No. 10-179

In The Supreme Court of the United States

HOWARD K. STERN, EXECUTOR OF THE ESTATE OF VICKIE LYNN MARSHALL,

Petitioner,

v.

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

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF PETITIONER

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FACTUAL STATEMENT

The opposing briefs contain numerous factual distortions, some lifted from the concurrence. *See* Cert.Pet:10-11 n.4. We lack space to address every inaccuracy, but below are key clarifications:

- Pierce nonsuited Vickie from a pending state defamation action; he then filed a proof of claim for defamation seeking recovery from her bankruptcy estate, not merely a nondischargeability complaint. Pet.App:15-16 & n.11, 77, 274-76; JA:57-58; Pet.Br:3.[1] He sought to liquidate his defamation claim in the bankruptcy court, SER:6101-02, 6801, and to estimate his claim for plan confirmation, SER:8409. *Compare* Resp.Br:25; National Black Chamber of Commerce ("NBCC") Br:13, 17 & n.6; Center for the Rule of Law ("CFTRL") Br:28-30.

- Vickie asserted her tortious interference with gift claim first in the bankruptcy court, not the probate court. Pet.Br:3, 6; Cert.Pet.Reply:1-2 & n.4. *Compare* Resp.Br:20, 24.

- Vickie's bankruptcy estate benefits from the counterclaim because her reorganization

[1] Pierce describes a joint appendix document—in which he instructed Edwin Hunter to use a "shotgun approach" to filing proofs of claim, JA:55—as "privileged." Resp.Br:32. The district court admitted this document into evidence on grounds including the crime-fraud exception, Pet.App:157-58 n.25; *see* SER:8727-29, and Pierce never appealed that ruling.

plan specifies that all counterclaim proceeds are applied first to satisfy creditors. Pet.App:17; SER:6074-75, 6086. *Compare* Resp.Br:34; NBCCBr:20 n.8; CFTRLBr:28-29.

- Pierce sought to withdraw his defamation claim to the district court only after he had litigated in the bankruptcy court for twenty-seven months and faced adverse rulings; he never raised the "personal injury tort" issue in response to Vickie's summary judgment motion on his creditor's claim for defamation and never appealed the separate bankruptcy final judgment on that claim. *See* §III.A.2., *infra*. *Compare* Resp.Br:27, 70.

- Vickie properly asserted preclusion in the probate court, but that court refused to accord the bankruptcy judgment preclusive effect; her timely appeal of the probate judgment remains pending. Pet.App:223 n.4; SER:8485, 8493-94, 10306-09; 9th Cir.Docket Entry 225; Tex. 1st Ct. App. case information, http://www.1stcoa.courts.state.tx.us/opinions/case.asp?FilingID=83346 (last visited January 6, 2011). *Compare* Washington Legal Foundation ("WLF") Br:3, 10-11.

- The bankruptcy court's evidentiary sanctions for Pierce's discovery abuses are fully-supported by detailed factual findings and a lengthy appendix. Pet.App:320-26; ER:1949-57, 2235-38; D.C.Docket Entry 137: AP007986-008272. Although the district court earlier had reversed evidentiary sanctions

for lacking specific documentation, it left in place substantial monetary sanctions and stated its "preliminary" conclusion that Pierce was "stonewalling" and evidentiary sanctions were "correct." JA:128-29, 138-39. It subsequently denied Pierce's writ petition to vacate the fully-documented sanctions, SER:6720, and on de novo review of the bankruptcy judgment, it stated that had the evidence been insufficient to establish certain facts it might have deemed them established as a sanction for Pierce's discovery abuses. Pet.App:137 n.17; SER:8693-98, 8703-13. *Compare* Resp.Br:28-30, 32.

ARGUMENT

I. CONGRESS INTENDED 28 U.S.C. §157(b)(2)(C) TO EMPOWER BANKRUPTCY COURTS TO DETERMINE ALL COMPULSORY COUNTERCLAIMS.

A. Vickie's Counterclaim Falls Within §157(b)(2)(C)'s Express Language.

Pierce argues that Vickie did not assert her counterclaim to Pierce's proof of claim but instead filed it against the nondischargeability complaint attached to his proof of claim. Resp.Br:52-53. That's a red herring.

Section 157(b)(2)(C) identifies as "core" all counterclaims "against persons filing claims against the estate." It does not require that counterclaims be

asserted as objections to proofs of claim. *See* Pet.App:378-79 (counterclaim captioned "Against E. Pierce Marshall," asserting jurisdiction under §157(b)(2)), 273 (district court noting/citing cases treating counterclaims as core where "asserted by procedures other than counterclaiming against the proof of claim itself").[2]

B. Pierce's "State Law" Theory Is Unfounded.

Pierce asserts that Congress' "jurisdictional scheme purposefully limits a bankruptcy court's ability to determine state law causes of action" and generally confers non-core jurisdiction over "a debtor's state law causes of action against creditors and third parties." Resp.Br:8; *see also* WLFBr:29.

But §157(b)(2) does not distinguish between counterclaims based on state law and those based on federal law. Nor does any other "core proceeding" definition listed in §157(b)(2).[3]

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[2] Pierce obfuscates by stating Vickie's objections to the proof of claim "did not assert her tortious interference counterclaim" nor assert the truth defense to defamation. Resp.Br:26, 52-53. Debtors need only plead defenses under 11 U.S.C. §502(b). Vickie pled under §502(b)(1) that Pierce's claim was "unenforceable," SER:6031, thereby asserting all defenses based on applicable law, including all defenses available under nonbankruptcy law. *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 450 (2007).

[3] For example, §157(b)(2)(H) and (b)(2)(F) define as "core" all proceedings to "determine, avoid, or recover" fraudulent

(Continued on following page)

To the contrary, Congress specified in §157(b)(3) that "[a] determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law." Thus, "section 157(b)(3) restricts the use of a state-law rationale as a device to have a particular civil proceeding characterized as related. The nature or source of the cause of action, *not the governing substantive law*, is to be determinative. [¶] Nothing the Supreme Court has stated in or about [*Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (*Marathon*)] suggests another conclusion." 1 Collier on Bankruptcy, *supra*, ¶3.02[6][a], at 3-37 (emphasis added). In enacting §157(b)(3), Congress rejected Pierce's *Marathon* interpretation "that bankruptcy courts cannot constitutionally hear any controversy that is based upon state law." *Id.*

Pierce never *even mentions* §157(b)(3).

Moreover, Pierce's theory would gut Congress' statutory scheme. Bankruptcy courts must "consult state law in determining the validity of most claims" because "'[c]reditors' entitlements in bankruptcy

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conveyances or preferences, without distinguishing actions created by 11 U.S.C. §§548 and 574 from those created by state law that vest in the trustee under 11 U.S.C. §544(b). *See* 5 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy, ¶¶544.06[2], 547.01, 548.01[2], pp. 544-20, 544-21, 547-48 n.4, 548-12, 548-13 (16th ed. 2010); *In re Mankin*, 823 F.2d 1296, 1299-1300 (9th Cir. 1987).

arise in the first instance from the underlying substantive law creating the debtor's obligation," *Travelers*, 549 U.S. at 450, and objections to claims "almost always involve state law," even avoidance actions, 1 Collier on Bankruptcy, *supra*, ¶3.02[6][a], at 3-37.

Pierce's theory also contradicts the legislative history. He references bills that were not adopted and comments by senators who opposed broad bankruptcy court jurisdiction, Resp.Br:13-17, but those views did not carry the day. Section 157 was based on a bill crafted by Representatives Kastenmeier and Kindness, who viewed *Marathon*'s constitutional strictures as narrow. *See* Pet.Br:28-31. Pierce cites snippets to suggest Kastenmeier and Kindness were concerned about "rights arising under State law" and intended to "restrict the ability of bankruptcy judges to hear state law matters." Resp.Br:17-18, 56. But Kastenmeier and Kindness distinguished between state law claims "integral to the core bankruptcy function of restructuring debtor-creditor rights" and *Marathon*-type claims. 130 Cong. Rec. 6046 (1984); *see* Pet.Br:29-31.

Pierce faults Vickie for citing Kastenmeier's and Kindness's comments in March 1984, claiming she ignores a June amendment. Resp.Br:18 n.3. But, as Kastenmeier explained, the ultimately-enacted bill rejected the Senate's attempted limitations on bankruptcy court power and "adopt[ed] the House formulation on bankruptcy court structure" with one "minor exception"—it defined "a narrow category" of proceedings (certain "personal injury tort and

wrongful death" proceedings) to be non-core, which Kastenmeier believed would "rare[ly]" result in district court adjudication. 130 Cong. Rec. 20227-20228 (June 29, 1984); *see also* 130 Cong. Rec. 20081 (June 29, 1984) (Sen. Thurmond: "the House language on the definition of core proceedings is utilized," except for the "personal injury" additions).

Pierce's implied state-law exception theory is groundless: "'[W]here Congress has intended to provide . . . exceptions to provisions of the Bankruptcy Code, it has done so clearly and expressly.'" *Travelers*, 549 U.S. at 453.

C. Pierce's Two-Step Construction Fails.

Pierce claims Congress intended a two-step approach to determining whether bankruptcy courts can finally decide "core proceedings" identified in §157(b)(2): The proceeding must (1) be "core," and (2) "arise under" the Bankruptcy Code or "arise in" the bankruptcy case. Resp.Br:51, 54.

But, as the Government explains, Pierce's two-step approach contravenes §157(b)'s plain language and statutory construction rules. Brief for the United States ("U.S.Am.Br"):18-21. It also contravenes the legislative history showing Congress used "core proceedings" to mean proceedings bankruptcy courts can finally determine, Pet.Br:29 n.12—which is how this Court has always construed the term, U.S.Am.Br:17.

Pierce accuses Vickie and the Government of "ignor[ing]" or "removing the 'arising under' and 'arising in' concepts" from the definition of core proceedings. Resp.Br:56-57. Wrong. The "core proceedings" listed in §157(b)(2) are those proceedings Congress deemed bankruptcy courts can determine *because* they "arise under" the Bankruptcy Code or "arise in" the bankruptcy case. Section 157(b)(1) does not say, as Pierce urges, "core proceedings that *also* arise under title 11 or arise in a title 11 case." Instead, it identifies two types of core proceedings—those "arising under title 11" and those "arising in a case under title 11"—differentiating them from the only other proceedings identified in §157(a), those merely "related to a case under title 11," which bankruptcy courts cannot finally determine without the parties' consent.

Pierce's assertion that Congress intended that core proceedings specified in §157(b)(2) might also be merely "related to" proceedings flouts the statutory language. "The phraseology of section 157 leads to the conclusion that there is no such thing as a core proceeding that is 'related to' a case under title 11. Core proceedings are, at most, those that arise in title 11 cases or arise under title 11." 1 Collier on Bankruptcy, *supra*, ¶3.02[2], at 3-26.

Pierce's interpretation renders much of §157(b) nonsensical. For example, Congress specified that the §157(b)(2) core proceeding list is non-exhaustive. Thus, if "core proceeding" is not shorthand for proceedings that arise under the Bankruptcy Code or

arise in the bankruptcy case, the term lacks definition and bankruptcy judges have no criteria to apply §157(b)(3)'s mandate that they determine whether proceedings are "core."

Pierce also misses the mark in his discussion of §157(b)(2)(A) and (b)(2)(O)—which define as core "matters concerning the administration of the estate" and "proceedings affecting the liquidation of the assets of the estate." Resp.Br:57-59. Courts have cautioned that a broad construction of these "catch-all" provisions could encompass the "related to" claim at issue in *Marathon* because any claim that augments the estate might conceivably "concern" estate administration or "affect" asset liquidation. *E.g*, *In re Harris*, 590 F.3d 730, 739-41 (9th Cir. 2009); *In re CBI Holdings Co.*, 529 F.3d 432, 462 & n.13 (2d Cir. 2008); *In re Meyertech Corp.*, 831 F.2d 410, 416-17 (3d Cir. 1987). Since Congress obviously did not intend a *Marathon*-type claim to be "core," courts construe the catch-all provisions narrowly to encompass only "arising under" or "arising in" matters, as Congress intended. *E.g.*, *Harris*, 590 F.3d at 739-41.

But the need to construe narrowly the ambiguous catch-all provisions does not justify engrafting restrictions onto §157(b)(2)(C)'s unambiguous language: "While the principle that constitutional problems are to be avoided in the construction of statutes is apt where a catch-all provision is at issue," the appropriate principle governing construction of §157(b)(2)(B)-(N) is that "the will of the legislature

underlying the provision is not to be ignored." *Mankin*, 823 F.2d at 1301 n.3.

Pierce also argues that "[u]nder the Government's theory, there is no such thing as a 'noncore' proceeding under section 157(b)(2)(B), and thus section 157(b)(4) would have to be ignored in its entirety." Resp.Br:59-60. Nonsense. Section 157(b)(4) provides that "[n]on-core proceedings under section 157(b)(2)(B) . . . shall not be subject to the mandatory abstention provisions of section 1334(c)(2)," and §157(b)(2)(B) deems certain personal injury tort and wrongful death proceedings to be non-core. Thus, §157(b)(4) makes mandatory abstention inapplicable to the particular tort proceedings §157(b)(2)(B) classifies as non-core. *In re Dow Corning Corp.*, 86 F.3d 482, 497 (6th Cir. 1996); *In re Pan Am Corp.*, 950 F.2d 839, 845 (2d Cir. 1991) (*Pan Am I*).

D. Vickie's Counterclaim "Arose In" The Bankruptcy Case.

Asserting that "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 bankruptcy," Pierce argues Vickie's counterclaim "obviously falls outside the scope of these standards; it is a creation of state law that could be brought in a court outside of bankruptcy." Resp.Br:55.

The legislative history confirms, however, that counterclaims and other proceedings specified in

§157(b)(2) met Congress' view of "arising under" or "arising in" proceedings because they are "proceedings integral to the core bankruptcy function of restructuring the obligations of the debtor and his creditors." 130 Cong. Rec. 6242 (Rep. Kindness); *see also* Pet.Br:28-31; 129 Cong. Rec. 9952 (April 27, 1983) (Senator Thurmond explaining mandatory abstention would not apply to proceedings "integral to the core bankruptcy function of restructuring debtor-creditor rights," including "setoffs to claims against the estate").

Ignoring the historical record of Congress' intent, Pierce instead bases his "arising in" definition on snippets from post-1984 cases that formulated their own definition of "arising in" but did not involve counterclaims. Resp.Br:55. But even cases applying that case-generated definition recognize that counterclaims to creditor claims—like the creditor claims to which they respond—"arise in" the bankruptcy case even when predicated on pre-petition state law claims. Pet.Br:27-28 & n.11. As courts rejecting Pierce's theory have explained: Such proceedings "'arise only in the context of bankruptcy,'" and although "'the state-law right underlying the claim could be enforced in a state court proceeding absent the bankruptcy, . . . the nature of the state proceeding would be different from the nature of the proceeding following the filing of a proof of claim.'" *In re Manville Forest Prods. Corp.*, 896 F.2d 1384, 1389-90 (2d Cir. 1990).

Compulsory counterclaims, in particular, "arise in" the bankruptcy case: The debtor *must* file them and they are factually and legally interconnected with the creditor's claim. Pet.Br:28.

II. SECTION 157(b)(2)(C)'S GRANT OF CORE JURISDICTION OVER ALL COMPULSORY COUNTERCLAIMS IS CONSTITUTIONAL.

Katchen/Langenkamp/Granfinanciera. Pierce attempts to distinguish *Katchen v. Landy*, 382 U.S. 323 (1966) and *Langenkamp v. Culp*, 498 U.S. 42 (1990), by arguing preference counterclaims are specially "integral to the claims allowance process" because §502(d) requires disallowance of a claim unless the creditor surrenders all preferences or fraudulent conveyances. Resp.Br:41-43. He contends §502(b) does not identify a debtor's tort claim as a disallowance ground. Resp.Br:43.

But §502(b)(1) requires disallowance of the creditor claim if it is "unenforceable . . . under applicable law," which encompasses all defenses under nonbankruptcy law and thus includes any counterclaim that offsets the claim in part or entirely. *See* n.2, *ante*; *In re R. Bastyr & Assocs., Inc.*, 81 B.R. 978, 981 n.10 (Bankr. D. Minn. 1988) (a "debtor's right of setoff" is established under state law and §502(b)(1)).

Moreover, *Langenkamp* and *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) do not mention §502(d) or accord special status to avoidance claims. Instead, both cases turned on whether the creditor

had triggered the bankruptcy court's equitable powers over bankruptcy claims. *Langenkamp*, 498 U.S. at 44; *Granfinanciera*, 492 U.S. at 58-59. Neither case states—as Pierce suggests—that counterclaims must be "integral to claims allowance"; instead, both focus on whether the proceeding at issue arises in the claims-allowance process and thus becomes "integral to the restructuring *of the debtor-creditor relationship*." *Langenkamp*, 498 U.S. at 44 (emphasis added); *see Granfinanciera*, 492 U.S. at 58, 60 ("debtor-creditor relations").

That focus on the debtor-creditor relationship comports with the rationale of *Alexander v. Hillman*, 296 U.S. 222, 241-42 (1935) adopted in *Katchen,* 382 U.S. at 335-36, discussed in *Granfinanciera*, 492 U.S. at 59 n.14 and incorporated by reference in *Langenkamp* (citing the aforementioned *Granfinanciera* footnote discussing it, 498 U.S. at 44)—which extends the bankruptcy court's equitable power to the entire dispute between the creditor and debtor, and requires creditors, as claimants to the bankruptcy res, to account for monies owed the estate. Pet.Br:46-48.

Pierce tries to avoid *Katchen*'s adoption of *Hillman*'s rationale by claiming *Katchen* focused only on §57(g) of the Bankruptcy Act, §502(d)'s predecessor. Resp.Br:41-42. However: (1) *Katchen*, 382 U.S. at 335, expressly states that *Hillman*'s rationale "is equally applicable here"; (2) *Katchen* focused on §57(g) only because Congress had not expressly conferred summary jurisdiction on bankruptcy referees to order surrender of preferences, and the Court discerned

that intent from §57(g)'s claims-allowance connection, *id.* at 328-35; (3) §57(g) was a codification of the maxim that parties seeking equity must do equity, *In re Ft. Wayne Electric Corp.*, 99 F. 400, 402 (7th Cir. 1900), a maxim consistent with *Hillman*'s rationale; (4) this Court has rejected Pierce's narrow interpretation of *Katchen*'s scope, Pet.Br:45-46; and (5) avoidance claims (which often arise from or involve state law) are no more essential to claims allowance than compulsory counterclaims that could defeat all or part of the creditor claim.

Far from being "neither procedurally nor substantively relevant" to the allowance of Pierce's proof of claim, Resp.Br:43, Vickie's success on her counterclaim would have defeated Pierce's defamation claim, and Pierce's success on his defamation claim would have defeated her counterclaim. Pierce's assertion that "the Bankruptcy Court actually resolved Pierce's claim nearly a year before it decided Vickie's counterclaim" (based on another affirmative defense) is irrelevant. Resp.Br:42. As the Ninth Circuit held—a ruling Pierce and his amici do *not* contest—the determination whether a counterclaim is core must focus "on what is available to the court at the time of the filing, that is, the parties' pleadings." Pet.App:51-52.

Article III tests. Pierce largely ignores Vickie's explanations of why her counterclaim is constitutionally core under this Court's various tests. For example:

- He argues the Court has "made clear" that the "public rights" doctrine only applies to

"rights created by Congress" and that the adjunct theory of *Crowell v. Benson*, 285 U.S. 22 (1932) only applies to "congressionally-created rights," not state-law claims, Resp.Br:38-39, 48-49, ignoring that the core bankruptcy function of adjusting debtor-creditor relations *is* a system of congressionally-created rights, even where issues involve state law. *See Marathon*, 458 U.S. at 84 n.36 (plurality describing bankruptcy adjudications and adjustment of debtor-creditor rights as "matters of federal law").

- He quotes the *Marathon* concurrence's adjunct-court analysis as though it addressed the 1984 Act, Resp.Br:48, ignoring the structural differences between the 1978 and 1984 Acts.

- Instead of addressing constitutionality under this Court's "purposes of Article III" approach, *see* Pet.Br.50-59, he mistakenly accuses Vickie of seeking to extend the waiver analysis in *Commodity Future Trading Commission v. Schor*, 478 U.S. 833 (1986) (*Schor*), Resp.Br:45-47.[4]

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[4] The amicus briefs of NBCC, WLF and law professors S. Todd Brown, et al., essentially echo Pierce's arguments. The CFTRL Brief, however, goes much farther: It argues that bankruptcy courts may not constitutionally enter final judgments on counterclaims *or claims* based on state-law actions between private parties. CFTRLBr: 3-4, 12-16, 18-26. Since "in the ordinary bankruptcy proceeding the great bulk of creditor claims are claims that have accrued under state law," *Marathon*, 458 U.S. at 96 (White, J., dissenting), CFTRL's theory would effectively

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III. PIERCE'S "PERSONAL INJURY TORT" ARGUMENT IS NO BASIS TO AFFIRM THE NINTH CIRCUIT JUDGMENT.

A. Pierce Waived/Forfeited His "Personal Injury Tort" Argument.

1. Creditors can waive/forfeit objections to bankruptcy courts entering final orders on "personal injury tort or wrongful death" claims.

Pierce argues that the bankruptcy court lacked "jurisdiction" over his defamation claim and therefore lacked "jurisdiction" to determine Vickie's compulsory counterclaim. Resp.Br:35-36, 65-71. His argument confuses subject matter jurisdiction with the classification of proceedings as core/non-core.

District and bankruptcy courts have subject matter jurisdiction over all bankruptcy cases and all proceedings arising under the Bankruptcy Code or arising in or related to bankruptcy cases. 28 U.S.C. §§1334(b), 157(a); *Celotex Corp. v. Edwards*, 514 U.S. 300, 307-08 (1995). Parties cannot waive, forfeit or expand that jurisdiction. *In re Mullarkey*, 536 F.3d 215, 222 (3d Cir. 2008).

In contrast, "'[t]he classification of a proceeding as core or noncore does not determine the jurisdiction of a bankruptcy court, but instead relates to a

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render the entire bankruptcy scheme unconstitutional and invalidate over a century of bankruptcy practice.

determination of whether the court may enter a final order or judgment. . . .'" 1 William L. Norton, Jr., Norton Bankruptcy Law and Practice §4:30, 4-124 (3d ed. 2010). It concerns the right to adjudication by an Article III judge, a personal right that can be willingly relinquished or waived/forfeited by litigation conduct, just like the jury-trial right. *Schor*, 478 U.S. at 849 (failure to object until after adverse ruling); *Roell v. Withrow*, 538 U.S. 580, 583, 590 (2003) (consent to magistrate's final judgment inferred from party's failure to timely assert right to refuse final adjudication).

Consequently, parties to bankruptcy proceedings can consent to bankruptcy courts entering final judgment on non-core matters. §157(c)(2); *In re OCA, Inc.*, 551 F.3d 359, 368 (5th Cir. 2008). And, they can waive/forfeit objections to bankruptcy courts entering final orders on non-core matters, by failing to assert—clearly and promptly—a right to Article III adjudication or by objecting to bankruptcy court adjudication as non-core only after adverse rulings. *Id.* at 368-69; *In re Tx. Gen. Petroleum Corp.*, 52 F.3d 1330, 1337 (5th Cir. 1995) (citing cases).[5]

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[5] Bankruptcy parties can similarly waive/forfeit a right to jury trial (Pierce never requested one) by failing to file a jury-trial demand shortly after service of the last relevant pleading. Fed. R. Bankr. P. 9015, 5005; Fed. R. Civ. P. 38(b), (d); *In re Yukon Energy Corp.*, 138 F.3d 1254, 1260 (8th Cir. 1998). Even parties filing timely jury demands can subsequently waive/forfeit their right by waiting too long to seek withdrawal to the

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Parties also waive/forfeit the right to contest a bankruptcy court's entry of a final judgment on a non-core matter by "'failing to raise or pursue the issue adequately on appeal,'" including by failing to appeal in the district court before launching an attack in the circuit court. *Mullarkey*, 536 F.3d at 221; *Yukon*, 138 F.3d at 1258; *see also* §157(c)(1) (confining district court de novo review of bankruptcy court decisions in non-core proceedings to "matters to which any party has timely and specifically objected").[6]

Although Vickie unequivocally raised the issue during the certiorari petition process (Cert.Pet. Reply:12-13), Pierce's brief ignores the waiver/forfeiture issue. Instead, Pierce suggests bankruptcy courts can never adjudicate personal injury tort claims by characterizing §157(b)(5)'s "shall be tried in the district court" language as mandatory. Resp.Br:66.[7] But "[s]ection 157(b) generally, and Section 157(b)(5) in particular, do not create or destroy jurisdiction." *In re Smith*, 389 B.R. 902, 912

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district court. *In re HA-LO Indus.*, 326 B.R. 116, 122 (Bankr. N.D. Ill. 2005).

[6] Circuit courts in bankruptcy cases have jurisdiction only over district court judgments; parties can therefore waive circuit court challenges to bankruptcy court judgments by failing to seek district court review. *Brandt v. Wand Partners*, 242 F.3d 6, 14-15 (1st Cir. 2001); *In re Andy Frain Servs., Inc.*, 798 F.2d 1113, 1124 (7th Cir. 1986).

[7] He later equivocates, noting personal injury claims can be tried in state court. Resp.Br:66-67; *see Pan Am I*, 950 F.2d at 844 ("Despite the mandatory 'shall order,' section 157(b)(5) has consistently been construed to recognize discretion in district courts to leave personal injury cases where they are pending").

(Bankr. D. Nev. 2008).[8] Section 157(b)(5) is a venue-fixing provision that situates the bankruptcy jurisdiction already conferred upon federal courts. *Id.*[9] Such case-processing provisions can always be waived. *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004); *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1380 (2010).[10] Representative Kastenmeier confirmed the nonjurisdictional nature of §157(b)(5) by acknowledging that bankruptcy courts can determine personal injury torts "with the consent of all parties." 130 Cong. Rec. 20228 (June 29, 1984).

Thus, "personal injury tort" proceedings are subject to the same waiver/forfeiture principles as all

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[8] Notably, as one bankruptcy judge has explained in detail, "[s]ection 157(b)(5) is not worded as Congress might normally construct a restrictive jurisdictional statute." *Smith*, 389 B.R. at 911. Where Congress has not explicitly designated a statute jurisdictional, it must be deemed nonjurisdictional. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006).

[9] A primary purpose of §157(b)(5) is to empower the district court to centralize in one federal court all personal injury tort actions pending against the debtor in federal and state courts. *Dow Corning*, 86 F.3d at 495-97; *In re Pan Am Corp.*, 16 F.3d 513, 516 (2d Cir. 1994) ("Congress enacted section 157(b)(5) to expand the district court's venue-fixing powers").

[10] In suggesting bankruptcy courts can never adjudicate personal injury tort proceedings, Pierce quotes sweeping language in *Pettibone Corp. v. Easley*, 935 F.2d 120, 123 (7th Cir. 1991). Resp.Br:65-66. That language is dicta and has been criticized as "the most egregious misapplication of *Marathon*." *In re Downing Corp.*, 215 B.R. 346, 353 (Bankr. E.D. Mich. 1997); *see In re UAL Corp.*, 310 B.R. 373, 379 (Bankr. N.D. Ill. 2004). *Pettibone* does not address the waiver/forfeiture issue.

other non-core proceedings. *Smith*, 389 B.R. at 906-16 (creditor waived right to contest bankruptcy court entering final judgment on non-core defamation claim by, as here, filing proof of claim for defamation and a complaint seeking nondischargeability that alleged the adversary proceeding was core, and not filing a jury-trial demand); *In re Leslie Fay Cos.*, 212 B.R. 747, 772-73 (Bankr. S.D.N.Y. 1997) (failure to timely raise personal injury issue to bankruptcy court), *aff'd*, 222 B.R. 718 (S.D.N.Y. 1998), *aff'd*, 82 F.3d 899 (2d Cir. 1999); *Adams v. Cumberland Farms, Inc.*, 86 F.3d 1146, at *3 (1st Cir. 1996) (unpublished table decision) (circuit court argument waived by failure to raise personal injury argument in bankruptcy court and opening brief to district court).

2. Pierce's waiver/forfeiture.

a. Pierce litigated his claim in the bankruptcy court for twenty-seven months before seeking withdrawal in response to adverse rulings.

Parties to adversary proceedings must state in their pleadings whether a proceeding is core or non-core and whether they consent to the bankruptcy judge finally determining any non-core matter. Fed. R. Bankr. P. 7008(a), 7012(b). Pierce never alleged non-core jurisdiction. In fact, the only pleading attached to the proof of claim and incorporated by reference—Pierce's previously-filed dischargeability complaint—alleged that the adversary proceeding was "a core proceeding" and raised no distinction

between the nondischargeability request and the underlying defamation claim. Pet.App:81. And although Pierce emphasizes that "when [he] filed his proof of claim, he expressly indicated that his defamation action constituted a personal injury tort," Resp.Br:25, 68, all he did was check a box on a preprinted form, which merely identified the claim's basis and contained no statutory references or indication that the claim was non-core or that he did not consent to final bankruptcy court adjudication, Pet.App:78.

Indeed, Pierce expressly told the bankruptcy court that "[a]ll parties are in agreement that *the amount* of the contingent Proof of Claim filed by [Pierce] shall be determined by the adversary proceedings filed herein" and that he would be "happy" and "pleased" to litigate "[his] claim here" because "we did choose this forum." SER:6101-02, 6801 (emphasis added). The district court recognized that Pierce thereby consented to the bankruptcy court adjudicating his defamation claim. Pet.App:266-67 n.17.

Pierce distorts the record when he sweepingly asserts that he "repeatedly raised section 157(b)(5) below." Resp.Br:70. Tellingly, he cites only his September 1998 motion under §157(d) to withdraw the entire litigation to the district court and jurisdictional arguments he made in his Ninth Circuit appeal. Resp.Br:70; *see id.* at 26-27; JA:95. He omits that he first sought withdrawal only after extensively adjudicating his claim in the bankruptcy court *for*

twenty-seven months and he was facing the bankruptcy court's imposition of substantial monetary and potentially terminating discovery sanctions. *See* JA:117-21; ER:1949-57, 2235-38; D.C.Docket Entry 137:AP007986-008272; Pet.Br:4 n.4.

Although the district court initially withdrew Pierce's defamation claim and Vickie's counterclaim, it shortly referred them back to the bankruptcy court to be tried, relying among other things on "judicial economy," the "immersion that the bankruptcy judge has in this case," and Pierce's "selection of forum," stressing that "much of what we see here is the spawn of what he begot." JA:129-30, 138-39.

That decision was a proper exercise of discretion. Parties must seek withdrawal "'as promptly as possible in light of the developments in the bankruptcy proceeding'" and district courts must consider "the efficient use of judicial resources, delay and costs to the parties, uniformity of bankruptcy administration, the prevention of forum shopping, and other related factors." *Sec. Farms v. Int'l Broth. of Teamsters, Chauffers, Warehousemen & Helpers*, 124 F.3d 999, 1007 n.3, 1008 (9th Cir. 1997); *see* §157(d) (motion must be "timely"). The timeliness requirement prevents parties "'from forum shopping, stalling, or otherwise engaging in obstructionist tactics,'" including extensively litigating matters in the bankruptcy court long after the alleged ground for withdrawal was known and seeking withdrawal because of adverse rulings—exactly what Pierce did. *In re Childs*, 342 B.R. 823, 828-30 (M.D. Ala. 2006) (citing cases); *In re GTS 900*

F, LLC, No. CV10-06693 SJO, 2010 WL 4878839, at *2-3 (C.D. Cal. 2010) (citing cases).

b. Pierce never appealed the bankruptcy court's entry of final judgment on his defamation claim.

After the district court returned the defamation claim to the bankruptcy court, Pierce never raised the "personal injury tort" exception in the bankruptcy court:

- When Vickie moved for summary judgment on the defamation claim, Pierce opposed on the merits and never argued that the "personal injury tort" exception precluded that court from entering final judgment. D.C.Docket Entry 140:AP009614-009668, AP009722-009736.
- After the bankruptcy court entered a separate final judgment dismissing the defamation claim, Pierce never appealed that judgment. SER:7940-42, 8086-87; Fed. R. Bankr. P. 8002; 28 U.S.C. §158(a), (b), (c)(2).
- When the bankruptcy court subsequently tried Vickie's counterclaim, Pierce never argued that the bankruptcy court lacked core jurisdiction over the counterclaim because the "personal injury tort" exception made his defamation claim non-core. D.C.Docket Entries 152:AP016108-016147, 159:AP019936-019979, 162:AP019777-019818, 165:AP022062-022088.

- After the bankruptcy court entered a separate judgment on Vickie's counterclaim, Pierce appealed only that judgment. Pet.App:300-04; D.C.Docket Entry 172:AP025768-02570, AP026129-026132.

The absence of an appeal from the bankruptcy court's entry of final judgment on Pierce's defamation claim makes that adjudication final, thereby precluding Pierce's argument that the adjudication of the defamation claim was non-core and that therefore Vickie's counterclaim was non-core.

Further, in his appeals to the district court and Ninth Circuit, Pierce never attempted to counter the undisputed record of his waiver/forfeiture or contest the district court's discretionary decision to vacate withdrawal of the defamation claim. Instead, he hung his hat—as he does now—on the erroneous notion that the "personal injury issue" can never be waived/forfeited.[11]

[11] In response to the district court's decision to vacate withdrawal, Pierce filed a writ of mandate in the Ninth Circuit, arguing withdrawal was mandatory because the bankruptcy court lacked subject matter jurisdiction over personal injury claims and, alternatively, that the district court abused its discretion. D.C.Docket Entry 97:CA0001-0026. After the Ninth Circuit summarily denied the writ, SER:5982, Pierce never again raised the latter argument; he argued only his erroneous jurisdictional argument.

B. Pierce's Defamation Claim Was Not A "Personal Injury Tort Or Wrongful Death" Proceeding Under §157(b).

Because parties can waive/forfeit the right to refuse or contest final adjudication by a bankruptcy court, and the undisputed record establishes such waiver/forfeiture by Pierce, this Court need not determine whether his defamation claim falls within the "personal injury tort" exception. We therefore address the issue only briefly.

Pierce argues that this Court should broadly construe §157(b)'s "personal injury tort" language because "where Congress intends to narrow 'personal injury torts' to those involving bodily injury, it does so expressly," and since "Congress did not impose such a limitation in §157(b)(5), the term should be given its ordinary, intended meaning." Resp.Br:69-70.

But §157(b) does not only refer to "personal injury tort" claims. It says "personal injury tort [and/or] *wrongful death* claims." *See* §157(b)(2)(B), (O), (b)(5) (emphasis added.) Wrongful death claims stem from bodily injury. Under the *ejusdem generis* doctrine, the inclusion of that language indicates Congress intended a narrow concept of "personal injury tort." Moreover, the legislative history confirms that a narrow scope was intended. Representative Kastenmeier described the personal injury tort/ wrongful death exception as a "minor exception" encompassing only "a narrow category of cases," 130 Cong. Rec. 20228, and the only torts specifically

identified in §157(b)(2)(B)'s legislative history are "claims arising from automobile accidents," 130 Cong. Rec. 17155.

Thus, the legislative history and usage of the phrase "personal injury tort or wrongful death" indicates Congress did *not* intend the exception to apply broadly but only to traditional personal injury torts involving physical impact or trauma (the type that could lead to wrongful death), such as automobile accidents, slip and falls, and products liability. *See*, *e.g.*, *In re Atron Inc. of Mich.*, 172 B.R. 541, 543-45 (Bankr. W.D. Mich. 1994). Accordingly, defamation claims have been held to fall outside the exception. *Massey Energy Co. v. W. Va. Consumers for Justice*, 351 B.R. 348, 351 (E.D. Va. 2006); *In re Davis,* 334 B.R. 874, 878 n.2 (Bankr. W.D. Ky. 2005), *aff'd in part, rev'd in part on other grounds*, 347 B.R. 607 (W.D. Ky. 2006).[12]

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[12] Pierce erroneously cites 11 U.S.C. §522(d)(11)(D) for the principle that Congress always uses the term "bodily" to narrow personal injury torts to physical-impact torts. Resp.Br:69. But §522(d)(11)(D) is not a personal injury tort statute, nor does it reference "wrongful death." Instead, it lets debtors exempt from the bankruptcy estate certain payments "on account of [the debtor's] personal bodily injury," excluding mental anguish and pecuniary loss, *i.e.*, loss-of-limb type payments that can come from any source, including insurance or workers' compensation. Moreover, bankruptcy statutes often use "wrongful death" and "personal injury" together when unmistakably intending to mean only physical-impact injuries. *E.g.*, 11 U.S.C. §§523(9) ("death or personal injury" caused by operation of vehicle),

(Continued on following page)

Regardless, Pierce's particular defamation claim falls outside even a broader construction. Pierce concedes that the "personal injury tort" exception "rests on grounds of fairness," emphasizing Senator DeConcini's comments that "'[u]nlike a trade creditor who elects to do business with a particular company, the personal injury tort claimant does not choose to be injured by a particular debtor.'" Resp.Br:67-68. DeConcini emphasized that with the latter torts, the injury "just happened." 130 Cong. Rec. 13076. Courts have relied on such comments to extend §157(b) beyond physical-impact torts but not to torts bearing "earmarks of a financial, business or property tort claim, or a contract claim"—an approach that requires a "searching analysis of the complaint." *In re Ice Cream Liquidation, Inc.*, 281 B.R. 154, 161 (Bankr. D. Conn. 2002).

Pierce's defamation claim is not a tort between strangers occurring out of the blue, such as a dispute between a private citizen and newspaper columnist. *Compare Smith*, 389 B.R. at 905-06. It stems from a financial dispute between a mother-in-law and son-in-law over alleged interference with her right to receive property from her husband. It's a family battle over money, not a random tort between strangers that "just happened."

524(g)(2)(B)(i)(I) ("personal injury, wrongful death" from asbestos).

CONCLUSION

The Ninth Circuit erred in holding that the bankruptcy court lacked core jurisdiction over Vickie's compulsory counterclaim. This Court therefore should remand the case to the district court, because that court erroneously treated the proceeding as non-core and has not yet reviewed it under the correct, more deferential standard.

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Respectfully submitted,

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