No. 13-3827

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SECRETARY, DEPARTMENT OF LABOR,
Plaintiff-Appellee

v.

JOHN J. KORESKO,
Defendants-Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

BRIEF FOR THE SECRETARY OF LABOR

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JURISDICTIONAL STATEMENT

The Secretary of Labor brought this action under sections 502(a)(2) and (a)(5) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1132(a)(2), (a)(5). The district court had jurisdiction under 29 U.S.C. § 1132(e)(1). The district court order on appeal was dated September 16, 2013 and entered on September 17, 2013. Appellant's Appendix (App.) 2-8. The appeal was timely filed on September 19, 2013. App. 1.

The order on appeal is not a final order, but this Court has jurisdiction under 28 U.S.C. § 1292(a)(1) because the order effectively grants a preliminary injunction. An injunction under this section "is an order [1] directed to a party, [2] enforceable by contempt, and [3] designed to accord or protect some or all of the substantive relief sought by the complaint in more than a [temporary] fashion." In re Pressman-Gutman Co., Inc., 459 F.3d 383, 392 (3d Cir. 2006) (citations and internal quotation marks omitted). The order on appeal removes John Koresko and related defendants from the positions they hold in two trusts and with related welfare benefit plans, appoints an independent fiduciary to administer the trusts and the plans, and enjoins the Koresko defendants from interfering with this transfer of authority. App. 2-3, 6-7, ¶¶ 1, 10. The order is enforceable through contempt. See District Court Document (Doc.) 522 (Order for Koresko defendants to show cause why they should not be held in contempt

for failure to comply with the order on appeal). The September 17, 2013 order also grants some of the relief sought by the Secretary. See Supplemental Appendix (SA) -173 (Doc. 1) (complaint, prayer for relief, seeking among other things an order removing the Koresko defendants from their positions, appointing an independent fiduciary, and enjoining the Koresko defendants from exercising any custody, control, or decision-making authority with respect to the assets of any ERISA plan); SA-281 (Doc. 349) (supplemental complaint, same relief). The order is also not "temporary" for purposes of defining an injunction because it has lasted substantially longer than the period of a temporary restraining order. See Casey v. Planned Parenthood of S.E. Pa., 14 F.3d 848, 855 (3d Cir. 1994); 16 C.Wright, et al., Federal Practice & Procedure, § 3922, at 72 n.5 (2d ed. 2012).

Because the Court has jurisdiction under 28 U.S.C. § 1292(b)(1), it is unnecessary to decide whether jurisdiction exists under 28 U.S.C. § 1292(b)(2) on the theory that the order under review appoints a receiver.

STATEMENT OF THE ISSUES

Whether the district court acted within its discretion in removing the Koresko defendants from their positions of authority in two trusts and related welfare benefit plans, appointing an independent fiduciary to administer the

trusts and the plans, and enjoining the Koresko defendants from interfering with this transfer of authority.

STATEMENT OF RELATED CASES AND PROCEEDINGS

In earlier proceedings in this case, this Court denied the Koresko defendants' request for a stay of the order on appeal and their challenge to the order through a petition for a writ of mandamus. Order, No. 13-3827 (Dec. 26, 2013); Order, No. 13-4617 (Dec. 26, 2013). The Court also denied as moot Koresko's pro se motion to stay the trial held from June 9-11, 2014. Order, No. 13-3827 (June 17, 2014). The Court dismissed the Koresko defendants' attempt to appeal a district court order denying reconsideration of the order on appeal, Order, No. 13-3890 (Dec. 3, 2013), and their attempts to appeal six other district court orders against them. Order, No. 13-3359 (Dec. 3, 2013) (order scheduling depositions); Order, No. 13-3358 (Dec. 3, 2013) (order permitting Secretary's lawsuit to continue despite bankruptcy filings); Order, Nos. 13-3102, 13-3103, 13-3104, 13-3130 (Aug. 19, 2013) (orders granting partial summary judgment to Secretary, ordering Koresko to support his claim of medical impairment, and temporarily freezing trust assets). Koresko's appeal from an order setting a trial date and restricting the use of frozen funds to pay Koresko's attorneys fees is pending in this Court in No. 14-1934.

The cases listed as related in appellant's brief do not arise out of the Secretary's litigation against the Koresko defendants. They are appeals by Koresko from orders granting relief from a bankruptcy stay to the United States to seek tax penalties, In re Penn-Mont Benefit Servs., Inc., No. 14-1933 (3d Cir.), and to a private plaintiff to seek death benefits, Langlais v. PennMont Benefit Servs., No. 14-1940 (3d Cir.) . On February 25, 2014, this Court issued an Order in the instant case stating that because it appears the automatic stay does not apply, the appeal here (No. 13-3827) will not be stayed. See infra, note 2 and Statement Section H (discussing history of bankruptcy proceedings).

STATEMENT OF THE CASE

A. Koresko's Death Benefits Operation

Appellant John Koresko has been marketing and running a death benefit insurance arrangement through a number of entities controlled by him. SA-125 (Doc. 474), at 1. These entities include Penn-Mont Benefit Services, Inc., Penn Public Trust, two Koresko law firms, and two trusts called the Regional Employers' Assurance Leagues Voluntary Employees' Beneficiary Association Trust (REAL-VEBA) and Single Employer Welfare Benefit Plan Trust

(SEWBPT). Id. at 1 n.1; SA-024 (Doc. 314), at 5-9 (Solis v. Koresko, 884 F. Supp. 2d 261, 266 (E.D. Pa. 2012)) .[1]

Koresko's arrangement involves a prototype death benefit plan, a corresponding trust, and an unincorporated association of employers. Secretary of Labor v. Koresko, 377 Fed. Appx. 238, 239 (3d Cir. 2010). Penn-Mont markets the arrangement to employers, who, in order to participate, are required to become members of the association, adopt the prototype plan, and subscribe to one of the trusts. SA-024 (Doc. 314), at 5-6. Penn-Mont has no employees of its own and operates through the Koresko law firms. Id. at 8.

Employers who adopt the prototype plan can select the type and amount of benefits offered and set eligibility requirements for their employees. SA-024 (Doc. 314), at 6; see SA-215 (Doc. 268-17) (GX 14, prototype plan for REAL VEBA). Eligible employees of these adopting employers may then sign

[1] Koresko purported to appeal on behalf of himself, all of these entities, and an attorney who formerly worked for Koresko's law firms (Jeanne Bonney). His appeal on behalf of the trusts is improper because he has no authority to act on their behalf. SA-136 (Doc. 509), at 3. Although his law license in Pennsylvania has been suspended, http://www.padisciplinaryboard.org/look-up/pa-attorney-public.php?id=42795&attname=John+J.+Koresko+V&violations=10, and he admits that he was recently disqualified from being trial counsel for Bonney and filed his brief pro se, he asserts that he is representing his affiliates, Appellants Br. Cover page *, and that he is a member in good standing of the bar of this Court. Id., Local Rule 46.1(e) Certification. See also In re Koresko, No. 13-mc-0294 (E.D. Pa. Jun 19, 2014) (temporary suspension of Koresko pending further definitive disciplinary action by the Pennsylvania Supreme Court).

agreements to participate in the arrangement. SA-024 (Doc. 314), at 6; see, e.g., SA-264 (Doc. 268-48) (GX 44, Castellano Adoption Agreement); SA-271 (Doc. 268-50) (GX 46, Castellano Participation Agreement).

The prototype plan document, which governs the benefit arrangement, requires employers to contribute all amounts necessary to provide all benefits. SA-215 (Doc. 268-17), at 23 (GX 14, § 4.01(a)(1)). Penn-Mont also charges additional annual trustee fees and administrative fees. See, e.g., SA-387-458 (Doc. 377-58, 377-64, 377-70, 377-71, 377-72, 377-74to 75, 377-76 to 78, 377-80 to 81, 377-82) (GX 25b, 25g, 25l, 25m, 25n, 25o, 25p, 25r, 25s). Employer contributions are received into a trust, and may be used to purchase insurance policies on the lives of participating employees to fund benefits. SA-201 (Doc. 268-14) (GX 11, Master Trust Agreement Whereas Cl., § 4.2); SA-215 (Doc. 268-17) (GX 14, § 7.05(a)). The assets and earnings of the trust are to be used only for the benefit of persons designated as employees or beneficiaries of adopting employers. SA-201 (Doc. 268-14) (GX 11, §§ 2.1, 2.3); see also SA-215 (Doc. 268-17) (GX 14, §§ 2.01, 2.03).

B. The Secretary's 2009 Litigation Against the Koresko Defendants

In a March 2009 complaint, the Secretary alleged, in relevant part, that Koresko and entities he controlled were ERISA fiduciaries with respect to at least 126 employer-sponsored plans that participated in this multiple-employer

death benefit arrangement. SA-173 (Doc. 1) (complaint), ¶¶ 9-13. They violated their fiduciary duties, the Secretary alleged, by failing to hold ERISA plan assets in trust and by using the assets for purposes other than to provide benefits under the terms of the plans. SA-173 (Doc. 1), ¶¶ 29-39. Penn-Mont, as plan administrator, also set its own fees without approval by an independent fiduciary and directed the payment of these fees from plan assets. Id. ¶ 34. The Secretary further alleged that, contrary to plan terms requiring full payments of death benefits, eligible beneficiaries under at least three of the employer-sponsored plans did not receive full payment of these benefits. Id. ¶¶ 25-28. Among other things, the Secretary sought an order removing the Koresko defendants from their positions as fiduciaries and appointing an independent fiduciary in their place. Id. p. 19-20 (Prayer for Relief).

In May and June 2009, the Koresko defendants directed a bank acting as trustee for the plans to use trust assets to pay legal fees to Koresko's law firm and other law firms that were defending various plan sponsors in litigation with the Internal Revenue Service. See SA-001 (Doc. 107), at 9 (Solis v. Koresko, 2009 WL 2776630 (E.D. Pa. Aug. 31, 2009)). The bank refused to do so, and Koresko, through Penn-Mont, gave notice that he was firing the bank. SA-001 (Doc. 107), at 9. The Secretary then sought a temporary restraining order and preliminary injunction. Docs. 63, 65. The district court (Jones, J.) denied the

application for a temporary restraining order, Doc. 71, and the Koresko defendants filed a motion to dismiss, arguing that ERISA does not apply to the plans at issue here. Doc. 69. They also argued that on July 29, 2009, they had amended the terms of the death benefit arrangement to eliminate coverage for non-owner employees, thereby leaving only plans with owners, which are not covered by ERISA. App. 175-178 (Doc. 139 at 28-42, transcript of October 6, 2009 afternoon hearing); see, 29 C.F.R. § 2510.3-3(b) (plan under which no employees are participants is not an ERISA plan).

On August 31, 2009, Judge C. Darnell Jones II denied the Koresko defendants' motion to dismiss, reasoning in relevant part that whether the plans at issue are covered by ERISA is not a question of subject matter jurisdiction SA-001 (Doc. 107) at 12-13. In January 2010, the district court concluded that the Secretary had not made the high showing for injunctive relief at that stage of the case and denied the Secretary's motion for a preliminary injunction without prejudice. App. 187-188 (Doc. 195, at 2-3).

C. The Secretary's 2012 Motion for Partial Summary Judgment

In March 2010, the district court granted the Koresko defendants' motion to stay proceedings due to a medical condition of one of the defendants, Jeanne Bonney. Doc. 210. The case was transferred to Judge Mary A. McLaughlin and after further proceedings the case was removed from the court's suspense

calendar in January 2012. Doc. 260. In February 2012, the Secretary filed a motion for partial summary judgment, which focused on defendants' ERISA violations related to three plans that had beneficiaries who had not been paid the full death benefits owed under the plans' terms. Doc. 267.

In August 2012, the district court (McLaughlin, J.) granted the Secretary's motion in part. Doc. 315. In an accompanying memorandum, the court initially concluded that although the Koresko-run trust that held employer contributions was not itself an ERISA plan, the three employer-sponsored plans at issue were ERISA plans. SA-024 (Doc. 314), at 20-32. The court relied largely on Gruber v. Hubbard Bert Karle Weber, Inc., 159 F.3d 780 (3d Cir. 1998), and Department of Labor opinion letters for this conclusion. SA-024 (Doc. 314), at 20-27.

The court gave three reasons for rejecting the Koresko defendants' argument that the purported July 29, 2009 amendment SA-273 (Doc. 285-2, pp. 4-5) had eliminated ERISA coverage by eliminating benefits for non-owner employees. SA-024 (Doc. 314), at 32-37. First, the court concluded that the entity executing the amendment (PennMont, the plan administrator) did not have authority under the governing plan document to amend the plans. SA-024 (Doc. 314), at 34-36. Second, the court concluded that the amendment violated a provision in the governing plan document prohibiting discrimination in favor

or highly compensated employees. Id. at 36. Finally, the court reasoned that it would be wholly contrary to ERISA's purposes to allow a plan to avoid enforcement of otherwise applicable ERISA requirements simply by an amendment that eliminates ERISA coverage. Id. at 37.

The court also rejected the Koresko defendants' argument that the REAL-VEBA trust held no ERISA plan assets. SA-024 (Doc. 314), at 45-58. Applying the test established in Secretary of Labor v. Doyle, 675 F.3d 187 (3d Cir. 2012), the court concluded that the trust held ERISA plan assets because the ERISA plans contributing funds to the trust had an undivided beneficial interest in the trust's assets. Id. at 46-56. The court also found support for its conclusion in a Department of Labor regulation defining plan assets, 29 C.F.R. § 2510.3-101(h)(2). SA-024 (Doc. 314), at 56-58.

Based on these determinations and the conduct at issue, the district court concluded, in relevant part, that three of the Koresko defendants (Koresko, PennMont, and Bonney) are ERISA fiduciaries and that they violated ERISA by failing to keep the assets of the three employer-sponsored plans in trust, and by diverting plan assets into accounts subject to their sole control. SA-024 (Doc. 314), at 58-70. The court concluded that there was insufficient evidence to show that the diverted plan assets were used for non-trust purposes, however. Id. at 72. Accordingly, the court denied summary judgment on the Secretary's

claim of self-dealing and deferred a decision on relief, stating that ongoing discovery may reveal additional facts that could bear on the court's exercise of discretion. Id. at 75-76.

D. The Secretary's 2013 Motion for a TRO and Preliminary Injunction

After the district court's August 2012 decision, the Secretary discovered that the Koresko defendants had diverted more than $2,500,000 in death benefit proceeds for their own use and benefit, diverted at least $35,000,000 in loans on insurance policies owned by the REAL VEBA and SEWBPT trusts to accounts not owned by the trusts, and misappropriated at least $3,500,000 of these loan proceeds for their own use and benefit. Doc. 377-2 at 2 (Pls. Mem. in Support of Application for Temporary Restraining Order and Preliminary Injunction). This evidence shows that he misappropriated loan proceeds and death benefits have been used for non-trust puposes to purchase, among other things, Caribbean condominiums for Koresko and to pay his law firm and personal expenses. Id. at 2-3. The Secretary alleged that the Koresko defendants may lack sufficient domestic assets to make the plans whole for their losses. Id. at 3.

Based on this newly discovered evidence, on June 19, 2013, the Secretary again sought a temporary restraining order and preliminary injunction and an order removing the Koresko defendants from their fiduciary positions and

appointing an independent fiduciary to administer the plans and hold plan assets. Doc. 377.

E. The District Court's Initial Response to the Secretary's Motion

The district court initially scheduled an evidentiary hearing on the Secretary's motion for July 8, 2013. SA-102 (Doc. 379). On June 26, 2013, the district court ordered that similar motions filed in three cases brought by private parties against the Koresko defendants also be heard on July 8, 2013. SA-103 (Doc. 385). In response to a motion by the Koresko defendants for a continuance of the hearing based on Mr. Koresko's health, Doc. 387, the court changed the July 8 hearing from an evidentiary one to a hearing on the temporary restraining order motions and a status hearing on Mr. Koresko's health. Doc. 391, at 2. The court also directed the Koresko defendants to provide medical information on Mr. Koresko's health. Id. at 2-3. With the consent of the parties, including counsel for Koresko, the court froze money in certain Koresko-controlled bank accounts pending the July 8 hearing and enjoined the Koresko defendants from taking actions affecting the accounts except as ordered by the court. SA-106 (Doc. 392), at 2.

On July 8, 2013, neither Koresko nor any of the other defendants appeared at the district court hearing on the Secretary's motion, and their counsel moved to withdraw. SA-109 (Doc. 407) at 2 n.1. The district court

addressed the withdrawal issue without reaching a decision on it and contacted Koresko by telephone. Id. Koresko then participated in the discussion of the substantive issues in court. Id. In response to Koresko's claim of prejudice, the district court issued an order on July 9, 2013, modifying the freeze on bank accounts to remove three accounts subject to the freeze, and granted the Koresko defendants' request for a continuance of the evidentiary hearing until August 12, 2012. SA-109 (Doc. 407), at 2-3, 6-7. The court found that the Secretary and private plaintiffs "have established a substantial likelihood of success on the merits," and irreparable injury to the public, the plans, and their participants and beneficiaries without relief to preserve plan assets. Id. at 4-6. The court declined, however, to appoint an independent fiduciary without first holding a full evidentiary hearing, however. Id. at 7.

F. Koresko's Actions After the District Court's Freeze Orders

Koresko responded to the district court's orders by filing a series of appeals in this Court that have since been dismissed. See Nos. 13-3102, 13-3103, 13-3104, 13-3130, 13-3358, 13-3359. While these appeals were pending and the district court's freeze orders were in effect, Koresko tried to withdraw funds from five insurance policies insuring the lives of individuals who had participated in litigation against him. SA-161 (Doc. 458) at 28, 35-37 (transcript of July 22, 2013 telephone hearing). He also requested withdrawals

and obtained some funds from 50 insurance products owned by the trusts and deposited the resulting cash into his "vault." Id. at 28-29. The district court responded by prohibiting Koresko from taking any further action to remove cash from the trust-owned insurance policies and ordering him to return money he had received. SA-118 (Doc. 436) (July 23, 2013 Interim Order).

Less than 24 hours after the district court ordered him not to take further money from the insurance policies and to return the money he had taken, Mr. Koresko filed bankruptcy petitions on behalf of the trusts, his law firms, Penn Mont, and Penn Public Trust in the Bankruptcy Court for the Eastern District of Pennsylvania.[2] Koresko then attempted to drain the assets from an account frozen by the district court's July 8, 2013 order, citing the bankruptcy filings as authority for doing so. See SA-476 (Doc. 491-5). Koresko also sent letters to plan sponsor employers stating that if they did not send him a cash "special assessment" to fund the bankruptcies by September 3, 2013, he would cancel the benefits of their employees "forever." SA-133 (Doc. 489), at 2; SA-468-2 to SA-468-8 (Doc. 472-2 to 472-8). The district court then ordered Koresko

[2] The district court held that the Secretary's action was exempt from the automatic stay resulting from this bankruptcy filing, SA -125 (Docs. 446, 474), and this Court dismissed the Koresko defendants' appeal from that decision after the Pennsylvania bankruptcy court dismissed the Koresko-filed bankruptcy petitions. Order, Secretary of Labor v. Koresko, No. 13-3358 (3d Cir. Dec. 3, 2013); see App. 19-21 (discussing bankruptcy court's dismissal).

not to withhold benefits or deny services based on anyone's response to those letters or failure to forward money to Koresko. SA-133 (Doc. 489), at 1.

Koresko also resisted attempts by the Secretary and district court to hold an evidentiary hearing on the Secretary's application for a temporary restraining order and preliminary injunction. He did not provide medical information requested by the district court, but then told the district court that he was unable to comply with a court order to propose a new date for an evidentiary hearing due to illness. App. 19, 23. At a September 16, 2013 hearing, Koresko again said he was ill and opposed appointment of an independent fiduciary without an evidentiary hearing. SA-167 (Doc. 515), at 71-72. He admitted that he had taken assets out of the trusts and used trust assets to purchase real estate in South Carolina and Caribbean condominiums but contended that they were "an investment on behalf of the trust." Id. at 89-90; see SA-145 (Doc. 429), at 59-61, 191 (transcript of July 8, 2013 hearing).

G. The District Court's Order on Appeal

In light of this history, the district court concluded that it had no choice but to appoint an independent fiduciary over the trusts at issue. App. 23. The court reasoned that it had attempted to maintain the status quo until Koresko's alleged health problems improved, but he "continued to violate the spirit of the Court's orders at every turn." Id. The court was "greatly concerned" about its

inability to inventory any diverted assets and all other assets of the trusts and to maintain those assets for the benefit of participants and beneficiaries of the employer-level plans. Id. at 24.

Accordingly, the court's September 16, 2013 order appoints Wagner Law Group as an independent fiduciary to accomplish those tasks with oversight by the court. App. 2-3. The court's interim order removes the Koresko parties from their positions in the two trusts and related plans, enjoins them from serving in such positions, orders them to turn over all assets that have not been frozen and relevant documentation to the independent fiduciary, prohibits them from interfering with the independent fiduciary, and orders them to cooperate with the independent fiduciary. Id. at 1-8.

H. The Florida Bankruptcy Filings and Continuing Proceedings in District Court

After the dismissal of the Pennsylvania bankruptcy cases, Koresko met with a Florida attorney who then filed involuntary bankruptcy petitions in Florida against the entities whose Pennsylvania bankruptcy petitions had been dismissed. Doc. 858, at 4-5. Koresko also refused to cooperate with the independent fiduciary, which led the Secretary to ask the district court to hold him in contempt. Doc. 518.

In October and November 2013, the district court held contempt hearings and enlisted the aid of a magistrate judge in attempts to get Koresko to comply

with the order on appeal here. See Docs. 530, 532, 534, 536, 553, 582, 615, 616. In December 2013, the Florida bankruptcy court transferred the Florida petitions to the Eastern District of Pennsylvania Bankruptcy Court, stating that the filing of the Florida cases "is tantamount to an impermissible change of venue for the [Department of Labor] Enforcement Action," and "an impermissible end-run around the dismissals of the Debtors' voluntary bankruptcy cases in the dismissal Pennsylvania Bankruptcy Court." In re Penn-Mont Benefit Sers., Inc., 2013 WL 6405046, at *10 & n.48 (Bankr. M.D. Fla. 2013).

In February 2014, the district court learned that the Pennsylvania bankruptcy court had scheduled a hearing that would require the independent fiduciary to submit financial information regarding the REAL VEBA and SEWBPT Trusts. SA-140 (Doc. 709), at 1. Because the bankruptcy court order conflicted with an order of the district court restricting disclosure of similar information, the district court found cause pursuant to 28 U.S.C. § 157(d) to withdraw the cases from the bankruptcy court. Id. at 4; see Docs. 566 (order that initial report from Independent Fiduciary be filed under seal), 567 (initial report, filed under seal). The court further found that withdrawal would reduce forum shopping and confusion, promote uniformity of trust administration, conserve the assets of debtors and creditors, promote efficiency, and expedite

administration of the trusts' assets. SA-140 (Doc. 709) at 4-5. Koresko challenges the withdrawal in this case. Appellant's Br. 16-23.

In March 2014, the independent fiduciary filed additional reports under seal. Docs. 739, 760. The district court set a trial schedule for June 9 through June 20, 2014 and stated that Koresko could not use frozen funds to pay an attorney to represent him at trial, although the court had allowed Koresko to use those funds to pay for an attorney in the contempt proceedings. Doc. 720. Koresko has appealed this district court order in a separate appeal, No. 14-1934.

The district court held a trial on June 9, 10, and 11, 2014, without thes participation of Koresko or any of the other defendants, and on June 17, 2014 this Court denied as moot a Koresko motion filed on Saturday, June 7, 2014 to stay the trial.

SUMMARY OF ARGUMENT

A. The district court acted well within its discretion in removing the Koresko defendants from their positions of authority over the trusts and appointing an independent fiduciary. The removal was necessary to preserve the assets of the trusts after Koresko admittedly took millions of dollars in assets out of the trusts to buy, among other things, Caribbean condominium and obtain loans he has not fully repaid, and attempted to obtain more trust assets by

repeatedly violating the spirit of district court orders freezing assets. Courts have upheld removal of ERISA fiduciaries on less egregious conduct.

All of the considerations for a preliminary injunction support the district court's order. The Secretary has a high probability of prevailing on the merits because he established that Koresko's death benefit arrangement includes ERISA plans, that these plans have undivided interests in the trusts' assets, that Koresko and other defendants are ERISA fiduciaries because of their control over plan assets, and that they breached their fiduciary duties by failing to hold plan assets in trust and by using them for prohibited purposes. Koresko's continuing attempts to obtain trust assets and refusal to comply with court orders shows that the plans will be irreparably harmed if he has authority over the trusts. Other interested parties, including employers and employees who participate in Koresko's death benefit arrangement and their beneficiaries, will be helped, not harmed by the order removing the Koresko defendants from their positions of authority over the trusts and appointing an independent fiduciary. Any harm to Koresko from the order is speculative, largely a result of his refusal to cooperate with the independent fiduciary, and far outweighed by the harm the order avoids. The public interest embodied in ERISA also outweighs any harm to Koresko.

B. Koresko ignores the district court's reasons for removing him, and presents arguments that confirm the wisdom of the district court's decision. He argues that ERISA does not apply because a July 2009 amendment to the Master Trust Agreement between Penn-Mont and the bank that was trustee at the time (unsigned by the bank) removed all ERISA plans from his death benefit arrangement. The governing documents did not authorize the amendment and in any event the amendment does not retroactively excuse the pre-2009 ERISA violations, including Koresko's use of trust assets to buy Caribbean condominiums, or Penn-Mont's continuing administration of ERISA plans and collection of contributions from them after the amendment. Koresko also argues incorrectly that the Secretary lacks Article III standing to sue him, contrary to established law and based on a misapplication of ERISA principles applicable to participants and beneficiaries. In pursuit of his admitted goal of using bankruptcy to avoid further proceedings in the Secretary's ERISA enforcement action and eliminate all claims against the trusts by the plans that participate in the trusts, he also attacks a February 2014 district court order withdrawing the bankruptcy cases to district court. The order is not part of this appeal, Koresko lacks standing to assert the rights of the entities in bankruptcy, and the order was well within the district court's discretion to avoid conflicts between its orders and bankruptcy proceedings.

STANDARD OF REVIEW

A preliminary injunction is reviewed for abuse of discretion, with findings of fact reviewed for clear error and legal issues reviewed de novo. See, e.g., Adams v. Freedom Forge Corp., 204 F.3d 475, 484 (3d Cir. 2000). This standard of review is narrow, and the district court's judgment is presumptively correct absent a clear abuse of discretion, obvious error in the application of the law, or a serious and important mistake in the consideration of the proof. Liberty Lincoln-Mercury, Inc. v. Ford Motor Co., 562 F.3d 553, 556 (3d Cir. 2009).

ARGUMENT

THE DISTRICT COURT ACTED WELL WITHIN ITS DISCRETION IN REMOVING THE KORESKO DEFENDANTS AND APPOINTING THE INDEPENDENT FIDUCIARY

A party seeking a preliminary injunction must show that it is likely to experience irreparable harm without an injunction and is reasonably likely to succeed on the merits. Adams, 204 F.3d at 484. If relevant, the court also examines the likelihood of irreparable harm to the non-moving party and whether the injunction serves the public interest. Id. ; see Winter v. Natural Res. Def. Council, 555 U.S. 7, 21 (2008). Here, the district court repeatedly found that these factors supported its order removing Koresko and related parties from their positions of authority in the trusts and plans and appointing

the independent fiduciary. SA-109 (Doc. 407) at 5; SA-118 (Doc. 436) at 2; App. 23. The court's findings are based on the series of events starting in June 2013, when the Secretary and private parties sought a preliminary injunction, and on the court's 2012 partial summary judgment decision. App. 11-12. This Court may consider these events and the summary judgment decision to the extent necessary to assess whether the order on appeal is within the district court's discretion. Liberty Lincoln-Mercury, 562 F.3d at 556-57; Kershner v. Mazurkiewicz, 670 F.2d 440, 448-50 (3d Cir. 1982) (en banc). Considering the relevant facts as found by the district court (many of which are largely undisputed), the Court should uphold the district's order removing Koresko and related parties and appointing the independent fiduciary.

A. The Secretary Is Likely to Prevail on the Merits

ERISA sets exacting standards for fiduciaries of employee benefit plans that include, among other things, requirements for a fiduciary to hold plan assets in trust, to act solely in the interest of plan participants and beneficiaries and with a high degree of prudence, and not to deal with plan assets in his own interest or for his own account. 29 U.S.C. §§ 1003(a), 1104(a)(1)(A), (B), 1106(b); see Edmonson v. Lincoln Nat'l Life Ins. Co., 725 F.3d 406, 413 (3d Cir. 2013), cert. denied, 2014 WL 469647 (U.S. May 19, 2014). It broadly defines the term "fiduciary" in functional terms, to include, among other things,

any person to the extent "he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition its assets " 29 U.S.C. § 1002(21)(A)(i). Thus, a person who manages or disposes of plan assets is a fiduciary whether or not the person exercises discretion. Bd. of Trs. of Bricklayers Local 6 Welfare Fund v. Wettlin Assocs., Inc., 237 F.3d 270, 273-75 (3d Cir. 2001).

The Secretary has a high probability of prevailing in this case because the evidence shows: (1) ERISA plans participate in Koresko's death benefit arrangement; (2) the trusts controlled by Koresko and related parties until the district court removed their authority held and continue to hold plan assets; (3) Koresko took millions of dollars from the trusts and spent large amounts of these funds to benefit himself and his law firms and thereby violated his fiduciary duties under ERISA; and (4) removing the authority of Koresko and other defendants over the trusts and plans and holding them personally liable for their misconduct is appropriate relief.

1. ERISA plans participate in the Koresko death benefit arrangement

In Gruber v. Hubbard Bert Karle Weber, Inc., 159 F.3d 780, 788-90 (3d Cir. 1998), this Court agreed with the Secretary that individual employers who participate in a benefits arrangement such as the one at issue here, may establish

separate, single-employer ERISA plans even if the overall arrangement is not itself an ERISA plan. The Court reasoned that the test for a single-employer plan is whether a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits. Id. at 789. The crucial factor, the Court explained, is whether the employer expressed an intention to provide benefits on a regular and long-term basis. Id.

The Secretary established at the summary judgment stage that at least three employers (Decor Coordinates, Cetylite Industries, and Domenic M. Castellano, D.D.S.)had established ERISA plans by participating in the Koresko death benefit arrangement even though the overall arrangement was not itself an ERISA plan. SA-024 (Doc. 314), at 24-32; see also 29 U.S.C. § 1002(1) ("welfare benefit plan" include plans that provide, "through the purchase of insurance or otherwise . . . benefits in the event of . . . death"). In addition, in seeking a preliminary injunction in June 2013, the Secretary presented evidence that more single-employer ERISA plans participate in the arrangement. See SA-371 (Doc. 377-56), GX 25 (Sweeting Declaration with supporting exhibits). At the June 2014 trial, the Secretary presented uncontested evidence that employer plans currently participate in the arrangement. The Secretary has thus established that ERISA plans participated and continue to participate in Koresko's death benefit arrangement.

2. The REAL VEBA and SEWBPT Trusts Hold Plan Assets

Under ERISA, the term "plan assets" is generally defined by the Secretary's regulations. 29 U.S.C. § 1002(42). The Secretary's regulations provide that when an ERISA plan acquires or holds an interest in an entity that is established or maintained for the purpose of offering or providing benefits described in ERISA's definitions of welfare and pension plans to participants or beneficiaries of the investing plan, "its assets will include its investment and an undivided interest in the underlying assets of that entity." 29 C.F.R. § 2510.3-101(h)(2). That regulation applies here because the single-employer ERISA plans that participate in the Koresko arrangement acquire or hold an interest in the trusts that are to provide the death benefits to their employees, a form of benefits described in ERISA's definition of "welfare plan," 29 U.S.C. § 1002(1). See also 29 C.F.R. § 2510.3-101(j)(12) (when a medical benefit plan acquires a beneficial interest in a trust that will provide the benefits, its assets include this beneficial interest "and an undivided interest in each of [the trust's] underlying assets"); 50 Fed. Reg. 961, 967 (1985) (preamble to proposed rule, explaining that rule applies to participation in multiple employer trusts, including trusts that are not ERISA plans).

Because the Secretary's regulation is an exercise of delegated rulemaking authority, it is entitled to controlling weight unless it is arbitrary, capricious, or

manifestly contrary to the statute. Chevron, USA, Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843-44 (1984); see, e.g., Nat'l Sec. Sys., Inc. v. Iola, 700 F.3d 65, 96 (3d Cir. 2012). The Secretary's regulation easily satisfies this test. First, the Secretary's rule is entirely consistent with background principles of property law, under which tenants in common, the most common form of joint ownership, each have an undivided right in the property. See Stoebuck & Whitman, The Law of Property § 5.2 (3d ed. 2000); Black's Law Dictionary 1604 (9th ed. 2009) (definition of tenancy in common). It also promotes ERISA's overriding purpose of protecting the interests of ERISA plan participants and beneficiaries, 29 U.S.C. § 1002(b), by ensuring that even when a plan has placed its assets in a common trust fund that holds both plan and non-plan assets, those who manage the fund remain plan fiduciaries subject to ERISA. 50 Fed. Reg. 961, 967 (1985). The alternative would allow ERISA plans to "put all their assets beyond the protection of ERISA by the simple act of placing the assets in a common trust fund." Martin v. Nat'l Bank of Alaska, 828 F. Supp. 1427, 1432 (D. Alaska 1992).

Moreover, the trusts hold ERISA plan assets under ordinary notions of property rights that this Court uses to identify plan assets in the absence of specific statutory or regulatory guidance. Secretary of Labor v. Doyle, 675 F.3d 187, 203 (3d Cir. 2012). Under this approach, plan assets generally

"'include any property, tangible or intangible, in which the plan has a beneficial ownership interest.'" Id. (quoting DOL Advisory Op. No. 93-14A (May 5, 1993)). A plan obtains a beneficial interest in particular property if "the property is held in trust for the benefit of the plan or its participants and beneficiaries." DOL Advisory Op. No. 94-31A, 1994 WL 501646, at *2 (Sept. 9, 1994); see also Black's Law Dictionary 885 (9th ed. 2009) ("beneficial interest" means "[a] right or expectancy in something (such as a trust or an estate), as opposed to legal title to that thing"). Documents governing the plan may establish such beneficial interests. Doyle, 675 F.3d at 204.

The Master Trust Agreement SA-201 (Doc. 268-14, § 2.1) and Adoption Agreement SA-215 (Doc. 268-17, §§ 2.01, 2.03, 2.04) require employer contributions to be held in trust and require all trust assets and earnings to be used exclusively for the benefit of the employees and beneficiaries of employees that participate in the Koresko death benefit arrangement. See also SA-024 (Doc. 314) at 48-52 (district court summary judgment decision). Because the trust assets and earnings are to be used for the benefit of plan participants and beneficiaries, the ERISA plans that participate in this arrangement have a beneficial interest in them. The interest is undivided because the assets of ERISA plans were comingled with the assets of non-ERISA plans. SA-024 (Doc. 314) at 52-53; see also Helene S. Shapo &

George T. Bogert, The Law of Trusts and Trustees § 181, at 299 (3d ed. 2012) (general rule in trust law is that beneficiaries have undivided interests in the entire trust property).

3. Koresko is an ERISA fiduciary who violated ERISA

There is no serious dispute that Koresko's exercise of control over the trusts' assets, in which ERISA plans held undivided interests, made him an ERISA fiduciary, see Wettlin, 237 F.3d at 273-75, and that he breached his duties to the plans by admittedly taking money from the trusts to purchase Caribbean condominiums and a property in South Carolina and by taking more than $34,000,000 in loans from trust-owned insurance policies. SA-145 (Doc. 429) at 59, 180-86, 191. His assertion that the condominium purchases were investments on behalf of the trust, SA-167 (Doc. 515), at 89-90, is contrary to evidence that he purchased the condominiums for himself, in his name. See SA-305 -324 (Docs. 377-18, 377-22, 377-26) (GX 14, 18, 22) It is also contrary to an ERISA prohibition against maintaining plan assets outside the jurisdiction of federal district courts. 29 U.S.C. § 1104(b). This misuse of plan assets is a clear violation of ERISA's duty of loyalty in 29 U.S.C. § 1104(a)(1)(A) and prohibition against self-dealing in 29 U.S.C. § 1106(b).

4. Removing Koresko and appointing the Independent Fiduciary is appropriate equitable relief under ERISA

ERISA provides that a breaching fiduciary is personally liable for plan losses and profits the fiduciary made through misuse of plan assets "and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." 29 U.S.C. § 1109(a). "Removal and replacement of a fund administrator under ERISA has been found appropriate where the administrator has been in substantial violation of his fiduciary duties." Delgrosso v. Spang & Co., 769 F.2d 928, 937 (3d Cir. 1985); see, e.g., Chao v. Malkani, 452 F.3d 290, 293-94 (4th Cir. 2006).

The district court's removal of Koresko and related defendants and appointment of the independent fiduciary was appropriate because Koresko's misappropriations and diversions in this case far exceed the misconduct found sufficient to remove the fiduciaries in Delgrosso and Malkani. Moreover, Koresko compounded his misappropriations and diversions by circumventing the district court's initial freeze order when he extracted cash value out of insurance policies, filed bankruptcy proceedings to avoid the district court's orders and evidentiary hearing, and threatened to cut off plan participants' benefits unless they paid fees to fund the bankruptcy actions. App. 23-24; SA-468, 476 (Docs. 472-2, 491-5). The district court's removal of the Koresko defendants as plan fiduciaries was a necessary response to a "real emergency" intended, among other things, to allow the district court to inventory any

diverted assets and all other assets of the trusts and the employer-level plans or arrangements. App. 24.

B. The Other Preliminary Injunction Factors Support the District Court's Order

1. The Secretary showed irreparable harm

The order removing the Koresko defendants from their positions in the trusts and plans and appointing the independent fiduciary protects the participating plans and their participants from the Koresko defendants' diversion and dissipation of plan assets. The threat of such diversion and dissipation, which, in fact, has already happened in this case, is irreparable harm. See Elliott v. Kiesewetter, 98 F.3d 47, 57-58 (3d Cir. 1996); Fechter v. HMW Indus., Inc., 879 F.2d 1111, 1121 (3d Cir. 1989). Thus, to the extent the Secretary was required to show irreparable harm, he did so.[3]

[3] The Secretary was not required to show irreparable harm beyond the ongoing ERISA violations because, "when a statute contains, either explicitly or implicitly, a finding that violations will harm the public, the courts may grant preliminary equitable relief on a showing of a statutory violation without requiring any additional showing of irreparable harm." Government of Virgin Islands v. Virgin Islands Paving, Inc., 714 F.2d 283, 286 (3d Cir. 1983); see also City of New York v. Golden Feather Smoke Shop, Inc., 597 F.3d 115, 120-21 (2d Cir. 2010) (discussing presumption of irreparable harm based on a statutory violation). ERISA contains an express finding that violations will harm the public. 29 U.S.C. § 1001(a) (Congressional findings that employee benefit plans "are affected with a national public interest"); id. §§ 1001(a), (b) (findings that ERISA's requirements are necessary to protect public interest as well as the interests of participants and beneficiaries in those plans). ERISA also authorizes preliminary injunctive relief to redress ERISA violations. 29

2. The order will not result in greater harm to other parties

The district court's order aids rather than harms employers, participants, and beneficiaries of the trusts by allowing the independent fiduciary to take necessary steps to preserve trust assets, recover diverted assets, and prepare an inventory of assets for the district court. Any harm to Koresko from not being able to use trust assets is not legally cognizable because the order simply prevents him from doing what he had no right to do in the first place. Koresko also told the district court, "I don't have a problem" with a four to six week appointment of the independent fiduciary. SA- 167 (Doc. 515), at 102. Koresko's allegations of harm from having to cooperate with the independent fiduciary are therefore meritless. Any complaint about the length of the independent fiduciary's service is meritless because the independent fiduciary's extended service is largely the result of Koresko's refusal to cooperate with the independent fiduciary.

3. The public interest supports the district court's order

The public interest, as protected by ERISA, holds plan fiduciaries to high standards to protect plans and their participants and beneficiaries and "far outweigh[s]" the Koresko defendants' interests in their corporate businesses. See Johnson v. Couturier, 572 F.3d 1067, 1082 (9th Cir. 2009); Fechter, 879

U.S.C. § 1132(a)(5); see Rosa v. Resolution Trust Corp., 938 F.2d 383, 400 (3d Cir. 1991).

F.2d at 1121. That ERISA interest is a further reason the order on appeal should be upheld..

C. Koresko's Defenses Confirm the Wisdom of the District Court's Order

Koresko does not dispute that he used trust funds to purchase Caribbean condominiums in his own name and has still not explained what happened to all of the $34,000,000 in loans he took from trust-owned insurance policies. See SA- 145 (Doc. 429), at 59-61, 180-86. He also does not dispute the district court's findings that, despite the court's attempts to maintain the status quo until his alleged health problems improved, he "continued to violate the spirit of the Court's orders at every turn." App. 23. Instead, he argues that: (1) ERISA does not apply to his operation because a 2009 amendment removed all ERISA plans (Br. 33-40): (2) the Secretary has no Article III standing to bring this suit (Br. 23-33); and (3) the district court erroneously withdrew the involuntary bankruptcy cases originally filed in Florida and transferred to Pennsylvania (Br. 16-23). Koresko's arguments are meritless and show a fundamental misunderstanding or disregard of ERISA requirements that make him unfit to serve as an ERISA fiduciary.[4]

[4] Koresko also argues that the ERISA plans that participate in his insurance scheme have no beneficial interest in the trusts' assets. Br. 41-47. For reasons discussed in Argument A.2, the plans do have beneficial interests. Koresko's contrary view is based on the incorrect and unsupported assertion that

1. The 2009 amendment did not eliminate Koresko's ERISA problems

After the Secretary had sued him, Koresko tried to eliminate his ERISA problems through a July 2009 amendment to the Master Trust document that purported to eliminate benefits for non-owner employees and their beneficiaries. SA-273 (Doc. 285-2), at 4-5. The amendment did not save Koresko from his ERISA liabilities for three reasons.

First, the amendment does not excuse the fiduciary breaches that occurred before the amendment, such as the 2008 purchases of Caribbean condominiums with plan assets. SA-305, 320 (Docs. 377-18, 377-19) (GX 14, 15). By its terms, the amendment is effective only from April 2009. SA-273 (Doc. 285-2), at 2 ("NOW THEREFORE" clause). Even that retroactive effective date is invalid because, as this Court recognized in Confer v. Custom Eng'g Co., 952 F.2d 41, 43 (3d Cir. 1991), where a plan sponsor attempted to amend a plan retroactively to eliminate coverage for motorcycle accidents after

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"beneficial interest" means a vested remainder estate. Br. 42. He also incorrectly states that if an insurance company's general account does not include plan assets, then cash value rights attributable to insurance policies and funds derived from the policies also are not plan assets. Id. Insurance policies, however, are plan assets, 29 U.S.C. § 1101(b)(2), as are funds derived from those policies. Edmonson, 725 F.3d at 423.

an employee had been in such an accident, the change "could operate only prospectively."[5]

Second, the amendment did not actually eliminate coverage of non-owner employees. The Secretary presented evidence that Koresko's operation continued to include and charge fees to employers that sponsored plans that included non-owner employees after the amendment. SA-387 -458 (Docs. 377-58, 377-64, 377-70, 377-71, 377-72, 377-74 to 75, 377-76 to 78, 377-80 to 81, 377-82) (GX 25b, 25g, 25l, 25m, 25n, 25o, 25p, 25r, 25s). Given this continuing ERISA coverage, and the requirement in 29 U.S.C. § 1104(a)(1)(D) that fiduciaries follow plan documents only to the extent they are consistent with ERISA's requirements, the "'trust documents cannot excuse trustees from their duties under ERISA.'" Fifth Third Bancorp v. Dudenhoeffer, No. 12-751,

[5] Koresko also incorrectly relies on the holding in Confer v. Custom Eng'g Co., 952 F.2d 34, 37 (3d Cir. 1991), that an individual officer acting on behalf of a corporate fiduciary is not liable as a fiduciary unless the officer has an individual discretionary role. Br. 48. This holding is inapplicable because Koresko was not acting on behalf of a corporation when he diverted plan assets from the trusts and used them for his own purposes. In particular, at times when F&M Bank was the trustee, see SA-018 (Doc. 165), ¶ 6, he falsely claimed to be a trustee to get loans. See, e.g. SA-335-364 (Docs. 377-38, 377-46, 377-53) (GX 24j-1, 24o, 24v). Confer's holding is also questionable because it predates the Supreme Court's recognition that ERISA defines a "fiduciary" in "*functional* terms," Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993) (Court's emphasis), and has been rejected by post-Mertens decisions. See, e.g., Musmeci v. Schwegmann Giant Super Markets, Inc., 332 F.3d 339, 350-51 (5th Cir. 2003).

2014 WL 2864481, at *8 (U.S. June 25, 2014) (quoting Cent. States, SE & SW Areas Pension Fund v. Cent. Transp.., Inc., 472 U.S. 559, 568 (1985)).

Finally, the amendment was not "executed in accordance with the Plan's own procedure for amendment" and was therefore invalid. Confer, 952 F.2d at 43. The Master Trust Document allows the Regional Employer Assurance Leagues to amend the document. SA-201 (Doc. 268-14), § 9.1; see id. § 1.10 (defining "League"). The July 2009 amendment was signed by Penn-Mont Benefits Services, the plan administrator, through its Vice-President Lawrence Koresko and President John Koresko. SA-273 (Doc. 285-2), at 9. None of the sections cited by Koresko (Br. 35-38) gives Penn-Mont the authority to amend the document. Instead, they address Penn-Mont's authority to act as plan administrator SA-201 ((Doc. 268-14), §§ 11.2, 11.3 and recital clauses) or as attorney in fact for employers regarding all matters pending before the Department of Labor and IRS. SA- 215 (Doc. 268-17), § 10.21. Additionally, the amendment is invalid because it contradicts provisions in the governing plan document prohibiting amendments that discriminate in favor of highly compensated employees, officers, or owners. SA-215 (Doc. 268-17), § 9.03(c)(3).

2. The Secretary has Article III standing

Koresko recognizes that the Secretary has standing to sue under ERISA, 29 U.S.C. § 1132(a)(2), (a)(5), but argues incorrectly that the Secretary lacks Article III standing. Citing a section of ERISA that applies to benefit claims by a participant or beneficiary (29 U.S.C. § 1132(a)(1)(B)), he asserts that a plaintiff seeking to recover for a fiduciary breach must demonstrate that benefits are actually due (Br. 25), contrary to the well-established rule that participants and beneficiaries need only a colorable claim for benefits. See, e.g., Graden v. Conexant Sys., Inc., 496 F.3d 291, 296 (3d Cir. 2007). He then asserts that because no participant has a claim to any particular assets in defined benefit pension plans, the plan administrator in this case can remove "excess amounts" not necessary for death benefit obligations by classifying them as "surplus." Br.28. Ignoring the many private party lawsuits against him and related entities, he then asserts that his death benefit arrangement has "no economic value," that the plan documents allow him to reduce death benefits if insurance proceeds are not collected, that claimants who do not receive benefits all at once can "arrive at an 'agreed' lump sum" with the administrator, and the Secretary is therefore bound by the principle that a beneficiary can waive rights to benefits. Br. 30-31.

The short answer to Koresko's dubious assertions is that the Secretary's Article III standing does not rest on the rights of a participant or beneficiary. The Secretary represents the public interest in ERISA enforcement and is not bound by private party ERISA settlements. See, e.g., Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 687-94 (7th Cir. 1986) (en banc); Herman v. South Carolina Nat'l Bank, 140 F.3d 1413, 1423 (11th Cir. 1998). Like other governmental entities enforcing the government's own laws, the Secretary has an injury sufficient for Article III standing when a law the Secretary is charged with enforcing is violated. See, e.g., Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 771 (2000); United States v. Raines, 362 U.S. 17, 27 (1960); United States v. American Bell Tel. Co., 128 U.S. 315, 366-36 (1888). Thus, even courts that have limited private party standing under ERISA in some circumstances recognize that the Secretary "always remains empowered" to enforce ERISA. David v. Alphin, 704 F.3d 327, 339 (4th Cir. 2013); see also Glanton ex rel Alcoa Prescription Drug Plan v. Advance PCS, Inc., 465 F.3d 1123, 1126 (9th Cir. 2006) ("government entities have a concrete stake in the proper application of the laws of their jurisdiction").

3. The District Court's Withdrawal of the Bankruptcy References and Stay of Bankruptcy Proceedings Provides No Basis to Upset the Order at Issue Here

This Court has already recognized that the bankruptcy automatic stay does not apply to the Secretary's action because it is a governmental enforcement action exempt from the stay under 11 U.S.C. § 362(b)(4). Order, No. 13-3827 (3d Cir. Feb. 25, 2014); accord, SA-125 (Doc. 474); Solis v. Wallis, 2012 WL 3779065, at *7-*8 (N.D. Ill. Aug. 30, 2012), and cases cited. Koresko nevertheless asserts that the Secretary's case has to stop so that matters concerning the trusts can be resolved in bankruptcy court. Br. 31-33. His goal here is to turn all the ERISA plans and other employer arrangements that participate in the trusts into "executory contracts," and then reject them so that they no longer have any claims in bankruptcy against the trusts. Br. 31-32. In pursuit of this goal, he attacks the district court's withdrawal of the bankruptcy references and stay of bankruptcy proceedings. This Court should reject Koresko's arguments because the Court lacks jurisdiction to review the order withdrawing the references, and the district court acted well within its discretion in withdrawing them.

This Court lacks jurisdiction to review the withdrawal order SA-140 (Doc. 709) because the order is reviewable only through mandamus, In re Pruitt, 910 F.2d 1160, 1165-67 (3d Cir. 1990), and Koresko failed to file a

separate petition for mandamus as required by Fed. R. App. P. 21. See Clerk's Order, No. 13-3827 (3d Cir. April 21, 2014) (rejecting Koresko's attempt to file a "Petition for Extraordinary Relief" in this appeal and informing him that "[a] mandamus petition cannot be filed in an existing appeal. It must be filed as an original proceeding").[6]

Moreover, Koresko's arguments are meritless. Mandamus is a drastic remedy available only in extraordinary situations where the petitioner establishes a clear and indisputable right to the writ and lack of adequate alternative means to obtain the relief it seeks. Id. at 1167; In re Pasquariello, 16 F.3d 525, 528-29 (3d Cir. 1994). Koresko fails to show either prerequisite.

Koresko has no clear and indisputable right to overturn the withdrawal order because he lacks standing to challenge it. He does not represent the creditors who filed the involuntary bankruptcy proceedings. He cannot represent the interests of the debtors because he appears pro se in this Court and therefore has authority to represent only himself. See, e.g., Rowland v.

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[6] Koresko also did not challenge the withdrawal order in the brief he filed on May 6, 2014 in response to this Court's order to file by then or have the appeal dismissed. See Appellant's Br. 12 (stating that "if the District Court has effectively destroyed the opportunity of the Appellants to participate in Chapter 11, and the district should not have with withdrawn the reference without cause from the Bankruptcy Court, it has nothing more to do in this case"). By raising new issues and rewriting the substance of his May 6 brief, Koresko violates the spirit of this Court's May 14, 2014 order giving him two weeks to correct the deficiencies in the May 6 brief.

California Men's Colony, 506 U.S. 194, 202 (1993); Osei-Afriyie v. Med. Coll. of Pa., 937 F.2d 876, 882-83 (3d Cir. 1991); Simbraw, Inc. v. United States, 367 F.2d 373, 374 (3d Cir. 1996); see also SA-136 (Doc. 509), at 3 (Koresko lacks authority to represent the trusts). He also cannot assert harm to himself based on possible harm to the entities in bankruptcy. Cf. Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727, 732 (3d Cir. 1970) (shareholder lacks standing to sue for diminution of the value of his shares in a corporation).

Even if Koresko had standing, he has no right to mandamus because the district court acted well within its discretion in withdrawing the references. A district court may find cause to withdraw a reference after considering "the goals of promoting uniformity in bankruptcy administration, reducing forum shopping and confusion, fostering the economical use of the debtors' and creditors' resources, and expediting the bankruptcy process," as well as the stage of the bankruptcy proceedings. Pruitt, 910 F.2d at 1168. The district court considered these goals and reasonably found cause for the withdrawal. SA-140 (Doc. 709), at 4-5. The withdrawal promotes uniformity by preventing a conflict between the district court's orders restricting the independent fiduciary's disclosure of financial information and a bankruptcy court order requiring disclosure. Id. at 4. It reduces forum shopping and confusion by coordinating all issues regarding the independent fiduciary's report in the

district court. Id. It conserves the assets of debtors and creditors by preventing the trusts from having to expend funds in coordinating conflicting obligations between two courts. Id. It expedites administration of the trusts' assets by coordinating the bankruptcy cases with the Secretary's case. Id. at 4-5. The bankruptcy proceedings were also in early stages, so possible harm from a removal at a late stage, see Pruitt, 910 F.2d at 1168, is not present here.

Mandamus is also inappropriate because Koresko has a remedy in district court. This is not a case where a withdrawal prevents a creditor from obtaining immediate relief it seeks. See Pruitt, 910 F.2d at 1165 (mortgagee appealed after district court withdrew reference and stayed state foreclosure proceedings). Instead, the district court is moving expeditiously to determine rights to trust assets in the Secretary's action, a necessary predicate to determining rights in the bankruptcy proceedings. Koresko's rights and the rights of other interested parties are adequately protected by allowing the Secretary's action to proceed first, rather than having bankruptcy proceedings running at the same time. Cf. SEC v. Byers, 609 F.3d 87, 91-93 (2d Cir. 2010) (upholding district court injunction against involuntary bankruptcy proceedings as part of the district court's broad equitable power during SEC receivership).

CONCLUSION

The district court's order should be affirmed.

Respectfully submitted,

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JUNE 2014

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9624 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June 2014, the Brief for the Secretary of Labor was served on counsel of record through the Court's CM/ECF system. Ten paper copies are being mailed by express mail to the Court and two copies are being mailed by express mail to the following counsel of record:

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