No. 15-3141
(Consolidated with No. 15-2470 for purposes of scheduling and disposition)

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOHN J. KORESKO, V,

Appellant

v.

THOMAS E. PEREZ, UNITED STATES SECRETARY 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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases:

Federal Cases (continued):

Federal Cases (continued):

Federal Cases (continued):

Federal Cases (continued):

Federal Statutes:

Title 28 Judiciary and Judicial Procedure:

Miscellaneous:

STATEMENT OF THE ISSUES

1. Whether this Court lacks jurisdiction over the appeal of the district court's August 4, 2015 postjudgment order appointing a permanent independent fiduciary and holding that the resulting expenses ultimately would be borne by the defendants.

2. Whether defendants' appeal of the merits decision in this case divested the district court of authority to issue the August 4, 2015 order appointing an independent fiduciary and making defendants liable for the costs of the appointment.

3. Whether the district court acted within its discretion in concluding that the defendants were responsible for and thus should be held liable for the costs associated with the appointment of the independent fiduciary, where the court, after conducting a bench trial, had already found that the defendants committed numerous breaches of their fiduciary duties in administering the ERISA plans and the trusts from which benefits were paid, including misappropriating trust assets.

STATEMENT OF THE CASE

On September 16, 2013, after many years of investigation and litigation by the Secretary of Labor ("Secretary"), the district court removed defendant John Koresko from his position of authority over two multiple employer trusts at issue in this case, the Single Employer Welfare Benefit Plan Trust ("SWEBPT") and the

Regional Employers Assurance League Voluntary Employees Beneficiary Association Trust ("REAL VEBA") (collectively, the "Trusts"), from which benefits were paid to participants in numerous ERISA plans. Solis v. Koresko, No. 09-988, 2013 WL 5272815, at *7 (E.D. Pa. Sept. 17, 2013). Subsequently, following a bench trial, the district court issued an order on March 13, 2015, finding defendant-appellant John J. Koresko and a number of companies he controlled (collectively, "Koresko")[1] liable for approximately $19 million based on numerous violations of ERISA involving the administration of the Trusts, including misappropriation of plan assets. In this order, the court stated that:

> This Court retains jurisdiction over this action for purposes of enforcing compliance with the terms of this Order; addressing the appointment of a permanent Independent Fiduciary to administer and oversee [the Trusts] and the Plans; securing an equitable accounting of the assets of [the Trusts] and the Plans; and overseeing any other outstanding issues requiring resolution in relation to the Memorandum Opinion and the satisfaction of this Judgment and Order.

Perez v. Koresko, No. 09-988, 2015 WL 1182846, at *2 (E.D. Pa. Mar. 13, 2015) [A323 at 5].

After Koresko appealed the district court's March 13, 2015 order, the district court issued an order on August 4, 2015, addressing the appointment of a permanent independent fiduciary. A1621. The court appointed Manufacturers &

[1] These companies are PennMont, Koresko & Associates, P.C., Koresko Law Firm, P.C., and Penn Public Trust. Solis v. Koresko, 2013 WL 4594847, *1 n.1 (E.D. Pa. Aug. 29, 2013).

Traders Trust Company "to serve as Trustee, investment manager, and independent fiduciary" for the Trusts. A1621 at 1. The court specified certain duties the new trustee would need to meet, including "retitl[ing] ownership of [trust assets] to the full control of the Trustee for the benefit" of the Trusts, "mak[ing] monthly reports to the Court" showing "all cash receipts and disbursements for the Trust Fund," furnishing the court "with an annual statement of account," and other actions to facilitate the ongoing judicial oversight by the district court. Id. at 2-3.

Finally, the district court held that "[t]he costs of the Trustee's appointment . . . will be borne by the Koresko Defendants," because "there would be no need to appoint an Independent Trustee" if "the Koresko Defendants [had] complied with their fiduciary duties." A1621 at 11. The court further explained that "the Trustee shall be paid out of the Trust assets in accordance with the terms outlined in its attached bid." Id. Finally, the court explained that "[a]t the close of the appointment, the Court shall issue a separate order specifying the total amount the Koresko Defendants are liable to the Plans to restore on account of this appointment." Id.

Koresko appealed the district court's August 4 Order. On September 9, 2015, this Court ordered the parties to address the jurisdiction of the Court to hear the appeal and Koresko and the Secretary filed simultaneous responses coming to opposite conclusions on the matter. On December 1, 2015, this Court consolidated

this appeal with Koresko's appeal of the March 13, 2015 Judgment and Order, and ordered the parties to file briefs addressing both the merits and the jurisdictional issue, without repeating arguments or facts set forth in the briefs in case number 15-2470. Therefore, in addition to this Statement, the Secretary of Labor incorporates by reference his Statement of the Case in his appellate brief filed in case number 15-2470.

SUMMARY OF THE ARGUMENT

1. This Court lacks jurisdiction over this appeal. The district court's August 4 Order was not a final decision under 28 U.S.C. §§ 1291 or 1292, because it did not end the litigation on the merits and leave nothing for the court to do but execute the judgment. Because the expenses were not yet incurred, the order did not calculate the amount of Koresko's liability with regard to the independent fiduciary or provide a method for such calculations that would render the determination of liability merely mechanical; instead, the order expressly stated that the Trusts would pay the expenses as they were incurred and that Koresko would be required, not to pay a specific amount immediately, but to reimburse the Trusts for those expenses at the close of the appointment. Thus, the order was not directed to Koresko (or any other party), and was not enforceable against him through contempt proceedings. Furthermore, the order was neither a receivership

order, nor an order that conclusively determined a disputed question and settled an issue separate from the merits of the action under the collateral order doctrine.

2. Koresko's appeal of the district court's March 13, 2015 Judgment and Order did not divest the district court of jurisdiction to issue an order appointing a new independent trustee, and holding that Koresko ultimately would be responsible for paying the costs associated with the independent trustee. This order fits within the recognized exceptions to the general rule that an appeal divests the district court of jurisdiction.

3. The district court acted within its discretion by holding that Koresko would be responsible to repay the Trusts for the costs associated with its appointment of an independent trustee. Koresko's many ERISA violations in mismanaging the plans and misappropriating their assets necessitated the appointment of an independent fiduciary. Given the additional oversight of the Trusts and the need of the new trustee to undo the harm Koresko's violations caused to the Trusts and the participating plans, the resulting costs will undoubtedly be higher than what would have been charged by an ERISA trustee if the trusts had been properly administered as an initial matter. The district court therefore acted within its discretion in ordering that Koresko pay the costs of appointing the independent trustee – an unremarkable form of relief that has been

applied in many ERISA cases in the past where, as here, there have been repeated or systemic breaches by plan fiduciaries in administering their plans.

ARGUMENT

I. This Court Lacks Jurisdiction under 28 U.S.C. § 1291 to Hear Koresko's Appeal of the District Court's August 4 Order

Koresko argues that this Court has jurisdiction under 28 U.S.C. 1291 to hear this appeal. This is incorrect. Section 1291 states, as relevant, that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States." As this Court has recognized, "[a] 'final decision' is a decision by the district court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment' . . . or one 'by which a district court disassociates itself from a case.'" New Jersey Dep't of Treasury v. Fuld, 604 F.3d 816, 819 (3d Cir. 2010) (quoting Caitlin v. United States, 324 U.S. 229 (1945) and Swint v. Chambers County Comm'n, 514 U.S. 35, 42 (1995)). "While decisions of this Court have accorded § 1291 a 'practical rather than a technical construction,' the statute's core application is to rulings that terminate an action." Gelboim v. Bank of Am. Corp., 135 S. Ct. 897, 902 (2015) (citations omitted) (quoting Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106 (2009)).

The district court's August 4 Order is not a final order appealable under 28 U.S.C. § 1291 because it does not end the litigation on the merits and leave nothing for the court to do but execute the judgment, and therefore is not one through

which the district court has "disassociate[d]" itself from the case. Fuld, 604 F.3d at 819. First, the costs which the Koresko Defendants will eventually have to pay are not yet a sum certain, or an amount that simply can be mechanically determined. Second, the order is not an appealable injunction directed to a party and enforceable by contempt, under 28 U.S.C. § 1292(a)(1), because Koresko was not ordered to pay the costs yet, or to take other action. Nor is the order a receivership order appealable under 28 U.S.C. § 1292(a)(2), or an order that fits within the collateral order doctrine. The Court should therefore dismiss the appeal for lack of jurisdiction.

A. The August 4 Order Was Not Final Because It Was For an Unquantified Amount That Cannot Be Mechanically Calculated

As explained by this Court, "[t]he general rule is that we do not have appellate jurisdiction over a non-final order." Com. of Pa. v. Flaherty, 983 F.2d 1267, 1276 (3d Cir. 1993). Because "[a]n award of unquantified [monetary relief] is interlocutory," postjudgment orders imposing them on parties likewise are "not subject to appellate review as a general rule." Id. Thus, a postjudgment order imposing costs on a defendant is only appealable if it "fix[es] the amount of the [monetary] award or specif[ies] a formula allowing the amount to be computed mechanically", and otherwise "is not a final decision within the meaning of 28 U.S.C. § 1291." Id. (quoting John v. Barron, 897 F.2d 1387, 1389 (7th Cir.)). The order at issue here did neither.

Instead, the August 4 Order imposed an unquantified monetary liability on Koresko for costs that have not yet (fully) accrued, and does not yet order him to pay that money. Instead, it requires that Koresko eventually repay the trust for the costs associated with the district court's appointment of an independent trustee to oversee the Trusts. The order did not and indeed could not yet set those costs as a sum certain; nor did it provide a formula for their mechanical calculation.

Although the district court has held that Koresko will be liable for these costs, this does not mean that it has imposed costs that are capable of mechanical calculation, especially prior to costs being incurred. For instance, in Flaherty, this Court determined that an order apportioning liability for attorneys' fees that had not yet been fully incurred, which allocated 75% of liability to one party and 25% to another but failed to provide the total amount owed, was not sufficiently mechanical to come under the mechanical-computation exception. "An award of a 'proportionate' amount of reasonable attorney's fees . . . lacks the necessary element of finality for purposes of § 1291." 983 F.2d at 1277; see Sun Shipbuilding & Dry Dock Co. v. Benefits Review Bd., 535 F.2d 758, 760 (3d Cir.1976) (per curiam) ("It is a well-established rule of appellate jurisdiction . . . that where liability has been decided but the extent of damage remains undetermined, there is no final order."); Becton Dickinson & Co. v. District 65, 799 F.2d 57, 61 (3rd Cir. 1986) (a

district court order awarding "reasonable attorneys" fees' was not final because had not yet been reduced to definite amount).

The Flaherty decision also explained that it does not serve the interests of judicial economy to allow appeals from postjudgment orders when another appeal is likely to occur upon the issuance of an actual fee determination. 983 F.3d at 1277 ("Furthermore, the likely potential of an appeal on the actual fee determination mitigates any public policy argument based on judicial economy for reviewing the district court's order on the fee issue."). Such is the situation here. The factual issue of which costs constitute "costs associated with the independent trustee's appointment" may be disputed in the district court, requiring further factual determinations in this matter. However those issues are resolved, there is some likelihood that they will result in an additional appeal as to the ultimate costs imposed on Koresko, as determined in a future district court order. See Catlin, 324 U.S. at 233–34 ("The foundation of this policy is not in merely technical conceptions of 'finality.' It is one against piecemeal litigation.").[2] As this Court explained in a similar case, "until the court enters a judgment with the precise amount of damages calculated, the extent of [the party's] liability is unknown." Apex Fountain Sales, Inc. v. Kleinfeld, 27 F.3d 931, 935 (3d Cir.), modified on

[2] The Koresko Defendants have, to date, appealed from district court decisions in this litigation (2:09-cv-988) twelve times, not including the two appeals currently being considered by this Court. See A1673.

other grounds, 30 F.3d 1484 (3d Cir. 1994). The Court also held that the calculation of damages is not merely mechanical when disagreement is expected over the making of those calculations. Id. ("It is more than likely that after the district court resolves the issue, one or both parties will dispute the ultimate amount of damages awarded, leading to a second appeal. This would be contrary to the federal judiciary's general policy against piecemeal litigation."). Because such disagreement is probable, or at least possible here, the August 4 Order was not a final decision under section 1291.

Vitale v. Latrobe Area Hospital, the case relied upon by appellant Koresko, does not compel a different result. 420 F.3d 278, 281 (3d Cir. 2005). In Vitale, the district court concluded that the plaintiffs were entitled to early retirement benefits. Id. at 281. Although the "order did not specifically fix damages, instead referring the matter to [defendant] for calculation of benefits," this Court concluded it had jurisdiction over defendants' appeal of the order because "[t]he parties agree[d] that the benefits calculation required by the District Court would be entirely mechanical: the Plan contain[ed] a precise mathematical formula for calculating the monthly retirement benefit, and the inputs to the formula [we]re all undisputed facts." Id. Therefore, the required calculation was merely mathematical, and this Court had jurisdiction to hear the appeal.

By contrast, the August 4 Order neither instructed Koresko to pay a specified sum, nor did it make him liable for a certain numbers of hours of trustee time at a specified rate. To the contrary, because the time that will be required for the independent trustee to fulfill its duties in winding down the plans, and therefore the corresponding expenses incurred by the trustee were unknown at the time of the Order, and still cannot be predicted with any certainty, the Order simply specified that the Trusts will be pay the expenses as they accrue and Koresko will be required to repay the trusts at the end of the trustee's appointment.

B. The August 4 Order is Not an Injunction For the Purposes of 28 U.S.C. § 1292(a)(1)

Section 1292(a)(1) also allows appeals from interlocutory orders that grant, continue, or modify injunctions. This provision, however, is construed narrowly so as not to swallow the final-judgment rule. In re Pressman-Gutman Co., Inc., 459 F.3d 383, 392 (3d Cir. 2006). "An 'injunction' for the purposes of 28 U.S.C. § 1292(a)(1) is an order '[1] directed to a party, [2] enforceable by contempt, and [3] designed to accord or protect 'some or all of the substantive relief sought by the complaint' in more than a [temporary] fashion.'" Id. (citations omitted). The August 4 Order fails to meet the first two of those requirements.

The August 4 Order is not directed to a party; it appoints a non-party, Manufacturers and Traders Trust Co., to perform some of the independent fiduciary functions previously assigned to the Wagner Law Group, as well as some

additional functions. The order states that Koresko will be responsible for paying Manufacturers and Traders Trust's fees, but it does not direct him to pay them now. Instead, it says that the trusts will pay them and that the court will later determine the amount that Koresko will be required to reimburse to the trusts. An order, like the August 4 Order, directed to a non-party is not an injunction. See NutraSweet Co. v. Vit-Mar Enterprises, Inc., 176 F.3d 151, 154 (3d Cir. 1999) (writ of replevin was directed to U.S. Marshals, not to a party, and therefore was not injunction under section 1292(a)(1)); In re Lorillard Tobacco Co., 370 F.3d 982, 986 (9th Cir. 2004) (ex parte seizure order was not directed to a party and therefore was not injunction).

The August 4 Order does direct Koresko, plan sponsors, insurance companies and financial institutions to comply with requests from Manufacturers and Traders Trust for information and documents, A1630, but that direction does not turn the order into a final or otherwise appealable order directed to a party. Instead, the direction is similar to an order directing property, books, or records to be turned over to a receiver (although it is not an order appointing a receiver, as we discuss infra at 13-15). Such an order "is neither final nor within any category of appealable interlocutory orders." United States v. Chelsea Towers, Inc., 404 F.2d 329, 330 (3d Cir. 1968) (order granting receiver's motion for delivery to him of accounts and deposits held by defendant was not final or appealable); F.T.C. v.

Overseas Unlimited Agency, Inc., 873 F.2d 1233, 1235 (9th Cir. 1989) (order directing party to turn over bank accounts to receiver is a "mere administrative turnover direction," not injunction); see also 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Fed. Prac. & Proc. § 3925 nn. 33-35 (3d ed. 2015).

Moreover, in order to be an injunction for purposes of section 1292(a)(1), an order "must be immediately enforceable by contempt." Hershey Foods Corp. v. Hershey Creamery Co., 945 F.2d 1272, 1277 (3rd Cir. 1991). Here, however, because the order does not direct Koresko to pay the Trustee's fees at this point, but only states that the court will later issue an order directing him to reimburse the plans and specifying the amount, contempt against him is not available. See Santana Products, Inc., v. Compression Polymers, Inc., 8 F.3d 152, 155 (3d Cir. 1993) (where order did not compel party to take any action or restrain it from doing anything, party could not be held in contempt for failure to comply, and therefore party could not appeal from order).

C. The August 4 Order is Not a Receivership Order Under 28 U.S.C. § 1292(a)(2)

Section 1292(a)(2) gives courts of appeals jurisdiction to hear appeals from "interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property." 28 U.S.C. § 1292(a)(2). The purpose of section 1292(a)(2) is to allow appeal "from interlocutory orders affecting control

over the property." Martin v. Partridge, 64 F.2d 591, 592 (8th Cir. 1933); see also Federal Trade Comm'n v. World Wide Factors Ltd., 882 F.2d 344, 348 (9th Cir. 1989); Gulf Refining Co. v. Vincent Oil Co., 185 F. 87, 89 (5th Cir. 1911); 16 Federal Prac. & Proc. § 3925. The section is interpreted narrowly to permit appeals only from the three discrete categories of receivership orders described. Pressman-Gutman, 459 F.3d at 393. The August 4 Order clearly does not refuse to wind up anything or refuse to take steps toward that goal. Nor does the August 4 Order appoint a receiver within the meaning of 1292(a)(2).

Treating the August 4 Order as the appointment of a receiver would not be consistent with the purpose of 28 U.S.C. § 1292(a)(2), which is aimed at allowing a party to object when property is taken from its control. See Pressman-Gutman, 459 F.3d at 393 ("In determining whether a receiver has been appointed, a court must take into account 'the purposes of the receivership and the extent of the powers possible in the situation'"). The August 4 Order does not affect the parties' control over Trust property; the Koresko Defendants lost control over Trust property through the September 16, 2013 and March 13, 2015 district court orders giving control to the Wagner Law Group. The August 4 Order does not change that fact. Instead, it additionally appoints Manufacturers and Traders Trust Co. as a successor to some of the Wagner Law Group's functions and gives Manufacturers and Traders management and investment authority in carrying out those functions.

Thus, even if the district court's September 16, 2013 and March 13, 2015 orders, which are already on appeal, could be considered orders appointing a receiver, the August 4 Order transferring some of Wagner's authority is not an order appointing a receiver for purposes of appeal. See F.D.I.C v. Anderson, No. 97-15558, 1998 WL 141336 at *1 (9th Cir. Mar. 25, 1998) (unpublished) (order merely substituting one receiver for another is not appealable).

D. The Collateral Order Doctrine Does Not Apply to the August 4 Order

To fall within the collateral order doctrine for purposes of appeal, an order must "(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment." Pressman-Gutman, 459 F.3d at 395-96 (internal quotations and citation omitted). To meet this "stringent" standard, the order must meet all three of these requirements. Id. at 396. A failure to meet any of the three criteria renders the collateral order doctrine inapplicable as a basis for appeal, even if the other two criteria are compelling. Id.; Fuld, 604 F.3d at 819. The August 4 Order fails to meet all of these requirements.

Because the district court issued a judgment on the merits of the case on March 13, 2015, the order here is properly viewed as part of the post-judgment proceedings. The Court should therefore look to the scope of these proceedings to determine finality. Courts "treat [a] postjudgment proceeding like a freestanding

lawsuit and look for the final decision in that proceeding to determine the scope of appellate review." JPMorgan Chase Bank, N.A. v. Asia Pulp & Paper Co., 707 F.3d 853, 867 (7th Cir. 2013) (citation omitted). The relevant question for post-judgment orders is "whether the district court's order completely disposes of the postjudgment proceedings, not a single issue within those proceedings. A contrary approach would permit piecemeal appeals of interlocutory orders in ongoing postjudgment proceedings." Id. at 868; see also Solis v. Current Development Corp., 557 F.3d 772, 775-76 (7th Cir. 2009) (post-judgment decision in ERISA case to remove breaching fiduciary as trustee and appoint new independent fiduciary was interlocutory ruling, because "[t]o hold otherwise would invite litigants to appeal every procedural order … resulting in 'an unmanageable proliferation of appeals"); 15B Federal Prac. & Proc. § 3916 (2d ed. 1991). Here, the post-judgment proceedings involve "enforcing compliance with the terms of [the March 13, 2015] Order; addressing the appointment of a permanent Independent Fiduciary to administer and oversee [the trusts] and the Plans; securing an equitable accounting of the assets of the [trusts] and the Plans; and overseeing any other outstanding issues requiring resolution in relation to the [district court's February 6, 2015] Memorandum Opinion and the satisfaction of [the March 13, 2015] judgment." Perez v. Koresko, No. 09-988, 2015 WL 118246, at *2 (E.D. Pa. Mar. 13, 2015) [A323 at 5].

Because the August 4 Order does not secure the equitable accounting referred to in the March 13, 2015 Order or otherwise wrap up the outstanding issues concerning the remaining plan assets, it does not finally resolve the district court's post-judgment proceedings. It does not even resolve issues concerning the fees that Manufacturers and Traders Trust Co. is authorized to charge, but instead expressly states that Koresko's liability for the fees will be determined later. A1621 at 11 ¶ 17. It therefore fails the first collateral order requirement. See 15B Federal Prac. & Proc. § 3916 ("Appeal ordinarily should not be available as to any particular post-judgment proceeding before the trial court has reached its final disposition").

The August 4 Order also fails the second collateral order requirement because it does not "resolve an important issue completely separate from the merits of the action." Pressman-Gutman, 459 F.3d at 396. Here, the August 4 order is little more than a follow-on to the court's earlier appointment of an independent fiduciary and its determination in the judgment concerning Koresko's repeated breaches of his duties as a fiduciary to ERISA plans, including by misappropriating plan assets. Perez v. Koresko, No. 09-988, 2015 WL 118246 [A323 at 1-4]. Cf. Pressman-Gutman, 459 F.3d at 396 (collateral order doctrine does not apply to orders appointing a guardian ad litem for an ERISA plan because the orders "are enmeshed with the factual and legal issues comprising [a] claim against the Plan

administrators"); Securities & Exchange Comm'n v. Black, 163 F.3d 188, 195 (3d Cir. 1998) (order awarding fees in receivership is not separate from the merits because it "is intimately related to the undecided issue of the ownership of the pooled account funds and a final distribution of the receivership assets").

Finally, to the extent that Koresko challenges the August 4 Order insofar as it concerns fees, the order is also effectively reviewable after the district court issues a final judgment in the post-judgment proceedings, because Koresko may effectively challenge the imposition of fees at that time. See Black, 163 F.3d at 195 ("there is no reason why this fee order could not be reviewed following a final judgment"); Sec. & Exch. Comm'n v. Independence Drilling Corp., 595 F.2d 1006, 1008 (5th Cir. 1979) (order awarding attorneys' fees, but postponing determination of amount, was not final; only later order, directing payment of bills for fees, was final and appealable); Mekdeci By & Through Mekdeci v. Merrell Nat. Labs, 711 F.2d 1510, 1523 (11th Cir. 1983) (order in controversy not final when court announced intention to award costs but had yet to fix amount); cf. Law Offices of Beryl A. Birndorf v. Joffe, 930 F.2d 25 (7th Cir. 1991) (cited in Black) (interim fee awards do not cause irreparable harm unless appellant shows there is danger fee cannot be retrieved at end of litigation if it be determined that it was erroneously awarded).

There is a "longstanding rule that a determination as to liability, prior to a determination on the issue of damages or other relief requested, is not a final appealable judgment." Morgan v. Union Metal Mfg., 757 F.2d 792, 795 (6th Cir. 1985). In the Third Circuit, "a decision that fixes the parties' liability but leaves damages unspecified is not final, and the adjudication of liability is not immediately appealable." Gen. Motors Corp. v. New A.C. Chevrolet, Inc., 263 F.3d 296, 311 n.3 (3rd Cir. 2001). Here, the August 4 Order expressly states that: "[T]he Trustee shall be paid out of the Trust assets . . . At the close of its appointment, the Court shall issue a separate order specifying the total amount the Koresko Defendants are liable to the Plans to restore on account of this appointment." A1621 at 11 ¶ 17.

II. The District Court Had Jurisdiction to Enter the August 4 Order

Koresko also argues that the district court was divested of jurisdiction to issue the Order once Koresko appealed the judgment on the merits. Koresko Br. at 8-9. This is not correct.

It is true that, as a general rule, the timely filing of a notice of appeal divests the district court of jurisdiction over the case while the appeal is pending. Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982); United States v. Leppo, 634 F.2d 101, 104 (3d Cir. 1980); Venen v. Sweet, 758 F.2d 117, 120–21 (3d Cir. 1985) (an appeal takes away the district court's "power to act, in all but a

limited number of circumstances"). However, this Court has recognized numerous exceptions to the "judge-made" Griggs rule, which "is designed to prevent the confusion and inefficiency that would result if both the district court and the court of appeals were reviewing the same issues simultaneously." Mary Ann Pensiero, Inc, v. Lingle, 847 F.2d 90, 97 (3d Cir. 1988). Thus, this Court has recognized exceptions, among other things, that "allow the district court to retain jurisdiction to issue orders staying, modifying, or granting injunctive relief, to review applications for attorney's fees, to direct the filing of supersedeas bonds, to correct clerical mistakes, and to issue orders affecting the record on appeal and the granting or vacating of bail." Sheet Metal Workers' Int'l Ass'n Local 19 v. Herre Bros., 198 F.3d 391, 394 (3d Cir. 1999). Venen, which Defendants cite for the proposition that the district court was divested of jurisdiction upon filing off the appeal, specifically notes that there are a number of areas in which district courts are not divested of jurisdiction during the pendency of an appeal, and includes a nonexhaustive list of such circumstances. 758 F.2d at 121 n.2 (holding that district court is not divested of jurisdiction to, for example, determine attorneys' fees, and modify or grant injunctions); see also West v. Keve, 721 F.2d 91, 95 n. 5(3rd Cir. 1983) (during pendency of appeal, district court retains jurisdiction to consider fee application). Indeed, "[a]s a prudential doctrine, the rule should not be applied

when to do so would defeat its purpose of achieving judicial economy." Lingle, 847 F.2d at 97 (citations omitted).

The district court's appointment of a permanent independent fiduciary after appeal of an order in which it expressly retained jurisdiction to "address[] the appointment of a permanent Independent Fiduciary to administer and oversee [the Trusts] and the Plans," 2015 WL 1182846, at *2, falls comfortably within the kinds of exceptions to Griggs that this Court has recognized. First, because it requires Koresko to pay the costs associated with the new trustee's appointment at the end of the appointment, the August 4 Order is similar to the type of fee award that this Court and others have routinely held may be imposed by a district court during the pendency of an appeal. See Lingle, 847 F.2d at 97-98 (discussing cases); Solis v. Malkani, No. CIV. WDQ-00-3491, 2010 WL 311858, at *2 (D. Md. Jan. 20, 2010) (concluding that supersedeas bond order requiring defendant to prepay potential costs of an appointed independent fiduciary was appropriate "affirmative injunction" remedy), aff'd, 638 F.3d 269 (4th Cir. 2011). Likewise, the Order is one that grants or modifies injunctive relief: it appointed a new and permanent independent trustee to take over most of the tasks from the previously-appointed independent fiduciary of administering the Trusts from that time forward.[3] Thus,

[3] The Wagner Law Group was appointed as part of a preliminary injunction, Solis v. Koresko, 2013 WL 5272815, *1 (Sept. 17, 2013) (appointment was a "limited injunction order for a limited period"). The March 2015 order entered a permanent

although the August 4 Order is not an appealable injunction in the narrow sense required for an interlocutory appeal under 28 U.S.C. § 1292(a)(1), because it does not order Koresko to pay the fees incurred by the independent trustee until some time in the future and thus it is not immediately enforceable in contempt, supra at 11-13, and, for the same reasons, it is also not yet an appealable fee award, the district court nevertheless had jurisdiction to issue the order during the pendency of the appeal under these well-recognized exceptions to Griggs. Furthermore, perhaps most simply, it can be seen as an order "to aid in the execution of a judgment." Sheet Metal Workers', 198 F.3d at 394 (quoting Showtime/The Movie Channel Inc. v. Covered Bridge Condo. Ass'n, 895 F.2d 711, 713 (11th Cir. 1990)).

Moreover, practically speaking, the district court needed to issue this order postjudgment. After it issued its March 13 Judgment and Order deciding the merits of the case, the court asked the Secretary to provide it with three bids from independent fiduciaries willing to receive appointment as trustee over the Trusts. After receiving these bids, the court selected Manufacturers & Traders Trust Company as the new trustee and concluded that it would ultimately hold Koresko liable for the costs of that appointment. None of these actions affected any of the issues involved in the pending appeal of the district court's judgment on the merits. Thus, there was no risk here "of the confusion and inefficiency that would result if

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injunction, A326-7, and the August 4 Order modified the previous appointment, A1621-31.

both the district court and the court of appeals were reviewing the same issues simultaneously." Lingle, 847 F.2d at 97.

III. The District Court Acted Within Its Discretion in Determining that it Would Hold Koresko Liable for the Costs Associated with the Appointment of an Independent Trustee in this Case

Postjudgment orders are reviewed on appeal for abuse of discretion. See T.D.D. Enterprises, Inc. v. Yeaney, 83 F. App'x 492, 494 (3d Cir. 2003) (reviewing district court attorneys' fees award for abuse of discretion); Coltec Indus., Inc. v. Hobgood, 280 F.3d 262, 269 (3d Cir. 2002) (district court's denial of post-judgment motion reviewed for abuse of discretion).

On the merits, Koresko argues that the district court erred by imposing liability on him for the costs of the independent trustee's appointment. Specifically, Koresko argues that imposition of liability was improper because the trust agreements at issue make the Trusts and the adopting employers liable for "any expenses incurred by the Trustee in connection with its administration of the Trust[s]." In other words, Koresko seeks to avoid liability on the grounds that the Trusts envisioned that other parties would pay for a trustee's expenses, and that those "costs relating to the [independent] trustee would have been necessary regardless of whether Mr. Koresko did or did not violate any fiduciary duties". Koresko Brief at 10.

This argument is flawed for several reasons. First, the August 4 Order appoints Manufacturers and Trading Trust Co. to serve in a threefold role, not simply as trustee, but as "Trustee, investment advisor, and fiduciary" for the Trusts. A1621 at 1. Therefore, while it is referred to as the Trustee, Manufacturers and Trading Trust Co. has duties greater than the trustee contemplated by the trust documents. See A1674 at 3 (Feb. 23, 2015 DOL Response to Order to Discuss Next Steps in Case) (proposing that "if the trustee selected has both the expertise and authority to make investment decisions on behalf of the Trusts, the Court could dispense with the need to retain an investment advisor or other named fiduciary," but that in the alternative, the court could "retain an investment professional to act as an Independent Fiduciary with authority to direct a directed Trustee (who could be retained at minimal cost to take legal custody of Plan assets).").

Second, the independent trustee must now take up the task of "retitl[ing] ownership of [trust] assets to the full control of the Trustee for the benefit of" the Trusts. See A1621 at 2. Locating, recovering, and reinvesting all the assets Koresko improperly diverted from the Trusts is a large task that will take considerable resources to complete. See Perez v. Bar-K, Inc., No. 14CV05549JSWJSC, 2015 WL 4454785, at *9 (N.D. Cal. June 4, 2015) (order in ERISA case imposing costs on defendant for appointment of independent fiduciary

was appropriate because of the increased costs the trustee would incur to undo the damage defendant's ERISA violations caused).

Third, the August 4 Order imposes new duties on the new trustee regarding district court oversight. For instance, the trustee must provide the court and the Secretary with certain monthly and annual reports. See A1621 at 3. This additional oversight is a direct result of Koresko's ERISA violations, and will require the new trustee to expend additional resources beyond that of a typical ERISA trustee.

Finally, the type of relief awarded in the district court's August 4 Order is unremarkable, as other courts have made similar awards in the past requiring breaching fiduciaries to pay for independent trustees' costs. See Chao v. Morris, No. CV-06-1581-PHX-DGCUN, 2007 WL 1655552, at *1 (D. Ariz. June 6, 2007) (requiring defendant to pay costs of independent trustee's appointment); Solis v. Malkani, No. CIV. WDQ-00-3491, 2010 WL 311858, at *2 (D. Md. Jan. 20, 2010), aff'd, 638 F.3d 269 (4th Cir. 2011) (same); Chao v. Wagner, 2009 WL 102220, at *4 (N.D. Ga. Jan. 13, 2009)(same); Herman v. Enhance Memory Products Inc., 2000 WL 33236601, at *1 (C.D. Cal. Oct. 2, 2000)(same); Solis v. Cardiografix, Inc., 2012 WL 3638548, at *4 (N.D. Cal. August 22, 2012)(same). As another court noted, when defendants' fiduciary breaches lead directly to the

need to appoint an independent fiduciary, it is only just for the defendants to pay those costs, to keep the participants from suffering still further harm:

> We have required defendants to pay for costs incurred by the independent fiduciary, including attorneys' fees, that resulted from the need to remove [defendant] as trustee due to his already-determined breaches of fiduciary duty. Those costs must be borne by [defendant] in order to prevent the former participants, whom [defendant] shortchanged in the initial distributions, from being further injured.

Chao v. Current Dev. Corp., No. 03 C 1792, 2009 WL 393862, at *4 (N.D. Ill. Feb. 13, 2009).

Therefore, the district court acted well within its discretion when it ordered the Koresko Defendants to pay the costs associated with its appointment of an independent trustee.

CONCLUSION

For the reasons discussed above, this Court should dismiss this appeal in No. 15-3141 for lack of jurisdiction. Alternatively, this Court should hold that the district court had jurisdiction to enter the August 2015 order while the appeal in

No. 15-2470 was pending and acted within its discretion in ordering that Koresko pay the costs associated with the appointment of an independent trustee.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I, Robin Springberg Parry, hereby certify that this brief complies with the type-volume limitations of Fed.R.App.P. 32(a)(7)(B). This brief contains 6,432 words, exclusive of the exempted portions pursuant to Fed.R.App.P. 32(a)(7)(B)(iii). This word count was provided by the Microsoft Word 2010 software program with which the brief was produced.

Date: February 10, 2016

/s/ Robin Springberg Parry
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CERTIFICATION PURSUANT TO LAR 31.1

I, Robin Springberg Parry, hereby certify that the electronic version of this brief was scanned with McAfee VirusScan Enterprise ver. 8.8 virus scanning software and was found to be free of any currently known viruses.

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

Date: February 10, 2016

/s/ Robin Springberg Parry
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CERTIFICATE OF SERVICE

I, Robin Springberg Parry, hereby certify that on this 10th day of February, I caused a true and correct copy of the foregoing written response in Perez v. Koresko (No. 15-2470) to be filed electronically with the court using the CM/ECF system, which will then send a notification of such filing to the following:

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