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 REPLY BRIEF

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PRELIMINARY STATEMENT

The Debtor's opposition to this appeal of an issue of first impression in Third Circuit Court of Appeals and without guidance from the Supreme Court (as acknowledged by both lower courts)[1] is a blinkered approach devoid of any substantive analysis of the complex issues of bankruptcy, ERISA and tax law. Rather, the Appellee's position reads more of a policy white paper, rather than a synthesized analysis of law and fact. The Appellee's brief is littered with strident, gratuitous, *ad hominem* attacks, in violation of the Third Circuit Appellate Rules,[2] and unnecessary and unfounded hyperbole about the floodgates[3] opening with retirement accounts litigation if the Third Circuit reverses the lower courts.

The Appellee complains that the presentation of the facts is one-sided, but refuses to provide any response. *See* Red. Br. 20. If they are one-sided (which they are not), it is simply because the Debtor himself, not the Trustee, controlled all the facts through his conduct pre-petition, the administration of the Retirement Plans, and conduct during these pro-

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[1] Appx 55, 513, 955.

[2] *See generally* 3d Cir. L.A.R. 28(d)("The court expects counsel to exercise appropriate professional behavior in all briefs and to refrain from making *ad hominem* attacks on opposing counsel or parties.").

[3] *In re Countrywide Home Loans*, 384 B.R. 373, 387 (Bankr. W.D. Pa. 2008) (courts "always remains available to rein in or restrict any attempt to abuse the process") (citations omitted).

ceedings. The Debtor has been certainly free to commence motion practice or otherwise, to address or contest the Trustee's characterization of the record, as the Debtor has reminded the Trustee in other contexts to commence motion practice,[4] as it pertains to the facts surrounding the Debtor. The Appellee slept on his rights, chose not to act, and therefore, must live with those consequences because "equity aids the vigilant." *In re Aluminum Shapes, LLC*, Case No. 21–16520 (JNP) Adv. Pro. No. 21–01467 (JNP) 2022 Bankr. LEXIS 1209, at *15 n.4 (Bankr. D.N.J. May 2, 2022).

The Appellee, like the lower courts, fails to synthesize the facts and the law to this complex issue of first impression: of whether a retirement plan must comply with ERISA only or both ERISA and the IRC as well as the related proper issues presented to this Court. The Trustee, and the Trustee's sole appeal, focuses on the following issues:

First, the procedural errors by the Bankruptcy Court, affirmed by the District Court, are not moot. This Court can fashion a remedy on remand.

Second, the Appellee concedes the Appellant's views by deliberately refusing to respond to the due process violations of refusing to comply

[4] Appx 93, 100, 611.

with its statutorily defined obligations to provide all information to the Trustee[5] as well as the ERISA and IRC interplay with *Patterson v. Shumate*, 504 U.S. 753 (1992).

Third, the lower courts, despite citing cases to arrive at their outcome, failed to integrate the law and facts of those cases to the facts before the Circuit. Blue Br. 40–45.

Fourth, the Appellee attempts to create rules and revisions to the statutes and readings that do not exist, but are more appropriate for a political white paper. Courts have routinely held that a federal docket is not the place to improve a litigant's image or pursue an agenda. *See In re Certain Claims & Noticing Agents' Receipt of Fees*, Misc. Pro. No. 22–00401 (MG) 2022 Bankr. LEXIS 3467, at *26 (Bankr. S.D.N.Y. Dec. 8, 2022).

Fifth, despite acknowledging that facts and law exist to rule in the Trustee's favor, the lower courts failed to provide the same evidentiary analysis as the cases relied upon by the lower courts conducted.[6]

Sixth, the Appellant argues that an exemption does not apply and argued same because the Debtor listed such exemptions on his petition. Any failure to challenge those exemptions could be deemed a waiver by the Trustee to raise those challenges under Bankruptcy Rule 4003. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 643 (1992) (quoting Fed. R. Bankr.

[5] Red Br. 5 n. 1.

[6] Appx 60, 513, 955.

P. 4003(b) (1992)); *Duvall v. Cnty. of Ontario*, 83 F.4th 147, 151–152 (2d Cir. 2023); *In re Malloy*, Civil Action No. 15–0580, 2017 U.S. Dist. LEXIS 125836, at * 5 n.1 (E.D. Pa. Aug. 9, 2017).

Seventh, the avoidance actions have merit. Despite Appellee's assertions to the contrary, randomly "locating" the 2012 W-2 (the authenticity remains in question) despite telling the Bankruptcy Court, under oath, that Debtor "has cooperated to a level that is rarely seen" and "fulfilled his obligation"[7] and the fact that the law does not require damages to creditors, just the act of shielding money from creditors, avoidance action criteria can be met. Blue Br. 71–72.

Eighth, an amended complaint is not futile as explained herein.

Ninth, judicial and equitable estoppel are grounded in Third Circuit and Supreme Court jurisprudence, not a desperate "Hail Mary" as characterized by the Debtor. Realizing that the undisclosed 2012 W-2 is detrimental to the Debtor and aids the Trustee's case that the Retirement Plans do not meet ERISA and the IRC because the Ex-Wife was never an eligible employee on each day of the plan year, the Debtor attempts to raise defenses that were waived by the Debtor by refusing to respond to the Trustee's information requests.[8] The lower courts decided these complex issues on a motion dismiss notwithstanding the fact that the courts

[7] Appx 1029-1031 (Oct. 26, 2021 Hearing Trans. 3:9-15); 1062-1064, 1067, 1069.

[8] Appx 1062-1067.

that have decided these issues did not do so on a motion to dismiss. Absent reversal, the Debtor will receive a windfall of over $1 million in a sham retirement account while living in Puerto Rico at the expense of his creditors.

Accordingly, the Third Circuit should reverse the lower courts.

STATEMENT OF ISSUES

This Court must ignore the Debtor's statement of issues as violative of the Federal Rules of Bankruptcy Procedure and Appellate Procedure. It is not for the Debtor to be "inclined to allow the Trustee"[9] to present which issues it presents to the appellate court. The Debtor is an appellee to the Appeal, not the Court. This Court adjudicates these issues, not the Debtor.

Bankruptcy Rule 8009 requires an appellee to file a timely notice of cross-appeal, as a prerequisite submit a designation of record and statement of an issues. Fed. R. Bankr. P. 8009(a)(2)–(3). The Debtor never filed a cross-appeal and therefore, this Court must disregard its proposed counter-statement of issues on appeal. *See In re Vencor, Inc.*, 98 F.App'x 93, 96 (3d Cir. 2004) (applying prior rule 8009 to rule 8006); *In re Blatstein*, 260 B.R. 698, 709–710 (Bankr. E.D. Pa. 2001).

[9] Red Br. 1.

STANDARD OF REVIEW

The Appellee's "issue" with the citation of *In re Oncology Assocs. of Ocean Cty. LLC*, 510 B.R. 463, 466–67 (Bankr. D.N.J. 2014) is meritless. Notwithstanding the case citation, the Appellee does not challenge the fact that 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).

ARGUMENT

I. Appellee Has Conceded Certain Issues on Appeal.

As discussed herein, the failure to address issues by the Appellee constitutes a waiver of any defenses. *See e.g.*, *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010) ("Failure to respond to an argument . . . results in waiver."); *PDS Hotspot Corp. v. Swope, Civil No. 18–285*, 2018 U.S. Dist. LEXIS 62681, at *6 (Bankr. W.D. Pa. April 13, 2018) (same).

A. Appellee Has Conceded that the Lower Courts Erred Holding that It Considered All Responses to the Retirement Accounts Litigation.

The Appellee does not challenge the Bankruptcy Code's requirement that the Debtor (whose counsel is a panel chapter 7 trustee) is required to disclose of all his assets and liabilities to the Trustee pursuant to Sec-

tions 521, 541 and 542 of the Bankruptcy Code, the Trustee's discovery requests and the Bankruptcy Court's TRO Order. The Appellee ignores the Third Circuit standard that a "party in interest" is broadly defined as including anyone with a legally protected interest in the outcome of the bankruptcy proceeding. *See In re Global Indus. Techs.*, 645 F.3d 201, 210–212 (3d Cir. 2011).

If the old or new TPA was not a party-in-interest according to the Appellee, then the Debtor could have moved to quash the Bankruptcy Rule 2004 deposition of the old TPA and sought a declaration from the Bankruptcy Court that the new TPA is not a party-in-interest notwithstanding Third Circuit precedent. Furthermore, the Appellee does not even address why the Bankruptcy Rule 2004 deposition of the old TPA, NPPG was randomly postponed, causing the Trustee to keep the deposition open.[10]

B. Appellee Concedes the Non-Compliance with Tax Issues and ERISA.

The Appellee's assertions the tax and ERISA issues are "surplusage" and "hyper-technical arguments" ignore the fact the issues before this Circuit are issues of first impression.[11] While the Appellee argues that the Trustee's arguments are "fundamentally flawed"[12] and accuses the

[10] Appx 1874-1875.

[11] Red Br. 2, 19.

[12] Red Br. 2.

Appellant of littering the record, the Appellee chooses not respond and provide its own legal analysis as the Trustee has done before every court.[13]

II. Mootness is Inapplicable to the Shortened Time and Strike Order Appeals.

Here, mootness does not bar the Appellant's appeal of the Shorten Time Order and Strike Order Appeal. The Third Circuit errs on the side not dismissing an appeal on procedural grounds, and hearing the appeal on the merits. *See In re Richardson Indus. Contrs.*, 189 F.App'x 93, 97–98 (3d Cir. 2006). Other jurisdictions have held equitable mootness in applicable when the court can fashion the appropriate remedy. *See, e.g.,In re Keese*, CV 22–5176 DSF; 20-BK-21022-BR; 21-AP-01155-BR, 2023 U.S. Dist. 75752, at *5–8 (C.D. Cal. May 1, 2023) (appeal of sale not equitably moot). The District Court did not dismiss the procedural appeals as moot but rather ruled on the merits in its decision.[14]

A. Constitutional Mootness is Inapplicable.

"[A] case 'becomes moot [in the constitutional sense] only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" *In re ICL Holdings, Co.*, 802 F.3d 547, 553 (3d Cir. 2015)

[13] Appx 111-142, 994-1076.

[14] Appx 68.

(citations omitted). Here, this Court can fashion relief to re-set the deadlines, control the docket and enforce deadlines and orders (something the Bankruptcy Court did not do) as other circuit courts have stated. *See In Am.-CV Station Grp., Inc.*, 56 F.4th 1302, 1313 (11th Cir. 2023). Accordingly, the Appellant's procedural appeals not constitutionally moot.

B. Statutory Mootness is Inapplicable.

Section 363(m) of the Bankruptcy Code, which bars appeals of sales pursuant to Section 363(b) of the Bankruptcy Code, is inapplicable to this case as a sale was not involved. *See In re Energy Future Holdings, Corp.*, 949 F.3d 806, 818–819 (3d Cir. 2020); *In re ICL Holdings, Co.*, 802 F.3d at 553–54. The Supreme Court held that a stay of a sale order is not required in connection with an appeal pursuant to Section 363(m) of the Bankruptcy Code. *MOAC Mall Holdings, LLC v. Transform Holdco, LLC*, 143 S.Ct. 927 (2023). The Supreme Court's *Transform Holdco* ruling has implications beyond Section 363 sales in terms of appellate review of bankruptcy decisions as other Supreme Court decisions have impacted bankruptcy proceedings beyond that which the Supreme Court adjudicated. *See, e.g., Roman Catholic Archdiocese of San Juan v. Feliciano*, 140 S.Ct. 696, 700–701 (2020) (bankruptcy courts are not permitted to enter "now for then" orders).

Accordingly, the Appellant's procedural appeals are not statutorily moot.

C. Equitable Mootness is Inapplicable.

Equitable mootness does not bar the Trustee's appeal of the Shortened Time Order. Equitable mootness only applies in the plan context, and the Third Circuit has not held that equitable mootness applies outside of the plan context to cut off the appellate court's authority to hear an appeal. *In re ICL Holdings, Co.*, 802 F.3d at 554–55 (citing *In re Sem-Crude, L.P.*, 728 F.3d 314, 317 (3d Cir. 2014)); *See One2One Communs., LLC v. Quad Graphics, Inc.*, 805 F.3d 428 (3d Cir. 2015).

No court has identified a constitutional basis and, "as courts and litigants [] have struggled to identify a statutory basis for the doctrine, it has become painfully apparent that there is none." *One2One Communs., LLC*, 805 F.3d at 438 (Krause, J., concurring).

In fact, "[b]ecause Congress specified certain orders that cannot be disturbed on appeal absent a stay, basic canons of statutory construction compel us to presume that Congress did not intend for other orders to be immune from appeal." *One2One Communs., LLC*, 805 F.3d at 444 (Krause, J., concurring).

As Judge Krause observed, "[e]quitable mootness drastically weakens that supervisory authority . . . . The doctrine not only prevents appellate review of a non-Article III judge's decision; it effectively delegates the power to prevent that review to the very non-Article III tribunal whose decision is at issue." *One2One Communs., LLC*, 805 F.3d at 445.

Here, dismissing the Shortened Time Appeal and Strike Order Appeal improperly empowers the Bankruptcy Court as the trial court and appellate court.

D. Mootness Policy Considerations.

The Trustee primarily exists to protect the integrity of the bankruptcy system and ensure a debtor's fairness to the treatment of his or her creditors. *See In re Jain*, 626 B.R. 336, 341 (Bankr. D.N.M. 2021) ("If the UST's office wishes to pursue this litigation to protect the integrity of the bankruptcy system, it has the right to do so.").

As the Third Circuit has stated: "The presumptive position remains that federal courts should hear and decide on the merits cases properly before them. When equitable mootness is used as a sword rather than a shield, this presumption is upended." *SemCrude*, 728 F.3d at 326.

For the reasons set forth above, the procedural appeals are not moot.

III. Bankruptcy Rule 8009(e) Expressly Allows the Appeals Court to Correct the Record.

The Appellee's contention that an appellate court cannot modify or correct the record on appeal is antithetical to the plain language of the Bankruptcy Rules and the Federal Rules of Appellate Procedure.

The Appellee fails to synthesize the complex issues of law and fact in this appeal that intertwines bankruptcy, ERISA and tax law (something debtor's counsel admits is not an expert).[15]

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.[16] As discussed below, the Appellee fails to acknowledge this and instead, attempts to distinguish cases cited by the Appellant with irrelevant background and creating exceptions that do not exist.

A. The Appellee Ignores the Plain Language of the Bankruptcy Rules and the Federal Rules of Appellate Procedure.

The Appellee's scattershot objection to an inclusive record on an issues of first impression belies the law and facts.

Ironically, the Appellee cites an out of jurisdiction Tenth Circuit case, *In re Woods*, 743 F.3d 689, 694 (10th Cir. 2014) while at the same time criticizing the Appellant's citation to *In re Bloom* as being unpersuasive because it is from a bankruptcy appellate panel in the Tenth Circuit. Red Br. 10. Yet, the Appellee's cosmetic statutory construction analysis

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[15] Appx 1005, 1284-1285 (Jan. 11, 2022 Hearing Transcript, 14: 20-25, 15:1-2).

[16] Appx 1186.

and reliance on *Woods* is incomplete and inapplicable. *Woods*, involving the construction of the definition of family farmer and Chapter 12 confirmation under the Bankruptcy Code, requires the Court to examine the context, as well the statutory subsection's structure: "examining the subsection's structure, as 'the meaning of statutory language, plain or not, depends on context.'" *Id.* (citing *United States v. Villa*, 589 F.3d 1334, 1343 (10th Cir. 2009) (quoting *Bailey v. United States*, 516 U.S. 137, 145 (1995)) (internal quotation marks omitted)).

Bankruptcy Rule 8009(e)(1) provides that bankruptcy courts **may** have the authority to decide modify an appellate record. An appellate court is not prevented from modifying the appellate record. The Appellee has failed to cite a case to the contrary because one does not exist. Nothing in the plain language of the rule limits the appellate court's authority to decide the motion to strike under subsection (e)(2) and (e)(3). Furthermore, the Appellee cannot cite a case (because one does not exist) that refutes the plain language of Bankruptcy Rule 8009(e)(2) and (e)(3) which 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.

Bankruptcy Rule 8009(e)(2) and (e)(3) is modeled after rule 10(e)(2) and (e)(3) Federal Rules of Appellate Procedure (the "**Appellate Rules**"). While the District Court cannot apply Rule 10(e)(2) and (e)(3)

of the Appellate Rules in a bankruptcy appeal before the district court,[17] nothing prevents the application before the Circuit, where the appeal is pending. Appellate Rule 10(e)(2) and (e)(3) provides:

> (e) Correction or Modification of the Record.
>
> (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 and a supplemental record may be certified and forwarded:
>
> (C) by the court of appeals.
>
> (3) All other questions as to the form and content of the record must be presented to the court of appeals.

Appellate courts have also acknowledged that a record may be modified and supplemented by the court where the appeal is pending and accordingly, the Circuit should reverse the lower courts by following the statutory rules, not a litigant's view of "common sense"[18] the Appellee attempts to shoe horn into the appellate record rules. *See, e.g., In re Brekelmans*, Bankr. Case No. 18–260, No. 18-cv-2318 (KBJ) 2020 U.S. Dist. LEXIS 1582, at *8–10 (D.D.C. Jan. 2, 2020) (J. Ketanji Brown Jackson) (remanding case based on voluntary dismissal of appeal to supplement record); *In re Huff*, Civil Action no. 2:18-cv-00997, 2019 U.S. Dist. LEXIS 141728, at *3 (S.D.W.Va. Aug. 21, 2019) (relying on Bankrupt-

[17] *In re eToys, Inc.*, 263 F.App'x 235, 238 (3d. Cir. 2008).

[18] Red Br. 8, 9.

cy Rule 8009(e)(2) and Appellate Rule 10(e)(2) in remanding appeal to bankruptcy court for determination for additional evidence to be included in record).

B. The Appellee's Remaining Arguments to Limit the Record are Baseless.

The Circuit must ignore the Appellee's remaining arguments to limit the record because they are devoid of any legal or factual analysis. First, the Appellee alleges that the Motion to Strike the Trustee's appellate record was designed "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."[19] This confounding argument has no basis in the law and the Rules of Professional Conduct because the Debtor's counsel cannot simultaneously represent the Debtor and the Trustee. This and other jurisdictions have routinely held that a lawyer cannot simultaneously represent clients with competing interests at the same time, absent consent or court approval. *In re Congoleum Corp.*, 426 F.3d 675, 690–692 (3d Cir. 2005); *Bagdan v. Beck*, 140 F.R.D. 650, 659–660 (D.N.J. 1991).

Second, the Appellee's faux outrage of the Trustee's absolute right to determine the contents of the appellate ignores the requirements of Bankruptcy Rule 8009(a)(1), (a)(4), (b)(1) must file a designation of

[19] Red Br. 6.

record on appeal and order transcripts, among other things. The Bankruptcy Rules direct the Trustee to decide what to include in the appellate record at the outset. Furthermore, the Appellee contradicts this faux outrage by saying he made the determination as to what main Chapter 7 case documents "the Debtor allowed to be included in the record."[20] The Bankruptcy Code, Bankruptcy Rules and Appellate Rules do not transmogrify the Appellee into an appellate court with the power to determine what it will or will not allow in the appeal just as the rules do not transmogrify the Bankruptcy Court into an Article III court with the authority to adjudicate its own appeals.

As already argued, 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 as other courts have had expansive records. *See In re In re Goldschein*, 244 B.R. 595 (Bankr. D. Md. 2000); *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).[21]

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[20] Red Br. 11.

[21] Appx 751-773.

IV. The Lower Courts Failed to Analyze the Post-*Patterson* Case Law Split to the Uncontested/Debtor Conceded Facts of the Lack of ERISA and Tax Compliance Requirements in the Debtor Controlled Professional Services Retirement Plans, and Thus, Must be Reversed.

A. The Plain Language Reading of the Bankruptcy Code Does Not Support the Appellee's Arguments or Bar the Courts Analysis of the Overlapping Statutes in this Appeal.

1. Courts Routinely Analyze Competing and Overlapping Statutes.

A debtor's bankruptcy estate includes all property wherever located.[22] The *Patterson* Court concluded in its recitation of the facts 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 Supreme Court to decide the dispute before it based on the plan language of the Bankruptcy Code, something that did not occur in the lower courts in this case.[23]

The Supreme Court provided no definition of what constitutes an "ERISA-qualified" plan and whether a plan must be subject to ERISA or ERISA and tax compliance. As such, the plain language reading is in-

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[22] "(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."

[23] Appx 962.

applicable and the Court must look to different interpretations beyond the text. *See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. Lasalle St. P'ship.*, 526 U.S. 434, 448–451 (1999). Analyzing the issue beyond the text is required because of the case law split.

"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)." *In re Meinen*, 228 B.R. 368, 378 (Bankr. W.D. Pa. 1998) (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 First Indem. of Am. Ins. Co. v. George Copulos*, 1998 U.S. Dist. LEXIS 6672 (D. N.J. Feb. 24, 1998); *In re Hall*, 151 B.R. 412 (Bankr. W.D. Mich. 1993); *In re Harris*, 188 B.R. 444, 449–51 (Bankr. M.D. Fla. 1995); *Goldschein*, 244 B.R. at 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). While other courts have held that tax qualifications is irrelevant. *In re Meinen*, at 378 (citations omitted); *In re Handel*, 301 B.R. 421 (Bankr. S.D.N.Y. 2003). Under this approach, the tax qualification is not required or relevant. *Id.*

Yet, the Appellee asserts that the plain language of the Bankruptcy Code requires ruling in his favor based on the plain language of the

Bankruptcy Code.[24] The plain language of the Bankruptcy Code does not support affirmance for several reasons. First, the Appellee's assertion that because Section 541(c)(2) of the Bankruptcy Code references "trust" and not the Internal Revenue Code the Court is barred from examining ERISA and the Internal Revenue Code is incorrect. Section 541(c)(2) references "applicable nonbankruptcy law" and does not numerically limit what "applicable nonbankruptcy law applies." Neither case law nor legislative history to support that view.

This Court may examine the overlap of ERISA and IRC in this bankruptcy issue, especially since this is an issue of first impression in the Third Circuit with no guidance from the Supreme Court, as acknowledged by the lower courts.

Second, nothing prevents this Court from giving effect to overlapping statutes. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) (Supreme Court held that 28 U.S.C. § 158(d) did not limit review of interlocutory appeal under 28 U.S.C. § 1292); *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 144 (2001) (overlapping intellectual property statutes); *In re Trump Entm't Resorts, Inc.*, 534 B.R. 93, 102 (Bankr. D. Del. 2015) (Bankruptcy Code and National Labor Relations Act).

[24] Red Br. 10, 14.

2. The Age of *Patterson* Does Not Prevent Reexamination by Appellate Courts When Such Decision Has Resulted in a Sharp Split Among the Lower Courts.

The Appellee fails to acknowledge that notwithstanding the fact that *Patterson* was decided over thirty (30) years ago by the Supreme Court,[25] appellate courts routinely revisit issues that when first decided resulted in a split in lower court jurisprudence, needed to be reexamined. *See, e.g., Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 682–684 (2015).

3. The Appellee's Policy Arguments Are Inapplicable to the Competing Statutes in Dispute.

The Appellee fails to acknowledge that the Third Circuit has never squarely addressed the issue of first impression presented here. The Appellee, like the lower courts, fails to analyze the cases he relies upon. First, *In re Laher*, 496 F.3d 279 (3d Cir. 2007), addressed whether an annuity established under New York state law was excluded from a debtor's estate. Second, *In re Yuhas*, 104 F.3d 612 (3d Cir. 1997), addressed the New Jersey State exemption statute which requires a tax analysis as required by *Copulos*, discussed *supra*. This Court has reversed and remanded when the Bankruptcy Court fails to conduct a thorough analysis. *See In re Davis*, 108 F.App'x 717, 722 (3d Cir. 2004).

[25] Red Br. 17.

The Appellee's attempts to shoehorn administrative agency interpretation of regulation. First, the Bankruptcy Code, ERISA and IRC are the overlapping statutes at issue, not an administrative agency ruling. Second, as discussed *supra*, IV.A.2, nothing prevents appellate courts from reexamining its prior decisions. The Appellee fails to acknowledge that the administrative agency ruling and the related *Chevron* doctrine he relies upon[26] is under advisement before the Supreme Court and could be overruled. *See Loper Bright Enters v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022), *cert. granted*, No. 22–451, 2023 U.S. LEXIS 1847, at *1 (U.S. May 1, 2023); *Relentless, Inc. v. Dep't of Commerce*, 62 F.4th 621 (1st Cir. 2023), *cert. granted*, No. 22–1219, 2023 U.S. LEXIS 4146, at *1 (U.S. Oct. 13, 2023).

4. The Appellee's Hyperbole Ignores the Court's Authority to Control Their Dockets and Prevent Abuse of the Process.

The Appellee's hyperbole that the floodgates of retirement account litigation would result in the event this Court reverses the lower courts ignores the fact that courts have the inherent authority to control their own dockets to prevent an abuse of process.[27] Putting aside the Appellee's aspersions about the fact that the Appellant sought and received permission from this Court to file an over-sized brief because this Appeal

[26] Red Br. 18.

[27] *Countrywide Home Loans*, 384 B.R. at 387.

contained three (3) consolidated appeals, the Appellant's analysis are not "hyper-technical arguments"[28] "designed solely to distract"[29] the judiciary and the litigants. Rather, they are synthesis of the overlap of the Bankruptcy Code, ERISA and IRC and the extensive factual analysis required of "substantial time" in this issue of first impression.

The Debtor, the sole owner and operator of his consulting company that advises major companies, is a double-Stanford educated sophisticated businessman that made every determination concerning the Retirement Plans, lived in a $1.6 million house with his Ex-Wife following their divorce prior to relocating to the most expensive areas of Old San Juan, Puerto Rico, and hired multiple law firms (Mayer Brown LLP; McConnell Valdés LLC) in his bankruptcy.[30] The Debtor is not the hypothetical debtor who is a common law employee of a retirement plan's sponsor who "unexpectedly risk[s] losing her life savings because of actions taken by her employer over which she had no control"[31] like the debtor in *In re Sewell*.[32] As evidenced by the amount of work performed by the Trustee to prosecute this Appeal, it is highly unlikely that the bankrupt-

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[28] Red Br. 19.

[29] Red Br. 20.

[30] Appx 1138-1140, 1546, 1725, 1878-1881.

[31] Red Br. 21.

[32] 180 F.3d 707, 720–721 n. 17 (5th Cir. 1999).

cy courts will become "clogged with ERISA/tax litigation"[33] simply because the burden is primarily on the Trustee to conduct discovery, commence motion practice and appeals.[34]

B. The Debtor's Operation of the Retirement Plans Include them in the Debtor's Estate, Not Subject to Exemption.

The Appellee's (whose counsel admitted is not versed in the interplay of bankruptcy and ERISA and tax law as applied in the trustee's lawsuit)[35] assertions that the Trustee relies entirely on the IRC, not ERISA, are incorrect. The Appellant does not rely entirely IRC to prove his case. The Appellant has extensively briefed in the Bankruptcy Court and the District, that the Retirement Plans do not comply with both the Internal Revenue Code and ERISA.

As the Trustee has always alleged that the Retirement Accounts are not facially ERISA qualified, as well as not tax qualified because[36] the Debtor's Ex-Wife was an ineligible employee of the Debtor's businesses making the DB Plan and the 401(k) Plan are not ERISA-qualified, thus, not in compliance with *Patterson*. As one court in this Circuit explained:

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[33] Red Br. 21.

[34] Appx 1023-1045, 1619, 1647-2588.

[35] Appx 694, 1005, 1221.

[36] Appx 1189-1190.

> 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 considered 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 and his actions, controls every aspect of them as the Plan Administrator, a fact that the Bankruptcy Court erroneously ignored when it held that the Debtor's role as the DB Plan and 401(k) Plan administrator is not relevant.[37] That control permitted him to decide who is eligible to participate in the Retirement Plans, whether they are an actual employ-

[37] Appx 942.

ees or not. As a result, as other courts have held, the Retirement Plans part of the bankruptcy estate where the non-employee spouse is a plan member or employee in name only. *See Goldschein*, 244 B.R. at 600–601; *In re Hall*, 151 B.R. 412; *Lane*, 149 B.R. at 765–66; *Harris*, 188 B.R. at 450–51; *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 F.App'x 880 (11th Cir. 2011); *In re Yerian*, 927 F.3d at 1229–32.

C. The Appellee's Citations Reinforce the Application of *Copulos*.

The Appellee's reliance on *In re Andolino* is misplaced because that case involved the application of the New Jersey state exemption statute N.J.S.A. § 25:2–1(b), which expressly requires an analysis of the Internal Revenue Code. 525 B.R. 588 (Bankr. D.N.J. 2015).

The Bankruptcy Court and District Court refused to follow the District Court's *Copulos* decision which reversed in part, affirmed in part and remanded to the Bankruptcy Court,[38] 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

[38] *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.

U.S.C. § 401 in order to determine whether a retirement plan is property of the estate under N.J.S.A. § 25:2–1(b) and *Patterson* and therefore, subject to an applicable bankruptcy exemption or not.[39] The Appellant submits that the *Copulos* should be followed because of the Appellee's reliance upon *Andolino*.[40]

V. The Trustee Must Analyze the Exclusion and Exemption of the Retirement Accounts to Meet its Burden that they are Estate Property.

While the Debtor took a "belt and suspenders" approach to claiming the Retirement Accounts are not property of the bankruptcy estate and exempt, the Trustee is required to seek a determination that the Retirement Accounts are not property of the bankruptcy and not subject to an applicable exemption in order for the Retirement Accounts to be available to creditors.

VI. The Lower Courts and the Appellee Ignore the Law and Misrepresented Facts in the Avoidance Claims.

The Appellee, like the lower courts, fails to address the mistakes by the lower court and the last minute document disclosures (i.e., the 2012 W-2), despite representing under penalty of perjury that all documents were produced that require further discovery.

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

[40] Red Br. 15.

The Bankruptcy Court, without conducting an evidentiary hearing and solvency analysis, erroneously found the Debtor solvent based solely on his Petition,[41] while ignoring the fact that the Debtor ceased paying his creditors in 2014 and that his Ex-Wife paid the household expenses on a $1.6 million home.[42] The MSA was designed for the Debtor, through the veil of his companies and his Ex-Wife as a straw man to shield any assets from his creditors. Diminution to the estate is not required to establish a fraudulent transfer claim.

The ten (10) year look back period is routinely utilized by trustees[43] notwithstanding the Appellee's allegations that it is designed to distract and does not apply if the IRS does not file a proof of claim or if one is not scheduled.[44]

The Debtor reliance on *In re J&M Sales, Inc.*,[45] is misplaced. In *J&M Sales*, the bankruptcy court refused to permit the chapter 7 trustee to utilize the IRS ten-year look back period in a fraudulent conveyance action because the IRS had not filed a claim and the debtors had not scheduled the IRS as a creditor in its bankruptcy cases. *J&M Sales*, 2022

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41 Appx 963.

42 Appx 1761, Appx 466, 2598.

43 *In re Kossoff PLLC*, Case No. 21-10699 (DSJ) Adv. Pro. No. 22-01141 (DSJ) 2023 Bankr. LEXIS 2554, at *6 (Bankr. S.D.N.Y. Oct. 17, 2023).

44 Red Br. 25-26.

45 Case No. 18-11801 (JTD) Adv. Proc. No. 20-50775, 2022 Bankr. LEXIS 434 (Bankr. D. Del. Feb. 22, 2022).

Bankr. LEXIS 434, at *14–15. The *J&M Sales* decision is readily distinguishable from the facts in this case. The *J&M* court disagreed with *In re Polichuk*,[46] that held that as long as the IRS held an allowable proof of claim did not need to be filed in order for the chapter 7 trustee to invoke the IRS ten-year look back provision. However, the *J&M Sales* decision is readily distinguishable from this present case and the 2014 *Polichuk* case. In 2010, the *Polichuk* court issued a decision that held that because the IRS was a potential creditor at the time of the transfers, the chapter 7 trustee was permitted to step into the shoes of the IRS and utilize the ten-year look back period. *See In re Polichuk*, Case No. 08–10783, Adv. No. 10–0031, 2010 Bankr. LEXIS 4345, at *16–17 n.9 (Bankr. E.D. Pa. Nov. 23, 2010) (the court held that trustee alleged that the IRS was an actual creditor of the debtor at the time the transfers at issue occurred and pleaded additional facts in paragraphs, 31, 94, 160–63 in that complaint, which, if proven, support the allegation) (relying on *United States v. Summerlin*, 310 U.S. 414, 416 (1940)).

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 their inception. 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. Therefore, the lower courts must be reversed or the Ap-

[46] 506 B.R. 405 (Bankr. E.D. Pa. 2014).

pellant 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.

VII. Third Circuit Precedent Authorizes An Amended Complaint.

The Third Circuit routinely authorizes multiple amendments to complaints, especially when the defendant withholds documentary evidence, as has occurred here in light of the undisclosed 2012 W-2. *Arthur v. Maersk, Inc.*, 434 F.3d 196, 205–206 (3d Cir. 2006).

VIII. Estoppel Applies in These Proceedings.

Realizing the disastrous implications of the undisclosed 2012 W-2, the Appellee falsely alleges that the Appellant's allegations are a "Hail Mary."[47] The Appellee failed to challenge or "explain" the undisclosed 2012 W-2. The 2012 W-2 was not produced until May 5, 2022,[48] making it impossible to incorporate in the first amended complaint that was filed on March 10, 2022.[49] The Appellee, rather than raise a FRE 408 argu-

[47] Red Br. 30.

[48] Appx 1062-1064.

[49] Appx 1134.

ment below (which is now waived), sent a snide letter refusing to even address the previously undisclosed evidence that was requested in the form of the 2012 W-2.[50]

FRE 408 does not shield the undisclosed 2012 W-2. The Advisory Comments to FRE Rule 408 states that "the Rule cannot be read to protect pre-existing information simply because it was presented to the adversary in compromise negotiations." Fed. R. Evid. 408, advisory committee notes; *see also Lyondell Chem. Co. v. Occidental Chem. Corp.*, 608 F.3d 284, 300, n.57 (5th Cir. 2010); *Accurso v. Infra-Red Servs.*, Civil Action No. 13–7509, 2016 U.S. Dist. LEXIS 44419, at *18–19 (E.D. Pa. April 1, 2016).

[50] Appx 1067.

CONCLUSION

WHEREFORE, the Appellant respectfully requests that this Court reverse the lower courts.

Respectfully submitted,

Dated: March 7, 2024

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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 Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains **6,413** 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:

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Dated: March 7, 2024 By: /s/ Richard Corbi

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **APPELLANT'S REPLY BRIEF** with the Clerk of the Court by using the Appellate CM/ECF system on March 7, 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: March 7, 2024 By: /s/ Richard Corbi