No. 18-

IN THE

Supreme Court of the United States

RITZEN GROUP, INC.,

Petitioner,

v.

JACKSON MASONRY, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an order denying a motion for relief from the automatic stay is a final order under 28 U.S.C. § 158(a)(1). In diverting from this Court's prior precedent, and in conflict with the First and Third Circuit Courts of Appeal, the Sixth Circuit ruled that an order denying relief from the automatic stay is *per se* final.

CORPORATE DISCLOSURE STATEMENT

Petitioner Ritzen Group, Inc., has no parent corporation, and no publicly held company owns 10% or more interest in the company.

Upon information and belief, Jackson Masonry, LLC, is a limited liability company, has no parent corporation, and no publicly held company owns 10% or more interest in the company.

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Ritzen Group, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra,* pp. 1a-23a) is reported at 906 F.3d 494. The opinion of the district court (App. B, *infra,* pp. 24a-47a) is not yet reported but is available at 2018 WL 558837. The opinion of the bankruptcy court is not reported but is included in Appendices C and D (Apps. C & D, *infra*, pp. 48a-68a).

JURISDICTION

The judgment of the court of appeals was entered on October 16, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Pertinent portions of Section 158 and of Title 28 of the United States Code are reprinted in the appendix to this petition. App. E, *infra,* p. 69a.

Section 1291 of Title 28 is reprinted below in its entirety:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court

> of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C.A. § 1291 (West, Westlaw through Pub. L. No. 115-281 (also includes Pub. L. 115-283 to 115-327, 115-329 to 115-333, 115-337, and 115-338. Title 26 current through Pub. L. 115-338)).

STATEMENT OF THE CASE

This case concerns an expressly acknowledged and now entrenched circuit conflict over the appealability of a commonly recurring type of motion—one for relief from the automatic stay. One of the time-honored rules of bankruptcy is that it is intended to provide a fresh start for the "honest but unfortunate debtor." *Cohen v. de la Cruz*, 523 U.S. 213, 217 (1998) (internal citation omitted).

In keeping with that objective, the Bankruptcy Code provides that the filing of a bankruptcy petition operates as an automatic stay of certain acts against the debtor and against property of the estate. 11 U.S.C. § 362(a). The Bankruptcy Code also provides relief from the automatic stay "for cause." 11 U.S.C. 362(d)(1) (West, Westlaw through Pub. L. No. 115-281 (also includes Pub. L. 115-283 to 115-327, 115-329 to 115-333, 115-337, and 115-338. Title 26 current through Pub. L. 115-338)). Courts across the country have uniformly held that the filing of a bankruptcy petition in bad faith constitutes both "cause" for relief

from the automatic stay under section 362(d)(1) as well as "cause" for dismissal of a bankruptcy case under section 1112(b) of the Bankruptcy Code.

Petitioner was denied stay relief by the bankruptcy court. Petitioner then appealed to the United States District Court for the Middle District of Tennessee and thereafter to the United States Court of Appeals for the Sixth Circuit. Both appellate courts dismissed the appeals as untimely.

In diverting from this Court's prior precedent, and in conflict with the First and Third Circuit Courts of Appeal, the Sixth Circuit essentially adopted the "blanket rule" employed by seven other Circuit Courts of Appeal by holding that an order denying relief from the automatic stay is *always* a final order. App. A, *infra,* p. 12a.

The Sixth Circuit's opinion has exacerbated an already-entrenched circuit split by presenting a new test that apparently will apply in all bankruptcy cases, and to all orders entered by bankruptcy courts, to determine an order's "finality." Guidance from this Court is necessary to ensure that all bankruptcy litigants, regardless of forum, have a firm understanding of how to determine the finality of an order entered by a bankruptcy court.

A. Factual Background

On March 21, 2013, Petitioner Ritzen Group, Inc. and Respondent Jackson Masonry, LLC entered into a Real Estate Sale Contract (the "Contract") under which Respondent would sell real property to Petitioner for $1.55 million.

The Contract did not close, and, as a result, on December 23, 2014, Petitioner called Respondent in default for materially breaching the Contract and initiated a lawsuit styled *Ritzen Group v. Jackson Masonry*, Case No. 14-1822-II (Davidson County Chancery Court) (the "State Court Action"). App. B, *infra,* p. 26a.

Litigation in the State Court Action was contentious, requiring Petitioner to file multiple motions to compel discovery responses from Respondent. *Id.* at 27a. On March 24, 2016, *seven days prior to the scheduled trial date*, Petitioner appeared for a hearing on its Fourth Motion to Compel (the "Second Sanctions Hearing"). *Id.* At 8:43 a.m.—*seventeen minutes* prior to the Second Sanctions Hearing—Respondent filed its chapter 11 petition ("Bankruptcy Case") in the United States Bankruptcy Court for the Middle District of Tennessee (the "Bankruptcy Court"). *Id.* This filing stayed the State Court Action and avoided the ramifications of the Second Sanctions Hearing. *Id.* The filing of the Bankruptcy Case also stayed the upcoming trial in the State Court Action. *See id.*

Understanding Respondent's motive in filing for chapter 11 relief, Petitioner sought relief from the automatic stay (the "Motion"). *Id.* at 28a-39a. In so doing, Petitioner argued that Respondent was a financially sound company that was not utilizing the bankruptcy laws for the reasons Congress intended when enacting Title 11 and, thus, Respondent's bankruptcy case was filed in bad faith as an attempt to forum shop. *Id.*

The Bankruptcy Court held an evidentiary hearing on the Motion and ultimately ruled in favor of Respondent (the "Denial Order"). *Id.* at 30a-31a.

The Denial Order resulted in Petitioner litigating the State Court Action before the Bankruptcy Court to determine whether or not it had a claim in Respondent's Bankruptcy Case. Respondent was successful in the litigation in the Bankruptcy Court and Petitioner appealed both the Denial Order and the order adjudicating the Contract dispute to the United States District Court for the Middle District of Tennessee (the "District Court"), which held that Petitioner's appeal of the Denial Order was untimely. *Id.* at 34a-37a. On appeal, the Sixth Circuit affirmed. App. A, *infra,* p. 12a.

B. Lower Courts' Rationale

Under 28 U.S.C. § 158(a)(1), a party may appeal "final judgments, orders, and decrees" of a bankruptcy court to the district court or a Bankruptcy Appellate Panel ("BAP"). The District Court ruled that the Bankruptcy Court's Denial Order was final under Section 158(a)(1), because the Sixth Circuit B.A.P. routinely applied a "blanket rule" that all orders adjudicating a request for relief from the automatic stay—regardless of whether such a motion is granted or denied—are "final." App. B, *infra,* pp. 36a-37a. In rejecting Petitioner's request for a case-by-case approach, as employed by the First and Third Circuits, the District Court cited concerns of efficiency by noting that "[s]uch a test would leave parties forever guessing about when they needed to file an appeal, always at the risk of waiting too long and losing their rights or appealing too early and wasting their time." *Id* at 37a.

On appeal, the Sixth Circuit similarly noted that the First and Third Circuit's case-by-case approach was "vague" and "unpredictable." App. A, *infra,* p. 6a. The Sixth Circuit went a step further, however, by noting

that none of the other circuits have provided a workable test for determining the finality of orders entered by bankruptcy courts. *Id.* To rectify this perceived problem, the Sixth Circuit articulated a purportedly "clear test for courts to apply: a bankruptcy court's order may be immediately appealable if it is (1) 'entered in [a] . . . proceeding' and (2) 'final'—terminating that proceeding." *Id.* at 7a-8a. Applying this test to this case, the Sixth Circuit determined that requesting stay relief initiates a "proceeding" on that issue, and that an order granting or denying the request ultimately terminates that proceeding. *Id.* at 12a.

Critically, both lower courts failed to recognize the significance of Petitioner basing its request for stay relief on the argument that Respondent filed the Bankruptcy Case in bad faith. This issue extends beyond the question of stay relief and goes to the core of the Bankruptcy Case itself. The Denial Order did not resolve this underlying issue. As such, the purported "finality" of the Denial Order is impacted, because Petitioner could still challenge the validity of the Bankruptcy Case, as a whole, on good faith grounds even after entry of the Denial Order.

Moreover, while apparently simple on its face, the Sixth Circuit's new test—applicable not only to stay relief requests but to *all* bankruptcy court orders—rejects the flexibility that has long been a landmark of bankruptcy appellate review. Flexibility has been a necessary component of bankruptcy cases because the varying issues that arise within the umbrella of an overarching bankruptcy case do not lend themselves to simple analysis.

REASONS FOR GRANTING THE PETITION

This Court should grant this petition for three reasons. First, the circuits are split into two camps on whether an order denying a motion for relief from the automatic stay is a final and appealable order. One group says they are. The other group says it depends.

Second, the Sixth Circuit's opinion conflicts with—and substantially distorts—this Court's decision in *Bullard v. Blue Hills Bank*, -- U.S. --, 135 S. Ct. 1686 (2015). The *Bullard* Court was presented with the issue of "how to define the immediately appealable 'proceeding' in the context of the consideration of Chapter 13 plans." *Id.* at 1692. Bullard argued that "[e]ach time the bankruptcy court reviews a proposed plan . . . it conducts a separate proceeding[,]" and, as a result, "an order denying confirmation and an order granting confirmation both terminate that proceeding, and both are therefore final and appealable." *Id.*

This Court soundly rejected that argument, opining: "The relevant proceeding is the process of attempting to arrive at an approved plan that would allow the bankruptcy to move forward. This is so, first and foremost, because only plan confirmation—or case dismissal—alters the status quo and fixes the rights and obligations of the parties." *Id.* By contrast, denial of plan confirmation, with the debtor free to propose a new plan, "changes little." *Id.* The same is true with respect to orders denying relief from the automatic stay.

But the Sixth Circuit departed from *Bullard's* guidance by too narrowly defining the relevant proceeding.

That decision adds to an incomprehensible mishmash of circuit court cases attempting to determine the finality of a bankruptcy court order—a jumble that has been decades in the making. The need for clarity is long overdue.

Finally, the Sixth Circuit's opinion adopting a test to determine the finality of all bankruptcy court orders will have widespread consequences for bankruptcy practitioners across the nation. The sweeping implications of the Sixth Circuit's ruling counsel strongly in favor of this Court's granting review.

I. The Circuits are Irrevocably Split on Whether an Order Denying a Request for Relief From the Automatic Stay Is Always Final and Appealable.

Two circuits recognize that a denial of a motion for relief from stay, unlike an order granting relief from stay, is not always final and appealable under settled principles of finality that have long governed bankruptcy cases. Seven circuits have adopted a "blanket rule" which provides that orders denying motions for relief from the automatic stay are always appealable. The Sixth Circuit adopted a rule which effectively states that all bankruptcy court orders that fully resolve a "judicial unit" are final, immediately appealable orders. Only this Court's review can resolve the conflict.

A. In Two Circuits, the Appealability of an Order Denying Stay Relief Rests on a Case-by-Case Analysis to Determine Whether the Order Effectively Resolved the Proceeding.

The First and Third Circuits have held that in determining whether an order on a motion for relief

from stay is final for purposes of 28 U.S.C. § 158(a)(1), the court should consider the "nature of the dispute," "the nature of relief from stay proceedings," as well as the "operative effect" of the order being appealed. *See Pinpoint IT Servs., LLC v. Rivera (In re Atlas IT Export Corp.)*, 761 F.3d 177, 184 (1st Cir. 2014) (holding that "in some cases an order denying stay relief may lack finality," and finding that whether or not a denial of stay relief is final depends on whether the issues underpinning the determination were "fully-developed" such that the denial "definitively decided" the issues between the parties); *Grella v. Salem Five Cent Savings Bank*, 42 F.3d 26, 31–33 (1st Cir.1994), *In re Henriquez*, 261 B.R. 67 (1st Cir. B.A.P. 2001); *Moxley v. Comer (In re Comer)*, 716 F.2d 168, 174 n. 11 (3rd Cir.1983) (holding that the bankruptcy court's denial of a creditor's motion for relief from stay was a final order for purposes of the case before it, but cautioning that "an order of the bankruptcy court denying relief from an automatic stay might, in some instances, be interlocutory."); *Matter of West Elecs.*, 852 F.2d 79, 82 (3d Cir. 1988) (recognizing that "in some instances, an order denying relief from the automatic stay may not be final.").

In *Atlas*, the First Circuit recognized the inherent differences between denials and grants of stay relief. *See In re Atlas IT Export Corp.*, 761 F.3d at 184. The First Circuit rejected the blanket approach that other circuits have adopted, noting that such approach is improper because it "makes an order's appealability turn on the label affixed to it . . . rather than on finality telltales." *Id.* Moreover, the First Circuit struck down the cornerstone argument supporting the blanket rule: "that an automatic stay is like an injunction and so is final and appealable." *Id.* The First Circuit noted that while both injunctions and the automatic stay enjoin parties from acting, the automatic

stay is distinct from an injunction in one key regard: the automatic stay is the "default position." *Id.* (citation omitted). As such, "the *automatic* stay's continued operation—thanks to the denial of stay relief—should not be treated for finality purposes like an injunction entered at a case's start after a judge has sifted [all] the familiar injunction factors." *Id.* at 185 (citation omitted).

In applying a standard by which each stay relief order must be analyzed independently for purposes of finality, the First Circuit further critiqued the flaw of the blanket approach by noting that treating all denials of stay relief as final "inevitably will result in appeals that are superseded by events in related proceedings." *Id.*

The Third Circuit has similarly recognized that "in some instances, an order denying relief from the automatic stay may not be final. . . ." *Matter of West Elecs. Inc.*, 852 F.2d at 82. This recognition was based, in part, on the Third Circuit's previous case *In re Comer*, wherein the Third Circuit "caution[ed] that in some instances a permanent injunction [via denial of a stay relief request] that did not dispose of all the matters at issue might not be final . . . ." 716 F.2d at 174. While in both *West Electronics* and *Comer*, the court determined that, in the particular cases before them, the stay relief orders were final, both cases indicate that courts in the Third Circuit must inquire as to whether the underlying issues pertaining to the stay relief request were fully disposed of to determine an order's is finality.

Thus, in both the First and Third Circuits, denials of stay relief are not uniformly viewed as "final" orders subject to immediate appeal.

B. Eight Circuits, Including the Sixth Circuit Below, Hold that an Order Denying Relief from the Automatic Stay is Categorically Appealable.

Eight circuit courts, including the Sixth Circuit below, have held that orders denying relief from the automatic stay are categorically appealable. *See* E*ddleman v. Dep't of Labor*, 923 F.2d 782, 784–85 (10th Cir.1991), *overruled in part on other grounds by Temex Energy, Inc. v. Underwood*, 968 F.2d 1003, 1005 n. 3 (10th Cir.1992); *Sonnax Indus., Inc. v. Tri Component Prods. Corp. (In re Sonnax Indus., Inc.)*, 907 F.2d 1280, 1284–85 (2d Cir.1990); *In re Lieb*, 915 F.2d 180, 185 n. 3 (5th Cir.1990); *In re Dixie Broad.*, 871 F.2d 1023, 1028 (11th Cir.1989); *Grundy Nat'l Bank v. Tandem Mining Corp.*, 754 F.2d 1436, 1439 (4th Cir.1985); *Crocker Nat'l Bank v. Am. Mariner Indus. (In re Am. Mariner Indus.)*, 734 F.2d 426, 429 (9th Cir.1984), o*verruled in part on other grounds by United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988); *Aetna Life Ins. Co. v. Leimer (In re Leimer)*, 724 F.2d 744, 745–46 (8th Cir.1984).

The Eighth and Tenth Circuits have held that orders denying stay relief motions are always "final" by analogizing the automatic stay to a permanent injunction. *See* E*ddleman*, 923 F.2d at 784-85 ("The legislative history of the Bankruptcy Code shows that Congress views the imposition of the automatic stay to be analogous to a permanent injunction. . . . Because a permanent injunction is appealable as a final order, we may infer that Congress intended the grant or denial of stay relief to be similarly appealable." (internal citations omitted)); *In re Leimer*,

724 F.2d at 745 (holding that all denials of stay relief are final because the "final order denying relief from a stay functions as a permanent injunction, [and] is [therefore] a final order for purposes of appeal.").

Similar to the views espoused by the Sixth Circuit in this case, the Second and Ninth Circuits have held that orders denying stay relief are *per se* "final" because of the need for judicial economy. *See In re Sonnax,* 907 F.2d at 1283-84 (holding that all denials of stay relief are final, appealable orders based primarily on the argument that judicial economy is the "purpose of the finality rule" and rejecting a case-by-case analysis as not serving the interests of judicial economy); *In re Am. Mariner Indus.*, 734 F.2d at 429 (basing its holding that "decisions of the bankruptcy courts granting or denying relief from the automatic stay under section 362(d) are final decisions reviewable by this court" on its interpretation that Congress "intended the courts to conclusively and expeditiously adjudicate, apart from the bankruptcy proceedings as a whole, complaints for relief from the automatic stay.").

Finally, the Fourth, Fifth, and Eleventh Circuits all held that denials of stay relief motions are final without offering much, if any, analysis on the issue, instead, relying on the holdings of other circuits. *See In re Lieb*, 915 F.2d at 185 n.3 (noting in a footnote with a string cite that "[o]rders granting or denying relief from the automatic stay are final and appealable"); *In re Dixie Broad.*, 871 F.2d at 1026 (recognizing that district court orders affirming or reversing a bankruptcy court's grant or denial of stay relief is a final order by citing cases that apply the blanket rule); *Grundy Nat'l Bank*, 754 F.2d at

1439 (citing its sister circuits in agreeing that "an order denying relief from the automatic stay is a final appealable order").

Both of the underlying rationales for the blanket rule—(1) that judicial economy is served by treating all stay relief orders as "final" and (2) that the automatic stay is akin to a traditional permanent injunction, and orders adjudicating its applicability should thus be treated as final—are insufficient to justify abandoning the flexibility that bankruptcy practice requires for finality determinations by treating all stay relief orders the same.

C. The Conflict Is Entrenched and Warrants Review

With the Sixth Circuit's ruling in this case, a new test has been proposed that effectively rejects the other circuits' views of this question and furthers the confusion and inconsistency with which this issue is treated across the country. Only review by this Court can resolve the current conflict.

II. The Sixth Circuit's Decision Misreads *Bullard* and Adds to a Confusing and Inconsistent Body of Lower-court Case Law.

Despite acknowledging that the definition of "finality" in Section 158(d)(1) is more "loose" in bankruptcy than it is in general civil litigation, App. A, *infra,* p. 5a, the Sixth Circuit held that an order denying a motion for relief from the automatic stay is final and appealable because such a motion initiates a "proceeding" that is terminated once an order resolving the motion is entered, *id.* at 12a.

Although drafted as a straightforward test, the Sixth Circuit's holding is in direct conflict with this Court's decision in *Bullard*.

In an attempt to justify its overly-simplistic test to determine whether an order is final, the Sixth Circuit observed that courts reviewing this issue "simply treat the finality of the specific order before them as a case-by-case question and do not look to or articulate principles that can be applied to other types of orders. As a result, parties must constantly guess, at risk of either appealing too early and getting bounced back, or appealing too late and forfeiting their rights. Appellate deadlines cannot serve their purpose when their trigger is unclear. This case is a perfect example." App. A, *infra,* pp. 5a-6a.

As an initial matter, this rationale is in direct conflict with the precedent of this Court, which has long held that there is no magic wand to resolve the issue of finality. *See*, e.g., *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152 (1964) ("And our cases long have recognized that whether a ruling is 'final' within the meaning of §1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality. Because of this difficulty this Court has held that the requirement of finality is to be given a 'practical rather than a technical construction.'"); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545 (1949).

What's more, this Court in *Bullard* rejected a nearly identical rationale as the one expressed by the district court and the Sixth Circuit:

Bullard also raises a more practical objection. If denial orders are not final, he says, there will be no effective means of obtaining appellate review of the denied proposal. The debtor's only two options would be to seek or accept dismissal of his case and then appeal, or to propose an amended plan and appeal its confirmation.

The first option is not realistic, Bullard contends, because dismissal means the end of the automatic stay against creditors' collection efforts. Without the stay, the debtor might lose the very property at issue in the rejected plan. Even if a bankruptcy court agrees to maintain the stay pending appeal, the debtor is still risking his entire bankruptcy case on the appeal.

The second option is no better, says Bullard. An acceptable, confirmable alternative may not exist. Even if one does, its confirmation might have immediate and irreversible effects—such as the sale or transfer of property—and a court is unlikely to stay its execution. Moreover, it simply wastes time and money to place the debtor in the position of seeking approval of a plan he does not want.

All good points. We do not doubt that in many cases these options may be, as the court below put it, "unappealing." But our litigation system has long accepted that certain burdensome rulings will be "only imperfectly reparable" by the appellate process.

135 S. Ct. at 1694–95 (quoting *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 872 (1994)) (emphasis added).

This holding, in contrast to the Sixth Circuit's view, reflects a long line of decisions establishing that finality in bankruptcy is a flexible concept. *See In re Chateaugay Corp.*, 880 F.2d 1509, 1511 (2d Cir. 1989) ("Because bankruptcy proceedings often continue for long periods of time, and discrete claims are often resolved at various times over the course of the proceedings, the concept of finality that has developed in bankruptcy matters is more flexible than in ordinary civil litigation."); *see, e.g., Ritchie Special Credit Investments, Ltd. v. U.S. Trustee,* 620 F.3d 847, 852 (8th Cir. 2010); *In re Oakley,* 344 F.3d 709, 711 (7th Cir. 2003); *In re Millers Cove Energy* Co., *Inc.,* 128 F.3d 449, 451 (6th Cir. 1997); *Lewis,* 992 F.2d at 772; *In re Taylor,* 913 F.2d 102, 104 (3d Cir. 1990).

Given the flexible nature of finality, even though a majority of circuit courts currently apply the "blanket rule" that all denials of stay relief are "final," not all lower courts have reached the same conclusion in every instance.

For example, in *Rodriguez-Borges v. Lugo-Mender*, the District of Puerto Rico dismissed an appeal of an order denying stay relief for lack of appellate jurisdiction. *See* 938 F.Supp.2d 202 (D.P.R. 2013) ("*Therefore, the order subject to this appeal [denying stay relief for disqualification of counsel and not on the merits] did not address, much less dispose of, the discrete dispute within the larger case. For this reason the Court finds that it is an interlocutory order not reviewable under Section 158(a).* A contrary holding would flout the strong policy against piecemeal

litigation, and "the strong interest in allowing trial judges to supervise pretrial and trial procedures without undue interference." (emphasis added)).

In *In re: Kyle Parker, Debtor.*, the District of Arizona, citing *Bullard*, determined that a conditional order regarding stay relief was not "final" for purposes of appealability. *See* No. CV-15-02106-PHX-NVW, 2016 WL 1535176, at *4 (D. Az. Apr. 15, 2016). In *Parker*, the bankruptcy court entered a conditional order regarding stay relief that allowed the stay to remain in effect pending confirmation of an amended plan of reorganization. *Id.* at *3-*4. In denying immediate appeal of that order, the District Court recognized that "[o]rdinarily, orders lifting the automatic stay are final for purposes of appeal. *Id.* at *3. This is so because "lifting the stay exposes debtor assets to foreclosure proceedings and litigation harassment, the adverse effects of which cannot be remedied by an appeal at the conclusion of the bankruptcy proceeding because by then the injury will have already been inflicted." *Id.* Relying on this Court's decision in *Bullard*, the District Court determined that the bankruptcy court's order on stay relief in this instance was not "final": "The Court's observation in Bullard is apt: "'Final' does not describe this state of affairs." The Stay-Relief Order is better characterized as an interlocutory order, not appealable as of right." *Id.*

Put simply, even where courts do apply the "blanket rule," the underlying merits of the order must come into play when determining whether an order on stay relief is final. The Sixth Circuit's new test undercuts the flexibility employed by these courts.

A. Denials of Stay Relief Motions Which Do Not Fully Resolve the Issue Underlying the Request are Not Final and Appealable Orders.

In *Bullard*, this Court addressed a similar question to that proposed by this case and recognized that, with regard to plan confirmation, "[t]he relevant proceeding is the process of attempting to arrive at an approved plan that would allow the bankruptcy to move forward. This is so, first and foremost, because only plan confirmation—or case dismissal—alters the status quo and fixes the rights and obligations of the parties." *Bullard*, 135 S. Ct. at 1692–93. This is so because confirmation of a chapter 11 plan, as this Court recognized, "has preclusive effect, foreclosing relitigation of 'any issue actually litigated by the parties and any issue necessarily determined by the confirmation order.'" *Id.* By contrast, an order denying confirmation and dismissing the case "lifts the automatic stay entered at the start of bankruptcy, exposing the debtor to creditors' legal actions and collection efforts." *Id.* As this Court aptly explained:

> Denial of confirmation with leave to amend, by contrast, changes little. The automatic stay persists. The parties' rights and obligations remain unsettled. The trustee continues to collect funds from the debtor in anticipation of a different plan's eventual confirmation. The possibility of discharge lives on. "Final" does not describe this state of affairs. An order denying confirmation does rule out the specific arrangement of relief embodied in a particular plan. But that alone does not make the denial final any more than, say, a car buyer's declining

> to pay the sticker price is viewed as a "final" purchasing decision by either the buyer or seller. "It ain't over till it's over."

Id.

The same is true of denials of motions for relief from the automatic stay predicated on the argument that the debtor filed the bankruptcy case in bad faith.

1. "Good Faith" Permeates Through Bankruptcy Cases and is Central to the Request in this Case.

First, the automatic stay provided for in section 362 of the Bankruptcy Code is an interlocutory stay—meaning it eventually terminates.

This Court has held that an order by a bankruptcy court implementing a section 105 injunction is not a final order. In *Celotex Corp. v. Edwards*, this Court held that creditors could not collaterally attack an injunction prohibiting them from executing against a Chapter 11 debtor's surety on *supersedeas* bond by asking the district court to allow execution on the bond. 514 U.S. 300, 313 (1995). To square its holding with 28 U.S.C. § 157(c)(1), which prevents a bankruptcy court from issuing a "final order or judgment" in related noncore proceedings, this Court found that "the Bankruptcy Court did not lack jurisdiction under § 157(c)(1) to issue the Section 105 Injunction because that injunction *was not a "final order or judgment*." *Id.* at 310 n. 7 (emphasis added); *see also In re CEI Roofing, Inc.*, 315 B.R. 61, 67–68 (Bankr. N.D. Tex. 2004) (examining *Celotex* and holding:

"[t]he injunction requested is consistent with and does not violate any provision of the bankruptcy code. SAI simply seeks to enjoin, during the pendency of this adversary proceeding, the conduct that it believes is detrimentally affecting its ability to reorganize. Since SAI requests only a preliminary injunction—not a final order or judgment—this Court is empowered to grant it under *Celotex*.)"

Because a motion for relief from stay predicated on the argument that the case was filed in bad faith can be renewed at any time, an order denying such a motion is likewise not a final order inasmuch as "[t]he filing of a bankruptcy petition in bad faith taints every aspect of the case" thereby making impossible satisfaction of the section 1129(a)(3) good faith requirement for confirmation of a plan. *In re Phoenix Piccadilly, Ltd.*, 849 F.2d 1395 (11th Cir. 1988); *see also In re Kollar*, 357 B.R. 657, 661 (Bankr. M.D. Fla. 2006) ("A good faith condition permeates virtually every aspect of a bankruptcy case.").

Indeed, good faith permeates every aspect of a bankruptcy case. A debtor's bankruptcy petition must be filed in good faith. *In re Albany Partners, Ltd.*, 749 F.2d 670, 674 (11th Cir.1984); 2 Collier On Bankruptcy ¶ 301.17[3], at 301–45–46 (15th ed. rev. 2005). A conversion of a case from one chapter to another must be done in good faith. 11 U.S.C.A. § 348(f)(2) (West, Westlaw through Pub. L. No. 115-281 (also includes Pub. L. 115-283 to 115-327, 115-329 to 115-333, 115-337, and 115-338. Title 26 current through Pub. L. 115-338)). A plan of reorganization must be presented in good faith. 11 U.S.C.A. §§ 1129(a)(3), 1325(a)(3) (West, Westlaw through Pub. L. No. 115-281 (also includes Pub. L. 115-283 to 115-327, 115-329 to 115-333, 115-337, and 115-338. Title 26 current through Pub.

L. 115-338)). A Chapter 13 plan shall not be confirmed unless "the plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C.A. § 1325(a)(3) (West, Westlaw through Pub. L. No. 115-281 (also includes Pub. L. 115-283 to 115-327, 115-329 to 115-333, 115-337, and 115-338. Title 26 current through Pub. L. 115-338)). Section 1325(a)(3) was enacted by Congress "to provide bankruptcy courts with a discretionary means to preserve the bankruptcy process for its intended purpose." *In re Waldron*, 785 F.2d 936, 940 (11th Cir.1986).

The importance of the good faith requirement is aptly illustrated by the fact that a bankruptcy court may *sua sponte* consider the issue of whether to dismiss a case as a bad faith filing. *See, e.g., In re Anderson*, Case No. 3:14-bk-09568, 2015 WL 534423, at *3 (Bankr. M.D. Tenn. Feb. 5, 2015) (recognizing ability of courts to *sua sponte* dismiss bad faith bankruptcy filings). As such, the specter of "finality" in this case regarding the Denial Order is undercut by the fact that Petitioner, or even the Bankruptcy Court itself, could have argued at a later time that the bankruptcy case was filed in bad faith and, therefore, stay relief, or even dismissal, would be appropriate.

2. Petitioner Sought Relief Based on Respondent's Bad Faith and the Denial Order Was Not Final as to that Issue.

Denials of stay relief motions that do not fully resolve the issues underlying the stay relief request are not final and appealable orders. When a stay relief request that is premised on a claim that the debtor's case was filed in bad faith is denied, the bankruptcy case moves forward

with the underlying issues between the parties remaining unresolved. The creditor seeking stay relief retains its rights to adjudicate or otherwise resolve its claim and the debtor retains the right to challenge the creditor's claims. Moreover, the creditor may still seek to dismiss the case outright, or seek stay relief at a later time once circumstances change and more evidence of bad faith comes to light. As such, the denial of stay relief in this instance does not fully resolve anything and is not a final order pursuant to 28 U.S.C. § 158(d)(1).

Requiring immediate appeals from denials of stay relief could lead to a host of potential problems arising from a premature appeal, especially in cases like this where the bad faith nature of the bankruptcy petition is at stake. This problem was recognized by the First Circuit in *Atlas*:

> Bankruptcy courts deny relief from the automatic stay based on circumstances that are often rapidly changing and on records that are not fully developed. Letting parties appeal as of right in such situations inevitably will result in appeals that are superseded by events in related proceedings. A more nuanced approach avoids this unnecessary judging. Also, without a blanket rule, parties will not reflexively appeal from the denial of a request for relief from the automatic stay. Instead, they will have to think through the finality issue themselves given the guidance provided here. That self-policing by the parties will contribute to overall judicial economy in bankruptcy cases.

In re Atlas IT Exp. Corp., 761 F.3d at 185. The First Circuit's approach is more in line with the concept of flexibility given to "finality" considerations in bankruptcy and allows for flexibility in cases like this, where the underlying issue for stay relief is not finally adjudicated by the order denying such relief.

Moreover, because Petitioner presented issues going to the very merits of Respondent's bankruptcy case, the issues between the parties were not fully resolved through the Denial Order. The Denial Order was not final because it did not "completely resolve all issues" between the parties regarding the claim, its adjudication, or the good faith nature of the bankruptcy case.

As the First Circuit has held, a hearing on a motion for relief from stay "is meant to be a summary proceeding." *Grella*, 42 F.3d at 31–33. Such hearings "do not involve a full adjudication on the merits of claims, defenses, or counterclaims, but [are instead] simply a determination as to whether a creditor has a colorable claim to property of the estate." *Id.* at 32.

In reliance on *Grella*, the First Circuit B.A.P. has held that, in determining whether an order on a motion for relief from stay is, in fact, final for purposes of 28 U.S.C. § 158(a)(1), the Court should consider the "nature of the dispute," "the nature of relief from stay proceedings," as well as the "operative effect" of the order being appealed. *In re Henriquez*, 261 B.R. at 72 and n.7 (holding that denial of stay relief was interlocutory because "to be final, [the order denying stay relief] would have to completely resolve all issues between Caterpillar and the trustee with regard to the Loader"). In so doing, the court observed

the difference between an order *granting* a motion for relief from the automatic stay, and one *denying* such a motion. With respect to the former, the court noted that "[a]ll [courts] seem to agree that orders lifting the automatic stay are final." *Id.* at 70 (collecting cases). The court reasoned:

> *Th[is] proposition makes sense because once a party is granted relief from the automatic stay, it is then free to pursue remedies against the debtor, or property of the estate, outside the jurisdictional reach of the bankruptcy court*, whether through self-help or in another judicial forum. In other words, within the bankruptcy case a discrete dispute has been finally determined, and unless appellate review is immediately available, it most likely will not be available at all. We thus agree that an order granting relief from stay is, for purposes of 28 U.S.C. § 158(a)(1), a final order.
>
> *Such is not always the case, however, when, as in the matter before us, the bankruptcy court denies the moving party relief from the automatic stay.* The question for us here, unanswered as of yet by our circuit court, is in what circumstances an order denying relief from stay is final for purposes of 28 U.S.C. § 158(a)(1).

Id. (emphasis added).

Based on the facts before it, the First Circuit B.A.P. found that the order denying relief from the automatic stay was not a final order inasmuch as it "decided only

that Caterpillar failed to convince the bankruptcy court in a nonevidentiary setting that it had a sufficiently colorable (senior) claim to the Loader to warrant stay relief. Caterpillar is not foreclosed from attempting to prove its case in the adversary proceeding." *Id.* at 71-72. The court concluded: "[o]ur determination in this case that the bankruptcy court's order denying Caterpillar relief from the automatic stay is not a final order is a result of the nature of relief from stay proceedings, coupled with the nature of the dispute between the trustee and Caterpillar. At the core, we are faced with a dispute that has not yet been finally resolved, and thus with an order that is not yet 'final.'" *Id.* at 72.

The issues between Petitioner and Respondent were not "fully resolved" until the final order was entered regarding the trial between the parties, at which point Petitioner immediately and timely filed its notice of appeal.

B. The Finality of Some Orders in Bankruptcy Cases Depends on Whether the Relief Sought was Granted or Denied.

The argument for a more flexible standard of finality for stay relief denials is supported by the fact that, in many instances, the immediate appealability of an order in bankruptcy depends on whether or not the order grants or denies relief.

The primary, and most analogous example to this case is orders to dismiss bankruptcy cases as bad faith filings.[1]

1. The standard for determining whether stay relief should be granted for "cause" as a bad faith filing is functionally the same as the standard for determining whether or not a bankruptcy case

Unlike an order resolving all of the issues related to a discrete claim or proceeding within a bankruptcy case, the denial of a motion to dismiss does not finally resolve anything. Instead, the denial of a motion to dismiss a bankruptcy case means the same thing it does in any other case: the case goes forward. Accordingly, the vast majority of courts of appeal to consider the issue have concluded that the denial of a motion to dismiss a bankruptcy case is not final. *See*, *e.g.*, *Barben v. Donovan (In re Donovan)*, 532 F.3d 1134, 1137 (11th Cir. 2008) (recognizing that denial of motion to dismiss bankruptcy case is not final); *Fruehauf Corp. v. Jartran, Inc. (In re Jartran, Inc.)*, 886 F.2d 859, 863-64 (7th Cir. 1989) (same); *Promenade Nat. Bank v. Phillips (In re Phillips)*, 844 F.2d 230, 235-36 (5th Cir. 1988) (same); *Farber v. 405 N. Bedford Dr. Corp. (In re 405 N. Bedford Dr. Corp.)*, 778 F.2d 1374, 1379 (9th Cir. 1985) (same).

Similarly, appealability of an order is different depending on whether a request for substantive consolidation is granted or denied. *See Huntington Nat. Bank v. Richardson, et al. (In re Cyberco Holdings, Inc.)*, 734 F.3d 432, 440 (6th Cir. 2013) ("It is not unreasonable to view the contested substantive consolidation motions as a 'judicial unit' in the finality analysis. But that judicial unit must also be considered in the broader context of the adversary proceedings that spawned those motions. *And although granting the motion would have profoundly affected the administration of the bankruptcy estate, very*

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should be dismissed for cause. *See, e.g., In re Lady Bug Corp.*, 500 B.R. 556 (Bankr. E.D. Tenn. 2013) (recognizing that there is "no substantive difference between the cause requirement for dismissal of a petition under Section 1112(b) and the cause requirement for relief from stay under Section 362(d)(1)." (citing *Laguna Assocs. Ltd. v. Aetna Cas. Sur. Co. (In re Laguna Assocs. Ltd.)*, 30 F.3d 734, 737-38 (6th Cir. 1994))."

few, if any, of those consequences come to pass from the denial of the motions." (emphasis added)).

And as this Court held in *Bullard*, the finality of plan confirmation orders also hinges on whether or not the order grants or denies confirmation. *See Bullard*, 135 S.Ct. at 1692 ("We agree with the Bank: The relevant proceeding is the process of attempting to arrive at an approved plan that would allow the bankruptcy to move forward. This is so, first and foremost, because only plan confirmation—or case dismissal—alters the status quo and fixes the rights and obligations of the parties. When the bankruptcy court confirms a plan, its terms become binding on debtor and creditor alike. Denial of confirmation with leave to amend, by contrast, changes little. The automatic stay persists. The parties' rights and obligations remain unsettled.")

These cases all exemplify the flexibility of "finality" in bankruptcy and support a more nuanced approach to determining whether a denial of stay relief is "final" in each case.

III. The Sixth Circuit's Over-Reaching Decision Will Have Widespread Consequences.

Not only is there a clear and definitive circuit split on this important issue of bankruptcy law, but the Sixth Circuit explicitly recognized in this case that there is no clear test to determine finality in this instance:

> [C]ourts have taken the loose finality in bankruptcy as a license for judicial invention. *The result: a series of vague tests that are impossible to apply consistently.*

***

> *This case is a perfect example. The parties are unable to articulate a clear test for whether a bankruptcy order is final. For good reason—the courts have not given them one.* Ritzen asks us to adopt the First Circuit's approach, where '[e]verything depends on the circumstances, naturally: taking into account the particular order's reasoning and effect, an inquiring court must determine ... whether that edict definitively decided a discrete, fully-developed issue that is not reviewable somewhere else.' This test is 'vague' and 'unpredictable,' to say the least. For its part, Jackson points to other circuits, *but those circuits either have similarly vague tests or no consistent test at all.*

App. A, *infra,* pp. 5a-6a (emphasis added).

But the Sixth Circuit went further than merely addressing whether denials of stay relief are final. Instead, the Sixth Circuit attempted to create a "one-size-fits-all" test for determining finality for all orders in bankruptcy cases. As discussed above, this approach cuts against the long-standing tradition, espoused by this Court, that the finality of bankruptcy court orders should be viewed flexibly. *See Gillespie*, 379 U.S. at 152; *Cohen*, 337 U.S. at 545.

If additional courts attempt to utilize the test set forth in this case, the long-held notions of flexible finality could give way to more stringent, paint-by-numbers application of finality in bankruptcy. This Court should proactively

resolve this pending problem and reestablish the enduring principal of flexible finality that has long undergirded bankruptcy practice.

IV. "Finality" of Stay Relief Orders is an Important, Far-Reaching Issue that is Squarely Presented in this Case.

This case concerns a matter that arises every day in bankruptcy courts across the Nation: whether a bankruptcy court order denying relief from stay is "final." For the calendar year 2018, from January 1 through November 30, there were 703,130 bankruptcy cases filed. *See* Am. Bankr. Inst., December 2018 Bankruptcy Statistics–State and District, https://www.abi.org/newsroom/bankruptcy-statistics. Petitioner cannot determine exactly how many of these cases involved motions for stay relief, but can say with confidence that, given the fundamental nature of the automatic stay[2] and the volume of bankruptcy petitions, these requests numbered in the thousands.[3]

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2. This Court has previously recognized the importance of the automatic stay: "The automatic stay provision of the Bankruptcy Code, § 362(a),5 has been described as 'one of the fundamental debtor protections provided by the bankruptcy laws.'" (citing S.Rep. No. 95–989, p. 54 (1978); H.R.Rep. No. 95–595, p. 340 (1977), U.S.Code Cong. & Admin.News 1978, pp. 5787, 5840, 5963, 6296). *Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494, 503 (1986).

3. The numbers surrounding this issue have previously been presented to this court in the petition for a writ of *certiorari* filed by Pinpoint IT Services, LLC in the *Atlas* case arising out of the First Circuit. The petitioner in that case noted that for the twelve month period ending in June of 2014, 194,348 motions requesting relief from the automatic stay were filed. Petition for

As the law of the land currently stands, movants denied relief from stay in the Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits can appeal those denials as a matter of right. Unsuccessful movants in the First and Third Circuits may, depending on the conflicting tests set forth in each of those circuits, file an immediate appeal. And movants in the remaining circuits, the Seventh and D.C. Circuits, will be left to wonder whether or not their courts of appeals will join the majority of circuits that employ the "blanket-rule" approach, will adopt one of the tests employed by the First, Third, or Sixth Circuits, or, to add to the chaos by fashioning their own rules to determine whether an order denying a motion for relief from stay is final or interlocutory. This intolerable situation calls for this Court's intervention and fixing of a uniform, national rule.

To be sure, this Court has consistently found issues of pure Bankruptcy Code interpretation deserving of its review. Indeed, as of 2016, thirty-six of this Court's eighty-two bankruptcy decisions (approximately forty-four percent), comprise of cases that present questions of Bankruptcy Code interpretation without constitutional implications or intersections with other law.[4] As such, this

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Writ of Certiorari, *Pinpoint IT Servs, LLC v. Rivera*, No. 14-418, 2014 WL 5075086, at *5 (U.S. Oct. 8, 2014). Unfortunately, the petitioner in that case withdrew its petition, thereby leaving the question of whether an order denying stay relief is final unresolved. *See Pinpoint IT Servs, LLC v. Rivera*, -- U.S. --, 135 S. Ct. 1758 (Mem) (2015).

4. *See Harris v. Viegelahn*, 135 S. Ct. 1829 (2015) (holding that debtor's postpetition wages held by a chapter 13 trustee under a confirmed chapter 13 plan but not yet distributed must be returned to the debtor after the debtor converts the case to chapter 7 in

good faith); *Bullard*, 135 S. Ct. 1686 (2015) (holding that an order denying confirmation of a chapter 13 plan is not a final order); *Bank of Am. v. Caulkett*, 135 S. Ct. 1995 (2015) (holding that a chapter 7 debtor may not lien strip a wholly-undersecured secured claim); *Clark v. Rameker*, 134 S. Ct. 2242 (2014) (holding that funds held in inherited Individual Retirement Accounts are not "retirement funds" within the meaning of Bankruptcy Code § 522(b)(3)(c) and therefore not exempt); *Bullock v. BankChampaign*, 133 S. Ct. 1754 (2013) (interpreting "defalcation" under Bankruptcy Code § 523); *RadLAX Gateway Hotel v. Amalgamated Bank*, 132 S. Ct. 2065 (2012) (holding that chapter 11 debtor may not confirm a cram-down plan that proposes to sell a creditor's collateral free and clear of liens without permitting the creditor to credit bid); *Ransom v. FIA Card Servs.*, 131 S. Ct. 716 (2011) (holding that a debtor may deduct a "car ownership allowance" from "disposable income" under Bankruptcy Code § 707 for purposes of calculating minimum payments under a chapter 13 plan only if the debtor is making loan or lease payments); *Schwab v. Reilly*, 130 S. Ct. 2652 (2010) (holding that the trustee need not object to a facially valid exemption claim in order to preserve the estate's right to retain value in excess of the permissible exemption amount); *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010) (interpreting "projected disposable income" under chapter 13); *Travelers Cas. & Sur. Co. v. Pac. Gas & Elec. Co.*, 549 U.S. 443 (2007) (holding that the Bankruptcy Code does not bar recovery of contractual attorney's fees merely because the fees were incurred in a bankruptcy matter); *Rousey v. Jacoway*, 544 U.S. 320 (2005) (holding that Individual Retirement Account assets may be exempted under Bankruptcy Code § 522); *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004) (determining proper measure of cram-down interest in chapter 13 plan); *Lamie v. U.S. Tr.*, 540 U.S. 526 (2004) (holding that a chapter 7 debtor's attorney is not entitled to attorney fee compensation from the estate under Bankruptcy Code §§ 327, 330); *Archer v. Warner*, 538 U.S. 314 (2003) (interpreting "money ... obtained ... by fraud" dischargeability provision); *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1 (2000) (holding that an administrative claimant has no standing to pursue a 506(c)

surcharge against a secured creditor's collateral); *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434 (1999) (interpreting the absolute priority rule and new value corollary); *Cohen v. de la Cruz*, 523 U.S. 213 (1998) (interpreting the scope of "actual fraud" for dischargeability purposes); *Kawaauhau v. Geiger*, 523 U.S. 57 (1998) (interpreting willful and malicious injury scienter standard for purposes of dischargeability); *Assocs. Comm'l Corp. v. Rash*, 520 U.S. 953 (1997) (determining standard for evaluating collateral value under chapter 13 plan); *Field v. Mans*, 516 U.S. 59 (1995) (interpreting "reliance" for purposes of fraud dischargeability); *Citizens Bank v. Strumpf*, 516 U.S. 16 (1995) (holding that an administrative hold is not an impermissible setoff); *Rake v. Wade*, 508 U.S. 464 (1993) (determining the proper measure of interest on oversecured mortgage arrears cured under a chapter 13 plan); *Nobelman v. Am. Sav. Bank*, 508 U.S. 324 (1993) (holding that chapter 13 bars lien stripping with respect to the debtor's principal residence); *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993) (determining standard of excusable neglect); *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992) (holding that trustee's failure to object timely to facially invalid exemption claim bars trustee from later contesting it); *Barnhill v. Johnson*, 503 U.S. 393 (1992) (holding that transfer occurs at the time of honor with respect to a check received prior to preference reach back period but honored within preference period); *Dewsnup v. Timm*, 502 U.S. 410 (1992) (interpreting the phrase "allowed secured claim" to prohibit lien stripping in chapter 7); *Union Bank v. Wolas*, 502 U.S. 151 (1991) (interpreting the phrase "ordinary course of business" for purposes of preference defenses); *Toibb v. Radloff*, 501 U.S. 157 (1991) (holding that an individual not engaged in business may reorganize under chapter 11); *Johnson v. Home State Bank*, 501 U.S. 78 (1991) (holding that a mortgage that survived a chapter 7 discharge may be treated as a claim in a subsequent chapter 13 case); *Farrey v. Sanderfoot*, 500 U.S. 291 (1991) (holding that a debtor may not avoid a lien imposed on property as part of a reordering of the debtor's and former spouse's rights in their divorce settlement); *Grogan v. Garner*, 498 U.S. 279 (1991) (holding that the preponderance

case fits squarely within the standard of cases for which *certiorari* is granted.

Moreover, uniformity in this area is particularly important in light of the Constitution's grant to Congress of authority to establish "*uniform* Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4 (emphasis added).

Because this issue is fundamental to bankruptcy practice throughout the country, and because courts are currently divided on how to resolve this question, this Court should grant this petition for *certiorari* and resolve this question once and for all.

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of evidence rather than clear and convincing standard of proof applies to dischargeability exceptions); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989) (holding that Bankruptcy Code § 506 allows postpetition interest on oversecured involuntary liens); *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988) (holding that the promise of future sweat equity is insufficient to satisfy the new value corollary to the absolute priority rule, without determining whether that corollary survives under the Bankruptcy Code); *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365 (1988) (holding that the Bankruptcy Code does not authorize postpetition interest on undersecured claims); *CFTC v. Weintraub*, 471 U.S. 343 (1985) (holding that a bankruptcy trustee has the power to waive a corporate debtor's attorney client privilege).

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED OCTOBER 16, 2018

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 18-5157/5161

IN RE: JACKSON MASONRY, LLC,

Debtor.

RITZEN GROUP, INCORPORATED,

Appellant,

v.

JACKSON MASONRY, LLC,

Appellee.

On Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
Nos. 3:17-cv-00806; 3:17-cv-00807
Aleta Arthur Trauger, District Judge.

United States Bankruptcy Court for the
Middle District of Tennessee
No. 3:16-bk-02065
Keith M. Lundin and Charles M. Walker, Judges.

Appendix A

October 4, 2018, Argued
October 16, 2018, Decided
October 16, 2018, Filed

Before: SUTTON, McKEAGUE, and THAPAR, Circuit Judges.

OPINION

THAPAR, Circuit Judge. Deadlines matter. Ritzen Group missed two of them: the closing deadline in a contract and the appellate deadline for bankruptcy orders. Accordingly, the district court rejected both of Ritzen's appeals. We affirm.

I.

Over five years ago, Ritzen Group contracted to buy a piece of property from Jackson Masonry. But the sale never went through. Ritzen claims Jackson breached by providing error-ridden documentation on the eve of the closing deadline, while Jackson claims Ritzen breached by failing to secure funding by that deadline.

After the deal failed, Ritzen sued Jackson for breach of contract in Tennessee state court. The case progressed for nearly a year-and-a-half until, about a week before trial, Jackson filed for bankruptcy. As a result of the bankruptcy, the litigation was automatically stayed. 11 U.S.C. § 362. Ritzen filed a motion to lift the stay, which the bankruptcy court denied. Ritzen did not appeal.

Instead, Ritzen sought to vindicate its rights in bankruptcy court. So Ritzen brought a claim against the bankruptcy estate. It lost. The bankruptcy court found that Ritzen, not Jackson, breached the contract. Ritzen subsequently filed two appeals to the district court. The first targeted the bankruptcy court's order denying relief from the automatic stay. The second targeted the breach-of-contract determination. The district court found that the first appeal was untimely and rejected the second on the merits.

Now Ritzen appeals again. We review the bankruptcy court's fact findings for abuse of discretion and its legal conclusions de novo. *In re Purdy*, 870 F.3d 436, 442 (6th Cir. 2017).

II.

We start with Ritzen's first appeal contesting the stay order. We begin, as we must, with the text of the bankruptcy appeals statute. Under the statute, a bankruptcy court's order may be immediately appealed if it is (1) "entered in [a] . . . proceeding[]" and (2) "final"—terminating that proceeding. 28 U.S.C. § 158(a). An order denying stay relief terminates a proceeding, so it is final. In bankruptcy, parties must appeal final orders within fourteen days of the court's ruling. Fed. R. Bankr. P. 8002(a). Ritzen did not appeal the stay-relief denial within fourteen days. Thus, Ritzen's appeal is untimely.

Appendix A

A.

In ordinary civil litigation, parties can generally only appeal "final decisions." 28 U.S.C. § 1291. A decision is "final" when the court has disposed of every claim for relief by every party and has nothing left to do but execute the judgment. *Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897, 902, 190 L. Ed. 2d 789 (2015). In other words, parties cannot appeal until the entire case is complete. This general rule prevents "piecemeal" appeals that would bog things down, "undermin[ing] efficient judicial administration." *Mohawk Indus., Inc v. Carpenter*, 558 U.S. 100, 106, 130 S. Ct. 599, 175 L. Ed. 2d 458 (2009) (internal quotation marks omitted).

But bankruptcy is different. A bankruptcy case is an aggregation of individual disputes, many of which could be entire cases on their own. *See Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1692, 191 L. Ed. 2d 621 (2015). Take, for example, Ritzen's contract claim against Jackson—a fully discrete dispute litigated within the overall umbrella of Jackson's bankruptcy case. Once such a dispute is finally decided, it is immediately appealable—the fact that the overall bankruptcy case may be ongoing is no reason to delay. In fact, just the opposite: a bankruptcy case is like a jigsaw puzzle, and the claims against the bankrupt debtor are the pieces. To complete the puzzle, one must "start by putting some of the pieces firmly in place." John Hennigan, Jr., *Toward Regularizing Appealability in Bankruptcy*, 12 Bankr. Dev. J. 583, 601 (1996). "Accordingly, Congress has long provided that orders in bankruptcy cases may be immediately appealed if they finally dispose of discrete

disputes within the larger case." *Bullard*, 135 S. Ct. at 1692 (quoting *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 657 n.3, 126 S. Ct. 2105, 165 L. Ed. 2d 110 (2006) (internal quotation marks omitted)).

Unfortunately, courts have taken the loose finality in bankruptcy as a license for judicial invention. The result: a series of vague tests that are impossible to apply consistently. 1 Collier on Bankruptcy ¶ 5.08 (16th ed. 2014) ("In the specific context of bankruptcy cases, the courts have had a difficult time in determining what is a final order."); *see, e.g., In re Perl*, 811 F.3d 1120, 1126 (9th Cir. 2016) ("Our precedent has not been entirely pellucid regarding the flexible concept of finality in the bankruptcy context."); *In re Comdisco, Inc.*, 538 F.3d 647, 651 (7th Cir. 2008) (stating that bankruptcy finality caselaw "suffers from a lack of clarity" and the list of orders considered final "is dismayingly long and inconsistent"); *In re West Electronics, Inc.*, 852 F.2d 79, 81 (3d Cir. 1988) ("In the context of bankruptcy cases, the definition of a final order is less than crystalline." (quoting *In re Meyertech Corp.*, 831 F.2d 410, 414 (3d Cir. 1987))). In some cases, courts do not articulate a general test at all. They simply treat the finality of the specific order before them as a case-by-case question and do not look to or articulate principles that can be applied to other types of orders. As a result, parties must constantly guess, at risk of either appealing too early and getting bounced back, or appealing too late and forfeiting their rights. Appellate deadlines cannot serve their purpose when their trigger is unclear.

This case is a perfect example. The parties are unable to articulate a clear test for whether a bankruptcy order is final. For good reason—the courts have not given them one. Ritzen asks us to adopt the First Circuit's approach, where "[e]verything depends on the circumstances, naturally: taking into account the particular order's reasoning and effect, an inquiring court must determine . . . whether that edict definitively decided a discrete, fully-developed issue that is not reviewable somewhere else." *In re Atlas IT Export Corp.*, 761 F.3d 177, 185 (1st Cir. 2014). This test is "vague" and "unpredictable," to say the least. *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, No. 3:17-cv-00806, 2018 U.S. Dist. LEXIS 12296, 2018 WL 558837, at *5 (M.D. Tenn. Jan. 25, 2018). For its part, Jackson points to other circuits, but those circuits either have similarly vague tests or no consistent test at all. *See, e.g., In re West*, 852 F.2d at 81 (applying bankruptcy finality when "nothing remains for the [lower] court to do" but also considering finality "in a more pragmatic and less technical sense").

The problem here is easy to diagnose. None of these courts have started where they should: with the text of the bankruptcy appeals statute. *See Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69, 131 S. Ct. 716, 178 L. Ed. 2d 603 (2011). That statute provides:

> The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees [and certain interlocutory orders] of bankruptcy judges entered in cases and proceedings . . . .

28 U.S.C. § 158(a). Breaking it down, a bankruptcy court's decision can be appealed if it is (1) a "final judgment[], order[], [or] decree[]," or a qualifying interlocutory order; and (2) entered in either a "case[]" or a "proceeding[]." *Id.* Instead of limiting appeals to final judgments in cases, Congress specifically extended the scope of appellate jurisdiction in bankruptcy matters to include "final judgments, *orders, and decrees*" entered in both "cases *and proceedings*." *Bullard*, 135 S. Ct. at 1692 (quoting 28 U.S.C. § 158(a)) (emphasis added). These extra words have meaning. *Id.*; *Ransom*, 562 U.S. at 70 ("[W]e must give effect to every word of a statute wherever possible." (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 12, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004))*; see also* 2 Collier on Bankruptcy ¶ 301.03 (distinguishing between bankruptcy "cases" and discrete "proceedings" within the overall bankruptcy case). Indeed, courts have viewed the "proceeding" as the relevant "judicial unit" for bankruptcy finality for over 100 years. *In re Saco Local Dev. Corp.*, 711 F.2d 441, 444-45 (1st Cir. 1983); *see also* Hennigan, *supra*, at 584.[1]

Thus, the statutory text provides a clear test for courts to apply: a bankruptcy court's order may be immediately

1. Congress also provided for immediate appeals of certain interlocutory bankruptcy orders. *See In re Lindsey*, 726 F.3d 857, 860 (6th Cir. 2013) (citing 28 U.S.C. §§ 158(a)(3), (d)(2)(A)). These statutes serve as an added layer of flexibility, permitting appeals of otherwise non-final orders in "exceptional circumstances." *In re A.P. Liquidating Co.*, 350 B.R. 752, 755 (E.D. Mich. 2006). But limited interlocutory appeals are a supplement, not a replacement, for the broad approach to appealability set forth in § 158(a) itself. *See Bullard*, 135 S. Ct. at 1692. In any event, since Ritzen did not rely on these statutes here, we do not address them.

appealed if it is (1) "entered in [a] . . . proceeding" and (2) "final"—terminating that proceeding. We analyze the meaning of these terms and apply them below.

B.

This case concerns the finality of an order denying relief from the automatic stay. Here, Ritzen sought such relief, was denied, and did not appeal until months later. If that stay-relief denial was a final and immediately-appealable order, then the fourteen-day clock started to tick as soon as it was entered, and Ritzen's appeal months later was untimely. *See* Fed. R. Bankr. P. 8002(a). We conclude that it was because (1) stay-relief motions initiate a proceeding and (2) this proceeding is terminated by an order denying stay relief.

Proceeding. The first step is to identify the appropriate "judicial unit" for finality analysis—the "proceeding[]." 28 U.S.C. § 158(a). Generally speaking, a proceeding is a process whereby a court follows some formal procedural steps to adjudicate a moving party's claim for relief. This is true now and was true when the bankruptcy appeals statute was enacted. *Compare Black's Law Dictionary* (10th ed. 2014), *with Black's Law Dictionary* (5th ed. 1979) (defining "proceeding" as "[r]egular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment"). And as explained above, in the context of bankruptcy the word "proceeding" has long been understood to refer to disputes narrower than, and distinct from, the bankruptcy case as a whole. *See Black's Law Dictionary* (10th ed.

2014); *see also In re Saco*, 711 F.2d at 444-45. Indeed, an older edition of the leading bankruptcy treatise (closer in time to the enactment date of the statute) evokes both of these concepts—procedural formality and discreteness—in defining "proceeding." 2 Collier on Bankruptcy ¶ 301.03 (15th ed. 1996) (defining "proceeding" as "any subaction raised or commenced within the case, including motions or adversary proceedings, which may raise a disputed or litigated matter").

Putting it all together, a "proceeding[]" under § 158(a) is a discrete dispute within the overall bankruptcy case, resolved through a series of procedural steps. Adversary proceedings are the archetypal example. They are "essentially full civil lawsuits carried out under the umbrella of the bankruptcy case," generally governed by the Federal Rules of Civil Procedure or bankruptcy rule adaptations of them. *Bullard*, 135 S. Ct. at 1694; *see also* Fed. R. Bankr. P. 7001 Advisory Committee Note (1983 Amendment).[2] To conclude with an analogy, a "proceeding" is akin to a case within a case.

A bankruptcy court's stay-relief adjudication fits this description. It begins "on request of a party" through a motion. 11 U.S.C. § 362(d); Fed. R. Bankr. P. 9014(a). The non-moving party then must be given notice through

2. Of course, a dispute does not *have* to be a full-blown "adversary proceeding" to qualify as an appealable "proceeding[]" under § 158(a). *See Bullard*, 135 S. Ct. at 1694 (explaining that an order confirming a repayment plan is final, even though it arises out of a "contested matter" rather than an "adversary proceeding") (citing Fed. R. Bankr. P. 3015(f), 7001, 9014).

service. Fed. R. Bankr. P. 9014(a)-(b). After that, on a set timeframe, the court must conduct a hearing where both parties are present. 11 U.S.C. § 362(d)-(e). Afterwards, the court determines whether the relevant legal standard has been met and grants or denies relief accordingly. *Id.* So there is a discrete claim for relief, a series of procedural steps, and a concluding decision based on the application of a legal standard. This sure looks like a proceeding.

We also look to other provisions of the statute for help. Again, the bankruptcy appeals statute covers "cases and *proceedings* referred to the bankruptcy judges under section 157 of this title." 28 U.S.C. § 158(a) (emphasis added). And § 157, in turn, contains a non-exhaustive list of "[c]ore *proceedings*" that includes "motions to terminate, annul, or modify the automatic stay." *Id.* § 157(b)(2)(G) (emphasis added). Courts presume that the same words in the same statute mean the same thing. *See Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 232, 127 S. Ct. 2411, 168 L. Ed. 2d 112 (2007). Here, we presume Congress used the same word—"proceedings"—consistently across these statutory subsections. Stay-relief motions initiate "core proceedings" under § 157, so presumably they are also "proceedings" in § 158. The Supreme Court used similar logic in *Bullard*, though it was careful to warn that this "hardly clinches the matter" because § 157's "purpose is not to explain appealability." 135 S. Ct. at 1693. Rightly so, and we do not assume that being listed as a "core proceeding" in § 157(b)(2) is either necessary or sufficient to be an appealable "proceeding[]" under § 158(a). But still, the fact that stay-relief motions are referred to as a type of "proceeding[]" in § 157 certainly suggests that they are also "proceedings" in the next section over.

In conclusion, a stay-relief motion initiates a series of formal procedural steps whereby a court determines whether a legal standard is met and grants or denies relief accordingly. This stay-relief dispute is distinct from the overall bankruptcy case. It qualifies as a "proceeding[]" under 28 U.S.C. § 158(a).

Final order. The next question is whether an order denying stay relief is "final"—i.e., whether the order terminates the stay-relief proceeding. 28 U.S.C. § 158(a). The finality of a bankruptcy order is determined "first and foremost" by whether it "alters the status quo and fixes the rights and obligations of the parties." *Bullard*, 135 S. Ct. at 1692. Additionally, courts should look to whether the order completely resolves all substantive litigation within the proceeding. *See id.* at 1692-93. In a nutshell, a bankruptcy order is final "if it is both procedurally complete and determinative of substantive rights." Hennigan, *supra*, at 587.

In *Bullard*, the Supreme Court concluded that a bankruptcy court order denying a debtor's repayment plan with leave to amend is not final. 135 S. Ct. at 1696. Instead, because the debtor has leave to amend, the plan confirmation process continues until either (1) the debtor proposes an acceptable repayment plan that is then confirmed by the court, becoming binding and preclusive on all parties; or (2) the court concludes that the debtor is incapable of proposing an acceptable plan and dismisses the bankruptcy case in its entirety. *Id.* at 1692-93. Either of these two outcomes "fixes the rights and obligations of the parties" at issue in the plan confirmation process,

but a simple plan denial with leave to amend does not. *Id.* at 1692.

In contrast, a stay-relief denial is procedurally complete—once entered there are no more "rights and obligations" at issue in the stay-relief proceeding. The stay-relief denial prohibits the moving party from pursuing its pre-bankruptcy claim against the debtor. The "judicial unit" is the stay-relief proceeding, and that unit is over once a stay-relief denial is issued. *Id.* This is unlike the plan confirmation denial addressed by *Bullard*, which was just one step in a back-and-forth process. And it is also unlike, for example, a denial of a motion to dismiss or a motion for summary judgment in an ordinary civil case. Those motions address the same question that the ultimate decision-maker will—whether the plaintiff can win on the merits. Granting such a motion is a final answer to the ultimate question ("no") but denying one is not ("maybe"). A stay-relief motion asks its own discrete question, and this question is finally answered by either a grant or a denial.

As with many rules, there are exceptions. But here, the exception—a denial without prejudice—helps prove the rule. Courts may deny stay-relief motions without prejudice if it appears that changing circumstances could change the stay calculus. *See, e.g., In re Palmdale Hills Prop., LLC*, 423 B.R. 655, 660 (B.A.P. 9th Cir. 2009); *In re Arizmendi*, No. BR 09-19263, 2011 Bankr. LEXIS 2138, 2011 WL 2182364, at *13 (Bankr. S.D. Cal. May 26, 2011). And when a court denies a motion without prejudice, a party may file a second motion if circumstances change.

But the bankruptcy court here did not deny Ritzen's motion without prejudice, meaning that its stay-relief order was intended to be the final word on the matter. Accordingly, we need not determine now whether a stay-relief denial without prejudice is "final" for purposes of § 158(a).

In addition to procedural completeness, *Bullard* teaches that we must also look to the consequences of the order at issue. 135 S. Ct. at 1692-93. The more significant and irreparable the consequences, the more likely a given order really is final. The consequences of a stay-relief denial are both significant and irreparable. Once denied, the creditor usually has no choice but to file a proof of claim in bankruptcy, litigating their pre-bankruptcy dispute anew in the bankruptcy court. They have no choice because failure to file a proof of claim could preclude them from collecting anything once the bankruptcy case concludes and the debtor's debts are discharged. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 383-85, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993). Creditors cannot simply wait it out and pick up their pre-bankruptcy litigation where they left off. And if they did, their stay-relief claim could end up moot: once a bankruptcy case ends, the automatic stay is lifted anyway. Thus, if a stay-relief denial is not immediately appealable, then it is effectively never appealable. *See Eddleman v. U.S. Dep't of Labor*, 923 F.2d 782, 785 (10th Cir. 1991), *overruled in part on other grounds by Temex Energy, Inc. v Underwood, Wilson, Berry, Stein & Johnson*, 968 F.2d 1003, 1005 n.3 (10th Cir. 1992).

Ritzen argues that the stay order was not final because it was not a ruling on the merits of its contract claim. Rather, it simply determined the location of the litigation. Thus, it did not "finally resolve all issues between the parties." 18-5157 Appellant Br. at 28. But that is irrelevant. A substantive claim against the bankruptcy estate is adjudicated in a *different* proceeding, separate from the stay-relief proceeding. That happened here. After the stay-relief denial, Ritzen filed a proof of claim, Jackson responded, and the claim was resolved through an adversary proceeding. Fed. R. Bankr. P. 7001. Though the stay-relief denial did not fix *every* right and obligation of the parties, it fixed the rights and obligations at issue in the stay-relief proceeding. That is enough in bankruptcy. Indeed, Ritzen's argument—that an order can only be appealable if it "finally resolve[s] all issues between the parties"—is really just an attempt to import the definition of finality from ordinary civil litigation. 18-5157 Appellant Br. at 28. As explained above, in ordinary litigation parties generally can only appeal once the entire case is complete and all issues have been resolved, but in bankruptcy, parties can appeal discrete disputes within the overall case. Ritzen's argument would have us ignore the longstanding and textually-compelled rule of looser finality in bankruptcy. We decline to do so.

Ritzen makes a separate, last-ditch policy argument: if stay-relief denials are final, then debtors would be forced "to confront early, costly, and time-consuming appeals while their bankruptcies are just beginning." 18-5157 Appellant Br. at 32. But "early" appeals are a necessary consequence of the looser concept of finality

in bankruptcy. And there is good reason to be skeptical of Ritzen's doomsday predictions. After all, as Ritzen concedes, stay-relief denials are considered final in many circuits and often have been for decades. *See* Collier, *supra* at ¶ 5.09 (citing the Second, Third, Fourth, Seventh, and Tenth Circuits, and noting that "the courts have . . . concluded, almost unanimously, that orders refusing to lift the stay, are final"). The sky has not fallen in these circuits. If anything, efficiency concerns *undermine* Ritzen's argument. Ritzen's proposal would force creditors who lose stay-relief motions to fully litigate their claims in bankruptcy court and then, after the bankruptcy case is over, appeal and seek to redo the litigation all over again in the original court. That would be a tremendous waste of time and money. And of course, creditors would only appeal if they *lost* in bankruptcy court. So Ritzen's proposal would also guarantee creditors—but not debtors—a second bite at the apple. That is neither fair nor efficient. Finally, even if Ritzen is right about policy, it does not matter for our analysis here. No policy argument can overcome the plain text of a statute. As shown above, the text is plain.

In conclusion, a stay-relief denial ends a proceeding, fixes the rights of the parties, and has significant consequences for them. Under *Bullard*, it qualifies as a final order.

C.

Anticipating our conclusion that stay-relief denials are immediately appealable, Ritzen tries to recast its

motion as seeking *both* stay relief *and* dismissal of Jackson's bankruptcy case in entirety. *See* 11 U.S.C. § 1112(b) (permitting a bankruptcy court to dismiss a case "for cause" "on request of a party in interest"). If the bankruptcy court also denied a motion to dismiss, and such denials are not immediately appealable, then Ritzen's appeal was timely.

But Ritzen did not file a motion to dismiss. From title to conclusion, Ritzen's motion sought relief from the automatic stay, not dismissal of Jackson's bankruptcy case. Ritzen titled its motion "Ritzen Group, Inc.'s Motion to Modify or Lift the Automatic Stay." BR. 57 at 1.[3] In the first sentence of the introduction, Ritzen "respectfully moves the Court to modify or lift the automatic stay." *Id.* The argument section's sub-headings are, "The Court Should Grant Relief From Stay for Judicial Economy" and "The Court Should Grant Relief From Stay 'For Cause' Under Section 362(d)(1)." *Id.* at 15, 18. In each of these argument sub-sections, Ritzen describes and applies the legal test for stay relief and concludes by requesting it. Though Ritzen cites some dismissal cases in the second sub-section, Ritzen clearly explains that they are only persuasive authority, cited because the legal standards for stay relief and dismissals are similar. *Id.* at 18. Finally, in the conclusion, Ritzen "requests that the Court enter an order granting relief from the automatic stay provisions of 11 U.S.C. § 362"—again with no mention of dismissal. *Id.* at 23. Indeed, Ritzen only requests dismissal a single

3. The prefix "BR" refers to the bankruptcy court docket, Case No. 16-bk-02065. The prefix "DR" refers to the district court docket, Case No. 17-cv-00806.

time in the entire motion. Buried at the end of the facts section, after requesting that the court lift the stay, Ritzen says "[i]n addition, the Court should dismiss the bankruptcy as a bad faith filing." *Id.* at 12. But this single passing request for dismissal in the *facts* section does not override its glaring omission from every other part of the brief. *Cf. McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997) ("It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to put flesh on its bones." (internal quotation marks and alteration omitted)).

Ritzen says this conclusion would "elevate[] form over substance." 18-5157 Appellant Br. at 19-20. Not so. Ritzen relies entirely on cases where pleadings clearly sought one form of relief but were incorrectly labelled as seeking another. In these cases, courts construed pleadings based on their substance rather than their titles. *See, e.g., Andrews v. United States*, 373 U.S. 334, 337-38, 83 S. Ct. 1236, 10 L. Ed. 2d 383 (1963) (construing a criminal defendant's motion for correcting his sentence under Fed. R. Crim. P. 35 as a habeas motion under 28 U.S.C. § 2255 because "in this area of the law . . . adjudication upon the underlying merits of claims is not hampered by reliance upon the titles petitioners put upon their documents" (internal quotation marks omitted)); *Lam Research Corp. v. Schunk Semiconductor*, 65 F. Supp. 3d 863, 869 (N.D. Cal. 2014) (rejecting a party's attempt to avoid a local rule against raising repetitive arguments in motions for reconsideration by giving his motion a different title; despite the title change, the motion "raise[d] identical arguments as those raised in

the original motion for reconsideration"); *Russ v. Safeco Ins. Co. of Am.*, No 2:11-cv-195-KS-MTP, 2013 U.S. Dist. LEXIS 42333, 2013 WL 1310501, at *28 (S.D. Miss. Mar. 26, 2013) ("Notwithstanding the title of the [Rule 12(f)] motion, the relief requested by the Plaintiff falls within the confines of Federal Rule of Civil Procedure 37."). Ritzen's situation is different. Yes, Ritzen's motion sought stay relief in its title. But it also sought stay relief practically everywhere else. Construing its motion accordingly does not "elevate form over substance"—it is pure substance. Though Ritzen may be right that the tests for dismissal and stay relief are similar (or even the same), courts do not construe motions as seeking every conceivable form of relief that could be granted based on the arguments contained therein. Courts are not mind readers. Parties are responsible for being clear in what they seek with their motions. Here, Ritzen was clear; it sought stay relief. Its belated attempt to recast its motion fails.

Since Ritzen only sought stay relief, it naturally follows that the bankruptcy court only denied stay relief. But if there was any doubt, the court here removed it by clearly and repeatedly explaining exactly what it was denying. For example, at one point the court reiterated three times in four sentences of the transcript that Ritzen had not filed a motion to dismiss:

> I haven't been asked to dismiss the case. I don't have a motion to dismiss. I haven't tried a motion to dismiss but the very first thing I said to you is your case here today has been more like a motion to dismiss the case than like

> a relief statement. But, trust me, I don't have a motion to dismiss and I'm not going to dismiss the Bankruptcy case today.

DR. 12-2 at A289. The court's analysis also made clear that it did not consider the possibility of dismissal. The main reason it denied Ritzen's motion was judicial economy: if it granted stay relief and Ritzen won against Jackson in state court, then Ritzen would still have to file a claim in Jackson's bankruptcy case to actually recover on that state court judgment. Obviously, this assumes that Jackson's bankruptcy case would continue and not be dismissed. If dismissal was a possibility, then this analysis would make no sense. Finally, the court's ultimate ruling from the bench was crystal clear: "[f]or the following reasons I'm going to deny the request to modify or lift the automatic stay." *Id.* at A313. This ruling was memorialized by a written order the next day which likewise made no reference to dismissal.

Ritzen argues that the bankruptcy court implicitly rejected dismissal because it noted several times that the legal standards for stay relief and dismissal are similar. Thus, Ritzen argues, it was "faced with a Hobson's Choice: file a second, identical motion styled as a 'Motion to Dismiss' and subject itself to potential sanctions" or accept that dismissal had already been effectively denied. 18-5157 Appellant Br. at 25-26. Of course, Ritzen neglects to mention that this was a problem entirely of its own making—if it had clearly sought dismissal, then the court would have clearly considered it. In any event, a court's offhand remarks about the legal standard for a

motion do not mean that it has pre-judged the outcome of that motion. And even if it had, that did not excuse Ritzen from actually attempting to test it. In fact, at the stay-relief hearing the judge specifically contemplated a potential future motion to dismiss by Ritzen. Ritzen was not faced with a "Hobson's Choice" at all—it was free to file a motion to dismiss after its request for stay relief was denied. It chose not to.

Ritzen clearly sought, and the bankruptcy court clearly denied, stay relief. Stay-relief denials are final orders. Thus, Ritzen's first appeal is untimely, and we do not address its merits.

III.

Ritzen's second appeal concerns its underlying contract claim against Jackson. But Ritzen cannot show that the bankruptcy court clearly erred when it found that Ritzen breached by failing to secure funding in a timely fashion. Under governing law, Ritzen's breach means it is unable to recover against Jackson, even if Jackson also breached. Therefore, we affirm without addressing Ritzen's claim against Jackson.

Under Tennessee law, a plaintiff cannot recover for breach of contract unless they themselves were able to perform.[4] *Margrave v. Channabassappa*, No. 87-159-II, 1987 Tenn. App. LEXIS 3036, 1987 WL 19444, at *5 (Tenn. Ct. App. Nov. 6, 1987) (citing *Ching-Ming Chen v.*

4. The parties agree that their contractual dispute is governed by Tennessee law.

Advantage Co., 713 S.W.2d 79, 81 (Tenn. Ct. App. 1986)); *see also* 10 *Corbin on Contracts* § 54.20 (2017). Ritzen asserts that this rule only applies to plaintiffs seeking monetary damages. But Ritzen is incorrect; it also applies to plaintiffs seeking specific performance. Indeed, the Tennessee Court of Appeals has applied this rule to a plaintiff similarly situated to Ritzen here. *Gibson v. Jones*, No. W2008-00042-COA-R3-CV, 2009 Tenn. App. LEXIS 82, 2009 WL 482376, at *2-3 (Tenn. Ct. App. Feb. 25, 2009) (rejecting a real estate buyer's action for specific performance because he was unable to pay for the property by the deadline).

At issue here is Ritzen's core performance as a buyer—whether it was able to pay for the property by the closing deadline as required by the contract. Ritzen does not dispute that failure to secure funding by the closing deadline would have been a material breach. Instead, Ritzen claims that it actually had secured funding. The bankruptcy court conducted a three-day trial to address this very question (among others). After hearing testimony from ten witnesses and reviewing hundreds of documents, the court ruled against Ritzen and set forth detailed factual findings in a thirteen-page order, concluding that Ritzen was unable to perform the contract at closing. On appeal, the district court conducted a thorough review of the record and upheld this conclusion. We directly (but deferentially) review the bankruptcy court's factual finding. *Thompson v. Greenwood*, 507 F.3d 416, 419 (6th Cir. 2007). We can only reverse if that finding is "clearly erroneous." *In re Purdy*, 870 F.3d at 442.

Plenty of evidence supports the bankruptcy court's conclusion that Ritzen breached. In the months leading

up to closing, Ritzen struggled to find financing. At least two banks rejected it. Ritzen finally found a potential financer two weeks before the closing deadline—Amber Lane. But Amber Lane would only provide funding if Ritzen assigned them its rights under the contract (i.e., the right to the property). Ritzen and Amber Lane exchanged several drafts but were unable to finalize the assignment agreement by the closing deadline. In fact, the agreement was not finalized until eight days *after* the deadline. Instead, on closing day, Ritzen presented Jackson with a two-sentence letter from the bank stating that the funds were "available on deposit . . . for delivery to Amber Lane . . . upon confirmation of the satisfaction of several conditions related to the closing . . . ." DR 12-5 at Pg. ID #5890. Even at face value, this letter offered no confirmation that Amber Lane would deliver the funds *to Jackson*—the actual seller—and did not explain what the vague "several conditions" were. And, to add another layer of uncertainty, it turns out Amber Lane did not even have the money in its account. Instead, the money was to come from Byrd Cain, step-father of Amber Lane's owner. But Mr. Cain provided no written authorization to transfer the funds from his account. Nor did he testify at trial.

In response, Ritzen argues that, although it did not have an actual agreement or firm written commitment from anyone, various witnesses testified after-the-fact that the funds would have been available. But the bankruptcy court did not find these witnesses persuasive. For instance, it found that Amber Lane's owner "presented little more than a hypothetical description of what might have been or could have been under circumstances that did not actually exist," since the assignment agreement had not been finalized. BR. 423 at 7. It concluded that,

although Ritzen had tried, it had not "secured funding to close the deal" by the deadline. *Id.* at 13. Neither Ritzen nor its witnesses offer a satisfactory explanation for how the money would have been transferred to Jackson without any agreement in place governing how it would be spent. Thus, Ritzen's arguments do not show that the bankruptcy court's conclusion was clearly erroneous.

It is not our role to second-guess the bankruptcy court based on a cold record. Ritzen had its day in court and lost. All we can do is correct clear errors, and we do not find any here.

* * *

We therefore affirm the judgments of the district court and bankruptcy court.

APPENDIX B — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION, FILED JANUARY 25, 2018

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Case No. 3:17-cv-00806
Judge Aleta A. Trauger

RITZEN GROUP, INC.,

Appellant,

v.

JACKSON MASONRY, LLC,

Appellee.

Case No. 3:17-cv-00807
Judge Aleta A. Trauger

RITZEN GROUP, INC.,

Appellant,

v.

JACKSON MASONRY, LLC,

Appellee.

Appendix B

January 25, 2018, Decided
January 25, 2018, Filed

MEMORANDUM

Before the court are two appeals filed by Ritzen Group, Inc. ("Ritzen") from orders in the bankruptcy proceedings of Jackson Masonry, LLC ("Jackson Masonry") (Bankr. Case No. 3:16-bk-02065). Ritzen's first Notice of Appeal relates to a ruling made following a June 14, 2016 hearing, in which Ritzen sought relief from the automatic stay. (Case No. 3:17-cv-00806 ("*Ritzen I*"), Docket No. 1.) Ritzen has filed an Appellant's Brief (*Ritzen I*, Docket No. 11), to which Jackson Masonry has filed an Appellee's Brief in response (*Ritzen I*, Docket No. 15), and Ritzen has filed a Reply Brief (*Ritzen I*, Docket No. 17). Ritzen's second Notice of Appeal relates to the bankruptcy court's later disposition of two consolidated adversary proceedings between Ritzen and Jackson Masonry. (Case No. 3:17-cv-00807 ("*Ritzen II*"), Docket No. 1.) Ritzen has filed an Appellant's Brief (*Ritzen II*, Docket No. 11), to which Jackson Masonry has filed an Appellee's Brief in response (*Ritzen II*, Docket No. 20), and Ritzen has filed a Reply Brief (*Ritzen II*, Docket No. 23). For the reasons stated herein, Ritzen's first appeal will be dismissed as untimely, and the Bankruptcy Court's judgment in the second appeal will be affirmed.

Appendix B

I. BACKGROUND AND PROCEDURAL HISTORY

A. Initial Dispute and Chancery Court Action

In 2013, Jackson Masonry and Ritzen entered into a contract for Ritzen to purchase a piece of Jackson Masonry's Nashville real property for $1.55 million. (*Ritzen II*, Docket No. 5 at 2680-90 ("Contract"), at 1-10.) The contract provided that "[t]he consummation of the transaction contemplated by this Agreement ('Closing') shall take place on a mutually agreeable day and time," as calculated within a framework set forth in the contract. (*Id.* at 2.) Although the parties have disputed the calculation of some aspects of the timeline of obligations under the contract, they agree that the parties eventually faced a closing date of December 15, 2014, after which the sale could not be completed without an extension. The contract imposed particular obligations for the parties to perform "at Closing," including Jackson Masonry's providing Ritzen with a number of documents related to the property. (*Id.* at 2-3.)

The sale did not go through, and each party blames the other. Jackson Masonry suggests that Ritzen was unable to finalize its financing for the purchase in time and that December 15, 2014 therefore came and went with no financing in place and no payment conveyed. (*Ritzen II*, Docket No. 20 at 6.) Ritzen disputes that account and argues that it did have a financing deal in place with Amber Lane Development, LLC ("Amber Lane"), which was prepared to provide the funds once Ritzen and Jackson Masonry were otherwise ready to close. Ritzen

claims, instead, that the deal fell apart because Jackson Masonry failed to act in good faith in providing the required documentation. Specifically, Ritzen argues that Jackson Masonry unreasonably and improperly withheld key documents until the eve of the final closing date and then provided copies that contained errors, omissions, and irregularities that stood in the way of completing the sale. (*Ritzen II*, Docket No. 11 at 10.) On December 23, 2014, Ritzen sued Jackson Masonry in Davidson County Chancery Court for breach of contract. (*Ritzen I*, Docket No. 12-1 at 43.)

Discovery in the Chancery Court case was contentious. On February 11, 2016, the Chancery Court entered an order for sanctions against Jackson Masonry, concluding that the company had "failed to provide full and candid responses" to Ritzen's discovery requests. (*Id.* at 52.) Specifically, the court ordered Jackson Masonry to pay Ritzen attorney's fees related to the discovery dispute, granted Ritzen supplemental discovery, and granted Ritzen the opportunity to supplement its previously filed motion for summary judgment. (*Id.* at 53.) Although an April 4, 2016 trial date was rapidly approaching, the discovery disputes continued, and another such hearing was scheduled for March 24, 2016. Ritzen suggests that Jackson Masonry was likely to face further sanctions in the wake of that hearing. Instead, minutes before the scheduled start of the hearing, Jackson Masonry filed for Chapter 11 bankruptcy, triggering an automatic stay of pending litigation. (*Compare id.* at 4 (showing 8:43 electronic filing stamp on bankruptcy petition) *with id.* at 46 (noting 9:00 AM motion hearing on Chancery Court docket)).

B. Ritzen's April 14, 2016 Motion

On April 14, 2016, Ritzen filed a motion in the Bankruptcy Court styled "Ritzen Group Inc.'s Motion to Modify or Lift the Automatic Stay." (*Ritzen I*, Docket No. 6 at 30-53 ("Stay Motion"), at 1-24.) Because the precise scope of the relief requested in that motion is contested, *see infra*, the court will describe the motion's contents and structure in greater detail than would typically be necessary, with a particular eye to the degree to which Ritzen's motion can be characterized as having raised, and the Bankruptcy Court can be characterized as having considered, the issue of dismissing the Chapter 11 petition on the basis of bad faith filing.

The motion's opening paragraph characterizes Ritzen's request for relief as Ritzen's "mov[ing] the Court to modify or lift the automatic stay in [Jackson Masonry's] bankruptcy related to pending state court litigation." (*Id.* at 1.) Neither the motion's title nor the introductory paragraph suggests that Ritzen is seeking any relief other than a lift or modification of the stay.

After a summary of its contents, the motion proceeds to a section under the header "Business, Property, and Litigation Facts." (*Id.* at 4.) For the most part, this section presents a straightforward recitation of the facts and procedural history leading up to the motion. (*Id.* at 4-12.) The final paragraph of the section, however, reads as follows: "This Court should lift the stay to allow the state court to adjudicate these important evidentiary issues and to allow trial to proceed. *In addition, the Court should*

dismiss the bankruptcy as a bad faith filing." (*Id.* at 12 (emphasis added).)

The motion's eventual "Argument" section does not include any arguments specifically devoted to dismissal. Rather, Ritzen's argument is presented under two subheadings: "I. The Court Should Grant Relief From Stay for Judicial Economy"; and "II. The Court Should Grant Relief From Stay 'For Cause' Under Section 362(d)(1)." (*Id.* at 15, 18.) The second of those sections does discuss a number of cases regarding dismissal, but only after explaining that "there is 'no substantive difference between the cause requirement for dismissal of a petition under Section 1112(b) and the cause requirement for relief from stay under Section 362(d)(1).'" (*Id.* at 18 (quoting *In re Lady Bug Corp.*, 500 B.R. 556, 562 (Bankr. E.D. Tenn. 2013)).) The dismissal cases, therefore, appear to be presented as persuasive authority on the question of relief from the stay, not in support of any distinct request for dismissal.

Finally, in the motion's "Conclusion" section, Ritzen characterizes the relief requested in the motion as follows:

> For the reasons set forth above, Ritzen Group requests that the Court enter an order granting relief from the automatic stay provisions of 11 U.S.C. § 362, for the provision of Rule 4001(a)(3) to be waived, and grant such other and further relief as this Court deems as just and appropriate.

(*Id.* at 23.)

Appendix B

On June 14, 2016, the Bankruptcy Court held a hearing on the motion. (*See Ritzen I*, Docket No. 1-1.) Following the presentation of proof, the court explicitly addressed the relationship between Ritzen's arguments related to the stay and the potential for an argument in favor of dismissal for bad faith filing. Addressing Ritzen's counsel, Judge Keith Lundin stated:

> You've tried a case to dismiss a Chapter 11 for bad faith filing. That's the case you've tried. Whether you know it or not, that's—and no criticism intended, I'm just telling you that's the issue you put up here. And I understand because I've been here long enough to know that the criteria for relief from a stay sometimes overlaps the motion to dismiss.

(*Ritzen I*, Docket No. 12-2 at 116.) The court, however, stressed that it was considering the motion only as having sought relief from the stay:

> I haven't been asked to dismiss the case. I don't have a motion to dismiss. I haven't tried a motion to dismiss but the very first thing I said to you is your case here today has been more like a motion to dismiss the case than like a relief statement. But, trust me, I don't have a motion to dismiss and I'm not going to dismiss the Bankruptcy case today.

(*Id.* at 118.) The court's ensuing judicial economy analysis was explicitly premised on the assumption that, even if the

court granted Ritzen's motion, the bankruptcy proceeding as a whole would continue:

> You're going to come right back here [if the stay is lifted and you succeed in state court]. I've got exclusive jurisdiction over the property of the estate. You go to state court, say you get an order for specific performance. The Debtor rejects the contract . . . . How do you stop that?

(*Id.* at 121-22.) The Bankruptcy Court's consideration of the motion, in other words, was based, in part, on issues of judicial economy that assumed that Ritzen was not seeking dismissal. Consistently with that reading, the court later referred to a hypothetical future Ritzen "motion to dismiss the case outright, when or if [Ritzen] files." (*Id.* at 139.) Judge Lundin, who was on the verge of retirement, specifically indicated that any such motion would be decided by his successor at that later date. (*Id.*)

When the court announced its ruling from the bench, it characterized the ruling as follows: "For the following reasons I'm going to deny the request to modify or lift the automatic stay." *Id.* at 142. The court memorialized the decision by written order the next day. The written order makes no mention of any request for dismissal. (*Ritzen I*, Docket No. 1-1.) Ritzen has not identified any later-filed motion to dismiss based on bad faith filing.

D. Adversary Proceedings

Jackson Masonry construed Ritzen's motion regarding the stay as an informal proof of claim and objected to the allowance of Ritzen's claim. (*Ritzen II*, Docket No. 12-3 at 6.) Each of the parties filed an adversary proceeding against the other, which the Bankruptcy Court consolidated with Jackson Masonry's objection and set for trial. (*Id.* at 408.)

Following a bench trial, the Bankruptcy Court disallowed Ritzen's claim. (*Id.* at 885.) The court noted that, "[c]learing away all of the smoke and mirrors," Ritzen's claim presented a "very straightforward matter . . . boil[ing] down to, under the terms of the Contract, who performed at the Closing of this commercial real estate transaction." (*Id.* at 898.) The court disregarded, as implausible, Ritzen's argument that the alleged defects in Jackson Masonry's paperwork presented an obstacle to closing or constituted a failure to perform under the contract:

> Documents are adjusted at Closing as a matter of course and this transaction was no exception. With the wealth of experience of the attorneys involved on both sides of this transaction, it is impossible to believe that, with both sides at the Closing table or engaged in meaningful dialogue on the phone or by electronic communication on the day of closing, that the necessary changes could not have been accomplished with minimal effort. Debtor's deficiencies were relatively easy

> to correct, were not commercially unreasonable and within the scope of what a reasonable person would expect to handle to finalize the deal at closing, and overall simply did not rise to the level of a material breach.

(*Id.* at 898-99.) The court found that "both parties wanted the transaction to close, and acted in good faith toward that end," but that, based on the testimony, "Ritzen was not prepared to tender funds" by the date of closing. (*Id.* at 899.) As a result, "Ritzen was unable to perform its duties under the Contract on December 15, 2014," was in breach, and, consequently, did not have a claim against Jackson Masonry. (*Id.*) The court further ordered that Jackson Masonry was entitled to damages from Ritzen for breach of contract. (*Id.* at 886.) The Bankruptcy Court entered a final judgment against Ritzen on April 17, 2017. (*Ritzen II*, Docket No. 12 at 58-59.)

E. Ritzen's Appeals

Ritzen filed two Notices of Appeal on May 5, 2017. (*Ritzen I*, Docket No. 1; *Ritzen II*, Docket No. 1.) The first Notice of Appeal purported to be directed at the Bankruptcy Court's "Stay Relief Order [that] was entered on June 16, 2016 but did not become final until April 17, 2017." (*Ritzen I*, Docket No. 1 at 2.) The second Notice of Appeal was directed at the disallowance of Ritzen's claim and judgment in favor of Jackson Masonry. (*Ritzen II*, Docket No. 1 at 2.) Both appeals are now fully briefed and ripe for decision.

II. LEGAL STANDARD

The court has jurisdiction over this matter pursuant to the United States Code, which provides that:

> The district courts of the United States shall have jurisdiction to hear appeals . . . from final judgments, orders, and decrees . . . of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

28 U.S.C. § 158(a). In hearing an appeal from a bankruptcy court's order, the district court reviews the bankruptcy court's findings of fact for clear error and the court's conclusions of law *de novo. In re Wells*, 561 F.3d 633, 634 (6th Cir. 2009); *In re Rembert*, 141 F.3d 277, 280 (6th Cir. 1998).

III. ANALYSIS

A. Modification or Lift of Automatic Stay

Ritzen identifies a number of alleged errors in the analysis underlying the Bankruptcy Court's June 15, 2016 ruling on the motion that Ritzen, at the time, denominated as its "Motion to Modify or Lift the Automatic Stay," but that Ritzen now renames its "Dismissal/Stay Relief Motion." (*Ritzen I*, Docket No. 11 at 12.) Although Jackson

Masonry disputes that the Bankruptcy Court committed reversible error, it argues first that this appeal is untimely because a denial of a motion to lift or modify an automatic stay is a final order from which a timely notice of appeal must be filed within fourteen days, pursuant to Fed. R. Bankr. P. 8002(a). Ritzen replies that the court should not consider the Bankruptcy Court's order merely as a denial of a motion for relief from the stay, but as the denial of a "request to dismiss the case, or in the alternative, for relief from the automatic stay." (*Ritzen I*, Docket No. 11 at 2.) As a denial of a motion to dismiss, Ritzen argues, the Bankruptcy Court's ruling was interlocutory and did not become final until the parties' dispute was resolved on the merits.

The details painstakingly recounted above leave little doubt that Ritzen's motion was, in both its form and the near totality of its content, a simple motion for relief from the automatic stay, not a motion to dismiss. At best, it was a motion to lift or amend the stay that included a passing suggestion, in its facts section, that the court "*should* dismiss the bankruptcy." (*Ritzen I*, Docket No. 7 ¶ 47 (emphasis added).) Moreover, insofar as the motion itself left room for confusion, the Bankruptcy Court explained to the parties, copiously and clearly, that the court was not construing the motion as a motion to dismiss and, if Ritzen sought to pursue dismissal, Ritzen would have to file a fresh motion to that effect. This court has not found, nor has Ritzen identified, any suggestion in the transcript of the relevant hearing that the parties, at the time, were at all confused about what was under consideration and what was not. The Bankruptcy Court's ruling was,

unambiguously, a denial of relief from the stay and only a denial of relief from the stay.

Ritzen argues next that, even if the court considers the Bankruptcy Court's ruling a denial of a motion for relief from the automatic stay, the court should not consider that order as having been final for purposes of appeal. As Jackson Masonry points out, however, most courts that have spoken on the issue, including the Sixth Circuit Bankruptcy Appellate Panel ("B.A.P."), have held that a denial of a motion for relief from an automatic stay constitutes a final, appealable order. *See, e.g., In re Schaffrath*, 214 B.R. 153, 154 (B.A.P. 6th Cir. 1997) ("Grants and denials of motions for relief from the automatic stay are final, appealable orders."); *In re Elliot*, 214 B.R. 148, 149 (B.A.P. 6th Cir. 1997) ("Denial of a motion for relief from the automatic stay is a final, appealable order.") (citing *In re Megan-Racine Assocs., Inc.*, 102 F.3d 671, 675 (2d Cir. 1996); *Franklin Sav. Ass'n v. Office of Thrift Supervision*, 31 F.3d 1020, 1022 n.3 (10th Cir. 1994); *In re West Electronics*, 852 F.2d 79, 82 (3rd Cir. 1988); *In re Cimarron Investors*, 848 F.2d 974, 975 (9th Cir. 1998)); *In re Curry*, 347 B.R. 596, 597 (B.A.P. 6th Cir. 2006) ("The bankruptcy court's order denying relief from the automatic stay is a final, appealable order."); *In re So. Indus. Banking Corp.*, 70 B.R. 196, 198 (E.D. Tenn. 1986) (noting that orders "granting or denying relief from automatic stays by bankruptcy courts . . . have been held to be 'final' orders reviewable by district courts").

In its Reply, Ritzen concedes that the Sixth Circuit B.A.P. and others have applied a "blanket rule" treating

all such orders as final and appealable but argues that this court should, instead, adopt a case-by-case approach, which Ritzen identifies with *In re Atlas IT Export Corp.*, 761 F.3d 177, 184 (1st Cir. 2014). Under the *Atlas IT* approach, an order granting relief from a stay is always final and appealable, but, if the order denies relief, "[e]verything depends on the circumstances . . . : taking into account the particular order's reasoning and effect, an inquiring court must determine . . . whether that edict definitively decided a discrete, fully-developed issue that is not reviewable somewhere else. If yes, the order is final; if no, it is not." *Id.* at 185.

In other words, Ritzen asks this court to go against every other identified case in this circuit and replace a simple, predictable rule with a vague, unpredictable one. The court declines to do so. Such a test would leave parties forever guessing about when they needed to file an appeal, always at the risk of waiting too long and losing their rights or appealing too early and wasting their time. Ritzen presents no convincing reason for the court to depart from the substantial body of caselaw recognizing that an appeal from an order denying relief from a stay can—and therefore should—be filed within fourteen days of when the decision is rendered. Because Ritzen did not appeal the denial of relief from the automatic stay within fourteen days, that appeal is untimely.

B. Disallowance of Ritzen's Claim

Ritzen identifies five issues for appeal regarding the Bankruptcy Court's ultimate disposition of the

parties' adversary proceedings, but those five issues can be reduced to three core questions: 1) whether the Bankruptcy Court erred by interpreting the contract as requiring Jackson Masonry to provide the required documentation only at the time of, rather than prior to, closing; 2) whether the Bankruptcy Court erred in concluding that Jackson Masonry did not violate the duty of good faith and fair dealing with regard to the required documentation and the arrangement of the closing; and 3) whether the Bankruptcy Court clearly erred in its factual finding that Ritzen failed to acquire financing for the transaction by the closing date.

1. Interpretation of the Contractual Language

Ritzen argues, first, that the Bankruptcy Court erred by construing the parties' purchase contract to require that Jackson Masonry provide adequate documents only by the time of closing, rather than at some earlier time. Jackson Masonry responds that the Bankruptcy Court correctly read the contract as requiring tender of adequate documents "at closing" and that Jackson Masonry, therefore, did not breach the contract by providing imperfect documents when there was still time to revise them.

In "resolving disputes concerning contract interpretation, [the court's] task is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the contractual language." *Planters Gin Co. v. Fed. Compress & Warehouse Co.*, 78 S.W.3d 885, 890 (Tenn. 2002) (quoting *Guiliano v. Cleo,*

Inc., 995 S.W.2d 88, 95 (Tenn. 1999)).[1] The central tenet of contract construction is that the intent of the contracting parties at the time of executing the agreement should govern. *Id.* The determination of the parties' intent is generally a question of law, because the words of a written contract are definite and undisputed. *Id.* (citing *Doe v. HCA Health Servs. of Tenn., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001); 5 Joseph M. Perillo, Corbin on Contracts § 24.30 (rev. ed. 1998)). The parties' intent is presumed to be that specifically expressed in the body of the contract. "In other words, the object to be attained in construing a contract is to ascertain the meaning and intent of the parties as expressed in the language used and to give effect to such intent if it does not conflict with any rule of law, good morals, or public policy." *Id.* (quoting 17 Am. Jur. 2d Contracts § 245).

If clear and unambiguous, the literal meaning of the language controls the outcome of contract disputes. Ambiguity does not arise "merely because the parties may differ as to interpretations of certain of its provisions." *Johnson v. Johnson*, 37 S.W.3d 892, 896 (Tenn. 2001) (citation omitted). Rather, "a contract is ambiguous only when it is of uncertain meaning and may fairly be understood in more ways than one.'" *Planters Gin*, 78 S.W.3d at 890 (quoting *Empress Health & Beauty Spa, Inc. v. Turner*, 503 S.W.2d 188, 190-91 (Tenn. 1973)).

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1. The parties agree that this matter is governed by Tennessee law. (*Ritzen II*, Docket No. 11 at 21; Docket No. 20 at 30.)

In this case, the plain language resolves the dispute. The contract unambiguously states that Jackson Masonry had a duty to deliver the relevant documents "[a]t Closing," with "Closing" defined as "[t]he consummation of the transaction contemplated by this Agreement." (Contract at 2.) That transaction, however, was never consummated, and none of Jackson Masonry's conduct was inconsistent with ultimately fulfilling its obligations in time. There is simply no language in the contract that forbids, or could even be charitably construed as forbidding, last-second revisions to bring Jackson Masonry's documentation into compliance with its duties as seller.[2]

Ritzen argues next that, even if the contract would seem to require Jackson Masonry to provide the transaction documentation only at the time of closing, such a reading fails to take into account the customs and norms of the commercial real estate business. See *Explosive Specialists, Inc. v. Whaley Constr. Co.*, No. 03A01-9509-CH-00305, 1996 Tenn. App. LEXIS 1, 1996 WL 4040, at *2 (Tenn. Ct. App. Jan. 3, 1996) (noting that it is appropriate

2. Ritzen suggests that Jackson Masonry's continued revision of the title insurance policy ran afoul of section 13(m) of the contract, which makes Ritzen's obligations as the purchaser contingent on there being "no adverse change in the Property or due diligence items reviewed by the Purchaser (including, but not limited to, environmental and title matters) prior to Closing." (Contract at 7.) This general reference to "title matters," however, cannot overcome the contract's more specific language, in section 7(b)(ix), making the title insurance policy due only "at Closing." (*Id.* at 3.) The Bankruptcy Court received testimony at trial that there had been no adverse change in the title and found that that testimony was "well taken." (*Ritzen II*, Docket No. 1-3 at 7.)

to "tak[e] into account the custom and usage of the trade" when construing a contract). In support of its argument, Ritzen cites testimony from an expert whom it presented at trial as well as secondary sources, suggesting that the parties in a commercial real estate transaction should circulate required documents "in advance" or "sufficiently prior to the closing." (*Ritzen II*, Docket No. 11 at 34 (quoting 12 *Tenn. Prac., Legal Forms Real Estate* § 2:25; *Commercial Real Estate Transactions* § 13:11 (3d ed.).) None of those sources, however, suggests that "at closing" has any specialized meaning other than "at closing." Rather, they merely suggest that best practices would have the parties exchange all relevant documents well ahead of time. The fact that exchanging documentation early is a good idea—or even the norm—does not establish that the parties in this case had a meeting of the minds that a failure to do so would be a breach. Indeed, there are many reasons why parties might wish not to commit themselves to an overly aggressive timeline for finalizing paperwork. Ultimately, the court must be guided by the plain language of the agreement itself, not the court's own judgment about the best way to complete a real estate transaction. The contract, as written, did not impose any mandatory calendar for circulating Jackson Masonry's closing documents in advance. The Bankruptcy Court's interpretation of the contractual language, therefore, was not error.

2. Duty of Good Faith and Fair Dealing

Closer to capturing the essence of Ritzen's theory of the case is its allegation that Jackson Masonry violated

its duty of good faith and fair dealing. It is well-settled in Tennessee that "there is implied in every contract a duty of good faith and fair dealing in its performance and enforcement." *Wallace v. Nat'l Bank of Commerce*, 938 S.W.2d 684, 686 (Tenn. 1996) (quoting *Covington v. Robinson*, 723 S.W.2d 643, 645-46 (Tenn. Ct. App. 1986)). The Tennessee Supreme Court has suggested that one way to look at this duty is by "allowing the qualifying word 'reasonable' and its equivalent 'reasonably' to be read into every contract."[3] *Dick Broad. Co. of Tenn. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 661 (Tenn. 2013) (citing *Pylant v. Spivey*, 174 S.W.3d 143, 152 (Tenn. Ct. App. 2003); *Hathaway v. Hathaway*, 98 S.W.3d 675, 678-79 (Tenn. Ct. App. 2002); *Hurley v. Tenn. Farmers Mut. Ins. Co.*, 922 S.W.2d 887, 892 (Tenn. Ct. App. 1995)).

Jackson Masonry, accordingly, had a duty to act reasonably and in good faith in fulfilling its duties and exercising its rights under the contract. It is certainly conceivable that a party to a real estate sale contract

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3. However, the implied duty of good faith and fair dealing "does not extend beyond the agreed upon terms of the contract and the reasonable contractual expectations of the parties." *Wallace*, 938 S.W.2d at 687. "The implied obligation of good faith and fair dealing does not . . . create new contractual rights or obligations, nor can it be used to circumvent or alter the specific terms of the parties' agreement." *Goot v. Metro Gov't of Nashville*, No. M2003-02013, 2005 Tenn. App. LEXIS 708, 2005 WL 3031638, at *7 (Tenn. Ct. App. Nov. 9, 2005); *see also Dick Broad.*, 395 S.W.3d at 666; *APAC-Atl., Inc. v. State*, No. E2012-01536-COA-R3CV, 2013 Tenn. App. LEXIS 720, 2013 WL 5883697, at *9 (Tenn. Ct. App. Oct. 31, 2013); *Barnes & Robinson Co. v. OneSource Facility Servs., Inc.*, 195 S.W.3d 637, 642 (Tenn. Ct. App. 2006).

might violate such a duty through its bad-faith, dilatory, and uncooperative behavior related to finalizing of the required documentation. Whether Jackson did so in this case, however, depends on factual determinations that this court reviews only for plain error. The Bankruptcy Court concluded that the "complained-of insufficiencies" in Jackson Masonry's documents "could have been corrected with minor adjustments given the relative simplicity of the documents." (*Ritzen II*, Docket No. 1-3 at 11.) It concluded that Jackson Masonry "acted in good faith and was ready, willing, and able to perform its responsibilities under the Contract on December 15, 2014." (*Id.* at 13.) Ritzen's argument that the Bankruptcy Court erred in those conclusions amounts to little more than suggesting that the court should have put more credence in the testimony of Ritzen's preferred witnesses. Such a claim is insufficient to show clear error.[4] Based on the Bankruptcy Court's findings of fact that were not clearly erroneous, Ritzen did not establish a breach of the duty of good faith and fair dealing.

3. Ritzen's Failure to Secure Financing

Ritzen argues, finally, that the Bankruptcy Court committed clear error in concluding that Ritzen had not secured financing and, therefore, was unable to tender the

4. Nor can Ritzen show plain error based on the theory that Jackson Masonry violated the duty of good faith and fair dealing because of its failure to grant an extension beyond December 15. Ritzen's failure to have funding in place after several months would seem to be the precise type of situation that the deadline was drafted to address.

purchase price by the December 15, 2014 closing date. "A finding of fact is clearly erroneous when[,] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *In re Burke*, 863 F.3d 521, 528 (6th Cir. 2017) (quoting *In re DSC, Ltd.*, 486 F.3d 940, 944 (6th Cir. 2007)).

As evidence that it had funding in place by the closing date, Ritzen first points to a letter of December 15, 2014, from Community First Bank & Trust ("Community First") Vice President Michael Franks, in which Franks offers "confirmation that guaranteed funds of $1,550,000 are on deposit . . . for delivery to [Amber Lane] (or its assigns) for purchase of" the property. (*Ritzen II*, Docket No. 12-5 at 77.) The letter, however, states that release of the funds would be conditioned "upon confirmation of the satisfaction of several conditions related to the closing that must be approved by [Amber Lane] or its assigns." (*Id.*) The Bankruptcy Court's holding did not hinge on the question of whether the funds were "available" in some abstract sense, but on whether the various people and entities necessary to complete the financing transaction reached a timely, final agreement that would have granted Ritzen access to those funds in time. (*Ritzen II*, Docket No. 1-3 at 12-13.)

Ritzen relies next on the testimony of Austin Pennington, the president of Amber Lane and a long-time friend of Ritzen's principal, George Ritzen. Pennington testified that, by December 15th, he believed that all issues between Ritzen and Amber Lane had been resolved and

that he was ready to authorize disbursement of the funds, once the final closing documents were ready. (*Ritzen II*, Docket No. 12-3 at 282.) Franks, however, testified that Pennington's sole authorization was insufficient for the funds to be released, and Community Trust could not disburse the funds without authorization from Byrd Cain, Pennington's step-father. (*Ritzen II*, Docket No. 12-5 at 536.) Cain himself did not testify at trial, and, while Franks' testimony established that Cain was aware of the transaction and willing to release the funds if his conditions were met, Franks did not testify to any such final communication indicating that the conditions had been met and the funds should be sent. (*Id.* at 535-39.)

The Bankruptcy Court, moreover, found Pennington's testimony not to be credible:

> Mr. Pennington's testimony did not meet the mark and lacked credibility. . . . Mr. Pennington presented little more than a hypothetical description of what might have been or could have been under circumstances that did not actually exist. His testimony lacked any convincing detail regarding a funding arrangement that could have really closed on December 15, 2014, with a specific identified owner and a concrete method of financing. . . . Taken as a whole, the Court found Mr. Pennington's testimony to lack credibility on the crucial question of Ritzen's ability to close.

(*Ritzen II*, Docket No. 1-3 at 7-8.)

Some of the other witnesses with knowledge of the transaction provided accounts suggesting that financing was not in place. Tim Crenshaw, one of Jackson Masonry's attorneys in the real estate sale, testified that an attorney for Ritzen, Laurence Papel, informed him on December 15, 2014, that Ritzen was still working on securing the funds and that it might require an additional two weeks. (*Id.* at 750.) The deposition testimony of the transaction's closing attorney, Keene Bartley, confirmed Crenshaw's account. (*Id.* at 628.)

While Ritzen points to other witnesses' testimony to refute those witnesses' version of events, that testimony merely confirms that this issue hinges on a relative assessment of the witnesses' credibility.[5] The collected testimony, like the parties' overall theories of the case, offers conflicting accounts of the hectic events leading up to and on December 15, 2014. What the evidence does not offer, however, is any basis for this court to form a definite and firm conviction that the Bankruptcy Court was wrong to ultimately credit Jackson Masonry's account over Ritzen's. The court, accordingly, will not reverse the Bankruptcy Court's judgment for being clearly erroneous on the facts.

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5. Ritzen devotes a great deal of attention to the fact that the Bankruptcy Court, in its bench ruling, referred to a portion of Bartley's testimony as "uncontroverted," when, in fact, Papel did offer a contrary account of the same events. It is difficult for this court, reading the Bankruptcy Court's statement in isolation, to discern which detail or details the court was considering "uncontroverted." (*Ritzen II*, Docket No. 1-3 at 10; Docket No 12-3 at 446.) The bench ruling as a whole, however, makes clear that the Bankruptcy Court considered and weighed all of the witnesses' testimony in reaching its ultimate conclusion.

IV. CONCLUSION

For the foregoing reasons, Ritzen's appeal docketed as Case No. 3-17-cv-00806 will be dismissed as untimely, and the Bankruptcy Court will be affirmed in the appeal docketed as Case No. 3:17-cv-00807.

An appropriate order will enter.

/s/ Aleta A. Trauger
ALETA A. TRAUGER
United States District Judge

APPENDIX C — ORDER DENYING MOTION OF THE UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION, DATED JUNE 15, 2016

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Case No. 3:16-bk-2065
Chapter 11
Judge Keith M. Lundin

IN RE: JACKSON MASONRY, LLC,

Debtor.

ORDER DENYING MOTION TO MODIFY OR LIFT AUTOMATIC STAY

This matter is before the Court upon Ritzen Group, Inc.'s *Motion to Modify or Lift the Automatic Stay* (Docket No. 57) (the "Motion") and the Debtor's *Response in Opposition* (Docket No. 101) to the Motion. The Court conducted a hearing on the Motion on June 14, 2016. Based on the witness testimony and other evidence properly before the Court, and for the reasons set forth on the record pursuant Federal Rule of Bankruptcy Procedure 7052, it is hereby ORDERED that the Motion is DENIED.

IT IS SO ORDERED.

APPENDIX D — EXCERPTS OF TRANSCRIPT OF THE UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE, FILED OCTOBER 26, 2016

U.S. BANKRUPTCY COURT
MIDDLE DISTRICT OF TENNESSEE
(NASHVILLE)

Bankruptcy Petition #: 3:16-bk-02065

Debtor:
Jackson Masonry, LLC
1200 49th Avenue North
Nashville, TN 37209

TRANSCRIPT OF PROCEEDINGS
June 14, 2016
Before The Honorable Keith Lundin,
Bankruptcy Judge

***

[139]THE COURT: All right, back on the record in Jackson Masonry on the Ritzen Group's motion to modify or lift the automatic stay. These are my findings of fact and conclusions of law under Bankruptcy Rule 7052.

For the following reasons I'm going to deny the request to modify or lift the automatic stay. Because I'm doing this orally sometimes this comes out in a less than perfect order of things but I'm going to start with the big picture and go to the small picture.

It's not usual to have a request [140]for relief from a stay like this at the beginning of a Chapter 11 case when there's a major piece of litigation pending in another court. In fact, it's almost always true that there are one or more major pieces of litigation pending in another court at the beginning of a Chapter 11 case. That's the way it works.

It's also almost always true that filing a Chapter 11 case presents some sort of litigation advantage for a debtor. And I read lots and lots of recorded cases where appellate courts use "litigation advantage" as a reason for either dismissing a Chapter 11 case or granting relief from the stay. And that's fine for appellate courts to do that but it typically is because they're looking for some nice catch word or buzz word to describe why something shouldn't be in Chapter 11. And that leads to a philosophical debate that I don't need to engage in here today, except to say this, it's almost always true at the beginning of a Chapter 11 case that there's litigation pending, and it's almost always true that the 11 is filed, at least in part, to stop that litigation and to shift the litigation to some other court. And if that was the reason for granting relief from the stay there wouldn't have been any asbestosis litigation, there wouldn't have been in Bankruptcy Court, there wouldn't have been any breast implant litigation in Bankruptcy Court. I could go on and on and on. [141]Because those whole industries, the trucking industry, came into Bankruptcy because they had litigation problems in some other court.

That's not the issue. The issue is whether this is an unusual fact pattern and the unusual thing that a Bankruptcy Court looks for is a debtor who is on the

verge of losing something in state court that only affects the debtor themselves and not creditors of the debtor or not other parties, and they're using the Bankruptcy as a way of putting off that inevitability. Now I'm going to come back to that thought over and over again, because in the criteria for lifting a stay I'm supposed to evaluate "the inevitability of outcome in some other court."

In this case I don't see an inevitable outcome in state court law. I think there's a real horse race going on over in state court between the debtor and the Ritzen Group about whether this contract was enforceable by the Ritzen Group. And there's lots of facts on both sides. And there's a good reason why Chancellor McCoy didn't grant summary judgment. There's all kinds of contested facts.

There's (inaudible) with respect to law firms, there's all kinds of problems in the state court litigation, which raises a significant risk of loss for both sides. That's how I see it. It's not one where the Bankruptcy Court is simply putting off the inevitable outcome [142]in some other court. I don't see an inevitable outcome in some other court. I see there are some questions that have to be answered somewhere and they can be answered more efficiently in Bankruptcy Court and more appropriately in the Bankruptcy Court because there are huge Bankruptcy issues here that complicate the state court litigation. And I don't think everybody quite appreciates that yet so I'll make it clear.

Let's do it this way. In deciding whether to back away from the stay I'm supposed to look at judicial economy. Yes.

About the trial readiness in state court, about whether there are Bankruptcy issues and what predominates and what has to come first and second with respect to state court issues and Bankruptcy Court issues. Chances of success on the merits, yes. Cost of defense, burdens to the Bankruptcy estate, impact on other creditors and such things.

I've considered all of those, I've looked at all of the exhibits, and I think that this case weighs in favor of not granting a relief from the stay. And it's because of something like this. We have a contract between the debtor and Ritzen Group, which may still be an executory contract. It may not be an executory contract. What I mean, the technical meaning of that is it's either enforceable or it isn't, there's either obligations on both sides. And we [143]don't know whether that contract is enforceable. That's the essence of the state court litigation.

If the state court were to determine that it was an executory contract sometime down the road, and it's important to note the state court has not determined that question, the state court refused to determine that question, and said it was inappropriate to decide that question on summary judgment.

If they were to decide that it was an executory contract, then you'd have the classic Bankruptcy question of whether the debtor can and should reject that contract. Is it burdensome to the estate to perform that contract and what would the damage claim be if it were rejected by the Bankruptcy Court by the debtor in the Bankruptcy case.

That's an issue of economics. And the Debtor and Ritzen are not the only people concerned about that question. There's other people out there who aren't in the courtroom today. And, in particular, there's the City of Clarksville, which is missing - of course, they never even had notice. They didn't even know to be here. They may know about a Bankruptcy case but they have no idea that their right of recovery, in the event that the marina lawsuit goes bad for a now defunct general contractor, as I understand it from something that I read the pocket is sitting right over here, and it's Jackson Masonry. And we're going to be [144]looking at a big claim against Jackson Masonry that's going to be sitting on the same table with Ritzen Group. And that is the kind of thing that inspires Bankruptcy Judges when they're looking at an early stage Chapter 11 case and a request from one major creditor for relief from the stay.

Let's take a hard look at the economics of what's going on. If Ritzen Group ends up having substantial rights in this debtor, they're going to be in competition with whoever the other creditors are. And that's a Bankruptcy issue and that would be one of the issues with respect to rejection of the contract, in the event that we find that there is an enforceable contract, and would have to be balanced against the Debtor's ability to pay other creditors and whether rejection is going to create a debtor situation or a worse situation for the other creditors. That's a Bankruptcy question and it's written all over here. And the fact that we don't know whether the contract is enforceable yet just increases the risk on both sides. That's what it is. And risk evaluation is what Bankruptcy Courts

do. That's what we do. That's what happens in Bankruptcy. We eval u ate the likelihood of success by the Ritzen Group, the likelihood of success by the Debtor, we value those risks, we figure out what would be the worst outcome for the debtor, the best outcome for the debtor, we put those numbers down on paper, we look at the other assets [145] and income and liabilities, like Clarksville, et cetera, the other $233,000 worth of unsecured debt in addition to Clarksville, and we figure out how to get everybody paid, or as nearly get everybody paid as possible.

If I grant relief from the stay in this case and send the contract question back to state court, what happens is the debtor has to make a business judgment about whether they want one bite or two bites at the apple. It's an interesting question but that really is the question. They get two bites at the apple if they don't do anything in Bankruptcy for a while. And they, instead, defend in state court and they man up, woman up, whatever they're going to do in state court and they litigate to the Court of Appeals and Tennessee Supreme Court the question of whether there is a contract and whether it is enforceable. Because if they win that argument in state court, after spending I would say several hundred thousand dollars' worth of attorneys' fees, they don't have a rejection issue anymore because they don't have to reject it. But they get that bite and that bite, if I represented the debtor and decided to do that in state court, would include full scale completion of discovery, litigation with the law firms that are all tangled up in the closing in this case with respect to who they represent, whether they're the closing agent, whether they have a conflict of interest and all that, what

kind of proof am I [146]going to be able to present? It's going to be a lot of hoo-doo over in state court that we haven't finished yet.

And then a full scale trial on the merits. If I win that trial, Ritzen Group has got to appeal and we're going to go up either way, through the state court system. And we're looking at, I would say years, but at least many, many months of litigation in state court. Meanwhile, the debtor is sitting over here in Bankruptcy, continuing to operate if they can, hopefully continue to pay their 45 employees, if they can, and bid on projects where they're not going to be able to get bonding, if they're required to get bonding, because they're sitting over here in Chapter 11 now and can't do it.

It's going to severely impair the ability of the debtor to continue to function as a contractor in the masonry business while they litigate for a year or two over in state court.

Now, the reason I say it's two bites at the apple, if they win that bite, they win. That's great. They've proven there's no contract right on behalf of Ritzen Group and after appeals they don't have a contract to deal with and so they don't have to do anything more in Bankruptcy except Ritzen Group will then file a proof of claim for its discovery abuse amounts that haven't been determined but might be determined by the state court if I granted[147] relief from the stay.

Now, we come back over here as a claim in the Bankruptcy case. And if the debtor is still in business at that point, the debtor would have some assets to sell and be able to pay people.

If they lose that litigation in state court or it looks like they're going to lose that litigation in state court, they reject the contract in Bankruptcy and we have a trial in Bankruptcy at that point on whether they can reject the contract and reject some damages under the contract, once the state court has determined that there is a contract.

Would I let the state court go on and order specific performance at that point? No. I wouldn't do that. There are some cases that talk about doing that but it's a bazaar outcome. That's to say that the other creditors in the case, chat you don't have say in this. You don't have a say in how we value and manage and distribute the assets of this Bankruptcy estate. The state court gets to decide that, not the Bankruptcy Court. It doesn't work that way. There is an overriding Bankruptcy issue for stay relief purposes that has to be decided, and it is a huge asset that could have tremendous value to this estate, doesn't get distributed by a state court after the filing of the Chapter 11 case. It doesn't work that way. It gets done [148]in the Bankruptcy Court. Eventually somebody has to come back here for that to happen.

And even if you win the argument in state court that you have a contract and it is enforceable, you're still going to have to talk with the Bankruptcy Court down the road because the debtor is going to reject the contract at that

point, if it's not before. And strategically I can see an argument for rejecting it now, before anybody else acts because look what else happens then. Then the issue before the Bankruptcy Court is was there a contract, and if there was a contract, what are the damage rights in the Bankruptcy case now? And it could be that's the most efficient way yet. The answer for all the questions is for it to be right here in Bankruptcy, in the context of all the Bankruptcy and state court issues destroyed at the same time.

In other words, rejection of a contract that may not exist, or it may exist, with the first issue being was there a contract that could be rejected and, if so, is it executory and what's the economics of now rejecting that contract? It could be more efficient to do it here. But it's clear to me that granting relief from the stay doesn't answer the questions and it doesn't because one of the criteria is are there competing, if not preliminary, Bankruptcy issues and the Bankruptcy issues are substantial here. They just are. And they have to do with contract [149]rejection where you don't have a judicial decision about whether there is an enforceable contract. And when you're in that situation, granting relief from the stay to go to state court to answer the preliminary question would be silly, in my opinion. It's not more efficient and it's not a good use of judicial time in either place.

Trial (inaudible) is one of the issues. Yeah, there's been some development over in state court. There has. Some of that would be - it doesn't matter which court that preparation goes to. There's been a deposition taken, at

least one. There may be supplemental discovery as well. That stuff is all going to be usable here as well as there, either place. I don't see an advantage gained in terms of the cost of preparation, the trial readiness. Going to state court you're going to try some things that shouldn't be tried in state court now that there is a Bankruptcy. And there are some issues that could be tried there or here.

It reminds me a little bit of the cases that say for eligibility purposes you sometimes grant relief from a stay to go to state court to liquidate a claim. That's silly. My job is to determine eligibility. And my job is to determine whether to allow the rejection of this contract. And one of the things I would have to decide is, is there a contract, first of all. And then can it be rejected? And granting relief from the stay to the [150]state court to go ahead and do that has (inaudible) problems.

The only situation where I would do that would be if I was also willing to dismiss the case. If I don't think there's a Bankruptcy here at all. And I think there is a Bankruptcy here. It's not the kind of dire moment where a business has to be in Bankruptcy; it's a case of a business that has had ups and downs and is facing a bunch of litigation now that's going to drain its resources, and there's no better place for it to be than Bankruptcy. And there are allegations that there have been preferential payments made, maybe fraudulent conveyances. Answering those arguments, there's the transfer of assets into the debtor on the eve of Bankruptcy, some refinancing that may have been a wash to some extent. There's been a payment or two made to some insiders, which is only going to be recoverable in the

Bankruptcy case. It's the exactly the right place for us to value those things and include them in the distribution calculous for this business.

And on top of that there is the management of the Clarksville litigation, which I think as only a matter of timing hasn't become a bigger financial drain on business.

I see this all the time with contractors who have secondary and tertiary liability in great big lawsuits, and it ruins their business because they can't get [151]bonding and because they can't get on jobs of a certain size and things of that sort until they get a handle on that. And that's what I see going on here. I do.

The fact that in eight, nine, 10, 11 and 12 they didn't make money and then when they started making money, it means that the economy in Middle Tennessee has helped them now. I don't see that they're out of the woods. They did some things that I always see to try to stay in business during that period, borrowing money from family members, doing lien adjustments. That troubles me only a little bit. You look for excessive stuff like that. As I've said, the way you undo the payment to Mr. Jackson's wife is by staying in Bankruptcy, not by getting out of Bankruptcy, and stay relief just complicates that, complicates the accounting for that in the Bankruptcy case.

There was a little Bankruptcy pre-planning here and I bring it up because this is the kind of argument that gets made in the Appellate Court that they misunderstand. He went out and bought a couple of cars right before filing

Bankruptcy because, as Mr. Jackson said, it would be hell to get those cars after filing Bankruptcy. I don't hold that against them. We got $100,000 worth of assets in the estate also. We got the two cars and not paid for. And it's between Mr. Jackson and the banks whether he had to tell them that he was contemplating Bankruptcy. That [152] ain't a problem for the debtor. The debtor has got two new trucks and they're going to help the debtor in the business and the debt appear s to me to be inconsequential in the context of whether Ritzen Group will get paid whatever they're owed, and other creditors in the case, anything that will help the debtor pay their debts down the road.

I've got to do an economic assessment. And the economics of this case is absolutely clear to me where I stand on the (inaudible).

Thankfully tomorrow is my last day, which has nothing to do with the outcome of this case, it would be the same. But if I was staying here, I'd have you all in for a pre-trial conference in 30 or 40 days. I would tee up everything that you have going here. Is there a contract? Can it be rejected? What would be the damages if it were rejected? What kind of recoupment rights are there, if any, if it can or can't be rejected? I'd have all those things; I'd tee them all up; and then I'd order you guys to mediation and I'd get the best business mediator I could find in town and I'd have you all spend a couple of days really talking about what your risks are, because you've got risks on every side of this. Everybody is at risk of losing completely. That's my appraisal of your respective positions.

Appendix D

I read the depositions and I looked at the meeting of creditors stuff and I look at all the [153]documents and contracts and the timing when all those closing documents were due and the letters and emails that were exchanged and everything. That's the stuff that makes up lawsuits. And that's why Bankruptcy works so well. Bankruptcy is the perfect place to do honest to goodness risk assessment. And everybody (inaudible) is just that. It's a bunch of huff and puff. I don't take it seriously. You've all got skin in the game and you all can lose. Everybody in this room can. And that's why this is a Bankruptcy case and not a state court specific performance lawsuit. It got here before the state court ordered anything like that. And now you all get to be realistic about who owes what to whom and how much, and what's the most efficient way to resolve it?

I see that factor about the cost of defense and potential burden to the estate and the impact of the litigation on creditors as very strongly favoring a Bankruptcy forum for all of this because you can't get it all together except here. You can go to state court and talk about specific performance and contract rights and other things but it's got to come back here at that point to do all the rest of it. And I don't grant relief from the stay in hopes of avoiding what I see as well up in the six figure costs to go to state court, litigate all of those questions, and then come back here and answer the Bankruptcy questions.

Instead, the Bankruptcy questions [154]give you the perfect platform for addressing the value of everybody's not risk- free positions. This is it. This is where you need to be, in my opinion. That's why I'm not granting relief from the stay.

Appendix D

The likelihood of success on the merits I've already talked about. I really see it as a horse race. (Inaudible) rejection of the contract, if there is one, and the predicate question of whether there is one. That's based on my review of both of your respective positions in the state court.

The discovery stuff that happened in state court, it's always there. Somebody always doesn't do the discovery stuff right. And it's not uncommon for me to see that as one of the things that's going on in the state court litigation. And on even Bankruptcy litigation like this it's often part of the litigation calculous by Jackson that they are not cooperating in discovery to the extent that a state court expects them to.

I bring it up here for a different reason, and the reason is it won't be tolerated in Bankruptcy Court. It won't be. It's naked time; it's time where everybody has to get naked. That means all the facts have to come out on the table here. Nobody is going to tolerate the kind of stuff that was going on in state court. There is no other place to go now for litigation of this. It's all going [155]to happen right here and it's going to happen very efficiently under the Federal Rules and you all aren't going to be permitted to do the sort of stuff that was going on in state court.

And I tell you that because it will be more efficient here. If we need to estimate claims, we'll estimate the rejection damage claim, if there is a rejection damage claim here for the Ritzen Group. The cost of estimating that claim is a fraction of the actual cost that would be

incurred in actually litigating and liquidating that claim. I've done it. I've done it many times. I've seen it done in billions of dollars' worth of litigation in other cases. Not so much here in Nashville but other places. It's a very efficient way to figure out exactly what somebody is due. And here you get it, you will get it that the debtor has a huge incentive to figure this out because, to the extent that there's damages here, those damages are reflected in the increased value of the estate. It's that simple.

You know, if this property really is worth a lot of money, and the Ritzen Group is going to have a right, if they have an enforceable contract, to a big piece of that. Because that's going to be included in their lost business opportunity here if it's found that there was a contract and the debtor is allowed to reject it.

Now, on the other hand, the risk of [156]a goose egg and not proving that is significant here, as I've found. And so there's so much room here for discussion and negotiations. It's a classic Bankruptcy moment. That's what it is. You can't do what I just described over there in state court because we don't have all of the folks, all of the stake holders are not there. The stake holders being the other $230,000 worth of unsecured creditors and this Clarksville, the unknown creditor that wants to have a say. They just don't know it yet. And keeping this business going while we work all of that out just has Bankruptcy written all over it. And it doesn't have the stench that I see in cases where there's no reorganization. We're just holding off litigation for a while. We have a business here that everybody wants to keep in business, and assets that

need to be preserved, maybe some assets that need to be recovered. That's a Bankruptcy picture and not a bad faith picture. And so that's how I get where I get.

Don't be confused. I haven't made any decisions about who's going to win and who's going to lose with respect to the existence of a contract, the right to reject that contract, the amount of damages, if any. I'm telling you all you have a lot at risk, everybody does, and this is the place to work that out. Relief from the stay is not the right way to go. It's going to cost everybody a lot more money.

[157]Okay, there's a lot of very specific findings I can make in addition to this about the pending Ritzen lawsuit, about what happened on December 15 when we didn't have a closing, about the Ritzen Group not being there, about Jackson Masonry being there. I could go through a lot of those details. It would only be to tell you why I think there's risks on all sides here and why I understand completely why Carol McCoy didn't grant summary judgment to anybody. It's a big horse race still, a lot of facts out there.

I think I'm not going to burden you all with any greater detail than that, than what I've done. I did consider the fact that it looks like there may be assets here in excess of liabilities but that's a really strange way to describe this fact pattern. Without valuing the Clarksville case and without knowing whether there is a rejection damages here and what that rejection damages claim would be to the Ritzen Group, it's not possible to say whether the assets exceed the liabilities in this case. You can't say so.

And I'm talking Bankruptcy now but those are facts that simply aren't here. Yeah, there may be $1 million worth of equity in a piece of property but that equity may belong to the Ritzen Group if they have a contract and if they can prove that there are damages in the event a Bankruptcy Court allows rejection would be measured by the [158] value that they didn't have. But I would guess you've got to discount that by a whole bunch of stuff, by the risk of not recovering, by the cost of attorneys' fees and things. In other words, the math of those assets and how they might be distributed is not at all clear again. We don't know how much the Clarksville lawsuit is worth. So we don't know how to put that in here.

We transferred an asset here on the eve of Bankruptcy, the Old Hickory property, into the estate, personally, as I gather, by Mr. Jackson and his former spouse because the assets went up. And then they borrowed a bunch of money in order to pay off some other creditors. The math of that and who came out ahead and whether there are preferences or other kinds of recovery, that map would have to be included in any calculation of solvency or insolvency here, and I can't do it sitting here yet. I just don't know.

I'm glad to hear, it's unusual, that this Debtor is paying its debts, trade debt and for employees along the way. And with a little luck they'll get to continue doing that. I think that's important for them to stay in business while this is going on. I hope they can.

From my standpoint, that's a real plus for staying in Bankruptcy is preserving the going concern value of this business, now that it has become profitable in the last two years, so that there's money there in the [159] event that these debts turn out adverse to Jackson Masonry.

When all is said and done, we value the Clarksville problem; we value Mr. Ritzen's situation, whatever it may be; if everything else is gathered up we may need a going concern business in order to get everybody paid. I can't tell. But that's a Bankruptcy issue also.

I'm also telling you that I've considered all this stuff. I get the fact pattern here and I've thought about all these things in reaching my conclusion that we're better off on the Bankruptcy side than we are in the anarchy of sending this part back to state court and having part of it here where we can manage this litigation more efficiently for everybody concerned.

Those are findings and conclusions. I could add a bunch of state law cases. You all have cited some that are good from the Sixth Circuit about how to evaluate this. I should say I've read, over the years, dozens of these dismissal cases usually, sometimes release stay cases, where courts have said this is a two-party matter and that's all it is and it ought to go back to state court, and it shouldn't be here.

Number one, this isn't just a two-party matter. I'd say there is a barking dog in the Ritzen, and please take no offense at my analogy. The Ritzen Group's claim is right

here and there's no question that the timing[160] of this filing most affected the Ritzen claim. It did. And it was filed a few days before the hearing on sanctions and for discovery, and a few days before the actual trial in state court. As a strategic matter, if I represented the debtor, I would have filed the debtor even earlier to keep the state court from finishing this litigation. That's what you need to do and they did.

Through one set of lenses that's a litigation strategy, through another set of lenses that's good Bankruptcy advice. I've seen both kinds. And this is not absolutely bright line clearly good Bankruptcy advice, there's a little litigation strategy in there, too.

I think that good Bankruptcy advice outweighs the litigation strategy in this fact pattern. So, I come out on the side of that timing question.

Any questions from Counsel about what I did or why I did it? And you won't offend me a bit because, as I say, you're going to be in front of a different judge the next time you're in the room.

Unless you have a question, I'm going to just repeat one thing that I've said before. You have a golden opportunity before this case hits in dark directions. Now is the time for you to get help. Talk to each other. Now is the time. Front end. And figure out what your realistic likelihoods are of success in this litigation. And [161]if Jackson Masonry stays in business and realizes the value of its assets, then everybody might walk away smelling very, very good, sooner rather than later.

But I guarantee you the lawyers in the room and not in this room can consume easily a half a million dollars of value over the next year because of litigation. And I want them to earn livings, I really do want them to earn livings but there are also good lawyers involved, and the kind that will be able to have conversations you need to have sooner rather than later about the things we've been talking about today. Do it here. It's just the right place and the right time.

Anything else from anybody?

(No audible response)

THE COURT: Okay, I need an order from you that simply says: "For the reasons stated orally by the Court under Bankruptcy Rule 7052, motion for relief from stay is denied." And nothing more than that needed. Thank you for great preparation. You're used to the electronics; it was perfect. Thank you so much. It's so complicated to do this on paper, everybody was ready and everybody did a very, very good job today. Thank you. We'll be in recess.

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APPENDIX E — STATUTE 28 U.S.C. § 158

28 U.S.C. § 158 states:

(a) The district courts of the United States shall have jurisdiction to hear appeals

(1) from final judgments, orders, and decrees;

(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

(3) with leave of the court, from other interlocutory orders and decrees;

of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b) (1) The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council in accordance with paragraph (3), to hear and determine, with the consent of all the parties, appeals under subsection (a) unless the judicial council finds that—

(A) there are insufficient judicial resources available in the circuit; or

(B) establishment of such service would result in undue delay or increased cost to parties in cases under title 11.

Not later than 90 days after making the finding, the judicial council shall submit to the Judicial Conference of the United States a report containing the factual basis of such finding.

(2) (A) A judicial council may reconsider, at any time, the finding described in paragraph (1).

(B) On the request of a majority of the district judges in a circuit for which a bankruptcy appellate panel service is established under paragraph (1), made after the expiration of the 1-year period beginning on the date such service is established, the judicial council of the circuit shall determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(C) On its own motion, after the expiration of the 3-year period beginning on the date a bankruptcy appellate panel service is established under paragraph (1), the judicial council of the circuit may determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(D) If the judicial council finds that either of such circumstances exists, the judicial council may provide for the completion of the appeals then pending before such service and the orderly termination of such service.

(3) Bankruptcy judges appointed under paragraph (1) shall be appointed and may be reappointed under such paragraph.

(4) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(5) An appeal to be heard under this subsection shall be heard by a panel of 3 members of the bankruptcy appellate panel service, except that a member of such service may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

(6) Appeals may not be heard under this subsection by a panel of the bankruptcy appellate panel service unless the district judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district.

(c) (1) Subject to subsections (b) and (d)(2), each appeal under subsection (a) shall be heard by a 3-judge panel of the bankruptcy appellate panel service established under subsection (b)(1) unless—

(A) the appellant elects at the time of filing the appeal; or

(B) any other party elects, not later than 30 days after service of notice of the appeal;

to have such appeal heard by the district court.

(2) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d) (1) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

(2) (A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in

such first sentence, or all the appellants and appellees (if any) acting jointly, certify that—

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel—

(i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or

(ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A);

then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A).

(C) The parties may supplement the certification with a short statement of the basis for the certification.

(D) An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal is pending, issues a stay of such proceeding pending the appeal.

(E) Any request under subparagraph (B) for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.