QUESTIONS PRESENTED

1) Whether the Due Process Clause is violated when a trial court denies a brief continuance to a civil litigant who has lost counsel, where the denial forces a litigant to proceed alone in a complex trial, and where the court of appeals evaluates prejudice through a retrospective, outcome-based test—contrary to this Court's prospective fairness standard in *Ungar* and *Slappy*, its structural-error doctrine in *Cronic*, and modern due-process requirements ensuring meaningful participation by individuals, especially those with disabilities?

LIST OF PARTIES

All parties to the proceeding are name in the caption of the case before the Court.

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On May 7, 2025, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") issued its judgment and opinion affirming the judgment of the United States Bankruptcy Court, District of Oregon ("Bankruptcy Court"). *See Thomas Byron Cattell v. Victoria Deeks et. al.*, No. 24-2857 (9th Cir. May 7, 2025)(unpublished). A copy of that opinion is attached as Exhibit A to this Petition. The United States Court of Appeals for the Ninth Circuit then denied Petitioner's Motion for Rehearing and Rehearing en banc on June 16, 2025. A copy of that denial is attached as Exhibit C to this Petition.

The Bankruptcy Court issued its opinion and judgment on October 11, 2022. *See Thomas Byron Cattell v. Victoria Deeks et. al.*, Adv. No. 19-03123-dwh (Bankr. D. Or. October 11, 2022)(unpublished). A copy of that denial is attached as Exhibit B to this Petition.Although the Ninth Circuit hears cases on appeal from United States Bankruptcy Appellate Panel of the Ninth Circuit ("BAP") *de novo* and the Ninth Circuit does consider the judgement and opinion of the BAP, the BAP affirmed the Bankruptcy Court on March 29, 2024. *See Thomas Byron Cattell v. Victoria Deeks et. al.*, No. OR-22-1214-SLB (9th Cir. BAP March 29, 2024)(unpublished).

JURISDICTION

On May 7, 2025, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") issued its judgment and opinion affirming the judgment of the United States Bankruptcy Court, District of Oregon ("Bankruptcy Court"). *See Thomas Byron Cattell v.*

Victoria Deeks et. al., No. 24-2857 (9th Cir. May 7, 2025)(unpublished). The United States Court of Appeals for the Ninth Circuit then denied Petitioner's Motion for Rehearing and Rehearing en banc on June 16, 2025. On September 5, 2025, Petitioner filed an Application for Extension of Time to File Petition of Writ of Certiorari (App. No. 25A273) which was granted by Justice Kagan on September 9, 2025, extending the time to file such writ until November 13, 2025. This petition is filed within the time allowed by extension.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTE AND REGULATIONS AT ISSUE

Due Process Clause of The U.S. Const. amend. XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS

On November 13, 2019, Petitioner, as debtor in bankruptcy, filed an adversary proceeding in the Bankruptcy Court. The adversary proceeding ("Adversary") sought to return Petitioner's life savings

to him tied up in real property that was part of a partnership with his ex-partner, Victoria Deeks ("Victoria"), who, along with her son Connor Deeks ("Connor"), a certified public accountant working for Price Waterhouse Coopers, successfully took control of Petitioner's property and locked him out of his own business and accounts. The complaint in the Adversary ("Complaint") had ten separate claims against various defendants, including both Deeks. The claims involved dissolving the partnership with Deeks, setting aside preferential and fraudulent transfers of Petitioner's real property, and financial abuse of Petitioner as a vulnerable person suffering from autism under State of Oregon law.

On July 2, 2021, after settling the pleadings, significant discovery and motion practice yielding hundreds of docket entries since filing of the Complaint, Petitioner's trial counsel filed an expedited motion to withdraw presumably related to the attorney's negligence regarding missing a discovery deadline, leaving Petitioner without counsel or needed discovery. Trial was set for a five-day trial beginning on December 7, 2021. Petitioner then searched for substitute bankruptcy adversary trial counsel throughout the State of Oregon, a small legal market, for counsel willing and able to go to review the entire case and go trial in a short timeframe.

On November 26, 2021, attorney Jesse London made a special appearance on behalf of Petitioner and moved the Bankruptcy Court to continue trial for a short amount of time until February 17, 2022, in order for Mr. London to fulfill his ethical duties to get up to speed and be prepared for trial. The Bankruptcy Court denied Petitioner's motion to continue on November 30, 2021. On December 6, 2021, just one day before trial started, the Bankruptcy Court denied

Petitioner's motion for stay the order denying continuance pending appeal, effectively mooting any appeal because there was not enough time to petition a higher court for a stay before trial began without Petitioner having an attorney.

Trial began on December 7, 2021, with Petitioner having no attorney. What would have been a five (5) day or less trial which would be done in a week, had Petitioner been allowed to have an attorney, turned into a fifteen (15) day trial not ending until March 28, 2022, more than a month after it would have ended, had the Bankruptcy Court granted Petitioner's motion to continue.

On October 11, 2022, the Bankruptcy Court entered final judgment against Petitioner and denied Petitioner's post-trial motions, including a motion for mistrial and a motion for a new trial based on the denial of counsel and Petitioner's mental-health disability, Aspergers autism. Judgment was entered the same day. Petitioner timely appealed.

On October 25, 2022, Petitioner timely filed a Notice of Appeal to the BAP as BAP No. OR-22-1214 ("BAP Appeal").

On March 29, 2024, after briefing and oral argument, the BAP affirmed the Bankruptcy Court. On April 29, 2024, Petitioner timely appealed to the United States Court of Appeals for the Ninth Circuit, which docketed the case as No. 24-2857 ("Ninth Circuit Appeal").

On May 7, 2025, a Ninth Circuit panel affirmed the BAP. The panel opinion (1) did not address Petitioner's autism diagnosis coupled with a lack of counsel during trial and its relevance to the prejudice analysis underlying the denial of the continuance; and (2) incorrectly applied the law by finding no abuse of discretion to grant a continuance before trial began by

analyzing whether prejudice existed *post-hac*, after trial had ended, rather than analyzing potential prejudice at the time when the motion was made.

B. STATEMENT OF THE RELEVANT FACTS

Petitioner Thomas Bryon Cattell is an autistic adult diagnosed with Asperger's Syndrome, a condition that substantially impairs his ability to process information, navigate social interactions, detect manipulation, and protect his own interests in adversarial settings. Before the events underlying this case, Mr. Cattell lived simply and independently as a fisherman, avoiding environments requiring complex social reasoning. He now works as a truck driver, in a field where he does not need to interact with others frequently. He used his life savings to purchase and improve a 40-acre property in rural Oregon, intending to build his permanent home there.

In 2013, Cattell met Victoria Deeks and her son, Connor, a sophisticated CPA. Connor represented to Cattell—explicitly invoking his professional expertise at PricewaterhouseCoopers—that he and his mother intended to "help" him manage the property and finances. Given his disability, Cattell fully trusted them. Instead, the Deeks family systematically took control of his property, displaced him from financial decisionmaking, and diminished his equity. By the time the relationship collapsed, the bulk of Cattell's lifetime savings and the value of his land had been diverted, encumbered, or lost.

The resulting adversary proceeding was complex: it involved partnership formation and dissolution, alleged fraudulent transfers, constructive trust theory, accounting disputes, and years of interwoven financial transactions. After extensive pretrial litigation, Cattell's attorney withdrew unexpectedly—with indications of professional fault—and left him

without representation shortly before trial. Cattell diligently sought counsel to the best of his ability given his disability and finally succeeded: on November 26, 2021, attorney London entered a limited appearance and explained to the bankruptcy court that he could competently serve as trial counsel if the court granted a modest continuance to prepare.

The bankruptcy court denied the request. It also denied a stay of that denial the day before trial began, ensuring that Cattell—an autistic litigant with no legal training—would be forced to try a multi-week adversary proceeding entirely *pro se*. Trial was held intermittently between December 7, 2021, and March 28, 2022, spanning fifteen trial days and hundreds of exhibits, with complex evidentiary objections, cross-examinations, and legal theories. The denial of counsel was not abstract: it was lived in real time.

The trial record reflects Cattell's confusion, cognitive overload, and severe emotional distress as result of his autism. Something that the Bankruptcy Court could, and in no way did, cure by continuing a gauntlet of a trial for Petitioner that should have stopped as soon as the Bankruptcy Court saw Petitioner's mental health condition in real time.

Petitioner repeatedly stated that he could not keep pace with evidentiary rules, procedural demands, or the defendants' coordinated litigation strategy. He struggled to introduce exhibits, formulate objections, or understand the court's instructions. The experience caused him tangible mental anguish, panic, and overwhelm—symptoms directly tied to his disability and exacerbated by being required to litigate alone against multiple represented parties. As the Ninth Circuit concurrence later observed, the trial was "fraught with traps and rules that led him astray,"

and the presentation of his case was sharply impaired as a result.

The consequences were devastating. Cattell lost the case. He lost the property he had spent his life improving. He lost the equity that constituted his life's savings. And he lost these things after being forced to proceed without the counsel he had retained and who stood ready to try the case with only a brief continuance.

These facts demonstrate prejudice in the constitutional sense. When a litigant with a recognized cognitive disability—one that makes him vulnerable to exploitation and unable to navigate complex social or legal environments—is compelled to conduct a multi-week trial alone, the fairness of the proceeding is compromised at its core. The harm is not measured merely in missing documents or technical missteps; it is the denial of a meaningful opportunity to be heard.

As discussed, *infra*, these facts represent precisely the form of prejudice this Court identified in *Ungar*, 376 U.S. at 589 ("a myopic insistence upon expeditiousness in the face of a justifiable request for delay"), and reaffirmed in *Morris*, 461 U.S. at 11–12. Civil litigants, no less than criminal defendants, are deprived of due process when a court insists on speed over fairness and thereby denies them a meaningful chance to present their case. *See Ungar*, 376 U.S. at 589; *Slappy*, 461 U.S. at 11–12.

C. BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES BANKRUPTCY COURT

The United States Bankruptcy Court for the District of Oregon had original jurisdiction under 28 U.S.C. § 1334(b), which grants federal district courts—and by reference, bankruptcy courts—jurisdiction over "all civil proceedings arising under title 11, or arising in

or related to cases under title 11." Pursuant to 28 U.S.C. § 157(a), the District of Oregon referred all bankruptcy matters to the bankruptcy court. The adversary proceeding below—concerning alleged fraudulent transfers, partnership interests, and claims affecting the administration of the bankruptcy estate—constituted a core proceeding under 28 U.S.C. § 157(b)(2), and thus the bankruptcy court possessed statutory authority to enter final judgment.

REASONS FOR GRANTING THE WRIT

A. INTRODUCTION

This case presents a recurring and nationally important constitutional question: What standard governs a trial court's denial of a continuance when the denial forces a civil litigant—especially one with a cognitive disability—to proceed to trial without counsel? Lower courts are deeply divided. Some circuits hold that no showing of prejudice is required when the denial undermines the basic fairness of the proceeding. Others require prejudice but assess it prospectively, consistent with *Ungar* and this Court's focus on the fairness of the process at the time of the denial. Still others apply a retrospective, outcome-based test requiring litigants to identify missing evidence after the trial has concluded. Courts also diverge on whether disability and cognitive vulnerability must be considered when evaluating whether a litigant can meaningfully participate in a complex civil trial. These incompatible frameworks produce materially different constitutional protections depending solely on geography.

This case illustrates each dimension of the split. The Ninth Circuit's binding precedent—*United States v. 2.61 Acres of Land*—requires a prospective assessment of prejudice. But the panel here misapplied that standard, effectively adopting the

minority retrospective approach used in the Fifth, Seventh, and Eleventh Circuits, and demanding that an autistic pro se litigant reconstruct specific missing testimony after a fifteen-day trial he was unable to navigate. That misapplication places the Ninth Circuit in direct conflict with *Ungar*, *Slappy*, *Cronic*, and *Goldberg*, all of which require courts to ensure fairness at the time of the decision, to avoid arbitrary insistence on speed, to treat structural impairments as inherently prejudicial, and to guarantee meaningful participation in judicial proceedings.

This case is an ideal vehicle for resolving these conflicts and restoring a coherent, nationally consistent due-process standard.

B. DUE PROCESS REQUIREMENT IN CIVIL CONTINUANCE CASES

The Ninth Circuit's decision conflicts with a long-established constitutional doctrine applied in civil litigation nationwide: denying a continuance violates the Due Process Clause when a court exhibits an ", a myopic insistence upon expeditiousness in the face of a justifiable request for delay" This rule, first articulated by this Court in *Ungar*, 376 U.S. 575, and reaffirmed in *Morris v. Slappy*, 461 U.S. 1 (1983), is not limited to criminal cases. Federal courts routinely apply it in civil contexts—including bankruptcy, habeas, administrative review, and ordinary federal civil litigation—because the constitutional guarantee of fundamental fairness does not depend on whether the litigant is a criminal defendant or a civil party.

1. The Constitutional Standard Originates in Due Process, Not the Sixth Amendment

Although *Slappy* was a criminal case, this Court did not create a new criminal-only right. Instead, the Court reaffirmed *Ungar*, a due-process decision,

which held that courts violate the Constitution when they deny a continuance through: "a myopic insistence upon expeditiousness in the face of a justifiable request for delay." *Ungar*, 376 U.S. at 589.

Slappy quoted and adopted that same due-process formulation. The animating principle—ensuring a fair opportunity to be heard—applies with equal force to civil litigants whose property interests, reputations, and legal rights are at stake.

Civil litigants have no Sixth Amendment right to counsel. But they do have a constitutional right not to be forced into trial under conditions that make a fair hearing impossible. The right is grounded in the Fifth Amendment in federal cases and the Fourteenth Amendment in state cases.

2. Federal Civil Courts Apply the *Slappy/Ungar* Standard Across Multiple Circuits

Dozens of civil decisions across the circuits apply the same constitutional test articulated in *Ungar* and reaffirmed in *Slappy*, recognizing that an arbitrary refusal to grant a continuance violates due process in civil litigation.

Civil courts adopting or applying this constitutional standard include:

• *Anderson*, 2002 U.S. Dist. LEXIS 28047—holding that denial of a civil continuance may constitute a constitutional violation when the trial judge exhibits an unreasoning and arbitrary insistence on expeditiousness.

• *Palmer*, 2022 U.S. Dist. LEXIS 149571—applying constitutional fairness principles derived from *Ungar*/*Slappy* to civil proceedings.

• *In re US Airways, Inc.*, 2011 Bankr. LEXIS 2279—a bankruptcy case explicitly invoking the *Ungar*/*Slappy* constitutional rule.

• *Webb*, 1982 U.S. Dist. LEXIS 9985—holding in a civil rights case that arbitrary denial of a continuance can deny the litigant a "fair trial."

• *Sampley*, 786 F.2d 610—a civil habeas case recognizing the due-process limits on denial of continuances.

• *Hopper*, 228 B.R. 216—bankruptcy appellate panel applying fundamental fairness standards to continuance denials.

These cases demonstrate a national consensus tied to this Court's precedent: the Constitution limits courts' power to force civil litigants into trial unprepared when a continuance is justified.

3. Civil Application of the *Slappy* Doctrine Is a Compatible Natural Extension, Not an Expansion

The Ninth Circuit panel in the case at bar treated *Slappy* as if it were a narrowly criminal holding. It is not and this Court should make that point clear to all circuits. Three features of the Supreme Court's jurisprudence confirm that civil courts correctly apply *Ungar*/*Slappy*:

(a) The foundational rule is grounded in general due process. The *Slappy* Court's citation and reliance on *Ungar*—a case about constitutional fairness in contempt proceedings—shows that the rule is not confined to criminal defendants.

(b) The right at issue is the opportunity to be heard—not the right to counsel. Civil litigants, particularly those proceeding *pro se* or with disabilities, require adequate time to prepare to ensure a meaningful opportunity to present evidence.

Fundamental fairness protects that opportunity categorically.

(c) Civil stakes may be severe. In bankruptcy proceedings—such as Petitioner's adversary trial—property rights, financial survival, and legal status are directly at issue. Civil litigants may suffer consequences as grave as, or graver than, many criminal defendants.

For these reasons, other circuits correctly recognize that the *Slappy/Ungar* constitutional fairness principle applies across both civil and criminal contexts.

4. The Ninth Circuit's Approach Conflicts With These Principles

The Ninth Circuit panel refused to examine whether denying Petitioner's continuance request at the time it was made deprived him of a meaningful opportunity to be heard. Instead, it applied a post-hoc prejudice test that looked only at whether Petitioner could prove outcome-determinative prejudice after months of complex trial proceedings in which he was unrepresented and struggling with autism.

That retrospective standard contradicts: (1) *Ungar*, which requires evaluation of the circumstances as they appeared to the trial court at the time, not after judgment; (2) Civil due-process decisions recognizing that forced unrepresented participation in complex proceedings is itself prejudicial; and (3) the large body of civil authority across numerous circuits applying *Slappy/Ungar*'s fairness standard to civil continuance denials.

5. This Case Exemplifies the Constitutional Harm the Due-Process Rule Forbids

Petitioner—a litigant with a documented autism diagnosis—requested a short continuance of ten

weeks so newly secured counsel could prepare for a multi-week, fact-intensive adversary trial involving partnership dissolution, fraudulent transfers, forensic accounting, and cross-border assets.

The Bankruptcy Court denied that request with no meaningful analysis, then denied a stay of that denial one day before trial, ensuring Petitioner would go to trial unrepresented. The result was a trial that lasted more than fifteen days, involved hundreds of exhibits, and ended with a sweeping judgment against the unrepresented autistic litigant.

This is the paradigmatic case in which "an unreasoning and arbitrary insistence upon expeditiousness" violated fundamental fairness.

C. CIRCUIT SPLIT

1. INTRODUCTION

This case presents an exceptional opportunity for the Court to harmonize and unify a set of deeply fractured constitutional standards that now vary widely across the circuits. Federal courts disagree sharply—and irreconcilably—on four foundational questions: (1) whether prejudice is required at all, (2) whether prejudice is assessed prospectively or retrospectively, (3) whether the analysis collapses into a forbidden harmless-error framework, and (4) whether disability and cognitive vulnerability are constitutionally relevant. The Ninth Circuit panel's decision stands at the extreme end of each divide. This inconsistency creates precisely the geographic disparity in the application of federal law that this Court can correct on review.

The Ninth Circuit's decision below—misapplying its own prospective standard and effectively adopting the most restrictive, retrospective approach in the country—further deepens these divisions. This case is therefore a clean and powerful vehicle for restoring

national uniformity, realigning lower-court doctrine with this Court's due-process precedents, and preventing the Constitution from meaning one thing in some regions of the country and something else entirely in others.

2. Circuits Are Split on the Foundational Question: Is Prejudice Required at All in a Due-Process Challenge to a Continuance Denial?

Some circuits hold that prejudice is not required when the denial of a continuance undermines the fundamental fairness of the proceeding. Under this approach, the question is structural: whether the denial itself—given the timing, the complexity of the case, or the loss of counsel—rendered the trial fundamentally unfair.

Circuits requiring no specific showing of prejudice include:

- Fourth Circuit – finding due-process violations based on unfairness of the proceeding as a whole, without requiring post-hoc evidentiary loss showings (e.g., *Sampley v. Attorney General*).
- Eighth Circuit – focusing on whether the denial "seriously impaired" the presentation of the case, not whether specific evidence was omitted.
- Tenth Circuit – similarly treating the loss of counsel or inability to prepare as inherently prejudicial.

These circuits recognize that the nature of the right—the opportunity to be heard—cannot depend on an unrepresented litigant's ability to identify technical omissions after the fact.

By contrast, the Ninth Circuit panel here took the opposite view: that a disabled, unrepresented litigant must identify specific evidence, witnesses, and objections that would have been presented had counsel been allowed to prepare. That requirement—

especially for an autistic *pro se* litigant—is incompatible with the approach adopted in many other circuits and with this Court's prospective fairness standard in *Ungar*.

3. Even Among Circuits That Require Prejudice, There Is a Deep Split on How Prejudice Must Be Evaluated: Prospective vs. Retrospective

(a) Prospective rule: prejudice is prospective, assessed at the moment of denial. Several circuits explicitly follow *Ungar*'s temporal focus: "What did the trial court know at the time it denied the continuance? Based on that evidence and how it weighed the evidence, was it unreasonable?" These courts examine: (1) the complexity of the case; (2) the litigant's ability to proceed; (3) the reasons for the withdrawal of counsel, and (4)the foreseeable impact of forcing the litigant to trial without counsel. Some examples are :

- Eighth Circuit – *Comcast of Ill. X*, 491 F.3d at 946 (court must consider harm the litigant "might suffer").
- Fourth Circuit – *Latham*, 492 F.2d 913 (adopting a forward-looking fairness inquiry).
- Ninth Circuit (historical rule) – *2.61 Acres of Land*, 791 F.2d at 671–72 ("prejudice" assessed in light of what was known when the continuance was denied).

(b) Retrospective rule: prejudice is retrospective, assessed *post-hac*, harmless error test. The Fifth Circuit, for example, repeatedly requires litigants to identify specific evidence they were unable to present, even when the denial of a continuance resulted in the absence of counsel. *See Stubblefield*, 74 F.3d at 995–96 (requiring a showing of "specific prejudice" and rejecting due-process challenge absent identification

of particular evidence lost); *German*, 486 F.3d at 854 (affirming denial because defendant failed to specify what evidence would have been introduced).

The Eleventh Circuit likewise demands a "clear showing of specific substantial prejudice," often requiring the litigant to specify omitted evidence or witnesses. *See Verderame*, 51 F.3d at 251–52 (requiring identification of specific testimony that would have been obtained); *Quiet Tech. DC-8, Inc.*, 326 F.3d at 1351–52 ([P]rejudice requires identification of particular evidence unavailable due to the denial.).

Some Fifth Circuit civil cases go even further by equating denial-of-continuance claims with harmless-error review, upholding denials unless the litigant can establish outcome-determinative prejudice. *See Walker*, 293 F.3d at 1039 (continuance denial upheld because plaintiff failed to show that the result would have been different).

A handful of Seventh Circuit cases similarly emphasize actual and substantial prejudice, often defined in outcome-based, retrospective terms. *See Sinclair*, 74 F.3d at 758 (must demonstrate that additional time would have changed the outcome).

These circuits treat the right to a fair opportunity to be heard as contingent on a litigant's ability—after trial—to identify defects in a record distorted precisely because counsel was absent.

(c) The Retrospective Rule Makes the Due-Process Standard Impossible to Satisfy and Swallows the Tests

Under the Fifth, Seventh, and Eleventh Circuit versions of the retrospective rule: (1) a litigant who performs poorly means that "no prejudice because the outcome was inevitable,"; (2) a litigant who performs moderately well means that "no prejudice because he

handled himself,"; and (3) a litigant who loses means "no prejudice because he cannot identify missing evidence." Therefore, there is no scenario in which a review for abuse of discretion can succeed, even if it violates due process.

Other circuits have explicitly recognized this. The Fourth Circuit held that requiring specific record defects would defeat the purpose of ensuring a fair opportunity to present one's case. *Sampley*, 786 F.2d at 613–14.

The Eighth Circuit BAP likewise recognizes that prejudice is inherent where the litigant's ability to prepare or present a case is structurally compromised. *Hopper*, 228 B.R. at 219–20.

(d) The Ninth Circuit's actual rule is prospective—but this panel misapplied its own rule, creating a de facto shift toward the "retrospective" camp.

The Ninth Circuit has long applied the same prospective fairness standard that the Eighth and Fourth Circuits use, and that this Court articulated in *Ungar*. Under *2.61 Acres*, the Ninth Circuit evaluates prejudice based on what the trial court knew *at the time* the continuance was denied, not on what the litigant can prove after the trial is over. The *2.61 Acres* factors require the court to examine the requested delay in context—including the complexity of the proceeding, the need for counsel, the reasons for the request, and whether denying the continuance creates a risk that the litigant will be unable to present the case fairly.

But the Panel here did not apply that rule. Instead, it required Petitioner—an autistic *pro se* litigant forced into a fifteen-day trial without counsel—to identify specific evidence he failed to introduce, and precise objections he failed to make, months after a cognitively overwhelming proceeding. This is true

even though the Bankruptcy court assumed prejudice existed. That is not the Ninth Circuit's test. It is a retrospective "missing evidence" standard found in a minority of circuits and squarely at odds with *Ungar, Slappy*, and *2.61 Acres* itself.

Judge Lee's concurrence captured this misalignment. He noted that under the *2.61 Acres* factors, "three of the four" favored Cattell, and that the trial was "fraught with traps and rules that led him astray." The trial court's denial of the continuance—given the autism diagnosis, the late loss of counsel, and the complexity of the case—was unfair when made, regardless of Petitioner's post-hoc ability to catalog technical omissions.

(e) Dangers of allowing the Ninth Circuit ruling and the circuit split on this issue. If left standing, the panel's misapplication will not remain an isolated error. Though unpublished, the decision already appears prominently in Lexis and could begin to circulate in briefing well beyond the Ninth Circuit. Its retrospective standard—requiring an unrepresented disabled litigant to prove missing evidence—will inevitably be cited as persuasive authority. Over time, this will shift Ninth Circuit law away from its long-standing prospective approach toward the minority retrospective rule, placing the Ninth Circuit in direct conflict with this Court's precedents and expanding the inter-circuit split.

The need for this Court's intervention is heightened by the fact that the bankruptcy court's unpublished memorandum decision in this very case has already been indexed in Lexis and appears as the first and most "relevant" nationwide result for searches involving "autism" with regard to continuances. *See Cattell v. Deeks (In re Cattell)* (*In re Cattell*), 19-33823-dwh13, Adversary Proceeding No. 19-03123-dwh

(Lead action), 2022 Bankr. LEXIS 2901 (Bankr. D. Or. Oct. 11, 2022). Allowing the Ninth Circuit's retrospective prejudice standard to stand—especially when the panel did not apply even its own prospective rule correctly—creates a serious risk that courts across the country will treat this case as persuasive authority, thereby spreading a doctrine that makes it virtually impossible for unrepresented or disabled civil litigants to secure relief.

In an era of heightened public skepticism toward governmental institutions, permitting unpublished, internally inconsistent decisions to shape due-process protections across geographic regions undermines public confidence and risks turning the constitutional standard into a hollow formality that "swallows" the test entirely. Uniformity is essential: a disabled civil litigant's right to a fair opportunity to be heard cannot be allowed to depend on the accident of appellate geography.

4. Some Courts Treat Denial of a Continuance as a Structural Fairness Issue, While Others Apply a Harmless-Error-Like Test

Several circuits (and this Court) treat the deprivation of counsel or meaningful preparation time as a structural due-process problem, not subject to a harmless-error or "identify the mistake" framework. Examples include: (1) the Fourth, Eighth, and Tenth Circuits examine whether the denial compromised the fairness of the overall hearing, not whether a litigant can later prove specific evidentiary prejudice; and (2) this Court's precedents—*Ungar, Slappy, Cronic, Evitts, Goldberg*—stress that structural fairness, not outcome speculation, governs due process.

By contrast, the Ninth Circuit panel applied the equivalent of a harmless-error test: because Petitioner

could not specify what evidence a lawyer would have introduced, the court deemed the denial harmless.

This method is incompatible with circuits treating the harm as structural and in conflict with this Court's decisions refusing to allow harmless-error analysis where the procedural fairness of the trial itself has been compromised.

5. Need for Uniformity

The lack of a uniform constitutional standard governing continuance denials—especially when the denial forces a disabled litigant to trial without counsel—raises profound concerns about public confidence in the judicial system. At a time of heightened distrust and uncertainty about governmental institutions, allowing the Ninth Circuit panel's decision in Cattell to stand would signal that the level of due-process protection available to a vulnerable civil litigant depends not on the Constitution but on where in the country one happens to live.

The Constitution cannot mean one thing for an autistic litigant in Oregon, another for similarly situated litigants in the Fourth or Eighth Circuits, and something else entirely for litigants in the Fifth or Eleventh Circuits. Geographic variability in fundamental fairness erodes the legitimacy of the judiciary itself.

Certiorari is warranted to restore harmony among the circuits, prevent unequal access to due-process protections across regions, and reaffirm that the Constitution offers the same procedural safeguards to all citizens—regardless of disability and regardless of where their cases arise.

D. IMPORTANT UNRESOLVED FEDERAL QUESTION AND CONFLICT WITH THIS COURT'S PRECEDENTS

The petition for a writ of certiorari should be granted. This case is an ideal vehicle to resolve important circuit splits and to correct misapplication of this Court's precedent in an important and common class of case where there is lack of uniformity leading to some severely poor outcomes, especially where disabilities are involved. This Court can resolve the doctrinal confusion, restore uniformity, and reaffirm the constitutional principles of *Ungar*, *Slappy*, and *Cronic* that have been confused and stretched beyond recognition in some circuits.

(f) Conflict with *Evitts v. Lucey* and *Tennessee v. Lane*. This Court has repeatedly held that due process requires courts to ensure procedures that actually work for individuals with disabilities. *Lane* held that access to courts includes access that is meaningful for those with disabilities. *Lane*, 541 U.S. at 533–34.

The Ninth Circuit did the opposite. It required Petitioner—an autistic civil litigant forced into a fifteen-day trial without counsel—to identify specific evidence he failed to present after the trial had ended. That retrospective inquiry directly contradicts Ungar's time-of-decision rule and transforms a prospective fairness test into a post-hoc evidentiary one.

(a) Conflict with *Ungar v. Sarafite*. This Court held in Ungar that courts must evaluate the denial of a continuance based on the circumstances as they existed "at the time the request is denied." *Ungar*, 376 U.S. at 589. The analysis is prospective, contextual, and focused on fairness, not hindsight speculation about the evidentiary record.

This case is therefore the ideal vehicle to clarify the constitutional standard for continuance denials in civil proceedings involving unrepresented or disabled

litigants and to resolve how Ungar and Slappy apply outside the criminal context.

1. The Ninth Circuit's Decision Conflicts with This Court's Core Due-Process Precedents

This creates uncertainty not only for litigants but for judges, bankruptcy panels, district courts, and pro bono counsel evaluating their obligations when a litigant cannot safely proceed alone.

CONCLUSION

That question has never been directly resolved by this Court, yet it arises with increasing frequency in bankruptcy courts, administrative proceedings, immigration hearings, and civil trials involving self-represented parties, many of whom have documented cognitive impairments. The lower courts have attempted to apply this Court's precedents—*Ungar v. Sarafite*, *Morris v. Slappy*, *United States v. Cronic*, and *Goldberg v. Kelly*—but have diverged dramatically in how they understand and implement this Court's guidance.

Beyond the entrenched circuit split, this case squarely presents an important unresolved federal question that only this Court can answer: "What is the constitutional standard for reviewing a civil litigant's request for a short continuance to secure counsel—particularly when the denial forces a disabled litigant to trial alone?"

Without this Court's intervention, lower courts will continue applying divergent and incompatible standards—some requiring no prejudice, some applying a prospective test, some applying a retrospective "missing evidence" test, and some applying a de facto harmless-error regime.

Continuance requests involving: (1) sudden loss of counsel; (2) disabled litigants; (3) complex civil

proceedings, (4) bankruptcy trials, and (4)pro se representation are common nationwide.

The Ninth Circuit disregarded Petitioner's autism diagnosis entirely, holding him to the same retrospective evidentiary burden as a trained lawyer—contrary to *Lane*, *Evitts*, and the very nature of procedural due process.

2. The Question Presented Is Nationally Important and Recurring

(b) Conflict with *Goldberg v. Kelly* and Modern Due-Process Doctrine. *Goldberg* emphasizes that due process requires the opportunity to be heard at a meaningful time and in a meaningful manner." *Goldberg*, 397 U.S. at 267. When a litigant's cognitive limitations and lack of counsel make meaningful participation impossible, the fairness of the procedure—not the accuracy of the outcome—is the constitutional measure.

The Ninth Circuit treated the denial of a continuance as a harmless-error problem requiring proof of outcome-changing omissions, ignoring Goldberg's foundational principle that meaningful access to the process itself is the constitutional right.

Here, the Bankruptcy Court denied a short continuance even though counsel had already appeared and stated he could competently try the case with a brief delay. Forcing an autistic litigant to proceed pro se under these circumstances is the very definition of the "arbitrary insistence upon expeditiousness" *Slappy* forbids.

The Ninth Circuit required Petitioner to do exactly what *Cronic* says he cannot do: reconstruct specific evidentiary gaps months after an overwhelmingly complex trial he was incapable of conducting alone because of his disability.

(c) Conflict with *United States v. Cronic*. Cronic teaches that when structural circumstances render a litigant incapable of mounting a defense or presenting a case, prejudice is presumed. *Cronic*, 466 U.S. at 659–60. This Court held that when the adversarial process itself breaks down, a litigant need not identify specific errors or omissions.

(d) Conflict with *Morris v. Slappy*. *Slappy* prohibits an unreasoning and arbitrary insistence upon expeditiousness" at the expense of fairness. *Slappy,* 461 U.S. 1, 11–12 (1983). Although arising in the criminal context, its due-process principle applies equally in civil cases: courts must avoid arbitrary speed when a litigant demonstrates a justifiable need for counsel or additional time.

Dated: November 13, 2025

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: THOMAS BRYAN CATTELL
Debtor

THOMAS BRYAN CATTELL,
Appellant.

v.

VICTORIA DEEKS; CONNOR DEEKS; GARRET WELCH,
Appellees.

No. 24-2857
D.C. No. 22-1214

MEMORANDUM*

Appeal from the Ninth Circuit Bankruptcy Appellate Panel

FILED
MAY 7, 2025
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Gary A. Spraker, William J. Lafferty, III, and Julia W. Brand, Bankruptcy Judges, Presiding

Argued and Submitted April 1, 2025 Portland, Oregon

Before: BYBEE, LEE, and FORREST, Circuit Judges. Concurrence by Judge LEE.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Thomas Cattell's consolidated adversary proceeding appeared ready to go to trial in bankruptcy court in December 2021. *See In re Thomas Bryon Cattell*, No. 19-03123-dwh (Bankr. D. Or.). But in the months leading up to trial, Cattell's trial counsel withdrew after failing to file a response to a summary judgment motion. Cattell told the bankruptcy court that he contacted at least four other attorneys, each of whom declined to represent him because they were "too busy." Finally, eleven days before trial, Cattell secured new counsel in Jesse London, who made a special appearance on November 26, 2021, to request the trial be continued for two to three months so that he could get up to speed.

London explained that he agreed to represent Cattell at trial. But due to prior commitments, including a planned vacation and several other trials in December and January, his representation of Cattell was "necessarily contingent" on having a continuance from December 7, 2021, to February or

early March. Otherwise, Cattell would have to proceed to trial without an attorney.

In a puzzling decision, the bankruptcy court denied the continuance. Weighing the factors in *United States v. Flynt*, 756 F.2d 1352, 1358 (9th Cir. 1985), the court ruled that the inconvenience to defendants of having to re-serve witnesses and re-schedule time off work outweighed the benefit of Cattell having a lawyer to try the case, even though the trial was scheduled for non-consecutive days and over Zoom. The court also determined that Cattell did not exercise diligence by contacting four attorneys over four months. Predictably, Cattell had trouble presenting his case *pro se*, and the trial took nearly three times longer than expected. Following an unsuccessful appeal to the Bankruptcy Appellate Panel (BAP), Cattell challenges the bankruptcy court's decision to deny the continuance. Cattell also challenges a number of other procedural and substantive rulings. We assume the parties' familiarity with the remaining facts and do not recite them here. We have jurisdiction under 28 U.S.C. § 158(d), and we affirm.

* * *

1. Motion to Continue. We review the decision to grant or deny a continuance for "clear abuse of . . . discretion," applying the factors outlined in *Bearchild v. Cobban*, 947 F.3d 1130, 1138 (9th Cir. 2020). Although we may assign any weight to these factors, "prejudice resulting from the denial—is required before error will be assigned to the failure to grant a continuance" *Id.*

Cattell falls short of showing prejudice. He has not pointed to any evidence that he was not able to present. *See 2.61 Acres of Land*, 791 F.2d at 671. And having to proceed *pro se* in a civil trial is not

inherently prejudicial. *United States v. 30.64 Acres of Land*, 795 F.2d 796, 801 (9th Cir. 1986); *see also Ungar*, 376 U.S. at 575. While Cattell's presentation may have been affected, his manner and credibility were not of particular importance in this trial to the bankruptcy court. *Cf. United States v. Kloehn*, 620 F.3d 1122, 1129 (9th Cir. 2010); *United States v. Mejia*, 69 F.3d 309, 316 (9th Cir. 1995). Indeed, bankruptcy trials tend to be more informal, and the court gave Cattell plenty of accommodation in the length and format of his presentation, finding that he ultimately "had an ability to say the things [he] wanted to say." Therefore, though we are sympathetic to the difficulties Cattell faced at trial, we decline to find a clear abuse of the court's broad discretion to deny the continuance. *See Flynt*, 756 F.2d at 1358.

2. Financial Abuse. Cattell argues for relief under Oregon Revised Statutes (ORS) § 124.100(2), which prohibits financial abuse of a vulnerable person.[1] But Cattell is not able to establish the required elements of this claim. First, he is not a "vulnerable person" as defined by § 124.100(1)(e): Cattell is not "financially incapable" because he has been able to own businesses, buy properties, and use financial accounting software to produce financial statements in the form of spreadsheets, and he is not a "person with a disability" as defined by § 124.100(1)(d) because he has not shown an inability to perform "substantially all the ordinary duties of occupations"

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[1] "A vulnerable person who suffers injury, damage or death by reason of physical abuse or financial abuse may bring an action against any person who has caused the physical or financial abuse or who has permitted another person to engage in physical or financial abuse." ORS § 124.100(2).

that a neurotypical person with similar training and experience could perform. Second, Cattell has not established that he suffered "financial abuse" under ORS § 124.110(1) sufficient to overcome the bankruptcy court's finding that no such abuse occurred. *See In re Cattell*, 2022 WL 6797579, at *9 (Bankr. D. Or. Oct. 11, 2022).

3. Fraudulent Transfer. Cattell argues that the bankruptcy court should have analyzed his fraudulent transfer claim under the partnership avoidance powers in ORS § 67.095(2). But this claim—which hinges on the allegation that Garrett Welch knew the Skyliner property "was partnership property and that Deeks lacked authority to bind the partnership"—is nowhere to be found in Cattell's Second Amended Complaint. The complaint alleges that Welch "had knowledge that his title might be affected by the Cattel [sic] and Deeks dispute." It does not mention knowledge of the partnership or of Deeks' authority to bind it. Therefore, the complaint does not contain "a short and plain statement of the claim showing that the pleader is entitled to relief," and it is thus insufficient. *Bautista v. Los Angeles County*, 216 F.3d 837, 840 (9th Cir. 2000) (quoting FED. R. CIV. P. 8(a)). As for the question of trial by consent, the evidence Cattell adduced at trial both was "also relevant to the other issues at trial" and "only inferentially supports [his] unpleaded claim," *In re Acequia, Inc.*, 34 F.3d 800, 814 (9th Cir. 1994); *Campbell v. Bd. of Trs. of Leland Stanford Junior Univ.*, 817 F.2d 499, 506 (9th Cir. 1987), rendering amendment under Federal Rule of Civil Procedure 15(b) unavailable.

4. Remaining Motions. Cattell alleges error with respect to other motions that he made before or during the trial. Each challenge is unavailing.

For his oral motion for a new trial on January 24, 2022, Cattell has not shown a "manifest error of law, manifest error of fact, [or] newly discovered evidence" as required under Federal Rule of Civil Procedure 59(a)(2). *Brown v. Wright*, 588 F.2d 708, 710 (9th Cir. 1978). As to the motion for a protective order on February 8, 2022, Cattell admits that any potential error was harmless. *See Boyd v. City & County of San Francisco*, 576 F.3d 938, 949 (9th Cir. 2009). As to the motion for a stay pending appeal on December 6, 2021, this issue is moot. And for Cattell's remaining challenges to matters of discovery, evidence, and case management, none of these decisions by the bankruptcy court amounted to an abuse of discretion. *See City of Pomona v. SQM N. Am. Corp.*, 866 F.3d 1060, 1065 (9th Cir. 2017).

E. AFFIRMED.

FILED
MAY 7, 2025
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Cattell v. Deeks et al., Case No. 24-2857 LEE, Circuit Judge, concurring:

After his attorney failed to respond to a summary judgment motion and then withdrew from the case only a few months from trial, Thomas Cattell repeatedly searched for new trial counsel. He finally found one, but his new lawyer said he needed two months to prepare for trial and tend to his other commitments. As the panel put it in the memorandum

disposition, the bankruptcy court's refusal to grant this continuance—and thus force Cattell to try his case *pro se*—was "puzzling." But it is more than that—it is troubling. We as judges need to do better not to act arbitrarily, even if Cattell ultimately did not suffer sufficient prejudice to merit a reversal here.

The U.S. legal system is the envy of the world. But it is mystifying for most people. And for obvious reasons: Our legal system has esoteric rules, technical terms, and legions of requirements. These rules are both a strength and a weakness of our system. They help establish the rule of law, but they can also ensnare inexperienced parties. While the Constitution does not guarantee a right to counsel for civil litigants, courts should be mindful that lay parties benefit from having lawyers—especially for trials.

Yet for inexplicable reasons, the bankruptcy judge refused to grant a mere two-month continuance in this case. Three of the four *Flynt* factors favored continuing the trial. *United States v. Flynt*, 756 F.2d 1352, 1359 (9th Cir. 1985). Cattell was fairly diligent in trying to get specialized counsel after his prior counsel withdrew after apparently committing malpractice. *See United States v. Pope*, 841 F.2d 954, 956 (9th Cir. 1988). Cattell's new counsel reasonably asked that the trial date be continued to February 2022 so he could get up to speed (and, in any event, the trial set for December would have likely extended into the new year, given the holiday season). Importantly, there was no hint of gamesmanship on Cattell's part—he was a hapless victim of his prior counsel's negligence. The alternative to a two-month continuance was to deprive Cattell of an attorney for a trial.

Somehow, the bankruptcy court concluded that all these factors were outweighed by the

inconvenience to the opposing parties. Victoria Deeks stated that she would have "difficulties . . . scheduling similar time off" work as a nurse, and Garrett Welch would have to re-serve his witnesses, if any. But these issues are not "substantial." Any continuance is inconvenient to a degree: A witness has to re-schedule and show up, but that is just a part of litigation. It matters even less when the trial is on Zoom. The bankruptcy court could tell from the hearing on the motion to continue that explaining the procedures of trial to Cattell and giving him extra leeway to present was likely to incur *more* time than just delaying the trial—which is exactly what happened.

As a result of the denial, Cattell struggled mightily to present his case. He repeatedly brought evidence into his arguments and arguments into his presentation of evidence. He claimed to have "noise" or "white noise" in his head. He was emotional when talking about Connor and Victoria Deeks—key players in the trial. He asked for an attorney at least ten times. At one point, Cattell called a statement by the Welches "fruitcakes. I know that's not a legal term[, but] I don't know what to say." While Cattell fails to show actual prejudice, it is clear that he had trouble trying this case.

An old adage says that someone who represents himself has a fool for a client. Trying a case pro se can be like walking a labyrinth without a map. The path for Cattell was legally open, but his trial was fraught with traps and rules that led him astray. Ultimately, the bankruptcy court's baffling refusal to grant the continuance may not have been the reason Cattell lost. But if courts act arbitrarily, people lose trust in the rule of law—and our judicial system is the loser.

APPENDIX B

UNITED STATES BANKRUPTCY COURT
THE DISTRICT OF OREGON

In re **Thomas Bryan Cattell,**
Debtor

Case No. 19-33823-dwh13

Thomas Bryan Cattell,
Plaintiff

v.

Victoria D. Deeks, an individual, **Garrett Welch,** and **Carol Williams,**
Defendant

Adv. Proceeding No. 19-03123-dwh (Lead action)

JUDGMENT

Thomas Bryan Cattell,
Plaintiff

v.

Alison Hohengarten; Francis Hansen & Martin LLP, an Oregon limited liability partnership; Connor Deeks; and **PricewaterhouseCooper LLP,**

Defendants.

Adversary Proceeding No. 20-03024-dwh

DISTRICT OF OREGON
FILED
OCT 11, 2022
Clerk, U.S. Bankruptcy Court

s/ David W. Hercher
DAVID W. HERCHER
U.S. Bankruptcy Judge

For the reasons set forth in the separate Memorandum Decision filed today, the court

ADJUDGES as follows:

1. In No. 19-33823—

a. On plaintiff's first claim against Victoria D. Deeks (Victoria), the court dissolves the partnership between plaintiff and Victoria if it had not previously been dissolved. By this judgment, the partnership's business has been wound up.

b. On plaintiff's second claim against Victoria—

i. Victoria may retain the $908.27 held in her lawyer's client trust account as her property.

ii. In addition, Victoria has judgment against plaintiff for $35,823.11. This money judgment arose from plaintiff's actions before his bankruptcy, and Victoria's right to enforce it is

subject to the law applicable to enforcing such claims.

c. The court denies relief on plaintiff's remaining claims against Victoria, Victoria's counterclaims against plaintiff, and plaintiff's claims Garrett Welch.

d. Carol Williams was previously dismissed as a defendant.

2. In No. 20-03024—

a. The court denies relief on plaintiff's claims against Connor Deeks.

b. Alison Hohengarten, Francis Hansen & Martin LLP, and

PricewaterhouseCooper LLP have previously been dismissed as defendants.

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cc: Thomas Bryon Cattell

UNITED STATES BANKRUPTCY COURT
THE DISTRICT OF OREGON

In re **Thomas Bryan Cattell,**
Debtor

Case No. 19-33823-dwh13

Thomas Bryan Cattell,
Plaintiff

v.

Victoria D. Deeks, an individual, **Garrett Welch,** and **Carol Williams,**
Defendant

Adv. Proceeding No. 19-03123-dwh (Lead action)

MEMORANDUM DECISION[1]

Thomas Bryan Cattell,
Plaintiff

v.

Alison Hohengarten; Francis Hansen & Martin LLP, an Oregon limited liability

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[1] This disposition is specific to this action. It may be cited for whatever persuasive value it may have.

partnership; Connor Deeks; and
PricewaterhouseCooper LLP,
Defendants.

Adversary Proceeding No. 20-03024-dwh

DISTRICT OF OREGON
FILED
OCT 11, 2022
Clerk, U.S. Bankruptcy Court

s/ David W. Hercher
DAVID W. HERCHER
U.S. Bankruptcy Judge

I. Introduction

In these two consolidated adversary proceedings, the plaintiff is the chapter 13 debtor, Thomas Bryon Cattell, and the remaining defendants are Victoria D. Deeks, Connor Deeks, and Garrett Welch. Because the Deekses share a last name, I will refer to them as Victoria and Connor. Victoria is Connor's mother.

Cattell and Victoria formed a business partnership to develop the Skyliners Road property and to engage in fishing in Alaska. The partnership should be dissolved, if it hasn't already been dissolved. In the course of the winding up of the partnership's business, I find that the partnership owes Victoria for amounts she paid for partnership purposes totaling $72,554.49. She is entitled to retain the $908.27 held in her lawyer's client trust as partial payment of that amount. Her net claim of $71,646.22 is against the

partnership, and her contribution claim against Cattell is that he be required to contribute his share—one-half—of the amount due to her from the partnership. She is entitled to recover from him $35,823.11.

With respect to Connor, I conclude that (1) he did not breach a fiduciary duty to Cattell, (2) Cattell is not a vulnerable person, and (3) "estoppel" is not a basis for Cattell to recover from Connor.

Finally, I conclude that Cattell is not entitled to any recovery from Welch.

Because the transfer to Welch was by Victoria, not Cattell, Cattell is not entitled to recover the property from Welch.

II. Background

A. *Consolidation*

After I granted unopposed motions to consolidate these two actions on March 10, 2020,[2] most papers in the nonlead action, and all those in the lead action, were filed under the adversary proceeding number of the lead action. References to the docket numbers of papers filed in the nonlead action include that action's number, 20-03024, and the paper's ECF number.

References to papers filed in the main chapter 13 bankruptcy case include the main case number, 19--33823, and the paper's ECF number. References to the docket numbers of papers filed in the lead action—the bulk of the references to filed papers—include just the paper's ECF number.

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[2] ECF No. 9; No. 20-03024 ECF No. 14.

B. Removal

Cattell commenced the lead action in Deschutes County, Oregon, Circuit Court on October 18, 2018, and he removed it on November 13, 2019. The paper that initiated that action was named "Petition for Dissolution of Domestic Partnership."[3] After removal, Cattell filed a second amended complaint,[4] which Victoria answered with counterclaims,[5] and Welch answered without counterclaims.[6]

Cattell commenced the nonlead action in Multnomah County, Oregon, Circuit Court on January 23, 2020, and it was removed on February 20, 2020, by defendants who have since been dismissed. No defendant answered before removal. After removal, Connor answered without counterclaims.[7]

III. Victoria

I will address the claims in the order in which the defendants became parties: Victoria, Connor, and Welch.

A. Main-case background

In Cattell's main chapter 13 bankruptcy case, Victoria filed two proofs of claim. The second, claim 9-1, is for $71,000, and she describes its basis as "lost sale proceeds from interference with contract 925,000-854,000." He objected to that claim, stating that

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3 ECF No. 1 at 3 ¶ 6, Ex. 1.

4 ECF No. 185.

5 ECF No. 195.

6 ECF No. 215.

7 No. 20-3024 ECF No. 22.

resolution of the lead action "should resolve the claim."[8] In her response to the claim objection, she essentially agreed, saying that the claim "is at issue in" the lead action and "may be resolved within that proceeding."[9]

B. Jurisdiction

The district court has referred to this court all bankruptcy cases and proceedings arising under title 11 of the United States Code (the Bankruptcy Code) or arising in or related to bankruptcy cases. With the consent of all parties to an action that isn't a core proceeding but is otherwise related to a bankruptcy case, the district court has referred the proceeding to this court to enter appropriate orders and judgments in the proceeding, subject to appellate review.[10] The referral includes all removed claims and causes of action.[11]

Victoria's claims against Cattell are core claims as to which this court may enter final orders or judgment.[12]

Because resolution of Cattell's claims against Victoria could have resulted in a recovery by him, which in turn could have affected the administration of the estate, the claims between them are least related to the main case.

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8 No. 19-33823 ECF No. 36 at 2 ¶ 2.

9 No. 19-33823 ECF No. 44.

10 LR 2100-2(a)(1).

11 LR 2100-2(a)(2).

12 28 U.S.C. § 157(b)(2)(B).

Because Cattell[13] and Victoria[14] have both consented to entry of final orders or judgment in the lead action, it is unnecessary to address whether the claims between them are core or noncore but related.

C. Cattell's claims against Victoria

In the lead action, the complaint includes the following nine claims against Victoria.

1. First claim: Dissolution of common-law partnership

In the first claim in the lead action, which is only against Victoria, Cattell asks that the partnership between her and him be dissolved and wound up.[15] Victoria disputes the existence of a partnership.[16]

(a) Existence of a partnership

Cattell and Victoria do not dispute that Oregon law governs a partnership between them, including whether one was formed. Oregon statutes governing partnerships are in Oregon Revised Statutes chapter 67, known as the Oregon Revised Partnership Act or RPA.[17]

Determining whether Cattell and Victoria were business partners is difficult here due to the complicated nature of their relationship. It's undisputed that they were domestic partners. She contends that that's all they were, while he argues

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13 ECF No. 185 at 2 ¶ 1.

14 ECF No. 195 at 2 ¶ 1.

15 ECF No. 185 at 19–20 ¶¶ 83–85.

16 ECF No. 400-155 Ex. 156 at 1.

17 Or. Rev. Stat. § 67.815.

that they were also business partners. Combining assets and jointly investing in real estate—the major activities that he alleges were business activities—are also consistent with what one would expect domestic partners to do. For example, if a couple buy land and build a house together, it would be strange to say that this makes them business partners—even though they may well have intended to profit from their investment.

Nevertheless, for the following reasons, I conclude that Cattell and Victoria were business partners. Most importantly, their joint undertakings were ultimately dissimilar to the kind of joint undertaking one would expect from domestic partners who are not also business partners. In my prior example of a couple investing in a home, it may be true that they intend to profit from doing so, but probably their main purpose would be to have a place to live. If the couple instead buy a second home to operate as a for-profit vacation-rental business, it would seem much more plausible to call them business partners as well as spouses. Cattell and Victoria had a mutually understood objective of building a resort on their Skyliners property, which is not an ordinary domestic activity. They also jointly invested in a fishing enterprise—again, not an activity one expects of domestic partners who are not engaged in business.

A second reason for finding that they were partners is that they both literally referred to themselves as "50-50 partners." There's no reason in principle that this expression couldn't have meant that they were equal participants in a domestic relationship—which is what Victoria says it meant. But the most natural interpretation is that they understood themselves to be equal business partners.

The term "50-50" in particular implies a measurable economic investment or stake in an enterprise, and it's not a phrase that ordinarily is used by couples who have a domestic, but not business, relationship.

In mid-2017, they both signed an informal agreement acknowledging the partnership's formation and agreeing to dissolve it.[18]

(b) Effect of Mediated Settlement Agreement and stipulated order

Victoria also argues that, if a partnership existed, it was eliminated by the parties' 2018 Mediated Settlement Agreement (MSA)[19] or the stipulated order that they signed and the Deschutes County Circuit Court entered in 2019.[20]

The MSA was struck during a dispute over Victoria's attempted sale of the property to Pedro Pizarro (identified in the agreement as "Purchaser X"). The gist of the agreement is that Cattell would make a "back-up offer contingent upon the termination of the existing, binding sale agreement of the Property to Purchaser X."[21] If Cattell could provide evidence of his financial wherewithal to follow through with the purchase, Victoria would try to persuade Pizarro to break the existing deal. If Pizarro chose to back out, Victoria and Cattell would then be bound to consummate a sale to Cattell.[22]

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[18] ECF No. 400-79 Tr. Ex. 80.

[19] ECF No. 380 PDF 147 Ex. 116.

[20] ECF No. 380 PDF 156 Ex. 117.

[21] ECF No. 380 PDF 147 Ex. 116 at 1 ¶ 1.

[22] ECF No. 380 PDF 147 Ex. 116 at 1 ¶ 2

If not, Cattell agreed to leave the property within three days.[23]

Victoria also argues that several provisions of the MSA constitute either an acknowledgment that a partnership never existed or an agreement to terminate it. She points first to paragraph A, an introductory statement that the parties "agree to settle and resolve all matters in dispute." That statement says nothing about whether a partnership had existed or was then being terminated.

Second, Victoria points to paragraph 6, which refers to paying debts "associated with the Parties [*sic*, "Parties"'] prior partnership." That phrase could be read as an acknowledgment that the partnership had previously ceased to exist. Or it could refer to a partnership that had existed but might or might not continue to exist. The latter understanding of "prior relationship" is consistent with the context in which the agreement was negotiated and drafted: she had contended (as she does now) that there was no business partnership, and it would not be surprising for the agreement to sidestep that contentious issue and focus instead on the immediate dispute about the property sale. That the agreement was drafted to avoid such a contentious issue would be consistent with the intense negotiations over the terms of the document, as reflected by its many hand-written edits and additions. By statute, a partnership ceases to exist only after completion of the winding up of its business, which follows dissolution;[24] and a partnership can be dissolved without judicial action

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23 ECF No. 380 PDF 147 Ex. 116 at 2 ¶ 4.

24 Or. Rev. Stat. § 67.295(1).

only by agreement of a majority of the partners[25]—both partners in a two-partner partnership. But Victoria points to no evidence of Cattell's agreement to dissolve the partnership before or at the time of the MSA. For those reasons, I find that the reference in paragraph 6 to the "prior" partnership isn't an acknowledgement that the partnership no longer existed. But it is inconsistent with Victoria's argument that no business partnership was formed.

Finally, Victoria points to paragraph 11, an integration clause that she says terminates the partnership:

> The Parties understand and acknowledge that this Agreement and the Contract [between Victoria and Pizarro] as modified by this Agreement constitutes [*sic*] the full and complete agreement between the Parties regarding its subject matter, and that this Agreement and the Contract as modified by the Agreement supersedes any and all express or implied prior agreements, contracts, or understandings between the Parties.

The first part of paragraph, ending with "regarding its subject matter," says that the MSA states the parties' complete agreement "regarding its subject matter." The subject matter of the MSA is the set of circumstances on which the property will be sold, either to Pizarro or Cattell, and how certain specified debts will be paid. The sole MSA reference to the partnership in paragraph 6 doesn't constitute the parties' agreement to do anything with or about the partnership as such. So, the first part of paragraph 11 is best read as the parties' agreement that there are no other agreements between them about how the

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25 Or. Rev. Stat. § 67.290(1).

property should be sold or the debts paid—not an agreement that there would be no further partnership.

The second part of paragraph 11 states that the MSA supersedes prior agreements between the parties. It doesn't include the same qualifying phrase ("regarding its subject matter") that appears in the first phrase. Even if the absence of that phrase from the second part meant that the MSA superseded the partnership agreement, which Victoria doesn't argue, it's not clear what would be meant for a partnership agreement to be "superseded." A partnership exists until it is wound up after dissolution; it cannot simply go away because the partnership agreement has been superseded by another agreement. At best, the MSA should be read as steps the two partners agreed should be taken as part of the process leading to the partnership's dissolution and winding up.

The stipulated order, which was drafted and entered after the sale to Pizarro had failed, provided that Cattell would vacate the property by March 8, 2019, that he could reenter the property to remove some specified items, and that, if the property sold, the net proceeds would be placed in escrow and held there until further order, where they remain today.[26] Similarly, the order again makes no mention of any partnership and doesn't purport to alter, or even to describe, the parties' existing relationship.

I find that neither the MSA nor the stipulated order had the effect of dissolving or winding up the partnership.

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26 ECF No. 380 PDF 153 Ex. 117 at 2.

(c) The partnership property

In early 2015, Cattell caused Chelsea Trees, Inc., which he owned, to deed the property to Victoria. He and she dispute whether the property became partnership property.

There is a rebuttable presumption that property is separate property of a partner, rather than property of the partnership, if the partner acquired it in the partner's name without use of partnership assets and with no indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership, even if the property is used for partnership purposes.[27] Here, even though the deed by which the property was conveyed to Victoria did not mention the partnership or refer to her as partner, I find that Cattell has rebutted the presumption that the property became property only of her. I accept his testimony that he intended that both he and she develop the property and benefit from its appreciation. His intent is evidenced in part by the partnership balance sheet that he prepared, showing the property as a partnership asset.[28] Also, she gave nothing for the property. For years after the conveyance, he continued to live on the property and devoted most of his time and effort to its development. The mid-2017 agreement they signed, agreeing to dissolve the partnership, included an acknowledgment that it included "the land, structures, and equipment located at" the property and their Alaska fishing business.

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27 Or. Rev. Stat. § 67.065(4).

28 ECF No. 400 Ex. 156.

I find that Cattell and Victoria formed a partnership before or in conjunction with the early 2015 conveyance of the property to her. The business of the partnership was both the ownership and development of the property and the Alaska fishing business, and I find that he contributed the property to the partnership. I reject his argument that he or she contributed other property to the partnership or that the partnership assumed any liabilities of either of them that preceded formation.

(d) Dissolution of partnership

A partnership at will can be is dissolved by agreement of a majority of the partners, after which its business must be wound up.[29]

Here, Cattell and Victoria agreed to dissolution in mid-2017. Even without majority partner agreement on dissolution, a court may dissolve a partnership if dissolution and winding up of its business are "equitable."[30] Although she opposes a finding that a partnership exists, I don't read her arguments to include opposition to dissolution if a partnership exists.

To the extent dissolution did not occur in mid-June 2017, I will adjudge that the partnership be dissolved and that its business be wound up.

2. Second claim: Equitable accounting

In the second claim against Victoria, Cattell requests "a full accounting of the partnership" for

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29 Or. Rev. Stat. § 67.290(1).

30 Or. Rev. Stat. § 67.290(5)(d).

2013 through 2019 and "an equitable division" of its assets and liabilities.[31]

Although Cattell's second claim requests an equitable accounting, the more appropriate and specific remedy is to give effect to the RPA provisions for addressing partner creditor claims upon a partnership's dissolution.

A partnership must reimburse a partner for payments made and indemnify a partner for liabilities incurred by the partner in the ordinary course of the business of the partnership or for preservation of its business or property.[32] The partnership must also reimburse a partner for payments made and indemnify a partner for an advance to the partnership beyond the amount of capital the partner agreed to contribute.[33] In winding up a dissolved partnership's business, the assets of the partnership must be applied to discharge its obligations to creditors, including partner creditors to the extent permitted by law.[34]

(a) Whether Cattell breached the MSA and caused the loss of the Pizarro sale

In Victoria's closing-argument brief, she claims entitlement to recovery of certain amounts from Cattell. On pages 7 and 8 of her brief, she claims entitlement to recover damages of $137,200. That amount is the sum of $65,000, the amount by which the price that Pizarro had agreed to pay for the

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31 ECF No. 185 at 20 ¶¶ 86–88.

32 Or. Rev. Stat. § 67.140(3).

33 Or. Rev. Stat. § 67.140(4).

34 Or. Rev. Stat. § 67.315(1).

property exceeded the price that Welch paid, and other amounts reflecting payments she made in 2018 and 2019.

Victoria alleges in her answer that Cattell breached the MSA by interfering with her effort to comply with the MSA and sell the property.[35] In her closing brief, she argues that he breached by recording his second notice of pendency of an action under Oregon Revised Statutes § 93.740 (previously known as a notice of *lis pendens*) on October 18, 2018, and by filing his lawsuit (the petition initiating the lead action in state court before removal) on the same day.[36]

Victoria does not identify any provision of the MSA that she contends Cattell breached by those actions, and I have found none.

The second notice of pendency, prepared and filed by Cattell's lawyer, gave notice of the petition and the possibility that it could have an effect on the property.[37] Those steps certainly could have delayed or prevented a sale closing that was imminent. But I see nothing in the MSA that was breached by Cattell asserting, even incorrectly, an ownership interest in the property. Even if Cattell had breached the MSA by filing the petition and second notice of pendency, Victoria hasn't proved that those acts caused the failure of the sale to Pizarro. On February 28, 2019, Cattell's lawyer recorded a release of the second notice of pendency.[38] Pizarro terminated his purchase offer

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35 ECF No. 195 at 6 ¶ 37.

36 ECF No. 546 at 5–6.

37 ECF No. 400-117 Ex. 118.

38 ECF No. 400-118 Ex. 119.

in May 2019. That Pizarro didn't terminate his offer until five months after the recording of the second notice of pendency suggests that he remained willing to buy in the interim. That conclusion is also consistent with Victoria waiting until after Pizarro's termination in May to recommence marketing efforts. If the recording of the second notice of pendency was improper, then Victoria could have obtained an early court order striking it. If it was proper, Cattell did nothing wrong. In either case, I'm unable to conclude that Cattell's petition and second notice of pendency breached the MSA or that the breach proximately caused the Pizarro sale failure.

(b) Other claims by Victoria

On pages 12 through 16 of Victoria's closing brief, she addresses her "contribution claim" that exists "alternatively, if a partnership did exist." With that title in mind, and because there are apparent substantial overlaps between the amounts of her damage claims addressed on pages 7 and 8 and her contribution claim, I will treat the contribution claim as encompassing the earlier claims.

Victoria asserts a "contribution claim" of "not less than $265,533."[39] The amounts that comprise that total, listed on page 15, include $119,713 "paid to the IRS for tax debt incurred in 2014 through 2017." To explain inclusion of the $119,713 amount paid to the IRS, Victoria explains that she liquidated her separate retirement accounts to pay "the IRS debt incurred during their relationship to prevent a tax lien from being assessed against the Property."[40] She

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[39] ECF No. 546 at 12, heading A.

[40] ECF No. 546 at 3.

doesn't allege whether or in what amount the tax debt she paid is attributable to partnership income. She expressly alleges that the partnership made no income in any of the years 2013 through 2017.[41] That she benefitted the partnership by preventing attachment of an IRS tax lien, which would have attached to her nominal title ownership of the property, doesn't entitle her to reimbursement if the tax was in fact not on account of partnership income.

I accept that the other components of Victoria's $265,533 contribution claim are amounts she paid in 2018 and 2019 to discharge debts incurred for partnership business.

Victoria concedes that she received from Pizarro $27,711 as a forfeited earnest-money deposit and $45,555 from the sale closing.[42] From the total amount of her contribution claim, $265,533, I have subtracted the IRS payments and her receipts, resulting in a net claim of $72,554.49. She is a partnership creditor for that amount.

Cattell provided insufficient evidence that any partnership assets or proceeds of partnership business were applied by Victoria other than to partnership obligations or that he is a partnership creditor, including on account of any partnership debts that he paid with his separate funds. I accept her explanation that any amounts that he deposited in 2018 and 2019 from his separate funds, which she concedes total $14,662 but in any case totaled not more than $29,260, were used to pay debts incurred during their relationship and expenses related to the property. Without those payments, the amount that

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41 ECF No. 546 at 10–11.

42 ECF No. 546 at 16.

she would have been able to pay creditors would have been correspondingly decreased and the amount she would now be owed by the partnership would be correspondingly increased.

The partnership has one asset: the $908.27 held in Victoria's lawyer's client trust account. Because partnership property must first be used to pay partnership creditors, that amount must be allocated to her, and she is entitled to retain it as her property. After crediting that amount to her

$72,554.49 contribution claim, the balance is $71,646.22. If Cattell were to pay more than his half share of that balance, he would be entitled to contribution from Victoria for her half. Because the partnership has no other assets, she is entitled to recover from him half the amount of her net contribution claim, or $35,823.11.

3. Third claim: Setting Aside Preferences and Transfers

In the third claim against Victoria, Cattell asks that "preferences and transfers" be "set[] aside."[43] The third claim's title states that it is "as to [Victoria] and Williams." Williams is a now-dismissed defendant. The third claim alleges a prepetition payment by Cattell to Williams and includes other allegations apparently intended to state a claim for avoidance of a preference under Bankruptcy Code § 547.

For a payment to be avoided as preferential, section 547(b)(5) requires that it enable the creditor recipient to receive more than the creditor would have received had the payment not been made and the creditor received a chapter 7 bankruptcy dividend.

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43 ECF No. 185 at 20–21 ¶¶ 90–95.

But Cattell's third claim twists that allegation to apply it not to Williams, the recipient, but to "the defendants."[44] In the complaint's prayer with respect to the third claim, he requests judgment avoiding and recovering "the Preference Period Transfer, or the value thereof, from the Defendants for the benefit of the bankruptcy estates."[45] He seems to request that an allegedly preferential payment to Williams be recovered from Victoria (but not Welch, who isn't named in the third claim). A preference can't be recovered except from a transferee,[46] and Cattell does not argue or point to evidence showing why Victoria is a transferee of the payment he made to Williams.

Cattell is not entitled to relief on his third claim.

4. Fifth claim: Breach of fiduciary duty

In the fifth claim (the fourth claim is only against Williams), Cattell alleges that Victoria breached fiduciary duties to him and owes him damages of at least $195,000.[47]

Under Oregon Revised Statutes § 67.155(1), the duties of a partner are limited to the duties of loyalty and care. The duty of loyalty requires a partner to (1) account to the partnership and hold for it property or benefit derived from the business[48] and (2) refrain from dealing with the partnership in a manner adverse to it and to refrain from representing a person

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[44] ECF No. 185 at 21 ¶ 94.

[45] ECF No. 185 at 29–30 ¶ 3.

[46] 11 U.S.C. § 550(a)(1).

[47] ECF No. 185 at 23–24 ¶¶ 103–08.

[48] Or. Rev. Stat. § 67.155(2)(a).

with an interest adverse to the partnership in the conduct or winding up of its business.[49] The duty of care requires a partner to refrain from grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.[50]

The evidence does not support a finding that Victoria breached her duties of loyalty or care as defined in section 67.155. I don't accept Cattell's argument that she sold the property for an inadequate price. Under the circumstances, including his resistance to her marketing and sale efforts, she acted reasonably. But in any case, there is no evidence that her conduct was grossly negligent, reckless, or in knowing violation of law or that it constituted intentional misconduct.

Cattell is not entitled to relief on his fifth claim.

5. Sixth claim: Abuse of a vulnerable person

In the sixth claim, Cattell seeks damages from Victoria for financially abusing him as a vulnerable person.[51] He alleges that he suffers from a significant cognitive impairment because he is autistic, and he is thus a "financially vulnerable person" under section 124.100.[52]

The phrase "financially vulnerable person" does not appear in section 124.100. That statute instead uses the term "vulnerable person" to refer to the entire class of persons who are protected by the financial-abuse statute. There are four subclasses of

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[49] Or. Rev. Stat. § 67.155(2)(b).

[50] Or. Rev. Stat. § 67.155(3).

[51] ECF No. 185 at 24–25 ¶¶ 109–15.

[52] ECF No. 185 at 24 ¶ 110.

vulnerable persons, one of which is "[a] financially incapable person."[53] It's likely that the complaint drafter intended to allege that Cattell is a financially incapable person and mistakenly used the nonstatutory term "financially vulnerable person" instead.

(a) Financially incapable person

"Financially incapable," as used in section 124.100, is defined in section 125.005(3). A person is financially incapable if unable to manage the person's financial resources effectively for reasons including mental illness, mental retardation, or physical illness or disability. Somewhat awkwardly, section 125.005(3) defines "manage financial resources" as "those actions necessary to obtain, administer and dispose of real and personal property, intangible property, business property, benefits and income."[54] I take the statute to mean that "**managing** financial resources" means "**taking** those actions necessary to obtain" and so on.

Despite the length of this definition, it still contains many technical terms that are not further defined, including "mental illness" and "mental retardation." But, however those terms are defined, it's clear from the evidence that Cattell does not meet this definition of a "financially incapable" person. The record makes it abundantly clear that he can manage his financial resources. He has owned and operated several businesses, including ones engaged in commercial fishing and contracting. He has bought and sold several properties over his career. He is

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53 ORS 124.100(1)(e)(B).

54 Or. Rev. Stat. § 125.005(3).

adept at using computers, particularly QuickBooks, is familiar with the concept of double-entry bookkeeping, and regularly produces—and did for trial—financial-statement reports of his and his businesses' finances. He prepared a detailed analytical document to aid in development of the property as a resort. Whatever other difficulties he may have, there can be no doubt that he is able to obtain, administer, and dispose of real and personal property.

Cattell is not a financially incapable person.

(b) Person with a disability

In addition to the financially incapable person subclass of vulnerable person, there are three other subcategories, one of which is "person with a disability," which is defined in section 124.100(1)(d). Although Cattell's sixth claim does not use the term "disability," it does allege that he has a "cognitive impairment /physical [*sic*] condition."[55] Because "mental impairment" is one of the elements that defines "person with a disability," I will address whether Cattell fits in that subclass.

On summary judgment, the parties dedicated considerable attention to whether Cattell has autism. At trial, Dr. Karen McKibbin testified that he meets the diagnostic criteria of autism level one, or Asperger's disorder and may have some difficulty interacting with people.

But, ultimately, the evidence does not support the primary element of section 124.100(1)(e)(D)—the requirement that the person be a "person with a

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55 ECF No. 185 at 24 ¶ 110.

disability." The latter phrase is defined to require that the person have—

> a physical or mental impairment that . . . [p]revents performance of substantially all the ordinary duties of occupations in which an individual not having the physical or mental impairment is capable of engaging, having due regard to the training, experience and circumstances of the person with the physical or mental impairment"[56]

There is no evidence that Cattell's impairment fits that definition. I conclude that his autism does not make him a person with a disability under section 124.100(1)(e)(D).

(c) Elderly person

Another subclass of vulnerable person is "elderly person"—one 65 years of age or older.[57]

Cattell did not allege in the complaint that he was 65 years of age or older at the time of any of the occurrences in the complaint. Nor did he offer evidence to that effect at trial.

(d) Vulnerable person

Even if Cattell had proved that he is a vulnerable person for any of the above reasons, to recover, he would also have had to prove that he suffered physical or financial abuse.[58] There is no evidence that he suffered physical abuse. With irrelevant exceptions, to prove financial abuse, a plaintiff must prove that a defendant wrongfully took

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56 Or. Rev. Stat. § 124.100(1)(d)(B).

57 Or. Rev. Stat. § 124.100(1)(a), (1)(e)(A).

58 Or. Rev. Stat. § 124.100(2), (4).

or appropriated the plaintiff's money or property.[59] There was no evidence that Victoria (or Connor) took any money or property from him wrongfully.

Cattell is not entitled to relief on his sixth claim against Victoria.

6. Seventh claim: Declaratory judgment

The seventh claim's title says it's against both Victoria and Welch. It concludes in paragraph 122 by asserting that "[Cattell] is entitled to equitable relief to void the transfer deed upon [Cattell] paying Welch his purchase price and attendant closing costs....." The preceding paragraphs imply that Cattell requests this relief on the ground that Victoria lacked legal authority to sell the Skyliners property to Welch. The claim appears to request a declaration, as a general matter of Oregon law, that the sale to Welch was unlawful and that he knew so. Despite the reference to "equitable relief to void the transfer deed," the claim is captioned "Declaratory Judgment against [Victoria] and Welch," and other paragraphs in that claim seem to say, consistently with the caption but inconsistently with the reference to "void[ing]" the deed, that Cattell seeks only a declaratory judgment that the transfer was improper. I therefore interpret the claim as requesting only declaratory relief.

The complaint cites the Oregon declaratory-judgment statute. That statute doesn't apply in federal court; the applicable statute is 28 U.S.C. § 2201. But the difference is not important to my analysis.

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59 Or. Rev. Stat. § 124.110(1)(a).

The requested declaration is that Victoria's sale of the property to Welch was unlawful. The complaint doesn't spell out why that is the case. Even though the MSA did not affirmatively authorize Victoria to sell to anyone other than Pizarro, it did not forbid her from doing so. So, to the extent that the seventh claim is premised on a contention that she violated the MSA by selling to Welch, I disagree that the sale was unlawful.

I found above, addressing the first claim, that the property belonged to the partnership. For that reason, I agree with Welch[60] that the validity of the transfer as against him depends on section 67.095. That section governs transfers of property owned by a partnership. Under section 67.095(1)(c)—

> Partnership property held in the name of one or more persons other than the partnership, without an indication in the instrument transferring the property to them of their capacity as partners or of the existence of a partnership, may be transferred by an instrument of transfer executed by the persons in whose name the property is held.

In other words, if property belongs to a partnership, but title to the property is in the name of someone other than the partnership itself and the person who holds title to the property transfers it to another person, the transfer is valid.

Section 67.095(1)(c) describes precisely the events that Cattell alleges occurred. The Skyliners property was undisputedly titled in Victoria's name, although I have found that it really belonged to the partnership. And she—who held title to the property—sold it to Welch. So, section 67.095(1)(c)

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60 ECF No. 544 at 7–9.

made the transfer effective, and Welch legitimately acquired title. Whether she acted properly by selling it is a different question. For the seventh claim, what matters is that the transfer was legitimate and valid.

Cattell is not entitled to relief on his seventh claim against Victoria.

7. Eighth claim: Avoidance of fraudulent transfers

The eighth claim is captioned "Avoidance of Fraudulent Transfers" and concludes with a request for "equitable relief to void the transfer deed upon [Cattell] paying Welch his purchase price ....."[61] The relief requested here is the same as that in the seventh claim, except here it's clear that Cattell really is requesting avoidance of the transfer rather than only a declaration that the transfer was improper. But in this claim, he characterizes the transfer as "fraudulent" in the sense that the property was sold for less than a reasonably equivalent value when Cattell was insolvent.

The eighth claim as described in the complaint is based on Bankruptcy Code § 548(a)(1).[62] That section authorizes the bankruptcy trustee to "avoid any transfer … of an interest of the debtor in property … that was made or incurred on or within 2 years before the date of the filing of the petition."

The fatal problem with the eighth claim is that section 548 allows avoidance only of a transfer of "an interest of the debtor in property." Here, Cattell is the debtor. When Victoria sold the property, he didn't own it. He argues that it was not her property, but instead

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61 ECF No. 185 at 28 ¶ 127.

62 ECF No. 185 at 28.

it was the property of the partnership. I agree and have so found above. But that still doesn't mean that the owner of the property was Cattell himself. Because the property was not his property when it was sold, he cannot recover it under section 548.

I will deny relief to Cattell on the eighth claim against Victoria.

8. Ninth claim: Avoidance of preference payments

The ninth claim is captioned "Avoidance of Preference Payments." Although the term "preference" ordinarily refers to a prebankruptcy payment made to a creditor that gives the creditor preferential treatment in comparison to other creditors, this claim for relief also contains a reference to section 548, which is unrelated to preferences but instead addresses fraudulent transfers. The ninth claim says nothing about any creditors to whom any preferential or fraudulent payments might have been made, but as far as I know Welch is the only defendant who is alleged to have ever received a transfer of any kind, so I will assume that the ninth claim is intended to refer to the sale of the property to him.

To the extent that the ninth claim really is intended to seek recovery of an allegedly fraudulent sale to Welch, it duplicates the eighth claim. And to the extent that it seeks to recover from Welch an actual preferential payment in the sense in which that term is used in the preference-recovery provision of the Bankruptcy Code, § 547, the complaint doesn't allege either that the transfer was of "an interest of the debtor in property" or that the transfer was "for or

on account of an antecedent debt owed by the debtor before such transfer was made."[63]

Cattell is not entitled to relief on his ninth claim against Victoria.

9. Tenth claim: Equitable subordination

The tenth claim is entitled "equitable subordination." Complaint paragraph 132 requests that—

In the alternative to the eighth and ninth claims for relief, to the extent the security interests transferred or created as part of any of the transactions more specifically set forth in paragraph 44 - 110 are deemed valid, they should be equitably subordinated to the partnership or the estate.

It's not clear what Cattell means by "the security interests transferred or created by any of the transactions" and the security interests being "deemed valid." The only other reference in the complaint to "security interest" (singular) is in paragraph 100, which refers to a grant of collateral to Williams. Paragraph 102 asks that Williams's status as a secured creditor and lienholder on the property be subordinated to other creditors.

Because the tenth claim does not appear to request relief against anyone but Williams, I will deny relief to Cattell on the tenth claim against Victoria.

D. Victoria's counterclaims against Cattell

In Victoria's answer, she includes a section entitled "[Victoria's] Claims against Cattell."[64] She

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63 11 U.S.C. § 547(b)(2).

64 ECF No. 195 at 10–13 ¶¶ 70–93.

asks that this court determine the extent and amount of her creditor claim, including six counterclaims (which she calls counts).

1. First counterclaim: Dissolving the relationship by enforcing the MSA and compelling arbitration

In Victoria's first counterclaim, the asks that the "relationship" between Cattell and Victoria "be appropriately dissolved or resolved" and that this court "uphold the State court's Order Enforcing the MSA and compel the parties to return to arbitration."[65]

In ruling on Cattell's second claim for relief, I have considered and ruled on all of Victoria's claims for monetary relief against Cattell. She doesn't say what more she requests in the form of enforcement of the MSA.

Under the Federal Arbitration Act, a court considering a dispute subject to arbitration under a written arbitration agreement must stay trial of the action pending arbitration—"on application of one of the parties."[66] Even where a party does seek a stay pending arbitration, its "extended silence and delay in moving for arbitration" can constitute waiver of the right to arbitrate, and a "statement by a party that it has a right to arbitration in pleadings or motions is not enough to defeat a claim of waiver."[67] A waiver is not defeated by the absence of prejudice.[68]

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[65] ECF No. 195 at 11 ¶¶ 73–74.

[66] 9 U.S.C. § 3.

[67] *Martin v. Yasuda*, 829 F.3d 1118, 1125 (9th Cir. 2016).

[68] Morgan v. Sundance, Inc., 142 S.Ct. 1708 (2022).

Here, Victoria did not request a stay of the trial, which has been completed. Any issue that might have been arbitrated has been tried and is decided in this decision. She has pointed to no authority requiring a referral to arbitration under this circumstance. She has waived the right to compel arbitration.

2. Second counterclaim: Dissolving or resolving the domestic partnership

In Victoria's second counterclaim, in the alternative, she alleges that the assets and debts that Cattell and she contributed to a domestic partnership be divided justly and equitably under Oregon law.[69] She also requests an equitable accounting of their finances, transfers, and other financial information during their relationship.[70] She also requests an equalizing judgment against Cattell for specified amounts.

In ruling on Cattell's first claim for relief, I found that the parties formed a business partnership and not just a domestic partnership. And in addressing his second claim for relief, I otherwise resolved all the requests for economic relief that Victoria raised in her closing brief.

3. Third counterclaim: Intentional interference with economic relations

In Victoria's third counterclaim, entitled "In the alternative, Intentional Interference with Economic Relations," she alleges that Cattell intentionally interfered with her sale of the Skyliners property when he repeatedly filed notices of pendency of action and the state-court lawsuit in violation of the

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69 ECF No. 195 at 11 ¶ 76.

70 ECF No. 195 at 11 ¶ 77.

MSA, which actions and interference ultimately resulted in loss of sale of the property to Pizarro for $920,000.[71] She also requests a judgment for specified amounts and recovery from Cattell for any liability she is determined to have to Welch arising from the sale of the Skyliners Property.[72]

The reference to "repeatedly" filing notices of pendency may be an invocation of the first and third notices, in addition to the second, which I've already addressed. The first preceded the MSA, so it couldn't have interfered violated the MSA, and the third followed—and thus couldn't have caused—Pizzaro's withdrawal of his purchase offer. Welch has not asserted any claim against Victoria. In my ruling on Cattell's second claim, I otherwise resolved all the requests for economic relief that Victoria raised in her closing brief.

Victoria is not entitled to relief on her third counterclaim.

4. Fourth counterclaim: Breach of fiduciary duty

In Victoria's fourth counterclaim, to the extent the court finds that a partnership existed, she requests "in the alternative" an award of damages of "at least" $205,000 for Cattell's breach of his partner duties by maintaining separate secret bank accounts, secretly transferring funds to Patty Gough between 2013 and 2017, instructing Victoria to stop her tax withholding from her wages, generally transferring Victoria's sole and separate wages and financial resources for his sole benefit, and materially

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71 ECF No. 195 at 12 ¶ 80.

72 ECF No. 195 at 12 ¶ 82.

misrepresenting the value of the property to Victoria and her creditors.[73]

Victoria did not prove that she reasonably relied on any advice from Cattell to stop tax withholding. She had an independent obligation to comply with the law; he is not a lawyer or tax accountant; and she did not prove that he overcame her ability to make her own decisions. She offered no evidence regarding transfers to Gough. She offered no evidence that she was damaged by Cattell's maintenance of any separate, secret bank accounts. She offered no evidence that his access to her bank account was without her consent or that he made any specific transfers without her consent. She offered no evidence that she was damaged by any misrepresentation by him of the value of the property.

Victoria is not entitled to relief on her fourth counterclaim.

5. Fifth counterclaim: Attorney fees

In Victoria's fifth counterclaim, she requests payment of her reasonable attorney fees incurred in this action due to Cattell's breach of the MSA and violation of state-court orders in filing repeated notices of pendency and interfering with the sale of the property. She also requests attorney fees incurred in this action because he asserted claims without a reasonably objective basis.[74]

I have found above that Cattell did not breach the MSA. In any case, Victoria does not identify a provision of the MSA allowing the recovery of attorney fees by the prevailing party in litigation to enforce it,

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73 ECF No. 195 at 12 ¶¶ 84–86.

74 ECF No. 195 at 13 ¶ 88.

and I have found none. And she does not explain how Cattell's assertion of claims without a reasonably objective basis states a claim for relief, as opposed to possible violation of Federal Rule of Bankruptcy Procedure 9011, which can be raised only by motion under the conditions of that rule.

Victoria is not entitled to relief on her fifth counterclaim.

6. Sixth counterclaim: Non-dischargeability

In Victoria's sixth counterclaim, she requests that her claim be excepted from discharge under Bankruptcy Code §523(a)(2), (4), and (6) because Cattell intentionally interfered with the terms of the MSA, resulting in damages exceeding $59,400.[75]

For her section 523(a)(2) claim, Victoria first alleges that Cattell's intentional inference with the terms of the MSA damaged her, and the resulting debt is for "false pretenses, false representations, and/or actual fraud." I have previously found that Cattell did not breach the MSA. If she relies on a cause of action for "interference" with the MSA, she points to no authority for such a claim. If she meant to refer to the tort of interference with economic relations—which she did expressly invoke in her third counterclaim—an element of that tort is the existence of a professional or business relationship between the plaintiff and a third party with which the defendant intentionally interferes.[76] But she points only to the relationship evidenced by the MSA—between her and Cattell.

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75 ECF No. 195 at 13 ¶¶ 90–93.

76 Cron v. Zimmer, 296 P.3d 567, 575 (Or. App. 2013).

For her section 523(a)(4) claim, she alleges that her claim is for "fraud and/or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." She does not explain why the evidence supports any of those grounds for nondischargeability, and I see none.

For her section 523(a)(6) claim, she alleges that Cattell willfully and maliciously injured her, again by intentionally interfering with the MSA. For the reason that I find her section 523(a)(2) claim deficient, I make the same finding for her section 523(a)(6) claim.

Victoria is not entitled to relief on her sixth counterclaim.

IV. Connor

In the nonlead action, Connor is the only remaining defendant.

A. Jurisdiction

As is the case with the claims between Cattell and Victoria, the claims by Cattell against Connor are related to the main case because resolution of the claims could result in a recovery by Cattell, which in turn could affect the administration of the estate.

Unlike in the lead action, where all remaining parties—including Cattell—have expressly consented to entry of final judgment by the bankruptcy court, I find no express record of either Cattell or Connor consenting in the nonlead action to entry of final orders or judgment by the bankruptcy court. On the other hand, the April 10, 2020, letter from Cattell's lawyer, Terry Scannell, stated with respect to the nonlead action that "[a]ll Defendants have consented to the jurisdiction of this Court and to entry of a final

judgment."[77] No one has objected to that statement by Scannell. I read that letter not only to state that Connor consented, but also implicitly to represent that Cattell consented; if Cattell hadn't consent, Scannell would have had little reason to report the defendants' consent, which would be irrelevant absent Cattell's.

Federal Rule of Bankruptcy Procedure 9027(e)(3) requires that, after removal, a nonremoving party who has filed a pleading in the removed action "file a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy court." Cattell, a nonremoving party, didn't do so. Rule 7012(b) and Local Bankruptcy Rule 7012-1 require that a defendant's answer state consent or lack of consent; Connor's answer did not do so.[78] Consent to entry of final orders or judgment in a noncore proceeding need not be express but may be implied.[79] Here, Scannell's letter implies Cattell's consent and states Connor's consent, which Connor hasn't denied.

Inferring Cattell's consent is consistent with Scannell's letter and Cattell's failure to file a statement of nonconsent under Rule 9027(e)(3); and inferring Connor's consent is consistent with his failure to file a statement of nonconsent under Rule 7012(b) and LBR 7012-1(b) and to dispute Scannell's

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[77] ECF No. 25 at 3.

[78] ECF No. 37.

[79] Wellness Intern. Network, Ltd. v. Sharif, 575 U.S. 665, 683–85 (2015); *In re* Daniels-Head & Assocs., 819 F.2d 914, 918–19 (1987).

statement that Connor consented. Inferring Cattell's consent is also consistent with his express consent in the consolidated lead action.

I find that Cattell and Connor have consented to entry of final orders or judgment by this court in the nonlead action.

B. Claims

1. First: Breach of fiduciary duty

Cattell's first claim against Connor is that Connor breached fiduciary duties to Cattell in the following ways:

> 1. By designing a plan to engage in a systematic actions [*sic*] to lock the Plaintiff out of all the partnership accounts and divert as much money as possible to Victoria at the expense of the Plaintiff. . . ..
>
> 2. By aiding and abetting in the breach of Victoria's fiduciary duties to the Plaintiff. . . ..
>
> 3. Failing to disclose to the Plaintiff that Connor and Victoria were working together to strip the partnership of all its assets and divert those assets to the greatest extent possible to Victoria to the detriment of the Plaintiff and leaving the Plaintiff with the liabilities of the partnership and none of its assets.
>
> 4. Aiding and abetting in engineering the insolvency o the Plaintiff. . . ..
>
> 5. Taking at least $3,000 in partnership assets for himself …."

Fiduciary-breach allegations 1, 3, and 5 depend on proof that Connor owed a fiduciary duty directly to Cattell. I conclude that he owed no such duty.

According to Connor's testimony, which I believe, he became involved in Victoria's finances in June 2017, when he learned that she had relapsed into drinking heavily and was in dire financial straits. Connor didn't know Cattell well and rarely communicated with him, although he did meet him and exchanged emails with him. There is mixed evidence whether Connor's help to his mother included professional CPA services or just help that any dutiful child would provide for a parent in need. But, even if Connor's help included professional CPA services, that wouldn't support Cattell's assertion. There is no evidence that Connor ever undertook to provide CPA services to Cattell. If Cattell subjectively assumed that Connor was working for him as a CPA, that assumption was unwarranted.

Breach allegations 2 and 4 allege that Connor is secondarily liable for aiding and abetting Victoria's breaches of fiduciary duties to Cattell. But I have found above that she did not breach any fiduciary duties to Cattell. In the absence of her liability to Cattell, Connor can't be secondarily liable.

Cattell is not entitled to relief on his first claim against Connor.

2. Financial abuse of a vulnerable person

Cattell's second claim against Connor is for financial abuse of a vulnerable person. It is essentially identical to the sixth claim in the lead complaint.

For the same reasons that Cattell is not entitled to relief on his sixth claim against Victoria, he is also not entitled to relief on his second claim against Connor.

3. Estoppel

Cattell's "estoppel" asserts that that Connor made but breached a promise to provide services to the partnership. The claim is based on the doctrine of promissory estoppel. In the Oregon Supreme Court's 2013 decision in *Cocchiara v. Lithia Motors, Inc.*,[80] it adopted the Restatement (Second) of Contracts conception of promissory estoppel:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

There is no evidence that Connor ever made any promise to Cattell. Cattell is not entitled to relief on his third claim against Connor.

V. Welch

A. Jurisdiction

As noted above, Cattell expressly consented to this court's entry of final orders or judgment in the lead action, which is against only Victoria and Welch. Welch gave the same express consent in his answer.[81]

B. Claims

Although the caption of the lead-action's second-amended complaint does not include Welch's name as a defendant, the body of the complaint includes claims against him, and the parties have proceeded as though he were named in the caption.

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80 297 P.3d 1277, 1283 (Or. 2013).

81 ECF No. 215 at 2 ¶ 1.

The complaint's seventh through tenth claims are against Welch in addition to Victoria. For the same reasons that Cattell is not entitled to relief on those claims against Victoria, he is also not entitled to relief on them against Welch.

VI. Conclusion

On Cattell's first claim against Victoria, I will dissolve the partnership to the extent it wasn't previously dissolved. This decision has the effect of winding up its business.

On Cattell's second claim against Victoria, I will allow her to retain the $908.27 held in her lawyer's client trust account and to recover from Cattell $35,823.11. Her disputed proof of claim is for $71,000. I will allow the claim for $35,823.11. Her claim arose from his actions before his bankruptcy, and her right to enforce it is subject to the law applicable to enforcing such claims.

I will deny relief on Cattell's remaining claims against Victoria, her counterclaims against him, and his claims against Connor and Welch.

I will prepare a judgment and claim-allowance order.

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cc: Thomas Bryon Cattell

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-2857

BAP No. 22-1214
Bankruptcy Appellate Panel for Oregon, Portland

ORDER

In re: THOMAS BRYON CATTELL
Debtor

THOMAS BRYON CATTELL, Appellant.

v.

VICTORIA DEEKS, et al.; Appellees.

FILED
JUN 16, 2025
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Before: BYBEE, LEE, and FORREST, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

Judge Lee and Judge Forrest have voted to deny the petition for rehearing en banc, and Judge Bybee has recommended denying that petition. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. FED. R. APP. P. 40.

The petitions for rehearing and rehearing en banc, **Dkt. 49**, are **DENIED.**