No. 21-___

IN THE

Supreme Court of the United States

VSP LABS, INC.,

Petitioner,

v.

HILLAIR CAPITAL INVESTMENTS L.P. AND HILLAIR CAPITAL MANAGEMENT L.L.C.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995), this Court cautioned that a bankruptcy court's "related to" jurisdiction "cannot be limitless." But the Court has never established a test to determine "related to" jurisdiction.

The lower courts are now deeply divided on this issue. They cannot agree on whether indirect or speculative possibilities confer bankruptcy jurisdiction under 28 U.S.C. § 1334(b) or on whether it must be construed more narrowly. The lower courts also cannot agree on whether and when to apply the "anticipated outcome" test, the "conceivable effect" test, the "significant connection" test, the "close nexus" test, or the "common sense" test to decide jurisdiction. The lower courts even disagree internally about which conflicting test to apply. Confusion and misapplication are rampant.

This Court has not yet determined the correct test, and now is the time to resolve the longstanding divide among the lower courts. Now is also the time to reaffirm bankruptcy jurisdiction "cannot be limitless." The decision below directly defied this principle.

The Question Presented is:

What test determines whether a bankruptcy court has "related to" jurisdiction under 28 U.S.C. § 1334(b)?

PARTIES TO THE PROCEEDING

Petitioner is VSP Labs, Inc. Petitioner was a creditor and movant in the bankruptcy court, the appellant in the district court, and the appellant in the court of appeals.

Respondents are Hillair Capital Investments L.P. and Hillair Capital Management L.L.C. Respondents were creditors and movants in the bankruptcy court, appellees in the district court, and appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Petitioner states as follows:

Petitioner VSP Labs, Inc. is wholly owned by Vision Service Plan, a California not-for-profit corporation. It has no publicly owned stock, and no publicly held company owns 10 percent or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings in the Fifth Circuit Court of Appeals, the United States District Court for the Northern District of Texas, and the United States Bankruptcy Court for the Northern District of Texas:

- *Matter of PFO Global, Incorporated*, No. 20-10885, 5th Cir. (Feb. 9, 2022) (affirming district court and bankruptcy court orders)
- *VSP Labs, Inc. v. Hillair Capital Investments, L.P.*; *Hillair Capital Management, L.L.C.*, No. 3:19-CV-1575-S , N.D. Tex. (Aug. 21, 2020) (affirming bankruptcy court orders)
- *In re PFO Global Inc., et al.*, No. 17-30355-HDH-7, Bankr. N.D. Tex. (Dec. 12, 2019) (fee award)
- *In re PFO Global Inc., et al*., No. 17-30355-HDH-7, Bankr. N.D. Tex. (Oct. 8, 2019) (denying motion for relief from lift stay order)
- *In re PFO Global Inc., et al.*, No. 17-30355-HDH-7, Bankr. N.D. Tex. (June 20, 2019) (denying motion for reconsideration of emergency order)
- *In re PFO Global Inc., et al*., No. 17-30355-HDH-7, Bankr. N.D. Tex. (June 20, 2019) (enforcing emergency order)
- *In re PFO Global Inc., et al.*, No. 17-30355-HDH-7, Bankr. N.D. Tex. (May 2, 2019) (emergency order precluding claims against non-debtor)

- *In re PFO Global Inc., et al.*, No. 17-30355-HDH-7, Bankr. N.D. Tex. (Sept. 7, 2017) (order granting lift stay motion)

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

This case presents an important and recurring jurisdictional issue that has deeply divided the courts of appeal: What test determines "related to" jurisdiction when deciding the scope of a bankruptcy court's reach under 28 U.S.C. § 1334(b)? Under Article III of the Constitution, bankruptcy courts, like all federal courts, have limited jurisdiction. But now, the Fifth Circuit and several sister courts have concluded "related to" jurisdiction is "extremely broad." Other courts, including the Seventh Circuit, have properly recognized there must be a "more narrow" interpretation of "related to" jurisdiction in "a universe where everything is related to everything else."

While some lower courts hold there is jurisdiction based on "speculative" effects on the debtor, others have squarely—and properly—rejected this. Now is the time to clarify the correct jurisdictional test and reaffirm the principle this Court previously articulated in *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995): bankruptcy jurisdiction "cannot be limitless." *Id.* This case demonstrates how several lower courts have recently disregarded this principle. Although Petitioner urged the Fifth Circuit to apply the "anticipated outcome" test previously adopted and endorsed by that circuit, it instead applied another circuit's "extremely" broad "conceivable effect" test. The court then misconstrued this test in finding that hypothetical, tenuous, and speculative effects on the debtor were enough to confer bankruptcy jurisdiction. The Fifth Circuit then affirmed the bankruptcy court's emergency adjudication of Petitioner's claims—claims that arose under state law, were filed in state court, and had no effect on the debtor's bankruptcy estate. The Northern District of Texas

had no interest in the California state law claims at issue between two non-debtor California corporations. The California state court did. More importantly, the California court had the jurisdiction and the right to adjudicate these claims pled in its court.

Certiorari is imperative. This case shows the "conceivable effect" test has gone too far. The lower court's misinterpretation and misapplication of this amorphous test has stripped state courts of their jurisdiction—and their right—to adjudicate the state law disputes between their citizens. The Court should grant certiorari to reject the Fifth Circuit's decision and establish a clear jurisdictional test for the lower courts to follow.

This case is the perfect vehicle to decide this critical issue. The facts in the record are undisputed, and Petitioner urged all three lower courts that the California state court must be permitted to exercise its general jurisdiction to adjudicate Petitioner's claims. Unless there is review and reversal, the Fifth Circuit's decision will render bankruptcy jurisdiction "limitless" and state courts will continue to be stripped of their jurisdictional authority. Under this Court's clear precedent, that cannot be the case.

OPINIONS BELOW

The Fifth Circuit's opinion is published at 26 F.4th 245 and reproduced at App.1a-16a. The decision of the United States District Court for the Northern District of Texas is published at 619 B.R. 883 and reproduced at App.17a-59a. The orders of the United States Bankruptcy Court for the Northern District of Texas are unpublished and reproduced at App.60a-91a.

JURISDICTION

The opinion of the Fifth Circuit Court of Appeals was filed on February 9, 2022. The Fifth Circuit's judgment was also entered on February 9, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1334(b) provides in relevant part:

> [N]otwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or *related to* cases under title 11 (emphasis added).

STATEMENT OF THE CASE

A. Legal Background

"The jurisdiction of the bankruptcy courts, like that of other federal courts, is grounded in, and limited by, statute." *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995). "Title 28 U.S.C. § 1334(b) provides that 'the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.'" *Id.* "The district courts may, in turn, refer 'any or all proceedings arising under title 11 or arising in or related to a case under title 11 . . . to the bankruptcy judges for the district.'" *Id., citing* 28 U.S.C. § 157(a). This case addresses whether the bankruptcy court had "related to" jurisdiction over Petitioner's state law claims against a non-debtor.

B. Factual Background

In 2019, Petitioner VSP Labs, Inc. ("VSP"), a California corporation, filed state law claims against two other California corporations, Hillair Capital Investments L.P. and Hillair Capital Management L.L.C. (collectively "Hillair"). App.3a. After VSP filed these claims in California state court, Hillair sought emergency relief in the Northern District of Texas Bankruptcy Court. App.3a-5a. It asked the bankruptcy court to adjudicate VSP's claims pursuant to a 2017 bankruptcy order relating to Debtor Pro Fit Optix, Inc. ("PFO"). App.5a.

The bankruptcy court adjudicated these claims and held they were barred under its 2017 order. App.5a-6a. The court further held it had jurisdiction to decide the claims because they could "conceivably" affect PFO's estate. App.5a-6a. The Northern District of Texas and the Fifth Circuit affirmed this decision. App.6a. The California action is stayed pending resolution of this Petition.

1. VSP's 2013 Lawsuit Against Debtor PFO.

In 2012, VSP and PFO entered a four-year agreement requiring PFO to develop and transfer eyewear technology to VSP. App.3a. If PFO could not meet its developmental milestones under the agreement, VSP could "step in" and take over developing the technology. App.3a. If it did, PFO was obligated to reimburse VSP for its development costs. App.3a.

In 2013, VSP sued PFO in California state court asserting its failure to develop the technology and refusal to reimburse VSP for its step-in costs. App.3a. VSP asserted claims for breach of contract and

declaratory relief. App.3a. PFO filed cross-claims, and the parties' trial was set for March 2017. App.3a.

Two months before trial, PFO filed for Chapter 11 bankruptcy in the Northern District of Texas. App.3a. It later converted to Chapter 7. App.60a, 63a, 66a, 70a, 86a. PFO's bankruptcy proceedings automatically stayed the California action. App.3a. During the stay, Hillair purchased PFO's cross-claims against VSP. App.3a-4a. Hillair then tried to sever these cross-claims from VSP's original claims against PFO. App.3a-4a. Hillair's goal was to take PFO's cross-claims to trial, while VSP's claims remained stayed. App.4a.

In response, VSP sought relief in the bankruptcy court. App.4a. It asked the court to lift the automatic stay so VSP could pursue its setoff rights in the California action. App.4a. Allowing VSP to pursue its claims against PFO would ensure any damages awarded against VSP would be offset by any damages awarded against PFO. App.4a. Although third-party Hillair had recently purchased PFO's cross-claims, the California action remained a dispute between VSP and debtor PFO only. App.4a.

On September 7, 2017, the bankruptcy court granted VSP's motion to lift the stay. App.4a. At that time, VSP solely alleged wrongdoing by PFO. App.4a. Hillair's only involvement was its ownership of PFO's cross-claims. App.4a. Thus, Hillair wanted confirmation that VSP was pursuing its setoff rights only against PFO, and not seeking damages from Hillair because it purchased the cross-complaint. App.4a.

To address this concern, VSP, Hillair, and PFO's trustee stipulated to the following language in the bankruptcy court's 2017 lift stay order:

> The automatic stay is modified in the above-styled case so that [VSP] may liquidate the amount of its affirmative claims against [PFO] for the purpose of asserting its rights to setoff and recoupment in [the California action]; provided however that to the extent money damages are awarded to VSP Labs, Inc., in excess of any monetary damages awarded to [Hillair], or PFO in the California Action . . . no money damages or other amounts of any kind may [be] recovered from Hillair. App.4a, 90a-91a.

Two years later, VSP discovered independent misconduct by Hillair, which was wholly unrelated to its 2017 purchase of PFO's cross-claims. App.4a-5a.

2. In 2019, VSP Discovers Hillair's Wrongdoing, and the Bankruptcy Court Adjudicates VSP's New State Law Claims Against Hillair.

When the bankruptcy court entered its 2017 order, VSP knew nothing about any independent tortious conduct by Hillair. App.4a-5a. But in 2019, VSP discovered Hillair itself had independently decided to direct PFO and did direct PFO to breach its 2012 agreement with VSP. App.4a-5a. VSP promptly sought to amend its complaint in the California action. App.5a.

Specifically, VSP sought to add three new claims against Hillair for intentional interference with contractual relations, aiding and abetting fraudulent transfer, and unfair business practices under the California Business and Professions Code (the "Unfair Competition Law" or "UCL"). App.40a. VSP asserted the first two claims against Hillair only. App.40a.

And these common law claims sought damages against Hillair only. App.40a. Although VSP asserted UCL claims against PFO and Hillair, it did not seek any damages for these claims. App.40a. In California, only injunctive relief and restitution are available for UCL violations.

Before the California court granted VSP's motion for leave to amend, Hillair filed an emergency motion with the Texas bankruptcy court. App.25a. It asked the court to adjudicate VSP's state law claims and hold they were barred under the 2017 lift stay order. App.25a-26a. The court granted Hillair's motion. On May 2, 2019, the bankruptcy court held it had core jurisdiction over these claims. App.60a-62a. It then fully and finally adjudicated them. App.60a-62a. It held VSP was "prohibited from pursuing the [claims] against Hillair." App.61a.

VSP immediately sought reconsideration of the bankruptcy court's emergency order. App.5a. It argued that, because these claims were based on California law, and brought by a California corporation against another California corporation, the court had neither core jurisdiction nor "related to" jurisdiction over its claims against Hillair. App.5a.

Shortly after Hillair sought emergency relief with the bankruptcy court, the state court ordered the parties to file supplemental briefs. App.5a, 100a-101a. The court ordered the parties to "file a copy of any order issued by the Bankruptcy Court" and a "brief of no longer than five pages explaining how the outcome of the [bankruptcy] hearing impacts the Court's ruling on VSP's Motion for Leave to File an SAC, *if at all*." App.100a-101a (emphasis added).

VSP timely complied with the California court's order. App.5a. It informed the court that VSP had filed a motion for reconsideration with the bankruptcy court and argued that the 2019 order adjudicating its claims against non-debtor Hillair had exceeded the bankruptcy court's jurisdiction. App.28a. This was the same argument VSP made in its reconsideration motion to the bankruptcy court. App.28a.

In response, Hillair again sought emergency relief in the bankruptcy court. App.27a. It asked the court to enforce its 2019 order adjudicating VSP's claims and to award Hillair the attorney's fees it incurred filing its new motion. App.27a. On June 20, 2019, the bankruptcy court denied VSP's reconsideration motion and granted Hillair's motion seeking enforcement of the May 2 order and its attorney's fees. App.27a-29a. The court then awarded Hillair $49,075.30 in fees and costs. App.30a.

In order to perfect its appeal, VSP moved for relief from the 2017 lift stay order under Federal Rules of Civil Procedure 60(b)(4). App.29a. The bankruptcy court denied the motion. App.29a. The court held it had jurisdiction to adjudicate VSP's claims against Hillair because "the outcome of VSP's causes of action against Hillair . . . could conceivably have an effect on the Debtor's estate." App.38-39a.

3. The District Court and Fifth Circuit Affirm the Bankruptcy Court's Orders.

In 2020, the district court affirmed all of the bankruptcy court's orders. App.18a-19a. It held the bankruptcy court had "related to" jurisdiction over VSP's claims because it was "conceivable that VSP's claims against Hillair could have an effect on the Debtor's estate." App.39a-40a. The district court

agreed with the bankruptcy court's finding that "if Hillair 'is found to be independently liable for some portion of the damages that are the subject of the Second Amended Complaint, it could reduce the amount of damages that the Debtor could be found liable for.'" App.39a-40a.

It also agreed with the bankruptcy court's finding that "if Hillair 'is somehow found jointly liable for damages to VSP, it could result in a contribution claim between Hillair and the Debtor.'" App.39a. The district court further agreed there was "related to" jurisdiction because "each claim asserted against Hillair . . . is clearly intertwined with the Debtor's alleged misconduct." App.39a-40a. However, after affirming the bankruptcy court's jurisdiction, the district court acknowledged: "[I]t is possible that VSP's claims against Hillair would *not* impact the bankruptcy estate." App.39a (emphasis added). VSP timely appealed to the Fifth Circuit. App.3a.

On appeal, Hillair argued that the bankruptcy court had jurisdiction because it was "improbable" but not "impossible" for VSP's claims to affect debtor PFO. App.94a. The Fifth Circuit agreed. App.8a-9a. It held the bankruptcy court had "related to" jurisdiction for one reason: "the outcome of VSP's claims against Hillair could conceivably affect PFO's estate because successful claims against Hillair could reduce the amount of damages for which PFO's estate is found liable." App.8a-9a.

In their orders and opinions, the lower courts failed to analyze the actual claims VSP pled against Hillair. App.1a-91a. Again, all three claims sought damages or restitution against Hillair *only*. App.40a, 94a-97a. The lower courts also ignored there was no indemnity or contribution agreement between PFO and Hillair.

App.94a-97a. They further ignored that PFO had no income or assets since 2017. App.1a-97a. Finally, they failed to consider that PFO was undergoing Chapter 7 dissolution when VSP filed its claims. App.1a-97a.

REASONS FOR GRANTING THE PETITION

I. THIS COURT HAS NEVER ANSWERED THE QUESTION PRESENTED, WHICH CONTINUES TO DIVIDE THE LOWER COURTS.

This Court has never articulated a test to determine "related to" jurisdiction, so the lower courts have "developed different tests" to decide this critical jurisdictional issue. *Celotex*, 514 U.S. at 308 n.6; *In re Salem Mortg. Co.*, 783 F.2d 626, 634 (6th Cir. 1986); *In re Mid-States Express, Inc.*, 433 B.R. 688, 698 (Bankr. N.D. Ill. 2010) ("The circuits do not agree on the definition of proceedings 'related to' cases under title 11.").

In *Celotex*, this Court confirmed "related to" jurisdiction extends to "more than simple proceedings involving the property of the debtor or the estate." *Celotex*, 514 U.S. at 308. But this Court also cautioned that "related to" jurisdiction "cannot be limitless." *Id.* It explained that "bankruptcy courts have no jurisdiction over proceedings that have no effect on the estate of the debtor." *Id.* at n.6. The Court also noted the "jurisdiction of bankruptcy courts may extend more broadly" to Chapter 11 reorganization cases than Chapter 7 liquidation cases. *Id.* at 310.

After recognizing these principles, the Court narrowly held there was "related to" jurisdiction because the creditor's action "would have a *direct* and *substantial* adverse effect" on successful reorganization of the debtor's estate. *Id.* at 300, 308-10 (emphasis

added). The Court, however, did not resolve the circuit split regarding which test correctly determines "related to" jurisdiction. *Id.* at 308 n.6. In *Celotex*, it did not matter which test was correct—it was clear the creditor's action would directly affect the debtor's Chapter 11 reorganization. *Id.* at 300. Moreover, in 1985, the lower courts' tests were only "slightly different." *Id.* at 308 n.6. Today, they are drastically different. See *infra*, Section II.A-D.

Most cases are also more complicated than *Celotex*. Often, it is entirely unclear—or extraordinarily unlikely—that a third-party action will affect the bankruptcy estate. *See, e.g.*, *Matter of FedPak Systems, Inc.*, 80 F.3d 207, 214 (7th Cir. 1996). A clear standard to determine "related to" jurisdiction has therefore become imperative. The lower courts' differing and amorphous jurisdictional tests have led to inconsistent and irreconcilable outcomes. *See In re Santa Clara County Child Care Consortium*, 223 B.R. 40, 47–49 (B.A.P. 1st Cir. 1998). Worse, and notwithstanding this Court's warning in *Celotex*, the widely adopted "conceivable effect" test has conferred "extremely broad" and virtually "limitless" bankruptcy jurisdiction. *See, e.g., In re Farmland Industries, Inc.*, 567 F.3d 1010, 1019 (8th Cir. 2009).

Absent certiorari, litigants like Hillair will continue arguing there is "related to" jurisdiction unless it is "impossible" for claims between non-debtors to affect the bankruptcy estate. But, of course, impossibility cannot be the test since, by design, bankruptcy courts have "limited jurisdiction." *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940). State courts can and must be able to adjudicate state law claims between their citizens. Federalism depends on this, but this principle is gravely jeopard-

ized by the lower courts' inconsistent tests for "related to" jurisdiction, each of which is set forth below.

A. The "Anticipated Outcome" Test

Just four years after *Celotex*, the Fifth Circuit established a two-part test to determine "related to" jurisdiction. *In re Bass*, 171 F.3d 1016, 1022 (5th Cir. 1999). Although this test avoids "limitless" bankruptcy jurisdiction, it has not been widely adopted. Even the Fifth Circuit declined to use its own test in the proceedings below.

For jurisdiction to attach under this test, "the *anticipated outcome* of the action must both (1) alter the rights, obligations, and choices of action of the debtor, and (2) have an effect on the administration of the estate." *Id.* (emphasis added).

Though not widely adopted, this two-part test has never been overruled. But the Fifth Circuit inexplicably ignored it here and applied instead the "conceivable effect" test, discussed *infra*. Its mistake was dispositive. Once again, Hillair conceded it was "improbable" VSP's claims could have any effect on PFO's estate. Thus, it was undisputed the "anticipated outcome" of VSP's claims against Hillair would *not* alter debtor PFO's rights or affect its estate. Had the Fifth Circuit applied its own *In re Bass* test, the California court could have promptly adjudicated VSP's state law claims against non-debtor Hillair. Instead, the Northern District of Texas Bankruptcy Court fully and finally adjudicated these California claims between two California corporations—claims that were never likely to affect debtor PFO.

The Fifth Circuit's decision cannot stand. *In re Bass* properly recognized that "related to" is "a term of art in bankruptcy jurisdiction, where its meaning is

not as broad as it is in ordinary parlance where it means 'having some connection with.'" *In re Bass*, 171 F.3d at 1022. "The distinction is that, for purposes of bankruptcy jurisdiction, there is a *cause* component in 'related to.'" *Id.* (emphasis in original). "The proceeding must be capable of affecting the bankruptcy estate for it to be 'related to' the bankruptcy." *Id.*

The "cause component" is missing here. VSP's claims were never "anticipated" to affect PFO's estate because they sought relief against Hillair only. Certiorari is needed to ensure the lower courts apply the principles of *Celotex* and *In re Bass* rather than the overbroad and imprecise "conceivable effect" test erroneously used in this case.

B. The "Conceivable Effect" Test

When deciding the bankruptcy court's jurisdiction over VSP's claims, the Fifth Circuit used the "conceivable effect" test. It held "related to" jurisdiction "turns on whether the outcome of a proceeding could *conceivably* have *any* effect on the estate being administered in bankruptcy." App.8a-9a (emphasis added).

Other circuits have adopted this "extremely broad" standard. *See, e.g.*, *In re Farmland Industries, Inc.*, 567 F.3d at 1019 ("This court has adopted the 'conceivable effect' test," which is "extremely broad.") *In re Toledo*, 170 F.3d 1340, 1345 (11th Cir. 1999) ("The key word [is] 'conceivable,' which makes the jurisdictional grant extremely broad."); *see also In re Fietz*, 852 F.2d 455, 457 (9th Cir. 1988).

The Third Circuit first established this test in *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984). There, the court stated jurisdiction depends on whether the third-party action "could conceivably

have any effect on the estate being administered in bankruptcy." *Id.* Since *Pacor,* many lower courts have had a myopic—and misplaced—focus on the term "conceivably." Therefore, several courts have found "related to" jurisdiction based on pure speculation. *See, e.g., Buffets, Inc. v. Leischow*, 732 F.3d 889, 894 (8th Cir. 2013) ("Even a proceeding which portends a mere contingent or tangential effect on a debtor's estate meets this broad jurisdictional test."); *In re Bernard L. Madoff Inv. Securities LLC*, 740 F.3d 81, 88 (2d Cir. 2014) (even "speculative" interests are "within the reach of the bankruptcy estate"); *Marah Wood Productions, LLC v. Jones*, 534 B.R. 465, 471 (D. Conn. 2015) (jurisdiction attaches to even "contingent, speculative, and derivative" interests of the debtor).

Here too, despite being bound to follow the "anticipated outcome" test from *In re Bass*, the Fifth Circuit invoked this broad standard and based its decision on pure speculation. Rather than examining the actual claims VSP pled, the Fifth Circuit merely hypothesized these claims could "conceivably" affect PFO. Its skeletal analysis of the bankruptcy court's "related to" jurisdiction was only four sentences. The Fifth Circuit failed to examine the record, and it failed to examine the law governing VSP's claims. The facts and the law compelled one conclusion: VSP's new claims—seeking separate relief against Hillair—would not affect PFO's estate. Yet, the Fifth Circuit could not get past the term "conceivably." It therefore relied on improper and unfounded speculation to reach its decision.

Of course, the bankruptcy court and the district court also found "related to" jurisdiction based on pure speculation. They both held there was jurisdiction because Hillair might someday seek contri-

bution against PFO if VSP prevailed on its claims. Given this hypothetical possibility, the lower courts held VSP's claims could "conceivably" affect PFO's estate. Their speculative analysis contravenes *Celotex's* clear admonition that bankruptcy jurisdiction "cannot be limitless." *Celotex*, 514 U.S. at 308. It also contravenes the *Pacor* test they purported to follow.

Although *Pacor* first articulated the "conceivable effect" test, *Pacor* also made clear that tenuous connections *cannot* confer jurisdiction. In *Pacor*, the bankruptcy court lacked jurisdiction because "[a]t best" the nondebtors' dispute was "a mere precursor to the potential third party claim for indemnification" against the debtor. *Pacor*, 743 F.2d at 995. This "potential" outcome did not confer jurisdiction. *Id.*

"Unfortunately, the application of the [*Pacor*] test has been far less consistent than has been the acceptance of the test." *In re Santa Clara County Child Care Consortium*, 223 B.R. at 48*, citing In re Rainbow Sec. Inc.*, 173 B.R. 508, 511 (Bankr. M.D.N.C. 1994). "The result is that some cases seemingly have reached opposite conclusions regarding jurisdiction when applying the same test to fact situations which are very similar." *Id.* The "conceivable effect" test has led to "inconsistent" decisions and unfair outcomes that *Pacor* itself would have rejected. *Id.* at 49; *see also In re W.R. Grace & Co.*, 591 F.3d 164, 172–173 (3d Cir. 2009).

In 2009, the Third Circuit confirmed its "conceivable effect" test is not as broad as other courts suggest. *In re W.R. Grace & Co.,* 591 F.3d at 172–173. In *Grace*, the court held there was no "related to" jurisdiction because the debtor would "not be bound by any judgment against the third party in question." *Id.* at 172. Instead, "an entirely separate action would

be necessary" to have any impact on the bankruptcy estate. *Id.* The non-debtor "would first have to be found liable by its state courts and would then have to successfully bring an indemnification or contribution claim against [the debtor] in the Bankruptcy Court." *Id.* at 172-173.

The Third Circuit held: "This is precisely the situation in which we have found that related-to jurisdiction does not exist." *Id.* at 173. "[I]n order for a bankruptcy court to have related-to jurisdiction to enjoin a lawsuit, that lawsuit must 'affect the bankruptcy without the intervention of yet another lawsuit.'" *Id., citing In re Federal–Mogul Global, Inc.*, 300 F.3d 368, 382 (3d Cir. 2002); *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 232 (3d Cir. 2004); *Pacor*, 743 F.2d at 986. The court emphasized: "[I]n *Pacor*, we were clear that an inchoate claim of common law indemnity is not, in and of itself, enough to establish the bankruptcy court's subject matter jurisdiction." *In re W.R. Grace & Co.*, 591 F.3d at 171.

Here, the lower courts reached the opposite conclusion. They found "related to" jurisdiction because VSP's claims "*could* result in a contribution claim between Hillair and the Debtor." (emphasis added). Their decisions cannot be squared with *Celotex* or *Pacor*. Hillair and PFO had no indemnity agreement. If Hillair later sought contribution from PFO, "yet another lawsuit" would be required. *In re W.R. Grace & Co.*, 591 F.3d at 172.

Since *Celotex*, many courts have expanded *Pacor's* "conceivable effect" test beyond recognition. This body of case law and the Fifth Circuit's decision cannot stand. Absent certiorari, bankruptcy jurisdiction will become increasingly "limitless" and state court jurisdiction even more restricted, despite this Court's

clear precedent holding this "cannot" be the case. *Celotex*, 514 U.S. at 308.

C. The "Significant Connection" Test

Historically, the Second Circuit construed bankruptcy jurisdiction more narrowly than its sister courts. Before *Pacor*, it held there must be a "significant connection" between the third-party action and the bankruptcy case for jurisdiction to attach. *In re Turner*, 724 F.2d 338, 341 (2d Cir. 1983).

In the Second Circuit, bankruptcy courts must be "evermindful" that "any controversy having 'only a speculative, indirect or incidental effect' on the estate is not 'related to' the bankruptcy action." *176-60 Union Turnpike, Inc. v. Howard Beach Fitness Center, Inc.*, 209 B.R. 307, 312-313 (S.D.N.Y. 1997), *citing Turner*, 724 F.2d at 341. Several other courts have also held speculative effects do not confer jurisdiction. *See In re DVI, Inc.*, 305 B.R. 414, 418 (Bankr. D. Del. 2004) ("A debtor may not invoke 'related to' jurisdiction where the action 'may have only speculative, indirect or incidental effect on the estate.'"); *Transamerica Financial Life Ins. Co. v. Merrill Lynch & Co., Inc.*, 302 B.R. 620, 626 (N.D. Iowa 2003) (no jurisdiction "even though indemnification and contribution claims against [debtor] are conceivable in the future"); *In re Inn on the Bay, Ltd.,* 154 B.R. 364, 367 (Bankr. S.D. Fla. 1993) (no jurisdiction based on "speculative, indirect or incidental effect on the estate"); *Retirement Systems of Alabama v. J.P. Morgan Chase & Co.*, 285 B.R. 519, 529 (M.D. Ala. 2002) ("Where a lawsuit's potential effect on a bankruptcy estate is 'speculative and premature,' then such a case fails to warrant federal bankruptcy 'related to' jurisdiction."); *Showalter v. Rinard*, 126 B.R. 596, 599 (D. Or. 1991) ("A controversy that has

only a vague or incidental connection with a pending case in bankruptcy . . . is unrelated to the bankruptcy estate.").

Importantly, the Second Circuit's "significant connection" test has never been overruled. However, to the great detriment of non-debtors and state courts, many federal courts have ignored the common sense behind this test: "Congress must have intended to put *some* limit on the scope of 'related to' jurisdiction." *In re Turner*, 724 F.2d at 341 (emphasis added). Absent certiorari, some limit will become no limit.

D. The "Close Nexus" Test

Yet another jurisdictional standard is the "close nexus" test. Some circuits that have adopted the "conceivable effect" test have recognized its overbreadth and improper application. For, example, "when a bankruptcy plan has been confirmed, the Ninth Circuit applies a more stringent 'close nexus' test." *Stichting Pensioenfonds ABP v. Countrywide Financial Corp.*, 447 B.R. 302, 308 (C.D. Cal. 2010), *citing In re Pegasus Gold Corp*., 394 F.3d 1189, 1194 (9th Cir. 2005). Under this test, "the question is whether there is a close nexus to the bankruptcy plan or proceeding sufficient to uphold bankruptcy court jurisdiction over the matter." *Id., citing Pegasus*, 394 F.3d at 1194. Importantly, "the Ninth Circuit has curtailed the reach of 'related to' jurisdiction to ensure that bankruptcy jurisdiction does not continue indefinitely." *Id., citing Pegasus*, 394 F.3d at 1194.

The Tenth Circuit has also applied a "strict test" for "related to" jurisdiction after the debtor's reorganization. *In re Peterson*, 6 Fed. Appx. 837, 839 (10th Cir. 2001). It "look[s] to the proceeding's practical effect

on implementation of the confirmed reorganization plan, rather than to its conceivable effect on the bankruptcy estate." *Id.* (holding "[a]ny impact on the implementation of [debtor's] plan is simply too remote a contingency to support bankruptcy jurisdiction under § 1334(b)").

While the Ninth and Tenth Circuits have applied these tests to Chapter 11 cases after confirmation of the debtor's reorganization, their principles apply even more readily to Chapter 7 cases like this one, where bankruptcy jurisdiction should be construed more narrowly. *Celotex*, 514 U.S. at 310.

E. The "More Limited" Test and "Common Sense" Approach

The Seventh Circuit takes yet another approach. Traditionally, it has construed "related to" jurisdiction more strictly than its sister circuits. Its interpretation is "narrow[,] not only out of respect for Article III but also to preserve the jurisdiction of state courts over questions of state law involving persons not party to the bankruptcy." *Home Ins. Co. v. Cooper & Cooper, Ltd.*, 889 F.2d 746, 749 (7th Cir. 1989); *Bush v. United States*, 939 F.3d 839, 845-846 (7th Cir. 2019) (recognizing the Seventh Circuit's historically narrow standard while affirming this precedent). "Overlap between the bankrupt's affairs and another dispute is insufficient unless its resolution also affects the bankrupt's estate or the allocation of its assets among creditors." *Cooper*, 889 F.2d at 749.

Unlike many lower courts, the Seventh Circuit has recognized "related to" jurisdiction must be curbed: "common sense cautions against an open-ended interpretation of the 'related to' statutory language 'in a universe where everything is related to everything

else.'" *FedPak Systems, Inc.*, 80 F.3d at 214. Thus, in *Cooper*, the court held there was no "related to" jurisdiction because the nondebtor's claims did "not *necessarily* have a financial effect on the [debtor's] estate or apportionment among its creditors." *Cooper*, 889 F.2d at 749 (emphasis added). This analysis cannot be reconciled with the Fifth Circuit's analysis below.

F. This Case Demonstrates the Lower Courts' Confusion and Why There Must be a Clear, Universal Test

Of course, the test applied can frequently be outcome determinative, as was the case in this matter. Here, there would be no "related to" jurisdiction under the "anticipated outcome" test, the "significant connection" test, the "close nexus" test, or the "common sense" test.

Under the extremely broad "conceivable effect" test, however, and in direct contravention of *Celotex*, the Fifth Circuit affirmed the bankruptcy court's jurisdiction. Had the court followed its own *In re Bass* precedent, or the precedent of several sister courts, the California court would be properly adjudicating VSP's separate California claims against Hillair. These state law claims against a non-debtor will have at best only a "speculative, indirect or incidental effect on [PFO's] estate." *See In re Inn on the Bay, Ltd.,* 154 B.R. at 367. Such effects should not confer bankruptcy jurisdiction. *Id.* Nevertheless, the lower courts remain divided on this issue. *Compare In re Mid-States Express, Inc.* 433 B.R. 688, 698 (Bankr. N.D. Ill. 2010), *citing FedPak Sys*., 80 F.3d at 210 ("Merely speculative or hypothetical [e]ffects on the estate's property . . . are not enough to invoke 'related to' jurisdiction.") *with Marah Wood Productions,*

LLC, 534 B.R. at 471 (jurisdiction attaches to even "contingent, speculative, and derivative" interests of the debtor).

The Fifth Circuit's unfounded speculation rendered the bankruptcy court's jurisdiction limitless, thus depriving a state court of jurisdiction. If the Fifth Circuit had faithfully followed its own precedent and considered the "anticipated outcome" of VSP's claims on debtor PFO, or used the Tenth Circuit's test and analyzed the "practical effect" of VSP's claims, it would have found no "related to" jurisdiction existed. *See In re Peterson*, 6 Fed. Appx. at 839. Even Hillair conceded it was "improbable" that VSP's claims would affect PFO's estate, and the claims against Hillair will never have a "practical effect" on PFO's estate, which already has no income and no assets. No money will be collected from the estate by VSP or Hillair.

Likewise, if the Fifth Circuit viewed "related to" jurisdiction "narrowly" out of "respect for Article III" of the Constitution, it would have reversed the bankruptcy court's orders improperly adjudicating VSP's claims. *Cooper*, 889 F.2d at 749. Although we are "in a universe where everything is related to everything else," the term "related to" in 28 U.S.C. § 1334(b) must be given a specific and narrow meaning. *See FedPak Systems, Inc.*, 80 F.3d 207 at 214.

This Court's review is urgently needed. The decisions below demonstrate the "conceivable effect" test has gone too far, and bankruptcy jurisdiction should be construed more narrowly to "preserve the jurisdiction of state courts over questions of state law involving persons not party to the bankruptcy." *Cooper*, 889 F.2d at 749.

II. THE SPLIT AMONG THE LOWER COURTS WILL PERSIST UNLESS THIS COURT INTERVENES.

This case presents an exceptionally important and frequently recurring jurisdictional issue. "By far the largest number of reported cases dealing with bankruptcy jurisdiction over civil proceedings are concerned with whether a particular proceeding is 'related to' a title 11 case." 1 Collier on Bankruptcy ¶ 3.01[e][ii] (16 ed. 2010). A clear standard to determine "related to" jurisdiction is thus imperative. For decades, the lower courts have failed to identify, analyze, or apply a clear and consistent standard. And, after the Third Circuit established the "conceivable effect" test, many courts have improperly and inconsistently applied it. Their misinterpretation of this test—or use of it despite contravening precedent, as was the case here—risks bankruptcy jurisdiction becoming "limitless." *Celotex*, 514 U.S. at 308.

As demonstrated, this Court's review is required since the lower courts can agree neither on the proper test nor on how to apply it. The time is right to resolve the conflicting and unpredictable tests now circulating in the lower courts, create consistency, and put an end to improper expansion of "related to" jurisdiction. The only mechanism to do so is a decision on the issue from this Court. Without it, bankruptcy jurisdiction will continue expanding exponentially and the warning of *Celotex* will become a nullity.

III. THE DECISIONS BELOW ARE WRONG AND CONTRAVENE *CELOTEX*.

The Fifth Circuit's decision defies this Court's clear command that bankruptcy jurisdiction "cannot be limitless." *Celotex*, 514 U.S. at 308. The bankruptcy

court had no jurisdiction to fully and finally adjudicate VSP's California state law claims against non-debtor and California corporation Hillair at an emergency hearing in Texas.

Initially, the bankruptcy court clearly erred in holding that it had "core" jurisdiction over VSP's claims. The district court and Fifth Circuit disagreed with the bankruptcy court's core jurisdiction determination, but then erred in upholding the bankruptcy court's secondary finding that it had "related to" jurisdiction.

Again, the Fifth Circuit offered only one explanation for its decision: "the outcome of VSP's claims against Hillair could conceivably affect PFO's estate because successful claims against Hillair could reduce the amount of damages for which PFO's estate is found liable." As a matter of law, the Fifth Circuit was mistaken. VSP asserted separate claims for damages against PFO and Hillair. And, although VSP asserted UCL claims against Hillair and PFO, it never sought relief against Hillair based on PFO's unfair business practices, or vice versa.

More importantly, there are no money damages awarded for UCL claims in California. "Only two remedies are available under the UCL: injunctive relief and restitution (i.e., disgorgement of money or property unlawfully obtained)." *Clifford v. Quest Software Inc.*, 38 Cal. App. 5th 745, 749 (2019). Thus, if VSP prevails on this claim against Hillair and obtains disgorgement of its profits, it will have no effect on PFO's estate. VSP's UCL claim—the only claim asserted against both parties—will never provide a basis for damages against either PFO or Hillair. "A UCL action is equitable in nature; damages cannot be recovered." *In re Tobacco Cases II*, 240 Cal. App.

4th 779, 790 (2015). The Fifth Circuit ignored this reality, and its perfunctory analysis was fundamentally flawed. Its conjecture failed to analyze the actual claims VSP pled—claims premised on Hillair's own wrongdoing. The Fifth Circuit therefore wrongly affirmed the lower courts' orders, which were rife with their own errors.

The bankruptcy court and the district court offered three explanations for why there was "related to" jurisdiction: (1) VSP's claims against Hillair could reduce the damages awarded against PFO, (2) they could "result in a contribution claim" between Hillair and PFO, and (3) they were "clearly intertwined" with PFO's misconduct. All of these findings were wrong.

Of course, the first finding is wrong for the reasons detailed above. The second finding is wrong because it is pure speculation—entirely untethered to any facts in the record. *See In re DVI, Inc.*, 305 B.R. at 418; *Transamerica Financial Life Ins. Co.*, 302 B.R. at 626. Finally, the third finding is wrong too. It is irrelevant that VSP's claims against Hillair are "clearly intertwined with the Debtor's alleged misconduct." A bankruptcy court cannot preclude a state action from proceeding simply because the debtor is a defendant. *See Coleman v. Williams*, 538 Fed.Appx. 513, 515 (5th Cir. 2013). "[B]ankruptcy court jurisdiction covers only property in which the debtor has an interest." *Id.* Here, PFO has no interest in VSP's claims against Hillair. PFO's status as a defendant in the California action does not change this. Once again, "bankruptcy courts have no jurisdiction over proceedings that have no effect on the *estate* of the debtor." *Celotex*, 514 U.S. at 310 n.6 (emphasis added). Regardless of PFO's own wrongdoing, VSP's claims against Hillair will not

affect PFO's estate, which already has no assets. The bankruptcy court therefore lacked jurisdiction.

This Court's review is required. At every turn below, the federal courts erred. They deprived VSP of its right to pursue its claims in California, and they stripped the state court of its general jurisdiction over those claims. Only this Court can right these wrongs, and only this Court can establish the correct standard for determining "related to" jurisdiction.

IV. THE DECISIONS BELOW UNDERMINE THE CALIFORNIA COURT'S SOVEREIGNTY.

The bankruptcy court's adjudication of VSP's claims also undermines the well-established principles of comity, federalism, and judicial economy. Absent reversal, its decision invites non-debtors to rush to bankruptcy court while state-court litigation is pending. It also invites bankruptcy courts to usurp state courts' general jurisdiction to decide disputes between their own citizens involving exclusively state law claims. The Texas bankruptcy court had no interest in this dispute between two non-debtor California corporations. California plainly did.

The California state court—where VSP's claims were pled—had the jurisdiction, authority, and expertise to adjudicate these claims and decide whether the 2017 lift stay order barred VSP's new claims against Hillair. The "preclusive effect of a bankruptcy judgment on a party to a later state court action is determined under res judicata principles." *See Patel v. Crown Diamonds*, *Inc.*, 247 Cal. App. 4th 29, 37 (2016). Moreover, in California, "plaintiff is not required to anticipate [a release] defense . . . instead, the defendant bears the burden of raising the defense

and establishing the validity of a release as applied to the case at hand." *City of Santa Barbara v. Superior Court*, 41 Cal. 4th 747, 780 n.58 (2007). Finally, federal courts have shown "little concern" about state courts undermining the "integrity or efficacy of [a] bankruptcy court's order" when adjudicating state law claims. *Scheidel v. Lister*, 182 Cal. App. 3d 657, 667 (1986).

The Fifth Circuit's decision usurped the California court's exclusive jurisdiction to resolve VSP's state law claims. "With an eye to federalism and comity concerns, federal courts are understandably reluctant to insert themselves into areas that are traditionally the province of the state courts." *Miller v. Bruenger*, 949 F.3d 986, 994 (6th Cir. 2020). State courts—not federal courts—are experts on state law. *Montana v. Wyoming*, 563 U.S. 368, 377 n.5 (2011), *quoting West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 236 (1940) ("[E]ach State, of course, remains 'the final arbiter of what is state law.'"). And, again, state courts can readily interpret the effect of bankruptcy court orders. *Scheidel*, 182 Cal. App. 3d at 667. The Fifth Circuit ignored this. The California court had the jurisdiction—and the right—to determine whether VSP's new claims against Hillair were released under California law in the 2017 lift stay order.

"States are sovereign entities." *Webb v. Webb*, 451 U.S. 493, 499 (1981). The lower courts disregarded this foundational principle of federalism. *Id.* "Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty." *Id.* There must be "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief

that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.* at 499-500, *citing Younger v. Harris*, 401 U.S. 37, 44 (1971).

Here, the federal courts stripped the state court of the "opportunity to perform [its] duty." *Webb*, 451 U.S. at 499–500. Moreover, they ordered VSP to pay Hillair $49,075.30 in fees and costs based on the brief VSP filed in state court *at the specific direction of the state court*. If federalism means anything, a different outcome is imperative in this case. State courts must be given "proper respect," and they must be "left free to perform their separate functions in separate ways." *Webb*, 451 U.S. at 499–500.

In this case, the bankruptcy court's usurpation of the state court's jurisdiction could not be clearer. In May 2019, the California court specifically asked VSP to file a brief explaining whether the bankruptcy proceedings affected "the Court's ruling on VSP's Motion for Leave to File an SAC, *if at all*." (emphasis added). As required, VSP timely provided the California court with the bankruptcy court's order. VSP then explained its legal position: the California court—not the bankruptcy court—had jurisdiction to decide VSP's claims. And VSP was not coy about its position; its arguments to the state court mirrored those it made to the bankruptcy court in its reconsideration motion. Rather than allowing the state court to decide these claims, the bankruptcy court awarded Hillair $49,075.30 and barred VSP from pursuing its claims that had no effect on debtor PFO. Its decision was rushed and improper. Indeed, the bankruptcy court fully and finally adjudicated VSP's claims at an emergency hearing—without

giving VSP a chance to even brief the issue. This result was unjust and unreasonable. Bankruptcy courts cannot infringe on the sovereignty of state courts. And they cannot bar litigants from responding to binding state court orders.

V. THIS CASE IS AN IDEAL VEHICLE TO SET THE STANDARD FOR "RELATED TO" JURISDICTION.

This case provides the perfect vehicle to definitively resolve the test for "related to" jurisdiction. The facts in the record are undisputed, and there are no waiver issues. The bankruptcy court, the district court, and the Fifth Circuit unambiguously but wrongly held there was "related to" jurisdiction over VSP's claims. VSP's claims deserve to be fully and finally adjudicated in California—not cursorily dismissed based on the bankruptcy court's misunderstanding of its limited jurisdiction.

This case is also the perfect vehicle because the Fifth Circuit's application of the "conceivable effects" test was not only improper under binding precedent, but outcome-determinative. Had it applied the "anticipated outcome" test, the California court would be adjudicating VSP's claims now. Likewise, had it applied the "significant connection" test, the "close nexus test," or merely taken a "common sense" approach, the California court would be adjudicating VSP's claims now.

Furthermore, this case is an excellent vehicle because the Court can clarify the limits—or entirely overrule—the "conceivable effect" test that many courts have adopted, wrongly expanded, and badly misconstrued. The Court can also settle the longstanding dispute as to whether speculative and hypothetical

effects on a debtor confer bankruptcy jurisdiction. Plainly, they should not.

Finally, this case is an ideal vehicle for the court to affirm, clarify, and further explain its prior assessment that bankruptcy jurisdiction is more limited in Chapter 7 cases. *Celotex*, 514 U.S. at 310. The Fifth Circuit did not consider this, and its decision has no limiting principle.

CONCLUSION

The Court should grant this Petition to resolve an important and recurring jurisdictional issue.

Respectfully submitted,

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May 10, 2022

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed February 9, 2022]

No. 20-10885

IN THE MATTER OF: PFO GLOBAL, INCORPORATED

Debtor,

VSP LABS, INCORPORATED, *Creditor and Movant,*

Appellant,

versus

HILLAIR CAPITAL INVESTMENTS, LP., *Interested Party and Respondent*; HILLAIR CAPITAL MANAGEMENT, L.L.C., *Interested Party and Respondent,*

Appellees,

IN THE MATTER OF: PFO GLOBAL, INCORPORATED

Debtor,

VSP LABS, INCORPORATED, *Creditor and Movant,*

Appellant,

versus

HILLAIR CAPITAL INVESTMENTS, L.P., HILLAIR CAPITAL MANAGEMENT, L.L.C.

Appellees,

IN THE MATTER OF: PFO GLOBAL, INCORPORATED

Debtor,

VSP Labs, Incorporated, *Creditor and Movant,*

Appellant,

versus

HILLAIR CAPITAL INVESTMENTS, L.P.,
Interested Party and Respondent;
HILLAIR CAPITAL MANAGEMENT, L.L.C

Appellees,

IN THE MATTER OF: PFO GLOBAL, INCORPORATED

Debtor,

VSP LABS, INCORPORATED,

Appellant,

versus

HILLAIR CAPITAL INVESTMENTS, L.P.,
HILLAIR CAPITAL MANAGEMENT, L.L.C.

Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:19-CV-1575
USDC No. 3:19-CV-1576
USDC No. 3:19-CV-1603
USDC No. 3:20-CV-47
USDC No. 3:19-CV-2525

Before HIGGINBOTHAM, WILLETT, and DUNCAN, *Circuit Judges.*

PATRICK E. HIGGINBOTHAM, *Circuit Judge*:

These consolidated cases arise out of the bankruptcy of Pro Fix Optix ("PFO") and a dispute over the validity and scope of the bankruptcy court's orders prohibiting one non-debtor, VSP Labs, Inc., from asserting claims against two other non-debtors, Hillair Capital Investments L.P. and Hillair Capital Management L.L.C. The district court affirmed the orders of the bankruptcy court and VSP appealed to this Court. We affirm.

I.

In 2012, PFO and VSP entered an agreement for PFO to develop and transfer eyewear technology to VSP over four years. Under the agreement, VSP had the right to step in and take over development if PFO did not meet performance milestones, with PFO responsible for reimbursing VSP for costs incurred. VSP claims that PFO failed to meet several milestones, leading VSP to step in, but PFO did not reimburse VSP for the resulting expenses. VSP filed suit against PFO in California state court in 2013 (the "California Action"), asserting claims for breach of contract and seeking declaratory relief. PFO filed counterclaims. The California Action was scheduled for trial in March 2017.

In January 2017, PFO filed for bankruptcy under Chapter 11 in the Northern District of Texas. The resulting automatic stay paused the California Action. Shortly after PFO filed its petition, the bankruptcy court approved an asset purchase agreement between PFO and its largest pre-petition lender, Hillair,

transferring PFO's counterclaims against VSP in the California Action to Hillair.

Seeking to escape the stay, Hillair asked the California court to sever its newly acquired counterclaims, and VSP then moved for relief from the automatic stay to offset PFO's counterclaims in the California Action.

Responding to VSP's motion, the bankruptcy court entered a Lift Stay Order on September 7, 2017, which reads:

> The automatic stay is modified . . . so that VSP Labs, Inc. may liquidate the amount of its affirmative claims against Pro Fit Optix, Inc. ("PFO") for the purpose of asserting its rights to setoff and recoupment in [the California Action]; provided, however, that to the extent monetary damages are awarded to VSP Labs, Inc. in excess of any monetary damages awarded to [Hillair], or PFO in the California Action, the excess amount may only be enforced through a proof of claim filed in the above-styled and -numbered case, and, without affecting VSP's rights of setoff or recoupment in defense of claims in the California Action, no money damages or other amounts of any kind may be recovered from Hillair under any circumstance on account of any claims that have been or could have been asserted in the California Action[.]

This language was presented to the bankruptcy court by the parties following negotiations between VSP, Hillair, and the trustee.

VSP alleges that subsequent discovery in the California Action revealed that Hillair had directed

PFO to breach the 2012 technology development agreement. VSP thus sought leave from the California Superior Court to file a second amended complaint in the California Action, asserting new causes of action against PFO and Hillair, individually and collectively. Before the bankruptcy court, Hillair moved for an order prohibiting VSP's assertion of direct claims against it in California under the terms of the Lift Stay Order. Before the California Superior Court granted VSP leave to amend, the bankruptcy court granted Hillair's motion and entered the Enforcement Order, holding that the Lift Stay Order "entered with the consent of the parties, prohibits the assertion of the claims proposed in the VSP Second Amended Complaint against Hillair . . . ."

VSP moved for reconsideration of the Enforcement Order, arguing in part that the bankruptcy court lacked jurisdiction to adjudicate state law actions between non-debtor third parties. The bankruptcy court denied VSP's motion.

Meanwhile, the California Superior Court requested that the parties clarify the effect of the bankruptcy court's order. VSP filed a supplemental brief which advised the California Superior Court that the bankruptcy court's Enforcement Order had no effect on VSP's proposed claims. In response to VSP's supplemental brief in the California Action, Hillair moved for an order from the bankruptcy court enforcing the Enforcement Order and sanctioning VSP for what Hillair characterized as "[w]illfully [i]gnoring and [v]iolating" the original Enforcement Order. Accordingly, the bankruptcy court sanctioned VSP and ordered it to pay Hillair's reasonable attorneys' fees.

VSP then moved in bankruptcy court for relief from the Lift Stay Order under Federal Rules of Civil

Procedure 60(b)(4) and 60(b)(6). The bankruptcy court denied VSP's Motion for Relief under Rule 60(b)(4) because it had jurisdiction to enter the Lift Stay Order and subsequent interpretive orders because "the outcome of VSP's causes of action against Hillair in the Second Amended Complaint could conceivably have an effect on the Debtor's estate being administered in bankruptcy." The bankruptcy court further denied relief under Rule 60(b)(6) because "[t]he language at issue in the Stay Relief Order was negotiated by the parties and submitted to the Court by VSP . . . . [and] VSP has enjoyed the benefits of having relief from the automatic stay for two years now[.]"

II.

VSP appealed to the district court, challenging the bankruptcy court's four 2019 orders interpreting the Lift Stay Order and imposing sanctions. VSP argued that the bankruptcy court lacked jurisdiction to prevent VSP's assertion of state law claims against a non-debtor, claims which VSP described as "non-core" and unrelated to PFO's bankruptcy estate.

In a comprehensive opinion, the district court affirmed each of the bankruptcy court's orders.[1] Specifically, the district court determined that the bankruptcy court had jurisdiction over VSP's state law claims because they were non-core proceedings related to the bankruptcy estate and because VSP consented to their adjudication by agreeing to the text of the Lift Stay Order.[2] The district court also

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[1] *See VSP Labs, Inc. v. Hillair Cap. Invs. LP*, 619 B.R. 883, 888 (N.D. Tex. 2020).

[2] *Id.* at 895-900.

affirmed the bankruptcy court's interpretation of the Lift Stay Order, finding that the order's text unambiguously prevented VSP from asserting "any claims" for damages against Hillair in the California Action under "any circumstances" as a condition of partially lifting the automatic stay.[3] Finally, the district court found no abuse of discretion in the bankruptcy court's imposition of sanctions against VSP because the supplemental brief VSP filed in California violated the valid Enforcement Order.[4] VSP timely appealed to this Court.

III.

We apply the same standards of review to the bankruptcy court as a district court, reviewing a bankruptcy court's legal conclusions *de novo* and its findings of fact for clear error.[5] "The extent of a bankruptcy court's jurisdiction is a legal issue that we review *de novo.*"[6] While we review purely legal issues *de novo*, we defer to the bankruptcy court's reasonable interpretation of any ambiguities in its orders.[7] We review the bankruptcy court's decision not to abstain from hearing a proceeding and its award of attorneys' fees for abuse of discretion.[8]

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[3] *Id.* at 901-03.

[4] *Id.* at 904-05.

[5] *Matter of Lopez*, 897 F.3d 663, 668 (5th Cir. 2018).

[6] *In re 804 Cong., L.L.C.*, 756 F.3d 368, 372-73 (5th Cir. 2014).

[7] *In re Nat'l Gypsum Co.*, 219 F.3d 478, 484 (5th Cir. 2000).

[8] *In re Moore*, 739 F.3d 724, 728 (5th Cir. 2014); *Matter of Riley*, 923 F.3d 433, 437 (5th Cir. 2019).

IV.

We first address whether the bankruptcy court had jurisdiction to prevent VSP from asserting state law claims in state court. Under 28 U.S.C. § 1334, unless an exception applies "district courts shall have original and exclusive jurisdiction of all cases under title 11."[9] This includes "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."[10] The bankruptcy courts in turn draw their jurisdiction from the district courts.[11]

The relief from the automatic stay granted by the 2017 Lift Stay Order allowing claims against PFO's estate to advance in the California Action was a core proceeding over which the bankruptcy court had jurisdiction.[12] However, the additional provision of the 2017 Lift Stay Order concerning claims by VSP, a non-debtor, against Hillair, another non-debtor, in a separate proceeding was not core.[13]

For a bankruptcy court to have jurisdiction over a non-core proceeding, the proceeding must be "related to" the bankruptcy case.[14] In *Celotex Corp v. Edwards*, the Supreme Court held that while a bankruptcy court's "related to" jurisdiction is not limitless, it goes beyond "simple proceedings involving the property of the debtor or the estate."[15] It turns on "whether the

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[9] 28 U.S.C. § 1334(a).

[10] 28 U.S.C. § 1334(b).

[11] 28 U.S.C. § 157(a).

[12] 28 U.S.C. § 157(b)(2).

[13] *Id.*

[14] 28 U.S.C. § 157(a).

[15] 514 U.S. 300, 308 (1995).

outcome of a proceeding could conceivably have *any* effect on the estate being administered in bankruptcy."[16] The bankruptcy court had "related to" jurisdiction as the outcome of VSP 's claims against Hillair could conceivably affect PFO's estate because successful claims against Hillair could reduce the amount of damages for which PFO's estate is found liable.[17]

Although the bankruptcy court had "related to" jurisdiction, its exercise was limited absent party consent.[18] And where the parties consent, a bankruptcy judge may "hear and determine and [ ] enter appropriate orders and judgments" over proceedings that are not core to the bankruptcy case, subject to review by the district court.[19] The parties' "consent may be either express or implied, so long as it is knowing and voluntary; the determination whether a party consented to the bankruptcy court's jurisdiction requires 'a deeply factbound analysis of the procedural history' in the proceeding."[20]

Reviewing this factual question for clear error,[21] we find that VSP and Hillair knowingly and voluntarily consented to the bankruptcy court's jurisdiction over the claims in the California Action. The parties agreed to the language of the Lift Stay Order and presented it to the bankruptcy court, which then entered the

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[16] *In re Prescription Home Health Care, Inc*., 316 F.3d 542, 547 (5th Cir. 2002).

[17] *See In re Canion*, 196 F.3d 579, 586-87 (5th Cir. 1999).

[18] 28 U.S.C. § 157(c).

[19] 28 U.S.C. §§ 157(c)(2), 158(a).

[20] *Saenz v. Gomez*, 899 F.3d 384, 391 (5th Cir. 2018) (quoting *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 684-85 (2015)).

[21] *Id.*

proposed order. The parties having thus consented, the bankruptcy court had jurisdiction to hear and enter appropriate orders related to the proceedings surrounding the entry of the Lift Stay Order.[22]

The bankruptcy court also had jurisdiction to enter its four 2019 orders which interpreted and enforced the 2017 Lift Stay Order. "[T]he Bankruptcy Court plainly had jurisdiction to interpret and enforce its own prior orders."[23] This includes jurisdiction to pause state court litigation controlled by a prior order and the automatic stay.[24] In sum, we find that the bankruptcy court had jurisdiction to enter the Lift Stay Order and it retained jurisdiction to interpret and enforce its orders, as it did in the 2019 orders.

V.

VSP argues that, even if the bankruptcy court had jurisdiction, it was required to abstain from adjudicating VSP's non-core claims already subject to the separate California state court proceeding. Parties can ask the district court—and thus the bankruptcy court—to abstain from hearing a proceeding where the issue is based on state law and the federal court would not have jurisdiction absent 28 U.S.C. § 1334.[25]

VSP waived this argument by failing to present this issue to both the bankruptcy court and the district court. As we sit as a court of second review, "[e]ven if an issue is raised and considered in the bankruptcy court, this court will deem the issue waived if the party

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[22] *See* 28 U.S.C. § 157(c)(2).

[23] *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151 (2009).

[24] *In re Lothian Oil, Inc.*, 531 F. App'x 428, 436-44 (5th Cir. 2013).

[25] 28 U.S.C. § 1334(c)(2).

seeking review failed to raise it in the district court."[26] Because VSP did not raise its abstention argument before district court, it did not sufficiently preserve this issue for appeal.

While VSP admits it did not "specifically" move for abstention; it nevertheless urges that a motion for abstention can be gleaned from its filings and that the lower court should have looked beyond the labels VSP applied to its own motions. However, in its motions before the bankruptcy court, VSP did not make a cognizable motion for abstention; it only challenged the bankruptcy court's jurisdiction. A motion explicitly challenging a bankruptcy court's jurisdiction does not implicitly constitute a motion for abstention.[27] And we see no grave miscarriage of justice in finding that VSP waived its abstention argument.[28] We do not require a bankruptcy court to read beyond the text of motions in search of implicit arguments, and we decline to do so here. In sum, the bankruptcy court would not have abused its discretion in refusing to abstain under 28 U.S.C. § 1334(c)(2) as there was no timely motion for abstention.

VI.

Turning to the reading of the Lift Stay Order, VSP first contends that lower courts should have analyzed the Lift Stay Order under California law rather than Texas law. VSP also argues that the lower courts misinterpreted the Lift Stay Order and that it did not prohibit the assertion of VSP 's allegedly undiscovered

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[26] *In re Bradley*, 501 F.3d 421, 433 (5th Cir. 2007).

[27] *In re Moore*, 739 F.3d at 729.

[28] *In re Bradley*, 501 F.3d at 433 (considering an argument waived "in the absence of any perceived miscarriage of justice").

claims against Hillair. These arguments are unavailing. We hold that the district court correctly interpreted the Lift Stay Order as prohibiting VSP 's assertion of claims against Hillair in the California Action.

A.

VSP contends that the Lift Stay Order should be interpreted under California law rather than Texas law. VSP 's argument for the application of California law rather than Texas law is waived because VSP did not present this argument prior to appealing to this Court.[29]

B.

VSP further contends that the district court misinterpreted the Lift Stay Order because the district court ignored the parties' intent and surrounding circumstances, failed to review the entirety of the Lift Stay Order, and read the Lift Stay Order to produce an unreasonable result. As the language of the Lift Stay Order was jointly proposed to the bankruptcy court following negotiations amongst the parties, the district court properly relied on ordinary principles of contract interpretation when analyzing the Lift Stay Order.[30]

Where a contract's terms are unambiguous, it must be enforced irrespective of the parties' subjective intent; the same applies to an unambiguous court

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[29] *In re Martin*, 222 F. App'x 360, 362 (5th Cir. 2007) ("[W]e will not consider any issues on appeal that were not raised before the bankruptcy court."); *see also In re Bradley*, 501 F.3d at 433.

[30] *See United States v. Chromalloy Am. Corp*., 158 F.3d 345, 349 (5th Cir. 1998) ("General principles of contract interpretation govern the interpretation of a consent decree.").

order such as the Lift Stay Order.[31] The Lift Stay Order unambiguously conditioned the partial lift of the automatic stay by ordering that "no money damages or other amounts of any kind may be recovered from Hillair under any circumstance on account of any claims that have been or could have been asserted in the California Action[.]" Thus, VSP's reliance on its subjective intent when proposing the language of the Lift Stay Order is unavailing: the plain text controls. The circumstances of formation are also irrelevant when interpreting an unambiguous consent order.[32] Regardless, they at best lend no support to VSP.

VSP argues that a holistic reading of the Lift Stay Order shows that its purpose was to allow VSP to pursue claims against PFO and that the condition was only to prevent VSP from recovering from Hillair under VSP 's claims against PFO. VSP further argues that independent claims asserted directly against Hillair are not prohibited. The Lift Stay Order clearly prohibits VSP from asserting "any claims that have been or could have been asserted in the California Action[.]" VSP's suggested reading would constrain "any claims" to apply only to those claims arising from the purchased counterclaims, but there is no such constraint in the text. We must read the order as written,[33] such that "any claims that have been or could have been asserted in the California Action" includes the claims that VSP now seeks to include in its VSP's proposed Second Amended Complaint. VSP's assertion of new claims against Hillair in the California Action is thus prohibited.

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[31] *Travelers*, 557 U.S. at 151-52.

[32] *Robinson v. Vollert*, 602 F.2d 87, 92 (5th Cir. 1979).

[33] *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971).

Even if the term "any claims" were ambiguous as to whether it included claims directly against Hillair, we would defer to the bankruptcy court's reasonable resolution of any ambiguities in the Lift Stay Order.[34] The bankruptcy court provided a reasonable interpretation, finding that VSP's pursuit of claims against Hillair violated the Lift Stay Order.

C.

VSP argues that the district court's interpretation—and thus the bankruptcy court's interpretation—produces an unreasonable result. That the district court's interpretation of the unambiguous text is unfavorable to VSP does not make it unreasonable. Our precedent has found the plain text of a contract to be unreasonable only in limited situations, such as when a contract would have prevented one party from taking government-mandated action[35] or when the only explanation for the result is error or inadvertence by the parties.[36] Here, however, the district court's interpretation does not lead to "a senseless result."[37] We affirm the district court's interpretation of the Lift Stay Order and the bankruptcy court's interpretation in its 2019 orders interpreting and enforcing the Lift Stay Order.

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[34] *In re Nat'l Gypsum Co.*, 219 F.3d at 484.

[35] *Apache Deepwater, L.L.C. v. W&T Offshore, Inc.*, 930 F.3d 647, 657 (5th Cir. 2019).

[36] *Makofsky v. Cunningham*, 576 F.2d 1223, 1230 (5th Cir. 1978).

[37] *Motor Vehicle Cas. Co. v. Atl. Nat. Ins. Co.*, 374 F.2d 601, 605 (5th Cir. 1967).

VII.

The bankruptcy court awarded Hillair attorneys' fees as a civil contempt sanction after determining that VSP's supplemental brief violated the Lift Stay Order and the Enforcement Order. VSP argues that the bankruptcy court abused its discretion in awarding attorneys' fees because VSP did not act in bad faith and because the bankruptcy court acted with an erroneous view of the merits of VSP's arguments.

First, VSP argues that the bankruptcy court abused its discretion by awarding attorneys' fees because VSP was not acting in bad faith when it sought to enter its Second Amended Complaint and argued before the California Superior Court that the bankruptcy court's order was void. However, "[g]ood faith is not a defense to civil contempt; the question is whether the alleged contemnor complied with the court's order."[38] VSP's disagreement with the Enforcement Order did not entitle it to judge the validity of the bankruptcy court's order or to set the order aside by its own act of disobedience.[39] The bankruptcy court did not abuse its discretion in awarding attorneys' fees in an order of civil contempt for VSP's failure to comply with an extant court order.[40] VSP's argument that it did not act in bad faith is unavailing. We affirm the award of attorneys' fees.

Second, VSP argues the award was an abuse of discretion because the bankruptcy court erred as to the

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[38] *Chao v. Transocean Offshore, Inc.*, 276 F.3d 725, 728 (5th Cir. 2002).

[39] *In re Bradley*, 588 F.3d at 265 (quoting *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 450 (1911)).

[40] *FDIC v. LeGrand*, 43 F.3d 163, 170 (5th Cir. 1995).

merits of VSP's arguments. We here affirm the earlier bankruptcy court's orders.

VIII.

The judgement of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed August 21, 2020]

Civil Action No. 3:19-CV-1575-S

VSP LABS, INC.

v.

HILLAIR CAPITAL INVESTMENTS LP and
HILLAIR CAPITAL MANAGEMENT LLC

MEMORANDUM OPINION AND ORDER

This appeal covers complex litigation in two states, spanning seven years, in three courts with respect to five bankruptcy court orders. Although the history of this litigation is complicated, and the parties have asserted numerous arguments, resolution of the appeal turns on two key issues. First, did the Bankruptcy Court have jurisdiction to enter an order that precludes a non-debtor from asserting state law claims against another non-debtor? Second, did the Bankruptcy Court correctly interpret the language of its own order as precluding such state law claims? To resolve the second issue, the Court must determine the meaning of a 178-word sentence in that order.

I. INTRODUCTION

Pending before the Court is VSP Labs, Inc.'s ("VSP") appeal of the following five orders of the United States Bankruptcy Court for the Northern District of Texas:

(1) Order Granting in Part Emergency Motion of Hillair Capital Investments LP and Hillair Capital Management LLC (collectively, "Hillair") for Order (I) Enforcing, and in Aid of, this Court's Prior Orders and (II) Granting Related Relief, entered on May 3, 2019 ("Enforcement Order");[1]

(2) Order Denying Motion for Reconsideration of the Enforcement Order, entered on June 24, 2019 ("Enforcement Reconsideration Order");

(3) Order Granting in Part Emergency Motion of Hillair Capital Investments LP and Hillair Capital Management LLC for Order (I) Enforcing this Court's May 2, 2019 Order, (II) Sanctioning VSP Labs, Inc. for Willfully Ignoring and Violating the Same and (III) Granting

[1] Pursuant to a transfer order, the appeal of the Enforcement Order was transferred from the docket of Judge A. Joe Fish to the docket of this Court on July 3, 2019. Order of Transfer, *YSP Labs, Inc. v. Hillair Capital Invs. LP*, Civil Action No. 3:19-cv-1603-G (N.D. Tex. July 3, 2019), ECF No. 2. On September 20, 2019, this Court consolidated the appeals of the Enforcement Order, the Enforcement Reconsideration Order, and the Sanctions Order under the above-styled civil action number. Order, *VSP Labs, Inc. v. Hillair Capital Invs., LP*, Case No. 3:19-cv-1575-S (N.D. Tex. Sept. 20, 2019), ECF No. 4; Order, *VSP Labs, Inc. v. Hillair Capital Invs., LP*, Case No. 3:19-cv-1576-S (N.D. Tex. Sept. 20, 2019), ECF No. 3; Order, *VSP Labs, Inc. v. Hillair Capital Invs., LP*, Case No. 3:19-cv-1603-S (N.D. Tex. Sept. 20, 2019), ECF No. 4.

Related Relief, entered on June 24, 2019 ("Sanctions Order");

(4) Order Denying VSP Labs, Inc.'s Motion for Relief from Automatic Stay Order Dated September 7, 2017, entered on October 8, 2019 ("Lift Stay Reconsideration Order");[2] and

(5) Order Awarding Fees Pursuant to Sanctions Order, entered on December 12, 2019 ("Attorney's Fees Order").[3]

The Enforcement Order, Enforcement Reconsideration Order, Sanctions Order, Lift Stay Reconsideration Order, and Attorney's Fees Order shall be referred to collectively as the "Orders." After reviewing the briefs, the applicable law, and the relevant parts of the record, the Court AFFIRMS the Orders of the Bankruptcy Court.

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[2] Pursuant to a transfer order, the appeal of the Lift Stay Reconsideration Order was transferred from the docket of Judge Sam A. Lindsay to the docket of this Court on October 31, 2019. Order, *VSP Labs, Inc. v. Hillair Capital Invs., LP*, Civil Action No. 3:19-cv-2525-L (N.D. Tex. Oct. 31, 2019), ECF No. 3. On November 4, 2019, this Court consolidated the appeal of the Lift Stay Reconsideration Order under the above-styled civil action number. Order, *VSP Labs, Inc. v. Hillair Capital Invs., LP*, Civil Action No. 3:19-cv-1575-S (N.D. Tex. Nov. 4, 2019), ECF No. 11.

[3] Pursuant to a transfer order, the appeal of the Attorney's Fees Order was transferred from the docket of Judge Ed Kinkeade to the docket of this Court on February 20, 2020. Electronic Order, *VSP Labs, Inc. v, Hillair Capital Invs., LP*, No. 3:20-cv-0047-K (N.D. Tex. Feb. 20, 2020), ECF No. 4. On February 25, 2020, this Court consolidated the appeal of the Attorney's Fees Order under the above-styled civil action number. Order, *VSP Labs, Inc. v. Hillair Capital Investments, LP*, Civil Action No. 3:19-cv-1575-S (N.D. Tex. Feb. 25, 2020), ECF No. 31.

II. BACKGROUND

A. *Breach of Contract Dispute Between VSP and Debtor*

On April 20, 2012, VSP and Pro Fit Optix, Inc. ("Debtor") entered into a $6 million, four-year Technology Transfer and Development Agreement ("Agreement") relating to Debtor's "ongoing development of eyewear measurement technology for VSP." Br. of Appellant 10. Under the Agreement, VSP had "step-in-rights" to "take over development at [Debtor's] expense if [Debtor] could not meet its performance obligations." App. in Supp. of Br. of Appellant 0643 [hereinafter "Appellant's App."]. According to VSP, Debtor was unable to fulfill its obligations under the Agreement and, in 2013, VSP hired third parties to fulfill Debtor's obligations. Br. of Appellant 10. After Debtor refused to reimburse VSP for these expenses, VSP filed a lawsuit in 2013 against Debtor in the California Superior Court ("California Court") for breach of contract ("California Action"). *Id.* at 11; Appellant's App. 0425. Debtor subsequently filed counterclaims[4] ("Counterclaims") against VSP alleging that VSP had breached the same Agreement. Appellant's App. at 11-12.

[4] Appellant characterizes these claims as "cross-claims," Br. of Appellant 11, but Debtor correctly identifies these as counterclaims, Br. of Appellees 9.

B. *Debtor Files for Bankruptcy and Hillair Purchases Debtor's Counterclaims Against VSP*

Shortly before trial in early 2017, Debtor, and certain affiliates,[5] filed for bankruptcy, and the Bankruptcy Court stayed the California Action. *Id.* at 12; Appellant's App. 0344; Br. of Appellee 10. On May 5, 2017, the Bankruptcy Court entered an order, as part of the settlement of Debtor's estate, authorizing Hillair,[6] the estate's largest creditor, to purchase the Debtor's Counterclaims against VSP in the California Action. Br. of Appellant 12; Br. of Appellees 9. On June 20, 2017, Debtor and Hillair filed a motion to sever the Counterclaims from VSP's claims in the California Action and set only the Counterclaims for trial.[7] *Id*; Appellant's App. 0425-26. In response, VSP filed a motion for relief from the automatic stay ("Lift Stay Motion") with the Bankruptcy Court seeking to lift the bankruptcy stay on the California Action. Appellant's App. 0424-25. VSP filed the Lift Stay Motion "to ensure its ability to set off any damages [Debtor] might be awarded against VSP with any damages that VSP might be awarded against [Debtor]." Br. of Appellant 12. Hillair subsequently filed a limited

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[5] Any reference herein to "Debtors" refers to Debtor and its affiliates that filed for bankruptcy in the underlying bankruptcy case.

[6] Hillair has an extensive history with Debtors. Hillair was the estate's largest creditor and its pre-petition and post-petition lender. *See* Br. of Appellant 12; Br. of Appellees 9.

[7] The California Court eventually denied this motion because, according to VSP, "it would have created an unfair asymmetrical action against VSP" as the Bankruptcy Court had stayed VSP's claims in the California Action. Br. of Appellant 12; Appellant's App. 0344.

objection to the Lift Stay Motion expressing concern about the wording of VSP's proposed order. Appellant's App. 0503-05 ("VSP should make clear the relief sought. If the Motion is granted, the proposed order should clarify that the purpose of pursuing setoff and recoupment is to prove its claim against the Debtors and not to seek recoveries from Hillair. Even if recovery against Hillair was not VSP's purpose in bringing the Motion, Hillair is concerned that the proposed order as drafted may lend itself to such a construction by another court or otherwise."). The Bankruptcy Trustee ("Trustee") also filed an objection to the Lift Stay Motion for other reasons.[8] *Id.* at 0509-10.

On August 23, 2017, counsel for VSP, Hillair, the Trustee, and the committee of unsecured creditors convened for a hearing on the Lift Stay Motion. Tr. of Aug. 23, 2017 Hr'g. During the hearing, VSP's counsel represented to the Bankruptcy Court that: (1) "all parties" agreed that the California Action could proceed; (2) VSP and Hillair agreed that if VSP recovered a net amount in the California Action, VSP would not seek to recover this amount from Hillair; and (3) VSP and Hillair had agreed on the language of a proposed order to that effect. *Id.* at 5:3-6:4.

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[8] The Trustee argued that "[l]iquidating VSP's claim for damages in an out-of-state venue is a waste of judicial and estate resources, is prejudicial to the Trustee and other creditors, [and] would distract from the Trustee's most pressing concern, which is to devise a plan of reorganization if possible, or to convert to Chapter 7 if not." Appellant's App. 0510. The Trustee participated in the hearing on August 23, 2017, and appears to have agreed to the entry of the Lift Stay Order after modifications were made to address the Trustee's concerns. Tr. Aug. 23, 2017 Hr'g at 12:6-11.

The Trustee's counsel then asked the Bankruptcy Court to include additional language in its order to address the Trustee's concern on an issue not related to the instant appeal.[9] *Id.* at 12:12-14:l. As a result, the Bankruptcy Court directed VSP to consult with the Trustee and submit a proposed order with additional language that would address the concern. *Id.* at 16:21-18:17. VSP and the Trustee were not able to agree on the language of the order. Appellant's App. 0055. Accordingly, VSP and the Trustee each submitted their own proposed version of the order granting the Lift Stay Motion to the Bankruptcy Court. *Id.* Relevant to the instant appeal, both versions included the following language:

> without affecting VSP's right of setoff or recoupment in defense of claims in the California Action, no money damages or other amounts of any kind may be recovered from Hillair under any circumstance on account of any claims that have been or could have been asserted in the California Action.

Id. at 0055-56. On September 7, 2017, the Bankruptcy Court entered the Order Granting VSP Labs, Inc.'s Motion for Relief from Automatic Stay ("Lift Stay

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[9] The Trustee articulated the following concern: "What we're concerned with is a different hypothetical than what was presented to the Court. So what if . . . Hillair's counterclaims are settled out, but VSP still maintains its affirmative claims against [Debtor], there is a potential there, because we are not there defending ourselves, that we're in . . . a default judgment situation where we're looking at . . . a proof of claim for a default judgment in an amount to be . . . determined solely by VSP. So with the addition of this language, it provides the Trustee and the estate some comfort that in a situation like that, a proof of claim for a default judgment doesn't have any preclusive effect in this case." Tr. Aug. 23, 2017 Hr'g at 12:22-13:8.

Order"), which included the above, agreed-upon language. *Id.* at 0056.

C. *VSP Attempts to Pursue State Law Claims Against Hillair, and the Bankruptcy Court Finds that Such Claims Are Prohibited by the Lift Stay Order*

In 2018, in the California Action, VSP sought discovery of information regarding Debtor's relationship with Hillair. Appellant's App. 0381. A dispute ensued, and VSP successfully obtained an order from the California Court requiring Debtor to comply with VSP's discovery requests. *Id.* Around this time, Hillair also complied with a subpoena issued in the California Action. *Id.* After reviewing the produced documents in 2019—nearly two years after the Lift Stay Order had been entered—VSP contends it discovered new facts giving rise to direct claims against Hillair for Hillair's own misconduct "in the context of its investments with [Debtor]." Br. of Appellant 14. According to VSP, during the course of its four-year Agreement with Debtor, Hillair provided Debtor with capital of approximately $10 million and instructed Debtor not to devote this money to fulfilling Debtor's contractual obligations to VSP. *Id.* at 14-15. Instead, Hillair allegedly directed Debtor to start a new company, "even though Hillair and [Debtor] knew that VSP was incurring millions of dollars in third-party expenses to develop the measurement technology that [Debtor] had promised to deliver." *Id.* at 15. Based on this new information, VSP sought leave to amend its complaint in the California Action to assert direct claims against Hillair. *Id.* at 16. In VSP's proposed Second Amended Complaint ("Second Amended Complaint") filed with the California Court, VSP asserted causes of action against Hillair for intentional interference with

contractual relations, aiding and abetting fraudulent transfer, and unfair business practices. *Id* at 17.

In response, Hillair filed an emergency motion with the Bankruptcy Court seeking to prohibit VSP from pursuing such claims against Hillair in the California Action. Appellant's App. 0139. Hillair sought relief on several grounds.[10] Relevant to the instant appeal, Hillair argued that the Lift Stay Order prohibited VSP from asserting claims against Hillair in the California Action. *Id.* at 0163.

The Bankruptcy Court conducted a hearing on the motion on May 1, 2019, and entered the Enforcement

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[10] In addition to arguing that the Lift Stay Order precluded VSP's state law claims against Hillair, Hillair asserted two additional grounds for relief in its emergency motion. Appellant's App. 0140-63. In the Enforcement Order, the Bankruptcy Court did not address these two additional arguments. Enforcement Order, *In re PFO Global, Inc*., Case No. 17-30355-HDH-7 (Bankr. N.D. Tex. May 3, 2019), ECF No. 438. Appellee reasserts these arguments in its response brief submitted to this Court as an alternative basis for denying the instant appeal. Br. of Appellees 41-50. First, Hillair argues that three prior orders entered by the Bankruptcy Court prohibit third-party claims against Hillair, and Hillair's attempt to pursue its claims against Hillair amounts to a collateral attack on the prior orders. Appellant's App. at 0140-43. Second, Hillair asserts that VSP's allegations in the Second Amended Complaint closely mirrored allegations set forth in a complaint filed by the Trustee, which also alleged wrong-doing on the part of Hillair. *Id.* at 0149. Therefore, according to Hillair, the claims asserted by VSP in the Second Amended Complaint are derivative of the estate claims in the pending bankruptcy and cannot be prosecuted by VSP. *Id.* at 0150-52. Because the Court resolves the appeal on other grounds, the Court will not address these arguments. *See, e.g., Zhao v. Gonzales*, 404 F.3d 295, 310 n.17 (5th Cir. 2005) (declining to consider additional issues when appeal was resolved on other grounds).

Order on May 3, 2019. Tr. May l, 2019 Hr'g; Enforcement Order, *In re PFO Global, Inc*., Case No. 17-30355-HDH-7 (Bankr. N.D. Tex. May 3, 2019), ECF No. 438. The Bankruptcy Court granted in part Hillair's motion solely on the grounds that the language of the Lift Stay Order prohibited VSP from pursuing claims against Hillair in the California Action.[11] Tr. May 1, 2019 Ruling at 3:2-6. The Bankruptcy Court stated:

> The [Lift Stay Order] entered by this Court with the consent of the parties prohibits the assertion of the claims proposed in the amended complaint against Hillair. The language of that order covers claims that have been or could have been asserted in the California action.

Id. Thus, the Bankruptcy Court specifically prohibited VSP from asserting the claims set forth in the Second Amended Complaint against Hillair in the California Action. *See id.*

D. *VSP Continues Pursuing Its State Law Claims, and the Bankruptcy Court Awards Attorney's Fees to Hillair for VSP's Violation of the Lift Stay Order and the Enforcement Order*

The California Court subsequently ordered the parties to file the Enforcement Order and submit a

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[11] Later, in the Lift Stay Reconsideration Order, the Bankruptcy Court explained that it "did not rule on the effect of all of the orders discussed by Hillair" in its motion to enforce, but instead focused on the language in the Lift Stay Order, which the Bankruptcy Court "found to be pretty clear." Lift Stay Reconsideration Order, *In re PFO Global Inc*., Case No. 17-30355-HDH-7 (Bankr. N.D. Tex. Oct. 8, 2019), 6-7, ECF No. 511.

brief explaining how the outcome of the May 1, 2019 hearing impacted, if at all, VSP's motion for leave to file the Second Amended Complaint. *See* Br. of Appellant 19. In VSP's brief filed with the California Court ("Supplemental Brief"), VSP asserted that the Enforcement Order was "void, unenforceable, and rife with error." Appellant's App. 0290. VSP also claimed that the Bankruptcy Court lacked jurisdiction to bar VSP from "pursuing independent state law claims based upon Hillair's own tortious misconduct," and that the Enforcement Order had "no bearing on the proceedings before the California Court]." *Id.*

In response, Hillair filed an emergency motion ("Sanctions Motion") with the Bankruptcy Court seeking to enforce the Enforcement Order and sanction VSP for allegedly engaging in "bad-faith conduct by seeking to end-run the Enforcement Order in California less than a week after its entry." *Id.* at 0280-83. The Bankruptcy Court held a hearing on the motion on June 11, 2019. Tr. of June 11, 2019 Hr'g. During the hearing, Hillair withdrew its request for monetary sanctions over and above attorney's fees and costs. *Id* at 13:18-24.

Thereafter, the Bankruptcy Court entered the Sanctions Order finding that the Supplemental Brief violated the Stay Order and Enforcement Order, and that any subsequent action to bring claims against Hillair in the California Action would be a violation of both of these orders. Sanctions Order, *In re PFD Global, Inc*., Case No. 17-30355-HDH-7 (Banks. N.D. Tex. June 24, 2019), 2, ECF No. 464. The Bankruptcy Court ordered VSP to pay Hillair's reasonable attorney's fees incurred in connection with the Sanctions Motion from May 9, 2019, through June 11, 2019. *Id.* The Bankruptcy Court further ordered Hillair's

counsel to submit sworn declarations attaching their billing records for fees sought.[12] *Id* at 3.

E. *The Bankruptcy Court Denies VSP's Enforcement Reconsideration Motion and Motion for Relief*

VSP filed a motion for reconsideration of the Enforcement Order on May 8, 2019 ("Enforcement Reconsideration Motion"). Appellant's App. at 0254. In the Enforcement Reconsideration Motion, VSP argued that: (l) the Bankruptcy Court lacked subject matter jurisdiction to adjudicate VSP's state law claims against Hillair that arose from Hillair's own tortious conduct; (2) the Lift Stay Order never held that VSP could not assert claims directly against Hillair for its own misconduct; and (3) VSP's claims against Hillair did not belong to the Trustee. *Id.* at 0263-0272. During a hearing on June 7, 2019, the Bankruptcy Court denied the Enforcement Reconsideration Motion on the record, finding that: (l) the Bankruptcy Court had jurisdiction to interpret and enforce its prior orders;

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[12] At the time Appellant filed its brief in the instant appeal, the Bankruptcy Court had not yet determined the amount of attorney's fees to be awarded to Hillair. *See* Br. of Appellee 1-2. Hillair subsequently filed a motion to dismiss with this Court with respect to the appeal of the Sanctions Order on the grounds that the Sanctions Order "did not reduce [Hillair's] award of attorney's fees to a sum certain, and [therefore,] it is not a final order." Order, *VSP Labs, Inc. v. Hillair Capital Invs., LP*, Civil Action No. 3:19-cv-1575-S (N.D. Tex. Feb. 24, 2020), ECF No. 30. However, shortly thereafter, the Bankruptcy Court entered the Attorney's Fees Order, which reduced the Sanctions Order to a sum certain. *Id.* For that reason, this Court denied the motion to dismiss the appeal of the Sanctions Order. *Id.* Thus, the Court will not address this argument in Hillair's response brief, which was filed prior to this Court's denial of the motion to dismiss, as the issue is moot.

(2) the language in the Lift Stay Order was agreed to by the parties, and any attempt to argue the meaning of the terms of the Lift Stay Order went beyond the proper scope of a motion for reconsideration; and (3) whether VSP's claims were direct or derivative was not relevant to the interpretation of the Lift Stay Order and went beyond the proper scope of a motion for reconsideration. Tr. of June 7, 2019 Hr'g at 6:l-8:11.

On July 26, 2019, VSP filed a motion pursuant to Rules 60(b)(4) and 60(b)(6) of the Federal Rules of Civil Procedure for relief from the automatic stay, as interpreted by the Enforcement Order and Enforcement Reconsideration Order ("Motion for Relief"). Appellant's App. 0375. VSP asserted that the Bankruptcy Court lacked subject matter jurisdiction to enter the Lift Stay Order and, therefore, the Lift Stay Order should be declared void. *Id.* at 0376, 0384. Because VSP argued that the Lift Stay Order should be declared void, VSP asserted it should be granted relief under Rule 60(b)(4), which relieves a party from final judgment, order, or proceeding if the judgment is void. *Id.* VSP also asserted that the Enforcement Order deprived VSP of its ability to pursue legal recourse against Hillair and, therefore, VSP should be granted relief under Rule 60(b)(6), which provides the court with authority to vacate judgments to accomplish justice. *Id.* at 0389. In denying VSP's motion, the Bankruptcy Court explained that it had subject matter jurisdiction to enter the Lift Stay Order as interpreted because the causes of action that VSP asserted against Hillair in the Second Amended Complaint were "related to" the bankruptcy case. Lift Stay Reconsideration Order, *In re PFD Global, Inc.*, Case No. 17-30355-HDH-7 (Bankr. N.D. Tex. Oct. 8, 2019), 3, ECF No. 511. The Bankruptcy Court also found that VSP did not present the "kind of extraordinary

circumstances that would justify relief under Rule 60(b)(6)." *Id.* at 13.

F. *The Bankruptcy Court Calculates and Awards Attorney's Fees to Hillair*

On November 20, 2019, the Bankruptcy Court conducted a hearing to determine the amount of attorney's fees to be awarded to Hillair pursuant to the Sanctions Motion and Sanctions Order. Tr. of Nov. 20, 2019 Hr'g at 4:6-5:15. After reviewing the relevant billing records and receiving testimony from the parties, the Bankruptcy Court found that the attorney's fees incurred in connection with the Sanctions Motion were reasonable, necessary, and appropriate, and awarded Hillair $49,075.30 in attorney's fees and costs. Attorney's Fees Order, Case No. 17-30355-HDH-7 (Bankr. N.D. Tex. Dec. 12, 2019), 3, ECF No. 531.

G. *VSP Appeals to the District Court*

Between June 2019 and December 2019, VSP filed three Notices of Appeal with regard to the Orders.[13] On November 1, 2019, VSP filed its appellant's brief [ECF No. 9] and designated the following issues for appeal:

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[13] *See* Notice of Appeal, *In re PFO Global, Inc*., Case No. 17-30355-HDH-7 (Bankr. N.D. Tex. June 25, 2019), ECF No. 465 (appealing the Enforcement Order, Enforcement Reconsideration Order, and Sanctions Order); Notice of Appeal, *In re PFO Global, Inc*., Case No. 17-30355-HDH-7 (Bankr. N.D. Tex. Oct. 21, 2019), ECF No. 514 (appealing the Lift Stay Reconsideration Order); Notice of Appeal, *In re PFO Global, Inc.*, Case No. 17-30355-HDH-7 (Bankr. N.D. Tex. Dec. 26, 2019), ECF No. 532 (appealing the Attorney's Fees Order).

1. Did the bankruptcy court err and exceed its jurisdiction when it adjudicated VSP Labs, Inc.'s ("VSP") California state law tort claims against third-party California entity Hillair Capital Investments LP and Hillair Capital Management LLC (together, "Hillair"), when such claims have no effect of any kind — actual or conceivable — on debtor Pro Fit Optix, Inc. ("PFO") or on the administration of PFO's bankruptcy estate?

2. Did the bankruptcy court err in ordering VSP to pay third-party Hillair's attorneys' fees that were incurred in connection with briefing the issues associated with the bankruptcy court's jurisdiction to adjudicate PFO's state law tort claims referenced above, either because the bankruptcy court had no jurisdiction over these claims or because Hillair withdrew its request for sanctions?

Br. of Appellant 8. After a series of consolidations, the appeal of each Order is now ripe and pending before this Court. *See supra* Notes l-3 and accompanying text.

III. LEGAL STANDARD

A district court has jurisdiction to hear appeals from "final judgments, orders, and decrees" of a bankruptcy court. 28 U.S.C.A. § 158(a)(1) (Westlaw through P.L. 116-52). A bankruptcy court's "[f]indings of fact are reviewed for clear error, and conclusions of law are reviewed *de novo.*" *Drive Fin. Servs., L.P. v. Jordan*, 521 F.3d 343, 346 (5th Cir. 2008) (citing Fed. R. Bankr. P. 8013). A finding of fact is clearly erroneous when "the reviewing court upon examination of the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Justiss Oil Co. v.*

Kerr-McGee Ref. Corp., 75 F.3d 1057, 1062 (5th Cir. 1996) (citing *United States v. US. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

IV. ANALYSIS

A. *The Bankruptcy Court's Jurisdiction to Enter the Lift Stay Order*

VSP argues that the Bankruptcy Court did not have jurisdiction to enter the Lift Stay Order as interpreted to preclude non-debtor VSP from asserting state law claims against non-debtor Hillair that purportedly "do not relate to or have any conceivable effect on the bankruptcy estate." Reply Br. of Appellant 6. The parties have not identified, and the Court's independent research has not revealed, a factually analogous case in the Fifth Circuit, or elsewhere, that addresses the precise issue presented in the instant appeal: whether the Bankruptcy Court had jurisdiction to enter an order, negotiated and agreed to by the parties, that precludes a non-debtor from asserting state law claims against a non-debtor in another proceeding,

(1) Standard of Review

In this case, the key question is whether the Bankruptcy Court had jurisdiction to enter an order that precluded VSP from asserting state law claims against a non-debtor. *See* Appellant's Br. 6. A "bankruptcy court's jurisdiction is a legal question reviewed *de novo*." *Cole v. Nabors Corp. Servs., Inc.* (*In re CJ Holding Co.*), 597 B.R. 597, 604 (S.D. Tex. 2019) (citing *Wells Fargo Bank, N.A. v. 804 Congress L.L.C.* (*In re 804 Congress, L.L.C.*), 756 F.3d 368, 372-73 (5th Cir. 2014)). Because the Bankruptcy Court's jurisdiction is

a legal question, the Court will conduct a *de novo* review.

(2) *The Bankruptcy Court's Jurisdiction*

"A bankruptcy court's jurisdiction is governed by 28 U.S.C. § 1334." *In re CJ Holding Co*., 597 B.R. at 604. Under § 1334(a), a district court has jurisdiction over all cases under title 11. *Wood v. Wood* (*In re Wood*), 825 F.2d 90, 92 (5th Cir. 1987). Under § 1334(b), a district court has jurisdiction over (1) civil proceedings "arising under" title 11, (2) civil proceedings "arising in" a case under title 11, and (3) civil proceedings "related to" a case under title 11. *Id.* (citing § 1334(b)). District courts may refer such proceedings to the bankruptcy judges in their district under 28 U.S.C. § 157(a). *Stern v. Marshall*, 564 U.S. 462, 473 (2011). Pursuant to § 157(a), bankruptcy judges "may hear and determine all cases under title 11 and all *core* proceedings arising under title 11, or arising in a case under title 11 ... and may enter appropriate orders and judgments, subject to review under section 158 . . . ." 28 U.S.C.A. § 157(b)(l) (Westlaw through P.L. 116-52) (emphasis added). Thus, if a matter is not a case under title 11, a bankruptcy court's jurisdiction depends on whether a proceeding is "core" or "non-core." *See id.*

Core proceedings include, but are not limited to, the 16 different types of matters enumerated in § 157(b)(2). *Stern*, 564 U.S. at 474; § 157(b)(2).[14] If the

[14] Even when a bankruptcy court has statutory authority to enter final judgment in a core proceeding, the Supreme Court has held that there may still be constitutional limitations. *Stern*, 564 U.S. at 482, 503 (holding that although § 157(b)(2)(C) permits a bankruptcy court to enter final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim, Article III of the Constitution does not). However, because the Supreme Court's decision in *Stern* was narrow, the

proceeding is non-core, but is otherwise "related to" a case under title 11, the bankruptcy judge may "submit proposed findings of fact and conclusions of law to the district court." *Stern*, 564 U.S. at 473 (quoting § 157(c)(1)). If a proceeding contains a mixture of core and non-core matters, the court should divide the matters into their core and non-core components. *See Miller v. Boutwell, Owens & Co.* (*In re Guynes Printing Co. of Texas, Inc.*), No, 15-cv-149-KC, 2015 WL 3824070, at *2 (W.D. Tex. June 19, 2015) (noting that if a case is a mixture of core and non-core proceedings, the bankruptcy court can only enter final judgment on the core proceedings); *see also Dunmore v. U.S.*, 358 F.3d 1107, 1114 (9th Cir. 2004) (citing *Halper v. Halper*, 164 F.3d 830, 839 (3d Cir. 1999)) ("When presented with a mixture of core and non-core claims, we must employ a claim-by-claim analysis to determine whether the bankruptcy court could enter a final order for that claim.").

"For the core matters, a bankruptcy judge can enter a final judgment. For the non-core proceedings, the bankruptcy court can handle all pretrial matters, and

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Court will not consider whether the instant appeal raises constitutional issues. *Tanguy v. West* (*In re Davis*), 538 Fed. Appx. 440, 443 (5th Cir. 2013), *cert. denied sub nom. Tanguy v. West*, 571 U.S. 1163 (2014) ("[W]hile it is true that *Stern* invalidated 28 U.S.C. § 157(b)(2)(C) with respect to 'counterclaims by the estate against persons filing claims against the estate,' *Stern* expressly provided that its limited holding applies only in that 'one isolated respect.") (citations omitted). Furthermore, even if the Court found that the instant appeal raised constitutional issues, the Court's holding would not change because the Supreme Court has held that *Stern claims* may be adjudicated by a bankruptcy court with the parties' consent, as the Court finds in the instant case. *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, ___, 135 S.Ct. 1932, 1938 (2015); *infra* Section IV(A)(2)(d).

issue findings of fact and conclusions of law for any dispositive motions that the [district court] will then review *de nova*." *In re Guynes Printing Co. of Texas, Inc.*, 2015 WL 3824070, at *2 (citing § 157(c)(1)). However, if the parties consent, the bankruptcy court can adjudicate non-core proceedings. *Wellness Int'l Network Ltd.*, 135 S.Ct. at 1940. The Court will consider each aspect of jurisdiction in turn.

a. *Did the Bankruptcy Court Have Jurisdiction Pursuant to § 1334(a) or § 1334(b)?*

In this case, VSP sought to assert California state law claims against Hillair for intentional interference with contractual relations, aiding and abetting fraudulent transfer, and unfair business practices. Br. of Appellant 17. Because these California state law claims were asserted by a non-debtor (VSP) against another non-debtor (Hillair) and, therefore, did not "arise under" title 11, the Bankruptcy Court did not have jurisdiction under § 1334(a) to preclude VSP from asserting these claims. § 1334(a) (Westlaw through P.L. 116-52). Thus, the Court must determine whether the proceeding at issue was a core proceeding "arising under title 11" or "arising in a case under title 11," or a non-core proceeding "related to a case under title 11." §§ 157(b)(l) and (c)(1).

b. *Was the Proceeding "Core" or "Non-core"?*

"[A] proceeding is core under section 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case." *In re Wood*, 825 F.2d at 97. "Core proceedings include, but are not limited to . . . motions to terminate, annul, or modify the automatic

stay." §§ 157(b)(2) and (b)(2)(G). "If the proceeding does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy[,] it is not a core proceeding; it may be *related* to the bankruptcy because of its potential effect, but under section 157(c)(1), it is an `otherwise related' or non-core proceeding." *In re Wood*, 825 F.2d at 97 (emphasis in original).

Here, the Bankruptcy Court found that because "[t]his matter arose in the context of a motion for relief from the automatic stay, . . . [the Bankruptcy Court] clearly had core jurisdiction pursuant to 28 U.S.C. § 157(b)(2)(G)." Lift Stay Reconsideration Order, *In re PFO Global, Inc.*, Case No. 17-30355-HDH-7 (Bankr. N.D. Tex. Oct. 8, 2019), 2, ECF No. 511. Although a motion for relief from automatic stay is a core proceeding under § 157(b)(2)(G), the inquiry does not end there. The critical issue is whether the Bankruptcy Court had jurisdiction to enter such order with language that precluded VSP from asserting state law claims against Hillair in the California Action. *See In re Guynes Printing Co. of Texas, Inc.*, 2015 WL 3824070, at *2 (noting that when a case contains a "mixture of core and non-core matters," the bankruptcy court can only issue findings of fact and conclusions of law for the non-core proceedings); *see also Rinaldi v. HSBC Bank USA, NA.* (*In re Rinaldi*), 487 B.R. 516, 525 (Bankr. E.D. Wis. 2013) (citing, among other authorities, *Halper*, 164 F.3d at 839) ("When faced with a combination of core and non-core claims, 'the better approach in a mixed core and non-core proceeding is for the bankruptcy court to determine the extent of its jurisdiction with respect to each claim. It should then enter a final judgment with respect to only those claims that are truly core matters and should forward a report and recommendation to

the district court on the non-core but 'related to' claims.").

The Court finds that the Lift Stay Order contains a mixture of core and non-core matters. The modification of the automatic stay is core because "motions to terminate, annul, or modify the automatic stay" are core proceedings under § 157(b)(2)(G). § 157(b)(2)(G). However, the state law claims at issue are not core because they did not "arise in a bankruptcy case or under title 11." *See Stern*, 564 U.S. at 476. Indeed, if Debtor had not filed for bankruptcy, VSP could still assert its claims against Hillair in California state court, which makes it clear that such claims are not "core." *See In re Wood*, 825. F.2d at 97. Thus, the Bankruptcy Court was not acting pursuant to its jurisdictional authority under § 157(b)(1) when it entered the language at issue in the Lift Stay Order. *See Joyner v. S.F.L. & S.I.L., LLC*, 485 B.R. 538, 561 (W.D. La. 2013) (citing *Stern*, 564 U.S. 462) ("A Bankruptcy court lacks authority under Article III to enter a final judgment for claims that arise under state law."). Accordingly, the Court must next determine whether the state law claims were "related to" the title 11 case such that the Bankruptcy Court had jurisdictional authority pursuant to § 157(c)(l) to enter the Lift Stay Order.[15]

[15] In the alternative, the Court finds that the Bankruptcy Court acted pursuant to a core proceeding when entering the Lift Stay Order because it was an order modifying the automatic stay, which is a core proceeding under § 157(b)(2)(G). § 157(b)(2)(G).

c. Did the Bankruptcy Court Have "Related to" Jurisdiction Pursuant to § 157(c)(1)?

"Proceedings 'related to' the bankruptcy include . . . suits between third parties which have an effect on the bankruptcy estate." *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 n.5 (1995) (citing 1 Collier on Bankruptcy ¶ 3.01[1][c][iv], p. 3-28 (15th ed. 1994)); *see also TMT Procurement Corp. v. Vantage Drilling Co.* (*In re TMT Procurement Corp.*), 764 F.3d 512, 523 (5th Cir. 2014) (quoting *In re Wood*, 825 F.2d at 93) ("A matter is 'related to' the bankruptcy if 'the outcome of that proceeding could *conceivably* have any effect on the estate being administered in bankruptcy.") (emphasis in original). "'Related to' jurisdiction has been defined quite broadly . . . [but] cannot be limitless." *U.S., Internal Revenue Serv. v. Prescription Home Health Care, Inc.* (*In re Prescription Home Health Care, lnc.*), 316 F.3d 542, 547 (5th Cir. 2002) (citing *Celotex Corp*., 514 U.S. at 308). "For jurisdiction to attach, the anticipated outcome of the action must both (1) alter the rights, obligations, and choices of action of the debtor, and (2) have an effect on the administration of the estate." *Bass v. Denney* (*In re Bass*), 171 F.3d 1016, 1022 (5th Cir. 1999). "It is well-established that, to be 'related to' a bankruptcy, it is not necessary for the proceeding to be against the debtor or the debtor's property." *In re Prescription Home Health Care, Inc*., 316 F.3d at 547 (citing *Celotex Corp*., 514 U.S. at 308).

In the Lift Stay Reconsideration Order, the Bankruptcy Court determined it had "related to" jurisdiction because it found that "the outcome of VSP's causes of action against Hillair in the Second Amended Complaint could conceivably have an effect on the

Debtor's estate being administered in bankruptcy." Lift Stay Reconsideration Order, *In re PFO Global, Inc.*, Case No. 17-30355-HDH-7 (Banter. N.D. Tex. Oct. 8, 2019), 11, ECF No. 511. Specifically, the Bankruptcy Court found that if Hillair "is found to be independently liable for some portion of the damages that are the subject of the Second Amended Complaint, it could reduce the amount of damages that the Debtor could be found liable for." *Id.* at 12 (citing, among other authorities, *Randall & Blake, Inc. v. Evans* (*In re Canion*), 196 F.3d 579 (5th Cir. 1999)) (noting that courts have found that "related to" jurisdiction exists in similar circumstances). The Bankruptcy Court also found that if Hillair "is somehow found jointly liable for damages to VSP, it could result in a contribution claim between Hillair and the Debtor, which could be complicated by VSP's intention to assert rights to setoff and recoupment against the Debtor's Counterclaims that have been sold to Hillair." *Id.*

The Court agrees with the Bankruptcy Court's findings. While it is possible that VSP's claims against Hillair would not impact the bankruptcy estate, "jurisdiction will attach on finding of any *conceivable* effect" on the bankruptcy estate. *In re Canion*, 196 F.3d at 586-87 (emphasis in original); *In re Wood*, 825 F.2d at 93 ("Although we acknowledge the possibility that this suit may ultimately have no effect on the bankruptcy, we cannot conclude, on the facts before us, that it will have no *conceivable* effect.") (emphasis in original). As the Bankruptcy Court noted, the California Action presents an "interconnected web of interests," and it is indeed conceivable that VSP's claims against Hillair could have an effect on the Debtor's estate. Lift Stay Reconsideration Order, *In re PFO Global, Inc.*, Case No. 17-30355-HDH-7 (Bantu.

N.D. Tex. Oct. 8, 2019), 11, ECF No. 511. In fact, each claim asserted against Hillair in the Second Amended Complaint is clearly intertwined with the Debtor's alleged misconduct. *See* Appellant's App. 0240 (Fifth Cause of Action for Intentional Interference with Contractual Relations (asserted against Hillair): "Hillair's intentional acts caused [Debtor's] breach of the Agreement . . . ."); *id.* 0240-41 (Sixth Cause of Action for Aiding and Abetting Fraudulent Transfer (asserted against Hillair): "Hillair substantially encouraged and assisted [Debtor] in filing for bankruptcy and selling its claims against VSP to Hillair in order for [Debtor] to escape any liability owed to VSP and to wrongfully preclude VSP's recovery of any damages against [Debtor] in this lawsuit."); *id.* at 0241 (Seventh Cause of Action for Unfair Business Practices (asserted against Debtor and Hillair): "[Debtor] and Hillair engaged in unfair competition . . . in that they used unfair, unlawful, and/or fraudulent business practices . . . ."). For these reasons, the Court finds that the Bankruptcy Court had non-core, but otherwise "related to," jurisdiction over the state law claims asserted against Hillair in the Second Amended Complaint.

A bankruptcy judge's jurisdiction, however, over non-core proceedings that are otherwise "related to" a case under title 11 is limited. *Stern*, 564 U.S. at 473. As discussed above, "[a]bsent consent, bankruptcy courts in non-core proceedings may only 'submit proposed findings of fact and conclusions of law,' which the district courts review *de novo*." *Wellness Int'l Network, Ltd*., 135 S.Ct. at 1940 (quoting § 157(c)(1)). Thus, the Bankruptcy Court's authority to enter the Lift Stay Order turns on whether the parties consented. *Id.* at 1947.

d. *Did the Parties Consent to the Entry of the Lift Stay Order?*

In a non-core proceeding, a bankruptcy court's authority is limited to submitting proposed findings of fact and conclusions of law to the district court for review, unless the parties consent, as summarized by the Supreme Court in *Wellness Int'l Network, Ltd*.:

> Congress gave bankruptcy courts the power to "hear and determine" core proceedings and to "enter appropriate orders and judgments," subject to appellate review by the district court. § 157(b)(l); *see* § 158. But it gave bankruptcy courts more limited authority in non-core proceedings: They may "hear and determine" such proceedings, and "enter appropriate orders and judgments," only "with consent of all the parties to the proceeding." § 157(c)(2). Absent consent, bankruptcy courts in non-core proceedings may only "submit proposed findings of fact and conclusions of law," which the district courts review *de novo*. § 157(c)(1).

Id. at 1940. "[A] litigant's consent—whether express or implied—must still be knowing and voluntary." *Id.* at 1948. "[T]he key inquiry is whether 'the litigant or counsel was made aware of the need for consent and the right to refuse it . . . .'" *Id.* (citing *Roell v. Withrow*, 538 U.S. 580, 590 (2003)).

Here, the Bankruptcy Court found that the parties expressly agreed and therefore consented to the language of the Lift Stay Order. Appellant's App. 0416-17. It is undisputed that the parties consented to

the entry of the Lift Stay Order.[16] The Bankruptcy Court specifically found the following:

> [T]he Court notes that VSP consented to this Court's determination in the matter disposed of in the [Lift Stay Order] by seeking relief from the stay and by expressly agreeing to the terms contained in that order. That order was an agreed order between VSP and Hillair, and was submitted to the Court for approval . . . . The Court did not choose the specific language of that order; the parties

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[16] Although VSP does not dispute that it agreed to the language in the Lift Stay Order, VSP asserts that it did not agree to waive its state law claims against Hillair because at the time the Lift Stay Order was entered, Hillair did not yet know of the facts giving rise to such claims. *See* Br. of Appellant 14. However, in the context of a bargained-for exchange, it is not uncommon for a party to waive potential future claims, whether known or unknown. *See, e.g., Keck, Makin & Cate v. Nat'l Union Fire Ins. Co of Pittsburgh*, 20 S.W.3d 692, 698 (Tex. 2000) (citations omitted) ("Although releases often consider claims existing at the time of execution, a valid release may encompass unknown claims and damages that develop in the future."). Courts have upheld settlement agreements containing similar language releasing future claims. *See, e.g., CIC Property Owners v. Marsh USA Inc.*, 460 F.3d 670, 671, 673 (5th Cir. 2006) (holding settlement agreement releasing known and unknown claims "that have been or could have been brought" was enforceable when parties were represented by counsel, and precluded claim brought by plaintiff after settlement agreement was executed). Moreover, the issue here is not whether VSP consented to the potential future consequences of entering the Lift Stay Order, but whether VSP consented to the entry of the Lift Stay Order. *See Wellness Int'l Network Ltd.*, 135 S.Ct. at 1940 (citing § 157(c)(2)) (finding that bankruptcy courts can "enter appropriate orders and judgments" in non-core proceedings with the parties' consent). It is clear that VSP consented to the entry of the Lift Stay Order. *See. e.g.*, Tr. of Aug. 23, 2017 Hr'g at 5:24-6:4.

> negotiated and agreed to that language, and the Court approved it.

Id.

Furthermore, the transcript of the August 23, 2017 hearing on the Lift Stay Motion confirms that the parties negotiated the language of the Lift Stay Order and expressly consented to its entry by the Bankruptcy Court. Tr. of Aug. 23, 2017 Hr'g. at 5:3-6 (Counsel for VSP, stating, "I think all parties are in agreement that the California action can proceed . . ."); *id.* at 5:24-6:l (Counsel for VSP, stating, "With respect to the limited objection filed by Hillair, we have exchanged and agreed on some proposed language in the form of an order."); *id.* at 14:8-13 (Counsel for Hillair, stating, "[W]e have mutually agreed that the other side could pursue its claims and set up rights and recoupment rights . . . and we have a form of agreed order . . . ."); *id.* at 12:6-8 (Counsel for Trustee, referring to the proposed order "that has been agreed to by VSP and Hillair").

The Court finds that the parties expressly consented, and that such consent was knowing and voluntary. Even if the Court did not find express consent (which it does), the Court also finds implied consent because VSP (l) requested that the automatic stay be lifted, participated in the automatic stay proceedings, did not object to or oppose the entry of the Lift Stay Order, and continued to seek relief from the Bankruptcy Court by filing a Rule 12(b)(6) motion; (2) was represented by experienced and sophisticated bankruptcy counsel; and (3) negotiated and jointly proposed the very language at issue in the Lift Stay Order and requested the Bankruptcy Court to include such language in the Lift Stay Order. *See, e.g., Saenz v. Gomez* (*In re Saenz*), 899 F.3d 384, 390-91 (5th Cir.

2018) (finding implied consent when, among other factors, appellant was represented by experienced bankruptcy counsel and sought affirmative relief by filing Rule 12(b)(6) motions); *In re Mosher*, 578 B.R. 765, 771 (Bankr. S.D. Tex. 2017) (finding implied consent when parties participated in automatic stay proceedings and did not object to bankruptcy court's authority to enter final order to lift the automatic stay). For these reasons, the Court finds that the parties knowingly and voluntarily consented to the entry of the Lift Stay Order, and, accordingly, the Bankruptcy Court had jurisdiction to enter the Lift Stay Order.

B. *The Bankruptcy Court's Interpretation of the Lift Stay Order*

VSP argues that the Bankruptcy Court erroneously held that the language of the Lift Stay Order barred VSP from asserting direct claims against Hillair in the California Action. Br. of Appellant 14. To resolve this issue, the Court must first identify the correct standard of review, which the parties dispute.

(1) *Standard of Review*

VSP argues that a bankruptcy court's interpretation of its own orders regarding purely legal issues are reviewed *de novo*, *id.* at 9, while Hillair argues that a bankruptcy court's interpretation of its own orders is entitled to substantial deference and is reviewed for an abuse of discretion, Br. of Appellee 4. When litigants dispute whether the standard of review with respect to a bankruptcy court's interpretation of its own orders is *de novo* or substantial deference, the Fifth Circuit has set forth the "proper reconciliation of these two positions." *New Nat'l Gypsum Co. v. Nat'l Gypsum Co. Settlement Trust* (*In re Nat'l Gypsum Co.*),

219 F.3d 478, 484 (5th Cir. 2000). The district court reviews any legal issues *de novo*, but defers to the bankruptcy court's reasonable resolution of any ambiguities in its own orders. *See id*.; *Morrison v. Brousseau*, 377 B.R. 815, 821 (RD. Tex. 2007). However, because textual interpretation of a court order is ultimately a legal question, an order "must truly be ambiguous . . . even in light of other documents in the record" before deferring to the bankruptcy court's interpretation of that order. *In re Nat'l Gypsum Co.*, 219 F.3d 478 at 484. Because the Court finds that the language of the Lift Stay Order is unambiguous, the Court will conduct a *de novo* review.

(2) *Interpretation of the Lift Stay Order*

The Court is asked to determine whether the Bankruptcy Court properly concluded that the below paragraph from the Lift Stay Order ("Paragraph") prohibits its VSP from asserting direct claims against Hillair in the California Action:

> ORDERED, ADJUDGED, AND DECREED, that the Motion for Relief From Automatic Stay filed by VSP Labs, Inc., is GRANTED with conditions. The automatic stay is modified in the above-styled case so that VSP Labs, Inc. may liquidate the amount of its affirmative claims against Pro Fit Optix, Inc. ("PFO") for the purpose of asserting its rights to setoff and recoupment in Case No. 34-2013-00153788, pending in the Superior Court of California, in and for the County of Sacramento, styled *VSP Labs, Inc. v. Pro Fit Optix, et al.* (the "California Action["]); provided, however, that to the extent monetary damages are awarded to VSP Labs, Inc. in excess of any monetary damages awarded to

> Hillair Capital Investments LP or Hillair Capital Management LLC ("Hillair"), or PFO in the California Action, the excess amount may only be enforced through a proof of claim filed in the above-styled and —numbered case, and, without affecting VSP's rights of setoff or recoupment in defense of claims in the California Action, no money damages or other amounts of any kind may be recovered from Hillair under any circumstance on account of any claims that have been or could have been asserted in the California Action[.]

Lift Stay Order, *In re PFO Global, Inc*., Case No. 17-30355-HDH-7 (Bankr. N.D. Tex. Sept. 7, 2017), 1, ECF No. 273. To interpret the Paragraph, the Court will apply traditional rules of contract interpretation. *Bourbon Saloon, Inc. v. Absinthe Bar, L.L.C.* (*In re Bourbon Saloon, Inc.*), 647 Fed.Appx. 342, 348 (5th Cir. Apr. 28, 2016) (applying general principles of contract interpretation to determine meaning of an agreed order); *Consumer Protection Financial Bureau v. Klopp*, 957 F.3d 454, 462-63 (4th Cir. 2020) (applying traditional rules of contract interpretation to determine meaning of a negotiated court order).

The beginning of the second sentence indicates that the automatic stay is modified so that Debtor may assert its rights to setoff and recoupment in the California Action. Lift Stay Order, *In re PFO Global, Inc.*, Case No. 17-30355-HDH-7 (Bankr. N.D. Tex. Sept. 7, 2017), 1, ECF No. 273. ("The automatic stay is modified . . . so that [VSP] . . . may liquidate the amount of its affirmative claims against . . . [Debtor] . . . for the purpose of asserting its rights to setoff and recoupment . . . .").

Immediately after the semi-colon, the sentence contains a proviso ("provided, however, that to the extent . . . ."). *Id.* at 2. This is critical to the interpretation of the sentence because the proviso places conditions on the preceding text (i.e. modifying the automatic stay). *Id.* As courts have noted, a proviso places a condition on the text that precedes the proviso. *See, e.g., Chesapeake Energy Corp. y. Bank of New York Mellon Trust Co.*, 773 F.3d 110,115 (2d Cir. 2014) (noting that a proviso introduces a condition that narrows the broader initial proposition); *see also* A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 154 (2012) (explaining the "proviso canon" and noting that a proviso is a clause that introduces a condition by the word "provided" and "modifies the immediately preceding language").

Here, the proviso sets forth two conditions for lifting the automatic stay. Lift Stay Order, *In re PFO Global, Inc*., Case No. 17-30355-HDH-7 (Bankr. N.D. Tex. Sept. 7, 2017), 2, ECF No. 273. First, if VSP is awarded monetary damages in excess of any monetary damages awarded to Hillair or Debtor in the California Action, the excess amount may only be enforced through a proof of claim with the Bankruptcy Court. *Id.* ("provided, however, that to the extent monetary damages are awarded to [VSP] . . . in excess of any monetary damages awarded to [Hillair] . . . or [Debtor] . . . the excess amount may only be enforced through a proof of claim . . . ."). Second, money damages may not be recovered from Hillair in the California Action. *Id.* ("provided, however, that . . . no money damages or other amounts of any kind may be recovered from Hillair under any circumstance on account of any claims that have been or could have been asserted in the California Action"). *Id.*

The Court's conclusion as to the effect of the proviso is consistent with the first sentence of the Paragraph, which indicates that the lift of the automatic stay is subject to conditions. *Id.* at 1 ("ORDERED, ADJUDGED, AND DECREED, that the Motion for Relief From Automatic Stay filed by VSP Labs, Inc., is GRANTED *with conditions*.") (emphasis added).

After reviewing the plain language of the Lift Stay Order, applying the relevant canon of interpretation, and considering the impact of the proviso on the overall meaning of the Paragraph, the Court finds that the Lift Stay Order is unambiguous. Because the lift of the automatic stay is subject to the condition that VSP cannot recover money damages from Hillair "under any circumstance on account of any claims that have been or could have been asserted," VSP is precluded from asserting direct claims against Hillair in the California Action. *Id.* at 2.

VSP argues that given the procedural posture of the case at the time the Lift Stay Order was entered, the language was only intended to cover claims related to Debtor's wrongdoing. Appellant's Br. 14. However, because the Court finds that the language of the Lift Stay Order is unambiguous, the Court will not consider extrinsic evidence. *See, e.g., Dean v. City of Shreveport*, 438 F.3d 448, 460-61 (5th Cir. 2006) (noting that under general principles of contract interpretation, extrinsic evidence is not considered unless the document is ambiguous).

Moreover, even if the Court found that the Lift Stay Order was ambiguous (which it does not), the Court would defer to the Bankruptcy Court's interpretation under the applicable standard of review. *In re Nat'l Gypsum Co.*, 219 F.3d 478 at 484. Thus, the result

would be the same. For the foregoing reasons, the Court affirms the Enforcement Order.

C. Enforcement Reconsideration Order

VSP also appeals the Enforcement Reconsideration Order. The Court reviews the denial of a motion for reconsideration for an abuse of discretion. *Life Partners Creditors' Trust v. Cowley* (*In re Life Partners Holdings, Inc.*), 926 F.3d 103, 128 (5th Cir. 2019) (citing *ICES Distribs., Inc. v. J&J Snack Foods Corp.*, 445 F.3d 841, 847 (5th Ch. 2006)). For the reasons stated in Sections IV(A)-(B), *supra*, and in the June 7, 2019 transcript of the hearing on this matter, the Court finds no abuse of discretion. Tr. of June 7, 2019 Hr'g. To the extent VSP contests the Bankruptcy Court's legal conclusions that underlie its decision to deny the Enforcement Reconsideration Motion, the Court has conducted a *de novo* review of the relevant conclusions and affirms the Bankruptcy Court's legal conclusions for the reasons stated herein and in the record in this case.

D. *Sanctions Order and Attorney's Fees Order*

VSP also appeals the Sanctions Order and Attorney's Fees Order. VSP appealed the Attorney's Fees Order after submitting its brief to this Court and, as explained above, the Court consolidated that appeal under the above-styled civil action number. *See supra* Note 3 and accompanying text. However, VSP did not provide any separate or supplemental briefing in support of its appeal of the Attorney's Fees Order. Issues raised on appeal, but not briefed, are waived. *See Patterson v. Mobil Oil Corp*., 335 F.3d 476, 483 n.5 (5th Cir. 2003) (citation omitted). Nevertheless, the Court will consider the appeal of the Attorney's Fees

Order given that it relates to the Sanctions Order, which was briefed.

(1) Standard of Review

The Court reviews a bankruptcy court's imposition of sanctions and award of attorney's fees for an abuse of discretion. *Cadle Co. v. Pratt* (*In re Pratt*), 524 F.3d 580, 584 (5th Cir. 2008) (citing *Coie v. Sadkin* (*In re Sadkin*)), 36 F.3d 473, 475 (5th Cir. 1994) & *In re Cahill*, 428 F.3d 536, 539 (5th Cir. 2005)). "A bankruptcy court abuses its discretion when it '(l) applies an improper legal standard or follows improper procedures in calculating the fee award or (2) rests its decision on findings of fact that are clearly erroneous.'" *Gassaway v. TMGN 121, LLC*, No. 5:19-cv-082-H, 2020 WL 789199, at *6 (N.D. Tex. Feb. 18, 2020) (citing *Caplin & Drysdale Chartered v. Babcock & Wilcox Co.* (*In re Babcock & Wilcox Co.*), 526 F.3d 824, 826 (5th Cir. 2008)).

(2) *Sanctions Order*

Bankruptcy courts may award attorney's fees pursuant to statute or pursuant to their inherent authority. 11 U.S.C. § 105(a) provides as follows:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provision of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(Westlaw through P.L. 116-58). Under this section, "a court can issue *any judgment* necessary or appropriate to carry out the requirements of the code." *In re Rodriquez*, 517 B.R. 724, 729 (Bankr. S.D. Tex. 2014) (emphasis added). "Any judgment would include any remedy available in a private cause of action, including attorney's fees." *Id.* A bankruptcy court may impose attorney's fees without finding bad faith. *Id.* at 729-30 (noting that a court does not need to make a fording of bad faith to award attorney's fees and finding that compensating attorney's fees is an appropriate remedy when a party violates a court order).

Courts may also impose sanctions pursuant to their inherent authority. *See Carroll v. Jaques Admiralty Law Finn, P.C.*, 110 F.3d 290, 292 (5th Cir. 1997). The inherent power of the court to sanction conduct applies to bankruptcy courts. *Schermerhorn v. Kubbernus* (*In re Skyport Glob. Commc'n, Inc.*), 642 F. App'x. 301, 303 (5th Cir. 2016) (citing *Citizens Bank & Tr Co. v. Case* (*In re Case*), 937 F.2d 1014, 1023 (5th Cir. 1991)). Although bankruptcy courts must make a finding of bad faith to impose sanctions pursuant to their inherent authority, bad faith may be inferred. *In re Keating*, Civ. A. No. 6:16-mc-00005, 2016 WL 8808668, *6 (W.D. La. Nov. 16, 2016) (noting that it is unnecessary for a court to make a specific finding of bad faith when bad faith may be inferred from the record).[17]

Here, VSP argues that the Sanctions Order should be reversed because (1) the Bankruptcy Court lacked

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[17] *See also In re Skyport Glob. Commc'n, Inc.*, 642 F. App'x 301 at 303-04 (finding that appellant's argument that bankruptcy court erred by failing to make specific findings of bad faith was without merit because the bankruptcy court found that appellant violated a court order and the bankruptcy code, which was sufficient to support a finding of bad faith).

jurisdiction to adjudicate VSP's state law claims against Hillair; (2) Hillair voluntarily withdrew its request for sanctions during the June 11, 2019 hearing on Hillair's Enforcement Motion; and (3) the Bankruptcy Court did not make a specific finding of bad faith. Br. of Appellant 31-32; Reply Br. of Appellant 26-27.

The Court disagrees. As stated herein, the Court finds that the Bankruptcy Court had jurisdiction to enter the Lift Stay Order as interpreted. *Supra*, Section IV(A). And, although it is undisputed that Hillair withdrew its request for sanctions "over and above" attorney's fees and costs, Hillair did not withdraw its request for reimbursement of attorney's fees and costs incurred in connection with the Sanctions Motion. Tr. of June 11, 2019 Hr'g at 13:18-21 ("[W]e're going to back off our request for any monetary sanction *over and above* an award of fees and costs incurred by Hillair in conjunction with bringing this proceeding . . . .") (emphasis added).

Finally, a bankruptcy court is not required to make a specific finding of bad faith to order the payment of reasonable attorney's fees when it finds a violation of a court order. *In re Rodriquez*, 517 B.R. at 729.

In its Sanctions Order, the Bankruptcy Court ruled:

> [U]pon the arguments and representations of counsel at the hearing . . . and after due deliberation and sufficient cause appearing therefor, the Court finds as follows:
>
> A. VSP's Supplemental Brief was a violation of the [Lift Stay Order].
>
> B. VSP's Supplemental Brief was a violation of the [Enforcement Order].

> C. Any subsequent actions by VSP to bring claims against Hillair in the case styled *VSP Labs, Inc. v. Pro Fit Optix, Inc., et al*., Case No. 34-201300153788, pending in the Superior Court of the State of California, County of Sacramento, as described in the [Lift] Stay Order, would be a violation of the [Lift] Stay Order and the Enforcement Order.

Sanctions Order, *In re PFO Global, Inc*., Case No. 17-30355-HDH-7 (Bankr. N.D. Tex. June 24, 2019), 2, ECF No. 464. Based on these findings, the Bankruptcy Court ordered VSP to pay Hillair's reasonable attorney's fees incurred in connection with the Sanctions Motion. *Id.* at 3.

Under § 105(a), the Bankruptcy Court had authority to award attorney's fees without making a finding of bad faith. *In re Rodriquez*, 517 B.R. at 729 (finding that court orders may not be violated without recourse and awarding attorney's fees is an appropriate remedy). For these reasons, the Court finds that the Bankruptcy Court did not abuse its discretion by entering the Sanctions Order and awarding reasonable attorney's fees to Hillair.[18] To the extent VSP contests the Bankruptcy Court's legal conclusions that underlie its decision to enter the Sanctions Order, the Court has conducted a *de novo* review of the relevant conclusions and affirms the Bankruptcy Court's legal

---

[18] Alternatively, the Bankruptcy Court's finding that VSP violated two of its court orders sufficiently supports an inference of bad-faith conduct. *In re Skyport Glob. Commc'n, Inc*., 642 F. App'x at 303-04. Bankruptcy courts may impose attorney's fees pursuant to their inherent authority when bad-faith conduct is inferred. *Id.*; *In re Keating*, 2016 WL 8808668, *6.

conclusions for the reasons stated herein and in the record in this case.

(3) *Attorney's Fees Order*

"In this circuit, courts apply a two-step method for determining a reasonable attorney's fee award." *MetroPCS v. Thomas*, No. 3:18-mc-0037-S, 2020 WL 1666538, at *2 (N.D. Tex. Apr. 3, 2020) (quoting *Combs v. City of Huntington*, 829 F.3d 388, 391 (5th Cir. 2016)). First, the court must calculate the lodestar. *Id.* (quoting *Jimenez v. Wood Cty.*, 621 F.3d 372, 379 (5th Cir. 2010)). Second, "[a]fter calculating the lodestar, the court can adjust the lodestar amount based on the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) . . . ." *Id.* 2020 WL 1666538, at *3 (citation omitted). The Court will consider each step in turn.

a. Lodestar Calculation

The lodestar "is equal to the number of hours reasonably expended multiplied by the prevailing hourly rate in the community for similar work." *Id.*, 2020 WL 1666538, at *2 (citing *Jimenez*, 621 F.3d at 379) (internal quotation marks omitted). "While 'the reasonable hourly rate for a community is established through affidavits of other attorneys practicing there,' the '[c]ourt . . . may use its own expertise and judgment to make an appropriate independent assessment of the hourly rates charged for the attorneys' services.'" *Id.* (quoting *Dartson v. Villa*, No. 3:17-cv-569-M, 2018 WL 4002474, at *2 (N.D. Tex. Aug 22, 2018)).

Here, the Bankruptcy Court conducted an extensive hearing in which the relevant billing records were admitted into evidence and the lawyers who oversaw

billing on the matter were questioned under oath with respect to their expertise, experience, billing rates, and hours spent. Tr. of Nov. 20, 2019 Hr'g. Based on the record, the Court fords that the Bankruptcy Court did not abuse its discretion in finding that the lawyers' billing rates and the time spent on the matter were reasonable.

b. Johnson *Factors*

In *Johnson*, the Fifth Circuit set forth twelve factors that the court can use to adjust the lodestar amount. *Metro PCS*, 2020 WL 1666538, at *3. The court must "provide a concise but clear explanation of its reasons for the fee award." *Id.* (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). However, the court's findings "need not be 'excruciatingly explicit in this area,' and the court commits no error by 'omit [ting] discussion of one of the *Johnson* factors so long as the record clearly indicates that the . . . court has utilized the *Johnson* framework as the basis of its analysis.'" *Id.* (citing *FTC v. Nat'l Bus. Consultants, Inc.*, No. 08-30320, 2008 WL 5068620, at *2 (5th Cir. Dec. l, 2008)). "In fact, 'there is a strong presumption that the lodestar figure is reasonable,' *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 554 (2010), and the . . . court commits no error so long as the court 'sufficiently considered the appropriate criteria.'" *Id.* (citing *Serna v. Law Office of Joseph Onwuteaka, P.C.*, 614 F. App'x 146, 157 (5th Cir. 2015)) (internal quotation marks omitted).

Here, the transcript of the proceeding before the Bankruptcy Court demonstrates that the Bankruptcy Court heard testimony from the witnesses with respect to all of the *Johnson* factors: (1) the time and labor required, *see* Tr. of Nov. 20, 2019 Hr'g at 14:2-18, 16:19-17:14, 18:15-21:19, 24:1-2, 36:1-40:1; (2) the

novelty and difficulty of the questions, *see id.* at 24:3-11; (3) the skill requisite to perform the legal service properly, *see id.* at 24:12-15; (4) the preclusion of other employment by the attorney due to acceptance of the case, *see id.* at 24:20-24; (5) the customary fee, *see id.* at 10:10-18, 12:6-12, 22:25-23:15, 24:25-25:2, 31:11-18; (6) whether the fee is fixed or contingent, *see id.* 25:3-5; (7) time limitations imposed by the client or the circumstances, *see id.* 25:6-19; (8) the amount involved and the results obtained, *see id* at 25:20-25; (9) the experience, reputation, and ability of the attorneys, *see id.* at 8:17-10:9, 26:1-4, 29:1531:10; (10) the "undesirability" of the case, *see id* at 26:5-6; (11) the nature and length of the professional relationship with the client, *see id.* at 26:7-10; and (12) awards in similar cases, *see id.* at 26:11-17.

After considering the evidence presented and applying the *Johnson* factors, the Bankruptcy Court found that the attorney's fees and costs were reasonable, necessary, and appropriate, and that no downward adjustments were necessary. *Id.* at 54:13-58:13; Attorney's Fees Order, No. 17-30355-HDH-7 (Bankr. N.D. Dec. 12, 2019), 3, ECF No. 531. Based on the record, the Court finds that the Bankruptcy Court did not abuse its discretion in finding that the attorney's fees and costs incurred by Hillair were reasonable, necessary, and appropriate. Attorney's Fees Order, No. 17-30355-HDH-7 (Bankr. N.D. Dec. 12, 2019), ECF No. 531. To the extent VSP contests the Bankruptcy Court's legal conclusions that underlie its decision to enter the Attorney's Fees Order, the Court has conducted a *de novo* review of the relevant conclusions and affirms the Bankruptcy Court's legal conclusions for the reasons stated herein and in the record in this case.

E. *Lift Stay Reconsideration Order*

VSP argues that the Bankruptcy Court's denial of its Motion for Relief, in which VSP sought relief pursuant to Rules 60(b)(4) and 60(b)(6), should be reversed because (l) the Bankruptcy Court did not have subject matter jurisdiction to enter the Lift Stay Order, and (2) the Bankruptcy Court's interpretation of the Lift Stay Order resulted in the "deprivation of legal recourse" that constitutes extraordinary circumstances that justify relief. *See* Reply Br. of Appellant 24-25. The Court reviews the denial of a Rule 60(b)(4) motion *de novo* and the denial of Rule 60(b)(6) relief for abuse of discretion. *Callon Petroleum Co. v. Frontier Ins.*, 351 F.3d 204, 208-10 (5th Cir. 2003) (citations omitted). In applying the abuse of discretion standard, "[i]t is not enough that the granting of relief might have been permissible, or even warranted . . . ." *Diaz v. Stephens*, 731 F.3d 370, 374 (5th Cir. 2013) (citing *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981)) (internal quotation marks and alterations omitted).

Under Rule 60(b)(4), "the court may relieve a party . . . from a final judgment, order, or proceeding . . . [if] the judgment is void . . . ." FED. R. CIV. P. 60(b) & 60(b)(4). "A judgment is void under Rule 60(b)(4) if the court lacks jurisdiction over either the subject matter or the parties." *Lessin v. Kellogg Brown & Root*, No. H-05-1853, 2007 WL 9761654, at *1 (S.D. Tex. June 4, 2007) (citing *Hill v. McDermott, Inc.*, 827 F.2d 1040, 1043 (5th Cir. 1987)). After conducting a *de novo* review, the Court affirms the Bankruptcy Court's denial of the Motion for Relief for the reasons stated herein and for the reasons stated in the Lift Stay Reconsideration Order.

Under Rule 60(b)(6), "the court may relieve a party . . . from a final judgment, order, or proceeding . . . [for] any other reason that justifies relief." FED. R. Civ. P. 60(b) & 60(b)(6). Rule 60(b)(6) is a "catch-all provision, meant to encompass circumstances not covered by Rule 60(6)'s other enumerated provisions" and "will be granted only if extraordinary circumstances are present." *Hess v. Cockrell*, 281 F.3d 212, 215-16 (5th Cir. 2002) (citations omitted). The Court finds that the Bankruptcy Court did not abuse its discretion in denying VSP relief under Rule 60(b)(6) for the reasons stated herein and in the Lift Stay Reconsideration Order. To the extent VSP contests the Bankruptcy Court's legal conclusions that underlie its decision to deny VSP relief under Rule 60(b)(6), the Court has conducted a *de novo* review of the relevant conclusions and affirms the Bankruptcy Court's legal conclusions for the reasons stated in the record in this case.

V. CONCLUSION

For the foregoing reasons, the Court fords the Bankruptcy Court committed no clear error with respect to its factual findings. Moreover, after a de novo review, the Court agrees with the Bankruptcy's Court's legal conclusions. Therefore, the Court AFFIRMS the (1) Order Granting in Part Emergency Motion of Hillair Capital Investments LP and Hillair Capital Management LLC for Order (I) Enforcing, and in Aid of, this Court's Prior Orders and (II) Granting Related Relief; (2) Order Denying Motion for Reconsideration of the Enforcement Order; (3) Order Granting in Part Emergency Motion of Hillair Capital Investments LP and Hillair Capital Management LLC for Order (I) Enforcing this Court's May 2, 2019 Order, (II) Sanctioning VSP Labs, Inc. for Willfully Ignoring and Violating the Same and (III) Granting Related

Relief; (4) Order Denying VSP Labs, Inc.'s Motion for Relief from Automatic Stay Order Dated September 7, 2017; and (5) Order Awarding Fees Pursuant to Sanctions Order.

SO ORDERED.

SIGNED August 21, 2020.

/s/ Karen Gren Scholer
KAREN GREN SCHOLER
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES BANKRUPTCY COURT
[SEAL]

The following constitutes the ruling of the court and has the force and effect therein described.

Signed May 2, 2019 /s/ Harlin DeWayne Hale
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Chapter 7
Case No. 17-30355-HDH-7
(Jointly Administered)

In re: PFO GLOBAL INC., *et al.*,

Debtors.[1]

ORDER GRANTING IN PART EMERGENCY MOTION OF HILLAIR CAPITAL INVESTMENTS LP AND HILLAIR CAPITAL MANAGEMENT LLC FOR ORDER (I) ENFORCING, AND IN AID OF, THIS COURT'S PRIOR ORDERS AND (II) GRANTING RELATED RELIEF

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[1] The Debtors are PFO Global, Inc.; Pro Fit Optix Holding Company, LLC; Pro Fit Optix, Inc.; PFO Technologies, LLC; PFO Optima, LLC; and PFO MCO, LLC.

Upon the Emergency Motion (the "Motion")[2] of Hillair Capital Investments LP and Hillair Capital Management LLC (together, "Hillair"), seeking entry of an Order (i) Enforcing, and in Aid of this Court's Prior Orders and (ii) Granting Related Relief; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and 1 consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (D), (M), (N) and (0); and venue being proper pursuant to 28 U.S.C. §§ 1408 and 1409; and there being due and sufficient notice of the Motion; and upon the arguments and representations of counsel at the hearing on the Motion conducted on May l, 2019 (the "Hearing"); and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:[3]

1. The Motion is granted, in part, as set forth herein.

2. As stated on the record at the Hearing, the Court's *Order Granting VSP Labs, Inc.'s Motion for Relief from Automatic Stay* [Docket No. 273] (the "Stay Order"), entered with the consent of the parties, prohibits the assertion of the claims proposed in the VSP Second Amended Complaint against Hillair. The language of the Stay Order covers claims that have been or could have been asserted in the California Litigation, and VSP is thus prohibited from pursuing the same against Hillair.

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[2] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

[3] Capitalized terms used but not defined herein have the meanings ascribed to such terms in the Motion.

3. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

4. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

END OF ORDER # #

Submitted by:

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APPENDIX D

UNITED STATES BANKRUPTCY COURT
[SEAL]

The following constitutes the ruling of the court and has the force and effect therein described.

Signed June 20, 2019 /s/ Harlin DeWayne Hale
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

———

Chapter 7
Case No. 17-30355-HDH-7
(Jointly Administered)

———

In re: PFO GLOBAL INC., *et al.*,
Debtors.[1]

———

ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER GRANTING EMERGENCY MOTION OF HILLAIR CAPITAL INVESTMENTS LP AND HILLAIR CAPITAL MANAGEMENT LLC FOR ORDER (I) ENFORCING AND IN AID OF, THIS COURT'S PRIOR ORDERS AND (II) GRANTING RELATED RELIEF

———

[1] The Debtors are PFO Global, Inc.; Pro Fit Optix Holding Company, LLC; Pro Fit Optix, Inc.; PFO Technologies, LLC; PFO Optima, LLC; and PFO MCO, LLC.

Upon the Motion for Reconsideration of Order Granting Emergency Motion of Hillair Capial Investments LP and Hillair Capial Management LLC for Order (i) Enforcing and in Aid of, this Court's Prior Orders and (ii) Granting Related Relief, filed by [Docket No. 440] (the "Motion for Reconsideration") filed by VSP Labs, Inc. ("VSP"), the objection thereto filed by Hillair Capital Investments LP and Hillair Capital Management LLC [Docket No. 448], and the reply thereon filed by VSP [Docket No. 450]; and the Court having jurisdiction to consider the Reconsideration Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Reconsideration Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and venue being proper pursuant to 28 U.S.C. §§ 1408 and 1409; and there being due and sufficient notice of the Reconsideration Motion; and after due deliberation and sufficient cause appearing therefor, it is hereby

ORDERED that the Reconsideration Motion is denied for the reasons set forth in the Court's oral ruling on the record in open court on June 7, 2019.

END OF ORDER # #

Submitted by:

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APPENDIX E

UNITED STATES BANKRUPTCY COURT
[SEAL]

The following constitutes the ruling of the court and has the force and effect therein described.

Signed June 20, 2019 /s/ Harlin DeWayne Hale
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Chapter 7
Case No. 17-30355-HDH-7
(Jointly Administered)

In re: PFO GLOBAL INC., *et al.*,
Debtors.[1]

ORDER GRANTING IN PART EMERGENCY MOTION OF HILLAIR CAPITAL INVESTMENTS LP AND HILLAIR CAPITAL MANAGEMENT LLC FOR ORDER (I) ENFORCING THIS COURT'S MAY 2, 2019 ORDER, (II) SANCTIONING VSP LABS, INC. FOR WILLFULLY IGNORING AND VIOLATING THE SAME AND (III) GRANTING RELATED RELIEF

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[1] The Debtors are PFO Global, Inc.; Pro Fit Optix Holding Company, LLC; Pro Fit Optix, Inc.; PFO Technologies, LLC; PFO Optima, LLC; and PFO MCO, LLC.

Upon the Emergency Motion (the "Motion")[2] of Hillair Capital Investments LP and Hillair Capital Management LLC (together, "Hillair"), seeking entry of an Order(i) Enforcing this Court's May 2, 2019 Order, (ii) Sanctioning VSP Labs, Inc. ("VSP") for Willfully Ignoring and Violating the Same and (iii) Granting Related Relief [Docket No. 4421, the response in opposition thereto filed by VSP [Docket No. 449], and the reply thereon filed by Hillair [Docket No. 451]; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (D), (M), (N) and (0); and venue being proper pursuant to 28 U.S.C. §§ 1408 and 1409; and there being due and sufficient notice of the Motion; and upon the arguments and representations of counsel at the hearing on the Motion conducted on June 11, 2019 (the "Hearing"); and after due deliberation and sufficient cause appearing therefor, the Court finds as follows:

A. VSP's Supplemental Brief was a violation of the Court's *Order Granting VSP Labs, Inc. 's Motion for Relief from Automatic Stay* [Docket No. 273] (the "Stay Order").

B. VSP's Supplemental Brief was a violation of the Court's Order Granting In Part Emergency Motion of Hillair Capital Investments LP and Hillair Capital Management LLC for Order (i) Enforcing, and in Aid of this Court's Prior Orders and (ii) Granting Related Relief [Docket No. 438] (the "Enforcement Order").

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[2] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

C. Any subsequent actions by VSP to bring claims against Hillair in the case styled *VSP Labs, Inc. v. Pro Fit Optix, Inc., et al.,* Case No. 34-2013-00153788, pending in the Superior Court of the State of California, County of Sacramento, as described in the Stay Order, would be a violation of the Stay Order and the Enforcement Order.

Based on these findings, it is HEREBY ORDERED THAT:

1. The Motion is granted in part as set forth herein.

2. The request for sanctions was withdrawn by Hillair at the Hearing and is, therefore, moot.

3. VSP shall pay Hillair's reasonable attorneys' fees incurred in connection with the Motion from May 9, 2019 through June 11, 2019.

4. Hillair shall submit sworn declarations attaching its billing records for fees sought in accordance with this Order within seven (7) days from the date of this Order.

5. VSP shall have fourteen (14) days to object to Hillair's billing records from the date they are submitted.

6. The Court may set a hearing if an objection is filed with respect to Hillair's fees but reserves the right to rule on Hillair's fee submission and any objection thereto without further hearing.

7. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

8. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

END OF ORDER # #

Submitted by:

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APPENDIX F

UNITED STATES BANKRUPTCY COURT
[SEAL]

The following constitutes the ruling of the court and has the force and effect therein described.

Signed October 3, 2019 /s/ Harlin DeWayne Hale
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Case No. 17-30355-HDH
Chapter 7

In re: PFO GLOBAL INC., *et al.*,

Debtors.

ORDER DENYING VSP LABS, INC.'S MOTION FOR RELIEF FROM AUTOMATIC STAY ORDER DATED SEPTEMBER 7, 2017

Before the Court is a motion (the "Motion for Relief")[1] filed by VSP Labs, Inc. ("VSP") asking this Court to vacate or modify a prior order of this Court

[1] *Motion for Relief from September 7, 2017, Order Granting VSP Labs, Inc.'s Motion for Relief from Automatic Stay, as Interpreted by the Court's May 2, 2019, and June 24, 2019, Orders, Pursuant to Federal Rules of Civil Procedure, Rule 60(b)* [Docket No. 499].

(the "Stay Relief Order").[2] The Stay Relief Order granted VSP relief from the automatic stay so that it could proceed with a pending lawsuit in state court against one of the debtors in the above-captioned bankruptcy cases, but the Stay Relief Order also incorporated some related agreements between VSP and Hillair Capital Investments, LP (together with its related entities, "Hillair"). Hillair has a few different roles in these bankruptcy cases, but Hillair was involved in VSP's efforts to lift the automatic stay because (l) Hillair had previously provided the debtor with funding for the litigation with VSP and (2) Hillair had recently purchased an interest in the debtor's counterclaims against VSP in the litigation.

The current dispute arose when VSP recently attempted to assert claims against Hillair in the state court litigation and this Court interpreted the language of the Stay Relief Order to prohibit VSP from asserting those claims against Hillair. VSP argues that the Stay Relief Order could not have prohibited the assertion of the state-law claims of a non-debtor against another non-debtor, but the Court stands by its interpretation. Given the Court's interpretation, VSP filed the Motion for Relief seeking relief under Federal Rules of Civil Procedure 60(b)(4) and 60(b)(6) on the grounds that this Court lacked subject matter jurisdiction to enter the Stay Relief Order.

The Court is somewhat surprised that its jurisdiction to enter the Stay Relief Order is being challenged two years after the Stay Relief Order was entered, particularly since the party that is challenging the order is the party that negotiated the language at

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[2] *Order Granting VSP Labs, Inc.'s Motion for Relief from Automatic Stay* [Docket No. 273].

issue and submitted it to the Court. This case is different from most that address when a bankruptcy court has subject matter jurisdiction to order the release of certain causes of action because most cases address (i) contested motions to approve a settlement between parties that also wish to obtain a non-consensual release from a third party or (ii) non-debtors receiving non-consensual releases from non-debtors in the context of plan confirmation. This matter arose in the context of a motion for relief from the automatic stay, over which this Court clearly had core jurisdiction pursuant to 28 U.S.C. § 157(b)(2)(G). In negotiating a resolution of VSP's motion for relief from the automatic stay, VSP and Hillair agreed to request that the Court include certain language in an order granting VSP's motion—language that would prohibit VSP from asserting certain claims against Hillair.

Nevertheless, after due consideration, the Court believes the causes of action that VSP is now prohibited from asserting against Hillair are sufficiently related to the bankruptcy cases to give this Court subject matter jurisdiction to address them in the Stay Relief Order.

Background

In late 2013, VSP filed a lawsuit (the "State Court Action") against Pro Fit Optix, Inc. (the "Debtor") in the Superior Court of California, Sacramento County. The Debtor subsequently filed claims against VSP in the State Court Action (the "Counterclaims"). As the Court understands it, VSP currently has claims pending against the Debtor for breach of contract and for certain declaratory relief. The Debtor's Counterclaims included claims for fraud in the inducement, breach of contract, aiding and abetting breach of fiduciary duty, and unfair business practices.

In January of 2017, the Debtor, along with several related entities, filed for bankruptcy in the Northern District of Texas. Early in the bankruptcy cases, the Debtors filed a motion for approval to sell substantially all of their assets, including their causes of action,[3] to Hillair. During the sale process, it was disclosed to the Court that in March of 2016, the Debtor entered into a Claim Investment Agreement with Hillair pursuant to which the Debtor would submit requests to Hillair to pay its legal fees and expenses in the State Court Action. In return, the Debtor agreed that if a final disposition or settlement of the State Court Action resulted in a recovery to the Debtor, the Debtor would pay Hillair (a) 100% of any recovery until Hillair recovered an amount equal to the legal expenses it funded and (b) 50% of any recovery in excess of the investment amount. Pursuant to the sale of the Debtors' assets that the Court approved on May 5, 2017,[4] the Debtor was allowed to retain a participation interest in the Counterclaims, as more fully described in a settlement

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[3] *Debtor's Motion for Order Pursuant to Sections 105, 363 and 365 of the Bankruptcy Code: (A) Approving Asset Purchase Agreement; (B) Authorizing Sale of Substantially All Assets of the Debtor Free and Clear of All Liens, Claims, Encumbrances and Other Interests; (C) Authorizing the Assumption and Assignment of Certain Executory Contracts and Leases (D) Authorizing Debtor to Consummate All Related Transactions* [Docket No. 34].

[4] *See Order (A) Approving Asset Purchase Agreement; (B) Authorizing Sale of Certain Assets of the Debtors Free and Clear of All Liens, Claims and Encumbrances; (C) Authorizing the Assumption and Assignment of Certain Licenses and Executory Contracts and Rejection of Certain Executory Contracts; and (D) Authorizing Debtors to Consummate All Related Transactions* [Docket No. 188].

agreement[5] entered into by the Debtors, Hillair, the Official Committee of Unsecured Creditors, and several unsecured creditors.

Following the sale, Hillair filed a motion to sever in the State Court Action in an attempt to go forward on the Counterclaims against VSP without going forward on VSP's claims against the Debtor. That effort ultimately failed because it would have created an asymmetric action, which could have deprived VSP of defenses it may have to the Counterclaims.

On July 27, 2017, VSP filed a motion (the "Lift Stay Motion")[6] asking this Court to lift the automatic stay so that VSP could continue with the State Court Action against the Debtor. In the Lift Stay Motion, VSP expressed concerns about Hillair's purchase of the Debtor's interest in the Counterclaims and asked that the stay be lifted so that VSP could defend against the offensive litigation to be pursued by Hillair. Specifically, VSP stated its intention to "further preserve, perfect, and pursue its rights to setoff and recoupment in the State Court Action by litigating those rights against PFO (subject to the ability to enforce any judgment or collect recovery against PFO being limited to these bankruptcy proceedings)." Lift Stay Motion at 2. VSP also pointed out that in its answer to the Counterclaims, it pled the affirmative defenses of setoff and recoupment based on damages VSP alleges it suffered from the Debtor's breach of contract.

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[5] The Settlement Agreement, as approved by this Court, is attached as Exhibit A to the *Motion to Approve Settlement Agreement Pursuant to Bankruptcy Rule 9019* [Docket No. 167].

[6] *VSP Labs, Inc.'s Motion for Relief from Automatic Stay* [Docket No. 243].

Hillair filed a limited objection to the Lift Stay Motion[7] asking that any order granting the Lift Stay Motion clarify that the purpose of pursuing setoff and recoupment would be to prove VSP's claim against the Debtor and not to seek recoveries from Hillair. The Chapter 11 Trustee also filed an objection to the Lift Stay Motion.[8]

The Court held a hearing on the Lift Stay Motion on August 23, 2017. At the hearing, counsel for VSP announced that the parties all agreed that the State Court Action could proceed but that if VSP recovered a net amount in the State Court Action, VSP would not seek to recover that amount from the Hillair entities.[9] VSP would only seek to collect any net amount owing by the Debtor by filing a proof of claim in the Debtor's bankruptcy case. Counsel for VSP also announced that VSP and Hillair had agreed to the terms of a proposed order and that VSP would not be seeking a recovery from Hillair.[10] With that agreement, the Court granted the Lift Stay Motion and asked VSP to submit a written order for the Court to sign.

Following the hearing, VSP and the Chapter 11 Trustee were not able to agree on the language of the order, so both VSP and the Chapter 11 Trustee submitted their own versions of the order granting the

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[7] *Limited Objection of Hillair Capital Investments LP and Hillair Capital Management LLC to VSP Labs, Inc.'s Motion for Relief from Automatic Stay* [Docket No. 252].

[8] *Trustee's Response to VSP Labs, Inc.'s Motion for Relief from Stay* [Docket No. 253].

[9] Transcript of August 23, 2017 Hearing at 5:3-14 [Docket No. 286].

[10] Transcript of August 23, 2017 Hearing at 5:20-6:16 [Docket No. 286].

Lift Stay Motion. Relevant to the matter currently before the Court, both VSP and the Chapter 11 Trustee submitted proposed orders that included a provision stating that "without affecting VSP's rights of setoff or recoupment in defense of claims in the California Action, no money damages or other amounts of any kind may be recovered from Hillair under any circumstance on account of any claims that have been or could have been asserted in the California Action." Thus, it is unsurprising that when the Court entered the Stay Relief Order on September 7, 2017, it included that same language that VSP proposed stating that "no money damages or other amounts of any kind may be recovered from Hillair under any circumstance on account of any claims that have been or could have been asserted in the California Action."

On April 8, 2019, nearly two years later, VSP filed a motion in the State Court Action seeking leave to file an amended complaint (the "Second Amended Complaint") that would assert causes of action against Hillair for intentional interference with contractual relations, aiding and abetting fraudulent transfer, and unfair business practices. Two of the causes of action were asserted solely against Hillair, and one cause of action was asserted against both Hillair and the Debtor.

On April 24, 2019, Hillair filed a motion to enforce several orders issued during the course of these bankruptcy cases, including the Stay Relief Order,[11] and asked this Court to prohibit VSP from pursuing its

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[11] *Emergency Motion of Hillair Capital Investments LP and Hillair Capital Management LLC for Order (I) Enforcing, and in Aid of this Court's Prior Orders and (II) Granting Related Relief* [Docket No. 427] (the "Motion to Enforce").

claims against Hillair in the State Court Action. Because a hearing on VSP's motion for leave to file the Second Amended Complaint was set for May 2, 2019, this Court set a hearing on Hillair's Motion to Enforce for May 1, 2019. Despite having roughly a week to file a response to the Motion to Enforce, VSP chose not to do so. Instead, VSP appeared at the hearing on the Motion to Enforce and offered its arguments in opposition to the Motion to Enforce at that time. VSP made several arguments at the hearing on the Motion to Enforce, including that the conduct at issue in the Second Amended Complaint was not the same conduct for which Hillair had received releases in prior orders issued by this Court.[12] The Court, however, did not rule on the effect of all of the orders discussed by Hillair in its Motion to Enforce and instead focused on the language of the Stay Relief Order, which the Court found to be pretty clear. The Court granted the Motion to Enforce and interpreted the language of the Stay Relief Order to prohibit the assertion of the claims proposed in the Second Amended Complaint against Hillair.[13]

On May 8, 2019, VSP filed a motion to reconsider the Enforcement Order.[14] Hillair objected to the

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[12] *See* Transcript of May 1, 2019 Hearing at 16:4-6 [Docket No. 495].

[13] *Order Granting in Part Emergency Motion of Hillair Capital Investments LP and Hillair Capital Management LLC for Order (I) Enforcing, and in Aid of this Court's Prior Orders and (II) Granting Related Relief* [Docket No. 438] (the "*Enforcement Order*").

[14] *Motion for Reconsideration of Order Granting Emergency Motion of Hillair Capital Investments LP and Hillair Capital Management LLC for Order (I) Enforcing, and in Aid of this*

Motion to Reconsider,[15] and VSP filed a reply in support of the Motion to Reconsider.[16] In its briefing, VSP made several arguments for why the Enforcement Order should not, or could not, have been entered. Most significantly to the issues presently before the Court, VSP argued that the Court lacks subject matter jurisdiction to adjudicate VSP's state law claims against Hillair. On June 7, 2019, this Court issued an oral ruling denying the Motion to Reconsider.[17] In response to VSP's subject matter jurisdiction argument, the Court noted that the Enforcement Order did not adjudicate any claims between the parties. The Enforcement Order merely interpreted this Court's prior order, which federal courts have jurisdiction to do. *See In re Christ Hosp.,* 502 B.R. 158, 182 (Banks. D.N.J. 2013). The language of the original Stay Relief Order, which VSP drafted, had the effect of prohibiting VSP from asserting

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Court's Prior Orders and (II) Granting Related Relief [Docket No. 438] [Docket No. 440] (the "Motion to Reconsider").

[15] *Objection to Motion for Reconsideration of Order Granting Emergency Motion of Hillair Capital Investments LP and Hillair Capital Management LLC for Order (I) Enforcing, and in Aid of this Court's Prior Orders and (II) Granting Related Relief* [Docket No. 448].

[16] *Reply in Support of Motion for Reconsideration of Order Granting Emergency Motion of Hillair Capital Investments LP and Hillair Capital Management LLC for Order (I) Enforcing, and in Aid of this Court's Prior Orders and (II) Granting Related Relief [Docket No. 438]* [Docket No. 450].

[17] A written order memorializing this ruling was entered on June 24, 2019. *See Order Denying Motion for Reconsideration of Order Granting Emergency Motion of Hillair Capital Investments LP and Hillair Capital Management LLC for Order (I) Enforcing, and in Aid of this Court's Prior Orders and (II) Granting Related Relief* [Docket No. 463].

certain claims against Hillair, but all the Enforcement Order did was review the Stay Relief Order and tell the parties what it meant.

On June 26, 2019, VSP filed notices of appeal[18] for the Enforcement Order, the order denying the Motion to Reconsider, and an order entered on June 24, 2019 sanctioning VSP for willfully violating this Court's orders (the "Sanction Order").[19]

On July 26, 2019, VSP filed the Motion for Relief that is currently before the Court. The Motion for Relief asks the Court to invoke Federal Rules of Civil Procedure 60(b)(4) or 60(b)(6)[20] to modify the language in the Stay Relief Order providing that ". . . no money damages or other amounts of any kind may [be] recovered from Hillair under any circumstances on account of any claims that have been or could have been asserted in the California Action" to "comport with the Court's subject matter jurisdiction" or, alternatively, to vacate the Stay Relief Order as void. Motion for Relief at ¶ l. The basic argument in the Motion for Relief is that the language at issue, as interpreted by this Court in the Enforcement Order, bars or adjudicates the direct state-law claims of VSP (a non-debtor) against Hillair (another non-debtor) in a manner that exceeds this Court's subject matter jurisdiction. VSP also continues to argue that the

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[18] *Notice of Appeal* [Docket Nos. 467 and 468].

[19] *Order Granting in Part Emergency Motion of Hillair Capital Investments LP and Hillair Capital Management LLC for Order (I) Enforcing This Court's May 2, 2019 Order, (II) Sanctioning VSP Labs, Inc. for Willfully Ignoring and Violating the Same and (III) Granting Related Relief* [Docket No. 464].

[20] Federal Rule of Civil Procedure 60 is applicable to cases under the Bankruptcy Code pursuant to Federal Rule of Bankruptcy Procedure 9024.

Court misinterpreted the Stay Relief Order, but the Court has now squarely ruled against that argument several times and will not address it again.

Jurisdiction to Consider the Motion for Relief

As an initial matter, the Court must determine whether it has jurisdiction to consider the Motion for Relief in light of VSP's appeals of the Enforcement Order, the Sanction Order, and the order denying the Motion to Reconsider. "It is a fundamental tenet of federal civil procedure that—subject to certain, defined exceptions—the filing of a notice of appeal from the final judgment of a trial court divests the trial court of jurisdiction and confers jurisdiction upon the appellate court." *In re TransTexas Gas Corp*., 303 F.3d 571, 578-79 (5th Cir. 2002). But "the bankruptcy court retains jurisdiction to address elements of the bankruptcy proceeding that are not the subject of that appeal." *Id.* at 580 n.2. The Fifth Circuit "has specifically rejected 'the broad rule that a bankruptcy court may not consider any request which either directly or indirectly touches upon the issues involved in a pending appeal and may not do anything which has any impact on the order on appeal.'" *In re Scopac*, 624 F.3d 274, 280 (5th Cir. 2010) (quoting *In re Sullivan Cent. Plaza I, Ltd*., 935 F.2d 723, 727 (5th Cir. 1991)). Instead, the Fifth Circuit has adopted a "functional test: `once an appeal is pending, it is imperative that a lower court not exercise jurisdiction over those issues which, although not themselves expressly on appeal, nevertheless so impact the appeal so as to interfere with or effectively circumvent the appeal process.'" *Id.* (quoting *In re Whispering Pines Estates, Inc*., 369 B.R. 752, 759 (B.A.P. lst Cir. 2007)). The Fifth Circuit has also drawn a distinction between the jurisdiction of a lower court to grant a Rule 60(b) motion as opposed to

denying one. *See Travelers Ins. Co. v. Liljeberg Enters*., 38 F.3d 1404, 1407 n.3 (5th Cir. 1994). Where courts have held that a bankruptcy court was divested of jurisdiction to enter a subsequent order, it is usually because the subsequent order would have modified, or would have been inconsistent with, an order pending on appeal. *Neutra, Ltd. v. Terry (In re Acis Capital Mgmt., L.P.),* 2019 U.S. Dist. LEXIS 119361 at *59-61 (N.D. Tex. July 18, 2019).

The Court believes that it is appropriate to enter this order because while the subject matter of the Motion for Relief certainly touches on matters that are currently on appeal, an order denying the Motion for Relief will not modify or be inconsistent with the Enforcement Order or the order denying the Motion to Reconsider and will not interfere with the pending appeals.

Relief Under Rule 60(b)(4)

Federal Rule of Civil Procedure 60(b)(4) provides that the court may relieve a party from a final judgment, order, or proceeding if the judgment is void. A judgment is void if the court lacked jurisdiction over the subject matter or the parties. *Hill v. McDermott, Inc.,* 827 F.2d 1040, 1043 (5th Cir. 1987). Federal courts considering Rule 60(b)(4) motions that assert a judgment is void because of a jurisdictional defect generally have reserved relief only for the exceptional case in which the court that rendered judgment lacked even an "arguable basis" for jurisdiction. *See United Student Aid Funds, Inc. v. Espinosa,* 559 U.S. 260, 271 (2010). In vacating judgments, courts generally look for a "clear usurpation of power" or "total want of jurisdiction." *See Ferret v. Handshoe,* 708 F. App'x 187, 188 (5th Cir. 2018).

The jurisdiction exercised by bankruptcy courts comes from 28 U.S.C. § 1334. Under section 1334(a), district courts have original and exclusive jurisdiction of all cases under title 11, and under section 1334(b), district courts have original, but not exclusive, jurisdiction of all civil proceedings "arising under" title 11 or "arising in" or "related to" cases under title 11. 28 U.S.C. § 157(a), in turn, permits district courts to provide that "any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." The District Court for the Northern District of Texas has entered a standing order referring all such matters to the bankruptcy courts in this District.

In order to determine whether a matter falls within bankruptcy jurisdiction, the Court need not distinguish between proceedings "arising under" title 11 or "arising in" or "related to" cases under title 11 because the provisions operate in conjunction. *Feld v. Zale Corp.* (*In re Zale Corp.*), 62 F.3d 746, 751-52 (5th Cir. 1995). To ascertain whether jurisdiction exists, it is only necessary to determine whether a matter is at least "related to" the bankruptcy because that is the broadest grant of jurisdiction. *Id.*

A matter is "related to" the bankruptcy case for jurisdictional purposes if "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Wood v. Wood* (*In re Wood*), 825 F.2d 90, 93 (5th Cir. 1987). That is, an action is related to bankruptcy "if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate."

In re Majestic Energy Corp., 835 F.2d 87, 90 (5th Cir. 1988).

In this case, the Court finds that the outcome of VSP's causes of action against Hillair in the Second Amended Complaint could conceivably have an effect on the Debtor's estate being administered in bankruptcy. The State Court Action presents an interconnected web of interests, and it appears that the outcome of VSP's claims against Hillair could alter the Debtor's rights or liabilities. At present, the claims in the State Court Action are only asserted against the Debtor. In the Second Amended Complaint, some causes of action are asserted only against the Debtor, some causes of action are asserted only against Hillair, and one cause of action is asserted against both the Debtor and Hillair. While the theories of liability and the targets of liability are new, the damages suffered by VSP appear to be the same. That is, VSP appears to now be seeking the same damages from the Debtor, Hillair, or both. As a result, if Hillair is found liable to VSP, it could affect the Debtor's estate in a few ways.

If Hillair is found to be independently liable for some portion of the damages that are the subject of the Second Amended Complaint, it could reduce the amount of damages that the Debtor could be found liable for. Courts have found that "related to" jurisdiction exists in similar circumstances. *See Randall & Blake, Inc. v. Evans* (*In re Canion*), 196 F.3d 579 (5th Cir. 1999) (holding that the bankruptcy court had "related to" jurisdiction over a judgment creditor's claims against third-party defendants because any amount collected by the judgment creditor from the third-party defendants would decrease the total amount claimed against the estate); *Nuveen Municipal Tr. v. WithumSmith Brown, P.C.*, 692 F.3d 283 (3d

Cir. 2012) (holding that the bankruptcy court had "related to" jurisdiction over a lender's claims for fraud and negligent misrepresentation against the debtor's accounting firm because if the lender's claims against the accounting firm were successful, its claim against the debtor's estate would have to be adjusted to prevent double recovery); *Lone Star Bank v. Waggoner* (*In re Waggoner Cattle, LLC*), 2018 Bankr. LEXIS 3632 (Bankr. N.D. Tex. Nov. 19, 2018).

In addition, if Hillair is somehow found jointly liable for damages to VSP, it could result in a contribution claim between Hillair and the Debtor, which could be complicated by VSP's intention to assert rights to setoff and recoupment against the Debtor's Counterclaims that have been sold to Hillair but in which the Debtor still maintains a small interest.

For these reasons, the Court finds that it had subject matter jurisdiction to enter the Stay Relief Order as it has been interpreted, and relief under Rule 60(b)(4) should be denied.

Relief Under Rule 60(b)(6)

Federal Rule of Civil Procedure 60(b)(6) provides that the court may relieve a party from a final judgment, order, or proceeding if any other reason justifies relief. Rule 60(b)(6) is a "catchall provision, meant to encompass circumstances not covered by Rule 60(b)'s other enumerated provisions." *Hess v. Cockrell*, 281 F.3d 212, 216 (5th Cir. 2002). Courts should only grant Rule 60(b)(6) motions if extraordinary circumstances are present. *Id.*

The Court does not believe this case presents the kind of extraordinary circumstances that would justify relief under Rule 60(b)(6). The language at issue in the Stay Relief Order was negotiated by the parties and

submitted to the Court by VSP. It was part of a carefully structured arrangement designed to allow the State Court Action to go forward in a way that would afford the Debtor adequate representation and allow VSP to assert all of its claims and defenses. VSP has enjoyed the benefits of having relief from the automatic stay for two years now, and the Court sees no reason to disrupt the deal that was struck between VSP and Hillair simply because VSP now believes the deal was ill-advised.

IT IS THEREFORE ORDERED that the Motion for Relief is DENIED.

###End of Order###

APPENDIX G

UNITED STATES BANKRUPTCY COURT
[SEAL]

The following constitutes the ruling of the court and has the force and effect therein described.

Signed December 10, 2019 /s/ Stacey G. C. Jernigan
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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Chapter 7
Case No. 17-30355-HDH-7
(Jointly Administered)

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In re: PFO GLOBAL INC., *et al.,*

Debtors.[1]

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ORDER AWARDING FEES PURSUANT TO SANCTIONS ORDER

The Court conducted a hearing on November 20, 2019 (the "Hearing") to determine the amount of attorney's fees to be awarded to Hillair Capital Investments LP and Hillair Capital Management LLC (together, "Hillair") pursuant to *(i) Emergency Motion*

[1] The Debtors are PFO Global, Inc.; Pro Fit Optix Holding Company, LLC; Pro Fit Optix, Inc.; PFO Technologies LLC; PFO Optima, LLC; and PFO MCO, LLC.

of Hillair Capital Investments LP and Hillair Capital Management LLC for Order (i) Enforcing this Court's May 2, 2019 Order, (ii) Sanctioning VSP Labs, Inc. for Willfully Ignoring and Violating the Same and (iii) Granting Related Relief [Docket No. 442] (the "Sanctions Motion") and (ii) the *Order Granting in Part Emergency Motion of Hillair Capital Investments LP and Hillair Capital Management LLC for Order (i) Enforcing this Court's May 2, 2019 Order, (ii) Sanctioning VSP Labs, Inc. for Willfully Ignoring and Violating the Same and (iii) Granting Related Relief* [Docket No. 464] (the "Sanctions Order"). Before the Court was (i) the *Declaration of Jason S. Brookner in Support of Fees Incurred by Gray Reed & McGraw LLP in Connection with Emergency Motion of Hillair Capital Investments LP and Hillair Capital Management LLC for Order (i) Enforcing this Court's May 2, 2019 Order, (ii) Sanctioning VSP Labs, Inc. for Willfully Ignoring and Violating the Same and (iii) Granting Related Relief* [Docket No. 470] (the "Brookner Declaration"); (ii) the *Declaration of Jonathan T. Koevary in Support of Fees Incurred by Olshan Frome Wolosky LLP in Connection with Emergency Motion of Hillair Capital Investments LP and Hillair Capital Management LLC for Order (i) Enforcing this Court's May 2, 2019 Order, (ii) Sanctioning VSP Labs, Inc. for Willfully Ignoring and Violating the Same and (iii) Granting Related Relief* [Docket No. 471] (the "Koevary Declaration" and together with the Brookner Declaration, the "Fee Declarations"); (iii) the objection to the Fee Declarations filed by VSP Labs, Inc. [Docket No. 489] (the "Objection"); and (iv) the reply thereon filed by Hillair [Docket No. 492].

The Court has jurisdiction over the Sanctions Motion and to award attorney's fees pursuant thereto pursuant to 28 U.S.C. §§ 157 and 1334. This is a core

proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (0). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

Based upon the arguments and representations of counsel at the Hearing, the evidence presented and testimony adduced thereat, and after due deliberation and sufficient cause appearing therefor, and for all of the reasons set forth on the record at the Hearing, which are hereby adopted and incorporated herein by reference, the Court finds as follows:

A. The rates charged by Gray Reed & McGraw LLP ("Gray Reed") and Olshan Frome Wolosky LLP ("Olshan") in connection with the Sanctions Motion and related proceedings were reasonable.

B. The hours expended by Gray Reed and Olshan in connection with the Sanctions Motion and related proceedings were reasonable.

C. The expenses incurred by Olshan in connection with traveling to and appearing at the Hearing were reasonable.

D. After consideration of the factors set forth in *Johnson v. Ga. Highway Express, Inc*., 488 F.2d 714 (5th Cir. 1974), the attorney's fees requested by Hillair are reasonable, necessary, and appropriate, and no adjustments are necessary. As a result, the Court will allow the attorney's fees and expenses as requested.

Based on these findings, it is HEREBY ORDERED THAT:

1. The Objection is overruled.

2. Pursuant to the Sanctions Motion and the Sanctions Order, Hillair is awarded $49,075.30 (the "Fee Award"), reflecting (i) $32,119.50 in attorney's fees incurred by Gray Reed prior to the Hearing, (i)

$2,392.50 in attorney's fees incurred by Gray Reed at the Hearing, (iii) $13,526.00 in attorney's fees incurred by Olshan, and (iv) $l,037.30 in expenses incurred by Olshan in connection with traveling to and appearing at the Hearing.

3. VSP shall pay the Fee Award within thirty (30) days of entry of this Order.

4. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

5. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order and the Sanctions Order.

END OF ORDER # #

Submitted by:

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APPENDIX H

UNITED STATES BANKRUPTCY COURT
[SEAL]

The following constitutes the ruling of the court and has the force and effect therein described.

Signed September 7, 2017 /s/ Harlin DeWayne Hale
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Chapter 11

Case No. 17-30355-HDH

(Jointly Administered)

In re: PFO GLOBAL, INC., *et al.,*

Debtors.

ORDER GRANTING VSP LABS, INC.'S MOTION FOR RELIEF FROM AUTOMATIC STAY

The Court, having considered the Motion for Relief From Automatic Stay filed by Party-in-interest, VSP Labs, Inc., and any objections thereto, finds that good cause exists to grant the relief requested in said Motion, now, therefore, it is hereby:

ORDERED, ADJUDGED, AND DECREED, that the Motion for Relief From Automatic Stay filed by VSP Labs, Inc., is GRANTED with conditions. The automatic stay is modified in the above-styled case so that VSP Labs, Inc. may liquidate the amount of its

affirmative claims against Pro Fit Optix, Inc. ("PFO") for the purpose of asserting its rights to setoff and recoupment in Case No. 34-2013-00153788, pending in the Superior Court of California, in and for the County of Sacramento, styled *VSP Labs, Inc. v. Pro Fit Optix, et al.* (the "California Action); provided, however, that to the extent monetary damages are awarded to VSP Labs, Inc. in excess of any monetary damages awarded to Hillair Capital Investments LP or Hillair Capital Management LLC ("Hillair"), or PFO in the California Action, the excess amount may only be enforced through a proof of claim filed in the above-styled and—numbered case, and, without affecting VSP's rights of setoff or recoupment in defense of claims in the California Action, no money damages or other amounts of any kind may be recovered from Hillair under any circumstance on account of any claims that have been or could have been asserted in the California Action;

IT IS FURTHER ORDERED, that notwithstanding the aforementioned modification to the automatic stay granted herein, should Hillair's default be entered in the California Action, such that Hillair is no longer participating in any part of the California Action and PFO is not represented in the California Action, or should Hillair settle claims with VSP, consent to judgment in favor of VSP, or dismiss the counterclaim against VSP, the automatic stay shall remain in full force and effect with respect to VSP's affirmative claims against PFO pending further order of this Court;

IT IS FURTHER ORDERED that nothing in this order allows for a default judgment to be sought against PFO on account of PFO not having counsel in the California Action.

*** END OF ORDER ***

APPENDIX I

* * *

Appellees

IN THE MATTER OF: PFO GLOBAL, INCORPORATED,

Debtor,

VSP LABS, INCORPORATED,

Appellant,

v.

HILLAIR CAPITAL INVESTMENTS L.P.;
HILLAIR CAPITAL MANAGEMENT, L.L.C.,

Appellees.

United States District Court for the Northern District of Texas; Civil Action Nos. 3:19-CV-01575-s, 3:19-cv-1576-s, 3:19-cv-1603-s, 3:20-47-s, 3:19-cv-2525-s, Honorable Karen Gren Scholer, District Judge, presiding

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* * *

2019 bankruptcy orders was undisputedly timely. Res judicata therefore does not apply.

Indeed, it is "well settled" that "the subject matter jurisdiction of a federal court can be challenged at any stage of the litigation (including for the first time on appeal), even by the party who first invoked it." *In re Canion*, 196 F.3d 579, 585 (5th Cir. 1999). VSP's timely appeal challenging the bankruptcy court's jurisdiction must be adjudicated on the merits.

B. The Bankruptcy Court Lacked Jurisdiction Over VSP's Claims.

1. Hillair's Jurisdictional Arguments Misconstrue VSP's Position and This Court's Precedent.

Hillair cherry-picks language from VSP's brief, and contends VSP has "fabricated" an incomplete rule regarding "related to" jurisdiction. AB p. 23. Hillair is wrong. Based on this Court's well-established precedent, VSP has argued the bankruptcy court lacked jurisdiction over its claims against Hillair because "they have no conceivable effect on debtor PFO" or its "rights, liabilities, options, or freedom of action." AOB pp. 34-37, *citing In re TMT Procurement Corp*., 764 F.3d 512, 526 (5th Cir. 2014). Nor will these claims

"influence the administration of the bankruptcy estate." *Id.* And, without any of these anticipated effects, there is no "related to" jurisdiction over these claims, as "related to" jurisdiction is not "limitless." *Id.*

Contrary to Hillair's suggestion, "related to" jurisdiction is not as expansive as its title indicates. "'Related to' is a term of art in bankruptcy jurisdiction, where its meaning is *not* as broad as it is in ordinary parlance where it means 'having some connection with.' The distinction is that, for purposes of bankruptcy jurisdiction, there is a *cause* component in 'related to.'" *In re Bass*, 171 F.3d 1016, 1022-23 (5th Cir. 1999) (emphasis in original). "The proceeding must be capable of affecting the bankruptcy estate for it to be 'related to' the bankruptcy." *Id.* Here, that causal link is missing.

2. Hillair Admits It Is "Improbable" VSP's Claims Will Affect PFO's Estate, Thereby Conceding the Bankruptcy Court Lacked Jurisdiction.

Hillair argues it is not "impossible" for VSP's claims to affect PFO. AB p. 31. But "impossibility" is not the test. "For jurisdiction to attach, the *anticipated outcome* of the action must both (1) alter the rights, obligations, and choices of action of the debtor, and (2) have an effect on the administration of the estate." *In re Bass*, 171 F.3d at 1022. Here, VSP's claims against Hillair are *not anticipated* to alter PFO's rights, obligations, choices, or estate. Hillair even admits such outcome is "improbable." AB p. 31. "Related to" jurisdiction therefore does not attach to these claims.

This result is unsurprising. The "vast majority of cases" hold bankruptcy courts lack jurisdiction over

third-party complaints. *In re Walker*, 51 F.3d 562, 569 (5th Cir. 1995). As such, this Court has precluded bankruptcy court intervention in a wide variety of third-party disputes. *Id.*; *In re Zale Corp.*, 62 F.3d 746 (5th Cir. 1995) (reversing settlement that would have enjoined third-party tort and contract actions).

Otherwise, bankruptcy jurisdiction would in fact be "limitless." *In re TMT*, 764 F.3d at 52. "For example, the bankruptcy court would have jurisdiction over *any* action (however personal) against key corporate employees [of debtor], if they were willing to state that their morale, concentration, or personal credit would be adversely affected by that action." *In re Prescription Home Health Care, Inc*., 316 F.3d 542, 548 (5th Cir. 2002). Such hypothetical, tenuous, and unrealistic connections do not establish jurisdiction. *Id*; *In re Lemco Gypsum, Inc*., 910 F.2d 784, 787-88 (11th Cir. 1990) ("an overbroad construction of § 1334(b) may bring into federal court matters that should be left for state courts to decide"). Here, however, that is all Hillair offers.

3. Hillair's Purported Bases for "Related to" Jurisdiction Are Legally and Factually Flawed.

Hillair argues the bankruptcy court had jurisdiction over VSP's claims for three reasons: (1) Hillair and PFO engaged in "joint" misconduct, (2) prevailing on claims against Hillair could reduce what VSP recovers from PFO, and (3) VSP's claims against Hillair "could result in contribution claims against PFO." AB pp. 24-31. Each argument lacks merit.

First, the fact that VSP alleges wrongdoing by PFO and Hillair is irrelevant. A bankruptcy court cannot bar a state action simply because the debtor engaged

in wrongdoing and is a party to that action. *See Coleman v. Williams*, 538 F. App'x 513, 515 (5th Cir. 2013). "[B]ankruptcy court jurisdiction covers only property in which the debtor has an interest." *Id.* (bankruptcy court could not enjoin an eviction action against the debtor because the debtor's interest in the house was previously terminated); *see also In re Bass*, 171 F.3d at 1022-1023 ("it is the relation of dispute to estate, and not of party to estate, that establishes jurisdiction").

Hillair's reliance on *In re Wood* is misplaced. There, the complaint involved a dispute over the division of ownership in a clinic partially owned by debtors. *In re Wood*, 825 F.2d 90, 94 (5th Cir. 1987). Given the debtors' ownership of stock in the clinic, their disputed shares were part of the estate itself. *Id.* "Related to" jurisdiction therefore plainly existed. *Id.* Here, on the other hand, VSP's claims against Hillair will not affect any stock or other ownership interest in PFO's estate.

Second, prevailing on claims against Hillair will not reduce what VSP recovers from PFO's estate. Indeed, there is simply nothing to be recovered. PFO is being dissolved — it is a gutted shell of an entity with no income or assets. ROA.778-779, 1094-1095, 1140. Because there is nothing for VSP to recover, prevailing on claims against Hillair will not affect PFO's estate in any way.

Regardless of the size of any judgment against Hillair, VSP will be unable to seek any recovery from PFO.

Third, VSP's claims against Hillair will not result in contribution claims against PFO. Hillair, like VSP, has nothing to recover from PFO's estate. Further, Hillair does not allege any contractual basis for

contribution, and any supposed claim for equitable contribution is speculative, unfounded, and insufficient to confer jurisdiction. *See Arnold v. Garlock, Inc.*, 288 F.3d 234, 238-39 (5th Cir. 2002) (absent a judgment against defendant, common law contribution could not give rise to "related to" jurisdiction).

As detailed above, for "related to" jurisdiction to attach, the "anticipated outcome" of VSP's claims against Hillair "must both (1) alter the rights, obligations, and choices of action of the debtor [PFO], and (2) have an effect on the administration of the estate." *In re Bass*, 171 F.3d at 1022. Hillair has not shown VSP's claims will have either effect, and Hillair concedes it is "improbable" VSP's claims will ever have such effect. AB p. 31. The lower courts' orders should therefore be reversed.

Hillair's convoluted and speculative analysis regarding issues of joint liability and contribution do not give rise to "related to" jurisdiction. *See In re Prescription Home Health Care, Inc.*, 316 F.3d at 548. At bottom, VSP asserts separate claims against PFO and Hillair, and seeks to hold each of them accountable for their own unfair business practices harming VSP. While VSP must vigorously pursue its setoff rights in the California action, there is simply no affirmative recovery to be had from PFO's estate. Hillair's contrary argument contradicts common sense and must be rejected. *U.S. v. Cook*, 384 U.S. 257, 262 (1966) (judicial decisions should not "override common sense"). If PFO's trustee believed VSP's claims against Hillair could impact PFO's estate, he would have informed the bankruptcy court of this issue. He did not. The lower courts' orders cannot stand.

4. Hillair Fails to Meaningfully Distinguish *Mooney*.

As detailed in VSP's opening brief, *Mooney* held the bankruptcy court erred when it relied on a prior order to adjudicate new third-party claims that accrued years later. *In re Mooney Aircraft, Inc.*, 730 F.2d 367, 373-375 (5th Cir. 1984). Here, the bankruptcy court made the same error, and Hillair's attempt to distinguish *Mooney* fails.

First, Hillair distinguishes *Mooney* because the accident giving rise to plaintiff's claims occurred after entry of the bankruptcy court's order. Here, Hillair's misconduct harming VSP occurred before 2017, but VSP did not know about it. Hillair's factual distinction is legally meaningless. Tort claims do not accrue until they are known or suspected. *See Frame v. City of Arlington*, 657 F.3d 215, 238 (5th Cir. 2011) ("accrual occurs" when "plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he [was] injured"); *Lincoln Unified*

* * *

Respectfully submitted,

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APPENDIX J

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE
MINUTE ORDER

DATE: 05/02/2019
TIME: 09:00:00 AM
DEPT: 54

JUDICIAL OFFICER PRESIDING:
Christopher Krueger
CLERK: G. Toda
REPORTER/ERM:
BAILIFF/COURT ATTENDANT: N. Alvi, R. Mays

CASE NO: **34-2013-00153788-CU-CO-GDS**
CASE INIT.DATE: 10/25/2013
CASE TITLE: **VSP Labs Inc vs. Pro Fit Optix Inc**
CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Motion to File Amended Complaint - Civil Law and Motion

APPEARANCES

Nature of Proceeding: Motion to File Amended Complaint

TENTATIVE RULING

Plaintiff/Cross-Defendant VSP Labs, Inc.'s ("VSP") Motion for Leave to File a Second Amended Complaint ("SAC") is continued on the Court's own motion to May 16 at 9:00 a.m. in Dept. 54.

On April 26, Defendant/Cross-Complainant Pro Fit Optix, Inc. ("PFO") and Hillair Capital Investments LP ("Hillair") notified the Court that an emergency hearing was set for May 1 in the United States Bankruptcy Court for the Northern District of Texas,

Case No. 17-30355-HDH, the outcome of which may substantively effect this motion.

Accordingly, the parties are ordered to file a copy of any order issued by the Bankruptcy Court in connection with the May 1 hearing, along with a brief of no longer than five pages explaining how the outcome of the May 1 hearing impacts the Court's ruling on VSP's Motion for Leave to File an SAC, if at all. Any such brief must be filed no later than May 8. No replies are permitted.

COURT RULING

The Court affirmed the tentative ruling.

Motion to File Amended Complaint - Civil Law and Motion continued to 05/16/2019 at 09:00 in this department,