No. 22-7058

IN THE

Supreme Court of the United States

Michael S. Helmstetter, *Petitioner*
V.
David Herzog, Et Al., *Respondents*

On Petition For A Writ Of Certiorari
To United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did lower courts err when they ruled that a bankruptcy debtor did not have standing to object to settlement of his claims against third parties despite evidence that the bankruptcy estate would likely have a surplus?

2. Did lower courts deny due process to a bankruptcy debtor when they refused standing to hear the merits of his solvency?

3. Should this Court exercise supervisory authority to examine and remediate indicia of systemic and operational deficiencies presented in the bankruptcy court's valuation of a debtor's bankruptcy estate?

LIST OF PARTIES

Michael S. Helmstetter, Petitioner/Debtor

David Herzog, Trustee/Appellee

Richard Ruscitti, Appellee

Kingdom Chevrolet, Inc., Appellee

RELATED CASES

In re Michael Helmstetter, 19-28687 United States Bankruptcy Court for the Northern District of Illinois, Appealable order entered September 1, 2020.

Helmstetter v. Herzog, et al., 20-CV-5485 United States District Court for the Northern District of Illinois, Memorandum Opinion and Order entered July 13, 2021, Judgment entered July 14, 2021.

Helmstetter v. Herzog, et al, 21-2486 United States Court of Appeals for the Seventh Circuit, Opinion and Judgment entered August 11, 2022.

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STATUTES AND RULES

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is reported at *In re Helmstetter*, 44 F.4th 676 (7th Cir. 2022).

The opinion of the United States District Court appears at Appendix B to the petition and is unpublished: *Helmstetter v. Herzog*, 20 C 5485 (N.D. Ill. July 13, 2021).

The order of the United States Bankruptcy Court appears at Appendix D to the petition and is unpublished: *In re Helmstetter*, 19-28687, (N.D. Ill. BK Ct., September 1, 2020).

JURISDICTION

The date on which the United States Court of Appeals decided my case was August 11, 2022.

An extension of time to file the petition for a writ of certiorari was granted to and including January 8, 2023 on November 7, 2022 in Application No. 22 A 398.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Art. III (Appendix E)

U.S. Const. Amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of

War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

11 U.S.C. §704 (Appendix F)

28 U. S. C. § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1408

Except as provided in section 1410 of this title, a case under title 11 may be commenced in the district court for the district (1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district; or (2)

in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership.

Federal Rules of Bankruptcy Procedure, Rule 1001

The Bankruptcy Rules and Forms govern procedure in cases under title 11 of the United States Code. The rules shall be cited as the Federal Rules of Bankruptcy Procedure and the forms as the Official Bankruptcy Forms. These rules shall be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every case and proceeding.

Federal Rules of Bankruptcy Procedure, Rule 6005

The order of the court approving the employment of an appraiser or auctioneer shall fix the amount or rate of compensation. No officer or employee of the Judicial Branch of the United States or the United States Department of Justice shall be eligible to act as appraiser or auctioneer. No residence or licensing requirement shall disqualify an appraiser or auctioneer from employment.

26 C.F.R. § 1.451-2 (Appendix G)

STATEMENT OF THE CASE

This appeal seeks the reversal of appellate decisions from the United States Circuit Court for the Seventh Circuit, *In re Helmstetter*, 44 F.4th 676 (7th Cir. 2022), and United States District Court for the Northern District of Illinois, *Helmstetter v. Herzog*, 20 C 5485 (N.D. Ill. July 13, 2021), (hereinafter "Appellate Decisions" and "Appellate Courts") each affirming a decision of the United States Bankruptcy Court for the Northern District of Illinois, *In re Helmstetter*, 19-28687 (N.D. Ill. BK Ct., 2020). (hereinafter "Bankruptcy Court"), which approved a settlement agreement proposed by the Trustee releasing for $550,000 all of Debtor Appellant Michael Helmstetter's (hereinafter "Helmstetter") claims against Richard Ruscitti and Kingdom Chevrolet (hereinafter "Settlement Agreement" and "Debtor's Claims" respectively). Debtor's Claims were valued by two CPAs/Forensic Accountants at no less than $11.9 million. *Helmstetter v. Herzog, et al.*, 20 cv 05485, DKT 16 -1, 16-2 (N.D. Ill., 2021) (Affidavits of Paul Rodrigues and Deborah J. Temkin, respectively). Helmstetter's jurisdiction within the United States Bankruptcy Court for the Northern District of Illinois was based on 28 U.S.C. § 1408 in that his domicile, residence, and principal place of business were located within the Norther District of Illinois for the one hundred and eighty days immediately preceding the filing.

This case fundamentally arises from the failed business relationship between Helmstetter, at the relevant times an automotive executive based in the Chicago area, and Richard Ruscitti, a person having a number of business interests including a number of auto dealerships in the Chicago area. Helmstetter suffered a series of breaches of contract, obligations, and fiduciary duties; as well as defalcations inflicted by Richard Ruscitti. These breaches and defalcations

wrongfully converted from or deprived Helmstetter of funds and property interests estimated to be more than $11.9 million. These funds included unpaid compensation, dividends, and distributions of more than $4 million of liquid assets earned by Helmstetter and unpaid by Ruscitti.

1. DEBTOR'S CLAIMS

Helmstetter filed suit in 2014 both individually and derivatively on behalf of Kingdom Chevrolet, Inc. and Western Avenue Nissan, Inc. (hereinafter "Dealerships") against Richard Ruscitti, individually and as an officer, director, and shareholder of the Dealerships, and the Dealerships (hereafter collectively as "Ruscitti") *Helmstetter v. Ruscitti, et. al.,* Circuit Court of Cook County, Illinois, 2014 CH 20208. Helmstetter sued for Debtor's Claims: specifically, remediation and damages for misfeasance, malfeasance, and nonfeasance; including but not limited to, acts of fraud, misrepresentation, breach of contract, and breach of fiduciary duties by Ruscitti.

The complaint details that on or about 2009 Ruscitti and Helmstetter entered into several business relationships. Among these were sharing ownership interests in the Dealerships. As part of these joint ventures, Helmstetter assumed responsibility for the day-day management of both Dealerships for sales, finance, and service. Helmstetter identifies that the remediation he seeks includes in part compelling Ruscitti to pay all dividends and other distributions due and owing to Helmstetter but not paid by Ruscitti.

The complaint details how during the period from 2009 to 2014 and continuing through the bankruptcy, Ruscitti inflicted and continues to inflict multiple acts of misfeasance, malfeasance and nonfeasance upon Helmstetter. Among these acts are the following:

1. Failing to pay Helmstetter appropriate compensation, including but not limited to dividends

and distributions. Instead Ruscitti had these monies delivered to himself. Ruscitti then wrongfully converted these monies to his personal use. Ruscitti never informed Helmstetter of these monies and instructed others not to tell him;

2. Instructing company financial and accounting personnel to book and report to the Internal Revenue Service and the Illinois Department of Revenue that Helmstetter had received certain compensation, dividends and distributions; when Ruscitti knew that, in truth and in fact, Helmstetter had not received these monies. Further, Ruscitti knew that Helmstetter was unaware that these monies even existed;
3. Ruscitti reporting to the Internal Revenue Service and the Illinois Department of Revenue that Helmstetter had been paid compensation, dividends and distributions, when Ruscitti knew he had not received them resulting in a significant tax liability to Helmstetter;
4. Failing to inform Helmstetter of the distributions being made and that Ruscitti was wrongfully paying himself unauthorized revenues from the Dealerships; and
5. Failing to allow Helmstetter appropriate access to the business financial records necessary for him to responsibly monitor and manage his interests and the interests of the Dealerships.

Forensic accounting experts Paul Rodrigues and Deborah J. Temkin of The BERO Group, an established and well-respected CPA firm (hereinafter "BERO Group"), filed affidavits as part of the District Court appeal. *Helmstetter v. Herzog, et al.,* 20 cv 05485, DKT 16 -1, 16-2. BERO Group accountants examined Helmstetter's documents and calculated that Helmstetter's Debtor's Claims against Ruscitti

totaled at least $11.9 million. Furthermore, BERO Group accountants estimate claims of the bankruptcy estate totaling approximately $33 million with assets exceeding debts alleged by approximately $20 million. *Id.* Affidavits from the BERO Group are neither contradicted by any significant, material or credible evidence of record nor opposing expert opinion.

BERO Group accountants' affidavits made the following conclusions:

a. Examination to date of the limited financial records made available revealed that Helmstetter's Debtor's Claims against Ruscitti were reasonably valued at no less than $11.9 million;
b. Initial research into the financial backgrounds of both Ruscitti and Kingdom Chevrolet revealed that both appeared financially capable of paying Helmstetter's claimed amounts;
c. The financial records made available for examination included only some, but not all, of the relevant years in the examination period;
d. Examination of the financial records not yet produced for the additional years in the examination period may be anticipated to reveal that Helmstetter's Debtor's Claims against Ruscitti may significantly exceed $11.9 million;
e. Included in Helmstetter's Debtor's Claims of no less than $11.9 million were an estimated $4.1 million of compensation and distributions earned by Helmstetter but never paid by Ruscitti;
f. Examination revealed that Helmstetter owned an uncontested 33% ownership in an auto dealership commonly known as Kingdom Chevrolet, Helmstetter's 33% share being valued at $ 7,000,000;
g. Examination did not reveal a reasonable basis to conclude that Helmstetter was hopelessly insolvent; and

h. Examination did not reveal a reasonable basis for Helmstetter to ever file bankruptcy. Helmstetter v. Herzog, et al., 20 cv 05485, DKT 16 -1, 16-2.

2. HELMSTETTER'S BANKRUPTCY FILING

Helmstetter's bankruptcy schedules listed a number of claims for damages arising from numerous acts of malfeasance, misfeasance, and nonfeasance from incompetent or corrupt service providers, including attorneys, accountants, financial lenders and advisors, and other business support services. *In re Michael Helmstetter*, 19-28687 DKT 131. These wrongful acts include but are not limited to mail fraud, wire fraud, breaches of contract obligations and fiduciary duties; and fraud in the inducement, as detailed herein. Among the most devastating damages inflicted by these incompetent or corrupt service providers was wrongfully convincing Helmstetter to unnecessarily file for Chapter 7 bankruptcy.

Pursuant to legal and accounting advice, Helmstetter filed Chapter 7 bankruptcy on October 19, 2019 in the Bankruptcy Court, *In Re Michael Helmstetter*, 19 B 28687. The assigned trustee hired both an attorney and a special counsel (collectively "Trustee") to assist him in the administration of Helmstetter's bankruptcy estate.

With respect to Helmstetter's Debtor's Claims, the Trustee entered into a conditional Settlement Agreement, subject to the approval of the Bankruptcy Court, to release all of Helmstetter's Debtor's Claims against Ruscitti and Kingdom Chevrolet for $550,000 to be paid by Ruscitti. *In re Michael Helmstetter*, 19-28687 DKT 59. The Trustee executed this contingency agreement and presented it for approval to the Bankruptcy Court in August 2020, despite being briefed in April 2020 by the two CPA/Forensic Accountants from the BERO Group on their examination as described

above. Helmstetter filed an objection to the approval of this Settlement Agreement and argued against approval before the Bankruptcy Court. *In re Michael Helmstetter*, 19-28687 DKT 62, 74.

On September 1, 2020, The Bankruptcy Court approved the Settlement Agreement proposed by the Trustee and adopted his proposed findings and holdings, including that the Settlement Agreement was prudent, appropriate, and adequately supported both legally and factually. *In re Michael Helmstetter*, 19-28687 DKT 76. Notice of appeal was timely filed on September 15, 2020. *In re Michael Helmstetter*, 19-28687 DKT 79. Lacking funds, Helmstetter was unable to post bond or move for a stay pending appeal. The Settlement Agreement was executed among the Trustee and other parties, but not Helmstetter.

Helmstetter filed motions before the United States District Court to supplement the record, conduct special discovery, and to appoint a special master. *Helmstetter v. Herzog*, et al. 20-cv-0585, DKT 20. Those motions were targeted in part towards determining the facts, data, opinions, authorities, standards, and methodologies used by the Trustee in arriving at the findings and holdings he recommended to the Bankruptcy Court. *Id.*. The scope of these motions included, but were not limited to, seeking the facts, documents, authorities, and methodologies and rationale the Trustee used in valuing Debtor's Claims, all Helmstetter's assets, the claims against his estate, and future financial solvency. Another objective was to put on the record the facts, documents, authorities, and methodologies and rationale the Trustee used in evaluating the reports of forensic accountants from the BERO Group.

On July 13, 2021, the District Court's decision denied all of the Helmstetter's motions and dismissed the appeal for lack of standing. *Helmstetter v. Herzog*,

20-5485, DKT 50-52. Helmstetter timely filed his notice of appeal to the 7th Cir. Court of Appeals on August 12, 2021. *Helmstetter v. Herzog*, 20-5485, DKT 53. The 7th Cir. Court of Appeals affirmed the District Court's dismissal based on a lack of standing without reaching the merits of Helmstetter's objection or matters of mootness raised by Trustee. Helmstetter timely files this Petition for Writ of Certiorari.

ARGUMENTS

This Court should grant Helmstetter's Petition for Writ of Certiorari because (1) Lower courts erred when they ruled that standing did not exist despite evidence that Helmstetter's bankruptcy estate would likely have a surplus; (2) Lower courts denied due process to Helmstetter when they refused to hear the merits regarding Helmstetter's solvency; and (3) This Court should exercise its supervisory authority to examine and remediate indicia of systemic and operational deficiencies presented in the Bankruptcy Court's valuation of Helmstetter's estate.

I. LOWER COURTS ERRED WHEN THEY RULED THAT STANDING DID NOT EXIST DESPITE EVIDENCE THAT HELMSTETTER'S ESTATE WOULD LIKELY HAVE A SURPLUS

Appellate Courts denied standing to Helmstetter due to an incorrect valuation of the bankruptcy estate by the Trustee. The Trustee's wrongful valuation resulted in a finding that the bankruptcy estate was insolvent and that no surplus could be distributed to Helmstetter. Appellate Courts denied standing to hear valuation arguments based on a perceived lack of pecuniary interest of Helmstetter. That perception was based on the bankruptcy court's wrongful valuation. In fact, the BERO Group affidavits show that it was "likely" rather than "merely speculative" that the estate would have a surplus, as is required by case

law. See *United States v. Windsor*, 570 U.S. 744, 757 (2013); *In re Stinnett*, 465 F.3d 309, 315 (7th Cir. 2006); and *In re Andreuccetti*, 975 F.2d 413, 416-17 (7th Cir. 1992).

"The requirements of Article III standing are familiar: 'First, the plaintiff must have suffered an "injury in fact" — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent", not "conjectural or hypothetical." ' Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *United States v. Windsor*, 570 U.S. 744, 757 (2013) (citing U.S. Const. Art. III) (also citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (footnote and citations omitted)).

In this case, the only issue of standing raised by the Appellate Decisions concern part three: that it must be "likely" rather than "merely speculative" that a favorable ruling would redress Helmstetter's injury. *Windsor*, 570 U.S. at 757. The distinction between the two is addressed by case law.

In the bankruptcy context standing is narrower than Article III standing. *In re Stinnett*, 465 F.3d 309, 315 (7th Cir. 2006). However, all that is required is the showing of a pecuniary interest. *Id.* ("To have standing to object to a bankruptcy order, a person must have a pecuniary interest in the outcome of the bankruptcy proceedings."). With regard to debtors, "If the debtor can show a reasonable possibility of a surplus after satisfying all debts, then the debtor has shown a pecuniary interest and has standing to object to a bankruptcy order." *Id.* The purpose of this

standard is one of judicial economy, efficiency, and a "swift and efficient administration of the bankrupt's estate." *In re Ray*, 597 F.3d 871, 874 (7th Cir. 2010). However, the *In re Ray* court also observed that "the requirements of due process outweigh those of judicial efficiency." *Id.*

As stated by Judge Pallmeyer in her District Court opinion, "There is some debate regarding whether the Seventh Circuit's characterization of 'bankruptcy standing' as a form of prudential standing survives the Supreme Court's decision in *Lexmark Int'l, Inc. v. Static Control Components, Inc.,* 572 U.S. 118 (2014)." *Helmstetter v. Herzog*, 20 C 5485, page 19. Judge Pallmeyer summarized the *Lexmark* opinion as follows:

> The defendant agreed that the plaintiff had Article III standing but argued that the Court should "decline to adjudicate" the claim for "prudential" rather than constitutional reasons. [*Lexmark*] at 125–26. The Court refused that request. *See* [*Lexmark*] at 128. It reiterated that a federal court's duty to decide cases that are within its jurisdiction "is virtually unflagging." [*Lexmark*] at 126 (internal quotation marks omitted). The Court then explained that although it had used the term "prudential standing" in recent jurisprudence, the label was inapt because the Court had been using it to describe what was actually an issue of statutory interpretation: "whether a legislatively conferred cause of action encompasse[d] a particular plaintiff's claim." *See* [*Lexmark*] at 126–28. The Court warned that "[j]ust as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied . . . it cannot limit a cause of action that Congress has created merely because 'prudence' dictates." [*Lexmark*] at 128.

To the extent that "bankruptcy standing" requires a pecuniary interest narrower than Article III standing, the *Lexmark* opinion may have expanded jurisdiction in this regard. *Id.* If such is the case, Helmstetter certainly meets the requirements of Article III standing because of the likelihood that a proper valuation of the bankruptcy estate would result in collection of a surplus. In any event, the jurisdiction imposed by the pecuniary interest standard must be assessed in light of its purpose of judicial economy and efficiency as explained in the opinion of *In re Ray*, 597 F.3d at 874, wherein "the requirements of due process outweigh those of judicial efficiency."

In this case, the Appellate Courts were tasked to balance the purposes of judicial economy, efficiency, and a "swift and efficient administration of the bankrupt's estate" against the injustice and due process violation to Helmstetter of selling Debtor's Claims, credibly estimated at $11.9 million to Ruscitti for $550,000. *Id.* This is especially poignant given that Ruscitti himself is the perpetrator of the damages alleged in the Debtor's Claims.

The case of *Andreuccetti* has similarities to the case at hand. *In re Andreuccetti*, 975 F.2d 413, 416-17 (7th Cir. 1992). In that case the debtors objected to a bankruptcy court's ruling regarding a Chapter 11 reorganization plan. The reorganization plan that was adopted by the *Andreuccetti* court dismissed state court litigation by the debtor against two of the largest bankruptcy creditors. *Id.* The *Andreuccetti* opinion overturned a district court finding that "the amount of debt was so great that they stood no realistic chance of emerging from bankruptcy with surplus assets." *Id.* at 416. The *Andreuccetti* opinion went on to find that standing existed to hear the merits of debtor's arguments. *Id.* at 417. In its opinion the Seventh Circuit stated:

> The outcome of this litigation could potentially have a huge effect on the liabilities of the [debtors] and could give them a substantial surplus upon emerging from bankruptcy. Moreover, the compensatory and punitive damages claims in the state court counterclaims, if they had been litigated and not settled, as the [debtors] urge, could make it possible for the [debtors] to recover an amount sufficient to discharge their debts and also provide them with a surplus following bankruptcy. The reorganization plan effectively extinguishes that chance by settling the suits for less than what would be needed to create a surplus. The [debtors]' submission to the district court included allegations that the bankruptcy court failed to accord them sufficient opportunity to establish that the creditors' plan was inadequate and that the bankruptcy court's methodology in assessing the value of the state court lawsuits was flawed. Thus, the [debtors]' interest in gaining the possible surplus has been affected by the confirmation of the plan, and they possess a pecuniary interest that could be directly and adversely affected by the confirmation order. This alleged injury is sufficiently direct to allow for standing. We cannot hold that the [debtors]' contentions with respect to the bankruptcy court's treatment of these state counterclaims are so unmeritorious as to justify terminating the appeal without reaching the merits. *Id.* at 417.

In this case, Debtor's Claims are similar to the claims of the debtors in *Andreuccetti*. *Id.* Helmstetter continues to assert that, but for the Trustee's Settlement Agreement, the estate would have a surplus of millions. Helmstetter presented the Appellate Courts with affidavits of BERO Group accounts to support

that assertion. *Helmstetter v. Herzog, et al.*, 20 cv 05485, DKT 16 -1, 16-2. In fact, it seems that the Trustee's argument for Helmstetter's insolvency is "merely speculative" because Trustee presented no evidence to support its conclusions. Helmstetter's argument cannot be the "merely speculative" argument when he is the only party presenting actual evidence to support valuation.

The Appellate Decisions heavily rely on the opinion of *In re GT Automation Group, Inc.* regarding bankruptcy standing which states that "Standing is lacking if it is merely 'speculative'—as opposed to 'likely'—that plaintiff's injury would be redressed by a favorable decision.". 828 F.3d 602, 604 (2016). The GT Automation Grp., Inc., opinion is clearly distinguished from the case at hand because, in that case, the party held to lack standing made no attempt to argue that the bankruptcy estate's assets exceeded its liabilities. *Id.* at 605 ("Asked whether Arlington would get 'even a dollar' from a favorable decision, he responded, 'Who knows?' He urged that it was 'theoretically possible' that Arlington would benefit, but he could not describe this theory."). In that case the distinction between "likely" and "merely speculative" was easily made. The opinion of *GT Automation Group* is clearly distinguished from the case at hand because Helmstetter presented evidence supporting solvency and has steadfastly argued that his estate should have a surplus.

Helmstetter's arguments and evidence supporting valuation of the bankruptcy estate were never heard by the Appellate Courts. The Appellate Courts dismissed Helmstetter's appeals citing a lack of standing—a jurisdictional issue. The merits of Helmstetter's valuation was never heard. *In re Helmstetter*, 44 F.4th at 680 ("Because Helmstetter fails to demonstrate that he would be able 'to realize

any economic benefit from a potential reversal,' he lacks standing…and we do not reach the merits of Helmstetter's claim" (quoting *GT Automation Group*, 828 F.3d at 604)).

However, the Appellate Court's findings of insolvency necessitated examining the value of the estate. In finding that it lacked jurisdiction the Seventh Circuit necessarily addressed fact issues valuing Helmstetter's estate. For example, its opinion stated "Because Helmstetter's assets do not exceed his conceded liabilities of $20 million, Helmstetter cannot explain how it is 'likely' that any distribution from the estate will ultimately flow to him." *Id.* It defies logic to explain how the Appellate Courts could make such a factual determination while at the same time denying Helmstetter jurisdiction to present evidence supporting his valuation of the estate. The value of Helmstetter's assets were never established by the Trustee or the Appellate Courts. The sole evidence of record valuing Helmstetter's assets consisted of the BERO Group affidavits. *Helmstetter v. Herzog, et al.*, 20 cv 05485, DKT 16 -1, 16-2. Neither the Trustee nor the adverse parties produced evidence contradictory to those affidavits.

For Helmstetter to fight even for standing, the very right to be heard, seems inconsistent with our sense of justice. If Helmstetter leaves bankruptcy without a fair evaluation of his assets and creditors claims, he risks being deprived of tens of millions of dollars, despite sincere efforts to obtain competent and credible expert testimony. The concept of debtors ever losing standing in a bankruptcy related proceeding on its face seems at odds with the basic constitutional concepts of due process.

II. DUE PROCESS WAS DENIED WHEN LOWER COURTS REFUSED TO HEAR THE MERITS REGARDING HELMSTETTER'S SOLVENCY

The Appellate Decisions denied Helmstetter jurisdiction to hear his valuation arguments on the merits. (Index A and C). The District Court denied Helmstetter's motions to supplement the record, conduct special discovery, and to appoint a special master. No oral arguments were heard. *Helmstetter v. Herzog*, 20 C 5485 DKT 50, 51. Helmstetter's motions were necessary for a determination of the facts, data, opinions, authorities, standards, and methodologies used by the Trustee in arriving at the findings and holdings he recommended to the Bankruptcy Court, including valuation of the Debtor's Claims and his alleged insolvency. *Id*.

The Fifth Amendment contains the "due process clause" guaranteeing that an individual will not be subject to the arbitrary deprivation "of life, liberty, or property without due process of law." U.S. Const. Amend. V. "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) "The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights were denied we are governed by the substance of things and not by mere form." *Simon v. Craft*, 182 U.S. 427, 436 (1901) (citing *Louisville Nashville Railroad Co. v. Schmidt*, 177 U.S. 230 (1900)). The constitutional sufficiency of a hearing procedure was address by the opinion of *Goldberg v. Kelly* as follows:

> The city's procedures presently do not permit recipients to appear personally with or without counsel before the official who finally determines continued eligibility. Thus a recipient is not permitted to present evidence to that official orally, or to confront or cross-examine adverse witnesses. These omissions are fatal to the constitutional adequacy of the procedure. 397 U.S. 254, 268 (1970).

In this case, Helmstetter was denied due process in that he was denied discovery on critical issues involving the value of his estate and valuation of the Debtor's Claims; did not have an opportunity to confront Trustee with oral argument; and was denied standing to be heard.

The opinion of *Mathews v. Eldridge* sets out procedural requirements for hearings in more detail. 424 U.S. 319 (1976).

> These decisions underscore the truism that "`[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. *Arnett v. Kennedy*, [416 U.S. 134] at 167-168 [1974] (POWELL, J., concurring in part); *Goldberg v. Kelly*, supra, at 263-266; *Cafeteria Workers v. McElroy*, supra, at 895. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: **First**, the private interest that will be affected by the official action; **second**, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and **finally**, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional

> or substitute procedural requirement would entail. *Id.* at 334-335 (citing *Goldberg v. Kelly*, 397 U.S. at 263-271) (emphasis added).

In this case, first, the private interest affected by the Appellate Decisions is the deprivation of Helmstetter to the financial benefit of the surplus of the estate, estimated by the BERO Group at $20 million overall. *Helmstetter v. Herzog*, 20-5485, DKT 16-1 and 16-2. With respect to just the Debtor's Claims at issue before the Court, Helmstetter would be denied the difference between the BERO Group's valuation of the Debtor's Claims at $11.9 million and the Trustee's sale of those claims to Ruscitti for $550,000. In addition to the financial deprivation suffered by Helmstetter he has a private interest in the adjudication of his own solvency and the ability to pay his creditors in full.

Second, the risk to Helmstetter of an erroneous deprivation of his multi-million dollar financial interest through the procedures used was that Trustee's Settlement Agreement was entered, despite Trustee's presentment of no evidence supporting his valuation of those assets. Implementing procedural safeguards requiring Trustee to evaluate Helmstetter's assets prior to sale would have been of tremendous value because the estate's value could have been maximized. The probable value of safeguarding Helmstetter's right to be heard is that he could properly litigate issues concerning his own solvency and the value of both the Debtor's Claims and the bankruptcy estate in general.

Finally, the government's interest in approving the Settlement Agreement without a proper evidentiary hearing was a rapid sale of Debtor's Claims. Trustee had received an offer of $550,000 and its acceptance put an efficient and rapid end to his work on that portion of the bankruptcy. A proper valuation of the Debtor's Claims would likely necessitate litigation of those claims or finding a buyer willing to litigate

Debtor's Claims. The government's interest in denying discovery and evidentiary hearing to Helmstetter concerning Trustee's valuation was also a rapid liquidation of the estate. Whatever the Trustee's interests in approving the Settlement Agreement were, the opinion of *In re Ray* would still demand that "the requirements of due process outweigh those of judicial efficiency." 597 F.3d at 874. Therefore, it cannot be said that Trustee's interest in efficiency outweighs Helmstetter's interests in due process.

When evaluating the factors set out in *Mathews v. Eldridge*, each factor weighs in favor of disapproving the Settlement Agreement. 424 U.S. 319. Helmstetter's private interests were substantial, as were the interests to his creditors. The risk to Helmstetter of approval of the Settlement Agreement was substantial because no efforts were made to determine if the valuation was proper. The government's interest in efficiency was minimal because the Trustee was already tasked with maximizing the value of the estate for the benefit of creditors and the debtor. All things considered, the due process balance weighs heavily in favor of disapproving the Settlement Agreement, granting Helmstetter a proper evidentiary hearing and the opportunity to discover evidence concerning valuation of his own bankruptcy estate.

III. THIS COURT MUST EXERCISE ITS SUPERVISORY AUTHORITY TO EXAMINE AND REMEDIATE INDICIA OF SYSTEMATIC AND OPERATIONAL DEFICIENCIES PRESENTED BY THE BANKRUPTCY COURT'S VALUATION OF THE ESTATE

The record of this case reveals significant indicia of material and significant systemic and operational deficiencies relating to the United States Bankruptcy Court for the Northern District of Illinois. Examples of

these deficiencies include the following: (1) The record does not reveal reasonable efforts by the Bankruptcy Court and the Trustee to properly analyze and value Helmstetter's assets, claims made against his estate, and financial solvency; and (2) Neither the record nor the Appellate Decisions reflect a reasonable process of analysis or an appropriate factual, legal, and logical predicate for key holdings, for example:

a. Holding that Helmstetter is hopelessly insolvent and therefore lacks standing;
b. Approval of the Settlement Agreement releasing Debtor's Claims against Ruscitti, which were estimated by the two CPA forensic accountants of the BERO Group as being at least $11.9 million for $550,000;
c. Failure to act on repeated notifications that Helmstetter's assets included monies from compensation, dividends, and distributions earned by Helmstetter, reported to the taxing authorities but never paid by Ruscitti;
d. Failure to invoke the doctrines of Constructive Receipt or Constructive Trust based on current law and tax statutes and regulations;
e. Failure to recognize that any earned or declared monies, dividends, and distributions to Helmstetter were actually liquid assets of the estate held in constructive trust by Ruscitti;
f. Failure to conduct a reasonable search for, examination, or valuation of compensation, dividends, and distributions earned by Helmstetter but never paid by Ruscitti;
g. Failure to examine or review the valuation of Helmstetter's 33% equity interest in Kingdom Chevrolet despite BERO Group accountants estimating this asset at $7 million. Similarly, the record does not reveal recognition that this asset has the potential to serve as financing collateral or operational capital; and

h. Failing to reasonably consider the findings of the BERO Group accountants who found no reasonable basis for either 1) concluding that Helmstetter was hopelessly insolvent or 2) finding a just cause and predicate for him to ever file bankruptcy in the first place.

The actions of the Bankruptcy Court are at odds with the duties of a trustee to a debtor. Among the fundamental and core principles of the bankruptcy system are the high levels of duty and responsibility that the Trustee and courts owe to debtors, their estates, and creditors. This foundational maxim is revealed throughout the Bankruptcy Code, rules and case precedence. See e.g. 11 U.S.C. §704.

"A bankruptcy trustee is a fiduciary of the estate's creditors, and his duty to collect and 'conserve the assets of the estate and to maximize distribution to creditors' is a fiduciary obligation." *In re Melenyzer*, 140 B.R. 143, 154 (Bankr. W.D. Tex. 1992); *see, e.g., United States v. Aldrich (In re Rigden),*795 F.2d 727, 730-31 (9th Cir. 1986) (citing *In re Benny*,29 B.R. 754, 860 (Bankr.N.D.Cal. 1983) for the same proposition); see also *In re Central Ice Cream Co.*, 836 F.2d 1068, 1072 (7th Cir. 1987) (faulting trustee for taking easy settlement and noting failure to consider debtor's residual interest as a shareholder). Further, even though the trustee has no obligation to investigate every matter that is brought to his or her attention, the trustee is statutorily required to look into charges of the concealment of assets, fraudulent conduct, and any other wrongdoing by the debtor or other third parties. *In re Melenyzer*, 140 B.R. at 155.

Procedures utilized by the Bankruptcy Court must operate within the framework of the general purpose of the Bankruptcy Act.

> One of the primary purposes of the bankruptcy act is to "relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." citing *Williams v. U.S. Fidelity G. Co.*, 236 U.S. 549, 554-555 [1915]…The various provisions of the bankruptcy act were adopted in the light of that view and are to be construed when reasonably possible in harmony with it so as to effectuate the general purpose and policy of the act. Local rules subversive of that result cannot be accepted as controlling the action of a federal court. *Local Loan Co. v. Hunt,* 292 U.S. 234, 244 (1934).

"This Court has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals." *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (citing *Carlisle v. United States*, 517 U.S. 416, 426 (1996)). "However the power to judicially create and enforce nonconstitutional 'rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress.'" *Id.* (quoting *Palermao v.United States*, 360 U.S. 343, 353, n. 11 (1959)).

For the purposes of bankruptcy, statutory authority does not directly address procedures to be used in valuation of a bankruptcy estate. The Bankruptcy Code charges a trustee to "collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest" and "investigate the financial affairs of the debtor". 11 U.S.C. § 704(a)(1 and 4). Therefore, the Bankruptcy Code did not legislate procedures for valuation of bankruptcy estates and the Supreme Court's exercise of authority

over the Bankruptcy Court in that regard would not run afoul of the rule set out in *Palermao*, 360 U.S. 343.

The Supreme Court has already set out the Federal Rules of Bankruptcy Procedure which are to be "construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every case and proceeding." Federal Rules of Bankruptcy Procedure, Rule 1001. Rule 6005 allows the trustee to employ an appraiser—which did not happen in this case. No Rules govern methods or procedures by which a trustee or bankruptcy court are to value assets of a debtor. Therefore, the Bankruptcy Code and Federal Rules of Bankruptcy Procedure are essentially silent with regard to how assets within the bankruptcy estate are to be valued other than to allow for a trustee to employ an appraiser—which the Trustee in this case did not do.

In any event, the valuation procedure must comport with the Bankruptcy Code whereby a trustee must "close such estate as expeditiously as is compatible with the best interests of parties in interest" and "investigate the financial affairs of the debtor". 11 U.S.C. § 704(a)(1 and 4). In this case it cannot be said that liquidating Debtor's Claims, credibly valued at $11.9 million, for $550,000 was in the interest of Helmstetter or his creditors. Settling Debtor's Claims for that amount was likely to push the bankruptcy estate into insolvency, leaving Helmstetter to emerge penniless. Additionally, it cannot be said that the Trustee investigated the financial affairs of the debtor because no evidence of valuation was put forth to justify the Settlement Agreement. Certainly Trustee did not investigate the Debtor's Claims because he made to effort to turnover constructive trust assets held by Ruscitti as a result of unpaid compensation and distributions earned by Helmstetter but never paid by Ruscitti as set out in the Bero Group's affidavits. *Helmstetter v. Herzog, et al.*, 20 cv 05485, DKT 16 -1, 16-2.

Furthermore, the procedures that were utilized cannot be said to have resulted in justice as required by Federal Rules of Bankruptcy Procedure, Rule 1001. The Bankruptcy Court seems to have set aside all other considerations in favor of a rapid resolution and liquidation of the estate, to the detriment of Helmstetter and likely his creditors. In this case, utilizing the supervisory authority set out in *Dickerson* would not conflict with the existing Bankruptcy Code or Federal Rules of Bankruptcy Procedure and is required by justice. 530 U.S. 428.

Supervisory authority over the Bankruptcy Court should require procedures by which the Trustee values the estate assets before liquidating them and procedures that demanded the Trustee litigate or negotiate in a manner to maximize the value of the estate. In this case, nothing in the record indicates that the Trustee or the lower courts materially examined or considered either the expert reports of the BERO Group or the various attorney proffers reporting the findings and opinions of these reports to the Courts. See *Helmstetter v. Herzog*, 20-5485, DKT 20, 25, 62. Further there is no indication of any material efforts by the Trustee or the lower courts to independently obtain credible valuations of Helmstetter's assets or liabilities.

With respect to compensation, dividends and distributions not paid by Ruscitti to Helmstetter, both the Trustee and the lower courts were advised that these monies were current assets of the bankruptcy estate held in constructive trust by Ruscitti; and further that these funds could probably be recovered by the issuance of a judicial turnover order relatively quickly and inexpensively. As explained, by operation of law and the application of the doctrines of constructive receipt and constructive trust, at all relative times, in truth and in fact, Helmstetter was not insolvent. Rather

at all relevant times under the law Helmstetter and later his estate were the rightful owners of millions of dollars in liquid assets held in the constructive trust by Ruscitti and his agents. See generally, 26 C.F.R. § 1.451-2 – Constructive Receipt of Income and *In re Miss. Valley Livestock, Inc.,* 745 F.3d 299, 304-307 (7th Cir. 2014).

The nature of the indica of possible systemic deficiencies noted by Helmstetter have potentially devastating consequences. At least two CPA/Forensic Accountants have reviewed the financial and corporate records available and reported that a) there is no reasonable basis for concluding that Helmstetter was or is financially insolvent and b) their examination did not reveal a reasonable basis for Helmstetter to have ever filed bankruptcy to begin with, however, the Trustee found that the estate was insolvent without justification. (Bero Group Affidavits, Index H and I). With these facts of record, it would be reasonable to expect that some form of prospective system revision may be examined.

The record reflects that Helmstetter suffered a series of injuries from multiple acts of misfeasance, malfeasance and nonfeasance. He suffered multiple acts of legal and accounting malpractice, as reflected in his amended schedules. The Court has an overarching mandate to do justice and to avoid unjust results. Helmstetter is deserving of the exercise of that power.

The record as described herein reflects that Helmstetter entered bankruptcy by mistake and misfortune following what would turn out to be severely damaging legal and accounting advice. The Court has its supervisory powers to redress cases of severe injustice and accomplish the overarching objectives of achieving justice and avoiding unjust results.

At the end of the day, unless prior decisions of the lower courts are overturned the key beneficiary here

is Ruscitti. Furthermore, if the reports of the BERO Group are correct there is a very significant chance, if not probability, that Ruscitti paid the $550,000 Settlement Agreement for the release of what is estimated to be $11.9 million in claims using Helmstetter's own money. Such a result, if proven true, is severely unjust. Furthermore, it would be damaging to the reputation of the judiciary and would harm the public's confidence in the judicial system. This court should use the supervisory authority over the lower courts set out in *Dickerson* to correct that injustice. 530 U.S. at 437.

REASONS FOR GRANTING THE PETITION

1. Lower courts erred when they ruled that standing did not exist despite evidence that Helmstetter's bankruptcy estate would likely have a surplus.
2. Lower courts denied due process to Helmstetter when they refused to hear the merits regarding Helmstetter's solvency.
3. This Court should exercise its supervisory authority to examine and remediate indicia of systemic and operational deficiencies presented in the Bankruptcy Ccourt's valuation of Helmstetter's estate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: June 12, 2023

/s/ *Michael T. Stanley*

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INDEX TO APPENDICES

APPENDIX A

No. 21-2486
United States Court of Appeals, Seventh Circuit
In re Helmstetter
44 F.4th 676 (7th Cir. 2022)
Decided Aug 11, 2022

No. 21-2486
08-11-2022
IN RE: Michael S. HELMSTETTER, Debtor-Appellant.
Nicola S. Tancredi, Attorney, Law Office of Nicola S. Tancredi, Oakbrook Terrace, IL, for Debtor-Appellant.
Gregory K. Stern, Attorney, Chicago, IL, for David Herzog.
Jackson-Akiwumi, Circuit Judge.
Nicola S. Tancredi, Attorney, Law Office of Nicola S. Tancredi, Oakbrook Terrace, IL, for Debtor-Appellant.
Gregory K. Stern, Attorney, Chicago, IL, for David Herzog.
Before Sykes, Chief Judge, and Kirsch and Jackson-Akiwumi, Circuit Judges.
Jackson-Akiwumi, Circuit Judge.
Chapter 7 Debtor Michael S. Helmstetter appeals the bankruptcy court's decision approving a settlement agreement entered into on behalf of his estate and executed by the estate's trustee. But because Helmstetter fails to show how it is likely—and not merely speculative—that his purported injury would be redressed by a favorable decision from this court, he lacks Article III standing to appeal the bankruptcy court's decision. Accordingly, we affirm the district court's judgment dismissing the bankruptcy appeal for lack of jurisdiction.

I

In 2014, five years before Helmstetter voluntarily filed for Chapter 7 bankruptcy, he filed a lawsuit in state court against his former employers, Kingdom Chevrolet, Inc., and Western Avenue Nissan, Inc., and their majority shareholder, Richard Ruscitti (collectively,

the "Kingdom Entities"). The Kingdom Entities then filed counterclaims and a separate lawsuit against Helmstetter in state court. The state court litigation between Helmstetter and the Kingdom Entities was automatically stayed when Helmstetter filed his bankruptcy petition in October 2019. At the time of the stay, the parties had only completed limited written discovery.

As expected, after Helmstetter filed his bankruptcy petition, an estate was created containing all of his legal and equitable *678 property interests, including the state court litigation. *See* 11 U.S.C. § 541(a)(1). The bankruptcy court appointed David Herzog as trustee over Helmstetter's estate. Trustee Herzog's task was to "gather the estate's assets for pro rata distribution to the estate's creditors." *In re Teknek, LLC*, 563 F.3d 639, 645 (7th Cir. 2009) (citation omitted). To facilitate the distribution process, Helmstetter filed three schedules of assets and liabilities under penalty of perjury with the bankruptcy court. He filed his first set of schedules in November 2019 and his first amended set in April 2020. In both sets of schedules, Helmstetter valued his total assets at approximately $8.5 million, which included his projected recovery in the state court litigation of between $5 million and $7.5 million, and some "other assets" worth roughly $1 million to $3.5 million. In both sets of schedules, Helmstetter valued his liabilities between approximately $6.5 million and $10.5 million.

After Helmstetter filed the first amended schedules but before Helmstetter filed his second amended schedules, Trustee Herzog moved the bankruptcy court to approve a settlement agreement between the Kingdom Entities and Trustee Herzog, on behalf of the estate. Relevant to this appeal, the parties agreed to dismiss the state court litigation; the Kingdom Entities agreed to pay $550,000 to Trustee Herzog for

the benefit of the estate; and Trustee Herzog agreed to transfer to the Kingdom Entities the estate's interests, if any, in the Kingdom Entities and related companies.

Subsequently, Helmstetter filed his second amended schedules wherein he valued his total assets at $43 million[1] and his liabilities at approximately $20 million. His total assets included $16 million for the estate's recovery in the state court litigation and $24 million for other assets. The "other assets" valuation now included$20 million from purported claims against third parties. Helmstetter's new valuations copied estimates from a report produced by accountants from The BERO Group. Helmstetter provided no evidence to support the estimates, and the report does not explain how the accountants reached the estimates or what methodologies they used. Helmstetter then objected to Trustee Herzog's motion to approve the settlement, arguing that the settlement was improper because it undervalued the state court litigation.

The bankruptcy court held a hearing on Trustee Herzog's motion to approve the settlement. Relying on the second amended schedules and The BERO Group report, Helmstetter argued at the hearing that the state court litigation recovery was worth $16 million, so the $550,000 proposed settlement was insufficient. Trustee Herzog disputed Helmstetter's increased valuation of the state court litigation. He argued that Helmstetter wanted the estate to hire a new attorney who requested a 50 percent contingency fee to recover the projected $16 million, so even accepting the$16 million figure, the state court litigation recovery amount was much lower than Helmstetter's projections.

[1] Helmstetter actually valued his total assets at nearly $60 million in the second amended schedules, but he revised that amount to $43 million in his district court briefing.

Over Helmstetter's objection, the bankruptcy court approved the settlement agreement, finding that it was fair and reasonable and that approving it was in the best interest of the estate.

Without seeking a stay of the bankruptcy court's order, Helmstetter appealed the bankruptcy court's decision to the district court, arguing that the bankruptcy court improperly approved the settlement agreement and undervalued the state court litigation. *679 He also filed a motion to supplement the record, to conduct discovery, and for appointment of a special master. Trustee Herzog moved to dismiss the appeal for lack of standing. He argued that Helmstetter did not have a reasonable expectation of recovering a surplus after the estate paid all creditors, therefore Helmstetter would not benefit from reversal of the bankruptcy court's order. Helmstetter countered that, based on The BERO Group report and the second amended schedules, the estate would have a $20 million surplus after paying the creditors.

The district court granted Trustee Herzog's motion and denied Helmstetter's motion. Helmstetter timely appealed to this court. At some point before this appeal, Trustee Herzog and the Kingdom Entities executed the settlement agreement and dismissed the state court litigation.

II

In this appeal, Helmstetter maintains that the bankruptcy court undervalued the estate's potential recovery from the state court litigation and erred in approving the settlement. He also challenges the district court's decision dismissing the matter for lack of jurisdiction and denying his request to supplement the bankruptcy court record. Trustee Herzog argues that Helmstetter lacks standing to bring this appeal for the same reasons advanced in the district court. Alternatively, Trustee Herzog argues that the appeal

is moot, both equitably and under 11 U.S.C. § 363(m), because the settlement agreement is complete and the state court litigation has been dismissed.

Article III standing is jurisdictional, so if Helmstetter lacks standing, we lack jurisdiction to address the merits of this appeal. *See Nowlin v. Pritzker* , 34 F.4th 629, 632 (7th Cir. 2022). Accordingly, we start (and end) our analysis with Helmstetter's standing, and our review is de novo. Id.

"The test for standing is a familiar one: [a] plaintiff has standing only if he can allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.' " *Pavlock v. Holcomb* , 35 F.4th 581, 588 (7th Cir. 2022)(quoting *California v. Texas* , —— U.S. ——, 141 S. Ct. 2104, 2113, 210 L.Ed.2d 230 (2021)). "Standing is lacking if it is merely 'speculative'—as opposed to 'likely'—that the plaintiff's injury would be redressed by a favorable decision." In re GT Automation Grp., Inc. , 828 F.3d 602, 604 (7th Cir. 2016) (quoting *United States v. Windsor* , 570 U.S. 744, 757, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013)). We have "noted that debtors often lack standing to challenge bankruptcy orders 'because no matter how the estate's assets are disbursed by the trustee, no assets will revert to the debtor[,]' " and therefore, it is unlikely that a favorable decision from this court would redress the debtor's injury. *Id.* at 604–05 (citation omitted). The party invoking federal jurisdiction bears the burden of establishing standing. *See Pavlock* , 35 F.4th at 588. Helmstetter fails to meet his burden because he provides only speculative support that he would recover from the estate after creditor distribution, such that reversing the bankruptcy court's decision would likely redress his injury. He argues that he would recover the estate's $20 million surplus. But this "surplus" is based on The BERO Group's estimates of $16 million

from the state court litigation and $20 million from purported claims against third parties. Critically, Helmstetter fails to provide any support for these estimates or The BERO Group's calculations. Indeed, at oral argument, Helmstetter's attorney could explain only that the estimates were based on records available to *680 The BERO Group. He could not articulate what methodologies The BERO Group used to produce the estimates, and he professed that he "can't speak to" how The BERO Group determined the value of the purported claims against third parties. Helmstetter's abstract notion of a "surplus" is insufficient to establish standing and confer jurisdiction upon this court. *See GT Automation*, 828 F.3d at 605 (holding that appellant failed to demonstrate Article III standing to appeal a bankruptcy court's decision where it was only "theoretically possible" for appellant to receive any benefit from the estate).

At most, Helmstetter's assets total $15 million. This amount generously includes $8 million in recovery from the state court litigation (after paying a 50 percent contingency fee to a new attorney).[2] The amount does not include any of the $20 million in purported claims against third parties that Helmstetter fails to substantiate.[3] Because Helmstetter's assets do not exceed his conceded liabilities of $20 million, Helmstetter cannot explain how it is "likely" that any distributions from the estate will ultimately flow to him. *See GT Automation*, 828 F.3d at 604. Because Helmstetter fails to demonstrate that he would be able "to realize any economic benefit from a potential reversal," *id.* (quotation omitted), he lacks standing. Therefore, we affirm the district court's judgment dismissing the bankruptcy appeal, and we do not reach the merits of Helmstetter's claim or Trustee Herzog's arguments that the matter is moot.

2 We say "generously" because the state court litigation was dismissed with prejudice in September 2021, which means Helmstetter cannot recover anything from the litigation.

3 Indeed, at oral argument, Trustee Herzog's attorney highlighted that those claims have been monetized for less than $40,000 and some claims sold for as little $1.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
MEMORANDUM OPINION AND ORDER

MICHAEL S. HELMSTETTER,	)	
	)	No. 20 C 5485
Appellant,	)	
v.	)	Bankruptcy
DAVID HERZOG,	)	No. 19-28687
Trustee,	)	
RICHARD RUSCITTI,	)	Judge Rebecca R.
and KINGDOM	)	Pallmeyer
CHEVROLET, INC.,	)	
	)	
Appellees.	)	

Appellant Michael S. Helmstetter was the minority owner and an employee of two car dealerships. A dispute between Helmstetter and the majority shareholder led to litigation in state court and ultimately to a Chapter 7 bankruptcy petition. Helmstetter filed the petition in October 2019. By August 2020, Appellee David Herzog, the appointed Trustee for the bankruptcy estate, had negotiated an agreement to settle the estate's disputes with the dealerships—Kingdom Chevrolet, Inc. ("Kingdom") and South Chicago Nissan, d/b/a Western Avenue Nissan ("Western Avenue")—and the majority owner, Richard Ruscitti. Over Helmstetter's objection, Bankruptcy Judge Jacqueline P. Cox granted Herzog's motion for approval of the settlement agreement and transfer of assets. Arguing that the Trustee undervalued his estate, Helmstetter appeals. For the reasons explained below, the court denies Helmstetter's motion to supplement the record and grants the Trustee's motion to dismiss the appeal for lack of standing.

BACKGROUND

A. State Court Proceedings

From the complicated and sometimes inconsistent record, the court gleans the following: Helmstetter is a former employee of Kingdom and claims to own at least 33 percent of the company. (*See, e.g.,* Trustee Motion for Approval of Settlement of Disputes and Transfer of Assets ("Mot. to Approve Settlement"), Appellant Record on Appeal ("Appellant ROA") [11-2] at PageID#: 428; BERO Report, Exs. B, C to Helmstetter Objection to Mot. to Approve Settlement, Appellant ROA at PageID#: 601.) Kingdom operates an automobile dealership in Chicago, Illinois. (Mot. to Approve Settlement at PageID#: 428.) The parties do not specify how or when Helmstetter's employment with Kingdom ended, but it appears that Ruscitti fired him sometime in 2014. (*See* BERO Report at PageID#: 601.) Kingdom is an S-Corporation (*id.*), meaning that it "pass[es] corporate income, losses, deductions, and credits through to [its] shareholders for federal tax purposes." (S Corporations, Internal Revenue Service, https://www.irs. gov/businesses/small-businesses-self-employed/s-corporations (last visited July 12, 2021); *see also* Mot. to Approve Settlement at PageID#: 435–36 (indicating that Kingdom is a closely held corporation).) Ruscitti is the majority owner of Kingdom. (Mot. to Approve Settlement at PageID#: 429.)

Helmstetter also maintains that he has a 25 percent ownership interest in Western Avenue. (*Id*. at PageID#: 428.) Like Kingdom, Western Avenue is a closely held corporation of which Ruscitti is the majority owner and operates an automobile dealership in Chicago, Illinois. (*Id.* at PageID#: 429, 435–36.) Helmstetter is a former employee of Western Avenue, as well. (*See* BERO Report at PageID#: 614 (stating that "Ruscitti

fired Helmstetter from Western Avenue Nissan" in August 2014).)[1]

Finally, Helmstetter claims that he has an ownership interest in two unidentified reinsurance companies (the "Reinsurance Companies"). (Mot. to Approve Settlement at PageID#: 428.) Ruscitti is a full or partial owner of the Reinsurance Companies and contends that Helmstetter has no ownership interest in them. (Proposed Settlement Agreement, Appellant ROA at PageID#: 440.) The Trustee eventually identified the Reinsurance Companies and, as it turns out, there are eight, not two. (Mot. to Approve Settlement at PageID#: 429 n.4.) Neither the number of companies nor their names are relevant to the outcome of this appeal.

The falling-out between Helmstetter and the dealerships led to Helmstetter's filing an accounting action in state court (the "Chancery Action") against Ruscitti, Kingdom, and Western Avenue on December 17, 2014. (Proposed Settlement Agreement at PageID#: 439.)[2] Seeking to enforce his ownership interest in Kingdom and his claimed ownership interest in Western Avenue and the Reinsurance Companies, Helmstetter sought to compel examination of Kingdom and Western Avenue's books and records. (Mot. to Approve Settlement at PageID#: 429; Proposed Settlement Agreement at PageID#: 439.) On March 29, 2017, Helmstetter added claims alleging deprivation of corporate distributions and loss of corporate opportunities. (Proposed Settlement Agreement at PageID#: 439.) On June 22, 2017, Ruscitti, Kingdom, and Western Avenue filed counterclaims, asserting that Helmstetter engaged in misconduct while employed at Kingdom and/or West-

[1] Western Avenue is not an Appellee. Neither side explains why.

[2] That case is *Helmstetter v. Kingdom Chevrolet, Inc.*, Case No. 2014 CH 20208.

ern Avenue. (*Id.*) According to the counterclaims, Helmstettler fraudulently approved a payment of more than $700,000 for "unrealized advertising services"[3]; purchased a stolen vehicle for $25,000 and attempted to resell it; and maintained an "improper relationship" with a subordinate who allegedly was stealing from the dealerships. (*Id.*) The bankruptcy record shows that Ruscitti, Kingdom, and Western Avenue seek $1,383,596.69 in damages for the counterclaims. (Second Am. Schedules at PageID#: 536.) It is not clear from the bankruptcy record why the damages request substantially exceeds $725,000.

On March 3, 2015, Kingdom and Western Avenue filed a separate lawsuit against Helmstetter in the Circuit Court of Cook County, asserting claims for breach of fiduciary duty and fraud (the "Fraud Action"). (*Id.*)[4] The bankruptcy record that Helmstetter provided to this court does not contain further information about those claims.[5]

As of October 9, 2019, the Chancery and Fraud Actions (collectively, the "Circuit Court Litigation") were nearly five years old, but discovery was not complete; the parties had exchanged some written discovery, but they had taken no depositions, nor had they engaged

[3] The parties do not explain what the "unrealized advertising services" were, why Helmstetter allegedly paid $700,000 for them, to whom he allegedly paid that sum, or whether he had a relationship with the recipient.

[4] That case is Kingdom Chevrolet, Inc. v. Helmstetter, Case No. 2015 L 002134. (*Id.*)

[5] The Trustee states that Helmstetter's adversaries in the Circuit Court Litigation seek "$700,000.00 and $1,383,591.69" in damages. (Trustee Mot. to Dismiss [14] at 8.) Because the bankruptcy record states that the defendants in the Chancery Action seek approximately $1.38 million in damages for the counterclaims, the court assumes that the request for $700,000 relates to the fraud allegations—despite that $700,000 appears to align with the conduct charged in the Chancery Action counterclaims rather than the Fraud Action.

in expert discovery. (Mot. to Approve Settlement at PageID#: 433.) On October 9, 2019, Helmstetter filed his voluntary Chapter 7 bankruptcy petition. (Id. at PageID#: 427.) According to Helmstetter, he did so "[a]t least in part because of the costs and length of" the Circuit Court Litigation. (Helmstetter Appellant Br. [37] at 6.) The Chapter 7 filing resulted in an automatic stay of the Circuit Court Litigation. (Trustee Mot. to Dismiss at 2 (citing 11 U.S.C. § 362).)

B. Chapter 7 Proceedings

Chapter 7 of the Bankruptcy Code "gives an insolvent debtor the opportunity to discharge his debts by liquidating his assets to pay his creditors." Law v. Siegel, 571 U.S. 415, 417 (2014) (citing 11 U.S.C. §§ 704(a)(1), 726, 727). Filing a bankruptcy petition under Chapter 7 "creates a bankruptcy 'estate' generally comprising all of the debtor's property." *Id.* (citing 11 U.S.C. § 541(a)(1)). "The estate is placed under the control of a trustee, who is responsible for managing liquidation of the estate's assets and distribution of the proceeds." *Id.* (citing 11 U.S.C. § 704(a)(1) (providing that the trustee shall "collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest")).

1. Procedural History

On October 21, 2019, David Herzog was appointed as the Trustee in Helmstetter's Chapter 7 case. (Bankruptcy Court Docket, Appellant ROA at PageID#: 49). On November 4, 2019, Helmstetter filed the first of three sets of Schedules of Assets and Liabilities that he ultimately submitted to the Bankruptcy Court. (Original Schedules, Appellant ROA at PageID#: 139–212.) On March 10, 2020, the Trustee filed a motion under Federal Rule of Bankruptcy Procedure 2004 for leave to examine Helmstetter and collect documents Helmstetter had failed to provide regarding (among other

things) his financial condition and the disclosures in the Schedules. (Rule 2004 Mot., Appellant ROA at PageID#: 310–17.) The Bankruptcy Court granted the motion on March 17, 2020. (Bankruptcy Court Docket at PageID#: 320.) When the Rule 2004 examination occurred is not clear from the record, but on April 9, 2020, Helmstetter filed the second iteration of his Schedules of Assets and Liabilities. (First Amended Schedules, Appellant ROA at PageID#: 321–90).

On August 11, 2020, the Trustee filed a motion for entry of an agreed order in which Helmstetter, Ruscitti, Kingdom, and the Trustee agreed that: (1) Helmstetter once owned at least 33 percent of the shares of common stock of Kingdom; (2) any transfers of said shares that Helmstetter claimed to have made are null;[6] and (3) pursuant to the Chapter 7 petition, the Trustee is the sole owner of Helmstetter's 33 percent interest in Kingdom. (Mot. for Entry of Agreed Order at PageID#: 411–17; Agreed Order at PageID#: 418, 420.) The agreed order also provided that the Trustee "is the sole owner of . . . 25% of the stock of [Western Avenue]." (Agreed Order at 418, 420.) As Ruscitti and Western Avenue continue to deny that Helmstetter has any ownership interest in Western Avenue (see, e.g., Proposed Settlement Agreement at PageID#: 440; Trustee Mot. to Dismiss at 7), the court understands the agreed order as providing that if a

[6] According to the Trustee, Helmstetter "disclosed on his Schedules and Statement of Financial Affairs transfers within one year of the Petition Date of some or all of the shares of Kingdom and Western Avenue to three entities": Zephyr 2020, Inc., which is a Nevada corporation solely owned by Helmstetter; the Helmstetter Family Trust; and the Helmstetter Children's Trust. (Mot. for Entry of Agreed Order, Appellant ROA at PageID#: 415; see also Agreed Order, Appellant ROA at PageID#: 418.) The parties agree that the stock transfers were "never completed by being registered with the requisite stock registry of" the dealerships. (Agreed Order at PageID#: 418.)

court later determines that Helmstetter did once own 25 percent of Western Avenue's stock, the Trustee would be the sole owner of that stock.

Also on August 11, 2020, the Trustee moved for approval of the settlement agreement challenged in this appeal, resolving claims between the Trustee, Kingdom, Western Avenue, and Ruscitti, and a transfer of assets under 11 U.S.C. § 363(f).[7] (Mot. to Approve Settlement at PageID#: 422–38; Proposed Settlement Agreement at PageID#: 439–50.) The settlement agreement would end the state court litigation. It called for release of all parties in the Circuit Court Litigation from all claims and counterclaims; required them to file pleadings dismissing the claims and counterclaims with prejudice; and directed the Trustee to release any other past, present, or future claims of the estate against Ruscitti, Kingdom, Western Avenue, the Reinsurance Companies, and any other entities that Ruscitti owns in whole or in part. (Proposed Settlement Agreement at PageID#: 440–42.) The settlement agreement would also require Ruscitti and/or Kingdom to pay $555,000.00 "in good funds to the Trustee for the benefit of the Estate." (*Id.* at PageID#: 441.) And it would require the Trustee to transfer to Ruscitti and/or Kingdom the Trustee's rights, titles, and interests in Kingdom, Western Avenue, and the Reinsurance Companies—whether "real, apparent or disputed." (Mot. to Approve Settlement at PageID#: 430; *see also* Proposed Settlement Agreement at PageID#: 441; 11 U.S.C. § 363(f) (permitting a trustee to sell property of the estate "free and clear of any

[7] The title of the Trustee's motion to approve the settlement agreement suggests that the agreement resolves claims only for the Trustee, Ruscitti, and Kingdom. (See Mot. to Approve Settlement at PageID#: 422, 427.) But the agreement itself states that Western Avenue is also a party. (See Proposed Settlement Agreement at PageID#: 439.)

interest in such property of an entity other than the estate" in certain circumstances).)[8]

Some two weeks later, on August 26, 2020, Helmstetter filed his third set of Schedules of Assets and Liabilities. (Second Amended Schedules, Appellant ROA at PageID#: 475–559.) He also filed, on August 31, 2020, an objection to the Trustee's motion for approval of the settlement agreement, discussed in more detail below. (Helmstetter Obj., Appellant ROA at PageID#: 590–95.) Bryan D. King, whose law firm (Brown, Udell, Pomerantz & Delrahim (the "Brown Firm")) had represented Helmstetter in the Circuit Court Litigation, also objected. (*See* Brown Firm Obj., Appellant ROA at PageID#: 588-89; Original Schedules at PageID#: 146; Trustee Mot. to Dismiss at 6 n.3.) In its objection, the Brown Firm argued that the settlement agreement did not sufficiently advise the Bankruptcy Court of a secured claim it had filed against the estate for the work it had completed in the Circuit Court Litigation. (Brown Firm Obj. at PageID#: 588.)

After a telephone hearing on September 1, 2020, Judge Cox granted both motions. (See Sept. 1, 2020 Hr'g Tr. [39]; Order Approving Settlement, Appellant ROA at PageID#: 625–26; Order Entering Agreed Order, Appellant ROA at PageID#: 627.) This appeal, timely filed by Helmstetter on September 15, 2020, followed.[9] Helmstetter did not request a stay pending appeal or post a bond, but the Trustee has not yet executed the terms of the settlement agreement. (*See* Trustee Mot. to Dismiss at 2.)

[8] The settlement agreement would also require the Trustee to release the estate's interest in an entity called "Kingdom Advertising" and in a domain name, Westernavenissan.com. (Mot. to Approve Settlement at PageID#: 430; Proposed Settlement Agreement at PageID#: 440–41.) In the briefing submitted to this court, neither side discusses these provisions.

[9] The Brown Firm did not file an appeal.

2. Helmstetter's Schedules of Assets and Liabilities

Helmstetter's Schedules of Assets and Liabilities are central to his appeal and the other motions before this court. As noted, Helmstetter has filed three different sets of Schedules, each under penalty of perjury. (See Original Schedules at PageID#: 211; First Am. Schedules at PageID#: 389–90; Second Am. Schedules at PageID#: 554.) Attorney J. Kevin Benjamin represented Helmstetter when he filed the Original and First Amended Schedules. (See Bankruptcy Court Docket, Appellant ROA at PageID#: 50, 52.) Helmstetter substituted Richard L. Hirsh as his counsel in May 2020, and it was Hirsh who represented Helmstetter when he filed the Second Amended Schedules. (Id. at PageID#: 52, 53.) The Second Amended Schedules incorporate analysis from a third attorney (Nicola S. Tancredi) and two forensic accountants (hereinafter, the "BERO Group"). (*See, e.g.,* Helmstetter Obj. at PageID#: 590–91.)

As shown in the following chart, Helmstetter's estimates of the value of his total assets and liabilities, all furnished under oath, have varied significantly. The estimated value of his liabilities increased by millions of dollars from the time he filed his Original Schedules to the time of the First Amended Schedules and by millions more by the time of the Second Amended Schedules. His estimated assets are similar in the Original and First Amended Schedules, but have ballooned from some $8 million in those schedules to nearly $60 million in the Second Amended Schedules.

	All Assets	Kingdom Assets	Liabilities	Balance
Original Schedules (Nov. 4, 2019)	$8,414,579.67	$5,000,000.00	$6,597,144.72	$1,817,434.95
First Amended Schedules (Apr. 9, 2020)	$8,415,919.67	$7,500,000.00	$10,652,390.01	($2,236,470.33)
Second Amended Schedules (Aug. 26, 2020)	$59,840,319.27 (revised to $43,000,000 in Helmstetter's briefing on appeal)	$18,500,000.00	$19,978,842.25	$39,861,477.01

(Trustee Mot. to Dismiss at 5–6 (providing chart); *see* Original Schedules at PageID#: 146, 148; Nov. 5, 2019 Summary of Assets and Liabilities, Appellant ROA at PageID#: 236–37; First Am. Schedules at PageID#: 325, 328, 330, 388; Second Am. Schedules at PageID#: 479, 483, 489; Aug. 26, 2020 Summary of Assets and Liabilities, Appellant ROA at PageID#: 574.)

Helmstetter has now dialed that inflation back in part. (Helmstetter Opp. to Trustee Mot. to Dismiss ("Helmstetter Opp.") [25] at 11 n.5 (maintaining "certain sums [were entered] under different categories" in the Second Amended Schedules, which resulted in an "overstatement").)

According to Helmstetter, the total value of his assets is $43 million. (*Id.*) If that is true, the value of his assets exceeds his liabilities (according to the Second Amended Schedules) by some $23 million—by the court's calculation. Curiously, Helmstetter himself states that the balance is $20 million. (*See, e.g., id.* (stating that despite the "overstatement" of the total

value of assets, the BERO Group "stand[s] behind the estimated surplus of $20 million").)

At the time the Trustee negotiated the proposed settlement agreement and transfer of assets, Helmstetter had not yet filed the Second Amended Schedules, and the Trustee therefore relied on the information set forth in the First Amended Schedules. (See Helmstetter Obj. at PageID#: 590; Trustee Mot. to Dismiss at 6; Helmstetter Opp. at 9.)[10]

a. Kingdom Assets

As the court understands the Original Schedules, Helmstetter valued his potential recovery in the Circuit Court Litigation (where he sought to enforce his ownership interest in the dealerships) at $5 million, a projected recovery he identified as the "Kingdom Assets." (Original Schedules at PageID#: 146.) In the First Amended Schedules, it appears that Helmstetter identified the Kingdom Assets as (1) the Circuit Court Litigation (which he again valued at $5 million) and (2) his alleged ownership interest in the Reinsurance Companies, which he valued at $2.5 million. (First Am. Schedules at PageID#: 325, 328.) And in the Second Amended Schedules, Helmstetter again identified the Kingdom Assets as (1) the potential recovery in the Circuit Court Litigation, which he now valued at $16 million and (2) his interest in the Reinsurance

[10] According to Helmstetter, attorney Tancredi tried to contact the Trustee by phone before the Trustee moved for approval of the settlement agreement, in an effort to present the BERO Group's analysis of Helmstetter's assets and liabilities. (Helmstetter Opp. at 5–6.) The court has found no reference to that telephone call in the record of the Bankruptcy Court proceedings, however, and therefore disregards it. *See, e.g., Diekemper v. Eggman,* No. 12-CV-1219-JPG, 2013 WL 1308976, at *2 (S.D. Ill. Apr. 1, 2013), *aff'd sub nom. In re Diekemper,* No. 13-1843, 2013 WL 6438404 (7th Cir. Aug. 22, 2013) (when adjudicating a bankruptcy appeal, a district court can consider only documents that were presented to the bankruptcy court).

Companies, which he again valued at $2.5 million. (Second Am. Schedules at PageID#: 479, 483.)

Helmstetter's valuation of the Circuit Court Litigation in the Second Amended Schedules is, thus, more than triple the amount at which he valued that same asset in the Original and First Amended Schedules. The court has located an asset-by-asset breakdown of the Circuit Court Litigation only in the BERO Report—which Helmstetter did not file with his Second Amended Schedules, and appears only as an exhibit to his objection to the proposed settlement agreement. The BERO Group prepared that report from an analysis of Kingdom's financial documents from May 2016 and earlier. (See BERO Report at PageID#: 601–11.)[11] Based on those documents, the BERO Group estimated that Kingdom owes Helmstetter $12.7 million or more, comprising: $7 million, which the BERO Group estimated is 33 percent of the present-day market value of Kingdom; $1.1 million in unpaid salary and bonuses; $3.1 million in "unpaid dividends"; $1.5 million, which the BERO Group estimated is 33 percent of the "excess executive compensation" allegedly paid to Ruscitti in unspecified years; and several assets whose value the BERO Group did not estimate. (BERO Report at PageID#: 604–05.)

In its Report, the BERO Group does not explain specifically how its $12.7 million figure rounds up to $16 million. Perhaps the BERO Group was also counting Helmstetter's disputed 25 percent ownership interest in Western Avenue among the Kingdom Assets. The

[11] When Helmstetter filed his objection in the Bankruptcy Court, he reportedly did not have access to Kingdom documents post-dating May 2016, but he did not say why. (*See* Helmstetter Obj. at PageID#: 593 (stating that the BERO Group relied on documents "produced to date" and on publicly available materials).) Helmstetter did not file the documents underlying the BERO Report in the Bankruptcy Court. (*See id.* at PageID#: 594.)

BERO Report analyzed Western Avenue's financial statements and tax returns dated December 2015 and earlier (again because Helmstetter reportedly did not have more current records at the time he filed his objection in the Bankruptcy Court). (See Helmstetter Obj. at PageID#: 593.) Based on those early documents, and assuming that Helmstetter has a 25 percent ownership interest in Western Avenue, the BERO Group estimated that Western Avenue owes Helmstetter $4,082,000 million or more, comprising: $1.6 million, which the BERO Group estimated is 25 percent of the present-day market value of Western Avenue; $1.1 million in unpaid salary and bonuses; $1.3 million in "unpaid dividends," which the BERO Group estimated is 25 percent of the "dividends paid to Ruscitti in 2015"; $82,000, which the BERO Group estimated is 25 percent of "rent [paid] in excess of [Western Avenue's] lease agreement"; and several assets whose value the BERO Group did not estimate. (BERO Report at PageID#: 615–16.)

The Kingdom- and Western Avenue-related assets described in the BERO Report total $16.8 million.

b. Other Assets

Helmstetter's "other" assets consist of all of his assets that are not part of the Kingdom Assets: $3,414,579.67 in the Original Schedules and $915,919.67 in the First Amended Schedules. Neither side explains the reason for the difference, but the court assumes that the answer lies in how Helmstetter counted his alleged interest in the Reinsurance Companies (i.e., as an "other" asset or a Kingdom Asset). The parties do not discuss what kind of property comprised the "other" assets in the Original and First Amended Schedules.

In his third submission, Helmstetter's valuation of his "other" assets grew from less than $1 million to $24.5 million: the Second Amended Schedules (as revised by Helmstetter in his briefing before this

court) reported $43 million in total assets including $18.5 million in Kingdom Assets. Helmstetter told the Bankruptcy Court that the "other" assets include 23 "claims . . . against various third parties" that, according to Tancredi and the BERO Group, are worth approximately $20 million. (Helmstetter Obj. at PageID#: 590–91.) Neither side discusses what kind of property comprises the remaining $4.5 million in "other" assets.

In the objection he filed with the Bankruptcy Court, Helmstetter did not describe the claims he has against third parties. Instead, he simply attached to the objection a chart that he had previously attached to the Second Amended Schedules. (See Ex. A to Helmstetter Obj., Appellant ROA at PageID#: 596–600; Third-Party Claim Chart, Appellant ROA at PageID#: 555– 59.) That chart presents no basis for the $20 million valuation. The first claim is a representative example: the chart identifies the parties and the purported causes of action, including "fraudulent financial accounting practices." (Ex. A to Helmstetter Obj. at PageID#: 596.) The chart values that claim at $7.5 million based on the following description: Claim by "Michael Helmstetter/New City Historic Auto Row, Inc." against "FCA/Santander for damages caused by FCA/Santander by unordered vehicles forced onto New City Historic Auto Row, Inc., and for Santander forcing the dealership into default and alleged tortious interference by Santander in the dealership's business operations." (*Id.*) According to Helmstetter's objection, New City Historic Auto Row, Inc. is "one of [his] dealerships." (Helmstetter Obj. at PageID#: 592.) Without more context, there is no way to estimate the value of this claim, let alone contend that the value is as much as $7.5 million, or discern whether Helmstetter would, in his individual capacity, be entitled to the full amount of any recovery.

Notably, although Helmstetter stated in the objection he filed with the Bankruptcy Court that he has 23 claims against third parties whose total value is $20 million (*see id.* at PageID#: 591), the Third-Party Claim Chart lists more than 23 claims and values them at more than twice that amount—the Chart estimates that the total value of third-party claims exceeds $40 million. In other words, it appears that Helmstetter is not counting everything in the chart as an "other" asset. The court can detect two reasons for this. First, one of the claims listed in the chart is the Circuit Court Litigation, valued at $16.8 million. (*See* Third-Party Claim Chart at PageID#: 555; Ex. A to Helmstetter Obj. at PageID#: 596.) Helmstetter counts the Circuit Court Litigation (valued at $16 million) as a Kingdom Asset in the Second Amended Schedules, so to treat it as an "other" asset—as he treats the 23 claims against third parties—would double count it. In fact, it appears that Helmstetter did just that when he stated in his Second Amended Schedules that his total assets are approximately $59.8 million. As discussed above, Helmstetter later reduced that estimate by approximately $16.8 million, to $43 million. (*See* Helmstetter Opp. at 11 n.5.) Second, Helmstetter concedes that the statute of limitations has run for certain claims that are listed in the chart. (See Helmstetter Obj. at PageID#: 591 ("The claims bar date having passed, only 23 claims have been filed and they total about $20,000,000.").) The court assumes that, because those claims are time-barred, Helmstetter is not planning to pursue them and therefore is not counting them as "other" assets.

c. Liabilities

As noted earlier, the scheduled value of Helmstetter's liabilities tripled between the Original and Second Amended Schedules, and nearly doubled between the First and Second Amended Schedules. This court

could not locate any explanation for the increases in the record that Helmstetter provided on appeal.

3. Helmstetter's Objection to the Motion to Approve the Settlement Agreement

In the motion to approve the settlement agreement, the Trustee stated that he had "compared the value of the agreement with the costs, effort and risks associated with continuing" the Circuit Court Litigation. (Mot. to Approve Settlement at PageID#: 433.) He explained why the cost-benefit analysis led him to conclude that the settlement is in the estate's best interest. (*Id.*) Helmstetter objected on the ground that the Trustee had not considered the Second Amended Schedules, which, according to Helmstetter, reflect "[t]he true, accurate and appropriate valuation of" his assets. (Helmstetter Obj. at PageID#: 590.) Helmstetter maintains that his assets are sufficient to pay all creditors and, after doing so, are "very likely" to leave him a surplus. (*Id.*) By contrast, he argued, the proposed $555,000 payment to the estate contemplated under the settlement agreement would be insufficient even to pay his creditors. (*Id.* at PageID#: 593.)

Helmstetter informed the Bankruptcy Court that attorney Tancredi had sought the Trustee's permission to pursue the Circuit Court Litigation, and was prepared to litigate Helmstetter's other claims against third parties on behalf of the estate. (*Id.* at PageID#: 592.) It appears that Helmstetter did not disclose to the Bankruptcy Court how much Tancredi planned to charge for that work. As discussed below, the Trustee represented to the Bankruptcy Court that Tancredi had proposed charging a 50 percent contingency fee.

4. Bankruptcy Court Hearing and Order on Motion to Approve Settlement

During the September 1, 2020 hearing on the Trustee's motion to approve the settlement agreement, the Trustee's counsel stated that there is "no . . . cash in

[the] estate" other than the $555,000 it would receive under the agreement. (Sept. 1, 2020 Hr'g Tr. [39] at 3:11–13.) He also emphasized that the Circuit Court Litigation was filed in 2014; has not advanced beyond written discovery; and could "take many more years." (*Id.* at 3:13–17.) He reiterated that the Trustee's "duty is to quickly turn assets into cash to distribute to creditors." (*Id.* at 3:18–19.)

Moreover, the Trustee's counsel noted that there is "no real support" for Helmstetter's contention that the potential recovery in the Circuit Court Litigation is $16 million. (*Id.* at 8:24–9:3.) To recover that $16 million, the estate would have to pay the Brown Firm for its prior work and hire Tancredi, "who wants a 50 percent contingent fee." (*Id.* at 9:6–12; see also Mot. to Approve Settlement at PageID#: 434 (same).) According to the Trustee's counsel, completing those steps would cut a $16 million recovery to "something like $4 million"—which would not come close to paying the $20 million in liabilities recorded in the Second Amended Schedules. (Sept. 1, 2020 Hr'g Tr. at 9:14–16.) Finally, the Trustee's counsel argued that, because the estate's liabilities exceed its assets, Helmstetter lacked standing to object to the proposed settlement agreement. (*See id.* at 9:13–19.)

At the hearing on this motion, Helmstetter's bankruptcy attorney, Hirsh, argued that the proposed settlement undervalued Helmstetter's claims in the Circuit Court Litigation and would deny recovery for any unsecured creditors. (*Id.* at 4:22–5:1.) Citing the Second Amended Schedules, the Third-Party Claim Chart, and the BERO Report, Hirsh maintained that the estate's assets could "probably" pay "the general unsecured creditors" and "even possibly [leave] a surplus" for Helmstetter. (*Id.* at 5:2–19; *see also id.* at 12:2–9 (similar).) Helmstetter's counsel did not dispute that Tancredi proposed charging a 50 percent

contingency fee for his work on the Circuit Court Litigation. (*See generally id.*)

The Bankruptcy Court granted the Trustee's motion to approve the settlement agreement on September 1, 2020. (Order Approving Settlement at PageID#: 625–26.) In a written order, the court stated that it had considered whether the estate could successfully litigate the claims involving Ruscitti, Kingdom, and Western Avenue. (*Id.* at PageID#: 626.) The court also stated that it had considered "the complexity, expense and likely duration of such litigation, the possible difficulties in collecting on any judgment which could be obtained and all other factors relevant to a full and fair assessment of the wisdom of the proposed settlement." (*Id.*) "The most important factor," the court stated, "is that the underlying litigation has been pending since 2014." (*Id.* (citing *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 424 (1968) (setting forth factors a bankruptcy court should consider in determining whether a settlement is "fair and equitable")).) The court concluded that the settlement agreement was fair, reasonable, and "in the best interests of the estate." (Order Approving Settlement at PageID#: 626.) The court overruled Helmstetter's and the Brown Firm's objections without additional discussion. (*Id.*)

DISCUSSION

On September 16, 2020, Helmstetter filed his notice of appeal of the Bankruptcy Court's order approving the settlement agreement and transfer of assets [1]. On November 16, 2020, the Trustee filed a motion to dismiss the appeal [14]. The Trustee argues that because there is "no evidence" to support Helmstetter's assertion that there will be leftover funds after the estate pays all creditors, Helmstetter would not benefit financially from reversal of the Bankruptcy Court's order and therefore lacks standing to challenge it.

(Trustee Mot. to Dismiss at 5.) On December 4, 2020, Helmstetter filed a motion "to supplement the record and for leave to file special interrogatories and requests to produce and for alternative relief" ("Helmstetter Mot. to Supplement") [20]. For the reasons explained below, the court denies Helmstetter's motion to supplement the record and dismisses the appeal.

A. Helmstetter's Motion to Supplement

In his motion to supplement the record, Helmstetter seeks leave to take "special discovery" regarding the "factual or legal predicate" for the Trustee's argument that Helmstetter cannot reasonably expect a surplus. (Helmstetter Mot. to Supplement ¶¶ 9, 12.) Specifically, Helmstetter asks for permission to serve interrogatories and requests for production of documents that would identify the factual and legal bases for the Trustee's positions that (1) Helmstetter has nearly $20 million in liabilities;[12] (2) the BERO Group's estimate of the estate's likely surplus (approximately $20 million) is incorrect; and (3) the BERO Group's analysis "should not be determinative." (Proposed Interrogatories & Requests for Production, Ex. 1 to Helmstetter Mot. to Supplement [20-1] at 1–5, 6–8.) Assuming that the court grants Helmstetter permission to serve those discovery requests, Helmstetter asks the court to require the Trustee to file whatever responses he provides "as supplements to the record on appeal." (Helmstetter Mot. to Supplement, Prayer for Relief.) In the alternative to supplemental discovery, Helmstetter asks the court to appoint a special master to "investigate" his solvency and to hold an evidentiary hearing on that issue. (*Id.* ¶¶ 18–19.)

[12] Helmstetter's challenge to the amount of his liabilities is puzzling because, in the Second Amended Schedules, he confirms that his liabilities are $19,978,842.25. (Second Am. Schedules at PageID#: 574.) He has never revised that figure or stated that it is incorrect.

The Trustee responds that Helmstetter's motion should be denied because this court cannot properly consider evidence that was not before the Bankruptcy Court. The court agrees. "When considering an appeal from a bankruptcy court, district courts act as appellate courts. . . . As such, a district court considering a bankruptcy appeal may only consider evidence that was before the bankruptcy court and made part of the record." *Diekemper*, 2013 WL 1308976, at *2; *see also In re Loefgren,* 305 B.R. 288, 291 (W.D. Wis. 2003), *aff'd,* 85 F. App'x 522 (7th Cir. 2003) (similar).

By definition, the evidence that Helmstetter seeks was not before the Bankruptcy Court. Furthermore, Helmstetter does not dispute that he made no attempt to obtain the evidence in the bankruptcy proceedings, and he provides no explanation for his failure to do so. Finally, Helmstetter's contention that the Trustee did not make adequate attempts to gather and value his assets is unpersuasive, especially considering the Trustee's statement in his Rule 2004 motion that Helmstetter himself failed to cooperate with several requests for discovery concerning his assets and liabilities. (Rule 2004 Mot. at PageID#: 313.) Even without that, Helmstetter's argument is waived because he does not explain how the Trustee's efforts to gather and value his assets were deficient. (Helmstetter Reply to Mot. to Supplement [27] at 2; *see Uncommon, LLC v. Spigen, Inc.,* 926 F.3d 409, 425 (7th Cir. 2019) ("arguments that are underdeveloped, conclusory, or unsupported by law are waived" (internal quotation marks omitted)).)

Helmstetter's motion to take additional discovery and for alternative relief is denied. Helmstetter cites no authority for the proposition that the court can or should appoint a special master in this circumstance, and the court does not need an evidentiary hearing to understand the record.

B. Trustee's Motion to Dismiss

In his motion to dismiss, the Trustee argues that Helmstetter lacks standing to appeal the Bankruptcy Court's order approving the settlement and transfer of assets, and that this court must therefore dismiss the appeal. As discussed here, the court agrees.

1. Legal Standard

A federal district court has jurisdiction to hear appeals from a bankruptcy court's "final judgments, orders, and decrees." 28 U.S.C. § 158(a)(1). The Bankruptcy Court's order approving the settlement agreement and transfer of assets was a final judgment because it resolved all disputes between the estate, Kingdom, Western Avenue, and Ruscitti. *See, e.g., Ritzen Grp., Inc. v. Jackson Masonry, LLC,* 140 S. Ct. 582, 586 (2020) ("Orders in bankruptcy cases qualify as 'final' when they definitively dispose of discrete disputes within the overarching bankruptcy case."). A district court reviews a bankruptcy court's approval of a settlement "deferentially, for abuse of discretion." *In re Drs. Hosp. of Hyde Park, Inc.,* 474 F.3d 421, 426 (7th Cir. 2007). "The abuse of discretion standard recognizes that because of the bankruptcy judge's unique position, second-guessing by appellate courts will do little to improve upon bankruptcy judges' decisions." *Depoister v. Mary M. Holloway Found.,* 36 F.3d 582, 586–87 (7th Cir. 1994) (internal quotation marks omitted). "Factual findings are reviewed for clear error; legal conclusions are reviewed de novo." *In re Drs. Hosp.,* 474 F.3d at 426; *see also, e.g., In re Jepson,* 816 F.3d 942, 945 (7th Cir. 2016). Likewise, although a bankruptcy court cannot simply "rubber stamp" a trustee's settlement decision, it must give "[s]ome deference . . . to the trustee's expertise." *In re Commercial Loan Corp.,* 316 B.R. 690, 698 (Bankr. N.D. Ill. 2004) (internal quotation marks omitted). This court will exercise jurisdiction to review the mer-

its of Helmstetter's appeal only if he has standing to challenge the bankruptcy court's order. *See, e.g., In re GT Automation Grp., Inc.,* 828 F.3d 602, 604 (7th Cir. 2016). The burden is on Helmstetter to show that he does. *Id.* at 605.

In its bankruptcy jurisprudence, the Seventh Circuit has discussed both Article III standing and "bankruptcy standing." *See, e.g., id.* at 604–05 & n.1. To establish Article III standing, the plaintiff must show that he "has suffered an 'injury in fact,' which is 'fairly traceable' to the challenged action of the defendant, and which would 'likely' be redressed by a favorable decision." *Id.* at 604 (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559–62 (1992)). Mere speculation that a favorable decision would redress the injury is insufficient. See *GT Automation*, 828 F.3d at 604. "In the bankruptcy context," the Seventh Circuit has explained that "an appellant lacks standing if it is 'unable to realize any economic benefit from a potential reversal.'" *Id.* (quoting *In re Stinnett,* 465 F.3d 309, 315 (7th Cir. 2006)). Thus, in *GT Automation,* an unsecured creditor failed to demonstrate Article III standing where it could not say whether it "would get 'even a dollar' from a favorable decision"; argued only that it was "theoretically possible" that it could receive some financial benefit; did not know how many claims had been filed against the estate that would take priority over its own; and did not know the likelihood that the bankruptcy court would approve any of those claims. 828 F.3d at 605.

In decisions predating *GT Automation,* the Seventh Circuit has referred to "bankruptcy standing" as "'a form of prudential standing' . . . that is 'narrower than Article III standing.'" *GT Automation*, 828 F.3d at 605 n.1 (quoting *In re Ray*, 597 F.3d 871, 875 (7th Cir. 2010); *In re CultAwareness Network, Inc.*, 151 F.3d 605, 607 (7th Cir. 1998)). The court in *Cult Awareness* stat-

ed that to establish "bankruptcy standing," "a person must have a pecuniary interest in the outcome of the bankruptcy proceedings." *Cult Awareness*, 151 F.3d at 607. It further explained that "[i]f the debtor can show a reasonable possibility of a surplus after satisfying all debts, then the debtor has shown a pecuniary interest and has standing to object to a bankruptcy order." *Id.* at 608; *see also, e.g.*, *Stinnett*, 465 F.3d at 315 (quoting same); *In re Andreuccetti*, 975 F.2d 413, 416 (7th Cir. 1992) ("A 'person aggrieved' by a bankruptcy order must demonstrate that the order diminishes the person's property, increases the person's burdens, or impairs the person's rights."(internal quotation marks omitted)).

There is some debate regarding whether the Seventh Circuit's characterization of "bankruptcy standing" as a form of prudential standing survives the Supreme Court's decision in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). In *Lexmark*, the Court considered "the appropriate analytical framework for determining a party's standing to maintain an action for false advertising under the Lanham Act." *Id.* at 125 (internal quotation marks omitted). The defendant agreed that the plaintiff had Article III standing but argued that the Court should "decline to adjudicate" the claim for "prudential" rather than constitutional reasons. *Id.* at 125–26. The Court refused that request. *See id.* at 128. It reiterated that a federal court's duty to decide cases that are within its jurisdiction "is virtually unflagging." *Id.* at 126 (internal quotation marks omitted). The Court then explained that although it had used the term "prudential standing" in recent jurisprudence, the label was inapt because the Court had been using it to describe what was actually an issue of statutory interpretation: "whether a legislatively conferred cause of action encompasse[d] a particular plaintiff's claim."

See id. at 126–28. The Court warned that "[j]ust as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied . . . it cannot limit a cause of action that Congress has created merely because 'prudence' dictates." *Id.* at 128. In *GT Automation*, the Seventh Circuit flagged this discussion, suggesting that it might affect whether "the standing analysis in bankruptcy cases involves any 'prudential' considerations." 828 F.3d at 605 n.1. But because the case before the Seventh Circuit concerned only Article III standing, it left that question to another day. *See id.*

Here, Helmstetter advances only one theory of standing: that the estate will have a surplus after it pays all creditors, and that reversing the Bankruptcy Court's order would permit him to collect the surplus. The Trustee, for his part, contends that Helmstetter offers only conjecture to support his theory. The parties' dispute sounds in Article III. *See GT Automation*, 828 F.3d at 604 (appellant lacks standing if he is "unable to realize any economic benefit from a potential reversal" of the bankruptcy court's order). Notably, the "pecuniary interest" test has the same focus; indeed, the Seventh Circuit cited it in articulating the Article III standard for bankruptcy cases. *See Stinnett*, 465 F.3d at 315 ("To have standing to object to a bankruptcy order, a person must have a pecuniary interest in the outcome of the bankruptcy proceedings." (quoting *Cult Awareness*, 151 F.3d at 607); *GT Automation*, 828 F.3d at 604 (quoting same). The parallels between the standards support a conclusion that where, as here, debtor standing turns only on the possibility of recovering a surplus, the framework for assessing Article III and "bankruptcy" standing is the same. At its core, it asks whether that possibility is too remote to support the exercise of the court's jurisdiction. *See GT Automation*, 828 F.3d at 605 ("theoretical[ ] possib[ility]"

that favorable decision would yield financial benefit is insufficient to confer standing); *Cult Awareness*, 151 F.3d at 608 (debtor must show a "*reasonable* possibility of a surplus" (emphasis added)). To establish that he has standing here, Helmstetter must show more than a remote possibility that he could recover a surplus if the Bankruptcy Court's decision is reversed. It bears mention that in discussing both Article III standing and "bankruptcy" standing, the Seventh Circuit has observed that "[d]ebtors, *particularly Chapter 7 debtors*, rarely have" a pecuniary interest in the outcome of a bankruptcy court's order "because no matter how the estate's assets are disbursed by the trustee, no assets will revert to the debtor." *Cult Awareness*, 151 F.3d at 607 (emphasis added); *GT Automation*, 828 F.3d at 604–05 (same).

2. Analysis

The Trustee argues that Helmstetter has offered "no evidence" that "the value of the assets and causes of action involved in the" settlement agreement—*i.e.*, all claims against Ruscitti, Kingdom, Western Avenue, and the Reinsurance Companies—exceeds his $20 million in liabilities. (Trustee Mot. to Dismiss at 5.) He also argues that Helmstetter offers no support for the valuation of his claims against other third parties. (*See id.* at 9.) According to the Trustee, therefore, Helmstetter cannot show that he has a reasonable expectation of recovering a surplus after paying all creditors.

Helmstetter does not dispute that the estate has nearly $20 million in liabilities. (*See generally* Helmstetter Opp.) Citing the Second Amended Schedules and the BERO Report, however, he maintains that the estate will have a surplus of approximately $20 million after paying all creditors. (*Id.* at 11, 12; *see also id.* at 15 (stating that, according to the BERO Group, "it

is unclear why Appellant filed bankruptcy at all").)[13] As explained here, the court agrees with the Trustee that Helmstetter's expectation in recovering a surplus is speculative, and that he therefore lacks standing to challenge the Bankruptcy Court's order approving the settlement agreement and transfer of assets.

As the Trustee observes, Helmstetter's valuation of the Kingdom Assets (including his purported interest in the Reinsurance Companies) increased from $7,500,000 to $18,500,000 between the First and Second Amended Schedules. (Trustee Mot. to Dismiss at 6.) According to the Trustee, the only explanation Helmstetter has offered for the increase is his assertion that attorney Tancredi could obtain a judgment in the Circuit Court Litigation of $16 million or more. (*See id.*) The Trustee contends that the possibility of a $16 million judgment is speculative for several reasons. First, he states that Helmstetter's 25 percent ownership interest in Western Avenue is "vigorously disputed" and argues that the state court will not necessarily find in Helmstetter's favor on that issue. (*Id.* at 7.) The fact that only minimal discovery had been completed in the Circuit Court Litigation before the automatic stay adds to the uncertainty on that issue. (*See id.*)

[13] Yet it was Helmstetter himself who filed the bankruptcy petition. Helmstetter also relies on the affidavit of Deborah J. Temkin, one of the BERO Group's forensic accountants, for the proposition that his estate will have a $20 million surplus. (Temkin Aff., Ex. 1 to Helmstetter Opp. [25-1].) The court strikes the Temkin Affidavit because Helmstetter did not present it to theBankruptcy Court. *See, e.g.*, *Diekemper*, 2013 WL 1308976, at *2. In any event, the Temkin Affidavit does not help Helmstetter establish that his assets exceed his liabilities. Specifically, it states that the value of Helmstetter's interests in Kingdom is approximately $11.9 million—which is *less* than the $12.7 million value set forth in the BERO Report. (*See* Temkin Aff. ¶¶ 14, 21–26;BERO Report at PageID#: 604–05.) The failure of Helmstetter and Temkin to acknowledge thatinconsistency calls into question the reliability of the BERO Group's analysis.

Second, the Trustee emphasizes that Helmstetter's undisputed 33 percent interest in themarket value of Kingdom and his disputed 25 percent ownership interest in the market value of Western Avenue are not liquid assets. (*See id.* at 8.) Rather, they are minority shareholder interests in closely held corporations. (*Id.*) To liquidate those interests, Helmstetter would need to find a purchaser willing to become a business partner with Ruscitti. (*Id.*) That would, as the Trustee observes, limit the market of purchasers—particularly because Ruscitti has been embroiled in litigation with his former business partner—and depress the value of the shares. (*Id.*) In any event, Helmstetter would be unable to liquidate his minority shares until the Circuit Court Litigation concludes, which will not happen soon, if the pace of the litigation to date is any indication. These circumstances render it difficult to make an accurate estimate of the future market values of Kingdom and Western Avenue. (*Id.*)

Third, the Trustee points out that Ruscitti, Kingdom, and Western Avenue have adverse claims against Helmstetter in the Circuit Court Litigation for "$700,000.00 and $1,383,591.69." (*Id.*) The difficulty in predicting the outcome of the adverse claims "further diminishes the value of the estate's interests in" the Circuit Court Litigation, the Trustee argues. (*Id.* at 8–9.) In addition, there is the issue of the contingency fees: even if the estate recovers $16 million in the Circuit Court Litigation, the Trustee notes, it would have to pay a 50 percent contingency fee.[14] Finally, the Brown Firm would take a portion of the recovery as

[14] The Trustee had characterized this as a 50 percent contingency fee payable to attorney Tancredi. In his reply, the Trustee explains that Tancredi proposed charging "a 25% contingent fee for his services and an additional 25% contingent fee for the services of the BEROGroup." (Trustee Reply [29] ¶ 4.)

payment for its prior work[15] and the estate would owe "administrative costs and Trustee fees." (*Id.* at 9–10.)

Helmstetter brushes these concerns aside, urging that the Trustee's arguments lack "any credible, substantial or material factual predicate or evidentiary foundation" and are "contrary to the manifest weight of evidence." (Helmstetter Opp. at 3.) The court disagrees. In advancing his arguments, the Trustee relies on evidence in the bankruptcy record, including the Original, First, and Second Amended Schedules; undisputed facts about how the Circuit Court Litigation progressed before the bankruptcy stay; undisputed facts about the corporate structures of Kingdom and Western Avenue; and attorney Tancredi's undisputed proposal to charge a 50 percent contingency fee (including the BERO Group's 25 percent fee) to pursue the Circuit Court Litigation. Furthermore, it is Helmstetter's burden to establish that he has standing, *GT Automation*, 828 F.3d at 605, and Helmstetter does not adequately respond to the substance of the Trustee's concerns about his asset valuations.

In his opposition brief, for example, Helmstetter again fails to dispute that Tancredi proposed charging a 50 percent contingency fee in the Circuit Court Litigation. Instead, Helmstetter states that "[e]ven assuming that a contingency fee of 50% . . . might have been initially proposed; there is no reasonable basis that this rate was mandatory." (Helmstetter Opp. at 17.) The court declines Helmstetter's invitation to "take judicial notice" that there are other lawyers available and that "it is reasonable to anticipate that a significant number of Plaintiff attorneys

[15] The Trustee states that the Brown Firm's attorneys' fees are "21%." (Trustee Mot. to Dismiss at 9.) It is unclear whether this is a reference to a separate contingency fee that the Brown Firm would take from any recovery, or to the firm's secured claim for work that it already completed.

would be available at mutually beneficial terms." (*Id.*) To the contrary, the notion that other attorneys would be willing to propose more reasonable terms to pursue Helmstetter's claimsis purely speculative. On the record that Helmstetter has provided to this court, Tancredi is the only attorney who has offered to pursue the Circuit Court Litigation in place of the Brown Firm, and the only one who has valued the potential recovery from that litigation at $16 million. And Tancredi's request for such a substantial contingency (including the portion he may be sharing with the BERO Group) speaks volumes about his own confidence in the likely outcome. AssumingTancredi could obtain a $16 million judgment, the contingency fees would reduce the estate's interest in the judgment to $8 million.

The Trustee emphasizes that Helmstetter's $16 million valuation of this asset rests on several assumptions, including that Helmstetter will prevail on all claims in the Circuit Court Litigation; that the alleged present-day market values of Kingdom and Western Avenue will be the same when the Circuit Court Litigation concludes; and that Helmstetter will be able to find a buyer for his minority interests in those entities at their fair market prices. True, the Trustee cannot provide hard evidence that disproves Helmstetter's assumptions. (*See, e.g.*, Helmstetter Opp. at10 (arguing that the Trustee "never filed any expert reports or . . . documentation" to show that the $16 million valuation of the Kingdom Assets is incorrect).) But Helmstetter bears the burden of proof on this issue, and the absence of expert reports or documentation illustrates the Trustee's point: whether Helmstetter has standing depends on events that may or may not occur. Case lawsupports the Trustee's argument that the very types of assumptions he identifies undermine debtor standing. *See, e.g.*, *Cult Awareness*, 151 F.3d at 608 (where debtor had to "win a very large [court]

award . . . to have any chance at a surplus" and it was uncertain whether debtor would be able to "collect th[e] judgment, pay its litigation costs and attorneys' fees, and have anything left over," debtor did not show a "reasonable possibility of a surplus" sufficient to confer standing). Helmstetter has not distinguished *Cult Awareness*, nor has he addressed any other case law about debtor standing. His failure to show that the Second Amended Schedules (or the BERO Report) account for these uncertainties casts serious doubt on the notion that he could recover $16 million in the Circuit Court Litigation.

So, too, do several other aspects of the bankruptcy record. Chief among them is that Helmstetter swore to the accuracy of all three Schedules of Assets and Liabilities, yet offers scantsupport for the substantial increase in the estimated value of the Circuit Court Litigation from $5 million in the first two Schedules to $16 million in the third. The only explanation appears to be a change in counsel. In addition, Helmstetter presented inconsistent valuations of the CircuitCourt Litigation in the same submission ($16 million in the Second Amended Schedules versus $16.8 million in the attached Third-Party Claim Chart); he initially double-counted, including both valuations toward his total assets; and in the September 1, 2020 hearing before the Bankruptcy Court, Helmstetter's new counsel stated only that it was "possibl[e]" that the funds in the estate could leave Helmstetter a surplus. (Sept. 1, 2020 Hr'g Tr. at 5:13–19.)

Even if Helmstetter could explain away these concerns regarding valuation of the KingdomAssets, the Trustee contends that the value Helmstetter assigns to other claims against third parties is "unsubstantiated." (Trustee Mot. to Dismiss at 9.) Relatedly, the Trustee observes that Helmstetter provided no explanation in the bankruptcy record for the total increase

in "other" assets from approximately $3.4 million in the Original Schedules to $41.3 million the Second Amended Schedules. (*See id.* at 6, 9.) (To reiterate, Helmstetter now states that the value of total assets is approximately $43 million, *see* Helmstetter Opp. at 11, meaning that the purported total value of "other" assets is approximately $24.5 million. Of that $24.5 million, the claims against third parties purportedly comprise approximately $20 million.)

Again, the court agrees with the Trustee. Helmstetter provides no support for his contention that his claims against third parties are worth $20 million. As discussed above, the Third-Party Claim Chart contains no information that could substantiate the values Helmstetter assigns to each claim. In the Bankruptcy Court, moreover, Helmstetter did not explain whether he included those claims in the Original and First Amended Schedules; if so, how he valued the claims; and if not, why not. The briefing Helmstetter has submitted to this court suffers the same deficiencies. The court concludes that Helmstetter's $20 million valuation of claims against thirdparties is conjectural, and that he cannot properly rely on it to show that his assets exceed his liabilities. *Cf. GT Automation*, 828 F.3d at 605 (mere possibility that unsecured creditor could benefit from a favorable decision did not establish standing).

To summarize: Helmstetter concedes that the estate has approximately $20 million in liabilities ($19,978,842.25, to be precise). (Second Am. Schedules at PageID#: 574.) He contends that his total assets are $43 million, comprising: the Kingdom Assets (the Circuit Court Litigation valued at $16 million plus the purported interest in the Reinsurance Companies valued at $2.5 million); claims against third parties valued at approximately $20 million; and unspecified assets valued at $4.5 million. Because Helmstetter's

$20 million valuation of his claims against third parties is speculative, the court will not count those claims among the estate's assets. For purposes of this ruling, the court will give Helmstetter the benefit of the doubt on the following issues: Tancredi could recover $16 million in the Circuit Court Litigation (despite the many assumptions on which the $16 million valuation relies); Helmstetter could recover his purported

$2.5 million interest in the Reinsurance Companies without litigation (despite that the interest is disputed and appears to be at issue in the Circuit Court Litigation); Helmstetter's estate has $4.5million in other assets (despite that Helmstetter makes no effort to explain that valuation to this court); the Brown Law firm's secured claim for its work on the Circuit Court Litigation is already recorded as a liability in the Second Amended Schedules; and the potential damages stemming from adverse claims against Helmstetter in the Circuit Court Litigation are already recorded as a liability in the Second Amended Schedules. After paying the 50 percent contingency fee, the estate's interest in the recovery from the Circuit Court Litigation would be no greater than $8 million. The estate's total assets, therefore, are at most $15 million: $8 million plus $2.5 million plus $4.5 million. Fifteen million dollars falls far short of Helmstetter's $19,978,842.25 in liabilities. Helmstetter has no reasonable expectation in recovering a surplus and would not benefit financially from a reversal of the Bankruptcy Court's order.[16]

Helmstetter's constructive trust theory does not alter this conclusion. Citing the agreed order that the

[16] Using Helmstetter's inconsistent, $16.8 million valuation of the Circuit Court Litigation would increase the estate's total assets by only $400,000—not enough to alter the conclusion that Helmstetter's liabilities exceed his assets.

Bankruptcy Court entered on September 1, 2020 (*see* Appellant ROA at PageID#: 627), Helmstetter contends that the Trustee is judicially estopped from disputing that he has a33 percent ownership interest in Kingdom and a 25 percent ownership interest in Western Avenue. (Helmstetter Opp. at 15–16.)[17] He argues that "earned but unpaid distributions and executive compensation" from Kingdom and Western Avenue became his property "by operation of law" as soon as Ruscitti received distributions and executive compensation from those entities. (*Id.* at 6–7, 17 (citing, *inter alia*, *United States v. Fletcher*, 562 F.3d 839, 843 (7th Cir. 2009) (discussing dispute between United States and taxpayer regarding the point at which a stock transaction counted as income) ("Income is 'received' not only when paid in hand but also when the economic value is within the taxpayer's control; this is known as constructive receipt.")).)

Helmstetter does not explain what he means by "earned but unpaid distributions and executive compensation" from Kingdom and Western Avenue (*see* Helmstetter Opp. at 6, 17), sothe court cannot discern how much money Helmstetter contends is in the supposed constructivetrust. More important, Helmstetter concedes that litigation would be required to obtain whatever funds are in the constructive trust. (*See* Helmstetter Opp. at 13 ("[A]n experienced commercial litigator could reasonably be expected to successfully prosecute selected partial summaryjudgments requiring turn-over of those funds . . . from their respective constructive trusts ").)

[17] The agreed order does not appear to resolve the dispute about Helmsetter's ownership interest in Western Avenue, so the court disagrees that Ruscitti and Western Avenue are judicially estopped from denying that Helmstetter has any such interest. But this does not influence the analysis of Helmstetter's standing.

Accordingly, even assuming that the constructive trust contains all assets identified in the BERO Report ($16.8 million, comprising, among other things, unpaid salary, bonuses, and dividends from Kingdom and Western Avenue), Tancredi's contingency fee would cut the estate's interest in the constructive trust to $8.4 million. The estate's total assets would be $15.4 million, still significantly less than the estate's liabilities.

The Trustee's alleged failure to challenge the BERO Report does not alter the analysis. (*See* Helmstetter Opp. at 15.) The Second Amended Schedules incorporate the BERO Group's assessment of Helmstetter's assets and liabilities. (*See, e.g.*, *id.* at 9–10; *see also* Helmstetter Obj. at PageID#: 590–91.) The Trustee challenges the Second Amended Schedules, so his arguments necessarily address the BERO Group's conclusions. The court recognizes that the BERO Report post-dates the Second Amended Schedules and could, in theory, supplement or clarify the analysis underlying those Schedules. But Helmstetter does not explain whether that is the case. Moreover, nothing the court has seen in the BERO Report cures the defects that the Trustee identified in the Second Amended Schedules. The BERO Report, for example, does not reduce the value of the Kingdom Assets to reflect Tancredi's 50 percent contingency fee; does not account for the fact that Helmstetter could lose his claims in the Circuit Court Litigation; and does not present a plan for liquidating minority interests in Kingdom and Western Avenue at the market values estimated in the report. (*See, e.g.*, Trustee Reply ¶¶ 2–5.) In a similar vein, the BERO Group used financial documents from 2016 and earlier to estimate the present-day market values of Kingdom and Western Avenue, and, in turn, to estimate the value of Helmstetter's interests in those entities. (*See, e.g.*, *id.* ¶ 5 (observing same).)

Like the asset valuations in the Second Amended Schedules, therefore, the asset valuations in the BERO Report are speculative.In a last-ditch attempt to show that he has standing, Helmstetter argues that if the court "den[ies]" him standing, Helmstetter's creditors—who will lose "large sums" of money if the Bankruptcy Court's order is not reversed—"would petition for relief to either the Executive or Legislative Branches of government." (Helmstetter Opp. at 18.) The court is uncertain of the nature of these petitions, and Helmstetter does not advance a coherent legal argument that the creditors could seek such relief. Nor are any avenues that may be available to Helmstetter's creditors relevant to Helmstetter's standing to challenge the Bankruptcy Court's order.

Helmstetter has not shown that he has standing to challenge the Bankruptcy Court's order approving the settlement agreement and transfer of assets. The court, therefore, grants the Trustee's motion and dismisses Helmstetter's appeal for lack of subject matter jurisdiction.

CONCLUSION

For the foregoing reasons, the court denies Helmstetter's Motion to Supplement the Record and For Leave to File Special Interrogatories and Requests to Produce and For Alternative Relief [20]; grants the Trustee's Motion to Dismiss Appeal for Lack of Standing By Appellant [14]; and dismisses Helmstetter's Appeal from U.S. Bankruptcy Court Case Number 19 B 28687 [1]. The Clerk is directed to enter judgment in favor of the Trustee.

ENTER:

Dated: July 13, 2021

REBECCA R. PALLMEYER
United States District Judge

APPENDIX C

AO 450 (Rev. 11/11) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

Northern District of Illinois

Michael S. Helmstetter Plaintiff	)	
v.	)	Civil Action No.
David Herzog et al Defendant	)	20 CV 5485

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

❒ the plaintiff *(name)*_____recover from thedefendant *(name)* _____ the amount of _____ dollars ($_____), which includes prejudgmentinterest at the rate of____%, plus post judgment interest at the rate of__% per annum, along with costs.

❒ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ _____ recover costs from the plaintiff *(name)* _____ _____ .

❒ other:

The court denies Helmstetter's Motion to Supplement the Record and for Leave to File Special Interrogatories and Requests to Produce and for Alternative Relief. The Trustee's Motion to Dismiss the Appeal for Lack of Standing By Appellant is granted. Judgment is entered in favor of the Trustee. .

This action was *(check one)*:

❒ tried by a jury with Judge _____presiding, and the jury hasrendered a verdict.

❒ tried by Judge___without a jury and the above decisionwas reached.
❒ decided by Judge Rebecca R. Pallmeyer on a motion for
dismissal of the appeal for lack of standing by appellant.
Date: 07/14/2021
CLERK OF COURT
R. Franco
Signature of Clerk or Deputy Clerk

APPENDIX D

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In Re:	)	Case Number:
MICHAEL S.	)	19-28687
HELMSTETTER	)	
	)	Chapter 7
	)	Honorable Jacqueline
	)	P. Cox
Debtor(s)	)	

ORDER APPROVING THE SETTLEMENT AGREEMENT BETWEEN TRUSTEE AND KINGDOM CHEVROLET, INC., AND RICHARD RUSCITTI AND TRANSFER OF ASSETS PURSUANT TO SECTION 363(1) FREE AND CLEAR OF ALL LIENS, CLAIMS AND INTERESTS

THIS CAUSE COMING ON TO BE HEARD ON David R. Herzog, Chapter 7 Trustee'sMotion for Approval of Settlement Agreement of Disputes with Kingdom Chevrolet, Inc., and Richard Ruscitti and Transfer of At Least 33% of Shares of Stock of Kingdom Chevrolet, Inc., 25% of Shares of South Chicago Nissan d/b/a Western Avenue Nissan to Kingdom Chevrolet, Inc., And to Limit Notice to Twenty Largest Creditors, after notice and hearing, this Comi havingjurisdiction over the parties and subject matter hereto, having the Constitutional authority to enterthe requested order, the subject matter of the Motion constituting a core proceeding for which this Court is able to adjudicate its merits and enter a dispositive order, and being fully advised in the premises;

IT IS HEREBY ORDERED THAT:

1. Notice of the Trustee's Motion is limited to (i) the United States Trustee, (ii) the Debtor, (iii) parties entitled to receive notice and (iv) the twenty largest creditors.

2. The Trustee's Motion is granted in its entirety as stated hereinafter.
3. The Settlement Agreement between the Trustee and Kingdom Chevrolet, Inc. ("Kingdom") and Richard Ruscitti ("Ruscitti") is approved and the Trustee is authorized to perform the obligations of the Trustee as required by the terms and conditions of the Settlement Agreement.
4. Kingdom and Ruscitti are each authorized and directed to pay in good funds the sum of $555,000.00 to the Trustee in accordance with the terms and conditions of the Settlement Agreement.
5. The Trustee is authorized to transfer to Kingdom and Ruscitti the assets subject to the Settlement Agreement, free and clear of all liens, claims and interests pursuant to Section 363(f) in accordance with the terms and conditions of the Settlement Agreement, with all alleged liens and interests thereon including the lien of Michael Pomerantz and/or Brown, Udell, Pomerantz & Delrahim, Ltd., transferred to the settlement consideration pending further orders of this Court determining the nature, extent, validity and amount of all such liens and interests.
6. Advertisement and further actions of the Trustee to solicit further offers from third parties to submit higher and better offers are waived for good cause shown; provided, however, the Trustee shall not, after the entry of this order, consider the acceptance of nor accept a higher consideration than stated in the Kingdom Settlement Agreement.
7. The court has availed itself of all of the facts necessary to make an intelligent and objective opinion of the probabilities of ultimate success should the claim(s) be litigated. In addition, the court has

formed an informed, educated opinion of the complexity, expense and likely duration of such litigation, the possible difficulties in collecting on any judgment which could be obtained and all other factors relevant to a full and fair assessment of the wisdom of the proposed settlement. The most important factor is that the underlying litigation has been pending since 2014. *Protective Comm. for Indep.Stockholders ofTMJ', Inc. v. Anderson,* 390 U.S. 414,424 (1968). The court is persuaded to approve the settlement by the Trustee's assertions about the propriety thereof.

8. The court finds that the proposed settlement agreement is fair and reasonable and that its approval is in the best interests of the estate. The Motion to Approve Settlement is granted.
9. The objections at Dockets 73 and 74 are overruled.

Enter:

Dated: SEP - 1 2020

Honorable Jacqueline P. Cox
United States Bankruptcy Judge

Prepared by:

Gregory K. Stern (Atty. ID #6183380)
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APPENDIX E

U.S. Constitution Article III

Section 1 - Judicial Power, Courts, Judges

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2 - Judicial Power and Jurisdiction

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shallbe held in the State where the said Crimes shall have been committed; but when not committedwithin any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3 - Treason

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

APPENDIX F

11 U.S.C. § 704

Section 704 - Duties of trustee

(a) The trustee shall-

(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;

(2) be accountable for all property received;

(3) ensure that the debtor shall perform his intention as specified in section 521(a)(2)(B) of this title;

(4) investigate the financial affairs of the debtor;

(5) if a purpose would be served, examine proofs of claims and object to the allowance of anyclaim that is improper;

(6) if advisable, oppose the discharge of the debtor;

(7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;

(8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires;

(9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee;

(10) if with respect to the debtor there is a claim for a domestic support obligation, provide the applicable notice specified in subsection (c);

(11) if, at the time of the commencement of the

case, the debtor (or any entity designated by thedebtor) served as the administrator (as defined in section 3 of the Employee Retirement Income Security Act of 1974) of an employee benefit plan, continue to perform the obligations requiredof the administrator; and

(12) use all reasonable and best efforts to transfer patients from a health care business that is in the process of being closed to an appropriate health care business that-

(A) is in the vicinity of the health care business that is closing;

(B) provides the patient with services that are substantially similar to those provided by the health care business that is in the process of being closed; and

(C) maintains a reasonable quality of care.

(b)

(1) With respect to a debtor who is an individual in a case under this chapter-

(A) the United States trustee (or the bankruptcy administrator, if any) shall review all materials filed by the debtor and, not later than 10 days after the date of the first meeting of creditors, filewith the court a statement as to whether the debtor's case would be presumed to be an abuse under section 707(b); and

(B) not later than 7 days after receiving a statement under subparagraph (A), the court shall provide a copy of the statement to all creditors.

(2) The United States trustee (or bankruptcy administrator, if any) shall, not later than 30 days after the date of filing a statement under paragraph (1), either file a motion to dismiss or convert under section 707(b) or file a statement setting forth the reasons the United States trustee (or the bankruptcy administrator, if

any) does not consider such a motion to be appropriate, if the United States trustee (or the bankruptcy administrator, if any) determines that the debtor's case should bepresumed to be an abuse under section 707(b) and the product of the debtor's current monthly income, multiplied by 12 is not less than-

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner; or

(B) in the case of a debtor in a household of 2 or more individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals.

(c)

(1) In a case described in subsection (a)(10) to which subsection (a)(10) applies, the trustee shall-

(A)

(i) provide written notice to the holder of the claim described in subsection (a)(10) of such claimand of the right of such holder to use the services of the State child support enforcement agency established under sections 464 and 466 of the Social Security Act for the State in which such holder resides, for assistance in collecting child support during and after the case under this title;

(ii) include in the notice provided under clause (i) the address and telephone number of such State child support enforcement agency; and

(iii) include in the notice provided under clause (i) an explanation of the rights of such holder to payment of such claim under this chapter;

(B)

(i) provide written notice to such State child support enforcement agency of such claim; and

(ii) include in the notice provided under clause (i) the name, address, and telephone number of such holder; and

(C) at such time as the debtor is granted a discharge under section 727, provide written notice to such holder and to such State child support enforcement agency of-

(i) the granting of the discharge;

(ii) the last recent known address of the debtor;

(iii) the last recent known name and address of the debtor's employer; and

(iv) the name of each creditor that holds a claim that-

(I) is not discharged under paragraph (2), (4), or (14A) of section 523(a); or

(II) was reaffirmed by the debtor under section 524(c).

(2)

(A) The holder of a claim described in subsection (a)(10) or the State child support enforcement agency of the State in which such holder resides may request from a creditor described in paragraph (1)(C)(iv) the last known address of the debtor.

(B) Notwithstanding any other provision of law, a creditor that makes a disclosure of a last known address of a debtor in connection with a request made under subparagraph (A) shall not be liable by reason of making such disclosure.

APPENDIX G

Section 1.451-2 - Constructive receipt of income

(a) General rule. Income although not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had been given. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions. Thus, if a corporation credits its employees withbonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt. In the case of interest, dividends, or other earnings (whether or not credited) payable in respect of any deposit or account in a bank, building and loan association, savings and loan association, or similar institution, the following are not substantial limitations or restrictions on the taxpayer's control over the receipt of such earnings:

(1) A requirement that the deposit or account, and the earnings thereon, must be withdrawn in multiples of even amounts;

(2) The fact that the taxpayer would, by withdrawing the earnings during the taxable year, receive earnings that are not substantially less in comparison with the earnings for the corresponding period to which the taxpayer would be entitled had he left the account on deposit until a later date (for example, if an amount equal to three months' interest must be forfeited upon withdrawal or redemption

before maturity of a one year or less certificate of deposit, time deposit, bonus plan, or other deposit arrangement then the earnings payable on premature withdrawal or redemption would be substantially less when compared with the earnings availableat maturity);

(3) A requirement that the earnings may be withdrawn only upon a withdrawal of all or part of the deposit or account. However, the mere fact that such institutions may pay earnings on withdrawals, total or partial, made during the last three business days of any calendar month ending a regular quarterly or semiannual earnings period at the applicable rate calculated to theend of such calendar month shall not constitute constructive receipt of income by any depositoror account holder in any such institution who has not made a withdrawal during such period;

(4) A requirement that a notice of intention to withdraw must be given in advance of the withdrawal. In any case when the rate of earnings payable in respect of such a deposit or account depends on the amount of notice of intention to withdraw that is given, earnings at the maximum rate are constructively received during the taxable year regardless of how long the deposit or account was held during the year or whether, in fact, any notice of intention to withdraw is given during the year. However, if in the taxable year of withdrawal the depositor or account holder receives a lower rate of earnings because he failed to give the required notice of intention to withdraw, he shall be allowed an ordinary loss in such taxable year in an amount equal to the difference between the amount of earnings previously included

in gross income and the amount of earnings actually received. See section 165 and the regulations thereunder.

(b) Examples of constructive receipt. Amounts payable with respect to interest coupons which have matured and are payable but which have not been cashed are constructively received in the taxable year during which the coupons mature, unless it can be shown that there are no funds available for payment of the interest during such year. Dividends on corporate stock are constructively received when unqualifiedly made subject to the demand of the shareholder.

However, if a dividend is declared payable on December 31 and the corporation followed its usual practice of paying the dividends by checks mailed so that the shareholders would not receive them until January of the following year, such dividends are not considered to have been constructively received in December. Generally, the amount of dividends or interest credited on savings bank deposits or to shareholders of organizations such as building and loan associations or cooperative banks is income to the depositors or shareholders for the taxable year when credited. However, if any portion of such dividends or interest is not subject to withdrawal at the time credited, such portion is not constructively received and does not constitute income to the depositor or shareholder until the taxable year in which the portion first may be withdrawn.

Accordingly, if, under a bonus or forfeiture plan, a portion of the dividends or interest is accumulated and may not be withdrawn until the maturity of the plan, the crediting of such portion to the account of the shareholder or

depositor does not constitute constructive receipt. In this case, such credited portion is income to the depositor or shareholder in the year in which theplan matures. However, in the case of certain deposits made after December 31, 1970, in banks, domestic building and loan associations, and similar financial institutions, the ratable inclusion rules of section 1232(a)(3) apply. See § 1.1232-3A . Accrued interest on unwithdrawn insurance policy dividends is gross income to the taxpayer for the first taxable year during which such interest may be withdrawn by him.