Dated: April 14, 2023
The following is ORDERED:

M. Ruthie Hagan
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re:

Ronald Keith Anderson and Case No.: 15-21681
Carmen Webb Anderson, Chapter 7

Debtors.

Ronald Keith Anderson and
Carmen Webb Anderson,
Plaintiffs (Realigned Defendants),

v. Adv. Proc. No.: 21-00042

United States of America and
Internal Revenue Service
Defendants (Realigned Plaintiffs).

ORDER GRANTING MOTION TO STRIKE CERTAIN ITEMS DESIGNATED BY INTERNAL REVENUE SERVICE AS PART OF THE RECORD ON APPEAL

This matter came before the Court on Ronald Keith Anderson's and Carmen Webb Anderson's (the "Andersons") Motion to Strike Certain Items from Appellants' Designation of Record on Appeal [Adv. DE 109] and the Objection of the United States ("United States" or "IRS") [Adv. DE 112].

As background, the Motion to Strike is related to a pending appeal of this Court's Order Granting the Andersons' Motion for Summary Judgment entered on February 28, 2023 and March 1, 2023 [Adv. DE 96 and 97] along with this Court's Order denying the IRS's Motion for Partial Summary Judgment entered on February 25, 2022 [Adv. DE 58].[1] The IRS filed its Appellant's Designation of Items to be Included in the Record on Appeal [Adv. DE 107] on March 27, 2023. This Designation includes 46 enumerated items. Of the 46 items, the Andersons move to strike the following items designated by the IRS:

1. Motion to Strike Expert Report [Adv. DE 74];
2. Response to Motion to Strike Expert Report [Adv. DE 77];
3. Opinion and Order Denying Motion to Strike Expert Report [Adv. DE 93];
4. Motion to Employ David Dreary Outside Bankruptcy [DE 31];[2]
5. Motion of Debtors to Authorize Payment of Funds to IRS [DE 43];

[1] This opinion does not make any findings that the February 2022 Order denying the IRS's Motion for Partial Summary Judgment is subject to a timely appeal. Any reference to the "two" opinions or orders on appeal is just this Court recognizing the two orders listed in the Notice of Appeal [Adv. DE 102] and Statement of Issues on Appeal [Adv. DE 108], and not that both orders are subject to a timely appeal under FED. R. BANKR. P. 8002(a).

[2] The Andersons' orally withdrew their request to strike the Motion to Employ David Dreary Outside of Bankruptcy [DE 31] because the Bankruptcy Court referenced the order employing Mr. Dreary in its opinion. *See* Adv. DE 96, p. 4.

6. Trustee's Objection to Motion to Authorize Payment of Funds [DE 53]; and

7. Consent Order on Debtors' Motion to Authorize Payment of Funds to IRS [DE 54].

[Adv. DE 109]

Based on the pleadings, counsel arguments, the record before this Court, and for the reasons stated herein, the Andersons' Motion to Strike as it relates to the IRS's designation of certain items to be included in the record on appeal is GRANTED. Federal Rule of Bankruptcy Procedure 8009(e)(1) provides:

> *Correcting or Modifying the Record.*
>
> *Submitting to the Bankruptcy Court*. If any difference arises about whether the record accurately discloses what occurred in the bankruptcy court, the difference must be submitted to and settled by the bankruptcy court and the record conformed accordingly. If an item has been improperly designated as part of the record on appeal, a party may move to strike that item.

FED. R. BANKR. P. 8009(e)(1). The language of the Rule "leaves no doubt that any dispute over designation of items must be adjudicated by the bankruptcy court. . . ." *See In re Digerati Techs., Inc*., 531 B.R. 654, 659 (Bankr. S.D. Tex. 2015).

In general, only items considered by the bankruptcy court in reaching a decision should be included in the designation of the record. *Church Joint Venture, L.P. v. Blasingame* (*In re Blasingame*), 559 B.R. 692, 700-01 (B.A.P. 6th Cir. 2016) (citing *In re Ames Dep't Stores, Inc*., 320 B.R. 518, 521 (Bankr. S.D.N.Y. 2005) (if an item was not considered by the court, it should be stricken from the record on appeal)). However, there is a recognized exception to this rule. *See In re Purvi Petroleum III, LLC*, 2012 WL 360047 at *2 (Bankr. M.D. Tenn. Feb. 2, 2012). The 6th Circuit Bankruptcy Appellate Panel in *Blasingame* stated that even if the bankruptcy court did not consider certain items in reaching its decision, items should be included if they contain findings of fact and legal conclusions related directly to the issue on appeal. *In re Blasingame*, 559 B.R. at 701; *see also Food Distrib. Ctr. v. Food Fair, Inc*., (*In re Food Fair, Inc*.), 15 B.R. 569, 572

(Bankr. S.D.N.Y. 1981) (finding record may be supplemented with materials from other adversary proceedings arising from the same bankruptcy case closely related to the appeal).

The 6th Circuit B.A.P. goes on to state that the bankruptcy court may also properly strike motions and briefs that are (1) filed by the parties and (2) do not contain findings of fact or legal conclusions of the court. *In re Blasingame,* 559 B.R. at 701. The bankruptcy court is mindful that "[w]hile the record should contain all documents necessary to afford a full understanding of the case.... [i]tems not before the bankruptcy court and not considered by it in rendering its decision may not be included in the record." *Amedisys, Inc. v. JP Morgan Chase Manhattan Bank* (*In re Nat'l Century Fin. Enters., Inc.*), 334 B.R. 907, 917 (Bankr. S.D. Ohio 2005) (citation and internal quotation marks omitted).

First, this Court, when drafting the two orders relating to the two separate motions for summary judgment, did ***not*** consider nor review ***any*** of the six (6) items the Andersons seek to have stricken from the Appellants' designation of contents for inclusion in the record on appeal. Despite the IRS's argument that the Bankruptcy Court's standard language in its opinions and orders indicates that it reviewed "the entire record of the case," this is simply broad language so that the Bankruptcy Court does not have to recite every document and pleading the Court has knowledge of relating to the history of the bankruptcy case. The "record of the case" is merely the record as presented by the parties to the Court. All pleadings and documents which the Bankruptcy Court relied on in reaching its decision are referenced in its Opinion and Order with citations to the record. Moreover, the underlying bankruptcy case is riddled with eight (8) years of case history, including many unrelated and immaterial pleadings and orders, which should not hamper the appellate court's review. Likewise, while the adversary proceeding has a shorter life span, the

reviewing court should not be bogged down with pleadings (and orders) which were not considered by the Bankruptcy Court in ruling on the motions for summary judgment.

Next, while the Bankruptcy Court did not consider any of the six items in dispute, this Court must still, under *Blasingame*, review each item to determine if (1) the item to be added is closely related to the matter at issue and/or (2) the item includes findings of fact or conclusions of law. Only two of the six items are orders; the remaining four[3] items are pleadings which contain no findings of fact nor conclusions of law (as they were drafted by various litigants in this adversary proceeding and the underlying bankruptcy case). These four non-order items are not closely related to the matter at issue on appeal and were not referenced anywhere in the Bankruptcy Court's opinions. Therefore, they should be stricken from the record.

The two remaining items are orders. One Order is the Consent Order on Debtors' Motion to Authorize Payment of Funds to IRS [DE 54]. This Order is a consent order, it contains no findings of fact and/or conclusions of law. The Order memorialized the agreement entered into between the Chapter 7 trustee and Debtor's counsel. As previously stated, the Order was not considered by this Court in making its findings related to the issues on appeal and the Order contains no findings of fact and/or conclusions of law. Furthermore, it is an Order entered in the underlying bankruptcy case and simply not closely related to the issues considered by the Bankruptcy Court when ruling on the motions for summary judgment or issues on appeal, thus, the Consent Order on Debtors' Motion to Authorize Payment of Funds to IRS [DE 54] should be stricken.

[3] Motion to Strike Expert Report [Adv. DE 74]; Response to Motion to Strike Expert Report [Adv. DE 77]; Motion of Debtors to Authorize Payment of Funds to IRS [DE 43]; Trustee's Objection to Motion to Authorize Payment of Funds [DE 53].

The second Order is the Court's Opinion and Order Denying Motion to Strike the IRS's expert report [Adv. DE 93]. This is an Opinion and Order drafted by the Bankruptcy Court. This Opinion is related to whether a certain expert report prepared by Dr. Michael Cragg should be stricken and not allowed to be used during trial. The Bankruptcy Court specifically made no findings in its Opinion as to whether the report was relevant under FED. R. EVID. 401 and 402, or whether the expert was qualified as an expert - instead the Bankruptcy Court reserved these issues for trial. More importantly, the Opinion is just an analysis of whether the purported expert's report was based on reliable principles and methods to meet the requirements of FED. R. EVID. 702 and did not in any way relate to whether the Andersons (specifically, Mr. Anderson) had unclean hands. The purported expert's opinions contained in the report were not accepted as true - only the purported expert's methodology was under scrutiny by the Bankruptcy Court.

In order for the expert report and the Court's Opinion to be related to the unclean hands argument, the Bankruptcy Court would have had to accept Dr. Cragg's opinions as fact, and this Court expressly declined to do so. The only issue before the Bankruptcy Court in its Memorandum Opinion and Order Denying the Andersons' Motion to Strike Expert Report was whether Dr. Cragg employed reliable principles and methodology that could assist the trier of fact in order to meet the initial requirements for admissibility under Rule 702. The Bankruptcy Court "conditionally admitted" the report into evidence with the caveat that the report may still be struck down by Rules 401, 402, and whether Dr. Cragg would be qualified as an expert.

Because of the limited nature of the Bankruptcy Court's Opinion, the Memorandum Opinion made no findings of fact and/or conclusions of law relating to the issues on appeal, and this Court did not consider the report or the Memorandum Opinion when drafting its summary

judgment orders;[4] therefore, the Opinion and Order Denying the Andersons' Motion to Strike Expert Report should be stricken from the Appellants' designation of the record.

Furthermore, while the IRS, in responding to the Andersons' Motion for Summary Judgment, may have attempted to include the expert report into the record, it was not supported by any affidavit verifying its authenticity and was, in this Court's opinion, inadmissible and could not be considered for purposes of summary judgment. *Scott v. Edinburg*, 346 F.3d 752, 759 (7th Cir. 2003)(citation omitted); *see also* FED. R. CIV. P. 56 advisory committee's note to 2010 amendment ("The burden is on the proponent [of evidence] to show that the material is admissible as presented or to explain the admissible form that is anticipated."); *see also Russell v. Home Depot, Inc.*, 2022 WL 18955863, at *3 (6th Cir. Nov. 3, 2022) (citations omitted) (district court properly declined to consider the expert report in ruling on summary judgment motion); *In re Blasingame*, 559 B.R. at 701 (bankruptcy courts should be mindful that they should only strike documents that were not filed in the case, have no bearing on the appeal, or contain evidence which *was not* admitted at trial.).

In conclusion, this Court finds that the Motion to Strike Expert Report [Adv. DE 74]; Response to Motion to Strike Expert Report [Adv. DE 77]; Opinion and Order Denying Motion to Strike Expert Report [Adv. DE 93]; Motion of Debtors to Authorize Payment of Funds to IRS [DE 43]; Trustee's Objection to Motion to Authorize Payment of Funds [DE 53]; and Consent Order on Debtors' Motion to Authorize Payment of Funds to IRS [DE 54] are hereby stricken from the appellate record.

THEREFORE, the Motion to Strike is GRANTED. The following items will NOT

[4] The issues brought before the Bankruptcy Court in the Memorandum Opinion and Order Denying the Andersons' Motion to Strike Expert Report did not exist at the time the Bankruptcy Court ruled on the IRS's Motion for Summary Judgment (which was almost a year prior).

be included in the Record on Appeal:

1. Motion to Strike Expert Report [Adv. DE 74];
2. Response to Motion to Strike Expert Report [Adv. DE 77];
3. Opinion and Order Denying Motion to Strike Expert Report [Adv. DE 93];
4. Motion of Debtors to Authorize Payment of Funds to IRS [DE 43];
5. Trustee's Objection to Motion to Authorize Payment of Funds [DE 53]; and
6. Consent Order on Debtors' Motion to Authorize Payment of Funds to IRS [DE 54].

The Bankruptcy Court Clerk shall cause a copy of this Order and Notice to be sent to the following interested persons:

Plaintiffs/Realigned Defendants
Plaintiffs'/Realigned Defendants' Attorney
Defendants/Realigned Plaintiffs
Defendants'/Realigned Defendants' Attorney
Chapter 7 Trustee
U.S. Trustee