No. 23-2944

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOHN M. MCDONNELL, as Chapter 7 Trustee,

Plaintiff - Appellant,

v.

ERIC S. GILBERT,

Defendant - Appellee.

On Appeal from the United States District Court
for the District of New Jersey
No. 22-cv-05274
Hon. Georgette Castner

APPELLANT'S BRIEF AND APPENDIX
VOLUME 1 of 10 (Appx 1 – Appx 69)

THE LAW OFFICES OF RICHARD J. CORBI PLLC
Richard J. Corbi
1501 Broadway, 12th Floor
New York, NY 10036
(646) 571-2033
rcorbi@corbilaw.com
Special Counsel for Appellant

MCDONNELL CROWLEY, LLC
Brian T. Crowley
115 Maple Avenue
Red Bank, NJ 07701
(732) 383-7233
bcrowley@mchfirm.com
Counsel for Appellant

Corporate Disclosure Statement

Pursuant to Federal Rules Appellate Procedure 26.1, **Plaintiff - Appellant, JOHN M. MCDONNELL, as Chapter 7 Trustee** is an individual and there are no interests to report.

Dated: January 24, 2024 By: /s/ Richard J. Corbi

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Statutes:

Court Rules:

Other:

Appellant's Brief

STATEMENT OF APPELLATE JURISDICTION

The Bankruptcy Court had jurisdiction over this core matter in the Debtor's bankruptcy proceeding pursuant to 28 U.S.C. § 1334(b) and 28 U.S.C. § 157. The Trustee timely appealed the Bankruptcy Court's orders to the District Court, which exercised its jurisdiction under 28 U.S.C. § 158(a)(1) and Bankruptcy Rule 8001(a). The Third Circuit has jurisdiction to review the District Court's final order under 28 U.S.C. § 158(d)(1) and 28 U.S.C. § 1291.

STATEMENT OF RELATED CASES

This case has not previously been before this Court, and there are no related cases.

STATEMENT OF ISSUES AND STANDARD OF APPELLATE REVIEW

STATEMENT OF ISSUES

Did the District Court err in affirming the Bankruptcy Court's decision that granted, in part, the Debtor's motion to strike certain items from the Trustee's designation of record?

Did the District Court in err affirming the Bankruptcy Court's decision that granted the Debtor's request to shorten time for the hearing in connection with the Debtor's motion to strike certain items from the Trustee's designation of record?

Did the District Court err in affirming the Bankruptcy Court's decision in finding it considered all responses to the litigation when all relevant parties to the proceeding, including but not limited to the new third party administrator of the Debtor's retirement accounts, whose identity was not disclosed to the Trustee, were not provided with sufficient notice and due process?

Did the District Court err in affirming the Bankruptcy Court's decision that held that the Debtor's retirement accounts were not property of the Debtor's estate to be turned over to the Trustee, pursuant to Section 541 of the Bankruptcy Code?

Did the District Court err in affirming the Bankruptcy Court's decision in its application of the Supreme Court decision *Patterson v. Shumate*, 504 U.S. 753 (1992)?

Did the District Court err in affirming the Bankruptcy Court's decision in not analyzing the whether the Debtor's retirement accounts were proper exemptions or not pursuant to Section 522(d)(12) of the Bankruptcy Code and Section 522(b)(4) of the Bankruptcy Code?

Did the District Court err in affirming the Bankruptcy Court's decision in not following *First Indem. Of Am. Ins. Co. v. Copulos*, Civ. No. 97–4283 (GEB) 1998 U.S. Dist. LEXIS 6672 (D.N.J. Feb. 24, 1998)?

Did the District Court err in affirming the Bankruptcy Court's decision in not following the line of cases relied upon by the Appellant such as, *In re Goldschein*, 244 B.R. 595 (Bankr. D. Md. 2000) and instead following the line of cases relied upon by the Appellee such as, *In re Handel*, 301 B.R. 421 (Bankr. S.D.N.Y. 2003)?

Did the District Court err in affirming the Bankruptcy Court's decision in not analyzing whether the Debtor's retirement plans complied with the Internal Revenue Service guidelines, the Internal Revenue Code and ERISA?

Did the District Court err in affirming the Bankruptcy Court's decision that held that the Trustee could not pursue avoidance actions pursuant to Sections 544, 547, 548 and 550 of the Bankruptcy Code?

Did the District Court err in affirming the Bankruptcy Court's decision holding that the Trustee could not utilize the ten (10) year look back period of the Internal Revenue Service under 26 U.S.C. § 6502(a)(1) in connection with pursuing avoidance actions under Sections 544, 547, 548 and 550 of the Bankruptcy Code?

Did the District Court err in affirming the Bankruptcy Court's decision denying the Trustee leave to further amend the complaint?

Did the District Court err in affirming the Bankruptcy Court's decision in not applying judicial or equitable estoppel?

STANDARD OF REVIEW

The Third Circuit reviews *de novo* a district court's appellate review of a bankruptcy court's decision, exercising the same standard of review as the district court. *In re Winstar Communs., Inc.*, 554 F.3d 382, 389 n.3 (3d Cir. 2009). At the motion-to-dismiss stage, the court accepts all factual allegations as true to determine whether the complaint states a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). This assumption of truth does not apply to "naked assertion[s]" or "[t]hreadbare recitals of the elements of a cause of action." *Id.* at 678. If well-pled allegations fail to "nudge[] the[] claims across the line from conceivable to plausible, the[] complaint must be dismissed." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Courts are averse to dismissing complaints pursuant to Federal Rule of Civil Procedure 12(b)(6) because it prevents a litigant from obtaining their "day in Court." *Hishon v. King & Spalding*, 467 U.S. 69, 79 (1984).

The Third Circuit applies a two-part test when considering motions to dismiss: (i) the facts set forth in the pleading and the content of the documents incorporated therein must be accepted as true, with legal conclu-

sions disregarded; and (ii) the facial plausibility of the plaintiff's claims must be construed in the plaintiff's favor. *In re Oncology Assocs. of Ocean Cty. LLC*, 510 B.R. 463, 466–67 (Bankr. D.N.J. 2014).

STATEMENT OF THE CASE

BACKGROUND

On April 1, 2021 (the "**Petition Date**"), Eric S. Gilbert (the "**Debtor**" or the "**Appellee**") filed his voluntary petition (the "**Petition**") for relief under chapter 7 of title 11 of the Bankruptcy Code, 11 U.S.C. 101, *et. seq*. (the "**Bankruptcy Code**") in the Bankruptcy Court for the District of New Jersey (the "**Bankruptcy Court**"). App2614. The exemptions listed on schedule C of the Petition, include, among other exemptions, a 401(a) pension plan account (the "**401(a) Account**") that contains $1,607,536.99 and a 401(k) account (the "**401(k) Account**", together with the 401(a) Account, the "**Retirement Accounts**")) that contains $47,031.48 (the "**Retirement Plans**").[1]

[1] Appx 2601, 2605.

RETIREMENT ACCOUNTS LITIGATION AND RELATED MATTERS

A. Adversary Proceedings

1. 727 Discharge Litigation

On November 29, 2021, John M. McDonnell, the court appointed chapter 7 trustee (the "**Trustee**") for the Debtor, commenced an adversary proceeding (the "**727 Complaint**") to deny the Debtor's discharge pursuant to certain subsections of Section 727 of the Bankruptcy Code.

On May 18, 2022, the Bankruptcy Court entered an order (the "**727 MTD Order**") dismissing the 727 Complaint. On June 8, 2022, the Bankruptcy Court entered order discharging the Debtor, which the Trustee appealed on May 27, 2022, and was subsequently dismissed as moot by the District Court on November 10, 2022.[2]

2. Retirement Accounts Litigation

On January 9, 2022, the Trustee filed his exemptions objection and original Complaint (the "**Original Complaint**") in connection with the Retirement Accounts, as well as a temporary restraining order (the "**TRO**") given the circumstances that the Debtor, as the trustee, administrator, plan sponsor, sole beneficiary and person who controls the Retirement Accounts (an issue that the Bankruptcy Court mistakenly believed

[2] Appx 698-699.

was irrelevant)[3] and because of his past conduct towards his ex-wife (the "**Ex-Wife**") and creditors may transfer funds out of the Retirement Accounts that will be difficult or impossible to track or recover once transferred.[4] The Ex-Wife testified that the Debtor entered into a promissory note with her on September 15, 2015 for $403,984.00 because she "had supported the house with money from [her] trust, and [] felt that he had bankrupt [her] and taken all of [her] money and left [her] vulnerable . . . ." Appx 456, Appx 2573. The Debtor's ex-wife further testified that "Well, I had money from a trust. As I said to you, my parents were both terminally ill, they both passed. I received money in a trust. When he was doing his startup business, I took money from the trust to maintain our household along with using funds from a loan that we had and I believe also some money from my Voya account was used. So I felt vulnerable and felt like I wanted to leave the marriage but couldn't because I had nothing." Appx 456, Appx 2573. This testimony, combined with the last minute rescheduling of a deposition of the TPA, outstanding document requests and the Debtor's retention of yet another professional firm, Morgan Lewis Bockius LLP, created an urgency to freeze the funds and move for a TRO.

The Bankruptcy Court held a hearing on January 11, 2022 (the "**TRO Hearing**") and on January 12, 2022, granted the Trustee's request for

[3] *In re Gilbert*, 642 B.R. 687, 706 n. 14 (Bankr. D.N.J. 2022).

[4] Appx 1642-2589.

a TRO to maintain the status quo so that the funds in the Retirement Accounts could not be depleted during the pendency of the litigation surrounding the Debtor's Retirement Accounts.[5]

In fact, one of the reasons the Bankruptcy Court provided when granting the TRO at the TRO Hearing was the Debtor's post-petition trips to Puerto Rico, among other regions. Such concerns were realized when the Debtor informed the Bankruptcy Court and parties in interest that he relocated his residence and business to San Juan, Puerto Rico a few weeks later on January 28, 2022.[6]

On February 1, 2022, the Debtor and his Ex-Wife each filed motions to dismiss the Original Complaint.[7]

On February 15, 2022, the Trustee filed an omnibus opposition (the "**Omnibus Opposition**") to the motions to dismiss.[8]

On February 18, 2022, the Debtor filed a reply to the Trustee's Omnibus Opposition the dismissal motions.[9]

On February 22, 2022, the Bankruptcy Court held a hearing on the motions to dismiss (the "**MTD Hearing**").[10] At the MTD Hearing, the

---

[5] Appx 1582, 1583.

[6] Appx 1546.

[7] Appx 1312-1321, 1322-1545.

[8] Appx 1239-1311.

[9] Appx 1219-1236.

[10] Appx 1190-1215.

Bankruptcy Court granted the Ex-Wife's motion to dismiss and granted in part and denied in part the Debtor's motion to dismiss (the "**February 22 Ruling**").[11]

The Bankruptcy Court's February 22 Ruling denied the Debtor's motion to dismiss count one (1) of the Original Exemption Complaint in which the Trustee sought a declaration that the funds in the Retirement Accounts are property of the Debtor's estate and not proper exemptions; denied the Debtor's motion to dismiss counts four (4), five (5), six (6) and seven (7) of the Original Exemption Complaint in connection with the Trustee's avoidance action causes of action but required the Trustee to file an amended complaint as to those avoidance action causes of action; granted the Debtor's motion to dismiss counts three (3), eight (8), nine (9), and ten (10) of the Original Complaint which were the turnover, attorney's fees, unjust enrichment and reservation of rights.

With respect to count two (2) of the Original Exemption Complaint in which the Trustee sought a TRO and preliminary injunction to prevent the distribution of the funds in the Retirement Accounts during the pendency of the litigation surrounding the Exemptions litigation, the Debtor consented to an extension of the TRO Order through the conclusion of

[11] Appx 1185-1189, 1216-1218.

the mediation.[12] The February 22 Ruling was incorporated into an order entered by the Bankruptcy Court on March 7, 2022 (the "**MTD Order**").[13]

In the MTD Order, the Bankruptcy Court procedurally consolidated the objection and the adversary proceeding.[14]

The Appellant and the Appellee submitted competing MTD Orders.[15] The Debtor submitted a proposed order deeming the Objection in the main case withdrawn.[16] The Trustee objected to that provision in the Debtor's order because it would impair the Trustee's appellate rights in the litigation and the Trustee submitted a proposed order deeming the exemption objection part of the adversary proceeding through procedural consolidation.[17] *See, e.g.*, *Weinberg v. Kaplan*, 699 F.App'x 118, 121 (3d Cir. 2017); *In re Forever 21, Inc.*, 623 B.R. 53, 60 (Bankr. D. Del. 2020); *In re Wen Jing Huang*, 509 B.R. 742, 747–48 (Bankr. D. Mass. 2014). The Trustee's assertions at that time were realized by the Debtor's Motion to Strike. The Debtor resurrected the strategy to impair the Trustee's appellate rights, which the Bankruptcy Court granted without any analysis.

---

[12] Appx 1185-1189.

[13] Appx 1185-1189.

[14] Appx 702.

[15] Appx 702.

[16] Appx 702.

[17] Appx 702.

On March 10, 2022, the Trustee filed an amended complaint.[18] The parties were directed to mediation,[19] which was ultimately unsuccessful[20] and lacked good faith indicated in the Trustee's letter to this Court.[21] The Debtor filed another motion to dismiss[22] to the amended complaint, which the Trustee objected to,[23] but was overruled by the Bankruptcy Court's retirement account decision (the "**Decision**")[24] and order (the "**Order**").[25]

On February 22, 2022, the Bankruptcy Court partially granted the Debtor's motion to dismiss the Original Complaint, but granted the Trustee the right to amend certain causes of action.[26]

Following the conclusion of mediation, which the Appellant believed lacked good faith by the Appellee as noted in a letter ignored by the Bankruptcy Court,[27] the Bankruptcy Court ultimately dismissed the lit-

---

[18] Appx 703.
[19] Appx 703.
[20] Appx 703.
[21] Appx 703.
[22] Appx 703.
[23] Appx 703.
[24] Appx 703.
[25] Appx 703.
[26] Appx 1185-1189.
[27] Appx 1125-1129.

igation in an Opinion[28] and Order[29] issued on August 23, 2022, and dissolved the TRO Order (because Appellant did not file a brief despite being instructed not to do so by the Bankruptcy Court).[30]

On August 26, 2022, the Trustee timely filed his notice of appeal of the Opinion and Order.[31]

On September 29, 2023, the District Court for the District of New Jersey affirmed the Bankruptcy Court.[32]

B. The Motion to Strike, Shorten Time and Lower Court Decisions

On September, 8, 2022, the Trustee filed his *Statement of Issues, Designation of Items to be Included in the Record on Appeal, and Certificate Regarding Transcripts* (the "**Record**").[33]

On September 16, 2022, the Debtor filed his motion to strike the Trustee's record designation (the "**Motion to Strike**"),[34] with a return date of October 18, 2022 and objection deadline of October 11, 2022, pur-

---

28 Appx 936.

29 Appx 971.

30 Appx 683-955.

31 Appx 889.

32 Appx. 37, 39.

33 Appx 817-841.

34 Appx 801, 703.

suant to the local rules, the same day that the Trustee's appellate brief was originally due before the District Court in the Retirement Accounts Appeal.[35]

On September 20, 2022, at 9:17 a.m., the Bankruptcy Court issued a notice re-scheduling the hearing in connection with the Motion to Strike for October 25, 2022 at 10:00 a.m.[36]

On September 20, 2022, at 2:00 p.m., ***four (4) days after the Motion to Strike was filed***, and the hearing and objection deadlines re-set by the Bankruptcy Court, the Debtor filed his application to shorten time (the "**Motion to Shorten**").[37] At 2:07 p.m., the Trustee e-mailed the Bankruptcy Court, with notice to Debtor's counsel, requesting twenty-four (24) hours to respond to the Motion to Shorten. The Bankruptcy Court granted the Trustee's request to respond to the Motion to Shorten and set a deadline of 4:00 p.m. on September 21, 2022 to submit his objection, which objection was subsequently filed on September 21, 2022.[38]

On September 22, 2022, the Bankruptcy Court entered an order granting the Motion to Shorten (the "**Shortened Time Order**").[39]

Neither the Bankruptcy Court nor the Debtor ever addressed the need for the Motion to Strike to be heard on a shortened basis. The Trustee

---

[35] Appx 703.

[36] Appx 764.

[37] Appx 773.

[38] Appx 769.

[39] Appx 765.

noted in his opposition that it appeared to be a consistent litigation tactic to force the Trustee to have to file multiple pleadings on or around the same date and/or holidays, despite not filing a motion to strike the record in the appeal of the 727 Complaint.[40]

On September 30, 2022, the Trustee filed an objection to the Motion to Strike.[41]

On October 4, 2022, ***a week*** before the original hearing date by the Debtor that did not comply with the local rules, the Bankruptcy Court conducted hearing in accordance with the Shortened Time Order and granted the Motion to Strike (the "**Strike Order**").[42]

The Bankruptcy Court, in entering the Strike Order, decided (mistakenly) that "any dispute over designation of the items must be adjudicated by the bankruptcy court and not the district court to which the appeal has been assigned" and "clearly the federal rules of bankruptcy procedure now explicitly provide a bankruptcy court with discretion to strike items from a party's designation of record . . . ." (the "**Strike Order Ruling**").[43] The Bankruptcy Court concluded (mistakenly) that the

---

[40] Appx 771-772.

[41] Appx 688.

[42] Appx 668.

[43] Appx 677-678 (Oct. 4, 2022 Hearing Trans. at 10:24-25; 11:1-2, 4-7).

items that the Bankruptcy Court struck from the designation of record "because they were not presented to this [Bankruptcy Court] in either oral or written argument for reliance . . . ."[44]

On October 5, 2022, the Trustee timely filed a notice of appeal of the order granting the Motion to Shorten (the "**Shortened Time Appeal**").[45]

On October 5, 2022, the Trustee timely filed a notice of appeal of the Strike Order (the "**Strike Order Appeal**").[46]

On September 29, 2023, the District Court affirmed the Bankruptcy Court's Decision regarding the retirement accounts, and the orders shortening time and striking the record (the "**District Court Decision**").[47] Despite stating that the issues in this case have never been decided by the Third Circuit and there is no *per se* rule about bringing retirement accounts into a bankruptcy estate, confusingly, the District Court found that the stricken documents were "irrelevant."[48]

On October 26, 2023, the Trustee timely filed a notice of appeal of the District Court Decision to the Third Circuit Court of Appeals.[49]

---

[44] Appx 681-682 (Oct. 4, 2022 Hearing Trans. at 14:18-19; 15:6-8, 14-16).

[45] Appx 640.

[46] Appx 652.

[47] Appx 39.

[48] Appx 50.

[49] Appx 1.

SUMMARY OF ARGUMENT

The issue before this Circuit, whether a debtor's retirement accounts must comply with **both** the Employee Retirement Income Security Act of 1974 ("**ERISA**") and tax regulations issued by the Internal Revenue Code (the "**IRC**") in order to be excluded from the debtor's bankruptcy estate pursuant to Section 541 of the Bankruptcy Code, is an issue of first impression that requires an extensive record, a thorough analysis of the legal issues and the case law addressing these issues. The Debtor's Retirement Plans are facially and operationally defective and fail to comply with ERISA and the tax regulations issued by the IRC, which make the funds in the Retirement Accounts property of the Debtor's estate pursuant to Section 541 of the Bankruptcy Code. The lower courts' holdings that compliance with either ERISA or IRC, not both, belies the fact that ERISA by its terms and operation is a tax statute designed to defer taxation on retirement accounts while the Bankruptcy Code is designed to address economic problems. *See* Adam David Elfenbein, *Patterson v. Shumate: Interpretative Error*, 66 Am. Bankr. L.J. 439, 447–448 (1992).

The Debtor's justification of the facial and operational defects in both the DB Plan and the 401(k) Plan such as his Ex-Wife's ineligibility to participate in the Retirement Plans, the prohibited transactions, im-

proper COVID-19 withdrawal, the disputed minimum funding requirements, participation requirements and non-discriminatory requirements fail causes them to fail as a matter of law and fact.

The lower courts erroneously dismissed the litigation pursuant to Rule 12(b)(6) "absent any guidance from either the Third Circuit or the United States Supreme Court" on these issues[50] and therefore, should be reversed.

ARGUMENT

I. The District Court Erred in Affirming the Shorten Time Order.

The Debtor's Motion to Shorten was nothing more than a litigation tactic, devoid of any legal and factual analysis, designed to distract the Bankruptcy Court, increase administrative expense costs to the Debtor's estate and attempt to divert the focus of the Trustee's professionals from an appellate brief originally due on the same date as the objection to Motion to Shorten. The Debtor offered no reasoning as to why on at Friday, September 16, 2022 at 2:40PM the correct hearing date for the Debtor was October 18, 2022 but four (4) days later on Tuesday, September 20, 2022 at about 2PM the matter was so emergent that it had to be heard twelve (12) days earlier than requested and twenty-one (21) days earlier than allowed under the local rules.

[50] Appx 55.

The Motion to Shorten epitomized the Debtor's "failure to plan ahead [that] d[id] not rise to the level of a genuine emergency justifying shortened notice or expedited relief. Any emergency is one of the debtor's own making." *In re Schindler*, Case No. 09–71199-ast, 2011 Bankr. LEXIS 1208, at *7 (Bankr. E.D.N.Y. Mar. 21, 2011) (quoting *In re Fort Wayne Assocs., L.P.*, Case No. 97–10378, 1998 Bankr. LEXIS 1695, at *3–4 (Bankr. N.D. Ind. Dec. 16, 1998)). Furthermore, the Motion to Shorten fell woefully short of an "emergency" and "was brought on solely by the dalliance of debtor['s] counsel" and did not meet any standard of "cause" under Bankruptcy Rule 9006(c)(1). *See Official Comm. of Disputed Litig. Creditors v. McDonald Invest., Inc.*, 42 B.R. 981, 987 (N.D. Tex. 1984) (district court reversed bankruptcy court order entered on 20 hours' notice); *In re Amagansett Family Farm, Inc.*, Case No: 11–73929-AST, 2011 Bankr. LEXIS 4161, at *14 (Bankr. E.D.N.Y. Oct. 25, 2011); *In re Villareal*, 160 B.R. 786, 787–88 (Bankr. W.D. Tex. 1993).

The District Court merely suggested that the Motion to Shorten was just an "inconvenience" that did not substantially prejudice the Trustee. However, "[t]he conduct of bankruptcy proceedings not only should be right but must seem right." *See In re Ira Haupt & Co.*, 361 F.2d 164, 168 (2d Cir. 1966). While the Bankruptcy Court granted the Motion to Shorten, it did not provide the same courtesy to the Trustee. Despite directing the Trustee not to file any motion for a stay pending appeal pending prior to the October 4, 2022 status conference, the Bankruptcy Court ig-

nored its own decision, dissolved a TRO pending appeal, and forced the Trustee to file a motion to stay pending appeal on one day's notice and ultimately denied the request, despite acknowledging that this is an issue of first impression.[51]

Fairness, not "inconvenience," requires this Court to reverse the affirmance.

II. The District Court Erred in Affirming the Bankruptcy Court Decision Striking the Record Pursuant to Bankruptcy Rule 8009(e) Applying the Wrong Legal Standard

The Strike Order Ruling was an incomplete, general, rather than a line by line, analysis of the Record, that was an unnecessarily rushed proceeding for no apparent reason, despite the procedural consolidation of the adversary and main case bankruptcy pleadings, discussed *supra* at pages 10–11.[52] Accordingly, the District Court should be reversed.

A. Bankruptcy Rule 8009(e)

Bankruptcy Rule 8009(e) governs corrections or modifications to the record on appeal and states, in relevant part:

> (2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected . . . :

[51] Appx 513, 955.

[52] Appx 702.

> (C) by the court where the appeal is pending.
>
> (3) All other questions as to the form and content of the record must be presented to the court where the appeal is pending.

Fed. R. Bankr. P. 8009(e)(2–3).

Bankruptcy Rule 8009(e)(2) allows the court where the appeal is pending to correct any "omission or misstatement" in the appellate record, and Bankruptcy Rule 8009(e)(3) requires the court where the appeal is pending to resolve "[a]ll other questions as to the form and content of the record." Accordingly, the plain language of Bankruptcy Rule 8009(e)(2) and (e)(3) empowers the "court where the appeal is pending" with the final determination as to what to include and what not to include in the record, **not** the Bankruptcy Court.

Subsection (e)(3) permits appellate courts to resolve motions to strike. *See In re Bloom*, 634 B.R. 559, 579 (B.A.P.10th Cir. 2021). While Bankruptcy Rule 8009(e)(1) provides that bankruptcy courts **may** have the authority to decide certain motions also—when a party alleges that an item has been "improperly designated" in the appellate record, it does not limit the appellate courts authority to decide the motion to strike under subsection (e)(3). *Id*.

The Bankruptcy Court erroneously held that "any dispute over designation of the items must be adjudicated by the Bankruptcy Court and not the District Court to which the appeal has been assigned" and "clear-

ly the federal rules of bankruptcy procedure now explicitly provide a bankruptcy court with discretion to strike items from a party's designation of record."[53] The Bankruptcy Court ignored the plain language of Bankruptcy Rule 8009(e), while maintaining that it must rely solely on the plain language of the statute.[54] The District Court stated that the documents were of "little value" while noting it had no guidance from the Third Circuit or Supreme Court on the underlying retirement account issue and refusing to adopt to a *per se* rule excluding all retirement accounts from a debtor's bankruptcy estate but requiring more proof and evidence to rule for the Trustee.[55]

The lower courts' reading of Bankruptcy Rule 8009(e)(1) renders (e)(2) and (e)(3) superfluous, which would, contrary to the plan language of Rule 8009(e), make the Bankruptcy Court is the first and only arbiter of disputes over a bankruptcy appellate record. The Bankruptcy Court's ruling functionally morphs the Bankruptcy Court into an Article III appellate court deciding its own appeal, which received the imprimatur from the District Court.

---

[53] Appx 677-678 (Oct. 4, 2022 Hearing Trans. at 10:24-25; 11:1-2, 4-7).

[54] "This court is 'bound by the language of the statute as it is written' even if the position advocated by the Trustee is arguably better policy." *In re Gilbert*, 642 B.R. at 693; (quoting *Comm'r v. Lundy*, 516 U.S. 235, 252 (1996))

[55] Appx 50, 60.

B. Appropriate Case Law Standards

As discussed *supra*, every item requested by the Trustee to be included in the record was presented by the Trustee in its pleadings and is required in connection with the causes of action dismissed by the Bankruptcy Court in the Decision.[56]

Bankruptcy Rule 8009(e) does not provide any guidance on how to determine whether an item designated in an appellate record has been 'improperly designated' or what analysis should be conducted by the court. *In re Digerati Techs., Inc.*, 531 B.R. 654, 660 (Bankr. S.D. Tex. 2015). The Bankruptcy Court erred in its over reliance on *Digerati*, a Fifth Circuit standard that requires a court to strike items that were **never** introduced in the bankruptcy court proceedings. *Id.* at 660–61 (citing *In re CPDC, Inc.*, 337 F.3d 436 (5th Cir. 2003). Here, the Trustee cited **every** pleading and cross-referenced the main case docket and adversary proceeding docket, which the lower courts failed to acknowledge to the contrary.

The Bankruptcy Court ignored the applicable Third Circuit decision of *In re Indian Palms Assocs., Ltd.*, 61 F.3d 197, 204–205 (3d Cir. 1995) while the District Court misconstrued it. In *Indian Palms*, the Third Cir-

[56] Appx 702.

cuit, held that a court may draw from the record of the underlying bankruptcy case in addition the record in connection with the contested matter at issue (the lift stay motion in Indian Palms). *Id.* at 205.

Essentially, *Indian Palms* explained that pleadings and minute entries not introduced into evidence at a hearing on a contested matter should be allowed in the record on appeal where either (1) the contested matter is sufficiently associated with the general administration of the debtor's estate that the relevant record should include the case file as well as the documents submitted in connection with the contested matter, or (2) offered as a request to take judicial notice of the proceedings below, or otherwise relevant to an issue on appeal. *See also In re Soppick*, 516 B.R. 733, 737 n.3 (Bankr. E.D. Pa. 2014).

Courts must err on the side of being overinclusive and allow the appellate court to decide the relevance of each item. *See In re Blasingame*, 559 B.R. 692, 701 (B.A.P.6th Cir. 2016) (in reversing bankruptcy court's order to strike designated items, the BAP explained: "When in doubt, it is better to err on the side of caution, include the items, and allow the appellate court to determine the relevance of the designated items."); *In re Dow Corning*, 263 B.R. 544, 547 (Bankr. E.D. Mich. 2001). In the appellate context "[i]ncluding a pleading on a designation of record does not somehow automatically imbue that document with any evidentiary or probative value. It merely allows an appellate court to review the docu-

ment in order to get a fuller view of the case." *Agrifund, LLC v. Blankenship (In re Blankenship)*, Nos. 16-10839, 17-5098, 2019 Bankr. LEXIS 1422, at *18 (Bankr. W.D. Tenn. Apr. 25, 2019).

The Bankruptcy Court ruled on the pleadings and did not conduct an evidentiary hearing, despite relying on cases that held evidentiary hearings on the retirement accounts issues, while the District Court frequently contradicted itself in stating it needed more evidence to rule in the Trustee's favor as this is an issue of first impression in the Third Circuit while providing no analysis of the facts heavily briefed by the Trustee at the lower courts. Accordingly, the lower courts must be reversed.

Here, the *Indian Palms* analysis favors the Appellant. All of the documents sought to be added in the designation of record were introduced by the Trustee, involved a hearing, and were considered by the Bankruptcy Court. At no point throughout the proceedings did the Debtor seek to limit the use of any of the documents in any of the Trustee's motion practice in the main bankruptcy case or relevant adversary proceeding, especially when a similar record was presented in the appeal of the dismissal of the 727 Complaint.[57]

The Bankruptcy Court's Strike Order Ruling and District Court's affirmance must be viewed in a wider context of the Retirement Accounts appeal, especially in light of the fact that the District Court mistakenly

[57] Appx 702.

thought the Trustee's excessive detail was nothing more than "generalized allegations" of "improprieties,"[58] yet did not believe in a *per se* rule of including retirement monies in a bankruptcy estate.[59]

The Bankruptcy Court's Decision was premised on a motion to dismiss pursuant to Federal Rules of Civil Procedure 12, which courts are generally averse to granting.[60] Both the Bankruptcy Court and the District Court admitted that the Retirement Accounts appeal concerning anti-alienation provisions in retirement plans coupled with ERISA and IRC compliance is an issue of first impression in the Third Circuit and has not been addressed by the Supreme Court.[61]

Neither the Bankruptcy Court nor the District Court provided a specific line by line analysis of why certain items should be stricken from the Trustee's designation of the record and hidden from the appellate courts, especially when certain of the items were never objected to in the designation of the record in the appear of the dismissal of the 727 Complaint or sought to be stricken in the underlying contested motion practice in this bankruptcy case by the Debtor. Rather, the Bankruptcy Court grouped the stricken items under large umbrellas that they were not "because they were not presented to this [Bankruptcy Court] in ei-

---

58 Appx. 60.

59 Appx. 60.

60 *Hishon*, 467 U.S. at 79.

61 *Gilbert*, 642 B.R. at 692 n.15; Appx 55.

ther oral or written argument for reliance . . . ."[62] or there was no conceivable was any of items in the main bankruptcy case and 727 Appeal "are not even remotely related"[63] or related to the sub-issues of the exemptions. As demonstrated in the chart presented to the lower courts,[64] that is not the case. The District Court did not even attempt to analyze the items stricken from the Trustee's Record.

All of the stricken items by the Bankruptcy Court were expressly referred to in the pleadings by the Trustee,[65] which were referenced by the Bankruptcy Court in the Strike Order Ruling.[66] The Strike Order Ruling ignored the solvency and valuation items in the Appellant's designation that are necessary for its solvency elements in the avoidance actions.[67] The Bankruptcy Court erroneously believed the "only conceivable overlap" between the 727 Appeal, the main case, and the retirement ac-

---

[62] Appx 681-682 (Oct. 4, 2022 Hearing Trans. at 14:18-19; 15:6-8; 14-16).

[63] Appx 679 (Oct. 4, 2022 Hearing Trans. at 12:17-18).

[64] Appx 347-364.

[65] Appx 994 and 1239.

[66] Appx 681 (Oct. 4, 2022 Hearing Trans. at 14:25).

[67] *Gilbert*, 642 B.R. at 698–705.

counts appeal are "some of the same background facts"[68] while the District Court required more than generalized allegations[69] despite being presented with evidence to the contrary.[70]

Because the post-P*atterson* case law either requires compliance only with ERISA or ERISA and IRC regulations and the Trustee is a proponent of the view that ERISA and IRC compliance is required when analyzing an anti-alienation provision in a retirement plan, an expansive designations of record in the appeals are required. *See Goldschein*, 244 B.R. at 595; *In re Xiao*, 610 B.R. 183 (D. Conn. 2019); *In re Daniels*, 452 B.R. 335, 347 (Bankr. D. Mass. 2011) aff'd on other grounds, 482 B.R. 1 (D. Mass. 2012) aff'd sub nom., 736 F.3d 70 (1st Cir. 2013).[71]

The Bankruptcy Court's repeated statement that the trustee's designated items are not necessary because the "[Bankruptcy] Court did not rule on the exemption issue as part of the motion to dismiss"[72] misses the point of the fact that there is a split in post-*Patterson* case law and because the trustee referenced specific ERISA and IRC statutes and regulations in its amended complaint and exemption objection (which was

---

[68] Appx 680 (Oct. 4, 2022 Hearing Trans. at 13:2-3)

[69] Appx 60.

[70] Appx 347-364, 399-417.

[71] Appx 738-760.

[72] Appx 680 (Oct. 4, 2022 Hearing Trans. at 13:6-7).

stricken despite being procedurally consolidated in the adversary proceeding and addressing the property of the estate issue)[73] and therefore, required in the Trustee's appeal to the District Court and now this Court.

Most importantly, in the documents discussing the Retirement Accounts and whether they are property of the estate and subject to bankruptcy exemptions, the documents make repeated references to the Debtor's assertions that he was always trying to maintain proper tax compliance with his business, the retirement accounts and his relocation to Puerto Rico.[74]

As discussed by the Appellant before the District Court and **not** addressed by the either the Bankruptcy or District Court at any point in time, the Debtor produced a 2012 W-2 regarding his Ex-Wife's involvement with his companies (which the Trustee has questioned its authenticity) at the conclusion of mediation, despite representing to the Bankruptcy Court, the Appellant and the mediator, that he had produced all the documents required and requested. Likewise, the adjournment requests relate to the Appellant's good faith issues in mediation because statements made in adjournment requests by the Debtor's counsel were not agreed to by the Trustee and the Trustee was provided an advance copy of the adjournment request prior to its submission to the Bankruptcy Court. At that point, mediation had **not** concluded and the mediator

[73] Appx 702.

[74] Appx 717-727.

had not reached out to the Trustee's advisors prior to, during, and after a bankruptcy conference when the mediator was on vacation out of the country, other than to send an invoice).[75]

Accordingly, an expansive record is warranted in these proceedings and the lower courts should be reversed.

III. The District Court Erred in Affirming the Bankruptcy Court's Holding that It Considered All Responses to the Retirement Accounts Litigation

The identity of the new third party administrator (the "**TPA**") of the Retirement Plans was never been disclosed to the Trustee despite numerous requests. "Due process requires 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *In re Rental Car Intermediate Holdings, LLC*, Case No. 20–11247 (MFW), 2022 Bankr. LEXIS 1945, at *9–10 (Bankr. D. Del. July 14, 2022) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950))

"In the bankruptcy context, the Third Circuit has held that to satisfy due process notice requirements, '[k]nown creditors must be provided with actual written notice,' while for 'unknown' creditors, 'notification

[75] Appx 673 (Oct. 4, 2022 Hearing Trans. at 6:14-21).

by publication will generally suffice.'" *Rental Car*, 2022 Bankr. LEXIS 1945, at *10 (quoting *Chemetron Corp. v. Jones*, 72 F.3d 341, 346 (3d Cir. 1995)).

It is incumbent upon the Debtor to disclose key parties and transfers, whether he was asked or not. Failure to do so results in a revocation of a debtor's discharge. *See In re Lawrence*, Case No. 10–27803 (RTL) Adv. Pro. No.11–1430 (RTL) 2012 Bankr. LEXIS 81, at *16–18 (Bankr. D.N.J. Jan. 10, 2012).

The Debtor retained a new TPA for the Retirement Accounts, but refused to inform the Trustee of the new TPA's identity.

The Debtor is required to disclose of all his assets and liabilities to the Trustee pursuant to Sections 521, 541 and 542 of the Bankruptcy Code, the Trustee's discovery requests and the Bankruptcy Court's TRO Order. The TRO Order required that the Debtor provide monthly statements concerning the funds but only provided the June 2022 statement. The Debtor's refusal to inform the identity of the TPA is based on the fact that, according to the Debtor, the Debtor does not want the relationship impacted by this litigation and Debtor's counsel's representations that the TPA is aware of the TRO Order and this case. That excuse fails because the Debtor, not the Trustee, filed the bankruptcy case and bankruptcy law requires that creditors and parties-in-interest be notified.[76]

[76] Appx 1068-1074.

The District Court continued its contradictory analysis that on the one hand, the identity of the TPA would not alter the outcome before the District Court while ignored the simple fact that a debtor must turnover all information in a bankruptcy, yet noted that there is no *per se* rule excluding a retirement accounts from a bankruptcy estate provided there are more than generalized allegations and proof (which the Trustee has provided notwithstanding discovery pursuant to the Federal Rules of Civil Procedure did not commence).[77] Furthermore, the Bankruptcy Rule 2004 deposition of the old TPA, NPPG was randomly postponed, causing the Trustee to keep the deposition open.[78]

Accordingly, this Court should reverse the lower courts.

IV. The District Court Erred in Affirming the Bankruptcy Court Decision that held that the Retirement Plans Were Not Property of Debtor's Estate

A. The *Patterson* Decision

A debtor's bankruptcy estate includes all property wherever located.[79] The lower courts erroneously held that the Retirement Accounts were

---

[77] Appx 60, 393-417.

[78] Appx 1851-1852.

[79] "(a) The commencement of a case . . . . creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held: (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(c)(1).

excluded from the Debtor's bankruptcy estate because both the 401(k) Plan and the DB Plan contain anti-alienation provisions, certain trust language, are subject to ERISA, did not need to comply with all the tax regulations in connection therewith, and are thus, not property of the estate under Section 541(c)(2) of the Bankruptcy Code and *Patterson*.[80] The Bankruptcy Court held that the 401(k) Plan and the DB Plan met the three elements to be excluded from the estate under Section 541(c)(2)[81] of the Bankruptcy Code.[82] The Bankruptcy Court found that the Debtor had a beneficial in a trust, which contained a restriction on transfer and was enforceable under applicable non-bankruptcy law.[83]

The Bankruptcy Court incorrectly presumed that because the *Patterson* Court concluded that in the fact section of the *Patterson* decision that the retirement "plan at issue 'satisfied all applicable requirements of [ERISA] and qualified favorable tax treatment under the Internal Revenue Code'" which allowed the Patterson court to decide the dispute before it based on the plan language of the Bankruptcy Code, then the

---

[80] Appx 942-954.

[81] "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title."

[82] Appx 947.

[83] Appx 941-944.

Bankruptcy Court here could proceed in a similar fashion.[84] The District Court erroneously rubber stamped the Bankruptcy Court absent guidance from the "Third Circuit or the United States Supreme Court."[85]

B. Post-*Patterson* Case Law Split.

Such presumption by the Bankruptcy Court was erroneous. The Bankruptcy Court, like the District Court, ignored the lack of ERISA and tax compliance of the Retirement Plans assuming that it did not have to consider because *Patterson* did not make any such considerations. The Supreme Court provided no definition of what constitutes an "ERISA-qualified" plan. "The Supreme Court's use of this particular term has engendered much confusion because 'the term 'ERISA qualified' … is not a term of art and is not defined in the Bankruptcy Code, the IRC, or ERISA[, and] … it is not even a term used by employee benefit practitioners." *In re Meinen*, 228 B.R. 368, 378 (Bankr. W.D. Pa. 1998) (quoting *In re Hall*, 151 B.R. 412, 417 (Bankr. W.D. Mich. 1993) (citing J. Gordon Christy & Sabrina Skeldon, *Shumate and Pension Benefits in Bankruptcy*, 2 J.Bankr.L. & Prac., 719, 722–23 (1992)).

"As a consequence of this confusion, post-Shumate courts cannot be certain whether the Supreme Court, by its use of the term 'ERISA-qualified' plan, intended to refer to '(1) a plan [that is] subject to ERISA;

---

[84] Appx 947.

[85] Appx 55.

(2) a plan [that is] subject to ERISA [and] which contains an anti-alienation clause; or (3) a plan that is tax qualified under I.R.C. § 401(a), subject to ERISA, and [which] has an anti-alienation provision as required by ERISA § 206(d)(1).'" *Meinen*, 228 B.R. at 378 (citations omitted). "Numerous post-Shumate courts have adopted the view that the Supreme Court, when referring to an 'ERISA-qualified' plan in Shumate, was referring to a plan that is tax qualified under I.R.C. § 401(a), subject to ERISA, and which has an anti-alienation provision as required by ERISA § 206(d)(1)." *Id.* (citing *Hall*, 151 B.R. at 419–20; *In re Nolen*, 175 B.R. 214, 217–18 (Bankr. N.D. Ohio 1994); *In re Foy*, 164 B.R. 595, 597 (Bankr. S.D. Ohio 1994); *In re Orkin*, 170 B.R. 751, 753–54 (Bankr. D. Mass. 1994). *See also Copulos*, 1998 U.S. Dist. LEXIS 6672; *In re Hall*, 151 B.R. 412; *In re Harris*, 188 B.R. 444, 449–51 (Bankr. M.D. Fla. 1995); *In re Goldschein*, 244 B.R. 595; *In re Yerian*, 927 F.3d 1223 (11th Cir. 2019); *In re Lane*, 149 B.R. 760, 765–66 (Bankr. E.D.N.Y. 1993).

"However, an approximately equal number of courts have adopted the competing view that the Supreme Court in Shumate, when referring to an 'ERISA-qualified' plan, envisioned a plan that is subject to, or governed by, ERISA, and which contains an anti-alienation clause that is enforceable under ERISA, but not one that necessarily satisfies the tax qualification requirements under I.R.C. § 401(a).'" *In re Meinen*, 228 B.R. at 378 (citations omitted). *See e.g., In re Hanes*, 162 B.R. 733 (Bankr. E.D. Va. 1994); *In re Handel*, 301 B.R. 421. Under this approach, the tax

qualification is not required or relevant. *Id*. Neither the Third Circuit Court of Appeals nor the Supreme Court has resolved this post-*Patterson* split, as the lower courts noted.[86]

As alleged by the Trustee,[87] the Debtor's Ex-Wife was an ineligible employee and thus, the Retirement Accounts are not facially ERISA qualified. Because the Debtor's Ex-Wife was not an eligible employee, the DB Plan and the 401(k) Plan are not ERISA-qualified, thus, not in compliance with *Patterson*, and thus, the lower courts must be reversed. As one court in this Circuit explained:

> A basic requirement of ERISA is that 'the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to participants in the plan….' 29 U.S.C. § 1103(c)(1) (ERISA § 403(c)(1)). A 'participant' is defined as 'any employee or former employee of any employer…who is or may become eligible to receive a benefit of any type from an employee plan…' 29 U.S.C. § 1002(7). To determine the status of the debtor and Becker as 'employees', the bankruptcy court looked to the common law definition of 'employee' found in the applicable Treasury Regulation, 26 C.F.R. § 31.31121(d)-(c)(2), as well as to Pennsylvania case law. In addition, the Bankruptcy Court examined regulations promulgated by the Department of Labor pursuant to ERISA. By definition, 'employees' exclude 'an individual and his spouse …. with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse.' 29 C.F.R. § 2510.3–3. Moreover, said regulations provide that any plan in which no employees are participants covered under the plan cannot be con-

[86] Appx 55, 943.

[87] Appx 1172-1173.

> sidered an employee benefit plan. In light of the aforementioned authority, the bankruptcy court accurately concluded that since the Plan's sole participants were its owners, the Plan did not cover any employees and, therefore, did not qualify under ERISA.

In re Kaplan, 189 B.R. 882, 888–889 (E.D. Pa. 1995).

Here, the Debtor, pursuant to the plain language of the Retirement Plans, controls every aspect of them.

On January 1, 2007, the Debtor's company, Professional Service established the DB Plan in which he and his Ex-Wife were named the trustees.[88] The Bankruptcy Court erred when it held that the Debtor's role as the DB Plan and 401(k) Plan administrator is not relevant by only focusing on the Debtor's role with the Retirement Plans in connection with the existence of a trust analysis rather than the holistic analysis of ERISA, IRC and the Bankruptcy Code.[89]

The Appellee controls both Retirement Plans, which permits him to control who is eligible to participate as outlined below. This Court should reverse the Bankruptcy Court and the District Court on that basis alone.

The Debtor and his Ex-Wife, as trustees of the DB Plan, executed board resolutions adopting the DB Plan. Professional Service and its successor, PSSoL is the DB Plan administrator.[90] The DB Plan provides, among other things, that "[t]he Administrator [the Debtor] shall be

---

[88] Appx 1920.

[89] Appx 942.

[90] Appx 1925, 1935-1938.

charged with the duties of the general administration of the Plan as set forth under the terms of the Plan, including, but not limited to, the following: (a) the discretion to determine all questions relating to the eligibility of Employees to participate or remain a Participant hereunder and to receive benefits under the Plan . . . ."[91]

On January 7, 2007, the Debtor's company, Professional Service established the 401(k) Plan in which he and his Ex-Wife were named the Trustees.[92] The Debtor and his Ex-Wife, as trustees of the 401(k) Plan, executed and adopted the 401(k) Plan. Professional Service and its successor company PSSoL is the 401(k) Plan administrator.[93] The 401(k) Plan provides that "[t[he Plan Administrator [the Debtor] shall have full and complete discretion to determine eligibility for participation and benefits under this Plan, including, without limitation, the determination of those individuals who are deemed Employees of the Employer (or any controlled group member). The Plan Administrator's decision shall be final, binding, and conclusive on all parties having or claiming a benefit under this Plan."[94] In addition, the powers of the plan administrator of the 401(k) Plan, among other things, include: "(b) The Plan Administrator shall be responsible for the general administration of the Plan,

---

91 Appx 1936.

92 Appx 2094.

93 Appx 2109, 2114.

94 Appx 2109.

including, but not limited to, the following duties: (1) To determine all questions relating to the eligibility of an Employee to participate in the Plan or to remain a Participant in the Plan."[95]

The Trustee submits that the *Goldschein*, *Harris*, *Hall* line of cases is more applicable. The District Court labels these decisions "as older bankruptcy court opinions" from 1995 and 2000[96] while *Baker* and *Sewell*, from 1997 and 1999, respectively, and does not explain how that even factors into the analysis of the issues.

The *Goldschein* case follows the line of cases that hold that a retirement plan must be governed by ERISA, contain the anti-alienation provision required by that statute, and qualify for tax-deferral under 26 U.S.C. § 401, while acknowledging that "plans may exist which are governed by ERISA, contain the anti-alienation provision required by the statute and to which no tax qualification statute has, or is intended to have any applicability," which was no such case as in *Goldschein*. *In re Goldschein*, 244 B.R. at 600–601. The *Goldschein* court held that "the Pension Plan was not operated in compliance with the plan provisions as required by the applicable statutory requirements. There is no legitimate dispute of fact that at least one significant beneficiary of the Pension Plan was not an employee of the participating companies. Under the terms of the Pension Plan (and as required by 26 U.S.C. § 401 for tax

[95] Appx 2178.

[96] Appx 59.

qualification) only employees were eligible to be beneficiaries. Notwithstanding this requirement, Goldschein caused his wife, Kristina Goldschein, to be included as one of the largest beneficiaries under the Pension Plan. Further, the loans to Goldschein violated Pension Plan provisions concerning the extent that such loans could be made to one participant, the requirements for approval of such loans, and the requirement of security for such loans. The acts in derogation of the Pension Plan's terms, which terms were required by the applicable statutes, were done by the Debtor herein in his capacity as Plan Trustee and (as argued by the Plaintiff) amounted to the Debtor using the Pension Plan assets and his interest therein as his own 'personal piggy bank'. At all times relevant to this case, the Debtor was the President of National Medical Services, Inc. (the employer), a plan trustee, the actor in the doing of the violative acts, and the beneficiary of such acts." *Id.* at 601.

Similarly, the *Hall*[97] and *Lane*[98] courts held that after deciding that the debtor's retirement accounts were property of the estate based on *Patterson*, that the debtor's retirement plans were not exempt under the Bankruptcy Code because the primary beneficiaries were the debtor and the non-employee spouse or employee in name only spouse while the

[97] 151 B.R. 412.

[98] *Lane*, 149 B.R. at 765–66.

Harris,[99] *Willis*,[100] and *Yerian*[101] courts held that after deciding that the debtor's retirement accounts were property of the estate based on *Patterson*, that the debtor's retirement plans were not exempt under the Bankruptcy Code because the debtor did not operate the plans in accordance with the applicable ERISA and IRC rules, such conduct including loans from the plans, improper withdrawals are generally not complying the governing documents of the retirement funds. The Debtor's Retirement Accounts are property of the estate.

C. District Court Decisions are Inapplicable or Bolster the Appellant.

The majority of the District Court's decisions are either inapplicable notwithstanding the holdings, super ceded by statute in one case, or in another, favor the Appellant.

First, the District Court's citation to *In re Jacobs*,[102] bolsters the Appellant's viewpoint. There, the bankruptcy court granted summary judgment on all counts, except one, in favor of the trustee on a determination that the proceeds in the retirement accounts were property of the

---

[99] 188 B.R. at 450–51.

[100] *In re Willis*, Case No. 07-11010-BKC-PGH, 2009 Bankr. LEXIS 2160, (Bankr. S.D. Fla. Aug. 6, 2009); *aff'd*, *Willis v. Menotte*, Case No. 09-82303-CIV, 2010 U.S. Dist. LEXIS 44773 at *16 (April 6, 2010 S.D. Fla.), *aff'd. sub nom*, 424 Fed. Appx. 880 (11th Cir. 2011).

[101] 927 F.3d at 1229–32.

[102] 648 B.R. 403 (Bankr. N.D. Okla. 2023).

debtor's estate not subject to any state law exemption based on a factual analysis of the debtor's pre-petition transactions, use of accounts, need for a TRO to prevent the debtor from moving funds, the fact that the plan had no other true employees other than the owner, and analysis of the retirement accounts under all retirement and tax laws. Subsequently, the *Jacobs* bankruptcy court granted summary judgment on the remaining issue in favor of the trustee.[103] As a result, the District Court's citation to *Jacobs* benefits the trustee.

Second, the District Court's reliance on *In re Baker*[104] and *In re Sewell*[105] is misplaced and inapplicable to these proceedings, notwithstanding their bankruptcy holdings.

The Seventh Circuit in *Baker* affirmed the bankruptcy court for the Northern District of Illinois in holding that "ERISA-qualified" only means that the retirement plans contains an anti-alienation clause required by Section 206(d)(1) of ERISA.[106] The District Court completely ignored *Baker* bankruptcy court analysis that led to the affirmance by the Seventh Circuit. The *Baker* bankruptcy court conducted a multi-day

---

[103] Case No. 21-10658-M, 2023 Bankr. LEXIS 2702 (Bankr. N.D. Okla. Nov. 7, 2023).

[104] 114 F.3d 636 (7th Cir. 1997).

[105] 180 F.3d 707 (5th Cir. 1999).

[106] *Baker*, 114 F.3d at 640.

evidentiary hearing, following by post-trial briefing in connection with the bank's objection to the debtor's interest in his companies retirement plan.[107]

The *Baker* bankruptcy court found that the loan balances at issue and other transfers were made pursuant to fully vested balance of the retirement plan participants, used to repay a spouse who covered a payroll tax shortfall, the debtor's company that ran the retirement plan had ceased operating after the bank attached its assets, notwithstanding that technical procedural requirements may not have been complied with and that the debtor's plan complied with tax requirements of the IRC.[108] In addition, the bank in *Baker* provided no proof or allegations (unlike the Appellant) that the retirement plan at issue was used for improper purposes or violated the statutory and regulatory requirements of ERISA, but only sought a general equitable policy position to invade the retirement assets.[109] The exact opposite of what the Trustee argues in this appeal and discussed further.

Likewise, the District Court's reliance on *Sewell* is factually distinguishable from this appeal. The debtor in *Sewell* was a common law employee of the retirement plan's sponsor, Home Care, completely remote

---

[107] *In re Baker*, 195 B.R. 386, 388 (Bankr. N.D. Ill. 1996).

[108] *Baker*, 195 B.R. at 389–390, 394.

[109] *Baker*, 195 B.R. at 394–395.

from the management of Home Care and the retirement plan.[110] As a result, the tax qualification of the retirement plan was not necessary in the Fifth Circuit's analysis. Furthermore, the *Sewell* court, like the *Baker* court, explained that its opinion should not be read as a *per se* rule that any retirement account is automatically excludable from a bankruptcy estate.[111] The *Sewell* and *Baker* acknowledges that a retirement account could be invaded by creditors if a record was established demonstrating unlawful withdrawals from the retirement account.[112]

Likewise, the District Court explained that no *per se* rule prevents a retirement account from being utilized to pay creditors as long as a record exists to warrant such finding.[113] However, the District Court erroneously held that the Trustee did not proffer any evidence that the retirement plans rendered the anti-alienation provisions unenforceable or that the plans are no longer subject to ERISA, despite the extensive briefing before the Bankruptcy Court and District Court.[114]

None of the Trustee's arguments are generalized. In fact, they are as specific as possible, given the fact that the discovery was limited with the case dismissed under Rule 12(b)(6) and a request to amend a complaint for a second time was denied, notwithstanding newly produced

---

110 *Sewell*, 180 F.3d at 720–721 n.17.

111 *Sewell*, 180 F.3d at 712 n. 21.

112 *Id*.

113 Appx 60.

114 Appx 347-364,399-417, 692-728, 1013-1045.

documents by the Debtor that the Debtor testified under oath was provided, and then acknowledge in the 727 litigation that it did not produce all documents.[115]

Third, the District Court relied on a hypothetical argument in the *Meinen* case where the plaintiff assumed how the Third Circuit "would rule" on this issue.[116] The Trustee never made hypothetical arguments or requested advisory opinions. All his arguments are based on law and fact.

Fourth, the District Court's reliance on *Coar v. Kazimir*,[117] a non-bankruptcy case, arose out of a lawsuit commenced by by a pension fund and trustee's against its former trustee (Coar) for embezzlement of pension funds for breach of fiduciary duties to the fund under ERISA, which resulted in the District Court setting off Coar's personal liability to the fund with Coar's own benefits. Coar then commenced an action for a determination that the pension fund's set off of his benefits violated section 206(d)(1), the anti-alienation provisions of ERISA and the Supreme Court's decision of *Guidry v. Sheet Metal Workers Nat'l Pension Fund*,[118] a non-bankruptcy case which did not decide whether a pension fund could set off benefits to a fiduciary who breached fiduciary duties to the

---

115 Appx 457-458, 1709.

116 Appx 56.

117 990 F.2d 1413 (3d Cir. 1993).

118 493 U.S. 365 (1990).

fund based on the remedial provisions of ERISA and thus overriding the anti-alienation provisions of ERISA.[119] The *Coar* court reversed the district court on the grounds that remedial provisions of ERISA did not override the anti-alienation provisions of ERISA and thus, reversed the district court.[120] Both *Coar* and *Guidry* involved litigation over competing ERISA provisions, not an interplay with ERISA, bankruptcy and *Patterson* implications. Rather, the District Court relied on a general policy point of the *Coar* decision without any analysis to the present appeal.

Similarly, the District Court's reliance on *Priv. Cap. Invs., LLC v. Schollard*,[121] is also misplaced as that case involved whether the NY CPLR permitted a judgment creditor to levy a retirement account, not the interplay of bankruptcy and ERISA. The *Schollard* court also analyzed the retirement plan at issue in connection with the IRC and ERISA, something that the lower court's here did not conduct. As a result, *Schollard* does not apply here.

D. In the Alternative, the *Copulous* Decision Should be Applied.

The Bankruptcy Court and District Court refused to follow this Court's *Copulos* decision which reversed in part, affirmed in part and

---

[119] *Id*. at 1415.

[120] *Coar*, 990 F.2d at 1420.

[121] No. 07-CV-0757C, 2014 U.S. Dist. LEXIS 79103 (W.D.N.Y. June 10, 2014).

remanded to the Bankruptcy Court,[122] which held that a court examine the anti-alienation provision of ERISA and the operational defects of the retirements plans to determine if they qualify for tax-deferral under 26 U.S.C. § 401 in order to determine whether a retirement plan is property of the estate under N.J. Stat. § 25–2-1(b) and *Patterson* and therefore, subject to an applicable bankruptcy exemption or not.[123] The Bankruptcy Court and District Court explained that because *Copulos* involved the New Jersey state exemption statute, the *Copulos* decision is inapplicable.[124] The Appellant submits that the *Copulos* should be followed for the reasons set forth *supra*, especially given that the District Court relied on the *Jacobs*.

V. Notwithstanding The Debtor's Improper Attempt to Utilize State Law Exemptions Despite Selecting a Federal Exemption on his Petition, the Debtor's Strategy Fails and the Retirement Funds are Estate Property, Not Subject to an Applicable Exemption

Bankruptcy Courts have held that the "plain language of section 522(b)(1), a debtor must choose between utilizing federal or state exemp-

---

[122] *In re Copulos*, 210 B.R. 61 (Bankr. D.N.J. 1997), *aff'd in part, rev'd in part sub nom*., *Copulos*, 1998 U.S. Dist. LEXIS 6672.

[123] *Copulos*, 1998 U.S. Dist. LEXIS 6672, at *12–17.

[124] Appx 56, 950.

tions," but not both. *In re Paturu*, Case No. 18–18864 (CMG) Adv. Pro. No. 20–1465 (CMG) 2021 Bankr. LEXIS 102, at *8 (Bankr. D.N.J. Jan. 24, 2021).

The Debtor repeatedly told the Trustee and the Bankruptcy Court that he is not amending his Petition and no amendments have been filed. At his deposition, the Debtor answered the following:

> Q Do you plan to file any amendments or revisions to your petition?
>
> A No . . . .[125]

The Bankruptcy Court, mistakenly appeared to have thought the Trustee argued that the Debtor would have to amend his Petition to have a defense to the Trustee's declaratory judgement cause of action that the Retirement Plans are property of the estate.[126] The Bankruptcy Court misconstrued the Trustee's argument. The Trustee was responding to the position in the Appellee's motion to dismiss[127] that asserted a state law exemption applied and objected to any potential amendments to the exemptions by the Debtor while the appeal of the 727 Complaint was pending.[128] The District Court did not address this point.

---

[125] Appx 1744.

[126] Appx 939.

[127] Appx 1103-1104.

[128] Appx 1020-1023.

VI. The Debtor is Responsible for the Non-Compliance of both Retirement Plans

As explained below and despite the contradictory statements of the District Court that the non-compliance of the retirement plans are "generalized allegations of operational improprieties,"[129] but yet ERISA-governed plan are not "*per se* excludable" "when monies are available for current consumption" by the Debtor, the Trustee submits that not only is this applicable in its *Patterson* analysis, but also meets the non-*per se* exclusion view espoused by the District Court.[130]

A. Case Law and the IRS Guidelines Dictate that the "Opinion Letters" Do Not Constitute Favorable Determination

The IRS opinion letters and the fact that the Retirement Accounts are volume submitter ("**VS**") plans does not help shield the Retirement Accounts from the Debtor's bankruptcy estate.

A VS plan is a specimen plan (sample plan) of a VS practitioner, that its employer-clients adopt on an identical or substantially identical basis. The IRS issues advisory letters to VS practitioners on the acceptability of the specimen plans' **form**. The practitioner then makes its plan(s) available for employers to adopt. A VS plan consists of: (i) a specimen

[129] Appx 60.

[130] Appx 60.

plan document that offers choices over plan terms; (ii) a trust or custodial account; and (iii) an adoption agreement containing elective provisions (optional).

All a VS plan does is allow reliance on the IRS advisory letter for identical or substantially identical plans' form. That has nothing to do with whether there were plan operational issues and facial defects.

Here, the Debtor relied on the IRS letters as to the form of the DB Plan and the 401(k) Plan. The IRS letters do not pre-approve operational defects and the Debtor's substantial non-compliance with the operation of the 401(k) Plan and the DB Plan.

The district court decision of *Xiao*, 610 B.R. 183, affirmed the bankruptcy decision and is instructive persuasive authority in this case. First, the district court affirmed the Bankruptcy Court's decision that the IRS letters did not protect the *Xiao* debtor's retirement plans from becoming property of the bankruptcy estate because the amendments included, among other things, eligibility changes. *Id.* at 190–91. Second, *Xiao* found that substantial operational failures of the retirement plans constituted violations of the qualifications of the plans. *Id.* at 192. Third, *Xiao* affirmed and gave deference to the Bankruptcy Court's decision that the debtor lacked credibility in discussing the retirement plans because his testimony was conclusory, evasive, and rehearsed when discussing the retirement plans. *Id.* at 193. Fourth, the *Xiao* district court affirmed the bankruptcy court's decision because the plans violated the perma-

nency, minimum participation requirements, nondiscrimination and exclusive benefit requirements, and requirement that a plan operate by its terms. *Id.* at 194.

Finally, the *Xiao* district court affirmed the bankruptcy court's decision that the debtor was substantially responsible for the non-compliance and thus, the retirement funds were property of the estate.

Furthermore, in *In re Bauman*,[131] the court held, among other things, that "[t]he letter dated January 31, 2011, from the IRS to Pension Administrators merely found 'acceptable' the form of a 'volume submitter defined benefit plan.' (B. Ex. 3 at 102). The letter specifically said that it was "not a ruling or determination as to whether an employer's plan qualifies under Code section 401(a)" . . . 'The terms of the plan,' the letter said, 'must be followed in operation.' . . . A letter of this kind, addressing only 'form' and not 'operation,' does not raise the presumption under section 522(b)(4)(A)." (relying on *In re Daniels*, 452 B.R. 335, 347 (Bankr. D. Mass. 2011), *aff'd on other grounds*, 482 B.R. 1 (D. Mass. 2012), *aff'd sub nom.*, 736 F.3d 70 (1st Cir. 2013). The IRS letters here, in connection with the Debtor's DB Plan and 401(k) Plan, respectively state: "This opinion relates only to the acceptability of the form of the Plan under the Internal Revenue Code . . . . Our opinion on the acceptability of the form

[131] Case No. 11-32418, 2014 Bankr. LEXIS 742, at *41–42 (Bank. N.D. Ill. Feb. 24, 2014).

of the plan is not a ruling or determination as to whether an employer's plan qualifies under Code section 401(a) . . . . The terms of the plan must be followed in operation."[132]

The Debtor did not cured any operational defects or facial defects in his plans, has not received any correction approval from the IRS and has not produced any public expert analysis to the contrary and does not even address the substantial non-compliance element.

Accordingly, this Court should follow *Xiao*, *Daniels*, *Bauman*, *Willis* and reverse the lower courts.

B. The DB Plan and the 401k) Plan are not in Substantial Compliance with the Tax Code

Because neither the IRS nor a court has determined that the Retirement Accounts are in substantial compliance with the IRC and neither the DB Plan nor the 401(k) Plan is in substantial compliance with the IRC, the Debtor is materially responsible for the non-compliance.

These are "operational defects" and facial defects that defeat any favorable tax treatment of the DB Plan and the 401(k) Plan, and thus, make them property of the estate.

---

[132] Appx 1988, 1990, 1992.

i. The Debtor's Ex-Wife was Not Eligible to Participate in the Retirement Plans

The Debtor's Ex-Wife was not eligible to participate in either the DB Plan or the 401(k) Plan. This was a facial and operational defect in both the DB Plan and the 401(k) Plan.

The DB Plan specifically states that "[a]n individual shall not be an Eligible Employee if such individual is not reported on the payroll records of the Employer as a common law Employee."[133] The 401(k) Plan states that "[u]nless otherwise provided under this Plan, individuals who are not contemporaneously classified as Employees of the Employer for purposes of the Employer's payroll system . . . are not considered to be Eligible Employees of the of the Employer and shall not be eligible to participate in the Plan . . . ."[134]

The documents produced in Bankruptcy Rule 2004 discovery by the Debtor, prior to mediation, show that the Debtor's Ex-Wife was never on the payroll of either Professional Service or PSSoL from its inception until the approval of the MSA. As a result, she was never an "eligible employee" and not permitted to participate in either the DB Plan or 401(k) Plan.

The Debtor's Ex-Wife testified that she had no background in healthcare strategic consulting for large multinational companies, what the

---

[133] Appx 1929.

[134] Appx 2109.

Debtor's business engage in, and did not contribute any capital to the Debtor's business and did not have any responsibilities or provide services at either of the companies.[135] She was not a consultant in the healthcare space and had no responsibilities.[136] Prior to that, the Debtor alleged that her responsibilities were some bookkeeping and nothing more since 2012 and when she began employment at Princeton University.[137] Rather, the Ex-Wife worked at Williams-Sonoma for over thirteen (13) years in California, and upon moving to the east coast, started a home staging business that she later dissolved, was the primary caretaker of her children and ill-parents, and began work at Princeton University in 2017.[138]

Furthermore, the Debtor's businesses certificate of incorporations for Professional Service and PSSoL do not include any reference to the Debtor's Ex-Wife's homes staging business.[139] The Ex-Wife testified that an accountant or lawyer, whose name she could not recall, advised her that because her home staging business was a "consulting business," her business invoices should be invoiced through her husband's consulting company.[140] Because the Ex-Wife's home staging business was never a

---

135 Appx 1804-1805.

136 Appx 1806.

137 Appx 1709-1710.

138 Appx 1803-1804.

139 Appx 1854-1856, 1858-1859.

140 Appx 1803.

separate formal legal corporate entity,[141] she listed any income from her business as "commissions" on Schedule C of her tax returns after the divorce, and prior to the divorce such income was either included on the personal joint tax returns as miscellaneous income or improperly commingled on Professional Service's tax returns.[142] Based on the Ex-Wife's own tax returns filed after the divorce, and the Professional Service and PSSoL certificates of incorporation, the home staging business was never legally or formally part of the Debtor's C-corp. strategic pharmaceutical consulting corporations.

Brazenly, the Debtor provided, **for the first time, in May 2022**, just days before a hearing, a 2012 W-2 (the "**2012 W-2**"), allegedly showing that the Debtor's Ex-Wife was an employee of the Debtor's companies in 2012.[143] The Trustee sent an informal discovery request for information from the Debtor in connection with the 2012 W-2 asserting that the 2012 W-2 is not subject to any mediation privilege because it meets an exception to mediation privilege pursuant to N.J. Stat. § 2A: 23C-4(c) because the requested information is subject to discovery through Federal Rule 45 and Bankruptcy Rule 9014.[144]

---

141 Appx 1861-1862.

142 Appx 1864-1865.

143 Appx 1029-1032, 1062-1065.

144 Appx 1029-1032, 1062-1065.

The Debtor refused to provide this information, which had already been requested by the Trustee in June 2021, because such information will "not involve items outside the four corners of the pleadings as they exist in the record."[145] The Debtor's characterizations were wrong and the District Court erroneously refused to address this material point.

The Trustee has challenged the Debtor's Ex-Wife eligibility to participate in both the DB Plan and the 401(k) Plan from the outset of this case and has raised it in every pleading in the retirement account litigation. Specifically, on February 15, 2022, in the Trustee's opposition to the Debtor's motion to dismiss the litigation, the Trustee provided an extensive analysis by demonstrating that the Ex-Wife was not an employee of the Debtor's companies to which the Debtor did not respond.[146]

The Trustee disputes the authenticity of the single W-2 from 2012 as well as other circumstances contained therein in light of the Ex-Wife's Rule 2004 testimony.

> Q. What were your duties and responsibilities as a partner of PSSOL?
>
> A. I didn't have any. . . .
>
> A. This is 2012. So this is 2012, 2013, I was spending a lot of my time going back and forth between Princeton and North Carolina. So my – my focus was not on the business."[147]

[145] Appx 1029-1032, 1062-1065, 1067.

[146] Appx. 1249-1251, 1307-1308.

[147] Appx 1804, 1821-1822.

Even assuming the 2012 W-2 is authentic, it does not show that the Ex-Wife was an eligible employee throughout the life of the plan as required by the IRC incorporated into the ERISA analysis.

Section 401(a)(26) of the IRC requires that retirement plans, "on each day of the plan year," the participation requirements and eligibility requirement must be met. Even if the Debtor is able to prove that his Ex-Wife was an eligible employee for one particular year, the IRC requires that the she be an eligible employee on each day of the plan year and this operational and facial defect makes both the DB Plan and the 401(k) Plan property of the Debtor's estate.

ii. The July 2020 DB Amendment

The Debtor's dedication to the July 10, 2021 letter from National Professional Planning Group ("**NPPG**") advising the Debtor of the July 31, 2020 amendment to the DB Plan (the "**July 2020 DB Amendment**") ignores the fact that the Debtor, who controls every aspect of his businesses, maintains the ultimate responsibility that the DB Plan and 401(k) Plan were in compliance with the IRC. *See In re Plunk*, 481 F.3d 302, 307 (5th Cir. 2007).

Furthermore, NPPG is a third-party administrator with no fiduciary responsibilities or discretionary authority over the Retirement Accounts while the Debtor still controlled the companies and was responsible for all the compliance from the inception of the Retirement Accounts. NPPG

was scheduled to be deposed pursuant to a Bankruptcy Rule 2004 subpoena, cancelled at the last minute causing the Trustee to not close the deposition and reserve the right to depose NPPG after the commencement of litigation.[148]

Xiao similarly found when the debtor there entered into a plan amendment by relying on his team of accountants and financial advisors because he did not know the innerworkings of the plan, the *Xiao* district court explained that the debtor's testimony was evasive and lacked credibility "to outweigh the strong inference that [the debtor'] understood at least the gist of the one page amendment and termination documents that he signed, which so significantly changed the structure of the Plan of which he and his then wife were the sole beneficiaries." *Xiao*, 610 B.R. at 197.

In this case, although the July 2020 DB Amendment was sent by NPPG and appeared to be "administrative" in nature according to the Debtor (a double Stanford graduate), the Debtor, like *Xiao*, had to understand that only he and his Ex-Wife would be the primary beneficiaries of the Retirement Accounts.

[148] Appx 1851-1852.

iii. The Prohibited Transactions

The Trustee has consistently alleged in this litigation that the prohibited transactions defect only applies to the 401(k) Plan. The remaining operational defects that apply to the 401(k) Plan, apply to the DB Plan **equally**.

Courts have held that any prohibited transaction makes the retirement account non-exempt for tax purposes and therefore, property of the debtor's estate for bankruptcy purposes. *See In re Willis*, Case No. 07–11010-BKC-PGH, 2009 Bankr. LEXIS 2160 (Bankr. S.D. Fla. Aug. 6, 2009); *aff'd*, *Willis v. Menotte*, Case No. 09–82303-CIV, 2010 U.S. Dist. LEXIS 44773, at *16 (S.D. Fla. April 6, 2010), *aff'd. sub nom*, 424 Fed. Appx. 880 (11th Cir. 2011); *In re Daniels*, 452 B.R. 335 (Bankr. D. Mass. 2011) aff'd, 482 B.R. 1 (D. Mass. 2012) aff'd, 736 F.3d 70 (1st Cir. 2013); *In re Kellerman*, 531 B.R. 219, 224–27 (Bankr. E.D. Ark. 2015).

The IRC defines "Prohibited transactions" as the following:

> (A) sale or exchange, or leasing, of any property between a plan and a disqualified person;
>
> (B) lending of money or other extension of credit between a plan and a disqualified person;
>
> (C) furnishing of goods, services, or facilities between a plan and a disqualified person;
>
> (D) transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan;

> (E) act by a disqualified person who is a fiduciary whereby he deals with the income or assets of a plan in his own interests or for his own account; or
>
> (F) receipt of any consideration for his own personal account by any disqualified person who is a fiduciary from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.

See 26 U.S.C. § 4975(c)(1)(A–F).

Here, the Debtor engaged in prohibited transactions under 26 U.S.C. § 4975(c)(1)(B), (E) & (F) of the IRC by taking out loans to remodel his home and using his Ex-Wife's 401(k) Plan to fund another business in direct violation of the IRC.

The Debtor took loans out to remodel his house and other personal loans, which were never fully repaid, a fact that the Debtor's accountants informed him of which could jeopardize any favorable tax treatment of the 401(k) Plan.[149] Furthermore, the Debtor raided his Ex-Wife's 401(k) account (through the Debtor's businesses) in order to use her funds for a startup business, along with money her parents left for her benefit in a trust, in order to fund another of his startup businesses.[150]

The Debtor's accountant and NPPG informed the Debtor of the "prohibited transactions" and the consequences of them. The Debtor is a disqualified person and a fiduciary who engaged in prohibited transactions

[149] Appx 1055-1057, 1732, 1734-1735, 1847-1849.

[150] Appx 1810, 1818, 1824-1825, 2233-2234.

in connection with the 401(k) Plan. Based on the documents from Prager and the analysis by Bederson, the Trustee's accountants, the loans were not repaid as of 2016 and 2017, which would invalidate the 401(k) Plan's tax exempt status and make it property of the Debtor's estate.[151]

Based on the Debtor's use of his Ex-Wife's 401(k) Plan as a haven for the prohibited transactions of funding separate businesses, the accountant's correspondence with the Debtor about the 2016–2017 loans, and NPPG's letter about "prohibited transactions," the Debtor's conduct constitutes "prohibited transactions" under the IRC, deems the 401(k) Plan not qualified because the plans did not operate by their terms, and thus, not excluded from the Debtor's bankruptcy estate.

iv. The COVID-19 Withdrawal was Unnecessary

The Debtor testified the fact that certain of his projects were put on a brief hold as a result of the COVID-19 pandemic as justification for a max $92,000 COVID-19 withdrawal[152] and a "true-up" payment as part of the Marital Settlement Agreement ("**MSA**"). This ignores the fact that the Debtor testified and provided evidence that he received all of his consulting fees from 2020 (totaling $175,000) and early 2021 as of the Petition Date.[153] Tellingly, the Debtor still does not explain or identify what

---

151 Appx 1055-1057, 2211-2231.

152 Appx 1343.

153 Appx 1716-1717, 2246-2259.

the "true-up" payment as part of the MSA to his Ex-Wife was that caused him to take the maximum COVID-19 withdrawal. One of the only logical conclusion is that either the COVID-19 withdrawal was not necessary or was needed on or around March 15, 2021 (two weeks before the Petition Date well within the ninety (90) day preference period and **not disclosed** on the Debtor's bankruptcy Petition) to make payments totaling $40,424.75 to Mayer Brown LLP; McConnell Valdés LLC; NPPG, Prager Metis; and the IRS.

v. Minimum Funding

Although, at first glance, the minimum funding requirements were zero and therefore, the minimum funding requirements are not in dispute, the actuarial calculation performed by NPPG were based on the information provided by the Debtor as plan sponsor (through Professional Service and later PSSoL) and trustee of the DB Plan. Furthermore, NPPG expressly stated, for example, in the cover letter to the 2017, 2018, 2019, and 2020 actuarial reports that following:

> The census information which forms the basis of this report was provided by the Plan Sponsor, and the financial information was provided by the Plan Sponsor and its advisors . . . The Actuary has relied upon the above information as being complete and accurate in preparing the valuation. The valuation and certification does not constitute an opinion by the actuary or the firm on the qualified status of the plan in form or in operation.[154]

The Debtor controls his companies, Professional Service and PSSOL, and is ultimately responsible for meeting the plan funding requirement. The NPPG/Voya activity statements did not reconcile with the Form 5500s. Below is a chart of the balances and different amounts between the Voya/NPPG statements which were provided to NPPG and Voya by the Debtor, and the Form 5500s filed with the Department of Labor (the "**DOL**"):

Year	NPPG/Voya Balance	Form 5500 Balance	Difference
2011	$465,162.88	$554,769.00	($89,606.12)
2012	$631,102.82	$913,015.00	($281,912.18)
2013	$1,060,373.54	$1,024,198.00	$36,175.54

As set forth herein, no employee contributions were made into the DB Plan after 2013. The bulk of the contributions were made between 2011 and 2013, with substantial discrepancies between the Voya/NPPG statements and the Form 5500s filed with the DOL.[155]

In *Bauman*,[156] the bankruptcy court held that the debtor's retirement accounts were not exempt from the bankruptcy estate under either the

[154] Appx 2278-2553.

[155] Appx 1995-2011, 2011-2014.

[156] 2014 Bankr. LEXIS 742, at *20, 41–42, 47–53.

federal exemptions or Illinois state exemptions because the debtor never received a favorable determination from the IRS, did not operate the plans by their terms and was responsible for the substantial non-compliance of the plans.

Likewise, the 401(k) Plan activity statements provided by NPPG, which were drafted based on the information provided by the Debtor, disagreed substantially with the Form 5500s from 2009 through 2017.[157] Below is a chart of the balances and different amounts between the Voya/NPPG statements which were provided to NPPG and Voya by the Debtor, and the Form 5500s filed with the DOL:

Year	Voya/NPPG Balance	Form 5500 Balance	Difference
2009	$253,104.77	$402,261.00	($149,156.23)
2010	$328,927.39	$501,590.00	($172,662.61)
2011	$441,348.81	$586,626.00	($145,277.19)
2012	$574,134.32	$612,707.00	($38,572.68)
2013	$530,560.83	$637,350.00	($106,789.17)
2014	$576,075.42	$660,279.00	($84,203.58)
2015	$170,514.77	$242,972.00	($72,457.23)

[157] Appx 2210-2231.

Year	Voya/NPPG Balance	Form 5500 Balance	Difference
2016	$173,687.65	$244,268.00	($70,580.35)
2017	$171,794.00	$239,274.00	($67,479.60)

This Court cannot ignore the fact that the Debtor himself controls all aspects of his companies, which are responsible for the funding.[158]

vi. Participation and Non-Discrimination Requirements Impact Both Plans

There were three (3) participants in both the DB Plan and the 401(k) Plan for a portion of 2020. However, not all three participants were "eligible" (as such term is used in the DB Plan and the 401(k) Plan) to participate in the DB Plan and the 401(k) Plan. The Debtor's Ex-Wife was not an "eligible employee" under either plan. Most significantly, the MSA was approved on October 5, 2020.[159] The MSA, negotiated by the Debtor and his Ex-Wife, provided the Debtor with all of the funds contained in the Retirement Accounts.[160] As a result, only the Debtor was a participant in the 401(k) Plan and DB Plan. Even if the participants of both plans were in the Debtor's favor, with the inclusion of a former employee, the participation requirements are still not met.

---

158 Appx 1724.

159 Appx 1913-1914.

160 Appx 1869-1911.

Because the Debtor's Ex-Wife was not eligible to participate in either plan from their inception, the DB Plan and the 401(k) Plan lose any tax retirement plan qualification status, and as a result, even assuming that the plans now had two (2) participants (the Debtor and a former employee), they do not meet the minimum participation requirement.

The analysis of *Hall*[161] and *Lane*[162] applies because there, the courts held that the participation requirement was not met even when the court took everything in the debtor's favor as to the number of employees and former employees for its participation analysis. Therefore, the DB Plan and the 401(k) Plan failed to meet the participation requirements and thus, are not qualified plans, and are property of the Debtor's bankruptcy estate.

"[T]he law looks not only to the form of the plan, but also to its operation." *Dzikowski v. Blais (In re Blais)*, 220 B.R. 485, 489 (S.D. Fla. 1997) (internal citations omitted). The timing of plan amendments may not have the effect of discriminating significantly in favor of highly compensated employees. *See* 26 C.F.R. § 1.401(a)(4)–1(b)(4). As discussed *supra*, the July 2020 DB Amendment had the effect of only benefitting highly compensated employees and making the Debtor's Ex-Wife eligible after being ineligible, which then, the Debtor was able to benefit from in the MSA.

---

[161] 151 B.R. at 424.

[162] *Lane*, 149 B.R. at 765–66.

Accordingly, the DB Plan and the 401(k) Plan are estate property.

vii. Neither the DB Plan nor the 401(k) Plan Operated by Their Terms

Based on the foregoing, the DB Plan and 401(k) Plan did not operate by their terms as required by the IRC, ERISA, the treasury regulations, the Bankruptcy Code, and the plain language of the IRS opinion letters. *See In re Bennett*, Case No. 12–60642, 2013 Bankr. LEXIS 3660, at *21–22, 24–25 (Bankr. D. Or. Sept. 3, 2013) (The bankruptcy court, in addressing retirement plan under an Oregon state statute, held that the debtor's plans lost their tax qualification status and thus, were not excluded from the debtor's estate based on not operating the plans in accordance with their terms regarding breaches, contributions, prohibited transactions).

Accordingly, this Court must reverse the lower courts.

VII. The District Court Erred in Affirming Bankruptcy Court's Dismissal of the Trustee's Avoidance Action Claims.

A. Preferential Transfers.

The lower courts improperly dismissed the Appellant's claims pursuant to Sections 544, 547, 548 and 550 of the Bankruptcy Code on a motion to dismiss when factual issues were in dispute and last minute

document disclosures (i.e., the 2012 W-2) require further discovery. Because the Debtor and his Ex-Wife are "insiders" as defined in Section 101(31)(A)(i)[163] and (iv)[164] of the Bankruptcy Code, the Trustee can avoid and recovery the transfers in connection with the July 2020 DB Amendment pursuant to both Section 547(b)(4)(B) and Section 548(a)(1)(A) and (B) of the Bankruptcy Code.

The Bankruptcy Court presumed the Debtor solvent when it dismissed the Appellants preference claims.[165]

The Bankruptcy Court, without conducting an evidentiary hearing and solvency analysis, found the Debtor solvent because the Petition listed assets of $1,682,400 and liabilities of $589,790.[166] Solvency is a fact based inquiry that requires an evidentiary hearing with expert testimony (which the Trustee has provided early in these proceedings, as discussed *supra*) and an examination of different valuation methods to prove solvency.[167] The Bankruptcy Court mistakenly ignored the statu-

---

[163] Relative of the debtor or general partner of the debtor.

[164] Corporation of which the debtor is a director, officer or person in control.

[165] Appx 963.

[166] Appx 963.

[167] *FBI Wind Down, Inc. v. Careers U.S., Inc. (In re FBI Wind Down, Inc.)*, 614 B.R. 460, 479 (Bankr. D. Del. 2020).

tory requirement that the Debtor is presumed insolvent at least ninety (90) days (here one year because the transfers involved insiders) prior to the Petition Date.[168]

It is for the ***Debtor***, not the Bankruptcy Court, to rebut the solvency element. In fact, the Debtor testified that he had stopped paying his creditors in 2014 and his Ex-Wife has to pay the household expenses: "And I believe it was approximately 2014 when I was personally unable and professionally unable to stay current."[169] Thus, by paying himself instead of his creditors, the bankruptcy estate was diminished, as evidenced by Schedule E/F on the Debtor's bankruptcy petition.[170] *See In re Allou Distribs. Inc.*, 387 B.R. 365, 405 (Bankr. E.D.N.Y 2008) (preference and fraudulent transfer claim not dismissed when transactions were "round-tripped").

The lower courts dismissed the Appellant's reliance on the Third Circuit's decision in *KB Toys*[171] because any "transfer" was ultimately returned to the Debtor as part of the MSA and thus, the Trustee's preference action failed and the estate was not diminished.[172] The lower courts ignored the Debtor's own testimony that he stopped paying his creditors

---

168 11 U.S.C. § 547(f).

169 Appx 1738.

170 Appx 2607-2611.

171 736 F.3d 247, 254 (3d Cir. 2013).

172 Appx 964.

in 2014, his lender obtained judgment against him and his Ex-Wife testified that she financed the day-to-day living expenses because the Debtor was unable to do so.[173]

The ultimate beneficiary of the funds in the Retirement Accounts is solely in the possession of the Debtor, and prior to the MSA, both the Debtor's and his Ex-Wife's possession.

As stated previously, the Debtor's businesses, Professional Service and its successor PSSOL, are the plan sponsors, with the Debtor and his Ex-Wife both having been the trustees of the DB Plan and 401(k) Plan, and the beneficiaries of the funds in the Retirement Accounts. The Debtor controlled the Retirement Accounts. The Debtor's Ex-Wife merely exercised signing authority, while her husband, the Debtor, made all the decisions concerning the 401(k) Plan and the Debtor's Ex-Wife did not realize that the DB Plan existed.[174] The Debtor's own testimony bolsters the fact that his Ex-Wife had no role in the day-to-day operations of the Debtor's consulting business.

> Q So is -- is PSSOL essentially the same business as Professional Service Solutions?
>
> A It is engaged in the same set of activities. I don't know how to answer the question you have posed. It is a strategy consulting firm. Professional Service Solutions, Inc., which is currently inactive, is a strategy consulting firm.

---

[173] Appx 456, 2573.

[174] Appx 1817, 1822.

> Q And did you control Professional Service Solutions, Inc. the way you control PSSOL?
>
> A Yes, with one nuanced difference. As of the bankruptcy petition date, PSSOL, Inc. was 100 percent owned by me. And if I go back in time to when Professional Service Solutions, Inc. was active, it was owned jointly with my now ex-wife. But the entities in both cases, I was the sole full-time employee; and I was responsible for identifying plan opportunities, structuring either a letter agreement or a scope of work document, managing the work, and delivering the work that would result in them paying the invoices.[175]

Following the execution of MSA and state court approval of the divorce judgment, the Debtor, through the veil of his companies, is currently the only beneficiary of both the DB Plan and the 401(k) Plan. The Debtor's businesses, Professional Service and PSSoL, are merely an alter ego of the Debtor. The transfer from PSSoL, controlled by the Debtor, to the Ex-Wife received in connection with the July 2020 DB Amendment was her 50% share of the Retirement Accounts in the amount of $827,297.73, which was in turn, awarded to the Debtor as part of the MSA.

The Debtor's Ex-Wife was never an eligible employee of the DB Plan and 401(k) Plan and as a result, had no right to receive that money and in turn, award her share to the Debtor as part of the MSA.

Utilizing the ten-year IRS look back period, the Trustee is entitled to void all retirement funds transfers, part of the MSA, going back to April 1, 2011. The Bankruptcy Court noted that the Appellant named PSSoL

---

[175] Appx 1723.

in the cause of action, but was not named as a defendant containing a pierce the corporate veil cause of action.[176] The lower courts should be reversed and the Appellant should be permitted to amend his complaint to include a cause of action to pierce the corporate veil and conduct further discovery of the Debtor and his companies in connection with the 2012 W-2, the companies are the same industry of strategic consulting, businesses to pay for personal tax advice.

B. Actual Fraudulent Conveyance Under Section 548(a)(1)(A)

The lower courts mistakenly dismissed the Appellant's actual fraudulent conveyance claims based on the reasons it dismissed the preference claims, in particular that the Debtor's estate was not diminished.[177] Courts have held that diminution to the estate is not required to established a fraudulent transfer claim. *See In re Parameswaran*, 50 B.R. 780, 784 (S.D.N.Y. 1985) ("[A]n effort by the debtor to put property beyond the reach of his creditors[,]... regardless of the value of the property, may not be tolerated by the courts"); *Tavenner v. Smoot*, 257 F.3d 401, 406 (4th Cir. 2001); *In re Davis*, 911 F.2d 560, 562 n.2 (11th Cir. 1990); *Shapiro v. Wilgus*, 287 U.S. 348, 355–56 (1932) (transfer from debtor's corporation to another that benefitted him was a fraudulent conveyance); *In re Live*

[176] Appx 962.

[177] Appx 959-960, 964-966.

Well Fin., Inc., 652 B.R. 699, 708 (Bankr. D. Del. 2023); *In re DSI Renal Holdings, LLC*, 574 B.R. 446, 467 (Bankr. D. Del. 2017) ("[I]f one acts with knowledge that creditors will be hindered or delayed by a transfer but then intentionally enters the transaction in disregard of this fact, he acts with actual intent to hinder and delay them.").

The District Court's reliance on the non-precedential opinion *In re Skinner*[178] and *In re Yahweh Ctr., Inc.*[179] are factually and legally inapplicable in this case. *Skinner* dealt with a creditor who did not have standing to challenge the dischargeability of the debtor's debts while *Yahweh* dealt with the dismissal of a trustee's fraudulent transfer lawsuit concerning the debtor's payment of tax penalties that arose by statute.

Here, Debtor controlled the companies that permitted his Ex-Wife to receive pension benefits to transfer back to him pursuant to the MSA, while not paying his creditors since 2014.

Courts consider the existence of the following "badges" in establishing actual intent:

> (1) the transfer or obligation was to an insider; (2) the debtor retained possession or control of the property transferred after the transfer; (3) the transfer or obligation was disclosed or concealed; (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit; (5) the transfer was of substantially all the debtor's assets; (6)

[178] 636 F.App'x 868 (3d Cir. 2016).

[179] 27 F.4th 960 (4th Cir. 2022).

> the debtor absconded; (7) the debtor removed or concealed assets; (8) the value of the consideration received by the debtor was not reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; (9) the debtor was insolvent or become insolvent shortly after the transfer was made or the obligation was incurred; (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Id. at 198 (citing N.J.S.A. § 25:2–26 (1997)).

"When the transferee or obligee is in a position to dominate or control the debtor's disposition of his property, however, his intent to hinder, delay or defraud creditors may imputed to the debtor so as to render the transfer fraudulent within section 548(a)(1)(A), regardless of the actual purpose of the debtor transferor." 5 Collier on Bankruptcy P 548.01 at 548–24 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. 2009).

"Cases imputing a transferee's intent to a transferor have typically involved sole shareholders of the transferor, with complete control of the transferor, transferring assets to themselves as transferee." *See In re Elrod Holdings Corp.*, 421 B.R. 700, 710–712 (Bankr. D. Del. 2010); *In re Maxus Energy Corp.*, 641 B.R. 467, 513 (Bankr. D. Del. 2022) (same).

The ultimate transferee of the Retirement Accounts was the Debtor through his companies he solely controlled. In this case, factors one, two, three, and eight weigh in favor of an actual fraudulent transfer. The Ex-Wife and Debtor were insiders of the Debtor's companies and there was

no value or consideration provided by the Ex-Wife to the Debtor's companies for her to receive the pension benefits and the Debtor testified that he himself could not pay his creditors for almost a decade. Especially when she testified that she had no responsibilities at the companies and did not know of the existence of the DB Plan that was a separate plan from the 401(k) Plan.

Accordingly, the lower courts "no harm, no foul"[180] ruling must be reversed or the Appellant must be permitted to amend his complaint.

C. Constructive Fraudulent Conveyance Under Sections 544(b)(1) and 548(a)(1)(B)

The Bankruptcy Court also erred in dismissing the constructive fraudulent conveyance claims because the Trustee did not allege insolvency or incurring debt beyond the Debtor's ability to pay or that the debtor's estate was diminished.[181]

The Trustee's constructive fraudulent transfer claims are brought under federal bankruptcy and state law, including the utilization of the Trustee's "strong arm" powers under 11 U.S.C. § 544(b)(1); 11 U.S.C. § 548(a)(1)(B), 11 U.S.C. § 544(b)(1) and N.J.S.A. §§ 25:2–25a(2) and 25:2–27a. *See VFB LLC v. Campbell Soup Co.*, 482 F.3d 624 (3d Cir. 2007) (applying state fraudulent transfer law under § 544(b)(1)). Both

[180] *Tavenner*, 257 F.3d at 406.

[181] Appx 965.

require proof that the Debtor received less than "reasonably equivalent value" in connection with the challenged transaction. Fraudulent transfer claims under federal and state bankruptcy laws require almost identical analysis in the Third Circuit. *Lowenschuss v. Resorts Int'l Inc. (In re Resorts Int'l Inc.)*, 181 F.3d 505, 514 n.6 (3d Cir. 1999); *Motorworld, Inc. v. Benkendorf*, 228 N.J. 311, 327 (2017) (citing to Third Circuit fraudulent transfer law).

Section 548(a)(1)(B) of the Bankruptcy Code elements of a constructive fraudulent conveyance are as follows: "(1) the debtor had an interest in property; (2) a transfer of that interest occurred within one year of the bankruptcy filing; (3) the debtor was insolvent at the time of the transfer or became insolvent as a result of the transfer; and (4) the transfer resulted in no value for the debtor or the value received was not 'reasonably equivalent' to the value of the relinquished property interest." *In re Fruehauf Trailer Corp.*, 444 F.3d 203, 210–11 (3d Cir. 2006).

"Reasonably equivalent value is not defined in the bankruptcy code." *In re R.M.L.*, 92 F.3d 139, 148 (3d Cir. 1996). In the Third Circuit, courts apply a two-step test to determine whether a transferor received reasonably equivalent value. The first step is to determine whether the transferor received any value at all. *Id.* at 150. The Third Circuit has defined "reasonably equivalent value" as "any benefit . . . whether direct or indirect . . . [which includes any] 'opportunity' to receive an economic benefit in the future." *Id.* at 148. *See also BFP v. Resolution Tr. Corp.*, 511 U.S.

531, 535 (1994). Second, "[i]n order to determine whether a benefit constitutes 'reasonably equivalent value,' courts routinely look to the 'totality of the circumstances' of the transfer in balancing the following factors: (1) the 'fair market value' of the benefit received as a result of the transfer, (2) 'the existence of an arm's length relationship between the debtor and the transferee,' and (3) the transferee's good faith." *In re TSIC, Inc.*, 428 B.R. 103, 113 (Bankr. D. Del. 2010) (citations omitted).

Reasonably equivalent value is "whether the debtor got roughly the value it gave." *Fruehauf Trailer*, 444 F.3d at 213. "Courts will look to the substance of a transaction rather than its form to determine whether a fraudulent transfer has occurred." *In re Mall at the Galaxy*, Case No. 10–12435 (VFP) Adv. Pro. No. 12–1769 (VFP), 2022 Bankr. LEXIS 1180, at *37 (Bankr. D.N.J. April 29, 2022).

The burden of proving reasonably equivalent value, like all other affirmative elements of a fraudulent transfer claim, rests with the Trustee. *Fruehauf Trailer*, 444 F.3d at 211.

The Ex-Wife testified that she had no responsibilities at the Debtor's companies, did not provide capital and was not in the same healthcare strategic consulting industry, and thus, provided no value or consideration to the Debtor's companies and the Debtor could not pay his creditors for almost a decade prior to the Petition Date.

Accordingly, the retirement funds the Ex-Wife received and ultimately transferred to the Debtor as part of the MSA are voidable. *See TSIC*,

428 B.R. at 115 (severance payment of $850,000 to debtor's former CEO deemed fraudulent transfer for lack of consideration). As stated *supra*, diminution of the estate is not required and accordingly, the lower courts must be reversed or the Appellant must be permitted to amend his complaint.

D. IRS Ten-Year Look Back Standard

The Bankruptcy Court, affirmed by the District Court, denied the Trustee's ability to utilize the extended look back period of ten (10) year under 26 U.S.C. § 6502(a)(1) in conjunction with Section 544 of the Bankruptcy Code because the funds were not property of the Debtor's estate, the Debtor's company, PSSoL is not a party to the litigation, the IRS had not filed a proof of claim, and no tax liability has been assessed against the Debtor or his companies.[182] The Bankruptcy Court's analysis was flawed.

Courts have held that trustees may step into the shoes of the IRS and clawback payments made by the debtor ten (10) years prior to the petition date. *See In re Zagaroli*, No. 18–50508, 2020 Bankr. LEXIS 3111 (Bankr. W.D.N.C. Nov. 3, 2020); *In re Gaither*, 595 B.R. 201 (Bankr. D.S.C. 2018); *In re Kipnis*, 555 B.R. 877 (Bankr. S.D. Fla. 2016); *Hillen v. City of Many Trees (In re CVAH, Inc)*, 570 B.R. 816 (Bankr. D. Idaho 2017).

[182] Appx 965-968.

Although, the Debtor did not list the IRS as a creditor in this case, the trustee may nevertheless use the IRS ten-year look back statute even where the IRS's claims were paid in full after the commencement of the bankruptcy case or if a tax assessment could have occurred. *See Alberts v. HCA Inc. (In re Greater Southeast Cmty. Hosp. Corp. I)*, 365 B.R. 293, 301 (Bankr. D.D.C. 2006); *In re Tops Holding II Corp*, 646 B.R. 617, 654–655 (Bankr. S.D.N.Y. 2022).

In this case, the Trustee has pled facts that the Debtor's Ex-Wife was not eligible to participate in either the DB Plan and the 401(k) Plan since the inception of plans. Accordingly, the Debtor will most likely have tax consequences from April 1, 2011 to the Petition Date based on the Debtor's Ex-Wife's ineligibility to participate in the retirement plans and the undisclosed 2012 W-2.

In addition, on or around March 15, 2021, two weeks before the Petition Date well within the ninety (90) day preference period and **not disclosed** on the Debtor's bankruptcy petition, the Debtor to make payments totaling $40,424.75 to Mayer Brown LLP; McConnell Valdés LLC; NPPG, Prager Metis; and the IRS. The Debtor paid the IRS an undisclosed $11,000.00. Furthermore, the Appellant has argued *supra* that the Retirement Accounts are property of the Debtor's estate and subject to a tax, and thus, avoidable.

Accordingly, the Trustee is entitled to step into the shoes of the IRS and utilize the ten-year look back provision to void the transfers in which

the Ex-Wife received the retirement funds and ultimately transferred to the Debtor. Therefore, the lower courts must be reversed or the Appellant must be permitted to amend his complaint to among other things, name PSSoL as a defendant related to the 2012 W-2 and address the non-disclosures by the Debtor, following additional discovery.

VIII. Request to Amend Any Deficiencies

The Bankruptcy Court took the unseal step and denied the Appellant's request, pursuant to Federal Rule 15 and made applicable by Bankruptcy Rule 7015, to amend the complaint.[183]

Federal Rule 15, made applicable through Bankruptcy Rule 7015, permits amendments to complaints to be freely granted when justice requires. Courts in this district have routinely permitted amendments to complaints. *See e.g., In re Dots, LLC*, Case No. 14–11016 (MBK) Adv. Pro. No. 16–01040 (MBK) 2017 Bankr. LEXIS 1686, at *7–14 (Bankr. D.N.J. June 16, 2017); *In re Norvergence, Inc.*, 405 B.R. 709, 765 (Bankr. D.N.J. 2009) (bankruptcy court permitted trustee to correct name of a defendant and the alleged transaction amounts). "The Third Circuit has shown a strong liberality in allowing amendments under Rule 15 in order to ensure that claims will be decided on the merits rather than on technicalities." *Dots*, at *5 (citations omitted).

[183] Appx 968-969.

Courts have permitted amendments to complaints when newly produced documents have been provided that require additional document discovery and depositions. *See, e.g.*, *Cloud Farm Assocs., L.P. v. Volkswagen Grp. of Am., Inc.*, 2012 U.S. Dist. LEXIS 104982, at *16 n.6 (D. Del. July 27, 2012) (court allowed amended complaint following discovery of new information not disclosed); *Int'l Constr. Prods. LLC v. Caterpillar Inc.*, Civil Action No. 15-108-RGA, 2018 U.S. Dist. LEXIS 164801, at *8–11 (D. Del. Sept. 26, 2018); *SEPTA v. Orrstown Fin. Servs.*, 335 F.R.D. 54, 77 (M.D. Pa. 2020); *In re Tarragon Corp.*, Case No. 09-10555, Adv. No. 09-02012, Adv. No. 09-01465, 2012 Bankr. LEXIS 3874 (Bankr. D.N.J. Aug. 22, 2012); *Bright v. Tyson*, Civil Action No. 2:15-CV-8038-SDW-SCM, 2019 U.S. Dist. LEXIS 106827 (D.N.J. June 25, 2019).

For the reasons discussed throughout, the Trustee should be permitted to file a second amended complaint after additional formal discovery, especially in light of the undisclosed 2012 W-2.

IX. This Court Must Invoke Judicial and Equitable Estoppel

The Debtor's conduct throughout this case justifies this Court applying both judicial estoppel and equitable estoppel. These are not mere "inconveniences" or "frustration" as mistakenly alleged by the District Court.

A. Judicial Estoppel Applies in this Case

The Trustee submits that judicially estoppel is warranted in this case.

"The doctrine of judicial estoppel 'prevent[s] a litigant from asserting a position inconsistent with one that she has previously asserted in the same or in a previous proceeding in separate proceedings to the benefit of the litigant in each proceeding.'" *In re Peterburg Regency, LLC*, 540 B.R. 508, 533 (Bankr. D.N.J. 2015) (quoting *Oneida Motor Freight v. United Jersey Bank*, 848 F.2d 414, 415, 418 (3d Cir. 1988). "The doctrine prevents a litigant from playing 'fast and loose' with the courts." *Peterburg Regency*, at 534 (quoting *Scarano v. Cent. R.R. Co. of N.J.*, 203 F.2d 510, 513 (3d Cir. 1953)). Judicial estoppel "'prohibit[s] parties from deliberately changing positions according to the exigencies of the moment.'" *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (quoting *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993)). Most importantly, judicial estoppel "is to be used sparingly and reserved for the most egregious case." *Krystal Cadillac-Oldmobile GMC Truck, Inc. v. GMC*, 337 F.3d 314, 324 (3d Cir. 2003). The Trustee submits that this is that egregious case.

The Supreme Court has set forth three factors coupled with other considerations that court may consider in deciding to impose judicial estoppel. First, a party's later position must be "clearly inconsistent" with its earlier position. *New Hampshire v. Maine*, 532 U.S. at 750 (internal cita-

tions omitted). "Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled,'. . . Absent success in a prior proceeding, a party's later inconsistent position introduces no 'risk of inconsistent court determinations,' and thus poses little threat to judicial integrity." *Id.* at 750–51 (internal citations omitted). "A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 751 (citations omitted).

The Third Circuit has adopted a variation of this standard from the Supreme Court. "First, the party to be estopped must have taken two positions that are irreconcilably inconsistent; second, judicial estoppel is unwarranted unless the party changed his or her position in bad faith; and third, a district court may not employ judicial estoppel unless it is tailored to address the harm identified and no lesser sanction would adequately remedy the damage done by the litigant's misconduct." *Lewis v. BCI Servs., LLC*, Civil Action No. 11–4661, 2013 U.S. Dist. LEXIS 116807, at *4–5 (D.N.J. Aug. 19, 2013) (citations omitted).

In the Third Circuit, the judicial estoppel doctrine does not contain a requirement that a party must have benefitted from their prior position in order to be judicially estopped from subsequently asserting an in-

consistent one. *BCI Servs.*, 2013 U.S. Dist. LEXIS 116807, at *5 (citing *Ryan Operations G.P. v. Forrest Paint Co., Inc.*, 81 F.3d 355, 361 (3d Cir. 1996)).

The Debtor has engaged in egregious conduct throughout this bankruptcy case, culminating in his disclosure of a 2012 W-2 at the end of mediation, despite having informed the Trustee and the Bankruptcy Court prior to mediation that he had "fulfilled his obligations." The Debtor has also received his discharge over the Trustee's objection because, in part, the Debtor persuaded the Bankruptcy Court that the Debtor timely complied with all of his obligations, when in fact, he had not. The Debtor helped obtain his discharge by stating one thing that he complied with all of his disclosure obligations to the Bankruptcy Court, now the Debtor appears to be seeking to protect nearly $1.7 million in disputed funds in a retirement account by introducing a document that allegedly protects a portion of those funds for one year. The first element is met. The Debtor has clearly taken two inconsistent positions. The second element is easily met because permitting the Debtor's behavior, non-disclosure of key information (i.e. ninety (90) day preference payments not listed on his petition and the sudden disclosure of the 2012 W-2) and complying with his obligations as a debtor, would permit the Debtor to discharge all of his debts, and retain nearly $1.7 million by producing exculpatory evidence previously intentionally withheld from the Trustee.

Finally, there is no lesser remedy available to the Trustee. This Court must bar the Debtor from using any evidence, documentary or otherwise, including without limitation, any expert analysis that relied on such documents not previously disclosed to the Trustee, that may assist the Debtor in opposing the Trustee's litigation.

B. Equitable Estoppel Applies in this Case

The Trustee submits that equitable estoppel applies here.

"Parties claiming equitable estoppel must establish that (1) a representation of fact was made to them, (2) upon which they had a right to rely, and (3) the denial of the represented fact by the party making the representation would result in injury to the relying party." *In re Rfe Indus.*, 283 F.3d 159, 164 (3d Cir. 2002) (citations omitted).

The Debtor repeatedly made representations under penalty of perjury, that he produced all documents/information to the Trustee, which the Trustee relied upon, which in turn permits the Debtor, to shield nearly $1.7 million from his creditors.

CONCLUSION

WHEREFORE, the Appellant respectfully requests that this Court enter an order reversing the District Court's affirmance of the Bankruptcy Court.

Respectfully submitted,

Dated: January 24, 2024

By: /s/ Richard J. Corbi

Richard J. Corbi
The Law Offices of Richard J. Corbi PLLC
1501 Broadway, 12th Floor
New York, New York 10036
Telephone: (646) 571-2033
Email: rcorbi@corbilaw.com
Special Counsel for Appellant

Brian T. Crowley
McDonnell Crowley, LLC
115 Maple Avenue
Red Bank, NJ 07701
Telephone: (732) 383-7233
Fax: (732) 383-7531
Email: bcrowley@mchfirm.com
Counsel for Appellant

CERTIFICATE OF BAR MEMBERSHIP

I certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit. See 3d Cir. R. 28.3(d) & 46.1(e).

Dated: January 24, 2024 By: /s/ Richard J. Corbi

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

> This Brief complies with the type-volume limitation set forth in this Courts order entered on January 10, 2024 (docket no. 15) providing that this Brief could not contain no more than 18,000 words because it contains **17,714** words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).
>
> This Brief complies with the typeface and typestyle requirements of Federal Rule of Appellate Procedure 32(a)(5) – (6) because it has been prepared in a proportionately spaced typeface using TypeLaw's Legal Text Editor in 14-point Century Schoolbook font.

Pursuant to Local Rule 31.1(c), I certify the following:

> This electronic submission is free of viruses.
>
> The text of this electronic brief is identical to the text in the paper copies.

Dated: January 24, 2024 By: /s/ Richard J. Corbi

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **APPELLANT'S OPENING BRIEF** with the Clerk of the Court by using the Appellate CM/ECF system on January 24, 2024. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 24, 2024 By: /s/ Richard J. Corbi

No. 23-2944

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOHN M. MCDONNELL, as Chapter 7 Trustee,

Plaintiff - Appellant,

v.

ERIC S. GILBERT,

Defendant - Appellee.

On Appeal from the United States District Court
for the District of New Jersey
No. 22-cv-05274
Hon. Georgette Castner

APPENDIX

Richard J. Corbi
The Law Offices of Richard J. Corbi PLLC
1501 Broadway, 12th Floor
New York, NY 10036
(646) 571-2033
rcorbi@corbilaw.com

Brian T. Crowley
McDonnell Crowley, LLC
115 Maple Avenue
Red Bank, NJ 07701
(732) 383-7233
bcrowley@mchfirm.com

Attorneys for Plaintiff - Appellant
JOHN M. MCDONNELL, as Chapter 7 Trustee

Table of Contents

Exhibit	Description	Date	Vol.	Page
15	Appellant's Opening Brief (Strike Order Appeal (Doc. No. 8)	11/16/2022	3	Appx 311
16	Appellant's Retirement Account Brief (Doc. No. 19)	11/15/2022	3	Appx 368
17	Appellant Obj. to Dimiss and Consolidate	10/31/2022	3	Appx 440
18	Appellees Motion to Dimiss Appeal 5910 and Obj. Consolidate	10/24/2022	4	Appx 595
19	Motion to Consolidate Appeals (District Court)	10/07/2022	4	Appx 623
20	Notice of Appeal of Order Shortening Time (Adv. Pro. Doc. No. 72)	10/05/2022	4	Appx 640
21	Notice of Appeal of Strike Record Order (Adv. Pro. Doc. No. 73)	10/05/2022	4	Appx 652
22	Order Granting in part striking in part record	10/05/2022	4	Appx 662
23	Order Granting Mot. to Strike (Adv. Pro. Doc. No. 70)	10/05/2022	4	Appx 665
24	Hearing Transcript Strike Record	10/04/2022	4	Appx 668
25	Trustee's Obj. to Strike Record (Adv. Pro. Doc. No. 69)	09/30/2022	4	Appx 688
26	Notice of Scheduled Hering (Adv. Pro. Doc. No. 62)	09/22/2022	4	Appx 764

Exhibit	Description	Date	Vol.	Page
27	Order Granting Shortened Time Hearing (Adv. Pro. Doc. No. 65)	09/22/2022	4	Appx 765
28	Trustee's Objection to Strike Record (Adv. Pro. Doc. No. 64)	09/21/2022	4	Appx 769
29	Debtor's Motion to Shorten Notice for Strike Record (Adv. Pro. Doc. No. 63)	09/20/2022	4	Appx 795
30	Debtor's Motion to Strike Record (Adv. Pro. Doc. No. 61)	09/16/2022	4	Appx 801
31	Trustee's Designation of Record (Strike Appeal) (Adv. Pro. Doc. No. 57)	09/08/2022	4	Appx 817
32	Notice of Appeal	08/26/2022	5	Appx 842
33	Notice of Appeal Retirement Accounts (Adv. Pro. Doc. No. 51)	08/26/2022	5	Appx 889
34	Bankruptcy Opinion Dismiss Complaint (Adv. Pro. Doc. No. 46)	08/23/2022	5	Appx 936
35	Order Dismissing Amended Complaint (Adv. Pro. Doc. No. 47)	08/23/2022	5	Appx 971
36	June 21, 2022 Hearing Transcript (Adv. Pro. Doc. No. 43)	07/01/2022	5	Appx 974
37	Debtor's Reply to Opp. to MTD (Adv. Pro. Doc. No. 42)	06/17/2022	5	Appx 990
38	Trustee's Opp. to MTD Amended Complaint (Adv. Pro. Doc. No. 41)	06/14/2022	5	Appx 994

Exhibit	Description	Date	Vol.	Page
39	May 17, 2022 Hearing Transcript (Adv. Pro. Doc. No. 39)	06/03/2022	5	Appx 1080
40	Debtor's MTD Amended Complaint (Adv. Pro. Doc. No. 38)	05/31/2022	5	Appx 1091
41	Trustee's Letter (Main Case Doc. No. 90)	05/13/2022	6	Appx 1125
42	Trustee's Amended Complaint (Adv. Pro. Doc. No. 32)	03/10/2022	6	Appx 1134
43	Order re TRO and MTD (Adv. Pro. Doc. No. 30)	03/07/2022	6	Appx 1185
44	Feb. 22, 2022 Hearing Trans. (Adv. Pro. Doc. No. 28)	02/28/2022	6	Appx 1190
45	Order Granting Ex-Wife MTD (Adv. Pro. Doc. No. 26)	02/22/2022	6	Appx 1216
46	Debtor's Reply Letter to MTD (Adv. Pro. Doc. No. 24)	02/18/2022	6	Appx 1219
47	Lender's Letter re MTD (Adv. Pro. Doc. No. 25)	02/18/2022	6	Appx 1237
48	Trustee's Opposition to MTDs (Adv. Pro. Doc. No. 23)	02/15/2022	6	Appx 1239
49	Debtor's Ex-Wife MTD (Adv. Pro. Doc. No. 22)	02/01/2022	6	Appx 1312
50	Debtor's Motion to Dismiss (Adv. Pro. Doc. No. 21)	02/01/2022	7	Appx 1322
51	Debtor's Change of Address (Main Case Doc. No. 84)	01/28/2022	7	Appx 1546
52	Hearing Transcript (Adv. Pro. Doc. No. 19)	01/24/2022	7	Appx 1547

Exhibit	Description	Date	Vol.	Page
53	Order Scheduling Briefing Schedule (Adv. Pro. Doc. No. 16)	01/14/2022	7	Appx 1579
54	Order Granting TRO (Adv. Pro. Doc. No. 14)	01/12/2022	7	Appx 1583
55	Debtor's Letter to TRO (Adv. Pro. Doc. No. 9)	01/10/2022	7	Appx 1588
56	Order Granting Hearing on Shortened Notice (Adv. Pro. Doc. No. 7)	01/10/2022	7	Appx 1593
57	Adversary Complaint (Main Case Doc. No. 76)	01/09/2022	8	Appx 1596
58	Complaint (Adv. Pro. Doc. No. 5)	01/09/2022	8	Appx 1619
59	Declaration in Support of Complaint (Adv. Pro. Doc. No. 1)	01/09/2022	9	Appx 1642
60	Motion for TRO (Adv. Pro. Doc. No. 2)	01/09/2022	10	Appx 2563
61	Motion to Shorten time for TRO (Adv. Pro. Doc. No. 3)	01/09/2022	10	Appx 2583
62	Debtor's Bankruptcy Petition (Main Case Doc. No. 1)	04/01/2021	10	Appx 2589

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

In re: ERIC S. GILBERT, Debtor.	Civil Action No. 22-05274 (GC) (Consolidated with Civil Action Nos. 22-05910 & 22-05911) On Appeal from Bankruptcy Case No. 21-12725 (KCF) Adversary Pro. No. 22-01005 (KCF)
JOHN M. McDONNELL, Chapter 7 Trustee, Appellant, v. ERIC S. GILBERT, Appellee.	

NOTICE OF APPEAL

The appellant, John M. McDonnell, the chapter 7 trustee for the estate of Eric S. Gilbert, the chapter 7 debtor, hereby appeals to the Third Circuit Court of Appeals, from the consolidated opinion (the "**Opinion**") and order (the "**Order**") of United States District Court for the District of New Jersey, entered in this case on September 29, 2023, which affirmed and dismissed the following appeals of the Appellant: (i) the *Order Granting Motion of Defendant Eric S. Gilbert, Chapter 7 Debtor, to Dismiss All Counts of First Amended Adversary Complaint filed at Adv. Pro. No. 22-1005 (KCF)* [Adv. Pro. No. 22-01005; Adv. Pro. Doc. No. 47], filed and entered on August 23, 2022, which is based upon the *Memorandum Opinion* [Adv. Pro. No. 22-01005; Adv. Pro. No. 46], by the United States Bankruptcy Court for the District of New Jersey; (ii) the *Order Shortening Time Period for Notice, Setting Hearing and Limiting Notice* [Adv. Pro. No. 22-01005; Adv. Pro. Doc. No. 65], filed and entered on September 22, 2022, by the United States Bankruptcy

Court for the District of New Jersey; and (iii) the *Order Granting, in Part, Motion to Strike Items from Designation of Record on Appeal* [Adv. Pro. No. 22-01005; Adv. Pro. Doc. No. 70], filed and entered on October 5, 2022, by the United States Bankruptcy Court for the District of New Jersey.

A copy of the Opinion and Order is attached hereto as **Exhibit A**.

The names of the parties and parties-in-interest to the Order and Opinion appealed from and the names, address and telephone numbers of their respective attorneys are as follows:

Party	Counsel
John M. McDonnell, chapter 7 trustee, appellant	**MCDONNELL CROWLEY, LLC** Brian T. Crowley 115 Maple Avenue Red Bank, NJ 07701 Tel: (732) 383-7233 Fax: (732) 383-7531 Email: bcrowley@mchfirm.com
John M. McDonnell, chapter 7 trustee, appellant	**THE LAW OFFICES OF RICHARD J. CORBI PLLC** Richard J. Corbi 1501 Broadway, 12th Floor New York, NY 10036 Tel: (646) 571-2003 Email: rcorbi@corbilaw.com
Eric S. Gilbert, chapter 7 debtor, appellee	**McMANIMON, SCOTLAND & BAUMANN, LLC** Andrea Dobin Michele M. Dudas 427 Riverview Plaza Trenton, NJ 08611 Tel: (609) 695-6070 Fax: (973) 622-7333 Email: adobin@msbnj.com Email: mdudas@msbnj.com
Lakeland Bank, successor by merger to 1st Constitution Bank, party-in-interest	**SAIBER LLC** John M. August 18 Columbia Turnpike, Suite 200 Florham Park, NJ 07932 Tel: (973) 622-3333 Fax: (973) 622-3349 Email: jaugust@saiber.com

Party	Counsel
Julia B. Gilbert, party-in-interest	**GORSKI and KNOWLTON, P.C.** Allen I. Gorski 311 White Horse Avenue Suite A Hamilton, NJ 08610 Tel: (609) 964-4000 Email: agorski@gorskiknowlton.com
Known Third Party Administrator of Debtor's Retirement Plans, party-in-interest	**NPPG** Michael M. Salerno 494 Sycamore Ave., Suite 100 Shrewsbury, NJ 07702 Tel: (732) 758-1577 ext. 239 Fax: (732) 758-1582 Email: msalerno@nppg.com
Voya Financial, party-in-interest	**O'TOOLE + O'TOOLE, PLLC** Andrew D. O'Toole 280 Trumbull Street 15th Floor Hartford, CT 06103 Tel: (860) 519-5805 Fax: (914) 232-1599 Email: aotoole@otoolegroup.com
Prager Metis, party-in-interest	**MARKS, O'NEILL, O'BRIEN, DOHERTY & KELLY, P.C.** Kathryn T. Siegeltuch Cherry Tree Corporate Center Suite 501 535 Route 38 East Cherry Hill, NJ 08002 Tel: (856)-663-4300 Email: ksiegeltuch@moodklaw.com
Mayer Brown LLP, party-in-interest	**MAYER BROWN LLP** Lori A. Zahalka 71 South Wacker Drive Chicago, Illinois 60606 Tel: (312) 782-0600 Fax: (312) 706-8608 Email: lzahalka@mayerbrown.com
McConnell Valdés LLC, party-in-interest	**MCCONNELL VALDÉS LLC** Nayuan Zouairabani Trinidad 270 Muñoz Rivera Ave. San Juan, Puerto Rico 00918 Tel: (787) 250-5619 Fax: (787) 759-8282 Email: nzt@mcvpr.com
Andrew Vera, United States Trustee, District of New Jersey, party-in-interest	**OFFICE OF THE UNITED STATES TRUSTEE** One Newark Center, Suite 2100

Party	Counsel
	Newark, NJ 07102 Tel: (973) 645-3014 Fax: (973) 645-5993 Email: USTPRegion03.NE.ECF@usdoj.gov

Dated: October 26, 2023
Red Bank, New Jersey

MCDONNELL CROWLEY, LLC
/s/ Brian T. Crowley
Brian T. Crowley
115 Maple Avenue
Red Bank, NJ 07701
Tel: (732) 383-7233
Fax: (732) 383-7531
Email: bcrowley@mchfirm.com

Counsel to John M. McDonnell, Chapter 7 Trustee/Appellant

-and-

THE LAW OFFICES OF RICHARD J. CORBI PLLC
/s/ Richard J. Corbi
Richard J. Corbi (admitted *pro hac vice*)
1501 Broadway, 12th Floor
New York, New York 10036
Telephone: (646) 571-2033
Email: rcorbi@corbilaw.com

Special Counsel to John M. McDonnell, Chapter 7 Trustee/Appellant

Exhibit A

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE: ERIC S. GILBERT, JOHN M. MCDONNELL, Chapter 7 Trustee, Appellant, v. ERIC S. GILBERT, Chapter 7 Debtor, Appellee.	Civil Action No. 22-05274 (GC) (Consolidated with Civil Action Nos. 22-05910 & 22-05911) On Appeal from Bankruptcy Case No. 21-12725 (KCF) Adversary Pro. No. 22-01005 (KCF) **OPINION**

CASTNER, District Judge

THIS MATTER comes before the Court upon three appeals brought by Chapter 7 Trustee John M. McDonnell from three different orders issued by Bankruptcy Court Judge Kathryn C. Ferguson in Adversary Proceeding Number 22-01005. (Civ. Nos. 22-05274 (Appeal of Dismissal Order), 22-05910 (Appeal of Shortening Time Order), and 22-05911 (Appeal of Strike Order).) After completion of briefing, the Court consolidated the appeals on August 23, 2023, at Civil Action Number 22-05274, the lead case. The Court has carefully considered the parties' submissions, and for the reasons set forth below, and other good cause shown, **AFFIRMS** each of the Bankruptcy Court's orders.

I. BACKGROUND

At root, this Chapter 7 bankruptcy dispute centers on whether the monies in two retirement accounts are excluded from the debtor's estate under 11 U.S.C. § 541(c)(2).

A. PROCEDURAL BACKGROUND

On April 1, 2021, Appellee Eric S. Gilbert (the "Debtor") filed a Chapter 7 petition that listed his interest in two retirement accounts: (1) a 401(a) defined benefit plan account held by Voya Financial with a balance of $1,607,536.99, and (2) a 401(k) plan account held by Voya Financial with a balance of $47,031.48. (Civ. No. 22-05274, ECF No. 19-6 at 109-160.[1])

On April 5, 2021, Appellant John M. McDonnell (the "Trustee") was appointed Trustee for the Debtor's estate. (ECF No. 19-4 at 21.)

The main bankruptcy proceeding has a protracted history. The present appeal arises from an adversary complaint that the Trustee filed in January 2022, Adversary Proceeding Number 22-01005, against the Debtor and the Debtor's ex-wife seeking to have the two retirement accounts ruled property of the estate that can be used to pay holders of claims. Specifically, the Trustee appeals the Bankruptcy Court's August 23, 2022 Order that granted the Debtor's motion to dismiss all counts in the adversary complaint ("Dismissal Order"). (*See generally* ECF No. 1.)

After the Trustee filed his notice of appeal of the Dismissal Order, the Debtor moved before the Bankruptcy Court to strike certain items that the Trustee was alleged to have improperly designated as part of the appellate record. (Civ. No. 22-05911, ECF No. 8-1 at 29.) The Debtor also moved to shorten the time for a hearing on the motion to strike. (Civ. No. 22-05910, ECF No. 8-1 at 46.) The Bankruptcy Court granted the motion to shorten ("Shortening Time Order") and then, after briefing and argument, granted the motion to strike in part ("Strike Order"). The Trustee separately appeals each of those orders. (*See* Civ. No. 22-05910, ECF No. 1 (Appeal of

---

[1] Because the present matter involves filings in three separate dockets, the Court notes the civil action number of the docket before the specific record cite. Once a civil action number is cited, subsequent record cites refer to that docket until a different civil action number is cited. Page numbers for record cites (*i.e.*, "ECF Nos.") refer to the page numbers stamped by the Court's e-filing system and not the internal pagination of the parties.

Shortening Time Order); Civ. No. 22-05911, ECF No. 1 (Appeal of Strike Order).)

On October 7, 2022, the Trustee moved before this Court to consolidate the three appeals. (Civ. No. 22-05274, ECF No. 8.) The Trustee also asked to delay briefing on the appeal of the Dismissal Order until the Court issued a decision on the appeal of the Shortening Time Order and Strike Order. (*Id.*) The Debtor opposed and cross-moved, asking the Court to dismiss the appeal of the Shortening Time Order because it was from an interlocutory order and the Trustee had failed to obtain leave to appeal. (ECF No. 15-1 at 12-14.) The Court declined to delay, and after briefing was complete, the Court consolidated the appeals for purposes of the present opinion, denying without prejudice the Debtor's cross-motion to dismiss the appeal of the Shortening Time Order. (ECF Nos. 12 & 28.)

B. Bankruptcy Court's Rulings

1. Bankruptcy Court's Dismissal Order

On February 1, 2022, both the Debtor and the Debtor's ex-wife moved to dismiss the Trustee's original Complaint in Adv. Pro. No. 22-01005. The ex-wife's motion was granted with prejudice, and the Debtor's motion was granted in part. The Trustee was permitted to amend his complaint. (Civ. No. 22-05274, ECF No. 19-5 at 99-101, 127-31.) Once the Trustee's First Amended Adversary Complaint was filed, the Debtor again moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), and the Bankruptcy Court issued the Dismissal Order and accompanying Memorandum Opinion on August 23, 2022, dismissing the Trustee's claims against the Debtor with prejudice.[2] (ECF No. 1 at 10-44.)

The Bankruptcy Court dismissed Count One (Declaratory Judgment) on the ground that the two retirement accounts are excluded from property of the estate in accordance with 11 U.S.C.

---

[2] Judge Ferguson's opinion can be found at *In re Gilbert*, 642 B.R. 687 (Bankr. D.N.J. 2022).

§ 541(c)(2). *First*, the court found that the accounts are trusts that the Debtor has a beneficial interest in. (*Id.* at 16.) *Second*, it found that the accounts contain restrictions on transfer, *i.e.*, anti-alienation provisions pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq*. (*Id.*) *Third*, it found that the restrictions on transfer are enforceable under applicable nonbankruptcy law, *i.e.*, the federal ERISA statute. (*Id.* at 17.)

In response to the Trustee's argument that the accounts must also be "tax qualified" under the Internal Revenue Code ("IRC") to be excluded from the estate's property, the Bankruptcy Court identified no support for such a requirement in the plain text or legislative history of Section 541 of the Bankruptcy Code, and the court cited case law for its holding that "[o]nce one nonbankruptcy law (ERISA) provide[s] the enforcement of a restriction on transfer[,] there [i]s no reason to look for another nonbankruptcy law (IRC)." (*Id.* at 17-21 (citing *Patterson v. Shumate*, 504 U.S. 753 (1992)).)

As to Count Two (Preliminary Injunction and Temporary Restraining Order) seeking to enjoin the Debtor from making distributions from the two retirement accounts, the Bankruptcy Court maintained the restraints already in place and noted that the Trustee had a pending motion that the court would utilize to determine if a stay pending appeal was warranted. (*Id.* at 28-29.)

As to Count Three (Preferential Transfers – 11 U.S.C. § 547(b)), the Bankruptcy Court viewed the Trustee's attempt to "claw back" the funds in the retirement accounts as "baffling" and "conceptually flawed." (*Id.* at 30.) The court explained that there was nothing to "claw back" because the funds were in the Debtor's retirement accounts at the time he filed the Chapter 7 petition, and if they had been deemed property of the estate, the Trustee "would have control over th[e] accounts" without the need for a preference action. (*Id.*) The court further found that, in any

event, the Trustee's allegations did not establish the elements for a preference action, namely, that there was a "transfer" or a transfer "of an interest of the debtor in property." (*Id.* at 30-38.)

As to Counts Four (Actual Fraudulent Conveyance – 11 U.S.C. § 548(a)(1)(A)) and Five (Constructive Fraudulent Conveyance – 11 U.S.C. § 548(a)(1)(B)), the Bankruptcy Court found that they suffered from the same defects as Count Three, that is, the Trustee had not "properly allege[d] that there was a 'transfer' and that the transfer was 'of an interest in the debtor in the property.'" (*Id.* at 38-39.)

Finally, as to Count Six (11 U.S.C. § 544 and 11 U.S.C. § 550(a)), the Bankruptcy Court wrote that it was "plagued" by similar faults as the other counts. (*Id.* at 39-40.) Specifically, the Trustee's attempt to use the IRS as the "triggering creditor" was problematic because the IRS was not a listed creditor and there were no allegations that "the Debtor had an actual tax liability during the 10-year period preceding filing." (*Id.* at 40-42.) The court wrote that, in any event, "even if the IRS [were] a legitimate triggering creditor all that accomplishes is providing the Trustee with a ten-year look back period for avoidable transfers," and similar to the other counts, there was no transfer "[]sufficient to support an avoidance action." (*Id.* at 42.)

In dismissing the claims with prejudice, the Bankruptcy Court concluded that "[g]iven the pervasive problems with th[e] complaint . . . further amendment would be futile." (*Id.* at 43.) The court acknowledged that the creditors were faced with "essentially a no-asset case" absent access to the retirement funds, but it wrote that it did not have "the authority to alter . . . the Bankruptcy Code to better accommodate the Trustee's idea of justice." (*Id.* at 44.)

2. *Bankruptcy Court's Shortening Time Order*

On September 8, 2022, after the Bankruptcy Court issued its Dismissal Order, the Trustee filed his statement of issues and designation of the record for appeal in accordance with Federal

Rule of Bankruptcy Procedure 8009(a). (Civ. No. 22-05910, ECF No. 8-1 at 4.) On September 16, 2022, the Debtor moved before the Bankruptcy Court for an order striking portions of the record that the Trustee designated for appeal. (*Id.* at 29.) The motion was initially assigned a return date of October 18, 2022, and the Trustee's opposition was due on October 11, 2022, but the return date was then changed to October 25. (*Id.* at 45.)

On September 20, 2022, the Debtor applied to shorten the time for the motion to strike to be heard. (*Id.* at 46.) The Trustee opposed. (*Id.* at 52.) The Bankruptcy Court granted the application to shorten on September 22, 2022, setting a hearing date of October 4, 2022, and a deadline of September 30, 2022, for the Trustee's opposition. (*Id.* at 78-81.)

3. *Bankruptcy Court's Strike Order*

On October 4, 2022, the Bankruptcy Court heard oral argument on the Debtor's motion to strike certain documents that the Trustee had designated as part of the appellate record. (Civ. No. 22-05911, ECF No. 8-1 at 170.) In an oral opinion, the Bankruptcy Court granted the motion.

The court began by explaining that Federal Rule of Bankruptcy Procedure 8009(e)(1) allows bankruptcy judges to strike items "improperly designated as part of the record on appeal." (*Id.* at 179-80.) The court noted that it was "mindful that [it] should only strike documents that were not filed in a case" and "have no bearing on the appeal," and if in doubt, it is "better to err on the side of caution" by including the items. (*Id.* at 180 (citing *In re Blasingame*, 559 B.R. 692, 701 (B.A.P. 6th Cir. 2016)).)

The court identified three categories of documents that could be stricken: (1) documents from a *separate* adversary proceeding challenging the discharge of the Debtor's bankruptcy estate under Section 727 of the Bankruptcy Code; (2) documents from the main bankruptcy case that "were not presented . . . in either written or oral argument for reliance in reaching" the Dismissal

Order and did not relate to whether the retirement accounts were property of the estate; and (3) documents that "were not referenced in any written or oral argument on the issue on appeal, were not relied upon [by] the Court by way of judicial notice on this issue, and [we]re also not relevant to the issue on appeal." (*Id.* at 170-85.)

The Bankruptcy Court emphasized that the parties had presented three items in connection with their briefing of the 12(b)(6) motion to dismiss: the Debtor's motion package, the Trustee's opposition brief with exhibits attached, and the Debtor's reply. (*Id.* at 183-84.) The court stated that all of these items would be part of the record on appeal along with the Bankruptcy Court's opinion, but it found unnecessary other documents that the Trustee wanted to include. (*Id.* at 184.)

As to documents that the Trustee tried to include from a separate adversary proceeding under Section 727 of the Bankruptcy Code, the Bankruptcy Court found that those documents should be stricken because the appeal of that separate proceeding was pending before a different district court "and there ha[d] not been, nor conceivably could there be, any merger of that appeal with the current appeal." (*Id.* at 181.) The court underscored that it had not relied on any of the facts in the complaint of that separate proceeding in reaching its Dismissal Order. (*Id.*) The court further underscored that "[t]he legal issues in the two adversary proceedings are not even remotely related. One adversary proceeding relates to a discharge under Section 727 of the Bankruptcy Code" while "[t]he other seeks [a] declaratory judgment regarding property of the bankruptcy estate, and contains counts to bring money into the estate." (*Id.*)

As to other documents, including from the main bankruptcy case, that were struck, the Bankruptcy Court saw no reason to include documents that had not been referenced by the parties in the briefing on the motion to dismiss and, therefore, had not been considered by the court in reaching its decision that was on appeal. (*Id.* at 183-84.) The court also found said documents

"not relevant to the issue on appeal" and not "necessary for a general understanding of the case." (*Id.* at 184-85 ("[T]here is no doubt that the documents referenced were neither presented to the Court in connection with this complaint, nor relied upon by this Court in dismissing the complaint.").)

II. LEGAL STANDARD

In cases originating in the Bankruptcy Court, district courts occupy the first level of appellate review. 28 U.S.C. § 158(a)(1) grants a district court jurisdiction "to hear appeals from final judgments, orders and decrees" of the bankruptcy court. A court considering such an appeal "review[s] the bankruptcy court's legal determinations *de novo*, its factual findings for clear error, and its discretionary decisions for abuse of discretion." *In re Imerys Talc Am., Inc.*, 38 F.4th 361, 370 (3d Cir. 2022) (quoting *In re Somerset Reg'l Water Res., LLC*, 949 F.3d 837, 844 (3d Cir. 2020)). And a court "must break down mixed questions of law and fact, applying the appropriate standard to each component." *Meridian Bank v. Alten*, 958 F.2d 1226, 1229 (3d Cir. 1992) (quoting *In re Sharon Steel Corp.*, 871 F.2d 1217, 1222 (3d Cir. 1989)). The district court "may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings." *In re Holmes*, 603 B.R. 757, 770 (D.N.J. 2019) (citation omitted).

III. DISCUSSION

A. Shortening Time Order

The Trustee objects to the Bankruptcy Court's Shortening Time Order that set a hearing date of October 4, 2022, and an opposition deadline of September 30, 2022, on the Debtor's September 16, 2022 motion to strike certain items that the Trustee designated as part of the appellate record. (Civ. No. 22-05910, ECF No. 8.) The Trustee argues that the Debtor's request

to shorten was a "litigation tactic" designed to distract the Trustee from his appellate brief then due on October 11, 2022,[3] in the appeal of the Dismissal Order, and the Bankruptcy Court should not have issued the Shortening Time Order because there was no "cause" for it. (*Id.* at 12-15.)

The Debtor submits that, contrary to the Trustee's "conspiracy theory," the request to shorten was filed when it was so that the record would be finalized before appellate briefing was due in the appeal of the Dismissal Order. (ECF No. 9 at 13-15.) Regardless, the Debtor argues that the appeal of the Shortening Time Order should be dismissed because the Trustee never sought leave to appeal the interlocutory order, and even if he had, the appeal is moot because the relief requested (reversing the order) is "impossible" now that the hearing has occurred. (*Id.* at 18-19.)

Even if the Court were to view the appeal of the Shortening Time Order as properly brought and not moot, the Trustee has offered no basis to find that the Bankruptcy Court abused its discretion. *See* Fed. R. Bankr. P. 9006(c)(1) (a bankruptcy court "for cause shown may in its discretion with or without motion or notice order [a] period reduced"). The Trustee was given fourteen days between when the motion to strike was filed (September 16) and when his opposition was due under the shortened deadline (September 30), and the only alleged prejudice the Trustee has identified is having to file his opposition sooner than otherwise required. While the Court appreciates the inconvenience caused by a shortened deadline, the Court does not find that the Trustee was substantially prejudiced, especially when there was a legitimate basis for hearing the motion to strike on an expedited basis: to finalize the appellate record before briefing in the appeal of the Dismissal Order was due. *See In re Asbestos Prod. Liab. Litig. (No. VI)*, 921 F.3d 98, 109

---

[3] The Court granted the Trustee an extension from October 11, 2022, until November 15, 2022, to submit a revised brief in support of the Trustee's appeal of the Dismissal Order, which should have cured any prejudice – if any – caused by the Bankruptcy Court's hearing the motion to strike on an expedited schedule. (Civ. No. 22-05274, ECF No. 18.)

(3d Cir. 2019) ("We will not interfere with a . . . court's control of its docket except upon the clearest showing that the procedures have resulted in actual and substantial prejudice to the complaining litigant." (quoting *In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 817 (3d Cir. 1982))). Accordingly, the Court affirms the Bankruptcy Court's Shortening Time Order.

B. STRIKE ORDER

The Trustee objects to the Strike Order on multiple grounds: (1) this Court, not the Bankruptcy Court, should have ruled on any motion to strike items designated for appeal; (2) the Bankruptcy Court ignored the opinion of the United States Court of Appeals for the Third Circuit in *In re Indian Palms Assocs., Ltd.*, 61 F.3d 197 (3d Cir. 1995), which allows a district court on appeal to draw from the record of the underlying bankruptcy proceeding; and (3) the items stricken "are necessary to provide . . . the complete picture of the case and the complex and nuanced issues." (Civ. No. 22-05911, ECF No. 8 at 23-36.)

The Debtor submits that the Bankruptcy Court correctly struck the items improperly designated on appeal, and he emphasizes that the issues to be considered in the appeal of the Dismissal Order are largely legal, *i.e.*, whether the two retirement accounts are or are not property of the bankruptcy estate under the Bankruptcy Code. (ECF No. 9 at 17-19.) Particularly on a motion to dismiss, the Debtor argues that going beyond what was submitted to and considered by the Bankruptcy Court is "incomprehensible." (*Id.* at 19.)

Having canvassed the record and considered the arguments, the Court finds that the Bankruptcy Court did not err as a matter of law or abuse its discretion in granting the motion to strike certain documents that the Trustee improperly designated as part of the appellate record.

Contrary to the Trustee's contention, the Bankruptcy Court was authorized by Federal Rule of Bankruptcy Procedure 8009(e)(1) to rule on the Debtor's motion to strike. The Bankruptcy

Rule states that "[i]f any difference arises about whether the record accurately discloses what occurred in the bankruptcy court, the difference must be submitted to and settled by the bankruptcy court and the record conformed accordingly." Fed. R. Bankr. P. 8009(e)(1). It further states that "[i]f an item has been improperly designated as part of the record on appeal, a party may move [before the bankruptcy court] to strike that item." *Id.* While the district court can also correct the record on appeal "in other ways," *see* Fed. R. Bankr. P. 8009(e)(2), nothing prohibits or militates against a bankruptcy court deciding a motion to strike items improperly designated on appeal, and it was appropriate for the Bankruptcy Court in this case to do so. *See also* Bankr. Proc. Manual § 8009:6 (2023 ed.) ("The docketing of an appeal in the district court does not divest the bankruptcy court of jurisdiction to determine the contents of the record on the appeal.").

Furthermore, the Third Circuit's opinion in *Indian Palms* does not alter the conclusion. In *Indian Palms*, the Court of Appeals considered whether a district court had erred in declining to strike documents that had not been presented to or considered by the bankruptcy court in connection with a motion to lift a stay. 61 F.3d at 204. The Court of Appeals noted precedent holding "that a bankruptcy judge deciding an adversary proceeding, which is an independent litigation, and an appellate court reviewing that decision, cannot properly use documents filed only in the underlying bankruptcy case unless that use can be justified under the judicial notice doctrine." *Id.* Notwithstanding this precedent, the Court found that the district court had "properly looked to the record of the underlying bankruptcy case" and "outside the record developed on . . . [the] stay motion" when the documents "were used for the sole purpose of determining whether [a party] had waived an argument it sought to make in its motion for reconsideration." *Id.* at 205.

Here, the Bankruptcy Court struck documents that the Trustee sought to include from a separate adversary proceeding as well as from the main bankruptcy case not simply because they

had not been presented to the court or considered by the court when it issued the Dismissal Order (the order on appeal) but also because the Bankruptcy Court found these documents "not relevant to the issue[s] on appeal" and also not "necessary for a general understanding of the case." (ECF No. 8-1 at 183-85.) Such a finding is consistent with the Third Circuit's approach in *Indian Palms*.

Finally, the Trustee argues that the documents stricken are "necessary" for a complete picture of this complex case, but he fails to mention that even excluding the documents struck by the Bankruptcy Court, the record on appeal consists of six volumes exceeding 1,800 pages. Indeed, the Court has reviewed the Trustee's chart of documents stricken as well as the reasons the Trustee provides for why he believes those documents should be included on appeal. Many of the documents appear intended to shape the Court's perception of the Debtor and how the Debtor conducted himself in mediation or during the underlying litigation and are largely irrelevant to the legal issues the Court must now decide. (ECF No. 8 at 37-54.) The Court sees little value in such documents on appeal of the grant of a 12(b)(6) motion. *See Simko v. United States Steel Corp*, 992 F.3d 198, 201 (3d Cir. 2021) ("In reviewing a dismissal under Federal Rule of Civil Procedure 12(b)(6), we 'must consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents.'" (quoting *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010))). Accordingly, the Court affirms the Bankruptcy Court's Strike Order.

C. Dismissal Order

1. Rule 12(b)(6) Standard

Federal Rule of Civil Procedure 12(b)(6) is made applicable to bankruptcy matters via Federal Rule of Bankruptcy Procedure 7012(b), and it requires courts to "accept the factual allegations in the complaint as true, draw all reasonable inferences in favor of the plaintiff, and

assess whether the complaint and the exhibits attached to it 'contain enough facts to state a claim to relief that is plausible on its face.'" *Wilson v. USI Ins. Serv. LLC*, 57 F.4th 131, 140 (3d Cir. 2023) (quoting *Watters v. Bd. of Sch. Directors of City of Scranton*, 975 F.3d 406, 412 (3d Cir. 2020)). "A claim is facially plausible 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Clark v. Coupe*, 55 F.4th 167, 178 (3d Cir. 2022) (quoting *Mammana v. Fed. Bureau of Prisons*, 934 F.3d 368, 372 (3d Cir. 2019)). When assessing the factual allegations in a complaint, courts "disregard legal conclusions and recitals of the elements of a cause of action that are supported only by mere conclusory statements." *Wilson*, 57 F.4th at 140 (citing *Oakwood Lab'ys LLC v. Thanoo*, 999 F.3d 892, 903 (3d Cir. 2021)). The defendant bringing a 12(b)(6) motion bears the burden of "showing that a complaint fails to state a claim." *In re Plavix Mktg., Sales Pracs. & Prod. Liab. Litig. (No. II)*, 974 F.3d 228, 231 (3d Cir. 2020) (citing *Davis v. Wells Fargo*, 824 F.3d 333, 349 (3d Cir. 2016)).

2. *Count One – Declaratory Judgment*

In Count One, the Trustee sought a declaration from the Bankruptcy Court that the Debtor's two retirement accounts are property of the estate that can be used to satisfy the claims of the Debtor's creditors. (Civ. No. 22-05274, ECF No. 19-5 at 173-74.) Dismissing the count, the Bankruptcy Court found that the two retirement accounts are excludable from the estate under 11 U.S.C. § 541(c)(2); thus, they cannot be used to satisfy the creditors' claims. The Trustee argues that the Bankruptcy Court erred as a matter of law for two reasons: *first*, the retirement plans must be subject to ERISA *and* tax qualified under the Internal Revenue Code for the accounts to be

excluded from property of the estate; *second*, alleged "operational defects" in the plans can bring the retirement accounts within the estate. (ECF No. 19 at 22-50.)

After careful review of the Bankruptcy Court's decision, the Trustee's complaint, the record on appeal, as well as the parties' briefing, the Court finds that the Bankruptcy Court did not err in determining that the two retirement accounts are excluded from property of the estate under the Bankruptcy Code.[4]

i. Property Excludable Under § 541(c)(2)

The filing of a petition in bankruptcy creates an estate consisting of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Although the reach of the estate is broad, the Bankruptcy Code carves out certain exclusions and exemptions. Relevant here is § 541(c)(2) that excludes property from the estate that contains:

> A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.
>
> [11 U.S.C. § 541(c)(2).]

Significant litigation has arisen since the enactment of the Bankruptcy Code as to what precisely qualifies as excludable from the estate under § 541(c)(2). Notably, in *Patterson v. Shumate*, the United States Supreme Court resolved a split among the federal Courts of Appeals as to "whether an anti-alienation provision contained in an ERISA-qualified pension plan constitutes a restriction on transfer enforceable under 'applicable nonbankruptcy law,' and

---

[4] Because the Court affirms the Bankruptcy Court on the ground that the retirement accounts are excluded from the estate under § 541(c)(2), it does not reach the parties' arguments as to why the accounts should or should not be exempt under state law. *See Martin v. Leinbach*, Civ. No. 14-04040, 2016 WL 409180, at *4 (M.D. Pa. Feb. 3, 2016) ("This issue of whether the earnings are part of the estate is a threshold issue that must be determined before there can be a determination of whether the earnings are properly exempted.").

whether, accordingly, a debtor may exclude his [or her] interest in such a plan from the property of the bankruptcy estate." 504 U.S. 753, 755 (1992). Prior to *Shumate*, several lower courts had determined that § 541(c)(2)'s reference to "applicable nonbankruptcy law" embraced only state law, not federal law such as ERISA, but the Supreme Court rejected such rulings as incompatible with the plain language of the Bankruptcy Code. *Id.* at 757-58. The Court held that a "natural reading" of "applicable nonbankruptcy law" in § 541(c)(2) as well as a reading of the provision in the context of the Bankruptcy Code as a whole revealed that § 541(c)(2) "encompasses any relevant nonbankruptcy law, including federal law such as ERISA," and the provision must be enforced "according to its terms." *Id.* at 758-59.

Although *Shumate* was intended to foster a uniform understanding as to what interests are excludable under § 541(c)(2), it has unfortunately led to further confusion as to what, if anything, the Supreme Court meant by the term "ERISA-qualified" plan in the *Shumate* opinion. *Id.* at 759 ("ERISA-qualified Plan . . . satisfies the literal terms of § 541(c)(2)."). The confusion stems from the fact that "ERISA qualified" is not a recognized term of art. While retirement plans may be "tax qualified" under the Internal Revenue Code, ERISA has no qualification requirements, and retirement plans are typically referred to as "subject to" or "governed by" ERISA, not "ERISA qualified." *See In re Meinen*, 228 B.R. 368, 378 (Bankr. W.D. Pa. 1998) ("The Supreme Court's use of this particular term has engendered much confusion because '[t]he term 'ERISA qualified' . . . is not a term of art and is not defined in the Bankruptcy Code, the IRC, or ERISA, and . . . it is not even a term used by employee benefit practitioners.'" (cleaned up) (quoting *In re Hall*, 151 B.R. 412, 417 (Bankr. W.D. Mich. 1993))).

As a result, two differing approaches have emerged to determine whether a retirement plan is "ERISA qualified" for purposes of being excluded from a debtor's estate under Section

541(c)(2): (1) some courts have found that a plan governed by ERISA that includes an anti-alienation provision enforceable under ERISA is excludable, and (2) other courts have required such a plan to also be "tax qualified" under the Internal Revenue Code to be excludable.[5] *Id.* at 378 ("Numerous post-*Shumate* courts have adopted the view that the Supreme Court, when referring to an 'ERISA-qualified' plan in *Shumate,* was referring to a plan that is tax qualified under I.R.C. § 401(a), subject to ERISA, and which has an anti-alienation provision as required by ERISA § 206(d)(1). However, an approximately equal number of courts have adopted the competing view that the Supreme Court in *Shumate,* when referring to an 'ERISA-qualified' plan, envisioned a plan that is subject to, or governed by, ERISA, and which contains an anti-alienation clause that is enforceable under ERISA, but not one that necessarily satisfies the tax qualification requirements under I.R.C. § 401(a)." (collecting cases)); *see also* 5 *Collier on Bankruptcy* ¶ 541.27A (16th ed. 2023) ("Courts have applied different tests . . . for determining whether a plan is ERISA-qualified. Courts have generally used either a two-step inquiry or a three-step inquiry to determine whether a plan is subject to ERISA. . . . Even where courts seek to determine whether a plan is tax-qualified, however, that prong of the analysis is generally not determinative.").

The Bankruptcy Court in this case sided with those courts that have held that an interest in a retirement plan that contains an anti-alienation provision enforceable under ERISA may be excluded from the estate even if the plan is not tax qualified under the Internal Revenue Code because ERISA, alone, constitutes "applicable nonbankruptcy law" under Section 541(c)(2). (Civ. No. 22-05274, ECF No. 1 at 17-28.) The court reasoned that "nothing in § 541(c)(2) . . . requires the court to look beyond whether there is an enforceable restriction on transfer and delve into whether the plans comply with the Internal Revenue Code." (*Id.* at 18.) The court was "unwilling"

---

[5] The Third Circuit Court of Appeals has yet to weigh in on this specific issue.

to "rewrite § 541(c)(2)" to require consideration of a plan's tax qualification when Congress has not expressly required such a consideration, even if it is "arguably better policy." (*Id.* at 18-19.)

On appeal, the Trustee does not dispute that the two retirement accounts at issue are trusts that the Debtor has a beneficial interest in nor does the Trustee contest that the plans include an anti-alienation provision enforceable under ERISA. Instead, the Trustee asks this Court to rule that ERISA-governed retirement plans with enforceable restrictions on transfer must *also* be tax qualified under the Internal Revenue Code in order to be excluded from a debtor's estate under Section 541(c)(2) of the Bankruptcy Code. The Court declines this invitation, and absent guidance from either the Third Circuit or the United States Supreme Court, the Court concurs with the Bankruptcy Court that it would be inappropriate to judicially engraft a "tax qualification" requirement onto the plain language of § 541(c)(2), which permits a Debtor's interest in a retirement plan to be excluded from the estate if it contains a restriction on transfer "enforceable under applicable nonbankruptcy law," such as ERISA. *See Shumate*, 504 U.S. at 759 ("Plainly read, the provision encompasses any relevant nonbankruptcy law, including federal law such as ERISA. We must enforce the statute according to its terms.").

This same conclusion has been reached by multiple Courts of Appeals that have examined the issue. In *Matter of Baker*, for example, the Seventh Circuit Court of Appeals held that "[u]nderstanding 'ERISA-qualified' to mean nothing more complex than 'containing the anti-alienation clause required by § 206(d)(1) of ERISA' makes the phrase mesh with the topic of the [*Shumate*] opinion: whether ERISA is 'applicable nonbankruptcy law.'" 114 F.3d 636, 638 (7th Cir. 1997), *as amended on denial of reh'g* (June 4, 1997). Then, in *In re Sewell*, the Fifth Circuit Court of Appeals followed the Seventh Circuit's lead in *Baker*, "[c]oncluding that an ERISA plan's tax qualification is not a prerequisite to exclusion of a participant's beneficial interest from her

bankruptcy estate under § 541(c)(2)." 180 F.3d 707, 709 (5th Cir. 1999). The Fifth Circuit underscored that "[n]owhere in ERISA . . . is there a requirement that, to be an ERISA plan and thus be governed by ERISA, a plan must be tax qualified. Indeed, the converse is true: An ERISA plan that is not or may not be tax qualified nevertheless continues to be governed by ERISA for essentially every other purpose." *Id.* at 711.

Both bankruptcy and district courts in this Circuit have followed the approaches of the Fifth and Seventh Circuits. In *Meinen*, the bankruptcy court rejected the plaintiff's arguments that "the Third Circuit would rule . . . that an interest in a pension plan that is subject to, or governed by, ERISA, and which also contains an anti-alienation clause as required pursuant to ERISA § 206(d)(1), must also be tax-qualified in order for it to be excluded from property of a bankruptcy estate pursuant to § 541(c)(2)." 228 B.R. at 380 n.10. Analyzing the Supreme Court's opinion in *Shumate* and based on its "substantial research and much reflection," the court was persuaded "that the *Shumate* Court, when it used the term 'ERISA-qualified plan,' contemplated a plan that was merely subject to, or governed by, ERISA regardless of whether it was also tax-qualified." *Id.* at 378-80. Likewise, in *Hill v. Dobin,* the district court found that "in order to demonstrate that an asset is excluded from a bankruptcy estate pursuant to § 541(c)(2), the debtor must establish that: (1) the asset represents the debtor's beneficial interest in a trust, (2) there is a restriction on transfer, and (3) the restriction is enforceable under an applicable non-bankruptcy law." 358 B.R. 130, 135 (D.N.J. 2006). In so finding, the court clarified that "there is no requirement in § 541(c)(2) that the asset be qualified under Section 408 of the Internal Revenue Code."[6] *Id.* at 134.

---

[6] The Trustee asks the Court to part from the above case law and to rely on the district court's decision in *First Indem. of Am. Ins. Co. v. Copulos*, for the proposition that tax qualification is a necessary element for a plan subject to ERISA to be excludable from a debtor's estate. Civ. No. 97-4283, 1998 WL 231224 (D.N.J. Feb. 24, 1998). *Copulos* is not directly on point, however. In *Copulos*, the bankruptcy court had found that the debtor's pension plan was a qualified trust under

In view of the above-cited precedent as well as the plain language of Section 541(c)(2) of the Bankruptcy Code, the Bankruptcy Court did not err when it ruled that the Debtor's retirement accounts were excludable from the estate. It is uncontested that the ERISA-governed plans contain anti-alienation provisions enforceable under ERISA, and the Court finds that there is no statutory requirement that the ERISA-governed plans also be "tax qualified" under the IRC.

ii. OPERATIONAL DEFECTS

Next, the Trustee argues that the Bankruptcy Court erred in finding that the retirement accounts are excludable from the estate under § 541(c)(2), because the retirement plans had "operational defects." (Civ. No. 22-05274, ECF No. 19 at 32-36.) Stated differently, the Trustee contends that the plans were operated in ways that were not in compliance with either the Internal Revenue Code or ERISA and that this non-compliance should bring the retirement accounts within the estate. These alleged defects include that the Debtor controlled both plans; the Debtor's ex-wife (who was not an employee of the Debtor's companies) was a non-eligible member of the plans; the Debtor made prohibited loans/transactions from his 401(K) plan; the Debtor made an unnecessary COVID-19 withdrawal; the plans did not comply with minimum funding, participation, or non-discrimination requirements; and the plans were not operated according to their terms. (*Id.* at 25-31, 36-50.)

The Bankruptcy Court rejected the argument that these "operational defects" brought the retirement accounts within the estate, ruling as a matter of law that ERISA-governed plans that

---

New Jersey law and thus excludable, but the district court later ruled that the New Jersey statute, N.J. Stat. Ann. § 25:2-1(b), requires an examination of whether the trust also conformed to applicable federal law in order to be deemed qualified under the New Jersey statute. *Id.* at *5. In contrast to *Copulos*, the Bankruptcy Court in the present case did not rely on New Jersey law or New Jersey's definition of a qualifying trust as the basis of the exclusion of the retirement accounts from the estate.

may have been operated in a non-compliant manner remain excludable so long as the anti-alienation provision is enforceable and the plans are subject to ERISA. (ECF No. 1 at 19-21.)

The Court once more concurs with the Bankruptcy Court's ruling. Like other federal courts, the Third Circuit Court of Appeals has recognized that an anti-alienation provision enforceable under ERISA shields a beneficiary's interest in an ERISA-governed plan from third-party creditors and is not generally subject to equitable exceptions. *See, e.g.*, *Coar v. Kazimir*, 990 F.2d 1413, 1420-21 (3d Cir. 1993) ("[W]e read section 206(d)(1) and, by extension *Guidry,* as shielding . . . the beneficiaries' interest under the pension plan from third-party creditors."). As a result of this principle, courts have held that for purposes of determining whether a retirement plan is excludable from a debtor's estate under Section 541(c)(2) of the Bankruptcy Code, alleged defects in how the ERISA-governed plan may have been operated do not typically affect whether the plan contains "[a] restriction on . . . transfer . . . enforceable under applicable nonbankruptcy law." *See, e.g.*, *Matter of Baker*, 114 F.3d at 640 ("[V]iolations of ERISA do not make ERISA inapplicable . . . ; if extensive violations of a federal law made that law go away, the rules would be chimerical. ERISA applied, and was violated; . . . what matters is the application of ERISA's subchapter I, rather than observance of its rules."); *In re Jacobs*, 648 B.R. 403, 418 (Bankr. N.D. Okla. 2023) ("[A] plan subject to ERISA[] . . . is protected regardless of the subsequent operation of the plan."); *Priv. Cap. Invs., LLC v. Schollard*, Civ. No. 07-0757, 2014 WL 2587721, at *4 (W.D.N.Y. June 10, 2014) ("[V]iolations in the operation of a plan do not vitiate enforcement of ERISA's anti-alienation prohibition and there are no equitable exceptions to enforcement of ERISA's anti-alienation prohibition.").

One of the more thorough examinations of this issue was undertaken by the bankruptcy court in *In re Handel*, 301 B.R. 421 (Bankr. S.D.N.Y. 2003). In *Handel*, the debtor had "exerted

control over his interest in the savings and profit sharing plan in violation of the plan's terms and [ERISA] . . . in a manner that would cause the plan, at least as it pertain[ed] to [the debtor] not to qualify for favorable tax treatment under section 401(a) of the Internal Revenue Code." *Id.* at 423. This included the debtor representing himself as the trustee of the plan to gain the ability to control his interest in the plan and to withdraw substantial sums from the brokerage accounts to pay for renovations to the debtor's Park Avenue apartment. *Id.* at 426. One of the debtor's creditors, HSBC Bank USA, argued that this conduct should bring the plans within the property of the estate under Section 541(c)(2). *Id.* at 431-32. The bankruptcy court disagreed.

The court surveyed precedent and concluded that the question as to how an ERISA-governed plan has been operated is largely "irrelevant" to the exclusion analysis because most alleged violations in compliance do "not render any less enforceable the alienation prohibition in the plan and ERISA § 206(d)(1)" and, therefore, the ERISA-governed plan continues to be excluded from the property of the estate notwithstanding the alleged non-compliance. *Id.* at 423. The court acknowledged that giving a debtor the benefit of a plan whose requirements may have been "disregarded may seem inequitable," but it wrote that, "as currently enacted, ERISA's anti-alienation requirement has no exceptions that are applicable here, and the Supreme Court has refused to graft any equitable exceptions onto the statute." *Id.* at 423. The court also took the position that creating new equitable exceptions would be poor public policy because there is a "strong" basis for the current framework: "the protection of pension benefits." *Id.* at 435.

The Trustee asks this Court to part from the above, citing a pair of older bankruptcy court opinions: *In re Harris*, 188 B.R. 444 (Bankr. M.D. Fla. 1995), and *In re Goldschein*, 244 B.R. 595 (Bankr. D. Md. 2000). In *Goldschein*, however, the bankruptcy judge determined that the plan there had to be "tax qualified" to be excluded from the estate, and the judge found that that plan,

operated by the debtor as a "personal piggy bank," could not be excluded by virtue of the "anti-alienation provision of a plan that the debtor . . . materially disregarded in its operation." 244 B.R. at 601-02. Similarly, in *Harris*, the bankruptcy judge determined that "the general failure to administer th[e] Plan in compliance with ERISA and the Internal Revenue Code, and the use of the Plan as a personal bank . . . justifie[d] the treatment of th[e] Plan as property of the estate." 188 B.R. at 450-51.

Here, unlike in *Goldschein* and *Harris*, the Court has already determined that the "tax qualification" status of the Debtor's retirement plans is not relevant for purposes of whether those plans contain an enforceable restriction on transfer under ERISA. Further, for the reasons outlined in *Handel* and the other opinions cited above, the "operational defects" alleged by the Trustee in this case do not bring the accounts within the estate because the anti-alienation provisions in the two plans remain enforceable. *See Jacobs*, 648 B.R. at 418 ("[A] plan subject to ERISA[] . . . is protected regardless of the subsequent operation of the plan."); *see also Baker*, 114 F.3d at 640 ("There is no 'equity' exception to § 1056(d)(1) of ERISA, or § 541(c)(2) of the Bankruptcy Code." (citing *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365 (1990))). Absent a suggestion, which the Trustee has not proffered, that the alleged defects in the Debtor's ERISA-governed plans' operation have either rendered the anti-alienation provisions unenforceable or the plans are no longer subject to ERISA, this Court agrees with the Bankruptcy Court that the generalized allegations of operational improprieties do not suffice here to bring the Debtor's retirement accounts within the property of the estate.[7]

---

[7] This Court agrees with other courts that have noted that interests in ERISA-governed plans are not *per se* excludable, especially when the monies in the plans are "readily available" for current consumption. *Sewell*, 180 F.3d at 713 n.21 (citation omitted).

3. *Count Three – Preferential Transfers (11 U.S.C. § 547(b))*

In Count Three, the Trustee alleges that he can avoid the alleged preferential transfer of retirement funds that occurred when a "July 2020 DB Amendment" changed the retirement plans' participation requirements and then, as part of the marital settlement between the Debtor and the ex-wife, the Debtor received a 100 percent share in the retirement accounts in exchange for the ex-wife receiving alimony payments and the marital residence. (Civ. No. 22-05274, ECF No. 19-5 at 144, 176-77.)

The Bankruptcy Court viewed the Trustee's attempt to "claw back" the retirement account monies via a preference action as "conceptually flawed" because all of the funds sought by the Trustee were in the Debtor's own retirement accounts when the Chapter 7 petition was filed, so there was no transfer to avoid. (ECF No. 1 at 30.) What this meant, practically, was that if the Debtor's interest in the retirement plans had not been excluded from the estate under the Bankruptcy Code, the Trustee could have potentially accessed the retirement monies without avoiding anything. Any alleged transfer, wrote the court, "did not diminish what was available to the Debtor's creditors." (*Id.* at 34.) If anything, the Bankruptcy Court suggested that the more viable claim may have been for the Trustee to seek to void the transfer of the marital residence to the ex-wife, but the Trustee did not bring such a claim and did not challenge the dismissal with prejudice of the ex-wife from the proceeding. (*Id.* at 33-34.)

As the Third Circuit has outlined, "[t]o succeed in a preference action, a trustee must show that a transfer: (1) was to or for the benefit of a creditor; (2) was for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) was made while the debtor was insolvent; (4) was on or within 90 days before the filing of the bankruptcy petition; and (5) enabled the creditor to receive more than it would have in a Chapter 7 liquidation." *In re KB Toys Inc.*,

736 F.3d 247, 250 n.5 (3d Cir. 2013) (citing 11 U.S.C. § 547(b)). The aim of preference actions is to "facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor. Any creditor that received a greater payment than others of its class may be required to disgorge the payment so that all may share equally." *Id.* (quoting 5 Collier on Bankruptcy ¶ 547.01 (16th ed. 2010)).

On appeal, the Trustee does not address the elements of a preference action or explain how his allegations could be plausibly construed to state such a claim. Instead, he makes generalized arguments that do not indicate any preference claim under § 547(b) has been or could be plead. (ECF No. 19 at 50-56.) As the Bankruptcy Court detailed, the Trustee's allegations do not support such a claim because, among other things, there is no allegation that a transfer was made to a creditor or that a creditor received more as a result of any alleged transfer than they would have received in a Chapter 7 liquidation. According to the Trustee's own allegations, the Debtor had full control over the retirement accounts when the petition was filed, and there are thus no alleged payments to a creditor of retirement funds that need to be disgorged to ensure equality of distribution. (*See* ECF No. 19-5 at 144 ("Pursuant to the [Marital Settlement Agreement], the Debtor received . . . the entire amount in the Retirement Accounts.").)

4. Counts Four & Five – Actual Fraudulent Conveyance (11 U.S.C. § 548(a)(1)(A)) and Constructive Fraudulent Conveyance (11 U.S.C. § 548(a)(1)(B))

In Counts Four and Five, the Trustee alleges that the Debtor actually and constructively fraudulently conveyed the retirement account monies. In bringing these claims, the Trustee relies on the same allegations plead in support of the preference cause of action. (Civ. No. 22-05274, ECF No. 19-5 at 177-80.) The Bankruptcy Court dismissed the fraudulent conveyance claims,

finding that there was nothing alleged that suggests there is a fraudulent "transfer" to be avoided, among other defects. (ECF No. 1 at 38-39.)

On appeal, the Trustee argues that the division of marital assets during a divorce is a transfer of property that may be successfully challenged as a fraudulent transfer, but cites no support for the proposition that where the alleged transfer of funds is, as here, to the Debtor and the Debtor possesses the funds sought by the creditor at the time of filing the petition that any fraudulent transfer claim can be maintained on that basis. (ECF No. 19 at 56-61.) Indeed, in the case cited by the Trustee, *In re Hill*, the debtor transferred, among other things, an interest in her marital residence to her ex-husband and transferred an interest in a separate residence to her daughter, and the bankruptcy court found that these transfers were "done to prevent collection efforts." 342 B.R. 183, 198-202 (Bankr. D.N.J. 2006). Here, in contrast, the retirement funds at issue were ultimately transferred to the Debtor's control, and the Trustee offers no explanation as to how this could be deemed to have been fraudulently done to prevent collection on the retirement accounts or how avoiding said transfer would benefit the estate or its creditors. *See, e.g.*, *In re Skinner*, 519 B.R. 613, 623 (Bankr. E.D. Pa. 2014), *aff'd*, 532 B.R. 599 (E.D. Pa. 2015), *aff'd*, 636 F. App'x 868 (3d Cir. 2016) ("The Plaintiff seeks to avoid transfers of assets from the Mother to the Defendants, a transfer that allegedly enriched the Debtor. If successful, the avoidance of the alleged transfers would cause the divestiture of estate assets and necessarily fail to benefit the Debtor's estate. The Plaintiff has not offered and cannot offer any explanation of how the avoidance of the alleged transfers would benefit the Debtor's creditors."); *see also In re Yahweh Ctr., Inc.*, 27 F.4th 960, 964 (4th Cir. 2022) ("'Avoiding' a transfer of property or an obligation makes the transfer or obligation null and void. In other words, whatever property the debtor transferred is returned to the debtor and any obligation the debtor incurred goes away."); *Robinson*

v. Coughlin, 830 A.2d 1114, 1120 (Conn. 2003) ("[A]voidance of the transfer was not available . . . inasmuch as the assets had been reconveyed.").

In addition, to state a claim for actual fraudulent conveyance, a trustee must allege that (i) the transfer was made within two years of the petition date, and (ii) the debtor voluntarily or involuntarily made such transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted. 11 U.S.C. § 548(a)(1)(A). To state a claim for constructive fraudulent conveyance, a trustee must allege that (i) the transfer was made within two years of the petition date; (ii) the debtor received less than reasonably equivalent value in exchange of the transfer; and (iii) the debtor either (a) was insolvent on the date that the transfer was made or became insolvent as a result of the transfer; or (b) was or was about to engage in a business or transaction for which any remaining property remaining with the debtor was an unreasonably small capital; or (c) intended or believed that the debtor would incur debts beyond the debtor's ability to pay; or (d) the debtor made the transfer or incurred the obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business. 11 U.S.C. § 548(a)(1)(B).

Here, the Trustee does not address how what has been plead or could be plead satisfies the elements for such claims or overcomes the deficiencies identified by the Bankruptcy Court. The Trustee writes that he seeks to void the transfer of "the retirement funds . . . *to the Debtor* as part of the [marital settlement agreement]," which again, would be implausible when it is the Debtor's estate that the creditors are recovering against in the Chapter 7 proceeding. (ECF No. 19 at 60-61 (emphasis added).)

5. COUNT SIX – 11 U.S.C. § 544 AND 11 U.S.C. § 550(A)

In his last Count, the Trustee argues that he should have been allowed to "step into the shoes of the IRS and clawback payments made by the debtor ten . . . years prior to the petition date," which includes the retirement funds. (Civ. No. 22-05274, ECF No. 19 at 61-64.) The Bankruptcy Court rejected the argument below because, among other reasons, the IRS was not a listed creditor and there were no allegations that "the Debtor had an actual tax liability during the 10-year period preceding filing." (ECF No. 1 at 39-42.) Even ignoring these defects, the court found that "[t]he bottom line is that even if the IRS is a legitimate triggering creditor all th[at] accomplishes is providing the Trustee with a ten-year look back period for avoidable transfers," and for the reasons already stated, there are no transfers to avoid because the retirement funds sought were in the Debtor's control when the Chapter 7 petition was filed by the Debtor. (*Id.*) The Court agrees. The Trustee writes that he should be permitted to "utilize the ten-year look back provision to void the transfers" that resulted in "the retirement funds" being "ultimately transferred to the Debtor," but there is no explanation offered by the Trustee as to what this would accomplish when it is the Debtor's estate that the creditors are recovering against and the funds are in the Debtor's retirement accounts, which are excluded from the estate under the Bankruptcy Code. (ECF No. 19 at 63-64.)

6. OTHER ARGUMENTS

The Trustee advances several other arguments as to why the Bankruptcy Court should be reversed, none of which the Court finds compelling. For example, the Trustee argues that the Bankruptcy Court did not hear from the allegedly "new third party administrator" of the retirement plans, but does not explain how this would have altered the outcome or would influence the issues presented to this Court on appeal. (Civ. No. 22-05274, ECF No. 19 at 20-22.) The Trustee also

argues that "[t]he Debtor's conduct throughout th[e] case justifies . . . applying both judicial and equitable estoppel," and asks this Court to effectively disregard the Bankruptcy Code and allow the creditors to make claims against the retirement accounts, even if the accounts are properly excluded from the property of the estate. (*Id.* at 65-69.) While the Court understands the Trustee's frustration with what the Bankruptcy Court referred to as "essentially a no-asset case," the Court does not believe that there is an appropriate basis for use of estoppel under the circumstances.

7. *Dismissal With Prejudice*

Finally, the Trustee submits that the Bankruptcy Court should have granted him further leave to amend his adversary complaint (beyond the one amendment that the Bankruptcy Court granted). Although the Court generally supports multiple opportunities to amend, the Bankruptcy Court correctly determined that any further amendments would be futile. The dispute as to whether the retirement accounts are excluded from the estate boils down to a primarily legal question under the Bankruptcy Code, and the Trustee does not suggest that there are facts that could have been plead that would have altered the Bankruptcy Court's, and now this Court's, analysis. As to the other counts seeking to avoid a purported "transfer," the Court agrees that the Trustee has not indicated that there are any new or different facts that could be plead to cure these "conceptually flawed" claims. Thus, while leave to amend is liberally granted, the Court finds that it was not required in this case when it would be futile. *See, e.g.*, *Pacira Biosciences, Inc. v. Am. Soc'y of Anesthesiologists, Inc.*, 583 F. Supp. 3d 654, 662 (D.N.J. 2022), *aff'd*, 63 F.4th 240 (3d Cir. 2023) ("The Court . . . finds amendment would be futile and dismisses the Complaint with prejudice for failure to state a claim upon which relief may be granted.").

IV. CONCLUSION

For the foregoing reasons, and other good cause shown, the Bankruptcy Court's Shortening Time Order, Strike Order, and Dismissal Order are **AFFIRMED**. An appropriate Order follows.

Dated: September 29, 2023

GEORGETTE CASTNER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE: ERIC S. GILBERT, JOHN M. MCDONNELL, Chapter 7 Trustee, Appellant, v. ERIC S. GILBERT, Chapter 7 Debtor, Appellee.	Civil Action No. 22-05274 (GC) (Consolidated with Civil Action Nos. 22-05910 & 22-05911) On Appeal from Bankruptcy Case No. 21-12725 (KCF) Adversary Pro. No. 22-01005 (KCF) **ORDER & JUDGMENT**

THIS MATTER comes before the Court upon three appeals brought by Chapter 7 Trustee John M. McDonnell from three different orders issued by Bankruptcy Court Judge Kathryn C. Ferguson in Adversary Proceeding Number 22-01005. (Civ. Nos. 22-05274 (Appeal of Dismissal Order), 22-05910 (Appeal of Shortening Time Order), and 22-05911 (Appeal of Strike Order).) After completion of briefing, the Court consolidated the appeals on August 23, 2023, at Civil Action Number 22-05274, the lead case. The Court carefully considered the parties' submissions and decided the matter without oral argument pursuant to Federal Rule of Bankruptcy Procedure 8013(c) and Local Civil Rule 78.1(b). For the reasons set forth in the Court's accompanying Opinion, and other good cause shown,

IT IS on this 29th day of September, 2023, **ORDERED**, **ADJUDGED**, and **DECREED** as follows:

1. The Trustee's appeals are **DENIED**.

2. The Orders of the Bankruptcy Court are **AFFIRMED**.

3. The Clerk is directed to **CLOSE** this case and to **TERMINATE** all deadlines.

GEORGETTE CASTNER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE: ERIC S. GILBERT, JOHN M. MCDONNELL, Chapter 7 Trustee, Appellant, v. ERIC S. GILBERT, Chapter 7 Debtor, Appellee.	Civil Action No. 22-05274 (GC) (Consolidated with Civil Action Nos. 22-05910 & 22-05911) On Appeal from Bankruptcy Case No. 21-12725 (KCF) Adversary Pro. No. 22-01005 (KCF) **ORDER & JUDGMENT**

THIS MATTER comes before the Court upon three appeals brought by Chapter 7 Trustee John M. McDonnell from three different orders issued by Bankruptcy Court Judge Kathryn C. Ferguson in Adversary Proceeding Number 22-01005. (Civ. Nos. 22-05274 (Appeal of Dismissal Order), 22-05910 (Appeal of Shortening Time Order), and 22-05911 (Appeal of Strike Order).) After completion of briefing, the Court consolidated the appeals on August 23, 2023, at Civil Action Number 22-05274, the lead case. The Court carefully considered the parties' submissions and decided the matter without oral argument pursuant to Federal Rule of Bankruptcy Procedure 8013(c) and Local Civil Rule 78.1(b). For the reasons set forth in the Court's accompanying Opinion, and other good cause shown,

IT IS on this 29th day of September, 2023, **ORDERED**, **ADJUDGED**, and **DECREED** as follows:

1. The Trustee's appeals are **DENIED**.

2. The Orders of the Bankruptcy Court are **AFFIRMED**.

3. The Clerk is directed to **CLOSE** this case and to **TERMINATE** all deadlines.

GEORGETTE CASTNER
UNITED STATES DISTRICT JUDGE

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE: ERIC S. GILBERT, JOHN M. MCDONNELL, Chapter 7 Trustee, Appellant, v. ERIC S. GILBERT, Chapter 7 Debtor, Appellee.	Civil Action No. 22-05274 (GC) (Consolidated with Civil Action Nos. 22-05910 & 22-05911) On Appeal from Bankruptcy Case No. 21-12725 (KCF) Adversary Pro. No. 22-01005 (KCF) **OPINION**

CASTNER, District Judge

THIS MATTER comes before the Court upon three appeals brought by Chapter 7 Trustee John M. McDonnell from three different orders issued by Bankruptcy Court Judge Kathryn C. Ferguson in Adversary Proceeding Number 22-01005. (Civ. Nos. 22-05274 (Appeal of Dismissal Order), 22-05910 (Appeal of Shortening Time Order), and 22-05911 (Appeal of Strike Order).) After completion of briefing, the Court consolidated the appeals on August 23, 2023, at Civil Action Number 22-05274, the lead case. The Court has carefully considered the parties' submissions, and for the reasons set forth below, and other good cause shown, **AFFIRMS** each of the Bankruptcy Court's orders.

I. BACKGROUND

At root, this Chapter 7 bankruptcy dispute centers on whether the monies in two retirement accounts are excluded from the debtor's estate under 11 U.S.C. § 541(c)(2).

A. Procedural Background

On April 1, 2021, Appellee Eric S. Gilbert (the "Debtor") filed a Chapter 7 petition that listed his interest in two retirement accounts: (1) a 401(a) defined benefit plan account held by Voya Financial with a balance of $1,607,536.99, and (2) a 401(k) plan account held by Voya Financial with a balance of $47,031.48. (Civ. No. 22-05274, ECF No. 19-6 at 109-160.[1])

On April 5, 2021, Appellant John M. McDonnell (the "Trustee") was appointed Trustee for the Debtor's estate. (ECF No. 19-4 at 21.)

The main bankruptcy proceeding has a protracted history. The present appeal arises from an adversary complaint that the Trustee filed in January 2022, Adversary Proceeding Number 22-01005, against the Debtor and the Debtor's ex-wife seeking to have the two retirement accounts ruled property of the estate that can be used to pay holders of claims. Specifically, the Trustee appeals the Bankruptcy Court's August 23, 2022 Order that granted the Debtor's motion to dismiss all counts in the adversary complaint ("Dismissal Order"). (*See generally* ECF No. 1.)

After the Trustee filed his notice of appeal of the Dismissal Order, the Debtor moved before the Bankruptcy Court to strike certain items that the Trustee was alleged to have improperly designated as part of the appellate record. (Civ. No. 22-05911, ECF No. 8-1 at 29.) The Debtor also moved to shorten the time for a hearing on the motion to strike. (Civ. No. 22-05910, ECF No. 8-1 at 46.) The Bankruptcy Court granted the motion to shorten ("Shortening Time Order") and then, after briefing and argument, granted the motion to strike in part ("Strike Order"). The Trustee separately appeals each of those orders. (*See* Civ. No. 22-05910, ECF No. 1 (Appeal of

---

[1] Because the present matter involves filings in three separate dockets, the Court notes the civil action number of the docket before the specific record cite. Once a civil action number is cited, subsequent record cites refer to that docket until a different civil action number is cited. Page numbers for record cites (*i.e.*, "ECF Nos.") refer to the page numbers stamped by the Court's e-filing system and not the internal pagination of the parties.

Shortening Time Order); Civ. No. 22-05911, ECF No. 1 (Appeal of Strike Order).)

On October 7, 2022, the Trustee moved before this Court to consolidate the three appeals. (Civ. No. 22-05274, ECF No. 8.) The Trustee also asked to delay briefing on the appeal of the Dismissal Order until the Court issued a decision on the appeal of the Shortening Time Order and Strike Order. (*Id.*) The Debtor opposed and cross-moved, asking the Court to dismiss the appeal of the Shortening Time Order because it was from an interlocutory order and the Trustee had failed to obtain leave to appeal. (ECF No. 15-1 at 12-14.) The Court declined to delay, and after briefing was complete, the Court consolidated the appeals for purposes of the present opinion, denying without prejudice the Debtor's cross-motion to dismiss the appeal of the Shortening Time Order. (ECF Nos. 12 & 28.)

B. Bankruptcy Court's Rulings

1. Bankruptcy Court's Dismissal Order

On February 1, 2022, both the Debtor and the Debtor's ex-wife moved to dismiss the Trustee's original Complaint in Adv. Pro. No. 22-01005. The ex-wife's motion was granted with prejudice, and the Debtor's motion was granted in part. The Trustee was permitted to amend his complaint. (Civ. No. 22-05274, ECF No. 19-5 at 99-101, 127-31.) Once the Trustee's First Amended Adversary Complaint was filed, the Debtor again moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), and the Bankruptcy Court issued the Dismissal Order and accompanying Memorandum Opinion on August 23, 2022, dismissing the Trustee's claims against the Debtor with prejudice.[2] (ECF No. 1 at 10-44.)

The Bankruptcy Court dismissed Count One (Declaratory Judgment) on the ground that the two retirement accounts are excluded from property of the estate in accordance with 11 U.S.C.

---

[2] Judge Ferguson's opinion can be found at *In re Gilbert*, 642 B.R. 687 (Bankr. D.N.J. 2022).

§ 541(c)(2). *First*, the court found that the accounts are trusts that the Debtor has a beneficial interest in. (*Id.* at 16.) *Second*, it found that the accounts contain restrictions on transfer, *i.e.*, anti-alienation provisions pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq*. (*Id.*) *Third*, it found that the restrictions on transfer are enforceable under applicable nonbankruptcy law, *i.e.*, the federal ERISA statute. (*Id.* at 17.)

In response to the Trustee's argument that the accounts must also be "tax qualified" under the Internal Revenue Code ("IRC") to be excluded from the estate's property, the Bankruptcy Court identified no support for such a requirement in the plain text or legislative history of Section 541 of the Bankruptcy Code, and the court cited case law for its holding that "[o]nce one nonbankruptcy law (ERISA) provide[s] the enforcement of a restriction on transfer[,] there [i]s no reason to look for another nonbankruptcy law (IRC)." (*Id.* at 17-21 (citing *Patterson v. Shumate*, 504 U.S. 753 (1992)).)

As to Count Two (Preliminary Injunction and Temporary Restraining Order) seeking to enjoin the Debtor from making distributions from the two retirement accounts, the Bankruptcy Court maintained the restraints already in place and noted that the Trustee had a pending motion that the court would utilize to determine if a stay pending appeal was warranted. (*Id.* at 28-29.)

As to Count Three (Preferential Transfers – 11 U.S.C. § 547(b)), the Bankruptcy Court viewed the Trustee's attempt to "claw back" the funds in the retirement accounts as "baffling" and "conceptually flawed." (*Id.* at 30.) The court explained that there was nothing to "claw back" because the funds were in the Debtor's retirement accounts at the time he filed the Chapter 7 petition, and if they had been deemed property of the estate, the Trustee "would have control over th[e] accounts" without the need for a preference action. (*Id.*) The court further found that, in any

event, the Trustee's allegations did not establish the elements for a preference action, namely, that there was a "transfer" or a transfer "of an interest of the debtor in property." (*Id.* at 30-38.)

As to Counts Four (Actual Fraudulent Conveyance – 11 U.S.C. § 548(a)(1)(A)) and Five (Constructive Fraudulent Conveyance – 11 U.S.C. § 548(a)(1)(B)), the Bankruptcy Court found that they suffered from the same defects as Count Three, that is, the Trustee had not "properly allege[d] that there was a 'transfer' and that the transfer was 'of an interest in the debtor in the property.'" (*Id.* at 38-39.)

Finally, as to Count Six (11 U.S.C. § 544 and 11 U.S.C. § 550(a)), the Bankruptcy Court wrote that it was "plagued" by similar faults as the other counts. (*Id.* at 39-40.) Specifically, the Trustee's attempt to use the IRS as the "triggering creditor" was problematic because the IRS was not a listed creditor and there were no allegations that "the Debtor had an actual tax liability during the 10-year period preceding filing." (*Id.* at 40-42.) The court wrote that, in any event, "even if the IRS [were] a legitimate triggering creditor all that accomplishes is providing the Trustee with a ten-year look back period for avoidable transfers," and similar to the other counts, there was no transfer "[]sufficient to support an avoidance action." (*Id.* at 42.)

In dismissing the claims with prejudice, the Bankruptcy Court concluded that "[g]iven the pervasive problems with th[e] complaint . . . further amendment would be futile." (*Id.* at 43.) The court acknowledged that the creditors were faced with "essentially a no-asset case" absent access to the retirement funds, but it wrote that it did not have "the authority to alter . . . the Bankruptcy Code to better accommodate the Trustee's idea of justice." (*Id.* at 44.)

2. *Bankruptcy Court's Shortening Time Order*

On September 8, 2022, after the Bankruptcy Court issued its Dismissal Order, the Trustee filed his statement of issues and designation of the record for appeal in accordance with Federal

Rule of Bankruptcy Procedure 8009(a). (Civ. No. 22-05910, ECF No. 8-1 at 4.) On September 16, 2022, the Debtor moved before the Bankruptcy Court for an order striking portions of the record that the Trustee designated for appeal. (*Id.* at 29.) The motion was initially assigned a return date of October 18, 2022, and the Trustee's opposition was due on October 11, 2022, but the return date was then changed to October 25. (*Id.* at 45.)

On September 20, 2022, the Debtor applied to shorten the time for the motion to strike to be heard. (*Id.* at 46.) The Trustee opposed. (*Id.* at 52.) The Bankruptcy Court granted the application to shorten on September 22, 2022, setting a hearing date of October 4, 2022, and a deadline of September 30, 2022, for the Trustee's opposition. (*Id.* at 78-81.)

3. *Bankruptcy Court's Strike Order*

On October 4, 2022, the Bankruptcy Court heard oral argument on the Debtor's motion to strike certain documents that the Trustee had designated as part of the appellate record. (Civ. No. 22-05911, ECF No. 8-1 at 170.) In an oral opinion, the Bankruptcy Court granted the motion.

The court began by explaining that Federal Rule of Bankruptcy Procedure 8009(e)(1) allows bankruptcy judges to strike items "improperly designated as part of the record on appeal." (*Id.* at 179-80.) The court noted that it was "mindful that [it] should only strike documents that were not filed in a case" and "have no bearing on the appeal," and if in doubt, it is "better to err on the side of caution" by including the items. (*Id.* at 180 (citing *In re Blasingame*, 559 B.R. 692, 701 (B.A.P. 6th Cir. 2016)).)

The court identified three categories of documents that could be stricken: (1) documents from a *separate* adversary proceeding challenging the discharge of the Debtor's bankruptcy estate under Section 727 of the Bankruptcy Code; (2) documents from the main bankruptcy case that "were not presented . . . in either written or oral argument for reliance in reaching" the Dismissal

Order and did not relate to whether the retirement accounts were property of the estate; and (3) documents that "were not referenced in any written or oral argument on the issue on appeal, were not relied upon [by] the Court by way of judicial notice on this issue, and [we]re also not relevant to the issue on appeal." (*Id.* at 170-85.)

The Bankruptcy Court emphasized that the parties had presented three items in connection with their briefing of the 12(b)(6) motion to dismiss: the Debtor's motion package, the Trustee's opposition brief with exhibits attached, and the Debtor's reply. (*Id.* at 183-84.) The court stated that all of these items would be part of the record on appeal along with the Bankruptcy Court's opinion, but it found unnecessary other documents that the Trustee wanted to include. (*Id.* at 184.)

As to documents that the Trustee tried to include from a separate adversary proceeding under Section 727 of the Bankruptcy Code, the Bankruptcy Court found that those documents should be stricken because the appeal of that separate proceeding was pending before a different district court "and there ha[d] not been, nor conceivably could there be, any merger of that appeal with the current appeal." (*Id.* at 181.) The court underscored that it had not relied on any of the facts in the complaint of that separate proceeding in reaching its Dismissal Order. (*Id.*) The court further underscored that "[t]he legal issues in the two adversary proceedings are not even remotely related. One adversary proceeding relates to a discharge under Section 727 of the Bankruptcy Code" while "[t]he other seeks [a] declaratory judgment regarding property of the bankruptcy estate, and contains counts to bring money into the estate." (*Id.*)

As to other documents, including from the main bankruptcy case, that were struck, the Bankruptcy Court saw no reason to include documents that had not been referenced by the parties in the briefing on the motion to dismiss and, therefore, had not been considered by the court in reaching its decision that was on appeal. (*Id.* at 183-84.) The court also found said documents

"not relevant to the issue on appeal" and not "necessary for a general understanding of the case." (*Id.* at 184-85 ("[T]here is no doubt that the documents referenced were neither presented to the Court in connection with this complaint, nor relied upon by this Court in dismissing the complaint.").)

II. LEGAL STANDARD

In cases originating in the Bankruptcy Court, district courts occupy the first level of appellate review. 28 U.S.C. § 158(a)(1) grants a district court jurisdiction "to hear appeals from final judgments, orders and decrees" of the bankruptcy court. A court considering such an appeal "review[s] the bankruptcy court's legal determinations *de novo*, its factual findings for clear error, and its discretionary decisions for abuse of discretion." *In re Imerys Talc Am., Inc.*, 38 F.4th 361, 370 (3d Cir. 2022) (quoting *In re Somerset Reg'l Water Res., LLC*, 949 F.3d 837, 844 (3d Cir. 2020)). And a court "must break down mixed questions of law and fact, applying the appropriate standard to each component." *Meridian Bank v. Alten*, 958 F.2d 1226, 1229 (3d Cir. 1992) (quoting *In re Sharon Steel Corp.*, 871 F.2d 1217, 1222 (3d Cir. 1989)). The district court "may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings." *In re Holmes*, 603 B.R. 757, 770 (D.N.J. 2019) (citation omitted).

III. DISCUSSION

A. Shortening Time Order

The Trustee objects to the Bankruptcy Court's Shortening Time Order that set a hearing date of October 4, 2022, and an opposition deadline of September 30, 2022, on the Debtor's September 16, 2022 motion to strike certain items that the Trustee designated as part of the appellate record. (Civ. No. 22-05910, ECF No. 8.) The Trustee argues that the Debtor's request

to shorten was a "litigation tactic" designed to distract the Trustee from his appellate brief then due on October 11, 2022,[3] in the appeal of the Dismissal Order, and the Bankruptcy Court should not have issued the Shortening Time Order because there was no "cause" for it. (*Id.* at 12-15.)

The Debtor submits that, contrary to the Trustee's "conspiracy theory," the request to shorten was filed when it was so that the record would be finalized before appellate briefing was due in the appeal of the Dismissal Order. (ECF No. 9 at 13-15.) Regardless, the Debtor argues that the appeal of the Shortening Time Order should be dismissed because the Trustee never sought leave to appeal the interlocutory order, and even if he had, the appeal is moot because the relief requested (reversing the order) is "impossible" now that the hearing has occurred. (*Id.* at 18-19.)

Even if the Court were to view the appeal of the Shortening Time Order as properly brought and not moot, the Trustee has offered no basis to find that the Bankruptcy Court abused its discretion. *See* Fed. R. Bankr. P. 9006(c)(1) (a bankruptcy court "for cause shown may in its discretion with or without motion or notice order [a] period reduced"). The Trustee was given fourteen days between when the motion to strike was filed (September 16) and when his opposition was due under the shortened deadline (September 30), and the only alleged prejudice the Trustee has identified is having to file his opposition sooner than otherwise required. While the Court appreciates the inconvenience caused by a shortened deadline, the Court does not find that the Trustee was substantially prejudiced, especially when there was a legitimate basis for hearing the motion to strike on an expedited basis: to finalize the appellate record before briefing in the appeal of the Dismissal Order was due. *See In re Asbestos Prod. Liab. Litig. (No. VI)*, 921 F.3d 98, 109

---

[3] The Court granted the Trustee an extension from October 11, 2022, until November 15, 2022, to submit a revised brief in support of the Trustee's appeal of the Dismissal Order, which should have cured any prejudice – if any – caused by the Bankruptcy Court's hearing the motion to strike on an expedited schedule. (Civ. No. 22-05274, ECF No. 18.)

(3d Cir. 2019) ("We will not interfere with a . . . court's control of its docket except upon the clearest showing that the procedures have resulted in actual and substantial prejudice to the complaining litigant." (quoting *In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 817 (3d Cir. 1982))). Accordingly, the Court affirms the Bankruptcy Court's Shortening Time Order.

B. STRIKE ORDER

The Trustee objects to the Strike Order on multiple grounds: (1) this Court, not the Bankruptcy Court, should have ruled on any motion to strike items designated for appeal; (2) the Bankruptcy Court ignored the opinion of the United States Court of Appeals for the Third Circuit in *In re Indian Palms Assocs., Ltd.*, 61 F.3d 197 (3d Cir. 1995), which allows a district court on appeal to draw from the record of the underlying bankruptcy proceeding; and (3) the items stricken "are necessary to provide . . . the complete picture of the case and the complex and nuanced issues." (Civ. No. 22-05911, ECF No. 8 at 23-36.)

The Debtor submits that the Bankruptcy Court correctly struck the items improperly designated on appeal, and he emphasizes that the issues to be considered in the appeal of the Dismissal Order are largely legal, *i.e.*, whether the two retirement accounts are or are not property of the bankruptcy estate under the Bankruptcy Code. (ECF No. 9 at 17-19.) Particularly on a motion to dismiss, the Debtor argues that going beyond what was submitted to and considered by the Bankruptcy Court is "incomprehensible." (*Id.* at 19.)

Having canvassed the record and considered the arguments, the Court finds that the Bankruptcy Court did not err as a matter of law or abuse its discretion in granting the motion to strike certain documents that the Trustee improperly designated as part of the appellate record.

Contrary to the Trustee's contention, the Bankruptcy Court was authorized by Federal Rule of Bankruptcy Procedure 8009(e)(1) to rule on the Debtor's motion to strike. The Bankruptcy

Rule states that "[i]f any difference arises about whether the record accurately discloses what occurred in the bankruptcy court, the difference must be submitted to and settled by the bankruptcy court and the record conformed accordingly." Fed. R. Bankr. P. 8009(e)(1). It further states that "[i]f an item has been improperly designated as part of the record on appeal, a party may move [before the bankruptcy court] to strike that item." *Id.* While the district court can also correct the record on appeal "in other ways," *see* Fed. R. Bankr. P. 8009(e)(2), nothing prohibits or militates against a bankruptcy court deciding a motion to strike items improperly designated on appeal, and it was appropriate for the Bankruptcy Court in this case to do so. *See also* Bankr. Proc. Manual § 8009:6 (2023 ed.) ("The docketing of an appeal in the district court does not divest the bankruptcy court of jurisdiction to determine the contents of the record on the appeal.").

Furthermore, the Third Circuit's opinion in *Indian Palms* does not alter the conclusion. In *Indian Palms*, the Court of Appeals considered whether a district court had erred in declining to strike documents that had not been presented to or considered by the bankruptcy court in connection with a motion to lift a stay. 61 F.3d at 204. The Court of Appeals noted precedent holding "that a bankruptcy judge deciding an adversary proceeding, which is an independent litigation, and an appellate court reviewing that decision, cannot properly use documents filed only in the underlying bankruptcy case unless that use can be justified under the judicial notice doctrine." *Id.* Notwithstanding this precedent, the Court found that the district court had "properly looked to the record of the underlying bankruptcy case" and "outside the record developed on . . . [the] stay motion" when the documents "were used for the sole purpose of determining whether [a party] had waived an argument it sought to make in its motion for reconsideration." *Id.* at 205.

Here, the Bankruptcy Court struck documents that the Trustee sought to include from a separate adversary proceeding as well as from the main bankruptcy case not simply because they

had not been presented to the court or considered by the court when it issued the Dismissal Order (the order on appeal) but also because the Bankruptcy Court found these documents "not relevant to the issue[s] on appeal" and also not "necessary for a general understanding of the case." (ECF No. 8-1 at 183-85.) Such a finding is consistent with the Third Circuit's approach in *Indian Palms*.

Finally, the Trustee argues that the documents stricken are "necessary" for a complete picture of this complex case, but he fails to mention that even excluding the documents struck by the Bankruptcy Court, the record on appeal consists of six volumes exceeding 1,800 pages. Indeed, the Court has reviewed the Trustee's chart of documents stricken as well as the reasons the Trustee provides for why he believes those documents should be included on appeal. Many of the documents appear intended to shape the Court's perception of the Debtor and how the Debtor conducted himself in mediation or during the underlying litigation and are largely irrelevant to the legal issues the Court must now decide. (ECF No. 8 at 37-54.) The Court sees little value in such documents on appeal of the grant of a 12(b)(6) motion. *See Simko v. United States Steel Corp*, 992 F.3d 198, 201 (3d Cir. 2021) ("In reviewing a dismissal under Federal Rule of Civil Procedure 12(b)(6), we 'must consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents.'" (quoting *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010))). Accordingly, the Court affirms the Bankruptcy Court's Strike Order.

C. Dismissal Order

1. Rule 12(b)(6) Standard

Federal Rule of Civil Procedure 12(b)(6) is made applicable to bankruptcy matters via Federal Rule of Bankruptcy Procedure 7012(b), and it requires courts to "accept the factual allegations in the complaint as true, draw all reasonable inferences in favor of the plaintiff, and

assess whether the complaint and the exhibits attached to it 'contain enough facts to state a claim to relief that is plausible on its face.'" *Wilson v. USI Ins. Serv. LLC*, 57 F.4th 131, 140 (3d Cir. 2023) (quoting *Watters v. Bd. of Sch. Directors of City of Scranton*, 975 F.3d 406, 412 (3d Cir. 2020)). "A claim is facially plausible 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Clark v. Coupe*, 55 F.4th 167, 178 (3d Cir. 2022) (quoting *Mammana v. Fed. Bureau of Prisons*, 934 F.3d 368, 372 (3d Cir. 2019)). When assessing the factual allegations in a complaint, courts "disregard legal conclusions and recitals of the elements of a cause of action that are supported only by mere conclusory statements." *Wilson*, 57 F.4th at 140 (citing *Oakwood Lab'ys LLC v. Thanoo*, 999 F.3d 892, 903 (3d Cir. 2021)). The defendant bringing a 12(b)(6) motion bears the burden of "showing that a complaint fails to state a claim." *In re Plavix Mktg., Sales Pracs. & Prod. Liab. Litig. (No. II)*, 974 F.3d 228, 231 (3d Cir. 2020) (citing *Davis v. Wells Fargo*, 824 F.3d 333, 349 (3d Cir. 2016)).

2. *Count One – Declaratory Judgment*

In Count One, the Trustee sought a declaration from the Bankruptcy Court that the Debtor's two retirement accounts are property of the estate that can be used to satisfy the claims of the Debtor's creditors. (Civ. No. 22-05274, ECF No. 19-5 at 173-74.) Dismissing the count, the Bankruptcy Court found that the two retirement accounts are excludable from the estate under 11 U.S.C. § 541(c)(2); thus, they cannot be used to satisfy the creditors' claims. The Trustee argues that the Bankruptcy Court erred as a matter of law for two reasons: *first*, the retirement plans must be subject to ERISA *and* tax qualified under the Internal Revenue Code for the accounts to be

excluded from property of the estate; *second*, alleged "operational defects" in the plans can bring the retirement accounts within the estate. (ECF No. 19 at 22-50.)

After careful review of the Bankruptcy Court's decision, the Trustee's complaint, the record on appeal, as well as the parties' briefing, the Court finds that the Bankruptcy Court did not err in determining that the two retirement accounts are excluded from property of the estate under the Bankruptcy Code.[4]

i. Property Excludable Under § 541(c)(2)

The filing of a petition in bankruptcy creates an estate consisting of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Although the reach of the estate is broad, the Bankruptcy Code carves out certain exclusions and exemptions. Relevant here is § 541(c)(2) that excludes property from the estate that contains:

> A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.
>
> [11 U.S.C. § 541(c)(2).]

Significant litigation has arisen since the enactment of the Bankruptcy Code as to what precisely qualifies as excludable from the estate under § 541(c)(2). Notably, in *Patterson v. Shumate*, the United States Supreme Court resolved a split among the federal Courts of Appeals as to "whether an anti-alienation provision contained in an ERISA-qualified pension plan constitutes a restriction on transfer enforceable under 'applicable nonbankruptcy law,' and

---

[4] Because the Court affirms the Bankruptcy Court on the ground that the retirement accounts are excluded from the estate under § 541(c)(2), it does not reach the parties' arguments as to why the accounts should or should not be exempt under state law. *See Martin v. Leinbach*, Civ. No. 14-04040, 2016 WL 409180, at *4 (M.D. Pa. Feb. 3, 2016) ("This issue of whether the earnings are part of the estate is a threshold issue that must be determined before there can be a determination of whether the earnings are properly exempted.").

whether, accordingly, a debtor may exclude his [or her] interest in such a plan from the property of the bankruptcy estate." 504 U.S. 753, 755 (1992). Prior to *Shumate*, several lower courts had determined that § 541(c)(2)'s reference to "applicable nonbankruptcy law" embraced only state law, not federal law such as ERISA, but the Supreme Court rejected such rulings as incompatible with the plain language of the Bankruptcy Code. *Id.* at 757-58. The Court held that a "natural reading" of "applicable nonbankruptcy law" in § 541(c)(2) as well as a reading of the provision in the context of the Bankruptcy Code as a whole revealed that § 541(c)(2) "encompasses any relevant nonbankruptcy law, including federal law such as ERISA," and the provision must be enforced "according to its terms." *Id.* at 758-59.

Although *Shumate* was intended to foster a uniform understanding as to what interests are excludable under § 541(c)(2), it has unfortunately led to further confusion as to what, if anything, the Supreme Court meant by the term "ERISA-qualified" plan in the *Shumate* opinion. *Id.* at 759 ("ERISA-qualified Plan . . . satisfies the literal terms of § 541(c)(2)."). The confusion stems from the fact that "ERISA qualified" is not a recognized term of art. While retirement plans may be "tax qualified" under the Internal Revenue Code, ERISA has no qualification requirements, and retirement plans are typically referred to as "subject to" or "governed by" ERISA, not "ERISA qualified." *See In re Meinen*, 228 B.R. 368, 378 (Bankr. W.D. Pa. 1998) ("The Supreme Court's use of this particular term has engendered much confusion because '[t]he term 'ERISA qualified' . . . is not a term of art and is not defined in the Bankruptcy Code, the IRC, or ERISA, and . . . it is not even a term used by employee benefit practitioners.'" (cleaned up) (quoting *In re Hall*, 151 B.R. 412, 417 (Bankr. W.D. Mich. 1993))).

As a result, two differing approaches have emerged to determine whether a retirement plan is "ERISA qualified" for purposes of being excluded from a debtor's estate under Section

541(c)(2): (1) some courts have found that a plan governed by ERISA that includes an anti-alienation provision enforceable under ERISA is excludable, and (2) other courts have required such a plan to also be "tax qualified" under the Internal Revenue Code to be excludable.[5] *Id.* at 378 ("Numerous post-*Shumate* courts have adopted the view that the Supreme Court, when referring to an 'ERISA-qualified' plan in *Shumate,* was referring to a plan that is tax qualified under I.R.C. § 401(a), subject to ERISA, and which has an anti-alienation provision as required by ERISA § 206(d)(1). However, an approximately equal number of courts have adopted the competing view that the Supreme Court in *Shumate,* when referring to an 'ERISA-qualified' plan, envisioned a plan that is subject to, or governed by, ERISA, and which contains an anti-alienation clause that is enforceable under ERISA, but not one that necessarily satisfies the tax qualification requirements under I.R.C. § 401(a)." (collecting cases)); *see also* 5 *Collier on Bankruptcy* ¶ 541.27A (16th ed. 2023) ("Courts have applied different tests . . . for determining whether a plan is ERISA-qualified. Courts have generally used either a two-step inquiry or a three-step inquiry to determine whether a plan is subject to ERISA. . . . Even where courts seek to determine whether a plan is tax-qualified, however, that prong of the analysis is generally not determinative.").

The Bankruptcy Court in this case sided with those courts that have held that an interest in a retirement plan that contains an anti-alienation provision enforceable under ERISA may be excluded from the estate even if the plan is not tax qualified under the Internal Revenue Code because ERISA, alone, constitutes "applicable nonbankruptcy law" under Section 541(c)(2). (Civ. No. 22-05274, ECF No. 1 at 17-28.) The court reasoned that "nothing in § 541(c)(2) . . . requires the court to look beyond whether there is an enforceable restriction on transfer and delve into whether the plans comply with the Internal Revenue Code." (*Id.* at 18.) The court was "unwilling"

---

[5] The Third Circuit Court of Appeals has yet to weigh in on this specific issue.

to "rewrite § 541(c)(2)" to require consideration of a plan's tax qualification when Congress has not expressly required such a consideration, even if it is "arguably better policy." (*Id.* at 18-19.)

On appeal, the Trustee does not dispute that the two retirement accounts at issue are trusts that the Debtor has a beneficial interest in nor does the Trustee contest that the plans include an anti-alienation provision enforceable under ERISA. Instead, the Trustee asks this Court to rule that ERISA-governed retirement plans with enforceable restrictions on transfer must *also* be tax qualified under the Internal Revenue Code in order to be excluded from a debtor's estate under Section 541(c)(2) of the Bankruptcy Code. The Court declines this invitation, and absent guidance from either the Third Circuit or the United States Supreme Court, the Court concurs with the Bankruptcy Court that it would be inappropriate to judicially engraft a "tax qualification" requirement onto the plain language of § 541(c)(2), which permits a Debtor's interest in a retirement plan to be excluded from the estate if it contains a restriction on transfer "enforceable under applicable nonbankruptcy law," such as ERISA. *See Shumate*, 504 U.S. at 759 ("Plainly read, the provision encompasses any relevant nonbankruptcy law, including federal law such as ERISA. We must enforce the statute according to its terms.").

This same conclusion has been reached by multiple Courts of Appeals that have examined the issue. In *Matter of Baker*, for example, the Seventh Circuit Court of Appeals held that "[u]nderstanding 'ERISA-qualified' to mean nothing more complex than 'containing the anti-alienation clause required by § 206(d)(1) of ERISA' makes the phrase mesh with the topic of the [*Shumate*] opinion: whether ERISA is 'applicable nonbankruptcy law.'" 114 F.3d 636, 638 (7th Cir. 1997), *as amended on denial of reh'g* (June 4, 1997). Then, in *In re Sewell*, the Fifth Circuit Court of Appeals followed the Seventh Circuit's lead in *Baker*, "[c]oncluding that an ERISA plan's tax qualification is not a prerequisite to exclusion of a participant's beneficial interest from her

bankruptcy estate under § 541(c)(2)." 180 F.3d 707, 709 (5th Cir. 1999). The Fifth Circuit underscored that "[n]owhere in ERISA . . . is there a requirement that, to be an ERISA plan and thus be governed by ERISA, a plan must be tax qualified. Indeed, the converse is true: An ERISA plan that is not or may not be tax qualified nevertheless continues to be governed by ERISA for essentially every other purpose." *Id.* at 711.

Both bankruptcy and district courts in this Circuit have followed the approaches of the Fifth and Seventh Circuits. In *Meinen*, the bankruptcy court rejected the plaintiff's arguments that "the Third Circuit would rule . . . that an interest in a pension plan that is subject to, or governed by, ERISA, and which also contains an anti-alienation clause as required pursuant to ERISA § 206(d)(1), must also be tax-qualified in order for it to be excluded from property of a bankruptcy estate pursuant to § 541(c)(2)." 228 B.R. at 380 n.10. Analyzing the Supreme Court's opinion in *Shumate* and based on its "substantial research and much reflection," the court was persuaded "that the *Shumate* Court, when it used the term 'ERISA-qualified plan,' contemplated a plan that was merely subject to, or governed by, ERISA regardless of whether it was also tax-qualified." *Id.* at 378-80. Likewise, in *Hill v. Dobin,* the district court found that "in order to demonstrate that an asset is excluded from a bankruptcy estate pursuant to § 541(c)(2), the debtor must establish that: (1) the asset represents the debtor's beneficial interest in a trust, (2) there is a restriction on transfer, and (3) the restriction is enforceable under an applicable non-bankruptcy law." 358 B.R. 130, 135 (D.N.J. 2006). In so finding, the court clarified that "there is no requirement in § 541(c)(2) that the asset be qualified under Section 408 of the Internal Revenue Code."[6] *Id.* at 134.

---

[6] The Trustee asks the Court to part from the above case law and to rely on the district court's decision in *First Indem. of Am. Ins. Co. v. Copulos*, for the proposition that tax qualification is a necessary element for a plan subject to ERISA to be excludable from a debtor's estate. Civ. No. 97-4283, 1998 WL 231224 (D.N.J. Feb. 24, 1998). *Copulos* is not directly on point, however. In *Copulos*, the bankruptcy court had found that the debtor's pension plan was a qualified trust under

In view of the above-cited precedent as well as the plain language of Section 541(c)(2) of the Bankruptcy Code, the Bankruptcy Court did not err when it ruled that the Debtor's retirement accounts were excludable from the estate. It is uncontested that the ERISA-governed plans contain anti-alienation provisions enforceable under ERISA, and the Court finds that there is no statutory requirement that the ERISA-governed plans also be "tax qualified" under the IRC.

ii. Operational Defects

Next, the Trustee argues that the Bankruptcy Court erred in finding that the retirement accounts are excludable from the estate under § 541(c)(2), because the retirement plans had "operational defects." (Civ. No. 22-05274, ECF No. 19 at 32-36.) Stated differently, the Trustee contends that the plans were operated in ways that were not in compliance with either the Internal Revenue Code or ERISA and that this non-compliance should bring the retirement accounts within the estate. These alleged defects include that the Debtor controlled both plans; the Debtor's ex-wife (who was not an employee of the Debtor's companies) was a non-eligible member of the plans; the Debtor made prohibited loans/transactions from his 401(K) plan; the Debtor made an unnecessary COVID-19 withdrawal; the plans did not comply with minimum funding, participation, or non-discrimination requirements; and the plans were not operated according to their terms. (*Id.* at 25-31, 36-50.)

The Bankruptcy Court rejected the argument that these "operational defects" brought the retirement accounts within the estate, ruling as a matter of law that ERISA-governed plans that

---

New Jersey law and thus excludable, but the district court later ruled that the New Jersey statute, N.J. Stat. Ann. § 25:2-1(b), requires an examination of whether the trust also conformed to applicable federal law in order to be deemed qualified under the New Jersey statute. *Id.* at *5. In contrast to *Copulos*, the Bankruptcy Court in the present case did not rely on New Jersey law or New Jersey's definition of a qualifying trust as the basis of the exclusion of the retirement accounts from the estate.

may have been operated in a non-compliant manner remain excludable so long as the anti-alienation provision is enforceable and the plans are subject to ERISA. (ECF No. 1 at 19-21.)

The Court once more concurs with the Bankruptcy Court's ruling. Like other federal courts, the Third Circuit Court of Appeals has recognized that an anti-alienation provision enforceable under ERISA shields a beneficiary's interest in an ERISA-governed plan from third-party creditors and is not generally subject to equitable exceptions. *See, e.g.*, *Coar v. Kazimir*, 990 F.2d 1413, 1420-21 (3d Cir. 1993) ("[W]e read section 206(d)(1) and, by extension *Guidry,* as shielding . . . the beneficiaries' interest under the pension plan from third-party creditors."). As a result of this principle, courts have held that for purposes of determining whether a retirement plan is excludable from a debtor's estate under Section 541(c)(2) of the Bankruptcy Code, alleged defects in how the ERISA-governed plan may have been operated do not typically affect whether the plan contains "[a] restriction on . . . transfer . . . enforceable under applicable nonbankruptcy law." *See, e.g.*, *Matter of Baker*, 114 F.3d at 640 ("[V]iolations of ERISA do not make ERISA inapplicable . . . ; if extensive violations of a federal law made that law go away, the rules would be chimerical. ERISA applied, and was violated; . . . what matters is the application of ERISA's subchapter I, rather than observance of its rules."); *In re Jacobs*, 648 B.R. 403, 418 (Bankr. N.D. Okla. 2023) ("[A] plan subject to ERISA[] . . . is protected regardless of the subsequent operation of the plan."); *Priv. Cap. Invs., LLC v. Schollard*, Civ. No. 07-0757, 2014 WL 2587721, at *4 (W.D.N.Y. June 10, 2014) ("[V]iolations in the operation of a plan do not vitiate enforcement of ERISA's anti-alienation prohibition and there are no equitable exceptions to enforcement of ERISA's anti-alienation prohibition.").

One of the more thorough examinations of this issue was undertaken by the bankruptcy court in *In re Handel*, 301 B.R. 421 (Bankr. S.D.N.Y. 2003). In *Handel*, the debtor had "exerted

control over his interest in the savings and profit sharing plan in violation of the plan's terms and [ERISA] . . . in a manner that would cause the plan, at least as it pertain[ed] to [the debtor] not to qualify for favorable tax treatment under section 401(a) of the Internal Revenue Code." *Id.* at 423. This included the debtor representing himself as the trustee of the plan to gain the ability to control his interest in the plan and to withdraw substantial sums from the brokerage accounts to pay for renovations to the debtor's Park Avenue apartment. *Id.* at 426. One of the debtor's creditors, HSBC Bank USA, argued that this conduct should bring the plans within the property of the estate under Section 541(c)(2). *Id.* at 431-32. The bankruptcy court disagreed.

The court surveyed precedent and concluded that the question as to how an ERISA-governed plan has been operated is largely "irrelevant" to the exclusion analysis because most alleged violations in compliance do "not render any less enforceable the alienation prohibition in the plan and ERISA § 206(d)(1)" and, therefore, the ERISA-governed plan continues to be excluded from the property of the estate notwithstanding the alleged non-compliance. *Id.* at 423. The court acknowledged that giving a debtor the benefit of a plan whose requirements may have been "disregarded may seem inequitable," but it wrote that, "as currently enacted, ERISA's anti-alienation requirement has no exceptions that are applicable here, and the Supreme Court has refused to graft any equitable exceptions onto the statute." *Id.* at 423. The court also took the position that creating new equitable exceptions would be poor public policy because there is a "strong" basis for the current framework: "the protection of pension benefits." *Id.* at 435.

The Trustee asks this Court to part from the above, citing a pair of older bankruptcy court opinions: *In re Harris*, 188 B.R. 444 (Bankr. M.D. Fla. 1995), and *In re Goldschein*, 244 B.R. 595 (Bankr. D. Md. 2000). In *Goldschein*, however, the bankruptcy judge determined that the plan there had to be "tax qualified" to be excluded from the estate, and the judge found that that plan,

operated by the debtor as a "personal piggy bank," could not be excluded by virtue of the "anti-alienation provision of a plan that the debtor . . . materially disregarded in its operation." 244 B.R. at 601-02. Similarly, in *Harris*, the bankruptcy judge determined that "the general failure to administer th[e] Plan in compliance with ERISA and the Internal Revenue Code, and the use of the Plan as a personal bank . . . justifie[d] the treatment of th[e] Plan as property of the estate." 188 B.R. at 450-51.

Here, unlike in *Goldschein* and *Harris*, the Court has already determined that the "tax qualification" status of the Debtor's retirement plans is not relevant for purposes of whether those plans contain an enforceable restriction on transfer under ERISA. Further, for the reasons outlined in *Handel* and the other opinions cited above, the "operational defects" alleged by the Trustee in this case do not bring the accounts within the estate because the anti-alienation provisions in the two plans remain enforceable. *See Jacobs*, 648 B.R. at 418 ("[A] plan subject to ERISA[] . . . is protected regardless of the subsequent operation of the plan."); *see also Baker*, 114 F.3d at 640 ("There is no 'equity' exception to § 1056(d)(1) of ERISA, or § 541(c)(2) of the Bankruptcy Code." (citing *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365 (1990))). Absent a suggestion, which the Trustee has not proffered, that the alleged defects in the Debtor's ERISA-governed plans' operation have either rendered the anti-alienation provisions unenforceable or the plans are no longer subject to ERISA, this Court agrees with the Bankruptcy Court that the generalized allegations of operational improprieties do not suffice here to bring the Debtor's retirement accounts within the property of the estate.[7]

---

[7] This Court agrees with other courts that have noted that interests in ERISA-governed plans are not *per se* excludable, especially when the monies in the plans are "readily available" for current consumption. *Sewell*, 180 F.3d at 713 n.21 (citation omitted).

3. *Count Three – Preferential Transfers (11 U.S.C. § 547(b))*

In Count Three, the Trustee alleges that he can avoid the alleged preferential transfer of retirement funds that occurred when a "July 2020 DB Amendment" changed the retirement plans' participation requirements and then, as part of the marital settlement between the Debtor and the ex-wife, the Debtor received a 100 percent share in the retirement accounts in exchange for the ex-wife receiving alimony payments and the marital residence. (Civ. No. 22-05274, ECF No. 19-5 at 144, 176-77.)

The Bankruptcy Court viewed the Trustee's attempt to "claw back" the retirement account monies via a preference action as "conceptually flawed" because all of the funds sought by the Trustee were in the Debtor's own retirement accounts when the Chapter 7 petition was filed, so there was no transfer to avoid. (ECF No. 1 at 30.) What this meant, practically, was that if the Debtor's interest in the retirement plans had not been excluded from the estate under the Bankruptcy Code, the Trustee could have potentially accessed the retirement monies without avoiding anything. Any alleged transfer, wrote the court, "did not diminish what was available to the Debtor's creditors." (*Id.* at 34.) If anything, the Bankruptcy Court suggested that the more viable claim may have been for the Trustee to seek to void the transfer of the marital residence to the ex-wife, but the Trustee did not bring such a claim and did not challenge the dismissal with prejudice of the ex-wife from the proceeding. (*Id.* at 33-34.)

As the Third Circuit has outlined, "[t]o succeed in a preference action, a trustee must show that a transfer: (1) was to or for the benefit of a creditor; (2) was for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) was made while the debtor was insolvent; (4) was on or within 90 days before the filing of the bankruptcy petition; and (5) enabled the creditor to receive more than it would have in a Chapter 7 liquidation." *In re KB Toys Inc.*,

736 F.3d 247, 250 n.5 (3d Cir. 2013) (citing 11 U.S.C. § 547(b)). The aim of preference actions is to "facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor. Any creditor that received a greater payment than others of its class may be required to disgorge the payment so that all may share equally." *Id.* (quoting 5 Collier on Bankruptcy ¶ 547.01 (16th ed. 2010)).

On appeal, the Trustee does not address the elements of a preference action or explain how his allegations could be plausibly construed to state such a claim. Instead, he makes generalized arguments that do not indicate any preference claim under § 547(b) has been or could be plead. (ECF No. 19 at 50-56.) As the Bankruptcy Court detailed, the Trustee's allegations do not support such a claim because, among other things, there is no allegation that a transfer was made to a creditor or that a creditor received more as a result of any alleged transfer than they would have received in a Chapter 7 liquidation. According to the Trustee's own allegations, the Debtor had full control over the retirement accounts when the petition was filed, and there are thus no alleged payments to a creditor of retirement funds that need to be disgorged to ensure equality of distribution. (*See* ECF No. 19-5 at 144 ("Pursuant to the [Marital Settlement Agreement], the Debtor received . . . the entire amount in the Retirement Accounts.").)

4. Counts Four & Five – Actual Fraudulent Conveyance (11 U.S.C. § 548(a)(1)(A)) and Constructive Fraudulent Conveyance (11 U.S.C. § 548(a)(1)(B))

In Counts Four and Five, the Trustee alleges that the Debtor actually and constructively fraudulently conveyed the retirement account monies. In bringing these claims, the Trustee relies on the same allegations plead in support of the preference cause of action. (Civ. No. 22-05274, ECF No. 19-5 at 177-80.) The Bankruptcy Court dismissed the fraudulent conveyance claims,

finding that there was nothing alleged that suggests there is a fraudulent "transfer" to be avoided, among other defects. (ECF No. 1 at 38-39.)

On appeal, the Trustee argues that the division of marital assets during a divorce is a transfer of property that may be successfully challenged as a fraudulent transfer, but cites no support for the proposition that where the alleged transfer of funds is, as here, to the Debtor and the Debtor possesses the funds sought by the creditor at the time of filing the petition that any fraudulent transfer claim can be maintained on that basis. (ECF No. 19 at 56-61.) Indeed, in the case cited by the Trustee, *In re Hill*, the debtor transferred, among other things, an interest in her marital residence to her ex-husband and transferred an interest in a separate residence to her daughter, and the bankruptcy court found that these transfers were "done to prevent collection efforts." 342 B.R. 183, 198-202 (Bankr. D.N.J. 2006). Here, in contrast, the retirement funds at issue were ultimately transferred to the Debtor's control, and the Trustee offers no explanation as to how this could be deemed to have been fraudulently done to prevent collection on the retirement accounts or how avoiding said transfer would benefit the estate or its creditors. *See, e.g.*, *In re Skinner*, 519 B.R. 613, 623 (Bankr. E.D. Pa. 2014), *aff'd*, 532 B.R. 599 (E.D. Pa. 2015), *aff'd*, 636 F. App'x 868 (3d Cir. 2016) ("The Plaintiff seeks to avoid transfers of assets from the Mother to the Defendants, a transfer that allegedly enriched the Debtor. If successful, the avoidance of the alleged transfers would cause the divestiture of estate assets and necessarily fail to benefit the Debtor's estate. The Plaintiff has not offered and cannot offer any explanation of how the avoidance of the alleged transfers would benefit the Debtor's creditors."); *see also In re Yahweh Ctr., Inc.*, 27 F.4th 960, 964 (4th Cir. 2022) ("'Avoiding' a transfer of property or an obligation makes the transfer or obligation null and void. In other words, whatever property the debtor transferred is returned to the debtor and any obligation the debtor incurred goes away."); *Robinson*

v. Coughlin, 830 A.2d 1114, 1120 (Conn. 2003) ("[A]voidance of the transfer was not available . . . inasmuch as the assets had been reconveyed.").

In addition, to state a claim for actual fraudulent conveyance, a trustee must allege that (i) the transfer was made within two years of the petition date, and (ii) the debtor voluntarily or involuntarily made such transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted. 11 U.S.C. § 548(a)(1)(A). To state a claim for constructive fraudulent conveyance, a trustee must allege that (i) the transfer was made within two years of the petition date; (ii) the debtor received less than reasonably equivalent value in exchange of the transfer; and (iii) the debtor either (a) was insolvent on the date that the transfer was made or became insolvent as a result of the transfer; or (b) was or was about to engage in a business or transaction for which any remaining property remaining with the debtor was an unreasonably small capital; or (c) intended or believed that the debtor would incur debts beyond the debtor's ability to pay; or (d) the debtor made the transfer or incurred the obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business. 11 U.S.C. § 548(a)(1)(B).

Here, the Trustee does not address how what has been plead or could be plead satisfies the elements for such claims or overcomes the deficiencies identified by the Bankruptcy Court. The Trustee writes that he seeks to void the transfer of "the retirement funds . . . *to the Debtor* as part of the [marital settlement agreement]," which again, would be implausible when it is the Debtor's estate that the creditors are recovering against in the Chapter 7 proceeding. (ECF No. 19 at 60-61 (emphasis added).)

5. COUNT SIX – 11 U.S.C. § 544 AND 11 U.S.C. § 550(A)

In his last Count, the Trustee argues that he should have been allowed to "step into the shoes of the IRS and clawback payments made by the debtor ten . . . years prior to the petition date," which includes the retirement funds. (Civ. No. 22-05274, ECF No. 19 at 61-64.) The Bankruptcy Court rejected the argument below because, among other reasons, the IRS was not a listed creditor and there were no allegations that "the Debtor had an actual tax liability during the 10-year period preceding filing." (ECF No. 1 at 39-42.) Even ignoring these defects, the court found that "[t]he bottom line is that even if the IRS is a legitimate triggering creditor all th[at] accomplishes is providing the Trustee with a ten-year look back period for avoidable transfers," and for the reasons already stated, there are no transfers to avoid because the retirement funds sought were in the Debtor's control when the Chapter 7 petition was filed by the Debtor. (*Id.*) The Court agrees. The Trustee writes that he should be permitted to "utilize the ten-year look back provision to void the transfers" that resulted in "the retirement funds" being "ultimately transferred to the Debtor," but there is no explanation offered by the Trustee as to what this would accomplish when it is the Debtor's estate that the creditors are recovering against and the funds are in the Debtor's retirement accounts, which are excluded from the estate under the Bankruptcy Code. (ECF No. 19 at 63-64.)

6. OTHER ARGUMENTS

The Trustee advances several other arguments as to why the Bankruptcy Court should be reversed, none of which the Court finds compelling. For example, the Trustee argues that the Bankruptcy Court did not hear from the allegedly "new third party administrator" of the retirement plans, but does not explain how this would have altered the outcome or would influence the issues presented to this Court on appeal. (Civ. No. 22-05274, ECF No. 19 at 20-22.) The Trustee also

argues that "[t]he Debtor's conduct throughout th[e] case justifies . . . applying both judicial and equitable estoppel," and asks this Court to effectively disregard the Bankruptcy Code and allow the creditors to make claims against the retirement accounts, even if the accounts are properly excluded from the property of the estate. (*Id.* at 65-69.) While the Court understands the Trustee's frustration with what the Bankruptcy Court referred to as "essentially a no-asset case," the Court does not believe that there is an appropriate basis for use of estoppel under the circumstances.

7. DISMISSAL WITH PREJUDICE

Finally, the Trustee submits that the Bankruptcy Court should have granted him further leave to amend his adversary complaint (beyond the one amendment that the Bankruptcy Court granted). Although the Court generally supports multiple opportunities to amend, the Bankruptcy Court correctly determined that any further amendments would be futile. The dispute as to whether the retirement accounts are excluded from the estate boils down to a primarily legal question under the Bankruptcy Code, and the Trustee does not suggest that there are facts that could have been plead that would have altered the Bankruptcy Court's, and now this Court's, analysis. As to the other counts seeking to avoid a purported "transfer," the Court agrees that the Trustee has not indicated that there are any new or different facts that could be plead to cure these "conceptually flawed" claims. Thus, while leave to amend is liberally granted, the Court finds that it was not required in this case when it would be futile. *See, e.g.*, *Pacira Biosciences, Inc. v. Am. Soc'y of Anesthesiologists, Inc.*, 583 F. Supp. 3d 654, 662 (D.N.J. 2022), *aff'd*, 63 F.4th 240 (3d Cir. 2023) ("The Court . . . finds amendment would be futile and dismisses the Complaint with prejudice for failure to state a claim upon which relief may be granted.").

IV. CONCLUSION

For the foregoing reasons, and other good cause shown, the Bankruptcy Court's Shortening Time Order, Strike Order, and Dismissal Order are **AFFIRMED**. An appropriate Order follows.

Dated: September 29, 2023

GEORGETTE CASTNER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE: ERIC S. GILBERT, JOHN M. MCDONNELL, Chapter 7 Trustee, Appellant, v. ERIC S. GILBERT, Chapter 7 Debtor, Appellee.	Civil Action No. 22-05274 (GC) On Appeal from Bankruptcy Case No. 21-12725 (KCF) Adversary Pro. No. 22-01005 (KCF) **ORDER ON MOTION TO CONSOLIDATE AND CROSS-MOTION TO DISMISS**

THIS MATTER comes before the Court upon Appellant John M. McDonnell's October 7, 2022 Motion to Consolidate Cases and Conform Briefing Schedule (ECF No. 8), and Appellee Eric S. Gilbert's October 24, 2022 Cross-Motion to Dismiss the Appeal at Civ. No. 22-05910 (GC) (ECF No. 15).

Appellant has initiated three bankruptcy appeals each objecting to a different order of the Bankruptcy Court in Adversary Proceeding Number 22-01005 (KCF). The appeals are before this Court at Civil Action Nos. 22-05274 (GC), 22-05910 (GC), and 22-05911 (GC). Briefing has been completed by the parties and the Court intends to issue a consolidated opinion resolving the issues raised in each appeal, including those issues raised in Appellee's cross-motion to dismiss the appeal at Civ. No. 22-05910 (GC). In accordance with Federal Rule of Bankruptcy Procedure 8003(b)(2) and Federal Rule of Civil Procedure 42(a)(2), and because the three appeals relate to a common dispute between the same parties and because consolidation will enable the Court to decide the appeals in the most effective manner, and other good cause shown,

IT IS on this 23rd day of August, 2023, **ORDERED** as follows:

1. Appellant's motion to consolidate (*see* ECF No. 8) is **GRANTED**, and the Clerk is directed to consolidate Civ. Nos. 22-05910 (GC) and 22-05911 (GC) at Civ. No. 22-05274 (GC), which is the case bearing the earliest docket number and will now be the lead case. The request to conform the briefing schedule in the three appeals is denied as moot because briefing has been completed, and no further briefing is requested at this time.

2. Appellee's cross-motion to dismiss the appeal at Civ. No. 22-05910 (GC) (*see* ECF No. 15) is **DENIED** without prejudice, and the issues raised in the cross-motion will be addressed in the Court's consolidated opinion.

3. The Clerk is directed to **TERMINATE** the motions pending at ECF Nos. 8 and 15. Once consolidation of the cases has occurred at Civ. No. 22-05274 (GC), the Clerk is directed to administratively **CLOSE** the cases at Civ. Nos. 22-05910 (GC) and 22-05911 (GC).

Georgette Castner

GEORGETTE CASTNER
UNITED STATES DISTRICT JUDGE