Case Nos. 02-56002, 02-56067

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: VICKIE LYNN MARSHALL,
Debtor.

ELAINE T. MARSHALL, EXECUTRIX
OF THE ESTATE OF E. PIERCE MARSHALL,

Appellant and Cross-Appellee,
v.

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

Appeal from Decision of the United States District Court
Central District of California
Case No. Case No. SA CV-01-00097
(Honorable David O. Carter, Judge)

APPELLEE'S/CROSS-APPELLANT'S PETITION FOR REHEARING AND REHEARING EN BANC

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INTRODUCTION

In 2006, the Supreme Court reversed this Circuit's holding in this case that the probate exception barred the federal courts from hearing Vickie Lynn Marshall's counterclaim for tortious interference with gift filed against Pierce Marshall's proof of claim for defamation. *Marshall v. Marshall*, 547 U.S. 293, 314-15 (2006).[1]

On remand, the motions panel that previously reversed the district court's decision in Vickie's favor has done so again. Opn:4534-35.[2] This time it has held that Vickie's compulsory counterclaim was not a core proceeding under 28 U.S.C. §157(b)(2)(C) and therefore the bankruptcy court's judgment was not "final," and a later judgment in a Texas probate court entered while the district court was reviewing the bankruptcy court ruling should be given issue-preclusive effect. Opn:4527-28, 4534-35.

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[1] Both original parties are now deceased. Following the Opinion, we refer to Vickie and Pierce as though still the current parties.

[2] After a briefing schedule was ordered in this appeal, Pierce filed a motion for summary reversal with the then-current motions panel, which *sua sponte* ordered expedited briefing on the merits. 9thCir.Doct.Nos. 22, 51. Over two years later, the motions panel denied Pierce's motion and issued its probate-exception opinion. *In re Marshall*, 392 F.3d 1118, 1137 n.16 (9th Cir. 2004). After the Supreme Court reversed, Vickie moved to regularize the appeal, including assignment to a randomly-assigned merits panel to hear the remaining issues. 9thCir.Doct.No. 143; cf. former 9th Cir. R. 3-3(d); *Monterey Mech. Co. v. Wilson*, 138 F.3d 1270, 1271 (plurality), 1274 n.3 (Reinhardt, J., dissenting) (9th Cir. 1998); *Int'l Soc'y for Krishna Consciousness of Cal. Inc. v. City of L.A.*, 530 F.3d 768, 773 (9th Cir. 2008). Vickie's motion was never ruled on.

En banc review is necessary because the Opinion creates a circuit split on exceptionally important constitutional and statutory questions in which there is an overriding need for national uniformity, and its breadth will fundamentally change—indeed, confound—everyday bankruptcy practice within this Circuit. The Opinion holds that even though Vickie's tortious interference counterclaim was a compulsory counterclaim to Pierce's creditor's claim for defamation, and that success on her counterclaim would defeat Pierce's claim, her counterclaim was non-core based on the constitutional limitations set forth in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality opinion) (*Marathon*).

Although *Marathon* did not involve a counterclaim to a proof of claim or the revamped post-*Marathon* bankruptcy scheme, the Opinion relies on *Marathon* to announce a new rule that bankruptcy courts have no core jurisdiction over *any* compulsory counterclaim—even one that could defeat the creditor's claim—unless resolving the counterclaim is a necessary predicate to the allowance/disallowance of the creditor's claim and it raises no issue outside the creditor's claim. En banc review should be granted because the Opinion:

- Conflicts with the uniform rule of every Circuit that has considered the issue that core jurisdiction exists over any compulsory counterclaim to a creditor's claim.

- Ignores that Congress rectified *Marathon*'s separation of powers concerns, including making bankruptcy courts units of the district courts with their judges appointed by Article III judges.

- Ignores and contravenes a key post-*Marathon* Supreme Court decision upholding the constitutionality of a statutory scheme allowing non-Article III judges to decide compulsory counterclaims.

- Contravenes Congress' intent in enacting 28 U.S.C. §157(b); indeed, renders the statute's counterclaim provision superfluous.

- Creates the absurd result that debtors *must* file compulsory counterclaims in bankruptcy courts that then cannot finally decide them.

- Effects a sea change in Ninth Circuit bankruptcy practice that will undermine efficient bankruptcy administration by saddling courts with jurisdictional battles and splintering inextricably-linked claims between bankruptcy and district courts.

Panel review is also necessary because the Opinion overlooks Vickie's argument that the district court properly exercised its discretion to deny issue preclusion on fundamental fairness grounds. The Opinion holds that Pierce established all elements of preclusion, but the fairness inquiry is independent of whether the issue-preclusion elements are present.

THE OPINION

Core/Non-Core: The Opinion holds that determination of whether a counterclaim to a creditor's claim is core under 28 U.S.C. §157(b)(2)(C) "must focus largely on what is available to the court at the time of filing, that is, the parties' pleadings." Opn:4525. Those pleadings generally alleged:

Pierce's creditor's claim: Vickie, through attorneys, defamed him to extort a settlement by making false media statements that he had used "forgery, fraud or over-reaching" to "wrongfully . . . steal control" of her husband Howard's assets, and that she was entitled to half of Howard's earnings during marriage. Opn:4496-98 & n.11; OpnAppx:4551-52.

Vickie's counterclaim: Pierce, in fact, "engag[ed] in a concerted campaign" through "fraud, duress and undue influence" to wrongly transfer Howard's property "inconsistent with his expressed wishes" and interfered with her expectancy. Opn:4521-22, 4526-27 & n.31; SER 6739-40.

The Opinion holds that Vickie's counterclaim was a compulsory counterclaim to Pierce's defamation claim "because the 'operative facts underlying [her] action' are the same as those underlying [Pierce's] defamation claim" and that "[t]he defamation claim, [Vickie's] affirmative defense of truth, and her counterclaim for tortious interference all concern the alleged efforts by [Pierce] to obtain control of his father's estate" through improper means.

Opn:4521-22 & n.29. It also holds that core jurisdiction can exist over state law counterclaims such as Vickie's. Opn:4518-19 & n.27.

Nonetheless, the Opinion holds that Vickie's compulsory counterclaim is non-core because *Marathon* compels the following test: A compulsory counterclaim is a core proceeding under §157(b)(2)(C) only if "'the resolution of the counterclaim is necessary to resolve the allowance or disallowance of the claim itself.'" Opn:4524.

Applying this new test, the Opinion holds Vickie's compulsory counterclaim was non-core because it "was not a necessary predicate to the bankruptcy court's decision to allow or disallow [Pierce's] defamation claim" because the "defamation claim could be fully adjudicated without fully adjudicating [her] tortious interference claim." Opn:4524-27. It emphasizes that even if Vickie showed the statements underlying the defamation claim were true (which would defeat Pierce's creditor claim), she would have to prove additional factual elements to establish her counterclaim, such as the amount of damages from Pierce's tortious conduct. Opn:4527. Thus, while the Opinion recognizes that Vickie's success on her counterclaim would necessarily defeat Pierce's

creditor's claim by establishing the affirmative defense of truth, it concludes that is not enough to confer core jurisdiction. *Id.*[3]

Preclusion: After concluding Vickie's counterclaim was non-core and her bankruptcy judgment thus not final, the Opinion reverses the district court judgment on the ground that "[a]ll of the elements of issue preclusion have been met in this case" and the Texas probate court findings prevent Vickie from establishing her tortious interference counterclaim. Opn:4490, 4528, 4534. But the Opinion overlooks Vickie's argument that the district court properly exercised its discretion to deny issue preclusion for fundamental fairness reasons, a ground that applies even when all issue-preclusion elements are met.

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[3] The concurrence identifies "alternative" grounds for reversal, but each rests on assertions the majority *rejected* and the record refutes. Opn:4538. (Kleinfeld, J., concurring.)

- The concurrence states Pierce only sought a non-dischargeability determination, not damages from the bankruptcy estate. *Id.* The majority rejected that contention. Opn:4498 n.11. The record disproves it. SER:6801, 6101-02 (Pierce telling bankruptcy court that amount of his creditor's claim "shall be determined by the adversary proceedings filed herein" and he's "happy" to litigate "[his] claim here" because "we did choose this forum"), SER:8409-16 (Pierce estimating his claim at $8.5 million).
- The concurrence couches Vickie's counterclaim as an "evasion of Pierce's constitutional right to jury trial in Texas." Opn:4538. The majority held that Pierce *dismissed* his Texas defamation claim against Vickie after the bankruptcy filing. Opn:4496 n.10.
- The concurrence asserts there wasn't even "related to" jurisdiction because Vickie "had already been discharged and her creditors would get none of the money she sought from Pierce in her counterclaim." Opn:4538. The majority held that the bankruptcy plan specified that the counterclaim proceeds be applied first to creditor claims. Opn:4499.

I. EN BANC REVIEW IS NECESSARY BECAUSE THE OPINION'S RESTRICTIVE CONSTRUCTION OF BANKRUPTCY COURT CORE JURISDICTION OVER COMPULSORY COUNTERCLAIMS CREATES A CONFLICT WITH OTHER CIRCUITS, SUBVERTS CONGRESSIONAL INTENT AND FUNDAMENTALLY CHANGES AND CONFOUNDS BANKRUPTCY PRACTICE IN THIS CIRCUIT.

A. The Opinion's Restrictive Core Jurisdiction Analysis Contravenes Congress' Intent And Makes §157(b)(2)(C) Superfluous.

Marathon did *not* involve a *counterclaim* to a *proof of claim*. It held merely that "a non-Article III bankruptcy judge could not adjudicate a pre-petition contract dispute arising under state law *against a party that had not filed a proof of claim and was not otherwise related to the bankruptcy proceedings*." *In re CBI Holding Co.*, 529 F.3d 432, 459 (2d Cir. 2008) (emphasis added).

Consistent with *Marathon*'s narrow scope, Congress broadly defined core proceedings as those "arising under" the bankruptcy code and "arising in" bankruptcy cases and additionally specified in subsection (b)(2) of section 157, the "various types of proceeding *deemed by Congress* to be core proceedings." *In re Mankin*, 823 F.2d 1296, 1299 (9th Cir. 1987) (emphasis added); *accord In re Eastport Assocs.*, 935 F.2d 1071, 1076 (9th Cir. 1991) ("§157(b) defines core proceedings as ones 'arising under title 11, or arising in a case under title 11,' and gives a nonexhaustive list of types of core proceedings"). Congress believed that

almost all proceedings before bankruptcy judges—the sponsors said 95%—would be core. *In re Arnold Print Works, Inc.*, 815 F.2d 165, 168-69 (1st Cir. 1987); *Mankin*, 823 F.2d at 1301.

Congress specified in §157(b)(2)(C) that "counterclaims by the [bankruptcy] estate against persons filing claims against the estate" are core proceedings, thus demonstrating its intent that bankruptcy courts could enter judgment on those counterclaims. *See* §157(c)(1) (in non-core proceeding "otherwise related to" the bankruptcy case, bankruptcy judges can only make proposed findings).[4]

Congress thus understood and intended that while bankruptcy courts would have "related to" jurisdiction over state law claims against persons who had not filed proofs of claim (the *Marathon* situation), core jurisdiction would exist over counterclaims to creditor claims because they arise in bankruptcy cases in connection with adjusting debtor-creditor relations. *See Marathon*, 458 U.S. at 71

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[4] The emergency bankruptcy rules enacted in *Marathon*'s wake similarly specified that bankruptcy courts could not enter final judgments in "related proceedings" and that such proceedings included "claims brought by the estate against parties *who have not filed claims against the estate*" and "do *not* include . . . counterclaims by the estate in whatever amount against persons filing claims against the estate." *See In re Comm. of Unsecured Creditors of FS Commc'ns Corp.*, 760 F.2d 1194, 1200 (11th Cir. 1985) (emphasis added). §157's sponsors intended to codify those emergency rules. A&P 130 Cong. Rec. D338, at 1610, 1620, 1630; 130 Cong. Rec. 6045 (daily ed. March 20, 1984).

(distinguishing "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power" from the contract claim at issue).

Since permissive counterclaims are not required to be asserted in bankruptcy cases, many courts have implied a permissive counterclaim exclusion to §157(b)(2)(C)'s unqualified language. But *compulsory* counterclaims to creditor claims *must* be filed in bankruptcy cases; otherwise, res judicata precludes their subsequent assertion. *In re Baudoin*, 981 F.2d 736, 741-44 (5th Cir. 1993).

The Opinion, by prohibiting core jurisdiction over a compulsory counterclaim unless it is necessary to determining allowance/disallowance of the creditor claim and raises no issues outside the claim, goes far beyond a mere implied limitation—*it renders §157(b)(2)(C) entirely superfluous*. Congress already specified in §157(b)(2)(B) that core proceedings include the "allowance or disallowance of claims against the estate." If Congress had intended to limit core counterclaim jurisdiction to the allowance/disallowance of creditor claims, as the Opinion holds, the counterclaim provision would have been unnecessary.

But even the Opinion holds that "[w]e do not believe Congress intended §157(b)(2)(C) to be a meaningless (or near meaningless) provision," warning "against construing a 'statute in a manner that is strained and, at the same time, would render a statutory term superfluous.'" Opn:4519. Yet, the Opinion's own

restrictive construction of core compulsory counterclaim jurisdiction does exactly that.

This restrictive construction contravenes Congress' intent. As this Circuit has recognized, although the principle that courts should avoid constitutional problems may be apt in applying §157(b)(2)'s catch-all provisions (§157, subdivs. (b)(2)(A) and (b)(2)(O)), the more apt principle in applying its other provisions is that "the will of the legislature underlying the provision is not to be ignored." *Mankin*, 823 F.2d at 1301 n.3.

B. The Opinion Ignores That Congress Rectified *Marathon*'s Separation Of Powers Concerns In The Present Bankruptcy Law.

The *Marathon* plurality partly based its decision on the threat of encroachment by the political branches on the judiciary's powers under the then-existing bankruptcy scheme. *See, e.g.*, 458 U.S. at 57-60, 64 n.15, 74, 83-84. Under that scheme, bankruptcy courts were independent of and required to exercise all of the jurisdiction conferred on the district courts, and bankruptcy judges were appointed by the political branches. *Id.* at 79 n.31, 84-87.

Congress then enacted the present statutory scheme, which as this Circuit recognized, was "for the specific purpose of curing the constitutional problems of the scheme under which [*Marathon*] arose." *Mankin*, 823 F.2d at 1306. Among the changes: district courts have *discretion* to delegate matters to bankruptcy

courts and the power to withdraw previously referred matters, 28 U.S.C. §§1334(a), (b), 157(a), (d); bankruptcy courts are now units of the district courts, §151; and bankruptcy judges are appointed by Article III judges, §152. Under the new scheme, "there is less threat that exercise of 'judicial power' will be unduly influenced by the executive or legislative branches." *Mankin*, 823 F.2d at 1309.

C. The Opinion Conflicts With How Courts Nationwide Interpret §157(b)(2)(C), Including The Decades-Long Practice Of This Circuit's Courts.

The Opinion also conflicts with the overwhelming view—essentially settled until this case—that bankruptcy courts have core jurisdiction over compulsory counterclaims to creditor claims. That is the view of every Circuit that has addressed the issue and legions of lower courts within the other Circuits.[5]

Until the Opinion, it also was the view of this Circuit's courts, which have recognized *for decades* that "[r]eason and precedent" compel the rule that "a debtor's counterclaim arising from the same transaction as the creditor's claim

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[5] *See, e.g.*, *In re C.W. Mining Co.*, No. 2:09 CV417DAK, slip op., 2009 WL 4906702 at *3 (D.Utah Dec. 11, 2009); *In re Mercer's Enters. Inc.*, 387 B.R. 681, 686 (Bankr.E.D.N.C. 2008); *In re Geneva Steel, LLC*, 343 B.R. 273, 277-78 (Bankr.D.Utah 2006); *In re Applied Thermal Sys., Inc.*, 294 B.R. 784, 787-89 (Bankr.N.D.Okla. 2003); *In re ABC-NACO, Inc.*, 294 B.R. 832, 837 (Bankr.N.D.Ill. 2003); *In re Asousa P'ship*, 276 B.R. 55, 66-72 (Bankr.E.D.Pa. 2002); *In re Norrell*, 198 B.R. 987, 994 n.4 (Bankr.N.D.Ala. 1996); *In re Nationwide Roofing & Sheet Metal*, 130 B.R. 768, 776 (Bankr.S.D.Ohio 1991).

against the estate may be decided in the same manner as the claim." *In re Lion Country Safari, Inc. Cal.*, 124 B.R. 566, 569 (Bankr.C.D.Cal. 1991); *accord In re PNP Holdings Corp.*, 184 B.R. 805, 806 (B.A.P.9th Cir. 1995)), *aff'd*, 99 F.3d 910 (9th Cir. 1996) ("[i]t is well settled that a creditor consents to jurisdiction over related counterclaims by filing a proof of claim"); *In re Castlerock Props.*, 781 F.2d 159, 162 (9th Cir. 1986) (recognizing "well-settled law that a creditor consents to jurisdiction over related counterclaims by filing a proof of claim"); *In re County of Orange*, 203 B.R. 977, 980 (Bankr.C.D.Cal. 1996); *In re Marshland Dev., Inc.* 129 B.R. 626, 631 n.10 (Bankr.N.D.Cal.1991); *In re Beugen*, 81 B.R. 994, 998-1000 (Bankr.N.D.Cal. 1988); *In re Sun W. Distribs.*, 69 B.R. 861, 863-65 (Bankr.S.D.Cal. 1987).

D. The Opinion Creates A Circuit Split.

The Opinion's compulsory counterclaim holding is contrary to every Circuit that has addressed the issue—the First, Second and Fifth—all of which have expressly upheld core jurisdiction over compulsory counterclaims to creditors' claims under §157(b)(2)(C) without qualification.

First Circuit: One week before the Opinion here, the First Circuit held in *In re American Bridge Products, Inc.*, __ F.3d _, 2010 WL 797014 at *3 (1st Cir. 2010) that the bankruptcy court could adjudicate a trustee's counterclaims for negligence and breach of fiduciary duty against a receiver who filed a

compensation claim because compulsory counterclaims to creditors' claims meet the statutory definition of core proceedings under §157(b)(2)(C). It did so even though the trustee sought damages for misfeasance, an issue beyond the mere allowance/disallowance of the creditor's claim.

Second Circuit: In 2008, the Second Circuit upheld compulsory counterclaim jurisdiction under §157(b)(2)(C) where the debtor's auditor filed a proof of claim for $210,000 in unpaid pre-petition services for a 1994 audit, and the debtor's successor responded with compulsory contract and tort counterclaims, claiming the creditor committed malpractice from 1992 through 1994. *CBI*, 529 F.3d at 438, 441-42. The alleged malpractice was a defense to the creditor's claim, but the counterclaims also sought millions of dollars in malpractice damages relating to different years than those at issue in the creditor's claim. *Id.* at 461-62.

Holding the counterclaims core, the Second Circuit recognized that nothing in *Marathon* "'alters the basic principle that the filing of a proof of claim invokes the special rules of bankruptcy'" and thus counterclaims that are factually and legally connected to a proof of claim are core proceedings—regardless whether they are based on state law, could have existed independently of the bankruptcy, are disproportionate to the creditor's claim or involve issues that are not a defense to the creditor's claim. *Id.* at 461-63 & n.12.

Fifth Circuit: In 1993, the Fifth Circuit held that a former debtor was required to have brought his lender liability claims as a counterclaim in bankruptcy against a former creditor who filed a claim based on the loans, because the former-debtor's claim would have been a core proceeding under §157(b)(2)(C). *Baudoin*, 981 F.2d at 741-42. It held the issue was whether a common nucleus of operative facts existed allowing the claims to be litigated together effectively, not whether the counterclaim, had it been brought, would have extinguished the creditor's claim. *Id.* at 743.

The facts of these cases show that none of the counterclaims was a necessary predicate to the decision to allow or disallow the creditor's claim and each involved issues beyond the allowance/disallowance decision. If the Opinion's new restrictive test for whether a counterclaim to a proof of claim is core under §157(b)(2)(C) is right, each of these Circuit cases would be wrong.

E. The Decision Ignores And Contravenes Supreme Court Authority Upholding Non-Article III Adjudication Of Counterclaims Arising Out Of The Same Transaction As The Claim.

In *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 837, 850 (1986) (*Schor*), the Supreme Court upheld the constitutionality of a statutory scheme that allowed customers to sue their commodity brokers before the Commodity Futures Trading Commission (CFTC), an Article I agency, and

allowed the CFTC, in conformance with Congress's goal of efficient dispute resolution, to adjudicate counterclaims "'aris[ing] out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint.'" *Id.*

The Supreme Court rejected the Court of Appeals' conclusion that *Marathon* prohibited the agency from adjudicating counterclaims based on state common law. *Id.* at 839-40. First, it recognized that the right to adjudication by an Article III judge is a personal right that can be waived by filing a claim in an Article I forum. *Id.* at 848-49. Second, it described *Katchen v. Landy*, 382 U.S. 323 (1966) as upholding "a bankruptcy referee's power to hear and decide state law counterclaims against a creditor who filed a claim in bankruptcy when those counterclaims *arose out of the same transaction*." *Schor*, 478 U.S. at 852 (emphasis added).

Given *Schor*'s holding and its description of *Katchen*, the Opinion is wrong. Since the Opinion never mentioned *Schor*, it made no attempt to reconcile its restrictive interpretation of core jurisdiction with that case.

F. The Opinion's New Core Jurisdiction Test Flouts The Goal Of Efficient And Expeditious Bankruptcy Administration.

This Circuit has recognized "Congress's intent to reduce substantially the time-consuming and expensive litigation regarding a bankruptcy court's jurisdiction over a particular proceeding" and to ensure "the efficient and

expeditious resolution of all matters connected to the bankruptcy estate." *In re Fietz*, 852 F.2d 455, 457 (9th Cir. 1988).

The Opinion flouts those objectives. It produces the absurd result that debtors must file compulsory counterclaims in bankruptcy courts that cannot finally adjudicate them. It will swamp bankruptcy and district courts with abstention and withdrawal motions, and spawn endless litigation and confusion over jurisdictional limits and claim and issue preclusion, since bankruptcy courts will have core jurisdiction over creditor claims, but legally and factually interconnected compulsory counterclaims may have to be decided in district court.

In short, the Opinion ensures that the confusion and complexity of this case will become the norm.

II. PANEL REHEARING IS REQUIRED BECAUSE THE OPINION OVERLOOKS VICKIE'S FUNDAMENTAL FAIRNESS ARGUMENT.

A. The Unaddressed Ground Would, If Affirmed, Preclude Reversal Because A District Court Has Discretion To Deny Issue Preclusion On Fairness Grounds Even If All Elements Of Issue Preclusion Are Present.

The Opinion reverses the district court judgment on the ground that "[a]ll of the elements of issue preclusion have been met" and thus Vickie is bound by

Texas probate court findings that prevent her from establishing her counterclaim. Opn:4490, 4528, 4534. However, the Opinion's reversal is premature, as it did not address the district court's *independent* ground that to bind Vickie to the Texas court's findings would be fundamentally unfair. *In re Marshall*, 271 B.R. 858, 866 (C.D.Cal. 2001).[6]

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

Courts have discretion to refuse to apply issue preclusion in the interest of fairness. *See* citations, Supp.Br:48. The district court recognized the unfairness of barring Vickie "from making her arguments in this [federal] forum, which was originally chosen by Pierce" and "is the only one she actively sought relief in." *Marshall*, 271 B.R. at 866. It stressed that Vickie "voluntarily dismissed her claims in the Texas Probate proceedings" and she no longer had any "motivation to litigate" her issues there. *Id.*

When her bankruptcy judgment became final, Vickie promptly filed it in the probate proceedings and nonsuited her claims there without prejudice. Supp.Br:4-

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[6] Vickie argued this issue in her original and supplemental briefing, Comb.Br:104-05; Supp.Br:48-52, and the Opinion notes that the district court had declined to apply issue preclusion as "inconsistent with the notion of fundamental fairness," Opn:4528 n.32.

6, 49. That should have been the end of her role in the Texas proceedings.[7] However, Pierce dragged her back there by bringing new claims against her that evidenced his intention to relitigate issues already decided by the bankruptcy court. Supp.Br:49.

Vickie tried to stop this effort, but the Texas court refused to give full faith and credit to the bankruptcy judgment. The bankruptcy court enjoined Pierce from proceeding against Vickie in Texas on his new claims but relented on one claim in reliance on Pierce's assurances that it did not require the Texas court to relitigate any issues the bankruptcy court had decided. Supp.Br:49-50.

Pierce told the bankruptcy court he was litigating in Texas only "to ensure that the Texas Probate Court can determine all claimants and efficiently administer that estate." Supp.Br:50. Since she was not a claimant of Howard's Estate or Living Trust, and her federal judgment awarded her only damages against Pierce

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[7] The Opinion quotes what it calls a "warning" to Vickie from the Texas court that once it entered judgment as to "who is entitled to [Howard's] Estate," her statutory right to refile her claim for tortious interference with a gift would be moot, because the Estate would be gone. Opn:4501. But Vickie's claim here was for damages against Pierce personally, and not for estate assets. The Texas court itself expressly disclaimed that it tried any "issue of tortious interference with inter vivos gift in this case at all" or decided any "complaints that [Vickie] has against [Pierce]" or any issues "to do with what complaints that [Vickie] has against [Pierce]." Supp.Br:43. It confirmed that Vickie's tortious interference claim was "not affected by [the probate court judgment] at all" and was "still in court out there" in California. Supp.Br:36.

personally, she had no reason to believe the Texas court was relitigating the claim she had already won in federal court.

Pierce reneged on his representations when he moved in the district court to preclude Vickie's tortious interference counterclaim based on the Texas judgment. *Marshall*, 271 B.R. at 862. If the bankruptcy court could enjoin Pierce from bringing new claims in Texas to avoid an inconsistent judgment, and Vickie could reasonably rely on his no-relitigation promises, the district court could on fairness grounds prevent Pierce from asserting that judgment to preclude Vickie's counterclaim and thus profiting from his misrepresentations.

Dated: April 7, 2010

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