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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.,
Respondent.

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

BRIEF FOR PROFESSORS RICHARD AARON, LAURA BETH BARTELL, JAGDEEP S. BHANDARI, SUSAN BLOCK-LIEB, JOHN COLLEN, JESSICA DAWN GABEL, JACKIE GARDINA, GEORGE W. KUNEY, ADAM J. LEVITIN, ANGELA LITTWIN, STEPHEN J. LUBBEN, LOIS R. LUPICA, C. SCOTT PRYOR, THERESA J. PULLEY RADWAN, NANCY B. RAPOPORT, MARIE T. REILLY, LYNNE F. RILEY, MICHAEL D. SOUSA, ETTIE WARD, AND ROBERT M. ZINMAN, AS *AMICI CURIAE* SUPPORTING RESPONDENT

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Dated: November 12, 2013

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INTEREST OF THE AMICI[1]

The *Amici Curiae* are law professors who have devoted their careers to the teaching and study of bankruptcy law.[2] They are keenly interested in this appeal because its outcome will have a significant impact on litigation in bankruptcy cases, particularly the many in which fraudulent conveyance claims are asserted by bankruptcy estates for the benefit of their creditors. Proper administration of bankruptcy cases depends upon the establishment of clear principles gov-

[1] Pursuant to Rule 37 of this Court, the *Amici* file this brief with the written consent of both parties, which is on file with the Clerk. No counsel for any party authored this brief in whole or in part. No person or entity, including the *Amici* or their counsel, made a monetary contribution for the preparation or submission of this brief.

[2] The *Amici* are the following law professors who teach at the law schools indicated next to their names: *Richard Aaron*, University of Utah S. J. Quinney College of Law; *Laura Beth Bartell*, Wayne State University Law School; *Jagdeep S. Bhandari*, Florida Coastal School of Law; *Susan Block-Lieb*, Fordham University School of Law; *John Collen*, St. John's University School of Law; *Jessica Dawn Gabel*. Georgia State University College of Law; *Jackie Gardina*, Vermont Law School; *George W. Kuney*, University of Tennessee College of Law; *Adam J. Levitin,* Georgetown University Law Center, *Angela Littwin,* University of Texas School of Law, *Stephen J. Lubben,* Seton Hall University School of Law, *Lois R. Lupica*, University of Maine School of Law; *C. Scott Pryor*, Regent University School of Law; *Theresa J. Pulley Radwan,* Stetson University College of Law; *Nancy B. Rapoport*, William S. Boyd School of Law-University of Nevada, Las Vegas; *Marie T. Reilly*, Penn State University-Dickinson School of Law; *Lynne F. Riley*, Boston College Law School; *Michael D. Sousa*, University of Denver-Sturm College of Law; *Ettie Ward*, St. John's University School of Law; and *Robert M. Zinman*, St. John's University School of Law.

erning whether fraudulent conveyance claims may be adjudicated by bankruptcy courts with the consent of the parties and, if so, whether such adjudicatory authority may be exercised on the basis of implied consent and waiver.

The *Amici* believe that under this Court's Article III jurisprudence, a bankruptcy court's exercise of adjudicating authority based on implied consent and waiver by a party does not run afoul of Article III. This brief sets forth the *Amici*'s analysis of why the doctrines of implied consent and waiver apply in this case.

The *Amici* represent no institution, group or association. Their sole purpose is to offer what assistance they can to this Court as it considers this important issue. They believe their brief offers a unique analysis of important case law bearing on the issue.

SUMMARY OF ARGUMENT

The *Amici* support Respondent's position that Article III of the Constitution gives rise to a personal right, and that Article III does not bar the adjudication of an action by a bankruptcy court based on consent of the parties.[3] They argue that express consent is not required, and that an Article III personal right may be waived by implication from litigation conduct, as happened in this case.

[3] Because Respondent's brief fully addresses Petitioner's contention that Article III prohibits an exercise of adjudicatory authority by a bankruptcy judge in a fraudulent conveyance action, this *amicus* brief does not address that basic constitutional issue, and is limited to consideration of implied consent and waiver in the Article III context.

The *Amici* urge that waiving the personal right to have an Article III court adjudicate a fraudulent conveyance action does not require the waiving party to have actual knowledge that it has an Article III court option. Case law establishes that knowledge of the Article III option is imputed based on presumed knowledge of the law. Indeed, contrary to Petitioner's contention, in *Commodity Futures Trading Comm'n. v. Schor*, 478 U.S. 833 (1986), there was no evidence that the party asserting an Article III right had actual knowledge of the existing case law that would have permitted him to bring his action before an Article III court. Presumptive knowledge of such case law was the basis for this Court's conclusion in *Schor* that the party knew of his Article III district court option. Despite the lack of actual knowledge, the party in *Schor* was nevertheless held to have waived his Article III right by litigating the claim in a non-Article III forum without asserting his personal right under Article III. Petitioner, however, mischaracterizes *Schor* as requiring "full knowledge," Pet'r's Br. 40, without acknowledging that such knowledge was clearly grounded on presumed knowledge of case law, as it was in the present fraudulent conveyance case.

This Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011), was not essential for Petitioner to know that it had an Article III right. Years before the present action was commenced, this Court's precedent established that a fraudulent conveyance claim is a private right under Article III, *see Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 55–56 (1989), thereby giving Petitioner an incontrovertible basis for an Article III

objection. Petitioner, however, mistakenly asserts that a pre-*Granfinanciera* decision by the Ninth Circuit – *Duck v. Munn (In re Mankin)*, 823 F.2d 1296 (9th Cir. 1987) – barred it as binding Circuit precedent from asserting an Article III objection. *Mankin* held that a fraudulent conveyance claim was a public right on the theory that it "directly relates to the restructuring of debtor-creditor relations." *Id.* at 1307. Significantly, however, after *Mankin* was decided by the Ninth Circuit, this Court in *Granfinanciera*, by holding that a fraudulent conveyance claim is a *private* right, rejected *Mankin's* holding that a fraudulent conveyance claim is integral to "the restructuring of debtor-creditor relations" for Article III purposes, 492 U.S. 58, thereby repudiating the very basis on which *Mankin* was decided. Petitioner is charged with knowing that this Court had rejected *Mankin*'s theory and that *Mankin* did not prevent Petitioner from asserting its Article III right.

Moreover, Petitioner's answer to the complaint denied that the action was a core proceeding and denied that the bankruptcy court could even hear this case – a position which Petitioner failed to prosecute by, among other things, not filing a statement under Federal Rule of Bankruptcy Procedure 7012(b)[4] that it did not consent to the exercise of authority – a position inconsistent with its litigation posture in the bankruptcy court and on its appeal to the district court from that court's summary judgment. Importantly, that initial denial overwhelmingly shows that Petitioner was, in fact, *actually* aware that it had a right to

[4] Federal Rules of Bankruptcy Procedure are referred to herein as "Bankruptcy Rules."

have the case adjudicated in the district court because that would have been the *only* basis for denying that the action was a core proceeding and also for denying that the bankruptcy court could even hear it.

Rather than revealing its position, Petitioner did not assert its Article III right in its answer or in any other document filed in the bankruptcy or district court, first asserting an Article III objection in its appeal to the Circuit Court. Had Petitioner asserted its right in the bankruptcy court, the litigation could have gone forward in the district court, and both costly litigation of the Article III issue and additional demands on the already overworked judiciary could have been avoided. Implied consent and waiver should be upheld as a basis for adjudication of a private right by a bankruptcy court to avoid gamesmanship. A party should not be permitted to keep its Article III objection secret until after it took its chances in the bankruptcy court and lost there on the merits, and thereafter be allowed to assert such objection, imposing significant additional legal costs on the estate, and causing further delay in the bankruptcy case and reduction in the amount of the distributions of estate assets to creditors.

ARGUMENT

POINT I

PETITIONER'S LITIGATION CONDUCT ESTABLISHED ITS CONSENT TO THE BANKRUPTCY COURT'S ADJUDICATION OF THE SUMMARY JUDGMENT MOTION

A. Implied Consent is an Established Doctrine in the Article III Context

The *Amici* urge this Court to hold that, by its conduct in this litigation, Petitioner impliedly consented to the bankruptcy court's exercise of authority to adjudicate the fraudulent conveyance claim in suit. Petitioner waived its Article III right by not asserting it until after it litigated the case and lost on the merits in the bankruptcy court, and belatedly asserting an Article III objection for the first time in its appeal to the Circuit Court. This Court made it clear in *Roell v. Withrow*, 538 U.S. 580, 582 (2003), that consent to a non-Article III judge's adjudication may be inferred from a party's litigation conduct. As stated in *Roell*, "The question is whether consent can be inferred from a party's conduct during litigation, and we hold that it can be." *Id.* at 582; *see also Men's Sportswear, Inc. v. Sasson Jeans, Inc.* (*In re Men's Sportswear, Inc.)*, 834 F.2d 1134, 1137 (2d Cir. 1987); *McFarland v. Leyh (In re Tex. Gen. Petroleum Corp.)*, 52 F.3d 1330, 1337 (5th Cir. 1995); *Beitel v. OCA, Inc. (In re OCA, Inc.)*, 551 F.3d 359, 368 (5th Cir. 2008).

B. Petitioner is Charged with Knowledge of Case Law

Although in some circumstances a party in a bankruptcy case may be aware that it has a right to have the claim at issue adjudicated by a district court, knowledge of such right may also be gained inferentially. It has long been established that a party is deemed to know the case law that governs its destiny. *See United States v. Yazell*, 382 U.S. 341, 346 (1966) (holding that state law applied to a federal agency's collection of its loan, pointed to two reported federal court decisions in finding that the lender "was aware and is chargeable with knowledge that the contract would be subject to [state] law. . . ."; *New Jersey v. New York*, 523 U.S. 767, 809 (1998) (stating that, when writing a Compact fixing a boundary, "[w]e assume that the parties to the Compact were well aware of our precedent . . . ."); *Central Hanover Bank & Trust Co. v. Herbst,* 93 F.2d 510, 512 (2d Cir. 1937), (Hand, L., J.) (where the time to appeal an order had not expired, a non-lawyer either "knew, or if he did not know, was charged with notice" that an order could be reversed on appeal and thus could not be relied upon); *Fed. Deposit Ins. Co. v. Henderson*, 940 F.2d 465, 477 (9th Cir. 1991) (persons "are charged with knowledge of constitutional developments at the time of the alleged constitutional violations, including all available case law"). As seen in Point II, Petitioner is specifically charged with knowledge of its Article III right as established by this Court's precedent.

POINT II

SCHOR DEMONSTRATES THAT PETITIONER'S KNOWLEDGE OF ITS ARTICLE III RIGHT IS CONCLUSIVELY PRESUMED FROM ITS DEEMED KNOWLEDGE OF CASE LAW

Significantly, in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), a party's knowledge of its Article III option was predicated on its presumptive knowledge of case law cited by this Court in its opinion, not on evidence of actual knowledge of an Article III court option. *Id.* at 849. The *Amici* urge this Court likewise to hold in the present case that, even if Petitioner did not consciously understand that it had an Article III right, it is presumed to have known that under the law, as pronounced by this Court in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), a fraudulent conveyance claim is a private right governed by Article III, rather than a public right excluded from the judicial power of the United States. *Granfinanciera* is analyzed in Point III *infra*.

This Court found in *Schor* that a person may know that it has an Article III right not only on the basis of actual knowledge of the right, but also on the basis of knowledge such person is presumed to know from case law that informs it of such right. In *Schor*, this Court held that a party was conclusively presumed to know that it had an option for an Article III court based on case law cited by the Court, which it elected to forgo in preference to litigating the claim before a federal administrative agency. *Schor*, 478 U.S. at 849.

There is no evidence that the objecting party in *Schor* had actual knowledge of his Article

III option. Petitioner nevertheless erroneously relies on *Schor* for the proposition that "full knowledge" is required for consent to a non-Article III adjudication. Pet'r's Br. 40. Petitioner missed the crux of *Schor* by failing to understand that *Schor* turned on imputed knowledge of the law, not actual knowledge. The crucial point of *Schor* is that the party's "full knowledge" of its Article III option was not actual knowledge, but instead consisted of presumptive knowledge imputed to such party from two decisions cited by the Court informing him that he had a private right of action that could have been adjudicated in an Article III court. *Schor*, 478 U.S. at 849–50.

Schor treated presumed knowledge as equivalent to "full knowledge" of an option to have the issue determined in a "federal Article III court." *Id.* at 850. The critical point for which *Schor* stands is that because presumptive knowledge of a party's Article III right is equivalent to actual knowledge of such right, presumptive knowledge constitutes a basis for "an effective waiver." *Id.* at 849. In the present case, Petitioner's presumptive knowledge of the case law gave it sufficient knowledge and awareness of an Article III right. Its litigation of the fraudulent conveyance action in the bankruptcy court, without asserting an Article III objection, thus constituted implied consent to adjudication of the claim by the bankruptcy court or an implied waiver of its Article III right.

POINT III

THERE WERE MULTIPLE PRE-STERN COURT HOLDINGS THAT A FRAUDULENT CONVEYANCE ACTION IS A PRIVATE RIGHT FOR ARTICLE III PURPOSES. PETITIONER DID NOT NEED *STERN* TO LEARN IT HAD AN ARTICLE III RIGHT

There were several pre-*Stern* warnings that alerted Petitioner to its Article III right. Prior to this Court's decision in *Stern* and long before summary judgment was granted in this case, this Court's decision in *Granfinanciera* established that Petitioner had a sound basis to assert an Article III right to a district court adjudication of the fraudulent conveyance action at issue. Similarly, the Ninth Circuit's 2010 decision in *Marshall v. Stern*, also issued before summary judgment was granted, signaled prior to *Stern* that a fraudulent conveyance defendant had the right to an Article III court's determination. *See Marshall* v. *Stern (In re Marshall)*, 600 F.3d 1037, 1054 n. 23 (9th Cir. 2010), *aff'd*, 131 S. Ct. 2594 (2011). Lastly, Petitioner's pleadings indicate it was aware that it had a right to an Article III court's adjudication. *See* Point IV.

A. This Court's Decision in *Granfinanciera* Established Petitioner's Article III Right

This Court held in *Granfinanciera* that fraudulent conveyance actions do not fall within the public rights doctrine. Looking to the lines drawn by past Article III precedent, *Granfinanciera* made clear that such actions only assert private, rather than public rights. *Granfi-*

nanciera, 492 U.S. at 53–54. This Court there resolved that "a bankruptcy trustee's right to recover a fraudulent conveyance under 11 U.S.C. § 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. This is because fraudulent conveyance actions "are quintessentially suits at common law that more nearly resemble state-law contract claims brought . . . to augment the bankruptcy estate . . . ." *Id.* at 56. This Court left no doubt as to its view of the character of fraudulent conveyance claims for Article III purposes, reiterating that fraudulent conveyance claims "appear matters of private rather than public right." *Id.*

This Court in *Granfinanciera* then carefully noted the importance of its view that a fraudulent conveyance claim is a private right, pointing out that prior to its decision in that case, the only potential basis for exempting fraudulent conveyance claims from Article III might have been under the long-established public rights exception. This Court, however, rejected that possibility, concluding in *Granfinanciera* that because a right to recover a fraudulent conveyance "is not a 'public right' for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court . . . ." *Id.* at 53 (citing *Crowell v. Benson*, 285 U.S. 22, 50 (1932)).

Indeed, Petitioner itself cites *Granfinanciera* in support of its acknowledgment that "the fraudulent conveyance claims asserted against [Petitioner] do not qualify as public rights." Pet'r's Br. 30 n. 2. Moreover, this Court in *Stern*,

upon which Petitioner heavily relies, pointed out, in buttressing its holding that a tort counterclaim is a private right, that in *Granfinanciera* this Court "*rejected* a bankruptcy trustee's argument that a fraudulent conveyance action filed . . . against a noncreditor in a bankruptcy proceeding fell within the [public rights] exception." *Stern v. Marshall*, 131 S. Ct. 2594, 2598 (2011) (emphasis added). In resolving the tort counterclaim issue in *Stern*, this Court left no doubt as to its understanding of *Granfinanciera* by concluding that "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. *Stern* thus did not create or establish a new Article III right for fraudulent conveyance defendants, but only reaffirmed *Granfinanciera*'s conclusion that a fraudulent conveyance claim is a private right within Article III, not a public right excluded from the judicial power. Petitioner has no excuse for not having acted upon the utterly clear lesson of *Granfinanciera* about fraudulent conveyance claims in bankruptcy proceedings. Its dredged-up protestation that it needed *Stern* to learn that lesson lacks credibility.

Petitioner's Article III objection was clearly established by binding case law issued by this Court long before *Stern*, which, as a basis for its own decision, relied on *Granfinanciera*'s holding that a fraudulent conveyance claim is a private rather than a public right. *Id*. Petitioner did not need *Stern* to know what *Granfinanciera* said so clearly. The only new knowledge that Petitioner may have gained from *Stern* was that a counter-

claim sounding in tort is a private right for Article III purposes. That holding and its supporting analysis, however, was not necessary for Petitioner to understand that it could make a sound Article III objection in the fraudulent conveyance case brought against it in the bankruptcy court. In this case, a fraudulent conveyance claim is at issue, not a counterclaim, so *Stern* only provides a link for a different chain. In sum, prior to *Stern*, Petitioner was warned that the fraudulent conveyance action asserted against it was a private right giving rise to an Article III objection.

B. Conscientious Review of this Court's Precedents in *Granfinanciera* and *Northern Pipeline* Would Have Alerted Petitioner to Its Article III Right. The Ninth Circuit's Erroneous Holding in *Mankin* Did Not Bar Petitioner's Assertion of the Right. Nor Was *Stern* an Intervening Change in Law

Petitioner and its *amici* also urge that its consent to the bankruptcy court's exercise of authority over this case could not have been "knowing and voluntary," claiming that binding Ninth Circuit precedent foreclosed making an Article III objection. Pet'r's Br. 44–46. That contention is devoid of merit. Because Petitioner had a strong basis for raising that objection based on this Court's precedent issued both before and after the asserted Ninth Circuit precedent, its reliance on the Ninth Circuit precedent as foreclosing such an objection is misguided.

To support that contention, Petitioner relies on *Duck v. Munn (In re Mankin)*, 823 F.2d 1296 (9th Cir. 1987), arguing that, until that case was

overruled, fraudulent conveyances were public rights outside the scope of Article III under Ninth Circuit law, and that it was barred by such precedent from asserting an Article III objection. Such reliance, however, is flawed for two reasons: first, *Mankin* missed the point of *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); and second, the holding in *Mankin* was clearly overruled two years later by *Granfinanciera*. *See* Point III.A. The court's holding in *Mankin* was based heavily on its conclusion that the court in that case "need not decide if this case neatly falls within the *Northern Pipeline* plurality's definition[] of . . . public rights," *Mankin*, 823 F.2d at 1306. *Mankin,* however, erroneously disregarded that *Northern Pipeline* required such a determination to be made. Instead, the court ignored the plurality's clear holding that "*only* controversies" involving public rights "may be removed from Article III courts and delegated to legislative courts or administrative agencies for their determination," *Northern Pipeline*, 458 U.S. at 70, a holding with which six Justices concurred. *See id.* at 91 (Rehnquist, J., concurring). Moreover, *Mankin'*s inconsistency with *Granfinanciera* is equally clear. The Ninth Circuit in *Mankin* based its holding on its conclusion that a fraudulent conveyance action was a public right because it "directly relate[d] to the restructuring of debtor-creditor relations and is not merely an action to bring property into the estate." *Mankin*, 823 F.2d at 1307. By sharp contrast, two years after *Mankin*, this Court's 1989 decision in *Granfinanciera* made it clear that a fraudulent conveyance does not involve such restructuring and "is more accurately characterized as a private rather than a public right." *Granfinanciera*, 492

U.S. at 34. The fact that litigants would have treated bankruptcy court determinations of fraudulent conveyance actions as routine and uncontroversial based on *Mankin* is not, as Petitioner argues, an acceptable excuse for disregarding *Granfinanciera's* later treatment of such claims as private rights for Article III purposes. Petitioner was bound to follow this Court's lead in *Granfinanciera*, not to accept the Circuit Court's erroneous *Mankin* decision.

Petitioner's reliance on *Sigma Micro Corp. v. Healthcentral.com (In re Healthcentral.com)*, 504 F.3d 775 (9th Cir. 2007), is also utterly misplaced. In that case, the objectant did not make any Article III objection, and the court did not even discuss Article III rights. Petitioner nevertheless urges that *Healthcentral* suggests that a bankruptcy court may, in the face of an Article III objection, adjudicate an avoidance claim by summary judgment in the absence of consent. The opinion in that case, however, provides no basis whatsoever for it to have any relevance to an Article III issue. Contrary to Petitioner's position, *Healthcentral*'s allowance of summary judgment where a jury demand was made has no bearing on Article III. The Seventh Amendment and Article III diverge in regard to the summary judgment authority of a bankruptcy court. As explained in *Healthcentral*, a summary judgment motion is consistent with the right to a jury trial because a summary judgment motion merely addresses "whether trial is necessary at all," and no findings of fact are made where there is no genuine dispute as to any material fact. *Id*. at 787. By contrast, when there are no material facts in dispute, a summary judgment, as a dispositive

order, gives rise to an Article III right. Petitioner would simply have this Court read summary judgments, which are dispositive orders, out of Article III. Petitioner's reliance on *Healthcentral* flies in the face of this Court's Article III jurisprudence, which extends to all dispositive means for adjudicating a case, including summary judgment. Summary judgment motions, when decided, finally determine the rights of the litigants. *See* Fed. R. Bankr. P. 7056 (incorporating Fed. R. Civ. P. 56). This Court's "precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at *all* stages of adjudication . . . ." *Northern Pipeline*, 458 U.S. at 86 n. 39 (italics added).

Nor is Petitioner's argument to be credited that it may raise its Article III right for the first time on appeal because *Stern* was "an intervening change in law[.]" Pet'r's Br. 42. *Stern* cannot fairly be viewed as such a change in light of its express endorsement of *Granfinanciera's rejection* of a bankruptcy trustee's argument that a fraudulent conveyance claim fell within the public rights exception to Article III. *Stern*, 131 S. Ct. at 2598. *Granfinanciera* was no less available to Petitioner well in advance of the bankruptcy court's granting of summary judgment, than it was to this Court when it was deciding *Stern*. Petitioner simply did not need *Stern* to raise an objection based on Article III.

Moreover, the cases on which Petitioner relies to support its "intervening change in the law" contention are not on point. In *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 143–44 (1967), the party, Curtis, had no way to raise a First

Amendment defense until this Court issued its decision in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), while Curtis's appeal was pending. In contrast, Petitioner's right under Article III was established by this Court's decisions in *Northern Pipeline* and *Granfinanciera* rendered long before the bankruptcy court's grant of summary judgment. Unlike *Curtis*, in which a precedent was issued while an appeal was pending, *Stern* was not a precedent that established Petitioner's Article III right. Rather, Petitioner's Article III right depended on much earlier decisions of this Court.

Petitioner's reliance on *Hawknet Ltd. v. Overseas Shipping Agencies*, 590 F.3d 87 (2d Cir. 2009), is equally unavailing. As in *Curtis*, the intervening change in that case, unlike the present case, established a new principle that was not guided by prior precedent of this Court. In that case, the Circuit Court allowed a party to support its argument on its appeal by relying upon a new Circuit Court opinion issued in a different case only after the district court's decision was rendered. When the case was before the district court, the Circuit Court's precedent in effect precluded a "new objection." *Id.* at 92. In overruling the earlier precedent, the new Circuit Court decision that surfaced during the appeal to the Circuit Court in *Hawknet,* unlike *Stern* in present case, was not based upon or foretold by prior law.[5] It is in

[5] It is clear from the discussion in *Hawknet*, that the newly surfaced Circuit Court decision in *Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 67 (2009), was not guided by prior cases in overturning that court's own precedent set in *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263 (2d Cir. 2002).

this context that the *Hawknet* court noted, "the doctrine of waiver demands conscientiousness, not clairvoyance, from parties." *Id*. Conscientiousness is all the *Amici* suggest Petitioner needed in order to know that it had a well-founded Article III objection.

The *Amici* do not expect Petitioner to have been clairvoyant. Rather, their position is just that Petitioner should have been more "conscientious," *see id.*, in reviewing the state of the law regarding Article III and fraudulent transfer claims. Had it done so, it would have known that it had a strong basis for raising an Article III objection. Petitioner's election not to raise that objection should thus be considered both knowing and voluntary.

The *Amici* do not fault Petitioner "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 rather fault Petitioner precisely because there *was* legitimate legal support for such an argument. Nor do they expect Petitioner to have "litter[ed its] pleadings with every argument which might conceivably be adopted during the pendency of a proceeding." *Id*. Petitioner's TOUSA *amici* likewise miss the point when they argue "Lawyers . . . – and their clients – should not be punished for keeping their creativity within the clear boundaries of existing law." TOUSA Br. 7. Rather than being punished for restraining their creativity, litigants would simply be held to the consequence of their decision not to argue for a change in the law when they have a sound basis for doing so. For this Court to hold otherwise would be to sanction the

free-riding of litigants on the possibility that unknown third parties make the argument for them. On the contrary, when case law on an important issue is erroneous, this Court should adopt a rule that encourages litigants and their lawyers to "[say] so – and [say] so promptly[,]" *Stern*, 131 S. Ct. at 2608, rather than waiting for resolution of the litigation of others.

C. The 2010 Decision of the Ninth Circuit in *Marshall v. Stern* Alerted Petitioner to Its Article III Right

The 2010 decision in *Marshall* v. *Stern (In re Marshall),* 600 F.3d 1037 (9th Cir. 2010), decided by the Ninth Circuit before the bankruptcy court issued summary judgment against Petitioner, should also have alerted Petitioner to a right to an Article III adjudication of the fraudulent conveyance claim asserted against it. Prior to the summary judgment in this case, the Ninth Circuit held in *Marshall v. Stern* that a proceeding, although designated as "core" by 28 U.S.C. § 157(b)(2), raises an Article III issue if the proceeding, such as the one involved in the present case, involves a private right requiring an Article III court's determination. *Marshall v. Stern* thus signaled that, just as the counterclaim at issue in that case raised an Article III issue, the fraudulent conveyance claim in the present case, although also designated as "core," likewise raised an Article III issue. *Id.* at 1060. Significantly, the court cautioned that a broad interpretation of 28 U.S.C. § 157(b)(2) would run afoul of this Court's holding in *Northern Pipeline*. *Id.* at 1057.

The court in *Marshall v. Stern* acknowledged that the concept of core and non-core pro-

ceedings "has its roots in Justice Brennan's plurality" decision in *Northern Pipeline*. *Id*. at 1054 n.23 (citing *Northern Pipeline*, 458 U.S. at 71). In the plurality decision, Justice Brennan characterized the exercise "of the historically recognized judicial power" as those proceedings that assert private rights or "the liability of one individual to another . . . ." *Northern Pipeline*, 458 U.S. at 69–70. By holding in *Marshall v. Stern* that the counterclaim involved was non-core, the Ninth Circuit pointed out that the counterclaim sounding in tort did not implicate "the restructuring of debtor-creditor relations. . . ." *Marshall v. Stern*, 600 F.3d at 1054 (citing *Northern Pipeline*, 458 U.S. at 71). Instead, the tort claim there in suit was a claim that would have determined the liability of one individual to another and had to be determined by an Article III judge. This was a clear indication of a right to an Article III court's determination of other private right claims, including fraudulent conveyance claims, which likewise determine the liability of one individual to another and thus fall within Article III.

In sum, Petitioner had clear indications prior to this Court's decision in *Stern* of the Article III right to adjudication of a fraudulent conveyance claim. Petitioner's asserted need for *Stern* to know its Article III rights utterly lacks merit – nor did the Circuit Court precedent cited by Petitioner bar it from making an Article III objection so clearly established by this Court's precedent.

POINT IV

THERE IS EVERY INDICATION THAT PETITIONER WAS AWARE THAT IT COULD MAKE A SOUND ARTICLE III OBJECTION, BUT FAILED TO ASSERT IT. GAMESMANSHIP BY SILENCE SHOULD NOT BE ENCOURAGED

Petitioner's actions in the bankruptcy court indicate that it was aware of its Article III right. Its denials of the Respondent's allegations in the complaint initiating this action raise a strong inference that it knew that it had an Article III right. Even if Petitioner were not charged with knowledge of its Article III right because of the compelling prior case law, there is a strong indication that it had actual knowledge of its right, as well.

In his complaint, Respondent alleged, "This is . . . a 'core proceeding'" pursuant to 28 U.S.C. § 157 (b)(2)(H). J.A. 50, ¶ 2.1. Petitioner denied this allegation, J.A. 80, ¶ 2.1, even though § 157(b)(2) provides, "Core proceedings include . . . (H) proceedings to . . . recover fraudulent conveyances." Because Congress defined a fraudulent conveyance proceeding as a core proceeding, Article III was the only basis for Petitioner's denial of the allegation that this action was a core proceeding. Petitioner thus understood that it had an Article III right to object to an adjudication of this action by the bankruptcy court.

Petitioner also denied Respondent's allegation that the bankruptcy court could even hear this case. J.A. 50, ¶2.2; J.A. 80, ¶ 2.2.[6] This denial cannot

[6] Respondent's complaint states, "2.1 This is an action to recover estate property by avoiding preferential transfers, fraudulent transfers, imposing successor liability, equitably

be explained simply by noting that Petitioner believed the case was non-core, because Petitioner must have been aware that the bankruptcy court had statutory authority without the consent of the parties to hear, without adjudicating, a non-core proceeding pursuant to 28 U.S.C. § 157(c)(1). Understanding that the bankruptcy court could at least hear a non-core proceeding, which Petitioner believed this case to be, it nonetheless denied that the bankruptcy court had any authority even to hear this fraudulent conveyance case. That denial, then, must have been based on its understanding that it had an Article III right to require this case to be in the district court.

Indeed, it is not enough for Petitioner to point to the qualified language of its denial to avoid this conclusion. While it is true that Petitioner's precise language noted that legal conclusions do not require a response, it continued to say, "To the extent that a response is required, Defendant denies." J.A. 80, ¶ 2.1, ¶ 2.2. Whether or not the allegations of the complaint were legal conclusions, Bankruptcy Rule 7012(b) required a response. Bankruptcy Rule 7012(b) provides, "[A]

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subordinating the claims of ARIS, EBIA, Palaveda, Ewing and Pearce, for conversion, for an accounting, for substantive consolidation and for breach of fiduciary duty and thus is a "core proceeding" pursuant to 28 U.S.C. §157(b)(2)(B), (C), (E), (F), (H), and (O). 2.2 This Court has jurisdiction to hear this complaint pursuant to 28 U.S.C. §157(a) and (b), 1334(a) and (b), and 11 U.S.C. §§105, 510, 544, 547, 548, 550 and 551." Petitioner's answer states, "2.1 Paragraph 2.1 of the Complaint states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies. Paragraph 2.2 of the Complaint states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies."

responsive pleading shall admit or deny an allegation that the proceeding is core or non-core." By denying that the proceeding was "core," Petitioner treated the claim as non-core, and thus was charged with knowledge of the further obligation under Bankruptcy Rule 7012(b) then and there either to state that it did consent to the entry of a final order, or that it refused to consent.

Although Petitioner asserted in its answer that the bankruptcy court could not hear the case, Petitioner did not, as Bankruptcy Rule 7012(b) requires, expressly refuse to consent to the bankruptcy court's adjudicatory authority, but instead kept its awareness of its Article III right to itself.[7] Throughout this litigation, Petitioner elected to forego numerous opportunities to bring its Article III objection to the surface. First, when it demanded a jury trial, it could have moved to withdraw the reference pursuant to 28 U.S.C. § 157(d) predicated on its Article III right. Second, after the bankruptcy court interpreted its demand for a jury trial as a motion to withdraw the reference, J.A. ¶ 102, Petitioner could have argued before the district court that Article III precluded the bankruptcy court from adjudicating the case. Instead, Petitioner stood mute as other defendants and Respondent submitted a status report to the district court stating that there were various matters, including a motion for summary judgment, remaining for the bankruptcy court to

[7] It is well established that, notwithstanding the express consent provision of Bankruptcy Rule 7012(b), consent may arise by implication from a party's litigation conduct during the proceeding. *See Roell v. Withrow*, 538 U.S. 580, 582 (2003) (holding that consent may be inferred from a party's conduct during litigation). *See also* cases cited in Point I.

determine. Pet'r's App. 73a. Third, after the proceeding returned to the bankruptcy court, Petitioner continued not to assert an Article III objection, just as it did not when the proceeding was first in that court. Fourth, after the Ninth Circuit announced its 2010 decision in *Marshall v. Stern*, Petitioner could have asked the bankruptcy court to consider the import of that decision on the summary judgment motion still pending before that court. Fifth, Petitioner could also have argued to the district court on its appeal from the summary judgment that the bankruptcy court lacked authority to adjudicate the case, but it did not until it made an Article III objection for the first time in a motion predicated on *Stern* that it filed in the Circuit Court below. The Petitioner did not need to know the holding in *Stern* in order to know its Article III rights from the inception of the proceeding. Petitioner had such knowledge from clear pre-*Stern* signals that alerted it. *See* Point III. In short, Petitioner waived its Article III personal right by failing to "[say] so – and [say] so promptly." *Stern*, 131 S. Ct. at 2608.

Petitioner now, as an afterthought, seeks to use Article III to void the judgment against it and to enjoy a brand new opportunity to defend against the fraudulent conveyance claim at issue, despite Petitioner's acknowledged awareness that "time and cost factors" are matters of serious concern to the proper and efficient functioning of the system for bankruptcy litigation. Pet'r's Br. 56. Petitioner's position, which it presses at significant cost to the estate and its creditors, is predicated squarely on this Court's decision in *Stern*, although it is clear that Petitioner did not need *Stern* to know that it had a sound Article III

objection on the basis of the unqualified proposition announced almost 25 years ago in *Granfinanciera* that a fraudulent conveyance claim is a private right for Article III purposes. *See* Point III.A.

Petitioner's argument should also fail because a ruling in its favor would promote gamesmanship. In *Stern*, this Court noted the perils of allowing litigants to "sandbag" the court with jurisdictional and constitutional issues after a substantial amount of litigation. *Stern,* 131 S. Ct at 2608 ("In such cases, as here, the 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 particularly severe.") (citing *Puckett v. United States*, 556 U.S. 129, 134 (2009)).

In any proceeding, the interests of finality and judicial economy are best served by requiring a litigant to raise its objections in its pleadings and surely before a court rules on a dispositive motion. Emphasizing the importance of finality, this Court stated in *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938): "It is just as important that there should be a place to end [a case] as that there should be a place to begin litigation. After a party has his day in court . . . [t]here is no reason to expect that the second decision [after a new hearing] will be more satisfactory than the first."

Moreover, this Court recognizes that finality is important to conserve judicial resources. *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 84 (1984) (recognizing the importance of conserving judicial resources); *Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 467 n.6 (1982) (same); *In re Owens Corning*, 419 F.3d 195, 203 (3d Cir. 2005)

(recognizing the "protracted nature" of bankruptcy cases and the need to avoid the waste of time and resources). The substantial "risk of a full and complicated [proceeding being] wasted at the option of an undeserving and possibly opportunistic litigant" weighs against the Petitioner. *See Roell,* 538 U.S. at 590. A rule allowing Petitioner first to raise its Article III rights after judgment has been issued against it is simply "not worth the downside." *Id.* (finding that inferring consent limits the possibility of gamesmanship). A party should not be allowed to impose added burdens on the judiciary, nor to add the expense of relitigating a case to the large cost of a bankruptcy case, while diminishing the estate and delaying distribution to the creditors, by remaining silent while preserving an Article III basis for upsetting a judgment if the case goes against it.

CONCLUSION

Based on the foregoing, and on the Respondent's Brief in Opposition, the order appealed from should be affirmed.

Respectfully submitted,

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Dated: November 12, 2013