No. 12-1200

IN THE

Supreme Court of the United States

EXECUTIVE BENEFITS INSURANCE AGENCY,

Petitioner,

v.

PETER H. ARKISON, CHAPTER 7 TRUSTEE OF THE ESTATE OF BELLINGHAM INSURANCE AGENCY, INC.,

Respondent.

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

BRIEF OF CERTAIN *TOUSA* DEFENDANTS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

This Court held in *Stern v. Marshall*, 131 S. Ct. 2594 (2011), that non-Article III bankruptcy courts cannot finally adjudicate certain claims despite their designation as "core" under 28 U.S.C. § 157. The petition for a writ of certiorari presents the question whether litigants nevertheless may consent to the exercise of such authority by bankruptcy courts, and, if so, whether such consent may be implied by their conduct. *Amici* will address the following question:

Whether "implied consent" to the exercise of authority barred by *Stern* can be derived solely from the fact that the litigants did not expressly challenge the bankruptcy court's authority before *Stern* was decided.

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STATEMENT OF INTEREST OF THE *AMICI CURIAE*

The *amici curiae* are members of a group of defendants referred to as the "Transeastern Lenders" in a case currently pending before the United States District Court for the Southern District of Florida, *3V Capital Master Fund Ltd. v. Official Committee of Unsecured Creditors of TOUSA, Inc. (In re TOUSA, Inc.)*, Case No. 10-62035-CIV-Moore (the "TOUSA Litigation").[1] The TOUSA Litigation began in July 2008, when the Official Committee of Unsecured Creditors (the "Committee") of TOUSA, Inc., a bankrupt Florida homebuilder, filed an adversary proceeding against the Transeastern Lenders and two other groups of defendants on behalf of certain TOUSA, Inc. subsidiaries, alleging a variety of claims including fraudulent transfer claims under 11 U.S.C. §§ 544 and 548 and Florida and New York state law. (*See* Case No. 08-01435-JKO, ECF No. 243.) The bankruptcy court issued a final judgment in favor of the Committee against the Transeastern Lenders, but the district court "quashed" the judgment and found the Transeastern Lenders not liable. *See generally In re TOUSA, Inc.*, 422 B.R. 783 (Bankr. S.D. Fla. 2009); *In re TOUSA, Inc.*, 444 B.R. 613 (S.D. Fla. 2011). The Committee appealed to the Eleventh Circuit and the parties completed briefing

1. The parties have granted blanket consent to the filing of *amicus curiae* briefs, which is on file with the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission. The *amici curiae* are identified in the attached appendix.

on June 17, 2011, just six days before the Court issued its decision in *Stern*. Following this Court's decision in *Stern*, the Transeastern Lenders filed notices of supplemental authority before the Eleventh Circuit scheduled oral argument, and the Committee filed a letter in response. (*See* Case No. 11-11071.) Counsel for the Transeastern Lenders and the Committee argued the implications of *Stern* at oral argument before a panel of the Eleventh Circuit.

The Eleventh Circuit reviewed the bankruptcy court's decision as though it were a final judgment, affirmed the bankruptcy court judgment, and remanded the case to the district court to review the bankruptcy court's extensive remedies scheme. *See In re TOUSA, Inc.*, 680 F.3d 1298, 1316 (11th Cir. 2012). Without addressing the parties' arguments regarding *Stern* in any respect, the Eleventh Circuit stated that it was reviewing the bankruptcy court judgment "independently of the district court," and reviewing the bankruptcy court's factual findings for clear error and its equitable determinations for abuse of discretion. *Id.* at 1310; *see also id.* ("The factual findings of the bankruptcy court are not clearly erroneous unless . . . we are left with the definite and firm conviction that a mistake has been made. Neither the district court nor this Court is authorized to make independent factual findings; that is the function of the bankruptcy court.") (internal citations and quotation marks omitted). The Transeastern Lenders filed a petition for rehearing, again raising the issue of *Stern*'s applicability to the TOUSA Litigation, which the Eleventh Circuit denied without comment.

The implication of the *Stern* decision for fraudulent transfer defendants like the Transeastern Lenders,

who did not file proofs of claim against the bankruptcy estates, seems clear—such defendants have a right to Article III adjudication of the claims against them and the bankruptcy court is without authority to enter a final judgment. Accordingly, the district court decision was the final judgment in the TOUSA Litigation and the Eleventh Circuit should have reviewed that decision with deference, rather than "independently." The Transeastern Lenders agree with petitioner that the right to adjudication of a private right by an Article III court cannot be waived (*see* Pet. Br. at 25-27),[2] but submit this brief on the sole issue of whether, assuming *arguendo* that right can be waived, such a waiver may be implied from the mere fact that a litigant did not argue, prior to this Court's decision in *Stern*, that the bankruptcy court's exercise of final adjudicative authority was unconstitutional.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Ninth Circuit held below that under this Court's decision in *Stern*, bankruptcy courts do not have the authority to enter final judgments on fraudulent conveyance claims asserted against non-creditors to the

2. *See also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850-51 (1986) (stating that "Article III, § 1 safeguards the role of the Judicial Branch" and prevents "the encroachment or aggrandizement of one branch at the expense of the other" and "[t]o the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty"); *Wellness Int'l Network, Ltd. v. Sharif*, No. 12-1349, --- F.3d ----, 2013 WL 4441926, at *18 (7th Cir. Aug. 21, 2013) (holding that a litigant cannot waive an Article III objection to a bankruptcy court's entry of final judgment in a core proceeding).

bankruptcy estate. *Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.)*, 702 F.3d 553, 565 (9th Cir. 2012) ("*Bellingham*"), Pet. App. 23a. The court further held, however, that petitioner Executive Benefits Insurance Agency ("EBIA") waived its objection to the bankruptcy court's adjudication because it did not assert the objection in the bankruptcy court, *even though Stern* had not yet been decided. *Id.* at 568. According to the Ninth Circuit, EBIA should have anticipated the holding in *Stern* based on this Court's decision in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), as well as the Ninth Circuit's own decision in *Marshall v. Stern (In re Marshall)*, 600 F.3d 1037 (9th Cir. 2010). *Bellingham*, Pet. App. 32a. If this Court rejects EBIA's submission that a litigant cannot consent by implication to bankruptcy court adjudications barred by *Stern*, the Court should nevertheless hold that EBIA's conduct here did not qualify as implied consent. EBIA's conduct—an omission, actually—was simply the failure to raise a *Stern* objection before *Stern* was decided. Under this Court's own precedents, and as a matter of basic fairness and common sense, the failure to assert a right before the law recognizes it cannot be considered a knowing and intelligent waiver of that right. *Stern* gave EBIA a right—*viz.*, the right not to be subject to the bankruptcy court's final adjudicative power—that did not exist under controlling law when EBIA was litigating before the bankruptcy court. Indeed, existing judicial precedent *denied* EBIA that right, as did the express language of 28 U.S.C. § 157(b). EBIA did not impliedly consent to the bankruptcy court's exercise of unlawful authority by failing to raise an argument that contradicted existing law. The failure to assert a presently-nonexistent right is not a knowing waiver of that right.

ARGUMENT

I. Litigants in Pending Cases Can Raise Arguments that Arise Upon Changes in the Law

If the Court concludes, contrary to EBIA's view, that a party can waive the constitutional error under *Stern* of a bankruptcy court entering final judgment on a private right claim, the Court should make clear that such a waiver must be clear and unequivocal, and cannot be "implied" by the mere fact that the party did not raise a *Stern* objection even before *Stern* was decided.

The law is well-settled that "an effective waiver must . . . be one of a 'known right or privilege.'" *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 143 (1967) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); *see also Krentz v. Robertson Fire Prot. Dist.*, 228 F.3d 897, 908 & n.8 (8th Cir. 2000) (knowing and voluntary waiver standard applies in both civil and criminal contexts). As a general matter, "courts closely scrutinize waivers of constitutional rights, and 'indulge every reasonable presumption against a waiver.'" *Sambo's Rests., Inc. v. City of Ann Arbor*, 663 F.2d 686, 690 (6th Cir. 1981) (citing *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389 (1937)).

A closely related principle is that where there is an intervening change in the law, an exception to normal waiver rules "exists to protect those who, despite due diligence, fail to prophesy a reversal of established adverse precedent." *GenCorp, Inc. v. Olin Corp.*, 477 F.3d 368, 374 (6th Cir. 2007). As this Court held in *Curtis Publishing*, a party does not waive a "known right" simply by failing to assert the right before it was recognized in a

subsequent decision. 388 U.S. at 143-45; *see also Hormel v. Helvering*, 312 U.S. 552, 558-59 (1941) (exception to waiver exists in "those [cases] in which there have been judicial interpretations of existing law after decision below and pending appeal—interpretations which if applied might have materially altered the result"). The federal circuits have repeatedly reiterated this common-sense point: "Where the Supreme Court decides a relevant case while litigation is pending . . . omission of an argument based on the Supreme Court's reasoning does not amount to a waiver . . . ." *Indiana Bell Tel. Co., v. McCarty*, 362 F.3d 378, 390 (7th Cir. 2004).[3] As the Second Circuit observed,

3. *See also Ray v. UNUM Life Ins. Co. of Am.*, 314 F.3d 482, 487 (10th Cir. 2002) ("[A]n intervening change in the law permits appellate review of an issue not raised below."); *Forshey v. Principi*, 284 F.3d 1335, 1356 (Fed. Cir. 2002) ("[D]ecision of an issue not decided or raised below is permitted when there is a change in the jurisprudence of the reviewing court or the Supreme Court after consideration of the case by the lower court."); *Big Horn Cnty. Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 953 (9th Cir. 2000) (rejecting waiver theory and applying principles from intervening decision where plaintiff altered its stance once decision was issued, noting "an exception to the waiver rule exists for intervening changes in the law"); *DSC Commc'ns Corp. v. Next Level Commc'ns*, 107 F.3d 322, 326 & n.2 (5th Cir. 1997) (applying principles from case decided after oral argument, stating "[w]e are unwilling to ignore this important clarification of the law, and perpetuate incorrect law, merely because [the case] was decided after briefing and oral argument in this case"); *Holzsager v. Valley Hosp.*, 646 F.2d 792, 796 (2d Cir. 1981) ("a party cannot be deemed to have waived objections or defenses which were not known to be available at the time they could first have been made"); *Schaff v. R.W. Claxton, Inc.*, 144 F.2d 532, 533 (D.C. Cir. 1944) (finding that the "appellant did not have a fair chance to raise and press at the trial" an argument based on a decision in another case issued after the trial).

"the doctrine of waiver demands conscientiousness, not clairvoyance, from parties," and thus a party should be allowed to assert a new objection on appeal when there is a "changed legal landscape." *Hawknet, Ltd. v. Overseas Shipping Agencies*, 590 F.3d 87, 92-93 (2d Cir. 2009).

These principles reflect a basic point of fairness, *viz.*, a litigant "can hardly be faulted for failing to raise an argument before there was legitimate legal support for such an argument." *Planned Parenthood Cincinnati Region v. Taft*, 444 F.3d 502, 516 (6th Cir. 2006). But there is also an equally important practical consideration, for lawyers and courts alike: without an exception to normal waiver rules for intervening authority, "[p]arties would be forced to . . . litter their pleadings with every argument which might conceivably be adopted during the pendency of a proceeding." *Id.* Lawyers can and should be creative in their advocacy, but they—and their clients—should not be punished for keeping their creativity within the clear boundaries of existing law.

II. This Court's Decision in *Stern v. Marshall* Changed Existing Positive Law by Declaring Part of 28 U.S.C. § 157(b) Unconstitutional

According to 28 U.S.C. § 157(b)(1), bankruptcy courts have the authority to "hear and determine . . . all core proceedings" and "enter appropriate orders and judgments." 28 U.S.C. § 157(b)(1). Section 157(b)(2) provides a non-exclusive list of "core" proceedings that includes "counterclaims by the estate against persons filing claims against the estate," at issue in *Stern*, and "proceedings to determine, avoid, or recover fraudulent conveyances," at issue in *Bellingham*. 28 U.S.C.

§ 157(b)(2)(C) & (H). *Stern* effected a change in the existing positive law by declaring that—despite the language of § 157(b)—bankruptcy courts lack *constitutional* authority to issue final judgments on state law counterclaims that would not be resolved in the process of ruling on a creditor's proof of claim. *Stern*, 131 S. Ct. at 2620.

The *Stern* Court relied predominantly on *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), and *Granfinanciera*. Far from being a mere restatement of *Northern Pipeline* or *Granfinanciera*, however, "*Stern* goes further than both those cases." *Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, 462 B.R. 457, 468 (S.D.N.Y. 2011). *Northern Pipeline* held that the assignment of state-law contract claims to bankruptcy courts under the Bankruptcy Act of 1978 violated Article III of the Constitution. 458 U.S. at 87. A majority of the Court agreed that the claims at issue did not involve "public rights" that could be delegated to bankruptcy courts for resolution, but a majority was unable to agree on the confines of the public rights exception. *Id.* at 69-72. In *Granfinanciera*, the Court held that a non-creditor defending against a fraudulent transfer claim by a bankruptcy estate is entitled to a jury trial under the Seventh Amendment. 492 U.S. at 58-59, 64. The Court held that a fraudulent transfer claim was "more accurately characterized as a private rather than a public right," because such claims 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." *Id.* at 55-56. *Granfinanciera* did not hold any portion of § 157 unconstitutional, or that bankruptcy courts could not adjudicate fraudulent transfer claims. Indeed, the Court

stated explicitly that it was not "express[ing] any view as to whether the Seventh Amendment or Article III allows jury trials in such actions to be held before non-Article III bankruptcy judges." *Id.* at 64.

In *Stern*, a majority of the Court found that the state law counterclaim at issue—like the fraudulent transfer claim in *Granfinanciera*—sought to augment the estate and thus did not fall within any of the iterations of the public rights exception. *Stern*, 131 S. Ct. at 2614, 2616. Accordingly, the Court held that § 157(b)(2)(C), by authorizing bankruptcy courts to issue final judgments on such state law counterclaims, violates Article III. *Id.* at 2608, 2616, 2620. "*Stern* represents the first time a solid majority of the Supreme Court has applied the categorical, historical approach to limit the final adjudicative authority of the Bankruptcy Court following the 1984 Act." *Dev. Specialists*, 462 B.R. at 468.

Indeed, this Court acknowledged in *Stern* that its decision was a departure from certain assumptions in prior decisions: "In past cases, we have suggested that a proceeding's 'core' status alone authorizes a bankruptcy judge, as a statutory matter, to enter final judgment in the proceeding." 131 S. Ct. at 2604 (citing *Granfinanciera*, 492 U.S. at 50 (explaining that a bankruptcy court may adjudicate "core" proceedings and issue final judgments if the district court has referred the matter to it)). Generally, lower courts and litigants had adopted the same assumption. *See Penson Fin. Servs. v. O'Connell (In re Arbco Capital Mgmt.)*, 479 B.R. 254, 260 (S.D.N.Y. 2012) ("[P]rior to *Stern*, it was widely understood that, pursuant to the 1984 Act, the Bankruptcy Court had the authority to finally resolve core matters."); *Dev. Specialists*, 462 B.R. at 466 ("Before *Stern*, courts . . . were accustomed

to resolving whether the Bankruptcy Court could finally adjudicate a given claim by asking whether or not it could be considered 'core' under 28 U.S.C. § 157."). *Stern* upended the widespread belief that Congress had lawfully granted authority to bankruptcy courts to issue final judgments on core claims in § 157(b)(1) and (2).

III. Litigants in Pending Cases Should Be Allowed to Argue that a Bankruptcy Court Lacked Authority to Issue a Final Judgment Based on *Stern*

Prior to this Court's decision in *Stern*, defendants could not have known that they had the right to contest the bankruptcy court's adjudicative power on certain claims—because it was *Stern* itself that provided defendants "with a legal basis to contest the Bankruptcy Court's adjudicative power that they did not have before." *Dev. Specialists*, 462 B.R. at 472 (noting that a "waiver of important rights should only be found where it is fully knowing").[4] As discussed in Part I above, principles of

4. *See also Messer v. Bentley Manhattan Inc. (In re Madison Bentley Assocs., LLC)*, 474 B.R. 430, 440 (S.D.N.Y. 2012) (holding that defendants' conduct did "not warrant the waiver of important rights given the emergence of important new precedent" where defendants filed a motion to withdraw the reference eight months after *Stern*); *Wolf v. Nayna Networks, Inc. (In re Prof'l Satellite and Commc'n, LLC)*, No. 12cv70 L(MDD), 2012 WL 6012829, at *2 (S.D. Cal. Dec. 3, 2012) (finding motion to withdraw reference timely "[g]iven the timing of the *Stern* decision"); *Retired Partners of Coudert Bros. Trust v. Baker & McKenzie LLP (In re Coudert Bros. LLP)*, No. 11-2785(CM), 2011 WL 5593147, at *12 (S.D.N.Y. Sept. 23, 2011) ("[U]ntil *Stern* strongly embraced the approach of the *Marathon* plurality, it is doubtful that the [defendant] knew or could have known that it had a right to Article III adjudication that it was waiving."); *Meoli v. Huntington Nat'l Bank (In re*

waiver, fairness, and common sense dictate that a litigant in a pending case who, before *Stern*, did not object to the bankruptcy court's authority to issue a final judgment on a "core" claim—as the language of 28 U.S.C. § 157 clearly provides—should be allowed to contest the bankruptcy court's authority following *Stern*.

According to the Ninth Circuit, EBIA should have foreseen the Court's decision in *Stern*, and contested the bankruptcy court's constitutional authority to adjudicate the claims, based on the Court's prior precedent. *Bellingham*, Pet. App. 32a. But as discussed, litigants were not on notice based on *Granfinanciera* and the Court's other decisions that aspects of § 157(b) were unconstitutional. *See supra* Part II; *see also Teleservices Grp.*, 456 B.R. at 339 n.66 (rejecting argument that defendant should have been aware of the constitutional deficiencies of § 157 based on *Granfinanciera* and *Northern Pipeline*). The Ninth Circuit, like most courts, assumed the constitutionality of § 157(b)(2) long after *Granfinanciera*. *See, e.g., Sigma Micro Corp. v. Healthcentral.com (In re Healthcentral.com)*, 504 F.3d 775, 786-88 (9th Cir. 2007) (noting *Granfinanciera*'s "exclusive holding," and stating that requiring immediate transfer based on the right to a jury trial would subvert § 157, which allows bankruptcy courts to "hear" Title 11 actions and enter orders in most cases). Notably, in litigating *Stern* before the Ninth Circuit and this Court, respondent Pierce Marshall did not point to a single case from the Ninth Circuit or any other jurisdiction holding

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Teleservices Grp., Inc.), 456 B.R. 318, 339 (Bankr. W.D. Mich. 2011) (stating that, prior to the issuance of *Stern*, defendant did not make a knowing waiver of its right to have an Article III judge issue a final judgment on fraudulent transfer claims).

that bankruptcy courts lack the constitutional authority to decide core matters.[5]

The Ninth Circuit's own decision in *Marshall v. Stern* certainly was not a meaningful precursor to this Court's holding in *Stern*. *See Bellingham*, Pet. App. 32a (conceding that the Ninth Circuit "reached a different set of conclusions than the Supreme Court ultimately did" in *Stern*). The Ninth Circuit held that the bankruptcy court could not issue a final judgment on the estate's counterclaim because it was *not* a core proceeding under § 157. *See Marshall*, 600 F.3d at 1060. The Ninth Circuit made no comparison to the fraudulent transfer claims at issue in *Granfinanciera*, as did the *Stern* majority in explaining that both types of claims were private rights.[6] *Stern*, 131 S. Ct. at 2614, 2616, 2618. Thus, the Ninth Circuit's decision could not have put litigants on notice that

5. Indeed, the Ninth Circuit affirmatively held that bankruptcy courts *did* have the constitutional authority to adjudicate fraudulent transfer claims, such as those at issue in *Bellingham*. *See Duck v. Munn (In re Mankin)*, 823 F.2d 1296, 1300 (9th Cir. 1987) (holding that a fraudulent transfer suit brought pursuant to 11 U.S.C. § 544 and California law was a core proceeding and the bankruptcy court's adjudication of the matter did not violate Article IIIa); *see also id.* at 1299 (noting as a preliminary matter that fraudulent transfer claims under § 548 are "unquestionably" core matters under § 157(b)(2)(H)). *Mankin* remained the law in the Ninth Circuit until the *Bellingham* court explicitly overruled it. *Bellingham*, Pet. App. 15a.

6. The Ninth Circuit cited *Granfinanciera* in a different context and without any discussion of the case. *See Marshall*, 600 F.3d at 1053 n.23, 1057. The concurring opinion cited *Granfinanciera* as further support for the Ninth Circuit's holding that the counterclaim was not "core," and the bankruptcy court lacked jurisdiction over it. *See id.* at 1068 nn.16 & 18.

bankruptcy courts do not have constitutional authority to issue final judgments on certain core claims, particularly fraudulent transfer claims.

In contrast to the Ninth Circuit's decision in *Stern*, this Court's decision did reference *Granfinanciera* and other earlier decisions, but reliance on prior precedent—an inherent feature of judicial decision-making—hardly means the outcome was so inevitable that any prudent litigant should have anticipated it. This Court rejected a similar approach to waiver in *Curtis Publishing*. At issue in that case was whether the defendant had waived certain constitutional defenses to libel claims based on this Court's decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which the Court issued soon after the jury returned a verdict against the defendant in *Curtis Publishing*. *See* 388 U.S. at 138-39. The appellate court held that the defendant waived any right to challenge the verdict on *Sullivan* grounds because "the general state of the law at the time of [the] trial was such that [appellant] should . . . have seen 'the handwriting on the wall.'" *Id*. at 143 (citing 351 F.2d 702, 734 (5th Cir. 1965)). This Court disagreed, stating that although *Sullivan* "did draw upon earlier precedents," there was strong precedent indicating that libel actions were not subject to constitutional challenge.[7] *Id*. at 143-44. The Court held that it was the

7. The Court stated further that "[g]iven the state of the law prior to our decision in [*Sullivan*], we do not think it unreasonable for a lawyer trying a case of this kind . . . to have looked solely to the defenses provided by state libel law." 388 U.S. at 144. Moreover, the Court rejected the notion that its grant of certiorari in *Sullivan* should have signaled a different conclusion, or that defendants' counsel, who were involved in *Sullivan*, should have been alerted to the constitutional issues. *Id*.

"eventual resolution of [*Sullivan*], rather than its facts and the arguments presented by counsel, which brought out the constitutional question," and thus the Court "would not hold that [the defendant] waived 'a known right' before it was aware of the [*Sullivan*] decision." *Id.* at 145.

As with the *Sullivan* defense in *Curtis Publishing*, bankruptcy litigants should be allowed to assert a *Stern* objection to the bankruptcy court's exercise of authority to decide a particular claim, even if they did not assert that objection before *Stern* was decided. What should matter is the litigant's conduct *after Stern*, not before. *See Dev. Specialists*, 462 B.R. at 469 (stating that the timeliness of a motion to withdraw the reference "should be evaluated by looking to how promptly the [defendants] moved for withdrawal following *Stern*"). If the litigant asserted an objection based on *Stern* within a reasonable time period, the objection should be heard. By contrast, if the litigant waits to let the case develop and then springs the *Stern* objection only after things go south, then the *Stern* objection might be deemed waived. *See Bank of Neb. v. Rose (In re Rose)*, 483 B.R. 540, 545 (B.A.P. 8th Cir. 2012) (debtor consented to bankruptcy court's final judgment on state law counterclaims where debtor failed to object at the trial or in the post-trial brief filed nearly one year after *Stern* was issued and objected only after receiving an adverse judgment).[8] But where a litigant asserts its

8. *See also Gibson v. Tucker (In re G&S Livestock Co.)*, 478 B.R. 906, 917 (S.D. Ind. 2012) (defendants consented to bankruptcy court adjudication of fraudulent transfer claims where they stipulated to the court's authority under § 157 in their post-trial brief filed four months after *Stern* was issued and objected to the court's authority only after receiving an adverse judgment); *Dev. Specialists*, 462 B.R. at 472 (distinguishing litigants that move to

(new) rights within a reasonable period of time, there is no concern with sandbagging, and no waiver of a known right.[9]

So it is here. Under Ninth Circuit precedent controlling at the time, EBIA did not have a valid constitutional objection to the bankruptcy court's adjudication of the claims against it. *Stern* gave EBIA the objection it did not previously have, and EBIA thereafter asserted it. EBIA did not waive the objection by failing to assert it earlier, when it did not yet exist.

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withdraw the reference after an adverse ruling from defendants, who moved to withdraw shortly after the *Stern* decision was issued, making "sandbagging" concerns "considerably less acute").

9. The *Stern* decision discusses "sandbagging" in response to the statutory argument that the bankruptcy court lacked jurisdiction to enter final judgment on a defamation claim against the bankruptcy estate under § 157(b)(5), which provides for trial of certain claims in the district court. 131 S. Ct. at 2607-08. The *Stern* Court's comments about sandbagging did not relate to the argument that the bankruptcy court lacked constitutional authority to enter final judgment on the bankruptcy estate's counterclaim. *Id.*

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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September 16, 2013

APPENDIX

APPENDIX — LIST OF *AMICI CURIAE*

The *amici curiae* consist of the following entities:

- Atascosa Investments, LLC;
- Aurum CLO 2002-1 Ltd.;
- Bank of America, N.A.;
- Burnet Partners, LLC;
- Deutsche Bank Trust Company Americas;
- Flagship CLO III;
- Flagship CLO IV;
- Flagship CLO V;
- Gleneagles CLO Ltd.;
- Goldman Sachs Credit Partners, L.P.;
- Grand Central Asset Trust, HLD Series;
- Grand Central Asset Trust, SOH Series;
- Hartford Mutual Funds, Inc., on behalf of The Hartford Floating Rate Fund by Hartford Investment Management Company, their Sub-Advisor;
- Highland CDO Opportunity Fund, Ltd.;
- Highland Credit Opportunities CDO Ltd.;
- Highland Floating Rate Advantage Fund;
- Highland Floating Rate LLC;
- Highland Legacy Limited;
- Highland Loan Funding VII, LLC;
- Highland Offshore Partners, L.P.;
- Jasper CLO, Ltd.;

- LL Blue Marlin Funding LLC;
- Liberty CLO, Ltd.;
- Merrill Lynch Credit Products LLC;
- Ocean Bank;
- Rockwall CDO, Ltd.;
- Silver Oak Capital LLC;
- Stedman CBNA Loan Funding LLC;
- The Foothills Group, Inc.;
- Van Kampen Dynamic Credit Opportunities Fund;
- Van Kampen Senior Income Trust;
- Van Kampen Senior Loan Fund; and
- Wells Fargo Bank, N.A.