IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RALPH S. JANVEY, in his capacity as Court-appointed receiver for the Stanford Receivership Estate; SANDRA DORRELL; SAMUEL TROICE; and MICHOACAN TRUST; individually and on behalf of a class of all others similarly situated, Plaintiffs, v. GREENBERG TRAURIG, LLP; GREENBERG TRAURIG, PA; AND YOLANDA SUAREZ, Defendants	§	CIVIL ACTION NO. 3:12-cv-04641-N

GREENBERG TRAURIG'S BRIEF IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS

Greenberg Traurig, LLP and Greenberg Traurig, PA (collectively "Greenberg") respectfully move for judgment on the pleadings, under FRCP 12(c), on the Receiver's claim for "Aiding, Abetting, or Participation in Breaches of Fiduciary Duty." This motion is one for reconsideration of the Court's prior ruling, because the law has now been clarified—the Fifth Circuit has now established that no such claim exists in Texas. *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.*, 888 F.3d 753, 782 (5th Cir. 2018) ("*DePuy*").

At the beginning of this case, Greenberg moved to dismiss all claims under FRCP 12(b)(6). The Court granted relief on some of the Receiver's claims but left intact the aiding and abetting claim. The Court acknowledged "confusion" about whether such a

claim existed in Texas. Docket No. 114 (Dec. 17, 2014). The Court stated: "Although there is no binding case law directing the outcome here, the Court aligns itself with the number of courts that have recognized claims for aiding and abetting breach of fiduciary duty." *Id*.

Since the Court's 2014 order, both the Fifth Circuit and the Texas Supreme Court have spoken on the issue.

- First, in 2017, the Texas Supreme Court confirmed it had never recognized a cause of action for aiding and abetting a breach of fiduciary duty, whether called by that name or the label "knowing participation" in a breach of fiduciary duty. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d, 214, 224-5 (Tex. 2017) ("*Parker*").
- Following that case, the Fifth Circuit in 2018 dismissed an aiding and abetting claim "because no such claim exists in Texas." *DePuy*, 888 F.3d at 782.

Because these decisions clarify any confusion about the viability of the Receiver's claim, Greenberg asks the Court to take another look at it. A discussion of both cases follows.

Parker

A little background is necessary to put the new pronouncement from the Texas Supreme Court into context. Ever since *Kinzbach Tool Co. v. Corbett-Wallace Corp*., 160 S.W.2d 509 (Tex. 1942), lower Texas courts have relied on that decision to support liability for knowing participation in a breach of fiduciary duty. It was for decades a seemingly

independent avenue to hold one defendant liable for the harm caused by another party's fiduciary breach.

Fast forward to 1996, when the Texas Supreme Court took up an unusual case involving a police officer injured during a protest demonstration. *Juhl v. Airington*, 936 S.W.2d 640 (Tex. 1996). The officer sought to hold the protestors liable on a "concert of action" theory—that is, imposing liability on a person for the conduct of another if the defendant, for example, knows that the other's conduct constitutes a breach of duty and gives substantial assistance to the other. This theory found support in RESTATEMENT (SECOND) OF TORTS § 876 (1977), an often-cited authority for aiding and abetting claims, but the Court noted that the section had never been adopted by the Texas Supreme Court. The Court observed that "whether such a theory of liability [*i.e.* "concert of action"] is recognized in Texas is an open question." *Id*. at 643.

To be clear, *Juhl* did not explicitly deal with aiding and abetting. That would wait another 21 years, when *Parker* was decided. *Parker*, like this case, involved a client suing its own lawyer for aiding and abetting or knowing participation in a breach of fiduciary duty by another. The case arrived at the Texas Supreme Court as an appeal from the granting of a summary judgment in favor of the lawyer. The Supreme Court opened its discussion of the issue:

> We begin by noting that this Court has not expressly decided whether Texas recognized a cause of action for aiding and abetting. See *Juhl v. Airington*, 936 S.W.2d 640, 643 (Tex. 1996). However, the parties do not raise or brief the question of whether such a cause of action exists in Texas, so we will assume, without deciding that it does.

Parker, 514 S.W.3d at 224.

The Court determined that the plaintiff's pleadings, which referred only to "knowing participation" but not "aiding and abetting," did not give the lawyer sufficient information to determine that the plaintiff was asserting a claim for aiding and abetting. The plaintiff thereby failed to preserve its claim because its pleadings did not give fair notice of it. Though this holding disposed of the claim, the Court nevertheless commented that the plaintiff had presented no evidence that the lawyer had assisted or encouraged the theft that was the basis of the claim. In making this last observation, the Supreme Court once again stated "we have never expressly recognized a distinct aiding and abetting cause of action." *Id*. at 224-5.

DePuy

Relying on *Parker*, the Fifth Circuit held in *DePuy* that because the Texas Supreme Court has never recognized a cause of action for aiding and abetting, federal courts sitting in diversity should not recognize this cause of action either. The plaintiffs in *DePuy* sought to hold Johnson & Johnson liable for aiding and abetting a subsidiary's allegedly defective design or prosthetics. The Fifth Circuit brushed aside the parties' debate about whether Texas would accept such a claim in a strict liability context because "[w]hen sitting in diversity, a federal court exceeds the bounds of its legitimacy in fashioning causes of action not yet recognized by the state courts." *DePuy*, 888 F.3d at 781.

The Fifth Circuit explained "*Erie* authorizes us to wager a guess about how the state court might fill the interstices of existing doctrinal frame-works; inventing a new framework *ex nihilo* is another matter entirely." *Id*. In dismissing the aiding and abetting claim—"because no such claim exists in Texas," *id*. at 782—the Fifth Circuit expressly

declined to rely on older Texas Supreme Court law, such as *Kinzbach*. Though *Kinzbach* was often cited as the source of the "knowing participation" claim, the Fifth Circuit called it instead "a joint-tortfeasor matter." *DePuy*, 888 F.3d at 782. In any event, the Fifth Circuit declared that half-century-old decisions must yield to the Texas Supreme Court's "more timely and direct pronouncements to the contrary." *Id.*[1]

The Receiver labels his claim as both "aiding and abetting" or "participation" in breaches of fiduciary duties. Compl. at 141. The label does not matter. Whatever the claim is called, it falls within the holding of *DePuy*, and it must be dismissed. Greenberg asks this Court to reconsider its earlier decision. There can no longer be any confusion about whether federal courts in this circuit can entertain an aiding and abetting claim.

The Court need not be concerned that a dismissal of the aiding and abetting claim leaves the Receiver without a remedy. The Receiver's negligence claim—based on the same alleged Greenberg conduct and seeking the same damages—remains in the case. The sole purpose of this motion is to streamline the ultimate submission of this case to the jury by removing a claim that no longer has any support in the law.

CONCLUSION

Greenberg asks the Court to grant this motion and dismiss the Receiver's aiding and abetting claim.

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[1] The single published Fifth Circuit case decided after *Parker* (but before *Depuy*) reversed summary judgment in favor of the plaintiff on a knowing participation claim without addressing the issue of whether the cause of action exists at all. *D'Onofrio v. Vacation Publications, Inc.*, 888 F.3d 197, 216 (5th Cir. 2018). In that case, no party cited *Parker*, and no party argued that the cause of action does not exist in Texas.

Respectfully Submitted,

FOGLER, BRAR, FORD, O'NEIL & GRAY LLP

By: */s/ Murray Fogler*
Murray Fogler
mfogler@fbfog.com
Michelle E. Gray
mgray@fbfog.com
Robin O'Neil
roneil@fbfog.com
909 Fannin Suite 1640
Houston, Texas 77010
Telephone: (713) 481-1010
Facsimile: (713) 574-3224

BOIES SCHILLER FLEXNER LLP

Stuart H. Singer
ssinger@bsfllp.com
Sashi C. Bach
sbach@bsfllp.com
Pascual A. Oliu
poliu@bsfllp.com
401 East Las Olas Boulevard, Suite 1200
Fort Lauderdale, Florida 33301
Telephone: (954) 356-0011
Facsimile: (954) 356-0022

COWLES & THOMPSON, P.C.

Jim E. Cowles
jcowles@cowlesthompson.com
Sim Israeloff
sisraeloff@cowlesthompson.com
Charles A. Green
cgreen@cowlesthompson.com
901 Main Street, Suite 3900
Dallas, Texas 75202
Telephone: (214) 672-2000
Facsimile: (214) 672-2347

Counsel for Defendants Greenberg Traurig, LLP and Greenberg Traurig, PA

CERTIFICATE OF SERVICE

The undersigned certifies that on December 4, 2018, a true and correct copy of the foregoing document was delivered via electronic means using the ECF system pursuant to FED. R.CIV. P. 5(b)(2)(D) and Local Rule 5.1(d), to all counsel of record.

NELIGAN, LLP

Douglas J. Buncher
dbuncher@neliganlaw.com
Republic Center
325 N. St. Paul, Suite 3600
Dallas, Texas 75201
Telephone: (214) 840-5320
Facsimile: (214) 840-5301

CLARK HILL STRASBURGER

Judith R. Blakeway
judith.blakeway@clarkhillstrasburger.com
2301 Broadway
San Antonio, Texas 78215
Telephone: (210) 250-6004
Facsimile: (210) 258-2706

CASTILLO SNYDER, P.C.

Edward C. Snyder
esnyder@casnlaw.com
Jesse R. Castillo
jcastillo@casnlaw.com
700 N. St. Mary's Street, Suite 405
San Antonio, Texas 78205
Telephone: (210) 630-4200
Facsimile: (210) 630-4210

CLARK HILL STRASBURGER

David N. Kitner
david.kitner@clarkhillstrasburger.com
901 Main Street, Suite 4400
San Antonio, Texas 75202
Telephone: (214) 651-4300
Facsimile: (214) 651-4330

STANLEY LAW, P.C.

Michael J. Stanley
MStanley@stanleylaw.com
230 Westcott St., Suite 120
Houston, Texas 77007
Telephone: (713) 980-4381
Facsimile: (713) 980-1179

By: /s/ *Murray Fogler*
Murray Fogler