No. ______

In the Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY, PETITIONER

v.

PETER H. ARKISON, TRUSTEE, SOLELY IN HIS CAPACITY AS CHAPTER 7 TRUSTEE OF THE ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), this Court held that Article III of the United States Constitution precludes Congress from assigning certain "core" bankruptcy proceedings involving private state law rights to adjudication by non-Article III bankruptcy judges. Applying *Stern*, the court of appeals for the Ninth Circuit held that a fraudulent conveyance action is subject to Article III. The court further held, in conflict with the Sixth Circuit, that the Article III problem had been waived by petitioner's litigation conduct, which the court of appeals construed as implied consent to entry of final judgment by the bankruptcy court. The court of appeals also held, in conflict with the Seventh Circuit, that a bankruptcy court may issue proposed findings of fact and conclusions of law, subject to a district court's de novo review, in "core" bankruptcy proceedings where Article III precludes the bankruptcy court from entering final judgment. The court of appeals' decision presents the following questions, about which there is considerable confusion in the lower courts in the wake of *Stern*:

1. Whether Article III permits the exercise of the judicial power of the United States by bankruptcy courts on the basis of litigant consent, and, if so, whether "implied consent" based on a litigant's conduct, where the statutory scheme provides the litigant no notice that its consent is required, is sufficient to satisfy Article III.

2. Whether a bankruptcy judge may submit proposed findings of fact and conclusions of law for de novo review by a district court in a "core" proceeding under 28 U.S.C. 157(b).

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

The following list provides the names of all parties to the proceedings below:

Petitioner Executive Benefits Insurance Agency (EBIA) was the appellant in the court of appeals. EBIA has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent Peter Arkison is the Chapter 7 Trustee of the bankruptcy estate of Bellingham Insurance Agency, Inc. (Bellingham), and was the appellee in the court of appeals.

Aegis Retirement Income Services, Inc., Nicholas Paleveda, Marjorie Ewing, Peter Pearce, and Jane Doe Pearce, were co-defendants of EBIA in the adversary proceeding commenced in the bankruptcy court by Arkison as Trustee of Bellingham's estate, but were not subject to the bankruptcy court's judgment that was reviewed by the court of appeals, and were not parties to the proceedings before the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Executive Benefits Insurance Agency (EBIA) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a–40a) is reported at 702 F.3d 553. The opinion of the district court (App. 41a–52a) is unreported. The opinion of the bankruptcy court (App. 53a–54a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 2012. On March 1, 2013, Justice Kennedy granted an extension of time to and including April 3, 2013, in which to file a petition for certiorari. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

The notification required by Rule 29.4(b) has been made to the Solicitor General of the United States. Although no court has previously made a certification to the Attorney General pursuant to 28 U.S.C. 2403(a), the United States was informed by the court of appeals of the constitutional issues presented in this case following the decision in *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), and the United States thereafter participated as amicus curiae in the court of appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, section 1 of the Constitution provides:

> The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

U.S. Const. art III, § 1.

STATUTORY PROVISIONS INVOLVED

Sections 157 and 158 of Title 28 of the United States Code are reproduced in full in an appendix hereto (App. 64a–72a).

STATEMENT OF THE CASE

In *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), this Court held that Congress violated Article III when it vested in bankruptcy courts the authority to enter final judgments on certain state-law counterclaims designated as "core" bankruptcy proceedings under Section 157(b)(2) of Title 28. *Id.* at 2620. At the same time, the Court held that proceedings Congress had designated "core" could not simply be recharacterized as "related to" proceedings, in order to avoid the constitutional defect. *Id.* at 2604–2605. *Stern* left open two questions on which the courts of appeals are now divided. First, under what circumstances, if any, can litigant consent cure an otherwise unconstitutional exercise of the judicial power of the United States by a bankruptcy judge? And second, does the grant to bankruptcy judges of authority to "hear and determine" certain proceedings (including proceedings labeled "core") subject to district court appellate review include the authority to issue proposed findings of fact and conclusions of law subject to de novo adjudication by the district court?

A. The Bankruptcy Court's Entry Of Final Judgment Against EBIA

In 2006, Bellingham Insurance Agency, Inc. (Bellingham) declared bankruptcy, filing a voluntary Chapter 7 petition in the United States Bankruptcy Court for the Western District of Washington. Respondent Peter H. Arkison (Trustee) was appointed trustee of Bellingham's bankruptcy estate, and later commenced an adversary proceeding against non-creditor EBIA and five other defendants. The bankruptcy court's jurisdiction was invoked under 28 U.S.C. 1334 and 28 U.S.C. 157. Among other claims, the Trustee asserted that EBIA had received fraudulent transfers from Bellingham and that EBIA was liable for Bellingham's debts as a successor corporation. See App. 6a.

At the time the Complaint was filed, binding Ninth Circuit precedent specifically held that final adjudication of fraudulent conveyance actions by bankruptcy courts was consistent with Article III. *Duck* v. *Munn (In re Mankin)*, 823 F.2d 1296 (1987), *overruled by* App 15a. Under *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33 (1989), however, a defendant in such an action could insist on its right to a jury trial. In its Answer, EBIA demanded a jury trial and expressly indicated that it did not consent to a jury trial before a bankruptcy judge. App. 82a. EBIA renewed its demand for a jury trial in the district court after the bankruptcy judge set a trial date. App. 77a–80a. The bankruptcy judge referred EBIA's request to the district court, which construed it as motion to withdraw the reference.

In a status report filed with the district court, several parties indicated that the Trustee was about to file a summary judgment motion against EBIA before the bankruptcy court and further requested time to conduct a settlement conference before a bankruptcy judge. App. 74a–75a. EBIA did not join in that status report. App. 76a. Noting that the case was still far from ready for trial, the district court stayed consideration of the motion to withdraw for three months. App. 62a–63a.

While the motion was stayed, the Trustee moved in the bankruptcy court for summary judgment against EBIA on the fraudulent transfer and successor liability causes of action. App. 56a–57a. The bankruptcy judge granted the motion and entered a final, binding judgment against EBIA in the amount of $389,474.36. App. 53a–55a, 57a. The district court thereafter denied EBIA's motion to withdraw the reference and conduct a jury trial for the sole reason that the bankruptcy court had already entered summary judgment against EBIA and no other party sought withdrawal. App. 61a.

B. Appellate Proceedings In The District Court And The Court of Appeals

EBIA appealed the bankruptcy court's final judgment to the district court. The district court indicated that the bankruptcy court's grant of summary judgment was subject to de novo review, but, at the same time, invoked a "substantial evidence" standard in reviewing the bankruptcy court's findings. App. 45a, 50a.

The district court concluded that EBIA had failed to show any error on the part of the bankruptcy court and, on that basis, dismissed EBIA's appeal and affirmed the bankruptcy court's entry of judgment. App. 51a.

EBIA appealed to the Ninth Circuit. After EBIA filed its opening brief, this Court issued its decision in *Stern*, which held that bankruptcy courts lack constitutional authority to enter final judgment in certain "core" proceedings. EBIA thereafter filed a supplemental brief in the court of appeals arguing that, under *Stern*, the bankruptcy judge was constitutionally proscribed from entering final judgment on the Trustee's claims. App. 7a–8a.

Following oral argument, the court of appeals sua sponte invited amicus briefs on two questions:

> 1) Does *Stern v. Marshall*, 131 S. Ct. 2594 (2011), prohibit bankruptcy courts from entering a final, binding judgment on an action to avoid a fraudulent conveyance?
>
> 2) If so, may the bankruptcy court hear the proceeding and submit a report and recommendation to a federal district court in lieu of entering a final judgment?

App. 58a–59a. More than a dozen amici, including the United States, filed briefs in response to the court's invitation. App. 3a–4a.

The court of appeals issued its decision on December 4, 2012. Relying on *Stern* and *Granfinanciera*, the court first overruled its decision in *Mankin*, and concluded that a fraudulent conveyance claim against a non-creditor is subject to Article III and cannot constitutionally be assigned by Congress to a bankruptcy court for final adjudication. App. 15a, 23a.

The court of appeals acknowledged that this holding, though required by *Stern*, "create[d] a gap in [the Bankruptcy Code's] statutory framework" because "[n]owhere does the statute explicitly authorize bankruptcy judges to submit proposed findings of fact and conclusions of law in a core proceeding." See App. 23a–24a. The court recognized that 28 U.S.C. 157(c)(1) grants bankruptcy judges the authority to issue proposed findings of fact and conclusions of law only in a proceeding that is " 'not a core proceeding,' " and further that a fraudulent conveyance proceeding does not fall within Section 157(c)(1) because it is "core" under the statute. App. 24a. The court of appeals determined that the gap should be filled by reading "the power to 'hear and determine' a proceeding" under Section 157(b)(1) to encompass the "more modest power to submit findings of fact and recommendations of law to the district courts." *Ibid.* It reasoned that Congress intended to vest bankruptcy judges with "as much adjudicatory power as the Constitution will bear." *Ibid.*

The court of appeals acknowledged that the Seventh Circuit had expressed a contrary view in *Ortiz* v. *Aurora Health Care (In re Ortiz)*, 665 F.3d 906, 915 (2011), which indicated that proposed findings of fact and conclusions of law were authorized only in non-core proceedings. The court of appeals declared that it did "not find the *Ortiz* court's analysis of the issue thoroughly reasoned." App. 25a n.8. The court of appeals did not explain how, under its own solution, the district court's "de novo review" of a bankruptcy court in a core proceeding could be reconciled with Section 157(b)'s statement that a bankruptcy court's orders and judgments in core proceedings are reviewable only on "appeal[]" to the district court. 28 U.S.C. 157(b), 158. Nor did the court of appeals address the absence of authority in Section 157(b) for a district court to enter final judgment in core proceedings. *Cf.* 28 U.S.C. 157(c)(1) (specifying that, in any non-core proceeding "any final order or judgment shall be entered by the district judge").

The court of appeals next held that EBIA had "impliedly consented" to adjudication by the bankruptcy judge. App. 30a. It reasoned that a litigant's consent can cure an otherwise unconstitutional exercise of judicial power by a non-Article III bankruptcy judge. App. 26a–29a. The court acknowledged that litigant consent cannot overcome Article III's structural protection of the separation of powers. App. 27a n.9 (citing *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. 833, 850–851 (1986)). But the court believed that the structural component of Article III is only implicated where "the encroachment or aggrandizement of one branch at the expense of the other is at stake." *Ibid.* (internal quotation marks omitted). The court concluded that "the allocation of authority between bankruptcy courts and district courts does not implicate structural interests, because bankruptcy judges are officers of the district court and are appointed by the Courts of Appeals." *Ibid.* (brackets and internal quotation marks omitted).

The court of appeals concluded that EBIA, through its litigation conduct, had "impliedly consented" to adjudication by a bankruptcy judge. App. 29a–30a. Although EBIA had repeatedly demanded a jury trial before the district court, the court of appeals found that EBIA's failure to object to the bankruptcy court adjudicating the Trustee's summary judgment motion amounted to an "elect[ion] not to pursue a hearing in an Article III court." App. 29a. The Ninth Circuit also emphasized that EBIA had not framed its objection in terms of Article III until after this Court's decision in *Stern*, which was after EBIA filed its opening brief in the court of appeals. App. 30a. "Because it waited so long to object, and in light of its litigation tactics," the court held that "EBIA impliedly consented to the bankruptcy court's jurisdiction." *Ibid.* Although the court of appeals faulted EBIA for failing to anticipate this Court's holding in *Stern*, the court of appeals itself was required to overrule binding circuit precedent upholding bankruptcy courts' entry of final judgment in fraudulent conveyance actions. App. 15a (overruling *Mankin*).

On the merits, the court of appeals affirmed the bankruptcy court's grant of summary judgment on the fraudulent conveyance and successor entity claims. App. 34a–39a.

REASONS FOR GRANTING THE PETITION

This petition presents two fundamental questions about the authority of non-Article III bankruptcy judges. The court of appeals' decision creates a clear split with the Sixth Circuit on whether litigants can consent to the exercise of the judicial power of the United States by a non-Article III judge, in the form of entry of a final, enforceable judgment. No decision of this Court has specifically addressed the question whether the structural, separation-of-powers function of Article III permits Congress to reassign the powers of the Judicial Branch as long as the parties consent. Although the court of appeals found support for that proposition in this Court's decision in *Stern* v. *Marshall*, see App. 33a, that decision suggests the contrary conclusion, stressing that "it does not matter who * * * authorized the [bankruptcy] judge to render final judgments in such proceedings. The constitutional bar remains," 131 S. Ct. 2594, 2619 (2011). This Court's decision in *Roell* v. *Withrow*, 538 U.S. 580 (2003), upon which the court of appeals also relied, did not address the separation-of-powers aspect of Article III. And, in any event, *Roell* construed a statute under which litigants were "made aware of the need for consent and the right to refuse it." *Id.* at 590. Here, by contrast, the statutory scheme does not require consent, and binding circuit precedent denied that EBIA had an Article III right to adjudication by a district judge.

The court of appeals' decision also creates a split with the Seventh Circuit on whether bankruptcy judges have statutory authority to propose findings of fact and conclusions of law in "core" proceedings. *Stern* held that bankruptcy judges lack constitutional authority to enter final judgment against non-creditors in core proceedings asserting private rights of action. But the Bankruptcy Code grants bankruptcy judges authority to issue proposed findings of fact and conclusions of law only in *non*-core proceedings. As a result, lower courts have struggled to determine what authority bankruptcy judges retain in those core proceedings where the constitution precludes the bankruptcy court from entering final judgment. The Ninth Circuit's remedy—allowing bankruptcy judges to issue proposed findings of fact and conclusions of law in core proceedings—is inconsistent with the text and structure of the statute, which assigns no such authority to bankruptcy judges, and which provides only for district court appellate review of bankruptcy court orders and judgments in core proceedings. As this Court has previously held, recalibrating the allocation of authority between bankruptcy courts and district courts in light of a constitutional defect in the statute is the responsibility of Congress, not the federal courts.

These circuit splits reflect the extent to which the lower courts are struggling to deal with the statutory gaps exposed by this Court's decision in *Stern*. Only this Court can resolve those open questions.

I. THIS COURT SHOULD RESOLVE THE QUESTION WHETHER, AND UNDER WHAT CIRCUMSTANCES, LITIGANT CONSENT CAN CONFER ON NON-ARTICLE III JUDGES AUTHORITY TO EXERCISE THE JUDICIAL POWER OF THE UNITED STATES

A. The Court of Appeals' Holding Conflicts With A Decision of the Sixth Circuit

In *Waldman* v. *Stone*, the Sixth Circuit considered and squarely rejected the argument that litigants can consent, by implication or otherwise, to a bankruptcy judge's entry of final judgment on a private right of action subject to Article III. 698 F.3d 910, 917–918 (2012), cert. denied, 2013 U.S. LEXIS 2333 (Mar. 18, 2013). "[T]he structural principle advanced by Article III," the Sixth Circuit reasoned, "is not [a litigant's] to waive." *Id.* at 918. The holding of the court of appeals below is directly to the contrary. According to the Ninth Circuit, "the allocation of authority between bankruptcy courts and district courts does not implicate structural interests" and can therefore be waived. App. 28a & n.9. That direct conflict among the circuits reflects the ambiguity in this Court's own statements on the issue. Only this Court can resolve that fundamental constitutional question.

The relevant facts in *Waldman* are identical to this case. Like EBIA, the defendant in *Waldman* was subject to a money judgment entered by a bankruptcy judge and affirmed by the district court. 698 F.3d at 916. Like EBIA, he argued in the court of appeals, in a supplemental brief following *Stern*, that the "judgment was beyond the bankruptcy court's power as limited by Article III of the Constitution." *Ibid.* And like EBIA, he was opposed by the plaintiff and the United States as amicus curiae, both of whom argued that the Article III objection was waived because the defendant had not raised the argument prior to appeal. *Id.* at 917.

Unlike the Ninth Circuit, however, the Sixth Circuit concluded that the defendant's purported waiver could not cure the constitutional defect in the bankruptcy judge's adjudication. The Sixth Circuit observed that Article III not only protects litigants' personal interest in an impartial adjudicator, but also " 'serves as an inseparable element of the constitutional system of checks and balances' " and thus embodies a "non-waivable structural principle." *Waldman*, 698 F.3d at 917 (quoting *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 850 (1986)). The Sixth Circuit explicitly rejected the argument, advanced by the United States, that the structural component of Article III is implicated only where the encroachment or aggrandizement of one branch at the expense of another is at risk: "The issue here is not so much the aggrandizement of the Legislative or Executive Branches, as it is the diminution of the Judicial one. * * * To the extent that Congress can shift the judicial Power to judges without [Article III] protections, the Judicial Branch is weaker and less independent than it is supposed to be." *Id.* at 918. Because the bankruptcy judge's entry of final judgment "implicate[ed] * * * the structural principle advanced by Article III," the Sixth Circuit held that the constitutional defect could not be cured by the litigants' waiver. *Ibid.*

Notwithstanding the Sixth Circuit's decision in *Waldman*, the Ninth Circuit held that EBIA's failure to raise its Article III objection before the bankruptcy judge or the district court was dispositive. App. 26a–33a. Contrary to the Sixth Circuit, the Ninth Circuit concluded that entry of final judgment by bankruptcy judges on the consent of the parties raises no separation-of-powers concern "because bankruptcy judges are 'officer[s]' of the district court and are appointed by the Courts of Appeals." App. 27a n.9.

The question on which the Ninth and Sixth Circuits are divided was outcome determinative in EBIA's case. Had EBIA been sued for fraudulent conveyance in a bankruptcy court in Ohio, the final judgment entered against it by the bankruptcy judge would have been vacated. Because it was sued in bankruptcy court in Washington, the judgment was affirmed. Until this conflict is resolved by this Court, every judgment entered by a bankruptcy court on the basis of litigant consent will be in doubt, subject to possible vacatur on appeal if this Court ultimately agrees with the views of the Sixth Circuit.

B. Entry Of Final Judgment On A Private Right Of Action By A Non-Article III Bankruptcy Judge Violates The Separation Of Powers Regardless Of Litigant Consent

The Ninth Circuit's decision is, moreover, contrary to this Court's clear statements that the core structural features of Article III cannot be dispensed with by litigant consent. EBIA's purported consent thus could not have cured the constitutional defect in the bankruptcy court's adjudication identified by the Court in *Stern*.

This Court has repeatedly recognized that "Article III is 'an inseparable element of the constitutional system of checks and balances.' " *Stern*, 131 S. Ct. at 2608 (quoting *N. Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (plurality opinion)). Article III protects the separation of powers by reserving in "one supreme Court" and "such inferior Courts" as Congress may establish—and in those courts alone—the "judicial Power of the United States." U.S. Const. art. III, § 1, cl. 1; see *Stern*, 131 S. Ct. at 2608.

The Court has made clear that Article III's protection of the separation of powers cannot be overcome by waiver or litigant consent. As the Court explained in *Schor*: "To the extent that this structural principle [of separation of powers] is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III." 478 U.S. at 850–851; see also *id.* at 867 (Brennan, J., dissenting) ("[C]onsent is irrelevant to Article III analysis."); *Peretz* v. *United States*, 501 U.S. 923, 950 (1991) (Marshall, J., dissenting) (citing *Schor* for the proposition that "parties may *not* waive Article III's structural guarantee"). Consistent with that principle, the Court has held that a litigant cannot consent to presence of a non-Article III judge on a panel of the court of appeals. *Nguyen* v. *United States*, 539 U.S. 69, 80 (2003) (explaining that "[e]ven if the parties had *expressly* stipulated to the participation of a non-Article III judge in the consideration of their appeals * * * such a stipulation would not have cured the plain defect in the composition of the panel"). The Court has likewise held that other structural constitutional objections cannot be overcome by litigant consent. See *Freytag* v. *Comm'n of Internal Revenue*, 501 U.S. 868, 879–880 (1991) (Appointments Clause objection). Thus, at least to the extent that the exercise of judicial power by a non-Article III bankruptcy judge threatens the separation of powers, notions of waiver and consent are irrelevant to the constitutional analysis.

Of course, "[p]rivate parties may, without offense to the Constitution, agree to settle their disputes *outside the federal adjudicatory system*." *Schor* v. *Commodity Futures Trading Comm'n*, 740 F.2d 1262, 1274 (D.C. Cir. 1984) (Ginsburg, R.B., J.) (emphasis added) (explaining that arbitration "does not implicate the separation of powers" for this reason), rev'd on other grounds, 478 U.S. 833 (1986); see *Geras* v. *Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1052 (7th Cir. 1984) (Posner, J., dissenting) (explaining that, unlike magistrates, "[a]rbitrators are not public officials" and "[t]heir decisions carry no official imprimatur"). Likewise, state court adjudication of claims that could have been asserted in federal court does not offend the Constitution, notwithstanding that state court judges are not appointed in accordance with Article III. Only where the adjudicator is an organ of the federal government is the judicial power "of the United States" implicated, and the separation of powers potentially endangered.

The broad statutory authority of bankruptcy judges to enter final judgments poses a serious risk to the separation of powers. As this Court recognized in *Stern*, bankruptcy judges exercise "the essential attributes of judicial power" by entering " 'appropriate orders and judgments'—including final judgments—subject to review only if a party chooses to appeal." 131 S. Ct. at 2618–2619. A judgment of a bankruptcy court carries the full weight of a judgment of the United States. It may be registered and enforced in another judicial district, 28 U.S.C. 1963, and it is entitled to preclusive effect in subsequent litigation, including in state courts, see *Stern*, 131 S. Ct. at 2600.

That bankruptcy judges are appointed by Article III judges rather than the political branches does render bankruptcy judges mere "adjuncts" of the district courts, nor alleviate the danger to the separation of powers that results from their entering final judgments. *Stern*, 131 S. Ct. at 2619 ("[I]t does not matter who appointed the bankruptcy judge or authorized the judge to render final judgments in such proceedings."). Congress cannot circumvent Article III simply by commanding life-tenured judges to appoint lesser officers to exercise the judicial power of the United States. To the contrary, as this Court "emphatic[ally]" declared in *Stern*, the exercise of judicial power by bankruptcy judges poses a real "threat to the separation of powers" because "[a] statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely." *Id.* at 2620.

The court of appeals' decision dismissed as insignificant the separation-of-powers concerns presented by the bankruptcy courts' exercising "the most prototypical * * * judicial power: the entry of a final, binding judgment." See *Stern*, 131 S. Ct. at 2615. Citing *Schor*'s statement that Article III serves "primarily personal, rather than structural, interests," the court of appeals held that "the allocation of authority between bankruptcy courts and district courts does not implicate structural interests, because bankruptcy judges are 'officer[s] of' the district court and are appointed by the Courts of Appeals." App. 27a & n.9. But that holding disregards *Stern*, which unequivocally established that bankruptcy judges are *not* mere adjuncts of the district courts, and that Congress' allocation of judicial power to bankruptcy courts *does* infringe separation-of-powers principles. See 131 S. Ct. at 2619–2620. The court of appeals' reliance on *Schor* was also misplaced because, there, the Court based its conclusion that adjudication of counterclaims by the Commodity Futures Trading Commission (CFTC) posed "no genuine threat to [separation of powers] principles" in part on the fact that orders of the CFTC were enforceable only by a district court, and the district court's review was more searching than normal appellate standards. 478 U.S. at 853, 857. By contrast, this Court made clear in *Stern* that bankruptcy courts' entry of enforceable, final judgments on private rights of action, subject only to appellate review, *does* pose "a threat to the separation of powers." *Stern*, 131 S. Ct at 2610–2611, 2620. Because allocation of the judicial power of the United States to bankruptcy courts implicates separation-of-power principles, private litigants can no more "authorize[] the [bankruptcy] judge to render final judgments in such proceedings" than can Congress. *Id.* at 2619.

Contrary to the understanding of the court of appeals, no decision of this Court has ever held that litigant consent is sufficient to validate what would otherwise be a separation-of-powers violation of Article III. The court of appeals cited *MacDonald* v. *Plymouth County Trust Co.*, 286 U.S. 263 (1932), and *Roell* v. *Withrow*, 538 U.S. 580 (2003), as holding that litigant consent can authorize the entry of final judgment by (respectively) a bankruptcy judge or magistrate judge that would otherwise violate the Constitution. See App. 27a–28a & n.10. But neither *MacDonald* nor *Roell* holds that Article III separation-of-power principles could be overcome by litigant consent.[1] The court of appeals also cited this Court's discussion in *Stern* of Pierce Marshall's waiver of any objection to the bankruptcy court's adjudication of his own defamation claim against the bankruptcy estate. App. 33a (citing *Stern*, 131 S. Ct. at 2606, 2608). But that discussion in *Stern* concerned only Pierce's purported *statutory* right to adjudication of the defamation claim by the district court. See 28 U.S.C. 157(b)(5). Because Pierce's claim

[1] *MacDonald* does not even mention Article III and, as the plurality opinion in *Marathon* recognized, the practice of bankruptcy referees exercising plenary authority had "never been explicitly endorsed by this Court." 458 U.S. at 79 n.31. In *Roell*, the Court made clear that "[t]he *only question*" at issue was the statutory one: whether consent implied through conduct "can count as conferring 'civil jurisdiction' under [28 U.S.C.] § 636(c)(1)." *Roell*, 538 U.S. at 586–587 (emphasis added). Neither decision constitutes controlling precedent on the Article III questions presented by this petition. See *Webster* v. *Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

was asserted against the bankruptcy estate, there was no Article III right to adjudication by a district court. See *Marathon*, 458 U.S. at 71 (plurality opinion) ("restructuring of debtor-creditor relations * * * is at the core of the federal bankruptcy power"). Thus, the court of appeals was mistaken to think that this Court had endorsed litigant consent as sufficient to overcome Article III structural concerns.

Because the exercise of judicial power by non-Article III bankruptcy judges threatens the Constitution's separation of powers, EBIA's purported implied consent could not confer on the bankruptcy court the authority to enter final judgment.

C. Consent Is Only Relevant To An Article III Structural Analysis To The Extent Congress Made Consent A Feature Of The Statutory Scheme, Not Where It Is Inferred Post-Hoc From A Litigant's Failure To Object

To the extent consent is relevant to the Article III structural analysis, it is as part of the Court's review of the statutory scheme Congress adopted, not as part of a post-hoc analysis in an individual case. The Ninth Circuit's post-hoc approach to consent was plainly insufficient to eliminate separation-of-powers concerns. Nothing in the Bankruptcy Code ensures voluntary litigant consent to a bankruptcy court's adjudication of core claims. For this reason, and in light of binding circuit precedent upholding the statute, nothing would have advised EBIA of its right to insist on an Article III court. In *Roell*, Justice Thomas's dissenting opinion warned of the "serious constitutional concerns" raised by relying on implied consent to authorize adjudication by a magistrate judge. 538 U.S. at 592. Those constitutional concerns are fully realized in the present case, where the court of appeals extended *Roell* to the point that "consent" no longer offers any protection for Article III values. Unlike the Federal Magistrate Act of 1979 considered in *Roell*, the Bankruptcy Code does not ensure that litigants in core proceedings are advised of their Article III rights. In the present context, the court of appeals' invocation of "implied consent" was merely a post-hoc justification for an unconstitutional statutory scheme. The result is that a litigant who made every available objection to litigating in bankruptcy court under then-existing precedent was held to have waived an Article III right that no bankruptcy or district court could have recognized until the court of appeals overturned its own precedent.

1. To the extent consent can form a part of the separation-of-powers analysis, it must be central to the statutory scheme

Even where consent can be considered as part of the Article III separation-of-powers analysis, it is not alone dispositive, but must be weighed as one of several factors in assessing the constitutionality of the statutory scheme under review. See *Schor*, 478 U.S. at 855; *Stern*, 131 S. Ct. at 2625 (Breyer, J., dissenting) (noting five factors considered in *Schor*). For litigant consent to lessen Article III separation-of-powers concerns about a statutory grant of judicial power to non-Article III courts, the requirement of genuine and voluntary consent must be a central, limiting feature of the statute. If litigants are unaware of their right to insist on adjudication by an Article III judge, then the notion of "consent" does not constrain a statute's potential to erode Article III courts' constitutional role. In *Schor*, the Court considered consent as a factor in its separation-of-powers analysis because consent was an essential feature of every matter adjudicated by the CFTC: "the decision to invoke [that] forum [was] left entirely to the parties." 478 U.S. at 855.

In other instances where Congress has assigned adjudicatory power over private rights to non-Article III judges, it has specifically incorporated litigant consent into the statutory scheme. The Bankruptcy Code, for example, authorizes bankruptcy judges to finally adjudicate *non*-core proceedings only if "the district court, with the consent of all of the parties to the proceeding," refers the matter to the bankruptcy judge. 28 U.S.C. 157(c)(2); see Fed. R. Bankr. P. 7008, 7012 (requiring parties' pleadings to state whether "the party does or does not consent to entry of final orders or judgment by the bankruptcy judge"). Likewise, the Federal Magistrates Act permits civil cases to be assigned to magistrate judges for final adjudication only "[u]pon the consent of the parties," and under procedures that "advise the parties that they are free to withhold consent" and are otherwise designed "to protect the voluntariness of the parties' consent." 28 U.S.C. 636(c)(1), (2); see also *Pacemaker Diagnostic Clinic of Am., Inc.* v. *Instromedix, Inc.*, 725 F.2d 537, 546 (9th Cir.) (en banc) (Kennedy, J.) (noting the Federal Magistrate Act's "statutory safeguard[]" through "the requirement of litigant consent"), cert. denied, 469 U.S 824 (1984).

The adjudication of core claims by bankruptcy judges under the Bankruptcy Code does not depend on litigant consent at all. As the Court recognized in *Stern*, Congress has in such actions assigned bankruptcy judges "the power to adjudicate, render final judgment, and issue binding orders * * * without consent of the litigants." 131 S. Ct. at 2615 (internal quotation marks omitted). Because Congress did not incorporate consent into the statutory scheme for core claims, there was nothing in the statute to ensure that EBIA genuinely and voluntarily consented to adjudication of the claims against it by a non-Article III judge, and nothing to limit the encroachment on the authority of Article III courts.

The court of appeals' finding of consent in the case at bar did not implement a limiting statutory feature that cabins Congress's reallocation of Article III authority, but was rather a post-hoc rationalization of an unconstitutional statute. The courts should not save Congress from its own violations of Article III. Where the statutory scheme adopted by Congress breaches the separation of powers, the fortuity of litigant consent not contemplated by the statute is irrelevant. See *Schor*, 478 U.S. at 850–851; *Pacemaker*, 725 F.2d at 544 ("Statutes * * * which violate the separation of powers doctrine in its systemic aspect should be invalidated, as a general rule, despite waiver by affected private parties."). If this Court is to consider litigant consent at all in assessing the separation-of-powers implications of a statute, it should insist that Congress include consent in the statute it enacts.

2. The court of appeals' decision illustrates the danger of allowing post-hoc findings of implied consent to form part of the separation-of-powers analysis

In *Stern*, this Court held unequivocally, even "emphatically," that Congress's assignment of private rights to final adjudication by bankruptcy judges violated the "separation of powers." 131 S. Ct. at 2620.

But the court of appeals treated the issue of consent as though all that was at stake were "personal, rather than structural, interests." App. 27a (quoting *Schor*, 478 U.S. at 848); see also App. 27a n.9 ("[T]he allocation of authority between bankruptcy courts and district courts does not implicate structural interests."). In the court of appeals' view, as long as EBIA could be said, after the fact, to have "waived its right to an Article III hearing" through its litigation conduct, Article III was satisfied. App. 26a. The tenuous facts from which the court of appeals inferred EBIA's consent demonstrate how little protection that approach affords Article III values. The court of appeals' holding goes far beyond what this Court has previously recognized as sufficient to evidence voluntary consent to adjudication by a non-Article III judge.

This Court has held that consent to adjudication by a non-Article III tribunal must at the very least be given by a litigant who "was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case" before a non-Article III judge. *Roell*, 538 U.S. at 590; *id.* at 587 n.5 (holding that "notification of the right to refuse the magistrate judge is a prerequisite to any inference of consent"). Other courts of appeals have likewise recognized that unambiguous voluntary consent is essential to preserving Article III from encroachment. See, *e.g.*, *Phillips* v. *Beierwaltes*, 466 F.3d 1217, 1221 (10th Cir. 2006) ("Because there was no notification to the Beierwaltes or their counsel of the need to consent or the right to refuse consent, *Roell* does not permit us to infer consent * * * ."); *Donaldson* v. *Ducote*, 373 F.3d 622, 624 n.1 (5th Cir. 2004) (holding that *Roell* "did not alter our rule that the party's consent must be clear and unambiguous"); *Sheridan* v. *Michels (In re Sheridan)*, 362 F.3d 96, 101 (1st Cir. 2004) (no consent where litigant's "conduct did not unambiguously connote consent, either to the bankruptcy court's characterization of the proceeding as core or to its final adjudication of the proceeding as non-core"); *Pacemaker*, 725 F.2d at 546 (voluntary consent "essential to the constitutionality" of the Federal Magistrates Act).

Here, the court of appeals found that EBIA had "impliedly consented" to final adjudication by a bankruptcy judge even though the statute in question assigned adjudication to the bankruptcy court, without regard to litigant consent, and binding circuit precedent had upheld that statutory scheme against constitutional challenge. In those circumstances, a finding of "consent" cannot serve the function this Court has attributed to consent as a factor that reduces Article III concerns. EBIA was never made aware of the "need to consent" to proceedings before the bankruptcy court or of its "right to refuse it." As noted, under Section 157(b)(2)(H), fraudulent conveyance actions were deemed "core" proceedings, and bankruptcy courts were authorized to "hear and determine" such proceedings, including issuing final judgments, without regard to the consent of the parties. 28 U.S.C. 157(b); cf. 28 U.S.C. 157(c)(2) (requiring litigant consent for final adjudication of non-core proceedings by a bankruptcy judge). Moreover, controlling case law in the Ninth Circuit at that time upheld as valid under Article III Section 157(b)'s assignment of fraudulent conveyance claims against non-creditors to final adjudication by a bankruptcy judge *even where the defendant objected*. See *Duck* v. *Munn (In re Mankin)*, 823 F.2d 1296 (1987), overruled by, App 15a. An objection by EBIA that it did not consent to adjudication before a bankruptcy judge would have been futile. See *Robinson* v. *Heilman*, 563 F.2d 1304, 1307 (9th Cir. 1977) (holding that "[n]o exception is required when it would not have produced any results in the trial court because a solid wall of Circuit authority then foreclosed the point").

Contrary to the understanding of the court of appeals, the fact that intervening judicial decisions might have provided a basis to challenge the statute and precedent does not provide the same safeguard of Article III values as a requirement that parties be notified before the fact of their right to insist on an Article III tribunal. The court of appeals suggested that *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33 (1988), should have foreshadowed to EBIA and its counsel the eventual demise of *Mankin* and unconstitutionality of Section 157(b)(2)(H). App 32a. *Granfinanciera* did confirm that a fraudulent conveyance defendant could insist on its right to trial by jury, and EBIA did assert that right, repeatedly. 492 U.S. at 36; App. 77a–80a, 82a. *Granfinanciera* did not, however, establish that a litigant had a right to insist on an Article III judge to adjudicate dispositive pre-trial motions. And, indeed, the Ninth Circuit's own decision in *Stern* did not even reference *Mankin*, much less overrule it. See generally *Marshall* v. *Stern (In re Marshall)*, 600 F.3d 1037 (2010), aff'd on other grounds, 131 S. Ct. 2594 (2011). Thus, there was no notice to EBIA that it had a right to insist that the Trustee's pre-trial motion for summary judgment be decided by the district court.[2]

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[2] Notably, the district court also appears to have distinguished between the Seventh Amendment right to a jury trial be-

Because EBIA was never made aware of the need for consent or its right to refuse it, the implied consent found by the Ninth Circuit could not have been voluntary. The Ninth Circuit's holding in this case goes far beyond the holding of this Court in *Roell* and the holdings of other courts of appeals.

II. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG LOWER COURTS ON WHETHER BANKRUPTCY JUDGES ARE STATUTORILY AUTHORIZED TO SUBMIT PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN "CORE" PROCEEDINGS

After *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), bankruptcy judges can no longer finally adjudicate some proceedings statutorily designated as "core" under Section 157(b). Section 157(c), which allows bankruptcy judges to "submit proposed findings of fact and conclusions of law to the district court," only applies in proceedings that are "not * * * core." 28 U.S.C. 157(c)(1). The court of appeals recognized that *Stern*'s holding left a "gap" in the statute. App. 23a. Rather than wait for Congress to address this statutory gap, the Ninth Circuit rewrote Section 157(b) to authorize bankruptcy judges to propose findings of fact and conclusions of law in core proceedings.[3] The text and

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fore the district court and adjudication of dispositive pre-trial motions, which the court left to the bankruptcy judge. App. 62a–63a.

[3] In light of the court of appeals' finding that EBIA consented to final adjudication by the bankruptcy court, its discussion of the bankruptcy court's authority to propose findings of fact and conclusions of law was technically dictum. But it is nonetheless binding in the Ninth Circuit. See *Miranda B.* v. *Kitzhaber*, 328 F.3d 1181, 1186 (9th Cir. 2003) ("[W]here a panel confronts an issue

structure of Section 157 make clear that Congress did not provide bankruptcy courts that authority in core proceedings, and it is up to Congress, not the courts, to remedy the statutory gap.

A. The Ninth Circuit's Decision Conflicts With A Decision Of The Seventh Circuit

In *In re Ortiz*, 665 F.3d 906 (2011), the Seventh Circuit concluded that bankruptcy judges lack statutory authority to issue a report and recommendation in a core proceeding. *Id.* at 915. The question arose in the context of a direct appeal from a bankruptcy judge's grant of summary judgment on a state law claim in a core proceeding. *Id.* at 908–909. To determine its own jurisdiction, the Seventh Circuit was required to decide how the bankruptcy judge's purportedly final judgment could be characterized after *Stern*. See 28 U.S.C. 158(a), (d)(2)(A). Based on a textual reading of the statute, the Seventh Circuit rejected the possibility that the bankruptcy judge's decision could be deemed proposed findings of fact and conclusions of law. *Ortiz*, 665 F.3d at 915. It observed that bankruptcy judges are authorized to issue proposed findings and conclusions under 28 U.S.C. 157(c)(1), but that section only applies to proceedings that are "not a core proceeding"

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germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense." (internal quotation marks omitted)). If this Court were to agree with petitioner's first argument that the bankruptcy court's judgment violated Article III and must be vacated, then the Court should address the court of appeals' erroneous holding concerning the scope of the bankruptcy court's authority, which would otherwise be binding on remand.

but are "otherwise related to a case under title 11." *Ibid.* Because the proceeding in *Ortiz* was "core," *id.* at 911–912, the Seventh Circuit concluded that the bankruptcy court lacked statutory authority to issue proposed findings of fact and conclusions of law, *id.* at 915.

The Ninth Circuit's decision below is directly contrary to that of the Seventh Circuit in *Ortiz*. Instead of adhering to the text of the statute, as the Seventh Circuit did, the Ninth Circuit reasoned that "the power to 'hear and determine' a proceeding" could be read to encompass the "more modest"—but distinct—"power to submit findings of fact and recommendations of law to the district courts." App. 24a.

B. The Ninth Circuit's Holding Is Contrary To The Text And Structure Of The Statute

Congress clearly distinguished between the authority it granted bankruptcy courts in core proceedings and in non-core proceedings. Contrary to the ruling of the Ninth Circuit, the latter is not simply a subset of the former. Rather, the text and structure of Section 157 make clear that core and non-core proceedings are subject to two entirely distinct adjudicatory procedures. The "gap in the [statutory] framework," App. 23a, revealed when this Court held in *Stern* that bankruptcy courts cannot finally adjudicate certain statutory core cases, is a gap that only Congress can fill.

1. Statutory construction "begin[s] with the understanding that Congress says in a statute what it means and means in a statute what it says there." *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted). The court of appeals' construction of the phrase "hear

and determine" as encompassing proposed findings of fact and conclusions of law cannot be squared with text of the statute. A "determination" is a "final decision." Black's Law Dictionary 514 (9th ed. 2009). The word "determine" thus connotes finality—not the issuance non-final recommendations.

That reading is confirmed by the fact that Congress only provided for *appellate* review of matters that the bankruptcy court is to "hear and determine." In Section 157(b)(1) Congress specified that in core proceedings that a bankruptcy court may "hear and determine," the bankruptcy court "may enter appropriate orders and judgments, subject to review under section 158 of this title." 28 U.S.C. 157(b)(1). Section 158(a), in turn, is entitled "appeals" and provides district courts with "jurisdiction to hear appeals" from bankruptcy court final judgments, orders, and decrees and from certain classes of interlocutory orders. See 28 U.S.C. 158(a). Neither Section 157(b) nor Section 158 authorizes the district court to enter judgment in a core proceeding that has been referred to the bankruptcy court. Section 157(c)(2), which authorizes bankruptcy courts to "hear and determine" certain non-core proceedings on the consent of the parties, likewise specifies that the bankruptcy court may "enter appropriate orders and judgments, subject to [appellate] review under section 158 of this title." 28 U.S.C. 157(c)(2).

By contrast, Section 157(c)(1), which is limited to non-core proceedings, see *Stern*, 131 S. Ct. 2605, authorizes bankruptcy courts to "submit proposed findings of fact and conclusions of law to the district court," 28 U.S.C. 157(c)(1). Section 157(c)(1) further specifies that "*any final order or judgment shall be entered by the district courts*" after reviewing "de novo" those parts of the bankruptcy court's proposal to which the parties have objected. *Ibid.* (emphasis added). Section 157(b) grants no similar authority to district courts to review de novo or enter final judgment in core proceedings that have been referred to the bankruptcy court.

This structural dichotomy between core and non-core proceedings, including in particular the provision for district court de novo review and entry of judgment only in non-core proceedings, confirms that Congress only granted bankruptcy courts authority to conclusively adjudicate core proceedings, not to issue non-final proposed findings of fact and conclusions of law.

2. Other indications confirm that Congress intended the phrase "hear and determine" to require a final decision, rather than mere submission of proposed findings of fact and conclusions of law. The sponsors of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the "1984 Act") explained that the bill empowered bankruptcy judges to "enter final judgments in the 95 percent of cases that do not require involvement by an article III judge." 130 Cong. Rec. 6045 (1984) (remarks of Rep. Kastenmeier). Indeed, the bill's sponsors listed as a benefit of the Act that it would "provide[] a *single*, *prompt forum* for almost all bankruptcy litigation," and that "the bankruptcy judges would make recommendations to the district court, rather than enter final judgments, in [only] about 5 percent of bankruptcy matters." *Ibid.* (emphasis added). The efficiency of *avoiding* proposed findings and conclusions in core proceedings was thus an important consideration in Congress' choice of language to describe the powers of bankruptcy courts in the respective proceedings.

Moreover, Congress has employed the "hear and determine" language in other contexts as well to require a final decision and preclude the possibility of a non-final proposal of findings and conclusions. The use of the phrase "hear and determine" in the Federal Magistrates Act, upon which Section 157 was based, 130 Cong. Rec. at 6046–6047, was intended to avoid unnecessary and duplicative reports and recommendations and to "make[] it clear that Congress intends that the magistrate shall have the power to make a determination of any pretrial matter * * * and that this determination * * * shall be 'final,' " H.R. Rep. No. 94-1609, at 10 (1976). Congress believed it "duplicative to require a 'report and recommendation' from the magistrate to the judge as a prelude to a separate order by the judge." *Ibid.* Similarly, this Court has elsewhere held that Congress uses "hear and determine" when it wants to "get * * * dispute[s] settled" and convey "the idea of deciding a controversy." *N.L.R.B.* v. *Radio & Television Broad. Eng'g Union*, 364 U.S. 573, 579 (1961) ("hear and determine" means NLRB must issue decision and settle dispute).

C. It Is For Congress, Not The Courts, To Determine How To Address The Statutory "Gap" Revealed By *Stern*

As this Court has explained on several occasions, filling statutory gaps created by this Court's constitutional rulings is the responsibility of Congress, not the federal courts. Courts are "not free to rewrite the statutory scheme in order to approximate what [they] think Congress might have wanted had it known that [a particular provision] was beyond its authority." *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 76 (1996).

This Court has previously taken exactly this approach with respect to Article III defects arising from the allocation of authority to bankruptcy courts. In *Northern Pipeline Construction Company* v. *Marathon Pipe Line Company*, after holding that bankruptcy judges cannot decide state law contract claims consistent with Article III, the Court did not attempt to reform the statute based on what it believed Congress might have wanted. 458 U.S. 50, 87 n.40 (1982) (plurality opinion). Instead, the Court left it to "Congress to determine the proper manner of restructuring the Bankruptcy Act." *Ibid.*

Other lower courts have also attempted to remedy the statutory gap created by *Stern*, but these efforts, like that of the court of appeals, underscore that the responsibility for amending the statute rests with Congress alone. Several lower courts, for example, have reclassified fraudulent conveyance actions as non-core and on that basis have purported to permit bankruptcy judges to propose findings and conclusions under Section 157(c)(1). See, *e.g.*, *Field* v. *Lindell (In re Mortg. Store, Inc.)*, 464 B.R. 421, 427–428 (D. Haw. 2011); *Paloian* v. *Am. Express Co. (In re Canopy Financial, Inc.*), 464 B.R. 770, 774–775 (N.D. Ill. 2011). Of course, this directly contradicts the text of the statute, as well as this Court's directive in *Stern* that the courts must honor Congress's designation of proceedings as core or non-core. *Stern*, 131 S. Ct. at 2604–2605.

Several judicial districts have gone even farther, effectively attempting to amend the statute through the adoption of standing orders that purport to grant bankruptcy courts the authority to propose findings of fact and conclusions of law in core proceedings where the bankruptcy courts cannot, consistent with Article

III, issue final judgments. See, *e.g.*, *In re Standing Order of Reference Re: Title 11*, No. 12-misc-00032 (S.D.N.Y. Jan. 31, 2012); *In re Standing Order of Reference Re: Title 11* (D. Del. Feb. 29, 2012); *In re Bankruptcy Proceedings*, Admin. Order 2012-25 (S.D. Fla. Mar. 25, 2012). That numerous courts have found the need to adopt such quasi-legislation in the wake of *Stern* demonstrates the broad significance of this issue, which cries out for this Court's review.

As discussed above, it was a goal of the 1984 Act that all statutory core matters be determined in *one* forum, without the need for duplicative report and recommendation proceedings. Now that the core/non-core distinction currently delineated by statute has been unsettled by *Stern*, Congress may choose any number of reasonable policy alternatives. It may ultimately choose to grant bankruptcy judges authority to issue reports and recommendations in core proceedings, and grant district courts authority to enter judgment upon de novo review of such reports and recommendations. But Congress may also choose an entirely different approach, with a changed allocation of power and responsibilities between the district courts and bankruptcy judges. It is impossible to predict with any certainty how Congress might choose to respond to *Stern*. Without doubt, however, that responsibility lies with Congress and not the courts. *Marathon*, 458 U.S. at 87 n.40.

III. THIS COURT'S REVIEW IS NECESSARY TO RESOLVE TREMENDOUS UNCERTAINTY IN THE LOWER COURTS FOLLOWING *STERN*

As demonstrated by the decision below, and by the circuit splits of which it is part, this Court's decision in *Stern*, has given rise to tremendous uncertainty among the lower courts. As one bankruptcy judge observed, the "huge uncertainty" that *Stern* raises concerning whether litigant consent is sufficient to permit bankruptcy courts to enter final judgment "presages litigation over that issue with the potential to tie up this case, and countless others, in knots." *In re BearingPoint, Inc.*, 453 B.R. 486, 497 (Bankr. S.D.N.Y. 2011); cf. *Tech. Automation Servs. Corp.* v. *Liberty Surplus Ins. Corp.*, 673 F.3d 399, 404–407 (5th Cir. 2012) (raising sua sponte whether magistrates may enter final judgment with litigant consent after *Stern*). Writing about this very case, one scholar has observed that the Ninth Circuit's decision created "a split among the circuits and the need for the Supreme Court to decide an issue that affects litigants across the country every day." Erwin Chemerinsky, *Circuit Split Over Parties Expanding A Bankruptcy Court's Power*, Daily J. (Feb. 12, 2013); see also Ralph Brubaker, *The Constitutionality of Litigant Consent*, 32 No. 12 Bankr. L. Letter (Dec. 2012) 1 ("Given the importance of § 157(c)(2), in particular, to the routine functioning of the bankruptcy court system, the Supreme Court may soon need to clarify the constitutional validity of litigant consent to non-Article III bankruptcy adjudications."); Erwin Chemerinsky, *Enormous Confusion*, Nat'l L.J. (Aug. 29, 2011).

Stern has also resulted in substantial confusion regarding the authority of bankruptcy judges to propose findings of fact and conclusions of law in core proceedings. District courts have complained of being placed in "something of a procedural morass" following *Stern*, *In re Coudert Bros. LLP*, No. 11-2785, 2011 WL 5593147, at *13 (S.D.N.Y. Sept. 23, 2011), and have noted the "large number of motions to withdraw the reference that have been brought * * * in the wake of *Stern*, many of which advance statutory 'gap' arguments," *Weisfelner* v. *Blavatnik (In re Lyondell Chem. Co.)*, 467 B.R. 712, 724 (S.D.N.Y. 2012). Attempts by the lower courts to remedy the "gap" by rewriting the statute only heighten the need for this Court's review. And the number of amici who participated in the court of appeals plainly demonstrates the importance of this issue to the bankruptcy bar. See App. 3a–4a.

The questions presented by this petition implicate the integrity of the Constitution's system of separated powers and directly affect countless federal proceedings that occur before non-Article III judges every day. These issues have perplexed the bankruptcy and district courts, and now have divided the courts of appeals. Prompt resolution of these questions by this Court is therefore critical.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APRIL 2013

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In the Matter of

BELLINGHAM INSURANCE AGENCY, INC.,
Debtor,

EXECUTIVE BENEFITS INSURANCE AGENCY,
Appellant,

v.

PETER H. ARKISON, TRUSTEE, solely in his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency, Inc.,
Appellee.

No. 11-35162

D.C. No. 2:10-cv-00929-MJP

OPINION

Appeal from the United States District Court
for the Western District of Washington

Marsha J. Pechman, Chief District Judge, Presiding

Argued and Submitted
October 13, 2011—Seattle, Washington

Filed December 4, 2012

Before: Alex Kozinski, Chief Judge, Richard A. Paez, Circuit Judge, and Raner C. Collins,* District Judge.

Opinion by Judge Paez

SUMMARY**

Bankruptcy

Affirming the district court's affirmance of the bankruptcy court's summary judgment, the panel held that a non-Article III bankruptcy judge lacks constitutional authority to enter a final judgment in a fraudulent conveyance action against a nonclaimant to the bankruptcy estate, but that the nonclaimant here waived its right to an Article III hearing.

The panel held that following *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), and *Stern v. Marshall*, 131 S. Ct. 2594 (2011), the public rights exception to the rule of Article III adjudication does not encompass federal-law fraudulent conveyance claims, even though Congress designated such claims as core bankruptcy proceedings. The panel stated that in light of *Stern*, *In re Mankin*, 823 F.3d 1296 (9th Cir. 1987), was overruled. The panel held that 11 U.S.C. § 157(b)(1) provides bankruptcy courts the power to hear fraudulent conveyance cases and to submit reports and recommendations to the district courts.

The panel also held that the right to a hearing in an Article III court is waivable, and that here the nonclaimant consented to the bankruptcy judge's adjudica-

* The Honorable Raner C. Collins, United States District Judge for the District of Arizona, 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.

tion of the fraudulent conveyance claim by failing to object until the case reached the court of appeals.

The panel held that the bankruptcy trustee satisfied all elements of a constructively fraudulent transfer of the debtor's property under 11 U.S.C. § 548 and under Washington State law. In addition, the nonclaimant was a successor corporation of the debtor and therefore liable for its debts.

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LLC, Yellowstone Mountain Club, LLC, and Yellowstone Development, LLC.

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OPINION

PAEZ, Circuit Judge:

This quotidian bankruptcy case presents a novel question: can a non-Article III bankruptcy judge enter a final judgment in a fraudulent conveyance action against a nonclaimant to the bankruptcy estate? Federal law empowers bankruptcy judges to do so, but we hold that the Constitution forbids it.

The Executive Benefits Insurance Agency suffered an adverse final judgment in a fraudulent conveyance at the hands of a bankruptcy judge. But our decision today is no reprieve, because we also hold that the company consented to the adjudication of the fraudulent conveyance claim by a bankruptcy judge by failing to object until the case reached this court. Thus, unencumbered by constitutional doubts, we review the entry of summary judgment de novo, and affirm.

I

Nicholas Paleveda and his wife, Marjorie Ewing, operated a welter of companies, including Aegis Retirement Income Services, Inc. ("ARIS") and the Bellingham Insurance Agency, Inc. ("BIA"). ARTS designed and administered defined-benefit pension plans, and BIA sold insurance and annuity products that funded those plans.

BIA and ARIS were closely related: Paleveda owned 100% of ARIS and served as the CEO and sole director of BIA until February 14, 2006, when Ewing took over. Ewing owned 80% of BIA and served as ARIS's general manager. ARIS and BIA shared an office and a phone number. Because ARIS lacked sufficient assets to operate independently, it routed all of its income and expenses through BIA, kept joint accounting records with BIA, and declared its income on consolidated tax returns with BIA.

By early 2006, BIA was insolvent. And though the company ceased operations on January 31, 2006, it did not stop acting entirely. Two weeks after closing its doors, the company irrevocably assigned the insurance commissions from one of its largest clients, the American National Insurance Company, to Peter Pearce, a longtime BIA and ARIS employee who had often acted as a conduit for insurance commissions between BIA and its clients.

The day after BIA stopped operating, Paleveda used BIA funds to incorporate the Executive Benefits Insurance Agency, Inc. ("EBIA"). In 2006, $373,291.28 of commission income earned between January 1 and June 1 was deposited into an account held jointly by ARIS and EBIA. Pearce deposited $123,133.58 and EBIA deposited the remainder. At the end of the year, all of the deposits were credited to EBIA via an "intercompany transfer."[1]

In the meantime, BIA had filed a voluntary Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Western District of Washington. The Trustee, Peter Arkison—the Appellee in this case—filed a complaint against EBIA and ARIS in the same court to recover the commissions deposited into the EBIA/ARIS account, which the Trustee alleged to be property of the estate. The complaint alleged eighteen causes of action, including federal- and state-law preferential and fraudulent transfer claims and a claim that EBIA was a successor corporation of BIA and therefore liable for its debts.

The bankruptcy court granted summary judgment in favor of the Trustee, concluding that the depos-

[1] As the district court did, we draw these facts from the uncontroverted accounting evidence produced by the Trustee.

its into the EBIA/ARIS account were fraudulent conveyances of BIA assets and that EBIA was a "mere successor" of BIA. The bankruptcy court entered a final judgment for $373,291.28.[2]

EBIA appealed to federal district court. The district court affirmed, holding that the commissions paid into the ARIS/EBIA account were fraudulent transfers under both the Bankruptcy Code, 11 U.S.C. § 548, and Washington's Uniform Fraudulent Transfer Act, Wash. Rev. Code § 19.40.041. The district court also affirmed the bankruptcy court's judgment that EBIA was liable for BIA' s debts as a corporate successor.

EBIA appealed. In a motion to dismiss submitted prior to oral argument, EBIA objected for the first time to the bankruptcy judge's entry of final judgment on the Trustee's fraudulent conveyance claims. Styled

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[2] In total, EBIA was credited with $373,291.28 in commission income for the January 1, 2006 to June 1, 2006 period, an amount that formed the basis of the bankruptcy court's judgment. Of this total, $123,133.58 was deposited by Pearce, and the remaining $250,836.98 was deposited by EBIA itself.

In his declaration, the Trustee's accounting expert, Michael Quackenbush, appears to have improperly summed these figures. He avers, "There are five deposits buy [sic] Pearce totaling $122,454.30. There are 14 additional deposits into the ARIS account by EBIA for commissions it earned totaling $277,885.82. Thus the total commissions deposited into the ARIS account for commissions earned from BIA related business was $373,291.28." In fact, the sum of $122,454.30 and $277,885.82 is $400,340.12, according to Microsoft's venerable Windows Calculator. Some expert. The accountant also summed the deposits within each category incorrectly: the Pearce deposits actually total $123,133.58, and the EBIA deposits total $250,157.70. Because the corrected figures sum to $373,291.28, however, the expert's errors did not undermine the accuracy of the bankruptcy court's judgment.

as a motion to vacate the judgment for lack of subject-matter jurisdiction, and relying on *Stern v. Marshall*, 131 S. Ct. 2594 (2011), the motion argued that the bankruptcy judge was constitutionally proscribed from entering final judgment on the Trustee's claims.[3] It is to this vexing constitutional issue that we first turn.

II

A

Bankruptcy judges are appointed for terms of 14 years, 28 U.S.C. § 152(a)(1), and their salaries are subject to Congressional diminution. *Id.* § 153(a). Hence, bankruptcy judges cannot exercise "[t]he judicial Power of the United States," which is vested by the Constitution in courts whose judges enjoy life tenure and salary protection. U.S. Const. art. III, § 1.

Nonetheless, bankruptcy judges enjoy substantial statutory authority. Although the district courts have exclusive jurisdiction over "all cases under title 11," *id.* § 1334(a), they may refer all of the cases within that broad jurisdiction to bankruptcy judges, *id.* § 157(a). What the bankruptcy court may do with a given referred proceeding depends on whether the proceeding is denominated a "core" or a "non-core" proceeding. In all "core proceedings arising under title 11,

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[3] Following oral argument in this appeal, we invited briefs from amicus curiae on the questions: 1) whether bankruptcy courts may enter a final, binding judgment on an action to avoid a fraudulent conveyance, and 2) whether, if they cannot enter such final judgments, bankruptcy courts may hear the proceeding and submit a report and recommendation to a federal district court. *See Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.)*, 661 F.3d 476 (9th Cir. 2011). We appreciate the many thoughtful briefs that were submitted in response to our invitation.

or arising in a case under title 11," a bankruptcy judge has the power to "hear and determine the controversy" and enter final orders, subject only to appellate review. *Id.* § 157(b)(1). In a non-core proceeding "that is otherwise related to a case under title 11," however, a bankruptcy judge may only "submit proposed findings of fact and conclusions of law to the district court." *Id.* § 157(c)(1). The entry of final judgment in non-core proceedings is the sole province of Article III judges.

Section 157(b)(2) enumerates sixteen nonexclusive examples of "core proceedings." Among these are "proceedings to determine, avoid, or recover fraudulent conveyances." *Id.* § 157(b)(2)(H). The bankruptcy judge hearing the Trustee's claim was thus empowered by statute to enter a final judgment. Indeed, until quite recently, the exercise of that statutory power was routine and uncontroversial. *See, e.g.*, *Jones v. Schlosberg*, No. 04-00571, 2005 WL 6764810, at *5–6 (C.D. Cal. 2005) (affirming a bankruptcy court's entry of judgment in a fraudulent conveyance action); *see also Duck v. Munn (In re Mankin)*, 823 F.2d 1296, 1300–01 (9th Cir. 1987) (holding that both state- and federal-law fraudulent conveyance actions are core proceedings). But following the Supreme Court's decision in *Stern v. Marshall*, the view that such judgments are consistent with the Constitution is no longer tenable.

B

To explain why this is so, we must begin somewhat earlier, with the Supreme Court's epochal decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). The Bankruptcy Reform Act of 1978 invented the modern bankruptcy judge, subject to the same conditions as today: a 14-

year term and a mutable salary. *Id.* at 53. *Northern Pipeline* was the Supreme Court's first effort to demarcate the constitutional limits of these judges' authority.

Northern Pipeline filed a Chapter 11 petition for reorganization in a bankruptcy court. *Id.* at 56. It then filed a suit against Marathon Pipe Line for a prepetition breach of contract and warranty. *Id.* Marathon sought to dismiss the suit on the grounds that the claim at issue could only be decided by an Article III judge. *Id.*

A plurality of the Court agreed that the assignment of Northern Pipeline's state-law claims for resolution by a bankruptcy judge violated Art. III of the Constitution. *Id.* at 87 (Brennan, J., plurality opinion); *id.* at 91 (Rehnquist, J., concurring in judgment). The plurality admitted to only three exceptions to the rule of Article III adjudication: territorial courts, *id.* at 64, military tribunals, *id.* at 66, and cases involving "public" as opposed to "private" rights, *id.* at 67.[4] Outside of the narrowly drawn exceptions for territorial and military courts, the distinction between public and private rights was the crucial determinant of whether a dispute belonged in an Article III court: "Our precedents clear-

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[4] A majority of the *Northern Pipeline* Court also acknowledged that it is constitutionally permissible for an Article III court to assign factfinding responsibility to an adjunct, provided that the Article III court retains "the essential attributes of the judicial power." 458 U.S. at 77 (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932) (internal quotation marks omitted)). Nonetheless, "the bankruptcy court is not an 'adjunct' of either the district court or the court of appeals." *Id.* at 91 (Rehnquist, J., concurring in the judgment); *see also id.* at 81–86 (plurality opinion). *Stern* reaffirmed that bankruptcy courts are not adjuncts. *See* 131 S. Ct. at 2611 ("Nor can the bankruptcy courts under the 1984 Act be dismissed as mere adjuncts of Article III courts . . . .").

ly establish," the Court explained, "that *only* controversies in the former category may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination. Private-rights disputes, on the other hand, lie at the core of the historically recognized judicial power." *Id.* at 70 (internal citations and footnote omitted).

While a majority of the Court could not agree on the scope of the public rights exception, a majority did agree that the public rights exception could not justify the adjudication of Northern Pipeline's claims by a non-Article III officer. *See id.* at 69 (plurality opinion); *id.* at 91 ("To whatever extent different powers granted under [the Bankruptcy Reform] Act might be sustained under the 'public rights' doctrine . . . I am satisfied that the adjudication of Northern's lawsuit cannot be so sustained.") (Rehnquist, J., concurring).

Despite consigning the breach of contract and breach of warranty claims at issue to the category of private rights, the *Northern Pipeline* plurality hinted that some quantum of bankruptcy proceedings might fall within the public rights exception:

> [T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former may well be a "public right," but the latter obviously is not.

Id. at 71.

Following the *Northern Pipeline* decision, Congress amended the statutes governing bankruptcy jurisdiction and bankruptcy judges. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98–353, 98 Stat. 333 (the "1984 Act"). The legislation enacted, among other reforms, the division of claims in bankruptcy cases into core and non-core proceedings. This distinction was clearly inspired by the *Northern Pipeline* plurality's dictum that certain proceedings "at the core of the federal bankruptcy power . . . may well be a 'public right.'" 458 U.S. at 71; *see also In re Mankin*, 823 F.2d at 1305.

The cases following *Northern Pipeline* created substantial new ambiguity about the content and import of the public rights exception. In *Thomas*, the Court addressed a law that required pesticide manufacturers to submit research data to the Environmental Protection Agency on a new product's "health, safety, and environmental effects." 473 U.S. at 571. The law allowed subsequent registrants of similar products to rely on the proprietary data, but required them to compensate the first manufacturer for the data and to submit to binding arbitration of any disagreement over the fee amount. *Id.* at 573–74. The *Northern Pipeline* plurality had defined public rights as "matters arising between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." 458 U.S. at 67–68 (plurality opinion) (internal quotation marks omitted). The *Thomas* Court rejected that definition, opting for a more fluid position: "the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers is reduced." 473 U.S. at 589 (quoting *Northern Pipeline*, 458 U.S. at 68). Under this newly pragmatic approach, the Court was convinced that "the right created by [the statute] is not a purely 'private' right." *Id.* Rather, it bore "many of the characteristics of a 'public' right": it "serve[d] a public purpose as an integral part of a program safeguarding the public health" and "represent[ed] a pragmatic solution to the difficult problem of spreading the costs of generating adequate information regarding the safety, health, and environmental impact of a potentially dangerous product." *Id.* at 589–90.

Similarly, in *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833,851 (1986), the Supreme Court abjured "formalistic and unbending rules" for "determining the extent to which a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch." Instead, the Court held that determining when a proceeding required an Article III court entailed balancing several factors "with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary":

> Among the factors upon which we have focused are the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of

> jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.

Id. (citing *Thomas,* 473 U.S. at 587, 589–93). This multifactor standard demanded a certain hierophancy on the part of the lower courts, which had to comb through the Court's inconsistent statements about the metes and bounds of Article III to apply it. But the standard did reflect a pragmatic accommodation of the realities of modern bankruptcy practice and the logistical and administrative difficulty of circumscribing the authority of the bankruptcy courts.

Encouraged by the Supreme Court's retreat from a formalist conception of the public rights exception and the limitations of Article III more generally, we concluded in 1987 that certain controversies at the core of the bankruptcy process implicated public rights. *See In re Mankin*, 823 F.2d at 1308 ("The public rights doctrine in large part simply constitutionalizes the historical understanding of what need and need not be committed to Article III officers for determination. While, as indicated above, it has always been understood that the property rights of creditors cannot be committed exclusively to the political branches for determination, by the same token it has always been understood that bankruptcy proceedings need not be solely determined by Article III officers."). We also held that the portion of bankruptcy-related proceedings that fit within the public rights exception was coextensive with that portion which had been designated as "core" by the 1984 Act. *Id.*

Today, we acknowledge *Mankin*'s demise.[5] It has been felled by two cases: *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), and *Stern v. Marshall*, which together point ineluctably to the conclusion that fraudulent conveyance claims, because they do not fall within the public rights exception, cannot be adjudicated by non-Article III judges.

In *Granfinanciera*, the Court considered whether a non-claimant to a bankruptcy estate has a Seventh Amendment right to a jury trial when sued by the bankruptcy trustee under 11 U.S.C. § 548 to recover allegedly fraudulent prepetition conveyances. 492 U.S. at 36. Because Congress had designated fraudulent conveyance actions core proceedings, which non-Article III judges could decide, the Court defined the issue as "whether the Seventh Amendment confers on petitioners a right to a jury trial in the face of Congress' decision to allow a non-Article III tribunal to adjudicate the claims against them." *Id.* at 50. And that required the Court to again construe the public rights exception, because "Congress may only deny trials by jury in actions at law . . . in cases where 'public rights' are litigated." *Id.* at 51.

Was a fraudulent conveyance proceeding a matter of public right? The Court's answer was, if not unequivocal, at least conclusive: "Although the issue admits of some debate, a bankruptcy trustee's right to recover a fraudulent conveyance under 11 U.S.C.

[5] Because the result in *Mankin* cannot be reconciled with the reasoning in *Stern*, we may overrule it without taking this case en banc. *See Miller* v. *Gammie*, 335 F.3d 889, 899 (9th Cir. 2003).

§ 548(a)(2) seems to us more accurately characterized as a private rather than a public right as we have used those terms in our Article III decisions." *Id.* at 55. The Court echoed the *Northern Pipeline* plurality's distinction between the (possibly[6]) public-right "restructuring of debtor-creditor relations"—the "core of the federal bankruptcy power"—and the "adjudication of state-created private rights." *Northern Pipeline*, 458 U.S. at 71. Fraudulent conveyance actions, the *Granfinanciera* Court explained, are obviously in the latter category, because they "are quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res." 492 U.S. at 56.

Granfinanciera clarified that fraudulent conveyance actions are not matters of public right, and that a noncreditor retains a Seventh Amendment right to a jury trial on a bankruptcy trustee's fraudulent con-

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[6] Notably, the *Granfinanciera* Court did not decide the question whether even the "restructuring of debtor-creditor relations" was in fact a "public right." 492 U.S. at 56 n.11 ("We do not suggest that the restructuring of debtor-creditor relations is in fact a public right. This thesis has met with substantial scholarly criticism, and we need not and do not seek to defend it here. Our point is that even if one accepts this thesis, the Seventh Amendment entitles petitioners to a jury trial." (citation omitted)). Neither did the *Stern* Court decide whether the public rights exception constitutionally validates any of the powers that bankruptcy judges today exercise. *See* 131 S. Ct. at 2614 n.7 ("We noted [in *Granfinanciera*] that we did not mean to 'suggest that the restructuring of debtor-creditor relations is in fact a public right.' . . . Because neither party asks us to reconsider the public rights framework for bankruptcy, we follow the same approach here."). We, of course, follow the Court's example in declining to take up the question.

veyance claim. Some courts, however, seemed disinclined to deduce from those holdings that such litigants also retain a right to be heard by an Article III court. *See, e.g.*, *McFarland v. Leyh (In re Tex. Gen. Petroleum Corp.)*, 40 F.3d 763, 770 (5th Cir. 1994), *withdrawn and replaced by* 52 F.3d 1330 (5th Cir. 1995); *Turner v. Davis, Gillenwater & Lynch (In re Investment Bankers, Inc.)*, 4 F.3d 1556, 1561 (10th Cir. 1993). *But see Leyh*, 52 F.3d at 1336–37; *Gower v. Farmers Home Admin. (In re Davis)*, 899 F.2d 1136, 1140 n.9 (11th Cir. 1990).

Following *Stern*, we can no longer resist *Granfinanciera*'s logic. The issue in *Stern* was whether a bankruptcy court could enter final judgment on a state-law claim for tortious interference with a gift expectancy, which Vickie Marshall had filed as a compulsory counterclaim to Pierce Marshall's proof of claim in her ongoing bankruptcy proceeding. *See* 131 S. Ct. at 2601. The Supreme Court held that it could not, because "Vickie's counterclaim cannot be deemed a matter of 'public right' that can be decided outside the Judicial Branch." *Id.* at 2611. In the course of a lengthy exegesis of its own public-rights precedents, the Court explained that the state-law counterclaim at issue was indistinguishable from the fraudulent conveyance claim in *Granfinanciera:* "Vickie's counterclaim—like the fraudulent conveyance claim at issue in *Granfinanciera*—does not fall within any of the varied formulations of the public rights exception in this Court's cases." *Id.* at 2614. This common character of the claims in *Granfinanciera* and *Stern* means that neither can be consigned to the bankruptcy courts without doing violence to the constitutional separation of powers:

> What is plain here is that this case involves the most prototypical exercise of judicial power: the entry of a final, binding judgment *by a court* with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime. If such an exercise of judicial power may nonetheless be taken from the Article III Judiciary simply by deeming it part of some amorphous "public right," then Article III would be transformed from the guardian of individual liberty and separation of powers we have long recognized into mere wishful thinking.

Id. at 2615. Here, the Trustee's fraudulent conveyance claims are not matters of "public right," and, *ipso facto*, cannot be decided outside the Article III courts.[7]

Our conclusion is buttressed by the Supreme Court's equation of litigants' Article III rights with their Seventh Amendment jury trial rights in bank-

[7] Our analysis is unaffected by the Sixth Circuit's recent decision in *Onkyo Europe Electronics GMBH v. Global Technovations Inc. (In re Global Technovations Inc.)*, 694 F.3 d 705,722 (6th Cir. 2012). There, the Sixth Circuit concluded that it was "crystal clear that the bankruptcy court had constitutional jurisdiction under *Stern* to adjudicate whether the sale of GTI was a fraudulent transfer." *Id.* But it was "crystal clear" because "it was not possible . . . to rule on [the creditor's] proof of claim without first resolving the fraudulent-transfer issue." *Id.* (quoting *Stern*, 131 S. Ct. at 2616). That rendered In re Global "fundamentally unlike" both *Granfinanciera* and our case, "where the bankruptcy estate reached out to file a fraudulent-transfer claim against a party who had filed no claim against the estate." *Id.*

ruptcy-related cases. *Granfinanciera* itself drew the comparison explicitly:

> Indeed, our decisions point to the conclusion that, if a statutory cause of action is legal in nature, the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal. For if a statutory cause of action, such as respondent's right to recover a fraudulent conveyance under 11 U.S.C. § 548(a)(2), is not a "public right" for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court lacking "the essential attributes of the judicial power."

492 U.S. at 53. And the Court in *Stern* characterized cases involving Seventh Amendment jury trial rights as binding authority on the Article III issue. *Stern* described *Granfinanciera*—a case about Seventh Amendment rights—as deciding that "Congress could not constitutionally assign resolution of the fraudulent conveyance action to a non-Article III court." 131 S. Ct. at 2614 n.7.

The *Stern* Court again transmuted a Seventh Amendment case into an Article III precedent in its analysis of *Langenkamp v. Culp*, 498 U.S. 42 (1990). *Langenkamp* itself stated that the case "present[ed] the question whether creditors who submit a claim against a bankruptcy estate and are then sued by the trustee in bankruptcy to recover allegedly preferential monetary transfers are entitled to jury trial under the Seventh Amendment." *Id.* at 42–43. On the *Stern* Court's reading, however, *Langenkamp* also decided whether such a claim could be heard in bankruptcy at all: "We explained [in *Langenkamp*] that a preferential transfer claim *can be heard in bankruptcy* when the allegedly favored creditor has filed a claim . . . . If, in contrast, the creditor has not filed a proof of claim, the trustee's preference action does not 'become [ ] part of the claims-allowance process' subject to resolution by the bankruptcy court." 131 S. Ct. at 2617 (alteration in original) (emphasis added) (quoting *Langenkamp*, 498 U.S. at 45).

Stern fully equated bankruptcy litigants' Seventh Amendment right to a jury trial in federal bankruptcy proceedings with their right to proceed before an Article III judge. Hence, *Granfinanciera*'s statement that "[u]nless a legal cause of action involves 'public rights,' Congress may not deprive parties litigating over such a right of the Seventh Amendment's guarantee to a jury trial" is powerful evidence that Congress also may not deprive such parties of their right to an Article III tribunal. 492 U.S. at 53.

Several *amici* object that the claim at issue in *Stern* was a state-law claim, and that the Trustee's § 548 fraudulent conveyance claim is indistinguishable from the preferential transfer claim at issue in *Katchen v. Landy*, 382 U.S. 323 (1966). *Katchen* held that bankruptcy referees acting under the Bankruptcy Acts of 1898 and 1938 could exercise summary jurisdiction over a voidable preference claim brought by a bankruptcy trustee against a creditor who filed proof of claim in the bankruptcy proceeding. *Id.* at 329–30, 332–33. The *Stern* Court did distinguish *Katchen* on the grounds that "the trustee bringing the preference action was asserting a right of recovery created by federal bankruptcy law." 131 S. Ct. at 2618 ("Vickie's claim, in contrast, is in no way derived from or dependent upon bankruptcy law; it is a state tort action that exists without regard to any bankruptcy proceeding."). And *Granfinanciera* noted that actions to recover preferences are "indistinguishable . . . in all relevant respects" from actions to recover fraudulent conveyances. 492 U.S. at 48–49. There is an argument, then, that bankruptcy courts can render final judgment on a fraudulent conveyance claim whose source of law is the Bankruptcy Code.

That is wrong for two reasons. First, the dispositive distinction between the claims in *Stern* and *Katchen* was that in *Katchen*, the trustee's preference action "would necessarily be resolved in the claims allowance process" because the defendant had filed a proof of claim against the bankruptcy estate. *Stern*, 131 S. Ct. at 2618. The preference action necessarily had to be resolved in the course of deciding whether to allow the defendant's claim on the estate. By contrast, Vickie Marshall's counterclaim in *Stern* required the bankruptcy court to "make several factual and legal determinations that were not disposed of in passing on objections to Pierce's proof of claim for defamation." *Id.* at 2617 (internal quotation marks omitted). "There thus was never reason to believe that the process of ruling on Pierce's proof of claim would necessarily result in the resolution of Vickie's counterclaim." *Id.* at 2617–18.

Second, a rule that classified any federal-law claim as a "public right" would render *Stern* internally contradictory. Assume that the *Stern* Court's observation that "Vickie's claim . . . is in no way derived from or dependent upon bankruptcy law" was the sole basis by which the Court distinguished the counterclaim in that case from the preference action in *Katchen.* If that were so, the *Stern* Court's characterization of the holding in *Granfinanciera*—that "Congress could not constitutionally assign resolution of the fraudulent conveyance action to a non-Article III court," 131 S. Ct. at 2614 n.7—would be incoherent, because the claim in *Granfinanciera* arose under § 548 of the Bankruptcy Code. *See* 492 U.S. at 36.

Granfinanciera involved a federal-law claim, and *Stern* involved a state-law claim. But *Stern* held that both claims required an Article III court. Thus, the only principled basis on which to distinguish *Katchen* from *both Stern* and *Granfinanciera* is that *Katchen* involved a claim against a creditor that necessarily had to be resolved in the course of the claims-allowance process, and *Stern* and *Granfinanciera* did not.

In this case, EBIA is a noncreditor to the BIA bankruptcy estate. Hence, it is not subject to the bankruptcy court's equitable jurisdiction; the trustee can recover monies fraudulently conveyed to it only by initiating a legal action. *Cf. Langenkamp*, 498 U.S. at 45 ("If a party does *not* submit a claim against the bankruptcy estate, however, the trustee can recover allegedly preferential transfers only by filing what amounts to a legal action to recover a monetary transfer."). That legal action need not necessarily have been resolved in the course of allowing or disallowing the claims against the BIA estate. For that reason, the claim belonged in an Article III court. *See Stern*, 131 S. Ct. at 2618 ("Congress may not bypass Article III simply because a proceeding may have *some* bearing on a bankruptcy case; the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process."). That the Trustee asserted a federal-law fraudulent conveyance claim against EBIA is of no moment to our conclusion that the claim is nonadjudicable by a bankruptcy judge.

* * *

Taken together, *Granfinanciera* and *Stern* settle the question of whether bankruptcy courts have the general authority to enter final judgments on fraudulent conveyance claims asserted against noncreditors to the bankruptcy estate. They do not. We now turn to a subsidiary question: whether bankruptcy judges may constitutionally hear such claims, and prepare recommendations for de novo review by the federal district courts.

III

Federal law authorizes bankruptcy judges to "hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11." 28 U.S.C. § 157(b)(1). Bankruptcy judges have the narrower power to "hear" a proceeding that is "not a core proceeding but that is otherwise related to a case under title 11," and to "submit proposed findings of fact and conclusions of law to the district court" for the entry of final judgment. *Id.* § 157(c)(1).

Our conclusion today creates a gap in this framework: Federal law classifies fraudulent conveyance proceedings as "core" proceedings, 28 U.S.C. § 157(b)(2)(H), but the Constitution prohibits bankruptcy judges from entering a final judgment in such core proceedings. Nowhere does the statute explicitly authorize bankruptcy judges to submit proposed findings of fact and conclusions of law in a core proceeding; § 157(c)(1) is expressly limited to "non-core" proceedings. Is the power "to hear and determine" capacious enough to include the power to submit proposed findings in a core proceeding? Or are bankruptcy courts impotent to address fraudulent conveyance proceedings, because they fall in the interstices of § 157?

We have noted that Congress enumerated the examples of core proceedings in § 157(b)(2) with "a view toward expanding the bankruptcy court's jurisdiction to its constitutional limit." *Mankin*, 823 F.2d at 1301; *see also Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995). With respect to any bankruptcy-related claim, then, the bankruptcy courts must be vested with as much adjudicatory power as the Constitution will bear. In light of this statutory objective, the power to "hear and determine" a proceeding surely encompasses the power to hear the proceeding and submit proposed findings of fact and conclusions of law to the district court. Section 157(b)(1) empowers bankruptcy courts to "hear and determine" fraudulent conveyance claims in a manner consistent with the strictures of Article III—and that includes the more modest power to submit findings of fact and recommendations of law to the district courts.

In sum, § 157(b)(1) provides bankruptcy courts the power to hear fraudulent conveyance cases and to submit reports and recommendations to the district courts. Such cases remain in the core, and the § 157(b)(1) power to "hear and determine" them authorizes the bankruptcy courts to issue proposed findings of fact and conclusions of law. Only the power to enter final judgment is abrogated.[8]

Our conclusion is consistent with the *Stern* Court's tacit approval of bankruptcy courts' continuing to hear and make recommendations about statutory core proceedings in which entry of final judgment by a non-Article III judge would be unconstitutional. The district court that heard *Stern* before it reached the Supreme Court took the view that the bankruptcy court had lacked the constitutional authority to enter final judgment on Vickie Marshall's counterclaim. *See Stern*, 131 S. Ct. at 2602. For that reason, the district court treated the bankruptcy court's judgment as "proposed[,] rather than final," and reviewed the judgment de novo. *Id.* (alteration in original). Nowhere did the *Stern* Court object to the district court's judgment. Instead, the Court noted that Pierce Marshall "ha[d] not argued that the bankruptcy courts are barred from hearing all counterclaims or proposing findings of fact and conclusions of law on those matters." *Id.* at 2620 (internal quotation marks omitted). Immediately there-

[8] In dicta, the Seventh Circuit has implied that bankruptcy courts cannot propose findings of fact and conclusions of law in any proceeding classified as core by § 157. *See Ortiz v. Aurora Health Care, Inc. (In re Ortiz)*, 665 F.3d 906, 915 (7th Cir. 2011). We do not find the *Ortiz* court's analysis of the issue thoroughly reasoned. *See also Waldman v. Stone*, --- F.3d --- , 2012 WL 5275241, at *8 (6th Cir. Oct. 26, 2012) (observing in dicta that "§ 157(b)(1) authorizes the bankruptcy court to enter appropriate orders and judgments,' not to propose them," but acknowledging that "one might argue that . . . Congress's grant of the greater power to enter final judgments implies a lesser authority to propose them").

after, the Court explained, "We do not think the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute; we agree . . . that the question presented here is a 'narrow' one." *Id.* Stripping the bankruptcy courts of the power to entertain state-law counterclaims in *any* capacity would have roiled the prevailing bankruptcy schema. The Court was surely suggesting that bankruptcy courts were *not* "barred from hearing all counterclaims or proposing findings of facts and conclusions of law on those matters." *Id.* (internal quotation marks omitted); *see also Heller Ehrman LLP v. Arnold & Porter, LLP (In re Heller Ehrman)*, 464 B.R. 348, 355–56 (N.D. Cal. 2011) (noting the near-universal approbation by district courts and bankruptcy courts of the view that *Stern* permits bankruptcy courts to submit reports and recommendations in bankruptcy-related proceedings even when the entry of final judgment is unconstitutional).

For these reasons, we conclude that bankruptcy courts have statutory authority to hear and enter proposed findings of fact and conclusions of law in a fraudulent conveyance proceeding asserted by a bankruptcy trustee against a noncreditor, subject to de novo review by a federal district court.

IV

Several *amici* contend that even if defendants in fraudulent conveyance suits have a right to a hearing in an Article III court, that right is waivable. We agree, and hold that EBIA waived its right to an Article III hearing.

The waivable nature of the allocation of adjudicative authority between bankruptcy courts and Article III courts is well established. Prior to the Bankruptcy Act of 1978, federal law distinguished between "summary" matters, which involved property in the actual or constructive possession of the court, and "plenary" matters, which did not. *See Northern Pipeline*, 458 U.S. at 53. Bankruptcy referees were vested with jurisdiction over summary matters, but plenary suits could only be tried by an Article III judge. But the right to an Article III judge in plenary proceedings could be waived by the litigants. *See MacDonald v. Plymouth County Trust Co.*, 286 U.S. 263, 267 (1932).

Following the genesis of the modem bankruptcy system, the Supreme Court clarified that "Article III, § l's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States . . . serves to protect primarily personal, rather than structural, interests." *Schor*, 478 U.S. at 848.[9] *Stern* further made clear that § 157 "does not implicate questions of subject matter jurisdiction." 131 S. Ct. at 2607. Accordingly, "as a personal right, Article III's guarantee of an impartial and

[9] *Schor* did hold that "notions of consent and waiver cannot be dispositive" of Article III problems when "the encroachment or aggrandizement of one branch at the expense of the other" is at stake, because in such cases structural principles are implicated in addition to private rights entitlements. 478 U.S. at 850–51, 860 (internal quotation marks omitted). In fact, that was the case in *Schor*, because the case involved whether an Executive Branch administrative agency could adjudicate a state-law counterclaim. *Id.* at 852. But the allocation of authority between bankruptcy courts and district courts does not implicate structural interests, because bankruptcy judges are "officer[s]" of the district court and are appointed by the Courts of Appeals. *See* 28 U.S.C. § 151, 152(a)(1).

independent federal adjudication is subject to waiver."[10] *Schor*, 478 U.S. at 848; *see also Daniels-Head & Assocs. v. William M. Mercer, Inc. (In re Daniels-Head & Assocs)*, 819 F.2d 914, 918 (9th Cir. 1987). And in fact, § 157(c)(2) expressly provides that bankruptcy courts may enter final judgments in non-core proceedings "with the consent of all the parties to the proceeding." 28 U.S.C. § 157(c)(2).

If consent permits a non-Article III judge to decide finally a non-core proceeding, then it surely permits the same judge to decide a core proceeding in which he would, absent consent, be disentitled to enter final judgment. The only question, then, is whether EBIA did in fact consent to the bankruptcy court's jurisdiction.

We have previously held that a bankruptcy litigant impliedly consents to the bankruptcy court's jurisdiction when he fails to timely object. In *In re Daniels-Head*, 819 F.2d at 919, we held "that appellant's failure to object to the bankruptcy court's jurisdiction constitutes consent to that jurisdiction." Similarly, in *Mann v. Alexander Dawson Inc. (In re Mann)*, 907 F.2d 923, 926 (9th Cir. 1990), we held that a debtor's decision to file an adversary proceeding in bankruptcy court, and his failure to object to the court's jurisdiction

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[10] The same principle permits federal magistrate judges, acting with the consent of the litigants, to enter final judgments in proceedings that would otherwise be the exclusive province of Article III courts. *See* 28 U.S.C. § 636(c)(1); *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 547 (9th Cir. 1984) (en banc) ("We hold that consensual reference of a civil case to a magistrate is constitutional . . . ."). And consent to a magistrate judge's case-dispositive authority may be implied from a litigant's actions. *See Roell v. Winthrow*, 538 U.S. 580, 586–87 (2003).

prior to the time it rendered judgment against him, meant that "he consented to the court's jurisdiction." *Id.*

This case, of course, is somewhat different, because the Trustee, not EBIA, initiated the adversary proceeding. But EBIA's conduct bore considerable indicia of consent. EBIA initially demanded a jury trial, invoking its rights under *Granfinanciera*, which the district court treated as a motion to withdraw the reference. *See* Defs.' Answer at 14, *In re Bellingham Ins. Agency*, No. 06-11721 (Bankr. W.D. Wash. Aug. 2, 2008), ECF No. 169; Mot. to Withdraw the Reference, *Arkison v. Exec. Benefits Ins.*, No. 10-cv-00171 (W.D. Wash. Jan. 28, 2010), ECF No. 1. But EBIA elected not to pursue a hearing in an Article III court. Instead, EBIA petitioned the district court to stay its consideration of the motion to withdraw the reference to give the bankruptcy court time to adjudicate the Trustee's motion for summary judgment. *See Order*, *Arkison v. Exec. Benefits Ins.*, No. 10-cv-00171 (W.D. Wash. Mar. 26, 2010), ECF No. 5. In other words, EBIA did not simply fail to object to the bankruptcy judge's authority to enter final judgment in the fraudulent conveyance action; it affirmatively assented to suspend its demand for a jury trial in district court to give the bankruptcy judge an opportunity to adjudicate the claim.

A month later, the bankruptcy court entered summary judgment in Arkison's favor. EBIA abandoned its motion to withdraw the reference, and the district court dismissed the action. *See Order*, *Arkison v. Exec. Benefits Ins.*, No. 10-cv00171 (W.D. Wash. July 2, 2010), ECF No. 8. EBIA then separately appealed the bankruptcy court's judgment in the district court for the Western District of Washington. EBIA did not argue at any point during that appeal that the bankruptcy court lacked authority to issue a final judgment in the fraudulent conveyance action. In fact, EBIA did not raise a constitutional objection to the bankruptcy court's entry of final judgment in favor of the Trustee until after the briefing in this appeal was complete, when it filed a motion to vacate the bankruptcy court's judgment on the eve of oral argument. Because EBIA waited so long to object, and in light of its litigation tactics, we have little difficulty concluding that EBIA impliedly consented to the bankruptcy court's jurisdiction. *See United States v. Olano*, 507 U.S. 725, 731 (1993) ("'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited . . . by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944))). *Cf. In re Ortiz*, 665 F.3d at 909–10, 915 (refusing to find implied consent to a bankruptcy judge's authority where the debtors moved for the bankruptcy judge to abstain from jurisdiction and petitioned the district court to withdraw the reference from the bankruptcy judge).

There are two potential objections to our conclusion that EBIA impliedly consented to the bankruptcy judge's authority. The first is that Federal Rules of Bankruptcy Procedure 7008 and 7012, which implement the statutory core/non-core dichotomy, preclude a finding of implied consent. These rules provide that an adversary proceeding complaint "shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge"; a similar requirement applies to responsive pleadings. *See* Fed. R. Bankr. P. 7008(a), 7012(b). A 1987 advisory committee note to Rule 7008 provides that "only express consent in the pleadings or otherwise is effective to authorize entry of a final order or judgment by the bankruptcy judge in a non-core proceeding."

We have subsequently held, however, that a litigant's actions may suffice to establish consent. *See In re Mann*, 907 F.2d at 926; *accord In re Tex. Gen. Petroleum Corp.*, 52 F.3d at 1337; *Abramowitz v. Palmer*, 999 F.2d 1274, 1280 (8th Cir. 1993); *Canal Corp. v. Finnman (In re Johnson)*, 960 F.2d 396, 403 (4th Cir. 1992).

Indeed, *Roell*—decided in 2003—precludes any objection on the basis of the bankruptcy rules. 538 U.S. at 586. At the time *Roell* was decided, Federal Rule of Civil Procedure 73(b) specified that if parties consented to a magistrate judge's dispositive power over their case, their consent was required to "be memorialized in 'a joint form of consent or separate forms of consent setting forth such election.'" 538 U.S. at 586 (quoting Fed. R. Civ. P. 73(b) (2003)). The Federal Magistrate Act, however, stated only that "[u]pon the consent of the parties, a full-time United States magistrate judge . . . may conduct any or all proceedings in a jury or non-jury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court." 28 U.S.C. § 636(c)(1). Noting that "§ 636(c)(1)[] speaks only of 'the consent of the parties,' without qualification as to form," the Court held that implied consent could satisfy the statute, notwithstanding the specific procedure described in Rule 73(b). *Roell*, 538 U.S. at 586.

Like the provision of the Federal Magistrate Act at issue in *Roell*, the text of § 157(c) only requires consent simpliciter. *See* 28 U.S.C. § 157(c)(2) (requiring "the consent of all the parties to the proceeding"). By contrast, § 157(e) permits bankruptcy judges to conduct jury trials "with the *express* consent of all the parties" (emphasis added). The adjectival distinction suggests that Congress intended to allow parties to consent by their actions to the authority of bankruptcy courts to enter dispositive orders on any bankruptcy-related claim. Accordingly, in cases like this one—in which the defendant was aware of its right to seek withdrawal of the reference but opted instead to litigate before the bankruptcy court—consent is established.

The second potential objection is that *Stern* was not decided until EBIA's appeal was pending before this court. True, but EBIA had ample reason to be alert to the possible jurisdictional problem. We published *Marshall v. Stern*, 600 F.3d 1037 (9th Cir. 2010), on March 19, 2010, before EBIA asked the district court to stay its motion to withdraw the reference. That predicate opinion featured a lengthy perscrutation of the Article III question. Although we reached a different set of conclusions than the Supreme Court ultimately did, the opinion should have been sufficient to alert EBIA to the possible jurisdictional problem. The same is true of *Granfinanciera*, which thoroughly foreshadowed the result in *Stern.* And we know that EBIA' s counsel was aware of *Granfinanciera*, because the company asserted—and then abandoned—the very Seventh Amendment right that case established.

Further, the *Stern* Court applied the doctrine of litigant consent even when little authority existed to notify the litigant that a constitutional objection was there for the making. In *Stern*, Pierce Marshall propounded the novel argument that the bankruptcy court lacked jurisdiction to enter final judgment on his defamation claim because § 157(b)(5) granted to district courts exclusive jurisdiction over "personal injury tort" claims. 131 S. Ct. at 2606. The Court held that Pierce consented to the bankruptcy court's jurisdiction over the claim when he failed to timely object. *Id.* at 2608. By contrast, Pierce voiced his objection to the bankruptcy court's jurisdiction over Vickie's counterclaim from the outset of the litigation. *See id.* at 2601.

Although EBIA may not be as sophisticated or creative as Pierce, it fully litigated the fraudulent conveyance action before the bankruptcy court and the district court, without so much as a peep about Article III—even going so far as to abandon its motion to withdraw the reference. "[T]he consequences of a litigant sandbagging the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor—can be . . . severe." *Id.* at 2609 (internal quotation marks, alterations, and citations omitted). Having lost before the bankruptcy court, EBIA cannot assert a right it never thought to pursue when it still believed it might win. *Id.*

V

Because we conclude that EBIA consented to the bankruptcy court's jurisdiction, we proceed to the merits of that judgment.

A

The district court affirmed the bankruptcy court's grant of summary judgment on the claim that the transfer of BIA' s assets to EBIA constituted a fraudulent transfer. *See* 11 U .S.C. § 548. Section 548 empowers the trustee to avoid a transfer of the debtor's property, or any obligation incurred by the debtor, that was fraudulently made or incurred within two years of the bankruptcy petition. A trustee may exercise the avoidance power when the transfer was actually intended to hinder, delay, or defraud a creditor. *Id.* § 548(a)(1)(A). Even in the absence of actual fraudulent intent, the trustee can avoid a "constructively" fraudulent transfer: one that was made in exchange for less than "reasonably equivalent value" at a time when the debtor was insolvent. *Id.* § 548(a)(1)(B).

The district court held that the trustee satisfied all elements of a constructively fraudulent transfer, because BIA transferred to EBIA all of its assets when EBIA began operating in February 2006, including its phone number, book of business, and especially its stream of insurance commissions. BIA received nothing in return.

EBIA's only defense is that it received no items of value from BIA prior to the filing of the bankruptcy petition. EBIA argues first that any commission streams that changed hands were transferred to the related entity ARIS, not to EBIA, and second that everything else that was transferred was either a liability or an asset with negligible value.[11]

EBIA's assertions are belied by the record. EBIA is correct that the Trustee's expert accountant, Michael Quackenbush, testified that $373,291.28 was deposited into an account held jointly by ARIS and EBIA. But, as the district court correctly noted, those commissions were credited to EBIA via intercompany transfers in the accounting software. The evidence that this money was transferred from BIA to EBIA is overwhelming. BIA executed a written assignment of its commissions from a major client to an employee, Peter Pearce, who immediately became an EBIA employee upon BIA's dissolution. Pearce deposited $123,133.58 into the ARIS/EBIA account. And EBIA itself deposited more than $250,000 in additional commissions that obviously belonged to BIA.

EBIA is entitled to any reasonable inference that would suggest an explanation of the provenance of these sums other than the one the Trustee proposes. *See Bodett v. CoxCom, Inc.*, 366 F.3d 736, 742 (9th Cir. 2004). But EBIA makes no serious attempt to offer a nonfraudulent explanation. EBIA's only rebuttal evidence is the declaration of erstwhile BIA CEO Nicholas Paleveda, who claims that the commissions Pearce deposited into the account belonged to Pearce personally. In his declaration, he also asserts that the remaining quarter-million dollars of commissions credited to EBIA between January 1 and June 1 came from new

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[11] EBIA's piteous examples of such assets include "unemployed actuaries" and "a lease arrangement . . . for an office that no clients visited." Appellant's Opening Br. 9.

business that the company drummed up without relying on BIA's old business relationships.

Both claims are incredible. Property of the estate includes intangible assets, such as corporate goodwill and a "book of business." *See Stoumbos v. Kilimnik*, 988 F.2d 949, 963–64 (9th Cir. 1993). The transfer of an ongoing business concern can constitute a fraudulent transfer. *See, e.g.*, *id.* The Trustee produced to the bankruptcy court the document assigning the commissions from BIA's client American National to Pearce, and various witnesses testified that Pearce's role at BIA was to act as a conduit for commissions between the company and its clients. Further, Paleveda stated that EBIA did not earn any revenue until May 2006. Paleveda thus suggests that in a matter of weeks—from May to June 1—EBIA earned hundreds of thousands of dollars of new commissions that were unrelated to BIA's old business.

Put simply, there is no genuine dispute of material fact that these transfers were constructively fraudulent and recoverable by the Trustee under § 548. *See Stoumbos*, 988 F.2d at 953.

The bankruptcy court also granted summary judgment on the Trustee's claim that EBIA violated Washington's Uniform Fraudulent Transfer Act, Wash. Rev. Code §§ 19.40.011–19.40.904. The definition of a constructively fraudulent transfer under the Washington Uniform Fraudulent Transfer Act is essentially identical to the definition of a constructively fraudulent transfer under § 548 of the Bankruptcy Code. It is any transfer that is made "[w]ithout receiving a reasonably equivalent value in exchange for the transfer or obligation" while the debtor:

> (i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

Id. § 19.40.041(a)(2).

EBIA does not argue in its briefs that we ought to distinguish between the state- and federal-law causes of action. We therefore conclude that the district court properly affirmed the bankruptcy court's grant of summary judgment on the Trustee's state-law constructive fraudulent transfer claim.

The district court also concluded that the Trustee adduced sufficient evidence to demonstrate actual fraudulent intent by BIA. Our conclusion that the transfers to EBIA were constructively fraudulent under Washington law is a sufficient basis on which to affirm the judgment. *See Thompson v. Hanson*, 219 P.3d 659, 664 (Wash. 2009). Hence, we need not reach the question of whether the transfers were actually fraudulent.

B

In addition to addressing the Trustee's fraudulent conveyance claims, the bankruptcy court granted summary judgment on the Trustee's claim that EBIA was a successor corporation of BIA, and therefore liable for the latter's debts. We agree that EBIA is BIA's successor.

The rule in Washington is that "a corporation purchasing the assets of another corporation does not become liable for the debts and liabilities of the selling corporation." *Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 209 P.3d 863, 868 (Wash. 2009). An exception is made, however, when "the purchaser is a mere continuation of the seller." *Id.* (internal quotation marks omitted). Several factors dictate whether a business is a "mere continuation" of its predecessor, including "a common identity between the officers, directors, and stockholders of the selling and purchasing companies, and the sufficiency of the consideration running to the seller corporation in light of the assets being sold." *Id.* The nub of the inquiry is whether "the purchaser represents merely a 'new hat' for the seller." *Cashar v. Redford*, 624 P.2d 194, 196 (Wash. Ct. App. 1981) (internal quotation marks omitted).

EBIA marshals a variety of facts in an attempt to prove that the two companies are authentically distinct entities. For instance, EBIA notes that none of BIA's seven shareholders became EBIA shareholders. EBIA also adopted a radically different business image, including a "completely different name" and a new logo and website Finally, EBIA remarks that its business model represents a sea change from BIA's, because BIA focused exclusively on 412(i) retirement plans, while EBIA traffics in a broader range of defined-benefit retirement plans.

EBIA is indulging in what Freud called the narcissism of minor differences.[12] EBIA's statement that there were no common shareholders between the two entities is technically true but deeply misleading.

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[12] SIGMUND FREUD, ON SEXUALITY 272 (Penguin ed. 1991).

Paleveda was the sole owner of EBIA and the CEO of BIA prior to EBIA's incorporation; his wife, Marjorie Ewing, owned eighty percent of BIA. Because a "common identity of the officers, directors, and stockholders" is the "crucial factor" in the "mere continuation" judgment, *Cashar*, 624 P.2d at 196, the fact that the same married couple owned and operated both BIA and EBIA is virtually dispositive. In any case, a variety of other factors militate in favor of a finding of successor liability. The core employees remained the same, there was no consideration paid for BIA's transfer of assets, and the essential business—marketing and selling defined-benefit plans funded by insurance policies—remained the same. *Cf. Cambridge Townhomes*, 209 P.3d at 869.

Weighed against these fundamental commonalities, minor divergences like the company names, logos, and websites are immaterial. The evidence shows that EBIA was nothing more than a "new hat" for Paleveda and Ewing. The bankruptcy court correctly granted summary judgment to the Trustee on the issue of successor liability.

VI

Fraudulent conveyance claims are "quintessentially suits at common law" designed to "augment the bankruptcy estate." *Granfinanciera*, 492 U.S. at 56. Thus, Article III bars bankruptcy courts from entering final judgments in such actions brought by a noncreditor absent the parties' consent. But here EBIA consented to the bankruptcy court's jurisdiction, rendering that court's entry of summary judgment in favor of the Trustee constitutionally sound. That judgment was also correct.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re:
BELLINGHAM INSURANCE AGENCY, INC.,
Debtor.

PETER ARKISON, TRUSTEE, solely in his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency, Inc.,
Plaintiff/Appellee,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY, A.R.I.S., NICHOLAS PALAVEDA, MARJORIE EWING, PETER PEARCE and JANE DOE PEARCE,
Defendants/Appellants.

Case No. 10-929 MJP

ORDER

This matter comes before the Court on Appellant Executive Benefits Agency's appeal of the Bankruptcy Court's entry of judgment against it and five other defendants in an adversary proceeding. (Dkt. No. 7.) Having reviewed the motion, the response (Dkt. No. 12), the reply (Dkt. No. 13), and all supporting papers, the Court DISMISSES the appeal.

Background

Appellee Peter Arkison, the Trustee for the debtor, Bellingham Insurance Agency, Inc. ("BIA"), filed an adversary complaint against Appellant Executive Benefit Insurance Agency ("EBIA"), A.R.I.S. Inc. ("ARIS"), Nicholas Paleveda, Marjorie Ewing, Peter Pearce, and Jane Doe Pearce (collectively "Defendants") on May 31, 2008. (ER 1-24.) The complaint accused Defendants of engaging in preferential and fraudulent transfers from the debtor, BIA. The Trustee argued that Defendants sought to avoid paying BIA's debts owed to certain creditors by closing down BIA and opening up a new company, EBIA, that was a mere continuation of BIA that received the accounts due to BIA and used the same office space as BIA. The Trustee filed a motion for summary judgment, which the Bankruptcy Court granted.

Prior to its closure, BIA sold and marketed 412(i) insurance plans. It worked closely with its affiliated company, ARIS, which provided plan design and retained the sole responsibility for maintaining the insurance plans BIA sold. (ER 38-39, 51-53.) ARIS and BIA were closely related companies. Nicholas Paleveda was the sole director and CEO of BIA from its inception through February 14, 2006. (ER 145.) His wife, Majorie Ewing, owns eighty percent of the shares of BIA, and became the sole director of BIA after Paleveda resigned on February 14, 2006. (ER 45, 145.) Ewing also runs and owns ARIS. ARIS and BIA shared office space until January 31, 2006, and testimony of the Trustee's CPA shows that ARIS and BIA shared finances. (ER 65; ER 132; Dkt. No. 14-2 at 8-11.) Peter Pearce, one of the defendants in the adversary proceeding, is also a shareholder of BIA, as well as the licensed Washington insurance agent who was employed by BIA. (Id.; ER 281-83.) He worked for both BIA and ARIS and received a single paycheck for work done for both companies. (ER 118.)

On January 31, 2006, BIA ceased operations and the following day Nicholas Paleveda commenced operations of a new company, Executive Benefits Insurance Agency ("EBIA") in the same office building. He remained CEO of BIA until February 14, 2006, when his wife, Ewing, took over. (ER 145.) EBIA had a very similar website to BIA's website. EBIA used the same phone number as BIA and it worked with ARIS in much the same manner BIA worked with ARIS. By the time EBIA was formed, BIA was insolvent. (ER 137.)

Prior to BIA closing, BIA, ARIS, Ewing, Paleveda, and Pearce arbitrated a dispute involving three individuals who sought money from them (collectively the "Arbitration Victors"). The proceedings ultimately resulted in a judgment against BIA, ARIS, Ewing, Paleveda, and Pearce in the amount of $104,212.42. (ER 256-57.) On November 21, 2005, the arbitrator issued a temporary award to the Arbitration Victors, and on February 3, 2006, he issued a final reasoned award. (ER 401, 404, 198.) Three days prior to the final reasoned award, BIA ceased to operate and the next day EBIA picked up where BIA left off.

In an effort to enforce their judgment, the Arbitration Victors issued writs of garnishment against several insurance companies with which BIA did business and which were believed to owe BIA money. (See ER 260-64.) One of these companies was American National Insurance Company ("ANICO"). In response to the writ of garnishment, ANICO stated that "our records indicate that Bellingham Insurance Agency, Inc. has an absolute assignment set up with Peter Pearce," and refused to satisfy the writ. (ER 265.) The Trustee argued that this inquiry revealed that the Defendants used Pearce to try to hide BIA's assets from the creditors. Pearce served as the agent of record for BIA, and he took the commissions assigned to him and deposited them into an ARIS account. (ER 130, 293-96.) Common accounting software shows that ARIS and EBIA shared the deposits made by Pearce after the arbitration award was issued in February 2006. (ER 456-58.) These transfers are alleged to have been fraudulent and a means to hide assets of BIA after EBIA was formed to replace it.

On June 2, 2006, the Arbitration Victors filed suit in Whatcom County Superior Court to recover the transfers made by the Defendants. (ER 417-24.) The court granted a TRO and a writ of attachment on June 6, 2006. (ER 447-48.) BIA filed for bankruptcy on June 1, 2006. The Trustee then filed an adversary proceeding against Defendants and filed for summary judgment on March 17, 2010. (Dkt. No. 8.) In response to the motion, Defendants filed only one declaration from Nicholas Paleveda. This is the sole evidence on which the Defendants relied to oppose summary judgment. On April 14, 2010, the Bankruptcy Court granted the motion in favor of the Trustee. (ER 449-54.) The Court ruled that Appellant had engaged in fraudulent transfers and that EBIA was a mere successor to BIA.

Analysis

A. Deficiencies in Appeal Record

Appellant failed to file any excerpts of record, as required by Local Bankruptcy Rule 8006-1. It is a simple proposition that without a record to review, a court cannot determine whether there is merit to an appeal. The Court is surprised by Appellant's failure to abide by this basic rule. Appellee requests the Court sanction Appellant for this failure, including striking the brief and dismissing the appeal. However, given that Appellee did file excerpts of record, the Court has sufficient basis to review the appeal, which lacks merit. The Court does not strike the opening brief or dismiss the appeal for Appellant's failure to abide by Rule 8006-1.

B. Standard

The Court reviews the Bankruptcy Court's order de novo. In re Caneva, 550 F.3d 755, 760 (9th Cir. 2008). Summary judgment is appropriate where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A material fact is one that, "under the governing substantive law . . . could affect the outcome of the case." Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Savings Ass'n, 322 F.3d 1039, 1046 (9th Cir. 2003). When reviewing the record, all "'inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.'" Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587, (1986) (quoting United States v. Diebold. Inc., 369 U.S. 654, 655 (1962)). However, self-serving declarations that lack detailed facts or supporting evidence are insufficient to raise a genuine issue of material fact. See Sec. Exchange Comm'n v. Platforms Wireless Int'l Corp., 617 F.3d 1072, 1089 (9th Cir. 2010).

C. Avoidance Claim

As was the case in the Bankruptcy Court, Appellant has failed to raise any dispute of fact that might preclude entry of judgment on the Trustee's avoidance claim. There is no basis to reverse the Bankruptcy Court's decision on this issue.

A Trustee may seek to avoid transfers made within one year of the date of the bankruptcy filing where the insolvent Debtor received less than reasonably equivalent value in the exchange. 11 U.S.C. § 548(a)(2). "Value is defined for purposes of section 548 of the Code as 'property, or satisfaction or securing of a present or antecedent debt of the debtor. . . ." In re United Energy Corp., 944 F.2d 589, 595 (9th Cir. 1991) (quoting 11 U.S.C. § 548(d)(2)(A)). The Second Circuit has noted that the term "reasonably equivalent value" means more than the "consideration" necessary to support a contract. See Rubin v. Manufacturers Hanover Trust Co., 661 F.2d 979, 991 (2d Cir. 1981). "Reasonable equivalence" requires a comparison of the value of what went out with the value of what was received. In re Grabill Corp., 121 B.R. 983, 994 (Bankr. N.D. Ill. 1990). The intent of the person causing the transfer is irrelevant if the Trustee can demonstrate the Debtor received less than reasonably equivalent value. Id.

The Trustee has satisfied all elements of § 548(a)(2). First, the transfers of items of value from BIA to EBIA were made within one year of the bankruptcy action. The transfers occurred in February 2006 and the bankruptcy was filed in June 2006. Second, BIA was insolvent on the date of the transfers. (ER 137.) Third, the evidence shows that commissions owed to BIA were routed through Peter Pearce, into ARIS's joint account that was shared with EBIA. The accounting spreadsheet for ARIS showed that after BIA ceased to operate, Pearce deposited the BIA commissions into the ARIS account, which was shared with EBIA. (See Dkt. No. 13-1 at 5.) ARIS is entirely owned by Marjorie Ewing, who is not only the wife of Paleveda, but also became the CEO of BIA after EBIA was created. Indeed, there was little distinction between ARIS and BIA, with employees splitting time between the two companies and yet receiving one pay check for work done for both companies. (See ER 109.) Appellant attempts to controvert these facts with a self-serving statement from Defendant Paleveda that he did "not know whether Peter Pearce deposited any of his commissions into the ARIS accounts" and that "[i]f this is true, it is a clerical error." (Dkt. No. 7 at 9.) This conjecture does not controvert the accounting records that show the transactions moved BIA's accounts receivable to EBIA at the expense of BIA's creditors. The Bankruptcy Court did not err in making this determination. The Court DISMISSES the appeal of this claim.

D. Fraudulent Transfer

Appellant has failed to show any error in the Bankruptcy Court's grant of summary judgment on the Trustee's fraudulent transfer claim.

State law provides a cause of action similar to 11 U.S.C. § 548(a)(2), permitting the avoidance of fraudulent transfers. RCW 19.40.041 states that a transfer or obligation incurred by a debtor is fraudulent if:

> the debtor made the transfer or incurred the obligation:

(1) With actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) Without receiving reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

RCW 19.40.041(a). The Court may consult eleven factors to determine whether there is actual intent to hinder, delay, or defraud any creditor of the debtor. RCW 19.40.041(b). The creditor may obtain avoidance of fraudulent transfers to the extent necessary to satisfy the creditor's claim. RCW 19.40.071(a).

As the Trustee correctly points out, a finding of avoidance under § 548 of the Bankruptcy Code supports a finding under RCW 19.40.041. As explained above, the transfers here were made without the giving of reasonably equivalent value at a time when BIA was insolvent. Thus the Trustee satisfied the elements of RCW 19.40.041(a)(2), showing the transfers were fraudulent. In addition, the Trustee has shown that seven of the eleven factors in RCW 19.40.041(b) favor a finding of actual intent to hinder the creditor's recovery of money owed. (Dkt. No. 12 at 24.) First, the transfer was made through an insider, Peter Pearce, to another insider ARIS, and ultimately to EBIA, yet another company closely connected to BIA's ownership. RCW 19.40.041(b)(1). Second, BIA retained constructive control of the property by using Pearce to move the money to ARIS and then to EBIA. RCW 19.40.041(b)(2). ARIS and EBIA/BIA were really mutually controlled by the Defendants. Third, the transfers were not disclosed to the creditors, which is evidence of intent to conceal. RCW 19.40.041(b)(3). Fourth, at the time of the transfers, BIA had been sued and owed a substantial judgment to the Arbitration Victors. RCW 19.40.041(b)(4). Fifth, the transfers involved a large amount of the debtor's assets—its accounts receivable. RCW 19.40.041(b)(5). Sixth, the debtor was insolvent at the time the transfer was made. RCW 19.40.041(b)(9). Seventh, the transfer happened shortly after a large judgment was entered against the Debtor on February 3, 2006. RCW 19.40.041 (b)(l0). Together these facts weigh in favor of a finding of a fraudulent transfer under RCW 19.40.041(a)(1).

Appellant has done nothing to point out where in the record contradictory facts exist. It attempts to argue that EBIA received nothing from BIA and that it was an entirely different business. This is supported only by Defendant Paleveda's self-serving declaration, which, as explained above, fails to raise a genuine issue of material fact. The Court DISMISSES the appeal of this claim.

E. Mere Continuation

Appellant spends much of its briefing on the question of whether EBIA is a "mere continuation" of BIA. There was no error in the Bankruptcy Court's conclusion on this matter.

When a company sells its assets to another corporation, the purchasing corporation normally does not become liable for the seller's debts. Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp., 135 Wn.2d 894, 901 (1998). If the buying corporation is a "mere continuation" of the seller or if the transfer of assets is for a fraudulent purpose to escape liability, then liability may be imposed on the new corporation. Id.

There is substantial evidence supporting that Bankruptcy Court's conclusion that EBIA is a mere continuation of BIA. First, Nicholas Paleveda is the sole owner of EBIA and immediately prior to EBIA's creation, he was the CEO of BIA. (ER 463.) Second, EBIA was formed the day after BIA ceased operations. Third, Paleveda replaced himself at BIA with his wife, Ewing. Fourth, EBIA contains the same key employees as BIA did: Pearce, Ewing, and Paleveda. (ER 429.) Fifth, EBIA took over the same office space and telephone line as BIA, while its website is nearly identical to BIA's. (ER 430.) Sixth, EBIA and ARIS shared the same accounting as did ARIS and BIA. Seventh, EBIA obtained the accounts receivable for BIA on several outstanding commissions. Eighth, several employees testified that the companies were virtually the same. One employee, John Bremer, stated that the company stayed the same after it changed name to EBIA. (ER 33-34.) Peter Pearce also testified that the same employees worked for EBIA as BIA. (ER 118.)

These facts support the finding that EBIA was a mere continuation of BIA.

Appellant argues that EBIA did not open a bank account until May, 2006 and that no commissions were received until May 2006. This contention is made only by Paleveda in his self-serving declaration. The weight of the evidence shows this not to be the case. For example, Pearce testified that he always assigns all of the commissions to BIA and that he did not take the commissions for himself. (ER 428.) Those commissions were then deposited by Pearce into ARIS's joint account, shared with EBIA. The accounting spreadsheet shows that EBIA was receiving commissions funneled from Pearce to ARIS well before May, 2006. Even if the Court assumes Paleveda is correct that EBIA did not earn any commissions until May 2006, then it only reinforces the fact that the money deposited by Pearce into the ARIS/EBIA account was derived from commissions that were not owed to EBIA. This fails to aid Appellant's position. Appellant fails to raise a plausible basis for reversal on this issue. The Court DISMISSES the appeal.

Conclusion

Appellant has done nothing to show any defect in the Bankruptcy Court's grant of summary judgment. Procedurally, Appellant has done everything to hinder the Court in assessing the merits of the appeal. On the merits, Appellant has failed to show any dispute of material fact in the record that could possibly support the reversal of the Bankruptcy Court's order. The Court DISMISSES the appeal and AFFIRMS the Bankruptcy Court.

The clerk is ordered to provide copies of this order to all counsel.

Dated this 21st day of January, 2011.

/s/ Marsha J. Pechman
Marsha J. Pechman
United States District
Judge

APPENDIX C

Entered On Docket May 27, 2010

UNITED STATES BANKRUPTCY COURT FOR
THE WESTERN DISTRICT OF WASHINGTON

IN RE:
BELLINGHAM INSURANCE AGENCY, INC.,
DEBTOR.

PETER ARKISON, TRUSTEE, solely in his capacity
as Chapter 7 Trustee of the estate
of Bellingham Insurance Agency, Inc.,
Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY,
ET AL.,
Defendants.

PETER ARKISON, TRUSTEE, solely in his capacity
as Chapter 7 Trustee of the estate
of Bellingham Insurance Agency, Inc.,
Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY,
ET AL.,
Defendant.

Bankruptcy No. 06-11721

Adversary No. 08-1132

JUDGMENT

Judgment Debtor:	Executive Benefits Insurance Agency, dba Executive Benefits Design Group, Inc.
Judgment Creditor:	Peter Arkison, Chapter 7 Trustee for the Bankruptcy Estate of Bellingham Insurance Agency, Inc.
Attorneys for Plaintiff:	Denice E. Moewes Wood & Jones, P.S. 303 N. 67th Street Seattle WA 98103-5209
Principal Judgment Amount	$373,291.28
Filing Fee	$ 250.00
Interest from date of complaint to May 26, 2010 at 2.14%	$ 15,933.08
TOTAL JUDGMENT AMOUNT	$389,474.36

THIS MATTER having been commenced on May 31, 2008 by the Chapter 7 Trustee/Plaintiff; the Plaintiff filed a Motion for Summary Judgment which was granted. Based upon the entry of the Order Granting Summary Judgment; it is hereby:

ORDERED ADJUDGED AND DECREED that Peter Arkison, the Chapter 7 Trustee for the Bankruptcy estate of Bellingham Insurance Agency, Inc., is hereby awarded judgment against Defendant Executive Benefits Insurance Agency dba Executive Benefits Design Group in the amount of $389,474.36.

The judgment shall bear interest at the rate of .38% per annum from the date of the entry of this judgment forward, until paid in full; and it is further

ORDERED ADJUDGED AND DECREED that the Defendant Executive Benefits Insurance Agency dba Executive Benefits Design Group, Inc., is a mere successor to the debtor and therefore remains liable for the allowed debts of the debtor, however, the Trustee shall credit any payments received by the Trustee on this judgment against the liability of Executive Benefits Insurance Agency dba Executive Benefits Design Group, Inc. for the allowed debts of the debtor.

DATED this _____ day of May, 2010.

/s/ Thomas T. Glover
Thomas T. Glover
United States Bankruptcy Judge
(Dated as of "Entered on Docket" date above)

Presented by:

WOOD & JONES, P.S.

/s/ Denice E. Moewes
Denice E. Moewes, WSB #19464
Attorney for Plaintiff Peter Arkison
Chapter 7 Trustee

APPENDIX D

Entered On Docket May 27, 2010

UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF WASHINGTON

In Re:
BELLINGHAM INSURANCE AGENCY, INC.,
Debtor.

Bankruptcy No. 06-11721

PETER ARKISON, TRUSTEE, solely in his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency,
Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY, Et Al.,
Defendants.

Adversary No. 08-1132

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S COMPLAINT TO RECOVER FRAUDULENT TRANSFERS SOLELY AS TO DEFENDANT EXECUTIVE BENEFITS INSURANCE AGENCY AND TO IMPOSE SUCCESSOR LIABILITY FOR ALLOWED DEBT OF DEBTOR

THIS MATTER came before the Court on April 14, 2010 on the Trustee's Motion for Summary Judgment on Plaintiff's Complaint to Recover Fraudulent Transfers Solely as to Defendant Executive Benefits Insurance ("Plaintiff's SJ Motion"); the Court finding that the Plaintiff's SJ Motion, and all supporting documents was timely given and was in compliance with the Bankruptcy Code and Rules and Local Rules, the Court having considered the Plaintiff's SJ Motion and supporting declarations and the Objection thereto filed by Defendant Executive Benefits Insurance Agency and the supporting declaration, and having heard the oral argument of the parties, and noting that Plaintiff moved for summary judgment under two separate causes of action - - 1) that certain transfers were fraudulent in nature and 2) that Executive Benefits Insurance Agency, dba Executive Benefits Design Group, Inc. is a mere successor of the debtor, and deeming itself fully informed in the matter, now, therefore, it is hereby

ORDERED ADJUDGED AND DECREED that the Plaintiff's SJ Motion is GRANTED on both causes of action on which the Trustee moved for summary judgment.

Dated this ___ day of May, 2010.

/s/ Thomas T. Glover
Thomas T. Glover
United States Bankruptcy Judge
(Dated as of "Entered on Docket" date above)

Presented by:

Wood & Jones, P.S.
/s/ Denice E. Moewes
Denice E. Moewes, WSB #19464
Attorney for Chapter 7 Trustee
Peter Arkison

APPENDIX E

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Filed November 4, 2011

No. 11-35162

In the Matter of: BELLINGHAM INSURANCE AGENCY, INC.,
Debtor,

EXECUTIVE BENEFITS INSURANCE AGENCY
Appellant,

v.

PETER H. ARKISON, TRUSTEE, solely his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency, Inc.,
Appellee.

D.C. No. 2:10-cv-00929-MJP
Western District of Washington, Seattle

ORDER

Before: KOZINSKI, Chief Judge, PAEZ, Circuit Judge, and COLLINS, District Judge.*

The court invites supplemental briefs by any amicus curiae addressing the following questions: Does *Stern v. Marshall*, 131 S. Ct. 2594 (2011), prohibit bankruptcy courts from entering a final, binding judgment on an action to avoid a fraudulent conveyance? If so, may the bankruptcy court hear the proceeding and submit a report and recommendation to a federal district court in lieu of entering a final judgment?

Any briefs responding to this order shall be filed no later than thirty days from the filed date of this order. All briefs shall comply with the page or type-volume limitations specified in Federal Rules of Appellate Procedure 29(d) and 32(a)(7). Any person or entity wishing to file a brief as an amicus curiae in response to this order is granted leave to do so pursuant to Federal Rule of Appellate Procedure 29(a).

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE BELLINGHAM INSURANCE AGENCY, INC.,
Debtor,

PETER ARKISON, in his capacity as Chapter 7 trustee,
Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY, INC., et al.,
Defendants.

CASE NO. C10-171RAJ

BKRPTCY NO. 06-11721

ADVERSARY NO. 08-1132TTG

ORDER

This matter comes before the court on a motion to withdraw the reference. Dkt. # 1. The motion was created when the Bankruptcy Court entered an order on December 30, 2009, directing that trial in this matter be referred to a United States District Court Judge.

In a March 26, 2010 order, this court directed the parties to file a joint status report on the need to try this matter no later than June 15, 2010. The court issued that order because no party was certain that trial would be necessary.

No party complied with the June 15 deadline. On June 22, the court issued an order to show cause why this action should not be dismissed. The sole response to that order came on June 30 from Peter Arkison, the trustee of the bankruptcy estate. He stated that the Bankruptcy Court had entered summary judgment against the sole Defendant who had sought to withdraw the reference. No other party expressed an interest in trying this matter in this court.

Finding no party in favor of withdrawing the reference, the court DENIES the motion to withdraw the reference (Dkt. # 1) and directs the clerk to DISMISS this action.

DATED this 2nd day of July, 2010.

/s/ Richard A. Jones

The Honorable Richard A. Jones
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE BELLINGHAM INSURANCE AGENCY, INC.,
Debtor,

BKRPTCY NO. 06-11721

PETER ARKISON, in his capacity as Chapter 7 trustee,
Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY, INC., et al.,
Defendants.

CASE NO. C10-171RAJ

ADVERSARY NO. 08-1132TTG

ORDER

This matter comes before the court on a motion to withdraw the reference. Dkt. # 1. So far as it appears, the motion was created when the Bankruptcy Court entered an order on December 30, 2009, directing that trial in this matter be referred to a United States District Court Judge.

The court requested a joint status report from the parties. That report indicates that this case is far from ready for trial, and indeed may never go to trial. Among other things, the parties wish to have additional time to complete discovery, to file dispositive motions in the bankruptcy court, and to attend a settlement conference before a bankruptcy judge. This process will take at least three months, in the parties' view.

The court accordingly directs the clerk to RE-NOTE the motion to withdraw the reference (Dkt. # 1) for June 15, 2010. On that date, the parties shall file another joint status report indicating what progress they have made in readying this case for trial, including proposing a trial date if appropriate. To the extent that events in the Bankruptcy Court obviate the need for trial, or otherwise impact the motion to withdraw the reference, the parties shall inform the court as soon as possible thereafter.

DATED this 26th day of March, 2010.

/s/ Richard A. Jones
The Honorable Richard A. Jones
United States District Judge

APPENDIX H

28 U.S.C. 157

(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.

(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;

(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.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(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.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

APPENDIX I

28 U.S.C. 158

(a) The district courts of the United States shall have jurisdiction to hear appeals

(1) from final judgments, orders, and decrees;

(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

(3) with leave of the court, from other interlocutory orders and decrees; and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council in accordance with paragraph (3), to hear and determine, with the consent of all the parties, appeals under subsection (a) unless the judicial council finds that—

(A) there are insufficient judicial resources available in the circuit; or

(B) establishment of such service would result in undue delay or increased cost to parties in cases under title 11. Not later than 90 days after making the finding, the judicial council shall submit to the Judicial Conference of the United States a report containing the factual basis of such finding.

(2)(A) A judicial council may reconsider, at any time, the finding described in paragraph (1).

(B) On the request of a majority of the district judges in a circuit for which a bankruptcy appellate panel service is established under paragraph (1), made after the expiration of the 1-year period beginning on the date such service is established, the judicial council of the circuit shall determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(C) On its own motion, after the expiration of the 3-year period beginning on the date a bankruptcy appellate panel service is established under paragraph (1), the judicial council of the circuit may determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(D) If the judicial council finds that either of such circumstances exists, the judicial council may provide for the completion of the appeals then pending before such service and the orderly termination of such service.

(3) Bankruptcy judges appointed under paragraph (1) shall be appointed and may be reappointed under such paragraph.

(4) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate pan-

el comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(5) An appeal to be heard under this subsection shall be heard by a panel of 3 members of the bankruptcy appellate panel service, except that a member of such service may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

(6) Appeals may not be heard under this subsection by a panel of the bankruptcy appellate panel service unless the district judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district.

(c)(1) Subject to subsections (b) and (d)(2), each appeal under subsection (a) shall be heard by a 3-judge panel of the bankruptcy appellate panel service established under subsection (b)(1) unless—

(A) the appellant elects at the time of filing the appeal; or

(B) any other party elects, not later than 30 days after service of notice of the appeal; to have such appeal heard by the district court.

(2) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d)(1) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

(2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that—

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken; and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel—

(i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or

(ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A); then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A).

(C) The parties may supplement the certification with a short statement of the basis for the certification.

(D) An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal is pending, issues a stay of such proceeding pending the appeal.

(E) Any request under subparagraph (B) for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.

APPENDIX J

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In Re:
BELLINGHAM INSURANCE AGENCY, INC.,
Debtor.

Bankruptcy No. 06-11721

PETER ARKISON, TRUSTEE, solely in his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency,
Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY, Et Al.,
Defendants.

Case No. C10-171RAJ

JOINT STATUS REPORT

Peter Arkison, the Chapter 7 Trustee in the above-referenced case and plaintiff in the above-captioned adversary proceeding, through his undersigned counsel, Marjorie Ewing and A.R.I.S., Inc., through their undersigned counsel, Peter Pearce, through his undersigned counsel and E.B.I.A., through its undersigned counsel submits this Joint Status Report pursuant to this Court's Minute Order dated February 25, 2010. Mr. Palaveda, representing himself, was advised via email as to the status conference and did not opt to attend, so this report does not contain any information regarding the position of Mr. Palaveda.

STATUS REPORT

1). <u>Summary of the Pleadings in Bankruptcy Court</u>

The plaintiff filed a motion for summary judgment against ARIS which was denied. The Judge specifically told the parties what other information he needed before he could grant either party summary judgment. It is probable that one party will file another summary judgment motion before the Bankruptcy Court prior to trial in this matter.

The Trustee has prepared a motion for summary judgment against E.B.I.A. which will be noted on the Bankruptcy Judge's April 14, 2010 calendar.

The Trustee has prepared a motion for summary judgment against Peter Pearce which he intended to note for hearing on the April 14, 2010 calendar. However, it appears that Mr. Pearce may be judgment proof and he is currently unemployed. Accordingly, Pearce's counsel is preparing a financial declaration for the Trustee evidencing the fact he is judgment proof. If, after reviewing the declaration and supporting documentation, the Trustee believes Mr. Pearce is judgment proof he will dismiss Mr. Pearce from this adversary proceeding.

No summary judgment has been filed against Mr. Palaveda or Ms. Ewing as of yet but the Trustee anticipates doing so in the near future.

2). <u>Statement of what Pretrial Proceedings are Necessary in District Court</u>

It appears that discovery is substantially completed. The parties would probably need two more months in order to complete any discovery.

The parties believe it would be beneficial to attend a settlement conference before one of the Bankruptcy Judges who is willing to serve as the settlement judge. The Bankruptcy Judges are very busy due to the economy. According to one of the Bankruptcy Judge's secretary, settlement conferences are being set about three months out. Thus, the parties would like to have that much time to convene a settlement conference. If the issues still remain the parties would like a schedule as follows:

Discovery Deadline - Two months after the conclusion of the settlement conference.

Dispositive Motion Deadline - Three months after the conclusion of the Discovery Deadline.

Preliminary Pretrial Statements - One month after the Dispositive Motion Deadline.

Pretrail Statement - One month after Dispositive Motion Deadline.

Trial Date - As set by the Court.

Dated this 12th day of March, 2010.

WOOD & JONES, P.S.

/s/ Denice E. Moewes
Denice E. Moewes, WSB #19464
Attorney for Chapter 7 Trustee
Peter Arkison

SHAFER & BAILEY,

See attached signature
Donald Bailey, WSBA#12289
Attorney for A.R.I.S.

JEFFREY TEICHERT

**
Jeffrey Teichert, WSBA#29826
Attorney for E.B.I.A.

JAMES STURDEVANT

James Sturdevant per email authority
James Sturdevant, WSBA#8016
Attorney for Peter Pearce

**
Mr Teichert has not responded at all to the proposed Status Report.

APPENDIX K

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON AT
SEATTLE

In Re:
BELLINGHAM INSURANCE AGENCY, INC.,
Debtor.

Bankruptcy No. 06-11721

PETER ARKISON, TRUSTEE, solely in his capacity
as Chapter 7 Trustee of the
estate of Bellingham Insurance Agency, Inc.,
Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY,
and A.R.I.S.

and

NICHOLAS PALAVEDA and
MARJORIE EWING,

and

PETER PEARCE and JANE DOE
PEARCE,

Defendants.

Adversary No. 08-1132

MEMORANDUM IN SUPPORT OF MOTION TO
VACATE TRIAL DATE

BACKGROUND

Executive Benefits Design Group ("EBDG") is a defendant in the case of Hess v. Executive Benefits Insurance Agency, originally filed in the Superior Court for the State of Washington for Whatcom County as Case No. 06-2-00622-1. Said lawsuit alleged fraudulent conveyances and successor liability to the defendants, and was filed in an attempt to pierce the corporate veil to collect from EBDG and others an arbitration award obtained against the debtor in Whatcom County Case No. 03-2-02515-8 in the amount of $104,214.42. Because any fraudulently conveyed property of the debtor was properly an asset of the bankruptcy estate, counsel for EBDG and the other defendants filed notice of removal of the fraudulent conveyance action to this court on June 30, 2006. On August 2, 2008, EBDG timely filed an answer and a jury demand.[1] On November 20, 2009, this case was set for trial on January 4, 2010.

[1] These documents appear at Docket No. 169 and 171 in Case No. 06-11721-TTG, but undersigned counsel appears not to have utilized the Adversary No. 08-1132, when submitting these documents. This is so because, at that time, said counsel was not accustomed to using the ECF filing system in bankruptcy cases. This possible error was not prejudicial to any party in the case. The Answer and Jury Demand were delivered to the Trustee and all other relevant parties via the ECF system at the time. The jury demand was also discussed with this Court and all relevant parties at the pretrial conference. The Court stated at that time that when the case was prepared for trial it would be referred to the U.S. District Court for the Western District of Washington for a jury trial.

DISCUSSION

The United States Supreme Court is unequivocal in holding that preferential transfer actions are actions at law and, thus, the parties to said actions are entitled to jury trials under the Seventh Amendment to the United States Constitution. Granfinanciera v. Nordberg, 492 U.S. 33, 43-49 (1989).

> The question presented is whether a person who has not submitted a claim against a bankruptcy estate has a right to a jury trial when sued by the trustee in bankruptcy to recover an allegedly fraudulent monetary transfer. We hold that the Seventh Amendment entitles such a person to a trial by jury, notwithstanding Congress' designation of fraudulent conveyance actions as "core proceedings" in 28 U.S.C. § 157(b)(2)(H) (1982 ed. Supp. V).

Id. at 37. The United States Court of Appeals for the Ninth Circuit further clarified that, while a bankruptcy court lacks jurisdiction to try a preferential transfer case where there is a jury demand, it retains jurisdiction over pretrial proceedings. Sigma Micro Corp. v. Healthcentral.com, 504 F.3d 775, 786-788 (9th Cir. 2007) ("A valid right to a Seventh Amendment jury trial in the district court does not mean the bankruptcy court must instantly give up jurisdiction and that the action must be transferred to the district court. Instead, we hold, the bankruptcy court may retain jurisdiction over the action for pre-trial matters"). When the pretrial phase of this matter is complete, this Court's jurisdiction over the case is at an end. Thus, the trial date should be stricken and the case transferred to the U.S. District Court for the Western District of Washington for a jury trial. This was discussed in the Judge's Chambers at the pre-trial phase of these proceedings.

DATED this 21st day of December 2009.

TEICHERT LAW OFFICE, PC
/s/ Jeffrey B. Teichert
Jeffrey B. Teichert, WSBA #29826
Attorney for Executive Benefits Insurance Agency

APPENDIX L

JUDGE THOMAS GLOVER
CHAPTER 7

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In Re:
BELLINGHAM INSURANCE AGENCY,
Debtor.

PETER ARKISON, TRUSTEE, solely in
his capacity as Chapter 7 Trustee of the estate of Bellingham Insurance Agency,
Plaintiff,

v.

EXECUTIVE BENEFITS INSURANCE AGENCY,
A Washington Corporation,

and

A.R.I.S. Inc., A Washington Corporation,

and

NICHOLAS PALAVEDA and MARJORIE EWING,
husband and wife and the marital community composed thereof,

and

PETER PEARCE and JANE DOE PEARCE husband & wife, and the marital community composed thereof,
Defendants.

Bankruptcy No. 06-11721

ANSWER OF DEFENDANT EXECUTIVE BENEFITS INSURANCE AGENCY

ANSWER

Defendant, Executive Benefits Insurance Agency ("Defendant"), by and through its attorney, Jeffrey B. Teichert of the law firm of Teichert Law Office, PC, and answer the Complaint in this matter as follows:

* * *

JURY DEMAND

26.1 Defendant elects to have the above-entitled cause of action tried before a jury on all issues upon which it is entitled to a jury. Defendant does not consent to have said jury trial in this Court or any other bankruptcy panel.

DATED the 1st day of August 2008.

TEICHERT LAW OFFICE, PC
/s/ Jeffry B. Teichert
Jeffrey B. Teichert, WSBA #29826
Attorney for Defendant