Appeal No. 11-35162

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE 412(I) COMPANY *a/k/a* BELLINGHAM INSURANCE AGENCY, INC.,

Plaintiff-Appellee,

vs.

EXECUTIVE BENEFITS INSURANCE AGENCY, INC.,

Defendant-Appellant.

On Appeal from the United States District Court
For the Western District of Washington
Hon. Marsha J. Pechman
Case No. 10-cv-00929

BRIEF OF *AMICUS CURIAE* OF CONCERNED CHAPTER 7 AND 11 TRUSTEES AND PLAN ADMINISTRATORS IN SUPPORT OF PLAINTIFF-APPELLEE IN RESPONSE TO THE CIRCUIT'S QUESTIONS

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On behalf of Amicus Curiae Concerned Chapter 7 and 11 Trustees and Plan Administrators

TABLE OF CONTENTS

Page

Table of Authorities

Cases

Statutes

Other Sources

INTEREST OF AMICUS CURIAE

Amici curiae are chapter 7 and chapter 11 panel trustees, private trustees, and plan administrators for liquidating debtors serving in cases throughout the nation ("*Amici*").[1] Each has extensive experience. *Amici* serve as U.S. Department of Justice-appointed and court-approved fiduciaries, special administrators, referees, and receivers for property liquidations and distributions. The group includes trustees involved in major bankruptcy cases in the Ninth Circuit (Heller Ehrman LLP and Howrey LLP law firm bankruptcy cases); Second Circuit (Dreier LLP and Thelen LLP law firm bankruptcies); Third Circuit (Syntax-Brillian bankruptcy); Sixth Circuit (Appalachian Fuels bankruptcy); and the Seventh Circuit (Lancelot and Equipment Acquisition Resources bankruptcies).

As fiduciaries for debtors' estates (both pre- and post-confirmation) and their creditor beneficiaries, *Amici* are concerned with preserving the ability of bankruptcy estates and trustees to effectively marshal the assets of debtors by bringing fraudulent transfer claims under Bankruptcy Code sections 544 and 548 in bankruptcy court adversary proceedings. In the experience of *Amici*, the ability of bankruptcy trustees to bring fraudulent transfer actions in the bankruptcy court is

[1] A list of the *Amici* and summaries of their professional qualifications are provided in the Appendix. Counsel for *Amici* offer their services on this brief *pro bono*. None of the estates represented by *Amici* are funding this effort.

crucial to their ability to efficiently and effectively recover property transferred out of the estate to the detriment of the debtor's creditors.

One bankruptcy court recently explained why keeping fraudulent transfer actions in bankruptcy court is critical to the efficient and effective management of bankruptcy cases:

> Since the enactment of the Bankruptcy Code, the management and determination of statutory avoidance claims has been a primary function of the bankruptcy courts. Such claims often play a prominent role in bankruptcy cases, either because of their sheer numbers or because of the effect that the potential avoidance of a transfer, lien or obligation may have on creditors' recoveries. This is particularly so in cases where most, if not all, of the debtor's estate was transferred to third parties pre-bankruptcy, such as the many Ponzi-scheme driven cases of recent years, requiring a coordinated response overseen by one judge on behalf of a host of creditor-victims. The ability to manage efficiently the investigation and litigation of such claims, and their possible global settlement, decreases if handled on a piecemeal basis by different judges, no matter how talented.

Kirschner v. Agoglia (In re Refco Inc.), 2011 Bankr. LEXIS 4496, at *5 (Bank. S.D.N.Y. Nov. 30, 2011).

Amici agree wholeheartedly with this description of the importance of fraudulent transfer actions in bankruptcy cases. In many cases, not only are fraudulent transfer actions important to the bankruptcy case, they are the primary focus of the bankruptcy case. Without fraudulent transfer (and preference) actions, in many cases there are no assets to distribute to creditors. Moreover, in many

cases, the trustee or debtor will bring scores of fraudulent transfer actions to reconstitute the corpus of the wrongfully diminished estate. For example:

- *Amicus* Michael Burkart is the Plan Administrator under a Confirmed Plan of Liquidation in *In re Heller Ehrman LLP*, No. 08-32514 DM (Bankr. N.D. Cal.) ("Heller"). The Heller estate initiated approximately one hundred adversary proceedings in the bankruptcy court to avoid preferential and fraudulent transfers, along with related claims, and has recovered in excess of $34 million.

- *Amicus* Sheila M. Gowan is the chapter 11 trustee for the estate of Dreier LLP ("Dreier") in *In re Dreier LLP*, No. 08-15051-SMB (Bankr. S.D.N.Y.). The Dreier trustee has brought over sixty avoidance actions, including against those persons and entities that invested in Marc S. Dreier's Ponzi scheme. To date the trustee has recovered over $44 million in settlements for the benefit of the Dreier estate.

- In another major Ponzi scheme case, the trustee in the Madoff bankruptcy initiated over 1,000 adversary actions alleging claims under sections 544 and/or 548. *See Madoff Investment Securities APScans CADDJ Report, available at* http://www.burbageweddell.com/apscans/madoff-avoidance-actions-listin/ (last visited Dec. 7, 2011).

- *Amicus* William A. Brandt, the Plan Administrator under a confirmed Plan of Liquidation in *In re Equipment Acquisition Resources Corp.*, No. 09-39937 (Bankr. N.D. Ill.), has filed dozens of fraudulent transfer actions under section 548 arising out of another Ponzi-like scheme involving hundreds of millions of dollars in losses.

In our experience, having multiple, similar fraudulent transfer cases, with overlapping facts and legal issues, handled by one judge familiar with the entire bankruptcy case and the situation of the debtor is critical to the efficient and effective management of the estate.[2]

[2] The position of *Amici* is limited to those arguments expressed in this brief. *Amici* take no position on whether Defendant-Appellant, by his silence before the

SUMMARY OF ARGUMENT

Sections 544(b) and 548 of the Bankruptcy Code allow bankruptcy trustees to avoid a debtor's fraudulent conveyances and recover property for the estate with the ultimate goal of a distribution to general unsecured creditors. Particularly in chapter 11 cases, these avoidance powers provide critical tools for trustees to maximize the amount of property available for distribution and to "level[] the playing field" among creditors, and often provide the only available avenue for recovery to unsecured creditors.[3]

Under 28 U.S.C. section 157(b)(2)(H), actions to recover fraudulent transfers are "core" proceedings in which bankruptcy courts may enter final judgment. Both the Ninth and the Tenth Circuits have held that a bankruptcy court's entry of final judgment pursuant to section 157(b)(2)(H) does not violate Article III of the U.S. Constitution. *See Duck v. Munn* (*In re Mankin*), 823 F.2d 1296, 1309 (9th Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988); *Turner v. Davis, Gillenwater & Lynch* (*In re Investment Bankers*), 4 F.3d 1556, 1560-62 (10th Cir.

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bankruptcy court and subsequent appeal, may have waived any argument that the bankruptcy court's entry of judgment violated Article III of the U.S. Constitution, or whether the issues listed in this Court's invitation for supplemental briefing are ripe for decision in this appeal.

[3] The recent plethora of Ponzi scheme cases have underscored that often the only available means by which fraud victims can hope to receive a distribution from the debtor's estate is through the recovery efforts of trustees and other fiduciaries pursuing chapter 5 avoidance actions such as fraudulent transfer claims.

1993). As both courts recognize, fraudulent transfer actions are grounded in the Bankruptcy Code, enacted by Congress under Article I, Section 8 of the Constitution, to provide for uniform bankruptcy laws. *In re Mankin*, 823 F.2d at 1308; *In re Investment Bankers*, 4 F.3d at 1561. Such claims "only exist if the conveyor is insolvent or about to become insolvent, and thus [are] inextricably tied to the bankruptcy scheme." *In re Mankin*, 823 F.2d at 1307 n.4.

The Supreme Court's holding in *Stern v. Marshall*, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011), does not overrule *In re Mankin* or *In re Investment Bankers* for a number of reasons. First, *Stern's* holding is expressly limited to a different provision of the Bankruptcy Code: the blanket provision in 28 U.S.C. section 157(b)(2)(C) denominating as core any "counterclaims by the estate against persons filing claims against the estate." Thus, the Court specifically held that its ruling was a "narrow one" and applied to the Bankruptcy Code "in one isolated respect." Such express limitations—particularly in Supreme Court opinions regarding the authority of bankruptcy courts—are treated with respect by both the Court itself and the Ninth Circuit.

Second, bankruptcy court adjudication of fraudulent conveyance actions falls within the "public rights" doctrine. *Stern* describes claims which "stem from the bankruptcy itself" as within the "public rights" doctrine. As the Ninth Circuit and the Tenth Circuit held in *In re Mankin* and *In re Investment Bankers*,

fraudulent conveyance actions meet this test. In contrast with the state-law counterclaims in *Stern*, fraudulent conveyance claims arise from a debtor's bankruptcy and are integrally related to the operation of the federal Bankruptcy Code, which gives debtors and trustees the power to assert such claims post-bankruptcy filing on behalf of creditors. Fraudulent transfer claims are tied more closely to the claims adjudication process and relate much more directly to the restructuring of debtor-creditor relations and the claims allowance process. Far from overruling *In re Mankin* and *In re Investment Bankers*, *Stern*'s discussion of the public rights doctrine reaffirms them.

Certainly, in any event, the Supreme Court's holdings in *Katchen v. Landy*, 382 U.S. 323, 334 (1966) and *Langenkamp v. Culp*, 498 U.S. 42, 44-45 (1990), leave no doubt that when fraudulent transfer claims are asserted against a creditor who has filed a proof of claim in bankruptcy, no Article III issue is raised and the bankruptcy court's authority to enter a final judgment is unchallenged.

Finally, even if *Stern* is interpreted to bar bankruptcy courts from entering final judgments in fraudulent transfer actions, bankruptcy courts may still submit a report and recommendation to the district court in lieu of entering a final judgment. This approach has been taken by virtually every court since *Stern* under a common-sense reading of the Bankruptcy Code. Such a procedure was, in fact, essentially endorsed by *Stern* itself. Even if *Stern* is read to bar bankruptcy courts

from entering final judgments in fraudulent transfer actions against defendants who do not file proofs of claim, nothing bars the bankruptcy court from issuing a report and recommendation in accordance with section 157(c)(1).

ARGUMENT

I. BANKRUPTCY COURTS MAY ENTER FINAL JUDGMENT ON FRAUDULENT TRANSFER CLAIMS.

A. The Express Limitations On *Stern*'s Holding Should Be Respected.

The Supreme Court's characterization of its holding deserves great weight.[4] In *Stern*, the Court pointedly emphasized that its ruling was "narrow" and intended to address the Bankruptcy Code only "in one isolated respect." *See Stern*, 131 S. Ct. at 2620. The Court wrote that "our decision today does not change all that much" and that any changes were "slight." *Id.* In short, the Court went out of its way to note that it was addressing merely the constitutionality of bankruptcy courts adjudicating state-law counterclaims. *Id.*

[4] *See, e.g., Johnson v. Texas*, 509 U.S. 350, 365 (1993) (citing the Court's characterization of its own holding in a previous opinion as a "straightforward application of our earlier rulings," concluding that this statement "makes it clear that these cases can stand together with *Perry*"); *Wasman v. United States*, 468 U.S. 559, 571 (1984) (citing Justice Douglas's prior characterization of majority opinion); *United States v. Won Cho*, 730 F.2d 1260 (9th Cir. 1984) (declining to extend holding of Supreme Court in *Ralston v. Robinson*, 454 U.S. 201 (1981) based on explanation by the Court in *Ralston* as to how its holding should be interpreted).

It is therefore too much of a leap to interpret *Stern* to bar bankruptcy courts from entering final judgments on all fraudulent conveyance claims. *See Kirschner v. Agoglia (In re Refco Inc.)*, 2011 Bankr. LEXIS 4496, at *8-9 (Bankr. S.D.N.Y. Nov. 30, 2011) (relying on, *inter alia*, the "repeated and emphatic limiting language in *Stern*" to hold that "Article III of the Constitution does not prohibit the bankruptcy courts' determination of fraudulent transfer claims under 11 U.S.C. §§ 544 and 548 by final judgment").

While not unanimous,[5] many lower courts accordingly have held that *Stern* is limited only to the bankruptcy courts' adjudication of state-law counterclaims. *Peacock v. Ford Motor Credit Co., LLC* (*In re Peacock*), 455 B.R. 810, 812 (Bankr. M.D. Fla. 2011) ("The narrow holding in Stern, as just described, does not impact a bankruptcy court's ability to enter a final judgment in any other type of core proceeding authorized under 28 U.S.C. § 157(b)(2)."); *Menotte v. United States (In re Custom Contrs., LLC)*, 2011 Bankr. LEXIS 5202, at *4 (Bankr. S.D. Fla. Dec. 5, 2011) ("While *Stern* held that bankruptcy judges lacked authority to enter final judgments on state law counterclaims . . . it did not hold that bankruptcy judges lack authority to enter final judgments on fraudulent transfer claims . . . ");

[5] *See e.g., In re Heller Ehrman LLP*, _ F. Supp. 2d. __, 2011 U.S. Dist. LEXIS 143223 (N.D. Cal. Dec. 13, 2011); *Field v. Lindell (In re Mortgage Store, Inc.)*, 2011 U.S. Dist. LEXIS 123506, at *11-13 (D. Haw. Oct. 5, 2011) (discussing other cases in which courts interpret *Stern* broadly).

In re Safety Harbor Resort & Spa, 456 B.R. 703, 716-17 (Bankr. M.D. Fla. 2011) ("The Supreme Court plainly intended to, and in fact did, narrowly limit the scope of its holding in *Stern*."); *Springel v. Prosser* (*In re Innovative Commun. Corp.*), 2011 Bankr. LEXIS 3040, at *9-10 (Bankr. D.V.I. Aug. 5, 2011) ("As the Supreme Court deems its holding to be narrow, we take the Court at its word.").[6]

Consistent with the majority approach, *Amici* contend that a broad reading of *Stern* is unwarranted. The Court in *Stern* not only described its holding as "narrow"—it also clarified what it was *not* holding. The Court said that it was *not* "reconsidering the public rights framework for bankruptcy." 131 S. Ct. at 2614 n.7. Nor was it addressing "whether, and on what grounds, a bankruptcy court may resolve a claim pretrial." *Id.* at 2606 n.4 (citing *In re Dow Corning Corp.*, 215 B.R. 346, 349-51 (Bankr. E.D. Mich. 1997)). Indeed, the Court did not view its holding as disrupting the "division of labor" under the Bankruptcy Code. *Id*. at 2620.[7]

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[6] *See also Miller v. Greenwich Capital Fin. Prods.* (*In re Am. Bus. Fin. Servs.*), 457 B.R. 314, 319 (Bankr. D. Del. 2011) (holding that because "[i]n *Stern*, the Court held that its decision is a 'narrow one,'" *Stern* did not apply to claims at issue, noting "[i]f not for the bankruptcy, these claims would never exist").

[7] On January 12, 2012, the Delaware Bankruptcy Court recently reached the same conclusion after thoughtfully analyzing the *Stern* opinion and its implications. *Burtch v. Seaport Capital, LLC (In re Direct Response Media)*, Case No. 10-10058, Adv. No. 10-50855 (Bankr. D. Del. Jan. 12, 2012) ("The Court adopts the Narrow Interpretation and holds that . . . *Stern* does not remove the bankruptcy courts' authority to enter final judgments on . . . fraudulent conveyance actions.").

These express limitations are typical of the Court's (and the Ninth Circuit's) careful, incremental approach in addressing constitutional issues in the bankruptcy context. For example, in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), the Court held that defendants in an adversary proceeding who have not filed a claim in the bankruptcy are entitled to a jury trial under the Seventh Amendment. 492 U.S. at 64. The Court was careful to limit its holding to the Seventh Amendment issue *alone*. *See id.* at 50 ("We are not obliged to decide today [anything more than] . . . whether the Seventh Amendment confers on petitioners a right to a jury trial . . . .").

The Ninth Circuit adhered to this instruction in *Sigma Micro Corp. v. Healthcentral.com (In re Healthcentral.com)*, 504 F.3d 775 (9th Cir. 2007), where it rejected the argument that *Granfinanciera* required the bankruptcy court to immediately transfer an action to an Article III court "once a jury right is found." 504 F.3d at 786-88. It instead observed that *Granfinanciera* was limited to the jury trial issue. *See id.* at 786 (noting right to jury trial was "the exclusive holding of *Granfinanciera*" and that "the *Granfinanciera* Court explicitly stated it would hold no more"). Moreover, requiring an immediate transfer to the district court "would run counter to our bankruptcy system," which "promotes judicial economy and efficiency by making use of the bankruptcy court's unique knowledge of Title 11 and familiarity with the actions before them." *Id.* at 787-88.

Stern should be read equally as narrowly. As *Granfinanciera* was limited to its "exclusive holding" in *Healthcentral.com,* so too should *Stern* be interpreted as applying only to the Bankruptcy Code "in one isolated respect"—the constitutionality of adjudicating state-law counterclaims in bankruptcy court. *See Stern,* 131 S. Ct. at 2620.

B. Fraudulent Transfer Actions Fall Under The "Public Rights" Doctrine Because They "Stem From The Bankruptcy Itself."

Stern expressly affirms the long line of cases, reaching back to *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. 272 (1855), holding that non-Article III courts may adjudicate "public rights" in "cases in which the claim at issue derives from a federal regulatory scheme" or is "integrally related to particular federal government action." *Stern*, 131 S. Ct. at 2613; *accord Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67 (1982).

Applying this principle in the bankruptcy context, the *Stern* Court explains that "the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Id.* at 2618. The counterclaim for defamation in *Stern* fell outside of the public rights exception because "Vickie [Marshall's] claim is a state law action independent of the federal bankruptcy law." *Id.* at 2611. The Court further reasoned that the state-law counterclaim fails the public rights test because it is a "common law cause of action" that did not "derive from," "depend upon," or "flow from a federal

statutory scheme." *Id.* at 2614. The Court emphasized that, unlike "a right of recovery created by federal bankruptcy law," the counterclaim was a "state tort action that exists without regard to any bankruptcy proceeding." *Id.* at 2619.

Fraudulent transfer claims, in contrast, derive from, depend on, and flow from the federal regulatory scheme set out in the Bankruptcy Code. The claims themselves rest on federal statutory predicates. 11 U.S.C. § 544, §548. This Court, after a detailed analysis, reached the same conclusion in *In re Mankin*, 823 F.2d 1296, 1309 (9th Cir. 1987) (fraudulent transfer claims by trustees are "dependent for [their] existence on federal law"). So did the Tenth Circuit. *In re Inv. Bankers*, 4 F.3d 1566, 1561 (10th Cir. 1993) ("the right of a bankruptcy trustee to void preferences and fraudulent transfers is a congressionally created right pursuant to Congress' authority under Article I Section 8 of the Constitution to provide for uniform bankruptcy laws").

Fraudulent transfer claims "only exist if the conveyor is insolvent or about to become insolvent, and thus [are] inextricably tied to the bankruptcy scheme." *In re Mankin*, 823 F.2d at 1307 n. 4. Although state law causes of action exist with respect to fraudulent conveyances, courts consistently recognize that the Bankruptcy Code modifies and augments the rights of the estate to pursue such claims for the benefit of creditors. *E.g.*, *In re Mankin*, 823 F.2d at 1307 ("the trustee here, unlike the debtor in *Northern Pipeline*, is acting pursuant to his duty

under the federal bankruptcy law to gather property into the estate on the behalf of creditors of the debtor to facilitate the restructuring of creditor-debtor relations.").

As one district court explained:

> The action to avoid a fraudulent conveyance under 28 U.S.C. sec. 157(b)(2)(H) is premised on the notion that the estate remains in constructive possession of the fraudulently conveyed property as the conveyance does not effectively transfer title. Therefore, such an action does relate directly to restructuring of debtor-creditor relationship where it is brought by the trustee to gather property into the estate on the behalf of creditors of the debtor to facilitate the restructuring of creditor-debtor relations.

In re Vylene Enterprises, Inc. 122 B.R. 747, 753 (C.D. Cal. 1990) (internal citations omitted); *accord In re Ramirez*, 413 B.R. 621, 628 (Bankr. S.D. Tex. 2009) ("While the [Texas fraudulent transfer] claim is rooted in state law, it is now a federal claim under 11 U.S.C. § 544 as a result of the commencement of the bankruptcy case (as evidenced by the Trustee's intervention) and invokes a substantive right provided by title 11.").

Indeed, without a federal bankruptcy proceeding, fraudulent transfer claims would be unavailable to the trustee. *In re Heller Ehrman LLP*, 2011 Bankr. LEXIS 3764, at *20 ("[B]ut for the bankruptcy, Heller could not assert these claims at all. As the transferor, it would lack standing had it not acquired the rights and duties of a trustee as a debtor-in-possession.") (internal quotes and citations omitted); *Bliss Techs., Inc. v. HMI Indus.* (*In re Bliss Techs., Inc.*), 307 B.R. 598, 604-605 (Bankr. E.D. Mich. 2004) ("In the absence of a bankruptcy, for example, a cause of action

under Ohio's Uniform Fraudulent Transfer Act could be pursued only by a creditor of Debtor Bliss Technologies, not by Debtor itself (or a creditor's committee acting on behalf of Debtor.) . . . It is only § 544(b)(1) of the Bankruptcy Code that permits a trustee/bankruptcy debtor-in-possession to pursue such an action.") (internal citations omitted).

Historically, bankruptcy has been a "quintessentially public" concern. Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 Notre Dame L. Rev. 605, 647 (2008).[8] As one bankruptcy judge noted, at the founding "[t]he federal power to regulate debtor-creditor relationships was thought to be essential to maintaining a stable Union," and quoted James Madison as follows:

> [T]he most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation and involves the spirit of party and faction in the necessary and ordinary operations of government.

[8] The power to rule on actions to recover fraudulent conveyances and "property that the bankrupt had transferred before bankruptcy" has long been a fixture of the bankruptcy system. *See, e.g.*, Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 Am. Bankr. L.J. 567, 584-87 (1998).

West v. Freedom Med., Inc.(In re Apex Long Term Acute Care-Katy, L.P.), No. 09-37096, 2011 Bankr. LEXIS 5162, at *7 (Bankr. S.D. Tex. Dec. 28, 2011) (quoting *The Federalist* No. 10 (James Madison)). The importance of and public interest in bankruptcy administration is endorsed in the Constitution itself, which grants Congress the express authority "to establish . . . uniform laws on the subject of bankruptcies throughout the United States." U.S. Const. art. I, § 8.

Granfinanciera, 492 U.S. 33, is not to the contrary. The "sole" issue before the Court there was whether a defendant had a right under the Seventh Amendment to a jury trial in a fraudulent conveyance action. 492 U.S. at 50 (holding that defendants in a fraudulent transfer claim have a right to a jury trial). The Court expressly declined to "decide today whether the current jury trial provision . . . permits bankruptcy courts to conduct jury trials in fraudulent conveyance actions like the one respondent initiated," and declined to "express any view as to whether . . . Article III allows jury trials in such actions to be held before non-Article III bankruptcy judges subject to the oversight provided by the district courts pursuant to the 1984 Amendments." *Id.* at 64.

Courts and commentators thus have repeatedly recognized that *Granfinanciera* does not bar bankruptcy courts from entering final judgment on fraudulent transfer claims under Article III. *E.g., In re Investment Bankers*, 4 F.3d at 1561 (discussing *Granfinanciera* and holding Article III does not bar bankruptcy

courts from adjudicating fraudulent transfer claims); Hon. William L. Norton, Jr. et al., *Norton Bankruptcy Law And Practice 3d*, § 2:12 at 2-27 (2011) ("a determination of whether there is a right to a trial by jury does not provide insight as to whether a right to be adjudicated by a court is a 'public right' within the meaning of the traditional exception to Article III crafted by the Supreme Court over the past century.").

A close reading of *Granfinanciera* bears this out. It sets forth a test for determining whether the Seventh Amendment's right to a jury trial applies: whether the rights at issue "more nearly resemble" "state-law contract claims" that are "subject to a suit at common law." *Granfinanciera*, 492 U.S. at 55-56. The Court held that fraudulent transfer claims "resembled" such claims, and that the 1984 Bankruptcy Act could not sweep away the right to a jury trial for fraudulent conveyance actions (which had previously existed under the Bankruptcy Code) by simply re-labeling such actions "core." *Id.* at 60-61 (emphasis in original).

In contrast, under *Stern*, the inquiry under Article III is different: "whether the action at issue *stems from the bankruptcy itself* or would necessarily be resolved in the claims allowance process." *Stern*, 131 S. Ct. at 2618 (emphasis added). Unlike state-law contract claims or state-law counterclaims, claims under sections 544 and 548 for fraudulent transfer *do not exist* unless the debtor files for bankruptcy. By their very nature, fraudulent transfer claims "stem from the

bankruptcy itself." *Id.* Moreover, unlike traditional "common law" claims like contract or tort claims, debtors and trustees would not be able to bring such claims but for the Bankruptcy Code's provisions, which allow them to assert such claims on behalf of creditors. *See* 28 U.S.C. §§ 544 and 548.[9]

Fraudulent transfer claims go the heart of the bankruptcy administrative process and are part and parcel of the Congressionally mandated statutory regime. Not only do these claims arise out of the bankruptcy statutory scheme, but they have a fundamental and essential *impact* on the bankruptcy administrative process. Unlike state fraudulent transfer claims that are brought for the benefit of an individual creditor-plaintiff, section 548 fraudulent transfer recoveries flow to the estate for the benefit of all creditors. Accordingly, even after *Stern*, the public rights exception still squarely applies to section 548 claims, and bankruptcy courts have the constitutional authority to enter final judgments on those claims.

C. Undoubtedly, *Stern* Does Not Apply to Fraudulent Transfer Claims Against Creditors Who Filed a Proof of Claim.

The defendant-appellant in this appeal did not file a proof of claim in the bankruptcy. *See* Claims Register, *In Bellingham Insurance Agency Inc.*, Case No. 06-11721 (Bankr. W.D. Wash.). If it had, there would be no serious issue regarding the authority of the bankruptcy court to enter final judgment. In

[9] Nor is the public rights doctrine unavailable because the government is not a party to the claim. *Cf. Stern*, 131 S. Ct. at 2621 (Scalia, J., concurring) (advocating such a limitation, but acknowledging "contrary precedents").

Lagenkamp v. Culp, 498 U.S. 42 (1990) (*per curiam*), the Court expressly reaffirmed that, even after *Granfinanciera*, where a creditor files a claim against the bankruptcy estate and "is met, in turn, with a preference action from the trustee, that action becomes part of the claims-allowance process [which is] integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's equity jurisdiction." 498 U.S. at 44-45. As the Court explained both in *Lagenkamp* and *Katchen v. Landy*, 382 U.S. 323, 334 (1965), any claim to the estate belonging to the recipient of a preference or fraudulent transfer will be disallowed. *See* 11 U.S.C. § 502(d) ("the court shall disallow any claim of any entity . . . that is a transferee of a transfer avoidable" as a preference or fraudulent transfer).

The Court cemented the holdings of *Lagenkamp* and *Katchen* in *Stern*, explaining that because the issue of whether a transfer was preferential or fraudulent must be decided before the recipient's claim can be allowed, it is "necessarily resolvable by a ruling on the creditor's proof of claim in bankruptcy." 131 S. Ct. at 2611.[10] As such, "there [would be] no basis for the creditor to insist

[10] *See also Stern*, 131 S. Ct. at 2617 ("We explained [in *Lagenkamp*] that a preferential transfer claim can be heard in bankruptcy when the allegedly favored creditor has filed a claim, because then 'the ensuing preference action by the trustee becomes integral to the restructuring of the debtor-creditor relationship.' 498 U.S. at 44.").

that the issue be resolved in an Article III court," and no constitutional mandate is violated by adjudicating that claim in the bankruptcy court. 131 S. Ct. at 2616.

II. BANKRUPTCY COURTS CAN ISSUE REPORTS AND RECOMMENDATIONS IN CORE PROCEEDINGS WHERE IT MAY BE UNCONSTITUTIONAL TO ENTER A FINAL JUDGMENT.

Section 157(a)(1) of the Judicial Code gives broad discretion to district courts. They "may provide that any and 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." 28 U.S.C. § 157(a)(1). Section 157(b)(1) likewise provides a broad authorization permitting "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 . . . and . . . enter appropriate orders and judgments, subject to review under section 158 of this title." 28 U.S.C. § 157(b)(1). This broad delegation of authority allows bankruptcy courts to submit proposed findings of fact and conclusions of law as an alternative to entering a final judgment in cases, such as the counterclaim in *Stern*, that are statutorily designated as core, but in which the bankruptcy court cannot constitutionally enter a final judgment.

Submitting proposed findings of fact and conclusions of law is, of course, expressly permitted in non-core matters under 28 U.S.C. section 157(c)(1). As one district court recently found, there are "two possibilities" when answering the

question "how would Congress intend for the bankruptcy court to handle [unconstitutional core matters]." *JustMed, Inc. v. Byce (In re Byce)*, 2011 U.S. Dist. LEXIS 144115, at *12 (D. Idaho Dec. 14, 2011). Those are either "default to the procedure used for non-core matters, (*i.e.*, proposed findings and recommendations under 28 U.S.C. § 157(c)), or, alternatively, [determine] that such matters should be entirely removed from the bankruptcy courts." *Id.*

Given that Congress delegated broader authority to bankruptcy courts in core matters than non-core matters, and the delegation included not only the authority to hear and determine all cases but also to enter all appropriate orders, common sense should drive the outcome: in matters statutorily defined as core, where entering a final judgment would be unconstitutional, bankruptcy courts can continue to hear all pretrial proceedings and enter as an appropriate order proposed findings of fact and conclusions of law in the manner prescribed by section 157(c)(1) of the Judicial Code. *Stern* itself supports this conclusion. The Court explained:

> Pierce has not argued that the bankruptcy courts "are barred from 'hearing' all counterclaims" or *proposing findings of fact and conclusions of law on the matters*, but rather that it must be the district court that finally decides them. We do not think the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction meaningfully changes the division of labor in the statute."

131 S. Ct. at 2620 (emphasis added) (internal citations omitted).

Virtually every court to consider the question has ruled that bankruptcy courts have the authority to enter proposed findings of fact and conclusions of law in "core" proceedings in which they cannot enter final judgments. *E.g.*, *In re Byce*, 2011 U.S. Dist. LEXIS 144115, at *12-13 (adopting "majority view" and collecting cases).[11] Support for this conclusion comes from the Judicial Code

[11] *See, e.g., Walker, Truesdell, Roth & Assocs. v. Blackstone Group, L.P. (In re Extended Stay, Inc.)*, 2011 U.S. Dist. LEXIS 131349, at *30 (S.D.N.Y. Nov. 10, 2011) ("In the event that the bankruptcy court does not have constitutional authority to enter a final judgment on certain claims, it may submit proposed findings of fact and conclusions of law to this Court."); *Paloian v. Am. Express Co.* (*In re Canapy Fin., Inc.*), 2011 U.S. Dist. LEXIS 99804, at *12-13 (N.D. Ill. Sept. 1, 2011) ("*Stern* did not strip the Bankruptcy Court of the authority to hear Paloian's [fraudulent transfer] claims . . . and to propose findings of fact and conclusions of law on those claims to this court."); *Adams Nat'l Bank v. GB Herndon & Assocs.* (*In re GB Herndon & Assocs.*), 2011 Bankr. LEXIS 3851, at *47-48 (Bankr. D.D.C. Oct. 4, 2011) (proposing finding of facts and conclusions of law, in the alternative, in a proceeding to adjudicate a debtor's state law counterclaims); *Hagan v. Smith* (*In re Naughton*), 2011 Bankr. LEXIS 3762, at *2-3 (Bankr. W.D. Mich. Sept. 6, 2011) (entering a "Report and Recommendation" in a case seeking authority to conduct a sale pursuant to 11 U.S.C. § 363); *Meoli v. Huntington Nat'l Bank* (*In re Teleservices Group, Inc.*), 2011 Bankr. LEXIS 3128, at *78, 59 (Bankr. W.D. Mich. Aug. 17, 2011) (holding decisions on summary judgment on core claims to which *Stern* applicable "will be submitted to the district court as a non-core matter on report and recommendation"); *Tibble v. Wells Fargo Bank, N.A.* (*In re Hudson*), 2011 Bankr. LEXIS 3134, at *22-23 (Bankr. W.D. Mich. Aug. 16, 2011) ("If this court's order is appealed, and the district court decides this court is not constitutionally authorized to issue a final order in this adversary proceeding, this Opinion should be treated as a report and recommendation."); *Siegel v. FDIC* (*In re IndyMac Bancorp Inc.*), 2011 U.S. Dist. LEXIS 78418, at *17-18 (C.D. Cal. July 15, 2011) (intimating that a bankruptcy court could enter proposed findings of fact and conclusions of law in matters that were statutorily, but not constitutionally, core); *In re Bearingpoint, Inc. v. Stoebner v. PNY Techs., Inc.* (*In re Polaroid Corp.*), 451 B.R. 493, 497 (Bankr. D. Minn. July 7, 2011) (holding that absent the parties' consent, the state law counterclaim at

itself. In *Heller Ehrman LLP v. Arnold & Porter, LLP (In re Heller Ehrman LLP)*, 2011 U.S. Dist. LEXIS 143223, at *17-18 (N.D. Cal. Dec. 13, 2011), the district court held that section 157(a)(1)'s "general grants of broad authority to both district and bankruptcy courts" give bankruptcy courts the ability to enter proposed findings of fact in core, as well as non-core proceedings, and concluded that merely because section 157(c)(1) specifically provides for such a procedure for non-core proceedings did not bar a similar procedure for core proceedings. As the court put it "[t]he absence of an explicit provision is not a prohibition." *Id*.; *see also Heller Ehrman LLP v. Arnold & Porter, LLP (In re Heller Ehrman LLP)*, 2011 Bankr. LEXIS 3764, at *25 (Bankr. N.D. Cal. Sept. 28, 2011) (holding similarly and noting that "the fact that Bankruptcy Rule 9033 only mentions non-core proceedings in no way prohibits following the same procedure in core matters."). Indeed, "the intent behind [the 1984 Bankruptcy Act] is clear: Congress wanted Bankruptcy Judges to finally adjudicate bankruptcy-related matters whenever Article III permitted them to do so, *and to issue recommended findings subject to de novo review in the District Court whenever it did not*." *In re Coudert Bros. LLP*, 2011 U.S. Dist. LEXIS 110425, at *36-37 (S.D.N.Y. Sept. 22, 2011) (emphasis added); s*ee also In re Mortgage Store, Inc.*, 2011 U.S. Dist.

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issue would be subject to the "report and recommendation" procedure used for non-core proceedings).

LEXIS 123506, at *16 (D. Haw. Oct. 5, 2011) (Congress intended that bankruptcy courts, to the extent possible, should adjudicate cases relating to Title 11.).

Amici have found only one decision where a bankruptcy court held that it lacked authority to enter proposed findings of fact and conclusions of law in core matters. *See In re Blixseth*, 2011 Bankr. LEXIS 2953 (Bankr. D. Mont. Aug. 1, 2011).[12] That court has now reversed itself. *Blixseth v. Kirschner (In re Yellowstone Mountain Club, LLC)*, Case No. 08-61750, Adv. No. 09-0014, Docket No. 682 (Bankr. D. Mont. Dec. 13, 2011) ("Having now had the benefit of more time to reflect[], I find my [prior] conclusion may be flawed. . . . [T]o the extent [my prior decision] is inconsistent with the decision expressed today [it is] overruled.")

Amici have found no reported bankruptcy decision that followed *Blixseth* before the court changed course, while numerous courts specifically reject both the prior *Blixseth* holding and its reasoning. *See, e.g.*, *RES-GA Four LLC v. Avalon Builders of GA LLC*, 2012 U.S. Dist. LEXIS 485 at *31 (M.D. Ga. Jan. 4, 2012)

[12] In a recent decision, the Seventh Circuit, without any analysis, stated in dicta that where a debtor's claims qualify as core proceedings, entering proposed findings of fact and conclusions of law on those claims is not constitutionally permissible for a non-Article III court because the actions "do not fit" under 28 U.S.C. § 157(c)(1). *Ortiz v. Aurora Health Care Inc. (In re Ortiz)*, 2011 U.S. App. LEXIS 26009 at *21 (7th Cir. Dec. 30, 2011). This decision without any reasoning or legal support is not persuasive particularly in light of the weight of contrary authority at both the district court and bankruptcy court levels.

("In view of pre- and post- Stern jurisprudence, the Court disagrees with *In re Blixseth* and concludes that bankruptcy courts have authority to hear and submit proposed findings of fact and conclusions of law in proceedings related to title 11 cases, regardless of whether they are classified as core or non-core."); *In re Emerald Casino, Inc.*, 2011 Bankr. LEXIS 3324, *5-7 n.1 (Bankr. N.D. Ill. Aug. 26, 2011) (discussing *Blixseth* and concluding that "[e]ven if the Supreme Court had not already directed a more reasonable remedy for the constitutional violation it found in *Stern*, the perverse effect of the remedy suggested by the defendants' argument would require that it be rejected"); *Field v. Lindell (In re Mortgage Store, Inc.)*, 2011 U.S. Dist. LEXIS 123506 (D. Haw. Oct. 5, 2011) (rejecting *Blixseth* and instead noting that "the court has little difficulty in finding that Congress, if faced with the prospect that bankruptcy courts could not enter final judgments on certain 'core' proceedings, would have intended them to fall within 28 U.S.C. § 157(c)(1) granting bankruptcy courts authority to enter findings and recommendations").

Therefore, even if this Court were to conclude that *Stern* divests bankruptcy courts of authority to enter final decisions in fraudulent transfer cases, it is clear that *Stern* does not prevent – and indeed endorses – bankruptcy courts issuing reports and recommendations to district courts. *Stern*, 131 S. Ct. at 2620.

III. CONCLUSION

For the reasons set forth above, *Amici* respectfully submit that bankruptcy courts may enter final judgments on fraudulent transfer claims, and, if not, may issue a report and recommendation instead of a final judgment.

DATED: January 19, 2012

TREPEL GREENFIELD SULLIVAN & DRAA LLP

By: */s/ Christopher D. Sullivan*
Christopher D. Sullivan

/s /Matthew R. Schultz
Matthew R. Schultz

DIAMOND MCCARTHY LLP

CERTIFICATION OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation provided in Rule 32(a)(7)(C)(i) of the Federal Rules of Appellate Procedure. The foregoing brief contains 6,425 words of Times New Roman (14 pt) proportional type. Microsoft Word is the word-processing software that was used to prepare the brief.

/s/ Christopher D. Sullivan
Christopher D. Sullivan

APPENDIX A

LISTING OF *AMICI CURIAE*

Michael F. Burkart
Plan Administrator, *In re Heller Ehrman LLP*, No. 08-32514 (Bankr. N.D. Cal., Honorable Dennis Montali)

Mike Burkart, as the court-appointed Plan Administrator in the Heller Ehrman bankruptcy case, supervises the management, control and operation of the Estate as a Liquidating Debtor. Mr. Burkart supervises all Estate litigation and actively participates in any settlement discussions for all contested litigation and claims objections. Mr. Burkart has more than fifteen years as a Bankruptcy Panel Trustee and free-lance consultant specializing in management, financial and banking services, liquidation analysis, and general business project management. He also has substantial experience as a bank executive prior to his trustee work.

William A. Brandt
Plan Administrator, *In re Equip. Acquisition Res. Corp.*, No. 09-39937 (Bankr. N.D. Ill.)

Bill Brandt is the Plan Administrator in the Equipment Acquisition Resources bankruptcy in Chicago, Illinois, which resulted from a Ponzi scheme involving equipment leases causing hundreds of millions of dollars in investor/creditor losses. Mr. Brandt has served as the Plan Administrator pre-petition and currently serves in that capacity for the liquidating debtor estate pursuant to a confirmed Plan of Liquidation. As part of Mr. Brandt's supervision of the liquidating estate, including all estate litigation and contested claims objections, Mr. Brandt has commenced dozens of fraudulent transfer actions under section 548 of the Bankruptcy Code seeking to recover many millions of dollars in recoveries for the benefit of the liquidating estate's creditor beneficiaries. Mr. Brandt has decades of experience in prosecuting fraudulent transfer actions, among other claims, in connection with his work as a court appointed trustee, plan administrator and fiduciary. Mr. Brandt also has substantial experience in turnaround management activities, as well as financial and corporate restructuring and other consulting activities involving distressed debt and the litigation resulting therefrom. Mr. Brandt is also the gubernatorial appointment as Chair of the Illinois Finance Authority, which is one of the nation's largest state-sponsored self-financing entities principally engaged in issuing taxable and tax-exempt bonds, making loans, and investing capital for businesses, non-profit organizations and

local government. The Governor has also appointed Mr. Brandt to the Illinois Broadband Deployment Council, which works to ensure that advanced telecommunication services are available to all the citizens of Illinois

Sheila M. Gowan

Chapter 11 Trustee, *In re Dreier LLP*, No. 08-15051 (Bankr. S.D.N.Y.)

Sheila Gowan is the Department of Justice-appointed and court-approved chapter 11 trustee in the law firm bankruptcy of Drier LLP in New York City. The Dreier case involves one of the largest Ponzi schemes in United States history involving a lawyer, Marc Dreier, who defrauded hedge funds and other entities and individuals out of more than seven hundred and fifty million dollars. Mr. Dreier has been convicted of various federal crimes and is currently serving a twenty year prison sentence in a federal penitentiary. As trustee, Ms. Gowan has brought over sixty avoidance actions, including section 548 fraudulent transfer actions in the bankruptcy courts of the southern district of New York and has recovered more than $44 million to date. Ms. Gowan is a former federal prosecutor in the U.S. Attorney's Office for the Southern District of New York where she handled complex litigation as well as joint civil and criminal fraud investigations.

Allan B. Diamond

Chapter 11 Trustee, *In re Howrey LLP*, No. 11-31376 (Bankr. N.D. Cal.)

Allan Diamond is the Department of Justice-appointed and court approved current chapter 11 trustee in the law firm bankruptcy of Howrey LLP in San Francisco, California, one of the largest law firm bankruptcies in U.S. history. As trustee in the Howrey case, Mr. Diamond is responsible for administering all aspects of the chapter 11 case on behalf of the estate of the former international law firm of Howrey LLP, including, *inter alia*, the marshaling, protection and liquidation of all estate assets and the commencement of litigation against third parties asserting, among other things, claims under section 548 of the Bankruptcy Code for fraudulent transfers. Mr. Diamond is a senior trial lawyer with more than 30+ years of experience in complex business litigation and insolvency matters and has served for more than 10+ years as a managing partner of a national boutique law firm. Mr. Diamond's experience includes representing trustees, plan administrators, international liquidators, creditors' committees, debtors and other fiduciaries in some of the largest bankruptcy estates and insolvency litigation matters in the world.

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Geoffrey L. Berman

Post-Confirmation Liquidating Trustee, *In re: Syntax-Brillian Corporation et al*, (Case No. 08-11407 BLS – Jointly Administered Chapter 11 Bankr. D. Del).

Geoffrey Berman is the post-confirmation trustee of the SB Liquidation Trust, a trust created pursuant to the Delaware bankruptcy court approved liquidating plan of reorganization of Syntax-Brillian Corporation et al, debtors, formerly a publicly traded company engaged in the manufacturing, distribution, marketing and sales of HDTV's globally. In his capacity as trustee, Mr. Berman has commenced a multitude of litigation actions, including claims under Section 548 of the Bankruptcy Code, for recovery of hundreds of millions of dollars in losses resulting from, among other things, the discovery of a massive fraudulent scheme perpetrated by various insiders of the debtors, many of whom have now admitted liability and entered into consent judgments or had default judgments entered against them in favor of the United States Securities and Exchange Commission. Mr. Berman serves as a court approved Examiner, as well as in other fiduciary capacities for debtors and companies, and is considered one of the leading authorities on assignments for the benefit of creditors in California and around the nation.

Ronald R. Peterson

Chapter 7 Trustee, In re: Lancelot Investors Fund, L.P., et al (N.D. Ill. Case No. 08-28225 Jointly Administered) and Chair, Creditors Committee, In re: Petters Co. Bankr. Minn)

Ron Peterson is the court-appointed Chapter 7 Trustee in the Lancelot Investment bankruptcy, a $1.7 billion dollar Ponzi scheme. In his capacity as trustee, Mr. Peterson has commenced various chapter 5 avoidance action litigation, including section 548 fraudulent transfer claims, against numerous third parties seeking to recover certain of the investor and creditor losses arising from this Ponzi scheme. In addition, Mr. Peterson is the Chair of the Creditors Committee in the Thomas J. Petters bankruptcy estate, a $3.5 billion Ponzi scheme of national notoriety. Mr. Peterson regularly serves as a court appointed fiduciary in cases of national interest and also represents debtors, trustees, creditors, committees and others in Chapter 11 bankruptcy cases. Mr. Peterson is also a fellow of the American College of Bankruptcy.

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Yann Geron

Trustee, *In re Thelen LLP* (Case No. 09-15631 in the Southern District of New York, Manhattan)

With more than two decades experience in bankruptcy law, Yann Geron has served continually with distinction as a member of the Panel of Bankruptcy Trustees for the Southern District of New York (Manhattan). He is also a member of the Executive Committee, the firm's governing body. Yann has represented a number of panel and non-panel trustees in New York and other jurisdictions. In his trustee matters, Yann has significant experience in complex wind-downs and liquidations, and in the investigation and recovery of estate claims including against prior management. Joining Fox Rothschild has allowed Yann, when appropriate, to bring into his team a broader platform of more highly qualified and experienced attorneys, at competitive rates. With the resources of the firm behind him, he has achieved significant results in complex litigations, including multi-million dollar recoveries from prior management, and efficient resolution of complex multi-party litigations. Yann was appointed as a Chapter 7 Bankruptcy Trustee in the Southern District of New York in 1992. He has served as a trustee in Manhattan in thousands of bankruptcy cases, with asset values of as much as several million dollars. In this capacity, Yann has also handled and supervised countless litigation matters in the bankruptcy district and state courts, from standard recovery actions to complex fraud. Yann has also served as a court-approved Assignee for the Benefit of Creditors in a complex corporate shut-down and liquidating.

9th Circuit Case Number(s) 11-35162

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