No. 03-35760

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES DEPARTMENT OF LABPOR,

Appellant

v.

BARCLAY L. GRAYSON,

Appellee.

On Appeal from and Order of the United States Bankruptcy Court
for the District of Oregon

BRIEF OF THE APPELLANT UNITED STATES DEPARTMENT OF LABOR

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IN THE UNITED STATES COURT OF APPEALS
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UNITED STATES DEPARTMENT OF LABOR,

Appellant,

v.

BARCLAY L. GRAYSON,

Appellee,

and

RICK A. YARNALL,

Trustee.

On Appeal from an Order of the United States District Court
for the District of Oregon

BRIEF FOR THE APPELLANT SECRETARY OF LABOR

STATEMENT OF JURISDICTION

This Court's jurisdiction is a subject that the parties, at the request of this Court (EOR 250),[1] have previously briefed. On March 16, 2004, this Court issued an Order stating that the issue was not suitable for summary disposition. EOR 252. Pursuant to that Order, the Secretary is submitting this appellate brief, which includes her argument on the jurisdiction

[1] "EOR" refers to the Excerpt of Record submitted herewith.

issue. The Secretary submits that under the less restrictive definition of finality applied by this Circuit to decisions in bankruptcy cases, this matter is ripe for appeal.

STATEMENT OF THE ISSUES

1. Whether the district court erred in holding that Grayson's counsel, who was retained on behalf of Grayson to negotiate and enter into a stipulated order with the Secretary, lacked actual or apparent authority to bind Grayson to all the terms of a stipulated order.

2. Whether under the liberal definition of finality applied by this Circuit to decisions in bankruptcy matters, the order of the district court is immediately appealable.

STATEMENT OF THE CASE

This appeal arises out of a litigation against an investment management company, Capital Consultants, LLC ("CCL"), and the father and son principals of that company, respectively, Jeffrey and Barclay Grayson. Litigation was initiated concurrently by the Securities and Exchange Commission ("SEC")(EOR 30), which alleged that CCL and the Graysons violated various federal securities laws, and the Department of Labor ("DOL")(EOR 13), which alleged that CCL and the Graysons caused losses of over $160 million to pension and health benefit plans, in violation of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, _et seq_. As a result of the

efforts of the DOL, the SEC, the court appointed receiver, and several private litigants, the ERISA plans have or expect to recover approximately 70% of their losses, exclusive of opportunity costs and interest that might have been earned had their money been properly invested. Despite engaging in conduct sufficient to earn him an 18-month prison sentence, Barclay Grayson has to date, pledged a mere $500,000 in a settlement with the private plaintiffs and the CCL receiver. The relevant facts for this appeal follow.

In August of 2000, Barclay Grayson, his father (Jeffrey Grayson) and their company, Capital Consultants, were under investigation by the DOL and the SEC. On August 15, 2000, Grayson retained Steven Ungar, Esq. ("Ungar") to represent him in connection with these investigations. EOR 97. On September 20, 2000, Ungar, along with Norman Sepanuk, counsel for Jeffrey Grayson, and counsel for CCL, met with representatives from the DOL and the SEC. EOR 94, 97-98. Grayson alleges that he did not know that representatives from the DOL would be present at this initial meeting but admits that he learned immediately afterwards that the DOL was a party to the negotiations. EOR 81. Ungar testified that he knew that he would be meeting with the DOL. EOR 97-98.

At the September 20 meeting, the DOL and the SEC each represented that they were prepared to file for preliminary

injunctive relief and offered defendants an alternative to costly litigation. EOR 93-94. The DOL presented the defendants with a draft of a stipulated order appointing a receiver over CCL, which was ultimately modified as a Stipulation and Order (the "DOL Order"). EOR 94-95. The draft provided, among other things, that Grayson, his father and CCL would be liable for the payment of receivership fees and expenses. EOR 9. At approximately noon, counsel for the defendants represented that they were going to meet with their clients and recommend settlement. EOR 95

On September 21, 2002, Ungar executed the DOL Order on behalf of Grayson. EOR 67. The DOL Order contains the provision making Grayson, along with his father and CCL, liable for the fees and expenses of the receivership. EOR 65. The DOL Order also provided that Ungar was "authorized and empowered to execute the Consent Order [DOL Order] on behalf of [Grayson]." EOR 58-59.

In February of 2001, Grayson filed a Chapter 13 petition in Bankruptcy Court for the District of Oregon (Case No. 301-30932-ep13). On that petition, he listed liquidated, unsecured and non-contingent debt in the amount of approximately $181,000. EOR 89. Grayson omitted his liability for receivership fees and expenses in the CCL case, which, at that time, were approximately $1.5 million. EOR 86. Had he listed this

liability, his relevant debt would have been far in excess of the $269,250 limit imposed by the Bankruptcy Code (for cases commenced prior to April 1, 2001), 15 U.S.C. § 109(e), and he would have been ineligible for Chapter 13 relief.

On March 15, 2002, the Secretary filed her Motion to Dismiss the Chapter 13 petition filed by Grayson. EOR 100. At that time, the district court, which was presiding over the motion, had withdrawn the reference of the matter to the bankruptcy court. After a settlement was reached among Grayson, the CCL receiver and the private parties in the CCL case, the district court terminated its withdrawal of the reference and the bankruptcy court heard the Secretary's Motion to Dismiss. On December 5, 2002, the bankruptcy court issued its finding and recommendations and returned the matter to the district court for an evidentiary hearing on the issue of whether Grayson's counsel had the authority to execute the DOL Order. EOR 125. That hearing was held on May 14 and 15, 2003.

On July 7, 2003, the district court issued an order (EOR 224), based on the court's July 3, 2003 opinion (EOR 217), denying the Secretary's motion. The district court held that Ungar, who signed the DOL Order, did not have authority to bind Grayson to the provision of the DOL Order requiring Grayson to pay the fees and expenses of the receivership to which Grayson had agreed under the DOL Order. EOR 218. Accepting as credible

Grayson's testimony that while he knew that Ungar would be executing documents on his behalf, he did not know about the provision for receivership fees and costs, the court concluded that "Ungar did not have actual authority to execute the Stipulations." EOR 219-20.

Consequently, the district court concluded that Grayson had less than $269,250 in liquidated, non-contingent and unsecured debt as required for filing under Chapter 13, denied the Secretary's motion to dismiss Grayson's Chapter 13 petition and again terminated the withdrawal of the reference and returned the matter to the bankruptcy court. EOR 224.

The Secretary moved for reconsideration on the grounds that the district court decision was contrary to the controlling case of Kaiser Found. Health Plan v. Doe, 136 Or. App. 566, 574, 903 P.2d 375, 380 (1995), modified on other grounds, 138 Or. App. 428, 908 P.2d 850 (1996). EOR 226. She also argued that the court overlooked important facts showing that Grayson gave his counsel actual authority to execute the settlement agreement and, thereby, all the terms of the agreement. EOR 235-37. The court did not address this latter argument in its opinion denying reconsideration. EOR 241-42. The court also did not address the Secretary's argument that Grayson ratified the receivership liability provision when he revised provisions in the SEC Order, which mistakenly made Grayson's attorneys and

agents liable for receivership fees and expenses, but left unaltered his own liability for those fees and expenses. Id. Finally, the court did not consider the equities of reforming the DOL Order after Grayson had received all the benefits under that Order. Id. The court merely distinguished this case from Kaiser on the ground that this case involved much more money. Id. The Secretary filed a Notice of Appeal on September 4, 2003. EOR 243.

ARGUMENT

I.

UNDER THE LIBERAL AND PRAGMATIC APPROACH TAKEN IN THIS CIRCUIT TO BANKRUPTCY APPELLATE JURISDICTION, THE DISTRICT COURT ORDERS DENYING THE SECRETARY'S MOTION TO DISMISS GRAYSON'S CHAPTER 13 PETITION ARE IMMEDIATELY APPEALABLE

Jurisdiction of an appeal from a district court order in a bankruptcy matter is governed by 28 U.S.C. § 158, which grants the court of appeals jurisdiction over "final decisions, judgments, orders and decrees." Although, "[o]rdinarily, a final decision is one that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment,'" the Ninth Circuit applies a more "pragmatic approach" to finality that "'emphasizes the need for immediate review, rather than whether the order is technically interlocutory.'" Bonham v. Compton, 229 F.3d 750, 761 (9th Cir. 2000). "This more liberal standard and 'pragmatic approach'

stem from the 'unique nature' of bankruptcy proceedings." In re Dominguez, 51 F.3d 1502, 1506 (9th Cir. 1995), citing Bonner Mall Partnership v. U.S. Bankcorp Mortgage Co., 2 F.3d 899, 903 (9th Cir. 1993).

This Court, in determining its jurisdiction to review bankruptcy orders, thus "'emphasizes the need for immediate review rather than whether the order is technically interlocutory.'" Bonham, 229 F.3d at 761, 762 quoting In re Frontier Properties, 979 F.2d 1358, 1362 (9th Cir. 1992), and In re Allen, 896 F.2d 416, 418 (9th Cir. 1990). This is done because "'certain proceedings in a bankruptcy case are so distinctive and conclusive either to the rights of individual parties or the ultimate outcome of the case that final decisions as to them should be appealable as of right.'" Id. at 761, quoting Frontier Properties, 979 F.2d at 1363.

Under this liberal approach, "a bankruptcy court order is considered to be final and thus appealable 'where it 1) resolves and seriously affects substantive rights and 2) finally determines the discrete issue to which it is addressed.'" Bonham, 229 F.3d at 761, quoting In re Lewis, 113 F.3d 1040, 1043 (9th Cir. 1997). Alternatively, the Ninth Circuit applies a four-part test that balances the need to avoid piecemeal litigation, judicial efficiency, the bankruptcy court's role as fact finder and the possibility that delay would cause

irreparable harm to either side. Lundell v. Anchor Constr. Specialists, Inc., 223 F.3d 1035, 1038 (9th Cir. 2000).

"Because an order determining the validity of a petition and denying a motion to dismiss . . . does not terminate the bankruptcy proceedings, it fails the conventional test of finality." In re Allen, 896 F.2d at 418 (citation omitted). In this case, however, because the district court's orders meet this Circuit's two-part test applicable to bankruptcy appeals, they are "final" in the relevant sense. First, there can be no doubt that the orders finally determined that Grayson was not liable for the receivership fees and thus did not exceed the monetary limits for Chapter 13 bankruptcy. There is no procedure in the upcoming Chapter 13 proceedings that would allow revisiting the issue of Grayson's liability under the stipulated order. Second, the determination that Grayson is not liable for receivership fees seriously affects the Secretary's substantive rights, not only in the bankruptcy proceedings, but also in the underlying receivership.

Whether Grayson is liable for receivership fees and expenses is a controlling factor in his ability to continue under Chapter 13. If allowed to remain in Chapter 13, the Secretary's claims against Grayson for his violations of ERISA would be subject to the expansive discharge provision of Chapter 13, 11 U.S.C. § 1328(a), and if not successfully appealed would

likely result in little, if any, additional recovery from Grayson. Nevertheless, even in the face of an uncertain recovery if the Chapter 13 proceeding stands, the Secretary will need to prosecute her ERISA claims in order to protect her interests in the ERISA case. As for Grayson, he will incur the cost of defending against the Secretary's claims.

An immediate appeal may thus allow both Grayson and the Secretary to avoid the inefficiency and expense of potentially unnecessary proceedings. In addition, if Grayson is not liable for the receivership fees and expenses, those costs will be paid out of the receivership estate, thereby further reducing the likely recovery for plan participants and beneficiaries if the Secretary is successful with her ERISA suit against Grayson. Thus, when the liberal and pragmatic approach is applied to this case, it is clear that the district court orders resolve and seriously affect the Secretary's rights.

The instant appeal differs from In re Rega Properties, Ltd., 894 F.2d 1136 (9th Cir. 1990), and In re Allen 896 F.2d 416, the cases cited in this Court's November 26 Order, because the district court orders in those cases did not affect the viability of the underlying claims in dispute between the creditors and the debtors.

In Rega, the debtor filed for Chapter 11 protection, and in accordance with 11 U.S.C. § 365, the bankruptcy court authorized

the debtor to reject an executory real estate contract it had entered into with the creditor. 894 F.2d at 1137. The creditor sought to dismiss debtor's petition on the grounds that it was filed in bad faith. Id. The bankruptcy court denied the creditor's motion and authorized the debtor to return the remaining land to the creditor, with damages representing the difference between the creditor's claim and the value of the property. Id. The district court affirmed.

On appeal, this Court recognized the liberal approach to bankruptcy appeals taken by this Circuit, but found that the creditor would not suffer irreparable harm if not allowed an immediate appeal. 894 F.2d at 1138. The Rega court noted that although without an immediate appeal the debtor would be required to continue its participation in the reorganization process, the creditor's interests would be protected. Id., citing In re 405 N. Bedford Dr. Corp., 778 F.2d 1374, 1377 (9th Cir. 1985).

The Rega facts are distinguishable because the underlying claim on the executory contract was liquidated. The contract required specific payment amounts. This is not the case between the Secretary and Grayson. The Secretary's underlying ERISA claims are not liquidated, the claims may well exceed tens of millions of dollars, and Grayson has not made payment on the value of the Secretary's claims, as in Rega. The creditor in

Rega did not face the prospect of complex and costly litigation, nor did he face the expansive discharge provisions of Chapter 13. Rather than face the prospect of expensive litigation over a potentially discharged claim, the debtor had made payment on the creditor's claim. The risk of irreparable harm was accordingly reduced.

Similarly, in Allen, this Court held that it lacked subject matter jurisdiction where the district court affirmed a bankruptcy court's refusal to dismiss an involuntary petition because the order did not seriously affect substantive rights. 896 F.2d at 419. In moving to dismiss, the debtor, Kenneth Allen, asserted that the papers served upon him were defective because, he claimed, they were impermissibly filed against him and his spouse jointly, rather than against him individually. Id. at 417. The Allen court noted that while interlocutory orders are generally not appealable, in bankruptcy proceedings "this court has, however, 'adopted a test that emphasizes the need for immediate review, rather than whether the order is technically interlocutory.'" Id. at 418, quoting 405 N. Bedford, 778 F.2d at 1377, and Rega, 894 F.2d at 1138. The Allen court further noted that "[b]ankruptcy orders that determine and seriously affect substantial rights can cause irreparable harm if the losing party must wait until bankruptcy

court proceedings terminate before appealing." Id., quoting In re Mason, 709 F.2d 1313, 1316 (9th Cir. 1983).

The court found that the bankruptcy order at issue there did not have such an effect. The Allens claimed that they were harmed because the order refusing to dismiss the petition allowed the trustee to liquidate and distribute Kenneth Allen's assets. The court rejected this claim, however, because the liquidation would not take place until the bankruptcy court had issued an order for relief, and the Allen's were not appealing such an order for relief. 896 F.2d at 419. Likewise, the court noted that if the Allens' creditors were adversely affected by the filing date, they would have ample opportunity to protect their own rights. Id. Thus, the court concluded that "[b]ecause we find that no substantive interference with the Allens' property rights could result from the bankruptcy court's [order], the bankruptcy's court [sic] order is not final and we are without jurisdiction to review it." Id. at 419.

In both Allen and Rega, the orders appealed from did not threaten the underlying claims between the parties. Here, however, the value of the Secretary's ERISA claims against CCL are likely to be diminished if the district court's orders relieving Grayson of his obligation to pay the receivership fees and expenses is left intact and the CCL estate must pay those fees. Even more significantly, given the uncertainty of any

ultimate recovery, the value of the Secretary's action against Grayson is greatly diminished if Grayson is allowed to proceed in Chapter 13. Thus, unlike the situation in Allen and Rega, the parties here face the time and expense of complicated litigation that may ultimately be mooted.[2]

More relevant to the present matter is In re Padilla, 222 F.3d 1184, 1188-89 (9th Cir. 2000), in which this Court held that it had jurisdiction over a bankruptcy appellate panel's order declining to dismiss a Chapter 7 petition as not filed in good faith. Applying the four-factor test, the Court found that: (1) because no further appeal was likely, piecemeal litigation was not likely to result from the appeal; (2) judicial efficiency was a neutral factor; (3) because the issue before the Court involved interpreting the "bad faith" provision of Chapter 7 and applying that interpretive law to the facts, it was predominantly legal and not purely factual, and taking the appeal would not undermine the bankruptcy court's role as a fact finder; and (4) delaying review would make little sense because the bankruptcy judge had already entered an order

[2] More recently, in In re City of Desert Hot Springs, 327 F.3d 930 (9th Cir. 2003), this Court held that it lacked jurisdiction to hear a judgment creditor's appeal from a denial of its motion to dismiss for bad faith a debtor's Chapter 9 petition. As in Rega and Allen, because the underlying claim between the parties was liquidated and the order appealed from did not seriously affect the property rights of either party, the lack of immediate appeal would not cause irreparable harm.

of discharge and closed the file. The Court thus found that three of the four factors were met, and accordingly concluded that it had jurisdiction over the appeal.

As in Padilla, at least three, and arguably all four, factors are met here. First, because there is not a strong likelihood of further appeals in this matter, the first factor is met. Second, as we have discussed, because a decision by this Court will either eliminate the need for the Chapter 13 proceeding, or lessen the incentive (by diminishing the likely recovery) for protracted litigation in the ERISA case, an immediate appeal will clearly serve judicial efficiency. Moreover, because the Secretary's argument on the merits of the appeal relies primarily on application of relevant case and hornbook law to the undisputed facts, it is not purely factual, but is predominantly legal in precisely the same sense as the issue in Padilla. Finally, the parties are likely to suffer irreparable harm without immediate review because of the wasted time and expense of engaging in complex litigation that might ultimately be unnecessary. Moreover, the CCL receivership estate, which is not a party to the bankruptcy, may also suffer irreparable harm to the extent that it is obligated to pay the receivership fees that Grayson currently is absolved from paying under the district court's orders. Thus, on balance, the four

factors -- (1) avoiding piecemeal litigation, (2) promoting judicial efficiency, (3) preserving the bankruptcy court's role as fact finder, and (4) avoiding irreparable harm -- weigh strongly in favor of an immediate appeal in this case.

Consequently, unlike the orders in Rega, Allen or City of Desert Hot Springs, and like the order appealed from in Padilla, the orders in this case meet the test of finality applied by the Ninth Circuit in bankruptcy proceedings. This Court thus has jurisdiction to hear the merits of the Secretary's appeal in this case.

II.

GRAYSON IS BOUND BY THE TERMS OF THE STIPULATED ORDER AND IS LIABLE FOR CCL RECEIVERSHIP FEES AND EXPENSES

A. Ungar Had Both Actual and Apparent Authority to Bind Grayson to the DOL Order

Under the governing Oregon law, the relationship between an attorney and client is that of agent and principal. Mahoney v. Linder, 14 Or. App. 656, 514 P.2d 901 (Or. Ct. App. 1973).[3] An

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[3] The question in this case concerns Grayson's obligations under the DOL Order and, as a consequence, his rights with regard to the Chapter 13 proceeding. Such issues of property rights in a bankruptcy proceeding are generally determined under state law. "In the absence of a controlling federal rule, we generally assume that Congress has 'left the determination of property rights in the assets of a bankrupt's estate to state law' since such '[p]roperty interests are created and defined by state law.'" Nobleman v. American Savings Bank, 508 U.S. 324, 329 (1993), quoting Butner v. United States, 440 U.S. 48, 54-55 (1979). The same rule holds true in interpreting a consent decree, which basically is treated as a contract and as such is

attorney acting as an agent for his client has authority under agency principles if he has the "power . . . to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him." Restatement (Second) of Agency § 7 (1958). This actual authority includes both "express authority" and "implied authority." Id. § 7 cmt. c; see also Kaiser, 136 Or. App. at 573 n.3, citing Wiggins v. Barrett & Assocs., 295 Or. 679, 686-87, 669 P.2d 1132 (1983). Express authority exists when the principal manifests his intent that his agent take action. Kaiser, 136 Or. App. at 573 n.3, citing Wiggins. However, because the principal does not always specify minutely what the agent is authorized to do, "most authority is created by implication." Restatement § 7 cmt. c. An agent with express authority to take certain action, has the implied authority "to do those other things that are reasonably necessary to carry out the authorized task. Kaiser, 136 Or. App. at 573 n.3, citing Wiggins.

Both express and implied authority should be distinguished from "apparent authority." Apparent authority is based on the "conduct of the principal, which when reasonably interpreted causes a third party to believe that the principal has authorized the agent to act on the principal's behalf in the

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generally construed as a matter of state law. See Molski v. Gleich, 318 F.3d 937, 956 (9th Cir. 2003) (Graber, concurring).

matter." Kaiser, 136 Or. App. at 573, citing Jones v. Nunley, 274 Or. 591, 595, 547 P.2d 616 (1976). Apparent authority thus "results from a manifestation by a person that another is his agent," which manifestation may be made either directly to the third person, or by other means such as by "authorizing the agent to say that he is authorized, or by continuously employing the agent." Restatement § 8 cmt. b.

1. Ungar Had Both Actual and Apparent Authority to Execute the DOL Order

Here, the district court erred because Grayson admittedly instructed his lawyer to return to the court on September 21, 2000, and execute an agreement with the DOL. EOR 184-85. Under Oregon law, this fact establishes Ungar's actual authority to bind Grayson to the DOL Order as negotiated. See Kaiser, 136 Or. App. at 573. In Kaiser, an employee agreed to mediate her sexual harassment complaint with a private mediator but later sought to rescind the agreement reached during the mediation, claiming that she did not give her attorney authority to enter into a final settlement and that she was not aware of some of the terms of the agreement. As in Kaiser, defendants in the present matter entered into negotiations hoping to reach a settlement, albeit on different terms. Moreover, in this case, as in Kaiser, there were no direct communications between the principal and the third party. See 136 Or. App. at 573. In

both cases, all communications were through the principal's attorney (and the mediator in Kaiser), who kept his client apprised of the negotiations and relayed counter-offers from his client to the third party. Compare EOR 221, with 136 Or. App. at 573. The Kaiser court held that there was sufficient evidence that the client had authorized her attorney to execute a settlement agreement, and should be bound to its terms. In this case, Grayson admitted that he authorized Ungar to execute the DOL Order. EOR 184-85.

Both Kaiser and this case thus are best understood as standing for the principle that agents with express authority to settle can bind their principals to the terms of the settlement. Here, by declining to read any of the drafts of the DOL Order but nevertheless authorizing Ungar to settle, Grayson should be viewed as having effectively authorized Ungar to accept what terms Ungar thought best. EOR 183-84. Both Grayson and his counsel testified that the only provision of the DOL Order they recall discussing is the appointment of a receiver over the business of CCL. EOR 98, 184. With respect to all other provisions of the DOL Order Ungar had the authority to do what he thought best for his client. If Ungar failed Grayson or did not live up to his expectations, the solution is not to revise the DOL Order. Grayson should seek his recourse against Ungar. See Hiransomboon v. Unigard Mut. Ins. Co., 46 Or. App. 493, 499,

612 P.2d 306, 309 (1980) ("If an agent is authorized to perform a certain act on behalf of his principal, the principal cannot escape liability that arises from that act because the principal does not like the consequences.").

Even if Ungar did not have actual authority, the district court opinion is clearly erroneous on the issue of apparent authority. Although the DOL did not have direct contact with Grayson, when Grayson allowed his attorney both as an initial matter to meet with the DOL and SEC, and later to reconvene and execute an agreement, these actions gave rise to Ungar's authority to execute the DOL Order, as the Oregon Court held in similar circumstances in Kaiser. The Kaiser court correctly held that the principal's conduct in receiving offers from her attorney and relaying counter-offers to the other side during negotiations, was sufficient to allow a reasonable belief that counsel had apparent authority, and did not require "direct" communications between the principal and the third party, 136 Or. App. at 573, as the district court here appears to have believed necessary. EOR 221-22. All of the conduct was wholly consistent with Ungar's express representation in the DOL Order that he was "authorized and empowered to execute the Consent Order [DOL Order] on behalf of [Grayson]." EOR 58-59.

The district court's requirement that the DOL should have had some form of direct communication with Grayson makes little

sense when all of Grayson's actions were represented accurately to the DOL by Grayson's counsel. Ungar represented that he had shared at least some of the contents of the DOL Order with his client and, after limited revisions, his client accepted the terms of that Order. All of this was true. Ungar did not act contrary to his client's instructions or in any way misrepresent statements made or positions taken by his client. Furthermore, Ungar and the DOL acted appropriately under the long-standing ethics requirements that attorneys ought not have direct contact with a party represented by counsel.

What Grayson says he did not do was discuss the receivership fee specifically with Ungar or specifically agree to that provision, and the district court apparently found this dispositive. Under this rationale, Grayson would not be bound to this provision even had he been present and affirmatively authorized Ungar to sign or himself signed the Order. But of course in the hypothetical case, as here, Grayson ought to be bound, despite his failure to familiarize himself with and consider the consequences of the terms to which he was agreeing. See First Fed. Sav. & Loan Ass'n of Walla Walla v. C.P.R. Constr., Inc., 70 Or. App. 296, 302 n.6, 689 P.2d 981, 984 (1984) (client cannot later reject a settlement where it gave the attorney express authority to settle because this "'ignores the basic distinction between an agent's authority to act versus

an agent's responsibility to produce certain consequences'"), quoting Hiransomboon, 46 Or. App. at 499, 612 P.2d at 309.

Moreover, it is significant that, shortly after executing the DOL and SEC Order, the SEC and defendants revised the provisions in the SEC Order relating to the payment of receivership fees and expenses because the SEC Order mistakenly included Grayson's attorneys and agents as parties liable for receivership fees and expenses. EOR 219. After execution of the DOL and SEC Orders, the defendants revisited this provision. In fact, the language of the SEC Order, once revised, became indistinguishable from paragraph 12 of the DOL Order. Id. In other words, the parties specifically reviewed the fee provision after execution of the agreement, and retained the provision making Grayson liable for those fees. This strongly undercuts Grayson's contention that he never authorized this provision.

In addition, in both Kaiser and this case, at the time the attorney executed the settlement agreement on the client's behalf, the attorney had been authorized by the client to do so. Compare 136 Or. App. at 569, with EOR 219 ("Grayson knew [on Sept. 20] that Ungar would be executing documents on his behalf."); see also EOR 184-85. In such circumstances, the Kaiser court found both actual and apparent authority because, even though the principal did not know all the terms of the agreement, she instructed her attorney to execute the agreement.

Kaiser is in all relevant senses indistinguishable from this matter, and establishes that Ungar had both actual and apparent authority to enter into the DOL Order.

2. Fennell and Walson are Clearly Distinguishable

Rather than applying Kaiser, which is an Oregon case involving similar facts, the district court erroneously relied on cases from other jurisdictions, which are readily distinguishable. In both Fennell v. TLB Kent Co., 865 F.2d 498 (2d Cir. 1989), and Walson v. Walson, 37 Va. App. 208, 556 S.E.2d 53 (2001), the attorneys who entered into settlement agreements on behalf of their clients disregarded the express instructions of their clients, and the clients' actions did not indicate that their attorneys had authority to execute settlements on their behalf.

In Fennell, the client submitted evidence that he had instructed his counsel that he would not accept a settlement of $10,000. 865 F.2d at 500. Nevertheless, counsel proceeded to report to the court that the matter had been settled for $10,000, and the court dismissed the case. Id. In relieving the client of the dismissal, the court ruled that Fennell's counsel did not have apparent authority because Fennell had done nothing to indicate that his counsel had authority to settle, and his counsel had in fact acted against the express wishes of his client. Id. at 502.

In Walson, a wife discovered, after her attorney signed a divorce property settlement on her behalf, that the agreement was inconsistent with what she and her attorney had discussed. 37 Va. App. at 213, 556 S.E.2d at 55. Moreover, the husband and his counsel witnessed behavior by the wife's counsel, which made it apparent that the wife did not agree with what her counsel was proposing. Id. at 212. Finally, three previous drafts of the property settlement called for the husband and wife, and not counsel, to execute the agreement. Id. at 216. Thus, the wife reasonably expected that she would execute the final agreement. Id.

The facts here are substantially different than in Fennell and Walson. Grayson testified that he knew Ungar was returning to the district court on September 21, 2003, to execute the DOL Order. EOR 184-85. Grayson also testified that he authorized his counsel to execute an agreement with the Department involving the appointment of a receiver. Id. In Fennell and Walson, counsel acted contrary to their clients' instructions. Here, there is no allegation that Ungar disregarded any of his client's instructions. Additionally, in Walson, the husband and his counsel had reason to believe that the wife did not agree with what her counsel was proposing. Here, DOL counsel had no reason to believe the settlement or any of its provisions was contrary to Grayson's wishes. In fact, the Kaiser court

distinguished an earlier case, Johnson v. Tesky, 57 Or. App. 133, 643 P.2d 1344 (1982), because in Kaiser, unlike Johnson, the principal told her counsel to accept the agreement. 136 Or. App. at 573. Again, as here, the Kaiser court upheld the agreement even though the principal authorized her agent to execute the agreement not knowing all of the terms of the agreement. Id.

The district court suggests that the Department should have known that Grayson would not agree to a provision requiring him to pay receivership fees and expenses because receiverships can be quite costly. EOR 222. The district court repeated this rationale in its denial of the Secretary's Motion for Reconsideration, although it cites no law for this proposition. EOR 242. However, the Department routinely asks defendants, and defendants routinely agree to pay receivership fees and expenses. Moreover, the magnitude of the fee here is in no way surprising in light of the magnitude of the settlement, which froze all of Grayson's assets and transferred control of a company that managed hundreds of millions of dollars to a receiver. In addition, Grayson's attorney signed off on the provision three times, first when he executed the two agreements with the DOL and the SEC, and then again when he executed the amended SEC agreement. Therefore, the Department had no reason to question Grayson's agreement to such a provision. Indeed,

given that Grayson agreed in the SEC Order to have his assets frozen, it would be reasonable to conclude that he was willing to pay receivership fees and expenses out of those assets.

In this case the undisputed facts support that Grayson had given Ungar actual authority to settle the receivership issues, and that, acting pursuant to this authority, Ungar did so. Grayson may have chosen not to read the agreement provided to his attorney, but he gave his attorney the authority to settle with the Department over the receivership. Ungar represented in good faith that he had such authority, and the Department relied on Ungar's apparent authority. Grayson's decision not to read the drafts that had been provided or to express any limits on the scope of Ungar's authority distinguishes this case from Fennell and Walson.

B. Even If Ungar Had Not Had Authority to Execute the DOL Order, Grayson Ratified His Liability for Receivership Fees and Expenses

Despite the intense reexamination of the allegedly offensive provisions of both the DOL and SEC Orders, Grayson did not then ask to be relieved of his obligation to pay for receivership fees and expenses under the DOL Order, or otherwise challenge the provision. He did not move for reformation of the DOL Order until May 3, 2001, nearly eight months after the execution of the DOL Order.

Grayson's conduct ratified the provision to pay receivership fees and expenses. The Restatement provides that "[a]n affirmance of an unauthorized transaction can be inferred from a failure to repudiate it," Restatement (Second) of Agency § 94, a rule that the Supreme Court of Oregon has expressly adopted. See Kneeland v. Shroyer, 214 Or. 67, 94, 328 P.2d 753, 765-66 (1958). By failing to repudiate any part of the DOL Order for nearly eight months after its execution, despite renegotiating the receivership fee provision of the SEC Order and having his company's assets frozen under both Orders, Grayson impliedly ratified the DOL Order. See Michel v. ICN Pharmaceuticals, Inc., 274 Or. 795, 549 P.2d 519 (Or. 1976) (by delaying disaffirmance for 20 days, defendant ratified contract, whether or not plaintiff was prejudiced). In Lockwood v. Wolf Corp., 629 F.2d 603, 609 (9th Cir. 1980), the court held that where a principal remains silent on an agent's lack of authority and the principal accepts benefits secured by agent, the principal has impliedly ratified the agreement. As in Lockwood, Grayson continued to accept the benefit of not having to face a costly, time-consuming and public preliminary injunction action, while the DOL continued to rely on the contract negotiated by proceeding with the receivership. By not promptly moving to reform the contract, Grayson should be deemed to have ratified the contract, even assuming Ungar did not have authority to bind

Grayson to the DOL Order as an initial matter. In another sense, however, Grayson's delay in challenging the DOL Order also supports what Grayson's own testimony established: that Ungar had actual authority to enter into the agreement.

C. Under Principles of Agency Estoppel, the District Court Erred in Revising the Consent Order

For similar reasons, principles of estoppel prevent Grayson from now evading his responsibility to pay receivership fees. Again, if Grayson had not, in fact, authorized Ungar to execute the Stipulation and Order on his behalf, by standing silently by while he knew that the Secretary was proceeding with the receivership action, Grayson is now estopped from repudiating the Order. See Restatement (Second) § 8B cmt. c. The district court issued an order revising a consent order, which is now almost three years old. Throughout that period, the Secretary adhered to her part of the bargain contained within the DOL Order and did not bring action for preliminary injunctive relief, as would have been her right absent the consent order. Moreover, had the Secretary sought a preliminary injunction, she could also have sought an order that required Grayson to pay receivership fees and expenses. However, the Secretary relied on Grayson's actions in continuing to accept the benefits and burdens of the DOL Order. The Secretary would not have signed

the DOL order absent Grayson's agreement to pay receivership fees and expenses.

The cases relied on by the district court do not support the relief granted by the district court. In Fennell and Walson, the relief was to undo the entire settlement agreement. Obviously, at this stage of the receivership such a remedy is impossible. The Secretary agreed to the settlement based upon all of its terms, including Grayson's liability for the fees. Accordingly, it was unjust for the district court to reform the DOL Order. See Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998) ("Neither the district court nor this court had the ability to delete, modify or substitute certain provisions. The settlement must stand or fall in its entirety.").

CONCLUSION

WHEREFORE, the Secretary respectfully submits that the orders appealed from are final and this Court should hold that is has subject matter jurisdiction over her appeal and should reverse the decision of the district court and reinstate the DOL Order as originally negotiated, drafted and executed.

Dated: April 16, 2004

Respectfully submitted,

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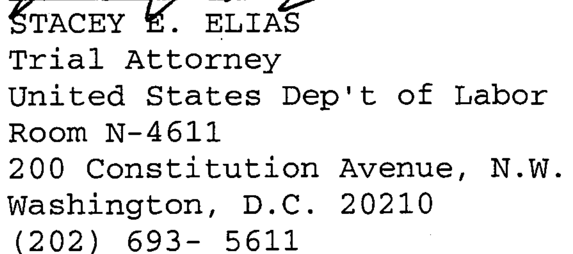

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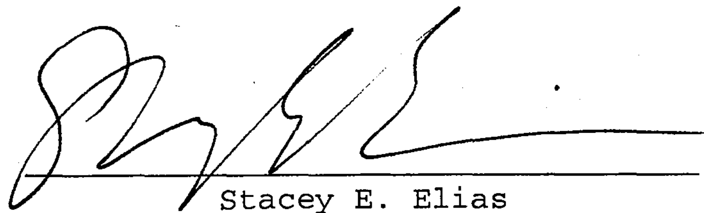
STATEMENT OF RELATED CASES

This case is related to No. 03-35409 and the cases consolidated therewith.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7), and Ninth Circuit Rule 32-1, I hereby certify that the Brief for the Appellant Secretary of the United States Department of Labor is monospaced, has 10.5 or fewer characters per inch and contains 6,455 words as determined by the Microsoft Word software system used to prepare the brief.



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Certificate of Service

I hereby certify that true and correct copies of the foregoing Brief of Appellant United States Department of Labor and the Excerpts of Record were served upon the following by Federal Express, marked for overnight delivery, on April 16, 2004:

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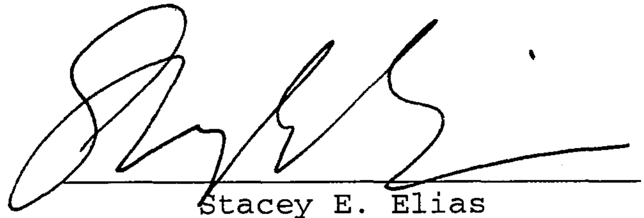

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