

MAY IT PLEASE THE COURT:

Petitioners are filing this brief reply (1) to correct a misstatement by Conwill and (2) to point out to the Court that Conwill's principal contention in opposition is on a false issue.

Respondent, Conwill, wrote one correct thing in his brief in opposition: Petitioners specified in their cross-appeal notices (Pet. App. 52a-53a) only those issues as to which they did not prevail. Conwill Br. at p. 19. In the exercise of its supplemental jurisdiction, the district court decided Petitioners' motions for summary judgment on their merits, granting the motions and dismissing with prejudice all of the state law claims save one. As to the one—breach of fiduciary duty—the motions were denied on their merits. Pet. App. 11a-31a. Petitioners appealed this adverse decision precisely in accordance with FED. R. APP. PROC. 3(c)(1)(B).

Conwill incorrectly states that Petitioners argued post-judgment in favor of maintaining the dismissal without prejudice of the remainder state law claim, even restating the question presented in such terms as to imply a waiver or acquiescence by Petitioners. Conwill Br. at p. i. Conwill's post-judgment motion pursuant to FED. R. CIV. PROC. 59(e) (copy appended) did not raise any issue as to the nature of the dismissal order or as to supplemental jurisdiction.<sup>1</sup> The motion sought to establish a separate basis for jurisdiction, a ruling that the court had original

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<sup>1</sup> Conwill repeatedly misdescribes his Rule 59 motion. See Conwill Br. at pp. i, 14, 18, 19-20 n.34, 26.

diversity jurisdiction (28 U.S.C. §1332) even though diversity jurisdiction had never been pled or invoked. Conwill's motion stated:

It is evident in the record of this matter that there is complete diversity of citizenship between the parties and that the amount in controversy exceeds \$75,000, such that this Court has diversity jurisdiction pursuant to 28 U.S.C. §1332. . . . *and there is no question as to whether this Court should exercise its supplemental jurisdiction over that claim.* [Italics supplied].

It was this contention that Petitioners opposed in the district court because original diversity jurisdiction was neither pled nor was it, as contended, "evident in the record." The district court agreed with Petitioners and denied Conwill's motion, holding "[P]laintiff has neither alleged nor invoked diversity jurisdiction... . Furthermore, plaintiff has failed to identify any portions of the record. ... [T]he court finds that the elements of diversity jurisdiction are not satisfied on the face of the pleadings."

Conwill's brief also extensively argues a false issue: that Petitioners should have appealed specifically from the court's decision to decline to further exercise supplemental jurisdiction over the remaining state law claim once the RICO claim—the sole support for federal question jurisdiction—was found to be legally insufficient. Conwill Br. at p. 17. It is a false issue for two reasons. First, Petitioners sought to reverse a merits decision and to terminate the case in the Fifth Circuit. Their appeal notices

were specific in this regard as required by FED. R. APP. PROC. 3(c)(1)(B). Petitioners had no interest in continuing to litigate through a trial in the district court on a claim which they believed was extinguished pursuant to LA. REV. STAT. § 9:5605 and that the district court erred in deciding to the contrary.

Second, Conwill's contention that in the absence of such a specification for appeal the interlocutory ruling of July 28, 2010 (Pet. App. 11a) was "rendered non-appealable" (Conwill Br. at pp. 10, 16) is not supported by any cited authority. This contention ignores the principle that interlocutory orders merge into a final judgment and become appealable. *See* Pet. at n.2.

The essence of Conwill's opposition supports a case-by-case fact finding as to those "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." Conwill Br. at p. 29. That opposition illustrates the need for this Court's review. The suggested approach, approved by the Fifth Circuit, does nothing to resolve the circuit conflict, but rather yields the practical consequence in future cases that there will be no likelihood of uniformity or predictability of outcomes.

**CONCLUSION**

The petition 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

## **APPENDIX**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

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Civil Action No. 09-4365  
SECTION “I-1”  
JUDGE LANCE M. AFRICK  
MAGISTRATE SALLY SHUSHAN

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DANIEL O. CONWILL, IV,  
*Plaintiff,*

—versus—

GREENBERG TRAUIG, L.L.P., JAY I. GORDON, AND  
JOHN B. OHLE, III,  
*Defendants.*

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**RULE 59(E) MOTION TO ALTER OR AMEND  
ORDER AND JUDGMENT DISMISSING  
PLAINTIFF’S STATE LAW CLAIM**

The Plaintiff, Daniel O. Conwill, IV, pursuant to Federal Rule of Civil Procedure 59(e), moves for alteration or amendment of the Order dismissing Mr. Conwill’s state law claim for breach of fiduciary duty, and the Judgment entered as a result of that Order.

Doc. Nos. 328, 329 (Mar. 22, 2011). In dismissing Mr. Conwill's state law claim, this Court found,

Having dismissed plaintiff's federal claim before trial, the Court next considers whether to exercise supplemental jurisdiction over plaintiff's remaining state law claim for breach of fiduciary duty.

Doc. No. 328, at 12. It is evident in the record of this matter that there is complete diversity of citizenship between the parties and that the amount in controversy exceeds \$75,000, such that this Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332. As detailed in the accompanying memorandum in support, this Court has original jurisdiction over Mr. Conwill's state law claim for breach of fiduciary duty under its diversity jurisdiction, and there is no question as to whether this Court should exercise its supplemental jurisdiction over that claim. Accordingly, Mr. Conwill requests that the Court alter or amend its March 22, 2010 Order and Judgment, acknowledging the error in dismissing Mr. Conwill's state law claim of breach of fiduciary duty, and reinstate this matter for purposes of the scheduled May 26, 2011 trial of Mr. Conwill's remaining breach of fiduciary duty claim. In the alternative to reinstating this matter under the current originally filed Complaint, Mr. Conwill requests that the Court grant him leave to file a First Amended and Supplemental Complaint for Damages for the sole purpose of clarifying the existence of diversity jurisdiction.

Respectfully submitted,

/s/ H.S. Bartlett III  
GLADSTONE N. JONES (#22221), T.A.  
LYNN E. SWANSON (#22650)  
H.S. BARTLETT III (#26795)  
CATHERINE E. LASKY (#28652)  
JONES, SWANSON, HUDDALL &  
GARRISON, L.L.C.  
601 Poydras Street, Suite 2655  
New Orleans, Louisiana 70130  
Telephone: (504) 523-2500  
Telecopier: (504) 523-2508  
  
Counsel for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing has been served upon all counsel of record, by filing through this Court's electronic filing and notification system, this 22nd day of March, 2011, and by mailing the same First Class U.S. Postage pre-paid to John B Ohle, III P.O. Box 8260 Northfield, IL 60093-8260.

/s/ H.S. Bartlett III