Nos. 09-1383(L) and 10-1061

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HILDA L. SOLIS, Secretary of Labor,
Plaintiff-Appellee,
and
CLARK & WAMBERG,
Party in Interest-Appellee
v.
ROMA P. MALKANI, et al.,
Defendants-Appellants

On Appeal from the United States District Court
for the District of Maryland

BRIEF FOR THE SECRETARY OF LABOR

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: Page

Cases--continued: Page

Cases--continued: Page

Cases--continued: Page

Cases--continued: Page

Federal Statutes: Page

Miscellaneous:

Miscellaneous--continued: Page

JURISDICTIONAL STATEMENT

The district court had jurisdiction of this enforcement action by the Secretary of Labor (Secretary) under section 502(e)(1) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132(e)(1). This Court has jurisdiction under 28 U.S.C. § 1291 to review final judgments of the district court.

In No. 09-1383, the district court's February 25, 2009, order awarding fees to Clark Consulting is considered a final judgment because it finally resolved a post-judgment dispute. See Solis v. Current Dev. Corp., 557 F.3d 772, 776 (7th Cir. 2009); Securities & Exch. Comm'n v. Suter, 832 F.2d 988, 990 (7th Cir. 1987); 15B Charles A. Wright et al., Federal Practice & Procedure § 3916, at 350-56 (2d ed. 1992). The March 26, 2009 appeal in No. 09-1383 was timely under Fed. R. App. P. 4(a)(1). The questions presented in No. 09-1383 are not properly before this Court, however, because the district court's decision adopts a magistrate judge's decision, and ISN and Malkani failed to seek district court review of the magistrate judge's decision in a timely manner. See Argument I, infra.

In No. 10-1061, the district court's December 16, 2009 order approving a replacement for Clark as independent fiduciary and authorizing the replacement to terminate ISN Corporation's pension plan is considered a final judgment

because it finally resolved a post-judgment dispute. The January 5, 2010 appeal of that order in No. 10-1061 was timely under Fed. R. App. P. 4(a)(1). ISN and Malkani instigated a new post-judgment dispute when they filed a motion for approval of a supersedeas bond and grant of a stay of the December 16, 2009 order. The district court denied that motion in an order issued January 20, 2010, which Malkani and ISN did not separately appeal.[1] However, the January 21, 2010 docketing statement filed by ISN and Malkani, and referencing the January 20, 2010 order, may serve as the functional equivalent of an appeal. See United States v. Coleman, 319 Fed. Appx. 228, *228 n.1 (4th Cir. 2009); B. Willis, C.P.A., Inc. v. BNSF Ry. Corp., 531 F.3d 1282, 1296 (10th Cir. 2008) (both citing Smith v. Barry, 502 U.S. 244, 248 (1992)). In any event, issues concerning the bond and stay, including the issue of whether ISN and Malkani perfected an appeal of the January 20, 2010 order and properly invoked this Court's jurisdiction to decide those issues, are moot because ISN and Malkani complied

[1] Cf. Solis v. Current Dev. Corp., 557 F.3d at 775 (noting that the appellant filed a second appeal after an unsuccessful motion to reconsider the district court's non-ministerial distribution order, which was undoubtedly a final judgment, and which appeal was consolidated with an arguably premature appeal that had been filed after several earlier post-judgment orders but before the distribution order; and stating "[w]e treat each postjudgment proceeding like a freestanding lawsuit and look for the final decision in that proceeding to determine the scope of our review"); EEOC v. Wal-Mart Stores, Inc., 187 F.3d 1241, 1250 (10th Cir. 1999) ("a supplemental notice of appeal is required for us to have jurisdiction over an attorneys' fees issue [which is collateral to and separate from a decision on the merits] that becomes final subsequent to the initial notice of appeal").

with the December 16, 2009 order without seeking a stay in this Court under Fed. R. App. P. 8(a)(2). See Argument IV.B, infra.

STATEMENT OF THE ISSUES

1. Whether appellants waived their right to further review of a magistrate judge's order that awarded $498,116 in fees to an independent fiduciary in an enforcement action under the Employee Retirement Income Security Act (ERISA) by failing to seek district court review of the order within the 10-day period specified by 28 U.S.C. § 636(b), Fed. R. Civ. P. 72, and D. Md. R. 301.5.

2. If the magistrate judge's order is reviewable, whether the district court committed any reversible error by adopting the order as a final order of the district court.

3. Whether the district court abused its discretion by authorizing a replacement for the independent fiduciary to terminate ISN Corporation's Pension Plan.

4. Whether issues concerning the district court's refusal to stay the monetary portions of its order authorizing the replacement fiduciary to terminate the Pension Plan are moot and, if not, whether the district court properly denied a stay.

STATEMENT OF THE CASE

A. The Secretary's lawsuit against ISN and Malkani

The issues in these consolidated appeals arise out of a November 2000 lawsuit by the Secretary of Labor against ISN Corporation and Roma Malkani, the president and sole owner of ISN, for fiduciary violations involving ISN's defined contribution pension plan and profit sharing plan. See Chao v. Malkani, 216 F. Supp. 2d 505, 508 (D. Md. 2002), aff'd, 452 F.3d 290 (4th Cir. 2006). In July 2002, the district court held that Malkani and ISN had breached their fiduciary duties under ERISA and removed them from their positions as fiduciaries to the ISN plans. 216 F. Supp. 2d at 513, 518. The court also ordered the Secretary to name an independent fiduciary to replace them, with all of the independent fiduciary's costs and expenses to be paid by ISN and Malkani. Id. at 518. In May 2003, the district court appointed the predecessor company to intervenor-appellee Clark Consulting as the independent fiduciary and ordered that all costs and expenses incurred by Clark be paid by ISN and Malkani. JA 38B.

On October 4, 5, and 6, 2004, the district court held a bench trial to determine the amount that ISN and Malkani were required to repay to the pension plan in the Secretary's lawsuit. See JA 25-26. On March 30, 2005, the district court issued a decision requiring repayment of $696,524, plus interest. JA 246A.

On June 22, 2006, this Court affirmed the district court's July 2002 and March 2005 decisions. Malkani, 452 F.3d at 290.

B. The fee disputes

In response to a motion by the Secretary to hold ISN and Malkani in civil contempt, on August 14, 2003, the district court ordered ISN and Malkani to produce documents requested by Clark and pay Clark's $200,000 retainer. JA 38F. The retainer was later paid. See JA 41. On May 11, 2004, the district court ordered ISN and Malkani to pay the non-outside counsel part of Clark's bill for additional work not covered by the retainer, to pay Clark's expenses at an upcoming deposition, and to submit written objections to the outside counsel part of Clark's bill. JA 38H. On June 22, 2004, the district court issued an order for ISN and Malkani to show cause why they should not be held in contempt for their failure to comply with the May 11, 2004 order. See JA 21 (Docket Entry 159), 379. In July 2004, the court held a show-cause hearing, see JA 22, 379. Clark then filed an accounting of its fees and expenses, and the parties filed responses and replies. JA 39-246.

C. The magistrate judge's fee decision

On July 24, 2006, after this Court upheld the district court decisions on the underlying ERISA violations, the Secretary filed a motion asking, among other things, for the district court to refer Clark's pending fee request to a magistrate

judge. JA 247A. On July 27, 2006, the district court issued an order making the referral. JA 248. ISN and Malkani opposed the Secretary's motion. Second Supp. Appx. (SSA) at 91 n.3; see also JA 467.

The magistrate judge received further briefs, JA 249-374, and on July 11, 2007, issued a decision and order awarding Clark $498,116 in fees and expenses. JA 375-411; SSA 93-102. ISN and Malkani appealed the magistrate judge's decision to this Court on August 8, 2007, and Clark filed a cross-appeal on August 22, 2007. JA 412-14.

D. Dismissal of ISN and Malkani's appeal and remand to the district court

On June 5, 2008, this Court granted Clark's motion to dismiss for lack of appellate jurisdiction. JA 429-31. The Court reasoned that a magistrate judge's order can be appealed directly to the court of appeals only if the district court specially designates the magistrate judge to exercise the district court's authority under 28 U.S.C. § 636(c) and the parties consented to the magistrate judge exercising such authority. JA 429-30. Because it did not appear that the parties consented, the Court dismissed the appeal without prejudice and without deciding whether ISN and Malkani waived their right to appeal. JA 430. [2]

[2] This Court also upheld a district court decision requiring ISN to reimburse payments made by a service provider to an ISN health plan. Great-West Life & Annuity Ins. Co. v. Info. Sys. & Networks Corp., 523 F.3d 266 (4th Cir. 2008). The ISN health plan is not at issue here.

On February 25, 2009, the district court issued an opinion that treated the magistrate judge's order as a report and recommendation issued under 28 U.S.C. § 636(b)(1)(B), and an order adopting the report and recommendation without modification. JA 466-75. The district court held that ISN and Malkani waived their right to object to the report by failing to do so within the 10 days required by that section, Fed. R. Civ. P. 72(b), and D. Md. R. 301.5(b), but also stated that it had reviewed the report. JA 470-71, 473. On March 26, 2009, in No. 09-1383, ISN and Malkani appealed this district court order.

E. Replacement of Clark as the independent fiduciary

In April 2009, Clark filed a motion to withdraw as independent fiduciary. Supplemental Appendix (SA) 2. The Secretary responded that Clark should not be released until a suitable replacement is approved. SA 50. The Secretary further requested the court to order ISN and Malkani to pay the replacement's fees in advance, in light of their history of not paying Clark, and to order the plan terminated because the actions of ISN and Malkani over the last several years were a de facto termination. SA 53-54. In October 2009, the district court held that Clark could withdraw within 30 days after the Court approved a replacement fiduciary and ordered the Secretary to recommend a replacement within 30 days of the court's order. SA 67-69. The court further ordered ISN and Malkani to pay in advance one year of the replacement fiduciary's fees within 60 days of the

court's appointment of the replacement fiduciary. SA 69-70. The court denied the Secretary's motion to deem the plan terminated. SA 70-71.

On November 16, 2009, the Secretary proposed the approval of Nicholas Saakvitne as the replacement fiduciary and requested that he be given authority to terminate the ISN pension plan. SA 112. The same day, the district court issued a memorandum opinion that, among other things, required ISN and Malkani to prepay the replacement fiduciary's fees within 15 days of the court's approval of the replacement fiduciary and made Clark's withdrawal contingent on the court's approval and appointment of the replacement fiduciary. SA 125-33. On December 16, 2009, the district court approved Saakvitne as the replacement fiduciary, granted him authority to terminate the pension plan, and provided that his appointment was contingent on his receipt of ISN's and Malkani's pre-payment of his fee and estimated expenses. SA 155. The court further provided that removal of Clark as the fiduciary would become effective upon Saakvitne's receipt of that payment. SA 155-56.

ISN and Malkani failed to pay Saakvitne, which led Clark to file an emergency motion for contempt. SA 157-64. ISN and Malkani argued that they were not in contempt because they had filed an appeal (No. 10-1061) and a motion asking the district court to stay its December 16, 2009 order and approve a bond they had posted. SA 173-75. On January 20, 2010, the district denied

ISN's and Malkani's motion, held them in civil contempt, and fined them $250 a day until they paid Saakvitne's fees and expenses. SA 181-91. ISN and Malkani complied with the January 20, 2010 order, SA 192-93, by paying the fees and expenses and filed no appeal from it.

STATEMENT OF FACTS

A. Appointment of Clark as the independent fiduciary

The Secretary sued ISN and Malkani for failing to make annual contributions to two defined contribution plans sponsored by ISN Corporation, the ISN Pension Plan and ISN Profit Sharing Plan. Malkani, 452 F.3d at 291; Malkani, 216 F. Supp. 2d at 508. The Pension Plan, which was established in 1982, has held between $6.4 million to more than $10 million in assets. See Malkani, 216 F. Supp. 2d at 509, 515; Malkani, 452 F.3d at 296. The Pension Plan recently had $5,507,949 in assets and covered 309 participants, 302 of whom are inactive. SA 47. The Profit Sharing Plan recently had $1,177,050 in assets and covered 105 employees, 71 of whom are inactive. Id.

Before the district court could determine the amount of unpaid contributions, ISN and Malkani responded to the Secretary's lawsuit by making "repeated efforts to plunder the [pension] Plan's assets and minimize their own liabilities." Malkani, 452 F.3d at 294. That conduct plainly violated ERISA's requirements for fiduciaries to act solely in the interests of plan participants and

beneficiaries, in a prudent manner, and in accordance with governing plan documents, see 29 U.S.C. § 1104(a)(1), and caused the district court to remove ISN and Malkani from their positions as plan fiduciaries in 2002. Malkani, 216 F. Supp. 2d at 512-18; see also 452 F.3d at 294-98 (affirming the district court's decision).

The removal of ISN and Malkani led the Secretary to request and the district court to order the 2003 appointment of Clark as an independent fiduciary for the ISN pension and profit sharing plans. At the time of Clark's appointment, ISN and Malkani were still in control of the company and in litigation with the Secretary over how much they should have contributed to the plans. As a fiduciary, Clark had the same obligations as other fiduciaries to act solely in the interest of participants and beneficiaries, with prudence, and in accordance with governing plan documents. See 29 U.S.C. § 1104(a)(1); JA 202. Like other fiduciaries, Clark could be sued by the Secretary or by plan participants and beneficiaries for a breach of its fiduciary responsibilities. See 29 U.S.C. § 1132(a)(2), (3), (5).

B. Clark's services and fees as the independent fiduciary

To carry out its fiduciary duties, Clark proposed a three-phase approach to ensure that the plans were tax-qualified under the Internal Revenue Code and complied with ERISA. JA 202. The first phase required Clark to perform a

number of specific tasks to carry out an historical assessment and correction of ISN's pension plan for years 1982 through 2002 and ISN's profit sharing plan for years 1996 through 2002. JA 202-03. This work also required meetings with ISN officers and on-site visits to ISN and vendor offices. JA 204. The second phase required a number of specific tasks involved in ongoing plan administration and trustee functions including full investment consulting services, and the third phase required written quarterly reports for the court. JA 204-06, 267.

In appointing Clark as the independent fiduciary, the district court accepted the Secretary's recommendation and ordered "[t]hat all costs and expenses incurred by Clark" be paid by ISN and Malkani. JA 38B-38C. Clark's costs and expenses included a $200,000 retainer for review and correction of historical plan administrative errors; direct out of pocket expenses; time and expenses required to respond to inquiries of governmental or civil authorities, or to prepare for or deliver testimony in legal proceedings; ongoing fees for services beginning with the 2003 plan year not to exceed $60,000 per year; and legal fees and reasonable expenses of Thelen Reid & Priest (later Thelen Reid Brown Raysman & Steiner) as Clark's outside counsel. See JA 262, 377. Thelen Reid's hourly rates and billing practices were attached to Clark's proposal and submitted to the district court. See JA 263, 377 & n.5; SSA 42-46.

C. The fee disputes

As discussed above, ISN and Malkani failed to produce documents to Clark or pay Clark's $200,000 retainer. Consequently, the Secretary filed a contempt motion, and in August 2003 the district court ordered ISN and Malkani to produce the documents and pay the retainer. See JA 38F. Clark claims to have spent time worth more than $400,000 on work covered by the retainer because of, among other things, inadequate records, repeated plan amendments, unreliability of data provided by ISN, and a huge volume of correspondence from plan participants complaining of inaccuracies in data supplied by ISN. JA 43-48. Clark has not sought reimbursement for the extra work, JA 48, and the retainer was paid after the court's order. JA 41.

Additional fee disputes, at issue here, involve the failure by ISN and Malkani to pay Clark's bills for ongoing administrative services, for preparing for and attending a deposition that ISN and Malkani requested, and for the costs of outside counsel. See JA 41, 61-74, 379. Part of this work involves ISN's failure to provide information and plan documents requested in writing by Clark and delay in providing necessary census data for Clark to determine the proper contributions to the pension plan. JA 267 (Disabato Declaration ¶ 5). The disputes also involve the failure by ISN and Malkani to pay for time spent by Clark, at the Secretary's request, in preparing for and attending the three-day trial

in October 2004 to determine the amount of unpaid contributions owed by ISN and Malkani to the pension plan. JA 75, 338-52, 397.

D. The fee award to Clark

In April 2005, Clark asked the district court to rule on its pending request for fees and expenses. JA 247. On July 24, 2006, after this Court had upheld the district court's decisions removing ISN and Malkani as fiduciaries and requiring repayment of unpaid contributions, the Secretary filed a motion "to assign Clark's pending requests for fees and costs to Magistrate Judge Susan K. Gauvey." JA 247A-247B. On July 27, 2006, the district court issued an order stating that the fee request "BE, and HEREBY IS, referred to" the magistrate judge. JA 248. Neither the Secretary nor the district court addressed whether the referral was for a final decision on a non-dispositive matter under 28 U.S.C. § 636(b)(1)(A), or a report and recommendation on a dispositive pre-trial matter under 28 U.S.C. § 636(b)(1)(B). See JA 247E-247F, 247I, 248. After the district court's referral, ISN and Malkani stated that if they had been given the opportunity to do so, they would have objected to the referral. SSA 91 n.3.

On July 11, 2007, the magistrate judge awarded Clark $489,116 in fees and expenses, a reduction of $64,289 from the amount Clark requested. JA 375 & n.1 (rounding amounts to the nearest dollar). ISN and Malkani did not seek district court review of the magistrate judge's decision within the 10 day time

limit set by 28 U.S.C. § 636(b), Fed. R. Civ. P. 72, and D. Md. R. 301.5, but instead filed an appeal in this Court on August 8, 2007. JA 412. In June 2008, this Court dismissed the appeal for lack of appellate jurisdiction and remanded the case to the district court without addressing whether ISN and Malkani had waived their right to appeal. JA 429-31.

On February 2009, the district court issued a memorandum opinion and order adopting the magistrate judge's decision. JA 466-75. The district court reasoned that the magistrate judge's order addressed a pretrial dispositive matter and should be treated as a report and recommendation under 28 U.S.C. § 636(b)(1)(B) because the order was analogous to an order addressing attorney's fees, which are treated as dispositive under that section. JA 468-70. The court concluded that the order was not issued on the consent of the parties because ISN and Malkani objected to referral of the matter to the magistrate judge. JA 472. The court further concluded that ISN and Malkani had waived their right to further review of the order by failing to appeal the order to the district court within 10 days. JA 470-73. Because no party timely objected to the magistrate judge's report, the court reasoned that it was free to adopt it without further review, but nevertheless stated that "[t]he Court has reviewed that report and will adopt [it] without modification." JA 473. In March 2009, ISN and Malkani appealed this district court fee order in No. 09-1383.

E. Replacement of Clark as the independent fiduciary and denial of ISN's and Malkani's request for a stay

In April 2009, Clark sought the district court's permission to withdraw as the independent fiduciary on the ground that its duties had become an increasing hardship and a series of corporate transactions and personnel changes had left Clark with no expertise in qualified plan administration and record keeping. SA 8-9, 45-49. The Secretary, who had earlier attempted to work with ISN to secure a replacement fiduciary (SSA 131-37), did not oppose Clark's withdrawal, but argued that Clark should not be released until a suitable replacement was approved and until ISN and Malkani paid the fees and estimated expenses of the replacement in advance. SA 50-51. The Secretary explained that permitting a fiduciary to withdraw without making adequate provisions for a successor is inconsistent with ERISA, and that advance payment of a replacement fiduciary was necessary in light of ISN's and Malkani's history of not paying Clark. SA 51-53. The Secretary further requested the court to order the pension plan terminated because the actions of ISN and Malkani over the last several years in ignoring their obligations were a de facto termination. SA 53-54. These actions included failures to make mandatory contributions to the pension plan for 2006 and 2007, to respond to Clark's request for census data necessary to calculate ISN's 2008 pension plan contribution, to pay interest resulting from delayed

contributions for 2004 and 2005, and otherwise to cooperate in the ongoing administration of the pension plan. SSA 105-06, 113-28.

In October 2009, the district court permitted Clark to withdraw once the Court approved a replacement fiduciary, ordered the Secretary to recommend a replacement within 30 days of the court's order, and denied the Secretary's motion to deem the plan terminated. SA 67-71. The Secretary contacted five firms with prior experience as independent fiduciaries, and all five of them indicated that they were unable to risk having to spend the time, effort, and money necessary to collect their fees and expenses from ISN if the plan were ongoing. SA 120. All five proposals were therefore contingent on termination of ISN's pension plan. SA 120. The Secretary proposed Nicholas Saakvitne from this group and submitted his services agreement to the district court. SA 114-15, 121. Consistent with the district court's October 2009 order that ISN and Malkani prepay one year of the independent fiduciary's fees and expenses, SA 70, Saakvitne's proposal required advance payment of $60,000 to cover all of his services to complete termination of the plan and $18,000 in estimated expenses. SA 123. Clark informed the district court that it was "under extraordinary time pressure to withdraw as independent fiduciary, as the business relationship which is allowing it to continue serving as independent fiduciary ends on December 31, 2009." SA 93.

On December 16, 2009, the district court approved Saakvitne as the replacement fiduciary, granted him authority to terminate the pension plan, and provided that his appointment was contingent on his receipt of ISN's and Malkani's pre-payment of his fee and estimated expenses. SA 155. That prepayment was due by December 31, 2009. See SA 130 (payment due within 15 days of the court's approval of the successor fiduciary). Removal of Clark as the fiduciary would become effective upon Saakvitne's receipt of that payment. SA 155-56.

ISN and Malkani failed to pay Saakvitne, whereupon Clark filed an emergency motion for contempt. SA 157-64. ISN and Malkani argued that they were not in contempt because they had filed an appeal (No. 10-1061) and a motion asking the district court to stay its December 16, 2009 order and approve a bond they had posted. SA 173-75. On January 20, 2010, the district court denied ISN's and Malkani's motion, held them in civil contempt, and fined them $250 a day until they paid Saakvitne's fees and expenses. SA 181-91. ISN and Malkani complied with the January 20, 2010 order, SA 192-93, and filed no appeal from it. They argue in No. 10-1061 that the district court erred by not staying the December 16, 2009 order to pay Saakvitne's fees and expenses and by allowing Saakvitne to terminate the pension plan. Supp. Br. of Appellants 7-12.

SUMMARY OF ARGUMENT

The Secretary's primary interest in this case is to ensure that independent fiduciaries are adequately compensated for their services. The Secretary often requests the appointment of an independent fiduciary when existing fiduciaries have been removed for misconduct because ERISA requires that plans be managed and administered by fiduciaries. 29 U.S.C. § 1102(a). If qualified persons are not willing to serve as independent fiduciaries, the Secretary will have a more difficult time remedying fiduciary breaches in a way that protects plans and their participants and beneficiaries.

I. The district court correctly concluded that ISN and Malkani waived their right to further review of the magistrate judge's fee award by failing to seek district court review of the award within the 10-day time limit set by 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 72, and D. Md. R. 301.5.a. It makes no difference whether the magistrate judge's order is characterized as dispositive or nondispositive because a 10-day time limit for objecting applies in both situations. Under this Court's precedents, the failure to seek timely review waives a right to further review.

The magistrate judge did not act on the consent of the parties pursuant to 28 U.S.C. § 636(c) because, contrary to ISN and Malkani's assertions, ISN and

Malkani objected to the district court's referral of the fee dispute to the magistrate judge. The earlier appeal by ISN and Malkani to this Court from the magistrate judge's order does not excuse their failure to file timely objections in the district court.

II. If the Court reviews the district court's decision adopting the magistrate judge's fee award, it should affirm the district court. Review, if any, should be limited to plain error, and there was no plain error because ISN and Malkani failed to establish any obvious and clear error that seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

If the Court goes beyond plain error review, it should hold that the district court acted within its discretion in adopting the magistrate judge's fee award without modification. ERISA authorizes a court to require defendants who are removed from their positions as fiduciaries because of fiduciary breaches to pay the fees and expenses of an independent fiduciary appointed to replace them. Such payment is necessary to put the plan in the position it would have been in but for the fiduciary breaches. The amount of the award should be set at a level appropriate to ensure that qualified persons accept appointments as independent fiduciaries because of the important role independent fiduciaries play in remedying fiduciary breaches and the high standards of care that ERISA imposes on them.

Under these standards, the district court acted reasonably in adopting the magistrate judge's fee award. The magistrate judge fully considered ISN's and Malkani's objections, partially reduced the fees requested, and adequately explained her reasoning.

III. The district court acted well within its discretion in authorizing the replacement fiduciary to terminate the ISN pension plan. ERISA authorizes a court to enter such an order, consistent with the common law of trusts. The court's December 16, 2009 order was appropriate here because 302 of the 309 participants in the plan were inactive, ISN was treating the plan as if it had been terminated, it was necessary to find a replacement for Clark as fiduciary, and no fiduciary was willing to act as a replacement without authority to terminate the plan. ISN and Malkani incorrectly argue that 29 U.S.C. § 1341 forbids the order. That section is inapposite because it applies to defined benefit plans, not defined contribution plans such as ISN's pension plan, and in any event does not forbid an order authorizing a fiduciary to terminate a plan.

IV. ISN and Malkani have mooted their challenge to the district court's denial of their motion for a stay of the requirement in the December 16, 2009 order that they pre-pay one year of the replacement fiduciary's fee by paying the fees without asking this Court for a stay. Their challenge is also meritless because they could not stay the district court's order simply by posting a bond.

Posting a bond only stays a monetary judgment, to protect prevailing parties against the risk of non-payment. The payment requirement was not a monetary judgment but was instead injunctive and integrally related to the removal of Clark as a fiduciary and the appointment of the replacement fiduciary. Allowing ISN and Malkani to stay the payment requirement by posting a bond would not protect Clark or the Secretary but instead would call into question Clark's removal and further delay termination of ISN's pension plan.

ARGUMENT

I. ISN AND MALKANI WAIVED THEIR RIGHT TO FURTHER REVIEW OF THE MAGISTRATE JUDGE'S FEE AWARD BY FAILING TO SEEK DISTRICT COURT REVIEW OF THE AWARD IN A TIMELY MANNER

A. Standard of review

Although a district court's findings of fact are reviewed for clear error, the ultimate question whether a waiver occurred is reviewed de novo. See United States v. Boynes, 515 F.3d 284, 286 (4th Cir. 2008).

B. ISN and Malkani waived their right to further review of the fee award by failing to seek district court review of the award in a timely manner

1. Under 28 U.S.C. § 636(b)(1)(A), a district court may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except for certain specified motions. Under 28 U.S.C. § 636(b)(1)(B), a district court may also designate a magistrate judge to submit proposed findings

of fact and recommendations for the disposition of these excepted motions. Matters under 28 U.S.C. § 636(b)(1)(A) are called "nondispositive," while matters under 28 U.S.C. § 636(b)(1)(B) are called "dispositive." See, e.g., United States v. Raddatz, 442 U.S. 667, 673 (1980); 12 Charles A. Wright et al., Federal Practice and Procedure § 3068.2 , at 332 (2d ed. 1997).

A party must file written objections to a magistrate judge's order in a non-dispositive matter within 10 days after entry of the order. Fed. R. Civ. P. 72(a); D. Md. R. 301.5.a. A party similarly has 10 days from service to object to a magistrate judge's recommendations on dispositive matters. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). A failure to object to a magistrate judge's order in either a dispositive or a nondispositive matter waives further review. See, e.g., United States v. Benson, 523 F.3d 424, 428 (4th Cir. 2008); Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310, 316 (4th Cir. 2005); Wells v. Shriners Hosp., 109 F.3d 198, 199-200 (4th Cir. 1997); Sunview Condo. Ass'n v. Flexel Int'l, Ltd., 116 F.3d 962, 964-65 (1st Cir. 1997); Charter Oil Co. v. American Employers' Ins. Co., 69 F.3d 1160, 1171-72 (D.C. Cir. 1995).

This waiver rule further requires a party to do more than present a general objection. Instead, a party must object "'with sufficient specificity so as reasonably to alert the district court of the true ground for the objection.'" Benson, 523 F.3d at 428 (quoting United States v. Midgette, 478 F.3d 616, 622

(4th Cir. 2007)). The waiver doctrine thereby "preserves judicial resources and makes certain that appellate courts have well-formed records to review." Benson, 523 F.3d at 428.

2. In this case, ISN and Malkani waived their right to further review of the magistrate's fee award by failing to file objections to the award with the district court within the 10-day period specified by 28 U.S.C. § 636(b), Fed. R. Civ.. P. 72, D. Md. R. 301.5.a, and this Court's precedents. Whether the fee award is characterized as a decision on a non-dispositive matter or a recommendation on a dispositive matter, see Appellants' Br. 11-12, is irrelevant because the 10-day time limit for objecting, and waiver rule for a failure to object, apply in both situations. The district court was also correct in finding that the magistrate judge did not act on the consent of the parties pursuant to 28 U.S.C. § 636(c), because ISN and Malkani objected to the referral, SSA 91 n.3, contrary to their repeated assertions that no one objected. See Appellants' Br. 12, 22 & n.18, 23, 24-25, 30.

It is also irrelevant that the magistrate judge failed to mention the 10-day time limit for objecting in her fee award. Appellants' Br. 29, 30. Where parties are represented by counsel, notice of the time limit is unnecessary because "the Magistrates Act, the Federal Rules, and Fourth Circuit precedent provide[] more than sufficient notice." Wells, 109 F.3d at 200; see also Fed. R. Civ. P. 72(a) (for non-dispositive matters, "[a] party may not assign as error a defect in the order

not timely objected to"); Caidor v. Onondago County, 517 F.3d 601, 605 (2d Cir. 2008) (Fed. R. Civ. P. 72(a) provides sufficient notice to a pro se litigant). ISN and Malkani were represented by counsel and therefore cannot rely on the magistrate judge's failure to mention the 10-day time limit in her fee award.

Finally, ISN's and Malkani's earlier appeal of the magistrate judge's order to this Court does not excuse their failure to file timely objections in district court. The appeal was filed more than 10 days after the magistrate judge's decision and therefore would not have been timely if filed in district court. See JA 412. Moreover, the appeal was filed in the wrong tribunal. As this Court reasoned in refusing to accept a timely appeal filed in the wrong tribunal under the Black Lung Benefits Act, there is no basis "to disregard the clear language of statutes requiring that notices of appeal be filed within a certain period of time and in the office of a particular court." Adkins v. Director, Office of Workers' Compensation Programs, 889 F.2d 1360, 1363 (4th Cir. 1989). The appeal was also insufficient because it did not set out any objections with the specificity required by this Court's decisions. See Benson, 523 F.3d at 428; Midgette, 478 F.3d at 622; JA 412. Permitting a general appeal to the court of appeals to serve as the functional equivalent of specific objections to the district court would defeat the purpose of the waiver doctrine of preserving judicial resources and

making sure that the court of appeals has a well-formed record to review. Benson, 523 F.3d at 428.

II. IF THE COURT REVIEWS THE DISTRICT COURT'S ADOPTION OF THE MAGISTRATE JUDGE'S AWARD, IT SHOULD AFFIRM THE DISTRICT COURT

A. Standard of review

Because ISN and Malkani failed to raise their objections to the magistrate judge's fee award in a timely manner, this Court's review, if any, is limited to plain error. See Celotex Corp. v. Rapid Am. Corp. (In re Celotex Corp.), 124 F.3d 619, 630-31 (4th Cir. 1997). If the objections were timely, the Court would review the district court's adoption of the magistrate judge's decision as a grant of equitable relief, reviewable for abuse of discretion, with fact questions reviewed for clear error and issues of law reviewed de novo. Dixon v. Edwards, 290 F.3d 699, 710 (4th Cir. 2002); see also Johannssen v. District No. 1 - Pac. Coast Dist., MEBA Pension Plan, 292 F.3d 159, 178 (4th Cir. 2002) (applying a similar standard of review to an award of attorney's fees).

B. There is no plain error in the district court's decision

In Celotex, 124 F.3d at 631, this Court held that in the civil context an appellant who has forfeited an issue by not raising it below "at a minimum" must satisfy the requirements for plain error applicable in criminal cases under Fed. R. Crim. P. 52(b) to obtain appellate review. In criminal cases, a party claiming

plain error must demonstrate, among other things, that a legal rule was violated during the district court proceedings, that the error was obvious and clear under current law, and that it seriously affected the fairness, integrity, or public reputation of the judicial proceedings. Benson, 523 F.3d at 429-34. ISN and Malkani fail to meet any of these requirements.

ISN and Malkani fail to establish that the district court committed any legal error. They complain that the district court did not review the magistrate judge's decision, Appellants' Br. 17-18, but the district court expressly stated that it "has reviewed that report." JA 473. ISN and Malkani also complain that the magistrate judge failed to apply the de novo standard of review that district courts are required to apply to a magistrate judge's recommendation on a dispositive pretrial motion and failed to review the underlying transcript and record. Appellants' Br. 19-21. De novo review applies, however, only to timely filed objections. See, e.g., Benson, 523 F.3d at 428-29. There was also no hearing and therefore no need for a transcript before the magistrate judge, and the district court specifically asked for and received briefs from the parties on whether to affirm the magistrate judge's decision. See JA 432-65. Given the presumption that the district court conducted the required review of the magistrate judge's report, see, e.g., Northington v. Marin, 102 F.3d 1564, 1570 (10th Cir. 1996); Jones v. Pillow, 47 F.3d 251, 252-53 (8th Cir. 1995), and the failure by ISN and

Malkani to identify anything material that was not in the magistrate judge's report and the parties' briefs to the district court that the district court should have reviewed, there is no basis for this Court to conclude that the district court erred (much less "plainly" erred) by failing to conduct an adequate review of the magistrate judge's report and record.[3]

Similarly, the district court made no error in adopting the magistrate's fee award without modification. See Appellants' Br. 32-45. As discussed infra, the magistrate judge reasonably explained why Clark should receive the awarded fees and expenses for preparing for and attending depositions requested by Malkani and ISN; preparing for and attending the trial on plan losses; and paying outside counsel fees and for ongoing plan administration. The district court therefore reasonably adopted the recommendation without modification.

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[3] ISN and Malkani mistakenly rely on cases where parties timely objected to a magistrate judge's recommendation and circumstances indicated that the district court had not reviewed the recommendation de novo when required to do so or had not reviewed such things as a transcript or testimony before the magistrate judge. See Appellants' Br. 19-20 (citing Wimmer v. Cook, 774 F.2d 68, 76 (4th Cir. 1985); Summers v. Utah, 927 F.2d 1165, 1167 (10th Cir. 1991); Hernandez v. Estelle, 711 F.2d 619, 620 (5th Cir. 1983); Coolspring Stone Supply, Inc. v. American States Life Ins. Co., 10 F.3d 144, 147 (3d Cir. 1993); Branch v. Martin, 886 F.2d 1043, 1046 (8th Cir. 1989); United States v. Remsing, 874 F.2d 614, 618 (9th Cir. 1989); Hill v. Duriron Co., 656 F.2d 1208, 1215 (6th Cir. 1981); Campbell v. United States Dist. Court, 501 F.2d 196, 206-07 (9th Cir. 1974)). Those cases are inapposite because ISN and Malkani were not entitled to de novo review and there was no need in this case for the district court to review a transcript or record materials other than those submitted to the district court.

In any event, even if the district court had erred in adopting the magistrate judge's recommendation, the error is certainly not "obvious and clear under current law." Benton, 523 F.3d at 433 (citations and internal quotation marks omitted). Instead, as discussed infra, requiring a breaching fiduciary to pay the fees and expenses caused by its breach is well-supported by existing law. Nor can any alleged error be said to "'seriously affect the fairness, integrity or public reputation of judicial proceedings.'" Benton, 523 F.3d at 434. ISN and Malkani created the need for an independent fiduciary to incur substantial fees and expenses through their misconduct, refusal to cooperate, and continuing resistance to the district court's orders. The magistrate judge gave ISN and Malkani a full and fair opportunity to dispute the amount of the fees, and issued a thorough decision discussing their objections and accepting some of them. See JA 375-410. In these circumstances, any error in the district court's adoption of the magistrate judge's decision will not seriously affect the fairness, integrity, or public reputation of judicial proceedings.

C. The district court acted within its discretion in adopting the magistrate judge's decision without modification

The Secretary's primary interest in this case is to ensure that independent fiduciaries are adequately compensated for their services. Contrary to ISN's and Malkani's understanding, see Appellants Br. 8 n.6, 10 n.10, the Secretary cannot represent an independent fiduciary, such as Clark, during litigation against

former fiduciaries, such as ISN and Malkani. The Secretary has no authority to represent other parties in ERISA litigation, and her interests diverge from the interests of private parties because she is charged with enforcing ERISA's requirements in the public interest. See Wilmington Shipping Co. v. New England Life Ins. Co., 496 F.3d 326, 340 (4th Cir. 2007), and cases cited. As a fiduciary, Clark was charged with acting solely in the interest of participants and beneficiaries, with a high degree of prudence, and in accordance with governing plan documents. See 29 U.S.C. § 1104(a)(1). As with other independent fiduciaries, Clark was therefore subject to suit by the Secretary or by private parties such as plan participants and beneficiaries for breaches of its fiduciary duties.

Thus, to the extent the Court reaches the merits of the fee award in this case, it should uphold the award. As discussed below, requiring defendants who are removed from their positions as fiduciaries to pay the fees and expenses of an independent fiduciary is authorized by ERISA and within a district court's discretion. The award in this case is also within the district court's discretion.

1. ERISA authorizes a court order requiring defendants to pay an independent fiduciary's fees and expenses

A fiduciary who violates ERISA is "personally liable to make good to [the] plan any losses to the plan resulting from each such breach," and is "subject to such other equitable or remedial relief as the court may deem appropriate,

including removal of such fiduciary." 29 U.S.C. § 1109(a). The provision imposing personal liability for plan losses aims to put the plan in the position it would have been in but for the breach of fiduciary duty. See, e.g., Martin v. Feilen, 965 F.2d 660, 671 (8th Cir. 1992); Donovan v. Bierwirth, 754 F.2d 1049, 1056 (2d Cir. 1985); Eaves v. Penn, 587 F.2d 453, 462 (10th Cir. 1978). The provision authorizing appropriate equitable or remedial relief allows a court to appoint an independent fiduciary after removing a breaching fiduciary. See DelGrosso v. Spang & Co., 769 F.2d 928, 938 (3d Cir. 1985) (directing the appointment of an independent fiduciary to decide whether to terminate plan following fiduciary breach); Katsaros v. Cody, 744 F.2d 270, 281 (2d Cir. 1984) (upholding appointment of asset and fund managers as "permissible and appropriate").

Read together, a court's authority to appoint an independent fiduciary and to require a breaching fiduciary to pay for plan losses resulting from the breach allows a court to order a breaching fiduciary to pay the fees and expenses of an independent fiduciary whose appointment results from the breach. As this Court recognized, removal of a breaching fiduciary "imposes significant costs on plans, which must undergo an inevitable period of transition as a new fiduciary familiarizes itself with the plan's provisions." Malkani, 452 F.3d at 294. Because a plan would not have incurred those costs but for the fiduciary's breach

and removal, the breaching fiduciary rather than the plan should pay for those costs. To hold otherwise would force participants to suffer losses twice as a result of the fiduciary's breaches.

Moreover, an independent fiduciary may incur additional costs trying to remedy a fiduciary breach. In this case, for example, the breaches involved the failure of ISN and Malkani to pay required plan contributions from 1995 through 2003. Malkani, 452 F.3d at 292. Clark had to undertake a detailed analysis of historical plan data beginning in 1982 and make corrections to determine the extent to which required contributions were not made. See JA 202-04 (Clark's project approach, Phase I). It is appropriate to charge ISN and Malkani with these costs just as it is appropriate to charge a common law trustee with the costs of an accounting required by the trustee's failure to make and preserve proper records. See Restatement (Second) of Trusts § 172 cmt. b (1959); George G. Bogert & George T. Bogert, The Law of Trusts and Trustees § 962, at 23 (1983).

2. The district court acted within its discretion in requiring ISN and Malkani to pay for the challenged expenditures

In deciding whether the district court acted within its discretion in awarding the challenged fees to Clark, this Court should ensure that fees are set at a level appropriate to ensure that qualified persons accept appointments as independent fiduciaries. Cf. Newton v. Consol. Gas Co., 259 U.S. 101, 105 (1922) (compensation for special masters should generally be higher than the rate

prescribed for judicial officers performing similar duties "to secure ability and experience in an exacting and temporary employment which often seriously interferes with other undertakings"). Ensuring that qualified persons accept appointments as independent fiduciaries is important because of the important role, discussed above, that independent fiduciaries play in protecting plan participants and beneficiaries after former fiduciaries have been removed for misconduct.

In reviewing a fee award to an independent fiduciary, the Court should also consider that the independent fiduciary is subject to ERISA's stringent fiduciary requirements. See Malkani, 452 F.3d at 293-94. An independent fiduciary may therefore "exercise special care to conduct a thorough factual and legal investigation," and a court should consider such special care in deciding whether an independent fiduciary's actions were necessary and expenses reasonable. Chao v. Current Dev. Corp., No. 03 C 1792, 2007 WL 2484338, *2 (N.D. Ill. Aug. 27, 2007), dismissed in part and aff'd in part on other grounds, 557 F.3d 772 (7th Cir. 2009).

Under these standards, ISN and Malkani present no good reasons to upset the district court's award. Cf. Securities and Exch. Comm'n v. First Sec. Co., 528 F.2d 449, 451 (7th Cir. 1976) (giving "great weight" to position of Securities and Exchange Commission concerning fees in securities law receiverships). Clark

has not sought reimbursement for extra time caused by inadequate records, repeated plan amendments, and unreliable data provided by ISN where such work was covered by its retainer. See JA 41, 43-48. The district court reasonably adopted a magistrate judge's award that explains why Malkani and ISN should pay additional fees and expenses incurred by Clark in preparing for and attending depositions requested by Malkani and ISN; preparing for and attending the trial on plan losses; and paying outside counsel's fees and for ongoing plan administration.

(a) Preparing for and attending depositions. The district court adopted the magistrate judge's award to Clark of $39,050 in fees and expenses in connection with two depositions requested by ISN and Malkani. JA 388-93, 473. ISN and Malkani argue that the entire award is improper because Clark sent a former employee rather than a current employee to one of the depositions, the work cannot be construed as preparing for or delivering testimony in any legal proceeding, the district court failed to approve Clark's fee structure and determine a reasonable hourly rate, and the magistrate judge never acted on her conclusions concerning Clark's justifications and billing judgment. Appellant's Br. 35-37.

The district court reasonably adopted the magistrate judge's determination that Clark appropriately sent a former employee because the former employee had the most complete knowledge of Clark's work and because the costs would

likely have been higher if Clark had sent a current employee. JA 389-90 & n.22. The depositions also occurred in a legal proceeding because ISN and Malkani requested the depositions as part of their defense on the question of plan losses in the Secretary's lawsuit. See JA 64. The district court also reasonably adopted the magistrate judge's determination that Clark's work was necessary because ISN and Malkani had requested a large amount of documents and testimony relating to ten broad subject areas. JA 390; see JA 64-65 (subpoena); cf. United States v. Krizek, 111 F.3d 934, 943 (D.C. Cir. 1997) (rejecting "contention that a litigant should not be billed for time spent considering irrelevant evidence when the evidence was presented by the complaining party"). Contrary to ISN's and Malkani's assertions, the magistrate judge acted on her conclusions concerning Clark's justifications and billing judgment because she reduced Clark's request by more than 10%. See JA 393. The district court similarly approved Clark's fee structure and determined a reasonable hourly rate when it rejected ISN's and Malkani's motion to reconsider the appointment of Clark, see JA 38E, ordered ISN and Malkani to pay the costs of the deposition, JA 38H, and adopted the magistrate judge's decision on those issues. See JA 388-93.

(b) Trial preparation and attendance. The district court adopted the magistrate judge's award to Clark of $50,812 of the $62,110 it requested for preparing for and attending the three-day trial on plan losses. JA 393-98.

Although ISN and Malkani argue that Clark did not establish the necessity or reasonableness of its work or exactly what its employees did, Appellants' Br. 37-38, the magistrate judge reasonably considered the necessity and reasonableness of Clark's work in reducing the amount Clark requested by almost 18% . JA 394-98. ISN and Malkani complain that the magistrate judge relied on their behavior as a reason against adopting a potentially greater reduction in Clark's fees, Appellants' Br. 38, but the magistrate judge did so not to punish ISN and Malkani but to ensure that Clark was fully compensated. See JA 397 & n.37. ISN and Malkani also incorrectly assert that the Secretary requested Clark employees to be available as "observers" at the trial, Appellants' Br. 37, when the Secretary in fact requested at least two Clark employees to testify "as to the source of all documents used or relied upon, what information was learned from the documents, what was done with the documents and information, how the historical reconciliation was performed and the results of the historical reconciliation." JA 75.

(c) Clark's fees for outside counsel. The district court adopted the magistrate judge's award to Clark of $147,644 for the fees and expenses of outside counsel, a 25% reduction of the amount requested. JA 404. ISN and Malkani argue that the use of outside counsel was unnecessary for a garden variety pension plan with very small assets and participants, and that the fees

charged were unreasonable. Appellants' Br. 39-41. The magistrate judge reasonably concluded that Clark's use of outside counsel was appropriate because Clark had disclosed its intent to use outside counsel and ISN and Malkani had failed to persuade the district court that their proposed alternative of in-house counsel at $320 an hour was preferable. See JA 377-79 & n.7. Outside counsel was also appropriate because the case was not a garden variety pension plan with very small assets and participants. Instead, it was a plan that had applied to 1560 employees over a 20 year period, JA 43, and had been badly mismanaged by former fiduciaries who maintained control of company records and were in litigation with the Secretary and uncooperative with Clark, which led to more litigation. See JA 38F-38I (district court orders for ISN and Malkani to produce documents and pay Clark's fees). The magistrate judge also reasonably explained why she determined that the fees awarded were reasonable. JA 400-04.

(d) Annual fee for ongoing fiduciary services. The district court adopted the magistrate judge's conclusion that Clark is entitled to a flat fee of $60,000 per year for ongoing services to the ISN plans in 2003, 2004, 2005, and 2006. JA 408. ISN and Malkani argue that Clark was required to itemize its costs because Clark's fee proposal said that Clark's annual fees would not exceed $60,000. Appellants' Br. 42-45. The magistrate judge reasonably explained that itemization was not required because the proposal said that itemization was not

required; that the $60,000 was a flat fee rather than a cap on variable, itemized fees because it was to be paid in advance on the first day of the plan year; and that such payments were consistent with industry custom and Clark's practice. JA 405-07. Furthermore, ISN and Malkani did not rebut Clark's evidence concerning industry custom of charging a flat fee. JA 407.

III. THE DISTRICT COURT ACTED WITHIN ITS DISCRETION BY AUTHORIZING THE REPLACEMENT FIDUCIARY TO TERMINATE ISN'S PENSION PLAN

A. Standard of review

The district court's order authorizing the replacement fiduciary to terminate ISN's pension plan grants equitable relief and is therefore reviewable for abuse of discretion, with fact questions reviewed for clear error and issues of law reviewed de novo. See Dixon, 290 F.3d at 710.

B. The district court had authority under ERISA and properly exercised it

In an ERISA action by the Secretary, a court has authority to award appropriate equitable relief to redress ERISA violations and enforce ERISA's requirements. 29 U.S.C. §§ 1109(a), 1132(a)(2), 1132(a)(5). This includes "broad equitable power to implement [the court's] remedial decrees." DelGrosso, 769 F.2d at 937. Such power includes, where necessary, an order "that an independent [fiduciary] be appointed to determine whether to terminate the Plan." Id. at 938; see also Del Grosso v. Spang & Co., 776 F. Supp. 1065, 1066-70

(W.D. Pa. 1991) (holding that independent administrator could terminate plan despite employer's desire to continue the plan), aff'd, 968 F.2d 12 (3d Cir. 1992). This authority is consistent with the common law of trusts, which recognizes a court's authority to order the termination of a trust "[i]f appropriate to the circumstances prompting the court action, and to the purposes and other circumstances of the trust." Restatement (Third) of Trusts § 66 cmt. b at 493 (2003); see also Restatement (Second) of Trusts § 336, at 157 (1959).

The district court acted well within its discretion in authorizing the replacement fiduciary here to terminate ISN's pension plan. Clark had reported to the court that 302 of the plan's 309 participants were inactive. SA 47. The Secretary had reported that ISN treated the plan as if it were terminated by never cooperating with Clark absent court intervention, and by resisting such things as providing necessary information to Clark, making mandatory plan contributions, and paying Clark. SSA 105-06. Clark had reported that, as a result of personnel and business changes, it lacked expertise to continue as the independent fiduciary and was "under extraordinary time pressure to withdraw" by December 31, 2009. SA 9, 93. The Secretary had searched for a replacement fiduciary and found no one willing to take the job if the plan was ongoing, given ISN's history of noncooperation and failure to pay Clark's fees. SA 120. Allowing the replacement fiduciary to terminate the plan was the only realistic option. Cf.

Solis v. Vigilance, Inc., No. C 08-05083 JW, 2009 WL 2031767, *3 (N.D. Cal. July 9, 2009) (removing employer-fiduciaries who abandoned their plan and authorizing independent fiduciary to terminate plan); Chao v. Wagner, No. CIV.A.1:07-CV1259JOF, 2009 WL 102220, *3 (N.D. Ga. Jan. 13, 2009) (same).

ISN and Malkani do not dispute any of these facts or give any reason why the plan should continue. Their only argument is that ERISA does not allow the district court to authorize termination of the plan unless the requirements of 29 U.S.C. § 1341 are met. Supp. Br. of Appellants 11-12. Section 1341 is completely inapposite. It sets out a procedure for termination of a single employer defined benefit pension plan. See 29 U.S.C. § 1321 (coverage of subchapter III of ERISA, 29 U.S.C. § 1301 et seq.). ISN's pension plan is "a defined contribution plan," Malkani, 452 F.3d at 291, and therefore not covered by Section 1341. See 29 U.S.C. § 1321(b)(1) (individual account plans are not covered); 29 U.S.C. § 1002(34) (individual account plan is a defined contribution plan). And even if Section 1341 were relevant, it would not have prevented the district court from allowing the independent fiduciary to terminate the plan. The fiduciary would simply have had to follow the procedures in Section 1341 in carrying out the termination, as was the case with the termination of the defined benefit plan in DelGrosso.

IV. CHALLENGES TO THE DISTRICT COURT'S REFUSAL TO STAY THE MONETARY PORTIONS OF ITS ORDER AUTHORIZING THE REPLACEMENT FIDUCIARY TO TERMINATE THE PLAN ARE MOOT AND MERITLESS

A. Standard of review

This Court decides de novo whether challenges to a district court's refusal to stay monetary portions of its order are moot. On the merits, the Court reviews legal conclusions de novo but accepts the district court's interpretation of the district court's own order so long as it is reasonable. See In re Grand Jury Subpoena (T-112), 597 F.3d 189, 202 (4th Cir. 2010).

B. The challenges are moot because ISN and Malkani complied with the order without asking this Court for a stay

In Koger v. United States, 755 F.2d 1094 (4th Cir. 1985), this Court dismissed as moot an appeal by taxpayers from a dismissal of their lawsuit to enjoin collection of income tax deficiencies. The Court reasoned that the appeal was moot because the taxpayers had fully paid the income tax deficiencies while the appeal was pending. Id. at 1096. The Court rejected the taxpayers' argument that they were forced to pay because the IRS had levied on their home and property, explaining that they could have sought a stay under Fed. R. Civ. P. 62 and Fed. R. App. P. 8(a). 755 F.2d at 1098. This Court has similarly dismissed as moot appeals challenging an authorized sale of property to a bona fide

purchaser when the appellant failed to obtain a stay and the sale took place while the appeal was pending. See, e.g., National Homeowners Sales Serv. Corp. v. Savage-Fogarty Cos., Inc. (In re National Homeowners Sales Serv. Corp.), 554 F.2d 636, 637 (4th Cir. 1977); A & H Holding Corp. v. O'Donnell (In re Abingdon Realty Corp.), 530 F.2d 588, 589-90 (4th Cir. 1976). The Court noted that this rule applies whether or not the purchaser knows of the pendency of the appeal. National Homeowners, 554 F.2d at 637; A & H Holding, 530 F.2d at 590.

The rationale of these cases applies here. The district court denied ISN's and Malkani's request for a stay, and they failed to seek relief in this Court under Fed. R. App. P. 8(a)(2). They paid the replacement fiduciary, SA 192-93, who is not a party to this appeal and is in an analogous position to a bona fide purchaser who is entitled to rely on the court order authorizing the payment. Their failure to ask this Court for a stay and their payment to the replacement fiduciary have mooted their challenge to the district court's decision not to stay the payment portion of its order.

C. The challenges are meritless because the district court reasonably construed its order to grant an injunctive-type remedy

Even if ISN and Malkani had not mooted their challenge to the district court's January 20, 2010, order, the challenge should be rejected because ISN and Malkani were not entitled to a stay. Under Fed. R. Civ. P. 62(d), an appellant

"may obtain a stay by supersedeas bond, except in an action described in Rule 62(a)(1) or (2), i.e., "an interlocutory or final judgment in an action for an injunction or a receivership" or a judgment that directs an accounting in an action for patent infringement. Fed. R. Civ. P. 62(a)(1), (2). The district court determined in its January 20, 2010 order that the court's December 16, 2009 order requiring prepayment of the successor fiduciary was an "injunctive type" remedy under Fed. R. Civ. P. 62(a)(1). SA 186. Because that determination is a reasonable reading of the December 16, 2009 order and consistent with the relevant law, the filing of a bond by ISN and Malkani was insufficient to stay the order.[4]

As the district court recognized, SA 185, the purpose of filing a bond is to "protect[] the prevailing plaintiff from the risk of a later uncollectible judgment and [to] compensate[] him for delay in the entry of the final judgment." NLRB v. Westphal, 859 F.2d 818, 819 (9th Cir. 1988). Thus, filing a bond entitles an

[4] The district court's December 16, 2009 order could also qualify as an order appointing a receiver under Fed. R. Civ. P. 62(a)(1). A receiver is a disinterested person appointed by a court for the protection or collection of property that is the subject of diverse claims. Black's Law Dictionary 1383 (9th ed. 2009); see, e.g., Powell v. Maryland Trust Co., 125 F.2d 260, 271 (4th Cir. 1942). The successor fiduciary met these requirements, although he was also subject to ERISA's requirements. It does not matter that he was appointed as a successor fiduciary because the label is not determinative of status as a receiver. See, e.g., In re Pressman-Gutman Co., 459 F.3d 383, 393 (3d Cir. 2006); Piambino v. Bailey, 610 F.2d 1306, 1327 (5th Cir. 1980). Because the court's order is reasonably viewed as an injunction, it is unnecessary to decide whether it should also be treated as an order appointing a receiver.

appellant to a stay only where the judgment being appealed is a money judgment or its equivalent. See Hebert v. Exxon Corp., 953 F.2d 936, 938 (5th Cir. 1992); Westphal, 859 F.2d at 819; Donovan v. Fall River Foundry Co., 696 F.2d 524, 526 (7th Cir. 1982). Filing a bond does not stay orders that are not money judgments or their equivalents, such as orders to comply with subpoenas, Westphal, 859 F.2d at 819; Fall River, 696 F.2d at 526, or judgments in actions for an injunction or receivership under Fed. R. Civ. P. 62(a)(1).

Although Fed. R. Civ. P. 62(a)(1) does not define when an order is considered a judgment in an action for an injunction, the history of the Rule shows that the relevant injunctions are those that are appealable under what is now 28 U.S.C. § 1292(a)(1). See Fed. R. Civ. P. 62, advisory committee note to 1937 adoption of subdiv. (a); 28 U.S.C. § 227 (1940). Thus, the district court correctly looked to a definition of injunction used under 28 U.S.C. § 1292(a)(1), a definition that includes orders "directed to a party, enforceable by contempt, and designed to accord or protect some or all of the substantive relief sought by a complaint in more than temporary fashion." SA 186 (quoting United States v. Kaley, 579 F.3d 1246, 1252 (11th Cir. 2009), and 16 Charles A. Wright et al., Federal Practice and Procedure § 3922, at 65 (2d ed. 1996) (internal quotation marks omitted)).

Consistent with this authority, the district court reasonably construed its December 16, 2009, order to be an injunctive-type order. The order grants injunctive relief by removing Clark as the independent fiduciary and appointing a successor fiduciary. The portion of the order requiring ISN and Malkani to pay the successor fiduciary's fees is an integral part of the injunctive relief because Clark could not be removed until the successor was appointed and the successor could not be appointed until he received payment of his fees. The order to pay the successor is therefore injunctive by itself, like an order for an employer to pay withdrawal liability to a pension fund, see Central States, Se. & Sw. Areas Pension Fund v. Wintz Props., Inc., 155 F.3d 868, 873-74 (7th Cir. 1998), or injunctive because it is integrally related to the injunctive orders concerning Clark's removal and the successor's appointment. See United States v. Bedford Assocs., 618 F.2d 904, 916 (2d Cir. 1980) (order for tenant to pay rent and utilities as a condition prohibiting termination of a lease is integrally related to the prohibition); cf. In re Capital W. Investors, 180 B.R. 240, 243-44 (N.D. Cal. 1995) (filing a bond does not result in a stay under Fed. R. Civ. P. 62(d) where monetary parts of a bankruptcy court order confirming a plan of reorganization cannot be stayed without affecting other parts of the order).

Moreover, as the district court recognized, the purpose of allowing a stay based on filing a bond does not apply here. That purpose, as discussed above, is

to protect a money judgment in favor of a prevailing party. A bond here would not protect Clark or the Secretary because it "neither secures [the successor's] appointment nor releases Clark as Plan fiduciary." SA 186. Instead, allowing a bond to stay the payment of the successor's fees would effectively grant ISN and Malkani a stay of the order relieving Clark of its responsibilities and appointing a successor without having ISN and Malkani address the factors regulating issuance of a stay, i.e., probability of success, irreparable harm, public interest, and injury to other parties. See Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

ISN and Malkani do not discuss the purpose of filing a bond, much less show how their filing a bond could meet that purpose in this case. Instead, they rely on Dewey v. Reynolds Metals Co., 304 F. Supp. 1116, 1118 (W.D. Mich. 1969), rev'd on other grounds, 429 F.2d 324 (6th Cir. 1970), which stayed a monetary part of an order (a back pay award) but not the non-monetary part (order to reinstate an employee). Appellants' Supp. Br. 9. Dewey is inapposite because the district court in that case could reasonably conclude that the monetary and non-monetary parts of its order were separable and that posting a bond protected the employee's back pay award. The order to pay the successor fiduciary in this case was not separable from other injunctive parts of the order, and posting a bond would not protect Clark or the Secretary.

ISN and Malkani also incorrectly state that "none of the indicia of an injunction remedy were present (i.e. irreparable harm, likelihood of success on the merits)" in the district court's December 16, 2009 order. Appellants' Supp. Br. 10. To the extent that ISN and Malkani are arguing that the order had to expressly discuss irreparable harm and likelihood of success on the merits, they are incorrect. See Wintz Props., 155 F.3d at 874. To the extent they are arguing that the Secretary and Clark failed to show irreparable harm or likelihood of success, they are also incorrect. Clark presented evidence that it would be irreparably harmed by informing the district court that it was "under extraordinary time pressure to withdraw as independent fiduciary, as the business relationship which is allowing it to continue serving as independent fiduciary ends on December 31, 2009." SA 93. The Secretary established that she should succeed on the merits by showing that ERISA requires a plan to have a fiduciary, see 29 U.S.C. § 1102(a), that ISN and Malkani were treating the plan as if it were terminated, and that no fiduciary would accept appointment without pre-payment of fees and authority to terminate the plan. SA 120; SSA 105-06, 113-28. ISN and Malkani presented no contrary evidence. In these circumstances, the district court properly denied their motion for a stay.

CONCLUSION

The district court's orders should be affirmed.

Respectfully submitted.

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REQUEST FOR ORAL ARGUMENT

Counsel requests oral argument to assist the Court in answering questions about the procedural history of this case and the use of independent fiduciaries under ERISA.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7), I hereby certify that the Brief for the Secretary of Labor is proportionally spaced in 14-point type and contains 10,794 words as determined by the Microsoft Word software program used to prepare the brief.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3d day of May, 2010, I electronically filed the Brief for the Secretary of Labor with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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