

Nos. 16-3806 & 17-1140

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

JOHN J. KORESKO, V,

Appellant

v.

**R. ALEXANDER ACOSTA, SECRETARY,
UNITED STATES DEPARTMENT OF LABOR,**

Appellee.

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

Brief of Appellee Secretary of Labor

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STATEMENT OF JURISDICTION

The Secretary of Labor brought this action under sections 502(a)(2) and (a)(5) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(2), (a)(5). The district court had jurisdiction under 29 U.S.C. § 1132(e). The district court orders appealed are the August 31, 2016 order denying the motion to reconsider the order of contempt issued April 26, 2016, and the December 5, 2016 order denying the motion to quash the writ of garnishment. The appeals were timely filed and consolidated.

This court has jurisdiction of the appeal under 28 U.S.C. § 1291.

STATEMENT OF RELATED CASES

The Secretary is unaware of related cases pending in this Court.

STATEMENT OF THE ISSUES

1. Whether the district court properly exercised its discretion and acted in accordance with law when it entered the orders of contempt and garnishment.
2. Whether Appellant's due process rights were violated by the entering of the order of contempt.
3. Whether the district court had subject-matter jurisdiction to issue an order of contempt.

STATEMENT OF THE CASE

After many years of investigation and litigation culminating in a bench trial,

the district court found Appellant John J. Koresko ("Koresko") breached his fiduciary duties and misappropriated millions of dollars in plan assets from hundreds of employee benefit plans participating in a multiple-employer death benefit arrangement. Perez v. Koresko, 86 F. Supp. 3d 293 (E.D. Pa. 2015).

On March 6, 2009, the Department of Labor brought suit against Koresko and others to redress violations of ERISA committed while administering the Regional Employers Assurance Leagues Voluntary Employees' Beneficiary Association ("REAL VEBA"), and the Single Employer Welfare Benefit Plan Trusts ("SEWBPT") (collectively, the "trusts" or "plans"). The district court found on partial summary judgment that Koresko committed fiduciary breaches and engaged in prohibited self-dealing in violation of ERISA by his mishandling and misappropriating plan assets. Solis v. Koresko, 884 F. Supp. 2d 261 (E.D. Pa. 2012).

In its final decision on the merits, the district court noted the "voluminous evidence" presented by the Secretary of numerous ERISA violations, including the diversion of tens of millions of dollars of plan assets, particularly into accounts which only Koresko controlled, and "the use of death benefit proceeds to purchase property in the Caribbean island of Nevis." Id. at 300 (emphasis added). On this basis, the court issued its final order "remov[ing] [Koresko] from any position of fiduciary authority and permanently bar[ring him] from ever serving as fiduciar[y]"

or service provider[] to ERISA-covered plans," and holding Koresko and related entities liable for over \$18,000,000 "in restitution for losses and disgorgement of profits." Id.

On April 5, 2016, this Court affirmed the district court's rulings imposing liability on Koresko for breach of fiduciary duties and ordering Koresko to restore over \$18,000,000 in misappropriated plan assets. Sec'y U.S. Dep't of Labor v. Koresko, 646 F. App'x 230 (3d Cir. 2016).

1. The Contempt Order

In June 2013, prior to the district court's final judgment on the merits, the Secretary sought a temporary restraining order, preliminary injunction, and an order removing Koresko from his fiduciary position and appointing an independent fiduciary to administer the plans and hold plan assets. SA-2-5 (Appl. for TRO and Prelim. Inj.); Perez v. Koresko, 86 F. Supp. 3d at 304. The Secretary supported the motion with evidence that Koresko used trust assets to purchase real property in the Caribbean island of Nevis, and moved \$1.68 million from bank accounts in the United States containing trust assets to an account in Nevis. SA-3; Perez v. Koresko, 86 F. Supp. 3d at 304. With consent of the parties, the court froze money in certain Koresko-controlled bank accounts pending a hearing and enjoined Koresko from taking actions affecting the accounts except as ordered by the court. SA-6-8 (June 28, 2013 Interim Order); Perez v. Koresko, 86 F. Supp. 3d at 305.

At a hearing on July 8, 2013, Koresko admitted he used trust assets to purchase six condominium units in Nevis and transferred \$1.68 million to Nevisian accounts in order purchase additional units. SA-12-13, -15 (Tr. of TRO Hr'g and Status Conference); SA-205 (Op. on Mot. for Recons.). To avoid an evidentiary hearing on the Secretary's application for a temporary restraining order and preliminary injunction, Koresko filed a number of motions for continuance, suggestions of bankruptcy, and even a series of appeals in this Court that were dismissed.¹ Perez v. Koresko, 86 F. Supp. 3d at 304-07; Solis v. Koresko, No. 09-988, 2013 WL 5272815, at *2-6 (E.D. Pa. Sept. 17, 2013) (same). During this period of delay lasting over three months, Koresko made numerous attempts to remove and hide funds from the trusts. Perez v. Koresko, 86 F. Supp. 3d at 306; Solis v. Koresko, 2013 WL 5272815, at *6. At a later hearing on the Secretary's motion on September 16, 2013, Koresko again testified that he used trust assets to purchase real property in Nevis. SA-30, 32-33 (Tr. of Mot. Hr'g); SA-205 (Op. on Mot. for Recons.).

Accordingly, on September 16, 2013, the district court removed Koresko from positions of authority over the plans and the two trusts that held plan assets, and appointed an independent fiduciary to administer the plans and trusts. SA-17-18 (Order); Solis v. Koresko, 2013 WL 5272815, at *7; Perez v. Koresko, 86 F.

¹ See Docket Nos. 13-3102, 13-3103, 13-3104, 13-3130, 13-3358, 13-3359 (3d Cir.).

Supp. 3d at 307. The court's order also required that Koresko turn over to the independent fiduciary all assets he had removed from the trusts, as well as property purchased with trust assets. SA-20-21; Solis v. Koresko, 2013 WL 5272815, at *7; Perez v. Koresko, 86 F. Supp. 3d at 307. The September 16, 2013 order included the trust assets that Koresko transferred to an account at the Scotia Bank in Nevis, and ordered Koresko to assign "all rights in the Nelson Springs condominiums" in Nevis to the independent fiduciary. SA-20; SA-205-206 (Op. on Mot. for Recons.).

On September 27, 2013, the Department filed its first motion for contempt for Koresko's failure to comply with the September 16, 2013 order because he failed to provide information and documents about these assets to the independent fiduciary as required. Pl.'s Mot. for Adjudication of Civil Contempt, Perez v. Koresko, No. 09-cv-0988 (E.D. Pa. Sept. 27, 2013), ECF No. 518. On September 30, 2013, the district court issued an order to show cause why Koresko should not be held in civil contempt and subject to sanctions for failure to comply. SA-34. While the contempt motion was pending, Koresko gave deposition testimony that "[t]he original intention was that [the purchase of the condominiums] was going to be a trust investment." SA-109 (Tr. of Dec. 18, 2013 Dep.). He also testified that he initially transferred \$1.68 million in trust assets to the Scotia Bank in Nevis to facilitate construction on condominium properties. SA-105-112 (Tr. of Dec. 18,

2013 Dep.); SA-114 (Tr. of Jan. 7, 2014 Dep.). Critically, Koresko admitted he traveled to Nevis and transferred the plan funds held in the Scotia Bank to the Royal Bank of Trinidad and Tobago *after* the district court had ordered him to transfer the funds in Nevis to the independent fiduciary. SA-115-121 (Tr. of Jan. 7, 2014 Dep.); Pl.'s Suppl. Mot. and Exs. in Supp. of Mot. for Adjudication of Civil Contempt and Req. for Show Cause Hr'g at 6-8, Perez v. Koresko, No. 09-cv-0988 (E.D. Pa. March 10, 2014), ECF No. 726.

At a second contempt hearing on April 1, 2014, the parties agreed on language to be included in a court order directing Koresko to sign letters authorizing the banks in Nevis to give information to the independent fiduciary as an alternative to the district court holding Koresko in contempt at that stage. SA-41-42 (Order); SA-207 (Op. on Mot. for Recons.). In an order on June 27, 2014, the district court directed Koresko to wire transfer the funds in Nevis to an account used for the administration of the trusts by July 14, 2014. SA-44. Koresko filed a declaration with the court on July 11, 2014, stating the Royal Bank of Trinidad and Tobago would not wire the Nevis funds into the United States as requested. SA-46. Accordingly, the Court granted leave for Koresko to travel to Nevis to arrange the transfer of funds to the independent fiduciary. SA-207 (Op. on Mot. for Recons.); Perez v. Koresko, 86 F. Supp. 3d at 309. Koresko claimed to have been in a car accident and unable to complete the transaction by the ordered time. SA-

50-53 (Tr. of Aug. 12, 2014 Status Conference); SA-207 (Op. on Mot. for Recons.); Perez v. Koresko, 86 F. Supp. 3d at 309.

On September 10, 2014, the district court denied the Secretary's motion for contempt "except with respect to Mr. Koresko's failure to transfer to the United States the accounts held in the Nevis branch of the Royal Bank of Trinidad and Tobago." SA-54. The district court then ordered Koresko to transfer the funds in the Nevis account to the United States by October 3, 2014, or face contempt. SA-54. This deadline was extended due to Koresko's representations about his poor health, and the court ordered that if Koresko could not effectuate the transfer of funds by that date, he must "sign a power-of-attorney, providing the Independent Fiduciary (the 'IF') control of the accounts" by October 31, 2014. SA-56-57 (Oct. 15, 2014 Order).

Koresko drafted his own power of attorney, but it was deemed deficient under Nevisian law by Nevisian counsel for the independent fiduciary. SA-63-64 (Tr. of Dec. 4, 2014 Telephone Conference); SA-208 (Op. on Mot. for Recons.). On December 4, 2014, Koresko was ordered to sign a power of attorney previously approved by Nevisian counsel for the independent fiduciary no later than December 8, 2014, or face contempt. SA-58. The district court delayed holding Koresko in contempt until December 15, 2014, when the court gave him three more days to sign the document and ordered him to surrender to the U.S. Marshals

if he failed to do so. SA-59-60. On December 15, 2014, Koresko's attorney informed the district court Koresko had executed the revised power of attorney, and on December 30, 2014, the independent fiduciary confirmed receipt. SA-61 (Letter from L. McMichael); SA-65 (Letter from The Wagner Law Group). While a completed power of attorney was submitted as ordered, it is limited to a specific account and Koresko has not provided adequate information on the exact location of the plan funds. Therefore, the independent fiduciary cannot reach other accounts and real property. SA-173-175 (Tr. of June 16, 2016 Telephone Status Conference).

In its February 6, 2015 judgment, the district court found the funds Koresko transferred first to Scotia Bank and then to the Royal Bank of Trinidad and Tobago were the plans' assets and that Koresko was the sole signatory on the accounts. Perez v. Koresko, 86 F.Supp.3d at 351-52; SA-208 (Op. on Mot. for Recons.). The district court also found that Koresko traveled to Nevis and transferred the assets from the Scotia Bank to the Royal Bank of Trinidad and Tobago *after* the court had taken away Koresko's authority over the plans' assets. Perez v. Koresko, 86 F.Supp.3d at 351-52; SA-208 (Op. on Mot. for Recons.). In the final judgment entered on March 13, 2015, the court reiterated that Koresko must disgorge and surrender all trust assets and other misappropriated funds. Perez v. Koresko, 86 F. Supp. 3d at 393-96; SA-69 (Mar. 13, 2015 Mem. Op); SA-208 (Op. on Mot. for

Recons.). The total dollar amount of the final judgment for \$38,417,109.63 was separate and apart from the funds that were moved to Nevis and the Royal Bank of Trinidad and Tobago and subject of the contempt order now on appeal. SA-67 n.2 (stating the court reduced the total monetary liability by the "plan assets that Mr. Koresko had transferred to the Caribbean island of Nevis"). Accordingly, Koresko is liable for the \$38,417,109.63 judgment, and he must comply with the court's orders to return to the trust the additional plan assets he illegally transferred.

Because of the limited scope of the power of attorney and Koresko's failure to provide information regarding the assets, the independent fiduciary still could not reach the funds deposited in the Nevisian accounts and the property purchased with those funds; therefore, the Secretary filed a second motion for contempt on February 9, 2016. Secretary's Second Mot. for Contempt, Perez v. Koresko, No. 09-cv-0988 (E.D. Pa. Feb. 9, 2016), ECF No. 1283. At a status conference on March 8, 2016, Koresko was represented by counsel. SA-122 (Order) (directing Koresko "through his counsel"). On March 31, 2016, the district court ordered Koresko to file a response to the contempt motion no later than April 14, 2016, and scheduled a hearing on the contempt motion on April 26, 2016. SA-124. Koresko and counsel received notice of the hearing and had an opportunity to be heard on the Secretary's second motion for contempt, but neither Koresko nor counsel appeared at the scheduled contempt hearing or filed a written opposition prior to

the hearing. On April 26, 2016, the district court held Koresko in contempt. A48-49 (Apr. 26, 2016 Order) (hereinafter "Contempt Order"). The court found that Koresko violated its September 16, 2013 order and subsequent orders compelling him to turn over all assets of the plans, expressly including \$1.68 million in trust assets that he had transferred to accounts in Nevis (first to the Scotia Bank and then to the Royal Bank of Trinidad and Tobago). Id. The court also ordered Koresko to assign all rights in the Nelson Springs Resort and Cliffdwellers condominiums in Nevis to the independent fiduciary, and to surrender to the U.S. Marshals within five days. Id.

Based on its findings, the district court determined that the Secretary had produced clear and convincing evidence that: (i) Koresko had knowledge of the September 16, 2013 order and subsequent reaffirming orders directing him to turn over the trust funds originally held in a bank account in Nevis to the independent fiduciary and to assign all of his rights to the real property in Nevis to the independent fiduciary; (ii) Koresko disobeyed the district court's orders directing him to turn over the assets to the independent fiduciary; and (iii) Koresko has a present ability to comply with the orders. SA-148-152 (Tr. of Apr. 26, 2016 Conference); SA-210-211 (Op. on Mot. for Recons.).² The Contempt Order

² The district court reaffirmed the September 16, 2013 order on multiple occasions. SA-37-38 (Dec. 19, 2013 Order); SA-39-45 (Apr. 1, 2014 Order); SA-

specifically directed Koresko to: (i) cause the transfer of \$1.68 million to the court-appointed independent fiduciary; (ii) cause the transfer of title for the real property located at Nelson Springs Resort in Nevis, i.e., Condo Unit 3A, Condo Unit 5B, Condo Unit 5C, Condo Unit 6A, and Condo Unit 6B, to the independent fiduciary; and (iii) transfer the title of any lot of land held in the name of John Koresko at Cliffdwellers in Nevis to the independent fiduciary. A48-49; SA-154-156 (Tr. of Apr. 26, 2016 Conference).

On May 2, 2016, Koresko provided a thirty-one page document that detailed his familial difficulties, objections to ERISA, conviction that the district court lacked jurisdiction over this matter, and allegations of constitutional violations. Letter from Koresko re: Resp. to Mot. for Contempt, Perez v. Koresko, No. 09-cv-0988 (E.D. Pa. May 3, 2016), ECF No. 1310. Because Koresko failed to surrender himself as ordered, the court issued a bench warrant for Koresko's arrest, which resulted in his arrest and incarceration. A50 (May 5, 2016 Order); SA-126 (Arrest Warrant). Under the Contempt Order, Koresko is to remain incarcerated indefinitely until such time as he transfers identified plan assets and the title to specific real properties in Nevis to the independent fiduciary. A48-49. At the May 18, 2016 status conference, Koresko's attorney represented Koresko in a motion to free him from his incarceration and to challenge the Contempt Order, which the

44-45 (June 27, 2014 Order); SA-54-55 (Sept. 10, 2014 Order); SA-56-57 (Oct. 15, 2014 Order); SA-58 (Dec. 4, 2014 Order); SA-59-60 (Dec. 15, 2014 Order).

court denied on June 1, 2016. SA-131-137 (Def.'s Mem. of Law in Supp. of Mot. for Relief); SA-181(Tr. of Status Conference); SA-160 (June 1, 2016 Order).

Prior to March 31, 2016, the district court allowed Koresko's representation on the issue of contempt to be paid for by the trusts. However, because the district court found Koresko breached his fiduciary duties to the plans, the court explicitly held that "any plan indemnification provisions that purport to allow the plan itself, through plan assets, to indemnify" Koresko were void under ERISA section 410(a), 29 U.S.C. § 1110(a). SA-80 (May 13, 2015 Mem. Op.). Therefore, indemnification of the cost of representation specifically relating to contempt was also impermissible. SA-125 (March 31, 2016 Order). Koresko's attorney withdrew his appearance on May 26, 2016. SA-158.

The court held status conferences on June 1, June 16, and July 5, 2016, regarding Koresko's willingness to comply with the Contempt Order. SA-163-164 (Tr. of June 1, 2016 Hr'g); SA-169 (Tr. of June 16, 2016 Telephone Status Conference); SA-212 (Op. on Mot. for Recons.). At the district court's suggestion, the Secretary deposed Koresko for the purpose of gathering relevant information and determining whether Koresko would cooperate in resolving the contempt issue. SA-166-167 (Tr. of June 1, 2016 Hr'g). After the deposition, the Secretary's counsel reported at a status conference on June 16, 2016, that the deposition yielded little useful information other than the inescapable conclusion that Koresko

refused to purge his contempt. SA-176 (Tr. of Telephone Status Conference). Specifically, Koresko refused to disclose information regarding the status of the real properties in Nevis and refused to identify the whereabouts of trust assets. SA-171-173 (Tr. of Telephone Status Conference). Koresko stated on multiple occasions that he would refuse to sign any instrument transferring the real properties in Nevis to the independent fiduciary. SA-196-197, -201 (Tr. of June 8, 2016 Dep.). Koresko also refused to provide information regarding the location of relevant financial records. SA-198-199 (Tr. of June 8, 2016 Dep.). Koresko also admitted that, despite his claims to be unable to travel, he travelled to Nevis to transfer the funds into another bank account in his name rather than comply with the court's orders. Perez v. Koresko, 86 F. Supp. 3d at 351-52; SA-208 (Op. on Mot. for Recons.); SA-115-121 (Tr. of Jan. 7, 2014 Dep.); Pl.'s Suppl. Mot. and Exs. in Supp. of Mot. for Adjudication of Civil Contempt and Req. for Show Cause Hr'g at 6-8, Perez v. Koresko, No. 09-cv-0988 (E.D. Pa. March 10, 2014), ECF No. 726.

On August 31, 2016, the district court considered numerous filings by Koresko to be a motion to reconsider the Contempt Order. SA-203 n.1. Finding Koresko had not offered a basis for reconsideration, the district court denied the motion for reconsideration of the order of contempt. SA-218.

2. The Garnishment Order

On April 21, 2016, the Secretary's representative recorded the final judgment in this case for restitution of losses and disgorgement of profits in the amount of \$38,417,109.63 with the Oklahoma County Clerk in the State of Oklahoma, based on information that Koresko held funds in escrow in the County of Oklahoma that could be used towards satisfying Koresko's liability. SA-222 (Abstract of J.). The Secretary had reason to believe that Koresko deposited funds from his personal accounts with Jetstream Escrow & Title Services, Inc. ("Jetstream Escrow") located in Oklahoma City, Oklahoma, which Koresko confirmed during his June 8, 2016 deposition. SA-194-195 (Tr. of June 8, 2016 Dep.). On September 23, 2016, the district court issued a writ of continuing garnishment (hereinafter "Garnishment Order") for these funds, SA-223-225, which the Secretary's counsel served upon Jetstream Escrow and Koresko, SA-226-227 (Correspondence). Under the district court's order appointing an independent fiduciary, Wilmington Trust is entitled to receive and hold for the benefit of the plans the funds currently held in the possession, custody, or control of Jetstream Escrow. SA-68 (Mar. 13, 2015 J. and Order); SA-91(Aug. 4, 2015 Order).

On October 17, 2016, Jetstream Escrow filed an answer to the Garnishment Order, as required by 28 U.S.C. § 3205(c)(4), which identified \$50,000 held in an escrow account in which Koresko has a substantial, non-exempt interest belonging

and due to Koresko that the garnishee had in its possession or under its control at the time of the service of the Garnishment Order. SA-219-221 (Answer of the Garnishee). On November 10, 2016, Koresko filed a motion to quash. Mot. to Quash Writ of Attach., Perez v. Koresko, No. 09-cv-0988 (E.D. Pa. Nov. 10, 2016), ECF No. 1415.

On December 5, 2016, the district court issued an order denying Koresko's motion. A45.³

SUMMARY OF THE ARGUMENT

This Court should affirm the Contempt Order and the Garnishment Order because Koresko failed to demonstrate that the district court abused its discretion, made a clearly erroneous factual finding, incorrectly decided any question of law, or lacked jurisdiction.

1. The district court did not abuse its discretion in entering the Contempt Order or the Garnishment Order.

a. Courts possess the inherent authority to hold persons in contempt and the district court properly exercised its authority against Koresko when it found that the Secretary had proved by clear and convincing evidence that valid orders of the court existed, Koresko had knowledge of the orders, and Koresko disobeyed

³ On December 7, 2016, the district court amended the Garnishment Order by vacating a portion of the order unrelated to Koresko's motion to quash and this appeal. SA-228.

the orders despite several opportunities to comply.

In response, Koresko cannot legitimately defend his failure to comply with the district court's orders based on his frivolous argument that the underlying merits of the orders are somehow defective. Koresko was made aware of the orders that are the basis for the contempt, through his personal attendance at hearings and electronic service. Koresko's failure to perform as the court specifically directed leaves "no question" that Koresko failed to comply with the orders. Koresko also has not established his defense of impossibility by clearly demonstrating an inability to comply. Nor can Koresko compare this Contempt Order to criminal contempt or debt collection. The district court properly and clearly entered an order of civil contempt, the purpose of which is remedial and coercive, to force compliance with court orders and obtain the rightful return of assets to the plans.

b. Additionally, Koresko's challenge to the Garnishment Order must fail. This Court held that Koresko committed fiduciary breaches in overseeing the plans, and on this basis, he is personally liable for restoring the resulting losses to the plans out of his assets. Therefore, the Secretary has authority under ERISA to pursue monetary relief against Koresko for his breaches of fiduciary duties through a properly executed garnishment.

2. Koresko alleges broad due process violations, but he received

adequate notice of the contempt proceedings, was given opportunities to respond in writing and appear at a hearing, and was represented by counsel in challenging the Contempt Order. The requirements of due process for a civil contempt proceeding were satisfied.

3. Koresko also raises a broad jurisdictional argument. The district court clearly had jurisdiction to enter the Contempt Order and over all prior and subsequent proceedings. The entirety of Koresko's arguments to the contrary merely repeats arguments previously briefed, argued, and rejected by this Court in Secretary United States Department of Labor v. Koresko, 646 F. App'x 230 (3d Cir. 2016). The orders at issue in this appeal concern the ability of the district court to enforce its own orders and judgment; thus, Koresko's argument that they are jurisdictionally invalid as outside the scope of ERISA is entirely misplaced.

ARGUMENT

I. THE DISTRICT COURT ACTED WITHIN ITS DISCRETION AND IN ACCORDANCE WITH THE LAW WHEN IT ENTERED THE CONTEMPT ORDER AND THE GARNISHMENT ORDER

A. The District Court Met the Standards for Holding a Person in Contempt

This Court has held that an order for contempt is reviewed for an abuse of discretion and "will only be disturbed if there is an error of law or a clearly erroneous finding of fact." Harris v. City of Phila., 47 F.3d 1311, 1321 (3d Cir. 1995) (citation omitted); see also Roe v. Operation Rescue, 54 F.3d 133, 137 (3d

Cir. 1995).

The district court properly exercised its inherent authority to hold persons in contempt. Courts may deploy "a variety of weapons" to coerce compliance with court orders, including "an indeterminate period of confinement which may be brought to an end only by the contemnor's ultimate adherence to the court order." Latrobe Steel Co. v. United Steelworkers of Am., 545 F.2d 1336, 1344 (3d Cir. 1976); see also Shillitani v. United States, 384 U.S. 364, 370 (1966); Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 828 (1994); United States v. Harris, 582 F.3d 512, 514 (3d Cir. 2009); Harris, 47 F.3d at 1328. Specifically, "civil contempt may be employed to coerce the defendant into compliance with the court's order and to compensate for losses sustained by the disobedience." McDonald's Corp. v. Victory Invs., 727 F.2d 82, 87 (3d Cir. 1984) (citations omitted).

1. The District Court Complied With All Requirements for a Contempt Order

In denying Koresko's motion for reconsideration of the Contempt Order, the district court held that the Secretary proved "by clear and convincing evidence" that valid orders of the court existed, that Koresko had knowledge of the orders, and that Koresko disobeyed the orders. SA-152 (Tr. of Apr. 26, 2016 Conference); SA-218 (Op. on Mot. for Recons.). These three criteria are all that is required to prove contempt. See FTC v. Lane Labs-USA, Inc., 624 F.3d 575, 582 (3d Cir.

2010); Marshak v. Treadwell, 595 F.3d 478, 485 (3d Cir. 2009) (same).

a. Koresko Failed to Comply with Valid Court Orders and He Can Not Collaterally Attack the Merits of Those Orders

On February 9, 2016, the Secretary filed a second motion for contempt. Secretary's Second Mot. for Contempt, Perez v. Koresko, No. 09-cv-0988 (E.D. Pa. Feb. 9, 2016), ECF No. 1283. Upon consideration of this motion, the district court held Koresko in contempt, finding he violated the district court's September 13, 2013 injunctive order, SA-17, and subsequent related orders affirming the directive that Koresko to turn over to the appointed independent fiduciary all assets he had removed from the trust, all property purchased with trust assets, expressly including "all rights in the Nelson Springs condominiums" in Nevis, and the proceeds of loans taken against insurance policies held by the trusts for the benefit of the plans and their participants and beneficiaries. SA-20-21 (Sept. 16, 2013 Order); Solis v. Koresko, 2013 WL 5272815, at *7; Perez v. Koresko, 86 F. Supp. 3d at 307. The district court found as a matter of fact that these orders constituted valid orders of the court and a basis for a finding of contempt. SA-148-149 (Tr. of Apr. 26, 2016 Conference).

Koresko cannot legitimately defend his failure to comply with the district court's orders on the grounds that he believes that the substantive merits of the orders are somehow defective. See Roe v. Operation Rescue, 919 F.2d 857, 871

(3d Cir. 1990) ("[T]he validity of the order may not be collaterally challenged in a contempt proceeding for violating the order.") (citation omitted); see also Maggio v. Zeitz, 333 U.S. 56, 69 (1948) ("It would be a disservice to the law if we were to depart from the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy."). This Court has stated that "a party who is alleged to be in contempt of a court order may not challenge the substantive merits of that order within contempt proceedings." Marshak, 595 F.3d at 486 (citation omitted). Accordingly, valid orders were the basis for the district court's Contempt Order against Koresko.

b. Koresko had Knowledge of the Orders

The district court found that in addition to his physical presence at hearings, Koresko was made aware of the district court's September 16, 2013 order, and subsequent orders reaffirming it, through the court's Case Management/Electronic Case Filing ("CM/ECF") system. SA-206, 216 (Op. on Mot. for Recons.); SA-150 (Tr. of Apr. 26, 2016 Conference); see E.D. Pa. Local Rule 5.1.2(4)(c) ("Registration as an ECF Filing User constitutes agreement to receive and consent to make electronic service of all documents as provided in these ECF Procedures in accordance with Rule 5(b)(2)(D) of the Federal Rules of Civil Procedure."); see also United States v. Coles, 558 F. App'x 173, 182-83 (3d Cir. 2014); United States

v. Kaplan, 526 F. App'x 208, 216-17 (3d Cir. 2013).

Koresko also submitted a declaration acknowledging the September 16, 2013 order and, as mentioned, appealed the order to this Court. SA-46 (Decl. of John J. Koresko, V); SA-102-103 (May 4, 2015 Order, No. 13-3827). Specifically, Koresko's own submissions, under penalty of perjury, after the issuance of the September 16, 2013 order show he knew he was required to transfer the assets in Nevis to the independent fiduciary. See, e.g., SA-46 (Decl. of John J. Koresko, V) at ¶ 1 ("I was advised that an order would be entered requiring the transfer of the Nevis funds to the United States"). There is no dispute that Koresko had knowledge of the underlying orders that were the basis for the finding of contempt.

c. Koresko Disobeyed the Orders

The district court found as a matter of fact that Koresko directly disobeyed the court's orders. SA-151-152 (Tr. of Apr. 26, 2016 Conference). The district court found that Koresko had the ability "to transfer these funds" and "assign whatever rights he has in the properties to the Independent Fiduciary, but has refused to do so." SA-210 (Op. on Mot. for Recons.); SA-151 (Tr. of Apr. 26, 2016 Conference). The failure to perform as the court specifically directed leaves "no question" that Koresko failed to comply with the orders. See Am. Rivers v. U.S. Army Corp of Eng'rs, 274 F. Supp. 2d 62, 66 (D.C. Cir. 2003).

Koresko's unsupported allegation that his failure to comply was not in bad

faith is irrelevant. Willfulness is not an element of civil contempt, and good faith efforts to comply are, at most, mitigating factors to be considered when weighing the imposition of contempt sanctions. See Lane Labs-USA, Inc., 624 F.3d at 582; Harley-Davidson, Inc. v. Morris., 19 F.3d 142, 148-49 (3d Cir. 1994); Robin Woods Inc. v. Woods, 28 F.3d 396, 399 (3d Cir. 1984). Moreover, far from indicating good faith, Koresko's actions demonstrate he not only consistently failed to comply with the court's orders, but deliberately evaded compliance through a pattern of delay and disobedience. Nor can Koresko legitimately defend his violation as a technical or inadvertent failure to comply. Id. His violation of the orders was not inadvertent; he repeatedly chose not to convey the assets or property rights to the independent fiduciary. The district court specifically found that:

[the]first order to turn over the Nevisian assets was issued in September of 2013. In the intervening two and a half years defendant Koresko has squandered this Court's patience and disregarded countless opportunities to comply with the subsequent orders. At various points the Court has appointed counsel for defendant Koresko, paid the costs of the legal representation from trust accounts, granted extensions due to his medical issues, and awaited his compliance long past the deadlines to do so. Nevertheless, defendant Koresko has refused to comply with the Court's many orders to transfer these assets to the independent fiduciary, has failed to respond to the Secretary's motion for contempt, and has failed to appear.

SA-152-153 (Tr. of Apr. 26, 2016 Conference). The Contempt Order itself also delineates in clear terms what Koresko must do to no longer be held in contempt.

A48-49. Koresko has never asserted, nor could he, that he complied with the

directives of the court that are the basis of the Contempt Order. In multiple filings in this appeal, he still has not provided any evidence that he intends to fully comply.

Koresko asserts that the September 16, 2013 order was imprecise as to what assets he must return. But the plain, unambiguous language of that order clearly states what was required of Koresko to comply, and the district court properly found that Koresko had not done so. Appellant Br. 24-25, 28-30; see Robin Woods Inc., 28 F.3d at 399. In support of his claim that specific property was not identified in the order, Koresko cites to a number of inapposite cases that he claims require a finding of possession before one can be found in violation of an order to surrender property. Appellant Br. 31-34.⁴ But the record is filled with explicit references, including Koresko's own admissions, to the trust assets deposited in Nevis and the property purchased by Koresko in Nevis with trust assets leaving no

⁴ The cases deal with turnover orders pursuant to the bankruptcy code and the surrender of property within that very specific statutory scheme inapplicable here. See Maggio, 333 U.S. at 68; In re Rubin, 378 F.2d 104, 109 (3d Cir. 1967) (holding appellants should not have been found in contempt where there was question as to whether a property right existed at all or was property of the debtor). Specifically, in Maggio, the Supreme Court found that the Court of Appeals did not believe Maggio was able to comply with the order and the district court felt compelled to order commitment only in deference to Court of Appeal's precedent. Maggio, 333 U.S. at 77. In direct contrast, here, the district court found explicitly that Koresko was in violation of its order and had the ability "to transfer these funds" and "assign whatever rights he has in the properties to the Independent Fiduciary, but has refused to do so." SA-210 (Op. on Mot. for Recons.); SA-151 (Tr. of Apr. 26, 2016 Conference).

question that Koresko was aware of the assets and property being demanded. E.g., SA-2 (Appl. for TRO and Prelim. Inj.); SA-12-13, -15 (Tr. of July 8, 2013 TRO Hr'g and Status Conference); SA-30, -32-33 (Tr. of Sept. 16, 2013 Mot. Hr'g); SA-105-112 (Tr. of Dec. 18, 2013 Dep.); SA-115-121 (Tr. of Jan. 7, 2014 Dep.). The district court repeatedly demanded the surrender of these assets and gave Koresko numerous opportunities to comply. See, e.g., SA-44-45 (June 27, 2014 Order); SA-54-55 (Sept. 10, 2014 Order). There was no confusion or ambiguity surrounding the directive issued to Koresko, nor did he at any point ask for clarification. Koresko's belated claim of ignorance is another baseless attempt to further avoid the return to the plans assets that were wrongly taken.

In short, Koresko disobeyed the court's September 16, 2013 order and the subsequent orders reaffirming it. He never transferred title or assigned ownership in the Nevis properties to the independent fiduciary; nor did he surrender the trust assets that he transferred first to the Scotia Bank and then, in blatant violation of court orders, transferred to the Royal Bank of Trinidad and Tobago. He flouted these orders.

2. Koresko Has No Grounds for an Impossibility Defense

The defense of impossibility is not available to Koresko because it requires the defending party to clearly establish an inability to comply with the court order. See United States v. Rylander, 460 U.S. 752, 757 (1983); Hicks v. Feiock, 485

U.S. 624, 638 n.9 (1988). Impossibility "refers to physical impossibility beyond the control of the alleged contemnor," and the court can only excuse Koresko's contempt if he was incapable of compliance in spite of his best efforts. Inmates of Allegheny Cnty. Jail v. Wecht, 874 F.2d 147, 152 (3d Cir. 1989), vacated on other grounds, 493 U.S. 948 (1989); see Lane Labs-USA, Inc. 624 F.3d at 590; Harris, 47 F.3d at 1324.

Koresko's execution of documents and previous transfers of the plan assets in Nevis show his ability to comply with the district court's orders, whether through his own action or through the actions of representatives and agents. See e.g., Pl.'s Suppl. Mot. and Exs. in Supp. of Mot. for Adjudication of Civil Contempt and Req. for Show Cause Hr'g at 3-4, 6-8, Perez v. Koresko, No. 09-cv-0988 (E.D. Pa. March 10, 2014), ECF No. 726; Perez v. Koresko, 86 F. Supp. 3d at 351-52; SA-61 (Letter from L. McMichael); SA-63-64 (Tr. of Dec. 4, 2014 Telephone Conference); SA-105-112 (Tr. of Dec. 18, 2013 Dep.); SA-115-121 (Tr. of Jan. 7, 2014 Dep.). Furthermore, the district court found that Koresko had the ability "to transfer these funds" and "assign whatever rights he has in the properties to the Independent Fiduciary, but has refused to do so." SA-210 (Op. on Mot. for Recons.); SA-151 (Tr. of Apr. 26, 2016 Conference). Koresko has not established any circumstances that prevented compliance with the district court's orders. Contrary to Koresko's assertions, the burden of proving a defense of impossibility

is on Koresko, not the Department of Labor. Appellant's Br. 34-38; Cameron's Hardware Inc. v. Independence Blue Cross, 363 F. App'x 197, 201 (3d Cir. 2010) ("the party raising the impossibility defense has the burden of proving it"). The burden is only met by introducing evidence "beyond 'a mere assertion of inability,' and [showing] that [the contemnor] has made 'in good faith all reasonable efforts to comply.'" Harris, 47 F.3d at 1324 (citation omitted); see also NLRB v. Trans Ocean Exp. Packing, Inc., 473 F.2d 612, 616 (9th Cir. 1973); Hicks, 485 U.S. at 638 n.9; Marks Law Offices, LLC v. Mireskandari, No. 15-3014, 2017 WL 3575237, at *5 (3d Cir. Aug. 18, 2017).

If Koresko was not capable of complying, he could have presented evidence of impossibility at numerous stages in the proceedings, including at his depositions, various status hearings, or in a response to the second motion to compel, but he did not. Despite his claim of impossibility now on appeal, Koresko did not clearly establish impossibility through evidence at the hearing on September 16, 2013, in response to the Secretary's first motion for contempt, or at the deposition on June 8, 2016.⁵ Appellant's Br. 35-36; SA-26 (Tr. of Mot. Hr'g); SA-193 (Tr. of June 8, 2016 Dep.). In fact, the district court's findings support the opposite conclusion, because Koresko repeatedly admitted, through testimony and

⁵ Koresko refers to evidence offered during "six hours of questioning" on June 8, 2017. As the district court's docket does not include any hearing held that day it is assumed he is referring to the deposition that occurred on June 8, 2016. SA-193.

his own actions, that he had the ability to transfer and control the assets, including by travelling to Nevis to transfer the funds held in the Scotia Bank to the Royal Bank of Trinidad and Tobago after the district court had ordered transfer to the independent fiduciary. See, e.g., SA-115-121 (Tr. of Jan. 7, 2014 Dep.).

Koresko's implausible assertions of impossibility do not satisfy his burden of proof. See Maggio, 333 U.S. at 75–76. His alleged inability to comply based on his own assertions of obstacles without any evidence is inadequate. As in United States v. Rylander, cited by Koresko, he has failed to introduce any evidence in support of his claim that he is unable to convey the assets. Appellant's Br. 34-36; Rylander, 460 U.S. at 757.

Even now, Koresko cannot establish that compliance with the Contempt Order is impossible. Appellant's Br. at 34-38. Koresko's unsuccessful motions in this Court requesting relief and immediate release do not satisfy the requirements for impossibility. See, e.g., Orders dated March 15, May 2, May 3, May 9, and Aug. 18, 2017. The self-serving and unsubstantiated lawyer's report and declaration submitted by Koresko for the first time in this Court are not in the record on appeal. Fed. R. App. Proc. 10(a) (defining the record on appeal); 3d Cir. L.A.R. 30.3 (2011). This Court does not consider new evidence presented for the first time on appeal. Adegbuji v. Fifteen Immigration & Customs Enf't Agents, 169 F. App'x 733, 736 (3d Cir. 2006); In re Application of Adan, 437 F.3d 381,

389 n.3 (3d Cir. 2006); Mills v. Phila. Gas Works, 264 F. App'x 239, 241 (3d Cir. 2008). Additionally, Koresko relies on the granting of in forma pauperis status as evidence of impossibility. Appellant's Br. 36. However, in forma pauperis status in no way establishes a lack of possession or control of the plan assets at issue in the contempt proceeding, only that "appellant qualifies for in forma pauperis status." 3d Cir. L.A.R. 24.3 (2011); see Clerk Order, March 30, 2017 ("Appellant is advised that the Court may reconsider in forma pauperis status or request additional information at any time during the course of this appeal."). Koresko has not met his burden to prove the defense of impossibility to excuse his failure to comply with the district court's orders.

3. The Contempt Order Was Based on Violations of Orders that Were Not Supplanted by the Final Judgment

Koresko's attempts to excuse his repeated violation of court orders by declaring that the final judgment did not explicitly demand "surrender" of the assets taken from the trusts are meritless. Appellant Br. 30-31. The final order issued by the district court, and upheld by this Court, demands that Koresko return all assets of the trust in his possession. SA-69 (Mar. 13, 2015 J. and Order); Sec'y U.S. Dep't of Labor v. Koresko, 646 F. App'x 230, 245-46 (3d Cir. 2016). The final order and judgment specifically notes that the total liability of the monetary judgment (\$38,417,109.63) does not include the amount of plan assets Koresko transferred to Nevis, the assets at issue in the Contempt Order. SA-67 n. 2.

Koresko is liable for the total monetary judgment, and he must also comply with the court's orders to return to the trust the plan assets he illegally transferred. This appeal concerns only the Contempt Order, which found Koresko failed to comply with those orders. Accordingly, the final order and judgment in no way supersedes the Contempt Order. See Maggio, 333 U.S. at 69 ("when it has become final, disobedience cannot be justified by re-trying the issues as to whether the order should have issued in the first place").

Koresko is incorrect that the final judgment "swallowed up" the prior orders of the district court requiring Koresko restore to the trusts the assets he was found to have taken. Appellant's Br. 38. In fact, this Court has held that "contempt orders are not mooted by the termination of the underlying proceeding." Harris, 582 F.3d at 516. The Contempt Order executed by the district court is based in the district court's authority "to coerce the defendant into compliance with the court's order." McDonald's Corp., 727 F.2d at 87 (citations omitted). This appeal addresses the ability of the district court to enforce its own valid orders. As Koresko has not complied with the court's valid orders, he was, and remains, in contempt.

B. Koresko Is Not Imprisoned for Criminal Contempt or to Collect a Debt

As this Court held in United States v. Harris, contempt is proper where a person disobeys a court order, and coercive imprisonment, which may be purged

by obeying conditions set by the court, is a proper form of civil contempt. 582 F.3d 512, 519 (3d Cir. 2009). The court has wide discretion to tailor the most effective remedy to obtain compliance. See Harris v. City of Philadelphia, 47 F.3d 1311, 1328 (3d Cir. 1995); Elkin v. Fauver, 969 F.2d 48, 52 (3d Cir. 1992). In exercising that discretion, the court may deploy "a variety of weapons" to coerce compliance, including "an indeterminate period of confinement which may be brought to an end only by the contemnor's ultimate adherence to the court order." Latrobe Steel Co., 545 F.2d at 1344.

1. Koresko's Identified "Attributes" Do Not Transform the Civil Contempt Order into a Criminal Contempt Order

Koresko purports to identify a number of "attributes" that indicate the Contempt Order at issue was criminal in nature and thus improper. Appellant's Br. 45-47. The record plainly shows, however, that the district court issued an order of civil contempt.⁶ "The dichotomy between criminal and civil contempt lies in the function of the order." McDonald's Corp., 727 F.2d at 86; Roe, 919 F.2d at 868. Civil contempt orders are issued to coerce present compliance with a court order, while criminal contempt orders are intended to punish past violations of a court order. Hicks, 485 U.S. at 631; see also Berne Corp. v. Gov't of the Virgin Islands, 570 F.3d 130, 139 (3d Cir. 2009) (holding the district court's order was intended to

⁶ Koresko's discussions of his solitary confinement are not relevant to this appeal as prison conditions are at the discretion of the U.S. Bureau of Prisons and have no impact on the legality of the Contempt Order. See, e.g., Appellant's Br. 46.

coerce compliance with a previous order, not to impose punishment for refusing to abide by it); Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 441–42 (1911) ("It is not the fact of punishment, but rather its character and purpose, that often serve to distinguish between the two classes of cases."). The district court understood this distinction. SA-212 n.4 (Op. on Mot. for Recons.)

When the relief ordered is imprisonment, the contempt remains civil in nature "if the defendant stands committed unless and until he performs the affirmative act required by the court's order." Roe, 919 F.2d at 868 (internal quotations marks omitted) (citation omitted); see Chadwick v. Janecka, 312 F.3d 597, 608 (3d Cir. 2002); Harris, 582 F.3d at 519; Int'l Union, 512 U.S. at 828. Koresko has not complied with the court orders by transferring the plan funds and the indicia of ownership in the Nevis properties to the independent fiduciary; therefore, his continuing incarceration is a proper application of civil contempt. A48-49 (Apr. 26, 2016 Order).

In fact, this Court has held that "a valid order of civil contempt does not become punitive simply because the contemnor persists in punishing himself." Harris, 582 F.3d at 520. An order of civil contempt only becomes punitive, and therefore criminal, if the circumstances are such that the court is maintaining contempt for an impermissible punitive purpose. Harris, 582 F.3d at 520. As in Harris, here the Court should not "dissolve a lawful order . . . merely because the

contemnor persists in violating it." Id. at 519 (citation omitted) (upholding incarceration for over five years); see also Chadwick, 312 F.3d at 611–12.

Koresko has the ability to prevent his incarceration, but he simply refuses to exercise that ability. Accordingly, there is no punitive intent and the Contempt Order is civil.

2. The Government Seeks the Recovery of Plan Assets

The district court entered the Contempt Order against Koresko for a remedial and coercive purpose – seeking the rightful return of assets to the plans. Koresko admitted he used trust assets to purchase condominiums and transferred \$1.68 million dollars in plan assets to Nevis. SA-12-13, -15 (Tr. of July 8, 2013 TRO Hr'g and Status Conference); SA-30, -32-33 (Tr. of Sept. 16, 2013 Mot. Hr'g); SA-105-112 (Tr. of Dec. 18, 2013 Dep.); SA-114 (Tr. of Jan. 7, 2014 Dep.); SA-205 (Op. on Mot. for Recons.). In its order on September 16, 2013, and in the Contempt Order, the district court demanded Koresko return these plan assets in order to make the plans whole again, not to collect a monetary judgment against Koresko. SA-20-21 (Sept. 16, 2013 Order); A48-49 (Apr. 26, 2016 Order); SA-154-156 (Tr. of Apr. 26, 2016 Conference); Solis v. Koresko, 2013 WL 5272815, at *7; Perez v. Koresko, 86 F. Supp. 3d at 307. The Contempt Order intends to coerce Koresko to return the identified assets to the plans and in doing so "look[s] to the future and [is] designed to aid the plaintiff by bringing a defiant party into

compliance with the court order." Latrobe Steel Co., 545 F.2d at 1344.

In the instant case, the Secretary is seeking the recovery of misappropriated plan assets, not imposing a penalty for misconduct, and numerous orders of the court, including the final judgment, have been issued toward that end. SA-20-21 (Sept. 16, 2013 Order); SA-37-38 (Dec. 19, 2013 Order); SA-39-43 (Apr. 1, 2014 Order); SA-44-45 (June 27, 2014 Order); SA-54-55 (Sept. 10, 2014 Order); SA-56-57 (Oct. 15, 2014 Order); SA-58 (Dec. 4, 2014 Order); SA-59-60 (Dec. 15, 2014 Order); SA-66-71 (Mar. 13, 2015 J. and Order); A48-49 (Apr. 26, 2016 Order). The Secretary of Labor has the authority to sue on behalf of plans and beneficiaries to recover assets to correct wrongs committed by fiduciaries under sections 502(a)(2) and (a)(5) of ERISA, 29 U.S.C. § 1132(a)(2), (a)(5). The Secretary's action and the district court's orders are not seeking restitution for the benefit of the Secretary or the court, and neither are the payees of the assets demanded. Appellant's Br. 40-42, 44. Instead, as in Doyle v. London Guar. & Accident Co., Ltd., cited by Koresko, the monetary remedy enforced here is for the benefit of private parties (the plans and their participants and beneficiaries) through the return to the plans of the assets misappropriated by Koresko.⁷ 204 U.S. 599,

⁷ Unlike Bessette v. W.B. Conkey Co., cited by Koresko, the Contempt Order does not concern a non-party or a fine payable to the United States. 194 U.S. 324, 338 (1904). Here, the district court is demanding that Koresko return assets that this Court has held belong to the plans and must be returned.

606-07 (1907) (holding the contempt order was civil in nature as the proceeding was "to enforce an order seeking the protection of rights of the party to the suit for whose benefit it was made" and compliance with the order avoided the incarceration). "It's well established that an equitable [order] in an ERISA case may be enforced by contempt." SA-214 (Op. on Mot. for Recons.) (quoting Chesmore v. Fenkell, 829 F.3d 803, 817 (7th Cir. 2016)).

Accordingly, the Contempt Order would pass the so-called "government interest test" asserted by Koresko to distinguish criminal versus civil contempt.⁸ Appellant's Br. at 42-44 (citing In re Nevitt, 117 F. 448, 458-59 (8th Cir. 1902)). Even if such a test applies, the Contempt Order was not based on a governmental interest in the specific assets, because the ultimate party in interest here is the plans that have been wronged by Koresko.⁹ Most importantly, the Supreme Court has

⁸ Koresko claims that United States v. Spectro Foods Corp. supports his application of a "government interest" test. Appellant's Br. 44. In that case, however, this Court did not discuss the role of the government as a party but vacated the contempt order because it had punitive elements, namely a flat fine for past misconduct. United States v. Spectro Foods Corp., 544 F.2d 1175, 1182-83 (3d Cir. 1976). The Contempt Order here is purely coercive and there is no evidence that the order serves as punishment for past conduct, only to enforce compliance with a valid order.

⁹ The other two cases cited by Koresko support that contempt orders may be civil in a case involving the Government. Rylander, 460 U.S. at 761 (upholding an order of civil contempt for failure to comply with an IRS summons "until he either produces the documents which the District Court found to be in his possession, or adduces evidence as to his present inability to comply with that order"); McCrone v. United States, 307 U.S. 61(1939) (upholding an order of contempt for refusal to

clarified that "the mere presence of the United States as a party, acting through its agents, does not impress upon the controversy the elements of a criminal proceeding." McCrone v. United States, 307 U.S. 61, 64 (1939). This Court and the Supreme Court have upheld orders of civil contempt where the United States or its representative is a party in the action. United States v. Rylander, 460 U.S. 752, 757 (1983); Shillitani, 384 U.S. at 370-71; Lane Labs-USA, Inc., 624 F.3d at 582, 591; Harris, 582 F.3d at 520. Therefore, the Contempt Order serves to protect the rights of the plans and their participants and beneficiaries, as the parties in interest, by enforcing compliance with the court's orders and is thereby entirely civil. Nevitt, 117 F. at 456 (finding contemnors were "imprisoned for the purpose of protecting or enforcing the private rights and remedies of parties to civil suits," and thus the contempt was civil).

3. The Contempt Order Was Not for Debt Collection but Compliance with Court Orders

Koresko also falsely alleges he is improperly imprisoned for a debt owed. Appellant's Br. at 48-52. He is imprisoned only for disobeying orders to return assets that belonged to his victims, not to repay a debt. SA-20-21 (Sept. 16, 2013 Order); SA-39-43 (Apr. 1, 2014 Order); SA-44-45 (June 27, 2014 Order); SA-54-55 (Sept. 10, 2014 Order); SA-56-57 (Oct. 15, 2014 Order); SA-58 (Dec. 4, 2014

testify in a proceeding under the Internal Revenue laws because the proceeding was civil and not criminal).

Order); SA-59-60 (Dec. 15, 2014 Order); SA-69 (Mar. 13, 2015 J. and Order); A48-49 (Apr. 26, 2016 Order). These are assets that Koresko admitted belonged to the plans, he deposited in accounts, and used to purchase property outside of the country. SA-12-13, -15 (Tr. of July 8, 2013 TRO Hr'g and Status Conference); SA-30, -32-33 (Tr. of Sept. 16, 2013 Mot. Hr'g); SA-105-112 (Tr. of Dec. 18, 2013 Dep.); SA-114 (Tr. of Jan. 7, 2014 Dep.); SA-205 (Op. on Mot. for Recons.). Both the judgment upheld by this Court and the Contempt Order require the return of assets belonging to the plans. SA-69 (Mar. 13, 2015 J. and Order); Sec'y U.S. Dep't of Labor v. Koresko, 646 F. App'x at 245-46; A48-49 (Apr. 26, 2016 Order); see Trans Ocean Exp. Packing, Inc., 473 F.2d at 615-16 (finding a contempt order to compel the production of records cannot be analogized to proceedings for enforcement of a debt under federal statute); Oriel v. Russell, 278 U.S. 358, 365-66 (1929) (citation omitted) ("Actual or virtual imprisonment for debt has ceased, but imprisonment to compel obedience to a lawful judicial order (if it appear that obedience is being willfully refused) has not yet ceased, and ought not to cease, unless it should be thought expedient to destroy all respect for the courts by stripping them of power to enforce their lawful decrees."). Federal and state statutes regarding imprisonment for debt are completely irrelevant, and Koresko is in no way entitled to bail based on a state provision he cites. Appellant's Br. at 48-51; see Hicks, 485 U.S. at 630 (recognizing that federal, not state, law governs

federal contempt proceedings).¹⁰

C. The Government Has Authority to Complete Collection Activities and the Garnishment Order Was Proper

Separately, Koresko also challenges the court's Garnishment Order.

Garnishment orders are reviewed for an abuse of discretion. See United States v. Clayton, 613 F.3d 592, 595 (5th Cir. 2010). The Garnishment Order is the result of the Secretary's efforts to collect on the final judgment for losses and disgorgement of profits in the amount of \$38,417,109.63, separate from the recovery of specific plan assets that is the focus of the Contempt Order. SA-69-70 (Mar. 13, 2015 J. and Order). The district court denied Koresko's Motion to Quash Writ of Attachment and ordered that Jetstream Escrow pay the sum of \$50,000 to the independent fiduciary. See A45 (Dec. 5, 2016 Order). The Garnishment Order was valid, and it was properly served.

The Secretary has authority under ERISA to pursue monetary relief against Koresko for his breaches of fiduciary duties. Both the district court and this Court have held that Koresko committed fiduciary breaches in overseeing the plan, and on this basis, he is personally liable to disgorge his profits and restore losses to the plans out of his personal assets. See 29 U.S.C. § 1109(a) (a breaching fiduciary

¹⁰ Koresko's citation to McDonald's Corp. v. Victory Investments is inapposite. There, the court invoked contempt for the defendant's failure to pay attorney fees as required by court order. McDonald's Corp., 727 F.2d at 86; Appellant's Br. at 48-49. The court, in fact, did not reach the merits of whether imprisonment was permitted. McDonald's Corp., 727 F.2d at 86-87.

"shall be personally liable to make good to such plan any losses to the plan resulting from each such breach"); Perez v. Koresko, 86 F. Supp. 3d at 393 (finding defendants liable for restitution and disgorgement to the plans as breaching fiduciaries). This Court upheld the district court's judgment and damage calculation. Sec'y U.S. Dep't of Labor v. Koresko, 646 F. App'x 230 (3d Cir. 2016). The Secretary made a demand for payment of this outstanding judgment, and, pursuant to 28 U.S.C. § 3205, the Garnishment Order was executed. SA-223-225 (Writ of Continuing Garnishment).

In response, Koresko provides an inaccurate citation to and discussion of the "Debt Collection Act." Appellant's Br. at 53. The Federal Debt Collection Procedures Act permits the government to garnish "property . . . in which the debtor has a substantial nonexempt interest." 28 U.S.C. § 3205(a). The Secretary is able to execute garnishment under the long-arm execution statute, 28 U.S.C. § 2413, bypassing any local registration requirement for immediate implementation. See, e.g., S.E.C. v. Gold Standard Mining Corp., 2017 WL 760773, at *2 (C.D. Cal. Jan. 19, 2017); United States v. Palmer, 609 F. Supp. 544, 548 (E.D. Ten. 1985); United States v. Thornton, 672 F.2d 101, 104 (D.C. Cir. 1982); see Clark v. Wilbur, 913 F. Supp. 463, 465–66 (S.D.W. Va. 1996), aff'd sub nom. Clark v. Allen, 139 F.3d 888 (4th Cir. 1998). The Secretary followed the required procedures under those statutes. The Secretary's representative recorded the final

judgment with the Oklahoma County Clerk in the State of Oklahoma, based on information that Koresko had funds from his personal accounts held in escrow in the County of Oklahoma. SA-222 (Abstract of J.). The district court issued the Garnishment Order for these funds, SA-223-225, which the Secretary's counsel served upon both Jetstream Escrow and Koresko, SA-226-227. Jetstream Escrow acknowledged service and waived any objection to personal jurisdiction when it filed an answer without raising any objections. SA-219-221 (Answer of the Garnishee). The Department of Labor therefore had the requisite authority to collect on the garnishment on behalf of the plans and its participants and beneficiaries for the \$50,000 deposited by Koresko with Jetstream Escrow.

Koresko's argument turns on the misconception that the Secretary is seeking to recover a government debt. However, the garnishment order was not to collect any debt owed to the Department of Labor or the independent fiduciary, as Koresko asserts, but enforcing a recovery on behalf of the plans and its participants and beneficiaries. Appellant's Br. at 51-52; 29 U.S.C. § 1132(a)(2), (a)(5). The Secretary is executing a monetary judgment against Koresko, a fiduciary under ERISA section 409(a), 29 U.S.C. § 1109(a), for restitution for losses and disgorgement of profits, and the plan cannot be made whole until that judgment is satisfied.

This Court should affirm the Contempt Order and the Garnishment Order

because Koresko failed to demonstrate that the district court abused its discretion, made a clearly erroneous factual finding, or incorrectly decided any question of law.

II. THE DISTRICT COURT DID NOT VIOLATE KORESKO'S DUE PROCESS RIGHTS IN ENTERING THE CONTEMPT ORDER

A. Koresko was Provided Notice and Opportunity to Respond

Koresko contends that the district court violated his right to due process when it entered the Contempt Order. For civil contempt sanctions, due process is satisfied by notice and a hearing appropriate to the nature of the case. Harris, 47 F.3d at 1322; Interdynamics, Inc. v. Firma Wolf, 653 F.2d 93, 97 (3d Cir. 1981); see Bell v. Burson, 402 U.S. 535, 541-42 (1971) (finding the hearing required by due process must be appropriate to the nature of the case). Because they are non-punitive and avoidable through obedience to the court, civil contempt sanctions require fewer procedural protections under the Fifth and Fourteenth Amendments' Due Process Clause than would be required for criminal contempt and may be imposed through a normal civil proceeding.¹¹ Turner v. Rogers, 564 U.S. 431, 442 (2011); Int'l Union, 512 U.S. at 827, 831; Lundy v. Yost, 405 F. App'x 690, 695

¹¹ As this Court noted in B & G Const. Co., Inc. v. Director, Office of Workers' Compensation Programs, 662 F.3d 233, 246 n.14, 253 (3d Cir. 2011), while the Appellant relies on procedural "due process" cases concerning the Fourteenth Amendment, this claim in federal court concerns the Fifth Amendment. As in B & G Const., this brief assumes the cited cases relying on the Fourteenth Amendment are applicable to this Fifth Amendment claim.

(3d Cir. 2011). The district court found that because Koresko and counsel received adequate notice of the proceedings, were given an opportunity to respond in writing and appear at a hearing, and Koresko had the option of privately retaining counsel, the requirements of due process in a civil contempt proceeding were met. Appellant's Br. 60-67; SA-147-148 (Tr. of Apr. 26, 2016 Conference). Moreover, Koresko was represented by counsel at the time of the hearing, which neither Koresko nor his counsel decided to attend despite ample notice. Nor does Koresko's failure to appear at the hearing result in a violation of due process. As this Court held in Roe v. Operation Rescue, 920 F.2d 213, 217-19 (3d Cir. 1990), default judgment may be entered if, after adequate notice, a defendant fails to make a timely appearance in a civil contempt proceeding.

Koresko has not shown that he was denied due process in any way. First, Koresko alleges he was not afforded notice of the hearing. Appellant's Br. 60-63. As the district court found, from October 2013 through May 26, 2016, Koresko was represented by counsel. See SA-215 (Op. on Mot. for Recons.); SA-35 (Entry of Appearance of Lawrence McMichael); SA-158 (Notice of Withdrawal of Dilworth Paxson LLP). This period covers the events leading up to and after the contempt hearing. If a party is represented by an attorney, service "must be made on the attorney unless the court orders service on the party." Fed. R. Civ. P. 5(b)(1). The district court found the Department of Labor served Koresko's

attorney with the second motion for contempt and Koresko himself was properly served as a participant in the CM/ECF system. Supra Sec. I.A.1.b; SA-216 (Op. on Mot. for Recons.); Mem. of Law in Supp. of Secretary's Second Mot. for Contempt at 20, Perez v. Koresko, No. 09-cv-0988 (E.D. Pa. Feb. 9, 2016), ECF No. 1283-1. Koresko entered an appearance on his own behalf in April 2009 in this matter and from that date received notifications from the CM/ECF system. SA-216 (Op. on Mot. for Recons.); SA-1 (Entry of Appearance by John J. Koresko, V). Indeed, Koresko admitted in a hearing on May 18, 2016, that he received email notices related to the case. SA-189-191 (Tr. of Status Conference). Therefore, Koresko was afforded actual notice and his discussion of legal standards for failed attempts of notice is irrelevant. Appellant's Br. 62-63. Koresko also received service of the motion and order as indicated by a document he filed with the district court in response to the Contempt Order on May 2, 2016, after the issuance of the Contempt Order on April 26, 2016, and before a bench warrant was issued for his arrest on May 5, 2016. See Letter from Koresko re: Resp. to Mot. for Contempt, Perez v. Koresko, No. 09-cv-0988 (E.D. Pa. May 3, 2016), ECF No. 1310; SA-211 (Op. on Mot. for Recons.).

Accordingly, Koresko has not established the district court's factual findings that Koresko received notice of the hearing and service of the motion and order were clearly erroneous, and this Court should affirm them. SA-215-216 (Op. on

Mot. for Recons.); Mireskandari, 2017 WL 3575237, at *4 (non-precedential) (finding evidence defendants had actual notice satisfied due process).¹²

Koresko also claims with conclusory assertions that one letter from the condominium holding company concerning Koresko's ownership of condominium property in Nevis admitted to support the finding of contempt was hearsay. Appellant's Br. at 59-60. First, the letter was merely cumulative of other evidence. The district court relied on Koresko's own admissions to find the same facts recorded in the letter and ample other evidence was provided to establish Koresko's purchase of property in Nevis including a certificate of title. SA-205-206 (Op. on Mot. for Recons.); Exs. to Secretary's Second Mot. for Contempt, Perez v. Koresko, No. 09-cv-0988 (E.D. Pa. Feb. 9, 2016), ECF No. 1283. The overwhelming evidence provided in support of the Secretary's second motion for contempt went far beyond the specific letter Koresko objects to and satisfied the district court that "clear and convincing" standard required for an order of contempt was met. Supra I.A.1; SA-152 (Tr. of Apr. 26, 2016 Conference); SA-218 (Op. on Mot. for Recons.); Lane Labs-USA, Inc., 624 F.3d at 582; Marshak,

¹² Contrary to Koresko's arguments, personal service of the civil contempt filings was not required under Federal Rules of Civil Procedure 4, 4.1, or 5 as these rules are not strictly applicable to the contempt proceedings, and Koresko consented to electronic service for regular filings. Appellant's Br. 61-63; see Fed. R. Civ. P. 4; Fed. R. Civ. P. 4.1; Fed. R. Civ. P. 5 (applicable to the service of pleadings, including service "by electronic means if the person consented in writing").

595 F.3d at 485; Harris, 47 F.3d at 1321, 1326. Second, the document would be admissible hearsay under the exception contained in Federal Rule of Evidence 803(15). Fed. R. Evid. 803(15) ("A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose — unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document."); United States v. Abbey, 2007 WL 216294 (E.D. Mich. Jan. 25. 2007). For all these reasons, Koresko's hearsay objection has no merit.

Koresko argues that some form of affidavit was required to be in evidence by citing to the standards for seizure of property, but the standards for seizure of property are not relevant to the legality of the Contempt Order requiring Koresko to return plan assets that are not his property. Appellant's Br. 57-58. Because he was given notice of the contempt proceeding and a hearing was held, Koresko's arguments that his procedural due process rights were violated are unsupportable. Appellant's Br. at 55-57. The cases cited by Koresko in support of his assertion that additional procedures were required are all distinguishable from the instant case. In Gault, the Supreme Court determined that juveniles who had been arrested as delinquents and sentenced to imprisonment were afforded certain procedural protections. In re Gault, 387 U.S. 1 (1967) (discussing the procedural protections owed under the statutory scheme for juvenile case adjudication). However, the

Court explicitly stated that the Gault standards relied upon by Koresko were "concerned only with a proceeding to determine whether a minor is a 'delinquent' and which may result in commitment to a state institution." In re Gault, 387 U.S. at 44. The other two cases Koresko cites were also limited by the statutory context of the procedures under review, i.e., the termination of welfare benefits and the revocation of a government security clearance, but even if they were to apply, Koresko was afforded the right of an evidentiary hearing to dispute any evidence before contempt was ordered. Goldberg v. Kelly, 397 U.S. 254, 255 (1970) (welfare); Greene v. McElroy, 360 U.S. 474, 508 (1959) (security clearance).

This Court may not invalidate a civil contempt order on the basis of the due process standards that apply to different proceedings. Hicks, 485 U.S. at 638. Affording Koresko with an opportunity to respond to the contempt motion in writing and at a hearing satisfied the district court's obligation to provide Koresko with notice and opportunity to be heard before imposing the contempt sanction.

B. The District Court Did Not Deny Koresko Any Right to Counsel

Koresko also alleges he was deprived of the right to counsel. The Contempt Order at issue is not criminal and, therefore, the Sixth Amendment right to counsel is not implicated in this case. Cameron's Hardware Inc., 363 F. App'x at 200 n.6. "The Supreme Court has not recognized nor has the court of appeals found a constitutional right to counsel for civil litigants." Parham v. Johnson, 126 F.3d

454, 456 (3d Cir. 1997). The cases cited by Koresko, particularly Turner v. Rogers, do not support Koresko's argument that he was deprived of a right to counsel under the Fifth Amendment's Due Process Clause based on cases discussing that right under the Fourteenth Amendment.¹³ Appellant's Br. 64-67; see Turner, 564 U.S. at 442-43 (finding no right to counsel under the Fourteenth Amendment when incarceration is threatened in civil contempt proceedings related to child support orders); Vitek v. Jones, 445 U.S. 480, 496–497 (1980) (finding no right to counsel under the Fourteenth Amendment in a proceeding to transfer a prison inmate to a hospital for the mentally ill); Lassiter v. Dep't of Soc. Servs. of Durham Cnty., 452 U.S. 18, 31-32 (1981) (finding no right to counsel in a civil proceeding leading to a loss of parental rights). In Turner, the Supreme Court explicitly held that "the Due Process Clause does not always require the provision of counsel in civil proceedings where incarceration is threatened." Turner, 564 U.S. at 446. The safeguards discussed in Turner are not relevant to the instant case as the Contempt Order is not concerned with Koresko's financial ability to pay a debt, but the return of plan assets he admittedly deposited outside of the country. See supra Sec. I.B.3. The cases cited by Koresko that found a right to counsel are readily distinguishable, because they involved juveniles or criminal prosecutions. See In re Gault, 387 U.S. at 35–42 (finding a right of counsel in a juvenile

¹³ Supra note 11.

delinquency proceeding which may result in commitment to a state institution); Powell v. Alabama, 287 U.S. 45, 73 (1932) (finding a due process violation in denial of the right to counsel in criminal prosecutions).

Koresko has repeatedly asserted that the Secretary and the district court deprived him of counsel paid by the plans or the court. Appellant's Br. 63-67. The district court, however, did not deny Koresko counsel at any stage. At most, the district court only determined that, as a matter of law, under ERISA, Koresko was not entitled to be indemnified by the trusts for the cost of his defense after he was found to have breached his fiduciary duties. SA-78-82 (May 13, 2015 Mem. Op.); SA-125 (Mar. 31, 2016 Order). Koresko's counsel withdrew from representation, but not until *after* the Contempt Order was in place. SA-181-188 (Tr. of May 18, 2016 Status Conference); SA-158 (Notice of Withdrawal of Dilworth Paxson LLP). The district court did not bar Koresko from being represented; it merely followed the law by not permitting Koresko to pay for his representation with money from the trusts that he wronged. Most importantly, as Koresko himself concedes in his brief, his attorney presented numerous arguments against the second motion for contempt before the finding of contempt, see Appellant's Br. 16-17, and after he was found in contempt, see Appellant's Br. 21 ("motion to set aside the order of contempt"). See also SA-131 (Def.'s Mem. of Law in Supp. of Mot. for Relief from Civil Contempt Order); SA-181 (Tr. of May 18, 2016 Status

Conference). Both Koresko and his counsel received notice of the hearing but neither decided to appear. SA-124 (Mar. 31, 2016 Order); SA-148 (Tr. of Apr. 26, 2016 Conference); SA-209-210 (Op. on Mot. for Recons.). Furthermore, as his counsel remained counsel of record throughout this period, Koresko was never denied a right to counsel. See SA-215 (Op. on Mot. for Recons.); SA-35 (Entry of Appearance of Lawrence McMichael); SA-158 (Notice of Withdrawal of Dilworth Paxson LLP).

In conclusion, Koresko's contention that he was denied due process is meritless.

III. THE DISTRICT COURT HAD SUBJECT-MATTER JURISDICTION TO ENTER THE CONTEMPT ORDER AND OVER ALL PRIOR AND SUBSEQUENT PROCEEDINGS

A. Koresko's Arguments Are Barred under the Law of the Case Doctrine

The entirety of Koresko's jurisdictional argument is barred by the law of the case, as these issues were previously briefed, argued, and decided by this Court in Secretary, United States Department of Labor v. Koresko, 646 F. App'x 230 (3d Cir. 2016). Appellant's Br. 68-86; Brown v. United States, 508 F.2d 618, 630 (3d Cir. 1974). Under the law of the case doctrine, the "reconsideration of issues previously resolved by an earlier panel" is barred. Atl. Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders of Atl. City, 112 F.3d 652, 663 (3d Cir. 1997) (citations omitted), amended, 135 F.3d 891 (3d Cir. 1998). These

arguments are also precluded under res judicata as the issues were decided in a final adjudication on the merits in this Court between the same parties. See, e.g., Am. Sur. Co. v. Baldwin, 287 U.S. 156, 166 (1932) ("The principles of res judicata apply to questions of jurisdiction as well as to other issues."); Allen v. McCurry, 449 U.S. 90, 94 (1980); Gen. Motors Corp. v. New A.C. Chevrolet, Inc., 263 F.3d 296, 336 n. 25 (3d Cir. 2001).

Koresko has not asserted that any of the traditional exceptions to the law of the case doctrine or res judicata apply, giving no reason to revisit any of these issues. Atl. Coast Demolition & Recycling, Inc., 112 F.3d at 663; AL Tech Specialty Steel Corp. v. Allegheny Int'l Credit Corp., 104 F.3d 601, 605 (3d Cir. 1997). No underlying defects in any action of the district court invalidated the subsequent proceedings, including the Contempt Order and Garnishment Order. Contrary to Koresko's repeated arguments, the district court had and retained jurisdiction over this matter. Appellant's Br. 78, 80-82, 85-86; U.S. Dep't of Labor v. Koresko, 646 Fed. App'x at 232 (addressing this argument); 29 U.S.C. § 1132(e)(1). In 2013, the district court had jurisdiction under ERISA, and therefore had the authority to remove Koresko and other defendants as fiduciaries and direct the appointment of an independent fiduciary to take control of the plans and trusts at issue. See Sec'y U.S. Dep't of Labor v. Koresko, 646 F. App'x at 236, 240; 29 USC § 1109(a). Similarly, despite Koresko's recurring assertions, the Department

of Labor has standing to sue on behalf of the plan and/or plan beneficiaries.

Appellant's Br. 81-82; 29 U.S.C. § 1132(a)(2), (a)(5).

Furthermore, in Secretary United States Department of Labor v Koresko, 646 F. App'x 230 (3d Cir. 2016), this Court explicitly determined that the plans at issue were covered by ERISA, that the plan amendment Koresko relies upon for absolution was invalid, and that indemnification of Koresko was not permitted. Sec'y U.S. Dep't of Labor v. Koresko, 646 Fed. App'x at 236, 240, 243, 244-45. Koresko, however, again raises these issues, despite the clear prior determination from this Court. Appellant's Br. 68-69, 76-82; Sec'y U.S. Dep't of Labor v. Koresko, 646 Fed. App'x 230 (3d Cir. 2016). Koresko has already argued and this Court has already determined in a prior appeal that the plan documents themselves did not absolve Koresko of liability. Appellant's Br. 69-7; Sec'y U.S. Dep't of Labor v. Koresko, 646 Fed. App'x at 236, 238 (addressing this argument). Furthermore, the plan documents in no way empowered Koresko to remove funds from the plans for his own personal use and gain. See Sec'y U.S. Dep't of Labor v. Koresko, 646 Fed. App'x at 245.

The remedy in the underlying action was also upheld by this Court and Koresko's collateral attack on the judgment is impermissible. Appellant's Br. 81-82, 85-86; Sec'y U.S. Dep't of Labor v. Koresko, 646 Fed. App'x at 245-46 (addressing this argument).

B. The Contempt Order is Not Based on ERISA

The orders at issue in this appeal deal with the ability of the district court to enforce its own orders and judgment. See supra Part I.A. Therefore, Koresko's argument that they are invalid because they are outside the scope of ERISA is entirely misplaced. Appellant's Br. 80, 82-85. The Contempt Order is based not on ERISA, but on the district court's authority "to coerce the defendant into compliance with the court's order." McDonald's Corp., 727 F.2d at 87 (citations omitted); United States v. Asay, 614 F.2d 655, 660 (9th Cir. 1980) (finding a civil contempt order was not one arising under the Internal Revenue Code, but "imposed under the court's inherent contempt power" to provide an orderly judicial process not "dependent upon authorization from any outside source"). Koresko's discussion of ERISA remedies and limitations is not relevant to the validity of the Contempt Order, and this Court has already upheld the remedies under ERISA. Appellant's Br. 82-85; Sec'y U.S. Dep't of Labor v. Koresko, 646 Fed. App'x at 245-46.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that this Court affirm the orders of the district court.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I, Stephanie B. Bitto, hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 27(d)(2)(A). This brief contains 12,839 words, exclusive of the caption, tables, and certifications. This word count was provided by the Microsoft Word 2010 software program with which the brief was produced.

Date: October 18, 2017

/s Stephanie B. Bitto
STEPHANIE B. BITTO

CERTIFICATION PURSUANT TO LAR 31.1

I, Stephanie B. Bitto, hereby certify that the electronic version of this brief was scanned with McAfee Virus Scan Enterprise ver. 8.8 virus scanning software and was found to be free of any currently known viruses.

I further certify that the text of this electronic version of this brief is identical to the paper copies to be filed.

Date: October 18, 2017

/s Stephanie B. Bitto
STEPHANIE B. BITTO

CERTIFICATE OF SERVICE

I, Stephanie B. Bitto, hereby certify that on this 18th day of October, I caused a true and correct copy of the foregoing written response to be filed electronically with the court using the CM/ECF filing system, and that an identical paper copy has also been sent to the following via first class mail, postage prepaid:

JOHN J. KORESKO #67892-066
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/s Stephanie B. Bitto
STEPHANIE B. BITTO