In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-19-00176-CV

CUDD PUMPING SERVICES, INC. D/B/A CUDD ENERGY SERVICES,
Appellant

V.

ROCKING C TRANSPORT LLC, Appellee

On Appeal from the 17th District Court
Tarrant County, Texas
Trial Court No. 017-276900-15

Before Sudderth, C.J.; Gabriel and Bassel, JJ.
Memorandum Opinion by Chief Justice Sudderth

MEMORANDUM OPINION

I. Introduction

This case arises from a disagreement over payment for sand-hauling services in connection with fracking operations in the Marcellus Shale. Trucking companies ECG Operating, LLC, Selah Transport, Inc., and Bones Trucking, Inc. sued Appellee Rocking C Transport LLC, a transportation-services broker, for failure to pay for services rendered. They nonsuited their claims after Rocking C brought Appellant Cudd Pumping Services, Inc. d/b/a Cudd Energy Services, an oilfield service contractor, into the lawsuit as a third-party defendant. Rocking C complained in its third-party petition that to the extent it was indebted to the plaintiffs, Cudd was indebted to it, and ten out of twelve jurors found that Cudd owed Rocking C over $3 million.

In five issues, Cudd challenges the trial court's judgment on the jury's verdict. We affirm the judgment as modified.

II. Background

Rocking C sued Cudd for breach of contract and quantum meruit based on work performed from May 19, 2014 to August 29, 2014. In its live pleadings, Rocking C alleged that on May 7, 2014, Cudd orally contracted with it to reserve 50 trucks and 4 sand pushers for a flat daily fee and then reduced that oral agreement to writing in an email.

Rocking C's co-owner Philip Carter;[1] Selah Transport's owner Daryl Elliott;[2] James Bolling, Cudd's regional accounting manager for the Oklahoma-Arkansas-Michigan-Pennsylvania region; and Matthew Lacy, one of Cudd's corporate representatives, testified at trial, but most of the evidence—the parties' Master Transportation Services and Equipment Interchange Agreement (MSA), invoices, and emails—was documentary.[3]

A. Before the May 7, 2014 Email

Cudd's emails showed that in April 2014, it had experienced difficulty securing enough sand-hauling trucks to run its fracking operations in the Marcellus Shale. Philip testified that Cudd's people had complained about the "hundreds of thousands of dollars a day" it was losing because of its inability to procure trucks, equipment, and sand and because of the Marcellus Shale's infrastructure, which was not conducive to fracking.[4] Trucking rates "were going through the roof" in the area.

---

[1]Because Philip and his wife Amy, Rocking C's other co-owner, share the same last name, we will refer to them by their first names to reduce confusion.

[2]Elliott and Kyle Clark were partners in ECG Operating; Clark owned Bones Trucking. The "paid-if-paid" clause in Bones's contract with Rocking C provided that Bones would be paid by Rocking C when Rocking C was paid by Cudd, and Elliott said that Bones had shut down because of Cudd's failure to pay Rocking C.

[3]The parties agreed to the admission into evidence of 47 exhibits.

[4]The Marcellus Shale is located in New York, Pennsylvania, West Virginia, and Ohio. Witnesses' descriptions of the rainy and mountainous sites reached by one-way roads—some of which were "no bigger than a horse and buggy at times"—is reminiscent of a science-fiction movie character's description of drilling on an asteroid

Subject to the availability of sand and other conditions, a truck could haul three or four loads a day for up to $3,500 a load.

Jimmy Williams, Cudd's material control manager and inventory control supervisor in Pennsylvania, contacted Philip about trucking after a Cudd employee met Rodger James and Preston James, two Rocking C employees,[5] in a hotel bar. Williams then told Kelly Denton, Cudd's business unit manager, that Rocking C was able to commit 10 trucks that week and had another 25 trucks inbound from North Dakota. He attached to his email Rocking C's Pennsylvania price sheet:

- 0 to 50 miles, $900.00;
- 101 to 150 miles, $1100.00;[6]
- 150+ miles, quotable at time of dispatch.
- Demurrage[7] of waiting to load after 2 hours (14hr cap): $65 per hour.
- Demurrage of waiting to unload after 2 hours (14hr cap): $65 per hour.

---

as "the scariest environment imaginable." *See Armageddon* (Touchstone Pictures 1998). Because Cudd's site was at "the top of a mountain," it could only fit four trucks on a well pad at a time, unlike the sites in Texas, North Dakota, and Oklahoma, where the land was flat, the facilities were good, and the fracking sites were huge.

[5]Rodger was Rocking C's field operations manager, and Preston was Rocking C's lead coordinator and supervisor in the North East District. We refer to them by their first names to reduce confusion.

[6]Philip said that the Pennsylvania rate sheet reflected higher prices because of the Marcellus Shale working conditions. Elliott said that the freelance rate in the Marcellus Shale in 2014 was between $1,000 and $1,200 a load but that it would not be unreasonable for an oilfield service contractor to pay over $3,000 for a single load under some circumstances.

[7]Demurrage (also referred to as detention) is the time that a truck gets paid by the hour to sit when waiting to load or unload.

- All of the prices include a fuel surcharge.
- Other billable charges included $1.00 per mile to deadhead anything over 100 miles,[8] "Truck ordered but not used $2.24 per mile," and sand coordinator for $65 per hour.[9]

Denton asked Tim Mathews, one of Cudd's executives, for an "override" to hire Rocking C's 10 trucks "asap" and told Williams that Cudd would look long term at Rocking C's additional 25 trucks.[10] Fabian Rivera, Cudd's director of supply chain management, chimed in on the email conversation, stating,

> I think we should use the 10 in the short term. But I think we should play all of them off each other for the long term. I will be speaking to Lightning [Energy Services] in the AM, and depending on what price range they come in with, I'll ask [Rocking C] to match or beat.

The next morning, a Cudd operations manager urged Rivera by email to hurry along his conversation with Lightning because Cudd needed "30 by the weekend." Forty minutes later, Williams told Philip that he wanted to secure 20 of Rocking C's trucks as soon as they became available for immediate use in West Virginia. Mathews told Cudd's director of procurement to activate Rocking C as a vendor and told her,

---

[8]Philip said that when a truck was paid a dollar a mile for deadheading anything over a certain allotted number of miles and paid $65 an hour for waiting, "[you] could be sitting close to 700 bucks and you haven't even got the load on yet."

[9]A "sand coordinator" or "sand pusher" is someone who works on location to coordinate getting trucks in and out, makes sure they have the right type of sand, and identifies "how much they need when they need it." Philip said that Go Frac in West Virginia had been paying $100 per hour for sand pushers in 2014.

[10]Philip said that Cudd had already had 20 to 25 trucks in the Marcellus Shale when Williams called him in April 2014.

"After we are up an[d] running we can continue the process to qualify them." Philip signed the MSA after Williams told him that Rocking C was "approved by executive order."

The MSA form contract "set forth the terms and conditions under which all Work, irrespective of the formality or informality by which [Rocking C] is retained, shall be performed by [Rocking C] for [Cudd]." It stated, "All prior agreements between [Rocking C] and [Cudd] are terminated as of the effective date of this [MSA]; provided, however, that any current pricing agreements in effect shall remain in effect."

Articles 3 and 26 of the MSA explained how the parties' paperwork would function. Article 3 stated,

> This Agreement shall be automatically incorporated into each and every request for Work ("Work Order"), whether written or verbal, between [Cudd] and [Rocking C]. Each such Work Order shall be construed as a separate contract between the parties named in the particular order. . . . Except as otherwise provided herein, any Work Order, delivery ticket, bill of lading, invoice, pricing proposal, or similar document shall be valid only to specify the Work to be performed and/or the price [Cudd] shall pay [Rocking C] for the Work, and all other "terms and conditions" contained in such documents shall be void and unenforceable.

Regarding "Work Orders," Article 26 reiterated, "Each Work Order shall be deemed a separate contract between the Parties named in the particular Work Order and the rights, obligations[,] and liability under any such order extend only to the respective parties named in such Work Order." Other articles covered compensation (that it would be "as agreed upon" between Rocking C and Cudd), time of payment (which

would be within 45 days of Cudd's receiving Rocking C's invoice), and record requirements. Under the MSA, Rocking C was required to retain three years' worth of detailed books and records "sufficient to fully verify and support" its charges.

Article 23 of the MSA contained a merger clause, stating that the MSA constituted the parties' entire agreement, that "no prior or subsequent discussions, negotiations[,] or writings shall be used to construe its terms," that the MSA could be modified "only in a writing signed by an authorized signatory of both Parties," and that such a writing had to identify the specific MSA section that it modified. It reiterated the terms in Article 3, stating that "any job order, service order, Work Order, delivery ticket, pricing proposal[,] or similar document shall be valid only to specify the work to be performed and/or the price [Cudd] shall pay [Rocking C] for the Work," with all other terms in such documents void and unenforceable. The MSA stated that it was terminable by either party upon giving 30 days' written notice.

The day after Philip signed the MSA, Rocking C was approved by Cudd for the "emergency situation" and was put on a "6 month pending file for review at that time." Philip said that the MSA was the foundation and that Cudd, through Williams, had confirmed oral requests for work in writing through emails, in addition to making written requests for work.

B. May 7, 2014

On May 7, 2014, Denton asked Cudd's management to change the payment terms for eight sand truck vendors, including Rocking C, to "Net 15." "Net 15"

meant that the vendors would be paid within 15 days instead of within 45 days as set out in the MSA. Laurie Daugherty, Cudd's vice president of finance, emailed Mathews to ask for his thoughts about the change, noting, "I know we are having an issue with getting trucking companies in general." In his reply approving the change, Mathews observed, "This will not only get them the best rates but will make the trucks available" and told Daugherty that she could see what the lack of trucking had cost Cudd by looking at Denton's financials for the prior month. Mathews added that he had told Denton that Denton needed "to establish a way to validate the bills quickly so we are not going back after the fact with over charges."

Chuck Feaster, Cudd's regional financial analyst, emailed Daugherty to thank her for the net-15 change and advised her of some of the workflow improvements he had made for the worksites' day and night shifts, including a receiver for all trucking of sand and one "doing nothing but receiving Sand, Chemicals, and Inventory Items," so that Cudd could "enable accurate and timely paying of the trucking bills to ensure availability of trucks and better price[.]"

On the same day that Cudd made the net-15 change to facilitate its ability to secure the trucks that it needed, Rodger emailed Williams to ask whether Cudd would commit to Rocking C for at least a year. Williams replied that Cudd could not commit to a year because the site they were working—the Rice site—was Cudd's "qualifying pad for this customer." Williams offered that Cudd would instead commit—as a performance incentive—to using Rocking C's trucks at that site for as

long as Cudd worked for that customer and that if Cudd lost the customer unrelated to any fault of Rocking C, Cudd would move as many of Rocking C's trucks to other crews as it could "as long as costs benefits are maintained."

Amy sent Williams a follow-up email to express Rocking C's concern that its price might be undercut if it did not have a commitment for the work. Williams assured Amy that Cudd would keep Rocking C's trucks busy, elaborating as follows:

> We are paying to get [Rocking C's trucks] here, we will make it profitable. We are adding [a] third crew with these new trucks and pushers. Rates are solid and he will be primary source for any new requirements. I have a few carriers that have some shaky ratings that will be cut loose first should work slow[]down or truck count get too heavy. However, we also have a couple of carriers that have worked with us for several years, that have rates already locked in that have been here during good and bad times. They will be part of any fleet we operate.
>
> With the workload and volumes we are looking at over the next two years, I think we can maintain a strong fleet with your trucks and our dedicated, long term vendors. A fourth crew is also being planned. Any reduction in fleet would be announced ahead of time and we would work to rotate crews as needed. I think that would be fair to all.
>
> We will switch all trucks to new rates[;] however, allow me a day or two for new PO and we will make new rates effective next work date to help keep invoicing simple. Is that agreeable?
>
> As with any agreement and joint venture, production and performance must be maintained by both parties. We expect to be held to standards, and we will hold likewise expectations of your operation. Communication and cooperation will insure success.

Philip said that he and Williams then had several conversations. Philip said that Williams first proposed a change from Rocking C's Pennsylvania rate sheet to $1,000

per load with no detention or deadhead charges. When Philip balked at the rate cut, Williams told him, "I'll guaranty you that no matter what, two loads a day, no matter what," which Philip said was a $2,000-a-day guarantee for dedicating 50 trucks for Cudd's use even if Cudd did not have the work for 50 trucks to each transport two loads per day.[11] Philip said that for Cudd, the advantage of dedicated trucks was in avoiding the loss of millions of dollars from not having equipment or sand when Cudd needed it—Cudd would have the trucks that it needed at its beck and call.

Philip said that for Rocking C, the offer's only attraction had been the guaranteed $2,000-a-day-per-truck payment because otherwise Rocking C could "go chase oil field boom money elsewhere" for up to $3,500 a load. Philip also said that having dedicated trucks on a daily rate in this manner was not unusual and that Go Frac, another oil field service contractor, had been offering $2,300 to $2,400 a day for dedicated trucks in West Virginia.

On the evening of May 7, Williams sent the following email:

To confirm our conversation[:]

> We want to keep the 20 trucks already agreed to on the current pads along with the two pushers already in use. Starting May 19, we want an additional 30 trucks and two more pushers. We will pay $1200 per day per truck for mobilization to PA.

[11]Elliott opined that the infrastructure in the Marcellus Shale was such that it would be impossible to make sure that each truck had two loads every day.

> We will pay $1,000 per load with guaranteed two loads per day, within a 24 hour period and keeping within the 14 hour rule.[12] Beginning with third load, rate goes to $950.00 per load. No detention on any loads.
>
> When moving between pads, we will keep those trucks that wish to stay in the area busy. Drivers wanting to go home will be released with understanding full service will resume when next pad is ready.

Williams then emailed Denton and Mathews to inform them that he had confirmed that Cudd would "have 30 trucks dedicated to Rice pad beginning May 19. Subject to confirmation of frac date."

Philip testified that Williams told him to bill Cudd weekly for the loads that were actually hauled and quarterly for the trucks that did not run "because you never knew what you were going [to have in terms of how many trucks and loads were needed] -- is it one or is it two or is it none? So we were asked to only bill the guarantee [for the unused trucks] every quarter." Philip testified as follows about his conversation with Williams about the arrangement:

> Q. When Jimmy Williams and you spoke orally, did Jimmy Williams tell you that Cudd would pay Rocking C $2,000 per truck per day whether or not the truck ran zero, one[,] or two loads?

---

[12]The "14-hour" rule is a federally-mandated rule governing how many consecutive hours a commercial truck driver may work before he or she is required to go off duty. *See* 49 C.F.R. § 395.3. Philip said that there was an exception to the 14-hour rule that allowed a driver who was unloading "to go ahead and finish his duty status within a reasonable amount of time and proceed to the next safe location to go off duty" and that a driver could unload ("blow off") 700 pounds of sand a minute from a 46,000-pound load, but it could take three or four hours for the four trucks that could fit on a site to unload their sand.

A. Yes, sir. That's true.

Q. Now, if the truck in a single day did happen to run a third load, did Jimmy Williams promise you any additional compensation for that truck?

A. Yes, sir, 900 -- pardon me, $950.

Q. And when you received this e-mail confirmation from Jimmy Williams of Cudd on May 7, 2014, did this e-mail meet your expectations, based upon your conversation with Jimmy Williams at Cudd?

A. Yes, sir, it did.

During cross-examination, Philip gave the following testimony about his conversations with Williams that resulted in the May 7, 2014 agreement:

Q. Out of all the documents the jury has seen and that you brought to court to prove your case, you admit there's not one single document saying that Cudd guarantees payment for 50 trucks at $2,000 a day whether the trucks are used or not, whether or not they make a load or not. There's not a document that clearly states that, is there?

A. That's false.

Q. Show the -- show the jury the document that you think clearly states that Cudd said it would pay for 50 trucks whether they were used or not used or whether they did not make any load deliveries.

A. I think they've seen the e-mail about a thousand times now.

Q. And the e-mail you're referring to is the e-mail from Jimmy Williams; is that correct?

A. Yes, sir, a Cudd representative, and there was several, several phone calls in regards to that as well. The MSA says that it can be verbal and in writing, and it was done in both. There was only two guys there, me and [Williams,] and God.

C. After the May 7, 2014 Email

On May 12, 2014, Williams emailed Rodger to tell him that Cudd was ready to start the new rate. He told him to "[c]hoose a clean cutoff point and all subsequent invoicing will be at new rate." Later that day, Williams emailed both Rodger and Philip to tell them that they needed to have a meeting to go over some billing problems because "[m]ileage, demurrage, standby, all of it is not matching quotes or [bills of lading]." Amy responded by emailing Rodger and Williams, stating, "Those are in fact the agreed upon rates listed below."

Four days later, Williams emailed Rodger and Philip to ask when Rocking C expected to have all 20 trucks at the Noble site and whether Rocking C would have the 30 trucks at the Rice site by the following Thursday.

The following week, Rodger emailed Williams to let him know that Rocking C had signed on another 20 trucks, putting Rocking C's total at 70 that would be ready by the following Thursday. Rodger asked Williams whether Cudd could use an additional 20 trucks. Williams replied a few minutes later, stating, "Let[']s get the fifty in place and see where we are. With Rice limited to two, may not be able to use all 50 effectively."

By the end of May, Rocking C had to address some problems that had arisen with regard to communications with and reports to Cudd, trucks running out of sand, and personnel missing safety meetings. Preston emailed Williams to let him know that under Rocking C's new chain of command, Preston would be the first to be

contacted with any changes to daily operations such as loading facilities or purchase order numbers, followed by Rodger, and then Philip if Preston or Rodger were both unavailable.

Philip also addressed the problems, apologizing to Williams in an email and promising him a complete dispatch log at the end of every shift starting that day. At the end of the first week in June, Philip emailed Rocking C employees, copying Williams, to remind everyone about the importance of customer service. He empathized with their frustration over "not having enough equipment at the moment" and told them that he had "a ton of trucks heading y'all[']s way" and would make sure that they had "well over the allotted amount for [Cudd]."

On July 24, 2014, Williams emailed Philip, copying Preston and Rivera, to set out Cudd's truck requirements for the following 60 days. He stated:

> PLHC (current pad) approx. 72 loads per day; request 35 trucks.
>
> EQT-est Aug. 1 prefill, approx. 20 loads per day, request 15 trucks (primary sand is Beaver OH)[.]
>
> Rice pad-Okie crew-est. Aug 9 prefill, approx. 45 loads per day, request 25 trucks[.]
>
> All three pads expected to run about 45 days.
>
> Trucks running for blue thunder will be done next week.
>
> We need to get head count from all trucking companies for KNOWN trucks available and then go back and find additional trucks as necessary. Truck count requested is based on loads needed and probable sources for sand. Trying to maintain two loads per day, but we may have some longer hauls on some sand.
>
> We will keep Rocking C pushers on PLHC. The pushers for EQT pad will remain the same. Plan on using Rockin[g] C for the new Rice pad[;] however, we may staff that pad with Cudd operators if

> available by then. And it is possible to have them overlap while starting up. Will know for sure by next week.

The following week, Rocking C's organizational efforts paid off—on July 29, Williams sent an email to Philip, copying other Rocking C employees, to congratulate them on their successful work on the PLHC site. Williams stated:

> Just wanted to pass on a big thanks and JOB WELL DONE to every one for the operations on PLHC . . . dispatch has done [a] fantastic job keeping trucks moving and sand on deck. Communication seems to be going the way it should, especially with all the changes on sand sources.[13] Keep up the good work. Still a long way to go on this pad but this shows it can be done. THANKS TO ALL!!!

On July 31, the parties had a conference call to discuss a Cudd proposal to Rocking C about changing rates again. Philip said that the conference call was because Cudd had started to see that 50 trucks was "just too much for what they had going on." Cudd had lost a customer at that point, so the $2,000-per-day rate and 50-truck guarantee "was becoming a problem for [it]" because it was paying for empty trucks. Philip said that this conversation occurred around the time that he had orally requested payment on the 50-truck guarantee.

---

[13]Philip said that the work had been complicated by sand shortages and that Cudd's purchasing agents had been responsible for buying sand. Philip complained that with Cudd, "it was almost like the right hand didn't know what the left hand was doing," and that his truckers would drive 150 to 200 miles to a barge to pick up sand only to discover that there was none, necessitating a drive to another facility, which could add another 100 miles. Philip also complained that the sand-loading plants Cudd used were old and accustomed to loading only 10 to 15 trucks a day instead of 500 to 1,000 trucks. Philip said that sometimes the loading would only take 30 minutes but sometimes it could take up to 5 hours. Philip complained to Williams but nothing was done to fix the issues.

Philip said that Cudd proposed a much lower rate, which Rocking C refused. The next day, Rocking C submitted a counterproposal,[14] which Cudd ultimately did not accept. Philip's counterproposal to Rivera was that Rocking C would change to a $1,500-per-day rate and, as of August 3, 2014, at midnight, would no longer bill Cudd for the $2,000-per-day rate if Rocking C did not haul two loads.[15] But in exchange for a lower daily rate of $1,500, Rocking C wanted a 24-month contract with Cudd with an additional 24-month option and a guarantee of the availability of picking up and delivering two loads, with a number of contingencies: if only one load was actually hauled in a 24-hour period due to Rocking C's errors, that load would be billed at $800, but if only one load was actually hauled in a 24-hour period because of Cudd's errors ("Bad Sand PO, P[O] Reroute, Rail Switches, Well Pumping Slow, Out of Acid, Out of Water, Wire-Line, Etc.") then the $1,500 price would stand. Additionally, each extra load hauled within the 24-hour period would cost $1,000, with no detention costs billable or payable, and—among other things—Rocking C wanted Cudd to assist it in collecting any debts that Cudd still owed Rocking C in other areas, such as an outstanding balance of $125,000 in East Texas. Philip said that while Cudd contemplated Rocking C's counterproposal, Rocking C continued to have the 50

[14]Elliott and his partner helped Philip with the counterproposal and had been prepared to honor it if Cudd had accepted it.

[15]Philip said that when Cudd did not accept the offer, Rocking C never revised the day rate from $2,000 to $1,500.

trucks on standby, dedicated to Cudd's use, and that Cudd continued to use at least some portion of those trucks.

On August 9, 2014, Melody Smith at Rocking C sent an email to Lori Webster, Cudd's regional administrator for billing, and told Webster that Philip had told her that a CPA was coming to put a new billing system in place for Rocking C. Smith told Webster, "[Philip] claims all the customers and owner operators are stating that they are being billed incorrectly and paid incorrectly but that is not the info I am receiving so who knows?"[16] Philip complained that every time Rocking C tried to bill the $2,000 daily rate, Cudd's accounting department "would kick it back and they'd tell us we were overbilling them, when we weren't. We were trying to bill it correctly. Their systems just weren't set up to accept it."

On August 14, 2014, Feaster emailed Williams, copying Denton, and asked him to forward "any and all emails . . . that reference the agreement between [Cudd] and Rocking C. Please include any emails that might discuss any payment details that you

[16]Philip testified that this email referred to the implementation of their new billing system, which they did because Cudd's system had been rejecting Rocking C's billing: "So what we did was we went back and started designing a software that we could actually work with in y'all's software and there wouldn't be so many rejections." Philip said that the only customer who had complained about billing was Cudd and that Smith had been on leave at the time of that email "because she [had] a mental breakdown." Philip explained that Smith had been overwhelmed by stress because "things [were] going crazy with the billing system with Cudd and so forth and she had put in a lot of hours and a lot of work."

had with them." Two weeks later, Rivera forwarded Williams's May 7, 2014 email to Feaster.

On August 25, Philip emailed Williams and Rivera, warning them that he would have to move trucks if Rocking C and Cudd could not work something out on payment status because he was unable to make payroll. Williams immediately forwarded Philip's email to Denton, copying Rivera and Philip, and adding, "Any idea on the status of the invoicing, and payments? Can't afford to lose these trucks during a job. Also, is the contract finished?"

Rivera replied the next day that the "core pieces of the contract" were in place but that even after everything was settled on the invoicing, he would need approval from Denton and Mathews "on the path forward with" Rocking C. In response, Philip pointed out to Rivera that "the $2000.00 day rate was [Cudd's] idea" and that there was no double-billing when the day rate ran from midnight-to-midnight. He warned Rivera, "If there were only two loads hauled in a 24[-]hour period and they were billed at $2000.00 per load, then that may be a double[-]billing situation. But to not communicate this in full with me and to halt my pay is unacceptable. I will be moving my trucks by the end of the day."

Rivera responded by telling Philip that Cudd had found invoicing discrepancies, and he apologized for the delay and asked Philip "to <u>not</u> pull [Rocking C's] equipment, as [Cudd] will be coming to you with further discussion points." Webster, in the meantime, forwarded the email chain to Feaster.

Philip said rates were going up every day in the Marcellus Shale during this time. Go Frac had offered to pay Rocking C "$2[,]300 a day for our trucks, same thing, guaranteed" and Stingray, another oil field service contractor, had offered Rocking C $2,000 a day to leave Cudd. Philip said that Rocking C had declined both offers in order to stay with Cudd because Philip had given Cudd his word, and Rivera and Williams had given Philip their word that they would fix the situation.

Two days after Rivera's email asking Rocking C not to pull its equipment, Philip shared with Rivera his understanding of the May 7, 2014 agreement, stating,

> If you read over what [Williams] guaranteed us below you will find that actually he guaranteed me that for 50 trucks. Everyday. 50 trucks. So in actuality with what he guaranteed below, I should be billing for 50 trucks daily. His writing, his agreement. If you will notice exactly what was promised you'll find I'm well within my legal rights on the billing [] [o]ther than the items I agreed that were mistak[enly] billed incorrectly. Please let me know when [Cudd] plans to pay me the remainder of my money.

Rivera responded that he needed to talk with his team about the information. He told Amy,

> Thanks for all of the information that you and Phil have provided. Please understand that this is the first time that I've seen these communications, please give me an opportunity to have a conversation with my team and investigate your information. If you have a copy of the MSA, please forward to me as soon as you can, and any other documentation that might be relevant.
>
> Please be aware that we will be releasing for payment $377,200 . . . today (with the holiday weekend, you might not receive the transfer until next week). We have informed you of the concerns we have over the "double-billed/mis-billed" invoices[] that total approx. $504,400

> (currently). Please let us know your next step regarding this latter amount.
>
> Also, please understand that as of today, and unless [Cudd] and Rocking-C can resolve the outstanding invoice concerns, we will have to discontinue contracting your sand hauling trucks.

Denton forwarded Rivera's email to Feaster.

Philip said that Rocking C had 50 trucks available for Cudd's use each day between May 19, 2014 and August 29, 2014, when Cudd terminated the contract. Philip added, "Kind of the wormy thing about it was two days prior to [August 29], [Cudd] went out and contracted another company for the same amount of money."

Amy corresponded with Rivera in early September, asking for "the document that [Feaster] had on the screen" at their meeting and asking him whether he had "gotten with [Williams] and [Denton]" about the billing. Amy told Rivera that Rocking C was willing to accept and correct "anything that was double billed with [two] $2000.00 day rates . . . [b]ut as for the others that Cudd is questioning, that's how we were told to bill on several different occasions when [Rocking C] asked." She also reminded Rivera that Cudd owed Rocking C "a lot of money . . . right now."

On September 5, 2014, Rivera replied to Amy's email, stating,

> [Cudd] understands that we would pay $2000/day/truck. That truck would maximize the amount of loads per day, but [Cudd] understands that there were occasions where neither [Cudd] [n]or Rocking C[] could control the pickup and delivery (haul) of certain amount of sand/day. What [Cudd] is contending and does not agree with, are invoices where Rocking C would pick up a load of sand and not deliver until the next day (where there would be two $950 charges for one load). What [Cudd] considers a load is: picking up sand, travelling to site[,] and delivering

> sand[;] anything short of "delivering sand" should not be charged a second $950.
>
> We will be happy to split out the double-billing vs the mis-billed items (extra $950 charges), if you need that. I can double-check with PA to make sure that it was already done or do we need to split those charges[.]

Amy responded by asking Rivera if there was "somebody in legal that we can speak with? I can't keep doing this." Philip said that he and Amy had found it difficult to get a straight answer from Cudd.

Later that day, Amy emailed Rivera again, referenced Williams's May 7 email, and asked him,

> Where or whom do we send the invoices to on the 50 truck $2000.00 per day guarantee? [Williams] guaranteed us in writing starting May 19, 2014 until the day you guys shut us off being August 28, 2014[,] that 50 trucks would be guaranteed $2000.00 per day. Upon auditing we have found we have many days that we have not submitted for on the guarantee. Can you assist me with finding out where we send those please sir?

Later that day, a series of redacted emails were exchanged between Rivera, Amanda Richards (Cudd's in-house counsel), Mathews, and Denton; Feaster was included at the end of the email chain at 11:23 p.m. that night.

D. Billing Problems

Philip explained that part of the billing problem arose from the fact that despite the two-load guarantee, when Rocking C tried to invoice for a second "phantom" load that was not run, Cudd would reject the invoice because it did not have a sand ticket. He complained that although Williams told them how to bill, including billing

quarterly for trucks that did not run, Cudd's in-house "bean counters" would reject the bills without talking to Cudd's people at the worksites. Philip stated, "[W]e went up there and [did] an honest day's work and we deserved to be paid what we [were] told we [were] going to get paid."

Philip said that Cudd kept coming up with excuses not to pay Rocking C. He said that Richards, Cudd's in-house counsel, first told him over the phone, "You don't have anything in writing." Then, after he forwarded Williams's email to her, Richards told him that Williams did not have the authority to make the deal. Philip said that Cudd also tried to make the excuse that there was no purchase order, but he said that purchase orders were one of Cudd's in-house items that had nothing to do with Rocking C; that Cudd claimed that Rocking C never billed Cudd for the $2,000 daily rate despite Williams's having told Rocking C to bill it every quarter; and that Cudd claimed that the MSA could not be modified by an oral request for work and a confirmation e-mail, notwithstanding the MSA's plain language that contemplated both oral and written requests for work.

On October 9, 2014, Cudd's administrative coordinator emailed Denton, Daugherty, and Feaster to tell them that Rocking C's purchase order was ready to be approved; Denton replied to all, stating, "Done." But on October 23, when Feaster was emailed about "Cancelled Receipts," Feaster said, "This is part of that whole Rocking C mess. We cancelled those and received them again to make the undisputed payout. We're trying to clean it all up." By February 11, 2015, Cudd's administrative

coordinator let Webster and Feaster know that the Rocking C purchase order had been approved for a total of $285,400.

Philip said that in response to Cudd's failure to pay, Rocking C had to hire an attorney and ultimately file suit against Cudd. He said that Cudd's failure to pay the amounts due under their contract had cost Rocking C a lot of money, as well as costing Philip a lot of good relationships and friendships. Philip calculated Rocking C's damages as follows:

- Four sand pushers at $65 per hour for 14 hours per day was $3,640 per day from May 19 to August 29, totaling $396,760.
- 50 trucks at $2,000 per day was $100,000 per day from May 19 to August 29, totaling $10,780,000.
- 20 trucks at $2,000 each per day and 2 pushers, May 12 to May 19.

Philip said that, with interest, Cudd still owed Rocking C $13,922,718.64.

Philip said that Rocking C owed ECG, Bones, and Selah because it had agreed to pay each a share of the $2,000 daily rate, and he asked for the jury to deduct any payments that it found that Cudd made because he did not want anything that he was not owed. Philip said that he knew that Cudd had made a $500,000 payment to Rocking C. On cross-examination, he acknowledged that the three trucking companies that had sued Rocking C were seeking only $94,000 from Rocking C for the work they did on the Cudd project and that he did not know if Rocking C had

been sued by other companies for work for Cudd because he gave "all that to [his] lawyer."

A sampling of 23 Rocking C invoices to Cudd were admitted into evidence. Philip agreed on cross-examination that it appeared on one of the invoices that Rocking C was only invoicing for loads that were completed, but he said that he would need the supporting documents to be sure. On re-direct, Philip said that Rocking C was supposed to bill weekly for the loads that were hauled and then bill every quarter on the 50-truck guarantee. On re-cross-examination, Philip stated that he and Williams had several conversations about the 50-truck guarantee, but he also agreed that the first time payment on the 50-truck guarantee showed up in writing was an email at the end of August.

Bolling testified that Cudd had a three-way matching system that required three items for him to approve payment to a vendor. The first was the receiving document from the field, such as a sand ticket signed by a company man or any other "actual acknowledgment of receipt of material [or] service" that shows completion of part of an agreement.[17] The next was an invoice from the vendor, and the last item was a

[17]Bolling said that in deciding whether to process a payment, Cudd wanted to see bills of lading from the trucking company and the sand company with pickup and delivery times and locations; ideally, a bill of lading would also reference the purchase order number used by the vendor to get paid, a trucking number, the trucker's signature, and the signature of the company man who "actually said, 'Okay. Put [the sand] in this bin,'" for proof of delivery.

purchase order. He also reviewed bills of lading. Bolling testified that Cudd would not issue payment unless a purchase order was in its accounting system.

Bolling first stated that there was no invoice from Rocking C that Cudd had refused to pay due to lack of a purchase order, but then he acknowledged that he had stated the contrary during his deposition—that Cudd had refused to make payments to Rocking C due to the absence of a purchase order. He also agreed that he had been unaware of MSA Article 3, which provided for the MSA's terms to be automatically incorporated into any written or verbal request for work, when Cudd made the decision not to issue payment because of the lack of a purchase order.

Bolling also said that he had not been aware of Williams's May 7, 2014 email when Cudd decided not to pay Rocking C but that the email was irrelevant to his decision about whether to process payment because "[i]t wouldn't be fair to the stockholders."[18] He stated that Cudd had refused to issue payment to Rocking C because Cudd's accounting department had not had a purchase order for the 50-truck guarantee, the receipt document, or an invoice.

During his examination by Cudd's counsel, Bolling reviewed a "typical" invoice that Rocking C would send to Cudd and said that he would require the bill of lading to verify the well pad for which the invoice was being issued and the payments that were charged to Cudd. Bolling said that he would expect the purchase order to match

[18]Bolling had no response when Rocking C's counsel asked him, "Would it be fair to the vendors that Cudd has hired and agreed to pay and refuses to pay?"

the rates on the invoice, stating, "We have to have a piece of paper, a writing, in order to -- to reconcile the books. We can't do it off of verbal order, e-mails or dinner napkins." Bolling said that the three-way match was an industry standard and that it was Cudd's regular practice to match a purchase order against an invoice prior to issuing payment.

Bolling said that in Cudd's review of the invoices submitted by Rocking C, Cudd never received one for trucks that did not haul loads and that every invoice submitted by Rocking C that was paid by Cudd had a bill of lading. Bolling said that Cudd was never invoiced for $13.9 million by Rocking C and that Rocking C never submitted an invoice to Cudd for trucks that did not haul sand. With regard to Philip's testimony that Cudd had instructed Rocking C to invoice Cudd on a quarterly basis for the trucks that were not utilized during the May 19-to-August 19, ninety-day period, Bolling said that Rocking C never submitted an invoice on August 19 or thereafter for services that were not performed.

Bolling testified that Cudd had paid Rocking C everything that had been invoiced that met the three-way match and that Cudd had made total payments to Rocking C of $7,548,271.50. He stated that Cudd performed two audits of the Rocking C invoices because after the first audit, Rocking C presented more invoices and "there w[ere] multiple billing errors presented. There was double invoicing . . . for more than one [bill of lading]," and Cudd had to make sure there were no double payments. The first audit was in October 2014 and the second was in January or

February 2015. Bolling said that none of the invoices presented after the first audit reflected invoicing on the 50-truck guarantee or services that were not performed.

During his redirect examination by Rocking C's counsel, Bolling agreed that not every invoice that Rocking C submitted had been paid. He also acknowledged that a Cudd purchase order for Rocking C with a May 8, 2014 creation date had a "revision" date of April 15, 2015, and he said that he did not know how many of Cudd's purchase orders had "revision" dates months after Cudd terminated Rocking C. Bolling testified as follows:

> Q. You've already candidly admitted to the jury that you have never even seen [Williams's] e-mail until July of this year, correct?
>
> A. That's correct.
>
> Q. So you didn't bother to look at what Jimmy Williams had requested and confirmed in an e-mail to Rocking C when Rocking C was requesting for Cudd to process payment, did you?
>
> A. I don't have time to look at every e-mail.
>
> Q. In a situation -- and I understand Cudd disputes the 50-truck guarantee. You've told me that before yourself, correct?
>
> A. That's correct.
>
> Q. Because you had never seen a purchase order, one of these documents, for the 50-truck guarantee, correct?
>
> A. That's correct.
>
> Q. Couldn't you go in and revise a purchase order -- what is today, August -- no, October 17, 18? Could you go in and revise a purchase order on October 18, 2018 to provide for the 50-truck guarantee?

A. You could revise it.

Q. Just like this one was revised eight months after Rocking C was terminated by Cudd, correct?

A. The PO was still open. Yes.

Q. You never bothered to revise a PO so that you could process the 50-truck guarantee, did you?

A. There was no guarantee.

Q. I understand that's your position. My question is a little different. Did you as the accounting arm who relies on the three-way matching of this purchase order that you create for your own internal records go in and revise one of these POs, much like you did eight months later here, for the 50-truck guarantee so that you could process payment to Rocking C?

A. I never saw the e-mail.

. . . .

Q. Yet, you didn't think it was necessary to contact Jimmy Williams ever, even after this lawsuit was filed, and ask him, "Why is Rocking C telling us they have a 50-truck guarantee?"

A. That wouldn't have been relevant.

Q. And still today, despite your audits and your investigation, you never once bothered to speak with Jimmy Williams, did you?

A. I did not.

Bolling opined that "work order" referenced in MSA Article 3 was synonymous with "purchase order," so while the request could be written or verbal, "the work or purchase order is a document." He agreed on redirect examination that purchase

orders are "very dynamic" in that if the customer calls for 1,000 loads but only runs 850, Cudd "would reduce the quantity at that time at the end of the well." When asked, "Is Cudd reverse engineering these POs after the fact to match whatever it is that Cudd decides they want to pay Rocking C," Bolling replied, "It matches the three-way match."

Lacy, who was designated as Cudd's corporate representative and who was working in Cudd's service line procurement department at the time of the trial, had been a field engineer for Cudd during the April–August 2014 time period, but not in the Marcellus Shale. He had never met or spoken with Williams, who had been laid off from Cudd "a couple of years ago . . . due to the industry." Lacy testified that there had been no 50-truck guarantee to Rocking C "because it's [a] request for trucks that [Cudd does] every day" and "[a]bsolutely a purchase order is required." Like Bolling, he testified that "purchase order" and "work order" were interchangeable. He also testified about his interpretation of the May 7, 2014 email:

> It says right there that, "We'll pay a thousand dollars per load." How I would interpret it fully as a whole, instead of taking bits and pieces like this whole trial has been, reading the top as well, the 20 trucks agreed to on a current pad or pads. Those are individual jobs. It's not an extended four month – you know, three and a half, four month. These were individual jobs. So this isn't, hey, the 20 trucks you have for six months. This is for a job, and that's what we request trucks for every single day. So for them to turn it into something bigger than that, it's not what it is.

Lacy said that every job changes every day so the email was "[a]bsolutely not" a work order or a purchase order (which he said were the same thing) and that a work order

could not be verbal. He stated that in his six-and-a-half years working for Cudd, he was not aware of any company ever requesting a number of trucks and paying for them whether or not they delivered a load.

Lacy said that Cudd would not pay for a truck that had not delivered a load and that a load is considered complete as follows: "you pick up, come to the wellsite, . . . you finish offloading your material on-site, that's when a load is complete and it can be billed for." Lacy also testified that every 12 hours, Rocking C would send a shift summary report, "so that's 202 shift summary reports that they should show 50 trucks on. I can count on one hand how many times they showed 50 trucks." Lacy further testified:

> Q. Can you think of any instance where Cudd would ever guarant[ee] payment for a certain number of trucks whether those trucks were delivering loads or not?
>
> A. No, sir.
>
> Q. And I know you deal with the MSA all the time -- and you deal with vendors, right?
>
> A. Yes, sir.
>
> Q. And, again, you had Jimmy Williams'[s] position, right?
>
> A. Yes, sir.
>
> Q. If you were ever going to enter into a contract that was worth millions of dollars, would you want it in writing?
>
> A. Absolutely.
>
> Q. Would it have to be in writing pursuant to Cudd's guidelines?

A. It would have to be signed off on by the vice president of our company, of finance.

Q. What are some of the things you want in that contract?

A. Term; number of trucks guaranteed; like I said, the period of time; where this is taking place at, the main rundown.

Q. When you say "number of trucks guaranteed," what do you mean by that?

A. How many trucks they expect to be paid for a day, if this was a contract. If you expect 50, then it's laid out -- the terms need to be laid out for how long a period this goes on for, the start date, the end date, everything.

Q. Would you expect more than just a three-paragraph e-mail?

A. Absolutely.

E. Closing Arguments

During closing arguments, Rocking C argued that Cudd had a case of buyer's remorse, that $100,000 a day was a lot of money until compared to the millions the company stood to lose per day because it could not get enough trucks, and that Lacy and Bolling had had nothing to do with the Rocking C–Cudd transaction, had not been to the Marcellus Shale, and did not know or talk with Williams. Rocking C claimed that Cudd still owed $10,674,920.

Cudd responded that the jury only needed to look at one paragraph in the three-paragraph May 7, 2014 email, which said nothing about paying for trucks to sit around idle, and argued that the guarantee was for loads, not trucks. Cudd further

asserted that a multimillion-dollar contract had to be based on more than one paragraph in an email and that Rocking C had already been paid $7.5 million.

Rocking C rebutted Cudd's argument by pointing out that, per Williams's email, the trucks would not have needed permission to leave if they had not been on standby and asserting that rather than $7.5 million, Rocking C had only been paid $500,000.

F. Jury Charge and Verdict

1. Charge Requests and Objections

Cudd's amended proposed charge contained the following first question: "On May 7, 2014, did Cudd enter into a contract with Rocking C to pay for a guaranteed 50 trucks at $2000.00 per day, whether or not sand was actually hauled?" Cudd also requested the following instruction: "In deciding whether the parties reached an agreement, you may consider what they said and did in light of the surrounding circumstances, including any earlier course of dealing. You may not consider the parties' unexpressed thoughts or intentions." Cudd made no objections during the charge conference to the first three questions in the court's charge; instead, Cudd's counsel stated that Cudd's "only objections [were] to Question 4 and Question 5," which pertained to Rocking C's quantum meruit claim.[19]

2. Trial Court's Jury Charge

[19]Without an objection to the jury charge, we review evidentiary sufficiency in light of the charge submitted. *Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212, 221 (Tex. 2005) (citing *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 715 (Tex. 2001)).

The trial court charged the jury as follows:

Question No. 1:

It is your duty to interpret the following language of the agreement:

[From Jimmy Williams May 7, 2014 Email] Rocking C Exhibit No. 10

To confirm our conversation:

We want to keep the 20 trucks already agreed to on the current pads along with the two pushers already in use. Starting May 19, we want an additional 30 trucks and two more pushers. We will pay $1200 per day per truck for mobilization to PA.

We will pay $1,000 per load with guaranteed two loads per day, within a 24 hour period and keeping within the 14 hour rule. Beginning with third load, rate goes to $950.00 per load. No detention on any loads.

When moving between pads, we will keep those trucks that wish to stay in the area busy. Drivers wanting to go home will be released with understanding full service will resume when next pad is ready.

Did Cudd and Rocking C agree that from May 19, 2014 through August 29, 2014, Cudd would pay Rocking C for four sand pushers at the rate of $65 per hour for 14 hours per day per each sand pusher (for a total of $3,640 per day) and for 50 trucks at the rate of $2,000 per truck per day (for a total of $100,000 per day) regardless of whether Cudd called some or all of the trucks into service each day?

In deciding whether the parties reached an agreement, you may consider what they said and did in light of the surrounding circumstances, including any earlier course of dealing. You may not consider the parties' unexpressed thoughts or intentions.

You must decide its meaning by determining the intent of the parties at the time of the agreement. Consider all the facts and circumstances surrounding the making of the agreement, the

interpretation placed on the agreement by the parties, and the conduct of the parties.

Answer "Yes" or "No."

After deliberating for around four hours, ten of twelve jurors replied, "Yes," found that Cudd had failed to comply with its contract, found that Rocking C had performed compensable work for Cudd that was not compensated, and found $3,126,649.50 in damages to fairly and reasonably compensate Rocking C for Cudd's failure to comply (the answer to Jury Question No. 3) and as the reasonable value of Rocking C's compensable work. They also awarded $148,282.50 as reasonable attorney's fees for representation in the trial court, along with conditional appellate attorney's fees.

G. Post Trial

Cudd filed several postjudgment motions. The trial court rendered judgment on the jury's verdict and gave Rocking C the option to elect its remedy, noting that because the damages for breach of contract and for quantum meruit were the same, Rocking C's election under either "would result in the same amount of damages awarded in this judgment."

III. Discussion

In its first, second, and fourth issues, Cudd argues that Rocking C's claim for breach of contract is barred as a matter of law because it fully complied with the parties' agreement by paying "every penny that Rocking C charged" according to

Rocking C's invoices; that there was no guarantee for 50 trucks at $100,000 per day except for payment per load; and that there is legally and factually insufficient evidence to support the jury's answers on either the breach-of-contract or quantum meruit questions. In its third issue, Cudd complains that Rocking C cannot prevail on a quantum meruit claim when the parties agreed that a contract governed their transaction, and in its final issue, Cudd asserts that Rocking C cannot recover its attorney's fees if it failed to prevail on either of its claims or failed to suffer any damages.

A. Standards of Review and Applicable Law

We may sustain a legal-sufficiency challenge—that is, a no-evidence challenge—only when (1) the record bears no evidence of a vital fact, (2) the rules of law or of evidence bar the court from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence establishes conclusively the opposite of a vital fact. *Shields Ltd. P'ship v. Bradberry*, 526 S.W.3d 471, 480 (Tex. 2017); *see also Ford Motor Co. v. Castillo*, 444 S.W.3d 616, 620 (Tex. 2014) (op. on reh'g); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998) (op. on reh'g).

In determining whether legally sufficient evidence supports the finding under review, we must consider evidence favorable to the finding if a reasonable factfinder could and must disregard contrary evidence unless a reasonable factfinder could

not. *Cent. Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007); *City of Keller v. Wilson*, 168 S.W.3d 802, 807, 827 (Tex. 2005). We indulge "every reasonable inference deducible from the evidence" in support of the challenged finding. *Gunn v. McCoy*, 554 S.W.3d 645, 658 (Tex. 2018). That is, "[i]f the parties to an oral contract testify to conflicting terms, a reviewing court must presume the terms were those asserted by the winner." *City of Keller*, 168 S.W.3d at 819.

Anything more than a scintilla of evidence is legally sufficient to support a finding. *Cont'l Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 450 (Tex. 1996); *Leitch v. Hornsby*, 935 S.W.2d 114, 118 (Tex. 1996); *see also 4Front Engineered Sol., Inc. v. Rosales*, 505 S.W.3d 905, 909 (Tex. 2016) ("The evidence is legally sufficient if . . . there is more than a scintilla of evidence on which a reasonable juror could find the fact to be true."). Scintilla means a spark or trace. *Scintilla*, Black's Law Dictionary (10th ed. 2014). More than a scintilla exists if the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *Rocor Int'l, Inc. v. Nat'l Union Fire Ins.*, 77 S.W.3d 253, 262 (Tex. 2002); *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). On the other hand, when the evidence offered to prove a vital fact is so weak that it creates no more than a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003); *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983).

When reviewing an assertion that the evidence is factually insufficient to support a finding, we set aside the finding only if, after considering and weighing all the pertinent record evidence, we determine that the credible evidence supporting the finding is so weak, or so contrary to the overwhelming weight of all the evidence, that the finding should be set aside and a new trial ordered. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986) (op. on reh'g); *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965). The factfinder is the sole judge of the witnesses' credibility and the weight to be given to their testimony. *Golden Eagle Archery, Inc. v. Jackson,* 116 S.W.3d 757, 761 (Tex. 2003).

Generally, a plaintiff asserting a breach-of-contract claim must prove (1) the existence of a valid contract,[20] (2) the plaintiff performed or tendered performance as the contract required, (3) the defendant breached the contract by failing to perform or tender performance as the contract required, and (4) the plaintiff sustained damages as a result of the breach. *Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd.*, 574 S.W.3d 882, 890 (Tex. 2019). Contested fact issues are for the jury to resolve, and the burden

[20]To prove the existence of a valid contract, the plaintiff must establish, among other things, that the parties had a meeting of the minds on the contract's essential terms. *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 501 n.21 (Tex. 2018) (op. on reh'g). The jury need only be asked and instructed about the issues that the parties dispute and on which the pleadings and evidence raise an issue. *Id.* at 501; *see also City of Keller*, 168 S.W.3d at 819 ("Jurors . . . may choose to believe one witness and disbelieve another."). Whether the parties formed a contract is a fact question. *Hawkins v. Myers*, No. 02-14-00123-CV, 2015 WL 1646812, at *6 (Tex. App.—Fort Worth Apr. 9, 2015, no pet.) (mem. op. on reh'g).

of proof is on the party seeking a remedy. *Id.* Further, there is no question that a contract can be oral: In *Chalker Energy Partners III, LLC v. Le Norman Operating LLC*, the court acknowledged that "[a]n agreement as to many things can be oral, sealed by a handshake, even a $10.53 billion handshake." 595 S.W.3d 668, 669 (Tex. 2020).[21] And email, "a ubiquitous feature of modern life . . . used by nearly everyone for nearly every type of communication, from the flippantly inconsequential to the bindingly formal," can memorialize an agreement. *Copano Energy, LLC v. Bujnoch*, 593 S.W.3d 721, 728 (Tex. 2020).[22]

---

[21]In *Chalker Energy Partners*, the court concluded that the parties' emails did not raise a fact issue sufficient to preclude summary judgment on the question of whether a definitive agreement existed. 595 S.W.3d at 670–73. The existence of a definitive agreement was a condition precedent to contract formation required by the "no obligation clause" in the parties' confidentiality agreement, and the parties' emails, which included a redline draft agreement, merely contemplated completing the preparation of agreements. *Id.* at 670–71, 673, 675–76 (observing that no-obligation clauses would be stripped of their meaning and utility "[i]f mere proposals that contemplate a later-executed PSA and the subsequent exchanging of unagreed-to drafts are sufficient to raise a fact question on the existence of a definitive agreement"). No such condition precedent is at issue in the instant case. Instead, the MSA specifically contemplated both oral and written requests setting out work to be performed and price to be paid.

[22]In *Copano Energy, LLC*, a summary judgment appeal, the court held that the parties' emails about the sale of a proposed easement—an interest in real property—were not sufficient to constitute a contract that satisfied the statute of frauds when the emails reflected "a forward-looking request to negotiate a contract" through their "future-tense phrasing" but did not evidence the defendant's agreement to the particular terms stated therein or intent to be bound. 593 S.W.3d at 723–24, 729–30. In contrast, here, Rocking C produced evidence both that it had performed the parties' agreement and that Cudd had acknowledged the $2,000-per-day rate even as it tried to renegotiate a lower rate.

The terms of an oral agreement may be established by direct or circumstantial evidence. *Inimitable Grp., L.P. v. Westwood Grp. Dev. II, Ltd.*, 264 S.W.3d 892, 899 (Tex. App.—Fort Worth 2008, no pet.). In determining whether an oral contract exists, we look to the parties' communications and to the acts and circumstances surrounding those communications. *Id.* We may consider objectively determinable facts and circumstances that contextualize the parties' transaction and inform the meaning of the language used, but we may not use surrounding circumstances to alter or contradict an unambiguous contract's terms. *Murphy Expl. & Prod. Co.-USA v. Adams*, 560 S.W.3d 105, 109 (Tex. 2018).

B. 50-truck guarantee and $100,000 per diem

In its first, second, and fourth issues, Cudd challenges the jury's verdict from a number of angles, including that the May 7, 2014 email is not the controlling contract or an enforceable agreement that could have been properly submitted to the jury to interpret; that it, "at best, only controls as to pricing terms"; and that Rocking C failed to produce any evidence that the parties ever strictly complied with the May 7, 2014 email's terms.[23]

[23]Rocking C responds by contending that Cudd waived any challenge to the judgment by failing to challenge the *oral* 50-truck/4-pusher guarantee contract in addition to the May 7, 2014 confirmation email despite acknowledging the oral contract in its opening brief, referring us to the portion of Cudd's brief in which Cudd argues that the jury's answer to Question 1 should be disregarded and then states, "Rocking C brought this suit seeking a judgment against Cudd for breach of contract (or quantum meruit) for failing to pay amounts it alleges were due under a *prior oral agreement, confirmed in a May 7, 2014 email from Cudd to Rocking C*." [Emphasis added.]

In support of its arguments, Cudd points out that Rocking C confirmed that it never submitted an invoice on the alleged guarantee and that the Rocking C invoices that were admitted into evidence showed that Rocking C only billed for actually delivered loads. Cudd also argues that the parties' course of dealings and performance established that there was no $100,000-per-day guarantee.

However, under the parties' overarching agreement—the MSA—which was automatically incorporated into every request for work, a "Work Order," whether written or verbal, was valid as to the price to be paid and as to the specified work to be performed. The parties' oral agreement, as subsequently memorialized in Williams's email, specified both the work to be performed and the price to be paid for the work: 50 trucks, 4 pushers, and a guarantee of two loads per day at $1,000 per load, followed by $950 for any subsequent loads within the 24-hour period. Although Cudd argued to the jury that the email specifically referred to loads and said nothing about paying for trucks to sit around idle, the jury was entitled to determine that the only way for the deal to make sense for both parties—according to Philip's testimony and the parties' emails before, during, and after the deal—was if Rocking C had been guaranteed payment for time that its trucks spent dedicated to Cudd's exclusive use. In particular, Rivera said in an email that he did not see Williams's May 7, 2014 email

---

Cudd replies that its challenge to the oral contract is fairly included in the argument in its first and second issues. We need not address Rocking C's waiver argument in light of our holding that the evidence is sufficient to uphold the judgment. *See* Tex. R. App. P. 47.1.

until the end of August but nonetheless acknowledged that Cudd "understands that we would pay $2000/day/truck" and complained only about additional $950 charges.

And although Bolling and Lacy testified that a "work order" under the MSA meant a written "purchase order," their interpretation conflicts with the MSA's plain language, which provided for either a verbal or written request and identified items that were valid to specify work and price under the MSA: "any Work Order, delivery ticket, bill of lading, invoice, pricing proposal, or similar document." Their testimony also conflicts with Philip's testimony that a "purchase order" was one of Cudd's in-house items that had nothing to do with Rocking C.[24] Cudd ignores Philip's testimony that he had orally requested payment on the guarantee around the time that Cudd tried to renegotiate the daily rate and that Williams had told him to invoice on the trucks that actually delivered sand separately from a quarterly request for payment on the guarantee.

Contrary to Cudd's representation of the parties' course of dealings and performance, the jury could have determined that during the fracking boom in the Marcellus Shale, Cudd was desperate for trucks and offered $2,000 per truck per day to secure exclusive use when it otherwise could have been charged between $1,000 and $3,400 per load, assuming it could find available trucks, and that Rocking C relied

[24]Further, as pointed out by Rocking C, Cudd's corporate representatives—Bolling and Lacy—admitted that they lacked personal knowledge of any of the facts underlying the lawsuit and thus failed to controvert Philip's testimony about the parties' oral agreement and course of dealing.

on that agreement and performed based on it, even if Williams's agreement subsequently ended up creating a "mess" for Cudd's accounting department and multiple excuses by Cudd to avoid paying Rocking C.

Cudd also argues that the jury's answer to Question 3—$3,126,649.50—is not supported by legally and factually sufficient evidence and is excessive. However, Philip testified that Cudd stood to lose hundreds of thousands of dollars a day without trucks and sand for its fracking operation, and while he initially told the jury that Cudd still owed Rocking C $13,922,718.64, upon recalculation, Rocking C ultimately asked the jury for $10,674,920. Bolling testified that Cudd had already paid Rocking C $7,548,271.50, while Philip testified that Cudd had only paid Rocking C $500,000. The jury was entitled to consider all of the evidence, evaluate its weight and credibility, and award any amount remaining due based on the range presented to it by the witnesses.

Based on this evidence, as well as all of the other evidence set out in our extensive factual recitation above, we conclude that the evidence is legally and factually sufficient to support the jury's findings—that there was a 50-truck guarantee for $100,000 per day, that Cudd did not fully comply with it, and that Cudd still owed $3,126,649.50 to Rocking C—and we overrule Cudd's first, second, and fourth issues.

C. Remaining Issues

In its third issue, Cudd complains that Rocking C cannot prevail on its quantum meruit claim, and in the remainder of its fourth issue, Cudd complains that

there is legally and factually insufficient evidence to support the jury's answers to questions 4 and 5 (the quantum meruit questions). Based on our resolution of Cudd's first and second issues and part of its fourth issue, we need not reach Cudd's third issue or the remainder of its fourth issue and, instead, we reform the judgment to reflect Rocking C's recovery on its breach-of-contract claim and to delete the quantum meruit claim. *See* Tex. R. App. P. 43.2(b), 47.1.

In its fifth issue, Cudd argues that Rocking C cannot recover its attorney's fees if it fails to prevail on its breach-of-contract claim or its quantum meruit claim or if it failed to suffer any damages. Based on our holding above—that Rocking C prevailed on its breach-of-contract claim and supported its claim for damages with legally and factually sufficient evidence—we do not reach this issue. *See* Tex. R. App. P. 47.1.

IV. Conclusion

Having overruled Cudd's dispositive issues, we modify the trial court's judgment to delete the quantum meruit ground of recovery and affirm the trial court's judgment as modified. *See* Tex. R. App. P. 43.2(b).

/s/ Bonnie Sudderth
Bonnie Sudderth
Chief Justice

Delivered: November 5, 2020