IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

The Michelin Retirement Plan and the Investment Committee of the Michelin Retirement Plan, Plaintiff, v. Dilworth Paxson, LLP, BFG Socially Responsible Investments, Ltd., Burnham Financial Group, Inc., Burnham Securities, Inc., COR Fund Advisors, LLC, GMT Duncan, LLC, Greenburg Traurig, LLP, Thorsdale Fiduciary and Guaranty Company Ltd., U.S. Bank National Association, Valor Group Ltd., Wakpamni Lake Community Corp., Wealth-Assurance AG, Wealth Assurance Private Client Corporation, Timothy B. Anderson, Jon Michael Burnham, Devon D. Archer, Bevan T. Cooney, Hugh Dunkerley, Jason W. Galanis, John P. Galanis, Gary T. Hirst, Frankie D. Hughes, and Michelle A. Morton, Defendants.	)	Case No. 16-cv-03604

<u>DEFENDANT GREENBERG TRAURIG'S REPLY IN SUPPORT OF ITS RULE 12(b)(6) MOTION TO DISMISS</u>

Greenberg Traurig, LLP's ("Greenberg") Motion to Dismiss the legal malpractice claim should be granted because, as confirmed by the Opposition ("Br.") filed by the Michelin Retirement Plan (the "Plan") and the Investment Committee of the Michelin Retirement Plan (collectively, "Plaintiffs"), the Plaintiffs had no attorney-client relationship with Greenberg. The only other claim pled against Greenberg must also be dismissed because Plaintiffs are not entitled to equitable relief from Greenberg (*i.e.*, it is undisputed that Greenberg did not receive any of the "ill-gotten gains") and therefore have no basis upon which to assert a claim for knowing participation in a prohibited transaction in violation of the Employee Retirement Income Security Act of 1974 ("ERISA") §502(a)(3), 29 U.S.C §1132(a)(3).

As Plaintiffs cannot overcome these obvious fatal deficiencies, Plaintiffs improperly attach 17 exhibits to their Opposition and devote 17 pages of their brief to "background facts," most of which cannot be found anywhere in the Complaint.[1] Plaintiffs' improper effort to essentially amend their Complaint with extrinsic evidence should be disregarded. Yet, even considering the new information, there is no basis to hold Greenberg liable for legal malpractice or an ERISA violation. Plaintiffs must assert the existence of a duty owed by Greenberg and that they are entitled to equitable relief *from Greenberg*. Plaintiffs simply cannot do that here. Accordingly, Greenberg respectfully requests that this Court dismiss Count 10 and Count 2, as to Greenberg, with prejudice.

I. ANALYSIS

A Rule 12(b)(6) motion to dismiss requires dismissal where a plaintiff fails to assert factual allegations that "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*,

[1] Although Greenberg disputes many of Plaintiffs' newly purported facts—based on their relevance and veracity—in this Reply brief, Greenberg does not refute the improper allegations because they are ultimately irrelevant to Greenberg's Motion to Dismiss.

550 U.S. 544, 555 (2007). Plaintiffs contend they satisfy the pleading standard because they have provided Greenberg "fair notice of what the . . . claim is and the grounds upon which it rests." (Br. at 18-19 (citations omitted).) The Complaint alleges an ERISA knowing participation claim and a legal malpractice claim. But Plaintiffs' "formulaic recitation of the elements of a cause of action" does not provide notice of the grounds upon which their purported claims rest and therefore fails the federal pleading standard. *Bell Atlantic*, 550 U.S. at 1964-65; *McCleary-Evans v. Maryland Dep't of Transp.*, 780 F.3d 582, 585 (4th Cir. 2015).

Moreover, allowing Plaintiffs to re-plead would be futile, so leave to amend should be denied. *Samuels v. Agency Ins. Co. of Maryland*, 215 F.3d 1321 (4th Cir. 2000) (Table); 2000 WL 627645, at *1. As shown in Section A, below, Plaintiffs admit they had no attorney-client relationship with Greenberg but nevertheless assert their legal malpractice claim is valid because an attorney-client relationship is not a prerequisite to such a claim. Plaintiffs, however, misconstrue the law—outside of the estate planning context, the existence of an attorney-client relationship is a necessary and essential element of a legal malpractice claim. Plaintiffs also contend they have claims for negligent misrepresentation and aiding and abetting (Br. at 33-34), but the Complaint alleges no such causes of action. Accordingly, Count 10 should be dismissed with prejudice.

As explained in Section B, below, to hold a non-fiduciary, like Greenberg, liable under 29 U.S.C. § 1132(a)(3), Plaintiffs must plead that (i) Greenberg knew or should have known of the alleged ERISA violations, *and* (ii) Plaintiffs are entitled to appropriate equitable relief from Greenberg. Apparently recognizing their allegation that all of the defendants, generally, knew or should have known of the prohibited transaction is insufficient to satisfy the pleading requirement that Greenberg, specifically, knew or should have known, Plaintiffs attempt to avoid dismissal by asserting new "facts." (*See* Br. at 2-18 and Exhibits A-Q.) And despite expressly seeking damages in the Complaint (Compl. ¶ 137), in their Opposition, Plaintiffs now claim they seek only equitable relief in the form of "the return of Plan funds" (Br. at 27). Plaintiffs' attempt to amend their Complaint via their Opposition to the Motion to Dismiss is wholly improper. *Fieger v. Supreme Court of S.C.*, No. C/A 3:10-1038-CMC-PJ, 2010 WL 3521606, at *4 (D.S.C. Aug. 16, 2010), *report and recommendation adopted*, 2010 WL 3521605 (D.S.C. Sept. 7, 2010); *Chewning v. Ford Motor Co.*, 35 F. Supp. 2d 487, 488 (D.S.C. 1998). Even assuming Plaintiffs seek only equitable relief in the form of "the return of Plan funds," Plaintiffs are not entitled to recover "Plan funds" *from Greenberg* because Greenberg is not and never was in possession of Plan funds. *Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan*, 577 U.S. --, 136 S. Ct. 651, 660 (2016). That is, "only a ***transferee*** of ill-gotten trust assets may be held liable" and Plaintiffs simply do not and cannot allege *Greenberg* is a "transferee of ill-gotten trust assets." *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 246, 250-51 (2000) (emphasis added). Accordingly, Count 2 should be dismissed against Greenberg with prejudice.

A. Count 10 Should Be Dismissed As To Greenberg Because Plaintiffs Have Not Pled, And Cannot Plead, The Existence Of An Attorney-Client Relationship Giving Rise To A Duty.

Plaintiffs argue they sufficiently state a claim for legal malpractice because "[a]n attorney-client relationship is not an absolute prerequisite for a claim against counsel." (Br. at 29.) Even if that were true—it is not—Plaintiffs make no effort to demonstrate the existence of a duty owed by Greenberg, which is an essential element of a legal malpractice claim, arising from something other than an attorney-client relationship. Plaintiffs contend only that Greenberg's legal services "were necessary to the consummation of this sham bond transaction" and that Greenberg should have caught the fraud perpetrated by Jason Galanis and his associates. (Br. at 31.) This does not confer a duty. Plaintiffs also contend they sufficiently assert causes of action for negligent misrepresentation and aiding and abetting. (Br. at 33-34.) This is simply incorrect; Count 10 is expressly a claim for "Professional Negligence—Legal Malpractice." (Compl. p. 51.) Plaintiffs make no attempt to establish the elements of these purported claims. Accordingly, Count 10 should be dismissed as to Greenberg.[2]

1. Contrary To Plaintiffs' Contention, An Attorney-Client Relationship Is An Essential Element Of A Legal Malpractice Claim.

To establish a claim for legal malpractice, Plaintiffs must plead, and ultimately prove: (1) the existence of an attorney-client relationship giving rise to a duty, (2) a breach of that duty, (3) proximate cause, and (4) damages. *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012); *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). Plaintiffs admit they were not Greenberg's client. (Br. at 29.) Instead, Plaintiffs rely on two cases they claim support their argument that an attorney-client relationship is unnecessary. (Br. at 29-

[2] Count 10 should be dismissed for an independent reason: Plaintiffs have not included an expert affidavit of merit required by the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-100. Plaintiffs contend the Act does not apply here because it only protects lawyers barred in South Carolina. (Br. at 35, n.9.) However, the purpose of the Act is to reduce the filing of meritless claims. Moreover, the Court should not read §15-36-100 to deny out-of-state professionals the same protections afforded South Carolina professionals because, otherwise, the statute could not survive either a facial or an "as applied" attack under the United States Constitution or the South Carolina Constitution's guarantees of equal protection, due process, and privileges and immunities. U.S.C.A. Const. Art. 4, § 2, cl. 1; U.S.C.A. Const.Amend. 14; S.C. Const. Art. 1, § 3. (The licensing state (Colorado) of the Greenberg attorneys who provided the legal services at issue to WLCC similarly requires an affidavit of merit for professional malpractice claims. Colo. Rev. Stat. Ann. § 13-20-602.) Indeed, South Carolina cases apply the statute to attorneys not licensed in South Carolina. *E.g. First Reliance Bank v. Romig*, No. 4:14-CV-00084-BHH, 2014 WL 5644602, at *4 (D.S.C. Nov. 4, 2014) (considering the application of S.C. Code Ann. § 15-36-100, even though the attorney at issue "is not licensed to practice in South Carolina and has never appeared in a South Carolina court or been admitted *pro hac vice*").

30, citing *Fabian v. Lindsay*, 410 S.C. 475, 765 S.E.2d 132 (S.C. 2014) and *Moore v. Weinberg*, 383 S.C. 583, 681 S.E.2d 875 (2009).) Plaintiffs' reliance on these cases is, at best, misplaced.

According to Plaintiffs, the South Carolina Supreme Court held in *Moore* that a "plaintiff could maintain a negligence claim against an attorney even though the attorney represented" the plaintiff's adversary. (Br. at 30.) This is a mischaracterization of the court's holding in *Moore*. The court held that a plaintiff could sue an *escrow agent* who also happened to be an attorney for negligence, *not legal malpractice*, because the defendant escrow agent owed the plaintiff a fiduciary duty "by virtue of this role" as escrow agent. *Moore*, 383 S.C. at 588. Although, as Plaintiffs contend (Br. at 30), the court rejected the defendant's argument that the negligence claim intruded on his attorney-client relationship, the court did so because *the defendant's role as an attorney was irrelevant* and therefore his "argument misse[d] the mark." *Moore*, 383 S.C. at 588. As the court found, the defendant's "role as an escrow agent" was at issue in the case, not his role as an attorney, and it was his role as an escrow agent that conferred a duty owed to the plaintiff, which had nothing to do with the duties he owed his client. *Id.* Plaintiffs here have not asserted any relationship giving rise to a duty owed by Greenberg and *Moore* is not relevant.

Plaintiffs argue that the South Carolina Supreme Court's decision in *Fabian* similarly is instructive because the court "rejected the strict privity requirement" that was traditionally an essential element of a legal malpractice claim. (Br. at 29.) Plaintiffs' intimation that *Fabian* applies in any context other than estate planning, however, is misplaced. The court made explicitly clear that its holding was narrow and limited to wills and estate planning documents: "today we affirmatively recognize causes of action in tort and contract by a third-party beneficiary of an existing will or estate planning document against the lawyer whose drafting error defeats or diminishes the client's intent." *Fabian,* 410 S.C. at 491. In so holding, the court recognized that allowing a cause of action by a third-party beneficiary under these limited circumstances was "not a radical departure from the existing law of legal malpractice *that requires a lawyer-client relationship*" because "there [wa]s an attorney-client relationship that form[ed] the basis for the attorney's duty to carry out the client's intent." *Id*. at 490.

Plaintiffs also argue the *Fabian* court adopted factors to "analyz[e] whether a duty exists" and that the factors "weigh[] in favor of finding the existence of a duty" here. (Br. at 32.) According to Plaintiffs a duty exists because "it is clear that 'the transaction was intended to affect [P]laintiff[s].'" (*Id*.) Even if it were clear the transaction was intended to affect Plaintiffs (it is not), contrary to Plaintiffs' contention, this does not give rise to a duty. Although the *Fabian* court acknowledged the factors "propounded by the California courts provide[] a valuable framework in evaluating" whether a cause of action exists, the court used that framework to recognize the limited existence of a malpractice claim by a third-party beneficiary in the estate planning context; the court did not "adopt" factors to consider in other situations. *Fabian*, 410 S.C. at 491-92.

Here, Plaintiffs are not third-party beneficiaries of a will, so *Fabian* has no bearing on the situation at bar. Plaintiffs do not cite any case law even suggesting *Fabian's* narrow exception to the strict privity requirement for legal malpractice claims has been extended to other contexts. Nor would such an extension make sense. Lawyers owe duties to their clients. *E.g. Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Sols.*, 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010). The source of that duty is the attorney-client relationship. *E.g. id.* "In his professional capacity the attorney is not liable, except to his client and those in privity to his client, for injury allegedly arising out of the performance of his professional activities." *Gaar v. N. Myrtle Beach Realty Co., Inc.*, 287 S.C. 525, 529, 339 S.E.2d 887, 889 (1986). Extending a lawyer's duties to non-clients would create an unworkable situation for lawyers involving improper conflicts of interest and split duties of loyalty. *See, e.g.*, ABA Model Rule of Prof. Conduct 1.7. Because there is no basis to allow a non-client to sue a lawyer for legal malpractice, Count 10 should be dismissed with prejudice as to Greenberg.

2. Plaintiffs Attempt To Assert Causes Of Action For Negligent Misrepresentation Or Aiding And Abetting Is Improper And, In Any Event, Fails As A Matter Of Law.

Recognizing they cannot succeed on their legal malpractice claim because there is no attorney-client relationship, Plaintiffs attempt to assert new causes of action for negligent misrepresentation (Br. at 30-33) and aiding and abetting breach of fiduciary duty (Br. at 34). Despite Plaintiffs' contention to the contrary, Count 10 is expressly a claim for "Professional Negligence—Legal Malpractice" and the Complaint contains no claims for negligent misrepresentation or aiding and abetting. It is "well-settled that a complaint cannot be amended by plaintiff's briefs in opposition to a motion to dismiss." *Chewning*, 35 F. Supp. 2d at 488. Because it is improper to raise new claims in opposition to a motion to dismiss, Plaintiffs' arguments in support of their purported claims for negligent misrepresentation and aiding and abetting should be rejected. *Miles v. Owen*¸ No. 14:12-998-MGL, 2013 WL 227766, at *2 (D.S.C. Jan. 22, 2013). But even considering these purported claims, Plaintiffs cannot allege the required elements, and should not be given leave to amend because any attempt to amend would be futile. *Samuels*, 2000 WL 627645, at *1.

a. Negligent Misrepresentation

To state a claim for negligent misrepresentation, a plaintiff must allege and prove: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care;

(5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation. *West v. Gladney*, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000). Plaintiffs simply cannot do that here.

The heart of a negligent misrepresentation claim, like a legal malpractice claim, is the existence of a duty. *See, e.g.*, *Harrington v. Mikell*, 321 S.C. 518, 524, 469 S.E.2d 627, 630 (Ct. App. 1996). As the bond issuer's lawyer, Greenberg did not owe Plaintiffs a duty. *See Schatz v. Rosenberg*, 943 F.2d 485, 493 (4th Cir. 1991). Imposing a duty between a seller's lawyer and a purchaser on the other side of a transaction would improperly undermine attorney-client relationships. *Id.* at 490-91. The *Schatz* court expressly approved a Seventh Circuit holding that a bond counsel was not liable to a bond purchaser for a purportedly false opinion letter. *Id.* (citing *First Interstate Bank v. Chapman & Cutler*, 837 F.2d 775, 780 n.4 (7th Cir. 1988)).

Moreover, statements about the future do not give rise to a negligent misrepresentation claim. An actionable "representation must relate to a present or pre-existing fact and be false when made." *Sauner v. Pub. Serv. Auth. of S.C.*, 581 S.E.2d 161, 167 (S.C. 2003). The *Sauner* plaintiffs alleged the defendant negligently represented that appraisals would establish fair market value for certain property. *Id.* at 406. The South Carolina Supreme Court held the statement was not actionable because the appraisals were not done when the statement was made; "representations based on statements as to future events or unfulfilled promises" are not actionable. *Id.* at 408.

In their Opposition, Plaintiffs contend that Greenberg represented, in its opinion letter, that "proceeds from the sale of the Bonds are to be used to finance: (i) the purchase of an Annuity Contract …" and that the bond indenture states that "the bulk of the bond proceeds would be placed in an annuity investment with an annuity provider that provides annuity investments as part of its regular trade or business." (Br. at 33.) According to Plaintiffs, "these representations were false."

(Br. at 33.) But these purported misrepresentations relate solely to a future event, namely, using the proceeds from the sale of the bonds to purchase an annuity. As a result, there is no actionable false representation. Where there is no duty and no false representation, a claim for negligent misrepresentation fails. *Thomas Daniels Agency, Inc. v. Nationwide Ins. Co. of Am.*, 122 F. Supp. 3d 448, 452 (D.S.C. 2015); *Sauner*, 354 S.C. at 405.

b. Aiding And Abetting

In their Opposition, in one short paragraph, Plaintiffs now contend their Complaint "includes a claim for aiding and abetting a conversion and a breach of fiduciary duty." (Br. at 34.) Plaintiffs, however, do not allege the elements of an aiding and abetting claim. *See, e.g.*, *Gordon v. Busbee*, 397 S.C. 119, 133, 723 S.E.2d 822, 830 (Ct. App. 2012) (a claim for aiding and abetting a breach of fiduciary duty requires a breach of a fiduciary duty owed to the plaintiff, the defendant's knowing participation in the breach, and damages resulting therefrom). More importantly, Plaintiffs' purported claim for aiding and abetting is pre-empted by ERISA.

ERISA preempts state laws "insofar as they now or hereafter relate to any employee benefit plan[.]" 29 U.S.C. § 1144. The Supreme Court explained that "any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2000). A claim is preempted when it "relates to" or "has a connection with or reference to" an ERISA plan. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). Plaintiffs' attempt to assert an aiding and abetting claim relates solely to its claim for an ERISA prohibited transaction; indeed, Plaintiffs' ERISA claim against Greenberg asserts that Greenberg knowingly participated in the Plan fiduciaries' breach of fiduciary duties.

Moreover, that Plaintiffs ultimately fail to state an ERISA claim against Greenberg because they are not entitled to equitable relief from Greenberg does not avoid preemption. States may not enlarge the universe of defendants, or expand the liability of a particular defendant, by permitting "aiding and abetting" claims relating to ERISA breaches. *E.g. McLemore v. Regions Bank*, 682 F.3d 414, 425 (6th Cir. 2012). Permitting Plaintiffs "to bring state-law damages action against non-fiduciaries for ERISA violations would interfere with ERISA's enforcement scheme permitting only equitable relief against such defendants." *Wright v. Harrison*, No. SA-13-CA-332, 2013 WL 12116326, at *7 (W.D. Tex. July 25, 2013).

Because Plaintiffs fail to state a claim for legal malpractice, Count 10 should be dismissed as to Greenberg. Dismissal should be with prejudice because there are no circumstances in which Plaintiffs can assert the existence of an attorney-client relationship or allege claims for negligent misrepresentation or aiding and abetting.

B. Count 2 Asserting A Claim For Knowing Participation In An Alleged ERISA Violation Should Be Dismissed As To Greenberg.

To state an ERISA claim against a non-fiduciary like Greenberg for knowing participation in a prohibited transaction, pursuant to 29 U.S.C. § 1132(a)(3), Plaintiffs must allege actual or constructive knowledge of the fiduciary violation *and* that they are entitled to equitable relief from Greenberg. *See, e.g., Harris*, 530 U.S. at 250-51; *Mellon Bank, N.A. ex rel. Weiss Packing Co. Profit Sharing Plan v. Levy*, 71 F. App'x 146, 149 (3d Cir. 2003). Because Plaintiffs fail to do either, Count 2 should be dismissed as to Greenberg.

1. The Complaint Fails To Allege Greenberg Had Constructive Knowledge Of The Fiduciary Violations.

As explained in Greenberg's Motion, the Complaint makes no effort to differentiate Greenberg's alleged knowledge from the alleged knowledge of the many other defendants. (*See*, *e.g.*, Compl. ¶¶ 130-39.) Greenberg, however, is in a different position from the other defendants. Greenberg was counsel to the entity that issued the Bonds and was two steps removed from the Plan *fiduciaries*, let alone the Plan. The Plan fiduciaries named as defendants obviously had knowledge of their own breaches, but the Complaint does not allege how Greenberg had knowledge of their breaches.

Although Plaintiffs attempt to rectify their pleading deficiencies by attaching exhibits and asserting new "facts" in their Opposition to the Motion to Dismiss purportedly demonstrating that Greenberg should have known of the prohibited transactions, Plaintiffs cannot amend their Complaint "by the briefs in opposition to a motion to dismiss." *Fieger*, 2010 WL 3521606, at *4. Nevertheless, Plaintiffs' improper attempt to amend their Complaint is for naught. Assuming (solely for the purpose of this Motion to Dismiss) Plaintiffs sufficiently pled Greenberg should have known of the fiduciary violation, Plaintiffs' ERISA claim still fails because Plaintiffs are not entitled to equitable relief from Greenberg.

2. Plaintiffs Are Not Entitled To Equitable Relief From Greenberg.

Plaintiffs admit the *only* relief available under 29 U.S.C. § 1132(a)(3) is equitable relief: "Michelin agrees that it is only entitled to 'appropriate equitable relief.'" (*See* Br. at 26.) Plaintiffs say the relief they seek is equitable in nature because they "only seek[] the return of Plan funds wrongfully removed from its trust." (Br. at 27.) Contrary to Plaintiffs' contention, the Complaint does not seek equitable relief. The Complaint alleges Plaintiffs are "entitled to all damages, including the return of the Plan's funds and all consequential damages" (Compl. ¶ 137). Requiring a non-fiduciary, like Greenberg, "to make the plan whole for the losses it sustained would not constitute 'appropriate equitable relief.'" *Mertens v Hewitt Associates*, 508 U.S. 248 (1993). Rather, as explained in Greenberg's Motion to Dismiss (Dkt. 67 at 11-13), requiring a non-fiduciary to make the plan whole "is the classic form of legal relief, compensatory damages" to which Plaintiffs are not entitled under 29 U.S.C. § 1132(a)(3). *Mertens*, 508 U.S. 248.

But regardless, Plaintiffs are not entitled to equitable relief from Greenberg because Greenberg does not have and never had any Plan funds. "Only a transferee of ill-gotten trust assets may be held liable[.]" *Harris Trust*, 530 U.S. at 251. *Accord Mellon Bank*, 71 F. App'x 146, 149 (3d Cir. 2003) (dismissing complaint against non-fiduciary because "[i]t is not alleged that Levy ever participated in the actual exchange of money for property, ever saw profit from the transaction, or ever possessed title or right to the property or money involved"). Appropriate equitable relief "is limited to 'those categories of relief that were typically available in equity.'" *Montanile*, 136 S.Ct. at 657 (quoting *Mertens v. Hewitt Associates*, 508 U.S. 248, 256 (1993)).

a. Restitution Is Not Available *From Greenberg* Because Greenberg Does Not Have Plan Funds.

Plaintiffs contend "the return of Plan funds wrongfully removed" constitutes equitable relief known as restitution. (Br. at 27.) There are two types of restitution—legal and equitable—and not all restitution is available under ERISA. *See, e.g., Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002). Restitution at law allows a plaintiff to recover when the plaintiff can "show just grounds for recovering money to pay for some benefit the defendant had received." *Id*. at 213. Restitution in equity, which generally takes the form of a constructive trust or equitable lien, is available where money or property can "clearly be traced to particular funds or property in the defendant's possession." *Id*. The relief sought must be to restore to the plaintiff specific funds or property that is currently in the defendant's possession; restitution in equity is not to impose personal liability on the defendant. *Id.* As a result, the latter is available under ERISA, the former is not. *Id*. at 214.

In order to obtain the equitable remedy of restitution—*i.e.*, "the return of Plan funds wrongfully removed"—Plaintiffs must trace Plan funds to Greenberg. *See, e.g., Montanile,* 136 S.Ct. at 661-62 (no recovery where Plan funds had already been dissipated); *Great-West*, 534 U.S. at 214 (equitable restitution is unavailable where funds are not in the defendant's possession); *Mellon Bank*, 71 F. App'x at 149 (3d Cir. 2003) (same). Plaintiffs cannot trace Plan funds to Greenberg, nor do they attempt to. Plaintiffs may not obtain restitution in equity from Greenberg.

b. An Accounting And Disgorgement Also Is Not Available *From Greenberg* Because Greenberg Never Had Ill-Gotten Plan Funds.

Although Plaintiffs say they "only seek[] the return of Plan funds," Plaintiffs simultaneously contend that an accounting and disgorgement are available equitable remedies under ERISA to which they are purportedly entitled and therefore have successfully pled an ERISA claim against Greenberg. (Br. at 27-29.) Of course, an accounting and disgorgement are not "the return of Plan funds," nor are these equitable remedies sought in the Complaint. They are likewise not available from Greenberg under the circumstances presented here.

Plaintiffs rely on *LeBlanc v. Cahill* and *Martens v. Hewitt* to support their contention that a non-fiduciary service provider must disgorge profits earned from participating in a prohibited transaction. This reliance is misplaced. Greenberg does not dispute restitution and disgorgement are available remedies; rather, Greenberg disputes restitution and disgorgement are available *from Greenberg* in this case. When assets "are no longer in the hands of the transferee," the plaintiff may be entitled to profits earned by the transferee, *Spear v. Fenkell*, No. CV 13-2391, 2016 WL 5661720, at *32-33 (E.D. Pa. Sept. 30, 2016) (cited in Br. at 28), but that is not the situation here. *See In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 579 F.3d 220, 238 (3d Cir. 2009). "[T]he question here is not whether disgorgement of profits or accounting for profits is an equitable remedy, but rather whether the plaintiffs have demonstrated that their claims for relief meet the requirements for applying this type of remedy." *Id.*

To obtain an accounting and disgorgement, Plaintiffs must "identify money or property belonging in good conscience to them and clearly traceable to particular funds or property in the defendants' possession." *Id.* (quotation omitted); *accord Great-West*, 534 U.S. at 214 n.2. That likewise is not the situation here. Plaintiffs intimate that Greenberg should disgorge its profits, *i.e.*, the fees Greenberg received for the legal services it provided (Br. at 28), but Greenberg is not a transferee of wrongfully-obtained Plan assets, *Harris Trust*, 530 U.S. at 251, and disgorgement of fees paid for services rendered is not equitable in nature. Rather, "the relief sought is actually to recover damages . . . [and] the nature of the claim is one at law." *N.Y. Dist. Council of Carpenters Pension Fund v. Savasta*, No. 99 CV 11362 (GBD), 2005 WL 22872, at *3 (S.D.N.Y. Jan. 4, 2005). In fact, the fees paid to Greenberg for services rendered were not even paid by Plaintiffs. *See, e.g.*, *Bast v. Prudential*, 150 F.3d 1003, 1011 (9th Cir. 1998) (no equitable relief available because funds sought were "not an 'ill-gotten profit' in the same sense as . . . money taken from the pension plans").

In *Savasta*, the plaintiff pension fund brought an ERISA claim against the non-fiduciary defendant consulting firm retained by the pension fund to perform actuarial and general consulting services. 2005 WL 22872, at *1. The pension fund alleged the defendant was liable for knowing participation in a fiduciary breach pursuant to 29 U.S.C. § 1132(a)(3) and sought disgorgement of the fees paid to defendants for their actuarial and consulting services. *Id*. The defendant moved to dismiss, arguing, among other things, that the relief sought was not equitable in nature. *Id*. The court agreed, finding that the plaintiff could "not transform the nature of the relief sought by simply designating it as equitable relief in the form of disgorgement of fees." *Id*. at *3. The fees were not "identifiable proceeds belonging to the [plaintiff] which are in the defendants' possession" and therefore "did not amount to illegal profits or ill-gotten gains derived directly from defendants' alleged culpable acts." *Id*.

Whether Plaintiffs are entitled to equitable relief *from Greenberg* is an essential element of their ERISA claim *against Greenberg*. Dismissal of an ERISA claim against a non-fiduciary like Greenberg is required where, as here, a plaintiff fails to plead entitlement to equitable relief. *See, e.g., Moon v. BWX Techs., Inc.*, 577 F. App'x 224, 229 (4th Cir. 2014) (affirming dismissal where "there exists no ERISA violation for Appellant to redress and equitable relief under 29 U.S.C. § 1132(a)(3) is unavailable"). Accordingly, Count 2 of the Complaint should be dismissed with prejudice as to Greenberg.

Dated: March 24, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2017, I have electronically filed a copy of the above and foregoing with Clerk of Court using the ECF system, which sent notification of such filing to counsel of record.

/s/ William A. Coates

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
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The Michelin Retirement Plan and the Investment Committee of the Michelin Retirement Plan, Plaintiff, v. Dilworth Paxson, LLP, BFG Socially Responsible Investments, Ltd., Burnham Financial Group, Inc., Burnham Securities, Inc., COR Fund Advisors, LLC, GMT Duncan, LLC, Greenburg Traurig, LLP, Thorsdale Fiduciary and Guaranty Company Ltd., U.S. Bank National Association, Valor Group Ltd., Wakpamni Lake Community Corp., Wealth-Assurance AG, Wealth Assurance Private Client Corporation, Timothy B. Anderson, Jon Michael Burnham, Devon D. Archer, Bevan T. Cooney, Hugh Dunkerley, Jason W. Galanis, John P. Galanis, Gary T. Hirst, Frankie D. Hughes, and Michelle A. Morton, Defendants.	))	Case No. 16-cv-03604 **CERTIFICATE OF SERVICE**

The undersigned does hereby certify that the following documents were served by United States Mail, postage prepaid, on this 24th day of March 2017, to the parties listed below.

DOCUMENTS

1. Greenberg Traurig, LLP's Reply In Support Of Its Rule 12(b)(6) Motion to Dismiss

PARTY SERVED

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Dated: March 24, 2017

Respectfully submitted,

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