Case Nos. 02-56002, 02-56067

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: VICKIE LYNN MARSHALL,
Debtor.

ELAINE T. MARSHALL, AS INDEPENDENT EXECUTOR
OF THE ESTATE OF E. PIERCE MARSHALL

Appellant and Cross-Appellee,

v.

HOWARD K. STERN, EXECUTOR
UNDER THE WILL OF VICKIE LYNN MARSHALL,
Appellee and Cross-Appellant

Appeal from Decision of the United States District Court
Central District of California,
Case No. CV-02-00342-DOC
(Honorable David O. Carter, Judge)

APPELLEE'S/CROSS-APPELLANT'S SUPPLEMENTAL BRIEF

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PRELIMINARY STATEMENT

Considerable confusion has been sown as to whether Vickie's tortious interference with an *inter vivos* gift claim is core or precluded by the judgment in the Texas probate proceedings. This Court's understanding of the facts is critical to the issues remaining for decision. We appreciate the chance to set the record straight. We clarify that:

- Vickie's tortious interference with gift claim against Pierce was *first* filed in the *bankruptcy* court in 1996, and only filed in the Texas probate proceedings in 2000.
- Pierce did more than file a non-dischargeability complaint in Vickie's bankruptcy; he filed a proof of claim—and the bankruptcy court adjudicated both.
- In 2001, Vickie immediately notified the probate court of her bankruptcy judgment, timely nonsuited her probate-court claims and amended her answer to assert claim and issue preclusion.
- The probate court did not adjudicate Vickie's nonsuited tortious interference claim or any issue therein and did not hold it was a compulsory counterclaim in the probate proceedings.
- Vickie's Chapter 11 Plan expressly provides that all creditors will be satisfied in full from her judgment against Pierce before she receives anything.

- The gift J. Howard Marshall ("Howard") intended to provide for Vickie was an *inter vivos* gift of one-half the appreciation of his assets in the form of an irrevocable trust that was to be completely vested, fully funded and enforceable during his lifetime, so that it could not be undone by anyone.

I. THE BANKRUPTCY COURT HAD CORE JURISDICTION OVER VICKIE'S COUNTERCLAIM.

A. Vickie's Counterclaim Was Compulsory.

Shortly after Vickie filed for bankruptcy in 1996, Pierce filed a non-dischargeability adversary complaint and a creditor's claim for an "unliquidated" amount, alleging Vickie, through her lawyers, defamed him by accusing him of forgery, fraud and overreaching to gain control of Howard's assets. SER:6020-26.

Vickie immediately objected to the creditor's claim, answered the adversary complaint, pleading truth as an affirmative defense, and counterclaimed for tortious interference with an *inter vivos* gift from Howard. SER:6028-29, 6727-40. As Pierce stated in court filings, "[a] review of [Vickie's] counterclaim demonstrates that the defamatory statements and the challenged transactions at issue in [Pierce's] Defamation Action are at the heart of [Vickie's] causes of

action against [Pierce]." SER:6698A2, 8418. The facts underlying Vickie's counterclaim constituted the affirmative defense of truth to Pierce's claim.

Vickie's counterclaim was compulsory as it arose from the same transaction or occurrences as Pierce's defamation claim. *In re Lazar*, 237 F.3d 967, 979 (9th Cir. 2001); Fed. R. Civ. P. 13(a); Fed. R. Bankr. P. 7013.

Vickie's counterclaim in bankruptcy was the first time she had asserted a claim against Pierce for tortious interference with an *inter vivos* gift. Had Vickie not filed her counterclaim, and Pierce won his claim, res judicata would have precluded any subsequent assertion of her claim. 10 Collier on Bankruptcy ¶7013.02 (15th Ed. 2008).

As demonstrated below, the bankruptcy court's jurisdiction over Vickie's compulsory counterclaim was core. The amicus brief of Professors Brown, Cole et al. ("Brown/Cole") in support of Pierce actually supports Vickie, because amici recognize that core jurisdiction exists over compulsory counterclaims. Brown/Cole:21-27. Amici argue, however, that Vickie's counterclaim was not compulsory. *Id.* at 27-32. That argument rests on three factual errors.

First, amici assert the district court found Vickie's counterclaim was permissive. *Id.* at 8, 27. Not so. The district court held the counterclaim was compulsory, but still concluded it was non-core. SER:12437 (stating Vickie's

counterclaim "falls within the 'same transaction' rule"), 12204 ("Vickie filed an answer and compulsory counter-claim"), 8702; *see also* SER:5951-52.

Second, amici erroneously assert the district court found "the counterclaim was not compulsory" because "the falsity of the statements had already been established in a prior state court proceeding in which Pierce obtained a judgment against Vickie's attorneys," and therefore the only issue was Vickie's responsibility for the statements. Brown/Cole:28. But amici ignore that when Vickie subsequently moved for reconsideration because Pierce never obtained a judgment against Vickie's attorneys, the district court acknowledged it "was mistaken as to the final posture of the case." SER:8702. The district court still denied reconsideration because it found its mistake did not affect the following "three factors" contributing to its prior decision, that: (1) "*even a compulsory counterclaim* is not necessarily a core proceeding"; (2) Vickie's counterclaim dwarfed Pierce's defamation claim; and (3) Vickie obtained summary judgment on Pierce's claim on the ground she "was not responsible for her lawyer's statements." SER:8702 (emphasis added).

Third, citing the rule that a claim is not compulsory if at the time it was filed it was already pending in another action, amici erroneously assert that Vickie already had a claim for tortious interference with *inter vivos* gift pending when she filed the bankruptcy counterclaim. Brown/Cole:29. She didn't. The first time she

filed that claim was in the bankruptcy case; four years later, in 2000, she also filed the claim in the probate proceedings as a prophylactic measure after Pierce asserted the bankruptcy court lacked jurisdiction under the probate exception. ER:2863-65, 2875; SER:7509A1-A2, 12411-13, 12660-80.

Pierce previously suggested Vickie's claim was already pending in the probate court since April 1995 when, before Howard's death, Vickie "commenced" probate court proceedings alleging that "Pierce had tortiously interfered with her property rights with respect to J. Howard's assets." Pierce's Substituted Corrected Opening Brief ("POB"):43-44. But Vickie's April 1995 claim was for tortious interference with *Texas statutory spousal support* and filed in a 1995 *guardianship* proceeding *Pierce* brought to declare the then-living Howard incapacitated. ER:724-37; SER:7959, 8005-06, 10194, 12585-86. It was not the same as Vickie's tortious interference with gift claim filed in 1996 in the bankruptcy court and in 2000 in Howard's probate proceedings. *Compare* SER:12585-86 *with* SER:6732-40 *and* ER:2838, 2863-65.

Pierce himself confirmed this in his sworn bankruptcy answer, stating Vickie had "not filed any claim" in the probate court when she filed her tortious interference counterclaim in the bankruptcy court, SER:6757, and again in his bankruptcy-court stay application, stating "[a]t no time . . . in early 1995 court proceedings for spousal support . . . did Vickie . . . raise a claim that she had any

right or entitlement such as found in the [bankruptcy opinions],"

DC Dock. 172:AP025810 n.5.

B. 28 U.S.C. §157 Confers Core Jurisdiction To The Bankruptcy Court Over Vickie's Counterclaim.

1. Congress defined counterclaims to creditor claims as "core."

Vickie's counterclaim falls under §157(b)(2)(C)'s definition of "core" claims as "counterclaims by the [bankruptcy] estate against persons filing claims against the estate," and also satisfies §157(b)(2)(B)—"allowance or disallowance of claims against the estate"—and §157(b)(2)(O)—"the adjustment of the debtor-creditor . . . relationship."

Pierce argues that although Congress expressly designated an estate's counterclaim against a creditor's claim as "core," it is not "core" unless it "arises under" or "arises in" bankruptcy. Elaine Marshall Supplemental Brief ("ESB") 5-9.

This is a smokescreen. The very cases he cites explain that the "core proceedings" listed in §157(b), by definition, meet the arising in/arising under standard. ESB:7 (citing *In re Eastport Assocs*., 935 F.2d 1071, 1076 (9th Cir.

1991) ("§ 157(b) defines core proceedings as ones 'arising under title 11, or arising in a case under title 11,' and gives a nonexhaustive list of types of core proceedings"), *In re Wood*, 825 F.2d 90, 96 (5th Cir. 1987) (§157 "equates core proceedings with the categories of 'arising under' and 'arising in' proceedings").)

Pierce injects confusion by noting that §§157(b)(2)(A) and 157(b)(2)(O) could be construed broadly enough to encompass the state-law proceeding at issue in *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), which Congress did not intend to be "core." ESB:10. But courts recognize that those "catch-all" provisions must be construed narrowly to ensure the underlying proceeding actually "arises under" or "arises in" bankruptcy, unlike the state-law claim in *Marathon*. *E.g.*, *In re Castlerock Props.*, 781 F.2d 159, 162 (9th Cir. 1986).

No such ambiguity exists regarding §§157(b)(2)(B) and (C). *See id.* at 162 (distinguishing claims "within the literal wording of the two catch-all provisions" from "core proceedings enumerated in 28 U.S.C. §157(b)(2)(B)-(N)"); *In re CBI Holding Co.*, 529 F.3d 432, 462 n.13 (2d Cir. 2008).

Marathon did not involve a counterclaim to a proof of claim. *Marathon* merely held that "a non-Article III bankruptcy judge could not adjudicate a pre-petition contract dispute arising under state law against a party that had not filed a proof of claim and was not otherwise related to the bankruptcy proceedings." *Id.*

at 459. The state law claim in *Marathon* did not "arise in" the bankruptcy case because it was not part of the claims allowance process.

But where, as here, a creditor files a proof of claim and a debtor files a counterclaim thereto, those claims "arise in" the bankruptcy case for core jurisdiction purposes even if predicated on state law—because they are part of the claims allowance process. *In re Manville Forest Prods.*, 896 F.2d 1384, 1390 (2d Cir. 1990) ("'*[A] claim filed against the estate is a core proceeding because it could arise only in the context of bankruptcy*. Of course, the state-law right underlying the claim could be enforced in a state court proceeding absent the bankruptcy, but the nature of the state proceeding would be different from the nature of the proceeding following the filing of a proof of claim.'"); *In re Asousa P'ship*, 276 B.R. 55, 77 (Bankr. E.D.Pa. 2002) ("objections to claims and counterclaims which are part and parcel of the claims allowance process, by their nature, could arise only in the context of a bankruptcy case since absent the bankruptcy case, the claims allowance process would not exist").[1]

Pierce inserts implied limitations into §157(b)(2)(C) based on the principle that courts should interpret statutes "to avoid constitutional questions." ESB:6.

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[1] *See also In re Bar M Petroleum Co.*, 63 B.R. 343, 346 (Bankr. W.D.Tex. 1986) (trustee's counterclaim might support state court suit, but it "could only be asserted in the Debtor's reorganization case in which the claim of Defendant was filed"); *In re Robino*, 243 B.R. 472, 493 (Bankr. N.D.Ala. 1999) (estate's counterclaim against creditor's claim "would not exist outside of bankruptcy").

But this Court has explained that "[w]hile the principle that constitutional problems are to be avoided in the construction of statutes is apt *where a catch-all provision is at issue*, more apt in construing a specific provision of a statute is the principle that the will of the legislature underlying the provision is not to be ignored." *In re Mankin*, 823 F.2d 1296, 1301 n.3 (9th Cir. 1987) (emphasis added); *see id.* at 1300 (refusing to imply limitations to §157(b)(2)(H) because the canon about construing statutes to avoid constitutional issues does not allow courts "to ignore the legislative will").

2. Congress intended to confer broad "core" jurisdiction over state-law counterclaims.

Pierce manufactures his two-step analysis to infer an undisclosed intent by Congress to bar "core" jurisdiction over state-law counterclaims. Not only does §157(b)(2)(C)'s express language defeat his interpretation, so does its legislative history.

First, as courts have recognized (*e.g.*, *Manville*, 896 F.2d at 1388), Congress realized *Marathon*'s scope was narrow and did not require that Article III judges adjudicate all state law claims (*see*, *e.g.*, A&P 130 Cong. Rec. D338, at 1620 (daily ed. Mar. 21, 1984) [§157's co-sponsor Representative Kindness: "*Marathon* . . . was not concerned even with all bankruptcy proceedings involving

questions of State law," but "only with State law issues that did not arise in the core bankruptcy function of adjusting debtor-creditor rights."], *id.* at 1630 [Kindness: *Marathon* "did not state that all questions of State law must be decided by an article 3 judge," but "dealt only with noncore bankruptcy proceedings that arise under State law, outside of the bankruptcy estate."]) Congress specifically mandated that "[a] determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law." 28 U.S.C. §157(b)(3).

Second, §157's sponsors intended that the statute codify the emergency bankruptcy rules enacted in *Marathon*'s wake. *See* A&P 130 Cong. Rec. D338, at 1610, 1620, 1630; 130 Cong. Rec. 6045 (daily ed. Mar. 20, 1984). Those emergency rules specified that bankruptcy courts could not enter final judgments in "related proceedings" and that such proceedings include "claims brought by the estate against parties *who have not filed claims against the estate*" and "do *not* include . . . counterclaims by the estate in whatever amount against persons filing claims against the estate." *See In re Comm. of Unsecured Creditors of F S Commc'ns Corp.*, 760 F.2d 1194, 1200 (11th Cir. 1985) (appendix of rules) (emphasis added). Thus, Congress did not consider state-law counterclaims to creditors' claims to fall within "related to" bankruptcy jurisdiction.

Third, §157 co-sponsor Representative Kastenmeier expressly (a) stated his approval of *Katchen v. Landy*, 382 U.S. 323 (1966), which upheld a bankruptcy court's summary jurisdiction over creditor claims and estate counterclaims, emphasizing that *Katchen* recognized "[s]tate common law actions become transformed into Federal bankruptcy matters when brought in proceedings integral to a bankruptcy case," 130 Cong. Rec. 6046 (daily ed. Mar. 20, 1984); (b) stated "jurisdiction in core bankruptcy proceedings is broader than the summary jurisdiction under pre-1978 law," *id.* at 6045, which had included counterclaims; and (c) acknowledged the constitutionality of bankruptcy jurisdiction by consent, *id*. at 6047.

In sum, Congress intended to confer broad core jurisdiction to bankruptcy courts over counterclaims and §157(b)(2) "lists various types of proceedings *deemed by Congress* to be core proceedings." *Mankin*, 823 F.2d at 1299 (emphasis added).

C. The Bankruptcy Court's Final Judgment On Vickie's Compulsory Counterclaim Is Constitutional.

1. The general rule is that bankruptcy courts have core jurisdiction over compulsory counterclaims.

Pierce urges a dramatic departure from how courts within this Circuit and across the country have treated compulsory-counterclaim bankruptcy jurisdiction. In the 27 years since *Marathon*, courts have almost uniformly upheld core bankruptcy jurisdiction over state-law counterclaims arising out of the same transaction as the creditor's claim.[2] "[C]ourts *routinely* deem state law claims in the nature of counterclaims to be core proceedings when they are asserted by a trustee against a creditor who has previously asserted a claim against the bankruptcy estate." *Am. Bridge Prods.*, 398 B.R. at 729 (emphasis added).

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[2] *See*, *e.g.*, *In re Am. Bridge Prods.*, 398 B.R. 724, 729-30 (D.Mass. 2009); *CBI*, 529 F.3d at 459-64; *In re Mercer's Enters.*, 387 B.R. 681, 686 (Bankr. E.D.N.C. 2008); *In re Enron Corp.*, 349 B.R. 108, 112-13 (Bankr. S.D.N.Y. 2006); *In re ABC-Naco*, 294 B.R. 832, 837 (Bankr. N.D.Ill. 2003); *In re Iridium Operating*, 285 B.R. 822, 831-32 (S.D.N.Y. 2002); *Asousa P'ship*, 276 B.R. at 66-72; *In re Gunsmith's*, 271 B.R. 487, 490-91 (S.D.Miss. 2000); *In re Norrell*, 198 B.R. 987, 994 n.4 (Bankr. N.D.Ala. 1996); *Baudoin*, 981 F.2d at 741-44; *In re Fang Operators*, 158 B.R. 643, 647-48 (Bankr. N.D.Tex. 1993); *In re Cont'l Fin. Res.*, 149 B.R. 260, 262-63 (Bankr. D.Mass. 1993), *aff'd,* 154 B.R. 385 (D.Mass. 1993); *In re Nationwide Roofing & Sheet Metal*, 130 B.R. 768, 776 (Bankr. S.D.Ohio 1991); *Bar M*, 63 B.R. at 346-48.

Courts within this Circuit uniformly follow that approach. This Court has recognized as "well-settled law" that a "creditor consents to jurisdiction over related counterclaims by filing a proof of claim." *Castlerock*, 781 F.2d at 162.[3] So has its Bankruptcy Appellate Panel. *In re PNP Holdings Corp*., 184 B.R. 805, 806 (B.A.P. 9th Cir. 1995), *aff'd*, 99 F.3d 910 (9th Cir. 1996). So have its lower courts. *In re County of Orange*, 203 B.R. 977, 980 (Bankr. C.D.Cal. 1996); *In re Lion Country Safari, Inc*. 124 B.R. 566, 568-69 (Bankr. C.D.Cal. 1991); *In re Beugen*, 81 B.R. 994, 998-1001 (Bankr. N.D.Cal. 1988); *In re Sun West Distribs*., 69 B.R. 861, 863-64 (Bankr. S.D.Cal. 1987).

2. The Second Circuit's *CBI* decision.

In 2008, the Second Circuit decided a case that directly undermines the district court's reasoning here.

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[3] Pierce emphasizes that this Court held the counterclaims in *Castlerock* to be non-core, but he doesn't explain why. ESB:15. This Court concluded it "would be unfair" to categorize the claims as counterclaims within §157(b)(2)(C) because "[t]he counterclaims were asserted before the Proof of Claim was filed" and the creditor would never have filed the proof of claim had the bankruptcy court not denied its request for relief from the automatic stay. *Castlerock*, 781 F.2d at 161-62; *see In re S.G. Phillips Constructors*, 45 F.3d 702, 707 (2d Cir. 1995) (*Castlerock* involved a unique situation).

As the district court recognized, "Pierce filed his proof of claim offensively." SER:12435; *accord* SER:12414.

In *CBI*, a creditor filed a proof of claim to enforce a pre-petition claim for unpaid services slightly exceeding $210,000, and the debtor filed disproportionate state-law counterclaims in the tens of millions of dollars. 529 F.3d at 437-38, 441, 444, 463. The Second Circuit recognized that the debtor's claims "are explicitly core" under §157(b) because they "affect the 'allowance or disallowance of [a] claim[] against the estate" and/or "are 'counterclaims by the estate against persons filing claims against the estate.'" *Id.* at 461.

Rejecting the argument the district court relied upon here, SER:8702, it held "'counterclaims based on state law causes of action that would exist independently of a bankruptcy and are disproportionate to the proof of claim'" are core. 529 F.3d at 463. It held nothing in *Marathon* "'alters the basic principle that the filing of a proof of claim invokes the special rules of bankruptcy,'" and thus counterclaims that are factually and legally connected to a proof of claim are core proceedings. *Id.* at 461-62.

3. By voluntarily filing a proof of claim, Pierce submitted to the bankruptcy court's core jurisdiction over his claim and any compulsory counterclaim.

In 1966, the Supreme Court in *Katchen* upheld a bankruptcy court's authority to enter final judgment on a trustee's counterclaim because the creditor,

by presenting its own claim, subjected itself "'to all the consequences that attach to an appearance'" and the entire controversy was "part of the process of allowance or disallowance of claims." 382 U.S. at 335-36.

In *Marathon* (which involved a debtor's claim against a *stranger* to the bankruptcy case), the three-justice dissent noted that had Marathon filed a claim against the estate, the bankruptcy court, under *Katchen*, could have adjudicated the debtor's state-law claim as a counterclaim. 458 U.S. at 99 (Burger, C.J., dissenting). In a footnote response, the plurality noted that *Katchen* neither discussed Article III nor involved the 1978 Act. 458 U.S. at 79 n.31.

The district court here described the footnote as indicating it would be unconstitutional to hold all counterclaims core. SER:12435. The footnote doesn't say that. More important, Justice Rehnquist's concurrence established the *Marathon* holding, and "the reasoning of the majority as reflected in Justice Rehnquist's concurrence supports the continued relevance and precedential value of *Katchen*." *Bar M*, 63 B.R. at 347.

In any event, as our opening brief explained (pp. 142-45), the Supreme Court's post-*Marathon* decisions have repeatedly reaffirmed *Katchen* and the rule that parties voluntarily filing proofs of claim submit to the bankruptcy court's summary/core adjudication of interconnected counterclaims. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 852 (1986) (upholding

constitutionality of statute allowing non-Article III adjudication of claims and state-law compulsory counterclaims; citing with approval *Katchen*'s upholding of "a bankruptcy referee's power to hear and decide state law counterclaims against a creditor who filed a claim in bankruptcy when those counterclaims arose out of the same transaction"); *Granfinanceria, S.A. v. Nordberg*, 492 U.S 33, 58-59 n.14 (1989) (holding creditor's right to jury trial on trustee's preference claim depends on whether creditor submitted claim against estate, triggering "process of allowance and disallowance of claims'"; *Katchen* "makes clear" that "by submitting a claim against the bankruptcy estate, creditors subject themselves to the [bankruptcy] court's equitable power"); *Langenkamp v. Culp*, 498 U.S 42, 44-45 (1990) (creditors filing claims against estate held subject to bankruptcy court's core jurisdiction over estate's preference counterclaims because creditor who files claim "triggers the process of 'allowance and disallowance of claims,' thereby subjecting himself to the bankruptcy court's equitable power," and "becomes part of the claims-allowance process which is triable only in equity").

Virtually all courts now recognize the constitutionality of bankruptcy courts entering final judgment on compulsory counterclaims, since "the adjudication of counterclaims in the context of claim allowance constitutes the adjudication of public rights by the bankruptcy court." *In re Applied Thermal Sys.*, 294 B.R. 784, 789 (Bankr. N.D.Okla. 2003); *accord Asousa P'ship*, 276 B.R. at 66-67 (Supreme

Court authority holds "counterclaims that could affect the allowance or disallowance of a proof of claim are part and parcel of the claims allowance process and are subject to the bankruptcy court's equitable jurisdiction" and a "creditor who files a claim in the bankruptcy court . . . impliedly consents to being sued on counterclaims arising out of the same but not unrelated transactions").

Pierce's authorities are inapposite. *E.g.*, *Castlerock*, 781 F.2d at 161 (proof of claim filed defensively, not voluntarily; *see* n.3, *supra*); *In re Conejo Enters.*, 96 F.3d 346, 349, 353-54 (9th Cir. 1996) (assessing standards for remand orders and relief from automatic stay; court recognized proof of claim triggered core jurisdiction); *Dunmore v. United States*, 358 F.3d 1107 (9th Cir. 2004) (party never filed proof of claim).

This Circuit has followed the Supreme Court's post-*Marathon* decisions, holding that "[w]hen a creditor submits to bankruptcy court jurisdiction by filing a proof of claim in order to collect all or a portion of a debt, it assumes certain risks," including submitting to the bankruptcy court's equity jurisdiction "to resolve counter-claims filed by the debtor or the trustee." *In re Simon*, 153 F.3d 991, 997 (9th Cir. 1998). Indeed, in *Dunmore*, this Circuit noted that Dunmore had not submitted "himself to the bankruptcy court's equity jurisdiction" by filing a proof of claim, thereby triggering the claims-allowance process. 358 F.3d at

1116; *see also Conejo Enters.*, 96 F.3d at 354 n.6; *In re Harleston*, 331 F.3d 699 (9th Cir. 2003).

4. The district court's retrospective approach was erroneous.

The district court noted Pierce's defamation claim presented two issues: "whether Vickie was responsible for the statements of her attorneys" and "whether she knew the statements to be true or false." SER:12435. It held Vickie's compulsory counterclaim did not invoke core jurisdiction because Vickie ultimately obtained summary judgment on Pierce's claim based on the defense she "was not responsible for her lawyer's statements." SER:8702. Thus, even though the bankruptcy court later upheld Vickie's truth defense by favorably adjudicating her compulsory counterclaim, the district court ruled the truth defense and counterclaim were non-core because the bankruptcy court previously sustained her other defense as a matter of law.

This retrospective approach—where an affirmative-defense-based compulsory counterclaim morphs into a non-core proceeding based on the bankruptcy court's ultimate disposition of the creditor's claim—flouts basic tenets of bankruptcy law.

In bankruptcy cases, jurisdiction over claims and the compulsory status of counterclaims is determined based on the original pleading date. *In re Fietz*, 852

F.2d 455, 457 n.2 (9th Cir. 1988); *In re Crystal Cascades Civil*, *LLC*, 398 B.R. 23, 28 (Bankr. D.Nev. 2008); Fed. R. Civ. P. 13(a) (compulsory counterclaim is claim which when serving "the pleading the pleader has against an opposing party"); Fed. R. Bankr. P. 7013; *cf. Carlsbad Tech. v. HIF Bio, Inc.*, 129 S.Ct. 1862, 1866-67 (2009) (federal courts retain jurisdiction over state-law claims even after dismissal of federal-claim predicate for pendant jurisdiction).

A retrospective approach also flouts the "congressionally-endorsed objective" of ensuring "the efficient and expeditious resolution of all matters connected to the bankruptcy estate," *Fietz*, 852 F.2d at 457, as it splinters interconnected claims into adjudication by different forums long after they have been pending in one court.[4]

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[4] Pierce asserts "[a] bankruptcy court's jurisdiction is not immutable—it can be lost as a bankruptcy proceeding evolves and assets are transferred." ESB:18. But none of his authorities involve pending creditor claims and compulsory counterclaims. Rather, they involve the inapposite context of bankruptcy courts losing subject matter jurisdiction over property that leaves the bankruptcy estate free of liens.

D. Pierce's Other Attempts To Avoid §157(b)(2)(C) Fail.

1. Pierce filed a proof of claim against Vickie's estate.

Pierce tries to avoid §157(b)(2)(C) by claiming he never filed a proof of claim "against the estate," but merely a proof of claim "form," attaching his prior non-dischargeability complaint to demonstrate he was seeking only a nondischargeability determination—a claim "against Vickie personally, not her 'estate.'" ESB:19-20. As the district court concluded, SER:12434, that's preposterous.

First, Pierce filed the proof of claim *after* filing his nondischargeability complaint—a superfluity if he sought only a dischargeability determination. *In re Grynberg*, 986 F.2d 367, 370 (10th Cir. 1993) (proof of claim unnecessary if creditor seeks only nondischargeability determination). "The sole purpose served by filing a proof of claim in [the] bankruptcy case, from the creditor's standpoint, is to obtain a share of the debtor's bankruptcy estate." *Lion Country Safari*, 124 B.R at 572 n.13.

Second, Pierce purposefully sought bankruptcy-court adjudication of his claims. He instructed his attorneys:

> *We must file proofs of claim* that provide us the maximum range of options, whether or not we think we can ultimately prevail on each one. A shotgun approach. . . . *Definitely file a claim* to protect the

> estate and trust from . . . the . . . position that [Howard's] transfers to [Vickie] constituted 'gifts' and not 'support'. *We must be prepared for the bankruptcy court to take it. . . . Definitely file a claim on my libel action. . . .*

SER:10204 (emphasis added).

Third, Pierce's statements to the bankruptcy court confirm he was pursuing a defamation claim against the estate. He told the court he dismissed his pending state-court slander suit against Vickie and "put [the slander claims] into the nondischargeability complaint," that the adversary proceeding "*included the slander lawsuit*" and that his claim and Vickie's counterclaim constituted "*both halves* of the [adversary] action." SER:12435 (district court citing DC Dock. 111:T00045, T00059.) And, in responding to Vickie's objections to his proof of claim, Pierce told the bankruptcy court that "[a]ll parties are in agreement that *the amount of the contingent Proof of Claim* filed by [Pierce] shall be determined by the *adversary proceedings filed herein.*" SER:6801 (emphasis added); *see* SER:8412, 8418 (Pierce stating he filed "an unliquidated, unsecured claim").

Fourth, Pierce non-suited Vickie from his pending Texas state court defamation action, never sought relief from the automatic stay, and pursued his claim in the bankruptcy court. SER:6108-10, 12434. He requested an $8.5 million estimation *of his claim* for plan confirmation and voting purposes. SER:8409-16. He vigorously participated as a creditor. SER:6039-43, 6054-63.

And he litigated his substantive defamation claim in the bankruptcy court until days before trial in November 1999, when the court granted summary judgment discharging *Pierce's claim* and granting judgment for Vickie on his nondischargeability complaint. *E.g.,* SER:6204-10, 8087, 12435.

2. §157(b)(5) is irrelevant.

Pierce also argues that if he *had* filed a defamation claim against Vickie's estate, the claim "would necessarily have been transferred to the district court" because §157(b)(5) specifies that "'personal injury tort and wrongful death claims *shall* be tried in the district court.'" ESB:20. He claims §157(b)(5) deprived the bankruptcy court of "jurisdiction" over his defamation claim. *Id.* Not so.

First, §157(b)(5)'s reference to "personal injury and wrongful death" only encompasses suits for *physical* or *bodily* injury. *Massey Energy Co. v. W. Va. Consumers for Justice*, 351 B.R. 348, 351 (E.D.Va. 2006) (defamation claim outside §157(b)(5), citing cases); *In re Atron Inc.*, 172 B.R. 541, 543-45 (Bankr. W.D.Mich 1994). While some courts interpret §157(b)(5) more broadly, the narrow view best furthers Congress' intent that courts broadly construe bankruptcy courts' core jurisdiction. *In re Arnold Print Works*, 815 F.2d 165, 169 (1st Cir. 1987) (legislative history shows Congress intended that core jurisdiction "be interpreted broadly, close to or congruent with constitutional limits" and that

95% of proceedings would be core); *Mankin*, 823 F.2d at 1301; *CBI*, 529 F.3d at 460-61. The narrow view is also confirmed by the fact that §157(b)(5)'s "special treatment for 'personal injury tort claims' was not constitutionally required but, rather, was a response to lobbying by the personal injury tort bar." *In re Ice Cream Liquidation*, 281 B.R. 154, 161 (Bankr. D.Conn. 2002); *In re Dow Corning Corp.*, 215 B.R. 346, 353-54 (Bankr. E.D.Mich. 1997) (criticizing Pierce-cited case as egregious dictum).

Second, even courts extending §157(b)(5) beyond physical injury recognize parties can impliedly consent, or waive any objection, to bankruptcy courts entering final judgment on personal injury claims. *E.g.*, *In re Smith*, 389 B.R. 902, 906, 908, 913-16 (Bankr. D.Nev. 2008) (creditor impliedly consented to core jurisdiction over defamation claim because his complaint alleged core jurisdiction and sought a nondischargeability determination, he filed a proof of claim for unliquidated damages, and he never timely objected); *In re Leslie Fay*, 212 B.R. 747, 772-73 (Bankr. S.D.N.Y. 1997) (waiver from failure to properly raise "personal injury" issue to bankruptcy court), *aff'd*, 222 B.R. 718 (S.D.N.Y. 1998), *aff'd*, 182 F.3d 899 (2d Cir. 1999).

Pierce waived or impliedly consented. Not only did he file a proof of claim, he told the bankruptcy court that "[a]ll parties are in agreement that *the amount* of the contingent Proof of Claim filed by [Pierce] shall be *determined by the*

adversary proceedings filed herein" and that he would be "happy" and "pleased" to litigate "[his] claim here" because "we did choose this forum." SER:6101-02, 6801 (emphasis added). The district court recognized that Pierce thereby consented to the bankruptcy court adjudicating his claim. SER:12431; *see also* SER:6023 (Pierce's complaint alleging bankruptcy court had core jurisdiction).[5] Moreover, in his district court and Ninth Circuit appeals, Pierce never contested the bankruptcy court's judgment on his defamation claim and nondischargeability complaint; he only contested the adjudication of Vickie's counterclaim. DC Dock. 172:AP025768-71, AP026129-32; DC Dock. 443; ER:1-2.

Third, where creditors file personal-injury proofs of claim, the bankruptcy court has core jurisdiction and §157(b)(5) at most directs a procedure for referring the claim to district court *for trial* if the bankruptcy court does not resolve the claim through pre-trial proceedings. *In re UAL Corp*., 310 B.R. 373, 377-83 (Bankr. N.D.Ill. 2004); *Dow Corning*, 215 B.R. at 352-53, 360.

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[5] After litigating his bankruptcy court claim for two years, Pierce reacted to adverse discovery rulings by seeking to withdraw the adversary proceeding to the district court, which initially withdrew "[t]he underlying suit for defamation" and Vickie's counterclaim, but not the dischargeability determination. ER:2019-33, 2043; SER:6705-09. It soon returned the entire matter to the bankruptcy court, telling Pierce its change of mind was partly "driven by your selection of forum . . . ." SER:6185, 6717. *See Sec. Farms v. Int'l Bhd. of Teamsters*, 124 F.3d 999, 1007 n.3 (9th Cir. 1997) (withdrawal motion must be "made as promptly as possible").

3. The bankruptcy court had post-confirmation power to enter final judgment on Vickie's counterclaim.

Pierce argues Vickie's counterclaim "ceased to be a claim 'by [her] estate'" upon the confirmation of her chapter 11 plan, which occurred before the bankruptcy court adjudicated her counterclaim. ESB:18. He asserts the confirmation transferred all estate property to her, including the counterclaim, because the Plan "expressly provided that 'all assets of the Estate shall vest in Reorganized Debtor [Vickie].'" *Id.* And he contends that "[i]f Vickie had wanted to preserve her tort claim as a claim 'by her estate,' she could and should have left it in her estate for the benefit first and foremost of her creditors." ESB:19.

But the Plan does that. In quoting its statement that "all assets of the Estate shall vest in Reorganized Debtor," Pierce omits the end of the sentence: "except as provided in the Plan." SER:6075. The Plan specifically provides that Vickie's creditors are to be paid from any judgment or settlement of her counterclaim against Pierce, SER:6074-75, and that Vickie shall not receive any distribution from the counterclaim until all creditors have been fully satisfied, SER:6075-76. It further specifies that the bankruptcy court retained jurisdiction to determine Pierce's claim and Vickie's counterclaim, both of which remained pending. SER:6074, 6078-79, 12453 n.7.

Pierce also wrongly suggests Plan confirmation somehow terminated all bankruptcy-court jurisdiction over Vickie's counterclaim. ESB:18, 22. Bankruptcy courts have jurisdiction over post-confirmation matters that affect "'the interpretation, implementation, consummation, execution or administration of the confirmed plan . . . .'" *In re Pegasus Gold Corp.*, 394 F.3d 1189, 1194 (9th Cir. 2005); *In re Sasson*, 424 F.3d 864, 869-70 (9th Cir. 2005); *In re Seven Fields Dev. Corp.*, 505 F.3d 237, 259-60 (3d Cir. 2007) (finding "core" post-confirmation jurisdiction); *In re Petrie Retail*, 304 F.3d 223, 229-31 (2d Cir. 2002) (same).

II. VICKIE'S TORTIOUS INTERFERENCE WITH *INTER VIVOS* GIFT CLAIM IS NOT BARRED BY CLAIM OR ISSUE PRECLUSION.

A. If Vickie's Claim Is Core, The Preclusion Issue Disappears.

The bankruptcy court entered final judgment for Vickie on her tortious interference counterclaim in December 2000. At that time, the probate court trial was ongoing and Vickie had not rested her case. SER:8426-27, 10308, 12453. She immediately nonsuited all her claims—a voluntary dismissal without prejudice under Texas law. SER:8427, 10306, 10610, 12260, 12453; Tex. R. Civ.

P. 162. In February 2002, the probate court entered a final judgment on the other matters before it. ER:4727; SER:12464.

If core, the bankruptcy judgment was final; since it was first in time, the later probate judgment cannot preclude it. "[R]es judicata doctrines cannot logically be raised as a defense against liability that was established by a decision in existence prior to the decision claimed to have preclusive effect." *McKenzie Eng'g. Co. v. NLRB*, 373 F.3d 888, 891-92 (8th Cir. 2004). The doctrines do not apply to a "direct appeal of a judgment that predates the judgment asserted to have claim preclusive effect." *Orion Tire Corp. v. Goodyear Tire & Rubber Co*., 268 F.3d 1133, 1136 (9th Cir. 2001); *accord Nationwide Mut. Ins. Co. v. Liberatore*, 408 F.3d 1158, 1162 (9th Cir. 2005) (later judgment "cannot operate to bar direct review of extant judgment"); *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994 (emphasis omitted) (court below faced no res judicata issue because "[o]nly a prior judgment is entitled to preclusive effect, and the [] court [below] entered final judgment in this case before [the other case] was decided").

B. Vickie's Final, First-In-Time Bankruptcy Judgment Is Not Barred By Preclusion.

Pierce asserts that "Vickie never properly presented her res judicata claim in the Texas Probate Court" and therefore "waived her preclusion argument." ESB:44. Pierce can make that assertion only by misstating the facts. But, in the end, what Vickie did in Texas is irrelevant, since she is not asserting preclusion here.

1. Contrary to Pierce's assertions, Vickie amended her answer in the probate proceedings to raise res judicata as an affirmative defense, and thus did not waive a preclusion defense.

Pierce asserts that even if the bankruptcy court judgment is "reinstated, the probate judgment would remain the preclusive judgment under both the Texas last-in-time rule and applicable federal law" because "Vickie never properly presented her res judicata claim in the Texas Probate Court" and therefore "waived her preclusion argument." ESB:43-44; *see also* Amicus Washington Legal Fund ("WLF"):2, 23.

Although Pierce has argued variations of this counter-factual argument before (*e.g.*, his claim that Vickie "never sought to establish the Bankruptcy Judgment as having preclusive effect in the Probate Court," 9th Cir. Dock. 98:35), now he asserts, for the first time, that Vickie never amended her answer to assert preclusion as Texas law requires. ESB:43, 44.

The facts are otherwise:

Immediately upon entry of the bankruptcy judgment, Vickie filed the final bankruptcy judgment in the probate proceedings and voluntarily nonsuited without prejudice all her claims there. SER:8427, 10306. At that point, Vickie remained in the probate proceedings only as a counterdefendant on an unrelated claim. SER:8422-27; DC Dock. 112:T001029.

When Pierce announced he was adding new claims against her, Vickie immediately moved to amend her answer to add affirmative defenses of claim and issue preclusion. Vickie's Request for Judicial Notice ("RFJN"), Exh. A, pp. 4-5; *see* SER:10610, 12260, 12453. Pierce objected. RFJN, Exh. B. The probate court granted leave and Vickie filed her amended answer. RFJN, Exh. C.

2. Pierce's "last-in-time" rule does not apply to Vickie's bankruptcy judgment.

Pierce argues that even if Vickie had not waived her preclusion defense in the probate court, the probate judgment is "entitled to preclusive effect under the 'last-in-time' rule," which he says provides that when two inconsistent judgments are rendered in separate actions, the later of the two judgments "is accorded preclusive effect under the rules of *res judicata*." ESB:44-45.

That's not how the "last-in-time" rule works. No case cited by Pierce (ESB:43-45) or his amicus (WLF:14-18) involve the present situation: an appeal on a first-in-time final judgment. Rather, those cases all involve *only* the question whether a final, first-in-time judgment is preclusive as against a *second* judgment in a *third* action. Rest.2d Judg., § 15 ("When in two actions inconsistent final judgments are rendered, it is the later, not the earlier, judgment that is accorded conclusive effect in a third action under the rules of res judicata.").

The district court gave Pierce credit (prematurely) for not making the "utterly absurd suggestion that a first obtained judgment can be reversed on appeal by an appellate court accepting as established those facts determined at a later trial in another case, and then precluding, ex post, the evidence submitted in the first trial." SER:10609-10 n.9. The district court concluded: "Such a proposition

would make every judgment infirm." *Id*. Indeed, it would "turn[] res judicata on its head." *Orion*, 268 F.3d at 1136.

C. If Vickie's Tortious Interference Claim Is Non-Core, It Is Still Not Precluded, Because *Only* The Bankruptcy And District Courts, *Not* The Texas Probate Court, Decided Her Tortious Interference With Gift Claim Or Issues Related To It.

1. No claim preclusion: The probate court did not decide Vickie's tortious interference with gift claim and it was not a compulsory counterclaim in the probate proceedings.

Texas *claim* preclusion law bars relitigation only of claims that were "finally adjudicated" or were "compulsory" counterclaims in a prior proceeding. *Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203, 206-07 (Tex. 1999); *In the Interest of P.D.D.*, 256 S.W.3d 834, 842, 844 (Tex.App. 2008). Vickie's tortious interference claim was neither.

Before she rested her case, Vickie voluntarily nonsuited her claims in the probate proceedings, including her tortious interference with gift claim. Tex. R. Civ. P. 162; p. 26, *supra*. Thereafter, Vickie "brought no additional claims against any party" but only "remained as a counterdefendant." ER:4713. None of her

proposed jury instructions was presented to the jury, which decided no issue related to her dismissed claims. *Compare* ER:3713-99 *with* ER:4076-77; *see* SER:10605, 10610, 12260-61 & n.2, 12453 & n.9. The probate court itself confirmed that "[w]e didn't try any issue of tortious interference with inter vivos gift in this case at all," SER:8660; it was only "deciding all the issues concerning the Estate" and "[n]ot anything to do with what complaints that [Vickie] has against [Pierce]," SER:8664.

By definition, her voluntarily dismissed claim was unadjudicated, and an unadjudicated claim dismissed without prejudice, unless a compulsory counterclaim, is not barred by res judicata. *E.g.*, *Weiman v. Addicks-Fairbanks Rd. Sand,* 846 S.W.2d 414, 421 (Tex.App. 1993); *Welch v. Hrabar,* 110 S.W.3d 601, 608 (Tex.App. 2003). And Vickie's tortious interference claim was not a compulsory counterclaim in the probate proceedings.

A counterclaim *cannot* be compulsory if it is already pending elsewhere at the time of pleading, and therefore cannot be claim-precluded. Tex. R. Civ. P. 97; *Ingersoll-Rand Co.*, 997 S.W.2d at 206-07; *Weiman,* 846 S.W.2d at 418, 421. This mirrors federal procedure. *Jack H. Brown & Co. v. Northwest Sign Co.*, 718 S.W.2d 397, 399 (Tex.App. 1986) (court must look to "rule 13(a) of the Federal Rules of Civil Procedure, from which Texas Rule 97(a) is taken"); *United Paving Co. v. Downer Corp.*, 276 F.2d 468, 470 (9th Cir. 1960) (when claim that would

"of necessity be pleaded as a compulsory counterclaim under Rule 13(a) is also the subject of pending litigation in another court," which was first filed, party failing to counterclaim the claim in question "will not thereafter be barred by res judicata").

Here, Vickie's tortious interference with gift claim was pending for years in the bankruptcy court before Pierce, in January 1999, filed his first claim against Vickie in the probate proceedings, seeking sanctions under a Texas law counterpart of Rule 11. SER:8422-23; DC Dock. 112:T001029. Thus, Vickie's tortious interference claim was not a compulsory counterclaim, and cannot be claim-precluded.

2. Pierce's argument rests on a demonstrably inaccurate version of the facts.

a. Vickie's tortious interference claim was neither sent to the jury nor decided by the court.

Pierce insists that the "probate court fully and finally resolved Vickie's claim, as well as the issues underlying her claim." ESB:26. As shown above, undisputed facts belie that assertion. Alternatively, Pierce argues that because Vickie "unsuccessfully sought to withdraw from the probate proceeding" and

"remained a party to [it]" on "Pierce's counterclaims" and "likewise participated fully and extensively in the Texas proceeding," the "Texas doctrine of claim preclusion properly applies." ESB:34-35. Not so.

First, Pierce filed post-nonsuit counterclaims against Vickie, but none detracts from her nonsuit's effectiveness. SER:8427-28, 8609-30; *Le v. Kilpatrick*, 112 S.W.3d 631, 633 (Tex.App. 2003) (if defendant has pending claim for affirmative relief, "plaintiff's nonsuit is effective for its own claims, but not for those of the defendant"). Moreover, his counterclaims did not replicate Vickie's tortious interference with gift claim. His declaratory judgment claim—the only claim involving Vickie that went to the jury—sought a declaration only as to whether she had an "*agreement or contract* for half of [Howard's] *estate*"; it sought no relief regarding whether Howard intended an *inter vivos gift*. SER:8615 (emphasis added). And Pierce's sanctions claim, which the court decided against him, alleged Vickie's pleadings were frivolous, and was essentially a request for payment of attorneys' fees. DC Dock. 112:T001029; SER:8422-23.

Second, Pierce's detailed description of the extent to which Vickie's counsel participated in the probate trial both before and after her nonsuit, ESB:27-30, 34-35, is utterly irrelevant to the claim preclusion issue.[6] Pierce made the

[6] Since Vickie initially was trying a tortious interference claim, it is no surprise that her counsel, in opening statement, identified that claim or "stressed" that her case was about "'tortious interference with an intent to give an inter vivos

same lengthy, irrelevant showing in his prior briefing in this Court.[7] The extensiveness of Vickie's participation does not negate the undisputed fact that she nonsuited her claims. Nor does the parties' post-nonsuit conduct change the fact that no tortious interference with gift claim was finally adjudicated in the probate proceedings.

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gift.'" ESB:27-28. Nor is it surprising that her counsel referenced evidence underpinning Vickie's tortious interference claim in the federal courts or examined witnesses "the District Court heard in its subsequent review" of Vickie's bankruptcy judgment. ESB:28-29. It is equally unremarkable that Vickie participated in the probate proceedings after her nonsuit, ESB:29-30, 34-35, defending against Pierce's post-nonsuit claims.

[7] Unfortunately, much of this irrelevant detail found its way into this Court's opinion. *In re Marshall*, 392 F.3d 1118, 1128-29 & n. 7 (9th Cir. 2004). Some of the detail is factually wrong. Thus, Vickie's "six days of her own testimony" did *not* occur in her "case in chief" (*see id.* at 1129), but when "she was called as an adverse witness" on the claims on which she remained a counterdefendant. ER:4071; SER:8429. Nor is there any evidence in the record that Vickie "presented her entire case in chief" (392 F.3d at 1129); rather, she nonsuited her claims before she rested her case (p. 26, *supra*).

b. The probate court not only never found Vickie's tortious interference with gift claim was a compulsory counterclaim, but stated that the probate judgment did not foreclose her from pursuing it in federal court.

Pierce argues that "the Probate Court explicitly found that Vickie's tort claim constituted a compulsory counterclaim that Vickie was required to raise in the Texas probate proceeding." ESB:35. The probate court expressly stated the reverse.

First, during the process of finalizing the probate judgment, the probate court stated that Vickie's tortious interference claim (her counsel referred to it as Vickie's "claims out in California") was "not affected by [the probate court judgment] at all" and recognized it was "still in court out there." SER:8669. Second, the court expressed doubt that Pierce's pleadings gave rise to any compulsory counterclaim, stating it was "not sure exactly what compulsory counterclaims there were to Defendant's lawsuit or answer" and suggested that none "arose in the fifth week of trial" when Pierce amended his pleading to add his declaratory judgment claim. SER:8609-30, 8669-70. Third, and most important, the court described the probate judgment as foreclosing only claims

against "property in the estate of J. Howard Marshall" and not Vickie's damages claim against Pierce in federal court, adjudging in the probate judgment that only claims by Vickie "against the Estate of [Howard] or against the property in [Howard's] Living Trust . . . were required by law to have been asserted as compulsory counterclaims in this proceeding." ER:4720; SER:8674-75.[8]

Pierce nevertheless asserts that the probate court concluded that Vickie's tortious interference claim "was required to be brought in the probate proceeding" because in section 3.34 of the probate judgment, it "determined" that "any and all claims by Vickie regarding J. Howard's intent and his property, 'including but not limited to claims that [Howard] intended but failed to give her or to leave her any portion of such property during his life or upon his death, were required by law to

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[8] The probate court explained that while it *did* intend the judgment to "terminate any potential claims [Vickie] might have to any property that was ever owned by the Decedent," it did not intend to terminate Vickie's tortious interference with gift claim against Pierce, since that was not a claim against Howard's estate. SER:8674. While Vickie "might have a claim for damages against Pierce because he did something tortious, and she might be able to recover on those damages, but . . . whatever basis that damages is based on, *it has nothing to do with the property that was owned by the Decedent*." SER:8674 (emphasis added). Thus, the probate court concluded:

> I don't want the judgment to leave that possibility [that Vickie would claim an entitlement to Howard's property] open, and I don't want to necessarily foreclose whatever was already filed out there that wasn't already also filed here. But that, as I understand it, was only *a claim for damages against Pierce, personally, individually, based on his personal individual conduct, and had nothing to do with this Court's jurisdiction over this Estate*." *Id*. (emphasis added).

have been asserted as compulsory counterclaims in this proceeding.'" ESB:26-27 (quoting ER:4720, §3.34).

But Section 3.34 does not state or even suggest that "any and all claims by Vickie regarding J. Howard's intent and his property" were required by law to have been asserted as compulsory counterclaims in the probate proceedings. Rather, reinserting language Pierce omits, section 3.34 provides that "[t]he Court finds that any and all claims by [Vickie] *against the Estate of [J. Howard] or against the property in the J. Howard Marshall II, Living Trust*, including but not limited to claims that [J. Howard] intended but failed to give her or to leave her any portion of such property during her life or upon his death, were required by law to have been asserted as compulsory counterclaims in this proceeding." ER:4720 (emphasis added).

Vickie's tortious interference claim was not directed against Howard's estate or living trust and thus nothing in section 3.34 made it a compulsory counterclaim. As the probate court stressed, her claim is solely a tort claim against Pierce individually.

Pierce also claims that under the probate judgment, "Vickie was entitled to 'take nothing' from Pierce." ESB:27. Section 3.34 states that "all defendants are also entitled to a take-nothing judgment based on any claim that [Vickie] *should have made in this proceeding as a compulsory counterclaim,*" and section 3.38

provides that Vickie "shall take nothing from any claim that *she should have made in this proceeding as a compulsory counterclaim*." ER:4721 (emphases added). However, as already shown, Vickie's claim against Pierce was *not* a compulsory counterclaim in the probate proceeding.

3. No issue preclusion: No issue identical to any issue pending in the bankruptcy or district courts was actually litigated or determined in the probate proceedings or necessary to the probate judgment.

To establish issue preclusion under Texas law, the defendant must demonstrate that the issue decided in the first action "was identical to the issue in the pending action," "was actually litigated" and "was determined on the merits and was necessary, essential and material to the outcome of the prior action." *Price v. Texas Employers' Ins. Ass'n*, 782 S.W.2d 938, 940 (Tex.App. 1989); *accord Fiallos v. Pagan-Lewis Motors*, 147 S.W.3d 578, 584-585 (Tex.App. 2004); *RecoverEdge L.P. v. Pentecost*, 44 F.3d 1284, 1290 (5th Cir.1995); *Clark v. Bear Sterns & Co*., 966 F.2d 1318, 1321 (9th Cir. 1992) (party asserting issue preclusion "bears the burden of showing with clarity and certainty what was determined by the prior judgment"); *Sysco Food Servs. v. Trapnell*, 890 S.W.2d 796, 801 (Tex. 1994).

There is no issue preclusion here.

Because of her nonsuit, Vickie did *not actually litigate* any tortious interference issue in the probate court. *In re T.N.V.*, 855 S.W.2d 102, 103 (Tex.App. 1993) ("A voluntary non-suit does not constitute a litigation of the issues in a case and does not prejudice the parties against seeking the same relief in a subsequent case."); *Rexrode v. Bazar*, 937 S.W.2d 614, 619 (Tex.App. 1997). The evidence, witnesses and arguments she presented before nonsuit, which Pierce presents at length, ESB:27-29, are thus irrelevant to issue preclusion.

Pierce's argument therefore must rest on his two claims against Vickie that were litigated and decided in the probate proceedings—his claim for sanctions for allegedly frivolous pleadings and his declaratory judgment claim. Neither presented any issue involving Vickie's tortious interference claim.[9]

The probate court denied the sanctions claim, finding Vickie's pleadings "do not contain allegations or other factual contentions that are without evidentiary support." ER:4725. Thus, no issue was litigated or decided in that claim that could possibly bar Vickie's tortious interference claim.

The same is true of Pierce's declaratory judgment claim. His complaint sought *only* a declaration that Vickie "had no *agreement or contract* for half of

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[9] Pierce nonsuited his tortious interference with inheritance claim. SER:8438, 8446; *see* SER:8610, 8621, 12514.

[Howard's] estate" and only requested that the court permit the jury to decide whether Vickie "has any rights to the property *of the Estate* of J. Howard Marshall II." SER:8615 (emphasis added). Consistent with that focus, the only question concerning Vickie sent to jury was Question 66, which asked: "Do you find that Vickie Lynn Marshall did not have *an agreement* with J. Howard Marshall, II that he would give her one half of all of his property?" ER:3782 (emphasis added); *see* ER:3713-99; SER:6624.

For res judicata purposes, there is no identity between a *contract* claim seeking Howard's *estate* property under the control of a probate court and a *tort* claim against *Pierce as an individual*. Pierce's counsel insisted on that distinction, stating to the district court *under oath* that Pierce "only seek[s] to avoid any possibility of future litigation with Vickie Marshall over [Howard's estate] and to ensure that the Texas Probate Court can determine all claimants and efficiently administer that estate." SER:8470.

All three lower courts agreed. The probate court stated it tried no "issue of tortious interference with inter vivos gift in this case at all," and no "complaints that [Vickie] has against [Pierce]." SER:8660, 8664. The bankruptcy court held that Question 66 was "entirely consistent" with its judgment in favor of Vickie, which "does not rest on the answer to" Question 66, as "this court has made no finding of an 'agreement' between [Vickie] and [Howard] to give her one-half of

all his property." SER:8585; *accord* SER:12453 & n.9. The district court held that the jury finding on Question 66 "has no relevance to the claims adjudicated by this Court in the Adversary Proceeding," as "Vickie never advanced the theory of a contract and the Court's award was based on Pierce's tortious interference with an inter vivos gift, not a contract." SER:12261 & n.2.

Nevertheless, Pierce argues that the probate court "determined on the merits" that "Howard did not intend, promise, represent, or agree to give Vickie any of his assets." ESB:33. The probate court determined nothing of the kind. Nor would it have done so given the undisputed fact that Howard lavished Vickie with millions of dollars in gifts during his lifetime. DC Dock. 113:T001494; SER:8664.

Elsewhere, Pierce quotes the probate judgment to the effect that Howard "'did not intend to give and did not give to [Vickie] a gift or bequest *from the Estate of [Howard] or from the [Living Trust]* either prior to or upon his death'" and that she "'does not possess any interest in and is not entitled to possession of any property *within the estate of [Howard] or any property of the [Living Trust]* because of any representations, promises, or agreements.'" *Id.*, quoting ER:4721 (emphasis added). But this language did not adjudicate any issue in Vickie's interference with gift claim.

First, as noted, the probate court expressly disclaimed that it tried any "issue of tortious interference with inter vivos gift in this case at all" or decided any "complaints that [Vickie] has against [Pierce]." SER:8660, 8664.

Second, the probate court stated it was "deciding all the *issues* concerning [Howard's] Estate . . . [n]ot anything to do with what complaints that [Vickie] has against [Pierce]." SER:8664 (emphasis added).

Third, Vickie's tortious interference claim did not allege that Howard intended that his estate or living trust be the source of his gift. Nor did she claim "any interest in" or entitlement "to possession of any property within the estate of [Howard] or any property of the [Living Trust]." The gift Howard intended was an irrevocable *inter vivos* gift. Thus, he could not have intended it as estate property because an estate can include only property a decedent owned at death, not property irrevocably disposed of during his lifetime. Moreover, "a gift from an estate can only be done by a will," SER:8677, and a gift from a trust can only be done by naming someone as a beneficiary. Vickie never contended Howard intended to name her a beneficiary of his will or living trust.

Fourth, even if the probate court had determined Howard never intended any gift to Vickie from property in his living trust, that would not collaterally bar her tortious interference claim. Pierce concedes Howard could have funded Vickie's gift during his lifetime by simply borrowing against his assets, without

ever taking funds from the living trust, because its "terms allowed J. Howard to borrow against his assets up until the day he died," and "if he had really wanted to give Vickie a large gift, he could have." 9th Cir. Dock. 98:2. Indeed, Howard's attorney contemplated funding the trust by creating and issuing notes or preferred stock measured by an increase in value of Koch stock, which would not have involved taking funds from the living trust. SER:9567.

Nor does issue preclusion arise from the findings of the jury and probate court on the validity of Howard's will and living trust. Pierce argues those findings are inconsistent with Vickie's "theory of liability" on her tortious interference claim. ESB:30, 33, 36. He summarizes the jury's findings as upholding "the validity of J. Howard's Will and Living Trust" and "reject[ing] all of the various allegations that the Living Trust and Will did not reflect Howard's true intentions" by virtue of having been "forged or altered" or resulting from Pierce's undue influence or interference. ESB:30-38.

But Vickie's tortious interference claim did not depend on the invalidity of the will or living trust. The gift Howard intended was an irrevocable gift during his lifetime. As the district court found, Vickie's tortious interference claim was based not on Howard's "testamentary intent, but his donative intent during his lifetime" and his intention that her gift be fully-funded, completed and "legally enforceable" while he was alive. SER:10611, 11788, 12479-83, 12500-51; pp. 60-

64, *infra*.[10] For the same reasons, Pierce's argument that "once a probate court determines that an estate plan is valid, only the beneficiaries of the validated plan have and may assert legitimate expectancies," ESB:32-33, is irrelevant. Vickie's claim is against Pierce personally; it is not a claim for Howard's estate assets and Vickie is not contending she is a beneficiary of Howard's will or living trust.

Pierce also argues that if the jury found that Howard's will and living trust are "not tainted by misconduct," then he "could not possibly have done anything 'tortious' to prevent Vickie from receiving her alleged gift." ESB:33, 36. However, the jury's finding relates only to Howard's will and living trust. It did not decide whether Pierce tortiously interfered with Howard's intention to give her an irrevocable gift during his lifetime.

The jury findings on the validity of Pierce's will and living trust are thus entirely consistent with Vickie's "theory of liability" on her tortious interference with gift claim. ESB:36. Nor is there any inconsistency between her "theory of liability" and the jury's finding on the only issue regarding Vickie. Pierce asserts that the jury "specifically rejected *Vickie's claim* that J. Howard had *promised* her

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[10] The district court did not invalidate Howard's living trust; it merely considered the circumstances surrounding its execution as "evidence to negate Pierce's contention that [Howard] had no donative intent." SER:11788 & n.2. Its judgment expressly did not rest on the invalidity of the will or living trust. It found it consistent for those documents to be valid and for Pierce to still owe Vickie damages for preventing Howard from structuring a separate irrevocable *inter vivos* trust. SER:12429.

half of his assets." ESB:30 (emphasis added). Not so. First, Vickie nonsuited all her claims in the probate proceedings and no issue went to the jury on them. Second, only one issue went to the jury regarding Vickie. It was on *Pierce's* complaint seeking a declaration that Vickie "had no *agreement or contract* for half of J. Howard's *estate.*" Pp. 40-42, *supra*.

D. No Texas Court Would Have Given The Probate Judgment Preclusive Effect Based On Any Special Preclusive Status Of Probate Judgments.

Pierce argues the district court erred in failing to give preclusive effect to the probate judgment because of the special status of probate judgments, which he contends "run[] against the world and [are] designed to resolve all disputes over the disposition of a decedent's assets." ESB:32-35.

He asserts "the Probate Court's final judgment determining the validity of J. Howard's estate planning documents [i.e., his will and living trust] precludes any tort claim based on any expectancy of property contrary to the terms of the validated instruments." ESB:32. Although a probate judgment may run against the world, it cannot bind anyone to anything the court or jury did not actually determine.

Pierce cites no Texas case that would give the probate judgment preclusive effect over Vickie's tortious interference claim on the basis of a "special status of probate judgments." His two main cases are clearly distinguishable. Pierce cites *Thompson v. Deloitte & Touche LLP*, 902 S.W.2d 13 (Tex.App. 1995), and *Neill v. Yett*, 746 S.W.2d 32, 35 (Tex.App. 1988) as holding that the determination of the validity of Howard's will and trust "precludes any tort claim based on any expectancy of property contrary to the terms of the validated instruments." ESB:32. But the cases are irrelevant here; they concern claims for tortious interference with an *inheritance* expectancy, not with an *irrevocable inter vivos gift*, and required a redetermination of the decedent's testamentary intentions. *Neill*, 746 S.W.2d at 35; *Thompson*, 902 S.W.2d at 16. As the district court explained, those cases are distinguishable based on the difference between "J. Howard's testamentary intent" and his "donative intent during his lifetime," stating that "while it might be the province of the Texas probate court to determine what J. Howard intended to do with his estate when he died, the question before this Court is what he intended to do with it while he was still alive." SER:10611.

E. The District Court Properly Exercised Its Discretion To Deny Issue Preclusion Based On Fundamental Fairness.

Under Texas law, courts "have discretion to refuse to apply [issue preclusion] in the interest of fairness." *Texas Commerce Bank Nat'l Ass'n v. Wood,* 994 S.W.2d 796, 809 (Tex.App. 1999); *accord Sysco Food Servs.*, 890 S.W.2d at 805; *State v. Leutwyler*, 979 S.W.2d 81, 83 (Tex.App. 1998).

The district court refused to give preclusive effect to the probate judgment on multiple grounds, including fundamental fairness. This determination is reviewed for abuse for discretion. *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1519 (9th Cir. 1985); *Robi v. Five Platters, Inc.*, 838 F.2d 318, 329 (9th Cir. 1988); *Texas Commerce Bank Nat'l Ass'n,* 994 S.W.2d at 809-10.

The district court properly exercised its discretion. It explained that once Vickie obtained her bankruptcy judgment, "she voluntarily dismissed her claims in the Texas Probate proceedings," since she "had no motivation to litigate" her issues there. SER:10610. It also noted that Pierce had "originally chosen" the bankruptcy forum, "the only [forum Vickie] actively sought relief in." *Id.*

Compelling facts support the district court's exercise of discretion. Vickie did everything to prevent the relitigation of her tortious-interference issues in the

probate court; Pierce did everything to keep her in that lawsuit to set up an inconsistent judgment.

It was Pierce, not Vickie, who forum shopped after he suffered the unfavorable bankruptcy court judgment. Vickie first brought her tortious interference counterclaim in the bankruptcy court, and only filed it in the probate proceedings after Pierce challenged bankruptcy-court jurisdiction. When her bankruptcy judgment became final in December 2000, she promptly filed it in the probate proceedings and nonsuited her claims there without prejudice. Pp. 4-6, *supra*.

Pierce reacted a month later, bringing new claims against Vickie, including a claim for tortious interference with inheritance that broadly alleged that Vickie's marriage with Howard and every promise and transfer he made to her resulted from *her* tortious interference. SER:8427-28, 8609-30.

Vickie tried to blunt Pierce's gamesmanship and prevent the relitigation of issues already decided by the bankruptcy court. In late January 2001, over Pierce's objection, she successfully filed an amended answer raising claim and issue preclusion as affirmative defenses. RFJN, Exhs. A-C. In February 2001, she asked the probate court to dismiss Pierce's new claims as precluded by the bankruptcy judgment. SER:8480, 8485-86, 8492-94, 10604 n.4.

The probate court refused even to engage in a preclusion analysis, stating it had no obligation to give the bankruptcy judgment full faith and credit. SER:8480, 8492-94, 10604 n.4. Vickie then turned to the bankruptcy court, which, after reviewing his amended complaint, directed Pierce to dismiss his new probate claims. SER:8432-33. Pierce dismissed his claim for tortious interference with inheritance, but not his declaratory judgment claim alleging Vickie had no "agreement" with Howard. SER:8438, 8446, 12514.

Over the course of future hearings, Pierce's attorney assured the bankruptcy court that any risk of inconsistent judgments had been eliminated and that the "only" issue "directed at Ms. Marshall" was Question 66—whether Howard and Vickie had an *agreement* for him to give her one-half his property. ER:3782; SER:6624. Another of his attorneys stated under oath that Question 66 "only seek[s] to avoid any possibility of future litigation with Vickie Marshall over [Howard's estate], and to ensure that the Texas Probate Court can determine all claimants and efficiently administer that estate." SER:8470.

The bankruptcy court was not convinced, directing Pierce to dismiss any claims or allegations, including Question 66, that the bankruptcy court previously determined or could have determined in Vickie's tortious interference counterclaim. SER:6625-30, 8498-00, 8505-07, 8543-45; DC Dock. 174:AP27076-86. Pierce ignored the injunction, instead obtaining a permanent

injunction from the probate court based on the probate exception enjoining Vickie from taking any action in the bankruptcy court to prevent him from seeking entry of final judgment on Question 66. SER:6649, 8584, 12220-25, 12256-58.

The next day, Pierce's attorney represented to the bankruptcy court that he *had* complied with its order and that Pierce and his agents "have withdrawn and are not proceeding on Question 66." SER:6690. The bankruptcy court *sua sponte* reviewed Question 66 and issued an order finding Question 66 "entirely consistent" with its judgment, which "made no finding of an 'agreement' between [Vickie] and [Howard] to give her one-half of all his property." SER:8585; *accord* SER:12454. Because it "perceive[d] no conflict that a determination of Question 66 would pose" to the matters it adjudicated, it modified its earlier orders and left the Question 66 issue to the probate court. SER:8585-86; *accord* ER:3996-97; SER:12262, 12454, 12458.

Clearly, the district court properly exercised its discretion in denying issue preclusion. Its finding that Vickie "had no motivation to litigate the issues in the Texas proceedings" is alone significant. SER:10610. Vickie's state of mind arose not only from prevailing on her bankruptcy claim, but from relying on Pierce's assurances that he was not litigating any issue there that could jeopardize her judgment or preclude her tortious interference claim.

Pierce's contrary arguments are unpersuasive. He contrives a conveniently tailored exception to Texas' fundamental fairness rule—"for parties who seek to withdraw from a prior litigation but are unsuccessful in doing so." ESB:41. His amici parrot those words. WLF:20. Neither cites any authority for that assertion or gives any reason for such a limit on the fundamental fairness exception.

F. The District Court Correctly Held The Bankruptcy Court's Findings Were Not Precluded By The Later Probate Judgment.

Pierce asks this Court to do something no court has done before: to hold that a later judgment in another court has preclusive effect over a bankruptcy court's findings on de novo review in the district court. The district court correctly found that preclusion should not apply.

As the district court found, the purposes behind preclusion are not served by applying the doctrine after a full bankruptcy court trial as it then does not avoid multiple lawsuits, conserve judicial resources or promote judicial economy by preventing needless litigation. SER:10609. Here, when the probate judgment became final in February 2002, not only had the bankruptcy court fully litigated and tried Vickie's tortious interference claim and issued findings and conclusions, but the district court's de novo review was almost complete and it was only a

month away from issuing its final judgment affirming the bankruptcy court on all points except damages.

Even in non-bankruptcy contexts, "[j]udgments are final for purposes of issue preclusion when fully litigated, even if not yet appealable," and "a court is not compelled to revise its fully litigated decision by later inconsistent decisions of other courts." *Cycles, Ltd. v. Navistar Fin. Corp.*, 37 F.3d 1088, 1090 (5th Cir. 1994). This rule applies with even greater force here given the greater likelihood of delay in entering a final judgment in bankruptcy because of the division of labor between bankruptcy and district courts. Thus, as the district court concluded, "there is no judicial economy to applying res judicata or collateral estoppel" here. SER:10609.

G. Judicial Estoppel Bars Pierce From Asserting Preclusion Here.

Judicial estoppel is an equitable doctrine that precludes a party from "taking one position, gaining advantage from that position," and then later "seeking a second advantage" through "taking an incompatible position" in the judicial proceedings. *United Nat'l Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772, 778 (9th Cir. 2009). It promotes "'general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings,' and to

'protect against a litigant playing fast and loose with the courts.'" *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001).

Estoppel applies when a party: (1) takes a position in a legal proceeding that is "clearly inconsistent" with a position taken earlier; (2) successfully persuaded a court to accept his earlier position; and (3) would gain an unfair advantage if not estopped. *United Nat'l Ins. Co.*, 555 F.3d at 779; *Hamilton*, 270 F.3d at 782-83.

Each element is satisfied here.

First, Pierce repeatedly assured the bankruptcy court there was no inconsistency between his declaratory judgment claim in the probate proceedings and the bankruptcy court judgment. Pierce represented he was asking the probate jury to decide only one issue involving Vickie—whether she and Howard had an *agreement* for him to give her one-half his property, ER:3782; SER:6624—and that its purpose was only "to avoid any possibility of future litigation with Vickie Marshall over [Howard's estate], and to ensure that the Texas Probate Court can determine all claimants and efficiently administer that estate," SER:8470. These representations directly conflict with his present preclusion claims.

Second, Pierce persuaded the bankruptcy court to accept the truth of his representations and withdraw an order directing him to dismiss his declaratory judgment claim and withdraw Question 66. SER:8585-86, 12454.

Third, if Pierce succeeded in asserting preclusion, he would escape liability on Vickie's claim based entirely on the preclusion claims he disavowed in the bankruptcy court.

III. THE JUDGMENT CANNOT BE REVERSED BASED UPON THE STATUTE OF FRAUDS.

A. Any Statute Of Frauds Defense Was Waived.

The statute of frauds is an affirmative defense that must be specifically pleaded. Fed. R. Civ. P. 8(c); Tex. R. Civ. P. 94.

Pierce never pleaded the statute of frauds in his answer to Vickie's counterclaim in bankruptcy court, SER:6760-62. Thus, the defense was waived. *See, e.g., Arizona v. California*, 530 U.S. 392, 410 (2000); *In re Adbox, Inc.*, 488 F.3d 836, 841-42 (9th Cir. 2007).

It cannot be resurrected by the court *sua sponte*. *Arizona*, 530 U.S. at 413; *see* Schwarzer, Tashima & Wagstaffe, Cal. Prac. Guide: Fed. Civ. Proc. Before Trial (The Rutter Group 2009) ¶8.969 at 8-106. Otherwise, "the principle of party presentation so basic to our system of adjudication" would be eroded. *Arizona*, 530 U.S. at 412-13, *see United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia,

J., concurring) (observance of "rule that points not argued will not be considered . . . distinguishes our adversary system of justice from the inquisitorial one"); *Erline Co. S.A. v. Johnson*, 440 F.3d 648, 653-54 (4th Cir. 2006) (reversing trial court's *sua sponte* dismissal of claims based on a statute of limitations, because "the parties are obliged to present facts and legal arguments before a neutral and relatively passive decision-maker").

B. Pierce Lacks Standing To Assert The Defense.

Texas law provides that the statute of frauds defense is personal to the parties to an agreement. *E.g.*, *Gulf, C. & S.F. Ry. Co. v. Settegast*, 15 S.W. 228, 229 (Tex. 1891) ("invalidity of parol contract cannot be set up by a stranger to it" as "defense is personal to the one sought to be charged"); *Panama-Williams, Inc. v. Lipsey*, 576 S.W.2d 426, 434 (Tex.App. 1978).

Vickie's tortious interference claim is not based on a contract or agreement. But, by parity of reasoning, a third party such as Pierce lacks standing to challenge Howard's gift to Vickie on that ground.

C. The Statute Of Frauds Does Not Bar Vickie's Claim For Tortious Interference.

The Texas Supreme Court has held that the statute of frauds is *not* a defense to a claim for tortious interference with contract, and its reasoning shows that the principle would apply equally to tortious interference with an intended gift, as the focus is on the tortious conduct, not the thing interfered with. *Clements v. Withers*, 437 S.W.2d 818, 821 (Tex. 1969) ("Aside from . . . any contractual relationship, [defendants] are liable for their tort"); *see also Sibley v. Southland Life Ins. Co.* 36 S.W.2d 145, 146 (Tex. 1931) (since plaintiff's claim grounded in tort, statute of frauds not a bar).

Key to its reasoning is the rule that a contract that violates the statute of frauds is merely voidable, "not a void or illegal contract, nor is there any public policy opposing its performance." *Clements*, 437 S.W.2d at 821; *see also Hutchings v. Slemons*, 174 S.W.2d 487, 490 (Tex. 1943) ("Statute of Frauds . . . does not render void or illegal a promise or contract within its terms"); *Eland Energy v. Rowden Oil & Gas*, 914 S.W.2d 179, 186 (Tex.App. 1995) failure to conform with statute of frauds renders contract voidable, not void); *Enochs v. Brown*, 872 S.W.2d 312, 318 (Tex.App. 1994) (same).

Pierce's cases, ESB:52-53, are not to the contrary. In those barring tortious interference claims, the underlying or prospective contract was void as illegal or against public policy for other reasons—not because it was voidable under the statute of frauds. *E.g.*, *Trammel Crow Co. No. 60 v. Harkinson*, 944 S.W.2d 631, 635-36 (Tex. 1997) (public policy under the Real Estate License Act precluded any action by broker for commissions absent signed agreement, distinguishing RELA requirement from general statute of frauds); *Juliette Fowler Homes v. Welch Assocs.*, 793 S.W.2d 660, 665 (Tex. 1990) (because covenants not to compete are unreasonable restraints of trade contrary to public policy, no action lies for tortious interference); *NCH Corp. v. Share Corp.*, 757 F.2d 1540, 1543-44 (5th Cir. 1985) (same); *Hi-Line Elec. Co. v. Dowco Elec. Prods.*, 765 F.2d 1359, 1362 (5th Cir. 1985) (same).[11]

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[11] None of Pierce's cases holds that the statute of frauds renders a contract void as illegal or against public policy so as to bar a tortious interference claim. *E.g., Lieber v. Mercantile Nat'l Bank*, 331 S.W.2d 463, 469 (Tex.App. 1960) (oral contract "cannot be upheld" under the relevant statute of frauds); *Texas Oil Co. v. Tenneco Inc.*, 917 S.W.2d 826, 831 (Tex.App. 1994) (dismissing tortious interference with contract claim because oral contract void as only agreement to agree, but denying summary judgment on tortious interference with *prospective* oral contract), *rev'd on other grounds sub nom Morgan Stanley & Co. v. Texas Oil Co.*, 958 S.W.2d 178, 182 (Tex. 1997) (reversing on *merits* because no tortious interference claim against agent acting in principal's best interest); *Royle v. Tyler Pipe Indus.*, 6 S.W.3d 593, 595 (Tex.App. 1999) (stating contract within statute of frauds "requires a writing to be enforceable"; term "void" used only in paraphrasing defendants' arguments).

In fact, Pierce's cases acknowledge that tortious interference claims lie even where the statute of frauds renders the contract unenforceable:

- "a contract that violates the statute of frauds may still be the subject of a tortious interference claim" (*Texas Oil Co.*, 917 S.W.2d at 830);
- "a contract voidable under the statute of frauds will support a suit for tortious interference" (*NCH Corp.*, 757 F.2d at 1543);
- "the mere voidability of a contract between the contracting parties is not a defense to an action against a third party for inducing one of the contracting parties to decline performing the contract" (*Hi-Line Elec. Co.*, 765 F.2d at 1362); and
- "mere unenforceablilty of a contract is not a defense to an action for tortious interference with its performance" (*Juliette Fowler Homes*, 793 S.W.2d at 664).

D. There Was Abundant Evidence Of Howard's Intent.

Pierce introduces his statute of frauds section by claiming there was insufficient evidence that Howard intended to give Vickie an irrevocable *inter vivos* gift. ESB:46-49. The district court found "a high degree of probability" that Howard would have given Vickie a completed gift during his lifetime in the form

of a fully-funded irrevocable trust to provide her one-half the appreciation of his assets. SER:12500-02. This Court cannot reverse if the district court's view of the evidence was merely "plausible." *Husain v. Olympic Airways,* 316 F.3d 829, 835 (9th Cir. 2002). Pierce does not even acknowledge let alone meet this heavy "clear error" standard. The evidence, including the following, fully supports the district court's conclusion:

- *Howard instructed his lawyer to structure a gift of "new community" to Vickie*: Harvey Sorensen testified he met with Howard and Pierce in December 1992. SER:10766-67, 11179-80. Expressing concern that Vickie's career would have a short life cycle, SER:10791, Howard told Sorenson it was his "personal goal" to make a "legally enforceable" gift to her of one-half his "new community" without incurring *gift* taxes, SER:11099-103, 11169. "New community" referred to one-half the appreciation of Howard's assets during his relationship with Vickie, a concept Howard had utilized to give assets to a prior wife. SER:8400-01, 10792. While wanting to provide for Vickie after his death, Howard intended the gift to be completed and enforceable during his lifetime so that it "could not be undone" by anyone. SER:8399-400, 11100, 11169. He wanted the "measuring stick" for the gift to be half the increase in value of his indirect ownership of Koch stock. SER:10792, 10794, 11100-03, 11158. He emphasized the gift was "important to him "because he was "going to make this Koch Industries greatly

enhanced in value and [he] want[ed] her to share in [his] achievements." SER:8401, 11171. However, shortly after December 1992, Sorensen's firm "dropped off the map" and never received new assignments. SER:7379, 11107.

- *Sorensen memorialized Howard's instructions in the "New Community Memorandum."* Sorensen dictated a memorandum that "incorporate[d] faithfully" Howard's instructions. SER:9567, 11099. It confirms Howard's personal goal of "provid[ing] his future wife [Vickie] with a gift of a half interest in his 'new community' without triggering any gift tax and in a legally enforceable way." SER:9567. It states that Howard's indirect ownership of Koch stock was his "principal" asset, and he believed Koch's "principal growth" would come from a recent deal "he was instrumental in causing." SER:9567. It states Sorensen suggested issuing "warrants or rights" that Vickie could later convert to a "promissory note or preferred stock" to be valued by the "change in value of the underlying [Koch] stock" from issuance through redemption. SER:9567.

- *Sorensen's handwritten agenda for the December 1992 meetings included a trust for Vickie*: Sorensen's handwritten agenda lists various items regarding Vickie, including a "GRIT"—a grantor retained income trust. The GRIT referred to Howard's instructions regarding his gift to Vickie, because, as

Sorensen testified, with a GRIT the settlor retains an income interest and therefore can transfer property without gift tax liability. SER:10776, 11212-13.

- *Sorensen created a formula for the gift:* Sorensen formulated a mathematical equation for valuing Howard's "new community" gift to Vickie based on increases in the fair market and book values of the Koch stock. SER:8752, 8754, 11101-03.[12]

- *Howard directed preparation of the trust for Vickie:* Attorney Jeff Townsend wrote that Howard instructed him and Edwin Hunter to prepare the same documents for Vickie's benefit mentioned in Sorensen's handwritten agenda, including the trust. SER:6424-26, 9505. Howard was expecting the documents in advance of a planned meeting with Sorensen on December 22, 1992, so it was "important that [the lawyers] swiftly present the framework for the financial arrangements with and for Vicky [sic]." SER:9505. Howard wanted to ensure that his provisions for Vickie were "provable by documents" so that she would never have to rely on testimony alone. SER:6435.

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[12] Pierce claims "the only evidence adduced" was that Howard's gift was to be based on an "increase in dividends (not asset value) on the Koch stock," and thus was worth "little or nothing." ESB:47-48. But Sorensen's handwritten formula values the gift based on increases in fair market and book values of Koch stock and has nothing to do with dividends. SER:8752, 8754, 11101-03. The district court rejected Pierce's contention. SER:12501-04.

- *The lawyers drafted the trust*. In November 1992, Townsend and Hunter discussed Howard's instruction to create the trust for Vickie. SER:8889, 11277-78. They again discussed the trust for Vickie on December 16, 1992. SER:8890. Their billing records show the "trust instrument" was drafted on December 21, 1992. SER:8890, 11271.

Notwithstanding this evidence, the trust was never produced at trial in the bankruptcy court or in the district court. Indeed, Hunter and Townsend repeatedly professed ignorance of it. Hunter testified he "had no idea" what the trust referred to in Townsend's letter meant or "if this was proposed for Vickie." SER:6523. Townsend testified he was "fuzzy on everything" involving Vickie's trust. SER:7279, 7285. However, confronted in the district court with his billing records, which he had not produced in the bankruptcy court, Hunter first maintained he didn't know why his billing records showed that a "draft trust instrument" was created for Vickie or where the instrument was. SER:6539, 11270-71. He then claimed to "suddenly realize" that the trust instrument was a "voting trust" that had nothing to do with the gift to Vickie. SER:11271-72. But the evidence showed the voting trust was a revision of another document that was not created until mid-1993. SER:8916, 10547-55, 10903-05.

The district court concluded Hunter's testimony was not credible and that, as the billing records and other evidence demonstrated, he drafted Howard's trust

for Vickie. SER:12479-83 & n.17. Because the district court's conclusion is, to say the least, "plausible," Pierce has failed to demonstrate "clear error."

IV. THE DISTRICT COURT BASED ITS FINDINGS ON EVIDENCE, NOT SANCTIONS; PIERCE HAS NOT DEMONSTRATED THE BANKRUPTCY COURT'S DISCOVERY SANCTIONS WERE ERRONEOUS.

As Pierce acknowledges, ESB:56, the district court, without resorting to sanctions for his extensive discovery abuses, concluded the evidence overwhelmingly supported his tort liability, SER:12466, 12478-505. Nonetheless, Pierce takes this opportunity to suggest that the *bankruptcy court's* imposition of discovery sanctions on him was arbitrary. ESB:54-57.

In neither his brief discussion in the Supplemental Brief nor his prior highly selective, scattergun recitation of "facts," POB 57-68, does Pierce directly claim or cite authority that the Bankruptcy Court's sanctions rulings constituted error. His bare assertions make this a non-issue. Fed. R. App. P. 28(a)(9)(A); *Sekiya v. Gates*, 508 F.3d 1198, 1200 (9th Cir. 2007). Nonetheless, we offer a few omitted facts that correct Pierce's assertions and support the district court's "clear" conclusion "that Pierce committed several types of discovery abuses." SER:8711.

- Far from taking "no evidence of Pierce's alleged discovery abuse," ESB:54, the bankruptcy court held *eight* hearings over twelve months in which it permitted Pierce *to fully present* his position and afforded him repeated opportunities to cure his misconduct, SER:8705-10; ER:2241.

- Pierce engaged in a shell game in which he denied possession of key documents because they were in the possession of his lawyers Hunter and Townsend. SER:8704-05. After the bankruptcy court rejected Pierce's position, Hunter still refused to produce the documents, claiming—contrary to Pierce's earlier admissions—he didn't represent Pierce. SER:8706-07, 12402-04; ER:2243-44; DC Dock. 103:PE001781-2100; DC Dock. 104:PE002102-551; DC Dock. 112:T000958-60, T000989; DC Dock. 113:T001200-01; DC Dock. 135:AP006686-939; DC Dock. 136:AP 007291; DC Dock. 137:AP008165-67, AP008203, AP008217, AP008224-25; *see* DC Dock. 206:10-14.

- In direct violation of the bankruptcy court's order, Pierce failed to appear for his deposition. SER:8708-09; ER:2241-42; DC Dock. 137:AP008030, AP008036-37, AP008045-46, AP008058-59.

- Pierce admitted he destroyed potentially relevant documents, testifying that he shredded them "in the last 30 days," well after Vickie's request for their production. SER:8697, 12402; DC Dock. 137:AP008015, AP008018, AP008217.

- That documents in the Texas proceedings were effectively available to Vickie's California lawyers, ESB:54-55, is irrelevant because Pierce admitted "these documents have never been brought to Los Angeles, California, as the Bankruptcy Court had ordered," SER:8710; DC Dock. 112:T000553-57.

V. GUARDIAN AD LITEM UNNECESSARY.

Vickie agrees with Pierce that no guardian ad litem is necessary for Dannielynn. ESB:58. Larry Birkhead is her natural father and court-appointed guardian.

CONCLUSION

For the reasons stated, this Court should find the bankruptcy judgment core; otherwise, it should affirm the district court judgment except as to damages.

Dated: June 1, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I am employed in the County of Los Angeles, State of California, am over the age of 18, and am not a party to the within action.

I certify that on **June 1, 2009**, I electronically filed the foregoing **APPELLEE'S/CROSS-APPELLANT'S SUPPLEMENTAL BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class mail, postage prepaid, to the following non-CM/ECF participants:

Bingham Dana
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I enclosed a copy of the document in a sealed, addressed envelope and placed the envelope for collection and mailing in the United States mail at Los Angeles, California, following our ordinary business practices on the aforesaid date.

/s/ Leanna Sun Borys

CERTIFICATE OF COMPLIANCE
Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1
for Case Nos.02-56002, 02-56067

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **APPELLEE'S/CROSS-APPELLANT'S SUPPLEMENTAL BRIEF** is proportionately spaced, has a typeface of 14 points or more and contains 13,996 words.

Dated: /s/ Alan Diamond