20-3757

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JAMES W. GIDDENS, AS TRUSTEE FOR
THE SIPA LIQUIDATION OF LEHMAN BROTHERS INC.,

Petitioner-Appellee,

—against—

THE LEHMAN BROTHERS INC. DEFERRED COMPENSATION DEFENSE STEERING COMMITTEE, AS ATTORNEY IN FACT FOR THOSE SPECIFIED HEREIN,

Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR RESPONDENT-APPELLANT

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I.

THE TRUSTEE NOW ABANDONS ALL PRIOR ARGUMENTS, AND THE DECISION BELOW, IN FAVOR OF NEW ARGUMENTS THAT CONTRADICT ITS EARLIER POSITIONS — THESE NEW ARGUMENTS FAIL

The Trustee's opposition brief can be fairly called astonishing, because the Trustee has abandoned its arguments made below — and any reasoning in the Bankruptcy Court Decision — in favor of two wholly new arguments not to apply §541(b)(7) here. Indeed, these two arguments are not just new (and hence impermissibly raised for the first time in this Court) but 180° inconsistent with most of its earlier arguments. Appellants show below that the new arguments do not withstand even cursory scrutiny. The Trustee, unable to overcome Appellants' reasoned arguments to apply §541(b)(7), has lobbed a "Hail Mary pass" — and in the process, effectively conceded that §541(b)(7) applies to Appellants' pensions, just as they contend.

The Trustee, for the first time on appeal, advances an entirely novel theory it claims to have unearthed by digging through BAPCPA's legislative history: it contends §541(b)(7) was intended to protect only amounts that are "in transit to plans (not funds already in plans)." Trustee's Opposition Brief ("Opp.") 44. As discussed below, this late-breaking gambit is not only barred by settled appellate practice law concerning assertion of arguments for the first time on appeal (§A), but also fails utterly for multiple, discrete reasons. It: (i) ignores the statute's plain language, which does not say what the Trustee would want it to say (§B.1); (ii) ignores the fact that 150+ published decisions that have applied §541(b)(7) since it was enacted in 2005 could not exist — and would be flat wrong in myriad ways — if the Trustee's "in transit" theory of §541(b)(7) were correct; not a single one of those decisions has adopted this "in transit" theory and *many others expressly rejected it* (§§B.2 and B.3); and (iii) relies on out-of-context quotes and glaring omissions from the legislative history that, when considered in full, makes clear the straight line the Trustee attempts to draw between a commission's 1997 recommendation and the actual language of the 2005 statute evaporates early on in the statute's drafting history in favor of other discussion and rationales in the history deceptively not disclosed by the Trustee (§C).

But beyond that, the Trustee ignores — or is simply oblivious to, in a blind rush to craft this desperate "Hail Mary pass" — the fatal fact that even if it were correct that §541(b)(7) protects only pension amounts "withheld" or "received" and still "in transit" in an employer's hands rather than in a segregated fund, *such a definition would encompass the deferred compensation that was in LBI's hands in 2008* — in other words, Appellants get their pensions under the Trustee's new theory (§D). (To be clear, Appellants believe their construction of §541(b)(7), rather than the Trustee's unsupported construction, is the reason they prevail.)

This final discrete fatal flaw — that the Trustee's "in transit" opposition to applying §541(b)(7) here cannot be squared with the obvious obstacle that Appellants' ESEP funds fit squarely into "in transit" status — apparently leads to the Trustee's second wholly new, and wholly untenable, desperation argument. With no support in any language in §541(b)(7) or ERISA, the Trustee asserts that Congress intended §541(b)(7), in expressly covering plans "subject to title I" of ERISA, not to apply to "nonqualified" ERISA plans — unfunded Top Hat deferred compensation plans — like ESEP. This, too, was not argued below. It is also flat wrong. Appellants demonstrated at §I.A of their opening brief ("Opening") (and at §E below) that ERISA's title I unquestionably covers plans like ESEP, not only per the plain language but per the entire structure of ERISA, all confirmed in a long line of caselaw that so holds, never suggesting it does not — not in 1974, not in 2005 and not today. The Trustee's new argument that ERISA title I does not apply is worse than untenable. (§E)

Finally, the Trustee attempts to revive a policy argument that applying §541(b)(7) here irreconcilably conflicts with tax law, but now with a different emphasis on, in particular, 26 U.S.C. §409A, a statute from a legislative term preceding §541(b)(7), which the Trustee explains was enacted *ad hoc* in response to the Enron/WorldCom series of scandals to prevent certain control executives from manipulating their benefits, like deferred compensation. Appellants' §F and their opening brief (§I.B.3) demonstrate that the conflict the Trustee posits between tax law and §541(b)(7) does not exist (and would be in any event irrelevant to application of §541(b)(7) to ESEP based on its unambiguous language (Opening §I.B.1)). The Trustee's new discussion of §409A is similarly irrelevant to §541(b)(7) but also grossly misleading (§G). Appellants demonstrate unequivocally that Congress's pre-§541(b)(7) tax policy in §409A was intended to target an entirely different set of *pre*-bankruptcy concerns and was in no way intended to prevent these retirees from collecting their earned pension payments after a bankruptcy.

The Trustee's abandonment of its earlier arguments — and of the Bankruptcy Court's reasoning — is fatal to its denial of §541(b)(7)'s applicability.

A. *The Trustee's Late-Breaking "In Transit" Theory of §541(b)(7) Was Not Presented Below and Is Impermissibly Inconsistent with Its Argument Below.*

All else aside, the Trustee's new "in transit" theory should not be considered here because it was not argued by the Trustee in the Court below — and is, as described here, inconsistent with its theories below. *See, e.g., Kraebel v. New York City Dept. of Hous. Preservation and Dev.*, 959 F.2d 395, 401 (2d Cir. 1992) ("We have repeatedly held that if an argument has not been raised before the district court, we will not consider it"); *Pulvers v. First UNUM Life Ins. Co.*, 210 F.3d 89, 95 (2d Cir. 2000) (same). While this Court has discretion to consider a new theory to avoid a manifest injustice or when it does not require fact-finding, *see Caiola v. Citibank, N.A., New York*, 295 F.3d 312, 327 (2d Cir. 2002), the fact that the new theory is *inconsistent* with and contrary to arguments the Trustee made below — and the stated reasoning of the Decision below — is reason this Court should not exercise discretion to allow new theories now. Appellants briefed this appeal based on arguments made to and decided by the Bankruptcy Court and should not be sandbagged with new theories not even considered below.[1]

The Trustee admits (Opp. 33, n.11) that its "in transit" theory is new and was not advanced below. It misleadingly quotes some out-of-context language in its opening brief below to indicate it made the same argument below, albeit without elaboration. *See id*. This is false. The Trustee actually points to an argument *that is wholly different from and inconsistent with the Trustee's current approach* [A-57]: that entire section of the Trustee's brief below was devoted to arguing that §541(b)(7) does not apply here because *it applies only to bankruptcies of*

[1] Most of the Trustee's argument and cases cited below have been relegated to a short section, stating, "Every court that has considered the issue has found that Section 541(b)(7) does not exclude top hat plan amounts from bankruptcy estates." Opp. 30. That is also false. Appellants have already addressed those cases extensively at Opening 37-43, and cited (22-23) *In re Twin City Hospital*, No. 10-64360, 2011 WL 2946172 (Bankr. N.D. Ohio July 21, 2011), which held that §541(b)(7) *does* apply to Top Hat plans. The fact, however, is that the Trustee's new "in transit" approach to §541(b)(7) is not endorsed in any of the cases the Trustee cited or any other, as the Trustee (somewhat quietly) admits. *See* Opp. 30, n.9.

individuals, not bankruptcies of their employers. [A-55-57, 268-69] On appeal, however, the Trustee argues, in 180° reversal, that §541(b)(7) *does* apply to employer bankruptcies, but only to "in transit" funds: "[i]n enacting Section 541(b)(7), Congress sought to ensure that amounts withheld or received from employees that were intended to be paid to an employee benefit plan, but that had not yet been paid to the plan at the time of the *employer's bankruptcy filing*, ultimately made their way to the plan." Opp. 32; *see also id.* at 1. The Trustee cannot be permitted to falsely describe its argument below as cover for its entirely inconsistent argument on appeal.[2]

B. *Section 541(b)(7) Is Not Ambiguous in Any Relevant Respect, as Caselaw So Holding and Rejecting the Trustee's "In Transit" Theory Makes Clear, and the Trustee's Legislative History Should, Therefore, Not Even Be Considered.*

1. *Section 541(b)(7) Is Not Ambiguous.*

The Trustee's approach to §541(b)(7) would require this Court to attribute to Congress a breathtaking level of drafting incompetence. In speaking of "any amount … (A) withheld by an employer from the wages of employees for payment

[2] The Trustee also relied on other inconsistent arguments below that it abandons on appeal. For example, despite the fact that §541(b)(7), at subsections (A & B)(i)(II), expressly refers to "deferred compensation" as among the kinds of compensation that can be "withheld" or "received," the Trustee argued — albeit incorrectly, per *In re Twin City, supra* — that courts "were unanimous in concluding that an agreement to defer income is 'qualitatively different from the type of "withholding" contemplated in §541(b)(7)(A)(i)(I).'" [A-263; *see also* A-53-54, 269-71] Such arguments are now abandoned.

as contributions" or "(B) received by an employer from employees for payment as contributions" "(i) to — (I) an employee benefit plan that is subject to title I of [ERISA]…," §541(b)(7), Congress — the Trustee urges — meant to say, but apparently forgot to say, that once "withheld" or "received" amounts are paid over to a pension plan, §541(b)(7) no longer applies to them. Of course, the language simply does not say that. There is no ambiguity to resolve by recourse to legislative history.

2. *Innumerable Cases Apply Section 541(b)(7) in Non-"In Transit" Settings*.

Still worse for the Trustee is abundant, uniform caselaw. In fact, the Trustee's "in transit" theory runs of afoul of hundreds, if not many thousands, of cases applying §541(b)(7) in non-"in transit" settings, including 150+ reported decisions, almost none of which would exist or have any viability at all under the Trustee's "in transit" theory. This, more than anything, reveals the absurdity of the Trustee's epiphany about an "in transit" limitation.

Specifically, Appellants have identified more than 150 reported decisions that discuss, address or touch upon aspects of §541(b)(7) decided in the 15 years since its 2005 enactment,[3] and not one of those decisions concludes that §541(b)(7) applies only to pension payments still in transit. The overwhelming majority of

[3] The decisions can be viewed by searching "541(b)(7)" in Westlaw's database of all federal cases.

those decisions address a single issue: whether, in individual bankruptcies, §541(b)(7) excludes employees' post-petition 401K contributions from "disposable income" under §1325(b)(2). By the nature of the issue presented, in nearly all those cases, the contributions at issue are not "in transit," but have already been paid or are being paid on an ongoing basis. *See, e.g., In re Vanlandingham*, 516 B.R. 628 (Bankr. D. Kan. 2014) (applying §541(b)(7) to hold: "Amounts withheld from prepetition income for retirement contributions *and paid to the retirement plan* can never be 'disposable income' under §1325(b)(1)(B)").

Thus, courts have routinely applied §541(b)(7) to contributions *already fully made*, not just those "in transit," in those 150+ published, and likely countless other, cases. Notably, in the Trustee's entire 12-page discussion of legislative history intended to support the strained "in transit" theory of §541(b)(7), *there is not so much as a single citation to a case interpreting §541(b)(7) in that fashion*. In the face of this incredibly broad and uniform interpretation of §541(b)(7) for more than 15 years, with no "in transit" limitation, the Trustee's sudden epiphany-interpretation is utterly frivolous.[4]

[4] Adding further to how disingenuous this argument is, the Trustee made the completely self-contradicting argument below that §541(b)(7) applies *only* in individual bankruptcies. While Appellants fully debunked that argument below [A-109-14], and the Trustee sensibly abandons it here, this shows that the Trustee is fully familiar with the abundant caselaw that simply could not exist if it were

3. *Much Other Caselaw Rejects the "In Transit" Notion.*

Moreover, courts have held *expressly* that §541(b)(7) is unambiguous in not being limited to "in transit" scenarios. Although the Trustee did not bring it to this Court's attention, a case within this Circuit rejected the exact argument the Trustee now makes. *In re Leahy*, 370 B.R. 620 (Bankr. D. Vt. 2007), summarized a trustee's argument there, which precisely mirrors this Trustee's argument here:

> "The Trustee argues that the language of §541(b)(7)(B)(i)(III): (1) could only refer to 'amounts still within the hands of the employer prior to being deposited in the debtor's account. The statute plainly applies to the "gap" period between the withholding of the debtor's wages by the employer and the employer's remittance to the debtor's plan'; and (2) "could not possibly exclude from the estate unlimited contributions to a debtor's account.'"

Id. at 623. Rejecting the argument, the Court held:

> "These cases speak with one voice in concluding that, pursuant to §541(b)(7), 401(k) or ERISA — qualified savings plan funds are not property of the bankruptcy estate. [Collecting cases.]
>
> "The same logic applies in the instant case…. *Reading the unambiguous language of §541(b)(7), "any amount" of Mrs. Leahy's (legally permissible) contributions are excluded from the bankruptcy estate. The Court rejects the Trustee's interpretation that the provision applies only to the "gap" period between the withholding of the debtor's wages by the employer and the employer's remittance to the debtor's plan. The statutory language simply does not support that narrow reading*."

Id. at 623-24 (emphasis added).

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correct (unless hundreds of cases were worse than incorrect, and completely lacking any foundation).

This Court, in a context making clear it was addressing funds *already* in a pension plan, also held that §541(b)(7) protects such funds. *See In re Robert Plan Corp.*, 777 F.3d 594, 597 (2d Cir. 2015) ("Kirschenbaum sought compensation for work that he and his professionals conducted for the Plan, to be paid out of Plan assets. However, 11 U.S.C. §541(b)(7) explicitly excludes ERISA plan assets from a debtor's bankruptcy estate").

Other cases have held similarly that §541(b)(7) unambiguously applies to funds in plans (not just "in transit" scenarios). *See, e.g.*, *In re Whitt*, 616 B.R. 323, 330 (Bankr. S.D. Miss. 2020) (§541(b)(7)'s language "is not ambiguous. Consequently, the language excludes funds already contained within a retirement account at the time of the filing [of] the petition from the bankruptcy estate"); *Miner v. Johns*, 589 B.R. 51, 60 (W.D. La. 2018) (holding §541(b)(7)'s "language to be unambiguous" in that "'property of the estate does not include' ...funds already contained within a retirement account at the time the petition is filed").

Indeed, as *Leahy* held, the cases speak "with one voice" in concluding that the language of §541(b)(7) is unambiguous in protecting *both* amounts "in transit" *and* all other amounts already in a pension plan.[5] Because there is no ambiguity,

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[5] Against this unequivocal, unanimous authority, the only "authority" the Trustee cites for its "in transit" theory (beyond the debunked legislative history discussed at §C below) is §541.23 of Collier on Bankruptcy (16th Ed. 2019), but the Trustee, as it does in many other parts of its discussion, uses quotes grossly out of context to falsely make it appear they address "in transit" contributions. *See* Opp. 44, n.24.

there is no basis for resorting to legislative history to clarify what is already clear. *See, e.g.*, *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 1149 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says…. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete'"); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6, 120 S. Ct. 1942, 1947 (2000) ("[W]hen the statute's language is plain, 'the sole function of the courts — at least where the disposition required by the text is not absurd — is to enforce it according to its terms'").

C. *The Trustee Misdescribes §541(b)(7)'s Legislative History, Which Yields No Support to Its "In Transit" Theory.*

The bravado with which the Trustee marches through legislative history is dramatic and compelling; but it is dead wrong. The Trustee's misleading presentation to support its "in transit" theory would draw a straight line between a 1994/1997 National Bankruptcy Review Commission report's recommendation ("Commission Report") and the final 2005 version of §541(b)(7). There is no such

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But Collier §541.23 actually addresses the question discussed in the text above, *viz*., whether §541(b)(7) excludes from "disposable income" under §1325(b)(2) only an individual debtor's *pre*-petition contributions to pension plans or, also, ongoing *post*-petition contributions not yet given to an employer, much less paid over to a plan *at all*. Such contributions, in most of these cases, are not "in transit" between an employer and a plan because *they are still in the employee's hands*, and the question is whether the employee may continue making contributions during a bankruptcy's pendency. This is simply a completely different issue.

straight line. The Trustee's rendition of the legislative history relies on material omissions and out-of-context quotations. When the full picture is revealed, it becomes clear that §541(b)(7) is in no way a mere implementation of any particular recommendation among many in the Commission Report, and the strained interpretation of §541(b)(7) — *viz*., that it applies only to "in transit" payments — that the Trustee hitches to its tendentious reconstruction of legislative history falls apart.

The Trustee quotes Commission Report recommendation 2.4.14 at Opp. 34. The recommendation focuses, by its terms, on "funds deducted from paid wages *within 180 days prior to* [bankruptcy], held by a debtor/employer, and *owed by employees to third parties*." (Emphasis added.) The more extensive discussion of the recommendation makes clear that pension payments were just one — and not even the first — of the Commission Report's concerns; rather, the concern was various types of payroll deductions, such as "voluntary programs, credit union loans or other loans," "pension fund[s]," "[u]nion dues," "[c]ourt-ordered support obligations" and other "wage garnishments" that are made by an employer on behalf of an employee and paid to third parties. *See* Commission Report (Ch. 2), 1997 WL 985132, at *52. *Needless to say, it is clear on the face of it that the final version of §541(b)(7) does not apply to virtually any of these scenarios*. It does not speak of payroll deductions "within 180 days prior to [bankruptcy]," does not address whether or not the funds at issue are "owed by employees to third parties," and does not apply at all to loan payments, union dues, court-ordered support obligations or wage garnishments.

The Trustee devotes several pages of discussion to, *see* Opp. 35, 45, and makes much of, the Commission Report's citation in a footnote to *In re College Bound, Inc.*, 172 B.R. 399 (Bankr. S.D. Fla. 1994), which addresses "in transit" ERISA plan payments. But the actual text of the Commission Report, which the Trustee omits from this discussion, does not support the import the Trustee gives this case; in fact, the focus of the sentence at issue *is actually not the protection of funds already protected by ERISA ("in transit" or not), but on the other areas of concern quoted above (union dues, etc.), where there was actual controversy*: "Some laws, such as ERISA, deem employee contributions to be held in trust, and therefore ERISA plan contributions are more likely to be recoverable,[1356] but the inability to trace funds can be fatal to the collection of non-ERISA benefit plans and third-party payments." Commission Report (Ch. 2), 1997 WL 985132, at *53. The footnote in the sentence (footnote 1356) is the citation to *College Bound*, which merely cites the case without further discussion.

Indeed, just as the Commission Report says, there is no indication in caselaw that "in transit" plan payments at issue in *College Bound* were even a matter of any controversy. Both before and after the Commission Report was issued (and before passage of BAPCPA), multiple courts had arrived at the same conclusion as *College Bound*. *See, e.g.*, *Bannistor v. Ullman*, 287 F.3d 394, 402 (5th Cir. 2002) ("Other courts have similarly defined the term ['plan assets'] to 'include employee contributions to benefit plans which are withheld from employees' paychecks and for deposit into their benefit plans, even though the contributions have not actually been delivered to the benefit plan'") (collecting cases from between 1987 and 1999). There were no cases holding otherwise on comparable facts — in other words, there was no actual "in transit" concern to address with ERISA-covered plans.

Still more disingenuous in the Trustee's legislative history discussion is the complete failure to mention a different recommendation in the Commission Report, §1.2.5, which, on its face, is far more relevant to what eventually became §541(b)(7) than the passage on which the Trustee narrowly focused, and which supports application of §541(b)(7), as Appellants argue is the statute's plain intent. This other recommendation, among other things, states: "Retirement plans that are ERISA-qualified … already are protected under current laws in all jurisdictions and are not included as property of the bankruptcy estate.[283] *The Commission recommends that the exclusive federal bankruptcy exemptions for other pension plans rely on the federal tax restrictions, exempting retirement funds in bankruptcy to the extent they are exempt under federal tax laws*." *See* Commission Report

(Ch. 1), 1997 WL 985124, at *15. The recommendation, in other words, was to protect, in a bankruptcy, tax-exempt pension plans — like Appellants' deferred compensation Top Hat ESEP plan.

The initial versions of what eventually became BAPCPA contained, at §108, a provision that closely tracked the Commission Report's recommendation on which the Trustee relies. That provision, from which the Trustee misleadingly excerpts five words, *see* Opp. 37 (referring to "funds deducted from paid wages"), available at https://www.congress.gov/105/bills/s1914/BILLS-105s1914is.pdf, is entitled "Exclusion of Payroll Deductions," would have amended §541(b) to add a provision excluding "any funds deducted from paid wages" that "were made during the 180-day period immediately preceding" a bankruptcy, "are held by an employer who is the debtor" and "were made for funds that are owed to any entity other than to the United States." While this language, indeed, tracks the Commission Report's broad recommendation to protect *any* "in transit" payroll deductions made within 180 days of a bankruptcy and owed by an employee to third parties, what the Trustee fails to mention is that *there is no connection between any of this language and what eventually becomes §541(b)(7).* This is obvious from side-by-side comparison of the two provisions, which have no language in common. It is also made clear in the legislative history that follows and which the Trustee, yet again, omits.

What happened, as discussed in Susan Jensen's, A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 79 Am. Bankr. L.J. 485 (2005), is this: the proposed 1998 bankruptcy legislation was the subject of hearings and recommendations throughout much of 1998, resulting, eventually, in a joint House and Senate Conference Report of October 7, 1998, which "combined approaches used in the House and Senate versions of the underlying legislation." *Id*. at 516-17. That Conference Report, available at https://www.congress.gov/congressional-report/105th-congress/house-report/794/1, *completely excises* what had been the above-described payroll deduction section (§108) of the April 1998 legislation and does not replace it with anything else. As Susan Jensen goes on to explain, after the 1998 legislation was derailed by the Clinton impeachment drama, the October 1998 Conference Report, *which excised the 1994-97 passage the Trustee points back to*, became the primary basis for the next version of the act, which re-surfaced in H.R. 833, introduced by Rep. Gekas on February 24, 1999. *See* 79 Am. Bankr. L.J. at 518-19. That next version (available at https://www.congress.gov/bill/106th-congress/house-bill/833/text), however, contained, among other changes, §322, entitled "Excluding Employee Benefit Plan Participant Contributions and Other Property from the Estate," now featuring for the first time ever the familiar "withheld/received" language and "employee benefit plan subject to title I of [ERISA]" language that would become the basis for §541(b)(7). In other words, §541(b)(7)'s legislative history does not include the Trustee's discussion of earlier comments, except in the most remote sense. *Again, the Trustee does not draw and cannot draw any line whatsoever, much less a straight line, between the 1994-97 Commission Report's "payroll deductions" recommendation closely mirrored in the initial 1998 version of BAPCPA's §108 and the entirely separate 1999 version of BAPCPA's §322 (emerging from the new, late 1998 Conference Report), concerning employee benefit plan contributions and containing language similar to the 2005-enacted version of §541(b)(7).*

What is, in fact, clear is that §541(b)(7) did not in any way, shape or form track the 1994-97 Commission Report's initial "in transit" "payroll deductions" recommendation, but rather — and especially after language was added to protect IRS §414(d) employee benefit plans and IRS §457 deferred compensation plans, *see* Opp. 40 — reflected an amalgam of considerations — including *the separate Commission Report recommendation, discussed above, that other tax-exempt pension plans, including plans like ESEP, receive protections some plans then-already received in the event of bankruptcy, see Patterson v. Shumate,* 504 U.S. 753, 759-60 (1992), with all those considerations expressed in §541(b)(7) and also in other reforms expressed in §522 of the Bankruptcy Code.

In light of this fuller examination of the relevant legislative history, the Trustee's legislative house of cards utterly collapses: there is simply no reason for anyone to conclude (and as discussed at §B.2 above, no court among 150+ has ever concluded) that §541(b)(7) — with its language which, on the one hand, swept far more broadly than the 1994-97 Commission Report's "in transit" recommendation and which, on the other hand, ignored nearly all the types of payroll deductions (as well as the 180-day timeframe and owed-to-third-parties requirement) on which that recommendation was principally focused — was enacted solely for the narrow purpose of excluding "in transit" pension payments from bankruptcy estates.

D. *Even if §541(b)(7) Had Been Limited to "In Transit" Funds, as the Trustee Contends, Appellants' Pension Deferrals Are Protected.*

The Trustee's untenable "in transit" gambit is even more bizarre — and ultimately, a losing cause — because the Trustee has failed to notice that Appellants' deferred compensation/pensions fall squarely within §541(b)(7)'s protection, as the Trustee proposes it be construed. The Trustee argues that §541(b)(7) applies to funds that are still in the employer's hands — *i.e.*, "caught in the debtor's general accounts" — at the time of a bankruptcy. *See* Opp. 36 (quoting Commission Report). That, of course, is exactly where the pension funds in this case were at the time of the bankruptcy: in LBI's general accounts.[6] Thus, even if this Court were to credit the Trustee's new theory that §541(b)(7) should be interpreted as applying only to money withheld from an employee's compensation or received by the employer *but not yet remitted elsewhere*, Appellants' deferred compensation is covered squarely by the statute, so construed. If the Trustee "wins" on this point, Appellants win and get their pensions under §541(b)(7), just as occurred in *Twin City*.

Appellants would like to have their pensions, and would be happy to have them under the theory offered by the Trustee. In candor, however, the Trustee's theory makes no sense. Appellants are entitled to their pensions, but for the reasons in their Opening, and the additional reasons discussed here (§§I.B-G).

E. *Nothing in §541(b)(7) Supports the Trustee's Contention that It Applies only to Qualified ERISA Plans.*

Perhaps to work around the fact Appellants' pensions would actually be protected under the Trustee's "in transit" interpretation of §541(b)(7) (§D above), the Trustee concocts, apparently as a new fallback position, yet another entirely new, but unsupported and unsupportable, argument to strip Appellants of their pensions: despite §541(b)(7)'s unambiguous language that it applies to all ERISA

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[6] The Trustee might contend §541(b)(7) was intended to apply only to such funds *when they were payable over to third parties*, *e.g.*, pension funds, but §541(b)(7) and its legislative history (§C above) do not mention any such requirement.

title I-covered plans, the Trustee argues it really applies only to so-called "qualified," funded ERISA plans. As Appellants discussed at Opening §I.A, the "subject to title I of [ERISA]" language clearly and unequivocally encompasses unfunded deferred compensation Top Hat plans like ESEP, and nothing the Trustee says in its opposition brief casts any doubt upon that conclusion.

Its argument is premised on yet another contention that §541(b)(7) is the product of extraordinary drafting ineptitude by Congress, and that when Congress wrote plans "subject to title I of [ERISA]," it really meant to write only *some* of those plans "subject to title I of [ERISA]," and *not really those plans covered by ERISA title I* as stated, and not a plan that had exemption from *some* ERISA title I provisions. This is more sophistry.

To begin, even the Trustee concedes ESEP and other unfunded Top Hat plans *are* "subject to title I of [ERISA]" — all that §541(b)(7) requires. The Trustee merely points to partial exemptions from some ERISA title I requirements, even though §541(b)(7) contains no such limitation or qualification. One does not become no longer "subject to title I of [ERISA]" merely because one is exempted from some part of title I of ERISA while remaining "subject to" the remainder. But more than that, as Appellants' Opening explained (13-15), and as the Trustee does not even attempt to dispute, the long-standing landscape of ERISA verbiage was clear in 2005 that Top Hat plans like ESEP were in fact covered by ERISA title I. *See* Opening 15, n.4. In that light, it is even more absurd for the Trustee to contend Congress meant to exclude Top Hat plans like ESEP from §541(b)(7) — what would obviously be a significant exclusion — even though it used the language widely used and understood *to cover and include ESEP-like plans* and made no mention of any exclusion at all. As discussed, Congress is presumed to mean what it says, and say what it means. *See Connecticut Nat. Bank*, 503 U.S. at 253-54 ("courts must presume that a legislature says in a statute what it means and means in a statute what it says").

In short, as Appellants explained in Opening, ERISA title I covers all "employee pension benefit plans," 29 U.S.C. §1002(3), ESEP is such a plan, ESEP-like plans are subject to title I's reporting and disclosure regulations, 29 U.S.C. §1021 *et seq*., ESEP-like plans are subject to title I's administration and enforcement provisions, including criminal penalties, civil enforcement and ERISA's preemption provision, 29 U.S.C. §1131 *et seq*., and extensive caselaw had long-recognized that title I applies to ESEP-like plans.[7] The Trustee's new argument on this point is thus, again, less than untenable. It ignores the plain meaning of ERISA title I coverage to advance another unsupportable theory for depriving Appellants of their pensions.

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[7] For the avoidance of doubt, Appellants explained (13, n.3) that any reference to ERISA coverage of ESEP-like plans by definition refers in particular to ERISA title I, because ERISA's other titles are irrelevant/inapposite.

F. *The Trustee's Last-Resort Request — to Nullify the Plain Language of §541(b)(7) — Must be Rejected Because There Is No Inconsistency Between Tax Law and ERISA and Applying §541(b)(7) to Top Hat Plans like ESEP.*

Ultimately, the Trustee recognizes all of these flaws in its argument, because it falls back (Opp. 22) to a desperation argument: "if [Appellants'] plain language argument had merit, this would be the rare case in which the Court should not allow the 'plain meaning' because 'literal application' would 'produce a result demonstrably at odds with the intention of'" Congress. The Trustee cites *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989), which actually declined to take the virtually unprecedented nullification step, discussed *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982), which similarly declined, and ultimately stands for the rule that such nullification is not allowed — certainly not based on the misleading assertions the Trustee makes about §541(b)(7) and prior law.

But as Appellants discussed in Opening (29-35), the purported inconsistencies are illusory. The Trustee's arguments continue a parade of misstatements and, in some instances, outright falsehoods.

To begin, even if there were inconsistencies between §541(b)(7) and ERISA or earlier tax law, Congress's later-enacted §541(b)(7) is the last, and prevailing, word, and certainly so absent some earth-shaking consequence. *Cf. Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (where "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute"). The Trustee identifies none here. To the contrary, the Trustee tactically ignores Appellants' detailed discussion (Opening 28-29) of *In re Twin City, supra*, where the court concluded that any perceived conflict does not negate §541(b)(7)'s clear language explicitly covering "deferred compensation" plans. That court, more than 10 years ago, applied §541(b)(7) just as Appellants argue it should be applied here, those pensioners received their pensions, and the earth remains unshaken. The Trustee fails to discuss this case or its import in any respect whatsoever.

While ignoring *Twin City*, the Trustee persists (Opp. 29) in remarkably false statements such as: "the tax code requires that the deferred [compensation] amounts be available to general creditors in bankruptcy — not merely subject to a hypothetical risk of pre-bankruptcy 'defalcation'" or presumably other losses. The Trustee cites nothing for this assertion about the tax code. In fact, the tax code says absolutely nothing about deferred compensation pension funds being available to general creditors in bankruptcy. The Trustee's stark misstatement on this critical issue is inexcusable.

The Trustee cites four cases (Opp. 25, n.6), each discussing in *dicta* as relates to the issue here, a pre-2005 description of unfunded pension plans — in other words, prior to §541(b)(7)'s 2005 enactment.[8] Those cases do not and could not state a rule negating §541(b)(7). More generally, the Trustee repeats over several pages (24-30) its red herring that unfunded deferred compensation plan funds should not be held in a segregated fund, and then conflates that concept with the limited protection §541(b)(7) gives pensioners in a bankruptcy. While §541(b)(7) presumably could have gone further to require segregating funds, in fact, it did not. Nothing in §541(b)(7) or in its implementation requires establishing segregated funds for plans like ESEP post-§541(b)(7); quite the opposite, deferred compensation pensioners remained at risk of total loss because nothing in §541(b)(7) protects against their employer's total loss, with no assets left at all. The Trustee would force a round peg into a square hole by arguing §541(b)(7) impermissibly results in segregated funds, when it plainly does not. It provides a more limited protection in bankruptcy scenarios — consistent with the comments discussed in §C above in the legislative history to the effect of generally protecting retirement funds exempt under federal tax laws in the event of bankruptcy. That protection should be enforced as Congress wrote it.[9]

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[8] *In re IT Group, Inc.*, 448 F.3d 661 (3d Cir. 2006), though decided in 2006, addressed a 2002, pre-§541(b)(7), bankruptcy.

[9] The Trustee's effort to craft an argument to deny Appellants their pensions, now based upon the "in transit" theory debunked above, is placed in an even more suspect light by how wide the Trustee reaches to find support. For example, the

G. *The Trustee's Final Argument Misreads the Import of IRS Code §409A.*

The Trustee's final policy argument on §541(b)(7) is an even greater overreach. IRS Code §409A (amending tax laws) was an *ad hoc* response to the public scandals over misdeeds causing the failures of Enron and WorldCom, enacted in 2004 (by a Congress different from the 2005 Congress that enacted §541(b)(7) (amending bankruptcy laws)). The Trustee's discussion concedes this was the purpose. (Opp. 47-52) But the Trustee then baselessly posits that this earlier law exhibited a broad legislative intent that should be inferred and used to override the later 2005 enactment of the §541(b)(7) protections for Appellants' pensions. Notably, the Trustee does not argue that §409A has any actual application here — only some attenuated guidance to cause this Court to sweep away the clear and precise language in §541(b)(7) in favor of a policy, which the Trustee tries to divine, in an earlier Congress's response to a political/business

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Trustee (Opp. 27-29) even references a GAO report recommending greater IRS and DOL oversight of executive retirement plans, even though the Trustee recognizes that this otherwise non-authority document does not even discuss §541(b)(7), as well as an IRS "Audit Techniques Guide"— which in fact covers irrelevancies such as when employers may deduct certain plan expenses and merely uses the phrase "look for indications" as a lead-in to some of the material the Trustee quotes (which is in fact used to educate auditors). Appellants cannot possibly take apart each of these far-flung reaches here, but despite the Trustee's creativity, such documents have no interpretive force to override and rewrite Congress's mandate in §541(b)(7) to protect Appellants' pensions.

scandal. This is worse than mixing apples and oranges. It conflates cats with elephants.

The Trustee's own discussion explains the irrelevance here of §409A, including that after executives controlling major companies such as Enron had run their companies into the ground (through highly-publicized illegal acts) (Opp. 48-49), Congress — when it was learned that those same control executives, using insider knowledge,[10] had also saved their deferred pensions through various steps such as distributing the money to themselves early or sequestering it offshore[11] — inserted certain restrictions on future control executives similarly lining their pockets into an omnibus Tax Code revision known as the "American Jobs Creation Act of 2004."[12]

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[10] *See, e.g.*, James Seely and Anthony Eppert, Successful Partnering Between Inside and Outside Counsel, §55A:53 (2020) ("congressional response to Enron and other corporate scandals of the early years of this century included Internal Revenue Code §409A…. abuses allegedly included accelerating payment of deferred compensation to themselves based on insider knowledge of the corporation's critical financial condition").

[11] *See, e.g., Test. of Pamela F. Olson Asst. Sec. of the Treas. (Tax Policy) for the Comm. on Fin. U.S. Sen. April 8, 2003*, Treas. JS-168, 2003 WL 1827183 (Apr. 8, 2003) (describing Enron executives' offshore accounts to protect deferred compensation and "keep [such] assets away from creditors without triggering current tax to the executives").

[12] Pub. L. 108-357, § 855 (2004), available at https://www.congress.gov/108/plaws/publ357/PLAW-108publ357.pdf

This Tax Code revision had no intersection with the next year's *Bankruptcy Code amendments* that included §541(b)(7) as part of deliberate changes to bankruptcy treatment of unfunded pension plans. In fact, §409A's limited character as a one-off response to the executives' conduct in the Enron series of scandals, for whatever else §409A is worth, is illustrated by the fact it was the only mention of such issues in this omnibus Tax Code revision, being inserted in the "Other Revenue Provisions" section (*id*. at 209), sandwiched between two other unrelated provisions: "Donations of motor vehicles, boats, and airplanes" and "Extension of amortization of intangibles to sports franchises." *Id*. at 218-25.

Congress swiftly inserted §409A into an extensive tax law revision to crack down publicly on management executives *using their insider information that they had run their company into the ground to protect themselves.* As the Trustee wrote, "Enron executives took tens of millions of dollars in early distributions from their non-qualified deferred compensation plans. Congress took note[:] … executives 'must not be permitted to continue to live like kings in bankruptcy while their former employees are looking for their next paycheck'" (Opp. 48 (citation omitted)). If anything, the Trustee's comments put the nail in the coffin of its contention of any relevance here by demonstrating Congress's intent to address an entirely unrelated phenomenon — *viz.*, control executives' misdeeds, including accelerating and off-shoring deferred compensation payouts. Congress sought to prohibit such misconduct, not to address the rights of pensioners in the administration of bankruptcies. The retired Appellants, who were not in control of LBI, were not the target of Congress's §409A, and, if anything, *were among those Congress would protect*. Congress's considerations, even as described by the Trustee, did not include and were not aimed at Appellants.

In fact, §409A overall addresses myriad granular subjects/kinds of transactions that came into focus because of the Enron-like scandals, *many unrelated to possible insolvency and far removed from anything having to do with what happens in a bankruptcy*, as is shown in the statute's text and in the Treasury Regulations implementing it. *See, e.g.*, 26 CFR §1.409A-3. The statute itself imposed a penalty for bad acts of 20% above taxes due in the ordinary course (end of tax-deferred status) when a tax deferral would be lost because of such act, *see* §1.409A(a)(1)(B)(i)(II) — irrelevant to Appellants' situation (though ironically, if relevant, a small price for Appellants to pay, in context, to get their pensions).

But above all, §409A was not written to reach Appellants' situation because §409A expressly applies only so long as unfunded deferred compensation retains a "risk of forfeiture," defined in §409A(d)(4) as "if such person's rights to such compensation are conditioned upon the future performance of substantial services by any individual," and cannot, per the additional reforms enacted in §409A, otherwise be controlled by an Appellant to be accelerated before the scheduled distribution date, *see* 26 U.S.C. §409A(a)(3), or shielded in other ways, such as through offshore trusts. *See* 26 U.S.C. §409A(b)(1). Appellants' rights at all times before the bankruptcy were conditioned upon the future performance of others (as the Trustee acknowledges (Opp. 8), there might have been no LBI assets for Appellants depending on outcomes controlled by parties other than Appellants), and Appellants could not control acceleration of a distribution or otherwise act to protect themselves.

Thus, the Trustee's effort to draw some inference about §541(b)(7) — even if one could be considered in light of §541(b)(7)'s unambiguous application — from §409A fails completely. Given Congress's explicit focus on control executives acting in ways that amounted to highly public self-dealing and its determination to stop that misconduct, §409A, written into the Tax Code, *ad hoc*, in 2004, gives rise to no possible inference whatsoever about the intent of §541(b)(7)'s separate-track protection in the Bankruptcy Code for the very different constituency of innocent parties — mostly retired persons — like Appellants.

II.

NO STATUTE OFLIMITATIONS APPLIES HERE

Appellants pointed out that §1658(a) has never been applied to a bankruptcy issue in 30+ years since it was enacted. Applying §1658(a) on these facts would be unprecedented. Appellants explained: (i) §541(b) determinations by their nature are not susceptible to any statute of limitations, as numerous cases determining what are (and are not) estate assets have held, and (ii) additionally, §1658(a) applies only to "civil actions," not bankruptcy matters. The Trustee does not overcome those obstacles.

A. *No Statute of Limitations Applies to Estate Property Determinations*.

The Trustee principally addresses the first argument — based on the many cases holding that determinations of whether or not property is part of a bankruptcy estate are by their nature not subject to *any* statute of limitations — by contending that this rule should not be applied because those cases predate §1658(a)'s 1990 enactment. This utterly misses the point.

While §1658(a) applies only to rights under statutes enacted after 1990, it does not apply where the law already said no statute of limitations applies. Specifically, the Trustee ignores the critical language with which §1658(a) begins: "Except as otherwise provided by law." The cases Appellants discussed in their Opening establish precisely that — a rule "otherwise provided by law" that *no statute of limitation will be applied* for reasons of policy and common sense *to §541(b) determinations as to what is bankruptcy estate property*.

A prime example is the Ninth Circuit Bankruptcy Appellate Panel case, *In re Fontaine*, ADV.LA 08-01994-BR, 2010 WL 6259993, at *7 (Bankr. App. 9th Cir. Nov. 26, 2010), *aff'd,* 472 Fed. Appx. 738 (9th Cir. 2012), quoting *In re Wiggins*, 220 B.R. 262 (Bankr. D.S.C. 1998), holding that "whether a debtor or the bankruptcy estate has any interest [under §541(b)] in property claimed as exempt is one of several … issues" that "'has no time limit'" — as distinct from expressly time-limited challenges to exemption claims under §522. Appellants explained (49-54) that court after court reached, *with no exception in 30 years*, the same conclusion. The Trustee simply ignores all that Appellants briefed, confirming that Appellants' analysis and proposed conclusion is correct.[13]

The Trustee also argues that even if Appellants are correct that "determining whether property is part of an estate under §541(b)" can be subject to "no limitation period," this case is different because Appellants would actually like to be paid their pensions in the wake of such determination. (Opp. 57 (Appellants

[13] Confirming the logic of this rule and Appellants' analysis — *viz.*, that no statute of limitations applies to §541(b) estate property determinations — is the Trustee's own ironic admission that, even though it claims Appellants were already time-barred to raise their present §541(b)(7) argument *by 2012*, the Trustee itself was free to wait *until 2015* (or later) to challenge Appellants' Proofs of Claim's §541(b)(7) assertion. The Trustee states that was "proper pursuant to the Bankruptcy Court-approved claims handling procedures." (Opp. 59) This confirms Appellants' point that bankruptcies — and §541(b) determinations in particular — follow *sui generis* timelines set in each bankruptcy. Section 1658(a) should not selectively interfere, as the Trustee's 2015 objection shows.

seek "rights to property")) This is a gross example of a distinction with no difference. The Trustee argues, in essence, that the rule against limitations periods for estate property determinations would not apply because the determination would affect substantive rights — who gets the money. But someone getting money is the result in any §541(b) estate property inquiry, so it makes no sense for the Trustee to argue that the rule against limitations periods does not apply because there is that real-world result at the inquiry's end. The Trustee's exception would swallow, and totally eviscerate, the rule.

B. *Section 1658(a) Does Not Apply at All in Bankruptcy.*

Appellants also established a separate and independent reason §1658(a) does not apply. By its terms, it applies only to "civil actions" and "causes of action" asserted in them, not in the *sui generis* bankruptcy universe. Accordingly, no decision has applied §1658(a) to any bankruptcy matter since it was enacted over 30 years ago.

Appellants' Opening explained in detail the extensive jurisprudence holding that the statute's explicit terminology — "civil action" — is a term of art with limited applicability to what can best be called traditional litigation, *viz.*, that which takes place in Article III courts. The Trustee avoids the bulk of Appellants' argument, simply asserting that "civil action" is not defined in a limiting way on the face of §1658(a). But this is yet another pure sidestep; the point is that the very term "civil action" specified in §1658(a) is itself also a term of art with a limiting meaning. To this, the Trustee has no answer.

The Trustee's other arguments similarly mischaracterize — and miss — what Appellants established. For example, the Trustee attempts to distinguish *Oppenheim v. Campbell*, 571 F.2d 660, 663 (D.C. Cir. 1978), as involving an administrative agency rather than a bankruptcy court, but ignores the case's actual, broader meaning that "civil action" is a term of art judicially and statutorily defined as a case in Article III courts. The Trustee then skips over the extensive other caselaw Appellants cite (58-60, 64-66), and similar and consistent language in Federal Rules of Civil Procedure (*e.g.*, 2 and 3) and specific similar statements found in/related to 28 U.S.C. provisions (*e.g.*, 1441, 1391) (59).

The Trustee similarly ignores the important, extensive law Appellants cited (60) holding that arbitrations are not "civil actions," with stark implications for when arbitrations are time-barred. The Trustee merely asserts that arbitrations are not bankruptcies. Again, this misses the point that the term "civil action" is commonly understood in myriad settings to be a term of art with strictly limited meaning, often to preclude limitations defenses.

The Trustee concedes (Opp. 62) §1658(a)'s legislative history is clear that its purpose was to end the messy practice of federal courts borrowing state statutes of limitations for certain federal law claims, but nonetheless argues §1658(a) should apply in bankruptcy because its legislative history does not say otherwise. But it ignores that Appellants pointed out (at 60-62) that, in the wake of using the limiting "civil action" term of art, §1658(a)'s legislative history *makes no mention of bankruptcy at all*, while confirming the limited meaning of "civil action" in numerous discussions (the remainder of §1658 addresses only federal securities law cases).

The Trustee's fallback, such as it is, is that Appellants cite no cases holding specifically that §1658(a) does not apply in bankruptcy. But in 30+ years since §1658(a) was enacted, no litigant with a post-1990 statutory right has even bothered attempting misapplication of §1658(a) to a bankruptcy matter. So there is good reason no case is found rejecting the attempt. What matters is that no case in 30+ years *has applied* the statute in bankruptcy — for the sound reason, consistent with Appellants' authorities and legislative history, that it does not apply there at all.

III.
LACHES IS NOT PRESENT IN THIS CASE

If this Court agrees that §541(b)(7) applies and its application is not barred by §1658(a), the laches finding must be reversed.[14] None of the three elements of

[14] The standard of review is *de novo*, as this Court stated in *Zuckerman v. Metropolitan Museum of Art*, 928 F.3d 186 (2d Cir. 2019), because the issue below was decided on a motion to dismiss. The Trustee relies heavily on *Zuckerman* (in

laches are present.[15] The case's byzantine path (described in Appellants' Opening (77-84, 87-89)) makes clear why this is not a laches story and why depriving Appellants of $270 million in purchased pensions would be unconscionable.

Appellants (67-68) explained the three missing elements:

(i) the Trustee's laches-defeating actual knowledge of what has always been at issue: whether §541(b)(7) applies;

(ii) the reasonableness of Appellants' conduct — 344 non-attorney individuals caught up in this overwhelming bankruptcy (managed in its arcane facets by major law firms) and matched against interests dominated by large financial institutions; and

(iii) the lack of cognizable prejudice of the sort necessary to laches (either lost evidence or an irrevocably, detrimentally changed position).

The Trustee needs to establish each of those three points, but Appellants explained in detail (84-99) that, below, the Trustee did not establish any. The Trustee's responding brief also fails. (§§III.C- E)

The Trustee also does not meaningfully defend the Bankruptcy Court's express preclusion of Appellants' factual showing and its determination of laches

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other respects discussed below), and surely knows this rule, but nonetheless asserts that "abuse of discretion" is the standard. *Zuckerman* makes clear it is not.

[15] The laches issue would be moot if the Court finds for Appellants in the Companion Appeal.

with no factual record. (§III.B) That was itself a fatal error of law requiring reversal, *see, e.g., Deere & Co. v. MTD Products, Inc.*, 00 CIV 5936 LMM, 2001 WL 435613, at *2 (S.D.N.Y. Apr. 30, 2001), especially with the Bankruptcy Court having discussed with the Trustee's counsel, before Appellants had even submitted a brief, its desire that Appellants' case end quickly. [A-231-35]

But above all, the Trustee fails to meet the broader equity threshold for laches — *that it be equitable*. (§III.E) It does not (i) acknowledge the 12+-year ESEP-specific saga that brings all here, (ii) come to grips with Appellants' narrative description of it (which the Bankruptcy Court refused to consider) or (iii) offer any different narrative of its own that addresses, at least with any candor and comprehensiveness, the byzantine maze through which these pensioners proceeded reasonably and diligently to seek their pensions.

A. *The Trustee's Assertions About Confusing and Inconsistent Positions Are Baseless*.

Before turning to the points Appellants argued in Opening, the Trustee's false assertion that Appellants have argued inconsistently, and even left the Trustee in the dark, requires refutation. Refutation is easy because the Trustee omits, admits and also just flat out makes up in some instances facts that, once clarified, preclude laches.

The Trustee concedes (Opp. 7-8) that from 2008-2012, *it did not even engage Appellants or any general creditor claimants*; it addressed only brokerage customer claims, per SIPA. But in addition to that laches-negating fact, Appellants have shown, among many laches-negating facts (77-84, 87-89):

- The Trustee controlled the timing of all else.
- The issues were arcane and the procedures byzantine, *but nonetheless*, Appellants managed to place §541(b)(7) openly in issue in 2009 through Proofs of Claim, such that they would have prevailed *in receiving their full pension payments based on §541(b)(7)* absent Trustee objection.
    - Appellants' 2009 Proofs of Claim, per 11 U.S.C. §502(a), *entitled Appellants to their full pensions* based on §541(b)(7) *unless and until the Trustee raised objection*.
- The Trustee addressed Appellants for the first time, out-of-the-blue, in 2013, *but only on a different issue*, ignoring §541(b)(7).
- The Trustee addressed §541(b)(7) for the first time only in 2015, but even then, only obliquely with a procedural attack.
- Appellants' counsel asked the Trustee to address the substantive issue directly, *but the Trustee rebuffed them, refusing to engage and discuss the merits*. *See* Bankruptcy Ct. Dkt. ("Dkt") 12833, ¶4; [A-148, n.36]

- Then a four-year hiatus ensued as the appeal of the Trustee's procedural attack went undecided (*see* Companion Appeal).

The Trustee/firm that controlled administration of this bankruptcy — at the center of the complex, detailed work it managed for 12+ years — had no misunderstanding. The Trustee understood the path — including the Companion Appeal's path — better than anyone. *Throughout, it was self-evident the substantive §541(b)(7) needed resolution.*

1. *The Trustee Was Not Misled or Confused*.

To avoid that obvious conclusion, the Trustees now sinks to a fiction that it really had no idea §541(b)(7)'s merits had been presented at all, *and goes so far as actually claiming it was duped by these pensioners*, who were "holding" the issue "in reserve" (Opp. 69),[16] keeping the Trustee from seeing that §541(b)(7) would be raised. It now contends it was duped into believing Appellants would assert §541(b)(7) *only* on the procedural path of "secured" pensions *within* the bankruptcy estate, but had no idea Appellants actually intended to seek their pensions under §541(b)(7) without regard to the label "secured," any other label — or *outside* the estate. The position is preposterous. Appellants had no reason to be

[16] In addition to that "holding in reserve" assertion, the Trustee asserts: it "could not know that Claimants actually intended to assert" the argument here (67); this was "an about-face in 2019" (16); and is an "eleventh hour reversal" (52).

"holding in reserve" (Opp. 69) this argument as they languished 12 years without pensions — whether to dupe the Trustee or otherwise. The Trustee posits no reason. In fact, Appellants merely litigated on the path the Trustee charted, but the issue was always apparent, including on the face of briefing leading to the Companion Appeal.

For example, the Trustee's filings described Appellants' Proofs of Claim as asking for determination that their pensions be classified as secured "'if it is determined that' wages withheld or contributed to LBI … *are not part of the Estate due to the provisions of … section[] §541(b)(7)*," and further argued that §541(b)(7) does "not give rise to security interests." Dkt. 12942, at ¶2, n.4 (emphasis added). The Trustee thus cannot now contend it had no idea §541(b)(7) would be litigated, as was stated, to determine that Appellants' pensions "are not part of the Estate due to the provisions of … section[] §541(b)(7)."

It is, of course, self-evident Appellants invoked §541(b)(7) with a singular purpose — in 2009, again in 2015 once challenged by the Trustee and at every point thereafter — of getting their money. While the Trustee attributes false significance to labels such as "secured" or "outside" the estate funds, all that ever mattered to Appellants is their $270 million — whether as funds inside or outside the estate, or $270 million in widgets. And all that ever mattered to the Trustee is that they not receive those funds. The Trustee understood this, but made strategic choices to help defeat Appellants' pensions. It was only derailed by the unexpected four-year wait in the District Court leading to the Companion Appeal. Its assertions that Appellants misled the Trustee are worse than untenable (and at best for the Trustee, raise an issue of fact not resolvable with no fact record).

2. *Appellants' Opposition to Subordination Was Not Inconsistent*.

The Trustee's other "we were misled" premise (Opp. 7) is that Appellants' opposition to the Trustee's 2013 effort to subordinate their rights to general creditors — rendering them worthless if deemed bankruptcy creditor claims — was inconsistent with asserting §541(b)(7). This is a red herring. The actual litigation history is recounted in Appellants' Opening (at 77-84, 87-89).

As noted, Appellants' Proofs of Claim asserted, *in the alternative*, the rights they maintain they have under §541(b)(7) — which established Appellants' positions unless challenged (and the Trustee was, of course, silent on §541(b)(7) from 2009 through 2015) — *as well as in the alternative* status as general unsecured creditors (in the alternative to the possibility their position under §541(b)(7) would not be sustained). Though the Trustee does not quote this, the Proofs of Claim stated, "This claim is an unsecured claim to the extent (a) it is determined that it is not [governed by §541(b)(7)]…." *See* Dkt. 12655, Addendum. As is typical in litigation, and especially in the wake of the Trustee's silence from 2009 (through 2013), nothing was known or assured, and Appellants needed to preserve all positions. In doing so, Appellants did not act inconsistently.

As explained more fully in Appellants' Opening (78), in 2013, the Trustee began a subordination campaign (having not addressed §541(b)(7) — with a short-form motion on short notice designed to get quick default victories on issues like alleged subordination [A-36] — at a point when Appellants had no representation. Appellants prudently reorganized into a new group and retained counsel for the reactive, limited and immediately necessary purpose of defending the Trustee's out-of-the-blue subordination motion to argue for alternative rights as general unsecured creditors (which the Trustee then threatened). They, in fact, fought like he[ck] to defeat what they believed to be an unfounded argument for subordination. Appellants lost that fight, and this Court affirmed the loss on appeal. So be it.

But it is beyond the pale for the Trustee to assert that vigorous defense of rights plainly stated in the alternative in Proofs of Claim waives or diminishes the alternative §541(b)(7) position stated at the same time. It is not what the Trustee calls a "reversal." (Opp. 52) If that were impermissible, then no party could ever argue in the alternative.

3. *The Trustee's Positions Reflect Laches-Defeating Inconsistency*.

Finally, Appellants point out the Trustee's own laches-defeating "gotcha" inconsistency. The Trustee contends §1658(a) time-barred Appellants in 2012 as to §541(b)(7) issues, yet, as discussed, did not address §541(b)(7) *itself* until *2015*. It explains this delay — in a muttered-under-its-breath aside — as "proper pursuant to the Bankruptcy Court-approved claims handling procedures." (Opp. 59) Proper, perhaps, but grossly inequitable. As Appellants' Companion Appeal briefs explained in detail (opening at 5-10 & 26; reply at 1-8), by 2015, when the Trustee first revealed its procedural challenge to Appellants' §541(b)(7)'s assertion, Appellants were, per the Trustee, ironically time-barred from themselves relying on §541(b)(7) to claim their property outside the estate — a time-whipsaw per a court-sanctioned "procedures" order enabling what is truly an unfair "gotacha" argument. Appellants cannot fairly be accused of laches for pursuing both the Proof-of-Claim path and this one. The inequity is manifest, and laches-defeating.

B. *The Lack of a Factual Record and the Refusal to Consider Facts Requires Reversal.*

Appellants explained in their Opening (71-74) that the Bankruptcy Court found laches on a no-factual record 12(b)(6) motion and expressly held it would not even consider facts proffered by Appellants [A-386 (stating it would not accept anything "in the nature of a proffer")]. That alone is reversible error under the cases and logic. To support this extraordinary invocation of laches, based on only the Judge's experience of a case (assigned as it happens to a different judge between 2008 and 2014, *see, e.g.*, Dkt. 353), the Trustee cites only *Zuckerman v. Metropolitan Museum of Art*, 928 F.3d 186 (2d Cir. 2019).

The Trustee did not discuss the numerous cases Appellants cited holding that an evidentiary process is almost always required for the fact-intensive laches inquiry (but for a one-sentence footnoted assertion (at Opp. 65, n.45) that those cases are not as clear as this one).

But that sole case the Trustee cites does nothing to save this laches finding from reversal. In *Zuckerman*, this Court actually noted that laches could rarely be determined on a pleading motion. But in unusual circumstance where parties were suing six decades after the fact — with no explanation and much evidence lost in the interim — to recover from the Metropolitan Museum art sold in the 1930s by those fleeing Nazi persecution, this Court held:

> "[D]etermination of prejudice is ordinarily fact-intensive, … [but] based on the unusual circumstances … we conclude that the Met has been prejudiced by the more than six decades that have elapsed since the end of World War II. *This time interval has resulted in 'deceased witness[es], faded memories, ... and hearsay testimony of questionable value,' as well as the likely disappearance of documentary evidence*."

Id. at 194 (emphasis added). That is the Trustee's only "pleadings dismissal" case, and it has nothing to do with the byzantine history of the LBI bankruptcy in which

Appellants acted diligently at every turn, in the face of all the Trustee threw at them.

The only other defense the Trustee offers for the "fact-free" laches finding is the uncontroversial proposition that the Bankruptcy Court could take judicial notice of earlier case events. It, of course, could. But that is irrelevant to refusal to consider evidence. Indeed, ironically, a substantial part of Appellants' proffered but ignored evidence, excluded by the Bankruptcy Judge [A-386], consists of extensive court records similarly subject to judicial notice. But, consistent with its stated intention before the motion now on appeal here was even submitted "to close the case in 2020" [A-235], the Bankruptcy Court refused to consider those records. That shines a harsh light on the error below.

C. *The Trustee's Knowledge of the §541(b)(7) Issue also Precludes Laches.*

The Trustee concedes (67, n.46) that lack of knowledge is a prerequisite to laches. *See, e.g., Rapf v. Suffolk County of New York*, 755 F.2d 282, 292 (2d Cir. 1985). In fact, the Court below had held in other cases that "lack of knowledge" is essential to laches, *In re LightSquared Inc.*, 511 B.R. 253, 345 (Bankr. S.D.N.Y. 2014) (Chapman, J.) ("lack of knowledge on the defendant's part that a claim would be asserted" is an element of laches), but completely ignored this element when raised by Appellants. Even *imputed* knowledge is sufficient to defeat laches. *See, e.g., In re Dark Horse Tavern,* 189 B.R. 576, 581-82 (Bankr. N.D.N.Y. 1995).

The Trustee's "knowledge" is already detailed above in §III.A. The Trustee responds only that it could not have even "guess[ed]" (Opp. 67) Appellants intended to invoke §541(b)(7) here because they had litigated their alternative claim to general unsecured status, fighting subordination, and that that would have been unnecessary because §541(b)(7) would give Appellants a better result. (Opp. 68) Of course, it would give that better result, but the point of arguing in the alternative, discussed in §III.A, is actually ratified by the Trustee: the Trustee now fights against applying §541(b)(7), and Appellants thus needed to argue all available theories, even lesser ones, given that its adversary might fight its others. As discussed in §III.A, the Trustee did not need to "guess" because it knew Appellants were standing on their §541(b)(7) rights — since 2009.

The Trustee goes further to also state it was shocked Appellants sought to recover under §541(b)(7) in *this* case because their earlier counsel used the "secured" appellation in the 2009 Proofs of Claim (within the bankruptcy) — as explained in the Companion Appeal — as distinct from express verbiage denoting outside-the-estate status. This is also refuted in §III.A. The question has always been — for the Trustee, Appellants and all LBI constituencies — how much money will they get?

The sophisticated Trustee/its counsel recognized the issue in characterizing Appellants' Proofs of Claim in the 2015 motion at issue in the Companion Appeal. It does not dispute that, speaking of "the assertion in the Proofs of Claim that the Claims were secured … 'if it is determined that' wages withheld by LBI or contributed to LBI or life insurance policies *are not part of the estate due to the provisions of ERISA or section[] 541(b)(7) … of the Bankruptcy Code*,'" it argued that "[t]hese provisions do not give rise to security interests." Dkt. 12942 at ¶2, n.4 (emphasis added). Thus, the Trustee itself understood the 2009 Proofs of Claim as, in fact, raising §541(b)(7)'s applicability and the need for a determination whether the "wages withheld by LBI or contributed to LBI … are not part of the estate due to the provisions of … section[] 541(b)(7)." It is simply false for the Trustee to contend now it did not understand then that Appellants relied on §541(b)(7) to give them that very determination — and their pensions — whether as property outside or in the estate. And it is preposterous for the Trustee to contend it believed Appellants wanted their money *only* if it came with a particular label, such as "secured" estate property or "secured"-equivalent property held for Appellants in the estate, *but not* "outside"-the-estate money or in other form. Any half-informed observer would understand §541(b)(7) was raised not only in the most narrow sense of particular bankruptcy labels, but to secure Appellants' pensions, regardless of labels. *Casablanca*'s Captain Renault said, "I'm shocked, shocked to find that gambling is going on in here!" The Trustee's denial of knowledge is even less credible.

The Trustee had long reserved the pensions amounts for the §541(b)(7) issue, whether deemed property belonging to Appellants within or outside the estate. That establishes at a minimum certainly its constructive knowledge, and constructive knowledge alone defeats laches, as *Dark Horse Tavern, supra*, holds. But the Trustee made a conscious choice *not to address* the substantive issue that required resolution, and its actual knowledge is apparent (and would only be further confirmed in discovery).

With the Court below not even mentioning the "knowledge" element, the laches finding must be reversed for this reason alone.

D. *The Trustee Abandons Any Case for Delay.*

The Trustee makes no case for the next essential element of laches — undue delay by Appellants. The Trustee (Opp. 69-70) devotes only four lines to this point (with six more addressing whether it must pinpoint a date when laches arose).

The Trustee does refer back to its earlier discussion (Opp. 52-54) that raising §541(b)(7) in the proceeding below was inconsistent with other positions. This point is debunked at §III.A and §III.C above — there were no inconsistent positions.

Appellants explained in Opening (at length at 77-84, 87-89) their diligence throughout the LBI bankruptcy's long, tortured path (and with no mention of delay by the Trustee when §541(b)(7) frequently arose). The Trustee (and the Court below) ignore those facts, as with all others that do not fit the false laches narrative. But the facts Appellants presented tell a story that is in no way a laches story. Instead, Appellants litigated diligently on the course set by the Trustee, and Appellants suffered a four-year wait for a decision on the District Court appeal of issues now presented in the Companion Appeal. That is not their fault. Appellants even reached out to the Trustee while waiting that extraordinarily long time to discuss expediting the merits, not knowing when a District Court ruling would ever come. [A-222]

The Trustee does not attempt to address that more complete story. It cannot. As Appellants showed in Opening, that circuitous story is fraught with numerous delays, many attributable to the Trustee's strategic choices. Nonetheless, 344 individuals caught in the complexities of this enormous bankruptcy managed to navigate it to press this issue throughout and present it thoroughly here for decision.

The Trustee's ships-passing-in-the-night contention that amounts only to "it all has taken a long time" is shared by Appellants, who have lived with no pensions for 12+-years. But the Trustee's few cherrypicked, deceptively described facts do not establish laches due to "long time." All facts matter, and they do not show undue delay. Indeed, the delay assertion, and hence laches, should be deemed abandoned in the wake of no greater showing by the Trustee.

E. *The Trustee Cannot Show Prejudice*.

As with all else it finds inconvenient, the Trustee ignores what constitutes prejudice (the third element of laches) — *viz.*, evidence has been destroyed or lost or a party irreversibly changed position to its detriment. *See* Opening 92, *et seq*. (citing authorities)

The Trustee of course cannot satisfy that standard, so ignores it in favor of pounding its themes that: (i) the litigation with Appellants could have been shorter, and (ii) the length of time has delayed closure of the estate. (Opp. 70) Appellants anticipated and rebutted both points in Opening (94-99), discussion also ignored by the Trustee.

In brief, on the first point, having to litigate an issue is not in itself prejudice. More, other issues litigated (subordination) have no overlap with the issues presented here, and hence the Trustee does not and cannot show duplicative expense. The Trustee concedes it did not engage Appellants from 2008 until 2012-13 (Opp. 7-8), and raised the subordination issue first, in 2013, at its choice, and at that point asserting no objection as to §541(b)(7) application (but with no assurance there would be none). Plainly the Trustee intended to litigate both issues relentlessly and chose the order and form of addressing §541(b)(7) for the first time in 2015, with its procedural challenge, *and refused to discuss the merits when Appellants' counsel requested that dialogue*. *See* Dkt. 12833, ¶4; [A-148, n.36]. It cannot now complain about the litigation path it designed. It also cannot seriously contend that Appellants should lose their $270,000,000 of self-funded pensions because these individuals did not get their money sooner by second-guessing and overriding the Trustee's strategic choices.

As to the second argument about closing the estate, again, this is not prejudice recognized by the cases, but in any event, again, the Trustee makes not even the slightest effort to show particularized cost. The Trustee tacitly concedes Appellants correctly identified extensive additional matters in which the Trustee will be engaged for years to come. The Trustee now contends for the first time some authority holds it could formally close the estate and leave those other matters, *but not this one*, to run their course. Whether or not true is unknowable on this record, but more, while the Trustee asserts that is meaningful to laches, it does not attempt to show how that could save any cost. It is evident that it did not because it cannot. Work is work. Much still needs to be done by the Trustee's attorneys. They will do it and be paid, whether or not there is formalistic closure of the bankruptcy estate. At bottom, while this is not, in any event, prejudice under the cases, no harm is shown.

F. *Equity Precludes Laches.*

Finally, the overriding principle is that laches cannot be inequitable. The Trustee undoubtedly would prefer to "win." Other creditors — today, 97+% comprised of hedge funds and institutions that purchased LBI debt at a deep discount and with open eyes, *see* Dkt. 14568, ¶20 — would like to see more money (what Appellants seek). But if §541(b)(7) protects Appellants' pensions, then in light of all of the facts discussed by Appellants in Opening and here, it is hard to conceive of a more unconscionable result than to deprive aged pensioners of their principal pensions they self-funded in the 1980s because it is inconvenient that they persist, or that they did not navigate the mess that was Lehman more felicitously. That result would be worse than language in the normal confines of legal writing can capture — and impermissibly inequitable.

Dated: New York, New York
February 25, 2021

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

1. This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as enlarged in this appeal in accordance with this Court's Order dated November 18, 2020, allowing appellants to file a reply brief of up to 12,000 words, because it contains 11,996 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This reply 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)(5) because this reply brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-Point font.

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