

Nos. 02-56002, 02-56067

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,

– against –

HOWARD K. STERN, as Executor under the Will of Vickie Lynn Marshall,

Appellee and Cross-Appellant.

APPEAL FROM THE FINAL DECISION OF THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA IN NO. 8:03-CV-01354-DOC
(HONORABLE DAVID O. CARTER, JUDGE)

SUPPLEMENTAL BRIEF
OF APPELLANT ELAINE T. MARSHALL

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PRELIMINARY STATEMENT

Appellant Elaine T. Marshall (“Elaine”), as Independent Executor of the Estate of E. Pierce Marshall (“Pierce”), submits this supplemental brief addressing the issues identified in the Court’s Order of March 19, 2009. For ease of reference and consistency with prior pleadings and decisions, this supplemental brief refers to Pierce rather than Elaine in the presentation of its arguments *infra*. Likewise, other than in Section V *infra*, this brief refers to Vickie Lynn Marshall (“Vickie”) rather than the executor of her estate, Howard K. Stern (“Stern”).

STATEMENT OF THE FACTS

In its prior decision, *In re Vickie Lynn Marshall*, 392 F.3d 1118 (9th Cir. 2004), the Court set forth many of the relevant facts. This brief does not repeat that discussion, but rather addresses essential factual matters as they arise in the context of the arguments presented *infra*. In addition, Elaine refers the Court to the extensive factual section in Pierce’s previously filed Substituted Corrected Opening Brief of Appellant E. Pierce Marshall (“OB”).

STATEMENT OF THE ISSUES

The unresolved issues in this appeal are summarized in the Court’s prior opinion, *Marshall*, 392 F.3d at 1137, and detailed in E. Pierce Marshall’s Request for Renewal of Prior Motion for Certification and Statement Concerning Open Issues on Remand (“Remand Statement”), filed on or about May 31, 2006. In addi-

tion to the arguments addressed in this supplemental brief, the unresolved issues include Pierce's arguments that (1) Vickie's alleged cause of action for tortious interference with an expectancy of a gift does not exist as a matter of Texas law; (2) the District Court violated Pierce's due process rights by, among other things, refusing to hear his percipient witnesses; (3) the District Court's findings of fact are clearly erroneous, particularly with respect to its conclusions that J. Howard Marshall, II ("J. Howard") intended to give Vickie a gift and that Pierce engaged in wrongdoing; and (4) the District Court erred in awarding punitive damages.

The Remand Statement sets forth the relevant pages of Pierce's previously filed briefs where his arguments on these issues appear. Elaine incorporates by reference the previous briefing in this case on each of the open issues. *See also* E. Pierce Marshall's Reply to Vickie Lynn Marshall's Response to E. Pierce Marshall's Request for Renewal of Prior Motion for Certification and Statement Concerning Open Issues on Remand (discussing remand issues).

ARGUMENT

I. Vickie's State-Law Claim Is Not "Core," and the Bankruptcy Court Lacked Jurisdiction to Enter a Judgment on Her Claim.

Assuming it exists (which it does not), Vickie's claim for tortious interference with an expectancy of a gift arises under Texas law. In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Supreme Court invalidated a bankruptcy jurisdictional statute that permitted bankruptcy judges to

finally resolve a debtor's state-law claim. *Id.* at 87. Congress crafted the current bankruptcy jurisdictional scheme in response to *Marathon*, and restricted the ability of bankruptcy judges to enter final orders resolving state-law matters. Review of the current statutory scheme – 28 U.S.C. §§ 1334 and 157 – demonstrates that the Bankruptcy Court here lacked jurisdiction to enter a final order resolving Vickie's state-law claim.

As the Supreme Court has explained, the “jurisdiction of the bankruptcy courts, like all federal courts, is grounded in, and limited by, statute.” *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995). As the Supreme Court explained further, the relevant statutory scheme unfolds in two phases.

First, under 28 U.S.C. § 1334, Congress vested the federal *district* courts with “original but not exclusive jurisdiction of all civil proceedings arising under [the Bankruptcy Code], or arising in or related to a case under [the Code].” *Celotex*, 514 U.S. at 307. In relevant part, section 1334 thus prescribes jurisdiction over three categories of matters: (1) civil proceedings “arising under” the Bankruptcy Code; (2) civil proceedings “arising in” a case under the Code; and (3) civil proceedings “related to” the bankruptcy case.

Second, under 28 U.S.C. § 157(a), the district courts may refer “any or all proceedings arising under [the Bankruptcy Code] or arising in or related to a case under [the Code] . . . to the bankruptcy judges for the district.” *Celotex*, 514 U.S.

at 308. In relevant part, section 157(a) thus delegates the district courts' jurisdiction to the bankruptcy courts. In turn, the next two provisions of section 157 – sections 157(b) & (c) – divide the bankruptcy court's *exercise* of its delegated jurisdiction into two parts:

- (1) “final order” jurisdiction under section 157(b)(1) over “core proceedings” that either “arise under” the Bankruptcy Code or “arise in” a case under the Code; and
- (2) “non-final order” jurisdiction under section 157(c) over “non-core” matters that are “related to” a bankruptcy case as to which a bankruptcy court is authorized to enter proposed findings of fact and conclusions of law, unless the parties consent expressly to the bankruptcy court's final resolution of the matter.

Vickie's alleged claim for tortious interference with an expectancy of a gift does not fall within the scope of section 157(b)(1) because it is not a “core proceeding” that either “arises under” the Bankruptcy Code or “arises in” a case under the Code. On the contrary, Vickie's claim is properly a “non-core” matter because it is a claim that arises under state law and could be brought (and in fact was brought) in another forum. *Dunmore v. United States*, 358 F.3d 1107, 1114 (9th Cir. 2004) (non-core matters are those that “do not depend on the Bankruptcy Code for their existence and . . . could proceed in another court”); *Sec. Farms v. Int'l*

Bhd. of Teamsters, 124 F.3d 999, 1008 (9th Cir. 1997) (“Actions that do not depend on bankruptcy laws for their existence and that could proceed in another court are considered ‘non-core.’”). Assuming Vickie’s “non-core” claim is also “related to” her bankruptcy case, the Bankruptcy Court was only authorized to issue recommended findings of fact and conclusions of law absent Pierce’s express consent to a final adjudication of Vickie’s claim by the bankruptcy judge. Pierce did not expressly consent to have the Bankruptcy Court finally resolve Vickie’s claim. Therefore, the Bankruptcy Court could not enter a final order resolving it. In addition, Vickie’s claim is not even “related to” her bankruptcy case because the outcome of the litigation will have no bearing on her bankruptcy estate. For all of these reasons, the District Court properly vacated the Bankruptcy Court’s judgment purporting to finally resolve Vickie’s claim.

A. Vickie’s Claim Does Not Fall Within the Scope of Section 157(b)(1).

In interpreting sections 157(b) & (c), the relevant starting point is, of course, “the existing statutory text.” *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004). In construing these provisions, the Court should (1) consider them in the context of Congress’ overall statutory scheme, (2) give meaning to all relevant statutory terms, and (3) avoid rendering any term superfluous. *United Sav. Ass’n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 369-71 (1988) (construing several sections of the Bankruptcy Code together and observing that “[s]tatutory construc-

tion...is a holistic endeavor.”); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476-77 (2003) (“we should not construe the statute in a manner that is strained and, at the same time, would render a statutory term superfluous”).

In addition, the Court should interpret the statute to avoid constitutional questions. *United States v. Sec. Indus. Bank*, 459 U.S. 70, 78 (1982) (relying on the “cardinal principle that th[e] Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided.”) (citation omitted).

By its terms, section 157(b)(1) permits bankruptcy judges to finally resolve only “core proceedings *arising under* [the Bankruptcy Code], or *arising in* a case under [the Code].” 28 U.S.C. § 157(b)(1) (emphasis supplied). Thus, regardless of whether Vickie’s claim falls within the definition of a “core proceeding” under section 157(b)(2) (which it does not), jurisdiction cannot exist under this section if her claim also fails to “arise under” or “arise in” her bankruptcy case. Vickie’s claim fails this test and her claim is properly “non-core” in nature.

1. Vickie’s claim neither “arises under” the Code nor “arises in” a case under the Code.

As this Court has explained, a matter “arises under” the Code if it depends for its existence on a substantive provision of bankruptcy law. *Eastport Assocs. v. City of Los Angeles (In re Eastport Assocs.)*, 935 F.2d 1071, 1076 (9th Cir. 1991); *Wood v. Wood (In re Wood)*, 825 F.2d 90, 96 (5th Cir. 1987) (“Congress used the

phrase ‘arising under [the Bankruptcy Code]’ to describe those proceedings that involve a cause of action created or determined by a statutory provision of [the Code].”). Assuming it exists, Vickie’s claim for tortious interference with an expectancy of a gift arises under Texas law. Accordingly, it does not depend for its existence on a substantive provision of the Bankruptcy Code and therefore does not “arise under” the Code.

In turn, this Court has explained that a matter “arises in” a bankruptcy case if it is an administrative matter unique to the bankruptcy process that has no independent existence outside of bankruptcy and could not be brought in another court. *Eastport Assocs.*, 935 F.2d at 1076; *Wood*, 825 F.2d at 96-97 (“‘arising in’ proceedings are those that are not based on any right expressly created by [the Bankruptcy Code], but nevertheless, would have no existence outside of the bankruptcy.”). Vickie’s claim is clearly one that can be brought, and in fact was brought, in another forum. Accordingly, her claim is not a unique administrative matter that can only be brought in the bankruptcy court, and therefore does not “arise in” a case under the Code. Because Vickie’s claim neither “arises under” the Code, nor “arises in” a case under the Code, it does not meet the jurisdictional prerequisites of section 157(b)(1), and the Bankruptcy Court lacked “final order” jurisdiction to resolve her claim.

- a. **Vickie’s argument that jurisdiction exists under section 157(b)(1) over “core proceedings” regardless of whether the particular matter “arises under” the Code or “arises in” a case under the Code is erroneous.**

The term “core proceeding” is defined in section 157(b)(2), which illustrates the term through an expansive, non-exhaustive list of generic matter descriptions. *Dunmore*, 358 F.3d at 1114. Ignoring the “arising under” and “arising in” requirements of section 157(b)(1), Vickie argues that the Bankruptcy Court had jurisdiction to finally resolve her claim simply because it falls within one of the generic descriptions. *See* Combined Appellee’s Brief/Cross-Appellant’s Opening Brief (Vickie’s Brief or “VB”) at 141. Even if her claim fell properly within one of the generic examples (which it does not), section 157(b)(1) is not written simply to confer jurisdiction over matters described as “core” in section 157(b)(2). It is written to confer jurisdiction over “core proceedings arising under [the Bankruptcy Code], or arising in a case under [the Code].” 28 U.S.C. § 157(b)(1).

As the Supreme Court has explained, in order for a bankruptcy court to have jurisdiction over any particular matter, “it *must* be based on the ‘arising under,’ ‘arising in,’ or ‘related to’ language of §§ 1334(b) and 157(a).” *Celotex*, 514 U.S. at 307 (emphasis supplied). Reliance on whether a matter is a “core proceeding” alone is thus insufficient, and for good reason: Vickie’s reading of section 157(b)(1) as prescribing jurisdiction merely if a matter is listed as a “core proceeding” under section 157(b)(2) would render the statute unconstitutional because it

would permit bankruptcy courts to finally resolve the very kind of state law causes of action the Supreme Court has concluded they cannot finally resolve.

b. Vickie’s interpretation of section 157(b)(1) would render the statute unconstitutional under *Marathon*.

In *Marathon*, the Court distinguished between, on the one hand, traditional “bankruptcy” matters, such as causes of action unique to the bankruptcy process, and, on the other, matters traditionally adjudicated in other courts, such as breach of contract actions and tort claims. 458 U.S. at 84 (citation omitted). The Court explained that matters of “public right,” including rights and actions created specifically as a matter of federal bankruptcy law, might be assigned for resolution by a non-Article III judicial officer. *Id.* at 70. In contrast, matters of “private right,” including causes of action created and defined under state law, must be resolved in federal court only by an Article III judge. *Id.* Because bankruptcy judges are not Article III judges, they may not finally resolve causes of action that arise under state law. Yet Vickie’s simplistic interpretation of section 157(b)(1) would allow precisely that.

For example, section 157(b)(2)(A) defines the term “core proceeding” to include “matters concerning the administration of the estate.” Taken literally, the resolution of a debtor’s state-law tort or breach of contract action is easily a “matter concerning the administration of the estate” because, if successful, the outcome of the action will augment the debtor’s bankruptcy estate for purposes of admini-

stration and distribution.

Similarly, section 157(b)(2)(O) defines the term “core proceeding” to include “other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor . . . relationship.” Taken literally, the resolution of a debtor’s state-law tort or breach of contract action is likewise easily a matter that affects the “liquidation of the assets of the estate” (the breach of contract claim itself) or “the adjustment of the debtor creditor . . . relationship” (the relationship between the debtor and the third party on account of the claim). Thus, if the only jurisdictional requirement under section 157(b)(1) were that a matter must fall within the scope of one of the generic examples of “core proceedings” listed in section 157(b)(2), section 157(b)(1) would authorize precisely what *Marathon* proscribes.

Section 157(b)(1) requires more than simply that a matter be a “core proceeding.” The particular matter also must either (1) “arise under” the Code, or (2) “arise in” a case under the Code. Vickie’s claim satisfies neither of these additional statutory requirements. Therefore, section 157(b)(1) does not authorize the exercise of “final order” jurisdiction in the Bankruptcy Court.

2. Vickie’s claim is properly a “non-core proceeding,” and not one that is “core.”

To the same end, this Court has cautioned repeatedly that, although the list of generic matter descriptions appearing in section 157(b)(2) is expansive, the term

“core proceeding” must be construed narrowly “to avoid potential constitutional problems arising from having Article I judges issue final orders in cases requiring an Article III judge.” *Dunmore*, 358 F.3d at 1115. Construing the term “core proceeding” narrowly, this Court has held repeatedly that “[a]ctions that do not depend on bankruptcy laws for their existence and that could proceed in another court are considered ‘non-core.’” *Sec. Farms*, 124 F.3d at 1008. Specific examples of “non-core” matters include such things as a claim for a tax refund arising under federal non-bankruptcy law, *Dunmore*, 358 F.3d at 1115, and a tort claim arising under state law, *Sec. Farms*, 124 F.3d at 1008.

Vickie argues that her claim is a “core” proceeding because, she says, it falls literally within the scope of section 157(b)(2)(C), which designates as a core proceeding “counterclaims by the estate against persons filing claims against the estate.” She contends that after she filed for bankruptcy, her claim belonged to her bankruptcy estate (*see* 11 U.S.C. § 541), and that once Pierce filed his proof of claim, she filed her state-law tort claim as a “counterclaim,” thereby bringing her claim within the scope of the statutory definition. Vickie’s approach is simplistic and wrong.

Consistent with the “cardinal principle” of avoiding statutory interpretations that raise constitutional questions, this Court has explained in the precedents quoted above that it is not enough for a litigant merely to invoke one of the broad

definitional forms of section 157(b)(2) to conclude that a claim is “core.” Instead, what is required is a closer examination of the substance of the claim to see if it is the kind of matter that is properly designated as “non-core.”

If Vickie had filed her tortious interference claim against Pierce in the Bankruptcy Court without Pierce ever having filed a proof of claim, the adjudication of Vickie’s claim would fall literally within the scope of section 157(b)(2)(O) as a matter affecting the “liquidation of the assets of the estate” – namely, the liquidation of her claim. Likewise, her claim could just as readily be characterized as falling within the scope of section 157(b)(2)(O) as a matter involving “the adjustment of the debtor creditor . . . relationship” – namely the relationship between herself (the debtor) and Pierce (the creditor). But this Court has properly limited the scope of “core matters” under sections 157(b)(2)(A) & (O) to those that (1) depend for their existence on the Code, and (2) could not be brought in some other proceeding. That same restriction, mandated by the “arising under” and “arising in” requirements of section 157(b)(1), also properly applies to “counterclaims” under section 157(b)(2)(C).

In *Dunmore*, the debtor brought a claim against the IRS for a refund of taxes paid. The IRS countered that it was entitled to offset the debtor’s refund claim by its own claim against the debtor for additional taxes the debtor owed. After considering whether the combination of the debtor’s and creditor’s offsetting claims

(claim and counterclaim) rendered the matter a “core proceeding” involving the “adjustment of the debtor-creditor relationship,” the Court concluded that it did not. Instead, the Court analyzed the debtor’s refund claim separately, determining it to be non-core because it (1) did not arise under the Bankruptcy Code and (2) did not involve the kind of proceeding that could be brought only in a bankruptcy case. The Court did so, it explained, to safeguard the debtor’s right to have his claim finally determined by an Article III judge irrespective of the IRS’ pleading. *Dunmore*, 358 F.3d at 1115.

The same analysis applies here. Regardless of whether Vickie filed her claim against Pierce independently in the Bankruptcy Court, or filed her claim as a “counterclaim” to Pierce’s proof of claim, her state-law tort claim remains a non-core matter under section 157 to safeguard Pierce’s right to a final determination by an Article III judge.

3. The fact that Pierce filed a proof of claim does not alter the analysis.

The fact that Pierce filed a proof of claim seeking to preserve Vickie’s defamation liability as a non-dischargeable debt does not mean that Vickie’s state-law tortious interference claim against Pierce is somehow transformed into a “core proceeding” that “arises under” or “arises in” a case under the Code. Regardless of any action Pierce took, Vickie’s alleged claim remains a matter that arises under Texas law and could proceed in another court, and thus the statutory requirements

of section 157(b)(1) remain unsatisfied.

Vickie contends that, by filing a proof of claim, Pierce “consented” to the Bankruptcy Court’s plenary jurisdiction over her tortious interference “counter-claim” as a “core” proceeding under section 157(b)(1). VB at 141. Her argument appears to be that, by invoking the bankruptcy court’s authority for one purpose (e.g., to preserve a defamation liability as a non-dischargeable debt), a party thereby vests jurisdiction in the bankruptcy court to finally adjudicate any claim against that party (e.g., to determine a state law tort action). Vickie’s argument is erroneous.

First, the argument is foreclosed by the statutory requirements of section 157(b)(1) limiting the bankruptcy court’s “final order” jurisdiction to matters that either “arise under” the Bankruptcy Code or “arise in” a case under the Code. No matter what a party does, it cannot by “consent” overcome express limitations in the statute text or vest greater jurisdiction in a court than the governing statute permits. *See* Cross-Appellee E. Pierce Marshall’s Opening Brief (Cross-Appellee’s Brief) (“CAB”) at 25-35; *Insurance Corp. of Ireland, Ltd. v. Compagnie*, 456 U.S. 694, 701 (1982) (“Federal courts are courts of limited jurisdiction...limited to those subjects encompassed within a statutory grant of jurisdiction...no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant”).

Second, Vickie's argument runs contrary to this Court's precedents. For example, in *Dunmore* the debtor plainly invoked the bankruptcy court's jurisdiction by commencing his bankruptcy case. Yet, in connection with the debtor's pursuit of his tax refund claim against the IRS, the debtor was not "deemed" to have vested the bankruptcy court with "core" jurisdiction over his claim. If a debtor cannot "vest" a bankruptcy court with "final order" jurisdiction over his claim by commencing a bankruptcy case, a creditor cannot do so by the lesser act of filing a proof of claim.

In addition, this Court has held that a creditor's request for relief from the bankruptcy court, including the filing of a proof of claim, does not convert a debtor's "non-core" counterclaims against the creditor into matters that are "core." For example, in *Castlerock* a creditor filed in the bankruptcy court a request for relief from the automatic stay to continue certain litigation against the debtor in state court. In response, the debtor filed in the bankruptcy court various state-law counterclaims against the creditor. Subsequently, the creditor filed a proof of claim. In considering whether the creditor's request for relief from the automatic stay vested the bankruptcy court with "final order" jurisdiction over the debtor's state-law counterclaims, this Court concluded that it did not. The Court reasoned that the counterclaims were merely "non-core" proceedings even though they fell arguably within the literal scope of section 157(b)(2)'s enumeration of the general forms of

core proceedings. *In re Castlerock Props.*, 781 F.2d 159, 162 (9th Cir. 1986).

Similarly, in *Conejo*, the debtor removed to the bankruptcy court a pending state-law action against it. *In re Conejo Enters., Inc.*, 96 F.3d 346, 349 (9th Cir. 1995). Thereafter, the creditor sought in the bankruptcy court to remand the action back to state court, and also filed a proof of claim. Although this Court held initially that the creditor's filing of a proof of claim converted the removed state-law action into a "core proceeding," the Court withdrew that opinion stating: "In our published opinion, we held that the [creditor's] filing of the claim in bankruptcy rendered the state law action a core proceeding. In doing so, we were in error." *Id.* As the Court explained in its revised analysis, "the filing of a claim does not consolidate it with the pending state law case (into the claim) even though they are based on the same transaction." *Id.* Instead, "[b]oth continue to exist, and must be considered separately." *Id.*

If the filing of a proof of claim does not render the very state-law cause of action that is the subject of the claim a "core proceeding," then the filing of a proof of claim cannot possibly render a state-law counterclaim a "core" matter either. *See Goya Foods, Inc. v. Unanue-Casal (In re Unanue-Casal)*, 164 B.R. 216, 221 (D.P.R. 1993) ("The mere fact that the Amended Counterclaim is raised in the form of a counterclaim against two parties that have filed contingent claims against the bankruptcy estate does not make it a core proceeding."), *aff'd*, 32 F.3d 561 (1st

Cir. 1994).

Third, Vickie's argument makes no sense from a statutory construction standpoint. Critically, nothing in section 157(b)(1) confers jurisdiction by consent. The only consent mechanism in the statute appears in section 157(c)(2) with respect to "non-core" matters that are "related to" a case. If Congress had intended a consent mechanism in section 157(b)(1), it would have placed one in that section. *Russello v. United States*, 464 U.S. 16, 23 (1983) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.") (citation omitted). Vickie cannot effect an end-run around the explicit consent requirements of section 157(c)(2) through the creation of a phantom implicit consent mechanism in section 157(b)(1) where one, in fact, does not exist.

Finally, Vickie's argument makes no sense from a policy standpoint. Whatever policies support the breadth of a bankruptcy court's jurisdiction, it remains a "cardinal principle" that federal statutes must be interpreted to avoid constitutional questions. That is all the more compelling here where Congress specifically enacted the current statutory scheme to avoid the constitutional problems of *Marathon*. Vickie's interpretation ignores this cardinal rule and is thus fundamentally flawed.

4. Vickie’s claim otherwise does not satisfy the requirements of section 157(b)(2)(C).

Vickie’s claim does not otherwise satisfy the requirements of section 157(b)(2)(C) that her claim be a “counterclaim by the estate against persons filing claims against the estate.” First, Vickie’s claim ceased to be a claim “by [her] estate” on March 8, 1999, the day she confirmed her chapter 11 plan and emerged from bankruptcy. ER 2200; *see Southwest Marine, Inc. v. Danzig*, 217 F.3d 1128, 1140 (9th Cir. 2000) (“[O]nce the bankruptcy court confirms a plan of reorganization, the debtor is free to go about its business without further supervision or approval of the court, and concomitantly, without further protection of the court”).

Vickie’s chapter 11 plan expressly provided that “all assets of the Estate shall vest in Reorganized Debtor [Vickie].” SER 12652. Because Vickie’s plan was confirmed long before the Bankruptcy Court adjudicated her alleged claim, the Bankruptcy Court could not have been reviewing a counterclaim by Vickie’s “estate” at the time of adjudication. Rather, the court reviewed only a state law claim by Vickie against Pierce, who at that time was no longer involved with any aspect of Vickie’s bankruptcy estate.

A bankruptcy court’s jurisdiction is not immutable – it can be lost as a bankruptcy proceeding evolves and assets are transferred. *See Borrego Springs Bank, N.A. v. Skuna River Lumber, L.L.C. (In re Skuna River Lumber, LLC)*, No 08-60185, 2009 WL 765885, at *2 (5th Cir. Mar. 25, 2009) (“[W]hen property is

transferred out of a bankruptcy estate free and clear of all liens, the bankruptcy court ceases to have jurisdiction over that property.”); *In re Xonics, Inc.*, 813 F.2d 127, 131 (7th Cir. 1987) (“jurisdiction does not follow the property. It lapses when property leaves the estate.”); *In re Hall’s Motor Transit Co.*, 889 F.2d 520, 522 (3d Cir. 1989) (same); *see also Boyer v. Conte (In re Import & Mini Car Parts, Ltd.)*, 200 B.R. 857, 860 (Bankr. N.D. Ind.), *aff’d*, 203 B.R. 124 (N.D. Ind.), *aff’d*, 97 F.3d 1454 (7th Cir. 1996).

If 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. She did not. She took the claim out of her estate for herself. As a result, it does not satisfy the criteria of section 157(b)(2)(C).

Second, Vickie’s claim is not a counterclaim “against persons filing claims against the estate.” *See* 28 U.S.C. 157(b)(2)(C). Pierce’s complaint sought only a determination that any debt Vickie might owe him for defamation would not be subject to her discharge in bankruptcy. Specifically, Pierce sought “[a] determination that [his] claims against [Vickie] have not been discharged.” ER 932. Although Pierce filed a proof of claim form, he attached a copy of the non-dischargeability complaint to it, demonstrating that what he was seeking was the relief specified in the complaint (*i.e.*, a determination of non-dischargeability). SER 12602. By pursuing this remedy, Pierce was asserting a claim against Vickie

personally, not her “estate,” because if a claim is determined to be non-dischargeable, it survives the debtor’s bankruptcy case and becomes a claim against the debtor personally. *See* 11 U.S.C. § 523; *Bugna v. McArthur (In re Bugna)*, 33 F.3d 1054, 1059 (9th Cir. 1994); *Tustin Thrift & Loan Ass’n v. Maldonado (In re Maldonado)*, 228 B.R. 735, 740 (B.A.P. 9th Cir. 1999) (“The determination of dischargeability is separate from the determination of the allowance of a claim.”).

More important, if Pierce *had* intended to file a defamation “claim” against Vickie’s estate for resolution in federal court, that “claim” would necessarily have been transferred to the district court, as section 157(b)(5) expressly provides that “[t]he district court *shall* order that personal injury tort and wrongful death claims *shall* be tried in the district court.” 28 U.S.C. § 157(b)(5) (emphasis supplied); *Pettibone Corp. v. Easley*, 935 F.2d 120, 123 (7th Cir. 1991) (“In the wake of *Marathon*, Congress required bankruptcy judges to transfer personal injury claims to district judges.”); *see also In re Miller*, 124 Fed. Appx. 495, 501 (9th Cir. 2005).

A defamation claim is a personal injury tort claim within the meaning of section 157(b)(5), and a bankruptcy court therefore lacks jurisdiction over it. *See Passialis v. Passialis*, 292 B.R. 346, 348 (Bankr. N.D. Ill 2003) (bankruptcy court lacked jurisdiction under section 157(b)(5) to determine underlying defamation claim in non-dischargeability proceeding); *Hansen v. Borough of Seaside Park (In*

re Hansen), 164 B.R. 482, 486 (D.N.J. 1994); *Leathem v. Von Volkmar (In re Von Volkmar)*, 218 B.R. 890, 894 (Bankr. N.D. Ill. 1998). This is confirmed by Texas law, which characterizes a defamation suit as a personal injury action. See *Newsom v. Brod*, 89 S.W.3d 732, 735 (Tex. App. 2002) (“The purpose of an action for defamation is to protect the personal reputation of the injured party.”); accord *Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53, 65-66 (1966) (discussing claim of damages for “personal injury” caused by defamation).

As the Seventh Circuit has explained, if a bankruptcy court lacks jurisdiction over a claim under section 157(b)(5), then “[t]he whole case, including defenses of all kinds, goes off to the district judge or the state court.” *Pettibone*, 935 F.2d at 123. Accordingly, because Pierce’s claim would have been transferred to the District Court, so, too, would Vickie’s counterclaim. The Bankruptcy Court had no jurisdiction to adjudicate Pierce’s defamation claim. Accordingly, Vickie’s alleged claim for tortious interference with an expectancy of a gift could not be pursued as a “counterclaim” against Pierce’s defamation claim in that court.

B. The Bankruptcy Court Lacked Even “Related to” Jurisdiction over Vickie’s Claim.

In contrast to the “final order” jurisdiction conferred by section 157(b)(1), section 157(c)(1) permits bankruptcy judges to enter *recommended findings of fact and conclusions of law* in “non-core” matters that are “related to a case under [the Code].” 28 U.S.C. § 157(c)(1). A matter is “related to” a bankruptcy case if “the

outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy.” *Fietz v. Great W. Sav. (In re Fietz)*, 852 F.2d 455, 457 (9th Cir. 1988). Vickie’s claim is not “related to” her bankruptcy case under this standard because the outcome of her case will not conceivably affect her bankruptcy estate. Instead, any recovery that Vickie might have obtained on her claim during her life would only have enriched her, and her claim now properly belongs to her probate estate. Therefore, her claim is not “related to” her bankruptcy case. *Feitz*, 852 F.2d at 458 (holding that there was no jurisdiction “because there would not have been any conceivable relationship between the outcome of the cross-claim and the bankruptcy estate”).

This remains true even though Vickie’s alleged cause of action once belonged to her bankruptcy estate. As noted, bankruptcy jurisdiction is not immutable, and once Vickie took her claim out of her estate for her own benefit, she severed the relationship between the claim and her estate, and bankruptcy jurisdiction ceased. Vickie has failed to demonstrate any connection between the outcome of the litigation and her bankruptcy estate. Accordingly, there is no bankruptcy jurisdiction over her claim.

C. If Vickie’s “Non-Core” Claim Is “Related to” her Bankruptcy Case, the Bankruptcy Court’s Jurisdiction Would Be Limited to Issuing Proposed Findings of Fact and Conclusions of Law.

As noted, in “non-core” proceedings that are “related to” a bankruptcy case,

section 157(c)(1) directs that a bankruptcy judge is authorized to issue merely proposed findings of fact and conclusions of law subject to “de novo” review in the district court, unless the parties consent to a final disposition in the bankruptcy court. *Dunmore*, 358 F.3d at 1114. Under Rule 7012(b) of the Federal Rules of Bankruptcy Procedure, the parties must consent expressly – implied consent is insufficient. Specifically, Rule 7012(b) provides that “[i]n non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge’s order except with the *express* consent of the parties.” FED. R. BANKR. P. 7012(b) (emphasis added). Similarly, the Advisory Committee Note to the Rule states: “A final order or judgment may not be entered in a non-core proceeding heard by a bankruptcy judge unless all the parties expressly consent.” FED. R. BANKR. P. 7012(b) advisory committee’s note (1987 amend.). As the District Court properly determined, Pierce did not expressly consent to have the Bankruptcy Court enter a final order. ER 111.

The requirement of “express” consent means that every party to the proceeding must expressly and consciously agree that the bankruptcy court may exercise “final order” jurisdiction. In Pierce’s answer to Vickie’s counterclaim, however, Pierce expressly denied “that [the Bankruptcy Court] has jurisdiction over any of [Vickie’s] counterclaims.” SER 6754. In addition, approximately three weeks after Vickie filed her counterclaim, Pierce objected to the Bankruptcy Court’s sub-

ject matter jurisdiction, requesting dismissal of her claim on the ground that jurisdiction belonged exclusively in the state court. SER 12631, 12642-45. At no time did Pierce ever expressly consent to the Bankruptcy Court's exercise of jurisdiction over Vickie's alleged claim. Moreover, Vickie also never expressly consented – her counterclaim stated only that her tort claim was a “core” proceeding under section 157(b). SER 12613.

Further, although Pierce's non-dischargeability complaint states that the court “has jurisdiction over this adversary proceeding,” this statement obviously refers only to the non-dischargeability request, not Vickie's claim. SER 12603. Pierce filed his non-dischargeability complaint on May 7, 1996, whereas Vickie filed her counterclaim on June 14, 1996. *Compare* SER 12602 *with* SER 12608. Pierce could not possibly have consented to the Bankruptcy Court's final adjudication of Vickie's counterclaim by virtue of a document filed over a month *before* she asserted her claim in the Bankruptcy Court. Vickie's allegations to the contrary are unsupported in the record. *See* CAB at 40-45.

Applicable case law likewise establishes that implied consent does not establish “final order” jurisdiction in a bankruptcy court under section 157(c). *See IRS v. Brickell Inv. Corp. (In re Brickell Inv. Corp.)*, 922 F.2d 696, 702 (11th Cir. 1991) (holding that Rule 7012 requires express consent, and concluding that filing claim against estate does not constitute express consent to jurisdiction over coun-

terclaim); *Home Ins. Co. v. Cooper & Cooper, Ltd.*, 889 F.2d 746, 749 (7th Cir. 1989) (“Under Bankruptcy Rules 7008 and 7012, which went into force on August 1, 1987, only written consent suffices.”). As discussed in Cross-Appellee’s Opening Brief, the cases Vickie cited previously are distinguishable. CAB at 45-49.

II. The District Court Erred in Failing to Give Preclusive Effect to the Probate Judgment.

Under the Federal Full Faith and Credit Act (“FFCA”), 28 U.S.C. § 1738, a federal district court must dismiss a pending claim if, following entry of a final judgment in a state court, the courts of the State where the judgment was entered would dismiss the claim in a subsequent or parallel proceeding under state-law preclusion principles. *See* 28 U.S.C. § 1738; *Allen v. McCurry*, 449 U.S. 90, 96 (1980); *Clements v. Airport Auth.*, 69 F.3d 321, 326-28 (9th Cir. 1995). In applying the FFCA, federal courts are not permitted to employ their own rules in determining the effect of a state-court judgment; rather, section 1738 “commands a federal court to accept the rules chosen by the State from which the judgment is taken.” *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 523 (1986) (quoting *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482 (1982)); *see also Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 293 (2005).

In this case, following a comprehensive jury trial, the Texas Probate Court fully and finally (a) dismissed Vickie’s claim against Pierce for tortious interference with an expectancy of a gift; (b) resolved all of the issues underlying her

claim; and (c) entered a final judgment that precludes her claim as a matter of Texas law. Following entry of the Probate Judgment, any Texas court would dismiss Vickie's claim in a subsequent or parallel proceeding under Texas preclusion principles. Under the FFCA, the District Court was required to do the same.

A. The Texas Probate Court Fully and Finally Resolved Vickie's Claim, as Well as the Issues Underlying Her Claim.

The Texas Probate Court entered its final Probate Judgment on December 7, 2001. ER 4706, 4727. In entering its judgment, the Probate Court validated J. Howard's estate plan, consisting primarily of two instruments: J. Howard's last will ("Will"), and his living trust ("Living Trust"). The court found both instruments to be genuine, valid, and not the product of improper conduct. ER 4714-15, 4717. Because the Living Trust contained all of J. Howard's assets, ER 1018, 2623, this document, rather than the Will, constituted J. Howard's principal estate planning instrument.

With respect to Vickie's claim for tortious interference with an expectancy of a gift, the Probate Court concluded that it had jurisdiction under Texas law over any claim "concerning the making of any *inter vivos* or testamentary gift or transfer by [J. Howard] of any of his property." ER 4712. The Probate Court determined further that any and all claims by Vickie regarding J. Howard's intent and his property, "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 his life or

upon his death, were required by law to have been asserted as compulsory counter-claims in this proceeding.” ER 4720-21.

On the merits of Vickie’s claim, the Probate Court found specifically that J. Howard “did not intend to give and did not give to [Vickie] a gift or bequest from the Estate of [J. Howard] or from the [Living Trust] either prior to or upon his death” ER 4721. The court held further that Vickie “does not possess any interest in and is not entitled to possession of any property within the estate of [J. Howard] or any property of the [Living Trust] because of any representations, promises, or agreements” ER 4721. The Probate Court also held that:

- (1) all of Vickie’s claims were resolved and dismissed, ER 4719, 4721;
- (2) Vickie was entitled to “take nothing” from Pierce, ER 4721; and
- (3) Pierce was entitled to his inheritance free and clear of any claim by Vickie. ER 4718.

All of the foregoing matters were fully litigated in the probate case, including the Probate Court’s jurisdictional determination and its conclusion that Vickie’s claim was required to be brought in the probate proceeding. ER 4712, 4721. Likewise, Vickie participated fully in the probate proceeding, litigated her claim for tortious interference there, and likewise litigated all of her allegations involving J. Howard’s intent and Pierce’s conduct.

Prior to trial, Vickie identified the causes of action against Pierce that she proposed to try to the Texas jury. ER 4073. These included her claim of tortious

interference with a gift, as well as other claims. ER 4076-78, ER 4086-90, 4102. On October 2, 2000, Vickie's counsel delivered Vickie's opening argument in the Probate Court. ER 4068, 4106. Among other things, he stressed that "[t]his is a case about tortious interference with an intent to give an *inter vivos* gift..." ER 4068, 4134. In discussing the evidence he intended to present, Vickie's counsel referred to the same evidence Vickie would later rely on in pursuing her tortious interference claim against Pierce in federal court: (a) Jeff Townsend's letter of December 15, 1992 mentioning a "catch-all trust" (Townsend was one of J. Howard's lawyers); (b) Harvey Sorensen's New Community Memo of December 23, 1992 (Sorensen was one of J. Howard's estate planning attorneys); (c) the alleged firing of Sorenson as J. Howard's principal estate planning lawyer; (d) the estate planning transactions that took place in 1993; (e) Edwin Hunter's Fine Tuning Outline regarding estate planning changes that J. Howard wanted to make after his marriage to Vickie (Hunter was another one of J. Howard's attorneys); (f) the execution of the Living Trust and power of attorney on July 13, 1994; and (g) the 1995 estate planning transactions. ER 4124-27, 4138, 4147, 4164-66.

As part of Vickie's case in the Probate Court, she called seven witnesses. ER 4069-70. Vickie called three additional witnesses in rebuttal. ER 4070. The Probate Court kept a running record of trial time consumed by the parties. ER 4070, 4173-75. The log reveals that Vickie's counsel spent 3,590 minutes in the

examination of witnesses. ER 4070-71. This includes a total of 1,031 minutes questioning Pierce. ER 4070. Vickie's counsel questioned at least fourteen other witnesses, including Sorensen, Hunter, Nancy Koonce (one of J. Howard's accountants), Finley Hilliard (another one of J. Howard's accountants), Arnold Wyche (J. Howard's driver), Leticia Hunt (one of J. Howard's nurses), and Eyvonne Scurlock (J. Howard's secretary). ER 4070. All of the five witnesses the District Court heard in its subsequent review of Vickie's claim (Hunter, Pierce, Sorensen, Vickie, and Townsend) testified in the Probate Court. ER 8, 4070-71, 4173-75.

Vickie herself testified in the Probate Court for approximately six days. ER 4071. She testified extensively regarding her alleged expectancy of a gift or inheritance, including her allegation that J. Howard promised to give her half of his assets. ER 4071.

On January 5, 2001 – shortly after the Bankruptcy Court issued its \$474 million judgment against Pierce – Vickie filed a “non-suit” of her tortious interference claim in the probate proceeding. ER 4713. Vickie also moved to dismiss the various counterclaims Pierce had filed against her in the probate case, and on January 17, 2001, the probate judge denied Vickie's motion to dismiss. ER 3446, 3472. Vickie was thus unsuccessful in withdrawing from the probate proceeding. *See Marshall*, 392 F.3d at 1128.

On February 9, 2001, Pierce, with leave of court, filed amended counter-claims against Vickie in the Probate Court, including a request for declaratory relief to determine Vickie's claims and rights in J. Howard's property and estate. ER 2196-97, 3620.

On March 7, 2001, following a five-and-a-half-month trial involving over forty witnesses and hundreds of items of evidence, ER 4066-71, 4706-27, the Texas probate jury returned its unanimous verdict upholding the validity of J. Howard's Will and Living Trust and rejecting all of the various claims seeking recoveries at odds with J. Howard's estate plan. ER 3719, 3735. In rendering its verdict, the Texas jury rejected all of the various allegations that the Living Trust and Will did not reflect J. Howard's true intentions. These included the allegations that the Living Trust had been forged or altered, that J. Howard had been the victim of fraud or undue influence, that Pierce had interfered with J. Howard's intent, and that J. Howard lacked the requisite mental capacity when he executed his Will and Living Trust. ER 3718, 3720, 3736, 3761, 3773, 3782. The jury also specifically rejected Vickie's claim that J. Howard had promised her half of his assets. ER 3782.

As noted, on December 7, 2001, the Probate Court entered its final Probate Judgment disposing of Vickie's claims. In entering its final Probate Judgment, the Probate Court rejected Vickie's claim that J. Howard intended to give her a gift

and ruled in Pierce's favor on his declaratory judgment claim seeking a determination of Vickie's rights and claims. ER 4713, 4712-23.

Turning to the relevant federal court proceedings, on June 20, 2001, the District Court vacated the Bankruptcy Court's \$474 million judgment against Pierce, citing the Bankruptcy Court's lack of jurisdiction to enter a final order resolving Vickie's state-law tortious interference claim. ER 120-21; *see also* ER 3821-3921. At the same time, the District Court refused to dismiss Vickie's claim, concluding that it had plenary authority to determine her claim *de novo*. ER 109-10, 120-21.

Following the Probate Court's entry of its Probate Judgment, and before the District Court entered its own judgment on Vickie's tortious interference claim, Pierce filed a motion in the District Court to dismiss Vickie's claim on grounds of issue preclusion and claim preclusion. ER 83, 86. On December 11, 2001, the District Court heard argument on Pierce's motion. ER 4762-815. On the same day, the District Court commenced its *de novo* hearing on Vickie's claim. ER 4, 8, 4815. On December 21, 2001, the court denied Pierce's motion. ER 82, 93. Thereafter, on March 7, 2002, the District Court entered its own \$89 million Judgment on Vickie's claim. ER 5385.

B. Following Entry of the Probate Judgment, Any Texas Court Would Dismiss Vickie’s Claim in a Subsequent or Parallel Proceeding on Grounds of Preclusion.

1. Any Texas Court Would Afford the Probate Court’s Judgment Preclusive Effect on the Ground of the Special Status of Probate Judgments.

As a matter of Texas law, the Probate Court’s final judgment determining the validity of J. Howard’s estate planning documents precludes any tort claim based on any expectancy of property contrary to the terms of the validated instruments. *See Thompson v. Deloitte & Touche, L.L.P.*, 902 S.W.2d 13, 16 (Tex. App. 1995) (probate judgment establishing validity of decedent’s intended scheme of distribution precludes a claim for tortious interference based on expectancy of a different distribution); *Neill v. Yett*, 746 S.W.2d 32, 35 (Tex. App. 1988). In Texas, a probate court’s judgment runs against the world and is designed to resolve all disputes over the disposition of a decedent’s assets. Interested parties who fail to participate are nonetheless bound by the outcome. *Ladehoff v. Ladehoff*, 436 S.W.2d 334, 336 (Tex. 1968); *see also Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex. 1981).

As these precedents establish, once a probate court determines that an estate plan is valid, only the beneficiaries of the validated plan have and may assert legitimate expectancies. By definition, other claimants, like Vickie, have no legitimate expectancies and cannot effect an end-run around a probate court’s judgment

by asserting a tort claim based on a competing theory of the decedent's "true" intentions without first setting aside the probate court's judgment.

Exercising its jurisdiction, the Probate Court determined on the merits that (1) the Living Trust expressed J. Howard's true intentions regarding the disposition of his assets; (2) J. Howard did not intend, promise, represent, or agree to give Vickie any of his assets; and (3) J. Howard's estate plan was not tainted by misconduct. In contrast, Vickie's tortious interference claim turns on her conflicting assertions that (1) the Living Trust did not reflect J. Howard's true intentions; (2) J. Howard intended to give Vickie a large portion of his assets; and (3) Pierce interfered with that intention by "tortiously" manipulating J. Howard's estate plan. Vickie's theory of liability is patently inconsistent with Texas law and the preclusive effect of the Probate Judgment, which proscribes all such theories of liability. Accordingly, any court in Texas would have dismissed Vickie's claim in a subsequent or parallel proceeding, and the District Court erred in failing to do so.

2. Any Texas Court Would Afford the Probate Court's Judgment Preclusive Effect Under Texas Principles of Res Judicata/Claim Preclusion.

Alternatively, the Probate Judgment precludes Vickie's tort claim under ordinary claim preclusion principles because the Probate Judgment (1) constitutes a final judgment of a court of competent jurisdiction; (2) involves the same parties and claims; and (3) involves claims that were or could have been raised in the pro-

bate proceeding. *See Amstadt v. United States Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996) (*res judicata* applies when these requirements are satisfied); *Gottschald v. Reaves*, 470 S.W.2d 149, 151 (Tex. Civ. App. 1971).

First, under Texas law, a probate court has broad authority to resolve claims and controversies concerning a decedent's affairs and property and had jurisdiction to enter the Probate Judgment. *See Coble Wall Trust Co. v. Palmer*, 859 S.W.2d 475, 480 (Tex. App. 1993); *Stevenson v. Tice*, 593 S.W.2d 794, 796 (Tex. App. 1980).

Second, the relevant parties in the Probate and District Courts were identical in both actions. *See Marshall*, 392 F.3d at 1125, 1126, 1130-31.

Third, Vickie could and did raise her claim in the Probate Court. Indeed, Vickie's claim for tortious interference that she filed in the Probate Court is virtually identical to the tortious interference claim she filed in federal court. *Compare* ER 948-49 *with* ER 2863-65.

Although Vickie eventually sought to withdraw from the probate proceeding after she obtained the \$474 million judgment from the Bankruptcy Court, she was unsuccessful and remained a party to the probate proceeding as a result of the various counterclaims filed against her, including Pierce's request for declaratory relief to determine Vickie's claims and rights. She likewise participated fully and exten-

sively in the Texas proceeding. *See Marshall*, 392 F.3d at 1125, 1128-30. Accordingly, the Texas doctrine of claim preclusion properly applies.

Moreover, even if Vickie had never brought her tortious interference claim in the probate proceeding, or had been successful in withdrawing from the probate case, she still would remain bound by the preclusive effect of the Probate Judgment. Under Texas law, *res judicata* applies not only to “matters actually litigated,” but also to “*causes of action* or defenses which arise out of the same *subject matter* and which might have been litigated in the first suit.” *Barr v. Resolution Trust Corp. ex rel. Sunbelt Fed. Sav.*, 837 S.W.2d 627, 630 (Tex. 1992) (emphasis in original). There is no question that Vickie’s tort claim “might have been litigated” in the Probate Court: 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. ER 4720-21; *Spangler v. Hickey*, 401 S.W.2d 721, 723 (Tex. Civ. App. 1966) (compulsory counterclaim is mandatory). And, in fact, she did raise her claim there. Vickie could and should have asserted her tort claim in the probate proceeding. Accordingly, her claim is now barred under ordinary principles of *res judicata*.

3. Any Texas Court Would Afford the Probate Court's Judgment Preclusive Effect Under Texas Principles of Collateral Estoppel/Issue Preclusion.

Further, Vickie's claim is barred under the Texas doctrine of collateral estoppel because issues critical to her claim were actually resolved against her in the probate proceeding. Relitigation of an issue will be barred under the doctrine if "(1) the facts sought to be litigated in the second action were fully and fairly litigated in the first action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action." *Sysco Food Serv., Inc. v. Trapnell*, 890 S.W.2d 796, 801 (Tex. 1994). Issue preclusion applies even if a subsequent action is based on an entirely different theory of liability. *See Wilhite v. Adams*, 640 S.W.2d 875, 876 (Tex. 1982).

Vickie's tortious interference claim turns on whether J. Howard intended to give her a gift. If he did not, she cannot possibly argue that Pierce interfered with J. Howard's intention regarding a gift. Vickie's claim likewise turns on whether Pierce interfered with J. Howard's intent by "tortiously" manipulating J. Howard's estate plan. If J. Howard's estate plan and the transactions underlying it are untainted by misconduct, Pierce could not possibly have done anything "tortious" to prevent Vickie from receiving her alleged gift. These issues were fully and fairly litigated against Vickie in the Probate Court; the resolution of these issues was

necessary to the Probate Court's judgment; and Vickie and Pierce were cast as adversaries in the probate case.

Under Texas law, a fact or issue has been "fully and fairly litigated" if the particular fact or issue is the same in the two proceedings and has been "actually litigated." *See Nat'l Union Fire Ins. Co. v. Dominguez*, 793 S.W.2d 66, 71 (Tex. App. 1990), *rev'd on other grounds*, 873 S.W.2d 373 (Tex. 1994); *McDonald v. Houston Brokerage, Inc.*, 928 S.W.2d 633, 637 (Tex. App. 1996). A claim is "actually litigated" under Texas law if the parties were fully heard; the trial court supported its decision with a reasoned opinion; and the decision is appealable. *See Cole v. G.O. Assocs., Ltd.*, 847 S.W.2d 429, 431 (Tex. App. 1993).

Throughout the course of the probate proceeding, Vickie attempted to demonstrate (1) that J. Howard intended to give her a sizeable gift of his assets, and (2) that Pierce interfered by "tortiously" manipulating J. Howard's estate plan contrary to J. Howard's intent. Vickie challenged J. Howard's estate planning transactions and otherwise participated exhaustively in the probate proceeding. *See Marshall*, 392 F.3d at 1128-30. As the Probate Court concluded in its carefully reasoned opinion, following a five-and-a-half month jury trial, J. Howard never intended to leave Vickie any gift, and his estate plan was free from misconduct by Pierce or anyone else. The issues underlying Vickie's tortious interference claim were thus "actually litigated."

Under Texas law, a fact is essential to a judgment if it is necessary to resolve the “ultimate issues” in the action. *See Cole*, 847 S.W.2d at 431; *see also Tarter v. Metropolitan Sav. & Loan Ass’n*, 744 S.W.2d 926, 928 (Tex. 1988). Here, before the Probate Court could determine the “ultimate issue” of the validity of J. Howard’s estate plan, or the “ultimate issue” of Vickie’s claims and rights in the context of Pierce’s request for declaratory judgment, it was necessary to resolve Vickie’s allegations that J. Howard’s estate plan and the transactions underlying it were tainted by illegality and that, contrary to his estate plan, J. Howard intended to give her a large gift. The Probate Court’s resolution of Vickie’s allegations was thus “essential” to the Probate Court’s judgment.

Finally, to establish that both parties were cast as adversaries in the first proceeding, “it is only necessary that the party against whom the doctrine is asserted was a party or in privity with a party in the first action.” *Sysco*, 890 S.W.2d at 802. As this Court has observed, the Probate Judgment involved both Pierce and Vickie as adversaries. *See Marshall*, 392 F.3d at 1125.

For these reasons, any Texas court would give preclusive effect to the Probate Court’s findings that J. Howard never intended to give Vickie a gift, and that his estate plan and the transactions underlying it were not the product of improper conduct. Thus, as a matter of law, the District Court was required to dismiss Vickie’s tortious interference claim.

C. The District Court’s Reasons for Refusing to Afford Preclusive Effect to the Probate Judgment Are Erroneous.

The District Court refused to afford preclusive effect to the Probate Judgment for five reasons: (1) the Probate Court’s judgment was not “final”; (2) principles of preclusion only applied before “trial” proceedings commenced in the Bankruptcy Court; (3) application of a preclusion doctrine would be “unfair” to Vickie; (4) the issues litigated in the Probate Court were not the same as those litigated in the District Court; and (5) the Bankruptcy Court might decide to vacate the Probate Court’s judgment. Each of these grounds is erroneous.

First, although the District Court initially determined that Vickie’s claim was not barred on the ground that the Probate Court’s judgment was not “final,” ER 5203, the District Court subsequently reversed course and acknowledged that the Probate Judgment became final prior to its own judgment, ER 5391 (“under Texas law, the judgment became final on February 11, 2002”). Under Texas law, the Probate Judgment was properly “final” for preclusion purposes prior to the District Court’s judgment. *Street v. Honorable Second Court of Appeals*, 756 S.W.2d 299, 302 (Tex. 1988); RESTATEMENT (SECOND) OF JUDGMENTS § 13 cmt. f (1982).

Second, the District Court determined erroneously that issue and claim preclusion did not apply because Pierce’s motion could only have been heard before “trial” proceedings began in the Bankruptcy Court. The District Court supported its determination by reasoning that preclusion did not apply in situations where a

party pursues identical claims in two courts and one court enters judgment before the other. This determination runs expressly counter to established precedent. Where, as here, the same parties are litigating in two different courts, both the state court and the federal court “may proceed with the litigation at least until judgment is obtained in one of them which may be set up as *res judicata* in the other.” *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 466 (1939); *Mack v. Reserve Life Ins. Co.*, 217 S.W.2d 39, 40 (Tex. Civ. App. 1948) (“regardless of which court first took jurisdiction of the case, neither should be enjoined from proceeding with the trial, but when one court has rendered a final judgment in the cause such judgment may be pleaded as *res judicata* in the other court”).

Third, the District Court determined erroneously that application of preclusion doctrine would be “unfair” given that Vickie sought to withdraw from the Texas probate proceeding and therefore did not “litigate” her claim in that forum. In fact, Vickie’s efforts to withdraw were unsuccessful and she plainly did participate fully in the probate proceeding. ER 948-49; 4066-71; 4713. She presented her claims there, testified for many days, examined and cross-examined numerous witnesses, presented evidence and argument, and vigorously opposed Pierce’s action for declaratory relief regarding her claims and rights.

More important, the District Court’s reasoning is unsound because Texas law does not recognize the District Court’s “unfairness” exception to its preclusion

doctrines for parties who seek to withdraw from a prior litigation but are unsuccessful in doing so. On the contrary, embedded in the Texas law of claim preclusion is the concept that a party may be bound not only by adverse judgments on claims she actually litigated, but also those she chose not to present, but could have presented, in the prior proceeding. Likewise, under the special doctrine of Texas probate preclusion, a party may be bound by a probate judgment even if she did not participate in the probate proceeding at all, so long as she was served (which Vickie was). *See e.g., Ladehoff*, 436 S.W.2d at 336. In any event, there is nothing “unfair” about applying preclusion principles in this case to prevent exactly what these principles uphold – the avoidance of duplicate proceedings and the risk of inconsistent judgments.

Fourth, the District Court ruled erroneously that the issues decided by the Probate Court were not the same as the issues presented in the District Court. The District Court reasoned that the issues were different on the theory that the Probate Court did not have before it any question of what J. Howard intended to do with his assets during his lifetime. ER 5207-5208. In fact, the Probate Court did have this issue before it and held explicitly that J. Howard “did not intend to give and did not give to [Vickie] . . . a gift or bequest from the Estate of [J. Howard]...either *prior to* or upon his death...” ER 4721 (emphasis added). Indeed, Vickie herself placed the issue before the Probate Court by, among other things, challenging the

legitimacy of J. Howard's *inter vivos* transactions as contrary to his intent. The District Court's determination that the Probate Court did not have before it J. Howard's *inter vivos* intentions is simply wrong.

Moreover, the Probate Court also held expressly that, under Texas law, it had jurisdiction over any claim "concerning the making of any *inter vivos* or testamentary gift or transfer by [J. Howard] of any of his property." ER 4712. The Probate Court was correct in this determination. A Texas probate court properly reviews a decedent's *inter vivos* intentions and transactions not only to determine the validity of an estate plan (e.g., to determine if transactions underlying an estate plan are tainted by misconduct), but also for purposes of recovering any improper transfer itself. *English v. Cobb*, 593 S.W.2d 674, 676 (Tex. 1979).

Finally, the District Court speculated that preclusion would be inappropriate because the Bankruptcy Court might at some point decide to vacate the Probate Judgment. ER 5208. The District Court, however, adduced no factual support that such an outcome was even remotely possible, nor, more important, that the Bankruptcy Court had any authority to take such a drastic step. In fact, the Bankruptcy Court has not vacated the Probate Judgment and has no authority to do so (*see* section II.D.2 *infra*). Each of the District Court's grounds for denying preclusion are thus in error.

D. Even If the Bankruptcy Court’s \$474 Million Judgment Were Reinstated, the Probate Judgment Would Remain the Preclusive Judgment Under Both the Texas Last-in-Time Rule and Applicable Federal Law.

Vickie has argued that if the Bankruptcy Court’s judgment is reinstated, it will take precedence over the Probate Judgment for purposes of issue and claim preclusion because the Bankruptcy Court’s judgment was first in time. Vickie’s theory is erroneous. Even if reinstated, however, the Bankruptcy Court’s judgment cannot take precedence over the Probate Judgment because Vickie failed to properly present the Bankruptcy Court’s judgment to the Probate Court in the probate proceeding and therefore waived any preclusion argument she had. Moreover, even if Vickie had properly presented the Bankruptcy Court’s judgment to the Probate Court, the Probate Court’s final Probate Judgment is more recent than the Bankruptcy Court’s Judgment and, under the “last-in-time” rule, is entitled to preclusive effect in the District Court.

1. Vickie Failed to Properly Present her Argument in the Probate Court.

It is well established under both Texas and federal law that a litigant must affirmatively plead a prior judgment in an action and argue its preclusive effect; otherwise, the defense of preclusion is waived. *See, e.g., Garner v. Long*, 106 S.W.3d 260, 264 (Tex. App. 2003); *Austin Transp. Study Policy Advisory Comm. v. Sierra Club*, 843 S.W.2d 683, 688 (Tex. App. 1992); *see also Clements v. Air-*

port Auth., 69 F.3d 321, 328 (9th Cir. 1995); *Kern Oil & Refining Co. v. Tenneco Oil Co.*, 840 F.2d 730, 735 (9th Cir. 1988); *Fount-Wip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296, 1300 n.1 (9th Cir. 1978). To that end, Texas Rule of Civil Procedure 94 requires that, in responding to a pleading, a party shall set forth affirmatively the defense of preclusion. Tex. R. Civ. P. 94.

Vickie never properly presented her *res judicata* claim in the Texas Probate Court. After the Bankruptcy Court entered its judgment, she never filed an amended answer to Pierce's amended declaratory judgment complaint setting forth her theory of preclusion. Although Vickie identified the Bankruptcy Court's judgment in various filings in the probate case, she did not follow the proper Texas procedure and, accordingly, waived her preclusion argument.

2. While the Probate Judgment Stands, It Is Entitled to Preclusive Effect.

Even if Vickie had not waived her argument, the Probate Judgment is still entitled to preclusive effect under the "last-in-time" rule. As federal and Texas courts have long recognized, when inconsistent final judgments are actually rendered in two separate actions (e.g., the Probate Judgment and the hypothetically reinstated judgment of the Bankruptcy Court), it is the *later* of the two judgments that is accorded preclusive effect under the rules of *res judicata*. RESTATEMENT (SECOND) OF JUDGMENTS § 15 (1982); *Kahn v. Bexar County*, No. 04-96-00296, 1997 WL 269008, at *2 (Tex. App. May 21, 1997); *Stoltz v. Coward*, 30 S.W. 935,

935 (Tex. Civ. App. 1895); *Browning v. Navarro*, 887 F.2d 553, 563 (5th Cir. 1989) (applying Texas law); *see also Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir. 1988) (“[i]f two or more courts render inconsistent judgments on the same claim or issue, a subsequent court is normally bound to follow the most recent determination that satisfies the requirements of *res judicata*”).

Principles of preclusion apply even if the judgment sought to be enforced is claimed to be erroneous, in which case the unsuccessful party’s sole remedy is to have the judgment set aside in the original proceeding. *Butler v. Continental Airlines, Inc.*, 116 S.W.3d 286, 288 n.4 (Tex. App. 2003) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 17 cmt. d (1982)); *see also Deposit Bank v. Bd. of Councilmen*, 191 U.S. 499, 511 (1903).

It is axiomatic that the lower federal courts may not sit in review of state-court judgments. *E.g., Exxon Mobil Corp.*, 544 U.S. at 292; *Atlantic Coast Line R.R. Co. v. Bhd. of Locomotive Eng’rs*, 398 U.S. 281, 286 (1970). This is especially true if the relevant state-court judgment is entered following a jury trial. *See Lumbermen’s Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 53 n.5 (1954); *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 99 (4th Cir. 1991); *cf. In re Air Crash Disaster near New Orleans*, 767 F.2d 1151, 1169 (5th Cir. 1985); *see also* 8 JAMES WM. MOORE, ET AL., MOORE’S FEDERAL PRACTICE § 38.03[3][b] (3d ed. 2009).

Vickie, of course, has not had the Probate Judgment set aside in the Texas

appellate courts. Accordingly, under the “last-in-time” rule, the Probate Judgment is entitled to preclusive effect even if the Bankruptcy Court’s judgment were reinstated. The fact that the District Court may have disagreed with the Probate Judgment is of no moment. Vickie’s claim is properly barred and should have been dismissed.

III. Vickie’s Claim Is Barred by the Texas Statute Of Frauds.

In order to prove a claim for tortious interference with an expectancy of a gift, Vickie was required to prove, by competent evidence sufficient to pass muster under the Texas Statute of Frauds, that J. Howard intended to give her a gift of some kind. Vickie failed to do so, and the Texas Statute of Frauds bars her claim.

Vickie testified that, to induce her to marry him, J. Howard promised her orally that he would give her “half” of his assets. ER 3606-07. Of course, Vickie’s uncorroborated testimony of an oral promise is insufficient to prove either a valid gift or J. Howard’s intent. Tex. R. Evid. 601(b) (uncorroborated statements by a decedent are inadmissible to prove the decedent’s intent); Tex. Bus. & C. Code Ann. § 26.01(a), (b)(3) (agreement made in consideration of marriage is not enforceable unless it is in writing and “signed by the person to be charged with the promise or agreement”); *Curtis v. Anderson*, 106 S.W.3d 251, 254 (Tex. App. 2003); *Lieber v. Mercantile Nat’l Bank*, 331 S.W.2d 463, 474 (Tex. Civ. App. 1960) (“any promise for which the whole consideration or part of the consideration

is marriage or a promise of marriage is within the statute”) (citation omitted); *see also Tatum v. Tatum*, 606 S.W.2d 31, 33 (Tex. Civ. App. 1980).

In any event, the District Court did not believe that Vickie’s uncorroborated testimony reflected J. Howard’s true intentions. ER 36. Instead, the District Court concluded that J. Howard “always intended to give Vickie only half of his ‘new community,’” *id*, which the court defined as “one-half of the growth of his assets during the time of their marriage,” ER 71.

In support of this conclusion, the District Court cited to a number of items the court believed demonstrated J. Howard’s inclination to treat Vickie generously. These are detailed in Pierce’s Opening Brief. *See* OB at 112-22. As Pierce explained in his brief, however, none of these items demonstrate that J. Howard actually intended to give Vickie a gift of “one-half of the growth of his assets during the time of their marriage.” Certainly no witness testified that this was J. Howard’s intent, and the only document the District Court could point to that even remotely mentions the idea is a memorandum (the “New Community Memo”) authored by Harvey Sorensen, one of J. Howard’s estate planning attorneys. ER 562.

Sorensen testified that J. Howard asked him to explore the idea of creating an option for Vickie based on the potential increase in dividends (not asset value) on the Koch stock that MPI owned, provided the option would not trigger any tax liability. ER 3181-82, 4878. Sorensen memorialized his discussion with J. How-

ard in the New Community Memo. ER 562; *see* OB 21-22, 117-19. Sorensen testified further that after he informed J. Howard that the option would generate a tax liability, J. Howard told him to drop the idea. ER 3178-79, 4929-30.

The New Community Memo is not a gift instrument of any kind. It is an internal legal memo by Sorensen to some of his colleagues directing further research regarding the option idea. J. Howard never signed the memo – no one did. Nor does the memo indicate in any way that J. Howard ultimately approved the idea or took any steps to implement it. Nor did any witness testify that J. Howard intended to implement the idea – the only testimony was that J. Howard intended to drop it. Further, under J. Howard’s idea, Vickie would not be entitled to receive any payment on the option until fifteen years after the death of J. Howard’s first wife, Eleanor. ER 562, 3171, 4926. In addition, the only evidence adduced shows that if J. Howard had implemented the idea set forth in the memo, Vickie would have been entitled to little or nothing under the valuation formula the memo recites. ER 5113-17, 5536-37.

In spite of Sorensen’s testimony that J. Howard never intended to pursue the option idea, the District Court concluded that J. Howard instructed Hunter to prepare a “catch-all” trust embodying the general idea set forth in the New Community Memo. ER 32, 4929-30. But there is no evidence of this instruction – there is only testimony that the instruction was never given. ER 4929-30, 4950-52. Nor is

there any evidence of the existence of a “catch-all trust” document. There is only an unexplained reference to a “catch-all trust” in Townsend’s letter of December 15, 1992, ER 4945, and the mere mention of the word “trust” in some billing entries, ER 4946. Further, the only testimony regarding these items was (1) that no one (including Townsend) can explain exactly what the word “catch-all trust” meant in Townsend’s letter, ER 5791-97, 5810-16; (2) whatever it meant, J. Howard never intended to pursue it, ER 5838-43; and (3) the mention of the word “trust” in some billing entries had nothing to do with a “catch-all trust” for Vickie, ER 4945-49, 4950-52.

Ultimately, the supposed evidence of J. Howard’s alleged trust for Vickie boils down to (1) the unsigned and unimplemented New Community Memo, (2) the unexplained phrase “catch-all trust” appearing in Townsend’s letter, and (3) the unadorned mention of the word “trust” in some billing records. This kind of evidence is patently insufficient under the Texas Statute of Frauds to support a claim of tortious interference with an expectancy of a gift.

A. The “Trust” Vickie Alleges J. Howard Intended to Create Fails to Satisfy the Statute of Frauds.

The Texas Statute of Frauds provision applicable to trusts states in relevant part that “a trust in either real or personal property is enforceable only if there is written evidence of the trust’s terms bearing the signature of the settlor or the settlor’s authorized agent.” Tex. Property Code Ann. § 112.004. A formal trust

instrument is not required to create an enforceable trust, but the beneficiary, the trust *res*, and the trust's purpose must be identified. *See In re Walker*, 250 S.W.3d 212, 214 (Tex. App. 2008). A trust will fail if "an essential term is altogether missing from an attempted express trust, or is at least not reasonably certain." *Id.*

Obviously, (1) the unsigned and unimplemented New Community Memo, (2) the unexplained phrase "catch-all trust" appearing in Townsend's letter, and (3) the unadorned mention of the word "trust" in some billing records are insufficient to establish a trust under section 112.004. Specifically, the unsigned and unimplemented New Community Memo merely outlines an idea for further research. Townsend's letter merely mentions the phrase "catch-all trust." The billing entries merely mention the word "trust" without explanation. Further, no witness testified that a trust instrument was ever prepared in final or draft form. Similarly, no witness testified that J. Howard ever signed such an instrument or attempted to do so, and no witness testified that any trust instrument was ever destroyed or concealed. Further, no witness testified regarding the terms of any such instrument. On the contrary, all of the testimony was that no such trust instrument ever existed. The evidence is thus patently insufficient to establish a trust.

In addition to section 112.004, the Texas Statute of Frauds requires further that any agreement "not to be performed within one year from the date of making the agreement" must be in writing and signed by the person to be charged with the

agreement or someone lawfully authorized to sign for him. Tex. Bus. & C. Code Ann. § 26.01(a), (b)(6). Under the New Community Memo, Vickie would not have received the value of any option until fifteen years after the death of J. Howard's first wife, Eleanor. Accordingly, the agreement could not be performed within one year, and the purported gift thus fails under this provision of the Statute of Frauds as well. ER 562.

Vickie contends that she need not produce any evidence of an actual written trust agreement. Rather, she contends that in order to maintain an action for tortious interference with an expectancy of a gift, all she need prove is that J. Howard *intended* to create a trust for her, and she asserts that the negligible items cited by the District Court suffice as adequate proof. But as the Texas courts have long recognized, a litigant may not so readily effect an end run around the Texas Statute of Frauds. *See Zaremba v. Cliburn*, 949 S.W.2d 822, 827 (Tex. App. 1997) (observing that Texas courts look “with disfavor on litigants seeking to bypass the statute of frauds by pleading other causes of action.”). The Texas Statute of Frauds remains robust in policing the *quality* of the evidence sufficient to maintain an action for tortious interference, and Vickie's claim fails to pass muster under its provisions.

B. The Alleged “Trust” Cannot Be the Basis for Vickie's Tortious Interference Claim

Texas courts have long invoked the Texas Statute of Frauds in evaluating the

evidence necessary to support a claim for tortious interference with a contract. For example, where a party proves the existence of a contract by producing the actual signed contract itself, a claim for tortious interference with the contract may proceed even though the contract is “voidable” owing to some minor defect in its terms. In *Clements v. Withers*, the Texas Supreme Court found that a claim brought by a realtor against a landowner for tortious interference with his contractual right to a commission was valid despite the underlying contract being found unenforceable due to an insufficient description of the land to be sold. 437 S.W.2d 818, 820-21 (Tex. 1969). The Court specifically noted that the contract, while technically unenforceable, was “not void or illegal, nor [was] there any public policy opposing its performance.” *Id.* at 821.

In contrast, where a contract is completely unenforceable under the Statute of Frauds, such as an oral promise required to be made in writing, a claim for tortious interference with the contract is barred. In *Trammel Crow Company No. 60 v. Harkinson*, another claim for tortious interference with a contractual right to a commission, the Texas Supreme Court limited its decision in *Clements* and found that the claim could not be brought where the commission agreement was oral. 944 S.W.2d 631, 632 (Tex. 1997). The Court distinguished *Clements* on the ground that there was no written contract, as opposed to a contract that was unenforceable due to a technical deficiency, and found that allowing a contract or tort

claim to proceed would violate the public policy expressed by the relevant provision of the Statute of Frauds requiring a signed written agreement for the recovery of a commission. *Id.* at 635. Likewise, the Texas Supreme Court and the Fifth Circuit applying Texas law have found tortious interference claims to be invalid where the underlying contract alleged to have been interfered with is an unenforceable covenant not to compete. *See Juliette Fowler Homes v. Welch Assocs.*, 793 S.W.2d 660, 665 (Tex. 1990); *NCH Corp. v. Share Corp.*, 757 F.2d 1540, 1543 (5th Cir. 1985); *Hi-Line Elec. Co. v. Dowco Elec. Prods.*, 765 F.2d 1359, 1362 (5th Cir. 1985). The logic and reasoning of these decisions apply here, and Vickie's claim is properly barred.

Under Texas law, oral premarital agreements that violate the Statute of Frauds are void. *Lieber*, 331 S.W.2d at 476. Similarly void are contracts that lack basic, essential terms. *Texas Oil Co. v. Tenneco Inc.*, 917 S.W.2d 826, 831 (Tex. App. 1994), *rev'd in part on other grounds sub nom Morgan Stanley & Co. v. Texas Oil Co.*, 958 S.W.2d 178, 182 (1997). Unwritten and unsigned contracts that are incapable of being performed within a year, such as the plan articulated in the New Community Memo, are also void. *See Royle v. Tyler Pipe Indus., Inc.*, 6 S.W.3d 593, 595 (Tex. App. 1999). So, too, are "trusts" premised on the inadequate evidence offered in this case.

IV. The District Court's Findings in this Case Were Not Based on Any Discovery Sanction, and No Sanctions Were Warranted.

The Bankruptcy Court based its \$474 million judgment against Pierce on presumed facts that it created as a “sanction” for Pierce’s alleged discovery abuse. ER 3049 n.5, 3050-52. As explained in Pierce’s Opening Brief, the Bankruptcy Court took no evidence of Pierce’s alleged discovery abuse; it simply accepted as true the false accusations of Vickie’s counsel. OB 56-70. As explained in Pierce’s brief, the record does not support these accusations. *Id.*

For example, on March 10, 1998, the Bankruptcy Court held a brief impromptu discovery conference. ER 1436. At the hearing, Vickie stated falsely through counsel that she was not receiving any documents from Hunter. ER 1438-39. In fact, at the time Vickie’s counsel in California was complaining to the Bankruptcy Court that Hunter had not produced anything, Vickie’s other counsel in Texas was reviewing and marking documents for copying from Hunter’s production. ER 1530-31. In any event, and in spite of Vickie’s failure to comply with applicable discovery procedures, Hunter responded properly to Vickie’s discovery demands and produced over 200 boxes of materials. ER 2216-17, 2232; *see* OB at 63-66.

The falsity of Vickie’s allegations of discovery abuse are highlighted by a certain Application to Employ Joint Special Litigation Counsel filed in the Bankruptcy Court (“Application”). As set forth in the Application, Vickie’s California

attorneys in the Bankruptcy Court (Kinsella, Boesch, Fujikawa & Towle), and Vickie's Texas attorneys in the Probate Court (Schechter & Marshall LLP), agreed explicitly "to keep the other fully apprised of all matters *including concurrent copying of each other with all correspondence, pleadings, discovery and evidence* both generated by the Attorney Parties as well as received from the third parties." (emphasis added). *See* Request for Judicial Notice, filed contemporaneously with this brief. In other words, under this agreement, any documents produced in the Texas probate proceeding were *required* to be shared with Vickie's California attorneys in the Bankruptcy Court. Thus, in addition to the fact that Pierce and others responded fully to all discovery requests in the Bankruptcy Court, Vickie's California counsel likewise had complete access to the full discovery in the Probate Court. Vickie's repeated statements in the Bankruptcy Court that she was not receiving discovery were simply a charade.

In any event, although the Bankruptcy Court entered its \$474 million judgment based on "facts" it deemed to exist as a discovery sanction, the court *sua sponte* vacated its own sanctions order. ER 2927-28. Likewise, the District Court vacated the Bankruptcy Court's \$474 million judgment based on these sanctions. ER 5458-62. At present, there are no outstanding, unvacated sanctions determinations by the Bankruptcy Court.

On appeal, the District Court likewise declined to draw any conclusions regarding Vickie's allegations of discovery abuse. In its opinion, the District Court stated that "the Court is able to make a determination of this matter on the merits and therefore does not reach the issue of evidentiary sanctions [T]herefore, except to the extent set forth in Footnote 17, the Court *makes no findings on the issue of sanctions at this time.*" ER 5395-96 (emphasis added).

Moreover, in footnote 17 of its opinion, the District Court found inexplicably that the evidence demonstrated that a draft catch-all trust instrument existed. The court added the comment that "if the evidence had not been sufficient, the discovery abuses in this case *might* have led the court to deem this fact as established as a sanction." ER 5419 (emphasis added). But the court clearly stopped short of actually imposing any discovery sanction. Accordingly, there is no sanction by the District Court for review in this Court.

In addition, there could be no legitimate ground for the District Court to impose any sanction on Pierce for any alleged discovery abuse. Taking matters into its own hands, the District Court essentially "re-did" discovery in the case. First, the court ordered Pierce to deliver to a certain warehouse several hundred boxes of documents consisting of his materials together with those of his counsel, some of which obviously were privileged. ER 5394-95; SER 8712-13. Pierce complied and produced more than 400 boxes of documents. ER 5395.

Second, although the District Court had stated previously that it would review *in camera* any of the delivered documents that were claimed to be privileged, the court abandoned that position and ruled at the warehouse that Vickie's counsel could simply *have all of Pierce's files* (including all files of his counsel) without any *in camera* review whatsoever. ER 4063-65. Consequently, without either a hearing or *in camera* review, the court handed over to Vickie literally thousands of privileged documents in violation of Pierce's rights.

Pierce complied fully with discovery in three separate proceedings: (1) in the Probate Court; (2) in the Bankruptcy Court; and, once again, (3) in the District Court. After discovery, the District Court then held its own evidentiary hearings and made its own findings of fact and conclusions of law. In order for the District Court to have imposed a discovery sanction on Pierce for Pierce's conduct in the District Court, the District Court would have had to have found that Pierce committed discovery abuse in the District Court. The District Court, of course, made no such finding, nor could it, since Pierce complied fully with the District Court's discovery orders. There is thus no substance behind the District Court's hypothetical comment that a catch-all trust might be deemed to have existed as a discovery sanction.

V. **There Is No Need for a Guardian Ad Litem for “DB.”**

Under California law, the executor or administrator of a decedent’s estate (here Stern) is the real party in interest. *See Olson v. Toy*, 46 Cal. App. 4th 818, 823-24 (Cal. Ct. App. 1996). Therefore, Stern is the proper real party in interest, and not Vickie’s minor child “DB.” There is likewise no need to appoint a guardian ad litem for DB because DB’s biological father, Larry Birkhead, is the current legal guardian of her estate, and his interests apparently are not adverse to hers. Birkhead Letter of Guardianship (June 19, 2007), Ex. A, Docket No. 02-56002, Document No. 6888020; Ex. A, Docket No. 02-56067, Document No. 6888026. Where a minor already has a guardian or parent acting on her behalf, a court typically will appoint a guardian ad litem only where the guardian’s interests are directly adverse to those of the minor. *See Berg v. Traylor*, 148 Cal. App. 4th 809, 821-22 (Cal. Ct. App. 2007).

CONCLUSION

For the foregoing reasons, and those previously briefed to the Court, Elaine respectfully requests that the Court vacate the District Court's judgment with instructions to dismiss Vickie's claim.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation provided in Rule 32(a)(7)(C)(i) of the Federal Rules of Appellate Procedure. The foregoing brief contains 13,963 words of Times New Roman (14 pt) proportional type. Microsoft Word is the word-processing software that was used to prepare the brief.

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2009, a copy of the foregoing was filed electronically with the Clerk of the Court using the ECF Filing System. Notice of this filing will be sent by either first class mail or e-mail, by operation of the Court's electronic filing system, to the following parties:

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ADDENDUM

28 U.S.C. § 1334: Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. Subsection (c) and this subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction--

(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and

(2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

28 U.S.C. § 157: Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to--

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. 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.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

FED. R. BANKR. P. 7012: Defenses and Objections - When and How Presented - By Pleading or Motion - Motion for Judgment on the Pleadings

(a) When presented.

If a complaint is duly served, the defendant shall serve an answer within 30 days after the issuance of the summons, except when a different time is prescribed by the court. The court shall prescribe the time for service of the answer when service of a complaint is made by publication or upon a party in a foreign country. A party served with a pleading stating a cross-claim shall serve an answer thereto within 20 days after service. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to a com-

plaint within 35 days after the issuance of the summons, and shall serve an answer to a cross-claim, or a reply to a counterclaim, within 35 days after service upon the United States attorney of the pleading in which the claim is asserted. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of a more definite statement.

(b) Applicability of Rule 12(b)-(i) F.R.Civ.P.

Rule 12(b)-(i) F.R.Civ.P. applies in adversary proceedings. A responsive pleading shall admit or deny an allegation that the proceeding is core or non-core. If the response is that the proceeding is non-core, it shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. In non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties.

Tex. R. Civ. P. 94: Affirmative Defenses

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. Where the suit is on an insurance contract which insures against certain general hazards, but contains other provisions limiting such general liability, the party suing on such contract shall never be required to allege that the loss was not due to a risk or cause coming within any of the exceptions specified in the contract, nor shall the insurer be allowed to raise such issue unless it shall specifically allege that the loss was due to a risk or cause coming within a particular exception to the general liability; provided that nothing herein shall be construed to change the burden of proof on such issue as it now exists.

Tex. R. Evid. 601: Competency and Incompetency of Witnesses

(a) **General Rule.** Every person is competent to be a witness except as otherwise provided in these rules. The following witnesses shall be incompetent to testify in any proceeding subject to these rules:

(1) *Insane persons.* Insane persons who, in the opinion of the court, are in an insane condition of mind at the time when they are offered as a witness, or who, in the opinion of the court, were in that condition when the events happened of which they are called to testify.

(2) *Children.* Children or other persons who, after being examined by the court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated.

(b) **“Dead Man's Rule” in Civil Actions.** In civil actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any oral statement by the testator, intestate or ward, unless that testimony to the oral statement is corroborated or unless the witness is called at the trial to testify thereto by the opposite party; and, the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent based in whole or in part on such oral statement. Except for the foregoing, a witness is not precluded from giving evidence of or concerning any transaction with, any conversations with, any admissions of, or statement by, a deceased or insane party or person merely because the witness is a party to the action or a person interested in the event thereof. The trial court shall, in a proper case, where this rule prohibits an interested party or witness from testifying, instruct the jury that such person is not permitted by the law to give evidence relating to any oral statement by the deceased or ward unless the oral statement is corroborated or unless the party or witness is called at the trial by the opposite party.

Tex. Bus. & C. Code Ann. § 26.01: Promise or Agreement Must Be in Writing

(a) A promise or agreement described in Subsection (b) of this section is not enforceable unless the promise or agreement, or a memorandum of it, is

(1) in writing; and

(2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.

(b) Subsection (a) of this section applies to:

(1) a promise by an executor or administrator to answer out of his own estate for any debt or damage due from his testator or intestate;

(2) a promise by one person to answer for the debt, default, or miscarriage of another person;

(3) an agreement made on consideration of marriage or on consideration of nonmarital conjugal cohabitation;

(4) a contract for the sale of real estate;

(5) a lease of real estate for a term longer than one year;

(6) an agreement which is not to be performed within one year from the date of making the agreement;

(7) a promise or agreement to pay a commission for the sale or purchase of:

(A) an oil or gas mining lease;

(B) an oil or gas royalty;

(C) minerals; or

(D) a mineral interest; and

(8) an agreement, promise, contract, or warranty of cure relating to medical care or results thereof made by a physician or health care provider as defined in Section 74.001, Civil Practice and Remedies Code. This section shall not apply to pharmacists.

Tex. Property Code Ann. § 112.004: Statute of Frauds

A trust in either real or personal property is enforceable only if there is written evidence of the trust's terms bearing the signature of the settlor or the settlor's authorized agent. A trust consisting of personal property, however, is enforceable if created by:

(1) a transfer of the trust property to a trustee who is neither settlor nor beneficiary if the transferor expresses simultaneously with or prior to the transfer the intention to create a trust; or

(2) a declaration in writing by the owner of property that the owner holds the property as trustee for another person or for the owner and another person as a beneficiary.

13446750.1.LITIGATION