No. _____

In the Supreme Court of the United States

CUKER INTERACTIVE, LLC, PETITIONER,

v.

PILLSBURY WINTHROP SHAW PITTMAN, LLP.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court deciding a state-law issue in a bankruptcy case must apply the forum State's choice-of-law rules or federal choice-of-law rules to determine what substantive law governs.

PARTIES TO THE PROCEEDINGS

Cuker Interactive, LLC, is the Petitioner here and was the Defendant-Appellant below.

Pillsbury Winthrop Shaw Pittman, LLP, is the Respondent here and was the Plaintiff-Appellee below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Petitioner identifies the following parent corporations or publicly held corporations that own 10% or more of its stock/membership interests: Cuker Design, Inc., a California corporation, is the sole member of Petitioner.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Pillsbury Winthrop Shaw Pittman, LLP, v. Cuker Interactive, LLC*, No.21-55298 (9th Cir.) (opinion issued and judgment entered on March 2, 2022);

- *Pillsbury Winthrop Shaw Pittman, LLP, v. Cuker Interactive, LLC*, No.20-CV-01882-CAB-BLM (S.D. Cal.) (order reversing bankruptcy court's grant of Petitioner's summary-judgment motion entered March 25, 2021);

- *Cuker Interactive, LLC v. Pillsbury Winthrop Shaw Pittman, LLP*, Adversary No.20-90075-LA11 (Bankr. S.D. Cal.) (order granting Petitioner's summary-judgment motion entered September 17, 2020; letter opinion on Petitioner's summary-judgment motion entered August 21, 2020; tentative ruling granting Petitioner's summary-judgment motion entered July 9, 2020);

- *In re Cuker Interactive, LLC*, Bankruptcy No.18-07363-LA11 (Bankr. S.D. Cal.).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, 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

"The federal courts are divided concerning whether federal choice of law rules or forum choice of law rules apply in bankruptcy courts," 17A James Wm. Moore et al., *Moore's Federal Practice – Civil* § 124.30 (2022), and "there is now a circuit split," 19 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4518 (3d ed. April 2022 update); *accord* 5 Collier on Bankruptcy ¶ 544.02 (16th ed. 2022). The Ninth Circuit has long held that courts must apply federal choice-of-law rules in bankruptcy cases, rather than the forum State's rules, when resolving such state-law issues, while admitting that its view differs from the approach taken by other courts. *See In re Sterba*, 852 F.3d 1175, 1177 & n.1 (9th Cir. 2017) (citing *Lindsay v. Beneficial Reinsurance Co. (In re Lindsay)*, 59 F.3d 942, 948 (9th Cir. 1995)). Every other court of appeals to have decided this issue has taken a contrary approach, holding that bankruptcy courts must apply the forum State's choice-of-law rules unless deciding an exceptional case involving a core federal interest. *See In re Gaston & Snow*, 243 F.3d 599, 604–07 (2d Cir. 2001); *In re Merritt Dredging Co.*, 839 F.2d 203, 205–06 (4th Cir. 1988); *Robeson Indus. Corp. v. Hartford Accident & Indem. Co. (In re Robeson Indus. Corp.)*, 178 F.3d 160, 164–65 (3d Cir. 1999); *Amtech Lighting Servs. Co. v. Payless Cashways, Inc. (In re Payless Cashways)*, 203 F.3d 1081, 1084 (8th Cir. 2000); *accord Matter of Iowa R. Co.*, 840 F.2d 535, 542 (7th Cir. 1988) (Easterbrook, J.).

The Ninth Circuit's entrenched position on the Question Presented is contrary to this Court's case law. Under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), there is no federal general common law, and this doctrine extends to choice-of-law rules under *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). Thus, federal courts must not apply federal common law when adjudicating state-law claims or issues, unless deciding an exceptional case involving a significant conflict between a federal policy and state law. The *Erie* doctrine, of course, applies no matter the source of a federal court's jurisdiction. Yet on the Question Presented, the Ninth Circuit has held that bankruptcy courts must *always* create and apply federal choice-of-law rules as a matter of federal common law when adjudicating state-law issues in bankruptcy proceedings.

This Petition is an ideal vehicle for this Court to resolve this nationally important issue. The Ninth Circuit's well-entrenched approach causes a national *dis*uniformity in bankruptcy law, contrary to the Constitution's requirement that bankruptcy laws enacted by Congress be "uniform." U.S. Const. art. I, § 8, cl. 4. The choice-of-law issue here is central to the outcome in this case, which is why Petitioner asked the Ninth Circuit to hear this case initially en banc to overrule that circuit's approach, while also leading with this same argument in its merits briefing. Finally, in *Sterba v. PNC Bank*, No.17-423, *cert. denied* 138 S. Ct. 2672 (2018), the petition raised the same circuit split as the Petition here, and this Court

called for the views of the Solicitor General. After the Solicitor General, along with the *Sterba* respondent, raised a number of what they claimed were vehicle problems with the *Sterba* petition, the petitioners there failed to file any reply in support of their petition or response to the Solicitor General's opposition brief. The Petition here is an ideal vehicle for resolving this circuit split.

This Court should grant the Petition.

DECISIONS BELOW

The Ninth Circuit's opinion below affirming the order of the district court is unreported, but it is available at 2022 WL 612671, and is reproduced at Pet.App. 1a–5a. The district court's opinion reversing the bankruptcy court's order on Petitioner's motion for summary judgment is unreported, but it is available at 2021 WL 1140894, and is reproduced at Pet.App. 6a–16a. The bankruptcy court's order on Petitioner's motion for summary judgment is unreported, but it is reproduced at Pet.App. 17a–19a. The bankruptcy court's letter opinion on Petitioner's motion for summary judgment is unreported, but it is reproduced at Pet.App. 20a–26a. Finally, the bankruptcy court's tentative ruling on Petitioner's motion for summary judgment is also unreported, but it is reproduced at Pet.App. 27a–33a.

JURISDICTION

The Ninth Circuit entered its judgment on March 2, 2022. Pet.App. 1a. On May 23, 2022, Justice Kagan granted Petitioner's application to extend the time to file this Petition until June 30, 2022, *Cuker Interactive, LLC v. Pillsbury Winthrop Shaw Pittman, LLP*, No.21A748 (U.S.), and Petitioner filed this Petition by that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8, Clause 4 of the Constitution provides, in part, that "Congress shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."

STATEMENT

A. This bankruptcy case arises in California. Petitioner, a full-service digital marketing, design, and e-commerce agency, is a California limited liability company with its sole place of business in California. Pet.App. 31a; Bankr. Ct. No.18-07363, Dkt.10-1 at 2; Bankr. Ct. No.20-90075, Dkt.10 at 32. Respondent, a major law firm, is a limited liability partnership with offices in California and other States. Pet.App. 24a, 31a.

In 2015, Petitioner engaged Respondent for legal representation in litigation against Wal-Mart Stores,

Inc. ("Walmart"), in the United States District Court for the Western District of Arkansas, a State in which Respondent has no office. Pet.App. 7a; Bankr. Ct. No.20-90075, Dkt.10 at 32; Bankr. Ct. No.20-90075, Dkt.4 at 4. As relevant here, the parties' engagement agreement did not grant Respondent a lien on any judgment that Petitioner may obtain in the Walmart litigation for the payment of attorney's fees. Pet.App. 32a. Petitioner eventually won a judgment against Walmart in that litigation, with Respondent still serving as its counsel. Pet.App. 7a.

Respondent thereafter sent a letter to Walmart's counsel purporting to assert a lien against the judgment under Arkansas law for Respondent's as-yet-unpaid attorney's fees. Pet.App. 7a, 28a. Petitioner did not sign Respondent's letter or otherwise consent to Respondent obtaining such a lien. *See* Pet.App. 15a.

B. About one year after Respondent sent its letter, Petitioner filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Southern District of California. Pet.App. 7a. Respondent filed a proof of claim with the bankruptcy court, asserting a claim for $1,637,418.71 against Petitioner's bankruptcy estate, which is the amount of its outstanding attorney's fees from the Walmart

litigation. *See* Pet.App. 7a, 28a.[1] Respondent alleged that, under Arkansas law, its claim was "secured by an attorney's lien on the judgment and proceeds of the Walmart lawsuit and perfected by [its] letter to Walmart's counsel" that had asserted that lien. *See* Pet.App. 7a (summarizing Respondent's position).

In response to Respondent's proof of claim, Petitioner filed an adversary proceeding against Respondent in the bankruptcy court, disputing the secured status of Respondent's claim. Pet.App. 7a.[2] Petitioner then moved for summary judgment in that adversary proceeding, arguing that California law, not Arkansas law, governed the secured status of Respondent's claim and that this claim was "a general unsecured claim not entitled to priority" under California law. Pet.App. 7a, 29a.

The bankruptcy court granted Petitioner's motion. Pet.App. 18a–19a. As relevant here, the bankruptcy court in its final decision applied federal

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[1] A "proof of claim" is a "written statement and verifying documentation filed by a creditor that describes the reason the debtor owes the creditor money." *Proof of Claim*, U.S. Courts, Bankruptcy Basics Glossary, available at https://www.uscourts.gov/educational-resources/educational-activities/bankruptcy-basics-glossary (all websites last visited June 29, 2022).

[2] An "adversary proceeding" is a "lawsuit arising in or related to a bankruptcy case that is commenced by filing a complaint with the [bankruptcy] court." *Adversary Proceeding*, U.S. Courts, Bankruptcy Basics Glossary, *supra*.

choice-of-law rules, rather than California's choice-of-law rules, to determine whether California law or Arkansas law governed the secured status of Respondent's claim. Pet.App. 21a. The bankruptcy court then explained that the federal choice-of-law rules follow the most-significant-relationship approach in the Restatement (Second) of Conflict of Laws. Pet.App. 21a. That approach differs from California's choice-of-law rules, which follow the "so-called governmental interest analysis." *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 922 (Cal. 2006). Applying those federal choice-of-law rules, the bankruptcy court held that California law, not Arkansas law, determines whether Respondent's claim was secured or unsecured. Pet.App. 21a–24a. The bankruptcy court then applied California law and concluded that "no lien for attorney's fees was created," meaning that Respondent's claim was unsecured. Pet.App. 24a–25a; *see* Pet.App. 20a–26a.

C. Respondent appealed the bankruptcy court's ruling to the district court. *See* Pet.App. 6a–16a. In that appeal, Respondent challenged only the bankruptcy court's conclusion that California law controlled whether Respondent's claim was secured or unsecured. Pet.App. 9a. That is, Respondent "argue[d] only that Arkansas law, and not California law, applies and that [its] lien is valid under Arkansas law." Pet.App.9a. Respondent did "not argue that it has a valid lien under California law." Pet.App. 9a.

The district court reversed the bankruptcy court's judgment. Pet.App. 16a. Like the bankruptcy court, the district court applied "federal choice of law principles" because, under controlling Ninth Circuit law, federal choice-of-law-rules apply in "bankruptcy court proceedings." Pet.App. 9a. The Ninth Circuit's controlling choice-of-law approach is contrary to the approach taken in every other circuit court to have decided this issue. *See In re Gaston & Snow*, 243 F.3d at 604–07; *In re Merritt Dredging Co.*, 839 F.2d at 205–06; *In re Robeson Indus. Corp.*, 178 F.3d at 164–65; *In re Payless Cashways*, 203 F.3d at 1084; *accord Matter of Iowa R. Co.*, 840 F.2d at 542 (Easterbrook, J.). The district court then held that the federal choice-of-law rules require the application of Arkansas law to determine whether Respondent's claim was secured or unsecured. Pet.App.9a–14a. Finally, applying Arkansas law, the district court concluded that Respondent held a valid lien on Petitioner's judgment in the Walmart litigation, meaning that Respondent's claim was secured. Pet.App.14a–16a.

D. On appeal, Petitioner understood that a key question here was whether federal or California choice-of-law rules applied. That is because California's choice-of-law rules clearly require the application of California law as compared to Arkansas law, *compare* Pet.App. 31a, *with* Pet.App.2a–4a, 9a–14a, and Petitioner could only prevail under California law, since that State does not recognize noncontractual attorney's liens, Pet.App. 31a–32a,

see, e.g., *Hansen v. Jacobsen*, 230 Cal. Rptr. 580, 583 (Cal. Ct. App. 1986). Indeed, the centrality of this choice-of-law issue to this case is why Petitioner petitioned the Ninth Circuit for initial hearing en banc on this very issue, requesting that it overrule its binding circuit precedent on this issue at the outset of the appeal, CA9 Dkt.13, and why Petitioner led with that same argument in its merits briefing, CA9 Dkt.14 at 24–32; *see generally* CA9 Dkt.36 (denying Petitioner's petition for initial hearing en banc, with no judge requesting a vote on the petition).

The Ninth Circuit panel—bound by the Ninth Circuit precedent noted above—applied federal choice-of-law rules, selected Arkansas law as the governing law, and affirmed. Pet.App. 1a–5a. The panel explained that "[b]ecause this is a bankruptcy proceeding, federal choice-of-law rules determine which state's substantive law applies." Pet.App.2a (citing *In re Lindsay*, 59 F.3d 942). That said, the panel recognized that Petitioner had "claim[ed] that [*In re*] *Lindsay* was wrongly decided" and should be overruled, but the court explained that *In re Lindsay* "binds [it] as a three-judge panel." Pet.App. 2a. So, applying federal choice-of-law rules as *In re Lindsay* requires, the panel "follow[ed] the approach of the Restatement" and concluded that Arkansas law, not California law, governed whether Respondent's asserted lien was valid. Pet.App. 2a–4a (citation omitted). Finally, the Ninth Circuit held that, under Arkansas law, Respondent's asserted lien was valid, meaning that its claim was secured. Pet.App. 5a.

REASONS FOR GRANTING THE PETITION

I. There Is A Well-Entrenched, Widely Acknowledged Circuit Split As To Whether Forum State Or Federal Choice-Of-Law Rules Apply In Bankruptcy Proceedings

Commentators and courts broadly acknowledge the long-standing, well-entrenched circuit split on the Question Presented. "The federal courts are divided concerning whether federal choice of law rules or forum choice of law rules apply in bankruptcy courts." 17A *Moore's Federal Practice – Civil* § 124.30. "[T]here is now a circuit split" on this issue, 19 *Federal Practice and Procedure* § 4518, with a "majority view" and a "minority rule," 5 Collier on Bankruptcy ¶ 544.02. "The federal courts are divided" on this question. *In re Gaston & Snow*, 243 F.3d at 605–07; *see Deutsche Bank Tr. Co. Ams. v. U.S. Energy Dev. Corp. (In re First River Energy, LLC)*, 986 F.3d 914, 924 n.19 (5th Cir. 2021) (expressly recognizing "a circuit split"); *In re Sterba*, 852 F.3d at 1177 n.1 (same). This circuit split comprises the Ninth Circuit on the one side, and multiple other courts of appeals on the other.

The Ninth Circuit sits alone in holding, for almost two decades, that federal choice-of-law rules apply in all bankruptcy cases. Pet.App. 2a (applying circuit precedent of *In re Lindsay*, 59 F.3d at 948). In its *In re Lindsay* decision, the Ninth Circuit held that, without exception, "[i]n federal question cases with

exclusive jurisdiction in federal court, such as bankruptcy, the court should apply federal, not forum state, choice of law rules." 59 F.3d at 948. Thus, in the Ninth Circuit's view, "[t]he rule in diversity cases" established by *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), "that federal courts must apply the conflict of laws principles of the forum state[,] does not apply to federal question cases such as bankruptcy." 59 F.3d at 948. The Ninth Circuit has recognized that its approach differs from that of its sister circuits, but has expressed no interest in changing course, *see In re Sterba*, 852 F.3d at 1177 & n.1; *see also, e.g.*, *In re Vortex Fishing Sys., Inc.*, 277 F.3d 1057, 1069 (9th Cir. 2002) (also following *In re Lindsay*), including in this case, where it denied Petitioner's en banc petition with no judge calling for a vote, CA9 Dkt.36.

Every other court of appeals to have decided this issue has held that a bankruptcy court should apply the forum State's choice-of-law rules when adjudicating state-law claims or issues, only noting a never-applied exception for exceptional cases that implicate special federal interests.

The Second Circuit has held that "bankruptcy courts should apply the choice of law rules of the forum state unless the case implicates important federal bankruptcy policy," while expressly recognizing that "[t]he federal courts are divided" on the Question Presented. *In re Gaston & Snow*, 243 F.3d at 605–07. The Second Circuit reached this

holding by applying the *Erie* doctrine, which only allows for the "judicial creation of a special federal rule" like a conflicts-of-law rule under extremely narrow circumstances, not present there. *Id.* (citations omitted). The Second Circuit also rejected the policy considerations supplied by the Ninth Circuit for its contrary approach, *id.* at 606 (citing *In re Lindsay*, 59 F.3d at 948), while explaining that its own approach creates "[a] uniform rule" that "will enhance predictability in an area where predictability is critical," *id.* at 606–07 (citations omitted).

The Fourth Circuit has taken the same approach as the Second Circuit, holding that bankruptcy courts must apply "the choice of law rule of the forum state" when adjudicating state-law claims and issues, in the absence of an "overwhelming federal policy" to the contrary. *In re Merritt Dredging Co.*, 839 F.2d at 205–06. Like the Second Circuit, the Fourth Circuit's holding rests on the *Erie* doctrine. *See id.* Finally, the Fourth Circuit also relied on *Butner v. United States*, 440 U.S. 48 (1979), which held that "[p]roperty interests are created and defined by state law" and that bankruptcy does not affect how federal courts must analyze these state-law interests. *In re Merritt Dredging Co.*, 839 F.2d at 205–06 (quoting *Butner*, 440 U.S. at 55).

The Third and Eighth Circuits have similarly held that bankruptcy courts must apply the forum State's choice-of-law rules, rather than federal rules, when resolving state-law claims and issues. *See In re*

Robeson Indus. Corp., 178 F.3d at 164–65; *In re Payless Cashways*, 203 F.3d at 1084.

Although other courts of appeals appear not to have decided which choice-of-law rules bankruptcy courts must apply when resolving state-law claims or issues, they have nevertheless acknowledged this circuit split. While the Seventh Circuit appears at one point to have held that bankruptcy courts should apply the forum State's choice-of-law rules based on the *Erie* doctrine, *see Matter of Iowa R. Co.*, 840 F.2d at 535–36, 542–43 (Easterbrook, J.), more recent Seventh Circuit precedent appears to consider this is an open question, *see In re Jafari*, 569 F.3d 644, 651 (7th Cir. 2009) ("[W]e need not decide whether state or federal law supplies the choice-of-law rules in a bankruptcy case because Nevada substantive law would apply either way."). The Fifth Circuit has expressly recognized that "[t]here is a circuit split" on the Question Presented, while suggesting support for the approach adopted by the Second, Third, Fourth and Eighth Circuits. *See In re First River Energy, LLC*, 986 F.3d at 924 n.19.

II. The Ninth Circuit's Entrenched Position That Federal Choice-Of-Law Rules Always Apply In Bankruptcy Proceedings Violates This Court's Case Law

Under this Court's *Erie* doctrine, "[t]here is no federal general common law," which means that "the law to be applied in any case" before a federal court

"is the law of the state"—"[e]xcept in matters governed by the Federal Constitution or by acts of Congress." *Erie*, 304 U.S. at 78. This Court "extend[ed]" the *Erie* doctrine in *Klaxon* to include "the field of conflict of laws," which means that federal courts must also apply the choice-of-law rules of their forum State, absent some federal constitutional or statutory rule to the contrary. *Klaxon*, 313 U.S. at 496. Further, "[w]hatever lack of uniformity this [rule] may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors." *Id.*

While *Erie* itself arose in the diversity-jurisdiction context, *see* 304 U.S. at 77–78, the *Erie* doctrine applies whenever federal courts decide state-law claims and issues. That is, under *Erie*, "federal courts are constitutionally obligated to apply state law to state claims," whatever the source of the federal courts' jurisdiction to decide them. *Felder v. Casey*, 487 U.S. 131, 151 (1988) (citing *Erie*, 304 U.S. at 78–79). This means that the *Erie* doctrine applies when, for example, "a federal court exercises diversity or pendent jurisdiction over state-law claims," *id.*; or when it exercises its jurisdiction to hear state-law claims brought by the federal government, *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 83–85, 87–88 (1994); *see also Atherton v. FDIC,* 519 U.S. 213, 218 (1997); or when it adjudicates state-law claims asserted against a foreign sovereign, *Cassirer v. Thyssen-*

Bornemisza Collection Found., 142 S. Ct. 1502, 1509–10 (2022). With each of these fonts of federal jurisdiction—and with all other springs of federal-court power—"[t]here is no federal general common law," and so federal courts must look to state law as *Erie* provides. *O'Melveny*, 512 U.S. at 83–85 (quoting *Erie*, 304 U.S. at 78).

Considered dicta in this Court's recent decision in *Cassirer* strongly supports the conclusion that the *Erie* doctrine applies outside of the diversity-jurisdiction context. There, this Court held that the Foreign Sovereign Immunities Act ("FSIA")—which is a federal statute granting district courts jurisdiction over suits against foreign sovereigns under limited circumstances—mandates that federal courts apply the same choice-of-law rules in FSIA cases as they "would apply in a similar suit between private parties," as a matter of statutory text. 142 S. Ct. at 1508. Most relevant here, this Court ended its decision by explaining that it "would likely reach the same result" under the *Erie* doctrine even if the FSIA's text were "not so clear," with no suggestion that the absence of diversity jurisdiction in the case would lead to a different conclusion. *See id.* at 1509.

Under the above-described principles, it is clear that the *Erie* doctrine requires bankruptcy courts to apply the forum State's choice-of-law rules when adjudicating state-law claims or issues. Bankruptcy courts frequently adjudicate state-law claims and issues in the course of settling bankruptcy disputes,

since "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law." *Butner*, 440 U.S. at 54. Nothing in the Constitution, *see id.* at 54 & n.9, or in the Bankruptcy Code, *In re Holiday Airlines Corp.*, 620 F.2d 731, 734 (9th Cir. 1980), directs bankruptcy courts to apply federal choice-of-law rules for these state-law claims or issues. Therefore, *Erie* requires bankruptcy courts to apply the forum State's choice-of-law rules to resolve those state-law claims and issues, *Erie*, 304 U.S. at 78; *Klaxon*, 313 U.S. at 496. And while bankruptcy courts do not exercise diversity jurisdiction, that is irrelevant to these courts' duty to follow the *Erie* doctrine here. *See Felder*, 487 U.S. at 151; *O'Melveny*, 512 U.S. at 83–85, 87–88; *Atherton,* 519 U.S. at 218; *Cassirer*, 142 S. Ct. at 1509. "There is no federal general common law" for bankruptcy courts to apply, *Erie*, 304 U.S. at 78—including as to the application of choice-of-law rules, *Klaxon*, 313 U.S. at 496—just like federal courts exercising jurisdiction under any other source.

Although *Erie* allows federal courts to create and apply federal common law when there is an "extraordinary" reason to do so, *O'Melveny*, 512 U.S. at 87–88; *accord Cassirer*, 142 S. Ct. at 1509–10, there is no such reason for bankruptcy courts to apply federal choice-of-law rules in the absence of unusual circumstances that may well never arise. After all, it is hard to see how a bankruptcy court's application of a forum State's choice-of-law rules while adjudicating state-law claims and issues could create "a significant

conflict" with "some federal policy," justifying "the judicial creation" of federal choice-of-law rules. *O'Melveny*, 512 U.S. at 87–89 (citation omitted). For example, in the present case, the dispute is solely over the validity of Respondent's asserted lien on Petitioner's judgment—with California law holding the lien invalid and Arkansas law taking the opposite view. *See* Pet.App. 5a, 9a, 14a–16a, 20a–26a. The validity of an asserted "security interest[ ]" like this is a "state law" question that does not run afoul of "any congressional command" or "any identifiable federal interest," as this Court has recognized. *Butner*, 440 U.S. at 55; *see also id.* at 54 (explaining that "Congress has not chosen to exercise its power [over bankruptcy] to fashion" a general rule regulating the validity of security interests in bankruptcy). Such state-law-security-interest questions are standard fare for the bankruptcy courts, as they complete their workaday tasks of identifying and adjudicating secured and unsecured claims against the bankruptcy estate and then distributing the estate's property accordingly. *See generally id* at 54–57; 1 Collier on Bankruptcy ¶ 1.03. Thus, while the Second and Fourth Circuits acknowledged a narrow potential space for federal common law in a bankruptcy court's choice-of-law determination when dealing with specific issues raising an "important federal bankruptcy policy," *In re Gaston & Snow*, 243 F.3d at 605–07; *accord In re Merritt Dredging Co.*, 839 F.2d at 205–06, it is not at all clear whether any bankruptcy case considering a state-law claim or issue could ever raise an "important federal

bankruptcy policy," so as to fall within that exception's narrow—or perhaps non-existent—scope.

The Ninth Circuit's contrary conclusion in *In re Lindsay* and its progeny is, with all respect, simply contrary to this Court's *Erie* case law. The Ninth Circuit primarily defended its position by claiming that *Klaxon*'s extension of *Erie* to choice-of-law rules does not apply "[i]n federal question cases with *exclusive* jurisdiction in federal court, such as bankruptcy." *In re Lindsay*, 59 F.3d at 948 (emphasis added). But, as explained above, the *Erie* doctrine "constitutionally obligate[s]" the federal courts "to apply state law to state claims" whenever those claims arise, *Felder*, 487 U.S. at 151, with no exclusive-federal-jurisdiction qualifier. The Ninth Circuit also invoked as support for its position "[t]he value of national uniformity of approach," *In re Lindsay*, 59 F.3d at 948, but this does not justify the creation of federal common law. To begin, *Klaxon*'s rule *does* create "[a] uniform rule," as it uniformly directs bankruptcy courts to apply the choice-of-law rules of the forum State. *In re Merritt Dredging Co.,* 839 F.2d at 205–06. That gives "uniform treatment" to bankruptcy creditors and debtors across the country, as the Bankruptcy Clause requires, "reduc[ing]" the "uncertainty" of which choice-of-law rules may apply in bankruptcy proceedings. *Butner*, 440 U.S. at 55; *accord In re Merritt Dredging Co.*, 839 F.2d at 205–06 ("enhance predictability"). *Klaxon*'s rule also ensures that state courts and bankruptcy courts treat the property rights of bankruptcy debtors

and creditors in a uniform manner, so that no one "receiv[es] a windfall merely by reason of the happenstance of bankruptcy." *Butner*, 440 U.S. at 55 (citation omitted); *accord In re Merritt Dredging Co.,* 839 F.2d at 206. In any event, "the interest in uniformity" is the "most generic (and lightly invoked) of *alleged* federal interests" to support an exception to the *Erie* doctrine*,* which does not "qualif[y] as an identifiable federal interest" justifying the creation of federal common law here. *O'Melveny*, 512 U.S. at 88 (emphasis added); *see also Atherton*, 519 U.S. at 219–20.

III. This Case Is An Ideal Vehicle For Resolving The Important Question Presented

This Petition is an ideal vehicle for this Court to resolve the Question Presented, which raises an important issue for the uniform administration of bankruptcy across the country.

A. This Petition presents an issue of national importance deserving of this Court's review. The Constitution's overarching requirement for Congress' power to enact "[l]aws on the subject of Bankruptcies" is for those laws to be "uniform." U.S. Const. art. I, § 8, cl. 4. This "[c]onstitutional requirement of uniformity is a requirement of *geographical uniformity*," *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 172 (1946) (Frankfurter, J., concurring) (emphasis added), meaning that the Constitution "does not permit arbitrary

geographically disparate treatment of debtors," *Siegel v. Fitzgerald*, 142 S. Ct. 1770, 2022 WL 1914098, at *7 (2022). Thus, under the Bankruptcy Clause, a debtor's "obligations" must be "treated alike . . . throughout the country regardless of the State in which the bankruptcy court sits." *Vanston*, 329 U.S. at 172 (Frankfurter, J., concurring). This primary concern for uniformity also furthers the "predictability" of bankruptcy proceedings, which is an especially "critical" consideration here, *In re Merritt Dredging Co., Inc.*, 839 F.2d at 206, given bankruptcy's "intimate[ ] connect[ion] with the regulation of commerce," The Federalist No. 42 at 221 (James Madison) (Gideon ed., 2001); *accord Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 195 (1819) (Marshall, C. J.) ("The bankrupt law is said to grow out of the exigencies of commerce.").

The entrenched circuit split on the Question Presented—with the Ninth Circuit on the one side, and multiple other courts of appeals on the other—creates a fundamental geographic *dis*uniformity in bankruptcy law. Under the Ninth Circuit's approach, bankruptcy courts must *always* apply federal choice-of-law rules when adjudicating state-law claims and issues, contrary to the approach taken in every other circuit to have decided the issue. *Supra* pp. 2, 10–11. Thus, bankruptcy creditors and debtors in the Ninth Circuit alone lose the protections of the forum State's choice-of-law rules for the resolution of the state-law claims and issues that they assert in bankruptcy court. *Contra* U.S. Const. art. I, § 8, cl. 4; *Siegel*, 142

S. Ct. 1770, 2022 WL 1914098, at *7; *Vanston*, 329 U.S. at 172 (Frankfurter, J., concurring). Further, this disuniformity creates the unacceptable "anomal[y]" that—for Ninth Circuit bankruptcy creditors and debtors alone—their "same property interest[s]" will be "governed by the laws of one state in federal diversity proceedings and by the laws of another state where a federal court is sitting in bankruptcy." *In re Merritt Dredging Co., Inc.*, 839 F.2d at 206.

B. This Petition is an ideal vehicle for this Court to consider the Question Presented.

Whether federal or California choice-of-law rules apply in this case is a key issue that, Petitioner respectfully submits, is outcome-determinative here. Petitioner prevails if California law, not Arkansas law, controls, as Respondent's lien is plainly invalid under California law. *See* Pet.App. 9a, 31a–32a. California's choice-of-law rules clearly require the bankruptcy court to apply California law, whereas the Ninth Circuit held that federal choice-of-law rules require the application of Arkansas law. *Compare* Pet.App. 31a, *with* Pet.App.2a–4a, 9a–14a. This is because California's choice-of-law rules—unlike the federal choice-of-law rules—follow the "governmental interest" approach, *Kearney*, 137 P.3d at 922, which strongly favors applying California law over Arkansas law here, due to California's overwhelming governmental interest in protecting "California entities and individuals from liens for attorney's fees

without informed consent." Pet.App. 31a. In contrast, federal choice-of-law rules apply the most-significant-relationship approach—including a "presumption in favor of [applying] the law where the chattel is located" in this case—which, in the Ninth Circuit's view, requires application of Arkansas law, as Petitioner's judgment "is located . . . i[n] Arkansas." Pet.App. 4a.

Given the central importance of this choice-of-law issue to this case, Petitioner repeatedly challenged *In re Lindsay* before the Ninth Circuit below, seeking to obtain the benefit of California choice-of-law rules. Petitioner requested initial hearing en banc from the Ninth Circuit, asking the en banc court to overrule *In re Lindsay*. CA9 Dkt.13. Further, Petitioner led with this challenge to *In re Lindsay* in its merits briefing, ultimately submitted to the three-judge panel. CA9 Dkt.14 at 24–32. Having failed on both efforts to persuade the Ninth Circuit to overrule *In re Lindsay*, Petitioner had to brief this issue under the far-less-favorable federal choice-of-law rules and thus lost.

C. Finally, the proceedings in *Sterba v. PNC Bank*, No.17-423. *cert. denied* 138 S. Ct. 2672 (2018)—where this Court called for the views of the Solicitor General, but ultimately denied the petition—further support granting the present Petition.

The petition in *Sterba* raised the same circuit split at issue here. In *Sterba*, the Ninth Circuit

applied the Ninth Circuit's *In re Lindsay* choice-of-law rule and then held that certain creditors' claims were *not* time-barred under state law and thus were allowable against the bankruptcy estate. *Id.* at 1177, 1180–81. The *In re Sterba* bankruptcy debtors petitioned this Court for certiorari, raising the same circuit split that is at issue here. *See* Petition for Writ of Certiorari at i, *Sterba v. PNC Bank*, No.17-423, 2017 WL 4174959 (U.S. Sept. 15, 2017). This Court called for the views of the Solicitor General on whether to grant the *Sterba* petition and decide the question presented. *Sterba v. PNC Bank*, No.17-423 (U.S. Jan. 22, 2018).

In his brief, the Solicitor General recommended that the Court deny the *Sterba* petition, echoing multiple arguments that the *Sterba* respondent had raised. Br. for the United States as Amicus Curiae, *Sterba v. PNC Bank*, No.17-423, 2018 WL 2278124 (U.S. May 17, 2018) ("*Sterba* SG Br."). The Solicitor General—like the *Sterba* respondent—focused on the alleged vehicle problems with the petition in *Sterba*, arguing that petitioners did not squarely challenge the lower courts' application of federal choice-of-law rules until their petition for certiorari, *Sterba* SG Br. 17–19; Brief in Opposition at 11–15, *Sterba v. PNC Bank*, No.17-423, 2017 WL 6422664 (U.S. Dec. 15, 2017) ("*Sterba* BIO"), and that the selection of either federal or the forum State's choice-of-law rules was unlikely to affect the outcome, *see Sterba* SG Br. 7, 17. The Solicitor General also argued that there was no circuit split over the question that, in his view,

Sterba presented: whether a bankruptcy court should apply federal or the forum State's choice-of-law rules when determining whether 11 U.S.C. § 502(b)(1) makes a claim unenforceable. *See Sterba* SG Br. at i, 14.[3] So, while the Solicitor General conceded that there is "some disagreement among the circuits" over whether bankruptcy courts should apply federal or the forum State's choice-of-law rules when adjudicating state-law claims or issues as a general matter, he claimed that *Sterba* did not actually implicate this split of authority when properly understood. *Sterba* SG Br. at 14–17. Finally, both the Solicitor General and the *Sterba* respondent sought to downplay the circuit split to some extent, as discussed below. *See infra* pp. 25–26.

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[3] The Solicitor General also argued that, on the merits, the Ninth Circuit was correct in *Sterba* to apply federal choice-of-law rules, despite the *Erie* doctrine, because *Sterba* "was not a diversity case under 28 U.S.C. 1332." *Sterba* SG Br. 11–14. The Solicitor General's merits argument is incorrect, as this Court has held that the *Erie* doctrine applies beyond diversity-jurisdiction cases. Indeed, as already explained above, this Court applies the *Erie* doctrine whenever federal courts decide state-law claims or issues, with no exception for cases arising in the exclusive jurisdiction of the federal courts. *See supra* pp. 13–15. The Solicitor General's approach in *Sterba* also appears to be inconsistent with the Solicitor General's arguments in *Cassirer*. Br. for the United States as Amicus Curiae at 18–19, *Cassirer v. Hyssen-Bornemisza Collection Found*, No.20-1566, 2021 WL 5513717 (U.S. Nov. 22, 2021).

The petitioners in *Sterba* failed to file either a reply in support of their petition to respond to the claimed vehicle problems that the *Sterba* respondent had raised, or a response to the Solicitor General's brief. *See generally Sterba*, No.17-423 (U.S.).

The Petition here does not suffer from the problems that the Solicitor General and the respondent raised in *Sterba*. To begin, Petitioner here challenged the application of federal choice-of-law rules prior to the filing of this Petition, including filing a petition for initial hearing en banc and raising this as its lead issue before the Ninth Circuit panel. *Compare Sterba* SG Br. 17–19, *and Sterba* BIO 11–12 & n.5, *with* CA9 Dkt.13, *and* CA9 Dkt.14 at 24–32. Additionally, this choice-of-law issue is outcome-determinative here, as explained above. *Supra* pp. 2, 8–9, 11, 22. Further, there is no possible dispute here that the bankruptcy court resolved an issue based fundamentally on state law, rather than on 11 U.S.C. § 502(b)(1), or some other federal law—unlike what the Solicitor General claimed was at issue in *Sterba*. *Compare* Pet.App. 21a–26a, *with Sterba* SG Br. 8–14. That is, both parties and every court below agreed, consistent with this Court's precedent, that whether Respondent held a valid lien in Petitioner's judgment is a question that "should be resolved by reference to state law," since the "application of state law" decides questions related to "security interests." *Butner*, 440 U.S. at 52, 55; *see generally* 1 Collier on Bankruptcy ¶ 1.03.

Finally, nothing in the *Sterba* certiorari-stage briefing undermines the existence of the circuit split on the Question Presented. In *Sterba*, the Solicitor General conceded that there was "some disagreement among the circuits," *Sterba* SG Br. at 14, while discussing the same circuit-court cases as Petitioner here, *compare id.* at 14–17*, with supra* Part I. The *Sterba* respondent also recognized this split, although claiming that this split was "nuanced," since the Second and Fourth Circuits would allow bankruptcy courts to apply federal choice-of-law rules in exceptional circumstances. *Sterba* BIO at 10. Yet, this split is clear: the Ninth Circuit *always* requires bankruptcy courts to apply federal choice-of-law rules when adjudicating state-law claims. *Supra* pp. pp. 2, 10–11, 20. In direct contrast, other circuits require bankruptcy courts to apply the forum State's choice-of-law rules, *supra* pp. 11–13—with the Second and Fourth Circuits recognizing an extremely limited exception to this rule for cases presenting extraordinary circumstances that may never be present in any actual case, *supra* pp. 11–12.

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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June 2022

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MARCH 2, 2022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-55298

D.C. No. 3:20-cv-01882-CAB-BLM

In re: CUKER INTERACTIVE, LLC,

Debtor,

PILLSBURY WINTHROP SHAW PITTMAN, LLP,

Plaintiff-Appellee,

v.

CUKER INTERACTIVE, LLC,

Defendant-Appellant.

MEMORANDUM[*]

Appeal from the United States District Court
for the Southern District of California
Cathy Ann Bencivengo, District Judge, Presiding.

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[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appendix A

February 18, 2022, Argued and Submitted,
Pasadena, California;
March 2, 2022, Filed

Before: BRESS and BUMATAY, Circuit Judges, and LASNIK,** District Judge.

In this adversary proceeding, Cuker Interactive, LLC appeals the district court's order finding that the law firm of Pillsbury Winthrop Shaw has a valid Arkansas attorney's lien against Cuker. Because this appeal requires no further fact finding and presents a pure legal issue, we have jurisdiction under 28 U.S.C. § 158(d) to review the district court's final order. *See In re DeMarah*, 62 F.3d 1248, 1250 (9th Cir. 1995). Reviewing de novo, *see In re Tenderloin Health*, 849 F.3d 1231, 1234-35 (9th Cir. 2017), we affirm.

Because this is a bankruptcy proceeding, federal choice-of-law rules determine which state's substantive law applies. *In re Lindsay*, 59 F.3d 942, 948 (9th Cir. 1995). Applying federal choice of law rules requires us to "follow the approach of the Restatement (Second) of Conflict of Laws." *In re Vortex Fishing Sys., Inc.*, 277 F.3d 1057, 1069 (9th Cir. 2002). Although Cuker claims that *Lindsay* was wrongly decided, it binds us as a three-judge panel. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc).

** The Honorable Robert S. Lasnik, United States District Judge for the Western District of Washington, sitting by designation.

We reject Cuker's argument that Restatement § 188 applies here. That section addresses "[t]he rights and duties of the parties with respect to an issue in contract." Although the parties have a contract (the Engagement Agreement), it has no nexus to the present lien dispute, as Cuker acknowledged at various points in this case. Instead, the lien is a non-consensual lien that arises from Arkansas statutes. *See* Ark. Code Ann. § 16-22-304. Section 251 of the Restatement is therefore the relevant section. It applies to the "validity and effect of a security interest in a chattel," and specifically to liens that arise by operation of law, including attorney's liens. Restatement (Second) of Conflict of Laws § 251 & comment *f*.

Section 251 states:

> (1) The validity and effect of a security interest in a chattel as between the immediate parties are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the parties, the chattel and the security interest under the principles stated in § 6.
>
> (2) In the absence of an effective choice of law by the parties, *greater weight will usually be given to the location of the chattel at the time that the security interest attached than to any other contact in determining the state of the applicable law.*

(Emphasis added).

Although both parties make plausible arguments under the § 6 factors that Arkansas and California each have a significant relationship to this dispute, subsection (2) of § 251 sets a presumption in favor of the law where the chattel is located, which here is Arkansas. As one secondary source explains:

> The generally accepted view is that the existence and effect of an attorney's lien is governed by the law of the place in which the contract between the attorney and the client is to be performed, that is, in which a contemplated action or proceeding is to be instituted, and that the place of contracting is immaterial where the contract contemplates the institution of an action in another jurisdiction.

Conflict of Laws as to Attorneys' Liens, 59 A.L.R.2d 564, § 4. Cuker has not provided a sufficient basis to conclude that the § 6 factors overcome § 251's general preference for the law of the place where the chattel is located. *See also* Restatement (Second) of Conflict of Laws § 251 comment *e* (explaining that "[t]he values of certainty and predictability of result are furthered as a consequence, since the place where a chattel is situated at a given time will either be known to the parties or else, except in rare instances, will be readily ascertainable"). Cuker's argument that it lacked sufficient notice that Arkansas law could apply is unpersuasive considering that Cuker knew it was retaining Pillsbury to represent it in litigation in Arkansas, and later filed a malpractice action against Pillsbury in that state.

Applying Arkansas law, Pillsbury has a valid lien. Arkansas Code Ann. § 16-22-304 sets out the procedures to perfect an attorney's lien in Arkansas. *See Mack v. Brazil, Adlong & Winningham, PLC*, 357 Ark. 1, 159 S.W.3d 291, 294-95 (Ark. 2004). It requires "service upon the adverse party of a written notice signed by the client and by the attorney at law . . . representing the client." Ark. Code Ann. § 16-22-304(a)(1). It also specifies "notice . . . to be served by certified mail" and "a return receipt" to "establish actual delivery of the notice." *Id.* The Arkansas Supreme Court has held, however, that "strict compliance with the attorney's lien statute is not required and substantial compliance will suffice." *Mack*, 159 S.W.3d at 295.

Pillsbury substantially complied with the lien statute. Although Pillsbury's lien was not signed by the client, Pillsbury sent written notice of its lien by certified mail to Walmart's counsel and to both of Cuker's principals, with return receipt requested. Pillsbury also emailed the notice to Cuker's principals, Walmart's counsel, and Cuker's counsel. Cuker has not argued that it was unaware of Pillsbury's lien. Under analogous circumstances, the Arkansas Supreme Court has found substantial compliance with its attorney's lien statute. *See Mack*, 159 S.W.3d at 296; *Metropolitan Life Ins. Co. v. Roberts*, 241 Ark. 994, 411 S.W.2d 299, 300 (Ark. 1967). As a result, Pillsbury has a perfected lien.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, FILED MARCH 25, 2021

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No.: 20-CV-01882-CAB-BLM

IN RE: CUKER INTERACTIVE, LLC,

Debtor.

PILLSBURY WINTHROP SHAW PITTMAN, LLP,

Appellant,

v.

CUKER INTERACTIVE, LLC,

Appellee.

ORDER REVERSING BANKRUPTCY COURT

In this matter, Appellant Pillsbury Winthrop Shaw Pittman LLP ("Pillsbury") appeals a September 17, 2020 order by the United States Bankruptcy Court for the Southern District of California granting a motion for summary judgment by Debtor and Appellee Cuker Interactive, LLC ("Cuker") in an adversary proceeding seeking declaratory relief concerning the validity and extent of a lien by Pillsbury. The appeal has been fully briefed, and the Court held oral argument. As discussed below, the bankruptcy court's grant of judgment in favor of Cuker is reversed.

Appendix B

I. Background

Pillsbury represented Cuker in litigation against Walmart in Arkansas federal court. After a jury trial, the Arkansas District Court entered judgment in favor of Cuker for $745,021 in damages and $2,664,262.44 in attorney's fees and sanctions. On December 8, 2017, while the litigation was ongoing, Pillsbury sent a letter to counsel for Walmart providing notice that Cuker owed Pillsbury money for its services in the Walmart lawsuit and purporting to assert an attorney's lien under Arkansas law on amounts owed by Walmart to Cuker in the lawsuit. [Doc. No. 20-1 at 13.][1]

On December 13, 2018, Cuker filed for Chapter 11 bankruptcy in this district. Pillsbury filed a proof of claim asserting a claim for $1,637,418.71 secured by an attorney's lien on the judgment and proceeds of the Walmart lawsuit and perfected by the December 8, 2017 letter to Walmart's counsel. [Doc. No. 20-1 at 10-12.] On May 29, 2020, Cuker filed an adversary proceeding against Pillsbury to determine whether Pillsbury's claim is secured or unsecured. [Doc. No. 20-1 at 5-8.] In a motion for summary judgment filed shortly thereafter, Cuker asked the bankruptcy court to determine as a matter of law that Pillsbury's claim is a general unsecured claim not entitled to priority. [Doc. No. 20-1 at 21.]

Pillsbury filed a petition to compel arbitration of the adversary proceeding based on an arbitration provision in

1. Citations to the record use the ECF watermark for the instant appeal.

Pillsbury's engagement letter with Cuker. [Doc. No. 19-1 at 53; Doc. No. 21-1 at 3.] The bankruptcy court denied Pillsbury's petition, and on September 18, 2020, Pillsbury filed a notice of appeal of that ruling and a statement of election to have the appeal heard in the district court. [Doc. No. 1.] This Court affirmed the bankruptcy court's ruling. *See* Doc. No. 24 in S.D.Cal. Case No. 18cv1854-CAB-BLM.

After determining that it had jurisdiction to decide Cuker's adversary proceeding, the bankruptcy court granted Cuker's motion for summary judgment, holding that: (1) California law governed the validity of Pillsbury's lien; and (2) Pillsbury did not have a valid lien under California law, meaning its claim is unsecured. On September 22, 2020, Pillsbury filed a notice of appeal of that ruling and a statement of election to have the appeal heard in the district court. [Doc. No. 1.]

II. Standard of Review

"When considering an appeal from the bankruptcy court, a district court applies the same standard of review that a circuit court would use in reviewing a decision of a district court." *Ho v. Wirum*, No. 19-CV-02095-RS, 2019 U.S. Dist. LEXIS 229442, 2019 WL 8263439, at *1 (N.D. Cal. Dec. 11, 2019) (citing *Ford v. Baroff (In re Baroff)*, 105 F.3d 439, 441 (9th Cir. 1997)). A "Bankruptcy Court's decision granting summary judgment is reviewed . . . de novo." *In re Del Biaggio*, No. 12-CV-6447 YGR, 2013 U.S. Dist. LEXIS 163953, 2013 WL 6073367, at *3 (N.D. Cal. Nov. 18, 2013) (citing *In re Caneva*, 550 F.3d 755, 760 (9th Cir. 2008)).

III. Discussion

Here, as the bankruptcy court found, the parties' dispute "is not factual, but rather requires an analysis of whether California law or Arkansas law applies" to the determination of whether Pillsbury holds a valid lien for attorney's fees. [Doc. No. 20-1 at 89.] As stated above, the bankruptcy court held that California law applies, and that Pillsbury does not have a valid lien under California law. In this appeal, Pillsbury argues only that Arkansas law, and not California law, applies and that Pillsbury's lien is valid under Arkansas law. Pillsbury does not argue that it has a valid lien under California law.

A. Choice of Law — California or Arkansas

The parties do not dispute that federal choice of law principles apply in bankruptcy court proceedings and "[f]ederal choice of law rules follow the approach of the Restatement (Second) of Conflict of Laws." *In re Vortex Fishing Sys., Inc.*, 277 F.3d 1057, 1069 (9th Cir. 2002). The parties do dispute, however, which section of the Restatement applies, with Cuker arguing section 188 applies and Pillsbury arguing section 251 applies. The bankruptcy court found this dispute irrelevant because both sections reference the principles of section 6 of the Restatement. This court respectfully disagrees with that conclusion.

Section 188 concerns the law governing "the rights and duties of the parties with respect to an issue in contract." Restatement (Second) of Conflict of Laws § 188

(1971). An issue in contract is not at issue in this adversary proceeding. The only issue is the validity of Pillsbury's statutory lien. Cuker argues that the parties' relationship is "anchored in a written contract," specifically Cuker's engagement agreement with Pillsbury. [Doc. No. 21 at 17.] The parties' rights and duties under the engagement agreement, however, are not at issue here. Indeed, the complaint in Cuker's adversary proceeding expressly states as much. [*Id.* at 6.] The only issue is the validity of Pillsbury's lien, and as the bankruptcy court held, this dispute "does not have its origins or genesis in the Engagement Agreement," and "there is no significant relationship, or any relationship for that matter, between the fee lien dispute and the Engagement Agreement." [*Id.* at 94.] Accordingly, section 188 plainly does not apply here.

Section 251, meanwhile, concerns the "validity and effect of a security interest in chattel," and comment "f" to the section states that it applies to non-consensual liens, including "an attorney's lien." Restatement (Second) of Conflict of Laws § 251 (1971). The complaint in Cuker's adversary proceeding states that it seeks a determination of the validity of Pillsbury's (i.e., Cuker's former attorneys') lien on property of Cuker's estate. [Doc. No. 20-1 at 6.] Accordingly, section 251 applies here.

Section 251 states:

> (1) The validity and effect of a security interest in a chattel as between the immediate parties are determined by the local law of the state which, with respect to the particular issue, has

> the most significant relationship to the parties, the chattel and the security interest under the principles stated in § 6.
>
> (2) In the absence of an effective choice of law by the parties, greater weight will usually be given to the location of the chattel at the time that the security interest attached than to any other contact in determining the state of the applicable law.

Restatement (Second) of Conflict of Laws § 251 (1971). While the bankruptcy court was correct that the principles in section 6 are relevant, in finding it immaterial whether section 188 or section 251 applied, the bankruptcy court ignored subsection (2), which advises that the location of the chattel is entitled to the greatest weight. Here, the chattel in question was, at the time of the lien, money held by Walmart and payable pursuant to a judgment entered by an Arkansas federal court. Based on subsection (2), Arkansas law applies to Pillsbury's lien.

The bankruptcy court discounted the importance of the location of the chattel, holding that the place of the chattel is less relevant when its location is temporary.[2] Instead, the bankruptcy court stated that whether California or Arkansas law applied is governed solely by the factors in section 6 of the Restatement, which include:

---

2. The Court disagrees with this premise, but even using the section 6 factors on which the bankruptcy court relied, Arkansas law applies.

> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws § 6 (1971). The bankruptcy court stated without explanation that not all of these factors are relevant here, and then relying on factors (b) and (c), held that California law applies because "Pillsbury's attorneys, who represented Plaintiff, are licensed in California; Cuker is a California company, and the parties' Engagement Agreement was entered into in California." [Doc. No. 20-1 at 101.]

The bankruptcy court's reliance on where the Engagement Agreement was executed, however, is inconsistent with its (correct) holding that there is

no relationship between this fee lien dispute and the engagement agreement. Moreover, its conclusion that "it is too great a leap to presume that Cuker might have predicted or expected Arkansas law to govern this aspect of its relationship with Pillsbury's California attorneys" [Doc. No. 20-1 at 101], is belied by the Engagement Agreement's express statement that Cuker was retaining Pillsbury for the Walmart litigation pending in Arkansas [Doc. No. 21-1 at 4].

Ultimately, a de novo review of the section 6 factors also supports applying Arkansas law to the lien dispute here. Arkansas's interests exceed those of California's with respect to an attorney's lien on a judgment issued by an Arkansas court, payable by a company with its principal place of business in Arkansas, based on fees incurred in connection with litigation that took place in Arkansas. Cuker (and Walmart) should have expected that liens on a judgment in an Arkansas litigation would be governed by Arkansas law. Further, the basic policies underlying the perfection of liens, predictability and uniformity of result, and ease of determination of the applicable law all support applying Arkansas law to a lien on a judgment issued by an Arkansas court for unpaid attorney's fees incurred in an Arkansas litigation. This conclusion is consistent with "[t]he generally accepted view [] that the existence and effect of an attorney's lien is governed by the law of the place in which the contract between the attorney and the client is to be performed, that is, in which a contemplated action or proceeding is to be instituted, and that the place of contracting is immaterial where the contract contemplates the institution of an action in another jurisdiction."

59 A.L.R.2d 564. Accordingly, even assuming, as did the bankruptcy court, that whether section 188 or section 251 of the Restatement is irrelevant, Arkansas law applies to this Pillsbury's lien.

B. Application of Arkansas Law to Pillsbury's Lien

"In order to perfect an attorney's lien in Arkansas, an attorney must follow the procedure set out in Ark. Code Ann. § 16-22-304. . . ." *Mack v. Brazil, Adlong & Winningham, PLC*, 357 Ark. 1, 159 S.W.3d 291, 294 (Ark. 2004). That section states:

> 16-22-304. Lien of attorney created.
>
> (a)(1) From and after service upon the adverse party of a written notice signed by the client and by the attorney at law, solicitor, or counselor representing the client, which notice is to be served by certified mail and a return receipt being required to establish actual delivery of the notice, the attorney at law, solicitor, or counselor serving the notice upon the adversary party shall have a lien upon his or her client's cause of action, claim, or counterclaim, which attaches to any settlement, verdict, report, decision, judgment, or final order in his or her client's favor, and the proceeds thereof in whosoever's hands they may come.

> (2) The lien cannot be defeated and impaired by any subsequent negotiation or compromise by any parties litigant.
>
> (3) However, the lien shall apply only to the cause or causes of action specifically enumerated in the notice.

Ark. Code Ann. § 16-22-304 (West). "[S]trict compliance with the attorney's lien statute is not required and substantial compliance will suffice." *Mack*, 159 S.W.3d at 295. "[T]he intent and purpose of the statute [is] to make sure . . . that [the attorney] represented [the client] and that [the adverse party] would be aware of [the attorney's] intention to claim a lien, for his fee, on the proceeds of the litigation before they were paid to the client . . . ." *Metro. Life Ins. Co. v. Roberts*, 241 Ark. 994, 411 S.W.2d 299, 300 (Ark. 1967).

Here, Pillsbury provided written notice of its lien by certified mail with return receipt to Walmart's counsel. [Doc. No. 20-1 at 13-17.] Walmart's counsel knew that Pillsbury represented Cuker in the litigation between Cuker and Walmart and confirmed receipt of the notice of Pillsbury's intention to create a lien. [*Id.* at 18.] Cuker, however, claims that this notice was insufficient to create a lien because it was not signed by Cuker. The Court is not persuaded. "[T]here is no question that [Walmart] had actual notice of the asserted lien before any settlement money was paid to [Cuker]." *Mack*, 159 S.W.3d at 296. Pursuant to *Metropolitan Life*, Pillsbury was therefore in substantial compliance with the statute and the fact

that Cuker did not sign the notice is not fatal. *See Metro. Life Ins. Co.*, 411 S.W.2d at 300 ("[I]t is appellant's sole contention that the notice given by appellee in his letter . . . was not signed by the client. . . . It is true that [the client] did not sign the notice, but we cannot agree that this omission is fatal.") Accordingly, Pillsbury's lien is valid under Arkansas law.

IV. Conclusion

For the foregoing reasons, the Court **REVERSES** the bankruptcy court's decision that Pillsbury's claim is unsecured, and **REMANDS** this matter to the bankruptcy court for further proceedings consistent with this order.

It is **SO ORDERED**.

Dated: March 25, 2021

/s/ Cathy Ann Bencivengo
Hon. Cathy Ann Bencivengo
United States District Judge

APPENDIX C — OPINION OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, ENTERED SEPTEMBER 17, 2020

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
325 West F Street, San Diego, California 92101-6991

Michael D. Breslauer, Esq. SBN 110259
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401 B Street, Suite 1200
San Diego, CA 92101
(619) 231-0303

Attorneys for Plaintiff Cuker Interactive, LLC

LODGED

BANKRUPTCY NO. 18-07363-LA11
ADVERSARY NO. 20-90075-LA11

In Re
CUKER INTERACTIVE, LLC,
Debtor.

CUKER INTERACTIVE, LLC,
Plaintiff,
v.
PILLSBURY WINTHROP SHAW PITTMAN, LLP,
Defendant.

Appendix C

Date of Hearing: July 9, 2020
Time of Hearing: 2:30 p.m.
Name of Judge: Louise DeCarl Adler

ORDER ON CUKER INTERACTIVE, LLC'S MOTION FOR SUMMARY JUDGMENT

The court orders as set forth on the continuation pages attached and numbered *Two (2)* through *Five (5)* with exhibits, if any, for a total of *Five (5)* pages. Notice of Lodgment Docket Entry No. *40*.

DATED:
September 17, 2020

/s/ Louise DeCarl Adler
Judge, United States Bankruptcy Court

On May 29, 2020, Plaintiff and Debtor-In-Possession Cuker Interactive, LLC ("Cuker") filed and served its Complaint containing two caues of action, Declaratory Relief to Determine Secured Status of Pillsbury Winthrop Shaw Pittman's Claim No. 13, and for Avoidance of Lien (the "Complaint"). On June 3, 2020, Cuker filed its Motion for Summary Judgment (the "Motion") (Dkt. No. 4) seeking the Court's determination that Pillsbury Winthrop Shaw Pittman's ("Pillsbury") Claim No. 13 is an unsecured claim for all purposes in Cuker's bankruptcy case. On June 25, 2020, Pillsbury filed its Request for Continuance and Opposition to Motion for Summary Judgment with Reservation if Rights (Dkt. No. 10), and on July 2, 2020, Cuker filed its Reply (Dkt. No. 14). On

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July 8, 2020, the Court filed its Tentative Ruling on the Motion (Dkt. No. 17; the "Tentative Ruling"), and on July 9, 2020 at 2:30 p.m., the Honorable Louise DeCarl Adler, United States Bankruptcy Judge, presided over oral argument where Michael D. Breslauer, Esq. appeared on behalf of Cuker, and Matthew S. Walker, Esq. appeared on behalf of Pillsbury. On September 4, 2020, Cuker filed its voluntary dismissal of its cause of action seeking lien avoidance, without prejudice (Dkt. No. 38). There were no other appearances.

Following oral argument, the Court took the matter under submission and on August 21, 2020, the Court filed its Letter Opinion (Dkt. No. 32; the "Letter Opinion").

The Tentative Ruling and the Letter Opinion constitute findings of fact and conclusions of law herein as may be required by Fed. R. Bankr. P 7052 and Fed. R. Bankr. P 9014.

Based on the facts and arguments as set forth in the Motion and the Reply, the papers filed in opposition, and the arguments made in oral argument, and for the reasons expressed in the Tentative Ruling and the Letter Opinion, and for good cause shown,

IT IS HEREBY ORDERED that the Motion is GRANTED. Judgment shall be entered in favor of Cuker as Plaintiff and against Pillsbury on the Complaint in the form attached hereto as Exhibit A.

IT IS SO ORDERED.

APPENDIX D — OPINION OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, FILED AUGUST 21, 2020

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT
OF CALIFORNIA

Michael D. Breslauer
Solomon Ward Seidenwurm & Smith, LLP
401 B Street, Suite 1200
San Diego, CA 92101

Matthew S. Walker
Pillsbury Winthrop Shaw Pittman LLP
12255 El Camino Real, Suite 300
San Diego, CA 92130-4088

Entered August 21, 2020
Filed August 21, 2020

Re: *In re Cuker Interactive, LLC,* Adv. Proc. No. 20-90075-LA Plaintiff's Motion to for Summary Judgment of Adversary Complaint

Dear Counsel:

At the hearing held on July 9, 2020 on the Motion of Cuker Interactive, LLC's (the "Plaintiff" or "Cuker"), for Summary Judgment on all claims alleged in its Adversary Complaint, Pillsbury Winthrop Shaw Pittman LLP's (the "Defendant" or "Pillsbury") argued against the tentative ruling, making three main points: (1) Defendant's Motion to Compel Arbitration [ECF #8] should be heard prior

to a decision on this Motion for Summary Judgment; (2) the Court applied the incorrect choice of law rules in its tentative ruling; and (3) California does not have a policy against the creation of fee liens. The Court took the matter under submission, and now amplifies its tentative ruling as follows:

1. Defendant's Motion to Compel Arbitration

On August 5, 2020, the Court issued its tentative ruling denying the Motion to Compel Arbitration or Alternatively Transfer Venue to the USDC in Arkansas [ECF # 27]. The Motion was then heard by this Court on August 6, 2020. The Court took the matter as to the Motion to Compel Arbitration under submission and issued a letter opinion affirming its tentative ruling, and thereby denying, the Motion to Compel Arbitration on August 19, 2020. As such, Defendant's first argument is no longer at issue.

2. Choice of Law

The parties are in agreement that federal choice of law rules apply, as set forth in the Restatement (Second) of Conflict of Laws ("Restatement"); however, they disagree as to whether Restatement § 188 or § 251 applies. Which section applies is irrelevant because each section applies the federal choice of law test set forth in Restatement § 6. That section essentially considers which state has the most significant relationship to the parties, the chattel, and the security interest. *See In re Symons Frozen Foods Inc.*, 432 B.R. 290, 297-98 (Bankr. W.D. Wash., April 2, 2010)

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If the Court finds that California has the more significant relationship, then California law should apply in determining the validity of the lien. If California law applies, then a lien for attorney's fees may only be created by contract, save a few exceptions that do not apply here. *See Fletcher v. Davis,* 33 Cal. 4th 61, 66 (Cal. 2004) (recognizing that a lien to satisfy attorney's fees and expenses out of the proceeds of recovery, "is created only by contract," under which the client must provide informed written consent). However, if the Court finds that Arkansas has a more significant relationship to the parties and the alleged security interest, then as a matter of law, Pillsbury holds a valid fee lien via so long as the attorney properly served upon the adverse party a written notice signed by the attorney and client stating that the attorney retains a lien upon his client's cause of action, claim, or counterclaim, which attaches to any judgment or proceeds thereof. Ark. Code. Ann. § 16-22-304; *see also Metropolitan Life Ins. Co. v. Roberts,* 241 Ark. 994, 996-97 (1967) (holding that a letter by an attorney giving notice of intention to impress a lien for services on insurance policy proceeds qualified as "substantial compliance" with the Arkansas Lien Statute though notice was not signed by the client as required by the Statute)

In determining which state has the more significant relationship to the parties and the alleged security interest, the Restatement requires consideration of the following factors, not all of which are relevant here:

a) The needs of the interstate and international systems;

b) The relevant policies of the forum;

c) The relevant policies of other interested states and the relative interests of those states in the determination of the issue;

d) The protection of justified expectations;

e) The basic policies underlying the particular field of law;

f) Certainty, predictability and uniformity of result; and

g) Ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws § 6. Generally, greater weight is given to the location of the "chattel" at the time the security interest attached; however, when the parties understand that the chattel will be kept only temporarily in the state where it was located at the time the security interest attached, it is more likely that some other state has the more significant relationship to the parties, and the law of that state should apply. *See In re Symons Frozen Foods Inc.*, 432 B.R. 290, 297-98 (Bankr. W.D. Wash., April 2, 2010).

Here, the jurisdictions are clearly in conflict as to how a fee lien can be created. As stated above, California law requires such a lien to be created by contract, whereas Arkansas law simply requires notice to the adverse

party that the lien has been created pursuant to the Arkansas Lien Statute. In considering factors (b) and (c), both California and Arkansas have an interest in the application of their respective law, but California's relationship to the parties and alleged security interest is more substantial. Pillsbury's attorneys, who represented Plaintiff, are licensed in California; Cuker is a California company, and the parties' Engagement Agreement was entered into in California. While Pillsbury rendered services in the USDC in Arkansas, it is too great a leap to presume that Cuker might have predicted or expected Arkansas law to govern this aspect of its relationship with Pillsbury's California attorneys. As such, factor (f) also favors application of California law.

Though Pillsbury is correct that the USDC in Arkansas in the Walmart Litigation held that fee issues were to be governed by Arkansas law, the issue here is unrelated to the amount of Pillsbury's fees. Instead, the issue is one regarding the validity of Pillsbury's alleged lien on the proceeds of the Judgment, now held in the Segregated Account. Therefore, the USDC's application of Arkansas law to the amount of Pillsbury's fees is irrelevant.

Given the foregoing, this Court now applies California law in determining the validity of Pillsbury's claimed statutory fee lien.

In applying California law, a fee lien has not been created because the parties did not contract for such, either expressly or implicitly, in their Engagement

Agreement. Pillsbury does not appear to dispute that the Engagement Agreement at no point states that Pillsbury may look to the Judgment, or now the Segregated Account, for payment of its attorney's fees. As such, no lien for attorney's fees was created under California law.

3. California Policy Regarding Fee Liens

To the extent the Court's prior tentative ruling could be read to infer that California has a policy against fee liens, the Court clarifies its ruling here. As mentioned above, California requires that a fee lien be created via contract (save a few exceptions not applicable here), and thereby requires a client give its informed consent to the creation of a fee lien. This is not to say that California never permits the creation of a fee lien in a different manner, however no such relevant exception applies to the facts of this matter.

Conclusion

To the extent that this Court's prior tentative ruling did not clearly set forth the support for its conclusions, by this letter opinion the prior tentative ruling is augmented and the prior tentative ruling as clarified by this augmented ruling is adopted by the Court. Any portions of the Court's prior tentative ruling not discussed in this letter remain intact (e.g.,Court's ruling as to Defendant's judicial estoppel argument).

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Movant is directed to prepare and lodge an order consistent with this Court's prior tentative ruling as augmented by this letter opinion.

Sincerely,

s/_____
LOUISE De CARL ADLER,
Judge

APPENDIX E — OPINION OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, DATED JULY 9, 2020

TENTATIVE RULING
ISSUED BY JUDGE LOUISE DECARL ADLER

CUKER INTERACTIVE, LLC,

v.

PILLSBURY WINTHROP SHAW PITTMAN, LLP.

Adversary Number:
20-90075

Case Number:
18-07363-LA11

Hearing:
02:30 PM Thursday, July 9, 2020

Motion:
CUKER INTERACTIVE, LLC'S MOTION FOR SUMMARY JUDGMENT FILED BY MICHAEL D. BRESLAUER ON BEHALF OF CUKER INTERACTIVE, LLC.

Plaintiff Cuker's Motion for Summary Judgment **GRANTED**. **Standard for Summary Judgment**

Summary judgment should be granted when there are no genuine issues of material fact and when the

movant is entitled to prevail as a matter of law. Fed. Rule Civ. P. 56(a)(made applicable in adversary proceedings by Fed. Rule Bankr. P. 7056). In resolving a summary judgment motion, the court does not weigh the evidence, but rather determines only whether a material factual dispute remains for trial. *Covey v. Hollydale Mobile Home Estates*, 116 F.3d 830, 834 (9th Cir. 1997). A material fact is one that, "under the governing substantive law … could affect the outcome of the case." *Caneva v. Sun Cmtys. Operating Ltd. P'ship (In re Caneva)*, 550 F.3d 755, 760 (9th Cir.2008). "A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Caneva*, 550 F.3d at 761 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Factual Background: Defendant Pillsbury Winthrop Shaw Pittman ("Pillsbury") represented Plaintiff Cuker Interactive ("Cuker") in a lawsuit against Walmart (Case No. 5:14-cv-5262) ("Walmart Litigation"), which resulted in an Amended Judgment in Cuker's favor in the amount of $3,409,283.44 ("Judgment").

Pillsbury filed a POC No. 13 ("Pillsbury's Claim") seeking payment of fees billed but unpaid by Cuker and asserted that payment of fees was secured by a lien against the Judgment, per Arkansas Code Sections 16-22-203 and 204 and the Arkansas Federal Disciplinary Rules. On December 8, 2017, Pillsbury sent notice of its alleged lien on the Judgment to Walmart (the "Lien Notice").

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By stipulation, Walmart agreed to pay all sums of the Judgment into a DIP segregated account (the "Segregated Account"). Pursuant to the Segregated Account Order, Pillsbury's lien, *if any*, attached to the funds in the Segregated Account. [ECF 247 in the main case]

The present Adversary Proceeding followed, and Cuker now seeks judicial determination of whether Pillsbury's Claim is secured or unsecured.

Legal Analysis:

1. *Choice of Law Issue:* Here, the Parties' dispute is not factual, but rather requires an analysis of whether California law or Arkansas law should be applied in determining whether Pillsbury holds a valid lien for attorney's fees in the Segregated Account. If California law applies, then a lien for attorney's fees may only be created by contract. *See Fletcher v. Davis*, 33 Cal. 4th 61, 66 (Cal. 2004) (recognizing that a lien to satisfy attorney's fees and expenses out of the proceeds of recovery, "is created only by contract," under which the client must provide informed written consent). However, if Arkansas law applies, then as a matter of law, Pillsbury holds a valid lien for attorneys' fees so long as the attorney properly served upon the adverse party a written notice signed by the attorney and client stating that the attorney retains a lien upon his client's cause of action, claim, or counterclaim, which attaches to any judgment or proceeds thereof. Ark. Code. Ann. § 16-22-304; *see also Metropolitan Life Ins. Co. v. Roberts*, 241 Ark. 994, 996-97 (1967) (holding that a letter by an attorney giving notice of intention to impress a

lien for services on insurance policy proceeds qualified as "substantial compliance" with the Arkansas Lien Statute though notice was not signed by the client as required by the Statute)

A federal court exercising jurisdiction over state law claims must apply the choice of law rules of the state in which it sits. *In re Nucorp Energy Sec. Litig.*, 661 F.Supp. 1403, 1412 (S.D.Cal. 1987) (citing *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941)); *see also Butner v. United States*, 440 U.S. 48, 54 (1979) (recognizing that determination of contract or property rights by bankruptcy courts is controlled by state law). California courts apply a three-part test:

> (1) The court must determine whether there is in fact a conflict between the competing jurisdictions.
>
> (2) If a conflict exists, the court must next determine whether each jurisdiction has a legitimate interest in the application of its law and underlying policy.
>
> (3) If both jurisdictions have a legitimate interest in the application of their conflicting laws, the court should apply the law of the state whose interest would be the more impaired if its law were not applied.

Kenneally v. Bosa California LLC, 2011 WL 2118255, at *3 (S.D.Cal. 2011) (citing *In re Nucorp Energy Sec. Litig.*, 661 F.Supp. at 1412).

Here, the jurisdictions are clearly in conflict as to when a lien for attorney's fees can be created. As stated above, California law requires such a lien to be created by contract, whereas Arkansas law simply requires notice to the adverse party that the lien has been created under the Arkansas Lien Statute. In considering the second prong of the test, both California and Arkansas have a legitimate interest in the application of its law. For instance, the Pillsbury attorneys representing Cuker are licensed in California, Cuker is a California company, and the Engagement Agreement was entered into in California. However, the Pillsbury attorneys rendered their services in the USDC in Arkansas. Therefore, both California and Arkansas have an interest in dictating the ethical means by which attorneys provide services.

Considering the third prong of the test, and for the same reasons stated above, this Court applies California law because failure to do so more significantly impairs the public policy intent behind the California statute: Protection of California entities and individuals from liens for attorney's fees without informed consent. Arkansas has no legitimate interest in application of its statute given the parties are not Arkansas entities. While Pillsbury is correct that the USDC in Arkansas in the Walmart Litigation held that fee issues were to be governed by Arkansas law, the issue here is unrelated to the validity of Pillsbury's fee. Instead, the issue is w/r/t the validity of

Pillsbury's alleged lien on the proceeds of the Judgment, now held in the Segregated Account. Therefore, the USDC's application of Arkansas law is irrelevant here.

In applying California law, no lien for attorney's fees has been created because the Parties did not contract for such, either expressly or implicitly, in their Engagement Agreement. Pillsbury does not appear to dispute that the Engagement Agreement at no point states that Pillsbury may look to the Judgment, or now the Segregated Account, for payment of its attorney's fees. As such, no lien for attorney's fees was created under California law. Given the foregoing, there is no need to discuss the ethical requirements for informed consent pursuant to CRPC 3-300, or any similar Arkansas statutes.

2. *Judicial Estoppel Argument:* Judicial estoppel does not warrant granting Pillsbury a lien for attorney's fees here. Pillsbury contends that Cuker assured this Court that Pillsbury was fully secured, and this Court cited the fact that Pillsbury was fully secured in ruling against Pillsbury on Cuker's Motion to Extend the Exclusivity Periods in the main case. [ECF 155] This is not true. In its moving papers, Cuker simply acknowledges that Pillsbury claims it is a secured creditor. [ECF 171, p. 3]. As for the Court's recognition of Pillsbury's secured status, such was acknowledged in the Court's Tentative Ruling [ECF 176], but the Tentative Ruling was not adopted in its entirety in the Minute Order; instead the Minute Order just continued the exclusivity period without acknowledging whether Pillsbury is a secured or unsecured creditor. [ECF 177].

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Regarding Cuker's treatment of HLF, Arkansas law applied to that lien validity dispute given HLF is an Arkansas firm, with attorneys licensed in Arkansas, who provided services only in Arkansas. The same cannot be said here for Pillsbury.

If Pillsbury is prepared to accept the tentative ruling, counsel shall notify Cuker's counsel and appearances will be excused. In that event, Cuker is to prepare and lodge an order in accordance with the tentative ruling. Nothing in this ruling shall be construed to affect the ongoing fee arbitration between these parties.