No. 18-10382

IN THE

# United States Court of Appeals for the Fifth Circuit

IN THE MATTER OF: LATITUDE SOLUTIONS, INCORPORATED,

Debtor,

CAREY D. EBERT,

Appellee,

v.

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

Appellants.

Appeal from the United States District Court,
Northern District of Texas, Fort Worth Division
Civil Action No. 4:15-cv-225-O
Judge Reed Charles O'Connor, Presiding

## BRIEF FOR APPELLEE

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September 26, 2018

## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

1. Carey D. Ebert, Appellee
2. Norton Rose Fulbright US LLP, counsel for Appellee
3. Jonathan S. Franklin, counsel for Appellee
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## STATEMENT REGARDING ORAL ARGUMENT

Oral argument in this case is not necessary. Appellants raise many issues on appeal, but the majority of those issues were waived or forfeited in the district court. Appellants' remaining challenges pertain to factual determinations that were well within the jury's province.

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## ISSUES PRESENTED

1. Whether the jury's verdict should be invalidated based on a non-jurisdictional argument, not raised below, that a bankruptcy trustee is not the real party in interest to bring claims for breaches of fiduciary duties owed to a corporation.

2. Whether, after proposing a jury instruction for "knowing aiding and abetting," defining that offense's elements "under Texas law" during the charge conference, and failing to challenge the cause of action's validity until after their post-verdict Rule 50 motions were denied, appellants may argue on appeal that Texas law does not recognize a cause of action for aiding and abetting a breach of fiduciary duties.

3. Whether, after informing the district court that an abettor is automatically "jointly and severally liable" for the underlying offense under Texas law, appellants may challenge the imposition against them of joint-and-several liability for aiding and abetting.

4. Whether the district court erred by concluding, as to the few challenges appellants preserved, that the jury acted rationally in reaching its verdict.

## INTRODUCTION

This appeal arises out of a five-day trial at which a unanimous jury determined that Matthew Cohen, John Paul DeJoria, Howard Appel, and Ernest Bartlett ("Appellants") together engaged in a scheme to squander assets of Latitude Solutions, Inc. ("LSI") for personal benefit. The jury's findings focused on Appellants' efforts to enable Appel, whom each Appellant knew was a serial securities manipulator and convicted criminal, to surreptitiously influence corporate actions and engage in fraudulent stock trades to temporarily boost LSI's share price to the company's long-term detriment. The record also demonstrated that DeJoria funded the plot and, while a director, shielded Appel, Bartlett, and Cohen (an LSI officer and director) from termination and other scrutiny. The jury determined that DeJoria and Cohen breached their fiduciary duties to LSI, that DeJoria, Appel, and Bartlett aided and abetted Cohen in breaching his duties, and that DeJoria, Cohen, and Appel were each liable for exemplary damages.

As is often true in complex trials, the district court's decisions about jury instructions and other critical matters were shaped largely by the contentions and adversarial presentations of the parties. Yet, in two briefs totaling more than 25,000 words, Appellants focus almost exclusively on rulings to which they did not object below, and save their sharpest criticism for decisions they openly urged the district court to make. Thus, despite having failed to raise the issue at trial,

Appellants argue for the first time that Carey D. Ebert, LSI's Chapter 11 trustee (the "Trustee"), was not the proper party to bring these claims. Worse still, they argue that the jury forms and instructions were flawed, even though the district court used the precise forms and instructions Appellants approved, without overruling a single objection they made. And, finally, of Appellants' many challenges to the jury's findings, few were raised in the district court, and most flatly contradict what Appellants said below about the governing law. The remainder of those challenges—which constitute the few preserved issues in this appeal—take aim at factual findings that were well within the jury's province. They should be rejected, and the judgment should be affirmed.[1]

## STATEMENT OF THE CASE

### A. Factual Background.

#### 1. Cohen Founds LSI, But It Is Set Up To Fail.

Notwithstanding Appellants' one-sided presentation, a reasonable juror could readily conclude that Appellants never intended for LSI to be a going concern. Cohen and his associates formed LSI in 2009. ROA.7505, 9615, 10059.

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[1] After this appeal was filed, the bankruptcy court authorized the sale and assignment of the judgment to Glacier Value Partners LLC. *See* Order, *In re Latitude Solutions, Inc.*, No. 12-46295-rfn-11 (Bankr. N.D. Tex. July 20, 2018) (Dkt. 435). The bankruptcy court's order allows for this appeal to continue to proceed in the name of the Trustee. *Id*. at 7, 20-21.

The company was ostensibly founded to pursue a water-cleaning technology called Electro-Precipitation, ROA.9012-9013, but it was clear from the outset that LSI was set up to fail. In the 150 years since Nikola Tesla invented the technology, all who have tried to employ Electro-Precipitation for profit—including Shell, Halliburton, and other major energy-sector entities—have abandoned the pursuit. ROA.9012-9013, ROA.9120-21. The jury heard ample evidence that LSI's technology was not commercially viable from the beginning, because the cost to clean a unit of water was more than ten times what the market would bear. ROA.9111-13. Put simply, LSI had no chance. ROA.8908, 8985, 9124.

Appellants were able to conceal that fact because LSI's financial team used accounting software that, while perhaps suited for small businesses, was absurd for a publicly traded company. ROA.8859-61, 9628-29; *see also* ROA.8861 (new CEO found it "pretty troubling" that LSI used software "that's a step above having a handwritten ledger, which is just not adequate"). The software left records easily alterable, such that frauds could be committed without leaving a footprint. ROA.9628-29. Huge sums of money went missing from LSI's coffers, and nobody noticed. ROA.9631-33 (LSI raised $28M in four years, but failed to account for $8.3M in R&D expenses in a single quarter, and a separate $6M went missing entirely). And in 2012, shortly before LSI reported itself to the Department of Justice on suspicions of fraud and stock manipulation, *see infra* at 14, its

independent auditors reported that LSI's software choices alone raised a "material weakness" in its financial controls. ROA.8859-61, 9629-31.

### 2. Cohen Secretly Delegates His Managerial Role To Appel.

The ringleader of the financial team was Cohen, who, after serving as a director from LSI's founding, became CFO in 2011. ROA.7505, 9210. He received roughly $557,000 in salary. ROA.9244.

Cohen delegated much of his job to Appel. But as Cohen knew, Appel was far from an honest businessman. He became involved with LSI within months of being released from federal prison, ROA.10018-20, having served 21 months for securities fraud and money laundering conspiracies, ROA.10015. His "recidivis[m]" continued through his time at LSI and is ongoing to this day. *See* SEC, *SEC Charges Recidivist in Stock Manipulation Scheme* (July 27, 2018), https://www.sec.gov/news/press-release/2018-148.[2] As one of DeJoria's advisors would later put it, Appel was such a "bad" character that his associates were

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[2] In August 2018, Appel and two associates pleaded guilty to charges that they conspired to "secretly gain control of large blocks of publicly-traded microcap stocks" using "nominee accounts," engage in fraudulent activities designed to "artificially increase the price of the stock" with Appel "working at times as a 'consultant' and at other times with no official role," and then "sell their shares for a profit." Information ¶¶ 18-36, *United States v. Appel*, 2:18-cr-00321-PD (E.D. Pa. July 27, 2018); U.S. Dep't of Justice, *Recidivist Fraudster Pleads Guilty for the Third Time to Securities Fraud, Sent to Jail by Judge* (Aug. 15, 2018), https://www.justice.gov/usao-edpa/pr/recidivist-fraudster-pleads-guilty-third-time-securities-fraud-sent-jail-judge.

"teetering on the precipice of criminality by association alone." ROA.8943. Appel himself was unquestionably on that precipice: he was barred from the securities industry, ROA.10122, 14632, 14638, but nevertheless accepted Cohen's offer to work off the books as a stock promoter for LSI, ROA.10037.

Appel's "employment" by Cohen and LSI was not memorialized on paper or reported outside the company. Yet, through an agreement with Bartlett's company, FEQ Realty, Inc., ROA.10117, which in turn had an unreported oral agreement with Appel, ROA.9202-03, 9295-96, Cohen took Appel on as an advisor, ROA.10036-37. Cohen spoke to Appel daily, ROA.9211, sent him non-public lists of shareholders and stock sales on a weekly basis, ROA.8955, 9211, secretly forwarded him non-public emails regarding business and corporate governance issues, ROA.9018, 9211-13, permitted him to recruit a new CEO largely by himself, ROA.8840, 8856-57, invited him to board meetings throughout 2011 and 2012, ROA.8999, and permitted him to serve as the "sales force" for LSI securities, despite the substantial legal restrictions he was under, ROA.8998. In a rare moment of candor, Cohen admitted to one colleague that it was Appel, rather than LSI's management, who "wagg[ed] the dog" at LSI. ROA.8953. But none of this was truly for LSI's benefit: Cohen kept Appel's involvement hidden from public view, ROA.8946-47, and sought to prevent other directors and officers from learning of Appel's criminal past, ROA.14708. And in 2012, when LSI's

Executive Committee finally ordered Cohen to cease communicating with Appel, Cohen disregarded that instruction. ROA.9227.

All the while, Appellants traded heavily in LSI shares, which they obtained at extraordinary discounts. ROA.9620-21 (average discount for Appellants and their nominee companies was 79%). Appel and Bartlett largely used "nominee companies," which are entities that own record title of shares even while their controllers own beneficial title. ROA.9316. Cohen, Appel, and Bartlett agreed that investors who sold their LSI shares were "scum bags" for failing to stick with the company during its early (and, ultimately, only) years. ROA.9216-17. But, through their nominee companies, Appel, Bartlett, and their associates traded heavily, earning themselves more than $5M in profits. ROA.9637. Nor could Appellants explain, other than by admitting that Cohen did not care about LSI's wellbeing, why Cohen sold $400K in LSI stock while still a director. ROA.9245-46 ("I needed to have some money in the bank. … At that point I took care of myself.").

### 3. DeJoria Surreptitiously Acquires Three Million Shares From Appel Just As LSI Begins To Project A False Image Of Success.

In March 2011, roughly six months after first investing in LSI, Appel persuaded DeJoria to invest $1M as well. ROA.10133, 10233; *see also* ROA.12479. At trial, DeJoria testified that Appel had nothing to do with his

becoming involved with LSI, and that, when he made his first investment, he had not even spoken to Appel about the company. ROA.10234. The documents, however, reflected otherwise, *see, e.g.*, ROA.14615, and a rational jury could have disbelieved that testimony, especially given DeJoria's long history with Appel and Bartlett. *See infra* at 11.

The jury also did not believe DeJoria's explanation of a highly unusual, multimillion-dollar loan he gave Appel and Bartlett less than a month later. In April 2011, after investing another half-million in LSI, ROA.12497, DeJoria loaned Appel, Bartlett, and one of their associates two million dollars. ROA.13317.[3] The loan was secured with 3,000,000 shares of LSI stock, "to be physically delivered to Veronika," DeJoria's secretary, in the event of nonpayment. *Id.* The annualized interest was 200%, but the loan was to be paid back (including $1M in interest) in just three months. *Id.* The loan document was a single page containing six "terms" comprising about 100 words. *See id.*

As DeJoria agreed, the loan was "unique." ROA.10269-70. Even stranger, though, was what happened afterwards. Two days after the parties signed the document, Veronika received a letter from Cohen, informing her that four nominee companies belonging to Appel and Bartlett were ***already*** working to transfer

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[3] The third associate, Kenneth Stevenson, was named as a co-conspirator in Appel's recent indictment. *See supra* note 2.

3,000,000 shares to DeJoria. ROA.15017, 10271. At trial, DeJoria vociferously denied he was attempting to simply acquire more LSI stock. ROA.10271. Appel, meanwhile, told the jury that DeJoria was eager to invest more heavily. ROA.10046 (LSI shares as collateral presented "comfort[able] … worst case scenario"). In any event, neither of them credibly explained why the transaction was structured in such an unusual manner. *See* ROA.10044-48 (Appel); ROA.10270-74 (DeJoria). In the absence of such an explanation, the jury could readily conclude it was either a surreptitious stock acquisition by DeJoria or a loan to Appel and Bartlett to purchase more LSI shares.

Shortly after DeJoria's large acquisition, LSI began to project "success" to the market. The process began when LSI negotiated a contract for a leading equipment manufacturer, Jabil, Inc. ("Jabil") to manufacture over $9 million worth of machinery. *See* ROA.9044, 9559-60. Cohen dealt with Jabil "personally" during negotiations. ROA.9198. At that time—and for months afterward—LSI had no idea whether the machinery would work. *See* ROA.9005-06. It had no working prototype. ROA.9004-05. The closest it had were two units, designed for on-site demonstrations, that could clean less than one fortieth of what the Jabil machinery was expected to handle. ROA.9007. When LSI finally hired a consultant to design their machinery ***after*** entering into the Jabil contract, he was baffled: in his experience, companies "fully design[] and test[]" machinery ***before***

paying millions to produce it. ROA.9006-07; *see also* ROA.9122. Yet LSI paid the millions first, saving questions for later.

LSI's consultant further opined that LSI had no business plan, contracts, or leads with which to monetize the equipment, even if it ***could*** make it work. ROA.9008 (contract was "fiscally irresponsible"). He was not surprised, then, when LSI ended up with no use for the machinery it ordered, and the deal turned into nothing more than a $9.5M liability. *See* ROA.14211-58.

For Appellants, however, cleaning water was not the point. Instead, the point was to generate good news and publicize it. Cohen and Appel routinely drafted LSI's press releases together, *see, e.g.*, ROA.13323-25, and whenever there was ***any*** good news at LSI, they shopped it around. In December 2011, Cohen told colleagues that LSI's "technology ha[d] been totally proven" and that revenue would commence the following month, even though other executives knew his claims were "not close to being true." ROA.14710. In 2012, Appel drafted a contract for a "one well deal" that was going to "break even at best and probably … lose money"—and then, before the deal was even signed, circumvented the CEO to announce the deal to the public on LSI's behalf. ROA.8860-63. The Jabil deal was just another effort to falsely project profitability. *See also* ROA.9017 (associates of Cohen falsely claimed to have signed contract for "long

engagement" with another drilling services provider, and continued to lie when confronted).

#### 4. Ignoring Warnings, DeJoria Continues To Participate In And Assist The Scheme.

Two months after LSI entered into the Jabil contract, DeJoria's outside advisors commissioned a background report on Cohen, Appel, Bartlett, and other LSI leadership. ROA.8940-43. The results were unsurprising. "Succinctly," the cover email read, "Appel and Bartlett are bad news." ROA.14693. "Appel is a convicted felon with a history of stock manipulation schemes. Bartlett has no identifiable criminal record, but both corporations he has been involved with have gone into Federal bankruptcy and he personally has over $700,000 in Federal tax liens against him. Not the sort you want on your team!" *Id.* DeJoria's advisor, upon reading the report, concluded that there was "[n]ot much more to say about Appel other than he has been consistent in his criminal behavior for the past twenty years." ROA.14694.

DeJoria's advisors rushed to convey the message, even though DeJoria had known Appel and Bartlett for roughly those same twenty years. ROA.10264-65. The advisors knew Appel and Bartlett were "scammers of the worst order," ROA.8944, and that LSI's leadership "seem[ed] like terrible business people who leave a trail of lost money from investors who have been scammed," ROA.14694. Seeking to protect DeJoria, ROA.8945, one advisor sent the report to DeJoria's

assistant (which was the "normal protocol" for getting materials to DeJoria), ROA.8947, and transmitted the report's contents to both Cohen and DeJoria separately, ROA.8949. The message was clear: Appel and Bartlett were dirty, and DeJoria should not go into business with them.

DeJoria ignored the warnings. Informing his advisors that Appel and Bartlett were "nice guys," ROA.14709, he continued to prop up LSI with more money, ROA.10257, and finally joined the Board of Directors on October 21, 2011. *See* ROA.7505. But upon his arrival, he seemed to have little interest in LSI's wellbeing. One advisor, Jeff Wohler, had been "attempting to circle the wagons on [Appel] since [early 2011]," but DeJoria "thwarted [him] on every single occasion." ROA.14714. DeJoria invited Appel to board meetings and then lied about Appel's participation, *id.*; *see also* ROA.8963-64, and "refused to acknowledge board minutes mentioning wrong doing of The Appel group," ROA.14714. Even more damning, when LSI attempted to terminate Cohen, DeJoria—at Appel and Bartlett's urging—forced the company to "rescind the firing." *Id.*; *see also* ROA.9247-48. DeJoria also maintained a policy of deliberate ignorance: he told associates that he could not be held liable as long as he remained uninformed of LSI's problems, ROA.8869, hung up on executives when they sought to discuss corporate governance, ROA.8868, and was openly dismayed whenever the new management team attempted to investigate wrongdoing,

ROA.8867-68. Management was flummoxed: Why, when he was pouring cash into LSI stock, did DeJoria "refuse to acknowledge" the "clear wrongdoing" of Cohen, Appel, and their associates? ROA.8967; ROA.14714.

During this period, LSI hired an investigator to examine suspicions of market manipulation. ROA.9019-20. The investigator found, among other things, that Appel and Bartlett routinely purchased shares at a deep discount and then immediately sold them into the market at higher prices, yielding "9 to 12 million dollars of" insider-trading "profits" that, the investigator opined, should have been forfeited to LSI. ROA.14737; *see also* ROA.13696-99. Much of that conduct occurred while DeJoria was a director. ROA.13696-99.

By early 2012, Appellants could no longer project even a façade of success. Those who dealt with LSI began to see that Appel was in charge. ROA.9025-27. By that point, although still off the books, Appel attended Board meetings, ROA.9029, made significant business decisions with Bartlett on LSI's behalf, ROA.9031, served as an ad-hoc executive-appointment committee with DeJoria, ROA.9030, and sought to "raise" his "voice" in LSI's management, despite not being on the "org chart." ROA.9240. With DeJoria's help, Appel recruited a new CEO, who left within weeks after discovering LSI was a shambles. ROA.8869-

70.[4] Appel's conduct continued, even after Wohler and other executives told Cohen to cease communicating with him—an order that Cohen ignored entirely. ROA.9227. Indeed, until he was asked to leave LSI after being charged with sexual harassment, ROA.9604, 9227, Cohen simply agreed to "anything" Appel said. ROA.9028.

DeJoria's tenure as a director ended in September 2012. ROA.7505. The next month, LSI turned Cohen and Appel in to the Department of Justice on suspicions of manipulating stock prices. ROA.8966, 8978-79, 9239. LSI never came anywhere close to earning revenue to pay for the Jabil machinery and, in November 2012, filed for bankruptcy. The Trustee was appointed in April 2013.

### B. Proceedings Below.

#### 1. Jury Charge And Verdict.

The Trustee filed the operative complaint in November 2015, alleging that Appellants and others committed torts precipitating LSI's failure. ROA.15. Trial began in July 2017, and lasted for five days, during which each of the Appellants, three experts, and other witnesses testified about Appellants' conduct. Ultimately, the claims that went to the jury (the "Claims") were a single count each against

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[4] Upon the CEO's departure, LSI falsely informed the market that he was leaving to become more involved in DeJoria's charities—even though he really left because DeJoria had "misled" him. ROA.8869-73.

DeJoria and Cohen for breaching fiduciary duties owed to LSI, and a single count each against DeJoria, Appel, and Bartlett for aiding and abetting Cohen's breach. *See, e.g.*, ROA.7505-09.

At the close of evidence, the court held a charge conference, ROA.10345-59, where each side had an opportunity to object to the proposed charge and verdict forms. With DeJoria's counsel speaking for all Appellants, ROA.10353, the parties largely agreed on how the jury should be instructed. As to Question 1, which would determine whether Cohen and DeJoria breached their fiduciary duties, no party requested anything more than the simple "yes" or "no" question the jury was eventually asked as to both defendants. *See* ROA.7505. Questions 4 and 5, which would determine eligibility for and quantify exemplary damages, were also agreed to without objection. *See* ROA.7508-09. On Question 2, which was intended to determine whether DeJoria, Appel, and Bartlett assisted Cohen's breach of fiduciary duties, the only material objection was from Appellants, who asked for the offense to be defined as "aiding and abetting," rather than "knowing participation in," a breach. ROA.10352. The district court obliged. *Id.*; ROA.7506.

Question 3, which largely reflected Appellants' own proposed language and format, asked the jury to specify certain elements of damages against each defendant. The form included boxes for the jury to separately find, as to each

defendant found liable, "[t]he reasonable cash market value of liabilities incurred by LSI" resulting from "that defendant's breach of fiduciary duty," and the "reasonable market value of any gains to that defendant … proximately caused by that defendant's breach of fiduciary duty." ROA.7507. The jury was instructed that it could "not increase or reduce the amount in one answer because of your answer to any other question about damages." *Id.*

The jury returned a verdict against Appellants on all five counts: DeJoria and Cohen had breached their fiduciary duties, and DeJoria, Appel, and Bartlett had aided and abetted Cohen's breach. ROA.7505-06. As to damages, the jury determined that DeJoria was liable for $1.5M for his breach; that Cohen was liable for a total of $6.9M for his breach; and that Appel and Bartlett were liable for $2.5M each, presumably stemming from the $5.1M they and their associates made in proceeds from sales of LSI stock. ROA.7507. The jury also assessed $5M in exemplary damages against Appel, $2M against Cohen, and $1M against DeJoria. ROA.7509.

**2. Post-Trial Motions And Final Judgment.**

Appellants filed post-verdict Rule 50 motions. Cohen argued only that he owed and breached no fiduciary duty ***to Jabil***; he presented no argument with respect to duties he owed ***to LSI***, which were the only duties the jury found he breached. ROA.7525-30. No other party made any further argument with respect

to Cohen's breach (even though it was an element of their aiding-and-abetting charges), but Appel, Bartlett, and DeJoria all argued that the evidence was insufficient to support the verdicts against them.

The district court upheld the jury's verdict. As to Cohen, the court discussed whether he owed duties to Jabil but held, in any event, that the jury's verdict was supported on the independent ground that Cohen breached the duties he owed to LSI. ROA.8388-91. As to DeJoria, the court upheld the jury's verdict on various grounds, including that, both before and during his time as a director, DeJoria "knowingly participated in Cohen's breach of fiduciary duty." ROA.8401-03. And, as to Appel and Bartlett, the district court found that the evidence supported the jury's verdict on both liability and damages. ROA.8391-97; *see also* ROA.8394 (noting that Trustee's expert, Manz, testified directly "that his extensive investigation into LSI's financials informed his opinion that certain defendants, including Appel [and Bartlett] profited $5.1 million from the sale of LSI stock").

DeJoria, Appel, and Bartlett moved for reconsideration. ROA.8415-18, 8419-39. All three argued—for the first time in the case—that they should not be held jointly and severally liable for the damages resulting from Cohen's breach, *see id.*, and DeJoria argued, also for the first time (and only in a footnote), that Texas law did not permit a cause of action for aiding and abetting, ROA.8427. The district court, noting that the first issue was waived as a result of Appellants'

concessions in the charge conference, ROA.8563, denied reconsideration, and entered judgment on March 7, 2018. This appeal followed.

## SUMMARY OF ARGUMENT

Appellants' first argument, that the Claims belonged to LSI's creditors and not the Trustee, is both waived and wrong. Appellants' challenge is not, as they suggest, a jurisdictional challenge to the Trustee's Article III "standing," but is instead a real-party-in-interest challenge under Fed. R. Civ. P. 17(a). That challenge was waived by Appellants' failure to raise it in the district court. In any event, because claims for breaches of fiduciary duties owed to LSI belonged to LSI itself (and after bankruptcy, to its estate), the Trustee was the proper plaintiff to bring the Claims.

Nor can Appellants argue that the judgment as to aiding and abetting was incorrect. DeJoria, Appel, and Bartlett belatedly argue that Texas law does not recognize an offense for aiding and abetting a breach of fiduciary duties, and that the district court did not obtain the requisite jury findings to impose damages for that offense. But both challenges are waived. In the charge conference, DeJoria's counsel, speaking for all Appellants, told the district court that Texas law ***does*** recognize an aiding-and-abetting offense, set forth the elements of that offense "under Texas law," and agreed that, as a matter of law, anyone found to have committed it would be liable as a principal for the underlying breach. The district

court then relied on those representations in crafting the jury's charge. Appellants cannot complain on appeal about legal theories they expressly urged the district court to adopt. And even if they could, their challenges are meritless, because the jury charge and the judgment correctly reflected Texas law.

Finally, Appellants launch an array of attacks on the jury's findings. Few are preserved, and none are meritorious. Cohen has waived any challenge to the jury's findings. DeJoria has waived most of his challenges, and the remainder would require this Court to second-guess determinations that were well within the jury's province. And Appel and Bartlett, who challenge only the amount of their damages, cannot establish that the jury acted irrationally by relying on unchallenged, unrefuted testimony from the Trustee's expert.

The judgment should therefore be affirmed.

## STANDARDS OF REVIEW

"If a litigant believes that an error has occurred (to his detriment) during a federal judicial proceeding, he must object in order to preserve the issue." *Puckett v. United States*, 556 U.S. 129, 134 (2009). Otherwise, "appellate-court authority to remedy the error … is strictly circumscribed." *Id.* at 134. Many unpreserved issues cannot be reviewed at all. *See, e.g., Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 399-407 (2006) (unpreserved Rule 50 challenges); *Int'l Meat Traders, Inc. v. H&M Food Sys.*, 70 F.3d 836, 840 (5th Cir. 1995)

(unpreserved real-party-in-interest challenges). Even where reviewable, an unpreserved, non-jurisdictional error will be sustained ***only*** if it (i) was neither waived nor invited by the complaining party, (ii) was so "obvious" that it was not "subject to reasonable dispute," (iii) was outcome-determinative, and (iv) was so egregious that to affirm would "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings." *Puckett*, 556 U.S. at 135; *see also Jimenez v. Wood Cty.*, 660 F.3d 841, 845 (5th Cir. 2011). "If [an] unpreserved error does not meet th[at] demanding standard, [the Court has] no authority to correct it." *Jimenez*, 660 F.3d at 845.

Where a sufficiency challenge is preserved, this Court "draw[s] all reasonable inferences and resolve[s] all credibility determinations in the light most favorable to the [verdict]." *Cowart v. Erwin*, 837 F.3d 444, 450 (5th Cir. 2016). The Court will disturb a jury's findings "only if, when viewing the evidence in the light most favorable to the verdict, the evidence points so strongly and overwhelmingly in favor of one party that the court believes that reasonable jurors could not arrive at any contrary conclusion." *Dresser-Rand Co. v. Virtual Automation Inc.*, 361 F.3d 831, 838 (5th Cir. 2004).

# ARGUMENT

## I. APPELLANTS' ARGUMENT THAT THE TRUSTEE MAY NOT SUE FOR BREACHES OF FIDUCIARY DUTIES OWED TO LSI IS BOTH WAIVED AND WRONG.

Appellants begin their briefs by arguing that the Trustee lacked "standing" to assert the Claims, purportedly because the Claims belonged to Jabil, rather than LSI. DeJoria Br. 15-20; Appel, Bartlett & Cohen Br. ("ABC Br.") 19-24. That argument is both waived and wrong. First, the Trustee undoubtedly had Article III standing to pursue a breach of fiduciary duties owed to LSI, and Appellants have not argued otherwise. Second, Appellants' challenge to the Trustee's power to bring a particular claim is a question of statutory authority, not Article III standing, and Appellants waived and forfeited that challenge by failing to raise it in the district court. And third, even if preserved, Appellants' argument would be incorrect: this Court's cases (and common sense) dictate that a claim for breach of fiduciary duties owed to a corporation belongs to the corporation (and, in bankruptcy, its trustee), rather than its creditors.

### A. The Trustee Had Article III Standing.

It is beyond peradventure that LSI (and, therefore, its trustee[5]) possessed ***constitutional*** standing under Article III to bring the Claims. Such standing

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5 *See, e.g., Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380, 385 (5th Cir. 2008) (trustee has standing to bring all "causes of action belonging to the debtor at

requires only that (i) the plaintiff have "suffered an injury in fact;" (ii) the injury be "fairly traceable to the challenged action of the defendant;" and (iii) the injury be "redress[able] by a favorable decision." *United States v. Windsor*, 570 U.S. 744, 757 (2013) (internal citations and quotation marks omitted); *see also Norris v. Causey*, 869 F.3d 360, 366 (5th Cir. 2017).

Application of that standard is straightforward here. As the jury found, LSI was harmed when Appellants caused it to take on millions of dollars of debt that it had no hope of repaying. *See, e.g.*, ROA.7507; *see Norris*, 869 F.3d at 366. As the Trustee alleged (and the jury found), that debt was a direct result of the efforts of Appellants, who were corporate fiduciaries and their abettors, to inflate LSI's stock price in the short term for their personal gain. *See* ROA.8380-8405; *Norris*, 869 F.3d at 366. And, as in *Norris*, "this litigation can redress the loss through damages, as the judgment demonstrates." 869 F.3d at 366. Thus, there can be no doubt about LSI's (and, in bankruptcy, the Trustee's) constitutional standing to assert the Claims. *See, e.g.*, *Ross v. Bernhard*, 396 U.S. 531, 538 (1970) (breach-of-fiduciary-duty claims are "***the corporation's***," and the resulting damages "***belong to the corporation***") (internal quotation marks omitted and emphasis

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the commencement of the bankruptcy case"); *Wieburg v. GTE Sw., Inc.*, 272 F.3d 302, 306 (5th Cir. 2001).

added). It is therefore not surprising that Appellants expressly concede that the district court possessed subject matter jurisdiction. *See* DeJoria Br. 1; ABC Br. 1.

### B. Appellants Waived Any Argument That The Claims Were Not Property Of The Estate.

Appellants argue that the Claims belonged exclusively to creditors, and that the Trustee therefore lacked "standing." But although "[t]he 'standing' label" is sometimes "placed on" arguments like this one (especially by litigants who, like Appellants, have failed to timely raise them below), the question of "who, according to the governing substantive law, is entitled to enforce [a] right" is "a merits question," not a jurisdictional one. *Norris*, 869 F.3d at 366-68 (quoting 6A Charles Alan Wright, *et al.*, *Federal Practice & Procedure* § 1543 (3d ed.)).[6] And because the question "does not go to a court's subject matter jurisdiction," it is waived if not timely raised in the trial court. *Norris*, 869 F.3d at 366; *Rideau v. Keller Indep. Sch. Dist.*, 819 F.3d 155, 163 n.7 (5th Cir. 2016) (where "the claim actually belongs to one person, but the action is filed by another person," issue is

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6 *See also Caplin v. Marine Midland Grace Tr. Co.*, 406 U.S. 416, 422, 434-35 (1972) (referring to issue as "standing," but clarifying that it "is capable of resolution by explicit congressional action," and is thus not constitutional); *Grede v. Bank of New York Mellon*, 598 F.3d 899, 900 (7th Cir. 2010) (Easterbrook, J.) (trustee's power to bring particular claim "is a question on the merits rather than one of justiciability"); *cf. Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011) ("Because the consequences that attach to the jurisdictional label may be so drastic, we have tried in recent cases to bring some discipline to the use of this term.").

"a waivable capacity problem, not a jurisdictional standing problem") (alterations and internal quotation marks omitted).

It was therefore incumbent on Appellants to raise and argue their challenge prior to trial. *Norris*, 869 F.3d at 367-68; *Int'l Meat Traders*, 70 F.3d at 840 (real-party-in-interest defense is "not to be used as a trial-by-ambush tactic," and is "waived … because of its tardiness" where raised afterwards). Yet, despite raising analogous challenges as to ***other*** causes of action, *see, e.g.*, ROA.2406-07, Appellants never pressed ***any*** argument below that the Trustee was not the appropriate party to bring the Claims. *Cf. U.S. Bank Nat'l Ass'n v. Verizon Commc'ns, Inc.*, 761 F.3d 409, 425-26 (5th Cir. 2014) (to preserve argument, party "must press its claims, which entails clearly identifying a theory as a proposed basis for deciding the case—merely intimating an argument is not the same as pressing it"). Appellants' argument is therefore waived, and it cannot provide grounds for disturbing the judgment.

### C. Even If Reviewable, The District Court's Determination That The Trustee Was The Real Party In Interest Was Correct.

Even if the issue were reviewable, Appellants have failed to demonstrate that the district court committed ***any*** error—much less plain error—by entering judgment for the Trustee. The Supreme Court has made clear that ***a corporation*** "is the real party in interest" in a suit alleging a breach of fiduciary duties owed to it. *Ross*, 396 U.S. at 538; *see also, e.g., LaSala v. Bordier et Cie*, 519 F.3d 121,

129 (3d Cir. 2008) (participation in "pump-and-dump scheme almost certainly constitutes a breach of the[] duty of loyalty," and "gives ***the corporation*** a colorable claim against the directors and officers (and anyone who knowingly aided them)") (emphasis added). As the verdict form makes clear, that is all this suit was. ROA.7500-11 (finding harm to LSI resulting from breaches of duties owed to it). Because the Trustee is the proper plaintiff to bring any suit that previously belonged to LSI, *see supra* note 5, the district court did not err by entering judgment for the Trustee on the Claims.

The authority Appellants invoke does not prove otherwise. Their Fifth Circuit cases serve only to demonstrate that the Trustee ***was*** the proper party to bring the claims.[7] Most of their remaining authority reflects the straightforward principle (which has no relevance here) that an entity may not sue for a breach of duties owed exclusively ***to others***.[8] Indeed, under Appellants' own authority, a

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7 *See In re Seven Seas Petroleum, Inc.*, 522 F.3d 575, 584-85 (5th Cir. 2008) ("*Seven Seas*") (claim for "conspir[ing] to make" entity "insolvent" belongs to entity, not its creditors); *In re Educators Grp. Health Tr.*, 25 F.3d 1281, 1284-85 (5th Cir. 1994) ("*Educators*") (same); *see also Reneker v. Offill*, 2009 WL 804134, at *5-6 & n.5 (N.D. Tex. Mar. 26, 2009) (breach-of-fiduciary-duty action "would clearly belong to" entity to whom duty was owed).

8 *See Fla. Dep't of Ins. v. Chase Bank of Tex. Nat'l Ass'n*, 274 F.3d 924, 931 (5th Cir. 2001) (receiver for Western Star insurance company could not bring claims for "breaches of duty" owed "***to policyholders, not Western Star***") (emphasis added); *In re Sw. Equip. Rental, Inc.*, 102 B.R. 132, 139 (E.D. Tenn. 1989) (trustee for company could not "recover … ***on behalf of employees***")

Trustee is barred only from asserting a claim that "does not explicitly or implicitly allege harm to the debtor … as of the commencement of the case…." *Seven Seas*, 522 F.3d at 584. But the Claims in this case plainly ***do*** allege harm to the debtor, including (among other things) the Jabil liability. Even if Jabil could have sued LSI separately to recover that unpaid debt, that fact merely proves that LSI was harmed when it took on that liability; it does not establish that LSI's claims against Appellants belonged "***exclusively*** to creditors." *In re Bradley*, 326 F. App'x at 839 (emphasis added).

Appellants' two remaining cases—one from the District of Connecticut, and one from a bankruptcy court in New York—do not establish error either. Both cases rest on the proposition, reflected in the *in pari delicto* defense, that one who participates in a legal wrong cannot sue a co-participant. *See Hirsch v. Arthur Andersen & Co.* ("*Hirsch I*"), 178 B.R. 40, 43 (D. Conn. 1994) (debtor could not sue its lawyers and accountants for participating in debtor's Ponzi scheme); *In re Waterford Wedgwood USA, Inc.*, 529 B.R. 599, 605 (Bankr. S.D.N.Y. 2015) (concluding, based on *Hirsch I*, that retirement plan could not sue accountants for

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(emphasis added); *see also In re Bradley*, 326 F. App'x 838, 839-40 (5th Cir. June 16, 2009) (debtor cannot pursue "creditors' direct claims").

alleged accounting errors where errors had temporarily increased plan's liquidity).[9] The Second Circuit once understood such a defense to be relevant to the real-party-in-interest determination, but it has since joined the consensus view—which includes this Court—in rejecting that mode of analysis.[10] Moreover, even to the extent *Hirsch I* is good law, it does not apply to suits against corporate insiders,[11] or against abettors who assisted a corporate insider to subvert the corporation's interests, *see, e.g.*, *Wight v. BankAmerica Corp.*, 219 F.3d 79, 87 (2d Cir. 2000).

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9 To the extent the cases purport to rest on grounds broader than the *in pari delicto* defense, the Second Circuit has declined to endorse those grounds. *Hirsch v. Arthur Andersen & Co.* ("*Hirsch II*"), 72 F.3d 1085, 1094 (2d Cir. 1995) (affirming *Hirsch I* on separate grounds); *In re Flagship Healthcare, Inc.*, 269 B.R. 721, 728 (Bankr. S.D. Fla. 2001) (Second Circuit affirmed *Hirsch I* "solely as to [the] holding").

10 *See Official Comm. of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 156-57 (2d Cir. 2003) (claims against debtor's accountants belonged to bankruptcy estate despite *in pari delicto* defense); *Educators*, 25 F.3d at 1285-86 (*in pari delicto* defense irrelevant "to the ability of the debtor to assert the claim"); *see also In re Senior Cottages of Am., LLC*, 482 F.3d 997, 1002-05 (8th Cir. 2007) (criticizing *Hirsch II* for "conflat[ing]" standing "with the *in pari delicto* defense," but noting that "the Second Circuit and the lower courts within [it] have [since] shifted").

11 *In re Mediators, Inc.*, 105 F.3d 822, 826-27 (2d Cir. 1997) (*in pari delicto* does not apply to suit by "a bankruptcy trustee" against "corporation's officers and directors"); *see also, e.g., In re Today's Destiny, Inc.*, 388 B.R. 737, 749 (Bankr. S.D. Tex. 2008) (noting lack of "any authority supporting the proposition that *in pari delicto* bars a Trustee from asserting claims against [i]nsiders for their wrongful conduct").

Thus, even if Appellants' argument had been timely raised, it would have been rejected.

## II. APPELLANTS' ARGUMENTS REGARDING LIABILITY FOR AIDING AND ABETTING A BREACH OF FIDUCIARY DUTY ARE WAIVED AND MERITLESS.

Appel, Cohen, and DeJoria next argue that the judgment must be reversed because Texas does not recognize a claim for aiding and abetting a breach of fiduciary duties. ABC Br. 42; DeJoria Br. 30-31. DeJoria further claims that the district court erred by imposing joint-and-several liability on that cause of action. DeJoria Br. 32-45; *see also* ABC Br. 43-54 (implying the same). But "[i]t is settled … law of [Texas] that where a third party knowingly participates in the breach of duty of a fiduciary, ***such third party becomes a joint tortfeasor and is liable as such***." *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 514 (Tex. 1942) (emphasis added); *see also In re DePuy Orthopaedics, Inc.*, 888 F.3d 753, 782 & n.53 (5th Cir. 2018) (quoting *Kinzbach* as "settled law" that third party who "knowingly participates in the breach of duty ***of a fiduciary***" is liable as joint tortfeasor) (emphasis supplied in *DePuy*); *Darocy v. Abildtrup*, 345 S.W.3d 129, 135, 137-38 (Tex. App. 2011) (affirming joint-and-several liability for abettor). Moreover, Appellants made binding concessions in the district court on both points they argue now. Their contentions therefore fail.

### A. Texas Law Recognizes A Cause Of Action For Aiding And Abetting A Breach Of Fiduciary Duty, And Appellants Have Waived Any Argument To The Contrary.

Appellants have waived—many times over—the argument that Texas does not recognize a cause of action for aiding and abetting a breach of fiduciary duty. DeJoria did not make such an argument until well after the verdict was rendered, when, for the first time, he hinted at it in a footnote in his motion for reconsideration of the order denying his Rule 50(b) motion. ROA.8427 n.5. Appel and Bartlett did not do even that. Because (i) issues not raised for the first time in a pre-verdict Rule 50(a) motion cannot be raised in a renewed Rule 50(b) motion, *see, e.g.*, *Flowers v. S. Reg'l Physician Servs., Inc.*, 247 F.3d 229, 238 (5th Cir. 2001), (ii) raising an issue for the first time in a motion for reconsideration does not preserve it, *see*, *e.g.*, *LeClerc v. Webb*, 419 F.3d 405, 412 n.13 (5th Cir. 2005), and (iii) Appel and Bartlett did not raise the issue at all below, Appellants are not entitled to ***any*** review, much less the *de novo* review they request. *Unitherm*, 546 U.S. at 399-407 (appellate courts are "powerless" to review issues that should have been raised in Rule 50 motion and were not); *see also McLendon v. Big Lots Stores, Inc.*, 749 F.3d 373, 374-75 & n.2 (5th Cir. 2015) (same).

In any event, Appellants expressly conceded in the district court the very point they argue now. Prior to the charge conference, the parties, relying on the Texas Pattern Jury Charges, submitted instructions setting forth the elements of

"knowing participation in a breach of fiduciary duty," ROA.7488, which is the specific nomenclature for the cause of action the Texas Supreme Court recognized in *Kinzbach*, 160 S.W.2d at 514. But DeJoria's counsel, speaking for all Appellants, insisted that the language be changed to "aiding and abetting." ROA.10352 ("***I think the cause of action is aiding and abetting***, so I could suggest knowing aiding and abetting.") (emphasis added); *see also* ROA.10358-59 (suggesting replacement of "knowingly participate" with "aid and abet"). He then proceeded to define the offense under Texas law. ROA.10352 ("[A]iding and abetting under Texas law, it's—it needs to have participation and provide substantial assistance in the breach of the fiduciary duty and it's basically based on Section 876 of the Restatement of Torts Second.").[12] Appellants cannot now argue that the district court erred by giving the jury the exact instruction, and using the exact nomenclature, that they requested. *See, e.g.*, *Druery v. Thaler*, 647 F.3d 535, 545 (5th Cir. 2011).

If Appellants could surmount these substantial waiver hurdles, their argument would nevertheless be foreclosed by precedent. Although this Court in *DePuy* would not expand Texas joint-tortfeasor liability "'beyond its presently

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12 *See generally* Restatement (Second) of Torts § 876 (1979) ("For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he … knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.").

existing boundar[y],'" it observed that *Kinzbach* recognized as "settled law of [Texas]" the maxim "that where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes a joint tortfeasor." *DePuy*, 888 F.3d at 782 n.53 (citing *Kinzbach*, 160 S.W.2d at 514) (additional citation omitted); *see also, e.g.*, *Meadows v. Hartford Life Ins. Co.*, 492 F.3d 634, 639 (5th Cir. 2007); *Helm Cos. v. Shady Creek Hous. Partners*, 2007 WL 2130186, at *5 (Tex. App. July 26, 2007) (*Kinzbach* rule is "well-settled law"). That is exactly the conduct on which the jury found DeJoria, Appel, and Bartlett liable, *see* ROA.7506, using the pattern instructions Appellants themselves proposed. *See* Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment § 104.3 (comments) (2016).

The district court therefore did not err by entering judgment on the jury's verdict. Moreover, even if the semantic distinction between "knowing participation" and "aiding and abetting" could give rise to legal error, ***and*** even if Appellants' own insistence on the latter term did not waive that error, any such error in nomenclature was harmless in light of the precise identity of elements between the two torts. *See, e.g.*, *999 v. C.I.T. Corp.*, 776 F.2d 866, 870 (9th Cir. 1985) (instruction on invalid theory of liability was "harmless" in light of valid theory with "essentially the same elements").

### B. The District Court's Damages Determinations Were Not Erroneous, And Were Based On Appellants' Express Concessions.

Appellants are no more justified in challenging the district court's determination that, as abettors, they are jointly and severally liable for the damages stemming from Cohen's breach. *See* ABC Br. 43-54; DeJoria Br. 31-45. On that issue, as well, the district court acted with Appellants' clear, unambiguous approval. For that reason, and because the district court did not err in any event, this Court should not disturb the district court's judgment.

#### 1. Under Texas Law, And According To Their Own Concessions, DeJoria, Appel, And Bartlett Are Liable As Principals For Aiding And Abetting Cohen's Breach.

DeJoria, Appel, and Cohen argue at length that even though the jury found them liable for aiding and abetting Cohen's breach, it did not make the findings necessary to impose damages on them for that offense. DeJoria Br. 31-45; ABC Br. 54-55.

As the district court itself suggested, ROA.8563, Appellants waived that argument below, when they told the district court precisely the opposite of what they now argue. The rules of waiver, forfeiture, and invited error assume "special force" in the context of "jury instruction[s]," *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987), where it is particularly likely that a failure to object reflects a strategic choice. *See, e.g., Williamson v. Handy Button Mach. Co.*, 817 F.2d 1290,

1296 (7th Cir. 1987). Thus, in civil cases, "[n]o party may assign as error the giving of an instruction unless he objects thereto before the jury retires to consider its verdict." *Kibbe*, 480 U.S. at 259 (internal quotation marks and alterations omitted). Where, as here, the complaining party did not merely fail to object to an instruction, but actually ***proposed or ratified*** it, that party must live with its choice. *McCaig v. Wells Fargo Bank (Texas), N.A.*, 788 F.3d 463, 476 (5th Cir. 2015) (party may not "speculat[e] on a verdict" by "expressly endors[ing] [a] jury question," and then challenging question on appeal after unfavorable verdict) (quoting *Alabama Great S. R. Co. v. Johnson*, 140 F.2d 968, 971 (5th Cir. 1944)); *see also Druery*, 647 F.3d at 545.

The imposition of joint-and-several liability stemming from Cohen's breach was based on Question 3 of the jury charge. *See* ROA.7507. At the charge conference, as the parties molded Question 3's language, DeJoria's counsel was clear: the jury did ***not*** need to determine aiding-and-abetting damages for his client, because those damages would flow automatically from whatever damages Cohen was assessed. Speaking for all Appellants, he informed the district court that "where the aiding and abetting factors in is—Let's say Cohen is found $100,000 for breach, DeJoria is found not independently liable for his own breach but then he is found to have aided and abetted, then ***that just means he's jointly and severally liable for $100,000***." ROA.10349-50 (emphasis added). When the

Trustee's counsel sought to confirm that understanding, Appellants' counsel said it again: it is "legally right," he agreed, that "an aider and abettor essentially buys any breach of fiduciary duty for someone he aided and abetted." ROA.10350; *see also* ROA.10355-56 (statement by Trustee's counsel that "as a matter of law someone that aids and abets a primary breach of fiduciary duty is jointly and severally liable with the damages caused by that primary actor.").[13]

There was therefore agreement as to how Question 3 should operate as to DeJoria: the jury would determine damages for DeJoria's own breach of fiduciary duty in his damages boxes, and, if he was also found liable for aiding and abetting Cohen's breach, additional damages would flow automatically—jointly and severally—from whatever numbers appeared in Cohen's. It was based on that agreement that the district court "crafted" Question 3. ROA.8563; *see also* ROA.10357 (district court's statement that aiding-and-abetting damages are "something I would apply legally after the trial"). Now that the jurors have gone

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13 DeJoria's counsel then proceeded to raise a different concern that, if the jury found Cohen had breached his duties in more than one way, it might be unable to correctly find aiding-and-abetting liability. ROA.10356. To remedy that concern, Appellants proposed a specific addition to Question 3 that they believed would clarify that issue. *Id.* ("MR. FARRELL: Maybe we could fix it in the actual question [by adding the phrase] by that defendant?"); ROA.10357-58 (MR. FARRELL: … I'm just concerned the way it's written now the jury can't draw that distinction. / THE COURT: Yes. But if I add 'by that defendant' it's drawing the line. / MR. FARRELL: I think so."). The district court accepted that proposal verbatim. ROA.10356-57.

home, it is too late for Appellants to renege. *See*, *e.g.*, *Highlands Ins. Co. v. Nat'l Union Fire Ins. Co.*, 27 F.3d 1027, 1032 (5th Cir. 1994) (validity of jury charge turns on what "trial court is given a fair opportunity to consider," not on what supposed "error[s]" are found "if pored over, long after the fact in the quiet of the library"); *McCaig*, 788 F.3d at 476.

Nor can DeJoria argue that the district court erred by supposedly failing to isolate in the jury charge the precise manner in which he aided and abetted Cohen's breach. DeJoria Br. 42-45. DeJoria never requested a more detailed charge; instead, he expressly agreed that, if found liable as an abettor, he would be subject to whatever damages appeared in Cohen's boxes. *See McCaig*, 788 F.3d at 476 (party "cannot argue for the first time on appeal that a new trial is required due to inherent ambiguity in the verdict form"); *Williamson*, 817 F.2d at 1296 (party could not challenge "open-ended instruction" on appeal after failing to request more detail in district court). Although DeJoria raised a related concern in the conference, he then proposed language designed to remedy it. *See supra* note 13. The district court incorporated that language in its entirety and instructed Appellants to "expla[in]" in their "final summation" what the insertion meant, ROA.10358, but Appellants failed to do so. DeJoria now claims that the language

he proposed did not provide the requisite clarity, DeJoria Br. 43, but even if that were true, it is the height of invited error.[14]

In any event, DeJoria, Appel, and Bartlett are wrong to argue that the jury needed to separately calculate their damages for aiding and abetting Cohen's breach. As noted, the Texas Supreme Court's decision in *Kinzbach* and this Court's decision in *DePuy* are directly to the contrary, holding that an abettor is liable as a principal as a matter of law. *See Kinzbach*, 160 S.W.2d at 514; *see also DePuy*, 888 F.3d at 782 n.53.[15] That rule reflects the settled approach to aiding-and-abetting and conspiracy offenses. Restatement (Second) of Torts § 876(b), cmt. d (1979) ("[T]he one giving [substantial assistance] is himself a tortfeasor and is responsible for the consequences of the other's act."). And DeJoria's claim that

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[14] *See McCaig*, 788 F.3d at 476-77 (party's effort to appeal jury instruction it had "expressly endorsed" in the district court presented "the sort of speculation the invited error doctrine is designed to prevent"); *see also Republic of Ecuador v. Connor*, 708 F.3d 651, 654 (5th Cir. 2013) (applying judicial estoppel to "protect the integrity of judicial proceedings by preventing [a] litigant[] from asserting contradictory positions for tactical gain"); *United States v. Silvestri*, 409 F.3d 1311, 1337 (11th Cir. 2005) (statement to district court that instruction was "acceptable" served "to preclude review of that [instruction] on appeal").

[15] Contrary to DeJoria's claim, *see* DeJoria Br. 38 n.8, the Texas Supreme Court's statement that the *Kinzbach* rule reflects the "settled" law of Texas has been reaffirmed repeatedly in subsequent years. *See, e.g, CBIF Ltd. P'ship, v. TGI Friday's, Inc.*, 2017 WL 1455407, at *7-8, *26 (Tex. App. Apr. 21, 2017) (affirming joint-and-several liability for abettor); *Darocy*, 345 S.W.3d at 135, 137-38 (same); *Denson v. Dallas Cty. Cred. Union*, 262 S.W.3d 846, 851 (Tex. App. 2008) (abettor becomes "joint tortfeasor equally liable with" principal).

it applies only to equitable remedies is groundless. *See, e.g.*, *Darocy*, 345 S.W.3d at 135, 137-38 (affirming joint-and-several damages award); *see also Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 173 (Del. 2002) (abettor of fiduciary-duty breach liable as a principal).

Appellants argue that Texas has silently overturned the time-honored rule *Kinzbach* reflects. But their only support is a single case, *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214 (Tex. 2017), that barely mentions either *Kinzbach* or the rule itself. In *First United*, the Texas Supreme Court declined to find an accused abettor liable where his only act was to "cover up," after the fact, another's breach of fiduciary duties. *Id.* at 224. Appellants imply that *First United*'s conclusion was so inconsistent with *Kinzbach* as to overrule it *sub silentio*. But in reasoning that there could be no liability in the absence of "evidence that [the defendant] was aware of [the breacher's] plans or actions until after they had taken place," *id.* at 225, *First United* merely applied the basic principle that "[o]ne cannot aid and abet a fraudulent scheme that is already complete," *S.E.C. v. Papa*, 555 F.3d 31, 36 (1st Cir. 2009) (Boudin, J.) (citing *United States v. Hamilton*, 334 F.3d 170, 180 (2d Cir. 2003)). That principle is entirely consistent with *Kinzbach* and the Restatement. It is also entirely consistent

with the judgment below, because DeJoria's participation was not merely an after-the-fact cover-up.[16]

Moreover, because *First United* did not find ***liability*** for aiding and abetting, it had no occasion to—and did not—undermine *Kinzbach*'s holding with respect to joint-and-several damages. Indeed, contrary to DeJoria's repeated suggestions, DeJoria Br. 32-34, the entirety of *First United*'s discussion of causation appears in a section analyzing ***breach*** liability, without regard to aiding and abetting. 514 S.W.3d at 220-22. DeJoria claims that *First United* requires a jury to determine the damages caused by "the conduct of ***the aider and abettor***," DeJoria Br. 33-34, but to the extent *First United* addresses aiding-and-abetting damages at all, it clearly refutes that contention. 514 S.W.3d at 225 (relevant metric is amount of harm proximately caused by conduct that abettor "***assisted***") (emphasis added). Appellants' argument is therefore as incorrect as it is untimely.

The analysis as to this issue is simple. DeJoria, Appel, and Bartlett told the court that if they were found to have abetted Cohen's breach, they would automatically be responsible, by operation of Texas law, for Cohen's damages. The jury then found them liable for aiding and abetting Cohen's breach,

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16 *See, e.g.*, *supra* at 7-11 (DeJoria loan, made to Appel and Bartlett ***before*** LSI took on Jabil debt), 11-14 (setting forth wrongful conduct undertaken by DeJoria while Cohen and Appel mismanaged company).

ROA.7506, and assessed Cohen $6.9M in damages, ROA.7507. Their effort to escape their unambiguous concession should be rejected.

### 2. The Jury's Answer To Question 3 Did Not Limit DeJoria's Liability For Aiding And Abetting, And DeJoria Has Waived Any Argument To The Contrary.

DeJoria next argues that the district court erred by construing the jury's answer to Question 3 to mean that he owed $1.5M to LSI for his own breach. DeJoria Br. 39-42. Instead, he argues, the verdict should be interpreted to mean that the jury assessed $1.5M in ***total*** damages against him, including aiding-and-abetting damages. *Id.* at 38-41.

That argument, like the previous one, is irreconcilable with what DeJoria told the district court at trial. First, as noted, DeJoria conceded that if found to be an abettor, he would be liable for whatever the jury wrote in Cohen's boxes, without regard for what it wrote in his. *See supra* at 32-36. Moreover, on ***the precise issue*** of whether the jury's answer to Question 3 would include aggregate damages or just damages for breach, DeJoria said this to the Court:

> MR. FARRELL: Well, Your Honor, actually, ***Question No. 3 is only predicated on – is only tied back to*** [***Question No. 1,***] ***which is breach***.

ROA.10349 (emphasis added). DeJoria reiterated that understanding five additional times in the following minutes. ROA.10349-51 (question measures

damages for "***each defendant's breach***") (emphasis added). Any argument to the contrary is waived. *See, e.g., McCaig*, 788 F.3d at 476-77.

As given to the jury, moreover, Question 3 clearly instructed that damages should be assigned ***only*** for DeJoria's own "breach of fiduciary duty." ROA.7507. Pursuant to DeJoria's request, Question 3 instructed the jury to answer only upon finding, "in response to Question No. 1, that there was a breach of fiduciary duty." *Id.* And, although the preliminary portion of Question 3 refers briefly to aiding and abetting, it specifically instructs the jury to write down only damages resulting from each "defendant's breach of fiduciary duty." *Id.* The jury was further instructed that it could "***not*** increase or reduce the amount in one answer because of [its] answer to any other question about damages." *Id.* (emphasis added). Accordingly, even setting aside DeJoria's comprehensive waiver of the arguments he now makes, it was not plain error for the district court to conclude, in the absence of an objection, that the jury's findings for DeJoria included only damages for his own breach. *See, e.g., Puckett*, 556 U.S. at 135 ("plain error" reversal appropriate only where issue is not "subject to reasonable dispute").[17]

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17 DeJoria argues that the Trustee misstated the parties' agreed-upon interpretation during closing arguments. DeJoria Br. 40-41. But there, too, DeJoria chose to sit silent and speculate on a favorable verdict. *See, e.g.*, *Hemmings v. Tidyman's, Inc.*, 285 F.3d 1174, 1193 (9th Cir. 2002) (noting "high threshold" imposed on unpreserved "claims of improper closing arguments in civil

## III. THE JURY'S VERDICT IS SUPPORTED BY THE EVIDENCE.

On appeal, Appellants press a variety of challenges to the jury's findings of fact. Most were not presented to the district court and are therefore waived. *See Unitherm*, 546 U.S. at 399-407; *In re Isbell Records, Inc.*, 774 F.3d 859, 867-69 (5th Cir. 2014). As to the others, the jury's findings rested on sufficient evidence and should be affirmed. *See Heck v. Triche*, 775 F.3d 265, 272 (5th Cir. 2014) (court "must" affirm jury's findings "unless there is no legally sufficient evidentiary basis for a reasonable jury to find as the jury did").

### A. Cohen Has Waived His Rule 50 Challenge, And, In Any Event, The Jury Acted Rationally In Determining His Liability And Damages.

In his Rule 50(b) motion, Cohen articulated precisely one argument as to why the jury's verdict that he breached his fiduciary duties should be overturned. He argued that he "neither owed ***Jabil*** any fiduciary duty" nor "breach[ed] any fiduciary duty owed ***to Jabil***." ROA.7525-30 (emphasis added). Nor did Cohen's aiders and abettors—of whose offenses Cohen's breach is an element—expand upon that argument. *See* ROA.7530-44 (Appel and Bartlett), ROA.7590 (DeJoria). Cohen now reiterates his argument, asserting that, for detailed reasons pertaining to

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cases," since prompt objection "permits the judge to examine the alleged prejudice and to … issue a curative instruction, if warranted").

the timing of LSI's insolvency, he owed no duty to Jabil, LSI's creditor. ABC Br. 24-31.

That lone argument fails, because even if it were correct, it would not undermine the jury's verdict. The verdict and judgment as to Cohen rested solely on breaches of duties Cohen owed ***to LSI***, not Jabil. ROA.7505.[18] By failing to challenge that finding, which is the actual ground for the judgment, Cohen waived his Rule 50 challenge in its entirety. *See, e.g., R.R. Mgmt. Co. v. CFS La. Midstream Co.*, 428 F.3d 214, 220 n.3 (5th Cir. 2005) (failure to challenge each independent ground for ruling waives appeal); *N.W. Enters., Inc. v. City of Houston*, 352 F.3d 162, 185-86 (5th Cir. 2003) (same).

In any event, the district court did not err—much less plainly err—by declining to overturn the jury's verdict. The duty of loyalty requires a fiduciary to "dedicat[e] … uncorrupted business judgment for the sole benefit of the corporation." *Sneed v. Webre*, 465 S.W.3d 169, 178 (Tex. 2015); *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 577 (Tex. 1963). A corporate director or officer breaches that duty when he or she participates in a fraudulent scheme to artificially inflate stock prices for personal enrichment. *See, e.g., LaSala*, 519 F.3d

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18 *See also* ROA.8389-90 (district court holding that Trustee presented sufficient "evidence at trial that Cohen" breached fiduciary duties ***to LSI*** by, among other things, "caus[ing] LSI to enter into the Jabil contract in May 2011 for illegitimate reasons") (emphasis added).

at 129-30; *In re Galena Biopharma, Inc. Deriv. Litig.*, 83 F. Supp. 3d 1047, 1052, 1063 (D. Or. 2015) (holding, as if anticipating this case, that "it is a violation of the fiduciary duties of … officers and directors" to "hire" a consultant "with the intent and purpose that [the consultant] would engage in a misleading campaign to artificially inflate [the company's] stock price so that the directors and officers … could profit"). The Trustee presented evidence that Cohen, among other things, smuggled corporate information (including stockholder lists and governance documents) to a known securities fraudster, ROA.9018, 9022-23, 9211-12, sought to cover up that fraudster's criminal past from LSI and its shareholders, ROA.9198, assisted the fraudster in "interfering with the day-to-day management of LSI almost on a daily basis," ROA.14743, and caused LSI to take on backbreaking debt to further the fraudster's scheme, *see* ROA.9198. From that evidence alone, a rational jury could readily find that Cohen breached his duties, both by those individual actions and by participating in a fraudulent scheme.[19]

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[19] Cohen's argument that the Trustee could not prove a breach of fiduciary duties without summoning expert evidence, ABC Br. 33-34, is baseless. Even without expert gloss, the evidence cited above easily established that Cohen's conduct fell well short of the "extreme measure of candor, unselfishness, and good faith" required of corporate fiduciaries. *Int'l Bankers*, 368 S.W.2d at 577; *see also, e.g.*, *Sneed*, 465 S.W.3d at 178; *LaSala*, 519 F.3d at 129-30. But in any event, the Trustee ***did*** put on experts, one of whom testified extensively about the reasons to conclude that Appellants engaged in a pump-and-dump scheme. ROA.9614-9623.

Nor is Cohen correct that, even though he failed to file a Rule 50 motion, the district court should have invalidated his damages *sua sponte*. *See* ABC Br. 36-41. District courts do not have that power. *See Unitherm*, 546 U.S. at 405. In any event, Cohen admitted that ***he dealt personally with Jabil*** while LSI negotiated the contract that put it $9.55M in debt, *see* ROA.9198, thus amply supporting the jury's imposition of $6.5M in damages on Element 1. He further admitted that he was given stock as part of his employment, ROA.9245, then sold that stock while still a director, earning $400,000 in the process, because he put his interests ahead of the company's, ROA.9245-46, *see also* ROA.9216-17 (Cohen statement that only "scum bags" exited their LSI investments). That stock sale, to say nothing of the $557,109 in salary that Cohen earned while serving as Appel's "inside man," easily justified the jury's imposition of $400K in damages on Element 2. *See* ROA.7507. Cohen's challenge to the jury's damages findings therefore fails.[20]

### B. The Jury Acted Rationally In Reaching Its Unanimous Findings As To DeJoria's Liability And Damages.

As noted, the jury found DeJoria liable both for aiding and abetting Cohen's breach and for breaching his own fiduciary duties once he joined LSI's board. As a result, in addition to the $6.9M in joint-and-several damages that attached as a

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[20] Cohen briefly argues that his exemplary damages must be reversed for the same reasons as his actual damages. ABC Br. 41. Because his actual damages should be affirmed, that challenge fails.

matter of law, *see supra* at 32-40, DeJoria was assessed $1.5M on Element 1, arising out of his own breach of fiduciary duties, and $1M in exemplary damages, ROA.7505-09. Each of those findings was supported in fact and law.

### 1. The Jury Acted Rationally In Finding That DeJoria Breached His Fiduciary Duties.

The jury's finding that DeJoria breached his fiduciary duties was well supported. As noted, participation in a scheme to insider trade for personal benefit is a breach of the duty of loyalty. *See supra* at 42-43. The question, therefore, is whether a reasonable jury could have concluded that DeJoria participated in such a scheme while serving as a director.

The answer is yes. The jury saw evidence that DeJoria joined LSI's board with full knowledge that Appel, whom he knew to be a criminal securities manipulator, was pulling the strings at LSI. ROA.8949-50, 8959. Despite that knowledge, DeJoria invited Appel into private company meetings, ROA.8965-66, lied about discussions of Appel that occurred in board meetings, ROA.8963-64, permitted Appel to recruit corporate executives, ROA.9030-31, "thwarted" colleagues who sought to terminate Cohen for his role in enabling Appel, ROA.8960,[21] "refused to acknowledge board minutes mentioning wrong doing of

[21] DeJoria's purported inability to fire Cohen unilaterally, DeJoria Br. 48-50, is irrelevant. Regardless of hiring and firing power, the duty of loyalty prohibits a

The Appel group," ROA.14714, ROA.8963-64, blatantly disregarded matters of corporate governance while telling associates he could not be liable for what he did not know, ROA.8868, and displayed open disdain for internal investigations of Cohen and Appel, ROA.8867-68. Although those who knew DeJoria well found his conduct bewildering, *e.g.*, ROA.14714, the jury could easily conclude that it was explained by Appellants' joint participation in a fraudulent scheme.

The jury's imposition of $1.5M in damages for DeJoria's breach was similarly well-rooted. First, the jury saw evidence that Appel and Bartlett profited far more than $1.5M from stock sales while DeJoria, serving as an LSI director, covered their tracks. *See supra* at 13. Financial gains from insider trading are valid damages for a breach of fiduciary duty, even without a showing of harm to the corporation. See, *e.g.*, *Kahn v. Kolberg Kravis Roberts & Co.*, 23 A.3d 831, 837-40 (Del. 2011); *Brophy v. Cities Serv. Co.*, 70 A.2d 5, 8 (Del. Ch. 1949). Nor was it irrational for the jury to hold DeJoria to account for the gains of co-conspirators whom he funded and offered access to LSI, and whose wrongdoing he covered up. *See, e.g.*, *Tompkins v. Cyr*, 202 F.3d 770, 783 (5th Cir. 2000)

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fiduciary to shield co-participants in a fraudulent scheme undertaken at the corporation's expense. *See, e.g.*, *LaSala*, 519 F.3d at 129-30.

(defendant liable for acts of co-conspirators). The jury's verdict can be affirmed on that basis alone.[22]

But the jury also saw evidence, in the form of a report prepared by the Trustee's expert, Robert Manz, that the company's debts exploded by $2.2M during the period when DeJoria was a director. *See* ROA.15038-52.[23] The Trustee argued that those damages were attributable to DeJoria, who (the jury reasonably found) propped up the company in hopes of personal benefit. ROA.10391 (pointing to "Schedule 10 of Mr. Manz's report" as supporting "$2.2 million" in damages against DeJoria). The jury then requested "the report from Manz" during its deliberations, ROA.7499, and was directed (again without objection) to that chart, ROA.10428-30. The jury could therefore have rationally

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[22] DeJoria argues that this theory of damages would have fit under Element 2, but not Element 1. DeJoria Br. 27-28. But for purposes of a ***sufficiency*** challenge, the only question is whether they are valid damages for breach of fiduciary duty—which they unquestionably are. *See Musacchio v. United States*, 136 S. Ct. 709, 715-16 (2016) (where jury finds liability, "[a] reviewing court's limited determination on sufficiency review … does not rest on how [it] was instructed").

[23] DeJoria argues that the chart was not competent evidence, DeJoria Br. 20 n.1, but he has waived any such challenge. *See Huss v. Gayden*, 571 F.3d 442, 466 (5th Cir. 2009) (the "uniform law of the circuits" is that expert evidence admitted "without a timely objection" is deemed "competent" and "passes to the jury for credibility and weight determinations"). Moreover, DeJoria's claim that the "accounting records" on which the calculation is based were "unreliable," DeJoria Br. 20 n.1, is sheer chutzpah: LSI's recordkeeping was questionable precisely because DeJoria and his associates were engaging in fraud.

imposed liability on DeJoria for a portion of those wholly unnecessary debts, which fall into damage Element 1. *See, e.g.*, *Educators*, 25 F.3d at 1285 (claims that defendants "conspired to make [entity] insolvent" were cognizable and belonged to estate).

DeJoria's counterarguments, *see* DeJoria Br. 26 n.3, are nothing more than an attempt to retry the case on appeal. First, as shown above, DeJoria's theory that the Trustee lacks standing to pursue such damages is both waived and incorrect. *Cf.* DeJoria Br. 20 n.1; *Educators*, 25 F.3d at 1285. Second, DeJoria argues that his "management team" was effective in reducing LSI's liabilities once it came aboard, DeJoria Br. 26 n.3, but the jury was well within its powers to calculate his damages based on the period of ***his own*** service. And it is that period that yields the $2.2M amount on which the jury likely relied. ROA.15038-52.

Nor was it "laughable" for the jury to find that DeJoria acted with gross negligence or malice, as necessary to support exemplary damages. DeJoria Br. 51-52. Regardless whether DeJoria "plowed" money into LSI, *id.*, the jury could easily have based its calculation on the conclusion that DeJoria participated actively in a fraud at LSI's expense in hopes of personal benefit. *See, e.g.*, *Cheek v. Humphreys*, 800 S.W.2d 596, 599 (Tex. App. 1990) ("Exemplary damages are proper where a fiduciary has engaged in self-dealing.") (citing *Tex. Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 510 (Tex. 1980)).

### 2. The Jury Acted Rationally In Finding That DeJoria Aided And Abetted Cohen's Breach By Participating With Him In An Ongoing, Fraudulent Scheme.

The district court did not err when it upheld the jury's verdict that DeJoria aided and abetted Cohen's breach both before and after DeJoria became a fiduciary himself. As noted, "[w]hen a defendant knowingly participates in the breach of a fiduciary duty, he becomes a joint tortfeasor and is liable as such." *Darocy*, 345 S.W.3d at 137 (Tex. App. 2011); *see also DePuy*, 888 F.3d at 782 & n.53. The record contains evidence that DeJoria actively interfered with attempts to put a stop to Cohen's misconduct, *see supra* at 45, and that he took overt acts, including providing $3M in financing, in support of Cohen's scheme to enrich himself and his associates at LSI's expense. The jury's conclusion that he aided and abetted Cohen's breach was therefore far from irrational.

No authority DeJoria invokes is to the contrary. He contends that aiding-and-abetting liability cannot be premised on inaction, DeJoria Br. 49-50, but that is both wrong and irrelevant. The cases DeJoria cites reaffirm that inaction ***can*** give rise to aiding-and-abetting liability where, as here, "the defendant owes a fiduciary duty directly to the plaintiff." *Chang v. JPMorgan Chase Bank, N.A.*, 845 F.3d 1087, 1098 (11th Cir. 2017); *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 295 (2d

Cir. 2006) (same).[24] In any event, there is ample evidence of DeJoria's overt acts, such as his funding of the scheme (both before and after the Jabil contract) and his affirmative interference when the Company tried to fire Cohen. *See supra* at 7-14.

Nor can DeJoria complain that the Trustee failed to "obtain specific fact findings" regarding which acts he abetted. DeJoria Br. 31. DeJoria never asked for those findings; instead, he agreed he would be liable for whatever was written in Cohen's boxes. ROA.10349-50; *see supra* at 32-40. Nor did he timely argue that he should not be jointly and severally liable for Cohen's damages. *See* ROA.7584-7603. To the extent DeJoria did raise any related concern, he then proposed a specific amendment to the verdict form designed to resolve that concern, and the district court accepted it. *See supra* note 13. If the language he proposed did not require the findings he now desires, the fault is his own.

But even if DeJoria had thought to seek a jury question about whether he abetted Cohen prior to the Jabil contract, the evidence would have supported an

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[24] In so holding, *Chang* and *Lerner* also refute DeJoria's spurious claim (DeJoria Br. 48-49 & n.11) that a fiduciary cannot be liable for aiding and abetting. *See also Darocy*, 345 S.W.3d at 138 (member of board of directors liable for aiding and abetting). DeJoria's authority does not support his claim. *See Gilbert v. El Paso Co.*, 490 A.2d 1050, 1057 (Del. Ch. 1984) (merely making clear that party need not be in "direct fiduciary relationship" to be liable as abettor); *Bradford v. Vento*, 48 S.W.3d 749, 761 (Tex. 2001) (affirming intermediate court's opinion, 997 S.W.2d 713, 729 (Tex. App. 1999), holding only that "***agents and their principals*** cannot conspire together") (emphasis added).

affirmative answer. DeJoria's suspicious "loan" to Appel and Bartlett (which resulted in his receiving 3,000,000 shares of LSI stock a month before the Jabil contract was publicized), his false testimony regarding the manner of and reasons for his involvement with LSI, *see supra* at 7-11, his decision to ignore the warnings of his associates regarding Appel and Bartlett, *see supra* at 11-14, and his later conduct as a director, which the jury could easily have attributed to his participation in the scheme from the outset, *see supra* at 7-14, all support the conclusion that he participated in the fraud from the beginning. Thus, although DeJoria's support for the scheme while it was still ongoing is all that was legally necessary to support the judgment, *see supra* at 36-39, there was ample evidence for a rational juror to find that he knowingly participated in the scheme from the start.

### C. The Jury Acted Rationally In Finding That Appel And Bartlett Aided And Abetted Cohen's Ongoing Breach And Assessing Damages.

Appel and Bartlett have not appealed the sufficiency of the evidence supporting the jury's finding that they aided and abetted Cohen's breach. Instead, they challenge only the jury's calculation of damages to them. ABC Br. 43-54. Here, too, the record evidence supported the jury's findings.

The critical evidence for purposes of Appel and Bartlett's damages calculation was the testimony of the Trustee's expert, Robert Manz. Both Manz

and another expert, Marc Steinberg, testified that a "nominee company" is one that "stands in the place of a person or another company," and holds legal ownership of shares on behalf of a beneficial owner. ROA.9621 (Manz), 9316 (Steinberg). Manz testified that, as of September 2011, Appel owned more than 5% of LSI's outstanding stock through nominee companies, and Bartlett owned another 1.5% through nominee companies. ROA.9622-23, 15043. He also told the jury that Appellants sold LSI shares to themselves at a steep discount—roughly 79% percent off of market price. *E.g.*, ROA.9620. And he testified, without a single objection, that Appel, Bartlett, and their associates earned "5.1 million dollars of profit" off of LSI stock, ROA.9637, 9641-44, with FEQ Realty, Bartlett's company, alone taking home $2.3M in profit, ROA.9643.

Manz's testimony was reinforced by other evidence. Contemporaneous documentary evidence demonstrated that with at most two days' notice, Appel and Bartlett could transfer to DeJoria three million shares of LSI stock from entities such as DIT Equity Fund (1.4 million shares), FEQ Realty LLC, Capital Growth Realty (250,000 shares), and Wiltomo Redemption Foundation (250,000). ROA.15017.[25] One witness, who had contemporaneously noted Cohen's

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25 Appel's claim that he did not control the entities that profited from sales of LSI stock, ROA.9873, is contradicted not only by that prompt transfer, but by Manz's testimony. *See* ROA.9363 (testifying that entities listed at ROA.15043 were Appel's and Bartlett's nominee companies); *see also* ROA.15031-37 (listing

observation that Appel "would not personally own any interests" in stock, "but would do so with nominee[s]," ROA.14615, understood that Appel employed that practice specifically to evade the law. ROA.8932 (Appel "[n]ever own[ed] any shares of LSI in his own name" because of his "restrictions on being affiliated in a direct manner with publicly traded companies"). That testimony made clear that Appel and Bartlett routinely used nominee companies for purposes of illicit stock trading, and that nominee companies associated with Appel, Bartlett, and their associates earned over $5M from selling LSI stock. It therefore more than suffices to support the jury's verdict.

Appel and Bartlett's contrary arguments are unpersuasive. They argue that the jury should not have imposed damages based on their nominee companies' earnings, ABC Br. 45-40, but a party cannot invoke the corporate form "as a cloak for fraud or illegality or to work an injustice," *Matthews Constr. Co., Inc. v. Rosen*, 796 S.W.2d 692, 693 (Tex. 1990) (internal quotation marks omitted); *see also Valley Mech. Contractors, Inc. v. Gonzales*, 894 S.W.2d 832, 834 (Tex. App. 1995) ("corporate fiction" will be "disregard[ed]" where used "to evade an existing legal obligation" or "perpetrat[e] a fraud"). They next argue that the Trustee failed

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trades), 9726 (tying entities to Appel, Bartlett, and associates). Once admitted, that testimony alone was sufficient to defeat Appel's challenge. *See Huss*, 571 F.3d at 466.

to demonstrate that Appel and Bartlett's wrongful stock sales ***harmed*** LSI, ABC Br. 52-54, but it is black-letter Texas law that a duty-of-loyalty plaintiff need not prove actual damages to receive a restitutionary award. *See, e.g.*, *Kinzbach*, 160 S.W.2d at 514; *see also Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999) (same).[26] And, finally, there is no anomaly in the jury's determination that Appel and Bartlett owed the proceeds from their stock sales, without subtracting what they paid. *Cf.* ABC Br. 50-52. Appel and Bartlett cite no case in which the costs of maintaining a fraudulent operation were subtracted from the damages. And, once again, Texas law is to the contrary. *See*, *e.g.*, *Burrow*, 997 S.W.2d at 240-45 (party may be forced to forfeit all compensation upon finding of breach of duty of loyalty).

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[26] Appel and Bartlett argue that the verdict cannot include disgorgement relief, because the Trustee supposedly sought only damages below. But the jury charge (to which Appellants lodged no pertinent objection) straightforwardly asked the jury to quantify ***Defendants' gains*** from their wrongdoing. ROA.7507; *see also First United*, 514 S.W.3d at 222 (party need not raise magic words "equitable, forfeiture, or disgorgement" to obtain restitution in duty-of-loyalty case) (emphasis omitted).

## CONCLUSION

For the foregoing reasons, this Court should affirm the judgment.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman typeface.

Dated: September 26, 2018

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## CERTIFICATE OF SERVICE

I certify that, on September 26, 2018, the foregoing brief was electronically filed via the Court's CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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