No.

In the Supreme Court of the United States

TIMOTHY L. BLIXSETH

V.

STATE OF MONTANA DEPARTMENT OF REVENUE

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

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATHAN A. SCHULTZ
Counsel of Record

Law Office of Nathan A. Schultz, P.C.
10621 Craig Road
Traverse City, MI 49686
nschultzesq@gmail.com
(310) 429-7128

IN THE SUPREME COURT OF THE UNITED STATES

No. 24A

TIMOTHY L. BLIXSETH, APPLICANT

v.

STATE OF MONTANA DEPARTMENT OF REVENUE

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Pursuant to Rules 13.5 and 30.2 of the Rules of this Court, Timothy L. Blixseth respectfully requests a 60-day extension of time, to and including February 28, 2025, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. The opinion of the court of appeals (App., infra, 1a-20a) is reported at 112 F.4th 837. The order of the bankruptcy appellate panel (App., infra, 21a-23a) is not reported and is not available on LEXIS. The decision of the bankruptcy court (App., infra, 24a-46a) is not reported and is not available on LEXIS.

The court of appeals denied rehearing on September 30, 2024. App., infra, 47a. Unless extended, the time within which to file a petition for a writ of certiorari will expire on December 30, 2024. The Jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1).

1. The vast majority of cases under the Bankruptcy Code are commenced voluntarily by the debtor. However, Section 303 of the Bankruptcy Code alternatively allows one or more non-debtor parties to commence an involuntary case against a putative debtor.

Sections 303(b) and 303(h) of the Code set forth certain threshold requirements that must be met for a non-debtor party to successfully initiate an involuntary bankruptcy case. If these requirements are not met, then no bankruptcy case is initiated and the involuntary petition is dismissed.

Section 303(i) of the Bankruptcy Code provides that if an involuntary petition is dismissed non-consensually, and if the debtor does not waive the right to a judgment under this section, then the court may grant judgment "(1) against the petitioners and in favor of the debtor for— (A) costs; or (B) a reasonable attorney's fee; or (2) against any petitioner that filed the petition in bad faith, for— (A) any damages proximately caused by such filing; or (B) punitive damages."

Section 106(a) of the Code abrogates the sovereign immunity of States and other governmental units with respect to a specific list of Bankruptcy Code sections, including Section 303. This Court also has long recognized the "litigation waiver" doctrine as a standalone exception to sovereign immunity. See Clark v. Barnard, 108 U.S. 436, 447–48 (1883).

2. In April 2011, the State of Montana Department of Revenue (State) filed an involuntary petition against Mr. Blixseth in the United States Bankruptcy Court for the District of Nevada. App., infra, 6a. In late 2019, the Ninth Circuit affirmed that the State lacked standing as a petitioning creditor because its claim was subject to a bona fide dispute. Id. In June 2021, the bankruptcy court entered its order dismissing the State's involuntary petition and reserving jurisdiction with respect to any claims brought under section 303(i) of the Bankruptcy Code. Id.

In December 2021, Mr. Blixseth filed an adversary proceeding against the State seeking damages under Section 303(i) of the Bankruptcy Code. App., infra, 8a. The State moved to dismiss, asserting sovereign immunity. Id. The bankruptcy court rejected the State's assertion of sovereign

immunity as to Mr. Blixseth's claims under section 303(i)(1) and (2)(A) on three grounds, holding that: (i) the State "voluntarily invoked the jurisdiction of [the bankruptcy] court by filing the [i]nvoluntary [p]etition"; (ii) the State's counsel "clear[ly] and unequivocal[ly] waive[d] [the State's] sovereign immunity under the Eleventh Amendment regarding any further Section 303(i) claims"; and (iii) an action under § 3030(i) "is ancillary to the bankruptcy court's *in rem* jurisdiction and that, "[t]o accept [the State's] argument would be to impermissibly read Section 106(a)(1) out of the [Bankruptcy] Code." Id. at 8a-9a.

The State appealed the bankruptcy court's decision to the Bankruptcy Appellate Panel for the Ninth Circuit, which dismissed the appeal on the ground that the collateral order doctrine did not apply. App., infra, 9a.

3. The court of appeals reversed and remanded with instructions to dismiss Mr. Blixseth's claims under section 303(i) as barred by sovereign immunity. App., infra, 1a-20a. The court first assessed whether the State waived sovereign immunity by voluntarily invoking the bankruptcy court's jurisdiction. Id. at 10a-13a. The court applied precedent focusing on the impact of a state filing a proof of claim on sovereign immunity, despite acknowledging that the State never filed a proof of claim. Id. at 10a-11a (citing Gardner v. New Jersey, 329 U.S. 565 (1947)). The court did not address this Court's precedent in Clark v. Barnard or its progeny. Instead, the court concluded that the State did not waive sovereign immunity by filing the involuntary petition because damages under section 303(i) do not meet the logical relationship test for compulsory counterclaims applicable to proof of claim waivers. Id. at 11a-13a.

The court next analyzed whether the State waived sovereign immunity by making a "clear declaration" of its intent to submit to the bankruptcy court's jurisdiction. App, infra, 13a. The court's opinion quotes colloquy between the State's counsel and the bankruptcy judge from

an initial hearing only days after the State filed the involuntary petition wherein the State's counsel (with a client representative present in the courtroom) affirmed that the State had waived sovereign immunity for all purposes, including with respect to any claim under section 303(i) of the Bankruptcy Code. Id. at 6a-8a. Nonetheless, the court summarily concluded that the State's counsel "could not and did not effect an 'unequivocal' waiver of [the State's] sovereign immunity through his statements to the court" because "the 'unequivocal expression' of elimination of sovereign immunity that [the Supreme Court] insist[s] upon is an expression in statutory text." Id. at 13a (quoting College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675-76 (1999) and United States v. Nordic Vil., Inc. 503 U.S. 30, 37 (1992)).

Finally, the court considered whether Congress had the power to abrogate the State's sovereign immunity as to claims under section 303(i) of the Bankruptcy Code, either under section 106(a)(1) of the Bankruptcy Code or more broadly under Article I, § 8, cl. 4 of the Constitution (i.e. the "Bankruptcy Clause"). App, infra, 13a-19a. The court began by citing its own prior holding in Mitchell v. California Franchise Tax Board (In re Mitchell), 209 F.3d 1111 (9th Cir. 2000) that section 106(a)(1) of the Bankruptcy Code "is an unconstitutional assertion of Congress's power," without acknowledging contrary Sixth Circuit precedent in Hood v. Tenn. Student Assistance Corp. (In re Hood), 319 F.3d 755, 767 (6th Cir. 2003), aff'd on other grounds, 541 U.S. 440 (2004).

The court then sided with the Third and Eleventh Circuits and applied this Court's holding from Central Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006) to determine whether Mr. Blixseth's adversary proceeding asserting claims under section 303(i) "qualifies as a 'proceeding[] necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts.'" App,

infra, 8a (quoting Katz). The court concluded that Congress could not have abrogated sovereign immunity under the Bankruptcy Clause because the dismissal of an involuntary petition cannot further any of the three "[c]ritical features" of an active bankruptcy proceeding. Id. at 15a-19a. The court also expressed concern that denying sovereign immunity in this context "could have the effect of subjecting a state to litigation merely because the state filed an involuntary petition." Id. at 19a. The court did not address the significant federalism implications of allowing a state to selectively invoke the powerful benefits of federal court jurisdiction under a federal statute but then assert sovereign immunity to avoid the remedial provisions included by Congress in the very same statute as a counterbalance.

4. Mr. Blixseth intends to file a petition for writ of certiorari in this case. Mr. Blixseth is aware that the Court previously granted a petition for writ of certiorari in United States v. Miller (Case No. 21-4135), which also presents a question directly concerning the application of section 106(a)(1) of the Bankruptcy Code. The Court currently has set argument in United States v. Miller for December 2, 2024. Therefore, if Mr. Blixseth is granted a 60-day extension (from December 30, 2024 to and including February 28, 2025), it is possible that the Court may have issued a ruling in United States v. Miller that could significantly impact the grounds for Mr. Blixseth's petition for writ of certiorari. At a minimum, granting the requested extension would provide additional time for Mr. Blixseth's counsel to analyze the issues discussed at oral argument in United States v. Miller.

In addition, Mr. Blixseth currently is represented in this matter by a solo practitioner who is admitted to this Court, but who has never filed a petition for writ of certiorari. In the approximately 30-day period since the Ninth Circuit denied Mr. Blixseth's petition for rehearing en banc, Mr. Blixseth and his current counsel have attempted to locate experienced co-counsel to

assist with Mr. Blixseth's petition for writ of certiorari. However, the cloud of the State's improper involuntary petition impeded Mr. Blixseth's career prospects for over a decade during his prime income-generating years. The expense of litigating against the State exhausted his financial resources. Granting the requested extension would provide Mr. Blixseth and his current counsel with additional time to locate experienced and economical co-counsel. Moreover, if Mr. Blixseth and his current counsel are unable to secure the assistance of experienced co-counsel, granting the requested extension would alleviate the burden on the undersigned solo practitioner of having to get a writ of certiorari prepared, printed, and filed for the first time during the holiday season.

Respectfully submitted.

NATHAN A. SCHULTZ
Counsel for Timothy L. Blixseth

OCTOBER 2024

APPENDIX

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: TIMOTHY L. BLIXSETH, *Debtor*, ---------- STATE OF MONTANA DEPARTMENT OF REVENUE, *Appellant*, v. TIMOTHY L. BLIXSETH, *Appellee*.	No. 22-60046 BAP No. 22-1160 OPINION

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Lafferty III, Taylor, and Gan, Bankruptcy Judges, Presiding

Argued and Submitted January 10, 2024
Pasadena, California

Filed August 14, 2024

Before: Johnnie B. Rawlinson, Michael J. Melloy,* and Holly A. Thomas, Circuit Judges.

Opinion by Judge Rawlinson

SUMMARY**

Bankruptcy

The panel reversed (1) the Bankruptcy Appellate Panel's order dismissing an interlocutory appeal and (2) the bankruptcy court's order denying the State of Montana Department of Revenue's motion to dismiss an adversary proceeding brought by Timothy Blixseth under 11 U.S.C. § 303(i) for costs and damages arising out of the State's involuntary petition filed against Blixseth under 11 U.S.C. § 303(b)(1).

The panel held that the BAP and this court had jurisdiction under the collateral order doctrine to review the bankruptcy court's order denying the State's sovereign immunity.

The panel held that the bankruptcy court erred in concluding that the State was not entitled to sovereign immunity in Blixseth's adversary proceeding. First, the State did not voluntarily invoke the jurisdiction of the

* The Honorable Michael J. Melloy, United States Circuit Judge for the U.S. Court of Appeals for the Eighth Circuit, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

bankruptcy court and waive its sovereign immunity by filing the involuntary petition under § 303(b)(1).

Second, the State's counsel did not waive sovereign immunity because counsel did not make a clear and unequivocal statement of waiver.

Third, 11 U.S.C. § 106, addressing sovereign immunity in a § 303(b) proceeding, is an unconstitutional assertion of Congress's power and therefore did not support the bankruptcy court's ruling. The panel therefore turned to the analysis set forth in *Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006), to determine whether the State was entitled to sovereign immunity. *Katz* held that the states agreed in the plan of the Constitutional Convention of 1787 not to assert any sovereign immunity defense that they might have had in bankruptcy proceedings, but this agreement was limited to proceedings necessary to effectuate the core *in rem* jurisdiction of the bankruptcy courts and orders ancillary to their *in rem* jurisdiction. The panel agreed with the Third and Eleventh Circuits that the critical functions delineated in *Katz* provide useful guidelines for discerning whether an adversary proceeding qualifies as a proceeding necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts. Applying these guidelines, the panel concluded that the adversary proceeding brought by Blixseth was not necessary to effectuate the jurisdiction of the bankruptcy court in this case because § 303(i) creates a remedial scheme that is markedly distinct from the first two critical functions described in *Katz*: a bankruptcy court's exercise of exclusive jurisdiction over all of the debtor's property and the equitable distribution of the property among the debtor's creditors. The panel concluded that a proceeding brought under § 303(i) also does not further the third critical function: the ultimate discharge that gives the debtor a fresh

start. The panel therefore reversed the bankruptcy court's denial of sovereign immunity and remanded with instructions to dismiss Blixseth's § 303(i) claim against the State as barred by sovereign immunity.

COUNSEL

Daniel Solomon (argued), Husch Blackwell LLP, Washington, D.C.; Lynn H. Butler, Husch Blackwell LLP, Austin, Texas; Ogonna M. Brown, Lewis Roca Rothberger Christie LLP, Las Vegas, Nevada; for Appellant.

Nathan A. Schultz (argued), Law Office of Nathan A. Schultz PC, Traverse City, Michigan; Brett A. Axelrod, Fox Rothschild LLP, Las Vegas, Nevada; for Appellee.

OPINION

RAWLINSON, Circuit Judge:

The State of Montana Department of Revenue (State) brings an interlocutory appeal of the bankruptcy court's decision denying the State's motion to dismiss an action brought by Timothy Blixseth under 11 U.S.C. § 303(i)[1] for costs and damages arising out of the State's involuntary petition filed against Blixseth under 11 U.S.C. § 303(b)(1).[2]

We have jurisdiction under 28 U.S.C. §§ 158(d)(1). We review decisions of the Bankruptcy Appellate Panel (BAP) and questions of sovereign immunity *de novo*. *See Leslie v. Mihranian (In re Mihranian)*, 937 F.3d 1214, 1216 (9th Cir. BAP 2019); *see also Miller v. Wright*, 705 F.3d 919, 923 (9th Cir. 2013), *as amended* (sovereign immunity). Because we

[1] 11 U.S.C. § 303(i) provides that:

> If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment-- (1) against the petitioners and in favor of the debtor for-- (A) costs; or (B) a reasonable attorney's fee; or (2) against any petitioner that filed the petition in bad faith, for-- (A) any damages proximately caused by such filing; or (B) punitive damages.

[2] 11 U.S.C. § 303(b) provides that:

> An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title-- (1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount . . .

conclude that sovereign immunity shields the State from Blixseth's action, we reverse the BAP decision denying sovereign immunity to the State.

I. Background

Following an audit of Blixseth and his business entities, the State of Montana Department of Revenue, Idaho State Tax Commission, and California Franchise Tax Board filed an involuntary bankruptcy petition against Blixseth for unpaid taxes. *See Montana Dept. of Revenue v. Blixseth*, 942 F.3d 1179, 1181-82 (9th Cir. 2019). The Yellowstone Club Liquidating Trust subsequently joined the action. *See id.* at 1182. After the Idaho State Tax Commission and California Franchise Tax Board settled with Blixseth, they withdrew as petitioning creditors. *See id.* The bankruptcy court then granted summary judgment in favor of Blixseth, finding that because the State's claim was the subject of a bona fide dispute as to the amount of liability, the State lacked standing to pursue the claim in bankruptcy court, and the petition could not be sustained based on the existence of only one remaining petitioning creditor (the Yellowstone Liquidating Trust). *See id.* at 1182-83.

The State appealed the bankruptcy court's decision to the district court, which affirmed. *See id.* at 1183. On appeal to this court, we also affirmed, agreeing that the State lacked standing as a petitioning creditor because its claim was subject to a bona fide dispute. *See id.* at 1187. On remand, the bankruptcy court dismissed the involuntary petition for want of prosecution.

During the pendency of the involuntary petition, the bankruptcy court held a hearing during which the parties discussed sovereign immunity. The following colloquy

between the bankruptcy court and MDOR's counsel occurred:

> COURT: [A]s a preliminary matter. I saw in both the settlements with respect to the Idaho Taxation Department and The California Franchise Tax Board something that piqued my interest. I take it that all the petitioning creditors, even though they are sovereigns, they're waiving their sovereign immunity with respect to any liability they might have for this action, is that correct?
>
> COUNSEL: To the extent that is consistent with the United States Supreme Court's rulings over the last couple of years—
>
> COURT: No, No. I don't want it consistent. I want explicit on the record that by coming into this court you are exposing yourself to anything this Court might have to remedy [sic] anything that the Bankruptcy Court says needs to be remedied.
>
> COUNSEL: I believe that's a correct summation of the law, that the courts—the three state agencies have voluntarily submitted themselves to the jurisdiction of this court.

> COURT: All right. And I will tell you, I don't—I have no idea if we will get there, although I saw that—I saw obviously there was a waiver with respect to . . . the Franchise Tax Board—I know from the debtor, but I also saw a request from the Debtor for 303(i) damages, and I just want to clear up front that it is my view at this point that, as you have stated, by commencing an action in this court, not only have they submitted to the jurisdiction of this Court, but they have waived whatever sovereign immunity they might have with respect to damages, fines, or penalties that might accrue because of actions taken in this Court.
>
> COUNSEL: I believe that's correct, Your Honor.

Blixseth subsequently brought an adversary proceeding against the State under § 303(i) seeking attorneys' fees and costs, proximate and punitive damages, and sanctions against counsel. The State moved to dismiss, asserting sovereign immunity. The bankruptcy court concluded that the State was not immune from liability. First, the bankruptcy court found that the State "voluntarily invoked the jurisdiction of [the bankruptcy] court by filing the [i]nvoluntary [p]etition." Next, the bankruptcy court concluded that the State's counsel "clear[ly] and unequivocal[ly] waive[d] [the State's] sovereign immunity

under the Eleventh Amendment regarding any future Section 303(i) claims." Finally, the bankruptcy court found that an action under § 303(i) "is ancillary to the bankruptcy court's *in rem* jurisdiction" and that, "[t]o accept [the State's] argument would be to impermissibly read Section 106(a)(1) out of the [Bankruptcy] Code."

The State appealed the bankruptcy court's decision to the BAP, which dismissed the appeal on the ground that the collateral order doctrine did not apply.

II. Jurisdiction

Citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), the BAP summarily concluded that the collateral order doctrine did not apply because the bankruptcy court's decision did not fit into "the small class which finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

Normally, appeals under 28 U.S.C. § 158(d) are from "final decisions, judgments, orders, and decrees" of a district court or of the BAP. However, a case that is still ongoing may be appealed if the case finally determines a claim or claims collateral to claims asserted in the underlying action and the collateral claims are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen*, 337 U.S. at 546. This doctrine is commonly referred to as the "collateral order doctrine." *See Security Pac. Bank Wash. v. Steinberg* (*In re Westwood Shake & Shingle, Inc.*), 971 F.2d 387, 390 (9th Cir. 1992) (applying the collateral order doctrine to appeals brought

under 28 U.S.C. § 158(d)). "To come within the small class [described in] *Cohen*, the order [being appealed] must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (citation, alteration, and internal quotation marks omitted).

Both the United States Supreme Court and this court have applied *Cohen* and concluded that denials of sovereign immunity are immediately appealable under the collateral order doctrine. *See id.*; *see also Childs v. San Diego Family Hous. LLC*, 22 F.4th 1092, 1095-96 & n.2 (9th Cir. 2022) (same). Consequently, the BAP ruling that the State's appeal did not fit within the collateral order doctrine was erroneous.

III. Discussion

A. Ground One - Voluntary Invocation of Jurisdiction

The bankruptcy court ruled that the State "voluntarily invoked the jurisdiction" of the bankruptcy court and waived its sovereign immunity by filing the involuntary petition, summarily concluding that "the logical relationship test [for compulsory counterclaims], to the extent applicable, is easily satisfied."

"It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court *by offering a proof of claim and demanding its allowance* must abide by the consequences of that procedure. . . ." *Gardner v. New Jersey*, 329 U.S. 565, 573 (1947) (citation omitted) (emphasis added). "When the State becomes the actor and *files a claim against the [res]* it

waives any immunity which it otherwise might have had respecting the adjudication of the claim." *Id.* at 574 (citations omitted) (emphasis added). "*[W]hen a state or an 'arm of the state' files a proof of claim in a bankruptcy proceeding*, the state waives its Eleventh Amendment immunity with regard to the bankruptcy estate's claims that arise from the same transaction or occurrence as the state's claim. . . ." *Lazar v. California (In re Lazar)*, 237 F.3d 967, 978 (9th Cir. 2001) (emphasis added).

The State never filed a proof of claim, so any litigation waiver must be predicated upon the existence of a claim arising out of the adversary proceeding brought by the State. *See id.* "To determine whether a claim against the state arises out of the 'same transaction or occurrence' as the state's proof of claim," thereby overcoming sovereign immunity, "we apply the 'logical relationship' test for compulsory counterclaims." *Montana v. Goldin (In re Pegasus Gold Corp.)*, 394 F.3d 1189, 1195-96 (9th Cir. 2005) (internal quotation marks omitted). Under that test,

> [a] logical relationship exists when the counterclaim arises from the same aggregate set of operative facts as the initial claim, in that the same operative facts serve as the basis of both claims or the aggregate core of facts upon which the claim rests activates additional legal rights otherwise dormant in the defendant.

Id. (citation omitted).

We are not persuaded, however, that a § 303(i) claim is the equivalent of a compulsory counterclaim when an involuntary petition is filed under § 303(b) because, much

like a common law malicious prosecution claim, a claim filed under § 303(i) cannot arise out of the same factual predicate that supports a § 303(b) claim. *See Hydranautics v. FilmTec Corp.*, 70 F.3d 533, 537 (9th Cir. 1995) ("[A] malicious prosecution claim cannot be asserted as a counterclaim to the original suit which furnishes its predicate. . . .") (citation omitted). A § 303(i) claim arises from the fact of the filing of an involuntary petition under § 303(b), and therefore cannot satisfy the logical relationship test as a matter of law. *See* 11 U.S.C. § 303(i) (conditioning award of costs, fees, and damages on "the court dismiss[ing] a petition under this section other than on consent of all petitioners and the debtor"). Such an action is not a permissible "counterclaim to the original [involuntary petition] which furnishes its predicate." *Hydranautics*, 70 F.3d at 537.

Nor are we inclined to conclude that sanctions imposed under Rule 11 are a more apt analogy. Indeed, we have held that "§ 303(i) is a fee-shifting provision rather than a sanctions statute" and we have "contrast[ed]" § 303(i) with Rule 11. *Orange Blossom Ltd. P'ship v. S. Cal. Subelt Devs., Inc. (In re S. Cal. Sunbelt Devs., Inc.*), 608 F.3d 456, 462 (9th Cir. 2010). Specifically, we observed that "[l]ike other fee shifting provisions, and in contrast to Rule 11, eligibility for fees [under § 303(i)] turns on the merits of the litigation as a whole, rather than on whether a specific filing is well founded." *Id.* (internal quotation marks omitted).

Blixseth's allegations fail the logical relationship test in any event because Blixseth's claim does not arise from the same "aggregate set of operative facts" as the State's involuntary petition. *In re Pegasus Gold Corp.*, 394 F.3d at 1195-96. The States's involuntary petition alleged a debt of unpaid taxes from an improper tax deduction. In contrast,

Blixseth sought relief based on the consequences of having to defend against the petition, rather than claims arising from the factual predicate of his alleged tax deficiency. *See id.*

B. Ground Two - Counsel's Waiver of Sovereign Immunity

"Generally, [a court] will find a waiver [of sovereign immunity] . . . if the State makes a clear declaration that it intends to submit itself to [the court's] jurisdiction." *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-76 (1999) (citations and internal quotation marks omitted). A "state's consent to suit," however, "must be unequivocally expressed." *Id.* at 676 (citation and internal quotation marks omitted). "[T]he 'unequivocal expression' of elimination of sovereign immunity that [the Supreme Court] insist[s] upon is an expression in statutory text. . . ." *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 37 (1992) (citation omitted). Thus, MDOR's counsel could not and did not effect an "unequivocal" waiver of MDOR's sovereign immunity through his statements to the court. *Id.*

C. Ground Three - Ancillary Bankruptcy Jurisdiction (*Katz* Analysis)

"The text of Article I, § 8, cl. 4, of the Constitution . . . provides that Congress shall have the power to establish uniform Laws on the subject of Bankruptcies throughout the United States. . . ." *Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 370 (2006) (internal quotation marks omitted). Pertinent to this appeal, Congress has established that:

> An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of

> this title . . . by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount . . .

11 U.S.C. § 303(b)(1).

> If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this section, the court may grant judgment--(1) against the petitioners and in favor of the debtor for-- (A) costs; or (B) a reasonable attorney's fee; or (2) against any petitioner that filed the petition in bad faith, for--(A) any damages proximately caused by such filing; or (B) punitive damages.

11 U.S.C. § 303(i)(1)-(2).[3]

"Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth within this section with respect to . . . [Section] 303 . . ." 11 U.S.C. § 106(a)(1).

In *Mitchell v. California Franchise Tax Board (In re Mitchell)*, 209 F.3d 1111, 1120 (9th Cir. 2000), *abrogation on other grounds recognized in Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015), we held that § 106(a) is "an

[3] This is the provision Blixseth used to support the claims in his adversary proceeding against the State.

unconstitutional assertion of Congress's power."[4] Thus, the bankruptcy court improperly relied on § 106(a) as a basis for ruling that the State waived its sovereign immunity. *See id.* Because § 106(a) does not support the bankruptcy court's ruling, we turn to the analysis set forth in *Katz* to determine whether the State is entitled to sovereign immunity.

In *Katz*, the Supreme Court held that Virginia institutions of higher education were "amenable" to "proceedings to recover preferential transfers." 546 U.S. at 379. To reach this conclusion, the Court observed that "states agreed in the plan of the [Constitutional Convention of 1787] not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to Laws on the subject of Bankruptcies." *Id.* at 377 (citation and internal quotation marks omitted). However, as the Supreme Court further explained, "[t]he scope of this consent was limited." *Id.* at 378. "In ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy court." *Id.* (footnote reference omitted). This subordination also encompassed orders "ancillary to the bankruptcy courts' *in rem* jurisdiction." *Id.* at 373.

The Court thus considered whether 11 U.S.C. § 550, the section under which the universities' sought "to avoid and

[4] *Hunsaker v. United States*, 902 F.3d 963 (9th Cir. 2018), does not negate our reasoning in *In re Mitchell*. *Hunsaker* concerned federal sovereign immunity rather than State sovereign immunity under the Eleventh Amendment. *See id.* at 967-68 (discussing the recovery of emotional distress damages against the federal government under a federal statute). For the same reason, the bankruptcy court's reliance on *Zazzali v. United States (In re DBSI, Inc.)*, 869 F.3d 1004, 1011 (9th Cir. 2017), was misplaced.

recover alleged preferential transfers" to the universities, *id.* at 360, was within the scope of the States' consent given during the Constitutional Convention. In concluding that proceedings brought under § 550 were within the scope of the States' consent given during the Convention, the Court reasoned that "those who crafted the Bankruptcy Clause would have understood it to give Congress the power to authorize courts to avoid preferential transfers and to recover the transferred property." *Id.* at 372. The Court described the recovery of preferential transfers under § 550 as "a core aspect of the administration of bankrupt estates since at least the 18th century." *Id.*

Proceedings are at the "core" of a bankruptcy court's jurisdiction (*i.e.*, within its *in rem* jurisdiction) to which the States acquiesced insofar as they further the three "[c]ritical features of every bankruptcy proceeding" as set forth in *Katz*: "[1] the exercise of exclusive jurisdiction over all of the debtor's property, [2] the equitable distribution of that property among the debtor's creditors, and [3] the ultimate discharge that gives the debtor a 'fresh start' by releasing him, or her, or it from further liability for old debts." *Id.* at 363-64 (citation omitted); *see also id.* at 362 ("Bankruptcy jurisdiction, at its core, is *in rem*. . . .") (citation omitted).

In *Venoco LLC v. California (In re Venoco LLC)*, 998 F.3d 94, 99 (3d Cir. 2021), the Third Circuit "appl[ied] *Katz* to a bankruptcy adversary proceeding brought by a liquidating trustee for the debtors' assets." The trustee sought "compensation from the State of California and its Lands Commission for the alleged taking of a refinery that belonged to debtors." *Id.* The adversary proceeding was "primarily a claim for inverse condemnation, a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental

defendant." *Id.* at 100 (citation and internal quotation marks omitted).

In reaching its holding that the governmental defendants could not assert sovereign immunity, the Third Circuit concluded that the adversary proceeding furthered the first and second critical functions articulated in *Katz*. *See id.* at 106. The court explained that the adversary proceeding "further[ed] the Bankruptcy Court's exercise of jurisdiction over property of the Debtors and their estates," namely the refinery owned by the debtors. *Id.* The adversary proceeding also furthered the second critical function of "facilitating equitable distribution of the estate's assets." The Third Circuit observed that if the governmental defendants could assert sovereign immunity they would be able to recover from the Trust as creditors of the estate, while at the same time "preventing any judicial scrutiny over whether they [could] use the [refinery] without payment." *Id.* In addition, the governmental defendants "would improve their status vis-à-vis other creditors solely owing to their status as a state that can invoke sovereign immunity, just the kind of result *Katz* wanted to avoid." *Id.* (citation omitted).

In *State of Florida Dept. of Revenue v. Diaz (In re Diaz)*, 647 F.3d 1073, 1079 (11th Cir. 2011), the Eleventh Circuit held that sovereign immunity shielded the Florida Department of Revenue and the Virginia Department of Social Services from the debtor's motion for contempt and sanctions for violation of the automatic bankruptcy stay and related discharge injunction.

The Eleventh Circuit acknowledged that "[t]he automatic stay is a fundamental procedural mechanism in bankruptcy that allows the court to carry out" the first and

second critical functions identified in *Katz*, and was therefore necessary to effectuate the *in rem* functions of the bankruptcy court. *Id.* at 1085. However, the debtor did not file the contempt motion until four years after "the bankruptcy court had distributed the estate according to the Chapter 13 plan and entered a discharge order, which replaced the automatic stay with the discharge injunction." *Id.* at 1086. Because the contempt motion at that point no longer furthered the purpose of the bankruptcy stay, the Eleventh Circuit determined that the contempt motion "was filed too late to be considered essential to any *in rem* functions of the bankruptcy court." *Id.* The Eleventh Circuit concluded that "[t]he nexus between the [contempt] motion and the bankruptcy court's *in rem* jurisdiction [was] thus too remote to satisfy *Katz's* 'necessary to effectuate [the *in rem* jurisdiction of the bankruptcy court] standard.'" *Id.*

We agree with the Third and Eleventh Circuits that the critical functions delineated in *Katz* provide useful guidelines for discerning whether an adversary proceeding qualifies as a "proceeding[] necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts." *Id.* (quoting *Katz*, 546 U.S. at 378). Applying these guidelines, we conclude that the adversary proceeding brought by Blixseth under § 303(i) was not "necessary to effectuate the jurisdiction of the bankruptcy court[]" in this case. *Id.* Section 303(i) creates a "remedial scheme" that "addresses . . . costs and attorneys' fees for dismissed involuntary petitions [and] compensatory and punitive damages for involuntary petitions filed in bad faith." *Miles v. Okun (In re Miles)*, 430 F.3d 1083, 1090 (9th Cir. 2005). This remedial function is markedly distinct from the first two critical functions described in *Katz*: a bankruptcy court's exercise of exclusive jurisdiction over all of the debtor's

property and the equitable distribution of that property among debtor's creditors. *See Katz*, 546 U.S. at 363-64.

Section 303(i) is also substantially different than § 550, the statute at issue in *Katz*, which "authorize[s] [bankruptcy] courts to avoid preferential transfers and to recover transferred property" that is part of the *res* of the bankruptcy estate. *Id.* at 372. As the Supreme Court explained, the authority "to avoid preferential transfers and to recover transferred property" of the estate "has been a core aspect of the administration of bankrupt estates since at least the 18th century." *Id.* (citations omitted). In contrast, an adversary proceeding brought under § 303(i) does not concern property in the *res* of the bankruptcy estate, but rather compensation for having been the subject of an unsuccessful involuntary petition that could have created a *res* but never did.

Neither does an adversary proceeding brought under § 303(i) further the third critical function, "the ultimate discharge that gives the debtor a fresh start by releasing him . . . from further liability for old debts." *Katz*, 546 U.S. at 364 (citation and internal quotation marks omitted). Blixseth does not seek a "fresh start" with regard to "old debts," but reimbursement of his costs incurred for undergoing bankruptcy proceedings. *Id.*

Denying sovereign immunity in this context could have the effect of subjecting a state to litigation merely because the state filed an involuntary bankruptcy petition. *See Katz*, 546 U.S. at 362-63 ("The . . . Bankruptcy Clause . . . was intended . . . to authorize *limited* subordination of state sovereign immunity in the bankruptcy arena.") (emphasis added). For these reasons, we conclude that the State's assertion of sovereign immunity under the Eleventh Amendment was properly invoked.

IV. Conclusion

We have jurisdiction over this appeal under the collateral order doctrine. We are not persuaded that any of the grounds relied upon by the bankruptcy court to deny sovereign immunity to the State survive the *Katz* analysis. Rather, we conclude that under the reasoning and analysis in *Katz*, the State properly invoked sovereign immunity for Blixseth's claim brought under § 303(i).

We therefore reverse the BAP's order finding that the collateral order doctrine does not apply. We also reverse the bankruptcy court's denial of sovereign immunity, and remand with instructions to dismiss Blixseth's § 303(i) claim against the State as barred by sovereign immunity.

REVERSED AND REMANDED with instructions.

FILED

OCT 13 2022

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

In re: TIMOTHY L. BLIXSETH, Debtor.	BAP No. NV-22-1160 Bk. No. 2:11-bk-15010-MKN Adv. No. 2:21-ap-01274-MKN
MONTANA DEPARTMENT OF REVENUE, Appellant, v. TIMOTHY L. BLIXSETH, Appellee.	**ORDER DISMISSING APPEAL**

Before: LAFFERTY, TAYLOR, and GAN, Bankruptcy Judges.

On August 10, 2022, the Montana Department of Revenue ("Montana") filed a notice of appeal from a July 27, 2022 order granting in part and denying in part its motion to dismiss an adversary proceeding. Adversary Proceeding Docket at 30 (Order Granting in part, Denying in part Motion to Dismiss Adversary Proceeding) and 34 (Notice of Appeal).

The BAP Clerk entered its order requiring Montana to explain how the order on appeal is final and immediately reviewable under 28 U.S.C. § 158(a)(1); or to file a motion for leave to appeal.

Montana timely filed its brief on August 24, 2022 (BAP Doc. 4) and Mr. Blixseth filed his reply August 31, 2022 (BAP Doc. 11). Montana did not file a motion for leave to appeal.

Montana argues that the order is immediately appealable as a collateral order citing *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993) (holding that "States and state entities ... may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity"). Montana concedes that the order is not final unless the collateral order doctrine applies.

Mr. Blixseth argues that the collateral order doctrine does not apply arguing that Montana waived its sovereign immunity when it joined others in filing the involuntary petition, that it conceded that it had waived its sovereign immunity at the first hearing on the involuntary petition, and that 11 U.S.C. § 106(a) abrogates sovereign immunity with respect to involuntary petitions.

The Panel has reviewed the briefs and the supporting arguments.

The Montana Department of Revenue has not established that this appeal fits the "small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

The appeal is ordered DISMISSED.

BAP No. NV-22-1160
DEBTOR: TIMOTHY L. BLIXSETH
RE: ORDER OF DISMISSAL

CERTIFICATE OF MAILING

The undersigned, deputy Clerk of the U.S. Bankruptcy Appellate Panel of the Ninth Circuit, hereby certifies that a copy of the document to which this certificate is attached was transmitted this date to all parties of record to this appeal, to the United States Trustee and to the Clerk of the Bankruptcy Court.

By: Cecil Lizandro Silva, Deputy Clerk
Date: October 13, 2022

Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
July 27, 2022

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

* * * * * *

In re: TIMOTHY L. BLIXSETH, Alleged Debtor.	Case No.: 11-15010-MKN Chapter 7
TIMOTHY L. BLIXSETH, Plaintiff, vs. MONTANA DEPARTMENT OF REVENUE, Defendant.	Adv. Proc. No.: 21-01274-MKN Date: April 6, 2022 Time: 10:30 a.m.

ORDER ON MONTANA DEPARTMENT OF REVENUE'S MOTION TO DISMISS ADVERSARY PROCEEDING[1]

On April 6, 2022, the court heard the Montana Department of Revenue's Motion to Dismiss Adversary Proceeding ("Dismissal Motion"). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

[1] In this Order, all references to "ECF No." are to the documents filed in the above-captioned bankruptcy proceeding. All references to "AECF No." are to the documents filed in the above-captioned adversary proceeding. All references to "Section" or "§" are to provisions of the Bankruptcy Code, 11 U.S.C. § 101, et seq. All references to "Bankruptcy Rule" are to the Federal Rules of Bankruptcy Procedure. All references to "Civil Rule" are to the Federal Rules of Civil Procedure. All references to "FRE" are to the Federal Rules of Evidence.

BACKGROUND[2]

On April 5, 2011 ("Petition Date"), the Montana Department of Revenue ("Montana"), joined by the Idaho State Tax Commission ("Idaho") and the California Franchise Tax Board ("California"), filed an involuntary Chapter 7 petition ("Involuntary Petition") against Timothy L. Blixseth, Alleged Debtor, commencing the above-captioned case ("Involuntary Proceeding"). (ECF No. 1). All three petitioning creditors asserted unsecured claims for unpaid taxes owing to their respective States, with $219,258.00 asserted by Montana, $1,117,914.00 asserted by Idaho, and $986,957.95 asserted by California.

On April 8, 2011, an Order to Show Cause Why Venue in this District is Proper and Why Transfer of Case is Not Appropriate ("OSC") was entered, setting an initial hearing date of April 22, 2011. (ECF No. 7).

On April 20, 2011, Idaho filed a notice of withdrawal from participation as a petitioning creditor. (ECF No. 20).

On April 20, 2011 the Alleged Debtor filed a response to the OSC that included a request to dismiss or abstain ("Dismissal Request"). (ECF No. 23). The Alleged Debtor's Dismissal Request also sought monetary sanctions against the petitioning creditors under Bankruptcy Rule 9011 and Section 303(i).

On April 20, 2011, California also filed a notice of withdrawal from participation as a petitioning creditor. (ECF No. 26).

On April 22, 2011, the initial hearing was held on the OSC by the assigned bankruptcy judge, Bruce A. Markell ("Judge Markell"), at which time the court engaged in the following colloquy with Montana Department of Revenue's counsel, Lynn Butler:

---

[2] Pursuant to FRE 201(b), the court takes judicial notice of all materials appearing on the dockets in the above-captioned bankruptcy case and adversary proceeding. See U.S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980). See also Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank, 136 F.3d 1360, 1364 (9th Cir. 1998) (taking judicial notice of court filings in a state court case where the same plaintiff asserted similar claims); Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015) ("The Court may consider the records in this case, the underlying bankruptcy case and public records.").

THE COURT: -- as a preliminary matter. I saw in both the settlements with respect to the Idaho Taxation Department and the California Franchise Tax Board something that piqued my interest. I take it that all the petitioning creditors, even though they are soverigns [sic], they're waiving their sovereign immunity with respect to any liability they might have for this action, is that correct?

MR. BUTLER: To the extent that is consistent with the United States Supreme Court's rulings over the last couple of years --

THE COURT: No, no. I don't want it consistent. I want explicit on the record that by coming into this court you are exposing yourself to anything this Court might have to remedy anything that the Bankruptcy Court says needs to be remedied.

MR. BUTLER: I believe that's a correct summation of the law, that the courts -- the three state agencies have voluntarily submitted themselves to the jurisdiction of this Court.

THE COURT: All right. And I will tell you, I don't -- I have no idea if we will get there, although I saw that -- I saw obviously there was a waiver with respect to respect [sic] to the Franchise Tax Board and -- or a release with respect to the Franchise Tax Board -- I know from the debtor, but I also saw a request from the Debtor for 303(i) damages, and I just want to clear up front that it is my view at this point that, as you have stated, by commencing an action in this Court, not only have they submitted to the jurisdiction of this Court, but they have waived whatever sovereign immunity they might have with respect to damages, fines or penalties that might accrue because of the actions taken in this Court.

MR. BUTLER: I believe that's correct, Your Honor.

THE COURT: Yeah. Thank you.

MR. BUTLER: The - - and - -

THE COURT: Sorry to start you off - -

MR. BUTLER: No, no.

THE COURT: - - on such an - -

MR. BUTLER: That's okay.

THE COURT: - - odd tone, but I just want - -

MR. BUTLER.: No, it's - -

THE COURT: I have learned dealing with states - -

MR. BUTLER: Yes, Your Honor.

THE COURT: - - it's good to be explicit.

> MR. BUTLER: And let me just - - let me correct something. I don't want this to - - it's - - it's the 11th amendment issue that we're dealing with.
>
> THE COURT: Yeah.
>
> MR. BUTLER: Yeah, okay. Sovereign immunity, there's a whole dispute over which one's which. I didn't want you to think that I was hiding the ball on that one. We are waiting - -
>
> THE COURT: Well, let's be clear. I mean - -
>
> MR. BUTLER: Yes.
>
> THE COURT: - - again, I mean there's 11th amendment which I'm not even sure applies necessarily to a state - -
>
> MR. BUTLER: Yes, Your Honor.
>
> THE COURT: - - that commences an action. I'm actually talking about sovereign immunity - -
>
> MR. BUTLER: Yes, Your Honor.
>
> THE COURT: - - as well.
>
> MR. BUTLER: I believe so, Your Honor.
>
> THE COURT: All right. Thank you.
>
> MR. BUTLER: The - - again - -
>
> THE COURT: Alden v. Maine and all that sort of stuff.
>
> MR. BUTLER: Exactly. And then - -
>
> THE COURT: Right.
>
> MR. BUTLER: - - quite frankly, the Supreme Court has pretty well nailed that issue shut over the last six years or so.

(ECF No. 50 at 4:24-7:18) (emphasis added). The OSC hearing was continued to May 18, 2011.

On April 27, 2011, the Alleged Debtor filed a motion under Bankruptcy Rule 9011 for sanctions to be awarded against Montana and its agents and attorneys. (ECF No. 55). The motion was set to be heard at the same time as the continued OSC hearing.

On May 5, 2011, a motion for relief from stay was filed by the Yellowstone Club Liquidating Trustee ("YCLT") to allow it to proceed with the various appellate matters related to separate bankruptcy proceedings arising out of the United States Bankruptcy Court for the District of Montana ("YCLT RAS Motion"). (ECF No. 82). That motion was noticed to be heard on June 7, 2011. (ECF No. 83).

On May 8, 2011, the continued OSC hearing was conducted. After consideration of the evidence and arguments presented, Judge Markell orally ruled that the Alleged Debtor's principal assets, consisting of intangible interests in two Nevada limited liability companies, are not located in Nevada, but at the place of the Alleged Debtor's undisputed residence in the State of Washington. As a result, the court concluded that the Involuntary Proceeding should be dismissed for lack of venue. The court also concluded that jurisdiction should be retained to consider the issuance of sanctions against the petitioning creditors and their representatives.[3]

On May 27 2011, Judge Markell entered an "Order Dismissing Involuntary Petition Against Alleged Debtor Timothy L. Blixseth" that incorporated by reference his oral rulings issued at the OSC hearing ("First Dismissal Order"). (ECF No. 122). In light of the dismissal, the court also concluded that Alleged Debtor's Dismissal Request was moot as well as the YCLT RAS Motion. That order reserved jurisdiction over the Alleged Debtor's sanction requests and directed the filing of renewed motions.

On June 10, 2011, Montana appealed the First Dismissal Order to the Bankruptcy Appellate Panel for the Ninth Circuit ("BAP"). (ECF No. 146).[4]

On June 30, 2011, Judge Markell entered an order denying Montana's request for a stay pending its appeal of the First Dismissal Order. (ECF No. 186).

On July 19, 2011, however, the BAP entered an order granting Montana's request for a stay pending appeal of the First Dismissal Order. (ECF No. 236). Later the same day, this bankruptcy court entered an "Order Regarding Stay Pending Appeal." (ECF No. 237). That order stated, *inter alia*, that "[g]iven the stay pending appeal issued by the Bankruptcy Appellate Panel, all hearings in this case are hereby taken off calendar, and the parties are ordered to hold in abeyance all discovery. No new motions of any type may be filed without the prior

---

[3] A transcript of the continued OSC hearing ("OSC Transcript") was filed on May 24, 2011. (ECF No. 120).

[4] In his oral ruling on the OSC, Judge Markell noted that both Idaho and California had filed withdrawals from participation in the case *nunc pro tunc* to the Petition Date, but that no order approving the withdrawals had been entered. See OSC Transcript at 55:7-13. The court also noted that Montana was the only petitioner actively participating in response to the OSC.

permission of the Bankruptcy Appellate Panel confirming that its stay does not prohibit the filing and prosecution of such motions. If, or when, the stay is dissolved or appropriately modified, the court will hold a status conference to assess what action should then be taken."

On December 17, 2012, a divided three-judge panel of the BAP entered an Opinion reversing the First Dismissal Order. (ECF No. 250). The majority concluded that the Alleged Debtor's intangible interests in the two Nevada limited liability companies were located in Nevada and venue in Nevada therefore was proper. The dissent agreed with Judge Markell that the Alleged Debtor's interest in those assets are general intangibles that are located for venue purposes at the Alleged Debtor's place of residence in the State of Washington.

On December 18, 2012, the bankruptcy court entered an Order Setting Scheduling Conference. (ECF No. 251). The order directed Montana, Idaho, California, and the Alleged Debtor to appear for a scheduling conference.

On January 11, 2013, after the scheduling conference was conducted, a Scheduling Order was entered. (ECF No. 256).

On January 18, 2013, the Alleged Debtor filed a Renewed Motion to Dismiss Involuntary Case ("Second Dismissal Motion"). (ECF No. 261). The Alleged Debtor asserted that it had more than 12 creditors and that the Involuntary Petition no longer had at least 3 petitioning creditors as required by section 303(b)(1).

On January 23, 2013, pursuant to the Scheduling Order, Montana and the Alleged Debtor filed a Joint Discovery Plan regarding the Second Dismissal Motion. (ECF No. 265). That discovery plan provided deadlines for expedited discovery to be conducted, including production of documents, deposition of witnesses, issuance of subpoenas, and the like. It further provided deadlines for the submission of witness declarations, excerpts of deposition transcripts, witness lists, exhibit lists, and trial stipulations. The Joint Discovery Plan was approved by a court order entered on January 24, 2013. (ECF No. 266).

On January 25, 2013, an amendment to the Joint Discovery Plan was submitted by Montana and the Alleged Debtor. (ECF No. 270). The amended Joint Discovery Plan was

approved by court order that set the trial of the Second Dismissal Motion for February 27, 2013. (ECF No. 271).

On February 1, 2013, an order was entered vacating the hearing on the Second Dismissal Motion as well as the discovery deadlines. (ECF No. 283).

On March 15, 2013, the bankruptcy court entered another Order Setting Scheduling Conference. (ECF No. 294). The order directed Montana and the Alleged Debtor to appear for a scheduling conference to be held on March 25, 2013.

On March 22, 2013, Montana filed a motion to abate further proceedings on the Second Dismissal Motion to allow "global mediation" to be pursued. (ECF No. 297).

On March 25, 2013, the court conducted the scheduling conference at which time a two-day trial on the Second Dismissal Motion was set for June 13 and 14, 2013. The court directed counsel for Montana and the Alleged Debtor to submit a related scheduling order.

On March 28, 2013, a further amended Joint Discovery Plan was submitted by Montana and the Alleged Debtor. (ECF No. 306). The further amended Joint Discovery Plan specifically provided that the Second Dismissal Motion would "be limited to contested issues under 11 U.S.C. § 303(b)" and that "[d]iscovery and trial on the Motion shall be limited as such and, therefore, will not encompass contested issues under 11 U.S.C. § 303(h), (i), (k) and F.R.B.P. 9011." Joint Discovery Plan at ¶ 3. It also scheduled a pretrial conference to be held on May 28, 2013.

On April 2, 2013, the Alleged Debtor filed an amendment to the Second Dismissal Motion as permitted by the further amended Joint Discovery Plan. (ECF No. 309).

On April 9, 2013, an order was entered approving the further amended Joint Discovery Plan, including the agreed terms and deadlines specified therein. (ECF No. 313).

On April 17, 2013, Montana filed a notice of deposition and subpoena duces tecum with respect to the California Franchise Tax Board. (ECF No. 330).

On May 6, 2013, Montana filed an amended notice of deposition and subpoena duces tecum with respect to Michael J. Flynn. (ECF No. 350).

On May 8, 2013, Brian A. Glasser, as Trustee of the YCLT, filed a "Notice of Joinder in Involuntary Petition" pursuant to which the YCLT joined the Involuntary Petition. (ECF No. 359). YCLT asserted an unsecured claim in the amount of $40,992,210.81 based on a judgment previously entered by the bankruptcy court in Montana.

On May 13, 2013, Montana filed notices of deposition and subpoena duces tecum with respect to the California Franchise Tax Board as well as with respect to the Idaho State Tax Commission. (ECF Nos. 367 and 370).

On May 14, 2013, the Alleged Debtor filed a notice of deposition and notice of subpoena with respect to the California Franchise Tax Board (ECF Nos. 376 and 377), as well as with respect to the Idaho State Tax Commission. (ECF Nos. 378 and 379). The following day, the Alleged Debtor filed the amended notices of subpoena with respect to both entities. (ECF No. 383 and 384).

On May 16, 2013, a Second Amended Joint Discovery Plan was submitted by Montana and the Alleged Debtor. (ECF No. 390). The amended discovery plan specifically provided that the Second Dismissal Motion would "be limited to contested issues under 11 U.S.C. § 303(b)" and that "[d]iscovery and trial on the Motion shall be limited as such and, therefore, will not encompass contested issues under 11 U.S.C. § 303(h), (i), (k) and F.R.B.P. 9011." Second Amended Joint Discovery Plan at ¶ 3. Attached to the amendment were preliminary witness lists from both Montana and the Alleged Debtor that included unnamed representatives from Idaho and California.

On May 20, 2013, the Alleged Debtor filed an amended notice of subpoena and amended notice of deposition of Todd Bailey of the California Franchise Tax Board. (ECF Nos. 400 and 401).

On May 22, 2013, an order was entered approving the Second Amended Joint Discovery Plan. (ECF No. 413).

On May 28, 2013, a pretrial conference was conducted confirming the June 13 and 14, 2013, trial dates.

On June 4, 2013, a Third Amended Joint Discovery Plan was filed. (ECF No. 465). The amended discovery plan set specific deadlines for certain depositions to be taken, as well as to exchange copies of all declarations, excerpts of deposition transcripts and exhibits to be used at trial. The further amended discovery plan specifically provided that the Second Dismissal Motion would "be limited to contested issues under 11 U.S.C. § 303(b)" and that "[d]iscovery and trial on the Motion shall be limited as such and, therefore will not encompass contested issues under 11 U.S.C. § 303(h), (i), (k) and F.R.B.P. 9011." Third Amended Joint Discovery Plan at ¶ 3. Attached to the Third Amended Joint Discovery Plan were preliminary witness lists from both Montana and the Alleged Debtor, which included the Alleged Debtor and unnamed representatives from Idaho and California. Also included on the witness lists were individuals named Mike Flynn ("Flynn"), Spencer Marks ("Marks"), Kim Davis ("Davis"), and Pete Donnelly ("Donnelly").

On June 6, 2013, an order was entered approving the Third Amended Joint Discovery Plan. (ECF No. 472).

On June 11, 2013, counsel for the Alleged Debtor and counsel for Montana filed a Joint Statement of Evidentiary Objections and Responses Thereto ("Joint Evidentiary Objections"). (ECF No. 490). Among other items, the Alleged Debtor and Montana objected to their respective designations and counter-designations of the deposition testimony of Patrick Fox, (California Franchise Tax Board Representative) Laura Shuck, Joel Silverman, Dan Bucks, and a representative of the Idaho State Tax Commission. See Joint Evidentiary Objections at Tables 8, 9, 10, 11, 12, 13, 14, and 15.

On June 13 and June 14, 2013, Judge Markell conducted a trial on the Second Dismissal Motion at which testimony was presented by multiple witnesses and more than 200 exhibits were offered into evidence.[5] After the conclusion of the trial, the court scheduled closing arguments

[5] Transcripts of the trial on the Second Dismissal Motion ("Trial Transcripts") were filed on June 20 and 21, 2013. (ECF Nos. 496, 497, 498, 499, and 504). The Trial Transcripts include the live trial testimony of the Alleged Debtor, Flynn, Marks, Donnelly, and Davis, as well as individuals named Jerry Keller ("Keller") and Thomas Morrison ("Morrison"). Flynn testified as an attorney who consulted with the Alleged Debtor's representatives who had

for July 5, 2013, with final evidentiary rulings to be issued prior to submission of post-trial briefs.

On July 2, 2013, Judge Markell entered omnibus rulings on the parties' evidentiary objections raised before and during trial, including those set forth in the Joint Evidentiary Objections. (ECF No. 512).

On July 3, 2013, post-trial closing briefs were filed by the Alleged Debtor and by Montana. (ECF Nos. 515 and 516).

On July 5, 2013, closing arguments were presented by counsel and the Second Dismissal Motion was taken under submission.[6]

On July 10, 2013, Judge Markell entered an "Order Granting Motion to Dismiss Involuntary Case" ("Second Dismissal Order"). (ECF No. 528). The court found that the Alleged Debtor had at least 12 creditors as of the date of the Involuntary Petition and concluded that the petition therefore must be supported by at least 3 qualifying creditors under Section 303(b)(1). See Second Dismissal Order at 5:9 to 9:2. The court further held that if any amount of a petitioning creditor's claim is subject to a bona fide dispute, the creditor is disqualified from filing or joining in an involuntary petition under Section 303(b). Id. at 9:3 to 14:2. Based on the evidence presented, Judge Markell found that Idaho's claim was subject to bona fide dispute because its acceptance of a discounted settlement inferred the petitioning creditor's own concerns about the Alleged Debtor's liability. Id. at 14:4-15. The court also found that California's claim was subject to bona fide dispute because the settlement of its claim required the existence of a good faith dispute to serve as consideration for an enforceable settlement

---

negotiated settlements with Idaho and California. Marks, Donnelly, Davis, and Keller testified as current or former employees with the Montana Department of Revenue. Direct testimony declarations from Flynn, Marks, Donnelly, Davis, and Keller were admitted into evidence, subject to the court's subsequent rulings on the Joint Evidentiary Objections. The Alleged Debtor, Flynn, Marks, Donnelly, Davis, and Keller were subject to cross-examination at trial. Morrison was offered by Montana as a percipient witness and as an expert witness, but the court sustained the Alleged Debtor's objection to his testimony in both capacities.

[6] A transcript of the closing arguments on the Second Dismissal Motion was filed on July 8, 2013. (ECF No. 525).

agreement. Id. at 14:16 to 15:3. Judge Markell concluded that because the claims of both Idaho and California were subject to bona fide dispute, both were disqualified as petitioning creditors. Id. at 15:4-6. The court further concluded that YCLT qualified as a creditor that joined in the petition under Section 303(c) notwithstanding a possible contingency or dispute as to its claim. Id. at 15:7 to 16:8. Finally, Judge Markell found that at least part of Montana's claim was subject to bona fide dispute as to liability and amount, thereby disqualifying Montana from being a petitioning creditor. Id. at 16:9 to 17:12. Because the Involuntary Petition was not filed or joined by at least 3 qualifying creditors as required by Section 303(b), Judge Markell concluded that the requirements for involuntary bankruptcy relief had not been met and therefore granted the Second Dismissal Motion.[7]

On July 22, 2013, Montana filed a notice of appeal with respect to the Second Dismissal Order. (ECF No. 541).

On July 23, 2013, the Alleged Debtor filed an election to have the appeal heard by the United States District Court for the District of Nevada ("USDC") rather than the BAP. (ECF No. 549). As a result of that election, Montana's appeal of the Second Dismissal Order was transferred to the USDC, assigned to Judge Jennifer Dorsey ("USDC Judge Dorsey"), and denominated Case No. 2:13-cv-01324-JAD ("USDC Appeal").[8] (USDC ECF No. 4).[9]

On July 24, 2013, the Alleged Debtor filed "Timothy L. Blixseth's Motion for Judgment and for Costs and Fees Pursuant to 11 U.S.C. §§ 105 and 303(i)(1)" pursuant to which the

[7] Judge Markell having found that the Alleged Debtor had 12 or more creditors, Section 303(b)(2) would not have applied to allow YCLT alone to file an involuntary petition, even if its claim was not subject to bona fide dispute as to liability or amount.

[8] Where necessary, "USDC ECF No." will be used in this Order to identify documents filed in the USDC Appeal.

[9] Excerpts of the record on appeal were filed with the USDC on August 21, 2014 ("USDC Record"). (USDC ECF No. 58). Copies of the declarations of certain witnesses who testified at trial, see note 5, supra, were included in the USDC Record. (USDC ECF No. 58-11, MER01439 to MER01476). Copies of the exhibits admitted at trial also were included in the USDC Record.

Alleged Debtor requested sanctions against Montana and the YCLT ("303(i)(1) Motion"). (ECF No. 554).

On August 5, 2013, the Alleged Debtor filed a cross-appeal of the Second Dismissal Order "with respect to the Bankruptcy Court's ruling regarding the claim of" the YCLT. (ECF Nos. 566 and 568). On that same day, an election was filed to have the cross-appeal heard by the USDC. (ECF No. 569).

On August 7, 2013, the cross-appeal was referred to the USDC. (ECF No. 575).

On August 9, 2013, Montana filed in the Bankruptcy Court "Petitioning Creditor Montana Department of Revenue's Motion for Stay Pending Appeal" ("Stay Motion"). (ECF No. 583).

On August 15, 2013, the Alleged Debtor filed an objection to the Stay Motion (ECF No. 592) and a supplemental objection on August 30, 2013 (ECF No. 612).

On September 6, 2013, Montana filed a reply in support of the Stay Motion. (ECF No. 621).

On September 13, 2013, Bankruptcy Judge William T. Thurman ("Judge Thurman") presided over a hearing on the Stay Motion. At the conclusion of the parties' arguments, Judge Thurman issued his oral findings of fact and conclusions of law granting the Stay Motion in light of, among other reasons, the "irreparable harm" that Montana could suffer if the Alleged Debtor was allowed to continue seeking discovery of privileged material in furtherance of the 303(i)(1) Motion.[10]

On September 20, 2013, Judge Thurman entered an "Order Granting a Stay of Proceedings Pending Appeal" ("Stay Order") pursuant to which he stayed "all 11 U.S.C. § 303(i) and other post-dismissal proceedings against Montana, pending final resolution of the appeals by Montana and Mr. Blixseth" of the Second Dismissal Order. (ECF No. 635). The Stay Order does not expressly reference the Alleged Debtor's cross-appeal or otherwise mention the YCLT.

[10] A transcript of the hearing before Judge Thurman was filed on September 18, 2013. (ECF No. 631).

On October 2, 2013, the Alleged Debtor filed "Timothy L. Blixseth's Motion Pursuant to Fed. R. Bankr. P. 9023 and Fed. R. Civ. P. 59(e) to Amend Order Granting a Stay of Proceedings Pending Appeal" ("Reconsideration Motion"). (ECF No. 638). By the Reconsideration Motion, the Alleged Debtor asked the bankruptcy court to lift the stay and authorize him to continue prosecuting the 303(i)(1) Motion, including authorizing him to continue conducting discovery.

On October 23, 2013, Montana filed an objection to the Reconsideration Motion. (ECF No. 648).

On October 30, 2013, the Alleged Debtor filed a reply in support of the Reconsideration Motion. (ECF No. 651).

On November 6, 2013, Judge Thurman presided over a hearing on the Reconsideration Motion. At the conclusion of the parties' arguments, Judge Thurman issued his oral findings of fact and conclusions of law denying the Reconsideration Motion.

On November 12, 2013, Judge Thurman incorporated his oral findings of fact and conclusions of law made at the November 6 hearing into an order denying the Reconsideration Motion ("Reconsideration Order"). (ECF No. 653).

On April 19, 2017, approximately three and a half years after Judge Thurman's entry of the Reconsideration Order, the Alleged Debtor filed a motion in the bankruptcy court seeking a variety of relief, including to lift the Stay Order previously entered in the case, to enter sanctions against Montana for various alleged misconduct, and for a protective order ("Sanctions Motion"). (ECF No. 673). On the same date, the Alleged Debtor filed a separate motion in the bankruptcy court requesting the YCLT successor trustee to show cause whether he has preserved or destroyed evidence ("OSC Motion"). (ECF No. 674).

On September 12, 2017, the bankruptcy court heard the Alleged Debtor's Sanctions Motion as well as his OSC Motion, and took them under submission.

On December 15, 2017, USDC Judge Dorsey entered her decision affirming the Second Dismissal Order ("USDC Decision"). (USDC ECF No. 87). The USDC agreed that the Alleged

Debtor had more than 11 creditors and that there were not at least three qualifying creditors. USDC Judge Dorsey therefore affirmed the Second Dismissal Order.

On December 20, 2017, the bankruptcy court entered an order denying the Sanctions Motion. (ECF No. 728). On the same date, the bankruptcy court entered an order denying the OSC Motion. (ECF No. 730).

On January 11, 2018, Montana appealed the USDC Decision to the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit").[11] (USDC ECF No. 88).

On March 6, 2018, YCLT filed a notice of withdrawal from participation as a petitioning creditor in the Involuntary Proceeding. (ECF No. 737).

On November 26, 2019, the Ninth Circuit entered its Opinion affirming in part and remanding in part to the bankruptcy court. See State of Montana Dep't of Revenue v. Blixseth, 942 F.3d 1179 (9th Cir. 2019). Agreeing with Judge Markell and USDC Judge Dorsey, the circuit panel held that "a creditor whose claim is the subject of a bona fide dispute lacks standing to serve as a petitioning creditor under § 303(b)(1) even if a portion of the claim amount is undisputed." Id. at 1186. The circuit panel also agreed that "on the petition date, the vast majority of [Montana's] claim remained disputed. As a result, [Montana's] claim was the subject of a bona fide dispute as to amount." Id. at 1187. The panel's decision then concluded as follows: "[Montana] also disputes whether Idaho, California, and [YCLT]'s claims may sustain the petition individually or in combination. We do not reach these issues because all other petitioning creditors have withdrawn their participation in the underlying bankruptcy proceeding. Instead, we remand for the bankruptcy court to determine whether this matter should be dismissed for want of prosecution consistent with 11 U.S.C. § 303(j)(3)." Id.

On January 6, 2020, the Ninth Circuit entered its order denying the Alleged Debtor's petition for rehearing. (9th ECF No. 52).

On January 14, 2020, the Ninth Circuit entered its mandate. (9th ECF No. 53).

[11] Where necessary, "9th ECF No." will be used in this Order to identify documents filed in the proceedings before the Ninth Circuit.

On February 19, 2020, the USDC entered the "Order on Mandate," where in the matter was remanded to the Bankruptcy Court for "further proceedings consistent with the Ninth Circuit's instructions." (USDC ECF No. 94).

On August 10, 2020, the Alleged Debtor filed and served a request for a status conference and noticed the matter to be heard by the bankruptcy court on September 16, 2020. (ECF Nos. 757 and 758).

On September 11, 2020, Montana filed and served a "Position Paper." (ECF No. 764).

On September 16, 2020, counsel for the Alleged Debtor and counsel for Montana appeared at the status conference at which time the bankruptcy court set deadlines for both parties to file motions in accordance with the instructions from the Ninth Circuit. The motions were ordered to be heard concurrently on November 13, 2020.[12]

On October 9, 2020, Montana filed and served a Motion for Relief from Judgment ("Relief Motion") along with a separate memorandum in support thereof. (ECF Nos. 770 and 771). Pursuant to the Relief Motion, Montana asked the court to reconsider the Second Dismissal Order.

On October 9, 2020, the Alleged Debtor filed and served the Motion Confirming Dismissal of Involuntary Petition, or, in the Alternative, Motion to Dismiss Involuntary Petition for Want of Prosecution Pursuant to 11 U.S.C. § 303(j) ("303(j) Motion"). (ECF No. 772).

On October 14, 2020, the Alleged Debtor also filed and served a Motion to Strike Montana Department of Revenue's Motion for Relief from Judgment ("Strike Motion"). (ECF Nos. 774 and 775).

On June 3, 2021, the court entered orders denying the Relief Motion, denying the Strike Motion, and granting the 303(j) Motion. (ECF Nos. 825, 827, and 828). In its order granting the 303(j) Motion ("303(j) Order"), the court recognized that "dismissal of an involuntary proceeding is a necessary predicate to the Alleged Debtor seeking sanctions under Section

[12] An order incorporating the briefing and hearing schedule was entered on October 15, 2020. (ECF No. 776). Notice of entry of the order was served on all creditors and parties in interest. (ECF No. 778).

303(i)" and ordered "that jurisdiction of this court is reserved with respects to claims, if any, brought under 11 U.S.C. § 303(i)."

On June 21, 2021, the involuntary bankruptcy case was closed. (ECF No. 834).

On December 23, 2021, the Alleged Debtor instituted the above-captioned adversary proceeding by filing a complaint ("Complaint") against Montana alleging three claims:

> Count I – Judgment Against Defendant MDOR for Reasonable Costs and Attorney's Fees Pursuant to 11 U.S.C. § 303(i)(1)(A)–(B)
>
> Count II – Judgment Against Defendant MDOR That it Commenced the Involuntary Proceeding in Bad Faith, Damages Proximately Caused by Defendant MDOR's Bad Faith Bankruptcy Filing, and Punitive Damages Pursuant to 11 U.S.C. § 303(i)(2)(A)–(B).
>
> Count III – Judgment Against Counsel[13] for Petitioner for Sanction Pursuant to Fed. R. Bankr. P. 9011(b)–(c)

(AECF No. 1).

On January 25, 2022, Montana filed the instant Dismissal Motion. (AECF No. 6).

On February 23, 2022, Alleged Debtor filed his opposition ("Opposition") to the Dismissal Motion. (AECF No. 9).

On March 2, 2022, Montana filed its reply ("Reply") to the Alleged Debtor's Opposition. (AECF No. 10).

DISCUSSION

Montana seeks to dismiss[14] the Complaint "based upon this Court's lack of personal jurisdiction pursuant to the Eleventh Amendment to the Constitution, U.S. Const. Amend. XI and Rule 12(b)(2) of the Federal Rules of Civil Procedure." Dismissal Motion at 1:23-25. In his Opposition, the Alleged Debtor responds that Montana has waived sovereign immunity.

I. Legal Standards.

[13] The court observes that Montana's counsel is not named as a defendant in the complaint.

[14] Count 3 of the Complaint is asserted against Montana's counsel, and not Montana. Therefore, the court interprets the Dismissal Motion as applying only to Counts 1 and 2 of the Complaint.

Civil Rule 12(b)(2), made applicable herein pursuant to Bankruptcy Rule 7012, authorizes a court to dismiss a complaint based on "lack of personal jurisdiction." FED. R. CIV. P. 12(b)(2); FED. R. BANKR. P. 7012. The court may consider facts outside the complaint to resolve a jurisdictional dispute under Civil Rule 12(b)(2). See CMB Infrastructure Group IX, LP v. Cobra Energy Inv. Fin., Inc. 2021 WL 5304175, at *4 n.55 (D. Nev. Nov. 15, 2021) citing Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 324 (9th Cir. 1996).

Section 303(i) states:

> (i) If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment—
>
> (1) against the petitioners and in favor of the debtor for—
>
> (A) costs; or
>
> (B) a reasonable attorney's fee; or
>
> (2) against any petitioner that filed the petition in bad faith, for—
>
> (A) any damages proximately caused by such filing; or
>
> (B) punitive damages.

11 U.S.C. § 303(i)(1)-(2).

The Eleventh Amendment to the U.S. Constitution states:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

U.S. CONST. amend. XI. As explained by the Ninth Circuit,

> "Under the Eleventh Amendment, a state is immune from suit under state or federal law by private parties in federal court absent a valid abrogation of that immunity or an express waiver by the state." *Mitchell v. Franchise Tax Bd. (In re Mitchell)*, 209 F.3d 1111, 1115–16 (9th Cir.2000). That immunity applies to state agencies as well. *Id*. at 1116 n. 1. A state may waive its immunity if it voluntarily invokes the jurisdiction of a federal court or if it makes a "clear declaration" that it intends to submit itself to federal court jurisdiction. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675–76, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999) (citations omitted).

In the bankruptcy context, the Supreme Court has held that a state, by filing a proof of claim, waives its sovereign immunity with respect to adjudication of that claim:

> It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. [Citation omitted.] ... When the State becomes the actor and files a claim against the fund, it waives any immunity which it otherwise might have had respecting the adjudication of the claim.

Gardner v. New Jersey, 329 U.S. 565, 573–74, 67 S.Ct. 467, 91 L.Ed. 504 (1947). Accordingly, we have held that, when a state files a proof of claim for unpaid tax debts, it waives its sovereign immunity with respect to a court's determination that those debts are dischargeable. *See Cal. Franchise Tax Bd. v. Jackson (In re Jackson)*, 184 F.3d 1046, 1049 (9th Cir.1999).

The scope of the waiver is not limited to adjudication of the proof of claim. "[W]hen a state or an 'arm of the state' files a proof of claim in a bankruptcy proceeding, the state waives its Eleventh Amendment immunity with regard to the bankruptcy estate's claims that arise from the same transaction or occurrence as the state's claim." *Lazar*, 237 F.3d at 978. …

To determine whether the "same transaction or occurrence" requirement is met, we apply the "logical relationship" test delineated in *Pinkstaff v. United States (In re Pinkstaff)*, 974 F.2d 113 (9th Cir.1992):

> A logical relationship exists when the counterclaim arises from the same aggregate set of operative facts as the initial claim, in that the same operative facts serve as the basis of both claims or the aggregate core of facts upon which the claim rests activates additional legal rights otherwise dormant in the defendant.

[*Schulman v. Cal. (In re*] *Lazar*[*)*], 237 F.3d at 979 (quoting *Pinkstaff*, 974 F.2d at 115).

State Bd. of Equalization v. Harleston (In re Harleston), 331 F.3d 699, 701–02 (9th Cir. 2003).[15]

[15] In State of Montana v. Pegasus Gold Corp. (In re Pegasus Gold Corp.), 394 F.3d 1189 (9th Cir. 2005), a voluntary Chapter 11 proceeding was commenced by a Nevada corporation wherein the State of Montana filed proofs of claim. After a liquidating Chapter 11 plan was confirmed a dispute arose between a newly created entity and the State of Montana. The newly created entity and the trustee of the Chapter 11 liquidating trust then commenced an adversary proceeding against the State of Montana in the bankruptcy court alleging a breach of certain postpetition agreements. Those agreements, however, required the parties to arbitrate their disputes or to resolve them in Montana state courts applying Montana law. Under the

Section 106 of the Bankruptcy Code states, in pertinent part, as follows:

> (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit[16] to the extent set forth in this section with respect to the following:
>
> (1) Sections 105, 106, 107, 108, **303**, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.
>
> (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.
>
> (3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages.[17] Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

---

circumstances, the Ninth Circuit concluded that Montana had not waived its immunity under the Eleventh Amendment by filing a proof of claim in the voluntary Chapter 11 proceeding. Dismissal of the adversary proceeding for lack of jurisdiction therefore was required. By contrast, the State of Montana in the present case initiated the involuntary Chapter 7 proceedings by which the Alleged Debtor's non-exempt assets would be administered for the payment of claims against the Alleged Debtor.

[16] Section 101(27) defines a "governmental unit" as follows:

> (27) The term "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

11 U.S.C. § 101(27). Montana does not dispute that it is a "governmental unit" as defined under Section 101(27).

[17] The Complaint seeks an award of punitive damages, which may be inappropriate under Section 106(a)(3). However, the amount and scope of damages are not the subject of the instant Dismissal Motion or this order, and Montana's arguments in its Reply regarding its potential liability are not addressed herein.

11 U.S.C. § 106(a)(1)-(3) (emphasis added).[18]

II. Analysis.

In its Reply, Montana concedes that it voluntarily waived its Eleventh Amendment immunity, though it classifies its waiver as "limited" based on the following arguments:

> Montana is not disputing that a limited, voluntary waiver of its Eleventh Amendment immunity occurred with the filing of the Involuntary Petition. The basis for Montana's participation in the Bankruptcy Case was in its capacity as a creditor asserting a claim for $219,258.00 against Mr. Blixseth for unpaid state taxes. In this Adversary Proceeding, Mr. Blixseth attempts to assert affirmative claims against Montana under Bankruptcy Code § 303(i), a proceeding distinct and separate from the prior § 303(b) proceeding. Moreover the § 303(b) proceeding necessarily had to be dismissed before any proceeding under § 303(i) could even exist, further indicating the distinction between the filing of the Involuntary Case and Adversary Proceeding.
>
> Montana invoked federal jurisdiction by asserting its tax claim against Mr. Blixseth through the mechanism of an involuntary bankruptcy filing. That action submitted Montana's claim to the federal court for adjudication. Montana did not instigate the § 303(i) proceeding and has not consented to it. Further, during the case, Montana made statements in the record of the Court that it will assert its Eleventh Amendment immunity and now does so.

Reply at 2:13-26. The court disagrees with Montana's implicit contention that its alleged "limited" waiver does not extend to the Alleged Debtor's current claims for relief under Section 303(i).

First, Montana voluntarily invoked the jurisdiction of this court by filing the Involuntary Petition and, as reflected by the extensive history previously recited, has expended substantial time and effort to keep the Involuntary Proceeding alive. Montana's voluntary actions constitute a clear and unequivocal waiver of its immunity under the Eleventh Amendment,[19] and Section

---

[18] Compare Central Virginia Community College v. Katz, 546 U.S. 356, 379 (2006) (bankruptcy clause under Art. I, § 8, cl. 4 authorizes Congress to enact uniform bankruptcy laws, including waiver of State sovereign immunity for avoidance of preferential transfers).

[19] Compare Lapides v. Board of Regents of University System of Georgia, 535 U.S. 613 (2002) (by voluntarily removing litigation to federal court, Georgia waived Eleventh Amendment immunity from federal court adjudication of state law claims against state entity).

106(a)(1) unambiguously provides that this waiver extends to Section 303(i). To put it another way, the "logical relationship" test, to the extent applicable, is easily satisfied.

Second, the following colloquy on April 11, 2011, between Judge Markell and Montana's counsel, Mr. Butler (who continues to represent Montana in this matter) further reflects Montana's clear and unequivocal waiver of its sovereign immunity under the Eleventh Amendment regarding any future Section 303(i) claims:

> THE COURT: No, no. I don't want it consistent. I want explicit on the record that by coming into this court you are exposing yourself to anything this Court might have to remedy anything that the Bankruptcy Court says needs to be remedied.
>
> MR. BUTLER: I believe that's a correct summation of the law, that the courts -- the three state agencies have voluntarily submitted themselves to the jurisdiction of this Court.
>
> THE COURT: All right. And I will tell you, I don't -- I have no idea if we will get there, although I saw that -- I saw obviously there was a waiver with respect to respect [sic] to the Franchise Tax Board and -- or a release with respect to the Franchise Tax Board -- I know from the debtor, but I also saw a request from the Debtor for 303(i) damages, and I just want to clear up front that it is my view at this point that, as you have stated, by commencing an action in this Court, not only have they submitted to the jurisdiction of this Court, but they have waived whatever sovereign immunity they might have with respect to damages, fines or penalties that might accrue because of the actions taken in this Court.
>
> MR. BUTLER: I believe that's correct, Your Honor.

(ECF No. 50 at 5:9-6:5).

Finally, contrary to Montana's implicit arguments to the contrary, the court did not lose jurisdiction over this matter simply because the underlying bankruptcy case was dismissed:

> Bankruptcy jurisdiction is governed by statute. 28 U.S.C. § 1334. That jurisdiction is not limited, relinquished, or otherwise affected by the closing or reopening of a bankruptcy case. *See, e .g., Menk v. Lapaglia (In re Menk)*, 241 B.R. 896, 906 (9th Cir.BAP1999) "[T]here is no jurisdictional requirement that a closed bankruptcy case be reopened before 'arising under' jurisdiction can be exercised to determine whether a particular debt is excepted from discharge."); *Koehler v. Grant*, 213 B.R. 567, 569 (8th Cir.BAP1997) ("The court's jurisdiction does not end once a plan is confirmed or the case is closed.").

In re Reynolds, 2014 WL 5325749, at *3 (Bankr. C.D. Cal. Oct. 20, 2014). Indeed, in its 303(j) Order, the court recognized that "dismissal of an involuntary proceeding is a necessary predicate to the Alleged Debtor seeking sanctions under Section 303(i)" and ordered "that jurisdiction of this court is reserved with respects to claims, if any, brought under 11 U.S.C. § 303(i)." Montana also recognizes that dismissal of the Involuntary Proceeding was a condition precedent to the Alleged Debtor's pursuit of sanctions under Section 303(i), though it confusingly argues that this factual and legal circumstance "indicat[es] the distinction between the filing of the Involuntary Case and Adversary Proceeding." See Reply at 2:18-21. In essence, therefore, Montana (a) concedes that it waived sovereign immunity based on its filing of the Involuntary Proceeding, (b) does not dispute its waiver of sovereign immunity under Section 106(a)(1), (c) recognizes that the Alleged Debtor could not have pursued Section 303(i) damages until after the Involuntary Proceeding was dismissed, but (d) then conveniently claims that upon dismissal, it retains the right to assert sovereign immunity in response to a Section 303(i) claim because the bankruptcy court's *in rem* jurisdiction concluded upon the dismissal of the Involuntary Proceeding. Montana is wrong.

"11 U.S.C. § 303(i) provides the exclusive cause of action for damages predicated upon the filing of an involuntary bankruptcy petition." Miles v. Okun (In re Miles), 430 F.3d 1083, 1091 (9th Cir. 2005). A Section 303(i) action is ancillary to the bankruptcy court's *in rem* jurisdiction and is designed to "deter misuse of the bankruptcy process…." Id. at 1089. See also Slayton v. White (In re Slayton), 409 B.R. 897, 903-04 (Bankr. N.D. Ill. 2009) ("The discharge is a fundamental *in rem* feature of bankruptcy by which the states are bound. … Injunctive relief, damages, and attorneys' fees, though seemingly *in personam* remedies, are ancillary to the Slaytons' *in rem* proceeding because those remedies serve as mechanisms for enforcement of the discharge."). To accept Montana's argument would be to impermissibly read Section 106(a)(1) out of the Code, which the Ninth Circuit has deemed to be improper:

> [T]he interpretation offered by the government would essentially nullify Section 106(a)(1)'s effect on Section 544(b)(1), an interpretation we should avoid. *See*, *e.g.*, *United States v. Powell*, 6 F.3d 611, 614 (9th Cir. 1993) ("It is a basic rule of statutory

> construction that one provision should not be interpreted in a way which is internally contradictory or that renders other provisions of the same statute inconsistent or meaningless." (internal quotation marks and citation omission)).

Zazzali v. U.S. (In re DBSI, Inc.), 869 F.3d 1004, 1011 (9th Cir. 2017). Montana, therefore, is not entitled to immunity under the Eleventh Amendment except as to any request in the Complaint for punitive damages which is expressly prohibited under Section 106(a)(3).

IT IS THEREFORE ORDERED that the Montana Department of Revenue's Motion to Dismiss Adversary Proceeding, Adversary Docket No. 6, be, and the same hereby is, **GRANTED IN PART AND DENIED IN PART**. Specifically, the court grants the Dismissal Motion to the extent it seeks to dismiss any claim for punitive damages based on immunity under the Eleventh Amendment and denies the Dismissal Motion in all other respects.

Copies sent via CM/ECF ELECTRONIC FILING

Copy sent via BNC to:
TIMOTHY L BLIXSETH
1605 73RD AVE., NE
MEDINA, WA 98039-2330

# # #

FILED

SEP 30 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: TIMOTHY L. BLIXSETH, Debtor, ---------- STATE OF MONTANA DEPARTMENT OF REVENUE, Appellant, v. TIMOTHY L. BLIXSETH, Appellee.	No. 22-60046 BAP No. 22-1160 ORDER

Before: RAWLINSON, MELLOY,* and H.A. THOMAS, Circuit Judges.

Judges Rawlinson and Thomas voted to deny, and Judge Melloy recommended denying, the Petition for Rehearing En Banc.

The full court has been advised of the Petition for Rehearing En Banc, and no judge of the court has requested a vote.

Appellee's Petition for Rehearing En Banc, filed August 28, 2024, is DENIED.

---

* The Honorable Michael J. Melloy, United States Circuit Judge for the U.S. Court of Appeals for the Eighth Circuit, sitting by designation.