20-2358

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

In re: LEHMAN BROTHERS, INC.,

Debtor,

THE LEHMAN BROTHERS INC. DEFERRED COMPENSATION DEFENSE STEERING COMMITTEE as Attorney in Fact for those Specified,

Respondents-Appellants,

—against—

JAMES W. GIDDENS, as Trustee for the SIPA Liquidation of Lehman Brothers Inc.,

Petitioner-Appellee.

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
ADVERSARY PROCEEDING INDEX NO: 19-01368-SCC

ESEP COMMITTEE'S MEMORANDUM OF LAW IN OPPOSITION TO THE TRUSTEE'S PETITION FOR PERMISSION FOR A DIRECT APPEAL

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Plaintiff The Lehman Brothers Inc. Deferred Compensation Defense Steering Committee as Attorney-in-Fact for Those Specified in the Complaint in this case (the "ESEP Committee" or "appellants"), by its counsel, Scarola Zubatov Schaffzin PLLC, submits this Memorandum in Opposition to the Trustee's Motion for Permission for a Direct Appeal Pursuant to 28 U.S.C. §158(d)(2)(A).

Preliminary Statement

The Trustee's motion grossly mischaracterizes the issues on appeal and the bankruptcy case's current circumstances. The Trustee also mischaracterizes the law governing when this Court should exercise discretion to allow direct appeal — generally, in a rare instance of pressing issues with broad implications, not a case where a Trustee merely wants to skip a step in the ordinary judicial review process where, as here, it perceives tactical advantage or even just seeks the expediency of less litigation with an adverse party. If this case made sense for direct appeal, then, as shown below, very few would not.

Before turning to the further reasons direct appeal is unwarranted, the appellant ESEP Committee points out that the case's true background is wholly lost in the Trustee's discussion. This case involves pension rights of 344 people (or, now, their successor estates) who funded their own pensions in the late 1980s with substantial portions (up to 50% for each of four years) of their earned income. *See* Bankr. Dkt. #8281. That group now is at an average age of 78, many

of its members relied upon these pensions as sole or principal sources of retirement income, and of course, not a penny has been paid to them since Lehman's bankruptcy. *See id.* They were owed approximately $270,000,000 at the time of the 2008 bankruptcy, and that amount would have grown to over $1,000,000,000 over time had there been no bankruptcy. *See id.*

For five years, *i.e.*, until 2013, the Trustee did not engage with them on *any* of numerous issues raised in their proofs of claim and then spent years litigating to avoid the parties' negotiated arbitration clause, which placed the case on a much longer litigation track. The Trustee then avoided a central issue on this appeal by attacking only its procedural posture rather than its merits (leading to a virtually unprecedented four-year appellate detour in the District Court).[1] Ironically, after these delays *caused by the Trustee*, the Trustee (and the Bankruptcy Court) blames appellants. *See, e.g.,* Trustee's Brief ("Tr. Br.") at 16. But, in fact, this litigation's long path is the result of the Trustee's calculated choices (an issue to be considered directly on this appeal (a laches defense, *see* Adversary Proc. Dkt. #10, at 53-73) as discussed below).

While appellants would prefer to be paid sooner than later, as discussed herein, the issues implicated by this appeal are so significant and life-altering for

[1] Appellants have identified the appeal to the District Court as related to the earlier case and for assignment to the same judge.

them that they want, above all, to be given the thorough treatment cases normally get in the courts. And for reasons specific to the four-year detour in the District Court mentioned above, they believe that Court (hopefully, by the same judge who heard the earlier appeal) should hear their arguments now precisely because the four-year District Court detour is intertwined with the Trustee's fact-intensive allegations of delay at the heart of an issue this appeal must address (fact questions glossed over by the Trustee). As noted above, the Trustee controlled completely this 12-year-long saga's course and is responsible for any delay.

Turning to the only two grounds raised by the Trustee for direct appeal, first, the Trustee mischaracterizes the issues on appeal in discussing its first point — *viz.*, that there is a pressing issue under 11 U.S.C. §541(b)(7) requiring Second Circuit guidance now, as a general public good, to resolve ongoing confusion in the law. There is no such pressing issue or issue of public import or confusion currently affecting the world outside of this case. The issue under §541(b)(7) upon which the Trustee focuses — one of four issues on this appeal (with two of them being heavily fact-intensive inquiries rather than pure legal questions) — has been addressed in only "several" bankruptcy court cases, Tr. Br. at 10, the latest being from 2012, and is of no current or pressing consequence to anyone except these parties. While this case's consequences are enormous for these appellants,

- there has *never* been a single district or circuit court decision on the §541(b)(7) issue;
- the parties identify only five earlier bankruptcy court decisions on this issue from any bankruptcy court since §541(b)(7) was enacted in 2005;[2]
- the most recent of those few bankruptcy court decisions is from 2012 — eight-years-old;
- there is no indication this issue has been litigated or is now being litigated in any other case since the last bankruptcy court decision on this issue in 2012; and
- there is no reason cited by the Trustee, and none in fact, why the §541(b)(7) issue would require this Court's immediate attention, leapfrogging District Court review, as a matter of "public importance," as that term is used in the jurisprudence of direct appeals.

Thus, the §541(b)(7) issue is a matter of first impression above the level of the bankruptcy courts, with no pressing need for this Court's guidance to assist

[2] Notably, despite the inexplicably incorrect statement by the Trustee that no authority supports this appeal, one of those decisions does support appellants' position. *See In re Twin City Hosp.*, 10-64360, 2011 WL 2946172 (Bankr. N.D. Ohio July 21, 2011) (§541(b)(7)(A)&(B)(i)(II) covers top hat deferred compensation plans). Moreover, the Trustee even acknowledges that contrary decisions have conflicting reasoning. *See* Tr. Br. at 14.

some abundance of other litigation or answer some critical question with widespread impact outside this case. While §158(d)(2)(A)(i) permits direct appeal as to questions of law for "which there is no controlling decision of the court of appeals for the circuit," that phrase does not mean an issue qualifies solely because it is an issue of first impression outside the bankruptcy courts. These parties care. There is no reason for this Court to believe anyone else does. (§I.A. below)

Further still, the fact that two of four issues on appeal are so fact-laden is further reason direct appeal is not warranted. (§I.B. below)

As to the Trustee's second, and only other, argument — that direct appeal will materially advance the progress of the bankruptcy — again, the Trustee is brazenly incorrect. There is no showing by the Trustee on this record that it will do so, the bankruptcy record shows in detail that it will not (§II.A. below), and even if the Trustee's bald assertion were true in any part, it would not be a material reason for direct appeal under the guidance of governing caselaw (§II.B. below).

Finally, appellants explain briefly, in §III. below, that common sense and the equities here weigh heavily against exercising discretion to allow direct appeal. This limited-purpose brief does not permit full explication of the case's merits or procedural history. But appellants points out that the Trustee's assertions of their delay is belied by the true procedural history revealed in 12 years of dug-in litigation by the Trustee against these pensioners. As stated above, the ESEP

Committee believes any issue of delay belongs in the first instance in the District Court because it is interwoven with the earlier years-long delay in that court. The Trustee, not 344 elderly retirees seeking their pensions, has of course held the controls of the bankruptcy's progress throughout. The Trustee cannot now colorably say that appellants should be rushed along because the Trustee finds the ordinary path of litigation inconvenient.[3]

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[3] Appellants note that while the merits of an appeal cannot be litigated on this motion, the Trustee has made extensive assertions about the merits throughout its brief. For avoidance of doubt, appellants point out that the merits are in their favor. Briefly, the language of §541(b)(7), on which the ESEP Committee relies, is clear and unambiguous. The decision below and the few other contrary bankruptcy court decisions recognize this but override that language because of a belief that Congress got the language wrong and did not mean for it to apply as it reads. *See, e.g., In re The Colonial BancGroup, Inc.*, 436 B.R. 695, 712-13 (Bankr. M.D. Ala. 2010) (holding that "literal application of [the] statute will produce a result demonstrably at odds with the intention of its drafters"); *see also* Bankr. Dkt. #15117 at 15. Neither a bankruptcy court nor any court, however, may rewrite a statute based on its belief as to what should be or should have been written. The statute's plain language — effectively ignored and rewritten out of the statute by the bankruptcy court — controls and unambiguously requires that the deferred compensation at issue here be excluded from the bankruptcy estate. Faced with such clear statutory language despite a belief that it might have been meant to be different, the Supreme Court has often stated that any such perceived error in the language (not that there is one here) is for Congress, not the courts, to correct. *See, e.g., Bostock v. Clayton County, Georgia*, -- S. Ct. --, 2020 WL 3146686, at *3 (June 3, 2020) (Gorsuch, J., writing for the Court) ("the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit").

The ESEP Committee also points out that the basis for the Bankruptcy Court's

Argument

The Trustee's motion does not present sufficient reason under this Court's criteria for direct appeal (§§I. and II. below), or as a matter of common sense and sound practice, to short-circuit the ordinary appellate process and deprive the ESEP Committee of its right to be heard before the District Court that, as discussed in §III. below, is uniquely positioned to address the significant issues on this appeal.

While the Trustee mentions only in passing this Court's leading decision on direct appeals in *Weber v. U.S.*, 484 F.3d 154 (2d Cir. 2007), and quotes some decontextualized language from that decision, Tr. Br. at 9, 14-15, the Trustee fails entirely to acknowledge that the considerations articulated in *Weber* militate strongly against its present motion. Tackling the application of the then-newly enacted direct certification statute as "a matter of first impression," *id.* at 157, this Court in *Weber*, recognized that the acceptance of a direct appeal is a matter of "discretionary jurisdiction," *id.* at 158, and that "Congress has explicitly granted us plenary authority to grant or deny leave to file a direct appeal, notwithstanding the

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conclusion that Congress got the statute's language wrong is that it sees, incorrectly, a conflict between §541(b)(7) and certain provisions of ERISA and federal tax law. Such a conflict, if there were one, would not permit a court to override statutory language, as the Bankruptcy Court did. But to be clear, appellants' brief below explains in detail no such conflict exists. *See* Adversary Proc. Dkt. #10, at 27-33.

presence of one, two, or all three of the threshold conditions" under §158(d)(2). *Id.* at 161. This Court further held, in essence, that a direct appeal should be the rare exception rather than the rule *even where the statutory criteria allowing direct appeal under the statute are met*:

> "*The focus of the statute is explicit: on appeals that raise controlling questions of law, concern matters of public importance, and arise under circumstances where a prompt, determinative ruling might avoid needless litigation.*"
>
> ***
>
> "[A]lthough Congress emphasized the importance of our expeditious resolution of bankruptcy cases, *it did not wish us to privilege speed over other goals*; indeed, speed is not necessarily compatible with our ultimate objective — answering questions wisely and well. *In many cases involving unsettled areas of bankruptcy law, review by the district court would be most helpful.* Courts of appeals benefit immensely from reviewing the efforts of the district court to resolve such questions. Permitting direct appeal too readily might impede the development of a coherent body of bankruptcy case-law.... We believe that Congress was aware of the dangers of leapfrogging the district court in the appeals process."

Id. at 158, 160 (emphases added).

This case presents neither pressing need for review of unsettled matters of public importance (§I. below) nor even the benefits of expedition (§II. below). To the contrary, expedition here would in fact have the inequitable effect of denying appellants review in the District Court of fact-intensive issues that, as noted above and as explained further in §III., involve that District Court's earlier proceedings. This is no more than an effort by a party Trustee to bypass the ordinary judicial

review process at the other party's expense, with no broad benefit such as §158(d)(2)(A) requires.

I.

THE TRUTEE HAS NOT SHOWN THAT THIS APPEAL PRESENTS A PURE QUESTION OF LAW THAT IS A PRESSING MATTER OF PUBLIC IMPORTANCE

The Trustee's argument that the issue of "whether 11 U.S.C. §541(b)(7) removes from the LBI estate the amounts Appellants deferred pursuant to the ESEP [Agreements]," Tr. Br. at 10, warrants direct appeal because of the issue's broad importance and the need for immediate and decisive Second Circuit authority fails. To begin, the Trustee makes no showing at all of a pressing need for this Court's immediate review to clarify current confusion about the law. The Trustee at most states that this Court can provide "definitive precedent" as to what it calls an "important question," Tr, Br. at 3, 10, but then actually asserts, albeit incorrectly,[4] that "every court that has considered the issue" has come out its way, Tr. Br. at 13. The Trustee, therefore, obviously makes no argument for a need to resolve confusion. Indeed, the most it argues for any purported urgent guidance is that it deems these earlier decisions to be "non-precedential," Tr. Br. at 14, though

[4] As discussed at Fn. 1, *supra*, that is not the case.

it does not even attempt to explain how or why any earlier decisions would be non-precedential.

Of course, it identifies no other pending case needing guidance. The same arguments made by the Trustee could be made about any appeal where one issue has been addressed in relatively few decisions. That circumstance alone does not warrant direct appeal — if assertions of those circumstances alone did, few bankruptcy appeals would not be appealed directly to this Court.

Interpretation of §541(b)(7) in fact is both (i) not an issue that requires immediate circuit court review and, as well, (ii) is only one issue among a number of others in the appeal in which fact-intensive inquiries predominate.

A. *The Trustee's Issue Has No Pressing Import Outside of This Case.*

The Trustee argues for a direct appeal because, it contends, this case presents an issue as to which there is no controlling caselaw in this circuit; but even if §541(b)(7) were not crystal-clear in appellants' favor, this hardly-ever-litigated issue does not call for discretion to allow a direct appeal because it has not yet been addressed by any district or circuit court and has no "public importance."

The Trustee asserts that treatment of deferred compensation plans under §541(b)(7) "has arisen, and likely will continue to arise, with some frequency," such that this is "a matter of public importance." Tr. Br. at 2, 9-10. This "frequency" assertion is objectively false: in the 15 years since §541(b)(7) was

enacted in 2005, there have been only five bankruptcy court decisions on this issue throughout the whole nation — none from within this circuit and the most recent from *anywhere* being from 2012.[5] Such issues should be permitted "to percolate through the normal channels," *Weber, supra*, at 160, rather than being sent on a fast-track to this Court. *See, e.g., In re Marrama*, 345 B.R. 458, 474 (Bankr. D. Mass. 2006) ("While there is no controlling case law in this circuit, the case law above reflects that there is no significant dispute regarding the applicable standard for looking at pending cases. This is not an issue of significant proportion or one that is certain to arise repeatedly"); *compare In re Wright*, 492 F.3d 829, 831-32 (7th Cir. 2007) (accepting direct appeal where, in contrast to this case, "the issue not only has divided the bankruptcy courts but also arises in a large fraction of all consumer bankruptcy proceedings," and "[l]ower litigation costs for thousands of debtors and creditors may be achieved by expediting appellate consideration of this case").

The authority governing the Trustee's assertion that this is a "matter of public importance" under §158(d)(2)(A)(i) presents an even greater obstacle to the extraordinary step of immediate circuit court review. With no other decision since 2012 or other current litigation, there is no urgent need for this Court to jump in to

[5] The Trustee itself admits the reality that only "[s]everal bankruptcy courts and one bankruptcy appellate panel" have opined on this issue since §541(b)(7) was enacted in 2005. *See* Tr. Br. at 10.

quiet a troubled, active, confused litigation landscape. *See*, *e.g.*, Collier on Bankruptcy ¶5.06[4][b] (16th ed. 2015) ("The bar for certification under this standard should be set high. A 'matter of public importance' should transcend the litigants and involve a legal question the resolution of which will advance the cause of jurisprudence to a degree that is usually not the case.... Alternatively, a court may find a matter to be of public importance if it could impact a large number of jobs or other vital interests in a community"); *In re Lehman Bros. Inc.*, 13 CIV. 5381 DLC, 2013 WL 5272937, at *5 (S.D.N.Y. Sept. 18, 2013) (declining to certify where "a direct appeal would [not] advance the development of the law to an unusual degree, or impact the public at large"); *Mark IV Industries, Inc. v. New Mexico Env. Dept.*, 452 B.R. 385, 388-89 (S.D.N.Y. 2011) ("Public importance exists when the matter on appeal 'transcend[s] the litigants and involves a legal question the resolution of which will advance the cause of jurisprudence to a degree that is usually not the case.' 'An appeal that impacts only the parties, and not the public at large, is not a matter of public importance'"); *In re Conex Holdings, LLC*, 534 B.R. 606, 611 (D. Del. 2015) ("The fact that an appeal will affect other parties to Debtors' bankruptcy does not establish an issue of public importance"); *In re Brannan*, 02-16647, 2013 WL 1352350, at *3 (Bankr. S.D. Ala. Apr. 3, 2013) ("While the outcome of this litigation is of great importance to the parties involved, its conclusion does not rise to the level

contemplated by § 158(d)(2)(A)(i)"); *WestLB AG v. Kelley*, 514 B.R. 287, 293 (D. Minn. 2014) ("True, the trustee has identified two investors in the SPEs who were forced to declare bankruptcy as a result of Petters's fraud, and whose bankruptcy cases now await the outcome of this case. But this does not represent the kind of broad impact on the public at large that renders a case a 'matter of public importance'").

B. *This Appeal Presents Numerous Fact-Intensive Issues Presented and Hence Is Not Appropriate for that Reason as Well.*

This appeal does not present an isolated pure legal question, as the Trustee asserts it does. Direct appeal is not warranted because this appeal presents numerous fact-intensive issues — additional issues beyond §541(b)(7) applicability — barely mentioned by the Trustee.

As this Court recognized in *Weber*, "Congress intended … to facilitate our provision of guidance on *pure questions of law*." *Id.* at 158 (emphasis added) (quoting H. R. Rep. No. 109-31, at 148-49, U. S. Code Cong & Admins. News 2005, 88, 206 and noting that Congress did not expect that [the statute] would be used to facilitate direct appeal of 'fact-intensive issues,' but rather 'anticipated that ... [for such issues] district court judges or bankruptcy appellate panels' would suffice)"). Neither *Weber* nor any case cited by the Trustee holds that there should be direct appeal in a fact-intensive appeal solely because *one* discrete question of

law can be isolated. Again, the Trustee has made no showing to the contrary, and this argument for direct appeal fails for this additional reason.[6]

II.

A DIRECT APPEAL WILL NOT MATERIALLY ADVANCE THIS CASE

The Trustee also seeks a direct appeal based on §158(d)(2)(A)(iii) to "materially advance the progress" of the bankruptcy. The Trustee, however, makes no actual particularized case for "material advancement." The assertion is just nonsensical bluster belied by all relevant objective facts in the bankruptcy record. Additionally, even if what the Trustee baldly asserts about possible "advancement" factors were accurate, applying those factors does not warrant direct appeal under applicable law.

A. *The Trustee Has Not and Cannot Make a Showing that an Immediate Appeal in this Court Would Result in "Material Advancement."*

The Trustee contends that, in substance, it is in a hurry to close out the LBI bankruptcy, and moving this dispute along would allow it to achieve that. While

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[6] The Trustee cites two decisions, *see* Tr. Br. at 17-18, holding that, on a direct appeal, a court *may* also hear the entire appeal and not just the part of it addressed to the issue meriting direct review. No one disputes that it *may* hear the entire appeal, but neither those cases nor any others research has revealed hold that it *should* hear such an appeal, where as here fact issues predominate.

the Trustee states, without citation to anything whatsoever, that appeals involving these claimants are "[t]he only matters standing in the way of a final distribution to creditors and closure of the LBI estate," Tr. Br. at 15, there is no record that that is in fact true. The record, in fact, shows unequivocally that the Trustee's claim *is false*. Indeed, while the Trustee, again without citation or even any elaboration, states flatly that the ESEP Committee is "simply wrong" about the state of the bankruptcy estate on this topic, *id.* at 15, n.9, the objective evidence from the bankruptcy court's docket, including the Trustee's own filings, tells a very different story — there are many pending controversies, and the Trustee, if it chose, might be able to close the estate while this and many other issues resolve in some post-estate "vehicle" in the years ahead. The record makes one thing clear: this case is not the key to estate closure.

Specifically, the Trustee has often proposed, since April 2019, closing the estate and creating a "vehicle" to handle the many estate matters still open. *See, e.g.*, Bankr. Dkt. #14906, ¶34; 15018, ¶22. If that is possible, the Trustee could do that now, leaving this issue and others to that vehicle for resolution. It has never explained why it could not, despite the ESEP Committee pointing out this precise issue in earlier litigation briefs. *See* Adversary Proc. Dkt. #10, at 96-97.

Proving that the Trustee could use such a vehicle to close the estate today, including this litigation in it, the Trustee's semi-annual public reports disclose

innumerable other matters, many at least as complex as this case, which it states could continue in such a vehicle. As examples:

- at the time the Trustee first proposed its "vehicle," it was litigating a $17 billion net operating loss calculation with New York State and described the issues as "complicated," such that its litigation would require extensive tax analysis "sufficiently complex so as to divert significant resources" from the estate (Bankr. Dkt. #15036, ¶¶3, 28); this dispute would have been included in the Trustee's proposed "vehicle," demonstrating its availability for matters like this case and even more complex than this case;[7]
- the Trustee is engaged in intensive litigation to recover a $230,000,000 judgment together with a Lehman affiliate, including litigation in Saudi Arabia; the Trustee has stated it might actually transfer *that* litigation to its proposed "vehicle;"
- the Trustee is still marshaling assets from Lehman counterparties, with a prospect of issuing new subpoenas for new efforts;
- the Trustee is still identifying new defendants for group antitrust litigation;
- the Trustee is pursuing a part of $4.275 billion in recovery from antitrust and other financial industry misconduct; and

[7] Since the proposal, that dispute apparently settled.

- the Trustee is pursuing ongoing securities litigation recoveries, including three possible new "class action" cases.

See Bankr. Dkt. #15094, at 5-7.

With these numerous other open matters affecting the estate, some possibly to be open for a long time to come, it is simply false that an appeal in this case is the obstacle to closing the estate. The Trustee's assertion is contradicted by the bankruptcy court record. If the Trustee wanted to close the estate in favor of its other conceived vehicle, it could do so now, and indeed could have done so long ago.

B. *Even the Trustee's Assertions of Expediency, if Taken as Correct, Do Not Warrant Certification Under the Governing Analysis.*

Normally, "[i]n determining whether to certify the appeal, the Court must determine whether there is anything 'extraordinary or urgent about this situation that recommends departing from the standard appellate process.'" *In re Aerogroup Intl., Inc.*, BR 17-11962 (CSS), 2020 WL 757892, at *4 (D. Del. Feb. 14, 2020) (internal citations omitted). That high bar is not met here. The mere fact that one party, *i.e.*, the Trustee, wishes to speed the case along so that it can avoid the inconvenience of this litigation, close out the LBI bankruptcy as a whole or pay

other parties the money claimed by appellants is insufficient to deprive the ESEP Committee of its normal appellate rights, as courts have repeatedly held.[8]

III.

COMMON SENSE AND THE EQUITIES ALSO ARGUE AGAINST CERTIFICATION

This is an especially unattractive case for the Trustee to argue for expediency at appellants' expense. This bankruptcy is 12 years old, and appellants

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[8] *See id.* at *5 (D. Del. Feb. 14, 2020) ("[T]he mere fact that the Chapter 11 cases are awaiting 'official closure' does not constitute an 'extraordinary or urgent' situation 'that recommends departing from the standard appellate process'"); *In re Wagstaff Minnesota, Inc.*, BR 11-43073, 2011 WL 5085100, at *2 (D. Minn. Oct. 26, 2011) ("Debtors correctly point out that there is uncertainty surrounding reorganization while an appeal is pending. However, … uncertainty to creditors in reorganization after a Chapter 11 bankruptcy is present in most cases. Creditor uncertainty alone does not meet the requirements of" §158(d)(2)(A)); *In re Kekauoha-Alisa*, No. 05–01215, 2013 WL 827738, at *2 (Bankr. D. Haw. Mar. 6, 2013) ("The appellate process should not be truncated simply based on one party's interest in saving the time spent in the district court").

Moreover, inevitability of a further appeal is insufficient reason to skip district court review. *See, e.g., In re Lehman Bros. Inc.*, 2013 WL 5272937, at *5 ("Hudson and Doral argue that direct appeal would materially advance the progress of this case because of the 'inevitable Second Circuit review of this matter.' But if the mere expectation of advancement to a circuit court was sufficient to establish material advancement, Section 158(d)(2)(A) would effectively eliminate the district court from the bankruptcy review process altogether"); *In re Johns-Manville Corp.*, 449 B.R. 31, 34 (S.D.N.Y. 2011) ("The only argument for expedition is that the appeal will be quicker because it need only be heard by one court — the Court of Appeals. That argument can be made in every case where there is an appeal involving a final judgment of the Bankruptcy Court").

have been paid nothing in those 12 years. At the same time, approximately 98% of the unsecured creditors competing for the funds in issue are comprised of approximately 25 financial industry firms that invested in (purchased) creditor claims in recent years, apparently at substantial profit. *See* Bankr. Dkt. #14568, ¶20. In those 12 years, all professional fees approach $1.4 billion. *See* Bankr. Dkt. #14431, ¶36. The ESEP Committee submits that against that background of this enormous, slow-to-resolve and long bankruptcy case, a sudden claimed urgency for a shortcut contrary to the appellant-pensioners' interests is not the kind of expediency the courts should permit.

The Trustee argues that the length of this litigation, for which the Trustee blames the ESEP Committee, *see* Tr. Br. at 16, argues in favor of a direct appeal. It cites no cases holding that the fact that a dispute has taken a long time to litigate is reason to avoid the ordinary appellate process. But more, the Trustee's assertion of delay by appellants is a mix of misdirection and hubris that should not be countenanced. On a proper record, appellants would show, as they previewed by proffer below (*see* Adversary Proc. Dkt. #10, at 53-73), that any delay is the Trustee's fault:

- they raised the §541(b)(7) in their proofs of claim in 2009 (even though they were hundreds of non-attorney individuals who in most instances would not even be aware of this issue in bankruptcy law);

- the Trustee ignored this and all other issues as to their earned, deferred compensation until five years into the bankruptcy (2013);
- the Trustee refused to arbitrate one principal issue that was agreed by all to be arbitrable per a specific contract clause, invoking a bankruptcy trustee's discretionary option to negate party arbitration agreements (leading to years of litigation about the limits of that discretion);
- the Trustee ignored the §541(b)(7) issue entirely, until in 2015 it raised a procedural issue *only* as to the way these individuals asserted it six/seven years earlier;
    - the Trustee could have then, but did not, address or challenge §541(b)(7)'s applicability on the merits;
- the Trustee certainly knew then, as it did when proofs of claim were filed in 2009, that the merits of the issue have been raised and needed to be resolved;
- the Trustee nonetheless later argued, after a four-year delay in the District Court, that it was appellants who were guilty of laches (even though Second Circuit law actually precludes that laches argument because of the Trustee's own knowledge, *see* Adversary Proc. Dkt. #10, at 87-91).

Above all, the most significant reason appellants are not responsible for any delay in this case is that the Trustee's 2015 procedural challenge languished in the

District Court undecided for almost four years. It was only that unprecedented four-year delay that even permits a laches discussion on these facts. The ESEP Committee has designated this appeal as a case related to the earlier litigation so that all those facts may be considered in the District Court, and hopefully before the District Judge most familiar with them.

These delay issues do not fit the established criteria for consideration for direct appeal. The Trustee nonetheless pounds upon alleged delay throughout its brief (and alludes to merits issues as if its position were unquestionably correct (appellants contend the opposite, *see* Fn. 4 above and Adversary Proc. Dkt. #10, at §I.)). That pounding is a red herring of the most disingenuous sort.

The Lehman bankruptcy had tragic consequences for the world, but few individuals suffered as much as these appellants, most of whom have lost their primary retirement income. It would exacerbate that tragedy terribly for this Court

to deprive appellants the full right to litigate and be heard now.

Dated: New York, NY
July 31, 2020

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 5 because it contains 5,179 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-Point font.

Dated: July 31, 2020

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