

No. 08A789

IN THE SUPREME COURT OF THE UNITED STATES

HOWARD K. STERN, EXECUTOR
UNDER THE WILL OF VICKIE LYNN MARSHALL, *Applicant*,

v.

ELAINE T. MARSHALL, AS INDEPENDENT EXECUTOR OF THE
ESTATE OF E. PIERCE MARSHALL, *Respondent*.

Ninth Circuit Case No. 02-56002, 02-56067

On Application to the Honorable Anthony M.
Kennedy, Associate Justice of the United States
Supreme Court and Circuit Justice for the Ninth
Circuit, for Order Vacating Stay of District Court
Judgment Entered by Motions Panel of the Court of
Appeals for the Ninth Circuit

**RESPONSE TO APPLICATION FOR ORDER VACATING THE NINTH
CIRCUIT ORDER STAYING THE DISTRICT COURT JUDGMENT WITHOUT
BOND AND THE DISTRICT COURT ORDER ALLOWING REGISTRATION
OF JUDGMENT IN
FOREIGN JURISDICTIONS; DECLARATIONS OF EDWIN K. HUNTER, AND
ELAINE T. MARSHALL IN OPPOSITION TO APPLICATION**

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PRELIMINARY STATEMENT

On March 7, 2002, the District Court entered a judgment (the “Judgment”) against E. Pierce Marshall (“Pierce”) in favor of Vickie Lynn Marshall (“Vickie”) in the amount of \$88,585,534.66. A54.¹ The Judgment became final on May 2, 2002 when the District Court denied Vickie’s motion to amend. A54, A471-475. Pierce filed his notice of appeal of the Judgment on June 3, 2002 and also moved the District Court for a stay pending appeal. A54. On June 12, 2002, following a hearing, the District Court denied Pierce’s stay motion. A53-60. Thereafter Vickie did not proceed immediately to enforce the Judgment. Instead, on June 14, 2002, she filed her own notice of appeal seeking to overturn it. A62-64. As Vickie’s statement of issues on appeal and subsequent briefing reveals, she clearly sought, and the executor of her estate, Howard K. Stern (“Stern”) still clearly seeks, to overturn the Judgment in its entirety in favor of other relief. A72-73.

After Vickie filed her notice of appeal, Pierce did not seek immediately to stay enforcement of the Judgment in the Court of Appeals because doing so was unnecessary: Vickie’s appeal by itself suspended enforcement. As this Court explained long ago:

[T]he District Court . . . would not be warranted in taking any steps in the execution of the decree in favor of the appellants. They having appealed from the decree, it would be against all reason and principle to permit them to proceed in the execution of it, pending the appeal. They assert the decree is founded in error, and for that reason should not be executed, but should be reversed and corrected in the appellate tribunal. The appeal suspends the execution of the decree. This is not a case where security is to be given in order to supersede the execution. That rule applies in cases where the decree or judgment is against the party appealing, and who desires to suspend the issuing of execution by the adverse party until the appeal is heard and determined.

¹ For ease of reference, this Response will cite to pages in Respondent’s Appendix by using the prefix “A,” whereas it will cite to pages in Stern’s Application by referring to “Appl.” Where the Response cites to Petitioner’s Appendix, it will cite to “Pet. App.”

Bronson & Soutter v. La Crosse & Milwaukee R.R. Co., 68 U.S. (1 Wall.) 405, 409-10 (1863) (“*Bronson*”); *see also Tennessee Valley Auth. v. Atlas Mach. & Iron Works, Inc.*, 803 F.2d 794, 797 (4th Cir. 1986) (“Where the prevailing party in the lower court appeals from the court’s judgment, the appeal suspends the execution of the decree.”) (citing *Bronson*, 68 U.S. at 410); *Northern Indiana Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 281 (7th Cir. 1986) (“A party that is trying to obtain specific performance in lieu of damages cannot at the same time attempt to execute a damage judgment.”) (citing *Bronson*, 68 U.S. at 409-410); *First Nat’l Bank of Miles City v. State Nat’l Bank of Miles City*, 131 F. 430, 431 (9th Cir. 1904) (same).

Under these precedents, Vickie could not simultaneously seek to enforce the Judgment *and* overturn it on appeal. Yet several months after she filed her notice of appeal, Vickie attempted just that: while her appeal was pending, she filed with the District Court a series of enforcement motions. A76, A139. Pierce opposed her motions, citing, among other things, *Bronson*. A139-144. Nevertheless, on November 27, 2002, the District Court entered an order (the “Enforcement Order”) declining to apply *Bronson* and permitting Vickie to proceed with her enforcement activities. A75-87.

Pierce appealed the Enforcement Order to the Ninth Circuit and moved that court for a stay of enforcement pending appeal, arguing, among other things, *Bronson*. A1-20. On January 13, 2003, the Court of Appeals granted Pierce’s motion. A404. Far from acting in an arbitrary or unprecedented manner, the Court below was fully justified in staying enforcement of the Judgment while Vickie’s (and now Stern’s) appeal remains pending. Stern criticizes *Bronson* as antiquated. Appl. 42. But for well over a century, the lower federal courts (including the Ninth Circuit) have applied *Bronson* in cases of

this kind.

Apart from *Bronson*, there are numerous other reasons why the Court of Appeals was justified in granting a stay, as well as why a stay should remain in place pending the outcome of the appeals. Contrary to Vickie's assertions, the Court of Appeals has before it for resolution some eleven fully-briefed substantive issues on remand, together with numerous motions, many filed by Vickie or Stern. A454-456. The issues requiring resolution include, but are not limited to, whether the Texas Probate Court's prior judgment denying Vickie's claim is entitled to preclusive effect; whether the federal courts lack bankruptcy jurisdiction over Vickie's claim because the outcome of the federal litigation will have no effect on her bankruptcy estate or creditors; whether the District Court erred in precluding Pierce from calling percipient witnesses who would have testified that Pierce engaged in no misconduct; and whether the District Court's findings are clearly erroneous because not only are they not based on the evidence, but they are contrary to all of the evidence actually presented, particularly concerning the allegations of Pierce's wrongdoing. A454-456, A666. As fully set forth in the relevant briefing, Elaine T. Marshall ("Elaine"), as the independent executrix of Pierce's estate, is likely to succeed on the merits of these arguments. A362-381, A424-425.

Seeking to show exigency where none in fact exists, Stern contends that "[u]nbeknownst to Vickie, under cover of the Ninth Circuit stay, Pierce *apparently* stripped himself of nearly all of his assets – valued in the billions of dollars – and transferred them out of his possession and into various grantor retained annuity trusts." Appl. 2-3 (emphasis supplied). Notably, Stern equivocates with the word "apparently" because he knows, or should know, that his allegation is mistaken.

As Elaine explained to the Court of Appeals in her opposition to Stern's motion to vacate the stay, grantor retained annuity trusts ("GRATS") are not asset-shielding devices. A418-419. Rather, they are widely recognized, congressionally-approved estate- and tax-planning instruments. A418-419, 449. By their terms, Pierce's GRATS are designed to return more value to his estate than he put into them – for every dollar transferred to a GRAT, the GRAT is effectively obligated to pay the estate a dollar *plus* significant interest. A419-420. Accordingly, the GRATS actually have the effect of *augmenting* Pierce's probate estate, providing additional funds to cover any judgment. In any event, the GRATS are fully subject to the claims of Pierce's creditors under Texas law. A419, A449. Thus, by definition, the GRATS cannot prevent creditors from reaching Pierce's assets and Stern's suggestion that Pierce used the GRATS to avoid paying the Judgment is in error.

Pierce died on June 20, 2006, and as part of her duties as the executrix of Pierce's estate, Elaine filed an inventory with the Probate Court listing Pierce's assets for probate purposes and valuing them at \$125,260,702.18. *See* Ex. A, Marshall Decl., Ex. A. Stern points to this valuation as suggesting Pierce engaged in "asset-stripping" because this valuation is less than the "billions" Stern says Pierce was worth. Stern's suggestion, however, is both irrelevant and unfounded. It is irrelevant because, whatever value might be placed on Pierce's assets at any given point for any particular purpose, the assets, whatever they are, remain subject to the claims of creditors regardless of any transfers to the GRATS. The suggestion is unfounded because the allegation that Pierce's assets were worth "billions" is likewise unsupported and mistaken, as Stern is also aware.

In 2000, Stern acquired Pierce's confidential personal financial statement from

the Texas Probate Court, which he then transmitted to Vickie's counsel in California who, in turn, filed the statement with the Bankruptcy Court as evidence of the value of Pierce's assets. A119-120. The statement disclosed that Pierce's net worth in 1990 was \$118,379,204.00. A671.

Rather than refer to Pierce's personal financial statement, Stern points to comments in the record that Pierce was "an extremely wealthy man," as well as various conflicting statements regarding the value of the assets of Pierce's father, J. Howard Marshall ("J. Howard"); the assets of Marshall Petroleum, Inc. ("MPI"); the assets of Trof, Inc. ("Trof"); and certain stock in Koch Industries ("Koch"). Appl. 8, 13. The District Court observed that J. Howard owned valuable Koch shares prior to 1984, but transferred them to MPI at that time. A495. The District Court also observed that, after J. Howard's death in 1995, Pierce owned shares in Trof, the corporate successor to MPI, as well as some Koch stock of his own. A560. But other than Pierce's own financial statement discussed above, there is no valuation in the record of *Pierce's* interest in either company, let alone any comprehensive valuation of his assets and liabilities as a whole. Stern's equivocal suggestion that Pierce was worth "billions" is both erroneous and unsubstantiated.

Stern suggests that Pierce, through his counsel, agreed to freeze his assets in order to obtain a stay from the Court of Appeals, and then violated that promise by finalizing his estate plan. Appl. 10-11. This suggestion is also untrue, and is not supported by the record citations that Stern offers. The record demonstrates that Pierce offered to agree to certain asset transfer restrictions as a condition of obtaining a stay pending appeal in the District Court *before* Vickie filed her notice of appeal. A298, A319, A325, A334.

Neither Vickie nor the District Court, however, accepted Pierce's proposal, and the District Court denied Pierce's request for a stay. A60. Pierce made no similar offer to the Court of Appeals in the context of obtaining a stay from that court, and none was required given the *Bronson* rule.² More important, as noted above, Pierce did not "dissipate" his assets. Nor did Pierce or Elaine somehow prevent Stern from discovering information about Pierce's probate estate. Following Pierce's death, the proper vehicle for the disclosure of information regarding Pierce's probate assets and probate estate plan is through the transparent probate process in Texas. Stern has availed himself of that transparency and has appended the inventory of Pierce's probate assets to his

² In Pierce's motion to the Court of Appeals seeking a stay, and in the specific context of explaining why the *District Court's* reasons for denying a stay were erroneous, Pierce explained that he had presented a proposed order to the *District Court* that had included "a prohibition against dissipation of assets." A25. Pierce also explained that the provisions of the proposed order presented to the *District Court* constituted "sufficient protections" to support an order granting a stay in the District Court without bond, particularly in light of the District Court's recognition that Pierce had done nothing to dissipate his assets. *Id.* Pierce never presented this or any other proposed order to the *Court of Appeals* offering the same or any other restriction, again because none was required. Stern states in his Application that "[n]ot only is the Koch stock Pierce's core asset and the key to paying the judgment, but its transfer flies in the face of Mr. Brunstad's representation in the district court that 'Pierce is willing to agree that the Koch stock is not going anywhere' and his statement in the Ninth Circuit that Pierce is bound by the prohibitions on transfer of his assets that he proposed in the district court and that '[t]hese terms are sufficient protections' for Vickie." Appl. 41 (emphasis added). Critically missing from Stern's brief is any support for the emphasized statement because this alleged representation was not made and Stern's assertion that it was is plainly in error. In his brief, Stern makes several other similarly erroneous assertions. These are collected in the chart accompanying this Response. *See* Ex. C. In addition, the balance of the above-quoted language is off-point and incomplete. Again, Pierce made an *offer* in the District Court to agree to an asset restriction provision in exchange for a stay pending appeal without bond. Again, this offer was never accepted and Pierce's proposed order was never entered. Instead, the District Court denied Pierce's motion for a stay. This hardly demonstrates that Pierce somehow restricted himself from engaging in legitimate estate planning transactions designed to minimize tax liability and maximize return for his estate, and that do not have the effect of shielding assets from the ultimate reach of creditors.

Application. Appl., Richland Decl., Ex. B.

Stern suggests that there is something nefarious about Pierce's completion of his estate plan a few days after this Court's decision in *Marshall v. Marshall*, 126 S. Ct. 1735 (2006). Appl. 13-14. As Elaine explained to the Court of Appeals, however, this timing reflected the pre-arranged culmination of years of estate planning activities beginning in November of 2004. A421-422. There is nothing wrong or nefarious about the fact that, shortly before Pierce died, he finalized his estate plan using legitimate estate-planning devices that do not impair the ability of creditors to collect on their claims. A447-51.

Pierce's estate would suffer irreparable harm if Vickie were permitted to enforce her judgment at this time or Pierce's estate were required to post a bond. In order to satisfy the Judgment at this time, the estate would be required to liquidate its irreplaceable, illiquid assets at fire sale prices. A321, 329. The estate would also have to liquidate its assets in order to offer a bond given that no surety would be willing to issue a bond in the amount of the Judgment without the estate first pledging cash with the surety sufficient to cover the amount of the bond in case the surety were ever required to pay on its bond. A45-47, 320-21. This course of action would make little sense given that Stern is currently seeking to overturn the very Judgment he wishes to enforce. In contrast, Stern will not suffer any harm if the stay remains in place. The only harm he alleges – diminished opportunity to recover her Judgment due to Pierce's asset transfers to the GRATS – is illusory.

Further, the probate estate cannot feasibly post a bond or pay the Judgment at this time consistent with the priorities Texas law assigns to claims against a decedent and the orderly resolution of the probate process. These priorities are prescribed by the Texas

Probate Code, which Elaine, the independent executor, must follow. *See* Tex. Prob. Code §§ 322, 320(a), 146(a)(3). Stern's general unsecured claim is behind at least seven other classes of claims, including federal and state taxes and secured claims. *See* Tex. Prob. Code § 322. This does not mean that Stern's claim (if valid) will not be paid. It means that the independent executor cannot pay a large general unsecured claim like Stern's out of the probate estate until she knows for sure what other higher priority claims exist, especially for taxes. 31 U.S.C. § 3713(b). Pierce's probate estate faces contingent claims with a higher level priority than Stern's claim and have yet to be resolved. Ex. A, Marshall Decl., at 1-2. Vickie is not entitled to jump the queue by insisting on execution at this point or by demanding a bond.

Stern's Application does not warrant extraordinary relief under Rule 22. Stern criticizes the merits of the Ninth Circuit's decision to issue a stay, challenging essentially whether the stay was appropriate under *Bronson* or on some other basis. But Rule 22 is not a general vehicle to review alleged error in a lower court decision; it is certainly not a vehicle for a litigant to criticize or overturn a longstanding precedent of the Court, define its scope, or determine whether a lower court applied it correctly. Nor is vacatur necessary to preserve this Court's jurisdiction to review the merits of the stay under *Bronson*, or the merits of any other issue in this litigation. Likewise, Stern has not demonstrated that the Court is likely to grant certiorari on any of the substantive issues he presents in his Application.

Stern complains procedurally that the Ninth Circuit has taken too long to rule on his motion to vacate. Once again, however, granting the Application is not necessary to preserve the Court's jurisdiction over this issue. Indeed, granting the Application would

serve only to defeat subsequent jurisdiction to review this issue by rendering it moot. Likewise, Stern has not demonstrated that the Court is likely to grant certiorari on the procedural issue he raises. Moreover, the remedy he seeks – vacatur of the stay – relates to the merits of the stay, not the question of delay in resolving his motion. Assuming delay in this case is sufficient to entitle Stern to some form of relief, Elaine respectfully suggests that the appropriate remedy would be to direct the court below to elaborate on its reasoning for its stay and to rule on Stern’s motion, not deprive the lower court of its office.

Finally, Stern’s Application has no bearing on the issue whether Vickie’s claim against Pierce falls within the scope of bankruptcy jurisdiction under 28 U.S.C. section 157(b)(1). *See* Appl. 23-35. Because of other issues pending before the Ninth Circuit, it is far from certain the court below will even reach this issue in disposing of the case on the merits. Likewise, granting Stern’s Application is unnecessary to preserve review of this issue in this Court in the event the Ninth Circuit ever reaches it. Nor is this Court likely to grant certiorari on the question even if the Ninth Circuit were to decide it; Vickie certainly has not demonstrated that it would.

The Ninth Circuit has before it an extremely complex case made even more complex by Vickie’s appeal of the very Judgment entered in her favor. The Application should be denied.

STATEMENT

A. General Background

Vickie and J. Howard were married in 1994. A653. Before J. Howard’s death in 1995, Vickie began challenging his estate plan in the Texas Probate Court. A655. During the course of the probate proceedings, Vickie asserted a claim against Pierce for

alleged tortious interference with an expectancy of a gift based on her allegation that J. Howard intended to give her more than the approximately \$8 million he actually gave her during his life. A656. After a five-and-a-half-month jury trial, the Probate Court entered a final judgment (the “Probate Judgment”) determining that J. Howard never intended to make any such gift, and Pierce did nothing to interfere with his father’s intentions. A659-60.

Before the Probate Court entered its Probate Judgment, Vickie filed for bankruptcy in California. A656. During the course of the bankruptcy proceeding, Vickie asserted in her bankruptcy case the same claim against Pierce that she asserted in the Probate Court – that he had tortiously interfered with her expectancy of a gift from J. Howard. A656-657. Prior to entry of the Probate Judgment, the Bankruptcy Court concluded that Vickie was entitled to relief and issued a judgment in her favor in the amount of \$474 million (the “Bankruptcy Judgment”). A658-59. Vickie, however, never moved in the Probate Court to have the Bankruptcy Judgment recognized as having preclusive effect in the probate proceeding. Under Texas law, Vickie therefore waived any right to claim the Bankruptcy Judgment precluded the Probate Judgment. It is well established under Texas law that if a litigant fails to present a prior judgment in an action and argue its preclusive effect, the defense of preclusion is waived. *See, e.g., Garner v. Long*, 106 S.W.3d 260, 263 (Tex. App. 2003); *Austin Transp. Study Policy Advisory Comm. V. Sierra Club*, 843 S.W.2d 683, 685 (Tex. App. 1992); *see also Dawson-Austin v. Austin*, 920 S.W.2d 776, 787 (Tex. App. 1996), *rev’d on other grounds*, 968 S.W.2d 319 (Tex. 1998). As a result, the Probate Judgment takes precedence over the Bankruptcy Judgment under Texas law. *Stoltz v. Coward*, 30 S.W. 935, 935 (Tex. Civ.

App. 1895); *Kahn v. Bexar County*, No. 04-96-00296, 1997 Tex. App. LEXIS 2669, at *4-5 (Tex. App. May 21, 1997) (same); *Standish v. Huddle*, No. 14-94-01256, 1996 Tex. App. LEXIS 4814, at *4 (Tex. App. Oct. 31, 1996); *see also Reimer v. Smith*, 663 F.2d 1316, 1327 n.13 (5th Cir. 1981) (applying Texas law); *Browning v. Navarro*, 887 F.2d 553, 563 (5th Cir. 1989) (applying Texas law).

B. Proceedings in the District Court

Pierce appealed the Bankruptcy Judgment to the District Court. A660. On appeal, the District Court vacated the Bankruptcy Judgment on the ground that the Bankruptcy Court lacked jurisdiction to enter a final judgment on Vickie’s claim. A660. Like all federal courts, bankruptcy courts exercise only the limited jurisdiction conferred by statute. Pursuant to 28 U.S.C. section 157(b)(1), bankruptcy courts may enter final judgments only in “core matters” that either “arise in” a case under title 11 (the “Bankruptcy Code” or “Code”), or “arise under” the Code. A matter “arises under” the Code if it depends on a provision of the Code for its existence. *See In re Wood*, 825 F.2d 90, 97 (5th Cir. 1987). A matter “arises in” a case under the Code if it is an administrative matter unique to the bankruptcy process. *Id.* A state law tort claim such as Vickie’s obviously does not “arise under” the Bankruptcy Code – it arises under state law. A693. Similarly, a state law tort claim such as Vickie’s does not “arise in” a case under the Code because it is not uniquely a matter of bankruptcy administration. A693. Instead, at best, Vickie’s claim is properly classified as a matter “related to” a bankruptcy case. A692-694. Pursuant to 28 U.S.C. section 157(c)(1), a bankruptcy court may not enter a final order resolving matters that are “related to” a bankruptcy case. Rather, bankruptcy judges may only issue recommended findings of fact and conclusions of law subject to *de*

novo review in the district court. *See Wood*, 825 F.2d at 95. Hence, in this case, the District Court properly vacated the Bankruptcy Court’s “final” judgment because the Bankruptcy Court was without jurisdiction to enter a final judgment.

Thereafter, the District Court concluded that it would consider Vickie’s claim *de novo*. After the Probate Court entered its final Probate Judgment, but before the District Court entered the Judgment in this case, Pierce moved to have the District Court afford preclusive effect to the Probate Judgment on Vickie’s claim. A660. The District Court denied Pierce’s motion. A660. The District Court reasoned that Vickie was not required to file or litigate her claim in the Probate Court (even though she did file and litigate her claim in the Probate Court and, as the Probate Court determined, she was required to do so under Texas law). *In re Marshall*, 271 B.R. 858, 863 (C.D. Cal. 2001). The District Court also concluded that the Probate Judgment was not final (although subsequently the District Court acknowledged that the Probate Judgment became final before the District Court entered its Judgment). *Id.* at 864. The District Court further concluded that the doctrines of issue preclusion and claim preclusion should not apply in situations in which a litigant pursues the same claim simultaneously in two separate courts and one court renders judgment before the other. *Id.* at 866. Finally, the District Court concluded that dismissing Vickie’s claim would be unfair because Vickie sought unsuccessfully to withdraw from the probate proceeding. *Id.*

During the course of the proceedings in the District Court, Pierce likewise raised numerous additional defects with Vickie’s claim, including the argument that jurisdiction in the federal courts over her claim was barred under the so-called “Probate Exception” to federal court jurisdiction; and that her alleged cause of action was not recognized under

Texas law, each of which the District Court denied. A487, A660.

After conducting its own review, the District Court entered the Judgment and Pierce appealed the Judgment to the Ninth Circuit. A660-661. As noted, Pierce also moved the District Court for a stay pending appeal, which the District Court denied. A54-60. In the context of asking the District Court for a stay pending appeal, Pierce offered in his proposed order granting a stay to refrain from asset transfers as a condition of obtaining a stay pending appeal without bond. A104. Likewise, during the hearing, Pierce's counsel reiterated Pierce's offer of refraining from asset transfers as a condition of obtaining a stay without bond. A298, A319, A325, A334. The District Court, however, declined to accept Pierce's tender or enter an order granting a stay. A54-60. Thereafter, Vickie filed her own appeal of the Judgment to the Court of Appeals. A62-64.

C. Vickie's Appeal to the Ninth Circuit

Vickie's statement on appeal and her subsequent briefing demonstrate that Vickie seeks to overturn the Judgment in its entirety. Specifically, Vickie (and now Stern in her stead) seeks to overturn the District Court's Judgment in order to revisit the District Court's decision to vacate the Bankruptcy Judgment. A653. By doing so, Stern plainly does not seek merely to increase the amount of the Judgment. He seeks to overturn it in favor of his hope of eventually resurrecting the prior, vacated Bankruptcy Judgment.

Significantly, the District Court's Judgment and the Bankruptcy Judgment do not rest on the same foundations. The Bankruptcy Court entered the Bankruptcy Judgment on the basis of discovery sanctions the court imposed on Pierce – sanctions the Bankruptcy Court later vacated *after* it entered its judgment. A657-58. In contrast, the

District Court entered its Judgment based on its review of the record in the probate proceedings and the limited testimony it allowed. A487. In addition, the two courts applied different legal analyses and reached vastly different conclusions. A660. For a variety of reasons, reversal of the District Court's Judgment on the grounds Vickie asserts in her appeal would not necessitate reinstatement of the Bankruptcy Judgment. Even in the event Vickie were successful in overturning her own Judgment, many unresolved issues remain with respect to the Bankruptcy Judgment that properly preclude its reinstatement.

Alternatively, Stern seeks to alter the basis for the District Court's calculation of its damages award in its Judgment. Specifically, Stern argues that the District Court selected the wrong dates for purposes of conducting its analysis. A472-73. The difficulty with this argument is that, if the Court of Appeals were to agree and remand on the issue of date selection, the District Court might select dates that result in a dramatically *lower* judgment amount, as the District Court itself acknowledged in the hearing on Pierce's motion to enforce the judgment on November 2, 2005. A182-183.

D. Vickie's Enforcement Efforts

Several months after Vickie filed her appeal of the Judgment, she filed a series of motions with the District Court seeking to enforce the Judgment in a variety of ways. A123-132. Pierce opposed her motions, arguing, among other things, that her appeal of her own Judgment precluded enforcement under the *Bronson* rule. A124-125. In a brief analysis, the District Court turned aside *Bronson*, concluding that this Court's analysis has been replaced by Rule 62(b) (notwithstanding that courts of appeals, including the Ninth Circuit, have continued to apply *Bronson* after the enactment of Rule 62(b)), and

that Vickie's effort to overturn the Judgment was not inconsistent with her enforcing it. A126.

Immediately after the District Court granted Vickie's motion to commence enforcement notwithstanding *Bronson*, Pierce filed his motion for a stay pending appeal with the Ninth Circuit. A1. Among other things, Pierce argued that a stay was warranted under *Bronson*, and also under application of the traditional factors for stay relief. A10-13, A16-22. On January 13, 2003, the Ninth Circuit granted Pierce's motion and thereafter proceeded to resolve the appeals. A404.

E. Proceedings in the Court of Appeals

Although Pierce briefed numerous issues of error, the Court of Appeals addressed only one: whether the Probate Exception applied in this case. Holding that it did, the Ninth Circuit vacated the Judgment and remanded with instructions to dismiss Vickie's claim. A666. In doing so, the court acknowledged expressly that it was not reaching any of Pierce's other grounds of error. A666.

After granting certiorari, this Court reversed the decision of the Ninth Circuit and remanded. On remand, Pierce filed on May 30, 2006 a statement of the open issues that remained for adjudication. A452-457. Shortly thereafter, Pierce passed away, occasioning a delay in the proceedings pending the appointment and substitution of Elaine as his successor in the litigation. On September 29, 2006, Vickie filed in the Ninth Circuit her motion for vacatur of the stay, to which Elaine objected on November 3, 2006. A405-451.

Thereafter, the parties engaged in voluntary court-sponsored mediation (which also occasioned a stay of the proceedings). After the mediation, Vickie passed away,

prompting her attorneys to obtain successfully yet another stay of the proceedings pending Stern's substitution in her stead. On or about March 6, 2009, Stern filed his Application with this Court seeking to vacate the Ninth Circuit's stay.

SUMMARY OF ARGUMENT

Stern's Application falls well short of the several requirements for relief under the All Writs Act, Rule 20.1, and the relevant standards applicable to requests for vacatur of a lower court's stay under Rule 22. Specifically, his Application does not state a claim for "interim relief" in aid of the Court's jurisdiction; does not present "exceptional circumstances" warranting exercise of the Court's discretionary powers; and does not demonstrate that "adequate relief" cannot otherwise be obtained short of vacatur. Similarly, his Application does not demonstrate that the case would "very likely be reviewed" by the full Court (let alone on any issue that requires "interim relief" in order to be preserved for subsequent review); does not demonstrate that Stern may be "seriously and irreparably harmed" by the stay; or that the Ninth Circuit is "demonstrably wrong in its application of accepted standards in deciding to issue a stay." On the contrary, Stern's request for vacatur is not necessary to preserve any issue for subsequent review; his allegation of harm is illusory; and less drastic, alternative relief exists. Similarly, the case is not likely to be reviewed by the full Court upon final disposition in the Court of Appeals; and the lower court was not demonstrably wrong in following applicable law in granting its stay.

Apart from these specific defects in his Application, the relief Stern seeks poses a series of very practical problems with very practical, and legally mandated, solutions. Stern seeks to enforce a judgment that he is simultaneously striving mightily to overturn on appeal in favor of a different, vacated judgment that will not be reinstated simply

because he overturns the first judgment. Alternatively, Stern seeks to alter a judgment to incorporate a modified damages calculation that might actually result in a dramatically *lower* damages award. In *Bronson*, this Court articulated a rule to deal with situations of this kind: a litigant may not enforce a judgment that she is simultaneously seeking to overturn on appeal.

The Ninth Circuit follows the letter of the *Bronson* rule, and appears to have done so in this case. The Fourth Circuit also follows *Bronson*. Other courts of appeals likewise follow *Bronson*, with a narrow exception not relevant here: a party may simultaneously enforce and appeal a judgment provided the party seeks on appeal merely to increase the amount of the particular judgment. This limited exception, of course, is not a rule of this Court. More important, it does not apply in this case because Vickie does not seek on appeal merely to increase the amount of the Judgment – she seeks to eliminate it. *Bronson* therefore applies, and the Court of Appeals properly granted its stay.

Another practical problem with Stern's request is that he seeks effectively to jump the queue with respect to Pierce's probate estate. Under Texas law, a general unsecured creditor such as Stern is not entitled to execute against a decedent's assets ahead of the claims of other creditors with higher priority claims. Instead Stern must wait until those other claims are resolved, including the currently contingent claim of the United States. There is thus no reason to vacate the stay at this time.

As discussed more fully below, Stern's other arguments are without merit, and the Court should deny the Application.

ARGUMENT

A. Stern Is Not Entitled To Relief Under The All Writs Act Or The Rules Of This Court

Stern seeks relief under the All Writs Act, 28 U.S.C. § 1651(a), and applicable Rules of this Court. As Rule 20.1 provides, “[i]ssuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised.” The Rule continues: “To justify the granting of any such writ, the petition must show that the writ will be in aid of the Court’s appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court’s discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.” Stern’s Application falls well short of this standard.

As Stern acknowledges, “the most compelling justification for a Circuit Justice to upset an interim decision by a court of appeals would be to protect this Court’s power to entertain a petition for certiorari before or after the final judgment of the Court of Appeals.” *New York, Natural Res. Def. Council, Inc. v. Kleppe*, 429 U.S. 1307, 1310 (1976) (Marshall, J., in chambers). Stern, however, cannot demonstrate that vacating the stay in this case is necessary for this purpose – to aid the Court’s appellate jurisdiction. Under Rule 20.1, Rule 22, and applicable precedents, this failure is fatal to his Application.

As Justice Rehnquist explained in *Kimble v. Swackhamer*, 439 U.S. 1385, 1385 (1978) (Rehnquist, J., in chambers): “[A] single Justice has authority only to grant interim relief.” The term “interim relief” means relief in aid of the Court’s jurisdiction, not the final disposition of an issue irrelevant to whether the Court may hear a case in the

future. In this case, Stern does not truly ask for interim relief; he seeks final relief in the form of vacatur of the Ninth Circuit's stay. If the Court were to vacate the stay at this juncture, that would essentially resolve the question of the propriety of the stay on the merits, not preserve the merits for future consideration by the Court or preserve any other issue for review. As noted at the outset, the Ninth Circuit's stay is fully justified under *Bronson*. It is also justified by consideration of the traditional stay relief factors. In order to vacate the stay at this point as having been improvidently granted, the Court would have to conclude that *Bronson* is either unsound, or that it does not apply here for some reason. Overturning or qualifying the Court's longstanding *Bronson* precedent, however, lies well outside the scope of a Rule 22 application for "interim" relief.

Viewed differently, if Stern were asking merely for interim relief on the question of the propriety of the stay, one would have expected him to explain precisely how vacating the stay would be in aid of preserving the Court's jurisdiction to consider either the *Bronson* issue on the merits at a later date or some other issue. But he does not even *allege* in any meaningful sense that the Court is likely to grant review of the question whether the Ninth Circuit properly applied *Bronson* (or otherwise granted the stay improvidently). Instead, he makes only the unrelated points that the Court might eventually grant certiorari on (i) the question whether the Ninth Circuit delayed too long in considering his motion to vacate, or (ii) the question of bankruptcy court jurisdiction. *See* Appl. 21-30. But vacating the stay is not necessary to preserve either of these two issues for review. In fact, vacating the stay would almost certainly render the first issue moot, and is entirely unrelated to the second. Stern's request for relief is transparently *not* interim in nature; it is not necessary to aid the Court's jurisdiction on any issue Stern

argues may properly come before the Court on certiorari. For this reason alone the Application should be denied.

Similarly, this case also does not present “exceptional circumstances” requiring vacatur of the stay. As noted at the outset, Stern will not suffer irreparable harm as a result of the stay continuing in effect because his claim of irreparable harm – that his ability to collect the Judgment is diminishing with the passage of time because of Pierce’s estate planning transactions with his GRATS – is illusory. By design, the GRATS pay back even more than Pierce transferred to them, thereby *augmenting* his probate estate, not diminishing it. *See* A449-450. Rather than stuff his assets into a mattress, Pierce invested them prudently in legitimate estate planning vehicles designed to minimize tax liability and maximize return. *See* A449-450. As a result, Stern’s ability to collect on the Judgment is actually enhanced with the passage of time, not reduced. There is simply no need for relief at this time, and Stern has not demonstrated that there is.

On the question of the availability of alternative “adequate” remedies, Stern’s request for relief is singular: he seeks to vacate the Ninth Circuit’s stay. At the same time, he bases his Application in no small measure on the separate argument that the Ninth Circuit has tarried too long in deciding his motion to vacate. The argument that the Ninth Circuit has delayed in deciding his motion, however, logically supports the argument that the lower court should delay no longer; it does not compel the conclusion that decision-making authority should be wrenched from its hands. Nevertheless, having presented his allegation of tardiness, Stern seeks the most extreme remedy possible: asking a Justice of the Court to intervene and order vacatur instead of allowing the lower court to address the question, thereby effectively supplanting the office of the Court of

Appeals. There is, of course, a far less drastic remedy available in response to Stern’s complaint of tardiness: a simple direction that the lower court explain the reasoning behind its stay and rule on Stern’s motion. Stern has not, and cannot, show that this less drastic remedy is inadequate. Accordingly, he has failed to show that, short of vacatur, “adequate relief cannot be obtained in any other forum or from any other court” as Rule 20.1 requires.

Stern quotes *Coleman v. PACCAR Inc.*, 424 U.S. 1301 (1976) (Rehnquist, J., in chambers), in support of his argument. This decision, however, actually cuts deeply against Stern’s position by illuminating the criteria under Rule 22 and section 1651 for vacating a stay. In *Coleman*, Justice Rehnquist stated:

a Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay.

Id. at 1304. Applying these criteria, it is clear that Stern has failed to demonstrate that this Court would likely revisit the *Bronson* rule on certiorari review – he does not even allege that it would. Nor could he. The Ninth Circuit’s issuance of a stay under the facts of this case does not conflict with the decisions of any other court of appeals; it is not contrary to any prior precedent of this Court (on the contrary, it follows *Bronson*); and the issue is not one of manifest public importance requiring review by the Court. *See* Rule 10 (general criteria for certiorari review). Although Stern contends that the Court might have occasion to review other issues arising in the case, he has not demonstrated that vacatur of the stay is necessary to preserve the Court’s ability to review them.

Further, Stern’s argument that certiorari is likely on any of these other issues falls short.

In addition, Stern cannot demonstrate that he may be “seriously and irreparably harmed” by the stay. The harm he complains of – that Pierce invested his property in the income-producing GRATS – is, in fact, no harm at all. Finally, given that the stay in this case is fully justified by this Court’s decision in *Bronson*, it is difficult to conclude that the Ninth Circuit was “demonstrably wrong in its application of accepted standards,” particularly since the courts of appeals have been following *Bronson* for over a century.

As Stern acknowledges in his Application, he bears an “augmented burden” of demonstrating his entitlement to the relief he seeks, explaining that a single Justice should hesitate to “disturb ‘except upon the weightiest considerations, interim determinations of the Court of Appeals in matters pending before it.’” *Certain Named & Unnamed Non-Citizen Children & Their Parents v. Texas*, 448 U.S. 1327, 1330-31 (1980) (Powell, J., in chambers) (quoting *O’Rourke v. Levine*, 80 S. Ct. 623, 624 (1960) (Harlan, J., in chambers)). Yet Stern has failed to demonstrate that the “weightiest considerations” favor his Application. His request for vacatur should be denied.

B. The Ninth Circuit Properly Granted Pierce A Stay Pending Appeal

The Ninth Circuit did not explain the reasoning behind its issuance of its stay in this case. Nevertheless, the propriety of its decision is readily reconciled with, indeed directed by, the law. Although Stern treats this Court’s decision in *Bronson v. La Crosse & Milwaukee R.R. Co.*, 68 U.S. 405, 410 (1863) with disdain, Appl. 42, *Bronson* stands for a well established, simple proposition: a party cannot enforce a judgment that she is attempting to overturn. 68 U.S. at 409-10. This, of course, makes infinite practical sense. If a party were to collect on a judgment, but then overturn that same judgment, the party would have to give the money back. Rather than abide that absurdity, together with

the risk that the enforcing party may become unable to return the funds she has collected, the law simply prohibits the party from collection while her appeal is pending.

Stern mischaracterizes the holding in *Bronson* as dicta, Appl. 42, perhaps because the holding was introduced by the following sentence: “*Another reason why this particular case is not within the provisions of the act of the 3d March is, that the District Court, even if it had jurisdiction of the proceedings, would not be warranted in taking any steps in the execution of the decree in favor of the appellants.*” 68 U.S. at 409 (emphasis added). But language of that kind does not relegate the holding at issue to dicta. In fact, it signifies exactly the opposite: that the decision rests on more than one ground, none of which are dicta. *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) (stating that “where a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*”); *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924) (stating that “where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, ‘the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other’”) (citations omitted); *Dragor Shipping Corp. v. Union Tank Car Co.*, 371 F.2d 722, 726 (9th Cir. 1967) (same).

Under *Bronson*, because Stern also appealed the District Court’s Judgment, he cannot enforce it. In *Bronson*, this Court held specifically:

[T]he District Court . . . would not be warranted in taking any steps in the execution of the decree in favor of the appellants. They having appealed from the decree, it would be against all reason and principle to permit them to proceed in the execution of it, pending the appeal. They assert the decree is founded in error, and for that reason should not be executed, but should be reversed and corrected in the appellate tribunal. The appeal suspends the execution of the decree.

68 U.S. at 409-10; accord *Tennessee Valley Auth. v. Atlas Machine & Iron Works, Inc.*, 803 F.2d 794, 797 (4th Cir. 1986) (“Where the prevailing party in the lower court appeals from that court’s judgment, the appeal suspends the execution of the decree.”); *Price v. Franklin Inv. Co.*, 574 F.2d 594, 597 (D.C. Cir. 1978); *Luther v. United States*, 225 F.2d

495, 497 (10th Cir. 1955) (“It is a well established general rule of solid foundation that a litigant who accepts all or any substantial part of the benefits of a judgment or decree is precluded from asking that such judgment or decree be reviewed on appeal. He cannot avail himself of its advantages and then challenge its disadvantages on appeal. After accepting all or any substantial part of its benefits, he cannot escape its burdens.”); *First Nat’l Bank of Miles City v. State Nat’l Bank of Miles City*, 131 F. 430, 431 (9th Cir. 1904); *see also Alcan Aluminum Corp. v. Continental Ins. Co.*, 28 Fed. Appx. 701, 703 & n.11 (9th Cir. 2002) (“Alcan’s appeal automatically stayed the judgment, however, and Alcan had no right to force Lloyd’s to pay. *See Alcan*, 173 F.3d at 859 (“once Alcan filed its appeal . . . the execution of the judgment against its insurers was automatically stayed”) (citing *Bronson*, 68 U.S. at 409-10)) (unpublished). This accords with a settled rule of law precluding a litigant from accepting “all or a substantial part of the benefit of a judgment” while, at the same time, challenging “unfavorable aspects of that judgment on appeal.” *Price*, 574 F.2d at 597; *accord Fidelcor Mortgage Corp. v. Insurance Co. of N. Am.*, 820 F.2d 367, 370 (11th Cir. 1987) (“It is well settled that when a litigant accepts the substantial benefits of a judgment, voluntarily and intentionally, and with knowledge of the facts, he waives the right to appeal from an otherwise adverse judgment.”).³ The import of *Bronson* and these decisions is clear: Vickie cannot enforce the Judgment while her appeal is pending.

Some courts of appeals have taken the view that where a party seeks to overturn a judgment on appeal, the appeal estops enforcement of the judgment only where the relief sought on appeal is inconsistent with enforcement of that judgment. *E.g., Carter v. United States*, 333 F.3d 791, 793 (7th Cir. 2003) (“an appeal by the prevailing party does not stay the judgment in his favor unless he is seeking to change the form of the relief

³ An exception to this rule exists when “a judgment or decree adjudicates separable or divisible controversies,” *Price*, 574 F.2d at 597, but that exception is inapplicable here.

that he obtained in the district court (for example, from damages to specific performance) rather than, as in this case, merely seeking more of the same”); *Trustmark Ins. Co. v. Gallucci*, 193 F.3d 558, 559 (1st Cir. 1999) (per curiam); *Jack Frost Labs., Inc. v. Physicians & Nurses Mfg. Corp.*, Nos. 96-1114, 96-1430, 96-1543, 1997 WL 306956, at *3 (Fed. Cir. Feb. 7, 1997); *BASF Corp. v. Old World Trading Co.*, 979 F.2d 615, 616-17 (7th Cir. 1992); *Enserch Corp. v. Shand Morahan 7 Co.*, 918 F.2d 462, 464 & n.3 (5th Cir. 1990) (“a lower court judgment may be suspended without bond when the relief sought by the prevailing party on appeal is inconsistent with enforcement of the lower court’s judgment”); *Northern Indiana Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 281 (7th Cir. 1986) (appeal seeking substitution of specific performance for damages judgment precludes execution of damages judgment).

For purposes of this case, however, the distinction is one without a difference, because Stern’s claim cannot be characterized as seeking merely more money on the same judgment. Rather, Stern has appealed and is attempting to overturn the Judgment, asserting that the District Court erred in holding that Vickie’s claim was “non-core,” and therefore erred in vacating the Bankruptcy Judgment. Appl. 25-26. But even if Stern’s appeal seeking to overturn the District Court’s Judgment were successful in the Ninth Circuit, the Bankruptcy Judgment would remain vacated, leaving Stern with exactly *nothing to enforce*. If Stern is successful in overturning the Judgment, the District Court would then have to take up the issue whether the Bankruptcy Judgment itself is defective -- a separate proceeding in its own right quite apart from this appeal. In other words, if Stern were successful in overturning the Judgment in the current appeal, he would have *no enforceable judgment* at the conclusion of his appeal.

Stern plainly seeks to overturn the District Court’s Judgment by arguing on the basis of his “core/non-core” theory that the Bankruptcy Court rather than the District Court had power to enter a final judgment. Appl. 25-27 (citing authority giving the bankruptcy court the power to enter final judgments in certain core cases), Appl. 31-35

(claiming Pierce consented to the bankruptcy court's power to enter a final judgment). Although Stern is hopeful that vacating the District Court's Judgment would lead, eventually, to reinstatement of the larger Bankruptcy Judgment, that is far from certain because the Bankruptcy Judgment is fundamentally defective. To begin with, the Bankruptcy Judgment is explicitly based on sanctions the Bankruptcy Court itself vacated and did not reinstate after it entered its judgment. A657-658. Accordingly, these sanctions could not properly be the basis for the judgment. Moreover, the sanctions were imposed mainly for a third party's conduct rather than Pierce's conduct. In addition, no evidence supports many of the Bankruptcy Court's key findings. Further, the Bankruptcy Court improperly barred Pierce from putting on his case. A657-658. There is therefore a strong likelihood that even if Stern's "core/non-core" theory were accepted, vacatur of the District Court's Judgment would result *without* reinstatement of the Bankruptcy Judgment.

In addition to seeking to overturn the Judgment in the hope of resurrecting the Bankruptcy Judgment, Stern also challenges the District Court's calculation of damages. Specifically, Stern contends that the District Court's damage award should be changed on the theory that the court erred in selecting the dates it used in performing its calculations. A63-64, A472-473, A477. If the Ninth Circuit were to agree that the District Court erred in its selection, the District Court on remand could select dates that are less favorable to Vickie's estate (rather than more favorable to Vickie's estate, as Stern hopes), thus dramatically reducing the Judgment. Accordingly, because Stern seeks to alter significantly the basis for the District Court's award, and this will not necessarily result in an increase, he cannot enforce the Judgment on behalf of Vickie's estate.

Finally, Stern argues that because Pierce appealed first, *Bronson* is inapplicable. Appl. 44 n.16. This is a red herring. The critical point is whether a prevailing party appeals, not when they do so. The label of "cross-appeal" is irrelevant. *BASF*, 979 F.2d at 617 ("Old World's position implies that a bond is essential if the loser files the first

appeal and the winner takes a cross-appeal but not when the sequence is reversed; what sense would that make?"); *Northern Indiana*, 799 F.2d at 281 (applying *Bronson* rule to cross-appeal and holding that “[a] party that is trying to obtain specific performance in lieu of damages cannot at the same time attempt to execute a damage judgment.”).

Stern’s appeal, even if successful, would lead only to further proceedings – not to an enforceable judgment. And even if an enforceable judgment did eventually result, it would be a different judgment from a different court – not the Judgment he is stayed from enforcing. In sum, under *Bronson*, *Tennessee Valley Authority*, or *Enserch*, Stern cannot enforce the judgment pending his appeal.

C. Elaine Is Likely To Succeed On The Merits Of Her Appeal

Time and space do not permit a full recitation of the defects in the District Court’s Judgment, or the panoply of reasons Elaine is entitled to prevail on her appeal. The Court of Appeals, of course, is fully aware of all the respective arguments of the parties and is likewise familiar with the voluminous record, having lived with the case for many years. Given its familiarity, it may be assumed that the Court of Appeals is well suited to evaluate the merits of the parties’ respective appeals and arguments, and likewise Stern’s motion to vacate its stay. On the issue of Elaine’s likelihood of prevailing in her appeal, Elaine presents here a summary of her argument on the issue of collateral estoppel and *res judicata* and explains why Stern’s “core/non-core” theory is irrelevant to the outcome of this case.

Under the Federal Full Faith and Credit Act, 28 U.S.C. § 1738, a federal district court must dismiss a claim if, following the entry of a final state court judgment, the courts of that state would do so under ordinary principles of claim and issue preclusion. *See* 28 U.S.C. § 1738; *Allen v. McCurry*, 449 U.S. 90, 96 (1980); *Clements v. Airport*

Auth. of Washoe County, 69 F.3d 321, 326-28 (9th Cir. 1995). Presented with the Probate Court's judgment in this case, any Texas court would dismiss Vickie's tort claim on either of these theories, and, accordingly, the District Court was required to do so as well. *See Harrold v. First Nat'l Bank*, 93 F. Supp. 882, 888 (D. Tex. 1950) (applying Texas law in probate matter).

With regard to claim preclusion, the Probate Court's judgment precluded Vickie's tort claim in the District Court because the Probate Judgment constitutes a final judgment of a court of competent jurisdiction, and involves the same parties and claims that were or could have been raised in the probate proceeding. *See Amstadt v. United States Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996) (*res judicata* applies when these requirements are satisfied). Under Texas law, the Probate Court is a court of general jurisdiction with broad authority to resolve claims and controversies concerning a decedent's affairs and property. *See Coble Wall Trust Co. v. Palmer*, 859 S.W.2d 475, 480 (Tex. App. 1993); *Stevenson v. Tice*, 593 S.W.2d 794, 796 (Tex. App. 1980). Although Vickie eventually sought to withdraw from the probate proceeding after she obtained the Bankruptcy Judgment from the Bankruptcy Court, she remained a party to the probate proceeding as a result of the various counterclaims filed against her, including Pierce's request for declaratory relief to determine Vickie's claims and rights. She likewise participated fully and extensively in the Texas proceeding. Under Texas law, *res judicata* applies "not only on matters actually litigated, but also on *causes of action* or defenses which arise out of the same *subject matter* and which might have been litigated in the first suit." *Barr v. Resolution Trust Corp. ex rel. Sunbelt Fed. Sav.*, 837 S.W.2d 627, 630 (Tex. 1992) (emphasis in original); *see also Underwriters Nat'l Assur. Co. v. N.C. Life & Accident &*

Health Ins. Guar. Ass'n, 455 U.S. 691, 710 (1982). In this instance, there is no question that Vickie's claim falls within the sweep of this doctrine: not only are the parties and issues the same, the Probate Court's judgment clearly determined that Vickie was entitled to take nothing on her claim from Pierce. A715-718.

Further, Vickie's claim was and is barred under the Texas doctrine of collateral estoppel because issues critical to her claim were actually resolved against her in the probate proceeding. Vickie's claim turns on whether J. Howard intended to give her a gift; if he did not, she cannot possibly argue that Pierce "tortiously" interfered with J. Howard's intention. This issue was fully and fairly litigated against Vickie in the probate proceeding, was essential to the Probate court's judgment, and involved both Pierce and Vickie as adversaries. Accordingly, any Texas Court would give preclusive effect to the Probate Court's findings that J. Howard never intended to give Vickie a gift; that his estate plan was valid; and Pierce did not engage in any improper conduct. *Mower v. Boyer*, 811 S.W.2d 560, 563 (Tex. 1991) (enumerating elements of collateral estoppel doctrine); A703-724.

Stern argues that Elaine's theories of issue preclusion and claim preclusion may not prevail in the event the Court of Appeals determines that the District Court improperly vacated the Bankruptcy Judgment and the Bankruptcy Judgment is reinstated at some point. Stern argues that the District Court improperly vacated the Bankruptcy Judgment on the theory that Vickie's state law claim for tortious interference with an expectancy of a gift is a "core" matter that the Bankruptcy Court had jurisdiction to finally resolve. Stern maintains that, if the Bankruptcy Judgment is reinstated, it will take precedence over the Probate Judgment for purposes of issue and claim preclusion because

the Bankruptcy Judgment was first in time. Stern's theory is in error because Vickie never moved in the Probate Court to have the Bankruptcy Judgment afforded preclusive effect prior to the Probate Court's entry of its Probate Judgment. Accordingly, under the "last-in-time" rule, the Bankruptcy Judgment cannot take precedence over the Probate Judgment even if reinstated.

It is well established under Texas law that if a litigant fails to raise a prior judgment in an action and argue its preclusive effect, the defense of preclusion is waived. *See, e.g., Garner v. Long*, 106 S.W.3d 260, 263 (Tex. App. 2003); *Austin Transp. Study Policy Advisory Comm. v. Sierra Club*, 843 S.W.2d 683, 685 (Tex. App. 1992). Having failed to properly present the Bankruptcy Judgment in the Texas probate proceedings and argue its preclusive effect, Vickie waived her right to assert the Bankruptcy Judgment's priority in terms of establishing her alleged entitlement. As Texas courts have long recognized in such instances, when inconsistent final judgments are rendered in two actions, it is the later of the two judgments that is accorded conclusive effect in subsequent actions under the rules of *res judicata*. Restatement (Second) of Judgments, § 15 (1982); *Stoltz v. Coward*, 30 S.W. 935, 935 (Tex. Civ. App. 1895); *Kahn v. Bexar County*, No. 04-96-00296, 1997 Tex. App. LEXIS 2669, at *4-5 (Tex. App. May 21, 1997); *Browning v. Navarro*, 887 F.2d 553, 563 (5th Cir. 1989) (applying Texas law).⁴ Accordingly, the later-in-time Texas Probate Judgment is properly the sole judgment with preclusive effect even if the Bankruptcy Judgment were reinstated. Accordingly, Stern's

⁴ Of course, this same rule does not apply to the District Court's Judgment, given that, after the Probate Court entered its Probate Judgment Pierce properly moved the District Court to recognize the Probate Judgment's preclusive effect before the District Court entered its Judgment.

theory on the “core” nature of Vickie’s claim is irrelevant to the proper resolution of this matter. For these reasons, Elaine is likely to prevail in her appeal to the Ninth Circuit.

D. Absent A Stay, Pierce’s Estate Is Likely To Suffer Irreparable Harm; Stern Will Suffer No Harm Under The Status Quo; Stern May Not Execute Against Pierce’s Probate Estate

Stern alleges on the basis of speculation that Pierce “apparently” dissipated his assets by transferring them to the GRATS. Appl. 2-3. This erroneous assertion of “apparent” asset depletion is particularly remarkable, and unsettling, given that (i) Elaine provided Stern with a copy of the terms of a representative GRAT several years ago (the Starolite Trust); (ii) GRATS are extremely common and their operation is widely understood; (iii) Texas law is clear that GRATS remain subject to the claims of the grantor’s creditors; and (iv) Pierce’s GRATS are designed to augment his probate estate, not deplete it – and in fact have been, and continue, to do so. Far from providing any basis to vacate the Court of Appeal’s stay, Stern’s unsupported allegation reveals a fundamental misunderstanding of estate planning methods. GRATS are legitimate instruments for tax and estate planning, not asset protection, and the GRATS here do not prevent collection of any judgment.

In a GRAT, the grantor/donor creates a trust and retains the right to receive a fixed annuity based on a specified sum or a fixed percentage of the value of the assets transferred to the trust. Since the grantor retains an annuity, it is called a grantor retained annuity trust. The GRAT tax benefit, specifically authorized by the Internal Revenue Code, is to exclude a portion of asset appreciation (if any, in fact, occurs) from the grantor’s estate for tax purposes. *See* 26 U.S.C. § 2702(a)(2)(B), 2702(b); 26 C.F.R. § 25.2702-3; 26 C.F.R. § 25.2702 Example 2; I.R.S., *Qualified Interests*, 70 Fed. Reg.

9222 (Feb. 22, 2005) (revising regulations governing “grantor retained annuity trust (GRAT)”); *Schott v. Commissioner of Internal Revenue*, 319 F.3d 1203 (9th Cir. 2003) (discussing and upholding “grantor retained annuity trust”).⁵

The GRATS here protect from taxation appreciation in some of Pierce’s assets; they do not prevent collection of claims. This rule is clearly articulated in Title 9 of the Texas Property Code, which provides that “[i]f the settlor is also the beneficiary of the trust, [even] a provision restraining the voluntary and involuntary transfer of the settlor’s beneficial interest does not prevent the settlor’s creditors from satisfying claims from the settlor’s interest in the trust estate.” Tex. Prop. Code Ann. § 112.035(d) (2007). Texas case law also demonstrates that a self-settled trust is subject to a creditor’s claim. *See Daniels v. Pecan Valley Ranch*, 831 S.W.2d 372, 378 (Tex. App. 1992) (“In Texas, a settlor cannot create a spendthrift trust for his own benefit and have the trust insulated from the rights of creditors. Such an instrument is ‘self-settled’ and, therefore, invalid.”); *Glass v. Carpenter*, 330 S.W.2d 530, (Tex. Civ. App. 1959) (same).

Moreover, each trust quickly pays Pierce (and now his estate) more than the value of what was placed in trust. Each trust requires payment of an annuity to Pierce with a present value equal to the value Pierce placed in trust. In absolute terms, the annuity paid will, over three years, equal over 112% of the value placed in trust. See *Staurolite Trust* § 3, Ex. A; Ex. B ¶ 6. Given the recent decline in the markets, the GRATS may well turn

⁵ *See also Walton v. C.I.R.*, 115 T.C. 589 (U.S. Tax Court 2000) (upholding GRAT), *acquiesced in by I.R.S.* Notice 2003-72, 2003-44 I.R.B. 964 (Oct. 15, 2003); M. Tarallo and B. Van Buren, “Impact of Federal Securities Law On Administration of Grantor Related Annuity Trust,” 25 *Banking & Financial Services Policy Report* 3 (2006) (“Estate planners frequently recommend that their clients employ a grantor retained annuity trust (also referred to as GRAT) as a tax advantageous vehicle for transferring highly appreciable assets to a future generation”; explaining GRAT mechanics and advantage).

out to be particularly prudent investments. Whereas the assets that Pierce transferred to them have probably declined significantly in value in recent months, the GRATS remain obligated to pay the annuity amounts as stated.

Nevertheless, Stern suggests that Pierce probably did something nefarious with his assets because Edwin Hunter is Pierce's estate planning counsel and Stern accuses Hunter of having "masterminded these transfers just as he had masterminded the use of grantor retained annuity trusts to divest J. Howard of all of his assets." Appl. 14. This bald accusation is extraordinary and does not follow at all. Vickie asserted a similar "guilt-by-association" accusation against Pierce in the District Court, which rebuffed her theory with the finding "Vickie has presented no evidence that Pierce is presently involved in hiding or dissipating assets." A128.

Stern complains further that the Judgment would constitute merely a general unsecured claim against Pierce's estate, subject to claims of a higher priority. Appl. 14. That, however, is simply the classification of the liability under Texas law. It is not the consequence of Pierce's estate plan.

Stern likewise complains that there is "a transferee federal gift-tax liability of more than \$100 million on behalf of J. Howard's estate," and comments that "Elaine has so far said nothing in her probate court filings on the subject of debts owed by the estate." Appl. 14. But that is because the IRS has not yet determined the portion of this liability attributable to Pierce's probate estate. Upon information and belief, the liability to Pierce's probate estate will be far less than the \$100 million amount, but the IRS has not yet stated its position. At the same time, as indicated in Elaine's declaration, the value of Pierce's probate estate has increased from the \$125 million value listed in her earlier

appraisal. Ex. A, Marshall Decl. In any event, the taxes are what they are, and the IRS is expected to take the position that it has a lien on all of the assets of the probate estate to secure payment of its claim. Ex. B, Hunter Decl. The good news as far as Stern is concerned is that the value of Pierce's probate estate is increasing and will continue to increase, while the amount of J. Howard's tax liability attributable to the estate appears to be falling.

Stern suggests that the creation of the GRATS, though innocent by itself, somehow violated a court order. Stern does not assert directly that Pierce violated any order, because plainly Pierce did not. Instead, Stern resorts to mistaken assertions, half-truths, and innuendo. Among other things, he contends that Pierce and his counsel "consistently represented to both the district court and the Ninth Circuit that Pierce would neither transfer nor dissipate the assets during the pendency of the stay." Appl. 10. In a footnote, Stern goes further and contends that "[i]n the Ninth Circuit," Pierce's counsel "asserted that in regard to any stay it granted, Pierce would be bound by the same restrictions on the dissipation or transfer of his assets that he had proposed in the district court." Stern offers several cites to his appendix that purport to support this contention. None do. In truth, no such assertion was ever made.

Stern's mistake in coloring the record in this fashion is neither innocent nor harmless. It lends the false impression that Pierce and his counsel set about on a plan to mislead the District Court and the Court of Appeals. Almost all of the cites that Stern supplies that allegedly support his assertion are to the record in the District Court and concern simply Pierce's offer to agree to the asset transfer restriction set forth in his proposed order as a condition of receiving a stay from the District Court that Pierce never

received. Obviously, the proposed term never became operative because his proposal was rejected and the proposed order never entered. There is only one cite to a pleading presented to the Court of Appeals, and it likewise does not support Stern's contention. This cite is discussed in footnote 2, *supra*.

More important, Stern's mistaken assertions amount to nothing because Pierce plainly did not "dissipate" his assets: GRATS are standard estate and tax-planning instruments recognized in judicial decisions and IRS regulations, and the money returns to the estate in three years. Nothing that happened in the District Court or the Court of Appeals barred Pierce from routine estate and tax planning.

The upshot of the foregoing is that Stern cannot contend legitimately that Pierce's estate planning, or the passage of time, is causing him harm, let alone harm that is irreparable. Seeking to cast further suspicion, Stern suggests that Pierce must have dissipated his assets because "apparently" he used to be worth "billions," but his probate estate is listed as having a value of approximately \$125 million. Appl. 2-3. As noted, a key problem with Stern's analysis is his contention that Pierce was ever worth "billions."

Stern cites to the District Court's opinion to support the proposition that Pierce's largest asset is J. Howard's former interest in Koch industries. Appl. 13 (citing to Pet. App. 86-88, 108-09, 111-19, 122-27, and 634-35). At no point, however, did the District Court evaluate *Pierce's* holdings in Koch. The court did describe J. Howard's holdings in MPI and J. Howard's sale of some of that stock to Pierce, but in spite of its observation that MPI had a value in 1995 of approximately \$260 million owing to its Koch stock, the court made no finding as to those shares' 2002 value, nor did it make a finding as to the value of *Pierce's* indirect interest in those shares.

Stern further cites Pierce's declaration, in which he described his interest in Trof, a minority shareholder of Koch, but there is no discussion whatsoever of particular dollar amounts in Pierce's declaration upon which Vickie could reasonably base an allegation that Pierce is worth "billions." Appl. 634-35.

More problematic, Stern contends that the Bankruptcy Court found that "Pierce's MPI stock was worth over \$1.6 billion as of August 1999." Appl. 13. But the record cite that he refers to actually states the Bankruptcy Court's statement that Pierce's MPI stock was worth \$1.6 billion in 1999. Appl. 13 (citing Pet. App. 29-30, 188). Apart from conflicting with the District Court's observation that MPI was worth approximately \$260 million in 1995, the District Court vacated the Bankruptcy Court's findings, which were based largely on presumed facts.

Vickie further states that the District Court found in 2002 that Pierce's "holdings in Koch stock were worth \$780 million in 1995," and that given "this fabulous rate of growth, . . . the stock would be worth more than \$2 billion today." Appl. at 13 (citing Pet. App. 6, 127). The District Court, however, did not actually make a \$2 billion valuation finding. Review of the record cite demonstrates that the Court merely speculated that, if Koch realized a certain growth rate, the stock might conceivably be worth that much. And the court attributed its \$780 million comment to an earlier "finding" that does not actually appear to exist. This number also conflicts with the court's \$260 million valuation observation mentioned above. Stern's other citations likewise do not establish his assertion.

It is not surprising that Stern can point to no tangible valuation in the record establishing that Pierce was ever worth "billions." That is because none of the courts

below actually undertook to value Pierce's assets because the value of Pierce's assets was irrelevant to the litigation. Stern's assumption that Pierce must have dissipated his assets because, at one time, he was worth "billions" is thus unfounded. Stern has failed to demonstrate that he would suffer irreparable harm from continuance of the stay.

In contrast, Pierce's estate would suffer irreparable harm if the Judgment were executed or a bond required. The estate's assets, though extensive, are illiquid. Ex. A, Marshall Decl. ¶ 9. As demonstrated in the prior litigation over the stay, the Judgment could not be paid without selling stock, which could not be replaced if the Judgment were finally vacated or reversed. Ex. A, Marshall Decl. ¶ 9; A31. Pierce's probate estate also could not post a bond. Ex. A, Marshall Decl. ¶ 10. Elaine faces personal liability if she pays claims other than in accordance with their relative priorities under law and it turns out there is not enough to go around. *See* 31 U.S.C. § 3713(b) (liability for paying other claim before federal tax); Tex. Prob. Code § 146(c) (exonerating independent executor from liability for paying claim *if* she reasonably believes the estate will have sufficient assets to pay all claims). And if Stern were allowed to seize assets, Pierce's estate would likely have great difficulty recovering from him if the Judgment were finally vacated or reversed.

In addition, there is no point in vacating the stay given that, by operation of law, Stern cannot execute on the assets of Pierce's estate. A plaintiff in federal court "may establish a debt against the estate [citations], but the debt thus established must take its place and share of the estate as administered by the probate court, and it cannot be enforced by process directly against the property of the decedent." *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 44 (1909); *accord Pufahl v. Parks' Estate*, 299

U.S. 217, 226 (1936); Charles A. Wright et al., *Federal Practice and Procedure* § 3610 at 496-97 (1984) (federal court may “establish the claimant’s right in a way that will be binding in the state proceedings” but “may not directly order the distribution of property in the custody of a state court, nor will execution lie on its judgment”).

The law is the same in Texas, the location of Pierce’s probate proceeding: “[A] money judgment against a deceased defendant is a claim to be proved up and paid in due course of administration.” *First Nat’l Bank of Bowie v. Cone*, 170 S.W.2d 782, 783 (Tex. App. 1943) (where judgment was entered during debtor’s life, his death prevented execution and attempted post-death lien was invalid) (citations omitted); *accord Castaneda v. Long*, 475 S.W.2d 578, 584 (Tex. App. 1972) (“A money judgment against a deceased defendant is a claim to be proved and claimed against the administration of his estate. . . . A judgment that is rendered against a person during his lifetime is no claim against his estate until it has been established as are other claims.”).

Currently, there is no deadline for presenting claims at Pierce’s probate. Thus, Vickie’s estate is not harmed by further delay. *See* Tex. Prob. Code § 298(a), 294(d) (with exception not relevant here, a claim not barred by the statute of limitations may be presented “at any time before the estate is closed”). The claim of Vickie’s estate, should the Judgment be affirmed by the Ninth Circuit, will be treated the same as all other general unsecured creditors of the estate, regardless of when the claim is filed. *See* Tex. Prob. Code § 146 (independent executor “shall approve, classify, and pay, or reject, claims against the estate in the same order of priority, classification, and proration prescribed in this Code”), § 322 (setting out priority of claims; Vickie’s estate’s falls in lowest-priority class, eighth), § 146(c) (independent executor may pay claim not barred

by the statute of limitations at any time, if she “reasonably believes the estate will have sufficient assets to pay all claims”); § 321 (claims in a given class “shall be paid pro rata” in event assets insufficient).

Stern argues that Pierce is required to post a supersedeas bond in order to obtain a stay pursuant to Fed. R. Civ. P. 62(d). Under *Bronson*, however, because Stern’s enforcement is automatically suspended owing to his own appeal of his own Judgment, the supersedeas bond requirement is waived. In *Bronson*, the Court reasoned that, when a prevailing party appeals a judgment in his or her favor, any bond requirement would be “an act of supererogation,” and therefore, not required. *Bronson, supra* at 410. This exception to the Rule 62(d) requirement still holds true today. As the Fourth Circuit stated in *Tennessee Valley Authority*, “where the prevailing party is the first to take an appeal, no supersedeas bond can be required of the losing party when it subsequently files its own appeal.” *Tennessee Valley Auth.*, 803 F.2d at 797.

E. The Ninth Circuit’s Order Is Entitled To A Presumption Of Validity, And Stern Has Not Demonstrated That It Was Improper In Any Respect

Stern states that, in considering an applications to a single Circuit Justice, “[a] lower court judgment, entered by a tribunal that was closer to the facts than the single Justice, is entitled to a presumption of validity.” *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972); *see also Holtzman v. Schlesinger*, 414 U.S. 1304, 1314 (1973) (Marshall, J., in chambers) (where a Circuit Justice considers vacating a stay imposed by a circuit court panel, the decision of the panel “is entitled to great weight”) (citing *United States ex rel. Knauff v. McGrath*, Oct. Term, 1949 printed in 96 Cong.Rec. A 3751 (1950) (Jackson, J., in chambers) (“As Circuit Justice for the Second Circuit, it is my almost invariable

practice to refuse stays which the Court of Appeals or its judges have denied. This is because they are closer to the facts, have heard the merits fully argued, and because I have confidence that they would grant stays in worthy cases.”) and *Breswick & Co. v. United States*, 75 S. Ct. 912, 915 (1955) (Harlan, J., in chambers) (“A single Justice may also be expected to give due regard to a lower court’s denial of a stay.”)). Stern contends that the presumption of validity may be overcome, but he has failed to do so here.

Stern faults Pierce for not filing his original motion for a stay in the Ninth Circuit until months after entry of the Judgment. Appl. 36. The chief problem with his argument, however, is that, once Vickie filed her own appeal of the Judgment, there was no need to file a motion for a stay with the Court of Appeals: under *Bronson*, enforcement of the Judgment was automatically suspended and, for several months, Vickie took no action to collect. When she eventually filed her various enforcement motions, Pierce timely opposed them, citing *Bronson*. It was only after the District Court turned *Bronson* aside that Pierce filed his emergency motion for a stay pending appeal.

Stern contends that the Ninth Circuit “*sua sponte* stayed the district court’s order permitting Vickie to register her judgment outside of California,” Appl. 37, implying that the Court acted on its own. Not so. Pierce specifically asked the Court to stay enforcement of the Judgment. A359. Logically and legally, this includes the Enforcement Order.

Stern contends that the Court of Appeals was required to defer to the District Court’s findings. Appl. 37. But this contention is also misplaced. Courts of appeals regularly assess the merits of stay applications independently, granting stays upon their own balancing of the hardships and likelihood of success. *See e.g., Harris v. United*

States, 413 F.2d 314 (9th Cir. 1969) (granting stay upon Court of Appeals' own balancing of hardships and of likelihood of success, where district court had denied stay); *FTC v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850 (10th Cir. 2003) (similar); *Haitian Refugee Ctr., Inc. v. Baker*, 950 F.2d 685 (11th Cir. 1991) (similar); *Standard Haven Prods., Inc. v. Gencor Indust., Inc.*, 897 F.2d 511 (Fed. Cir. 1990) (similar). The rule Stern cites relates to the standard for reviewing the *district court's* decision about bond, not the standard for a Circuit Court's decision on an application made to it. None preclude the appellate court from granting a stay without bond where, as here, the District Court's Judgment is deeply flawed. Stern cannot enforce the Judgment against his estate anyway, the balance of the equities tip sharply in favor of Elaine, and Stern has an adequate remedy if he ultimately prevails – resort to relief in the probate court. *See Pacific Reins. Mgmt. Corp. v. Ohio Reins. Corp.*, 935 F.2d 1019 (9th Cir. 1991) (amount of bond); *Arban v. West Publishing Corp.*, 345 F.3d 390, 409 (6th Cir. 2003) (denial of bond); *see also United States v. Peninsula Communications, Inc.*, 287 F.3d 832 (9th Cir. 2002) (stay of district court's own proceedings in favor of other case).

CONCLUSION

For the foregoing reasons, the Court should deny Stern's Application to vacate the Ninth Circuit's order staying (1) the Judgment without bond and (2) the District Court's order allowing registration of the judgment in foreign jurisdictions.

Respectfully submitted,

/s/ G. Eric Brunstad, Jr.

G. Eric Brunstad, Jr.

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EXHIBIT A

**DECLARATION OF ELAINE T. MARSHALL IN SUPPORT OF OPPOSITION TO
APPLICATION FOR ORDER VACATING THE NINTH CIRCUIT ORDER STAYING
THE DISTRICT COURT JUDGMENT WITHOUT BOND**

I, Elaine T. Marshall, declare as follows.

1. I am the widow of E. Pierce Marshall ("Pierce"), the Independent Executor of the Estate of E. Pierce Marshall. I have personal knowledge of the facts stated in this declaration, and could and would testify competently thereto if called to do so.
2. The will, trusts and related documents that Pierce executed in May 2006 were the product of approximately 18 months of planning, reparation and drafting, which Pierce began in November 2004. They were not caused by the Supreme Court's decision on May 1, 2006.
3. As Independent Executor, I was required to file an inventory and appraisalment of all assets in Pierce's probate estate with the probate court in Harris County, Texas. I timely filed this inventory and appraisalment on November 8, 2007, a copy of which is attached hereto as Exhibit A. As stated in the inventory and appraisalment, the total assets of Pierce's probate estate were approximately \$125 million. These assets have now been augmented by annuity payments from various grantor retained annuity trusts established by Pierce.
4. The inventory and appraisalment is a public document available to all claimants, including Howard K. Stern.
5. Pierce's estate has a large contingent transferee federal gift tax liability of many millions of dollars. This liability has been reduced to a judgment in the Tax Court and is pending with Collections.

6. In addition, Pierce's estate must pay significant secured claims, including secured notes. These claims are pending in probate proceedings. I expect these secured debts to be substantial, totaling several million dollars.

7. In addition to the priority claims for taxes and secured claims, Pierce's estate will owe significant expenses of administration and expenses incurred in managing the estate. These expenses are ongoing.

8. The claims described above hold legal priority over general unsecured claims. I understand that I may be held personally liable if I pay a general unsecured claim before a higher-priority claim and a deficiency results.

9. Pierce's estate largely consists of illiquid, highly-restricted interests in closely-held businesses controlled by third-parties. If these interests were seized and sold, the estate could not replace them do to their unique character and the fact that they would be discounted far below their intrinsic value.

10. The estate does not have sufficient liquid assets to post an appeal bond. Based on the Declaration of Jerry Macholz filed December 13, 2002, in the Ninth Circuit in support of Pierce's motion to stay enforcement of the judgment, I understand that, as a condition of posting a large appeal bond, a surety company would require the estate to post cash or cash equivalents for at least the amount of the judgment, *i.e.*, at least \$89,000,000. In addition, I understand that the annual premium would be nearly \$1,000,000. The estate does not have liquid assets in excess of the potential claims of the United States government for this purpose. Thus, it would be unable to post a bond.

11. I am trustee of The Staurolite 2006 Grantor Retained Annuity Trust. A true and correct copy of the trust instrument creating that trust is attached hereto as Exhibit B.

12. All of the annuity payments from The Staurolite 2006 Grantor Retained Annuity Trust owing to date have been fully paid, largely by returning to the estate the same illiquid, highly restricted assets which were settled on the trustee. Likewise, the other grantor-retained annuity trusts executed by Pierce in May 2006 (described more fully in the declaration of Edwin K. Hunter) are also all current in their annuity payments, again principally through the return of the assets originally settled on the trustee.

I declare under penalty of perjury under the laws of the United States and the State of Texas that the foregoing is true and correct.

Dated: March 12, 2009

Elaine T. Marshall
Elaine T. Marshall

1070529.1

**EXHIBIT A
TO DECLARATION**

FILED
2007 NOV -8 PM 3:59
Beverly B. Kaufman
COUNTY CLERK
HARRIS COUNTY, TEXAS

HORRIGAN & GOEHRS, L.L.P.

By: Linda C. Goehrs
LINDA C. GOEHRS
State Bar No.: 08059220
909 Fannin, Suite 1600
Houston, Texas 77010-1003
(713) 659-4200
(713) 659-3804 (Facsimile)

ATTORNEYS FOR ELAINE T. MARSHALL,
INDEPENDENT EXECUTRIX OF THE ESTATE
OF E. PIERCE MARSHALL, A/K/A PIERCE
MARSHALL, DECEASED

950-60-0626

THE STATE OF TEXAS §
COUNTY OF Dallas §

I, ELAINE T. MARSHALL, do solemnly swear that the foregoing Inventory and List of Claims is a full and complete inventory of the property and claims of the Estate that have come to my knowledge.

Elaine T. Marshall
ELAINE T. MARSHALL, Independent Executrix
of the Estate of E. Pierce Marshall, a/k/a Pierce
Marshall, Deceased

SUBSCRIBED AND SWORN TO BEFORE ME by Elaine T. Marshall, on this 7 day of
November, 2007.



Tammie J. Martin
Notary Public in and for the State of Texas

A CERTIFIED COPY

ATTEST: DEC - 4 2008
BEVERLY B. KAUFMAN, County Clerk
Harris County, Texas

Lisa Sheree Mitcham Deputy
Lisa Sheree Mitcham

**SCHEDULE A
REAL ESTATE**

<u>Description</u>	<u>Value</u>
<u>Separate Property</u>	
I. None	
Total Separate Property	<u>\$ 0.00</u>
<u>Community Property</u>	
I. Real property and improvements commonly known as 5917 Club Oaks Drive, Dallas, Texas, and legally described as Lot 16 of Block 3 of Bent Tree Subdivision, County of Dallas.	
(Value as per Dallas County Appraisal District market value)	<u>\$ 656,780.00</u>
Gross Community Property	<u>\$ 656,780.00</u>
Surviving Spouses' Undivided One-Half Community Property Interest	<u>(\$328,390.00)</u>
Net Community Property	<u>\$328,390.00</u>
TOTAL REAL ESTATE	<u>\$328,390.00</u>

958-68-0627

A CERTIFIED COPY
DEC - 4 2008

ATTEST:
BEVERLY B. KAUFMAN, County Clerk
Harris County, Texas

 Deputy

Lisa Sheree Mitcham

**SCHEDULE B
STOCKS, BONDS, AND MORTGAGES**

<u>Description</u>	<u>Value</u>
<u>Separate Property</u>	
1. None	
Total Separate Property	<u>\$ 0.00</u>
<u>Community Property</u>	
1. Dreyfus 698 Government Money Market Class B Fund, held in SWS Financial Services Account	\$417,880.52
2. USAA Brokerage Services Account	
a. 74,332.934 shares of USAA High Yield Opportunities Mutual Funds at \$0.00 per share	0.00
b. 30,000 shares of Drew Industries, Inc. at \$29.46 per share	883,800.00
c. 77,000 shares of Pizza, Inc. at \$2.79 per share	214,830.00
d. 1,967.267 shares of Enterprise Products Partners, L.P. at \$24.700038 per share	48,591.57
e. 2,166.941 shares of Magellan Midstream Partners, L.P. at \$33.78 per share	73,199.23
3. 105 shares of AT&T, Inc. Common at \$27.779982 per share	2,916.90
4. 8 shares of BellSouth Common at \$36.00 per share	288.00
5. 4 shares of ComCast Corp. New Common at \$32.335 per share	129.34
6. 12 shares of Lucent Technologies, Inc.	

950-60-01628

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ATTEST: DEC - 4 2008
BEVERLY B. KAUFMAN, County Clerk
Harris County, Texas

 Deputy

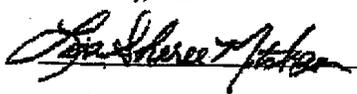
Lisa Sheree Mitcham

950-60-0679

	Common at \$2.675 per share	3.21
7.	12 shares of Qwest Communications International Common at \$7.58 per share	90.96
8.	14 shares of Verizon Communications Common at \$32.43 per share	454.02
9.	47 shares of TXU Corp. Common at \$57.47 per share	2,701.09
10.	9 shares of Nabors Industries, Ltd. Common at \$31.54 per share	283.86
11.	189 shares of Equitable Resources, Inc. Common at \$31.93 per share	6,034.77
12.	1,800 shares of Honeywell International Inc. Common at \$38.55 per share	69,390.00
13.	969 shares of Exxon Mobil Corp. Common at \$57.80 per share	56,008.20
14.	422 shares of American Electric Power Company Common at \$33.99 per share	14,343.78
15.	22,675 shares of Prestige Agri-Group, Inc. Common at \$0.00 per share	0.00
16.	8 shares of Seven I. Stock Farm, Inc. Common at \$0.00 per share	0.00
17.	3,858,387 shares of Pfizer, Inc. Common at \$23.02 per share	88,820.07

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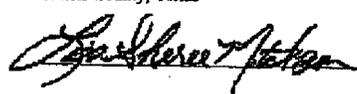
 Deputy

Lisa Sheree Mitcham

18.	3,976 shares of Honeywell International, Inc. Common at \$38.55 per share	153,274.80
	Gross Community Property	\$2,033,040.32
	Surviving Spouses' Undivided One-Half Community Property Interest	(1,016,520.16)
	Net Community Property	1,016,520.16
	TOTAL STOCKS AND BONDS	<u>\$1,016,520.16</u>

S15-8-6-0-06-310

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 ATTEST: **DEC - 4 2008**
 BEVERLY B. KAUFMAN, County Clerk
 Harris County, Texas

 Deputy
 Lisa Sheree Mitcham

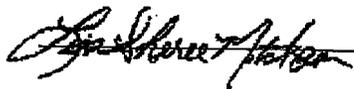
**SCHEDULE C
MORTGAGES, NOTES, AND CASH**

<u>Description</u>	<u>Separate Property</u>	<u>Value</u>
1. None		
Total Separate Property		\$ 0.00
	<u>Community Property</u>	
1. Checking Account held at MidFirst Bank.		\$2,351.74
2. Titanium Money Market Savings Account held at MidFirst Bank.		10,561,038.34
3. Checking Account held at Wells Fargo Bank, N.A.		601.56
4. Premier Checking Account held at JPMorgan Chase Bank, N.A.		832,750.74
5. Brokerage Account held at USAA Brokerage Services.		1,131.75
6. Cash.		<u>62,000.00</u>
Gross Community Property		\$11,459,874.13
Surviving Spouses' Undivided One-Half Community Property Interest		<u>(\$5,729,937.06)</u>
Net Community Property		<u>5,729,937.07</u>
TOTAL MORTGAGES, NOTES, AND CASH		<u>\$5,729,937.07</u>

1-930-09-053

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Harris County, Texas

 Deputy

Lisa Sheree Mitcham

**SCHEDULE D
MISCELLANEOUS PROPERTY**

<u>Description</u>	<u>Value</u>
Separate Property	
1. Gents Three Stone Diamond Ring. 15.3 dwt of 18Ky. No. 27943. The ring features three emerald cut diamonds, bezel set.	\$5,500.00
2. Gents 18Kyg President Rolex Watch with Day/Date. Oyster Perpetual featuring a slight bark finish and blue striped face. Circa 1990.	6,000.00
3. Gents Stainless Steel Yacht-Master Watch. Oyster perpetual, day/date, with hidden clasp. No. 16622. With diamond dial. Circa 2004.	\$3,500.00
4. 95.0636% interest in Idzig, Ltd.	2,566,717.20
5. 100% membership interest in Telomere, L.L.C.	115,523,000.00
Total Separate Property:	<u>\$118,104,717.20</u>

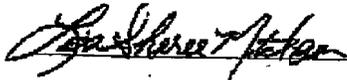
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DEC - 4 2008

ATTEST:

BEVERLY B. KAUFMAN, County Clerk
Harris County, Texas

 Deputy

Lisa Sheree Mitcham

Community Property

EE90-09-028

1.	1970 Pontiac GTO hardtop VIN - 242370R122862	27,825.50
2.	1977 Mercedes-Benz 6.9 Sedan VIN - 11603612002496	15,100.00
3.	1979 Mercedes-Benz 450 SEL Sedan VIN - 11603612007063	10,050.00
4.	1979 Chevrolet Malibu Classic Wagon VIN - 1W35L9K543266	\$3,175.00
5.	1979 Chevrolet Malibu Sedan VIN - 1T19L9K528178	2,000.00
6.	1983 Porsche 911 Turbo VIN - WP0ZZZ93ZD8000532	16,350.00
7.	1992 Mercedes-Benz 500E Sedan VIN - WDBEA36E7NB796604	8,000.00
8.	1996 29' Fountain Powerboat Serial No. FGQ296481596. Title No. 03312001, License No. TX 9406HT	50,000.00
9.	3% Working Interest and 2.502604% Revenue Interest in Walter Exploration Company, Lease 687561, Pace Heirs #1, Nolan County, Texas.	14,775.00
10.	Household furnishings and personal effects	15,000.00
	Gross Community Property	162,275.50
	Surviving Spouses' Undivided One-Half Community Property Interest	(81,137.75)
	Net Community Property	81,137.75
	TOTAL MISCELLANEOUS PROPERTY	<u>\$118,137.75</u>

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ATTEST: **DEC - 4 2008**
BEVERLY B. KAUFMAN, County Clerk
Harris County, Texas

 Deputy

Lisa Sheree Mitcham

01111

PROBATE COURT #2

NO. 365,053

891987

ESTATE OF
E. PIERCE MARSHALL a/s/a
PIERCE MARSHALL,
DECEASED

§
§
§
§
§
§
§
§
§
§

IN THE PROBATE COURT
NUMBER TWO (2) OF
HARRIS COUNTY, TEXAS

ORDER APPROVING INVENTORY AND LIST OF CLAIMS

3930 (b)
EFF 9-1-83

On this day the court considered the Inventory and List of Claims filed by the Independent Executrix. The Court finds that the Inventory and List of Claims is satisfactory and should be approved. It is, therefore,

ORDERED that the Inventory and List of Claims is approved.

SIGNED this 19 day of November, 2007

[Signature]
JUDGE PRESIDING

APPROVED AS TO FORM
AND SUBSTANCE:

HORRIGAN & GOEHRS, L.L.P.

By: *[Signature]*

LINDA C. GOEHRS
State Bar No. 08059220
909 Fannin, Suite 1600
Houston, Texas 77010-1003
(713) 659-4200
(713) 659-3804 (facsimile)

ATTORNEYS FOR ELAINE T. MARSHALL,
INDEPENDENT EXECUTRIX OF THE ESTATE
OF E. PIERCE MARSHALL, A/K/A PIERCE
MARSHALL, DECEASED

RECORDER'S MEMORANDUM:
At the time of recordation, this instrument was found to be inadequate for the best photographic reproduction because of illegibility, carbon or photo copy, discolored paper, etc. All backouts additions and changes were present at the time the instrument was filed and recorded.

FILED
2007 NOV 21 PM 2:22
[Signature]
COUNTY CLERK
HARRIS COUNTY, TEXAS

951-4-1-159

A CERTIFIED COPY

ATTEST: DEC - 4 2008
BEVERLY B. KAUFMAN, County Clerk
Harris County, Texas

[Signature] Deputy

Lisa Sheree Mitcham

**EXHIBIT B
TO DECLARATION**

**THE STAUROLITE 2006
GRANTOR RETAINED ANNUITY TRUST**

THIS TRUST AGREEMENT is made and entered into between E. Pierce Marshall, a resident of the County of Dallas, State of Texas (the "Grantor"), and Elaine T. Marshall, a resident of the County of Dallas, State of Texas (the "Trustee").

WITNESSETH:

WHEREAS, the Grantor desires and intends to create a grantor retained annuity trust ("GRAT") by this trust agreement and to transfer, assign, and deliver certain property (as described hereinbelow) to the Trustee to be held and administered in accordance with the terms and provisions set forth herein;

WHEREAS, the Grantor also desires to designate and appoint Elaine T. Marshall as the Trustee of this trust;

WHEREAS, Elaine T. Marshall is willing and desires to accept the designation and appointment of her as Trustee of this trust and to act as trustee hereof in accordance with the terms and provisions of this trust agreement;

WHEREAS, by creation of the trust pursuant to this trust agreement, the Grantor specifically desires and intends to create a GRAT pursuant to which the Grantor retains and is entitled to receive an annual annuity from said trust that is a "qualified interest" as defined by Internal Revenue Code ("IRC") §2702 and, more specifically, a "qualified annuity interest" under Treasury Regulations §25.2702-3(a) and (b); and

WHEREAS, the Grantor further desires and intends that he (the "Grantor") be treated as the owner of the trust property for federal income tax purposes under the "grantor trust rules" set forth in IRC §§671 *et seq.* such that all items of income, deduction, and credit of this trust shall be taxable to the Grantor until the expiration of the trust term (as defined hereinbelow) and all remaining trust property has been distributed.

NOW, THEREFORE, in consideration of the premises and of the mutual covenants herein contained, the Grantor and the Trustee hereby create the Staurolite 2006 Grantor Retained Annuity Trust in accordance with the following terms and provisions:

1. DEFINITIONS.

- 1.1 Trust.** The Trustee shall hold the trust property as a single trust. The trust shall be known and designated as the "STAUROLITE 2006 GRANTOR RETAINED ANNUITY TRUST," but is herein sometimes simply referred to as the or this "trust".

- 1.2 **Grantor.** E. Pierce Marshall is referred to as the "Grantor" in this trust agreement.
- 1.3 **Trustee.** Elaine T. Marshall is hereby appointed to serve as the trustee of the trust. Elaine T. Marshall accepts this appointment and shall serve as the trustee of the trust. Except as may be otherwise provided by the content of this trust agreement, all references to the "Trustee" shall include Elaine T. Marshall and any and all other trustees of the trust, whether one or more, whether male or female, whether individual or corporate, and whether original, successor, substitute, or ancillary.
- 1.4 **Trust Property.** The trust property transferred, assigned, and delivered by the Grantor to the Trustee is described as follows:

All of the Grantor's 98,161 shares of non-voting common stock of Trof, Inc., a Delaware Corporation, which is presently subject to a voting trust.

The Trustee accepts and acknowledges receipt and delivery of the foregoing described trust property and agrees to hold, administer, manage, and distribute the trust property (including all income and principal thereof) in accordance with the terms and provisions of this trust agreement. Additional contributions to the trust are expressly prohibited, and the Trustee is therefore prohibited from receiving and accepting any additional contributions to the trust.

2. **TRUST TERM AND IRREVOCABILITY.** This trust shall continue for a term of three (3) years from the date (or the third (3rd) anniversary date) of the creation of this trust (the "trust term"); and, therefore, this trust shall **NOT** terminate upon the death of the Grantor or any other beneficiary hereof. This trust shall be irrevocable; provided, however, that the Trustee, acting alone, shall have the limited power to amend this trust agreement and provisions hereof as provided in Section 5, below.

3. **ANNUAL ANNUITY.** During the trust term, the Trustee shall pay and/or distribute to the Grantor an annual annuity ("annual annuity amount") consisting of two components: (i) a "fixed annual annuity amount"; and (ii) an "excess income amount"; which shall be determined as follows:

- 3.1 **Fixed Annual Annuity Amount.** On the first anniversary date of the creation of this trust, the Trustee shall pay or distribute to the Grantor an amount ("fixed annual annuity amount") equal to 30.93010550% of the initial fair market value of the property transferred to the trust as finally determined for federal tax purposes; (ii) on the second anniversary date of

the date of creation of this trust, the Trustee shall pay or distribute to the Grantor a fixed annual annuity amount equal to one hundred twenty percent (120%) of the fixed annual annuity amount paid or distributed to the Grantor on the first anniversary date of the creation of this trust; and (iii) on the third anniversary date of the creation of this trust (or the date of termination of this trust), the Trustee shall pay or distribute to the Grantor a fixed annual annuity amount equal to one hundred twenty percent (120%) of the fixed annual annuity amount paid or distributed to the Grantor on the second anniversary date of the creation of this trust.

3.2 **Excess Income Amount.** In addition to the fixed annual annuity amount, the Trustee shall pay or distribute an amount to the Grantor equal to any income of the trust in excess of the fixed annual annuity amount ("excess income amount"), if any, to the extent permitted by IRC §2702 and, particularly, Treasury Regulations §25.2702-3(b)(1)(iii). The "excess income amount," if any, shall be determined and paid or distributed to the Grantor at the same time as the fixed annual annuity amounts (i.e., on the first, second, and third anniversary dates of the creation of this trust).

3.3 **Payment of Annual Annuity Amounts.** The annual annuity amount shall be paid or distributed at least annually on the first, second, and third anniversary dates of the creation of this trust, provided, however, that the Trustee may delay the payment or distribution of the annual annuity amount for up to (but not longer than) 105 days after the anniversary date for which such payment is due, but only if such delay is allowable and does not otherwise jeopardize the qualification of the annuity interest retained by the Grantor as a "qualified interest" as defined by IRC §2702(b) (and, particularly, a "qualified annuity interest" under Treasury Regulations §25.2702-3(b)) and the treatment of the Grantor as owner of the trust property for federal income tax purposes under the grantor trust rules set forth in IRC §§671 *et seq.* If the Grantor dies during the trust term, the annual annuity amount (or amounts) shall be paid to the Grantor's estate or duly-authorized legal representative of the Grantor's estate for the remainder of the trust term. The annual annuity amount shall be paid from income and, to the extent income is not sufficient, from principal of the trust property. The payment of an annual annuity amount shall **NOT** be satisfied by the use of a note, other debt instrument, option, or similar financial arrangement. The Trustee may however distribute trust property in kind to the Grantor in payment and satisfaction of all or any portion of an annual annuity amount. Payment of an annual annuity amount for a period of less than a full year shall be prorated on a daily basis.

- 3.4 **Fair Market Value of Trust Property.** Upon creation of this trust, the Trustee shall determine the initial fair market value of the trust property as of the date of creation of this trust by a duly qualified, independent, and competent appraiser or other valuation expert for purposes of determining the annual annuity amount. Further, if the Trustee should distribute trust property in kind (in lieu of cash) to the Grantor in payment and satisfaction of all or any portion of an annual annuity amount, the Trustee shall determine the fair market value of the trust property to be distributed in kind by a duly qualified, independent, and competent appraiser or other valuation expert for purposes of determining the amount, quantity, and/or percentage of trust property to be distributed in payment and satisfaction of each such annual annuity amount or portion thereof.
- 3.5 **Adjustment.** If the fair market value of the trust property is incorrectly determined for purposes of determining the annual annuity amount, the fair market value of any property distributed in kind, or otherwise, then within a reasonable period after the fair market value of such trust property is finally determined for federal tax purposes, the Trustee shall pay or distribute to the Grantor (in the case of an undervaluation) or shall collect and receive from the Grantor (in the case of an overvaluation) an amount (in cash or property) equal to the difference between the annual annuity amount properly payable and the annual annuity amount actually paid or distributed provided, however, that in no event shall any such amounts owed to or by the Grantor be satisfied by use of a note or other form of indebtedness.
- 3.6 **No other payments to the Grantor.** The Trustee shall NOT pay to the Grantor or the Grantor's executor or other legal representative any income, principal, or other trust property on account of or in discharge of the Grantor's income tax liability (whether federal, state, or otherwise), if any, in respect of property held in trust hereunder and taxable to the Grantor, including but without limitation, tax on realized capital gains. Further, except for the payment of the annual annuity amounts to the Grantor as expressly provided in this Section 3, the Trustee shall make no payments or distributions of trust property to or for the benefit of the Grantor, and the Grantor shall not be entitled to any payment or interest in the trust property.
- 3.7 **Other Additional Provisions.** The interest of the Grantor shall not be subject to commutation. During the trust term, no payment shall be made to any person other than the Grantor. If an incorrect payment of the annuity amount is made, the Trustee shall, promptly after the error is discovered, pay to the Grantor in the case of an underpayment or collect from the Grantor in the case of an overpayment, an amount equal to the difference

between the amount which the Trustee should have paid the Grantor and the amount which the Trustee paid the Grantor.

4. DISPOSITIVE PROVISIONS. Upon the expiration of the trust term (i.e., the third anniversary date of the creation of this trust), the Trustee shall distribute and dispose of all remaining trust property (after payment and/or distribution of all annual annuity amounts due and payable to the Grantor pursuant to this trust agreement) as follows:

1. If the Grantor dies on or before the expiration of the trust term and leaves a valid last will and testament disposing of the remaining trust property, then the Trustee shall distribute and dispose of the remaining trust property as provided in the Grantor's last will and testament; and
2. If the Grantor survives the expiration of the trust term or fails to dispose of the remaining trust property by valid last will and testament, the Trustee shall distribute the remaining trust property (i) one-half ($\frac{1}{2}$) of the remaining trust property to the Osprey Trust; and (ii) the remaining one-half ($\frac{1}{2}$) of the trust property to the Harrier Trust, provided, however, that if either or both of the foregoing referenced trusts have been terminated or are otherwise no longer in existence upon termination of this trust, then the Trustee shall distribute said portion or portions of the remaining trust property to the remainder or principal beneficiary or beneficiaries of such trust or trusts in accordance with the terms and provisions thereof.

The Osprey Trust and Harrier Trust have been or will be created by E. Pierce Marshall, Settlor and Elaine T. Marshall, as Trustee, by trust instruments dated May 5, 2006.

5. PURPOSES AND INTENT OF GRANTOR. By this trust agreement, the Grantor expressly intends to create a GRAT (a "grantor retained annuity trust") pursuant to which the Grantor retains and is entitled to receive a "qualified interest," as defined in IRC §2702(b), and, more specifically, a "qualified annuity interest" under Treasury Regulations §25.2702-3(a) and (b), both as may be amended from time to time. The Grantor further intends that this trust be treated as a "grantor trust" such that the Grantor is treated as the owner of the trust property for federal income tax purposes and that all items of income, deduction, and credit of the trust are taxable to the Grantor under the provisions of IRC §§671 *et seq.* during the trust term and until distribution of all trust property. Accordingly, notwithstanding any other term or provisions of this trust agreement to the contrary, this trust agreement shall be interpreted, construed, and amended as may be necessary, required, and/or advisable to ensure that: (i) the Grantor's retained annuity interest constitutes and shall continue to constitute a "qualified interest," and, specifically, a "qualified annuity interest" pursuant to IRC §2702(b) and Treasury

Regulations §25.2702-3(a) and (b); and (ii) the trust is treated as a "grantor trust" such that the Grantor is treated as the owner of the trust property for federal income tax purposes and that all items of income, deduction, and credit of the trust are taxable to the Grantor under the provisions of IRC §§671 *et seq.* until the expiration of the trust term and the distribution of all trust property. Further, to the extent that it may be deemed necessary, required, and/or advisable to amend any provisions of this trust agreement in order to achieve and fulfill the Grantor's expressed intent (as provided herein), the Trustee, acting alone, shall possess the limited power to amend the provisions of this trust agreement as may be necessary, required, and/or advisable to ensure that: (i) the Grantor's retained annuity interest constitutes and shall continue to constitute a "qualified interest" and, specifically, a "qualified annuity interest" as defined in IRC §2702(b) and Treasury Regulations 25.2702-3(a) and (b); and (ii) the trust is treated as a "grantor trust" under the provisions of IRC §§671 *et seq.* such that the Grantor is treated as the owner of the trust property for federal income tax purposes and taxable on all items of income, deduction, and credit of the trust until the expiration of the trust term and the distribution of all trust property.

6. **RESTRAINTS ON ALIENATION.** The beneficial interests of the Grantor and other beneficiaries of this trust shall be subject to a "spendthrift trust" and shall therefore NOT be subject to voluntary or involuntary alienation to the maximum extent permitted by Texas law or other applicable law.

7. **TRUSTEE POWERS.** The Trustee shall have, and in his or her uncontrolled discretion may exercise, all the rights, powers, and authorities that may be conferred upon trustees under applicable law, all of which, subject to any express limitations stated herein, shall be exercised in a fiduciary capacity, primarily in the interest of the Grantor and the remainder or principal beneficiaries as provided herein. If a question should arise as to whether the Trustee have a particular power, the trust shall be liberally construed as granting such power. Should future changes in the law expand the powers of trustees, the Trustee shall have those expanded powers. Without limiting the generality of the foregoing, the Trustee shall possess the additional powers to:

1. invest and reinvest the trust funds in property of any kind, real, personal, or mixed, or in choses in action, or in any business, irrespective of any statute, case, rule, or custom limiting the investment of trust funds;
2. sell, mortgage, lease (even though the term of the lease may extend beyond the term of the trust), and otherwise manage real estate and rights below and above its surface;

3. engage and rely on accountants, appraisers, and other experts and legal counsel; to employ agents, clerks, and other assistants; and to remunerate any or all of such persons and pay their expenses;
4. compromise and arbitrate claims;
5. borrow money and mortgage, create a security interest in, or pledge the property of the trust as security therefore;
6. exercise any options, privileges, or rights of any nature which may be granted to or exercisable by the holders of any property which forms a part of any trust hereunder, or sell any subscription or other rights or allow any such rights to expire or lapse; and
7. exercise all rights as the owner of corporate securities, including, among others, the right to vote by proxy, participate in reorganizations and voting trusts, and hold shares in their own names, jointly or severally, or in the name of a nominee, with or without disclosing the fiduciary relationship.

8. **GENERAL ADMINISTRATION.** The following provisions shall govern the general administration of the trust:

- 8.1 **Trustee's Fees.** No individual serving as the Trustee shall be entitled to compensation for serving as Trustee in connection with the administration of the trust and the trust property. Any other person or entity serving as the Trustee shall be entitled to receive reasonable compensation for services actually rendered. All persons or entities serving as the Trustee shall be entitled to reimbursement for reasonable expenses incurred and paid by him or her in connection with the administration of the trust.
- 8.2 **Trustee's Liability.** The Trustee is relieved from all liability in connection with the administration of the trust, including but limited to any loss resulting from an act or failure to act, or any loss or depreciation of trust property, except for any loss or other liability arising from the Trustee's breach of the duty of loyalty to a beneficiary or for breach of trust committed in bad faith. Successor trustees are relieved of any duty to examine the acts of any prior trustee or fiduciary, without the necessity of any court accounting, and shall be responsible only for those assets which are actually delivered to such trustees.

- 8.3 Trustee's Accounts.** The Trustee is relieved from filing accounts required by Texas or other applicable law, but shall account, reasonably, for the receipts and disbursements to the beneficiaries at least annually.
- 8.4 Deposit Security.** A banking institution serving as the Trustee need not obtain security for deposits of trust property with its own commercial banking department.
- 8.5 Bond.** The Trustee need not furnish bond or other security for the faithful performance of its duties hereunder.
- 8.6 Legal Matters.** The Trustee shall be empowered to select and designate legal counsel in all matters concerning the trust, and shall be empowered to relieve any attorney for the trust and to select and designate a successor. The Trustee shall be fully protected in any action taken, suffered, or performed in good faith, in accordance with the opinion of counsel.
- 8.7 Resignation.** The Trustee may resign as Trustee at any time by giving at least sixty (60) days written notice of resignation to each of the then beneficiaries and co-trustees, if any, by mail to the last known respective mailing address of said beneficiaries and co-trustees. Third parties shall be entitled to rely on the notice of resignation.
- 8.8 Books and Records.** All assets, books of account, and records of the trust shall be subject to the exclusive custody of the Trustee, but shall be available for inspection at all reasonable times during normal business hours by any beneficiary or by any person or persons designated by any one of them.
- 8.9 Successor Trustee.** The Trustee, Elaine T. Marshall, as well as any successor trustee, shall be empowered to select and designate one or more persons or entities to serve as successor trustee(s) in the event that he or she should cease or otherwise fail to serve for any reason whatsoever. The selection and designation of any successor trustee shall be made by a written instrument signed by the Trustee and duly acknowledged before a notary public or by valid last will and testament of the Trustee. If Elaine T. Marshall should cease or fail to serve as a trustee for any reason whatsoever and fail to select and designate one or more successor trustees of the trust, Preston Marshall shall succeed and serve as the trustee of the trust.
- 8.10 Incapacity and Facility of Payment.** If a beneficiary is under legal disability, or, if in the Trustee's opinion, is incapable of properly managing his or her affairs due to illness, age, or other cause, the Trustee may make

payment by any reasonable method, including the following: (i) directly to the beneficiary; (ii) to the legally appointed tutor (guardian) or curator (conservator) of the beneficiary; (iii) by disbursing such amounts directly for the benefit of the beneficiary; (iv) by depositing all or any part of the income into a checking or savings account in a bank, savings and loan association, or other depository in the name of the beneficiary; (v) to another trust for the benefit of the same beneficiary; (vi) to a custodian appointed under the Uniform Gifts to Minors Act adopted by any state; or (vii) by any other reasonable method permitted under applicable law. The Trustee is specifically authorized to recognize and honor the beneficiary's endorsement of any check issued by the Trustee to the beneficiary, whether or not the beneficiary is then a minor, and whether or not there is any person who is administrator of the minor's estate, tutor (guardian) of the minor.

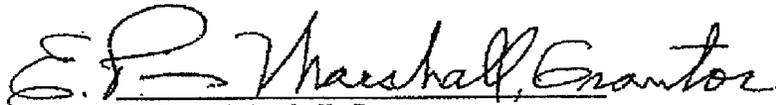
9. GOVERNING LAW, SITUS, AND INTERPRETATION.

- 9.1 Governing Law.** The validity, construction, interpretation, and effect of the terms and provisions of this trust agreement and the trust herein created shall be governed, regulated, and administered in all respects according to and by the laws of the State of Texas.
- 9.2 Situs.** The original situs of the trust shall be Dallas, Texas. The situs of the trust created may be maintained in any jurisdiction (including outside the United States), as the Trustee, in the exercise of sole and absolute discretion, may determine, and thereafter be transferred at any time or times to any jurisdiction selected by the Trustee. Upon any such transfer of situs, the trust property may thereafter, at the election of the Trustee of said trust, be administered exclusively under the laws of the jurisdiction to which it has been transferred. Accordingly, if the Trustee of the trust created hereunder elects to change the situs of the trust, the Trustee of said trust is hereby relieved of any requirement of having to qualify in any other jurisdiction and of any requirement of having to account in any court of such other jurisdiction.
- 9.3 Subsequent Amendment to Law.** Subsequent amendments to Texas or other applicable law concerning trusts shall be applicable to the trust created by this trust agreement to the extent such amendment or legislation advances the purposes and intent of the Grantor as expressly provided herein.
- 9.4 Interpretation and Construction.** The provisions of the trust shall be accorded liberal construction and construed to the extent reasonable possible and practical so as to be legal, valid, enforceable, and fully

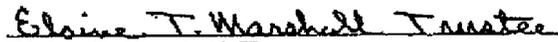
operative. The terms shall be construed in conformity with the definitions of Texas or other applicable law, unless otherwise stated or unless circumstances otherwise dictate. The headings are intended for convenience without limiting effect, and the illustrations of the Trustee's authority shall not be construed as limitations. All provisions are intended to be severable and shall exist and be construed separately and independently with respect to each trust created by this trust instrument and with respect to each and every item of trust property. A provision adjudicated to be invalid shall not impair the effectiveness of any other provision.

9.5 Use of Words. As used in this trust agreement, whenever the context so indicates, the gender of all words shall include the masculine, feminine, and neuter, and the number of all words shall include the singular and plural.

IN WITNESS WHEREOF, the Grantor has signed and executed this agreement and, to evidence her acceptance of the terms and conditions of the trust, the Trustee has signed and executed this trust agreement on this 5th day of May, 2006 (the "date of creation of this trust").



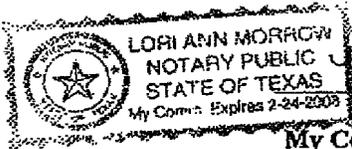
E. Pierce Marshall, Grantor


Elaine T. Marshall, Trustee

STATE OF TEXAS :

COUNTY OF HARRIS :

BEFORE ME, a notary public in and for the aforementioned county and state, on this 5th day of May, 2006, personally appeared E. Pierce Marshall, to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that he executed same, and that it was executed for the uses, purposes and considerations therein expressed as his free and voluntary act and deed.



Lori Ann Morrow
NOTARY PUBLIC
My Commission Expires: _____

STATE OF TEXAS :

COUNTY OF HARRIS :

BEFORE ME, a notary public in and for the aforementioned county and state, on this 5th day of May, 2006, personally appeared Elaine T. Marshall, to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that she executed same, and that it was executed for the uses, purposes and considerations therein expressed as her free and voluntary act and deed.



Lori Ann Morrow
NOTARY PUBLIC
My Commission Expires: _____

EXHIBIT B

**DECLARATION OF EDWIN K. HUNTER IN SUPPORT OF OPPOSITION TO
APPLICATION FOR ORDER VACATING THE NINTH CIRCUIT ORDER STAYING
THE DISTRICT COURT JUDGMENT WITHOUT BOND**

I, Edwin K. Hunter, declare as follows.

1. I am an attorney admitted to practice before the Supreme Court of the United States, the United States Court of Appeals for the Fifth Circuit, the United States Tax Court, and the courts of Louisiana, Texas, and the District of Columbia. I specialize in tax, estate planning and tax dispute resolution, among other areas. I represented J. Howard Marshall, II (“J. Howard”), and later E. Pierce Marshall (“Pierce”) before their deaths, and currently represent Elaine T. Marshall as Independent Executor of the Estate of E. Pierce Marshall. I have personal knowledge of the facts stated in this declaration, and could and would testify competently thereto if called to do so.
2. I advised Pierce on tax and estate-planning matters before his death. Estate planning for Pierce was extremely complicated and time-consuming because of, among other things, Pierce’s extensive illiquid assets, constraints placed on Pierce’s estate plan by J. Howard’s tax litigation pending in the United States Tax Court and tentative settlement with the Internal Revenue Service, his desire to provide for both family and charity, the need to minimize taxes to the extent permitted by law, and the intricacy of federal tax law.
3. The will, trusts and related documents that Pierce executed in May 2006 were drafted, reviewed by Pierce and revised several times during a period that commenced in November 2004. The project required engaging appraisers and collecting complex financial information. A suggestion that Pierce, his lawyers and experts accomplished such extensive work during the five-day interval after the Supreme Court’s May 1, 2006 decision in *Marshall v. Marshall*

reflects a benighted understanding of estate planning, and is not true. To the contrary, Pierce committed to the execution of these documents, and arranged for a Kane, Russell, Coleman and Logan conference room in Dallas and the use of one of that firm's notaries, all before he knew of the Supreme Court's ruling.

4. I advised Pierce concerning The Staurolite 2006 Grantor Retained Annuity Trust (the "Staurolite Trust") and other grantor-retained annuity trusts ("GRATs") that he executed on May 5, 2006. GRATs are a standard tax-planning device for wealthy individuals. They are discussed in federal judicial decisions concerning taxation, Internal Revenue Service regulations, and hundreds of tax-planning treatises and periodical articles. The purpose of so-called zeroed-out GRATs, including those executed by Pierce in May, 2006, is to retain the original value of the trust assets for the grantor, while excluding some of the appreciation in those assets from the grantor's estate to the extent permitted by the Internal Revenue Code. In my judgment, GRATs are not an effective way to shield assets from creditors. Among other things, the amount placed in trust is quickly returned to the grantor, essentially with interest. For another, under Texas law the grantor's interest in a trust is expressly subject to the claims of the grantor's creditors. A GRAT concentrates the grantor's assets in the hands of a fiduciary and thereby simplifies the creditor's collection efforts.

5. Pierce placed Trof shares in the Staurolite Trust by operation of a trust agreement dated May 5, 2006. I understand that a copy of the Staurolite Trust Agreement (the "Trust Agreement") is attached to the Declaration of Elaine T. Marshall filed contemporaneously with this declaration.

6. The Staurolite Trust has a term of three years from the date of its establishment. Over those three years, the trust instrument requires that the trustee pay Pierce (now his estate) an annuity. In absolute terms, the annuity paid will, over three years, equal over 112% of the original value of the stock that was placed in the trust. Specifically, under Section 3.1 of the Trust Agreement, on the first anniversary of the trust's establishment, the trust is obligated to pay the estate approximately 30.9% of the value originally placed into the trust; on the second anniversary, approximately 37.1%; and on the third anniversary, approximately 44.5%. Under Section 3.2, the annual payments to Pierce's estate must be increased if the Internal Revenue Service successfully challenges the appraisers who valued the corpus for distribution purposes. Under Sections 3.3 and 3.4 of the Trust Agreement, the trust must make the payments even if it requires invading principal, and the payments cannot be forgiven, reduced, or substituted with notes, options or similar instruments. Thus, the Staurolite Trust instrument requires the trust to pay Pierce's estate more than the amount originally placed in trust.

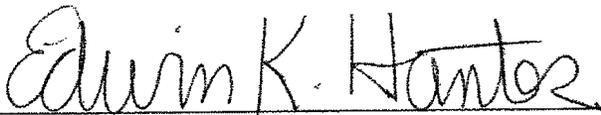
7. The trust agreements for The Ruby 2006 Grantor Retained Annuity Trust, The Pepino 2006 Grantor Retained Annuity Trust, The Onyx 2006 Grantor Retained Annuity Trust, The Azure 2006 Grantor Retained Annuity Trust, and The Jade 2006 Grantor Retained Annuity Trusts are similar to the Staurolite Trust in the respects discussed in the preceding paragraph. Each trust was designed to minimize taxes consistent with the law, and each trust will, by the end of three years, return to Pierce's estate all of the value placed in trust plus approximately 12%.

8. Pierce's estate has a contingent transferee federal gift tax liability of many millions of dollars. This is gift-tax liability of J. Howard's estate that the Internal Revenue Service will likely seek to collect from Pierce's estate as transferee. The liability was contingent on

completing certain litigation (not Vickie's claim against Pierce). The litigation is now completed. The contingency has been eliminated, the tax liability is due, and the Internal Revenue Service is expected to take the position that it has a lien against the assets of Pierce's estate.

I declare under penalty of perjury under the laws of the United States and the State of Texas that the foregoing is true and correct.

Dated: March 12, 2009



Edwin K. Hunter

EXHIBIT C

INCONSISTENCIES WITH THE RECORD IN STERN'S APPLICATION

Assertion	Brief Page	Nature of the Inconsistency	Appendix Page
Stern's Application states that the bankruptcy court's award of \$449 million in compensatory damages represented "the amount of the intended trust" from J. Howard to Vickie.	6	The bankruptcy court reached this valuation of damages by taking half of the amount by which J. Howard's MPI stock appreciated in value from the date of his marriage to Vickie until the date of trial.	36-37
Stern's Application falsely states that the district court held that "Vickie's counterclaim was compulsory" but was not core.	7	In fact, the district court never made a ruling as to whether Vickie's counterclaim was compulsory; rather the court stated that "it is not certain that Vickie's counterclaim arises from the same transaction as Pierce's proof of claim," but held that Vickie's claim was not core regardless of whether it was compulsory.	66-67
Stern falsely implies that Pierce delayed by waiting "six months after the district court denied Pierce's motion to stay judgment pending appeal" before filing an emergency motion for stay in the Ninth Circuit.	10	In fact, Pierce filed the emergency motion with the Ninth Circuit in December 2002, less than one month following the district court's November 2002 order granting Vickie's motion for registration of her judgment in foreign jurisdictions.	590, 9
Stern's Application states that "Pierce and his attorney Eric Brunstad consistently represented . . . that Pierce would neither transfer nor dissipate assets during the pendency of the stay" entered by the Ninth Circuit.	10, 10-11 n. 2	These representations were made to the court in the context of a proposed order to which Pierce would agree if he was not required to post a bond to stay the judgment.	614, 623, 629
Stern states that Eric's agreement at oral argument with the district court's statement that "Koch stock 'is not going to be hidden, concealed, moved, changed, et cetera'" was the basis for the court denying Vickie's motion for a turnover order.	10-11, n. 2	Koch was never mentioned by name during this discussion; moreover, this statement was in the context of how a turnover order tying up stock could cause irreparable harm to Pierce, rather than a discussion of the risk of Pierce dissipating assets.	374-75, 380

<p>Stern cites the district court opinion to argue that Pierce's largest asset consists of J. Howard's former interest in Koch Industries.</p>	<p>13</p>	<p>In fact, the district court never evaluated Pierce's holdings in Koch. Although the court described J. Howard's holdings in MPI and the sale of a portion of that stock to Pierce in 1993, it made no finding as to the current value of those shares or whether Pierce had retained ownership. Similarly, although the court acknowledged that MPI held shares of Koch, it made no findings as to whether Pierce personally held Koch shares or the value of such shares.</p>	<p>86-88, 108-09, 111-19, 122-27.</p>
<p>Stern cites Pierce's declaration accompanying his emergency motion to the Ninth Circuit for the proposition that Pierce is extremely wealthy.</p>	<p>13</p>	<p>Pierce's declaration acknowledges that he owns some shares of Koch stock directly and indirectly through his ownership of Trof, Inc. shares. However, the declaration does not provide dollar amounts, let alone a suggestion that Pierce is a billionaire.</p>	<p>634-35.</p>
<p>Stern also relies on the bankruptcy court's findings that Pierce's MPI stock was worth \$1.6 billion in 1999.</p>	<p>13</p>	<p>Any reliance on the bankruptcy court's findings is improper, as the district court vacated the bankruptcy court's opinion in its entirety.</p>	<p>29-30, 188.</p>
<p>Stern falsely states that the "district court found in 2002 that <i>Pierce's</i> holdings in Koch were worth \$780 million in 1995," relying upon the court's finding that <i>J. Howard's</i> Koch "stock would be worth more than \$2 billion today."</p>	<p>13</p>	<p>The district court simply made no determination as to the value of Pierce's assets. The court's valuation findings also failed to consider the existence of any liabilities of the companies. In any case, the district court findings do not support Vickie's contention that Pierce is worth billions of dollars.</p>	<p>6, 125-27</p>
<p>Stern asserts that Pierce's estate is "missing billions" as a result of the creation of multiple GRATs. As support, she cites Pierce's last will and testament, the Edwin K. Hunter Declaration, and the Staurolite Trust Agreement.</p>	<p>13-14</p>	<p>None of these three documents assigns a dollar value to Pierce's assets, let alone suggests that he had "billions" in assets. The Hunter declaration explicitly refutes the suggestion that the GRATs were created to dissipate assets in response to the Supreme Court's <i>Marshall v. Marshall</i> decision in May 2006.</p>	<p>500-21, 551-54, 561-70</p>

<p>Stern likewise claims that Pierce "transferred his most important asset, his stock in Trof, the family holding company for Pierce's Koch stock," into the Staurolite GRAT. Stern cites the Hunter Declaration and the Staurolite Trust Agreement as support.</p>	<p>14</p>	<p>Neither of the documents Stern relies upon supports the characterization of Trof as a "family holding company" for Koch shares. The Trust Agreement describes Trof as a Delaware corporation, not a holding company. The agreement also makes no reference to Koch whatsoever, instead listing the Trof shares as the sole assets placed in the GRAT. Similarly, nowhere does Hunter's declaration refer to Trof as a holding company or make any reference at all to Koch.</p>	<p>553, 561-70</p>
<p>Stern's Application states that "A stay of enforcement of a judgment without bond is appropriate only where there exists a probability the appellant will win on the merits and the appellant will suffer irreparable injury or where there are serious questions on merits and the balance of hardships tips decidedly in the appellant's favor."</p>	<p>40</p>	<p>Neither of the cited cases mention a bond. There is no required showing that the appellant <i>will</i> suffer irreparable injury, merely that there is a possibility of irreparable injury.</p>	<p>Case</p>
<p>Stern's Application states that "Because of the stay without bond, Vickie's estate is now just another unsecured creditor and, according to Elaine, a creditor that is now unlikely to find sufficient funds to satisfy the judgment."</p>	<p>40</p>	<p>Vickie's estate was an unsecured creditor prior to the stay without bond, not "because of the stay without bond." The record does not support the assertion that <i>now</i> she is unlikely to find sufficient funds to satisfy her judgment. The record excerpts cited discussed IRS debt primarily and Vicki's unsecured status generally.</p>	<p>App. 534, 547, 554-55, 557 Richland Decl. Ex. B., p.1</p>
<p>Stern's Application states that "Now, according to Elaine, these assets [Pierce's supposed billions] have shrunk to a gross value of only \$125 million."</p>	<p>41</p>	<p>The referenced excerpts do not discuss the \$125 million figure noted and certainly do not discuss any purported "shrinking" of those assets.</p>	<p>Richland Decl., Ex. B, p. 1</p>
<p>Stern's Application states that "under cover of the Ninth Circuit stay, Pierce transferred the bulk of his wealth into so-called grantor retained annuity trusts <i>so as to defeat Vickie's judgment</i>."</p>	<p>41</p>	<p>The referenced excerpts discuss the use of the trusts, but actually explain how these trusts are <i>not</i> used for the purposes of evading creditors, particularly in light of the fact that the underlying assets remain available for satisfaction of creditors.</p>	<p>App. 260-81, 552-54, 561-70</p>

<p>Stern's Application states that "Moreover, it appears Pierce handed over the Koch stock to his family while receiving nothing of value (or at least nothing approaching fair market value) in return. This was made possible by Pierce's use of grantor-retained annuity trusts as the vehicles for transferring his assets."</p>	<p>42</p>	<p>The referenced excerpts discuss the use of the trusts, but actually explain how these trusts return approximately 112% of the value of the assets within 3 years.</p>	<p>App. 260-81, 552-54, 561-70; Richland Decl., Ex. B, p. 1</p>
<p>Stern's Application states that "Now, however, the administratrix of Pierce's estate assets claims there is only \$125 million in the estate, that all Pierce's assets are part of his estate and that \$100 million is owed to the IRS."</p>	<p>46</p>	<p>The record does not support the assertion that <i>now</i> the estate is worth \$125 million by virtue of some wrongdoing.</p>	<p>App. 534, 547, 554-55, 557 Richland Decl. Ex. B., p.1</p>