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**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| COLLEEN P. LEHR; PAUL E, LEHR,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>PERRI ELECTRIC, INC., a California Corporation; et al.,<br><br>Defendants-Appellees. | No. 19-17199<br><br>D.C. No. 2:17-cv-01188-WBS-AC<br><br>MEMORANDUM* |

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued and Submitted November 17, 2022
San Francisco, California

Before: S.R. THOMAS, BENNETT, and SUNG, Circuit Judges.
Dissent by Judge BENNETT.

Appellants Colleen and Paul Lehr appeal from the district court's order granting summary judgment to Appellees Frank Perri, Perri Electric, Inc. ("Perri Electric"), the Perri Electric, Inc. Profit Sharing Plan ("the Plan"), and the Profit

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Sharing Trust Fund, in which the court determined that Appellees lacked statutory standing under the Employee Retirement Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* We have jurisdiction pursuant to 28 U.S.C. § 1291. We review the district court's decision to grant summary judgment de novo. *See Desire, LLC v. Manna Textiles, Inc.*, 986 F.3d 1253, 1259 (9th Cir.), *cert. denied*, 142 S. Ct. 343 (2021) (citation omitted). We affirm. Because the parties are familiar with the factual and procedural history of the case, we need not recount it here.

I

The Lehrs' central claim is that the money paid by the Trustee to Perri Electric should have been paid to the Plan. However, the judgment in Ms. Lehr's criminal case ordered payment to Perri Electric, not the Plan. More importantly, the stipulated judgment in the bankruptcy adversary proceeding directed payment to Perri Electric. The judgment included money owed to the corporation and the Plan. The district court correctly found no mandate, "in either the criminal case or the bankruptcy proceeding," requiring that the Trustee's initial payment to Perri Electric be remitted to the Plan.

The Lehrs argue that the corporation should have applied the initial installment payment to the Plan. However, a debtor in bankruptcy "cannot

designate to which liability its payments will be allocated." *United States v. Technical Knockout Graphics, Inc. (In re Technical Knockout Graphics, Inc.)*, 833 F.2d 797, 802 (9th Cir. 1987); *see also Gerwer v. Salzman (In re Gerwer)*, 353 B.R. 66, 71–72 (B.A.P. 9th Cir. 2000) (citation omitted) (noting that the creditor can apply the payments "as it 'sees fit,'" and that bankruptcy courts lack the equitable power to order allocation). If the Lehrs wished to require allocation, that provision should have been included in the stipulated bankruptcy judgment.

II

The remaining question is whether Ms. Lehr had standing as a former Plan participant to assert a breach of fiduciary duty claim against the corporation. To establish standing under ERISA, a former employee must make a "colorable claim" that she is a plan participant. *Leeson v. Transam. Disability Income Plan*, 671 F.3d 969, 977 (9th Cir. 2012) (quoting *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989)); *see* 29 U.S.C. § 1132(a)(1)(B).

Here, standing is foreclosed by our decision in *Parker v. Bain*, 68 F.3d 1131 (9th Cir. 1995). In *Parker*, we held that a plaintiff lacks standing under ERISA where they breach their fiduciary duty to the plan by embezzling funds in excess of their claimed account balance. 68 F.3d at 1140–41. Here, the money allegedly owed to the Plan by Ms. Lehr far exceeds her claimed account balance. She

attempts to distinguish *Parker* by asserting that the payment to Perri Electric should eliminate the offset. However, that logic is circular because, pursuant to the bankruptcy judgment, Perri Electric was not under an obligation to allocate the money to the Plan. Moreover, as Appellees point out, the amount owed by Ms. Lehr to the Plan likely far exceeds the amount paid to the corporation. Therefore, under *Parker*, the district court correctly concluded that Ms. Lehr lacked standing to assert an ERISA breach of fiduciary duty claim. We do not, of course, opine as to whether any other Plan participant, or the Plan itself, had an ERISA cause of action.

**AFFIRMED.**

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*Kaur v. Garland*, No. 19-17199
BENNETT, Circuit Judge, dissenting:

I respectfully dissent because the Lehrs have established a genuine dispute of material fact as to whether Ms. Lehr's restitution payment constituted a Plan asset. Both the criminal judgment ordering restitution and subsequent bankruptcy judgment directing payment pursuant to the criminal judgment are ambiguous as to the intended effect of payment. In my view, a reasonable fact finder could conclude that the restitution payment *was* intended to compensate the Plan rather than Perri Electric. Moreover, by finding that the Lehrs lack statutory standing because the restitution payment was unambiguously *not* a Plan asset, the majority effectively precludes other Plan participants from challenging defendants' use of the restitution payment under ERISA.

The majority concludes that the restitution payment was not a Plan asset because the criminal and bankruptcy judgments directed payment to Perri Electric rather than the Plan. But this ignores the Lehrs' argument that payment could have been ordered to Perri Electric in its capacity as a fiduciary of the Plan. *See* 29 U.S.C. § 1002(21)(A). There is evidence in the record to support this view. Ms. Lehr's plea agreement states that "the parties agree that the Court may order restitution in an amount up to $326,846, as that was the amount [Ms. Lehr] represented was in the plan accounts when she" falsified the document at issue. The factual basis for the plea agreement discusses only Ms. Lehr's embezzlement

from the Plan—it does not discuss any money she stole directly from Perri Electric or indirect costs to Perri Electric stemming from her criminal conduct. The district court ordered restitution in the exact amount contemplated by the plea agreement, $326,846, an amount based solely on Ms. Lehr's theft from the Plan. The bankruptcy court subsequently approved a stipulated judgment authorizing "an interim distribution of $326,846 . . . based on the restitution awarded by the Judgment in a Criminal Case."

I believe a trier of fact could conclude that the purpose of the restitution payment was to remediate Ms. Lehr's theft from the Plan. While the designation of Perri Electric as the payee of the restitution judgment could support that Perri Electric was the sole intended beneficiary of the restitution payment, that does not flow from the record as a matter of law, looking at the facts in the light most favorable to the Lehrs. *See Soc. Techs. LLC v. Apple Inc.*, 4 F.4th 811, 816 (9th Cir. 2021). While both the restitution order and the bankruptcy judgment *could* have mentioned the Plan and did not, so too could they have specified that the money was going to Perri Electric for its own account. If Ms. Lehr stole only from the company, it would not be necessary to specify that the restitution payment was intended to compensate Perri Electric's own account. But here she stole from both Perri Electric and the Plan, and the theft addressed in the restitution order *was* from the Plan. *See* 29 U.S.C. § 1002(21)(A).

The majority also finds that *this litigation* amounts to a debtor's attempt to impermissibly allocate a bankruptcy payment. *In re Technical Knockout Graphics, Inc.*, 833 F.2d 797, 802 (9th Cir. 1987). But this conclusion assumes that the bankruptcy judgment was meant to give Perri Electric unfettered discretion to spend the money as it wished. If the Lehrs are correct that the bankruptcy judgment was intended to restore monies to the Plan, the Lehrs are simply seeking to enforce the bankruptcy judgment and not usurp Perri Electric's supposed sole and unfettered discretion.

Contrary to the majority's assertion, its holding effectively deprives any Plan participant of a cause of action to challenge the defendants' allocation of the Lehrs' restitution payment. If the Lehrs' restitution payment was not a Plan asset, defendants could not have violated any fiduciary duty in using the payment to cover business expenses. Because the relevant provisions of ERISA only create liability for violating fiduciary duties, innocent Plan participants are left with no recourse against defendants under the statute. *See* 29 U.S.C. §§ 1104, 1109.

I agree that the Lehrs may lack statutory standing for other reasons. For example, it is unclear under our decision in *Parker v. Bain* whether an embezzler can ever restore their interest in a Plan by repaying the amount they owe. *See* 68 F.3d 1131, 1140-41 (9th Cir. 1995). In addition, documentary evidence in the record does not establish either the amount of money that should have been in the

Plan or the value of Ms. Lehr's stake in the Plan. The district court declined to address these issues below, and they may well entail other questions of fact. I would remand for consideration of these alternative standing arguments in the first instance.