

No. 21-5011

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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SHEET METAL WORKERS' HEALTH AND WELFARE FUND  
OF NORTH CAROLINA,

Plaintiff-Appellant,

v.

LAW OFFICE OF MICHAEL A. DEMAYO, LLP,

Defendant-Appellee.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE

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BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE  
IN SUPPORT OF THE PLAINTIFF-APPELLANT FOR REVERSAL

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## QUESTION PRESENTED

Whether the district court erred by failing to apply the “lowest intermediate balance” rule of equitable tracing in finding that an ERISA plan could not enforce its equitable lien by agreement on a specific fund after that fund was deposited in a commingled account.

## STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE

The Secretary of Labor (“Secretary”) files this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2). The Secretary has primary enforcement and interpretive authority for Title I of ERISA. *See* 29 U.S.C. §§ 1001, 1134, 1135. The Secretary’s interests include promoting uniformity of law, protecting beneficiaries, enforcing fiduciary standards, and ensuring the financial stability of employee benefit plans. *See Sec’y of Lab. v. Fitzsimmons*, 805 F.2d 682, 689–94 (7th Cir. 1986). ERISA secures these interests in part by allowing participants, beneficiaries, fiduciaries, and the Secretary to obtain “appropriate equitable relief” to redress statutory violations or enforce plan terms. 29 U.S.C. § 1132(a)(3), (a)(5). This case concerns a question of what qualifies as “equitable relief” under the foregoing statutory provisions, which the Secretary seeks to ensure are correctly interpreted to fully achieve the statute’s remedial purposes.

## STATEMENT OF THE CASE

### A. Factual Background

Walter Trumbull was a participant in the Sheet Metal Workers' Health & Welfare Fund of North Carolina (the "Fund"), a self-funded employee welfare benefit plan. Mem. Op., RE 40, Page ID # 287. His daughter ("Simpson") was a beneficiary. *Id.* In May 2016, Simpson sustained injuries in a car accident, resulting in medical bills for which the Fund paid \$16,225. *Id.* Trumbull and Simpson hired the Law Office of Michael A. DeMayo, LLP (the "Firm") to represent them in a personal injury matter arising from the accident. *Id.* at Page ID # 288.

In September 2016, Trumbull and Simpson signed an agreement with the Fund expressly recognizing the Fund's right of subrogation and reimbursement with respect to their personal injury action. *Id.* That right derives from the plan document, which states:

If a recovery is obtained by the Covered Person, either through settlement or as the result of judicial proceedings, the Fund is to be fully reimbursed, from the first dollars paid to or received by the Covered Person, for all benefits paid by the Fund on behalf of the Covered Person as well as for those medical expenses that are reasonable (sic) foreseeable.

*Id.* On October 18, 2016, the Fund notified the Firm of its right to full reimbursement of \$16,225, and sent the Firm a copy of the written subrogation agreement. *Id.*



Around two years later, Trumbull and Simpson, still represented by the Firm, settled their personal injury claim for \$30,000. *Id.* On November 12, 2018, the Firm received the \$30,000 settlement payment. *Id.* Three days later, the Firm informed the Fund about the settlement and requested an updated accounting of the subrogation amount. *Id.* The Fund responded by phone on December 5, 2018. *Id.* That same day, the Firm deposited the \$30,000 check into its trust account. *Id.*

“Despite the terms of the plan and the subrogation agreement, [the Firm] did not set aside the full amount of [the Fund’s] lien and did not pay [the Fund] from the first dollars received in the settlement before paying itself and the other lien holders.” *Id.* at Page ID # 289 n.3. Instead, on December 5, 2018, the Firm paid Simpson \$9,817.33, and on December 7, 2018, the Firm paid other lienholders and deposited \$10,152.67 into its separate operating account. *Id.* at Page ID ## 288–89, 294. Following these disbursements, \$9,029.18 remained in the Firm’s trust account. *Id.* at Page ID # 289.

## **B. Proceedings Below**

The Fund filed suit on February 15, 2019, to recover the full \$16,225 under its subrogation agreement. *See id.* On March 21, 2019, the Firm paid the Fund the \$9,029.18 left in the Firm’s trust account. *Id.* On March 28, 2019, the district court entered a temporary restraining order (“TRO”) agreed upon by the parties

requiring the Firm to maintain at least \$7,497.99 in the Firm’s operating account, representing the balance of the Fund’s lien. *Id.* at Page ID ## 289–90.<sup>1</sup>

Both parties moved for summary judgment. It was undisputed, and the district court found, that “the plan’s terms and the subrogation agreement created an equitable lien by agreement on any third-party settlement.” *Id.* at Page ID # 293. The Firm contended, however, that the Fund’s equitable lien was extinguished—and that the Fund thus was not seeking “equitable relief” cognizable under ERISA section 502(a)(3)—because any settlement funds the Firm deposited into its operating account “became immediately impossible to trace . . . because of the numerous deposits and withdrawals from that account.” *Id.* at Page ID ## 293–95. Specifically, the Firm declared that “[b]etween the time those funds were deposited into the Operating Account and July 31, 2019, there [were] 3,064 separate deposits and 2,867 separate withdrawals from the account, with the total cash flow in and out of the account in that time period far exceeding the balance of the account at the time the funds at issue were deposited.” DeMayo Decl. ¶ 18, RE 22-1, Page ID # 72.

In response, the Fund maintained that the “lowest intermediate balance” rule applied, allowing the Fund to enforce the full amount of its lien so long as the

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<sup>1</sup> The \$7,497.99 subject to the TRO is \$302.17 greater than the actual amount owed (\$7,195.82) due to a scrivener’s error. *Id.* at Page ID # 290.

balance of the operating account remained at or above the lien amount, which the TRO required. *See* Pl.’s Reply, RE 36, Page ID ## 274–75. The Firm’s summary judgment motion nowhere asserted that the balance of its operating account decreased below \$7,497.99, much less to zero, at any point between December 7, 2018 (when the Firm transferred the settlement funds to its operating account) and March 28, 2019 (when the parties entered into the TRO).

### **1. Summary Judgment Decision**

On October 26, 2020, the district court granted summary judgment in favor of the Firm. Mem. Op., RE 40, Page ID # 302. The court determined that the settlement funds the Firm deposited in its operating account were “certainly dissipated” by the time of the TRO. *Id.* at Page ID ## 294–95. In reaching this conclusion, the court relied solely on the Firm’s assertions that it had made thousands of deposits and withdrawals in the operating account between December 2018 and July 31, 2019, and that the total cash flow “exceed[ed] the balance of the account at the time the funds at issue were deposited.” *See id.* (citing DeMayo Decl., RE 22-1); DeMayo Decl. ¶ 18, RE 22-1, Page ID # 72. The court thus concluded that the Fund failed to show that its equitable lien could “clearly be traced to particular funds or property in the defendant’s possession” in the operating account. Mem. Op., RE 40, Page ID # 295. The court did not address the lowest intermediate balance rule. *See id.* at Page ID # 296 n.8.

The district court distinguished the TRO in this case from the restraining order in *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006), on which the Supreme Court relied in finding a specifically identifiable fund against which the plan’s equitable lien could be enforced. *Id.* at Page ID # 295.

According to the court, the order in *Sereboff* “required the defendant to maintain ‘settlement funds’ in a separate account,” whereas the court’s TRO here contained no mention of “settlement funds”—it only required the Firm to maintain at least \$7,497.99 in its operating account. *Id.* (citation omitted). The court determined that “at the time of the TRO there were no specific ‘settlement funds’ from this case remaining in [the Firm’s] operating account.” *Id.* Moreover, “even if one could argue that ‘settlement funds’ remained in [the Firm’s] operating account at the time of the TRO, nothing about the TRO required [the Firm] to retain specifically identified ‘settlement funds’ or funds belonging to [the Fund].” *Id.* at Page ID # 296.

## **2. Reconsideration Decision**

On November 16, 2020, this Court issued its ruling in *Zirbel v. Ford Motor Co.*, 980 F.3d 520 (6th Cir. 2020). In that case, a beneficiary (Zirbel) of the Ford Motor Company’s retirement plan opted to receive a lump-sum pension payment in lieu of monthly benefits. *Id.* at 522. Four years later, Ford determined that the payment it made to Zirbel was more than what was due under the plan’s terms, and

asked Zirbel to return the excess. *Id.* Zirbel—who by that point had deposited some of the money in her bank account, put some of it in a retirement account and mutual funds, gave some to her children, and used a portion to pay taxes—sued Ford, seeking an order that she was entitled to keep the money. *Id.* Ford counterclaimed under ERISA section 502(a)(3) seeking restitution to recover the overpayment from Zirbel pursuant to the plan’s reimbursement provision. *Id.* at 521–22, 524. This Court allowed the restitution remedy notwithstanding Zirbel’s depositing the money in various accounts, explaining that “a possessor does not dissipate a fund by depositing the cash into an account containing the possessor’s other assets.” *Id.* at 524. Rather, an equitable lien survives commingling and can be asserted on the commingled funds. *Id.* at 524–25 (“simply commingling funds into accounts and spending the money does not by itself extinguish a lien.”).

The Fund moved for reconsideration in light of *Zirbel*, but the district court denied the motion. According to the court, *Zirbel* was distinguishable: while the participant there used the contested funds to pay taxes and moved them into multiple different accounts, including accounts not in Zirbel’s possession, Zirbel did not argue complete dissipation. Order, RE 48, Page ID ## 336–37. In this case, however, the Firm “asserted, and the [c]ourt found, that any settlement funds in [the Firm’s] accounts had been completely dissipated and that [the Fund] did not show otherwise.” *Id.* at Page ID # 337. Based on that difference, the court held

that *Zirbel* did not alter the outcome in this case regarding the Fund's ERISA section 502(a)(3) claim.

### **SUMMARY OF ARGUMENT**

Section 502(a)(3) of ERISA authorizes a fiduciary to bring a civil action to obtain “appropriate equitable relief” to redress violations of the statute or to enforce the terms of the plan. 29 U.S.C. § 1132(a)(3). One form of “equitable relief” is an “equitable lien by agreement,” such as the Fund's lien in this case. That kind of lien is enforceable only against a specifically identified fund. But if the fund is completely dissipated and cannot be further traced, the lien is extinguished. As this Court has held, however, a defendant does not dissipate a fund simply by commingling it with other assets. *Zirbel*, 980 F.3d at 524.

Further, under a longstanding trust law doctrine known as the lowest intermediate balance rule, the lien remains fully intact even if money is later withdrawn from the commingled account, so long as the value of the commingled account always remains above the value of the specifically identified fund it contains. If the balance of the commingled account falls below the value of the specifically identified fund, then the lien is still enforceable, but only up to the lowest balance of the commingled account after the fund was deposited in it. The lien is extinguished only if all of the money in the commingled account is completely dissipated and cannot be further traced.

In this case, the district court held that the Fund could not enforce its equitable lien because the Firm completely dissipated the specifically identified fund (*i.e.*, the portion of the settlement recovery due the Fund) after commingling it with assets in the Firm's operating account. But the court did not find that the balance of the commingled operating account at any point fell below the value of the specifically identified fund, much less that it was completely dissipated, as would be necessary to completely extinguish the lien under the lowest intermediate balance rule. Nor is there record evidence that the account fell below the value of the identified fund or went to zero dollars.

Because the district court failed to consider the lowest intermediate balance rule or make any findings pertinent to the rule's application, the court's conclusion that the Firm completely dissipated the settlement funds on non-traceable assets is unfounded. Accordingly, the Court should reverse the decision below.

## **ARGUMENT**

### **The District Court Erred by Failing to Apply Equitable Tracing Rules in Determining the Settlement Proceeds Were Completely Dissipated**

The district court entered summary judgment for the Firm because it found that the Firm completely dissipated the settlement proceeds after transferring them to its operating account, thereby extinguishing the Fund's lien and defeating its claim for "equitable relief" under ERISA section 502(a)(3). To understand why

the court erred, we begin with basic principles of equitable relief available under ERISA section 502(a)(3). Those principles make clear that equitable relief includes enforcing an equitable lien by agreement on a specific fund, such as the settlement recovery here. They further establish that an equitable lien by agreement is not extinguished simply because a specific fund is commingled in an account with other assets. Rather, under the equitable tracing principle known as the lowest intermediate balance rule, the lien is extinguished only if all of the funds in the commingled account are completely dissipated (dropping the account's balance to zero dollars) and cannot be further traced. Against this backdrop, it is clear the court erred by failing to apply the lowest intermediate balance rule when it concluded that the lien was extinguished. Because the court did not find, and the Firm adduced no evidence, that the account balance ever reached zero dollars, nothing in the record supports the court's ruling that the lien was extinguished. The judgment for the Firm must be reversed.

**A. An Equitable Lien on a Specifically Identified Fund Is Enforceable Under ERISA Section 502(a)(3)**

ERISA section 502(a)(3) authorizes a fiduciary, such as the Fund, to bring a civil action to obtain "appropriate equitable relief" to enforce the terms of the plan. 29 U.S.C. § 1132(a)(3). "Equitable relief" refers to "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256



(1993). “[W]hether the remedy a plaintiff seeks ‘is legal or equitable depends on [(1)] the basis for [the plaintiff’s] claim and [(2)] the nature of the underlying remedies sought.’” *Montanile v. Bd. of Trs. of Nat’l Elevator Indus. Health Benefit Plan*, 577 U.S. 136, 142 (2016) (quoting *Sereboff*, 547 U.S. at 363 (alterations in original)).

The district court correctly held that “the basis for Plaintiff’s claim is equitable because the plan’s terms and the subrogation agreement created an equitable lien by agreement on any third-party settlement.” Mem. Op., RE 40, Page ID # 293 (citing *Montanile*, 577 U.S. at 143–44). An equitable lien by agreement is “created by an agreement to convey a particular fund to another party,” such as an “agreement with the plan to convey the proceeds of any third-party settlement.” *Montanile*, 577 U.S. at 143. Once the proceeds are acquired, the recipient becomes “a trustee as soon as he gets title to the thing.” *Sereboff*, 547 U.S. at 363–64 (quoting *Barnes v. Alexander*, 232 U.S. 117, 121 (1914)). Indeed, the equitable lien is automatic, because “[a]s soon as [the party] receive[s] the [funds], a lien attache[s], permitting the plan to seek equitable restitution.” *Zirbel*, 980 F.3d at 524. The Supreme Court has made clear that where a plaintiff seeks to enforce an “equitable lien by agreement,” the basis of the claim is equitable. See *Montanile*, 577 U.S. at 143–44.

But as noted, to qualify as “appropriate equitable relief,” “the nature of the remed[y] sought” must also be equitable. *Id.* at 142. Equitable liens are only enforceable against “specifically identified funds that remain in the defendant’s possession or against traceable items that the defendant purchased with the funds (e.g., identifiable property like a car).” *Id.* at 145–46. This is because equitable remedies “as a general rule . . . give or enforce a right to or over some particular thing.” *Id.* (quoting 4 S. Symons, *Pomeroy’s Equity Jurisprudence* § 1234, p. 694 (5th ed. 1941)); see *CIGNA Corp. v. Amara*, 563 U.S. 421, 439 (2011) (“[T]raditionally speaking, relief that sought a lien or a constructive trust was legal relief, not equitable relief, unless the funds in question were particular funds or property in the defendant’s possession.” (internal quotation omitted)). In order for a plan’s lien to attach, therefore, “[t]he plan must identify a particular fund, distinct from an insured’s general assets, and the portion of that fund to which the plan is entitled.” *Hall v. Liberty Life Assur. Co. of Boston*, 595 F.3d 270, 275 (6th Cir. 2010) (citation omitted).

The plan in this case properly sought to attach its lien to a specifically identified fund—the portion of the settlement proceeds to which it was entitled under the plan’s subrogation provision. Mem. Op., RE 40, Page ID ## 288, 289 n.3, 290, 293. But the district court concluded that, after the Firm transferred the settlement proceeds to its operating account, the proceeds were dissipated—and the

Fund's lien extinguished—by the Firm's subsequent withdrawals from that account. Mem. Op., RE 40, Page ID ## 293–95. As explained below, neither the Firm's act of commingling the settlement funds with its own assets in the operating account, nor the mere fact that it made withdrawals from that account, are sufficient to extinguish the Fund's lien.

**B. An Equitable Lien Is Not Extinguished When a Specific Fund Is Commingled with Other Assets, But Is Enforceable Against the Commingled Account Subject to the Lowest Intermediate Balance Rule**

Even if a fund is at one point specifically identifiable, the lien is destroyed if that fund is later dissipated and cannot be further traced. *See Montanile*, 577 U.S. at 145 (“If, instead of preserving the specific fund subject to the lien, the defendant dissipated the entire fund on non-traceable items, that complete dissipation eliminated the lien.”). But as this Court recognized in *Zirbel*, “a possessor does not dissipate a fund by depositing the cash into an account containing the possessor’s other assets.” 980 F.3d at 524. Rather, “[a]ny ‘commingling’ of wrongfully possessed funds and rightfully possessed funds permits a lien on the commingled account.” *Id.*; *see also Montanile*, 577 U.S. at 149 (“[C]ommingling a specifically identified fund—to which a lien attached—with a different fund of the defendant’s did not destroy the lien. Instead, that commingling allowed the plaintiff to recover the amount of the lien from the entire pot of money.”); Restatement (First) of

Restitution § 209 cmt. a (1937) (“The person whose money is wrongfully mingled with money of the wrongdoer does not thereby lose his interest in the money . . . but he acquires an interest in the mingled fund. His interest is such that he is entitled in equity to claim a proportionate share of the mingled fund or lien upon it.”).

Nor is a fund that has been transferred to a commingled account necessarily dissipated whenever money is withdrawn from the commingled account. Rather, under the “lowest intermediate balance rule,” equity assumes that “the trustee withdraws non-trust funds first, thus maintaining as much of the trust’s funds as possible.” *Dameron v. Tyler (In re Dameron)*, 155 F.3d 718, 724 (4th Cir. 1998). Thus, regardless of whether the trustee withdraws money from the commingled account, “if the amount on deposit in the commingled fund has at all times equaled or exceeded the amount of the trust, the trust’s funds will be returned in their full amount.” *Id.* If instead “the commingled fund has been reduced below the level of the trust fund but not depleted, the claimant is entitled to the lowest intermediate balance in the account.” *Id.* (quotation omitted). It is only if the commingled fund “has been depleted entirely” that the trust is considered lost and the lien extinguished.<sup>2</sup> And in that case, the lien remains extinguished even if the trustee

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<sup>2</sup> Unless the claimant can further trace the money removed from the commingled fund. See Austin W. Scott, *The Right to Follow Money Wrongfully Mingled with Other Money*, 27 Harv. L. Rev. 125, 125 (1913) (Scott) (person may “proceed

replenishes the account through subsequent deposits. *Id.*; Restatement § 212 (“Where a person . . . makes withdrawals from the mingled fund and dissipates the money so withdrawn, and subsequently adds money of his own to the fund, the other can enforce an equitable lien upon the fund only for the amount of the lowest intermediate balance.”).

The lowest intermediate balance rule is a longstanding principle of trust law applied by courts of equity. *See, e.g., Am. Sugar Ref. Co. v. Fancher*, 145 N.Y. 552, 556 (1895) (“The jurisdiction of a court of equity to follow the proceeds of property . . . mingled with that of the wrongdoers . . . has been frequently exerted and is a jurisdiction founded upon the plainest principles of reason and justice”); *see also Montanile*, 577 U.S. at 149 (citing Restatement § 209 & Scott, *supra* n.2, at 125–26). In a 1913 law review article preceding his authoritative treatise, Scott on Trusts (1st ed. 1939), Professor Scott described the doctrine as follows:

Whether . . . the money of the wrongdoer and the claimant is physically mingled, or is deposited in a single account, as long as there is always a balance on hand, at least as large as the amount of the claimant’s contribution, he will, by pursuing the lien remedy, come out whole . . . . If, however, the fund is diminished below the amount of the claimant's contribution, he will lose *pro tanto*; and, if the fund is exhausted, his interest is lost.

Scott, *supra* n.2, at 131 (footnotes collecting cases omitted).

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against the commingled fund or against any property for which it is exchanged by the wrongdoer”).

This Court also recognized the lowest intermediate balance rule in *First Federal of Michigan v. Barrow*, 878 F.2d 912 (6th Cir. 1989). The Court explained that “[t]he bankruptcy court will follow the trust fund and decree restitution where the amount of the deposit has at all times since the intermingling of funds equaled or exceeded the amount of the trust fund.” *Id.* at 916 (quoting 4 L. King *Collier on Bankruptcy*, ¶ 541.13, at 541-79 – 541-80 (15th ed. 1988)). If, “after the appropriation and mingling, all of the moneys are withdrawn, the equity of the cestui is lost, although moneys from other sources are subsequently deposited in the same account.” *Id.* (citation and quotation omitted). Where the commingled account “is reduced to a smaller sum than the trust fund, the latter must be regarded as dissipated, except as to the balance, and funds subsequently added from other sources cannot be subject to the equitable claim of the cestui que trust.” *Id.* (citation and quotation omitted).

The Supreme Court has also cited the lowest intermediate balance rule. In a case concerning the “remarkable criminal financial career of Charles Ponzi,” the Court explained that “where a fund was composed partly of a defrauded claimant’s money and partly of that of the wrongdoer, it would be presumed that in the fluctuations of the fund it was the wrongdoer’s purpose to draw out the money he could legally and honestly use rather than that of the claimant, and that the claimant might identify what remained as his res, and assert his right to it by way

of an equitable lien on the whole fund, or a proper pro rata share of it.”

*Cunningham v. Brown*, 265 U.S. 1, 7, 12 (1924) (discussing *Knatchbull v. Hallett*, (1880) L. R. 13 Ch. D. 696); *see also Schuyler v. Littlefield*, 232 U.S. 707, 710 (1914) (noting “the rule that where one has deposited trust funds in his individual bank account and the mingled fund is at any time wholly depleted, the trust fund is thereby dissipated, and cannot be treated as reappearing in sums subsequently deposited to the credit of the same account”).

Modern courts likewise apply the rule. The Tenth Circuit recognized, in an ERISA case, that “[t]he person whose money is wrongfully mingled with money of the wrongdoer does not thereby lose his interest in the money, . . . but he acquires an interest in the mingled fund.” *Teets v. Great-W. Life & Annuity Ins. Co.*, 921 F.3d 1200, 1226 (10th Cir.), *cert. denied*, 140 S. Ct. 554 (2019) (citation omitted); *see Foster v. Hill*, 275 F.3d 924, 927 (10th Cir. 2001) (further describing lowest intermediate balance rule). Numerous other circuits have recognized the lowest intermediate balance rule when applying trust law in bankruptcy and other contexts. *See, e.g., In re Miss. Valley Livestock, Inc.*, 745 F.3d 299, 308 (7th Cir. 2014); *In re MJK Clearing, Inc.*, 371 F.3d 397, 401–02 (8th Cir. 2004); *United States v. Coriaty*, 300 F.3d 244, 253–54 (2d Cir. 2002); *Dameron*, 155 F.3d at 723–24; *In re Columbia Gas Sys. Inc.*, 997 F.2d 1039, 1053, 1063–64 (3d Cir. 1993); *In re R & T Roofing Structures & Com. Framing, Inc.*, 887 F.2d 981, 987

(9th Cir. 1989); *Conn. Gen. Life Ins. Co. v. Universal Ins. Co.*, 838 F.2d 612, 619 (1st Cir. 1988). The lowest intermediate balance rule is therefore well settled and applicable in this ERISA action concerning enforcement of an equitable lien.

**C. The District Court Failed to Apply the Lowest Intermediate Balance Rule in Holding that the Firm Dissipated the Settlement Funds After Transferring Them to Its Operating Account**

Under the lowest intermediate balance rule, the Fund’s attempt to enforce its equitable lien against the Firm’s operating account qualifies as “appropriate equitable relief” under ERISA section 502(a)(3) unless the operating account’s balance went to zero and its assets cannot be further traced. Because the district court made no such finding—and because there is no evidence in the record of the account’s balance after the Firm transferred the settlement proceeds—the court erred in holding that the settlement proceeds were dissipated and entering summary judgment for the Firm.

As noted, the district court correctly held that “the basis for Plaintiff’s claim is equitable because the plan’s terms and the subrogation agreement created an equitable lien by agreement on any third-party settlement.” Mem. Op., RE 40, Page ID # 293. And there is also no question that when the Firm obtained the settlement recovery for Simpson and placed the funds in its trust account, the portion of that recovery due the Fund was a specifically identifiable fund. *See Sereboff*, 547 U.S. at 362–63 (holding that “Mid Atlantic sought specifically



identifiable funds that were within the possession and control of the Sereboffs—that portion of the tort settlement due Mid Atlantic under the terms of the ERISA plan”) (internal quotation omitted). Moreover, it is clear under the law of this Court and the law of trusts that those settlement funds qualified as a “specifically identifiable fund” even after the Firm commingled them with its other assets in its operating account. *See Zirbel*, 980 F.3d 524 (commingling does not destroy lien); Restatement § 209 cmt. a (same).

Thus, the only remaining question is whether the Firm completely dissipated the settlement funds at some point *after* transferring them to its operating account in December 2018. The district court found that was “certainly” the case, a conclusion it based entirely on a declaration the Firm provided with its motion. Mem. Op., RE 40, Page ID ## 294–95 (citing DeMayo Decl., RE 22-1). That declaration stated that between the time of the transfer and July 2019 (near the date of the declaration), thousands of withdrawals and deposits occurred and “the total cash flow in and out of the account . . . far exceed[ed] the balance of the account at the time the funds at issue were deposited.” DeMayo Decl. ¶ 18, RE 22-1, Page ID # 72. In other words, the district court *assumed* that because the total churn of

money in and out of the account exceeded the initial post-transfer balance, the settlement funds must have been among the funds withdrawn.<sup>3</sup>

That assumption was erroneous and no record evidence supports it. As explained, the lowest intermediate balance rule assumes that “the trustee withdraws non-trust funds first, thus maintaining as much of the trust’s funds as possible.” *Dameron*, 155 F.3d at 724. This means that a specifically identifiable fund that has been commingled is dissipated, and the lien extinguished, only “if the *commingled* fund”—here, the entire operating account—“has been depleted entirely.” *Id.* (emphasis added). Otherwise, complete equitable relief is available ““

*Barrow*, 878 F.2d

*Dameron*, 155 F.3d at 724. If the commingled account balance falls below the amount of the trust, the “lowest intermediate balance” in the account may be recovered. *Barrow*, 878 F.2d *Dameron*, 155 F.3d at 724. In short, the

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<sup>3</sup> In its reconsideration decision, the district court stated that “Defendant asserted, and the [c]ourt found, that any settlement funds in Defendant’s accounts had been completely dissipated and that Plaintiff did not show otherwise.” Order, RE 48, Page ID # 337. According to the court, “Plaintiff bears the burden of proving that the specifically identifiable funds it seeks to recover have not been dissipated . . . Plaintiff here did not satisfy that burden.” *Id.* at Page ID #337 n.3. Whether Plaintiff met its burden in moving for summary judgment is beside the point, because the court’s conclusion that Defendant met its burden by establishing dissipation was incorrect in light of its failure to consider the lowest intermediate balance rule.

“total cash flow in and out of the account” is completely irrelevant; it is only if the operating account was at some point “depleted entirely” (*i.e.*, had a balance of zero dollars) and was spent on non-traceable assets that the lien could have been extinguished. *See id.*; Scott, *supra*, n.2.

The district court made no finding regarding the operating account’s balance, much less that it was depleted entirely. Indeed, there is no evidence in the record that the Firm completely depleted the operating account prior to the TRO, and once the court entered the TRO, the Firm was *required* to maintain sufficient funds in its operating account to cover the Fund’s lien. *See* Mem. Op., RE 40, Page ID ## 289, 290 n.3, 294–95. The Firm did not state, and there is no evidence to suggest, that the Firm violated the TRO by maintaining a balance lower than the lien amount, much less by depleting the operating account entirely. Accordingly, the district court erred when it declared the lien extinguished without finding that the balance in the operating account at any point dwindled to zero.<sup>4</sup>

The district court also emphasized the fact that the TRO did not identify the specific funds to which the equitable lien attached; that is, “[t]here is no language

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<sup>4</sup> The district court made the same error in its reconsideration decision, distinguishing the facts here from those in *Zirbel* (where this Court held that commingling did not destroy an equitable lien) on the grounds that, unlike in *Zirbel*, “any settlement funds in Defendant’s accounts had been completely dissipated and that Plaintiff did not show otherwise.” Order, RE 48, Page ID # 337. Again, there is no indication in the record that the Firm at any point completely depleted its operating account.

in the TRO requiring that Defendant maintain ‘settlement funds,’” just that it “maintain at least \$7,497.99.” *See id.* at Page ID # 295. But maintaining a balance in the operating account in the amount of the lien is all that was required to preserve the lien in its entirety. Again, “[c]ommingling of wrongfully possessed funds and rightfully possessed funds permits a lien *on the commingled account.*” *Zirbel*, 980 F.3d at 524 (emphasis added). And the lowest intermediate balance rule assumes that non-trust funds are withdrawn first, thus maintaining the trust’s funds as much as possible. *Dameron*, 155 F.3d at 724. The TRO ensured that even if the Firm withdrew money from its operating account, it always maintained a balance that was greater than the amount of the Fund’s lien (or else risked the consequences of violating the court’s order), thereby providing further assurance that the lien funds were not dissipated. *See Pl.’s Reply*, RE 36, Page ID ## 274–75 (explaining the lowest intermediate balance rule, and relying on the TRO to ensure the operating account was not withdrawn to less than the lien amount during the relevant period).

Because the Firm did not adduce evidence that the operating account was completely dissipated down to zero, the district court erred in entering summary judgment for the Firm.

## CONCLUSION

For the reasons stated above, the Secretary respectfully requests that the Court reverse the district court decision below.

Dated: April 9, 2021

Respectfully submitted,

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Dated: April 9, 2021

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## CERTIFICATE OF SERVICE

I hereby certify that on this day, April 9, 2021, I electronically filed the foregoing BRIEF OF THE SECRETARY OF LABOR AS AMICUS CURIAE with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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