No. 04-4316

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOHN DANIELS, ET AL.,
Plaintiffs- Appellees,
v.
WAYNE BURSEY, ET AL.,
Defendants-Appellees,

APPEAL OF: JOHN J. KORESKO, V.

Appeal from the United States District Court
for the Northern District of Illinois.
Case No. 03 C 1550
Matthew F. Kennelly, District Judge

BRIEF OF APPELLEES NEW YORK LIFE, NATIONAL LIFE, ALLMERICA, PRUDENTIAL, METROPOLITAN LIFE, HARTFORD LIFE, U.S. TRUST, MELLON TRUST, THOMAS J. MURPHY, STEP, AND BENISTAR

Martin G. Durkin Jr.
Christopher W. Carmichael
HOLLAND & KNIGHT LLP
131 S. Dearborn St., 30th Flr.
Chicago, Illinois 60603
Telephone (312) 263-3600
Facsimile: (312) 578-6666

Counsel for Defendants-Appellees *New York Life Insurance Company, National Life Insurance Company* and *Allmerica Financial Benefit Insurance Company*

(Additional counsel listed within)

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: **04-4316**

Short Caption: **Daniels, et al. v. Bursey, et al.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):

New York Life Insurance Company, National Life Insurance Company, and Allmerica Financial Benefit Insurance Company.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Holland & Knight LLP and Morgan Lewis & Bockius LLP.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

New York Life has no parent corporation. National Life is a wholly owned subsidiary of NLV Financial Corporation and NLV Financial Corporation is a wholly owned subsidiary of National Life Holding Company. Allmerica is a wholly owned subsidiary of the Hanover Insurance Company; The Hanover Insurance Company is a wholly owned subsidiary of Opus Investment Management, Inc.; Opus Investment Management, Inc. is a wholly owned subsidiary of Allmerica Financial Corporation.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

No publicly traded company owns 10% or more of New York Life. No publicly held corporation owns 10% or more of National Life Holding Company. No publicly held corporation owns 10% or more of Allmerica Financial Corporation.

Attorney's Signature: _____ Date: June 10, 2005

Attorney's Printed Name: **Martin G. Durkin, Jr.**

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes X No ___.

Address: **Holland & Knight LLP, 131 S. Dearborn St., 30th Flr., Chicago, IL 60603**

Phone Number: **(312) 263-3600** Fax Number: **(312) 578-6666**

E-Mail Address: **martin.durkin@hklaw.com**

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: **04-4316**

Short Caption: **Daniels, et al. v. Bursey, et al.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):

The Prudential Insurance Company of America.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Sonnenschein Nath & Rosenthal LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Prudential Holdings, LLC (parent); Prudential Financial (grandparent)

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Attorney's Signature: _____ Date: June 7, 2005

Attorney's Printed Name: **John I. Grossbart**

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes **X** No __.

Address: **Sonnenschein Nath & Rosenthal LLP, 8000 Sears Tower, 233 S. Wacker Dr., Chicago, IL 60606**

Phone Number: **(312) 876-8000** Fax Number: **(312) 876-7934**

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 04-3741

Short Caption: John Daniels, et al v. Wayne Bursey, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Metropolitan Life Insurance Company

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Grippo & Elden LLC

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Metlife, Inc. is the parent of Metropolitan Life Insurance Company

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Metlife, Inc., a publicly held company, is the parent of Metropolitan Life Insurance Company

Attorney's Signature: Mark H. Carnow Date: June 8, 2005

Attorney's Printed Name: Mark H. Carnow

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No ____

Address: 227 W. Monroe, Ste. 3600, Chicago, IL 60606

Phone Number: 312.704.7700 Fax Number: 312.558.1195

E-Mail Address: mcarnow@grippoelden.com

rev. 11/01 AK

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 04-4316

Short Caption: John Daniels, et al. v. Wayne Bursey, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Hartford Life Insurance Company

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Akin, Gump, Strauss, Hauer & Feld LLP
Sidley Austin Brown & Wood LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Hartford Life and Accident Insurance Company is the sole parent of Hartford Life Insurance Company

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Hartford Financial Services Group, Inc., a publicly held company, is the great-great grandparent of Hartford Life Ins. Co.

Attorney's Signature: Bruce Braverman Date: June 10, 2005

Attorney's Printed Name: Bruce Braverman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

Address: Sidley Austin Brown & Wood LLP, 10 South Dearborn St., Chicago, IL 60603

Phone Number: (312) 853-7000 Fax Number: (312) 853-7036

E-Mail Address: bbraverman@sidley.com

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 04-4316

Short Caption: John Daniels, Manuel Sanchez, Timothy Hoffman, et al. v. Wayne Bursey, Mellon Trust of New York, Prudential Insurance Company of America, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

U.S. Trust Company of New York

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Goldberg, Kohn, Bell, Black, Rosenbloom & Moritz, Ltd.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

U.S. Trust Corporation

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None, but note that U.S. Trust Corporation is a wholly owned subsidiary of The Charles Schwab Corporation, which is publicly held.

Attorney's Signature: _____ Date: January 5, 2005

Attorney's Printed Name: Steven A. Levy

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes X No ____

Address: 55 East Monroe Street, Suite 3700
Chicago, IL 60603-5802

Phone Number: 312.201.3965 Fax Number: 312.863.7465

E-Mail Address: steven.levy@goldbergkohn.com

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: **04-4316**

Short Caption: **Daniels, et al. v. Bursey, et al.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):

Mellon Trust of New York

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Barnes & Thornburg LLP
Freeborn & Peters LLP
Axinn, Veltrop & Harkrider, LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

The Boston Company, Inc., and Mellon Financial Corporation

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Mellon Trust of New York, whose formal name is Mellon Trust of New York, LLC, is owned 100% by The Boston Company, Inc., which is, in turn, owned 100% by Mellon Financial Corporation

Attorney's Signature: Lee T. Polk Date: June 10, 2005

Attorney's Printed Name: **Lee T. Polk** (counsel of record) & _____

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes X No __.

Address: **Barnes & Thornburg LLP, One North Wacker Drive, Suite 4400, Chicago, IL 60606**

Phone Number: **312/214-8300** Fax Number: **312/759-5646**

E-Mail Address: **lee.polk@btlaw.com**

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: **04-4316**

Short Caption: **Daniels v. Bursey**

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. p. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. p 26.1 by completing item #3):

Thomas J. Murphy

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

O'Hagan, Smith & Amundsen, L.L.C

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature _____ Date: June 10, 2005

Attorney's Printed Name: **Michael Resis**

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No

Address: 150 N. Michigan Avenue, Suite 3300
Chicago, Illinois 60601

Phone Number: (312) 894-3249 Fax Number: (312) 894-3210

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: **04-4316**

Short Caption: **Daniels, et al. v. Bursey, et al.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):

Wayne Bursey, Daniel E. Carpenter, Step Plan Services, Inc., Benistar Admin Services, Inc., Teplitzky & Company, PC, and Benistar Insurance Group, Inc., Benistar 419 Plan Services, Inc., Benistar 419 Plan, Benistar Employer Services Trust Corp., Teplitzky & Company LLC, and Benistar, Ltd.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Freeborn & Peters LLP and Axinn, Veltrop & Harkrider LLP.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None.

Attorney's Signature: _____ Date: June 10, 2005

Attorney's Printed Name: **Charles W. Webster**

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes X No __.

Address: **Freeborn & Peters LLP, 311 S. Wacker Drive, Suite 3000, Chicago, IL 60606-6677**

Phone Number: **(312) 360-6000** Fax Number: **(312) 360-6596**

E-Mail Address: **cwebster@freebornpeters.com**

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JURISDICTIONAL STATEMENT

Appellants' jurisdictional statement is neither complete nor correct. The district court possessed original jurisdiction over the claims brought under the Employees Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and Racketeer Influenced and Corrupt Organizations Act ("RICO") 18 U.S.C. § 1961 *et seq.*, pursuant to 28 U.S.C. § 1331. The district court exercised supplemental jurisdiction over the state law consumer fraud claims pursuant to 28 U.S.C. § 1367(a).

The district court entered a Fed. R. Civ. P. 58 judgment on October 29, 2004. Appellants filed a premature notice of appeal on October 22, 2004, docketed as number 04-3741. This court dismissed that appeal as premature on February 25, 2005. On December 9, 2004, appellants requested that the district court extend time to file a notice of appeal, pursuant to Fed. R. App. P. 4(a)(5). On December 15, 2004, the district court granted appellants additional time to file another notice of appeal until and including December 24, 2004. Appellants filed a second notice of appeal on December 23, 2004. Thus, this court's jurisdiction is based on 28 U.S.C. § 1291. However, as further explained in Parts I and IV of this brief, no party to the proceedings below has taken an appeal and the additional time allowed for this appeal was improvidently granted. Therefore, this court ultimately lacks jurisdiction over this appeal.

STATEMENT OF THE ISSUES FOR REVIEW

1. Whether this court has jurisdiction to hear the appeal of non-parties to the proceedings below, including a plaintiffs' attorney, who never properly intervened in the action.

2. Whether, under Fed. R. Civ. P. 23, before a motion for class certification is fully briefed and considered and before a class is certified, the named plaintiffs to a putative class action may individually settle their claims, amend their complaint to withdraw the class allegations, and voluntarily dismiss their remaining individual claims.

3. Whether the district court's denial of plaintiffs' initial preliminary injunction motion and its termination of their second preliminary injunction motion as moot were clearly erroneous.

4. Whether the district court abused its discretion in granting appellants additional time to appeal after appellants made a legal error by filing a premature notice of appeal with the express intention of depriving the district court of jurisdiction.

STATEMENT OF THE CASE

The route this case has taken to this court is abnormal. No party to the proceedings below has taken an appeal. The parties reached a settlement of the individual claims and those claims were voluntarily dismissed. However, one of the named plaintiffs' attorneys – who also happens to run a business that competes with several of the defendants – is determined to take positions adverse to his own

clients' wishes and to re-open a closed case. Although neither the attorney, nor his new supposed clients, ever intervened in the district court proceedings, they purport to appeal several of the district court's rulings.

STATEMENT OF FACTS

Appellants' statement of facts violates Fed. R. App. P. 28 and Cir. R. 28. It fails to provide information relevant to the issues submitted for review, fails to provide supporting citations to the record, and consists of pure argument. Instead, appellants' statement of facts discusses issues that are not in the record, were never raised below, and are irrelevant to this appeal. Defendants-appellees will not further muddle the record by attempting to respond to appellants' argumentative and irrelevant statement of facts. Contained below is a brief and concise summary of the facts necessary to decide the issues raised in this appeal.

This case first began in September 2002, in the Pennsylvania Court of Common Pleas, Philadelphia County, when plaintiffs filed suit against numerous defendants.[1] (Record 57, 58: Mem. at 1-12.[2]) Plaintiffs alleged that the Severance Trust Executive Program ("STEP" Plan), a multiple employer welfare benefit plan providing severance benefits, was fraudulently marketed and later mismanaged. That action was removed to the United States District Court for the Eastern District of Pennsylvania and later voluntarily dismissed. (R. 57, 58: Mem. at 1-12.)

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[1] The plaintiffs were: "Sanchez & Daniels individually and on behalf of the Sanchez & Daniels STEP Plan and on behalf of the Sanchez & Daniels STEP Plan Participants and similarly situated individuals."

[2] Citations to the "record" are to the docket number designated by the district clerk and, where applicable, the specific name of the document and page numbers of the individual document.

A week before plaintiffs sought to dismiss that action voluntarily, the action was re-filed in the Circuit Court of Cook County on February 13, 2003, adding new plaintiffs,[3] and many new defendants. (R. 1, 21.) On March 24, 2003, defendants removed the action to the United States District Court for the Northern District of Illinois. (R. 21.)

On June 20, 2003, John J. Koresko sought to appear *pro hac vice* as an attorney for plaintiffs. (R. 77: Mem. at 1.) Koresko's request for admission was opposed by some of the defendants, in part, because Koresko is CEO of a direct competitor called Penn-Mont Benefit Services, Inc. (R. 77: Mem. at 1-5 & Exs. A-E.) On September 9, 2003, the district court granted Koresko *pro hac vice* status, but agreed that Koresko's access to certain materials could be limited because he is a competitor. (R. 92.)

On July 1, 2003, the named plaintiffs met with several of the defendants and engaged in settlement negotiations. (R. 86, 90, 91, and 103.) There was some disagreement as to whether there was a meeting of the minds, and plaintiffs sought to enforce what they argued was an oral settlement agreement. (R. 86, 90, 91, and 103.) The district court held an evidentiary hearing on whether a settlement was reached and found there was no meeting of the minds. (R. 103.) Consequently, the litigation continued, and the complaint was again amended on November 2, 2003, at which time U.S. Trust Company of New York was added as a defendant. (R. 111.)

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[3] Besides Sanchez & Daniels, the added plaintiffs were: John Daniels, Manuel Sanchez, Timothy Hoffman, Diane Huntley, Joseph Bonaccorsi, Mary Orbzut, Edward Ordonez.

During the same period, the fall of 2003, defendants filed a series of motions to dismiss the complaint and met with some success. (R. 93, 175, 176.) While these motions to dismiss were under consideration, plaintiffs engaged new local counsel who filed an appearance on February 10, 2004. (R. 147, 149, 174.) Plaintiffs' new local counsel, Clint Krislov & Associates, is well-versed in class action practice and immediately began to take the lead in the case. (R. 159, 171.)

On March 29, 2004, while the motions to dismiss were under advisement, plaintiffs filed a motion for a preliminary injunction seeking the appointment of a receiver for the STEP Plan. (R. 187.) The district court denied that motion on June 14, 2004. (R. 263; Defendants-Appellees' Appendix, Tab 2.)

On April 1, 2004, the district court referred the parties to a magistrate for a settlement conference. (R. 182.) The settlement conference occurred in May 2004, but no settlement was reached at that time. (R. 203, 211, and 236.)

On April 22, 2004, plaintiffs filed a motion for class certification, and the parties took some targeted discovery on class issues. (R. 207.) Defendants responded to the motion for class certification on July 23, 2004. (R. 290 and 289.) On August 9, 2004, plaintiffs filed for an extension of time to reply to the class certification opposition brief. (R. 302, 303, and 323.) Because the case was eventually settled, plaintiffs never replied in support of their motion for class certification and the issue was never submitted to the district court for consideration.

The settlement discussions reconvened informally in May 2004, and formally in June 2004. (R. 268 and 307.) On June 20, 2004, at plaintiffs' request, the district court again referred the parties to a magistrate judge for further assistance in reaching a settlement. (R. 265 and 268.) While the parties discussed settlement before the magistrate judge in July 2004, Koresko moved to withdraw as counsel on July 13, 2004, based on a claimed conflict of interest with the named plaintiffs. (R. 270, 278, 279, 286, 294, and 298.) Although Koresko was informed where and when the settlement discussions were being held, he did not participate. (R. 285.) Instead, Koresko repeatedly attempted to halt the discussions in order to prevent any settlement. (R. 285 and 325.)

In the meantime, on August 24, 2004, purportedly on the named plaintiffs' behalf, Koresko filed a second motion for preliminary injunction seeking the appointment of a receiver for the STEP Plan. (R. 324, 328, and 330.) On September 16, 2004, the named plaintiffs filed a notice disavowing the second motion. (R. 330; Def.-Appellees' App. Tab 4.)

In the end, a settlement was reached between defendants and the individual named plaintiffs on September 8, 2004. (R. 288, 307, and 326.) As part of the settlement, the individual named plaintiffs moved to amend their complaint and withdraw their class allegations on October 1, 2004. (R. 339.) Koresko, at this point on behalf of himself, filed various motions to prevent the conclusion of the litigation. (R. 336, 337, 338, and 349.) Koresko filed these motions without the consent of his clients, the named plaintiffs. (R. 330 and 342.) Over Koresko's

objections, the district court granted the motion to amend the complaint on October 19, 2004, explaining its decision in a four-page memorandum opinion and order. (R. 345; Def.-Appellees' App. Tab 5.) On October 20, 2004, plaintiffs filed a Fed. R. Civ. P. 41(a)(2) motion for dismissal of their *individual* claims, and on October 21, 2004, defendants moved to dismiss their counterclaims and cross-claims. (R. 346 and 347; Def.-Appellees' App. Tab 6 at 1-3.)

On October 21, 2004, after the class claims had been withdrawn and the individual named plaintiffs' had moved to voluntarily dismiss their claims, Koresko petitioned the district court to stay all further proceedings while he sought a new class representative. (R. 353.) However, by October 21 there was no putative class action to stay because the district court had granted the named plaintiffs leave to file an amended complaint, *instanter*, withdrawing the class allegations. (R. 345.) The district court subsequently denied Koresko's motion to stay the proceedings on October 26, 2004. (R. 357.)

On October 22, 2004, without leave of court, Koresko filed an appearance on behalf Robert Schmier and Schmier & Feurring Properties, Inc. (collectively "Schmier"), claiming that Schmier was a STEP Plan participant. (R. 355; Def.-Appellees' App. Tab 7.) Koresko never sought to intervene in the litigation under Fed. R. Civ. P. 24 on behalf of himself or Schmier. (R. 355.)

Also on October 22, 2004, Koresko filed his notice of appeal of the district court's October 19, 2004 order granting plaintiffs' motion for leave to amend. (R. 348.)

In open court on October 26, 2004, the district court granted the various motions to dismiss and, at the same time, terminated a number of other pending motions as moot, including the second motion for preliminary injunction. (R. 358.) The district court entered a Rule 58 judgment a few days later on October 29, 2004. (R. 359.) Koresko did not file a second notice of appeal within 30 days after the entry of the Rule 58 judgment.

On October 28, 2004, this court ordered briefing on whether Koresko's first appeal, No. 04-3741, was filed prematurely and whether appellants had standing. Defendants' briefs on jurisdiction and standing, filed on November 23, 2004, pointed out that Koresko's appeal was filed prematurely and could not be saved by Fed. R. App. P. 4(a)(2). Also, earlier, at a status conference on October 26, 2004, the district court warned Koresko that his initial notice of appeal was premature and advised him to file a new one. (Appellants' App. at 697.) Koresko disagreed with the district court, claiming that filing a second notice of appeal was unnecessary because the first notice of appeal deprived the district court of jurisdiction. (*Id.*)

Several weeks after this court and defendants-appellees questioned the timeliness of the first appeal, on December 9, 2004, Koresko filed a motion in the district court to extend the time to appeal, claiming excusable neglect. (Def.-Appellees' App. Tab 8.) On December 15, 2004, the district court granted Koresko additional time to file another notice of appeal until and including December 24, 2004, and Koresko filed a second notice of appeal on December 23, 2004. (Def.-Appellees' App. Tab 9.)

SUMMARY OF ARGUMENT

The genesis of this appeal is a disagreement between Koresko and his clients, the Sanchez & Daniels plaintiffs, as to how plaintiffs should have litigated their case below. Koresko, himself a competitor of some of the defendants, is unhappy that plaintiffs chose to settle their claims on an individual basis and to withdraw their class claims. Koresko prefers to continue to litigate this case on a class basis despite his clients' wishes, and seeks to appeal from the district court's order permitting plaintiffs to withdraw their class claims.[4] Koresko purports to bring this appeal on his own behalf and on behalf of Schmier, a stranger to the proceedings below.

Neither Koresko nor Schmier has standing to pursue this appeal. Neither was ever a party to the case. Schmier simply filed an appearance without first seeking leave to intervene and was never made a party to the case. Koresko argues that, as class counsel, he is the real party in interest. While it is unfortunately true that some class counsel improperly view themselves as the real party in interest and seek to control the case to the exclusion of any real client, as a matter of law Koresko is wrong – he is a lawyer, not the party in interest, and has no independent right to control the prosecution of the case or to pursue an appeal contrary to his clients' wishes. The fact that some class counsel, like Koresko, seek to overstep their bounds does not elevate their status to that of the real party in interest.

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[4] Koresko's dogged pursuit of this case appears to be in furtherance of his self-proclaimed, personal, "nuclear" mission to destroy the defendants. "The insurance companies and Mellon Trust are going to get very disturbed. I have something quite nuclear in store." (Appellants' Supplemental App. at 795.)

Substantively, appellants' arguments fail as well. Appellants argue that the plaintiffs were not permitted to settle the case individually and to withdraw their class claims. No class, however, was ever certified. Indeed, the plaintiffs' motion for class certification was not even fully briefed and presented to the district court for ruling. Under Fed. R. Civ. P. 23(e), there is no question that, as the district court properly found, plaintiffs were permitted to withdraw their class claims and settle their individual claims and that the district court's approval of the settlement agreement was not required. Likewise, appellants' arguments, raised for the first time on appeal, concerning the denial of the preliminary injunction motions lack merit. Finally, if the district court erred, it was too lenient in granting appellants additional time to file a second notice of appeal, when appellants deliberately filed a premature notice of appeal and then chose not to file another timely notice of appeal.

Koresko argues throughout his brief that he has been wronged. Koresko argues that "the practical effect of the district court's order was to approve a breach of Koresko's fee agreement with the plaintiffs and intentional interference with it by the Defendants." (Appellants' Br. at 21.) While plaintiffs and defendants in the underlying case deny these claims, if Koresko feels that he has been wronged, his remedy lies in separate litigation that he has already commenced against Sanchez & Daniels and the defendants alleging breach of contract and intentional interference with contract. (*See* No. 04 C 5138 (N.D. Ill.).) The fact that Koresko feels that he has been wronged, however, does not create standing for him to pursue

an appeal where, as here, standing does not otherwise exist.

Therefore, this court should dismiss the appeal, or, if it decides that it has jurisdiction, this court should affirm the judgment of the district court.

ARGUMENT

I. Appellees Lack Standing to Prosecute This Appeal

John Koresko is an attorney who represented the named plaintiffs. He has no stake in this litigation and could not state a claim against any of the defendants. Just before this litigation concluded in the district court, but after the class allegations were withdrawn, Koresko filed an appearance on behalf of Schmier. Koresko never filed an appearance on behalf of himself. He made no attempt to intervene under Fed. R. Civ. P. 24 on behalf of himself or on behalf of Schmier. Neither Koresko nor Schmier ever became parties to this litigation, and, by the time Koresko filed his appearance, there were no allegations or claims in which he or Schmier could have joined. Both Koresko and Schmier lack standing to bring this appeal.

A. Koresko is an attorney, not a party with a claim

A person or entity seeking to invoke the jurisdiction of the federal courts must have standing. *E.g.*, *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-63 (1992). Attorneys without clients have no independent standing to file motions or to request any relief from the court. *See Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 505 (7th Cir. 1989) (finding former attorney who assisted claimants lacked independent

standing to bring an action); *Weeks v. Indep. Sch. Dist. No. I-89, of Okla. County, Okla., Bd. of Educ.*, 230 F.3d 1201, 1213 (10th Cir. 2000) (noting that counsel has "standing [only] to appeal orders directly affecting them, but do not have standing to appeal orders only applicable to their clients"). Koresko does not represent any party to this action and an attorney has no independent standing to appeal substantive rulings of the court. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 64-65 (1997) ("The decision to seek review is not to be placed in the hands of concerned bystanders, persons who would seize it as a vehicle for the vindication of value interests.") (quotations and citation omitted); *De Kworin v. First Nat'l Bank of Chi.*, 235 F.2d 156, 158-59 (7th Cir. 1956). Koresko's objection to the settlement of the individual claims does not confer standing or party status upon him. *See* 20 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 303.10[1][b][3] (3d ed. 2002) ("[M]erely commenting on, or objecting to, the proposed settlement of an action is insufficient to permit an appeal by a non party."); *cf. Kokkonen*, 511 U.S. at 381-82.

Koresko cites *Culver v. City of Milwaukee*, 277 F.3d 908, 913 (7th Cir. 2002), for the proposition that he should have standing to petition this court because "lawyers are in effect parties in interest in a class action settings." (Appellants' Br. at 20.) *Culver*, however, specifically provides that attorneys are not parties to the class action, and makes clear that a class action cannot proceed without a plaintiff.

> So far as we can tell, no member of the class has any interest beyond that of a curious onlooker in pursuing this litigation. That is a compelling reason for decertification unless the requirement that a class action, like any other

> suit, have a plaintiff is to be dropped and the class lawyer recognized as the true plaintiff, *a step that however "logical" the courts and Congress have balked at taking.*

Id. at 912-13 (emphasis added). Moreover, the language in *Culver* on which Koresko relies is actually critical of the role of class counsel in that case, specifically noting that the inadequacy of class counsel is inextricably tied to the inadequacy of class plaintiff.

Because he lacks independent standing, Koresko's appeal should be dismissed.

B. Schmier never properly intervened in the underlying litigation and has no right to appeal

Only parties to a lawsuit may appeal adverse rulings. FED. R. APP. P. 3; *Marino v. Ortiz*, 484 U.S. 301, 304 (1988). Schmier was never a party to this litigation. *U.S. v. City of Milwaukee*, 144 F.3d 524, 531 (7th Cir. 1998) ("We have recognized repeatedly that, until a movant for intervention is made a party to an action, it cannot appeal any orders entered in the case other than an order denying intervention."); *cf. In re Dow Corning Corp.*, 255 B.R. 445, 464 (E.D. Mich. 2000) (finding that non-parties to an underlying litigation cannot intervene in an appellate proceeding). Schmier never moved to intervene in this litigation, and merely filing a notice of appearance is not equivalent to intervention.[5] 20 MOORE'S FEDERAL PRACTICE § 303.10[1][a] (3d ed. 2002) ("To have standing to appeal, the appellant must usually have been a party of record at the time the order or

[5] *Devlin v. Scardelletti*, 536 U.S. 4, 5-6 (2002), upon which appellants rely, is inapposite because, among other things, it involved a certified class where the settlement covered the class and class claims and the petitioner in that case actually moved to intervene in the district court proceedings to object to the class settlement.

judgment appealed was entered."). Among other things, by not moving to intervene, Schmier never demonstrated that he actually possesses any interest that will be impaired by the settlement of named plaintiffs' individual claims. *See New Orleans Public Serv., Inc. v. United Gas Pipeline Co.*, 732 F.2d 452, 464-65 (5th Cir. 1984). Moreover, Schmier could not have demonstrated that his rights were affected because, as explained further in Point II, the settlement and termination of the individual named plaintiffs' claims did not affect Schmier's ability to subsequently bring his own individual or class action.

C. Nothing in ERISA confers standing upon appellants

Nor is the strength of any of the foregoing points lessened by reason of the ERISA issues, as suggested by appellants. This court has scrutinized ERISA-based claims such as those alluded to by appellants for proper standing of the parties. *Johnson v. Allsteel, Inc.*, 259 F.3d 885, 887 (7th Cir. 2001); *Riordan v. Commonwealth Edison Co.*, 128 F.3d 549, 551 (7th Cir. 1997). These jurisdictional requirements for standing remain open to review at all stages of litigation. *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994). The record in this case fails to show that appellants satisfy the constitutional requirement of redressability.

There is nothing in the record suggesting that appellants are "fiduciaries" of the STEP Plan within the meaning of ERISA, 29 U.S.C. § 1002(21)(A). *See Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 535 (7th Cir. 1991). Appellants had no discretionary authority or control over the STEP Plan and there is nothing in the

record to support such an argument. *See Farm King Supply, Inc. Integrated Profit Sharing Plan and Trust v. Edward D. Jones & Co.*, 884 F.2d 288, 292 (7th Cir. 1989) (stating that whether a person is a fiduciary is determined by an objective not subjective standard). In fact, appellants' claims are based on the premise that they lacked control over the STEP Plan. Likewise, it is beyond reasonable argument to suggest that the named plaintiffs in the litigation below were transformed into ERISA fiduciaries simply by filing a lawsuit to recover funds over which they also claimed they lacked control.

D. Appellants lack standing to appeal the denial of the named plaintiffs' motions for preliminary injunction

In addition to the preceding arguments, appellants also lack standing to appeal the denial of the named plaintiffs' motions for preliminary injunction for further reasons. In contrast to the motions attacking the settlement filed by Koresko in his own purported right and on Schmier's behalf at the end of the case, the motions for preliminary injunction were filed on March 29 and August 25, 2004 on behalf of the named plaintiffs. (R. 187 and 190; Appellants' App. at 248 and 337.) The named plaintiffs, however, have not appealed any of the district court's decisions. Moreover, on September 16, 2004, the named plaintiffs filed a comment on Koresko's attempts to resuscitate the request for a preliminary injunction, stating that the filings were made without their authority or approval. (Def.-Appellees' App. Tab 4, at 1.) Consequently, the second motion for preliminary injunction was not even authorized by the parties in whose name it was filed and was, therefore, a nullity.

Appellants, neither of whom had even attempted to appear as a party until two months after the filing of the second motion for preliminary injunction, had no personal stake in and were strangers to both motions and made no attempt to join them in any manner. Koresko's status as counsel for the named plaintiffs does not confer standing upon him to appeal in own right against the wishes of his clients in whose names the motions were filed. An earlier case decided by this court, *De Kworin v. First Nat'l Bank of Chi.*, 235 F.2d 156, 158-59 (7th Cir. 1956), is directly applicable on this point. In that case, the district court restrained a party from prosecuting a partition suit in state court involving trust property. *Id.* The party did not appeal, but her attorney did. In dismissing the attorney's appeal this court stated: "In view of the fact that the only party to the suit in the state court who has been restrained, Mrs. Tonella, has not appealed, and Rinella claims only to have been counsel for her, it follows that, to the extent his connection with the partition case is concerned, that is, his claimed representation of Mrs. Tonella, his services are at an end." *Id.* at 159. Thus, as *De Kworin* holds, both Koresko and Schmier were nonparties without any interest or stake in the motions for preliminary injunction, and, as a result, cannot appeal the denial of such motions.[6]

Because neither Koresko nor his new client Schmier have standing, this appeal should be dismissed.

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[6] The *De Kworin* court suggested that the attorney had other remedies available. Koresko has actually availed himself of both remedies by filing (on October 26, 2004) a notice of attorney's lien on the settlement funds that are being held by the district court pending the outcome on appeal, (R. 356), and by filing a counterclaim in the declaratory judgment action and fee dispute filed in the district court (04 C 5138) against him by his former clients.

II. The Lower Court's Approval of the Settlement Was Not Required

Appellants' argument that appellees needed the lower court's approval to settle the underlying putative class action is wrong.

A. Amended Rule 23(e) does not require the district court to approve the settlement

Federal Rule of Civil Procedure 23(e) only requires that parties to a class action seek court approval of a settlement after a class has been certified. Specifically, Rule 23(e)(1)(A) states: "The court must approve any settlement, voluntary dismissal, or compromise of the class issues, or defenses of a *certified class*." FED. R. CIV. P. 23(e)(1)(A) (emphasis added).

Federal Rule 23(e) was amended in 2003 for the specific purpose of clarifying named plaintiffs' right to settle their own claims without court approval in a putative class action. The Committee Notes explaining amended Rule 23(e) state:

> Subdivision (e)(1)(A) expressly recognizes the power of a class representative to settle class claims, issues, or defenses.
>
> Rule 23(e)(1)(A) resolves the ambiguity in former Rule 23(e)'s reference to dismissal or compromise of a "class action." That language could be – and at times was – read to require court approval of settlements with putative class representative that resolved only individual claims. *The new rule requires approval only if the claims, issues, or defenses of a certified class are resolved by a settlement*, voluntary dismissal, or compromise.

Fed. R. Civ. P. 23 Committee Notes to 2003 amendment (emphasis added and citations omitted).

Although the Committee Notes are not binding on the Court, the "notes are analogous to legislative history which [the Court] use[s] to clarify legislative intent."

U.S. v. Hayes, 983 F.2d 78, 82 (7th Cir. 1992). In fact, this Court has on multiple occasions relied upon and cited the Committee Notes to Rule 23 when interpreting the Rule. *See, e.g., Blair v. Equifax Check Serv., Inc.*, 181 F.3d 832, 833-35 (7th Cir. 1999) (Committee Notes to Rule 23); *Amati v. City of Woodstock*, 176 F.3d 952, 957 (7th Cir. 1999) (citing Advisory Committee Notes to 1966 amendment to Rule 23(c)); *Eggleston v. Chi. Journeymen Plumbers' Local Union 130*, 657 F.2d 890, 896 n.10 (7th Cir. 1981) (citing Advisory Committee Notes to Rule 23).

The procedures that the appellees pursued to effectuate the settlement below, which was reached on an individual, non-class basis, followed exactly the procedure set forth with approval by the Honorable Anthony J. Scirica, Chair of the Committee on Rules of Practice, in his Memorandum to the United States Supreme Court summarizing the changes to the Federal Rules of Civil Procedure and specifically new Rule 23(e). (Def.-Appellees' App. at Tab 11.) As stated by Judge Scirica, court "[a]pproval is not required if class allegations are *withdrawn* as part of a disposition reached before a class is certified, because in that case, putative class members are not bound by the settlement. " Judge Anthony J. Scirica, *Memorandum – Summary of the Proposed Amendments to the Federal Rules*, November 18, 2002, at 3-4 (emphasis added). In the case below, a class was never certified. (R. 358.) Although the named plaintiffs in the underlying putative class action filed a motion for class certification (R. 207), briefing was never completed and a ruling on the motion never issued. (R. 358.) Prior to the completion of briefing on the motion, the parties engaged in settlement negotiations (R. 265, 268),

and after a settlement was reached the named plaintiffs sought to and were granted leave to amend their complaint to withdraw all class allegations. (R. 339, 245.) The district court found that "[a]ny of the absent class members will be perfectly free to file his or her own lawsuit, unimpaired in any way by the settlement of the individual claims of the named plaintiffs or the withdrawal of their class claims." (R. 345; Def.-Appellees' App. Tab 5, at 3.) In ruling that it was not obligated to approve the parties' settlement, the district court correctly noted that: "Rule 23(e)(1)(A), as amended in 2003, makes it clear that the Rule's requirement of court approval applied only to settlements "of the claims, issues, or defenses *of a certified class*." (R. 345; Def.-Appellees' App. Tab 5, at 2; emphasis in original.)

B. Amended Rule 23(e) applies in this case

Appellants' argument that amended Rule 23(e) does not apply to this case are meritless. Appellants argue that pre-amendment Rule 23 should be applied because "[t]he version of a federal rule, with a substantive component, in effect at the beginning of a lawsuit continues to be the law of the case." (Appellants' Br. at 35.) Appellants, however, fail to identify any "substantive component" of Rule 23(e) – because there is none.

Federal Rule of Civil Procedure 23(e) is a procedural rule setting forth the mechanisms governing settlement of class actions. *See* FED R. CIV. P. 23(e). As such, the district court correctly observed, "even though this provision of the amended Rule did not take effect until after the present case was filed, a new procedural rule applies to cases that were pending at the time the rule takes effect."

(R. 345; Def.-Appellees' App. Tab 5 at 2.) The district court's ruling on this issue is supported by this court's holding in *Richardson Elec., Ltd. v. Panache Broad. of Penn., Inc.*, 202 F.3d 957, 958 (7th Cir. 2000). In *Richardson*, this court stated "a new procedural rule applies to the uncompleted portions of suits pending when the rule became effective, and we have no reason to depart from the general principle in regard to Rule 23." *Id.* Amended Rule 23 was properly applied by the district court.

C. The district court was not obligated to approve the settlement

Appellants also claim that the district court still had the inherent power, and indeed some obligation, to review the settlement of the underlying action. (Appellants' Br. at 35-36.) None of the authorities cited by appellants in support of this proposition is on point. Each case that appellants cite was decided based on the pre-amendment version of Rule 23(e). Further, *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279 (7th Cir. 2002), and *Blanchard v. Edgemark Fin. Corp.*, No. 94 C 1890, 1998 WL 988958, at *5 (N.D. Ill. Sept. 11, 1998), addressed settlements that were either consummated after the certification of a class or bound absent class members; neither situation applies to the current case. Similarly, in *Bieneman v. City of Chi.*, 838 F.2d 962, 963 (7th Cir. 1988), and *Glidden v. Chromalloy Am. Corp.*, 808 F.2d 621, 623-24 (7th Cir. 1986), this court instructed lower courts regarding the obligation to address pending class claims prior to dismissing actions. Here, however, there were no pending class claims at the time the court dismissed the action.

D. The "picking-off" exception to Rule 23(e) does not apply here

Appellants argue alternatively that amended Rule 23(e) has no effect on a so-called "judicial exception" to that rule that prohibits "picking off" prospective class representatives. (Appellants' Br. at 39-42.) The case law and analysis relied upon by appellants are inapposite, as the district court noted. (Def.-Appellees' App. Tab 5, at 4.) In any event, appellants fail to cite to anything in the record which supports their claim that defendant-appellees "picked-off other possible plaintiffs." (Appellants' Br. at 40.)

Aside from another case decided under former Rule 23(e),[7] appellants cite only *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004), for the proposition that settlement in this case is inappropriate because defendant appellees tried to "pick off" named plaintiffs in order to destroy the class. *Weiss*, however, did not involve the settlement of a class action. *Id.* at 339-40. To the contrary, *Weiss* specifically distinguished cases where parties entered into voluntary settlements from cases, like *Weiss,* which involved a unilateral Rule 68 offer of judgment. *Id.* at 349. The *Weiss* court distinguished its facts from those in *Lusardi v. Xerox Corp.*, 975 F.2d 964 (3d Cir.1992), a decertified class action in which the parties mutually agreed to settle the individual claims. In doing so, the Third Circuit stated:

> Unlike the case here, *Lusardi* did not involve an offer of judgment made in response to the filing of a complaint. The named plaintiffs [in *Lusardi*] voluntarily entered into individual settlements subsequent to class decertification.

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[7] Appellants also cite *Culver v. City of Milwaukee*, 277 F.3d 908 (7th Cir. 2002). *Culver*, however, is a pre-amendment Rule 23(e) case that does not address the settlement of a class action, but rather the appropriateness of a district court's decertification and subsequent dismissal of a class action. *Id.* at 910.

> [*Lusardi*] at 979 ("Here, there is no dispute that plaintiffs voluntarily settled their individual claims."). In this [the *Weiss*] appeal, the "picking off" scenarios described by the Supreme Court in *Roper* are directly implicated. In *Lusardi* they were not. The *Roper* Court stressed that "at no time did the named plaintiffs accept the tender in settlement of the case; instead, judgment was entered in their favor by the court without their consent."

Weiss, 385 F.3d at 349. *Weiss* on its own terms distinguishes cases like the one at issue.

In the case below, there was no effort to destroy a class. Rather, *all the named-parties* reached a consensual agreement to settle that was the product of protracted negotiations. This type of settlement is expressly permitted under Rule 23(e). Appellants have offered no authority to support the broad "pick off" exception they ask this court to invoke.

E. The withdrawal and dismissal of class claims did not result in the barring of class claims by judicial estoppel or Rule 41

Contrary to appellants' assertions, the withdrawal of the class claims prior to certification did not create a barrier to any putative class member filing his or her own new individual, or even class, claim. First, as the district court correctly noted, because the class claims were withdrawn by amendment rather than dismissed, the "two dismissal rule" of Federal Rule of Civil Procedure 41(a)(1), cited by Koresko, does not apply and cannot operate to affect the claims of the absent class members. (R. 345.) Moreover, even if Rule 41(a)(1) did apply, its "two dismissal rule" would have no application to the current case. Non-parties are not bound by Rule 41(a)(1) or the state law barrier to refilings, because they were not parties to this case.

Appellants also argue that plaintiff-appellees were judicially estopped from settling the case below. (Appellants' Br. at 43-44.) Appellants' unsupported argument that plaintiff-appellees "promised" another federal court that they would pursue a class action does not constitute grounds for judicial estoppel. The core proposition of judicial estoppel is that a party may not use inconsistent positions to win two judgments arising from the same claim. *See Astor Chauffeured Limousine Co. v. Runnfeldt Investment Corp.*, 910 F.2d 1540, 1547-48 (7th Cir. 1990). Neither in this action, nor in the Pennsylvania action did plaintiffs-appellees receive a judgment. Accordingly, the doctrine of judicial estoppel is inapplicable and does not prevent the settlement of this case.

F. Appellants' remaining arguments relating to the appropriateness of the withdrawal of class claims and the subsequent settlement are without merit

Appellants also contend that Federal Rule of Civil Procedure 15 prohibited plaintiffs-appellees from being allowed to amend their complaint to withdraw class allegations. (Appellants' Br. at 33-34.) Appellants' reliance on Rule 15 is misplaced. Indeed, each of the cases cited by appellants to support this argument involves a defendant invoking Rule 15 to object to a plaintiff's last minute attempt to amend a complaint in a manner that is unfair *to the defendant*. This same argument was made in the case below, and the district court correctly noted: "The cases cited by Mr. Koresko in which amendment was refused involved situations where another party in the case would be unfairly prejudiced in some way. Such is not the case here." (R. 345; Def.-Appellees' App. Tab 5 at 3.)

Appellants' argument that the putative class members will be in a worse position *vis-à-vis* appellees' statute of limitations defenses as a result of the settlement is also wrong. The statute of limitations was tolled for all putative class members during the pendency of the case. *See Elmore v. Henderson*, 227 F.3d 1009, 1012 (7th Cir. 2000) (stating that a putative class member's individual claims are tolled at all times during the pendency of a class action up to and until it is determined that the case cannot proceed as a class action). Inexplicably, in the context of their own argument to this court, appellants claim to face "a rapidly approaching statute of limitations," yet they have not taken any action to toll the statute of limitations. (Appellants' Br. at 37.)

Similarly, appellants' arguments that settlement was premature because it preceded a determination of the pending class certification motion, has no merit. Federal Rule of Civil Procedure 23 specifically contemplates settlement of actions prior to class certification. Specifically, Rule 23(e) was amended to address a lack of clarity in the rule with respect to settlements of putative class actions – *i.e.*, those cases that are settled *before* class certification. As for appellants' contention that the settlement created an "improper opt-out" under Rule 23(b)(2), those provisions only apply when a class has been certified – which did not occur in this case.

Therefore, if this court determines it has jurisdiction, the judgment of the district court should be affirmed.

III. This Court Should Affirm the Denial of the Two Motions for Preliminary Injunction

A. The motions for preliminary injunction are now moot

The appeal of the denial of the motions for preliminary injunction should be dismissed because the motions are now moot. In most cases, the issuance or denial of a preliminary injunction becomes moot at the conclusion of the case when the trial court issues or denies a permanent injunction. In this case, however, no permanent injunction was issued or even sought because all the allegations of the complaint, including the prayers for preliminary and permanent injunctions, were swept away by the district court's granting of plaintiffs-appellees' motion to amend their complaint to withdraw their class allegations (R. 345), followed by the district court's granting of plaintiffs' motion for voluntary dismissal of their remaining individual claims. (R. 358.) As a result, no operative complaint remains in this case upon which either of the motions for preliminary injunction can be based. The district court recognized this when it "terminated as moot" the second motion in tandem with its granting of plaintiffs' motion for voluntary dismissal of their complaint. Under these circumstances, the requests for the provisional remedy of a preliminary injunction have become moot.

B. The district court applied, in an appropriate manner, the correct test for deciding a preliminary injunction motion

The district court appropriately denied the initial motion for preliminary injunction without assessing the likelihood of success on the merits once it determined that plaintiffs failed to demonstrate irreparable harm. (R. 263; Def.-

Appellees' App. at Tab 2.) Thus, the district court correctly applied the test for preliminary injunctions in this circuit. *See, e.g., Foodcomm Int'l v. Barry*, 328 F.3d 300, 303 (7th Cir. 2003).

Appellants argue that the district court should have determined likelihood of success on the merits and ignored the irreparable harm prong of the test as if this were a case brought by the government for statutory enforcement. (Appellants' Br. at 24-25.) This argument comes as a surprise because plaintiffs stated that irreparable harm was part of the test in their initial motion and briefed the issue of irreparable harm in the initial motion, and because Koresko, purportedly on behalf of plaintiffs, incorporated their initial motion and brief into the second motion and briefed the issue of irreparable harm again in the second motion. (R. 187 and 190; Appellants' App. at 339; Def.-Appellees' App. Tab 3.) Because appellants have raised this new argument for the first time on appeal, it was never preserved for appeal and this court should not even consider it. *Republic Tobacco Co. v. North Atlantic Trading Co., Inc.*, 381 F.3d 717, 728 (7th Cir. 2004).

In any event, appellants' new argument, relying upon a Ninth Circuit test and claiming that they should be accorded the same status as the government, is wrong for a number of reasons. While this court has not specifically addressed the Ninth Circuit test, it has continued to apply all the prongs of the traditional preliminary injunction test even when the government is seeking a preliminary injunction in statutory enforcement cases. *See, e.g., Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 286 (7th Cir. 2001). Moreover, the First Circuit rejected the

Ninth Circuit's test as applied in *Miller ex. rel. NLRB v. Cal. Pac. Med. Ctr.*, 19 F.3d 449 (9th Cir. 1994). *See Pye ex. rel. NLRB v. Excel Case Ready*, 238 F.3d 69 (1st Cir. 2001). Additionally, in *Miller*, the Ninth Circuit actually rejected the blanket use of the modified test that appellants suggest: "'[I]n statutory enforcement cases where the government can make only a 'colorable evidentiary showing' of a violation the court must consider the possibility of irreparable injury.'" 19 F.3d at 459 (citation omitted). Finally, to the extent the modified test in the Ninth Circuit could be extended to all "persons who have standing to sue" under ERISA, appellants would still not be excused from demonstrating a likelihood of success on the merits. *Id.* Consequently, appellants overstate the significance of the preliminary injunction test in government statutory enforcement cases in the Ninth Circuit.

Appellants attempt to parlay their inaccurate description of the preliminary injunction test in the Ninth Circuit to arrogate unto themselves the unique position of the government, erroneously relying on a single case, *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682 (7th Cir. 1986). (Appellants' Br. at 25.) *Fitzsimmons*, however, expressly contradicts appellants' contention. In *Fitzsimmons*, this court held that the interests of the private beneficiaries and the Secretary of Labor materially differ. 805 F.2d at 691.

In addition to applying the correct test, the district court was not clearly erroneous in finding that plaintiffs' evidence failed to show irreparable harm because they failed to establish current control or even current involvement by Daniel Carpenter in the STEP Plan. The premise of plaintiffs' motions for

preliminary injunction was that the participants of the STEP Plan were in danger of losing their potential benefits due to Carpenter's unrelated legal matters and, therefore, a receiver needed to be appointed to prevent such loss. The district court found, however, that Carpenter's other legal matters neither had anything to do with STEP Plan assets nor placed such assets at risk and that plaintiffs submitted no evidence tending to rebut the evidence that showed that Carpenter resigned and no longer had control over the STEP Plan's funds. (R. 263 at 4-5; Def.-Appellees' App. at Tab 2.) Despite these findings, plaintiffs made no attempt to take discovery on the issue of whether Carpenter maintained any direct or indirect control of STEP that appellants are now seeking to raise on appeal. (Appellants' Br. at 27.) Thus, appellants should not be heard to reargue the motion for preliminary injunction after making no attempt to address the factual deficiency clearly identified by the district court.

IV. Extension of Time to Appeal was Improvidently Granted

The district court was too lenient with Koresko, and, if it erred on any matter, it abused its discretion in granting additional time to appeal. *See* FED. R. APP. P. 4(a)(5); *Reinsurance Co. of Am., Inc. v. Administratia Asigurarilor de Stat*, 808 F.2d 1249, 1251-52 (7th Cir. 1986) (stating standard of review for additional time to appeal is abuse of discretion). Whether considered under the rubric of "excusable neglect" or "good cause," the facts of this case establish that it was an abuse of discretion to grant Koresko additional time in which to file a notice of appeal.

In the district court, Koresko offered a panoply of excuses for his failure to timely file a notice of appeal, from blaming his paralegal to the "confusing" docket. *See Marsh v. Richardson*, 873 F.2d 129, 130-31 (6th Cir. 1989) (finding that the failure to file a timely notice of appeal due to office absences "indicate[d] a serious lack of diligence and inattention to the everyday detail of the practice of law"); *Reinsurance Co. of Am.,* 808 F.2d at 1251-52 ("The history of the 'excusable neglect' standard thus clearly indicates that . . . few circumstances will ordinarily qualify under the excusable neglect rubric."). Koresko's explanation was inherently self-contradictory and inconsistent. For example, in his motion to extend the time to appeal, Koresko claimed that he was otherwise indisposed and unable to file the notice of appeal. However, he managed to file a Notice of Attorneys' Lien on October 26 and a Status Report on November 15, and attend court in Chicago on both those days. (R. 356.) Koresko's motion to extend time never provided any excuse as to why he could not have personally filed a one-page notice of appeal when he was in the Dirksen Federal Courthouse on October 26th and November 15, and all it would have taken is five minutes to change the dates on the one-page notice of appeal and drop it off at the Clerk's office on the 20th floor.

Moreover, this is not the first time Koresko has missed a jurisdictional filing deadline. Koresko was previously found to have no excuse for failing to file a timely notice of appeal in a recent case in Pennsylvania. *Home Ins. Co. v. Law Offices of Jonathan DeYoung, P.C.*, 156 F. Supp. 2d 488 (E.D. Pa. 2001). After that reprimand, Koresko should have been acutely aware of the need to file a timely

notice of appeal.

Koresko's statements in the district court and filings in this court clearly show that he thought he was ousting the district court of jurisdiction to dismiss the case by filing the first appeal. (Appellants' App. at 697; Def.-Appellees' App. Tab 10 at 6-7.) The district court even discussed the issue at with Koresko on ***October 26, 2004***, before the Rule 58 judgment was even docketed on October 29th, and Koresko's comments in response clearly show that he thought that his premature notice of appeal deprived the district court of jurisdiction:

> JUDGE KENNELLY: I guess if I were in your shoes, Mr. Koresko, I would refile that notice of appeal because I think there is a decent chance that the other one is going to be deemed ineffective. Today is going to be the final order. But that is your call.
>
> KORESKO: I understand.
>
> JUDGE KENNELLY: I don't want you to blow your appeal because you filed it too early.
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> KORESKO: No, actually that is what I was going to do because, your Honor, you actually just helped me, for the record, because I respectfully, very respectfully suggest that some of the things that happened today are beyond the Court's jurisdiction right now.

(R. 383 at 9; Appellants' App., Transcript, Oct. 26, 2004 at 697.)[8]

If the district court's admonition was not enough warning, on ***October 28, 2004***, this court specifically ordered briefing on whether Koresko's first appeal was filed prematurely and whether appellants had standing. Defendants-appellees filed

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[8] It is hornbook law that if a notice is defective as premature, it does not deprive the district court of jurisdiction. *See, e.g.,* 20 MOORE'S FEDERAL PRACTICE § 303.32[2][b][iv][A], [B] (3d ed. 2002) ("A notice of appeal that is deficient because it is untimely or because it lacks the essential recitals does not transfer jurisdiction to the circuit court.").

briefs on jurisdiction and standing on ***November 23, 2004***, pointing out that Fed. R. App. P. 4(a)(2) did not save Koresko's premature appeal. Only after defendants-appellees showed Koresko the legal error of his ways did Koresko file to extend the time to appeal, on ***December 9, 2004***. *See Prizevoits v. Ind. Bell Tel. Co.*, 76 F.3d 132, 133-35 (7th Cir. 1996) (noting that if the court upholds the district court's finding of "'excusable' neglect here, we have difficulty imagining a case of inexcusable neglect."). Filing an appeal from a non-final order is a legal error and is insufficient grounds to grant additional time to appeal. *See Advanced Estimating Sys., Inc. v. Riney*, 130 F.3d 996, 998 (11th Cir. 1997) (finding "as a matter of law, that an attorney's misunderstanding of the plain language of a rule cannot constitute excusable neglect"); *see also Amatangelo v. Borough of Donora*, 212 F.3d 776, 779-80 (3d Cir. 2000). Koresko's failure to file a timely notice of appeal was deliberate or, at best, based on a misunderstanding of clear legal principles.

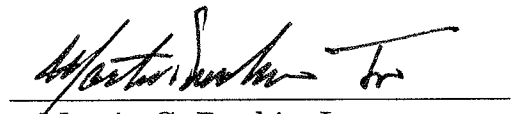
The district court abused its discretion in finding "excusable neglect" and granting Koresko additional time to file a notice of appeal, and, therefore, this court should vacate that finding and dismiss this appeal as untimely.

CONCLUSION

John Koresko, an attorney, would like to continue this litigation against the wishes of his clients and pursue claims against his competitor Benistar and the other defendants. However, neither Koresko nor Schmier was a party to the proceedings in the district court and they have no legitimate business in this court. This appeal is unnecessary, is jurisdictionally and procedurally defective, and is

without merit. It should therefore be dismissed, or, if it is not dismissed, the judgment of the district court should be affirmed in all respects.

Respectfully submitted,

By: 

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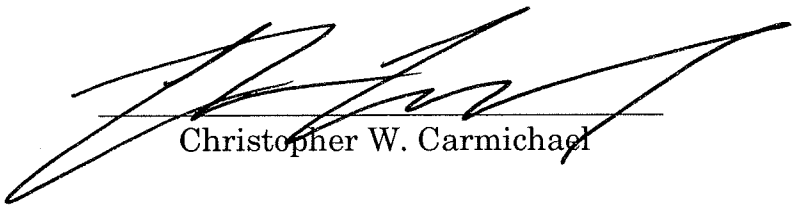
No. 04-4316

FED. R. APP. P. 32(a)(7)(B) CERTIFICATION

The undersigned hereby certifies that the foregoing brief complies with the type and volume limitations of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32, as it contains 10,932 words, based on the word count feature for Microsoft WORD, excluding the part of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

CIRCUIT RULE 31(e) CERTIFICATION

The undersigned hereby certifies that he electronically filed, pursuant to Circuit Rule 31(e), the brief in non-scanned PDF format on June 10, 2005 by uploading the document through the Seventh Circuit website.



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CERTIFICATE OF SERVICE

On **June 10, 2005**, the undersigned certifies that a copy of the foregoing **Defendants-Appellees Brief (and an electronic version on diskette)** was served upon counsel of record as follows:

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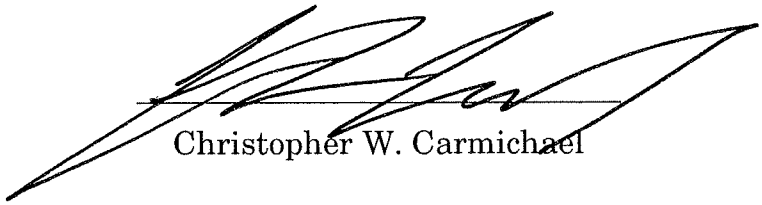

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