Case No. 19-2751

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

IN RE DEREK FRANCIS LUEBBERT, Debtor.

GLOBAL CONTROL SYSTEMS, INC., Plaintiff - Appellee,

vs.

DEREK FRANCIS LUEBBERT, Defendant - Appellant.

On appeal from U.S. District Court, Western District of Missouri
Honorable Beth Phillips, U.S. District Judge, No. 4:18-cv-00945;
and the U.S. Bankruptcy Court, Western District of Missouri
Honorable Cynthia A. Norton, Chief U.S. Bankruptcy Judge
Bankruptcy No. 16-42612; Adversary No. 16-4165

BRIEF OF THE APPELLEE

JONATHAN STERNBERG, Mo. #59533
Jonathan Sternberg, Attorney, P.C.
2323 Grand Boulevard #100
Kansas City, Missouri 64108
Telephone: (816) 292-7020
Facsimile: (816) 292-7050
jonathan@sternberg-law.com

COUNSEL FOR APPELLEE

Summary and Statement of No Oral Argument Needed

Derek Luebbert signed covenants not to compete with Global or solicit its customers. When he then solicited Global's customer, ATK, he settled by agreeing Global would receive half of all payment for his ATK work by Global receiving two-party checks and paying him half. But he soon breached this agreement by secretly stopping the two-party checks, keeping the checks from Global, depositing the checks in his own accounts, and acquiring new ATK business without telling Global.

A jury awarded Global $302,631.30 for breach of the settlement. Mr. Luebbert then sought to discharge this debt in a Chapter 7 bankruptcy. After an adversary trial, the bankruptcy court entered detailed findings holding it was nondischargeable as a debt for a "willful and malicious injury" under 11 U.S.C. § 523(a)(6). Mr. Luebbert appealed to the district court, which affirmed. He now appeals again.

This Court should affirm. Mr. Luebbert omits nearly half the adversary trial exhibits from record on appeal, rendering his claims not preserved. Regardless, the bankruptcy court correctly held collateral estoppel barred him from relitigating whether he "injured" global. And viewing the evidence in the light most favorable to Global, the bankruptcy court correctly held that injury was "willful and malicious."

Oral argument is unnecessary. The issues on appeal are straightforward and uncomplicated. The parties' briefs are sufficient to show that Mr. Luebbert's appeal is meritless.

Corporate Disclosure Statement

Appellee Global Control Systems, Inc., has no parent corporation. No publicly held corporation owns 10% or more of its stock.

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Statement of the Issues

I. Mr. Luebbert fails to provide an adequate record to permit meaningful appellate review, rendering his claims not preserved. His record omits nearly half the exhibits admitted below, including every deposition designation and many other crucial exhibits on which the bankruptcy court expressly relied. This Court cannot review his fact-based claims on appeal without those materials, so it must affirm the bankruptcy court's judgment.

Stanback v. Best Diversified Prods., Inc., 180 F.3d 903 (8th Cir. 1999)

Pellerin Laundry Machinery Sales Co. v. Reed, 300 F.2d 305 (8th Cir. 1962)

Whiteley v. Foremost Dairies, Inc., 254 F.2d 36 (8th Cir. 1958)

Sublette v. Servel, Inc., 124 F.2d 516 (8th Cir. 1942)

II. The bankruptcy court properly held that the judgment in the underlying case collaterally estops Mr. Luebbert from re-litigating whether he "injured" Global within the meaning of 11 U.S.C. § 523(a)(6), under which "injury" means a violation of another's legal right for which the law provides a remedy. The jury and district court in the underlying case found Mr. Luebbert had violated Global's rights under the Settlement Agreement and Amendment, for which the law provided a remedy of damages, costs, attorney fees, and interest.

In re Porcaro, 545 B.R. 384 (B.A.P. 1st Cir. 2016)
First Weber Group, Inc. v. Horsfall, 738 F.3d 767 (7th Cir. 2013)
In re Best, 109 F. App'x 1 (6th Cir. 2004)
In re Miera, 926 F.2d 741 (8th Cir. 1991)

III. The bankruptcy court properly found under 11 U.S.C. § 523(a)(6) that Mr. Luebbert's injury to Global from which the debt at issue arose was willful and malicious, and so was nondischargeable. Viewing the evidence in the light most favorable to Global and taking into account the bankruptcy court's credibility determinations, Mr. Luebbert knew or was substantially certain that harm to Global would result from his lying, furtive, covert, tortious conduct, and he intended that harm by that conduct.

In re Butler, 297 B.R. 741 (Bankr. C.D. Ill. 2003)

In re Caletri, 517 B.R. 655 (Bankr. E.D. La. 2014)

In re Rabinowitz, 508 B.R. 874 (Bankr. S.D.N.Y. 2014)

In re Jercich, 238 F.3d 1202 (9th Cir. 2001)

Statement of the Case

A. Background to the proceedings below[1]

1. Mr. Luebbert's employment with Global

Global Control Systems, Inc. ("Global") is a Kansas corporation based in Olathe, Kansas (Appx. 304). Global aids product manufacturers by putting together specialized computer hardware and designing computer software that controls equipment to make the product (Appx. 303, 305).

After graduating from college, Derek Luebbert went to work as a design engineer for Indicon Corporation in Kansas City (Appx. 205, 309-10, 418, 526). At Indicon, he worked on projects for Alliant Techsystems Inc. ("ATK") at its Lake City, Missouri ammunition plant (Appx. 309-12, 418-19). At the same time, ATK also was one of Global's customers, and ATK's plant was located within a 100-mile radius of Global's offices in Kansas (Appx. 634).

In 2006, Jim Schneider, who had been one of Mr. Luebbert's superiors at Indicon, left Indicon to become a vice president at Global (Appx. 308-09, 312, 396, 526). That August, Mr. Schneider recruited Mr. Luebbert to join Global (Appx. 419, 423-24, 526).

On his employment at Global, Mr. Luebbert signed an agreement (the "Employment Agreement") (Appx. 209-20, 313-14). The

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[1] This first section of this Statement of the Case generally mirrors the bankruptcy court's findings (Appellant's Appendix ["Appx."] 634-50).

Employment Agreement contained a three-year covenant not to compete with Global within a 100-mile radius and a covenant prohibiting Mr. Luebbert from soliciting business from Global's customers (Appx. 211-12). The Employment Agreement also contained nondisclosure and confidentiality provisions (Appx. 210-11).

Global's president, Manuel David, testified that he explained the Employment Agreement's provisions to Mr. Luebbert, including the noncompete and nonsolicitation provisions, before asking him to sign it (Appx. 314-17). The bankruptcy court found Mr. David's testimony credible and "believe[d] Mr. David's credible testimony that he explained the terms of the covenants to Mr. Luebbert" (Appx. 635). Mr. Luebbert testified that when he later decided to leave Global, he did not know he was subject to these covenants (Appx. 434). The bankruptcy court stated it believed it was "probable that Mr. Luebbert, a relatively young person at the time, either forgot about or did not understand the significance of what he was signing" (Appx. 63).

2. Mr. Luebbert's relationship with ATK, Global's customer

As a Global employee, Mr. Luebbert was tasked with developing Global's relationship with ATK (Appx. 312-13, 423). One of Mr. Luebbert's projects was working on ATK's "green ammo" project, in which ATK contracted with the U.S. Department of Defense to design and manufacture ammunition with less environmental impact (Appx. 40-47, 422). Mr. Luebbert was a bright employee and good engineer

and became increasingly essential to the project's success (Appx. 313, 422-423, 544, 557-58). His responsibilities on the project increased over time to the point that ATK was the only Global customer for which he worked (Appx. 422-23, 544, 557-58). He even became part of ATK's green ammo project management team and spent most of his time physically working at ATK's Lake City location (Appx. 422-23, 544, 557-58).

At the same time, Mr. Luebbert became increasingly dissatisfied with his job at Global, in part because he felt he was underpaid in comparison to the hourly rate Global was billing ATK (Appx. 407-08). Mr. David testified that during this time, Mr. Luebbert began to disparage Global to ATK (Appx. 356-57, 402-03). Mr. Luebbert in turn testified that ATK was unhappy with Global because of Jim Schneider and that ATK employees were encouraging him to start his own business (Appx. 545-46, 591). The bankruptcy court stated it believed there was "likely some truth in both versions of the story" (Appx. 636).

3. Mr. Luebbert forms Atlas and solicits ATK

About a year after ATK awarded Global a contract on the green ammo project, Mr. Luebbert decided to start his own business and bid for future ATK work (Appx. 431-32, 551-52). To that end, in late 2009 he formed a single-member limited liability company, Atlas Industrial Solutions, LLC ("Atlas") (Appx. 207-08, 431-32, 551-52).

A few months after forming Atlas, and while still employed by Global, Mr. Luebbert (through Atlas) bid on a $90,000 ATK project (Appx. 326, 431-32, 747-50). He did not tell Global he made the bid on his own behalf, and in fact he used Global's bid form to make the bid (Appx. 323, 325, 434, 747-50). His bid for ATK work while still employed at Global violated the non-solicitation and noncompete provisions of the Employment Agreement (Appx. 400).

A month later, on May 26, 2010, unaware Mr. Luebbert had made his own bid for ATK work, Jim Schneider emailed Mr. Luebbert to find out if ATK was "going to renew" its existing purchase order with Global (Appx. 318). This email was admitted below as Exhibit 53 and the bankruptcy court relied on it in its decision (Appx. 636), but Mr. Luebbert omitted it from the designated record in the district court below and does not include it in his appendix. *See* below at pp. 31-37.

That same day, ATK accepted Mr. Luebbert's bid and issued Atlas a new purchase order, number D37395 ("PO D95") for $96,000 (the $90,000 proposal plus $6,000 in travel expense reimbursements) for work to be completed within six months (Appx. 327-28, 623-29).

Still that same day, after receiving the successful bid Mr. Luebbert resigned from Global (Appx. 206, 318-19, 437). His resignation letter to Mr. David stated he had "decided to pursue alternate career opportunities" effective the next day (Appx. 206). He did not mention his formation of Atlas, new relationship with ATK, or

successful receipt of PO D95 (Appx. 206, 436-37). And at a meeting before he left, Mr. Luebbert evaded Mr. David's questions about what he intended to do (Appx. 319-20, 437-38).

4. Post-resignation threat of litigation, settlement

Shortly after Mr. Luebbert resigned, Mr. David learned about PO D95 and Mr. Luebbert's new relationship with ATK, and things turned ugly between them (Appx. 323-26). Mr. Luebbert testified he was surprised by this because, he said, the relationship between ATK and Global (and Mr. Schneider, in particular) had deteriorated to where ATK was disinclined to renew any work with Global so long as Mr. Schneider was the liaison, but instead ATK wanted Mr. Luebbert to take the lead on any projects (Appx. 439, 545-46).[2] Mr. David, on the other hand, viewed Mr. Luebbert's actions as a blatant and underhanded violation of his Employment Agreement (Appx. 400).

Global then threatened Mr. Luebbert with legal action, informing him it intended to enforce the Employment Agreement (Appx. 321-22, 510, 520). It also demanded he immediately return its computers and other equipment and not share any of its confidential information (Appx. 321-22, 324, 564). Mr. Luebbert did turn over Global's

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[2] Mr. Luebbert's testimony on this (and many other topics) also was in his 33 deposition transcript excerpts that were admitted below as Exhibits 70-102 (Appx. 727-28). Mr. Luebbert omitted them from the designated record on appeal in the district court below and does not include them in his appendix, either. *See* below at pp. 31-37.

computers, but not before removing information from them and wiping the hard drives clean (Appx. 321-22, 453, 564). This added fuel to the fire (Appx. 321-22). At one point, Global made some sort of referral to police about the computers, though Mr. Luebbert never was charged with a crime (Appx. 510, 522-23).

In early June 2010, Mr. David emailed Global's other employees to advise them that Mr. Luebbert no longer was employed at Global (Appx. 35). He told them Global was in the process of collecting all its property from Mr. Luebbert, including hardware, software, and intellectual property (Appx. 35). He also warned Global's employees not to contact Mr. Luebbert (Appx. 35).

The next day, Mr. David asked a project engineer at ATK, John Wopata, to remove Mr. Luebbert from project-update emails because Mr. Luebbert no longer worked at Global (Appx. 36). Mr. Wopata responded he was "led to believe by ATK purchasing that Mr. Luebbert was working for [Global] again" (Appx. 36). This apparently confirmed to Mr. David that Mr. Luebbert was continuing to work with ATK in violation of the noncompete (Appx. 638).

But by this point, Mr. Luebbert had become nearly indispensable to the green ammo project, which ATK considered extremely important (Appx. 331-33). Mr. David believed he only had two choices, both of which were unappealing: (1) either enforce the noncompete through expensive litigation but irreparably damage the project and lose ATK as

a customer, or (2) suspend enforcement of the noncompete to allow Mr. Luebbert to complete PO D95, giving Global time to try to salvage its relationship with ATK but setting a bad example for the remaining employees (Appx. 331-33). He reluctantly chose what he saw as the lesser of two evils: allowing the work to continue (Appx. 331-33). Mr. Luebbert for his part was not happy, either (Appx. 456-58). But since all believed PO D95 would be finished in six months, meaning before the end of that year, and Mr. Luebbert's involvement was necessary to finish the project and not harm ATK, in lieu of litigation Global and Mr. Luebbert agreed to settle (Appx. 328, 331-33, 456-58).

5. The Settlement Agreement

With assistance of counsel, Global and Mr. Luebbert entered into a settlement agreement on June 17, 2010 ("the Settlement Agreement") (Appx. 221-28, 331-33, 456-58).

The Settlement Agreement required Mr. Luebbert to pay Global $66,000 and sign a secured promissory note in that amount (Appx. 222). It specifically referred to PO D95 and reflected the parties' agreement that the settlement would not financially harm either one:

> [Mr. Luebbert's] intent in entering into this agreement is to restore [Global] to the approximately the [sic] same economic position with ATK it would have been in had the purchase order been issued to [Global] and [Mr. Luebbert] continued to work for [Global], to compensate [Global] for claimed damages due to the circumstances surrounding [Mr. Luebbert's] actions and allow [Mr. Luebbert] to earn

> approximately what he was earning before his employment ceased.

(Appx. 221).

The Settlement Agreement (again) terminated Mr. Luebbert's employment with Global and suspended the three-year noncompete until the conclusion of PO D95, repayment of the $66,000 note, or six months, whichever was earlier (Appx. 223-24). It further provided that beginning the day the suspension concluded, the noncompete would resume and remain in full force and effect for three years (Appx. 223-24). Mr. Luebbert also was required to sign an "affidavit of destruction" agreeing to return and destroy any confidential information he had relating to Global (Appx. 48).

The parties then decided that in furtherance of the Settlement Agreement, ATK would issue two-party checks payable to both Atlas and Global (Appx. 458-59). In mid-July 2010, Mr. Luebbert emailed an ATK employee to confirm ATK would commence issuing those two-party checks (Appx. 34). The parties agreed Atlas would invoice ATK in the name of both Atlas and Global, ATK then would send the check to Mr. Luebbert, made payable jointly to Atlas and Global, who in turn would endorse it on Atlas's behalf and then send it to Global (Appx. 336-37, 459). Global was to cash the check and remit a check back to Atlas, representing Mr. Luebbert's 50% share (Appx. 336-37, 459).

Later that month, Mr. Luebbert emailed Mr. David, with a copy to Mr. Luebbert's attorney, to let him know ATK had inquired about an addition to PO D95 (Appx. 770). Mr. Luebbert confirmed to Mr. David that he told ATK he could not talk to ATK, but that ATK needed to go through Global on additions to PO D95 (Appx. 770). Therefore, Mr. Luebbert was complying with the Settlement Agreement at that point (Appx. 364).

ATK began issuing the two-party checks to Atlas and Global in September 2010 (Appx. 16).

6. PO D95 work expanded; the Amendment

At the end of the six months, in November 2010 ATK revised PO D95 to add an additional $30,000 to the contract (Appx. 30-31). At this point, Mr. Luebbert otherwise had complied with the Settlement Agreement and paid back the note (Appx. 364). In September, in anticipation of PO D95 being extended, Mr. Luebbert's attorney had emailed Global's attorney about revising the settlement terms but had not heard back (Appx. 29). But when ATK issued the $30,000 addition to PO D95, Mr. Luebbert's attorney emailed Global's attorney to follow up and find out what Global wanted to do:

> I never heard back from you after my email of September 22. I assumed that meant that [Global] has no interest in agreeing to extending the work of Atlas for ATK on the terms set forth in my email. That is fine as [Mr. Luebbert] is pursuing other options. However, he wanted me to inform you that ATK unilaterally issued the attached change order

> extending the purchase order. Obviously, either [Mr. Luebbert] or [Global] needs to get with ATK and have them rescind the change order given the absence of agreement between [Global] and [Luebbert] that would allow for completion of the change order. Please advise whether you and your client will contact ATK or whether we have [Global's] permission for [Mr. Luebbert] to have those discussions with ATK.

(Appx. 29).

The addition to PO D95 resulted in the parties' execution of an amendment to the Settlement Agreement on January 28, 2011 (the "Amendment") to continue the 50/50 split with respect to the addition and any other work for ATK (Appx. 337-38). The amendment provided:

> [LUEBBERT] and ATLAS agree to pay [GLOBAL] fifty percent (50%) of all revenue, including travel expense markups, paid by Alliant Techsystems, Inc. ("ATK") to [LUEBBERT] and/or ATLAS for any alterations to the original purchase order, *this Amendment is entered until [LUEBBERT] and ATLAS cease further work or other economically remunerative activities for ATK.*

(Appx. 229).

The Amendment also expressly required continuing the two-party checks and for Mr. Luebbert to keep Global informed regarding purchase orders and additional work requests, invoices, or any other accounting related activities (Appx. 229). The Amendment reiterated that on Mr. Luebbert's completion of any work with ATK, the three-year noncompete would resume in its entirety (Appx. 229).

Mr. Luebbert continued to work on PO D95 as amended (Appx. 463). Several months later, in April 2011 he advised Mr. David that another Global client, Chevron, had called him about doing some work and he had told Chevron it needed to contact Global (Appx. 771). Mr. David testified he was pleased with this because it meant Mr. Luebbert understood his obligations under the Amendment (Appx. 401-02).

In June 2011, ATK issued checks for payment on the addition to PO D95 showing both Atlas and Global as co-payees, and the parties continued to split any ATK checks 50/50 (Appx. 16-18). This arrangement continued without incident for another year-and-a-half (Appx. 16-18). Indeed, in early November 2012, some two-and-a-half years after ATK had first issued the original PO D95, Mr. Luebbert and Atlas still were invoicing ATK for work on PO D95 and referring to the two-party checks (Appx. 55).

7. New purchase orders without Global

In November 2012, ATK issued a new purchase order to Atlas for work for $7,750, PO D50949 ("PO D49") (Appx. 56-62). It made no reference to Global, nor did Mr. Luebbert split the payment on it with Global (Appx. 56-62, 341-42). And at some point, before November, Mr. Luebbert started using a new invoicing address, a post office box in Westphalia, Missouri (Appx. 56), whereas before he had been using an address in Kansas City, Missouri (Appx. 623). Thereafter, ATK also issued other purchase orders only to Atlas (Appx. 55).

During this period, Mr. Luebbert again was becoming increasingly dissatisfied with the arrangement with Global, in part because it had continued for more than a year longer than the parties had anticipated and because he continued to believe it was unfair (Appx. 467, 521-22). On November 28, 2012, two weeks after receiving the new purchase order, Mr. Luebbert sent Mr. David an email asking to change the 50/50 split (Appx. 51). He indicated his relationship with ATK might be changing from "'full-time' contract engineer mode" to "more smaller time frame project specific task" (Appx. 51). He suggested a more reasonable arrangement would be for him to receive $75 of the $95-per-hour they were billing ATK, roughly an 80% split rather than 50/50 (Appx. 51). Mr. Luebbert did not disclose that he had received another purchase order from ATK (Appx. 51, 341-42). Mr. David was not interested in Mr. Luebbert's proposal (Appx. 521).

8. Mr. Luebbert seeks legal advice

Despite Global's opposition to changing the Settlement Agreement's and Amendment's terms, Mr. Luebbert continued to work on both POs D95 and D49 (Appx. 16-18, 465-66). Two months after proposing the 80% split, on February 5, 2013, he e-mailed Walter Brown, an employment attorney, who was not the attorney who had represented him in negotiating the Settlement Agreement and the Amendment (Appx. 764-66).

Mr. Luebbert outlined to Mr. Brown his version of the history of his relationship with Indicon, Global, and ATK, and described what led to the two settlements (Appx. 764-66). He also described that his role at the ATK project had evolved over the years to the point where he no longer was doing the kind of work Global did and now actually was involved in hiring people for the project (Appx. 764-66). He also said that receiving a percentage of Global's profit seemed to him to be "slightly illegal" since he was the one "hiring them on behalf of the Government/ATK" (Appx. 766).

Mr. Luebbert requested Mr. Brown's opinion about his options going forward (Appx. 766). He attached to the email copies of the Employment Agreement, the Settlement Agreement, the Amendment, the secured promissory note and security agreement, and the affidavit of destruction (Appx. 766).

Mr. Brown testified that Mr. Luebbert met with him shortly after first contacting him by email, though there was no evidence of exactly when their meeting occurred (Appx. 504-09). Mr. Brown advised Mr. Luebbert at that meeting that he believed the Settlement Agreement and Amendment related only to work done on PO D95 and that when PO D95 was finished, Mr. Luebbert no longer was obligated to split any fees with Global (Appx. 530-32). Mr. Brown also interpreted the springing noncompete in those documents to be unenforceable because, in his view, it had no end (Appx. 513-14).

Mr. Brown advised Mr. Luebbert that to be fair to Global, he should write Mr. David to make sure Mr. David understood the situation was untenable for Mr. Luebbert (Appx. 539). He further advised that Mr. Luebbert should continue the two-party checks until he wrote to Mr. David and they had finished PO D95 (Appx. 539). But to the extent Mr. Luebbert worked on anything other than PO D95, Mr. Brown opined that Mr. Luebbert was free from any noncompete and could stop the two-party checks (Appx. 539).

9. Mr. Luebbert does not immediately implement his attorney's advice

Later that month, on February 21, 2013, Atlas issued two invoices to ATK, No. 53 for $54,232.99 and No. 54 for $44,625.49 (Appx. 49-50, 63). Three days later, Mr. Luebbert emailed copies of these new (and other) invoices to Mr. David (Appx. 402, 767-69).

In that email, Mr. Luebbert did not say, as his attorney had recommended, that the situation was untenable, but instead referred to the possibility of additional ATK work for Global:

> Please find most recent PO's and Invoice for ATK. I will be getting another alteration for the B2 SCADA cover [sic] the above invoice. There will be some more work coming up on the B2 SCADA system that could be an opportunity for [Global]. Joan is leaving ATK so we are trying to closeout everything open with her. There may be some opportunities with the other PO's I just received.

(Appx. 767). The following day, Mr. Luebbert emailed Mr. David saying he was mailing Global an ATK check that day (Appx. 768).

The next day, February 26, Mr. Luebbert sent Mr. David another email, which referred to possible additional ATK work and Atlas hiring Global as a subcontractor:

> I wanted to discuss some other items with you. ATK is asking for estimates on a few things …. At one time we had discussed me subcontracting to [Global]. You had also mentioned giving me a percentage of the work that Jack did out here. I do not feel comfortable with getting a percentage of that work under the current relationship because I entered the purchase requisition to issue the PO. I would be willing to discuss subcontracting to [Global] for these projects if they want to get their foot back in the door at ATK. I could utilize Jack or someone to share the work load [*sic*], but if we went this route we would need to discuss my subcontractor hourly rate. If not I can just continue doing the work myself. But I don't like the conflict of interest that could be created by Atlas managing projects for ATK then giving work to [Global].

(Appx. 768). Mr. David responded,

> I agree with you. It would be a huge conflict of interest, if you are the one issuing the POs. I did not realize that you would be entering the purchase requisitions for [Global]. For now, you should continue doing the work yourself. Continue having Atlas receive the POs as in the past ….

(Appx. 768-69).

10. Mr. Luebbert stops the two-party checks

Around this time, Mr. Luebbert began the process of trying to stop the two-party checks on non-PO D95 invoices so that only Atlas would receive the checks (Appx. 344, 349-50). Initially, after he asked ATK to remove Global as a co-payee on the non-PO D95 invoices, ATK did so, but continued to reference Global in the memo line on the checks (Appx. 344, 474). Mr. Luebbert asked ATK to have those checks voided and reissued due to a "name change" (Appx. 53). And in email exchanges between Mr. Luebbert and ATK personnel between April 1 and April 4, 2013, he continued to ask about the "name change" to ensure checks were issued only in Atlas' name (Appx. 23-25, 68-72). One of those exchanges was admitted below as Exhibit 57 (Appx. 646), but Mr. Luebbert omitted it from the designated record in the district court below and does not include it in his appendix. *See* below at pp. 31-37. Mr. Luebbert was not really changing Atlas' name (Appx. 473-75).

On April 5, 2013, one day after confirming ATK would issue all future checks to Atlas only, Mr. Luebbert – himself, not his counsel – emailed Mr. David that he no longer intended to honor the settlement on its current terms (Appx. 630). This was two months after Mr. Luebbert first contacted his new counsel and had received the advice to inform Mr. David (Appx. 539). The bankruptcy court called the email "somewhat rambling" (Appx. 646). Mr. Luebbert explained the "current working relationship" between himself and Global was "not sustainable"

(Appx. 630). Mr. Luebbert said he believed he had fulfilled all his obligations to Global and expressed his frustration that the relationship limited his role at ATK (Appx. 630). He again expressed concern about the conflicts of interests created by his role at ATK (Appx. 630).

But instead of definitively terminating the agreement, as his attorney testified he had advised (Appx. 539), Mr. Luebbert proposed a 90/10 split of profits and alternatives to the two-party check payment method (Appx. 630). But he warned Mr. David that unless "a mutually beneficial and practical arrangement" was reached, he no longer would work at ATK "under the current arrangement" (Appx. 630). "Somewhat contradictorily," as the bankruptcy court put it (Appx. 646), Mr. Luebbert concluded, "Going forward I will continue to support ATK as need and ability agrees [sic] but will have no relationship with [Global]" (Appx. 630).

A few days later, Global's attorney sent a letter to Mr. Luebbert and Atlas (Appx. 646). The letter essentially said that "it sounded as though" Mr. Luebbert intended to breach the Settlement Agreement and Amendment, and reminded Mr. Luebbert of the springing three-year noncompete, which the attorney said Global intended to enforce (Appx. 646). This letter was admitted below as Exhibit 59 and the bankruptcy court relied on it in its decision (Appx. 646), but Mr. Luebbert omitted it from the designated record in the district court below and does not include it in his appendix. *See* below at pp. 31-37.

The following day, Mr. Luebbert received another check from ATK referring to Global in the memo line (Appx. 73-75), despite ATK's earlier assurances that it had corrected for the "name change" (Appx. 23-25). He crossed through the reference to Global on the check and deposited it himself, in his own account, and without splitting any proceeds with Global (Appx. 73-75). For the next several weeks and through the end of April, he continued to communicate with ATK personnel about ensuring ongoing checks would be made payable only to Atlas and that Global would not be referenced in the memo lines (Appx. 23-25). ATK finally began issuing single-party checks to Atlas in late April 2013 (Appx. 19-21).

On May 6, 2013, now some three years after PO D95 first was issued, Global's attorney sent a follow-up email to Mr. Luebbert, again asking for assurances that Mr. Luebbert intended to honor the Settlement Agreement and Amendment and asking for an accounting of his ATK work (Appx. 647). This email was admitted below as Exhibit 58 and the bankruptcy court relied on it in its decision (Appx. 647), but Mr. Luebbert omitted it from the designated record in the district court below and does not include it in his appendix. *See* below at pp. 31-37.

It is not clear whether Mr. Luebbert responded, though Mr. David testified he was unable to find or communicate with Mr. Luebbert during this period, in part because Mr. Luebbert had changed his

address to a post office box (Appx. 349-50). The bankruptcy court found Mr. David's testimony credible (Appx. 647).

Besides the new purchase orders being directed only to Atlas, ATK continued to issue change orders to PO D95 throughout this period and until August 31, 2013 (Appx. 751-763). By the end of the project in August 2013, more than three years after the initial Settlement Agreement, the total extended value of the work Atlas performed on PO D95 was $515,807 (Appx. 762).

11. Global sues Mr. Luebbert

In June 2013, Global filed a petition against Mr. Luebbert and Atlas in Missouri state court for breach of the Settlement Agreement and Amendment and enforcement of the covenants (Appx. 230).

In September 2013, despite the pending lawsuit, Mr. Luebbert emailed ATK personnel that instead of Atlas he now was working with Midwest Controls, LLC, a competitor of Global's that a Mr. Krahenbill owned (Appx. 350-51). Mr. Luebbert previously had utilized Mr. Krahenbill's services to help on Atlas's projects with ATK (Appx. 76-78). In December 2013, ATK's vice president and assistant general counsel sent Mr. Luebbert an email inquiring about holding payments from ATK to Mr. Luebbert in escrow pending the outcome of the litigation (Appx. 648). This email was admitted below as Exhibit 55 and the bankruptcy court relied on it in its decision (Appx. 648), but Mr.

Luebbert omitted it from the designated record in the district court below and does not include it in his appendix. *See* below at pp. 31-37.

In December 2013, again while the litigation was pending, Mr. Luebbert made a proposal to ATK on behalf of Midwest Controls, LLC to provide engineering services (Appx. 81-84). In a string of emails between Mr. Luebbert and someone at ATK, with copies to Mr. Krahenbill at Midwest Controls, ATK inquired about Mr. Luebbert's relationship with Midwest Controls (Appx. 79-80). One of those email strings was admitted below as Exhibit 56 and the bankruptcy court relied on it in its decision (Appx. 648), but Mr. Luebbert omitted it from the designated record in the district court below and does not include it in his appendix. *See* below at pp. 31-37. The bankruptcy court recited that in that email string, Mr. Luebbert responded he worked for Midwest Controls "as a consultant" and all "time-sheets" and invoices would "be solely from" Midwest Controls, he was "currently working at risk," and he wanted to "make sure there are not any unexpected road blocks" (Appx. 648).

In March 2014, ATK issued a purchase order to Midwest Controls, PO E55686 (Appx. 85-91) for the same work Global alleged Atlas had been doing for ATK in violation of the noncompete (Appx. 246-47). In June 2014, Mr. Luebbert began receiving checks for work at ATK through Midwest Controls (Appx. 19-21).

In the end, Mr. Luebbert acquired five additional purchase orders through Atlas from ATK for which Global was not paid: D49, D57, D58, D60, and D69 (Appx. 22). He also received $364,707.93 through Midwest that was not shared with Global (Appx. 22). The total amount Mr. Luebbert received that Global asserted should have been shared was $302,632.31 (Appx. 22).

12. Judgment in U.S. District Court

Global later added ATK and Midwest Controls as defendants, and the case was removed to U.S. District Court (Appx. 237, 239). Among other things, Global alleged that once ATK learned Global was suing Mr. Luebbert and Atlas, ATK conspired with Mr. Luebbert, Atlas, and Midwest Controls to allow Mr. Luebbert to continue his work at ATK without paying Global by funneling the funds through Midwest (Appx. 249-55). Before trial, the Court entered summary judgment in favor of Midwest Controls, and ATK settled with Global (Appx. 257). The matter went to trial on Mr. Luebbert's and Atlas's liability only, and only on Global's breach of contract claim (Appx. 257-58, 260). Mr. Luebbert's defenses included that the Settlement Agreement and Amendment were unenforceable and the result of duress and did not require him to share profits on the non-D95 purchase orders (Appx. 649).

The jury rejected Mr. Luebbert's arguments and defenses (Appx. 260-62). Following a trial, in April 2016 the jury returned a verdict in

favor of Global on its breach of contract claim (Appx. 261). The district court then entered judgment in favor of Global and against Mr. Luebbert in the amount of $302,631.30, and against Atlas in the amount of $1.00 (Appx. 260). This award represents the amount of money Global would have received if Mr. Luebbert had paid it 50% of all the revenues he received from ATK both through Atlas and through Midwest Controls (Appx. 19-21). The district court also awarded attorney fees of $305,802.89 jointly and severally against Mr. Luebbert and Atlas and awarded $47,074.85 in prejudgment interest against Mr. Luebbert (Appx. 268). It also awarded post-judgment interest at the applicable rate (Appx. 268-69).

Neither Mr. Luebbert nor Atlas appealed (Appx. 650).

B. Proceedings below

1. Bankruptcy court

In September 2016, Mr. Luebbert filed a Chapter 7 bankruptcy in the U.S. Bankruptcy Court for the Western District of Missouri (Appx. 632). Global filed a two-count adversary complaint to except its judgment debt from discharge, among other claims, for willful and malicious injury under 11 U.S.C. § 523(a)(6) (Appx. 270, 292-93).

The adversary action proceeded to a two-day trial in July 2018 (Appx. 283, 498). The only witnesses were Mr. David, Mr. Luebbert, and Mr. Brown (Appx. 496, 621).

In November 2018, the bankruptcy court entered its order and judgment granting Global's complaint and excepting Global's judgment debt from discharge (Appx. 631, 659). It first stated all the facts recounted in part "A" of this statement, *supra* (Appx. 634, 650). It then held that the judgment in the underlying case collaterally estopped Mr. Luebbert from re-litigating either whether Global suffered an "injury" or the amount of damages (Appx. 652).

The court then held that Mr. Luebbert's conduct was "willful" (Appx. 653). It did not "believe Mr. Luebbert's testimony that he did not intend to harm Global" and his "testimony that" he did not "intend to harm Global is simply not credible" (Appx. 654-55). It held he acted intentionally and secretly to take away Global's business, including:

> By secretly instructing ATK to remove Global's name from checks that were subject to the settlement, he in essence converted funds belonging to Global, and kept them for himself. And by so instructing ATK, he knew it was *certain* that Global would be deprived of its agreed-upon profit. Whether the conduct echoes of conversion or some other tort, Mr. Luebbert was certain or at a minimum substantially certain that Global would be harmed by being deprived of its share.

(Appx. 653-54) (emphasis in the original). It noted Mr. Luebbert "set up a company in secret, used his knowledge of the customer and Global's bid numbers to make a successful bid, and even used Global's own form to do so," and "did not offer any credible reason for" his "secretive and evasive actions, all of which seem designed to hide the fact he was

intending to go forward and take away Global's customer" (Appx. 654). His actions "all show that he knew he was violating the settlements and that he intended to conceal his actions" (Appx. 655).

The court then held that Mr. Luebbert's conduct was malicious – it "was inexcusable and resulted in an inevitable injury to" Global (Appx. 656) (citation omitted). It found this was because he

> knew about the noncompete agreement and his obligations under the Amendment and took calculated and clandestine steps to do business with ATK in violation of his obligations, including secretly stopping the two-party checks, changing his mailing address …, acquiring purchase orders without notifying Global (even before he had consulted an attorney), and, most significantly, teaming up with a colleague and funneling purchase orders and funds through Midwest Controls, even after being sued by Global.

(Appx. 657-68).

2. District court

Mr. Luebbert then timely appealed to the U.S. District Court for the Western District of Missouri (Appx. 661). In July 2019, the district court entered a judgment affirming the bankruptcy court's judgment (Appx. 793).

The district court held applying collateral estoppel was proper, as "while the jury was not asked to determine whether Luebbert acted willfully or maliciously, the Bankruptcy Court explicitly stated it was not relying on the judgment for those matters," and instead "relied on the judgment only to determine that Luebbert had injured" Global

(Appx. 801). It held "[t]here can be little doubt that Luebbert is collaterally estopped from arguing that he did not cause damage or injury to" Global (Appx. 801).

Mr. Luebbert's other arguments challenged the bankruptcy court's finding that he had acted willfully and maliciously (Appx. 801). The district court disagreed, holding the bankruptcy court was entitled to weigh the evidence and find that he "specifically intended to deprive [Global] of its agreed-upon portions of payments from ATK and keep them for himself" (Appx. 802). It held that these factual findings were supported by the record and fit the legal standard for a willful and malicious injury:

- Luebbert did not follow his attorney's advice, thereby undercutting his claim that he was relying on that advice.
- Luebbert's April 5, 2013 email to [Global] did not seek to terminate the relationship or content that all work under the Settlement Agreement and Amendment had been completed; instead Luebbert demanded a renegotiation that would provide him with 90% of the proceeds—contradicting hi stated belief that he had fulfilled all his obligations.
- Luebbert secretly arranged for ATK to stop issuing joint checks, and in doing so not only failed to relate his actions to [Global], but also misled ATK as to the reason for doing so.
- Luebbert arranged for payments to be paid to Midwest Controls so they could be passed to him without being detected by [Global].
- Luebbert did not remit [Global]'s share of some checks that were inarguably related to PO D95.

- Luebbert did not advise [Global] of ATK's new work requests (regardless of whether they related to PO D95) and instead worked on them and kept the profits.
- Luebbert knew that the Amendment applied to new work requests from ATK, as demonstrated by the facts that (1) on numerous occasions [Global] indicated that such requests should be forwarded to [Global] and (2) Luebbert has previously discussed such new work with [Global]. Indeed, it was his desire to garner a larger share of those proceeds at [Global]'s expense that motivated Luebbert to breach the Settlement Agreement and Amendment.

(Appx. 802-03).

Mr. Luebbert then timely appealed to this Court.

Summary of the Argument

At the outset, the Court should summarily affirm the bankruptcy court's judgment. Mr. Luebbert failed to provide an adequate record to permit meaningful appellate review. His designated record omits nearly half the exhibits below, including every single deposition designation and many exhibits on which the bankruptcy court stated it relied. This Court cannot review his claims on appeal without those materials, so it must affirm the bankruptcy court's judgment.

Otherwise, the bankruptcy court's judgment should be affirmed on the merits. First, Missouri's doctrine of collateral estoppel bars Mr. Luebbert from re-litigating whether his debt to Global at issue arises from an "injury" within the meaning of 11 U.S.C. § 523(a)(6). The jury and district court in the underlying case found that he had violated Global's rights under the Settlement Agreement and Amendment, for which the law provided a remedy of damages, costs, attorney fees, and interest. This is all Global had to show to prove "injury."

Second, the court's finding that Mr. Luebbert's injury was "willful and malicious" is supported by the evidence viewed in a light most favorable to Global and taking into account the court's findings that Mr. Luebbert was not credible. There was sufficient evidence that Mr. Luebbert knew or was substantially certain that harm to Global would result from his conduct and that he intended that harm. That is all Global had to show to prove the injury was "willful and malicious."

Argument

I. Mr. Luebbert fails to provide an adequate record to permit meaningful appellate review, rendering his claims not preserved. His record omits nearly half the exhibits admitted below, including every deposition designation and many other crucial exhibits on which the bankruptcy court expressly relied. This Court cannot review his fact-based claims on appeal without those materials, so it must affirm the bankruptcy court's judgment.

Standard of Review

Mr. Luebbert incorrectly couches both his issues on appeal, as well as his statement of the standard of review, as whether "the District Court erred" (Brief of the Appellant ["Aplt.Br."] 12-14, 27, 35).

"Although this is an appeal from the district court, [this Court]'s review is of the bankruptcy court's decision." *Caldwell v. DeWoskin*, 831 F.3d 1005, 1008 (8th Cir. 2016). This Court "conduct[s] an independent review of the bankruptcy court's judgment applying the same standards of review as the district court." *Fix v. First State Bank of Roscoe*, 559 F.3d 803, 808 (8th Cir. 2009) (citations omitted). At the same time, this Court is the judge of its own jurisdiction, reviewed *de novo*. *In re Yukon Energy Corp.*, 138 F.3d 1254, 1258-59 (8th Cir. 1998).

* * *

This Court should summarily affirm the bankruptcy court's judgment because Mr. Luebbert has failed to provide an adequate record to permit meaningful appellate review. Under Fed. R. Bankr. P.

8009(a)(1), he had the burden to designate for the record on appeal all materials before the bankruptcy court necessary to determine his claims on appeal. And under Fed. R. App. P. 10 and 30, as well as 8th Cir. R. 10A and 30A, it is his responsibility to see that the full record is before this Court. His claims are fact-driven and accuse the bankruptcy court of error as to questions of fact. But he omits from the record more than 50 exhibits, including every single deposition designation and many others on which the bankruptcy court relied. Without these materials, this Court cannot meaningfully review his claims. Instead, it must summarily affirm the bankruptcy court's judgment.

Bankruptcy Rule 8009(a)(1) provides that the "appellant must file with the bankruptcy clerk and serve on the appellee a designation of the items to be included in the record on appeal …." Rule 8009(b)(5) further provides that "[i]f the appellant intends to argue on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, *the appellant must include in the record a transcript of all relevant testimony and copies of all relevant exhibits.*" (Emphasis added). Similarly, under Appellate Rules 10 and 30, an appellant has the "responsibility … to see that the" full record is given to this Court. *Brattrud v. Town of Exline*, 628 F.2d 1098, 1099 (8th Cir. 1980). Finally, 8th Cir. R. 10A(a) directs that the "appellant must ensure that all trial exhibits … are submitted to the clerk of" this Court.

Therefore, when an appellant fails to provide this Court with all materials in the record necessary to determine his issues on appeal, this Court is unable to engage in its review. "An appellant who intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence must include in the record … all the evidence relevant to that finding or conclusion." 36 C.J.S. *Federal Courts* § 558 (2019) (citing Fed. R. App. P. 10(b)(2)). "Thus, errors in findings of fact or conclusions of law will be reviewed only where those errors are raised or shown by the record; otherwise, the findings of the trial court will generally be accepted as correct." *Id.* (internal citations omitted; citing among other authorities *Nat'l Bank of Ark. in N. Little Rock v. Parks*, 970 F.2d 480 (8th Cir. 1992)).

This Court many times has held that when an appellant fails to include necessary materials in the record on appeal, its issues are not preserved. *See, e.g.*, *AgGrow Oils, LLC v. National Union Fire Ins. Co. of Pittsburgh*, 420 F.3d 751, 755 (8th Cir. 2005) (failure to include entire fact record from district court, including exhibits); *Stanback v. Best Diversified Prods., Inc.*, 180 F.3d 903, 911-12 (8th Cir. 1999) (failure to include two affidavits in record); *Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277, 281 (8th Cir. 1995) (failure to transcribe portion of hearing); *Kinkead v. S.W. Bell Corp. Sickness & Acc. Disability Benefit Plan*, 111 F.3d 67, 69 (8th Cir. 1997) (failure to include pleading in record); *Pellerin Laundry Machinery Sales Co. v. Reed*, 300 F.2d 305,

314-315 (8th Cir. 1962) (failure to include exhibits pertinent to issue on appeal in record); *Whiteley v. Foremost Dairies, Inc.*, 254 F.2d 36, 38 (8th Cir. 1958) (same); *Sublette v. Servel, Inc.*, 124 F.2d 516, 516-17 (8th Cir. 1942) (same).

Similarly, when an appellant in a bankruptcy appeal fails to designate all the transcripts or all the evidence presented to the bankruptcy court, the reviewing court is "unable to review the evidence presented to the bankruptcy court" and so "cannot conclude that the bankruptcy court's findings of fact are clearly erroneous." *In re Rose*, 483 B.R. 540, 544 (B.A.P. 8th Cir. 2012). When this happens, "the record … does not permit [the reviewing court's] consideration of [the appellant]'s arguments." *Id.* Instead, the reviewing court must "summarily affirm" the bankruptcy court's decision. *In re Long*, 255 B.R. 241, 245 (B.A.P. 10th Cir. 2000); *see also In re Cupit*, 541 B.R. 739, 750 (D. Colo. 2015); *In re Coppess*, 567 B.R. 543, 545 (B.A.P. 8th Cir. 2017). This is a "well-established princip[e] of appellate jurisprudence." *In re Brown*, 446 B.R. 270, 272 (B.A.P. 8th Cir. 2011).

Mr. Luebbert fails these requirements. He argues the bankruptcy court erred in invoking collateral estoppel based on a "review" of what "the record reveals" (Aplt.Br. 28, 34). He argues the bankruptcy court committed "clear error" on a "question of fact" (Aplt.Br. 36) in determining that his conduct was willful and malicious and argues what he believes "[t]he evidence" shows (Aplt.Br. 38).

Despite all his appeals to the evidence and the "clear error" standard, Mr. Luebbert has omitted a huge swath of that evidence from the record he has provided to this Court. At trial, the parties jointly admitted 116 exhibits, which comprise Exhibits 3 through 118 (Appx. 724-28). But Mr. Luebbert failed to designate *nearly 60 of them* – half – for the record on appeal (Appx. 694-98). He omitted Exhibits 70 through 118, which are *all of the deposition designations*, 33 of which were from Mr. Luebbert himself (Appx. 726-28). He also conspicuously omitted numerous exhibits on which the bankruptcy court stated it relied in reaching some of its most important factual findings as to Mr. Luebbert's willful and malicious conduct:

- Exhibit 53: Jim Schneider's May 2010 e-mail to Mr. Luebbert asking whether ATK was "going to renew" its existing purchase order with Global, which showed Mr. Luebbert was working for Global while surreptitiously also making his own bid for ATK work (Appx. 636).
- Exhibit 57: An April 2013 e-mail exchange between Mr. Luebbert and ATK personnel in which he asked to issue checks in only Atlas' name due to a forthcoming "name change," which was untrue and showed Mr. Luebbert's willful, malicious lie to ATK so as to stop Global from being paid what it was owed (Appx. 646).
- Exhibits 58 and 59: Global's attorney's April and May 2013 correspondence to Mr. Luebbert and Atlas, reminding Mr.

Luebbert of the Settlement Agreement and Amendment, as well as the springing three-year noncompete, warning him that Global would enforce them, and seeking an accounting of his ATK work, showing he was well aware of his responsibilities at the time he was covertly seeking to cheat Global out of its funds due (Appx. 646-47).

- Exhibit 55: ATK's vice president's December 2013 e-mail to Mr. Luebbert inquiring about holding payments from ATK to Mr. Luebbert in escrow pending the outcome of Global's litigation, showing he had yet another opportunity to ensure Global could be paid what it was entitled to but willfully and maliciously refused (Appx. 648).
- Exhibit 56: Mr. Luebbert's December 2013 e-mail to ATK stating he worked for Midwest Controls "as a consultant," all "time-sheets" and invoices would "be solely from" Midwest Controls, he was "currently working at risk," and that he wanted to "make sure there are not any unexpected road blocks," which showed he continued his lying and covert scheme to cheat Global out of its funds while he was being sued, and not following his counsel's advice (Appx. 648).

With all these important exhibits – along with, again, *every single one of the more than 40 deposition designations* – missing from the record, Mr. Luebbert has failed to "include in the record a transcript of

all relevant testimony and copies of all relevant exhibits" as Bankruptcy Rule 8009(a)(1) and (b)(5) requires, and has failed his responsibility to give this Court the full record on appeal, as Appellate Rules 10 and 30 and 8th Cir. R. 10A(a) require. Therefore, his issues are not preserved for appeal, and this Court must summarily affirm the bankruptcy court's decision.

Moreover, while Bankruptcy Rule 8009(a)(2), 8th Cir. R. 10A(a), and 8th Cir. R. 30A(b)(3) provide that an appellee "may" provide additional parts of the record, it is well-established that an appellee is not required to do so to save the appellant or obviate or cure the appellant's existing failure. To the contrary, "Inasmuch as it is the appellant's burden to demonstrate the merits of [his] appeal, [h]e must bear the burden of the deficient record." *In re Webb*, 212 B.R. 320, 321 n.1 (B.A.P. 8th Cir. 1997) (citation omitted). Global is under no obligation to cure the deficiencies in Mr. Luebbert's appeal and will not do so.

Mr. Luebbert has failed to provide this Court an adequate record to permit meaningful review of either of his issues on appeal. The Court must summarily affirm the bankruptcy court's judgment.

II. The bankruptcy court properly held that the judgment in the underlying case collaterally estops Mr. Luebbert from re-litigating whether he "injured" Global within the meaning of 11 U.S.C. § 523(a)(6), under which "injury" means a violation of another's legal right for which the law provides a remedy. The jury and district court in the underlying case found Mr. Luebbert had violated Global's rights under the Settlement Agreement and Amendment, for which the law provided a remedy of damages, costs, attorney fees, and interest.

Standard of Review

In this appeal from a district court's decision affirming a bankruptcy court's decision, this Court reviews the bankruptcy court's decision, not the district court's. Above at p. 31.

"Collateral estoppel is a question of law, which [this Court] review[s] de novo." *Estrada-Rodriguez v. Lynch*, 825 F.3d 397, 401 (8th Cir. 2016). On questions of preclusion, including collateral estoppel, this Court "may affirm on any basis in the record." *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 912 F.3d 445, 452 (8th Cir. 2018).

* * *

In his first issue on appeal, Mr. Luebbert argues the bankruptcy court erred in concluding he was collaterally estopped from re-litigating in the adversary action below whether the debt at issue was for an "injury" he had committed against Global (Aplt.Br. 12, 27-35).[3] He says

[3] At one point, Mr. Luebbert suggests the bankruptcy court's application of collateral estoppel also went to the "willful" and "malicious" elements of § 523(a)(6), too (Aplt.Br. 30). As the district court pointed out (Appx.

this is because "[c]ollateral estoppel does not apply to this case as breach of contract damages are separate and distinct *from the tortious injuries required to satisfy a nondischargeability claim* under [11 U.S.C. §] 523(a)(6)" (Aplt.Br. 28) (emphasis added). Mr. Luebbert cites no authority that the "injury" under § 523(a)(6) must be "tortious."

Mr. Luebbert's argument is without merit. For purposes of the "willful and malicious injury" exception in § 523(a)(6), "injury" simply means a violation of another's legal right for which the law provides a remedy. The jury and district court in the underlying case found he had violated Global's rights under the Settlement Agreement and Amendment, for which the law provided Global a remedy of damages, costs, attorney fees, and interest. The law of Missouri is that Mr. Luebbert is collaterally estopped from re-litigating whether this was so.

11 U.S.C. § 523(a)(6) provides an exception to Chapter 7 discharge for any debt arising from "willful and malicious injury by the debtor to another entity or the property of another entity." The words "willful" and "malicious" in this statute modify the word "injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998). So, before determining whether an injury is willful or malicious, it first must be an "injury." *Id.*

800-01), this is untrue. The bankruptcy court only relied on collateral estoppel for the finding of an "injury" and damages (Appx. 652).

Mr. Luebbert offers no authority as to what constitutes an "injury" under § 523(a)(6). Instead, citing no authority, he says it "requires" "tortious injuries" (Aplt.Br. 28). This is untrue.

It is well-established that "the term 'injury'" in § 523(a)(6) merely "mean[s] a 'violation of another's legal right, for which the law provides a remedy.'" *First Weber Group, Inc. v. Horsfall*, 738 F.3d 767, 774 (7th Cir. 2013) (citation omitted); *see also, e.g., In re Best*, 109 F. App'x 1, 9 (6th Cir. 2004) (applying this definition); *In re Tacason*, 537 B.R. 41, 50 (B.A.P. 1st Cir. 2015) (same); *Nat'l Sign & Signal v. Livingston*, 422 B.R. 645, 653 (W.D. Mich. 2009) (same).

In establishing a cause of action for an exception to discharge under § 523(a), a creditor may invoke the principles of collateral estoppel, also known as issue preclusion. *Grogan v. Garner*, 498 U.S. 279, 285 (1991). "Collateral estoppel is the legal doctrine which bars the relitigation of factual or legal issues that were determined in a prior court action." *In re Jones*, 287 B.R. 188, 193 (E.D. Mo. 2001) (citing *In re Miera*, 926 F.2d 741, 743 (8th Cir. 1991)).

"When an issue related to a nondischargeability complaint may have already been decided by a state court judgment, the bankruptcy court looks to state law to determine the preclusive effect of that judgment." *Id.* (citing *In re Scarborough*, 171 F.3d 638, 641 (8th Cir. 1999)). This is equally true in cases removed from state court to federal court under the federal court's diversity jurisdiction, because "[f]or

judgments in diversity cases, federal law incorporates the rules of preclusion applied by the State in which the rendering court sits." *Taylor v. Sturgell*, 553 U.S. 880, 891 n.4 (2008).

Global originally brought the underlying case against Mr. Luebbert in Missouri state court under Missouri law, after which it was removed to U.S. District Court due to diversity of citizenship (Appx. 230, 237). That federal court then heard the case under its diversity jurisdiction (Appx. 239). Therefore, Missouri's law of collateral estoppel applies. *Taylor*, 553 U.S. at 891 n.4.

In Missouri, collateral estoppel "precludes parties from re-litigating issues that have been previously adjudicated." *Bd. of Educ. v. City of St. Louis*, 879 S.W.2d 530, 532 (Mo. banc 1994). It means "a fact appropriately determined in one lawsuit is given effect in another …." *Hudson v. Carr*, 668 S.W.2d 68, 70 (Mo. banc 1984).

> Collateral estoppel in Missouri involves four factors:
>
> (1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; and (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication …. Most courts have added a fourth factor to the three enunciated … whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit ….

Id. (citation omitted).

Applying these factors, the law of Missouri is that Mr. Luebbert is collaterally estopped from re-litigating whether he "injured" global to create the debt at issue – that is, whether he violated Global's legal right, for which the law provides Global a remedy. *First Weber Group*, 738 F.3d at 774. The jury and district court in the underlying case plainly held that he did. And Mr. Luebbert's argument otherwise depends on his incorrect notion that the "injury" must be tortious.

First, the limited "injury" portion of the issue here – whether Mr. Luebbert violated Global's legal right, for which the law provides a remedy – is identical with the issue in the underlying case. The underlying case went to trial on Global's breach of contract claim seeking damages (Appx. 257-58, 260). The jury returned a verdict in favor of Global and against Mr. Luebbert and awarded Global $302,631.30 in damages (Appx. 261). The district court then entered judgment in favor of Global and against Mr. Luebbert for that amount, plus costs, attorney fees, and interest (Appx. 260, 268-69).

Accordingly, the jury's and district court's finding that Mr. Luebbert had breached the Settlement Agreement and Amendment and award to Global of damages and other relief was more than sufficient to determine he "injured" Global under § 523(a)(6) and bar re-litigation of this issue. He violated Global's legal rights under the Settlement Agreement and Amendment, and the law provided Global a remedy. *See, e.g.*, *In re Porcaro*, 545 B.R. 384, 398 (B.A.P. 1st Cir. 2016)

(underlying judgment finding that debtor had breached contract "easily satisfied" finding of "injury" under § 523(a)(6), collaterally estopping debtor from re-litigating whether there was an "injury").

The other elements are simple. Second, the underlying judgment was on the merits. Mr. Luebbert does not contest that it was a final and enforceable judgment that disposed of all pending claims between all parties and was appealable. He could have appealed it but chose not to. Third, Mr. Luebbert is the same party in both the underlying judgment and this case. And finally, Mr. Luebbert had a full, fair opportunity in the underlying case to litigate whether he had violated Global's legal right for which the law provided Global a remedy. He was represented by counsel. He simply was unsuccessful, and the jury and the district court found in favor of Global. There was nothing stopping him from litigating this issue to its fullest.

Therefore, the law of Missouri is that collateral estoppel bars Mr. Luebbert from re-litigating in this adversary case whether the debt at issue arose from his "injury" to Global – whether he violated Global's legal right, for which the law provides a remedy.

This Court should affirm the bankruptcy court's judgment.

III. The bankruptcy court properly found under 11 U.S.C. § 523(a)(6) that Mr. Luebbert's injury to Global from which the debt at issue arose was willful and malicious, and so was nondischargeable. Viewing the evidence in the light most favorable to Global and taking into account the bankruptcy court's credibility determinations, Mr. Luebbert knew or was substantially certain that harm to Global would result from his lying, furtive, covert, tortious conduct, and he intended that harm by that conduct.

Standard of Review

In this appeal from a district court's decision affirming a bankruptcy court's decision, this Court reviews the bankruptcy court's decision, not the district court's. Above at p. 31. "Like the district court, '[this Court] review[s] the bankruptcy court's finding of fact for clear error ….'" *Caldwell*, 831 F.3d at 1008 (citation omitted).

Mr. Luebbert concedes that his second issue, which challenges the bankruptcy court's finding that his injury was "willful" and "malicious," "is a question of fact" that is reviewed only for clear error (Aplt.Br. 36). "To be clearly erroneous, a decision must strike [this Court] as more than just maybe or probably wrong; it must ... strike [this Court] as wrong with the force of a five-week-old, unrefrigerated dead fish." *In re Nevel Props. Corp.*, 765 F.3d 846, 850 (8th Cir. 2014) (citation omitted).

This Court give[s] "great deference to the bankruptcy court's findings, particularly those that turn upon the credibility of conflicting witnesses." *In re Quality Processing, Inc.*, 9 F.3d 1360, 1364 (8th Cir. 1993). Indeed, a bankruptcy court's "credibility determinations are

virtually unreviewable on appeal." *In re Hernandez*, 860 F.3d 591, 602 (8th Cir. 2017) (citation omitted).

After a bench trial, this Court views the evidence "in the light most favorable to the prevailing party …." *Triple Five of Minn., Inc. v. Simon*, 404 F.3d 1088, 1092 (8th Cir. 2005). This means "resolving conflicts in the [prevailing party]'s favor and accepting all reasonable inferences that support the" judgment and reversing "only if there is no construction of the evidence that supports the" judgment. *United States v. White*, 915 F.3d 1195, 1197 (8th Cir. 2019).

* * *

In his second issue on appeal, Mr. Luebbert challenges the bankruptcy court's findings that his injury of Global was "willful and malicious" under 11 U.S.C. § 523(a)(6). He argues the court "failed to narrowly construe" this exception (Aplt.Br. 40) and that "its factual findings are not supported by substantial evidence" (Aplt.Br. 36).

Mr. Luebbert's argument is without merit. He fails in any way to adhere to the extremely deferential standard of review accorded to factual findings after a trial. He gives no regard to the bankruptcy court's credibility determinations and fails to view the evidence in the light most favorable to Global.

Rather, actually viewing the evidence in the light most favorable to Global and taking into account the bankruptcy court's credibility determinations, there was more than sufficient evidence that Mr.

Luebbert's injury of Global from which the debt at issue arose was both willful and malicious. He knew or was substantially certain that harm to Global would result from his lying, furtive, covert, tortious conduct, and he intended that harm by that conduct.

A. A debt arising from a breach of contract is a nondischargeable willful and malicious injury under 11 U.S.C. § 523(a)(6) when the breach was intended or substantially certain to cause injury to the creditor.

Mr. Luebbert seems to argue that his breach of the Settlement Agreement and Amendment cannot qualify as a "willful and malicious injury" because the exception in § 523(a)(6) only encompasses judgments on actual intentional-tort claims, so a claim styled as a breach of contract would not qualify (Aplt.Br. 36-37).

In support, Mr. Luebbert quotes decisions applying § 523(a)(6) to intentional-tort judgments (Aplt.Br. 37) (citing *Erickson v. Halverson*, 226 B.R. 22, 26 (Bankr. D. Minn. 1998) (judgment on battery claim)), as well as trial-level decisions where the evidence was held insufficient to show either an "injury" or a "willful" or "malicious" one (Aplt.Br. 37) (citing *In re McDermott*, 434 B.R. 271, 283 (Bankr. N.D.N.Y. 2010) (insufficient evidence of "injury"); *In re Marcella*, 463 B.R. 212, 220 (Bankr. D. Conn. 2011) (insufficient evidence of "willful" or "malicious"); *In re Iberg*, 395 B.R. 83, 90 (Bankr. E.D. Ark. 2008) (same)).

At the same time, in the only decision he cites in which a willful and malicious breach of contract was held nondischargeable under §

523(a)(6), the appellate court affirmed. *See In re Jercich,* 238 F.3d 1202, 1205-06 (9th Cir. 2001) (agreement to pay employees wages).

Mr. Luebbert is wrong that the exception to discharge in § 523(a)(6) is limited to debts on judgments for intentional-tort claims. In *Kawaauhau v. Geiger*, while the Supreme Court discussed the application of § 523(a)(6) to debts for intentional torts, 523 U.S. at 61-62, it was not limiting the application of § 523(a)(6) to judgments on intentional-tort claims. *In re Kane*, 755 F.3d 1285, 1296 (11th Cir. 2014), *cert. denied*, 135 S.Ct. 718 (2014). Rather,

> that observation, which the Supreme Court quoted directly from the Eighth Circuit's opinion [under review in *Geiger*], invokes the concept of an 'intentional tort' for a limited purpose. The analogy to intentional torts merely emphasizes that § 523(a)(6) requires a creditor to show that a debtor "intended" the consequences of his actions ….

Id.

If the Supreme Court had wished to restrict the application of § 523(a)(6) to debts arising from injuries caused by intentional torts, an issue not before it in *Geiger*, it would have done so expressly. It did not. Instead, in a narrow holding it ruled that "debts arising from *recklessly or negligently* inflicted injuries do not fall within the compass of § 523(a)(6)." *Geiger*, 523 U.S. at 64 (emphasis added). Its references to intentional torts were illustrations, not interpretations. *Kane*, 755 F.3d at 1296.

Instead, it is well-established that "[e]ven a breach of contract claim, which contains no element of intent, may be the result of some intentional act and therefore subject to a determination of whether any findings or evidence demonstrate that it meets the willful and malicious requirements of § 523(a)(6)." *Hearing Assocs., Inc. v. Gervais*, 579 B.R. 516, 525 (D. Minn. 2016).

So, "injuries resulting from a knowing breach of contract may be nondischargeable under Section 523(a)(6)" when there is "evidence that [the] debtor's breach was intended or substantially certain to cause injury to the creditor." *In re Williams*, 337 F.3d 504, 511 (5th Cir. 2003). Under these principles, courts have held debts from breach-of-contract judgments nondischargeable under § 523(a)(6) many times. *See, e.g.*:

- *In re Rylant*, 594 B.R. 783, 787-89 (Bankr. D.N.M. 2018);
- *In re Smith*, 555 B.R. 96, 102-04 (Bankr. D. Mass. 2016);
- *Porcaro*, 545 B.R. at 396-400;
- *In re Hollier*, 517 B.R. 671, 679-80 (Bankr. W.D. La. 2014);
- *In re Caletri*, 517 B.R. 655, 662-64 (Bankr. E.D. La. 2014) (re: judgment for intentional breach of noncompete agreement);
- *In re Rabinowitz*, 508 B.R. 874, 879-80 (Bankr. S.D.N.Y. 2014) (re: judgment for repeated intentional violation of settlement agreement);
- *In re Garritano*, 427 B.R. 602, 613-14 (Bankr. N.D. Ohio 2009);

- *In re Walker*, 416 B.R. 449, 468-69 (Bankr. W.D.N.C. 2009);
- *In re Alessi*, 405 B.R. 65, 67-68 (Bankr. W.D.N.Y. 2009);
- *In re Stollman*, 404 B.R. 244, 266-67 (Bankr. E.D. Mich. 2009);
- *In re Clark*, 330 B.R. 702, 707-08 (Bankr. C.D. Ill. 2005);
- *In re Butler*, 297 B.R. 741, 747-49 (Bankr. C.D. Ill. 2003) (re: judgment for intentional breach of noncompete agreement);
- *Jercich*, 238 F.3d at 1208-09 (9th Cir. 2001);
- *In re Ketaner*, 149 B.R. 395, 400-02 (Bankr. E.D. Va. 1992) (re: judgment for intentional breach of noncompete agreement);
- *In re Hallahan*, 936 F.2d 1496, 1500-01 (7th Cir. 1991) (same);
- *In re Lindsay*, 55 B.R. 569, 573-74 (Bankr. W.D. Okla. 1985) (same).

Mr. Luebbert's argument that a breach of contract cannot ever constitute a nondischargeable willful or malicious injury under § 523(a)(6) is without merit.

B. Viewing the evidence in the light most favorable to Global, the bankruptcy court was right to liken Mr. Luebbert's actions to a conversion of Global's property or similar tort.

Moreover, just as in all these other decisions, the bankruptcy court here held "[t]his is not a simple breach of contract case" (Appx. 653). Instead, Mr. Luebbert "converted funds belonging to Global and then kept them for himself," meaning "he knew it was *certain* that Global would be deprived of its agreed-upon profit," which was conduct

that "echoes of conversion or some other tort" such as "breach of fiduciary duty" (Appx. 653-54) (emphasis in the original). He "was certain or at a minimum substantially certain that Global would be harmed" (Appx. 654), "he knew he was violating the settlements and that he intended to conceal his actions" (Appx. 655), and he "intended the harm to" Global (Appx. 656). Even Mr. Luebbert now concedes "his actions may have been in bad faith" (Aplt.Br. 38).

Nonetheless, Mr. Luebbert argues his actions "did not rise to the level of conversion" under Missouri law because the property of which he deprived Global was "not [Global]'s personal property" (Aplt.Br. 39).

This fails to view the evidence in the light most favorable to Global. Under the Settlement Agreement and Amendment, half of any money Mr. Luebbert invoiced from any work for ATK belonged to Global (Appx. 229, 337-38, 458-59). The work was even to be half-invoiced in Global's name and paid via two-party checks that Mr. Luebbert was obligated to sign and physically provide *to Global*, which *Global* would deposit in its own account and then remit half to Mr. Luebbert (Appx. 34, 336-37, 458-59).

But Mr. Luebbert then arranged it so that the checks would be only in Atlas's name, lying to ATK about a "name change" to effect this (Appx. 19-21, 53, 55-62, 341-42, 344, 349-50). Having done so, instead of physically providing the checks to Global as he was obligated to, he deposited these checks to which Global was entitled in his own

accounts, taking their funds for himself and not paying Global anything (Appx. 23-25, 68-75, 473-75; *see also* omitted Exhibit 57). And as soon as he effected this, he told Mr. David he no longer would honor the Settlement Agreement and Amendment, taking all of Global's checks thereafter (Appx. 630). A jury determined that the total value belonging to Global in the checks Mr. Luebbert took was $302,631.30 (Appx. 19-21, 260).

The law of Missouri is that Mr. Luebbert converted Global's property. "'Conversion is the unauthorized assumption of the right of ownership over the personal property of another to the exclusion of the owner's rights.'" *Herron v. Barnard*, 390 S.W.3d 901, 908 (Mo. App. 2013) (citation omitted). Conversion has three elements: "(1) the plaintiff 'owned the property or was entitled to possess it; (2) the defendant took possession of the property with the intent to exercise some control over it; and (3) the defendant thereby deprived the plaintiff of the right to possession.'" *Id.* (citation omitted).

While generally conversion "does not lie for the wrongful taking of money," nonetheless "[a]ctions for the conversion of 'notes, bills, checks, and other representatives of value' can be maintained where there is evidence of the specific value of the items." *Kingfisher Hosp., Inc. v. Behmani*, 335 S.W.3d 486, 500 (Mo. App. 2011) (citation omitted). "This is because 'a representative of value is itself a thing of value.' 'The recognized measure of damages for conversion of an identifiable check is

prima facie the value of the paper converted.'" *Moore Equip. Co. v. Callen Constr. Co.*, 299 S.W.3d 678, 681 (Mo. App. 2009) (citations omitted) (affirming judgment for conversion of checks).

Accordingly, Missouri courts routinely have allowed conversion actions for checks taken or kept in violation of contracts. *See, e.g.*, *id.*; *Pollock v. Berlin-Wheeler, Inc.*, 112 S.W.3d 73, 77-78 (Mo. App. 2003) (affirming judgment against contractual employee for conversion of check representing funds belonging to plaintiff when she was violating her contract in keeping the check); *Dayton Constr., Inc. v. Meinhardt*, 882 S.W.2d 206 (Mo. App. 1994) (affirming conversion judgment where worker deposited checks received as payment from customer into his own account, rather than remitting the checks to the employer as the parties had agreed); *Lapp & Assocs., Inc. v. Palmen*, 811 S.W.2d 468, 471 (Mo. App. 1991) (reversing defense judgment and holding for plaintiff where brokerage account executive converted plaintiff's check by depositing it in his own account, rather than giving it to brokerage).

Here, viewed in a light most favorable to the bankruptcy court's judgment, the Settlement Agreement and Amendment entitled Global to possess checks from ATK, Mr. Luebbert took possession of those checks, and he deprived Global of the right to possession of them. And the value to Global of the checks Mr. Luebbert converted was $302,631.30.

C. Only the language of § 523(a)(6) must be narrowly construed in favor of the debtor, not the evidence.

Mr. Luebbert argues the bankruptcy court "failed to narrowly construe GCS' request for an exception in [his] favor" (Aplt.Br. 40). This is without merit.

As he did below (Appx. 800-01), Mr. Luebbert fails to understand what "narrow construction" of § 523(a)(6) means. Statutory exceptions to discharge are narrowly construed. *In re Miller*, 276 F.3d 424, 429 (8th Cir. 2002). But this does not mean that doubts must be resolved in a debtor's favor, evidence construed in a debtor's favor, or facts construed in a debtor's favor. Rather, narrow statutory construction merely is the principle that in reading a statute, a court must confine its interpretation strictly to the statute's terms and not broaden those terms' meaning. In the context of § 523(a), this is an "interpretational rule that exceptions from discharge are to be strictly construed so as to give maximum effect to the policy of the bankruptcy code to provide debtors with a 'fresh start.'" *In re Geiger*, 113 F.3d 848, 853 (8th Cir. 1997) (en banc).

But this does not limit the trier of fact's weighing of the evidence before by binding it to lean toward one side or another. Like any trier of fact, the bankruptcy court had broad authority to weigh the evidence, determine credibility, and make findings accordingly. *Quality Processing*, 9 F.3d at 1364; *Hernandez*, 860 F.3d at 602.

Instead, the "question of fact" (Aplt.Br. 36) in Mr. Luebbert's second issue is whether, viewing the evidence *in the light most favorable to Global*, not him, and taking into account the bankruptcy court's credibility determinations – largely that Mr. Luebbert was not credible and Mr. David was credible, there was sufficient evidence that his breach was intended or substantially certain to cause injury to Global. There plainly was.

D. Viewing the evidence in the light most favorable to Global, Mr. Luebbert's debt to Global arose from conduct that was intended or substantially certain to cause injury to the Global, and so was nondischargeable under § 523(a)(6).

Mr. Luebbert's argument over his second issue entirely fails to view the evidence[4] in the light most favorable to Global or take into account the bankruptcy court's credibility determinations. But, especially having found Mr. Luebbert not credible, the bankruptcy court was entitled to draw the inference against him that his actions were "intending to go forward and take away Global's customer" (Appx. 654). It was entitled to find that Mr. Luebbert "knew he was violating the settlements and that he intended to conceal his actions" (Appx. 655). As in the decisions cited above at pp. 48-49, this is sufficient to establish that Mr. Luebbert's injury of Global was willful and malicious.

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[4] Again, Mr. Luebbert's failure to provide nearly half the adversary trial exhibits in the record renders this Court's review impossible to begin with. *See* above at pp. 31-37.

As the bankruptcy court found for "willfulness" (Appx. 655), Mr. Luebbert was not truthful with his own client, ATK. He told ATK that the change in the two-party checks was due to a mere "name change" – not because he had decided to breach the settlements with Global and take checks belonging to Global (Appx. 23-25, 53, 68-72; *see also* omitted Exhibit 57), and he was not changing Atlas's name (Appx. 473-75).

He likewise was not truthful in the emails he sent to Mr. David, which suggested he was still working in Global's bests interests (Appx. 318, 323, 325, 434, 747-50; *see also* omitted Exhibit 53) when in fact he had decided to pursue purchase orders on his own (Appx. 326, 431-32, 747-50). He continued this lying, covert behavior even after Global had sued him, when he hid his actions through Midwest Controls (Appx. 19-21, 79-91, 246-47, 350-51; *see also* omitted Exhibit 56). He crossed out Global's name on checks (Appx. 73-75), took checks to which Global was entitled, and used a post office box such that Global was unable to find him (Appx. 56, 349-50, 623).

The bankruptcy court properly held these actions all show Mr. Luebbert knew he was violating the settlements and intended to conceal his actions, and that accordingly his actions were willful under § 523(a)(6) – that he knew that injury to Global (i.e., violation of Global's legal rights, for which the law provided relief, *see* above at p. 40) was substantially certain to result from his conduct.

The findings for "malicious" (Appx. 656-57) are equally supported by the evidence. Mr. Luebbert knew about the noncompete agreement and his obligations under the Amendment (Appx. 314-17, 331-33, 456-58, 770-71). He took calculated and clandestine steps in bad faith to do business with ATK in violation of his obligations, including secretly stopping the two-party checks (Appx. 23-25, 53, 68-72, 344, 349-50, 474; *see also* omitted Exhibit 57), changing his mailing address to a post office box in Westphalia (Appx. 56, 349-50, 623), acquiring purchase orders without notifying Global even before he had consulted an attorney (Appx. 56-62, 341-42), and, most significantly, teaming up with a colleague and funneling purchase orders and funds through Midwest Controls, even after being sued by Global (Appx. 19-21, 79-91, 246-47, 350-51; *see also* omitted Exhibit 56).

The bankruptcy court properly held that under the totality of the circumstances, Mr. Luebbert's conduct was malicious – that it "was inexcusable and resulted in an inevitable injury to" Global (Appx. 656) (quoting *In re Jeffries*, 378 B.R. 248, 256 (Bankr. W.D. Mo. 2007)).

This Court should affirm the bankruptcy court's judgment.

Conclusion

The Court should affirm the district court's and bankruptcy court's judgments.

Respectfully submitted,

Jonathan Sternberg, Attorney, P.C.

by /s/Jonathan Sternberg

Jonathan Sternberg, Mo. #59533
2323 Grand Boulevard #1100
Kansas City, Missouri 64108
Telephone: (816) 292-7020
Facsimile: (816) 292-7050
jonathan@sternberg-law.com

COUNSEL FOR APPELLEE
GLOBAL CONTROL SYSTEMS, INC.

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I certify that on December 11, 2019, I electronically submitted the foregoing to the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit for review by using the CM/ECF system.

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