

**Hawaii Bankruptcy Law Section Seminar  
June 6, 2008  
Program: “Confidentiality Agreements”**

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**Bankruptcy Court Jurisdiction Over Non-Disclosure  
Agreements**

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Debtors and trustees frequently enter into non-disclosure agreements (“NDA’s”) with interested parties, such as creditors or potential investors or buyers of assets who seek confidential information about the company. Such agreements only have meaning if they can be enforced. If a party signs an NDA and subsequently breaches that NDA by disclosing or misusing the confidential information, does the bankruptcy court have jurisdiction over the resulting litigation? This presentation discusses the two potential bases for jurisdiction (core jurisdiction and ancillary jurisdiction) which are central to answering this question.

**Issues:**

1. Whether a bankruptcy court has jurisdiction, pursuant to 28 U.S.C. § 1334, to consider an adversary proceeding brought by a trustee or debtor in possession for breach of a NDA.

2. If the court lacks “core” jurisdiction over the adversary proceeding pursuant to 28 U.S.C. § 1334, whether the court nevertheless has “ancillary” jurisdiction over the action.

**ISSUE 1: CORE JURISDICTION**

“Core” Jurisdiction: Pursuant to 28 U.S.C. § 1334, district courts (and, by extension, bankruptcy courts) have concurrent jurisdiction over civil proceedings arising under, arising in, or related to, cases under Title 11.<sup>1</sup> Matters which “arise under” or “arise in” proceedings under Title 11 are collectively termed matters which are subject to a court’s “core jurisdiction.” *Maitland v. Mitchell (In re Harris Pine Hills)*, 44 F.3d 1431 (9th Cir. 1995). The distinction between “core” and “related to” (or “non-core”) jurisdiction is significant because, pursuant to 28 U.S.C. § 157<sup>2</sup>,

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<sup>1</sup> Section 1334 provides, in relevant part:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

<sup>2</sup> Section 157(b) provides, in relevant part:

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title [28 USCS § 158].

(2) Core proceedings include, but are not limited to--

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

bankruptcy courts may hear and determine on a final basis, only those matters which are subject to core jurisdiction. Matters which are non-core (or “related to” a case under Title 11) may be heard by a bankruptcy court acting only as a court making a recommendation to the district court without final disposition. *Piombo Corp. v. Castlerock Properties (In re Castlerock Properties)*, 781 F.2d 159 (9th Cir. 1986).

- Core Jurisdiction – Matters “Arising Under” Title 11: “Congress used the phrase ‘arising under title 11’ to describe those proceedings that involve a cause of action created or determined by a statutory provision of title 11.” *Harris Pine Hills*, 44 F.3d at 1435 (quoting *In re Wood*, 825 F.2d 90, 96-97 (5th Cir. 1987)).
- Core Jurisdiction – Matters “Arising In” Title 11: “The meaning of ‘arising in’ proceedings is less clear, but seems to be a reference to those ‘administrative’ matters that arise only in bankruptcy cases. In other words, ‘arising in’ proceedings are those that are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy.” *Harris Pine Hills*, 44 F.3d at 1435; *Bethlahmy v. Kuhlman (In re ACI-HDT Supply Co.)*, 205 B.R. 231 (B.A.P. 9th Cir. 1997).
- Non-Core Jurisdiction – Matters “Related To” Title 11: “The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of the proceeding could conceivably have any effect on the estate being

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- (C) counterclaims by the estate against persons filing claims against the estate;
  - (D) orders in respect to obtaining credit;
  - (E) orders to turn over property of the estate;
  - (F) proceedings to determine, avoid, or recover preferences;
  - (G) motions to terminate, annul, or modify the automatic stay;
  - (H) proceedings to determine, avoid, or recover fraudulent conveyances;
  - (I) determinations as to the dischargeability of particular debts;
  - (J) objections to discharges;
  - (K) determinations of the validity, extent, or priority of liens;
  - (L) confirmations of plans;
  - (M) orders approving the use or lease of property, including the use of cash collateral;
  - (N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;
  - (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and
  - (P) recognition of foreign proceedings and other matters under chapter 15 of title 11.
- (3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

- (c) (1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.
- (2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

administered in bankruptcy. Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.” *In re Feitz*, 852 F.2d 455 (9th Cir. 1988) (quoting and adopting *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984)).

#### Ninth Circuit Case Law:

*Maitland v. Mitchell (In re Harris Pine Hills)*, 44 F.3d 1431 (9th Cir. 1995): Purchaser of assets from a bankruptcy estate filed suit against a chapter 11 trustee for negligence and misrepresentation relating to the sale. Defendant trustee removed the action to district court, which denied a motion to remand and referred the matter to the bankruptcy court. On appeal, the Court of Appeals for the Ninth Circuit affirmed, holding that the matter was “inextricably intertwined” with the sale of property of the estate, and thus was subject to core jurisdiction. “The clear majority of decisions from other courts that have touched on this issue hold that postpetition state law claims asserted by or against a trustee in bankruptcy or the trustee’s agents for conduct arising out of the sale of property belonging to the bankruptcy estate qualify as core proceedings.”

- Implication: Under *Harris Pine Hills*, a matter is “arising in” a bankruptcy case, and thus subject to a bankruptcy court’s core jurisdiction, if it is “inextricably intertwined” with a matter which, itself, is a core matter (as with the sale of property of the estate). Courts have commented that this analysis to determine the issue is factually intensive and must be determined on a case by case basis.
- Open Questions: *Harris Pine Hills* involved state law claims *against* a chapter 11 trustee for actions taken by the trustee under authority of the court. The question is whether claims under a NDA are inextricably intertwined with the administration of the chapter 11 case to a greater or lesser extent than claims raised by the trustee for a third-party’s breach of an NDA. In addition, the claims raised against the trustee in *Harris Pine Hills* were raised before the final disposition of the chapter 11 bankruptcy estate. Accordingly, disposition of the claims against the trustee had a potential impact on the estate’s creditors.

*In re Cinematronics, Inc.*, 916 F.2d 1444 (9th Cir. 1990): Claims for breach of post-petition contract and fraud filed against a debtor’s Chief Operating Officer for the debtor’s postpetition conduct were not subject to a bankruptcy court’s core jurisdiction. The *Cinematronics* court specifically focused on the fact that claims were not raised against the debtor or its estate, stating that “[a] judgment against [the COO] would not directly determine or adjust the relationship of the Cinematronics estate to its creditors. Thus, the relationship of the claims to the reorganization proceedings are attenuated.” The Court specifically distinguished the facts of *Cinematronics* from those of *L.A. Clarke & Son, Inc. v. Bullock Construction, Inc.*, 51 B.R. 31 (Bankr. D.D.C. 1985), wherein a court determined it had core jurisdiction over breach of contract claims raised by a debtor in possession against a third party. The *Bullock* Court reasoned that the breach of contract claims “arise in” a bankruptcy case because “[a]ll the operative events giving rise to the claim and counterclaim occurred during the period after the Debtor's Chapter 11 petition was filed, while the Debtor was a Debtor-in-possession, and they all

involved the activities of the Debtor as Debtor-in-possession, operating under the aegis of this Court's protection and authority.”

- **Implication:** Claims which are based on a debtor’s actions but which do not directly involve the bankruptcy estate as a party are not subject to core jurisdiction. If the estate is a party to an action, however, that action is subject to core jurisdiction so long as the action is based on events which occurred during the administration of the debtor’s bankruptcy case, under the bankruptcy court’s protection and authority.

*In re Sun Cho, a/k/a Kim Cho*, 9 Fed. Appx. 633, 2001 U.S. App. LEXIS 9877 (9th Cir. April 12, 2001): State law claims raised against a bankruptcy trustee were subject to core jurisdiction even though the case was already closed when the claims were raised.

*In re Com 21*, 2005 U.S. Dist. LEXIS 34339 (N.D. Cal. July 6, 2005): Malpractice claims brought by a chapter 7 trustee against the debtors’ former bankruptcy counsel were “arising in” the bankruptcy case, and were thus subject to the court’s core jurisdiction. The *Com 21* Court specifically held that the claims were “inextricably intertwined” under *Harris Pine Mills* with administration of the estate, since the claims at issue arose “from the efforts of officers of the estate to administer the estate and collect its assets.” The Court specifically rejected the notion that the claims must have an “ongoing impact” to the administration of the estate.

*Oliner v. Kontrabecki*, 2006 U.S. Dist. LEXIS 93190 (N.D. Cal. Dec. 12, 2006): State law claims for, among other things, breach of fiduciary duty and impairment of collateral, raised by a creditor against a non-debtor were subject to core jurisdiction because the claims arose from the sale of assets of the estate outside the ordinary course of business.

*In re Harris*, 2007 U.S. Dist. LEXIS 62184 (S.D. Cal. Aug. 21, 2007): Breach of contract claims raised against a chapter 7 trustee were subject to core jurisdiction where the claims arose from the trustee’s sale of property of the estate.

#### Case Law From Outside The Ninth Circuit:

*Arnold Print Works, Inc. v. Apkin (In re Arnold Print Works, Inc.)*, 815 F.2d 165 (1st Cir. 1987) (Breyer, C.J.): Breach of contract claims raised by the debtor-in-possession against a third party which arose postpetition were subject to core jurisdiction because the claim “arose out of the administrative activities of a debtor-in-possession.” The Court continued by stating that “[i]t is the nature of the proceeding -- its relation to the basic function of the bankruptcy court -- not the state or federal basis for the claim, that makes the difference here.” Finally, the Court inferred that disputes relating to *any* post-petition agreement with the estate are subject to core jurisdiction, stating that “a party contracting with an officer of the court in fact contracts with the court itself, and by such act subjects himself for the purposes of the contract to the summary jurisdiction of the court.”

- **Implication:** This case represents a broad view of core jurisdiction, going so far as to say that any dispute relating to a postpetition agreement with the estate is subject to core jurisdiction. This view certainly leaves little room for debate as to whether the breach of an NDA is subject to a bankruptcy court’s jurisdiction, but a court need not adopt this view to assert jurisdiction over a particular dispute. It has been argued that the Ninth

Circuit rejected this view in *In re Cinematronics*, where it did not find core jurisdiction to exist even though the contract at issue was executed post-petition.

*Marotta Gund Budd & Dzera LLC v. Costa*, 340 B.R. 661 (D.N.H. 2006): Defamation claims raised by the debtor's former Chief Restructuring Officer against the debtor's Chief Executive Officer, were not considered to be "arising in" the bankruptcy case even though the claims were based on events which occurred during the bankruptcy case. The Court specifically noted that the defamation did not result from the defendant's obligations under the bankruptcy code, or from the defendant's behavior in the course of the bankruptcy proceedings.

*In re Hildebrand*, 205 B.R. 278 (Bankr. D. Colo. 1997): Claims against a chapter 7 estate for breach of a real estate purchase contract entered into postpetition were subject to core jurisdiction because they were "inextricably intertwined" with the chapter 7 trustee's sale of real property. The Court highlighted the fact that the contract was not entered in the ordinary course of business, inferring that the result may have been different if the court had not entered an order approving the sale of the property.

#### Observations/Analysis: Do Bankruptcy Courts Have Core Jurisdiction Over NDA's:

- *If The NDA Was Issued Pursuant To A Court Order*: If the NDA was issued pursuant to a court order or pursuant to a process which was authorized by a court order, it is more likely a court will find core jurisdiction over any disputes arising from the NDA. Under the "inextricably intertwined" analysis required by *Harris Pine Mills*, a court should find core jurisdiction over an NDA (or any other agreement) where: 1) the court had core jurisdiction over an initial process or matter, 2) the parties entered into the NDA in connection with that initial process, and 3) the circumstances surrounding the NDA are "inextricably intertwined" with the initial process. A debtor in possession or trustee who can point to a court order authorizing the initial process (such as an order authorizing sale procedures or authorizing solicitation of a disclosure statement) can easily establish the first element discussed above – that the court had core jurisdiction over the initial process.
- *If the NDA Was Not Issued Pursuant To A Court Order*: Debtors in possession or trustees often require third parties to enter into NDA's without specific authorization or acknowledgement from the court, as a matter of business judgment. If a dispute arises from an NDA in the absence of an order, a court may still find it has core jurisdiction over the NDA, provided that the requisite link to the administration of the estate can be established.
- *If Suit For Breach Of The NDA Is Filed After the Bankruptcy Case Is Closed*: *Cinematronics* makes clear that, for purposes of the "inextricably intertwined" analysis, the inquiry for core jurisdiction is whether the cause of action arose during the pendency of a bankruptcy case; the timing of the lawsuit raising the cause of action is largely irrelevant. Accordingly, so long as the NDA was breached during a bankruptcy case, a court will likely find it has jurisdiction over the NDA if it is otherwise "inextricably intertwined" with another core matter. If, on the other hand, the parties entered into the

NDA during the bankruptcy case but the breach occurred after the case was closed, it is unclear whether a court will have “core jurisdiction” over the resulting litigation.

Practical Suggestions:

- Include a preamble or other language in the NDA establishing that the NDA is “inextricably intertwined” with the administration of the estate or any other matter.
- Include a provision in the NDA granting the bankruptcy court exclusive jurisdiction over any dispute that arises under the NDA.

**ISSUE 2: ANCILLARY JURISDICTION**

Ancillary Jurisdiction: Even where a federal court lacks “core jurisdiction” over a specific matter, it may nevertheless have “ancillary jurisdiction” over something which has a factual and logical dependence on an otherwise “core” matter. *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28 (2002).

*In re Kokkonen*, 511 U.S. 375 (1994): District Court approved a stipulation and order of dismissal by stating simply: “It is so ordered.” Thereafter, the District Court asserted jurisdiction to consider the parties’ dispute arising from the stipulation. Stating that federal courts are courts of limited jurisdiction, the U.S. Supreme Court held that the District Court lacked subject-matter jurisdiction over the matter because enforcement of the stipulation was an issue entirely separate from continuation of the underlying suit. The Court specifically noted, however, that the District Court would have had ancillary jurisdiction over the dispute if it had either 1) incorporated the terms of the settlement into the original order which approved the stipulation, or 2) specifically reserved jurisdiction to enforce the settlement agreement.

- Implication: If a bankruptcy court lacks core jurisdiction over the enforcement of an NDA, it may nevertheless have ancillary jurisdiction over the enforcement action if the NDA was incorporated into a court order or if the court reserved jurisdiction over matters relating to the NDA.

*Kokkonen* held that a federal court may retain ancillary jurisdiction over an agreement if the federal court incorporates the terms of that agreement into a court order or specifically reserves jurisdiction to enforce the agreement. As discussed below, courts have interpreted this requirement narrowly, holding that incorporation must be extensive and the reservation of jurisdiction must be explicit.

Ninth Circuit Case Law:

*O’Connor v. Colvin*, 70 F.3d 530 (9th Cir. 1995): “[A]n order based on the settlement agreement, without more, does not embody the settlement contract” (quotations omitted). “Indeed, even a district court’s expressed intention to retain jurisdiction is insufficient to confer jurisdiction if that intention is not expressed in the order of dismissal.”

*In re Valdez Fisheries Dev. Assoc., Inc.*, 439 F.3d 545 (9th Cir. 2006): Bankruptcy Court specifically approved and authorized a settlement agreement and related order dismissing the litigation. The bankruptcy case was dismissed thereafter. Suit was brought in bankruptcy court

under the settlement agreement. The Ninth Circuit Court of Appeals held the bankruptcy court's approval of the settlement, by itself, was insufficient to reserve jurisdiction over the settlement agreement or to incorporate the agreement's terms into the court's order. The *Valdez* Court also held that by failing to retain jurisdiction over the agreement, the Bankruptcy Court also lost jurisdiction to interpret its order approving the agreement. The Ninth Circuit made clear, however, that retention of jurisdiction by the bankruptcy court would have established ancillary jurisdiction.

*Hagestad v. Tragesser*, 49 F.3d 1430 (9th Cir. 1995): Pursuant to a stipulation of the parties, the District Court entered a dismissal order without a clear indication in the order as to the Court's intention to retain jurisdiction. At the settlement conference, however, the Court's statements made on the record made clear that it *intended* to retain jurisdiction and to "act as a czar" over the parties' conduct under their agreement. The District Court's stated intention to retain jurisdiction was insufficient under *Kokkonen* to actually retain jurisdiction. To retain jurisdiction, the Court should have included a separate provision "such as a provision 'retaining jurisdiction' over the settlement agreement."

*San Bruno Mountain Watch v. U.S. Fish & Wildlife Svce.*, 2006 U.S. Dist. LEXIS 74322 (N.D. Cal. Sept. 29, 2006): Stipulated order submitted by the parties did not reserve jurisdiction over the parties' settlement agreement, but stated the following in a preamble: "This Consent Judgment is intended to resolve all Claims Plaintiff has alleged in this matter. . .the parties do hereby consent to the entry of judgment. . . [t]his Judgment constitutes the final, complete and exclusive agreement and understanding among the parties thereto. . ." Based on these statements, the Court found that the terms of the agreement were sufficiently incorporated into the order approving the parties' settlement.

- Implication: This holding, although found in an unpublished decision, represents an interpretation of *Kokkonen* which is broader than discussed in decisions from courts outside the Ninth Circuit. *San Bruno* may indicate that, at least in the Ninth Circuit, a bankruptcy court may have ancillary jurisdiction over an NDA which is merely sanctioned by a court order (such as an order implementing sale procedures).

*Cooper v. City of Ashland*, 1999 U.S. App. LEXIS (9th Cir. June 9, 1999): "[E]ven if the district court orally expressed his intent to retain jurisdiction over the settlement agreement and even if the parties agreed that compliance with the settlement agreement was to be determined exclusively by the district court, the district court lacks jurisdiction to enforce the terms of the settlement agreement absent compliance with *Kokkonen*."

#### Case Law From Outside The Ninth Circuit:

*In re Smyth*, 282 F.3d 268 (4th Cir. 2002): The District Courts' recital of the terms of a settlement agreement in its order was insufficient to incorporate those terms in the Court's order. Nothing in the order clearly compelled compliance with the agreement, or specifically reserved jurisdiction to enforce the agreement. "The court's findings are most properly read as noting and reciting the agreement in question as a component of its analysis." The district court must "give

a clear indication that it is incorporating the terms of the agreement into that order or retaining jurisdiction over the agreement.”

*Hospitality House, Inc. v. Gilbert*, 298 F.3d 424 (5th Cir. 2002): Physically attaching an agreement to the District Court’s order, without more, is insufficient under *Kokkonen*, to incorporate the terms of the agreement into the order. “At most, physical attachment of a settlement agreement to a dismissal order evinces the district judge’s awareness and approval of the terms of the settlement agreement, which do not suffice to make them part of this order” (quotations omitted).

*Miener v. Missouri Dept. of Mental Health*, 62 F.3d 1126 (8th Cir. 1995): The court’s reference to the fact of a settlement agreement was insufficient to incorporate the terms of the settlement into the court’s dismissal order. “A dismissal order’s mere reference to the fact of settlement does not incorporate the settlement agreement in the dismissal order.” To properly invoke “ancillary jurisdiction” under *Kokkonen*, the terms of an agreement “must be ‘embodied’” in the court order.

*Scelsa v. City University of New York*, 76 F.3d 37 (2d Cir. 1996): Reference to an agreement in an order of dismissal was insufficient to incorporate the terms of the agreement. As an alternative argument, the District Court’s ruling that the dismissal order did not support “ancillary jurisdiction” was an interpretation of the Court’s own order --- an interpretation entitled to deference.

- **Implication:** *Scelsa*’s alternative reasoning, looking to the District Judge’s interpretation of its own order, has two important implications. First, this reasoning implies that the *intent* of a district court may be relevant and important in determining whether an order incorporates the terms of an agreement or otherwise reserves jurisdiction over the agreement. Second, this reasoning implies that the appellate standard of review over a bankruptcy court’s finding of jurisdiction may be something less than *de novo* review.
- **Note:** The alternative reasoning of *Scelsa* was specifically rejected in *In re Phar-Mor, Inc.*, 172 F.3d 270 (3d Cir. 1999).

*In re Phar-Mor, Inc.*, 172 F.3d 270 (3d Cir. 1999): District Court order of dismissal specifically stated that it was issued “pursuant to the terms of the Settlement.” Nevertheless, the *Phar-Mor* Court held that this provision was insufficient to incorporate the terms of the settlement into the order, and merely indicated the District Court’s awareness of the settlement agreement. The *Phar-Mor* Court specifically rejected arguments that the District Judge’s intent underlying the dismissal order was relevant. “[U]nexpressed intent is insufficient to confer subject matter jurisdiction.”

*McAlpin v. Lexington 76 Auto Truck Stop, Inc.*, 229 F.3d 491 (6th Cir. 2000): District Court’s order specifically ordered a party to comply with one obligation owing under a settlement agreement. That provision was insufficient to incorporate the terms of the agreement into the dismissal order. To properly incorporate the terms of the settlement agreement into the dismissal order, the order should have referred to every obligation owing under the agreement.

- **Implication:** This is a particularly narrow interpretation of the holding in *Kokkonen*. Under this interpretation, the only practical way to incorporate the terms of an

agreement into an order is to reproduce the entire agreement, or specifically state that the terms of the agreement are incorporated therein.

Practical Suggestions:

- If practicable, request that the bankruptcy court issue an order approving an NDA, and include language which specifically incorporates the provisions of the NDA and also reserves jurisdiction over any disputes arising from the NDA.
- Include language in a confirmation order or an order closing the case which specifically reserves jurisdiction over any disputes arising from any NDAs executed during the bankruptcy case.

**CASE STUDY: HAWAIIAN AIRLINES, INC. V. MESA AIR GROUP, INC.**

Hawaiian Airlines, Inc. (“Hawaiian”) filed for chapter 11 bankruptcy relief in 2003, and a chapter 11 trustee was appointed shortly thereafter. In connection with the submission of competing plans of reorganization, the court issued a Plan Procedures Order which, among other things, included the obligation that “qualified proponents” enter into an NDA as a condition to gaining access to confidential information. A form of the NDA was attached to the order. In addition, the Plan Procedures Order also included a provision which reserved jurisdiction “to resolve any disputes arising out of the various rights and obligations set forth in this Order.” Mesa Air Group, Inc. (“Mesa”) was one of the parties who executed the form NDA and gained access to Hawaiian’s confidential information. After Hawaiian emerged from bankruptcy, it learned that Mesa had improperly retained and misused confidential information. Hawaiian filed an adversary proceeding against Mesa alleging that Mesa had breached the terms of the NDA. Following trial, the bankruptcy court issued judgment in Hawaiian’s favor. On appeal, Mesa argued that the bankruptcy court lacked subject-matter jurisdiction over Hawaiian’s claims. The appeal was dismissed by agreement pursuant to a settlement.

Hawaiian’s Arguments In Favor Of Jurisdiction:

- *Arguments In Favor of Core Jurisdiction:* Citing to *Harris Pine Mills*, Hawaiian argued that the NDA was “inextricably intertwined” with Hawaiian’s administration of its chapter 11 bankruptcy estate because the NDA was signed in connection with the plan reorganization process - a matter which undoubtedly is itself subject to core jurisdiction. Hawaiian also emphasized that execution of the NDA was required under the order as a condition to receive confidential information.
- *Arguments In Favor of Ancillary Jurisdiction:* Citing to *Kokkonen*, Hawaiian argued that the Plan Procedures Order specifically reserved jurisdiction over the NDA by stating that it reserved jurisdiction “to resolve any disputes arising out of the various rights and obligations set forth in this Order.” Hawaiian also argued that, by attaching the form NDA to the Plan Procedures Order, the Court effectively incorporated the NDA’s provisions into the Order itself. .

Mesa's Arguments Against Jurisdiction:

- *Arguments Against Core Jurisdiction:* Mesa did not, in its opening brief, cite to *Harris Pine Mills* or discuss the “inextricably intertwined” analysis. Instead, Mesa argued that the NDA was not subject to “arising in” jurisdiction because it was not a bankruptcy administrative matter. Mesa specifically noted that “arising in” jurisdiction is not simply dependent on a “but for bankruptcy” analysis.
- *Arguments Against Ancillary Jurisdiction:* Mesa argued that the Plan Procedures Order did not specifically and explicitly incorporate the terms of the NDA, or specifically reserve jurisdiction over disputes under the NDA. Mesa argued that Hawaiian’s claim against Mesa was simply a garden variety breach of contract dispute with no real nexus to the bankruptcy court or its jurisdiction. Mesa further argued that the Plan Procedures Order reserved jurisdiction only over the ability to determine disputes over the rights it created, asserting that the Order itself created not special rights relating to the NDA.