No. 11-772

IN THE
SUPREME COURT OF THE UNITED STATES

GREENBERG TRAURIG, L.L.P., *ET AL.*,
Petitioners,

v.

DANIEL O. CONWILL, IV,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a defendant is automatically entitled to an appeal of a dismissal without prejudice of a plaintiff's state law claim following the dismissal with prejudice of all federal law claims, even when the defendant **(1)** argued during Rule 59(e) proceedings in favor of maintaining the district court's dismissal of state law claims without prejudice under 28 U.S.C. § 1367(c)(3); **(2)** then failed to identify the district court's decision to decline to exercise supplemental jurisdiction as a decision under appeal in its notice of appeal; and **(3)** then failed to identify as an issue for appeal or to otherwise brief or argue to the Court of Appeals that the district court abused its discretion in declining to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c)(3).

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Respondent Daniel O. Conwill, IV requests that this Court deny the Petition for a Writ of Certiorari ("Petition") filed by Greenberg Traurig, L.L.P. ("Greenberg") and Jay I. Gordon (collectively, "the Greenberg Petitioners" or "the Petitioners"), seeking review of an unpublished, non-precedential decision of the United States Court of Appeals for the Fifth Circuit.[1] Although the state law claim as to which the Petitioners seek review was dismissed by the district court without prejudice under the court's discretion to not exercise supplemental jurisdiction upon dismissal of Mr. Conwill's federal claim, not once do the Petitioners so much as mention 28 U.S.C. § 1367, much less analyze the importance of the

[1] *Conwill v. Greenberg Traurig, L.L.P., et al.*, 2011 WL 4931256 (5th Cir. Nov. 18, 2011) (unpub.); Petition 1a.

district court's discretion to render such a dismissal under 28 U.S.C. § 1367(c)(3).

Particularly in light of this critical omission by the Greenberg Petitioners, this matter is not appropriate for certiorari review by this Court. The Fifth Circuit's decision (1) does not fairly present the appellate standing issue, as the decision is against the backdrop of the Petitioners' failure to invoke the Court of Appeals' jurisdiction on the district court's supplemental jurisdiction discretion and then the abandonment of that issue in their appellate briefing; and (2) does not present a true conflict between the Fifth Circuit's decision and the decisions of this Court or the other Courts of Appeals.

STATUTORY PROVISION INVOLVED

In addition to tangential relation to the Case or Controversy requirement of Article III of the United States Constitution, as identified in the Petition, the primary statutory provision implicated by the Petition is 28 U.S.C. § 1367(c)(3): "The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if …the district court has dismissed all claims over which it has original jurisdiction."

STATEMENT OF THE CASE

Unsurprisingly, the Greenberg Petitioners' Statement of the Case omits the key facts **(1)** that the dismissal of Mr. Conwill's breach of fiduciary duty claim was dismissed by the district court without prejudice pursuant to its discretion under 28 U.S.C. § 1367(c)(3); **(2)** that Mr. Conwill's Rule 59(e) motion following that dismissal was on the basis that

the district court should have retained jurisdiction over his state law claim, and that both Greenberg Petitioners actively *opposed* that motion; **(3)** that the Greenberg Petitioners' notices of cross-appeal failed to identify the March 22, 2011 decision to decline to exercise supplemental jurisdiction as an appeal issue; and **(4)** that, even if they had properly invoked the Court of Appeals' jurisdiction over that issue through their notices of cross-appeal, the Greenberg Petitioners failed in their appellate briefing to identify the district court's exercise of discretion regarding supplemental jurisdiction as an issue on appeal or to otherwise brief that issue. To rectify these and other key omissions, Mr. Conwill provides the following full statement of the case.

A. District Court's Jurisdiction Over State Law Claim Was Based On Supplemental Jurisdiction Under 28 U.S.C. § 1367

On July 9, 2009, Mr. Conwill brought this action against the Greenberg Petitioners and a third defendant, John B. Ohle, III, alleging a claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, pursuant to the federal court's federal question jurisdiction. Under the initial misapprehension that defendant John Ohle was, like Mr. Conwill, a citizen of Louisiana who would therefore destroy complete diversity, Mr. Conwill invoked the district court's supplemental jurisdiction under 28 U.S.C. § 1367 in bringing eight Louisiana state law claims. Mr. Conwill subsequently learned that Mr. Ohle was a citizen of Illinois, but did not amend his Complaint to invoke the district court's diversity jurisdiction over his state law claims.

On July 28, 2010, the district court granted in part and denied in part a motion for summary judgment by the Greenberg Petitioners, finding that the RICO claim was not time-barred by the four-year statute of limitations; that the state law breach of fiduciary duty claim was subject to the ten-year prescriptive period in Louisiana Civil Code article 3499 and was not time-barred by either Louisiana's one-year peremptive statute applicable to legal malpractice claims (La. R.S. § 9:5605) or the one-year prescription provision at Civil Code article 3492; but that the remainder of Mr. Conwill's state law claims were time-barred under Civil Code article 3492.[2]

B. District Court's Dismissal Of State Law Claim Was Pursuant To Discretion Under 28 U.S.C. § 1367(c)(3)

The Greenberg Petitioners suggest that the subsequent dismissal of Mr. Conwill's RICO claim with prejudice and his breach of fiduciary duty claim were both pursuant to their second round of motions for summary judgment.[3] The Greenberg Petitioners, however, only argued for the dismissal of the RICO claim in their second round of summary judgment motions, arguing successfully that Mr. Conwill's

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[2] Petition 11a. Notably, contrary to the Greenberg Petitioners' assertion that Mr. Conwill's claims were merely "based on legal advice [Mr.] Conwill received from Petitioners in connection with his 2002 income tax return[,]" Petition 2, the district court observed that Mr. Conwill's claims are based on allegations "that defendants breached their fiduciary duties by engaging in fraudulent conduct and self-dealing[.]" Petition 30a-31a.

[3] Petition 2.

RICO claim alleged a predicate act that constituted securities fraud and was therefore precluded from pursuit as a RICO claim under the Private Securities Litigation Reform Act ("PSLRA"). The Greenberg Petitioners did not re-urge any arguments for dismissal with prejudice of the breach of fiduciary duty claim. The district court, however, upon dismissing the RICO claim with prejudice, *sua sponte* chose to employ its discretion under 28 U.S.C. § 1367(c)(3) to not exercise supplemental jurisdiction over the state law breach of fiduciary duty claim.[4]

C. Petitioners Argued In Favor Of District Court's Dismissal Of State Law Claim Without Prejudice Under 28 U.S.C. § 1367(c)(3)

Believing facts had been developed in the course of the litigation that were evident on the record to justify allowing the district court to recognize original jurisdiction over the remaining state law claims pursuant to 28 U.S.C. § 1332 and not just under its § 1367 supplemental jurisdiction, Mr. Conwill filed a Rule 59(e) motion to alter or amend the Judgment with regard to the dismissal without prejudice of the state law claims. Critically, the Greenberg Petitioners both actively opposed the Rule 59(e) motion, and Greenberg filed an additional supplemental opposition. The district court denied Mr. Conwill's Rule 59(e) motion, finding that the elements of diversity jurisdiction were "not satisfied on the face of the pleadings."[5] Accordingly, as

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[4] Petition 48a-49a.

[5] Order and Reasons, Dist. Ct. Doc. No. 342 (April 5, 2011).

supported by the Greenberg Petitioners' active opposition to Mr. Conwill's Rule 59(e) motion, the district court's determination that it could employ its discretion under 28 U.S.C. § 1367(c)(3) to choose not to exercise supplemental jurisdiction over the state law claims remained intact.

D. Petitioners' Notices Of Cross-Appeal Failed To Identify As An Appeal Issue The District Court's Exercise Of Discretion To Dismiss State Law Claims Under 28 U.S.C. § 1367(c)(3)

Neither Mr. Conwill's initial notice of appeal nor the Greenberg Petitioners' notices of cross-appeal specified an appeal from the district court's decision to not use its discretion to exercise supplemental jurisdiction over Mr. Conwill's state law breach of fiduciary duty claim.

On April 13, 2011, Mr. Conwill filed his Notice of Appeal, appealing solely "from the final judgment dismissing with prejudice his civil RICO claims, and his state law claims for legal malpractice, fraud, conspiracy to commit fraud, and breach of contract (Doc. No. 329)."[6] Mr. Conwill expressly excluded from his Notice of Appeal the district court's decision to not exercise supplemental jurisdiction over his remaining state law claims pursuant to 28 U.S.C. § 1367(c)(3): "The Plaintiff does not appeal the dismissal without prejudice of his remaining state law claims." *Id.* With the Greenberg Petitioners' affirmative representation that they did not oppose

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[6] Notice of Appeal, Dist. Ct. Doc. No. 343 (April 13, 2011).

such a motion, Mr. Conwill subsequently moved to voluntarily dismiss his appeal.[7]

On April 20, 2011, Greenberg filed its Notice of Cross-Appeal; rather than a general notice of cross-appeal, Greenberg only specified appeal from certain rulings,[8] specifically (1) the March 22, 2011 Order and Reasons and Judgment "to the extent that [they] … did not dismiss the plaintiff's civil RICO claims with prejudice on the additional ground that the said claims are time-barred under the applicable four-year statute of limitations"; (2) the March 22, 2011, Judgment and the July 20 and July 29, 2010, Orders and Reasons "to the extent that [they] … did not dismiss plaintiff's state law or 'non-RICO claims,' *to wit*: declaratory judgment, unjust enrichment, legal malpractice, breach of contract, negligent representation, fraud, and civil conspiracy, with prejudice on the additional ground of peremption pursuant to [La. R.S. § 9:5605]"; and (3) the March 22, 2011, Judgment and the July 20 and July 29, 2010, Orders and Reasons to the extent that they "did not dismiss plaintiff's state law claim for breach of fiduciary duty with prejudice on the ground of peremption pursuant to [La. R.S. § 9:5605], but, to the contrary, held that said claim was subject to a ten-year prescription under Louisiana Civil Code Article 3499."[9]

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7 *See* App. Ct. Doc. No. 00511503855 (June 9, 2011).

8 Indeed, as the prevailing parties, with a dismissal of most of Mr. Conwill's claims with prejudice, it would not have made sense for the Greenberg Petitioners to file a general, all-encompassing notice of appeal.

9 Petition 52a.

On April 21, 2011, Mr. Gordon filed his Notice of Cross-Appeal, which was identical to the Notice of Cross-Appeal filed by Greenberg except that he also added that he was appealing from the December 21, 2009 Order and Reasons denying his motion to dismiss the claims against him for lack of personal jurisdiction.[10] While the Notices of Cross-Appeal filed by the Greenberg Petitioners specified the particular aspects of the rulings they were appealing, neither included in their Notice of Cross-Appeal that they were appealing the district court's decision in its March 22, 2011 Order and Reasons to decline to exercise supplemental jurisdiction over the state law breach of fiduciary duty claim pursuant to 28 U.S.C. § 1367(c)(3), or that they were appealing the district court's denial of Mr. Conwill's Rule 59(e) motion on that issue.

E. Petitioners Failed To Identify As Appeal Issues Or Otherwise Brief Whether The District Court Abused Its Discretion Under 28 U.S.C. § 1367(c)(3)

On June 10, 2011, Mr. Conwill filed his motion to dismiss the appeals of Greenberg and Mr. Gordon on multiple bases: (1) that the Greenberg defendants' appeals regarding alternate grounds to support the dismissal with prejudice of Mr. Conwill's federal RICO claim and certain enumerated state law claims were moot in light of Mr. Conwill's voluntary dismissal of his appeal on those claims; (2) that the Greenberg defendants did not have standing to appeal when they were the prevailing parties, not

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[10] Petition 55a.

aggrieved by the judgment of dismissal because certain claims were dismissed with prejudice and the without-prejudice dismissal of the remaining claims were non-appealable interlocutory judgments subject to further review in the re-filed action; and (3) that the appeals regarding whether La. R.S. § 9:5605 barred Mr. Conwill's state law breach of fiduciary duty claim did not properly invoke this Court's appellate jurisdiction where the defendants failed to appeal from the district court's determination that it would not exercise supplemental jurisdiction over Mr. Conwill's remaining state law claims.[11] The Greenberg Petitioners conceded mootness as to their appeal issues on the federal RICO claim and the with-prejudice dismissal of certain of Mr. Conwill's state law claims.[12]

The Greenberg Petitioners' principal appeal brief then utterly failed to identify that declination as an appeal issue or to brief it in any way. In their appeal brief and in their opposition to Mr. Conwill's motion to dismiss their appeals, the Greenberg Petitioners failed to address any appellate jurisdiction argument other than that the scope of their Notices of Cross-Appeal should be broadly construed to include the district court's decision to not exercise supplemental jurisdiction over the remaining state law claims; and their argument as to appellate standing only generally asserted that the cost of re-litigating the § 9:5605 peremption issue may rendered them an "aggrieved" party. Among other issues, they failed to address, and therefore

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[11] App. Ct. Doc. No. 00511506009 (June 10, 2011).

[12] App. Ct. Doc. No. 00511513878 (June 20, 2011), at 1.

abandoned or conceded, **(1)** the threshold jurisdictional issue of whether the district court abused its discretion in deciding to not exercise supplemental jurisdiction over the breach of fiduciary duty claim; **(2)** the legal issue that the Fifth Circuit's subject matter jurisdiction cannot expand beyond the scope of subject matter jurisdiction in the district court, which had relinquished jurisdiction over the state law claim under 28 U.S.C. § 1367(c)(3); or **(3)** the issue upon which the Fifth Circuit actually ruled and as to which the Greenberg Petitioners now, belatedly, wish to have this Court exercise its certiorari jurisdiction, regarding whether the dismissal of the breach of fiduciary duty claim without prejudice rendered the rulings on that claim non-appealable interlocutory rulings.

F. Fifth Circuit's Decision Analyzed Appellate Standing Under Appropriate Legal Standard, And Made Fact Finding That Appellate Standing Was Lacking Under Circumstances Of Dismissal Under 28 U.S.C. § 1367(c)(3)

The Fifth Circuit issued its ruling dismissing the Greenberg Petitioners' appeal on October 18, 2011.[13] The Fifth Circuit noted that, pursuant to Fifth Circuit Local Rule 47.5, its *per curiam* decision "should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4."[14] The Fifth Circuit recognized that there were two issues before it on the motion to dismiss the

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[13] Petition 1a.

[14] Petition 2a.

appeal: **(1)** The first related to appellate jurisdiction – namely, that its jurisdiction was not properly invoked; and **(2)** the second regarded appellate standing – that the Greenberg defendants were not aggrieved parties and therefore had no standing to appeal.[15]

The Fifth Circuit found that the Greenberg Petitioners "d[id] not argue that the district court abused its discretion or erred in dismissing that claim [the breach of fiduciary duty claim] without prejudice."[16] While observing in a footnote that the Greenberg Petitioners may have appellate jurisdiction problems highlighted by their opposition in the district court to Mr. Conwill's Rule 59(e) motion, the Fifth Circuit did not rule on the issue of appellate jurisdiction, however, instead dismissing the Greenberg Petitioners' appeal solely on the issue of appellate standing.[17]

As to appellate standing, the Fifth Circuit cited this Court's holding in *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980), for the general premise that "[o]rdinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom."[18] The Fifth Circuit also looked to *Roper* and the decisions of other Courts of Appeals to recognize

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15 Petition 3a.

16 Petition 4a.

17 Petition 8a n.4.

18 Petition 4a-5a.

> a handful of situations in which a party may be sufficiently aggrieved by a favorable judgment to appeal it, such as where the judgment itself contains prejudicial language on issues immaterial to the disposition of the case, where collateral estoppel may harm the party in future proceedings, or where the party will suffer financial loss as a result of the judgment.[19]

The Fifth Circuit's decision emphasized the importance of the collateral estoppel effect of a favorable judgment in "aggrieving" a prevailing party, as found in its own cases and in decisions from the Second, Sixth, Seventh, Ninth, Eleventh, and D.C. Circuits.[20] Here, because the dismissal of the state law breach of fiduciary duty claim was on the basis of the district court's discretion to not exercise supplemental jurisdiction, the Fifth Circuit made the

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[19] Petition 5a (citing *Roper*, 445 U.S. at 333-35; *Envtl. Prot. Info. Ctr., Inc. v. Pac. Lumber Co.*, 257 F.3d 1071, 1075-76 (9th Cir. 2001); *In re DES Litig.*, 7 F.3d 20, 23-25 (2d Cir. 1993); *Elec. Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241, 241-43 (1939)).

[20] *Id.* & n.2 (citing *Klamath Strategic Inv. Fund ex rel. St. Croix Ventures v. United States*, 568 F.3d 537, 546 (5th Cir. 2009); *Picard v. Credit Solutions, Inc.*, 564 F.3d 1249, 1255-56 (11th Cir. 2009); *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 427-28 (5th Cir. 2007); *AT&T Corp. v. F.C.C.*, 317 F.3d 227, 237-38 (D.C. Cir. 2003); *Chathas v. Local 134 Int'l Bhd. of Elec. Workers*, 233 F.3d 508, 512 (7th Cir. 2000); *ASARCO, Inc. v. Sec. of Labor*, 206 F.3d 720, 723-24 (6th Cir. 2000); *United States v. Good Samaritan Church*, 29 F.3d 487, 488-89 (9th Cir. 1994); *In re DES*, 7 F.3d at 23-25).

factual finding that the prior denial of the Greenberg Petitioners' summary judgment motion on time-bar grounds was an interlocutory decision with no collateral estoppel effect: "Although a different ruling on the prescription issue may have resulted in a dismissal with prejudice, that ruling was not … necessary to the district court's ultimate decision not to exercise supplemental jurisdiction. The ruling[] will not, therefore, have any preclusive effect in a later action between these parties."[21]

The Fifth Circuit then recognized the legal premise that "economic injury" caused by a judgment may still "render a party sufficiently aggrieved to appeal,"[22] the precise legal standard advocated by the Greenberg Petitioners here. While the Fifth Circuit observed that its previous *Leonard* decision had resulted in a finding of appellate standing for a prevailing party where the interlocutory decision being appealed resulted in "incurring 'considerable litigation expense and potential enormous liability to other policyholders' ***in hundreds of ongoing and future lawsuits***," it made the factual finding here that the threat that the Greenberg Petitioners may incur the expense of re-litigating the fiduciary duty issue in a single subsequent suit, "standing alone, is insufficient to render [the Greenberg Petitioners] sufficiently aggrieved to permit appeal of the district court's interlocutory opinion."[23]

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21 Petition 6a-7a.

22 Petition 7a.

23 Petition 7a-8a & n.3 (emphasis added).

On this factual finding regarding whether the litigation expense of a single, subsequent lawsuit may aggrieve a party sufficiently to create appellate standing, the Fifth Circuit noted that decisions from the Fourth, Sixth, and Seventh Circuits were distinguishable "because in all of them the prevailing party sought review of a decision to not exercise supplemental jurisdiction that was part of the final judgment dismissing the case."[24] The Fifth Circuit recognized explicitly that this case is not a case presenting the same aggrievedness issues as seen in other Circuits' fact-findings, due to the actions of the Greenberg Petitioners in opposing Mr. Conwill's motion for reconsideration of the decision to not exercise supplemental jurisdiction and in failing to appeal from the district court's decision to not exercise supplemental jurisdiction:

> In this case, [the Greenberg Petitioners] do not appeal the district court's decision to not exercise supplemental jurisdiction, and indeed, actually opposed a motion by [Mr. Conwill] for reconsideration of that decision. Instead, [the Greenberg Petitioners] seek to reach back and modify an interlocutory order not incorporated or relied upon in the final judgment. While a prevailing party may be able to appeal a decision to not exercise supplemental jurisdiction, it may not challenge an

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[24] Petition 8a n.4 (citing *Briscoe v. Fine*, 444 F.3d 478, 495 (6th Cir. 2006); *Custer v. Sweeney*, 89 F.3d 1156, 1163-64 (4th Cir. 1996); *LaBuhn v. Bulkmatic Transp. Co.*, 865 F.2d 119, 121-22 (7th Cir. 1988)).

> interlocutory ruling that is unrelated to the final judgment.[25]

Turning from its analysis and fact-findings under the appropriate legal standard under *Roper*, as well as the standard employed in its own decisions and those of the other Courts of Appeals, the Fifth Circuit articulated an additional policy justification for denying appellate review particularly "in this circumstance."[26] The Fifth Circuit quoted this Court's recent pronouncement in *Camreta v. Greene*, 131 S. Ct. 2020, 2030 (2011), that appellate courts "'review[] judgments, not statements in opinions.'"[27] The Fifth Circuit then held as a policy consideration that it should not "raise[] the possibility of opening the floodgates of appeal to review of non-binding interlocutory opinions" by allowing for appellate review of a denial of summary judgment on a pendent state claim as to which the district court later decided to not continue exercising supplemental jurisdiction.[28] Reiterating its fact-finding that the Greenberg Petitioners' are not sufficiently aggrieved in this situation to maintain an appeal, the Fifth Circuit noted that in three Tenth Circuit decisions that court reached an opposite conclusion,[29] though

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25 Petition 8a n.4.

26 Petition 8a.

27 Petition 9a.

28 *Id.*

29 Petition 9a-10a & n.6 (citing *Miami Tribe of Okla. v. United States*, 2011 WL 3805923 (10th Cir. Aug. 30, 2011); *Ashley Creek Phosphate Co. v. Chevron USA, Inc.*, 315 F.3d 1245 (10th Cir. 2003); *Jarvis v. Nobel/Sysco Food Servs. Co.*, 985 F.2d 1419 (10th Cir. 1993)).

in a manner that violated the policy consideration articulated in the Fifth Circuit's decision.

REASONS FOR DENYING THE PETITION

Tellingly, the Greenberg Petitioners fail to mention or account for the fact that the district court only had jurisdiction over the state law breach of fiduciary duty claim pursuant to its supplemental jurisdiction under 28 U.S.C. § 1367, and that the dismissal of that state law claim without prejudice was pursuant to the court's discretion to not exercise supplemental jurisdiction after dismissing the only federal law claim in the lawsuit. When the district court jettisoned its jurisdiction over the state law claim, the appellate court could not exercise jurisdiction over the merits of that claim without first overturning the district court's exercise of discretion in making the jurisdictional determination under 28 U.S.C. § 1367(c)(3). From this simple jurisdictional fact flows multiple grounds for the Fifth Circuit's dismissal of the Greenberg Petitioners' appeal, none of them properly presenting to this Court the question raised in the Petition.

A. The Question Raised By Petitioners Is Not Fairly Presented By The Fifth Circuit's Decision

In phrasing their "Question Presented," the Greenberg Petitioners purport to present a "simple question of federal law."[30] Because the Petitioners fail to acknowledge that their failure to initiate or

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[30] Petition i.

maintain an appeal of the grounds for the district court's dismissal without prejudice of the state law claim – whether the district court abused its discretion in declining supplemental jurisdiction under 28 U.S.C. § 1367(c)(3) – they over-simplify the actual issues in the Fifth Circuit's decision. In reality, the Fifth Circuit's factual finding that the Greenberg Petitioners were not aggrieved "in this circumstance" is an issue bound inextricably in the district court's exercise of discretion under 28 U.S.C. § 1367(c)(3), and as to which there is no reason for this Court to grant the writ of certiorari.

1. The Appellate Standing Issue Is Pretermitted By Lack Of Appellate Jurisdiction And By Petitioners' Abandonment Of The 1367(c)(3) Issue

The Greenberg Petitioners present the appellate standing issue as a question of whether they "lacked standing to appeal the dismissal without prejudice of a claim brought against them[.]"[31] The Petitioners ignore, however, that the Fifth Circuit's decision was that they lacked standing to appeal "in this circumstance,"[32] and that "this circumstance" involves the Petitioners' failure to actually appeal the circumstance of the dismissal without prejudice of the state law claim under 28 U.S.C. § 1367(c)(3).

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[31] Petition i.

[32] Petition 8a.

The Greenberg Petitioners completely ignore this crucial underlying fact to the appellate standing issue in their Petition – as they did in their briefing to the Court of Appeals – because they cannot dispute that **(1)** they actually opposed Mr. Conwill's Rule 59(e) motion on the district court's employment of 28 U.S.C. § 1367(c)(3), and **(2)** they never raised on appeal the question of whether the district court abused its discretion in dismissing the state law claim under 28 U.S.C. § 1367(c)(3). As this Court has recently emphasized in *Carlsbad Technology v. HIF Bio, Inc.*, 556 U.S. 635, 129 S. Ct. 1862, 1866 (2009),

> With respect to supplemental jurisdiction in particular, a federal court has subject-matter jurisdiction over specified state-law claims, which it may (or may not) choose to exercise. *See* §§ 1367(a), (c). A district court's decision whether to exercise that jurisdiction after dismissing every claim over which it had original jurisdiction is purely discretionary.

The Greenberg Petitioners would have this Court reverse itself and obliterate the "purely discretionary" nature of the § 1367(c)(3) action, replacing the abuse-of-discretion review of that action instead with an automatic right to appeal of the underlying merits of the dismissed claim.

As discussed above and recognized by the Fifth Circuit (though ignored in the Petition), the Greenberg Petitioners failed to invoke the Fifth Circuit's appellate jurisdiction over this discretionary issue by omitting the district court's § 1367(c)(3) decision from the issues specified in their Notices of

Cross-Appeal.[33] The Petitioners clearly could not have intended to appeal generally from all decisions made by the district court, as they prevailed on many of those issues, and therefore attempted to specify in their cross-appeal notices only those issues as to which they believed they did not fully prevail. Nevertheless, they have argued that their Notices of Appeal should be construed broadly to include the dismissal without prejudice of the state law claim. Even if such broad construction may be applied to their notices, the Petitioners cannot surmount the hurdle that, in their briefing to the Fifth Circuit, they do not identify as an appeal issue or otherwise brief the issue of whether the district court abused its discretion in dismissing the state law claim under 28 U.S.C. § 1367(c)(3). This failure constitutes an abandonment of any appeal of that issue,[34] an

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[33] *See Jebaco, Inc. v. Harrah's Operating Co.*, 587 F.3d 314, 322-23 (5th Cir. 2009) ("Harrah's could have cross-appealed the district court's decision to decline jurisdiction over the state law claims, and this court would have reviewed the decision for an abuse of discretion. We do not have appellate jurisdiction over that decision here.") (internal citation omitted); *see also Noble v. White*, 996 F.2d 797, 800 (5th Cir. 1993) (not reaching the merits of appellants' arguments on determining that the district court did not abuse its discretion in declining to exercise supplemental jurisdiction over state law claims).

[34] *See Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994) ("An appellant abandons all issues not raised and argued in its *initial* brief on appeal. … A party who inadequately briefs an issue is considered to have abandoned the claim.") (emphasis in original); *McMillan v. Jackson County Bd. or Sup'rs*, 212 F.3d 595, 2000 WL 423430, *1 (5th Cir. April 6, 2000) ("The plaintiffs' failure to brief the jurisdictional issue constitutes an abandonment of that issue on appeal. Therefore, we do not need to reach the merits of the state law claims; therefore, we affirm the judgment of the district court declining to exercise supplemental jurisdiction over the state law claims and

abandonment that should not be resurrected through this Court's certiorari jurisdiction.

These choices made by the Greenberg Petitioners at the district court and the Court of Appeals are part and parcel of "the circumstances" recognized by the Fifth Circuit as underlying its aggrievedness finding. The Greenberg Petitioners claim to be aggrieved by the dismissal without prejudice of Mr. Conwill's state law claim, yet they failed to appeal and to brief the basis for the dismissal without prejudice. Instead, they try to skip the actual issue of the dismissal without prejudice altogether and go straight to a review of the interlocutory decision eight months prior to deny summary judgment as to that state law claim. Simply put, the Greenberg Petitioners could not have been aggrieved by a decision they did not appeal. Their arguments in this Petition would result in a finding of *per se* aggrievedness any time that a district court dismisses state law claims under 28 U.S.C. § 1367(c)(3), a result that would flatly violate this Court's pronouncement regarding discretion in *Carlsbad Technology*.[35]

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dismissing those claims without prejudice.") (citing *Cinel*). Moreover, the Greenberg Petitioners' opposition to Mr. Conwill's Rule 59(e) motion regarding the dismissal without prejudice of his state law claim judicially estopped them from arguing otherwise on appeal. *See In re Lothian Oil Co.*, 411 Fed. Appx. 736, 736 (5th Cir. 2011) ("We also agree with the district court that Appellants are barred on appeal by the doctrine of judicial estoppel from making arguments contrary to the position they took during the summary judgment proceedings in the bankruptcy court.").

[35] Moreover, even if the Fifth Circuit's decision on appellate standing were not integral to the circumstances undermining the appellate jurisdiction in this matter, those

2. The Issue Regarding Aggrievedness Was Merely An Alternative Ground For Finding Lack Of Standing

The Greenberg Petitioners grossly misstate the holding in the Fifth Circuit's decision "as a general rule, that when a matter is dismissed without prejudice, the defendant has no standing to appeal the district court's refusal to dismiss with prejudice[,]" and link this misstated holding to the Fifth Circuit's reference to conflicting Tenth Circuit decisions.[36] As discussed above, the Fifth Circuit's decision was actually carefully tailored to "this circumstance," which circumstance is specific to the 28 U.S.C. § 1367(c)(3) scenario where the Petitioners have failed to notice or maintain their appeal on that issue. Furthermore, the Fifth Circuit's discussion of the potentially conflicting Tenth Circuit decisions was with regard to an alternate policy consideration, not the primary fact-finding of the court.

Footnote 6 of the Fifth Circuit's decision, where it discussed the contrary fact-findings in three Tenth Circuit decisions, falls well after the section of its opinion where it renders its primary (and circumstance-limited) holding and fact-finding that

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circumstances will remain to confront the Fifth Circuit even if this Court were to reverse the Fifth Circuit's decision on standing. Accordingly, such action by this Court would likely be futile, as the Fifth Circuit would be compelled to dismiss the appeal again for lack of appellate jurisdiction or on the basis of the Petitioners' abandonment of the 1367(c)(3) issue by their failure to brief it.

[36] Petition 3.

the Petitioners are not aggrieved by the interlocutory decision denying their earlier summary judgment motion on the state law claim. Following that section of the decision, the Fifth Circuit initiated an discussion that, alternatively, "as a matter of policy, it makes little sense to permit appellate review in this circumstance."[37] The annotation regarding the Tenth Circuit decisions follows this alternate policy basis, and does not impugn the Fifth Circuit's primary basis for decision.

B. There Is No True Circuit Conflict Or Conflict With This Court's Decisions Presented By The Fifth Circuit's Decision

1. The Fifth Circuit's Decision Is Of No Precedential Effect

"A petition for a writ of certiorari will be granted only for compelling reasons." U.S. S. Ct. R. 10. The Fifth Circuit's unpublished disposition in this matter cannot present such a compelling reason, as it is of no broadly precedential effect. The Fifth Circuit noted in its *per curiam* decision in this case, "[p]ursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4." Under Rule 47.5.4, "[u]npublished opinions issued on or after January 1, 1996, are not precedent, except under the doctrine of res judicata, collateral estoppel, or law of the case." 5th Cir. R. 47.5.4.

While this Court has reviewed unpublished decisions under its certiorari jurisdiction, that the

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[37] Petition 8a.

Fifth Circuit's decision in this case is, by rule, non-precedential, undermines the conclusion that any conflict with the decisions of other circuits is a "compelling" circuit conflict. Accordingly, as a threshold issue, the unpublished nature of the Fifth Circuit's decision should weigh against the granting of the Petition.

2. The Fifth Circuit Expressly Followed The Legal Standard Established By This Court, And Petitioners' Dispute Is Merely With The Fifth Circuit's Factual Finding Under That Correct Legal Standard

Under this Court's certiorari considerations, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. S. Ct. R. 10. Here, although the Greenberg Petitioners strive mightily to paint the Fifth Circuit's decision with the broad brush of conflict with the legal principle that a prevailing party may be aggrieved by and should have the right to appeal from the dismissal of a claim without prejudice, that depiction is inaccurate. The Fifth Circuit decision plainly announces that this legal standard is the appropriate one but that, "in this circumstance," pursuant to this legal standard it made the factual finding that the Greenberg Petitioners were not aggrieved.[38]

The Greenberg Petitioners have no support for their assertion that the Fifth Circuit's decision held,

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[38] Petition 8a.

"as a general rule, that when a matter is dismissed without prejudice, the defendants has no standing to appeal the district court's refusal to dismiss with prejudice."[39] Tellingly, the Petitioners provide no citation to any particular portion of the Fifth Circuit decision for this assertion. In actuality, the Fifth Circuit cited this Court's *Roper* decision, as well as decisions from the Fifth Circuit and other Courts of Appeals, for the general premise that there are "a handful of situations in which a party may be sufficiently aggrieved by a favorable judgment to appeal it," including specifically "where the judgment itself contains prejudicial language on issues immaterial to the disposition of the case, where collateral estoppel may harm the party in future proceedings, or where the party will suffer financial loss as a result of the judgment."[40]

The Fifth Circuit recognized that situations may arise where relitigation of a state law claim that was dismissed without prejudice may cause sufficient economic injury as to "aggrieve" a prevailing party for purposes of conferring appellate standing on that party.[41] While the Greenberg Petitioners would like this Court to believe that the Fifth Circuit applied an opposite legal standard, their real dispute here is with the Fifth Circuit's factual finding under this correctly articulated legal standard. The Fifth Circuit made the factual finding – based on the expense of re-litigating the 9:5605 issue in a single subsequent lawsuit and on the circumstance of the

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39 Petition 3.

40 Petition 5a.

41 Petition 7a-8a & n.4.

Petitioners' failure to appeal from the district court's decision to not exercise supplemental jurisdiction – that this case was distinct from the facts of other cases where a prevailing party was found to have standing to appeal from a dismissal without prejudice.[42]

Under Rule 10, the real dispute that the Greenberg Petitioners have with the Fifth Circuit decision is inappropriate for certiorari review.

3. There Is No Circuit-Split Regarding The Necessity To Challenge A District Court's Exercise Of Discretion Under 28 U.S.C. § 1367(c)(3) Before A Finding Of Aggrievedness By A Without-Prejudice Dismissal

As discussed above, the Petitioners are incorrect to assert that there is any split among the Circuits presented by the Fifth Circuit's discussion of the appropriate legal standards. Moreover, none of the cases cited by the Greenberg Petitioners indicate that there is a split even in the factual results with regard to the specific issue in this case – whether defendants may oppose a motion to reconsider the district court's exercise of discretion to dismiss a state law claim without prejudice under 28 U.S.C. § 1367(c)(3), fail to identify that exercise of discretion as one of the judgments being appealed in their notice of appeal, fail to identify that exercise of discretion as an issue on appeal or otherwise brief that issue, and still be entitled to a finding of *per se*

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[42] Petition 8a & n.4.

aggrievedness to support appellate standing on the underlying merits of the dismissed state law claim.

The Greenberg Petitioners suggest that the Fifth Circuit's decision conflicts with decisions of the Sixth, Seventh, Eighth, Ninth, Eleventh, D.C., and Federal Circuits.[43] The cases cited by the Petitioners, however, only highlight the importance of understanding the critical fact that the Greenberg Petitioners opposed Mr. Conwill's efforts to seek alteration of the "without prejudice" nature of the dismissal of his breach of fiduciary duty claim ***and*** then themselves failed to notice, argue, or brief the precise ruling that serves as the threshold for the dismissal without prejudice of the breach of fiduciary duty claim – whether the district court's decision to not exercise supplemental jurisdiction over the breach of fiduciary duty claim was an abuse of discretion. Every case cited by the Greenberg Petitioners in Section III of the Petition, without exception, involves a decision where the party appealing a "without prejudice" dismissal was specifically challenging not just the underlying substantive merits of the district court decisions, but also the threshold basis of the district court's decision to make that dismissal without prejudice.[44]

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[43] Petition 10-14.

[44] *See Schering-Plough Healthcare Prods., Inc. v. Schwarz Pharma, Inc.*, 586 F.3d 500, 507 (7th Cir. 2009); *Briscoe v. Fine*, 444 F.3d 478, 485 (6th Cir. 2000); *H.R. Technologies, Inc. v. Astechnologies, Inc.*, 275 F.3d 1378, 1383 (Fed. Cir. 2002); *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 647-48 (D.C. Cir. 1998); *Farmer v. McDaniel*, 98 F.3d 1548, 1549 (9th Cir. 1996); *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1095 n.10 (11th Cir. 1996); *Gregory v. Hartman*, 909 F.2d 1486, 1990 WL 112017, *1 (7th Cir. Aug. 3, 1990); *Disher v. Info. Resources, Inc.*, 873 F.2d 136, 139 (7th Cir. 1989); *LaBuhn v. Bulkmatic Transp.*

Here, the district court's order dismissing the federal RICO claim with prejudice and the breach of fiduciary claim without prejudice was pursuant to a summary judgment motion by the Greenberg Petitioners that only addressed the merits of the RICO claim. The Petitioners had not re-urged any summary judgment grounds as to the state law claim. The district court *sua sponte* exercised its discretion under 28 U.S.C. § 1367(c)(3). The basis for dismissal of the state law claim was the "pure[] discretion[]"[45] of the district court under § 1367, not a rejection of the Greenberg Petitioners' underlying merits-based argument. Therefore, a review of the district court's decision to dismiss the state law claim without prejudice, as allowed in the cases cited in the Petition, would require the Petitioners to have appealed the exercise of the district court's discretion under 28 U.S.C. § 1367(c)(3), which they failed to do in this case. Because of the Petitioners' failure, the Fifth Circuit's fact-finding that the Petitioners were not aggrieved does not present a split with the decisions of other Courts of Appeals.

The 11th Circuit in the *Grayson* decision cited by the Greenberg Petitioners specifically noted that a lack of appellate standing turns in part on the failure of the appellant to challenge the grounds for a district court's dismissal without prejudice. 79 F.3d at 1095 n.10. Here, the basis for the dismissal without prejudice was the district court's decision to not exercise supplemental jurisdiction under 28

Co., 865 F.2d 119, 121 (7th Cir. 1988); *Massachusetts Fire & Marine Ins. Co. v. Schmick*, 58 F.2d 130, 131 (8th Cir. 1932).

45 *Carlsbad Technologies*, 129 S. Ct. at 1866.

U.S.C. § 1367(c)(3); to challenge those grounds, the Greenberg defendants would have had to appeal that decision and argue that this Court abused its discretion in declining to exercise supplemental jurisdiction. By failing to do so, they lost any chance to show appellate standing, and the result would have been the same whether this case were in front of the Sixth, Seventh, Eighth, Ninth, Eleventh, District of Columbia, or Federal Circuits.

Also of particular interest in understanding the unique facts of this case is the Seventh Circuit's decision in *Disher*. In *Disher*, Judge Posner emphasized that the allowance of an appeal by a prevailing party from a district court's dismissal of a state law claim without prejudice instead of with prejudice is based on the situation "where … the dismissal without prejudice winds up the litigation in the federal court system." 873 F.2d at 139; *see also id.* ("Consistent with *LaBuhn,* we have allowed a dismissal without prejudice to be appealed where the effect of the dismissal was to end the litigation in the federal courts[.]"). Here, Mr. Conwill invoked the federal court's diversity jurisdiction and re-filed his state law claims before the same federal court, even succeeding in initially transferring them as a "related case" to the same section of the court; accordingly, Judge Posner's concern with whether the resulting disposition ends proceedings in a particular dispute-resolution system is not implicated. *See id.*; *see also Gregory*, 909 F.2d 1486, 1990 WL 112017, at *1.

The Greenberg Petitioners' assertion that the Fifth Circuit's decision conflicts with that court's previous decision in *Leonard* shows the extent to which the Petitioners will go to strip this case of all

necessary context in order to manufacture a phantom deviation from correct legal standards. The Petitioners write that the *Leonard* court "held that a prevailing defendant has standing to appeal a district court judgment that would result in that party incurring 'considerable litigation expense and potential enormous liability.'"[46] What the Petitioners fail to tell this Court is that the Fifth Circuit's fact-finding in *Leonard* was based on the potential relitigation of the policy coverage issue in that case in ***hundreds*** of subsequent state litigations. 499 F.3d at 428. Highlighting that the Fifth Circuit decision here comes down to a fact-finding and not a misapplication of the legal standard, here the Fifth Circuit found that the relitigation of a single legal issue in a single subsequent litigation would not rise to the level of aggrievedness that the relitigation of a coverage issue in hundreds of subsequent litigations would.[47] This is not "unworkable," as suggested by the Petitioners, but merely shows that the legal standard used by this Court and the other Courts of Appeals requires careful case-by-case analysis of the instances in which a prevailing party will be able to trigger the narrow exception to the general premise that prevailing parties will not ordinarily have standing to appeal.

Aside from this bulk of decisions, the Greenberg Petitioners place their greatest reliance on a small set of outlier results from the Tenth Circuit. As with the decisions from the other Circuits cited by the Petitioners, these Tenth Circuit

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[46] Petition 14 (citing *Leonard*, 449 F.3d at 428).

[47] Petition 8a.

decisions only serve to highlight the fact-intensive nature of the aggrievedness analysis and the unique procedural posture of this case in light of the Petitioners' litigation tactics.

The most recent of the Tenth Circuit decisions, *Miami Tribe of Okla. v. U.S.*, 656 F.3d 1129, 1137 (10th Cir. 2011), is wholly inapposite. *Miami Tribe* does not involve a claim dismissed without prejudice to re-filing, and so does not deal with whether the prevailing party was "aggrieved" by a decision on a claim that is still subject to review in a re-filed lawsuit. The other Tenth Circuit decisions cited by the Petitioners are no more helpful to the analysis of the Fifth Circuit's fact-finding here, however, as there is no indication in those decisions that the defendants there failed to initiate or maintain an appeal on the issue of whether the district court abused its discretion under 28 U.S.C. § 1367(c)(3).[48] Highlighting this disparity is the Tenth Circuit's decision in *Nicodemus*, where the defendant not only

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[48] *See Nicodemus v. Union Pac. Corp.*, 318 F.3d 1231, 1234 (10th Cir. 2003) (noting defendants challenged the without-prejudice dismissal with their own Rule 59 motion); *Ashley Creek Phosphate Co. v. Chevron USA, Inc.*, 315 F.3d 1245, 1265 (10th Cir. 2003) (examining the specific facts of the parties' arguments to determine *in that case* whether the defendants were truly aggrieved); *Amazon, Inc. v. Dirt Camp, Inc.*, 273 F.3d 1271, 1274 (10th Cir. 2001) (noting that the prevailing defendant appealed the § 1367(c)(3) dismissal on the basis that the district court actually had original jurisdiction under 28 U.S.C. § 1332); *Lopez v. Behles*, 14 F.3d 1497, 1499-1502 (10th Cir. 1994) (actually *dismissing* appeal on basis of lack of appellate standing); *Jarvis v. Nobel/Sysco Food Servs. Co.*, 985 F.2d 1419, 1425 (10th Cir. 1993) (basing its holding of appellate standing in part on the fact that the posture of that case created a collateral estoppel effect that sufficiently aggrieved the prevailing defendant).

appealed from the district court's *sua sponte* dismissal of the plaintiffs' claims without prejudice, but also was the party that filed the Rule 59(e) motion challenging the district court's determination that it did not have original jurisdiction over those claims – unlike here where the Petitioners were the parties that *opposed* Mr. Conwill's Rule 59(e) motion on those same grounds. 318 F.3d at 1234.

Because none of the cases cited by the Greenberg Petitioners present a "compelling" conflict with the Fifth Circuit's decision on "an important federal question," this Court's certiorari jurisdiction under its Rule 10(a) is not justified.

CONCLUSION

As shown above, this case does not present issues worthy of this Court's exercise of its certiorari jurisdiction. Although the Greenberg Petitioners attempt to frame the question presented as one involving general legal standards allowing for the right to appeal by a prevailing defendant where the plaintiff's claims are dismissed without prejudice, the Fifth Circuit's decision (1) actually employs the correct legal standard espoused by the Petitioners, but (2) arrives at a fact-finding under that standard that is unique to the facts and procedural posture created by the Petitioners' own litigation decisions. Those decisions – to oppose Mr. Conwill's Rule 59(e) motion as to the existence of original jurisdiction over the state law claim, to not designate the district court's decision declining supplemental jurisdiction on their Notices of Cross-Appeal, and to not brief the issue of whether the district court abused its discretion under 28 U.S.C. § 1367(c)(3) – are the fuel for the finding that the Petitioners were not

aggrieved by the district court's § 1367(c)(3) decision, and illustrate why there is no true conflict for this Court to review.

For these reasons, and for all reasons discussed above, the attention of this Court is not merited.

Respectfully submitted,

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