SC93719

IN THE SUPREME COURT OF MISSOURI

DANIEL B. NICKELL,

Plaintiff-Appellant,

v.

MICHAEL F. SHANAHAN, SR., ET AL.,

Defendants-Respondents.

Transferred from the Missouri Court of Appeals, Eastern District, Division One
Hon. Clifford H. Ahrens, Hon. Sherri B. Sullivan, and Hon. Glenn A. Norton
Court of Appeals No. ED99163

On Appeal from the Circuit Court of the City of St. Louis, Missouri
Cause No. 0822-CC09449-01
The Honorable Joan L. Moriarty, Circuit Court Judge

SUBSTITUTE BRIEF OF RESPONDENT MARK S. NEWMAN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Rules

Other Authorities

INTRODUCTION

Engineered Support Systems, Inc. ("ESSI") was a publicly-traded defense contractor headquartered in Missouri. On September 21, 2005, ESSI entered into an Agreement and Plan of Merger (the "Merger") with another publicly-traded defense contractor, DRS Technologies, Inc. ("DRS"), headquartered in New Jersey. *See* Legal File ("LF") 114, 117-18 (Second Amended Petition ("SAP") ¶¶ 3, 11, 12). Pursuant to the Merger, DRS acquired all of the 41,960,035 outstanding shares of ESSI common stock for $43.00 per share through a combination of cash and DRS common stock, for a total consideration of approximately $1.97 billion. LF 114, 135-36 (SAP ¶¶ 3, 56). The Merger closed on January 31, 2006. LF 114 (SAP ¶ 3). Respondent Mark S. Newman ("Newman") was the CEO and Chairman of the Board of DRS at the time of the Merger. LF 71 (SAP ¶ 31).

On November 5, 2008, Appellant Daniel Nickell, a Virginia resident, LF 399, filed this putative class action as a representative of ESSI shareholders who sold their stock in connection with the Merger. Nickell sued former ESSI officers and directors (the "ESSI defendants"), as well as Newman, alleging that the Merger terms undervalued his ESSI stock. LF 113, 116–17 (SAP ¶¶ 1, 6, 10). According to Nickell, the ESSI defendants engaged in improper backdating of the company's stock options from 1996 through 2003. LF 125–26 (SAP ¶ 37). Nickell avers, without any supporting facts, that Newman gained actual or

constructive knowledge of the backdating during the Merger due diligence process. LF 123–24 (SAP ¶¶ 31–34). Nickell claims that, in an alleged effort to conceal the backdating from ESSI shareholders and the authorities, the ESSI defendants agreed to a below-market bid by DRS. This bid included what Nickell alleges were personal benefits to the ESSI defendants, including DRS's indemnification of the ESSI defendants and the "cash[ing] out" of their backdated options. LF 114–15, 139–40 (SAP ¶¶ 3, 67).

Nickell does not allege Newman owed any independent duty to him or the ESSI shareholders generally at the time of the Merger, nor does he allege that Newman participated in the options backdating scheme. Rather, Nickell claims the ESSI defendants made omissions and misrepresentations of material facts regarding the backdating in various SEC filings related to the Merger and that Newman "aided and abetted" the ESSI defendants because he had "actual or constructive knowledge" that these filings were misleading. LF 150 (SAP ¶ 111) Nickell also alleges that defendant PricewaterhouseCoopers, LLP ("PWC"), ESSI's outside accountant and auditor, certified in the SEC filings that ESSI's financial statements had been prepared in conformity with GAAP, which because of the backdating was false. LF 124–25 (SAP ¶¶ 35–36). Nickell claims the alleged omissions and misrepresentations induced the ESSI shareholders to approve the Merger at an inadequate price for the ESSI stock. LF 114, 123 (SAP

¶¶ 2, 31). Notably, Nickell does not allege that either DRS or any other suitor ever offered ESSI a higher price per share than the Merger closing price.

In his substitute brief, Nickell challenges the dismissal of his causes of action for breach of fiduciary duty and unjust enrichment against the ESSI defendants and for aiding and abetting breach of fiduciary duty against Newman. As addressed in detail in the substitute brief of the ESSI defendants, the trial court properly dismissed the breach of fiduciary duty claim against the ESSI defendants on the ground that Nickell lacks standing to assert this as a direct, rather than derivative, claim. Absent a viable underlying tort claim, an ancillary claim of aiding and abetting cannot survive.

But even if Nickell has standing to pursue a claim of breach of fiduciary duty against the ESSI defendants, the dismissal of the aiding and abetting claim against Newman was proper for two independent reasons. First, Nickell's claim against Newman is precluded by the federal Securities Litigation Uniform Standards Act ("SLUSA"), 15 U.S.C. §§ 77p(b)–(c), 78bb(f)(1)–(2), which preempts state law class action claims based upon misrepresentations or omissions in connection with the sale of a publicly-traded security. The only exception to SLUSA preclusion, the so-called "Delaware carve-out," applies to communications between a company and its own shareholders and does not extend to claims against an officer of an acquiring company.

Second, Nickell has failed to state a claim for aiding and abetting breach of fiduciary duty. Missouri law does not recognize such a cause of action. Extending aiding and abetting liability to fiduciary duty claims would dramatically expand fiduciary relationships to parties who never were in, or contemplated being in, such a special relationship. A putative defendant can suddenly and without notice be deemed to have fiduciary liability to someone with whom he has no prior relationship, let alone a special one.

Moreover, even if such a claim were recognized, Nickell does not sufficiently allege facts that Newman actively assisted and encouraged the ESSI defendants to breach their fiduciary duties. Nickell's allegations that Newman became aware of the stock options backdating at ESSI are conclusory and lack even minimal factual support. Nor does he unequivocally allege actual, as opposed to constructive, knowledge on the part of Newman. At best, Nickell alleges that Newman merely acquiesced in the alleged breach by allowing the ESSI defendants to provide incomplete financial information to ESSI shareholders, which is not sufficient to satisfy the "substantial assistance or encouragement" requirement of an aiding and abetting claim.

Pursuant to Rule 84.04, Newman submits his own Statement of Facts in order to include facts omitted by Appellant's Substitute Brief that are pertinent to the procedural history of Nickell's separate claim against Newman for aiding and abetting breach of fiduciary duty.

STATEMENT OF FACTS

A.

Nickell's Failed Federal Action And Conflicting State Court Filing

In 2007, Nickell initially filed a shareholder derivative action in federal court on behalf of DRS against the ESSI defendants and the DRS Board of Directors. In that action, Nickell, then a DRS shareholder as a result of the Merger, alleged that DRS paid *too much* for ESSI in the Merger. Supplemental Legal File ("SLF") 598. After some preliminary motion practice, this claim was dismissed for lack of standing in early 2009 after DRS was acquired by another company and taken private, resulting in Nickell no longer being a shareholder of DRS. SLF 504.

On November 5, 2008, shortly after DRS's impending acquisition was announced, Nickell filed this action in the Circuit Court for the City of St. Louis as the putative representative of a class of former ESSI shareholders who allegedly were paid *too little* for their stock by DRS in connection with the Merger. LF 29. The named defendants included Newman as well as the ESSI defendants. On May 4, 2009, Nickell was granted leave to file his First Amended Petition, adding PWC as a defendant. LF 38. Nickell's First Amended Petition purported to allege the following causes of action: (1) breach of fiduciary duty against the ESSI Defendants; (2) an accounting against the ESSI defendants; (3) aiding and abetting breach of fiduciary duty against PWC and Newman; (4) unjust enrichment against

all defendants; and (5) negligent misrepresentation against all defendants. LF 42. At the time of the filing of the First Amended Petition, Newman still had not been served.

B.

The Removal and Remand

On June 15, 2009, shortly after it was added as a party by the First Amended Petition, PWC removed the action to the United States District Court for the Eastern District of Missouri based on federal question jurisdiction on the ground that the action was precluded by SLUSA. LF 39, SLF 527. PWC's Notice of Removal asserted that Nickell's Missouri law causes of action were preempted by SLUSA and that removal was proper under SLUSA's provision that "[a]ny covered class action brought in any State court involving a covered security . . . shall be removable to the Federal district court for the district in which the action is pending." SLF 528, *citing* 15 U.S.C. § 78bb(f)(2).

Nickell did not file a motion to remand. On January 13, 2010, the federal district court *sua sponte* remanded the action. *Nickell v. Shanahan,* 2010 WL 199957 (E.D. Mo. Jan. 13, 2010), SLF 527. The district court found that all conditions for SLUSA preclusion of Nickell's claims were satisfied. SLF 528–29. However, the court then applied an exception to SLUSA preemption known as the "Delaware carve-out" to find that the action could proceed in state court. SLF 529. The district court found that the Delaware carve-out applies when the action

involves: (1) the purchase or sale of securities by the issuer or an affiliate of the issuer from or to holders of equity securities of the issuer; or (2) any recommendation, position or other communication with respect to the sale of securities of an issuer made by or on behalf of the issuer or an affiliate of the issuer to holders of the securities of the issuer, concerning decisions of such equity holders with respect to voting their securities. SLF 529. The court ruled that DRS was ESSI's "affiliate" in the Merger transaction[1] and that DRS's purchases of ESSI stock were exclusively from ESSI shareholders. The court concluded "that the Delaware Carve-Out exception to the SLUSA applies, that this action may properly be maintained in state court, that removal was improper, and that this Court has no jurisdiction." SLF 530. Again, Newman had not been served in the action at the time of the removal and therefore was not a party to the federal proceedings. *See* SLF 568 (Entry of Appearance, dated 8/10/10). As a result, the district court did not specifically address whether the claims against Newman were precluded by SLUSA.

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[1] Nickell has not alleged in any iteration of his petition that DRS and ESSI were affiliates or otherwise related in any way prior to the Merger. *See* LF 117–18 (SAP ¶¶ 11, 12).

C.

Judge Dierker's Order on the First Motion to Dismiss

On remand, the ESSI defendants and PWC moved to dismiss Nickell's claims in the First Amended Petition, arguing SLUSA preemption, lack of standing and failure to state a claim on which relief could be granted. LF 43, 45. On September 3, 2010, Judge Dierker issued an order granting in part and denying in part the motions to dismiss. LF 41–57. Judge Dierker did not address the issue of SLUSA preemption on the merits, stating that "[t]he Court declines to revisit the ruling of the District Court." LF 43. Judge Dierker did address the arguments of lack of standing and failure to state a claim, ruling that Nickell had standing to assert a direct, as opposed to derivative, claim for breach of fiduciary duty against the ESSI defendants, and that the fiduciary duty count stated a claim upon which relief could be granted.

With respect to PWC's motion to dismiss Nickell's claim for aiding and abetting breach of fiduciary duty, Judge Dierker agreed with PWC that such a cause of action has not been expressly recognized in Missouri. LF 48–49. Judge Dierker added that, even if Missouri did recognize such a cause of action, Nickell's allegations failed to state a claim upon which relied could be granted. As the court explained:

> In the case at bar, the root of the Plaintiff's claim is the backdating of the stock options. There is no allegation that PWC encouraged, assisted or

> otherwise actively supported that scheme. Plaintiff's claim rests on allegations that PWC knew of the scheme and failed to disclose it, thereby enabling the consummation of the merger at a lower price than should have been paid. Plaintiff does not appear to argue that PWC had any direct fiduciary duty to ESSI shareholders, and it is hard to see how he could so argue. In the Court's view, the facts pleaded in the amended petition show no more than passive acquiescence by PWC in the misconduct of the ESSI defendants. The Restatement itself clearly excludes acts of omission from the scope of § 876. To borrow an analogy from the criminal law, an aider and abettor is not liable for concealment of an offense; only for conduct that aids or encourages its commission. While PWC undoubtedly owed a fiduciary duty to ESSI not to conceal the ESSI Defendants' misconduct, its conduct in submitting a report to ESSI, which was filed as part of the SEC registration statement by ESSI and DRS and not by PWC itself, amounts to nothing more than acquiescence in the ESSI Defendants' completed misconduct. PWC's conduct, as a matter of law, does not amount to aiding and abetting the breach of fiduciary duty of the ESSI Defendants.

LF 49–50.

In addition to dismissing the aiding and abetting claim against PWC, Judge Dierker dismissed Nickell's claim for an accounting, for unjust enrichment as against certain defendants, and for negligent misrepresentation. With respect to

the unjust enrichment and negligent misrepresentation counts, the court granted leave to amend. Again, because Newman was not a party to the case at the time the motions to dismiss were briefed and argued, Judge Dierker did not consider Newman's status or any arguments on his behalf in his rulings. LF 55.

D.

Judge Moriarty's Order on the Second Motion to Dismiss

In response to Judge Dierker's Order, Plaintiff filed a Second Amended Petition (the "SAP") on October 7, 2010. As of this time, Newman had agreed to voluntarily accept service and enter his appearance. SLF 568-70. The SAP purported to allege four causes of action: (1) breach of fiduciary duty against the ESSI defendants; (2) aiding and abetting breach of fiduciary duty against Newman; (3) unjust enrichment against ESSI defendants Michael Shanahan Sr., Michael Shanahan, Jr., Steve Landmann and Gary Gerhardt; and (4) negligent misrepresentation against all defendants. LF 148–53 (SAP ¶¶ 100–124).

Defendants, this time including Newman, again moved to dismiss Nickell's claims.[2] The ESSI defendants argued, in part, that Nickell did not have standing to assert direct claims for breach of fiduciary duty against the ESSI defendants and that those claims could only be asserted as derivative claims on behalf of the

[2] PWC did not join in the motions to dismiss, although it was named in the negligent misrepresentation count.

corporation. LF 166. Newman joined in that argument to the extent it would dispose of the aiding and abetting claim. He also asserted additional independent grounds for dismissal specific to the claims against him. Newman argued that: (1) the court lacked subject matter jurisdiction because Nickell's claims against him were precluded by SLUSA; (2) Nickell failed to state a claim under Missouri law for aiding and abetting breach of fiduciary duty; and (3) Nickell failed to state a claim under Missouri law for negligent misrepresentation. SLF 597–605.

On June 27, 2011, Judge Joan Moriarty dismissed Count I (Breach of Fiduciary Duty), Count II (Aiding and Abetting Breach of Fiduciary Duty) and Count III (Unjust Enrichment) as to all defendants named in those counts, and Count IV (Negligent Misrepresentation) as to Newman only. LF 169–73. Therefore, the only claim remaining in the case was Nickell's negligent misrepresentation claim against the ESSI defendants and PWC.

Judge Moriarty did not address Newman's arguments in support of SLUSA preclusion, stating only that the district court had found that Nickell's claims fell within an exception to SLUSA. LF 160. With regard to the specific claim against Newman at issue in this appeal,[3] Judge Moriarty stated that because Nickell did not state a claim for breach of fiduciary duty, he could not state a claim for aiding

[3] Nickell has not appealed the dismissal of the negligent misrepresentation count against Newman.

and abetting breach of fiduciary duty. LF 169–70. The court did not reach Newman's argument that the aiding and abetting claim did not independently state a cause of action under Missouri law.

E.

The Appeal

Following the entry of Judge Moriarty's Order, the remaining parties litigated the issue of class certification. On November 28, 2011, Nickell's motion for class certification was denied. SLF 705–16. On October 15, 2012, after the case had been set for trial, Nickell voluntarily dismissed his remaining claims of negligent misrepresentation against the ESSI defendants and PWC. SLF 721–24. On October 23, 2012, Nickell filed a Notice of Appeal of Judge Moriarty's Order. LF 345.

The Notice of Appeal did not name Newman as a respondent, nor was Newman served with the Notice of Appeal. *See id*. Moreover, Newman was not served with a copy of Nickell's brief. The brief itself, like Nickell's substitute brief in this Court, barely mentioned Newman and did not include any argument independently directed to the claim of aiding and abetting. Having learned of the appeal through his own efforts to monitor the case, Newman filed on February 21, 2013, a motion to dismiss the appeal to the extent it sought review of the dismissal of the claims against him on the grounds that Nickell failed to comply with Rules 81.08, 84.05 and 84.13 of the rules of appellate procedure. Nickell opposed the

motion, arguing that despite these acknowledged omissions, he did in fact intend to include Newman as a respondent in the appeal, and that Newman was not prejudiced by any rule violations. The Court of Appeals denied Newman's motion to dismiss.

On June 4, 2013, the Court of Appeals issued an opinion reversing the trial court's judgment and remanding the case for further proceedings. On February 4, 2014, this Court granted the applications of Michael Shanahan, Jr., *et al.* and Newman for transfer of the appeal.

POINTS RELIED ON

I.

The Trial Court Properly Dismissed Count II of Nickell's Second Amended Petition For Failure to State A Claim Because, Contrary to Points I, II and III of Nickell's Substitute Brief, the Underlying Claim For Breach of Fiduciary Duty (Count I) is a Derivative Claim and Cannot Be Asserted By Nickell Directly

K-O Enterprises, Inc. v. O'Brien, 166 S.W.3d 122, 129 (Mo.App. E.D. 2005)

Centerre Bank, N.A. v. Angle, 976 S.W.2d 608, 613 (Mo.App. W.D. 1998)

Brandt v. Medical Defense Assocs., 856 S.W.2d 667, 669 (Mo. banc 1993)

Rice v. Hodapp, 919 S.W.2d 240, 245 (Mo. banc 1996)

II.

Even If Nickell's Claims Are Not Derivative, Dismissal of Count II Was Proper Because the Trial Court Lacked Subject Matter Jurisdiction Under The Securities Litigation Uniform Standards Act Because Neither Newman Nor DRS Was an Affiliate or Acting on Behalf of ESSI at the Time of Any Alleged Misrepresentations As Required to Invoke an Exception to Federal Preclusion

Kircher v. Putnam Funds Trust, 547 U.S. 633, 646–47 (2006)

Greaves v. McAuley, 264 F.Supp.2d 1078, 1084 (N.D. Ga. 2003)

Superior Partners v. Chang, 471 F.Supp.2d 750, 756-57 (S.D. Tex. 2007)

Proctor v. Vishay Intertechnology, Inc., 584 F. 3d 1208, 1226–28 (9th Cir. 2009)

III.

Alternatively, the Trial Court Properly Dismissed Count II of Nickell's Second Amended Petition for Failure to State a Claim Because Missouri Law Does Not Recognize a Claim for Aiding and Abetting Breach of Fiduciary Duty And, Even If Such a Claim Were Recognized, Count II Fails to Plead the Necessary Elements as to Newman

Bradley v. Ray, 904 S.W.2d 302, 315 (Mo.App. W.D. 1995)

Manzer v. Sanchez, 985 S.W.2d 936, 940 (Mo.App. E.D. 1999)

Jo Ann Howard & Associates, P.C. v. Cassity, 2012 WL 3984486, **5-10 (E.D. Mo. Sept. 11, 2012)

Joseph v. Marriott Int'l, Inc., 967 S.W.2d 624, 630 (Mo.App. W.D. 1998)

Restatement (Second) of Torts, § 876(b)

ARGUMENT

Standard of Review

Upon transfer, a case is decided by this Court "the same as an original appeal." MO. CONST., art. V, § 10, *quoted in Murphy v. Carron,* 536 S.W.2d 30 (Mo. banc 1976). This Court reviews *de novo* a trial court's grant of a motion to dismiss for failure to state a claim upon which relief may be granted. *Lynch v. Lynch,* 260 S.W.3d 834, 836 (Mo. banc 2008). The trial court's judgment will be affirmed if it is correct on any ground supported by the record, regardless of whether the trial court relied on that ground. *Lough by Lough v. Rolla Women's Clinic, Inc.*, 866 S.W.2d 851, 852 (Mo. banc 1993). The primary concern is "with the correctness of the result, and not the route taken by the trial court to reach it." *Felling v. Giles*, 47 S.W.3d 390, 393 (Mo.App. E.D. 2001), *citing Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus*, 824 S.W.2d 92, 94 (Mo.App. E.D. 1992).

I. The Trial Court Properly Dismissed Count II of Nickell's Second Amended Petition For Failure to State A Claim Because, Contrary to Points I, II and III of Nickell's Substitute Brief, the Underlying Claim For Breach of Fiduciary Duty (Count I) is a Derivative Claim and Cannot Be Asserted By Nickell Directly

The circuit court properly found that Nickell failed to state a cause of action in Count I for breach of fiduciary duty against the ESSI defendants. *See* LF 169–70. In Missouri, it is well-established that "'corporate shareholders cannot in their own right and for their personal benefit maintain an action for the recovery of corporate funds or property improperly diverted or appropriated by the corporation's officers and directors' because the injury is to the corporation and not the shareholders individually." *K-O Enterprises, Inc. v. O'Brien*, 166 S.W.3d 122, 129 (Mo.App. E.D. 2005)(internal citation omitted); *see also Centerre Bank of Kansas City, N.A. v. Angle,* 976 S.W.2d 608, 613 (Mo.App. W.D. 1998) (holding shareholders could not bring direct action for breach of fiduciary duty against officers and directors for diversion of corporate assets). In fact, a recent action by shareholders seeking relief for alleged backdating of stock options by corporate officers was brought as a derivative action. *See New England Carpenters Pension Fund v. Haffner,* 391 S.W.3d 453 (Mo.App. S.D. 2012).

This standing issue has been fully addressed by the substitute brief of the ESSI defendants. *See* Substitute Brief of Respondents Kenneth E. Lewi, et al.

Rather than burden the Court by repeating those arguments, Newman adopts and incorporates by reference the substitute brief of the ESSI defendants on this point.

Nickell's claim against Newman for aiding and abetting a breach of fiduciary duty in Count II depends on the validity of Nickell's breach of fiduciary duty claim against the ESSI defendants. *See Brandt v. Medical Defense Assocs.*, 856 S.W.2d 667, 669, 675 (Mo. banc 1993)(affirming dismissal of claims of breach of fiduciary duty and aiding and abetting breach of fiduciary duty where allegations of petition did not state a claim of breach of fiduciary duty to maintain confidentiality of medical records); *see also Rice v. Hodapp*, 919 S.W.2d 240, 245 (Mo. banc 1996)(if tortious acts alleged as elements of a civil conspiracy claim fail to state a cause of action, then the conspiracy claim fails as well). Accordingly, because Nickell has failed to state a claim for breach of fiduciary duty in Count I of the SAP, Nickell's claim against Newman in Count II for aiding and abetting breach of fiduciary duty must also fail.

II. Even If Nickell's Claims Are Not Derivative, Dismissal of Count II Was Proper Because the Trial Court Lacked Subject Matter Jurisdiction Under The Securities Litigation Uniform Standards Act Because Neither Newman Nor DRS Was an Affiliate or Acting on Behalf of ESSI at the Time of Any Alleged Misrepresentations As Required To Invoke An Exception to Federal Preclusion

A.

Standard of Review

Dismissal for lack of subject matter jurisdiction is proper whenever it appears that the court is without jurisdiction. Mo. Sup. Ct. R. 55.27(g)(3); *James v. Poppa*, 85 S.W.3d 8, 9 (Mo. banc 2002). Where, as here, there is no dispute as to the pertinent facts, a question as to the subject matter jurisdiction of a court is purely a question of law that is reviewed *de novo*. *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n,* 102 S.W.3d 10, 22 (Mo. banc 2003). The Court has no subject matter jurisdiction over Nickell's putative class action claim against Newman because of federal preclusion of such causes of action under SLUSA.

B.

The Securities Litigation Uniform Standards Act Applies on its Face to Nickell's Putative Class Action Claim Against Newman

In 1995, Congress passed the Private Securities Litigation Reform Act ("PSLRA"), which was "'designed to curb abuse in securities suits, particularly shareholder derivative suits,'" by imposing certain stringent requirements on such suits, including heightened pleading standards. *Green v. Ameritrade, Inc.,* 279 F.3d 590, 595 (8th Cir. 2002), *quoting In re Lutheran Bhd. Variable Ins. Prods. Co. Sales Practices Litigation,* 105 F.Supp.2d 1037, 1039 (D. Minn. 2000). These requirements "'immediately drove many would-be plaintiffs to file their claims in state court, based on state law, in order to circumvent the strong requirements established by the [PSLRA].'" *Green,* 279 F.3d at 595, *quoting In re Lutheran Bhd.,* 105 F.Supp.2d at 1039. In response, Congress passed SLUSA in 1998.[4]

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[4] SLUSA amends "'in substantially identical ways,'" *Kircher v. Putnam Funds Trust,* 547 U.S. 633, 637 n.3 (2006)(citation omitted), both the Securities Act of 1933, 48 Stat. 74, and the Securities Exchange Act of 1934, 48 Stat. 881. For the sake of simplicity, this brief will rely exclusively on the amendments to the Securities Exchange Act of 1934.

SLUSA's preclusion clause states:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging --
>
> (A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. § 78bb(f)(1).

SLUSA generally precludes class action claims brought under state law that "'can reasonably be read as alleging a sale or purchase of a covered security made in reliance on the allegedly faulty information provided to [the plaintiff] and to putative class members by [the defendant]'"). *Sofonia v. Principal Life Ins. Co.*, 465 F.3d 873, 877 (8th Cir. 2006)(internal citation omitted). SLUSA was intended "'to prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court.'" *Id*. at 876, *quoting* H.R.Rep. No. 105-803 (Oct. 9, 1998) (Conf. Rep.).

Putative class actions covered by SLUSA are removable to federal district court and then subject to dismissal. *See* 15 U.S.C. § 78bb(f)(2). If they are not removed, they must be dismissed by the state court directly. *See*, *e.g.*, *Wells*

Fargo Bank, N.A. v. Superior Court, 159 Cal.App.4th 381, 385 (Cal. App. 1 Dist. 2008)(holding state court must dismiss class action claim precluded by SLUSA); *BT Securities Corp. v. W.R. Huff Asset Management Co.*, 891 So.2d 310, 317 (Ala. 2004)(same).

In response to the removal of this case by PWC after it was added as a defendant under the First Amended Petition, the federal district court found that Nickell's putative class action satisfied "all conditions for the application of the SLUSA." SLF 529.[5] Nickell's claims are a "covered class action," as defined by SLUSA, because they involve a putative class (the former ESSI shareholders) of more than 50 persons with the requisite allegations of common issues of law and fact.[6] SLF 528; *see* 15 U.S.C. § 78bb(f)(5)(B)(i)(II). In addition, Nickell's claims are brought under state law and allege misrepresentations or omissions of material facts. LF 528-29. A shareholder's exchange of an existing security for a new security, as occurred in the merger between ESSI and DRS, qualifies as a "purchase or sale" under SLUSA. *Sofonia,* 465 F.3d at 878–79. Moreover, ESSI

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[5] The Court of Appeals in its June 4, 2013 Opinion did not disagree.

[6] As Nickell states in his substitute brief, this is a "class action on behalf of all former holders of ESSI stock who sold their shares pursuant to a false and misleading Registration Statement disseminated in connection with the acquisition of ESSI by DRS." Appellant's Substitute Brief, p. 4.

stock was a "covered security" because it was traded on the NASDAQ. 15 U.S.C. §78bb(f)(5)(E) (citing to 15 U.S.C. §77r(b) for definition of "covered security"); SLF 529.[7]

Nevertheless, the district court concluded the case should be remanded because Nickell's claims fell within a savings clause in SLUSA. 15 U.S.C. § 78bb(f)(3). This savings clause, commonly referred to as the "Delaware carve-out,"[8] exempts actions from SLUSA preclusion where the "covered class action

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[7] The United States Supreme Court recently held that state law claims arising out of misrepresentations in connection with the sale of certificates of deposit were not precluded by SLUSA because certificates of deposit are not covered securities within the statutory definition. *Chadbourne & Parke LLP v. Troice*, – U.S. –, 134 S.Ct. 1058 (2014). The *Chadbourne & Parke* Court noted that it was not its intent to undermine SLUSA's purpose to limit frivolous and abusive class actions relating to nationally-traded securities, 134 S.Ct. at 1068, and that its opinion simply preserved state law relief "when the fraud bears so remote a connection to the national securities market that no person actually believed he was taking an ownership position in that market." *Id.* at 1070.

[8] The phrase "Delaware carve-out" comes from a 1998 case in which the Delaware Supreme Court described the provisions of 15 U.S.C § 78bb(f)(3) that

. . . is based upon the statutory or common law of the State in which the issuer is incorporated," and the action involves:

> (I) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or
>
> (II) any recommendation, position, or other communication with respect to the sale of securities of an issuer that –
>
> (aa) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and
>
> (bb) concerns decisions of such equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

15 U.S.C. § 78bb(f)(3)(A).

In other words, in a case like this involving alleged misrepresentations, SLUSA does not bar state law class action claims where the representations are made "on behalf of the issuer or affiliate of the issuer" incorporated in that state, to

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preserved certain state law claims as "Delaware carve-outs." *See Malone v. Brincat, et al.*, 722 A.2d 5, 13 (Del. Supr. 1998).

the issuer's own shareholders.[9] Nor does it preclude claims involving that issuer's or affiliate's purchase or sale of the issuer's securities from or to its own shareholders. Based upon the limited information before it, which did not include any briefing on behalf of Newman, who was not yet a party, the district court concluded that all of Nickell's claims were within the Delaware carve-out and remanded the case to state court.

C.

The Claim Against Newman Is Not Saved By The Delaware Carve-Out Exception to SLUSA Preclusion

i. A State Court Must Enforce SLUSA Preclusion

The United States Supreme Court has expressly held that on remand from a federal court, a state court has the authority to revisit the preclusion issue and dismiss claims on grounds of SLUSA preclusion. *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 646-47 (2006)("a district court does not have the last word on preclusion under the Act, for nothing in the Act gives the federal courts exclusive jurisdiction over preclusion decisions"). The *Kircher* Court explained that "[a] covered action is removable if it is precluded, and a defendant can enlist the Federal Judiciary to decide preclusion, but a defendant can elect to leave a case

[9]An "issuer" is defined as any person who issues or proposes to issue any security. 15 U.S.C. § 78c(a)(8).

where the plaintiff filed it and trust the state court (an equally competent body…) to make the preclusion determination." *Id*. at 646 (citation omitted). The Supreme Court added, "*And what a state court could do in the first place it may also do on remand*." *Id.* (emphasis added). Post-remand review is particularly important where, as here, a party did not have an opportunity to present its arguments to the federal court in the first instance. *See id.* at 646-48 (an advantage of not binding state court to reasoning of remand court is ability to consider subsequent developments).

ii. The Delaware Carve-Out to SLUSA Preclusion Does Not Save Nickell's Claim Against Newman

Where an action contains claims against multiple defendants, the Delaware carve-out analysis must be applied to each defendant separately. *See*, *e.g.*, *Greaves v. McAuley*, 264 F.Supp.2d 1078, 1084 (N.D. Ga. 2003)(finding that plaintiffs' claims against one corporate defendant were preserved under the Delaware carve-out while claims against a separate corporate defendant were not); *Superior Partners v. Chang*, 471 F.Supp.2d 750, 756-57 (S.D. Tex. 2007)(claims based on misstatements by selling company in a proxy statement prior to merger fell within Delaware carve-out, but claims based on alleged misstatement by purchasing company did not). SLUSA requires the dismissal of any *claim* that falls within the statute, while non-precluded claims may go forward. *See Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208, 1226–28 (9th Cir. 2009); *see also*

In re Lord Abbett Mut. Funds Fee Litig., 553 F.3d 248, 255–56 (3d Cir. 2009). Because Nickell's claim against Newman does not satisfy the requirements of the Delaware carve-out, it must be dismissed even if Nickell's claims against the other defendants survive.

a. Neither Newman nor DRS Was An Affiliate of ESSI As Required to Invoke the Delaware Carve-Out

It is clear from the allegations of the SAP that neither condition for the Delaware carve-out is met by Nickell's claim against Newman. The first condition requires that the claim involve "the purchase or sale of securities by the *issuer or an affiliate of the issuer* exclusively from or to holders of equity securities of the issuer." 15 U.S.C. § 78bb(f)(3)(A)(ii)(I) (emphasis added). This exception was intended to cover a company's sale or repurchase of its own stock to its existing shareholders. It does not apply here because the transaction at issue in this case involves **DRS's** – not ESSI's – purchase of ESSI stock from ESSI shareholders. Nickell does not allege, and could not allege, that DRS was the issuer of ESSI stock. Nor does Nickell allege that DRS was an "affiliate" of ESSI at the time of the Registration Statement. The term "affiliate" under SLUSA has a precise meaning. It is "a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer." 15 U.S.C. § 78bb(f)(5)(A). DRS did not control ESSI prior to the merger. Indeed, the purpose of the merger was to obtain control. Nor are there any

allegations in the SAP that prior to the merger, ESSI and DRS were anything but separate and independent entities.

In *Greaves v. McAuley*, 264 F.Supp.2d 1078 (N.D. Ga. 2003), the court found that plaintiff's claim against an acquiring corporation in a merger transaction was not within the Delaware carve-out, in part because an acquiring corporation is neither the issuer of a target corporation's stock nor an affiliate of a target corporation. *Id*. at 1084, *citing* 15 U.S.C. § 77p(f)(1). The plaintiff in *Greaves*, like Nickell, was a shareholder of the target corporation in a merger. *Id*. at 1080. The plaintiff brought a putative class action suit against the target corporation, its directors and the acquiring corporation. The plaintiff's claims were based on allegedly misleading statements contained in a joint proxy and registration statement the companies filed with the SEC. *Id*. The court found that the claims against the target corporation were within the Delaware carve-out because the target corporation was a Georgia corporation, it was the issuer of the stock that was the subject of the statements to the SEC, and the claims against it were based on Georgia law. *Id*. at 1083.

However, the court ruled that the Delaware carve-out did not apply to the plaintiff's claim against the acquiring corporation. *Id*. at 1084. The court found that the acquiring corporation was not the issuer of the target corporation's stock and, under SLUSA's statutory definition of "affiliate," was not an "affiliate" of the target corporation. *Id*.; *see also Superior Partners v. Chang*, 471 F.Supp.2d 750,

756 (S.D. Tx. 2007)(in applying SLUSA preclusion to state law claims by shareholders of target company against acquiring company, court noted that it was "undisputed that [acquirer] is not an 'issuer' of [target's] securities, nor is it alleged to be 'an affiliate of the issuer'"). Similarly, DRS is neither the issuer of ESSI stock nor ESSI's affiliate.[10] Accordingly, Nickell's claim against Newman does not satisfy the first condition of the Delaware carve-out.

b. Newman Is Not Alleged to Have Communicated To The ESSI Shareholders "On Behalf Of" ESSI

The second condition for the application of the Delaware carve-out is also inapplicable. The second condition requires that the communication "with respect to the sale of securities of an issuer … *[be] made by or on behalf of the issuer* or

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[10] In its June 4 Opinion holding the Delaware carve-out applicable, the Court of Appeals relied on the federal district court's finding that DRS was an "affiliate" of ESSI. SLF 529. The district court based that conclusion on a single citation to a District of Delaware decision that found an acquiring company was an affiliate of the target without any analysis or reference to SLUSA's definition of an "affiliate." *See Derdiger v. Tallman,* 75 F.Supp.2d 322, 325 (D. Del. 1999). The district court's interpretation is inconsistent with the statutory definition and, under the United States Supreme Court's opinion in *Kircher*, this Court is not bound by it.

an affiliate of the issuer to holders of equity securities of the issuer." 15 U.S.C. § 78bb(f)(3)(A)(ii)(II)(aa) (emphasis added). The only communication Newman is alleged to have made is the Registration Statement. However, Newman, as CEO and Chairman of the Board of DRS, signed the Registration Statement on behalf of DRS. He could not sign on behalf of ESSI or its board of directors. LF 124, 152 (SAP ¶¶ 34, 122). Gerald Potthoff, ESSI's President and CEO, signed the Registration Statement on behalf of ESSI. *Id.* As Nickell acknowledges in his SAP, the Registration Statement clearly stated the representations and recommendations being made to the ESSI shareholders were on behalf of the ESSI board of directors. *See* LF 139 (SAP ¶65):

> The Prospectus stated that: "The ESSI board of directors believes that the merger agreement and the transactions contemplated by the merger agreement are fair to and in the best interests of ESSI and its shareholders and has unanimously approved the merger agreement and the transactions contemplated by the merger agreement. Therefore, the *ESSI board of directors* unanimously recommends that *ESSI shareholders* vote for approval of the merger agreement and the transactions contemplated by the merger agreement."

(Emphasis added). *See also* LF 152-53 (SAP ¶ 122) ("The Registration Statements further stated that 'The *board of directors of ESSI* unanimously has approved the merger agreement, and unanimously recommends that *you [ie,*

ESSI's shareholders] vote "FOR" the approval of the merger agreement and the transactions contemplated by the merger agreement.'") (emphasis added)(brackets in original).

In the Court of Appeals, both Nickell and the Court relied solely on a Ninth Circuit decision, *Madden v. Cowen & Company*, 576 F.3d 957, 973 (9th Cir. 2009), to support the conclusion that Newman made representations "on behalf of" ESSI.[11] That case, however, involved an entirely different relationship. In *Madden,* an investment banker, Cowen & Company, had been hired *by the issuer* (the target company) to write a fairness opinion to be provided to the issuer's shareholders in support of a proposed merger. The *Madden* Court ruled that the investment banker was arguably making statements "by or on behalf of" the target company in the fairness opinion and *might* therefore be subject to a state court action under the Delaware carve-out. *Madden*, 576 F.3d at 973-74. Significantly, no claim was made in *Madden* that the investment banker was making

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[11] SLUSA does not define the phrase "by or on behalf of an issuer." However, the PLSRA defines the phrase "person acting on behalf of an issuer" to mean "an officer, director, or employee of the issuer." 15 U.S.C. § 77z-2(i)(6). Newman held none of those positions with ESSI.

representations by or on behalf of the *acquiring* company.[12] The Ninth Circuit itself cited the Congressional record as suggesting the purpose of the Delaware carve-out "was to preserve state-law actions brought by shareholders *against their own corporations* in connection with extraordinary corporate transactions requiring shareholder approval, such as mergers and tender offers . . . ." *Id.* at 971 (emphasis added).

Newman's alleged role prior to the merger was nothing like that of the investment banker in *Madden*. The Ninth Circuit understandably held that representations made in a fairness opinion, which had been bought and paid for by the target corporation (the issuer), were arguably statements made "on behalf of" the issuer. Neither Newman nor DRS is alleged to have been hired by ESSI to make statements on its behalf. Not only did Newman have no authority to speak on behalf of ESSI, the crux of Nickell's SAP is that Newman was assisting, not ESSI the company, but individual officers and directors of ESSI, by signing the Registration Statement. The alleged tortious conduct of holding down the

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[12] The *Madden* plaintiffs had previously attempted to bring state law claims against officers of the acquiring company and others. Those claims were dismissed by the district court due to SLUSA preclusion. *Madden v. Deloitte & Touche, et al.*, U.S.D.C., S.D.Ca. No. 99-CV-1516, Order dated October 13, 2000, *aff'd*, 118 Fed.Appx. 150, 153 (9th Cir. 2004).

acquisition price would have been squarely against ESSI's interest. Therefore, Newman is not alleged to have, and could not have, communicated with ESSI shareholders "on behalf of" the issuer, ESSI. The claim against Newman does not meet the second condition of the Delaware carve-out.[13]

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[13]Nickell further cannot satisfy a threshold requirement of the Delaware carve-out applicable to both conditions – that his claim against Newman be "based upon the statutory or common law of the State in which the issuer is incorporated." *See* 15 U.S.C. § 78bb(f)(3)(A)(i). Even if DRS were deemed to be an "issuer," Nickell brings his claim pursuant to Missouri law. He does not allege, and could not allege, that DRS is incorporated in Missouri. Therefore, the Delaware carve-out does not preserve his Missouri law claims against a non-Missouri corporation. *See Greaves*, 264 F.Supp.2d at 1084 (finding Delaware carve-out not satisfied where plaintiff's claim against acquiring corporation was not based on statutory or common law of state in which acquiring corporation was incorporated, but instead was brought pursuant to law of state in which target corporation was incorporated); *see also Madden,* 576 F.3d at 972 (Delaware carve-out did not permit shareholders of California corporation that had Delaware subsidiary to sue under California common law for misrepresentations made on behalf of Delaware subsidiary); *In re Stillwater Capital Partners Inc. Litigation,* 853 F.Supp.2d 441, 462 (S.D. N.Y. 2012)(dismissing as precluded by SLUSA

Because SLUSA precludes Nickell's claim against Newman, there is no subject matter jurisdiction and the claim must be dismissed. *Proctor*, 584 F.3d at 1226 ("SLUSA unquestionably requires the dismissal of the precluded claim."); *Prof'l Mgmt. Assoc., Inc. Employees' Profit Sharing Plan v. KPMG LLP*, 335 F.3d 800, 802 (8th Cir. 2003)(affirming dismissal where SLUSA precluded state law class action claim that defendant accountant had allegedly aided and abetted the issuer in making misrepresentations and omissions in financial statements), *cert. denied*, 540 U.S. 1162 (2004).

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class action claims asserted under New York law against acquiring corporation incorporated in Bermuda).

III. Alternatively, the Trial Court Properly Dismissed Count II of Nickell's Second Amended Petition for Failure to State a Claim Because Missouri Law Does Not Recognize a Claim for Aiding and Abetting Breach of Fiduciary Duty And, Even If Such a Claim Were Recognized, Count II Fails to Plead the Necessary Elements As To Newman

A.

This Court has not recognized a cause of action for aiding and abetting a breach of fiduciary duty based on § 876(b) of the Restatement (Second) of Torts

When the allegations of a petition fail to establish a right to recovery under a recognized cause of action under Missouri law, dismissal of that claim is proper. *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 333 (Mo. banc 2009). Nickell purports to allege a claim for "aiding and abetting breach of fiduciary duty" against Newman in Count II on the basis that Newman "assisted the ESSI defendants in their breach of their fiduciary duties of care, honesty, good faith and loyalty." LF 150 (SAP ¶ 112). However, contrary to the arguments made by the *Amici* Brief, no Missouri court has recognized a claim for aiding and abetting a

breach of fiduciary duty.[14] Accordingly, the dismissal of Count II of the Second Amended Petition was proper and should be affirmed.

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[14] The cases cited in the Brief of *Amici Curiae* Ruyle and Hoffman ("*Amici* Brief") do not support their contention that this cause of action has long been recognized in Missouri. Most of the cases do not involve claims of breach of fiduciary duty at all, much less whether there is a cause of action for aiding and abetting such a breach. *Amici* Brief at 9-10, 15-21, *citing, e.g., Hobbs v. Boatright,* 93 S.W. 934 (Mo. 1906)(decision involving fraud, not breach of fiduciary duty, in which court did not even address viability of claim for aiding and abetting fraud, but upheld verdict against bank that directly participated in ongoing scam and made direct fraudulent misrepresentations to plaintiff). The brief is otherwise a patchwork of inapposite cases involving criminal aiding and abetting, respondeat superior liability, fraud, and physical torts such as trespass. *See, e.g., Canifax v. Chapman & Wills,* 7 Mo. 175, 175 (1841)(holding that, in actions for trespass, "all are principals"); *State ex rel. The Doe Run Resources Corp. v. Neill,* 128 S.W.3d 502 (Mo. 2004)(addressing liability of corporate officer for acts of his own corporation; no discussion of aiding and abetting liability). The only case that the *Amici* Brief contends directly upholds a claim of aiding and abetting a breach of fiduciary duty does no such thing. The dispute in *Massie v. Barth,* 634 S.W.2d 208, 209-210 (Mo.App. E.D. 1982), arose in the trust

context and involved potential liability for conspiring to commit a breach of trust under the Restatement (Second) of Trusts § 326, not aiding and abetting a breach of fiduciary duty under the Restatement (Second) of Torts § 876(b). Moreover, as noted in *Centerre Bank*, 976 S.W.2d at 614, the defendant in *Massie*, who allegedly conspired to breach the trust, had a direct fiduciary duty to the plaintiffs as a result of plaintiffs' beneficial interest in the stock of the corporation in which the defendant was a director. *Massie,* 634 S.W.2d at 210; *Centerre Bank,* 976 S.W.2d at 614)("In [*Massie*], the director was found to have special fiduciary obligations to the shareholder which created a special basis for standing to assert individual claims").

The only Missouri cases that have followed *Massie* have also arisen in the trust context and again did not directly address aiding and abetting a breach of fiduciary duty. *See Deutsch v. Wolff,* 994 S.W.2d 561, 571 (Mo. banc 1999)(accountant held jointly and severally liable to trust for overpayment of trustee fees in breach of accountant's direct duties owed to trust); *Brown v. United Missouri Bank, N.A.,* 78 F.3d 382, 387 (8th Cir. 1996)(relying without analysis on *Massie* to find that Missouri law would recognize a cause of action for inducement to breach a fiduciary duty). As a careful examination of these cases demonstrates, there is good reason why neither Nickell nor the Court of Appeals relied on

Claims for aiding and abetting another in the commission of a tort generally have found support in § 876(b) of the Restatement (Second) of Torts. *Bradley v. Ray*, 904 S.W.2d 302, 315 (Mo.App. W.D. 1995). That section provides:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself . . .

Newman has not found any case in which a Missouri court has affirmatively recognized a claim for aiding and abetting a non-physical tort, such as breach of fiduciary duty, by substantial assistance pursuant to § 876(b). *See Manzer v. Sanchez*, 985 S.W.2d 936, 940 (Mo.App. E.D. 1999)(plaintiffs' claim for fraud committed by aiders and abettors "failed to plead a cause of action"); *see also Bradley*, 904 S.W.2d at 315 (noting that no Missouri court has recognized the tort of aiding and abetting as set forth in Restatement (Second) of Torts § 876(b)). The federal courts that have directly addressed aiding and abetting breach of fiduciary duty have rejected the argument that such a cause of action exists under Missouri law. *See Omaha Indemnity Company v. Royal American Managers, Inc.*,

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Massie or its progeny for the proposition that Missouri has recognized this cause of action.

755 F.Supp. 1451, 1459 (W.D. Mo. 1991)(declining to grant summary judgment in favor of plaintiffs on claim that corporate officers aided and abetted the corporation's breaches of fiduciary duty because court not convinced that Missouri courts would recognize a cause of action for aiding and abetting a breach of fiduciary duty); *see also Jo Ann Howard & Associates, P.C. v. Cassity*, 2012 WL 3984486, **5–10 (E.D. Mo. Sept. 11, 2012)(reviewing aiding and abetting cases including *Omaha Indemnity* and concluding Missouri Supreme Court would decline to adopt aiding and abetting a breach of fiduciary duty theory of liability under §876(b)).[15] The *Jo Ann Howard* Court noted the defendants' argument that

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[15] Nickell has not addressed the substantive validity of Count II in his substitute brief in this Court. In Nickell's two-paragraph argument on this issue on p. 25 of his reply brief in the Court of Appeals, he relied on three federal district court cases for the proposition that aiding and abetting a breach of fiduciary duty is a valid cause of action under Missouri law. *See Lonergan v. Bank of America, N.A.,* 2013 WL 176024, *12 (W.D. Mo. Jan. 16, 2013); *Callaway Bank v. Bank of the West,* 2013 WL 1222781 (W.D. Mo. Mar. 25, 2013)*; Phelps v. deMello,* 2007 WL 1063567 (E.D. Mo. Apr. 9, 2007). However, none of those cases involved a claim of breach of fiduciary duty, but rather claims of fraud and misrepresentation. The *Lonergan* court, for example, declined to dismiss an aiding and abetting fraud and misrepresentation claim by borrowers

"substantial policy concerns support limiting the scope of secondary liability" under §876(b) because such application "heightens the risk that the law will improperly impose liability on a party without fault or a direct connection between a wrongful act and tortious harm." *Jo Ann Howard,* 2012 WL 3984486 at *5.

There are opinions from Missouri courts that have used the terms "aid" and "abet" in discussing secondary liability. However, these cases involved the primary tortfeasor's criminal or physical torts in which the secondary actor was at the scene of the tort and actively engaged in the tort. *See, e.g.*, *Knight v. W. Auto Supply Co.*, 193 S.W.2d 771, 776 (Mo.App. K.C. 1946) ("aiding and abetting" by partaking in a joint assault); *see also Terrydale Liquidating Trust v. Barness*, 611 F.Supp. 1006, 1015 n.12 (S.D. N.Y. 1984) ("Missouri aider and abettor cases involve either criminal conduct . . . or physical intentional torts").

The importance of the distinction between physical and non-physical torts is illustrated by two opinions from the Western District Court of Appeals that have addressed the viability of a §876(b) claim of aiding and abetting and have come to different conclusions based upon the nature of the primary tort. *Compare Bradley v. Ray*, 904 S.W.2d 302, 315 n.11 (Mo.App. W.D. 1995)(declining to recognize claim of aiding and abetting sexual abuse by failing to report such abuse) *with*

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against a bank, but only because the bank did not present clear Missouri authority barring such an action as a matter of law. *Lonergan*, 2013 WL 176024 at *12.

Shelter Mut. Ins. Co. v. White, 930 S.W.2d 1 (Mo.App. W.D. 1996)(concluding that, in the context of a fatal automobile accident, passengers who encouraged driver to drive under the influence, speed, and ignore traffic signs, could be liable under § 876(b)).

The Court in *Bradley* addressed whether a therapist could be held liable for aiding and abetting the sexual abuse of a patient's stepdaughter based on allegations the therapist knew of the abuse and consciously failed to report it to the authorities. *Bradley*, 904 S.W.2d at 305-06, 314-15. The court concluded that Missouri did not recognize the tort of aiding and abetting based on § 876(b), stating that "Plaintiff has not cited any Missouri case which recognizes a claim for aiding and abetting in the commission of a tort, and none were located through the Court's own research." *Id*. at 315. Alternatively, the court found that, even if the claim were recognized in Missouri, the therapist's alleged failure to report the abuse would not state a claim, since "defendant must affirmatively act to aid the primary tortfeasor; neither failure to object to the tortious act nor defendant's mere presence at the commission of the tort is sufficient to charge one with responsibility." *Id*.

In contrast, the *Shelter Mutual* Court recognized a claim for aiding and abetting under § 876(b) against passengers in a car who actively encouraged the driver, who they knew was under the influence of alcohol, to drive fast and disobey traffic signs. *Shelter Mutual*, 930 S.W.2d at 5. *Shelter* is consistent with

cases that have recognized aiding and abetting in the context of a wrongful, physical act where the defendant is physically present and encourages or assists the tortfeasor. In a subsequent case, the Western District expressly questioned whether § 876(b) of the Restatement is applicable to any cases outside of the drunk driving context. *Joseph v. Marriott Int'l, Inc.*, 967 S.W.2d 624, 630 (Mo.App. W.D. 1998).

Shelter Mutual was cited in the more recent case of *Safe Auto Ins. Co. v. Hazelwood,* 404 S.W.3d 360, 367 (Mo.App. S.D. 2013), but that case again involved the alleged aiding and abetting liability of a passenger for the negligent conduct of a driver. It did not involve a claim of breach of fiduciary duty and the court did not purport to apply its ruling to facts outside of those before it. In *Safe Auto*, the plaintiff, who was injured in a car accident, sought to hold the passenger in the other car liable because the driver took his eyes off the road to find a compact disc to give to the passenger. *Safe Auto,* 404 S.W.3d at 364. The Court found no aiding and abetting liability as a matter of law because there was no evidence the passenger owed a direct duty to the plaintiff, or encouraged the driver to commit reckless acts in the operation of the vehicle. *Id.* at 367-68.

These Missouri cases illustrate that the nature of the underlying tort, and therefore the duty breached, is (and should be) significant to the determination whether aider and abettor liability exists under § 876(b). Everyone has a duty not to recklessly or negligently inflict physical injury on another, regardless of any

pre-existing relationship. However, a claim of breach of fiduciary duty *requires* a pre-existing special relationship between the injured party and the primary tortfeasor. *See Matter of Munford, Inc.*, 98 F.3d 604, 613 (11th Cir. 1996) (rejecting plaintiff's argument that tort of breach of fiduciary duty is akin to torts involving violence or fraudulent conveyances). As the Eleventh Circuit reasoned in *Munford* in declining to recognize aider and abettor liability for breaches of fiduciary duty in that case, "[t]o hold otherwise . . . would enlarge the fiduciary obligations beyond the scope of a confidential or special relationship." *Id*.

Other courts have also expressed reluctance to impose this expanded duty. *See, e.g., Antioch Company Litigation Trust v. Morgan,* 2012 WL 6738676, *3 (S.D. Ohio Dec. 31, 2012)(granting motion to dismiss claim for aiding and abetting breach of fiduciary duty in reliance on Ohio Supreme Court's recent determination that Ohio does not recognize cause of action for tortious acts in concert under § 876), *citing DeVries Dairy, LLC v. White Eagle Coop. Assoc., Inc.*, 974 N.E.2d 1194, 1194 (Ohio 2012); *In re Verilink Corp.*, 405 B.R. 356, 380-81 (N.D. Ala. 2009)(granting motion to dismiss claim against investment banker for aiding and abetting breach of fiduciary duty in providing fairness opinion to acquiring company in merger because Alabama does not recognize such a cause of action); *see also Pietrangelo v. Wilmer Cutler, et al.*, 68 A.3d 697, 711 (D.C. App. 2013)(noting that separate tort of aiding and abetting has not yet been recognized explicitly in the District of Columbia); *Gusinsky v. Flanders Corp.*, 2013 WL

5435788, *10 & n.38 (N.C. Super. Sept. 25, 2013)("The North Carolina Supreme Court appears never to have addressed whether a claim for aiding and abetting a breach of fiduciary duty is a valid cause of action").

This Court has been appropriately cautious in recognizing new causes of action, particularly ones involving fiduciary relationships. In the recent case of *John Doe 1631 v. Quest Diagnostics, Inc.*, 395 S.W.3d 8 (Mo. banc 2013), the Court declined to create a fiduciary relationship between a laboratory and a patient with respect to the confidentiality of test results. It emphasized that a fiduciary relationship is "a special relationship of trust and confidence." *Id.* at 16; *see also Western Blue Print Company, LLC v. Roberts*, 367 S.W.3d 7, 15-16 (Mo. banc 2012)(in action by employer against former employee, declining to extend the law of fiduciary duty to at-will employees not subject to a non-compete agreement). This Court also recently declined to interpret the Missouri Uniform Trade Secrets Act, RSMo. § 417.450 *et seq.*, as imposing liability for "aiding and abetting" the misappropriation of trade secrets. *Central Trust and Inv. Co. v. Signalpoint Asset Management, LLC*, 2014 WL 712970, *6 & n.11 (Mo. banc Feb. 25, 2014)(adopting an "aiding and abetting" standard for misappropriation more generally "is misguided").

Here, Nickell does not allege, and could not allege, that Newman, as an officer and director of DRS, owed any fiduciary duty to Nickell or ESSI shareholders generally. Instead, his aiding and abetting claim against Newman is

predicated on the special relationship between the ESSI defendants and the ESSI shareholders. This Court has not authorized the use of aiding and abetting claims to expand fiduciary obligations to individuals who have no confidential or special relationship with the plaintiff. This Court should decline to do so here.[16]

Accordingly, Count II does not state a claim for relief under a cause of action recognized by Missouri law and the trial court's dismissal of this claim should be affirmed.

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[16] The *Amici* Brief concludes by posing hypothetical scenarios in which Newman bribes an ESSI employee or attorney to gain confidential information to assist DRS in achieving the merger. The *Amici* Brief suggests that if this Court were to confirm that there is no cause of action for aiding and abetting breach of fiduciary duty, such bribery would go unpunished. *Amici* Brief at 28-29. That is nonsense. Any such bribery would not only be criminally actionable as commercial bribery under RSMo. §570.150, but would be civilly actionable as, for example, tortious interference with contract, or as a violation of the Missouri Uniform Trade Secrets Act, RSMo. §§ 417.450 *et seq., see Custom Hardware Engineering & Consulting, Inc.,* 918 F.Supp.2d 916, 937-38 (E.D.Mo. 2013)(misappropriation of trades secrets under MUTSA occurs through improper means, such as bribery).

B.

Count II also fails to state a claim for aiding and abetting because the allegations of Newman's conduct are both unsupported by facts and do not in any event rise above mere acquiescence in the ESSI defendants' alleged wrongdoing

Even assuming that Missouri law recognizes a cause of action for aiding and abetting a breach of fiduciary duty, Count II of the SAP must nonetheless be dismissed because Newman is not alleged to have participated in the core conduct underlying Nickell's claims: the backdating of stock options by the ESSI defendants. Nor is Newman alleged to have affirmatively acted to aid the ESSI defendants in either the backdating or in concealing it from ESSI's shareholders. Section 876(b) of the Restatement (Second) of Torts requires that the aider and abettor "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." As the *Bradley v. Ray* court noted, "'[t]he defendant must affirmatively act to aid the primary tortfeasor; neither failure to object to the tortious act nor defendant's mere presence at the commission of the tort is sufficient to charge one with responsibility.'" *Bradley*, 904 S.W.2d at 315, *quoting* Prosser and Keeton, *The Law of Torts*, § 46 at 323–24 (5th ed. 1984).

Here, the gravamen of Nickell's allegations against Newman is that he found out about the alleged backdating activity after the fact, but did not disclose

it. LF 150 (SAP ¶¶ 111–12). Judge Dierker recognized that similar allegations made by Nickell against defendant PWC established nothing more on the part of PWC than mere acquiescence in the ESSI defendants' conduct. He concluded that, as a matter of law, acquiescence was insufficient to aid and abet a tort. LF 50. In *Jo Ann Howard & Associates, P.C. v. Cassity*, 2012 WL 3984486, **5–10 (E.D. Mo. Sept. 11, 2012), as well, the district court confronted allegations of alleged aiders and abettors "passively failing to stop, warn of, or report the primary torts [fraud and breach of fiduciary duty] allegedly being committed by others." 2012 WL 3984486 at *10. The district court found that, even if Missouri recognized aiding and abetting in the context of fraud and breach of fiduciary duty, the plaintiff failed to plead sufficient facts to establish the requisite elements of any cause of action under § 876(b). *See also Bradley*, 904 S.W.2d at 315 (therapist's knowledge of abuse of patient's stepdaughter and failure to report it to authorities was insufficient to support claim of aiding and abetting sexual abuse); *Safe Auto Insurance Co. v. Hazelwood,* 404 S.W.3d 360, 367-68 (Mo.App. S.D. 2013)(allegations that passenger knew driver had been drinking and saw driver looking away from road were insufficient to constitute acts of encouragement to commit reckless acts in the operation of the vehicle).

The Court should reach the same conclusion with respect to the claims asserted against Newman. The SAP alleges that Newman was silent about the alleged backdating activity at the time of the issuance of the Registration

Statement, years after the options backdating activity at ESSI is alleged to have occurred. Nickell alleges that the Merger filings were prepared and disseminated by the ESSI defendants. LF 149 (SAP ¶ 103). There are no allegations that Newman did anything more than passively fail to report any misrepresentations or omissions by the ESSI defendants that Nickell alleges were contained in the Registration Statement. *See* LF 150 (SAP ¶ 111)("Newman had actual or constructive knowledge of the improper backdating of stock option grants and the fact that the Joint Proxy Statements issued by ESSI and DRS Technologies were false and misleading"). This alleged inaction by Newman clearly does not establish the affirmative acts and substantial assistance required by the Restatement.

Moreover, Nickell's allegations about Newman's "knowledge" of the backdating and of misrepresentations or omissions about the backdating in the Registration Statement are wholly conclusory and therefore fail to support a claim of aiding and abetting. "Under Missouri's fact pleading requirements, a pleader must state the ultimate facts, or allegations which infer those facts, which support every element of the cause of action pleaded to survive a motion to dismiss." *Hoag v. McBride & Son Inv. Co., Inc.*, 967 S.W.2d 157, 174 (Mo.App. E.D. 1998), *citing Sofka v. Thal,* 662 S.W.2d 502, 508 (Mo. banc 1983). A court "must ignore mere conclusions that the pleader alleges without supporting facts in determining whether the petition states a cause of action." *Id.* Here, Nickell

claims Newman discovered the improper backdating in the course of due diligence on the merger. LF 120-21, 123 (SAP ¶¶ 24, 32). However, Nickell does not allege a single fact in support of that allegation. When did this discovery occur? What did Newman see or hear that imparted this information? Was there a document he reviewed that revealed the backdating? Was he told something, and if so when, and by whom? The SAP alleges no facts that, if true, would answer these fundamental questions.

Nickell even concedes in the SAP that Newman may have had only "constructive knowledge," or been "reckless in not knowing," about ESSI's options backdating activity. LF 123, 150 (SAP ¶¶ 32, 111). Lack of knowledge, even if "reckless," does not support liability under § 876(b). The Restatement itself expressly provides that a defendant will be liable for the tortious conduct of another only if he "*knows* that the other's conduct constitutes a breach of duty . . . ." Restatement (Second) of Torts § 876(b) (emphasis added); s*ee Joseph,* 967 S.W.2d at 630 (even if § 876(b) liability applied outside of motor vehicle context, judgment on the pleadings was proper where no facts supported hotel's knowledge of tortious conduct by municipality in removing stairway from hotel premises); *Shelter Mutual,* 930 S.W.2d at 4 (reversing dismissal of action against passenger of allegedly negligent driver under § 876(b) where jury could reasonably conclude driver's conduct was "known" by passenger to be tortious); *see also Sender v. Mann,* 423 F.Supp.2d 1155, 1176 (D. Colo. 2006)("aiding and

abetting requires actual knowledge and is not satisfied by reckless or negligent conduct"). Nickell's failure to allege Newman's actual knowledge of the ESSI defendants' alleged tortious conduct is fatal to his cause of action against Newman.

Nickell has not provided, and cannot provide, factual support for his conclusory allegations sufficient to meet Missouri pleading standards. If this action goes forward in some form against the ESSI defendants and Nickell finds evidence of Newman's knowledge of the backdating and substantial assistance to the ESSI defendants, he can seek to add Newman as a party at that time. But no defendant should be forced to expend time and resources to answer conclusory allegations that are unsupported by facts. Accordingly, because Newman's alleged conduct cannot amount to aiding and abetting any breach of fiduciary duty by the ESSI defendants, the dismissal of Count II must be affirmed.

CONCLUSION

No Missouri court has recognized aiding and abetting liability in the context of a breach of fiduciary duty claim. To do so would create a significant expansion of fiduciary liability in Missouri to a wholly new class of claims. Such action would cut fiduciary liability loose from its traditional moorings: a pre-existing special, confidential relationship with the claimant.

Nor has any Missouri state court addressed the important jurisdictional issue of the scope of SLUSA preclusion. Nickell's contention that his claim against Newman is subject to a narrow exception to SLUSA preclusion is particularly unsupportable in a case by a non-Missouri resident directed against a non-Missouri defendant who was neither the issuer of the stock nor an agent of the issuer at the time of the alleged misrepresentation. An acquiring company should not be artificially deemed to be speaking for the target company prior to a merger in order to subject its officers and directors to state law claims of securities fraud in the state of the target company's incorporation.

For the foregoing reasons, Respondent Mark S. Newman respectfully requests that the dismissal of Nickell's claim against Newman in Count II of the Second Amended Petition for aiding and abetting a breach of fiduciary duty be affirmed.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. Brief of the Respondent Mark S. Newman contains the information required by Rule 55.03;

2. Brief of the Respondent Mark S. Newman, excluding the cover page, signature block, certificate of service and this certificate, contains 12,730 words, as determined by the word count tool contained in Microsoft Word 2013, and therefore complies with Rule 84.06(b).

April 1, 2014 /s/ Lisa A. Pake

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of April, 2014, the foregoing brief was filed electronically with the Clerk of the Court to be served by operation of the Missouri eFiling System upon all counsel of record.

/s/ Lisa A. Pake