No. 11-35162

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Debtor,

EXECUTIVE BENEFITS INSURANCE AGENCY,

Appellant,

v.

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

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

TONY WEST
Assistant Attorney General

JENNY A. DURKAN
United States Attorney

ROBERT M. LOEB
(202) 514-4332
SARANG V. DAMLE
(202) 514-5735
Attorneys, Appellate Staff
Civil Division, Room 7217
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530

Of Counsel:

RAMONA D. ELLIOTT
General Counsel

P. MATTHEW SUTKO
Associate General Counsel
Executive Office for United States Trustees
U.S. Department of Justice
20 Massachusetts Avenue, NW
Washington, DC 20530
Phone: (202) 307-1399
Fax: (202) 307-2397

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

Statutes:

Rules:

Other Authorities:

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-35162

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

Debtor,

EXECUTIVE BENEFITS INSURANCE AGENCY,

Appellant,

v.

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

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This Court's order of November 4, 2011, raises issues regarding the Article III limitations on a bankruptcy judge's authority to enter final judgment on a trustee's fraudulent-conveyance action and alter-ego claim against a noncreditor. The United States has a substantial interest in addressing the constitutionality and proper interpretation of the Bankruptcy Code. The United States also has an interest in the matter because the United States Trustees—who are Department of Justice officials—supervise the administration of bankruptcy cases. *See* 28 U.S.C. §§ 581–589a.

INTRODUCTION AND SUMMARY

I. In *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011), the Supreme Court held that, where a party has objected to a bankruptcy judge's exercise of core jurisdiction, the bankruptcy court lacks authority under Article III to enter final judgment on a debtor's counterclaims against a creditor if the debtor's claims are founded on state law and if resolution of the debtor's claims would require the court to make factual and legal determinations that would not be disposed of in the course of resolving objections to the creditor's countervailing proof of claim. This Court issued an order inviting views on the following question: "Does *Stern v. Marshall*, 131 S. Ct. 2594 (2011), prohibit bankruptcy courts from entering a final, binding judgment on an action to avoid a fraudulent conveyance?"

In the United States' view, after *Stern* and the Supreme Court's earlier decision in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), bankruptcy courts lack authority to enter final judgment in some, though not all, fraudulent conveyance actions. Specifically, *Stern* and *Granfinanciera*, when read together, make clear that bankruptcy courts may not enter final judgment in a case where the defendant in the fraudulent conveyance action is not a creditor, and where the parties have not either explicitly or through their actions consented to bankruptcy court entry of summary judgment. There are, however, situations that were not addressed by *Stern* in which it would still be appropriate for a bankruptcy court to enter final judgment on a fraudulent conveyance claim. For example, even after *Stern* parties may consent, explicitly or through their actions, to bankruptcy court adjudication of the fraudulent conveyance claim without running afoul of Article III.[1]

II. There is no reason in *this* case, however, for the Court to vacate the bankruptcy court's judgment based on *Stern v. Marshall*. As we explain in detail below, there are three separate and independent reasons why *Stern* does not, in and of itself, require vacatur of the bankruptcy court's entry of summary judgment in this case.

First, Executive Benefits failed to preserve the Article III issue for this Court's review. While Article III's structural limitations cannot be waived, Article III considerations like those raised by Executive Benefits entail personal rights that can be waived by a party's failure to invoke them in a timely fashion. *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 848-49 (1986). The Supreme Court, moreover, has urged a strict application of waiver principles in this context, stressing the dangers

[1] Pursuant to 28 U.S.C. § 530D, the Department of Justice has today submitted a report to Congress informing it of the Department's position in this matter. Section 530D acknowledges the possibility that "the House of Representatives and the Senate" might "take action, separately or jointly, to intervene in timely fashion in the proceeding." *Id.* § 530D(b)(2).

of permitting a litigant to "sandbag" the court and his opponent by objecting to the bankruptcy court's authority after receiving an adverse decision. *Stern*, 131 S. Ct. at 2608.

Executive Benefits' waiver is apparent: while it initially sought district court adjudication of this matter, it unambiguously abandoned that path in favor of bankruptcy court resolution of the trustee's summary judgment motion. It is no answer, moreover, to assert that *Stern* was only recently decided. Executive Benefits plainly recognized its right to district court adjudication, having discussed *Granfinanciera* in support of its request for referral to the district court for jury trial. Having consciously chosen bankruptcy court for resolution of this matter knowing its right to proceed in district court, Executive Benefits could not now claim error.

Second, separate and apart from the waiver point, any error in the bankruptcy court's entry of summary judgment was rendered harmless by the district court's full *de novo* review. Indeed, this Court's own review likewise gives no deference to the decision of the bankruptcy court, and can thus also serve to cure the constitutional defect. Returning this matter to district court for it to simply reaffirm a decision it has already made would serve no purpose.

Third, in addition to the other two independent and alternative grounds for affirmance, the bankruptcy court's conclusion that Executive Benefits was the "mere continuation" of the debtor is a sufficient basis in and of itself to support the entire judgment, separate and apart from the fraudulent-conveyance decision. A bankruptcy court *may* enter final judgment on such alter-ego claims, notwithstanding *Stern v. Marshall*. This sort of alter-ego claim is distinct from the state common-law claims at issue in *Stern* and *Northern Pipeline*, which bore only a tangential relationship to the bankruptcy. The bankruptcy court properly used its federal bankruptcy power to identify the "debtor," a term defined in the Bankruptcy Code, without regard to the debtor's use of fictional corporate shells.

III. This Court's order also asked whether, in cases in which a bankruptcy court is barred from entering judgment in an action to avoid a fraudulent conveyance, "may the bankruptcy court hear the proceeding and submit a report and recommendation to a federal district court in lieu of entering a final judgment?"

The answer to this question is "yes." The Supreme Court, in addressing the limited practical impact of its decision in *Stern*, clearly anticipated that result in stressing that the creditor there had not made such an argument and in suggesting that the decision should not "meaningfully change[] the division of labor in the current statute." 131 S. Ct. at 2620. Moreover, the statutory authority in 28 U.S.C. § 157(b)(1) to "hear and determine all cases" is sufficiently capacious to encompass this power.

STATEMENT

A. Statutory Scheme.

Jurisdiction over bankruptcy matters is governed by the framework established in the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984). That Act vests all bankruptcy power in Article III district courts. 28 U.S.C. § 1334(a), (b). Those courts may, at their discretion, refer bankruptcy matters to bankruptcy judges, who are "unit[s]" and "officer[s] of" the district court. *Id.* § 151.

The Act distinguishes between those referred cases in which the bankruptcy court may enter final judgment (subject to appellate review in the district court) and those referred cases in which the bankruptcy court may only issue a proposed decision, subject to *de novo* review in district court. *Id.* §§ 157 (b) & (c). The class of cases in which the bankruptcy court may enter final judgment are referred to as "core" proceedings, which "include, but are not limited to" matters concerning the administration of the estate, the allowance of disallowance of claims against the estate, and other specifically identified proceedings. *See Id.* § 157(b).

A bankruptcy judge may also hear, but not enter final judgment on, a matter that is not a core proceeding but that is otherwise related to a case under title 11. 28 *Id.* § 157(c). In these "non-core" proceedings, the bankruptcy judge "shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge . . . after reviewing de novo those matters to which any party has timely and specifically objected." *Id.* § 157(c)(1). Notwithstanding these provisions, the bankruptcy court may enter final judgment in a non-core proceeding if all the parties consent. *Id.* § 157(c)(2).

B. Statement of Facts.[2]

The debtor, Bellingham Insurance Agency, was in the business of selling insurance before it filed for chapter 7 bankruptcy relief. D.Ct. Op. 2. Bellingham is a closely held corporation whose shares are principally owned by Nicholas Palaveda and his wife Marjorie Ewing. *Id.* at 2–3. Palaveda acted as the sole director, president, and CEO of Bellingham until February 14, 2006, when Ewing took on those roles. *Ibid.* Palaveda and Ewing created a separate company called ARIS to handle insurance plan design and maintenance for Bellingham. *Id.* at 2; D.Ct. App'x 132.[3] ARIS and Bellingham shared office space and bookkeeping software, and Bellingham's insurance agent of record, Peter Pearce, was also employed by ARIS. D.Ct. Op. 2–3 D.Ct. App'x 132.

It was apparent that Bellingham was insolvent at least as of January 1, 2006, and on January 31, 2006, Bellingham ceased business operations. That same day,

---

[2] For the purposes of addressing the constitutional question presented here, we assume that the facts found by the district court are correct.

[3] D.Ct. App'x refers to the Appellee's appendix filed by the Trustee in district court. *See* R.12, exh. 1–5

however, Palaveda incorporated a new company called Executive Benefits Insurance Agency in Delaware. D.Ct. Op. 3; D.Ct. App'x 80–81. Executive Benefits commenced operations the next day, using the same office space and telephone line that Bellingham had used, sharing the same bookkeeping software, and maintaining the same relationship with ARIS. *See* Dist. Ct. Op. 3, 9.

Palaveda and Ewing also ensured that Executive Benefits, and not Bellingham, would be credited with future commissions received on Bellingham's outstanding insurance contracts. *See id.* at 3–4, 6. They did this by assigning the commissions Bellingham had yet to receive to Pearce. Pearce, in his capacity as an ARIS employee, deposited those commissions into an ARIS bank account. Those funds, however, were credited to Executive Benefits through the companies' common bookkeeping software. Thus, the record showed that, by June 1, 2006, commissions earned from Bellingham's insurance contracts totaling $373,291.28 were credited to Executive Benefits. There is no indication that Executive Benefits paid compensation to Bellingham for the accounts receivable it obtained.

C. <u>Course of Proceedings</u>.

1. Bellingham filed for voluntary chapter 7 bankruptcy relief on June 1, 2006. The bankruptcy trustee thereafter initiated an adversary proceeding against Executive Benefits, which had not filed a proof of claim in the bankruptcy proceedings. The complaint, as relevant here, sought to avoid the fraudulent transfer of the insurance

commissions from Bellingham to Executive Benefits or, in the alternative, a ruling that Executive Benefits was liable for Bellingham's debts as it was the "mere continuation" of Bellingham. D.Ct. App'x 13–14, 22–23.

Executive Benefits demanded a jury trial "on all issues upon which it is entitled to a jury," and refused to consent to have the jury trial held in bankruptcy court. *See* Answer, R.169, at 14, *In re Bellingham Ins. Agency*, Bankr. No. 06-11721 (Bankr. W.D. Wash. Aug. 2, 2008). Executive Benefit renewed its demand once a trial date was set in bankruptcy court. *See* Mem. in Support of Mot. to Vacate Trial Date, R.32, *Arkison v. Executive Benefits Ins. Agency*, Adv. No. 08-1132 (Bankr. W.D. Wash. Dec. 21, 2009). In response, the bankruptcy court referred trial of the case to the district court, while keeping for itself jurisdiction over all pretrial matters, including summary judgment proceedings. *See* Order, R.39, *Arkison*, Adv. No. 08-1132 (Dec. 31, 2009).

The bankruptcy court's order referring trial to the district court was filed before District Judge Richard Jones as a "motion to withdraw the reference." *See Arkison v. Executive Benefits Ins. Agency,* No. 10-cv-171 (W.D. Wash. Jan. 28, 2010). Executive Benefits, however, did not seek immediate withdrawal of the reference, but instead, in a March 2010 status report, explained that discovery and summary judgment proceedings were ongoing in the bankruptcy court. *See* Joint Status Report, R.4, *Arkison*, No. 10-cv-171 (Mar. 15, 2010). Judge Jones, noting that "the parties wish to have additional time . . . to file dispositive motions in the bankruptcy court," stayed district court proceedings and ordered the parties to file a joint status report in June 2010. *See* Order, R.5, *Arkison*, No. 10-cv-171 (Mar. 26, 2010).

Then, on May 26, 2010, the bankruptcy court entered summary judgment against Executive Benefits on two grounds. First, it concluded that the transfer of Bellingham's outstanding insurance commissions to Executive Benefits was "fraudulent in nature." Bankr. Ct. Op. at 2. The bankruptcy court accordingly ordered Executive Benefits to pay $389,474.36 into the estate, an amount representing the fraudulently conveyed commissions plus interest. Bankr. Ct. Judgment at 2. Second, the bankruptcy court ruled that Executive Benefits is the "mere successor" of the debtor and "therefore remains liable for the allowed debts of the debtor." *Ibid.*

Executive Benefits appealed the bankruptcy court's summary judgment order to the district court, where the matter was assigned to Judge Marsha Pechman; the present appeal arises out of those proceedings. *See Arkison v. Executive Benefits Ins. Agency*, Civil No. 10-cv-929 (W.D. Wash.). At the same time, Executive Benefits abandoned its efforts before Judge Jones to have the reference to the bankruptcy court withdrawn or to have the matter tried to a jury. The trustee filed a status report with Judge Jones explaining that summary judgment had been entered against Executive Benefits, and that trial was no longer necessary. Executive Benefits filed no response, and in no way sought to vindicate its jury demand or the request that the reference to the bankruptcy court be withdrawn. Judge Jones thus found that "[n]o . . . party expressed an interest in trying this matter in this court", and accordingly denied the motion to withdraw the reference and dismissed the action. *See* Order, R.8, *Arkison*, No. 10-171 (July 2, 2010).

2. Judge Pechman, on full *de novo* review of the bankruptcy court's determination, affirmed the grant of summary judgment to the trustee on both legal grounds. *See* Dist. Ct. Op. at 2. Notably, the district court's decision provided a fuller legal rationale for the judgment than had been provided by the bankruptcy court.

First, Judge Pechman concluded that the transfer of accounts from Bellingham to Executive Benefits constituted a fraudulent conveyance under 11 U.S.C. § 548(a)(1) and state law under § 544. *Id.* at 5–8. Specifically, she found that "transfers of items of value from [Bellingham] to [Executive Benefits] were made within one year of the bankruptcy action," and that, at the time, Bellingham was insolvent. *Id.* at 6. Second, Judge Pechman, like the bankruptcy court, concluded that Executive Benefits was the "mere continuation" of Bellingham and was thus liable for all of Bellingham's debts, separate and apart from the amount of the fraudulent conveyance. *Id.* at 8–9.

ARGUMENT

I. Under Article III, bankruptcy judges may not enter final judgment in fraudulent conveyance actions brought against noncreditors in the absence of consent.

1. Under Article III, the authority to adjudicate private state-law legal disputes must generally be vested in judges who, by virtue of lifetime tenure and restrictions on the ability of other branches to diminish their salaries, are insulated from political pressures on their decisionmaking. *Stern*, 131 S. Ct. at 2609. Thus, "[w]hen a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminister in 1789,' and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts." *Ibid.* (quoting *Northern Pipeline Constr. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in judgment)). Bankruptcy judges do not meet these criteria. Rather, bankruptcy judges for each judicial district are appointed to fourteen-year terms by the courts of appeals for the circuits in which their districts are located. 28 U.S.C. § 152(a)(1).

The Supreme Court, however, has recognized a class of "public rights" that may be adjudicated by non-Article III tribunals. Although the full contours of the "public rights" exception are not clearly defined, in the context of bankruptcy matters, the Court has long assumed that it encompasses those actions that are integral to "the restructuring of debtor-creditor relations." *See Stern*, 131 S.Ct. at 2614 n.7 (internal quotation marks and citation omitted); *see also Granfinanciera*, 492 U.S. 55–56 & n.11; *Northern Pipeline Construction Co.,* 458 U. S. at 71 (plurality opinion).

2. The Bankruptcy Code vests in bankruptcy judges the statutory authority to enter final judgment on fraudulent conveyance claims, if the district court refers the matter to it. *See* 28 U.S.C. § 157(b)(2)(H). In *Stern v. Marshall*, however, the Supreme Court cited its earlier decision in *Granfinanciera S.A. v. Nordberg*, 492 U.S. 33 (1989), for the proposition that "a fraudulent conveyance action filed on behalf of a bankruptcy estate against a noncreditor in a bankruptcy proceeding" falls outside the public rights exception. *Stern*, 131 S. Ct. at 2614. Moreover, the Court repeatedly described *Granfinanciera* as holding that fraudulent conveyance actions must be heard by Article III courts. *See, e.g, id.* at 2614 n.7 (describing *Granfinanciera* as concluding that "Congress could not constitutionally assign resolution of the fraudulent conveyance action to a non-Article III court"). These statements were not dicta. Instead, the Court used fraudulent-conveyance actions as a benchmark for the kinds of claims that a bankruptcy court may not finally decide. *Id.* at 2616 (explaining that the tortious interference counterclaim at issue was "the very type of claim that we held in *Northern Pipeline* and *Granfinanciera* must be decided by an Article III court").

In light of the foregoing, the United States regards *Stern* and *Granfinanciera*, when read together, as having established that Article III bars bankruptcy courts from entering final judgment in a fraudulent conveyance action brought against a noncreditor in the bankruptcy proceedings, absent the parties' consent to bankruptcy court adjudication.[4] We stress, however, that Article III does not foreclose bankruptcy court adjudication of all fraudulent conveyance claims. For instance, *Stern* does not address whether a bankruptcy court may finally decide a fraudulent-conveyance counterclaim by the estate against a claimant to the estate, if the claim and counterclaim are sufficiently intertwined. 131 S. Ct. at 2617–18; *see Langenkamp v. Culp*, 498 U.S. 42 (1991) (per curiam). Moreover, as we discuss in greater detail below, parties may still consent to bankruptcy court adjudication of a fraudulent-conveyance claim without running afoul of Article III; likewise, a defendant can waive his right to final decision by an Article III court by failing to assert it in a timely fashion.[5]

---

[4] This Court reached the opposite conclusion in an opinion predating *Granfinanciera*. *See In re Mankin*, 823 F.2d 1296, 1308–1309 (9th Cir. 1987). But the rationale of that decision—that a trustee's ability to avoid a fraudulent conveyance is public right—was vitiated by *Granfinanciera* and *Stern*.

[5] Furthermore, the Article III analysis may be different with respect to preference actions, as such actions are arise entirely out of federal bankruptcy law, and are closely tied to the bankruptcy process. *See id.* at 2618 (explaining that a "preference action" is "a right of recovery created by federal bankruptcy law").

II. For three separate and independent reasons, Article III concerns do not require vacatur of the bankruptcy court's summary judgment decision in the present case.

A. Executive Benefits waived any objection to bankruptcy court adjudication of the trustee's summary judgment motion.

1. Although Executive Benefits has cast its Article III objections as going to the subject-matter jurisdiction of the bankruptcy court, the Supreme Court has made clear that such objections are not jurisdictional in nature, and may be waived. In *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833 (1986), the Supreme Court held that "Article III, § 1's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States . . . serves to protect primarily personal, rather than structural interests," and that "as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." *Id.* at 848–49.

Although the Supreme Court in *Schor* suggested that Article III also imposes certain "structural" limits that, like subject matter jurisdiction, are not subject to waiver or consent by the parties, 478 U.S. at 850–51, those structural limits are not implicated by this case. The structural concerns addressed by *Schor* arise when a statutory scheme assigns adjudicative responsibility to a forum outside the judicial branch. Such schemes, as *Schor* explains, risk "encroachment or aggrandizement of one branch at the expense of the other." *Id.* at 850 (internal quotation and citations omitted). *Schor* was just such a case—it concerned whether a tribunal within an Executive Branch agency established by Congress could adjudicate a state-law counterclaim. *Id.* at 852.

By contrast, under the bankruptcy scheme, the decision-maker—the bankruptcy judge—is part of the judicial branch. Bankruptcy judges are "unit[s]" and "officer[s] of" the district court. 28 U.S.C. § 151. Their authority over *any* matter turns on whether the district court has made an appropriate reference of the case to them. *See id.* § 157(a). The reference may be withdrawn for cause shown. *Id.* § 157(d). And bankruptcy judges are appointed by the pertinent court of appeals, not by the President or other Executive Branch official. *Id.* § 152(a)(1). The allocation of final decision making authority to one judicial official rather than another does not pose any risk of "encroachment or aggrandizement of one branch at the expense of" the judicial branch.

Indeed, this Court has recognized that parties may waive objections to bankruptcy court adjudication of non-core claims under 28 U.S.C. § 157(c)(2). *See, e.g.*, *In re Mann,* 907 F.2d 923, 926 (9th Cir. 1990); *In re Daniels-Head & Associates*, 819 F.2d 914, 918 (9th Cir. 1987). Although these cases do not address the Article III issue, that issue has long been settled in the context of the Federal Magistrate Act. That Act permits magistrates, who are not Article III judges, to conduct "any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case," as long as they are "specially designated . . . by the district court" and acting with "the consent of the parties." 28 U.S.C. § 636(c)(1). The Supreme Court and this Court have both upheld this provision against Article III challenges. *See Roell v. Withrow*, 538 U.S. 580, 588–90 (2003) (Article III right is "substantially honored" where litigation conduct reflects the parties' implied consent to entry of judgment by magistrate judge); *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 547 (9th Cir. 1984) (en banc) (Kennedy, J.), *cert. denied*, 469 U.S. 824 (1984) ("We hold that consensual reference of a civil case to a magistrate is constitutional[.]"). There is no sound basis for applying a different constitutional analysis to consensual reference of bankruptcy-related matters to a bankruptcy court judge similarly acting as an adjunct to the district court.

2. Executive Benefits' litigation conduct below shows that it consciously waived any Article III objections to bankruptcy court adjudication of the trustee's summary judgment motion. As noted above, Executive Benefits initially made a jury demand upon the bankruptcy court, citing its rights under *Granfinanciera*. The bankruptcy court sent the jury demand to the district court, where it was docketed as a motion to withdraw the reference. *See* 28 U.S.C. § 157(d). Executive Benefits, however, failed to pursue withdrawal of the reference or its jury trial rights. Instead, it asked District Judge Jones, who was considering the withdrawal motion, to stay

district court proceedings while the bankruptcy court considered the trustee's summary judgment motion. After the bankruptcy court granted that motion, Executive Benefits abandoned the withdrawal motion pending before Judge Jones, and instead filed a separate appeal of the bankruptcy court's summary judgment order before District Judge Pechman. In those proceedings, Executive Benefits did not suggest in any way that bankruptcy court adjudication of the summary judgment motion was improper. Instead, it raised the Article III issue for the first time on appeal to this Court.

Executive Benefits thus had a clear opportunity to obtain district court adjudication, if it so wished. But it abandoned that avenue of relief in favor of bankruptcy court adjudication of the trustee's summary judgment motion and district court review of the bankruptcy court's summary judgment decision. Having made that conscious choice, it could not revisit it for the first time on appeal. *See In re Mann*, 907 F.2d at 926 (concluding that a debtor had impliedly consented to the bankruptcy court's adjudication of his non-core claim by failing to raise his objections in a timely manner).

There are, moreover, strong policy reasons for a finding of waiver in circumstances like those presented here. Parties can waste judicial resources and seek unfair advantage by reserving any objection until an adverse decision is entered against them. As the Court observed in *Stern*, "[i]n such cases . . . the consequences of a litigant . . . sandbagging the court . . . can be particularly severe." 131 S. Ct. at 2608 (internal quotation marks and citation omitted).

3. There are two potential objections to a finding of waiver in this case, though neither has merit.

First, the fact that Executive Benefits waived its objections to bankruptcy court adjudication of the trustee's summary-judgment motion through its litigation conduct rather than through an express statement is of no moment. *See In re Mann*, 907 F.2d at 926 (finding implied consent to bankruptcy court adjudication). Although Bankruptcy Rule 7012 provides that "[i]n non-core proceedings[,] final orders and judgments shall not be entered on the bankruptcy judge's order except with the *express* consent of the parties," that rule is not jurisdictional, *see Kontrick v. Ryan*, 540 U.S. 443, 453–54 (2004), and objections to noncompliance with the rule can be waived. Indeed, the relevant statute authorizing bankruptcy court determination of non-core proceedings speaks only in general terms of "the consent of all the parties to the proceeding," rather than *express* consent. *See* 28 U.S.C. § 157(c)(2). This conclusion is further supported by the Supreme Court's decision in *Roell*, 538 U.S. at 584–85, which held that a parties' failure to give express consent to magistrate judge entry of final judgment, as required by Fed. R. Civ. P. 73(b), was not a nonwaivable jurisdictional defect. In particular, the Court stressed that the relevant statute, 28 U.S.C. § 636(c)(1)—like 28 U.S.C. § 157(c)(2)—"speaks only of 'the consent of the parties,' without qualification." *Id.* at 587.

Second, though *Stern* was decided after the district court affirmed the bankruptcy court's order of summary judgment, the pre-*Stern* case law gave Executive Benefits sufficient notice of a potential Article III objection. This Court decided *Stern,* (*see* 600 F.3d 1037 (9th Cir. March 19, 2010)) and the Supreme Court granted certiorari (*see* 131 S. Ct. 63 (U.S. Sept. 28, 2010)), while this case was pending before the district court. That there was a substantial question as to a bankruptcy court's power in the context was presaged in *Northern Pipeline*, *Granfinanciera*, *Katchen v. Landy*, 382 U.S. 323 (1966), and *Langenkamp v. Culp*, 498 U.S. 42 (1990). Indeed, Executive Benefits expressly relied on *Granfinanciera* in its motion to vacate the bankruptcy court trial date, and thus was plainly on notice of the issue. Having failed to object, it has waived its right to do so now.

B. Any constitutional defect in the bankruptcy court's summary judgment decision was rendered harmless by the district court's *de novo* review of that decision.

Separate and apart from the waiver point, any defect in the bankruptcy court's entry of summary judgment was cured by the district court's later *de novo* review of that judgment. This case is thus unlike *Northern Pipeline* and *Stern*, which addressed situations where the bankruptcy courts had entered final judgment after trial, subject only to the ordinary appellate standard of review in the district court. *See Stern*, 131 S. Ct. at 2619 (given the authority to enter final judgments, "a bankruptcy court can no more be deemed a mere 'adjunct' of the district court than a district court can be deemed such an 'adjunct' of the court of appeals"); *Northern Pipeline*, 458 U.S. at 85 (plurality opinion) (noting that "judgments of the bankruptcy courts are apparently subject to review only under the . . . deferential 'clearly erroneous' standard").

This Court has found analogous defects to be harmless in light of the exercise of full *de novo* review on appellate review, and there is no sound basis for a different result here. For example, in *Estate of Conners v. O'Connor*, 6 F.3d 656, 659 (9th Cir. 1993), this Court held that 28 U.S.C. § 636(b)(1)(A) did not empower a federal magistrate judge to enter a final order on a post-judgment motion for attorney's fees. The district court, however, recognizing this potential defect in the magistrate's order, engaged in *de novo* review, and entered a reduced attorney's fee award. *Id.* at 658. This Court concluded that, although the magistrate lacked authority to enter final judgment, the "magistrate's error . . . was cured by the district court's later de novo review of the magistrate's findings and conclusions, and the court's entry of its own order awarding attorney's fees and costs." *Id.* at 659; *see also* Fed. R. Civ. P. 61 ("[u]nless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order").

The fact that the defect here is of constitutional dimension does not compel a different outcome. *See In re Wade*, 948 F.2d 1122, 1125 (9th Cir. 1991) (holding that a bankruptcy court's failure give debtors an opportunity to respond to a creditor's motion could have violated the debtors' due process rights but for the fact that debtors "had the benefit of de novo review by both the Bankruptcy Appellate Panel and this court"). Indeed, the Supreme Court has indicated that Article III concerns are substantially mitigated when the decision of a non-Article III entity is subject to full *de novo* review by an Article III court. *See United States v. Raddatz*, 447 U.S. 667, 681–83 (1980) (holding that Congress had not delegated Article III powers to a non-Article III officer by authorizing magistrate judges to issue proposed findings of fact and conclusions of law, as such decisions were subject to a "*de novo* determination" by a district court judge.).

Indeed, the district court here carefully and thoroughly reviewed the record compiled before the bankruptcy court, and provided a detailed rationale for entry of summary judgment. This Court too must engage in a similarly thorough *de novo* review of the lower courts' summary judgment decisions. *See, e.g.*, *Gill v. Stern (In re Stern)*, 345 F.3d 1036, 1040 (9th Cir. 2003). In these circumstances, no purpose would be served by remanding this case to the district court.

C. Bankruptcy courts may enter final judgment on claims that a nominally separate corporate entity is in fact the alter ego of the debtor, and the alter ego holding here in and of itself supports the entire judgment.

As explained, the judgment here encompasses two distinct legal theories. First, the district court, on *de novo* review of the bankruptcy court's summary judgment decision, ruled that Bellingham had fraudulently conveyed its insurance commissions to Executive Benefits. Based on that conclusion, the court ordered Executive Benefits to pay $389,474.36 into the bankruptcy estate. Second, separate and apart from the fraudulent conveyance ruling, the district court, on what it referred to as a "successor liability" theory, concluded that Executive Benefits was the "mere continuation" of the debtor. In other words, the district court ruled that the Executive Benefits was the "alter ego" of Bellingham. That ruling meant that Executive Benefits was liable for *all* of Bellingham's debts. In recognition of that fact, the bankruptcy court judgment ordered the trustee to credit any payments received as a result of the fraudulent-conveyance decision against the liability of Executive Benefits for the allowed debts of Bellingham.

Based on our understanding of the record, Bellingham's net liabilities (i.e., its allowable debts minus its assets) far exceed $389,474.36, the amount of the fraudulent-conveyance judgment.[6] This means that, even if judgment on the

[6] The most recent summary of schedules filed by Bellingham indicates that its total liabilities were $1,596,836.28, while its assets were $258,881.81. *See* R.25, No. 06-11721 (Bankr. N.D. Cal. Jan. 22, 2007).

fraudulent-conveyance count were vacated in light of *Stern*, the alter-ego count would, in and of itself, require Executive Benefits to pay at least the amount of the fraudulent-conveyance judgment, if not more. Accordingly, this Court would have no need to reach the fraudulent-conveyance issue if it were to instead conclude that bankruptcy courts may permissibly rule on alter-ego claims.

Stern and *Granfinanciera* do not address alter-ego claims, and thus leave open the question of whether bankruptcy courts may, consistently with Article III, enter final judgment on such claims against a noncreditor. In the United States' view, bankruptcy courts may continue to enter final judgment on claims that the debtor and some separate corporate entity are legally one and the same. *See* 15 Fletcher Cyclopedia on the Law of Corporations § 7124.10, at 287 (rev. perm. ed. 2008) ("The 'mere continuation' of business exception reinforces the policy of protecting rights of a creditor by allowing a creditor to recover from the successor corporation whenever the successor is substantially the same as the predecessor."). This Court has recognized the bankruptcy courts' ability to determine these sorts of claims, albeit without addressing Article III issues. *Stoumbos v. Kilimnik*, 988 F.2d 949, 962 (9th Cir. 1993) (discussing "mere continuation" theory of successor liability).

The alter-ego claim here is different in kind from the claims at issue in *Stern* and *Northern Pipeline*. In those cases, the Court addressed ordinary state common-law claims that the debtor possessed against a private party based on a defined wrong arising entirely outside of the bankruptcy process. *See Stern*, 131 S. Ct. at 2611 (describing debtor's counterclaim for tortuous interference as "a state law action independent of the federal bankruptcy law"); *Northern Pipeline*, 458 U.S. at 84 ("Northern's claim for damages for breach of contract and misrepresentation . . . involve a right created by *state* law, a right independent of and antecedent to the reorganization petition that conferred jurisdiction upon the Bankruptcy Court.").

In contrast, the issue here presents a fundamental question of federal bankruptcy law. The bankruptcy code defines the term "debtor" in an open-ended manner. *See* 28 U.S.C. § 101(13) ("The term "debtor" means person or municipality concerning which a case under this title has been commenced."). Bankruptcy courts, of necessity, must thus determine as a matter of federal statutory law who the debtor is, and whether the debtor can be identified without regard to its use of fictional corporate shells. Resolution of this central debtor-identity issue is far more integral to the bankruptcy process than the tangential contract and tort claims addressed in *Stern* and *Northern Pipeline*. Although many courts—including this Court—have looked to state corporations law to aid resolution of alter ego questions in the bankruptcy context, *see, e.g., Stoumbos*, 988 F.2d at 961–62, these decisions do not undermine the point that the identity of the debtor is ultimately question of federal law.[7]

---

[7] It is common for federal bankruptcy law to incorporate state law as the rule
(continued...)

This conclusion is reinforced by *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215 (1941), a pre-Bankruptcy-Reform-Act case. In *Sampsell*, a bankruptcy referee, who did not have full Article III protections, "ordered that the property of [the successor] corporation was property of the bankrupt estate and that it be administered for the benefit of the creditors of the estate." 313 U.S. at 217. That order was based on the referee's finding that the "corporation was the bankrupt's alter ego," *Imperial Paper & Color Corp. v. Sampsell*, 114 F.2d 49, 52 (9th Cir. 1940), *rev'd Sampsell*, 313 U.S. 215. In addressing the referee's order, the *Sampsell* Court held that "[t]here can be no question but that the jurisdiction of the bankruptcy court *was properly exercised by summary proceedings*," and that "[t]he legal existence of the affiliated corporation does not per se give it standing to insist on a plenary suit." 313 U.S. at 218 (emphasis added).

Sampsell's holding is significant because the Supreme Court has never suggested that a bankruptcy judge lacks the authority under Article III to adjudicate claims that fell within the bankruptcy referee's summary jurisdiction under the old bankruptcy scheme. *See Northern Pipeline*, 458 U.S. at 99 (White, J., dissenting) ("I take it that the Court does not condemn as inconsistent with Art. III the assignment of these functions—i.e., those within the summary jurisdiction of the old [referees]—to a

---

[7](...continued)
of decision absent some conflict with an identifiable federal interest. *Cf. Butner v. United States*, 440 U.S. 48, 54–55 (1979) ("Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law.").

non-Art. III judge, since, as the plurality says, they lie at the core of the federal bankruptcy power."); *id.* at 53 (describing the difference between "summary" and "plenary" jurisdiction); *see also* Ralph Brubaker, *Article III's Bleak House (Part II): The Constitutional Limits of Bankruptcy Judges' Core Jurisdiction*, 31 No. 9 Bankruptcy Law Letter 1, 18–19 (Sept. 2011) (concluding that the Court has set "the permissible bounds of a non-Article III bankruptcy judge's jurisdiction . . . to the 1898 Act's divide between summary and plenary proceedings").

The remedy ordered in *Sampsell* is referred to today as "substantive consolidation." *See In re Bonham*, 229 F.3d 750, 763 (9th Cir. 2000). It is true that the substantive consolidation remedy is distinct from the alter ego remedy. "Orders of substantive consolidation combine the assets and liabilities of separate and distinct—but related—legal entities into a single pool and treat them as though they belong to a single entity." *Id.* at 764. By contrast, when a trustee prevails on an alter ego claim, the defendant becomes liable for the claims of the debtor's creditors, but otherwise remains separate from the debtor. This difference, however, does not undermine the applicability of *Sampsell*'s holding to claims like the one here. The remedies are analogous, to the extent that they ensure that creditors' claims are satisfied out of the assets of the debtor without regard to the debtors' use of artificial and improper corporate forms.[8]

---

[8] The propriety of substantive consolidation is well-understood to be a

(continued...)

II. A bankruptcy court may properly hear a fraudulent conveyance proceeding and submit a report and recommendation to a federal district court.

This Court has also asked, in cases in which a bankruptcy court is barred by Article III from entering judgment in an action to avoid a fraudulent conveyance, whether that court may instead "hear the proceeding and submit a report and recommendation to a federal district court in lieu of entering a final judgment." In the United States view, the answer to that question is "yes."

The Supreme Court, in addressing the limited practical impact of its decision in *Stern*, anticipated that bankruptcy courts would be able to issue proposed findings of fact and conclusions of law on proceedings that the statute defines as "core" but that fall outside of their constitutional authority. *See* 131 S. Ct. at 2620 ("Pierce has not argued that the bankruptcy courts 'are barred from "hearing" all counterclaims' or proposing findings of fact and conclusions of law on those matters[.]"). Indeed, the Court suggested that its decision should not "meaningfully change[] the division of labor in the current statute." *Ibid.*

It is true that 28 U.S.C. § 157(c)(1) explicitly authorizes bankruptcy courts to

---

[8](...continued)
question of federal law rooted in the general equitable powers of the bankruptcy court. *In re Bonham,* 229 F.3d at 764; *In re Owens Corning*, 419 F.3d 195, 205 (3rd Cir. 2005). In the United States' view, a "mere continuation" or "alter ego" claim should likewise be viewed as a federal question in the bankruptcy context. Furthermore, although the successor corporation in *Sampsell* was also a creditor in that case, substantive consolidation has subsequently been applied by this Court to non-creditors. *See In re Bonham*, 229 F.3d at 763–64.

issue proposed findings of fact and conclusions of law in non-core proceedings, and that no such express authorization is found in § 157(b)(1). But the statutory authority in 28 U.S.C. § 157(b)(1) to "hear and determine all cases under title 11 and all core proceedings arising under title 11" is sufficiently capacious to encompass the ability to issue proposed findings of fact and conclusions of law in such matters. Indeed, such a reading is more consistent with the purpose of Congress in enacting the Bankruptcy Code, since bankruptcy courts are empowered to issue reports and recommendations even in cases much more tangentially related to bankruptcy than fraudulent-conveyance claims like the one in this case. *See* 28 U.S.C. § 157(c)(1).

CONCLUSION

For the foregoing reasons, the Court should find that Executive Benefits has waived its Article III objection to the bankruptcy court's adjudication of the trustee's summary judgment motion, or that the matter was otherwise within the district court's Article III jurisdiction. In the alternative, the Court should find that any constitutional violation was rendered harmless by the district court's and this Court's *de novo* review of the bankruptcy court's summary judgment order.

Respectfully submitted,

TONY WEST
Assistant Attorney General

JENNY A. DURKAN
United States Attorney

ROBERT M. LOEB
(202) 514-4332
SARANG V. DAMLE
(202) 514-5735
Attorneys, Appellate Staff
Civil Division, Room 7217
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530

Of Counsel:

RAMONA D. ELLIOTT
General Counsel

P. MATTHEW SUTKO
Associate General Counsel
Executive Office
for United States Trustees
U.S. Department of Justice
20 Massachusetts Avenue, NW
Washington, DC 20530
Phone: (202) 307-1399
Fax: (202) 307-2397

JANUARY 2012

FRAP 32(a)(7) CERTIFICATE OF COMPLIANCE

I certify that this brief has been prepared using a 14-point, proportionally spaced font and that, based on word processing software, this brief contains 6,889 words.

/s/ Sarang V. Damle
Attorney for the United States

CERTIFICATE OF SERVICE

I certify that on January 19, 2012, I served the foregoing Brief for the United States as amicus curiae by electronically filing the brief with the Court. As all counsel of record are registered with the Court's Electronic Case Filing System, the electronic filing of this brief constitutes service upon them.

/s/ Sarang V. Damle
Attorney for the United States