No. 19-

IN THE

Supreme Court of the United States

IN THE MATTER OF:
LATITUDE SOLUTIONS, INCORPORATED,

Debtor,

CAREY D. EBERT,

Petitioner,

v.

JOHN PAUL DEJORIA; HOWARD MILLER APPEL;
EARNEST A. BARTLETT, III; MATTHEW J. COHEN,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a bankruptcy trustee who proved at trial, without objection, that defendants' tortious conduct (breach of fiduciary duty and aiding and abetting claims) caused the debtor corporation to incur unpaid debt, has Article III standing to assert those claims.

PARTIES TO THE PROCEEDING

The caption to the case contains the names of all parties except Glacier Value Partners LLC. After the appeal to the Fifth Circuit was lodged, the bankruptcy court authorized the sale and assignment of the underlying Final Judgment (see attached App. B, pp. 21a-23a) to Glacier Value Partners LLC. See Order, *In re Latitude Solutions, Inc.*, No. 12-46295-rfn-11 (Bankr. N.D. Tex. July 20, 2018) (ECF No. 435). By Order of the District Court, Hon. J. Reed O'Connor, issued on September 3, 2019, Glacier Value Partners LLC was recognized and substituted as the real party in interest in this action in lieu of bankruptcy Trustee Carey D. Ebert. See Order, *Ebert v. Appel*, No. 4:15-cv-00225-0 (N.D. Tex., Fort Worth Div. September 3, 2019) (ECF No. 387). Both of these Orders authorized this litigation to proceed in the Trustee's name. *Id.*

RULE 29.6 STATEMENT

Glacier Value Partners LLC is a limited liability company, the members of which are Brookdale International Partners, L.P., a New York limited partnership, and Brookdale Global Opportunity Fund, a Cayman Islands exempted company. No owner or member of Glacier Value Partners LLC has issued shares or debt securities to the public.

RELATED CASES

In re Latitude Solutions, Inc, Debtor, U.S. Bankruptcy Court for the Northern District of Texas, Fort Worth Division, Case No. 12-46295-elm7. Pending.

Carey D. Ebert v. Howard Miller Appel, et al., U.S. District Court for the Northern District of Texas, Fort Worth Division, Civil Action No. 4:15-cv-225-0. Final Judgment entered March 7, 2018.

In the Matter of: Latitude Solutions, Incorporated, Debtor, Carey D. Ebert, Appellee, v. John Paul DeJoria, et al., U.S. Court of Appeals for the Fifth Circuit, No. 18-10382. The Opinion, dated April 30, 2019, of the Fifth Circuit is published at 922 F.3d 690 (5th Cir. 2019), and the rehearing requested by Petitioner here was issued on June 12, 2019.

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OPINIONS BELOW

The Trustee originally filed suit against Respondents in the U.S. Bankruptcy Court for the Northern District of Texas, Fort Worth Division, styled *In re Latitude Solutions, Inc, Debtor*, Case No. 12-46295-elm7. Respondents filed a motion to withdraw the reference, which was granted, and the Trustee's suit was transferred to the U.S. District Court for the Northern District of Texas, Fort Worth Division, styled *Carey D. Ebert v. Howard Miller Appel, et al.*, Civil Action No. 4:15-cv-225-0. Following a five-day jury trial in July 2017, the Final Judgment of the District Court, which adopted the jury's verdict, was entered on March 7, 2018, a copy of which is attached as App. B, pp. 21a-23a. Respondents appealed this Final Judgment to the U.S. Court of Appeals for the Fifth Circuit, in an appeal styled *In re Latitude Solutions, Incorporated, Debtor, Carey D. Ebert, Appellee, v. John Paul DeJoria, et al.*, No. 18-10382. The ruling of the Fifth Circuit is published at 922 F.3d 690 (5th Cir. 2019), and the Opinion of the Fifth Circuit, filed April 30, 2019, is attached as App. A, pp. 1a-20a. The Fifth Circuit denied Petitioner's petition for rehearing and issued its Opinion on June 12, 2019. The Trustee[1] petitions for a writ of certiorari to review the Fifth Circuit's decision.

JURISDICTION

The Fifth Circuit issued its decision on June 12, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1). The Fifth Circuit had jurisdiction under 28 U.S.C. § 158(d)

1. As used herein, the "Trustee" refers to the bankruptcy Trustee, Carey D. Ebert, the nominal petitioner for the real party in interest, Glacier Value Partners LLC.

(1). The District Court and the Bankruptcy Court had jurisdiction under 28 U.S.C. §§157, 158, and 1334.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves U.S. Const. art. III, § 2, cl. 1; 11 U.S.C. §§ 541(a)(1), 704(1); and 28 U.S.C. §§ 157, 158(d)(1), 1254(1), and 1334. The relevant provisions of the Constitution and cited Statutes are set forth in App. G, pp. 88a-103a.

INTRODUCTION

This petition arises out of a five-day trial at which a unanimous jury determined that Matthew Cohen, John Paul DeJoria, Howard Appel, and Ernest Bartlett ("Respondents") together engaged in a scheme to squander assets of Latitude Solutions, Inc. ("LSI"), a publicly traded corporation, for their personal benefit. On the basis of extensive evidence that Respondents' involvement with LSI was nothing more than an attempted pump-and-dump scheme, the jury returned a verdict against Respondents on all counts. As pertinent here, the jury found that Cohen had breached his fiduciary duties as an officer and director of LSI, and that DeJoria, Appel, and Bartlett had aided and abetted that breach. App. E, 76a-83a. The district court thus imposed joint-and-several damages against all four Respondents in the amount of $6.9 million. App. B, p. 22a. A large portion—$6.5 million—of that amount reflected the jury's finding that Cohen, as aided and abetted by the other Respondents, had wrongfully caused LSI to take on a debt to a third party, Jabil, Inc., which remained unpaid at the time of trial.

On appeal, the Fifth Circuit vacated that portion of the damages award, holding that a corporation suffers no cognizable injury when its officers and directors, acting unlawfully and for personal gain, cause a corporation to incur massive, unpayable debts that would not otherwise have been incurred and that trigger its bankruptcy. The Fifth Circuit therefore vacated $6,500,000 of the award, see App. A, pp. 8a-12a., holding that there is no Article III standing where "a bankruptcy trustee sue[s] and argue[s] a debt it owes constitutes an injury, despite having made no payments." App. A., 10a.[2] Compounding its error, the Fifth Circuit reached that result even though the dispute as a whole plainly presented a justiciable case or controversy, since the panel itself affirmed other damages on the same claim.

In reaching its holding, the Fifth Circuit aligned itself with the Second Circuit, which has routinely considered equitable, merits-based defenses to be part of the constitutional Article III standing analysis. The decision below thus conflicts with decisions of numerous other circuits, which have departed from and openly criticized the Second Circuit's rule. Moreover, by permitting merits-based arguments to be raised as defenses to jurisdictional standing, and thus dramatically increasing the number of non-waivable arguments, the decision threatens judicial economy and undermines our adversarial system of justice. The result of the decision below is to preclude recovery in a vast array of bankruptcy-court actions that have, until now, been commonplace. This Court's review is warranted.

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2. Because of its erroneous Article III standing ruling, the Fifth Circuit also reversed a total of $8 million in exemplary damages awarded by the jury against Respondents based upon their tortious conduct proven at trial.

STATEMENT OF THE CASE

A. Proceedings In The District Court

After a five-day trial, a unanimous jury in the Northern District of Texas concluded that Respondents had together engaged in a scheme to squander assets of Latitude Solutions, Inc. ("LSI") for personal benefit. ROA.7505-09;[3] App E. The jury's findings focused on Respondents' efforts to enable Appel, whom each Respondents knew was a serial securities manipulator and convicted corporate fraudster, to surreptitiously influence corporate actions and engage in fraudulent actions to temporarily boost LSI's share price to the company's long-term detriment. Trustee Br. 3-14.[4] Based on that conduct, the jury found Cohen and DeJoria liable for breaching their fiduciary duties to LSI, and DeJoria, Appel, and Bartlett liable for aiding and abetting Cohen's breach. ROA.7505-06; App E, pp. 76a-83a.

One measure of damages was based on debt Respondents caused LSI to take on as part of their scheme. See ROA.7507; App. E, pp. 79a-81a. And one such debt was incurred when Cohen, in the hope of personal gain, caused LSI to agree to pay Jabil, Inc. ("Jabil"), an equipment manufacturer, millions of dollars to manufacture machinery from which LSI had no hope of profiting. By the time LSI filed for bankruptcy, LSI owed Jabil $9,550,000. App. A, p. 5a. Without objection

3. "ROA" refers to the Record on Appeal maintained by the Fifth Circuit.

4. "Trustee Br." refers to the "Brief For Appellee" filed in the Fifth Circuit.

from Respondents, the jury was instructed to quantify the value of "liabilities incurred by LSI" as a result of Cohen's "breach of fiduciary duty." ROA.7507; App. E, pp. 79a-81a. It assessed $6,500,000 in damages, apparently reflecting a portion of the total debt, as well as $400,000 in response to a separate instruction to quantify Cohen's unlawful gains. *Id.* And, pursuant to Texas law, Cohen's abettors were deemed jointly and severally liable for both amounts. ROA.8561-69; App. B, p. 22a.

B. Proceedings In The Court of Appeals

On appeal, Respondents argued for the first time that the Trustee's Claims[5] were "a classic example of a creditor claim that the trustee has no standing to assert." DeJoria Br. 18; see ABC Br. 20 (trustee "has no right to bring claims that belong solely to the estate's creditors") (quoting *In re Seven Seas Petroleum, Inc.* ("*Seven Seas*"), 522 F.3d 575, 584 (5th Cir. 2008)).[6] In response, the Trustee pointed out that she plainly had constitutional standing, since, as the jury had found, "LSI was harmed when Respondents caused it to take on millions of dollars of debt that it had no hope of repaying," and that harm could be redressed by damages. Trustee Br. 22. Therefore, the Trustee argued, any suggestion that the Claims belonged to LSI's creditors was irrelevant to jurisdiction and thus waived because it was never raised below. *Id.* at 23-24.

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5. As used herein, "Claims" refers to the breach of fiduciary duty and aiding and abetting claims that the Trustee asserted against Respondents.

6. "DeJoria Br." refers to "Opening Brief of Appellant John Paul DeJoria"; "ABC Br." refers to "Brief For Appellants, Howard Miller Appeal, *et al.*".

Moreover, the Trustee emphasized, the Claims asserted breaches of duties owed to LSI, and the jury had expressly found that those breaches injured LSI, so the Claims were plainly LSI's to assert. *Id.* at 24-28. In short, the Trustee stands in the shoes of the Debtor and has the authority to bring suit on behalf of the Debtor for breaches of fiduciary duty by insiders and third parties.[7] In support of those contentions, the Trustee cited numerous cases, including *Seven Seas* and *In re Educators Group Health Trust* ("*Educators*") *v. Wright*, 25 F.3d 1281 (5th Cir. 1994), two Fifth Circuit cases establishing that a bankruptcy trustee has "exclusive standing" to pursue a claim that a defendant's wrongdoing caused the debtor's insolvency. *E.g.,* Trustee Br. 25 n.7 (citing *Seven Seas*, 522 F.3d at 584; *Educators*, 25 F.3d at 1284-85). As the Trustee further noted, *Educators* squarely holds that an action to recover damages for unpaid liabilities is "cognizable" in federal court. Trustee Br. 48. That is because incurring such liabilities constitutes "a direct injury to the debtor." 25 F.3d at 1284-85 (emphasis added).

In reply, Respondents abandoned any argument that the Claims did not belong to LSI. *See, e.g.,* DeJoria Reply Br. 16 (agreeing that "the Trustee has standing to pursue a fiduciary-duty claim on behalf of LSI"). Nevertheless,

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7. It is the duty of the trustee in bankruptcy to "collect and reduce to money the property of the estate for which such trustee serves." 11 U.S.C. § 704(1). The property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Causes of action are interests in property and are therefore included in the estate; it follows that the trustee has standing under § 704(1) to assert causes of action that belonged to the debtor at the time of filing bankruptcy.

Respondents sought to argue that, regardless of who possessed the Claims, LSI's incurrence of debt somehow constituted Article III injury only to Jabil. DeJoria Reply 14-19; ABC Reply 5-10. At oral argument, Respondents all but abandoned even that argument, referring to it only in rebuttal.

The Fifth Circuit adopted the argument anyway. Without mentioning *Seven Seas* or *Educators*, it pointed to a supposed dearth of Fifth Circuit authority addressing whether a trustee may sue a third party for damages related to an unpaid debt. App. A, p. 10a ("Although we have not squarely addressed Article III standing under the circumstances presented in this case . . . "). Instead, it invoked *In re Waterford Wedgwood USA, Inc.*, 529 B.R. 599 (Bankr. S.D.N.Y. 2015), and *Reneker v. Offill*, 2009 WL 804134 (N.D. Tex. Mar. 26, 2009). Those cases, it concluded, establish that a trustee lacks Article III standing to "sue[] and argue[] a debt it owes constitutes an injury, despite having made no payments." App. A, p. 10a.

Relying entirely on those cases, the Fifth Circuit vacated $6,500,000 of the damages award against Cohen, concluding that it "represent[ed] Jabil's injury, not LSI's." App. A, 9a. The Fifth Circuit asserted that because LSI received the equipment it purchased from Jabil, failed to pay Jabil's invoices, and then filed for bankruptcy, LSI "benefitted" from the Jabil contract, despite the massive liability the contract imposed and the bankruptcy it triggered. The Fifth Circuit reached that conclusion despite concluding elsewhere in its opinion that Cohen had breached his duty by causing LSI to enter into the contract "for nefarious purposes," and observing that the equipment was basically valueless to LSI. App. A, pp.

15a-16a ("LSI had no idea whether the machinery from the Jabil contract would work," and "no business plan, or leads to monetize the equipment from the contract"). App. A, p. 14a. On the basis of the supposed "benefit" to LSI, the Fifth Circuit held there was no Article III jurisdiction to assess damages for LSI's indebtedness, even while it affirmed the assessment of $400,000 in other damages against Cohen on the very same claim. App. A, p. 16a.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's decision conflicts with relevant decisions of this Court and deepens a circuit split on the question of whether Article III standing may be defeated by the presence of nonjurisdictional, merit-based defenses (such as real-party-in-interest, *in pari delicto*, estoppel, and measure of damages). As the First, Third, Sixth, Seventh, Eight, and Eleventh Circuits have correctly recognized, a proper analysis of constitutional standing does not include an analysis of such defenses. With its decision in this case, and its reliance on *Waterford Wedgewood*, the Fifth Circuit joins the Second Circuit in erroneously holding that courts may incorporate such equitable defenses into the constitutional Article III standing analysis. This Court's review is therefore necessary to restore uniformity to federal law.

Moreover, the constitutional question presented here is critically important. The Fifth Circuit's holding threatens to preclude bankruptcy trustees from recovering damages from tortfeasors whose conduct causes direct injury to the bankrupt Debtor in the form of corporate debt. Thus, if allowed to stand, the Fifth Circuit's decision will deprive bankruptcy trustees of any meaningful recovery in many,

commonplace bankruptcy cases, frustrating bankruptcy law's core aim of permitting innocent creditors of the Debtor to obtain recoveries to which the corporation was entitled to at the time a bankruptcy petition was filed.

Moreover, this case is an excellent vehicle for reviewing the question presented, because that question is squarely presented and dispositive. A jury has already found the Respondents liable for a variety of state-law torts. The only reason the portion of award at issue here no longer stands is the Fifth Circuit's conclusion that the Trustee lacked Article III standing. This Court's resolution of that question in petitioner's favor would necessarily result in vacatur of the Fifth Circuit's judgment.

I. This Court's Review is Warranted Because the Fifth Circuit's Decision Conflicts with Relevant Decisions of this Court and the Decisions of other United States Court of Appeals Regarding Constitutional Article III Standing Analysis

This Court recently advised lower courts to be careful when placing the "jurisdictional" label on a particular defense raised by a party. "Because the consequences that attach to the jurisdictional label may be so drastic," wrote this Court, "we have tried in recent cases to bring some discipline to the use of this term. We have urged that a rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)(citations omitted). Indeed, other recent decisions of this Court have called into question whether a court may deny standing for prudential reasons after Article III requirements have

been met. *See, e.g., Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014).[8]

Rather than heed this Court's urging to be disciplined about characterizing defenses as jurisdictional, the Fifth Circuit in this case wrongly embraced Defendants' untimely, merit-based defenses as constitutional Article III standing challenges which deprived it of jurisdiction over most of the Trustee's claims. Whether debt incurred by the LSI Debtor is a proper measure of damages and whether the Trustee is the real party in interest are separate questions from whether the Trustee meets the threshold "case-or-controversy" component of the constitutional Article III standing analysis. In failing to recognize that principle, the Fifth Circuit diverged from the majority view of the other federal courts of appeals.

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8. "But we have already concluded that petitioners have alleged a sufficient Article III injury. To the extent respondents would have us deem petitioners' claims nonjusticiable "on grounds that are 'prudential,' rather than constitutional," "[t]hat request is in some tension with our recent reaffirmation of the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.'" *Susan B.*, 573 U.S. at 167 (citing and quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-126 (2014)(quoting *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013)(some internal quotation marks omitted); *Gonzalez v. Thaler,* 565 U.S. 134, 141-144 (2012)("Recognizing our less than meticulous use of the term in the past, we have pressed a stricter distinction between truly jurisdictional rules, which govern a court's adjudicatory authority, and nonjurisdictional claim-processing rules, which do not.")(internal quotation marks omitted).

A. Respondents' Equitable, Merits-Based Defenses to the Trustee's Claims Are Nonjurisdictional According to Relevant Decisions of this Court and Cannot Be Used to Defeat Subject Matter Jurisdiction

For the first time after trial and on appeal, Respondents raised and argued that either (a) the Trustee did not suffer a sufficient "injury in fact" to satisfy Article III standing; and/or (b) the Trustee lacked Article III standing because she was really asserting claims that belonged to another entity, Jabil, the primary creditor of LSI. Although labelled as "standing" issues, Respondents' claims were actually equitable, merits-based defenses; namely, (a) improper-measure-of-damages, and (b) real-party-in-interest challenges to the Trustee's claims against Respondents.

The existence of a defense to a cause of action or to the capacity of plaintiff to bring it does not deprive the plaintiff of constitutional Article III standing. *Bell v. Hood*, 327 U.S. 678, 682 (1946); *Arizona State Legislature v. Arizona Indep. Redist. Com'n*, 135 S.Ct. 2652 (2015) (weakness on the merits must not be confused with the absence of Article III standing); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). The improper-measure-of-damages and real-party-in-interest defenses raised by Respondents here are nonjurisdictional in nature.[9] Even if such equitable defenses appear on the face of the complaint, they do not deprive the plaintiff of constitutional standing to assert the claim, though the

9. *Int'l Meat Traders, Inc. v. H&M Food Sys.*, 70 F.3d 836, 840 (5th Cir. 1995) (real- party-in-interest defense is "not to be used as a trial-by-ambush tactic," and is "waived … because of its tardiness" where raised afterwards).

defense may ultimately prove fatal to the claim if raised timely and sufficiently proven. Under no circumstance, however, should such equitable defenses cause the court to conclude that it lacks subject matter jurisdiction to decide the parties' dispute.

Although "[t]he 'standing' label" is sometimes "placed on" equitable defenses like these (especially by litigants who, like Respondents, failed to timely raise them below), the question of "who, according to the governing substantive law, is entitled to enforce [a] right" is "a merits question," not a jurisdictional one. *See Norris v. Causey*, 869 F.3d 360, 366-68 (5th Cir. 2017).[10] And because these questions do "not go to a court's subject matter jurisdiction," they are waived if not timely raised in the trial court.

It was therefore incumbent on Respondents to raise and argue their equitable defenses timely. *See, e.g., Puckett v. United States*, 556 U.S. 129, 134 (2009) (if a litigant believes that an error has occurred (to his detriment) during a federal judicial proceeding, he must object in order to preserve the issue). Yet, despite raising

10. Quoting 6A Charles Alan Wright, *et al.*, Federal Practice & Procedure § 1543 (3d ed.). *See also Caplin v. Marine Midland Grace Tr. Co.*, 406 U.S. 416, 422, 434- 35 (1972) (referring to issue as "standing," but clarifying that it "is capable of resolution by explicit congressional action," and is thus not constitutional); *Rideau v. Keller Indep. Sch. Dist.*, 819 F.3d 155, 163 n.7 (5th Cir. 2016)(where "the claim actually belongs to one person, but the action is filed by another person," issue is "a waivable capacity problem, not a jurisdictional standing problem")(alterations and internal quotation marks omitted); *Grede v. Bank of New York Mellon*, 598 F.3d 899, 900 (7th Cir. 2010)(trustee's power to bring particular claim "is a question on the merits rather than one of justiciability").

analogous challenges as to other causes of action,[11] Respondents never pressed any argument in the district court that the Trustee was not the appropriate party to bring the corporation's breach of fiduciary duty and aiding and abetting claims against them. Respondents' equitable defenses were therefore waived prior to appeal, and they cannot provide the grounds for the Fifth Circuit's decision.

Application of the Article III constitutional analysis is straightforward here. As the jury found, LSI was harmed when Respondents caused it to take on millions of dollars of debt that it had no hope of repaying. As the jury found, that debt was a direct result of the efforts of Respondents, who were corporate fiduciaries and their abettors, to inflate LSI's stock price for their personal gain. And, as in *Norris*, "this litigation can redress the loss through damages, as the judgment demonstrates." *Norris*, 869 F.3d at 366. Thus, there can be no doubt about LSI's (and, in bankruptcy, the Trustee's) constitutional standing to assert these claims. To overcome their failure to raise—much less prove—these merit-based defenses in the district court, Respondents disguised them in standing "garb"[12] in the hope of misleading the Fifth Circuit on appeal. Unfortunately, the Respondents' ruse worked.

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11. For example, in this case, Respondents sought and obtained a pre-trial dismissal of certain "securities fraud" and "blue sky" claims that the district court considered as belonging to individual investors in LSI, and not the corporation.

12. See 13 Charles Alan Wright *et al.*, Federal Practice and Procedure § 3531 (2006 Supp.)(stating with regard to the standing argument rejected by the Third Circuit in *In Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., Inc.*, 267 F.3d 340, 346 (3rd Cir.2001): "The urge to cloak routine cause-of-action questions in Article III garb seems to be irresistible.").

B. The Fifth Circuit and the Second Circuit Erroneously Conflate Constitutional Article III Standing with Nonjurisdictional Standing

The Fifth Circuit reached its conclusion in reliance on *Waterford Wedgwood*, which reflects a rule—heretofore adopted only by the Second Circuit—that a corporation does not have standing to bring a claim against outsiders for defrauding a corporation with the cooperation of an insider of the corporation. The rule arose in *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114 (2d Cir.1991). There, the sole shareholder, sole director and president of the corporation engaged in stock trades that allegedly dissipated the assets of the corporation. *Id*. at 117. The corporation filed for bankruptcy, and the bankruptcy trustee initiated arbitration against the corporation's stockbroker for fraud. *Id.* The district court enjoined the trustee from proceeding with the arbitration, and the Second Circuit affirmed. Rather than relying on the equitable, merit-based defense of *in pari delicto* or simply the absence of the element of reliance for the fraud claim, the Second Circuit analyzed the case as presenting a constitutional Article III standing problem:

> In our analysis of the question presented, the "case or controversy" requirement coincides with the scope of the powers the Bankruptcy Code gives a trustee, that is, if a trustee has no power to assert a claim because it is not one belonging to the bankrupt estate, then he also fails to meet the prudential limitation that the legal rights asserted must be his own.

Id. at 118. The Second Circuit then framed a broad standing rule holding, "A claim against a third party for defrauding a corporation with the cooperation of management accrues to creditors, not to the guilty corporation." *Id*. at 120. The Second Circuit arrives at its erroneous "standing" rule by incorporating an equitable, merits-based defense (namely, *in pari delicto*) into its constitutional Article III analysis. Although the *Wagoner* rule has been followed in the Second Circuit, it has also been criticized for characterizing an *in pari delicto* defense as a jurisdictional standing issue.[13]

The majority of United States court of appeals have rejected the lead of the Second Circuit and have declined to conflate the constitutional standing doctrine with the *in pari delicto* defense—or any other equitable, merit-based, nonjurisdictional defense. The First,[14] Third,[15]

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13. *See* Jeffrey Davis, *Ending the Nonsense: The* In Pari Delicto *Doctrine Has Nothing to Do with What Is § 541 Property of the Bankruptcy Estate*, 21 Emory Bankr.Dev. J. 519, 522–530 (2005); John T. Gregg, *The Doctrine of* In Pari Delicto: Recent Developments, 2006 Norton Annual Survey of Bankruptcy Law Part I § 5; Dan Schechter, *Trustee Lacks Standing to Sue Because Corporate Insiders' Prepetition Behavior Is Imputed to Corporation*, 2003 Comm. Fin. Newsl. 61 ("In my opinion, the rule in *Wagoner* is nonsensical ... [T]he injury forming the basis of the trustee's complaint is to the corporation itself....").

14. *Baena v. KPMG, LLP*, 453 F.3d 1, 6–10 (1st Cir.2006) (trustee's case barred by *in pari delicto*, but that doctrine "has nothing to do with Article III requirements").

15. *In Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., Inc*., 267 F.3d 340, 346 (3rd Cir.2001), the Third Circuit explained: "An analysis of standing does not include an analysis of equitable defenses, such as *in pari delicto*. Whether a

Sixth,[16] Seventh,[17] Eighth,[18] and Eleventh[19] Circuits do not follow the Second Circuit's approach and have refused to create a separate standing rule to address matters that could be addressed by a pre-existing equitable, merits-based defense.

The Eight Circuit recognized the split of authority between circuits regarding the immediate issue of Article III standing analysis, and revealed the error of the Second Circuit and its *Wagoner* rule, more than ten years ago in *Senior Cottages of America, LLC*, 482 F.3d 997 (8th Cir. 2007). In *Senior Cottages*, a bankruptcy trustee filed a malpractice suit against third party attorneys and alleged breach of fiduciary duty and aiding and abetting claims. In reversing the lower courts' decision to dismiss the

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party has standing to bring claims and whether a party's claims are barred by an equitable defense are two separate questions, to be addressed on their own terms."

16. *Terlecky v. Hurd (In re Dublin Securities, Inc.)*, 133 F.3d 377, 380 (6th Cir.1997) (considering *in pari delicto* defense and declining to consider standing argument).

17. *Scholes v. Lehmann*, 56 F.3d 750 (7th Cir.1995).

18. *Senior Cottages of America, LLC*, 482 F.3d 997, 1004 (8th Cir.2007) ("Even if an *in pari delicto* defense appears on the face of the complaint, it does not deprive the trustee of constitutional standing to assert the claim.").

19. *Official Comm. of Unsecured Creditors v. Edwards*, 437 F.3d 1145, 1149–50 (11th Cir.2006)(holding that trustee had standing, but federal claim was barred by *in pari delicto* and state claim for aiding and abetting breach of fiduciary duty was not cognizable under Georgia law), *cert. denied*, 549 U.S. 811 (2006); *O'Halloran v. First Union Nat'l Bank*, 350 F.3d 1197, 1203–04 (11th Cir. 2003) (corporation's trustee had standing to sue bank for aiding and abetting embezzlement by corporate fiduciary).

trustee's claims on "standing" grounds, the Eight Circuit correctly observed:

> We agree with the First, Third, Fifth, and Eleventh Circuits that the collusion of corporate insiders with third parties to injure the corporation does not deprive the corporation of standing to sue the third parties . . . . The *in pari delicto* doctrine is a defense. Even if an *in pari delicto* defense appears on the face of the complaint, it does not deprive the trustee of constitutional standing to assert the claim, though the defense may be fatal to the claim.

Id. at 1004 (citations omitted).

The Fifth Circuit's decision in this case muddles the constitutional Article III standing analysis just like the Second Circuit's *Wagoner* rule does. Despite the strength of the criticism of the *Wagoner* rule, this Court has never addressed the erroneous Article III standing analysis expressed by Second Circuit in *Wagoner*. Now that the Fifth Circuit has essentially followed the *Wagoner* rule, it should.

II. This Case Involves an Extremely Important Question of Federal Law that Threatens to Preclude Bankruptcy Trustees from Recovering Damages from Tortfeasors Whose Conduct Causes Direct Injury to the Bankrupt Debtor

Whether courts should consider equitable, merits-based defenses when making a threshold, constitutional Article III standing determination is an important

question of federal law that has not been, but should be, directly addressed and settled by this Court.

The Fifth Circuit excused Cohen and his abettors from paying damages simply because LSI's debt to Jabil was unpaid at the time of LSI's bankruptcy. As *Stanley* holds, that result is profoundly wrong. One of the primary purposes of filing for bankruptcy is to avoid further financial harm to the debtor—not to create it. By eliminating the estate's ability to redress an injury it suffered as of the commencement of bankruptcy as a result of Respondents' tortious conduct (in the form of a debt LSI still owed), the Fifth Circuit's decision turns that purpose on its head. LSI was injured by this debt at the time bankruptcy was filed; whatever happens post-bankruptcy does not eliminate this injury suffered by the Debtor—an injury that the Trustee has the authority to redress through a proper claim against the tortfeasors who caused it.

And the harmful effect of the Fifth Circuit's decision that corporate debt is not a redressable injury extends far beyond this case. The Fifth Circuit held that although Respondents unlawfully drove LSI into bankruptcy "for nefarious purposes" by incurring massive unpayable debts that would not otherwise have existed, the company suffered not even the slightest iota of harm necessary for standing. That holding thereby forecloses all trustees within the Fifth Circuit from bringing any claims against tortfeasors who have caused injury in the form of unpayable liabilities. Such claims have heretofore been commonplace in bankruptcy, but will be barred according to the formulaic rule issued by the Fifth Circuit's decision.

The Fifth Circuit's decision also undermines the fundamental goal of holding wrongdoers liable for the full harms they cause, even where plaintiffs have offset or insured against losses. *See Stanley v. Trinchard*, 500 F.3d 411, 424 (5th Cir. 2007). Plaintiffs may generally "pursue claims for property damage, albeit they have made no repairs," and sue "for medical payments when no such payments have been made." *Id.* But, according to the Fifth Circuit's decision, Respondents escape liability for a harm they caused solely because, due largely to that harm, LSI was forced into bankruptcy. *Id.* at 420-21. And, because creditors will seldom be able to recover directly from tortfeasors who breached duties owed only to the debtor, the likely result of the Fifth Circuit's decision will be to insulate wrongdoers like Cohen and his abettors from any liability at all. Indeed, Jabil did not file suit against Respondents in this matter.

Moreover, by constitutionalizing an argument that should be—at most—a merits-based defense to damages, the decision frustrates judicial economy and undermines our adversarial system of civil justice. The Fifth Circuit decision threatens judicial economy by permitting litigants to "cloak routine cause-of-action questions in Article III garb,"[20] and rewards litigants who, whether as a deliberate litigation strategy or through mere negligence, fail to raise such equitable defense timely.

Review by this Court is also warranted because the issue is exceptionally important to bankruptcy trustees. Bankruptcy estates often consist largely of claims against

20. 13 Charles Alan Wright *et al.*, Federal Practice and Procedure § 3531 (2006 Supp.).

directors, officers, and others whose wrongdoing caused the debtor to accumulate unpayable debts or other liability and become bankrupt. *See, e.g.*, Russell C. Silberglied, *Litigating Fiduciary Duty Claims in Bankruptcy Court and Beyond: Theory and Practical Considerations in an Evolving Environment*, 10 J. Bus. & Tech. L. 181, 181 (2015) ("Litigation against directors and officers is ubiquitous in bankruptcy courts."). By holding that the only cognizable injury in such circumstances is to creditors—who generally have no cause of action against defendants who owe no legal duties to them—the Fifth Circuit's decision forbids recovery in a vast array of cases that, until now, have been "standard bankruptcy litigation." *Id.* The result is a windfall to tortfeasors at the expense of debtors, creditors, and the bankruptcy system itself.

III. The Fifth Circuit's Decision has so Far Departed from the Accepted and Usual Course of Judicial Proceedings that an Exercise of this Court's Supervisory Power is Warranted and Summary Reversal May Be Appropriate

The Fifth Circuit's decision below is woefully incomplete and clearly wrong. The Fifth Circuit did not address several important, substantive legal issues that were raised and fully briefed by the parties on appeal, namely: (a) Why was the jury's verdict against DeJoria for $1.5 million (and the related award against him for $1 million in punitive damages) vacated?; and (b) Are DeJoria, Appel, and Bartlett jointly and severally liable with Cohen for the $400,000 award that the Fifth Circuit affirmed? These are real issues that the Fifth Circuit simply did not address.

DeJoria[21] became a director of LSI in October 2011 and, as supported by ample record evidence and the jury's verdict, he breached his fiduciary duty to LSI by refusing to take action against Cohen, Appel, and Bartlett (his co-abettors) while he was a director. "[W]e have been attempting to circle the wagons on Howard [Appel] since day one," wrote the C.E.O. of LSI, "but John Paul [DeJoria] has thwarted us on every single occasion." (Pl. Ex. 318; Wohler trial testimony).[22] By missing or refusing to address this portion of the jury's award, the Fifth Circuit's review is inexplicably incomplete.

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21. John Paul DeJoria is a celebrity business personality with a reported net worth of more than $3 billion. DeJoria is best known for being the co-founder and owner of the Paul Mitchell studios and the former owner of Patron Spirits Company (Patron Tequila), among other businesses. Through common investments and business dealings, DeJoria knew Appel and Bartlett for many years prior to LSI. When DeJoria's due-diligence team warned him that Appel and Bartlett were "scammers of the worst order" (Pl.Ex. 309; Wohler trial testimony) around the time of DeJoria's initial investment in LSI, DeJoria vouched for the character of Appel and Bartlett and considered them "nice guys." (Pl.Ex. 317; Wohler trial testimony).

22. Howard Appel has a long, sordid history of securities fraud and stock manipulation. After being fined and stripped of his NASD license for alleged stock manipulation in 1991, in 2004 he was charged criminally with conspiracy to commit securities fraud and money laundering; Appel ultimately plead guilty to both counts and received two one year and one day (concurrent) sentences which he served in 2008 to 2009—right before his initial involvement with LSI. Very recently, and subsequent to his involvement with LSI, Appel pleaded guilty to charges that he conspired with two associates to "secretly gain control of large blocks of publicly-traded microcap stocks" using "nominee accounts" designed to "artificially inflate the price of the stock." ¶¶18-36, *U.S. v. Appel*, 2:18-cr-00321-PD (E.D. Pa. July 27, 2018).

Moreover, given that the Fifth Circuit affirmed the $400,000 award against Cohen (App. A, pp. 12a-16a), as a matter of Texas law, DeJoria, Appel, and Bartlett are jointly and severally liable with Cohen as his aiders and abettors. Although the Trustee raised and briefed this issue on appeal (and on rehearing), the Fifth Circuit does not address this important issue in any way. This is not normal or acceptable practice by an appellate court.

Similarly, the Fifth Circuit's reasoning and analysis in support of its ruling that LSI's corporate debt cannot be considered an "injury-in-fact" to the Debtor does not withstand the slightest scrutiny. The Fifth Circuit reached its erroneous conclusion by misapprehending the two lower-court cases on which it relied. In *In re Waterford Wedgewood USA, Inc.*, 529 B.R. 599 (Bankr. S.D.N.Y. 2015), the trustee alleged that, because of malpractice by its retirement plan's auditor, the debtor underfunded that plan. *Id.* at 600-01, 604-05. Because the money was owed to the plan regardless of that malpractice, the alleged injury was the debtor's underpayment, rather than the creation of the debt itself. *Id.* at 605. Thus, *Waterford* merely held that the underpayment harmed the plan, not the debtor, since the debtor retained use of its money while owing no more than what it previously owed. *Id.*[23] But that principle has no application here, since—as even the Fifth Circuit observed—Cohen "nefarious[ly]" caused LSI to assume a massive debt in exchange for machinery for which it had no profitable use. App. A, pp. 8a-12a.[24]

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23. *See also, In re Am. Tissue, Inc. v. Donaldson*, 351 F. Supp. 2d 79, 93-94 (S.D.N.Y. 2004) ("equity infusion" caused no corporate injury, but taking on "unfavorable" debt would have).

24. The Fifth Circuit incorrectly hypothesized that "LSI gained even more than the debtor in *Waterford* because it

The only other case the Court relied on, *Reneker v. Offill*, 2009 WL 804134 (N.D. Tex. Mar. 26, 2009), is an unpublished district court decision that undermines the Fifth Circuit's conclusion. There, a receiver sued the debtors' attorneys, alleging negligence and fiduciary breaches. *Id.* at *5-6. Unlike here, the receiver did not seek the amount of the debtors' increased liabilities; instead, it sought "the difference between the amount owed to [creditors] and the amount of any [creditor recovery] from the assets of the [receivership]," irrespective of whether that difference was attributable to the defendants' wrongdoing. *Id.* at *6. The court held the claimed injury—the creditors' shortfall after they had recovered from the receivership—was suffered only by creditors. *Id.* But the court also made clear the result would be different if the receiver had instead sought (as the Trustee did here) the amounts by which the defendants' wrongdoing had "increased the [debtors'] liability to third parties or caused the [debtors] to be liable to third parties when they otherwise would not have been." *Id.* at *6 n.5. Accordingly,

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benefitted from not paying Jabil's invoice and retained and then sold the manufacturing equipment." App. A, p. 10a. But if LSI obtained any salvage value in the deal, that value was properly reflected in the jury's award of only $6,500,000 in damages, rather than the full $9,550,000. Furthermore, although the Fifth Circuit erroneously assumes that LSI received equipment from Jabil that was of reasonably equivalent value to the contractual price established by the Jabil deal, the actual Jabil equipment obtained by LSI was essentially worthless. In fact and as the record supports (see, e.g., Expert McBroom trial testimony), the jury accepted the Trustee's expert testimony that the Jabil equipment did not work and was of no use to LSI. Indeed, after LSI paid Jabil a considerable amount of money for worthless equipment, the Trustee eventually was forced to sell the very expensive Jabil water remediation units for scrap metal.

after the receiver amended its complaint to seek such damages, the court squarely held that such a claim stated cognizable injury. *Reneker v. Offill*, 2009 WL 3365616, at *3 (N.D. Tex. Oct. 20, 2009) ("[A]llegations that [the defendant's] negligence 'increased the [debtors'] liability to third parties or caused the [debtors] to be liable to third parties when they otherwise would not have been' are sufficient to allege an injury that is concrete, actual, and distinct from the [third party's] injury."). The Fifth Circuit only cites and relies upon the first *Reneker* decision issued in March 2009; had the Fifth Circuit read and considered the second *Reneker* decision issued in October 2009, perhaps it would have caught and corrected its erroneous ruling.

This case is a perfect example of the "drastic consequences" that result from a court considering equitable defenses as being jurisdictional in nature and erroneously attaching the "standing" label to them when making a threshold Article III determination. By allowing Respondents to disguise their equitable defenses in "standing" garb for the first time after trial, the Fifth Circuit stripped the Trustee here—and potentially many future Trustees—of any meaningful retort or recovery from fraudulent corporate actors who misuse a corporation for "nefarious" purposes. For all of the foregoing reasons, and on the relative weakness of the Fifth Circuit's decision and strength of her Petition, the Trustee respectfully prays that this Court summarily reverse the Fifth Circuit's decision and reinstate and affirm the jury's verdict and Judgment of the district court. App. B.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and reverse the Fifth Circuit's decision.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED APRIL 30, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-10382

In the Matter of:

LATITUDE SOLUTIONS, INCORPORATED,

Debtor.

CAREY D. EBERT,

Appellee,

v.

JOHN PAUL DEJORIA; HOWARD MILLER APPEL;
EARNEST A. BARTLETT, III;
MATTHEW J. COHEN,

Appellants.

April 30, 2019, Filed

Appeals from the United States District Court
for the Northern District of Texas

Before BARKSDALE, SOUTHWICK, and HAYNES,
Circuit Judges.

Appendix A

HAYNES, Circuit Judge:

This appeal involves two competing versions of the history and purpose of Latitude Solutions, Inc. ("LSI"). Howard Appel, Earnest Bartlett, Matthew Cohen, and John Paul DeJoria ("Appellants") characterize LSI as a publicly traded company which sought to commercialize technology that could remediate contaminated water but was unsuccessful as a speculative venture. On the other hand, LSI's bankruptcy trustee, Carey Ebert, characterizes LSI as a fraud from its inception—used only as a mechanism for Appellants to participate in and profit from a securities fraud scheme. Ebert sued several of LSI's corporate officers, directors, and investors for breaches of fiduciary duty. By the end of trial, her case focused primarily on a contract LSI entered into with Jabil Inc., one of LSI's bankruptcy creditors. The jury found Appellants liable and assessed millions of dollars in compensatory and exemplary damages. Appellants present various arguments for why we should overturn the jury verdict and reduce damages, including whether Ebert has Article III standing and whether there was legally sufficient evidence for the jury to find as it did. We AFFIRM in part, REVERSE and RENDER in part, VACATE in part, and REMAND for further consideration consistent with this opinion.[1]

1. As explained more fully below, we reverse and render judgment in favor of Appel, Bartlett, and DeJoria. As for Cohen, we vacate damages awarded under Damage Element No. 1, affirm damages awarded under Damage Element No. 2, and remand to the district court to consider the legal issues surrounding exemplary damages against Cohen in the first instance.

Appendix A

I. Background

This appeal stems from a jury verdict and final judgment adjudicating Matthew Cohen and John Paul DeJoria liable for breaches of fiduciary duty to LSI and finding Howard Appel and Earnest Bartlett liable for aiding and abetting those breaches. The final judgment awards Ebert compensatory damages against (i) Appel, Bartlett, Cohen, and DeJoria for $6.9 million, jointly and severally, for Cohen's breach of fiduciary duty; (ii) Appel and Bartlett for $2.5 million each for aiding and abetting Cohen's breach of fiduciary duty; (iii) DeJoria for $1.5 million for his breach of fiduciary duty; and (iv) Appel for $5 million, Cohen for $2 million, and DeJoria for $1 million in exemplary damages.

A. LSI

The parties disagree on the basic premise of LSI's formation. Ebert asserts LSI was a sham company set up to fail from the outset, and a vehicle for Appellants to participate in a securities fraud scheme known as "pump-and-dump," while Appellants claim LSI was legitimately founded to develop and commercialize technology capable of remediating contaminated water. LSI was a publicly traded company that began operating in 2009 and developed patented technology for treatment of wastewater in the oil and gas industry. LSI was a speculative venture that eventually filed for bankruptcy in November 2012.[2]

2. Aside from the allegations regarding each Appellant's conduct, which are discussed below, LSI experienced internal control and accounting issues. For example, its financial team used

B. Matthew Cohen

Cohen was one of the founding members of LSI and served as an officer and director of LSI from March 2009 through June 2012. Cohen was the Chief Financial Officer of LSI from June 2011 to June 2012.

C. Howard Appel

Appel was a business consultant to and raised capital for LSI. In 2004, before LSI existed, Appel pled guilty to conspiracy to commit securities fraud as well as conspiracy to commit money laundering and served twenty-one months in prison. The parties vehemently disagree whether this is relevant to LSI. The trustee uses Appel's conviction as evidence of a pattern of nefarious behavior, while Appellants argue Appel's past is the only reason for the trustee's lawsuit, despite no evidence that Appel engaged in any criminal conduct related to LSI. An LSI board member introduced Appel to the company in 2010, which eventually led to Appel's family and friends investing in LSI beginning in February 2011. Appel was responsible for raising at least $12 million in capital for LSI through outside investors. Appel did not purchase or sell any shares of LSI stock.

D. Earnest Bartlett

Bartlett is a friend and business associate of Appel. Appel introduced Bartlett to LSI. A company affiliated

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accounting software that was inadequate for a publicly traded company and eventually self-reported to the Department of Justice on suspicions of fraud and stock manipulation.

with Bartlett, FEQ Realty, invested in LSI beginning in December 2010. In April 2011, FEQ Realty entered into a consulting agreement with LSI. Appel provided his consulting services to LSI as an outside consultant under FEQ Realty's consulting agreement. Bartlett never purchased or sold any LSI stock.

E. John Paul DeJoria

DeJoria is an entrepreneur and philanthropist with an interest in developing clean-water solutions. He invested and lost over $11 million in LSI beginning in March 2011. For most of 2012, DeJoria was LSI's primary source of funding. DeJoria served on LSI's board of directors from October 2011 to September 2012.

F. Jabil, Inc.

Jabil, Inc., is not a party to the case but plays a crucial role here. In May 2011, Jabil entered into an agreement with LSI to manufacture remediation equipment. The parties dispute whether the deal was done for legitimate purposes. Jabil is a creditor in LSI's bankruptcy, with a claim for $9.55 million. By the end of evidence at trial, the trustee conceded the only damages the estate could recover were 1) the amount of the Jabil debt and 2) the amount of any gains to the defendants that the trustee could specifically link to fiduciary breaches.

G. LSI's Bankruptcy and the District Court Proceedings

Carey Ebert was appointed as LSI's Chapter 7 bankruptcy trustee, and the matter was eventually converted into a Chapter 11 proceeding. As the Chapter 11 trustee, she attempted to find investors to invest in LSI and lease equipment to keep LSI operating. Ebert, however, was unable to generate enough revenue to allow the company to resume business. Ebert filed the operative complaint in November 2015, raising various claims against over twenty defendants. With respect to the Appellants, Ebert alleged that Appel gained practical control of LSI and used it to perpetrate securities fraud and engage in insider trading; that LSI was a fraud formed for an illegitimate purpose; that Appel and Bartlett made substantial profit through manipulative conduct; and that Cohen and DeJoria joined in the conspiracy to profit from stock manipulation.

By the close of evidence at trial, the lawsuit had narrowed significantly—numerous counts and more than a dozen defendants were dismissed. The claims that went to the jury were one count each of a breach of fiduciary duty owed to LSI against Cohen and DeJoria, and one count of aiding and abetting Cohen's breach of fiduciary duty against DeJoria, Appel, and Bartlett. As noted above, based upon the evidence presented, the only damages remaining at issue were 1) the amount of the Jabil debt and 2) the amount of any gains to the defendants that the trustee could specifically link to fiduciary breaches.

Appendix A

Appellants moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a) and the district court carried the motions. The district court then held a charge conference, at which the parties agreed to the following: Question 1 would determine whether Cohen and DeJoria breached their fiduciary duties with a "yes" or "no" answer. Question 2 would determine whether Appel, Bartlett, and DeJoria aided and abetted[3] Cohen's breach of fiduciary duty. Question 3 limited the trustee's damages to the following:

> Damage Element No. 1: The reasonable cash market value of liabilities incurred by LSI as a proximate cause of that defendant's breach of fiduciary duty, which liabilities are still owed and have not yet been paid, if any.
>
> Damage Element No. 2: The reasonable market value of any gains to that defendant (including salaries, consulting fees, net proceeds from stock issuances to directors and/or officers of LSI, and other expenses) proximately caused by that defendant's breach of fiduciary duty.

Questions 4 and 5 would determine eligibility for and quantify exemplary damages. The jury found Cohen and DeJoria each committed a breach of fiduciary duty and Appel, Bartlett, and DeJoria aided and abetted Cohen's breach. The jury assessed damages as follows:

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3. Because of our conclusions below, we do not reach the issues surrounding whether "aiding and abetting" a breach of fiduciary duty was a proper jury submission in this case.

Defendant	Damage Element No. 1	Damage Element No. 2
Appel	$0	$2.5 million
Bartlett	$0	$2.5 million
Cohen	$6.5 million	$400,000
DeJoria	$1.5 million	$0

The jury also assessed exemplary damages of $5 million against Appel, $2 million against Cohen, and $1 million against DeJoria. Following the jury verdict, all four Appellants renewed their motions for judgment as a matter of law. The district court denied their motions, granted Ebert's motion for judgment, and later denied motions for reconsideration. This timely appeal followed.

II. Discussion

A. Ebert Lacks Article III Standing to Recover Jabil's Damages

Appellants argue that Ebert lacks Article III standing to recover Jabil's damages under Damage Element No. 1 of the jury charge. Article III standing requires a plaintiff to have "suffered an 'injury in fact,'" show "a causal connection" between the injury and the conduct at issue, and the injury must be redressable by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). "[A] plaintiff must demonstrate standing for each claim [s]he seeks to press" and have "standing separately for each form of relief sought." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006) (citation omitted).

Ebert's liability theory with respect to Cohen and DeJoria's breaches of fiduciary duty focused on Jabil.[4] In her closing argument, she claimed "the fraud, the improper conduct, was entering into the Jabil contract in May 2011 . . . that's what caused the damages." Ebert argued Jabil was misled because they "weren't given access to [LSI's] books," and were unaware of Appel's involvement or prior criminal history. As for damages, Ebert consistently asserted that she was seeking the amount of the Jabil debt, stating that "we know Jabil lost 9.5 million" and asked the jury to "forget about the other hundred and something creditors . . . focus on Jabil."

Under Damage Element No. 1, the jury was asked to assess "the reasonable cash market value of liabilities incurred by LSI as a proximate cause of that defendant's breach of fiduciary duty, which liabilities are still owed and have not yet been paid, if any." But the millions of dollars awarded under Damage Element No. 1 represent Jabil's injury, not LSI's. Jabil manufactured and delivered the contractually agreed upon equipment to LSI. LSI benefitted from the equipment, and Ebert even leased and sold the equipment in Chapter 11 proceedings. Moreover, LSI did not pay the invoices on the equipment. Therefore, LSI *benefitted* and even had cash available for other needs.

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4. We note one additional point relevant only to DeJoria: DeJoria did not become a director at LSI until October 2011, some five months after LSI entered into the Jabil contract. Ebert provided no evidence that DeJoria should be liable for the damages incurred by action that predated his time as an LSI director.

Although we have not squarely addressed Article III standing under the circumstances presented in this case, Appellants note several persuasive authorities holding there was no Article III standing in factually analogous scenarios. In *In re Waterford Wedgwood USA, Inc.*, 529 B.R. 599 (Bankr. S.D.N.Y. 2015), the debtor "failed to contribute the full amount it owed" to a retirement plan it sponsored. *Id.* at 601. The debtor hired an accounting firm to audit the retirement plan, but the firm failed to notify the debtor about the underfunding. *Id.* at 601. The bankruptcy trustee for the debtor sued the firm for unpaid liabilities to the retirement plan. *Waterford* held that the bankruptcy trustee lacked Article III standing because the debtor had not suffered an injury. *Id.* at 604-05. The court reasoned that "the trustee alleges damages to the debtors, to the extent of the unpaid obligations of the debtors to the creditors . . . [but] the Debtor appears to have benefitted from not paying the required Retirement Plan contributions by gaining the use of funds that should have been in the Retirement Plan's possession." *Id.* at 605 (citing *In re Am. Tissue, Inc.*, 351 F. Supp.2d 79, 93-94 (S.D.N.Y. 2004) (holding that a debtor could not characterize its monetary gain as injury)). The *Waterford* Court went on to state that the trustee could "allege a constitutional injury. . . if the bankruptcy estate paid any of the shortfall." *Id.* at 605. *Waterford* shares the factual circumstances of this case—a bankruptcy trustee sued and argued a debt it owes constitutes an injury, despite having made no payments. In fact, LSI gained even more than the debtor in *Waterford* because it benefitted from not paying Jabil's invoice *and* retained and then sold the manufacturing equipment.

In *Reneker v. Offill*, 2009 U.S. Dist. LEXIS 24567, 2009 WL 804134 (N.D. Tex. Mar. 26, 2009), a receiver for various entities sued the entities' attorneys for negligence, violations of securities laws, and the consequent $36.5 million liability owed to investors. 2009 U.S. Dist. LEXIS 24567, [WL] at *5. Citing *In re American Tissue*, the *Reneker* Court held the receiver lacked Article III standing because "the only harm alleged is the Receivership Estate's inability to satisfy its liabilities." 2009 U.S. Dist. LEXIS 24567, [WL] at *6. The court held the receiver did not have Article III standing to sue for damages his clients did not suffer, stating "[t]he Receivership Estate's financial inability to satisfy liabilities owed to investors as a result of securities-laws violations harm[ed] the investors," not the receiver. *Id. Reneker* is also analogous to LSI's case; the receiver and bankruptcy trustee are similarly situated, while Appellants are similarly situated to the attorneys accused of negligence. Jabil and the investors in *Reneker* are both creditors. In addition, the securities laws violations are analogous to the Jabil contract as the event the receiver and trustee argue caused damages. Based on the triggering events, Ebert and the receiver attempted to recover damages owed because of fraudulent or negligent conduct.

Ebert responds that LSI suffered harm by taking on millions of dollars in debt. She analogizes to *Norris v. Causey*, 869 F.3d 360 (5th Cir. 2017), to argue for standing. We held in *Norris* that "[t]he Norrises' injury is clear: they lost thousands of dollars." *Id.* at 366. However, *Norris* is distinguishable; the Norrises wrote checks for $48,000, $45,000, and $1,000, but the Causeys never moved forward

with their end of the bargain. *Id.* at 364. Here, LSI did not pay Jabil's invoice but still retained Jabil's end of the bargain, the manufacturing equipment. Ebert also cites *Norris* for the proposition that "this litigation can redress the loss through damages, as the judgment demonstrates." *Id.* at 366. But this argument refers to redressability, not LSI's injury in fact, and is thus inapposite.[5] Accordingly, all damages awarded under Damage Element No. 1 against any defendant must be reversed for lack of Article III standing (thus leaving no actual damages against DeJoria).[6]

B. A Reasonable Jury Could Find Cohen Liable for Breach of Fiduciary Duty Owed to LSI

Cohen argues[7] that he is entitled to judgment as a matter of law because there is not legally sufficient

5. In its order denying Appellants' post-verdict motions, the district court held there was sufficient evidence to support a jury finding that Appellants' breaches of fiduciary duty caused the damages the jury awarded, citing Jabil's proof of claim filed in bankruptcy court and the trial testimony of Jabil representatives. But this rationale only addresses what Jabil's injury and damages were; it does not explain how LSI was injured.

6. We need not address and therefore do not hold that there could not possibly be an Article III injury in fact stemming from Cohen and DeJoria's breaches of fiduciary duty. Instead, we hold there is no Article III injury stemming from the claims Ebert asserted and Damage Element No. 1 of the jury instruction.

7. Ebert argues Cohen has waived this argument but is mistaken; Cohen raised this issue during Rule 50(a) arguments and in his Rule 50(b) motion, as the district court noted.

evidence to prove he breached his fiduciary duty to LSI. "We review a district court's ruling on a motion for judgment as a matter of law *de novo*." *Nobach v. Woodland Vill. Nursing Ctr., Inc.*, 799 F.3d 374, 377 (5th Cir. 2015) (footnote and citation omitted). When reviewing a district court's denial of a post-verdict Rule 50(b) motion, we assess "whether a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." *Id.* (quoting FED. R. CIV. P. 50(a)(1)). Despite our holding in Section II.A, we address this issue because it concerns damages awarded under Damage Element No. 2.

Texas law required Ebert to prove: 1) that a fiduciary relationship existed; 2) that Cohen breached his fiduciary duty to LSI; and 3) that Cohen's breach resulted in injury to LSI or benefitted him. *Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 283 (5th Cir. 2007). The first element is not in dispute. Cohen's fiduciary duty required a duty of loyalty and duty of care to LSI.

As noted above, Ebert's case began by alleging an elaborate pump-and-dump scheme of LSI's stock and widescale fraud, but by the time the case was submitted to the jury, Ebert's argument was based entirely on the Jabil contract:

> the fraud, the improper conduct, was entering into the Jabil contract in May 2011. That's what inevitably caused this company to collapse, that's what caused the damages, and that was the impetus of why or purpose of this fraudulent scheme was to enter into that Jabil contract,

> make a big splash, make it seem like this was a legitimate business when it had no hope for survival.

Ebert provided the following evidence to support her claim: Cohen took on Appel as an advisor and spoke to him daily; Cohen sent Appel non-public information, including lists of shareholders and stock sales on a weekly basis; Cohen dealt personally with Jabil; prior to the Jabil contract, Cohen had not told anyone at Jabil about Appel's conviction for securities fraud manipulation; LSI had no idea whether the machinery from the Jabil contract would work; LSI had no business plan, or leads to monetize the equipment from the contract, but Cohen and Appel drafted LSI press releases together to generate good news and publicize it; and while still a director, Cohen sold his stock in LSI for $400,000 because he "needed to have some money in the bank."

Cohen contends that his conduct is protected by the business judgment rule. In Texas, the "rule . . . protects corporate officers and directors, who owe fiduciary duties to [a] corporation[] from liability for acts that are within the honest exercise of their business judgment and decision." *Sneed v. Webre*, 465 S.W.3d 169, 173 (Tex. 2015) (citation omitted). Negligent, unwise, inexpedient, or imprudent actions are protected so long as "the actions [are] 'within the exercise of their discretion and judgment in the development or prosecution of the enterprise in which their interests are involved.'" *Id.* at 178 (quoting *Cates v. Sparkman*, 73 Tex. 619, 11 S.W. 846, 849 (Tex. 1889)) (footnote omitted). The jury charge, however,

instructed the jury on both what is required to show a breach of fiduciary duty, along with the parameters of the business judgment rule. Given Cohen's actions, a reasonable jury could weigh the evidence, consider the business judgment rule, but conclude that Cohen breached his fiduciary duty to LSI.

Cohen also argues that because the existence of an attempted pump-and-dump securities fraud scheme would not be clear to a jury, Ebert was required to offer expert testimony supporting her claim. However, the case he cites, *Fener v. Operating Engineers Construction Industry & Miscellaneous Pension Fund (LOCAL 66)*, 579 F.3d 401, 409 (5th Cir. 2009), stands for a different proposition: that proving a loss causation claim under § 10(b) of the Securities Exchange Act of 1934 requires "the testimony of an expert—along with some kind of analytical research or event study." *Id.* No such claim exists here. Even if we were to apply Cohen's standard, Ebert *did* put on an expert who testified extensively about red flags of a pump-and-dump scheme in the securities industry and how LSI demonstrated a number of those traits. We therefore reject this argument.

The jury assessed damages of $400,000 against Cohen under Damage Element No. 2. Cohen argues there is no evidentiary support for this monetary amount. But Cohen himself testified that he made $557,109 in salary for his time at LSI and sold about $400,000 of LSI stock because he "needed to have some money in the bank." None of Appellants' lawyers objected during this testimony. Damage Element No. 2 allowed for damages from "the

reasonable market value of any gains to that defendant (including salaries, consulting fees, net proceeds from stock issuances to directors and/or officers of LSI . . .) proximately caused by that defendant's breach of fiduciary duty."

Considering the jury found Cohen liable for a breach of fiduciary duty based on an alleged pump-and-dump scheme and improperly propping up LSI by entering the Jabil contract for nefarious purposes, there is legally sufficient evidence for a reasonable jury to award $400,000 in damages.

C. Ebert Did Not Provide Legally Sufficient Evidence to Show Appel and Bartlett Personally Received Gains from Stock Sales

Appel and Bartlett were not liable for damages under Damage Element No. 1. On the other hand, the jury found Appel and Bartlett liable for $2.5 million each under Damage Element No. 2 for aiding and abetting Cohen's breach of fiduciary duty, which allowed the jury to award damages for the "reasonable market value of any gains to that defendant (including salaries, consulting fees, net proceeds from stock issuances to directors and/or officers of LSI, and other expenses) proximately caused by that defendant's breach of fiduciary duty."

Appel and Bartlett argue that Ebert presented no evidence they received gains from stock sales in their individual capacity and that any evidence instead relates to entities affiliated with them. Ebert cites the expert

testimony of Robert Manz as the "critical evidence" to support Appel and Bartlett's damages calculation. Manz testified that a "nominee company" is one that "stands in the place of a person or another company," and is often used to "hide the identity of a person or another entity." Manz also testified that Appel owned more than 5% of LSI's outstanding stock through nominee companies, that Bartlett owned another 1.5% of LSI through nominee companies, that Appel, Bartlett, and their associates earned a total of $5.1 million of profit from LSI stock, and that FEQ Realty made $2.3 million in profit from LSI stock. In its denial of Appellants' post-verdict motions, the district court cited Manz's testimony to uphold the jury's verdict.

Through Manz's testimony, however, Ebert tacitly admits that she provided evidence only for the nominee companies' gains, not for Appel and Bartlett in their individual capacity. Manz's calculations were based primarily on two documents: Schedule 7.B, which showed market sales of LSI stock, and a list of nominee companies with how many shares of LSI each owned as of September 9, 2011. Yet these documents only list companies and provide no proof of or insight into Appel and Bartlett as individuals. Ebert originally named a number of these entities as defendants in her lawsuit, including FEQ Realty, LLC, DIT Equity Holdings, Capital Growth Realty, and Wiltomo Redemption Foundation. But she eventually dismissed them with prejudice. Perhaps most significantly, Manz testified that "I don't know exactly what you define as the Appel Group" and acknowledged that he had no insight on whether or how a company was

related to Appel. Instead, Ebert's counsel simply informed Manz "what constituted Appel-related companies" for the document. Manz was also unable to answer questions about the various entities in his documents and testified that he had not tracked down the alleged gains to Appel and Bartlett individually.

Because Ebert did not provide evidence against Appel and Bartlett in their individual capacities and the entities and companies in question were dismissed with prejudice, the only way Appel and Bartlett could be liable is under an alter ego theory. Ebert, however, made no attempt to make such a showing. On appeal, she argues that a jury could impose damages based on Appel and Bartlett's nominee companies because "a party cannot invoke the corporate form 'as a cloak for fraud or illegality or to work an injustice,'" citing *Matthews Construction Company, Inc. v. Rosen*, 796 S.W.2d 692, 693 (Tex. 1990). However, even if we assumed the most generous reading of her corporate form arguments under Texas law, *cf.* Texas Business Organizations Code § 21.223, she provided no evidence to support piercing the corporate veil or any alter ego theory. Thus, Ebert did not provide legally sufficient evidence for a reasonable jury to find Appel and Bartlett liable in their individual capacities. We therefore REVERSE the damages against Appel and Bartlett under Damage Element No. 2, leaving no actual damages against them.

D. Exemplary Damages

No exemplary damages were awarded against Bartlett. In light of our holding leaving no actual damages against

Appel and DeJoria, the judgment awarding exemplary damages against them must be vacated. Tex. Civ. Prac. & Rem. Code 41.004(a) (requiring more than nominal damages to be awarded before exemplary damages can be awarded). Therefore, the only remaining actual damages are the $400,000 awarded against Cohen under Damage Element No. 2. In addition to the damages cap under Texas law (Tex. Civ. Prac. & Rem. Code § 41.008(b)), the jury was instructed to consider "the character of the conduct involved" and "the nature of the wrong" before assessing exemplary damages.[8] But because portions of the "conduct" and "wrong" are no longer viable as a matter of law, the jury may have awarded a different amount of exemplary damage against Cohen than the $2 million it awarded. Neither party has briefed the effect of this potential outcome on the exemplary damages awarded against Cohen. We conclude that this issue should be addressed in the first instance by the district court following full briefing. We therefore VACATE the exemplary damages award and REMAND to the district court to consider the legal issues surrounding exemplary damages against Cohen in the first instance.

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8. Texas law requires that the trier of fact "consider the definition and purpose of exemplary damages as provided by Section 41.001" in making an award of exemplary damages. Tex. Civ. Prac. & Rem. Code § 41.010. It further requires that the trier of fact consider evidence relating to, among other things, the "nature of the wrong" and the "character of the conduct involved." *Id.* at § 41.011.

III. Conclusion

In light of the foregoing decision, Appel, Bartlett, and DeJoria are entitled to judgment rendered in their favor: (1) DeJoria, because of the lack of proof of a recoverable injury, *see Lindley v. McKnight*, 349 S.W.3d 113, 124 (Tex. App.—Fort Worth 2011, no pet.) and the corresponding vacatur of exemplary damages; (2) Appel, because there was no evidence of individual liability and the corresponding vacatur of exemplary damages; and (3) Bartlett, because there was no evidence of individual liability. Thus, we REVERSE and RENDER judgment in favor of Appel, Bartlett, and DeJoria. As for Cohen, we VACATE damages awarded under Damage Element No. 1, AFFIRM damages awarded under Damage Element No. 2, and REMAND to the district court to consider how our opinion impacts the award of exemplary damages.

APPENDIX B — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION, FILED MARCH 7, 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No.: 4:15-cv-225-0

CAREY D. EBERT,

Plaintiff,

v.

HOWARD MILLER APPEL, *et al.*,

Defendants.

FINAL JUDGMENT

Plaintiff, Carey D. Ebert ("Carey Ebert"), as Trustee for the Chapter 11 estate of the Debtor, Latitude Solutions, Inc. ("LSI"), sued Defendants Howard Appel, Ernest Bartlett, Matthew Cohen, and John Paul DeJoria (collectively "Defendants"), for, *inter alia*, breach of fiduciary duty and aiding and abetting breach of fiduciary duty. The case was tried to a jury, and after hearing several days of testimony and argument, the jury returned a unanimous verdict of favor of the Trustee and against Defendants. Having considered the jury's verdict, the evidence presented at trial, and the applicable law, the

Appendix B

Court renders judgment pursuant to Federal Rule of Civil Procedure 58 as follows:

1. **IT IS HEREBY ORDERED** that Defendant John Paul DeJoria is liable to Plaintiff Carey Ebert for breach of fiduciary duty.

2. **IT IS FURTHER ORDERED** that Defendant Matthew Cohen is liable to Plaintiff Carey Ebert for breach of fiduciary duty.

3. **IT IS FURTHER ORDERED** that Defendants Howard Appel, Ernest Bartlett, and John Paul DeJoria are each liable to Plaintiff Carey Ebert for aiding and abetting Matthew Cohen's breach of fiduciary duty.

4. **IT IS FURTHER ORDERED** that Defendants Matthew Cohen, Howard Appel, Ernest Bartlett, and John Paul DeJoria are liable to Plaintiff Carey Ebert, jointly and severally, for compensatory damages in the amount of $6,900,000.00.

5. **IT IS FURTHER ORDERED** that Defendant John Paul DeJoria is liable to Plaintiff Carey Ebert for compensatory damages in the amount of $1,500,000.00.

6. **IT IS FURTHER ORDERED** that Defendant Howard Appel is liable to Plaintiff Carey Ebert for compensatory damages in the amount of $2,500,000.00.

7. **IT IS FURTHER ORDERED** that Defendant Ernest Bartlett is liable to Plaintiff Carey Ebert for compensatory damages in the amount of $2,500,000.00.

8. **IT IS FURTHER ORDERED** that Defendant Howard Appel is liable to Plaintiff Carey Ebert for exemplary damages in the amount of $5,000,000.00.

9. **IT IS FURTHER ORDERED** that Defendant Matthew Cohen is liable to Plaintiff Carey Ebert for exemplary damages in the amount of $2,000,000.00.

10. **IT IS FURTHER ORDERED** that Defendant John Paul DeJoria is liable to Plaintiff Carey Ebert for exemplary damages in the amount of $1,000,000.00.

11. **IT IS FURTHER ORDERED** that court costs are taxed in favor of Plaintiff Carey Ebert and against all Defendants, in an amount to be determined pursuant to Local Civil Rule 54.1 and applicable law.

12. **IT IS FURTHER ORDERED** that all amounts awarded in this Judgment shall bear post-judgment interest at the rate provided for pursuant to 28 U.S.C. §1961, compounded annually, from the date of judgment until paid.

SO ORDERED on this **7th day** of **March, 2018**.

/s/_____
Reed O'Connor
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORTH WORTH DIVISION, FILED MARCH 7, 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4:15-cv-00225-O

CAREY D. EBERT,

Plaintiff,

v.

MICHAEL GUSTIN, *et al.*,

Defendants.

ORDER

Before the Court are Defendants How ard Miller Appel and Ernest A. Bartlett, III's (collectively "Separate Defendants") Motion for Reconsideration (ECF No. 322), filed February 5, 2018; and Defendant John Paul DeJoria's ("DeJoria") Motion for Reconsideration (ECF No. 324), filed February 5, 2018. The motions have been fully briefed and are ripe for review.

For the reasons stated below, the Court finds that Separate Defendants' Motion for Reconsideration (ECF No. 322) should be and is hereby **DENIED**; and DeJoria's

Motion for Reconsideration (ECF No. 324) should be and is hereby **DENIED.**

I. BACKGROUND

Plaintiff Carey D. Ebert ("Ebert" or "Plaintiff"), the Trustee for the Chapter 11 estate of Latitude Solutions, Inc. ("LSI"), alleged that Defendants conducted a complex, fraudulent enterprise to control and manipulate LSI, its subsidiaries, and its stock. Specifically, Plaintiff alleged that two groups of corporate insiders and co-conspirators—the "First Board" and the "Second Board," respectively—misused LSI, its creditors, and its shareholders, by perpetrating a "pump-and-dump"[1] scheme. 2d Am. Compl. ¶ 12, ECF No. 34. Plaintiff alleged that the Second Board, all of whom were corporate fiduciaries, partnered with the First Board to continue this fraudulent scheme. *Id.* She also alleged that the Second Board deliberately disregarded warning signs from LSI's management, thereby violating its fiduciary duty, acting in its own self-interest, grossly mismanaging LSI's business, and squandering corporate assets. *Id.* ¶ 1. She further alleged that the combination of the First and Second Boards' fraud and corporate waste caused LSI to go bankrupt, leaving creditors with as much as $40 million in debt owed. *Id.*

1. "In a typical pump-and-dump, corporate insiders in a micro-cap give themselves stock in a company, intentionally manipulate the stock's price through press releases, marketing, and illegal trades, and then unload their shares at extravagant profits before letting the company die." Pl.'s 2d Am. Compl. 31, ECF No. 34.

The trial was held for five consecutive days between July 10, 2017, and July 14, 2017. *See* Min. Entries, ECF Nos. 279–84. On July 14, 2017, the jury found that Cohen and DeJoria breached their fiduciary duty to LSI (Jury Question 1); and that Appel, Bartlett, and DeJoria each aided and abetted Cohen's breach of fiduciary duty to LSI (Jury Question 2). Jury Charge 6–7, ECF No. 287. The parties then submitted the post-trial motions. *See* ECF Nos. 294, 296, 297. The Court issued an order on January 22, 2018, finding sufficient evidence to support the jury verdict against the Separate Defendants and DeJoria, and finding them jointly and severally liable for Defendant Matthew Cohen's ("Cohen") breach of fiduciary duty by virtue of the jury finding that they each aided and abetted Cohen's breach. *See* Jan. 22, 2018 Order, ECF No. 320. The Parties then filed the motions for reconsideration at issue here. *See* ECF Nos. 322, 324.

II. LEGAL STANDARD

A motion to reconsider under Rule 59(e) "calls into question the correctness of a judgment." *Templet v. HydroChem Inc.*, 367 F.3d 473, 478 (5th Cir. 2004) (quoting *In re Transtexas Gas Corp.*, 303 F.3d 571, 581 (5th Cir. 2002)). Further, a Rule 59(e) motion "serve[s] the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence." *Id.* at 479. "'Manifest error' is one that 'is plain and indisputable, and that amounts to a complete disregard of the controlling law.'" *Brush v. Wells Fargo Bank, N.A.*, 911 F. Supp. 2d 445, 480 (S.D. Tex. 2012) (quoting *Guy v. Crown Equip. Corp.*, 394 F.3d 320, 325 (5th Cir. 2004));

see also Bank One, Tex., N.A. v. FDIC, 16 F. Supp. 2d 698, 713 (N.D. Tex. 1998) (Fitzwater, J.) ("[A] 'manifest error' is an obvious mistake or departure from the truth.").

Additionally, a Rule 59(e) motion is "not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment." *Templet*, 367 F.3d at 479 (citing *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990)); *see also Berge v. GE Oil & Gas*, No. H-08-2931, 2011 WL 798204, at *3 (S.D. Tex. 2011) ("Importantly, a 'Rule 59(e) motion is not proper to re-litigate matters that have been resolved to the movant's dissatisfaction and [movant] cannot have a second bite at the apple on the same issues that were previously addressed by the parties and this Court.'") (quoting *Alvarado v. Tex. Rangers*, No. EP-03-CA-0305-FM, 2005 WL 1420846, at *2 (W.D. Tex. 2005)). Courts have significant discretion in deciding whether to grant a motion to reconsider, but the Fifth Circuit has cautioned that a Rule 59(e) motion is "an extraordinary remedy that should be used sparingly." *See Jones v. Stephens*, 998 F. Supp. 2d 529, 536 (N.D. Tex. 2014) (Means, J.) (citing *Templet*, 367 F.3d at 479); *see also Riddle v. DynCorp. Int'l Inc.*, 773 F. Supp. 2d 647, 649 (N.D. Tex. 2011) (Lindsay, J.) ("[T]he Fifth Circuit has observed that Rule 59(e) 'favor[s] the denial of motions to alter or amend a judgment.'") (quoting *S. Constructors Grp., Inc. v. Dynalectric Co.*, 2 F.3d 606, 611 (5th Cir. 1993)).

III. ANALYSIS

A. DeJoria's Motion for Reconsideration

DeJoria asks the Court to reconsider its finding that DeJoria is jointly and severally liable for the $6.9 million in compensatory damages awarded against Cohen. DeJoria's Mot. Recon. 4, ECF No. 324. DeJoria argues: (1) that the plain language of the Jury Charge provides, at most, $1.5 million in liability as to DeJoria; (2) the Texas Supreme Court recently clarified that liability for aiding and abetted a breach of fiduciary duty requires an analysis of each wrongful act and specifically whether the knowing and substantial assistance provided by the aider and abettor proximately caused the plaintiff's damages. *Id.* (citing *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214 (Tex. 2017)); *see* Jury Charge 6–8, ECF No. 287.

First, DeJoria argues that the plain language of the Jury Charge precludes a finding that DeJoria is liable for the damages caused by Cohen's breach. Specifically, DeJoria points to Question 3, in which the jury found a damage amount of $1.5 million against DeJoria in response to the Court's question of "[w]hat sum of money, if any, if paid now in cash, would fairly and reasonably compensate Carey Ebert, as LSI's trustee, for the damages, if any, that were proximately caused by any breach of fiduciary duty or *aiding and abetting* such breach of fiduciary duty *by that defendant*?" Jury Charge 8, ECF No. 287 (emphasis added). DeJoria argues that the jury's finding means that, at most, DeJoria is liable for $1.5 million in damages. DeJoria's Mot. Recon. 4, ECF No. 324. This

argument was not only previously considered by the Court in the jury charge conference—where the Court crafted Question 3 after considering the parties' arguments—it was also raised, considered, and rejected in the Court's consideration of the parties' post-trial motions. *See* Pl.'s App. Opp. DeJoria Mot. Recon. 9–10, 15–17 (Jury Charge Conf.), ECF No. 287 ("Mr. FARRELL: 'Let's say Cohen is found $100,000 for breach, DeJoria is found not independently liable for his own breach but then he is found to have aided and abetted, then that just means he's jointly and severally liable for the $100,000.'"); Jan. 22, 2018 Order 24–25, ECF No. 320. Here, the jury found DeJoria independently liable for $1.5 million in damages based on his breach of fiduciary duty. Jury Charge 8, ECF No. 287. The jury also found as a matter of fact that DeJoria aided and abetted Cohen's breach. *Id.* at 7. As determined by the Court in its January 22, 2018 Order, and addressed *infra*, as a matter of law, DeJoria is jointly and severally liable for aiding and abetting the full amount of Cohen's breach.

Next, DeJoria cites *Parker* for the proposition that "liability for aiding and abetting a fiduciary breach . . . requires an analysis of each wrongful act and specifically whether the knowing and substantial assistance provided by the aider and abettor proximately caused the damages claimed by the plaintiff." DeJoria's Mot. Recon. 9, ECF No. 324 (citing *Parker*, 514 S.W.3d at 224–25). DeJoria argues that for him to be jointly and severally liable for Cohen's breach, there must be proof that he knowingly and substantially assisted Cohen in the specific breach that caused the $6.5 million in damages to LSI. *Id.*

The Court notes that this argument was raised and argued in DeJoria's response to Plaintiff's motion to submit a proposed final judgment. *See* DeJoria's Resp. Pl's Mot. Final J. 2, 7–8, ECF No. 302 (citing *Parker*, 514 S.W.3d at 224–225). DeJoria essentially argues now that the Court committed manifest error when it failed to apply *Parker* to relieve him and the Separate Defendants from joint and several liability in its January 22, 2018 Order. The Court agrees that *Parker* does instruct a court to analyze the wrongful acts of a defendant to determine whether they knowingly or substantially assisted the underlying breach of fiduciary duty. But here, in contrast to the facts of *Parker*, there is evidence that DeJoria knew of and substantially assisted in Cohen's breach. The jury determined that, from the testimony and evidence presented at trial, DeJoria aided and abetted Cohen, *see* Jury Charge 6–7, ECF No. 287, and the Court's post-verdict analysis concluded there was evidence in the record that DeJoria knew about Cohen's actions before, during, and after LSI incurred damages. *See* Jan. 22, 2018 Order 23–24, ECF No. 320. The Court finds that *Parker* is factually distinguishable from the case at hand, and as such, concludes that an imposition of joint and several liability is proper and supported by Texas law. *See Kinzbach v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 512–14 (Tex. 1942); *Orchestratehr, Inc. v. Trombetta*, No 3:13-cv-2110-KS-BH, 2016 WL 4563348, at *5 (N.D. Tex. Sept. 1, 2016). Accordingly, DeJoria's motion for reconsideration is **DENIED**.

Appendix C

B. Separate Defendants' Motion for Reconsideration

Separate Defendants incorporate the arguments made by DeJoria into their motion for reconsideration, which for the reasons stated above are **DENIED**. They also raise an additional argument, which the Court considers below.

Separate Defendants argue that the Court erred when it found that Howard Appel and Ernest Bartlett were jointly and severally liable for the $6.9 million in compensatory damages awarded against Cohen based on an application of Texas case law addressing the common law tort of aiding and abetting breach of fiduciary duty. Br. Supp. Separate Defs.' Mot. Recon. 1, ECF No. 323. They argue that "the cases relied upon by the Court [in its January 22, 2018 Order] were decided prior to adoption of the 1995 tort reform amendments . . . [that] abolish joint and several liability" for intentional torts absent a finding of more than fifty percent responsibility. *Id.* (citing Tex. Civ. Prac. & Rem. Code § 33.013(b)). But Texas courts have consistently found that once a derivative tort, such as aiding and abetting, has been established, the third party is liable for the acts of the original defendant's breach, and apportionment of fault is immaterial. *See Heat Shrink Innovations, LLC v. Medical Extrusion Technologies-Texas, Inc.*, 2014 WL 5307191, *6–7 (Tex. App.—Fort Worth 2014) ("It is unnecessary to submit a question to the jury to apportion liability [for aiding and abetting breach of fiduciary duty]; Heat Shrink's liability is Wolfe's liability"); *Rosell v. Ctr. W. Motor Stages*, 89 S.W.3d 643, 656–57 (Tex. App.—Dallas 2002, pet denied). The Court's findings in its January 22, 2018 Order are

consistent with Texas courts' conclusions made after the 1995 tort reform amendments and does not amount "to a complete disregard of the controlling law.'" *Cf. Brush*, 911 F. Supp. 2d at 480 (quoting *Guy*, 394 F.3d at 325). Therefore, the Court finds that it did not commit manifest error in imposing joint and several liability for aiding and abetting breach of fiduciary duty.[2]

Accordingly, Separate Defendants' motion for reconsideration is **DENIED**.

IV. CONCLUSION

For the reasons stated below, the Court finds that Separate Defendants' Motion for Reconsideration (ECF No. 322) should be and is hereby **DENIED**; and DeJoria's Motion for Reconsideration (ECF No. 324) should be and is hereby **DENIED.**

SO ORDERED on this **7th day** of **March, 2018.**

/s/
Reed O'Connor
UNITED STATES DISTRICT JUDGE

2. To the extent that Separate Defendants argue that Plaintiff failed to prove the damages sought with regard to Appel and Bartlett's roles in Cohen's breach, the Court has already addressed this argument at length in its sufficiency of the evidence analysis. Br. Supp. Separate Defs.' Mot. Recon. 3, ECF No. 323; Separate Defs.' Reply 5, ECF No. 328. The Court detailed sufficient evidence of damages incurred by LSI by and through Appel and Bartlett's actions. *See* Jan. 22, 2018 Order 14–15, 17–18, ECF No. 320.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION, FILED JANUARY 22, 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No. 4:15-cv-00225-O

CAREY D. EBERT,

Plaintiff,

v.

MICHAEL GUSTIN *et al.*,

Defendants.

ORDER

Before the Court are Defendants Howard Miller Appel, Ernest A. Bartlett, III, and Matthew Cohen's (collectively "Separate Defendants") Motion to Alter Judgment as a Matter of Law (ECF No. 294), filed August 3, 2017; Defendant John Paul DeJoria's Motion for Judgment as a Matter of Law (ECF No. 296), filed August 7, 2017; and Plaintiff Carey D. Ebert's Amended Motion for Judgment (ECF No. 297), filed August 21, 2017. The motions have been fully briefed and are ripe for review.

Appendix D

Having considered the Motions, related briefing, and relevant law, the Court finds that Separate Defendants' Motion to Alter Judgment as a Matter of Law (ECF No. 294) should be and is hereby **DENIED**; Defendant John Paul DeJoria's Motion for Judgment as a Matter of Law (ECF No. 296) should be and is hereby **DENIED**; and Plaintiff's Amended Motion for Judgment (ECF No. 297) should be and is hereby **GRANTED**.

I. BACKGROUND

Plaintiff Carey D. Ebert ("Ebert" or "Plaintiff"), the Trustee for the Chapter 11 estate of Latitude Solutions, Inc. ("LSI"), alleged that Defendants conducted a complex, fraudulent enterprise to control and manipulate LSI, its subsidiaries, and its stock. Specifically, Plaintiff alleged that two groups of corporate insiders and co-conspirators—the "First Board" and the "Second Board," respectively—misused LSI, its creditors, and its shareholders, by perpetrating a "pump-and-dump"[1] scheme. 2d Am. Compl. ¶ 12, ECF No. 34. Plaintiff alleged that the Second Board, all of whom were corporate fiduciaries, partnered with the First Board to continue this fraudulent scheme. *Id*. She also alleged that the Second Board deliberately disregarded warning signs from LSI's management, thereby violating its fiduciary

1. "In a typical pump-and-dump, corporate insiders in a micro-cap give themselves stock in a company, intentionally manipulate the stock's price through press releases, marketing, and illegal trades, and then unload their shares at extravagant profits before letting the company die." Pl.'s 2d Am. Compl. 31, ECF No. 34.

duty, acting in its own self-interest, grossly mismanaging LSI's business, and squandering corporate assets. *Id.* ¶ 1. She further alleged that the combination of the First and Second Boards' fraud and corporate waste caused LSI to go bankrupt, leaving creditors with as much as $40 million in debt owed. *Id.*

The parties tried this dispute for five consecutive days between July 10, 2017, and July 14, 2017. *See* Min. Entries, ECF Nos. 279–84. On July 13, 2017, near the end of trial, the Court granted Plaintiff's motion to dismiss all of her fraud claims against Defendants Harvey Klebanoff (a/k/a Kaye); Michael Gustin; Jeffrey Wohler; RM Advisors, Inc.; Capital Growth Realty, Inc.; Capital Growth Investment Trust; DIT Equity Holdings; FEQ Realty, LLC; Discretionary Investment Trust; KWL Exploration and Development, Inc.; Moggle Investors, LLC; Wiltomo Redemption Foundation; and SST Advisors. *See* July 17, 2017 Order, ECF No. 285; Min. Entry, ECF No. 283. Claims of breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and any possible resulting damages—against Defendant DeJoria and the Separate Defendants—were the only claims that remained for jury consideration.

On July 14, 2017, the jury found that Cohen and DeJoria breached their fiduciary duty to LSI (Jury Question 1); and that Appel, Bartlett, and DeJoria each aided and abetted Cohen's breach of fiduciary duty to LSI (Jury Question 2). Jury Charge 6–7, ECF No. 287. The parties then submitted the post-trial motions at issue here. *See* ECF Nos. 294, 296, 297. The Court will consider each in turn.

Appendix D

II. LEGAL STANDARDS

A. Rule 50 Judgment as a Matter of Law

Rule 50 of the Federal Rules of Civil Procedure governs motions for judgment as a matter of law in jury trials. *See* FED. R. CIV. P. 50; *Weisgram v. Marley Co.*, 528 U.S. 440, 448–49 (2000). Rule 50(a) "authorizes the entry of judgment as a matter of law '[i]f a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.'" *See James v. Harris Cnty.*, 577 F.3d 612, 617 (5th Cir. 2009) (quoting FED. R. CIV. P. 50(a)). "It allows the trial court to remove cases or issues from the jury's consideration 'when the facts are sufficiently clear that the law requires a particular result.'" *Weisgram*, 528 U.S. at 448 (quoting 9 Wright & Miller, Federal Practice and Procedure § 2521 (2d ed. 1995)). "If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion." FED. R. CIV. P. 50(b).

"[I]n entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). "In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Id.* (citing *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554–55 (1990)). "Credibility

determinations, the weighing of the evidence, and the drawing of legitimate inference from the facts are jury functions, not those of a judge." *Id.* at 150–51 (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986)). "Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.* at 151.

"A motion for judgment as a matter of law is appropriate if, after considering the evidence presented and viewing all reasonable inferences in the light most favorable to the nonmovant, the facts and inferences point so strongly in favor of the movant that a rational jury could not arrive at a contrary verdict." *Murray v. Red Kap Indus., Inc.*, 124 F.3d 695, 697 (5th Cir. 1997). "If there is substantial evidence of such quality and weight that reasonable and fair-minded jurors might reach a different conclusion," then judgment as a matter of law is not appropriate. *Id.* "In other words, the evidence must be sufficient so that a jury will not ultimately rest its verdict on mere speculation and conjecture." *Anthony v. Chevron USA, Inc.*, 284 F.3d 578, 583 (5th Cir. 2002) (citing *Gulf Coast Real Estate Auction Co. v. Chevron Indus., Inc.*, 665 F.2d 574, 577 (5th Cir. 1982)). "We must remember, however, that evidence sufficient to support a jury verdict must be *substantial* evidence." *Guile v. United Sates*, 422 F.3d 221, 227 (5th Cir. 2005) (emphasis in original). "[T]he party opposing the motion must at least establish a conflict in substantial evidence on each essential element of [his] claim." *See Anthony*, 284 F.3d at 583. Finally, "[t]he 'standard of review with respect to a jury verdict

is especially deferential.'" *Lubke v. City of Arlington*, 455 F.3d 489, 494 (5th Cir. 2006) (quoting *Brown v. Bryan Cnty*, 219 F.3d 450, 456 (5th Cir. 2000)).

B. Rule 59 Motion for New Trial

Under Federal Rule of Civil Procedure 59, the Court may grant a new trial after a jury trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." FED. R. CIV. P. 59 (a)(1)(A). While this rule does not enumerate specific grounds for granting a new trial, the Fifth Circuit has found that a new trial is appropriate where: (1) the verdict is against the weight of the evidence, (2) the amount of damages awarded is excessive, or (3) the trial was unfair or marred by prejudicial error. *Seidman v. Am. Airlines, Inc.*, 923 F.2d 1134, 1140 (5th Cir. 1991). "Courts do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done, and the burden of showing harmful error rests on the party seeking the new trial." *Del Rio Distrib., Inc. v. Adolph Coors Co.*, 589 F.2d 176, 179 n.3 (5th Cir. 1979).

C. Rule 59(e) Motion to Alter or Amend Judgment

Federal Rule of Civil Procedure 59(e) allows a party to file a motion to alter or amend a judgment within twenty-eight days after entry of the judgment. FED. R. CIV. P. 59(e). Motions for reconsideration are permitted in limited situations, primarily to correct "a manifest error of law or fact" or "to present newly discovered evidence." *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 344 (5th

Cir. 2007). A motion for reconsideration is not a means for "rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment." *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004).

III. ANALYSIS

A. Separate Defendants' Rule 50 Motion

On August 3, 2017, Separate Defendants filed a motion for judgment as a matter of law under Rule 50, or in the alternative, a motion to alter or amend the judgment, and for a new trial under Rule 59. Separate Defs.' Mot. JMOL, ECF No. 294. Separate Defendants argue that Plaintiff failed to establish the existence of a fiduciary duty as to Cohen, a condition precedent to the jury finding that Defendants breached that duty or aided and abetted that breach. *Id.* at 7. Separate Defendants therefore argue that the evidence in the record is insufficient to support the jury's finding on Jury Questions 1 and 2. The Court will analyze the motion as to each defendant below.

1. Matthew Cohen

The jury found that Cohen breached his fiduciary duty to LSI's creditors and awarded Plaintiff damages in the amount of $6.5 million in connection with Damage Element 1[2] and $400,000.00 in connection with Damage Element

2. The Jury Charge on Damage Element 1 asks the jury to find whether "[t]he reasonable cash market value of liabilities

2.[3] Jury Charge 8, ECF No. 287. Separate Defendants argue that there is insufficient evidence to support the jury's finding that Cohen breached his fiduciary duty to LSI's creditors because, *inter alia*, (1) as a matter of law, corporations only owe their creditors a fiduciary duty when they are insolvent, and LSI was not insolvent during 2011 when the alleged breach occurred; and (2) Cohen had no duty to disclose Appel's involvement with LSI before LSI contracted with Jabil Circuits, Inc. ("Jabil") because Appel was only a minority shareholder at the time and was only employed by LSI as a consultant after LSI contracted with Jabil. Br. Supp. Separate Defs.' Mot. JMOL 5–7, ECF No. 294-1.

Plaintiff responds that the jury had sufficient evidence to find, and correctly found, that Cohen breached his fiduciary duty, because he (1) acquired for LSI a multimillion dollar contract with Jabil for an illegitimate purpose; (2) allowed Appel, who had a previous conviction for securities fraud, to control LSI; and (3) failed to disclose Appel's involvement to the public and outside creditors. Pl.'s Resp. Defs.' Mot. JMOL 4, ECF No. 306. Plaintiff does not address in writing the argument that

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incurred by LSI" was "a proximate cause of that defendant's breach of fiduciary duty, [and] which liabilities are still owed and have not yet been paid, if any." Jury Charge 8, ECF No. 287.

3. The Jury Charge on Damage Element 2 asks the jury to find whether Defendants' breach of fiduciary duty "proximately caused" damage to LSI, and "[t]he reasonable market value of any gains to that defendant (including salaries, consulting fees, net proceeds from stock issuances to directors and/or officers of LSI, and other expenses) . . . ." Jury Charge 8, ECF No. 287.

she failed to prove LSI was insolvent before May 2011, when Cohen committed LSI to the Jabil contract, but Plaintiff's counsel orally argued on July 12, 2017, during the hearing on the Rule 50 Motions, that "[t]here's ample evidence in the record that at that time, pretty much at all times, LSI was insolvent and as a matter of law fiduciary duties in an insolvent company run not to just the company and the shareholders but to creditor [sic]." Min. Entry at 23:20–23, ECF No. 291.

In resolving this motion as to Cohen, the Court must determine whether the evidence Plaintiff presented to the jury was sufficient regarding (1) proof of LSI's insolvency before Cohen committed LSI to the Jabil contract; and (2) Cohen's actions constituting breach of his fiduciary duty to LSI's creditors, namely Jabil. The Court addresses each prong in turn.

a. Sufficiency of the Evidence to Show LSI was Insolvent

Separate Defendants must show that Plaintiff failed to provide sufficient evidence that LSI was insolvent as a matter of law during the time that Cohen was an officer and director of LSI and before Cohen committed LSI to the Jabil contract.[4] Under Texas law corporate officers and directors only owe corporate creditors a fiduciary duty when their corporation is insolvent. *Conway v. Bonner*,

4. It is undisputed that Cohen was an officer and director of LSI from March 2009 to June 2012. *See* Jury Charge 5, ECF No. 287.

100 F.2d 786, 787 (5th Cir. 1939); *see also Carrieri v. Jobs. com, Inc.*, 393 F.3d 508, 534 n.24 (5th Cir. 2004) ("Officers and directors that are aware that the corporation is insolvent, or within the 'zone of insolvency' as in this case, have expanded fiduciary duties to include the creditors of the corporation."). Texas law defines "insolvent" as "(A) having generally ceased to pay debts in the ordinary course of business other than as a result of a bona fide dispute; (B) being unable to pay debts as they become due; or (C) *being insolvent within the meaning of the federal bankruptcy code*." TEX. BUS. & COM. CODE § 1.201(b)(23) (emphasis added). According to the Federal Bankruptcy Code, "insolvent" means a "financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of—(i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and (ii) property that may be exempted from property of the estate under section 522 [of the Bankruptcy Code]" 11 U.S.C. § 101(32)(a).

The Court, having reviewed the entire record, finds sufficient evidence to support a jury finding that LSI was insolvent at the time Cohen, as an officer and director of LSI, committed the company to the Jabil contract and allegedly breached his fiduciary duty to both LSI and now-creditor Jabil.

First, Plaintiff offered into evidence LSI's Form 10—the financial disclosure document filed with the U.S. Securities and Exchange Commission ("SEC") by which LSI went public. Cohen testified that on Form 10's

balance sheet for years 2008 and 2009, LSI had a negative net worth and that the liabilities exceed the assets of the company. *See* Defs.' Ex. 421 at 58–65, ECF No. 276. Plaintiff's counsel asked Cohen, "[D]oes that mean that as of that date at least by some definitions the company was technically insolvent?" *Id.* Cohen responded, "Yes. That's what it indicates. A negative net worth would be a sign of insolvency." *Id.*

Additionally, Dr. Joseph Anthony McGee, Jabil's executive vice president, testified about invoices Jabil sent to LSI pursuant to their master service agreement. Dr. McGee testified that LSI never paid its invoices as they became due, and that around the time of November 2011, LSI's non-payments caused executives at Jabil to become concerned that LSI could not pay its arrearages. Dr. McGee testified at length about the specifics of invoices and growing debt that LSI faced in its dealings with Jabil. *See* July 11, 2017 Trial Tr. (McGee testimony); Pl.'s Trial Ex. 176.

Finally, McBroom, an employee of Select Energy Services and the co-inventor of two patents relating to water remediation technology, testified about his experience working with LSI. Specifically, McBroom testified that LSI's October 6, 2011 Press Release regarding the successful deployment of water remediation technology by LSI was not a truthful statement. He also testified that LSI had never transitioned from a deployment phase to a commercial phase, meaning that LSI was never a revenue-producing company. In further support of McBroom's testimony, Plaintiff's counsel

submitted at trial the deposition testimony Jeffrey Wohler, LSI's President and chief executive officer ("CEO") from January 2012 until August 2012, who claimed that LSI was never commercially viable. Pl.'s App. Defs.' Mot. JMOL 62, ECF No. 307-1 (hereinafter "Pl.'s App.").

Under the Federal Bankruptcy Code, an entity whose debts are greater than its assets falls within the statutory definition of insolvency. 11 U.S.C. § 101(32)(a). The Court finds that the testimony and other evidence identified above is more than sufficient for a reasonable jury to find that LSI was insolvent before LSI contracted with Jabil. The Court therefore also finds that Cohen owed a fiduciary duty to LSI's creditor Jabil. The Court will next address whether there is sufficient evidence to show that Cohen breached his fiduciary duty to LSI's creditor Jabil.

b. Sufficiency of the Evidence to Show Cohen Breached His Fiduciary Duty

Separate Defendants argue Cohen never had a duty to disclose Appel's involvement with LSI before the execution of the Jabil contract, and therefore, the jury's finding that he breached his fiduciary duty must be overturned. Br. Supp. Separate Defs' Mot. JMOL 4, ECF No. 294-1. Plaintiff responds that the jury correctly found that Cohen breached his fiduciary duty to LSI in at least three ways: (1) he caused LSI to enter into a multimillion dollar contract with Jabil for an illegitimate purpose; (2) he allowed Appel, a convicted felon, to control LSI; and (3) he failed to disclose Appel's involvement to the public and outside creditors. Pl.'s Resp. Defs.' Mot. JMOL 4, ECF No. 306.

Appendix D

Under Texas law, a breach of fiduciary duty claim requires: (1) a fiduciary relationship; (2) a breach of this relationship; and (3) an injury to the plaintiff or benefit to the defendant resulting from this breach. *Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 283 (5th Cir. 2007). It is also well established that "[c]orporate officers owe fiduciary duties to the corporations they serve." *Duke Energy Int'l L.L.C. v. Napoli*, 748 F. Supp. 2d 565, 667 (S.D. Tex. 2010) (citing *Loy v. Harter*, 128 S.W.3d 397, 407 (Tex. App.—Texarkana 2004, pet. denied)). Consistent with these legal principles, the Court instructed the jury:

> You are instructed that an officer or director owes a fiduciary duty to a corporation during the period of time that he was an officer or director of the corporation. The period of time relevant to each defendant in connection with this question for LSI is as follows:
>
> 1. Matthew Cohen--March 2009 until June 2012.
>
> 2. John Paul DeJoria--October 21, 2011 until September 14, 2012.
>
> You are further instructed that to prove that a defendant failed to comply with his fiduciary duty to LSI, Carey Ebert, as Trustee, must prove that the defendant failed to comply with either a duty of loyalty or duty of care owed to LSI. The duty of loyalty requires that an officer or director act in good faith and not allow his or her personal interest to prevail over the interest of the corporation. The duty of loyalty

> is described as requiring an extreme measure of candor, unselfishness, and good faith on the part of the officer or director. The duty of care requires that the officer or director handle his corporate duties with the diligence and prudence that an ordinarily prudent person would use under similar circumstances. . . .[5]

Jury Charge 6, ECF No. 287. The jury found that Cohen breached his fiduciary duty to LSI. *Id.* For the following reasons, this finding is supported by sufficient evidence.

Plaintiff argued and presented evidence at trial that Cohen caused LSI to enter into the Jabil contract in May 2011 for illegitimate reasons, namely "to give the misleading appearance of commercial viability to the market for the purpose of furthering defendants' attempted pump-and-dump scheme." Pl.'s Resp. Defs.' Mot. JMOL 5, ECF No. 306. Cohen testified that he personally dealt with Jabil prior to the signing of the contract. Pl.'s App. 116, ECF No. 307-1. As stated above, McBroom and LSI CEO Wohler testified that LSI was not commercially viable at any time before or after the execution of the Jabil contract. Pl.'s App. 62, ECF No. 307-1. Wohler testified that when he was doing due diligence on behalf of DeJoria, he could not determine the operational cost of the water remediation technology, which meant that LSI's business model was unsound. Pl.'s App. 56–57, ECF No. 307-1. Furthermore, LSI's Form

5. This section of the jury charge further instructed the jury on the application of business judgment rule to actions by corporate officers and directors.

8K—filed with the SEC the day before LSI initiated bankruptcy proceedings—states that LSI "exploded its debt investment without a committed or potential revenue to service such debt." Pl.'s App. 21, ECF No. 307-1.

There is also evidence of Plaintiff's other two theories of Cohen's breach—that Cohen allowed Appel to control LSI and failed to disclose Appel's involvement to outside investors. *See infra* Section III(A)(2) (finding evidence of Appel's involvement in LSI decision-making sufficient to support a jury finding that Appel aided and abetted Cohen's breach of fiduciary duty). Upon review of the entire record, the Court finds sufficient evidence to support a jury finding that Cohen breached his fiduciary duty to LSI.

The Court also finds sufficient evidence to support a jury finding that Cohen's breach proximately caused $6.9 million in damages. *See* Jury Charge 8, ECF No. 287. Plaintiff argued that because Cohen entered the Jabil contract with knowledge that LSI would not be able to perform under the contract, the damages incurred as a result of this breach totaled slightly over $9.5 million (the amount of debt LSI owed to Jabil). To support this theory, Plaintiff presented Jabil's proof of claim filed in bankruptcy court and trial testimony of Jabil representatives. *See* Pl.'s Trial Exs. 175, 180. This is more than some evidence to show that the execution of the Jabil contract proximately caused LSI damages. It was within the jury's discretion to award below the requested $9.5 million based on their credibility determinations.

The jury also awarded $2 million in exemplary damages against Cohen based on clear and convincing evidence that Cohen acted with malice or gross negligence. Jury Charge 9–10, ECF No. 287; *see also* Tex. Civ. Prac. & Rem. Code § 41.003 (requirements for award of exemplary damages). The Court finds this award, based on the evidence of Cohen's conduct presented above, is appropriate and reasonable in relation to the actual damages awarded. *See Roth v. Mims*, 298 B.R. 272, 297–98 (N.D. Tex. 2003).

Accordingly, Separate Defendants JMOL is **DENIED** as to Cohen.

2. Howard Appel

The jury found that Appel aided and abetted Cohen's breach of fiduciary duty and it awarded $2.5 million in damages in connection with Damage Element 2.[6] Jury Charge 7–8, ECF No. 287. Separate Defendants argue that there is insufficient evidence to support these findings, namely that Appel was a minority shareholder before LSI executed the Jabil contract, and that Appel did not become an outside consultant to LSI until June 24, 2011. Br. Supp. Separate Defs.' Mot. JMOL 8–9, ECF No. 294-1. Further, Separate Defendants argue that Plaintiffs failed to present evidence of proximate cause with respect to the claim for damages assessed against both Appel and Bartlett. *Id.* at 16–17. They argue that Plaintiff's expert on damages "did not offer any opinion on causation between

6. *See supra* footnote 2 for Damage Element 2 of the jury charge.

the alleged $5.1 million and the breach of fiduciary duty or aiding and abetting breach of fiduciary duty." *Id.* at 18.

Plaintiff responds that the evidence supports a reasonable jury's conclusion "that Appel's participation in LSI and substantial assistance to Cohen started in early 2011 or late 2010" and Appel's participation was a proximate cause of Cohen's breach, resulting in the jury's reasonable finding of $2.5 million in damages. Pl.'s Resp. Defs.' Mot. JMOL 16–19, ECF No. 306.

Under Texas law, an aiding and abetting breach of fiduciary duty claim requires: (1) the existence of a fiduciary relationship; (2) a third party with knowledge of the fiduciary relationship; and (3) that third party's participation in the breach of that fiduciary relationship. *Meadows v. Hartford Life Ins. Co.*, 492 F.3d 634, 639 (5th Cir. 2007) (citing *Cox Tex. Newspapers, L.P. v. Wootten,* 59 S.W.3d 717, 721–22 (Tex. App. 2001). Consistent with these legal principles, the Court instructed the jury:

> To establish a claim for aiding and abetting a breach of fiduciary duty, Carey Ebert, as LSI's trustee, must prove: (1) the existence of a fiduciary relationship; (2) that the third party knew of the fiduciary relationship; and (3) that the third party was aware that it was participating in the breach of that fiduciary relationship.

Jury Charge 7, ECF No. 287. The first element here is undisputed—the parties agree that Cohen was an officer

and director of LSI and Cohen owed LSI a fiduciary duty. *Id.* at 5, 7. Second, Plaintiff offered more than some evidence that Appel knew that Cohen was an officer and director of LSI—including, for example, Appel's own testimony about his meeting with "Harvey Kaye, my friend Kenny, and Matt Cohen" in October 2010. *See* Pl.'s App. 77–78, 85, ECF No. 307-1.

Separate Defendants argue that there is no evidence in the record to support a jury finding that Appel "knowingly participated and provided substantial assistance in connection with the alleged breach of fiduciary duty" by Cohen, and therefore Plaintiff failed to prove an essential element of their claim. Br. Supp. Separate Defs.' Mot. JMOL 9, ECF No. 294-1. The Court disagrees. Plaintiff provided more than some evidence as to this element such that a reasonable jury could conclude that Appel knowingly participated in, and substantially assisted, Cohen's breach. Plaintiff presented evidence that Appel participated in LSI executive committee meetings (Pl.'s Trial Ex. 88); shared non-public information with Cohen (Pl.'s Trial Exs. 23, 81), drafted and edited LSI press releases (Pl.'s Trial Exs. 26, 145), and attempted to control the Board of Directors of LSI (Pl.'s Trial Ex. 70). Numerous LSI directors and associates testified that Cohen gave Appel access to LSI documents and allowed Appel to exercise control over LSI company policy and financial decisions. *See* Pl.'s App. 63, 66, 124, 128, 136–37, ECF No. 307-1. The evidence here sufficiently supports a reasonable jury finding that Plaintiff met her burden to prove the third element—that Appel knowingly participated and provided substantial assistance to Cohen in his breach of fiduciary

duty. For the reasons stated above, the Court finds that there is sufficient evidence for a jury finding that Appel aided and abetted Cohen's breach of fiduciary duty.

Separate Defendants next challenge the $2.5 million damages awards against Appel and Bartlett, claiming Plaintiff failed to prove that their actions proximately caused damage to LSI. They rely on *Qualls v. State Farm Lloyds*, 226 F.R.D. 551, 552 (N.D. Tex. 2005), for the proposition that "expert testimony is required under Texas law to prove causation where the underlying tort is of such a nature as not to be within the experience of the layman." Br. Supp. Separate Defs.' Mot. JMOL 17, ECF No. 294-1. They argue that Plaintiff's expert "Manz did not offer an opinion on causation between the alleged $5.1 million" and the breach, and therefore Appel and Bartlett cannot be found liable for the $2.5 million each or the additional $5 million in punitive damages assessed against Appel by the jury. Plaintiffs argue that under Texas law "lay testimony is adequate to prove causation in those cases in which general experience and common sense will enable a layman, to determine, with reasonable probability, the causal relationship between the event and the condition," and that this Court should review the evidence in this case under that standard. *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 733 (Tex. 1984).

But *Qualls* is legally and factually distinguishable. First, *Qualls* involved an action where homeowners brought claims for breach of the homeowner's policy, and *inter alia* breach of the duty of good faith and fair dealing against their insurance company. *Qualls*, 226 F.R.D. at

552. The court in *Qualls* considered if expert testimony on the issue of causation is required to prove damages under Texas law. *Id.* at 554–55. A faulty sewer pipe caused mold to develop in the Qualls' home, which led to the damages at issue. The court found that expert testimony was required to establish causation because "although it may be within general experience that water can cause mold, it is not within general experience that a buried sewer pipe that does not leak under normal flow conditions could cause mold over an extended distance throughout a house." *Id.* at 558. The *Qualls* court cited cases examining medical claims, where "medically complex diseases and causal ambiguities compound the need for expert testimony." *Id.* at. 556 (citations omitted). *Qualls* is therefore neither factually nor legally similar to the case at hand. Unlike *Qualls*, this case does not present the same kind of complex issues and ambiguities that would persuade the Court to depart from the standard set by the Texas Supreme Court in *Morgan* to prove causation. 675 S.W.2d at 733. Therefore, Plaintiff did not need to provide expert testimony on the causation issue if a reasonable jury of laymen could determine with reasonable probability that Appel's actions were a substantial factor in bringing about at least $2.5 million in damages to LSI.

There is more than some evidence in the record to support the jury's finding on causation. Manz testified that his extensive investigation into LSI's financials informed his opinion that certain defendants, including Appel, profited $5.1 million from the sale of LSI stock. Trial Tr. (Manz testimony) 32–34, ECF No. 288. There is also evidence in the record of Appel's involvement with

the terminated defendants—the "friends and family" who were included in Manz's damage assessment as entities who profited from selling LSI stock. Appel also testified at trial that he and Bartlett received "approximately a million and-a-half shares of restricted stock of LSI," warrants at a $2 strike price, and $350,000 in cash paid to FEQ Realty as a form of compensation for their efforts. This evidence is more than sufficient to support a jury finding that Appel caused, and is liable for, at least $2.5 million in damages.

The jury also awarded $5 million in exemplary damages against Appel. Jury Charge 10, ECF No. 287; *see also* Tex. Civ. Prac. & Rem. Code § 41.003 (requirements for award of exemplary damages).[7] The award of $5 million in exemplary damages equals two times the award of $2.5 million in actual damages assessed by the jury, and does not exceed the exemplary damages cap under § 41.008(b)(1)(A). Therefore, the Court finds this award, based on the evidence presented above of Appel's conduct, does not exceed the statutory cap and is appropriate and reasonable in relation to the actual damages awarded. *See Roth v. Mims*, 298 B.R. 272, 297–98 (N.D. Tex. 2003).

7. Texas imposes a cap on exemplary damages and provides "(b) [e]xemplary damages awarded against a defendant may not exceed an amount equal to the greater of: (1)(A) two times the amount of economic damages; (B) plus an amount equal to any noneconomic damages found by the jury, not to exceed $750,000; (2) or $200,000." Tex. Civ. Prac. & Rem. Code § 41.008.

Accordingly, Separate Defendants JMOL is **DENIED** as to Appel.

3. Earnest Bartlett

The jury found that Bartlett aided and abetted Cohen's breach of fiduciary duty and it awarded $2.5 million in damages in connection with Damage Element 2.[8] Jury Charge 7–8, ECF No. 287. Separate Defendants argue that there is insufficient evidence to support these findings because Plaintiff failed to prove that Bartlett "knowingly participated in and provided substantial assistance in connection with the alleged breach of [ ] Cohen's fiduciary relationship to LSI . . . ." Br. Supp. Separate Defs.' Mot. JMOL 19, ECF No. 294-1.

To prove Bartlett aided and abetted Cohen's breach of fiduciary duty, Plaintiff was required to prove: (1) the existence of a fiduciary relationship; (2) that Bartlett knew of the fiduciary relationship; and (3) that Bartlett was aware that he was participating in the breach of that fiduciary relationship. *Meadows*, 492 F.3d at 639. The first element here is undisputed—the parties agree that Cohen was an officer and director of LSI and Cohen owed LSI a fiduciary duty. Jury Charge 5, 7, ECF No. 287. Second, Plaintiff offered more than some evidence that Bartlett knew that Cohen was an officer and director of LSI—Appel testified about his close business relationship with Bartlett and how he encouraged Bartlett to invest in LSI

8. *See supra* footnote 2 for Damage Element 2 of the jury charge.

through his company FEQ Realty, LLC ("FEQ Realty"). Pl.'s App. 76–78, ECF No. 307-1; Def.'s Demo. Trial Ex. 30. Bartlett, through FEQ Realty, invested in LSI and it is therefore reasonable to infer that as an investor, he knew of LSI's officers and directors through LSI's public disclosure documents and other means. Pl.'s Trial Ex. 143. Bartlett confirmed in trial testimony that he was intimately involved with FEQ Realty and the company signed a written consulting agreement with LSI. Pl.'s App. 91, ECF No. 307-1; Pl.'s Trial Ex. 114). The Court finds that the jury could reasonably infer from all of the evidence presented that Bartlett knew of Cohen's fiduciary relationship with LSI.

Lastly, Separate Defendants argue that Plaintiff failed to prove an essential element of their claim because there is no evidence in the record to support a jury finding that Bartlett knowingly participated and provided substantial assistance in connection with Cohen's breach. Br. Supp. Separate Defs.' Mot. JMOL 18–19, ECF No. 294-1. The Court disagrees. Bartlett's company FEQ Realty had a consulting agreement giving it broad powers to manage and control LSI's affairs. Pl.'s Trial Ex. 114. There is also evidence that Bartlett and Appel regarded Cohen as their inside man within LSI who they could use for information and control. Bartlett attended LSI executive committee meetings (Pl.'s Trial Ex. 88) and convinced DeJoria to protect Cohen from being fired (Pl.'s Trial Ex. 318). LSI associates also believed that Bartlett "interfere[ed] with the day-to-day management of LSI almost on a daily basis." Pl.'s Trial Ex. 342. This is more than some evidence that Bartlett knowingly participated in, and provided substantial assistance to, Cohen's breach of fiduciary duty.

Separate Defendant's also argue that Plaintiff failed to establish that Bartlett's actions proximately caused damage to LSI. Separate Defendants raised many of the same arguments for Bartlett as they did for Appel, claiming there was insufficient evidence for the jury to find that Bartlett's actions resulted in $2.5 million in damages to LSI. The Court therefore incorporates here its reasoning on causation in Section III(A)(2) and holds that there is sufficient evidence to show causation with respect to Bartlett. Further, there is evidence that FEQ Realty, a company owned and controlled by Bartlett, generated a net profit of $2.3 million. Trial Tr. (Manz testimony) 37–38, ECF No. 288. This, along with the evidence described in Section III(A)(2) above, is more than sufficient to support a jury finding that Bartlett's actions proximately caused damage to LSI in the amount of $2.5 million.

Accordingly, the Court **DENIES** Separate Defendant's Rule 50 motion as to Bartlett.

B. Separate Defendants' Rule 59 Motion

The Fifth Circuit has held that a new trial is appropriate where: (1) the verdict is against the weight of the evidence, (2) the amount of damages awarded is excessive, or (3) the trial was unfair or marred by prejudicial error. *Seidman*, 923 F.2d at 1140. "Courts do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done, and the burden of showing harmful error rests on the party seeking the new trial." *Del Rio*, 589 F.2d at 179 n.3. Separate Defendants argue that Plaintiff's counsel made

remarks about expert testimony in his closing statement that were highly prejudicial. Defendants' counsel objected at the time and was overruled.[9] The Court does not believe the statement made by Plaintiff's counsel caused manifest injustice to the movants, and Separate Defendants have failed to provide evidence of harmful error. The Court therefore **DENIES** Separate Defendants' motion for new trial**.**

C. DeJoria's Rule 50 Motion

The jury found DeJoria breached his fiduciary duty and aided and abetted Cohen's breach of fiduciary duty. Jury Charge 6–7, ECF No. 287. The jury assessed damages against DeJoria totaling $1.5 million as to Damage Element 1 and $1 million in exemplary damages.

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9. The comment that Separate Defendants argue is prejudicial reads in the transcript as follows:

> **Mr. Cullens:** Thank you, Your Honor. Eight minutes? . . . I will suggest to you what Mr. Shemin knows, but I will make it clear. It would be improper for any experts – You remember we went through all the experts. You can't state your personal opinion; that's for the jury.
>
> **Mr. Shemin:** Objection, Your Honor. I hate to object. That's just not an accurate statement of law.
>
> **Mr. Cullens:** Your Honor, Federal Rules of Evidence clearly –
>
> **The Court:** Hold on. Hold on. I overrule the objection. Go ahead.

See Min. Entry 19:17–20:9, ECF No. 293.

Id. at 8, 10. DeJoria filed his motion for judgment as a matter of law under Rule 50, or in the alternative, motion to alter or amend the judgment, and motion for new trial under Rule 59 on August 7, 2017. DeJoria Mot. JMOL, ECF No. 296. DeJoria generally argues that the evidence presented at trial was insufficient to support the jury verdict.

To prove DeJoria breached his fiduciary duty to LSI, Plaintiff was required to establish (1) a fiduciary relationship; (2) a breach by DeJoria; and (3) that DeJoria's breach resulted in injury to Plaintiff or benefit to DeJoria. *Navigant Consulting*, 508 F.3d at 283. The first element is undisputed here—DeJoria as a director of LSI owed the company a fiduciary duty from the time he became a director on October 21, 2011, until September 14, 2012. Jury Charge 5, ECF No. 287.

As to the second element, Plaintiff did not argue at trial that DeJoria's direct actions resulted in a breach of his fiduciary duty. Rather, Plaintiff presented a theory that DeJoria's decision to refrain from acting in accordance with his legal duties constituted a breach. Plaintiff argued that DeJoria knew that the Jabil contract was harmful to the company, that Appel and Bartlett's influence hurt LSI, and that DeJoria chose to do nothing while the company floundered. Specifically, Plaintiff argued that upon becoming a director of LSI in October 2011, DeJoria had a duty to "immediately take the necessary steps to terminate the Jabil contract and mitigate the damage to LSI" and prevent Appel and Bartlett from exercising control over LSI. Pl.'s Resp. 15, ECF No. 308.

Appendix D

The Supreme Court recognized in *Briggs* that directors and officers of a corporation are liable for losses their company incurs due to their neglect of duty. *Briggs v. Spaulding*, 141 U.S. 132, 146 (1891); *see also* 3A Fletcher Cyclopedia Of The Law Of Private Corporations, 1082 (1986 rev. ed.) ("[D]irectors . . . liable for the losses caused by their neglect of duty although such losses resulted after they had ceased to be directors . . . ."). Plaintiff presented evidence at trial that DeJoria knew of: (1) LSI's insolvency before LSI entered into the Jabil contract, saddling the company with millions of dollars of debt; and (2) the shady and damaging actions taken by Appel and Bartlett. The Court is unpersuaded that the evidence of DeJoria's knowledge of LSI's insolvency before LSI committed to the Jabil contract sufficiently supports a finding that DeJoria is liable for the damages resulting from the Jabil contract. Plaintiff has not shown that DeJoria should be liable for damages incurred by action that predates his time as an LSI director. Nor has Plaintiff pointed to evidence in the record that would support a conclusion that he breached his fiduciary duty related to the Jabil contract while he was a director. *Cf. Navigant Consulting,* 508 F.3d at 283 (requiring the existence of a fiduciary relationship to find a breach of fiduciary duty).

The Court does find, however, that there is sufficient evidence to support Plaintiff's alternative theory of DeJoria's breach—namely, DeJoria's awareness of, and failure to shield LSI from, the bad acts of Cohen, Appel, and Bartlett. Plaintiff presented evidence that indicates DeJoria knew of Appel and Bartlett's self-dealing and chose to move slowly rather than attempt to cancel their

consulting agreements or halt their participation in LSI affairs. Pl.'s App. 18–20, ECF No. 307-1 (Mar. 2, 2012 letter from Gustin, Wohler, and Link to DeJoria); Pl.'s Trial Ex. 318 (Aug. 17, 2012 Wohler e-mail) ("[DeJoria] has thwarted us on every single occasion. To the point where he refused to acknowledge board minutes mentioning wrongdoing of the Appel group."). There is also evidence that Appel and Bartlett persuaded DeJoria not to allow CEO Wohler to fire Cohen after LSI associates became aware of Cohen's harmful actions. Pl.'s Trial Ex. 318 (Aug. 17, 2012 Wohler e-mail) ("I tried to fire [ ] Cohen for numerous documented reasons with [DeJoria]'s authority and then [Appel], [Bartlett] would call him and he would force me to rescind the firing"). With this evidence, the jury could reasonably infer that DeJoria's actions and inaction related to relieving Cohen of his duties constituted a breach of his duty to LSI.

The third element requires Plaintiff to provide evidence that proves DeJoria benefitted from his breach, or that his breach caused damage to LSI. It is clear that DeJoria did not benefit from his dealings with LSI; in fact he lost a substantial amount of money. *See* DeJoria Mot. JMOL 5, ECF No. 296 (containing a chart showing DeJoria's investments in LSI in 2011 and 2012). Plaintiff presented evidence of a report addressed on February 9, 2012, to Gustin and DeJoria (also received by CEO Wohler) summarizing documentation related to LSI stock sales by Appel. Pl.'s Trial Ex. 333 (Lugo Report) ("I have found numerous documents whereby shares are being purchased at $1.00 per share by [ ] Appel and or persons or corporations he may control and then sold into the open

market at then current price [sic] with a spread of 2 to 3 points of immediate profits generated."). LSI hired the author of the report, Jose Antonio Lugo ("Lugo"), to look into suspicions of market manipulation. July 13, 2017 Trial Tr. 113:17–23 (Appel Cross). Lugo opined that under a securities regulation known as Rule 16B, which regulates insider trading, Appel should have paid back the profits he made to LSI. *See* Pl.'s Trial Ex. 333. Months later, in May 2012, Lugo alerted LSI associates that he believed Appel would be considered an undisclosed investor by the SEC and "[e]ach and every share that [ ] Appel has purchased and sold can be considered by the SEC as RESTRICTED SHARES SALES. [Appel] is an insider and this will be a major problem for [LSI]." Pl.'s Trial Ex. 452 (Lugo e-email) (emphasis in original). This constitutes sufficient evidence that DeJoria consciously disregarded the activities of Cohen, Bartlett, and Appel. Moreover, from the evidence presented that Appel was profiting from LSI stock through insider trading, the jury could reasonably infer that absent DeJoria's protection of Cohen and Appel, the damages incurred by the undisclosed sale of LSI stock would not have occurred. Therefore, the jury could reasonably infer that DeJoria's acts proximately caused damages to LSI. Accordingly, the Court finds that sufficient evidence exists as to all three elements to support a finding that DeJoria breached his fiduciary duty to LSI.

The jury found DeJoria liable for $1.5 million in liabilities incurred by LSI because of his breach of fiduciary duty. Jury Charge 8, ECF No. 287. The Court must determine whether there is sufficient evidence in the

record to support the damage award. First, Manz testified that his extensive investigation into LSI's financials informed his opinion that certain defendants, including Appel and Bartlett, profited $5.1 million from the sale of LSI stock. Trial Tr. (Manz testimony) 32–34, ECF No. 288. This evidence alone is not sufficient; the profit must have occurred during DeJoria's tenure. While DeJoria was a director—from October 21, 2011 and through February 7, 2012—Appel himself provided a record, in the form of an e-mail, of the "Bartlett/Appel group" buying well over 2 million shares and selling them into the market. *See* Pl.'s Trial Ex. 124. At the minimum price of $1 per share (as described in Appel's e-mail), the jury could reasonably infer that Appel and Bartlett profited at least $2 million during DeJoria's tenure. This is more than some evidence to support a jury finding that DeJoria's breach caused $1.5 million in damages to LSI. It was within the jury's discretion to award below the amount shown by the evidence based on their credibility determinations.

Next, DeJoria also argues there is insufficient evidence that he aided and abetted Cohen's breach of fiduciary duty. DeJoria Mot. JMOL 6–7, ECF No. 296. To prove this claim at trial, Plaintiff was required to establish: (1) the existence of a fiduciary relationship between Cohen and LSI; (2) that DeJoria knew of that fiduciary relationship; and (3) that DeJoria was aware that he was participating in Cohen's breach of that fiduciary relationship. *Meadows*, 492 F.3d at 639. The first element here is undisputed—the parties agree that Cohen was an officer and director of LSI and Cohen owed LSI a fiduciary duty. Jury Charge 5, 7, ECF No. 287. Second, Plaintiff offered evidence that

DeJoria knew that Cohen was an officer and director of LSI—DeJoria was a longtime investor in LSI and it is therefore reasonable to infer that as an investor, he knew of LSI's officers and directors through LSI's public disclosure documents and other means. *See* Pl.'s Trial Ex. 143.

Lastly, Plaintiff argues that by allowing Cohen, Appel, and Bartlett to maintain control over LSI even after he knew of their wrongdoing, DeJoria knowingly participated in, and provided substantial assistance to, Cohen's breach of fiduciary duty. Pl.'s Resp. 9–13, ECF No. 308. There is more than some evidence in the record—detailed throughout this order—that DeJoria was fully aware of that Cohen was mishandling LSI's affairs. *See, e.g.*, Defs.' Ex. 421 at 58–65, ECF No. 276; Pl.'s App. 16, 18–20, 65–66, ECF No. 307-1. The evidence cited above shows that Wohler and other LSI associates frequently informed DeJoria of the day-to-day operations of the company and warned him of Cohen's dealings with Appel and Bartlett. There is also evidence that Bartlett persuaded DeJoria not to allow CEO Wohler to fire Cohen after LSI associates became aware of Cohen's harmful actions. Pl.'s Trial Ex. 318. This evidence supports the theory Plaintiff argued at trial—that DeJoria knowingly participated in Cohen's breach by allowing Cohen to continue his wrongful actions, namely giving Appel and Bartlett significant control over LSI's affairs, and these actions caused harm to LSI. The Court finds that the evidence is sufficient to support a finding that DeJoria aided and abetted Cohen's breach of fiduciary duty and DeJoria is therefore jointly and severally liable for the damages assessed by Cohen's breach of fiduciary duty.

The jury also awarded $1 million in exemplary damages against DeJoria. Jury Charge 9–10, ECF No. 287; *see also* Tex. Civ. Prac. & Rem. Code § 41.003 (requirements for award of exemplary damages). The Court finds this award, based on the evidence presented above of DeJoria's conduct, is appropriate and reasonable in relation to the actual damages awarded. *See Roth v. Mims*, 298 B.R. 272, 297–98 (N.D. Tex. 2003).

For the reasons stated above, DeJoria's Rule 50 motion is **DENIED** in its entirety.

D. DeJoria's Rule 59 Motion

DeJoria formulaically concludes his Rule 50 motion with a request that the Court grant a new trial in this matter, but provides no argument or evidence of prejudicial error or manifest injustice of the jury verdict. DeJoria Mot. JMOL 19–20, ECF No. 296. As stated above, the Fifth Circuit has found that a new trial is appropriate where: (1) the verdict is against the weight of the evidence, (2) the amount of damages awarded is excessive, or (3) the trial was unfair or marred by prejudicial error. *Seidman*, 923 F.2d at 1140. "Courts do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done, and the burden of showing harmful error rests on the party seeking the new trial." *Del Rio*, 589 F.2d at 179 n.3. The Court finds that DeJoria has failed to meet his burden of showing why the Court must grant a new trial and therefore DeJoria's motion is **DENIED.**

E. Plaintiff's Rule 58 Amended Motion For Judgment

The general rule, applicable here and in most cases, which has been recognized repeatedly by the Texas Supreme Court holds that: "The jury generally has discretion to award damages within the range of evidence presented at trial." *Sw. Energy Prod. Co.*, 491 S.W.3d at 713; *see also, e.g.*, *Gulf States Utils. Co. v. Low*, 79 S.W.3d 561, 566 (Tex. 2002); *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 506 (Tex. 2001) (holding that evidence was sufficient to support jury's damage award where jury's damages finding was "within the range of evidence the [plaintiff] presented"). The damage awards here were not excessive but were within the range of damages presented by Plaintiff at trial.

Texas law also states that if a third party knowingly participates in a defendant's breach of fiduciary duty owed to a plaintiff, the third party is jointly liable with the defendant for damages to the plaintiff proximately caused by this breach of fiduciary duty, and the plaintiff has the same equitable remedies against the defendant and the third party based upon this breach. *Kline v. O'Quinn*, 874 S.W.2d 776, 786–87 (Tex. App.—Houston [14th Dist.] 1994, writ denied); *Kinzbach v. Corbett–Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 512–14 (1942). Therefore, based on the jury findings and Texas law, the Court finds that Appel, Bartlett, and DeJoria are jointly and severally liable for the $6.9 million in compensatory damages awarded against Cohen. Defendants Appel, Bartlett, and DeJoria are also personally liable for the damages

assessed against them for aiding and abetting Cohen's breach and exemplary damages. Cohen is also personally liable for the exemplary damages assessed against him.

Plaintiff's amended motion for judgment is therefore **GRANTED**.

IV. CONCLUSION

For the reasons stated above, the Court finds that Separate Defendants' Motion to Alter Judgment as a Matter of Law (ECF No. 294) should be and is hereby **DENIED**; Defendant John Paul DeJoria's Motion for Judgment as a Matter of Law (ECF No. 296) should be and is hereby **DENIED**; and Plaintiff's Amended Motion for Judgment (ECF No. 297) should be and is hereby **GRANTED.** In light of this decision, the parties are to file a joint status report no later than January 29, 2018, setting forth what else needs to be accomplished to conclude this matter.

SO ORDERED on this **22nd day** of **January, 2018.**

/s/_____
Reed O'Connor
United States District Judge

APPENDIX E — JURY CHARGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORTH WORTH DIVISION, FILED JULY 14, 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Civil Action No.: 4:15-cv-225-0

CAREY D. EBERT,

Plaintiff,

v.

MICHAEL GUSTIN, *et al.*,

Defendants.

JURY CHARGE

MEMBERS OF THE JURY:

Introduction

It is my duty and responsibility to instruct you on the law you are to apply in this case. The law contained in these instructions is the only law you may follow. It is your duty to follow what I instruct you the law is, regardless of any opinion that you might have as to what the law ought to be.

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If I have given you the impression during the trial that I favor either party, you must disregard that impression. If I have given you the impression during the trial that I have an opinion about the facts of this case, you must disregard that impression. You are the sole judges of the facts of this case. Other than my instructions to you on the law, you should disregard anything I may have said or done during the trial in arriving at your verdict.

You should consider all of the instructions about the law as a whole and regard each instruction in light of the others, without isolating a particular statement or paragraph.

The testimony of the witnesses and other exhibits introduced by the parties constitute the evidence. The statements of counsel are not evidence; they are only arguments. It is important for you to distinguish between the arguments of counsel and the evidence on which those arguments rest. What the lawyers say or do is not evidence. You may, however, consider their arguments in light of the evidence that has been admitted and determine whether the evidence admitted in this trial supports the arguments. You must determine the facts from all the testimony that you have heard and the other evidence submitted. You are the judges of the facts, but in finding those facts, you must apply the law as I instruct you.

You are required by law to decide the case in a fair, impartial, and unbiased manner, based entirely on the law and on the evidence presented to you in the courtroom. You may not be influenced by passion, prejudice, or

sympathy you might have for the plaintiff or the defendant in arriving at your verdict.

Burden of Proof

Unless otherwise instructed, Plaintiff Carey Ebert, as the Trustee, has the burden of proving her case by a preponderance of the evidence. To establish by a preponderance of the evidence means to prove something is more likely so than not so. If you find that Carey Ebert has failed to prove any element of her claim by a preponderance of the evidence, then she may not recover on that claim.

The Evidence

The evidence you are to consider consists of the testimony of the witnesses, the documents and other exhibits admitted into evidence, and any fair inferences and reasonable conclusions you can draw from the facts and circumstances that have been proven.

Generally speaking, there are two types of evidence. One is direct evidence, such as testimony of an eyewitness. The other is indirect or circumstantial evidence. Circumstantial evidence is evidence that proves a fact from which you can logically conclude an other fact exists. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts from a preponderance of all the evidence, both direct and circumstantial.

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Witness Testimony

You alone are to determine the questions of credibility or truthfulness of the witnesses. In weighing the testimony of the witnesses, you may consider the witness's manner and demeanor on the witness stand, any feelings or interest in the case, or any prejudice or bias about the case, that he or she may have, and the consistency or inconsistency of his or her testimony considered in the light of the circumstances. Has the witness been contradicted by other credible evidence? Has he or she made statements at other times and places contrary to those made here on the witness stand? You must give the testimony of each witness the credibility that you think it deserves.

Even though a witness may be a party to the action and therefore interested in its outcome, the testimony may be accepted if it is not contradicted by direct evidence or by any inference that may be drawn from the evidence, if you believe the testimony.

You are not to decide this case by counting the number of witnesses who have testified on the opposing sides. Witness testimony is weighed; witnesses are not counted. The test is not the relative number of witnesses, but the relative convincing force of the evidence. The testimony of a single witness is sufficient to prove any fact, even if a greater number of witnesses testified to the contrary, if after considering all of the other evidence, you believe that witness.

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In weighing the credibility of a witness, you may consider the fact that he or she has previously been convicted of a felony. Such a conviction does not necessarily destroy the witness's credibility, but it is one of the circumstances you may take into account in determining the weight to give to his or her testimony.

In determining the weight to give to the testimony of a witness, consider whether there was evidence that at some other time the witness said or did something, or failed to say or do something, that was different from the testimony given at the trial. A simple mistake by a witness does not necessarily mean that the witness did not tell the truth as he or she remembers it. People may forget some things or remember other things inaccurately. If a witness made a misstatement, consider whether that misstatement was an intentional falsehood or simply an innocent mistake. The significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

When knowledge of technical subject matter may be helpful to the jury, a person who has special training or experience in that technical field is permitted to state his or her opinion on those technical matters. However, you are not required to accept that opinion. As with any other witness, it is up to you to decide whether to rely on it.

Deposition Testimony

Certain testimony has been presented to you through a deposition. A deposition is the sworn, recorded answers

to questions a witness was asked in advance of the trial. Under some circumstances, if a witness cannot be present to testify from the witness stand, that witness's testimony may be presented, under oath, in the form of a deposition. Sometime before this trial, attorneys representing the parties in this case questioned this witness under oath. A court reporter and sometimes a videographer was present and recorded the testimony. During the course of the trial the questions and answers have either been read to you or presented by video. This deposition testimony is entitled to the same consideration and is to be judged by you as to credibility and weighed and otherwise considered by you in the same way as if the witness had been present and had testified from the witness stand in court.

No Inference from Filing Suit

The fact that Carey Ebert brought a lawsuit and is in court seeking damages creates no inference that she is entitled to a judgment. Anyone may make a claim and file a lawsuit. The act of making a claim in a lawsuit, by itself, does not in any way tend to establish that claim and is not evidence.

Similar Acts

Evidence that an act was done at one time or on one occasion is not any evidence or proof whatsoever that the act was done in this case. Then how may you consider evidence of similar acts?

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You may consider evidence of similar acts for the limited purpose of showing motive, opportunity, intent, knowledge, plan, identity, or absence of mistake or accident, which is at issue in this case.

Such evidence may not be considered for any other purpose whatsoever. You may not use the evidence to consider or reflect an individual's character.

Limiting Instruction

You will recall that during the course of this trial I instructed you that I admitted certain testimony and certain exhibits for a limited purpose. You may consider such evidence only for the specific limited purpose for which it was admitted.

Objections and Arguments by Counsel

During the course of the trial, you have heard counsel make objections to evidence. It is the duty of the attorneys on each side of the case to object when the other side offers testimony or other evidence that the attorney believes is not properly admissible. You should not draw any inference against an attorney or his client because the attorney had made an objection.

Upon allowing testimony or other evidence to be introduced over the objection of any attorney, the Court does not, unless expressly stated, indicate any opinion as to the weight or effect of such evidence. You are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

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When the Court has sustained an objection to a question addressed to a witness, or to the introduction of any other evidence, you must disregard the question entirely, and may draw no inference from the asking of it, or speculate as to what the witness would have said if the witness had been permitted to answer.

From time to time during the trial, it may have been necessary for me to talk with the attorneys out of your hearing, either by having a conference at the bench when you were present in the courtroom, or by calling a recess. The purpose of these conferences was not to keep relevant information from you, but to decide how certain evidence is to be treated under the rules of evidence and to avoid confusion and error.

Definitions

You are hereby instructed that the following definitions apply to the Jury Instructions and Questions, unless otherwise indicated.

The Parties

"Carey Ebert" refers to the Plaintiff Carey D. Ebert, as trustee for the Chapter 11 bankruptcy estate of Latitude Solutions, Inc.

"LSI" refers to Latitude Solutions, Inc.

"Howard Appel" refers to Defendant Howard Appel.

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"Ernest Bartlett" refers to Defendant Ernest Bartlett.

"Matthew Cohen" refers to Defendant Matthew Cohen

"John Paul DeJoria" refers to Defendant John Paul DeJoria.

Stipulated Facts

A "stipulation" is an agreement. When there is no dispute about certain facts, the attorneys may agree or "stipulate" to those facts. You must accept a stipulated fact as evidence and treat that fact as having been proven here in court.

You are hereby instructed that the following stipulated facts apply to the Jury Instructions and Questions, unless otherwise indicated.

1. Matthew Cohen was a founding member of LSI and was named as officer and director of LSI in March 2009. Matthew Cohen resigned as an officer and director of LSI in June 2012.

2. John Paul DeJoria was named as director of LSI on October 21, 2011 and resigned as a director of LSI on September 14, 2012. John Paul DeJoria was never an officer of LSI.

With this information, please answer the following questions.

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FIDUCIARY DUTY

QUESTION NO. 1

You are instructed that an officer or director owes a fiduciary duty to a corporation during the period of time that he was an officer or director of the corporation. The period of time relevant to each defendant in connection with this question for LSI is as follows:

1. Matthew Cohen-- March 2009 until June 2012.

2. John Paul DeJoria -- October 21, 2011 until September 14, 2012.

You are further instructed that to prove that a defendant failed to comply with his fiduciary duty to LSI, Carey Ebert, as Trustee, must prove that the defendant failed to comply with either a duty of loyalty or duty of care owed to LSI. The duty of loyalty requires that an officer or director act in good faith and not allow his or her personal interest to prevail over the interest of the corporation. The duty of loyalty is described as requiring an extreme measure of candor, unselfishness, and good faith on the part of the officer or director. The duty of care requires that the officer or director handle his corporate duties with the diligence and prudence that an ordinarily prudent person would use under similar circumstances.

In addition, you are instructed claims may be maintained against corporate fiduciaries where there is no showing of any personal benefit if the corporation is damaged.

You are further instructed that a director or officer shall not be held liable if his conduct falls within the business judgment rule, as defined in these instructions.

The business judgment rule provides that, however mistaken a decision may appear in hindsight, an officer or director of a corporation cannot be liable for claims against him if, in the discharge of his duties, he exercised ordinary care and acted in good faith and honestly exercised his best business judgment within the limits of the actual authority of his position with the corporation. A director shall not be held liable for honest mistake of judgment if he acted with due care, in good faith, and in furtherance of a rational business purpose.

Did any defendant listed below fail to comply with his fiduciary duty to LSI during the period of time that defendant was an officer or director of LSI?

Defendants	**Answer "Yes" or "No" for each Defendant**
Matthew Cohen	YES
John Paul DeJoria	YES

QUESTION NO.2

If you answered "Yes" for any defendant in Question No. 1, then answer Questions 2A, 2B, and 2C. Otherwise, do not answer the following question.

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To establish a claim for aiding and abetting in a breach of fiduciary duty, Carey Ebert, as LSI's trustee, must prove: (1) the existence of a fiduciary relationship; (2) that the third party knew of the fiduciary relationship; and (3) that the third party knowingly participated and provided substantial assistance in the breach of that fiduciary relationship.

If you found that there was a breach of fiduciary duty by any defendant, did any of the following defendants knowingly aid and abet in such breach of fiduciary duty?

QUESTION NO. 2A

Did Howard Appel aid and abet Matthew Cohen in committing the breach of fiduciary duty that you found Matthew Cohen committed in response to Question No. 1?

Answer "Yes" or "No": YES

QUESTION NO. 2B

Did Ernest Bartlett aid and abet Matthew Cohen in committing the breach of fiduciary duty that you found Matthew Cohen committed in response to Question No. 1?

Answer "Yes" or "No": YES

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QUESTION NO. 2C

Did John Paul Dejoria aid and abet Matthew Cohen in committing the breach of fiduciary duty that you found Matthew Cohen committed in response to Question No. 1?

Answer "Yes" or "No": YES

QUESTION NO.3

If you found, in response to Question No. 1 that there was a breach of fiduciary duty by any defendant, then answer the following question. Otherwise, do not answer the following question.

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Carey Ebert, as LSI's trustee, for the damages, if any, that were proximately caused by any breach of fiduciary duty or aiding and abetting such breach of fiduciary duty by that defendant?

"Proximate cause" means a cause that was a substantial factor in bringing about an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using the degree of care required of him would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

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In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment. Do not add any amount for interest on damages, if any. Consider the following elements of damages, if any, and none other.

1. The reasonable cash market value of liabilities incurred by LSI as a proximate cause of that defendant's breach of fiduciary duty, which liabilities are still owed and have not yet been paid, if any.

2. The reasonable market value of any gains to that defendant (including salaries, consulting fees, net proceeds from stock issuances to directors and/or officers of LSI, and other expenses) proximately caused by that defendant's breach of fiduciary duty.

Answer separately in dollars and cents for damages, if any.

Defendant	**Damage Element No. 1**	**Damage Element No. 2**
Howard Appel	$0	$2.5 Million
Ernest Bartlett	$0	$2.5 Million

Matthew Cohen	$6.5 Million	$400,000
John Paul DeJoria	$1.5 Million	$0

QUESTION NO. 4

Answer the following question regarding a defendant only if you answered "Yes" to Question No.1 (breach of fiduciary duty) or any portion of Question No.2 (aiding and abetting breach of fiduciary duty) regarding that defendant. Otherwise, do not answer the following question regarding that defendant.

"Clear and convincing evidence" means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

"Gross negligence" means an act or omission by the defendant

1. which when viewed objectively from the standpoint of the defendant at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

2. of which the defendant has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

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"Malice" means a specific intent by the defendant to cause substantial injury or harm to LSI.

Do you find by clear and convincing evidence that the harm to LSI related to the breach of fiduciary duty you found, or aiding and abetting such breach, resulted from gross negligence or malice?

Defendants	**Answer "Yes" or "No" for each Defendant, if you answered "Yes" for that Defendant in either Question Nos. 1 or 2**
Howard Appel	YES
Ernest Bartlett	NO
Matthew Cohen	YES
John Paul Deloria	YES

QUESTION NO. 5

Answer the following question regarding a defendant only if you answered "Yes" to Question No. 4 regarding that defendant. Otherwise, do not answer the following question regarding that defendant.

"Exemplary damages" means an amount that you may in your discretion award as a penalty or by way of punishment.

Factors to consider in awarding exemplary damages, if any, are—

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1. The nature of the wrong.

2. The character of the conduct involved.

3. The degree of culpability of the defendant.

4. The situation and sensibilities of the parties concerned.

5. The extent to which such conduct offends a public sense of justice and propriety.

6. The net worth of the defendant.

What sum of money, if any, if paid now in cash, should be assessed against the defendants and awarded to Carey Ebert, as LSI's trustee, as exemplary damages, if any, for the conduct found in response to Question No. 4?

Defendants	**Answer separately in dollars and cents for exemplary damages, if any Defendants only for any defendant that you answered "Yes" in response to Question No. 4**
Howard Appel	$5 Million
Ernest Bartlett	
Matthew Cohen	$2 Million
John Paul Deloria	$1 Million

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Jury Deliberations

It is now your duty to deliberate and to consult with one another in an effort to reach a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to reexamine your own opinions and change your mind if you are convinced that you were wrong. But do not give up on your honest beliefs because the other jurors think differently, or just to finish the case.

When you go into the jury room to deliberate, you may take with you a copy of this charge and the exhibits that I have admitted into evidence. You must select a foreperson to guide you in your deliberations and to speak for you here in the courtroom.

Your verdict must be unanimous. After you have reached a unanimous verdict, your foreperson must fill out the answers to the written questions on the verdict form and sign and date it. After you have concluded your service and I have discharged the jury, you are not required to talk with anyone about the case.

If you need to communicate with me during your deliberations, the foreperson should write the inquiry and give it to the court security officer. After consulting with the attorneys, I will respond either in writing or by meeting with you in the courtroom. Keep in mind, however, that you must never disclose to anyone, not even to me, your numerical division on any question.

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You may now proceed to the jury room to begin your deliberations.

/s/_____
Presiding Judge

July 14, 2017_____
Date

Jury Certification

The foregoing answers are the unanimous answers of the jury.

/s/_____
Foreperson

July 14, 2017_____
Date

APPENDIX F — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JUNE 12, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-10382

IN THE MATTER OF: LATITUDE SOLUTIONS, INCORPORATED,

Debtor.

CAREY D. EBERT,

Appellee,

v.

JOHN PAUL DEJORIA; HOWARD MILLER APPEL; EARNEST A. BARTLETT, III; MATTHEW J. COHEN,

Appellants.

Appeals from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING AND REHEARING *EN BANC*

(Opinion 04/30/2019, 5 Cir., _____, _____ F.3d _____)

Before BARKSDALE, SOUTHWICK, and HAYNES, Circuit Judges.

PER CURIAM:

☒ The Petition for Rehearing of Appellee Carey D. Ebert is DENIED and no member of this panel nor

judge in regular active service on the court having requested that the court be polled on Rehearing *En Banc*, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing *En Banc* is also DENIED.

☐ The Petition for Rehearing of Appellee Carey D. Ebert is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing *En Banc* is also DENIED.

☐ A member of the court in active service having requested a poll on the reconsideration of this cause *en banc*, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing *En Banc* is DENIED.

ENTERED FOR THE COURT:
/s/
CATHARINA HAYNES
UNITED STATES CIRCUIT JUDGE

APPENDIX G — STATUTES AND REGULATIONS

U.S.C.A. CONST. ART. III § 2, CL. 1

Section 2, Clause 1. Jurisdiction of Courts

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

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11 U.S.C.A. § 541

§ 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

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11 U.S.C.A. § 704

§ 704. Duties of trustee

(a) The trustee shall--

(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;

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28 U.S.C.A. § 157

§ 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to--

> **(A)** matters concerning the administration of the estate;
>
> **(B)** allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;
>
> **(C)** counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of

law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

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28 U.S.C.A. § 158

§ 158. Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals

(1) from final judgments, orders, and decrees;

(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

(3) with leave of the court, from other interlocutory orders and decrees;

of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council in accordance with paragraph (3), to hear and determine, with the consent of all the parties, appeals under subsection (a) unless the judicial council finds that--

(A) there are insufficient judicial resources available in the circuit; or

(B) establishment of such service would result in undue delay or increased cost to parties in cases under title 11.

Not later than 90 days after making the finding, the judicial council shall submit to the Judicial Conference of the United States a report containing the factual basis of such finding.

(2)(A) A judicial council may reconsider, at any time, the finding described in paragraph (1).

(B) On the request of a majority of the district judges in a circuit for which a bankruptcy appellate panel service is established under paragraph (1), made after the expiration of the 1-year period beginning on the date such service is established, the judicial council of the circuit shall determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(C) On its own motion, after the expiration of the 3-year period beginning on the date a bankruptcy appellate panel service is established under paragraph (1), the judicial council of the circuit may determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(D) If the judicial council finds that either of such circumstances exists, the judicial council may provide for the completion of the appeals then pending before such service and the orderly termination of such service.

(3) Bankruptcy judges appointed under paragraph (1) shall be appointed and may be reappointed under such paragraph.

(4) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(5) An appeal to be heard under this subsection shall be heard by a panel of 3 members of the bankruptcy appellate panel service, except that a member of such service may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

(6) Appeals may not be heard under this subsection by a panel of the bankruptcy appellate panel service unless the district judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district.

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(c)(1) Subject to subsections (b) and (d)(2), each appeal under subsection (a) shall be heard by a 3-judge panel of the bankruptcy appellate panel service established under subsection (b)(1) unless--

(A) the appellant elects at the time of filing the appeal; or

(B) any other party elects, not later than 30 days after service of notice of the appeal;

to have such appeal heard by the district court.

(2) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d)(1) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

(2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that--

> **(i)** the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
>
> **(ii)** the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
>
> **(iii)** an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

> **(B)** If the bankruptcy court, the district court, or the bankruptcy appellate panel--
>
> > **(i)** on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or
> >
> > **(ii)** receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A);

then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A).

(C) The parties may supplement the certification with a short statement of the basis for the certification.

(D) An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal is pending, issues a stay of such proceeding pending the appeal.

(E) Any request under subparagraph (B) for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.

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28 U.S.C.A. § 1254

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

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28 U.S.C.A. § 1334

§ 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. Subsection (c) and this subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction--

(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and

(2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.