Case No. 4:18-cv-00945-BP

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

IN RE DEREK FRANCIS LUEBBERT, Debtor.

GLOBAL CONTROL SYSTEMS, INC., Plaintiff - Appellee,

vs.

DEREK FRANCIS LUEBBERT, Defendant - Appellant.

Appeal from the U.S. Bankruptcy Court, W. District of Missouri
Honorable Cynthia A. Norton, 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, Suite 1100
Kansas City, Missouri 64108
Telephone: (816) 292-7000 (Ext. 7020)
Facsimile: (816) 292-7050
jonathan@sternberg-law.com

COUNSEL FOR APPELLEE
GLOBAL CONTROL SYSTEMS, INC.

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. The Court should summarily affirm the bankruptcy court's judgment because Mr. Luebbert fails to provide an adequate record to permit meaningful appellate review. His designated 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 meaningfully review his fact-based claims on appeal without those materials, so it must affirm the bankruptcy court's judgment.

Standard of Review: de novo. *See infra* at p. 31.

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 plainly found that 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: de novo. *See infra* at p. 37.

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 conduct, he intended that harm to Global by that conduct, and his supposed reliance on counsel was both untrue and not in good faith.

Standard of Review: "for clear error", viewing the evidence in the light most favorable to Global and taking into account the bankruptcy court's unreviewable credibility determinations. *See infra* at pp. 43-44.

Statement of the Case

A. Introduction

The appellant's brief includes a section titled "Statement of Facts" (Brief of the Appellant ["Aplt.Br."] 3-9), which Fed. R. Bankr. P. 8014(a) does not authorize.[1] Rather, Rule 8014 requires a "statement of the case" setting forth the pertinent facts and citations. Moreover, his "Statement of Facts" is disorganized and skewed in his favor, and improperly omits considerable material on which the court below relied.

The appellee therefore offers its own statement of the case, Rule 8014(b), the "Background" section of which mirrors the bankruptcy court's comprehensive findings but adds in record citations. The Court should adopt the bankruptcy court's findings.

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[1] His brief also violates many other requirements. Its cover does not feature "the number of the case centered at the top", "the name of th[is] court", or "the nature of the proceeding …." Fed. R. Bankr. P. 8015(a)(2). It is in 12-point font, not "14-point or larger." *Id.* at (a)(5)(A). Its statement of issues does not contain "for each one, a concise statement of the applicable standard of appellate review," Rule 8014(a)(5), but instead states one blanket standard without explaining how it applies to "each" individual issue (Aplt.Br. 2-3). These deficiencies are "in and of [themselves] … a sufficient basis to dismiss [his] appeal." *Shah v. Motors Liquidation Co.*, No. 12-CV-8783, 2013 WL 12085091 at *6 (S.D.N.Y. June 3, 2013); *see also In re Stephenson*, No. 96-CV-558, 1996 WL 403087 at *1 (S.D.N.Y. July 18, 1996) (citing *In re Gulph Woods Corp.*, 189 B.R. 320, 323 (E.D.Pa. 1995); *In re Stotler & Co.*, 166 B.R. 114, 116-17 (N.D.Ill. 1994); *A. Marcus, Inc. v. Farrow*, 94 B.R. 513, 515 (N.D.Ill. 1989); *In re Marquam Inv. Corp.*, 942 F.2d 1462, 1467 (9th Cir. 1991)).

B. Background to the proceedings below

1. Mr. Luebbert's employment with Global

Global Control Systems, Inc. ("Global") is a Kansas corporation with its principal place of business in Olathe, Kansas (Aplt.Appx 304).[2] Global aids product manufacturers by putting together specialized computer hardware and designing computer software that controls equipment to make the product (Aplt.Appx. 303, 305).

After graduating from college, Derek Luebbert went to work as a design engineer for Indicon Corporation in Kansas City, Kansas (Aplt.Appx. 205, 309-10, 418, 526). At Indicon, he worked on projects for Alliant Techsystems Inc. ("ATK") at its Lake City, Missouri ammunition plant (Aplt.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 (Aplt.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 (Aplt.Appx. 308-09, 312, 396, 526). That August, Mr. Schneider in turn recruited Mr. Luebbert to join Global (Aplt.Appx. 419, 423-24, 526).

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[2] Mr. Luebbert filed an appendix under Fed. R. Bankr. P. 8018(b) along with his opening brief, and Global files one along with this brief. This brief cites Mr. Luebbert's appendix as "Aplt.Appx." and Global's as "Global Appx." The glaring material omissions from Mr. Luebbert's designated record are addressed *infra* at pp. 31-36.

On his employment at Global, Mr. Luebbert signed an employment agreement (the "Employment Agreement") (Aplt.Appx. 313-14). A copy is in the record at Aplt.Appx. 209-20. The 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 (Aplt.Appx. 211-12). The Employment Agreement also contained nondisclosure and confidentiality provisions (Aplt.Appx. 210-11).

Global's president, Manuel David, testified that he explained the Employment Agreement's provisions, including the noncompete and nonsolicitation provisions, to Mr. Luebbert before asking Mr. Luebbert to sign it (Aplt.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" (Aplt.Appx. 635). Mr. Luebbert testified that when he later decided to leave Global, he did not know he was subject to noncompete and nonsolicitation covenants (Aplt.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" (Aplt.Appx. 635).

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

As a Global employee, Mr. Luebbert was tasked with developing Global's relationship with ATK (Aplt.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 (Aplt.Appx. 40-47, 422). Mr. Luebbert was a bright employee and good engineer and became increasingly essential to the success of that project (Aplt.Appx. 313, 422-23, 544, 557-58). Mr. Luebbert's responsibilities on the project increased over time to the point that ATK was the only Global customer for which he worked (Aplt.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 (Aplt.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 (Aplt.Appx. 407-08). Mr. David testified that during this time frame, Mr. Luebbert began to disparage Global to ATK (Aplt.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 (Aplt.Appx. 545-46, 591). The bankruptcy court stated it believed there was "likely some truth in both versions of the story" (Aplt.Appx. 636).

3. Mr. Luebbert's formation of Atlas and solicitation of ATK

About a year after ATK awarded Global a contract on the green ammo project, Mr. Luebbert decided to start his own business and through it bid for future ATK work (Aplt.Appx. 431-32, 551-52). To that end, in late 2009 he formed a single-member limited liability company, Atlas Industrial Solutions, LLC ("Atlas"), and filed articles of organization with the Missouri Secretary of State (Aplt.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 (Aplt.Appx. 326, 431-32; Global Appx. 42-45).

Mr. Luebbert 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, which was admitted below as Exhibit 50 (Aplt.Appx. 323, 325, 434; Global Appx. 42-45). Mr. Luebbert designated Exhibit 50 as part of the record on appeal but omits it from his appendix even though the bankruptcy court relied on it (Aplt.Appx. 636).

Mr. Luebbert's bid for ATK work while still employed at Global violated the non-solicitation and noncompete provisions of his Employment Agreement (Aplt.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 (Aplt.Appx. 318). This email was admitted below as Exhibit 53 (Global

Appx. 21) and the bankruptcy court relied on it in its decision (Aplt.Appx. 636), but Mr. Luebbert omitted it from the designated record. *See infra* at pp. 31-36.

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 (Aplt.Appx. 327-28, 623-29).

Still that same day, after receiving the successful bid Mr. Luebbert resigned from Global (Aplt.Appx. 206, 318-19, 437). His resignation letter to Mr. David stated he had "decided to pursue alternate career opportunities" effective the next day (Aplt.Appx. 206). He did not mention his formation of Atlas, new relationship with ATK, or successful receipt of PO D95 (Aplt.Appx. 206, 436-37). And at a meeting before he left, Mr. Luebbert evaded Mr. David's questions about what he intended to do (Aplt.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 (Aplt.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 (Aplt.Appx. 439).[3] Mr. David, on the other hand, viewed Mr. Luebbert's actions as a blatant and underhanded violation of his Employment Agreement (Aplt.Appx. 400).

Global then threatened Mr. Luebbert with legal action, informing him it intended to enforce the Employment Agreement (Aplt.Appx. 321-22, 510, 520). It also demanded he immediately return its computers and other equipment and not share any of its confidential information (Aplt.Appx. 321-22, 324, 564). Mr. Luebbert did turn over Global's computers, but not before removing information from them and wiping the hard drives clean (Aplt.Appx. 321-22, 453, 564). This added fuel to the fire (Aplt.Appx. 321-22). At one point, Global made some sort of referral to police about the computers, though he never was charged with a crime (Aplt.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 (Aplt.Appx. 35). He told them Global was in the process of collecting all its property from Mr. Luebbert, including hardware, software, and intellectual property (Aplt.Appx. 35). He also warned Global's employees not to contact Mr. Luebbert (Aplt.Appx. 35).

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[3] 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 (Global Appx. 22-23). Mr. Luebbert omitted them from the designated record on appeal. *See infra* at pp. 31-36.

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 (Aplt.Appx. 36). Mr. Wopata responded he was "led to believe by ATK purchasing that Mr. Luebbert was working for [Global] again" (Aplt.Appx. 36). This apparently confirmed to Mr. David that Mr. Luebbert was continuing to work with ATK in violation of the noncompete (Aplt.Appx. 638).

But unfortunately for all involved, Mr. Luebbert had become nearly indispensable to the green ammo project, which ATK considered extremely important (Aplt.Appx. 331-33). Mr. David believed he had only 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 (Aplt.Appx. 331-33). He reluctantly chose what he saw as the lesser of two evils: allowing the work to continue (Aplt.Appx. 331-33). Mr. Luebbert for his part was not happy, either (Aplt.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 (Aplt.Appx. 328, 331-33, 456-58).

5. The Settlement Agreement

With the assistance of counsel, Global and Mr. Luebbert entered into a settlement agreement dated June 17, 2010 (the "Settlement Agreement") (Aplt.Appx. 331-33, 456-58). A copy is in the record at Aplt.Appx. 221-28.

The Settlement Agreement required Mr. Luebbert to pay Global $66,000 and sign a secured promissory note in that amount (Aplt.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.

(Aplt.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 (Aplt.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 (Aplt.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 (Aplt.Appx. 48).[4]

The parties then decided that in furtherance of the Settlement Agreement, ATK would issue two-party checks made payable to both Atlas and Global (Aplt.Appx. 458-59). In mid-July 2010, Mr. Luebbert emailed an ATK employee to confirm ATK would commence issuing those two-party checks (Aplt.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 (Aplt.Appx. 336-37, 459). Global was to cash the check and remit a check back to Atlas, representing Mr. Luebbert's 50% share (Aplt.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 (Global Appx. 65). A copy of this e-mail was admitted below as Exhibit 62 (Global Appx. 21), which Mr. Luebbert designated as part of the record on appeal but omits from his appendix even though the bankruptcy court relied on it (Aplt.Appx. 640). Mr.

[4] The parties disputed below whether Mr. Luebbert kept Global's confidential information contrary to his affidavit (Aplt.Appx. 640 (citing Aplt.Appx. 33)), but the bankruptcy court did not need to determine this dispute because that was not one of Global's claims (Aplt.Appx. 640).

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 (Global Appx. 65). Therefore, Mr. Luebbert was complying with the Settlement Agreement at that point (Aplt.Appx. 364).

ATK began issuing the two-party checks to Atlas and Global in September 2010 (Aplt.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 (Aplt.Appx. 30-31). At this point, Mr. Luebbert otherwise had complied with the Settlement Agreement and paid back the note (Aplt.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 (Aplt.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.

(Aplt.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 (Aplt.Appx. 337-38). The amendment is in the record at Aplt.Appx. 229, and 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*.

(Emphasis added).

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 (Aplt.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 (Aplt.Appx. 229).

Mr. Luebbert continued to work on PO D95 as amended (Aplt.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 (Global Appx. 66). This e-mail was admitted into evidence below as Exhibit 63 (Global Appx. 21), which Mr. Luebbert designated as part of the record but omits from his appendix, even though the bankruptcy court relied on it (Aplt.Appx. 642). Mr. David testified he was pleased with this because it meant Mr. Luebbert understood his obligations under the Amendment (Aplt.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 (Aplt.Appx. 16-18). This arrangement continued without incident for another year-and-a-half (Aplt.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 (Aplt.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") (Aplt.Appx. 56-62). It made no reference to Global, nor did Mr. Luebbert split the payment on it with Global (Aplt.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 (Aplt.Appx. 56), whereas before he had been using

an address in Kansas City, Missouri (Aplt.Appx. 623). Thereafter, ATK also issued other purchase orders only to Atlas (Aplt.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 (Aplt.Appx. 467, 521-22). On November 28, 2012, two weeks after receiving the new purchase order, Mr. Luebbert sent an email to Mr. David asking to change the 50/50 split (Aplt.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" (Aplt.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 (Aplt.Appx. 51). Mr. Luebbert did not disclose that he had received another purchase order from ATK (Aplt.Appx. 51, 341-42). Mr. David was not interested in Mr. Luebbert's proposal (Aplt.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 (Aplt.Appx. 16-18, 465-66). Two months after proposing the 80% split, on February 5, 2013, he contacted Walter Brown, an employment attorney, who was not the attorney who had

represented him in negotiating the Settlement Agreement and Amendment (Global Appx. 59-60). The e-mail was admitted as Exhibit 60 (Global Appx. 21), which Mr. Luebbert designated as part of the record on appeal but omits from his appendix even though the bankruptcy court relied on it (Aplt.Appx. 643).

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 (Global Appx. 59-60). 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 (Global Appx. 59-60). 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" (Global Appx. 60).

Mr. Luebbert requested Mr. Brown's opinion about the options he had going forward (Global Appx. 60). 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 (Global Appx. 60).

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 (Aplt.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 (Aplt.Appx. 530-32). Mr. Brown also interpreted the springing noncompete in those documents to be unenforceable because, in his view, it had no end (Aplt.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 (Aplt.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 (Aplt.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 (Aplt.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 (Aplt.Appx. 49-50, 63). Three days later, Mr. Luebbert emailed copies of these new (and other) invoices to Mr. David (Aplt.Appx. 402; Global Appx. 62). The e-mail was admitted as Exhibit 61 (Global Appx. 21), which Mr. Luebbert designated as part of the record on appeal but omits from his appendix even though the bankruptcy court relied on it (Aplt.Appx. 645).

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.

(Global Appx. 62). The following day, Mr. Luebbert emailed Mr. David saying he was mailing Global an ATK check that day (Global Appx. 63).

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, 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].

(Global Appx. 63). 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 ….

(Global Appx. 63-64).

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 (Aplt.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 (Aplt.Appx. 344, 474). Mr. Luebbert asked ATK to have those checks voided and reissued due to a "name change" (Aplt.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 (Aplt.Appx. 23-25, 68-72). One of those exchanges was admitted below as Exhibit 57 (Global Appx. 21), but Mr. Luebbert omitted it from the designated record. *See infra* at pp. 31-36. But Mr. Luebbert was not changing Atlas' name (Aplt.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 (Aplt.Appx. 630). This was two months after Mr. Luebbert first contacted his new counsel and had received the advice to inform Mr. David (Aplt.Appx. 539). The bankruptcy court called the email "somewhat rambling" (Aplt.Appx. 646). Mr. Luebbert explained that the "current working relationship" between himself and Global was "not sustainable" (Aplt.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 (Aplt.Appx. 630). He again expressed concern about the conflicts of interests created by his role at ATK (Aplt.Appx. 630).

But instead of definitively terminating the agreement, as his attorney testified he had advised (Aplt.Appx. 539), Mr. Luebbert proposed a 90/10 split of profits and alternatives to the two-party check payment method (Aplt.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" (Aplt.Appx. 630). "Somewhat contradictorily," as the bankruptcy court put it (Aplt.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]" (Aplt.Appx. 630).

A few days later, Global's attorney sent a letter to Mr. Luebbert and Atlas (Aplt.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 (Aplt.Appx. 646). This letter was admitted below as Exhibit 59 (Global Appx. 21) and the bankruptcy court relied on it in its decision (Aplt.Appx. 646), but Mr. Luebbert omitted it from the designated record. *See infra* at pp. 31-36.

The following day, Mr. Luebbert received another check from ATK referring to Global in the memo line (Aplt.Appx. 73-75), despite ATK's earlier assurances that it had corrected for the "name change" (Aplt.Appx. 23-25). He crossed through the reference to Global on the check and deposited it without splitting any proceeds with Global (Aplt.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 (Aplt.Appx. 23-25). ATK finally began issuing single-party checks to Atlas in late April 2013 (Aplt.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 (Aplt.Appx. 647). This email was admitted below as Exhibit 58 (Global Appx. 21) and the bankruptcy court relied on it in its

decision (Aplt.Appx. 647), but Mr. Luebbert omitted it from the designated record. *See infra* at pp. 31-36.

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 (Aplt.Appx. 349-50). The bankruptcy court stated it found Mr. David's testimony credible (Aplt.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 (Global Appx. 46-58). The change orders were admitted as Exhibit 52 (Global Appx. 21), which Mr. Luebbert designated as part of the record on appeal but omits from his appendix even though the bankruptcy court relied on it (Aplt.Appx. 647). 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 (Global Appx. 57).

11. Global sues Mr. Luebbert

In June 2013, Global filed a petition against Mr. Luebbert and Atlas in the Circuit Court of Jackson County, Missouri for breach of the Settlement Agreement and the Amendment and enforcement of the covenants (Aplt.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 (Aplt.Appx. 350-51). Mr. Luebbert previously had utilized Mr. Krahenbill's services to help on Atlas's projects with ATK (Aplt.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 (Aplt.Appx. 648). This email was admitted below as Exhibit 55 (Global Appx. 21) and the bankruptcy court relied on it in its decision (Aplt.Appx. 648), but Mr. Luebbert omitted it from the designated record. *See infra* at pp. 31-36.

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 (Aplt.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 (Aplt.Appx. 79-80). One of those email strings was admitted below as Exhibit 56 (Global Appx. 21) and the bankruptcy court relied on it in its decision (Aplt.Appx. 648), but Mr. Luebbert omitted it from the designated record. *See infra* at pp. 31-36. 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" (Aplt.Appx. 648).

In March 2014, ATK issued a purchase order to Midwest Controls, PO E55686 (Aplt.Appx. 85-91) for the same work Global alleged Atlas had been doing for ATK in violation of the noncompete (Aplt.Appx. 246-47). In June 2014, Mr. Luebbert began receiving checks for work at ATK through Midwest Controls (Aplt.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 (Aplt.Appx. 22). He also received $364,707.93 through Midwest that was not shared with Global (Aplt.Appx. 22). The total amount Mr. Luebbert received that Global asserted should have been shared was $302,632.31 (Aplt.Appx. 22).

12. Judgment in U.S. District Court

Global later added ATK and Midwest Controls as defendants, and the case was removed to the U.S. District Court for the Western District of Missouri (Aplt.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 (Aplt.Appx. 249-55). Before trial, the Court entered summary judgment in favor of Midwest Controls, and ATK settled with Global (Aplt.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 (Aplt.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 (Aplt.Appx. 649).

The jury rejected Mr. Luebbert's arguments and defenses (Aplt.Appx. 260-62). Following a trial, in April 2016 the jury returned a verdict in favor of Global on its breach of contract claim (Aplt.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 (Aplt.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 (Aplt.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 (Aplt.Appx. 268). It also awarded post-judgment interest at the applicable rate (Aplt.Appx. 268-69).

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

C. Proceedings below

In September 2016, Mr. Luebbert filed a chapter 7 bankruptcy in the U.S. Bankruptcy Court for the Western District of Missouri (Aplt.Appx. 632). Global timely filed a two-count adversary complaint

to except its judgment debt from discharge for fraud under 11 U.S.C. § 523(a)(2)(A) and for willful and malicious injury under § 523(a)(6), though it later abandoned the fraud claim (Aplt.Appx. 270, 292-93).

The adversary action proceeded to a two-day trial in July 2018 (Aplt.Appx. 283, 498). The only witnesses were Mr. David, Mr. Luebbert, and Mr. Brown (Aplt.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 Mr. Luebbert's chapter 7 discharge (Aplt.Appx. 631, 659). It first stated all the facts recounted in part "B" of this statement, *supra* (Aplt.Appx. 634, 650). It then held the judgment in the underlying case collaterally estopped Mr. Luebbert from re-litigating whether Global suffered an "injury" or the amount of damages (Aplt.Appx. 652).

The court then held that Mr. Luebbert's conduct was "willful" (Aplt.Appx. 653). It held it did not "believe Mr. Luebbert's testimony that he did not intend to harm Global" and that "Mr. Luebbert's testimony that" he did not "intend to harm Global is simply not credible" (Aplt.Appx. 654-55). To the contrary, 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.

(Aplt.Appx. 653-54) (emphasis in the original); and:

> While employed [by Global], [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. He was not straightforward in his resignation letter and he allegedly kept some of Global's confidential customer information and wiped computers that could have revealed what he planned to do. … [H]e did not offer any credible reason for these 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.

(Aplt.Appx. 654); and:

> 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. He was likewise not truthful in the emails he sent to Mr. David, suggesting that he was still working in Global's bests interests when in fact he had decided to pursue POs on his own and at a later point was hiding his actions through Midwest Controls, after he had been sued. He crossed out Global's name on checks and used a PO Box such that Global was unable to find him. His actions in ceasing work through Atlas and instead working for ATK through Midwest Controls – despite having been advised by a lawyer that taking on new work for ATK was not a problem – all show that he knew he was violating the settlements and that he intended to conceal his actions.

(Aplt.Appx. 655).

The court then held that Mr. Luebbert's conduct was malicious – it "was inexcusable and resulted in an inevitable injury to" Global (Aplt.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 to a post office box in Westphalia, 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.

(Aplt.Appx. 657-68).

Finally, the court rejected Mr. Luebbert's argument that his reliance on the advice of counsel negated his intent (Aplt.Appx. 657). It held that this did not fit the facts or the law, as he did not follow Mr. Brown's advice, but instead "ran purchase orders and payments through Midwest Controls, rather than Atlas or some other company he could have formed, and after he had already been sued" (Aplt.Appx. 658). It found his "reliance on counsel's advice was not reasonable or in good faith" (Aplt.Appx. 658).

Mr. Luebbert then timely appealed to this Court (Aplt.Appx. 661).

Summary of the Argument

At the outset, the Court should summarily affirm Mr. Luebbert's appeal without reviewing its supposed merits. He 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 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, that he intended that harm, and that his "reliance on counsel" defense was untrue and not in good faith.

Argument

I. The Court should summarily affirm the bankruptcy court's judgment because Mr. Luebbert fails to provide an adequate record to permit meaningful appellate review. His designated 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 meaningfully review his fact-based claims on appeal without those materials, so it must affirm the bankruptcy court's judgment.

Standard of Review

In an appeal from a bankruptcy court's decision, the district court is the judge of its own jurisdiction, reviewed *de novo*. *In re AFY*, 734 F.3d 810, 816-17 (8th Cir. 2013).

* * *

The Court should summarily affirm the judgment below 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. His claims are fact-driven and accuse the bankruptcy court of "misstatements" of fact and of failing to adhere to a preponderance of the evidence. But he omitted 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. The law is that the bankruptcy court's judgment must be summarily affirmed.

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).

Therefore, when an appellant 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 appellate court's] consideration of [the appellant]'s arguments." *Id.* Instead, this 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 this well-known, express requirement of Rule 8009. He argues the bankruptcy court committed "clear error" in invoking the *Rooker-Feldman* doctrine (Aplt.Br. 11). He argues the bankruptcy court "misstate[d] testimony" (Aplt.Br. 14) and "mishandl[ed] the facts" (Aplt.Br. 15) in determining that his conduct was willful and malicious, and instead "[t]he evidence presented at trial overwhelmingly establishes" otherwise (Aplt.Br. 18). He also argues "the preponderance of the evidence" establishes that his conduct was not willful or malicious, and the bankruptcy court's conclusion otherwise was "clear error" (Aplt.Br. 20-21).

Despite all his appeals to the supposed preponderance of the evidence and the "clear error" standard of review, Mr. Luebbert has failed to designate all of that evidence for this Court's review. At trial, the parties jointly admitted 116 exhibits, which comprise Exhibits 3 through 118 (Aplt.Appx. 285; Global Appx. 19-23). But Mr. Luebbert failed to designate *nearly 60 of them* – half – for the record on appeal (Aplt.Appx. 694-98). He omitted Exhibits 70 through 118, which are *all of the deposition designations*, 33 of which were from Mr. Luebbert himself (Global Appx. 21-23). He also conspicuously omitted numerous exhibits on which the bankruptcy court expressly 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 (Aplt.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 (Aplt.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 (Aplt.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 its funds due but willfully and maliciously refused (Aplt.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 (Aplt.Appx. 648).

Plainly, 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 Rule 8009(a)(1) and (b)(5) requires. Therefore, this Court "cannot conclude that the bankruptcy court's findings of fact are clearly erroneous." *Rose*, 483 B.R. at 544. "The record" simply "does not permit [the Court's] consideration of [Mr. Luebbert]'s arguments" that the bankruptcy court committed clear error, or what he believes the evidence establishes. *Id.* Instead, it must "summarily affirm" the bankruptcy court's decision. *Long*, 255 B.R. at 245.

Moreover, while Rule 8009(a)(2) provides that an "appellee may file … a designation of additional items to be included in the record", it

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 Mr. Luebbert's deficiencies and will not do so.

Mr. Luebbert has failed to provide this Court an adequate record to permit meaningful review of any of his issues on appeal. For this reason alone, 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 plainly found that 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

"When a bankruptcy court's judgment is appealed to the district court, the district court acts as an appellate court and reviews the bankruptcy court's legal determinations de novo …." *In re Falcon Prods.*, 497 F.3d 838, 840-41 (8th Cir. 2007). "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, an appellate 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 that the doctrine of collateral estoppel barred him from re-litigating in this bankruptcy adversary action whether the debt at issue was for an "injury" he had committed against Global

(Aplt.Br. 12-13).[5] His argument is without merit. For purposes of the "willful and malicious injury" exception in 11 U.S.C. § 523(a)(6), "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 plainly found that 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 debtor." 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 any

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[5] Mr. Luebbert also argues the bankruptcy court should not have applied the *Rooker-Feldman* doctrine to preclude him from re-litigating this question, because that doctrine only applies to state-court judgments and the underlying judgment debt was from a federal court (Aplt.Br. 11-12). Global concedes that *Rooker-Feldman* is inapplicable. *See, e.g.*, *Holmes v. AC & S, Inc.*, 388 F.Supp.2d 663, 674 (E.D.Va. 2004) (state court case removed to federal court becomes federal case, so *Rooker-Feldman* does not apply; collecting cases). But as this Court "may affirm [a decision on preclusion] on any basis in the record", *B&B*, 912 F.3d at 452, and the bankruptcy court's decision that collateral estoppel also precluded re-litigating this question is correct, the Court nonetheless should affirm the bankruptcy court's decision on this issue.

injury is willful or malicious, it first must be determined that it is an "injury." *Id.*

It is well-established that "the term 'injury'" in § 523(a)(6) "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) (reciting 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*, 387 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 the U.S. District Court for the Western District of Missouri due to diversity of citizenship (Aplt.Appx. 230, 237). The federal court then heard the case under its diversity jurisdiction (Aplt.Appx. 239). Therefore, Missouri's law of collateral estoppel applies. *Taylor*, 553 U.S. at 891 n.4.

In Missouri, collateral estoppel is "designed to further judicial economy by avoiding continual trials on the same issue" and "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 a remedy. *First Weber Group*, 738 F.3d at 774. The jury and district court in the underlying case plainly held that he did.

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 (Aplt.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 (Aplt.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 (Aplt.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 conduct, he intended that harm to Global by that conduct, and his supposed reliance on counsel was both untrue and not in good faith.

Standard of Review

"When a bankruptcy court's judgment is appealed to the district court, the district court acts as an appellate court and reviews the bankruptcy court's … findings of fact for clear error." *Falcon*, 497 F.3d at 840-41. "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 must give "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, the reviewing 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); *see also SVP Fin. Servs. Partners LLLP*, 588 B.R. 528, 533 (D.Ariz. 2018). 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 and third issues 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), though the two arguments are difficult to differentiate and seem to overlap. In the second issue, he argues the bankruptcy court failed to "narrowly construe" something – either Global's "request for an exception" (Aplt.Br. 2, 10), or "the facts … in favor of Mr. Luebbert" (Aplt.Br. 14-15, 19, 20-21). In the third, the argument over which comprises less than a page and which cites no evidence at all, he argues that "a preponderance of the evidence did not" support the bankruptcy court's findings on willfulness or malice (Aplt.Br. 20-21).

Mr. Luebbert's second and third issues are without merit. He fails in any way to adhere to the extremely deferential standard of review accorded to factual findings after a trial, improperly treating this

Court's appellate review as if it were some kind of retrial. He gives no regard whatsoever to the bankruptcy court's credibility determinations and fails to view the evidence in the light most favorable to Global. Instead, he twists the standard of review around, relies on his own testimony that the bankruptcy court found not credible, and harps on conclusions he wishes had been drawn from the evidence, but which the bankruptcy court was not bound to draw in this favor, especially given its findings that he was not credible. *Hernandez*, 860 F.3d at 602.

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. Mr. Luebbert knew or was substantially certain that harm to Global would result from his lying, furtive, covert conduct, that he intended that harm to Global by that conduct, and that his appeal to reliance on counsel was both untrue and not in good faith.

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 briefly 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 "intentional torts", and so a claim styled as a breach of contract would

not qualify (Aplt.Br. 13). He says this is because in *Geiger*, 523 U.S. at 61, the Supreme Court "envisioned" § 523(a)(6)'s exception being for an intentional tort (Aplt.Br. 13).

That is not the law. The Supreme Court in *Geiger* was not limiting the application of § 523(a)(6) only to intentional-tort debts. *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. 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).

Accordingly, "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 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 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) (holding debt arising from violation of covenant not to compete was for willful and malicious injury under § 523(a)(6) and so was nondischargeable); *In re Jercich*, 238 F.3d 1202, 1208-09 (9th Cir. 2001).

Mr. Luebbert's argument that a breach of contract cannot constitute a nondischargeable willful or malicious injury under § 523(a)(6) is without merit. Just as in all these other cases, the bankruptcy court here held "[t]his is not a simple breach of contract case" (Aplt.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" (Aplt.Appx. 653-54) (emphasis in the original). He "was certain or at a minimum substantially certain that Global would be harmed" (Aplt.Appx. 654), "he knew he was violating the settlements and that he intended to conceal his actions" (Aplt.Appx. 655), and he "intended the harm to" Global (Aplt.Appx. 656).

As in all the cases cited above, this is sufficient to establish that Mr. Luebbert's injury of Global was willful and malicious.

B. It is the statutory language of § 523(a)(6) that must be narrowly construed in favor of the debtor, not the evidence.

Throughout his second and third issues on appeal, Mr. Luebbert argues the bankruptcy court had to "narrowly construe [Global]'s request for an exception to discharge and resolve all doubts in Mr. Luebbert's favor" (Aplt.Br. 6, 10), "construe the facts narrowly in favor of Mr. Luebbert" (Aplt.Br. 14-15, 18-20), or "narrowly construe evidence in Mr. Luebbert's favor" (Aplt.Br. 21). But the only authority he cites regarding a "narrow" construal of anything is that "*statutory exceptions to discharge* are narrowly construed" (Aplt.Br. 13) (citing *In re Miller*, 276 F.3d 424 (8th Cir. 2002)). He cites no authority holding that doubts must be resolved in a debtor's favor, evidence must be construed in a debtor's favor, or facts must be construed in a debtor's favor.

Mr. Luebbert seems to misunderstand what narrow statutory construction means. It 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).

Narrow – or strict – construction is a principle of *statutory* construction, not *evidentiary* construction. It does not limit the trier of fact's weighing of the evidence before it to bind it to lean toward one side or another. Narrowly construing the language of a statute does not mean narrowly construing "facts" or "evidence." Mr. Luebbert cites no authority for this, because no authority holds so.

To the contrary, the bankruptcy court, like any trier of fact, had broad authority to weigh the evidence, make credibility determinations, and make findings of fact accordingly. *Quality Processing*, 9 F.3d at 1364; *Hernandez*, 860 F.3d at 602.

Rather, the question on appeal is whether, viewing the evidence *in the light most favorable to Global*, not Mr. Luebbert, and taking into account the bankruptcy court's credibility determinations (largely that Mr. Luebbert was not credible), there was sufficient evidence that his breach was intended or substantially certain to cause injury to Global. There plainly was.

C. Viewing the evidence in the light most favorable to Global, and taking into account the bankruptcy court's unreviewable determinations that Mr. David was credible and Mr. Luebbert was not, there was sufficient evidence that 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 attacks on the bankruptcy court's findings entirely fail to view the evidence[6] in the light most favorable to Global or take into account its credibility determinations.

> Mr. Luebbert challenges the bankruptcy court's finding that he
>
> 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, was not straightforward in his resignation letter and he allegedly kept some of Global's confidential customer information and wiped computers that could have revealed what he planned to do

and this was "designed to hide the fact that he was intending to go forward and take away Global's customer", ATK (Aplt.Br. 14) (citing Aplt.Appx. 654).

Mr. Luebbert says this "misstates testimony" because "*h*e was very clear" *in his own testimony* "that he turned over confidential information to GCS's attorney shortly after resigning from GCS" and "the information was stored at ATK and GCS would need to go to ATK

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[6] Again, Mr. Luebbert fails to provide nearly half of the exhibits before the bankruptcy court in the record on appeal, which renders this Court's review impossible to begin with. *Supra* at pp. 31-36.

to pick it up" (Aplt.Br. 14-15) (citing Aplt.Appx. 450-51) (emphasis added). Similarly, he says the bankruptcy court should not have found he "wiped clean computers he was using … to cover his tracks" because *he* "testified that he wiped the computers clean" for a benign reason (Aplt.Br. 15) (citing Aplt.Appx. 453).

All of this ignores that the bankruptcy court, which is the unfettered arbiter of credibility here, *Hernandez*, 860 F.3d at 602, *found Mr. Luebbert was not credible*. It found Mr. Luebbert "did not offer any credible reason for" his "secretive and evasive actions" he now challenges (Aplt.Appx. 654). It found his testimony "less than credible" (Aplt.Appx. 655). It stated, "Mr. Luebbert's testimony that in none of these actions did he intend to harm Global *is simply not credible to this court*" (Aplt.Appx. 655) (emphasis added). A court cannot be more direct than that.

Mr. Luebbert also discusses evidence viewed in a light most favorable to *him*, not Global, as the Court is required to do. This includes his billing through Midwest (Aplt.Br. 19), which the trial court found was a clandestine attempt to hide money from Global (Aplt.Appx. 655), a check on PO D95 that he failed to turn over to Global that he now alleges he did not have to because that could be concluded in his favor (Aplt.Br. 19), and the lack of any reputational damages to Global (Aplt.Br. 20), which the law does not require.

This is without merit. Rather, especially having found Mr. Luebbert not credible, the bankruptcy court was entitled to draw the inference against him that his actions instead were "intending to go forward and take away Global's customer" (Aplt.Appx. 654). It was entitled to find that Mr. Luebbert "knew he was violating the settlements and that he intended to conceal his actions" (Aplt.Appx. 655).

And the evidence supports all of this. As the bankruptcy court found for "willfulness" (Aplt.Appx. 655), Mr. Luebbert indeed 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 (Aplt.Appx. 23-25, 53, 68-72; *see also* omitted Exhibit 57), and he was not changing Atlas's name (Aplt.Appx. 473-5). He likewise was not truthful in the emails he sent to Mr. David, which suggested he was still working in Global's bests interests (Aplt.Appx. 318, 323, 325, 434; Global Appx. 42-45; *see also* omitted Exhibit 53) when in fact he had decided to pursue purchase orders on his own (Aplt.Appx. 326, 431-32; Global Appx. 42-45). He continued this lying, covert behavior even later, after Global had sued him, when he hid his actions through Midwest Controls (Aplt.Appx. 19-21, 79-91, 246-47, 350-51; *see also* omitted Exhibit 56). He crossed out Global's name on checks (Aplt.Appx. 73-75) and used a post office box such that Global was unable to find him (Aplt.Appx. 56, 349-50, 623).

The bankruptcy court did not "clearly err" in holding that these actions all show that 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, *supra* at p. 39) was substantially certain to result from his conduct.

The findings for "malicious" (Aplt.Appx. 656-57) are equally supported by the evidence. Mr. Luebbert knew about the noncompete agreement and his obligations under the Amendment (Aplt.Appx. 314-17, 331-33, 456-58; Global Appx. 65-66). He took calculated and clandestine steps to do business with ATK in violation of his obligations, including secretly stopping the two-party checks (Aplt.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 (Aplt.Appx. 56, 349-50, 623), acquiring purchase orders without notifying Global even before he had consulted an attorney (Aplt.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 (Aplt.Appx. 19-21, 79-91, 246-47, 350-51; *see also* omitted Exhibit 56).

The bankruptcy court did not "clearly err" in determining 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 (Aplt.Appx. 656) (quoting *In re Jeffries*, 378 B.R. 248, 256 (Bankr. W.D.Mo. 2007)).

Finally, Mr. Luebbert accuses the bankruptcy court of "wholly discounting [his] defense" that his breach "was made in reliance on advice from counsel" Mr. Brown (Aplt.Br. 16). But the bankruptcy court did no such thing. Rather, it considered but *rejected* the defense because, based on the evidence, "Mr. Luebbert's own actions belie his assertion that he relied on the attorney's advice" (Aplt.Appx. 658).

Mr. Brown testified that he advised Mr. Luebbert the Settlement Agreement and Amendment related only to work done on PO D95 and that, when PO D95 was finished, Mr. Luebbert was no longer obligated to split any fees with Global (Aplt.Appx. 530-32). He also said he interpreted the springing noncompete in those documents to be unenforceable because, in his view, the noncompete had no end (Aplt.Appx. 513-14). But he said he advised Mr. Luebbert that to be fair to Global, he should write Mr. David to make sure he understood that the situation was untenable for Mr. Luebbert (Aplt.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 (Aplt.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 (Aplt.Appx. 539).

As the bankruptcy court held, viewing the evidence in the light most favorable to Global Mr. Luebbert's own actions belied that he followed Mr. Brown's advice. He did not immediately contact Mr. David as Mr. Brown requested. Instead, he continued to lead Global on about additional work with ATK (Global Appx. 62-63). He lied to ATK about the reason for seeking to issue one-party checks and stopped them even before reaching out to Mr. David (Aplt.Appx. 23-25, 53, 68-72, 344, 349-50, 474; *see also* omitted Exhibit 57). Even while PO D95 was ongoing, he changed his mailing address so Global could not find him (Aplt.Appx. 56, 349-50, 623). He funneled purchase orders and funds through Midwest Controls, even after being sued by Global, so as to hide them from Global (Aplt.Appx. 19-21, 79-91, 246-47, 350-51; *see also* omitted Exhibit 56). He crossed through the reference to Global on a check and deposited it without splitting any proceeds with Global (Aplt.Appx. 73-75). Even his e-mail to Mr. David that he wants to characterize as terminating the agreements on advice of counsel proposed a 90/10 split of profits and alternatives to the two-party check payment method (Aplt.Appx. 630).

None of that was in reliance on Mr. Brown's advice, and the bankruptcy court was entitled to hold Mr. Luebbert was not acting on the advice of counsel in engaging in any of those actions (Aplt.Appx. 658).

In our legal system, an appeal is not a retrial. It is a review of the proceedings in the court being reviewed. To the extent that the review requires considering the lower court's factual determinations, the appellate court defers to those findings if at all reasonably possible, accounting for the lower court's determinations of witness credibility. Mr. Luebbert's appeal fails that exercise.

Viewing the evidence in the light most favorable to Global and taking into account the bankruptcy court's unreviewable credibility determinations, there was sufficient evidence that 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). This Court should affirm the bankruptcy court's judgment.

Conclusion

The Court should affirm the bankruptcy court's judgment.

Respectfully submitted,

Jonathan Sternberg, Attorney, P.C.

by /s/Jonathan Sternberg

Jonathan Sternberg, Mo. #59533
2323 Grand Boulevard, Suite 1100
Kansas City, Missouri 64108
Telephone: (816) 292-7000 (Ext. 7020)
Facsimile: (816) 292-7050
jonathan@sternberg-law.com

COUNSEL FOR APPELLEE
GLOBAL CONTROL SYSTEMS, INC.

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/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that on April 29, 2019, I electronically filed the foregoing and its appendix with the Clerk of the Court using the CM/ECF system, which sent notification of that filing to the following: Ms. Jessica-Marie Hutchison, Mr. Michael J. Wambolt, and Mr. Neil S. Sader, Sader Law Firm, LLC, 2345 Grand Boulevard, Suite 2150, Kansas City, Missouri 64108, telephone: (816) 561-1818, counsel for the appellant; and to Mr. Stewart C. Bogart, Millsap & Singer, LLC, 612 Spirit Drive, St. Louis, Missouri 63005, telephone: (636) 537-0110, counsel for the appellant.

/s/Jonathan Sternberg
Attorney