No. 23-

IN THE

Supreme Court of the United States

WVSV HOLDINGS, LLC,

Petitioner,

v.

10K, LLC, LEO BEUS, ANNETTE BEUS, PAUL GILBERT, SUSAN GILBERT, RANDY STOLWORTHY, KARI STOLWORTHY,

Respondents.

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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QUESTIONS PRESENTED

Whether a debtor's state law tort claim that only accrues following the bankruptcy petition date —indeed after confirmation of the bankruptcy plan —and which did not exist prepetition is property of the bankruptcy estate pursuant to § 541(a)(1) of the Bankruptcy Code (11 U.S.C.)?

Whether the bankruptcy court may exercise post-confirmation jurisdiction over state court claims when the debtor's Chapter 11 plan expressly excluded such claims from the bankruptcy court's jurisdiction?

Whether the bankruptcy court abuses its discretion by dismissing a complaint under the doctrine of judicial estoppel when it fails to consider any of the factors set forth by the Court in *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) and when it applies the wrong standard of judicial review?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

WVSV Holdings, LLC ("WVSV") is the Petitioner. WVSV was the appellant before the Ninth Circuit and the district court and plaintiff in the adversary proceeding before the bankruptcy court. Petitioner was also the debtor in the underlying bankruptcy case.

10K, LLC, Leo Beus, Annette Beus, Paul Gilbert, Susan Gilbert, Randy Stolworthy, and Kari Stolworthy are the Respondents and were appellees before the Ninth Circuit and district courts and defendants in the adversary proceeding before the bankruptcy court.

CORPORATE DISCLOSURE STATEMENT

Petitioner is a private, nongovernmental corporation with no parent corporation. No publicly held company owns 10% or more of the stock of the Petitioner.

RELATED PROCEEDINGS

WVSV Holdings, LLC v. 10K et al. (In re WVSV Holdings, LLC), No. 21-16874, United States Court of Appeals for the Ninth Circuit. Order denying petition for rehearing entered October 6, 2023.

WVSV Holdings, LLC v. 10K et al. (In re WVSV Holdings, LLC), Nos. 21-16874 & 21-16952 (consolidated), United States Court of Appeals for the Ninth Circuit. Memorandum Opinion entered August 29, 2023.

WVSV Holdings, LLC v. 10K et al. (In re WVSV Holdings, LLC), CV-20-01927-PHX-JJT, United States District Court for the District of Arizona. Order entered October 19, 2021.

WVSV Holdings, LLC v. 10K et al. (In re WVSV Holdings, LLC), Adv. Pro. No. 20-00060-MCW, United States Bankruptcy Court for the District of Arizona. Order entered September 22, 2020.

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WVSV respectfully petitions for a writ of certiorari to review the memorandum opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The memorandum opinion of the Ninth Circuit (Petitioner Appendix ("Pet. App.") A at p. 1a-13a) is unpublished but is available at *WVSV Holdings, LLC v. 10K, LLC (In re WVSV Holdings, LLC)*, Nos. 21-16874, 21-16952, 2023 U.S. App. LEXIS 22751, 2023 WL 5548975 (9th Cir. Aug. 29, 2023).

The order of the District Court for the District of Arizona (Pet. App. B at p.14a-37a) is unpublished but is available at *WVSV Holdings LLC v. 10K LLC (In re WVSV Holdings LLC)*, No. CV-20-01927-PHX-JJT, 2021 U.S. Dist. LEXIS 201345, 2021 WL 4861401 (D. Ariz. Oct. 19, 2021).

The order of the United States Bankruptcy Court for the District of Arizona (Pet. App. C at p. 38a-44a) is unpublished.

The transcript of the hearing referenced in the bankruptcy court order (Pet. App. D at p. 45a-54a) is included in the appendix.

The denial of rehearing of the Ninth Circuit (Pet. App. E at p. 55a-56a) is unpublished.

JURISDICTION

As set forth herein, Petitioner denies that the bankruptcy court had jurisdiction over its adversary proceeding against Respondents. The district court had jurisdiction pursuant to 28 U.S.C. § 158(a)(1). The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 158(d)(1). The Ninth Circuit's memorandum opinion was entered on August 29, 2023 and a timely petition for rehearing was denied on October 6, 2023. This Petition has been filed within 90 days of the denial. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. Bankruptcy Code § 541(a)(1) (2012).

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> > (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

2. 28 U.S.C. § 1334(b).

> (b) Except as provided in subsection (e)(2), and notwithstanding 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.

3. U.S. Constitution, art. 1, § 8, cl. 4.

> The Congress shall have Power . . . To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States. . . .

STATEMENT OF THE CASE

1. Introduction

The primary question presented here is whether a debtor's state law tort claim that only accrues following the bankruptcy petition date—indeed after confirmation of the bankruptcy plan—and which did not exist prepetition as a matter of law is nonetheless property of the bankruptcy estate under the Bankruptcy Code § 541(a)(1).

Twelve years prior to the 1978 enactment of the Bankruptcy Code, this Court issued its decision in *Segal v. Rochelle*, 382 U.S. 375 (1966). There, the Court held that property acquired by a debtor post-petition may be estate property under § 70a (5) of the Bankruptcy Act if the facts or conduct giving rise to the debtor's property rights are "sufficiently rooted in the prebankruptcy past and so little entangled with the bankrupts' ability to make

an unencumbered fresh start that it should be regarded as 'property' under § 70a (5)."

Despite the subsequent adoption of the Bankruptcy Code, many circuits, including the Ninth Circuit, continue to apply the "sufficiently rooted" test, with many courts regarding § 541(a)(1) as a codification of the holding in *Segal*. Other circuits reject this approach and consider *Segal* to have been superseded by § 541. Because § 541—which is the primary Bankruptcy Code provision that determines the extent of the bankruptcy estate—is implicated in every bankruptcy filing, large or small, it is of vital importance to the federal bankruptcy scheme that it be uniformly applied.

Thus, this Petition presents an ideal opportunity to further that uniformity by resolving a circuit split regarding the precedential value of *Segal* and, as a result, the scope of estate property under § 541(a)(1).

The Petition further presents an opportunity to define the scope of bankruptcy courts' post-confirmation jurisdiction under 28 U.S.C. § 1334(b).

Finally, review will clarify the Court's standard for application of the doctrine of judicial estoppel based on prior bankruptcy proceedings.

2. Facts

Although the parties have been litigating in various *fora* for some twenty years, the facts relevant to the Petition are straightforward and undisputed.

In 2002, Appellee 10K contracted to sell a 13,000-acre tract of land located in Arizona. When that deal fell through, 10K's manager sold the land to WVSV. 10K's other members objected to the sale and commenced an Arizona state court civil suit against WVSV that sought, in relevant part, to hold the original sale of the property to WVSV invalid (the "Prepetition Action").

In 2012, WVSV filed a petition for relief under Chapter 11 of the Bankruptcy Code. 10K was WVSV's largest creditor. WVSV's reorganization plan, which the bankruptcy court confirmed in 2014, provided, in pertinent part, that 10K and WVSV's respective claims against one another in the Prepetition Action were preserved, notwithstanding plan confirmation.

In 2019, WVSV obtained a judgment in its favor in the Prepetition Action (the "Post-Confirmation Judgment"). Based on the Post-Confirmation Judgment, WVSV commenced suit against 10K and the other Respondents, asserting various claims including wrongful institution of civil proceedings ("WICP") and a related and dependent claim for aiding and abetting tortious conduct (the "WICP Action"). Under applicable Arizona law, a cause of action for WICP does not accrue until plaintiff has obtained a judgment in its favor in the underlying civil action.

Respondents removed the WICP Action to the bankruptcy court and sought dismissal. In granting Respondents' motion, the bankruptcy court made three determinations: (1) although the WICP did not arise until after plan confirmation when WVSV prevailed in the underlying case, the WICP Action was nevertheless property of the bankruptcy estate that should have been

disclosed by WVSV during its bankruptcy; (2) the court had jurisdiction to make this determination despite its own conclusion that it did "not have jurisdiction over anything that was or should have been part of the state court litigation [between WVSV and Respondents"; and (3) the claims asserted by WVSV in the WICP Action were waived as a result of WVSV's non-disclosure.

3. Proceedings

WVSV filed a petition for relief under Chapter 11 of the Bankruptcy Code in 2012.

In 2019, Respondents moved to dismiss the WICP Action in the bankruptcy court.

The bankruptcy granted Respondents' motion. The district court and the Ninth Circuit, in a split decision, affirmed on appeal. In affirming the bankruptcy court order, the Ninth Circuit relied on the "sufficiently rooted" test set forth in *Segal v. Rochelle*, 382 U.S. 375 (1966).

The Ninth Circuit subsequently denied WVSV's petition for rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Split Over the Fundamental Question of What Constitutes Property of the Estate Under § 541(a)(1) of the Bankruptcy Code.

Bankruptcy Code § 541(a)(1) provides that the commencement of a bankruptcy case creates an estate generally comprised of "all legal or equitable interests

of the debtor in property as of the commencement of the case." Other sections of the Bankruptcy Code extend or limit the scope of the bankruptcy estate under § 541(a)(1). Bankruptcy Code §§ 1306(a), 1115(a) and 1186(a), for example, expand the estate to include certain property and income acquired by a debtor after the petition date. Still, the application of § 541(a)(1) is central to the ultimate outcome of every bankruptcy case whether filed by an individual without non-exempt assets or a multi-billion-dollar corporation. Thus, uniform application of § 541(a)(1) is not only fundamental to the integrity and effectiveness of the Bankruptcy Code but also implicates Congress' constitutional mandate to establish uniform laws on bankruptcy. U.S. Const. art. 1, § 8, cl. 4.

As more fully discussed, *infra*, several courts continue to apply the "sufficiently rooted" test set forth in this Court's pre-Bankruptcy Code's decision in *Segal v. Rochelle*, 382 U.S. 375 (1966) to determine the extent of the bankruptcy estate with many citing the legislative history of § 541. The relevant history states:

> This section defines property of the estate, and specifies what property becomes property of the estate. The commencement of a bankruptcy case creates an estate. Under paragraph (1) of subsection (a), the estate is comprised of all legal or equitable interest of the debtor in property, wherever located, as of the commencement of the case. The scope of this paragraph is broad. It includes all kinds of property, including tangible or intangible property, causes of action (*see* Bankruptcy Act § 70a(6) [section 110(a)(6) of former Title 11]), and all other forms of

> property currently specified in section 70a of the Bankruptcy Act § 70a [section 110(a) of former Title 11], as well as property recovered by the trustee under section 542 of proposed Title 11, if the property recovered was merely out of the possession of the debtor, yet remained "property of the debtor." The debtor's interest in property also includes "title" to property, which is an interest, just as are a possessory interest, or lease-hold interest, for example. **The result of *Segal v. Rochelle*, 382 U.S. 375 (1966), is followed, and the right to a refund is property of the estate** [emphasis added].

Senate Report No. 95-989, at 82 (1978).

A. The Pre-Bankruptcy Code Sufficiently Rooted Test under *Segal*.

In *Segal*, this Court resolved a circuit split as to whether tax refunds attributable to prepetition losses that could only be claimed and received by the bankrupt post-petition were property of the estate under § 70a (5) Bankruptcy Act of 1898 which provided:

> SEC. 70. TITLE TO PROPERTY.—a The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he adjudged bankrupt, except in so far as it is to property which is exempt, to all… (5) property which

> prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him[.]

In answering this question in the affirmative, the Court first noted that the primary purpose of § 70a (5) was "to secure for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition." 382 U.S at 379. The Court continued by noting that § 70a (5) should be construed broadly so that "an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed." *Id.* (citation omitted). Based on these considerations, the Court concluded that the tax refund at issue was "**sufficiently rooted in the prebankruptcy past** [emphasis added]… that it should be regarded as 'property' under § 70a (5)." *Id.* In concluding that the tax refund was sufficiently rooted in the prepetition past, the Court emphasized that the tax refund related to losses incurred by the debtor prior to bankruptcy. *Id.* The debtor's inability to claim the refund until after the petition date and the possibility that post-petition income might reduce or wipe out the refund simply created a contingent prepetition interest belonging to the estate and not the post-petition debtor. *Id.*

B. The Circuits Are Split Concerning the Continued Viability and Application of the Sufficiently Rooted Test.

Despite the adoption of § 541 in 1978, various bankruptcy courts continued to apply the sufficiently rooted test in determining the scope of the bankruptcy estate. *See, e.g., Winick & Rich, P.C. v. Strada Design*

Assocs. (In re Strada Design Assocs.), 326 B.R. 229, 236 (Bankr. S.D.N.Y. 2005) (concluding that *Segal* is still good law based on legislative history of § 541); *In re Eppolito*, 617 B.R. 249, 254 (Bankr. E.D. Pa. 2020) (explicitly adopting "sufficiently rooted" test under *Segal*); *Callahan v. Roanoke Cty. (In re Townside Constr., Inc.)*, 582 B.R. 407, 416 (Bankr. W.D. Va. 2018) (same). This approach has been adopted by several circuits and rejected by others with another seemingly modifying the holding of *Segal*.

The Second, Fourth, Seventh, and Tenth Circuits have continued to use the sufficiently rooted test to determine whether property interests arise pre- or post-petition.

In *Chartschlaa v. Nationwide Mut. Ins. Co.*, the Second Circuit considered whether a debtor's interest in an insurance agency was property of his estate under § 541 and thus subject to mandatory disclosure in his bankruptcy schedules. 538 F.3d 116 (2d Cir. 2008). Prior to the petition date, the debtor prepared corporate formation papers for a new insurance agency. *Id*. at 119. However, the papers were not filed until after the petition date. *Id*. In concluding that the agency was property of the debtor's estate, the court simply cited to *Segal,* without discussion, for the proposition that "Post-petition property will become property of the estate only if it is 'sufficiently rooted in the pre-bankruptcy past.'" *Id*. at 122.

In *Beaman v. Shearin (In re Shearin)*, the Fourth Circuit affirmed the bankruptcy court's application of the "sufficiently rooted" test under *Segal* to demarcate "the Bankruptcy Code's bright line distinction between the debtor's pre- and post-petition assets." 224 F.3d 346, 351 (4th Cir. 2000). Applying *Segal*, the bankruptcy

court determined that the debtors' post-petition receipt of partnership profits for work performed by them prepetition was property of the estate.

In *In re Meyers*— a case involving a post-petition refund attributable to prepetition tax obligations – the Seventh Circuit affirmed the use of the "sufficiently rooted" test by reference to the legislative history of § 541. 616 F.3d 626, 628. Specifically, the court relied on that portion of the legislative history stating, "The result of *Segal v. Rochelle*…is followed, and the right to a refund is property of the estate." *Id*. (citing Senate Report No. 95-989 at 82 (1978)).

In *In re Ryerson*—a case involving a post-petition termination payment under a prepetition employment agreement—the Ninth Circuit likewise relied on the legislative history of § 541, without discussion, in concluding that the property acquired post-petition belongs to the estate if it is sufficiently rooted in the prebankruptcy past. 739 F.2d 1423, 1426 (9th Cir. 1984) (citing Senate Report No. 95-989 at 82 (1978)).

Finally, in *In re Barowsky*—still another tax refund case—the Tenth Circuit also relied on the same legislative history, concluding, "When Congress enacted section 541 of the Bankruptcy Act of 1978, it affirmatively adopted the Supreme Court's analysis of property that was contained in *Segal*[.] 946 F.2d 1516, 1518-19 (10th Cir. 1991) (finding that Congress affirmatively adopted analysis of estate property under Segal). (citing Senate Report No. 95-989 at 82 (1978)).

The Fifth, Eighth and Eleventh Circuits have each rejected *Segal*'s viability following the enactment of the Bankruptcy Code.

In *Burgess v. Sikes (In re Burgess)*, the Fifth Circuit reiterated its conclusion in *In re Goff*, 706 F.2d 574, 578 (5th Cir. 1983), overruled on other grounds by *Patterson v. Shumate*, 504 U.S. 753 (1992), that "although Congress has specifically approved of *Segal*'s result, *Segal*'s 'sufficiently rooted' test did not survive the enactment of the Bankruptcy Code. 438 F.3d 493, 498 (5th Cir. 2006). Accordingly, post- petition disaster relief funds received by the debtor under newly enacted legislation for damages incurred by the debtor prepetition were not property of the bankruptcy estate.

The Eighth Circuit's decision in *Drewes v. Vote (In re Vote)* similarly considered whether aid payments made to the debtor under a federal act passed post-petition were property of the estate because the payment related to prepetition injury suffered by the debtor. 276 F.3d 1024 (8th Cir. 2002). In finding that the payments were not property of the estate, the court concluded that that applying the "sufficiently rooted" test to the payments at issue would broaden the scope of § 541 beyond claims which exist at the commencement of the case. *Id*. at 1026.

In *Bracewell v. Kelley (In re Bracewell)*, the Eleventh Circuit explicitly rejected *Segal*, stating:

> The *Segal* decision told us how to define property under the old bankruptcy code, before it was amended in 1978 to include an explicit definition of property. We will not attribute

> to the Supreme Court an intent to construe legislative language that it had not seen and which would not even exist for another dozen years.

454 F.3d 1234, 1242 (11th Cir. 2006).

Finally, the Sixth's Circuit view of *Segal* is somewhat less clear. In *In re Underhill*, the court noted that "most courts apply *Segal*…which defined pre-petition assets under a previous version of the Code as those 'sufficiently rooted in the pre-bankruptcy past' of the debtor—to the current version of the Code." 579 F. App'x 480, 482 (6th Cir. 2014). However, the court appeared to place an additional condition on the "sufficiently rooted" test in concluding that prepetition conduct alone is insufficient to root a debtor's cause of action in the prepetition past. *Id.* Rather, a prepetition injury is also required. *Id.* The Sixth Circuit's modified "sufficiently rooted" standard thus adds a third test for determining whether certain property belongs to the bankruptcy estate or the post-petition debtor.

C. *Segal* Has Been Superseded by § 541(a)(1).

In *Goff*, the Fifth Circuit identified the origin of the Court's holding in *Segal* that estate property under the Bankruptcy Act included property that "is sufficiently rooted in pre-bankruptcy past and so little entangled with the bankrupts' ability to make an unencumbered fresh start." *Goff* at 578 (internal quotations omitted) (citing *Segal*, at 380). The requirement that estate property must be "sufficiently rooted" and not "so little entangled" served two important, but at times competing interests

of the Bankruptcy Act: securing "for the benefit of creditors everything of value the bankrupt might possess in alienable or leviable form, but to permit a bankrupt to accumulate new wealth after the date of his petition and to allow him an unencumbered fresh start." *Id.* This two-prong inquiry created an "analytical conundrum" which resulted in "a complicated melange of references to State law, and [did] little to further the bankruptcy policy of distribution of the debtor's property to his creditor in satisfaction of his debts." *Id.* (citing H.R. Rep. No. 95-595 (1977). "The enactment of the Bankruptcy Code undertook to obviate this analytical conundrum [and] to remedy much of the old Act's perceived deficiencies[.]" *Id.* Because § 541's broad definition replaced § 70a's relatively restrictive definition, the Court-created test under *Segal* became superfluous.

A review of those cases holding that *Segal* remains valid following the enactment of the Bankruptcy Code supports this conclusion. Most notably, both *Meyers* and *Barowsky* held that post-petition tax refunds attributable to prepetition activity were property of the estate. Without *Segal*, this would not have been true under § 70a (5). However, without reference to *Segal*, this remains true under § 541(a) as the debtors in the aforementioned cases each had accrued a legal right to seek tax refunds prior to the commencement of their respective bankruptcy cases. Indeed, the legislative history of § 541 does not show that it is a codification of *Segal*, as some circuits claim, but only that the result in *Segal* would be the same under the new section in cases similarly involving tax refunds.

D. The Dissent Further Shows That *Segal* Was Superseded by Statute & the Majority Opinion Misapplied the Law.

The dissenting opinion below argued that the majority erred in its application of *Segal* by concluding "that potential lawsuits that may or may not come into existence in the future" such as the WICP Action are nonetheless property of the bankruptcy estate when those actions are sufficiently rooted in prepetition conduct. In so arguing, the dissent contrasts this case with other Ninth Circuit decisions holding that a contingent, but nevertheless cognizable, legal interest that arose pre-petition was property of the estate. Again, the dissent asserts that the majority misapplied *Segal*. But in actuality, the dissent argues unintentionally that property interests are now governed by § 541(a) without reference to *Segal*, and that under that provision, the WICP Action was not estate property, as it had not accrued as of the commencement of the bankruptcy case.

In examining causes of action as property, the federal courts look to state law to establish the elements of a claim and when it accrues. *Cusano v. Klein*, 264 F.3d 936, 947 (9th Cir. 2011). Only if the WICP Action existed could Petitioner have an obligation to disclose it so that the Confirmed Plan and Settlement Order could govern the claims. *See id.* ("generally, a debtor has no duty to schedule a cause of action that did not accrue prior to bankruptcy.").

The WICP Action indisputably did not exist during the bankruptcy. As the Majority acknowledged, under Arizona law, "WVSV could not have sued 10K for WICP until 2019." Pet. App. A at p. 3a & 5a (noting that winning

the underlying case is a "condition" of a WICP claim). Petitioner could not have filed the WICP Action earlier because "an essential element of a malicious prosecution claim is that the proceedings must have terminated in favor of the person against whom they were brought." *Nataros v. Superior Ct. of Maricopa Cnty.*, 557 P.2d 1055, 1057 (Ariz. 1976) (en banc). As the Dissent correctly points out, until a favorable termination in the underlying lawsuit, "there [is] no cause of action." (Pet. App. A at p. 8a, *citing Nataros* at 1057.)

Even the Respondents acknowledged, in their jurisdictional briefing in the Bankruptcy Court, the WICP Action "was not ripe until final disposition of the State Court Litigation." Because a WICP claim requires a successful resolution on the merits—something that did not occur until years after the Confirmed Plan and Settlement Order—Petitioner's claims arose post-confirmation and were not property of the bankruptcy estate. That conclusion aligns with the Ninth Circuit's reasoning in *Cusano*. As the Dissent states, "[u]nder our controlling decision in *Cusano*, that [accrual of the claim in January 2019 following favorable termination] means that WVSV had no obligation to list these claims on its initial disclosure schedules." Pet. App. A at p. 9a. As the Dissent also notes, the Majority's decision is contrary to "an overwhelming body of precedent that has explicitly rejected the view that unaccrued malicious prosecution claims belong to the bankruptcy estate" thus causing a split among the courts. Pet. App. A at p. 11a-12a, *citing McAtee v. Morrison & Frampton, PLLP*, 512 P.3d 235, 239 (Mont. 2021), *Vojnovic v. Brants*, 612 S.E.2d 621, 624 (Ga. Ct. App. 2005), *Jenkins v. A.T. Massey Coal Co.* (*In re Jenkins*), 410 B.R. 182, 193-194 (Bankr. W.D. Va. 2008),

Carroll v. Henry Cnty., 336 B.R. 578, 584 (N.D. Ga. 2006), *Brunswick Bank & Trust Co.* (*In re Atanasov*), 221 B.R. 113, 117 (D.N.J. 1998)); *see also Johnson v. Mitchell*, No. CIV S-10-1968 GEB, 2011 WL 1586069, at *7 (E.D. Cal. Apr. 25, 2011), report and recommendation adopted, No. CIV S-10-1968 GEB, 2011 WL 2259408 (E.D. Cal. June 7, 2011)).

Despite clear Arizona law that Petitioner had no claim to assert during the bankruptcy, the majority nevertheless found that Petitioner should have listed the WICP Action on its schedules because the claims were contingent property "sufficiently rooted in the pre-bankruptcy past," citing to *Segal v. Rochelle*, 382 U.S. 375, 380 (1966). Pet. App. A at p. 5a, The Ninth Circuit reasoned that in deciding whether to treat post-petition claims as estate property, "the Supreme Court has instructed us to determine whether such claims are 'sufficiently rooted in the pre-bankruptcy past.'" *Id.* This Court should reject the Ninth Circuit's reasoning and adopt the approach of the Fifth, Eighth and Eleventh Circuits, who have each rejected *Segal*"s viability following the enactment of the Bankruptcy Code. Under their conclusion that *Segal* has been superseded by § 541(a), a claim for WICP—which indisputably did not exist prepetition—cannot subsequently become property of the bankruptcy estate simply because it has some roots in the pre-bankruptcy past. Under the approach of the Fifth, Eighth and Eleventh Circuits, the WICP Action at issue here is not property of the bankruptcy estate as it did not exist until after confirmation of the bankruptcy plan. Neither the right to bring the WICP Action nor the possibility that such a claim might shortly arise was in existence 'at the commencement' of Petitioner's bankruptcy case within the

meaning of § 541(a). Therefore, the Ninth Circuit erred in applying the "sufficiently rooted" test of *Segal* to the WICP Action as it broadened the scope of § 541(a) beyond its clear language.

The Majority states that potential lawsuits that may or may not come into existence are no more or less contingent than success in a lawsuit that has come into existence. Pet. App. A at p. 5a-6a. But as the Dissent correctly notes, the Majority applied a "novel" rule that "overlooks" a "critical difference" between the contingent claims in *Segal* and *Jess v. Carey (In re Jess),* 169 F.3d 1204 (9th Cir. 1999), and the WICP Action at issue here. Pet. App. A at p. 11a. Specifically, the Dissent correctly notes that the contingency here determines whether any cause of action will ever exist at all—not just its ultimate value. Pet. App. A at p. 11a. In other words, the Majority holds that a debtor must list as property of the estate all possible causes of action that are based, in part, on pre-petition facts even if those causes of action might never come into existence. Such a rule is contrary to *Cusano* and not a sound rule of bankruptcy law.

If the Majority's decision is allowed to stand, not only does it expand the scope of § 541(a) beyond its clear language, but it also establishes a rule that encourages the assertion of disfavored claims that might never come into existence. Under the Majority's decision, any debtor that is involved in defending existing or pending litigation that it believes lacks merit must list a potential WICP/malicious prosecution claim in its schedules. Otherwise, the debtor risks being estopped from asserting such a claim if it ever comes into existence in the future. Such a rule thus encourages the assertion of malicious prosecution

claims—claims which are disfavored in the law. *See Frolich v. Miles Lab'ys, Inc.*, 316 F.2d 87, 89 (9th Cir. 1963) (actions for malicious prosecution are a disfavored action, for reasons of public policy); *Est. of Tucker ex rel. Tucker v. Interscope Recs., Inc.*, 515 F.3d 1019, 1030 (9th Cir. 2008) (under California law, a malicious prosecution claim is disfavored); *In re Jenkins*, 410 B.R. 182, 187 (Bankr. W.D. Va. 2008) (malicious prosecution claim disfavored by the West Virginia courts); *In re Trammell*, 388 B.R. 182, 193 (Bankr. E.D. Va. 2008) (malicious prosecution cases disfavored in Virginia). The premature assertion of such disfavored claims will likely have ramifications beyond just the debtor. If a debtor lists a possible WICP claim on its schedules—to avoid the risk of a future estoppel finding—the plaintiff and the attorney representing the plaintiff in the underlying case face reputational risk. And the attorney might have an obligation to put its insurance carrier on notice of the claim—triggering unintended consequences like an increase in rates and responding to an investigation by the carrier.

Also, the new rule as articulated by the Majority is not only limited to unaccrued WICP/malicious prosecution claims. Virtually all causes of action have multiple essential elements. Under the reasoning by the Majority, any possible cause of action based, in part, on pre-petition facts must be listed as a contingent asset if there is any future event that could potentially complete the cause of action. For example, under the Majority's new rule, the debtor has a possible breach of contract claim under every pre-petition contract to which it is a party—with the only contingency being whether the counterparty commits a breach in the future. Under the Majority's rationale, the debtor must assert that possible future claim even though

it has no idea whether it will ever exist or not. Another example is possible, but unaccrued, malpractice claims. *See Glaze v. Larsen*, 207 Ariz. 26, 29, 83 P.3d 26, 29 (2004) (tort claim for legal malpractice accrues when (1) the plaintiff knows or reasonably should know of the attorney's negligent conduct; and (2) the plaintiff's damages are ascertainable, and not speculative or contingent); *Amfac Distribution Corp. v. Miller*, 138 Ariz. 155, 156, 673 P.2d 795, 796 (Ct. App.), approved as supplemented, 138 Ariz. 152, 673 P.2d 792 (1983) (because one of the essential elements of a claim for negligence—injury to the plaintiff—cannot be known in a claim for malpractice in litigation until the litigation is complete, the claim cannot accrue until after the judgment becomes final, that is upon the final appellate decision or the expiration of any available appeals period). Under the Majority's new rule, a debtor must identify a potential malpractice claim where the negligence occurred pre-petition even if the debtor has not been damaged and might never be damaged. The Majority's expansive rationale of what constitutes a "contingent" cause of action will result in debtor's schedules simply listing a whole host of speculative claims in which some of the elements of the claim may be rooted in the pre-bankruptcy past, but with none having actually accrued.

In *In re Jenkins*, the bankruptcy court analyzed whether an unaccrued malicious prosecution claim was property of the bankruptcy estate, and in determining it was not, concluded the Court could not "support any position which would bring into the bankruptcy estate causes of action not existing as of the commencement of the case." 410 B.R. at 194. In direct contrast, the Ninth Circuit's decision in this case would open the flood gates

to debtors disclosing any number of potential – but not yet existing – claims on their bankruptcy schedules as contingent assets for fear of being barred from bringing the claim should it ever come to fruition. This Court should not allow the Ninth Circuit's decision establishing such a rule to stand.

II. The Court Below Erred in Affirming the Bankruptcy Court's Improper Jurisdiction Over the WICP Action.

A bankruptcy court's post-confirmation jurisdiction is limited to enforcing the provisions of a confirmed chapter 11 plan. *Hillis Motors, Inc. v. Hawaii Auto Dealers' Ass'n*, 997 F.2d 581, 587 at n.11 (9th Cir. 1993). Here, WVSP's confirmed plan expressly provided that the ongoing state court litigation with Respondents would continue in state court post-confirmation. Recognizing this provision, the bankruptcy court itself concluded that it lacked jurisdiction over the WICP Action. The bankruptcy court then seemingly contradicted itself by concluding that it nonetheless had continuing jurisdiction to interpret the plan including consideration of whether the WICP Action was property of the estate. However, whether that action was estate property was subsidiary to Respondents' judicial estoppel defense. Once the bankruptcy court admitted that it lacked jurisdiction to consider the WICP Action, no further inquiry was necessary or authorized under the debtor's confirmed plan or under 28 U.S.C. § 1334(b).

The Ninth Circuit affirmed based on the bankruptcy court's general jurisdiction under 28 U.S.C. § 1334(b) but without reference to the relevant plan provision regarding

post-confirmation state court litigation. This despite the court's statement that it had taken a "holistic look at the whole picture." Thus, the decision was clearly erroneous as a matter of fact and law.

Because a bankruptcy court's exercise of jurisdiction implicates constitutional considerations, the Court should grant the Petition.

III. The Court Below Incorrectly Concluded That the Bankruptcy Court Did Not Abuse Its Discretion by Dismissing the WICP Action.

In *New Hampshire v. Maine*, the Court identified several factors to be weighed before applying the doctrine of collateral estoppel including whether a party's later position is clearly inconsistent with is prior position and whether that inconsistent position resulted in an unfair disadvantage to the opposing party. 532 U.S. 742, 750 (2001). Apparently relying on its own decision in *Ah Quin v. Cty. of Kauai DOT*, 733 F.3d 267, 271 (9th Cir. 2013) – in which the court noted its default rule that if a "plaintiff-debtor omits a pending (or soon-to-be-filed) lawsuit from the bankruptcy schedules and obtains a discharge (or plan confirmation), judicial estoppel bars the action – the court below did not consider any of the factors set forth in *New Hampshire v. Maine*. Instead, the Majority simply concluded that because the WICP Action was estate property, the bankruptcy court did not abuse its discretion. As set forth, in *New Hampshire v. Maine*, however, courts should not rely on bright line default rules but must consider the facts on a case-by-case basis:

> In enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts.

532 U.S. at 751.

As the Dissent notes, Petitioner did not make a representation in the bankruptcy that was inconsistent with its later assertion of the WICP Action. Pet. App. A at p. 9a. Petitioner could not have disclosed its WICP Action against Respondents in the manner and at the times the District Court found it should have. The District Court found Petitioner failed to disclose its potential claims against Respondents when it marked "none" on its Schedule B and Amended Schedule B, which required Petitioner to list all assets, including "[o]ther contingent and unliquidated claims of every nature." However, Petitioner's Schedule B was filed on May 14, 2012 and its Amended Schedule B was filed on May 22, 2012. Respondents did not file their claim, which later formed the basis of Petitioner's WICP Action, until November 1, 2013 (it had been asserted previously but was dismissed 10-years prior in 2003). In 2012, Petitioner could not have disclosed a claim for wrongful institution of civil proceedings against Respondents for the pursuit of a wrongful claim that Respondents had not even asserted yet.

Petitioner's WICP Action was not covered by any of the categories listed in Schedule B – they were not "unliquidated claims" (because they were not "claims"

at all), Petitioner had no right to a set off, and Petitioner could not assert the claims as counterclaims in the pending state court litigation (because the litigation had to first conclude in Petitioner's favor for the WICP claims to exist). Marking "none" on Schedule B and the Amended Schedule B is not inconsistent with the WICP Action that Petitioner later asserted. Petitioner did not omit "a pending (or soon-to-be-filed) lawsuit" from its bankruptcy schedules since the WICP Action did not come into existence until and full five years after the Plan Confirmation in 2014.

Petitioner established that its claims arose post-confirmation and therefore were not property of the bankruptcy estate. Although Petitioner's claims arose post-confirmation, Petitioner nevertheless disclosed its *potential* claims against Respondents as best it could with the information it had at the time. As far back as the initial Debtor's Plan of Reorganization and the Disclosure Statement (both filed on September 11, 2012), Petitioner disclosed potential claims to be preserved for future prosecution/collection. The Disclosure Statement lists "Preserved Claims" as follows: "The Parties are referred to §8.9 of the Plan for a description of the claims which are being preserved for future prosecution/collection." The Debtor's Plan for Reorganization then states at §8.9, "…The debtor specifically preserves any and all claims against Robert Burns, Phoenix Holdings II, LLC, Brent Hickey, and/or Breycliffe, LLC…The debtor also preserves any and all claims available to it against 10K, LLC and its members, including but not limited to recovery of the amounts due the debtor if 10K, LLC is successful on its claims for rescission." Petitioner repeats that same statement in its later amended plans and amended disclosures. Judicial estoppel does not apply. *See*

Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 783 (9th Cir. 2001) (in bankruptcy context, party is judicially estopped from asserting cause of action not raised in reorganization plan or otherwise mentioned in debtor's schedules or disclosure statements) (emphasis added). The language used in Petitioner's Plans of Reorganization and Disclosure Statements preserving any and all claims available against Respondents, the broad preservation language used in the Amended Order Confirming Creditor's First Amended Plan of Reorganization, and Petitioner's election of Option A pursuant to the Creditor's First Amended Plan of Reorganization (which stated the Debtor's alleged claims against Respondents were to be resolved in state court as opposed to Option B which required Debtor to "fully and finally release any and all claims it may have against 10K or its members"), all demonstrate Petitioner's intent to preserve any potential claims it had against Respondents. Petitioner never intended or attempted to conceal its potential claims and did not release or disavow its potential claims against Respondents in the bankruptcy case, nor made any assertions or assurances that it would not pursue such claims.

The application of judicial estoppel fails because the WICP Action was not clearly inconsistent with Petitioner's earlier position in the bankruptcy disclosing and preserving potential claims against Respondents. There was no judicial acceptance of a prior inconsistent position made by Petitioner. Judicial estoppel "is inapplicable unless the inconsistent statement was actually adopted by the court in the earlier litigation; only in that situation, according to those circuits, is there a risk of inconsistent results and a threat to the integrity of the judicial process." *Morris v.*

California, 966 F.2d 448, 452 (9th Cir 1992) (noting that the majority of the circuits adhere to this view); *Ah Quin v. Cty. of Kauai Dep't of Transp.*, 733 F.3d 267, 270 (9th Cir. 2013) (noting that the first factor is "whether the positions taken before the bankruptcy court and the court asked to apply the doctrine are 'clearly inconsistent'" i.e., explicit indications by the court that 'a claim does not exist vs. a claim does exist.'"). The application of judicial estoppel has been restricted to cases where the court relied on, or "accepted," the party's previous inconsistent position. *See Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 784 (9th Cir. 2001).

The statements made in the bankruptcy case relevant to potential claims between Petitioner and Respondents indicate the bankruptcy court accepted the parties' attempts to preserve any and all claims. Judicial estoppel is reserved for more egregious conduct than just threshold inconsistency. *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1133 (9th Cir. 2012); *see also Gen. Signal Corp. v. MCI Telecom. Corp.*, 66 F.3d 1500, 1505 (9th Cir. 1995). Petitioner did not take an inconsistent position in the bankruptcy proceedings, let alone actually obtain judicial relief resulting from that position. Therefore, the Majority's decision should not be allowed to stand.

Moreover, there is a circuit split concerning whether dismissal on grounds of judicial estoppel should be reviewed *de novo*, *see Lia v. Saporito*, 541 F. App'x 71, 72 n.1 (2d Cir. 2013); *Solomon v. Vilsack*, 628 F.3d 555, 561, 393 U.S. App. D.C. 327 (D.C. Cir. 2010); *Lorillard Tobacco Co. v. Chester, Willcox & Saxbe*, 546 F.3d 752, 757 (6th Cir. 2008), or for abuse of discretion, *see Queen v. TA Operating, LLC,* 734 F.3d 1081 (10th Cir. 2013);

Ah Quin at 267 (9th Cir. 2013); *Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785, 795 (7th Cir. 2013); *Rockwood v. SKF USA Inc.*, 687 F.3d 1, 10 (1st Cir. 2012); *In re Oparaji*, 698 F.3d 231, 235 (5th Cir. 2012); *Capella Univ., Inc. v. Exec. Risk Specialty Ins. Co.*, 617 F.3d 1040, 1051 (8th Cir. 2010); *In re Kane*, 628 F.3d 631, 636 (3d Cir. 2010); *Stephens v. Tolbert*, 471 F.3d 1173, 1175 (11th Cir. 2006).

Because the court below erred in applying *New Hampshire v. Maine* and because there is a circuit split concerning the proper standard of appellate review concerning the application of the doctrine of judicial estoppel, review of this case is warranted.

CONCLUSION

Based on the foregoing, this Petition should be granted.

Respectfully submitted December ____, 2023.

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED AUGUST 29, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-16874

D.C. No. 2:20-cv-01927-JJT

IN RE: WVSV HOLDINGS, LLC,

Debtor,

WVSV HOLDINGS, LLC,

Plaintiff-Appellant,

v.

10K, LLC; LEO R. BEUS; ANNETTE BEUS; PAUL GILBERT; SUSAN GILBERT; RANDY STOLWORTHY; KARI STOLWORTHY,

Defendants-Appellees.

No. 21-16952

D.C. No. 2:20-cv-01927-JJT

IN RE: WVSV HOLDINGS, LLC,

Plaintiff-Appellee,

v.

Appendix A

10K, LLC; LEO R. BEUS; ANNETTE BEUS; PAUL GILBERT; SUSAN GILBERT; RANDY STOLWORTHY; KARI STOLWORTHY,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Arizona
John Joseph Tuchi, District Judge, Presiding

Argued and Submitted November 16, 2022
Phoenix, Arizona

Before: BYBEE, OWENS, and COLLINS, Circuit Judges.
Dissent by Judge COLLINS.

MEMORANDUM[*]

This case is the latest in a protracted litigation between two real-estate companies over a 13,000-acre tract in Arizona. Defendant 10K, LLC contracted to sell the land in 2002. The deal collapsed, and 10K's manager—a separate firm—sold the plot to Plaintiff WVSV Holdings, LLC. 10K's members challenged that sale in state court, precipitating a 16-year quagmire. In 2012, nine years after the inception of 10K's suit, WVSV filed Chapter 11 bankruptcy. 10K was by far its largest creditor. WVSV's reorganization plan was confirmed two years later, providing in part for the preservation of "all claims of 10K against the Debtor . . . [and vice versa] brought in the State Court Litigation."

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

Appendix A

In 2019, judgment was entered for WVSV on the land sale. A little over a year later, it sued Defendants in state court, claiming, *inter alia*, wrongful institution of civil proceedings ("WICP").[1] WVSV asserted that 10K's members, indignant over losing the contract, embroiled it in a decade and a half of sham litigation. Since Arizona law makes winning the wrongful suit a condition of pleading WICP, WVSV's 2020 action was the earliest that it could file. *Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 758 P.2d 1313, 1319 (Ariz. 1988). Defendants removed to bankruptcy court, 28 U.S.C. § 1452, and sought dismissal and attorneys' fees. Claiming jurisdiction to determine whether WVSV's suit flouted its confirmed plan, the bankruptcy court held that it did, dismissed, and awarded Defendants their fees. WVSV appealed to the district court, which affirmed the dismissal but reversed the fee award. Both sides cross-appeal from that judgment. We have jurisdiction under 28 U.S.C. § 158(d) and affirm.

1. Based on its authority to interpret WVSV's plan, the bankruptcy court asserted jurisdiction to verify whether the WICP claim was property of the estate, which should have been scheduled as an asset and was now waived. Reviewing de novo, we agree. "Bankruptcy courts have subject matter jurisdiction over proceedings 'arising under title 11 . . . or related to cases under title 11.'" *Wilshire Courtyard v. Cal. Franchise Tax Bd.* (*In*

1. WVSV's complaint also includes two declaratory relief claims (which the parties jointly move to dismiss, and which we grant); a slander of title claim (absent from its opening brief, and which we deem waived); and a claim for aiding and abetting tortious conduct. The latter claim rests on WICP, so we analyze both together.

re Wilshire Courtyard), 729 F.3d 1279, 1285 (9th Cir. 2013) (quoting 28 U.S.C. § 1334(b)). In determining whether a *post-confirmation* proceeding is sufficiently "related to" a bankruptcy case to confer jurisdiction, we ask if it "affect[s] the interpretation, implementation, consummation, execution, or administration of the confirmed plan." *Id.* at 1289 (citation omitted) (alteration in original).

Here, as the bankruptcy court explained, the central issues are whether WVSV's WICP claim was property of the estate and, if so, whether failure to schedule it operates as a waiver. These issues raise a "substantial question of bankruptcy law" that "requir[es] interpretation of the confirmed plan" and a determination of what constitutes "property" under the Bankruptcy Code. *Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733, 762 (9th Cir. 2022) (citation omitted). Considering these factors and taking a "holistic look at 'the whole picture,'" we hold that the bankruptcy court had jurisdiction under Section 1334(b) to decide the limited issues that it did. *Id.* (quoting *Wilshire Courtyard*, 729 F.3d at 1289).

2. That brings us to the merits. "We review *de novo* the district court's decision on appeal from a bankruptcy court," *United States v. Warfield* (*In re Tillman*), 53 F.4th 1160, 1166 (9th Cir. 2022), and the bankruptcy court's application of judicial estoppel for abuse of discretion, *Ah Quin v. Cnty. of Kauai Dep't of Transp.*, 733 F.3d 267, 270 (9th Cir. 2013). The bankruptcy court abuses its discretion if, *inter alia*, it applies the wrong legal standard. *Id.* We find the bankruptcy court did not err in defining estate property as it did and so affirm.

Appendix A

Determining what qualifies as property for bankruptcy purposes requires navigating a delicate intersection of state and federal law. "Property interests are created and defined by state law." *Butner v. United States*, 440 U.S. 48, 55, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979). Thus, in examining causes of action as property, we have "look[ed] to state law" to establish the elements of a claim and when it accrues. *Cusano v. Klein*, 264 F.3d 936, 947 (9th Cir. 2001). But that is not the whole story. "[The] definition of property of the estate has been broadly construed to encompass a debtor's contingent interest . . ., even if that interest is reliant on future contingencies that have not occurred as of the filing date." *Anderson v. Rainsdon* (*In re Anderson*), 572 B.R. 743, 747 (B.A.P. 9th Cir. 2017). To decide whether to treat post-petition claims as estate property, the Supreme Court has instructed us to determine whether such claims are "sufficiently rooted in the pre-bankruptcy past." *Segal v. Rochelle*, 382 U.S. 375, 380, 86 S. Ct. 511, 15 L. Ed. 2d 428 (1966); *see also Jess v. Carey* (*In re Jess*), 169 F.3d 1204, 1208 (9th Cir. 1999).

Under Arizona law, WVSV could not have sued 10K for WICP until 2019. *Frey v. Stoneman*, 150 Ariz. 106, 722 P.2d 274, 278 (Ariz. 1986). At that point, WVSV could assert all the elements of WICP, including a favorable judgment in the allegedly abusive litigation. But it is a question of bankruptcy law whether the unmatured claim was "sufficiently rooted" in pre-petition events to come into the estate. *Segal*, 382 U.S. at 380. We think that it was. At its bankruptcy, WVSV had satisfied all conditions to plead WICP, save for victory in the predicate suit. The conduct yielding this claim had been known to WVSV for a decade. And even if the state-court suit *had*

terminated in its favor before the petition, the resulting WICP claim would still have depended on winning some future action. The unmatured claim that WVSV knew of, no different from the counterfactual matured claim, was a contingent interest. Under Section 541, it should have been disclosed on WVSV's schedules. Based on its sound finding that WVSV's WICP claim was estate property, the bankruptcy court did not abuse its discretion by holding the unscheduled claim waived. *Ah Quin*, 733 F.3d at 271.

3. Finally, we agree with the district court that the bankruptcy court abused its discretion in granting 10K attorneys' fees. The award was granted under Ariz. Rev. Stat. § 12-341.01(A), which allows the victor to obtain fees in "any . . . action arising out of a contract." Here, 10K argues that the relevant contract was the land sale to WVSV. But the basis for the WICP claim sounded in tort, not contract. WVSV's claim was based on 10K's litigation conduct, and the Supreme Court of Arizona has held it is insufficient for Section 12-341.01(A) purposes that a contract exists "somewhere in the transaction." *Marcus v. Fox*, 150 Ariz. 333, 723 P.2d 682, 684 (Ariz. 1986). Since the bankruptcy court's fee award rested on an erroneous reading of Arizona law, it was properly reversed by the district court.

AFFIRMED.

COLLINS, Circuit Judge, dissenting:

I agree with the majority that, under the applicable "close nexus" test, *see Wilshire Courtyard v. Cal. Franchise Tax Bd.* (*In re Wilshire Courtyard*), 729 F.3d 1279, 1287 (9th Cir. 2013), the bankruptcy court properly exercised jurisdiction to decide the limited issues that it did. But I disagree with the majority's resolution of the merits of those issues.

The central question is whether WVSV Holdings, LLC ("WVSV") is barred from asserting its state law claim for "wrongful institution of civil proceedings" against Defendants due to the fact that no such claim was listed in WVSV's schedules during its bankruptcy proceedings. The answer to that question is no.

Ordinarily, "[i]f a plaintiff-debtor omits a pending (or soon-to-be filed) lawsuit from the bankruptcy schedules and obtains a discharge (or plan confirmation), judicial estoppel bars the action." *Ah Quin v. County of Kauai Dep't of Transp.*, 733 F.3d 267, 271 (9th Cir. 2013). However, "generally, a debtor has no duty to schedule a cause of action that did not accrue prior to bankruptcy." *Cusano v. Klein*, 264 F.3d 936, 947 (9th Cir. 2001); *see also* 11 U.S.C. § 541(a)(1) (stating that the estate's property generally includes, *inter alia*, "all legal or equitable interests of the debtor in property as of the commencement of the [bankruptcy] case"). "To determine when a cause of action accrues, we look to state law." *Cusano*, 264 F.3d at 947; *see also Butner v. United States*, 440 U.S. 48, 55, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979) (holding that, for bankruptcy

purposes, "[p]roperty interests are created and defined by state law"). In examining state law for this purpose, what matters is when "accrual has occurred for purposes of ownership," and not when the statute of limitations begins to run under "principles of discovery and tolling." *Cusano*, 264 F.3d at 947.

Only two claims in WVSV's removed complaint remain relevant here—WVSV's claim for "wrongful institution of civil proceedings" and its claim for aiding and abetting tortious conduct. *See* Mem. Dispo. at 2 n.1. A claim for "wrongful institution of civil proceedings" is the more technical name for a "malicious prosecution" claim based on an underlying civil matter, and for simplicity and convenience, I will use the latter term. *See Giles v. Hill Lewis Marce*, 195 Ariz. 358, 988 P.2d 143, 145 n.1 (Ariz. Ct. App. 1999). As WVSV notes in its opening brief, its aiding and abetting claim is predicated on its malicious prosecution claim, and the accrual of the former claim therefore turns on the accrual of the latter claim.

Under Arizona law, "an essential element of a malicious prosecution claim is that the proceedings must have terminated in favor of the person against whom they were brought." *Nataros v. Superior Ct. of Maricopa Cnty.*, 113 Ariz. 498, 557 P.2d 1055, 1057 (Ariz. 1976) (en banc) (footnote omitted). Accordingly, a "malicious prosecution claim accrues when the prior proceedings have terminated in the defendant's favor." *Id.* Prior to that point, "there [is] no cause of action." *Id.* In this case, the relevant "prior proceedings" that are the subject of WVSV's malicious prosecution claim did not terminate in WVSV's favor until

the mandate was issued in January 2019 with respect to the November 2018 final decision of the Arizona Court of Appeals. *See 10K, LLC v. WVSV Holdings, LLC*, 2018 WL 5904513 (Ariz. Ct. App. 2018). Thus, under Arizona law, the earliest that WVSV possessed its chose in action for malicious prosecution (and its related action for aiding and abetting) was January 2019.

The majority does not—and cannot—dispute that, under Arizona law, WVSV did not have any cause of action prior to January 2019. It follows from that premise that "accrual . . . occurred for purposes of ownership" in January 2019. *Cusano*, 264 F.3d at 947. Under our controlling decision in *Cusano*, that means that WVSV had no obligation to list these claims on its initial disclosure schedules. *Id.* And because these causes of action did not exist until well after WVSV's plan was confirmed, it is of no consequence that WVSV did not amend its schedules to list such claims prior to the confirmation of the plan. Moreover, it follows that, in not listing these claims in its disclosure schedules, WVSV did not make a representation that is inconsistent with its current assertion of the claims. There is thus no ground for finding that WVSV is judicially estopped on that basis, *see New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001), and the bankruptcy court abused its discretion in concluding otherwise. And, for the same reason, the bankruptcy court erred in holding that WVSV is limited to those claims that were preserved in the terms of the confirmation order.

The majority disregards our decision in *Cusano*, which requires us to give controlling weight to Arizona law on

this point, and instead relies on a novel, overriding rule of federal bankruptcy law that the majority erroneously derives from *Segal v. Rochelle*, 382 U.S. 375, 86 S. Ct. 511, 15 L. Ed. 2d 428 (1966). *Segal* recognized that there may be certain "interests" that, while still contingent in some respects at the time of the bankruptcy petition, are "sufficiently rooted in the pre-bankruptcy past" to count as "property" of the bankruptcy estate at the time of the bankruptcy petition. *Id.* at 380. But nothing in *Segal* or in our other cases applying it authorizes us to do what the majority has done here, which is to recognize, under federal law, property interests that simply do not exist under state law. *See id.* (holding that debtor's interest in tax refunds was "property" of estate even though refunds could not be claimed "until the end of the year," after the petition was filed; the core facts creating a contingent entitlement to the refunds had occurred before bankruptcy); *Jess v. Carey* (*In re Jess*), 169 F.3d 1204, 1207-08 (9th Cir. 1999) (holding that attorney's interest in contingency fees for pre-petition work was a property interest because it was rooted in contract rights that had value on the day the petition was filed); *Rau v. Ryerson* (*In re Ryerson*), 739 F.2d 1423, 1425 & n.1 (9th Cir. 1984) (holding that insurance district manager's contractual right to "accumulated value to which he was entitled upon termination or cancellation" of his appointment was "property" as of the filing of the bankruptcy petition; although termination occurred later, the contractual right had value and, in addition, "termination or cancellation of the appointment is an event certain to occur" at some point).

The majority contends that, under *Segal*, potential lawsuits that may or may not come into existence in the future are no more contingent or uncertain than *success* in a lawsuit that *has* come into existence. *See* Mem. Dispo. at 5-6. But the majority's analogy overlooks what, under *Cusano*, is a critical difference: the speculative future cause of action that has not yet accrued is not a property interest recognized under state law, while a cause of action that has accrued *is* a recognized property interest (despite the contingent risk and uncertainty as to its ultimate actual value). Here, the problem is not that the value of the property interest was contingent or uncertain at the filing of the petition; rather, it is that there was no property interest at all.

In addition to being contrary to *Cusano*, the majority's position is contrary to an overwhelming body of precedent that has explicitly rejected the view that unaccrued malicious prosecution claims belong to the bankruptcy estate. *See McAtee v. Morrison & Frampton, PLLP*, 2021 MT 227, 405 Mont. 269, 512 P.3d 235, 239 (Mont. 2021) (rejecting comparable judicial estoppel claim, holding that "McAtee's malicious prosecution claim, as premised on the civil fraud action, had not yet accrued at the time she filed her bankruptcy petition and cannot be deemed rooted in her pre-bankruptcy conduct"); *Vojnovic v. Brants*, 272 Ga. App. 475, 612 S.E.2d 621, 624 (Ga. Ct. App. 2005) (rejecting comparable judicial estoppel argument, because the debtor, who "filed for Chapter 7 bankruptcy on September 15, 1999," "did not have a viable malicious prosecution claim until January 2000, when the criminal case against her was ultimately dismissed"); *Jenkins v. A.T. Massey*

Coal Co. (*In re Jenkins*), 410 B.R. 182, 193-94 (Bankr. W.D. Va. 2008) (rejecting a comparable judicial estoppel claim with respect to a malicious prosecution action, holding that, "[u]ndoubtedly, the interests considered property of the estate are expansive under § 541; however, this Court cannot support any position which would bring into the bankruptcy estate causes of action not existing as of the commencement of the case"); *Carroll v. Henry Cnty.*, 336 B.R. 578, 584 (N.D. Ga. 2006) ("The plaintiff's state law claims for false arrest and malicious prosecution are, likewise, not barred by judicial estoppel since those causes of action did not accrue until the termination of his criminal trial."); *Brunswick Bank & Trust Co.* (*In re Atanasov*), 221 B.R. 113, 117 (D.N.J. 1998) ("In the current case, the indictment was dismissed on May 10, 1993. Accordingly, as the bankruptcy petition was filed on February 2, 1993, the cause of action for malicious prosecution arose post-petition. The claim—brought on May 9, 1995—simply was not an asset at the time the petition was filed. The analysis is that straightforward."). The one case cited by the parties that reaches a contrary conclusion, *Cole v. Pulley*, 18 Mass. App. Ct. 950, 468 N.E.2d 652 (Mass. App. Ct. 1984), is distinguishable, because it places dispositive weight on its state-law characterization of the "[s]uccessful termination" element of a malicious prosecution claim as being "in the nature of a threshold requirement" for filing suit and only "technically an element of the tort." *Id.* at 653. Arizona law does not follow that view: as explained earlier, Arizona law is clear that, prior to a successful termination of the predicate suit, "there [is] no cause of action" for malicious prosecution. *Nataros*, 557 P.2d at 1057.

Accordingly, I dissent from the majority's conclusion that federal law dictates that we deem a potential cause of action that does not yet exist under state law to be a "contingent interest" that, notwithstanding state law, counts as a sufficient property interest that must be listed on the debtor's schedules and that passes to the bankruptcy estate under § 541(a)(1) of the Bankruptcy Code.

Because in my view the claims at issue here were not property of the bankruptcy estate, there was no obligation for WVSV to list them on its disclosure schedules. And because there was no obligation to disclose the claims, judicial estoppel does not attach from the failure to do so. As a result, the bankruptcy court erred in holding that WVSV was barred from litigating its claims.

Because I would reverse the district court's judgment in favor of Defendants, I would dismiss as moot Defendants' cross-appeal regarding the district court's ruling on their request for attorneys' fees. *See Sutter Home Winery, Inc. v. Vintage Selections, Ltd.*, 971 F.2d 401, 409 (9th Cir. 1992). Under my resolution of the case, the limited jurisdiction that the bankruptcy court correctly asserted would be exhausted. I would then leave it to the district court to determine on remand whether the case should be remanded back to state court. Because the majority instead affirms the judgment, I respectfully dissent.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, FILED OCTOBER 19, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-20-01927-PHX-JJT

BK NO. 2:12-bk-10598-MCW

ADV NO. 2:20-ap-00060-MCW

IN THE MATTER OF:

WVSV HOLDINGS LLC,

Debtor.

WVSV HOLDINGS LLC,

Appellant,

v.

10K LLC, *et al.*,

Appellees.

October 19, 2021, Decided
October 19, 2021, Filed

Appendix B

ORDER

At issue is Appellant WVSV Holdings, LLC's Appeal (Doc. 15, "Appellant Opening Br.") of the United States Bankruptcy Court's Order dismissing Appellant's Complaint (Doc. 1). The Court also considered the Answering Briefs of Appellee 10K, LLC (Doc. 22, "10K Answering Br.") and individual Appellees Leo Beus, Annette Beus, Paul Gilbert, Susan Gilbert, Randy Stolworthy, and Kari Stolworthy (Doc. 21, "10K Members Answering Br."), as well WVSV's combined Reply (Doc. 29). For the following reasons, the Court will affirm the Bankruptcy Court's dismissal of WVSV's Complaint but reverse its award of attorney's fees.

I. BACKGROUND

This appeal arises from a dispute over 13,000 acres of real estate in the West Valley known as the Sun Valley Property. In June 2002, Appellee 10K LLC's ("10K") manager, Phoenix Holdings II, LLC ("PHII") improperly sold the Sun Valley Property to Breycliffe, LLC ("Breycliffe"). (WVSV's Excerpts of Record ("EOR") at 126-27 ¶¶ 22, 23.) The parties commenced litigation (the "State Court Litigation"), which is the nexus of the current dispute. The first round of the State Court litigation settled pursuant to the terms of the "2002 Breycliffe Agreement" on June 4, 2002. (EOR at 126 ¶ 22.) That same day, the Maricopa County Superior Court enjoined 10K to comply with the 2002 Breycliffe Agreement (the "Mangum Judgment"). Subsequently, PHII arranged the sale of Breycliffe's rights under the

2002 Breycliffe Agreement to WVSV and its principal, Conley Wolfswinkel. 10K objected to the sale and in May 2002, sued PHII, Breycliffe, WVSV, and Mr. Wolfswinkel seeking a declaration invalidating the 2002 Breycliffe Agreement and vacating the Mangnum Judgment (EOR at 131 ¶ 58.) The Superior Court dismissed 10K's suit in June 2003 and was affirmed in January 2005. *See Cal X-Tra v. W.V.S.V. Holdings, L.L.C.*, 229 Ariz. 377, 276 P.3d 11, 19, 20 (Ariz. App. 2012).

However, in 2008, the Superior Court vacated the 2003 dismissal of 10K's declaratory judgment claim based on new evidence that WVSV and others committed extrinsic fraud on the state court. *See Cal X-Tra*, 276 P.3d at 25. The Court of Appeals affirmed in April 2012. *See id.* at 32. This enabled 10K to reassert its declaratory judgment action against WVSV. However, prior to 10K filing an amended complaint in the State Court Litigation, WVSV filed for bankruptcy protection on May 14, 2012. (EOR at 27 ¶ 34.) 10K was the main creditor, holding a $45 million secured claim for the purchase of the Sun Valley Property as well as an unsecured claim for aiding and abetting against WVSV. As part of the bankruptcy proceeding WVSV filed a Schedule B requiring it to list its personal property. (10K's Supplemental Excerpts of Record ("SEOR") at 124-26.)

In November 2013, 10K filed a Third Amended Complaint in the State Court Litigation reasserting its declaratory judgment claim that was dismissed in 2003 and bringing additional tort claims against WVSV and Mr. Wolfswinkel. (EOR at 162-66 ¶¶ 129-142.)

Appendix B

On March 6, 2014, 10K and WVSV reached a settlement in the bankruptcy pursuant to the terms of the Settlement Term Sheet ("Settlement Agreement"). The Bankruptcy Court then entered an Amended Order (the "Confirmation Order") confirming 10K's First Amended Plan of Reorganization (the "Confirmed Plan" or "10K Plan"). The Confirmation Order incorporated the Settlement Agreement, which stated, "The 10K Plan, this Order and the documents incorporated herein are the controlling documents which govern the treatment of all creditors' claims." (EOR at 34 ¶ 20.)

In January 2017, the Superior Court found for 10K on multiple claims in the State Court Litigation for total damages of $225,031,215. It also vacated the Mangum Judgment due to extrinsic fraud. However, it denied 10K's request for declaratory judgment invalidating the 2002 Breycliffe Agreement. The Court of Appeals affirmed the decision on November 8, 2018. *10K, L.L.C. v. W.V.S.V. Holdings, L.L.C.*, No. 1 CA-CV 17-0155, 2018 Ariz. App. Unpub. LEXIS 1587, 2018 WL 5904513, at *13, 16 (Ariz. App. Nov. 8, 2018).

10K subsequently requested that the Bankruptcy Court implement the 10K Plan by compelling the sale of the Sun Valley property. Over WVSV's objection, the Bankruptcy Court agreed and entered an Order providing WVSV 20 months to market and sell the Property. (SEOR at 005, 032, 094.)

Rather than sell the property, WVSV filed a lawsuit against 10K for declaratory judgment to extend the

deadlines related to the sale of the Sun Valley Property, wrongful institution of civil proceedings ("WICP"), and slander of title. It also brought the WICP and slander of title claims as well as a fifth claim for aiding and abetting tortious conduct against individual Appellees Leo Beus, Paul Gilbert, and Randy Stolworthy as well as their spouses (the "10K Members"). The claims all arose from 10K's declaratory judgment action seeking to invalidate the 2002 Breycliffe Agreement in the State Court Litigation. WVSV had not previously asserted these claims in its Bankruptcy Schedules, Disclosures, or any other manner during the bankruptcy proceeding. (SEOR at 124-26.) Appellees removed the complaint to the Bankruptcy Court and filed a Motion to Dismiss based on judicial estoppel, equitable estoppel, and multiple other grounds. The Bankruptcy Court requested supplemental briefing on two issues: 1) whether the Court had jurisdiction over WVSV's claims; and 2) whether the 10K Plan intended WVSV's claims to be subsumed into the completed State Court Litigation. (SEOR at 116.)

After a full round of briefing and oral argument, United States Bankruptcy Judge Madeline C. Wanslee found that while the Bankruptcy Court did not have jurisdiction to decide WVSV's claims on the merits, it had continuing jurisdiction to interpret and implement the 10K Plan and thus determine whether WVSV waived its claims by not asserting them pre-confirmation. (EOR at 363:14-364:6.) The Bankruptcy Court reasoned that "any claim that relates to the actions of the parties in 2003 or any time before the May 14, 2012 bankruptcy filing date are included within the bankruptcy case because they're

property of the estate and they are, therefore, part of the Confirmation Order." (EOR at 361:6-10.) Accordingly, the Bankruptcy Court found that the claims should have been adjudicated as part of the 10K Plan. Because WVSV did not assert them pre-confirmation, the claims were waived. (EOR at 365-67.) In a later ruling, the Bankruptcy Court awarded 10K and the 10K Members attorney's fees. (EOR at 410-11.)

WVSV appealed, contending that the Bankruptcy Court erred by granting Appellees' motion to dismiss and awarding Appellees' their attorneys' fees and costs. WVSV sets forth four issues for this Court's review: Whether the Bankruptcy Court erred in: 1) granting Appellees' motion to dismiss and dismissing the adversary complaint in its entirety; 2) dismissing WVSV's claim for wrongful institution of civil proceedings; 3) dismissing the declaratory judgment and the aiding and abetting tortious conduct claims; 4) granting Appellees' their attorneys' fees and costs. Issues 1 through 3 implicate many of the same legal and factual questions.

II. LEGAL STANDARD

A party may appeal a Bankruptcy Court's Order to the District Court if the Order is final and binding. 28 U.S.C. § 158(a). An appellant may choose between a Bankruptcy Appellate Panel, if one exists in the Circuit, and a District Court to hear its appeal. 28 U.S.C. § 158(c). Thus, this Court has appellate jurisdiction to review all final and binding Orders issued by the Bankruptcy Court. In ultimately resolving the substance of the appeal, the

Court will review the Bankruptcy Court's conclusions of law *de novo*, its findings of fact under a clearly erroneous standard, and its interpretation of the 10K Plan for abuse of discretion. *See* Fed R. Bankr. P. 8013; *Wegner v. Murphy (In re Wegner)*, 839 F.2d 533, 536 (9th Cir. 1988) (citing *Pizza of Hawaii, Inc. v. Shakey's, Inc.* (*In re Pizza of Hawaii, Inc.*), 761 F.2d 1374, 1377 (9th Cir. 1985)); s*ee In re Alameda Investments, LLC*, 2014 Bankr. LEXIS 851, 2014 WL 868605, at *3 (B.A.P. 9th Cir. Mar. 5, 2014) ("The bankruptcy court's interpretation of the terms of a confirmed plan is, in essence, an interpretation of its own order, which we review under the abuse of discretion standard.").

III. ANALYSIS

A. Issues 1, 2, and 3

WVSV argues that the Bankruptcy Court made multiple errors in dismissing its claims. The Court will first address whether WVSV's claims were property of its estate arising out of pre-petition conduct. The answer to this question determines whether the Bankruptcy Court had jurisdiction to dismiss WVSV's claims and if so, whether it properly found that WVSV waived its claims by not asserting them pre-confirmation. Separately, WVSV argues that even if the Bankruptcy Court correctly dismissed the claims against 10K, it erred in dismissing the claims against the 10K Members.

Appendix B

1. The State Court Litigation Claims Arose Pre-petition and Were Property of Appellant

The Bankruptcy Court found that WVSV's claims were property of the bankruptcy estate. Specifically, it held:

> Any claim that relates to the actions of the parties in 2003 or any time before the May 14, 2012 bankruptcy filing date are included within the bankruptcy case because they're property of the estate and they are, therefore, part of the confirmation order...
>
> So this court holds that, to the extent that WVSV had any claims against 10K or 10K's members based on the state court litigation, they arose pre-petition and were included in the agreed-upon confirmed plan [10K Plan]. These claims were simply related to the pre-bankruptcy past and are, indeed, assets of the bankruptcy estate, property of the estate.

(EOR at 361:6-10, 366:19-24.) The Court will review these findings *de novo*. *Sierra Switchboard Co. v. Westinghouse Elec. Corp.*, 789 F.2d 705, 707 (9th Cir. 1986)

The Bankruptcy Code defines "claim" as "right to payment, whether or not such right is reduced to judgment, liquidated, *unliquidated*, fixed, *contingent*, matured, *unmatured*, [or] *disputed*..." (emphasis added).

11 U.S.C. § 101(5)(A). Its definition of "property" includes "all legal or equitable interests of the debtor in property as of the commencement of the case, proceeds... [and] profits of or from property of the estate, [as well as] "interest in property that the estate acquires after the commencement of the case." 11 U.S.C. §§ 541(a)(1), (6), (7). "The scope of section 541 is broad, and includes causes of action." *Sierra Switchboard Co*, 789 F.2d at 707. To determine whether a claim is property of the bankruptcy estate, courts ask whether the claims are "sufficiently rooted in the prebankruptcy past." *Segal v. Rochelle*, 382 U.S. 375, 380, 86 S. Ct. 511, 15 L. Ed. 2d 428 (1966).

Here, WVSV's claims arose from the pre-petition proceedings and thus are property under the Bankruptcy Code as well as Ninth Circuit caselaw. The WICP and declaratory judgment claims allege harm starting in 2003 from 10K's initial declaratory judgment claim to invalidate the 2002 Breycliffe Agreement. WVSV's WICP claim expressly identifies 10K's filing of the 2003 declaratory judgment action as the basis for its cause of action and alleges that it "tied-up WVSV's title to the Sun Valley Property for more than fifteen (15) years." (EOR at 90 ¶¶ 132-35.) Both claims for declaratory judgment sought extensions on a loan and Junior Trust deadlines based on "the 15 years that 10K wrongfully attempted to assert title to the Sun valley Property" through its pursuit of a civil claim to invalidate the 2002 Breycliffe Agreement. (EOR at 88-90.) Accordingly, each claim is sufficiently rooted in the prebankruptcy past and related to WVSV's legal or equitable interest in the Sun Valley Property. *Segal*, 382 U.S. at 380; s*ee Cox v. Old Republic Nat'l Title Ins. Co.*,

743 Fed. App'x. 104, 105 (9th Cir. 2018) (plaintiff's post-petition litigation claims against lender asserting that a loan was invalid or rescinded pre-petition were property of plaintiff since they were related to legal or equitable interest in real property).

WVSV argues that its WICP and declaratory judgment claims did not exist until the Court of Appeals affirmed the denial of 10K's declaratory judgment claim. (Appellant Opening Br. at 17, 23.) Specifically, it contends that a WICP claim cannot be pled without final disposition, *See Frey v. Stoneman*, 150 Ariz. 106, 722 P.2d 274, 277 (1986) (en banc), and the declaratory judgment claims would have been unnecessary if 10K successfully invalidated the 2002 Breycliffe Agreement. (Appellant Opening Br. at 17, 23.) However, whether a claim is ripe or contingent on future events does not dictate whether it is a "claim" under the Bankruptcy Code. *See* Section 101(5)(A) (definition of claim includes those that are unliquidated, contingent, unmatured, and disputed); *In re Touch America Holdings, Inc.*, 381 B.R. 95, 107 (Bankr. D. Del. 2008) ("A claim is contingent where it 'has not yet accrued and ... is dependent upon some future event that may never happen.'").

WVSV's right to relief was contingent; it depended on 10K losing in the state court action. But other than that, the significant events giving rise to the claim took place pre-petition. More generally, Section 101(5)(A) illustrates that there is no bright line rule that all necessary events giving rise to a claim need to have taken place. Importantly, WVSV did not need to actually file the

lawsuit. Rather, as discussed *infra*, it needed to assert the claims through the Bankruptcy Schedules or Disclosures prior to confirmation in order to put Appellees on notice. Therefore, the Bankruptcy Court did not err in finding that WVSV's claims constituted pre-petition property.

2. Judicial Estoppel Barred State Law Claims

Having determined that WVSV'S claims constitute pre-petition property, the Court finds that WVSV was judicially estopped from bringing the claims post-confirmation. While the Bankruptcy Court did not expressly rely on judicial estoppel, its ruling invoked the judicial estoppel principle that claims "not previously asserted by the Debtor... have been waived." (EOR at 367:11-13.)

Judicial estoppel—"an equitable doctrine invoked by a court at its discretion"— exists to protect the integrity of the judicial process by "prohibiting parties from *deliberately* changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 749-50, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) (citations and internal quotation marks omitted). "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *New Hampshire*, 532 U.S. at 749 (citations and internal quotation marks omitted). The application of judicial estoppel is appropriate to bar litigants from taking inconsistent positions not only in

the same case, but also in two different cases. *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 783 (9th Cir. 2001).

Courts consider three factors when determining whether to impose judicial estoppel: 1) whether the party's later position is "clearly inconsistent with its earlier position"; 2) whether the party succeeded in persuading the court to accept its earlier position, creating the perception that the first or second court was misled; and 3) whether the party seeking to assert an inconsistent position would "derive an unfair advantage or impose an unfair detriment to the opposing party." *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1133 (9th Cir. 2012) (citing *New Hampshire*, 532 U.S. at 750). The second factor — whether one of the courts was misled — is often considered dispositive. *Baughman*, 685 F.3d 1131, 1133 (9th Cir. 2012) (citing *Interstate Fire Cas. Co. v. Underwriters at Lloyd's, London*, 139 F.3d 1234, 1239 (9th Cir. 1998).

"In the bankruptcy context, the federal courts have developed a basic default rule: If a plaintiff-debtor omits a pending (or soon-to-be-filed) lawsuit from the bankruptcy schedules and obtains a discharge (or plan confirmation), judicial estoppel bars the action." *Ah Quin v. County of Kauai DOT*, 733 F.3d 267, 271 (9th Cir. 2013). *See Hamilton*, 270 F.3d at 783 ("a party is judicially estopped from asserting a cause of action not raised in a reorganization plan or otherwise mentioned in the debtor's schedules or disclosure statements."). Even where plaintiff did not know all of the facts of his claim, judicial

estoppel applies if the claim is not disclosed. *See Hay v. First Interstate Bank of Kalispell, N.A.*, 978 F.2d 555, 557 (9th Cir.1992) (failure to disclose potential cause of action in bankruptcy schedules or disclosures where plaintiff did not know all underlying facts estops the debtor from asserting that cause of action).

Here, WVSV failed to disclose its claims in the Bankruptcy Schedules or Disclosures during the bankruptcy proceedings. Specifically, it marked "none" on its Schedule B and Amended Schedule B, which required WVSV to list all assets, including "[o]ther contingent and unliquidated claims of every nature." (SEOR at 124-26.) When WVSV brought the claims post-confirmation, its position was clearly inconsistent from pre-confirmation. The Bankruptcy Court accepted Appellant's position that it did not have any claims upon its confirmation of the 10K Plan. *Ah Quin*, 733 F.3d at 271. Moreover, 10K relied to its detriment on WVSV's representation that it did not have additional claims when it agreed to the 10K Plan. *See Hamilton*, 270 F.3d at 783. Therefore, WVSV is judicially estopped from bringing the pre-petition claims.

WVSV argues that judicial estoppel does not apply because it reserved all claims against 10K in its September 2012 disclosures. The September disclosures state, "[t]he debtor also preserves any and all claims available to it against 10K, LLC and its members, including but not limited to recovery of the amounts due the debtor if 10K, LLC is successful on its claims for rescission." (Reply at 3-4.) However, such broad disclosure of "any and all claims" is insufficient. *See Hamilton*, 270 F.3d at

784 (failure to disclose specific claims estopped plaintiff from bringing those claims post-confirmation). WVSV contends that it did not need to specify the claim because under Arizona law, inconsistent positions must be factual inconsistences for judicial estoppel to apply and WVSV's broad disclosure of all potential claims is not factually inconsistent with its current lawsuit against Appellees. (Reply at 4-5.) Neither WVSV nor the non-bankruptcy cases it cites in support distinguish between a factual inconsistency and any other inconsistency. *See State Farm Auto. Ins. v. Civil Service Emp. Ins. Co.*, 19 Ariz. App. 594, 509 P.2d 725 (1973); *Colonia Verde Homeowners Ass'n v. Kaufman*, 122 Ariz. 574, 596 P.2d 712 (Ariz. App. 1979). Regardless, *Hamilton* is clear that failure to list specific claims in the bankruptcy schedules or disclosures and then suing a party on those claims constitutes an inconsistent position. 270 F.3d at 783-84; s*ee also Ah Quin*, 733 F.3d at 271 (9th Cir. 2013) (failure to disclose a specific claim estops party from bringing claim post-confirmation).

WVSV further argues that since it filed the Schedule B in 2012 and 10K did not file its Third Amended Complaint reasserting the declaratory judgment claim until 2013, WVSV did not have the opportunity to disclose its claims. (Reply at 5.) The Court remains unconvinced. As discussed *supra*, WVSV's claims are based on 10K's conduct starting with its 2003 declaratory judgment action to invalidate the 2002 Breycliffe Agreement. *See Hay*, 978 F.2d at 557. Moreover, 10K filed its Third Amended Complaint 5 months before the Confirmation Hearing and thus Appellant could have updated its Bankruptcy Schedules or Disclosures to include its claims prior to the Confirmation

Hearing. The debtor's duty to disclose potential claims as assets continues after it files its schedules through the duration of the bankruptcy proceeding. *In re Coastal Plains*, 179 F.3d at 208; *Youngblood Group v. Lufkin Fed. Sav. & Loan Ass'n*, 932 F. Supp. 859, 867 (E.D. Tex. 1996); Fed. R. Bankr. P. 1009(a) (schedules may be amended as a matter of course before the case is closed). For these reasons, the doctrine of judicial estoppel bars WVSV from bringing claims not previously asserted in the bankruptcy proceedings.

B. Jurisdiction

Likewise, the Court affirms the Bankruptcy Court's finding that it had jurisdiction to dismiss WVSV's claims. The Bankruptcy Court retains post-confirmation jurisdiction where there is a "close nexus" between the matter and the confirmed plan. *Montana v. Goldin (In re Pegasus Gold Corp.)*, 394 F.3d 1189, 1194 (9th Cir. 2005). "The interpretation, implementation, consummation, execution, or administration of the confirmed plan will typically have the requisite close nexus." *Id.* Here, The Confirmation Order expressly preserved the Bankruptcy Court's ability to retain jurisdiction over adversary proceedings between Appellees and Appellant that "relate to the interpretation or enforcement of the 10K Plan or this Confirmation Order." (EOR at 35 ¶ 21(b).) It further provided the Bankruptcy Court with continuing jurisdiction to "enforce the provisions, purposes, and intent of the 10K Plan... relat[ing] to [the] implementation of the 10K plan." (EOR at 35 ¶ 22(a).) The Bankruptcy Court correctly determined that WVSV's claims arose

pre-petition and thus were property of WVSV's estate that needed to be disclosed pre-confirmation. WVSV's failure to do so followed by its lawsuit asserting the claims post-confirmation necessarily involves the implementation and enforcement of the 10K Plan and Confirmation Order.

WVSV points to the Bankruptcy Court's finding that it did not have jurisdiction to hear WVSV's tort claims on the merits as evidence that it did not have jurisdiction at all. (Appellant Opening Br. at 14.) The Court disagrees. The existence of WVSV's claims implicated the enforcement and implementation of the 10K Plan, which gave the Bankruptcy Court jurisdiction pursuant to the Confirmation Order. To the contrary, determining the merits of WVSV's claims does not relate to the 10K Plan's implementation or enforcement. Therefore, the Bankruptcy Court's two findings — that it did not have jurisdiction to decide the claims on their merits but did have jurisdiction to determine whether WVSV was estopped from the claims — are not mutually exclusive.

Relatedly, WVSV argues that the express language of the 10K Plan preserved its claims and removed jurisdiction from the Bankruptcy Court. WVSV points to the Settlement Term Sheet's language that the 10K Plan "preserves any and all claims the parties... *may raise*..." (emphasis in original) (Appellant Opening Br. at 21; EOR at 40.) But WVSV needed to provide notice of the claims, which it failed to do, in order for this provision to apply. WVSV further cites to the 10K Plan's provision, "[i]f the Debtor elects Option A, all such claims, including those against the Debtor and the Debtor's alleged claims

against 10K, shall be resolved in the State Court. If the Debtor elects Option B, the Debtor shall fully and finally release any and all claims it may have against 10K or its members," (EOR at 40; Appellant Opening Br. at 22.) WVSV contends that it chose "Option A" and thus all claims must be resolved in state court. However, when it chose Option A, WVSV had not disclosed its claims as required in the Bankruptcy Schedules or Disclosures. Accordingly, there were no claims to preserve.

C. 10K Members

WVSV contends that the Bankruptcy Court erred in dismissing its claims for WICP and aiding and abetting WICP against the 10K Members. After specifically considering the issue of whether the Confirmation Order, Settlement Agreement, and 10K Plan applied to the 10K Members, the Bankruptcy Court found that "[to] the extent that WVSV had any claims against 10K or 10K's members based on the state court litigation, they arose pre-petition and were included in the agreed-upon confirmed plan." (EOR at 366-67.) Later, in a Minute Entry explaining its attorney's fees decision, the Bankruptcy Court stated, "the settlement agreement entered into as part of the resolution of the contested confirmation hearing whereby WVSV stated it was settling the claims it had against both 10K and the Individual Defendants [10K Members] . . ." (EOR at 411.) The Court reviews the Bankruptcy Court's interpretation of the 10K Plan under an abuse of discretion standard. *See In re Alameda Investments*, 2014 Bankr. LEXIS 851, 2014 WL 868605, at *3. The Court must find the decision "clearly erroneous" or that the "record

contains no evidence on which [the Bankruptcy Court] could have based that decision" in order to reverse it. *Kali v. Bowen*, 854 F.2d 329, 331 (9th Cir. 1988).

In addition to WVSV's arguments that this Court has already addressed, WVSV contends that the 10K Plan does not bar its claims against the 10K Members because they were not parties to the 10K Plan or Settlement Agreement and thus the claims do not affect its implementation. (Appellant Opening Br. at 15; Reply at 26.) However, this alone does not mandate the reversal of the Bankruptcy Court's decision. First, the claims against the 10K Members arise from the same facts and allegations as the claims against 10K. Moreover, the 10K Plan expressly addresses WVSV's potential claims against the 10K Members:

> Any and all claims of 10K against Debtor or third parties including Conley Wolfswinkel, brought in the State Court Litigation are preserved. If the Debtor elects Option A, all such claims including those against the Debtor and the Debtor's alleged claims against 10K, shall be resolved in the State Court. If the Debtor elects Option B, the Debtor shall fully and finally release any and all claims it may have against 10K or its members.

(EOR at 17.) WVSV argues that it chose Option A and thus this provision is meaningless. (Reply at 26.) But this misses the point. The 10K Plan clearly contemplated WVSV's potential claims against 10K members. As

discussed *supra*, when WVSV chose Option A, it needed to preserve its rights to bring the claims against 10K and 10K's members through the Bankruptcy Schedules or Disclosures. By not doing so, it waived the claims against the 10K Members. Notably, when WVSV did attempt to disclose its potential claims, it specified claims against 10K Members. *See* EOR at 174 ("[t]he debtor also preserves any and all claims available to it against 10K, LLC and its members...")

The 10K Plan further states that the Bankruptcy Court would not retain jurisdiction regarding the "[d]etermination of adversary proceedings and contested matters between the Plan Proponent, its members, the Debtor, Conley Wolfswinkel, and any other litigated matters instituted prior to the closing of the Chapter 11 Cases." (EOR at 19.) Again, the 10K Plan's language expressly treats 10K and the 10K members the same. WVSV needed to assert its claims against 10K and 10K Members pre-confirmation or otherwise they would be waived.

The Bankruptcy Court's determination that the 10K Plan applied to WVSV's claims against the 10K Members was not "clearly erroneous." Because WVSV failed to disclose such claims as required by the 10K Plan, it was judicially estopped from asserting them post-confirmation.

D. Attorney's Fees

WVSV appeals the Bankruptcy Court's award of attorney's fees. The Court reviews the award of attorney's

fees for abuse of discretion or erroneous application of the law that constitutes "clear error." *In re Eliapo*, 468 F.3d 592, 596 (9th Cir. 2006).

The Bankruptcy Court awarded Appellees attorney's fees pursuant to A.R.S. § 12-341.01, which provides, "[i]n any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees." The Bankruptcy Court found that this matter implicated two contracts — the Settlement Agreement and the Confirmation Order — that together served as the basis for its decision to dismiss WVSV's claims. It further found that Appellees sought to enforce those contracts through its Motion to Dismiss WVSV's claims. (EOR at 411.)

In Arizona, a dispute arises under contract where the dispute would not exist but for the contract's existence. *Hanley v. Pearson*, 204 Ariz. 147, 61 P.3d 29, 33 (Ariz. App. 2003) (citing *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 647 P.2d 1127, 1142 (1982)). Here, WVSV brought non-contract claims focused on Appellees' alleged tortious conduct in attempting to invalidate the 2002 Breycliffe Agreement. (EOR at 61-90.) The dispute would have existed with or without the Confirmation Order and Settlement Agreement and thus did not depend on either agreement. Nether the Bankruptcy Court nor Appellees cite any caselaw to support its finding that A.R.S. 12-341.01 applies where only the defendant invokes the contract as a defense against plaintiff's noncontract claims. Therefore, the Court finds that the Bankruptcy Court committed clear error awarding attorney's fees pursuant to Section 12-341.01.

Appellees argue that even if the Bankruptcy Court erred in its reliance on the Settlement Agreement and Confirmation Order, there are alternative bases to support its attorney's fees award. First, 10K contends that Section 12-341.01 applies since WVSV's declaratory judgment claims were predicated on the 2002 Breycliffe Agreement as well as the Junior Trust Agreement. (10K Answering Br. at 29-32; 10K Members Answering Br. at 14-15.) The Court disagrees. The claims were based on 10K's conduct in relation to the agreements as opposed to the agreements themselves. *See Hanley*, 61 P.2d at 33 (fee statute does not apply "if the contract is a factual predicate to the action but not the essential basis of it."). Courts have found Section 12-341.01 applies to claims other than breach of contract; however, the breach of a contract was central to the matter. *Sparks*, 647 P.2d at 1142 (holding plaintiff's bad faith claim warranted attorney's fees pursuant to A.R.S. 12-341.01 because the tort of bad faith cannot be committed absent the existence of an insurance contract and a breach thereof...") Here, WVSV's claims did not require the breach of the 2002 Breycliffe Agreement. Notably, *Sparks* held that plaintiff's misrepresentation claim did not warrant attorney's fees because it "sounds mainly in tort and its existence does not depend upon a breach of the contract of insurance." *Id.* Likewise, Appellees citation to *Modular Mining Systems, Inc. v. Jigsaw Technologies*, Inc., 221 Ariz. 515, 212 P.3d 853, 860-861 for the proposition that Section 12-341.01 applies to both contract and intertwined tort claims is inapposite. In *Modular*, plaintiff brought claims for misappropriation of trade secrets and breach of contract. The court awarded fees for the trade secrets claims because they required the

same fact development, research, and discovery. *Id.* Here, there was no such intertwining because WVSV did not bring a claim for breach of contract nor did its declaratory judgment claims relate to a contract claim. *See also Cashway Concrete & Materials v. Sanner Contracting Co.*, 158 Ariz. 81, 761 P.2d 155, 157 (Ariz. App. 1988) (holding Section 12-341.01 inapplicable where breach of contract was factual predicate to action but claims at issue were unrelated). Section 12-341.01 thus does not apply.

The 10K Members further point to WVSV's request for attorney's fees in its complaint as evidence that the claims arose out of contract. (10K Members Answering Br. at 15.) The Court disagrees. WVSV did not request the fees pursuant to Section 12-341.01. Regardless, WVSV's claims did not merit attorney's fees and its errant request in its complaint does not mean that Appellees are entitled to them now.

Finally, Appellees contend that the attorney's fees provisions in the 2002 Breycliffe Agreement and Junior Trust Agreement (collectively, the "Agreements") warrant the fee award. (10K Answering Br. at 30-31.) The Agreements respectively state: "the prevailing party in any dispute shall be entitled to attorneys' fees and costs" as well as "the prevailing party in any dispute, whether litigation or arbitration, shall be entitled to attorneys' fees and costs..." (SEOR at 210, 216.) As discussed *supra*, WVSV's claims arose from 10K's attempt to invalidate the 2002 Breycliffe Agreement, not the Agreements

themselves.[1] 10K cites no caselaw awarding attorney's fees pursuant to a contract's fee provision where there were no contract claims at issue and the claims did not arise from the contract. Instead, 10K cites one Arizona state law case for the broad proposition that "when a contract includes an attorneys' fees provision, fees are awarded in accordance with the terms of the contract and the trial court lacks discretion to refuse to award fees under the contractual provision." *A Miner Contracting Inc. v. Toho-Tolani Cty. Imp. Dist.*, 233 Ariz. 249, 311 P.3d 1062. However, *Miner* analyzes whether a fee award was excessive as opposed to when a fee award applies. The underlying cause of action was for breach of contract and thus there was no question as to the fee provision's applicability. While the Agreements' fee provisions are broad, the Court does not find them so broad as to apply to claims only tangentially related to the Agreements. Accordingly, the fee provisions do not warrant attorney's fees in this matter, and the Court will reverse the Bankruptcy Court's award of Appellees' attorney's fees and costs.

IT IS THEREFORE ORDERED affirming in part and reversing in part the Bankruptcy Court's Order. The Court affirms the Bankruptcy Court's dismissal of all of WVSV's claims. It reverses the Bankruptcy Court's awarding of attorney's fees to Appellees 10K and 10K Members.

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1. Importantly, the Bankruptcy Court made no finding regarding the Agreements' fee provisions but did state that the WICP and slander of title claims "may not fall under the terms of the two pre-petition agreements." (EOR at 411.)

IT IS FURTHER ORDERED directing the Clerk of Court to close this matter.

Dated this 19th day of October, 2021.

/s/ John J. Tuchi
Honorable John J. Tuchi
United States District Judge

APPENDIX C — MINUTE ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ARIZONA, DATED NOVEMBER 13, 2020

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

Minute Entry

Hearing Information:

Debtor:	WVSV HOLDINGS, LLC
Case Number:	2:12-BK-10598-MCW **Chapter:** 11
Date / Time / Room:	TUESDAY, NOVEMBER 10, 2020 02:00 PM 7TH FLOOR #702
Bankruptcy Judge:	MADELEINE C. WANSLEE
Courtroom Clerk:	RENEE BRYANT
Reporter / ECR:	N/A

Matters:

1) **ADV: 2-20-00060**
WVSV HOLDINGS, LLC vs KARI STOLWORTHY & LEO R. BEUS & 10K L.L.C. & PAUL GILBERT & RANDY STOLWORTHY & ANNETTE BEUS & SUSAN GILBERT
APPLICATION FOR ATTORNEY FEES AND COSTS FILED BY DANIEL GARFIELD DOWD OF COHEN DOWD QUIGLEY PC ON BEHALF OF 10K L.L.C.
R / M #: 49 / 0

Appendix C

2) ADV: 2-20-00060
WVSV HOLDINGS, LLC vs 10K L.L.C. & LEO R. BEUS & PAUL GILBERT & Randy Stolworthy & ANNETTE BEUS & SUSAN GILBERT & KARI STOLWORTHY
INDIVIDUAL DEFENDANTS' APPLICATION FOR AWARD OF FEES
R / M #: 51 / 0

Proceedings :

Matters #1 and #2

Mr. Durchslag provides an outline of 10K's fee request. He provides a brief history of the litigation between 10K and WVSV. He states 10K was served with a lawsuit based on their conduct during the state Court litigation. He states the lawsuit lacks basis and the claims were never brought to state Court.

The Court inquires how the pending appeal will bear on these issues.

Mr. Durchslag responds to the Court's questions. He states the ruling on the fee application would be consolidated into the pending appeal. He states his position is to move forward. Mr. Durchslag outlines the basis for awarding fees. He states the 12-34101 factors all favor an award of fees.

Mr. Worthington states he joins in 10K's arguments. He addresses the rates and time billed by Wilenchik & Bartness, noting the plaintiff has not made an

argument for the Court to deny the fees. He notes they were very careful about accruing fees. His position is they have not provided a basis for rejecting the application. Regarding the individual defendants, he states the plaintiff unnecessarily ran up expenses by filing a motion to strike. He states their argument was frivolous and they have a request for sanctions in their response to the motion to strike.

Ms. Bruemmer argues her position. She states WVSV's claims of wrongful institution have not been determined on the merits. She states the claims were based on damages WVSV suffered by having the property tied up in Court. Regarding attorney's fees, she states the main factor was the litigation. Ms. Bruemmer refers to case law cited in her response. She argues the fees are very excessive for this case and the individual defendants have no basis to be in the contract argument.

The Court inquires about the basis for the general fee request and asks Ms. Bruemmer to address the argument that the tort claims were intertwined with the contract claims.

Ms. Bruemmer responds to the Court. She states her position on the pending appeal, noting she believes this Court has jurisdiction.

The Court asks Ms. Bruemmer if she would like to address the impact of the settlement agreement reached in the bankruptcy and the confirmed plan.

Ms. Brummer responds to the Court and provides her argument.

Mr. Durchslag offers his final comments. He addresses the case law cited by Ms. Bremmer, noting the cases referenced do not apply. Mr. Durchslag states it is his position the fees are appropriate.

Mr. Worthington states he joins in Mr. Durchslag's argument. He states Ms. Bruemmer has not identified any unreasonable billing rates.

COURT: THE COURT APPRECIATES THE COMPREHENSIVE BRIEFING PROVIDED BY THE PARTIES. THE COURT WILL REVIEW THE CASES IDENTIFIED TODAY AND WILL ISSUE ITS DECISION IN THE MINUTE ENTRY.

SUBSEQUENTLY BY THE COURT: In arguing as to the right to recover attorney's fees and costs, the parties' papers and oral argument referred to and discussed their previous agreements known as the 2002 Breycliffe Agreement and the 2003 Junior Trust Agreement. WVSV argues that these agreements were not central to the new claims it brought and thus there is no basis for an award of fees based upon contract. In granting the Motion to Dismiss, the Court gave some consideration to these agreements.

Nonetheless, it does appear to the Court that the wrongful initiation of civil process and slander of title claims are tort claims that are based on the Defendants' conduct and perhaps were not expressly brought under

the terms of the 2002 Breycliffe Agreement or the 2003 Junior Trust Agreement. Curiously, the underlying Complaint itself requested attorney's fees, albeit without supplying a basis for the same.

But two other contracts are implicated here: (1) the settlement agreement entered into as part of the resolution of the contested confirmation hearing whereby WVSV stated it was settling the claims it had against both 10K and the Individual Defendants - this was a contract with mutual agreement as to the terms, those terms being stated on the record and put into a term sheet; and (2) the Amended Order Confirming Creditor's First Amended Plan of Reorganization Dated August 2013 (Dkt. No. 373), to which the term sheet was attached and incorporated.

Together these contracts served as the basis for the Court granting the Motion to Dismiss. The Motion to Dismiss sought to enforce the settlement and/or the terms of the confirmed plan. A confirmed chapter 11 plan becomes a new contract between parties and the terms can be enforced as essentially a breach of contract claim. See, e.g., *Paul v. Monts*, 906 F.2d 1468 (10th Cir. 1990) (a state law breach of contract action may be brought for a breach of chapter 11 plan obligations); *In re Kentucky Lumber Co.*, 860 F.2d 674, 679 (6th Cir. 1988) (the chapter 11 plan becomes a binding contract between the debtor and its creditors, and governs their rights and obligations).

Here, WVSV had settled all claims that it held against 10K and the individual defendants, except those

expressly reserved for the state court litigation. The settlement and the later confirmed plan, which are new contracts, meant that at the conclusion of the state court litigation, WVSV could not raise new and additional claims related to that litigation. Defendants' Motion to Dismiss was an act to enforce those new contracts, and they are the prevailing party in this litigation related to the settlement, the confirmed plan, and whatever claims they included.

As noted above, the WICP, slander of title, etc. are tort claims that may not expressly fall under the terms of the two pre-petition agreements. But for the post-petition settlement, these claims might have been brought separately, potentially with the underlying pre-petition state court action or afterward.

However, the settlement of essentially any and all claims that the parties had against each other, except for the claims to be resolved by the then-pending state court litigation, and which were finally resolved before WVSV instituted the new litigation removed to this Court containing the alleged "new" claims, is the contract that this Court shall enforce.

For these reasons, the Court considers the settlement agreement that led to the confirmed plan as being binding on the parties, and that the enforcement of the settlement agreement and the confirmed plan is subject to ARS § 12-341.01 for a discretionary award of attorney's fees based on enforcement of a contract. In other words, defense of the agreed settlement and the confirmed plan is a contract cause of action making

ARS § 12-341.01 applicable, and thus 10K and the Individual Defendants, as the prevailing parties, are entitled to a discretionary award of attorney's fees under AZ law.

WVSV asserts that the requested fees are excessive. However, WVSV does not give the Court any examples of why the fees are excessive, does not propose the amount by which the fees should be reduced, or even suggest the basis for a percentage reduction. WVSV did not raise any objection to the costs sought under the pending fee requests. Under prevailing Ninth Circuit authority, the Court cannot simply give a percentage haircut on a fee request without providing a clear explanation of its reasons for choosing that reduction. *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1203-06 (9th Cir. 2013) (citing *Gates v. Deukmejian*, 987 F.2d 1392, 1400 (9th Cir. 1992). In Arizona, a fee award is reasonable if both the rates and time spent on each task is reasonable. *Schweiger v. China Doll Restaurant, Inc.*, 673 P.2d 917, 931-32 (Ariz. App. 1983). WVSV has not shown that the rates and time spent on the described tasks are not reasonable.

The objections are overruled and the fee requests by 10K and the Individual Defendants are approved.

The parties are instructed to lodge orders consistent with this Minute Entry Order awarding the fees as requested.

HONORABLE MADELEINE C. WANSLEE
DATED AND SIGNED ABOVE

APPENDIX D — TRANSCRIPT EXCERPT OF THE UNITED STATES BANKRUPTCY COURT, DISTRICT OF ARIZONA, DATED SEPTEMBER 15. 2020

[Page 1]

UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

In re:

WVSV HOLDINGS, LLC, CH: 11

1) CONTINUED STATUS HEARING

2) ADV: 2-20-00060

WVSV HOLDINGS, LLC vs KARI STOLWORTHY & LEO R. BEUS & 10K L.L.C. & PAUL GILBERT & RANDY STOLWORTHY & ANNETTE BEUS & SUSAN GILBERT

ORAL ARGUMENT ON JURISDICTION AND CLAIM PRECLUSION REGARDING WVSV'S NEW LITIGATION CLAIMS (PURSUANT TO THE COURT'S MAY 20, 2020 MINUTE ENTRY)

2:12-BK-10598-MCW

U.S. Bankruptcy Court
230 N. First Avenue, Suite 101
Phoenix, AZ 85003-1706

Appendix D

September 15, 2020
10:45 a.m.

BEFORE THE HONORABLE
MADELEINE C WANSLEE, Judge

APPEARANCES:
(All present by video or telephone)

[Page 46] want to keep parties waiting on the line.

But I'm going to take a recess then and, we will regroup at 2 p.m., at which time I will give the parties a ruling on the record. All right? Thank you.

MS. BRUEMMER: Sounds good.

MR. CARMEL: Thank you, Your Honor.

(Recess)

THE CLERK: Recalling case 12-10598, WVSV Holdings, 9 LLC, with adversary 20-60.

THE COURT: Good afternoon. This is Judge Wanslee in the recalled telephonic hearing in WVSV Holdings, LLC. We have reconvened so this court can provide a ruling on the record. I am not going to retake appearances by counsel as we are convened just so I can provide a ruling on the record.

So in this adversary proceeding, adversary 20-60, the court was concerned about its continuing post-

confirmation jurisdiction over the matters that have been raised and had asked the parties for supplemental briefing. After reviewing the parties' papers on the confirmation order, I can, at this time, make a determination concerning the confirmation order and what it encompasses. In short, the settlement among the parties that resulted in the agreement to confirm the plan proposed by 10K include all claims that 10K, as a Debtor, had at the time of the filing of the WVSV Holdings, LLC, chapter case.

[Page 47] I've taken a look at the record, and I was trying to determine whether there was a disclosure by WVSV with respect to any reservation of claims against 10K and its members, or any disclosure that WVSV had any additional contingent or unliquidated claims against 10K on the issue of confirming competing plans to settle among the parties. Any claim that relates to the actions of the parties in 2003 or any time before the May 14, 2012 bankruptcy filing date are included within the bankruptcy case because they're property of the estate and they are, therefore, part of the confirmation order.

So taking a look at the confirmation order, the confirmation order allowed the parties to continue the then-pending state court litigation in order to liquidate the claims held by 10K, and any defenses or counterclaims arising out of the same nucleus of facts that they might have had against 10K. The parties concluded that litigation, which resulted in a January 10, 2017 money judgment of $72 million in damages in favor of 10K and against WVSV and Wolfswinkel. However, the state court did not find in favor of 10K on its constructive trust and

precision claims or ruled that the real property should be owned by 10K. 10K, therefore, has the money judgment against Debtor and/or Mr. Wolfswinkel, and the Debtor continues to own the real property. 10K was also awarded attorneys' fees and costs.

The state court judgment was appealed and then [Page 48] confirmed by the court of appeals on November 8th, 2018. No petition for review by the Arizona Supreme Court was filed, and the state court of appeals issued its mandate on January 31, 2019.

Following that, on February 4, 2019, Debtor returned to this court and filed a motion for entry of final decree and order closing the case, 10K objected to the request to final decree and filed a separate motion to sell the real property in order to implement the confirmed plan.

WVSV's position here is that none of their claims in this removed action arose pre-petition. Instead, these claims are all as a result of the state court judgment, but based on conduct taken by 10K or its members in initiating state court judgment or actions related thereto that took place entirely pre-petition and then continuing into the post-petition litigation.

The order confirming the 10K plan signed on March 13, 2014 and filed at docket number 373 and entered on the docket on March 14, 2014 is a final order from which no appeal was taken. The terms of the 10K plan and the order confirming the plan expressly limits the court's post-confirmation jurisdiction. Those papers provide that

this court has no jurisdiction over any proceeding related to, open quote, all adversary proceedings, contested matters, and other litigated matters between 10K and/or its members on the one hand, and the [Page 49] Debtor and/or Conley Wo1fswinkel on the other hand, instituted prior to closing of this Chapter 11 case, including without limitation the issuance of injunctions, except to the extent that the matter specified in this subparagraph B relates to interpretation or enforcement of the 10K plan or this confirmation order.

Now, I direct the parties to the amended order confirming creditors first amended plan of reorganization dated August 2013, and more specifically, paragraph 21B. Based upon this clear and unequivocable language, the Court finds and concludes that it does not have jurisdiction to hear any state court proceedings removed to the bankruptcy court except insofar as to interpret, going forward, the Chapter 11 plan.

In summary, I finally conclude that this court does not have jurisdiction over anything that was or should have been part of the state court litigation. So, for example, pre-petition claims that were or that could have been asserted by either parties because they related to the pre-petition actions of the parties, these claims would have been litigated in state court.

However, the bankruptcy court does have continuing jurisdiction to interpret and implement the confirmed plan and the confirmation order. So pursuant to the stipulation between the parties in 10K's confirmed plan, Debtor

chose Option A under Section 11, which is captioned as, "Preservation of [Page 50] Litigation Claim". That section provides, "Any and all claims of 10K against Debtor or third parties, including Conley Wolfswinkel, while in state court litigation are preserved. If the Debtor elects Option A, all such claims, including those against the Debtor and the Debtor's alleged claims against 10K, shall be resolved in the state court," end quote.

Exhibit A to the amended order confirming the creditor's first amended plan of reorganization dated August 2013 is a settlement term sheet dated March 6, 2014. Point 2 of the settlement term sheet states, "WVSV elects and will be afforded treatment under Option A as provided herein."

I also direct the parties to point 9 of the settlement term sheet which provides:

> "By agreeing to this settlement and confirmation of the 10K plan, 10K and WVSV agree that the state court litigation, 10K, LLC v WVSV Holdings, LLC, and Conley Wolfswinkel, case number CV2003-008362, including against Conley Wolfswinkel, may continue to proceed to conclusion in the state court. No party's rights, claims, or defenses in the state court litigation are waived, released, impaired, or otherwise affected by the entry or effectuation of the settlement and plan confirmation. This preservation of claims includes but is not limited to WVSV's right, if any, to pursue and 10K's, if any, to contest petition claims that [Page 51] WVSV has made.

> "This preservation of claims further includes but is not limited to 10K's right, if any, to pursue, and WVSV's right, if any, to contest 10K's claim to restorative damages. The purpose of this paragraph is to make explicit that the settlement does not prejudice but instead preserve any and all claims that we have in the state court litigation." End quote.

So after listening to all the parties and considering the terms of the confirmed plan and the parties' arguments, I do finally conclude that the confirmation order included any and all claims that arose from pre-petition conduct concerning Sun Valley property. I interpret the agreed confirmation of the 10K plan as modified by the settlement term sheet attached as Exhibit A as having preserved any and all claims related to the state court litigation and as having requiring that those claims be resolved in the context of the then-pending state court litigation. While the parties were free to assert any claims that they may have had against each other in that litigation, any claims that were not brought forward are barred by operation of the confirmation of the 10K plan.

10K amended the pleadings in the state court litigation at least in November of 2013 when it filed its third amended complaint, and as argued by WVSV, it was not until the [Page 52] third amended complaint that 10K alleged the facts of the basis for each of WVSV's new claims.

The Court finds and concludes that as of November 2013 when 10K filed its third amended complaint in the

state court litigation that WVSV admits 10K made the allegations that form the basis of its new claim. This third amended complaint was filed almost five months before the confirmation hearing, before the settlement where the parties agreed to pursue their claims against each other in state court litigation.

The causes of action that WVSV makes in its moot complaint initiated in January 2020 asserts claims based on the alleged actions of 10K or 10K's members that occurred in 2002 and 2003 and involved the litigation filed in 2003 that was referenced in the confirmation order as the state court litigation. WVSV asserts that its new causes of action did not arise until the state court litigation was completed and the state court found that 10K's claims for constructive trusts on the Sun Valley properties are not valid.

So this court holds that, to the extent that WVSV had any claims against 10K or 10K's members based on the state court litigation, they arose pre-petition and were included in the agreed-upon confirmed plan. These claims were simply related to the pre-bankruptcy past and are, indeed, assets of the bankruptcy estate, property of the estate.

The WVSV assertion that its claims did not arise [Page 53] until after the state court litigation was completed are without merit for the reasons most fully briefed by 10K. And the distinction that WVSV seeks to make that the claims are post-confirmation are similarly not persuasive.

The treatment of these claims asserted by WVSV are included in the confirmed plan and the only treatment of these claims is as specifically provided for under the

confirmed plan. Because there is no treatment of these claims WVSV is not allowed to proceed with new litigation outside the bankruptcy court to assert claims which should have been adjudicated as part of the confirmed plan. In other words, because they were not previously asserted by the Debtor they essentially have been waived.

Accordingly in interpreting and in enforcing the final confirmation order in this case the court finds and concludes that WVSV does not have any claims that were not included in the confirmation order and, upon the allowed continuation and final conclusion of the state court Litigation, WVSV no longer is able to assert claims based on the same pre-petition conduct of 10K or 10K's members. And for these reasons, 10K's motion to dismiss is granted and the claims asserted by WVSV based on the action of 10K and the members of 10K pre-petition are hereby dismissed with prejudice.

Mr. Dowd, if you will prepare and upload a form of [Page 54] order, the Court will sign it right away. That's the ruling of the Court. It will be available on the docket within a day or two if the parties wish to look into it. And, of course, the transcript can always be obtained from the court as noted on the court's website.

I've given the ruling for which this hearing was called. I'm now going to conclude the hearing and adjourn these matters. This hearing is concluded. Thank you.

(Proceedings concluded)

Appendix D

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated: September17, 2020 /s/_____

eScribers, LLC
7227 N. 16th Street
Suite #207
Phoenix, AZ 85020

APPENDIX E — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED OCTOBER 6, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-16874

In re: WVSV HOLDINGS, LLC,

Debtor,

WVSV HOLDINGS, LLC,

Plaintiff-Appellant,

v.

10K, LLC; LEO R. BEUS; ANNETTE BEUS; PAUL GILBERT; SUSAN GILBERT; RANDY STOLWORTHY; KARI STOLWORTHY,

Defendants-Appellees.

D.C. No. 2:20-cv-01927-JJT
District of Arizona, Phoenix

ORDER

Before: BYBEE, OWENS, and COLLINS, Circuit Judges.

Appendix E

Judge Bybee and Judge Owens have voted to deny the petition for panel rehearing, and Judge Collins has voted to grant the petition for panel rehearing. Judge Owens has voted to deny the petition for rehearing en banc, Judge Collins has voted to grant the petition for rehearing en banc, and Judge Bybee recommends denying that petition.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for rehearing and petition for rehearing en banc, filed September 12, 2023, is DENIED.