APPENDIX

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-30222

STEPHEN D. COOK, DOCTOR; IN HIS CAPACITY AS CO-TRUSTEE OF MARSHALL HERITAGE FOUNDATION,
Plaintiff-Appellee,

v.

PRESTON L. MARSHALL, IN HIS CAPACITY AS CO-TRUSTEE OF PEROXISOME TRUST,
Defendant-Appellant,

STEPHEN D. COOK, DOCTOR; IN HIS CAPACITIES AS CO-TRUSTEE OF THE MARSHALL HERITAGE FOUNDATION AND MARSHALL LEGACY FOUNDATION,
Plaintiff-Appellee,

v.

PRESTON L. MARSHALL, BOTH IN HIS OFFICIAL CAPACITY AS CO-TRUSTEE OF PEROXISOME TRUST AND IN HIS PERSONAL CAPACITY,
Defendant-Appellant.

FILED: January 23, 2025

Before Smith, Stewart, and Duncan, Circuit Judges.

Stuart Kyle Duncan, Circuit Judge:

Stephen Cook, trustee of two charitable trusts, sued Preston Marshall personally and in his capacity as trustee of a related trust, alleging that Preston's lapses damaged the charitable trusts by causing them

to incur debt and tax penalties. The district court denied Preston's motion to dismiss and later granted Cook partial summary judgment. Preston asks us to dismiss the suit, among other reasons, because Cook's unnamed co-trustees lack diversity of citizenship. We reject that argument and affirm.

I.

We again address litigation over the patrimony of "the late oil tycoon J. Howard Marshall." *Cook v. Marshall*, 842 F. App'x 858, 860 (5th Cir. 2020) (unpublished) ("*Cook I*"). By way of background:

> Elaine Marshall, the widow of one of J. Howard Marshall's sons, had two children: Pierce and Preston Marshall. Stephen Cook was a longtime acquaintance of the Marshall family and served as trustee on several Marshall family foundations. For decades, the Marshall family distributed large sums of money to charity through the Marshall Heritage Foundation and its predecessors. The trustees of the Marshall Heritage Foundation included Elaine, Pierce, Preston, and Cook. In 2011, Elaine created the Peroxisome Trust (Peroxisome) as a vehicle to donate $100 million to the Marshall Heritage Foundation. Peroxisome's trust instrument made Pierce and Preston its co-trustees[.]
>
> *Ibid.*

In 2014, the Marshall Heritage Foundation was split into two trusts: the Marshall Legacy Foundation (MLF) and The Marshall Heritage Foundation (TMHF). *Ibid.* In 2017, Cook (as trustee of TMHF) sued Preston, claiming Preston failed as Peroxisome co-trustee to authorize annuity payments to TMHF. *Ibid.* "The district court ruled in Cook's favor, ordered Preston to authorize payments from Peroxisome to TMHF, and held Preston breached his fiduciary duties." *Ibid.* We affirmed that judgment in *Cook I* on December 31, 2020. *Id.* at 859.

In February 2021, Cook moved to enforce *Cook I*, contending Preston persisted in refusing to authorize payments and failed to file tax returns and otherwise mitigate damage to Peroxisome's beneficiaries. Cook also asked the district court to remove Preston as Peroxisome co-trustee.

The district court held Preston in contempt and ordered him to authorize his co-trustee Pierce to resolve Peroxisome's IRS liability and to make required payments to beneficiaries. The court declined to remove Preston as co-trustee, however. In April 2021, Preston filed a notice stating he had given Pierce these authorizations. In June 2021, Cook asked the court to authorize Pierce to resolve Peroxisome's Louisiana tax liability without Preston's input, which the court granted.

On November 18, 2021, Cook (as co-trustee of TMHF and MLF) filed the present suit against Preston in both his personal capacity and as Peroxisome co-trustee. Cook alleged Preston's prior fiduciary breaches and post-*Cook I* lapses inflicted tax debt and penalties on Peroxisome, which in turn deprived TMHF and MLF of funds due them as Peroxisome beneficiaries. Cook sought damages and interest against Preston personally and again sought Preston's removal as co-trustee.

Preston moved to dismiss, arguing that Cook's claims were barred by *res judicata* and also that Cook failed to join Elaine and Pierce as necessary and indispensable parties whose presence would have destroyed diversity jurisdiction. The court denied Preston's motion. The court later granted Cook's motion for partial summary judgment, rejecting Preston's arguments that Elaine and Pierce were comparatively at fault and that Cook had failed to mitigate damages. Preston timely appealed.

II.

We review *de novo* the order denying Preston's motion to dismiss based on *res judicata*. *Davis v. Dallas Area Rapid Transit*, 383 F.3d 309, 313 (5th Cir. 2004). We review for abuse of discretion the order denying Preston's motion to dismiss based on failure to join parties. *PHH Mortg. Corp. v. Old Republic Nat'l Title Ins. Co.*, 80 F.4th 555, 559 (5th Cir. 2023). We review *de novo* the partial summary judgment, applying the same standard as the district court. *Hager v. Brinker Tex., Inc.*, 102 F.4th 692, 697 (5th Cir. 2024); FED. R. CIV. P. 56(a).

III.

Preston presents four arguments on appeal: (A) the parties lack diversity; (B) the district court erred in proceeding without Elaine and Pierce; (C) *res judicata* bars the suit; and (D) even assuming the suit may proceed, the district court erred by failing to account for comparative-fault and failure-to-mitigate evidence. We address each issue in turn.

A.

After years of litigation, for the first time Preston claims the parties lack complete diversity of citizenship. He argues that "a trustee party has the citizenship of all trustees for purposes of diversity jurisdiction," and that Cook's unnamed co-trustees, Elaine and Pierce, are Texas citizens like Preston. So, Preston argues we must dismiss for lack of subject matter jurisdiction. *See* 28 U.S.C. § 1332(a)(1); *Strawbridge v. Curtiss*, 7 U.S. 267, 3 Cranch 267, 2 L.Ed. 435 (1806). His argument fails.

To begin with, the trusts themselves, TMHF and MLF, are not parties. Nor could they be. As traditional trusts, they cannot sue or be sued and, in fact, are not legal entities at all but "relationships" with no

citizenship of their own. *See* La. R.S. § 9:1731 ("A trust . . . is the relationship resulting from the transfer of title to property to a person to be administered by him as a fiduciary for the benefit of another."); *Succession of Brandt*, 2021-01521 (La. 9/1/22), 346 So.3d 765, 773 (same); *see also Americold Realty Tr. v. Conagra Foods, Inc.*, 577 U.S. 378, 383, 136 S.Ct. 1012, 194 L.Ed.2d 71 (2016) ("Traditionally, a trust was not considered a distinct legal entity, but a 'fiduciary relationship' between multiple people." (quoting *Klein v. Bryer*, 227 Md. 473, 476-477, 177 A.2d 412, 413 (1962); RESTATEMENT (SECOND) OF TRUSTS § 2 (1957))).

This means Cook and Preston are the only parties whose citizenship matters. Cook is a Louisianan, and Preston is a Texan. *See SXSW, L.L.C. v. Fed. Ins. Co.*, 83 F.4th 405, 407 (5th Cir. 2023) ("For natural persons, § 1332 citizenship is determined by domicile . . . ."); *Sivalls v. United States*, 205 F.2d 444, 446 (5th Cir. 1953) ("Every person has one, and only one, domicile."). So, complete diversity exists.

No authority says we must also consider the citizenship of non-party trustees. To the contrary, consider how the Seventh Circuit approached this issue in *Doermer v. Oxford Fin. Grp., Ltd.*, 884 F.3d 643 (7th Cir. 2018). The court held a non-party co-trustee's citizenship was irrelevant to diversity jurisdiction because "traditional trusts . . . were not considered distinct legal entities at common law, and hence cannot sue or be sued in their own name." *Id.* at 647. Accordingly, the court "look[ed] only to [the trustee party]'s citizenship, not the citizenship of his co-trustees." *Ibid.*

Preston claims Doermer "fundamentally conflicts with" *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 100 S.Ct. 1779, 64 L.Ed.2d 425 (1980), which he argues

requires assigning the unnamed co-trustees' citizenship to Cook.[1] Not so. *Navarro* held only that the citizenship of the trustee parties mattered for diversity purposes, noting that "[f]or more than 150 years, the law has permitted trustees . . . to sue *in their own right*[.]" 446 U.S. at 465-66, 100 S.Ct. 1779 (emphasis added). *Navarro* said nothing about non-party trustees.

If there were any doubt, the Supreme Court later "reminded litigants" that "*Navarro* reaffirmed a . . . rule that when a trustee files a lawsuit in *her* name, her jurisdictional citizenship is the State to which she belongs—as is true of any natural person." *Americold*, 577 U.S. at 382-83, 136 S.Ct. 1012. So, *Doermer* follows Supreme Court precedent faithfully by holding that "when a trustee of a traditional trust 'files a lawsuit or is sued in her own name, her citizenship is all that matters for diversity purposes.'" 884 F.3d at 647 (quoting *Americold*, 577 U.S. at 383, 136 S.Ct. 1012)).

Accordingly, we reject Preston's argument that the parties lack complete diversity of citizenship.

B.

Preston's second argument plays a variation on the first: he claims that, under *Navarro* and *Thomas v. Board of Trustees*, 195 U.S. 207, 25 S.Ct. 24, 49 L.Ed. 160 (1904), whenever a trustee brings an action on behalf of a traditional trust, all co-trustees are

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[1] Preston cites a bevy of other cases supposedly supporting this view. *See Thomas v. Bd. of Trustees of Ohio State Univ.*, 195 U.S. 207, 25 S.Ct. 24, 49 L.Ed. 160 (1904), *Bass v. Int'l Bhd. of Boilermakers*, 630 F.2d 1058 (5th Cir. 1980), *GBForefront L.P. v. Forefront Mgmt. Grp. LLC*, 888 F.3d 29 (3d Cir. 2018), *Momenian v. Davidson*, 878 F.3d 381 (D.C. Cir. 2017), and *Raymond Loubier Irrevocable Tr. v. Loubier*, 858 F.3d 719 (2d Cir. 2017). He is mistaken. None of those cases even concerns an unnamed co-trustee.

indispensable parties. But those cases say nothing about the indispensability of unnamed co-trustees.

This argument essentially repackages Preston's contention that the district court erred by refusing to join Elaine and Pierce under Federal Rule of Civil Procedure 19(a). *See PHH Mortg. Corp.*, 80 F.4th at 560 ("[A] court must determine whether a party is 'required' under Rule 19(a)[.]"). The court denied that motion, holding that it could afford complete relief without Elaine and Pierce; that their interests would not be impaired; and that nonjoinder did not leave Preston subject to a substantial risk of inconsistent obligations. *See* FED. R. CIV. P. 19(a)(1). To succeed on appeal, Preston must show that ruling was an abuse of discretion. *See Acevedo v. Allsup's Convenience Stores, Inc.*, 600 F.3d 516, 520 (5th Cir. 2010). He fails to do so.

To begin with, Preston cites no authority requiring a court to join all co-trustees as a matter of law. This is unsurprising because Rule 19 requires a "highly-practical, fact-based" inquiry. *Hood ex rel. Miss. v. City of Memphis*, 570 F.3d 625, 628 (5th Cir. 2009). That flexibility suggests the opposite rule from the one Preston advances: whether a court may proceed without all co-trustees depends on the circumstances. *See* WRIGHT & MILLER, 7 FEDERAL PRACTICE AND PROCEDURE § 1618 (3d ed.) ("Under some circumstances a trustee may not even be considered a party who must be joined in litigation involving the trust.").[2]

In any event, Preston shows no abuse of discretion. He contends only that the court "erred" because

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[2] *See also*, *e.g.*, *Henry v. Rizzolo*, No. 2:08-CV-00635-PMP-GWF, 2011 WL 2975539, at *4 (D. Nev. July 21, 2011) (denying defendant's motion to dismiss for failure to join trustees when "the existing parties are willing to and capable of making the trustees' arguments").

"[e]vidence from Pierce and Elaine regarding their contribution to damages . . . would support Preston's comparative fault arguments." But the court could consider this comparative fault evidence regardless of whether Pierce and Elaine were made parties. *See Milbert v. Answering Bureau, Inc.*, 2013-0022 (La. 6/28/13), 120 So.3d 678, 688 (noting that "[u]nder Louisiana's pure comparative fault system," courts consider "the fault of every person responsible for a plaintiff's injuries . . . whether or not they are parties" (quoting *Dumas v. State ex rel. Dept. of Culture, Recreation & Tourism*, 2002-0563 (La. 10/15/02), 828 So.2d 530, 537)).

In sum, Preston fails to show the district court abused its discretion by declining to join Elaine and Pierce.[3]

C.

Next, Preston argues *res judicata* bars the suit. We again disagree.

Under Louisiana law,"[t]he doctrine of *res judicata* is *stricti juris*; any doubt must be resolved against its application." *Guidry v. State Farm Mut. Auto. Ins. Co.*, 2021-00808 (La. 11/10/21), 326 So.3d 1224, 1224; *Dotson v. Atlantic Specialty Ins. Co.*, 24 F.4th 999, 1002 (5th Cir. 2022). To succeed, Preston must demonstrate that "(1) the [original] judgment is valid; (2) the judgment is final; (3) the parties are the same; (4) the cause or causes of action asserted in the second suit existed at the time of final judgment in the first litigation; and (5) the cause or causes of action asserted in the second suit arose out of the transaction or occurrence that was the subject matter of the first litigation." *Forum for Equal. PAC v. McKeithen*, 04-

[3] Preston's other joinder arguments concern Rule 19(b), which the district court did not reach.

2551 (La. 1/19/05), 893 So.2d 738, 745 (citing La. R.S. § 13:4231).

Preston argues that Cook's claim for Preston's removal as co-trustee is barred by *Cook I*. That is incorrect. As the district court pointed out, the removal claim arises largely from Preston's failure to comply with *Cook I* and his post-judgment refusals to resolve Peroxisome's tax liability. That conduct necessarily did not exist at the time of *Cook I*, so *res judicata* could not bar the claim. *See Ins. Assocs. v. Francis Camel Constr.*, 95-1955 (La. App. 1 Cir 5/10/96), 673 So. 2d 687, 689 ("When new facts intervene before the second suit, furnishing a new basis for the claims of the parties, ... the identity of issues requisite for the application of res judicata is absent.").

Nor are Cook's damages claims barred, because here he seeks damages against Preston in a different capacity than in *Cook I*. "A party appearing in an action in one capacity, individual or representative, is not thereby bound by or entitled to the benefits of the rules of res judicata in a subsequent action in which he appears in another capacity." *Burguieres v. Pollingue*, 2002-1385 (La. 2/25/03), 843 So.2d 1049, 1054 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 36(2) (1982)). In *Cook I*, Cook sought a judgment against Preston only in his capacity as a co-trustee of Peroxisome. Here, Cook seeks damages against Preston personally. Therefore, the parties are not identical.[4] *See Thomas v. Marsala Bev. Co.*, 52,898-WCA (La. App. 2 Cir. 11/20/19), 284 So. 3d 1212, 1219 ("Res judicata does not bar a subsequent claim between the

[4] Because the damages claims here are against Preston in his personal capacity, we need not address Preston's argument that Cook as co-trustee of TMHF is identical to Cook co-trustee of MLF.

same parties if the parties appear in a different capacity.").[5]

In sum, we agree with the district court that *res judicata* does not bar Cook's suit.

D.

Finally, Preston argues the district court erred in granting partial summary judgment because it failed to consider evidence of Pierce's and Elaine's supposed "failures" to split Peroxisome in 2014 (and also evidence of Cook's "failure" to sue Preston sooner). *See Cook I*, 842 F. App'x at 860 (explaining "Pierce blocked Peroxisome from . . . splitting"). Preston contends this was evidence of comparative fault and failure to mitigate that should have obviated summary judgment. We disagree.

In effect, Preston contends Pierce and Elaine were at fault for failing to foresee that Preston would shirk his fiduciary duties years down the road. Similarly, Preston contends Cook should have sued Preston earlier to mitigate damages from Preston's own misconduct. We agree with the district court that these arguments are "unconvincing" and "meritless."

IV.

The district court's judgment is AFFIRMED.

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[5] This "identity of capacities" principle under Louisiana's *res judicata* law also disposes of Preston's argument that, in his personal capacity, he is somehow in "privity with himself" as Peroxisome co-trustee.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 17-5368 C / W 21-2139

DR. STEPHEN D. COOK, IN HIS CAPACITY AS CO-TRUSTEE OF THE MARSHALL HERITAGE FOUNDATION, AND DR. STEPHEN D. COOK, IN HIS CAPACITY AS CO-TRUSTEE OF THE MARSHALL HERITAGE FOUNDATION,
Plaintiff,

v.

PRESTON L. MARSHALL, BOTH IN HIS CAPACITY AS CO-TRUSTEE OF THE PEROXISOME TRUST AND IN HIS PERSONAL CAPACITY,
Defendant.

Signed March 7, 2024

SECTION: L

ORDER & REASONS

Eldon E. Fallon, United States District Judge

Before the Court is Preston Marshall's ("Preston") Motion for Reconsideration. R. Doc. 377. Dr. Stephen Cook ("Dr. Cook") opposes the motion. R. Doc. 379. After reviewing the record, parties' briefing, and applicable law, the Court rules as follows.

I. BACKGROUND:

The Court is well aware of the factual and procedural history of this case and finds no need to reproduce it in full. See R. Doc. 346 for a more complete history of this case. On November 29, 2023, this Court

granted Dr. Cook's Motion for Partial Summary Judgment on Removal, ordering Preston's removal as a co-trustee of the Peroxisome Trust, and this Court denied Dr. Cook's Motion for Partial Summary Judgment on Damages because the parties specifically disagreed on the calculation of interest owed to the beneficiary trusts. *See id.* (ordering Preston's removal but finding damages inappropriate for summary judgment at that time). Shortly after, Dr. Cook filed an amended motion for summary judgment on damages, agreeing to accept Preston's calculations and thereby asserting no genuine dispute of material fact remained for trial. R. Doc. 354. The Court granted the amended motion for summary judgment and issued a judgment against Preston and in favor of Dr. Cook. R. Docs. 374, 375.

II. PRESENT MOTION

Before the Court is Preston's Motion for Reconsideration of the Court's Order & Reasons granting partial summary judgment as to damages and the ensuing judgment. R. Doc. 377. Preston argues first that the judgment omits any mention of the fact that the 2018 tax abatement issue is still pending and that the judgment should be amended to reflect that should those penalties be waived and refunded, as in other years, Preston should have his liability reduced accordingly. *Id.* at 5-6. Preston seeks an amended judgment which offsets this amount and reduces his liability by the approximately $600,000 in expected abated penalties. *Id.* at 7. Preston next argues that his mitigation of damages argument was improperly rejected by the Court. He characterizes the Court's rejection as relying on the mitigation defense's inapplicability in breaches of fiduciary duty, arguing that this is a manifest error of law because Louisiana law permits

the affirmative defense in these circumstances. *Id.* at 7-8.

Lastly, Preston asserts that the Court failed to consider that Preston "could not act without waiving his appeal." *Id.* at 8. He identifies a sentence in this Court's Order & Reasons granting summary judgment on damages, alleging that it is factually erroneous and that Preston has sufficiently shown genuine disputes of material fact on damages to warrant a trial on the matter. *Id.* at 9-10 (pointing to the following language: "While Dr. Cook could have sought enforcement sooner, so too could Preston have complied sooner.") (quoting R. Doc. 374 at 6).

Dr. Cook opposes the motion, flagging at the outset that just recently, the IRS approved Pierces efforts to have the 2018 tax penalties abated, though they have not yet been refunded and that date is pending with the IRS. R. Doc. 379 at 2-3. Dr. Cook argues that Preston is not entitled to the "extraordinary remedy" of reconsideration and Preston's arguments amount only to "mere disagreement" with this Court's earlier orders and judgment. *Id.* at 3-4 (first quoting *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004); then quoting *Ferraro v. Liberty Mutual Ins. Co.*, No. 13-4992, 2014 WL 5324987, at *1 (E.D. La. Oct. 17, 2014)). Dr. Cook argues on the 2018 tax issue that even Preston's expert agreed that should the IRS refund the penalties, as it has now agreed to do, that amount would reduce Preston's liability. *Id.* at 5-6. Dr. Cook therefore argues no reconsideration is necessary and that all parties agreed earlier in this suit that this would be the result. *Id.*

On mitigation, Dr. Cook quotes earlier orders from this Court finding Preston's frequent deployment of the various mitigation arguments "meritless" and

"unconvincing." *Id.* at 8 (quoting R. Doc. 374). Dr. Cook asserts that contrary to Preston's characterization of his arguments and this Court's prior rulings, Dr. Cook did indeed have a duty to mitigate and he more than satisfied that duty in his various enforcement attempts throughout this litigation. *Id.* at 6-7. He also argues that Preston's references to comparative fault are inapplicable in a non-tort context. *Id.* at 7-8.

Additionally, Dr. Cook refutes that Preston would have waived his right to appeal had he complied, noting that Dr. Cook filed a motion to authorize the Clerk of Court to effect distributions on March 11, 2019, and then the next day, on March 12, 2019, Preston filed his notice of appeal and a motion to stay pending that appeal. *Id.* at 8-9. Therefore, Preston's assertion that "nothing precluded Dr. Cook from simply asking the Clerk to execute the transfers as he says he has sought to do multiple times in this litigation" is factually incorrect. *Id.* at 9. Dr. Cook then points to Wright & Miller to show that once a notice of appeal is filed, compliance with a judgment does not vitiate that appeal. *Id.* at 9-10 (citing 13B Federal Practice and Procedure § 3533.2.2 (3d ed. 2023)). Dr. Cook also cites *Gloria v. Valley Grain Products, Inc.*, a case in which the Fifth Circuit recognized this principle. 72 F.3d 497, 498-99 (5th Cir. 1996) ("[F]or an appeal to be foreclosed, there must be a 'mutual manifestation of an intention to bring the litigation to a definite conclusion upon a basis acceptable to all parties . . . not the bare fact of payment of the judgment.' ") (quoting *Gadsden v. Fripp*, 330 F.2d 545, 548 (4th Cir. 1964)).

III. APPLICABLE LAW

Since the Federal Rules of Civil Procedure do not specifically recognize a motion for reconsideration, such motions are treated as either a motion to challenge a judgment or order under Rule 54(b), 59(e), or 60(b). *Holmes v. Reddoch*, 19-12749, 2022 WL 16712872 at *2 (E.D. La. Nov. 4, 2022). While Rules 59 and 60 apply to final judgments only, "if a party seeks reconsideration of an order that adjudicates fewer than all the claims among all the parties prior to entry of final judgment, then Rule 54(b) controls." *Id.*

Rule 54 provides that district courts "possess[ ] the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient." *Melancon v. Texaco*, 659 F.2d 551, 552 (5th Cir. 1981). Under such a standard, district courts can be "more flexible, reflecting the inherent power of the rendering district court to afford such relief from interlocutory judgments as justice requires." *Austin v. Kroger Tex., L.P.*, 864 F.3d 326, 336-37 (5th Cir. 2017). Though this standard is lower than the threshold used for reconsideration of judgments under Rule 59, courts still "look to similar considerations as those it considers when evaluating Rule 59(e) motions." *Edwards v. Take Fo' Records, Inc.*, 19-12130, 2020 WL 3832606 at *11 & n.2 (E.D. La. July 8, 2020). These considerations include "(1) an intervening change in the controlling law, (2) the availability of new evidence not previously available, or (3) a manifest error in law or fact." *Henry v. New Orleans La. Saints, L.L.C.*, No. 15-5971, 2016 WL3524107, at *2 (E.D. La. June 28, 2016). Courts may also grant reconsideration when "necessary to prevent manifest injustice." *Fields v. Pool Offshore, Inc.*, No. 97-3170, 1998 WL 43217, at *2 (E.D. La. Feb. 3, 1998).

IV. DISCUSSION

The Court begins by grounding its discussion in the standard for reconsideration above. Preston argues that it would be a manifest injustice to assess Preston the approximately $600,000 in expected tax abatement and that a correction of the judgment is thus in order, and that it represents a manifest error of law and fact alike to reject the mitigation argument that Preston has put forth. Finding the grounds for reconsideration not satisfied in this instance, the Court denies Preston's motion for the following reasons.

As to the tax assessment matter, the Court acknowledged in its order granting partial summary judgment on damages that, should these taxes be abated and the penalties waived, those funds would be refunded to the beneficiary trusts and operate to reduce Preston's liability, noting that Dr. Cook argued as much and that Preston's own expert testified to this in his deposition. *See* R. Doc. 374 at 3-4. The Court understood therefore that both parties believed this reduction in liability would happen automatically, as neither party sought this offset be stated expressly in this Court's orders. Importantly, when granting summary judgment on damages, the Court noted that the parties agreed on the amount of annuities owed and interest alike, and even stipulated to these numbers in their uncontested facts in their pretrial order. R. Doc. 374 at 6 (citing Pretrial Order, R. Doc. 369 at 24, ¶¶ 56-57). At that time considering the matter under the summary judgment standard, the Court accordingly found no genuine dispute as to the dollar amounts of damages.

Understanding Preston's concern, and noting that Dr. Cook and this Court have both explicitly and implicitly agreed to the principle, the Court grants

reconsideration only to the extent that the judgment is amended to reflect that, when the 2018 tax penalties are refunded and disbursed to the trusts, then Preston's liability as to the 2018 tax issue ought to be reduced accordingly.

The Court now turns to the mitigation issue. To be clear, the Court rejected Preston's arguments about mitigation at the summary judgment stage because variations of these arguments have been rejected throughout this litigation, and the Court saw no genuine dispute as to the examples Preston put forward, one of which included that Pierce should have agreed to split the Peroxisome Trust years before this litigation. *See id.* at 5-6. The language Preston points to was not the basis on which the Court decided the mitigation question; the Court has repeatedly been unpersuaded by Preston's various mitigation arguments and granted summary judgment in favor of Dr. Cook because it found that Preston's allegations in support of mitigation did not rise to the level of a genuine dispute of material fact. Accordingly, the Court finds no manifest error of law or fact in finding mitigation inapplicable in this lawsuit.

Accordingly, for the foregoing reasons, the Court **GRANTS IN PART** Preston's motion for reconsideration to the sole extent that the judgment shall be amended to reflect that when the 2018 tax penalties are disbursed to the trusts, then Preston's liability in relation to said issue is reduced accordingly, and **DENIES IN PART** the rest of the reconsideration motion.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 17-5368 C / W 21-2139

DR. STEPHEN D. COOK, IN HIS CAPACITY AS CO-TRUSTEE OF THE MARSHALL HERITAGE FOUNDATION, AND DR. STEPHEN D. COOK, IN HIS CAPACITY AS CO-TRUSTEE OF THE MARSHALL HERITAGE FOUNDATION,
Plaintiff,

v.

PRESTON L. MARSHALL, BOTH IN HIS CAPACITY AS CO-TRUSTEE OF THE PEROXISOME TRUST AND IN HIS PERSONAL CAPACITY,
Defendant.

Signed January 11, 2024

SECTION: L

MAGISTRATE 1

ORDER & REASONS

Eldon E. Fallon, United States District Judge

Before the Court is Dr. Stephen Cook's ("Dr. Cook") Amended Motion for Partial Summary Judgment on Damages. R. Doc. 354. Preston Marshall ("Preston") opposes the motion. R. Doc. 359. After reviewing the parties briefing and applicable law, the Court rules as follows.

I. BACKGROUND:

The Court is well aware of the factual and procedural history of this case and finds no need to

reproduce it in full. See R. Doc. 346 for a more complete history of this case. On November 29, 2023, this Court granted Dr. Cook's Motion for Partial Summary Judgment on Removal, ordering Preston's removal as a co-trustee of the Peroxisome Trust, and this Court denied Dr. Cook's Motion for Partial Summary Judgment on Damages because the parties specifically disagreed on the calculation of interest owed to the beneficiary trusts. *See id.* (ordering Preston's removal but finding damages inappropriate for summary judgment at that time). The next day, the Court issued an order denying Dr. Cook's Motion to Strike Jury Demand, finding that the damages question warranted a jury trial rather than the summary proceeding urged by Dr. Cook. *See* R. Doc. 347. In that Order, the Court addressed the parties' arguments about whether this trust litigation sounds more in equity or law. The Court acknowledged that with the removal question answered, the only remaining issue to be tried is the question of monetary damages and monetary damages were historically the province of courts of law. *Id.*

II. PRESENT MOTION

Before the Court is Dr. Cook's Amended Motion for Partial Summary Judgment on Damages. R. Doc. 354. The Court previously denied Dr. Cook summary judgment on the question of damages because of the parties' differing calculations as to interest. *See* R. Doc. 346. In the instant motion, Dr. Cook addresses this question and argues that the only difference in interest calculations between his and Preston's experts amounts in whole to $42,033.66 for each of the two beneficiary trusts, the Marshall Legacy Foundation ("MLF") and The Marshall Heritage Foundation ("TMHF"). R. Doc. 354-1 at 4-6. Dr. Cook maintains

that there is no dispute as to the calculations of annuities owed each foundation, nor that the legal rate of interest applies to calculate the interest accruing following April 1, 2023. *Id.* at 3-6. Because the only dispute was to interest owed through April 1, 2023, and Dr. Cook in this motion waives his claim for the disputed amount and accepts Preston's expert's calculation, Dr. Cook argues that there no longer remains a genuine issue of material fact and that summary judgment is now appropriate and a trial on this singular issue is unnecessary. *Id.*

Preston opposes the instant motion arguing that (1) this Court has not ruled on whether mitigation of damages as an affirmative defense applies in the damages context and therefore mitigation is still a live issue that may operate to reduce damages, and (2) the tax issue for the year 2018 is still unresolved and this means damages may be reduced if the IRS chooses to refund penalties paid along with interest on those penalties. R. Doc. 359. Preston does not refute the calculations of annuities or interest. Preston acknowledges that the Court rejected his mitigation argument on the trustee removal question but argues that this Court did not specifically reject mitigation as to damages, and because a jury may find that Dr. Cook and/or Pierce Marshall ("Pierce") did not mitigate their damages, a jury might reduce a damage award accordingly. *Id.* at 4-5. Preston takes the position that Dr. Cook could have avoided the tax penalties for the years 2018 and 2019 if he had sought enforcement of this Court's February 26, 2019 judgment immediately, and a jury could find this constituted failure to mitigate and that Dr. Cook bears some comparative fault. *Id.* at 5-7. In other words, Preston argues that Dr. Cook should have sued him sooner. On the 2018

tax issue, Preston argues that once resolved this could change the amount of damages by approximately $600,000 and further, he argues that any failure to provide the IRS with the necessary information was not his responsibility and therefore not his fault. *Id.* at 7.

Dr. Cook filed a reply brief arguing that the mitigation and comparative fault arguments fail because the Court has consistently rejected Preston's arguments on these issues, and that the 2018 tax question is not a genuine dispute that defeats summary judgment because should the IRS refund any portion of that penalty, such refund will operate to reduce Preston's liability accordingly. R. Doc. 366 at 2-6. Refuting Preston's distinction between removal-mitigation and damages-mitigation, Dr. Cook argues that this Court dispensed with the mitigation argument several times and that any attempt by Preston to reference comparative fault is inapposite to this suit because Preston's liability is based on a breach of fiduciary duty and not a tort. *Id.* at 3-4. On taxes, Dr. Cook maintains that should the IRS refund any portion of the penalties for 2018, that refund would be distributed to the foundations and reduce Preston's liability. *Id.* at 4-6 (citing Preston's expert who testified the same in his deposition).

III. APPLICABLE LAW

Summary judgment is proper when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The court must view the evidence in the light most favorable to the nonmovant. *Coleman v. Hous. Indep. Sch. Dist.*, 113 F.3d 528, 533 (5th Cir. 1997). Initially, the movant bears the burden of presenting the basis for the motion; that is, the absence

of a genuine issue as to any material fact or facts. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the nonmovant to come forward with specific facts showing there is a genuine dispute for trial. *See* Fed. R. Civ. P. 56(c); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). "A dispute about a material fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 956 (5th Cir. 1993) (citation omitted).

IV. DISCUSSION

In its November 29, 2023 Order denying summary judgment on damages, this Court stated the following: "There is no question that the beneficiary trusts are owed annuities and accompanying interest. The question the Court has at this time however is how to calculate these damages, specifically the interest." R. Doc. 346 at 12. Dr. Cook now accepts Preston's expert's interest calculation of $2,257,465.91 per foundation, withdrawing any claim to the $42,033.66 difference between each expert's calculations. With the Court's primary factual question resolved by Dr. Cook's acceptance of this calculation, the Court is satisfied that summary judgment is now appropriate on the question of damages and that a trial on this discrete factual question is unnecessary.

Importantly, Preston did not show a genuine dispute of material fact as to the calculations of the annuities or interest in his opposition to the instant motion and instead reiterated defenses and arguments this Court has already rejected. For example, when pressed by the Court in the pretrial conference as to which specific mitigation arguments Preston is still asserting, he responded by arguing (1) that Dr. Cook

(or others) could have sued him sooner, an argument this Court has already rejected; (2) that Pierce could have authorized a split of the Peroxisome Trust in 2013, an argument raised in Preston's opposition to Dr. Cook's first motion for partial summary judgment on damages, *see* Opposition, R. Doc. 321 at 1-2; and (3) that Dr. Cook could have sought to enforce this Court's February 26, 2019 Judgment but that he took no action until the filing of this suit in early 2021.

This Court has already explicitly rejected the first argument as unconvincing. *See* R. Doc. 346 at 11. That Order & Reasons addressed both removal and damages and the Court rejected this argument as unconvincing in one of the paragraphs discussing the removal motion, *see id.* however, Preston made the same argument in his opposition to damages and the Court therefore considers this argument rejected as to both issues. Even if that Order & Reasons is construed as only rejecting the argument as to removal, the Court clarifies explicitly here that it is meritless in the context of damages as well. The second argument above is also rejected and not a genuine dispute of material fact to destroy summary judgment. That Pierce, not a party to this suit, refused to agree with Preston's proposed course of action for the Peroxisome Trust more than ten years ago is not a basis for mitigation of damages by Dr. Cook following Preston's established breaches of fiduciary duty. The Court similarly finds no merit to the third argument, that Dr. Cook could have sought to enforce the judgment sooner. Preston was ordered to authorize the distributions. While Dr. Cook could have sought enforcement

sooner, so too could Preston have complied sooner.[1] This is not a fact issue that defeats summary judgment.

Preston breached his fiduciary duty to the trust and as a result he is liable for damages. This Amended Motion addresses only the quantity of damages owed, and on this point, Preston identified no facts or evidence that refute the calculations Dr. Cook offers. To the contrary, they were agreed upon in the uncontested facts in the pretrial order. *See* R. Doc. 369 at 24, ¶¶ 56-57. This Court has already rejected the argument that Dr. Cook, or others, could have mitigated damages and Preston's comparative fault arguments are similarly unavailing since this Court has already found that he breached his fiduciary duty and that these damages were the direct result of said breach.

Accordingly, for the foregoing reasons, the Court **GRANTS** Dr. Cook's Amended Motion for Partial Summary Judgment on Damages, R. Doc. 354. The Court finds that The Marshall Heritage Foundation and the Marshall Legacy Foundation are *each* entitled to (1) judgment in the principal amount of $3,058,472.25, (2) accrued interest of $2,257,455.91 through April 1, 2023, and (3) from April 1, 2023 until the date of judgment, accrued interest at the Louisiana judicial rate. Thereafter, 28 U.S.C. § 1961 governs the accrual of interest.

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[1] It bears repeating that at every stage of this litigation, Preston has fought this Court's orders such that this Court even held him in contempt. *See* R. Doc. 178.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 17-5368 C / W 21-2139

DR. STEPHEN D. COOK, IN HIS CAPACITY AS CO-TRUSTEE OF THE MARSHALL HERITAGE FOUNDATION, AND DR. STEPHEN D. COOK, IN HIS CAPACITY AS CO-TRUSTEE OF THE MARSHALL HERITAGE FOUNDATION,
Plaintiff,

v.

PRESTON L. MARSHALL, BOTH IN HIS CAPACITY AS CO-TRUSTEE OF THE PEROXISOME TRUST AND IN HIS PERSONAL CAPACITY,
Defendant.

Signed November 29, 2023

SECTION: L

MAGISTRATE 1

ORDER & REASONS

Eldon E. Fallon, United States District Judge

Before the Court are two motions from Dr. Cook: a motion for partial summary judgment on damages and a motion for partial summary judgment on removing Preston as a trustee. After reviewing the parties briefing and applicable law, and following oral argument on the motions, the Court now rules as follows.

I. BACKGROUND:

a. Previous Suit

On May 30, 2017, Dr. Stephen Cook ("Dr. Cook" or "Plaintiff"), in his capacity as trustee of The Marshall Heritage Foundation ("TMHF"), brought suit against Preston L. Marshall ("Preston" or "Defendant") in his capacity as co-trustee of the Peroxisome Trust ("the Trust"). R. Doc. 1. Dr. Cook alleged that the terms of the Trust required Preston to authorize the Trust to release certain quarterly payments to TMHF. Plaintiff alleged that, in June of 2016, Preston stopped authorizing these payments. Therefore, Dr. Cook sought a declaratory judgment requiring Preston to authorize the Trust to pay all sums owed to TMHF. R. Doc. 1 at 3.

Preston denied that the terms of the Trust required him to authorize payments to TMHF. Rather, Preston argued that the terms of the Trust only required him to authorize payments to the original Marshall Heritage Foundation. This original entity had, subsequent to the founding of the Trust, been split into TMHF and the Marshall Legacy Foundation ("MLF"). Preston argued that these new foundations were thus different entities than the original Marshall Heritage Foundation. Therefore, Preston argued that he was not bound, by the terms of the Trust, to authorize payments to TMHF.

On February 25, 2019, this Court granted Dr. Cook's motion for summary judgment. The Court held that Preston was obligated to authorize payments from the Trust to TMHF and that Preston had breached his fiduciary duties as co-trustee by refusing to authorize these payments. R. Doc. 132 at 12. The United States Court of Appeals for the Fifth Circuit affirmed this Court's judgment on December 31, 2020. R. Doc. 161.

Nevertheless, Preston refused to authorize the payments.

Dr. Cook moved to enforce the judgment on February 3, 2021, alleging that Preston had continued his refusal to pay distributions to TMHF, file tax returns, and mitigate damage to the Trust and its beneficiaries. Dr. Cook also requested that the Court remove Preston as a co-trustee of the Trust. R. Doc. 162-1 at 2. The Court did not remove Preston as a co-trustee at that time, but ordered that Preston be held in contempt and that he authorize his co-trustee Pierce Marshall ("Pierce") to resolve the Trust's tax liability with the Internal Revenue Service ("IRS") and make the appropriate payments to its beneficiaries. R. Doc. 178 at 5. In its order, the Court gave Preston ten days, until April 15, 2021, to comply and purge himself from contempt, failing which he would be required to pay $500 per day. Preston filed a notice of compliance stating that he had given Pierce these authorizations on April 15, 2021. R. Doc. 179. On June 16, 2021, Dr. Cook sought further Court authorization for Pierce to resolve the Trust's Louisiana tax liability without the input of Preston. R. Doc. 180. The Court granted this authorization. R. Doc. 203.

b. Present Suit

On November 18, 2021, Dr. Cook filed a new lawsuit against Preston. In this new suit, Dr. Cook appears not only in his capacity as the co-trustee of TMHF but also in his capacity as co-trustee of the MLF. Additionally, Preston is named Defendant in his individual capacity, as well as in his capacity as co-trustee of the Trust. *See* R. Doc. 206, Consolidation Order.

Dr. Cook alleges that Preston's previous breaches of fiduciary duty caused the Trust to incur substantial tax debt. Moreover, Dr. Cook alleges that Preston's

post-judgment failures to authorize the filing of tax returns and to file for tax extensions caused the Trust to incur additional losses in the form of tax penalties. Dr. Cook alleges that these penalties have been deducted from the money TMHF and MLF were due to receive as beneficiaries. Thus, Dr. Cook on behalf of the Trust seeks reimbursement for these damages and seeks removal of Preston as co-trustee based on these alleged breaches of fiduciary duty.

Dr. Cook additionally seeks reimbursement for the amount of interest which would have accrued to TMHF and MLF had Preston timely authorized all payments to TMHF and MLF. Because Preston failed to authorize these payments, the money owed to TMHF and MLF remained in the Trust. Thus, Plaintiff alleges that the interest on this money wrongfully accrued to the Trust rather than to TMHF and MLF. Accordingly, Dr. Cook seeks monetary damages from Preston in the amount of this interest, calculated as of November 2021.[1]

Dr. Cook filed this case in federal court under basis of enforcing provisions of a charitable trust under 28 U.S.C. § 1391. R. Doc. 1 at 2.

c. Defendant's Response

Preston generally denies Dr. Cook's allegations and asserts a number of affirmative defenses, including: (1) claims are barred by res judicata and collateral estoppel; (2) improper venue; (3) lack of subject-matter jurisdiction; (4) TMFH and Legacy have not suffered damages; (5) if damages are found, they are de minimis; (6) Dr. Cook lacks standing or capacity; (7) Dr. Cook's

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[1] In his Motion for Partial Summary Judgment on Damages, Dr. Cook provides an updated calculation of interest through April 1, 2023.

alleged facts and damages do not warrant removing of a trustee; (8) unclean hands; (9) settlor's intent is sacrosanct; (10) Preston has capacity and competency to continue serving as trustee; and (11) removing Preston as trustee is in direct contradiction to the parties' prior agreement. R. Doc. 234 at 1-6. The Court rejected Preston's initial motion to dismiss on those grounds.

II. PRESENT MOTIONS

Before the Court are two motions by Dr. Cook: (1) a motion for partial summary judgment on damages, R. Doc. 239; and (2) a motion for partial summary judgment seeking removal of Preston L Marshall as co-trustee of the Peroxisome Trust, R. Doc. 240. Preston has filed responses in opposition to both. R. Docs. 320 and 321. Dr. Cook filed reply briefs. R. Docs. 338 and 340.

A. Damages

Dr. Cook asserts that there exists no dispute of material fact that Preston breached his fiduciary duty thereby incurring the unpaid annuities and interest at hand, and subsequently, a finding against Preston as to those ascertainable damages is appropriate for summary judgment. R. Doc. 239-1. Dr. Cook's theory of liability remains unchanged from earlier points in this litigation: Preston failed to authorize the required disbursements to TMHF and MLF, this caused the Peroxisome Trust to incur tax liabilities, Preston refused to work with Pierce to address those liabilities, and Preston failed to make the required disbursements, in part because the money for those disbursements was used to pay the tax liabilities Preston incurred. Therefore, the undisbursed amounts plus their accrued interest are owed to TMHF and MLF. *Id.* at 14-18. According to Dr. Cook, had the amounts

been disbursed on time to TMHF and MLF, the interest that Peroxisome earned on those funds would have inured to those beneficiary trusts and therefore that interest should go to them. *Id.* at 17-18. He calculates this sum at a total of $10,719,153.50 as of April 1, 2023, consisting of unpaid quarterly annuities of $6,116,944.50 and interest of $4,602,209. *Id.* at 18. In calculating the interest, Dr. Cook argues that courts in Louisiana in the trust context impose a "legal rate of interest" as set by statute and he therefore used that rate to calculate the interest amount. *Id.* at 16.

Preston in opposition argues that Dr. Cook, Pierce, and Elaine Marshall ("Elaine") failed to mitigate damages by refusing to consent to the splitting of the Peroxisome Trust in 2013. R. Doc. 321 at 10. He alleges further failures to mitigate, arguing that they should have filed suit against Preston and/or contacted the IRS sooner than they did, and that they should have sold off or leveraged the Peroxisome Trust assets to "make up the alleged shortfalls." *Id.* Preston argues that Pierce as a co-trustee had a duty to prevent other trustees from breaching their duties, but that his only action to mitigate the losses underlying this suit was to authorize Dr. Cook to file this suit. *Id.* at 12-13. Therefore, Preston asserts, questions of fact exist as to Pierce's fault in this matter and summary judgment is inappropriate. *Id.* at 11. Further, Preston argues that Pierce refused to furnish information that Preston needed in order to file the tax returns and therefore Pierce is arguably responsible for those tax consequences. *Id.* at 13. Preston makes similar claims about Elaine, arguing that there are questions of fact as to her fault and alleged failure to mitigate, therefore summary judgment is not proper. *Id.* at 15-16. Lastly on mitigation, Preston argues that the Peroxisome

Trust agreement permits annuity payments from the trust principal, therefore Dr. Cook and Pierce could have authorized such payments and avoided the shortfall. *Id.* at 17-18.

In addition to his mitigation arguments, Preston in his opposition argues that the term of the Peroxisome Trust could be extended by the IRS from its current twenty-year term when annuity schedules require deviation. *Id.* at 19. He further disputes the damages calculation Dr. Cook presents, stating they are far from certain and that interest was improperly calculated, and argues that any mitigation argument the Court finds persuasive should operate to reduce the damage award. *Id.* at 20-25. He additionally argues that if he is forced to pay damages personally, this will amount to a "double recovery" for the beneficiary trusts because once the appeals of the tax disputes become finalized, the trusts may receive "millions of dollars in additional payments." *Id.* at 22.

Dr. Cook filed a reply brief in which he rebuts Preston's attacks on the interest calculations and argues that Preston's failure to mitigate arguments are unpersuasive for numerous reasons, including *res judicata* on the division of Peroxisome Trust and that Preston's assertions that Dr. Cook and others should have sued him earlier is "the height of *chutzpah*." R. Doc. 334-1 at 7-9.

B. Removal

Dr. Cook's second motion for partial summary judgment moves the Court to remove Preston as a co-trustee of the Peroxisome Trust. R. Doc. 240. Dr. Cook argues that Louisiana state law permits removal of a trustee upon a showing of sufficient cause, a showing which is satisfied by breaches of the duties of loyalty and trust and failures to distribute according

to the trust instrument. R. Doc. 240-1 at 11-14. Pointing to the earlier lawsuit where Preston was found to have violated his fiduciary duties, compounded by his additional "contemptuous misconduct" following this Court's judgment, Dr. Cook represents that this more than rises to the level required by statute for removal. *Id.* at 14-15. Further, he points to a different state court lawsuit wherein Preston was removed as a trustee of a different trust (whose beneficiaries are also TMHF and MLF) to show that Preston has demonstrated a pattern of misconduct and breaches of his fiduciary duties in the trust context. *Id.* at 15-17.

In opposition, Preston argues that Dr. Cook could have but failed to seek enforcement of this Court's earlier judgment which would have accomplished the disbursements at issue, instead seeking only Preston's removal at that time. R. Doc. 320 at 7. Preston argues that this Court refused to remove him and instead directed him to authorize Pierce to work with the IRS to resolve the tax issues *Id.* at 8. Since then, Preston claims, no new facts have emerged that would warrant his removal. *Id.* at 11. He further argues that although he was found to be in breach of his fiduciary duties, he avers he acted "honestly and reasonably" under the circumstances such that the remedy of removal is inappropriate. *Id.* at 12. He further reiterates some of his other arguments, for example that Pierce is also to blame for the underlying events, Pierce, Elaine, and Dr. Cook failed to mitigate damages, and that the Peroxisome Trust could have made up the shortfalls by dipping into its principal, borrowing funds, or selling assets. *Id.* at 13-23. Lastly, he urges this Court not to consider other lawsuits when adjudicating these motions. *Id.* at 23-25.

Dr. Cook filed a reply brief arguing that Preston presents no disputes of material fact in his opposition and that his actions post-judgment warrant removal. R. Doc. 335-1 at 4-5. He further refutes any characterization of Preston's actions as "reasonable" and therefore objects to any excusal of liability on those grounds. *Id.* at 5.

III. APPLICABLE LAW

A. Summary Judgment Standard

Summary judgment is proper when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The court must view the evidence in the light most favorable to the nonmovant. *Coleman v. Hous. Indep. Sch. Dist.*, 113 F.3d 528, 533 (5th Cir. 1997). Initially, the movant bears the burden of presenting the basis for the motion; that is, the absence of a genuine issue as to any material fact or facts. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the nonmovant to come forward with specific facts showing there is a genuine dispute for trial. *See* Fed. R. Civ. P. 56(c); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). "A dispute about a material fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 956 (5th Cir. 1993) (citation omitted).

B. Louisiana Trust Code

The Louisiana Trust Code provides that:

> If a trustee commits a breach of trust, he shall be chargeable with: (1) A loss or depreciation in value of the trust estate resulting from a breach of trust; or (2) A profit made by him through breach

> of trust; or (3) A profit that would have accrued to the trust estate if there had been no breach of trust.

La. R.S. § 9:2201. The Code also contemplates personal liability in certain circumstances, for example when a trustee commits a tort: "A trustee may also be held personally liable for any tort committed by him or his agents or employees in the course of their employment, subject to the right of exoneration or reimbursement provided in R.S. 9:2191 through 9:2196." La. R.S. § 9:2126(D). Breaches of fiduciary duties also give rise to personal liability. *Brown v. Schwegmann*, 861 So. 2d 862,868 (La. App. 4 Cir. 2003) (holding that the trustee was personally liable for his breach of trust); *Succession of Carriere*, 216 So. 2d 616, 618 (La. App. 4 Cir. 1968) ("Moreover, like an executor, a trustee is personally liable for the breach of his fiduciary obligations . . . .") (citing La. R.S. § 9:2201).

The Trust Code permits a court to remove a trustee "for sufficient cause." La. R.S. § 9:1789(A). A beneficiary is also given the right to pursue a removal action against a trustee. La. R.S. § 9:2221(4). Courts interpreting the sufficient cause requirement have found that breaches of fiduciary duties can warrant a trustee's removal. For example, in *Albritton v. Albritton*, the court agreed that "the breach of the duty of loyalty, the escalating hostility between Mr. Albritton and his son, and the failure of the trustees to account, justified the removal of Dr. Albritton as trustee." 622 So. 2d 709, 715 (La. App. 1 Cir. 1993). That court however declined to remove another trustee, finding that the argument that she "worked for Dr. Albritton, [thus] she was his alter ego" did not amount to sufficient cause. *Id.* In that case, the court explained the "general rule [which is] that neither conflict of interest . . .

nor the hostility itself, constitutes sufficient cause for removal of a trustee unless it materially impairs or interferes with the proper administration of the trust." *Id.* at 713.

Courts require "more than a mere technical violation of the Trust Code as grounds for removal." *Fontenot ex rel. Fontenot v. Choppin*, 836 So. 2d 322, 324 (La. App. 1 Cir. 2002); *Curtis v. Breaux*, 458 So. 2d 582, 588 (La. App. 3 Cir. 1984). In *Fontenot*, the court found sufficient cause for removal existed because of the trustee's failure to provide annual accounting, failure to permit beneficiaries to inspect records, failure to collect assets of the trust, and the filing of inaccurate income tax returns. *Fontenot*, 836 So. 2d at 325 ("We find that the Trustee's multiple violations of the mandates of the Trust Code and of the terms of the Trust instrument comprise sufficient grounds for the removal of the Trustee . . . ."). In *Martin v. Martin*, the court found sufficient cause for removal after the trustee "failed to timely and consistently comply with the clear mandate of the trust instrument," for example by failing to provide annual accounting and failing to distribute income as required. 663 So. 2d 519, 522 (La. App. 4 Cir. 1995).

The Supreme Court of Louisiana has held that "while mere animosity is not sufficient ground for removal of the trustee, the statutory provisions relative to the responsibilities of a trustee are very rigid" and the trustee is held to "an even higher fiduciary responsibility to his beneficiary than that owed by a succession representative to heirs." *Succession of Dunham*, 402 So. 2d 888, 900 (La. 1981). The court affirmed the lower court's removal of the trustee in that case due to breaches of their fiduciary duties, including the duty to act prudently and the duty to

administer the trust solely in the beneficiaries' interest. *Id.* at 901 (quoting approvingly the lower court's reasoning).

While the Trust Code permits a court to remove a trustee in proper circumstances, a court may also "excuse a trustee wholly or partly from liability for a breach of trust if the trustee acted honestly and reasonably." La. R.S. § 9:2208. The case law interpreting this requirement is sparse[2] but the Louisiana Civil Law Treatise describes that the "conjunctive terms ('honest' and 'reasonable') suggest that court approval should be forthcoming only if the trustee acted in subjective good faith and the action, viewed objectively, was reasonable." 11 La. Civ. L. Treatise § 16:9 (3d ed. 2022).

Although not a provision of the Louisiana Trust Code, courts calculating damages in association with a trustee's removal associated debts to the trust will apply a legal rate of interest as set by statute. In *Bridwell v. Bridwell*, a trustee was removed after depleting the trust account and placing the funds into an account in her own name. 381 So. 2d 566, 570 (La. App. 2 Cir. 1980). The court noted that following her removal, her "position was that of a debtor of the trust, indebted for an amount equal to the value of the trust funds and loss of profit during her tenure as trustee." *Id.* at 570-71. "The only damages due for delay in the performance of an obligation to pay money is interest." *Id.* at 571. Therefore, the court applied the statutory legal rate of interest to calculate the damages. *Id.*

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[2] "There are no interpretative rulings on the meaning of Section 2208. The only case decided under it raised a question of the appropriate venue for the relief sought, rather than relief from liability." 11 La. Civ. L. Treatise § 16:9 (3d ed. 2022).

IV. DISCUSSION

On the question of removal, the Court acknowledges that Dr. Cook has asked for Preston's removal as a trustee in the past and that this Court declined to remove him at that time. Instead, the Court opted to hold Preston in contempt until he worked with Pierce to resolve the tax liability issues, and Preston complied. During oral argument on these motions for summary judgment and in his briefs, Preston argued that he has breached no additional duties and he has committed no further misconduct between that time and today that would warrant his removal and that the Court should again decline to impose such a remedy. However, the Court's decision not to remove Preston at that time, in April of 2021, was not premised on a lack of breach or a finding that removal was inappropriate under the facts and circumstances of this case. It was to give him one more chance to comply with his duties in the future. Instead, he squandered that chance.

Preston also argued that a court may relieve a trustee of liability if the trustee acted reasonably and honestly. The Court finds the notion that Preston's actions were honest and reasonable unpersuasive. Even after the Fifth Circuit affirmed this Court's finding on his breaches in the earlier suit, he refused to act until under contempt. Further, Preston's primary argument against removal, that Dr. Cook and others failed to mitigate damages by, among other things, failing to sue him sooner, is not a convincing argument. The fact is that this Court and the Fifth Circuit found that Preston breached his fiduciary duty to the Trust. Courts applying the Louisiana Trust Code have removed trustees for breaches of fiduciary duty. *See*, *e.g.*, *Albritton*, 622 So. 2d at 715; *Succession of Dunham*, 402 So. 2d at 901. Dr. Cook has shown

sufficient cause for removal and the Court will grant his motion for partial summary judgment on removal.

Next, on the issue of damages, the Court is less certain. There is no question that the beneficiary trusts are owed annuities and accompanying interest. The question the Court has at this time however is how to calculate these damages, specifically the interest. The parties disagree on how to calculate both the annuities and the interest and each party presents an expert in support of their preferred approach. Preston offers the opinion of Mickey Davis while Dr. Cook offers the opinion of Holly Sharp. The Court does not doubt that some amount of damages is owed to TMHF and MLF but given the dueling calculations and the applicability of interest, which continues to accrue, the Court finds the question of the amount of damages too uncertain at this time to warrant summary judgment.

Accordingly, for the foregoing reasons, the Court GRANTS Dr. Cook's Motion for Partial Summary Judgment Seeking Removal of Preston L. Marshall as Co-Trustee of the Peroxisome Trust, R. Doc. 240, and DENIES Dr. Cook's Motion for Partial Summary Judgment on Damages, R. Doc. 239.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 17-5368 C / W 21-2139

COOK,
Plaintiff,
v.

MARSHALL,
Defendant.

Signed December 8, 2022

Filed December 9, 2022

SECTION "L" (1)

ORDER AND REASONS

ELDON E. FALLON, UNITED STATES DISTRICT JUDGE

The Court has before it Defendant Preston Marshall's Motion to Dismiss. R. Doc. 207. Plaintiff has responded in opposition. R. Doc. 208. Having considered the briefing and the applicable law, and having hear the parties at oral argument, the Court now rules as follows.

I. BACKGROUND

A. Previous Suit

On May 30, 2017, Dr. Stephen Cook ("Dr. Cook" or "Plaintiff"), in his capacity as trustee of The Marshall Heritage Foundation ("TMHF"), brought suit against Preston Marshall ("Preston" or "Defendant") in his capacity as co-trustee of the Peroxisome Trust ("the

Trust"). R. Doc. 1. Dr. Cook alleged that the terms of the Trust required Preston to authorize the Trust to release certain quarterly payments to TMHF. Plaintiff alleged that, in June of 2016, Preston stopped authorizing these payments. Therefore, Plaintiff sought a declaratory judgment requiring Preston to authorize the Trust to pay all sums owed to TMHF. R. Doc. 1 at 3.

Preston denied that the terms of the Trust required him to authorize payments to TMHF. Rather, Preston argued that the terms of the Trust only required him to authorize payments to the original Marshall Heritage Foundation. This original entity had, subsequent to the founding of the Trust, been split into TMHF and the Marshall Legacy Foundation ("MLF"). Preston argued that these new foundations were thus different entities than the original Marshall Heritage Foundation. Therefore, Preston argued that he was not bound, by the terms of the Trust, to authorize payments to TMHF.

On February 25, 2019, this Court granted Plaintiff's motion for summary judgment. The Court held that Preston was obligated to authorize payments from the Trust to TMHF and that Preston had breached his fiduciary duties as co-trustee by refusing to authorize these payments. R. Doc. 132 at 12. The United States Court of Appeals for the Fifth Circuit affirmed this Court's judgment on December 31, 2020. R. Doc. 161.

Plaintiff moved to enforce the judgment on February 3, 2021, alleging that Preston had continued his refusal to pay distributions to TMHF, file tax returns, and mitigate damage to the Trust and its beneficiaries. Plaintiff also requested that the Court remove Preston as a co-trustee of the Trust. R. Doc. 162-1 at 2. The Court did not remove Preston as a co-trustee,

but ordered that Preston be held in contempt and that he authorize his co-trustee Pierce Marshall ("Pierce") to resolve the Trust's tax liability with the Internal Revenue Service ("IRS") and make the appropriate payments to its beneficiaries. R. Doc. 178 at 5. Preston filed a notice of compliance stating that he had given Pierce these authorizations on April 15, 2021. R. Doc. 179. On June 16, 2021, Plaintiff sought further Court authorization for Pierce to resolve the Trust's Louisiana tax liability without the input of Preston. R. Doc. 180. The Court granted this authorization. R. Doc. 203.

B. Present Suit

On November 18, 2021, Dr. Cook filed a new lawsuit against Preston. In this new suit, Dr. Cook appears not only in his capacity the co-trustee of TMHF but also in his capacity as co-trustee of the MLF. Additionally, Preston is named Defendant in his individual capacity, as well as in his capacity as co-trustee of the Trust.

Plaintiff alleges that Preston's previous breaches of fiduciary duty caused the Trust to incur substantial tax debt. Moreover, Plaintiff alleges that Preston's post-judgment failures to authorize the filing of tax returns and to file for tax extensions caused the Trust to incur additional losses in the form of tax penalties. Plaintiff alleges that these penalties have been deducted from the money TMHF and MLF were due to receive as beneficiaries. Thus, Plaintiff seeks compensation for these damages and seeks removal of Preston as co-trustee based on these alleged breaches of fiduciary duty.

Plaintiff additionally seeks compensation for the amount of interest which would have accrued to TMHF and MLF had Preston timely authorized all

payments to TMHF and MLF. Because Preston failed to authorize these payments, the money owed to TMHF and MLF remained in the Trust. Thus, Plaintiff alleges that the interest on this money wrongfully accrued to the Trust rather than to TMHF and MLF. Accordingly, Plaintiff seeks monetary damages from Preston in the amount of this interest, calculated as of November 2021.

II. PRESENT MOTION

Preston seeks to dismiss Dr. Cook's complaint, offering five arguments in support. First, he contends, under Federal Rule of Civil Procedure 12(b)(6), that Dr. Cook fails to state a claim upon which relief can be granted because all of Dr. Cook's claims are barred by res judicata. Second, Preston avers that Dr. Cook has failed to state a claim upon which relief can be granted because his claims are all barred by collateral estoppel. Third, Preston asserts, under Rule 12(b)(3), that venue is not proper. Fourth, he contends that, under Rule 12(b)(7), Dr. Cook has failed to join necessary parties who, if joined, would destroy the Court's diversity jurisdiction. Finally, Preston asserts that the Court should decline to exercise jurisdiction under the "Colorado River Doctrine" because a "parallel" suit is ongoing in state court. These arguments are addressed in turn below.

III. DISCUSSION

A. Defendant's Rule 12 (b)(6) Arguments

i. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a defendant may seek dismissal of a complaint based on the "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual

matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* When evaluating a 12(b)(6) motion, the Court must "take the well-pled factual allegations of the complaint as true and view them in the light most favorable to the plaintiff." *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008) (citing *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007)). However, a court "do[es] not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions." *Plotkin v. IP Axess Inc.*, 407 F.3d 690, 696 (5th Cir. 2005).

ii. Res Judicata

Preston argues that all of Cook's present claims could have been litigated in the first lawsuit ("*Cook I*") that Cook filed against Preston. Therefore, Preston argues that no relief can be granted on these claims because they are barred by the doctrine of res judicata.

"[R]es judicata[ ] bars the litigation of claims that either have been litigated or should have been raised in an earlier suit." *Test Masters Educational Services, Inc., v. Singh*, 428 F.3d 559 (5th Cir. 2005). Here, Louisiana res judicata law applies because "[f]ederal courts sitting in diversity apply the [res judicata] law of the forum state." *Dotson v. Atlantic Specialty Ins. Co.*, 24 F. 4th 999, 1002 (5th Cir. 2022). Under La. R. S. § 13:4231, five requirements must be met for res judicata to bar a lawsuit: "(1) the [original] judgment is valid; (2) the [original] judgment is final; (3) the

parties are the same; (4) the cause or causes of action asserted in the second suit existed at the time of final judgment in the first litigation; and (5) the cause or causes of action asserted in the second suit arose out of the transaction or occurrence that was the subject matter of the first litigation." The parties agree that the judgment in *Cook I* was both final and valid. However, they dispute the third, fourth, and fifth factors.

Significantly, the Fifth Circuit has noted that "generally a res judicata contention cannot be brought in a motion to dismiss; it must be pleaded as an affirmative defense." When a party nevertheless raises res judicata on a motion to dismiss, "the party urging res judicata has the burden of proving each essential element by a preponderance of the evidence." *Webb v. Town of St. Joseph*, 560 Fed. App'x 362 (5th Cir. 2014) (holding that dismissal was not proper on res judicata grounds when Defendants failed to prove one element of res judicata by a preponderance of the evidence).

Here, Defendant cannot prove all elements of res judicata by a preponderance of the evidence. Of the three elements contested by the parties, all three weigh in favor of denying Defendant's motion to dismiss.

1. Whether the Parties are the same

Under Louisiana law, "An identity of parties exists whenever the same parties, their successors, or others appear so long as they share the same quality as parties . . . A person has the same quality when [1] he or she appears in the same capacity in both suits, or [2] when he or she is in privy to a party in the prior suit." Each of these options is examined in turn.

First, the parties dispute whether Cook and Preston appear in the same capacities in both suits. Defendant contends that the parties appear in the same

capacities: "[i]n both cases, Cook appears as a purported co-trustee of a beneficiary of the Peroxisome Trust suing Preston as a co-trustee of the Peroxisome Trust." R. Doc. 207-1 at 9. Plaintiff disagrees with Defendant's conclusion. Plaintiff notes that Defendant is correct that, in both suits, Dr. Cook appeared in his capacity as a co-trustee of TMHF, and Preston appeared in his capacity as co-trustee of the Trust. However, Plaintiff points out that, in the present suit, the parties also appear in additional capacities: Cook appears in his capacity as co-trustee of the MLF, and Preston is named in his personal capacity. Thus, Plaintiff concludes that the parties do not appear in identical capacities.

The Court agrees with Plaintiff. "Res judicata does not apply when the parties appear in one action in a representative capacity and in a subsequent action in an individual capacity." *Howell Hydrocarbons, Inc. v. Adam*s, 897 F.2d 183, 188 (5th Cir. 1990). Here, both parties appear in different capacities in the second suit: Plaintiff appears as a representative of a separate foundation, and Defendant appears in his individual capacity. Thus, the Court finds that the parties are not the same under this test.

Alternatively, Defendant contends that the Court should find the parties to the present suit "in privity" with the parties to *Cook I*. R. Doc. 207-1 at 10. Privity is "a legal conclusion that the relationship between the one who is a party on the record and the non-party is sufficiently close to afford the principle of preclusion." *New York Life Ins. Co. v. Deshotel*, 946 F. Supp. 454, 462 (E.D. La. 1996). Here, the court declines to find privity between the parties and their counterparts in *Cook I*. As mentioned above, Cook brings suit on behalf of a separate foundation; thus, his position

in the present suit is not "sufficiently close" to his position in the past suit so as to warrant preclusion. Furthermore, Preston's personal interests, which are at issue in this suit, are not "close" to his interests as a co-trustee of the jointly held Trust. Therefore, the Court finds that there is not sufficient closeness between the parties.

2. Whether the cause or causes of action litigated in the second suit existed at the time of the final judgment in the first litigation

The doctrine of res judicata bars litigation of all issues that "could have" been litigated in an earlier suit. Here, the parties dispute whether Plaintiff's causes of action existed at the time of the final judgment in *Cook I*.

Defendant contends that Cook could have sought all relief requested in the present lawsuit in *Cook I*. Specifically, Preston contends that Cook knew, at the time of the initial suit, that the Trust might incur tax liability which would endanger its ability to meet its financial obligations to TMHF. Thus, Defendant contends that Cook could have requested compensation for damages arising from this potential underpayment in *Cook I*. Additionally, Defendant avers that Cook could have requested that the Court remove Preston as co-trustee in the initial suit.

Plaintiff argues that, when he filed *Cook I*, he did not know whether or to what extent the Trust would incur tax liability, nor whether damages to the Trust resulting from such liability would be passed on to TMHF and MLF. Plaintiff alleges that Preston reassured him, throughout the prior litigation, that the tax liability would not impact payments to TMHF and MLF. Finally, Plaintiff contends that he seeks dismissal of Cook as a co-trustee based on Preston's

post judgment breaches of fiduciary duty, such as his failures to file tax returns and extensions, and his including the Court's decision to hold him in contempt. Thus, Cook contends that the causes of action at issue in the present suit were not available in the first suit.

The Court agrees with Plaintiff. A cause of action for damages accruing to a plaintiff as a result of a defendant's failure to comply with a court's judgment necessarily do not exist at the time of the initial suit. *See New Orleans Jazz and Heritage Foundation, Inc. v. Kirksey*, 104 So.3d 714, 719 (2012). Plaintiff's complaint largely arises from Defendant's failure to comply with the Court's judgment to authorize payments to TMHF and MLF and post-judgment refusals to resolve the Trust's tax liability. These causes of action did not exist at the time of the initial judgment.

3. Whether the cause or causes of action asserted in the second suit arose out of the same transaction or occurrence that was the subject matter of the first litigation.

The final element of res judicata is strongly related to the last one. A plaintiff must assert all of his rights and claim all of his remedies arising out of the transaction or occurrence that is the subject matter of the first litigation. *Mason v. Auto Club Family Ins. Co.*, 2010 WL 4924766, at *4 (E.D. La. Nov. 29, 2010). What constitutes the transaction or occurrence is to be determined on a case-by-case basis. *See Dotson v. Atlantic Specialty Insurance Company*, 24 F.4th 999, 1003 (5th Cir. 2022). An action is barred by res judicata under Louisiana law when "both of the actions concern a group of facts so connected as to constitute a single wrong and so logically related that judicial economy and fairness mandate that all issues be tried in one suit." *Id.* at 1004 (citation omitted).

But a cause of action that arises after the rendition of the final judgment could not have been asserted earlier and thus is not precluded by the judgment. *Mason v. Auto Club Family Ins. Co.*, 2010 WL 4924766, at *4 (E.D. La. Nov. 29, 2010). Under Louisiana law, a cause of action accrues when a party has the right to sue, which requires fault, causation, and damages. *Oakes v. Countrywide Home Loans, Inc.*, 2012 WL 2327920, at *4-5 (E.D. La. Jun. 19, 2012) (citing *Ebinger v. Venus Constr. Corp.*, 65 So. 3d 1279, 1286 (La. 2011)). Damage is sustained "when it has manifested itself with sufficiency certainty to support accrual of a cause of action." *Id.* (quoting *Bailey v. Khoury*, 891 So. 2d 1268, 1275 (2005)).

Damages in this case are sought on behalf of MLF and TMHF. But no taxes, penalties, and interest were paid by the Peroxisome Trust until 2021; and those did not start being assessed until 2019, after the Court's Judgment in *Cook I*. Peroxisome Trust's damages were not certain until after Pierce was able to negotiate with the IRS and LDR and then pay the taxes, penalties, and interest following *Cook I*. Only after resolution of the tax issues did damages to TMHF and MLF arise and become certain. Indeed, if Preston had complied with the Judgment when it was rendered, these new damages might have been avoided. This case focuses on Preston's alleged post-Judgment misconduct, including his continued refusal to address the Peroxisome Trust's tax issues, to follow Court orders, and to cooperate with Pierce for years after the Judgment. Accordingly, the nucleus of operative facts in *Cook I* is not the same nucleus of operative facts as in this case. *See J. M. Smith Corp. v. Ciolino Pharmacy Wholesale Distributors, LLC*, No. 14-2580, 2015 WL 2383841 (E.D. La. 2015) (holding

that res judicata does not bar claims where the allegations are temporally related to the original action, but where the operative facts as to the new claims are actions defendants took after plaintiff's rights against them were established in the original action). Plaintiff's claims are not barred by res judicata.

B. Collateral estoppel

"A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment." La. R. S. 13:4231(3). But in order for this to apply, (1) the parties must be identical; (2) the issue to be precluded must be identical to that involved in the prior action; (3) the issue must have been actually litigated; and (4) the determination of the issue in the prior action must have been necessary to the resulting judgment. *Sevin v. Parish of Jefferson*, 632 F. Supp. 2d (E.D. La. 2008). The Court has determined supra that the parties in this action are not identical to the parties in *Cook I*. Accordingly, collateral estoppel does not bar Plaintiff's claims here.

C. Venue

Rule 12(b)(3) permits a defendant to move for dismissal due to "improper venue." *See Summers v. Kenton, OH Policea*, 2012 WL 1565363, at *4 (E.D. La. May 2, 2012). When an objection to venue has been raised, "the plaintiff bears the burden to establish that the district he chose is a proper venue." *Id.* (citation omitted). In this case, Defendant argues under Louisiana law that the Eastern District of Louisiana is not the proper venue for this action. But federal law, not state law, usually controls the outcome of subject matter jurisdiction and venue disputes in federal court.

See, e.g., *Trust Co. Bank v. U.S. Gypsum Co.*, 950 F.2d 1144, 1149 (5th Cir. 1992); *Randall v. Arabian Am. Oil Co.*, 778 F.2d 1146, 1150 (5th Cir. 1985) ("Only the Constitution and the laws of the United States can dictate what cases or controversies our federal courts may hear."). Federal jurisdictional statute 28 U.S.C. § 1391 provides that it "shall govern the venue of all civil actions brought in district courts of the United States." That statute provides that jurisdiction is proper, *inter alia*, in a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred. In this case, a substantial part of the events giving rise to this case occurred in this district. Plaintiff's complaint alleges that Defendant's breaches of fiduciary duty occurred here, as did tax issues with the trust due to the Louisiana State taxes were owed by foundation. Accordingly, Defendant's motion to dismiss under Rule 12(b)(3) is denied.

D. Joinder

Rule 12(b)(7) allows dismissal for failure to join a party under Rule 19. Rule 19 provides for joinder of all parties whose presence in a lawsuit is required for the fair and complete resolution of the dispute at issue. According to the Fifth Circuit, the Rule 12(b)(7) analysis entails two inquiries under Rule 19: The court must first determine under Rule 19(a) whether a person should be joined to the lawsuit. If joinder is warranted, then the person will be brought into the lawsuit. But if such joinder would destroy the court's jurisdiction, then the court must determine under Rule 19(b) whether to press forward without the person or to dismiss the litigation that should not proceed in the absence of parties that cannot be joined. *See HS Resources, Inc. v. Wingate*, 327 F.3d 432, 438 (5th Cir. 2003). Preston argues that his fellow co-trustee

of the Peroxisome Trust and co-trustee of TMHF and Legacy must be joined in this action, and that their addition would destroy diversity between the parties. R. Doc. 207 at 19-22. Therefore, he argues that this case should be dismissed.

Rule 19(a) provides that

> "[a] person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

This inquiry is necessarily factually intensive. *See* 7 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, § 1604 (3d ed. 2021) ("By its very nature Rule 19(a) calls for determinations that are heavily influenced by the facts and circumstances of individual cases."). The party advocating for joinder bears the initial burden of proving a necessary party must be joined. *Colbert v. First NBC Bank*, WL 1329834 (E.D. La. March, 31, 2014). Here, Preston fails to meet his burden of proof that either party must be joined. The Court can grant the relief requested in this case, damages against Preston and his removal as co-trustee, without either additional party being joined. Neither of those parties are claiming any interest that is not represented by Plaintiff: in fact, they authorized Dr. Cook, in his capacity as

co-trustee of TMHF and MLF, to file this lawsuit against Preston. Because these interests are adequately represented, failure to join these parties will not subject Defendant to a risk of incurring multiple of inconsistent obligations. Accordingly, dismissal for failure to join these so-called indispensable parties would be inappropriate.

E. Colorado River Doctrine

The Colorado River Doctrine provides that a federal court may under some circumstances decline to hear a case while there is a parallel case pending in state court. However, it is only available under "exceptional circumstances[.]" *Brown v. Pac. Life Ins. Co.*, 462 F.3d 384, 395 (5th Cir. 2006). Colorado River abstention "represents an 'extraordinary and narrow exception' to the 'virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.' " *Black Sea Inv., Ltd. v. United Heritage Corp.*, 204 F.3d 647, 649 (5th Cir. 2000) (citing *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)). Among other requirements, Colorado River abstention can only be applied when the movant meets his burden to show that a federal suit and a state suit "are parallel, having the same parties and the same issues." *Stewart v. W. Heritage Ins. Co.*, 438 F.3d 488, 491 (5th Cir. 2006). Actions are parallel where the state court proceedings "are sufficiently similar to the federal proceedings to provide relief for *all* of the parties' claims." *Biel v. Bekmukhamedova*, 964 F. Supp. 2d 631, 636-37 (2013) (emphasis original) (citation omitted). "In this analysis, the central inquiry is whether there is a substantial likelihood that the state litigation will dispose of all claims presented in the federal case." *Chaffee McCall, LLP v. World Trade Ctr. of New Orleans*, 2009

WL 322156, at *9 (E.D. La. Feb. 9, 2009). Ultimately, "[i]f the suits are not parallel, the federal court must exercise jurisdiction." *Stewart*, 438 F.3d at 491 n. 3. In this case, Plaintiff seeks damages from Preston personally due to the damage he caused TMHF and MLF as a co-trustee of the Peroxisome Trust; and Preston's removal as cotrustee of the Peroxisome Trust. Neither of these remedies is being sought in the related pending state law action. Accordingly, the Colorado River Doctrine does not apply in this case.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss is **DENIED**.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-30222

STEPHEN D. COOK, DOCTOR; IN HIS CAPACITY AS CO-TRUSTEE OF MARSHALL HERITAGE FOUNDATION,
Plaintiff-Appellee,

v.

PRESTON L. MARSHALL, IN HIS CAPACITY AS CO-TRUSTEE OF PEROXISOME TRUST,
Defendant-Appellant,

STEPHEN D. COOK, DOCTOR; IN HIS CAPACITIES AS CO-TRUSTEE OF THE MARSHALL HERITAGE FOUNDATION AND MARSHALL LEGACY FOUNDATION,
Plaintiff-Appellee,

v.

PRESTON L. MARSHALL, BOTH IN HIS OFFICIAL CAPACITY AS CO-TRUSTEE OF PEROXISOME TRUST AND IN HIS PERSONAL CAPACITY,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:17-CV-5368
USDC No. 2:21-CV-2139

FILED: February 27, 2025

ON PETITION FOR REHEARING

Before SMITH, STEWART, and DUNCAN, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

UNANIMOUS CONSENT OF THE TRUSTEES
OF THE MARSHALL HERITAGE FOUNDATION

We, the undersigned, representing all of the Trustees of The Marshall Heritage Foundation (herein "the Foundation"), who would be entitled to vote upon the resolutions hereinafter set forth at a formal meeting of the Trustees, sign this instrument in lieu of holding a special meeting of the Trustees to evidence our consent to the adoption of the following resolution:

WHEREAS, the Foundation is a charitable trust formed under the laws of the State of Louisiana; and

WHEREAS, Louisiana Revised Statutes 9:2274, relative to charitable trusts, provides:

9:2274. Application of Louisiana Trust Code

Whenever the law pertaining to charitable trusts is silent, the Louisiana Trust Code shall apply, but no provision of the Louisiana Trust Code or other law shall be applied to invalidate a trust or any provision thereof permitted by this Part, or to prevent a charitable tax deduction or to affect adversely the trust's tax-exempt charitable status; and

WHEREAS, Louisiana Revised Statutes 9:2114 provides:

9:2114 Three or more trustees; exercise of powers

A power vested in three or more trustees may be exercised by a majority of the trustees, unless the trust instrument provides otherwise. A trustee who has not joined in exercising a power shall not be liable to the beneficiaries or to others for the consequences of that exercise, nor shall a dissenting trustee be liable for the consequences of an act in which he joins at the direction of the majority of trustees, if he expresses his dissent in writing to his

co-trustees at or before the time of the joinder. Nothing in this section shall excuse a co-trustee from liability for inactivity in the administration of the trust nor for failure to attempt to prevent a breach of trust.

and

WHEREAS, Louisiana Revised Statutes 9:2221 provides:

9:2221 Remedies against trustee

A beneficiary of a trust may institute an action:
(1) To compel a trustee to perform his duties as trustee;
(2) To enjoin a trustee from committing a breach of trust;
(3) To compel a trustee to redress a breach of trust;
(4) To remove a trustee.

and

WHEREAS, the indenture establishing the Peroxisome Trust, as settled by Elaine T. Marshall, provides that the Foundation is a beneficiary of the Peroxisome Trust and requires distributions of funds by the Peroxisome Trust to the Foundation on a quarterly basis; and

WHEREAS, Preston L. Marshall, Co-Trustee of the Peroxisome Trust, refused to execute the mandatory quarterly wire transfer instructions making required distributions to the Foundation and refused to authorize the filing of tax returns on behalf of the Peroxisome Trust; and

WHEREAS, as a result, the Foundation did not receive distributions of funds due from the Peroxisome Trust for the 3rd and 4th quarters of 2016, all

quarters from 2017-2020 and 1st quarter 2021, leading to a significant shortfall in funds available to the Foundation for charitable giving; and

WHEREAS, the withholding of distributions by the Peroxisome Trust violated the indenture establishing the Peroxisome Trust and the Foundation instituted litigation against Preston L. Marshall as Co-Trustee of the Peroxisome Trust in the United States District Court for the Eastern District of Louisiana entitled, "Dr. Stephen D. Cook, in his capacity as Co-Trustee of The Marshall Heritage Foundation v. Preston L. Marshall, in his capacity as Co-Trustee of the Peroxisome Trust," C.A. No. 17-5386 (the "Peroxisome Litigation"); and

WHEREAS, the Foundation obtained a judgment against Preston L. Marshall as Co-Trustee of the Peroxisome Trust in the Peroxisome Litigation and this judgment was affirmed by the United States Court of Appeals for the Fifth Circuit; and

WHEREAS, as a consequence of the actions of Preston L. Marshall, the Peroxisome Trust incurred federal and state tax liability, including taxes, penalties and interest, which caused the Peroxisome Trust to not make all the distributions owed to the Foundation; and

WHEREAS, the Foundation suffered damages in the form of deficient payments from the Peroxisome Trust and interest as a direct consequence of the actions of Preston L. Marshall; and

NOW, THEREFORE, BE IT RESOLVED Stephen D. Cook, PhD, Co-Trustee of the Foundation, be, and is hereby, empowered to take all actions necessary and proper, including initiation of litigation in any appropriate jurisdiction, to enforce the provisions of

the Louisiana Trust Code and the relevant documents of the Peroxisome Trust and the Foundation so as to seek the removal of Preston L. Marshall as Co-Trustee of the Peroxisome Trust, and to seek from Preston L. Marshall any and all damages caused to the Peroxisome Trust and the Foundation by the actions of Preston L. Marshall, in his personal capacity and/or his capacity as Co-Trustee of the Peroxisome Trust.

BE IT FURTHER RESOLVED that Stephen D. Cook, Ph.D. as Trustee of the Foundation is solely authorized to take any and all necessary actions required to carry out these resolutions.

These resolutions may be signed in multiple counterparts at different times and at different locations with the same effect as if all signing parties had signed the same document. All such counterparts shall be construed together and constitute the same instrument.

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IN TESTIMONY WHEREOF, these resolutions are adopted by unanimous consent and we have signed these resolutions effective as of the 12 day of November 2021, to evidence our consent.

/s/ Elaine T. Marshall

ELAINE T. MARSHALL, Trustee

STATE OF TEXAS

COUNTY OF DALLAS

[Notary Block Omitted]

IN TESTIMONY WHEREOF, these resolutions are adopted by unanimous consent and we have signed these resolutions effective as of the 18 day of November 2021, to evidence our consent.

/s/ Stephen D. Cook

STEPHEN D. COOK, Ph.D., Trustee

STATE OF LOUISIANA

PARISH OF JEFFERSON

[Notary Block Omitted]

IN TESTIMONY WHEREOF, these resolutions are adopted by unanimous consent and we have signed these resolutions effective as of the 12th day of November 2021, to evidence our consent.

/s/ E. Pierce Marshall

E. PIERCE MARSHALL, JR., Trustee

STATE OF TEXAS

COUNTY OF DALLAS

[Notary Block Omitted]

MAJORITY CONSENT OF THE TRUSTEES
OF THE MARSHALL LEGACY FOUNDATION

We, the undersigned, representing a majority of the Trustees of the Marshall Legacy Foundation (herein "the Foundation"), who would be entitled to vote upon the resolutions hereinafter set forth at a formal meeting of the Trustees, sign this instrument in lieu of holding a special meeting of the Trustees to evidence our consent to the adoption of the following resolution:

WHEREAS, the Foundation is a charitable trust formed under the laws of the State of Louisiana; and

WHEREAS, Louisiana Revised Statutes 9:2274 relative to charitable trusts provides:

9:2274. Application of Louisiana Trust Code

Whenever the law pertaining to charitable trusts is silent, the Louisiana Trust Code shall apply, but no provision of the Louisiana Trust Code or other law shall be applied to invalidate a trust or any provision thereof permitted by this Part, or to prevent a charitable tax deduction or to affect adversely the trust's tax-exempt charitable status; and

WHEREAS, Louisiana Revised Statutes 9:2114 provides:

9:2114 Three or more trustees; exercise of powers

A power vested in three or more trustees may be exercised by a majority of the trustees, unless the trust instrument provides otherwise. A trustee who has not joined in exercising a power shall not be liable to the beneficiaries or to others for the consequences of that exercise, nor shall a dissenting trustee be liable for the consequences of an act in which he joins at the direction of the majority of trustees, if he expresses his dissent in writing to his

co-trustees at or before the time of the joinder. Nothing in this section shall excuse a co-trustee from liability for inactivity in the administration of the trust nor for failure to attempt to prevent a breach of trust.

and

WHEREAS, Louisiana Revised Statutes 9:2221 provides:

9:2221 Remedies against trustee

A beneficiary of a trust may institute an action:

(1) To compel a trustee to perform his duties as trustee;
(2) To enjoin a trustee from committing a breach of trust;
(3) To compel a trustee to redress a breach of trust;
(4) To remove a trustee.

and

WHEREAS, the indenture establishing the Peroxisome Trust, as settled by Elaine T. Marshall, provides that the Foundation is a beneficiary of the Peroxisome Trust and requires distributions of funds by the Peroxisome Trust to the Foundation on a quarterly basis; and

WHEREAS, Preston L. Marshall, Co-Trustee of the Peroxisome Trust, refused to execute the mandatory quarterly wire transfer instructions making required distributions to the Foundation and refused to authorize the filing of tax returns on behalf of the Peroxisome Trust, and

WHEREAS, as a result, the Foundation did not receive distributions of funds due from the Peroxisome Trust for the 3rd and 4th quarters of 2016, all

quarters from 2017-2020 and 1st quarter 2021, leading to a significant shortfall in funds available to the Foundation for charitable giving; and

WHEREAS, the withholding of distributions by the Peroxisome Trust violated the indenture establishing the Peroxisome Trust and The Marshall Heritage Foundation ("TMHF") instituted litigation against Preston L. Marshall as Co-Trustee of the Peroxisome Trust in the United States District Court for the Eastern District of Louisiana entitled, "Dr. Stephen D. Cook, in his capacity as Co-Trustee of The Marshall Heritage Foundation v. Preston L. Marshall, in his capacity as Co-Trustee of the Peroxisome Trust," C.A. No. 17-5386 (the "Peroxisome Litigation"); and

WHEREAS, TMHF obtained a judgment against Preston L. Marshall as Co-Trustee of the Peroxisome Trust in the Peroxisome Litigation and this judgment was affirmed by the United States Court of Appeals for the Fifth Circuit; and

WHEREAS, as a consequence of the actions of Preston L. Marshall, the Peroxisome Trust incurred federal and state tax liability, including taxes, penalties and interest, which caused the Peroxisome Trust to not make all the distributions owed to the Foundation; and

WHEREAS, the Foundation suffered damages in the form of deficient payments from the Peroxisome Trust and interest as a direct consequence of the actions of Preston L. Marshall; and

NOW, THEREFORE, BE IT RESOLVED Stephen D. Cook, PhD, Co-Trustee of the Foundation, be, and is hereby, empowered to take all actions necessary and proper, including initiation of litigation in any

appropriate jurisdiction, to enforce the provisions of the Louisiana Trust Code and the relevant documents of the Peroxisome Trust and the Foundation so as to seek the removal of Preston L. Marshall as Co-Trustee of the Peroxisome Trust, and to seek from Preston L. Marshall any and all damages to the Peroxisome Trust and the Foundation caused by the actions of Preston L. Marshall, in his personal capacity and/or his capacity as Co-Trustee of the Peroxisome Trust.

BE IT FURTHER RESOLVED that Stephen D. Cook, PhD as Trustee of the Foundation is solely authorized to take any and all necessary actions required to carry out these resolutions.

These resolutions may be signed in multiple counterparts at different times and at different locations with the same effect as if all signing parties had signed the same document. All such counterparts shall be construed together and constitute the same instrument.

REMAINDER OF PAGE LEFT BLANK INTENTIONALLY; SIGNATURE PAGES FOLLOW.

IN TESTIMONY WHEREOF, these resolutions are adopted by majority consent and we have signed these resolutions effective as of the 12 day of November 2021, to evidence our consent.

/s/ Elaine T. Marshall

ELAINE T. MARSHALL, Trustee

STATE OF TEXAS

COUNTY OF DALLAS

[Notary Block Omitted]

IN TESTIMONY WHEREOF, these resolutions are adopted by unanimous consent and we have signed these resolutions effective as of the 18 day of November 2021, to evidence our consent.

/s/ Stephen D. Cook

STEPHEN D. COOK, Ph.D., Trustee

STATE OF LOUISIANA

PARISH OF JEFFERSON

[Notary Block Omitted]

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1332 provides:

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d)(1) In this subsection—

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment

of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of—

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2)—

(A)(i) over a class action in which—

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant—

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which—

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim—

(A) concerning a covered security as defined under 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11)(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the

plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which—

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply—

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.