Opinion issued March 24, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00195-CV

INNOVATIVE VISION SOLUTIONS, LLC AND DR. JAMES S. GODDARD JR., Appellants

V.

HARRIS KEMPNER, JR. AND HARRIS KEMPNER, III, Appellees

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Case No. 16-CV-0912

MEMORANDUM OPINION

This is an appeal from a bench trial on the construction and enforceability of an oral Rule 11 Settlement Agreement entered between appellants Innovative Vision Solutions, LLC and Dr. James S. Goddard, Jr. (collectively, IVS) and appellees Harris Kempner, Jr. and Harris Kempner, III. In six issues, IVS argues

that the trial court erred in (1) failing to hold that the Rule 11 Settlement Agreement as read into the record was a valid, enforceable agreement; (2) allowing presentation of testimony regarding the parties' intent concerning the Rule 11 Settlement Agreement; (3) rendering a final judgment that did not comport with the Rule 11 Settlement Agreement and, instead, (4) adding new, material terms and obligations to the parties' agreement; (5) refusing to render judgment based on IVS's proposed final judgment; and (6) awarding attorney's fees to the Kempners.

Because we conclude that the trial court correctly determined that the Rule 11 Settlement Agreement was enforceable and properly construed that agreement according to its terms, we affirm.

Background

Goddard formed IVS for the purpose of developing, manufacturing, and selling new medical imaging technology. The Kempners allege that they provided financial backing and business consulting to Goddard and IVS. This included providing a loan of $22,500 in 2011 and additional funding of approximately $15,000. The Kempners also allege that they provided advice on starting the business and used their business connections and experience to IVS's advantage.

In 2014, IVS obtained a patent license agreement and a copyright license agreement granted by Oak Ridge National Labs and the University of Tennessee-Battelle (ORNL/UT-Battelle) to commercially develop and manufacture new

imaging technology. In return for the copyright license, ORNL/UT-Battelle received an execution fee, minimum and running royalties, and the right to audit IVS's business records under specific terms set out in the agreement. The patent license likewise entitled ORNL/UT-Battelle to receive royalties based on sales and sublicensing revenue—which included all consideration received by IVS for the disposition of licensed products by a sublicensee, including license fees, royalties, and milestone payments—and the right to audit IVS.

The copyright license agreement summarized the consideration and financial obligations:

> In consideration for the grant of a limited exclusive license, Licensee [IVS] agrees to comply with all the provisions of this Agreement, to pay all fees, [royalties], costs, and all other consideration according to the schedule specified . . . in this Agreement for the Term, and to satisfy the requirements of the Development and Commercialization Plan set forth in Exhibit C. Prompt payment of all amounts due to Licensor and satisfaction of the Development and Commercialization Plan requirements are material to this Agreement.

The patent license agreement contained a similar provision. "Exhibit C" contained milestones in development and production of the imaging technology leading to the eventual commercial sale of licensed products. Both the license agreement and the copyright license agreement (collectively, the license agreements) also provided detailed provisions regarding ORNL/UT-Battelle's right to audit and receive reports from IVS. The license agreements provided that IVS "shall keep and make available . . . adequate and sufficiently detailed records to

enable [IVS's] financial obligations required under this Agreement to be determined readily and accurately." IVS was required to maintain the records for a period of three years after the end of the last accounting period to which the records referred. The audit provision further stated, "In the event an examination of [IVS's] records reveal an underpayment of more than five percent (5%) of the accurate [royalty] amount, [IVS] shall pay all costs incurred by Licensor related to the examination of records in addition to paying the balance due, plus any applicable interest[.]"

The Kempners asserted that, in June 2016, they met with Goddard. They asserted that Goddard had agreed to give them an ownership interest in IVS in exchange for the business services and financial investment they had made in the company. They contended that they had entered an oral contract for an ownership interest in IVS of between 10 and 20 percent, the right to have a representative in IVS, and the right of first refusal regarding future investors. IVS, however, disputed that any such oral agreement had been made.

The Kempners filed suit on August 5, 2016, alleging that IVS and Goddard had breached the June 2016 oral contract, or, alternatively, seeking relief via quantum meruit and promissory estoppel. The discovery process was contentious. The trial court eventually ordered that IVS and Goddard pay $36,364.59 in fees as sanctions to the Kempners. The trial setting was also delayed. During the

intervening years, the parties exchanged settlement offers. Relevant here, the Kempners made a written settlement offer dated July 31, 2018, offering to settle their claims for enforcement of their purported ownership rights in exchange for a "2.5% gross royalty."

On the morning of February 19, 2019, the day the trial was set to begin, the parties agreed to a settlement based on the July 31, 2018 settlement offer. They entered into a Rule 11 Settlement Agreement on the record in open court, "to be reduced and memorialized later to writing." The parties agreed that IVS and Goddard would give the Kempners "a 2.5 percent gross royalty on the same present terms as the royalty granted to ORNL/UT-Battelle for 10 years from the first commercial sale or sublicence of the device." The parties further agreed that if "ORNL/UT-Battelle changes the terms of this royalty, the Kempners have a right to accept or reject the change in terms." The parties agreed that the gross royalty would be managed by a third-party trust company chosen by the Kempners and that the trustee would have the right to audit IVS's books and records up to four time a year, at the Kempners' expense. The Kempners were also to have notice of ORNL/UT-Battelle's audits of IVS and access to "the results, reports, etc. of any ORNL/UT-Battelle audit reports upon receipt."

The Rule 11 Settlement Agreement contained a provision that IVS would donate two imagining machines to UTMB in Ruth Kempner's name "immediately

upon commercial availability" and "if manufactured and sold by IVS." The parties further agreed that "the existing sanction the Court awarded against Dr. Goddard and IVS will not have to be paid." They stated that "[t]he existing loan . . . from the Kempners [to IVS] will be paid in accordance with its express terms." The parties agreed that "[e]ach party will be financially responsible for the respective attorney's fees and costs," that "neither party will file suit against the others from this point forward except to enforce the terms of this agreement and any accompanying written settlement agreement . . . and to enforce the terms of existing loans when they become due and owing." The parties provided that "the 212th Judicial District Court retains authority over this settlement agreement." Finally, the Rule 11 Settlement Agreement provided, "If IVS is sold, the Kempners collectively will receive 7 and a half percent of all sales proceeds that James Goddard and/or IVS receives as a result of the sale."

As contemplated on the record when they announced their Rule 11 Settlement Agreement, the parties subsequently attempted to draft a formal written settlement agreement based on the terms outlined in the Rule 11 Settlement Agreement. The Kempners, relying on the Rule 11 Settlement Agreement's reference to the "gross royalty on the same present terms as the royalty granted to ORNL/UT-Battelle," used terms from the ORNL/UT-Battelle license agreements to flesh out the terms of the Rule 11 Settlement Agreement and to define the

meaning of the word "sale." IVS added explicit release language, but it rejected the Kempners' addition of specific terms defining the full extent of the audit rights and other obligations. Despite exchanging several draft agreements, they were never successful in completing a formal written agreement.

On May 15, 2019, the Kempners filed a "Motion for Help to Finalize Settlement Agreement." In this motion, they stated that the parties had entered into a Rule 11 Settlement Agreement on the record on February 19, 2019, based in part on the July 31, 2018 settlement offer. They stated, "[B]efore anything substantive was read into the record, the Court asked both Parties if the settlement agreement was going to be 'reduced and memorialized later in writing,'" and the parties stated that it would be. However, the parties were unable to reach a "final agreement." The Kempners argued that the terms of the Rule 11 Settlement Agreement failed to clarify the meaning of several essential terms and asked the trial court to help the parties resolve their dispute over the terms of the agreement. IVS, on the other hand, responded that the Rule 11 Settlement Agreement was an enforceable agreement that included all the essential terms and that the Kempners were simply attempting to import additional, material requirements to the settlement. IVS asked the trial court to compel the Kempners to sign IVS's own proposed written settlement agreement setting out the terms of the Rule 11 Settlement Agreement.

The trial court ordered the parties to mediate their continued dispute over the Rule 11 Settlement Agreement. IVS delayed the mediation by filing a petition for writ of mandamus challenging the trial court's mediation order. This Court subsequently denied the petition for writ of mandamus. *See In re Innovative Solutions, LLC*, No. 01-19-00597-CV, 2019 WL 3850083, at *1 (Tex. App.—Houston [1st Dist.] Aug. 15, 2019, orig. proceeding) (mem. op.). In the meantime, the Kempners asked to audit IVS's records, citing the Rule 11 Settlement Agreement. The Kempners then asserted that IVS and Goddard disputed which records could be made available to audit, and the Kempners identified delays due to Goddard's schedule and IVS's CPA's work on the records that allegedly obstructed the audit process. The Kempners moved the trial court to compel the audit.

On September 11, 2019, the Kempners amended their petition to allege a claim for breach of contract and seeking declaratory relief relating to the Rule 11 Settlement Agreement. In their amended petition, the Kempners alleged that the parties read the Rule 11 Settlement Agreement into the record but were "unable to agree to a written settlement agreement" because IVS and Goddard "have insisted upon terms that could deprive [the Kempners] of consideration under the agreement." Nevertheless, the Kempners retained a third-party trust company to facilitate an audit of IVS's books and records, as provided for in the Rule 11

Settlement Agreement, and they deposited funds with the trust company to pay for the audit. The Kempners alleged that IVS "refused to allow an audit to proceed until a 'bookkeeper' could be retained by the company to '[ready]' IVS's books," which they alleged was not consistent with the terms of the Rule 11 Settlement Agreement. The Kempners asserted that IVS and Goddard breached the Rule 11 Settlement Agreement by failing to perform according to its terms, "including but not limited to [refusing to permit] an audit of IVS's books and records and [refusing to provide] 'all reports and disclosures submitted to ORNL/UT-Battelle' by IVS."

The Kempners further sought declaratory relief, asking the trial court to declare the parties' rights pursuant to the Rule 11 Settlement Agreement, including but not limited to the Kempners' "right to conduct an audit of IVS books and records," their right with respect to royalties from IVS; declarations that "IVS must pay for the audit in the event of an underpayment," that IVS was "obligated to operate in good faith"; and a declaration of the meaning of a "sale" under the Rule 11 Settlement Agreement.

At the hearing on the motion to compel the audit, held on September 12, 2019, the parties narrowed the scope of their dispute over the Rule 11 Settlement Agreement. IVS asserted that the Settlement Agreement contained all the essential terms of the parties' settlement, but IVS and Goddard also recognized some

unresolved issues, such as the definition of "sale" and issues related to audit rights and payment of royalties. The parties ultimately agreed that the royalty created by the Rule 11 Settlement Agreement included "2.5% of any revenue generated by IVS," including revenue "under the sublicense that's described in the copyright use license and in the patent use license." They continued to disagree about (1) the meaning of "sale" as it pertained to the Kempners' right to 7.5% of the proceeds in the event IVS was "sold"; (2) whether specific provisions governing the audit and retention of records from the license agreements, including provisions requiring financial information to be retained and available for a period of three years, applied to their Rule 11 Settlement Agreement; and (3) whether the Rule 11 Settlement Agreement required IVS to manufacture and sell imaging machines in accordance with the milestones set out in the Development and Commercialization Plan in Exhibit C to the license agreements.

Given the parties' continued disagreement, the trial court suggested setting aside the Rule 11 Settlement Agreement and setting the case back on the trial docket for a trial on the Kempners' original claims. Both the Kempners and IVS rejected this solution, stating on the record that they had had a meeting of the minds and intended to be bound by the terms of the Rule 11 Settlement Agreement. The Kempners brought their amended petition to the trial court's attention, and the trial court granted them leave to file the amended petition over IVS's objection.

The Kempners then sought resolution of the claims for breach of the Rule 11 Settlement Agreement and for declaratory relief. When the trial court stated its intention to grant the motion to compel the audit, the Kempners argued that the need for a declaratory judgment on the additional issues remained. The parties agreed that the trial court—and not a jury—could decide the remaining issues. IVS asked that the trial court do so as a matter of law, while the Kempners argued that there were some fact issues concerning the enforceability and construction of the Rule 11 Settlement Agreement that would require the introduction of evidence.

The bench trial was held on December 30, 2019. Over IVS's objection that no evidence should be entered during the bench trial, Kempner Jr. testified about the circumstances surrounding the Rule 11 Settlement Agreement and his understanding of the parties' intentions in entering into the Agreement. He testified that the Rule 11 Settlement Agreement was largely based on the Kempners' July 31, 2018 written settlement offer to IVS. He further testified that the Rule 11 Settlement Agreement's phrase, stating that the royalty was to be granted "on the same present terms" as those granted to ORNL/UT-Battelle in the license agreements, made clear that the terms of those license agreements would apply to the calculation of the royalty and to all other terms of the Rule 11 Settlement Agreement.

The Kempners also provided evidence to support a request for attorney's fees on their declaratory judgment claim. Their attorney testified regarding his work on the case to construe and enforce the Rule 11 Settlement Agreement, including the mediation, mandamus proceeding, and bench trial. They also provided billing records to support their claim for attorney's fees. The Kempners' attorney identified $87,000 worth of fees billed since the parties entered into the Rule 11 Settlement Agreement, but he stated that he believed only $75,000 of that amount was attributable to the dispute over the Rule 11 Settlement Agreement. He based his opinion on the time and labor involved as well as the novelty and difficulty of the issues.

The trial court rendered its amended final judgment on February 20, 2020. The trial court made findings of fact that the parties entered into the Rule 11 Settlement Agreement to settle the claims and disputes in the case and that they "agreed to reduce and memorialize [the Rule 11 Settlement Agreement] to writing," but were unable to do so. The trial court further found that the Kempners had amended their pleadings to include a claim for declaratory relief "asking the Court to declare their rights under" the Rule 11 Settlement Agreement, and it found that the parties "agreed to have any remaining issues . . . tried by the Court in a bench trial." The trial court rendered judgment that "[t]he parties entered into

an enforceable settlement agreement," and it declared the rights and responsibilities of the parties under the agreement.

The trial court's declarations contained provisions that tracked the provisions of the Rule 11 Settlement Agreement, including that (1) Goddard and IVS must pay a "2.5% gross royalty of any revenue"; (2) the royalty would be managed by a third-party trustee; (3) the term for the royalty is 10 years from the earlier of the first commercial sale of a licensed product or the first sublicense; (4) the Kempners' had a right to be notified, through their trustee, of any changes in the license agreements and the Kempners' right "in their sole discretion to accept or reject whether the proposed changes will be applied to the Kempner Royalty"; (5) the Kempners' had a right to audit IVS's records up to four times a year and to review audits done by ORNL/UT-Battelle; (6) IVS would donate two imaging machines to UTMB "if manufactured and sold by IVS"; (7) IVS was released from paying the litigation sanctions; (8) the previous loan will still be paid according to its own terms and is unaffected by the settlement; (9) the Kempners had a right to 7.5% of proceeds in the event IVS is sold; and (10) the parties would not file suit in the future "except to enforce any obligation under this Final Judgment, any agreement reached between the parties concerning this Final Judgment, or to enforce the Loan(s)."

The trial court's declaration construing the contract also included additional explanations of the parties' rights and responsibilities. Relevant here, the trial court determined that the license agreements were incorporated by reference into the parties' settlement. It held that the royalty granted in the Rule 11 Settlement Agreement specifically included "Sublicense Revenue generated under Article Five of the Patent License, shrink-wrap sublicense revenue, any sales, or any other revenue generated under such license or sublicense" as the parties agreed on the record at the September 12 hearing.

The trial court further determined that "[t]he same terms granted to ORNL/UT-Battelle in the license agreements apply to the Kempner Royalty, except where in conflict, then the [settlement agreement] controls" and that the definitions in the license agreements apply to the terms of the settlement agreement. The trial court also spelled out provisions for the method and timing for IVS's payment of the royalty to the Kempners. Most significant here, the trial court determined that certain terms governing audits and records under the license agreements likewise governed the parties' settlement agreement:

> As the same and present terms apply to the Kempner Royalty, IVS will keep such books and records during the full Royalty Term and for a period of three (3) years thereafter. The Trustee shall have the right, at the Kempners' expense, to audit the books and records (including without limitation, detailed financial statements) of the Company up to four (4) times per calendar year during the Royalty Term and for a period of three (3) years thereafter. IVS will provide full access to the Trustee (or its designee) to such books and records during customary

> business hours. IVS will promptly adjust and correct any error identified by the Trustee. In the event such audit determines an underpayment of the Kempner Royalty by 5% or more, IVS will immediately reimburse the Kempners for the actual cost of such audit.

The trial court further determined that Goddard and IVS were obligated to continue operating in good faith as described in the Development and Commercialization Plan in the license agreements:

> Goddard shall continue to operate the Company in good faith and in the ordinary course of business, and use best efforts to commercialize the Licensed Products and the Licensed Material so as to result in a Kempner Royalty. Specifically, Goddard and IVS will "satisfy the requirements of the Development and Commercialization Plan" set forth in each respective Exhibit C attached to both License Agreements. Prompt payment of all amounts due to the Kempners and satisfaction of the Development and Commercialization Plan requirements are material to the Agreement.

Finally, the trial court construed the exact nature of the Kempners' right to 7.5% of all sales proceeds resulting from any sale of IVS:

> In the event of any sale of IVS, the Kempners shall be entitled to receive seven-and-a-half percent (7.5%) of the total of: (a) the gross sales proceeds, plus (b) the value of any other consideration, received by IVS and any owner of IVS (including without limitation, Goddard). The "sale of IVS" is to be broadly construed and includes, without limitation, the sale of any ownership interest in IVS or any affiliate thereof; the sale of all or substantially all of the assets of IVS; any transfer, assignment or other disposition of at least ten percent (10%) of Goddard's ownership interest in IVS; any transfer, assignment or other disposition of IVS's rights under the License Agreements; any merger, joint venture or other business combination of any kind or nature involving IVS; and any other transaction of any kind or nature pursuant to which Goddard and/or IVS receives consideration in exchange for its ownership of IVS or any assets thereof, not in the ordinary course of IVS's business.

Finally, the trial court ordered the "Defendants"—IVS and Goddard—to pay $75,000 in costs and reasonable and necessary attorney's fees pursuant to Civil Practice and Remedies Code section 37.009.

Declaratory Judgment Construing the Rule 11 Settlement Agreement

In its first five issues, IVS challenges the trial court's declaratory judgment construing the parties' Rule 11 Settlement Agreement on multiple grounds.

A. Standard of Review

The Uniform Declaratory Judgments Act (UDJA) empowers Texas courts "to declare rights, status, and other legal relations whether or not further relief is or could be claimed." TEX. CIV. PRAC. & REM. CODE § 37.003(a); *see Allstate Ins. Co. v. Irwin*, 627 S.W.3d 263, 269 (Tex. 2021). The UDJA's "stated purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered." *Irwin*, 627 S.W.3d at 269 (quoting TEX. CIV. PRAC. & REM. CODE § 37.002(b)). Under its terms, any "person interested" under a written contract "may have determined any question of construction or validity" arising under that contract and "obtain a declaration of rights, status, or other legal relations thereunder." *Id.* (quoting TEX. CIV. PRAC. & REM. CODE § 37.004(a)).

"The UDJA is intended to provide an effective remedy for settling disputes before substantial damages accrue," and it "is often preventative in nature." *Id.*; *see*

Etan Indus. Inc. v. Lehmann, 359 S.W.3d 620, 624 (Tex. 2011) (noting that UDJA "is intended as a means of determining the parties' rights when a controversy has arisen but before a wrong has been committed"); *see also Bonham State Bank v. Beadle*, 907 S.W.2d 465, 468 (Tex. 1995) ("A trial court has discretion to enter a declaratory judgment so long as it will serve a useful purpose or will terminate the controversy between the parties."). We review a declaratory judgment under the same standards as other judgments and look to the procedure used to resolve the issue in the court below to determine the appropriate standard of review. *See* TEX. CIV. PRAC. & REM. CODE § 37.010; *Unocal Pipeline Co. v. BP Pipelines (Alaska) Inc.*, 512 S.W.3d 492, 499–500 (Tex. App.—Houston [1st Dist.] 2016, pet. denied).

Rule 11 agreements have long been recognized as "an effective tool for finalizing settlements by objective manifestation so that the agreements 'do not themselves become sources of controversy.'" *Knapp Med. Ctr. v. De La Garza*, 238 S.W.3d 767, 768 (Tex. 2007) (quoting *Kennedy v. Hyde*, 682 S.W.2d 525, 530 (Tex. 1984)). Rule 11 requires settlement agreements to "be in writing, signed and filed with the papers as part of the record" or "be made in open court and entered of record." TEX. R. CIV. P. 11. A Rule 11 settlement agreement must contain all the essential terms of the settlement. *Padilla v. LaFrance*, 907 S.W.2d 454, 460 (Tex. 1995); *MKM Eng'rs, Inc. v. Guzder*, 476 S.W.3d 770, 778 (Tex. App.—Houston

[14th Dist.] 2015, no pet.). Essential terms are those terms that the parties "would reasonably regard as vitally important elements of their bargain," *Potcinske v. McDonald Prop. Invs., Ltd.*, 245 S.W.3d 526, 531 (Tex. App.—Houston [1st Dist.] 2007, no pet.), and include payment terms and release of claims, *see Padilla,* 907 S.W.2d at 460–61; *MKM Eng'rs*, 476 S.W.3d at 778. Courts construe Rule 11 settlement agreements just as they would any contract. *See Padilla*, 907 S.W.2d at 460; *MKM Eng'rs*, 476 S.W.3d at 778.

When construing a contract, we must look to the language of the parties' agreement. *Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471, 479 (Tex. 2019). We must give effect to the parties' intentions as expressed in their agreement. *Id.*; *Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd.*, 574 S.W.3d 882, 888 (Tex. 2019) (stating that "primary objective" when construing contract is "to give effect to the written expression of the parties' intent"). "A contract's plain language controls, not 'what one side or the other alleges they intended to say but did not.'" *Great Am. Ins. Co. v. Primo*, 512 S.W.3d 890, 893 (Tex. 2017) (quoting *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 127 (Tex. 2010)). We construe contracts under a de novo standard of review. *Barrow-Shaver Res.*, 590 S.W.3d at 479.

"When discerning the contracting parties' intent, courts must examine the entire agreement and give effect to each provision so that none is rendered

meaningless." *Kachina Pipeline Co. v. Lillis*, 471 S.W.3d 445, 450 (Tex. 2015) (quoting *Tawes v. Barnes*, 340 S.W.3d 419, 425 (Tex. 2011)). We give contract terms their plain and ordinary meaning unless the contract indicates that the parties intended a different meaning. *Id.* (quoting *Dynegy Midstream Servs., Ltd. P'ship v. Apache Corp.*, 294 S.W.3d 164, 168 (Tex. 2009)). We construe contracts from a utilitarian standpoint bearing in mind the particular business activity sought to be served, and we avoid unreasonable, inequitable, and oppressive constructions when possible and proper. *N. Shore Energy, L.L.C. v. Harkins*, 501 S.W.3d 598, 602 (Tex. 2016); *Frost Nat'l Bank v. L & F Distribs., Ltd.*, 165 S.W.3d 310, 312 (Tex. 2005). If, after the rules of construction are applied, the contract can be given a definite or certain legal meaning, it is unambiguous, and we construe it as a matter of law. *Frost Nat'l Bank*, 165 S.W.3d at 312.

B. Appropriateness of Trial on Declaratory Judgment Claim

In its fifth issue, IVS argues that the trial court had a "ministerial duty to render a compliant final judgment, without more," and that the trial court erred in refusing to grant IVS's request to render final judgment based on IVS's own proposed final judgment. In its second issue, IVS argues that the trial court erred in holding a trial and taking evidence on the Kempners' declaratory judgment claim seeking construction of the Rule 11 Settlement Agreement.

IVS's arguments that the trial court erred in allowing the Kempners' to proceed with their declaratory judgment action and in holding a bench trial misconstrues the parties' pleadings. After the parties entered the Rule 11 Settlement Agreement on the record at the February 19, 2019 trial setting, they continued to experience conflict in reducing their agreement to a final written contract. They also disagreed about the terms and enforcement of the agreement regarding the Kempners' request to conduct an audit of IVS. Despite their disagreements regarding some of the provisions, however, the parties agreed that they had a meeting of the minds and that they intended to be bound by the terms of the Rule 11 Settlement Agreement. The Kempners subsequently amended their petition to seek a declaratory judgment construing the rights and responsibilities of the parties under the Rule 11 Settlement Agreement. In the hearings leading up to the bench trial and during the trial itself, both parties asserted that the Rule 11 Settlement Agreement was a valid, enforceable agreement, even though they disagreed regarding the construction of that agreement.

Thus, a conflict arose between the parties regarding their rights and obligations under the Rule 11 Settlement Agreement, and the Kempners pleaded a new cause of action to address that conflict. It would have been improper for the trial court to render judgment as a "ministerial duty," because the parties did not consent to an agreed judgment even though they agreed that they had reached a

settlement. *See Padilla*, 907 S.W.2d at 462 ("An action to enforce a settlement agreement, where consent is withdrawn, must be based on proper pleading and proof."). Rather, when, as here, a settlement dispute arises while the trial court has jurisdiction over the underlying action, a claim to enforce the settlement agreement should be asserted through an amended pleading. *Batjet, Inc. v. Jackson*, 161 S.W.3d 242, 245 (Tex. App.—Texarkana 2005, no pet.) (citing *Mantas v. Fifth Court of Appeals*, 925 S.W.2d 656, 658 (Tex. 1996); *Padilla*, 907 S.W.2d at 462).

The Kempners amended their pleadings to seek resolution of the parties' conflict over the construction of the Rule 11 Settlement Agreement, and the trial court could not resolve this dispute in a "ministerial" manner because of the nature of the dispute between the parties. *Id.* (holding that, when settlement dispute arises, rendering judgment on settlement agreement alone would "deprive a party of the right to be confronted by appropriate pleadings, assert defenses, conduct discovery, and submit contested fact issues to a judge or jury"); *see also Padilla*, 907 S.W.2d at 461–62 (contrasting, in context of a Rule 11 settlement agreement, requirements for agreed judgment as opposed to elements of enforceable settlement agreement; holding, "Although a court cannot render a valid agreed judgment absent consent at the time it is rendered, this does not preclude the court, after proper notice and hearing, from enforcing a settlement agreement complying with Rule 11 even though one side no longer consents to the settlement").

We conclude that the trial court did not abuse its discretion in holding a bench trial on the Kempners' UDJA claim seeking a declaration of the parties' rights and responsibilities under the Rule 11 Settlement Agreement. The Kempners sought relief within the scope of the UDJA—i.e., a determination of the validity and construction of the Rule 11 Settlement Agreement and a declaration of the parties' "rights, status, or other legal relations" pursuant to that agreement. *See* TEX. CIV. PRAC. & REM. CODE § 37.004(a). The trial court's resolution of the UDJA claim further served a "useful purpose" in clearly articulating the rights and obligations of the parties for their ongoing business relationship. *See Beadle*, 907 S.W.2d at 468 (holding that trial court has discretion to render declaratory judgment if it will "serve a useful purpose or will terminate the controversy between the parties"); *Etan Indus.*, 359 S.W.3d at 624.

IVS specifically argues that the trial court erred in permitting the Kempners to present Harris Kempner, Jr.'s testimony regarding the parties' intent in entering into the Rule 11 Settlement Agreement. We conclude that the trial court did not err in allowing the introduction of evidence and testimony during the bench trial.

The parol evidence rule "prohibits a party to an integrated written contract from presenting extrinsic evidence 'for the purpose of creating an ambiguity or to give the contract a meaning different from that which its language imports.'" *URI, Inc. v. Kleberg Cty.*, 543 S.W.3d 755, 764 (Tex. 2018) (quoting *Cmty. Health Sys.*

Prof'l Servs. Corp. v. Hansen, 525 S.W.3d 671, 681 (Tex. 2017)). Extrinsic evidence, such as evidence of the parties' intent, is admissible when a contract is ambiguous. *See id.* at 764–65 ("Only where a contract is ambiguous may a court consider the parties' interpretation and 'admit extraneous evidence to determine the true meaning of the instrument."). "The parol evidence rule does not, however, prohibit courts from considering extrinsic evidence of the facts and circumstances surrounding the contract's execution" for all purposes. *Id.* Thus, even when a contract is unambiguous, courts may consider "extrinsic evidence of the facts and circumstances surrounding the contract's execution as 'an aid in the construction of the contract's language.'" *Id.* at 765 (explaining such evidence may be used to 'give the words of a contract a meaning consistent with that to which they are reasonably susceptible, i.e. to 'interpret' contractual terms'") (quoting *Sun Oil Co. v. Madeley*, 626 S.W.2d 726, 731 (Tex. 1981); *Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 521 (Tex. 1995)).

During the bench trial, the trial court heard arguments from the parties but did not issue a ruling as to whether there was an ambiguity in the Rule 11 Settlement Agreement. The Kempners argued that, to the extent there was an ambiguity in the terms of the Rule 11 Settlement Agreement, they had "entered [into the record] what we believe the intent was." They also argued that Kempner

Jr.'s testimony was nevertheless relevant to the facts and circumstances surrounding the Rule 11 Settlement Agreement's execution.

We observe that there is no indication that the trial court concluded that the Rule 11 Settlement Agreement was ambiguous, nor do we conclude that the contract language was ambiguous. *See RSUI Indem. Co. v. Lynd Co.*, 466 S.W.3d 113, 119 (Tex. 2015) (ambiguity exists only if application of established rules of interpretation leaves contract language susceptible to more than one reasonable meaning); *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 781 (Tex. 2006) (holding that contract language is not ambiguous because it is unclear or because parties "assert forceful and diametrically opposing interpretations").

Nevertheless, we cannot say that the trial court abused its discretion in permitting Kempner Jr.'s testimony. Consistent with *URI, Inc. v. Kleberg*, the trial was at liberty to consider extrinsic evidence of the facts and circumstances surrounding the Rule 11 Settlement Agreement's execution as an aid in the construction of the contract's language. *See* 543 S.W.3d at 765. Nothing in the record suggests that the court considered extrinsic evidence for any purpose other than to understand the context in which the Rule 11 Settlement Agreement was made and to "elucidate[] the meaning of the words employed." *See id.*; *see also* TEX. R. EVID. 402 (providing that relevant evidence is generally admissible).

As we discuss further below, the Rule 11 Settlement Agreement can be construed—consistent with the meaning given by the trial court—based solely on the parties' intent as expressed in the agreement itself. *See URI, Inc.*, 543 S.W.3d at 765 ("Understanding the context in which an agreement was made is essential in determining the parties' intent *as expressed in the agreement*, but it is the parties' *expressed intent* that the court must determine."). The record does not support IVS's contention that the trial court considered Kempner Jr.'s testimony to alter or amend the terms of the Rule 11 Settlement Agreement.

Finally, even if we were to conclude that the trial court erred in allowing portions of Kempner Jr.'s testimony, we must nevertheless presume that the trial court disregarded any incompetent evidence. *See Gillespie v. Gillespie*, 644 S.W.2d 449, 450 (Tex. 1982) (holding that "the appellate court generally assumes that the trial court disregarded" evidence that should not have been admitted and, thus, error in admitting improper evidence was not calculated to cause and probably did not cause rendition of improper judgment); *Garza v. Prolithic Energy Co., LP.*, 195 S.W.3d 137, 147 (Tex. App.—San Antonio, pet. denied) (holding that appellate court presumes that, in matters tried without jury, trial court disregards any incompetent evidence and considers only competent evidence); *see also* TEX. R. APP. P. 44.1(a) (providing that error is not reversible unless is "probably caused the rendition of an improper judgment" or "probably prevented

the appellant from properly presenting the case to the court of appeals"). As stated above, nothing in the record overcomes this presumption that the trial court disregarded any incompetent evidence and considered only the competent evidence. Nothing in the trial court's final judgment indicates that it relied on any extrinsic evidence at all.

We overrule IVS's second and fifth issues.

C. Validity of Rule 11 Settlement Agreement

IVS further argues in its first issue that the trial court erred in failing to hold that the Rule 11 Settlement Agreement that was read into the record on February 19, 2019, "comprises all material, essential terms and/or conditions, leaving none for further negotiation or resolution, and contains no material ambiguities such that it constitutes a valid, enforceable agreement." The Kempners also agreed that the Rule 11 Settlement Agreement contained the material and essential terms of the agreement, but they disagreed with IVS's construction of some of the terms.

We have already concluded that, because of the parties' dispute regarding the construction of the Rule 11 Settlement Agreement, the trial court was obligated to conduct a bench trial. The trial court concluded, following the bench trial, that "the parties entered into an enforceable settlement agreement." In reaching this conclusion, the trial court considered the terms of the Rule 11 Settlement Agreement and the subsequent agreement of the parties on the record at the

September 12 hearing, which clarified the scope of the royalty. The trial court thus concluded that the Rule 11 Settlement Agreement was a valid, enforceable contract, and neither party disputes this conclusion on appeal. We agree.

The elements of a valid contract are (1) an offer, (2) acceptance, (3) a meeting of the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding. *Savoy v. Nat'l Coll. Student Tr. 2005-3*, 557 S.W.3d 825, 835 (Tex. App.—Houston [1st Dist.] 2018, no pet.); *Prime Prods., Inc. v. S.S.I. Plastics, Inc.*, 97 S.W.3d 631, 636 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). The determination of whether the parties had a meeting of the minds must be resolved utilizing an objective standard; we consider the meaning reasonably conveyed by what the parties said and did, and not on their subjective state of mind. *Parker Drilling Co. v. Romfor Supply Co.*, 316 S.W.3d 68, 73 (Tex. App.—Houston [14th Dist.] 2010, pet. denied). "We view the conduct and circumstances surrounding the transaction from a reasonable person's interpretation at that particular point in time." *Id.* A contract must also be "sufficiently definite to confirm that both parties actually intended to be contractually bound." *Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231, 237 (Tex. 2016). "To be enforceable, a contract must address all of its essential and material terms with 'a reasonable degree of certainty and definiteness.'" *Id.* (quoting *Pace Corp. v. Jackson*, 284 S.W.2d 340, 345 (Tex. 1955)). Whether a particular contractual

term is essential or material is a question of law. *Sharifi v. Steen Auto., LLC*, 370 S.W.3d 126, 142 (Tex. App.—Dallas 2012, no pet.).

Viewing the conduct and circumstances surrounding the Rule 11 Settlement Agreement using an objective standard, we conclude that the parties had a meeting of the minds on the essential terms. *See Fischer*, 479 S.W.3d at 237; *Parker Drilling Co.*, 316 S.W.3d at 73. When they read their Rule 11 Settlement Agreement into the record, the parties indicated that they all understood the terms and agreed. The fact that the parties intended to reduce the agreement to a formal written settlement agreement does not prohibit the formation of a binding agreement—agreements to enter into future contracts are enforceable if they contain all material terms. *McCalla v. Baker's Campground, Inc.*, 416 S.W.3d 416, 418 (Tex. 2013) (per curiam). A binding settlement may exist when parties agree upon some terms, understanding them to be an agreement, and leave other terms to be made later. *Gen. Metal Fabricating Corp. v. Stergiou*, 438 S.W.3d 737, 744 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *see Foreca, S.A. v. GRD Dev. Co.*, 758 S.W.2d 744, 745–46 (Tex. 1988). The parties later confirmed their intent to be bound by the Rule 11 Settlement Agreement after attempts to enter a finalized written agreement had failed. Both parties asked the trial court to construe the terms of the Rule 11 Settlement Agreement rather than schedule a new trial on the Kempners' original claims.

Furthermore, the Rule 11 Settlement Agreement contained the material terms, including that the Kempners would settle their claims against Goddard and IVS in exchange for "a 2.5 percent gross royalty on the same present terms as the royalty granted to ORNL/UT-Battelle for 10 years from the first commercial sale or sublicense of the device." *See MKM Eng'rs*, 476 S.W.3d at 778 ("Essential or material terms of a Rule 11 settlement agreement include payment terms and release of claims."). The Rule 11 Settlement Agreement also contained provisions to guide the parties in navigating their ongoing business, such as provisions for the appointment of a trustee, the Kempners' right to audit IVS's records, and the Kempners' right to 7.5% "of all sales proceeds that James Goddard and/or IVS receives" in the event IVS is sold. Thus, the Rule 11 Settlement Agreement contained the terms that the parties would reasonably regard as vitally important parts of their bargain, and those terms were sufficiently definite that the court was able to determine the material legal obligations of the parties. *See Fischer*, 479 S.W.3d at 237; *Abatement Inc. v. Williams*, 324 S.W.3d 858, 861 (Tex. App.—Houston [14th Dist.] 2010, pet. denied); *see also T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992) ("In order to be legally binding, a contract must be sufficiently definite in its terms so that a court can understand what the promisor undertook.").

That the trial court subsequently conducted a bench trial to determine the proper construction of such terms does not impact our analysis. Given the parties' disagreement over the construction of the Rule 11 Settlement Agreement, the Kempners advanced a declaratory judgment action seeking a declaration as to the parties' rights and obligations under the agreement. The trial court properly conducted a bench trial on the parties' existing dispute, construed the terms of the agreement, and issued declarations as to the parties' corresponding rights and obligations.

We overrule IVS's first issue.

D. Trial Court's Construction of Settlement Agreement

IVS's third and fourth issues assert that the trial court erred in construing the rights and responsibilities of the parties pursuant to the Rule 11 Settlement Agreement. IVS asserts that the trial court erred in rendering a final judgment construing those terms in a way that "is not in strict or literal compliance with the Rule 11 Settlement Agreement entered into the record in open court" and in construing the agreement in a way that "added new, material terms and obligations to the Rule 11 Settlement Agreement."

We first observe that the trial court had to address the Kempners' amended pleadings seeking a construction of the rights and obligations of the parties pursuant to the Rule 11 Settlement Agreement in order to resolve the ultimate

conflict between the parties. *See Padilla*, 907 S.W.2d at 462. IVS's arguments challenging the trial court's construction focus primarily on the portions of the judgment declaring that "[t]he same terms granted to ORNL/UT-Battelle in the license agreements apply to the Kempner Royalty, except where in conflict, then the [settlement agreement] controls." IVS argues that the trial court added new material terms in requiring IVS to pay for the required audit if the audit uncovered a discrepancy of more the 5%, in requiring IVS to maintain records for a period of three years beyond the royalty term, in requiring Goddard to continue to operate IVS in good faith in accordance with the Development and Commercialization Plan set forth in the license agreements, and in defining "sale" of IVS broadly.

We disagree with IVS that the trial court's final judgment added new, material terms that were not contemplated by the parties' agreement. The Rule 11 Settlement Agreement expressly stated that the Kempners' royalty was granted "on the same present terms as the royalty granted to ORNL/UT-Battelle." It is well established that documents, even unsigned documents, may be incorporated into a contract when the parties refer to the document in the contract. *Owen v. Hendricks*, 433 S.W.2d 164, 167 (Tex. 1968); *St. David's Healthcare P'ship, LP v. Fuller*, 627 S.W.3d 707, 712 (Tex. App.—Austin 2021, pet. filed) (citing *In re 24R, Inc.*, 324 S.W.3d 564, 567 (Tex. 2010) (orig. proceeding)). No specific language is necessary to incorporate a document by reference—it is only necessary that the

contract plainly refer to the other document or otherwise show that the parties intended for the other document to become part of or incorporated into the contract. *See Castillo Info. Tech. Servs., LLC v. Dyonyx, L.P.*, 554 S.W.3d 41, 47–48 (Tex. App.—Houston [1st Dist.] 2017, no pet.); *Bob Montgomery Chevrolet, Inc. v. Dent Zone Cos.*, 409 S.W.3d 181, 189 (Tex. App.—Dallas 2013, no pet.); *Owen*, 433 S.W.2d at 167. When a document is incorporated into another by reference, both instruments must be read and construed together. *Bob Montgomery Chevrolet*, 409 S.W.3d at 189.

The ORNL/UT-Battelle license agreements summarized the consideration and financial obligations involved in those agreements:

> In consideration for the grant of a limited exclusive license, Licensee agrees to comply with all the provisions of this Agreement, to pay all fees, [royalties], costs, and all other consideration according to the schedule specified in Exhibit B and as otherwise specified in this Agreement for the Term, and to satisfy the requirements of the Development and Commercialization Plan set forth in Exhibit C. Prompt payment of all amounts due to Licensor and satisfaction of the Development and Commercialization Plan requirements are material to this Agreement.

The license agreements further contained specific audit provisions designed to allow oversight and verification of the royalty interest, including provisions that IVS was required to maintain the records for a period of three years after the end of the last accounting period to which the records referred and an audit provision stating, "In the event an examination of [IVS's] records reveals an underpayment

of more than five percent (5%) of the accurate [royalty] amount, [IVS] shall pay all costs incurred by Licensor related to the examination of records in addition to paying the balance due, plus any applicable interest[.]"

Because the terms of the ORNL/UT-Battelle license agreements were expressly referenced in the Rule 11 Settlement Agreement, the trial court properly read and construed both instruments together to determine the obligations of the parties to the settlement. *See id.* The Rule 11 Settlement Agreement contemplated that the Kempners were entitled to regular audits and to examination of records. The trial court's conclusion that this right to audit and examine records included requiring IVS to pay for the audit if it uncovered a discrepancy of more the 5% and to maintain records for a period of three years beyond the royalty term comports with terms of the license agreements. Likewise, the Rule 11 Settlement Agreement contemplated that Goddard would continue to operate IVS in such a way that would generate revenue on which IVS could pay the Kempners their royalty. The trial court's conclusion that this implicated the requirement for Goddard to operate IVS in good faith in accordance with the Development and Commercialization Plan set forth in the license agreements likewise comports with the express language of the license agreements that were incorporated by reference.

Finally, the trial court's conclusion that the term "sale" of IVS should be defined broadly comports with the express language of the Rule 11 Settlement

Agreement that "[i]f IVS is sold, the Kempners collectively will receive 7 and a half percent *of all sales proceeds* that James Goddard and/or IVS receives as a result of the sale." (Emphasis added.) Thus, contrary to IVS's allegations, the Rule 11 Settlement Agreement was not "rewritten" but construed, and the trial court did not add any material terms, obligations or conditions that were not contemplated in the Rule 11 Settlement Agreement.

IVS argues that the phrase "on the same present terms" applies only to the calculation of the royalty, but nothing in the express language of the Rule 11 Settlement Agreement indicates that such a limitation was intended by the parties. Rather, the parties stated on the record that "[t]he Kempners offer to settle their claim against IVS and Dr. Goddard" for "a 2.5 percent gross royalty on the same present terms as the royalty granted to ORNL/UT-Battelle." The Rule 11 Settlement Agreement made other references to the terms of the ORNL/UT-Battelle license agreements, including in reference to the audit and record-keeping obligations. The parties agreed, "If ORNL/UT-Battelle changes the terms of this royalty, the Kempners have a right to accept or reject the change in terms." They also agreed that the Kempners' trustee "would be entitled to receive all reports and disclosures submitted to ORNL/UT-Battelle by IVS and we further agree that that audit right is only to [be exercised] four [times] a year." The Rule 11 Settlement Agreement provided that "IVS will notify the trustee within 10 business days [of]

receipt of a notice to audit both by ORNL/UT-Battelle. Furthermore, IVS will provide the results, reports, etc. of any ORNL/UT-Battelle audit reports upon receipt." Thus, the express language of the Rule 11 Settlement Agreement supports the conclusion that the parties' intended the ORNL/UT-Battelle license agreements to be integrated in the construction of their own settlement.

IVS also argues that the trial court illegally imposed obligations on Goddard individually. IVS argues that "[p]iercing the corporate veil was not before" the trial court during the bench trial and that the Kempners did not present any evidence regarding piercing the corporate veil. IVS argues that, without a finding demonstrating that IVS was Goddard's alter ego, Goddard "cannot be individually obligated to anything binding on IVS." These arguments misconstrue the trial court's judgment.

The trial court rendered its amended final judgment declaring the rights and obligations of the parties to the Rule 11 Settlement Agreement. Both Goddard and IVS were parties to that agreement. The parties stated on the record that the Kempners were settling their claim "against IVS and Dr. Goddard" in exchange for a 2.5% gross royalty. They agreed that "the existing sanction the Court awarded against Dr. Goddard and IVS will not have to be paid." And the parties agreed that the Kempners would receive a percentage "of all sales proceeds that James Goddard and/or IVS receives as a result of the sale." Because Goddard was an

express party to both the lawsuit that was settled by the Rule 11 Settlement Agreement as well as the agreements themselves, the trial court did not err in determining Goddard's obligations under the agreement.

We overrule IVS's third and fourth issues, challenging the trial court's declaratory judgment construing the parties' Rule 11 Settlement Agreement.

Attorney's fees

In its sixth issue, IVS argues that the trial court erred in awarding the Kempners their attorney's fees.

A. Standard of Review

Under the UDJA, a court "may award . . . reasonable and necessary attorney's fees as are equitable and just." TEX. CIV. PRAC. & REM. CODE § 37.009. The UDJA "entrusts attorney fee awards to the trial court's sound discretion, subject to the requirements that any fees awarded be reasonable and necessary, which are matters of fact, and to the additional requirements that fees be equitable and just, which are matters of law." *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). A trial court's award of attorney's fees under the UDJA is reviewed for an abuse of discretion. *See id.* at 20–21. A trial court abuses its discretion by awarding fees when there is insufficient evidence that the fees were reasonable and necessary, or when the award is inequitable or unjust. *Id.* at 21.

B. Analysis

IVS argues that the Kempners should not have been permitted to pursue their declaratory judgment action. But as we stated above, a declaratory judgment claim is a proper vehicle to seek construction of a contract. *See Irwin*, 627 S.W.3d at 269 (quoting TEX. CIV. PRAC. & REM. CODE § 37.004(a) (providing that under UDJA, any "person interested" under written contract "may have determined any question of construction or validity" arising under that contract and "obtain a declaration of rights, status, or other legal relations thereunder")).

IVS argues that the UDJA "is not available to settle disputes already pending before a trial court, as [the Kempners'] dispute was." However, when a settlement dispute arises while the trial court still has jurisdiction over the underlying action, a claim to enforce the settlement agreement should be asserted through an amended pleading or counterclaim. *Batjet, Inc.*, 161 S.W.3d at 245. That is what the Kempners did—a dispute regarding the obligations of the parties under the Rule 11 Settlement Agreement arose while the underlying claim was still before the trial court. The Kempners then amended their petition to assert a new claim for breach of the Rule 11 Settlement Agreement and seeking a declaration of the rights and obligations of the parties under that agreement. This is not a situation in which a party has "couple[d] a declaratory plea with a damages action just to recover attorney's fees." *See Cytogenix, Inc. v. Waldroff*, 213 S.W.3d 479, 490 (Tex.

App.—Houston [1st Dist.] 2006, pet. denied) (holding that "a trial court abuses its discretion in awarding attorney's fees under the DJA if the claim for declaratory relief is brought solely for the purpose of obtaining attorney's fees").

IVS also argues that the Kempners' attorney's fees were not incurred for its UDJA claim. It points to the Kempners' attorney's statement that "only $75,000 of the [identified fees] should be [awarded] as a result of the breach." This argument takes the attorney's testimony out of context. Reading the record as a whole, the Kempners provided evidence indicating that $75,000 in fees were incurred in their attempts to reduce the Rule 11 Settlement Agreement to writing and to construe and enforce its terms, including expenses incurred through multiple hearings, mediation, a mandamus proceeding, and ultimately the bench trial on the construction of the Rule 11 Settlement Agreement. The Kempners also provided the trial court with extensive billing records supporting their claim. This was sufficient to establish that the fees were attributable to the Kempners' UDJA claim. *See RM Crowe Prop. Servs. Co., L.P. v. Strategic Energy, L.L.C.*, 348 S.W.3d 444, 453 (Tex. App.—Dallas 2011, no pet.) ("[T]o meet a party's burden to segregate its attorney['s] fees, it is sufficient to submit to the fact-finder testimony from a party's attorney concerning the percentage of hours related to claims for which fees are not recoverable.") (citing *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 314 (Tex. 2006)); *Young v. Dimension Homes, Inc.*, No. 01-14-00331-CV,

2016 WL 4536407, at *10 (Tex. App.—Houston [1st Dist.] Aug. 30, 2016, no pet.) (mem. op.) ("[A]n attorney can satisfy his evidentiary burden by presenting evidence of unsegregated attorney's fees and a rough percentage of the amount attributable to the claims for which fees are not recoverable.").

Goddard also argues that he should not be individually liable for attorney's fees, but he was party to both the lawsuit and to the Rule 11 Settlement Agreement that the trial court was asked to construe in the UDJA claim. The UDJA permitted the trial court to "award . . . reasonable and necessary attorney's fees as are equitable and just." TEX. CIV. PRAC. & REM. CODE § 37.009. We cannot say that the trial court abused its discretion in awarding the fees against the "Defendants," which included both Goddard and IVS. *See Bocquet*, 972 S.W.2d at 21.

Finally, IVS argues that the Kempners are estopped from requesting attorney's fees because the Rule 11 Settlement Agreement provided that "[e]ach Party will be financially responsible for the respective Party's attorney's fees and costs." This agreement, however, pertains to the settlement of the original, underlying claims. Nothing in the Rule 11 Settlement Agreement indicated an intent of the parties to foreclose the right to seek attorney's fees in future litigation seeking to enforce the terms of the settlement.

We overrule IVS's sixth issue.

Conclusion

We affirm the judgment of the trial court.

Richard Hightower
Justice

Panel consists of Justices Goodman, Hightower, and Rivas-Molloy.