houston [14th Dist.] 2016, no pet.) ("To obtain a permanent injunction, a party must ordinarily show (1) a wrongful act, (2) imminent harm, (3) an irreparable injury, and (4) the absence of an adequate remedy at law.").

S.W.2d at 305; *see Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985).

Petrobras America and Petrobras challenge the amended permanent anti-suit injunction in three issues:

1. The injunction against the arbitration proceeding should be vacated because the trial court did not have authority to interfere in the two-year-old arbitration proceeding.
2. The injunction against the arbitration should be vacated because Astra did not carry its burden to establish its entitlement to an anti-suit injunction.
3. The injunction against the arbitration should be vacated because the Amended Arbitration Injunction is legally deficient.

We conclude that issue two is dispositive.

Petrobras America and Petrobras argue that the trial court abused its discretion because AOT and Astra Oil did not establish the *Golden Rule* factors for an anti-suit injunction and the traditional elements required to show entitlement to a permanent injunction.[35] Petrobras America and Petrobras contend that "[t]hese elements 'must be established by competent evidence,' and the proof required 'may not be made by affidavit.'" They contend that AOT and Astra Oil "did not submit any 'competent evidence'" and "established none of the required elements."

"[A] trial court has no discretion to grant injunctive relief . . . without supporting evidence." *Operation Rescue-Nat'l v. Planned Parenthood of Hous. & Se. Tex.*, 975 S.W.2d 546, 560 & n.56 (Tex. 1998). An applicant for injunction must establish its probable right to recovery and

[35] *See supra* note 34.

a probable injury by competent evidence adduced at a hearing. *See Millwrights Local Union No. 2484 v. Rust Eng'g Co.*, 433 S.W.2d 683, 686 (Tex. 1968). A sworn petition is not evidence, nor can the proof required to support issuance of an injunction be made by affidavit absent agreement of the parties. *See id.* at 686–87.

The trial court in its amended permanent anti-suit injunction stated that it was granting AOT's and Astra Oil's motion after considering it and "the evidence submitted therewith." However, the record contains no competent evidence adduced at the hearing. AOT and Astra Oil did not present any sworn witnesses or introduce any exhibits into evidence at the August 17, 2018 hearing. Nor does the record reflect the parties agreed that AOT and Astra Oil could make their proof by affidavit.

AOT and Astra Oil respond that Petrobras America and Petrobras committed briefing waiver by not citing to the record. *See* Tex. R. App. P. 38.1(i) ("The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record."). We do not agree. Perhaps Petrobras America and Petrobras could have cited to the hearing transcript to show that it contained no adduced evidence. But AOT and Astra Oil do not dispute, and the record confirms, that there was no hearing on their original motion for supplemental relief enforcing judgment and that the trial court's hearing on their motion for amended permanent anti-suit injunction was nonevidentiary.

AOT and Astra Oil next argue that the trial court "was entitled to rely on the determinations embodied in the Final Judgment and the undisputed facts concerning the Arbitration." However, AOT and Astra Oil do not explain how, and we cannot conclude, the final judgment "embod-

ied" any factual determinations regarding AOT's and Astra Oil's alleged entitlement to a permanent anti-suit injunction. In addition, their cited cases do not control.[36]

We conclude that the trial court abused its discretion in issuing the amended permanent anti-suit injunction.[37] Because there was legally-insufficient evidence to support the trial court's amended permanent anti-suit injunction, we sustain Petrobras America and Petrobras's second issue in appellate case number 14-18-00728-CV.[38] Accordingly, we reverse the trial court's August 21, 2018 amended order granting supplemental relief enforcing

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[36] The trial court did not render the permanent anti-suit injunction based on the unobjected-to findings of a special master. Cf. *Kim v. Bd. of Trustees of Korean Christian Church of Hous.*, No. 01-08-00970-CV, 2010 WL 2220591, at *6–7 (Tex. App.–Houston [1st Dist.] June 3, 2010, pet. denied) (mem. op.) ("Because there were no disputed facts, we conclude the trial court did not abuse its discretion by issuing the permanent injunction without holding an evidentiary hearing."). Moreover, Petrobras America and Petrobras opposed AOT's and Astra Oil's request for a permanent anti-suit injunction and disputed that they could demonstrate facts entitling them to one. AOT's and Astra Oil's other cited case did not consider this precise issue, but rather disposed of a conclusory-summary-judgment-evidence argument on briefing waiver. See *Yazdchi v. Unauthorized Practice of Law Comm.*, No. 01-09-00065-CV, 2010 WL 2650563, at *3–4 (Tex. App.–Houston [1st Dist.] July 1, 2010, no pet.) (mem. op.).

[37] *See Millwrights*, 433 S.W.2d at 687; *Ron v. Ron*, No. 14-18-00710-CV, 2020 WL 3467301, at *4 (Tex. App.–Houston [14th Dist.] June 25, 2020, no pet. h.) (citing *Millwrights* and concluding that trial court abused its discretion in issuing anti-suit injunction); *Shamoun & Norman, LLP v. Yarto Int'l Grp., LP*, 398 S.W.3d 272, 284 (Tex. App.–Corpus Christi 2012, pet. dism'd) (op. on reh'g) (same).

[38] Because we conclude that the trial court abused its discretion in issuing the amended permanent anti-suit injunction and reverse and render based on this issue, we do not address Petrobras America's and Petrobras's other two issues. *See* Tex. R. App. P. 47.1.

judgment in the form of a permanent anti-suit injunction and render judgment that the order is dissolved.

C. No. 14-18-00793-CV

This TCPA[39] appeal, *see* TCPA § 27.008, involves the same parties as appellate case number 14-18-00728-CV. On August 13, 2018, Petrobras America and Petrobras filed a motion to dismiss under the TCPA AOT's and Astra Oil's motion for supplemental relief enforcing judgment and motion for amended order in the form of an anti-suit injunction. *See id.* § 27.003. Petrobras America and Petrobras argued that AOT's and Astra Oil's motions were "legal actions" based on, related to, or in response to communications made by Petrobras America and Petrobras in the course of the arbitration—their "right to petition." Petrobras America and Petrobras requested dismissal unless AOT and Astra Oil established by clear and specific evidence a prima facie case on each essential element of their claims for injunctive relief.

AOT and Astra Oil responded that the TCPA was not applicable because it was intended to protect against meritless legal actions in retaliation for a party's exercising its First Amendment rights, Astra's post-judgment requests for an anti-suit injunction were not "legal actions" within the meaning of the TCPA, and Petrobras America's and Petrobras's post-judgment motion was frivolous and untimely. After holding a hearing,[40] the trial court, without providing its reasoning, signed an order on August 28,

[39] *See supra* note 3.

[40] *See supra* note 33.

2018, denying Petrobras America's and Petrobras's motion to dismiss under the TCPA.[41]

The TCPA provides a procedure for dismissing meritless suits that are based on the defendant's exercise of the rights of free speech, petition, or association as defined in the statute. *See id.* Under the TCPA, "[i]f a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action." *Id.* § 27.003(a). In pertinent part, the TCPA defines the "exercise of the right to petition" as "a communication in or pertaining to . . . an official proceeding, other than a judicial proceeding, to administer the law." *Id.* § 27.001(4)(A)(ii). The TCPA defines a "legal action" as "a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief." *Id.* § 27.001(6). A defendant wanting to take advantage of the statute must file a timely motion: "A motion to dismiss a legal action under this section must be filed not later than the 60th day after the date of service of the legal action. The court may extend the time to file a motion under this section on a showing of good cause." *Id.* § 27.003(b).

We review the trial court's denial of Petrobras America's and Petrobras's motion to dismiss de novo. *See Rehak Creative Servs. v. Witt*, 404 S.W.3d 716, 725 (Tex. App.–Houston [14th Dist.], no pet.), *disapproved on other grounds by In re Lipsky*, 460 S.W.3d 579 (Tex. 2015). In doing so, we "make[] an independent determination and appl[y] the same standard used by the trial court in the

[41] In this order, the trial court also denied AOT's and Astra Oil's request for court costs and reasonable attorney's fees. AOT and Astra Oil did not appeal the order.

first instance." *Id.* at 726. Application of this standard usually involves a "two-step" analysis in which we determine (1) whether the defendant has shown, by a preponderance of the evidence, that the plaintiff's legal action is based on, relates to, or is in response to the defendant's exercise of the right of free speech, to petition, or of association; and if so, (2) whether the plaintiff has shown, by clear and specific evidence, a prima facie case for each essential element of the claim in question. *Lipsky*, 460 S.W.3d at 586–87 (citing TCPA § 27.005(b), (c)).

On appeal, Petrobras America and Petrobras argue in their first issue that they met their burden to prove the TCPA applied because AOT's and Astra Oil's "requests for injunctive relief were 'legal actions . . . based on, relate[d] to, or . . . in response to' [Petrobras America's and] Petrobras's exercise of [their] right to petition."[42] They further contend in their second issue that AOT and Astra Oil "failed to present a prima facie case on each element of [their] claim[s] and thus the trial court erred in refusing to dismiss [AOT's and] Astra [Oil]'s requests for injunctive relief."

Because it is dispositive, we first address AOT's and Astra Oil's contention that the trial court did not err in denying Petrobras America's and Petrobras's TCPA motion to dismiss because it was untimely filed.[43] AOT and

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[42] The portion of the statute's definition of "legal action" relied on by Petrobras America and Petrobras is the catch-all provision, which includes "any other judicial pleading or filing that requests legal or equitable relief." TCPA § 27.001(6).

[43] We disagree with Petrobras America's and Petrobras's contention in their reply brief that AOT and Astra Oil only raise timeliness for the first time on appeal and thus waived the issue. AOT and Astra Oil raised timeliness in their response: "Had Petrobras actually believed that its right to pursue the Arbitration was a First Amendment

Astra Oil argue that even if their post-judgment request for an anti-suit injunction constituted a "legal action," it "did not add a new claim or seek new relief beyond what had already been requested" as "first asserted in Astra's 2016 filings" and thus "was not a 'legal action' that would reset the long-passed 60-day statutory deadline for a TCPA motion to dismiss." We agree.[44]

One of the overarching purposes of the TCPA is to provide an expedited dismissal procedure for lawsuits that are based on, related to, or in response to the exercise of certain statutorily-protected rights. *See, e.g.*, *id.* at 586 ("The Act provides a special procedure for the expedited dismissal of such suits [that fall within the TCPA's purview]."); *Jordan v. Hall*, 510 S.W.3d 194, 198 (Tex. App.–Houston [1st Dist. 2016, no pet.) (noting that it is "well settled" that purpose of TCPA is to allow defendant "early in the lawsuit" to seek dismissal of claims that implicate certain protected rights (citing *Paulsen v. Yarrell*, 455

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right and a stay of the Arbitration justified an anti-SLAPP motion, the time to have challenged that was prior to the entry of the Final Judgment, which declared that Petrobras' Arbitration claims were barred, or prior to the entry of the Order, which enforced the Final Judgment by staying the Arbitration." And the record of the hearing reflects that Petrobras America and Petrobras addressed the "timing issue." We further disagree that by "effectively conceding" timeliness, AOT and Astra Oil "denied" Petrobras America and Petrobras the opportunity to argue good cause for an extension under section 27.003(b).

[44] In our analysis, we assume without deciding that exercising the right to petition could include communications in an arbitration proceeding. We further assume without deciding that a post-judgment request for anti-suit injunctive relief could qualify as a "legal action" under the applicable 2013 version of the TCPA. However, we note under the 2019 version of the TCPA, the definition of "legal action" expressly excludes "post-judgment enforcement actions." *See* Tex. Civ. Prac. & Rem. Code Ann. § 27.001(6)(C).

S.W.3d 192, 197 (Tex. App.–Houston [1st Dist.] 2014, no pet.))); *Miller Weisbrod, L.L.P. v. Llamas-Soforo*, 511 S.W.3d 181, 193 (Tex. App.–El Paso 2014, no pet.) ("It is evident that the Legislature intended to effectuate the purpose of the TCPA by ensuring that courts will dismiss SLAPP suits quickly and without the need for prolonged and costly proceedings."). Thus, Petrobras America's and Petrobras's motion to dismiss under the TCPA needed to be filed not later than the 60th day after the date of service of AOT's and Astra Oil's "legal action" that was "based on, relate[d] to, or [was] in response to" such pursuit of arbitration. *See* TCPA § 27.003. But Petrobras America and Petrobras did not file their motion to dismiss under the TCPA until approximately two years after AOT and Astra Oil filed their initial "legal action" in response to Petrobras America's and Petrobras's exercise of their right to petition in the arbitration.

Here, the record reflects that Petrobras America and Petrobras filed their original demand for arbitration on July 29, 2016. In both AOT's and Astra Oil's original and first amended counterclaims, filed and served on August 8 and August 24, 2016, respectively, they sought a declaration that the 2012 Settlement was "valid, binding and enforceable . . . including . . . a declaration that the Release given by the 'Petrobras Parties' in Section 5.11 . . . is enforceable and binding and bars the claims sought to be asserted in the Demand and any other claims arising out of or related to the 2006 SPA."[45] In their motion to stay the arbitration, filed and served September 1, 2016, AOT and Astra Oil similarly alleged that section 5.11 of the 2012 Settlement "precludes . . . the substantive claims that

[45] In August 2016, AOT and Astra Oil also brought breach-of-contract counterclaims directed at Petrobras America's and Petrobras' pursuit of arbitration, which they dismissed. *See supra* note 5.

Petrobras seeks to make in the Arbitration." In part, because "Petrobras has released all of its substantive claims relating to the 2006 SPA, which necessarily constitutes a release of any right to arbitrate any of the released claims," AOT and Astra Oil requested that the trial court "permanently stay the Arbitration."

As discussed above, AOT and Astra also successfully moved for summary judgment on this portion of their declaratory-judgment counterclaims. The trial court's final judgment, signed June 12, 2018, expressly included a declaration that the section-5.11 release was "valid, enforceable and binding" and "bars . . . the claims sought to be asserted by Petrobras in the ICDR Arbitration commenced by Petrobras and styled *Petrobras America, Inc., et al. v. Astra Oil Trading NV, et al[.],* Cause No. 01-16-0003-1149." In their motion for supplemental relief enforcing the judgment in the form of an anti-suit injunction, filed and served July 10, 2018, AOT and Astra Oil sought to restrain Petrobras America and Petrobras "from continuing to pursue [their] released claims in the Arbitration." In their motion for an amended order, filed and served August 9, 2018, AOT and Astra Oil continued to request that the arbitration come to a "complete stop."

Petrobras America and Petrobras argue that the "very basis" for AOT's and Astra Oil's post-judgment requests for anti-suit injunctive relief involved "new claims" and "new facts." But an amended pleading that does not add new parties or claims does not restart the deadline for filing a motion to dismiss under the TCPA. *Paulsen*, 455 S.W.3d at 197; *see Bacharach v. Garcia*, 485 S.W.3d 600, 602–03 (Tex. App.–Houston [14th Dist.] 2016, no pet.). Only an amended petition asserting claims based upon new factual allegations may reset a TCPA deadline as to the newly added substance. *Jordan*, 510 S.W.3d at 198.

Under these circumstances, we cannot conclude that the Astra Defendants' post-judgment request seeking an anti-suit injunction to enforce an underlying declaratory judgment amounts to bringing a new claim for purposes of resetting the TCPA clock.[46] From the time Petrobras America and Petrobras filed their original demand for arbitration in July 2016, they pursued their right to petition through communications in the arbitration. From the time AOT and Astra Oil filed their declaratory-judgment counterclaims in August 2016, to when they moved to stay the arbitration in September 2016, to when they sought to enforce the trial court's final declaratory judgment based on such counterclaims through a post-judgment permanent anti-suit injunction as late as July and August 2018, they alleged and argued that Petrobras America's and Petrobras's pursuit of the arbitration was released, barred, and should not continue. While AOT's and Astra Oil's motions for supplemental relief enforcing the judgment in the form of an anti-suit injunction may have alleged additional facts concerning Petrobras America's

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[46] We disagree with Petrobras America and Petrobras's position in its reply brief that just because this court held they had an adequate remedy by appeal from the trial court's permanent anti-suit injunction, *see In re Petrobras Am. Inc.*, No. 14-18-00801-CV, 2018 WL 4700043, at *2 (Tex. App.–Houston [14th Dist.] Sept. 25, 2018, orig. proceeding) (mem. op.) (per curiam), that we already rejected any argument that AOT's and Astra Oil's request for such injunctive relief did not qualify as a claim. Nor do we find their cited cases controlling under these circumstances. *See Hicks v. Group & Pension Adm'rs, Inc.*, 473 S.W.3d 518, 527 (Tex. App.–Corpus Christi 2015, no pet.) (TCPA motion was timely as to new claims when plaintiff in amended petition added "new claims . . . for conspiracy and joint enterprise and coercion of a public servant"); *James v. Calkins*, 446 S.W.3d 135, 146 (Tex. App.–Houston [1st Dist.] 2014, pet. denied) ("[T]he amended petition . . . included substantively different factual allegations, and all of the causes of action alleged in the amended petition were new causes of action.").

and Petrobras's most recent communications in the arbitration, the substantive allegation underlying their motions was the same as their previous filings—that Petrobras America's and Petrobras's pursuit of arbitration should be barred by the 2012 Settlement's release.[47]

We therefore conclude there is no compelling basis or reason to reset the TCPA clock. This result comports with the legislative intent that suits be dismissed under the TCPA, if at all, early in the litigation. It does not unduly restrict the rights of either the plaintiffs or the defendants. Finally, it preserves the 60-day deadline mandated by the legislature. Because we conclude that Petrobras America's and Petrobras's TCPA motion to dismiss AOT's and Astra Oil's motions for supplemental relief enforcing judgment in the form of an anti-suit injunction was not timely filed, we need not proceed in the TCPA analysis. *See* Tex. R. App. P. 47.1; *Maldonado v. Franklin*, No. 04-18-00819-CV, 2019 WL 4739438, at *6 (Tex. App.–San Antonio Sept. 30, 2019, no pet.) (mem. op.).

Accordingly, we conclude that the trial court did not err by denying Petrobras America's and Petrobras's TCPA motion to dismiss. We therefore affirm the trial court's August 28, 2018 amended order denying Petrobras America's and Petrobras's motion to dismiss under the TCPA.

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[47] *See Mancilla v. Taxfree Shopping, Ltd*, No. 05-18-00136-CV, 2018 WL 6850951, at *4 (Tex. App.–Dallas Nov. 16, 2018, no pet.) (mem. op.) ("But the restrictions on communications and association sought by TFS in the second amended petition were identical or similar to the restrictions it sought in the original petition. Thus, appellants' alleged need for protection under the TCPA motion was apparent as of the original petition.").

III. Conclusion

In appellate case number 14-18-00728-CV, we reverse the trial court's August 21, 2018 amended order granting supplemental relief to AOT and Astra Oil enforcing the judgment in the form of a permanent anti-suit injunction and render judgment that the order is dissolved.

In appellate case number 14-18-00793-CV, we affirm the trial court's August 28, 2018 amended order denying Petrobras America's and Petrobras's TCPA motion to dismiss.

In appellate case number 14-18-00798-CV, we reverse the trial court's June 12, 2018 final judgment. While this court is authorized to render the judgment that the trial court should have rendered, under circumstances when remand is necessary for additional proceedings and for efficiency's sake, we remand with instructions for the trial court to render partial summary judgment in accordance with our judgment and conduct such additional proceedings. *See* Tex. R. App. P. 43.2, 43.3.

APPENDIX C

DISTRICT COURT OF HARRIS COUNTY, TEXAS
270TH JUDICIAL DISTRICT

No. 2016-43650

PETROBRAS AMERICA, INC., PETRÓLEO BRASILEIRO S.A.–PETROBRAS, PASADENA REFINING SYSTEM, INC., PRSI TRADING LLC, AND PRSI REAL PROPERTY HOLDINGS, LLC, PLAINTIFFS,

v.

ASTRA OIL TRADING NV, TRANSCOR ASTRA GROUP S.A., ASTRA OIL COMPANY, LLC, ASTRA ENERGY HOLDINGS, INC., ASTRA GP, INC., ASTRA TRADECO LP, LLC, PASADENA REFINERY HOLDING PARTNERSHIP, AOT BIS B.V., CLIFFORD L. WINGET, III, ALBERTO FEILHABER, KARI BURKE, JOHN T. HAMMER, CARLOS E. ORTIZ, THOMAS J. NIMBLEY, IRENEUSZ KOTULA, CHARLES L. DUNLAP, ERIC BLUTH, STEPHEN WADE, ROLF MUELLER, AND DANIEL BURLA, DEFENDANTS.

Filed: June 12, 2018

FINAL JUDGMENT

After considering (1) the Astra Defendants'[1] Amended Motion for Summary Judgment filed on November 21,

[1] The "Astra Defendants" are Astra Oil Trading NV; Transcor Astra Group S.A.; Astra Oil Company, LLC; Astra Energy Holdings, Inc.; Astra GP, Inc.; Astra Tradeco LP, LLC; Pasadena Refinery Holding Partnership; AOT Bis B.V.; Clifford L. Winget, III; Kari

2017; (2) Defendant Feilhaber's Amended Motion for Summary Judgment filed on November 22, 2017; (3) the Astra Defendants' Motion for Summary Judgment Regarding Third Amended Petition filed on January 25, 2018; (4) Defendant Feilhaber's Motion for Summary Judgment Regarding Third Amended Petition filed on January 26, 2018; and (5) Defendants Mueller and Burla's Conditional Motion for Summary Judgment Regarding Third Amended Petition filed on February 15, 2018 (the "**Motions for Summary Judgment**"), the responses, the replies, the surreplies, the evidence attached to these pleadings, the supplemental evidence admitted via order dated May 14, 2018, the evidence offered at the April 30, 2018 bench trial, and the arguments of counsel at the hearings on these motions; and having previously granted the Motions for Summary Judgment via orders dated January 11, 2018, February 22, 2018, March 9, 2018, and March 27, 2018 (the "**Summary Judgment Orders**"); and having denied Plaintiffs' May 4, 2018 Motion for Reconsideration; and having granted the Astra Defendants' Conditional Motion to Sever Claims dated May 7, 2018, which severed Plaintiffs' Breach of Contract Claim (Count X) and any request for relief related thereto (including any claim for actual, nominal, or punitive damages or injunctive relief), **IT IS ORDERED, ADJUDGED and DECREED** that the Court enters **FINAL JUDGMENT** in Cause No. 2016-43650 as follows:

IT IS ORDERED, ADJUDGED and DECREED that the Motions for Summary Judgment are granted and that Plaintiffs (collectively "**Petrobras**") take nothing on their claims for Declaratory Relief, Breach of Fiduciary Duty, Aiding and Abetting Breach of Fiduciary Duty,

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Burke; John T. Hammer; Carlos E. Ortiz; Thomas J. Nimbley; Ireneusz Kotula; Charles L. Dunlap; Eric Bluth; and Stephen Wade.

Civil Conspiracy—Breach of Fiduciary Duty, Unjust Enrichment/Money Had and Received, Common Law Fraud, Statutory Fraud, Negligent Misrepresentation, Civil Conspiracy, Exemplary and Punitive Damages, Attorneys' Fees and Costs, and Joint and Several Liability—PRHP;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Astra Defendants are entitled to and shall have a final declaratory judgment as follows:

a. the June 29, 2012 Settlement Agreement and Mutual General Release (the "**Settlement Agreement**") is valid, binding and enforceable in all respects;

b. the Petrobras Release given by the "Petrobras Parties" in Section 5.11 of the Settlement Agreement is valid, enforceable and binding; and

c. the Petrobras Release bars (i) the claims asserted in this proceeding for Breach of Fiduciary Duty; Aiding and Abetting Breach of Fiduciary Duty, and Civil Conspiracy-Breach of Fiduciary Duty; (ii) the claims sought to be asserted by Petrobras in the ICDR Arbitration commenced by Petrobras and styled *Petrobras America, Inc., et al. v. Astra Oil Trading NV, et al*, Cause No. 01-16-0003-1149; and (iii) any other claims arising out of or related to the 2006 SPA or the dealings between the parties.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Feilhaber is entitled to and shall have a final declaratory judgment as follows:

a. the Settlement Agreement is valid, binding and enforceable in all respects; and

b. the Petrobras Release given by the "Petrobras Parties" in Section 5.11 of the Settlement Agreement is enforceable and binding.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Astra Defendants are entitled to their reasonable and necessary attorneys' fees and costs pursuant to Texas Civil Practice & Remedies Code § 37.009 in the following amounts:

a. $1,194,844.00 as reasonable and necessary attorneys' fees incurred from July 1, 2016 through February 16, 2018;

b. $86,017.13 in reasonable and necessary costs and expenses incurred from July 1, 2016 through February 16, 2018;

c. An additional $100,000 in attorneys' fees in the event that Petrobras pursues an unsuccessful appeal to the Texas Court of Appeals; and

d. An additional $50,000 in attorneys' fees in the event that Petrobras appeals to the Texas Supreme Court and that appeal is unsuccessful after briefing on the merits.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Defendant Alberto Feilhaber is entitled to his reasonable and necessary attorneys' fees pursuant to Texas Civil Practice & Remedies Code § 37.009 in the following amounts:

a. $298,182.15 as reasonable and necessary attorneys' fees incurred through April 30, 2018;

b. An additional $75,000 in attorneys' fees in the event that Petrobras pursues an unsuccessful appeal to the Texas Court of Appeals; and

c. An additional $25,000 in attorneys' fees in the event that Petrobras unsuccessfully files a petition for review with the Texas Supreme Court to which Feilhaber is required to respond; and

d. An additional $60,000 in attorneys' fees in the event that Petrobras appeals to the Texas Supreme Court and that appeal is unsuccessful after briefing on the merits.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Defendants are entitled to post-judgment interest at a rate of 5% accruing from the date this Final Judgment is signed until the day the Final Judgment is satisfied. Post-judgment interest shall also accrue at a rate of 5% on amounts conditionally awarded for appellate attorneys' fees in this matter, accruing on the date that an unsuccessful appeal is concluded and the appellate court issues its final judgment until the date the judgment is satisfied.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that this is a Final Judgment. All claims relating to all parties remaining in Cause No. 2016-43650 are determined and disposed of by this Final Judgment. All relief requested but not herein awarded is denied Execution and all writs and processes may issue to enforce the terms of this Final Judgment. This Final Judgment is appealable.

APPENDIX D

DISTRICT COURT OF HARRIS COUNTY, TEXAS
270TH JUDICIAL DISTRICT

No. 2016-43650

PETROBRAS AMERICA, INC., PETRÓLEO BRASILEIRO S.A.–PETROBRAS, PASADENA REFINING SYSTEM, INC., PRSI TRADING LLC, AND PRSI REAL PROPERTY HOLDINGS, LLC, PLAINTIFFS,

v.

ASTRA OIL TRADING NV, TRANSCOR ASTRA GROUP S.A., ASTRA OIL COMPANY, LLC, ASTRA ENERGY HOLDINGS, INC., ASTRA GP, INC., ASTRA TRADECO LP, LLC, PASADENA REFINERY HOLDING PARTNERSHIP, AOT BIS B.V., CLIFFORD L. WINGET, III, ALBERTO FEILHABER, KARI BURKE, JOHN T. HAMMER, CARLOS E. ORTIZ, THOMAS J. NIMBLEY, IRENEUSZ KOTULA, CHARLES L. DUNLAP, ERIC BLUTH, STEPHEN WADE, ROLF MUELLER, AND DANIEL BURLA, DEFENDANTS.

Filed: July 10, 2018

ORDER GRANTING SUPPLEMENTAL RELIEF ENFORCING JUDGMENT

Before the Court is the Motion for Supplemental Relief Enforcing Judgment (the "**Motion**") filed by Defendants Astra Oil Trading NV and Astra Oil Company, LLC, ("**Astra**") requesting that the Court issue an injunction against Plaintiffs Petrobras America, Inc. and Petróleo

Brasileiro S.A.-Petrobras (collectively "**Petrobras**") from continuing to pursue certain claims that this Court has previously held to be barred by a release (the "**Petrobras Release**") contained in the parties June 29, 2012 Settlement Agreement and Mutual General Release (the **"Settlement Agreement")**.

The Court has considered the Motion, the evidence submitted therewith, any responses and replies, and finds that the Motion should be **GRANTED** in all respects.

The Court's June 12, 2018 Final Judgment ordered, adjudged and decreed that the Astra Defendants were entitled a final declaratory judgment as follows:

a. the Settlement Agreement is valid, binding and enforceable in all respects;

b. the Petrobras Release given by the "Petrobras Parties" in Section 5.11 of the Settlement Agreement is valid, enforceable and binding; and

c. the Petrobras Release bars (i) the claims asserted in this proceeding for Breach of Fiduciary Duty; Aiding and Abetting Breach of Fiduciary Duty, and Civil Conspiracy-Breach of Fiduciary Duty; (ii) the claims sought to be asserted by Petrobras in the ICDR Arbitration commenced by Petrobras and styled *Petrobras America, Inc., et al. v. Astra Oil Trading NV, et al*, Cause No. 01-16-0003-1149; and (iii) any other claims arising out of or related to the 2006 SPA or the dealings between the parties.

Following the entry of the Final Judgment, Petrobras has continued to pursue claims arising out of or related to the 2006 SP A and the dealings of the parties in the ICDR Arbitration styled *Petrobras America, Inc., et al. v. Astra*

Oil Trading NV, et al, Cause No. 01-16-0003-1149, even though the Final Judgment declared that those claims were barred by the Petrobras Release. Moreover, Petrobras has asserted to the Arbitration Tribunal that it may treat the Final Judgment as a nullity.

IT IS THEREFORE, ORDER ADJUDGED AND DECREED that Petrobras and its officers, employees, agents, representatives, attorneys and/or anyone acting in active concert or participation with Petrobras are permanently enjoined from, directly or indirectly, continuing to pursue in any way the claims asserted in the ICDR Arbitration styled *Petrobras America, Inc., et al. v. Astra Oil Trading NV, et al*, Cause No. 01-16-0003-1149 arising out of or related to the 2006 SPA.

APPENDIX E

DISTRICT COURT OF HARRIS COUNTY, TEXAS
270TH JUDICIAL DISTRICT

No. 2016-43650

PETROBRAS AMERICA, INC., PETRÓLEO BRASILEIRO S.A.–PETROBRAS, PASADENA REFINING SYSTEM, INC., PRSI TRADING LLC, AND PRSI REAL PROPERTY HOLDINGS, LLC, PLAINTIFFS,

v.

ASTRA OIL TRADING NV, TRANSCOR ASTRA GROUP S.A., ASTRA OIL COMPANY, LLC, ASTRA ENERGY HOLDINGS, INC., ASTRA GP, INC., ASTRA TRADECO LP, LLC, PASADENA REFINERY HOLDING PARTNERSHIP, AOT BIS B.V., CLIFFORD L. WINGET, III, ALBERTO FEILHABER, KARI BURKE, JOHN T. HAMMER, CARLOS E. ORTIZ, THOMAS J. NIMBLEY, IRENEUSZ KOTULA, CHARLES L. DUNLAP, ERIC BLUTH, STEPHEN WADE, ROLF MUELLER, AND DANIEL BURLA, DEFENDANTS.

Filed: August 9, 2018

AMENDED ORDER GRANTING SUPPLEMENTAL RELIEF ENFORCING JUDGMENT

Before the Court is the Motion for Amended Order Granting Supplemental Relief Enforcing Judgment (the **"Motion"**) filed by Defendants Astra Oil Trading NV and Astra Oil Company, LLC, **("Astra")** requesting that the

Court issue an amended injunction order against Plaintiffs Petrobras America, Inc. and Petróleo Brasileiro S.A.-Petrobras (collectively **"Petrobras")** further restraining them from continuing to pursue certain claims that this Court has previously held to be barred by a release given by Petrobras (the **"Petrobras Release")** contained in the parties' June 29, 2012 Settlement Agreement and Mutual General Release (the **"Settlement Agreement")**.

The Court has considered the Motion, the evidence submitted therewith, any responses and replies, and finds that the Motion should be **GRANTED** in all respects.

The Court's June 12, 2018 Final Judgment ordered, adjudged and decreed that the Astra Defendants were entitled a final declaratory judgment as follows:

a. the Settlement Agreement is valid, binding and enforceable in all respects;

b. the Petrobras Release given by the "Petrobras Parties" in Section 5.11 of the Settlement Agreement is valid, enforceable and binding; and

c. the Petrobras Release bars (i) the claims asserted in this proceeding for Breach of Fiduciary Duty; Aiding and Abetting Breach of Fiduciary Duty, and Civil Conspiracy-Breach of Fiduciary Duty; (ii) the claims sought to be asserted by Petrobras in the ICDR Arbitration commenced by Petrobras and styled *Petrobras America, Inc., et al. v. Astra Oil Trading NV, et al*, Cause No. 01-16-0003-1149; and (iii) any other claims arising out of or related to the 2006 SPA or the dealings between the parties.

Following the entry of the Final Judgment, Petrobras continued to pursue the claims mentioned in subdivision c

of the Final Judgment in the ICDR Arbitration styled *Petrobras America, Inc., et al. v. Astra Oil Trading NV, et al*, Cause No. 01-16-0003-1149 (the "**Arbitration**"), even though the Final Judgment declared that those claims were barred by the Petrobras Release. Moreover, Petrobras has asserted to the Arbitration Tribunal that it may treat the Final Judgment as a nullity, and the Arbitration Tribunal accepted Petrobras' argument and ruled that it will give no deference to the Final Judgment. Accordingly, on July 31, 2018, the Court, at Astra's request, signed an Order Granting Supplemental Relief to Enforce Judgement, which enjoined Petrobras from attempting to pursue the claims in the Arbitration. Following the issuance of the Court's July 31, 2018 Order, Petrobras requested a hearing before the Arbitration Tribunal and took the position that the Court's July 31, 2018 Order was defective because it was not sufficiently specific in identifying what actions in the Arbitration were prohibited. Although the Court rejects that assertion, in order to prevent any further allegations of lack of specificity, this Amended Order is being issued.

The Court finds that this Order is necessary in order to protect the integrity of its Final Judgment and this Court's exclusive jurisdiction. This Court further finds that the forum selection clause in the Settlement Agreement was intended to ensure that Astra's rights under the Settlement Agreement and the Petrobras Release were to be determined only by the Texas courts following Texas law and procedures. If Astra were required to litigate issues related to the validity, enforceability or interpretation of the Settlement Agreement and the Petrobras Release in the Arbitration, Astra would suffer immediate irreparable harm, for which there would be no adequate remedy at law. In addition, because Petrobras would be free to use documents and information it obtains in the

Arbitration in connection with proceedings in other forums, the continued pursuit of discovery and claims in the Arbitration in violation of the Final Judgment, Settlement Agreement, Petrobras Release and the forum selection clause would result in irreparable harm to Astra for which there would be no adequate remedy at law. In addition, the Court finds that permitting the Arbitration to go forward would create the possibility of an incurable conflict between the Final Judgment and any Award in the Arbitration, which would also result in irreparable harm to Astra for which there is no adequate remedy at law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that Petrobras and its officers, employees, agents, representatives, attorneys and/or anyone acting in active concert or participation with Petrobras are permanently enjoined from, directly or indirectly, continuing to pursue or litigate in any way the claims, defenses or any other issues presented in the ICDR Arbitration styled *Petrobras America, Inc., et al. v. Astra Oil Trading NV, et al*, Cause No. 01-16-0003-1149. This Amended Order is intended to result in an immediate stay and cessation of all proceedings and activities of any sort in the Arbitration, including, but not limited to, staying any requirement that any party participate in any way in the Arbitration absent a further order of either this Court or an appellate court of proper jurisdiction. Without intending any limitation, and solely for the avoidance of doubt, this Amended Order is intended to: (i) immediately stay any requirement that any party in the Arbitration produce any documents or information, make any objections, make any discovery responses, participate in any depositions, make any requests or objections regarding subpoenas, attend any hearings, or submit any briefs or evidence; and (ii) preclude any request by Petrobras to the Tribunal that it treat this Amended Order as a nullity in the Arbitration

or otherwise take any action. This Amended Order shall not prohibit Petrobras from discussing, internally and with their outside legal counsel, the Arbitration or the impact of this Amended Order. Nor shall this Amended Order be construed to prevent Petrobras from pursuing any appeals of this Amended Order or the Final Judgment in the Texas state appellate courts.

APPENDIX F

SUPREME COURT OF TEXAS

No. 20-0932

TRANSCOR ASTRA GROUP S.A., ET AL.,
PETITIONERS

v.

PETROBRAS AMERICA INC., ET AL.,
RESPONDENTS

Filed: September 2, 2022

REHEARING ORDER

Today the Supreme Court of Texas denied the motion for rehearing in the above-referenced cause.