14-1144-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN THE MATTER OF: ROBERT PLAN CORPORATION,
Debtor.

KENNETH KIRSCHENBAUM, CHAPTER 7 TRUSTEE OF THE ESTATE OF THE ROBERT PLAN CORPORATION,
Trustee-Appellant,

v.

United States Department of Labor,
Appellee.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR THE
UNITED STATES DEPARTMENT OF LABOR,

M. PATRICIA SMITH
Solicitor of Labor

G. WILLIAM SCOTT
Associate Solicitor for Plan Benefits Security

NATHANIEL I. SPILLER
Counsel for Appellate and Special Litigation

LEONARD H. GERSON
Trial Attorney, U.S. Dep't of Labor
200 Constitution Ave., N.W., N-4611
Washington, D.C. 20210
(202) 693-5615

TABLE OF CONTENTS

TABLE OF CONTENTS-(continued)

TABLE OF AUTHORITIES

Federal Cases: **Page**

Federal Cases--(continued): **Page**

Federal Cases--(continued): **Page**

Federal Cases--(continued): **Page**

Federal Cases--(continued): **Page**

Federal Cases--(continued): **Page**

Federal Cases--(continued): **Page**

Federal Statutes:

Bankruptcy Code:

Federal Statutes-(continued) **Page**

Federal Statutes-(continued) **Page**

Miscellaneous:

Miscellaneous-(continued): **Page**

STATEMENT OF JURISDICTION

The United States Bankruptcy Court for the Eastern District of New York (the "Bankruptcy Court") entered an order on August 20, 2012 (the "2012 Order") (J.A. 43-44),[1] granting a request for interim compensation under 11 U.S.C. § 331 to a Chapter 7 Trustee and his law firm for the work they performed in distributing the assets and terminating a 401(k) plan ("ERISA Plan" or "Plan") governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq. The Secretary of Labor, who has authority to interpret and enforce Title I of ERISA, see, e.g., id. §§ 1002(13), 1132, 1135, 1136(b), objected to these fees on jurisdictional and substantive grounds and filed a notice of appeal seeking interlocutory review of the Bankruptcy Court order on September 4, 2012. On April 9, 2013, the District Court for the Eastern District of New York (the "District Court") granted interlocutory review, limited to the question of whether the Bankruptcy Court had jurisdiction to order the award of compensation to the Trustee and his retained professionals to be paid from the assets of the ERISA Plan. (J.A. 78-86)

On March 31, 2014, the District Court ruled (the "2014 Opinion") (J.A. 78-107) that the Bankruptcy Court lacked jurisdiction to determine the compensation to be paid to the Trustee and his professionals, where payment was to be made

[1] "J.A." refers to the Joint Appendix, which was filed on July 8, 2014.

from an ERISA plan. The ruling by the District Court barred the Bankruptcy Court from any later consideration of a request for payment of compensation by the ERISA Plan, thereby making the District Court's ruling on jurisdiction a final order subject to review by this Court.[2] See In re Ichinose, 946 F.2d 1169, 1177 (5th Cir. 1991) ("Although the bankruptcy court's order was interlocutory when appealed to the district court, the district court's reversal of that order was itself a final order, subject to appellate review here."); see also In re Tri-Valley Distrib., Inc., 533 F.3d 1209, 1214 (10th Cir. 2008); In re Kjellsen, 53 F.3d 944, 945 (8th Cir. 1995).

The Trustee timely filed a notice of appeal of the order of the District Court on April 8, 2014. Accordingly, this Court has jurisdiction to hear this appeal of a final order under 28 U.S.C. §§ 158(d) and 1334.

[2] In bankruptcy, final orders are orders that "finally dispose of discrete disputes within the larger case." Shimer v. Fugazy (In re Fugazy Express, Inc.), 982 F.2d 769, 775 (2d Cir. 1992) (citations and italics omitted); accord In re Quigley, 676 F.3d 45, 51 (2d Cir. 2012).

COUNTER-STATEMENT OF THE ISSUE[3]

The sole issue decided by the District Court concerned the jurisdiction of the Bankruptcy Court to order that a compensation award to the Chapter 7 Trustee for services rendered by the Trustee and certain service providers, including the Trustee's law firm, to an ERISA Plan that was administered by the Debtors can be paid from the assets of the Plan, even though the Plan's assets are not assets of the Debtors' estate. The question presented is:

[3] The Statement of Issues in the Brief of the Trustee-Appellant, at pp. 2-3, is as follows:

> 1. Whether the Bankruptcy Trustee is subject to the Bankruptcy Court's jurisdiction in connection with the performance of his duties under 11 U.S.C. § 704(a), including those duties set forth under 11 U.S.C § 704(a)(11) . . .
>
> 2. Whether the Bankruptcy Court has jurisdiction to determine whether the exercise by the Bankruptcy Trustee of his business judgment was reasonable in connection with the performance of his duties under 11 U.S.C. § 704(a), including those duties set forth under § 704(a)(11).
>
> 3. Whether the District Court erred by equating the Bankruptcy Trustee with the Plan Administrator when § 704(a)(11) clearly specifies that the Trustee shall continue to perform the obligations required of the administrator, and not that the Trustee shall serve as the Plan Administrator.
>
> 4. Whether the Bankruptcy Trustee is entitled to derived judicial immunity when the performance of his duties under 11 U.S.C. § 704(a), including those under § 704(a)(11), are directed or approved by the Bankruptcy Court.

Whether the Bankruptcy Court had jurisdiction to order that the fees awarded in its August 20, 2012 order be paid from the ERISA Plan.

STATEMENT OF THE CASE

On August 25, 2008, The Robert Plan Corporation ("RPC") and The Robert Plan of New York Corporation (collectively, the "Debtors"), each filed a petition for relief under Chapter 11 of the Bankruptcy Code. On January 19, 2010, the Debtors' cases were converted to Chapter 7 and Kenneth Kirschenbaum was appointed the Chapter 7 Trustee (the "Trustee" or "Chapter 7 Trustee") by the United States Trustee. On September 8, 2010, the Bankruptcy Court issued an order substantively consolidating the Debtors' cases (J.A. 3).

Section 704(a)(11) of the Bankruptcy Code provides that, "if, at the time of the commencement of the [bankruptcy] case, the debtor (or any entity designated by the debtor) served as the administrator (as defined in Section 3 of the Employee Retirement Income Security Act of 1974) of an employee benefit plan," the bankruptcy trustee shall "continue to perform the obligations required of the administrator." 11 U.S.C. § 704(a)(11). RPC was the administrator for the Debtors' defined contribution pension plan, which is governed by ERISA (J.A. 8-9). Accordingly, the Trustee assumed RPC's ERISA obligations as plan administrator. Pursuant to ERISA, the assets of the Plan must be held in a separate trust for the exclusive benefit of the Plan's participants and beneficiaries, 29 U.S.C.

§§ 1103(a), (c)(1), and the plan administrator is a fiduciary subject to the fiduciary duties of ERISA, id. §§ 1002(21)(A), 1104. It is undisputed, as matter of bankruptcy law, that the Plan's assets are not part of the Debtors' bankruptcy estate, as the Bankruptcy Court found. (J.A. 9)

By applications filed on May 6, 2010, and June 10, 2010, supplemented by an affirmation filed on August 6, 2010 (collectively, the "Summer 2010 Motion"), the Trustee sought authorization from the Bankruptcy Court to, among other things: (i) terminate the ERISA Plan; (ii) retain the Trustee's law firm, Kirschenbaum & Kirschenbaum, P.C. ("K & K"), as legal advisors, David J. Witz ("Witz") as a pension consultant, and Travis Whitfield, CPA, PLLC ("Whitfield"), as an independent auditor (collectively, the "professionals") to assist him in performing his ERISA Plan administrator duties; and (iii) pay interim compensation to the Trustee and the professionals. (J.A. 10-12)

On September 1, 2010, the Secretary filed an objection to the 2010 Summer Motion, which was supplemented by a brief filed on October 13, 2010. The Secretary did not object to the Trustee's request for authorization to terminate the Plan because the decision to terminate the Plan was a settlor decision by the plan sponsor and debtor, RPC, and not a decision of the Trustee in his fiduciary capacity as plan administrator and, therefore, was within the jurisdiction of a bankruptcy court. But the Secretary asserted that the Bankruptcy Court lacked jurisdiction to approve the Trustee's requests as plan administrator for the retention of the professionals or to approve compensation from the assets of the ERISA Plan because those are fiduciary decisions made in effectuating the termination. See (J.A. 49) ("DOL has questioned the very jurisdiction of this Court to grant any of the relief requested by the Trustee, except for the request to authorize the Trustee to act as Administrator and terminate the Plan.").

On October 26, 2010, the Bankruptcy Court issued its order (J.A. 49) and accompanying opinion (J.A. 6-29) (collectively, the "2010 Opinion") authorizing the Trustee to terminate the Plan and retain the professionals. The court determined that it had "core" jurisdiction over the Trustee in the performance of his plan administrator duties, including the award of fees in connection with the administration of the Plan.[4] (J.A. 24-29) Stating that it could determine its core jurisdiction to award fees without deciding whether they "may come from the Plan, which is a non-estate asset," (J.A. 25), the Bankruptcy Court did not decide

---

[4] As described infra, Argument B. (pp. 15- 30), a bankruptcy court has core jurisdiction over those matters "arising in" a bankruptcy case or "arising under" the Bankruptcy Code. Bankruptcy courts are empowered to enter "appropriate orders and judgments" in such matters. 28 U.S.C. § 157(b)(1). In contrast, bankruptcy courts may submit only "proposed findings of fact and conclusions of law to the district court" in "related to" proceedings, which also are described as "non-core" proceedings. 28 U.S.C. § 157(c)(1). The district court has final authority over "non-core" proceedings, id., except that, with the consent of all parties, a bankruptcy court may issue "appropriate orders and judgment" in a "related to" proceeding, subject to district court review. Id. § 157(c)(2). See Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2174-755 (2014).

"whether Plan funds could be used to satisfy the award." Id. Instead, while noting the Trustee's intent to use Plan assets before estate assets to pay the fees, (J.A. 6, 8), the court denied on procedural grounds and as premature the Trustee's request for compensation to the Trustee or his professionals. (J.A. 28)

On January 5, 2011, interim fee applications were filed by the Trustee, K&K, Witz, and Whitfield. The Secretary filed an objection to the applications of the Trustee and K&K and later asserted an oral objection to the application of Witz. (J.A. 50)

The Bankruptcy Court overruled the Secretary's objections and on March 1, 2011, signed a series of separate orders (the "First Interim Compensation Orders") (J.A. 35-42) granting interim compensation to the Trustee and the professionals. These Orders did not specify the source from which these interim compensation payments should be made. After failing to reach a settlement with the Secretary on the amount of the fees that could be taken from the Plan, the Trustee disclosed that he took a total of $151,224 from the assets of the Plan in satisfaction of the First Interim Compensation Orders. (J.A. 91)

In November 2011, second interim fee applications were filed by the Trustee and K&K, and final fee applications were filed by Witz and Whitfield (collectively, the "Fee Applications"). (J.A. 91) On December 7, 2011, the Secretary filed an objection to the Fee Applications. The Secretary objected to the use of the formula provided in Section 326(a) of the Bankruptcy Code, 11 U.S.C § 326(a), for calculating the fee award to the Trustee. The Secretary further objected that the effective hourly rate resulting from the payment of the lump sum pursuant to this formula equated to between approximately $1,800 and $2,100 per hour depending on which hourly total submitted by the Trustee was accepted. This rate was approximately four times the $500 hourly rate that the Trustee sought in his first request for interim compensation, a rate the Bankruptcy Court found was reasonable (over the objections of the Secretary) in granting that request. (J.A. 51)

On August 20, 2012, the Bankruptcy Court issued the opinion (J.A. 45-77) and order (J.A. 43-44) (collectively, the "2012 Opinion") that are the subject of this appeal. In it, the Bankruptcy Court denied the Secretary's objections and granted the Fee Applications. The 2012 Order awarded interim compensation to the Trustee and K&K, and final awards to Witz and Whitfield (the "Second Trustee Interim Fee Award"). These awards totaled $281,942.42 (minus a 20% holdback on the $47,068.77 awarded to K&K). In awarding the Trustee interim compensation in a lump sum payment of $132,378.24, the Bankruptcy Court relied upon the Section 326(a) formula to which the Secretary had objected. While it had previously stated that "[a]ny order awarding fees would contain no determination of whether Plan funds could be used to satisfy the award," (J.A. 26), in its 2012 Opinion and 2012 Order the Bankruptcy Court asserted jurisdiction over the Plan and its assets. The 2012 Order states: "The Applicants may satisfy these awards using the funds in the Pguy Account [a portion of the ERISA Plan assets reserved by the Trustee to pay administrative costs], and to the extent the funds in the Pguy account are insufficient to pay these awards in full, the Applicants may use funds from the Debtors' estate for the remainder." (J.A. 44) The accompanying 2012 Opinion stated that the Court's core jurisdiction over the Trustee had been established in its 2010 Opinion and that such jurisdiction included the power to award fees "whether from Plan assets or assets of the Bankruptcy estate," and was not affected by any limitations imposed by ERISA. (J.A. 46-47)

On September 4, 2012, the Secretary filed a notice of appeal of the 2012 Order, together with a motion for leave to appeal the interlocutory portions of the Order. (J.A. 92) On April 9, 2013, the District Court granted the Secretary's request to appeal portion of the 2012 Order that asserted the Bankruptcy Court's jurisdiction to order the payment of fees from the assets of the ERISA Plan, but denied the Secretary's request to appeal any issue regarding the of the Trustee's and K&K's compensation award. (J.A. 78-86)

On March 31, 2014, the District Court issued its opinion (the "2014 Opinion") (J.A. 78-107), which reversed the 2012 Order. The District Court first ruled that the Secretary's obligation to protect the public interest made him a "person aggrieved" under the Bankruptcy Code with standing to appeal the 2012

Order. (J.A. 93-94). On the merits, the District Court ruled that the Bankruptcy Court lacked core jurisdiction over the Trustee in his role as ERISA plan administrator because "it is ERISA and the RPC Documents that establish and control the substantive rights and obligations of the RPC Plan Administrator," rather than the Bankruptcy Code, and "his obligations as RPC Plan Administrator are created by ERISA and exist outside of the bankruptcy." (J.A. 102) The District Court further ruled that no non-core jurisdiction existed. (J.A. 103-105) As the Trustee had stated that ERISA and the ERISA Plan documents already authorized him to pay the expenses for terminating the ERISA Plan, the "application to pay its administration expenses was superfluous and could have no conceivable effect on the bankruptcy estate or its allocation." (J.A. 103). The District Court noted that jurisdiction would arise if the Trustee sought approval from the Bankruptcy Court to use bankruptcy estate funds to compensate the Trustee and his professionals for their ERISA work. (J.A. 105-106)

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case concerns the intersection of ERISA and bankruptcy law. Specifically, it concerns whether the Bankruptcy Court's jurisdiction extends to approving fees incurred by the Chapter 7 Trustee or professionals hired by him in his capacity as successor ERISA plan administrator pursuant to 11 U.S.C. § 704(a)(11) and to ordering that the fees will be paid out of ERISA plan assets.

More broadly, the case concerns whether a bankruptcy court has jurisdiction over the actions of a Chapter 7 Trustee in his role as an ERISA plan administrator.

Assets of an ERISA plan are, indisputably, not property of a bankruptcy estate. The Bankruptcy Court, however, disregarded the critical importance of this this legal separation, which places all Plan assets entirely outside of the bankruptcy estate, when it ordered that the Plan pay the Chapter 7 Trustee and his professionals for their work on terminating the Plan. Without ever explaining how the assets of the Plan were subject to the court's jurisdiction, the court simply relied upon its belief that the Chapter 7 Trustee's work on the Plan invoked the court's core jurisdiction because section 704(a)(11) made the work an obligation of a bankruptcy trustee.

When Congress gave bankruptcy trustees the obligation to serve as ERISA plan administrators, it did nothing to alter the legal separation of ERISA plan assets from the bankruptcy estate. As a consequence of this legal separation, all of the actions taken by the Trustee in his role of ERISA plan administrator were governed by ERISA and the ERISA Plan itself, rather than the provisions of the Bankruptcy Code. The Bankruptcy Court ignored this principle and the central role that ownership of the assets plays in defining a bankruptcy court's jurisdiction when it asserted jurisdiction over the assets of the ERISA Plan without ever explaining the basis for such an exercise of power. It also ignored ERISA's basic separation of employer obligations from the obligations of an ERISA fiduciary, such as an ERISA plan administrator, even where both sets of obligations are being performed by the same person. The need to distinguish these two sets of responsibilities, known as the "two hat" doctrine, has been recognized repeatedly by the Supreme Court, this Court and numerous other circuit courts of appeal.

The District Court properly recognized that the Chapter 7 Trustee's assumption of the role of ERISA plan administrator allowed him to exercise his ERISA functions without the need for Bankruptcy Court approval. Thus, the District Court correctly reversed the Bankruptcy Court's determination that it had core jurisdiction over the actions performed by the Trustee in his Section 704(a)(11) role as ERISA plan administrator. Core bankruptcy jurisdiction exists when a proceeding is found to be "arising under" the Bankruptcy Code or "arising in" a bankruptcy case. 28 U.S.C. §§157(b), 1334(b). Because the substance of the Chapter 7 Trustee's ERISA work was governed by ERISA and not the Bankruptcy Code, no "arising under" jurisdiction existed. Because the matters that "arise in" a bankruptcy trustee's fulfillment of his ERISA duties are not the types of matters that arise only in a bankruptcy proceeding, such as the adjudication of a proof of claim, no "arising in" jurisdiction existed either. Finally, because ERISA Plan assets are not property of the bankruptcy estate and therefore could be expended by the Trustee without an order of the Bankruptcy Court, the District Court correctly concluded that obtaining payment from ERISA Plan assets would not have "any conceivable effect" upon the administration of the bankruptcy estate. Accordingly, the Bankruptcy Court also lacked "related to" jurisdiction under the well-accepted "conceivable effect" test for the assertion of such jurisdiction.

These conclusions are fully supported by the general jurisdictional principle that a bankruptcy court's core jurisdiction is in rem. This means that it has jurisdiction over the bankruptcy estate, which provides the res in a bankruptcy proceeding, but not over the assets of an ERISA employee benefit plan that the Chapter 7 Trustee administers because the debtor was the plan administrator at the time of bankruptcy. Those assets are not part of the bankruptcy estate and are not included within the res over which the court has jurisdiction.

ERISA and the Bankruptcy Code represent two distinct legal regimes, with their own sets of rules. The Supreme Court has recognized that ERISA is a carefully constructed, comprehensive system for protecting the retirement funds of workers. No Bankruptcy Code provisions are used to determine the rights of ERISA plan participants or the actions taken by a trustee in terminating an ERISA plan and distributing its assets. By seeking to employ an inapplicable Bankruptcy Code formula for paying himself rather than using a reasonable hourly rate, the Trustee was seeking to obtain an absurdly high fee for his ERISA work. Moreover, by seeking a Bankruptcy Court order where none was required, the

Trustee, as the District Court recognized, was wrongly seeking to immunize himself from ERISA liability by cloaking himself in "derived judicial immunity." Like the District Court, this Court should conclude that a Trustee who becomes an ERISA plan administrator pursuant to Section 704(a)(11) has the same rights and duties as any other ERISA plan administrator outside the bankruptcy context; and that the Bankruptcy Court's jurisdiction over the bankruptcy estate does not extend to the Plan, nor confer any special privileges on the Trustee when he acts simply as an ERISA fiduciary.

ARGUMENT

THE BANKRUPTCY COURT HAD NO JURISDICTION TO ORDER THAT THE FEES AWARDED IN ITS AUGUST 2012 ORDER BE PAID FROM THE ERISA PLAN

A. Standard of Review

A circuit court of appeals undertakes plenary review of a district court order in which it performs an independent examination of the bankruptcy court's decision. In re Colony Hill Assoc., 111 F.3d 269, 273 (2d Cir. 1997). A bankruptcy court's legal determinations receive de novo review; its findings of fact are reviewed for clear error. In re Coudert Bros. LLP, 673 F.3d 180, 186 (2d Cir. 2012). "[A] bankruptcy court would necessarily abuse its discretion if it based its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Klein v. Wilson Elser Moskowitz, Edelman & Dicker (In re

Highgate Equities, Ltd.), 279 F.3d 148, 152 (2d Cir. 2002). Questions of subject matter jurisdiction are questions of law, which are subject to de novo review. Shain v. Ellison, 356 F.3d 211 (2nd Cir. 2004) (standing).

B. The District Court Correctly Held that the Bankruptcy Court Had Neither Core nor Non-Core Jurisdiction To Cause the Plan to Pay the Fees

The seminal opinion in Northern Pipe Line Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 71 (1982), characterized "the core of the federal bankruptcy power" as "the restructuring of debtor-creditor relations." See also Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165, 2171 (2014); Stern v. Marshall, 131 S. Ct. 2594, 2614 n.3 (2011). The Fee Applications at issue in this appeal do not involve the restructuring of the Debtors' relations with their creditors; they involve the payment of non-estate assets to professionals for their work in distributing assets of an ERISA Plan (a non-estate asset) to non-creditors (participants and beneficiaries of the ERISA Plan). That is why the Fee Applications did not trigger the Bankruptcy Court's core jurisdiction.[5]

[5] The decision to terminate, as distinguished from the manner in which termination is implemented, is a settlor decision to be made by a trustee on behalf of a debtor which sponsors a plan, not a fiduciary decision governed by the fiduciary provisions of ERISA. See Beck v. Pace Int'l Union, 551 U.S. 96, 101 (2007));.Lockheed Corp. v. Spink, 517 U.S. 882, 890 (1996) . Because it is a settlor function, which is not governed by the fiduciary provisions of ERISA, a bankruptcy court has the jurisdiction to approve a decision by a Chapter 7 trustee to terminate an ERISA plan. However, implementation of settlor decisions, such

Bankruptcy judges possess the power to "hear and determine all cases under title 11 [the Bankruptcy Code] and any or all proceedings arising under title 11, or arising in a case under title 11." 28 U.S.C. § 157(b)(1) (emphases added). Section 157(b)(2) provides a long, non-exclusive list of potential "core proceedings." Id. § 157(b)(2)(A) – (P). None encompasses a proceeding for the payment of fees out of non-estate assets for services provided to an ERISA-covered plan.

This Court has adopted the test articulated in Wood v. Wood (In re Wood), 825 F.2d 90 (5th Cir. 1987), to determine whether core jurisdiction exists. MBNA America Bank, N.A. v. Hill, 436 F.3d 104, 109 (2d Cir. 2006). Equating "core proceedings with the categories of 'arising under' and 'arising in' proceedings," 825 F.2d at 96, Wood sets forth the following test for "arising under" jurisdiction: "the phrase 'arising under title 11' . . . describe[s] those proceedings that involve a cause of action created or determined by a statutory provision of title 11." Id. It then sets forth the following test for "arising in" jurisdiction: "'arising in' proceedings are those that are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of bankruptcy." Id. at 97. As described below,

---

as distribution of assets to participants from a plan, whether terminated or not, is a fiduciary function that implements the settlor decision. See, e.g., Bussian v. RJR Nabisco Inc., 223 F.3d 286, 295 (5th Cir. 2000).

the Fee Applications fail to fall within the scope of either of these jurisdictional tests.

1. No "arising under" jurisdiction exists.

"Arising under" jurisdiction exists where a claim "clearly invokes substantive rights created by federal bankruptcy law." MBNA America Bank 436 F.3d at 110. The case law is clear that for "arising under" jurisdiction to exist, a proceeding must do more than rely upon a provision in the Bankruptcy Code; it must invoke a substantive right under the Bankruptcy Code. The Seventh Circuit described the difference in In re United States Brass Corp., 110 F.3d 1261 (7th Cir. 1997), as follows:

> Core proceedings are actions by or against the debtor that arise under the Bankruptcy Code in the strong sense that the Code itself is the source of the claimant's right or remedy, rather than just the procedural vehicle for the assertion of a right conferred by some other body of law, normally state law.

Id. at 1268. In contrast, Section 704(a)(11) of the Bankruptcy Code, upon which the Trustee and Bankruptcy Court relied for the assertion of jurisdiction over plan assets, simply makes the Trustee the vehicle for administering an ERISA plan; it creates no substantive rights. See 6 Collier on Bankruptcy ¶ 704.14, at 704-32.2 (16th ed. 2014) ("[T]he trustee's duties as administrator of the ERISA plan continue to be governed by ERISA"). The Bankruptcy Code did not alter, augment, or diminish the duties of ERISA plan administrators, and it did not

3convert the assets of the ERISA plan into assets of the bankruptcy estate. Instead, ERISA, not the Bankruptcy Code, is the source of substantive rights regarding ERISA plans, including what constitutes appropriate compensation for services provided, just as ERISA's fiduciary standards, and not the business judgment rule from corporate law, apply when the plan administrator role is assigned to a corporate officer of the plan sponsor. E.g., Donovan v. Mazzola, 716. F.2d 1226, 1231 (9th Cir. 1983) (prudent person test, not less demanding business judgment rule, applies in ERISA). See Argument D.2. infra (pp. 38-40).

The 2012 Opinion relies upon the analysis in the 2010 Opinion for the proposition that because the Trustee's obligation to act as ERISA Plan administrator is imposed by Section 704(a)(11), the actions the Trustee takes in that role fall within the Bankruptcy Court's core jurisdiction. 2010 Opinion at J.A. 27 ("To the extent that the Trustee's duties over the Plan arise out of ERISA, they do so only by operation of § 704(a)(11) . . . Thus, § 704(a)(11), not ERISA, is the source of the Trustee's duties."). The Bankruptcy Court's analysis has it backwards, however, as it fails to properly distinguish the reason why the Trustee is performing the ERISA plan administrator obligation (the addition of Section 704(a) (11) to the Bankruptcy Code) from the source that defines that obligation, ERISA. That critical difference is why the Seventh Circuit took pains to distinguish "the source of . . . [a] right or remedy . . . [from] the procedural vehicle for the assertion of a right conferred by some other body of law." United States Brass, 110 F.3d at 1261. This difference is also why this Court stated in MBNA that for "arising under" jurisdiction to exist, the issue must "clearly invoke[] substantive rights created by federal bankruptcy law." MBNA America Bank, 436 F.3d at 110 (emphasis added).

The District Court, in reversing the Bankruptcy Court, correctly noted the absence of any sound basis for core bankruptcy court jurisdiction in this area:

> Section 704(a)(11) of the Bankruptcy Code does not modify the rights and obligations of an ERISA plan administrator, nor does it create additional obligations. . . . Unlike Kirschenbaum's duties as a Chapter 7 Trustee, his obligations as RPC Plan Administrator are created by ERISA and exist outside the bankruptcy. Therefore, the Bankruptcy Court lacks core jurisdiction over Kirschenbaum's obligations as RPC Plan Administrator.

J.A. at 102. The mistake in the Bankruptcy Court's "arising under" analysis was similarly recognized by the court in In re Mid-States Express, Inc., __B.R.__, 2010 WL 2653376 (Bankr. N.D. Ill. 2010), as follows:

> It cannot be said that section 704(a)(11) invokes a right created by the Bankruptcy Code in the same strong sense. It is not adjunct to, or supplemental of, any substantive right created by the Bankruptcy Code. Section 704(a)(11) stands alone in putting the trustee in the shoes of the ERISA plan administrator. The plan administrator's rights and obligations are found in ERISA. The Bankruptcy Code does not alter those rights and obligations.

Id. at *5.

The 2012 Order's grant of payments from the Plan, a non-estate asset, is another critical reason why there is a lack of core jurisdiction. The 2012 Order was issued pursuant to applications of the Chapter 7 Trustee and the professionals assisting him in his ERISA work under sections 330 and 331 of the Bankruptcy Code, 11 U.S.C. §§ 330, 331. Sections 330 and 331 provide for final (§ 330) and interim (§ 331) compensation to professionals retained in a bankruptcy, but only where payment is made from the bankruptcy estate. Thus, the Official Bankruptcy Rule applicable to requests for payment of compensation explicitly states that such requests are for "interim or final compensation . . . <u>from the estate</u>." Fed. R. Bankr. 2016(a) (emphasis added). In the system for compensation established by Congress under the Bankruptcy Code, therefore, only bankruptcy estate assets may be used to compensate bankruptcy professionals employed by a debtor-in-possession or a Chapter 7 trustee.

That sections 330 and 331 do not apply when professionals are being compensated from non-estate assets is supported by the weight of judicial opinion. <u>See</u> <u>Barron v. Countryman</u>, 432 F.3d 590, 595 (5th Cir. 2005) ("[section] 330 is not applicable to attorney fees derived from a source other than the debtor's estate"); <u>In re Engel</u>, 124 F.3d 567, 571-2 (3d Cir. 1997) (applications for compensation are "made under § 330, when the estate has been benefited and is to pay for the beneficial services"); <u>David & Hagner, P.C. v. DHP, Inc</u>., 171 B.R.

429, 437 (D.D.C. 1994) ("bankruptcy court has no authority to award compensation from sources other than the estate"), aff'd, 70 F.3d 637 (D.C. Cir. 1995). While this Court has not ruled on this issue, bankruptcy courts in this circuit recognize this limitation on their jurisdiction. See In re King, 392 B.R. 62, 70-71 (Bankr. S.D.N.Y. 2008) (payments to professionals that are not property of the estate not subject to § 330); In re Chaitkhan, 496 B.R. 687, 694 (Bankr. E.D. N.Y. 2012) (same).[6]

In the 2010 Opinion, the Bankruptcy Court stated that this case law did not "support the proposition that this Court lacks jurisdiction to award fees . . . from non-estate assets [because that fact] does not change the nature of the request." 2010 Opinion at J.A. 29. However, the court provided no explanation for this bare conclusion, which is contradicted by the above-cited case law, where the

---

[6] Section 329 of the Bankruptcy Code, which the above-cited cases reference, is also inapplicable to this case. While it provides a bankruptcy court with authority to review payments from non-estate sources to determine whether they are excessive, the payments that are encompassed are solely those to an "attorney representing a debtor in a case under this title, or in connection with such a case." 11 U.S.C. § 329(a) (emphasis added). Section 329 does not encompass payments to attorneys representing other entities other than the debtor, such as an ERISA plan. And it does not encompass any payments to the Trustee himself or to professionals other than attorneys for the debtor. Cf. In Dery v. Cumberland Casualty & Surety Co. (In re 5900 Assoc.), 468 F.3d 326, 329-30 (6th Cir. 2006) (discussing Sections 329 and 330 jurisdiction over attorney's fees in the context of a previously dismissed case).

determinative fact for the denial of jurisdiction in each case was that the requested payments were to come from non-estate sources.

2. No "arising in" jurisdiction exists.

In contrast to claims that are core because they "arise under" the Bankruptcy Code, the Court in MBNA described "arising in" core claims as "proceedings, that by their nature, could arise only in the context of a bankruptcy case." MBNA America Bank, 436 F.3d at 109. It is well established that the fact that a controversy arises during the pendency of a bankruptcy case is an insufficient basis for creating "arising in" jurisdiction. Valley Historic Ltd. P'shp v. Bank of New York, 486 F.3d 831, 836 (4th Cir. 2007). It must be a controversy which "'would have no existence outside of the bankruptcy.'" Id. at 835 (citation omitted); Montague Pipeline Tech Corp. v. Grace/Lansing & Grace Indus., Inc. (In re Montague Pipeline Tech Corp.), 209 B.R. 295, 299 (Bankr. E.D.N.Y. 1997) (no "arising in" jurisdiction where "action would exist outside of the bankruptcy context"). In addition, the relief being sought must have some effect upon the bankruptcy estate in order for "arising in" jurisdiction to exist. Poplar Run Five Ltd. P'shp v. Va. Elec. & Power Co. (In re Poplar Run Five Ltd. P'shp), 192 B.R. 848, 857-58 (Bankr. E.D. Va. 1995); see also Torkelson v. Maggio (In re The Guild and Gallery Plus, Inc), 72 F.3d 1171, 1179 (3d Cir. 1996) (no "arising in" jurisdiction exists where trustee's alleged negligence did not involve property of the estate).

The reasons the Fee Applications do not trigger this Court's "arising in" jurisdiction were described in In re AB&C Grp., Inc., 411 B.R. 284 (N.D.W. Va. 2009). In AB&C, a Chapter 7 trustee claimed that the bankruptcy court had "arising in" jurisdiction to determine the propriety of the amount of fees to be paid to an ERISA plan service provider because such payments were being made in carrying out the trustee's duties under section 704(a)(11). The court ruled that it was not enough that the trustee was making such payments pursuant to his obligations as plan administrator under section 704(a)(11):

> The resolution of disputes over the payment of administrative costs from Plan assets under ERISA is typically an issue that arises outside bankruptcy. It does not depend upon bankruptcy for its existence, nor does it involve an administrative matter that arises only in bankruptcy cases.

Id. at 292. For these same reasons, no "arising in" jurisdiction existed to hear the Fee Applications in this case.

The same view was expressed by the court in In re Trans-Indus., Inc., 419 B.R. 21 (E.D. Mich. 2009). Like the Chapter 7 trustee in AB&C, the chapter 7 trustee in Trans-Indus. argued that "arising in" jurisdiction existed because he had commenced an adversary proceeding in furtherance of his obligations under Section 704(a)(11). The court rejected the argument, holding instead that actions taken in furtherance of a trustee's Section 704(a)(11) obligations, without more, do not trigger "arising in" jurisdiction unless they "fit into the narrow category of administrative matters . . . which have no existence outside of the bankruptcy." Id. at 30 (citations omitted). The actions themselves (not simply the fact that the actions were being undertaken by a Chapter 7 trustee) would have to be actions that only could occur in bankruptcy. See Stoe v. Flahery, 436 F.3d 209, 218 (3d Cir. 2006); see also In re Golden Inv. Acquisitions, LLC, 508 B.R. 381, 385 (Bankr. N.D. W.Va. 2014); In re Barton, 2010 WL 3938352, at *6 (Bankr. D. S.D. Oct. 5, 2010); In re Newfound Lake Marina, Inc., 2008 WL 4868885 (Bankr. D. N.H. Nov. 6, 2008); Royal Indem. Co. v. Admiral Ins. Co., 2007 WL 417649, at *4 (D.N.J. Nov. 19, 2007); In re Best Mfg., Grp., LLC, 2007 WL 2746834, at *1-2, *5 (Bankr. D. N.J. Sept. 17, 2007).

The above-cited opinions reflect the fact that, "arising in" jurisdiction does not arise simply because bankruptcy provides the factual context for a controversy. For "arising in" jurisdiction to exist, the controversy must be one that has a unique bankruptcy character, such as the resolution of a proof of claim, the adjudication of which will arise only in a bankruptcy. In contrast, the payment of professionals for their work in terminating an ERISA plan sponsored by a company that is liquidating its assets may occur regardless of whether the company is in bankruptcy. Consequently, the Bankruptcy Court had no "arising in" jurisdiction to hear the Fee Applications.

3. No "related to" jurisdiction exists.

In addition to jurisdiction over "core proceedings," a bankruptcy court also has jurisdiction to "hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11." 28 U.S.C. § 157(c)(1). The generally accepted test for "related to" jurisdiction was articulated by the Third Circuit in Pacor v. Higgins, 743 F.2d 984 (3d Cir. 1984). Under that test, a court must decide "whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." Id. at 994 (emphasis omitted). As the Supreme Court recognized in Celotex v. Edwards, 514 U.S. 300, 308 n.6 (1995), the Pacor test for "related to" jurisdiction has been adopted (sometimes with some variation) by every circuit court of appeal. The Supreme Court in Celotex also observed "that a bankruptcy court's 'related to' jurisdiction cannot be limitless." 514 U.S. at 308 (citing Pacor, 743 F.3d at 994).

Similarly, this Court in Turner v. Ermiger, 724 F.2d 338 (2d Cir. 1983), recognized that Congress must have intended a practical limit on "related to" jurisdiction and adopted the explanation supplied by the leading bankruptcy treatise:

> Conceptually, there is no limit to the reach of this jurisdiction, insofar as the matter involved "arises in or [is] related to" the title 11 case. Situations will undoubtedly arise in which the controversy is so tangential to the title 11 case that a court will hold that the case neither arises in nor is related to the title 11 case. In such cases, the bankruptcy court may decide that the exiguous nature of the relationship between the proceeding and the

> bankruptcy case is such as to fall without the court's jurisdiction. The criterion to be adopted in such a situation will undoubtedly be related to a determination of whether the outcome of the proceeding could conceivably have any effect upon the estate being administered.

Id. at 341 (quoting 1 Collier, Bankruptcy § 3.01[1][e] (15th ed. 1983)). Accord Lyondell Chemical Co. v. Air Products L.P. (In re Lyondell Chemical Co.), 2009 WL 1767591 (Bankr. S.D. N.Y. 2009) (possible injury to debtor that could result from suit against non-debtor affiliates was too remote to create "related to" jurisdiction); CIT Comm'ns Finance Corp. v. Level 3 Comm'ns, LLC, 483 F. Supp. 2d 380, 389 (D. Del. 2007) (conceivable effect of state court action on bankruptcy too "attenuated" to create "related to" jurisdiction); 19 Court Street Assocs, LLC v. RTC, 190 B.R. 983, 996 (Bankr. S.D. N.Y. 1996) ("any impact on the administration of the debtor's estate . . . is too remote to invoke our jurisdiction").

The Second Circuit held more than thirty years ago in Turner that the bankruptcy court lacked "related to" jurisdiction to resolve a cause of action that had been exempted by the debtor from the bankruptcy estate because none of any damage award would go to the estate. Turner, 724 F.2d at 341. More recently, this Court reaffirmed the critical role of property of the estate in defining a bankruptcy court's jurisdiction in In re Johns-Manville Corp., 517 F.3d 52 (2d Cir. 2008) (known as "Manville III"), rev'd on other grounds, Travelers Indem. Co. v. Bailey, 557 U.S. 137 (2009); in In re Johns-Manville Corp., 600 F.3d 135 (2010) (known as "Manville IV"); and In re Quigley, 676 F.3d 45 (2d Cir. 2012).

The appeals in Manville involved an attempt by asbestos injury plaintiffs to assert state law claims legally independent of Manville's wrongdoing against Travelers Insurance and other insurers of Manville, thereby avoiding the reach of a 1986 "channeling" injunction requiring claims against Manville and its insurers to be brought in the Manville bankruptcy proceeding. Manville III, 57 F.3d at 57-58. This Court ruled that the 1986 injunction could not extend to actions which "make no claim against an asset of the bankruptcy estate, nor . . . affect the estate . . . . Instead, a bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the res of the bankruptcy estate." Id. at 65-66. In Manville IV, this Court reaffirmed that a bankruptcy court's jurisdiction "is in rem." Manville IV, 600 F.3d at 152.

In a subsequent appeal involving the scope of a different channeling injunction barring asbestos liability claims, this Court reaffirmed that this Court's ruling in Manville was based upon the fact that the claims against the insurers would have no effect upon the res. In re Quigley, 676 F.3d at 54-57. The Court concluded: "the potential [of a cause of action] to affect the bankruptcy res" is the key to determining whether "related to" jurisdiction has been invoked. Id. at 57.

Here, the Trustee is seeking compensation for work he and the professionals that he hired did for the Plan, to be paid out of Plan assets to the extent there are assets remaining in the Plan. Because none of those assets are within the bankruptcy estate, this request does not affect the estate within the limitations of the test for "related to" jurisdiction. A bankruptcy court cannot bootstrap its own jurisdiction by issuing an order it had no power to issue, and then draw a connection or create an effect between that order and the bankruptcy estate to establish "related to" jurisdiction.[7]

Moreover, even if there was non-core, "related to" jurisdiction in the case, the 2012 Order would still be an improper exercise of that jurisdiction. At a minimum, the Trustee would have had to file a separate adversary proceeding against the Plan, which is the means provided in bankruptcy cases (Bankruptcy Rules 7001, 7003 and 7004) to recover money for the estate or determine the debtor's interest in property outside the bankruptcy estate.[8] E.g., In re Lionel

---

[7] This does not mean that the actions of a trustee in his role as plan administrator may never result in bankruptcy court jurisdiction. As the District Court recognized, when a bankruptcy trustee seeks payment of his fees or those of his professionals from the bankruptcy estate, a bankruptcy court has jurisdiction to rule on such a request. However, no such limitation on a bankruptcy court's jurisdiction was recognized in the Bankruptcy Court's 2012 Opinion or Order, which crossed the boundary that exists between ERISA's legal regime and the Bankruptcy Code's.

[8] Thus, when a trustee seeks to recapture assets belonging to or in possession of an affiliated company or family member, because the debtor wrongfully transferred them, the Bankruptcy Rules contemplate that a bankruptcy trustee will bring a separate lawsuit within the bankruptcy case, known as an adversary proceeding. See Fed.R.Bankr.P. 7001 Advisory Committee Note; In re Golden Plan of California, Inc., 829 F.2d 705, 711 (9th Cir. 1986).

Corp., 23 B.R. 224, 225 (Bankr. S.D. N.Y. 1982). Assuming that this procedure is available in this circumstance, it is plain here that the Trustee did not attempt this route. He cannot achieve the same goal of attaining compensation for him and the other professionals from the Plan simply by filing a motion with the Bankruptcy Court, as was done in this case, without securing independent representation for the Plan. Id.

In an adversary proceeding, the Plan would have been entitled to separate representation given the clear adversity of its financial interests in preserving as much of its assets as possible for the participants, compared to the Trustee's interest in maximizing his fees. Cf. Hansberry v. Lee, 311 U.S. 32, 40 (1940) ("one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party."). Under ERISA, the Plan was entitled to representation free from the conflict of interest posed by having the Trustee simultaneously represent both the Plan and himself. 29 U.S.C. §§ 1104(a)(1)(A) (loyalty standard), 1106(b)(1) and (b)(2) (prohibition on self-dealing and conflicted interests); Pegram v. Herdrich, 530 U.S. 211, 225 (2000) ("ERISA does require, however, that the fiduciary with two hats wear only one at a time").

Furthermore, the Secretary's active participation in this proceeding was no substitute for obtaining private representation for the Plan. In the absence of an appropriate ERISA plan fiduciary to represent and defend the Plan in an action to recover from the Plan, the presence of the Secretary cannot be deemed to be an adequate alternative that cures this fundamental defect in process. Though their interests are aligned, the Secretary is not in privity with the ERISA Plan or its participants. Herman v. South Carolina Nat'l Bank, 140 F.3d 1413, 1424 (11th Cir. 1998) ("Every circuit addressing the issue has held that the Secretary is not bound by prior private litigation when the Secretary files an independent action to address ERISA violations.").

C. General Principles Concerning In Rem Jurisdiction Further Support the District Court's Reversal of the Bankruptcy Court

As stated above, a significant factor in the lack of core jurisdiction in this case was that the grant of payments was from a non-estate asset, the Plan. Indeed, even "related to" jurisdiction generally depends on the effect upon a res, as the Manville and Quigley decisions demonstrate. Thus, the central jurisdictional fact in this appeal is that the assets of an ERISA plan are not property of a debtor's estate. Patterson v. Shumate, 504 U.S. 753, 760 (1992) (holding that "[t]he antialienation provision required for ERISA qualification . . . constitutes an enforceable transfer restriction for purposes of [11 U.S.C.] § 541(c)(2)'s exclusion of property from the bankruptcy estate"); 5 Collier on Bankruptcy § 541.06 (16th ed.) ("an ERISA-qualified plan will be excluded from property of the estate"). In adding the ERISA plan administrator role to a bankruptcy trustee's duties, Congress preserved the complete separation of plan assets from bankruptcy estate assets. See 11 U.S.C. § 541(b)(7) (explicitly excluding employee contributions to ERISA plans from the definition of property of the debtor's estate).

The exclusion of the Plan assets from the bankruptcy estate is critically important to the analysis here because, as the Fourth Circuit has explained, "a bankruptcy court's jurisdiction does not extend to property that is not part of a debtor's estate." Rutherford Hosp., Inc. v. RNH P'ship, 168 F.3d 693, 699 (4th Cir. 1999). In fact, "[b]ankruptcy jurisdiction, at its core, is in rem . . . . Bankruptcy jurisdiction, as understood today and at the time of the framing, is principally in rem jurisdiction." Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 362, 370 (2006). See, e.g., Straton v. New, 283 U.S. 318, 321 (1931); Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 192 (1902); New Lamp Chimney Co. v. Ansonia Brass and Copper Co., 91 U.S. 656, 661 (1875). And "if the jurisdiction is in rem, the judgment can only affect property over which jurisdiction has properly been invoked." In re A.J. MacKay Co., 50 B.R. 756, 761 (D. Utah 1985).

When confronted with jurisdictional conflicts between bankruptcy law and other legal entitlements, the Supreme Court has looked to whether the exercise of a bankruptcy court's power fell within its in rem jurisdiction. Thus, in Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440 (2004), the Court rejected an attempt under the Eleventh Amendment to bar a bankruptcy court from discharging a student loan debt owed to a state. The Court found the Eleventh Amendment to be inapplicable because a bankruptcy court was exercising its in rem jurisdiction in the discharge of a debt. Id. at 450 ("No matter how difficult Congress has decided to make the discharge of student loan debt, the bankruptcy court's jurisdiction is premised on the res, not on the persona; that States were granted the presumptive benefit of nondischargeability does not alter the court's underlying authority.") (emphasis added).

As recently as this year, in the Executive Benefits case, the Supreme Court took note of the jurisdictional scheme under the former Bankruptcy Act, which defined a bankruptcy court's summary jurisdiction as solely encompassing "'property in the actual or constructive possession of the [bankruptcy] court.'" 134 S. Ct. at 2170 (quoting Northern Pipe Line, 458 U.S. at 53). The Court then described the 1984 revision of the Bankruptcy Code, which created the present jurisdictional system of core or non-core proceedings, as having "largely restored the bifurcated jurisdictional scheme that existed" under the Bankruptcy Act. Id. at 2171. The Court stated: "In using the term 'core', Congress tracked the Northern Pipeline plurality's use of the same term as a description of those claims that fell within the scope of the historical bankruptcy court's power." Id. at 2172, n.7. Thus, a court's in rem jurisdiction, which defined a bankruptcy court's summary jurisdiction under the predecessor Bankruptcy Act, see, e.g., In re Naturally

Beautiful Nails, Inc., 252 B.R. 574, 575 (Bankr. Fla. 2000), continues to be a critical factor in defining those core proceeding matters in which a bankruptcy court has the power to issue a final judgment.

Consequently, a "bankruptcy court [is] without subject matter jurisdiction to distribute [assets of] pension plans." In re Mclellan, 99 F.3d 1420, 1423 (7th Cir. 1996). The legally significant distinction between a debtor's estate and the assets of an ERISA plan cannot, therefore, be squared with the 2012 Order to pay fees out of the Plan's assets. Whether viewed as the absence of "core" jurisdiction or the lack of in rem jurisdiction, the Bankruptcy Court simply lacked the power to issue this Order.

The Bankruptcy Court initially skirted this critical limitation in its jurisdiction by establishing a conceptual framework in the 2010 Opinion under which the awarding of fees could be distinguished from the source from which the fees would be paid:

> The fact that the source of the funds available for payment of any award under this section may come from the Plan, which is a non-estate asset, is not central to the determination of the Court's jurisdiction to award fees for these services. . . . Whether the Trustee may use the Plan funds to pay this award will depend upon whether the services performed are compensable under the relevant ERISA statutes and the Plan documents. Any order awarding fees would contain no determination of whether Plan funds could be used to satisfy the award.

2010 Opinion, at J.A. 30-31(emphasis added). The Bankruptcy Court provided no authority in the 2010 Opinion to support its conceptual framework. By the time of the 2012 Opinion, however, the Bankruptcy Court determined that the ERISA Plan assets "could be used to satisfy the award" and declared this to be the "law of the case" based on the 2010 Opinion. J.A. at 55. The Bankruptcy Court provided no explanation of the jurisdictional basis for this fundamental change in approach. Thus, totally absent from the Bankruptcy Court's analysis is how the ERISA Plan could be made liable for the fees as part of the award, when no in rem jurisdiction over the ERISA Plan assets existed.

D. The Bankruptcy Court's Disregard of the Differences between ERISA and the Bankruptcy Code Undermined Important ERISA Interests

ERISA plan assets are not simply non-bankruptcy estate assets. As in this case, they are the retirement savings of workers who have lost their jobs. In contrast, most creditors in bankruptcy are businesses that are owed money from numerous customers, a small portion of whom are unable to repay their debts. It is essential that this difference be respected by observing the different legal regimes that Congress has erected to address these different problems. Congress protected the retirement savings of American workers by imposing high standards of fiduciary responsibility, making fiduciaries personally liable for losses cause by breaches of fiduciary duties and establishing a comprehensive remedial scheme enforced by the district courts. 29 U.S.C. §§ 1001 ("Congressional Findings and

Declaration of Purpose"), 1104 ("Fiduciary Duties"), 1132 ("Civil Enforcement").

The Bankruptcy Court disregarded these protections.

1. A Chapter 7 Trustee has a separate legal identity when performing his ERISA plan administrator duties.

A basic tenet of ERISA is that where an employer/sponsor of a plan also is the plan administrator, the two spheres of responsibility are legally distinct. Thus, this Court in Bell v. Pfizer, 626 F.3d 66 (2d Cir. 2010), observed:

> [B]ecause employers often act as both plan administrators and employers, ERISA permits employers to "wear two hats" and not all actions by an employer fall under its fiduciary role. . . . Rather, employers "assume fiduciary status only when and to the extent that they function in their capacity as plan administrators, not when they conduct business that is not regulated by ERISA."

Id. at 474 (citations omitted). Accord Hughes Aircraft Co, v. Jacobson, 525 U.S. 432, 444 (1999) ("In general, an employer's decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties which consist of such actions as the administration of the plan's assets."); Lockheed Corp. v. Spink, 517 U.S. 882, 890 (1996) (when an employer amends an ERISA plan, it does not become an ERISA plan fiduciary). See also, e.g., Holdeman v. Devine, 474 F.3d 770, 780 (10th Cir. 2007) (no breach of fiduciary duty because defendant "was 'wearing his CEO hat'" when he chose to satisfy business claims rather than ERISA plan medical claims); Ames v. American Nat'l Can Co., 170 F.3d 751, 757 (7th Cir. 1999) ("ERISA fiduciaries are allowed to wear more than one hat, and when employers make design changes in plans, they are not wearing their fiduciary hats").

This "two hat" concept is a special attribute distinguishing ERISA from the common law. See Pegram v. Herdrich, 530 U.S. at 224. ("[T]he trustee at common law characteristically wears only his fiduciary hat when he takes action to affect a beneficiary, whereas the trustee under ERISA may wear different hats."). When Congress determined who should be treated as a fiduciary under ERISA, it made "exercise[ing] any authority or control respecting management or disposition of . . . [plan] assets," a defining factor. 29 U.S.C. § 1002(21). But when the actions of an employer may affect a plan, but are not a part of a plan's administration or management or disposition of a plan's assets, an employer is wearing its employer hat. See, e.g., Flanigan v. Gen. Elec. Co. 242 F.3d 78, 87 (2d Cir. 2001) ("Fiduciary duty and prohibited transaction rules apply only to decisions by an employer acting in its fiduciary capacity. . . . Because GE's decision to spin-off the division along with its pension plan was, at its core, a corporate business decision, and not one of a plan administrator, GE was acting as a settlor, not a fiduciary, when it transferred the surplus to Lockheed.").

The dual roles of a Chapter 7 bankruptcy trustee as the person who directs and terminates a Chapter 7 debtor's business and who directs and terminates a Chapter 7 debtor's ERISA plan (if the debtor served as the ERISA plan's administrator) mirrors the pattern which exists outside of bankruptcy. When Congress explicitly gave bankruptcy trustees the duty to administer ERISA plans in 2005, it was careful not to alter this "two hat" structure. In enacting Section 704(a)(11) of the Bankruptcy Code, Congress did not simply state that it was adding another duty to those of a bankruptcy trustee. Instead, it described this revision to the Bankruptcy Code as "streamlin[ing] the appointment of an ERISA administrator for an employee benefit plan." The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), H.R. Rep. 109-31, pt. 1 (2005), as reprinted in 2005 U.S.C.C.A.N. 88, at 105.

The Sixth Circuit has recognized the continued importance of the "two hat" principle in bankruptcy. In McLemore v. Regions Bank, 682 F.3d 414, 420 (6th Cir. 2012), it held that when bankruptcy trustees are fulfilling their obligations to ERISA plans, they are acting as ERISA fiduciaries, not as bankruptcy trustees. In McLemore, a bankruptcy trustee of an investment advisor's bankrupt estate brought an ERISA action against a bank where the advisor-debtor maintained fiduciary accounts of employee benefit plans he had defrauded. The trustee alleged that the bank knowingly or in bad faith allowed the advisor to steal from the accounts in violation of ERISA. The bank moved to dismiss the trustee's ERISA claims on the ground that the cause of action was not an asset of the bankruptcy estate, but instead an asset of the ERISA plans. The Sixth Circuit rejected the bank's attempt to dismiss the suit on this jurisdictional ground. It ruled that the trustee's standing to bring the suit was not barred by the bankruptcy law rule that trustees only have standing to bring actions that are property of the estate because "[t]he Trustee brings this suit in his role as an ERISA fiduciary, rather than his role as a trustee to the debtor's estate." Id. at 420.

The Bankruptcy Court properly understood that the assets of an ERISA plan are not property of a bankruptcy estate, 2010 Opinion at J.A. 9, and that the Chapter 7 Trustee was governed by ERISA in fulfilling his ERISA plan administrator duties, id. at 20-22. Yet, the court failed to recognize the limitations this separate identity imposed on its own jurisdiction to adjudicate questions concerning the performance of such ERISA-related duties as distributing the assets of an ERISA plan in connection with its termination. There is no reason to reject the universally accepted "two hat" model, particularly where it is undisputed that the assets of an ERISA plan are not assets of a bankruptcy estate.

2. The mistaken use of the business judgment rule to evaluate the trustee's ERISA work and application of the Section 326 Bankruptcy Code formula resulted in the award of grossly excessive fees.

The Bankruptcy Court's erroneous applications of the business judgment rule and the Section 326 formula are not before this Court because review here is limited to the issue of whether Bankruptcy Court had jurisdiction to make any decision concerning the Trustee's actions as plan administrator, including the Fee

Applications in this case. Nevertheless, the Bankruptcy Court erred in both respects, and the errors spotlight why it is important to keep ERISA and bankruptcy law apart in this context. Both the Bankruptcy Court and the Trustee identified the business judgment rule as the applicable standard by which the work of the Trustee should be assessed. 2012 Opinion at J.A. 72; Trustee Brief at 11, 29 & 38. It is well established, however, that ERISA imposes a higher standard of care upon a fiduciary than the business judgment rule.[9] See Tibble v. Edison Int'l, 729 F. 3d 1110, 1133 (9th Cir. 2013) ("These [ERISA] obligations ['of care, skill, prudence and diligence'] are more exacting than those associated with the business judgment rule so familiar to corporate practitioners."), cert. granted, 82 U.S.L.W. 3284 (No. 13-550, Oct. 2, 2014) (cert. granted on statute of limitations issue unrelated to merits of prudence claims); Solis v. Couturier, 2009 WL 3055207, at *4 (E.D. Cal. 2009); (ERISA "imposes higher and more specific duties on ERISA fiduciaries than what the business judgment rule requires"); Lanka v. O'Higgins, 810 F. Supp. 379, 387 (N.D.N.Y. 1992) ("It is not a business judgment rule that

[9] See District Lodge 26, IAM v. United Tech Corp., 610 F.3d 44, 52 (2d Cir. 2010) (business judgment rule is a presumption that in making a business decision, the directors of a corporation acted on an informed basis and in the honest belief that the action was in the best interests of the company); In re Croton River Club, Inc., 52 F.3d 41, 44 (2d Cir. 1995) (under New York law, business judgment rule precludes judicial inquiry into the actions of corporate debtors so long as those actions were taken in good faith and after a reasonable investigation).

applies to the question of prudence in the management of an ERISA plan, but rather a prudent person standard."). The duty of care and loyalty owed by an ERISA fiduciary is "the highest known to the law." Donovan v. Bierwirth, 680 F.2d 263, 272, n.8 (2d Cir. 1982). The Supreme Court recently confirmed that the same high duty of prudence is owed by all ERISA fiduciaries to all plans. Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2467 (2014) (holding that fiduciaries of employee stock option plans are not entitled to a special "presumption of prudence"). The 2012 Opinion makes no attempt to explain why a bankruptcy trustee acting as an ERISA fiduciary should not be held to the same exacting fiduciary standards as all other ERISA fiduciaries. But it is simply wrong to apply a lesser, non-ERISA standard to the administrator of an ERISA plan just because the debtor who formerly was in that position (and whose ERISA-related duties have been assumed by the bankruptcy trustee) is going through a bankruptcy proceeding.

Contrary to the positions taken in the 2012 Opinion and by the Trustee, use of the section 326(a) formula to calculate a trustee's fee based on a percentage of plan assets was contrary to 326(a) (which is based on the amount of distributions from the bankruptcy estate) created an indefensible hourly fee award of approximately $2000 per hour that was excessive under ERISA standards.[10] The Secretary is not aware of any court, other than the Bankruptcy Court below, which has allowed for the computation of a bankruptcy fee based upon the amount of ERISA plan money distributed in a bankruptcy case. Moreover, that position has been rejected in analogous circumstances. In re Market Res Dev. Corp., 320 B.R. 841, 848 (Bankr. E.D. Va. 2004) (distributions by chapter 7 trustee of non-estate property the trustee held as an escrow agent may not be included in computing a compensation under section 326(a)); In re Reid, 251 B.R. 512, 518-19, 521 (Bankr. W.D. Mo. 2000) (trustee only entitled to take credit under section 326(a)

---

[10] The section 326(a) formula uses a percentage amount of monetary distributions made by a trustee as the basis for calculating a trustee's maximum compensation; the percentage falls as the amount of the distributions increase. Section 326(a) states:

> In a case under chapter 7 or 11, the court may allow reasonable compensation under section 330 of this title of the trustee for the trustee's services, payable after all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims.

11 U.S.C. § 326(a). A number of courts, viewing payments under section 326 as a commission, have concluded that there is a presumption that a trustee is entitled to a fee award equal to the section 326(a) calculation. E.g., Siskin v. Geltzer, 2012 WL 2367043 (S.D.N.Y. 2012); In re Salgado-Nava, 473 B.R. 911, 922 (BAP 9th Cir. 2012). The Office of U.S. Trustee appears to share this same view. The Office of U.S. Trustee Handbook for Chapter 7 Trustees, at 4-24. The U.S. Trustee's Office has neither supported nor objected to the fees requested in this case.

for 42% of the sale proceeds of a property not owned by the estate, reflecting the 42% ownership share in the property, notwithstanding critical role in the sale The Bankruptcy Court's approach, if followed by other courts, would permit the assessment of excessive fee amounts from ERISA plan assets whenever the Plan had a large amount of assets. The decision would effectively permit a trustee to receive extraordinarily high fees for traditional, non-complex bankruptcy estate administration where the estate is small but the pension plan is large.

The dangers are especially apparent on the facts of this case, as the use of the section 326(a) formula bears no relationship to this Court's description of a "presumptively reasonable fee." Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty of Albany and Albany Cnty Bd. of Elections, 522 F. 3d 182, 190 (2d Cir. 2008). Instead, the estate asset-based section 326(a) sliding scale formula resulted in an approximately $2000 per hour award to the Trustee because it was applied to a total of $9,560,215.70 in distributions and expenses paid by the Plan, and resulted in an amount of compensation of $132,378.24. Absent from the 2012 Opinion is any mention of the number of hours worked by the Trustee during this period, 62.4 hours, and the resulting rate of compensation of $ 2,121 per hour.

(The Trustee's time records also reflect a possible additional 9.85 hours that he may have worked during this period, which would result in a $1832 hourly rate.).[11]

Section 326(a)'s legislative history demonstrates why a trustee's disbursement of ERISA assets should not be a measure by which trustees are compensated for their ERISA work. Section 326(a)'s sliding scale formula for computing a Chapter 7 trustee's fee was intended by Congress as "an incentive to trustees to collect assets for the estate." H. Rep. No. 95-595 at 93 (1977). Congress stated "the trustee's principal duty is to collect and to reduce to money property of the estate." Id. at 379. In contrast, when a Chapter 7 trustee commences his ERISA plan administrator work, all, or almost all, of an ERISA's plan assets are already in the form of cash or liquid securities ready to be conveyed to plan participants. For example, in this case the Chapter 7 Trustee collected no assets; instead, the funds appear to have been simply sitting in Fidelity Investment accounts. Trustee First Interim Fee Application at ¶ 11.

Rather than using a formula based on the amount of distributions, ERISA fee awards are calculated by using a reasonable hourly rate. Ferrara v. Oakfield Leasing Inc., 904 F. Supp. 2d 249, 274 (E.D.N.Y. 2012) (relying upon Arbor Hill

[11] The $310,056.47 result from the initial Section 326(a) calculation was reduced by the $45,300 first interim award to the Trustee, which resulted in an amount of $264,756.47. The Trustee then halved this amount to demonstrate a supposed reasonableness, resulting in the fee award of $132,378.24. 2012 Opinion at J.A. 57.

Concerned Citizens, 522 F. 3d at 190 (2d Cir. 2008), which determined that the "presumptively reasonable fee" should be calculated by multiplying the reasonable hourly rate by the reasonable number of hours expended on a matter). In no event, however, does ERISA permit a fiduciary to set his own fees. See 29 U.S.C. 1106(bb)(1) (prohibition on fiduciary"deal[ing] with assets of the plan in his own interest or for his own account"). See infra, pp. 48-50 & n.12.

This award resulting from application of the section 326(a) formula to the distribution of the liquid assets in the Fidelity accounts is grossly excessive under the Arbor Hill standard used in ERISA. A reasonable hourly rate for ERISA attorneys in the Eastern District of New York was found, in 2012, to be "$350 per hour for partners; $275 per hour for senior associates; $225 per hour for junior associates; and $90 per hour for paralegals and law clerks." Ferrara, 904 F. Supp. 2d at 274. Moreover, the Trustee did not possess, nor claim to possess, any specialized ERISA expertise. Thus, the large award ordered to be paid out of Plan assets by the Bankruptcy Court, compared to the reasonable hourly rate formula that courts routinely apply in ERISA cases, reflects the absurd results that can arise when the Bankruptcy Code is used as the method for paying bankruptcy trustees for their ERISA work.

3. <u>The Trustee is seeking to undermine the protections granted by ERISA by obtaining an unwarranted immunity from suit and overriding the ERISA statute of limitations.</u>

The issue of derived judicial immunity was not ruled upon below and would only arise when and if the Trustee were sued and he raised it as a defense, which has not happened. Accordingly, there is no need for this Court to address it here. Nevertheless, the invalidity of the Trustee's argument (Trustee Br. 38-42) for affording it such immunity with respect to the Fee Applications further demonstrates why it is wrong to superimpose concepts familiar to bankruptcy law onto a plan administrator's fiduciary duties. The 2012 Order would indirectly and severely frustrate Congress's intent if it were to allow the Trustee to avoid his liability as a plan fiduciary by arguing that the 2012 Order provides him with the cloak of derived judicial immunity. <u>See</u> Trustee Br. at 40 ("just as the Trustee would be entitled to receive derived judicial immunity with respect to any action taken by him pursuant to an order of the Bankruptcy Court with respect to the performance of his other statutory duties, he is entitled to that same derived judicial immunity in connection with theperformance of his Bankruptcy Code section 704(a)(11) duties with respect any action taken by him pursuant to court order"). Such immunity would thereby render meaningless the ERISA statute of limitations in which a fiduciary breach suit may be brought. The doctrine of derived judicial immunity provides a bankruptcy trustee with immunity in the exercise of his business judgment, where he acts in accordance with an order of the court, after candid disclosure and on notice to interested parties. Bennett v. Williams, 892 F.2d 822 (9th Cir. 1989). As previously argued, the business judgment rule has no place in establishing a fiduciary's obligations under ERISA, and neither does the doctrine of derived judicial immunity.

In rejecting a similar attempt by a bankruptcy trustee, the court in AB&C stated:

> Where a bankruptcy "trustee acts pursuant to the explicit instructions of the bankruptcy court," he enjoys "complete immunity from suit." …[T]he Proposed Order is a method by which the Trustee seeks to obtain the imprimatur of the court regarding his decision made as Plan administrator.

AB&C, 411 B.R. at 295 (quoting Mosser v. Darrow, 341 U.S. 267 (1951). The court in AB&C then explained how such a purpose did not have a sufficient nexus to the case to provide any basis for subject matter jurisdiction. The District Court below expressed its agreement with the analysis in AB&C and correctly concluded: "The Secretary and RPC Plan participants remain eligible to bring a civil action against the Chapter 7 Trustee for any breaches of his fiduciary duties as RPC Plan Administrator. 29 U.S.C. § 1132(a)(2)." 2014 Opinion at J.A. 105.

Congress knows how to provide non-debtors with a release from liability, if appropriate. Congress created a mechanism in section 524(g) of the Bankruptcy Code for releasing non-debtors in asbestos cases. Congress created a mechanism in section 505(b) for eliminating a trustee's potential tax liability. Congress created no such mechanism when it enacted section 704(a)(11). What the Trustee is indirectly seeking is a new protection which Congress did not choose to add to the Bankruptcy Code. By seeking the Bankruptcy Court's approval for the disposition of non-estate assets, where no such approval was required or authorized, the Trustee was indirectly seeking to obtain a right that is denied to all others who administer ERISA plans – a release from potential fiduciary liability under ERISA.

Immunizing an ERISA fiduciary from potential liability for fiduciary acts, however, would completely frustrate a central purpose of ERISA. "In enacting ERISA, one of Congress' primary goals was to devise a system whereby plan participants and beneficiaries could hold fiduciaries accountable for their obligations." Herman v. NationsBank Tr. Co., 126 F.3d 1354, 1366 (11th Cir. 1997). A fiduciary that breaches any of his duties under ERISA is personally liable for plan losses resulting from the breach and may be sued to recover those losses or to obtain other appropriate equitable relief. 29 U.S.C. §§ 1109(a), 1132(a)(2), (3), (5). Granting derived judicial immunity in the ERISA context would largely render meaningless the statute of limitations under ERISA section 413, 29 U.S.C. § 1113. The general six-year statute of limitations set forth in section 413 of ERISA "reflects Congress' determination to impress upon those vested with the control of pension funds the importance of the trust they hold" and not to allow "those who violate that trust [to] easily find refuge in a time bar."

Brock v. Nellis, 809 F.2d 753, 754 (11th Cir. 1987). Cutting off the right to sue within ERISA's limitations period for fiduciary breach in the setting of compensation for plan-related services would leave participants (and the Secretary) only with the lesser protections arising from the notice and disclosure protections afforded in a bankruptcy motion for approval of fees, and derived judicial immunity would greatly eviscerate any right to challenge the fee award once the bankruptcy court issued its order. From an ERISA perspective, this would severely undermine Congress' intent to protect vulnerable pension plan participants. Cf. 29 U.S.C. § 1110 (bar on fiduciaries avoiding liability by means of exculpatory clauses).

4. The steps the Trustee should have taken instead of seeking Bankruptcy Court approval of the Fee Applications and protection from the Bankruptcy Court.

The scope of the Chapter 7 Trustee's fiduciary duties is not a matter before this Court because review here is limited to the jurisdiction of the Bankruptcy Court, but it is useful to bear those duties in mind when considering the jurisdictional issue. A critical goal in the enactment of ERISA was to prevent those who had control over ERISA plan assets from using such assets to further their own interests rather than for the benefit of the participants and beneficiaries of a plan. To satisfy that goal, ERISA "'establishes a blanket prohibition of certain acts, easily applied, in order to facilitate Congress' remedial interest in protecting employee benefit plans.'" Patelco Credit Union v. Sahni, 262 F.3d 897, 911 (9th Cir. 2001) (citation omitted). Among those per se violations, Section 406(b) of ERISA prohibits a fiduciary from (1) dealing with "the assets of the plan in his own interest or for his own account" (i.e., self-dealing), (2) acting in any transaction on behalf the plan and on behalf of a party "whose interests are adverse" to the plan, or (3) receiving "any consideration for his own personal account" from another entity derived from "a transaction involving the assets of a plan." 29 U.S.C. § 1106(b) (1) – (3). ERISA thus "'creates a per se ERISA violation; even in the absence of bad faith, or in the presence of a fair and reasonable transaction.'" Patelco Credit Union, 262 F.3d at 911 (citation omitted); Lowen v. Tower Asset Mgmt., Inc., 829 F.2d 1209, 1213 (2d Cir. 1987) (stating that protection of beneficiaries requires that liability be imposed under § 406(b)(1) even where there is "'no taint of scandal, no hint of self-dealing, no trace of bad faith'").

The Trustee was thus prohibited by ERISA from determining his fees and his law firm's fees and paying those fees out of the Plan's assets. Patelco Credit Union, 262 F.3d at 911 (violation where fiduciary set own compensation and collected the amount from plan assets); La Scala v. Scrufari, 479 F.3d 213, 221 (2d Cir. 2007) (violation where fiduciary unilaterally awarded raises to himself and his son, who was also a fiduciary); Cutaiar v. Marshall, 590 F.2d 523, 529-30 (3d Cir.

1979) (because the interests of a borrower and lender "are, by definition" adverse, trustees violated § 406(b)(2) when they negotiated a loan between two plans for which they both served as trustees); Weisler v. Metal Polishers Union, 533 F. Supp. 209, 216-17 (S.D.N.Y. 1982) (violation where fiduciary participated in decision to pay himself an excessive salary from plan).[12]

Under ERISA, therefore, the proper course of action would have been for the Trustee to seek a prohibited transaction exemption from the Secretary pursuant to 29 U.S.C. § 1108(a,), which would have allowed for reasonable fees. The Secretary has issued a detailed regulation governing the granting of such exemptions, 29 C.F.R. § 2570, and has granted more than one hundred individual

[12] Neither section 408(b)(2), 29 U.S.C. § 1108(b)(2), nor section 408(c)(2), id. § 1108(c)(2), of ERISA permit fiduciaries to engage in transactions prohibited by ERISA's self-dealing provisions, as set forth in ERISA Section 406(b). While fiduciaries can receive reasonable compensation, they cannot decide for themselves how much they will take from the plan as compensation. See 29 CFR § 2550.408b-2(a); 29 CFR § 2550.408c-2. 29 CFR § 2550.408b-2(e)(1) states, in pertinent part, that "[i]f the furnishings of . . . a service involves an act described in section 406(b) of the Act (relating to acts involving conflicts of interest by fiduciaries), such an act constitutes a separate transaction which is not exempt under section 408(b)(2) of the Act." This reasonable interpretation of the statute is entitled to the highest judicial deference. See also Patelco Credit Union, 262 F.3d at 910, n. 13 (§ 1108(b)(2) exempts payments by a plan to a party in interest which are otherwise prohibited by section 406(a), but not payments to fiduciaries that are prohibited under section 406(b)); Whitfield v. Tomasso, 682 F. Supp. 1287, 1304 (E.D. N.Y. 1988) ("([T]he exemptive provisions of sections 408(b)(2) and 408(c)(2) apply only to violations of section 406(a) [prohibited transactions of a 'party in interest'], not violations of 406(b) [prohibited transactions of a fiduciary]".).

exemptions over the last five years. Similarly, the Trustee could have entered into a settlement with the Secretary on the appropriate fee amounts. See Prohibited Transaction Exemption 94-71, 59 Fed. Reg. 51216 (Oct. 7, 1994) (Grant of Class Exemption to Permit Certain Transactions Authorized Pursuant to Settlement Agreements Between the U.S. Department of Labor and Plans). Alternatively, the Trustee could have hired non-conflicted professionals to do all of the compensable work (and receive all of the fees) in distributing assets from the terminated Plan. Any one of those courses of actions could have satisfied the Trustee's fiduciary obligations under ERISA without improperly invoking the presumed jurisdiction of the Bankruptcy Court.[13]

[13] To clarify fee issues created by the addition of the ERISA plan administrator role to the duties of a Chapter 7 trustee, the Secretary has proposed a modification to the Department of Labor's Abandoned Plan Regulation, 77 Fed. Reg. 74063-01, 2012 WL 6137323 (Dec. 12, 2012). If promulgated, the proposed regulation will allow a Chapter 7 bankruptcy trustee to hand off his ERISA responsibilities to an "eligible designee" (a large financial institution or other custodian of the ERISA plan's assets) and the trustee thereafter will only have the role of monitoring the eligible designee's performance. Id. § 2578.1(j)(1)(ii). As proposed, the bankruptcy trustee may also choose to retain his ERISA plan administrator responsibilities but can significantly lessen his burden and potential liability by electing to become what the regulation describes as a"qualified terminator administrator" (or "QTA"). Id. § 2578.1 (j)(3)(i). If a QTA complies with its obligations under the regulation, he will be deemed to satisfy his fiduciary responsibilities under section 404(a) of ERISA. Id. § 2578.1 (e) (1))(i). A QTA, including a bankruptcy trustee, will be able to receive fees, provided those fees are consistent with industry rates for ERISA service providers outside of bankruptcy. Id. § 2578.1 (j) (3))(vi).

CONCLUSION

For the reasons stated above, the order of the District Court reversing the order of the Bankruptcy Court should be affirmed.

Dated: October 7, 2014

M. PATRICIA SMITH
Solicitor of Labor

G. WILLIAM SCOTT
Associate Solicitor

NATHANIEL I. SPILLER
Counsel for Appellate and Special Litigation

s/Leonard H. Gerson
LEONARD H. GERSON
Trial Attorney
U.S. Department of Labor
Office of the Solicitor
Plan Benefits Security Division
P.O. Box 1914
Washington, D.C. 20013
(202) 693-5615

CERTIFICATE OF COMPLIANCE

I hereby certify that the fore going brief complies with the type-volume limitations provided in Fed. R. App. P. 32(a)(7)(B). The foregoing brief contains 13,193 words of Times New Roman (14 point) regular type. The word processing software used to prepare this brief was Microsoft Office Word 2010.

s/ Leonard H. Gerson
Leonard H. Gerson
Trial Attorney

Dated: October 7, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October, 2014, I electronically filed the Brief for United States Department of Labor, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all registered counsel of record.

s/ Leonard H. Gerson

LEONARD H. GERSON
Plan Benefits Security Division
200 Constitution Ave., N.W., N-4611
Washington, D.C. 20210