APPENDIX TABLE OF CONTENTS

App. 1

No. 20-0932

In the Supreme Court of Texas

Transcor Astra Group S.A., et al.,

Petitioners/Cross-Respondents,

v.

Petrobras America Inc., et al.

Respondents/Cross-Petitioners.

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[iii] **TABLE OF CONTENTS**

[vii] INDEX OF AUTHORITIES

Page

CASES

[xiii] **STATUTES**

RULE

[xiv] STATEMENT OF THE CASE

Nature of the Case:	Petrobras sued Astra for claims relate to Astra's criminal and fraudulent conduct in connection with a settlement agreement designed to resolve the parties' earlier disputes. (CR:3792–827.) Astra sought declaratory judgment that the settlement agreement is valid and enforceable in all respects. (CR:61, 74.) Some Astra Entities also sought a declaration that the settlement agreement's release barred claims in a separate arbitration. (CR:74.)
Trial Court:	270th Judicial District Court, Harris County, Texas (Hon. Brent Gamble, presiding)
Trial Court's Disposition:	In several orders, the trial court granted final summary judgment for Astra, including declaratory relief. (CR:5158–61 (App. Tab C), 5162-63 (App. Tab D), 5497–98 (App. Tab E), 5545–47 (App. Tab F), 5786–87 (App. Tab G).) The trial court also awarded Astra its attorneys' fees and costs. (CR:7686–90 (App. Tab H).)
Court of Appeals Opinion:	*Petrobras Am. Inc. v. Astra Oil Trading NV*, No. 14-18-00728-CV, No. 14-18-00793-CV, No. 14-18-00798-CV, 2020 WL 4873226 (Tex. App.—Houston [14th Dist.] Aug. 20, 2020, pet. filed) (App. Tab A)

Court of Appeals Disposition: In an opinion by Justice Spain (joined by Justices Christopher and Poissant), the court reversed the trial court's summary judgment and remanded for entry of partial summary judgment in Astra's favor on certain claims and for further proceedings. (App. Tab A.)

[xv] STATEMENT OF JURISDICTION

The Court has jurisdiction over this appeal from a final summary judgment because the case presents a question important to the jurisprudence of the state, and the case does not involve a matter in which the jurisdiction of the court of appeals is made final by statute. TEX. GOV. CODE § 22.001(a).

[xvi] ISSUES PRESENTED

1. The court of appeals erred in concluding that Astra is entitled to summary judgment on Petrobras's reliance-based claims because the Reliance Disclaimer is unenforceable under *Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997) and its progeny. This issue consists of the following sub-issues:

    a. the court of appeals erred in concluding that the Reliance Disclaimer bars Petrobras's omission-based fraud claims when they are not the mirror image of any affirmative misrepresentations by Astra;

b. the court of appeals erred in concluding that *Forest Oil*'s first factor did not require the parties to specifically address the SPSA negotiations when discussing the Settlement Agreement, when that conduct is the issue that has become the topic of the parties' subsequent dispute;

c. the court of appeals erred in concluding that fiduciary duties owed by certain Astra Individuals did not prevent the Settlement Agreement from being an arm's-length transaction under *Forest Oil*'s third factor; and

d. given Astra's bribery, the court of appeals should have refused to enforce the Reliance Disclaimer based on the totality of the circumstances.

2. The court of appeals erred in affirming the trial court's declaratory judgment that the Release bars the claims asserted in the Arbitration.

[1] INTRODUCTION

Fraud vitiates everything it touches. This bedrock principle empowers courts to set aside fraudulently procured contracts. There is a limited exception to this general rule: "in certain circumstances, it may be possible for a contract's terms to preclude a claim for fraudulent inducement by a clear and specific disclaimer-of-reliance clause." *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 332 (Tex. 2011). This Court has identified several nonexclusive factors that govern enforceability of reliance

disclaimers. *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 60 (Tex. 2008); *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 177–81 (Tex. 1997).

The Court should hear this case and reverse the summary judgment for two primary reasons. *First*, since this Court decided *Schlumberger*, *Forest Oil*, and *Italian Cowboy*, Texas courts (and federal courts applying Texas law) have grappled with what the factors mean and how they apply. This case gives the Court the opportunity to provide guidance on the factors. Under their proper interpretation, these factors establish that the Reliance Disclaimer is unenforceable and does not bar Petrobras's reliance-based claims.

Second, the trial court's declaratory judgment that the Release bars the claims in a separate arbitration is improper. Under well-established principles, [2] courts cannot interfere with an arbitration. And whether the Release applies to those claims is a matter for the arbitrators to determine, not a court. The Court should ensure that Texas courts do not interfere with arbitration proceedings.

The Court should grant review and reverse the grant of summary judgment.

STATEMENT OF FACTS

(1) The Lawsuit

In 2006, Petróleo Brasileiro S.A.—Petrobras as buyer and Astra Oil Trading NV and Astra Oil Company, Inc. as sellers signed a Stock Purchase and Sale

Agreement ("SPSA"). (CR:7853–902.) Petróleo Brasileiro S.A.—Petrobras acquired a 50% interest in Pasadena Refining Systems, Inc. ("PRSI") which owns a refinery in Pasadena, Texas. (*Id.*) The parties also formed PRSI Trading Company, LP to supply feedstocks to the refinery. (*Id.*)

Disputes arose leading to litigation and arbitration. In June 2012, to resolve those disputes, Petrobras America Inc., Petróleo Brasileiro S.A.—Petrobras, PRSI, PRSI Trading LLC, and PRSI Real Property Holdings, LLC (collectively, "Petrobras"), on the one hand, and Transcor Astra Group S.A., Astra Oil Trading NV, Astra Oil Company, LLC, Astra Energy Holdings, Inc., [3] Astra GP, Inc., Astra TradeCo LP, LLC, and Pasadena Refinery Holding Partnership (collectively, "Astra Entities"), on the other hand, signed a Settlement Agreement and Mutual General Release ("Settlement Agreement"). (CR:4015–16.)

At the request of the Astra Entities and the Astra Individuals[1] (collectively, "Astra"), the Settlement Agreement's Release applies to "any claim arising out of or related to the [SPSA], including without limitation, any claims related to the indemnities, representations, warranties, covenants and purchase price adjustments provided for therein." (CR:1609 (App. Tab I), 2044–45.) The Release does not apply to claims

[1] The Astra Individuals are Cross-Respondents 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 and Respondent Alberto Feilhaber.

arising out of or relating to the Settlement Agreement. (CR:1609 (App. Tab I).) The Settlement Agreement also contains a disclaimer of reliance ("Reliance Disclaimer"). (CR:1612 (App. Tab J).)

While specifically requesting that the Settlement Agreement include a release related to the SPSA, Astra never disclosed that they had orchestrated a $15 million bribery scheme in connection with the SPSA. (*See* CR:4016, [4] 4021.) They failed to disclose that: (1) Astra agreed to pay bribes totaling about $15 million while negotiating the SPSA; (2) Clifford L. "Mike" Winget, III and Alberto Feilhaber represented Astra during the SPSA negotiations and negotiated the bribes;[2] (3) Astra paid the bribes after the SPSA was signed; (4) some Astra Individuals received a portion of the bribes as kickbacks; and (5) during the disputes that led to the Settlement Agreement, Astra offered to pay between $80 million and $100 million in bribes to "solve the problem" and reach a settlement. (CR:4016.)

A Brazilian law-enforcement investigation dubbed "Operation Car Wash" revealed the truth. (CR:4016.) After learning the truth, Petrobras sued Astra for the following claims related to the Settlement Agreement: common-law fraud, statutory fraud, negligent misrepresentation, unjust enrichment, civil conspiracy, breach of fiduciary duty, declaratory judgment, and joint and several liability. (CR:21–42, 1150–78, 2469–501, 3792–827, 6745–85.)

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[2] Winget was also the principal negotiator for Astra who signed the Settlement Agreement. (CR:4018.)

Certain Astra Entities counterclaimed and asked for a declaratory judgment about the validity of the Settlement Agreement, including the [5] Release. (CR:61, 74.) They also sought a declaratory judgment that the Release bars claims asserted in the separate Arbitration, discussed below. (CR:74.)

(2) The Arbitration

When Petrobras filed this lawsuit, two Petrobras entities (Petrobras America Inc. and Petróleo Brasileiro S.A.—Petrobras) also began an arbitration proceeding ("Arbitration") under the SPSA against Cross-Respondents Astra Oil Trading NV and Astra Oil Company, LLC (collectively, the "Astra Respondents"). (CR:7850–51, 7904–23.) While this lawsuit focused solely on the Settlement Agreement, the Arbitration focused solely on the SPSA and the $15 million in bribes paid as part of that transaction. The Arbitration does not assert any claims related to the Settlement Agreement. (CR:7910.) The claims in the Arbitration arise solely from the SPSA's negotiation and execution. (*Id.*)

Petrobras America Inc. and Petróleo Brasileiro S.A.—Petrobras had to assert their SPSA-related claims in the Arbitration because the SPSA requires arbitration of "any controversy or claim . . . arising out of or related to" the SPSA, including "any question of the validity or effect" of the SPSA or the arbitration provision. (CR:7895 (App. Tab K).) The Arbitration claims undisputedly fall within this provision.

[6] **(3) Astra's Initial Efforts to Stop the Arbitration**

Despite the clear delineation between the Arbitration and this lawsuit, the Astra Respondents asked the trial court to stay the Arbitration, arguing (a) that the Settlement Agreement's forum-selection clause revoked and superseded the SPSA's arbitration clause; and (b) that the Settlement Agreement released the claims asserted in the Arbitration. (*See* CR:493–518.) Petrobras responded that (a) an arbitration agreement's existence and scope are threshold questions for the Tribunal to decide; (b) nothing in the Settlement Agreement prevents Petrobras "from filing and proceeding with [its] separate arbitration for claims arising under the [SPSA];" and (c) "there is no conflict between the Settlement Agreement and the [SPSA]." (*See* CR:1301–14.) The trial court declined to stay the Arbitration. (CR:1531–32.)

The Astra Respondents also challenged the Arbitration Tribunal's jurisdiction. But the Tribunal denied that challenge and determined that the claims before it were arbitrable. (CR:7986–8004.) The Tribunal recognized that Petrobras is "not advancing any claims 'arising out of' the 2012 Settlement Agreement" in the Arbitration. (CR:7999.) The Tribunal also acknowledged the distinction between the "validity and enforceability, *vel non*, of the Settlement Agreement[,] a matter properly before the Texas Courts," [7] and the effect of the Settlement Agreement on the SPSA, an issue before the Tribunal. (CR:8000.) The Tribunal agreed with Petrobras that release is an

affirmative defense, and thus the Release's effect on the Arbitration "is properly determined in the merits phase of this arbitration." (CR:8001.)

(4) Summary-Judgment Proceedings in the Trial Court

Relying on the Settlement Agreement's Reliance Disclaimer, Astra sought summary judgment on Petrobras's "misrepresentation-based claims." (*See* CR:1564.) Astra also sought summary judgment on the Settlement Agreement's validity. (*See* CR:1564–65.) And the Astra Respondents sought a declaratory judgment that the Release barred the claims in the Arbitration. (*See id*.) In moving for summary judgment, Astra maintained that the trial court could assume that they had made fraudulent misrepresentations and omissions. (CR:1563.) In several orders, the trial court granted summary judgment in Astra's favor. (CR: 5158–61 (App. Tab C), 5162–63 (App. Tab D), 5497–98 (App. Tab E), 5545–47 (App. Tab F).)

Among other things, the trial court's final judgment ordered (1) that Petrobras take nothing on its claims; and (2) that Astra was entitled to a declaratory judgment (a) that the Settlement Agreement and Release were [8] valid, binding, and enforceable, and (b) that the Release bars the claims asserted in the Arbitration. (CR:7686–90 (App. Tab H).)

(5) The Court of Appeals' Opinion

The court of appeals found that the trial court erred in part and reversed the summary judgment. *Petrobras Am. Inc. v. Astra Oil Trading NV*, No. 14-18-00728-CV, No. 14-18-00793-CV, No. 14-18-00798-CV, 2020 WL 4873226 (Tex. App.—Houston [14th Dist.] Aug. 20, 2020, pet. filed) (App. Tab A). The court held that the Release does not bar all of Petrobras's claims because claims related to the negotiation and signing of the Settlement Agreement fall within a carve out from the Release. *Id.* at *9. The court also held that the Astra Individuals had not established that the Release and Reliance Disclaimer applies to claims against them in their individual capacities. *Id.* at *16. The court then held that the trial court did not err in granting a declaratory judgment that the Release bars claims asserted in the Arbitration. *Id.* at *18– 19. The court remanded the case to the trial court for further proceedings, including the entry of a new partial summary judgment in accordance with the appellate court's opinion. *Id.* at *26.[3]

[3] The court of appeals also resolved two other issues that are not part of the petitions for review. First, the court reversed an anti-suit injunction that the trial court had entered barring Petrobras from proceeding with the Arbitration. *Id.* at *25. Second, the court affirmed the trial court's denial of a motion to dismiss that Petrobras had filed under the Texas Citizens Participation Act. *Id.*

[9] **SUMMARY OF THE ARGUMENTS**

Summary judgment based on the Reliance Disclaimer was improper under this Court's precedent, including *Forest Oil*'s totality-of-the-circumstances analysis. The court of appeals' erroneous analysis of the Reliance Disclaimer reveals several areas of confusion among lower courts that require this Court's intervention. First, the Reliance Disclaimer applies only to affirmative misrepresentations, and the claims here arise from fraudulent omissions. The appellate court (echoing an error made by other courts), misapplied *Schlumberger* to hold that a reliance disclaimer always bars omission-based claims, even if the alleged omissions are not mirror images of any alleged affirmative misrepresentations. This error results in courts applying reliance disclaimers to claims that are outside their scope.

The court of appeals also erred in its analysis of the *Forest Oil* factors. Contrary to the court's conclusion, two factors weigh heavily against enforcing the Reliance Disclaimer. The court erred in its analysis of the first factor by disregarding the fact that the parties did not discuss the issue that has become the topic of dispute. The parties did not specifically discuss the matter in [10] dispute—the negotiation of the SPSA or the bribery scheme perpetrated by Astra. The Court should grant review to correct lower courts' misapplication of this factor.

The court also erred in its analysis of the third *Forest Oil* factor. The Settlement Agreement was not

an arm's-length transaction because many Astra Individuals owed fiduciary duties that required them to disclose their bribery before they could insulate themselves from liability. The court of appeals erred by holding that it could ignore those fiduciary duties in deciding to enforce the Reliance Disclaimer. The Court should hold that this was not an arm's-length transaction.

Finally, as a matter of public policy, the Reliance Disclaimer should not immunize the Astra Entities and Astra Individuals from their crimes. This Court has declined to hold that reliance disclaimers are categorically enforceable. Rather, it has instructed courts to consider the totality of the circumstances. The *Forest Oil* factors are not exclusive, and the courts below should have considered the conduct that Astra sought to protect through the Release and Reliance Disclaimer. The Court should hold that the Reliance Disclaimer cannot be enforced because it would allow Astra to avoid liability for its criminal conduct under false pretenses.

[11] Furthermore, the trial court's declaratory judgment addressing the Release's effect on the Arbitration claims cannot withstand even cursory scrutiny. Courts may not interfere with an arbitrator's jurisdiction. The Release's effect on the Arbitration claims is a matter for the Tribunal, not a court. Thus, the trial court usurped the Tribunal's authority and improperly decided the merits of the Arbitration claims. Furthermore, any argument that the declaratory judgment was proper because the SPSA's arbitration clause has

been superseded fails. Whether the SPSA's arbitration clause has been superseded is an arbitrability issue that the parties delegated to the Tribunal, which correctly determined that the agreement was not superseded. And even if the Settlement Agreement somehow terminated the SPSA's arbitration agreement, the Arbitration claims still must be arbitrated because they arose long before the termination, while the arbitration agreement was still in effect. The Court should grant review and reverse the declaratory judgment to make clear that Texas courts must not interfere with arbitrators' jurisdiction.

Arguments and Authorities

1. The Reliance Disclaimer is unenforceable.

Summary judgment on Petrobras' reliance-based claims should be reversed because the Reliance Disclaimer is unenforceable. A reliance [12] disclaimer's enforceability is a question of law, which this Court reviews de novo. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333 (Tex. 2011). Reliance disclaimers must be strictly construed and applied only in accordance with their terms. *See id.* at 334–35 (holding that a disclaimer of the *existence* of extra-contractual representations did not disclaim *reliance* on extra-contractual representations). Courts must also examine the totality of the circumstances to determine whether a reliance disclaimer is binding. *Forest Oil*, 268 S.W.3d at 60. The court of appeals failed

to apply the Reliance Disclaimer's terms and failed to properly examine the totality of the circumstances.

A. Petrobras's omission-based claims are not the mirror image of any affirmative misrepresentation.

This Court should hold that the Reliance Disclaimer does not bar Petrobras's reliance-based claims because they do not fall within its scope. The Reliance Disclaimer cannot apply because Petrobras's claims stem from omissions, not affirmative misrepresentations, and nothing in the Reliance Disclaimer addresses omissions. (CR:1612 (App. Tab J).) Reliance disclaimers must be strictly construed according to their terms. *See Italian Cowboy*, 341 S.W.3d at 333–35. Because Petrobras's claims arise from omissions and the [13] Reliance Disclaimer addresses only misrepresentations, it does not preclude Petrobras's claims.

In rejecting this argument, the court of appeals misconstrued *Schlumberger*. 2020 WL 4873226, at *14 (App. Tab A). The court of appeals interpreted Schlumberger to hold that a disclaimer of reliance on affirmative representations always bars omission-based claims. *Id.* Other courts have similarly misconstrued *Schlumberger*. *See*, *e.g.*, *Cronus Offshore, Inc. v. Kerr McGee Oil & Gas Corp*., 369 F. Supp. 2d 848, 859 (E.D. Tex. 2004), *aff'd*, 133 F. App'x 944 (5th Cir. 2005). The Court should grant the petition for review to correct this misapplication of *Schlumberger*, which stands for a much narrower proposition—when a plaintiff's claim rests

on affirmative misrepresentations, she cannot avoid a reliance disclaimer by recasting those misrepresentations as omissions. 959 S.W.2d at 181–82.

Unlike the plaintiffs in *Schlumberger*, Petrobras is not asserting omission-based claims as the converse of any affirmative-misrepresentation claims. Petrobras's claims focus on Astra's failure to disclose the bribery scheme, and the undisputed facts prove that Astra never disclosed that scheme, either in whole or in part. Absent any affirmative disclosure by Astra, Petrobras's omission-based claims could not be the mirror image of any misrepresentation. [14] The Court should grant the petition to confirm that reliance disclaimers cannot apply beyond their strict terms and that the claims here do not fall within the Reliance Disclaimer's scope.

B. The court of appeals' analysis of the *Forest Oil* factors is faulty.

The trial court and the court of appeals also misconstrued the *Schlumberger* and *Forest Oil* factors. This Court has declined to "adopt a *per se* rule that a disclaimer automatically precludes a fraudulent-inducement claim." *Forest Oil*, 268 S.W.3d at 61; *see also Schlumberger*, 959 S.W.2d at 181 ("We emphasize that a disclaimer of reliance or merger clause will not always bar a fraudulent inducement claim."). Rather than adopt a per se rule, this Court has held that: "Courts must ***always*** examine the contract itself and ***the totality of the surrounding circumstances*** when determining if a waiver-of-reliance provision is

binding." *Forest Oil*, 268 S.W.3d at 60 (emphasis added). To do this, courts analyze five nonexclusive factors that serve as guidelines for determining whether a reliance disclaimer bars a fraudulent-inducement claim:

> (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;
>
> [15] (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.

Id. (emphasis added).

Here, factors (1) and (3) weigh against enforcement. During the Settlement Agreement negotiations, Astra did not discuss the SPSA negotiations or the related bribery scheme. And because certain Astra Individuals owed fiduciary duties to Petrobras, the Settlement Agreement is not an arm's-length transaction. In addition to the nonexclusive factors, given Astra's illegal conduct, the totality of the circumstances also requires that the Court decline to enforce the Reliance Disclaimer.

(1) The parties did not address the SPSA negotiations when discussing the Settlement Agreement.

Under *Forest Oil*'s first factor, the court considers 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." 268 S.W.3d at 60. This factor requires both (i) that the contract be negotiated *and* (ii) that the parties have discussed the issue that has become the later topic of dispute. *Id*. The factor's second part ensures that [16] the party against whom the disclaimer is asserted was not tricked into giving up claims that it did not know were at issue.

In *Schlumberger*, the dispute concerned a diamond-mining project's value and viability. 959 S.W.2d at 174. The reliance disclaimer was in a settlement agreement that the plaintiffs were trying to avoid based on fraud. *Id.* at 175. This Court found it significant that, during the negotiations that led to the settlement agreement, the parties had discussed and disagreed about the diamond-mining project's value and viability, and then included a reliance disclaimer in the settlement agreement. *Id.* at 174, 180. Thus, the record in *Schlumberger* showed that the parties had extensive discussions about the issue that became the topic of their later dispute—*i.e.*, the diamond-mining project's value and viability.

Despite *Schlumberger*'s teaching about the first factor's scope, lower courts have split on its application. Some, like the appellate court here, have construed the factor broadly, requiring only that the parties discuss the contractual term at issue. *See Leibovitz v. Sequoia Real Estate Holdings, L.P.*, 465 S.W.3d 331, 344 (Tex. App.—Dallas 2015, no pet.); *McLernon v. Dynegy*, 347 S.W.3d 315, 331 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

[17] Others (hewing more closely to *Schlumberger*) have determined that the topic of the dispute refers to the specific issue that led to the later litigation. For example, in *Baker v. City of Robinson*, the plaintiffs sued the city for breach of contract and statutory fraud based on the city's alleged misrepresentation about the zoning of certain property. 305 S.W.3d 783, 786 (Tex. App.—Waco 2009, pet. denied). The appellate court held that a contractual reliance disclaimer did not bar the claim because there was "nothing in the record to indicate the parties discussed ***the zoning of the property***"—which was the subject of the later litigation—"before the City prepared the contract." *Id.* at 796 (emphasis added).

Similarly, in *Residencial Santa Rita, Inc. v. Colonia Santa Rita, Inc.*, the court of appeals declined to apply a reliance disclaimer to the plaintiff's fraud claim. No. 04-06-00778-CV, 2007 WL 2608564, at *3 (Tex. App.—San Antonio Sept. 12, 2007, no pet.). The court held that the first *Schlumberger* factor was not satisfied. *Id.* The fraud claim related to conveyance of certain condominium units, but there was no evidence

that while negotiating the contract, "the parties engaged in lengthy negotiations with regard to the terms of the conveyance of the condominiums." *Id.* Accordingly, the parties' agreement did not bar the plaintiff's fraud claim. *Id.*; *accord Matlock Place* [18] *Apartments, L.P. v. Druce*, 369 S.W.3d 355, 372 (Tex. App.—Fort Worth 2012, pet. denied) (noting that the first factor was satisfied because "the parties specifically discussed and negotiated the issue of the property's need for repairs and maintenance when arranging for the sale of the property," which was the subject of the litigation).

And in *S.A.H.H. Hospital Management, LLC v. San Antonio Hospital Management, Inc.*, the plaintiffs alleged that the defendants fraudulently induced them to enter into a put/call agreement that allowed the defendants to buy the plaintiffs' interests in the parties' limited partnership. No. SA-12-CV-1069-XR, 2013 WL 5755611, at *1 (W.D. Tex. Oct. 22, 2013). The plaintiffs' fraudulent-inducement claim rested on the defendants' failure to disclose that they were under investigation by the federal government for improper medical billing practices. *Id.* at *6. The court declined to enforce a reliance disclaimer because "Texas law requires that for such a disclaimer of reliance to be effective, the parties must have '***specifically discussed the issue which has become the subject of the subsequent dispute***,'" and the parties never discussed the defendants being investigated by federal authorities. *Id.* at *8 (emphasis added) (quoting *Forest Oil*, 268 S.W.3d at 60).

[19] The courts that have required specific discussion of the topic of dispute have correctly applied *Schlumberger*. Requiring specific discussion of the topic of dispute furthers the purposes identified in *Schlumberger*. When the parties have discussed the topic, there can be no doubt that a party who signs a reliance disclaimer does so with clear and unequivocal intent to waive reliance on those discussions. *See Schlumberger*, 959 S.W.2d at 179–80. In contrast, if the only evidence is that the contract was negotiated, there is no clear and unequivocal intent to disclaim reliance on statements about the topic of dispute. And enforcing a reliance disclaimer without that clear and unequivocal intent would allow a fraudfeasor to exploit the opposing party's ignorance to insulate himself from his wrongdoing. The Court should reiterate its approach from *Schlumberger* and ensure that lower courts apply reliance disclaimers only when the parties have discussed the topic of dispute.

Under this application of *Schlumberger*, the first factor could be satisfied here only if during the Settlement Agreement negotiations, the parties had discussed the topic of the current dispute—the SPSA negotiations. But the undisputed evidence proves this did not happen. Testimony from Mike Winget, Astra's corporate representative and lead negotiator for both the Settlement Agreement and the SPSA, proves that the Settlement Agreement [20] negotiations included no discussion about the SPSA or its related bribery and corruption:

> Q: Okay. Do you remember having any specific discussions with Mr. Mattos or Mr. Rodrigues about the 2006 stock purchase and sale agreement?
>
> A: No.
>
> Q: Do you recall or do you know if anybody on the Astra side, like Mr. Bruno or otherwise, had any discussions with Mr. Rodrigues or Mr. Mattos about the 2006 agreement?
>
> A: I don't know.

(CR:1795.)

> Q: Okay. So it's correct to say, then – were there any discussions with – between Petrobras and Astra in connection with the settlement agreement regarding any potential bribery or corruption related to the earlier 2006 transaction?
>
> A: No.
>
> Q: Were there any specific discussions between Petrobras and Astra regarding that earlier 2006 transaction at all during the settlement negotiations?
>
> A: I don't remember.

(CR:1812; *see also* CR:1819, 4092–129, 4131–57, 4159–67.) The summary-judgment evidence established that the parties did not discuss the SPSA's negotiation, much less Astra's related bribery scheme. In fact, Astra concealed the scheme from Petrobras. Thus, the trial court and the court of appeals erred [21] in holding

that this factor supports enforcing the Reliance Disclaimer. Instead, it weighs against.

(2) Certain Astra Individuals owed fiduciary duties that prevented the Settlement Agreement from being an arm's-length transaction.

The third *Forest Oil* factor also weighs against enforcing the Reliance Disclaimer because Astra did not conclusively establish that the Settlement Agreement was an arm's-length transaction. A transaction is not arm's-length when the parties owe fiduciary duties to one another. *Schlumberger*, 959 S.W.2d at 175.

The Settlement Agreement was not arm's length because many Astra Individuals[4] owed Petrobras fiduciary duties. For example, under Connecticut and Delaware law, the Astra Individuals who were officers and board members of Pasadena Refining Systems, Inc. and PRSI Trading owed fiduciary duties to those entities.

Under the internal-affairs doctrine, the law of the place where an entity is organized governs the duties owed by its officers and directors. *See* TEX. BUS. ORGS. CODE §§ 1.101–1.105. PRSI is a Connecticut corporation, so [22] Connecticut law controls. *See First Equity Dev., Inc. v. Risko*, No. CV97 0162561 S, 1998 WL 294061, at *2 (Conn. Super. Ct. May 26, 1998) ("It is

[4] Clifford L. Winget, III; Alberto Feilhaber; Kari Burke; John T. Hammer; Thomas J. Nimbley; Ireneusz Kotula; Charles L. Dunlap; Eric Bluth; and Stephen Wade.

axiomatic that '[a]n officer and director occupies a fiduciary relationship to the corporation and its stockholders.'"). Although PRSI Trading LLC is a Texas limited liability company, its predecessor at the time of the Settlement Agreement, PRSI Trading Company LP, was a Delaware limited partnership. So Delaware law controls. *See Gantler v. Stephens*, 965 A.2d 695, 708–09 (Del. 2009) ("In the past, we have implied that officers of Delaware corporations, like directors, owe fiduciary duties of care and loyalty, and that the fiduciary duties of officers are the same as those of directors. We now explicitly so hold." (footnotes omitted)).[5]

The following Astra Individuals owed fiduciary duties to Petrobras entities:

- Feilhaber, Hammer, and Nimbley were members of the board of directors of Pasadena Refining System, Inc.;
- Feilhaber, Hammer, and Burke were members of the board of directors of PRSI Trading;

[23] • Dunlap, Bluth, and Wade were officers of Pasadena Refining System, Inc.;

- Burke and Kotula were officers of PRSI Trading; and

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[5] *See also Auriga Cap. Corp. v. Gatz Props., LLC*, 40 A.3d 839, 855 n.65 (Del. Ch. 2012) ("Delaware courts have ended up looking to corporate precedent even in the limited partnership arena, perhaps because the common law addressing the duties of partners is not as rich or often, as contextually relevant, as that addressing the conduct of corporate fiduciaries.").

- Winget was a member of the Senior Shareholders Committee of Pasadena Refining System, Inc. and the Senior Partners Committee of PRSI Trading.

(CR:3807–09, 4022–23, 5065–66.)[6] As fiduciaries, these Astra Individuals could not, as a matter of law, deal with Petrobras at arm's length, and they had to affirmatively disclose all material facts to Petrobras during the Settlement Agreement negotiations. The existence of the earlier disputes did not relieve these individuals of their duties. *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.").

Under governing Connecticut law, the officers and directors of PRSI—Winget, Feilhaber, Hammer, Nimbley, Dunlap, Bluth, and Wade—owed fiduciary duties to PRSI and its shareholders (including Petrobras) before, during, and after the Settlement Agreement negotiations. *Pacelli Bros. Transp.* [24] *v. Pacelli*, 456 A.2d 325, 329 (Conn. 1983). In *Pacelli Brothers*, three brothers were equal stockholders and directors in three corporations. *Id.* at 327–28. A dispute and litigation arose among the brothers, and two brothers bought the third brother's interests in the corporations as part of a

[6] Many Astra Individuals were also fiduciaries and high-level officers and directors of certain Astra Entities. (CR:4023–24.) Thus, they were vice-principals of those entities, and the individuals' knowledge and conduct are attributed to those entities. *See Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 391 (Tex. 1997) (listing factors for identifying vice-principals).

settlement agreement that contained a general release. *Id.* at 328. A year after the settlement, the two brothers discovered that before the settlement, the third brother had opened a secret bank account into which he transferred corporate funds to use for personal expenses. *Id.* In the later suit for fraudulent inducement, the third brother argued that the claims were barred by the release. *Id.*

In rejecting this argument, the Connecticut Supreme Court held that "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 abused." *Id.* at 329. The court first noted the high standards of loyalty required of fiduciaries and then found that the third brother's fiduciary duties survived the parties' adversarial litigation and the release given in the settlement agreement. *Id.* at 328–29. The third brother "could not doff his obligations so readily," and he "was bound to reveal his defalcations before he could be absolved" by the release. *Id.* at 329.

[25] Delaware law—which governs duties owed to Plaintiff PRSI Trading Company, LP—imposes similar obligations on fiduciaries. *See 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).

The court of appeals rejected these fiduciary duties as a basis to decline to enforce the Reliance Disclaimer. *Petrobras Am., Inc.*, 2020 WL 4873226, at *13 (App. Tab A). The court did not find that the individuals owed no fiduciary duties. Instead, the court held that the issue "'is whether, considering all of the circumstances, existence of the fiduciary relationship vitiates a conclusion that' the Petrobras plaintiffs bindingly disclaimed their reliance." *Id.* (quoting *Tex. Standard Oil & Gas, L.P. v. Frankel Offshore Energy, Inc.*, 394 S.W.3d 753, 776 (Tex. App.—Houston [14th Dist.] 2012, no pet.)). In other words, the court of appeals held that even in the face of these fiduciary duties, Astra could insulate itself from its fraud and bribery. The court of appeals' approach turns *Schlumberger* on its head. It allows a fiduciary to obtain a contractual release of its own fraud without disclosing all material facts.

[26] The court of appeals' approach undercuts the balance struck in *Schlumberger* between preventing parties from benefiting by their fraud and freedom of contract. That there was no evidence of a fiduciary or confidential relationship in *Schlumberger* was key to this Court's willingness to enforce the disclaimer. 959 S.W.3d at 176–77. By disregarding the fiduciary duties here, the court of appeals allowed these fiduciaries to hide the truth to avoid their fraud. The Court should grant review and reverse the grant of summary judgment to clarify that those who owe fiduciary duties cannot obtain contractual releases of claims arising

from their fraud without first disclosing all material facts.

C. The Reliance Disclaimer is unenforceable considering Astra's participation in a multi-million-dollar bribery and money-laundering scheme.

This Court has declined to "adopt a *per se* rule that a disclaimer automatically precludes a fraudulent-inducement claim." *Forest Oil*, 268 S.W.3d at 61; *see also Schlumberger*, 959 S.W.2d at 181 ("We emphasize that a disclaimer of reliance or merger clause will not always bar a fraudulent inducement claim."); *Int'l Bus. Machs. Corp. v. Lufkin Indus., LLC*, 573 S.W.3d 224, 229 (Tex. 2019) ("Not every such disclaimer is effective."). Instead, this Court has emphasized that "[c]ourts ***must always*** examine the [27] contract itself and ***the totality of the surrounding circumstances*** when determining if a waiver-of-reliance provision is binding." *Forest Oil*, 268 S.W.3d at 60 (emphasis added). While the *Forest Oil* factors assist with the totality-of-the-circumstances analysis, this Court has never held that those factors alone can determine whether a reliance disclaimer should be enforced.

If the totality of the circumstances ever precludes enforcing a reliance disclaimer, it does so here. The undisputed facts show that Astra: (1) paid $15 million of bribes to obtain the SPSA; (2) offered $80 to $100 million of bribes in connection with the Settlement Agreement; (3) violated fiduciary duties to Petrobras by

failing to disclose all material facts—including the bribes offered and paid; and (4) requested that the Settlement Agreement's Release specifically cover SPSA-related claims.

Although the parties did not discuss the SPSA or the bribery scheme when negotiating the Settlement Agreement, Astra requested that the Settlement Agreement include a reliance disclaimer applicable to the SPSA. (CR:1609, 2044–45, 4016.) While doing so, Astra knew it had paid bribes to obtain the SPSA and that Petrobras was ignorant of those bribes. (CR:4016, 4021.) The lower courts' decisions—if allowed to stand—permit a party to commit crimes, fraudulently induce a counterparty to enter into a settlement [28] agreement, and immunize itself from civil liability arising from those crimes. (*See* CR:4031–32 (describing $15 million bribery scheme); CR:4041 (same); CR:4049–51 (same); CR:4059–60 (same).) This Court should not allow such a result under the extreme circumstances here.

2. The appellate court erred in affirming the declaratory judgment that the Release bars the claims asserted in the Arbitration.

A. A court cannot interfere with an arbitrator's authority.

In entering a declaratory judgment that the Release bars the Arbitration claims, the trial court violated the fundamental principle that a court may not interfere with an arbitrator's jurisdiction. *See Epic*

Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018) (noting that the Federal Arbitration Act "establishes 'a liberal federal policy favoring arbitration agreements,'" and has "'the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts'"); *Babcock & Wilcox Co. v. PMAC, Ltd.*, 863 S.W.2d 225, 235–36 (Tex. App.—Houston [14th Dist.] 1993, writ denied) ("Because the parties agreed to submit the issue of attorney's fees to arbitration, the trial court was precluded from interfering with the arbitrator's jurisdiction and impermissibly modifying his decision."). This rule stems from the deference both Texas and federal law give to arbitrations: "once the arbitration [29] procedure is started it should be speedy and not subject to delay and obstruction in the courts." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McCollum*, 666 S.W.2d 604, 608 (Tex. App.—Houston [14th Dist.] 1984, writ ref d n.r.e.) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967)).

Arbitral authority holds such an exalted place in our jurisprudence that the United States Supreme Court has repeatedly addressed it and recently confirmed that, when an issue is subject to arbitration, a court has ***no power*** to decide that issue and must defer to the arbitrators. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019). Indeed, "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims."

AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986). Texas courts have echoed this sentiment. *See, e.g., Feldman/Matz Interests, L.L.P. v. Settlement Cap. Corp.*, 140 S.W.3d 879, 885–87 (Tex. App.—Houston [14th Dist.] 2004, no pet.) ("[T]he injunctive relief [the plaintiff] seeks would require the court to consider the merits of the underlying dispute, which would interfere with the arbitrator's independent determination of the issues and frustrate the strong federal policy in favor of speedy implementation of arbitration without [30] delay and obstruction in the courts."); *Metra United Escalante, L.P. v. Lynd Co.*, 158 S.W.3d 535, 539–40 (Tex. App.—San Antonio 2004, no pet.) ("We therefore follow the general rule applied by federal courts in Texas and conclude that the issuance of a preliminary injunction is not appropriate when the underlying claims are subject to arbitration under the FAA."). By entering the declaratory judgment, the trial court improperly interfered with the Arbitration.

B. The Release's effect on the Arbitration claims is a matter for the Tribunal, not the Court.

In asserting that the Settlement Agreement's Release applies to claims under the SPSA, the Astra Respondents are raising an affirmative defense to those claims' merits. Under the SPSA's arbitration agreement, that defense must be decided in the Arbitration. The trial court erred in purporting to decide that issue. This Court's review is needed to ensure that Texas

courts do not interfere with merits decisions that are committed to arbitrators.

Under the SPSA's arbitration clause, all disputes arising from or related to the SPSA—including disputes related to the clause's validity or effect—must be resolved by binding arbitration. (CR:7895 (App. Tab K).) Affirmative defenses are part of a claim's merits, and therefore they must be decided by the Tribunal. *See In re Jindal Saw Ltd.*, 264 S.W.3d 755, 764 (Tex. App.—[31] Houston [1st Dist.] 2008, orig. proceeding) ("Those defenses that go to the merits of the lawsuit would be determined by the arbitrator."); *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1109 (11th Cir. 2004) ("Arbitrators . . . are empowered, absent an agreement to the contrary, to resolve disputes over whether a particular claim may be successfully litigated anywhere at all (due to concerns such as statute of limitations, laches, justiciability, etc.), or has any substantive merit whatsoever."). Release is an affirmative defense. *See*, *e.g.*, *Williams v. Glash*, 789 S.W.2d 261, 264 (Tex. 1990) (noting that release is an affirmative defense); TEX. R. CIV. P. 94 (listing release as an affirmative defense). The trial court therefore had no power to usurp the Tribunal's jurisdiction by deciding the Release's effect on the Arbitration claims. *See McCollum*, 666 S.W.2d at 609 ("The merits of an arbitrable dispute are for the arbitrator to decide.").

In rejecting Petrobras's argument about the declaratory judgment, the appellate court found that Petrobras's cases are "distinguishable procedurally and factually." 2020 WL 4873226, at *18 (App. Tab A).

But those distinctions, *id.* at *18 n.31, ignore the fundamental principle underlying the cases—courts are powerless to decide issues delegated to arbitrators. Whether [32] that principle arises in connection with a motion to compel arbitration or a request for declaratory or injunctive relief is irrelevant.

The lack of procedurally analogous authority likely arises from no court adopting an approach like the court of appeals. Under that approach, a party can nullify an arbitration agreement by asking a court for a declaratory judgment on claims already pending in an arbitration. This would conflict with the United States Supreme Court's repeated instruction that courts cannot reach the merits of issues subject to arbitration and must defer to the arbitrators. *See Henry Schein*, 139 S. Ct. at 529. The Court should grant the petition, clarify that courts cannot decide issues that are subject to arbitration, and reverse the trial court's declaratory judgment.

C. Any argument that the SPSA's arbitration clause has been superseded fails.

The Astra Respondents have argued that the declaratory judgment was proper because the Settlement Agreement superseded the SPSA's arbitration clause. But there are four fundamental problems with this argument: (1) because the parties expressly delegated arbitrability to the Tribunal, the trial court had no power to decide that issue; (2) the Tribunal determined that the SPSA's arbitration clause was *not* superseded;

(3) the arbitration clause was not superseded under Texas law; and (4) even if the clause were [33] superseded, the Arbitration claims still must be resolved by the Tribunal, not the trial court.

(1) The trial court had no power to decide whether the SPSA's arbitration clause has been superseded.

As the United States Supreme Court has noted, "a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability.'" *Howsam v. Dean Witter Reynolds, Inc*., 537 U.S. 79, 84 (2002). Parties may agree to arbitrate gateway issues of arbitrability. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). And when they do so, the "court possesses no power to decide the arbitrability issue." *Henry Schein*, 139 S. Ct. at 529.

An agreement granting an arbitrator exclusive authority "to resolve any dispute relating to the interpretation, applicability, enforceability or formation of [the] agreement" is an unambiguous and proper delegation of authority under the Federal Arbitration Act. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 66, 75–76 (2010). And when an agreement has a broad-form clause submitting to arbitration "all disputes, claims, or controversies arising from or relating to" the agreement, a court must defer threshold questions of arbitrability to the arbitrator. *Pedcor Mgmt. Co. Welfare Benefit Plan v. Nations Pers. of Tex., Inc*., 343 F.3d 355, 359 (5th Cir. 2003).

[34] Courts have also held that incorporating the AAA rules into an arbitration clause is a clear and unmistakable agreement to delegate gateway issues to the arbitrator. *See Schlumberger Tech. Corp. v. Baker Hughes Inc.*, 355 S.W.3d 791, 802 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012) (holding that when the parties adopted the AAA Rules, they "unmistakably" granted to the arbitrator the authority to decide arbitrability).

Further, whether an arbitration clause has been superseded by another agreement is itself an arbitrability question. *See*, *e.g.*, *Agere Sys., Inc. v. Samsung Elecs. Co.*, 560 F.3d 337, 340–41 (5th Cir. 2009) (determining that the arbitrator should determine whether an arbitration clause—which delegated arbitrability issues to the arbitrators—was superseded by a later settlement agreement); *TAPCO Underwriters, Inc. v. Catalina London Ltd.*, No. 14-CV-8434 JSR, 2014 WL 7228711, at *2 (S.D.N.Y. Dec. 8, 2014) ("Whether the forum-selection clause . . . supersedes the arbitration clauses in the earlier agreements presents a question of arbitrability."); *cf. Zandford v. Prudential-Bache Sec., Inc.*, 112 F.3d 723, 727 (4th Cir. 1997) ("When a party seeking to avoid arbitration contends that the clause providing for arbitration has been [35] superseded by some other agreement, 'the presumptions favoring arbitrability must be negated expressly or by clear implication.' ").

Here, the SPSA's arbitration clause clearly and unmistakably provides that arbitrability must be

decided by the Tribunal. The SPSA requires arbitration of any claim or controversy arising out of or related to "any question of validity or effect of this Agreement including this clause." (CR:7895–96 (App. Tab K).) It also requires arbitration of any controversy or claim "arising out of or related to" the SPSA. (*Id.*) It also requires arbitration of any claim arising out of or related to "any amendments" of the SPSA.[7] (*Id.*) Finally, the SPSA delegates arbitrability to the Tribunal by expressly incorporating the AAA rules.

In the court of appeals, the Astra Respondents tried to argue that courts are empowered to consider the arbitration clause's ***validity***. But the Astra Respondents cannot obtain a judicial determination of invalidity because that is not a contract-*formation* issue. As the Fifth Circuit recently explained:

> The two-step framework for analyzing enforcement of arbitration agreements is well established: (1) "whether the parties entered into any arbitration agreement at all," and (2) "whether this claim is covered by the arbitration agreement." . . . The "first step ***is a*** [36] ***question of contract formation only***—did the parties form a valid agreement to arbitrate some set of claims."

Richland Equip. Co., Inc. v. Deere & Co., 745 F. App'x 521, 523–24 (5th Cir. 2018) (citations omitted)

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[7] The argument that the Settlement Agreement supersedes the SPSA's arbitration clause is an argument that the Settlement Agreement is an amendment of the SPSA, which confirms that the Tribunal must resolve the argument.

(emphasis added); *see also Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 202 (5th Cir. 2016) (stating that the first step is "an analysis of contract *formation*" (emphasis added)). In conducting the first step, courts "distinguish between 'validity' or 'enforceability' challenges and 'formation' or 'existence' challenges." *Arnold v. Homeaway, Inc.*, 890 F.3d 546, 550 (5th Cir. 2018) (citing *Rent-A-Center*, 561 U.S. at 70 n.2; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1, (2006)). The validity-formation distinction aligns with the Federal Arbitration Act,[8] under which "a court may consider only issues relating to ***the making and performance*** of the agreement to arbitrate." *In re Morgan Stanley & Co.*, 293 S.W.3d 182, 184–85 (Tex. 2009) (citing 9 U.S.C. § 4).

The United States Supreme Court has indicated that formation issues include "whether the alleged obligor ever signed the contract, whether the signor lacked authority to commit the alleged principal, and whether the signor lacked the mental capacity to assent." *Arnold*, 890 F.3d at 550 (quoting *Buckeye Check Cashing*, 546 U.S. at 444 n.1). This Court agrees. *See RSL Funding, LLC v. Newsome*, 569 S.W.3d 116, 124 (Tex. 2018) ("Contract formation defenses—such as whether a party ever signed a contract, whether a

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[8] The parties agree that the Federal Arbitration Act applies to and governs the SPSA's arbitration clause. (*See* CR:509 (Astra Respondents stating that "[t]here is no dispute that the 2006 SPA is a contract involving interstate commerce, and that the Federal Arbitration Act (the 'FAA') therefore governs."); CR:8860 (Astra Respondents stating that "the Federal Arbitration Act . . . governs this matter").)

signor had authority to bind a principal, or whether the signor had capacity to assent—are thus threshold issues to be decided by the court."). Here, there is no dispute that the parties entered into the SPSA and agreed to be bound by its arbitration clause. Invalidity is irrelevant to contract formation, and the trial court cannot consider it—only the Tribunal can.

If the Astra Respondents' cases cited before the court of appeals stand for a contrary rule,[9] they conflict with this Court's recent decision in *RSL*, which emphasizes that courts may consider only challenges to contract *formation*. 569 [38] S.W.3d at 124. Moreover, "the Federal Arbitration Act preempts any state law that would interfere with parties' freedom to contract to arbitrate their disputes." *Id.* at 122. By arguing that Texas law allows the trial court to determine arbitrability, even though the SPSA has delegated that issue to the Tribunal, the Astra Respondents "misunderstand[] arbitration and the preemptive effect of the Federal Arbitration Act." *Id.*

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[9] Many of the Astra Respondents' cases are distinguishable because they do not address the parties' ability to delegate arbitrability to the arbitrators. *E.g.*, *TransCore Holdings, Inc. v. Rayner*, 104 S.W.3d 317 (Tex. App.—Dallas 2003, pet. denied). Indeed, before determining whether a settlement agreement extinguished an arbitration agreement, the court in *Duarte v. Mayamax Rehabilitation Services, L.L.P.* noted the parties' ability to delegate the issue to the arbitrators: "[u]nder the FAA, ***absent unmistakable evidence that the parties intended the contrary***, it is the courts rather than arbitrators that must decide 'gateway matters' such as whether a valid arbitration agreement exists." 527 S.W.3d 249, 258 (Tex. App.—El Paso 2016, pet. denied) (emphasis added).

Because the SPSA delegates arbitrability to the Tribunal, and whether the arbitration clause has been superseded is an arbitrability question, the trial court lacked power to decide whether the Settlement Agreement superseded the SPSA's arbitration clause. *Henry Schein*, 139 S. Ct. at 529. That question should have been left to the Tribunal.

(2) The Tribunal determined that the Arbitration claims were arbitrable.

Having been empowered to decide arbitrability, the Tribunal resolved that issue against the Astra Respondents. (CR:7986–8004.) In the Arbitration, the Astra Respondents argued "that the arbitration provision under which the case was brought has been revoked and superseded by [the] Settlement Agreement between the Parties and that the Tribunal accordingly lacked jurisdiction to adjudicate the dispute." (CR:7989.) The parties briefed the issue extensively (CR:7993–97), and a unanimous Tribunal (including the [39] Astra Respondents' party-appointed arbitrator) determined that the Arbitration claims were arbitrable (CR:8002).

The Tribunal's decision is unassailable. *See AT&T Techs.*, 475 U.S. at 649–50; *see also Porter & Clements, L.L.P. y. Stone*, 935 S.W.2d 217, 221 (Tex. App.—Houston [1st Dist.] 1996, no writ) ("An arbitrator's award has the same effect as a judgment of a court of last resort, and the trial court may not substitute its judgment for the arbitrator's merely because it would have

reached a different conclusion."). Thus, the trial court could not reach a contrary conclusion about whether the Arbitration claims were arbitrable.[10]

(3) The SPSA's arbitration clause has not been superseded.

(a) No clear or unequivocal language revokes the right to arbitrate claims arising from the SPSA.

Texas courts require a "clearly expressed intent" or "unequivocal terms" to revoke or supersede an arbitration clause. *See Valerus Compression Serys., LP y. Austin*, 417 S.W.3d 202, 210 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *In re Kraft Foods N. Am., Inc.*, No. 01-02-01228-CV, 2003 WL 21197274, [40] at *7 (Tex. App.—Houston [1st Dist.] May 22, 2003, orig. proceeding) ("The absence of a clearly expressed intent in the August 28 letter to revoke the arbitration clause is paramount."); *In re Winter Park Constr., Inc.*, 30 S.W.3d 576, 578 (Tex. App.—Texarkana 2000, orig. proceeding) (holding that a forum selection clause does not "supersede or obviate an arbitration provision" unless it "specifically excludes arbitration"); *see also Personal Sec. &*

[10] Even if the trial court could determine arbitrability, it also decided the issue against the Astra Respondents. By refusing to stay the Arbitration in October 2016, the trial court rejected the Astra Respondents' argument that the arbitration clause has been superseded. Not only did the Astra Respondents fail to appeal the denial of their Motion to Stay, the trial court later declined the Astra Respondent's request to reconsider its ruling. (CR:9024–25.) The Astra Respondents also failed to appeal the denial of their reconsideration request.

Safety Sys., Inc. v. Motorola Inc., 297 F.3d 388, 395–96 & n.11 (5th Cir. 2002) (determining that a forum-selection clause nullifies an arbitration clause only if it specifically precludes arbitration).

Texas law favors arbitration and requires courts to resolve all doubts in favor of arbitration. *See Valero Energy Corp. v. Teco Pipeline Co.*, 2 S.W.3d 576, 590 (Tex. App.—Houston [14th Dist.] 1999, no pet.). As this Court recently reiterated, "[t]he presumption in favor of arbitration is so compelling that a court should not deny arbitration *unless it can be said with positive assurance* that an arbitration clause is *not* susceptible of an interpretation which would cover the dispute at issue." *Henry v. Cash Biz, LP*, 551 S.W.3d 111, 115 (Tex. 2018) (citations omitted).

The Fourteenth Court of Appeals' decision in *Valero Energy* shows why the Settlement Agreement did not revoke or supersede the SPSA's arbitration [41] clause. There, Teco argued that a merger clause and a forum-selection clause in a later settlement agreement reflected the clear and unequivocal evidence necessary to revoke arbitration clauses in earlier contracts. 2 S.W.3d at 587. The court disagreed, reasoning that (1) by referencing the "Agreement," the forum-selection clause in the settlement agreement applied only to disputes arising out of the settlement agreement itself, not the earlier contracts; (2) even if the settlement agreement modified some terms of the earlier contracts, these terms—unlike the earlier arbitration clauses—were expressly discussed in the settlement agreement; and (3) there was "nothing to indicate that

all the terms of the previous agreements have been superseded by the Settlement Agreement." *Id.* Accordingly, the court held that the settlement agreement did not revoke the arbitration clauses in the earlier contracts. *Id.*

The same is true here. First, the Settlement Agreement's forum-selection clause applies only to the Settlement Agreement; it does not apply to the SPSA. (CR:1644 (noting that Texas courts "are the exclusive forums for any disputes ***arising out of or related to this Settlement Agreement***").) Second, the Settlement Agreement does not specifically discuss the SPSA's arbitration clause. Third, the Settlement Agreement does not state that the SPSA's arbitration clause has been superseded. If the Astra Respondents wanted to [42] revoke or supersede the right to arbitrate disputes arising out of or relating to the SPSA, they could have included express language in the Settlement Agreement doing so, but they did not. And without clear and unequivocal language revoking the SPSA's arbitration provision, the Settlement Agreement does not affect the Tribunal's jurisdiction.

The Astra Respondents' argument that the Settlement Agreement's merger clause revokes the SPSA's arbitration clause similarly fails. Both the United States Supreme Court and this Court have found that, to avoid an arbitration agreement in the trial court, a party's attack must relate specifically to the arbitration agreement itself, rather than the contract as a whole. *See Prima Paint Corp.*, 388 U.S. at 404; *Forest Oil*, 268 S.W.3d at 56. When a claim "attacks the

broader contract, then the arbitrator, not a court, considers the matter." *Forest Oil*, 268 S.W.3d at 56 n.13. The Settlement Agreement's merger clause relates the SPSA as a whole, not just its arbitration clause. (CR:1612 (referring to "prior written or oral agreements" but not specifically identifying the SPSA's arbitration clause).) Thus, the Settlement Agreement's merger clause cannot support a determination that the SPSA's arbitration clause was superseded.

(b) The Settlement Agreement and the SPSA can be harmonized.

Texas courts seek to harmonize an earlier contract with a later one. *See Valerus Compression Servs.*, 417 S.W.3d at 210 ("The mere presence of venue and merger provisions does not invalidate an arbitration agreement when the provisions can be harmonized with the agreement to arbitrate."); *Coody Custom Homes, LLC v. Howe*, No. 10-06-00098-CV, 2007 WL 1374136, at *1–2 (Tex. App.—Waco May 9, 2007, no pet.) (harmonizing venue clause in settlement agreement allowing enforcement "by any court of competent jurisdiction in McLennan County, Texas," because it did not exclude arbitration and instead established venue if the "court's involvement is necessary in the event arbitration is waived or for proceedings consistent with the enforcement of the arbitration clause"); *New Concept Constr. Co. v. Kirbyville Consol. Indep. Sch. Dist.*, 119 S.W.3d 468, 470–71 (Tex. App.—Beaumont 2003, pet. denied) (similar).

The SPSA's and the Settlement Agreement's express language shows that they can be harmonized and do not conflict. The forum-selection clause does not provide the trial court with exclusive jurisdiction over claims related to the SPSA. It provides that courts "are the exclusive forums for any disputes ***arising out of or related to this Settlement Agreement***." This does not conflict [44] with the SPSA's grant of authority to the Tribunal to decide "[a]ny controversy or claim . . . arising out of or relating to [the SPSA]." (CR: 7895 (App. Tab K).) The SPSA and the Settlement Agreement are separate obligations. The SPSA's arbitration clause covers disputes related to the former and the Settlement Agreement's forum-selection clause covers disputes related to the latter. There is no conflict.

(4) Even if the SPSA's arbitration clause has been superseded, the claims in the Arbitration still must be arbitrated.

The trial court's declaratory judgment about the Release's effect is erroneous for a third, independent reason. "The Supreme Court has . . . held expressly that an arbitration agreement contained in a contract does not terminate merely because the contract has terminated." *Rive v. Briggs of Cancun, Inc.*, 82 F. App'x 359, 363 (5th Cir. 2003) (citing *Nolde Bros. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243, 249–55 (1977)). To hold otherwise "would preclude the entry of a post-contract arbitration order even when the dispute arose during the life of the contract but arbitration proceedings had not begun before

termination." *Nolde Bros.*, 430 U.S. at 251. Thus, "a dispute should still be referred to arbitration pursuant to an expired arbitration agreement if it falls within the scope of the agreement." *Richland* [45] *Equip. Co. v. Deere & Co.*, No. 5:17-CV-88-KS-MTP, 2017 WL 4707459, at *1 (S.D. Miss. Oct. 19, 2017), *aff'd*, 745 F. App'x 521, 524 (5th Cir. 2018).

Even if the Settlement Agreement superseded the SPSA's arbitration clause, it would do so only as to claims arising *after* the arbitration clause was superseded. *See Cooper Indus., LLC v. Pepsi-Cola Metro. Bottling Co.*, 475 S.W.3d 436, 447 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (holding that termination of the agreement containing the arbitration clause " [did] not affect the obligation to arbitrate" disputes related to conduct before the termination agreement was signed); *see also Richland Equip. Co. v. Deere & Co.*, 745 F. App'x 521, 524 (5th Cir. 2018) (holding that, where a contract requiring arbitration terminated *after* the dispute arose, that dispute was still "subject to a valid and enforceable arbitration agreement"). The United States Supreme Court has likewise held that "the parties' obligations under their arbitration clause survive[ ] contract termination when the dispute [is] over an obligation arguably created by the expired agreement." *Nolde Bros.*, 430 U.S. at 252.

This fundamental principle is fatal to the Astra Respondents' declaratory judgment about the Arbitration. All the Arbitration claims arose before the Settlement Agreement was signed in June 2012, and thus the Settlement Agreement "does not affect the

obligation to arbitrate [those claims]." *Cooper* [46] *Indus.*, 475 S.W.3d at 447. As a result, the Court should vacate the declaratory judgment because, even if the Settlement Agreement superseded the SPSA's arbitration clause, it could only do so as to claims arising after the Settlement Agreement's execution in June 2012.[11]

CONCLUSION AND PRAYER

The Court should grant the cross-petition for review, reverse the grant of summary judgment based on the Reliance Disclaimer and the Release, and vacate the declaratory judgment that the Release bars the Arbitration claims.

Respectfully submitted,

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[11] Additionally, even if the trial court could determine the Release's effect on the Arbitration claims, it erred in determining that the Release bars those claims because the Release is unenforceable for the same reasons as the Reliance Disclaimer. *Allen v. Devon Energy Holdings, L.L.C.*, 367 S.W.3d 355, 368 (Tex. App.—Houston [1st Dist.] 2012, pet. granted, judgm't vacated w.r.m.) ("[A] contractual release may be avoided by proof that it was fraudulently induced." (citing *Italian Cowboy*, 341 S.W.3d at 331 and *Schlumberger*, 959 S.W.2d at 178)).

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App. 59

No. 20-0932

IN THE SUPREME COURT OF TEXAS

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

PETITIONERS/CROSS-RESPONDENTS,

V.

PETROBRAS AMERICA, INC., ET AL.,

RESPONDENTS/CROSS-PETITIONERS.

On Petition for Review from the Court of Appeals for the Fourteenth District of Texas at Houston
Case No. 14-18-00798-CV

Cross-Respondents' Response Brief On The Merits

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[i] TABLE OF CONTENTS

[v] TABLE OF AUTHORITIES

Cases

[1] INTRODUCTION

On June 29, 2012, Cross-Petitioners Petróleo Brasiliero S.A.-Petrobras and Petrobras America, Inc. (collectively, with related companies, "**Petrobras**") and Appellees Astra Oil Trading NV, Astra Oil Company, LLC (collectively, with related companies, "**Astra**"), entered into a Settlement Agreement and Mutual General Release (the "**Settlement Agreement**").[1] (App.D; 3CR1598-1633)[2] This $820.5 million Settlement Agreement was extensively negotiated by sophisticated parties, who were represented by counsel and were seeking to achieve a full, final, once-and-for-all settlement of all possible claims between them.

The Settlement Agreement contains mutual general releases extinguishing all claims that Astra or Petrobras might have against each other. (App.D; 3CR1608-09) These releases specifically include any [2] claims relating to the parties' original transaction, a 2006 Stock Purchase and Sale Agreement involving

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[1] This Brief only discusses those aspects of the case that are relevant to the Cross-Petition and does not address issues related to Astra's Petition.

[2] References to the Clerk's Record give the volume number followed by the "CR" abbreviation and the specific page number(s), *e.g.*, "(1CR45-46)." References to the reporters' record are to "RR," followed by the specific page number(s). References to the Cross-Petitioners' Brief on the Merits are to "PB," followed by the page number(s), *e.g.*, "(PB,pp.23-25)."

a Texas refinery venture (the "**2006 SPA**"). (App.D; 3CR1609) The Settlement Agreement also contains a mutual disclaimer of reliance (App.D; 3CR1611-12), and a forum-selection clause giving Texas courts the exclusive right to determine any dispute "arising out of or relating to" the Settlement Agreement. (App.D; 3CR1611)

Petrobras invoked this exclusive forum-selection clause when it filed this action seeking to void the Settlement Agreement, alleging that it had been procured by affirmative misrepresentations and related nondisclosures by Astra. (1CR21-42) In addition, about the same time, Petrobras also began an arbitration (the "**Arbitration**") against two Astra entities (who were parties to the Settlement Agreement and defendants in this action), asserting claims arising out of the parties' 2006 SPA.

After granting summary judgment for Astra, the District Court entered a Final Judgment on June 12, 2018 (the "**Final Judgment**"). (App.A; 14CR7686-90) Among other things, the Final Judgment: (a) dismissed the fraud claims based on the disclaimer of reliance; and (b) [3] declared that the Settlement Agreement and the release given by Petrobras to Astra (the "**Release**") were valid and enforceable and barred the claims in the Arbitration. (16CR9032-35)

On appeal, the Court of Appeals upheld the enforcement of the disclaimer, finding that all six of the *Schlumberger* factors favored the disclaimer's

enforcement.[3] (*See* August 20, 2020 Memorandum Opinion (the "**Opinion**") (App.B,pp.18-30)) The Court of Appeals also held that the disclaimer covered all of the affirmative misrepresentations and nondisclosures alleged by Petrobras. (App.B,pp.28-29) In addition, the Court of Appeals upheld the Final Judgment's declaration that the Release was valid and barred the claims in the Arbitration. (App.B,pp.33-38)

Petrobras' Cross-Petition for Review and Brief on the Merits raise five issues. Four of those issues relate to the disclaimer. Petrobras first contends that even if the disclaimer is enforceable it does not apply here because Petrobras has asserted a pure non-disclosure claim. This argument misrepresents the record. Petrobras has alleged both [4] affirmative misrepresentations and related non-disclosures, and the Court of Appeals' decision that the disclaimer covered these nondisclosures was squarely within the holding in *Schlumberger*.

Petrobras then contends that the disclaimer is not enforceable because the Court of Appeals incorrectly applied two of the six *Schlumberger* factors: (1) did the parties discuss the "issue" that has become the "topic of the subsequent dispute;" and (2) was this an "arm's length" transaction. In fact, the Court of Appeals correctly applied these factors in accordance with settled and uniform precedent.

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[3] *See generally Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997).

Petrobras' last argument on the enforceability of the disclaimer is that the Court of Appeals erred by not creating a new public policy exception to the *Schlumberger* doctrine. The Court of Appeals rejected this invitation, holding that it would not serve the policies of the *Schlumberger* doctrine to do so.

Petrobras' final ground for appeal is that the District Court's declaratory judgment that the Release was valid and barred the claims in the Arbitration constituted improper interference with the Arbitration Tribunal's jurisdiction. This argument is a complete "about-face" by Petrobras, belatedly asserted in an effort to salvage its claims in the [5] Arbitration in the face of the District Court's ruling that they were barred.

Originally, Petrobras affirmatively asserted that the Settlement Agreement's forum-selection clause gave the District Court exclusive jurisdiction to determine the validity and effect of the Settlement Agreement and its Release. Thus, when Astra moved for summary judgment requesting this declaration, Petrobras did not object that such declaration would infringe on the Tribunal's jurisdiction. It was only *after* the District Court ruled that the Release was valid and barred the claims in the Arbitration that Petrobras for the first time argued that this declaratory relief would constitute interference with the Tribunal's jurisdiction.

Petrobras' interference claim fails for two reasons. First, there was no interference of any sort in the

Arbitration proceedings. The exclusive forum-selection provision specifically authorized the District Court to decide any issues relating to the validity and *effect* of the Release. That is all the District Court did here by issuing its declaratory relief. Second, and in any event, no action by the District court could constitute interference with any alleged arbitral jurisdiction. The Settlement [6] Agreement revoked the arbitration provisions of the 2006 SPA. The result was that there was no longer any agreement to arbitrate. No action by the District Court could interfere with arbitral authority that did not exist.

STATEMENT OF FACTS

A. The 2006 SPA transaction and the ensuing disputes

Pursuant to the 2006 SPA, Petrobras purchased from Astra a 50% interest in a refinery located in Pasadena, Texas and a partnership that provided feedstock to the refinery and traded its products. (1CR564-613)

Soon thereafter, substantial disagreements arose between the joint venture parties, leading to an April 2009 arbitration award in Astra's favor for approximately $640 million (the "**Award**"). (2CR669-686; 1CR485-487) The Award directed Astra to transfer its remaining ownership interest in the refinery venture to Petrobras and required Petrobras to simultaneously make payment for that interest. (4CR2041-42)

On April 27, 2009, pursuant to the Award, Astra transferred its 50% interest to Petrobras, making Petrobras the 100% owner of the [7] refinery entities.[4] (4CR2041-42) Astra then ceased to be a partner and co-shareholder with Petrobras in the refinery joint venture. (4CR2041-42)

Petrobras accepted Astra's transfer of its interest, but refused to pay anything due under the Award. (4CR2042) This led to litigation over the Award, and eventually a number of other disputes involving various Astra and Petrobras entities relating to other agreements and obligations. (4CR2042) When the parties settled in 2012, Astra had judgments against Petrobras exceeding $750 million, with approximately $380 million in additional claims pending, and Petrobras' total exposure was over $1.1 billion. (4CR2042-44)

B. The parties discuss a once-and-for-all settlement

In October 2011, Astra's CEO Mike Winget ("**Winget**") met with two Petrobras executives, Rogerio Mattos ("**Mattos**") and Reinaldo Rodrigues, regarding a potential settlement. (3CR1713) Winget and Mattos specifically discussed the parties' mutual desire for a complete, [8] clean break and the need for a

[4] The Court can take judicial notice of the facts surrounding the Award as detailed in a 2012 decision of the Houston Court of Appeals. *See Petrobras Am., Inc. v. Astra Oil Trading, N.V.*, No. 01-11-00073-CV, 2012 WL 1068311, at *7-9 (Tex. App.—Houston [1st Dist.], March 29, 2012) (noting that "Astra timely transferred its ownership interests to Petrobras on April 27, 2009.").

comprehensive and final settlement. (7CR3695) Winget testified without contradiction that Petrobras representatives agreed that both sides' objective was "We never want to see you guys ever again; you don't want to see us again" and "no matter what happened in the past . . . no more litigation." (7CR3695)

C. The 2012 Settlement Agreement

On December 7, 2011, Petrobras' counsel delivered to Astra's counsel the first draft of a proposed settlement agreement. (3CR1635-60) Multiple, extensive drafts were exchanged until the settlement was executed on June 29, 2012. (4CR2044-45)

Astra was advised throughout the settlement negotiations by its attorneys from K&L Gates LLP, and Petrobras was advised by its lawyers at Thompson & Knight LLP. (4CR2044) These lawyers had intimate familiarity with the parties' past dealings and disputes because they had represented the parties in connection with all of those disputes. (4CR2044)

Petrobras' counsel prepared and circulated the first draft of the Settlement Agreement. (3CR1635-60; 4CR2044) Reflecting the discussions between the parties' representatives, and their desire for a [9] clean break, putting behind them all their prior agreements, the first draft of the Settlement Agreement contained the following merger provision, which remained unchanged and appears in the Settlement Agreement as executed:

> This Settlement Agreement, together with the Common Interest Agreement, and the exhibits, schedules and appendices attached hereto, **represent the entire agreement** of the Parties and **supersede all prior written or oral agreements**, and the terms are contractual and not mere recitals.

(App.D; 3CR1612)(emphasis added)

1. Petrobras' counsel drafts mutual general releases, the disclaimer, and the exclusive forum-selection clause

The original draft of the Settlement Agreement prepared by Petrobras' counsel included the three Settlement Agreement provisions that Petrobras now seeks to avoid honoring: the mutual general releases; the mutual disclaimer; and the exclusive forum-selection clause. (3CR1642; 3CR1644-45; 3CR1644)

a. The mutual general releases

As originally drafted, the mutual general releases were extremely comprehensive. (3CR1641-43) They encompassed any claims relating to any of the parties' pre-settlement dealings. (3CR1641-43) More [10] specifically, the initial drafts covered "any and all claims, demands, and causes of action of whatever kind or character" arising out of acts prior to the settlement, based on "any acts or omissions, whether known or unknown." (3CR1641-42)

For purposes of illustration, the mutual releases listed various nonexclusive categories of claims being extinguished. One such category was "any claim growing out of, or connected in any way with, the Petrobras Parties' dealings with the Astra Parties." (3CR1641-42) The Petrobras draft also specifically referenced any claims arising out of any activities alleged to "violate any laws . . . of the United States, or . . . any foreign country . . . " (3CR1641-42)

After receiving this draft, Astra's counsel suggested as another illustrative category "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." (4CR2044; 3CR1674) This category of claim was already covered by the broad terms of the release, but the proposed [11] revision made it explicit. Petrobras accepted this suggestion and put it in its next draft. (4CR2044-45; 3CR1706)[5]

Section 5.11 of the Settlement Agreement, as finally executed, contains the Release, and reads, in pertinent part, as follows:

> [T]he Petrobras Parties generally release . . . all claims, demands, and causes of action of

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[5] Petrobras has stated that "Astra requested that the Settlement Agreement include a reliance disclaimer." (PB,p.27) That is incorrect. Astra's request was to add an explicit reference to the 2006 SPA in the mutual releases. The record cites given by Petrobras refer to the release, not the disclaimer. (*See* PB,p.27, *citing* CR4016)

> whatever kind or character . . . based on any acts or omissions, whether known or unknown, that have occurred on or before the Effective Date, including, without limitation: . . . (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; . . . (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 . . . of the United States . . . or any foreign country . . . (collectively, the "Petrobras Claims"). This release is to be construed as the broadest type of general release. . . .
>
> (App.D; 3CR1609)(emphasis added)

[12] **b. The mutual disclaimer of reliance**

Section 5.29 of the Settlement Agreement contains the mutual disclaimer of reliance, as originally drafted by Petrobras' counsel. (App.D; 3CR1640; 3CR1644-45) This disclaimer language is virtually identical to that enforced by this Court in *Schlumberger*. (App.D; 3CR1612)

In the disclaimer, each party represents that it is "not relying upon any statement or representation of any agent of the opposing parties being released," is "relying on its own judgment" and has had the "legal

consequences" of the disclaimer explained to it by counsel:

> [13] **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 THE SETTLEMENT AGREEMENT IN FULL, AS WELL AS THE LEGAL CONSEQUENCES OF IT.**
>
> (App.A; 3CR1612)(bold font and capitalization in original)

c. The exclusive forum-selection clause

Section 5.20 of the Settlement Agreement contains the exclusive forum-selection clause, again as originally drafted by Petrobras. (App.D; 3CR1644) The forum-selection clause provides, in relevant part, that the [14] Texas courts would be the "exclusive forums for any dispute arising out of or related to this Settlement Agreement:"

> The Parties agree (a) that the state courts of Harris County, Texas, and the United States District Court for the Southern District of Texas, Houston Division (collectively, **the "Texas Courts"), are the exclusive forums for any dispute arising out of or related to this Settlement Agreement** or the transactions contemplated herein, and (b) that any legal proceeding arising out of or related to such dispute must be filed in one of the Texas Courts. Each of the Parties hereby irrevocably submits to the jurisdiction of the Texas Courts for any legal proceeding arising out of or related to this Agreement or the transactions contemplated herein. The Parties further agree that the Parties shall not bring any suit with respect to any disputes arising out of or related to this Settlement Agreement in any court or jurisdiction other than the Texas Courts.
>
> (App.D; 3CR1611)(emphasis added)

D. Proceedings in the District Court and the Arbitration

Petrobras' original Petition, filed on June 29, 2016 (1CR21-42), sought to invalidate the Settlement Agreement because it was allegedly procured by fraud. The Petition stated that jurisdiction in the District Court was "mandatory" because of the exclusive forum-selection clause. (1 CR28) Petrobras not only accepted the District Court's exclusive jurisdiction to determine the validity and effect of the Release, it [15] affirmatively invoked the exclusive forum-selection clause as the basis for its action. (1CR28; 2CR1155; 5CR2475; 7CR3798) Each of Petrobras' amended Petitions similarly stated that the District Court's jurisdiction was "mandatory." (2CR1155; 5CR2475; 7CR3798)

1. Affirmative misrepresentations and related non-disclosures alleged by Petrobras

In support of its fraud claim, Petrobras alleged both affirmative misrepresentations and related non-disclosures by Astra. More specifically, Petrobras alleged 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, under the circumstances under which they were made, not misleading." (7CR3819-20; 7CR3799)

Petrobras' Petition also incorporated by reference three Astra Witness Statements that discussed the 2006 SPA. (8CR3805-07) Petrobras alleged that these

Witness Statements were misleading because they made "partial disclosures about the negotiation" of the 2006 SPA, while concealing the alleged bribery concerning the 2006 SPA, and "conveying the false impression" that it was a legitimate transaction. (8CR3806)

[16] Petrobras made these same allegations as to affirmative misrepresentations, partial disclosures and related non-disclosures in its briefs submitted in response to Astra's summary judgment motions. (8CR3987-88; 8CR4021-22)

In addition, Petrobras alleged that Astra's request during the settlement negotiations to include in the mutual releases the reference to any claims relating to the 2006 SPA "gave rise to a duty" to disclose the alleged 2006 SPA bribery scheme. (8CR4002)

2. <u>Petrobras' claims in the Arbitration</u>

In July 2016, shortly after it filed this action, Petrobras also initiated the Arbitration. There, Petrobras asserted similar claims arising out of Astra's alleged bribery in connection with the 2006 SPA. (14CR7910-23) Petrobras alleged that these claims were arbitrable pursuant to the arbitration provisions in the 2006 SPA. (14CR7911-12) In the Arbitration, Astra promptly, but unsuccessfully, objected to the Tribunal's jurisdiction, arguing that the 2006 SPA arbitration provisions had been entirely revoked by the Settlement Agreement. (14CR7936-59) The Arbitration went forward over Astra's continued objection, [17] concurrently with

the District Court proceedings. (*See*, *e.g.*, 14CR7805; 14CR7833)[6]

In the Arbitration, all of Petrobras' claims related to the 2006 SPA. (14CR7910-23) Petrobras not only did not assert a claim relating to the Settlement Agreement or Release in the Arbitration (14CR7910-23), it went so far as to expressly disavow any intention to do so. (3CR2027)

3. Astra's counterclaim for a declaratory judgment

Given Petrobras' claims in the Arbitration, Astra filed a counterclaim in this action for a declaratory judgment that the Settlement Agreement was valid and enforceable and that the Release barred all claims relating to 2006 SPA, including those in the Arbitration. (1 CR74)

4. Denial of Astra's early stay motion as premature

Soon after the Arbitration began, and early in this case, Astra sought a stay of the Arbitration from the

[6] Petrobras has denied that this was a strategic choice to obtain a more favorable forum for its 2006 SPA claims and asserted that it had no choice but to bring these claims in the Arbitration because it was supposedly obligated to do so by the arbitration provisions in the 2006 SPA. (*See* 14CR7961-84) That is not correct. Petrobras could always have waived any alleged contractual right to arbitrate, especially when Astra was insisting that the arbitration provisions did not apply and that the claims had to be brought in this action. (*See* 14CR7936-59)

District Court, arguing that the [18] entire arbitration provision in the 2006 SPA had been revoked by the various provisions in the Settlement Agreement, including the exclusive forum-selection clause. (1CR493-518) The stay was denied in October 2016, without any reasons being given. (3CR1531-32) Later, in 2018, however, the District Court explained that this denial was not because it had concluded there was any arbitral jurisdiction, but rather because the District Court believed it was premature to make any determination given the ongoing dispute as to the validity of the entire Settlement Agreement.[7] (RR17-22)

5. Astra obtains summary judgment; no Petrobras argument of interference with arbitral jurisdiction

On November 21, 2017, Astra moved for summary judgment, directed to Petrobras' then live pleading—its Second Amended Petition. (3CR1564-96) Astra sought, among other things: (a) dismissal of the fraud claims based on the disclaimer of reliance; and (b) a declaratory judgment that the Settlement Agreement and Release were valid and [19] enforceable and the

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[7] At an August 17, 2018 hearing, Astra urged the District Court to reconsider the October 2016 stay decision to eliminate any apparent inconsistency between the earlier ruling and the grant of summary judgment declaring that the Release barred the claims in the Arbitration. (RR17-22) The District Court explained that there was no inconsistency and reconsideration was unnecessary because the circumstances had changed (that is, the entire Settlement Agreement, including the provisions relied on by Astra, had been upheld) since the stay was denied. (RR17-22)

Release barred the claims in the Arbitration. (3CR1561-65; 3CR1594-95)

Petrobras opposed the motion on the merits. (8CR3970-4011) Petrobras did *not* argue, however, that the District Court did not have authority to issue this requested declaratory relief because it would interfere with the Tribunal's jurisdiction. (*See* 8CR4005-07; 10CR5038- 58) This was not surprising, given that Petrobras had asserted its own claim for a declaratory judgment as to the parties' rights under the Settlement Agreement. (7CR3813)

On January 11, 2018, the District Court issued its Order (the "**January 11 Order**") granting Astra's summary judgment motion in its entirety, including the declaratory relief sought by Astra. (10CR5158-60)

6. The District Court's rejection of Petrobras' belated interference claim

Shortly after Astra filed its summary judgment motion, Petrobras filed a Third Amended Petition. (7CR3792-827) That petition was essentially identical to the existing petition. (7CR3814)

Because the January 11 Order referred to the Second Amended Petition (10CR5158-60), Astra filed a new summary judgment motion directed to this new pleading. Astra's new motion incorporated by [20] reference all the grounds supporting its original, successful summary judgment motion. (10CR5164-74) At the time this motion was made, Petrobras had still not

challenged the District Court's jurisdiction to issue the declaratory relief requested by Astra.

Petrobras took advantage of this new motion to try to salvage its claims in the Arbitration. In a complete "about-face," Petrobras now opposed the motion by arguing that the District Court did not have the authority to issue the requested declaratory relief. (10CR5247-50) Petrobras asserted that any such declaratory relief would interfere with the Tribunal's alleged jurisdiction. (10CR5247-50)

Astra's reply submission in support of its motion disputed this new argument. (10CR5432-34) Astra explained that the Arbitration Tribunal had no jurisdiction to decide the validity or effect of the Release because the parties had specifically agreed that only the Texas courts would decide any such issues. (10CR5433) Astra also argued that the Settlement Agreement, with its forum-selection clause, revoked any otherwise existing arbitral authority, and there could be no interference with arbitral authority that did not exist. (10CR5432-34)

[21] In its March 9, 2018 Order (the "**March 9 Order**"), the District Court again granted summary judgment to Astra, re-issuing the identical declaratory relief previously granted. (11CR5545-47)[8] In doing so,

[8] The January 11 and March 9 Orders granted summary judgment to all the Astra Defendants (various entities and Individual Defendants associated with Astra). Two of the Individual Defendants whose prior special appearances were denied (Mueller and Burla) later obtained a similar summary judgment order in their favor. (11CR5786-87) Defendant Feilhaber, represented by

the District Court necessarily rejected Petrobras' argument that the issuance of this declaratory relief would interfere with any arbitral jurisdiction.

7. The Final Judgment

The Final Judgment, entered on June 12, 2018, incorporated these summary judgment rulings and (a) rejected the fraud claims based on the disclaimer of reliance, and (b) declared that the Settlement Agreement and Release were valid, binding and enforceable and the Release barred the claims in the Arbitration. (App.A; 14CR7686-90)

SUMMARY OF ARGUMENT

Petrobras makes four arguments in support of its effort to escape the enforcement of the disclaimer that it drafted and included in the Settlement Agreement.

[22] Petrobras first contends that, even if the disclaimer were otherwise enforceable, it does not apply here because this is a pure non-disclosure case, and the disclaimer only explicitly refers to representations and not non-disclosures. This is not a pure non-disclosure case, however. Contrary to its assertion, Petrobras has alleged affirmative misrepresentations accompanied by alleged non-disclosures. The Court of Appeals correctly found that, based on this Court's ruling in

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separate counsel, obtained his own summary judgment rulings consistent with that granted to Astra. (10CR5162- 63; 11CR5497-98)

Schlumberger, these alleged non-disclosures are covered by the disclaimer.

Petrobras next argues that although it has conceded four of the six *Schlumberger* factors favor enforcement of the disclaimer, the disclaimer still should not be enforced because of the two remaining *Schlumberger* factors: (1) did the parties discuss the "issue" that has become the "topic of the subsequent dispute;" and (2) was this an "arm's length" transaction. Although Petrobras contends that there is conflict and confusion in the lower courts as to how these factors are to be interpreted, there is none.

The Court of Appeals correctly held that the "issue" that was the topic of this dispute was the release of any claims relating to the 2006 [23] SPA, and this topic was admittedly discussed during the settlement negotiations. The Court of Appeals also rejected Petrobras' argument that the "arm's length" factor required the adoption of a *per se* rule barring a fiduciary from relying on the *Schlumberger* doctrine. The Court of Appeals properly concluded that a *per se* rule would not serve the policies of the *Schlumberger* doctrine.

Petrobras' last attack on the disclaimer's enforcement is based on its request for the courts to adopt a novel public policy exception to the *Schlumberger* doctrine based on Astra's alleged participation in a 2006 SPA bribery scheme. No case has recognized any such exception. After considering all the Texas public policies sought to be furthered by the *Schlumberger* doctrine, the Court of Appeals rejected this request,

finding that it was not needed to ensure that the policies actually underlying the *Schlumberger* doctrine were served here. In fact, such an exception would undermine the *Schlumberger* doctrine altogether by making it impossible for parties to finally release all known and unknown claims.

Petrobras' final argument is an attack on the District Court's declaratory judgment that the Release was valid and barred the claims [24] in the Arbitration. Petrobras contends that the mere issuance of this declaration constituted improper interference with the Tribunal's jurisdiction. The Court of Appeals correctly rejected this contention and explained that the District Court made its declaration pursuant to the exclusive jurisdiction given to it by the parties in the forum-selection clause.

Although the Court of Appeals did not reach this ground, Petrobras' interference claim is also meritless because the Settlement Agreement revoked the arbitration provisions in the 2006 SPA. Because there was no longer an agreement to arbitrate, there could be no interference with arbitral jurisdiction.

[25] **ARGUMENT**

I. PETROBRAS' FRAUD CLAIMS WERE PROPERLY DISMISSED BASED ON THE RELIANCE DISCLAIMER

The fundamental policy underlying the *Schlumberger* doctrine is that

> Parties **should be able to bargain for and execute a release barring all further dispute**. This principle necessarily contemplates that **parties may disclaim reliance on representations**. And such a disclaimer, where the parties' intent is clear and specific, should be effective to negate a fraudulent inducement claim.

959 S.W.2d at 179 (emphasis added).

Whether or not a disclaimer will be enforced depends upon the "circumstances surrounding [the agreement's] formation," with the courts considering whether, based on "well-established rules of contract interpretation," there was a sufficiently "clear and unequivocal" expression of the intent to disclaim. *Id*.

In *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51 (Tex. 2008), this Court listed the five factors considered in *Schlumberger*:

> [26] (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 [with the disclaimer] language was clear.

Id. at 60.

Forest Oil also recognized a sixth factor, stating that "[a] 'once and for all' settlement may constitute an additional factor" favoring enforcement." 268 S.W.3d at 88.

Not all these factors must be present to enforce a disclaimer. The issue is whether, on balance, "a sufficient number of factors are satisfied to meet the public policy concerns expressed in *Schlumberger* and its progeny," which focus on a party's ability to understand the significance of the disclaimer and the ability to negotiate to alter its terms. *Newman v. Firstmark Credit Union*, No. 03-14-00315-CV, 2015 WL 4998326, at *8 (Tex. App.—Austin Aug. 21, 2015, pet. dism'd); *see also Allen v. Devon Energy Holdings, L.L.C.*, 367 S.W.3d 355, 384 (Tex. App.—Houston [1st Dist.] 2012, pet. granted, judgm't vacated w.r.m.)("unnecessary to satisfy each factor when . . . sufficient number of factors are satisfied to meet the public policy concerns expressed in *Schlumberger* and its progeny").

[27] Here, Petrobras has conceded that four of the factors favor enforcement: the disclaimer is clear and unequivocal; Petrobras is sophisticated and knowledgeable in business matters; Petrobras was represented by counsel (who drafted the disclaimer to protect Petrobras' interests); and this was a global "once and for all" settlement. (*See* App.B,p.22) Further, in the disclaimer, Petrobras represented that "its . . . counsel has . . . explained . . . the legal consequences of this Settlement Agreement." (App.D; 3CR1612)(bold font and all caps from original omitted)

Given these conceded factors, even if the other two factors challenged by Petrobras did not support enforcement, these four factors satisfied the policy considerations favoring enforcement of the disclaimer. Therefore, the decision of the Court of Appeals that the disclaimer was enforceable was correct in any event.

Petrobras nevertheless advances four arguments why the disclaimer should not be enforced here. First, Petrobras argues that even if the disclaimer were otherwise enforceable, it does not apply to Petrobras' claims because they are pure omission claims. Second, Petrobras contends that the parties did not discuss the "topic" of the [28] current dispute and this factor weighs against enforcement. Third, Petrobras contends that there should be a *per se* rule that a disclaimer is not enforceable by a party with an alleged fiduciary duty to disclose. Fourth, Petrobras contends that the disclaimer should not be enforceable under a new "extreme circumstances" public policy exception to *Schlumberger*, invented by Petrobras and never before mentioned, much less approved by any Texas case.

A. The disclaimer covers Petrobras' claims

The disclaimer here, as in *Schlumberger*, disclaims reliance on any "representation," but does not explicitly refer to "non-disclosures." (App.D; 3CR1612) In *Schlumberger*, this Court held that this reference to representations subsumes non-disclosures that are merely the "converse" of covered misrepresentations. 959 S.W.3d at 181-82.

In the Court of Appeals, Petrobras argued, as it does here, that it had only asserted "omission-based" claims. (PB,pp.12-13) The Court of Appeals rejected this contention, summarizing the numerous affirmative misrepresentations alleged by Petrobras, and concluded that the nondisclosure claims here were covered by the disclaimer for the same [29] reasons the non-disclosures in *Schlumberger* were covered. (App.B,pp.28-29)

On appeal, Petrobras continues to misrepresent the record by asserting it has alleged a pure non-disclosure claim.

1. The affirmative misrepresentations and related non-disclosures alleged by Petrobras

Petrobras contends that its "claims stem from omissions, not affirmative misrepresentations" (PB,p.12); "Petrobras is not asserting omissions-based claims as the converse of any affirmative-misrepresentation claims" (PB,p.13); and "Petrobras's claims arise from omissions." (PB,p.12)

The record is to the contrary. Petrobras' Third Amended Petition repeatedly alleges affirmative misrepresentations accompanied by failures to disclose:

> [30] [T]he Defendants **made untrue representations of fact and/or omitted to state facts necessary to correct or make the statements and/or omissions that were made, under the circumstances under**

> **which they were made, not misleading**. The Defendants misrepresented and/or omitted material facts in connection with the Settlement Agreement . . .
>
> The Plaintiffs reasonably relied to their detriment on the omissions, misstatements, and/or misrepresentations made by the Defendants.
>
> (7 CR3819-2 1)(emphasis added)

In addition, the Third Amended Petition incorporates and relies on certain Astra Witness Statements. (7CR3805-07) The Petition alleges that in those Witness Statements Astra representatives made "voluntary or **partial disclosures** about the negotiation of the 2006 SPA, while affirmatively concealing" the alleged 2006 SPA bribery-kickback scheme. (7 CR3806) (emphasis added)

Petrobras' briefing in opposition to Astra's summary judgment motions also repeated these same allegations of affirmative misrepresentations and related non-disclosures. (*See*, *e.g.*, 3CR1323-24; 8CR4021-22; 8CR3987-88)

Petrobras also alleged that Astra's request during the settlement negotiations to include a specific reference to the 2006 SPA in the mutual [31] releases was a misleading "'partial disclosure'" that conveyed a "'false impression'" about the negotiations regarding the 2006 SPA, giving rise to a duty on Astra's part to disclose the alleged bribery scheme. (8CR4002)

This record evidence completely and overwhelmingly refutes Petrobras' assertion that it has asserted a pure non-disclosure claim here.

2. The Court of Appeals' decision was based on well-settled law

The Court of Appeals' decision specifically referred to and relied on Petrobras' alleged misrepresentations and related non-disclosures:

> 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 [the refinery] and their offer to pay between $80 million and $100 million in bribes to 'solve the problem' between the parties and reach a settlement."
>
> (App.B,p.29)(emphasis added)

The Court of Appeals also quoted Petrobras' allegations of "voluntary or partial disclosures" about the negotiation of the 2006 SPA, [32] "while affirmatively concealing" other facts concerning the negotiation of the 2006 SPA:

> The Petrobras Plaintiffs 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."

(App.B,p.29)(emphasis added)

The Court of Appeals was therefore fully justified in holding that: "Under these circumstances, we conclude that *Schlumberger* applies." (App.B,p.29)

Although the Opinion does not explicitly refer to these nondisclosures as the "converse" of the alleged misrepresentations, the conclusion that these non-disclosures were covered by the disclaimer was supported by a citation to pages 181-82 of the *Schlumberger* decision. There, the *Schlumberger* Court explained that the non-disclosures were covered because they were the "converse" of the alleged affirmative misrepresentations. 959 S.W.2d at 181-82.

[33] **3. Even if this were a pure non-disclosure case, the disclaimer would still apply**

Even if Petrobras had alleged a pure non-disclosure claim, it would still be covered by the disclaimer. In *Schlumberger* the Court "agreed" with the defendants' position that "the **language of the disclaimer** of reliance expressly covers claims for both affirmative statements and **non-disclosures** . . . that **are the equivalent of the representations** on which [the plaintiffs] disclaimed reliance." 959 S.W.2d at 181 (emphasis added).

Under Texas law a "representation" includes both an affirmative misrepresentation and a representation by silence when there is a duty to speak. When a person has a duty to speak and deliberately remains silent "his silence is equivalent to a false representation." *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 435 (Tex.1986); *see also Nelson v. Regions Mortg., Inc.*, 170 S.W.3d 858, 862 (Tex. App.—Dallas 2005, no pet.)("Concealment by silence, or fraudulent concealment, is a type of misrepresentation").

Petrobras has not cited a single case holding that a *Schlumberger* form of disclaimer does not cover a pure non-disclosure claim. (*See* PB,p.13) Moreover, the two courts that have considered this issue both [34] concluded that a non-disclosure is subsumed under the term "representation." *See Cronus Offshore, Inc. v. Kerr McGee Oil & Gas Corp.*, 369 F. Supp.2d 848, 859 (E.D. Tex. 2004), *aff'd*, 133 Fed. Appx. 944 (5th Cir. 2005); *Stabilis Fund II, LLC v. Compass Bank*, No. 3:18-CV0283-B, 2020 WL 487497 (N.D. Tex. Jan. 30, 2020).

This conclusion is consistent with the very reason that parties employ these reliance disclaimers: to ensure finality and to preclude after-the-fact claims of fraud. A disclaimer could not achieve that goal if it did not also cover a pure non-disclosure claim.

B. The "topic of the present dispute" was discussed

Petrobras also contends that the Court of Appeals incorrectly interpreted the factor that looks to whether the parties discussed the "issue" that has become the "topic of the present dispute." The Court of Appeals properly held that this factor looks to whether the parties discussed the contract term being enforced in a later dispute. Here, that is the Release. This interpretation is in line with all the cases that have considered the issue and furthers the policies under the *Schlumberger* doctrine.

[35] 1. The Court of Appeals correctly held that this factor looks to whether the Release was a "topic" discussed

Petrobras contends that to satisfy this "topic discussed" factor Astra had to have disclosed the alleged 2006 SPA bribery scheme during the settlement negotiations. (PB,pp.15,20) Petrobras' interpretation of this factor is not only contrary to the holdings in every case to have considered this question, its interpretation would *eliminate* the entire *Schlumberger* doctrine.

The Court of Appeals properly held that the "topic discussed" factor looks to whether the parties discussed the specific contract term being enforced in the subsequent dispute, which here is the Release:

> [36] [W]e do not require that the parties discussed the specific factual basis for the "fraud" concern to meet this . . . factor. **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.
>
> (App. B,pp.24-25) (emphasis added)

The Court of Appeals correctly concluded that the undisputed evidence demonstrated that the parties had discussed the topic of releasing any claims, including those relating to the 2006 SPA. (App.B,p.25) This conclusion was well-supported by the evidence.

Astra's CEO Winget testified, without contradiction, that he and the Petrobras negotiators had agreed "We never want to see you guys ever again; you don't want to see us again" and "no matter what happened in the past . . . no more litigation." (7CR3695) The parties exchanged multiple drafts of the releases during the negotiations, and from the very first draft the parties focused on ensuring that all possible claims were covered. (2CR756) As the Opinion mentions, the affidavit [37] of Petrobras' counsel acknowledged that "the parties, during negotiations, specifically discussed

releasing claims 'related to the 2006 purchase of 50% of PRSI [the refinery].'" (App.B,p.25; 8CR4016)

Thus, the evidence establishes that Petrobras was unquestionably aware that it was disclaiming reliance on any representations or disclosures relating to the release of all claims it might have against Astra, including any claims relating to the 2006 SPA, by virtue of the Release.

2. There is no "split" in the lower courts warranting review

Petrobras also asserts that there is a "split" in the lower courts as to what this factor means. (PB,pp.16-18) There is no such split. Each Court of Appeals that has examined this issue has concluded that this factor simply looks to whether the parties "discussed" the topic or contract term that is the subject of the subsequent dispute.

In *McLernon v. Dynegy*, 347 S.W.3d 315, 331 (Tex. App.—Houston [14th Dist.] 2011, no pet.), the court explained why "the inquiry under this guideline cannot be whether they discussed the [facts forming the basis of the] fraudulent-inducement claim." The court stated: "Axiomatically, if contracting parties discussed a fraudulent-inducement [38] 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. . . ." *Id*. at 331. "The significant point with respect to the *Forest Oil* factors is that McLernon was

aware of [the employer's] specific representations concerning [the agreement's loan repayment term] yet elected to disclaim reliance on those representations." *Id.*

The court in *Leibovitz v. Sequoia Real Estate Holdings, L.P.*, 465 S.W.3d 331, 343 (Tex. App.—Dallas 2015, no pet.) also included an extended discussion of this issue. Leibovitz alleged that Sequoia had fraudulently induced him into signing a settlement agreement by concealing facts concerning Sequoia's comingling of funds and the unprofitable nature of an investment. *Id*. at 341. In the settlement agreement, Leibovitz had agreed to release all claims related to the investments. Like here, Leibovitz claimed the settlement agreement and the release were invalid because Sequoia had not disclosed all facts relevant to the released claims, and therefore the parties had not discussed the "topic of the subsequent dispute." *Id*. at 341. Leibovitz [39] argued that the "topic" was the underlying facts regarding the comingling of funds and unprofitable nature of the investment. *Id*. at 344.

Rejecting this interpretation, the court explained that:

> Under appellants' interpretation, then, "the issue which has become the topic of the subsequent dispute" is the factual basis of the subsequent fraudulent inducement claim. We disagree. Under *Forest Oil Corp.*, **"the topic of the subsequent dispute" is the specific contract term being asserted against the party claiming fraud.** This interpretation

> goes along with the rest of the factors that "the terms of the contract were negotiated, rather than boilerplate." The terms of the contract and the factual basis of the subsequent fraud claim are such different concepts that we believe the supreme court would have made them different factors. Also, in *Forest Oil Corp*., **the court's analysis of the enforceability of the contract concerned the terms of the contract Forest Oil was seeking to enforce, an arbitration provision and a disclaimer of reliance, not the allegations in the subsequent lawsuit**.
>
> . . . The court's decision was not based on any similarity between the topics of discussion during negotiations and the factual allegations of McAllen's fraudulent inducement claim.
>
> *Id.* at 334 (internal citations omitted)(emphasis added).

The court held this factor favored enforcement because the "specific contract term being asserted" by Sequoia—the release of all claims related to the investments—had been discussed:

> [40] Likewise, in this case [as in *Forest Oil*], "the parties disclaimed reliance with respect to all decisions being made during negotiations," including the decisions that the parties released one another "from any and all presently existing claims . . . whether known or unknown, relating to and/or arising in any way out of the Dispute, the Property and/or any other matter whatsoever from the

> beginning of time to the present." Appellants do not assert on appeal that the parties failed to discuss this release provision in their negotiations.
>
> *Id.* at 334.

In *Tex. Standard Oil & Gas, L.P. v. Frankel Offshore Energy, Inc.*, 394 S.W.3d 753, 772-73 (Tex. App.—Houston [14th Dist.] 2012, no pet.), the plaintiff (Frankel) sued for fraud based on the defendant's concealment of facts related to a so-called "Probe transaction." *Id*. at 772-73. Frankel argued that the "topic [of the present dispute] is the Probe transaction and it is precisely this information that [the defendant] concealed. . . ." *Id*. at 772.

The court disagreed, explaining that *Forest Oil* "did not opine that the parties must have discussed the exact grounds [the alleged true facts concerning the Probe transaction] that form the basis of the subsequent dispute, in order to satisfy this factor." *Id*. at 772. The court stated that the "topic" of the present dispute was whether the plaintiff would [41] continue to have any interests in various oil and gas prospects, and that "topic" was discussed during the settlement negotiations that led to the plaintiff's release of any claims, whether known or unknown, in any such prospects. *Id*. at 772-73.

Two other decisions rejecting the argument that the "topic" refers to the facts allegedly concealed are *Bever Prop., LLC v. Jerry Huffman Custom Builder, L.L.C.*, No. 05-13-01519-CV, 2015 WL 4600347, at *11

(Tex. App.—Dallas July 31, 2015, no pet.)("topic" is the "specific contract term being asserted against the party claiming fraud"), and *Cmty. Mgmt., LLC v. Cutten Dev., L.P.*, No. 14–14–00854–CV, 2016 WL 3554704, at *10 (Tex. App.—Houston [14th Dist.] June 28, 2016, pet. denied)(inquiry is "not 'whether [the parties] discussed the [facts giving rise to the] fraudulent-inducement claim or whether [the plaintiff] was aware of the misrepresentations at issue.' ").

To support its "split" in the lower courts contention, Petrobras cites two outdated state court cases and a federal court decision. (*See* PB,pp. 17-19) None of those cases contains any actual analysis of how the "topic discussed" factor should be interpreted. None of these cases support [42] Petrobras' assertion that this factor requires disclosure of the very facts that allegedly were concealed or misrepresented.

3. Petrobras' interpretation would eliminate the *Schlumberger* doctrine

This Court should also reject Petrobras' interpretation because it would eliminate the *Schlumberger* doctrine and defeat the strong public policies underlying it. Under Petrobras' interpretation, a disclaimer would not be enforceable unless a party could prove that it disclosed the very facts allegedly misrepresented or concealed. If, despite the disclaimer, the party had to prove that it disclosed these allegedly concealed facts in order to defeat a later fraud claim, then

the disclaimer would not provide the finality that is its purpose. There would be no *Schlumberger* doctrine.

In contrast, the Court of Appeals' interpretation is perfectly consistent with the policies underlying the doctrine. This factor provides relevant evidence whether the party giving the disclaimer understood that it would not later be able to argue that it relied on any extra-contractual representations in agreeing to a specific contract term.

[43] **C. <u>The "arm's length" factor does not support a rule that fiduciaries cannot employ disclaimers</u>**

Petrobras also urges the Court to adopt a *per se* rule that the *Schlumberger* doctrine is not available to a party with an alleged fiduciary duty to disclose. (PB,p.26)("[T]hose who owe fiduciary duties cannot [use a disclaimer to] obtain contractual releases of claims arising from their fraud without first disclosing all material facts.")

According to Petrobras, during the 2011-12 settlement negotiations, certain Astra representatives owed Petrobras a fiduciary duty to disclose the alleged 2006 bribery scheme. This supposed fiduciary duty to disclose allegedly arose some time before April 2009, when those Astra personnel had served as officials in the refinery joint venture, which ended in April 2009, when Astra transferred its entire 50% interest in the refinery venture to Petrobras and the parties ceased to be co-shareholders and partners. (PB,pp.21-26)

The Court of Appeals properly rejected the adoption of any such *per se* rule, as have all the other courts that have considered this issue.

[44] 1. The Court of Appeals properly rejected Petrobras' proposed *per se* rule

The Court of Appeals properly rejected Petrobras' request for a *per se* rule, noting that in its prior decision in *Tex. Standard*, "we disagreed . . . that a fraudulent-inducement release between fiduciaries is *per se* unenforceable simply because they generally owed each other a duty to disclose." (App.B,pp.26-27)(citing 394 S.W.3d at 744-76)

Quoting from *Tex. Standard*, the Court of Appeals explained that even "fiduciaries, like other business associates, might wish to ensure finality to their disputes" and their intent should be accorded the "same respect as the intent of other parties:"

> [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, the 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**. . . .
>
> (App.B,pp.26-27)(citing 394 S.W.3d at 744-76) (emphasis added)

[45] Rather than adopting any *per se* rule, the Court of Appeals held that the "pertinent inquiry" was whether "considering all of the circumstances," the existence of an alleged fiduciary duty to disclose "vitiates a conclusion" that Petrobras bindingly disclaimed reliance. (App.B,p.27)

The Court of Appeals examined all the circumstances here and concluded that they favored enforcement of the disclaimer:

> [46] [T]he 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
>
> (App.B,p.28)

This conclusion was amply justified. Following the issuance of the 2009 Award, Astra transferred its 50% ownership interest in the refinery to Petrobras, and the parties' ceased to be co-shareholders and partners. (4CR2041-42) After April 2009, the only relationship between Astra and Petrobras was as adversaries, engaged in 13 different disputes involving claims by Astra against Petrobras in excess of $1.3 billon. (4CR2040-44; [47] *see also* 3CR1599 (defining the numerous disputes the parties were settling))

Petrobras has not alleged that during the settlement negotiations it believed that: (a) it was dealing with Astra in anything other than an arm's length capacity; (b) Astra had some sort or fiduciary duty to disclose any specific facts to Petrobras; (c) Astra had a fiduciary duty to prefer Petrobras' interests over Astra's own interests; or (d) Petrobras' disclaimer was not going to be enforceable. In short, Petrobras understood that it could not rely on Astra to protect Petrobras' interests in any way. Petrobras had to rely, as it stated in its disclaimer, on its "own judgment." (App.D; 3CR1612)

2. The lower courts have rejected any *per se* rule

No case has recognized the *per se* rule advocated by Petrobras. In addition to this case, there are three other Courts of Appeals' decisions that have carefully considered this fiduciary issue. Each has refused to recognize the *per se* rule Petrobras proposes.

In *Tex. Standard*, the fraud plaintiff argued, as Petrobras does here, that a fiduciary duty relationship does not terminate during [48] litigation.[9] The court held that even if settlement negotiations could not be "considered entirely an arm's length transaction because the parties were still fiduciaries," this factor still supported enforcement of a fraudulent inducement release. 394 S.W.3d at 777.[10]

The court found the following facts "negate[d] any notion that [plaintiff] was somehow dependent on [defendant] as its fiduciary" during the negotiations:

> [T]he fact that the parties were adverse litigants when they executed the Settlement Agreement also supports enforcement of the fraudulent-inducement release. This posture,

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[9] Texas law does not support this contention. *See*, *e.g. Kilpatrick v. Kilpatrick*, No. 02-12-00206-CV, 2013 WL 387467, at *5 (Tex. App.—Fort Worth July 25, 2013, pet. denied) (finding that "previously existing business relationships could no longer impose fiduciary duties" during the course of a settlement negotiation).

[10] A fraudulent inducement release is an alternative to a disclaimer of reliance, and involves the same *Schlumberger* enforcement analysis. *Tex. Standard*, 394 S.W.3d at 768.

> again considered together with Frankel's business acumen and representation by counsel, indicates Frankel understood that GTP was protecting its own interests by negotiating inclusion of a fraudulent-inducement release. Frankel could not reasonably rely on GTP to protect Frankel's interests relative to this provision. . . .
>
> * * * *
>
> Further, the fact that the Settlement Agreement contains mutual fraudulent-inducement releases [49] supports a conclusion that each party knew the other party was protecting its own interests.

394 S.W.3d at 777.

The court further observed that its decision was intended to avoid imposing requirements that would create "additional difficulties" preventing the finality of settlements involving fiduciaries:

> Finally, we reject the trial court's reasoning that the parties were required to contractually disavow any fiduciary duties in order to execute an enforceable fraudulent-inducement release. . . . [P]rescribing such a requirement could create additional difficulties which might defeat the finality sought to be achieved via enforcement of a fraudulent-inducement release.

394 S.W.3d at 777.

Tex. Standard was treated as "instructive" by the Court of Appeals in *Harrison v. Harrison Interests, Ltd.*, No. 14-15-00348-CV, 2017 WL 830504, at*4 (Tex. App.—Houston [14th Dist.] Feb. 28, 2017, pet. denied). In *Harrison*, the Court enforced a release and waiver of fiduciary duties employing the *Schlumberger/Forest Oil* six-factor analysis, ruling that even though a fiduciary duty existed a release and waiver were enforceable.

[50] In *Leibovitz*, the Dallas Court of Appeals also rejected a contention that a reliance disclaimer would be unenforceable if the defendant had a fiduciary duty. 465 S.W.3d at 347.

3. The out-of-state cases relied on by Petrobras have no application here

Petrobras has cited no Texas cases supporting its *per se* rule. Instead, Petrobras points to Connecticut and Delaware cases. (PB,pp.23-25) These cases deal with the issue of whether and when a fiduciary duty arises under Connecticut or Delaware law. They do not involve disclaimers of reliance; do not consider the *Schlumberger* doctrine; and do not consider whether a *per se* rule would impact Texas' public policies underlying the *Schlumberger* doctrine. In short, they are completely irrelevant to this *per se* rule issue.

4. Petrobras' *per se* rule would eliminate the *Schlumberger* doctrine for fiduciaries

Petrobras' proposed *per se* rule would completely eliminate the *Schlumberger* doctrine for fiduciaries, depriving them of the ability to fully and finally settle claims like any other party. By refusing to adopt any such *per se* rule, however, the courts can make a case-by-case analysis and an informed judgment as to whether any alleged fiduciary [51] duty outweighs all the other factors favoring enforcement of the disclaimer. That is what the Court of Appeals properly did here, in accordance with Texas law.

D. Petrobras' "extreme circumstances" exception has no legal or policy support

Petrobras also argues that the Court of Appeals should have adopted a new public policy exception barring the enforcement of a disclaimer in what Petrobras characterizes as the "extreme circumstances" here, namely the allegations of Astra's participation in the alleged illegal 2006 bribery scheme. (PB,pp.26-28) No case has ever recognized or even discussed any such exception. Nor would such an exception serve any public policy related to the *Schlumberger* doctrine.

This argument is yet another example of Petrobras seeking to escape the burden of a contractual provision that Petrobras drafted and included in the Settlement Agreement to protect itself. The mutual releases drafted by Petrobras specifically included language

stating that the released claims included those arising out of any activities alleged to "violate any laws . . . of the United States, or . . . any foreign country. . . ." (3CR1641-42) Yet, now Petrobras suggests that a party should not be [52] able to release claims arising out of violations of law based on some nonexistent public policy rationale.

Petrobras' adoption of the "extreme circumstances" label is an attempt to distort the "totality of the surrounding circumstances" test described in *Forest Oil*. (PB,p.27) This "totality of the circumstances" language, however, does not refer to the circumstances of what happened in years past. The six-factors considered in assessing these "circumstances" relate to the events surrounding the parties' agreement and execution of the disclaimer. *See* 268 S.W.3d at 60, 88. No case has ever applied the "totality of the circumstances" language outside the context of this six-factor test or in the way Petrobras advocates.

Moreover, Petrobras has not even sought to explain how this proposed exception is necessary to further the public policies underlying the *Schlumberger* doctrine. The Court of Appeals considered this very question, and concluded that "careful application of the *Forest Oil* factors adequately protects the public policies at issue:"

> 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 [53] the parties are protected "from unintentionally waiving a claim for fraud," 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. We cannot conclude that this case presents any "extreme circumstances" that preclude applying the *Schlumberger* doctrine.
>
> (App. B,pp.29-30) (citations omitted)(emphasis added)

Finally, refusing to enforce this knowing disclaimer would not only defeat the strong public policy that parties be able to fully and finally settle any possible disputes, it would be contrary to Texas' public policy of enforcing agreements knowingly entered into by sophisticated parties. *See*, *e.g.*, *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 232-33 (Tex. 2019)(holding that contractual provisions negotiated by sophisticated parties who were represented by counsel should be enforced even in the face of allegations of "reprehensible" fraud).

II. THE DECLARATION THAT THE RELEASE BARRED THE CLAIMS IN THE ARBITRATION DID NOT INTERFERE WITH ANY ARBITRAL JURISDICTION

Petrobras' contention that the declaratory judgment issued here constituted improper interference with the Arbitration is litigation [54] gamesmanship. As previously explained, before the District Court granted declaratory relief, Petrobras had affirmatively recognized the District Court's jurisdiction to issue such relief. Petrobras only decided this declaratory relief was "interference" after it was issued.

Petrobras' interference argument fails for two reasons. First, as the Court of Appeals held, the District Court merely exercised the exclusive jurisdiction the parties gave it to determine the validity and effect of the Release. The District Court did not insert itself into the Arbitration proceedings.

Second, although the Court of Appeals did not reach this issue, Petrobras' interference claim fails because the declaratory judgment could not interfere with arbitral jurisdiction that did not exist. The Settlement Agreement had revoked the arbitration provisions in the 2006 SPA. Once revoked, there was no longer an agreement to arbitrate. By definition, there can have been no interference with arbitral authority that did not exist.

A. There was no interference of any sort

In issuing its declaratory judgment, the District Court merely did what Petrobras had specifically and exclusively authorized it to do—[55]determine the validity and effect of the Release. Petrobras cannot complain that doing exactly what Petrobras had authorized the court to do should now be considered some sort of "interference" with the Tribunal.

1. The forum-selection clause mandates that only the Texas courts will determine issues relating to the validity and effect of the Release

The parties' forum-selection clause is extremely broad, encompassing any "dispute arising out of or relating to this Settlement Agreement." (App.D; 3CR1611) The term "dispute" is given a very broad interpretation and refers to any "conflict or controversy" relating to the contract containing the forum-selection clause. *Pinto Tech. Ventures, L.P. v. Sheldon*, 526 S.W.3d 428, 439-40 (Tex. 2017). Such a clause is broader than one referring to "claims based solely on rights originating exclusively from the contract" containing the clause. *Id*. at 439.

The term "relating to" is "deemed to encompass any claim that has **some possible relationship with the agreement**." *In re Rosewood Private Invs. Inc.*, No. 05-18-00166-CV, 2018 WL 4403749, at *2 (Tex. App.—Dallas Sept. 17, 2018, no pet.)(emphasis added); *see also Diamond Offshore (Bermuda) v. Haaksman*, 355

S.W.3d 842, 846 (Tex. App.—[56]Houston [14th Dist.] 2011, pet. denied)("any action or proceeding arising out of or relating to this Agreement" includes all claims with any "possible relationship" with the agreement); *RSR Corp. v. Siegmund*, 309 S.W.3d 686, 701 (Tex. App.—Dallas 2010, no pet.)(same).

It is self-evident that any dispute as to the validity and effect of the Release is a dispute about an integral part of the Settlement Agreement and within the scope of the forum-selection clause.

2. Petrobras initially recognized the District Court's jurisdiction to issue this declaratory relief

Until it lost on the merits in the District Court, Petrobras had affirmatively and repeatedly recognized that the forum-selection clause gave the District Court exclusive jurisdiction to decide and declare the validity and effect of the Release. (1CR28; 2CR1155; 5CR2475; 7CR3798)

Both Astra and Petrobras had requested a declaratory judgment from the District Court. Petrobras sought a declaration as to the "parties' respective rights, duties, and obligations under the Settlement Agreement." (7CR3813) Petrobras also alleged in its Petitions that it was "mandatory" for Petrobras to sue for this relief in the District Court because of the parties' exclusive forum-selection clause. (1 CR28; 2CR1155; 5CR2475; 7CR3798)

[57] In the Arbitration, Petrobras did not assert any claims relating to the Settlement Agreement or challenge the validity or effect of the Release. (14CR7910-23; 3CR2027) To the contrary, as the Court of Appeals noted, Petrobras "disavowed" any intention to assert a claim as to the validity or effect of the Settlement Agreement and its Release in the Arbitration. (App.B,p.35,n.27; 4CR2027) To support its efforts to convince the Tribunal to exercise jurisdiction, Petrobras argued that issues relating to the validity and effect of the Release were pending before the District Court. (14CR7961-84) In upholding Petrobras' claim of arbitral jurisdiction to decide the merits of claims relating to the 2006 SPA, the Tribunal's Award on Jurisdiction agreed that "[t]he validity and enforceability, *vel non*, of the Settlement Agreement is in fact a matter properly before the Texas Court." (8CR4183)

Even when Astra later moved for summary judgment declaring that the Release was enforceable and a bar to the claims in the Arbitration, Petrobras did not contest the District Court's jurisdiction to issue any such declaratory judgment. (*See* 8CR4005-07; 10CR5038-58) Nor did Petrobras assert that any such declaratory relief would somehow [58] interfere with the proceedings in the Arbitration. (*See* 8CR4005-07; 10CR5038-58)

3. After the declaratory relief is issued, Petrobras does an "about-face" and belatedly begins to claim interference

The first time that Petrobras ever made its current interference argument was *after* the District Court had issued summary judgment declaring that the Release was valid and barred the claims in the Arbitration. (10CR5247-50) Seeking to salvage those Arbitration claims, Petrobras did a complete "about-face."

In opposition to Astra's summary judgment directed to the Third Amended Petition, Petrobras raised a new argument—that the Court did not have jurisdiction to issue this declaratory relief and it would constitute improper interference with the Arbitration. (10CR5247-50) As previously discussed, the District Court rejected this argument and granted summary judgment, awarding the same declaratory relief it had previously granted in its January 11 Order. (11 CR5545-47; *see also* App.A; 14CR7686-90)

[59] 4. The Court of Appeals correctly held that there was no interference

The Court of Appeals correctly rejected Petrobras' interference claim, explaining that the District Court "did not make any declaration deciding any affirmative defense in the arbitration," and had simply "construed the Release" after reviewing the allegations in Petrobras' arbitration demand:

> [T]he 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 . . . the trial court declared that the release barred those claims.
>
> (App.B,p.37)

The Court of Appeals also ruled that none of the arbitration cases cited by Petrobras, on which Petrobras relies here, were relevant to the facts of this case:

> The cases relied on by . . . Petrobras . . . for their argument that the 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 . . . Here, [60] 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.
>
> (App.B,p.36, ns. 28, 29 and 31)(distinguishing Petrobras cases)

Petrobras' decision not to discuss the facts of any of the cases it relies on underlines their inapplicability here. None of those cases deals with a situation where a court was authorized by the parties' specific

agreement to issue declaratory relief as to the validity and effect of a contract, much less held that doing so would constitute some sort of improper interference with the jurisdiction of arbitrators.

It is true that the existence of this declaratory judgment will have consequences for Petrobras, but that does not transform the District Court's action into interference. The District Court simply made the determination that the parties had authorized it—and *only* it—to make.

B. The Settlement Agreement revoked the arbitration provisions of the 2006 SPA

There is a second, independent reason why the declaratory judgment could not constitute improper interference with the Tribunal's alleged authority. The Settlement Agreement and its exclusive forum-selection clause revoked the arbitration provisions in the 2006 SPA. [61] Once this revocation occurred, there was no longer any agreement to arbitrate any issues, including any issues relating to the validity or effect of the Release. And, of course, there can be no interference with arbitral authority that does not exist.

The Court of Appeals never reached this issue. During the course of rejecting various argument by Petrobras, the Court of Appeals incorrectly stated that Astra had not argued revocation in connection with its summary judgment motions. (App.B,p.37) In fact, Astra had done so in the District Court (10CR5432-34) and in its brief in the Court of Appeals. (App.F,pp.78-

91) Petrobras has never argued that Astra did not preserve the revocation issue. (*See generally* App.E; App.G,pp.20-30; PB,pp.32-45)

1. The courts determine whether an existing arbitration agreement has been revoked

Where, as here, the question is whether a subsequent agreement has revoked an earlier agreement to arbitrate, that issue is presumed to be one for the courts to decide. "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Howsam v. Dean Witter Reynolds, Inc*., 537 U.S. 79, 83 (2002). "The courts' role . . . is . . . to decide whether the parties [62] made a valid and **presently enforceable** agreement to arbitrate." *GT Leach Builders, LLC v. Sapphire VP*, 458 S.W.3d 502, 519 (Tex. 2015)(emphasis added).

Texas law is settled on this point. Whether a later agreement has revoked an earlier arbitration provision is for the courts to decide.

Tex. La Fiesta Auto Sales, LLC v. Belk, 349 S.W.3d 872, 880 (Tex. App.—Houston [14th Dist.] 2011, no pet.), dealt with a contention similar to Petrobras' argument here. There, the party seeking to arbitrate argued that "once the [earlier] arbitration agreement was found to exist, any issue concerning [its revocation] . . . should have been decided by an arbitrator," not the court. *Id*. at 880. The court disagreed, holding

that "it is the trial court's duty to determine whether a later agreement between the parties revokes an arbitration clause, because the court must determine the threshold issue of whether a valid arbitration agreement exists." *Id*. at 880-81.

In *FC Background, LLC v. Fritze*, No. 05-17-00277-CV, 2017 WL 5559594, at *2 (Tex. App.—Dallas, Nov. 16, 2017, pet. dism'd), the court stated that "[b]ecause the court must determine the threshold issue of whether a valid arbitration agreement exists, it is the trial court's duty [63] to determine whether a later agreement between the parties revokes or supersedes an arbitration clause."

In *TransCore Holdings, Inc. v. Rayner*, the court also recognized that it is "for the court to determine whether a later agreement . . . revoked an arbitration clause." 104 S.W. 3d 317, 322 (Tex. App.—Dallas 2003, pet. denied)(quoting *Valero Energy Corp. v. Teco Pipeline Co.*, 2 S.W.3d 576, 586 (Tex. App.—Houston [14th Dist.] 1999, no pet.)(court to determine whether a later agreement revoked an earlier arbitration agreement)).

The same view was expressed in *Duarte v. Mayamax Rehab. Servs., L.L.P.*, 527 S.W.3d 249, 257-58 (Tex. App.—El Paso 2016, pet. denied)("the trial court must first determine whether the parties' subsequent Settlement Agreement extinguished their previous agreement to arbitrate contained in the original partnership agreement"), and in *In re Am. Express Fin. Advisors Sec. Litig.*, 672 F.3d 113, 131 (2d Cir. 2011)(finding that

issue of whether subsequent settlement revoked prior arbitration provision was one for court).

[64] **2. <u>The delegation of authority in the 2006 SPA did not give the arbitrators jurisdiction to decide this revocation issue</u>**

Petrobras contends that this presumption does not apply here, and the Texas courts "had no power to decide" this revocation issue because the arbitration clause of the 2006 SPA "clearly and unmistakably provides that arbitrability must be decided by the Tribunal." (PB33,35) Once again, Petrobras has ignored the critical facts that defeat its argument.

There is a very narrow exception to the default rule that the courts, not arbitrators, determine whether an agreement to arbitrate still exists or has been revoked. That exception requires a showing that the "parties clearly and unmistakably" intended that arbitrators decide all arbitrability issues, including whether an agreement still existed or was revoked. *See Howsam*, 537 U.S. at 83.

In *PoolRe Ins. Corp. v. Org. Strategies, Inc.*, the Southern District of Texas rejected the exact argument advanced by Petrobras here, namely that the courts look only to the terms of the delegation in the original agreement and ignore any later agreement. No. H-13-1857, 2013 WL 3929007, at *7 (S.D. Tex. July 29, 2013), *aff'd*, 783 F.3d 256 (5th Cir. 2015). There, the court acknowledged the broad delegation clause in the [65] original agreement but held that the court "must

consider the interaction of multiple agreements in assessing whether there is 'clear and unmistakable evidence" of an intention to delegate to arbitrators authority to decide whether an agreement to arbitrate exists:

> If the delegation clause was the last word on arbitrability, the court's analysis would likely be complete. But this case presents a different reality. **The parties before the court executed a subsequent agreement**, the services agreement, in which they appeared to depart from the broad grant of arbitrability in prior provisions. Unlike *Petrofac*, in which the parties expressed their intent in a single agreement, **the court must consider the interaction of multiple agreements in assessing whether there is "clear and unmistakable evidence"** regarding the question of "who determines arbitrability" in this case.

Id. at *7 (emphasis added).

In *PoolRe*, the court found that the existence of a forum selection clause in the subsequent agreement negated any possible conclusion that there was a clear and unmistakable intent to delegate all arbitrability issues to arbitrators. *Id*.

In *Scott Envtl. Servs., Inc. v. Newfield Expl. Co.*, No. 2:19-cv-00026- JRG-RSP, 2019 WL 5393989, at *4 (E.D. Tex. Oct. 22, 2019), the court again considered the interaction of multiple agreements. The court held [66] that "[a]t the very least, this subsequent Non-Disclosure

Agreement creates ambiguity as to the parties' intent regarding the issue of whether the question of arbitrability itself should be arbitrated," and "the agreements, when construed together, do not 'clearly and unmistakably' suggest that the question of arbitrability should be decided by the arbitrator." *Id*.

Similarly, in *Southwinds Express Constr., LLC v. DH Griffin of Tex., Inc.*, 513 S.W.3d 66, 71-72 (Tex. App.—Houston [14th Dist.] 2016, no pet.), the Fourteenth Court of Appeals looked to a later agreement in rejecting a claim that an initial delegation of authority to arbitrators controlled and a later agreement may be disregarded. 513 S.W.3d at 73. There, the Court of Appeals noted that "ordinarily [courts] look to the arbitration provision's language" to determine whether the parties intended the arbitrators or the court to determine arbitrability. *Id*. But, when the issue is whether the earlier agreement has been revoked, it is a "court's duty to determine whether a later agreement . . . revokes" the earlier agreement, because the "court must determine the threshold issue of whether a valid arbitration agreement exists." *Id*.

[67] Here, Petrobras has not even attempted to demonstrate that, when the 2006 SPA and the Settlement Agreement are considered together, Petrobras has satisfied its burden to demonstrate a "clear and unmistakable" intent by the parties to empower the arbitrators to decide the revocation issue. Any such effort would be futile in the face of the extraordinarily broad scope of the exclusive forum-selection clause in the Settlement Agreement.

The forum-selection clause reflects the parties' intention that the Texas courts be the only forum to decide *any* issues having any possible relationship to the Settlement Agreement. Such exclusive jurisdiction necessarily includes deciding what impact the Settlement Agreement had on the arbitrability provisions of the 2006 SPA. Put another way, the forum-selection clause could not be clearer that no issue having any possible relationship to the Settlement Agreement is to be decided by any arbitrators.

Accordingly, the general default rule and non-arbitability presumption apply here, leaving to the courts—not arbitrators—to decide whether an agreement to arbitrate still exists or was revoked by a later agreement.

[68] **3. <u>Petrobras' mischaracterization of Astra's revocation theory</u>**

Petrobras has mischaracterized Astra's revocation argument. Petrobras contends that Astra is only arguing that: the Settlement Agreement was an "amendment" to the 2006 SPA (PB,p.35,n.7) or is an attack on the arbitration clause's "validity." (PB,pp.35-38) Petrobras further asserts that even if the arbitration agreement was "terminated," the arbitration provision would still apply to claims arising before it was superseded by the Settlement Agreement. (PB,p.49)

Astra has never claimed that the earlier agreement was simply amended, terminated or not originally valid. Astra's contention is that any previously

existing arbitration agreement was revoked. (*See* 1CR497-515; 10CR5434)(arguing "there is no agreement to arbitrate. The arbitration provision . . . was superseded and revoked.")

4. <u>There is no presumption that an agreement to arbitrate exists</u>

Petrobras has also argued that there is a presumption in favor of "arbitrability" that governs when deciding whether an agreement to arbitrate exists. (PB,p.40) There is no such presumption, and the cases [69] cited by Petrobras do not apply where the issue is whether an earlier agreement to arbitrate has been revoked.

As this Court has explained, "arbitrability" may be of two types: "substantive arbitrability" and "procedural arbitrability." *GT Leach Builders*, 458 S.W.3d at 520. Substantive arbitrability refers to the gateway issue whether any agreement to arbitrate exists. Procedural arbitrability refers to issues growing out of a dispute and bear on its disposition. *Id*.

The presumption of arbitrability upon which Petrobras seeks to rely applies only to procedural arbitrability questions. There is no presumption of arbitrability when deciding if an agreement to arbitrate still exists or has been revoked. "The strong presumption favoring arbitration . . . arises only after the party seeking to compel arbitration proves that a valid arbitration agreement exists, applying traditional contract principles." *Tex. La Fiesta*, 349 S.W.3d at 880 (rejecting

presumption argument when deciding whether earlier arbitration provisions revoked).

[70] **5. The Settlement Agreement revoked the arbitration provisions in the 2006 SPA**

Taken together, the forum-selection clause, merger, and release provisions in the Settlement Agreement demonstrate that the Settlement Agreement revoked the entire 2006 SPA or, at the very least, its arbitration provisions. The presence of all three provisions virtually compels the conclusion that the entire 2006 SPA was revoked. For purposes of this case, however, the important inquiry is whether the arbitration provisions in the 2006 SPA were revoked. They were.

a. The forum-selection clause

Standing alone, the exclusive forum-selection clause was clearly sufficient to at least revoke the earlier arbitration agreement.

There are "no magic words" necessary to revoke a prior arbitration agreement, and a later agreement need not even mention the earlier arbitration agreement in order to revoke it. *Valerus Compression Servs. v. Austin*, 417 S.W.3d 202, 210 (Tex. App.—Houston [1st Dist.] 2013, no pet.). Courts apply ordinary state law contract interpretation principles and engage in a "common-sense examination of the claims and the forum-selection clause to determine if the clause covers

the claims." *In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 677-78 (Tex. 2009)(per curiam).

[71] Where "the forum selection provisions [in earlier and later agreements] conflict, then the provision of the later-executed [agreement] will control." *The Courage Co., L.L.C. v. Chemshare Corp*., 93 S.W.3d 323, 334 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

Petrobras argues there is no such conflict here because the "arbitration clause covers disputes related to the [2006 SPA] and the Settlement Agreement's forum-selection clause covers disputes related to the [Settlement Agreement]." (PB,p.44) But, Petrobras is not simply arguing, despite its above contention to the contrary, that the "arbitration clause covers disputes related to the [2006 SPA]." (PB,p.44) Petrobras is actually arguing that the arbitration clause covers the dispute whether the Settlement Agreement and its Release are valid and whether the Release bars all claims relating to the 2006 SPA.

Thus, the conflict between the earlier and later provisions is obvious, direct and irreconcilable.

b. <u>The merger and integration provision</u>

The Settlement Agreement was intended to be a clean and final break between Astra and Petrobras. (*See* 7CR3695) Years earlier, the parties had ceased being partners or co-shareholders in any business [72]

venture. (4CR2040-44) For years, their only relationship had been as adverse litigants. (4CR2040-44)

In addition to the four parties to the 2006 SPA, there were a number of other Astra and Petrobras entities that were involved in the disputes being settled who had been parties to agreements other than the 2006 SPA. For example, there was a partnership agreement related to the refinery joint venture that was between four other Astra and Petrobras entities that were not parties to the 2006 SPA. (*See* App.D; 3CR1605 (referencing Agreement of Limited Partnership))

Per the Settlement Agreement, none of the provisions in their prior agreements would have any relevance going forward. Any issues that might arise going forward were addressed by the Settlement Agreement and ancillary agreements. (*See*, *e.g.*, App.D; 3CR1605-06 (provisions related to Common Interest Agreement governing tax issues going forward); 3CR1610 (provisions governing tax audits and access to books and records))

The merger provision (complementing the exclusive forum-selection clause) reflects the parties' intention to eliminate the possibility of earlier agreements with their own dispute resolution provisions [73] authorizing piecemeal litigation in different forums concerning claims that were being released by the Settlement Agreement. If such piecemeal litigation were permitted, it would expose the settling parties to potentially conflicting determinations by different forums regarding the validity and effect of the Settlement

Agreement, with a tremendous potential for undue prejudice. This is the very result that Petrobras seeks to achieve here by asking the Tribunal to determine that the Release is not valid and the claims are not barred.

The merger provision thus provides that all the prior agreements between and among all of these parties were being "superseded" and the parties "entire agreement" was now found in the Settlement Agreement:

> This Settlement Agreement, together with the Common Interest Agreement, and the exhibits, schedules and appendices attached hereto, **represent the entire agreement of the Parties and supersede all prior written or oral agreements**, and the terms are contractual and not mere recitals.
>
> (App.D; 3CR1 612))(emphasis added)

c. The mutual general releases

The parties' mutual general releases also reflected their agreement that no prior agreements would be the source of any future claims for [74] breach or of any other nature. The Release extinguished "all claims, demands, and causes of action of whatever kind or character . . . including . . . any claim arising out of or related to the 2006 SPA . . . , including without limitation, any claims related to . . . [any] covenants." (App.D; 3CR1609)

d. <u>Taken together, these provisions revoked the entire 2006 SPA, including its arbitration clause</u>

Taken together, the merger, release and forum-selection provisions revoked the earlier agreement to arbitrate, if not the entire 2006 SPA. The courts frequently rely on these types of provisions, in some combination, as support for a finding that a later agreement has revoked a prior agreement or, at the very least, an earlier agreement to arbitrate

For example, the following cases found an earlier agreement was revoked:

- *Tex. La Fiesta*, 349 S.W.3d at 880-81 (language that later agreement was the entire agreement of the parties and supersedes all prior agreements, plus different arbitration provision, revoked a prior agreement);
- *FC Background*, 2017 WL 5559594, at *2-3 (language that later agreement was entire agreement of parties and supersedes all prior agreements, plus exclusive forum-selection clause, revoked prior agreement);

[75] • *TransCore*, 104 S.W.3d at 323 (release of claims under prior agreement, plus exclusive forum selection clause, revoked prior agreement); and

- *Inteq v. Lotus, L.L.C.*, No. 08–02–00079–CV, 2002 WL 1987938, at *3 (Tex. App.—El Paso Aug. 29, 2002, pet. denied)(language

> that later agreement supersedes all prior agreements revoked prior agreements).

In *In re Am. Express*, the Second Circuit also dealt with a fact situation analogous to that here. 672 F.3d at 133. There, the court held that absent some language indicating otherwise, "where a party initially consents . . . to arbitrate certain types of claims, but later enters into a settlement agreement that releases claims that had been subject to the initial consent to arbitrate, the claims that have been released by such a settlement are no longer subject to arbitration," especially where the settlement agreement exclusively vests jurisdiction in the courts. *Id*.

6. The District Court never held that the Tribunal had jurisdiction

Petrobras asserts that the District Court's denial of Astra's September 2016 request to stay the Arbitration constituted a decision that the Arbitration Tribunal had jurisdiction to decide the validity and effect of the Release. (PB,p.39,n.10)

[76] Petrobras never mentions the District Court's later explanation that this stay decision was not a merits ruling on whether there was an agreement to arbitrate. (RR19-22) Nor does Petrobras mention the District Court's later ruling rejecting Petrobras' interference argument on summary judgment. (11CR5545-47; App.A; 14CR7686-90)

In any event, whatever the reason for the stay being denied, this ruling was superseded by the District Court's Final Judgment, incorporating the summary judgment ruling rejecting Petrobras' interference argument. *See Tex. Land & Loan Co. v. Winter*, 57 S.W. 39, 41 (Tex. 1900)(where judgment inconsistent with prior interlocutory order, "the order must give way to the judgment instead of limiting its effect").

In summary, the issuance of the declaratory judgment did not constitute any sort of "interference" with the Arbitration proceedings. The District court simply upheld and interpreted the Release in accordance with its exclusive authority to do so under the forum-selection clause. In any event, and independently, the declaratory judgment could not constitute interference with any arbitral proceedings, because the [77] earlier agreement to arbitrate had been revoked and no longer existed. There can be no interference with arbitral jurisdiction that does not exist.

III. CONCLUSION

Astra respectfully requests that this Court deny the Cross-Petition. Alternatively, if review is granted, Astra requests that the Court affirm the Court of

Appeals rulings that are the subject of the Cross-Petition.

[78] Respectfully submitted,

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In the Supreme Court of Texas

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v.

Petrobras America Inc., et al.

Respondents/Cross-Petitioners.

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[i] **TABLE OF CONTENTS**

Page

[iii] INDEX OF AUTHORITIES

Page

CASES

[vi] **STATUTES**

RULES

[1] INTRODUCTION

Astra and Feilhaber cannot avoid responsibility for their criminal conduct. While negotiating the Settlement Agreement, they owed and failed to comply with fiduciary duties that required them to disclose the bribery scheme related to the SPSA. Those fiduciary duties prevent the Settlement Agreement from being an arm's-length transaction under this Court's *Schlumberger* and *Forest Oil* factors. Astra and Feilhaber likewise cannot hide behind the Settlement Agreement's Reliance Disclaimer, which by its terms does not apply to their fraudulent omissions and which is unenforceable under *Schlumberger* and *Forest Oil*. The parties did not discuss the topic that has become the basis of this dispute—the SPSA negotiation—and thus the Reliance Disclaimer cannot bar any of Petrobras's claims. Astra and Feilhaber deceived Petrobras into signing the Settlement Agreement and made it a victim of their bribery scheme. The Court should reject Feilhaber's shameless attempt to transform himself from the bribery scheme's primary architect to a victim.

Lower courts need this Court's guidance in applying the factors from *Schlumberger* and *Forest Oil*. The Court should make clear that merely discussing the release or the reliance disclaimer is insufficient to satisfy the first factor. Without discussion of the topic of dispute (here, the SPSA's [2] negotiation), there is no indication that a party acted knowingly when it signed the reliance disclaimer. The Court should also make clear that if there is a continuing fiduciary duty under controlling law, a reliance disclaimer cannot excuse the

fiduciary's obligation of full disclosure. The Court should also reiterate that reliance disclaimers are not per se enforceable and hold that public-policy bars enforcement here.

The Court's guidance is also needed to clarify that Texas courts cannot interfere with an arbitrator's jurisdiction. The trial court's declaratory judgment about the Release's effect on the Arbitration claims improperly invades the Tribunal's authority to decide the merits of those claims. The parties delegated arbitrability issues to the Tribunal, including resolution of affirmative defenses like release. Relying on the declaratory judgment, Astra is improperly trying to restrain the Tribunal from reaching the merits of the Arbitration claims.

The trial court's declaratory judgment is also wrong on the merits. Nothing in the Settlement Agreement revokes the SPSA's arbitration agreement. But even if it did, that revocation cannot affect any of the Arbitration claims because they arose before the Settlement Agreement was signed. Terminating an arbitration agreement does not eliminate the parties' [3] obligation to arbitrate claims arising while the agreement was in place. The Court should grant Petrobras's petition and ensure that Texas courts do not improperly interfere with disputes that parties have committed to arbitration.

ARGUMENTS AND AUTHORITIES

1. The Reliance Disclaimer does not bar Petrobras's claims.

A. Petrobras's claims are not based on "mirror image" omissions.

Astra mischaracterizes Petrobras's fraud claim as based on omissions that are mirror images of affirmative misrepresentations. (Astra Resp. at 29-31.) Astra ignores the specific factual allegations in Petrobras's pleadings. (*Id.*) They reveal that the entire thrust of Petrobras's claims is that Astra failed to disclose the bribery. These are the operative factual allegations in Petrobras's petition:

> The Defendants' ***omissions*** include . . . the following material facts: (a) the Defendants agreed to pay bribes totaling about $15 million at the outset of the parties' relationship; (b) the Defendants did, in fact, pay about $15 million of bribes at the outset of the parties' relationship; (c) a portion of the bribes was distributed among the Defendants; (d) the Defendants concealed the payment of the bribes throughout the parties' relationship; (e) the bribes tainted the parties' entire relationship; and (f) during the ongoing litigation that culminated in the Settlement Agreement, the Defendants offered to pay between $80 million and $100 million in bribes. . . .
>
> . . .
>
> [4] Given his fiduciary duties and involvement in the bribery scheme outlined herein, Winget

> was ***obligated to disclose*** to the Plaintiffs all of the material facts, including those listed above, about that scheme while the Settlement Agreement was being negotiated and before it was signed.
>
> Indeed, ***none of the material facts about the bribery scheme were properly disclosed*** by the Defendants to the Plaintiffs while the parties were negotiating the Settlement Agreement in Houston, Texas, or at any time before it was signed in Houston, Texas.

(13CR:6754 (emphasis added).)

Astra instead relies on the "Counts" portion of Petrobras's petition, which explains how the facts alleged tie to the elements of Petrobras's claims. (Astra Resp. at 30 (citing 7CR:3819–21).) But there are no factual allegations in those paragraphs. (7CR:3819–21.)

Astra also relies on what it calls allegations about partial disclosures. (Astra Resp. at 30.) But Astra takes those allegations out of context. (3CR:1323–24; 7CR:3806; 8CR:4021–22; 8CR:3987–88.) Petrobras's claims do not arise from those allegations about the evidence developed during the prior arbitration and litigation. In context, these allegations merely highlight Astra's failure to disclose the existence of the bribery scheme.

In any event, even if Petrobras's complaint were construed to include allegations of affirmative misrepresentations, Petrobras's omission-based claims cannot be the mirror image of any misrepresentation

claim because [5] Astra *never* disclosed the bribery scheme, either in whole or in part. Tellingly, Astra does not identify any affirmative disclosure that is the mirror image of any alleged omission. As noted above, Petrobras expressly pleaded that "none of the material facts about the bribery scheme were properly disclosed." (13CR:6754.) That Astra may have discussed the 2006 SPSA during the prior arbitration and litigation does not transform Petrobras's failure-to-disclose claims into the converse of any alleged misrepresentation claim. Because the Reliance Disclaimer's plain language does not apply to omissions, the court of appeals misapplied both the contractual language and *Schlumberger*.

In seeking to avoid the Reliance Disclaimer's plain language, Astra argues for an unwarranted extension of *Schlumberger*. Astra asserts that every disclaimer of reliance on affirmative representations must also apply to fraudulent omissions. (Astra Resp. at 23.) This argument misunderstands both *Schlumberger* and the policies behind it. In *Schlumberger*, the plaintiffs alleged that the defendants made affirmative misrepresentations about a diamond-mining operation's viability. *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 174, 178 (Tex. 1997). They also alleged that the defendants failed to disclose material facts about the operation. *Id.* at 181-82. The Court held that the specific alleged omissions were the converse of the specific [6] alleged affirmative misrepresentations and that the disclaimer therefore applied to both. *Id.* But, contrary to Astra's suggestion, the Court did not hold that a

reliance disclaimer always bars fraudulent-omission claims. *Id*.[1]

Astra's argument also runs afoul of the policies embodied in *Schlumberger*, which is a narrow exception to the doctrine "that fraud vitiates whatever it touches." *See Stonecipher's Estate v. Butts' Estate*, 591 S.W.2d 806, 809 (Tex. 1979). The Court emphasized that reliance disclaimers should be enforced only if they clearly express the parties' intent. *Schlumberger*, 959 S.W.2d at 181. And the Court strictly construes these provisions. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 334-35 (Tex. 2011) (holding that a disclaimer of the *existence* of extra-contractual representations did not disclaim *reliance* on extra-contractual representations). Accepting Astra's argument that disclaiming reliance on affirmative misrepresentations also disclaims reliance on fraudulent omissions—regardless of whether the [7] omissions are the misrepresentations' converse—would rewrite the parties' agreement and eliminate claims absent the parties' clear intent to do so.

Recognizing the weakness of its argument, Astra attempts to blur the distinction between affirmative misrepresentations and omissions by citing cases holding

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[1] In this regard, *Cronus Offshore, Inc. v. Kerr McGee Oil & Gas Corp.*, cited by Astra, misinterprets *Schlumberger* in the same way that Astra does and contains no analysis supporting its interpretation. 369 F. Supp. 2d 848, 859 (E.D. Tex. 2004). *Stabilis Fund II, LLC v. Compass Bank*, No. 3:18-CV-0283-B, 2020 WL 487497, at *5 (N.D. Tex. Jan. 30, 2020), also cited by Astra, relies on *Cronus* in making this same error.

that fraudulent omissions can support fraudulent-inducement claims. (Astra Resp. at 33.) But the fact that an omission can support a fraud claim does not mean that a party who disclaims reliance on affirmative misrepresentations is automatically disclaiming reliance on (and waiving claims arising from) fraudulent omissions. Parties who wish to disclaim reliance on pure nondisclosures can easily draft contractual provisions that do just that. But courts should not rewrite contracts to include provisions (or language) that the parties expressly chose to omit. *See Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 161-62 (Tex. 2003) (noting that courts "may neither rewrite the parties' contract nor add to its language").

The Court should grant review to correct this misinterpretation and clarify that pure nondisclosure claims do not fall within the scope of a reliance disclaimer that expressly references only misrepresentations.

[8] B. In addressing the first factor, Astra collapses a two-part inquiry and ignores a split in authority.

The first factor this Court has identified as relevant to determining whether to enforce a reliance disclaimer requires *both* (i) that the contract be negotiated *and* (ii) that the parties have discussed the issue that has become the topic of dispute. *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 60 (Tex. 2008) (discussing the *Schlumberger* factors). Astra's argument that this

factor is met because the parties discussed the Release collapses this two-part factor into a single inquiry.[2] Put another way, if merely discussing the contractual term were sufficient, this factor would not have two parts; instead, the only inquiry would be whether the contract was negotiated.

Schlumberger shows that this factor cannot be met merely by discussing the contractual term at issue. Rather, the parties must have specifically discussed the issue that has become the topic of their dispute—e.g., the [9] diamond-mining project's value and viability. The Court in *Schlumberger* described this as disclaiming "reliance on representations about specific matters in dispute." 959 S.W.2d at 181. Thus, it is not enough that the parties discussed the contractual term. They also must have discussed the project's value and viability and then disclaimed reliance on representations about those specific matters if they become the basis of the parties' later dispute.

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[2] Astra also focuses on the wrong contractual term by arguing that a discussion of the Release (which mentions the SPSA) somehow satisfies the first *Schlumberger/Forest Oil* element for the Reliance Disclaimer (which does not mention the SPSA). Importantly, Astra cannot identify any record evidence showing that the parties ever discussed the Reliance Disclaimer, which is a separate contractual provision that appears in the Settlement Agreement three pages after the Release. (*Compare* 3CR:1609] (Release) *with* 3CR:1612 (Reliance Disclaimer).) Astra is thus mixing Release " apples " with Reliance Disclaimer "oranges" when arguing that a discussion of the Release renders the Reliance Disclaimer enforceable.

Requiring parties like Astra to meet the second part of *Schlumberger*'s first factor ensures that any reliance disclaimer is made knowingly. Contrary to Astra's contention (Astra Resp. at 42), Petrobras's interpretation of the first factor does not "eliminate" the *Schlumberger* doctrine; instead it furthers the doctrine's purpose. Using a straw-man argument (Astra Resp. at 35), Astra mischaracterizes Petrobras's position as requiring the parties to have discussed the bribery scheme to satisfy the first factor. In reality, Petrobras contends only that the parties must have discussed the SPSA negotiations before signing the Settlement Agreement. Because they did not, there was no discussion of the "specific matters in dispute." *Schlumberger*, 959 S.W.2d at 181. And the first factor is not met here.

Parties and courts need this Court's guidance because the courts of appeal are split on how to interpret the first factor's second part. Petrobras cited [10] several cases in which courts determined that the "topic of dispute" means the specific issue that led to the litigation. (Petrobras Br. at 17-18 (citing *Baker v. City of Robinson*, 305 S.W.3d 783 (Tex. App.—Waco 2009, pet. denied), *Residencial Santa Rita, Inc. v. Colonia Santa Rita, Inc.*, No. 04-06-00778-CV, 2007 WL 2608564 (Tex. App.—San Antonio Sept. 12, 2007, no pet.), *and S.A.H.H. Hosp. Mgmt., LLC v. San Antonio Hosp. Mgmt., Inc.*, No. 12-CV1069-XR, 2013 WL 5755611 (W.D. Tex. Oct. 22, 2013).) In its Response, Astra simply states—without explanation—that those cases do not support the argument that the first factor requires

disclosure of the facts that were concealed or misrepresented. (Astra Resp. at 41-42.) Not so.[3] Petrobras explained how the court in each case determined that the topic of the dispute refers to the specific issue that led to the later litigation. (Petrobras Br. at 1719.) The reasoning in these cases conflicts with the decision here and the cases Astra cites. (Astra Resp. at 37-41.)[4] The Court should ensure that lower courts properly apply both parts of the first factor.

[11] C. Astra's treatment of the arm's-length-negotiation factor ignores the internal-affairs doctrine.

The third factor considers whether the Settlement Agreement was an arm's-length transaction. *Forest Oil*, 268 S.W.3d at 60. An agreement is not arm's length when a fiduciary relationship exists. *See Schlumberger*, 959 S.W.2d at 175-76. The Settlement Agreement was not an arm's-length transaction because many Astra Individuals owed fiduciary duties to the Petrobras entities that signed the agreement.

Astra's treatment of the third factor largely argues that the Astra Individuals did not owe fiduciary

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[3] As discussed above, Petrobras does not assert that this factor requires an admissions of liability. It requires only a discussion of the topic of the later dispute.

[4] In arguing that there is no split in authority, Astra cites authority from two courts of appeals, one of which issued the opinion in this case. (Astra Resp. at 3741.)

duties.[5] (*E.g.*, Astra Resp. at 43, 46.) But this argument ignores the internal-affairs doctrine, which legislatively mandates that the law of the place where an entity is organized governs the duties owed by its officers and directors. *See* TEX. BUS. ORGS. CODE §§ 1.101-1.105. Pasadena Refining Systems, Inc. is a Connecticut corporation, so Connecticut law controls the fiduciary-duty analysis. PRSI Trading LLC's predecessor at the time of the Settlement Agreement was a Delaware limited partnership. Thus, Delaware law controls the fiduciary-duty analysis for that entity.

[12] Under Delaware and Connecticut law, various Astra Individuals owed fiduciary duties to the Petrobras entities that signed the Settlement Agreement. (Petrobras Br. at 21-26.) Astra ignores this law by suggesting that it "ha[s] no application here." (Astra Resp. at 50.) Astra is thus asking the Court to create a novel judicial exception to the statutory internal-affairs doctrine when a reliance disclaimer is at issue. The Court should clarify that *Schlumberger* does not create an exception to the legislature's mandate to apply the substantive fiduciary-duty law of the place where an entity is organized. The judicially created *Schlumberger* doctrine should not trump the statutory mandate embodied in the internal-affairs doctrine.

Astra also maintains that Petrobras's argument would eliminate the *Schlumberger* doctrine for fiduciaries. But the lack of a fiduciary relationship was

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[5] When moving for summary judgment, Astra did not contest that these individuals owed fiduciary duties. (10CR:5166-67); TEX. R. APP. P. 33.1(a).

material to this Court's decision in *Schlumberger*. 959 S.W.2d at 181 ("*As there is no evidence of a fiduciary or confidential relationship*, the trial court correctly rendered a judgment notwithstanding the verdict against the Swansons on their claims of breach of fiduciary duty and fraudulent inducement." (emphasis added)). Astra is asking this Court to give fiduciaries *carte blanche* to insulate themselves from liability, even if the substantive law [13] that governs their duties as officers and directors obligates them to fully disclose all facts that their beneficiaries would consider material.

Under the internal-affairs doctrine, the Astra Individuals' fiduciary duties continued despite the parties' dispute, and they had a duty of full disclosure in connection with the Settlement Agreement. *See*, *e.g.*, *Pacelli Bros. Transp. v. Pacelli*, 456 A.2d 325, 329 (Conn. 1983) (noting that a fiduciary could not benefit from a release without "reveal[ing] his defalcations"). It is undisputed that the Astra Individuals did not disclose any facts "reveal[ing their] defalcations" before the Settlement Agreement was signed. Accordingly, they breached their fiduciary duties, and the Settlement Agreement is not an arm's-length transaction. The Court should not accept Astra's argument that the individuals' fiduciary relationships are immaterial to the Reliance Disclaimer's enforceability.

D. Astra ignores that, under *Schlumberger* and its progeny, enforcing reliance disclaimers is an exception to the general rule that fraud vitiates everything it touches.

"Our courts have consistently held that fraud vitiates whatever it touches." *Stonecipher's Estate*, 591 S.W.2d at 809. This is the long-standing Texas rule to which *Schlumberger* created a narrow exception. 959 S.W.2d at 179. But notwithstanding *Schlumberger* and its progeny, this Court has [14] repeatedly emphasized that reliance disclaimers are not per se enforceable. *See*, *e.g.*, *Int'l Bus. Machs. Corp. v. Lufkin Indus., Inc.*, 573 S.W.3d 224, 229 (Tex. 2019) ("Not every such disclaimer is effective."); *Forest Oil*, 268 S.W.3d at 61 ("We decline to adopt a *per se* rule that a disclaimer automatically precludes a fraudulent-inducement claim.").[6] Instead, this Court has emphasized that "[c]ourts ***must always*** examine the contract itself and ***the***

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[6] Astra's citation to *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213 (Tex. 2019), misses the mark. This Court in *Bombardier* was not considering the enforceability of a reliance disclaimer under the rubric set forth in *Schlumberger*. Rather, the Court was considering a provision that barred recovery of punitive damages, and the Court noted there was a difference between waiving a claim for fraud and "only waiv[ing] the ability to recover punitive damages for any fraud." *Id. at* 230, 232. Further, because *Bombardier* did not involve a breach-of-fiduciary-duty claim, the Court "decline[d] to decide whether a breach of fiduciary duty for fraudulent conduct"—similar to the type alleged here—"would affect the validity of a limitation-of-liability clause." *Id.* at 231. Accordingly, if anything, *Bombardier* supports the need for this Court's review to clarify the scope of the public policy supporting *Schlumberger*.

totally of the surrounding circumstances when determining if a waiver-of-reliance provision is binding." *Forest Oil*, 268 S.W.3d at 60 (emphasis added). Indeed, *Schlumberger* rests on the basic foundation that courts should enforce disclaimers only when doing so satisfies public policy.[7] *Schlumberger*, 959 S.W.2d at 178-81.

[15] If public policy ever bars enforcement of a reliance disclaimer, it should do so here because Astra is trying to avoid the consequences of its bribery scheme. The undisputed facts show that Astra:

> (a) paid $15 million of bribes in connection with the SPSA;
>
> (b) offered to pay between $80 and $100 million of bribes to "solve the problem" and reach a settlement;
>
> (c) had an affirmative duty to disclose these facts (among others) to Petrobras before, during, and after the Settlement Agreement negotiations, but failed to do so; and
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> (d) asked Petrobras to release all claims regarding the SPSA in the Settlement Agreement.

In light of Astra's fraudulent and criminal conduct, Petrobras should be able to present its claims to

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[7] As explained above, it would be against Texas's public policy and the dictates of its legislature to enforce the Reliance Disclaimer in light of the Astra Individuals' fiduciary duties.

a jury, regardless of the Reliance Disclaimer in the fraudulently procured Settlement Agreement.[8]

[16] **2. The declaratory judgment that the Release bars the claims asserted in the Arbitration was improper.**[9]

A. Petrobras has not changed its position about whether the trial court could decide the Release's effect on the Arbitration claims.

Astra incorrectly argues that Petrobras has made an "about face" and engaged in "litigation gamesmanship." (*See* Astra Resp. at 58.) Litigants must comply with forum-selection clauses even if they are seeking to invalidate the agreements in which they appear. *See My Cafe-CCC, Ltd. v. Lunchstop, Inc.*, 107 S.W.3d 860, 867 (Tex. App.—Dallas 2003, no pet.) ("When, as in this case, the forum selection clause encompasses all causes of action concerning the contract, the claim that

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[8] Although Feilhaber brazenly attempts to portray himself as a victim (*e.g.*, Feilhaber Resp. at 10), he was a fiduciary and the primary architect of the multimillion dollar bribery and money laundering scheme that victimized Petrobras and renders the Reliance Disclaimer unenforceable. (13CR:6755-62, 6764.)

[9] In addition to the reasons set forth in this section, the Release also does not bar the claims because the Settlement Agreement was procured by fraud and is unenforceable. *See Stonecipher's Estate*, 591 S.W.2d at 809 ("Our courts have consistently held that fraud vitiates whatever it touches."). And Astra cannot maintain that the Reliance Disclaimer precludes this outcome because the Reliance Disclaimer is unenforceable for the reasons discussed in Section 1.

a party was fraudulently induced to enter the contract does not avoid the forum selection clause.").[10] Thus, Petrobras was [17] required to file suit and ask the trial court to determine if the Settlement Agreement was enforceable. (13CR:6770–71.)

Crucially, although the trial court could determine if the Settlement Agreement and its Release are enforceable, it could not go further and decide what effect, if any, they have on the Arbitration claims. The SPSA's arbitration clause requires that all disputes arising from or related to the SPSA be resolved through binding arbitration. (14CR:7895.) The clause thus empowers the Tribunal to decide the merits of the Arbitration claims. Because the Release is an affirmative defense to those claims, only the Tribunal can decide what effect (if any) the Release has on the Arbitration claims. *See In re Jindal Saw Ltd.*, 264 S.W.3d 755, 764 (Tex. App.—Houston [1st Dist.] 2008, orig. proceeding) ("Those defenses that go to the merits of the lawsuit would be determined by the arbitrator."); *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1109 (11th Cir. 2004) ("Arbitrators . . . are empowered, absent an agreement to the contrary, to resolve disputes over whether a particular claim may be successfully litigated anywhere at all (due to concerns such as statute of limitations, laches,

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[10] This approach to forum-selection clauses is similar to how Texas courts treat the enforceability of arbitration clauses in contracts procured by fraud. *Forest Oil Corp.*, 268 S.W.3d at 56 ("While an arbitration agreement procured by fraud is unenforceable, the party opposing arbitration must show that the fraud relates to the arbitration provision specifically, not to the broader contract in which it appears." (footnote omitted)).

justiciability, etc.), or has any substantive merit whatsoever."); *see also Williams v. Glash*, 789 S.W.2d 261, 264 (Tex. 1990) (noting that release is an affirmative defense); TEX. R. CIV. P. 94 (listing [18] release as an affirmative defense). Accordingly, the trial court could not—as it did in the declaratory judgment—usurp the Tribunal's jurisdiction and decide whether the Release bars any of the Arbitration claims. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McCollum*, 666 S.W.2d 604, 609 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) ("The merits of an arbitrable dispute are for the arbitrator to decide.") (internal citation omitted).

In light of the Settlement Agreement's forum-selection clause and the SPSA's arbitration clause, it was not gamesmanship for Petrobras to file this lawsuit asking the trial court to determine if the Settlement Agreement is valid and enforceable, while denying that it could proceed further to decide what effect, if any, the Release has on the Arbitration claims. These are separate issues that are contractually delegated to different decision-makers: (1) whether the Settlement Agreement is valid and enforceable is for the trial court; and (2) assuming the trial court finds the Settlement Agreement valid and enforceable, whether it has any effect on the Arbitration claims is for the Tribunal.

Astra does not—and cannot—argue that Petrobras has waived this issue. Petrobras timely questioned the trial court's authority to decide the Release's effect on the Arbitration claims when responding to Astra's summary-[19]judgment motion directed to Petrobras's

Third Amended Petition. (10CR:5247–50.) And although Astra suggests that Petrobras waited too long to challenge the trial court's authority (Astra Resp. at 5), Astra filed a new summary-judgment motion enabling Petrobras to raise any arguments it wished to assert about the trial court's inability to address the Arbitration claims. Simply put, this issue was timely presented to the trial court, which had the opportunity to rule on it. Astra's contrary argument is meritless. *See Osterberg v. Peca*, 12 S.W.3d 31, 40 (Tex. 2000) (noting that, to preserve an issue, a party must raise it with sufficient specificity to give the trial court an opportunity to rule).

B. The trial court interfered with the Arbitration.

Astra is wrong to argue that the trial court's declaratory judgment did not interfere with the Tribunal's authority. Again, Astra conflates the trial court's authority to interpret the Settlement Agreement with the Tribunal's authority to apply the Settlement Agreement as a defense to the Arbitration claims and decide whether the Release bars any of them. The latter issue is exclusively within the Tribunal's jurisdiction under the SPSA's arbitration clause.

Indeed, multiple decisions confirm that a court lacks the authority to interfere with an arbitrator's jurisdiction. *See Babcock & Wilcox Co. v. PMAC,* [20] *Ltd.*, 863 S.W.2d 225, 235-36 (Tex. App.—Houston [14th Dist.] 1993, writ denied) ("Because the parties

agreed to submit the issue of attorney's fees to arbitration, the trial court was precluded from interfering with the arbitrator's jurisdiction and impermissibly modifying his decision."); *Metra United Escalante, L.P. v. Lynd Co.*, 158 S.W.3d 535, 540 (Tex. App.—San Antonio 2004, no pet.) ("We therefore follow the general rule applied by federal courts in Texas and conclude that the issuance of a preliminary injunction is not appropriate when the underlying claims are subject to arbitration under the FAA."); *see also Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (noting that the Federal Arbitration Act "establishes 'a liberal federal policy favoring arbitration agreements,'" and has "'the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts'") (internal citations omitted). By issuing a declaratory judgment that the Release bars the Arbitration claims, the trial court interfered with the Tribunal's exclusive jurisdiction.

Astra concedes as much when it acknowledges that the declaratory judgment "will have consequences for Petrobras." (Astra Resp. at 60.) In fact, Astra initially used the declaratory judgment to obtain an injunction from the [21] trial court prohibiting Petrobras from pursuing the Arbitration claims. (15CR:8210–17, 15CR:8220-2215CR:8223–26, 16CR:9016–19). For almost two years, Petrobras could not arbitrate its claims under the possible penalty of contempt and sanctions. The court of appeals eventually vacated that injunction, but Astra has since used the declaratory judgment to

seek another injunction from the trial court. (*See* Petition for Writ of Injunction at 5, filed in No. 13-21-00448-CV, pending in the Court of Appeals for the Fourteenth District of Texas.)[11] Astra argues that it is entitled to a new injunction because Petrobras is "disregarding" the trial court's declaratory judgment by pursuing the Arbitration claims, which the trial court allegedly "extinguished" in the declaratory judgment. (*Id.* at viii, 5.) And now that the trial court has refused to issue another injunction, Astra has urged the court of appeals to do so, citing the declaratory judgment. (*Id.* at 2 (quoting the declaratory judgment and criticizing Petrobras for pursing claims in the Arbitration "even though the [declaratory judgment] declared them to be barred")). In this regard, it is Astra—not Petrobras—that is engaging in gamesmanship. Simply put, Astra cannot credibly argue—as it has done here and elsewhere—(1) that the [22] declaratory judgment did not interfere with the Arbitration, but (2) that the judgment already decided the merits of the Arbitration claims such that Petrobras cannot pursue them.

C. The Astra Respondents' revocation argument fails for multiple reasons.

Astra maintains that the declaratory judgment is proper because the Settlement Agreement revoked the

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[11] This document is not in the record on appeal in this case, but Petrobras requests that the Court take judicial notice of it. *See* TEX. R. EVID. 201.

SPSA's arbitration provision. As explained below, this argument falters at every step.

(1) The parties must arbitrate disputes relating to conduct that occurred before the Settlement Agreement was executed.

Astra offers no meaningful response to Petrobras's argument that, even if the Settlement Agreement superseded the SPSA's arbitration provision, it could do so only as to claims arising *after* the arbitration provision was terminated. Disputes relating to conduct that occurred before termination still must be arbitrated. *See Cooper Indus., LLC v. Pepsi-Cola Metro. Bottling Co.*, 475 S.W.3d 436, 447 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (holding that termination of the agreement containing the arbitration clause "[did] not affect the obligation to arbitrate" disputes related to conduct before the termination agreement was signed); *see also Richland Equip. Co. v. Deere & Co.*, 745 F. App'x 521, 524 (5th Cir. 2018) (holding that, if a contract requiring arbitration terminated *after* the dispute arose, that dispute is still "subject to [23] a valid and enforceable arbitration agreement"). The United States Supreme Court has held that "the parties' obligations under their arbitration clause survive[] contract termination when the dispute [is] over an obligation arguably created by the expired agreement." *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243, 252 (1977). That is exactly the situation here.

Astra's *only* answer to this clear authority is that the SPSA's arbitration agreement was *revoked*, not superseded or terminated. (Astra Resp. at 68.) But Astra fails to explain how this different terminology leads to a substantively different outcome. Nor does Astra cite any authority that would support a different outcome when an agreement is "revoked" rather than "terminated."

This fundamental principle is fatal to the trial court's declaratory judgment purporting to decide the Arbitration claims. All of those claims arose before the Settlement Agreement was signed in June 2012, and thus, the Settlement Agreement "does not affect the obligation to arbitrate [those claims]." *Cooper Indus.*, 475 S.W.3d at 447. Accordingly, the Court should vacate the declaratory judgment because Petrobras can prosecute the [24] Arbitration claims before the Tribunal, even if the Settlement Agreement superseded, terminated, or revoked the SPSA's arbitration clause.

(2) The trial court lacked authority to determine whether the SPSA's arbitration provision was superseded or revoked

In arguing that the trial court was empowered to consider the validity of the SPSA's arbitration clause (Astra Resp. 61-67), Astra conflates the various mechanisms for challenging an arbitration agreement. As this Court has held:

> There are three distinct ways to challenge the validity of an arbitration clause: (1) challenging the validity of the contract as a whole; (2) challenging the validity of the arbitration provision specifically; and (3) challenging whether an agreement exists at all.

RSL Funding, LLC v. Newsome, 569 S.W.3d 116, 124 (Tex. 2018) (citing *In re Morgan Stanley & Co.*, 293 S.W.3d 182, 187 (Tex. 2009)). When "a party . . . challenge[s] the arbitration provision itself . . . [a] court, not the arbitrator, hears such challenges *unless the parties have expressly delegated that issue to the arbitrator.*" *Dow Roofing Sys., LLC v. Great Comm'n Baptist Church*, No. 02-16-00395-CV, 2017 WL 3298264, at *4 (Tex. App.—Fort Worth Aug. 3, 2017, pet. denied) (citing *In re Morgan Stanley*, 293 S.W.3d at 187); *see also IHS Acquisition No. 131, Inc. v. Iturralde*, 387 S.W.3d 785, 793 (Tex. App.—El Paso 2012, no pet.) ("An arbitration provision may give the arbitrator the power to resolve gateway issues regarding validity and enforceability of the arbitration agreement."). When the parties have agreed that the arbitrator should decide [25] the arbitrability question, "a court possesses no power to decide the arbitrability issue." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019).

The SPSA's arbitration clause indisputably delegates arbitrability questions—including the "*validity* of [the SPSA] and [its arbitration clause]" to the Tribunal, not a Texas court. (14CR:7895 (emphasis added); *see also* Petrobras Br. at 35.) Accordingly, the Tribunal has exclusive authority to determine the arbitration

clause's continuing validity, including whether it has been revoked or superseded. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) ("[A] gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability'. . . ."); *TAPCO Underwriters, Inc. v. Catalina London Ltd.*, No. 14-CV-8434 JSR, 2014 WL 7228711, at *2 (S.D.N.Y. Dec. 8, 2014) ("Whether the forum-selection clause in the 2005 Agreement supersedes the arbitration clauses in the earlier agreements presents a question of arbitrability.").

And as Petrobras previously explained, revocation is not a contract-***formation*** issue, and therefore a trial court has no power to consider it when the parties have delegated arbitrability issues to the arbitrator. (Petrobras Br. at 35-38.) Astra ignores the authority recognizing this crucial distinction and [26] instead relies on distinguishable cases[12] or ones that directly contradict this Court's *RSL* opinion, which found that courts may consider only contract-formation challenges. 569 S.W.3d at 124. Indeed, Astra makes no attempt to address the formation-validity distinction or to reconcile its cited authority with *RSL*. Furthermore, that lower courts have misunderstood this fundamental arbitrability question indicates that this Court's review is warranted.

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[12] Many of Astra's cases do not even address the delegation of arbitrability. (*See* Petrobras Br. 37 n.9.)

(3) The SPSA's arbitration provision was not revoked or superseded.

Petrobras has explained why the Settlement Agreement did not revoke the SPSA's arbitration clause under Texas law. (Petrobras Br. at 39-42.) Turning first to the Settlement Agreement's forum-selection clause, by its terms that provision applies *only* to the Settlement Agreement, not the SPSA. And Astra's contrary argument misunderstands that the Arbitration claims' merits—which include the effect (if any) of the Release or any other affirmative defense—must be arbitrated.[13] If Astra wanted to revoke or [27] supersede the right to arbitrate disputes arising out of or relating to the SPSA, it could have included in the Settlement Agreement express language doing so, but it did not. *See Sundown Energy LP v. HJSA No. 3, Ltd. P'ship*, 622 S.W.3d 884, 889 (Tex. 2021) ("As we have said time and again, courts may not rewrite a contract under the guise of interpretation."). Without clear and unequivocal language revoking the SPSA's arbitration provision, the Settlement Agreement cannot affect the Tribunal's jurisdiction.

Astra's revocation argument based on the Settlement Agreement's merger-and-integration clause and general release provision also fails. Astra can avoid

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[13] Indeed, to the extent Astra argues that the Arbitration claims fall within the forum-selection clause's scope because the Release causes them to "relate" to the Settlement Agreement, the same logic would mean that the claims fall within the Release's Carve Out and therefore are not barred by the Release. (*See* Petrobras Resp. at 13-16.)

arbitration only if the Settlement Agreement contains provisions that specifically negate the SPSA's arbitration clause; references to the SPSA as a whole will not suffice under binding authority. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967); *Forest Oil*, 268 S.W.3d at 56. Neither the merger-and-integration clause nor the general release specifically references the SPSA's arbitration clause. They (at most) refer to the SPSA as a whole. Accordingly, they cannot deprive Petrobras of its right to arbitrate the claims pending before the Tribunal.

[28] CONCLUSION AND PRAYER

For these reasons (and those in Petrobras's opening brief on the merits), the Court should grant Petrobras's petition for review and hold that the Reliance Disclaimer does not bar Petrobras's reliance-based claims. The Court should also hold that the trial court erred in purporting to decide the Settlement Agreement's effect on the claims asserted in the Arbitration. Petrobras also requests general relief.

[29] Respectfully submitted,

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