No.

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

PETITION FOR WRIT OF CERTIORARI

STEPHEN H. KUPPERMAN
JAMIE L. BERGER
Barrasso Usdin Kupperman Freeman & Sarver, LLC
909 Poydras Street
Suite 2400
New Orleans, LA 70112

Counsel for Petitioner, Jay I. Gordon

DANIEL LUND*
RYAN M. MCCABE
Montgomery Barnett LLP
1100 Poydras Street
3300 Energy Centre
New Orleans, LA 70163
(504) 585-3200
dlund@monbar.com

Counsel for Petitioner, Greenberg Traurig, L.L.P.

*Counsel of Record

QUESTION PRESENTED

Whether the Fifth Circuit erred in concluding (in acknowledged conflict with the Tenth Circuit, in conflict with the majority of circuits, and in conflict with the principles stated in relevant decisions of this Court) that Petitioners lacked standing to appeal the dismissal without prejudice of a claim brought against them when the Petitioners will incur substantial attorneys' fees in defense of the refiled claim and a favorable decision on appeal would have ended the litigation between the parties.

The question presented involves an important but simple question of federal law. Petitioners respectfully submit that summary disposition is appropriate pursuant to Supreme Court Rule 16.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Fifth Circuit.

The Petitioners here and appellants below are Greenberg Traurig, L.L.P. and Jay I. Gordon.

The respondent here and appellee below is Daniel O. Conwill, IV.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners state as follows:

Greenberg Traurig, L.L.P., is a non-governmental party to the above-captioned litigation.

Greenberg Traurig, L.L.P., is a privately held New York limited liability partnership.

Greenberg Traurig, L.L.P.'s general partner is Greenberg Traurig, PA (a Florida professional association) and its limited partner is Greenberg Traurig of New York, PC (a New York professional corporation).

Greenberg Traurig, PA and Greenberg Traurig of New York, PC have no parent entities.

There is no publicly held corporation which holds an ownership interest of 10% or greater in Greenberg Traurig, L.L.P.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING iii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION 4

THE DECISION BELOW CREATES A DIRECT CONFLICT WITH THE WEIGHT OF AUTHORITY. 6

I. The Fifth Circuit Acknowledged That Its Decision Conflicts With Tenth Circuit Decisions. 7

II. The Decision Below Conflicts With This Court's Statements of Principle in *Roper* and *Camreta* 9

III. The Decision Also Conflicts With the Majority of Circuits.. 10

CONCLUSION 15

APPENDIX

Opinion of the United States Court of Appeals for the Fifth Circuit dated October 18, 2011, available at 2011 WL 4931256 ..... 1a

Order and Reasons of the United States District Court for the Eastern District of Louisiana dated July 28, 2010 ..... 11a

Order and Reasons of the United States District Court for the Eastern District of Louisiana dated March 21, 2011 ..... 32a

Judgment of the United States District Court for the Eastern District of Louisiana dated March 21, 2011 ..... 50a

Notice of Cross-Appeal filed by Greenberg Traurig, L.L.P. dated April 20, 2011 ..... 52a

Notice of Cross-Appeal filed by Jay I. Gordon dated April 21, 2011 ..... 55a

U.S. CONST. art. III 58a

TABLE OF AUTHORITIES

CASES

Page

Amazon, Inc. v. Dirt Camp, Inc.,
273 F.3d 1271 (10th Cir. 2001)..... 8, 9, 13

Ashley Creek Phosphate Company v. Chevron, USA, Inc., 315 F.3d 1245 (10th Cir. 2003) 5, 7

Briscoe v. Fine,
444 F.3d 478 (6th Cir. 2006)..... 11, 12, 13

Camreta v. Greene,
---U.S.---, 131 S. Ct. 2020 (2011) 4, 5, 9, 10

Chao v. Roy's Constr., Inc.,
517 F.3d 180 (3d Cir. 2008) 5

Custer v. Sweeney,
89 F.3d 1156 (4th Cir. 1996)..... 11

Deposit Guaranty Nat'l Bank v. Roper,
445 U.S. 326 (1980)..... 5, 7, 9, 10, 13

Disher v. Information Resources, Inc.,
873 F.2d 136 (7th Cir. 1989)..... 10, 11, 12, 13, 14

Farmer v. McDaniel,
98 F.3d 1548 (9th Cir. 1996),
abrogated on other grounds by
Slack v. McDaniel, 529 U.S. 473 (2000)..... 13

Grayson v. K Mart Corp.,
79 F.3d 1086 (11th Cir. 1996)..... 13

Gregory v. Hartman,
909 F.2d 1486 (7th Cir. 1990)..... 12

H.R. Technologies, Inc. v. Astechnologies, Inc.,
275 F.3d 1378 (Fed. Cir. 2002)..... 12, 13

Jarvis v. Nobel/Sysco Food Servs. Co.,
985 F.2d 1419 (10th Cir. 1993)..... 5, 7

Kirkland v. Nat'l Mortgage Network, Inc.,
884 F.2d 1367 (11th Cir. 1989)..... 14

LaBuhn v. Bulkmatic Transp. Co.
865 F.2d 119 (7th Cir. 1988)..... 10, 11, 12, 13

Leonard v. Nationwide Mut. Ins. Co.,
499 F.3d 419 (5th Cir. 2007)..... 14

Lopez v. Behles (In re American Ready Mix, Inc.),
14 F.3d 1497 (10th Cir.1994)..... 8

Massachusetts Fire & Marine Ins. Co. v. Schmick,
58 F.2d 130 (8th Cir. 1932)..... 14

Miami Tribe of Okla. v. United States,
656 F.3d 1129 (10th Cir. 2011)..... 6, 7

Nicodemus v. Union Pac. Corp.,
318 F.3d 1231 (10th Cir. 2003)..... 8

OSF Fitel, LLC v. Epstein, Becker and Green, P.C.,
549 F.3d 1344 (11th Cir. 2008)..... 5

Schering-Plough Healthcare Prods., Inc. v. Schwarz Pharma, Inc., 586 F.3d 500 (7th Cir. 2009).... 10, 12

Sea-Land Serv., Inc. v. Dep't of Transp.,
137 F.3d 640 (D.C. Cir. 1998)..... 13

Shannon v. General Elec. Co.,
186 F.3d 186 (2d Cir. 1999) 5

Williams v. Smith Protective Servs.,
140 F.3d 1038 (5th Cir. 1998)..... 5

STATUTES

Page

28 U.S.C. § 1254(1) 1

18 U.S.C. §§ 1961-1968..... 2

TREATISES

Page

15A FED. PRACTICE & PROC. § 3914.6
(2d ed. 2011)..... 6, 12

CONSTITUTIONAL PROVISIONS

Page

U.S. CONST. art. III 1, 5, 9, 10

OPINIONS BELOW

The per curiam decision of the Fifth Circuit, available at 2011 WL 4931256, is also reprinted in the Appendix to this Petition ("Pet. App.") at 1a-10a. The two unreported opinions of the district court herein at issue, the final judgment, and Petitioners' notices of appeal are reprinted at Pet. App. 11a-57a.

JURISDICTION

Jurisdiction to review the judgment by writ of certiorari is conferred on the Court by 28 U.S.C. § 1254(1). The Fifth Circuit entered and filed its opinion October 18, 2011.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the "Case" or "Controversy" provision of Article III of the United States Constitution. The provision is reprinted in the Appendix at Pet. App. 58a-59a.

STATEMENT OF THE CASE

The Petition presents a pure issue of law which may be resolved by reference to this case's uncontested procedural history. Accordingly, the facts on which Respondent's claims are based have been truncated for the sake of brevity.

Petitioners are before this Court because of (i) the circuit conflict which the Fifth Circuit itself acknowledged; (ii) the conflict with the principles stated in relevant decisions of this Court; and (iii) the fact that this case has been litigated for well over two years and, because of an overly restrictive and

unworkable limitation on the right to appeal, the case must now start over, has in fact started over in the same federal district court, and Petitioners now face potentially several more years of litigation to get the same substantive issue back before the Fifth Circuit.

Petitioner Greenberg Traurig, L.L.P. is a law firm, and Petitioner Jay I. Gordon is a former shareholder of Greenberg's parent entity. Respondent Daniel O. Conwill, IV's action against Petitioners is based on legal advice Conwill received from Petitioners in connection with his 2002 income tax return.

Conwill's Complaint alleged nine federal and state law causes of action against Petitioners.[1] On July 15 and 28, 2010, the district court granted Petitioners' motions for summary judgment in part and entered orders dismissing all of Conwill's claims except for a claim for breach of fiduciary duty and a claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. Pet. App. 12a. The July 28 order specifically rejected Petitioners' summary judgment argument that Conwill's fiduciary duty claim should be dismissed with prejudice on the merits because it was untimely brought. In response to a subsequent motion for summary judgment, the district court dismissed Conwill's RICO claim with prejudice and dismissed the fiduciary duty claim without prejudice. For purposes of appellate review, the district court's July

---

[1] The Complaint named a third defendant, John B. Ohle, III (who is unrelated to Greenberg). Conwill obtained a default judgment against Ohle.

28 order merged into the final judgment as a matter of law.

After filing an unsuccessful motion to alter or amend the judgment, Conwill filed a notice of appeal, which he later voluntarily dismissed. Petitioners cross-appealed on the basis that the district court "*did not dismiss plaintiff's state law claim of breach of fiduciary duty with prejudice*." Pet. App. 52a-53a, 55a-56a. After Conwill's appeal was dismissed, Petitioners automatically became the appellants.

During the pendency of the appeal, Conwill refiled the fiduciary duty claim in federal court, adding an additional claim not brought in the first action as well as a punitive damages demand the district court denied him leave to bring in the first action. The district court stayed the second action during the pendency of the appeal.

Ultimately, the Fifth Circuit declined to reach the merits of the fiduciary duty claim, instead dismissing the appeal, acknowledging that its decision was in conflict with decisions of the Tenth Circuit. The Fifth Circuit denied Petitioners the right to appeal, holding, 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.

Both Petitioners and Respondent had a personal stake in the appeal, and each aggressively and fully briefed the merits. Petitioners' injuries—the district court's refusal to dismiss the action with prejudice as requested by Petitioners, the attorneys' fees that will be incurred in defending the refiled and expanded action—would have been redressed by a favorable

decision by the Fifth Circuit. Likewise, Respondent had an ongoing interest in the dispute on appeal because an adverse ruling by the Fifth Circuit would have ended his case. Accordingly, the Fifth Circuit's holding that Petitioners lacked standing to appeal was erroneous, and the circuit conflict should be addressed by this Court.

REASONS FOR GRANTING THE PETITION

This case presents an important federal question which the Fifth Circuit has decided in conflict with the Tenth Circuit, the majority of circuits, and in conflict with the principles stated in relevant decisions of this Court: Can the right of appeal be denied to a so-called "prevailing party" from the portion of a final judgment which was decided against that party's interests? The answer to that question is important to maintaining certainty in the federal appellate process. Following the weight of authority will also promote judicial efficiency and lessen the cost of litigation.

The Fifth Circuit concluded that Petitioners prevailed below and were not sufficiently aggrieved by the final judgment to have a right of appeal. The court rejected the majority view that a prevailing party is aggrieved by a judgment and retains a sufficient personal stake in a matter when a dismissal without prejudice subjects that party to future litigation and the expenditure of its money and resources which would have been avoided by a successful appeal.

The Fifth Circuit also dismissed the appeal "as a matter of policy" deriving this consideration from this Court's recent decision in *Camreta v. Greene*, ---

U.S.---, 131 S. Ct. 2020, 2030 (2011). *Camreta*'s discussion of judicial policy, however, occurred in the context of this Court's discretionary review considerations and not in the context of the fundamental procedural due process right to an appeal of an adverse decision. *Camreta* and this Court's decision in *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 332-336 (1980), recognize that an appeal brought by a "prevailing party" is proper so long as "the litigant retains the necessary personal stake in the appeal." *Camreta*, 131 S. Ct. at 2029 (citing *Roper*, 445 U.S. at 334). This "personal stake" is necessary to enforce the Article III "Cases" or "Controversies" limitation on federal courts' jurisdiction. *Id.*[2]

The Fifth Circuit's decision so far departs from these standards as to repudiate them. As the Fifth Circuit acknowledged, its decision conflicts with Tenth Circuit law. Pet. App. 10a n.6. Under strikingly similar circumstances, the Tenth Circuit has held precisely opposite to the Fifth Circuit. *Jarvis v. Nobel/Sysco Food Servs. Co.*, 985 F.2d 1419, 1424-26 (10th Cir. 1993); *see also, Ashley Creek Phosphate Company v. Chevron, USA, Inc.*, 315 F.3d

---

[2] In addition, in the Fifth Circuit's view, Petitioners were attempting "to reach back and modify an interlocutory order not incorporated or relied upon in the final judgment." Pet. App. 8a n.4. It did so in disregard of the well-established principle that the interlocutory order complained of merged into the final judgment, and as a consequence could be appealed. *See, e.g.*, *Shannon v. General Elec. Co.*, 186 F.3d 186, 192 (2d Cir. 1999) (Sotomayor, J.); *Williams v. Smith Protective Servs.*, 140 F.3d 1038, at *2 and n.1 (5th Cir. 1998); *Chao v. Roy's Constr., Inc.*, 517 F.3d 180, 186-87 (3d Cir. 2008); *OSF Fitel, LLC v. Epstein, Becker and Green, P.C.*, 549 F.3d 1344, 1356 (11th Cir. 2008).

1245, 1263-65 (10th Cir. 2003); *Miami Tribe of Okla. v. United States*, 656 F.3d 1129, 1137-1138 (10th Cir. 2011).

The Fifth Circuit's ruling conflicts not only with the Tenth Circuit, but also with decisions of the Sixth, Seventh, Eighth, Eleventh, District of Columbia, and Federal Circuits and principles stated by this Court. Review by this Court is necessary to resolve the conflict which threatens certainty in the federal appellate process and will create extraneous, unnecessary litigation.

The undoubted denial of a fundamental legal right in this case and the conflict between the Fifth Circuit's decision and other circuits and with the principles stated in relevant decisions of this Court, coupled with the practical importance of the question presented, provide ample grounds for this Court to grant review.

THE DECISION BELOW CONFLICTS WITH THE WEIGHT OF AUTHORITY.

The leading treatise on federal procedure, Wright & Miller's FEDERAL PRACTICE & PROCEDURE, has gone so far as to state that "obviously, a defendant must be allowed to appeal a dismissal without prejudice in order to argue that the dismissal should have been with prejudice." 15A FED. PRACTICE & PROC. § 3914.6 (2d ed. 2011). But, the decision below is diametrically at odds with this seemingly "obvious" proposition and therefore has created tremors of uncertainty in the federal appellate process. Review should be granted to resolve the circuit conflict and to bring this case in line with this Court's opinions.

I. The Fifth Circuit Acknowledged That Its Decision Conflicts With Tenth Circuit Decisions.

The Fifth Circuit acknowledged that its decision conflicts with several decisions of the Tenth Circuit holding that a defendant is aggrieved by and therefore has standing to appeal a dismissal without prejudice. The Fifth Circuit acknowledged the conflict as follows:

> Contrary to our approach in this decision, the Tenth Circuit has held that a prevailing party may appeal in circumstances similar to this case. *See Jarvis*, 985 F.2d at 1424–26; *see also Miami Tribe of Okla. v. United States*, --- F.3d ---, 2011 WL 3805923, at *6 (10th Cir. Aug. 30, 2011); *Ashley Creek Phosphate Co. v. Chevron USA, Inc.*, 315 F.3d 1245, 1264 (10th Cir. 2003). We are, however, bound by our own case law…

Pet. App. 10a n.6.

The Tenth Circuit decisions cited by the Fifth Circuit cannot be reconciled with the Fifth Circuit's decision. For instance, in *Jarvis v. Nobel/Sysco Food Serv. Co.*, 985 F.2d 1419 (10th Cir. 1993), the Tenth Circuit held that under *Roper*, "when a district court denies summary judgment on the merits, and then exercises its discretion to decline pendent jurisdiction, the moving party is a party aggrieved by a judgment" and "has an appeal as of right on the merits of the denial of summary judgment." *Id.* at 1424-25. The requisite stake is present because a successful appeal terminates the litigation and would "substantially reduce…future litigation costs". *Id.* at

1425. In contrast, the Fifth Circuit held that the cost of re-litigating this suit, "standing alone, is insufficient to render Defendants-Appellants sufficiently aggrieved to permit appeal." Pet. App. 8a.

In another Tenth Circuit case equally on point, the Tenth Circuit held that "a prevailing party 'is aggrieved and ordinarily can appeal a decision granting in part and denying in part the remedy requested.'" *Amazon, Inc. v. Dirt Camp, Inc.*, 273 F.3d 1271, 1275 (10th Cir. 2001).

> Here, [defendant] sought final disposition on the merits as to all claims, but the district court granted summary judgment only on the federal claim. The court dismissed without prejudice the state law claims. As a result, [defendant] received only a part of what it sought. This disposition left [defendant] open to precisely what happened in this case, a second litigation. [Defendant] was sufficiently aggrieved by this result, and consequently has standing to appeal.

Id.; *see also Nicodemus v. Union Pac. Corp.*, 318 F.3d 1231, 1234 (10th Cir. 2003) (citing *Amazon* and *Jarvis*); *Lopez v. Behles (In re American Ready Mix, Inc.)*, 14 F.3d 1497, 1500 (10th Cir.1994) (holding that parties are "aggrieved" by a bankruptcy court's decision "if the order...diminishes their property, increases their burdens, or impairs their rights") (internal quotation and citation omitted).

Petitioners sought a merits dismissal which the district court denied. Even more than the defendant in *Amazon*, denial of their right to appeal has left

Petitioners open to a second litigation in which Respondent has added claims against Petitioners which were either not brought in the first litigation or which the district court specifically denied him leave to file in the first litigation. *See Amazon*, 273 F.3d at 1275 n.3.

II. The Decision Below Conflicts With This Court's Statements of Principle in *Roper* and *Camreta*.

In *Deposit Guaranty Nat'l Bank, Jackson, Miss. v. Roper*, this Court held that a prevailing party may nevertheless appeal a judgment or an order when it is "aggrieved" by it. 445 U.S. 326, 333 (1980). "A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Id.* But if the appellant retains a stake in the appeal so that Article III's "Cases" or "Controversies" requirement is satisfied (*id.* at 334), a prevailing party may appeal a district court's decision which denies part of the relief sought.

Earlier this year, this Court's *Camreta* decision reaffirmed the principles enunciated in *Roper*, further stating that "[s]o long as the litigants possess the personal stake…, an appeal presents a case or controversy, no matter that the appealing party was the prevailing party below." *Camreta v. Greene*, 131 S.Ct. 2020 (2011).

Petitioners were injured by the district court's refusal to dismiss the fiduciary duty claim with prejudice. After well over two years of litigation, they now have to incur additional attorneys' fees and

litigation costs to defend the refiled action, and their potential liability in the refiled action may be significantly higher in light of the punitive damages demand Respondent was denied leave to file in the original action. Accordingly, Petitioners have the requisite personal stake to satisfy the requirements of *Roper*, *Camreta*, and Article III.

III. The Decision Also Conflicts With the Majority of Circuits.

The Sixth, Seventh, Eighth, Ninth, Eleventh, District of Columbia, and Federal Circuits all have held in similar situations that the defendant has standing to appeal a dismissal without prejudice; the defendant is aggrieved because the dismissal without prejudice is less than it asked for, namely dismissal with prejudice.

Much of the line of authority outside the Tenth Circuit[3] began with two decisions from the Seven Circuit penned by Judge Posner, *LaBuhn* and *Disher*, the validity of which was recently reaffirmed by a third decision written by Judge Posner, *Schering-Plough*.

Just as the present case, *LaBuhn v. Bulkmatic Transp. Co.*, involved a federal claim and a pendent state claim. 865 F.2d 119, 120 (7th Cir. 1988). The district court dismissed the federal claim with prejudice on summary judgment and declined to

---

[3] The Tenth Circuit decisions reach the same conclusion as the decisions discussed in this section and for the same reasons, but the two lines of authority appear to have developed separately.

exercise supplemental jurisdiction over the state claim, dismissing it without prejudice. *Id.* at 121. The defendant appealed the dismissal without prejudice, arguing that the dismissal should instead have been with prejudice.[4]

After discussing the various scenarios in which a prevailing defendant may be theoretically aggrieved, the Seventh Circuit found that the defendant's aggrievement was plain and manifest:

> …[F]or here the defendant was aggrieved in a practical sense, and that is enough under *Roper* to entitle him to appeal. [Defendant] wanted a dismissal with prejudice, and didn't get it. The company had practical reasons to want it. It would have terminated the litigation. Instead, the plaintiff remains free to refile his suit in state court. … We conclude that we have jurisdiction of the appeal…

Likewise, *Disher v. Information Resources, Inc.*, 873 F.2d 136 (7th Cir. 1989), is indistinguishable from this case. Following dismissal of all federal claims with prejudice, the district court in *Disher* dismissed the remaining fiduciary duty claim

---

[4] In footnote 4 of its opinion, the Fifth Circuit distinguished *LaBuhn*, *Briscoe v. Fine*, 444 F.3d 478 (6th Cir. 2006), and *Custer v. Sweeney*, 89 F.3d 1156 (4th Cir. 1996), on the basis that the appellant had instead appealed a decision not to exercise supplemental jurisdiction. In these cases, however, the appellant appealed the court's refusal to dismiss the matter with prejudice, precisely as Petitioners did in the instant case. This formed the basis for the courts' decisions on standing to appeal. In any event, the Fifth Circuit's distinction is irrelevant; it puts form over substance.

without prejudice. 873 F.2d at 138. On appeal, the court noted that "[t]he only question is whether the prospect of further litigation confers standing on a winning defendant to appeal from such a dismissal [without prejudice], on the ground that he was entitled to a dismissal with prejudice." *Id.* at 139. Relying on *LaBuhn*, the Seventh Circuit again answered this question in the affirmative. *Id.; see also Gregory v. Hartman*, 909 F.2d 1486, at *1 (7th Cir. 1990) (following *Disher*).

The Seventh Circuit recently reaffirmed *LaBuhn* and *Disher* in *Schering-Plough Healthcare Prods., Inc. v. Schwarz Pharma, Inc.*: "Making a dismissal without prejudice can be challenged by the winner (the defendant) because a litigant has a significant interest in the preclusive effect of a judgment in its favor." 586 F.3d 500, 506 (7th Cir. 2009) (citing *LaBuhn*, *Disher*, and *Astechnologies*, *infra*). Just as with *Disher*, the key facts in *Shering-Plough* are indistinguishable: a defendant prevailed in the sense that suit was dismissed, but was nevertheless aggrieved because it did not receive all that it asked for, *i.e.*, a dismissal with prejudice.

Decisions from other circuits employ the same analysis as the Seventh Circuit. In *Briscoe v. Fine*, the Sixth Circuit recognized that "an exception [to the prevailing party rule] exists where the district court has dismissed pendent state-law claims without prejudice as opposed to with prejudice", citing Wright & Miller, *supra*. 444 F.3d 478, 495 (6th Cir. 2006). The *Briscoe* defendants were "aggrieved because they sought dismissal with prejudice…did not get it, and have now been forced to return to…court[.]" *Id.* Finding that the Seventh

Circuit's decisions in *LaBuhn* and *Disher* and the Tenth Circuit's decision in *Amazon* were "procedurally on all fours" with the case, the Sixth Circuit held that it had jurisdiction to consider the merits of the appeal.

The District of Columbia Circuit has also adopted *LaBuhn*'s holding that "[a] prevailing party may appeal a dismissal without prejudice on the grounds that it wants one with prejudice[.]" *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 647 n.4 (D.C. Cir. 1998).

Other circuits have come to the same conclusion. For instance, in *H.R. Technologies, Inc. v. Astechnologies, Inc.*, the Federal Circuit followed this Court's decision in *Roper* and concluded that a defendant has standing to appeal a without-prejudice dismissal if it did not receive all it sought. 275 F.3d 1378, 1381 (Fed. Cir. 2002). The court reasoned that the defendant "asked for a with-prejudice dismissal and did not get it". *Id.* "Instead, the without-prejudice dismissal subjects [the defendant] to further litigation and thus is not entirely in its favor, just as a judgment awarding money damages is not entirely in favor of a plaintiff who had sought a larger award." *Id.*

Similarly, in *Farmer v. McDaniel*, the Ninth Circuit held that a defendant which did "not get all that it wanted—dismissal with prejudice of claims asserted...— but instead faces the prospect of further litigation on these claims" has standing to appeal. 98 F.3d 1548, 1549 (9th Cir. 1996), abrogated on other grounds by *Slack v. McDaniel*, 529 U.S. 473 (2000); *see also Grayson v. K Mart Corp.*, 79 F.3d 1086, 1095

n.10 (11th Cir. 1996) (citing *Disher* and *Kirkland v. Nat'l Mortgage Network, Inc.*, 884 F.2d 1367, 1369 (11th Cir. 1989)); *Massachusetts Fire & Marine Ins. Co. v. Schmick*, 58 F.2d 130 (8th Cir. 1932) (holding that a defendant who appeals the conversion of a dismissal with prejudice to a dismissal without prejudice has standing to appeal from the dismissal without prejudice).

Even the Fifth Circuit's prior decision in *Leonard v. Nationwide Mut. Ins. Co.*, 449 F.3d 419, 428 (5th Cir. 2007) 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." The court's attempt to distinguish *Leonard* as a case of exceptional circumstances illustrates that the court's overly restrictive limitation on the right to appeal is unworkable.

The procedural facts in the instant case satisfy any permutation of the circuits' respective standing tests. Petitioners did not receive all they asked for because the dismissal of the fiduciary duty claim was not with prejudice when the district court took up the claim on its merits. Petitioners are aggrieved because they now face a new litigation, the attendant expenses, loss of resources, and significantly increased liability after already having litigated the matter for well over two years. A favorable decision by the Fifth Circuit would have redressed Petitioners' injuries for the same reason there is still adversity between the parties: this case stands or falls on the merits of the appeal. Accordingly, the Fifth Circuit's holding that Petitioners lacked

standing to appeal was erroneous, and the circuit conflict should be addressed by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL LUND*
RYAN M. McCABE
Montgomery Barnett, L.L.P.
3300 Energy Centre
1100 Poydras Street
New Orleans, Louisiana 70163
Telephone: (504) 585-3200
E-mail: dlund@monbar.com

Counsel of Record for Petitioner, Greenberg Traurig, L.L.P.

and

STEPHEN H. KUPPERMAN
JAMIE L. BERGER
Barrasso Usdin Kupperman Freeman & Sarver, LLC
909 Poydras Street
Suite 2400
New Orleans, Louisiana 70112

Counsel for Petitioner, Jay I. Gordon

*Counsel of Record