Case No. 23-2944

UNITED STATES COURT OF APPEALS
for the
THIRD CIRCUIT

JOHN M. McDONNELL, Chapter 7 Trustee,
Appellant,

v.

ERIC S. GILBERT, Chapter 7 Debtor,
Appellee,

ON DIRECT APPEAL FROM A FINAL ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED SEPTEMBER 29, 2023, AT CIVIL ACTION NO. 3:22-cv-05274 (GC)

BRIEF ON BEHALF OF APPELLEE ERIC S. GILBERT, CHAPTER 7 DEBTOR

McMANIMON, SCOTLAND & BAUMANN, LLC
427 Riverview Plaza
Trenton, NJ 08611
609-695-6070 (phone)
609-695-6071 (fax)
Andrea Dobin
Michele M. Dudas
Counsel to Appellee Eric S. Gilbert, Chapter 7 Debtor

TABLE OF CONTENTS

DEBTOR'S RESPONSE TO TRUSTEEE'S STATEMENT OF ISSUES ON APPEAL....1

DEBTOR'S RESPONSE TO TRUSTEE'S STATEMENT OF THE CASE 2

DEBTOR'S RESPONSE TO STATEMENT OF THE STANDARD OF REVIEW 3

SUMMARY OF ARGUMENT 4

LEGAL ARGUMENT 5

A. THE PROCEDURAL APPEALS WERE PROPERLY DECIDED AND ARE MOOT 5

B. THE BANKRUPTY COURT AND DISTRICT COURT RULINGS ON WHETHER THE DEBTOR'S RETIREMENT ACCOUNTS WERE PROPERTY OF THE BANKRUPTCY ESTATE MUST BE AFFIRMED 12

1. Section 541 of the Bankruptcy Code is the Starting Point for Analysis 12

2. Post-*Patterson v. Shumate* Case Law was Properly Examined and Applied by the Bankruptcy Court and District Court 13

a. The Code references a common law "trust" not the Internal Revenue Code....14

b. The Code only requires the identification of a single source of non-bankruptcy law 15

c. Operational irregularities, even if proven, do not make the exclusion of 541(c)(2) inapplicable....16

d. The *Copulos* decision does not mandate a different outcome 16

e. *Patterson* has been the law for 30 years; Congress has not seen the

need to change its outcome 17

3. The Motion to Dismiss Assumed the Facts Alleged by the Trustee Were True, but Wholly Irrelevant to the Legal Analysis..................................19

4. Public Policy Supports the Debtor's Position 20

C. THE TRUSTEE DOES NOT RECOGNIZE THE DIFFERENCE BETWEEN EXCLUSION AND EXEMPTION 22

D. THE TRUSTEE'S AVOIDANCE CLAIMS DO NOT MEET THE STATUTORY STANDARDS 23

E. FURTHER AMENDMENT OF THE COMPLAINT WOULD BE FUTILE 26

F. EQUITABLE AND JUDICIAL ESTOPPEL ARE INAPPLICABLE 30

CONCLUSION 31

COMBINED CERTIFICATIONS..33

TABLE OF AUTHORITIES

Cases **Page(s)**

Alberts v. HCA, Inc. (In r Greater Southeast Cmty. Hosp. Corp. I), 365 B.R. 293 (Bankr. D.D.C. 2006) 27
Arthur v. Maersk, Inc., 434 F.3d 196 (3d Cir. 2006) 29
Boggs v. Boggs, 520 U.S. 833 (1997) 21
Budhun v. Reading Hosp. and Medical Ctr., 765 F.3d 245 (3d Cir. 2014) 4
Burtch v. Milberg Factors, Inc., 662 F.3d 212 (3d Cir. 2011) 3
Commodity Future Trading Com'n v. Schor, 478 U.S. 833 (1986) 19
Doggett v. U.S., 505 U.S. 647 (1992) 5
First Indem. Of Am. Ins. Co. v. Copulos, 1998 WL 231224 (D.N.J. Feb. 24, 1998) 17
In re Andolino, 525 B.R. 588 (Bankr. D.N.J. 2015) 16
In re Blasingame, 559 B.R. 692 (6th Cir. BAP 2016) 8
In re Bloom, 634 B.R. 559 (B.A.P. 10th Cir. 2021) 10, 11
In re Burlington Coat Factory Securities Lit., 114 F.3d 1410 (3d Cir. 1997) 29
In re Digerati Tech., Inc., 531 B.R. 654 (Bankr. S.D.Tex. 2015) 10
In re Goldschein, 244 B.R. 595 (Bankr. D. Md. 2000) 16, 18
In re Hall, 151 B.R. 412 (Bankr. W.D. Mich. 1993) 16
In re Handel, 301 B.R. 421 (Bankr. S.D.N.Y. 2003) 17
In re Harris, 188 B.R. 444 (Bankr. M.D. Fla. 1995) 16, 18
In re Houck, 181 B.R. 187 23

In re Indian Palms Associates, Ltd.,
61 F.3d 197 (3d Cir. 1995) 11, 12
In re Kaiser,
525 B.R. 697 (Bankr. N.D.Ill. 2014) 27
In re Laher,
496 F.3d 279 (3d Cir. 2007) 19, 22
In re Meinen,
228 B.R. 368 (Bankr. W.D. Pa 1998) 18
In re New Century Holdings, Inc.,
387 B.R. 95 (Bankr. D.Del. 2008) 22
In re Nolen,
175 B.R. 214 (Bankr. N.D. Ohio 1994) 18
In re Oncology Assocs. Of Ocean Cty, LLC,
510 B.R. 463 (Bankr. D.N.J. 2014) 3
In re Orkin,
170 B.R. 751 (Bankr. D.Mass. 1994) 18
In re Owens,
2020 WL 5253843 (D. D.C. Sept. 3, 2020) 6
In re Sewell,
180 F.3d 707 (5th Cir. 1999) 18
In re TSIC, Inc.,
428 B.R. 103 (Bankr. D. Del. 2010) 26
In re Woods,
743 F.3d 689 (10th Cir. 2014) 10
In re Yuhas,
104 F.3d 612 (3d Cir. 1997) 22
Kowal v. MCI Communications Corp.,
16 F.3d 1271 (D.C. Cir. 1994) 30
Levit v Intersoll Rand Financial Corp. (In re Deprizio),
874 F.2d 1186 (7th Cir. 1989) 19
Lum v. Bank of Am.,
361 F.3d 217 (3d Cir. 2004) 4
Lutz v. Portfolio Recovery Assocs.,
49 F.4th 323 (3d Cir. 2022) 3
Matter of Baker,
114 F.3d, 636 (7th Cir. 1997) 18
Matter of Plaza Family Partnership,
95 B.R. 166 (E.D. Cal. 1989) 6
Medley v. Atlantic Exposition Svcs., Inc.,
550 F.Supp. 3d 170 (D.N.J. 2021) 7, 9

Miller v. Fallas (In re J&M Sales, Inc.,
2022 WL 532721 (Bankr. D.Del. February 22, 2022)........ 26, 27
N.L.R.B. v. Bell Aerospace Co Div. of Textron, Inc.,
416 U.S. 267 (1974)........ 19
Patterson v. Shumate,
504 U.S. 753 (1992)........ 4, 13, 14
Pharm. Sales & Consulting Corp. v. J.W.S. Delavau Co.,
106 F. Supp. 2d 761 (D.N.J. 2000)........ 29
Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon,
541 U.S. 1 (2004)........ 15
S. Cross Overseas Agencies, Inc v. Kwong Shipping Grp., Ltd.,
181 F.3d 410 (3d Cir. 1999)........ 7
Santiago v. Warminster Twp.,
629 F.3d 121 (3d Cir. 2010)........ 3
Smith v. Manasquan Bank,
2018 WL 1512054 (D.N.J. Mar. 27, 2018)........ 5, 6
Travelers Indem. Co., v. Dammann & Co.,
594 F.3d 238 (3d Cir. 2010)........ 30
U.S. v. Ron Pair Enterp., Inc.,
489 U.S. 235 (1989)........ 14
United States ex rel. Zizic v. Q2 Administrators, LLC,
728 F.3d 228 (3d Cir. 2013)........ 30
Walker v. Coffey,
905 F.3d 138 (3d Cir. 2018)........ 4
Westmoreland Human Opportunities, Inc. v. Walsh,
246 F.3d 233 (3d Cir. 2001)........ 13

Statutes

11 U.S.C. §522(d)(12)........ 15, 24
11 U.S.C. §541........ 13
11 U.S.C. § 547(b)(1)........ 24
401(a) of the Internal Revenue Code........ 14
Section 541(a)........ 13
Section 541(c)........ 13
section 541(c)(2) of the Bankruptcy Code........ Passim

Rules

Fed. R. App. P. 32(a)(5) and (6)........ 35

Fed. R. App. P. 32(a)(7)(B) 34
Fed. R. App. P. 32(a)(7)(c) 34
Fed. R. Bankr. P. 8009(e) 9
Fed. R. Bankr. P. 9006(c) 6
Fed. R. Bankr. P 2004 32
Fed. R. Civ. P. 12(b)(6) 3, 8, 9
Fed. R. Civ. P. 45 32
Fed. R. Ev. 408 32
Rule 8009 10
Rule 8009(e)(1) 9, 10, 11
Rule 8009(e)(2) 10, 12
Rule 8009(e)(2)(B) 12
Rule 8009(e)(3) 11

DEBTOR'S RESPONSE TO TRUSTEE'S STATEMENT OF ISSUES ON APPEAL

Although Debtor is generally inclined to allow Trustee to present his own issues on appeal, the Issues on Appeal presented by Trustee misstate the holdings below and, thus, must be restated for the purposes of clarity. For example, Debtor objects to Trustee's contention that the Bankruptcy Court held that the Trustee "could not pursue avoidance actions." The Bankruptcy Court would have allowed a properly pled avoidance action. It simply held that the Amended Complaint presented by Trustee was insufficient as a matter of law to state an avoidance claim against the Debtor *even if the facts alleged were true*. Appx 964-968**.**

Debtor contends that the within appeal presents five issues for this Court's consideration:

1. Did the District Court err in affirming the Bankruptcy Court's entry of an Order Shortening Time to consider the Trustee's Motion to Strike items from the appellate record?
2. Did the District Court err in affirming the Bankruptcy Court's Order striking items from the appellate record?
3. Did the District Court err in affirming the Bankruptcy Court's decision that the Debtor's retirement plans were not property of the bankruptcy estate?

4. Did the District Court err in affirming the Bankruptcy Court's decision that the Trustee's Amended Complaint filed to state a claim for avoidance of a preference or fraudulent transfer against the Debtor?
5. Did the District Court err in affirming the Bankruptcy Court's refusal to allow the Trustee to amend his Complaint for a second time?

DEBTOR'S RESPONSE TO TRUSTEE'S STATEMENT OF THE CASE

Consistent with his approach to the entirety of these proceedings, the Trustee has overly complicated the matter before this Court by including extraneous facts geared to influence the Court's view of the Debtor, in the hopes of convincing the Court to overlook the weaknesses in his legal theories. However, the accurate issues on appeal before this Court arise from the Trustee's abject failure to present the Bankruptcy Court with a meritorious Complaint, after having been given ample opportunity to do so. This finding was affirmed by the District Court. Ignoring the fact that this appeal is founded on the finding *by two courts* that the Trustee's legal approach is fundamentally flawed, the Trustee litters the record with disputed and incendiary factual allegations. The Statement of the Case is no different. Since the procedural recitation is accurate and with the expectation that this Court will ignore the surplusage, the Debtor will simply state that this appeal concerns the narrow legal issue of whether a retirement plan needs to be *both* formed under ERISA *and* operate in compliance with the Internal Revenue Code to be excluded from a

bankruptcy estate under section 541(c)(2) of the Bankruptcy Code. This is a purely legal issue; the facts of this specific case and the operation of these specific Plans is wholly irrelevant (but absorbs much of the Trustee's briefing attention) and need not be analyzed or even considered at this stage in the proceedings.

DEBTOR'S RESPONSE TO STATEMENT OF THE STANDARD OF REVIEW

The Debtor takes issue with Trustee's citation to *In re Oncology Assocs. Of Ocean Cty, LLC* 510 B.R. 463, 466-67 (Bankr. D.N.J. 2014) as to the mechanics for reviewing a determination that a complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). This Court has established a three-step process to review such rulings:

> First, the court must "tak[e] note of the elements a plaintiff must plead to state a claim." Second, the court should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." Finally, "where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief."

Burtch v. Milberg Factors, Inc., 662 F.3d 212, 221 (3d Cir. 2011) citing *Santiago v. Warminster Twp.*, 629 F.3d 121, 130 (3d Cir. 2010). *See also Lutz v. Portfolio Recovery Assocs.*, 49 F.4th 323, 327 (3d Cir. 2022) (outlining the "three-step process to evaluate a motion to dismiss a complaint for failure to state a claim for relief"). Applying this three-step process, this Court will reach the inescapable conclusion that the decisions of the Bankruptcy Court and District Court must be affirmed.

Finally, the denial of leave to amend a complaint is reviewed for an abuse of discretion. *Walker v. Coffey*, 905 F.3d 138, 143 (3d Cir. 2018); *Budhun v. Reading Hosp. and Medical Ctr.*, 765 F.3d 245, 259 (3d Cir. 2014), *citing Lum v. Bank of Am.*, 361 F.3d 217, 223 (3d Cir. 2004). The Bankruptcy Court's decision to deny leave to amend is not an abuse of discretion.

SUMMARY OF ARGUMENT

The law in this Circuit has generally been that retirement plans that are governed by ERISA are not property of a bankruptcy estate pursuant to the express language of 11 U.S.C. §541(c)(2) and *Patterson v. Shumate*, 504 U.S. 753 (1992). The Trustee is attempting to change the law in this Circuit. Unless and until he is successful, the underlying facts of this case which are the focus of the Trustee's Brief, *i.e.*, the manner in which the Debtor's retirement accounts were structured and/or maintained, are not relevant – much as the Trustee would like them to be.

The Trustee litters the record in this case with allegations of "bad faith," "impropriety," and unflattering portrayals of the Debtor hoping to bootstrap his manufactured rage into a change in the law. The Trustee is hoping that this Court will change the law *because* of the facts improperly presented. However, "bad facts make bad law." *Doggett v. U.S.*, 505 U.S. 647, 659 (1992). For that reason, we ask the Court to resist any urge to follow the Trustee down the path he is attempting to lay out. None of the facts presented by the Trustee are relevant based upon the law

as explained in detail by both the Bankruptcy Court and the District Court. The Debtor does not believe that a change in the law is warranted as a matter of law and/or policy. The District Court opinion must be affirmed.

LEGAL ARGUMENT[1]

A. THE PROCEDURAL APPEALS WERE PROPERLY DECIDED AND ARE MOOT.

The Trustee has appealed two procedural rulings of the Bankruptcy Court: (i) entry of an Order Shortening Time (the "**OST**") to consider the Debtor's Motion to Strike Items from the Record on Appeal (the "**Motion to Strike**") and the eventual Order granting the Motion to Strike (the "**Strike Order**"). The Debtor submits that both of these appeals are now moot as this Court cannot afford relief to the Trustee without an extraordinary waste of resources of the Courts and litigants. *Smith v. Manasquan Bank*, 2018 WL 1512054 **2 - 3 (D.N.J. Mar. 27, 2018) (granting cross-motion of appellee in part, upon finding that appeal by *pro se* debtor of order shortening time as moot and interlocutory order, filed without leave of court). *See also In re Owens*, 2020 WL 5253843 *1 (D. D.C. Sept. 3, 2020) (district court previously dismissed appeal on order shortening time as equitably and

[1] The Debtor will not be addressing Heading III of the Trustee's Brief as to alleged "due process" violations. He has had ample opportunity to explain how the Plans' Third Party Administrator (new and/or former) is a party in interest to these appeals and has yet to do so even after the District Court noted the defect in its opinion. Appx 65. No further discussion is required.

constitutionally moot); *Matter of Plaza Family Partnership*, 95 B.R. 166, 170 (E.D. Cal. 1989) (whether to grant or deny a hearing on shortened time because of a stated emergency is a decision within the discretion of the bankruptcy court pursuant to Fed. R. Bankr. P. 9006(c)).

In the first instance, the appeal of the OST is nonsensical. The hearing on the Motion to Strike was held on an emergent basis to facilitate the Trustee's preparation of his appellate Brief. Without knowing what was properly included in the appellate record, the Trustee would be unable to complete his briefing. The Trustee may disagree with the outcome (which he did) and appeal (which he did), but he cannot demonstrate that a reversal of the OST will have any effect on the outcome of the Motion to Strike. His counsel presented his position on the Motion to Strike and was heard. If now successful, would the Trustee be inclined to revisit the entirety of the proceedings since the OST was entered on September 22, 2022? There is no value to any participant resulting from such an outcome. Similarly, the Motion to Strike was granted on October 4, 2022, and prescribed the record for the appeal before the District Court. That record has served as the foundation for all proceedings before the Court since then. Would the Trustee ask that the Court return the matter to the District Court to issue its ruling again? As noted by the District Court in its Opinion, the record before it was still in excess of 1,800 pages. Appx 50.

The mootness of these appeals is particularly noteworthy considering the limited items that the Bankruptcy Court properly considered when ruling on the Debtor's Motion to Dismiss. In sum, when considering the Debtor's Motion to Dismiss for failure to state a claim, the Bankruptcy Court's deliberation and review was properly limited to "the facts alleged in the pleadings, the documents attached thereto as exhibits, and matters of judicial notice." *Medley v. Atlantic Exposition Svcs., Inc.*, 550 F.Supp. 3d 170, 181 (D.N.J. 2021) *citing S. Cross Overseas Agencies, Inc v. Kwong Shipping Grp., Ltd.,* 181 F.3d 410, 426 (3d Cir. 1999).[2] With this law in mind, the record on appeal for a Motion to Dismiss under Federal Rule 12(b)(6) was equally limited. The Bankruptcy Court repeatedly explained the limited nature of the record that was considered:

> The parties presented to the Court exactly three things in connection with this motion [to dismiss]. The debtor's motion package, the Trustee's reply brief with three exhibits attached, and the debtor's response. These items will all be part of the record on appeal along with the Court's opinion. Nothing else was presented nor relied upon by the Court.

---

[2] Suggesting that he is wholly unfamiliar with the intent and operation of a Rule 12(b)(6) Motion to Dismiss, the Trustee complains that the Bankruptcy Court "did not conduct an evidentiary hearing." Trustee's Brief, p. 24. An evidentiary hearing is not necessary or even appropriate when a plaintiff fails to include sufficient allegations *in its complaint* to entitle it to proceed with the litigation beyond the answer stage. This is just another example of the Trustee's wholesale misconstruing why and how his efforts to recover the Debtor's plan were unsuccessful.

Transcript of Hearing, October 4, 2022, p. 14-15. Appx 681-682. The Trustee argues that he should have been allowed to be "overinclusive and allow the appellate court to decide the relevance of each item." Trustee's Brief, p. 23. That position may be appropriate in some circumstances, but not here. The case cited by the Trustee involves the appeal of entry of a judgment denying discharge: *In re Blasingame*, 559 B.R. 692 (6th Cir. BAP 2016). Considering the standards that apply in such litigation, a broad appellate record would be appropriate.[3] It is *not* appropriate for the appeal of a ruling on a Rule 12(b)(6) motion. By ignoring the case law that restricts nature of the record before the Bankruptcy Court on a Rule 12(b)(6) Motion to Dismiss, the Trustee can seek a broader appellate record than is warranted and his actions are a transparent and desperate attempt to do so. In sum, since the record before the Bankruptcy Court was limited, so must be the appellate record. The Motion to Strike was appropriate and its appeal is now moot.

The single facially valid issue raised by the Trustee as to these procedural appeals was whether the Motion to Strike was properly heard by the Bankruptcy Court or the District Court. As a matter of *common sense*, it would be appropriate for the Bankruptcy Court to rule on such a motion as it is in the best position to guide

---

[3] The Trustee points to the (unsuccessful) appeal of the dismissal of his Complaint to bar the Debtor's discharge as a justification for having an improperly expansive appellate record in this proceeding. Trustee's Brief, p. 25. The dismissal of two different Complaints have two different appellate records, even though they involve the same parties. The analogy that the Trustee attempts to draw fails.

the appellate court as to what it considered when it ruled. The Trustee contends that he has the absolute right to include items that *he* considers relevant, regardless of the Bankruptcy Court's decision on that topic. In fact, the applicable rule follows the common-sense notion that the Bankruptcy Court is aware of what is relevant to the decision. In this case, the Bankruptcy Court limited the appellate record because the record that was available to the Bankruptcy Court on the Debtor's Motion to Dismiss under Rule 12(b)(6) was very limited; the appellate record must reflect that. *See Medley v. Atlantic Exposition Svcs., Inc.*, *supra*.

The process of establishing the record on appeal is governed by Fed. R. Bankr. P. 8009(e). Rule 8009(e)(1) 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." The venue for the resolution of disputes could not be more clearly stated in the first provision of Rule 8009. *See*, generally, *In re Digerati Tech., Inc.*, 531 B.R. 654 (Bankr. S.D.Tex. 2015). Query how the Trustee believes that there is a dispute on this narrow issue. In his appeal the Trustee simply ignores this first provision, focusing instead on the *next* subsection of Rule 8009(e) which allows the record to be modified in the event of "error or accident" "(A) on stipulation of the parties; (B) by the bankruptcy court…; or (C) by the court where the appeal is pending."

First, as a matter of statutory construction, the Court must review 8009(e)(1) *before considering* the later provisions of the Rule. The structure of a statute or rule is important to understand its meaning. *See In re Woods*, 743 F.3d 689, 694 (10th Cir. 2014) (analyzing the meaning of section 101(18)(A) "by examining the subsections structure…."). Next, since the Trustee's decision to burden the record with superfluous matters was not done in error or by accident, Rule 8009(e)(2) simply does not apply. *Digerati* at 666. ("[F]or Rule 8009(e)(2) to be applicable, the designated items in dispute must be *material* and they must have been omitted *by error or accident.*" [emphasis in original]). Appellant relies upon *In re Bloom*, 634 B.R. 559 (B.A.P. 10th Cir. 2021) to support his incorrect position that it was improper for the Bankruptcy Court to hear the Motion to strike rather than the within Court. The *Bloom* case related to a motion to strike ten exhibits included in the debtor's designation that were not admitted *at trial*. The debtor responded and a bankruptcy appellate panel "motions panel" referred the merits to the "merits panel assigned to the appeal." *Id.* at 578. The court ultimately concluded that Rule 8009(e)(3) permitted it to review the motion to exclude. *Id.* at 579. As an initial matter, the *Bloom* case is not binding on this Court and flies in the face of the plain language of Fed. R. Bankr. P. 8009(e)(1). This Court may take judicial notice that there is no Bankruptcy Appellate Panel for our jurisdiction. There is no "motion panel" or other similar function as there is in the 10th Circuit, which is a distinguishing feature.

The Trustee alleges that the Bankruptcy Court ignored this Court's decision in *In re Indian Palms Associates, Ltd.*, 61 F.3d 197 (3d Cir. 1995), and alleges that the District Court misconstrued it. *Indian Palms* allowed for the expansion of items not considered by the bankruptcy court in rendering its decision, because they may have been relevant to issues such as waiver, estoppel, preservation of an issue for appeal, litigation delay, limitations issues, prejudice to the opposing party, and the related reasons. This Court in *Indian Palms* found that the use of these documents did not offend the limitations because they were not being used to determine disputed facts relating to the merits. *Id.* at 204. The issue in *Indian Palms* related to filings in the debtor's Chapter 11 proceeding. Here, there are numerous documents from the main Chapter 7 case which the Debtor allowed to be included in the record which were not *directly* relevant to the Motion to Dismiss, and are, at most, the only documents which would be necessarily part of the record. There is nothing else from the stricken record which should have any bearing on this appeal, or any issue other than whether the subject retirement accounts were proper of the Estate.[4]

The Trustee's designation was the result of a strategic decision to try to distract the appellate courts from identifying the legal infirmities of the Trustee's argument by filling the record with extraneous allegations well-beyond that which

[4] No rational argument could be made that the contents of the Discharge Adversary Proceeding is relevant under this standard.

is permitted by the scope of decision-making on a Rule 12(b)(6) motion. Finally, even if it *does* apply, the rule, by its terms, allows for the Bankruptcy Court to rule on issues concerning the contents of the appellate records. Rule 8009(e)(2)(B). The rulings on the OST and Motion to Strike must be affirmed.

B. THE BANKRUPTY COURT AND DISTRICT COURT RULINGS ON WHETHER THE DEBTOR'S RETIREMENT ACCOUNTS WERE PROPERTY OF THE BANKRUPTCY ESTATE MUST BE AFFIRMED.

The entirety of the Trustee's litigation and approach to this bankruptcy case was driven by his single-minded desire to draw the Debtor's retirement accounts (worth more than $1Million) into the bankruptcy estate under 11 U.S.C. §541. He refuses to acknowledge that the case law painstakingly developed over the last few decades and now affirmed by the courts below does not support his position.

1. Section 541 of the Bankruptcy Code is the Starting Point for Analysis.

Section 541(a) sets out the all-encompassing view of what constitutes "property of the estate." In sum, everything is in the estate unless it is specifically excluded. "Congress intended the Bankruptcy Code's definition of property to sweep broadly. But the Code's property definition is not without limitations…." *Westmoreland Human Opportunities, Inc. v. Walsh*, 246 F.3d 233, 256 (3d Cir. 2001). Section 541(c) sets out *what* is specifically excluded from Property of the Estate. At issue in this matter is subsection (2) which excludes from property of the Estate any asset that contains "[a] restriction on the transfer of a beneficial interest

of the debtor in a trust that is enforceable under appliable nonbankruptcy law is enforceable in a case under this title." 11 U.S.C. §541(c)(2). Confronted with confusion about how to apply this subsection to retirement assets, the Supreme Court, in *Patterson v. Shumate* considered "whether an anti-alienation provision contained in an ERISA-qualified pension plan constitutes a restriction on transfer enforceable under 'applicable nonbankruptcy law,' and whether 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). The Supreme Court answered "yes" which would have appeared to put an end to the matter, *i.e.*, a properly formed retirement plan would not be property of the bankruptcy estate.

Unfortunately, the Supreme Court used a term in its decision that has no generally accepted meaning – "ERISA-qualified." It is not used in any statute or by professionals engaged in the subject matter. As with all ambiguities, litigation was spawned.

2. Post-*Patterson v. Shumate* Case Law was Properly Examined and Applied by the Bankruptcy Court and District Court.

The Post-*Patterson* cases created a dichotomy in the law. One group of cases held that retirement plans need only be *governed by ERISA* (since ERISA "qualification" is not possible) to be excluded from the bankruptcy estate; the other group of cases held that to be excluded a retirement plan needs to be governed by ERISA *and* "tax-qualified" under 401(a) of the Internal Revenue Code. The

Bankruptcy Court herein adopted the first standard, *i.e.*, that the plan need only be governed by ERISA, not necessarily tax-qualified. Both the Bankruptcy Court and the District Court have recognized that *this Court* has not yet weighed in on the issue. However, the Debtor believes that this Court's directive to and history of enforcing a statute in accord with its plain meaning will lead the Court to affirm the holdings of both the Bankruptcy Court and District Court. *See U.S. v. Ron Pair Enterp., Inc.*, 489 U.S. 235, 240-1 (1989) ("…as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute.").

a. *The Code references a common law "trust" not the Internal Revenue Code.*

The Code, by its terms, does not reference any specific source of nonbankruptcy law to support the enforceability of a restriction on transfer. When drafting 541(c)(2), Congress was within its power to reference specific provisions of the Internal Revenue Code (the "**IRC**") if it believed that should serve as the foundation of the restriction. It has not hesitated to reference the IRC in other sections of the Code. *See*, *e.g.*, the 2005 amendments to the Bankruptcy Code adding a new exemption for tax-exempt retirement funds under section 522(d)(12) that references specific sections of the IRC. Having not included a specific reference to the IRC, it would be improper for the Court to now require it. The IRC is *not* a source of law for the creation and/or enforcement of a *trust* relating to retirement

plans. It is the source of beneficial tax-treatment of a retirement plan. *See*, *e.g.*, *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 8 (2004)(describing the "favorable tax treatment" that a plan enjoyed under the Internal Revenue Code.) These are two very different provisions. A valid trust is excluded from a bankruptcy estate even though it does not have all of the tax advantages of a retirement account; that trust will still be able to take advantage of 541(c)(2). *See In re Andolino*, 525 B.R. 588, 592 (Bankr. D.N.J. 2015) (inherited IRAs do not enjoy all of the benefits of retirement accounts but are excluded from the bankruptcy estate under state law). There is simply no justification to impress a tax-qualification requirement on 541(c)(2) when it does not currently exist in the statute.

b. *The Code only requires the identification of a single source of non-bankruptcy law.*

Section 541(c)(2) of the Code, by its terms, requires that there is a "single" nonbankruptcy law supporting the enforceability of restrictions on transfer in order to exclude a trust fund from a bankruptcy estate. The provision does not require *two, i.e.*, the IRC *and* ERISA. The cases that require tax qualification that the Trustee is asking this Court to follow require ERISA oversight *and* tax qualification. *In re Hall*, 151 B.R. 412 (Bankr. W.D. Mich. 1993); *In re Harris*, 188 B.R. 444 (Bankr. M.D. Fla. 1995); *In re Goldschein*, 244 B.R. 595 (Bankr. D. Md. 2000). By its express terms, the Bankruptcy Code does not require that.

c. *Operational irregularities, even if proven, do not make the exclusion of 541(c)(2) inapplicable.*

The two courts below have held that because the Plans are *subject to* ERISA, they are excluded from the Estate. The Trustee alleges that the Plans have been operated in violation of ERISA. As repeatedly noted hereinabove, if properly pled, these factual allegations must be accepted as true for the purposes of the 12(b)(6) motion. The Trustee's articulation of this fact pattern, however, relies *in its entirety* on the IRC *and not ERISA*. The Trustee makes the intellectual leap that a violation of the IRC with regard to retirement plans results in a plan no longer being *subject to* ERISA. There is no suggestion that this legal leap exists. If the Plans *violated* the IRC, why would the Plans no longer be *subject to ERISA*? Rather than pointing to ERISA as a source of legal authority, the Trustee points to the IRC as the source of penalty. Since the Bankruptcy Court and District Court found that ERISA *governance* was all that was required, and *not* IRC qualification, the Trustee's argument as to the sacrifice of tax-qualification under the IRC based upon procedural irregularities is insufficient to place the Plans outside the reach of 541(c)(2). *See also*, *In re Handel*, 301 B.R. 421 (Bankr. S.D.N.Y. 2003). This holding must be affirmed.

d. *The Copulos decision does not mandate a different outcome.*

The Trustee insists that the courts below improperly failed to follow the reasoning of the District Court in *First Indem. Of Am. Ins. Co. v. Copulos*, Civ. No.

97-4283, 1998 WL 231224 (D.N.J. Feb. 24, 1998). First of all, the critical issue before the courts is the proper interpretation of *the Bankruptcy Code*; *Copulos* is not a bankruptcy case, focusing instead on the definition of a "qualifying trust" under New Jersey *state law*. Section 541(c)(2) of the Bankruptcy Code does not need to reference the state law definition of "qualifying trust" to be interpreted. Federal law (ERISA, principally) is a sufficient source of law. The Trustee's insistence that the unpublished, non-binding opinion *Copulos* is the foundation for his position as to issues in this matter is a reflection of the weakness of his position otherwise. Both the Bankruptcy Court and District Court were dismissive of the Trustee's argument in this regard.

e. *Patterson has been the law for 30 years; Congress has not seen the need to change its outcome*

Although the Debtor (and the Bankruptcy Court and District Court) have acknowledged that there are published opinions that require both ERISA governance and IRC qualification, those opinions are generally issued at the bankruptcy court level.[5] *See* Trustee's Brief, p. 34. The Bankruptcy Court and District Court elected to not follow those opinions and, instead, followed the Circuit level opinions of *Matter of Baker*, 114 F.3d, 636 (7th Cir. 1997) and *In re Sewell*, 180 F.3d 707 (5th

[5] *In re Meinen*, (228 B.R. 368 (Bankr. W.D. Pa 1998): *In re Nolen*, 175 B.R. 214 (Bankr. N.D. Ohio 1994); *In re Orkin*, 170 B.R. 751 (Bankr. D.Mass. 1994); *In re Goldschein*, 244 B.R. 595 (Bankr. D.Md. 2000); *In re Harris,* 188 B.R. 444 (Bankr. M.D. Fla. 1995).

Cir. 1999). When called upon to predict what this Court would rule as to this issue, Courts in this Circuit have predicted that it would follow these Circuit precedents. See *In re Meinen*, 228 B.R. 368, N. 10 (Bankr. W.D.Pa. 1998). In fact, when called upon to address a similar question, this Court *did* describe the *Patterson* holding as to the application of the 541(c)(2) exclusion without regard to tax qualification. *In re Laher*, 496 F.3d 279, 286 (3d Cir. 2007).

These Circuit level opinions have been the law of the land for more than twenty (20) years, yet Congress, apparently satisfied with the way in which its legislation is being interpreted and applied, has not seen fit to amend the Code to change these results. In the context of an administrative agency interpretation of a regulation, the Supreme Court has found that "when Congress revisits a statute giving rise to a longstanding administrative interpretation *without pertinent change,* the Congressional failure to revise or repeal the agency's interpretation 'is persuasive evidence that the interpretation is the one intended by Congress'." *Commodity Future Trading Com'n v. Schor*, 478 U.S. 833, 846 (1986) (emphasis added) *citing N.L.R.B. v. Bell Aerospace Co Div. of Textron, Inc.*, 416 U.S. 267, 275 (1974). Congress has amended the Bankruptcy Code *twice* since *Patterson v. Shumate* was decided, most recently, in 2005. No effort was made to change the outcome of the precedent that excluded retirement plans governed by ERISA from a bankruptcy estate. In the past, Congress has not hesitated to change the Code to

address what it believed to be an incorrect interpretation adopted by the Courts.[6] This Court need not attempt to change and has not changed that which Congress has not seen fit to change.

3. The Motion to Dismiss Assumed the Facts Alleged by the Trustee Were True, but Wholly Irrelevant to the Legal Analysis.

The Trustee's Brief expends substantial effort to identify the ways in which the Debtor's Plans should be deemed to <u>not be tax-qualified</u> based upon his (disputed) view that tax qualification is required. Trustee's Brief, p. 27 ("the Trustee is a proponent of the view that ERISA <u>and</u> IRC compliance is required…."). In fact, the Trustee sought an enlargement of his Brief size to be able to accommodate these hyper-technical arguments. The Debtor will not expend substantial time addressing these factual allegations, as they are wholly irrelevant as a matter of law and fact to the issues currently before the Court.

The standard for reviewing a Rule 12(b)(6) motion require that a court accept as true the factual allegations. The Bankruptcy Court properly did that. It <u>assumed</u> (although the Debtor denies and believes he can prove otherwise) that the Debtor engaged in prohibited transactions and that the Plans were not tax-qualified. It did

[6] In 1989 the Seventh Circuit rendered a decision styled *Levit v Intersoll Rand Financial Corp. (In re Deprizio)*, 874 F.2d 1186 (7th Cir. 1989) creating an extended lookback period for preference recoveries when the recipient's payment benefited an insider. In 1994 Congress amended section 550(c) to protect a third party lender from the extended 1 year insider preference recovery period created by *Deprizio*.

not matter; it still does not. The Trustee would prefer that this Court is bogged down in a litany of extraneous facts that do little more than cast aspersions on the Debtor. If the law is, as found by the two courts below, that the Plans *need not be tax-qualified*, then all of the arguments (in the almost 20 pages of Heading VI of the Trustee's Brief) about the Plans' failure to comply with the IRC are wholly irrelevant and designed solely to distract.[7]

4. Public Policy Supports the Debtor's Position.

Trustees are selected to serve based upon their expertise and demonstrated good judgment. They are rarely, if ever, experts in tax compliance of retirement plans. If this Court were to rule that 541(c)(2) required that only ERISA governed *and* tax-qualified plans were excluded from the Estate, trustees would become obligated to review the operation of every debtor's retirement plans to evaluate if they were properly managed. Suddenly, ERISA's policy of protecting the retirement savings of individuals would be sacrificed to the potential challenge by overzealous trustees looking to prove their superiority. *Boggs v. Boggs*, 520 U.S. 833, 845 (1997) ("The principal object of [ERISA] is to protect plan participants and beneficiaries.").

---

[7] If this Court were to find that tax qualification is a prerequisite to the application of 541(c)(4), the case must be remanded so that discovery could be undertaken and experts opine whether the Plans, in fact, are not tax-qualified based upon the Trustee's allegations. As a result of the procedural history of this case, there is no factual record on that question. The facts presented by the Trustee are, by their nature, one-sided and his complaint that he does not have requisite information (and threat to the Debtor's discharge) is wholly premature. *See* Trustee Brief, p. 30-31.

The case *sub judice* would be an attractive outlier due to the size of the retirement accounts at issue. However, any debtor with a retirement account of any size (even one managed by an unaffiliated employer) would have to be concerned with whether her employer had properly managed the plan in such a way that the tax qualification was sacrificed without her knowledge. A debtor thinking that her retirement plan administrator would protect her livelihood post-petition, will unexpectedly risk losing her life savings because of actions taken by her employer over which she had no control. Bankruptcy Courts will become clogged with ERISA/tax litigation because a determination of what is property of the Estate is a core matter over which the Bankruptcy Courts have primary jurisdiction. *In re New Century Holdings, Inc.*, 387 B.R. 95, 105 (Bankr. D.Del. 2008) ("…matters requiring a declaration of whether certain property comes within 541's definition of 'property of the estate' are core proceedings.").

This Court has historically protected ERISA governed retirement plans that constitute trusts under applicable state law from third parties. *In re Laher*, 496 F.3d 279 (3d Cir. 2007); *In re Yuhas,* 104 F.3d 612 (3d Cir. 1997). This appeal implicates these very same policy concerns. As a result, this Court must affirm the courts below to protect debtors' retirement plans from overreaching trustees.

C. THE TRUSTEE DOES NOT RECOGNIZE THE DIFFERENCE BETWEEN EXCLUSION AND EXEMPTION.

The Debtor's schedules claim that the Plans are *both* "not property of the Estate" *and* exempt under 11 U.S.C. §522(d)(12). Appx 2601, 2605. The Trustee objected to the Debtor's claimed exemption in the Plans. When the Trustee initiated the adversary proceeding seeking declaratory judgment that the Plans were property of the Estate, the Objection to Exemptions was combined with the adversary proceeding for resolution, but they are two very different issues which is apparently creating confusion for the Trustee. The Trustee contends (in Brief Heading V) that the Debtor has elected a state law-based exemption thereby improperly "mixing" state and federal exemptions. Trustee's Brief, p. 46-47. This is simply wrong.

On its face, the Debtor's Schedule C setting out his claim of exemption elects the federal exemption scheme; no state law citations exist on the document. Appx 2605. The Trustee's contention that the Debtor claimed the state law exemptions is simply wrong, as a matter of fact. However, it bears noting (to avoid the confusion suffered by the Trustee) that the Debtor need only *exempt* assets that are found to be property of the Estate. The Debtor need not exempt assets that are not property of the Estate:

> "[E]xclusion" and "exemption" do not mean the same thing. Property that is excluded from the bankruptcy estate never comes into the estate at all, by operation of law, while exempt property is

> estate property at all times but is protected from the reach of creditors and administration through the estate if the debtor exercises the statutory option.

In re Houck, 181 B.R. 187, 193, n. 16 (Bankr. E.D.Pa. 1995). Even though he contended that the Plans were not property of the estate, the Debtor did take the additional step of exempting the Plans -- as a sort of "belt and suspenders" approach to exemptions. At no time did he claim an "exemption" under state law and, more importantly, the Plans have been found to not be property of the Estate.[8] The Trustee's position is specious.

D. THE TRUSTEE'S AVOIDANCE CLAIMS DO NOT MEET THE STATUTORY STANDARDS.

Much like the declaratory judgment action, the Trustee failed to prove the elements of the avoidance actions he presented to the Bankruptcy Court. For example, the Trustee was required to plead that a transfer had occurred that he was entitled to avoid. He did not do so. The alleged "transfer" was the "July 2020 DB Amendment" which changed the service requirement to participate in the Plan. The Bankruptcy Court found that this allegation is insufficient to constitute a "transfer" as a matter of fact – a fact which was not erroneous. Furthermore, even if it was a "transfer," there is no evidence that, for a preference, it was a transfer to a "creditor"

---

[8] The fact that the exemptions are irrelevant may explain why the District Court elected not to address the argument in its opinion as noted by the Trustee in his Brief. Trustee's Brief, p. 47. Since the retirement accounts have been repeatedly found to not be property of the bankruptcy estate, the issue as to their exemption is irrelevant.

– also required by the Bankruptcy Code. *See* 11 U.S.C. § 547(b)(1). Further, the facts, as pled, suggested that the Debtor *already held and controlled* the assets for which the Trustee was suing, *i.e.*, the assets in the Plan, meaning that there was no relief that could be granted to the Trustee. In his Brief, the Trustee clearly states "[t]he ultimate transferee of the Retirement Accounts was the Debtor…." Trustee's Brief, p. 73. What relief was the Trustee pursuing? The Trustee also failed to allege insolvency (another element of a preference) with sufficient specificity or, in the case of the preference suit, allege that creditors will receive less than they would have received in a liquidation as a result of the transfer. The Bankruptcy Court called the 547 claim "conceptually flawed" as a result of these omissions; the District Court agreed. Appx 956. These conclusions must be affirmed. Appx 62.

In his Brief, the Trustee appears to ignore the shortcomings of its pleadings, focusing, again, on the *proofs* that he wanted to present in support of a claim that had no right to be brought. The *factual proofs* that the Trustee may or may not have are not yet relevant; the Court is merely testing the words on the page of the Amended Complaint. If the *words* had been sufficient, the Amended Complaint would not have been dismissed, discovery would proceed and the facts would have been developed. That is not what happened here. Instead, the Trustee's Brief ignores the shortcomings of the language of the Amended Complaint that was filed (and dismissed) electing, instead, to make unsupported allegations against the Debtor that

are nowhere in the Amended Complaint, are wholly disputed and/or were dismissed subject to a final order. The Trustee's citation to discovery of any sort is wholly improper at this stage. The Bankruptcy Court was not permitted to consider factual proofs as part of its ruling. Instead, it found that the Trustee had failed to make the legal allegations sufficient to support the claims. *See* Appx 963, *infra.*

The fraudulent transfer allegations fail for similar reasons. For instance, in support of his position, the Trustee relies upon *In re TSIC, Inc.*, 428 B.R. 103, 115 (Bankr. D. Del. 2010), as he did in the District Court below. In *TSIC*, a corporate debtor sued its former CEO for recovery of an $850,000 severance payment as a fraudulent transfer. A corporate debtor making payment to a former CEO is not the equivalent to a debtor receiving the funds back ***from*** his ex-wife. The Trustee's effort to draw such an analogy demonstrates his desperation.

Finally, the Trustee attempts to distract the Court with his invocation of a 10-year fraudulent transfer lookback period. First of all, no one disputes that if there is a valid debt due to the IRS, a 10-year lookback period may be used by a trustee. That law is no longer in dispute. However, since the Debtor has no scheduled IRS debt and the IRS has not filed a Proof of Claim, the effort fails *as a matter of fact*. The IRS has "no shoes" into which the Trustee may step in this case. In actuality, the Bankruptcy Court would not allow the Trustee to *manufacture* a debt to the IRS to take advantage of a 10-year lookback period particularly when the Trustee had

not pled a valid cause of action. This position (defeating the Trustee's over-reach) enjoys support. *See*, *e.g.*, *Miller v. Fallas (In re J&M Sales, Inc.*), 2022 WL 532721 (Bankr. D.Del. February 22, 2022) ("Since the IRS did not file a proof of claim (or even an informal proof of claim) and the debtors did not schedule an IRS claim, the trustee cannot rely on the IRS as a predicate creditor for the purposes of pursuing fraudulent conveyance claims beyond the four-year lookback period provided in [Delaware's Uniform Fraudulent Transfer Act]"); *In re Kaiser*, 525 B.R. 697, 712 (Bankr. N.D.Ill. 2014)(If the IRS has no allowed claim as of the Petition Date, the Trustee cannot rely upon the IRS's 10-year lookback period).[9] Further, since the Trustee had not properly plead a fraudulent transfer claim action of any kind, utilizing a 10-year look back is not appropriate. Neither the Bankruptcy Court nor the District Court could find a viable cause of action among the *170 paragraphs* presented by the Trustee in his effort to present one. Appx. 65-61, 930-931. That cannot be cured at this stage.

E. FURTHER AMENDMENT OF THE COMPLAINT WOULD BE FUTILE.

The Trustee initiated the adversary proceeding by filing a twenty-three (23)-

---

[9] The Debtor must point out that the Trustee has mischaracterized the holding in *Alberts v. HCA, Inc. (In r Greater Southeast Cmty. Hosp. Corp. I),* 365 B.R. 293, 301 (Bankr. D.D.C. 2006) because in that case it was *undisputed* that the IRS held a claim as of the petition date. Trustee's Brief, p. 78.

page, ten (10) count Complaint on January 9, 2022.[10] On February 1, 2022, the Debtor filed a Motion to Dismiss the Complaint in lieu of answer. The Trustee objected to the Motion; substantial oral argument was undertaken on February 22, 2022.[11] On March 7, 2022, the Court entered an order dismissing four (4) of the ten (10) counts outright; ordering an amended Complaint as to four (4) counts; and directing the parties to mediation.[12] Appx 1185-1188. The Transcript of the February 22, 2022 hearing was docketed and made available to the Trustee on February 28, 2022. With the benefit of knowing exactly what the problems were with the initial Complaint, the Trustee filed an Amended Complaint on March 10, 2022. The parties then proceeded into mediation.

When the mediation was unsuccessful, the Debtor filed another Motion to Dismiss -- this time as to the Amended Complaint. The Motion was granted; this appeal ensued. In sum, the Bankruptcy Court provided very clear guidance to the Trustee as to the deficiencies of each and every one of the Counts in the Complaint. Having come close to having his Complaint dismissed in response to the first Motion to Dismiss, the Trustee should have (and did) make amendments to the best of his ability to protect the claims he thought were meritorious. He failed. It is just that

---

[10] Appx 1619.

[11] Appx 1190.

[12] Count 1 of the Amended Complaint was allowed to proceed at this stage. Count 2 of the Complaint was for a temporary restraining order which had been imposed by agreement so was not the subject of the Court's order.

simple. This is not a situation where a plaintiff unilaterally filed amended complaints without being told of the problems with her complaint. The Bankruptcy Court was specific and provided clear guidance. When the Trustee failed to heed the guidance from the Bankruptcy Court, he risked the outcome that he eventually suffered, *i.e.*, dismissal with prejudice. The Trustee would have this Court believe he has been victimized by the lower Courts on all three (3) appeals, but neglects to acknowledge that he had ample opportunity to cure the defects and failed to do so.

Although there is a preference that litigants be given the chance to amend pleadings to cure defects, that opportunity is not limitless. *In re Burlington Coat Factory Securities Lit.*, 114 F.3d 1410, 1435 (3d Cir. 1997). As this Court ruled in *Arthur v. Maersk, Inc.*, 434 F.3d 196, 204 (3d Cir. 2006), "[l]eave to amend must be generally be granted unless equitable considerations render it otherwise unjust…. Among the factors that may justify denial of leave to amend are undue delay, bad faith, and futility." Having squandered the opportunity that he was given to amend the Complaint to meet the requirements of the Court, the Trustee simply asks for another chance. He does not establish how any future complaint will be better than the Complaints already filed and critiqued by the Bankruptcy Court. The Bankruptcy Court specifically recognized that amendment would be futile, *citing Pharm. Sales & Consulting Corp. v. J.W.S. Delavau Co.*, 106 F. Supp. 2d 761, 764 (D.N.J. 2000) (a determination as to futility does not require a conclusive determination on the

merits of a claim or defense; rather, the futility of an amendment may only serve as a basis for denial of leave to amend when the proposed amendment is frivolous or advances a claim that is legally insufficient on its face). The Bankruptcy Court reasoned: "Given the pervasive problems with this complaint, the court finds that further amendment would be futile. The court reaches that conclusion based both on the Trustee's faulty logic undergirding the avoidance counts, and on the fact that Julia Gilbert has been dismissed from the case with prejudice." Appx 931.

Additionally, the Trustee's request for amendment must further fail because he made nothing more than a blanket statement and neglected to attach his proposed amended pleading for the Court's consideration. Appx 1055. This Court has held that these are fatal defects for leave to amend, and it cannot be considered an abuse of discretion by the lower courts in their denial of the request for amendment. *United States ex rel. Zizic v. Q2 Administrators, LLC*, 728 F.3d 228, 243 (3d Cir. 2013) (*quoting Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1280 (D.C. Cir. 1994)).

For that reason, this Court must follow the ones below and find that amendment would be futile. Amendment is deemed be futile if the amended complaint would not survive a motion to dismiss for failure to state a claim. *Travelers Indem. Co., v. Dammann & Co.*, 594 F.3d 238, 243 (3d Cir. 2010). Neither the Trustee's (unsupported) version of the law nor the (insufficient) facts will be

changed before an amended complaint would need to be filed. It would, once again, be the subject of a motion to dismiss. As a result, it is inescapable that it would be futile to give the Trustee leave to amend. This finding was not an abuse of discretion, but, rather, required under the circumstances.

F. EQUITABLE AND JUDICIAL ESTOPPEL ARE INAPPLICABLE.

In a veritable "Hail Mary," the Trustee seeks to invoke equitable remedies to prevent a procedural dismissal of his Amended Complaint. The District Court dispatched this argument in two sentences expressing sympathy with the Trustee's "frustration," but stated that estoppel does not apply. Appx 66. Since the Trustee has spent four (4) pages of his Brief addressing judicial and equitable estoppel, the Debtor will address them more extensively than the District Court did. To wit, it is wholly improper to use equitable notions to attempt to change the result of the express application of the Federal Rules of Civil Procedure. There is no equitable exception to this particular Rule. If a plaintiff fails to state a claim, why would a court apply notions of equity to resurrect the claim, waste court resources and prejudice litigants by allowing litigation to proceed that has no hope of success? Although the Trustee expends a great deal of effort describing judicial estoppel and equitable estoppel, he fails to acknowledge that his loss in this matter is the result of

having no basis to proceed with the litigation as a matter of *fact* and *law*.[13] No number of equitable factors can cure these fatal defects.

CONCLUSION

The Trustee has been pursuing the Debtor's Plan assets with the passion of a zealot. If the Trustee's legal theory were sound, he would be lauded for his doggedness. Since his legal theory is **not** sound, his pursuit of the Debtor's assets appears more like a personal vendetta than an appropriate exercise of his rights as a fiduciary appointed under the Bankruptcy Code. He has been given every opportunity to prove that he *could* prevail; he failed. His only hope now is to change the law so that he gets another chance. Certainly, laws have changed over the years. However, the only way that the Trustee can prevail in this case is by changing the law to a degree that will disadvantage scores of innocent debtors in the future and severely undermine the protections afforded these debtors by both ERISA and the Bankruptcy Code. This Court must not be blinded by the Trustee's obvious distaste for this Debtor and adopt his convoluted reading of the Bankruptcy Code. Bad facts

[13] Moreover, the reasons for the application of judicial estoppel and equitable estoppel cited by the Trustee relate, in large part, to alleged statements made by the Debtor and/or documents produced during the course of a Rule 2004 examination (and/or through mediation, which would have been produced pursuant to Fed. R. Ev. 408). This Court may take judicial notice that once the Complaint was filed, it would be Fed. R. Civ. P. 45 that applies, and not Fed. R. Bankr. P 2004. Regardless, this issue was raised for the first time in response to the Debtor's Motion to Dismiss the Amended Complaint.

cannot be allowed to make bad law here. The Debtor urges this Court to affirm the holdings of both the Bankruptcy Court and the District Court.

COMBINED CERTIFICATIONS

1. I am a member in good standing of the Bar of this Court.

2. This Brief of Appellee Eric S. Gilbert compiles with the type-face requirements of Fed. R. App. P. 32(a)(5) and (6) because the document was prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman 14-point. This Brief of Appellee Eric S. Gilbert also complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B), in that it is 8,164 words and 676 lines.

3. Pursuant to Fed. R. App. P. 32(a)(7)(c) and L.A.R. 31.1(c), the text of the electronic copy and hard copy of the Brief of Appellee Eric S. Gilbert are identical.

4. Pursuant to L.A.R. 31.1(c), a virus check was performed on the electronic PDF version of the document prior to electronic filing using CrowdStrike Falcon Intelligence Sandbox.

5. On this 22nd day of February, 2024, the foregoing Brief of Appellee Eric S. Gilbert was served on counsel to the Appellant John M. McDonnell, Chapter 7 Trustee, via ECF and first-class mail.

/s/ Andrea Dobin
ANDREA DOBIN