UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:

COUDERT BROTHERS LLP,

App. Case No .11-2785 (CM)

Debtor.

x

RETIRED PARTNERS OF COUDERT BROTHERS TRUST,

Plaintiff-Appellant,

Adv. Pro. No. 08-1472

-against-

BAKER & MCKENZIE LLP, ORRICK HERRINGTON & SUTCLIFFE LLP, and DECHERT LLP,

Defendants-Respondents.

x

MEMORANDUM ORDER DENYING PLAINTIFF'S MOTION TO REMAND

McMahon, J.:

I. Background

Coudert Brothers LLP ("Coudert" herein) filed for Chapter 11 bankruptcy in the Bankruptcy Court for the Southern District of New York in September 2006. (Decl. of Rodriguez-McCloskey ¶5.) Six months later, Plaintiff-Appellant Retired Partners of Coudert Brothers Trust (the "Trust" herein) – a trust that represents the interests of some of Coudert's retired partners – commenced an action in Westchester County Supreme Court. The Defendants

included ten of Coudert's "active" partners and several law firms, including Defendants Baker & McKenzie, LLP, Orrick Herrington & Sutcliffe LLP and Dechert LLP (the "Firms" herein). (Id. ¶2.)

The Trust alleged that the active partners and the Firms conspired together to transfer Coudert's assets to the Firms for less than their fair market value; in exchange, the active partners were allegedly to be given "soft landings" at the Firms. Because no one of the Firms would acquire 50% of Coudert's assets, none of them would be a "successor firm," and so none would become liable for Coudert's contractual obligations to its retired partners (Id. ¶4.) The Trust alleged causes of action under state law for, among other things, breach of the Coudert's Partnership Agreement by the active partners, tortious interference with the Agreement by the Firms. It also sought to impose successor firm liability on the Firms collectively notwithstanding the fact that none of the Firms had individually acquired half of Coudert's assets. (Id. ¶3.)

In June 2007, the Firms removed the action to federal District Court under 28 U.S.C. § 1452(a); the asserted jurisdictional basis was "related to" jurisdiction under 28 U.S.C. §§ 1334(b) and 157(a). (Id. Exh. A.) Then-District Court Judge Lynch referred the matter to Bankruptcy Court to be considered with Coudert's Chapter 11 petition. (Id. ¶6.) This Court is not aware that any timely motion to remand the case was made. However, the Trust did demand a jury trial of "all issues so triable" immediately after removal. (Demand for Jury Trial, Case No. 07-5639, Docket No. 12.)

The Trust ultimately participated in the liquidation, submitting a proof of claim for retirement payments owing under Coudert's Partnership Agreement. (Decl. of Huene ¶7; Trust's Reply Br., at 4-5.) This action was stayed pending confirmation of Coudert's liquidation plan. (Decl. of Rodriguez-McCloskey ¶7; see also Decl. of Huene ¶¶ 9-11, Exh. A.) During the

confirmation process, the Trust argued that its Claims should survive because they did not "arise" in connection with Coudert's bankruptcy, and indeed were not even "related to" it. (Trust's Mem. In Support of Preservation, Bnkr. Case No. 06-12226, Docket No. 851, at 7-8.)

After the plan was confirmed in August 2008, the administrator of Coudert's estate, Development Specialists, Inc. ("DSI") moved successfully to intervene as a party plaintiff in the Trust's action against the Firms. (Decl. of Huene ¶13.) DSI and the Trust then filed a second amended complaint, which included the successor liability and tortious interference claims at issue on this motion (the "Claims"). (Id. ¶14.)

On the Firms' motion, Judge Drain dismissed the Claims in July 2010. He held that the Trust lacked standing to pursue the claims, which properly belonged to the estate, reasoning that "in order to prevail in requiring an alleged successor partnership to be liable for retirement income under [the Partnership Agreement], the Trust would have to prevail like any other creditor of Coudert in establishing that these [Firms] were in fact a 'successor partnership' . . . under New York common law principles as a successor to Coudert Brothers LLP." (See Bankr. Case No. 08-1215, at 5-7.) In other words, to the extent the Trust's recovery depended on finding the Firms generally liable as successors for all the obligations of Coudert, the Trust had no unique legal injury conferring standing; thus, the Trust's claims, if any, belonged to the estate, representing all creditors. Judge Drain also held that the Trust's non-successor claims amounted to no more than "a generalized claim that the [Firms] caused harm to Coudert's estate that rendered Coudert less able to pay its debts;" he found that insufficient to confer standing. (Id. at 11.)

DSI, on the other hand, did have standing to pursue successor liability claims, as it was the administrator of the estate. However, Judge Drain held that the second amended complaint

failed to state a cause of action for successor liability. DSI relied on the "de facto merger" and "mere continuation of business" exceptions to the general rule that a party acquiring the assets of a dissolved entity do not thereby acquire its liabilities as well. However, Judge Drain considered the law well established that those exceptions required an allegation that the business had continued in a different form, and that here – where Coudert was broken into several small pieces, and distributed to distinct entities with distinct management – no such allegation could be made. (Id. at 11-18.)

Finally, with respect to the Trust's claim for tortious interference with the Partnership Agreement, Judge Drain ruled that the Trust failed to allege either that the Firms intentionally procured a breach, or even that the Agreement was breached: "under paragraph 6(j) [Coudert] had to make payments to the retired partners only under certain circumstances, where there were sufficient profits to do so and the parties entitled to prior payments had received their payments. Satisfaction of these conditions is not alleged." (Id. at 20.)

The Trust – proceeding without DSI, and naming only the Firms as Defendants – subsequently tried twice to amend the complaint; Judge Drain denied both motions, in November 2010 and March 2011. (Huene Decl., ¶¶ 15-16; see also Hearing, Mar. 4, 2011, Case No. 06-12226, at 42-51.)

The Trust appealed the Bankruptcy Court's dismissal of the Claims to this Court. See Trust's App. Br. at 2. During briefing, the United States Supreme Court issued its decision in Stern v. Marshall, 131 S.Ct. 2594 (2011). The Trust now moves to dismiss the appeal and remand the Claims to Westchester County Supreme Court. It argues that Article III of the Constitution, as applied in Stern, precluded the Bankruptcy Court from entering a final order of dismissal on the Claims, and that this Court ought to abstain from deciding the state law issues

raised. Before this motion, the Trust has never argued that the matter should be remanded on abstention grounds.

For the reasons discussed below, the appeal is dismissed; the purported final determinations below are converted to recommendations by the Bankruptcy Judge; and the motion to remand or abstain is denied.

II. Discussion

A. Article III limitations on the adjudicative authority of legislative courts

Article III, § 1, of the Constitution provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." It also provides that the judges of those courts shall hold their offices during good behavior, without diminution of salary. The Supreme Court has held that, "The inexorable command of this provision is clear and definite: The judicial power of the United States must be exercised by courts having the attributes prescribed in Article III." Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58-59 (1982) ("Marathon" herein).

The question presented on this motion is whether Article III prohibits the Bankruptcy Court– an Article I court, whose judges lack the Article III protections of tenure and non-diminution of salary – from finally adjudicating the Trust's Claims against the Firms. The concern with allowing it to do so involves the constitutional principle of separation of powers: if Congress can vest adjudicative authority over all matters in Article I courts, which lack the tenure and salary protections of Article III, then the judicial independence those protections were meant to foster would be defeated. "The Federal Judiciary was . . . designed by the Framers to

stand independent of the Executive and Legislature – to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial." Id. at 58; see also Stern, 131 S.Ct. at 2608-609.

Recognizing this danger, the Supreme Court has sought to define the limit of the legislature's power to place adjudicative functions that are otherwise within the competence of Article III courts in courts (or administrative agencies) lacking the Article III protections. "[W]e have long recognized that, in general, Congress may not 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.'" Id. at 2609. Though this effort dates back more than a century and a half (see Murray's Lessee v. Hoboken Land & Imp. Co., 59 U.S. 272 (1855)), and the Supreme Court's analytical approach has altered over time (compare Marathon, 458 U.S. at 70-75, with Commodity Futures Trading Com'n v. Schor, 478 U.S. 833 (1986)), an exhaustive survey of this jurisprudence is unnecessary; two cases addressing Article III concerns in the specific context of Bankruptcy Courts provide the guidance necessary to decide this motion.

B. *Marathon*

In Marathon, the Supreme Court declared key provisions of the 1978 Bankruptcy Act unconstitutional. 458 U.S. at 50. The 1978 Act had transitioned from a system where bankruptcy referees administered bankruptcies to one in which Bankruptcy Judges did so. Those judges were given statutory authority to exercise a broad range of judicial functions over a broad range of cases. See id. at 54-55. Under the scheme envisioned by the 1978 Act, Bankruptcy Judges would have been appointed by the President, with the advice and consent of the Senate, but would not have enjoyed the Article III protections of life tenure and non-diminution of salary

during good behavior. See id. at 53, 60-61. Nevertheless, Bankruptcy Judges were empowered to hear and to issue final orders in "all 'civil proceedings arising under title 11 [the Bankruptcy title] or arising in or *related to* cases under title 11.'" Id. (emphasis in original). Those orders and final judgments were enforceable unless appealed to a district court, and appeals were to be reviewed under a deferential "clearly erroneous" standard. Id. at 55 n.5.

The issue addressed in Marathon was whether Article III of the Constitution precluded Congress from vesting that much adjudicative authority in a non-Article III tribunal. More specifically, the Supreme Court had to decide whether the delegation of authority was constitutional to the extent that it allowdc the Bankruptcy Court to make final determinations about various state law counter-claims that Northern Pipeline, a debtor in Bankruptcy Court, had filed against Marathon. Id. at 56; Marathon, 458 U.S. at 90-91 (Rehnquist, J., concurring in the judgment).

A plurality of four Justices found the entire delegation of authority unconstitutional. It concluded that Congress could confer final adjudicative authority over matters within the competence of the Article III judiciary on Article I courts in just three circumstances. The first two – involving territorial courts and military courts – are not implicated here. Marathon, 458 U.S. at 63-66. The third is when the rights to be adjudicated are so-called "public rights." Id. at 67-70. Speaking loosely, these are: (1) rights created by federal law, to which the political branches are free to attach conditions; (2) claims tied up inextricably with such rights; or (3) "matters that historically could have been determined exclusively by the Executive and Legislative Branches". See Stern, 131 S.Ct. at 2611-613 (internal quotation marks and citation omitted). By way of explanation, the Court noted that it "has continued . . . to limit the exception to cases in which the claim at issue derives from a federal regulatory scheme, or in which

resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority. . . . [W]hat makes a right 'public' rather than private is that the right is integrally related to particular federal government action." Id. at 2614.

The issue presented in Marathon was whether the rights being adjudicated – Northern Pipeline's state-law claims against Marathon – were "public" or private;" if the latter, Congress could not give the Bankruptcy Court power finally to determine them.

The Supreme Court declined to define the limits of the "public rights" category, but held that the state law contract and other claims filed by the debtor Northern Pipeline against Marathon were "private" rather than "public" – notwithstanding their relationship to the bankruptcy proceeding:

> the substantive legal rights at issue in the present action cannot be deemed "public rights." Appellants argue that a discharge in bankruptcy is indeed a "public right," similar to such congressionally created benefits as "radio station licenses, pilot licenses, or certificates for common carriers" granted by administrative agencies. But the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former may well be a "public right," but the latter obviously is not. Appellant Northern [Pipeline]'s right to recover contract damages to augment its estate is "one of private right, that is, of the liability of one individual to another under the law as defined."

Marathon, 458 U.S. at 71-72 (internal citations omitted). Because the claims adjudicated in the Bankruptcy Court did not implicate public rights, and did not fall under any other historical expection to Article III's placement of judicial power in the hands of tenured judged guaranteed their salary, the Supreme Court held that the Bankruptcy Court had no power to enter a final order with respect to those claims, and declared unconstitutional so much of the 1978 Bankruptcy Act as purported to create such power. Id. at 87-89.

The Supreme Court's rationale for limiting non-Article III adjudicative power to these three circumstances was largely historical. Id. at 70, n.25 ("In each of these situations, the Court has recognized certain exceptional powers bestowed upon Congress by the Constitution or by historical consensus."). This rationale has sometimes come under attack, and at times a "pragmatic" balancing approach to Article III separation of powers issues has commanded a majority. See, e.g., Thomas v. Union Carbide Agr. Products Co., 473 U.S. 568, 582-593 (1985); Schor, 478 U.S. at 847-857. Under that approach, the public rights/private rights dichotomy is not necessarily dispositive. See id. However, the Supreme Court's decision in Stern last term strongly reasserted the historical, categorical approach to this issue, at least in the bankruptcy context.

C. *Stern*

After Marathon, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984. Insofar as is relevant here, the 1984 Act divided the proceedings before the Bankruptcy Court into "core" and "non-core" proceedings. See In re S.G. Phillips Constructors, Inc., 45 F.3d 702, 704-705 (2d Cir. 1995). Bankruptcy Judges have the authority to "hear and determine" all so-called "core" proceedings "arising under title 11." With respect to those, a Bankruptcy Judge "may enter appropriate orders and judgments," subject only to deferential appellate review. See 28 U.S.C. §§ 157(b)(1), 158. With respect to non-core claims, by contrast, the Bankruptcy Court can only recommend findings of fact and conclusions of law, which are subject to *de novo* review in the district court. 28 U.S.C. §§ 157(c)(1) and (2). Bankruptcy Judges, are now appointed by the courts, rather than the political branches, lacked the tenure and salary guarantees of Article III judges. See Stern, 131 S.Ct. at 2603-604.

As noted, Marathon suggested that "the restructuring of debtor-creditor relations, which is at *the core of the federal bankruptcy power* . . . may well be a 'public right'" and therefore within the adjudicative competence of a non-Article III tribunal. 458 U.S. at 71-72; but see Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 56 n.11 (1989). The core/non-core division was intended to move final adjudicative authority over proceedings involving "public rights" to the Article I Bankruptcy Court, while retaining matters not at the "core" of the Congressionally created right to a bankruptcy discharge – i.e., claims involving only "private rights" – to the Article III courts, at least for final determination. See Stern, 131 S.Ct. at 2610-611. Congress tried to delineate the "core" of the public right by listing examples of claims that it believed the Bankruptcy Court could finally adjudicate consistent with Marathon. See 28 U.S.C. § 157(b)(2) (listing examples of "core" proceedings). "Congress realized that the Bankruptcy Court's jurisdictional reach was essential to the efficient administration of bankruptcy proceedings and intended that the 'core' jurisdiction would be construed as broadly as possible subject to the constitutional limits established in Marathon." In re S.G. Phillips, 45 F.3d at 705.

In Stern the Supreme Court held that Congress did not altogether succeed in its goal: some claims, though denominated "core" under the statute, nevertheless involve only private rights, which preclude the Bankruptcy Court from finally adjudicating them.

The facts and procedural posture of Stern are convoluted, see Stern, 131 S.Ct. at 2601-603; fortunately, most of that is irrelevant to this motion. What matters is that the heir to a fortune, Pierce, sued his deceased father's (bankrupt) third-wife, Vickie,[1] in the Bankruptcy Court, for defamation. After Vickie's untimely death, her estate counter-claimed against Pierce for tortious interference with a prospective gift – a claim based on Texas state law. The

[1] "Vickie" was more widely known by her "stage" name, Anna Nicole Smith.

Bankruptcy Court adjudicated that claim in Vickie's favor. Pierce argued, among other things, that the court lacked final adjudicative authority over the estate's counter-claim, whether or not it was denominated "core" under the 1984 Act.

The Supreme Court held that the counter-claim was "core" under the plain language of the statute, and so fell squarely within the adjudicative authority that Congress intended to confer on the Article I court. Id. at 2604-605; see also 28 U.S.C. § 157(b)(2)(C) ("Core proceedings include . . . counterclaims by the estate against persons filing claims against the estate"). Nonetheless, the Supreme Court held that Article III precluded the Bankruptcy Court from finally determining the counterclaim, because it involved only "private rights."

After examining its precedents on what constitutes a public rather than a private right, see Stern, 131 S.Ct. at 2611-614, a majority of the Supreme Court concluded as follows:

> Vickie's counterclaim . . . does not fall within any of the varied formulations of the public rights exception in this Court's cases. It is not a matter that can be pursued only by grace of the other branches, or one that "historically could have been determined exclusively by" those branches. The claim is instead one under state common law between two private parties. It does not "depend[ ] on the will of congress"; Congress has nothing to do with it.
>
> In addition, Vickie's claimed right to relief does not flow from a federal statutory scheme. It is not "completely dependent upon" adjudication of a claim created by federal law. And . . . Pierce did not truly consent to resolution of Vickie's claim in the Bankruptcy Court proceedings. He had nowhere else to go if he wished to recover from Vickie's estate.
>
> Furthermore, the asserted authority to decide Vickie's claim is not limited to a "particularized area of the law." We deal here not with an agency but with a court, with substantive jurisdiction reaching any area of the corpus juris. This is not a situation in which Congress devised an "expert and inexpensive method for dealing with a class of questions of fact which are particularly suited to examination and determination by an administrative agency specially assigned to that task." The "experts" in the federal

> system at resolving common law counterclaims such as Vickie's are the Article III courts, and it is with those courts that her claim must stay.

Id. at 2614-615 (citing Murray's Lessee, 59 U.S. at 272; Ex parte Bakelite Corp., 279 U.S. 438 (1929); Crowell v. Benson, 285 U.S. 22 (1932); Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 458 (1977); Marathon, 458 U.S. at 50; Thomas, 473 U.S. at 578; Schor, 478 U.S. at 833; Granfinanciera, 492 U.S. at 33).

D. The effect of *Stern* on the Bankruptcy Court's power to enter a final order in this case

Before Stern, courts were accustomed to resolving whether the Bankruptcy Court could finally adjudicate a given claim by asking whether or not it could be considered "core" under 28 U.S.C § 157. In other words, it was assumed that Congress had succeeded in identifying as "core" proceedings only those affecting "public rights."

However, Stern demonstrates that the constitutional question is not congruent with the text of the bankruptcy statute. What matters for Article III purposes – and so the question that must be asked in any challenge to the Bankruptcy Court's authority to make final adjudications – is whether the claim to be adjudicated involves a "public" or a "private" right. If the latter, Congress cannot vest final adjudicative power in the Bankruptcy Court consistent with Article III. Stern, 131 S.Ct. at 2594; Marthon, 458 U.S. at 50.

Moreover, Stern confirmed the Marathon plurality's statement that, "even with respect to matters that arguably fall within the scope of the 'public rights' doctrine, the presumption is in favor of Art. III courts." Stern, 131 S.Ct. at 2618 (citing 458 U.S. at 69, n. 23, 77, n. 29 (plurality opinion)).

Thus, the Article III issue in this case is whether the Claims involve "public" or "private" rights. See id. at 2618 ("[T]he question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process."). Although distinguishing between public and private rights may at times be difficult, the analysis here is straightforward. Under Marathon, Granfinanciera and Stern, the Trust is correct that its claims involve only the vindication of private rights.

First, the Trust's Claims, like "Northern [Pipeline]'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." Marathon, 458 U.S. at 84. Although the rights at issue in Marathon affected the "creditor-debtor relationships" in some sense, the fact that the debtor's recovery would augment the estate was deemed insufficient to convert the right being vindicated from private to public. So too here: the Firms argue that their state law claims involve public rights because their resolution will have the effect of modifying creditor-debtor relationships. See, e.g., Joint Br. at 10. Their argument works no better here than it did in Marathon.

Rather, the Claims allege that the active partners, anticipating bankruptcy, sought to avoid their obligations to the retired partners, who were creditors of the Coudert firm. They did so by transferring Coudert's assets to the Firms for less than fair consideration, rendering Coudert unable to satisfy its obligations. The Trust sues to undo the transaction so the retired partners' claims can be satisfied. However labeled, this appears to be a quintessential fraudulent conveyance claim. And in Granfinanciera, however, the Supreme Court ruled, in the context of the Seventh Amendment, that a claim of fraudulent conveyance implicates private rather than public rights, "notwithstanding Congress' designation of fraudulent conveyance actions as 'core

proceedings'" in the 1984 Bankruptcy Act. 492 U.S. at 36; see id. at 53 ("Unless a legal cause of action involves 'public rights,' Congress may not deprive parties litigating over such a right of the Seventh Amendment's guarantee to a jury trial.").

The remaining Claim is for tortious interference – the very type of claim found to involve only "private rights" in Stern itself. Indeed, in Stern the tortious interference claim was made by the debtor against a third party. Here, the claim is asserted by one third party against another, taking it even further away from the "core" restructuring of Coudert's relations with its creditors.

Nor are the Trust's Claims "derived from or dependent upon bankruptcy law; [they are] state tort [and contract] action[s] that exist[] without regard to any bankruptcy proceeding." Stern, 131 S.Ct. at 2618.

Finally, the Trust's Claims against the Firms would not be completely disposed of in the process of ruling on the Trust's proof of claim against the debtor's estate. See id. at 2616-617 (discussing Katchen v. Landy, 382 U.S. 323, 335 (1966)). Determining whether and to what extent Coudert is liable to the Trust for retirement payments involves the interpretation of Coudert's Partnership Agreement, but that determination would not resolve the other issues that are pertinent to the Firms' liability to the Trust: whether the Firms intentionally procured a breach of that Agreement and whether the Firms conspired with the active partners in such a way as to incur successor liability for Coudert's obligations. By contrast, in In re Salander O'Reilly Galleries, 453 B.R. 106 (Bankr. S.D.N.Y. 2011), Kraken filed a proof of claim against a painting in the debtor's estate. Although the proof of claim raised issues of private right under state law, the Bankruptcy Court continued to possess final adjudicative power over those rights because they would necessary be resolved in determining the proof of claim. As the court explained, "there are two foreseeable outcomes with respect to the art claim and proof of claim filed by

Kraken: The Trust [as successor to the debtor] will avoid Kraken's interest as consignor . . ., paying Kraken its dividend as a general unsecured creditor; or Kraken will recover the Botticelli and exit this case with its painting in hand. In either scenario, the Bankruptcy Court's ruling will finally determine Kraken's art claim [involving private rights under state law] and [Kraken's] proof of claim [against the debtor's estate]." Id. at 118; see also In re Hudson, --- B.R. ----, 2011 WL 3583278, at *7-8 (Bankr. W.D. Mich. Aug. 16, 2011). As the Supreme Court held in Stern, Bankruptcy Courts can constitutionally make final determinations with respect to private rights when those rights are necessarily fully disposed of in ruling on a proof of claim. Stern, 131 S.Ct. at 2616-617.

I thus conclude that the Claims involve private rather than public rights, and so cannot be finally determined by the Bankruptcy Judge.

The Firms argue that I should focus, not on the nature of the rights asserted, but on the legal basis on which the Bankruptcy Court below rested its final order of dismissal. They argue that Judge Drain's conclusion that the Trust lacks standing – since he determined that the Claims belong to the debtor's estate – renders his decision an integral part of the claims allowance process itself, and/or goes to the Bankruptcy Court's power of the debtor's estate property. As a result, the Firms argue, it implicates the "core" public right of debt-forgiveness and relationship restructuring. Baker's Br. at 10-11; Joint Br. at 9-13; but cf. Stern, 131 S.Ct. at 2614 n.7.

This argument is interesting, but ultimately it is not persuasive. Judge Drain dismissed with prejudice – finally and as a matter of law – claims that the Trust asserted under state law against another private party. Under Marathon and Stern, he lacked the *power* to do so; his *rationale* for doing so cannot change that dispositive fact. See, e.g., In re AIH Acquisitions, LLC, 2011 WL 4000894 (N.D.Tex. Sept. 7, 2011). The Supreme Court has never treated the

legal basis on which the non-Article III tribunal purported to act as relevant, let alone dispositive, to the constitutional issue.

Furthermore, the Firms' "standing" argument fails on its own terms. Whether the Trust or the estate owns the rights created by state law is itself an issue of state law; federal statutory entitlements are not at issue, and this is not a matter determined by looking to federal bankruptcy law. If Coudert had not gone into bankruptcy, but had conveyed assets so as to defeat the rights of its creditors, the creditors could have sued under New York's Debtor Creditor Law. By contrast, in cases like In re American Business Financial Services, Inc., --- B.R. ---, 2011 WL 3240596, at *2 (Bnkr. D.Del. July 28, 2011), and In re Turner, 2011 WL 2708907, at *4 (Bnkr. S.D. Tex. July 11, 2011), the relief sought did not exist outside of the bankruptcy context.

The Firms are thus left with the argument that, because the resolution of the Claims would have an impact on the debtor, its estate, its creditors, and their relationship, they "must" involve public rights. Citation to Marathon, Granfinanciera and Stern is sufficient to dispose of that argument.

Thus, under Stern, the Bankruptcy Court did not have constitutional authority to finally adjudicate the Claims, because they are based on state law and will not necessarily be resolved in the resolution of the proof of claim filed by the Trust against the Bankruptcy estate. Stern, 131 S.Ct. at 2620.

E. Consent to Article I adjudication post-*Stern*

There is an alternative basis on which Judge Drain might have possessed final adjudicative authority over the Claims, based on the parties' consent.

As discussed, the 1984 Bankruptcy Act divided proceedings related to a bankruptcy into "core" and "non-core," giving final adjudicative power to the Bankruptcy Court in the former, but not the latter case. See 28 U.S.C. § 157. However, § 157 also provides that a Bankruptcy Judge may finally adjudicate a non-core matter if the parties consent to such adjudication. "Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a Bankruptcy Judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title." Id. § 157(c)(2).

Here, the Trust never expressly consented to have "non-core" but "related" matters finally adjudicated by Judge Drain. This case is therefore different from Olde Prairie, a post-Stern case, where, "Pursuant to Rules 7008(a) and 7012(b) Fed. R. Bankr.P., the parties expressly consented in their pleadings to entry of final judgments by a Bankruptcy Judge on all of Debtor's counterclaims, even if any were determined to be non-core matters." In re Olde Prairie Block Owner, LLC, --- B.R. ----, 2011 WL 3792406, at *2 (Bnkr. N.D. Ill. Aug. 25, 2011).

Rather, the issue – which the parties failed to brief – is whether the Trust *impliedly* consented to such adjudication. If it did, the Trust's appeal should proceed under 28 U.S.C. § 158(a)(1), which gives this Court power to hear appeals from "final" orders. If there was no implied consent to final adjudication, however, then the order should be vacated, and Judge Drain's "final" determinations treated as recommendations under § 157(c)(1). As the parties correctly out, Judge Drain's legal conclusions will be reviewed *de novo* by this Court in either event.

Prior to Stern, courts in this Circuit routinely found that parties could and did consent implicitly to the exercise of final jurisdiction by the Bankruptcy Court even with respect to non-

core matters. See, e.g., In re Men's Sportswear, Inc., 834 F.2d 1134, 1137-138 (2d Cir. 1987); In re Millenium Seacarriers, Inc., 419 F.3d 83, 98 (2d Cir. 2005); In re Tyson, 433 B.R. 68, 77 (S.D.N.Y. 2010); cf. Roell v. Withrow, 538 U.S. 580 (2003). Stern confirmed that consent can be a sufficient basis for Article I final adjudication, making clear that its Article III holding did not go to the Bankruptcy Court's subject matter jurisdiction: "Section 157 allocates the authority to enter final judgment between the Bankruptcy Court and the district court. See §§ 157(b)(1), (c)(1). That allocation does not implicate questions of subject matter jurisdiction. See § 157(c)(2) (parties may consent to entry of final judgment by Bankruptcy Judge in non-core case)." Stern, 131 S.Ct. at 2608.

The Supreme Court held that Pierce did, in fact, consent to have his defamation cause of action – which he submitted as a proof of claim against the estate – finally resolved by the Bankruptcy Court. Pierce made several statements to the effect that he was happy to have, and preferred to have, the Bankruptcy Court decide that claim. Only after he lost he raised the issue of the Bankruptcy Court's adjudicative authority. Id. at 2607-608. The Supreme Court held that this course of conduct constituted consent:

> Given Pierce's course of conduct before the Bankruptcy Court, we conclude that he consented to that court's resolution of his defamation claim (and forfeited any argument to the contrary). We have recognized "the value of waiver and forfeiture rules" in "complex" cases, and this case is no exception. In such cases, as here, the consequences of "a litigant . . . 'sandbagging' the court – remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor – can be particularly severe. If Pierce believed that the Bankruptcy Court lacked the authority to decide his claim for defamation, then he should have said so – and said so promptly. Instead, Pierce repeatedly stated to the Bankruptcy Court that he was happy to litigate there. We will not consider his claim to the contrary, now that he is sad.

Id. at 2608 (internal citation omitted).

However, at the same time, the Supreme Court held that Pierce did not "truly consent" to having *Vickie's counter-claim* for tortious interference finally determined by the Bankruptcy Court. Id. at 2614-615.

The apparent tension between these holdings is resolved when one recognizes that the Court's consent holdings flow from its broader holding that the Bankruptcy Court may adjudicate not only public rights, but also any private rights *necessarily resolved* in ruling on a creditor's proof of claim. That is, by submitting a proof of claim based on defamation, and failing to demand an Article III forum for final determination, Pierce consented to have Bankruptcy Court final adjudication, not only of the defamation claim, but also of all state law issues necessarily resolved in ruling on the defamation claim.

However, because the Supreme Court determined that Vickie's counter-claim for tortious interference with a gift *would not* be completely resolved in ruling on the defamation proof of claim, it also found that Pierce's consent to Article I adjudication on the defamation claim did not necessarily extend to her counter-claim. See generally id. at 2615-618.

> In ruling on Vickie's counterclaim, the Bankruptcy Court was required to and did make several factual and legal determinations that were not "disposed of in passing on objections" to Pierce's proof of claim for defamation, which the court had denied almost a year earlier. There was some overlap between Vickie's counterclaim and Pierce's defamation claim that led the courts below to conclude that the counterclaim was compulsory, or at least in an "attenuated" sense related to Pierce's claim. But there was never any reason to believe that the process of adjudicating Pierce's proof of claim would necessarily resolve Vickie's counterclaim.

Id. at 2617 (internal citation omitted). In the absence of other evidence of express or implied consent to adjudication of those independent private rights, the Supreme Court concluded, there was no basis to uphold the Bankruptcy Court's exercise of jurisdiction.

Applying Stern here: the Trust filed a proof of claim for retirement payments against the estate. While this constitutes consent to final adjudication of the Trust members' contractual rights against Coudert, and any other state law private rights necessarily determined therewith, it does not constitute consent to resolution of any other private rights. I have already concluded that not all of the issues raised by the Claims will be resolved in ruling on the Trust's proof of claim. Therefore, under Stern, some other evidence of express or implied consent must be identified to uphold Judge Drain's exercise of final adjudicative authority.

The Firms did not brief this issue, and so failed to identify any indicia of implied consent. Nor could they. Following Stern, it is doubtful whether mere participation in litigation is enough to imply consent. Even if it were, a finding of consent is not consistent with the record in this case. First, the Trust filed a demand for a jury trial of "all issue so triable in the matter" immediately upon removal, thereby expressing its intention to reserve whatever Article III rights it had. See Demand for Jury Trial, Case No. 07-5639, Docket No. 12); cf. Granfinanciera, 492 U.S. at 33. Where a jury trial is demanded, it can only be held before the Bankruptcy Court when the parties give their *express* consent. 28 U.S.C. § 157(e). As noted, no express consent was given in this case. Later, the Trust denied that the Bankruptcy Court had any jurisdiction at all, by arguing that its Claims were not even "related to" the Coudert bankruptcy. Trust's Mem. In Support of Preservation, Bnkr. Case No. 06-12226, Docket No. 851, at 7-8. These objections are inconsistent with a finding that the Trust was "happy" to, or otherwise consented to litigate in Bankruptcy Court, changing its mind only after it lost. Compare Stern, 131 S.Ct. at 2607-608.

Nor was the Trust ever informed of its right to an Article III adjudication, calling into serious question the "knowing and voluntary" nature of any waiver of rights. Cf. Roell, 538 U.S. at 580. Indeed, until Stern strongly embraced the approach of the Marathon plurality, it is

doubtful that the Trust knew or could have known that it had a right to Article III adjudication that it was waiving. See In re Teleservices Group, Inc., --- B.R. ----, 2011 WL 3610050 (Bnkr. W.D. Mich. Aug. 17, 2011). The Firms could not consistently argue both that (1) the Trust had no right to an Article III court because the Claims involve only public rights, and that (2), the Trust not only had the right to an Article III court, that right was so obvious that the failure to assert it amounted to knowing and voluntary consent to forego it.

Thus, I find that the Trust did not consent, expressly to impliedly, to a final adjudication of the Claims before Judge Drain. Because I have already found that the Claims raise issues of private, rather than public right, and would not be resolved in the process of ruling on the Trust's proof of claim, Judge Drain lacked the power to enter a final order dismissing the claims.

F. The effect of *Stern* on this Court's power to determine the issues on appeal

The question then becomes, "So what?"

While Stern precludes the Bankruptcy Court from entering a final order dismissing the Claims, Stern says nothing about this Court's authority to rule on the merits. That authority derives from 28 U.S.C. § 1334(b), which says that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or *related to* cases under title 11." (Emphasis added.) "For the purposes of removal jurisdiction, a civil proceeding is related to a title 11 case if the action's outcome might have *any conceivable effect* on the bankrupt estate." Parmalat Capital Finance Ltd. v. Bank of America Corp., 639 F.3d 572, 579 (2d Cir. 2011) (internal quotation marks omitted) (emphasis added).

I am in something of a procedural morass. Having reached the conclusions I reach, I cannot consider the Trust's appeal on the merits, but must simply vacate the order of the

Bankruptcy Court. However, there is no reason not to treat what Judge Drain thought was a "final" determination dismissing the Claims as a report and recommendation of dismissal, which I will review *de novo*. The Trust's "appellate brief" will be deemed a set of objections to the report and recommendation. The Firms will have an opportunity to file an opposition to those objections, and the Trust to file a reply.

This course of proceeding has several benefits. First, it conforms to the expectations of the parties; because the Trust "appeals" from a motion to dismiss, the Court would have reviewed Judge Drain's legal conclusions *de novo* in any event. But treating the findings below as mere recommendations subject to *de novo* review here also preserves as far as possible the division of labor intended by the 1984 Act. As discussed, the intent behind that 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. See supra. Having concluded that the Bankruptcy Court in this case could not finally determine the Claims, this Court should effectuate the scheme as far as possible by treating the "final" conclusions as recommendations, and subject them to *de novo* review. See Stern, 131 S.Ct. at 2620 ("We do not think the removal of counterclaims such as [the one for tortious interference] from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute.").

The Trust objects to this mode of proceeding on two grounds. First, it argues that the Claims are not "related to" the Coudert bankruptcy, so that this Court lacks subject matter jurisdiction over them. See Trust's Mot. Br., at 8. This argument is rejected. The substantive bases for the Trust's claims are successor liability, premised on the Partnership Agreement – a contract between the debtor and the Retired Partners – and tortious interference with that

contract. See Trust's App. Br. at 15 ("Article 9, section iv of the Partnership Agreement . . . forms the basis of the right to purse the Law Firm Defendants for Retirement Income"). To the extent the Claims revolve around obligations owed by the debtor to the retired partners as obligors, their resolution will have "some effect" on the Bankruptcy proceedings and the bankruptcy estate. For example, should the Trust fail to establish its standing, it will be because these claims "belong" to the debtor estate (as Judge Drain ruled, see above). That determination will have the effect of augmenting the bankruptcy estate by the value of the Claims (if they have any value). Analogously, the Supreme Court in Marathon held that a contract claim by the debtor against a non-party to the bankruptcy "may be adjudicated in federal court on the basis of its relationship to the petition for reorganization." 458 U.S. at 71-72 n.26; see also DSI's Amicus Br., at 4 n.6 (explaining that Claims are "related to" the bankruptcy because four retired partners signed agreements assigning to the estate any rights they have against creditors, including one of the Firms).

On the other hand, if the Trust convinces me that it has standing to pursue the Claims, the estate could still be affected. For example, if the successor liability or tortious interference claims are proved, the Trust's claims against the bankruptcy estate for retirement payments could be satisfied by the Firms, which would eliminate at least one unsecured claim against the estate and increase the amount payable to the remaining unsecured creditors. Thus, while resolution of the Claims may not *necessarily* impact the bankruptcy estate, there are numerous *conceivable* ways in which it might, and that is all that is required. See Parmalat, 639 F.3d at 570 ("For the purposes of removal jurisdiction, a civil proceeding is related to a title 11 case if the action's outcome might have *any conceivable effect* on the bankrupt estate.") (Emphasis added).

The Trust's second objection to this Court's treating Judge Drain's final determinations as merely recommendations, and subjecting them to *de novo* review, is that abstention or equitable remand is the more appropriate course. I disagree. The Trust is asking for remand for the first time in this motion, despite the fact that its separate adversary proceeding against the Firms have been ongoing in federal court for three years. During that time the parties litigated with the expectation that they would be finally bound by the Bankruptcy Court's ruling. The parties' resources, as well as the debtor's (through DSI's intervention), have been poured into this litigation; so have the Bankruptcy Court's, and now this Court's. The Trust must therefore justify its delay in asking that these issues be resolved through brand new, duplicative litigation in the New York courts.

Stern says nothing about remand or abstention, and thus no change in the law explains the Trust's delay. To the contrary, Stern suggests that the usual division of labor should not be much upset. It would therefore seem perverse to remand a matter fully litigated in Bankruptcy Court – and indisputably properly before this Court on *de novo* review – on the basis of Stern.

Thus, because the Trust does nothing to justify its delayed request for abstention, and because that request appears prompted by its desire to avoid an adverse ruling in federal court, I will not entertain it at this juncture. Rather, should the Court conclude, following *de novo* review, that the Trust has standing and has succeeded in stating a claim – or that a substantial and novel question of New York law is implicated in conducting that review – it will consider at that juncture whether abstention or equitable remand of any properly stated state law claims is appropriate. In the meantime, I have before me a report and recommendation of a distinguished Bankruptcy Judge, along with the parties' comments thereon; I am perfectly positioned to review the matter *de novo* and make the any necessary determinations.

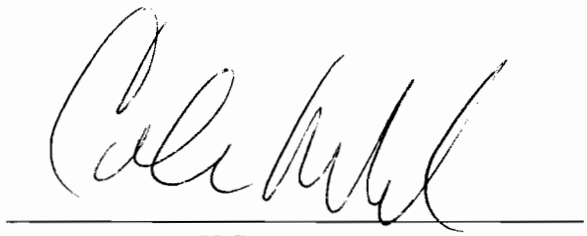
III. Conclusion

The Bankruptcy Court order granting the motion to dismiss is hereby vacated; the Bankruptcy Court's opinion is deemed a Report and Recommendation. The Trust's "Appellate Brief" (Case No. 11-cv-2785, Docket # 8) will be treated as objections to the Report and Recommendation. The Firms will have two weeks from the date of this order to file their opposition to the Trust's objections. The Trust will have one week thereafter to file a reply, if any.

The motion to remand or abstain is denied.

The Clerk of the Court is directed to close the motion at Docket No. 14.

Dated: September 22, 2011



U.S.D.J.

BY ECF TO ALL COUNSEL